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**ORDER DENYING REVIEW,
ARIZONA SUPREME COURT
(DECEMBER 12, 2025)**

SUPREME COURT STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
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ACCORD TRUCKING

v.

FEDEX

Arizona Supreme Court No. CV-25-0057-PR
Court of Appeals, Division One No. 1 CA-CV 23-0710
Maricopa County Superior Court No. CV2018-010982
Before: Ann A. SOOTT TIMMER, Chief Justice.

GREETINGS:

The following action was taken by the Arizona Supreme Court on December 12, 2025, regarding the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellee FedEx) = GRANTED.

App.2a

Aaron C. Nash

Clerk

TO:

Gregory G McGill

Ryan McGill

Lori A Guner

Gregory M Monaco

Shanicka Kennedy

Matthew J Martin

ar

**MEMORANDUM OPINION,
ARIZONA COURT OF APPEALS
(OCTOBER 29, 2024)**

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(C),
THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED
ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ACCORD TRUCKING, INC.,

Plaintiff/Appellant,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendant/Appellee.

No. 1 CA-CV 23-0710

Appeal from the Superior Court in Maricopa County

No. CV2018-010982

The Honorable Susanna C. Pineda, Judge

The Honorable John C. Rea, Judge (Retired)

The Honorable Joseph P. Mikitish, Judge

AFFIRMED

Before: Michael J. BROWN, Presiding Judge,
D. Steven WILLIAMS and Daniel J. KILEY, Judges.

MEMORANDUM DECISION

Presiding Judge Michael J. Brown delivered the decision of the Court, in which Judge D. Steven Williams and Judge Daniel J. Kiley joined.

BROWN, Judge:

¶ 1 Plaintiff Accord Trucking, Inc. (“Accord”) appeals from the superior court’s order granting judgment as a matter of law (“JMOL”) on several contract and tort claims brought against Defendant FedEx Ground Package System Inc. (“FedEx”).¹ Each claim stems from Accord’s position that FedEx improperly classified Accord as an independent contractor instead of an employee. For the following reasons, we affirm.

BACKGROUND

¶ 2 We view the evidence in the light most favorable to Accord, the party against whom JMOL was granted. *Warne Investments, Ltd. v. Higgins*, 219 Ariz. 186, 194, ¶ 33 (App. 2008). Hogan spent much of her professional life working as a truck driver. In 2015, she formed her own corporation, Accord, so she could provide linehaul trucking services for FedEx. It was Hogan’s understanding that FedEx would not contract with individuals, partnerships, or limited liability companies; instead, she had to form a corporation before she could work with FedEx. At the time, FedEx’s relationship with such corporations were governed by a Linehaul Contractor Operating

¹ Susan Hogan, president of Accord, prevailed on her individual claim for negligent infliction of emotional distress. Hogan is not a party to this appeal.

Agreement (“LCOA”), which provided for a one-year term, with automatic renewal for successive terms unless either party gave 30 days’ notice of termination.

¶ 3 The LCOA’s “Background Statement” described the parties’ intentions for the relationship between FedEx and its linehaul service providers. That portion stated in part as follows:

Contractor wants to make [its] equipment available, together with a qualified operator for each piece of equipment, to provide linehaul and other services on behalf of FedEx Ground. FedEx Ground wants to provide for package pickup and delivery services through a network of nationwide stations served by independent contractors, and, subject to the number of packages tendered to FedEx Ground for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor’s equipment.

This section also explained that “[b]oth FedEx Ground and Contractor inten[d] that Contractor will provide these services strictly as an independent contractor.”

¶ 4 Under the LCOA, the linehaul contractors were responsible for all maintenance and other operating expenses associated with their trucks. Contractors were not paid a set wage or salary; instead, their compensation would come through weekly settlements with FedEx, which were largely based on mileage. The LCOA further provided that “the Contractor shall be responsible for exercising independent discretion and judgment to achieve the business objectives” set out in the LCOA, and that “FedEx Ground

shall [not] have the authority to direct Contractor as to the manner or means employed to achieve such objectives.”

¶ 5 The LCOA also included a system for assigning runs to contractors, which was done through a point system that assigned points to specific tractors the contractors own.² Under this system, a tractor gains a point for each day it was available for service, regardless of whether FedEx made an offer to handle a run. But a tractor would not gain a point if the contractor declined to service a run, or the tractor was otherwise unavailable. A tractor could also lose points in some circumstances, such as a preventable accident or other service disruptions. Contractors would then use these points to bid on different run assignments. This system also required a 90 percent availability threshold, meaning that a tractor needed to be available for service with FedEx 90 percent of the time on a rolling 12-month basis; otherwise, that tractor would be designated a “spare.”³ Spare tractors were not given run assignments and did not accrue points.

¶ 6 In June 2015, Hogan signed the LCOA on behalf of Accord, though she later claimed she was not given sufficient time to review its contents. She also asserted the point system was not sufficiently explained to her when she began driving for FedEx. Nevertheless, Accord grew steadily, starting with two tractors in 2015 and adding three more over the next

² A tractor is the front part of the truck, which pulls the trailer. FedEx owned and supplied the trailers for the contractors.

³ As FedEx personnel explained at trial, it would normally take several months of consistent declining of runs to drop below the 90 percent threshold.

three years. Near the end of 2017, however, Hogan essentially came to the opinion that despite the language of the LCOA, FedEx did not give Accord the autonomy and discretion of an independent contractor. According to Hogan, FedEx exercised significant control over Accord's operations and in how it provided services to FedEx. The factors Hogan identified included, but were not limited to:

- (1) FedEx's requirement until 2017 that Accord put FedEx logos on its trucks, which Hogan felt made it impossible for Accord to use those trucks for other companies.
- (2) Accord's trucks using FedEx's U.S. Department of Transportation number and being registered and insured in FedEx's name.
- (3) FedEx prohibiting Accord's drivers from going faster than 65 miles per hour, regardless of any posted speed limit, and that speed was monitored through equipment installed on the tractor.
- (4) FedEx providing routes that Accord's drivers were encouraged to follow.
- (5) FedEx required any drivers Accord hired to first be approved through their vendor, First Advantage.
- (6) The point system's requirement effectively forced Accord to have constant availability to work with FedEx.

In August 2018, Accord sued FedEx. The 20-page complaint alleged many ways that FedEx engaged in "calculated and deceitful use of the LCOA," resulting in an "egregious misclassification of Accord as an

independent contractor in order to avoid taxes, costs and burdens the employment relationship requires. . . .” Accord alleged “the subterfuge breached the duty of good faith and fair dealing” as well as the “express provisions” of the LCOA. Accord also included claims for negligent and fraudulent misrepresentation, and violations of the Arizona Consumer Fraud Act. Separately, Hogan alleged negligent infliction of emotional distress (“emotional distress”).⁴

¶ 7 One month after Accord filed its suit, FedEx discontinued the LCOA and instead began using a new contract, the Transportation Service Provider Agreement (“TSPA”). The TSPA removed the LCOA’s reference to Accord being an “independent contractor,” instead stating that FedEx and Accord would enter a “business to business relationship.” The TSPA also omitted the LCOA’s provision that FedEx intended to make “full use” of Accord’s equipment; instead, the TSPA explicitly noted that it was a “requirements contract.” Despite having filed its lawsuit, Accord signed the TSPA in September 2018. The litigation continued throughout the remainder of the parties’ contractual relationship.

¶ 8 Over the next couple of years, the business relationship between Accord and FedEx deteriorated. Accord believed that both the quality and quantity of its run assignments were declining. Hogan claimed that, from late 2018 into 2019, FedEx stopped sending Accord’s trucks on cross-country runs, which provided more miles and thus more revenue, and instead assigned Accord shorter runs in the southwest. Hogan

⁴ The emotional distress claim centered on events that are not relevant to the resolution of the claims raised in this appeal.

also claimed that Accord had frequent issues with their trucks “sitting” on run assignments, meaning that Accord’s drivers were experiencing long delays once they arrived at their assignment location. As a result, Accord’s trucks were not generating revenue and stayed idle for extended periods. The issue with “sitting” trucks, according to Hogan, occurred weekly until 2022. On the other hand, FedEx claimed that starting in 2019, Accord had started refusing run assignments, resulting in three of Accord’s trailers being relegated to “spare” status, as their availability had fallen below the 90 percent threshold. FedEx also claimed it eventually “lost all contact” with Accord, and in June 2022, FedEx gave Accord a notice of non-renewal.

¶ 9 FedEx moved for summary judgment. FedEx argued that (1) Accord could not prove damages arising from the alleged misclassification, (2) FedEx had violated no contractual provision regarding the assignment of runs, (3) the misrepresentation and fraud claims were barred by the economic loss rule and were impermissibly based on promises of future conduct, and (4) the consumer fraud statute was inapplicable because Accord was not a “consumer” as the term is statutorily defined. Accord likewise moved for partial summary judgment, asserting FedEx’s liability on all claims. The court granted summary judgment for FedEx on the consumer fraud claim but found genuine issues of material fact on the remaining claims.

¶ 10 Accord’s expert, Donald Bays, drafted three reports for calculating damages. The first report calculated Accord’s economic damages from the alleged misclassification and calculated a hypothetical salary

for Hogan if she had been a FedEx employee based on her job duties along with certain other benefits such as paid leave, insurance, and “legally required benefits” such as social security and Medicare. The report also assumed that, as an employee, Hogan would not have been responsible for paying Accord’s operating expenses. Bays’s second report analyzed Accord’s damages arising from FedEx’s failure to dispatch Accord’s tractors, related to Hogan’s claim that FedEx had caused Accord’s trucks to sit for too long. The third report calculated lost earnings from FedEx “deliberately not awarding [Accord] delivery routes,” which prevented Accord from growing the size of its truck fleet. That report assumed that Accord was an independent contractor, not an employee.

¶ 11 In a series of motions, FedEx sought to preclude Bays’s proposed expert testimony on damages. After briefing, the court ruled that Accord could not establish damages under the first report by “creating a hypothetical contract based on fair compensation that contradicts the specific terms of compensation in the contract,” and that at trial Accord would need to establish the right to recover operating expenses “by statute or other applicable authority.” The court applied a similar analysis to the second report. As to the third report, the court determined that the report was “entirely divorced from [Accord’s] claims” because it did not turn on whether Accord was misclassified, and thus the court precluded the third report in its entirety. Even so, at a subsequent pretrial conference, the court found that Accord’s complaint sufficiently pled an alternative breach of contract claim. Under this theory, FedEx violated the implied covenant of good faith and fair dealing (“implied covenant”) by

intentionally having Accord's tractors sit for too long, which Accord claimed was a form of retaliation for filing its lawsuit. Because this theory could stand even if Accord were an independent contractor, the court reversed its ruling that excluded the third Bays's report.

¶ 12 After re-assignment of the case to a different judge as part of the superior court's periodic rotation of judicial assignments, the case proceeded to trial, where Accord claimed that if it was FedEx's employee, then Accord was entitled to "all the [operating] expenses that [Accord] had to pay," which included the costs of tractor acquisition, fuel, and maintenance. Accord also argued it was entitled to a payment of minimum wage along with a "reasonable amount of benefits." In a subsequent discussion with the court, Accord's counsel clarified that its claim for wages, benefits, and expenses was rooted in A.R.S. §§ 23-350 to -362, ("Arizona Wage Act"), which authorizes employees to sue their employers for failure to pay wages due. A.R.S. § 23-355(A). Accord did not allege a separate claim under the Wage Act. Hogan testified about the history of Accord and FedEx, including the circumstances under which she entered the LCOA and TSPA, along with her belief about why she was not a true independent contractor. She also detailed the expenses Accord incurred through its business, and the eventual decrease in runs, which led to termination of the business relationship. A few of Accord's previous drivers also testified. Several FedEx personnel testified about their understandings as to the LCOA and TSPA, including the function and procedures in the point system. Bays was Accord's final witness, and he

testified on the damage calculations in his three reports.

¶ 13 FedEx moved for JMOL under Arizona Rule of Civil Procedure 50 on Accord's claims for (1) breach of the implied covenant due to misclassification (to the extent it could be considered a "claim"), (2) alternative breach of the implied covenant based on FedEx's alleged failure to properly assign runs, (3) negligent and fraudulent misrepresentation, and (4) emotional distress. The court granted JMOL in favor of FedEx on each claim except for emotional distress. As to Accord's implied covenant claim that FedEx had misclassified it as an independent contractor ("the misclassification claim"), the court determined that Accord failed to establish a basis for its damages claim, finding that the definition of "employee" in the Arizona Wage Act does not include corporations.

¶ 14 Addressing the claim that FedEx alternatively breached the implied covenant by failing to assign runs to Accord and having tractors sit for extended periods of time, the court first determined that Accord did not present evidence that FedEx breached any term of the LCOA or TSPA in assigning (or failing to assign) runs to Accord. The court then explained that Hogan's testimony about her run assignments decreasing after her lawsuit began was insufficient evidence that FedEx had "abused its discretion or acted dishonestly in assigning runs or administering the point system."

¶ 15 On the negligent misrepresentation claim, the court found that FedEx was not a "supplier of information," and thus could not be liable for negligent misrepresentation. Lastly, the court determined that Accord provided no evidence at trial that FedEx knew

that any representation made in the contract was false. The court then entered a final judgment and Accord timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶ 16 Accord argues the superior court’s JMOL ruling was erroneous. We review such a ruling de novo, *Glazer v. State*, 237 Ariz. 160, 167, ¶ 29 (2015), viewing the evidence and all reasonable inferences in a light favorable to the nonmoving party, *Warne Investments, Ltd.*, 219 Ariz. at 194, ¶ 33. A court should grant JMOL only if “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party” on the issue judgment is sought. Ariz. R. Civ. P. 50(a)(1).

I. Procedural Issues Affecting JMOL

A. Improper Horizontal Appeal

¶ 17 Accord argues the court’s grant of JMOL constituted an improper horizontal appeal of the prior decision denying summary judgment of the same claims. A horizontal appeal occurs when a party asks a second judge to reconsider a decision made by a prior judge in the same matter, even though no new circumstances justify such a request. *Quinn v. Cardenas*, 256 Ariz. 77, 85 (App. 2023). Though such appeals are discouraged, the policy barring them is procedural; “a court does not lack the power to change a ruling simply because it ruled on the question at an earlier stage, especially where a substantial change has occurred in the evidence.” *Sholes v. Fernando*, 228 Ariz. 455, 458–59, ¶ 8 (App. 2011) (citation omitted). A motion for summary judgment and a motion for

JMOL occur during substantially different points during the litigation process. *Compare* Ariz. R. Civ. P. 50(a) *with* Ariz. R. Civ. P. 56. A motion for JMOL can be made only after a party has been “fully heard on an issue during a jury trial.” Ariz. R. Civ. P. 50(a). Because such a change in procedural posture offers “new circumstances” that warranted reconsideration, the superior court’s decision to grant JMOL did not constitute a horizontal appeal.

B. Principle of Party Presentation

¶ 18 Accord argues the superior court’s JMOL ruling violated the principle of party presentation because the grounds the superior court relied on had not been disclosed or argued before trial. Under the party presentation principle, courts should “rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Thus, courts should “normally decide only questions presented by the parties.” *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020).

¶ 19 The record does not show any violation of this principle. Primarily, Accord takes issue with the court’s reliance on the definitions in Arizona’s wage statutes in granting JMOL on the misclassification claim, alleging that such arguments were not raised during the litigation until the court’s JMOL ruling. But the following exchange after Accord’s opening statement shows otherwise:

The Court: [I]n your opening statement you said these are expenses an employee should not have to pay. There’s got to be a basis for that. It’s not—and it can’t be Bays’[s] opinion.

It's got to be a statute or some other form of authority that says an employer can't require an employee to pay these expenses just like the cases say.

[Accord's counsel]: Yeah, which is what I cited before several times which is [A.R.S. § 23-350, which is the statutory scheme for wages and benefits as a public policy in the state of Arizona when you're an employee.

Given that Accord expressly relied on that statute to support its theory of damages, the court was obligated to apply that statute correctly. *See Cook v. Cook*, 209 Ariz. 487, 496, ¶ 32 n.9 (App. 2005) ("Parties cannot stipulate as to the law applicable to a given state of facts and bind the court.") (citation omitted). Though Accord likely did not anticipate that citing this statute would justify judgment against it later, it cannot reasonably contend the court's JMOL ruling on this issue was an unfair surprise at trial. Accord has not shown there was a violation of the party presentation principle or disclosure requirements.⁵

II. Substantive Merits of Judgment

A. Misclassification – Alleged Breach of Implied Covenant

¶ 20 Accord argues the court incorrectly determined it could not establish damages for its mis-

⁵ Accord asserts that "[t]he defense violated the party presentation principle" but does not explain how a "party" could violate the principle. What Accord seems to argue in substance is that FedEx violated Rule 26.1's disclosure requirements. Because Accord introduced this statute into the case, there was no such violation.

classification claim based on violation of the implied covenant because Accord was not an “employee” under the Arizona statutes governing the payment of wages. See A.R.S. §§ 23-350, 355 (“Arizona Wage Act”). At trial, Accord’s theory of damages centered on Arizona wage statutes. Accord argued that had FedEx properly classified it as an employee, it would have been entitled to payment of minimum wage, reimbursement for operating expenses, as well as other incidental benefits such as vacation and sick time. Whether Arizona wage statutes afford these benefits to Accord is a question of statutory interpretation we review de novo. *S. Ariz. Home Builders Ass’n v. Town of Marana*, 254 Ariz. 281, 284, ¶ 16 (2023). We interpret statutes “neither narrowly nor liberally, but rather according to the plain meaning of the words [of the statutes] in their broader statutory context.” *Id.* at 286, ¶ 31.

¶ 21 Under the Arizona Wage Act, an “employee” is defined as “any person who performs services for an employer under a contract of employment either made in this state or to be performed wholly or partly within this state.” A.R.S. § 23-350(2). Conversely, an “employer” can be “any individual, partnership, association, joint stock company, trust or corporation, the administrator or executor of the estate of a deceased individual or the receiver, trustee or successor of any of such persons employing any person.” A.R.S. § 23-350(3). Section 23-362, which provides the definitions for statutes governing payment of minimum wage, likewise defines “employee” as “any person who is or was employed by an employer,” and “employer” as “any corporation, proprietorship, partnership, joint venture, limited liability company, trust, association, political subdivision of the state, individual or other

entity acting directly or indirectly in the interest of an employer in relation to an employee.” A.R.S. § 23-362(A), (B). The superior court found that the definition of employee included only a “person,” and not a corporation, which is specifically used in the definition of “employer.” Thus, the court determined the statutes that provided the basis for Accord’s theory of damages did not contemplate that a corporation could be an employee.

¶ 22 In determining whether Accord could be an employee under these statutes, we recognize that “[w]here the legislature has specifically used a term in certain places within a statute and excluded it in another place, courts will not read that term into the section from which it was excluded.” *Ariz. Bd. of Regents for & on Behalf of Univ. of Ariz. v. State*, 160 Ariz. 150, 157 (App. 1989). The wage statutes Accord relies on include “corporation” in the definition of “employer,” but not in the definition of “employee.” “Employee” is defined simply as a “person.” A.R.S. § 23-350(2). To conclude that a corporation can be an “employee” would require us to read, into the statutory definition, a term that was omitted there, but explicitly used elsewhere in the same statute. *See id.*; *see also Jessey Sports, LLC v. Intercollegiate Men’s Lacrosse Coaches Ass’n, Inc.*, 888 S.E.2d 677, 681 (N.C. Ct. App. 2023) (reasoning that a limited liability company was not an employee under North Carolina’s Wage and Hour Act because the definition of “employer” included individuals as well as different kinds of legal entities, while the term “employee” referred only to individuals).

¶ 23 On appeal, Accord does not address this statutory language, and instead cites to several

provisions in Arizona’s workers compensation statutes to argue that “public policy pronouncements” prohibit “misclassification of independent contractors through ‘misrepresentation, false statements, fraud, intimidation, coercion, or duress.’” *See* A.R.S. § 23-902(F); *see also* § 23-902(B) (noting that an employer who contracts with an independent contractor may be treated as an employer of the contractor’s employees if the employer “retains supervision or control” over the contractor’s work); § 23-902(D)(1) (noting a written agreement shall state that the business “[d]oes not require the independent contractor to perform work exclusively for the business”). None of these provisions imply, much less specify, that a corporation like Accord should be considered an employee under Arizona’s wage statutes.

¶ 24 Both at trial and on appeal, Accord has sporadically invoked the federal Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201, *et seq.*, to argue that federal law also required reimbursement of expenses. But neither in the superior court nor on appeal has Accord cited a specific provision of the FLSA requiring such reimbursement. And even assuming that Accord properly raised this argument, the FLSA defines “employee” as “any *individual* employed by an employer,” 29 U.S.C. § 203(e)(1) (emphasis added), and an employer as a “person,” which is further defined as “an individual, partnership, association, *corporation*, business trust, legal representative, or any organized group of persons,” 29 U.S.C. § 203(a), (d) (emphasis added). Thus, for the same reasons explained regarding Arizona’s statutes, *supra* ¶¶ 21–22, it seems apparent that Accord would not be an “employee” under the FLSA.

¶ 25 Accord also points to several decisions from other jurisdictions holding that FedEx had misclassified the plaintiff employees as independent contractors. See *Estrada v. FedEx Ground Package Sys. Inc.*, 64 Cal.Rptr.3d 327 (Cal. App. 2007); *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014). But these cases are distinguishable. All were class action cases in which individuals asserted FedEx hired them as drivers but then denied them benefits guaranteed to employees under applicable state and federal law. *Estrada*, 64 Cal.Rptr.3d at 335 (citing Cal. Lab. Code § 2802); *Alexander*, 765 F.3d at 987 (noting the plaintiff drivers brought claims under the California Labor Code and federal Family and Medical Leave Act); *Slayman*, 765 F.3d at 1042 (citing Or. Rev. Stat §§ 652.610, 653.621). None of these cases involve a claim by a corporation seeking to be treated as an employee. Accord has cited no relevant authority supporting its claimed damages relating to its misclassification claim, and thus Accord has shown no error.

B. Alternate Implied Covenant Claim

¶ 26 Accord also contends the court incorrectly granted JMOL on its claim that FedEx breached the implied covenant by failing to assign runs to Accord after Accord filed this lawsuit. Both the LCOA and TSPA identify Pennsylvania law as governing the contracts, and we analyze the contracts accordingly. See *Ciena Cap. Funding, LLC v. Krieg's Inc.*, 242 Ariz. 212, 216, ¶ 11 (App. 2017). Despite those provisions, Accord does not cite any Pennsylvania law in its briefing. Even so, because our review is de novo, we

decide this issue based on our own review of the pertinent legal authority as well as the arguments that were fairly presented to the superior court and raised in parties' briefs.

¶ 27 Pennsylvania law implies a covenant of good faith and fair dealing in every contract, *John B. Conomos, Inc. v. Sun Co., Inc. (R&M)*, 831 A.2d 696, 706, ¶ 16 (Pa. Super. Ct. 2003), which requires "honesty in fact in the conduct or transaction concerned," *Donahue v. Fed. Ex. Corp.*, 753 A.2d 238, 242, ¶ 11 (Pa. Super. Ct. 2000) (citation omitted). This obligation allows enforcement of a contract's terms "in a manner that is consistent with the parties' reasonable expectations." *Agrecycle, Inc. v. City of Pittsburgh*, 783 A.2d 863, 867 (Pa. Commw. Ct. 2001). However, this implied covenant is specifically tied to the express terms of the contract, and the implied covenant cannot and will not contradict the express terms of the contract. *Conomos*, 831 A.2d at 706–07, ¶ 17.

¶ 28 Accord contends that FedEx engaged in "manipulative conduct" by removing the "full use" verbiage found in the LCOA when it transferred to the TSPA. Accord believes this language provided a reasonable expectation as to the amount of freight FedEx would provide, and that FedEx "used its disparate bargaining power" to remove the "full use" language from the TSPA.⁶ In effect, Accord believes that FedEx

⁶ It is not clear that the "full use" language would have given Accord any reasonable expectation as to a certain volume of freight even under the LCOA. The full sentence in which that wording is found states:

FedEx Ground wants to provide for package pick-up and delivery services through a network of nationwide stations served by independent contractors, and, *sub-*

violated the implied covenant by the language it used in drafting the TSPA, before it was even signed. But Accord cites no authority for its position that a party can breach the implied covenant by choosing to include or omit certain contractual provisions before the contract is signed. Moreover, under Pennsylvania law, the implied covenant is tethered to the express terms of the contract. *Id.* The conduct giving rise to this claim—that FedEx retaliated against Accord by cutting its run assignments—occurred under the TSPA, which made no representations about any volume expectations.

¶ 29 Also, under Pennsylvania law the implied covenant does not permit adding terms to a contract that are not present or are disclaimed expressly in the contract itself. In *Agrecycle*, a composting company claimed a city breached the implied covenant by failing to deliver a certain volume of compostable material represented in the city’s bid for composting services. *Agrecycle*, 783 A.2d at 866. Rejecting the company’s argument that the trial court erred in refusing to instruct the jury on that alleged breach, the appellate court held that even though the bid specifications estimated a certain amount of compostable material, the parties’ agreement stated that the city “did not warrant or guarantee the

ject to the number of packages tendered to FedEx Ground for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor’s equipment.

(Emphasis added). Under the terms of the LCOA, any vague guarantee as to the amount of work available for Accord would necessarily be restricted by FedEx’s needs.

quantity or quality of the compostable materials to be delivered.” *Id.* at 868. Similarly, in *Kaplan v. Cablevision of PA, Inc.*, 671 A.2d 716, 722 (Pa. Super. Ct. 1996), a customer filed a class action complaint against a cable company, alleging it violated the implied covenant by failing to “provide continuous service or voluntarily rebate fees paid in advance by the cable subscribers when an outage occurs.” Affirming dismissal, the appellate court concluded that nothing in the agreement guaranteed such service or required rebates for interrupted service, and thus there was no lack of good faith or fair dealing. *Id.* Here, nothing in the TSPA shows that FedEx made any warranties or guarantees as to the volume of work Accord would receive or that Accord’s run schedules would be optimized to generate the maximum revenue possible. Accord has shown no error.

C. Negligent Misrepresentation

¶ 30 Accord alleged that FedEx negligently misrepresented that Accord would be an independent contractor, despite numerous provisions of the contractual agreements that gave FedEx control over Accord’s operations. Because these terms “failed to facilitate an [independent contractor] relationship” as the contract stated, Accord believed FedEx “supplied false or incorrect information.”

¶ 31 The superior court granted judgment for FedEx on that claim because nothing showed that FedEx was a “supplier of information,” meaning it could not be liable for negligent misrepresentation. Arizona has adopted the Restatement (Second) of Torts, § 552 (1977) to delineate the tort of negligent misrepresentation. *St. Joseph’s Hosp. & Med. Ctr. v.*

Rsrv. Life Ins. Co., 154 Ariz. 307, 312 (1987). Section 552(1) states that:

One who, in the course of his business, profession or employment, *or in any other transaction in which he has a pecuniary interest*, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts, § 552(1) (1977) (emphasis added).

¶ 32 FedEx maintains that liability for negligent misrepresentation is limited to “suppliers of information,” which, it argues, includes entities that are typically “in the profession or business of supplying information for the guidance of others in business transactions.” *See id.* cmt. (A) (limiting “the liability for negligence of a supplier of information to be used in commercial transactions”). But we do not read this section of the Restatement to limit liability for negligent misrepresentation only to those who are in a regular business of supplying information; instead, the tort applies to anyone who supplies false information for the guidance of others “in any other transaction in which he has a pecuniary interest.” Restatement (Second) of Torts, § 552(1) (1977); *see also Sain v. Cedar Rapids Comm. Sch. Dist.*, 626 N.W.2d 115, 124–25 (Iowa 2001) (recognizing that the Restatement offers a broader view of potential liability for negligent misrepresentation than Iowa’s rule, which limits any duty only to those “persons in the business or profession

of supplying information to others”). We therefore do not agree that Accord could not, as a matter of law, be a supplier of information for purposes of a negligent misrepresentation claim. Nonetheless, we will affirm the entry of JMOL “if it is correct for any reason.” See *Spooner v. City of Phoenix*, 246 Ariz. 119, 123, ¶ 7 (App. 2018).

¶ 33 A claim for negligent misrepresentation cannot be based on promises for future conduct. *McAlister v. Citibank (Arizona)*, 171 Ariz. 207, 216 (App. 1992). Instead, a negligent misrepresentation claim requires “a misrepresentation or omission of a *fact*,” and “[a] promise of future conduct is not a statement of fact capable of supporting a claim of negligent misrepresentation.” *Id.* Even if the contractual relationship ended up resembling an employment relationship more than an independent contractor, the provisions that Accord relied on are promises of future conduct between the parties. See *Manon v. Solis*, 142 S.W.3d 380, 388 (Tex. Ct. App. 2004) (finding that a party’s representations about the future conditions of the other party’s employment were promises of future conduct, not existing statements of fact, precluding a claim of negligent misrepresentation). Accord has cited no authority showing that a party can be liable for negligent misrepresentation based on the legal ramifications of the terms in the contract. And nothing presented at trial indicates FedEx misrepresented any existing fact to induce Accord to sign the LCOA or TSPA. See *McAlister*, 171 Ariz. at 216. Thus, JMOL was appropriate for Accord’s negligent misrepresentation claim.

D. Common Law Fraud

¶ 34 Finally, Accord claims the court incorrectly found there was insufficient evidence of fraud. “A claim for fraud requires proof of nine elements by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker’s knowledge of its falsity or ignorance of its truth; (5) the speaker’s intent that it be acted upon by the recipient in the manner reasonably contemplated; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely on it; (9) the hearer’s consequent and proximate injury.” *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 291–92, ¶ 14 (App. 2010)

¶ 35 Accord argues that “fraud can be proven by circumstantial evidence,” and that it presented such evidence at trial. Accord is correct that knowledge of a statement or representation’s falsity can be inferred from circumstantial evidence. *See Dawson v. Withycombe*, 216 Ariz. 84, 98, ¶ 32 (App. 2007). But some evidence on which that inference is based is still required; fraud is never presumed, and requires more than “doubtful, vague, speculative, or inconclusive evidence.” *Honk v. Karlsson*, 80 Ariz. 30, 37 (1956) (quotation omitted). Accord claims that it presented “substantial evidence at trial that when FedEx executed the LCOA and TSPA contract with Accord . . . [FedEx] knew the independent contractor representations in the [] agreements were false,” but Accord does not identify any such evidence in the record. Even assuming, as Accord argues, that “the relationship under the contracts bore no relationship to the reality on the ground,” evidence that the contracts inaccurately characterized Accord’s status as that of an independent

contractor does not mean that the contracts' characterization of Accord's employment status was a "fact" that FedEx knew to be false. *See De May v. Moore & Bruce, LLP*, 584 F. Supp. 2d 170, 185 (D.D.C. 2008) (dismissing plaintiffs' claim against former attorneys for constructive fraud based on inaccurate legal advice because plaintiffs failed to offer "any support for the proposition that erroneous legal advice can constitute a factual misrepresentation, nor has the Court's research unearthed such a case"). Accord has shown no error, and we affirm the court's ruling.

CONCLUSION

¶ 36 We affirm the superior court's judgment. Both parties have requested attorneys' fees incurred on appeal under A.R.S. § 12-341.01, which authorizes a discretionary fee award when a dispute arises out of contract. As FedEx is the prevailing party, we award reasonable attorneys' fees to FedEx relating to the claims for breach of contract and breach of the implied covenant. As the successful party on appeal, FedEx is entitled to recovery of taxable costs. The award of fees and costs is subject to compliance with ARCAP 21.

**MINUTE ORDER GRANTING DEFENDANT
MOTION FOR JUDGMENT,
SUPERIOR COURT OF ARIZONA,
MARICOPA COUNTY
(MARCH 21, 2023)**

03/21/2023

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

ACCORD TRUCKING, INC, ET AL.,

v.

FEDEX GROUND PACKAGE SYSTEM, INC, ET AL.,

No. CV 2018-010982

Before: Hon. JOHN REA

**TRIAL MINUTE ENTRY
DAY 6**

East Court Building 913

9:00 a.m. Trial to Jury continues from March 20, 2023. Plaintiffs, Accord Trucking Inc. and Susan R. Hogan who is present are represented by counsel, Gregory G. McGill and Ryan McGill. Defendant, FedEx Ground Package System Inc. is represented by counsel, Gregory M. Monaco and Shanicka Kennedy. Representative for FedEx, Brian Tangi is present.

Court Reporter, Diane Donoho, is present, and a record of the proceedings is also made digitally.

9:02 a.m. Jury panel is present.

Plaintiffs' case continues.

Donald Bays having been previously sworn, resumes the stand and testifies further.

Donald Bays is excused.

Plaintiff rests.

10:05 a.m. The jury panel leaves the courtroom and Court remains in session.

Defendant moves for judgment as a matter of law on all claims.

Oral argument is presented to the Court.

10:36 a.m. Court stands at recess.

10:53 a.m. Court reconvenes with the parties and respective counsel present. The jury panel is not present.

Court reporter, Diane Donoho is present, and a record of the proceedings is also made digitally.

Argument continues.

For the reasons stated on the record,

IT IS ORDERED Granting Defendant's Motion For Judgment as a matter of law, as to the remaining counts, except as to Count 7, Negligent Infliction of Emotional Distress.

12:14 p.m. Court stands at recess.

1:58 p.m. Court reconvenes with the parties and respective counsel present. The jury panel is present.

Court reporter, Diane Donoho is present, and a record of the proceedings is also made digitally.

Defendant's case.

Gregory Webster is sworn and testifies.

Gregory Webster is excused.

Chad Anderson is sworn and testifies.

The Court has received questions from the jury. Court and counsel discuss the questions out of hearing of the jury.

The relevant questions are asked and answered by Chad Anderson.

FILED: Juror questions (1)

Chad Anderson is excused.

Kendall Eskew is sworn and testifies.

The Court has received questions from the jury. Court and counsel discuss the questions out of hearing of the jury.

The relevant questions are asked and answered by Kendall Eskew.

FILED: Juror questions (3)

Kendall Eskew is excused.

3:04 p.m. The jury is excused until March 22, 2023, at 9:00 a.m. Court remains in session.

Discussion is held regarding scheduling.

3:06 p.m. Court stands at recess until March 22, 2023, at 9:00 a.m.

**UNDER ADVISEMENT RULING,
SUPERIOR COURT OF ARIZONA,
MARICOPA COUNTY
(JANUARY 31, 2023)**

01/31/2023

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

ACCORD TRUCKING, INC, ET AL.,

v.

FEDEX GROUND PACKAGE SYSTEM, INC, ET AL.,

01/31/2023

No. CV 2018-010982

Before: Hon. Joseph P. MIKITISH, Judge.

UNDER ADVISEMENT RULING

The Court has received and reviewed the *Motion for Partial Summary Judgment* and accompanying Statement of Facts filed by the Plaintiffs, Accord Trucking Inc. and Susan Hogan (collectively, “the Plaintiffs”) on September 11, 2021; the Response thereto and controverting Statement of Facts filed by Defendant, FedEx Ground Package System, Inc. (“FedEx Ground”) on July 12, 2022; and the Plaintiffs’ Reply filed on July 21, 2022.

The Court also has received and reviewed the Defendant's Motion for Summary Judgment and accompanying Statement of Facts, filed September 10, 2021; the Plaintiffs' Response thereto filed on July 13, 2022; and the Defendant's Reply filed on July 20, 2022.

Background

FedEx Ground is a motor carrier with operating authority under the U.S. Department of Transportation. FedEx Ground relies on independent businesses with which it contracts—not its own employees—to provide package transportation services between FedEx Ground's customers and its package sorting facilities, and between different FedEx Ground facilities.

FedEx Ground contracts with some businesses, referred to as transportation service providers ("TSPs"), for what are known as linehaul services, which involves the TSP's use of its own tractor and employees to pull a FedEx Ground-owned trailer. Plaintiff Accord is one such TSP business with which FedEx Ground contracts for linehaul services, and Ms. Hogan is its President and sole owner. A "run" is one trip between two locations, and some TSPs contract for what are known as "assigned runs" which are more regular trips assigned to one TSP. Some TSPs have one or more positions on an "unassigned run rotation" through which FedEx Ground offers runs on an as-needed basis to the next TSP in the rotation. FedEx Ground's TSP contracts have a run assignment system expressly detailed in the contracts, which defines how TSPs can accumulate points for performing runs and use those points to bid for open assigned runs or positions on the unassigned run rotation.

In June 2015, Ms. Hogan formed Accord and Accord entered its first contract with FedEx Ground, titled the “Linehaul Contractor Operating Agreement” (“LCOA”). Nothing in the LCOA required Ms. Hogan to provide any services personally to FedEx Ground; Accord determined which of its employees would perform services to fulfill its obligations under the contract. In 2018, Accord entered a new contract which replaced the LCOA, titled the “Transportation Service Provider Agreement” (“TSPA”), and Accord entered a second such TSPA in 2020.

Each LCOA and TSPA agreement had a one-year term, with additional renewal terms of one-year each unless either Accord or FedEx Ground gave timely notice of nonrenewal. Each agreement renewed according to its terms unless replaced by a subsequent agreement, and Accord remains under contract with FedEx Ground today.

The agreements provide FedEx Ground with areas of control of various aspects of Accord’s operations, including equipment, logos, insurance, schedules, uniforms, advertising, speed limits, etc.

Legal standard

Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Ariz. R. Civ. P.*, Rule 56(a). The moving party bears the burden of providing undisputed admissible evidence that would entitle it to judgment as a matter of law. *Wells Fargo Bank, NA. v. Allen*, 231 Ariz. 209, 213 ¶ 18 (App. 2012). A court should grant a motion for summary judgment only if the facts produced in support of the claim or defense have so little probative

value that reasonable people cannot agree with the conclusion advanced by the proponent. *Orme School v. Reeves*, 166 Ariz. 301, 309 (1990). A court must view the facts and any inferences drawn from those facts in the light most favorable to the party opposing the motion. *Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 199 ¶ 15 (App. 2007).

Discussion

I. The Plaintiffs' MSJ

The Plaintiffs first argue that FedEx Ground's methods of operation and areas of control breached the express provisions of the contract and the implied duty of good faith and fair dealing. They argue that FedEx Ground's operation changed Accord's contract from an independent contractor relationship to an employer-employee relationship.

FedEx Ground argues that substantial evidence exists opposing the misclassification claim. It argues that Ms. Hogan is not a party to the contract and that she is not bound to perform any personal services for FedEx Ground. It argues that a jury would be able to draw different inferences from the facts to decide the employment classification issue. FedEx Ground also argues that evidence supports the conclusion that Accord controlled the details of its work. It notes that the contract prohibits FedEx Ground from directing the manner of Accord's operations, prevents FedEx Ground from requiring Accord to follow specific routes, forbids FedEx Ground from controlling hours of accord's employees, stops FedEx Ground from requiring certain details regarding Accord's equipment, and bars FedEx Ground from dictating Accord's methods.

After reviewing the facts provided, the Court concludes that there are genuine issues of material fact and different inferences can be drawn from undisputed facts regarding Accord and Ms. Hogan's status as independent contractor. Therefore, summary judgment is not appropriate. *See Mitchell v. Gamble*, 207 Arizona 364, 366 (App. 2004) (reversing trial court's grant of summary judgment on the issue of employment status because "[a]lthough the material facts . . . [were] undisputed, they [were] amenable to different inferences").

II. Defendant's MSJ

FedEx Ground argues that Accord cannot prove a breach of contract or damages. It argues that FedEx did not breach the run assignment contract provisions, commonly referred to as the points system. It argues that those provisions were set forth in the contract. It further argues that the covenant of good faith and fair dealing does not change the analysis. It further argues that FedEx Ground cannot be liable for not dispatching Accord's vehicles 24 hours per day, seven days per week, because that was not included in the contract.

FedEx Ground goes on to argue that the Plaintiffs' fraud and negligent misrepresentation claims are not supported. It argues that the tort claims are barred by the economic loss doctrine. FedEx Ground further argues that Accord cannot establish reasonable reliance for its negligent misrepresentation and fraud claims. It argues that Ms. Hogan did not review the contract or seek the advice of a lawyer before signing it. It argues that any lack of understanding by Ms. Hogan is not justified or reasonable. It also argues that Ms. Hogan renewed the contract even after she alleges

that she was defrauded before June 2016. FedEx Ground further argues that any alleged misrepresentation concerned a promise of a future conduct, which is insufficient to support a claim for negligent misrepresentation. It also argues that it was not a party who provides information for the guidance of others and therefore does not owe a duty to ensure the accuracy of the information. Finally, FedEx Ground argues that the two-year statute of limitation bars the negligent misrepresentation claim.

In addition, FedEx Ground argues that the consumer fraud act claim is time-barred and inapplicable. It asserts that the Plaintiffs believed prior to June 2016 that they had been defrauded, more than two years before filing suit. Further, FedEx argues that the contracts at issue do not fall within the scope of the consumer fraud act because they were not in the connection with the sale or advertisement of any merchandise. *See* ARS § 44-1522 (A).

FedEx Ground further argues that Ms. Hogan cannot recover individually for the fraud related claims because a shareholder cannot recover personally for damages suffered by the Corporation.

Finally, FedEx Ground argues that Worker's Compensation exclusivity prevents the recovery of damages for negligent infliction of emotional distress.

The Plaintiffs argue that there are substantial questions of material fact on whether the contracts or deceitful, constituted a fraud, and or a breach of contract. The Plaintiffs argue that FedEx Ground provided the contract to lower its costs, circumvent tax obligations, and control Accord's operations without having to comply with employer related laws.

The Plaintiffs argue that Ms. Hogan brought a direct action on the tort claims and that owners of a closely held entity are entitled to sue derivatively or directly. The Plaintiffs argue that the economic loss rule cannot displace the torts alleged intentional torts and does not bar torts for fraud, negligent misrepresentation, and breach of fiduciary duty.

The Plaintiffs further argue that there is no remedy in the contract regarding misclassification, and therefore the economic recovery rule does not bar the tort claims.

The Plaintiffs further argue that the statute of limitations does not bar their claims because equitable tolling applies, and the actions were not discovered outside of the statute.

The Plaintiffs further argue that determination of employee or independent contractor status is an issue of fact. They reiterate that several factors support the finding of control sufficient to conclude that the contract established an employee employer relationship.

The Court concludes that genuine issues of material fact exist as to whether FedEx Ground breached its contract and whether it misclassified the Plaintiffs.

The Court further concludes that genuine issues of material fact exist as to the Plaintiffs' tort claims. The Court finds that the economic loss doctrine does not bar the tort claims as they do not spring solely from any breach of contract. There are genuine issues of material fact as to justifiable reliance and the other elements of the claims. There are also material issues of fact as to the application of the discovery rule and whether Ms. Hogan can recover personally.

The Court concludes, however, that the contracts at issue do not fall within the consumer fraud statute. Therefore, summary judgment is appropriate on the consumer fraud claim.

Conclusion

Based on the foregoing,

IT IS ORDERED denying the Plaintiffs' Motion for Partial Summary Judgment.

IT IS FURTHER ORDERED denying FedEx Ground's Motion for Summary Judgment in part on all claims except the consumer fraud claim.

IT IS FURTHER ORDERED granting FedEx Ground's Motion for Summary Judgment on the consumer fraud claim.

**COMPLAINT, FILED IN
SUPERIOR COURT OF
ARIZONA COUNTY OF MARICOPA
(AUGUST 27, 2018)**

McGILL LAW FIRM
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Attorney for Plaintiffs

SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

ACCORD TRUCKING, INC.;
SUSAN R. HOGAN, A MARRIED WOMAN,

Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.;
PHILIP GERARD; ALAN H. HAUSER; DALIBOR
KRISTIC; ZORAN DJORDJEVIC,

Defendants.

Case No: CV20:8-010982

[Breach of Contract/Misclassification of IC;
Consumer Fraud: ARS 44-1521; Common Law
Fraud; Negligent Misrepresentation; Civil Assault;

Intentional Infliction of Emotional Distress;
Negligent Infliction of Emotional Distress; Tortious
Interference with Contract; RICO: ARS 13-2314.04]

COMPLAINT

For its complaint plaintiff alleges the following against the named defendants:

INTRODUCTION & NATURE OF THE CASE

1. Plaintiffs Accord Trucking, Inc. (“Accord”) and Susan R. Hogan (“Hogan”) bring this action in contract and tort against defendant FedEx Ground Package System, Inc. (“FedEx”) for its calculated and systemic misclassification of Accord as an independent contractor in violation of the tax laws, and against the individually named defendants for continuing threats, intimidation and acts of extortion against Susan Hogan in order to prevent her from expanding trucking operations in Phoenix and other markets. Although in 2017 FedEx had Hogan sign a Linehaul Contractor Operating Agreement (“LCOA”) purporting to represent Accord as an independent contractor and not employed by FedEx, under the economic realities’ test the company has exerted substantial control (or the right to control) over Accord’s terms and conditions of operations. FedEx controls the terms and conditions of contractor operations, trucks, equipment, work hours, runs, routes, insurance, manner of payment, and opportunity for outside work. In fact, FedEx recently reinforced the misclassification by recently disseminating a Transportation Service Provider Agreement (“TSPA”) which revised the language (not the substance) in the LCOA to avoid “employment detection” and to cover-up the purposeful misclassification over the past several years.¹

2. The named individuals are Eastern European nationals who have engaged in the following unlawful acts over the past two years: (a) speak their Slavic lan-

guage at the FedEx hub while ridiculing Hogan in a full break-room by saying: “This is no place for a woman, you should be home baking cookies;” (b) pointing at her in the yard and speaking Slavic languages in a hostile manner and laughing at her; (c) stopping her vehicle in the yard and on the streets to stare at her in a hostile manner; (d) calling plaintiffs’ drivers in an effort to take them away from Accord; (e) in a continuing effort to stifle competition telling Hogan to stop trying to expand Accord’s trucking business; (f) telling her in broken English to “watch your back;” (g) telling her to “stay the hell out of Vegas, you have no God Damn business going to Vegas, and don’t put trucks in other hubs;” (h) saying to her in a full break-room “who let a woman in the good ole boys club;” (i) repeatedly saying to her in a hostile manner “stop stealing my drivers;” (j) don’t even think about adding peak trucks, you can’t compete with us big boys and all our points because you won’t get shit;” (k) threatening Hogan with “I’m warning you, you can’t talk to my drivers”; (l) for many months at the FedEx break room calling Hogan a “bitch and cunt” and bringing her to tears and despondency.

3. Over the past couple years Hogan reported the individuals’ continuing misconduct to FedEx and the

¹ The fraudulent misclassification, and effort to cover it up with the TSPA, calls for punitive damages because it shows an *intent to injure the contractor financially* (through lost wages, overtime, and benefits, increased costs, and lost legal protections in employment) which should be punished and deterred under employment law and tax law. In addition, the misclassification exacerbated the harm the individuals’ unlawful conduct caused Hogan because after Hogan lodged complaints FedEx stated: “We can’t do anything because you don’t work for FedEx.” On Counts 2, 3 punitives are warranted.

conduct threatens to remain continuing but FedEx management has told Hogan: “We can’t do anything because you don’t work for FedEx.” Prior FedEx manager Steve Tucker recently told Hogan “I can see that they upset you and shake you up.”

4. The misclassification of employment status in violation of the implied covenant of good and fair dealing in the LCOA, and the individual’s bad acts toward Ms. Hogan have harmed her business and caused physical and emotional injury to Hogan such as: *emotional distress, racing heart-beat, high blood pressure, vomiting, incessant crying, depression, lost sleep, lost memory, anxiety, headaches and ringing in the ears.*

5. For many months Hogan has been threatened, intimidated and extorted at the FedEx hub by the individual defendants, they have falsely accused plaintiff of interfering with their drivers, they have increased pay to their drivers (some in un-reported cash payments) to squeeze out drivers and impede Accord’s growth, they have, ignored FedEx safety rules and trucking procedures without repercussions from FedEx, they have taken driver tests for other drivers at FedEx who can’t speak English, and they seek to drive out plaintiffs with continuing threats, intimidation and extortion without any intervention by FedEx at its Phoenix hub.

6. Ironically, FedEx recently awarded Ms. Hogan “Entrepreneur of the Year” but afterward the hostile threats, intimidation and extortion escalated while FedEx ignored it. This is an action for compensatory and punitive damages and plaintiffs demand a jury trial.

PARTIES, JURISDICTION, AND VENUE

7. Plaintiff Accord is an Arizona corporation.

8. On information and belief defendant FedEx is a corporation headquartered in Pennsylvania and doing business in Maricopa County, Arizona.

9. Defendant Philip Gerard (“Gerard”) is a resident of Maricopa County, AZ.

10. Defendant Alan H. Hauser (“Hauser”) is a resident of Maricopa County, AZ.

11. Defendant Dalibor Kristic (“Kristic”) is a resident of Maricopa County, AZ.

12. Defendant Zoran Djordjevic (“Zoran”) is a resident of Maricopa County, AZ.

13. Jurisdiction is proper in this Court under A.R.S. §§ 12-123 and 12-401 because defendants reside and do business in Maricopa County, Arizona.

14. Venue is proper in Maricopa County, AZ because one or more of the defendants reside in the county. ARS Sec. 12-401(7).

ALTER EGO ALLEGATIONS

15. The legal separateness between the individual defendants and their “contractor entities” should be disregarded and defendants treated as a single enterprise or agents of each other to avoid injustice to plaintiffs. On information and belief defendants have colluded or acted in concert throughout, operate out of the same FedEx hub using the same furniture, fixtures and equipment, share common driver employees and the same contact information, commingle funds in bank accounts, are undercapitalized, lack minutes for

significant entity events, and use hostile threats, intimidation and extortion to disrupt the plaintiffs' operations and well-being constituting unlawful activity under ARS 13-2341.04 which conduct pierces the corporate veil and imposes tortious and statutory liability upon the individuals (hereafter referred to as the "enterprise" or "defendants").

GENERAL ALLEGATIONS

16. Prior to 2015 Ms. Hogan drove trucks for Gerard Trucking, Inc.

17. In 2015 Accord became a contractor providing trucking services for FedEx.

18. During 2015-2016 FedEx treated Accord as an independent contractor.

19. During the period 2015-2016 Accord's trucking services were controlled by FedEx Ground but it was treated as an independent contractor.

20. In 2017 Accord signed the LCOA and FedEx knew the representations in the document that Accord was an independent contractor were false and misleading when made.

21. The LCOA purported to make Accord an independent contractor but actual control evidence shows that FedEx has used the LCOA to control Accord's operations, hours and methods of work, routes, methods of pay, advertising, insurance, trucks, equipment, logos, uniforms, use of vendors, and route expansion through a "point system" which is patently unfair as certain contractors have accumulated more points because they've been around longer not because

they follow FedEx requirements or perform trucking services efficiently or safely.

22. FedEx has used the LCOA to lower its costs at Accord's expense, to circumvent tax obligations, and to control Accord's operations without having to comply with wages, withholding, overtime pay, benefits, and federal law such as the *FLSA*, the *NLRA*, *Title VI of the Civil Rights Act of 1964*, *OSHA*, *Family and Medical Leave Act*, the *ADA*.

23. In 2017 the LCOA was a non-negotiable contract of adhesion.²

24. The LCOA gives FedEx control over the termination of the agreement.

25. Under the LCOA FedEx retains the right to reconfigure the assigned routes.³

26. The LCOA also shows that line-haul drivers are compensated by the number of miles driven multiplied by \$1.37 per mile.⁴

27. As the court found in a prior case (*Estrada v. FedEx Ground*) the LCOA is a cleverly drafted contract creating the control envisioned by an employment relationship under the guise of an independent contractor model which is a misrepre-

² The misclassification in the LCOA is reinforced by the TSPA which FedEx is circulating to impose the constraints of an employment relation under the guise of an independent contractor model.

³ The FedEx practice of changing routes inhibits the contractor from growth and buying routes.

⁴ This compensation system allows FedEx enormous control over the contractor's income.

sentation that gives FedEx Ground exposure to contract and tort liability.⁵

28. The LCOA contains the following which breached the implied covenant:⁶

- FedEx has the sole right to interpret and terminate the agreement
- Drivers' routes can be reconfigured by FedEx without the driver's say
- The work the drivers perform is core to FedEx business
- FedEx controls who the contractor can hire and can fire at will
- FedEx controls the contractors' equipment, logos, insurance, schedules, uniforms, advertising, speed limit, vendors, badges, pick-ups and deliveries, and growth through a "point-system"
- In addition to normal contractor compliance with 49 CFR Sec. 396.5 and 396.7, ¶ I of contract addendum I requires the contractor to provide monthly maintenance reports supported by receipts for repairs done to the contractors' trucks and equipment
- Under contract addendum 1, ¶ II FedEx controls the display on the door of the contractor's truck by requiring the contractor's

⁵ See the federal *Estrada v. FedEx Ground* case.

⁶ The LCOA contains a *duty of good faith and fair dealing that it is a valid IC agreement but it is not.*

name and underneath the words “Operated by FedEx Ground”⁷

- Contract addendum 2, ¶’s 3.1 and 3.3 require the contractor to name FedEx Ground as an additional insured on its liability insurance policy, name FedEx as the certificate holder, and show that the contractor’s employees are covered by workmen’s compensation
- Contract addendum 2, ¶ 3.2 voids a FedEx indemnity if safety technology devices (windshield cameras) malfunction on the contractor’s truck which it leases from a third party
- Contract addendum 2, ¶ 3.5 requires contractors to take safety classes with vendor Import Safety Solutions or pay for additional fees or insurance coverage
- In contract addendum 2, FedEx specifies the types and amounts of insurance coverage the contractor must obtain
- Contract addendum 10, ¶ 1 imposes driver safety standards and requires vendor First Advantage to conduct background checks and employment verification of the contractors’ drivers
- Contract addendum 10, ¶ 5.11 controls the contractors speed at 65 mph
- Contract addendum 16, ¶’s 1-3 limit the contractor name on the driver’s uniform to the

⁷ The individual defendants have ignored this FedEx requirement without repercussions.

sleeve and FedEx controls the approval of any temporary drivers for the contractor. All of these are a sham and a breach.

29. During the period 2015-2018 the individual defendants have committed the following unlawful acts at the hub in a coordinated scheme and artifice to defraud plaintiffs by diminishing competition and plaintiffs' physical, emotional and economic well-being:

- (a) all of them have repeatedly spoken their Slavic language in loud hostile tones at the FedEx hub to intimidate and ridicule Ms. Hogan at the yard
- (b) all of them have repeatedly physically advanced toward her in a threatening manner and pointed at her and shouted the Slavic languages in a hostile manner
- (c) Gerard and Hauser repeatedly stopped her vehicle at the yard and on public streets to block her exit and to stare at her in a hostile manner causing her great distress
- (d) Gerard (through his son Adrian and through Ryan Smith) repeatedly called Accord's drivers in repeated attempts to take them away from Accord
- (e) all of them have repeatedly told Ms. Hogan to stop trying to expand Accord's business which they have said to her in order to stifle competition
- (f) Gerard has told Ms. Hogan in broken English "this is no place for a womans (sic), you should be home baking cookies."

- (g) Gerard has told her to “watch your back”
- (h) Gerard has told her to “stay the hell out of Vegas, you have no God Damn business going to Vegas, and don’t put trucks in other hubs”
- (i) Gerard and Hauser have yelled at her to “stop stealing my drivers”
- (j) All of them have said to her in a full break-room “who let a woman in the good ole boys club?”
- (k) Gerard has told her “and don’t even think about adding peak trucks, you can’t compete with us big boys and all our points because you won’t get shit.”
- (l) Hauser has told her “I’m warning you, you can’t talk to my drivers.”
- (m) All of them in the FedEx break room have repeatedly called Hogan a “bitch and cunt” and brought her to tears at the Fed Ex hub and off-site (“the bad acts”).

30. The common law test for an employment relationship is based upon whether the employer exercises control or has the “right to control” the person’s performance of the services and how the person accomplishes the services. The “right to control test” examines the hiring party’s right to control the “manner an means” by which the services are provided and ten (10) factors are considered (no one of which is dispositive):

- (i) the degree of employer control over the details of the services

- (ii) whether the person's business is a distinct entity
- (iii) whether the person's services are usually done without supervision
- (iv) whether the services require a low level of skill
- (v) whether the person provides the equipment and place of work
- (vi) the length of time the services are provided
- (vii) method of payment, by the job or time put in
- (viii) whether the services are part of the regular business of the employer
- (ix) the intent behind the IC relationship
- (x) whether the hiring party is in business

Based upon the common law test Accord was in an employment relation with FedEx.

31. The 20-Factor IRS Test is concerned about 3-types of employment taxes: (a) FICA under 29 USC Sec. 3121(d)(2) which governs employer and employee tax contributions to the Social Security system; (b) Federal Unemployment taxes or FUTA under 26 USC Sec. 3306(i) which governs employer contributions to the unemployment fund; and (c) employee personal income tax withholding under 26 USC Sec 3401(c). The 20-IRS factors are:

- (1) whether the person is required to follow instructions
- (2) the person's training on that job

App.51a

- (3) the amount of integration into the hiring party's business
- (4) whether the services are rendered personally
- (5) whether the hiring party hires, fires and pays assistants
- (6) whether there is a continuing relationship
- (7) whether there is a set amount of work hours
- (8) whether the person devotes nearly full time to the job
- (9) whether the person works on the hiring party's premises
- (10) whether the person works according to a sequence set by the other
- (11) whether regular or written reports must be submitted
- (12) whether pay is by time or by project
- (13) whether the person is reimbursed for expenses
- (14) whether the individual furnishes the tools and equipment
- (15) whether the person has invested in the facilities to provide the services
- (16) whether the person can realize a profit or loss
- (17) whether the person has one or multiple clients
- (18) whether the person makes her services available to the public

(19) whether the hiring party has the right to discharge the person

(20) whether the person has the right to terminate the relationship.

Based upon the IRS 20-factor test Accord was an employee of FedEx not an IC.

COUNT 1

[Breach of Express Contract and the ICGFFD] (FedEx)

32 Allegations 1-31 are re-alleged herein, in particular ¶ 's 1, 4, 6, 23-28.

33. In 2017 the parties entered into an LCOA and FedEx breached the express contract provisions identified in ¶ 28 causing Accord damages in an amount to be shown.

34. In addition, every contract in Arizona contains a covenant of good faith and fair dealing which prohibits a party (FedEx) from acting in a manner to deprive the other party (Accord) from the benefits of the contract or interferes with the other party's reasonable expectations under the contract. *Wells Fargo v. AZ Laborers*, 201 Ariz. 474 (2002).

35. FedEx's calculated and deceitful use of the LCOA resulted in an egregious misclassification of Accord as an independent contractor in order to avoid taxes, costs and burdens the employment relationship requires and the subterfuge breached the duty of good faith and fair dealing in the LCOA. On the breach of contract claim the key questions are: (1) was the unilateral and comprehensive control afforded to FedEx under the LCOA inconsistent with Accord's justifiable

expectations? (2) did FedEx deprive Accord of a primary benefit of the LCOA, i.e., Accord's right to control the terms and conditions of its own operations? (3) was it reasonable for Accord to assume that FedEx would honor a genuine commitment to Accord as an independent contractor with unfettered opportunity for growth as a "partner of FedEx" as advertised? (4) was it reasonable for Accord to assume that FedEx would adhere to the law on employment classifications and not use the LCOA as a subterfuge to avoid taxation, costs and employment protections at Accord's expense? The answer to these key questions on the implied covenant is YES. See *Wells Fargo v. Arizona Laborers*, 201 Ariz. 474 (2002).

36. Said breach of the express provisions and implied duty of good faith and fair dealing Damaged Accord re lost wages, overtime and benefits and increased Accord's costs.

COUNT 2
[ARS 44-1521: Consumer Fraud]
(FedEx)

37. Allegations 1-36 are re-alleged herein, in particular ¶'s 1, 4, 6, 19-28.

38. "One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering." *Restatement (2d) of Torts, Sec. 550*. The LCOA was an instrumentality used in 2017-2018 to conceal the fact that plaintiffs were in an employment relationship and

not a bona fide independent contractor (“the concealment”).

39. Through the LCOA FedEx used deception, made misrepresentations and engaged in concealment in connection with the sale and/or advertisement of merchandise which is statutorily defined as *services* under ARS 44-1521 (“deceptive practice”).

40. As alleged in ¶’s 1, 4, 6, 19-28 FedEx engaged in a deceptive practice in connection with the execution of the LCOA.

41. Pursuant to ARS 44-1522 FedEx concealed, suppressed or omitted a material fact when it used the LCOA to misclassify Accord as an independent contractor (“IC”).

42. FedEx intended that plaintiffs rely upon the deceptive practice and plaintiffs were Damaged as a result of such reliance in an amount to be proven at trial.

43. When FedEx used the LCOA it knew upon execution that the deceptive, false and misleading terms in the document would injure plaintiffs but it proceeded with the onerous LCOA nonetheless because it concealed the fraud and allowed FedEx to profit at the plaintiffs’ expense. FedEx use of the sham LCOA was intentional, calculated, and malicious. FedEx knew its deceitful conduct over an extended period served its own interests to the detriment of plaintiffs. FedEx also knew, or acted in reckless disregard of the legitimate employment information known to it, having reason to know but consciously disregarding a substantial risk that its deceptive practice would injure plaintiffs. Undaunted, FedEx knew that a perceived separation between FedEx and Accord would

give FedEx a pretext for refusing to cure any problems Accord faced at the hub. Such aggravating factors gives rise to \$2,000,000 in punitive damages in order to punish and deter such deceptive practices in the future.

COUNT 3
[Common Law Fraud] (FedEx)

44. Allegations 1-43 are re-alleged herein, in particular ¶ 's 1, 4, 6, 19-28.

45. "One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering." *Restatement (2d) of Torts, Sec. 550.*

46. In accordance with ¶ 's 1, 4, 6, 19-28 FedEx used the representations in the LCOA about independent contractor status to induce a false belief and the misclassification of Accord's employment status in 2017/18 was a fraud perpetrated by FedEx upon the plaintiffs on August 21, 2017 ("the representations").

47. The representations by FedEx were false when made.

48. The representations that FedEx made to plaintiffs were material.

49. FedEx knew that the representation to plaintiffs were false when made.

50. FedEx intended that plaintiffs act upon the representations by executing the LCOA and inducing Accord to follow it.

51. Plaintiffs did not know that the FedEx representations were false when made.

52. Plaintiffs relied on the truth of the representations in 2017.

53. Plaintiffs reliance was reasonable and justified under the circumstances.

54. As a result of the misrepresentations inherent in the misclassification of Accord's employment status in 2017 the plaintiffs were Damaged in an amount to be shown.

55. FedEx use of the sham LCOA was intentional, calculated, and malicious. FedEx knew that its deceitful conduct over an extended period served its own interests to the detriment of plaintiffs. FedEx also knew, or acted in reckless disregard of the legitimate employment information known to it, having reason to know but consciously disregarding a substantial risk that its deceptive practice would injure plaintiffs. Undaunted, FedEx knew that a perceived separation between FedEx and Accord would give FedEx a pretext for refusing to cure any problems Accord faced at the hub. Such aggravating factors gives rise to \$2,000,000 in punitive damages in order to punish and deter such deceptive practices in the future.

COUNT 4
[Negligent Misrepresentation]
(FedEx)

56. Allegations 1-55 are re-alleged herein, in particular ¶'s 1, 4, 6, 19-28.

57. "One who, in the course of business, profession, or employment, or in any other transaction in

which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused by their justifiable reliance upon the information, if he fails to use reasonable care in obtaining or communicating the information.” *Restatement (2d) Torts Sec. 552(1)*.

58. FedEx had a duty to act in good faith and with fair dealing and it had a duty not to mislead or deceive the plaintiffs in connection with the LCOA in 2017.

59. As alleged in ¶’s 1, 4, 6, 19-28 FedEx used an LCOA which contained provisions that were false or incorrect or failed to facilitate an IC relationship and thereby supplied false or incorrect information to plaintiffs (“the information”).

60. FedEx intended that plaintiffs rely upon the IC information.

61. FedEx failed to exercise reasonable care or competence in obtaining or communicating the IC information.

62. Plaintiffs relied upon the IC information provided by FedEx to its detriment.

63. Plaintiffs’ reliance upon the information in the LCOA document which was prepared by FedEx was justified under the circumstances.

64. As a direct and proximate result of FedEx negligent misrepresentations, plaintiffs suffered damages in an amount to be proven at trial.

COUNT 5
[ARS 13-1203: Civil Assault]
(Gerard, Hauser, Kristic & Zoran)

65. Allegations 1-64 are re-alleged herein, in particular ¶ 29 a-c, g, h, I, l, m.

66. Through the hostile acts alleged in ¶ 29 a-c, g, h, i, l and m against Gerard, Hauser, Kristic and Zopran have intentionally placed Ms. Hogan in reasonable apprehension of imminent physical injury constituting civil assault.

67. The individual defendants have committed the civil assault at the FedEx hub on many occasions over the past 2 years,⁸ the repeated hostile conduct at the FedEx yard were outrageous, and the cumulative impact of the assaults (at the site and off) have caused Ms. Hogan severe emotional distress manifested in physical and emotional harm as follows: *racing heart-beat, high blood pressure, vomiting, incessant crying, depression, lost sleep, lost memory, anxiety, headaches and ringing in the ears.*

68. The individuals consciously perpetrated the assaults over an extended period, and they knew or had reason to know but consciously disregarded a substantial risk that the assaults would injure Ms. Hogan which gives rise to The individuals consciously perpetrated the assaults over an extended period, they knew or had reason to know but consciously disregarded a substantial risk that the assaults would injure Ms. Hogan, giving rise to \$1,000,000 in punitive

⁸ The hostile and threatening acts were reported to FedEx whose management said “We can’t do anything because you don’t work for FedEx.”

damages in order to punish and deter such conduct by the individuals and others in the future.

COUNT 6

[Intentional Infliction of Emotional Distress] (Gerard, Hauser, Kristic & Zoran)

69. Allegations 1-68 are re-alleged herein, in particular ¶ 29 a-c, g, h, I, l, in.

70. The hostile acts alleged in ¶ 29 a-c, g, h, i, l and m against Gerard, Hauser, Kristic and Zopran were repeated, relentless, and done by each with knowledge of the other's wrongdoing, all in a coordinated effort to break Ms. Hogan emotionally and get her to terminate or curtail her competing business at FedEx.

71. The alleged bad acts were perpetrated by the individual defendants against Ms. Hogan at the FedEx hub with impunity and over an extended period.

72. The recurring acts over an extended period constitute extreme and outrageous conduct that is intolerable in our civilized society and the acts intentionally or recklessly caused Ms. Hogan severe emotional distress manifested in physical and emotional harm as follows: *racing heart-beat, high blood pressure, vomiting, incessant crying, depression, lost sleep, lost memory, anxiety, headaches and ringing in the ears.*

73. The individual defendants have committed the outrageous acts at the FedEx hub on many occasions over the past 2 years (at the site and off) and the cumulative impact has caused Ms. Hogan severe emotional distress manifested in physical and emotional harm as follows: *racing heart-beat, high blood pressure, vomiting, incessant crying, depression,*

lost sleep, lost memory, anxiety, headaches and ringing in the ears.

74. The individuals consciously perpetrated the bad acts against Ms. Hogan over an extended period, they knew or had reason to know but consciously disregarded a substantial risk that the bad acts would injure Ms. Hogan which gives rise to \$1,000,000 in punitive damages against the individuals jointly and severally in order to punish and deter such conduct by the individuals and others in the future.

COUNT 7

[Negligent Infliction of Emotional Distress] (FedEx, Gerard, Hauser, Kristic & Zoran)

75. Allegations 1-74 are re-alleged, in particular ¶ 29 a-c, g, h, I, l and m.

76. The hostile acts alleged in ¶ 29 a-c, g, h, i, l and m against Gerard, Hauser, Kristic and Zopran were repeated, relentless, and done by each *individual* with knowledge of the *other individual's* wrongdoing, all in a coordinated effort to break Ms. Hogan emotionally and get her to terminate or curtail her competing business at FedEx.

77. The individuals' bad acts were negligent as creating an unreasonable risk of causing Ms. Hogan bodily harm or emotional disturbance and it resulted in such emotional disturbance and harm as follows: *racing heart-beat, high blood pressure, vomiting, incessant crying, depression, lost sleep, lost memory, anxiety, headaches and ringing in the ears.*

78. FedEx knew or should have known about the individual defendants' recurring bad acts against Ms. Hogan (it was obvious and she told them) but FedEx

negligently failed to take appropriate action to abate the conduct.

79. Accordingly, FedEx and the individual defendants share comparative fault for the negligent infliction of emotional distress upon Ms. Hogan in an amount to be proven.

COUNT 8
[Tortious Interference with
Contract/Expectancy]
(Gerard, Hauser, Kristic & Zoran)

80. Allegations 1-79 are re-alleged herein, in particular ¶ 's 1-3, 5, 29.

81. Accord has an LCOA with FedEx ("contract") and a business expectancy.

82. In 2017 Gerard, Hauser, Kristic and Zoran knew about Accord's LCOA contract with FedEx (and its business expectancy) but despite such knowledge they engaged in recurring wrongful acts they knew was harming the plaintiffs but proceeded with impunity and have bragged at the hub about the mob-like conduct that Ms. Hogan has had to endure:

- (a) all of them speak their Slavic language in loud hostile tones at the FedEx hub to intimidate and ridiculing Ms. Hogan at the yard
- (b) all of them pointing at her and shouting the Slavic languages in a hostile manner and laughing at her
- (c) Gerard and Hauser repeatedly stopping her vehicle at the yard and on public streets to stare at her in a hostile manner which

unnerves her and causes her to go home in tears

- (d) Gerard (through his son Adrian and Ryan Smith) repeatedly calling Accord's drivers in a deliberate effort to take them away from Accord
- (e) all of them telling Ms. Hogan to stop trying to expand Accord's business in order to stifle competition
- (f) Gerard telling Ms. Hogan in broken English "this is no place for a womans (sic), you should be home baking cookies."
- (g) Gerard telling her to "watch your back"
- (h) Gerard telling her to "stay the hell out of Vegas, you have no God Damn business going to Vegas, and don't put trucks in other hubs"
- (i) Gerard and Hauser yelling at her "stop stealing my drivers"
- (j) All of them saying in a full break-room "who let a woman in the good ole boys club?"
- (k) Gerard telling her "and don't even think about adding peak trucks, you can't compete with us big boys and all our points because you won't get shit."
- (l) Hauser telling her "I'm warning you, you can't talk to my drivers."
- (m) All of them in the FedEx break room calling Hogan a "bitch and cunt" and bringing her to tears at the Fed Ex hub and off-site.

83. As alleged in ¶'s 1-3, 5, 29 the named individuals, jointly and severally, have acted to interfere with the contractual relationship between Accord and FedEx which interference has impaired and harmed the contractual relationship.

84. The interference by the individual defendants was improper and wrongful.

85. Plaintiffs have sustained Damage caused by the improper and wrongful interference with the contract and business expectancy in an amount to be proven at trial.

86. The individuals acted to intentionally disrupt, impair and harm Accord's contract and business operations with FedEx over an extended period, and they knew or had reason to know but consciously disregarded a substantial risk that the assaults would injure Ms. Hogan giving rise to \$1,000,000 in punitive damages against the individuals jointly and severally in order to punish and deter the conduct by them and others in the future.

**COUNT 9 [RICO: ARS 13-2314.04]
(Gerard, Hauser, Kristic & Zoran)**

87. Allegations 1-86 are re-alleged herein, in particular ¶'s 1-29.

88. In violation of *A.R.S., §§ 13-2301, et seq.* the individual defendants conducted the affairs of an association-in-fact or enterprise identified as the "EU enterprise," the affairs of which harmed the plaintiffs through a pattern of unlawful conduct under *A.R.S., §§ 13-2301.*

89. The EU enterprise is ongoing at the FedEx hub and engages in hostile threats, intimidation, extortion and a scheme and artifice to defraud which harms Accord.

90. While the individuals are members of the EU Enterprise, they also have a trucking contractor entity existence separate and distinct from the enterprise.

91. The enterprise uses hostile threats, intimidation, extortion and a scheme and artifice to defraud to adversely affect Accord operations, stymie growth and harm its business.

92. Said Defendants operated and controlled the EU enterprise as follows:

- Acting as a group around Hogan
- Speaking in Slavic around Hogan in a hostile manner
- Using English to blurt out profanity to Hogan to intimidate and coerce
- Threatening Hogan physically if she doesn't stop trying to expand
- Stopping her vehicle on and off-site to intimidate Hogan
- Acting as a hostile group to threaten, intimidate and extort plaintiffs

93. The enterprise has an ascertainable group structure and engaged in coordinated conduct at the hub separate and apart from the lawful activity of the individuals.

94. The enterprise has a systemic linkage because there are contractual relationships and continuing coordination of activities between said defendants. There is a common communication network allowing the individuals to share information about plaintiffs' activities which is continuing and threatens to continue and FedEx has done nothing to stop the abuse despite an awareness of it because "Hogan has never worked for FedEx."⁹

95. The individual defendants are willing participants in the EU enterprise, it has a common purpose and interest in the scheme and artifice to defraud Accord out of FedEx and other trucking business, and the enterprise carries out its illicit purpose of stifling competition and harming the Accord business to drive it out of the FedEx hub.

96. Three unlawful predicate acts exist: (a) extortion by threats and intimidation to do bodily harm [ARS 13-2301(ix)]; (b) a scheme and artifice to defraud by using contractor entities as a front for the unlawful conduct [ARS 13-2301(xx)]; and (c) restraint of trade or commerce which resulted from the coordinated and deliberate misconduct directed toward Ms. Hogan [ARS 13-2301(xxiv)].

97. Each of the individual defendants conducted and participated in the affairs of the EU enterprise through a pattern of unlawful activity, including acts that are indictable under *A.R.S., §§ 13-2301 et seq.*

⁹ This pretext for FedEx's failure to stop the abuse and extortion conduct at the yard is based upon the LCOA separating Accord from FedEx but TSPA reveals FedEx's attempt to cover-up the drafting flaws in the LCOA and FedEx seeks to double down on the deception it used to defraud plaintiffs & the IRS.

and which constitutes a “pattern of unlawful activity” within the meaning of *A.R.S., §§ 13-2301, et seq.*

98. The unlawful acts have injured the plaintiffs physically and economically.

99. Under the provisions of *A.R.S., §§ 13-2301, et seq.* of the Arizona RICO statute the individual defendants are jointly and severally liable to plaintiffs for *treble damage* under the RICO statute plus consequential and punitive damages and fees and costs.

100. The individuals consciously perpetrated the bad acts (in ¶ 29) in a coordinated scheme to disrupt, impair and injure the plaintiffs’ business and personal well-being in order to impede, curtail or terminate the competition at the FedEx hub, and they knew or had reason to know but consciously disregarded a substantial risk that the bad acts would injure Ms. Hogan giving rise to \$1,000,000 in punitive damages against the individuals jointly and severally in order to punish and deter the conduct by them and others in the future.

PRAYER FOR RELIEF

WHEREFORE, judgment is requested against defendants and each of them:

A. On Counts 1-9 for actual damages (including but not limited to *lost wages, overtime and other employee benefits* under Count 1) which are well above the \$50,000 minimum jurisdiction of this court in an amount to be proven at trial;

B. On Count 2 against FedEx for actual and consequential damages in an amount well above the

\$50,000 minimum jurisdiction of this court plus punitive damages in an amount not less than \$2,000,000 together with attorney's fees and court costs incurred;

C. On Count 3 against FedEx for actual and consequential damages in an amount well above the \$50,000 minimum jurisdiction of this court plus punitive damages in an amount not less than \$2,000,000 together with attorney's fees and court costs incurred;

D. On Count 4 against FedEx and Count 7 against all defendants for compensatory and consequential damages well in excess of the \$50,000 minimum jurisdiction of the court in an amount to be proven at trial.

E. On Counts 5, 6 and 8 against the individual defendants for actual damages in an amount to be proven plus punitive damages against the individual defendants jointly and severally for \$1,000,000 plus attorney's fees and court costs incurred;

F. On Count 9 against the individual defendants for *treble actual damages* under the RICO statute plus punitive damages against the individual defendants jointly and severally in the amount of \$1,000,000 as the individual defendants consciously pursued a course of conduct over an *extended period knowing* that it created a substantial risk of significant harm to plaintiffs and proceeded knowing that their unlawful conduct harmed the plaintiffs.

G. On all counts for an award of pre and post judgment interest at the legal rate from January 2015 until paid;

H. An award of attorney's fees and taxable costs under RICO and under law;

I. For such other and additional relief the court deems proper.

Dated this 24th day of August, 2018.

By: /s/ Gregory G. McGill
Counsel for plaintiffs

Verification by Declaration

Pursuant to Rule 80, the undersigned plaintiffs declare under penalty of perjury that the foregoing allegations in the Complaint are true and correct.

Dated this 24th day of August, 2018.

ACCORD TRUCKING, INC.

By: /s/ Susan R. Hogan
Its President

By: /s/ Susan R. Hogan
Individual

**JOINT PRETRIAL STATEMENT,
SUPERIOR COURT OF
ARIZONA COUNTY OF MARICOPA
(FEBRUARY 3, 2023)**

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SUPERIOR COURT OF ARIZONA
COUNTY OF MARICOPA

ACCORD TRUCKING, INC.;
SUSAN R. HOGAN, A MARRIED WOMAN,

Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendant.

Case No: CV2018-010982

[Rule 16(f)]

Before: Hon. Joseph MIKITISH, Judge.

JOINT PRETRIAL STATEMENT

Pursuant to Rule 16(f)(2) and the Court's trial setting order entered on July 28, 2022, Plaintiffs Accord Trucking, Inc. ("Accord") and Susan R. Hogan ("Hogan") and Defendant FedEx Ground Package System, Inc. ("FedEx Ground") submit the following Joint Pretrial Statement¹:

I. Stipulations of Material Fact

1. Plaintiff Hogan has been a resident in Maricopa County during the period of time in dispute and incorporated Accord Trucking, Inc. in 2015.

2. FedEx Ground is a federally registered motor carrier that operates a ground transportation network across the United States and Canada.

3. FedEx Ground contracts with corporations that are in the business of providing transportation services to haul trailers of packages to and from its facilities across the United States, where the trailers are unloaded and sorted for delivery to businesses and residences. In the industry, the use of tractor trailers to transport trailers on roads and highways is known as "linehaul."

4. In June 2015, FedEx Ground and Accord Trucking entered into a Linehaul Contractor Operating Agreement ("LCOA") under which Accord Trucking provided linehaul services to FedEx Ground.

¹ The parties acknowledge that various motions are pending before the Court that might impact the issues addressed herein. The parties do not intend to waive any positions or arguments to the extent the issues change after the Court rules on the motions.

5. Accord Trucking operated out of FedEx Ground's hub in Phoenix.

6. Susan Hogan signed the LCOA for Accord Trucking.

7. The LCOA automatically renewed yearly unless one of the parties terminated it or provided notice of its intent not to renew the contract.

8. From approximately June 2015 through August 2018, Accord Trucking provided linehaul services to FedEx Ground under the LCOA.

9. In August 2018, FedEx Ground and Accord Trucking entered into a Transportation Service Provider Agreement ("TSPA"). The effective date of the TSPA was September 1, 2018.

10. After execution of the TSPA, Accord Trucking continued to provide linehaul services to FedEx Ground. The services provided under the TSPA were essentially the same as the services provided under the LCOA.

11. In 2018, Susan Hogan complained to FedEx Ground that she was being harassed by personnel from other companies that provided linehaul services to FedEx Ground out of the Phoenix Hub.

12. A FedEx security specialist interviewed Ms. Hogan and other people whom she identified as being able to corroborate her allegations.

II. Stipulations as to Applicable Law

1. The Court should decide whether either party is entitled to attorney's fees and costs on the claims brought in this action.

III. Contested Material Issues of Fact and Law

1. Whether Pennsylvania law applies to the breach of contract claims. Both the LCOA and TSPA contain the following “Governing Law” provision: “This Agreement will be covered by and construed in accordance with the laws of the Commonwealth of Pennsylvania” FedEx Ground’s answer specifically refers to the choice of law provision in Paragraph 58 and Defense 10. Plaintiffs dispute the application of Pennsylvania law, contending that FedEx Ground has cited Pennsylvania law in briefing in this case. FedEx Ground contends that Arizona law was cited on other issues and has no bearing on the breach of contract claim.

2. The applicable legal test to determine if FedEx Ground misclassified Accord as an independent contractor. FedEx Ground submits that the test from *Santiago v. Phoenix Newspapers*, 164 Ariz. 505, 508 (1990), applies. Plaintiffs contend that a 10-factor common law test under a different Arizona case and/or the 20-factor IRS test apply.

3. Whether FedEx Ground exercised control over Accord Trucking such that an employment relationship existed between the parties under the LCOA and TSPA.

4. The parties’ understanding of the various provisions in the LCOA and TSPA and their impact on the misclassification analysis.

5. Whether FedEx Ground is liable to Accord Trucking for breach of contract based on the evidence admitted into the trial record.

6. Whether FedEx Ground is liable to Accord for common law and/or statutory fraud based on the evidence admitted into the trial record.

7. Whether Accord Trucking's consumer fraud claims was brought within the one-year statute of limitations.

8. Whether FedEx Ground is liable to Accord Trucking for negligent misrepresentation based on the evidence admitted into the trial record.

9. Whether Accord Trucking's negligent misrepresentation claim was brought within the two-year statute of limitations.

10. Whether FedEx Ground is liable to Accord Trucking for negligent infliction of emotional distress for the purported harassment.

11. Whether the trial evidence against FedEx Ground entitles Plaintiff Accord Trucking to an award of punitive damages, and if so how much.

IV. Separate Statement By Parties of Other Issues Believed to Be Material or Applicable

A. Plaintiffs:

1. Whether FedEx Ground can sustain the independent contractor classification under the 10-factor common law test as follows:

- (i) the degree of employer control over the details of the services
- (ii) whether the person's business is a distinct entity
- (iii) whether the person's services are usually done without supervision

- (iv) whether the services require a low level of skill
- (v) whether the person provides the equipment and place of work
- (vi) the length of time the services are provided
- (vii) method of payment, by the job or time put in
- (viii) whether the services are part of the regular business of the employer
- (ix) the intent behind the IC relationship
- (x) whether the hiring party is in business

2. Whether FedEx Ground can sustain the independent contractor classification under the 20-factor IRS test as follows:

- (1) whether the person is required to follow instructions
- (2) the person's training on that job
- (3) the amount of integration into the hiring party's business
- (4) whether the services are rendered personally
- (5) whether the hiring party hires, fires and pays assistants
- (6) whether there is a continuing relationship
- (7) whether there is a set amount of work hours
- (8) whether the person devotes nearly full time to the job
- (9) whether the person works on the hiring party's premises

- (10) whether the person works according to a sequence set by the other
- (11) whether regular or written reports must be submitted
- (12) whether pay is by time or by project
- (13) whether the person is reimbursed for expenses
- (14) whether the individual furnishes the tools and equipment
- (15) whether the person has invested in the facilities to provide the services
- (16) whether the person can realize a profit or loss
- (17) whether the person has one or multiple clients
- (18) whether the person makes her services available to the public
- (19) whether the hiring party has the right to discharge the person
- (20) whether the person has the right to terminate the relationship.

2. Whether FedEx Ground intentionally misclassified Accord and is therefore liable to Accord for punitive damages in addition to actual damages.

3. Whether FedEx Ground breached a contract with Accord.

4. Whether FedEx Ground committed fraud, consumer fraud and/or negligent misrepresentation against Accord.

5. Whether FedEx Ground is liable to Susan Hogan for negligent infliction of emotional distress by failing to detect and stop harassment of her by contract service providers at the Phoenix hub during the period 9/1/2016-12/31/2018.

6. Whether plaintiffs jointly or severally were Damaged by defendant in this matter on any or all claims and if so by how much.

B. Defendant:

1. Whether an employer-employee relationship existed between Accord Trucking and FedEx Ground is subject to a multi-factor test, including whether FedEx Ground exercised control over Accord Trucking concerning how it accomplished the tasks agreed to in the contracts between the parties, such as:

- a. Whether Accord Trucking operated a distinct business and promoted their own business enterprise, and whether the tasks performed by Accord Trucking employees resulted in a profit or loss to Accord Trucking;
- b. Whether the services performed were skilled or required a high degree of education;
- c. Whether FedEx Ground supplied the tools or equipment needed to perform the tasks and directed Accord Trucking to service a specific area or fixed route;
- d. Whether the services were part of a continuous working relationship and/or FedEx Ground had the rights to terminate the relationship without cause;

- e. Whether FedEx Ground paid for the services by the job instead of hourly or by salary;
- f. Whether the services were an integral part of FedEx Ground's regular business; and
- g. Whether FedEx Ground and Accord Trucking believed that an employment relationship was formed between them?

2. Because the transportation industry is subject to federal laws and regulations, whether Accord Trucking can use evidence of FedEx Ground complying with federal laws and regulations to show that FedEx Ground exercised control over Accord Trucking?

3. If misclassified, if the worker's compensation bar precludes Susan Hogan from recovering for negligent infliction of emotional distress.

4. Whether Accord Trucking can state a separate claim for breach of the implied covenant of good faith and fair dealing, particularly in light of the parties' dispute over whether Pennsylvania or Arizona law is controlling on contract-related claims.

5. If FedEx Ground breached the LCOA and TSPA, whether Accord Trucking waived its right to have FedEx Ground identify Accord Trucking as an employee.

6. If FedEx Ground breached the LCOA and TSPA, whether Accord Trucking failed to mitigate its damages.

7. If FedEx Ground is found to be liable to Accord Trucking for consumer fraud, whether Accord Trucking sustained actual injuries, not including lost profits or

speculative injuries, and are thus entitled to compensatory damages?

8. If FedEx Ground is liable for consumer fraud or common law fraud, whether Accord Trucking proved actual damages and also, whether Accord Trucking proved by clear and convincing evidence that FedEx Ground consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others? Further, whether Accord Trucking can introduce evidence of out-of-state court decisions involving different contracts from a different segment of FedEx Ground's business in support of its request for punitive damages.

9. If FedEx Ground is found to be liable to Accord Trucking for common law fraud, whether Accord Trucking can prove damages for the value of what Accord Trucking would have received but for the misrepresentation at the time of the transaction?

10. Whether the information allegedly negligently misrepresented is the type that is actionable under Arizona law.

11. Whether a percentage of fault should be allocated to Accord Trucking on the negligent misrepresentation claim.

12. Whether the economic loss rule bars recovery on the common law fraud and negligent misrepresentation claims.

13. Whether the alleged misrepresentation are actionable statements of fact for the purpose of misrepresentation claims.

14. Whether Accord Trucking justifiably relied on misrepresentations by FedEx Ground.

15. If FedEx Ground is liable for consumer fraud, common law fraud, or negligent misrepresentation, whether the doctrine of avoidable consequences should reduce Accord Trucking's damages.

16. Whether Accord Trucking can simultaneously submit its claims for breach of contract/breach of the implied covenant of good faith and fair dealing, consumer fraud, common law fraud, and negligent misrepresentation to the jury. FedEx Ground submits that the claims overlap and will result in double recovery.

17. The measure of damages legally available on Accord Trucking's claims.

18. Whether Susan Hogan can recover individual damages as the sole shareholder of Accord Trucking on Accord Trucking's claims for breach of contract, consumer fraud, common law fraud, and negligent misrepresentation.

19. Whether Accord Trucking can prove damages separately from the damages sought by Susan Hogan on the claims for breach of contract, consumer fraud, common law fraud, and negligent misrepresentation.

20. Whether Accord Trucking can seek to recover lost profits as an independent contractor in light of its claims to the effect that an employment relationship existed between the parties. FedEx Ground disputes whether such damages arise from any claim that Accord Trucking presently asserts against FedEx Ground in the case.

21. Whether FedEx Ground was the legal and proximate cause of damages to Plaintiffs Accord Trucking and Susan Hogan.

22. Whether the harassment occurred as Susan Hogan alleged.

23. Whether Susan Hogan proved that FedEx Ground's purported negligence related to the conduct of other contract service providers was a substantial factor in causing Ms. Hogan emotional distress and that the emotional distress would not have occurred but for FedEx Ground's negligence?

24. Whether percentages of fault should be allocated to Philip Gerard, Dalibor Krstic, Zoran Djordjevic, and Alan Hauser for contributing to the injuries to Susan Hogan that are the subject of the negligent infliction of emotional distress claim.

D. List of Witnesses

1. Plaintiffs' List of Trial Witnesses: and see Exhibit A Plaintiffs' Witness List attached hereto.

- a. Susan Hogan UNLESS UNDISCLOSED BY SOME METHOD IN DISCOVERY, THERE IS NO REQUIREMENT TO OBJECT TO WITNESSES, EACH PARTY JUST CROSS-EXAMINES THOSE WHO ARE ALLOWED TO TESTIFY

Defendant's Objection: To the extent Ms. Hogan intends to testify regarding information contained in any expert report, Defendant objects as said testimony is irrelevant and prejudicial (Ariz. R. Evid. 403) and hearsay (Ariz. R. Evid. 802). Additionally, Defendant objects to any testimony that is subject to its MSJ, Daubert motion, or any MIL.

b. Todd Hogan

Defendant's Objection: Mr. Hogan's testimony lacks foundation and is cumulative evidence regarding Accord Trucking's operations (Ariz. R. Evid. 403). Testimony regarding alleged harassment to Ms. Hogan is hearsay (Ariz. R. Evid. 802).

c. Brian Tangi

Defendant's Objection: Defendant anticipates that Plaintiffs might attempt to elicit testimony regarding other litigation which is irrelevant (Ariz. R. Evid. 403). Moreover, Defendant objects to the extent this testimony is subject to any MIL.

d. Dennis Snodgrass

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Defendant objects to the extent this testimony is subject to any MIL.

e. Tim Means

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Defendant objects to the extent this testimony is subject to any MIL.

f. Milton Peevy

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz.

R. Evid. 403). Defendant objects to the extent this testimony is subject to any MIL.

g. Jeremy Renshaw

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Defendant objects to the extent this testimony is subject to any MIL.

h. Tibor Kolumban

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Furthermore, much of the anticipated testimony is hearsay (Ariz. R. Evid. 802). Moreover, Defendant objects to the extent any of Mr. Kolumban's testimony is subject to any MIL.

i. Sandi Gredelj

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Furthermore, much of the anticipated testimony is hearsay (Ariz. R. Evid. 802).

j. April Ward

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Moreover, Defendant objects to the extent any of Ms. Ward's testimony is subject to any MIL.

k. Nelson Whiting

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Moreover, Defendant objects to the extent any of Mr. Whiting's testimony is subject to any MIL.

l. Dalibor Krstic

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403).

m. Zoran Djordjevic

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403).

n. Dr. Lisa Fischer

Defendant's Objection: Defendant anticipates Dr. Fischer may attempt to testify to an improper expert opinion as stated in a January 8, 2020, letter addressed to Plaintiffs' counsel. Moreover, Defendant objects to the extent any of Dr. Fischer's purported testimony is subject to Defendant's *Daubert* motion or any MIL.

o. CPA Don Bays

Defendant's Objection: Defendant objects to the extent that Mr. Bays' testimony is subject to Defendant's *Daubert* motion, MSJ or any MIL.

p. Omar Sullivan

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Moreover, Defendant objects to the extent any of Ms. Ward's testimony is subject to any MIL.

q. Curtis Cantonwine

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Moreover, Defendant objects to the extent any of Ms. Ward's testimony is subject to any MIL. Furthermore, much of the anticipated testimony is hearsay (Ariz. R. Evid. 802).

r. Donna Patterson

Defendant's Objection: Testimony regarding Defendant's business model, operations and contracting relationship is cumulative (Ariz. R. Evid. 403). Defendant objects to the extent this testimony is subject to any MIL.

2. Defendant's List of Trial Witnesses: See Exhibit B Defendant's Witness List attached hereto.

E. List of Claims

1. Plaintiffs: contract, fraud, consumer fraud, punitive damages, negligent misrepresentation, negligent infliction of emotional distress.

2. Defendant: N/A

F. List of Trial Exhibits

1. Plaintiffs:

1. Description: LCOA contract 8/1/14
Bates Number: SH Trial 001-3
Stipulated: Y
Objection: None
2. Description: Message from K. Whigham re:
TSPA to replace LCOA
Bates Number: SH Trial 004
Stipulated: None
Objection: Relevancy (Ariz. R. Evid. 403)
3. Description: TSPA contract 9/1/18
Bates Number: SH Trial 005,6,7
Stipulated: Y
Objection: None
4. Description: Truck photos
Bates Number: SH Trial 008–12
Stipulated: None
Objection:
Foundation (Ariz. R. Evid. 602)
Relevancy (Ariz. R. Evid. 403)
5. Description: Registration re DOT
Bates Number: SH Trial 013–15
Stipulated: None

Objection:

SH Trial 013–015 Relevancy (Ariz. R. Evid. 403)

Hearsay (Ariz. R. Evid. 802)

6. Description: ELD and FCAM notice

Bates Number: SH Trial 016–17

Stipulated: Y

Objection: None

7. Description: ELD Driver Log

Bates Number: SH Trial 018-020

Stipulated: None

Objection: Relevancy (Ariz. R. Evid. 401)

8. Description: VEDR notice

Bates Number: SH Trial 021

Stipulated: Y

Objection: None

9. Description: GPS notice

Bates Number: SH Trial 022

Stipulated: Y

Objection: None

10. Description: NDA - FedEx Routes

Bates Number: SH Trial 023

Stipulated: None

Objection:

Foundation (Ariz. R. Evid. 602)

Relevancy (Ariz. R. Evid. 403)

Hearsay (Ariz. R. Evid. 802)

11. Description: Maintenance Record
Bates Number: SH Trial 024
Stipulated: Y
Objection: None
12. Description: FedEx weekly settlement
Bates Number: SH Trial 025
Stipulated: Y – subject to redaction of the written notes
Objection: None
13. Description: Certificate of Insurance
Bates Number: SH Trial 026
Stipulated: Y
Objection: None
14. Description: GPS tech on all vehicles
Bates Number: SH Trial 027–29
Stipulated: Y (027)
Objection: Relevancy (Ariz. R. Evid. 403) (028–29)
15. Description: FedEx “Types of Opportunities” excerpts pp. 1–3 & 1-2
Bates Number: SH Trial 030–34
Stipulated: Y ??? (are there additional pages that should be disclosed—one document has 3 of 4 pages and one says 1 of 4 pages?)

Objection: None

16. Description: FedEx Policies

Bates Number: SH Trial 035–41

Stipulated: Y

Objection: None

17. Description: FedEx Whistleblower

Bates Number: SH Trial 042–43

Stipulated: None

Objection: Relevancy (Ariz. R. Evid. 403)

18. Description: FedEx Custom Critical —
uniform order

Bates Number: SH Trial 044

Stipulated: None

Objection: Relevancy (Ariz. R. Evid. 403)

19. Description: FedEx Ground communication
re: contractor relations organization

Bates Number: SH Trial 045

Stipulated: None

Objection: Relevancy (Ariz. R. Evid. 403)

20. Description: FXG update re vehicle standards

Bates Number: SH Trial 047

Stipulated: None

Objection: Vague/incomplete

21. Description: Gredelj statement

Bates Number: SH Trial 053–056

Stipulated: None

Objection: Hearsay (Ariz. R. Evid. 802)

22. Description: Email re Tibor to FXG

Bates Number: SH Trial 057

Stipulated: Y

Objection: None

23. Description: Hogan emails w Means

Bates Number: SH Trial 058–60

Stipulated: Y

Objection: None

24. Description: FedEx vendor badge

Bates Number: SH Trial 061

Stipulated: Y

Objection: None

25. Description: ACC info re CSP's

Bates Number: SH Trial 062–65

Stipulated: None

Objection:

Relevancy (Ariz. R. Evid. 401)

Hearsay (Ariz. R. Evid. 802)

26. Description: Workman's Comp

Bates Number: SH Trial 66

Stipulated: Y

Objection: None

27. Description: Email First Advantage
Bates Number: SH Trial 67
Stipulated: None
Objection: Hearsay (Ariz. R. Evid. 802)
28. Description: Freightliner lease
Bates Number: SH Trial 68
Stipulated: None
Objection:
 Relevancy (Ariz. R. Evid. 401)
 Hearsay (Ariz. R. Evid. 802)
29. Description: Freightliner Bill of Sale, title, POA, invoice
Bates Number: SH Trial 69–76
Stipulated: None
Objection:
 Relevancy (Ariz. R. Evid. 401)
 Hearsay (Ariz. R. Evid. 802)
30. Description: Dr Fischer Reports/bills
Bates Number: SH Trial 077–83
Stipulated: None
Objection:
 Relevancy (Ariz. R. Evid. 401)
 Impermissible expert opinions (Ariz. R. Evid. 702 and 703)
 Also subject to Defendant's Daubert Motion and MIL #9

31. Description: Dr Fischer CV
Bates Number: SH Trial 084–92
Stipulated: None
Objection:
 Relevancy (Ariz. R. Evid. 401)
 Hearsay (Ariz. R. Evid. 802)
32. Description: Hogan medical records
Bates Number: SH Trial 095–110
Stipulated: None
Objection: Relevancy (Ariz. R. Evid. 401)
33. Description: Henry & Horne Rept 1 &
Schedules 1–9 & Appendix 1–3
Bates Number: SH Trial 111
Stipulated: None
Objection:
 Impermissible expert opinions (Ariz. R.
 Evid. 702 and 703)
 This report is addressed in Defendant’s
 Daubert Motion and MSJ
34. Description: Henry & Horne Rept 2 &
Schedules 1–7 & Appendix 1–2
Bates Number: SH Trial 112
Stipulated: None
Objection:
 Impermissible expert opinions (Ariz. R.
 Evid. 702 and 703)

This report is addressed in Defendant's
Daubert and MIL #6)

35. Description: Henry & Horne Rept 3 &
Appendix A–F & Schedules 1–12

Bates Number: SH Trial 113

Stipulated: None

Objection:

Impermissible expert opinions (Ariz. R.
Evid. 702 and 703)

This report is addressed in Defendant's
Daubert Motion and MIL#6 and #7

36. Description: Henry & Horne Rept 4 &
Schedules 1–6 & Appendix A Statement of
Qualifications & full CV

Bates Number: SH Trial 114

Stipulated: None

Objection:

Impermissible expert opinions (Ariz. R.
Evid. 702 and 703)

This report is addressed in Defendant's
Daubert Motion.

37. Description: Accord 1120-S (2020)

Bates Number: SH Trial116

Stipulated: Y

Objection: None

2. Defendant

See Exhibit 1 attached. As to Exhibit 1, plaintiffs assert the following Objection to each exhibit to preserve their right to supplement with greater specificity (as to each defense exhibit) prior to the FPTC and counsel have agreed to cooperate with this procedure: Objection: relevance, disclosure, foundation, hearsay, prejudice, ARE 403 and 404.

G. Depositions

Plaintiffs: for impeachment and cross-examination only.

Defendant: Defendant reserves the right to use deposition testimony for impeachment and cross-examination purposes.

H. Brief Statement of the Case for Jury

In 2015, Plaintiff Accord Trucking and Defendant FedEx Ground entered into a Linehaul Contractor Operating Agreement. In 2018, Accord Trucking and FedEx Ground agreed to terminate the Linehaul Contractor Operating Agreement and entered into a Transportation Service Provider Agreement. Under the contracts, Accord Trucking provided transportation services to FedEx Ground. Those services involved using tractor trailers to haul trailers of packages to facilities in the FedEx Ground network.

This lawsuit arises out of Accord Trucking's claim that FedEx Ground misclassified Accord Trucking as an independent contractor under the contracts. Accord Trucking claims that it was misclassified, but FedEx Ground denies that claim. Plaintiff Accord Trucking filed claims for breach of contract, statutory consumer

and common law fraud and negligent misrepresentation. Accord Trucking seeks punitive damages on its fraud claims. FedEx Ground denies liability on all claims and does not believe any damages should be awarded on the claims asserted by Plaintiff Accord Trucking. Plaintiff Susan Hogan, the owner of Plaintiff Accord Trucking, has filed a claim for negligent infliction of emotional distress against FedEx Ground arising out of allegedly abusive conduct by service providers at the Phoenix hub. She asserts that FedEx management failed to address the conduct. FedEx Ground denies that claim.

I. Requested Technical Equipment

Plaintiffs: Court equipment to project exhibits for jury; Elmo and Easel.

Defendant: Same as Plaintiffs request. Defendant is continuing to evaluate any other technological needs and will be prepared to address at the final pretrial conference.

J. Requested Interpreters

None.

K. Jurors

6 out of 8 for a verdict and 2 alternates that deliberate.

L. Rule 615 re Witnesses

The Parties invoke the rule of exclusion. FedEx Ground does not agree that the rule applies to its experts.

M. Settlement Efforts

The Parties attempted to settle the case formally through mediation and informally through counsel but were unsuccessful.

N. Record of the Trial

FedEx Ground will arrange for a court reporter for a verbatim record at trial.

O. Miscellaneous:

(1) Proposed Voir Dire:

Plaintiffs: See Plaintiffs' Proposed *Voir Dire* Questions filed separately. Defendant: See Defendant's Proposed *Voir Dire* Questions filed separately.

(2) Final Jury Instructions:

Plaintiffs: See separate statement re Plaintiffs' Proposed JIs.

Defendant: See separate statement re proposed non-standard JIs. Both Parties: See *Plaintiffs. and Defendants Agreed Upon JIs.*

(3) Proposed Verdict Forms:

Plaintiffs: RAJI 6th Edition Single Defendant Form 1.

Defendant: Special Verdict Form submitted separately

Dated this 3rd day of February, 2023.

By: /s/ Gregory G. McGill, Esq.
Counsel for Plaintiffs

By /s/ Gregory M. Monaco, Esq.
Counsel for Defendant with consent

Original e-filed 2/4/2023 via TurboCt;
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Moon Township, PA 15108

By: /s/ Gregory G. McGill

**TRIAL DAY 6,
PARTIAL TRANSCRIPT
(MARCH 21, 2023)**

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA IN AND
FOR THE COUNTY OF MARICOPA

ACCORD TRUCKING, INC., ET AL.,
Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC., ET AL.,
Defendants.

No. CV2018-010982
REPORTER'S PARTIAL TRANSCRIPT
OF PROCEEDINGS BEFORE THE
HONORABLE JOHN REA
TRIAL DAY 6
Phoenix, Arizona
March 21, 2023

COUNSEL APPEARING:

For Plaintiff ACCORD TRUCKING INC., et al.:
McGILL LAW FIRM
Gregory McGill, Esq.
Ryan McGill, Esq.
4421 North 75th Street
Scottsdale, Arizona 85251

For the Defendant FEDEX GROUND PACKAGE SYSTEMS, INC.:

FEDEX GROUND PACKAGE SYSTEMS, INC.

Gregory Monaco, Esq.

Shanicka Kennedy, Esq.

1000 FedEx Drive

Moon Township, Pennsylvania 15108

In the event that the claim would survive this notice and go to the jury, specifically the breach of contract claim for misclassification, there is no recovery for negligent infliction of emotional distress because employees have Workers' Comp as an exclusive remedy under Arizona law. That's an alternative defense that we are raising preemptively. Specifically we would seek a ruling in that regard if the misclassification claim made it to the jury which, again, we submit that it should not.

THE COURT: Thank you.

MR. MONACO: Thank you, Your Honor.

THE COURT: Let's take our morning recess. We'll take 15 minutes and then come back for Mr. McGill's response.

MR. GREGORY MCGILL: Thank you.

(Whereupon a recess is taken.)

THE COURT: Let's go back on the record. We're here outside the presence of the jury arguing legal motions at the close of the Plaintiffs' case. FedEx has presented its arguments. Mr. McGill, go ahead.

MR. GREGORY MCGILL: Thank you, Your Honor. Your Honor, I want to start with—I want to start

with the breach of contract, the implied covenant of good faith and fair dealing. The breach—the breach of the express contract is—express breach of the contract deals with the misclassification that was done by the Defendant. And the—the evidence on the misclassification which deals with—we have the common law test—in the Complaint I had the Common Law Test, and I had the IRS 20 Factor Test. But the Common Law Test is a 10 factor test. And the evidence I believe was overwhelming that there were substantial number of control factors that the testimony and the exhibits brought out.

And what's important is that—to keep in context here, Your Honor, is much of the argument that Defense counsel just went through was in the nature dealing with legal—some legal issues that have been treaded over and retreaded and regurgitated and rehashed four, five times in several motions ruled on by Judge Mikitish. A lot of what he just talked about is a horizontal appeal because many of the issues he raised were purely legal issues he's talking about—

THE COURT: Could you refer me to the minute entries where Judge Mikitish actually made rulings on these legal issues?

MR. GREGORY MCGILL: Well, yes. I—his ruling on the—denying the Motion for Summary Judgment.

THE COURT: He said there were questions of fact on all these.

MR. GREGORY MCGILL: He said there was questions of fact, but he did not dispose of the case on any pure legal issues. Hence the horizontal appeal

that is being presented to you. He did not dispose of any of the claims asserted to you for the fourth, fifth, sixth, seventh time by the Defense again and again and again on legal issues. The Workman's Comp issue, the Economic Loss Rule, it's all been briefed over and over again. There were two Motions for Summary Judgment. Both of them were denied, and he just keeps bringing up these same legal questions.

Now, on the—on the questions of fact, Judge Mikitish—that's my next point. He ruled there were questions of fact based on what he saw. There are more questions of fact now on the control factors than what we had when we briefed it before Your Honor was assigned to this case before the trial started.

There are more questions of fact for the jury now than there was when we submitted that briefing because you have had live' testimony, conflicting testimony. And this would be a substantial invasion of the province of the jury to remove the issues of fact with the conflicting evidence because the jury, as you pointed out to the jury before the trial started—I believe these were your words—you said this to the jury, you're not deciding the case. The jury is deciding the case. And we have Judge Mikitish's ruling holding that there were issues of fact.

Now, the increased number of issues of fact, just going through the conflicting testimony—for example, Susan Hogan, she testified her company wasn't getting any runs to the east coast, it was just to the west coast, and that her runs were short and

she was—and she testified that they were—they were sitting for long periods of time.

Don Bays, the CPA, testified about the damages associated with the dropoff in the runs and the runs being—the trucks being idle. He testified to the damages associated with that.

On the misclassification I would cite the Court to Estrada versus FedEx Ground Package System Inc. Now, the Defense in some prior briefing they said, oh, that's P&D, that's not linehaul. All of the facts—virtually all of the facts in the Estrada case are virtually identical to the facts in this case. It's—it's stunning in how—

THE COURT: Do the P&D drivers have point system too?

MR. GREGORY MCGILL: No. But that—that—that works against them, not in favor of them because the point system was major control factor—that was my next point—because they had a 90 percent threshold in that point system. So it should be left for the jury to determine whether that 90 percent threshold, which is it's an availability threshold. So going into the contract, if that TSP is not available for FedEx virtually exclusively on a average only three times—missed three times a month but virtually exclusively available with the DOT number belonging to FedEx, those are major control factors that was not mentioned in Estrada, the point system, the control factor, and the DOT number.

But in Estrada they had a substantial number of control factors that the Court went through and

—and they decided the case. It was decided against FedEx. It was held that there was a misclassification without the point system, without the FedEx Ground DOT number, and without any mention of the 90 percent threshold for availability.

Now, the jury—it should be within the province of the jury based on the evidence to—to weigh the evidence, the credibility of the testimony—for example, Mr. Tangi talked about the 90 percent—and determine whether—if the TSP meets that 90 percent threshold, whether that restriction in the agreement prevents the TSP from doing what typical independent contractors do which is service multiple customers.

There's no evidence in this trial that Accord was able either through its own DOT number or through the availability restrictions in the two contracts to service any other customers. So that's—that's a major control factor that militates against independent contractor status.

THE COURT: I'm a little confused there because you're saying Ms. Hogan wanted to service other—other TSP companies but your damages are based on her performing 7 days a week, 24 hours a day, for Federal Express. I'm having a hard time connecting those.

MR. GREGORY MCGILL: Well, we're—we're—we're claiming damages for breach—breach of the agreement and the implied covenant of good faith and fair dealing because the contract, quote—to quote Estrada, was a brilliantly drafted contract creating a constraint of an employment relationship with

the drivers in the guise of an independent contractor model, end quote.

And in Estrada the Court held that FedEx not only had the right to control, it had close to absolute actual control over the drivers based on—upon interpretation and obfuscation in the contract. And so that's what—really what we have here.

Now, our claim for damages is, if there's a breach, if there's a misclassification which we're asserting that there is, then the damages that flow from that are—for example, Don Bays testified—now, on the damages on the first report—now, the damages—and this was glossed over by the Defense when they cross-examined Bays—there was some—there was testimony about the \$471,000 in adjusted gross profit in relation to the compensation, the minimum wage plus 20 percent benefits, which was \$180,000. But Don Bays said that that \$471,000 in adjusted gross profit did not take into account the compensation which would diminish that number because that's an expense item and it did not take into account the cash outlays and that went into the expenses for the tractors, leasing expense, and the fuel expense, and the maintenance and repair expense.

Those expenses were very real. They increased the risk to Susan Hogan, and she's a small business. She had to run her own trucks. She had to manage her own company. She had to hire her own employees. So there's a lot of burden there. There's a lot of risk. There's debt service with the lease purchase agreements and a lot of expenses associated with that. Don Bays testified that the net income in

2019 dropped down to \$41,000. That's a—that's a major drop in the net income.

So the notion that, if there's a misclassification, that there's no damages, it doesn't bear any relationship to economic reality—economic reality.

THE COURT: What in the contract gives Accord the right to minimum wage?

MR. GREGORY MCGILL: If you're misclassified as an employee—if you're misclassified as an employee, then under the Arizona statute—it's A.R.S. 23-350—minimum wage is defined as the means—it means that the nondiscretionary minimum compensation to an employee by reason of employment including the employee's commissions, excluding tips and gratuities. And it then defines—so that defines minimum wage. It's nondiscretionary minimum compensation to an employee. So if there's misclassification, then by definition they would be classified Accord as an employee.

The wages is defined as nondiscretionary compensation due an employee in return for labor or services rendered by an employee for which the employee has a reasonable expectation to be paid whether determined on a time, task, piece, commission, or other method of calculation. So the minimum wage—and Defense counsel—I think he corrected Don Bays—the \$13.80 per hour, I think that's just 2023. I think it was close to that last year.

But the early years, Your Honor, as I want to be clear on this, you know, that I believe Mr. Bays was incorrect on the minimum wage dollar—dollar amount in '15 and '16. I think it was closer to \$8

or 7, 7 or 8, and then it went up. Naturally it went up. So that \$180,000 compensation figure would be less. There's no question.

But going back to the contract, Your Honor—and he mentioned—I think he mentioned a factor of 20 percent employment benefits, sick leave, incidental employment benefits, that sort of thing—

THE COURT: Is that in the Wage Act, benefits, the 20 percent benefits?

MR. GREGORY MCGILL: I'm sorry, Your Honor.

THE COURT: Is that the Wage Act, the minimum wage also includes an—

MR. GREGORY MCGILL: No.

THE COURT: —additional 29 percent?

MR. GREGORY MCGILL: 20 percent, that's not—that's not in the statute that's—I think he said he got that from the Bureau of Labor Statistics.

THE COURT: Well, the question is: What right do they have to receive that?

MR. GREGORY MCGILL: The Fair Labor Standards Act.

THE COURT: Can you cite to me the provision for that?

MR. GREGORY MCGILL: Well, it's 29 United States Code Service, 291 USCS Section—I think it's Section 200 or 201 series going forward.

THE COURT: I need something—can you read to me the specific part that says employers have to provide paid vacation, sick time—

MR. GREGORY MCGILL: No. I don't think it says paid vacation. I think it says incidental benefits like sick leave and that—that—there's a few items within the Fair Labor Standards Act.

THE COURT: And it says they have to provide those things?

MR. GREGORY MCGILL: If they're incidental—incidental matters for example, the employer—the employer has to match FICA, Social Security withholding. They have to match that. Sick leave—

THE COURT: What does it say about sick leave?

MR. GREGORY MCGILL: That they have to provide reasonable—reasonable benefits associated with the employment. That's the language, and there's litigation over that.

THE COURT: Well, here's—

MR. GREGORY MCGILL: Government Fair Labor Standards Act.

THE COURT: Right. Here—I'm confused about one—

MR. GREGORY MCGILL: Sure.

THE COURT: Mr. Bays said she should get minimum wage and calculated that. And then he said she should also get paid sick time. But if she's getting paid for 2,080 hours a year, she is getting paid for time off, isn't she? Aren't you double-dipping there?

MR. GREGORY MCGILL: If she's getting paid for time off, I'm certainly not—I wouldn't argue that in the closing. I certainly wouldn't ask for that in the closing, Your Honor.

THE COURT: 20 percent extra is double-dipping.

MR. GREGORY MCGILL: Well, I don't—I don't—you know, the 20 percent, because I went through—Mr. Cook is the Defense expert, Your Honor. And I've gone through his data, as I—you know, and I deposed him. And I can just tell you that's at the low end of what he was estimating at some of his data per the benefits, the 20 percent.

THE COURT: What benefits specifically are you talking about? Vacation? Paid vacation?

MR. GREGORY MCGILL: Some paid vacation, incidental paid vacation, reasonable incidental employment benefits, cyclic—

THE COURT: What does that mean?

MR. GREGORY MCGILL: I don't know. It varies from business to business. It's on a case-by-case basis, and there's—

THE COURT: You said it was required—

MR. GREGORY MCGILL: Under the Fair Labor—

THE COURT: —for all employees. And you say it varies on a case by—

MR. GREGORY MCGILL: There has to be some provision for health insurance, for example, matching FICA, the employer has to match the FICA, a provision for—

THE COURT: That's not a damage to the employee. Go ahead.

MR. GREGORY MCGILL: Well, it's a damages—it's a damage if there's a misclassification. All these expenses are a damage if there's a misclassifi-

cation. FedEx is in this trial saying, if we misclassified, you're not Damaged. That's what we're trying to tell you. They're saying toss the case on a motion when we got her after Judge Mikitish's rulings. That's what they're saying. There's no damages, jury shouldn't hear this.

And I would submit to you with all the evidence that's been presented, they're not entitled to that on a Rule 50, not with the law of the case on the legal issues that we've talked about in the case. And then you add the conflicting testimony that should be going to the jury.

Conflicting testimony—the jury decides the facts here. We're at trial. There's conflicting—there's conflicting testimony on all these issues as Judge Mikitish noted before—before we even got to the trial. But let me—let me keep going with the contract part—

THE COURT: Please.

MR. GREGORY MCGILL: —on the contract. The other thing I wanted to point out, Your Honor, in terms—in terms of the damages—and this was squarely dealt with in the Estrada case which I know you've read. It spent about a third of the opinion talking about how—regarding business expenses. Okay.

It's true that an employer, as a condition of employment, can require an employee to use—use their own automobile, for example, if it's a sales piece as an example. They use that as an example in the Estrada case. But here's the rub. The employer's got to reimburse the expenses associated with

any such equipment that's used to service—to provide that service.

So the employer, as you—you posed this question a couple times early on—can't an employer enter into an agreement with an employee and, as a condition of employment, require the employee use their own vehicle, for example, or whatever as part of the work? And the answer is yes according to Estrada. But they point out several times—and it turns the case in a major way on damages—it says but the employer must indemnify or reimburse the employee for those expenses, very clear.

THE COURT: And what authority do they apply on that? How did they decide that?

MR. GREGORY MCGILL: They went to—they went—they follow federal law—they pointed out that California follows federal law. So they touched—there was a footnote here citing a federal regulation that they cited. They cited a couple of bulletins to the Labor Department in California. They canvassed several authorities right up to the federal—

THE COURT: So they applied California law?

MR. GREGORY MCGILL: Federal law, federal—the Fair Labor Standards Acts. A lot of this employment law, Your Honor, goes—goes to the Fair Labor Standards Act that's been around since 1938. It's been amended, but that sets the floor at a minimum on all this employment.

But let me—let me make another point because this gets glossed over. It's been glossed over in this trial.

THE COURT: Is there a definition—I know in the Wage Act here there's a definition of "employee." Does the Federal Fair Labor Standards Act have a definition of "employee"?

MR. GREGORY MCGILL: I think it does, and it's very close. It's very close to our statute on the definition, reasonable expectation of any person who performs services for an employer under a contract of employment—under a contract of employment basically performs services—

THE COURT: You're reading the Fair Labor Standards definition?

MR. GREGORY MCGILL: No. I'm reading the Arizona, A.R.S. 23-350, [reading] Any person who performs services for an employer under a contract of employment made in the state or to be performed wholly or partly within the state. And I think the Fair Labor Standards Act pretty well follows that.

Just as a point of reference, Your Honor, on page 5 of the Complaint—I mean, I teed this up right out—right out of the gate in the lawsuit because in paragraph 22 I've got an express reference to the Fair Labor Standards Act. And I also have a reference to Estrada for whatever that's worth. It's in the Complaint. It's not like I'm just coming up with it two weeks ago or something.

But just to move on. The—so, again, those expenses that I'm talking about, the expenses, if there's a misclassification, Your Honor—and they should have been—Accord should have been an employee because of the control factors that a lot of testimony pointed out—the point system; the 90 percent

threshold; you know, the white truck; the ELDs; the monitoring with radio frequency pings; controlling the assignments, the run assignments. There was a concession by Mr. Tangi that uniforms were required. At one point they stopped that. The—the LCOA said full-use. That's in 2015.

Mr. Tangi, their representative, said it was a mutual—he didn't use the word “symbiotic,” but that was his point. He said it was—it's—it's in a mutual interest of the parties to optimize the runs and have as many runs as possible because that's what moves their volume. Mr. Tangi said that. That's what increases the revenue to the driver. So it's a symbiotic relationship. It's a mutually beneficial relationship to have a lot of runs. And so if the runs drop off, it's a problem for us. He conceded it would be a problem for him.

So the breach is the misclassification. And then the breach is the—on the point system, Your Honor, not only did it have major control factors on the point system in terms of the 90 percent and you only get one point but you could get subtracted if there's a service disruption and FedEx controlled—control—they said they farm that out with a vendor. But in the contract, if that vendor comes back, you know, with a—with what they deem to be a preventable, you know, obstruction, there could be some major points.

Now, Mr. Tangi said—he conceded you would start out behind on the points, about 270 he said or so—on a tractor to tractor basis, and he conceded that it could take three years to five years to catch the other tractor.

Now—but what was not disclosed in the contract or even after the contract on the point system, the TSPs were never given their relative position on the points. In other words, there was some testimony, well, you could—you could find out how many points you had, as a TSP, through the portal, through MyGroundBiz portal. But then I asked but would you know what the other TSP point system status is so that you would know your relative position on the points. That's what's important if you're planning a small business and you're planning for growth. And the answer was no, you could not get that information.

There was no testimony about relative position or disclosure about relative position on points. And that—that's been glossed over in the trial. It's a very important item that was left out.

THE COURT: Before you go on, if you're doing the point system, you say the point system is an example of control.

MR. GREGORY MCGILL: Yes.

THE COURT: Why else is it important?

MR. GREGORY MCGILL: Well, it's a control factor.

THE COURT: Okay.

MR. GREGORY MCGILL: I think with typical—you know, with the typical independent contractor company, they don't have to deal with a contract that has a point system that allows one party—

THE COURT: Are you arguing—is there evidence that they didn't apply the point system as it appears in the contract?

MR. GREGORY MCGILL: Right. It's a breach of the implied covenant of good faith and fair dealing. As they applied the point system, it interfered with Accord's ability to grow as an entrepreneur.

THE COURT: So you're saying they didn't apply it as it appears in the contract? Is there evidence of that? If they applied it as it appears in the contract, how can—how can it be a breach of the implied covenant by following the express terms of the contract?

MR. GREGORY MCGILL: I'm saying that the point system, given its complexity and the absence of information about relative position on the point system, violated the covenant of good faith and fair dealing because it impeded the TSP, here Accord's reasonable expectations because by the time they could ascertain, as a practical matter, how it worked and they could never really find out the relative point position—it was never disclosed or explained—that that deviated from the implied covenant of good faith and fair dealing in this case.

THE COURT: Where did the reasonable expectations come from?

MR. GREGORY MCGILL: The reasonable expectations are that—

THE COURT: I guess first let's start what are the reasonable expectations? And then where do they come from?

MR. GREGORY MCGILL: That the contract is going to be implemented in accordance with the language on the first page of the Operating Agreement,

which is that FedEx Ground is going to supply sufficient runs to the TSP to enable full use of the TSP's resources. And that was verbiage.

Now, Defense counsel has tried to minimize that and trivialize the word "full use." He said some background statement. It's on page 1. It's in the contract. So I think it's kind of arbitrary to just say that that doesn't matter. It's right on the page. So there's an expectation on that language that there's going to be a fair application of the point system.

The point system's not fairly applied because the TSPs are never informed about the relative point position. So they can't plan. They can't manage it. And the way it was applied was a violation. There were trucks that Hogan had, there were tractors that got hit with points and various incidents that she didn't have an ability to contest. FedEx Ground controlled that. They said they farmed it out to a vendor, but they controlled the decision. They made the decision at the end of the day whether there was a subtraction of points.

THE COURT: What evidence is there that that was not done honestly in fact?

MR. GREGORY MCGILL: Hogan testified. She testified that that point system was not fairly applied to her—to her trucks. The runs weren't applied, and the point system was not fairly applied. She testified to that. I didn't hear anybody testify that refuted her testimony. You know, that's—that's jury—that's within the province of the jury.

THE COURT: What about the provision in the TSPA that it is expressly a requirements contract?

MR. GREGORY MCGILL: Well, if—if the—in the Operating Agreement and the TSPA, if the jury determines that they were misclassified, it's not clear to me that a requirements provision in the contract that the jury determines is misclassified would be operative because the contract—

THE COURT: It's not clear to me why it's not clear to you I guess.

MR. GREGORY MCGILL: Well, no. I mean, you know, because the jury is going to come back and say the contract, as applied, as implemented, was a misrepresentation.

THE COURT: What is being an employee or an independent contractor have to—I mean, you're basically you're assuming she's an independent contractor. So whether she's an employee or an independent contractor, how does that affect a provision that says this is a requirements contract when she's claiming damages because she wasn't running 24/7?

MR. GREGORY MCGILL: Well, what is—what is—see I would—I would ask what's the requirements contract? What—how does that legitimize FedEx Ground's position? In other words, they've got—you know, the contract is to require the supposed independent contractor to be virtually exclusively available to FedEx. So this requirements contract—I would just assert it's a red herring.

The point is does that contract on the breach of contract claim, our contract claim, is they misclassified it as applied. And it was a misrepresentation. It was deceptive as applied, as implemented. They're requiring availability, a high degree of

availability—Accord can't run for another business. It doesn't have its own DOT number. The misclassification is a control.

The requirements contract—they are—it's a requirements contract, but they said in the Operating Agreements they're going to make full use of the TSP's—

THE COURT: That's not in the TSPA.

MR. GREGORY MCGILL: Not in the TSPA, that's true. It's not in the TSPA. But that raises the specter of another question that's not favorable to the Defense which is you got full use in the Operating Agreement. Then they—and they have modifications of that agreement each year. And then in '18 they go to the TSPA, and "full use" is omitted. That's deleted.

And I asked Mr. Tangi why that was. I couldn't get an answer from him. But it raises an inference that the company in a calculated way is removing a provision that the other contracting party and through the Operating Agreement reasonably expected. They removed it, and that was right after the lawsuit. That was after our lawsuit.

So the inference—the jury can draw negative inference from that. That's my point. These are jury questions to weigh credibility and the weight of this evidence, Your Honor.

Let me move on to the—the other point I want to make is counsel respectfully—you know, he cited some Atlantic 2d cases. So he jumps to Pennsylvania when it's convenient, and then he jumps to Arizona. So that's still problematic as I see it. I

don't know why he gets to pick and choose which state law he wants to apply.

THE COURT: Well, I think he's referring to the choice of law provision in the contract that says Pennsylvania law applies.

MR. GREGORY MCGILL: All of his briefing is citing all Arizona law. He cited again today, you know, with the—the reference to Apolito. That's an Arizona case. He cited—he cited to a Pennsylvania case, and then he cited to Apolito, which is an Arizona case.

THE COURT: Well, Apolito is—never mind.

MR. GREGORY MCGILL: Apolito, he cited that for the proposition that, you know, a provision in a contract cannot—cannot constitute a fraud. You know, if you have a provision in the contract that's not—if it's—if it's not true—I'm—this is what I'm understanding his argument—that a provision that a contract can never constitute fraud, but that's not true, Your Honor. And I would cite you to—I don't have the cite, but I got the name of the case.

Apolito cited the *Barnes v. Lopez*. It qualified that—that decision. In Apolito, when you go into it, it cited a *Barnes v. Lopez* which is a celebrated public case in Arizona, and that case was on a—it was on a zoning issue where you had a positive direct representation about something. If you have that in an agreement and it's not true when represented—not true when represented and known not to be true when represented, that can be a fraud.

The fact that it's in a document on a zoning representation, that's beside the point. If we make a positive—direct positive statement about something—here you would analogize to the Operating Agreement, the TSPA. If the jury—based on the conflicting evidence, if the jury concludes that FedEx Ground was not on the up and up with this contract, that it was deceptive and it was—it was form over substance and deceptive going in—and this is important, Your Honor. This isn't the first time in 2015 with Susan Hogan. It's not first time they used the Operating Agreement. They used it before that. Mr. Tangi said that. They were using the contract.

So they came into 2015 with—with the Plaintiff in this case, knowing that that agreement was an artful agreement to evade a lot of these control factors. That's our theory. That's our position. We have had testimony on it. They disagree with that. It's a fair question for the jury to sort out and the evidence. That's my point.

THE COURT: Which claim are you talking about now?

MR. GREGORY MCGILL: That is on—this is on the—the Apolito case where—on the fraud claim where counsel was asserting that a provision in a contract cannot constitute fraud. That's generally true. But I'm saying in this case we fall in the exception, if—as applied or implemented, if going into the Accord contract the company had used this contract, if—if it's the case, if the jury—the jury could draw an inference they used this contract as a subterfuge to avoid the classification rules in order to save money, Your Honor, be-

cause there's a lot of expenses. I brought this out in the testimony. They save a lot of expenses through this Operating Agreement and the TSPA.

Now, the other part of the contract—that's the fraud, Apolito. And it's *Barnes v. Lopez* is cited in Apolito, and it says, if you make a direct positive statement in a document like zoning, that could be a fraud if at the time you know it's not true. That's my point.

Back—back to the—on the contract the—the control factors were substantial. And I don't know that I need to go through all those control factors, Your Honor, but they were—they were rather—rather substantial. And let me turn to—I want to turn to the TSPA.

The TSPA came in a month after the suit was filed. So what FedEx Ground did, they doubled down on the deceptive contract. They revised it. They deleted “full use,” and then they revised it in certain respects.

Mr. Tangi said they still kept the uniform requirement.

THE COURT: Can you remind me of the dates of the Complaint and the TSPA?

MR. GREGORY MCGILL: Yeah. The LCOA, as I recall with Accord, it went into effect in '15, and it went through—through August of '18. And the TSPA—and the lawsuit was filed in August, Your Honor, of 2018. It was August of '18.

THE COURT: And then—

MR. GREGORY MCGILL: And the TSPA came in September of 2018.

THE COURT: So when was the lawsuit served?

MR. GREGORY MCGILL: Right at the end of August.

THE COURT: So you think the inference is that in one month they completely redrafted their basic Operating Agreement in response to your Complaint?

MR. GREGORY MCGILL: No. I didn't say they redrafted it. I'm saying that they doubled down on it and they disseminated it. They didn't—They didn't withdraw it. They didn't postpone it. They didn't take a second look. They didn't say we got sued and, you know, maybe we need to take a second look at this. I don't think they cared about it. They still don't care about it obviously. That's why we're at trial.

I mean we're five years in this lawsuit, Your Honor. I mean, you know, they don't—they still don't think they did anything wrong. We do. That's why we have a jury sitting here.

But no, I don't think they just drafted it in a month. I think they intentionally—they didn't care about it and they doubled down on it and disseminated it three, four weeks later. They didn't think that any—you know, anything was going to come of it or nobody was going to stop them and they're going to keep going ahead. That's—and my point is that's—that's—Counsel said there's no—no factual basis for punitive damages.

If this jury could—punitive damages, as I understand it, it's an intent to harm for profit, that can be punitive damages. If you set up a subterfuge on a contract for profit and you do it year after year with impunity, that could constitute punitive damages because you're injuring someone in that agreement.

The other is consciously—conscious disregard that you might be doing something wrong. That could serve as a basis for punitive damages. And the TSP, if they doubled down on it and they keep plowing forward, punitive damages is designed to punish and deter the wrongdoer.

If the jury determines that there was fraud with this deceptive document—that's our theory—if they buy it, there's a basis for punitive damages to deter and stop it from happening again.

Let me go to—so that's the TSP. On the—Counsel said on the negligent misrepresentation that—that FedEx Ground did not supply information. Well, the contract—the evidence, the information in the contract—and it had a lot of schedules and exhibits to the Operating Agreement, the TSP—that's supplying information. If there's misrepresentations, you were back to, you know, the misclassification, the control factors, if—the contract, Your Honor, is saying on the one hand we—we only care about the results, the manner and means or the method and manner of delivering the service is up to the TSP.

If the jury thinks that was false, then that's conceivably a fraud claim because in the contract you're saying one thing but at the time you did

it—and I pled it this way—that it was—it was known to be false when done. The jury could draw that inference from the evidence that—because it's calculated, it's a complicated contract, it requires attorneys to draft it. It's not just a one page, slipshod agreement. This is a calculated contract. There is no doubt about that.

So the negligent misrepresentation is, if there's a misrepresentation, it could be fraudulent. It can be negligent. Do they have a duty—do they have a duty not to—not to supply false or misleading or deceptive information? Of course they do. They're entering into a contract with another party. They have a—the duty arises out of the contract. They have a—there's a duty—there's an implied duty of good faith and fair dealing.

The Economic Loss Rule, I don't really think I should need to address that. That's an example of a purely legal question that's been disposed of by Judge Mikitish, for example. That's the horizontal appeal. But the Economic Loss Rule, that typically applies to products liability for construction defect cases. There's a—

THE COURT: To save us some time, you don't have to worry about the Economic Loss Rule.

MR. GREGORY MCGILL: I briefed that before many times.

And the other—the negligent infliction of emotional distress—okay. Again, that—they filed a motion on it. It was denied, a Rule 56 motion, by Judge Mikitish and he—you know, he found there were a lot of issues of fact. I mean, he didn't go, you know, with the specificity that you were alluding

to, this issue, that issue. He didn't go that far. I don't know that he needed to. I mean he just—just ruled that there are a lot of issues of fact. So he denied the motion, you know, the claims that he allowed to go to trial.

So at the very least it's implicit that he found there's issues of fact on the negligent infliction as well, Your Honor. I think it's implicit in his ruling.

But the case I wanted to cite to you on the negligent infliction, this deals with duty. I think this case—it's the Supreme Court of Arizona. It's a 2018 case published—called Quiroz, Q-U-I-R-O-Z, v. Alcoa Inc.—Quiroz v. Alcoa Inc., 243 Ariz. 560, 2018.

And that—that case—it goes through, it just canvasses all the authorities in terms of duty. And it talks about foreseeable orbit, and it says that a foreseeable Plaintiff is one who's within orbit or zone of danger created by defendant's conduct.

Now, Mr. Tangi on behalf—the company representative, he conceded when I pressed him. First he said that the anti-harassment and anti-retaliation policy was intended for the employee. That's what he said first. But then I pressed him on that because that policy statement got to Hogan—she testified to it—on the portal, the MyGroundBiz portal. And I pressed Mr. Tangi, and I said, well, are you suggesting to the jury that zero—that the company does not have a zero tolerance policy with anti-harassment and retaliation. And he said no, I'm not suggesting that.

And he conceded that they have—that the company has a zero tolerance policy even with respect to the TSPs. That was important. Defense counsel didn't even mention that. But that's the testimony from their representative.

Let me talk just a moment, Your Honor—appreciate you giving me this time. Let's just talk a moment about the retaliation because that ties into the negligent infliction.

And incidentally, Your Honor, before I turn to that retaliation—

THE COURT: Are you talking about retaliation by the individuals—

MR. GREGORY MCGILL: Well—

THE COURT: —after she filed the lawsuit?

MR. GREGORY MCGILL: The retaliation—let me—let me—let me finish this negligent infliction, and then I'll go to retaliation, Your Honor. I got ahead of myself. Thank you.

On the negligent infliction, that case, it cites to the restatement. It makes several citations to the restatement.

THE COURT: I think, Mr. McGill, for—I think for the—I think—the Rule 50 motion on the negligent infliction of emotional distress claim is going to be denied. Focus on the other claims. And let me—I think you can probably tell our jurors they can go to lunch and come back at 1:30.

MR. GREGORY MCGILL: Yeah. Thank you, Your Honor. Now the retaliation real quick, on the retaliation, there were two components that we

had on the damage theory that supported Bays Report 3. In other words, if the jury comes back and says there was no misclassification, you hit a few control factors, not enough, you know, they just don't go my way on that. That's all. They could do that obviously.

If they do that, that's Report 3 on the damages where Bays said that he ran the data on revenue and he had expenses associated with the tractors, not the company operating expenses, but the fuel and the maintenance and he ran the numbers on the revenue. 1 gave his damage figure.

Now, that Report 3, if it's deemed to be properly classified, the point system and the retaliation -- the retaliation that I'm talking about is my client reporting the incidents to the company and then the lawsuit. Reporting the incidents, the lawsuit in August of '18, TSP is a few weeks after that. They didn't do it in three weeks, but they didn't stop it either. And then the evidence was—that we're presenting, the company said they did investigate it.

But, you know, Renshaw—I think it was Renshaw—he said he called Phillip Gerard's son to talk to him about one of the incidents. Gerard was one of the perpetrators. He's calling his son. That's what he did. And then he said he didn't do anything after that. And, you know, it was argued by Defense counsel that—that the incidents were verified and the file was closed. But the testimony showed that they weren't verified because nobody talked to Todd Hogan about it. Nobody came back to Susan Hogan about it. And then she's going to get

treatments with Dr. Fischer, 20-some times, you know, in '20 and '21 or whatever.

Nobody at the company—and, again, this is for the jury, Your Honor. The retaliation too, the retaliation—the point system, the retaliation for the incidents, the lawsuit, then the TSP, and then the third report of Bays, that's the—that's the basis—that's the basis of that.

The first report is the misclassification, Your Honor, that we talked about the breach and the misclassification.

THE COURT: I'm—again, are you saying there's evidence that FedEx—what does retaliation—what claim does it go? To the negligent infliction claim?

MR. GREGORY MCGILL: There's two—there's two types of retaliation that occurred. One is that, when she reported the incidents, they stopped giving her as many runs, and after she filed a lawsuit, they—her—the run assignments to her dropped off. We've talked about that. That's one. That's one—

THE COURT: Is there evidence? What evidence connects those things?

MR. GREGORY MCGILL: Hogan testified that in late '17, when she—most of her complaints on these incidents it was late '17 and '18. And it was in late '18 and early '19 is when—you heard Bays. He said that net income in '19 was \$41,000. Net income in 19 was \$41,000. There was a high revenue. There's no question. There was a high revenue. But the cost of goods sold in '19, Your Honor, the revenue was like \$1.49 million. That's

what the number is. I'm just giving you the numbers now. I'm trying to be as candid as I can be.

But the cost of goods sold almost matched that. The net income in '19 was 42 grand, Your Honor, \$41,000. That's the testimony. So—and the runs, we talked about the runs. The runs started dropping off in late—in '19 the runs started dropping. That's the retaliation. Is it an inference? Yes. I mean they're not going to admit that they did something wrong. It's an inference.

THE COURT: You're asking the jury to draw the inference solely because the runs dropped off after she complained? That's the evidentiary basis for the inference, you want them to draw that FedEx retaliated by reducing runs?

MR. GREGORY MCGILL: The reporting the incidents, the lawsuit, the runs start to drop, and that's—that's an inference. That's a tangible inference of retaliation. And they didn't follow up on the incidents. They didn't—they didn't follow up to stop it. That claim is a failure—it was a failure to stop it, to come in and stop it.

Now, Hogan testified they told her we can't do anything for you because you're an independent contractor. So the misclassification of her being an independent contractor impeded her ability to get protected at the Hub because, if she was an employee, if she was properly classified, she would have got the protection at the Hub. That's—that's what she testified to.

Now—and there was—the runs were short, Your Honor, and they were sitting. There were lengthy

periods of sitting. That's what the testimony was. I mean Bays touched on it in a damage context. But the testimony was there were short runs and sitting for long periods of time.

There were a couple of witnesses—I think it was Cantonwine, kind of a heavyset guy. I think he had a beard or whatever. He said the sitting was inordinate and frequent. He wasn't up there very long. He said the sitting was a real problem. That was Cantonwine. It wasn't just Susan Hogan.

I don't know if I missed another argument, Your Honor. I don't want to miss something and then, oh, you just didn't cover it or rebut it. I mean—

THE COURT: I have no other questions for you, no.

MR. GREGORY MCGILL: Okay, Your Honor. Thank you.

THE COURT: Okay.

MR. MONACO: Your Honor, may I be heard just very briefly?

THE COURT: No. Thank you. It's not necessary.

MR. MONACO: Thank you.

THE COURT: Let's start with Count 1, which is the breach of contract, breach of the implied covenant based on misclassification. Misclassification claims are—can be found all over. Mr. McGill cites Estrada versus FedEx which is 64 Cal. Rptr. 3d 327. The one—there's several opinions, but that's the one that has the most information about it.

And in many of these misclassification cases FedEx is the defendant. Gennell, G-E-N-N-E-L-L, versus

FedEx, 201 Westlaw 109, 1148. That's a District Court in New Hampshire.

Anfinson, A-N-F-I-N-S-O-N, versus FedEx, 244 P.3d 22, that's from Washington.

There's cases not involving FedEx and the ones—the two that I looked—one more FedEx—two more FedEx cases, Alexander versus FedEx, 765 F.3d 981, that's a Ninth Circuit case dealing with California law.

And Slayman, S-L-A-Y-M-A-N, versus FedEx, 765 F.3d 1033, another Ninth Circuit case, but that one deals with Oregon law.

All of those FedEx cases were the local package and delivery drivers which—and its significant that in all of those cases the plaintiffs were individuals and a lot of discussion in the cases dealt with class action certification. And in all of those cases the misclassification was not a claim for relief. The misclassification was a factual predicate for a claim under state law.

Estrada versus FedEx, the Court decided what costs and expenses could be validly imposed by FedEx on drivers as employees by referring to the California Labor Code as well as interpretive bulletins issued by the California Department of Industrial Relations interpreting the California Labor Code. The Gennell case dealt with New Hampshire statute relating to fair wages.

The Anfinson case referred to the Washington Minimum Wage Act. In Martins versus 3 PD—and that's 2014 Westlaw 127, 1761. It's a Massachusetts District Court case—there were individual

drivers who sued 3 PD, which was a transportation services, and they sought damages for reimbursement for amounts improperly deducted from their earnings. But that was in violation of the Massachusetts Wage Act.

In *Awuah, A-W-U-A-H, versus Coverall*, 925 NE.2d 890, the Supreme Judicial Court of Massachusetts dealt with a case with janitorial workers who alleged misclassification, and they looked at the Massachusetts Wage Act to determine what expenses the employer could validly require the employees to assume.

So the misclassification claim has to have some basis in—other than just misclassification. That's the factual predicate.

The only—the Plaintiffs have cited the Arizona Wage Act and the Fair Labor Standards Act although the—their reference to the Fair Labor Standards Act is very vague. The Arizona Wage Act applies only to wages, and expressly defines “employee” as any person who performs services for an employer. In this case the contract was between FedEx and Accord Trucking Inc., a corporation. The Wage Act by its terms means that Accord would not qualify as an employee because it's a corporation and not a person.

There are—if we look at other Arizona statutes, there are other examples of “employee” being defined in a way that includes corporations. I can't give you the specifics right now because I left that paper back in the office. But it's clear in Arizona statutes that the legislature knows how to include corporations in the definition of “employ-

ee,” and it did not do that in the Wage Act. So whether the control factors apply or not doesn’t matter in this case because Accord, as a corporation, doesn’t have any claim for minimum wages under the Minimum Wage Act.

The same is true for a claim for expenses like the acquisition of tractors, fuel costs. The Plaintiffs have cited no legal authority why an employee—or an employer could not require Accord even if the 10 factors were met, to absorb those costs themselves.

Now, the implied covenant—and this applies to both the misclassification claim and the damages claimed under Bays’ third report for the fail—for what I think we can call the failure to assign runs breach of contract claim.

The contract provision—the contracts themselves state that Pennsylvania law applies to the contract. But in the case of implied covenant of good faith and fair dealing the law in Arizona and the law in Pennsylvania are very similar although they—Pennsylvania uses some different terms.

In Pennsylvania—and the cases I’m looking at are John Conomos, C-O-N-O-M-O-S, versus Sun, and that’s 831 A.2d 696, Superior Court Pennsylvania. Also Somers versus Somers, S-O-M-E-R-S. And that is 613 A.2d 1211, and that’s another Superior Court of Pennsylvania case.

There is also Frickert versus Deiter Bros., 337 A.2d 701. That’s a Pennsylvania Supreme Court case. And the principles that the Pennsylvania court applies are—Pennsylvania like Arizona applies the Restatement of Second Contracts, Section 205

and—which is the statement of the implied covenant of good faith and fair dealing.

The Pennsylvania courts have recognized causes of action for breach of the implied covenant of good faith and fair dealing. The structure of that is that implied duties cannot trump express provisions in the contract. The Court applied—and the Pennsylvania courts refer to this as the Doctrine of Necessary Implication, and it's—that's defined as, [reading] In the absence of an express provision, the law will imply an agreement by the parties to a contract to do and perform those things that, according to reason and justice, they should do in order to carry out the purpose for which contract was made and to refrain from doing anything that would destroy or injure the other party's right to receive the fruits of the contract which sounds to me a lot like what in Arizona we call reasonable expectations.

The Pennsylvania courts go on though in this Doctrine of Necessary Implication do not apply where there are—does not apply where there are express twirls that cover the facts. It only—implied covenants only serve as a gap filler.

So in Arizona to determine the party's reasonable expectation we look to the terms of the contract. So we look to the terms of the contract to find the reasonable expectations. Any implied covenant cannot violate or contradict express terms of the contract.

The Plaintiffs refer to a statement in the very beginning of the Linehaul Contract or Operating Agreement. This is as a Background Statement,

and they stress the term “full use.” Well, the full sentence in which that occurs is, [reading] FedEx Ground wants to provide—wants to provide for package pickup and delivery services throughout a network of nationwide stations served by independent contractors and subject to the number of packages tendered to FedEx Ground for shipment will seek to manage its business so that it can provide sufficient volume of packages to contractor to make full use of the contractor’s equipment.

That’s not a statement that is sufficiently specific to engender any reasonable expectation particularly when the reasonable—when the expectation the Plaintiffs have defined from that contradicts the express terms of the contract concerning the point system and the assignment of runs that are in Addendum 20 of the Linehaul Contract Agreement. Moreover, the Transportation Service Provider Agreements, the term ‘full use’ is left out, and the transportation service provider is expressly a requirements contract.

So that—then, if FedEx is going to be held for breach of contract for failure to assign runs, then there has to be a breach of the express terms of Addendum 20 or the run assignment provisions of the contract or the point system.

There’s been absolutely no testimony that FedEx breached the express terms of the provision in either the LCOA or the TSPA governing assignment of runs or the administration of the point system. There’s been absolutely no testimony that they breached the express terms.

Now, under the implied covenant or the Doctrine of Necessary Implications, if they exercised some discretion in applying—in assigning runs or—or administering the point system, that would be unfair and defeat an expectation of fair dealing and honesty and fact that could conceivably support a claim for breach of contract for failing to assign runs. But, again, there's no—there's no evidence from which a jury could find that FedEx abused its discretion or acted dishonestly in assigning runs or administering the point system.

There's testimony that there were some layovers experienced by some drivers but no testimony at all about how FedEx assigned those that would allow a jury to find that FedEx was guilty of bad faith in assigning runs to Accord or in administering the points to Accord.

For that reason—

MR. GREGORY MCGILL: So, Your Honor, are you—for clarification, are you—you're holding, as a matter of law, that there was no evidence that there was a violation of a number of express terms in both contracts regarding the implementation of that contract? You're holding, as a matter of law, you're weighing the evidence and—

THE COURT: I'm not weighing the evidence. I am looking for evidence and finding none.

MR. GREGORY MCGILL: And you saw no testimony of any breach of any of the provisions in both contracts that—

THE COURT: Well, go ahead and describe the testimony.

MR. GREGORY MCGILL: Well, the testimony, for example, it says that the TSP is going to be free to—to have free control of the manner and means of providing the services, the transportation services. But there was—there was a substantial amount of testimony that Accord was restricted in applying—in running its company. They were told in the contract that they'd be able to run their company and—

THE COURT: Okay. How does that relate to the assignment of runs?

MR. GREGORY MCGILL: Well, for example, if—if— they have to have a white truck, they have to— they have to put equipment on the truck, they're increasing the expenses of the truck. The assigned runs, there was testimony that—that the runs dropped off after the incidents were reported and there was a lawsuit. There was testimony.

So the Court's weighing the testimony and making credibility determinations on conflicting testimony and taking that claim from the jury? Removing—that's a jury function, Your Honor. That's my—

THE COURT: You raised a point. The only inference that the Plaintiffs have—the only evidence the Plaintiffs have identified that would—from which they argue there's an inference that FedEx retaliated by reducing assignments is that the assignments were diminished after the lawsuit was filed. And I recognize that evidence, but I'm finding that's not sufficient evidence from which a reasonable jury can find that FedEx retaliated.

So for those reasons, Count 1, FedEx is granted judgment as a—as a matter of law, on Count 1,

all misclassification claims and any damages flowing from them.

FedEx is granted judgment, as a matter of law, on the unpled claim but described claim of violating the contracts for failing to assign runs.

The common law fraud—the fraud claim, fraud requires an intentional statement of a fact that is not true. The allegation is that the statement in the contract that Accord is an independent contractor was a statement that was not, true knowingly made false. Well, as Mr. McGill has pointed out, the Court ruled in summary judgment motions that there are serious questions of fact as to whether the control test meant that an employee or independent contractor relationship existed.

Even as we speak here today, there is no determination by a jury or by anyone else that the control test would—would indicate—would determine that whether Accord is an independent contractor or an employee. How then could FedEx be found to knowingly misrepresent that fact? There's been no evidence that FedEx had any knowledge sufficient to support a claim of action that Accord was an employee when the contract said it was an independent contractor. Even the Plaintiffs acknowledge that that's an open question until the jury decides it.

So FedEx is granted judgment, as a matter of law, on the common law fraud claim.

MR. GREGORY MCGILL: Let me correct the record on that, Your Honor—

THE COURT: Sure.

MR. GREGORY MCGILL: —if I could. I didn't say it's an open question until the jury decides it. I said that that's within the province of the jury to decide that issue. There's a difference. These are jury—these are jury issues.

THE COURT: Thank you.

MR. GREGORY MCGILL: The Court—to make a record, I think respectfully the Court is weighing the evidence and has become the ninth juror on those claims because for the Court to say there's no evidence to support any violations of any of the provisions in those contracts after the last three or four days of testimony with conflicting evidence on that issue, Your Honor, you just ruled, as a matter of law, there's no evidence—that's what you said—no reasonable jury could find that. And I think my—respectfully, I just think that's invading the province of the jury.

THE COURT: Thank you.

MR. GREGORY MCGILL: Just want to make a record on that.

THE COURT: On the negligent misrepresentation claim I think the Court agrees that FedEx is not a supplier of information within—within the meaning of the restatement provision dealing with negligent misrepresentation in the supplying of information for the guidance of others.

And so FedEx is granted judgment, as a matter of law, in the negligent misrepresentation claim.

Now, the negligent infliction of emotional distress claim, as I've indicated, that will be denied. Mr. Monaco pointed out in his—that Ms. Hogan was

not in any zone of danger within the meaning of some of the cases; however, that's not the only situation in which a negligent infliction of emotional distress claim may be asserted. And I'm relying for—on the case of Monaco versus Health Partners. No relation I assume.

MR. MONACO: Correct.

THE COURT: It is 196 Ariz. 299, and that was a case where a patient was—went in for a blood draw but was erroneously administered a radioactive substance and suffered emotional distress because of that. And the Court said that that was a valid claim for negligent infliction of emotional distress. And it particularly discussed the damages that were alleged in that case or the damages—the evidence of damages because it was a judgment—case of a Motion for Judgment as a matter of law.

I mean, in that case the plaintiff's psychologist testified that he had treated him for anxiety for six months, he diagnosed the plaintiff with post-traumatic stress disorder, and that the symptoms that the Court found to be adequate to support a claim for relief in Monaco are very similar to the evidence that has been presented in this case.

So the judgment for—Motion for Judgment, as a matter of law, on the negligent infliction of emotional distress claimed is denied.

I guess everybody needs to make plans for deciding how we're going to proceed from here.

MR. MONACO: Your Honor, may I ask one question?

THE COURT: You may, please.

MR. MONACO: Thank you. There also was the issue of punitive Damages.

THE COURT: With the dismissal—well, independently I would rule that there's no evidence sufficient for a punitive Damage claim. But the punitive damages are based on common law fraud. The only claim they could be attached to is common law fraud. And with the dismissal of that, the punitive damages claim would fail on its own.

MR. MONACO: Thank you for clarifying.

THE COURT: Thanks. Thank you. I guess just any questions about where that leaves us now, Mr. McGill?

MR. GREGORY MCGILL: No.

THE COURT: Mr. Monaco?

MR. MONACO: No.

THE COURT: This obviously affects what evidence FedEx is going to have for the remainder of the trial. You need some time to think about that. Do we—is 1:30 enough for you to make plans, or should we tell the jury to come back at 2:00 or so?

MR. MONACO: Probably 2:00 or so because the witness that we were going to call we'll have to confer whether or not's still necessary.

THE COURT: Want to plan on coming back at 2:00 then?

MR. MONACO: Yeah. Thank you.

THE COURT: As I said earlier, I have to take a break before 4:00 o'clock. I'm not sure how long that—I think we would just—I think under the circum-

stances we could probably finish Plaintiffs' case by tomorrow—or the Defense's case—

MR. MONACO: Yeah, we would think so.

THE COURT: —by tomorrow, and that would be any rebuttal. So we're in good shape to put what the claims that will go to the jury to the jury by Thursday. So we'll just figure on finishing up at 3:45 today? Is that all right?

MR. GREGORY MCGILL: Yeah, that's fine.

THE COURT: Anything else before we break?

MR. MONACO: No. Thank you.

MR. GREGORY MCGILL: No, Your Honor.

(Whereupon a recess is taken.)

* * *

(Whereupon subsequent proceedings
were had; not requested at this time.)

* * *

(Whereupon the proceedings adjourned.)

App.141a

**APPELLANT'S REPLY BRIEF,
FILED IN THE ARIZONA COURT OF APPEALS
(MAY 10, 2024)**

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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ACCORD TRUCKING, INC.,

Plaintiff/Appellant,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendant/Appellee.

Case No. 1 CA-CV 23-0710

Maricopa County Superior Court
No. CV2018-010982
Sr. Commissioner (Ret) John Rea

APPELLANT'S REPLY BRIEF

As the Court is aware, the standard of review on the Commissioner's directed verdict on day 6 of the trial on March 21, 2023 is de novo. See *Shoen v. Shoen*, 191 Ariz. 64, 191 Ariz 64 (1997). The Shoen court stated:

When reviewing denials of both a motion for directed verdict and a motion for JNOV, we view the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Piper v. Bear Med. Sys., Inc.*, 180 Ariz. 170, 173, 883 P.2d 407, 410 (App. 1993). In addition, the test for granting JNOV is the same as that for granting a directed verdict: both should be granted only if the facts presented in support of a claim have so little probative value that reasonable people could not find for the claimant. *Id.* Because the test for granting or denying a motion for JNOV and a directed verdict is the same, the standard of review ought also to be the same; and a ruling on a motion for directed verdict is reviewed de novo. *Gemstar, Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996)

1. **The Answering Brief mischaracterizes Accord's position**

FedEx incorrectly and cynically asserts the following:

"Accord contends that because the same standard of appellate review applies to judgment as a matter of law under Rule 50 and summary judgment under Rule 56, it follows

that denial of a motion for summary judgment due to disputed issues of material fact means that JMOL should be denied as well.” (AB 26).

Accord does not assert that because both a Rule 50 motion and a Rule 56 motion have a *de novo* standard of appellate review that necessarily means if a Rule 56 motion is denied then a Rule 50 motion must be denied. That is a nonsensical proposition and FedEx’s assertion this is the basis for Accord’s appeal is mystifying. Rather, Accord contends the denial of a Rule 56 motion on the basis there are “genuine issues of material fact” necessitating a trial means there are no legal impediments to the claims otherwise the issues of fact at the summary judgment stage would not be *material*. In other words, if there is a legal bar or defect with a claim, even if there are disputes over the facts at issue, a party could not survive summary judgment because those factual disputes would not be *material* since there is a legal bar to the claim.

Implicit in Judge Mikitish’s the ruling that genuine issues of material fact exist for the jury to weigh and decide is that no legal impediments exist for trial, because disputed issues of fact cannot be “material” if unsupported by governing law. *In re Allstate Life* 2013 US Dist Ct. Ariz. Lexis 131534, WL 5161688, citing *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (“as to materiality, the substantive law will identify which facts are material”).

For example, if a claim is barred by the statute of limitations, then it does not matter if there are genuine factual disputes regarding the merits of the case because the statute of limitations is a complete

bar to sustaining the claim. In that scenario, the trial court could not find there are genuine issues of material fact preventing the entry of summary judgment since there is a complete legal bar to recovery (SOL) so any factual issue on the merits would be *immaterial* to the disposition of the case.

Judge Mikitish fully understood this fundamental legal principle because he *granted* summary judgment in favor of FedEx on Accord's consumer fraud claim based on a legal defect. Judge Mikitish ruled the facts of this case fall outside the scope of the consumer fraud act as a matter of law, therefore there was a legal bar preventing the claim from proceeding to trial. Judge Mikitish correctly ruled that a claim (consumer fraud) could not survive summary judgment if a legal defect existed, regardless of whether there were genuine issues of fact in dispute. However, Judge Mikitish found there were genuine issues of *material* fact precluding the entry of summary judgment on the remaining contract and tort claims which necessarily means no legal bar to recovery existed.

2. Accord presented *more* evidence at trial than at Rule 56 briefing

FedEx then contends that "the JMOL Motion presented different damages and liability issues than the summary judgment motion because Accord's evidence changed at trial." AB 27. Accord presented *more* evidence at trial than it did at the summary judgment stage, not *different* evidence.

Susan Hogan testified that the IC provisions in the LCOA and TSPA, *as applied* to Accord, were false statements as the Accord tractors could run only for FXG since the LCOA and TSPA made the TSP part of

the FXG linehaul system and the FXG USDOT# was displayed on the TSPs tractors. TT Day 2, 3/14/2023 pp. 188, 205, 206. She testified Accord had to use a FedEx badge and FXG referred safety and insurance vendors (pp. 201); FXG uniforms and logos (pp. 200, 204); Accord had to absorb equipment costs (p. 202); and that the contract language that no manager at FXG shall direct a contractor on the “manner or means” any results was “a completely false statement” because FXG controlled all runs. Page 209.

FXG manager Donna Patterson admitted that she did not know why FXG revised the 2015 LCOA to the 2018 TSPA and she did not know why FXG had a “point system” in its “IC contract” with TSPs if they were truly ICs. TT Day 3, 3/14/2023 pp. 153-157. FXG manager Milton Peevy admitted that the FXG contracts required the TSPs to operate under the FXG DOT# and operating system. TT Day 3, 3/14/2023 pp. 167, 176. Tibor Kolumban testified he had a minor “trailer-touch” incident at the FXG yard and FXG “suspended him” for months. TT Day 3, 3/14/2023 pp. 187, 188, 192. FXG manager Jeremy Renshaw testified that the TSPs had FedEx decals on the tractors and had to use the FXG – USDOT # but he wasn’t sure why. TT Day 4, 3/16/2023 pp. 59-62. FXG manager Dennis Snodgrass conceded the same control factors. TT Day 4, 3/16/2023 pp. 107-150. And FXG manager Bran Tangi conceded the same control factors and testified that the “point system” in the supposed IC contracts was placed in it by FXG “due to the volume of cargo” and FXG needed to spur availability of TSP runs for its product for its customers. TT Day 4, 3/16/2023 pp. 200-214. Consequently, there were even more genuine

issues of material fact for the jury to adjudicate in comparison to the summary judgment stage.

3. The Directed Verdict Rested on Undisclosed Legal Theories

FedEx relied upon undisclosed legal theories originated by Commissioner Rea for the first time at trial to attack Accord's claims instead of the disclosed legal theories it asserted at the summary judgment stage which Judge Mikitish denied. Examples of legal theories asserted by Commissioner Rea at trial that FXG did not disclose in the 5-year case consist of the "full use" provision in the LCOA could not be breached by FXG because they deleted it from the TSPA in September 2018 a month after Accord's lawsuit rendering the TSPA a "requirements contract" unencumbered by the full use representation in the LCOA that induced Accord to the contract and caused Accord long-term expense commitments.

Another example was that Commissioner Rea incorrectly held that the *Estrada, Alexander and Slayman* trilogy (all decided against FedEx) asserted misclassification acts as a factual predicate for "labor law claims" unlike here. But that was not true. A review of the Complaint (IR 1), ¶'s 4, 28, clearly set out the misclassification acts that formed the factual predicate for the contract and tort claims that Judge Mikitish allowed to go to trial. The trilogy cases went against FedEx on a myriad of control factors similar to this case, it put FedEx on notice of the invalidity of an IC contract virtually identical to the LCOA and TSPA, the suit at bench asserted that FXG's use and application of the contract were a known deceit to the detriment of unsuspecting Arizona TSPs such as Accord, and that punitive damages was warranted in

light of the continued calculated use of a sham document. Despite all of this, Commissioner Rea arrived on the eve of trial, asserted legal theories never disclosed in the case by FXG, and entered a DV on legal grounds.

Another example of an undisclosed legal theory at trial was that the contract and tort claims had to be rooted in the labor laws instead of rooted in an artful, calculated misclassification scheme as the factual predicate for garden variety contract and fraud claims. Another example is that the IC terms in the FXG contracts could not be knowingly false when made if there was never an adjudication before trial that FXG knew they were false. Aside from the lack of disclosure, that DV finding was logically incoherent and legally incorrect.

Another was that a corporation is a “person” under various entity statutes in Arizona but Accord Trucking, Inc. could not be an employee because the wage statute (ARS 23-355) did not provide that an entity could be an employee. But that reasoning begs the question. If the jury found a misclassification, then Accord would devolve to Susan Hogan its sole owner. Ironically, FXG at trial did not dispute that it required all TSPs it contracted with to form a corporation, but then Commissioner Rea found *as a matter of law* that the FXG condition it imposed shielded it from having a jury determine whether Accord was misclassified by FXG’s acts.

Another example of an undisclosed legal theory at trial, i.e., Commissioner Rea asserted it for FXG not FXG, was that the “point system” that FXG had in the LCOA and TSPA could not breach the implied duty of good faith and fair dealing because FXG applied the point system in the contract. That legal finding was

equally incoherent because the claim was that the point system compelled TSPs to be available for FXG runs (no other customer) 90% of the time or a TSP would not receive points or may lose a point position and have a tractor be placed by FXG into “spare-truck” status which meant little or no runs and revenue. Additionally, FXG’s Brian Tangi admitted that the FXG portal showed the TSP points but not its relative point position with respect to other TSPs which violated Accord’s reasonable expectations because it never knew where it stood for runs and routes with other TSPs and the Point system was a FXG control factor on “availability” and far from the assured independent contractor model for entrepreneurship and growth.

Another example was the conclusion of law that the “full use” provision in the 2015-2018 LCOA could not be the subject of the contract claim or the implied covenant claim because in the FedEx post-suit TSPA they deleted the term so the TSPA could be asserted as an unencumbered requirements contract. But Accord asserted on Day 6 of the trial that the deletion came years after Accord was stuck in the IC scheme that imposed heavy capital expenditures and long-term lease commitments for the expensive tractors and equipment that employees would not be saddled with, and the deletion was another calculated fraud by FXG to avoid responsibility for the contracts that were subterfuges for misclassification.

FXG never disclosed any of the preceding legal theories at trial, they were not set out in the *Joint Pretrial Statement* (IR 234-236), they were all asserted by Commissioner Rea who was assigned to the trial bench out of semi-retirement on the eve of trial in Feb-

ruary 2023, and it was a serious violation of Rule 26.1(a)(2) that caused Accord substantial *prejudice* because trial counsel heard the legal theories for the first time at trial, they already had their trial preparation and strategies in place, and had no time to research the legal issues that Commissioner Rea thought were dispositive after Judge Mikitish, who had the case for 5-years, did not or he would not have allowed the contract, fraud and negligent misrepresentation claims to proceed to trial. *Zimmerman v. Shakman*, 204 Ariz. 231, 62 P.3d 976 (2003) stated:

A slight delay in a case such as this, where the trial date has not yet been set, clearly may be less prejudicial than that resulting from an attempt to disclose new witnesses just before trial. Factors supporting the exclusion of undisclosed evidence “gain strength as the trial nears.” Ariz. R. Civ. P.37(c), comment to 1996 and 1997 amendments.

And see *Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 880 P.2d 1103 (1993) which stated: “To justify reversal, trial errors must be prejudicial to the substantial rights of the appealing party, citing *Walters v. First Federal of Phoenix*, 131 Ariz. 321, 641 P.2d 235 (1982), furthermore, the prejudicial nature of the error must affirmatively appear from the record.” None of Commissioner Rea’s legal theories and defenses at trial were disclosed in the case, JPTS, at trial or in the AB so the prejudicial nature of that disclosure violation are manifest by the record.

Rule 26.1(a)(2) requires timely disclosure of a party’s legal defenses in a case to allow a reasonable understanding of them and citations to relevant

authorities but FXG did not do that on the legal theories that Commissioner Rea used to support the JMOL on Day 6 of the trial on March 21, 2023. And Rule 26.1(f) bars any legal defenses raised for the first time within 60-days of trial. Commissioner Rea allowed all of this despite Accord counsel's protestations and it was manifestly prejudicial to Accord since FXG never introduced any such disclosures at trial or its AB and they are not found in the JPTS filed on 2/4/2023. IR 234-236. See TT Day 6 (3/21/23) pp. 62-89. *Zuern v. Ford Motor Co.*, 188 Ariz. 486, 937 P.2d 676 (1996) stated:

Plaintiffs first *disclosed* that new, albeit alternative, theory informally during their expert's supplemental deposition one month before trial, and then formally through a supplemental disclosure a few days later. That disclosure came more than three months after the deadline for disclosing expert opinions. Thus, the trial court did not err in excluding the evidence based on plaintiffs' *failure* to timely and properly *disclose* the new liability theory.

FedEx argues that Judge Mikitish did not hear all of Accord's evidence at the summary judgment stage, including Accord expert Bay's testimony on damages, unlike Commissioner Rea at trial, therefore the grant of JMOL at trial should not be reversed. AB 27. But if there was an absence of evidence supporting Accord's damages at the summary judgment stage, Judge Mikitish would have granted FedEx's motion for summary judgment on all claims because damages are a required element of all of Accord's contract and tort claims. If there was an absence of evidence supporting

the damages element of the claims or a complete legal bar to recovery of damages on the claims, then Judge Mikitish would have granted summary judgment in favor of FedEx. FedEx does not explain how expert testimony on the issue of damages at trial can somehow cause a court to flip from concluding there is sufficient damages evidence to warrant denying summary judgment and then conclude after an expert witness elaborates on the issue of damages at trial there is insufficient damages evidence as a matter of law.

FedEx asserts “Arizona Civil Procedure Rule 50(a) expressly gave the trial court the authority to find that Accord had not carried its burden of presenting sufficient evidence at trial to support its claims.” AB 10-11. While this is an axiomatic and unremarkable legal proposition, it has little application to this appeal because the trial court dismissed Accord’s claims at trial on *legal grounds* never disclosed or asserted by FedEx, not on insufficient evidence or factual grounds.

Importantly, the legal grounds that Commissioner Rea cited at trial were legal theories that FedEx Ground never disclosed in the 5-year case. That failure alone should compel reversal of the di

4. The notion that a corporation cannot be an employee if misclassified is logically incoherent and legally flawed

As recited in the Opening Brief, the trial court dismissed Accord’s contract and tort “misclassification claims” based upon the undisclosed legal theory that Accord Trucking, Inc cannot be found by the jury to be properly classified as an employee (instead of unlawfully classified as an independent contractor) because

a corporation cannot be an employee as a matter of law. Beyond the nondisclosure (there is nothing about disclosure in the AB), this legal basis for dismissing all of Accord's contract and tort misclassification claims had nothing to do with the evidence presented at trial and could have been asserted in a motion to dismiss on the pleadings. This is a purely legal question and did not turn on the evidence presented at trial. Accord did not have to litigate the case for five years to be told at trial that a corporation cannot be an employee as a matter of law so therefore Accord cannot recover damages even if it was misclassified as an independent contractor and injured. *There was a serious violation of disclosure and abject prejudice.*

The trial court prevented the jury from deciding Accord's misclassification claims because it ruled as a matter of law a corporation, even if unlawfully classified as an independent contractor based on FXG practice, cannot prevail on any claims at trial because a corporation cannot be an employee as a matter of law. The trial court committed reversible error in dismissing all of Accord's claims as a matter of law on this undisclosed, unasserted, and fatally flawed legal ground.

5. The DV on contract/tort claims due to “no labor laws” was flawed

Commissioner Rea also granted FedEx's Rule 50 Motion on the ground that there are no labor laws in Arizona that permit Accord to recover Damages on its claims. Beyond the fact this is reversible error because Accord brought contract and tort claims and not statutory claims arising out of labor laws, FedEx did not disclose this legal defense at any point in the litigation. In its Answering Brief, FedEx did not reference a

single disclosure demonstrating it disclosed this legal defense theory during the litigation. Senior Commissioner Rae simply created and advocated this legal defense theory on behalf of FedEx at trial without Accord having an opportunity to research, brief, or amend the claims to properly address the issue. The prejudice was severe because the surprise at trial prevented Accord from having adequate time to properly address this purely legal issue. If this legal defense, which did not turn on any evidence at trial, was disclosed and briefed before trial, Accord could have properly confronted it or amended the complaint. There is no case law in Arizona to support the proposition contract and tort claims need to have a statutory basis (labor laws) to support the damages element of the claims otherwise they are fatally defective. FedEx did not cite any in its Answering Brief.

FedEx asserts that “Accord presented evidence of damages that were not recoverable under any law” (AB 30) but fails to cite any authority supporting the proposition that contract and tort damages need express authorization from a statute for a plaintiff to recover damages under the circumstances of this case. FedEx did not cite one case holding that if an employee is misclassified as an independent contractor, then a specific statute needs to affirmatively authorize recoverable contract or tort damages.

6. The independent contractor vs employee relationship

FedEx devotes a large section of its statement of facts to detailing how the 2015-2018 LCOA and September 2018 TSPA describes *on paper* the purported independent contractor relationship between the

parties. AB 12-18. FedEx's recitation of the independent contractor language appearing on pages in the contracts is irrelevant to the appeal because the trial court did not find as a matter of law Accord was properly classified as an independent contractor or that Accord presented insufficient evidence at trial of an employer-employee relationship. Rather, the court improperly dismissed Accord's claims based on undisclosed legal defenses (or the court improperly weighed the evidence and found no control factor infractions when the record was replete with testimony on both sides about FedEx Ground control acts such as the point system that controlled TSP availability to FXG, TSP use of the USDOT # that permits linehaul across state lines, Accord had to incorporate in order to be an IC with FXG, TSPs could not and did not run for any other customers than FXG (unlike genuine IC's who have multiple customers), FXG controlled the pricing, FXG controlled the logos, brand and paint on the TSP tractors, FXG controlled all run assignments and other cited in the OB and Reply Brief.

The main premise of Accord's claims from the inception of this action is the contract language is a sham and not implemented in practice. Courts in other jurisdictions have agreed with this conclusion but the trial court in this case prevented the jury from deciding it. *See Alexander, Estrada, and Santiago*. The trial court did not make any findings or rulings concerning whether the independent contractor relationship was implemented in practice and improperly prevented the jury from making that fundamental determination based upon the evidence. The artfully drafted independent contractor language in the contracts are nothing more than a subterfuge intended to

dupe contractors into believing they will have the freedom, control, and autonomy associated with an IC relationship while in practice FedEx controls nearly every aspect of the contractor's operations.

FedEx falsely attempts to blame Accord for the drop in run offerings it received toward the end of its relationship with FedEx. Plaintiff Susan Hogan, the founder and owner of Accord, prevailed on her negligent infliction of emotional distress claim against FedEx at trial and was awarded damages because she was consistently harassed, bullied, abused, and intimidated by other contractors and when she reported the misconduct to FedEx they did nothing to stop it. Worse yet, FedEx retaliated against her and Accord by giving her less runs and converted her tractors on the unassigned run rotation to "spare" status. There was conflicting evidence presented at trial regarding this retaliation and the reasons for why Accord's evidence began to fail.

7. The predicate fact issues of misclassification were for the jury and the undisclosed defense of "no labor laws" to support the claims

FedEx relies on two clearly erroneous rulings by Commissioner Rae at trial. First, Commissioner Rae concluded there is no such thing as a standalone legal claim for misclassification in Arizona so therefore the claims must be dismissed. But Accord did not assert a standalone cause of action for "misclassification." Accord asserted breach of contract and tort claims relying on deliberate misclassification as one of the factual predicates for the claims.

Based upon Commissioner Rae's misapprehension of the claims pending at trial, he concluded Accord had

to rely on a statute to provide a legal basis for recovering the damages it sought at trial. FedEx asserts “Accord did not do this” (AB 33) but that is because a statutory prerequisite enabling a damages claim was never asserted as a legal defense by FedEx during the five years of litigation and in any event was unnecessary to meet the elements of its contract and tort claims which relied upon compensatory damages based upon monetary losses from Accord being improperly classified as an independent contractor and punitive damages based upon the deliberate misclassification.

After being ambushed with an undisclosed legal defense regarding damages at trial, Accord scrambled and cited A.R.S. § 23-350 as a statutory underpinning for its misclassification and damages claims. Because an “employee” is defined as “any person” under the statute, Commissioner Rae ruled as a matter of law Accord could not rely on the statute because Accord is a corporation. But this is a classic circular reasoning fallacy. FedEx mandated Plaintiff Susan Hogan form a corporation so it could improperly classify her corporation as an independent contractor. If FedEx did not have a sham contract that improperly classified its employees as independent contractors and a mandate for all contractors to form a corporation, Accord the corporation would not exist. Instead, Plaintiff Susan Hogan herself would have been an employee of FedEx.

Based upon the reasoning of Commissioner Rae’s decision that Accord’s claims are barred as a matter of law because a corporation is not a “person” under the Arizona Wage Act, no purported “independent contractor” at FedEx can ever challenge FedEx’s fraudulent independent contractor scheme because all the “independent contractors” are mandated to form a cor-

poration as a condition to entering a contract with FedEx. In other words, a company can force a person to form a corporation to enter an “independent contractor business relationship” and then disregard Arizona law on the contours of an independent contractor relationship and be completely insulated from any liability because a corporation can never be an “employee” as a matter of law.

This absurd result gives blanket immunity to employers misclassifying their employees as independent contractors while stripping employees of any legal recourse. Employers should not be allowed to evade legal accountability for purposely misclassifying their employees as independent contractors to avoid paying employee benefits and tax liabilities that would otherwise exist, and avoid all legal liability. FedEx induces contractors with false representations regarding the benefits of an independent contractor relationship to justify offloading capital expenditures onto contractors for the tractors, equipment, gas, and all other expenses associated with transporting FedEx cargo. But under the FedEx scheme, in practice, the contractor gets saddled with all the burdens of an independent contractor (incurring significant expense to acquire or lease the tractors, maintenance, repairs, insurance, gas, safety features, etc.) while realizing none of the benefits (working for other companies, autonomy and discretion over methods and means, schedule flexibility, entrepreneurial growth, etc.).

Worse yet, once a contractor is forced to create a company to enter an independent contractor relationship with FedEx, it must make significant capital expenditures (typically with debt) to finance acquiring or leasing an expensive tractor to even start providing

services for FedEx. Once the contractor is forced to incur substantial debt and risk, the contractor is effectively locked into renewing the contract annually otherwise it is stuck in the unenviable position of being saddled with debt and depreciating assets without any prospect for earning income (generating revenues). Consequently, even if FedEx exerts the control of an employer over an employee in this relationship despite the express terms of the contract, the contractor has no practical way of doing anything about it because of the debt it accumulated and it has no bargaining power or leverage to negotiate different terms to the contract of adhesion FedEx drafts and offers on a “take-it-or-leave-it” basis. The trial court committed reversible error when it ruled as a matter of law this fraudulent scheme is insulated from legal challenge because a corporation cannot be an “employee” as a matter of law and that there can be no viable contract or tort claims that are disconnected from a statutory underpinning.

8. The trial contained circumstantial evidence of fraud

FedEx incorrectly contends there was no evidence presented at trial that FedEx *knowingly* misrepresented a fact. Commissioner Rae also ruled that a representation cannot be *knowingly* false unless the representation is first adjudicated to be false in a judicial proceeding. First, Accord presented substantial evidence at trial that when FedEx executed the LCOA and TSPA contracts with Accord and renewed each respective contract in successive years, it knew the independent contractor representations in the artfully drafted agreements were false because the relationship contemplated under the contracts bore no relationship to the

reality on the ground in the years preceding the contracts.

Second, fraud can be proven by circumstantial evidence, and there is no prerequisite under Arizona law for a plaintiff to first prove a representation is false in a prior judicial proceeding before it can present evidence it was *knowingly* false in a subsequent judicial proceeding. In a case involving fraud claims, a plaintiff at trial simply presents evidence of both the falsity of the representation and evidence the false representation was *knowingly false* when made. Arizona case law makes clear these are two elements of a fraud claim but there is no basis in Arizona law to dismiss a fraud claim because a representation cannot be *knowingly* false unless the representation is adjudicated to be false as a threshold matter in a prior judicial proceeding.

9. Many FXG control factors as a predicate for the claims

Importantly, the 2018 Complaint (IR 1) alleged in paragraph 1 that “Although in 2017 FedEx had Hogan sign an LCOA purporting to represent Accord as an independent contractor and not employed by FedEx, under the economic realities’ test the company has exerted substantial control (or the right to control) over Accord’s terms and conditions of operations. FedEx controls the terms and conditions of contractor operations, trucks, equipment, work hours, runs, routes, insurance, manner of payment, and opportunity for outside work. In fact, FedEx recently reinforced the misclassification by recently disseminating a TSPA which revised the language (not the substance) in the LCOA to avoid “employment detection” and to cover-up the purposeful misclassification over the

past several years and asserting punitive damages for the calculated misuse of the sham contract as an instrument of fraud.

Paragraph 28 set forth the factual predicate for the contract and tort claims that Judge Mikitish allowed to go to the jury. It pled, and the evidence is in the trial transcripts, that the LCOA contained the following contract provisions that were false when made and breached the implied covenant: FedEx has the sole right to interpret and terminate the agreement; drivers' routes can be reconfigured by FedEx without the driver's say; the work the drivers perform is core to FedEx business; FedEx controls who the contractor can hire and can fire at will; FedEx controls the contractors' equipment, logos, insurance, schedules, uniforms, advertising, speed limit, vendors, badges, pickups and deliveries, and [availability and] growth through a "point-system,"; under contract addendum 1, ¶ II FedEx controls the display on the door of the contractor's truck by requiring the contractor's name and underneath the words "Operated by FedEx Ground"; Contract addendum 2, ¶ 's 3.1 and 3.3 require the contractor to name FedEx Ground as an additional insured on its liability insurance policy, name FedEx as the certificate holder, and show that the contractor's employees are covered by workmen's compensation; in contract addendum 2, FedEx specifies the types and amounts of insurance coverage the contractor must obtain; and contract addendum 16, ¶ 's 1-3 limit the contractor name on the driver's uniform to the sleeve and FedEx controls the approval of any temporary drivers for the contractor. All of these are a sham and a breach.

On the issue of FXG control over Accord at trial, Commissioner Rea's directed verdict overlooked *Santiago v. Phoenix Newspapers*, 164 Ariz. 505, 794 P.2d 38 (1990). In that case the trial court granted the defendant newspaper summary judgment and the appellate court found that, *as a matter of law*, the newspaper was not vicariously liable for the injuries sustained by plaintiff, an individual involved in a collision with the newspaper's carrier. The lower court concluded that the carrier was an independent contractor. The court of appeals agreed but the Arizona Supreme Court reversed and remanded the case to the lower court, holding that reasonable minds could differ as to whether an employer-employee relationship existed between the newspaper and carrier, such could not be determined as a matter of law. Here, FedEx Ground controlled the USDOT # to run cargo across state lines, required a "point system" that required 90% TSP availability to FXG or penalties ensued including demerits to "spare truck status," none of the TSPs could (or did) run for any other customer than FXG, the TSPs parked their tractors at the FedEx hub, FXG was painted on the TSP tractors, and each TSP, which is designated as an independent contractor, took all its run assignments from FXG.

The directed verdict that no reasonable jury could find Misclassification on this record and under *Santiago* and *Estrada*, was a manifest miscarriage of justice.

On the implied covenant claim that Commissioner Rea dismissed as a matter of law at trial, see *Wells Fargo Bank v. Ariz. Laborers*, 201 Ariz. 474, 38 P.3d 12 (2002) where the Supreme Court stated that implied terms are as much a part of a contract as are

the express terms. The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement. The duty arises by operation of law but exists by virtue of a contractual relationship.

Importantly, the court stated that “because a party may be injured when the other party to a contract manipulates bargaining power to its own advantage, a party may nevertheless breach its duty of good faith without actually breaching an express covenant in the contract.” Commissioner Rea did not apply this law at trial before he directed a verdict on Accord’s claim that the LCOA and TSPA, *as applied*, violated FXG’s implied duty of good faith and fair dealing along and Accord’s reasonable expectations that the contracts were legitimate IC agreements and not a subterfuge by FXG to maintain TSP full time availability and control.

On the implied covenant claim Commissioner Rea improperly switched from both parties’ citations of Arizona cases to Pennsylvania cases, asserting that an implied duty cannot exist if unsupported by an express contract term. First, Arizona law was selectively cited by FXG in the MSJ and AB, and by Commissioner Rea at trial after Judge Mikitish applied Arizona law during MSJ briefing. Second, this is an Arizona case containing multiple contacts with Arizona which has a public policy of applying Arizona law to contracts entered into in Arizona dealing with an Arizona TSP and activity at a linehaul hub in Phoenix, Arizona. *Wells Fargo Bank* applied to the implied covenant claim not Pennsylvania case law and neither

Judge Mikitish nor Commissioner Rea entered an order that the case was governed by PA law.

Commissioner Rea also misapplied the law and abused his discretion when he directed a verdict against Accord on the negligent misrepresentation claim. He found, in a *conclusory* fashion, that FXG through the sham LCOA and TSP did not supply false or incorrect information for the guidance of Accord within the meaning of the law. TT Day 6 (3/21/23) pp. 107-108. However:

“One who, in the course of business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused by their justifiable reliance upon the information, if he fails to use reasonable care in obtaining or communicating the information.”

Restatement (2d) Torts Sec. 552(1).

Based on the record the issue whether FXG supplied false or incorrect information about IC status to Accord was for the jury to decide not Commissioner Rea in a conclusory fashion without any factual or legal support.

As to whether the contracts can support the fraud claim, Accord asserted that the LCOA and TSPA were a calculated instrument of subterfuge and deceit, that the IC terms therein were artfully presented on paper as an IC but control *in application*.

Additionally, the AB regurgitated the economic loss rule and “terms in a contract cannot be a basis of fraud” even if false when made but neither judge

applied those arguments and they cannot be credited on this record for the reasons stated here and, in the OB. When Accord counsel cited *Estrada* on day 6 the commissioner asked “Do the P&D have point system too?” Accord counsel said no but that favored Accord as the point system to reward TSP availability to FXG was a control factor here but not in *Estrada* and misclassification was found in *Estrada*. TT Day 6 3/21/2023, 65: 18-25. Likewise, the Commissioner refused to apply *Alexander v. FedEx Ground Package System*, 765 F. 3d 981 (9th Cir. 2014), a federal case in Oregon that applied California law that FXG misclassified ICs.

10. Statutory basis after all

And on the “labor law” defense, undisclosed until trial, Arizona has public policy pronouncements prohibiting misclassification of independent contractors through “*misrepresentation, false statements, fraud, intimidation, coercion or duress.*” ARS 23-902(f). And ARS 23-902(D)(2) provides for IC status if the IC agreement does not provide the IC with any business registration or licenses required to perform the services. But the trial testimony was that all of the TSPs did runs for FedEx Ground using its DOT#.

And under ARS 23-902(F) any written IC agreement shall be null and void and create no presumption of IC status if the consent of the other party to the agreement was obtained through “*misrepresentation, false statements, fraud, intimidation, coercion or duress.*” Commissioner Rea did not apply the public policy articulated in the Arizona workmen’s compensation statute at trial and Accord had no time to research the legal issue that was undisclosed by FedEx under Rule 26.1 in this case.

At trial appellant's counsel stated public policy supported the misclassification claim, e.g., Arizona wage act under ARS 23-355 and the federal Fair Labor Standards Act ("FLSA") but Commissioner Rea replied: "You'll have to do better than that." See TT Day 6, 3/21/2023 pp. 65-108.

See *Estrada v. FXG System Package, Inc.*, 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327 (2007) which reviewed a FedEx contract similar to the LCOA and TSPA:

"The LCOA is a cleverly drafted contract creating the control envisioned by an employment relationship under the guise of an independent contractor model which is a misrepresentation that gives FedEx Ground exposure to contract and tort liability."

Further, in late 2018 FXG doubled-down on the use of the contract as a subterfuge to control the TSPs by deleting the term "full use" after Accord sued on the control issue, another fact taken from the jury that suggested *FXG engaged in a fraud*. IR 1; TT Day 6, 3/21/2023 pp 65-108. In *Tarron v. Bowen*, 225 Ariz. 147 (S. Ct. 2010) the court held:

We concluded that "contract language does not determine the relationship of the parties."

Also see *Santiago v. Phoenix Newspapers*, 164 Ariz. 505 (1990) the court stated:

Whether an employer-employee relationship exists may not be determined as a matter of law in either side's favor, because reasonable minds may disagree on the nature of the employment relationship. A jury could infer

from these facts that Frausto was an employee . . .

And see *Alexander v. FedEx Ground*, 765 F.3d 981 (9th Cir. 2014) where the court stated: “the label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.” *Id. at 403*.

As to the fraud and punitive damages, the fraud instruments (LCOA and TSPA) were carefully crafted documents designed to evade the employment laws here which is a calculated and intentional harm that gives rise to punitive damages. See *Dunlap v. Jimmy GMC*, 136 Ariz. 338 (1983) (punitive damages allowed if the jury finds an intent to injure or a conscious disregard of a substantial risk of harm to a party and a *pattern* of wrongful conduct is admissible to prove it). Based the record the JMOL should be reversed and the case against FedEx Ground remanded on the contract and tort claims and appellant awarded fees and costs under ARCAP 21.

Respectfully submitted this 10th day of May, 2024.

/s/ Gregory G. McGill, Esq.

/s/ Ryan G. McGill, Esq.

**LINEHAUL
CONTRACTOR OPERATING AGREEMENT
(JUNE 24, 2015)**

**FXG Linehaul IC Version 2014.08.01
Operating Agreement**

Entity ID: V0017344

Contract Number: C7839449

Print Date: 06/23/2015

Entity Name: ACCORD TRUCKING,INC

Station Number: 00850

**FEDEX GROUND PACKAGE SYSTEM, INC.
LINEHAUL CONTRACTOR
OPERATING AGREEMENT**

BACKGROUND STATEMENT. FedEx Ground Package System, Inc. is a duly licensed motor carrier engaged in providing a small package information, transportation and delivery service throughout the United States, with connecting international service. The Contractor is an owner-operator of one or more pieces of trucking equipment suitable for use in such a service. Contractor wants to make this equipment available, together with a qualified operator for each piece of equipment, to provide linehaul and other services on behalf of FedEx Ground. FedEx Ground wants to provide for package pick-up and delivery services through a network of nationwide stations served by independent contractors, and, subject to the number of packages tendered to FedEx Ground for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment. Con-

tractor wants the advantage of operating within a system that will provide access to national accounts and the benefits of added revenues associated with shipments picked up and delivered by other contractors throughout the FedEx Ground system. In order to get that advantage, Contractor is willing to commit to provide on-time linehaul service, and to conduct his/her business so that it can be identified as being a part of the FedEx Ground system. Both FedEx Ground and Contractor intent that Contractor will provide these services strictly as an independent contractor, and not as an employee of FedEx Ground for any purpose. Therefore, this Agreement will set forth the mutual business objectives of the two parties intended to be served by this Agreement — which are the results the Contractor agrees to seek to achieve — but the manner and means of reaching these results are within the discretion of the Contractor, and no officer or employee of FedEx Ground shall have the authority to impose any term or condition on Contractor or on Contractor's continue operation which is contrary to this understanding.

1. EQUIPMENT AND OPERATIONS

1.1 Power Equipment. In conjunction with providing to FedEx Ground transportation services as herein provided, Contraction will provide and utilize the vehicular equipment identified in the most recent Addendum 1 to this Agreement (hereinafter called the "Equipment"). Contractor certifies that the Equipment meets the requirements of all applicable federal, state and municipal laws and regulations, and, subject to the determination of FedEx Ground of its suitability for the service called for in this Agreement, the selection

and replacement of the Equipment is within the discretion of Contractor,

1.2 Equipment Maintenance. Contractor agrees, at Contractor's expense, to maintain the Equipment in accordance with the safety and equipment standards specified in applicable federal, state and municipal without the written consent of the other party hereto.

[. . .]

16. GOVERNING LAW. This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Pennsylvania.

[. . .]

CONTRACTOR ACKNOWLEDGES AND REPRESENTS THAT CONTRACTOR HAS READ AND FULLY UNDERSTANDS THE PROVISIONS OF THIS AGREEMENT, AND HAS HAD SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH PERSONAL FINANCIAL, TAX AND LEGAL ADVISORS PRIOR TO EXECUTING THIS AGREEMENT.

IN WITNESS WHEREOF, the parties hereto enter into and execute this Agreement this 24th day of June 2015, at 11:45am

FedEx Ground Package System, Inc.:

/s/ Donna Patterson
Signature

6-24-15
Signature Date

/s/ Donna Patterson
Printed Name

App.171a

LH mgr

Title

Contractor:

/s/ Susan Richele Hogan

Signature

June 24, 2015

Signature Date

/s/ Susan Richele Hogan

Printed Name

Authorized Officer

Title

**TRANSPORTATION
SERVICE PROVIDER AGREEMENT
(AUGUST 26, 2018)**

TSPA US Version 2018.09.01

This Transportation Service Provider Agreement (“Agreement” or “TSPA”) is entered into effective as of 09/01/2018 (“Effective Date”) between FedEx Ground Package System, Inc. (“FXG”) and the party identified below as “Transportation Service Provider” (“TSP”). FXG and the identified TSP may be referred to in this Agreement individually as a “Party” and collectively as the “Parties.” TSP acknowledges and agrees that, by executing this Agreement, the Parties agree to terminate any previous or current Linehaul Contractor Operating Agreement, and that such termination shall take effect at 23:59: 59 on August 31, 2018.

**Transportation Service Provider:
ACCORD TRUCKING, INC (ATI)**

THE PARTIES HAVE READ AND UNDERSTAND THE PROVISIONS OF THIS AGREEMENT, AND HAVE HAD SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH FINANCIAL, TAX AND LEGAL ADVISORS PRIOR TO EXECUTING THE DOCUMENT. EACH SIGNATORY BELOW WARRANTS THAT HE OR SHE HAS AUTHORITY TO EXECUTE THIS AGREEMENT ON BEHALF OF AND TO LEGALLY BIND THE PARTY FOR WHICH EACH HAS SIGNED.

This document has been signed electronically on 08/26/2018 at 08:12:58 PM by 7588424 - Susan Richele Hogan for ACCORD TRUCKING, INC and by 1946051 - Chad Anderson for FXG, and the electronic signatures shall for all purposes be considered the equivalent of manual signatures, as set forth in the

Electronic Signatures in Global and National Commerce Act, the Uniform Electronic Transactions Act, and applicable state statutes.

1. OBJECTIVES, INTENT AND COMPLIANCE WITH APPLICABLE LAW

1.1 Objectives. The Parties have entered into this Agreement to achieve the following objectives:

- (A) FXG operates an information and distribution network throughout the United States and Canada and desires to contract with independent businesses to facilitate the package pickup and delivery services it offers to its Customers.
- (B) FXG makes an ongoing and continuous investment into brand awareness through marketing and brand protection, by obtaining and maintaining Customer accounts, by investing in technology to meet market demands and industry and consumer expectations, and by attracting and contracting with corporate business entities that provide package pickup, transport and delivery services.
- (C) ATI is a corporate business entity that provides package pickup, transport and delivery services with its own vehicles and its own employees. The Parties agree that, in addition to the services ATI provides to FXG under this Agreement, ATI is free to, or free not to, separately contract with and provide services to other companies.
- (D) ATI desires the advantage of contracting with FXG to gain access to national accounts and

the additional revenue that the access provides. ATI understands that this Agreement is between only it and FXG, and not between either of the Parties and any other person or entity.

- (E) The Parties desire to meet the expectations and demands of shippers and recipients (“Customers”) by providing superior Customer service and maintaining favorable brand identity. The Parties agree that ATI retains exclusive authority to determine the best means to meet such Customer expectations and demands, including complete discretion over and responsibility for routes travelled, type and number of equipment, and staffing and personnel decisions.
- (F) The Parties desire to comply with the United States Department of Transportation (“USDOT”) Leasing Regulations at 49 CFR Part 376 and agree that this Agreement is in compliance with that regulation.
- (G) The Parties acknowledge that safety, ATI’s provision of the Services and the Service Results, as defined herein, and service continuity are fundamental to this Agreement, and the Parties agree that this Agreement shall be performed and interpreted accordingly.

1.2 Intent and Relationship of the Parties.

The Parties agree that they intend to create by this Agreement a business-to-business relationship, not one of employment. The Parties further agree that neither Party is, nor will be represented, alleged, or

deemed to be a legal representative, joint venturer, joint employer, franchisor, franchisee, dealership, distributorship or partner of the other Party for any purpose. As a corporate entity and employer, ATI has the sole right and obligation to supervise, manage, direct, procure, perform or cause to be performed, all services to be provided by ATI under this Agreement. No officer, agent or employee of FXG has authority to direct either ATI or ATI's "Personnel" (defined in Section 6.2) as to the methods, manner or means employed to provide the contracted "Services" (defined in Section 3.3) or to achieve the "Contracted Service Results" (defined in Section 3.4). The Parties acknowledge their respective obligations to comply with "Applicable Law," as defined in Section 1.3, governing the operation of businesses picking up, transporting and delivering packages and agree that neither Party shall allege that such compliance results in either Party exerting control over the other Party's business, business decisions, or Personnel.

1.3 Compliance with Applicable Law. At their sole cost and expense, the Parties agree to comply with all applicable federal, state, and local laws and regulations (hereinafter referred to as "Applicable Law"). As used in this Agreement, the term Applicable Law means and includes the common law and judicial decisions and all statutes, laws, rules, regulations, ordinances, executive orders, policies and procedures established by any governmental authority with jurisdiction over a Party to this Agreement in effect on or after the Effective Date. By way of illustration and without limitation, Applicable Law governs the following subjects: operation of businesses picking up, transporting and delivering packages; licensing and

operation of vehicles; traffic laws pertaining to vehicle operators; business formation, reporting, recordkeeping, operation, and licensing requirements; hazardous waste and materials; occupational safety and health hazards; consumer protection; privacy; trade regulation; workers compensation insurance; unemployment insurance; withholding and payment of federal, state, and local income taxes and social security taxes; employment practices; anti-terrorism; anti-bribery and corruption; anti-discrimination; anti-corruption; and government contracts and subcontracts, certain of which are set forth on ATI's *MyGroundBizAccount*, which is incorporated herein by reference. ATI agrees to review the material referenced on ATI's *MyGroundBizAccount* from time to time throughout the duration of this Agreement.

2. TERM

The "Initial Term" of this Agreement will commence on 09/01/2018 and will continue in full force and effect until 06/24/2019, unless terminated pursuant to Section 15 of this Agreement. Thereafter, and for transactional convenience only, this Agreement shall continue for successive terms of one year each, unless one Party provides the other Party with written notice of its intention to let this Agreement expire at least 30 days' prior to expiration of the Initial Term or any successive term.

3. SERVICES AND SERVICE RESULTS

3.1 Requirements Contract. The Parties agree that this Agreement is a requirements contract whereby ATI will pick up, transport and deliver as many shipments in trailers supplied by FXG or Customers as FXG may tender to ATI for such services, subject to

ATI's "Right to Decline Service" and FXG's "Right to Ensure Service," as defined in Sections 3.5 and 3.6, respectively. The Parties further agree that such services may be required of ATI on the "Service Days" defined in Section 3.2.

3.2 Service Days. The Parties agree that the Service Days will be seven days each "Service Week," the Service Week running from 00:00:00 Saturday to the following Friday 23:59:59 (all times local).

3.3 Services. When performing the work offered to it pursuant to Schedule A ("Run Assignment") of this Agreement, ATI agrees to provide the services enumerated in this Section 3.3 using the vehicles it leases to FXG, as listed in Schedule B ("Leased Equipment") of this Agreement:

- (A) transportation of shipments in FXG- or Customer-supplied trailers between FXG hubs, stations, substations, non-facility substations or other designated points ("FXG Hub" or "FXG Station");
- (B) transportation of shipments in FXG-supplied or Customer-supplied trailers between Customer facilities and between Customer facilities and FXG Stations or FXG Hubs, together with any accompanying shipment documentation;
- (C) loading and unloading of trailers in connection with provision of the Services described in Sections 3.3(A) and 3.3(B);
- (D) upon request, collection and transmission of Customer signature, scanning results and shipment tracking data using compatible tech-

nology and equipment as set forth in Section 9.2, or manual recording and return of Customer signatures and package tracking data in situations where technology and equipment are inoperable, unavailable or otherwise unsuitable for the purpose.

- (E) preparation of daily driver logs, daily vehicle inspection reports and any other legally required documents, and filing or transmission of them with FXG at the end of each Service Day, or otherwise if the Parties agree; and
- (F) provision of the services described in the “Supplemental Services Settlement” Schedule of this Agreement, if any.

3.4 Contracted Service Results. The Parties agree to perform their obligations under this Agreement consistent with their mutual business objective of providing superior Customer service. To these ends, the Parties agree that the Services provided will meet the Service Results set forth in this Section 3.4.

- (A) ATI agrees to timely provide the Services to FXG and Customers compatible with the schedules, expectations and requirements of Customers for pickup, transportation and delivery.
- (B) ATI agrees to take all commercially reasonable measures to avoid theft, loss, damage, destruction and/or delay in the handling, loading, unloading, transporting, picking up and delivering of packages, shipments, and trailers.

- (C) The Parties agree to conduct all business activities with honesty and integrity, in accordance with Applicable Law and in a professional and safe manner at all times.

3.5 Right to Decline Service. FXG agrees that ATI has the right to provide, or to decline to provide, the Services under the terms and conditions set forth in Schedule A. Whenever ATI exercises its “Right to Decline Service”, ATI agrees to provide reasonable notice of its declination to FXG. If ATI declines to provide the Services, ATI agrees that FXG may exercise its “Right to Ensure Service” as defined in Section 3.6.

3.6 Right to Ensure Service. The Parties agree that FXG has the Right to Ensure Service whenever ATI exercises its Right to Decline Service, or if FXG exercises its right to mitigate damages under Section 15.3. The Right to Ensure Service means that FXG may exercise any and all alternative service options available to it, including utilizing the services of other transportation service providers and third parties. the laws of the Commonwealth of Pennsylvania without regard to choice of law principles.

APPENDIX

SCHEDULE A - Run Assignment

Attachment A-1 - Assigned Runs and Spots

SCHEDULE B - Leased Equipment

Statement of Lease

SCHEDULE C - Settlement

Attachment C-1 - Peak Period Settlement

Attachment C-2 - Peak Period Points Incentive

SCHEDULE D - Optional Programs

SCHEDULE E - Safe Operating Practices

Attachment E-1 - Entry Level Driver Program

SCHEDULE F - Licensed Software

SCHEDULE G - Insurance and Indemnification

[. . .]

- (A) Scanner Lease Charge.** If FXG makes Scanners available to ATI, ATI agrees to pay FXG a Scanner Charge of \$2.75 plus applicable sales tax per Scanner, for each day a Scanner is made available to ATI. ATI further agrees that FXG may invoice ATI for Daily Scanner Charges in accordance with Section 4.6 of this Agreement.
- (B) Responsibility for Loss and damage.** While any Scanner is in the possession of ATI, ATI agrees that, regardless of fault, it is solely responsible for the full replacement cost of any Scanner that is lost or any Scanner that is destroyed or physically Damaged such that the cost of repair exceeds the cost of replacing the Scanner. ATI further agrees that costs will be invoiced in accordance with Section 4.6 of this Agreement.
- (C) Return of Leased Scanners.** In the event this Agreement is terminated for any reason, ATI agrees to immediately return all Scanners rented from FXG to any FXG Hub or FXG Station, in no event later than five days following termination.

10. Point Accruals and Deductions for Performing Runs and Assigned Spots

The Parties agree that ATI will be eligible to accrue points when ATI performs the Runs and Spots offered to it and meets the service commitments associated with the offerings.

10.1 Point Accrual for Solo Runs and Assigned Spots. FXG agrees that ATI will be eligible to accrue one point each Operating Day for each tractor ID associated with an AR or URP listed on Attachment A-1, and one point each Operating Day for each tractor ID associated with one or more Assigned Spots listed on Attachment A-1, provided that ATI does not have a “Service Declination” or a “Service Failure” in connection with the tractor ID during the “Operating Day,” as defined below.

(A) Service Declinations

(1) Solo Runs. A Service Declination occurs when ATI declines or fails for any reason to perform, with any tractor ATI has leased to FXG as listed on Schedule B of this Agreement, a Solo Run offered as an AR or to a URP each time a Solo Run is offered during the Operating Day.

(2) Assigned Spots. A Spot Service Declination occurs when ATI for any reason declines to perform, either itself or by subcontracting, any one of the Assigned Spots associated with a tractor ID listed on Attachment A-1.

(B) Service Failures

(1) Solo Runs. A Solo Run Service Failure occurs when ATI fails to meet the “Run Time” associated

with each Trip Leg of a Solo Run offered as an AR or to a URP each time a Solo Run is performed during the Operating Day and, as a result, FXG is not able to meet service commitments to Customers on the packages being transported by ATI.

(2) Spots. A Spot Service Failure occurs when ATI fails to service any one of the Assigned Spots associated with a tractor ID listed on Attachment A-1 or any one of a bundle of Unassigned Spots offered to a URP held by ATI under this Agreement. If ATI agrees to service Unassigned Spots not offered to a URP held by ATI using a Spare tractor or the same tractor ATI is using to service Assigned Spots, a Service Failure will not be assessed in connection with any Unassigned Spots ATI agrees to service.

(C) Operating Day

The Parties agree that, for all Solo Runs and Spots, the Operating Day will span from Midnight one day to Midnight the next, seven days a week, 52 weeks a calendar year.

(D) Point Accrual

The Parties agree that the point ATI may accrue each Operating Day for properly servicing an AR, URP or AS will be added to any points ATI already has credited to the tractor ID associated with the AR, URP or AS set forth in this Section 10.

10.2 Point Accrual for Team Runs. FXG agrees that ATI will be eligible to accrue one point each Operating Day for each tractor ID associated with an AR or URP on Attachment A-1 for the duration of each Team Run performed, provided that ATI does not have

a “Service Declination” or a “Service Failure” during the “Operating Day,” as defined below.

- (A) **Service Declinations.** A Service Declination occurs when ATI declines or fails for any reason to perform, with any tractor ATI has leased to FXG as listed on Schedule B of this Agreement, the Team Runs offered as an AR or to a URP each time a Team Run is offered during the Operating Day.
- (B) **Service Failures.** A Service Failure occurs when ATI fails to meet the Run Time associated with each Trip Leg of the offered Team Run each time the Run is performed during the Operating Day and, as a result, FXG is not able to meet service commitments to Customers on the packages being transported by ATI.
- (C) **Team Run Operating Day.** For all Team Runs, the Operating Day will span from Midnight one day to Midnight the next, seven days a week, 52 weeks a calendar year.
- (D) **Team Run Point Accrual.** The Parties agree that the point the ATI may accrue each day for properly servicing an AR or URP will be added to any points ATI already has credited to the tractor ID associated with the AR or URP as set forth in this Section 10.

10.3 Point Accrual for a Temporary AR or URP. If, pursuant to Attachment C-1 to Schedule C of this Agreement, FXG agrees to award points for servicing a temporary AR or URP, when the temporary duration of the AR or URP has expired, as set forth in Attachment C-1, ATI agrees that any points ATI has

accrued for performing Solo and/or Team Runs under a temporary AR or URP will be transferred to any one tractor ID of the ATI's choosing that is associated with an AR or URP held by ATI under Attachment A-1. If ATI does not hold an AR or URP under Attachment A-1, FXG agrees that any points accrued for performing a temporary AR or under a temporary URP will remain with the tractor ID previously associated with the temporary AR or URP until ATI acquires an AR or URP, or ATI is awarded a URP under the RFI process. At that time, ATI agrees that the points held by the tractor ID formerly associated with the temporary AR or URP will be transferred to the tractor ID associated with the acquired or awarded AR or URP.

10.4 Point Deductions. ATI acknowledges and agrees that points will be deducted from the points **credited to tractor IDs as set forth below:**

(A) CSA Deductions. ATI will have points deducted for each "Compliance Safety Accountability" ("CSA") violation ATI receives. For violations related to ATI's Equipment or Personnel, the deduction will be the points (base and any multiplier) assigned to or related to the CSA violation by the Federal Motor Carrier Safety Administration. For violations related to defects in any FXG trailers and dollies being pulled by ATI, the deduction will be 7 points, provided the defects are readily discoverable in a routine pre-trip inspection. The deduction of points will be made when a CSA violation is reported or discovered and from the points credited to the tractor ID in connection with which the violation occurred. If a CSA viola-

tion is not attributable to a tractor ID, or the tractor ID in connection with which the CSA violation occurred cannot be determined, or at the time of deduction the tractor ID in connection with which the CSA violation occurred is no longer shown as leased to FXG, the points will be deducted from a tractor ID of ATI's choosing that is associated with an AR, URP or Assigned Spot held by ATI under this Agreement. If ATI does not hold an AR, URP or Spot under this Agreement, the points will not be deducted.

- (B) Accident Deductions.** ATI will have points deducted each time ATI experiences a “preventable accident” (as defined in Schedule E of this Agreement). The deduction will be 250 points for each preventable accident that is a “USDOT Recordable Accident” as defined in 49 CFR 390.5, The deduction will be 50 points for all other preventable accidents, including yard accidents. The deduction of points will be made when ATI is notified of a preventability determination by FXG and from any points credited to the tractor ID involved in the accident. If at the time of deduction the tractor ID involved in the accident is no longer shown as leased to FXG, the points will be deducted from a tractor ID of ATI's choosing that is associated with an AR, URP or Spot. If ATI does not hold an AR, URP or Spot under this Agreement, the points will not be deducted.
- (C) Service Failure Deductions.** ATI will have 200 points deducted each time ATI

experiences a Service Failure as defined in Section 10, above. The deduction of points will be made when ATI is notified that FXG was not able to meet its service commitments to the Customer due to ATI's failure to meet a Run Time or to service an AS. The deduction of points will be made from the tractor ID in connection with which the Service Failure occurred. If at the time of deduction the tractor ID in connection with which the Service Failure occurred is no longer shown as leased to FXG, the points will be deducted from a tractor ID of ATI's choosing that is associated with an AR, URP or AS. If ATI does not hold an AR, URP or AS under this Agreement, the points will not be deducted.

- (1) Breakdown.** If ATI notifies FXG that it has experienced an Equipment breakdown or other incident during a Run or while servicing an AS that will result in a Service Failure, no points will be deducted for the Service Failure if FXG is able to engage another transportation service provider to recover any stranded trailers and dollies in time to prevent the Service Failure.
- (2) Breakdown Recovery Services.** If ATI, at FXG's request, recovers trailers and dollies stranded by another transportation service provider, ATI will be compensated in accordance with this Agreement and awarded 50 points for the successful recovery.

(D) Spare Tractors. When a Spare Tractor (or other unassociated tractor) is used by ATI to perform a Run or Spot and the Spare Tractor has been substituted for an associated tractor under a “Short-Term Lease,” ATI agrees that the points to be deducted for a Preventable Accident, Service Failure or CSA violation in a Spare Tractor will be made from any points credited to the associated tractor ID. If the Spare Tractor has not been substituted under a Short-Term Lease, ATI agrees that the points to be deducted for a Preventable Accident, Service Failure or CSA violation in the Spare Tractor will be deducted from a tractor ID of ATI’s choosing that is associated with an AR, URP or AS. If ATI does not hold an AR, URP or AS under this Agreement, the points will not be deducted. When any tractor is run as an Extra, there will be no point deductions for CSA violations, Service Failures or Preventable Accidents attributable to the tractor.

(E) Points Not Reinstated. ATI acknowledges and agrees that point deductions are permanent and will not be reinstated, unless a CSA citation/violation, Service Failure or accident preventability determination is reversed. ATI understands that a tractor ID may have negative points credited to it.

10.5 Point Totals Posted. FXG agrees to post the accrued points credited to any tractor ID on *MyGroundBizAccount* for viewing by ATI.

11. Losing or Forfeiting Runs and Spots

11.1 Losing an AR for Business Reasons.

ATI acknowledges and agrees that it may, upon notice reasonable under the circumstances, lose an AR if FXG decides to eliminate, relocate or re-designate an AR as set forth in Section 2 above.

11.2 Losing a URP for Business Reasons.

ATI acknowledges and agrees that it may, upon notice reasonable under the circumstances, lose a URP if FXG decides to decrease the number of positions on an Unassigned Run Rotation as set forth in Section 4 above.

11.3 Losing an AS for Business Reasons. ATI acknowledges and agrees that it may, upon notice reasonable under the circumstances, lose an AS if:

- (A) A Customer changes, moves or eliminates an AS as set forth in Section 8 above; or
- (B) FXG, for the operational reasons set forth in Section 8 above, re-designates how an AS is to be serviced.

11.4 Forfeiting an AR or AS for Service Reasons. ATI acknowledges and agrees that it will forfeit a Solo AR, a Team AR or an AS for not maintaining either the “Availability Level” or the “Service Level” standard set forth in this Section 11.4:

- (A) **Availability Level Determination.** ATI agrees to maintain an Availability Level of 95 percent or more for each AR listed on Attachment A-1, or for the ASs associated with each tractor ID on Attachment A-1, during the immediately