Nos. 11-1382 & 11-1492 Consolidated

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ATA AIRLINES, INC.,
Plaintiff-Appellee, Cross-Appellant

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellant, Cross-Appellee

On Appeal from an Order of the United States District Court
For the Southern District of Indiana, Indianapolis Division
No. 1:08-cv-00785-RLY-DML
The Honorable Richard L. Young, Chief Judge

BRIEF OF PLAINTIFF-APPELLEE AND CROSS-APPELLANT ATA AIRLINES, INC.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 11-1382; 11-1492

Short Caption: ATA Airlines, Inc. v. Federal Express Corporation

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

ATA Airlines, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Haynes and Boone, LLP; Hoover Hull LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

The ATA Plan Trust, created in Bankruptcy Case No. 08-03675-BHL-11, owns 100% of the stock of ATA.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Wm. Alan Wright Date: September 2, 2011

Attorney's Printed Name: Wm. Alan Wright

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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STATEMENT OF JURISDICTION

The District Court had diversity subject matter jurisdiction over this action under 28 U.S.C. § 1332(a). The amount in controversy exceeds $75,000 and the action is between citizens of different states. ATA pleaded damages exceeding $75,000, exclusive of interest and costs, in its complaint. (R.1 at 3)[1] ATA is a corporation incorporated under the laws of the State of Indiana and its principal place of business is located in Indiana. (*Id.*; App.Br.8) Defendant-Appellant-Cross-Appellee Federal Express Corporation ("FedEx") is a corporation incorporated under the laws of the State of Delaware and its principal place of business is located in Tennessee. (*Id.*)

The Court of Appeals has jurisdiction over this appeal from a final judgment of the District Court under 28 U.S.C. § 1291. On January 25, 2011, the District Court entered its Amended Final Judgment. (FedEx.App.1-4) On February 16, 2011, FedEx filed a Notice of Appeal. (R.248) On March 2, 2011, ATA filed a Notice of Cross-Appeal. (R.264) This Court consolidated the appeals for briefing and disposition. (7th Cir. 11-1492, Docket No. 2)

[1] "R." represents references to the District Court docket number.

STATEMENT OF ISSUES

A. Issues Presented By FedEx's Appeal

1. Does legally sufficient evidence support the jury's finding that FedEx and ATA had an enforceable contract for long range international passenger business within the FedEx Team for the 3-year period from government fiscal year 2007 through government fiscal year 2009?

2. Since Tennessee contract law requires consideration of the words used, the situation, acts, and the conduct of the parties, as well as the attendant circumstances, does the absence of a price term invalidate the ATA Letter Agreement?

3. Does the Airline Deregulation Act of 1978 bar the application of state law to interpret a contract?

4. Was the ATA Letter Agreement an unenforceable agreement to agree?

5. Does the absence of Omni's signature on the ATA Letter Agreement render it unenforceable?

6. Did the District Court err in submitting the contract formation issue to the jury?

7. Did the District Court abuse its discretion by denying FedEx's motion to exclude the testimony of ATA's damages expert, Lawrence Morriss?

8. Does legally sufficient evidence support the jury's damages awards?

9. Did the District Court abuse its discretion by denying FedEx's motion for remittitur?

10. Does the Airline Deregulation Act of 1978 bar the award of prejudgment interest in this case?

B. Issues Presented By ATA's Conditional Cross-Appeal

11. Did the District Court err in excluding evidence of ATA's DC-10 costs incurred as a result of FedEx's breach of contract?

12. Did the District Court err in granting FedEx's motion for partial judgment on the pleadings and dismissing ATA's promissory estoppel claim?

STATEMENT OF THE CASE

The gravamen of this suit is FedEx's unilateral decision to terminate its 3-year contract with ATA granting ATA 50% of the FedEx Team's international military charter passenger flying for government fiscal years 2007, 2008 and 2009. ATA filed suit against FedEx in June 2008. In addition to its breach of contract claim, ATA asserted breach of fiduciary duty; breach of duty of good faith and fair dealing; equitable estoppel; promissory estoppel; and constructive fraud/fraudulent concealment. (R.1 at 8-17)

FedEx filed two dispositive motions before trial. FedEx first moved for partial judgment on the pleadings, arguing that all of ATA's affirmative claims except for its breach of contract claim were preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1). (R.76-2)[2] The District Court granted FedEx's motion, holding that ATA's non-contract state law claims were preempted by the ADA because (1) ATA's non-contract claims "relate to" the routes and services of air carriers and (2) ATA's non-contract claims sought to enforce state law against FedEx. (ATA.App.1-13)

FedEx also moved for summary judgment on ATA's breach of contract claim. (R.91) The District Court denied FedEx's motion. (R.132)

The case proceeded to trial before a jury in October 2010. The jury found an enforceable contract between FedEx and ATA, breach of the contract by FedEx, and damages to ATA of $65,998,411.00. (FedEx.App.29-31) Following disposition of the

[2] FedEx never pled ADA preemption as a defense to ATA's breach of contract claim. (R.95)

parties' post-verdict motions, the District Court entered its Amended Final Judgment on January 25, 2011. (FedEx.App.1-4)

STATEMENT OF FACTS

A. ATA Airlines – Background And Business.

ATA's well-entrenched military flying was global in its reach and dated back to 1983, predating ATA's participation as a founding member of the FedEx Team in 1991. (ATA.Supp.App.334, 548, 556) The FedEx Team was composed of the same members from FY04 through FY08. (ATA.Supp.App 148-63, 169-73, 335-41, 352-58; FedEx.Supp.App.13-17, 46-57, 92-98) ATA and Omni were the only 2 passenger fliers on the FedEx Team and had never been on any other team. (*Id.*) The FedEx Team performed almost 40% of the military's flying and the dollars involved were huge. The contract awarded to the FedEx Team alone in FY08 was more than $1 billion. (ATA.Supp.App.90, 566, 596) FedEx's Molinari testified that ATA's 50% for FY07-09 was potentially hundreds of millions of dollars. (ATA.Supp.App.619) ATA's lines of business included military and commercial charter, as well as low-fare scheduled service. (ATA.Supp.App 548)

1. ATA's Core Business: The FedEx Team.

In the Fall of 2005, ATA formulated a new business plan and procured new financing and ownership. (ATA.Supp.App.202-03, 342-50, 548-55) MatlinPatterson ("MP"), a multi-billion dollar private equity firm specializing in distressed companies, acquired the controlling interest in ATA and invested more than $280 million. (ATA.Supp.App.561, 627, 642, 655, 673) MP recognized that ATA had a

very profitable business with the FedEx Team and reorganized ATA around that business. (ATA.Supp.App.625-26, 654-56) ATA's long tenure on the FedEx Team, together with the Team's profitability accounted for MP's $280 million investment in ATA and its resolve to continue to invest in it. (ATA.Supp.App.629, 655-56) Indeed, FedEx's Bob Rachor testified that military flying is "profitable by design." (ATA.Supp.App.596) In fact, all of the evidence offered by FedEx, ATA and third parties was unanimous as to the high profitability of military flying. (ATA.Supp.App.2-3, 557-58, 619, 656)

ATA's military flying had been historically profitable and as such was the foundation of ATA's business plan. (*Id.*) ATA focused on its split of business within the FedEx Team, which included the multi-year revenue and fleet planning necessary to fulfill its obligations to FedEx under the 3-year contract. (ATA.Supp.App.559-60)

2. ATA made significant fleet decisions in reliance on FedEx's August 2005 oral commitment later codified in the ATA Letter Agreement.

Relying on FedEx's oral and written commitments, ATA made substantial capital investments to fulfill its contractual obligations to FedEx for FY07-09. Following the execution of the ATA Letter Agreement, ATA expanded its DC-10 fleet by purchasing approximately $25 million of aircraft. (ATA.Supp.App.4, 5-88) ATA also incurred millions of dollars for the commissioning of these DC-10s, the training of pilots and associated personnel, expenses associated with securing the necessary FAA certifications, and other one-time expenses related to the purchase. (ATA.Supp.App.638-41) With the ATA Letter Agreement in hand, ATA purchased

these DC-10s to fly "everything that we were entitled to based on the Agreement with FedEx." (ATA.Supp.App.564) Considering its historical and projected flying volumes as reflected in the military's COINS reports, the FedEx Team share of the military charter business was $1 billion for FY08, and ATA would receive 50% of the passenger flying. This would have translated into approximately $45 million in FY08 profits for ATA. (ATA.Supp.App.632-633) The DC-10 aircraft would not be operational until a required maintenance program was performed, as well as other startup modifications that would be performed in late 2007 and early 2008 during the first part of the ATA Letter Agreement. (ATA.Supp.App.640-41)

B. FedEx's 3-year Contracts With ATA And Omni.

Gary Molinari managed the day-to-day activities and made the rules for the FedEx Team from 1991-2008. He alone was the decision-maker for Team membership and allocating business among the Team members. (ATA.Supp.App.601-02, 604-06) As Team Leader, FedEx earned annual commissions paid by team members averaging $23 million annually during Molinari's tenure. (ATA.Supp.App.603-04)

1. The FY04-06 Agreement.

On January 17, 2003, ATA, FedEx and Omni made a contract allocating the passenger charter business within the FedEx Team between ATA and Omni for FY04-06 (the "FY04-06 Agreement"). (FedEx.Supp.App.2) According to Omni's Pollard, this was "probably the second or third letter agreement of this type after we

had joined the Federal Express Team." (ATA.Supp.App.294) The FY04-06 Agreement stated:

> It is mutually agreed by FedEx (DX), American Trans Air (ATA) and Omni Air International (OAI) that for the AMC contracts for the period of FY'04-FY'06, the distribution of fixed, long term expansion and expansion passenger award shall be sixty-two percent (62%) for ATA and thirty-eight percent (38%) for OAI.

(FedEx.Supp.App.2)

The FY04-06 Agreement governed the terms for splitting the passenger flying between ATA and Omni for any and all business obtained by the FedEx Team on AMC contract awards for those 3 fiscal years. (ATA.Supp.App.607-08) To implement the FY04-06 Agreement, FedEx Team members signed three separate agreements for each fiscal year to correspond with the yearly awards of military flying from the AMC to the FedEx Team. Mr. Doherty, ATA's Director of Military and Governmental Affairs, explained that the three annual form contracts were tied to the government's contracts while the FY04-06 Agreement was internal to the FedEx Team and tied to the administration of the FedEx Team. He testified these are "two different concepts." (ATA.Supp.App.590-91) Doherty testified that the 3-year agreements:

> Gives you some stability that when you're dealing with bankers and other investors, et cetera, it gives you something to show them that shows you are in this agreement for a period of time and you can predict to them and show them the level of compensation or level of revenue that was out there. So you can show them some sort of business plan and what kind of revenue you intend to make from that and that it was a stable business plan.

(ATA.Supp.App.584-85) An additional motivation for ATA to secure a 3-year commitment was that "we wanted to make sure we held onto our position within the Team." (ATA.Supp.App.585)

Omni's Pollard similarly testified about the benefits of "pinning down" its entitlement through the 3-year contract; since Omni was taking on a lot of business risk by making investments in equipment and people, the 3-year entitlement would give Omni "greater visibility, greater ability to plan what our revenue streams are likely to look like." (ATA.Supp.App.296) Pollard testified that FedEx knew the operating carriers needed the stability of a multi-year contract with FedEx for fleet planning purposes, and undertaking "significant commitments for equipment and the like" such as the acquisition of more DC-10s. (ATA.Supp.App.296-97, 609-10)

In recognizing the FY04-06 Agreement despite the absence of a commission rate, Molinari said he expected those carriers "to have sufficient fleet capabilities and operational capabilities to perform that division of business." (ATA.Supp.App.610)

2. The Omni Letter Agreement and the ATA Letter Agreement.

In the Summer of 2005, ATA and Omni each negotiated separately with FedEx for a renewal of the split of passenger flying on the FedEx Team for the next 3 fiscal years, FY07-09. (FedEx.Supp.App.3-5, ATA.Supp.App.586-89) The timing of these discussions was driven by ATA and Omni's need for lead time to purchase and allocate aircraft and budget for related scheduling needs within their respective fleets. (ATA.Supp.App.296-97)

Negotiations concerning the split of the passenger flying between FedEx, ATA and Omni went on for months until August 2005. On August 12, 2005, Molinari wrote Doherty, stating:

> Thanks I appreciate your input, in order to close this issue out and so we can aggressively move forward to expand the team for FY07 and beyond I would propose we go to a 50/50 split. I believe this is probably the most equitable position. . . . I would like to proceed on this basis with a letter agreement for 3 years. Please confirm.

(FedEx.Supp.App.4-5) Upon receiving Molinari's email, Doherty telephoned Molinari and confirmed ATA's acceptance of the "50/50 split" for FY07-09. (ATA.Supp.App.588) On August 18, 2005, Pollard sent a fax to Molinari, writing on the cover page:

> I just returned from vacation to hear **we've agreed on a 50/50 split**. That should be **fair all around**. Enclosed is a short letter agreement modeled after the one I sent you in June. Please review and sign as soon as possible. Call me with any questions.

(FedEx.Supp.App.6-7) (emphasis added) When Pollard stated that the 50/50 split should be "fair all around," he was referring to the split between ATA and Omni, "[t]here[] [being] no other 'all around' in the division of passenger flying at this point in time" than Omni, ATA and FedEx. (ATA.Supp.App.311-12) Pollard's August 18 fax to FedEx included a proposed "short letter agreement" memorializing the agreed 50/50 split between Omni and FedEx (the "Omni Letter Agreement"), which Molinari signed. (FedEx.Supp.App.6-7) Pollard testified that "when [he] wrote the sentence referring to a 50/50 split, that 50/50 split was between Omni and ATA." (ATA.Supp.App.311)

Because Omni prepared the Omni Letter Agreement, it did not include a signature block for ATA. The Omni Letter Agreement recognized that Omni was to receive only 50% of the FedEx Team's passenger revenue for FY07-09 and ATA would receive the other 50%. Doherty testified that Molinari similarly advised him in August 2005 that FedEx would send ATA an agreement memorializing the 3-year 50/50 split. (ATA.Supp.App.588) At no time did Molinari ever tell ATA that FedEx did not feel bound by the ATA Letter Agreement. (ATA.Supp.App.592) The FY07 Fee Agreements, which ATA and Omni separately signed with FedEx, echoed the agreed-upon 50/50 split. (FedEx.Supp.App.13-17; ATA.Supp.App.169-73)

During mid-2006, ATA was engaged in discussions with lenders for financing projects, including financing for additional DC-10s for ATA's military flying. (ATA.Supp.App.562-64) As part of the documentation ATA was to provide to lenders, ATA requested FedEx to provide a letter memorializing the 50/50 split agreement made in August 2005. (ATA.Supp.App.562-63)

Molinari prepared and signed a three-way letter and emailed it to Doherty and Pollard on September 7, 2006 (the "ATA Letter Agreement"). (FedEx.Supp.App.12) The ATA Letter Agreement stated:

> The letter will serve as **the agreement** for the distribution between ATA and Omni of both fixed and expansion for both wide and narrow body passenger business in the AMC Long Range International Contract for FY07-09. **It is agreed** that the distribution for the above passenger segments will be fifty-fifty (50%-50%) respectively for both wide and narrow body and for both fixed and expansion. . . .

FedEx concluded the ATA Letter Agreement by stating: "We are looking forward to a continued successful relationship **over this period**." (*Id.*) (emphasis added)

Molinari's email stated the letter was "formalizing the 50/50 split for the pax [passenger] biz [business]." (FedEx.Supp.App.10) At the time Molinari signed the ATA Letter Agreement, "the split of business that ATA was to receive was a revenue stream of hundreds of millions of dollars potentially." (ATA.Supp.App.619) Molinari believed that ATA was a quality charter operator capable of performing and was, in fact, the best charter operator in the CRAF program. (ATA.Supp.App. 1, 619-21)

Doherty signed the ATA Letter Agreement for ATA, but Omni did not. (FedEx.Supp.App.12) As Pollard explained, he did not sign the ATA Letter Agreement because Omni had already signed the Omni Letter Agreement for the 50/50 split for FY07-09. (ATA.Supp.App.314) Pollard testified that, by not signing it, Omni was not taking the position that it was entitled to more than 50% of the FedEx Team's passenger business for FY07-09. (*Id.*) FedEx's Rachor testified that the ATA Letter Agreement had no language indicating that it was "preliminary" or "not binding" or that it would be replaced by an annual agreement. To the contrary, the ATA Letter Agreement states "this letter will serve as *the agreement*." (FedEx.Supp.App.12 (emphasis added); ATA.Supp.App.599)

Contrary to the testimony from both Omni and ATA recognizing the 50/50 split, FedEx first claimed after this suit was filed that FedEx had no such agreement with ATA, with Molinari citing the absence of Omni's signature on the ATA Letter Agreement as supposedly proving a refusal by Omni to agree to the 50/50 split for FY07-09. However, Molinari testified that the Omni Letter

Agreement was a valid contract between FedEx and Omni, but the ATA Letter Agreement was not valid absent Omni's signature, even though the subject matter of the two documents was the same and, between the two documents, the signatures of all three necessary parties were included. (Fed.Ex.Supp.App.6-7,12; ATA.Supp.App.614-15) Molinari confirmed there was no substantive difference between the terms stated in the 2005 email from him confirming a 3-year agreement, the Omni Letter Agreement, and the ATA Letter Agreement, as each was signed by FedEx and covered the same subject matter. (ATA.Supp.App.614-15)

Doherty testified that Molinari never communicated to him that Omni refused to sign the ATA Letter Agreement or that there was no 3-year agreement for FY07-09. (ATA.Supp.App.592-94) Molinari claimed he told Doherty that "Omni is not agreeable to a 50/50 split for 3 years." (ATA.Supp.App.616) Molinari conceded at trial that there is no letter, email or other Omni document indicating that Omni had a change of heart and was no longer agreeable to the 50/50 split between Omni and ATA as embodied in the Omni Letter Agreement. (FedEx.Supp.App.6-7; ATA.Supp.App.617) Likewise, FedEx produced no documents advising ATA that FedEx did not consider the ATA Letter Agreement valid.

After these 3-year contracts were signed, Omni made a proposal to FedEx about changing the amount of wide body versus narrow body flying that Omni and ATA did while still maintaining the overall 50/50 split. (ATA.Supp.App.89, 316-17) When ATA refused, Molinari told Omni: "I have not been successful in getting ATA to back off the current 50/50 split . . . [ATA] are insistent that they have also made

fleet decisions based on the above split and are not willing to change." (ATA.Supp.App.351)

C. The FY08 Modification To The ATA Letter Agreement Confirmed That Agreement.

FedEx's conduct in negotiating the FY08 Contractor Team Arrangement Fee Agreement confirms FedEx's recognition of the existence of the agreed 3-year 50/50 split by seeking and obtaining ATA's consent to modify the ATA Letter Agreement to allow Northwest Airlines ("Northwest") to fly a small portion of ATA's 50% entitlement.

Northwest, another FedEx Team member, which had not done passenger flying for the Team, told FedEx that it wanted to start doing a small amount of FedEx Team passenger flying in FY08. (ATA.Supp.App.315-16) Thereafter, FedEx negotiated with ATA to allow Northwest to fly "up to 10 flights per month" out of ATA's 50% share of the FY08 business, in exchange for which FedEx reduced the commission that ATA had to pay FedEx from 7% to 4.5%. (FedEx.Supp.App.22, 71 § 5(A)(iv); ATA.Supp.App.567-69) Molinari recalled other occasions where FedEx had changed, modified or amended its contracts with the consent of the parties. (ATA.Supp.App.618)

D. FedEx Terminates ATA From The FedEx Team And Enters Into Another 3-year Contract With Omni In 2008.

In October 2007, Omni approached Molinari to "push for a team without ATA." (ATA.Supp.App.223) FedEx and Omni signed a new 3-year deal excluding ATA, under which Northwest received the Team's remaining share of the passenger

business and nothing was allocated to ATA. (ATA.Supp.App.319-21; FedEx.Supp.App.23) FedEx did not terminate ATA for FY09 until Northwest agreed to fly the remainder of passenger business not being flown by Omni. (ATA.Supp.App.91) In mid-January 2008, FedEx signed up Northwest for FY09. (ATA.Supp.App. 271, 623) FedEx then notified ATA on January 22, 2008 that it would no longer be on the FedEx Team for FY09. (FedEx.Supp.App.1; ATA.Supp.App.570-71) FedEx cited no ATA performance issues or other issues with ATA as a basis for its decision. (FedEx.Supp.App.1)

ATA asked FedEx to reverse its decision and warned FedEx's failure to do so would cause the demise of ATA. (ATA.Supp.App.571-72, 643) New teaming arrangements for FY09 would be announced in early April 2008, leaving ATA about 9 weeks to explore other options. (ATA.Supp.App.643-45) ATA explored all alternatives, including negotiations with the UPS Team, but determined that no available options would generate sufficient cash flow for ATA to remain in business. (ATA.Supp.App.359-70, 575-76, 580-81, 653, 658-59)

FedEx's termination notice put ATA in the position where it could no longer finance its operations or keep mechanics, pilots, and other key personnel from leaving. (ATA.Supp.App.646-52, 657-59, 728) On April 2, 2008, ATA filed for bankruptcy and ceased operations the next day. (FedEx.Supp.App.134)

SUMMARY OF ARGUMENT

For almost twenty years, as a member of the FedEx Team, ATA was one of the largest transporters of U.S. military personnel. In addition to year-by-year contracts, the FedEx Team's operations during the relevant time period were characterized by 3-year letter agreements addressing the distribution of passenger business between ATA and Omni. Within the larger context of the many years of dealings between ATA, FedEx and Omni, ATA's claim brings into focus the FY04-06 Agreement, the Omni Letter Agreement and the ATA Letter Agreement.

The jury heard evidence from FedEx that the FY04-06 Agreement and the Omni Letter Agreement were valid despite the absence of a stated commission rate. The jury also heard and rejected a litany of excuses as to why FedEx belatedly believed the virtually identical ATA Letter Agreement was not. This Court should decline FedEx's invitation to reweigh the evidence supporting the jury's liability verdict. Similarly, the jury's damages award is amply supported by the unrebutted expert testimony of Mr. Morriss, whose opinions were the result of exhaustive analysis based on accepted methodology. There is no reasoned ground for disturbing the damages found by the jury.

Nor is there a reasoned legal basis to reject the verdict and judgment in this case. FedEx's state law contract interpretation arguments, which are narrowly directed only against the ATA Letter Agreement and ignore the evidence showing the entirety of the ATA/FedEx relationship, violate multiple Tennessee rules of contract interpretation. FedEx's ADA preemption arguments fare no better. Its

attempt to escape liability by avoiding altogether Tennessee's contract interpretation rules flies in the face of settled jurisprudence holding that breach of contract claims are not preempted.

The defenses now urged by FedEx against the contract it drafted and signed are not supported by the evidence and were not found credible by the jury. While ostensibly labeling its attacks on the judgment and verdict as questions of law, at the heart of FedEx's complaints are fact and credibility determinations made by the jury. For instance, there were 3 fact witnesses on whether these 3 parties had agreed to a 50/50 split for FY07-09. The objective third party witness, Omni, testified there was. ATA said there was. Only FedEx took issue with the existence of that contract – and that was only *after* this dispute arose. The jury chose to believe the objective third party and ATA, and the plain language of the contract.

In short, the jury did not believe that a sophisticated company like FedEx would repeatedly draft, circulate and sign contracts not worth the paper they were written upon. The evidence establishes: i) the facts of these multiple contracts; ii) the business reasons to make such contracts; and iii) the parties' reliance upon and performance under them. The jury and the District Court rejected FedEx's contentions that the 3-year contracts it repeatedly drafted, signed and performed with ATA were meaningless. This Court should do the same.

ARGUMENT

I. FedEx And ATA Had An Enforceable Contract For Long Range International Passenger Business Within The FedEx Team For FY07-09.

Consideration of the evidence at trial in light of Tennessee's rules of contract construction makes clear that there was a valid contract related to team administration and that FedEx breached it. FedEx argues that ATA did not have a legally enforceable contract for membership on the FedEx Team for government FY09. FedEx misstates ATA's position by arguing that "ATA contends that the September 7 Letter concerning passenger distribution was, in and of itself, a legally enforceable contract for FedEx Team membership." (App.Br.23) FedEx's assertion is at odds with ATA's position throughout this litigation and with applicable law. ATA's position is that the entirety of the multi-year relationship and history of dealings between FedEx, ATA, and other members of the FedEx Team must be considered in determining the existence of a contract and whether the contract was breached.

A. Standard Of Review.

If a contract is plain and unambiguous, its meaning is a question of law, and it is the Court's function to interpret it. *Bratton v. Bratton*, 136 S.W.3d 595, 601 (Tenn. 2004). But where, as here, the exact contractual arrangement is not plainly disclosed by relevant documents, the contractual arrangement must be resolved by the jury. *Id.*; *Garner v. Phil Breeden & Assocs.*, M2002-03103-COA-R3-CV, 2004 WL 1888942, at *3 (Tenn. Ct. App. Aug. 24, 2004).

FedEx challenges the existence of the contract as a matter of law, essentially arguing the District Court erred in denying its Rule 50 motion. Yet FedEx fails to give credence to the proper standard of review. Judgment as a matter of law may only be granted if a reasonable jury would not have a legally sufficient evidentiary basis to find for the party. FED. R. CIV. P. 50. Under Rule 50, both the district court and the appellate court must construe the facts strictly in favor of the party that prevailed at trial. *See Tart v. Illinois Power Co.*, 366 F.3d 461, 464 (7th Cir. 2004). Although the court examines the evidence to determine whether the jury's verdict was based on that evidence, the court does not make credibility determinations or weigh the evidence. *See Waite v. Bd. of Trustees of Illinois Cmty. Coll. Dist. No. 508*, 408 F.3d 339, 343 (7th Cir. 2005). The result is that reversal presents "a difficult standard to meet[,]" and an appellate court must affirm unless "no rational jury could have found for the plaintiff." *Id.*

B. Rules Of Contract Construction Under Tennessee Law.

1. In construing contracts, the intent of the contracting parties at the time of executing the agreement should govern.

FedEx and ATA agree that Tennessee law governs the breach of contract claim. (App.Br.24 n2) Under Tennessee law, "[t]he central tenet of contract construction is that the intent of the contracting parties at the time of executing the agreement should govern." *Planters Gin Co. v. Fed. Compress & Warehouse Co., Inc.*, 78 S.W.3d 885, 890 (Tenn. 2002). The interpretation of an agreement is not dependent on any single provision, but upon the entire body of the contract and the legal effect of it as a whole. *Aetna Cas. & Sur. Co. v. Woods*, 565 S.W.2d 861, 864

(Tenn. 1978). In determining whether parties have mutually assented to the terms of a contract, courts apply an objective standard based upon the parties' manifestations. *Staubach Retail Services-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 524 (Tenn. 2005). A written contract does not have to be signed to be binding. *Tenn. Div., United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 116 (Tenn. Ct. App. 2005). Assent may be established by the parties' course of dealings. *T.R. Mills Contractors, Inc. v. WRH Enters., LLC*, 93 S.W.3d 861, 866 (Tenn. Ct. App. 2002).

2. When a contract is embodied in more than one written instrument, all of the instruments must be read together and construed with reference to each other.

Where, as here, a single transaction is embodied in more than one written instrument, all instruments should be read together and construed with reference to each other. *See McCall v. Towne Square, Inc.*, 503 S.W.2d 180, 182 (Tenn. 1973); *Oman Constr. Co. v. Tennessee Cent. Ry. Co.*, 370 S.W.2d 563, 570-71 (Tenn. 1963). Where two contracts deal with different aspects of the same subject, Tennessee courts have held (notwithstanding the presence of merger clauses in both contracts) that the parties did not intend the earlier agreement to be merged into the later agreement. *Magnolia Group v. Metro. Dev. & Hous. Agency*, 783 S.W.2d 563, 566-67 (Tenn. Ct. App. 1989); *Associated Press v. WGNS, Inc.*, 348 S.W.2d 507, 512 (Tenn. Ct. App. 1961); *The Realty Shop, Inc. v. RR Westminster Holding, Inc.*, 7 S.W.3d 581, 599 (Tenn. Ct. App. 1999); *McCall*, 503 S.W.2d at 182-83; *Stovall v. Dattel*, 619 S.W.2d 125, 127 (Tenn. Ct. App. 1981).

3. The rule of practical construction allows the fact finder to consider the situation of the parties and the accompanying circumstances.

"In applying the appropriate standard of interpretation even to an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into — not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement." *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 334 (Tenn. 1983) (quoting RESTATEMENT OF CONTRACTS, § 235(d) and cmt.).

Under the rule of practical construction, "the interpretation placed upon a contract by the parties thereto, as shown by their acts, will be adopted by the court and that to this end not only the acts but the declarations of the parties may be considered." *Id.* at 335. *See also Vanderbilt*, 174 S.W.3d at 121 ("Parties are far less liable to have been mistaken as to the meaning of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law[.]").

"A contract must be of sufficient explicitness so that a court can perceive what are the respective obligations of the parties." *Doe v. HCA Health Serv. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981) ("The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an

appropriate remedy."). In determining whether or not to construe an instrument as a binding contract,

> [t]he primary test as to the actual character of a contract is the intention of the parties, to be gathered from the whole scope and effect of the language used, and mere verbal formulas, if inconsistent with the real intention, are to be disregarded. It does not matter by what name the parties chose to designate it. But the existence of a contract, the meeting of the minds, the intention to assume an obligation, and the understanding are to be determined in case of doubt not alone from the words used, but also the situation, acts, and the conduct of the parties, and the attendant circumstances.

McMahan v. McMahan, No. E2004-03032-COA-R3-CV, 2005 WL 3287475, at *5 (Tenn. Ct. App. 2005) (quoting 17 AM.JUR.2d *Contracts* § 4 (1991)).

4. The District Court properly instructed the jury on Tennessee law regarding contract formation and interpretation.

The District Court instructed the jury that "A contract may be made up of several different documents if the parties intended that the various documents would be one contract. In addition, a contract may consist of both oral and written promises. The oral terms of the contract may be enforced just as though those terms had appeared in a written agreement." (ATA.Supp.App.396) This instruction correctly states Tennessee law and FedEx does not challenge the submission on appeal.[3]

The District Court also instructed the jury that "When a party's bargain is sufficiently definite to be a contract, but they have not agreed with respect to a term that is necessary to a determination of their rights and duties, a term which is

[3] FedEx conceded during the charge conference that Instruction 21 "does accurately reflect Tennessee law" and challenged only the existence of evidence of oral promises. (ATA.Supp.App.730) FedEx's objection was overruled and FedEx has abandoned this argument on appeal.

reasonable may be supplied by the court." (ATA.Supp.App.400) This instruction also correctly states applicable Tennessee law. FedEx's sole objection to this instruction was that resorting to state law to interpret a contract is "improper under the Airline Deregulation Act." (ATA.Supp.App.730-31) FedEx did not object that there was insufficient evidence to support implication of a commission rate. (*Id.*)

C. The Absence Of A Price Term Does Not Invalidate The ATA Letter Agreement.

Tennessee law holds that the absence of a price term does not invalidate a contract. There was ample evidence to support the District Court's contract submission and the jury's findings. Asserting that the absence of a commission rate in the ATA Letter Agreement is fatal to ATA's breach of contract claim; FedEx construes the contract too narrowly. Rather than considering the "words used, . . . the situation, acts, and the conduct of the parties, and the attendant circumstances[,]" FedEx wrongly focuses on the language of the ATA Letter Agreement in isolation. *McMahan*, 2005 WL 3287475, at *5.

The Restatement (Second) of Contracts provides that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." RESTATEMENT (SECOND) OF CONTRACTS § 204. Numerous Tennessee cases have held the absence of an essential term in a contract does not invalidate the contract, and that a missing contract term should be supplied by factual implication. *In Greene v. Leeper*, the court held a contract clause providing a right to renew "at a rental to be agreed on

according to business conditions at that time" was valid and enforceable. 245 S.W.2d 181 (Tenn. 1951).

Similarly, in *Gurley v. King*, the appellate court reversed the trial court's determination that a letter agreement stating the "details of the agreement will be worked out later but will basically follow the same arrangement currently in place" was too indefinite and uncertain to be enforced. 183 S.W.3d 30, 32 (Tenn. Ct. App. 2005). The opinion noted that "[d]estruction of contracts because of uncertainty has never been favored by the law[,]" and that "[p]art performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed." *Id.* at 34, 41.

Consistent with this guidance, the court in *German v. Ford* held that "[w]hen the parties' bargain is sufficiently definite to be a contract, but they have not agreed with respect to a term that is necessary to a determination of their rights and duties, a term which is reasonable may be supplied by the court." 300 S.W.3d 692, 706 (Tenn. Ct. App. 2009). The court concluded the agreement was sufficiently definite "even absent an express term requiring Dyer Investment to furnish Lents the basic information necessary to enable Lents to perform." *Id.* at 708.

Tennessee cases have applied this rule of construction to hold that a reasonable price may be implied where a price or cost term is missing. *See Minor v. Minor*, 863 S.W.2d 51, 55 (Tenn. Ct. App. 1993); *McClain v. Kimbrough Constr. Co.*, 806 S.W.2d 194, 198 (Tenn. Ct. App. 1990); *Pylant v. Spivey*, 174 S.W.3d 143, 155

(Tenn. Ct. App. 2003); *Pinson & Assoc. Ins. Agency v. Kreal*, 800 S.W.2d 486, 487 (Tenn. Ct. App. 1990).

In *Doe,* the Tennessee Supreme Court addressed omitted or indefinite contract terms. Although the Court held that the price term of the contract at issue, which stated that the plaintiff would pay unspecified "charges," was too indefinite to be enforced, the Court stated:

> Certainty with respect to promises does not have to be apparent from the promise itself, so long as the promise contains a reference to some document, transaction or other extrinsic facts from which its meaning may be made clear.

46 S.W.3d at 196. The Court made clear that "the Court's holding in this case does not invalidate all contracts that do not state a specific price; to the contrary, our holding is based upon the particular facts of this case." *Id.* at 197.

The evidence shows that the ATA Letter Agreement established the FedEx Team's passenger distribution over a 3-year period, and FedEx never took the position before suit was filed that its 3-year agreements were incomplete or lacked material terms. The absence of a commission rate in these agreements does not invalidate them any more than the absence of a commission rate in (1) the Contractor Team Arrangement Agreement or (2) the Contractor Team Arrangement Operating Agreement would invalidate those agreements. (FedEx.Supp.App.135-37) All of the written and oral contract terms and documents must be construed together to determine the terms of the overall relationship between the parties.

FedEx fails to note the undisputed evidence showing that the Fee Agreements between FedEx and ATA covering FY04, FY05, FY06, and FY07 all reflect a 7% commission payable by ATA to FedEx:

Historical Commission Rates

FY04	7%	ATA.Supp.App.148-52
FY05	7%	ATA.Supp.App.153-57
FY06	7%	ATA.Supp.App.153-63
FY07	7%	FedEx.Supp.App.13-17
FY08	4.5%	ATA.Supp.App.164-68
FY09	4.0% (Omni)	ATA.Supp.App.174-78

This evidence, which was before the jury, provides a practical method for determination of a commission rate for FY09. This Court should not be persuaded by FedEx's second-guessing.

D. The Airline Deregulation Act Does Not Bar The Application of State Law To Interpret A Contract.

FedEx argues that the Airline Deregulation Act of 1978 preempts the application of state law to contract interpretation questions. FedEx misreads *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), and conflates preemption with contract interpretation. The District Court correctly concluded the ADA does not preempt Tennessee law for ascertaining contracting parties' intent.

1. FedEx failed to plead ADA preemption as a defense to breach of contract.

This argument is not properly before the Court because FedEx did not plead preemption as a defense to ATA's breach of contract claim. FedEx sought leave to

amend to plead preemption for all causes of action *but breach of contract*. (R.95 at 6) Even though the District Court's summary judgment order cited Tennessee law on supplying reasonable terms, FedEx never moved to assert preemption as a defense to breach of contract, first raising the claim in objections to the jury charge. (R.132, R.172). Preemption is an affirmative defense that may be waived if not pled. *Russian Media Group, LLC v. Cable Am., Inc*, 598 F.3d 302, 309 (7th Cir. 2010). Because the District Court could have held that FedEx's failure to raise the issue prior to the close of evidence prejudiced ATA or was intentional, the ruling may be upheld on the basis of waiver. *Id.*; *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 336 (3rd Cir. 2009) (holding express preemption defense waived because it was raised only as to other claims).

2. The ADA preemption clause does not apply to breach of contract claims.

With regard to the merits of FedEx's preemption argument, it is important to note that the Supreme Court and this Court have held that the preemption clause does not apply to breach of contract claims. "We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Wolens*, 513 U.S. at 228. As explained in *Wolens*:

> Nor is it plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services. The ADA contains no hint of such a role for the federal courts. . . . The ADA's preemption clause, § 1305(a)(1) [now codified at 49 U.S.C. § 41713(b)(1)], read together with the FAA's saving clause [now codified at 49 U.S.C. § 40120(c)], *stops States from*

> *imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated*. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

Wolens, 513 U.S. at 232-33 (emphasis added).

In *Travel All Over the World, Inc. v. Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996), this Court reversed the district court's dismissal of a breach of contract claim, stating:

> *Wolens* compels us to conclude that the plaintiffs' breach of contract claim is not preempted by § 1305(a)(1). The plaintiffs claim that Saudia breached its agreement with Travel All to honor the confirmed reservations of Travel All's clients. Thus, as in *Wolens*, the plaintiffs here are not alleging a violation of state-imposed obligations, but rather are contending that the airline breached a self-imposed undertaking. *The terms and conditions in the contract between Travel All and Saudia are "privately ordered obligations" and therefore "do not amount to a State's enactment or enforcement of any law."*

73 F.3d at 1432 (emphasis supplied). *See also id.* at 1431 (noting that, in *Wolens*, "the Court held that a state does not 'enact or enforce any law' by enforcing private agreements"); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000) ("Doubtless the institution of contract depends on truthfulness; the staunchest defenders of private institutions and limited government believe that public bodies must enforce rules against force and fraud. *When all a state does is use these rules to determine whether agreement was reached, or whether instead one party acted under duress, it transgresses no federal rule.*") (emphasis added); *Lyn-Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 290 (5th Cir. 2002) (holding

that core concepts of contract law that "relate[] to the validity of mutual assent" are not preempted by the ADA).

Other courts have held that, once a breach of contract action is determined to be not preempted, the ADA does not prevent a court from applying state law rules of construction and contract interpretation. In *Power Travel Int'l v. American Airlines*, 257 F. Supp. 2d 701, 707 (S.D.N.Y. 2003), the district court rejected the airline's argument that a claim for breach of contract was preempted by the ADA because interpretation of the contract required the court to imply a commission rate. The court went on to note that "canons of interpretation are essential to making sense of contracts and understanding what the parties intended in their agreement." *Id.*

In *Wells v. Chevy Chase Bank*, Maryland's highest court rejected a preemption argument in a breach of contract action:

> [I]mplicit in the [party's] *Wolens* argument is the notion that, in contracts where preemption is an issue, even though federal law may exempt contracts from preemption, all of the terms of the parties' contract must be set forth in the contract, none of the principal provisions may be supplied by reference . . . . Not only does such a distinction make absolutely no sense, it *fails to distinguish between the preemption issue and the contract interpretation issue*. The latter is . . . a question of state law. . . .

832 A.2d 812, 831 (Md. 2003), *cert. denied*, 541 U.S. 983 (2004) (emphasis added). The court held the breach of contract claim was not preempted and remanded with instructions that the lower court apply Maryland canons of contract construction to determine the agreement's meaning, the parties' intent in drafting it, and the scope and extent of the parties' obligations and rights. *Id.* at 833.

As demonstrated by *Travel All*, *United*, *Power Travel,* and *Wells*, ATA's breach of contract claim is not preempted merely because a missing term may be supplied on the basis of the parties' intent. FedEx's argument would prevent a court from applying state law rules of construction and contract interpretation to a breach of contract action that is expressly permitted under *Wolens*.

Even if the ADA precluded implication of a reasonable term, FedEx did not object to evidence admitted at trial concerning the commission rates ATA and FedEx historically agreed to. Nor did FedEx object to Instruction 26, which states that "[i]ntent to assume an obligation may be determined not only by the words used, but also by the situation, acts, conduct of the parties, and attendant circumstances." (ATA.Supp.App.401) The jury could find—without resort to Tennessee law on implication of terms—that the course of conduct between FedEx and ATA established a particular commission rate. Therefore, FedEx cannot demonstrate error.

E. The ATA Letter Agreement Is Not An Unenforceable "Agreement To Agree."

Whether an agreement is an unenforceable agreement to agree raises a number of fact questions, all of which were submitted to the jury and determined in ATA's favor. As noted in *Gurley v. King*:

> Destruction of contracts because of uncertainty has never been favored by the law, and with the passage of time, such disfavor has only intensified. . . . The determination that an agreement is sufficiently definite is favored. Therefore, the courts will, if possible so construe the agreement as to carry into effect the reasonable intention of the parties, if that can be ascertained.

183 S.W.3d at 34.

For the reasons explained previously, the absence of a commission rate in the ATA Letter Agreement is not dispositive because: (1) properly construed, the agreement between ATA and FedEx consists of multiple writings and oral agreements and (2) under applicable law a reasonable commission rate may be supplied by factual implication. Similarly, the fact that the commission term was subject to annual confirmation or modification is not dispositive because it is undisputed that FedEx performed under prior agreements without express commission rates without challenging their validity. (*i.e.*, the FY04-06 Agreement and Omni Letter Agreement) (ATA.Supp.App.597-98, 607-13)

Finally, the issue of whether the parties expected to later enter into a final, integrated agreement is also not dispositive. *See Gurley*, 183 S.W.3d at 34 ("The fact that the parties omitted certain provisions that are commonly included may indicate an intention to be bound without them and the gaps may be provided for in the decree. . . . Apparent difficulties of enforcement that arise out of uncertainties in expression often disappear in the light of courageous common sense and *reasonable implications of fact*."); RESTATEMENT OF CONTRACTS § 33, comment a ("Terms may be supplied by factual implication, and *in recurring situations* the law often supplies a term in the absence of agreement to the contrary.") (emphasis added). It is undisputed that the commission rate paid by ATA to FedEx had been a consistent 7% for FY04-07. It was only lowered from 7% to 4.5% in return for ATA's giving some of its 50% entitlement to Northwest for FY08. The reduction in ATA's

entitlement in return for an offsetting reduction in commission rate could reasonably—in the light most favorable to the judgment—be interpreted by the jury to demonstrate that FedEx modified its existing enforceable contract with ATA. Consistent with this interpretation, the evidence showed that FedEx had modified existing agreements on several prior occasions. (ATA.Supp.App.618)

FedEx relies on inapposite Tennessee cases. Neither addressed a situation where oral agreements or course of dealing or performance could supply terms of the contract. Both are further distinguished because they involved single transaction real estate agreements with *express language* reserving the terms of the sale or lease for future negotiation. *Four Eights, LLC v. Salem*, 194 S.W.3d 484, 486-88 (Tenn. Ct. App. 2005) (holding option contract unenforceable because contract expressly reserved "fair market value" price term for future determination by the parties "negotiating in good faith", but noting the court could have used "common usage" to determine fair market value if parties had not expressly reserved the term for future determination); *Engenius Entm't v. Herenton*, 971 S.W.2d 12, 17-18 (Tenn. Ct. App. 1997). Because this case involves agreements whose meaning and interpretation were informed by the parties' course of dealing and performance, it was not error for the District Court to deny summary judgment and submit the contract claim to the jury.

F. The Evidence Showed, And The Jury Correctly Found, That FedEx Considered The ATA Letter Agreement To Be An Enforceable 3-year Contract, As FedEx Frequently Entered Into 3-year Letter Agreements With ATA And Other Parties.

FedEx's emphasis on evidence adverse to the jury finding is misplaced under the appropriate standard of review. *See Waite*, 408 F.3d at 343. By citing exclusively evidence favorable to its position, FedEx seeks to have this Court reweigh the evidence regarding the intention of the parties, an issue properly decided by the jury.

FedEx argues that the ATA Letter Agreement is unenforceable because (1) Omni did not sign it and (2) the absence of Omni's signature caused FedEx to "not view or treat this agreement as binding absent a fully-executed writing." (App.Br.41)

Curiously, FedEx concedes that under Tennessee law, a written contract does not have to be signed to be binding. (App.Br.41) Further, the evidence at trial allowed the jury to determine that FedEx considered the ATA Letter Agreement binding despite the absence of Omni's signature. Indeed, Pollard testified that Omni did not sign the ATA Letter Agreement because Omni had already signed a letter agreement with FedEx covering the same subject matter and memorializing the agreed 50/50 split, and did not dispute the agreement that was for ATA to receive the other 50%. (FedEx.Supp.App.6-7; ATA.Supp.App.314)

FedEx's argument that the ATA Letter Agreement is not binding because FedEx and ATA negotiated a reduced percentage of flying for ATA for FY08 is similarly defective. Northwest advised FedEx that it wanted to start doing some

passenger flying for the FedEx Team. In recognition of the fact that ATA was entitled to 50% of the passenger flying for FY08, FedEx went to ATA and negotiated that ATA give a portion of its 50% share to Northwest in exchange for FedEx lowering the commission rate that ATA had to pay FedEx from 7% to 4.5%. The fact that ATA and FedEx modified their 3-year agreement in September 2007 to satisfy Northwest's desire to do some passenger flying does not establish the absence of the 3-year agreement between ATA and FedEx. In fact, the jury reasonably could have inferred the opposite. If ATA had no right to 50% of the flying, FedEx would not have needed to negotiate with ATA and cut ATA's commission rate almost in half. This modification merely altered[4] the terms of the ATA Letter Agreement , leaving its general purpose and effect undisturbed.

II. The District Court Correctly Submitted The Contract Formation Issue To The Jury.

FedEx takes the untenable position that issues of contract formation should never be submitted to a jury under Tennessee law. This position rests upon FedEx's erroneous insistence that the "core question" in this case is whether the ATA Letter Agreement is "itself a legally enforceable contract that bound ATA to the FedEx Team for FY'09." (App.Br.44)

It is telling that FedEx did not timely raise this issue in the District Court. FedEx did not object to the submission of Question 1 in the Verdict Form (FedEx.App.29) or the accompanying Instructions (ATA.Supp.App.394-405) on the

[4] Where a contract is modified, the original contract remains in effect to the extent not altered by the modification agreement. *Arcata Graphics Co. v. Heidelberg Harris, Inc.*, 874 S.W.2d 15, 24 (Tenn. Ct. App. 1993).

basis that the question of contract formation was a question of law. (ATA.Supp.App.730-733) Nor did FedEx object to ATA's proposed jury question or instructions on contract formation on this ground. (*Id.*; R.172) Indeed, FedEx proposed its own jury questions and instructions on contract formation. (R.159; ATA.Supp.App.732 ("[W]e believe that the proper interrogatory is the one proposed by FedEx and submitted on October 1 that simply states that, 'Has ATA proven that it had an enforceable contract for FY09 team membership?'")) Thus, FedEx invited submission of contract formation to the jury and has waived any complaint regarding submission. *United States v. Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988). Even if FedEx had not precluded review entirely by inviting submission, failure to object to the submission would limit review to the plain error standard. *Lewis v. City of Chicago Police Dep't*, 590 F.3d 427, 433 (7th Cir. 2009) (citing FED. R. CIV. P. 51(d)(2)).

In any event, Tennessee law does not support FedEx's position. Numerous Tennessee decisions have confirmed the propriety of submitting contract formation to a jury. *Gurley,* 183 S.W.3d at 46-47 (summary judgment precluded regarding existence of contract because the "trier of fact, not the trier of law, must determine" material questions of fact relating to contract's existence); *Tip's Package Store, Inc. v. Commercial Ins. Managing Inc.*, 86 S.W.3d 543, 549, 560 (Tenn. 2001); *Davidson v. Holtzman*, 47 S.W.3d 445 (Tenn. App. 2000); *Ball v. Overton Square, Inc.*, 731 S.W.2d 536, 538 (Tenn. Ct. App. 1987); *Lativafter Liquidating v. Clear Channel*, 345

Fed.Appx. 46, 49-50 (6th Cir. 2009); *Sparton Tech., Inc. v. Util-Link, LLC*, 248 Fed.App'x. 684, 690-91 (6th Cir. 2007).

III. The District Court Did Not Abuse Its Discretion By Denying FedEx's Motion To Exclude The Testimony Of Morriss.

A. Standard Of Review.

FedEx does not assert that the District Court failed to apply the legal framework of *Daubert.* As a result, the District Court's decision to admit Morriss' expert testimony is reviewed under an abuse of discretion standard. *Trs. of the Chi. Painters & Decorators Pension v. Royal Int'l Drywall & Decorating*, 493 F.3d 782, 787-88 (7th Cir. 2007) (reviewing for abuse of discretion after determining that court had applied the *Daubert* framework) (App.Br.47) Under this standard, the district court's determination will only be reversed if it is "manifestly erroneous." *Banister v. Burton*, 636 F.3d 828, 831 (7th Cir. 2011).

B. The Use of Regression Analysis Has Been Recognized As Proper By This Court And Many Other Federal Courts.

FedEx argues that Morriss' use of simple regression analysis departed from recognized standards because it allegedly failed to consider "potentially important explanatory variables." (App.Br.47-48) Applicable case law does not support FedEx's attack on simple, or Ordinary Least Squares (OLS) regression analysis.

This Court has found regression analysis to be a common and reliable source of information. *Zenith Elec. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 418-19 (7th Cir. 2005). In fact, "regression analysis is common enough in litigation to earn

extended treatment in the Federal Judicial Center's *Reference Manual on Scientific Evidence*." *Id.* at 419.

Although the court's gatekeeping role requires it to exclude analyses which are misleading because they fail to account for plausible alternative explanations of the examined issue, an expert need not account for every possible variable which could affect profits. *See Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 794 (6th Cir. 2002). It was within the province of the jury to decide whether Morriss' failure to account for any variables made his testimony less credible. *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1242 (7th Cir. 1982) (failure to consider factors identified by opposing side's expert did not make testimony inadmissible).

In *Bazemore v. Friday*, Justice Brennan's concurring opinion, joined by all other members of the Court, stated:

> *While the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be*, it can hardly be said, absent some other infirmity, that an analysis which accounts for major factors "must be considered unacceptable as evidence of discrimination." *Normally, failure to include variables will affect the analysis' probativeness, not its admissibility.*

478 U.S. 385, 400 (1986) (Brennan, J., concurring) (emphasis added). Since *Bazemore*, a number of courts have reinforced the principle that the omission of variables from a regression analysis may affect the evidence's probative value, but not its admissibility. *See Rudebusch v. Hughes,* 313 F.3d 506, 516 (9th Cir. 2002); *In re Sulphuric Acid Antitrust Litig.*, 446 F. Supp. 2d 910, 923 (N.D. Ill. 2006). Of particular interest is *Smith v. Virginia Commonwealth Univ.,* which held that

disputes over excluded variables in multiple regression analysis were questions of material fact that precluded summary judgment. 84 F.3d 672, 676-77 (4th Cir. 1996). Even a partial or unsteady regression analysis is to be addressed not by exclusion but through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction" as "the traditional and appropriate means of attacking shaky but admissible evidence." *Conwood Co., L.P.*, 290 F.3d at 794.

In denying FedEx's motion to exclude Morriss' expert testimony, the District Court noted that simple regression analysis is an accepted methodology, that Morriss appeared to have applied it, and that FedEx's objections to Morriss' methodology and testimony were "all subject to vigorous cross-examination" at trial. (ATA.Supp.App.Tr. of Final Pretrial Conference (ATA.Supp.App.544-45) FedEx's counsel agreed with the District Court: "Again, it's not junk science. Regression analysis is an accepted form of doing things, whether it's simple is [sic] better than multiple I guess is up for debate." (ATA.Supp.App.543) The District Court did not abuse its discretion in so admitting Morriss' testimony.

Though FedEx argues Morriss' use of simple regression analysis improperly ignored "potentially important" explanatory variables, it fails to inform the Court of what these "potentially important" variables might be, or what difference they could have made in this case. Nor did FedEx offer a competing regression model during trial.[5] Errors in the admission of evidence "will be deemed to be harmless unless they had a 'substantial and injurious effect or influence on the jury's verdict.'"

[5] FedEx's counsel conceded as much at the final pretrial conference: "[W]e're not offering a competing analysis with Morriss." (ATA.Supp.App.542) In fact, FedEx chose not to present a competent expert on regression analysis at trial. (ATA.Supp.App.727)

Datamatic Servs., Inc. v. United States, 909 F.2d 1029, 1033 (7th Cir. 1990). FedEx's failure to identify the alleged missing variables or to make any effort to show how the jury's verdict was injuriously affected by the admission of the challenged testimony renders the District Court's ruling admitting the evidence at worst harmless error.

As shown by the record, the District Court's ruling admitting Morriss' expert testimony was not error. Morriss explained in detail in his expert report and his trial testimony that the tests he performed and the factual analysis he undertook to determine that simple regression analysis was the best way to determine ATA's Military Charter costs.

C. Morriss' Model Was Properly Specified.

Morriss' report and testimony addressed at length the numerous objective tests he performed on his regression model to determine the statistical validity of the results of his regression analysis. (ATA.Supp.App.490-91, 538)

The generally accepted tests utilized by Morriss indicated that his regression analysis conformed to all of the embedded regression assumptions and passed all of the regression significance tests. As such, Morriss' regression-based costs estimate of $253,843,094 met all generally accepted regression methods, standards and processes, resulting in a statistically valid projection of ATA's military costs during the relevant period. The record disproves FedEx's argument that Morriss failed to properly specify his model.

FedEx cites to the report of its expert, Dr. Adams, who promoted the Ramsey RESET test for specification error. The jury heard nothing from Dr. Adams, as FedEx did not call him to testify at trial. Morriss showed that disagreement exists among academic economists as to whether the Ramsey RESET test measures what Adams insisted it measures. (ATA.Supp.App.510-534) In any case, an arcane academic disagreement over the utility of the Ramsey RESET test to measure statistical certainty[6] provides no basis for the exclusion of Morriss' testimony or vacatur of the lost profits award as requested by FedEx. The District Court did not abuse its discretion in refusing to exclude Morriss' expert testimony.

IV. Undisputed Competent Evidence Supports The Jury's Damages Award.

A. Standard Of Review.

A district court's decision not to grant a new trial or remittitur on the grounds of excessive damages is reviewed for an abuse of discretion. *Houskins v. Sheahan*, 549 F.3d 480, 496 (7th Cir. 2008). Recent Seventh Circuit diversity cases hold where damages are based on state law, "[t]he question whether the jury's damages award was excessive is controlled by [state] law." *Smart Mktg. Group, Inc. v. Publ'ns Int'l Ltd.*, 624 F.3d 824, 832 (7th Cir. 2010); *Naeem v. McKesson Drug Co.*, 444 F.3d 593, 611-12 (7th Cir. 2006) (affirming district court's denial of new

[6] Adams asserted the RESET test suggested misspecification only "at the highest conventional level of statistical confidence, the 99% level." (FedEx.Supp.App.147) Adams did not justify his chosen confidence level with any reference to the facts of this case. As an expert could always do, he merely selected a sufficiently high confidence level to indicate misspecification *because* it indicated misspecification. But this Circuit has rejected bright line tests regarding statistical certainty because they, like Adams' opinion, are arbitrary when not connected to the underlying facts of the case. *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362-63 (7th Cir. 2001).

trial and remittitur because award did not violate Illinois' "shocks the conscience" test for excessiveness).[7]

Under Tennessee law, appellate review of excessiveness is limited. If an appellant asserts an award is excessive, a Tennessee appellate court "must affirm" the award "[i]f there is any material evidence to support the award of damages." *Davidson v. Lindsey*, 104 S.W.3d 483, 493-94 (Tenn. 2003); *see also Miller v. Williams*, 970 S.W.2d 497, 498-99 (Tenn. Ct. App. 1998); TENN. CODE § 20-10-102.

B. Measure Of Lost Profits Under Tennessee Law.

Tennessee law allows for the recovery of lost profits when the "nature and occurrence" of lost profits is provable with "reasonable certainty." *Waggoner Motors, Inc. v. Waverly Church of Christ*, 159 S.W.3d 42, 58 (Tenn. Ct. App. 2004). Once the existence of lost profits is reasonably certain, proof of the amount of damages may be less certain and "must be to some degree the result of estimation." *See id.*; *Ford Motor Co. v. Taylor*, 446 S.W.2d 521, 530 (Tenn. 1969). The evidence to support an award for lost profits need only provide a reasonable or rational basis for calculating what the lost profits would have been. *Waggoner*, 159 S.W.3d at 58. This reduced standard of proof for calculation of damages rests on the policy determination that, while it is desirable to have definite proof of damages, "it is even more desirable

[7] Some prior Circuit cases held that a court sitting in diversity applies federal standards to a motion for new trial, including determining "whether a jury verdict is excessive." *Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc.*, 356 F.3d 731, 739 (7th Cir. 2004). Under the federal standard, a court generally considers: (1) whether the award is "monstrously excessive"; (2) whether there is no rational connection between the award and the evidence; and (3) whether the award is roughly comparable to awards made in similar cases. *Kapelanski v. Johnson*, 390 F.3d 525, 532 (7th Cir. 2004).

that an injured party not be deprived of compensation merely because it cannot prove the extent of the harm suffered with complete certainty." *Id.*[8]

Tennessee requires that a damage model establish lost profits as the "probable income" that would have been earned but for the breach minus the "expenses [the plaintiff] would have incurred to produce that income." *Id.* Tennessee law follows the majority rule and holds that fixed costs, including overhead and other ownership expenses, are not subtracted from revenue except to the extent they are avoided as a result of the breach. *Id.* at 59 n.31. Where a defendant asserts a plaintiff mitigated (or failed to mitigate) lost profits damages, Tennessee places the burden of establishing the fact of mitigation on the defendant. *State ex rel. Chapdelaine v. Torrence*, 532 S.W.2d 542, 550 (Tenn. 1975)); *Fen Hin Chon Enters. Ltd. v. Porelon Inc*,. 874 F.2d 1107, 1116 (6th Cir. 1989). Thus, where a defendant argues a plaintiff could have acted to offset lost profits, the defendant is only entitled to the offset if the defendant proves the existence and amount of the offset. *Porelon*, 874 F.2d at 1116.

Tennessee law supports calculation of lost profits based on forecasted profits of the unit or division of plaintiff's business related to the contract. *Id.* at 1111-12 (allowing plaintiff to recover lost profits measured by the profit margin of a

[8] *See also Ellis v. Pauline S. Sprouse Residuary Trust*, 304 S.W.3d 333, 339 (Tenn. Ct. App. 2009) (affirming lay net income testimony of a farmer even though there was uncertainty in the amount of damages because "[t]he Landlord had a hand in creating any uncertainty in the amount of damages by preventing the Farmer from continuing and should not be placed at an advantage because of that uncertainty"); *Brandenburg v. Hayes*, No. E2009-00405-COA-R3-CV, 2010 WL 2787854 at *6 (Tenn. Ct. App. Feb. 2, 2010) (holding that "exactness of computation" was not required when calculating lost profits, because requiring a higher standard of proof resulted in courts "powerless to help some wronged parties").

profitable business unit, where the contract was related to that unit). Similarly, lost profits attributable to profitable contracts or transactions should not be reduced because the plaintiff's overall business enterprise is not profitable or has demonstrated recent losses. *Waggoner*, 159 S.W.3d at 60 (holding that denial of lost profits based on the plaintiff's short-term lack of profitability would have the "egregious" effect of awarding or denying profits for identical injuries based purely on the timing of defendant's act).

C. Morriss' Lost Profits Calculation.

ATA's damages expert Larry Morriss substantiated his lost profits analysis with a comprehensive study of the military charter industry and a comparison of ATA's profitability to other industry competitors. Morriss looked at a variety of statistical and financial source materials from the military (*e.g.* COINS Reports) and ATA's flight profitability system (FPS) reports which allowed him to discern trends and compare ATA to other airlines. (ATA.Supp.App.92-147, 665-70, 679-82) This helped Morriss thoroughly understand the relationship between cost and revenues in ATA's military charter business. (*Id.*; ATA.Supp.App. 334, 671-72) Morriss' study demonstrated that the military charter business was financially attractive and historically profitable because costs were reimbursed by the military. (ATA.Supp.App.628-30, 632-37, 664-70)

Consistent with Tennessee law, Morriss chose as his damage model an analysis of lost profits suffered by ATA's military charter operation as a consequence of FedEx's decision to terminate the FY07-09 contract related to that

operation. (ATA.Supp.App.682-86); *Porelon,* 874 F.2d at 1111-12 (allowing plaintiff to recover lost profits of a profitable business unit where the breached contract related to that unit). Morriss determined that the appropriate loss period ran from April 3, 2008 (the date ATA shut down its business) through September 30, 2009 (the end date for the ATA Letter Agreement).[9] (ATA.Supp.App.687-91) Morriss calculated projected lost profits for FY08 (the last year that could be used as a proxy for the revenues) and then applied the resulting annual rate of profits to the loss period.

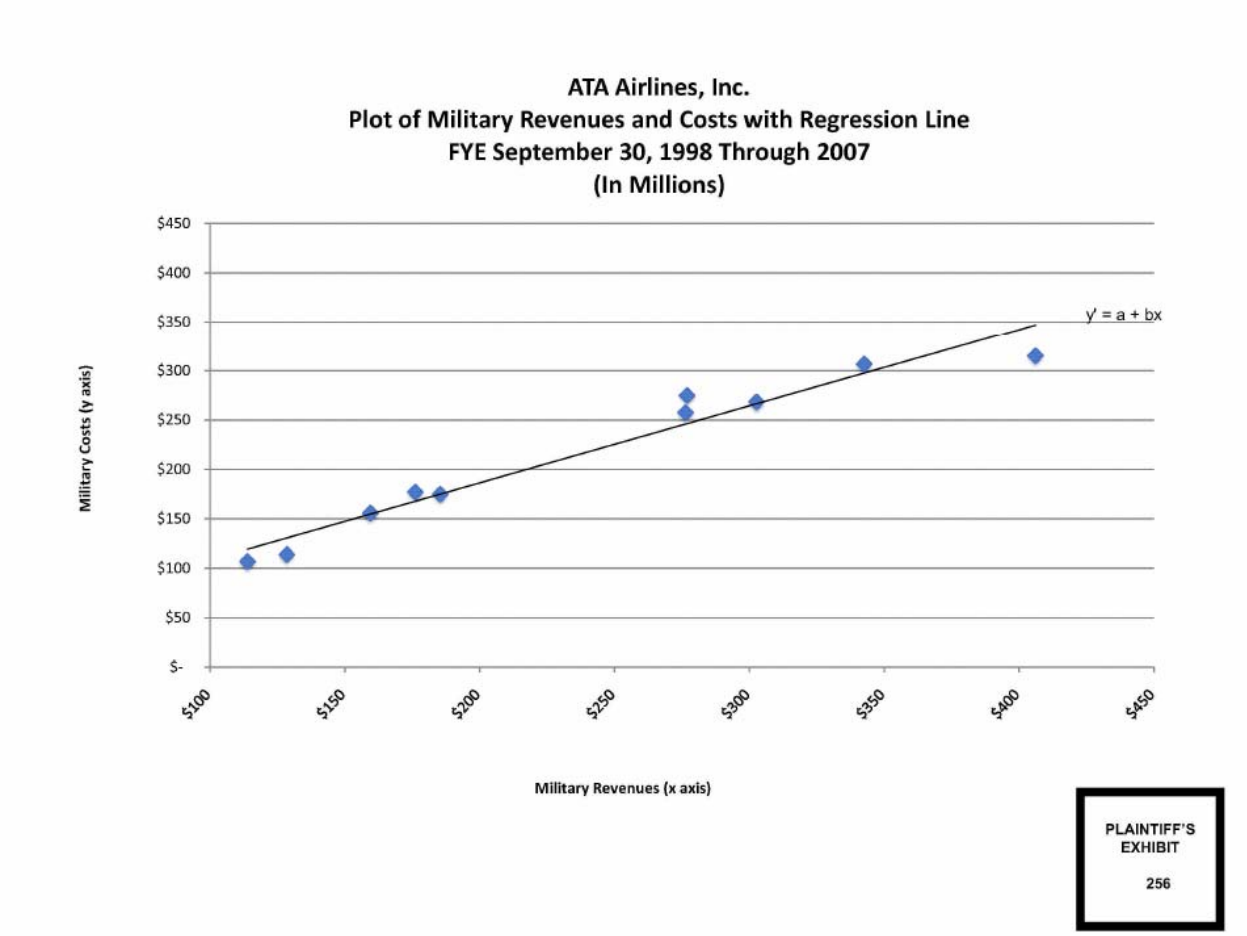
To calculate lost revenue for FY08, Morriss analyzed ATA's historical share of the FedEx Team revenue. Morriss determined that ATA's actual share of the FedEx Team revenue had historically been slightly below the contracted-for percentage. (ATA.Supp.App.485, 693) Morriss determined that ATA could expect to receive 47.6% of the FedEx Team passenger revenue under the FY07-09 contract. Morriss took the actual revenue for the FedEx Team for FY08, $601.8 million, and multiplied by 47.6% to establish ATA's expected $286.5 million share of the team revenue but for FedEx's termination of ATA. (ATA.Supp.App.693-95)[10]

To calculate expenses for FY08, Morriss looked to ATA's historic revenues and costs, which showed a linear relationship between them. (ATA.Supp.App.661-

[9] The evidence at trial was clear that, due to FedEx's wrongful conduct, ATA had to shut down on April 3, 2008 because it could not hold pilots, flight attendants, maintenance, etc., after the April 2008 disclosure that ATA was not going to continue on the FedEx Team for FY09. (ATA.Supp.App.573-75, 577-82)

[10] Morriss checked his methodology and results by comparing the result to projections made by ATA and independent analysts prior to FedEx's breach. Because those projections exceeded Morriss' projection, they indicated the reasonableness and conservative nature of his projection.

663, 694-97) Therefore, Morriss used regression analysis to determine a linear model for costs.



(*Id.*; ATA.Supp.App.179) Morriss testified about the statistical measures that validated his model, concluding that the result was "statistically reasonable" and a "confident number." (ATA.Supp.App.695-706) FedEx had every opportunity to cross-examine Morriss at trial regarding his methodology and conclusions.

Morriss' costs calculation was conservatively determined and resulted in a higher cost estimate. Because ATA's records did not completely segregate fixed ownership costs and non-recurring costs from variable or recurring costs, Morriss included all of these costs in his projections, recognizing that to do so would

understate ATA's lost profits by treating all costs as avoided. (*Id.*) Morriss calculated that ATA's costs for FY08 were $253.8 million. (FedEx.App.30)

Finally, Morriss had access to accounting information allowing him to derive certain fixed ownership costs of depreciation, amortization, and interest from ATA documents. Morriss projected that depreciation, amortization, and interest allocated to ATA's military charter segment would be approximately $11.4 million for FY08. (ATA.Supp.App.707) These fixed expenses are associated with assets previously purchased and debts previously incurred by ATA, and would not be avoided by FedEx's breach of the FY07-09 contract. Consequently, Morriss removed these non-cash costs from the projected expenses by adding them back in his calculation of lost profits. (*Id.*)

Having established ATA's annualized FY08 revenues ($286,478,392) and costs ($253,843,094 total costs minus $11,363,643 in non-cash costs of fixed interest, depreciation, and amortization), Morriss calculated FY08 lost profits of $43,998,941. To account for the 18-month loss period (April 2008-September 2009), Morriss extrapolated ATA's lost profits for the 12-month period FY08 to an 18-month period ($65,998,411). (ATA.Supp.App.707-711; FedEx.Supp.App.79-80) These amounts reflected Morriss' opinion "based to a reasonable degree of certainty of ATA's military lost profits for that period of time." (ATA.Supp.App.711-12)[11]

FedEx's expert, Howard Zandman, recognized lost profits as an appropriate

[11] Morriss calculated only ATA's military lost profits, without reference to ATA's scheduled service business, since the generally accepted methodology for the calculation of lost profits from a contract is to focus only on the lost profits associated with that contract. (ATA.Supp.App.709)

damage method in this case. (ATA.Supp.App.726) Zandman agreed with Morriss that ATA's military charter business had shown profitability and was an established business (ATA.Supp.App.725)

According to Zandman, *all* of ATA's costs, fixed and variable, disappeared and became avoided costs when ATA ceased operations and filed bankruptcy. (ATA.Supp.App.715-16, 719-21, 723-24) But for this disagreement over the effect of bankruptcy, Zandman stated that he "would subscribe to *exactly what Morriss said*[.]" (ATA.Supp.App.719) (emphasis added) Under Zandman's theory, a party who breaches a contract should make sure that the breach drives the other party out of business, because there would never be lost profits. Having heard evidence that ATA retained possession of assets and paid debts in a prior reorganization, it is not surprising that the jury rejected Zandman's unsupported[12] statements regarding avoided costs in bankruptcy and endorsed Morriss' lost profits calculation. (ATA.Supp.App.549-554)

D. The District Court Did Not Abuse Its Discretion by Denying FedEx's Motion for Remittitur.

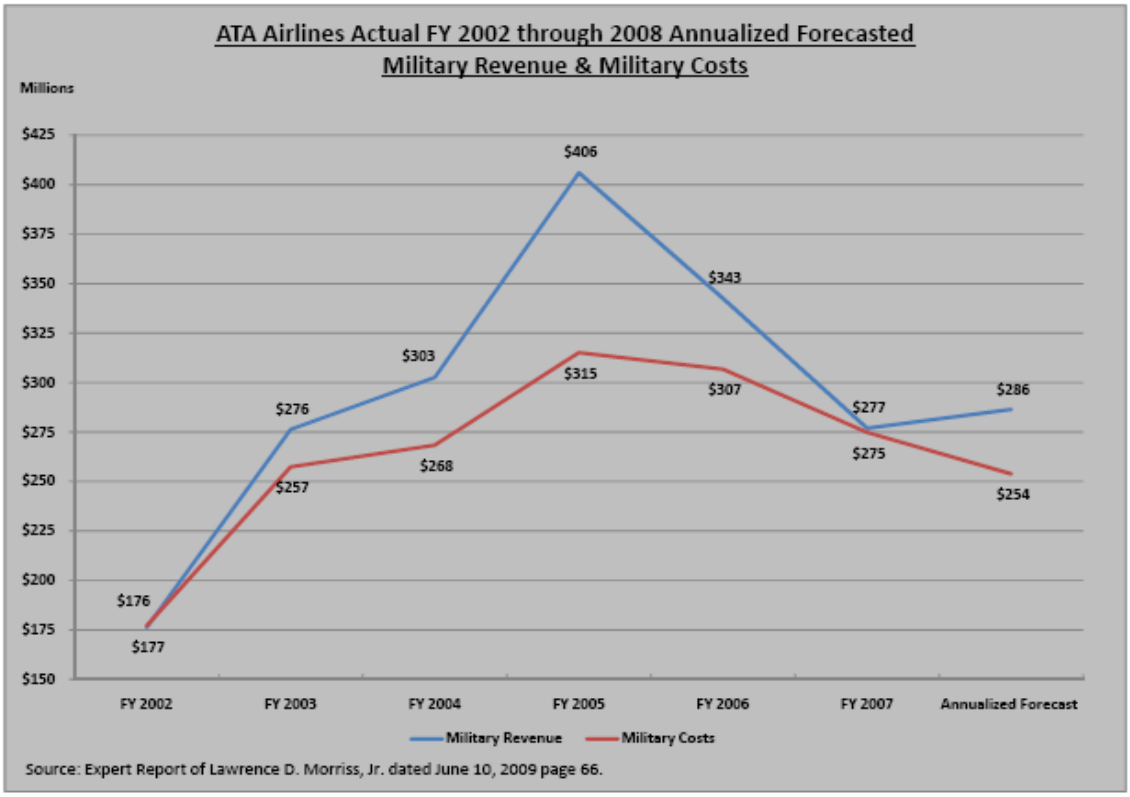
FedEx argues that, because ATA suffered a dip in historical net income for FY07 due to non-recurring expenses, an award of damages greater than ATA's FY07 profit[13] is excessive. This assertion is not supported by Tennessee law, which

[12] Zandman's only attempt to ground his testimony on "avoided costs" was a reference to alleged testimony that ATA avoided the fleet return costs in its leases by "just [giving] it back to the lessors," but there was no such testimony from any witness called by ATA or FedEx. (ATA.Supp.App.721-22)

[13] The $2.1 million profit number, and the FY03-06 numbers, were calculated by Morriss from ATA's documents. They include all costs. (ATA.Supp.App.700-702) Because costs

holds that it would work an "egregious result" to base the availability of lost profits on whether plaintiff's injury occurred during one of "its good years" or "its down years." *Waggoner*, 159 S.W.3d at 60. Nor is FedEx's assertion supported by the evidence, which showed historical revenue and profit at levels commensurate with the damages award. The FY07 profit of $2.1 million stood in contrast to the profits realized in FY03-FY06, which ranged from roughly $19 million to $91 million:

Chart 17a



(ATA.Supp.App.540) Further, Morriss testified that FY07 profit was related to one-time "cost anomalies" and did not reflect what ATA would have earned in FY08 and FY09. (ATA.Supp.App.674, 677-78) The FY07 dip was connected to start-up

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incurred despite a breach should not be subtracted from revenue in calculating lost profits, these numbers tend to understate lost profits.

expenses related to ATA's purchase and upgrade of DC-10s. (ATA.Supp.App.677-78, 713-14)

Morriss' credible explanation of the FY07 dip was unrebutted. No FedEx witness presented an alternative explanation that suggested any structural or systemic change in FY07 that would cause historically low profits in FY08 and FY09. The jury reasonably credited Morriss' explanation that FY06 and prior years were better predictors of ATA's revenues and expenses. Thus, there is material evidence supporting[14] the award of damages, and it was not an abuse of discretion for the District Court to deny remittitur.

E. FedEx's Flawed "Saved Costs" Theories Do Not Support Reversal or Modification of the Damages Award.

1. FedEx's claim regarding interest, depreciation, and amortization is a mitigation claim on which it did not carry its burden at trial.

Without citation to the record, FedEx asserts ATA's fixed interest, depreciation, and amortization expenses evaporated upon bankruptcy. Interest expenses derive from prior debts, and amortization and depreciation derive from prior acquired assets. Interest ceases to accrue when debts are paid, and amortization and depreciation cease accruing when assets are disposed of. Because ATA would have had to take affirmative action beyond terminating operations to "save" these costs — for example selling or leasing airframes, facilities, or intellectual property in bankruptcy or negotiating reduced debt obligations —

[14] Under the federal standard, the result would be no different because 1) as addressed above, there is a rational connection between the award and the evidence viewed in the light favorable to the verdict and 2) FedEx has not challenged whether the award is roughly comparable to similar cases.

FedEx's claim is in the nature of mitigation. *AMC-Tennessee, Inc. v. Hillcrest Healthcare, LLC*, No. M2003-00882-COA-R3-CV, 2004 WL 2533813, at *6 (Tenn. Ct. App. Nov. 8, 2004) (defining mitigation as the use of "proper means and efforts to protect [oneself] from loss").

At FedEx's request, the District Court instructed the jury on mitigation and correctly informed the jury that the burden of proof regarding mitigation was on FedEx. (ATA.Supp.App.411) *Id.* at *16. At trial, FedEx did not proffer *any evidence* regarding the disposition of ATA's assets or debts in bankruptcy, and the evidentiary record is silent on this point. Not surprisingly, the jury found FedEx did not prove its affirmative defense of mitigation. (FedEx.App.30) FedEx does not challenge this finding on appeal. In light of the jury's verdict and the state of the record on mitigation, FedEx's bare assertion on appeal that it is entitled to mitigation is without merit. *Bank of Gleason v. Weakley Farmers Coop., Inc.*, No. W1999-02161-COA-R3-CV, 2000 Tenn. App. LEXIS 303, at *14 (Tenn. Ct. App. Apr. 27, 2000) (holding "bare allegation that [plaintiff should have mitigated] will not suffice"); *Porelon,* 874 F.2d at 1115-16 (holding that where plaintiff ceased operations due to defendant's breach and entered a trademark licensing contract, defendant was not entitled to mitigation offset where it "elicited no evidence [of the amount] received under the royalty clause").

2. FedEx's assertion that expenses relating to ATA's scheduled services business were relevant to ATA's military charter business lost profits is unsupported by Tennessee law.

FedEx argues that the jury's alleged failure to consider ATA's supposed scheduled service shut down costs in its assessment of ATA's damages for FedEx's breach of the ATA Letter Agreement is plain error. This attack on the jury's verdict should be rejected if there is any evidence in the record to support the jury's determination. (*see* Section IV.A. *supra*).

ATA's scheduled service shut down costs are irrelevant to its damages for breach of contract. ATA sued FedEx for breach of the ATA Letter Agreement, not for destruction of its business or damage to its scheduled service business. As a result, the only relevant costs or damages are those costs or damages related to the ATA Letter Agreement. *Waggoner*, 159 S.W.3d at 60; *Porelon*, 874 F.2d at 1116 .

In Final Instruction 34, the District Court instructed the jury that "The damages to be awarded are those that may fairly and reasonably be considered as arising out of the breach or those that may reasonably have been in the contemplation of the parties when the contract was made." (ATA.Supp.App.409) The Instruction, unobjected to by FedEx, makes clear that damages are tied to the breach of the particular contract. Morriss testified that his damages calculations accounted for all costs and expenses related to ATA's claim for damages for breach of the ATA Letter Agreement. Costs and expenses not arising from the ATA Letter Agreement are not relevant.

Through its cross-examination of Morriss and their witness Zandman, the jury heard FedEx's arguments on the relevance of scheduled service shutdown costs. The Court should reject FedEx's challenge to the jury's weighing of the damages evidence as reflected in its verdict.

F. ATA Is Entitled To Recover Lost Profits For FY08.

FedEx's complaint regarding FY08 lost profits is a disguised challenge to the jury's breach finding. This challenge must fail if any rational jury could find breach of a contract including FY08. *Waite*, 408 F.3d at 343. The evidence at trial supports the finding. Mr. Garrett testified that ATA shut down in April 2008 because:

> the termination of our arrangement with FedEx later in the year, was too much to manage, and that the employee issues and exodus that would have taken place in our pilot ranks or mechanics and the people that ensure the operation and safety of our airline were going to be so significant, in our estimation, that we had no other alternatives than to shut the airline down.

(ATA.Supp.App.647) Mr. Patterson also testified that FedEx's breach of the ATA Letter Agreement caused ATA to shut down:

> We found that the foundation business, the military business, was no longer sustainable once the contract had been broken by FedEx. This [FedEx] is a mega trustworthy, large, influential company that had a 20-year relationship with a company that we owned. It tore up a contract halfway through the life of it, so we didn't have time to replenish that business with other parts of the airlines that supply, the other teams that supply the military transportation. So we couldn't salvage the business.

(ATA.Supp.App.659)

FedEx's argument also ignores the undisputed facts in the record and the law regarding prior anticipatory repudiation and material breach. The District Court

properly instructed the jury on material breach in Instruction 30: "A party who commits the first substantial breach of a contract cannot enforce the contract against the other party even if the other party later fails to abide by the terms of the contract." (ATA.Supp.App.405) The Court should decline FedEx's invitation to separate its breach of the ATA Letter Agreement from the FY08 teaming agreements. Mr. Yakola and Mr. Garrett testified that, upon learning of FedEx's January 22, 2008 termination of ATA from the FedEx Team for FY09, they asked FedEx to reconsider its decision. (FedEx.Supp.App.1; ATA.Supp.App.572, 643) FedEx's refusal to reconsider its termination decision was thus an unqualified refusal to perform that gave rise to this lawsuit.

By virtue of FedEx's January 2008 material breach of the ATA Letter Agreement, ATA was excused from further performance of the FY08 teaming agreements. *See Lopez v. Taylor*, 195 S.W.3d 627, 635 (Tenn. Ct. App. 2005); *Markow v. Pollock*, No. M2008-01720-COA-R3-CV, 2009 WL 4980264, at *5 (Tenn. Ct. App. Dec. 22, 2009); RESTATEMENT (SECOND) OF CONTRACTS § 253(2) ("Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.").

V. The Airline Deregulation Act Does Not Bar Prejudgment Interest.

A. The Award Of Prejudgment Interest Does Not Impermissibly Enlarge or Enhance The Contract.

FedEx argues that the ADA preempts ATA's prejudgment interest award because (1) it enlarges ATA's recovery under the contract by applying Tennessee law and (2) prejudgment interest is a form of equitable relief.

1. The ADA does not preempt Tennessee prejudgment interest law.

For the ADA to preempt Tennessee prejudgment interest statutes, they must (1) expressly refer to an air carrier's price, route, or service or (2) have a significant economic impact upon an air carrier's price, route, or service. *United Airlines*, 219 F.3d at 609. The Tennessee prejudgment interest statutes do neither. Economic regulation of air carriers under the statutes is either non-existent or too attenuated to justify preemption. *See Travel All*, 73 F.3d at 1433 (declining to find preemption where economic effect of tort suit on airline was "tenuous, remote, or peripheral"). The Tennessee statutes, as here, are generally applicable once a party has been found liable and a court or jury is assessing damages.

2. Prejudgment interest is not an "enlargement or enhancement" of contractual rights.

An award of prejudgment interest would not constitute an augmentation of ATA's contractual rights in violation of the ADA's preemption clause. To the contrary, "[p]rejudgment interest is an element of *complete compensation*." *West Virginia v. United States*, 479 U.S. 305, 310 and n.2 (1987) (emphasis added) ("Prejudgment interest serves to compensate for the loss of use of money due as

damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.") (citation omitted). *See also Hunter v. Ura*, 163 S.W.3d 686, 706 (Tenn. 2005) ("The purpose of prejudgment interest 'is to *fully compensate* a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing.'") (emphasis added); *Scholz v. S. B. Int'l., Inc.*, 40 S.W.3d 78, 82 (Tenn. Ct. App. 2000) (recognizing that a party is damaged by being forced to forego the use of its money over time).

The preemption clause of the ADA does not prevent states from affording relief to a party who proves that an airline dishonored a voluntary agreement. *See Wolens*, 513 U.S. at 232-33. Once liability has been established, prejudgment interest is necessary to make the injured party whole and is considered part and parcel of a routine breach of contract claim. Thus, awarding prejudgment interest will not be an "enlargement or enhancement" of ATA's rights to recover under the contract. Instead, denying prejudgment interest would further injure ATA. *See Bragdon v. Twenty-Five Twelve Assocs., Ltd. P'ship*, 856 A.2d 1165, 1171 (D.C. 2004) ("[A] denial of prejudgment interest would deny full compensation to the [plaintiff] while allowing the recalcitrant party to take advantage of his own wrong and become the richer for it.")

3. At least one circuit court has affirmed an award of prejudgment interest on an analogous breach of contract claim.

While the availability of prejudgment interest appears to be a matter of first impression under the ADA, there is precedent for awarding prejudgment interest on

a breach of contract claim related to a federal preemption statute. In *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212 (4th Cir. 2009), the Fourth Circuit affirmed a district court's award of prejudgment interest on a breach of contract claim despite the existence of a federal regulatory statute with a preemptive effect similar to that of the ADA. In *PCS Phosphate* the defendant argued that plaintiff's breach of contract and breach of covenant claims were preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* (the "ICCTA"). The district court held that the breach of contract and covenant claims were not preempted by the ICCTA, and awarded the plaintiff $18 million in damages, including $3 million in prejudgment interest under a North Carolina statute. *PCS Phosphate*, 559 F.3d at 217.

Holding that the that the ICCTA did not preempt enforcement of the breach of contract and breach of covenant claims, the Fourth Circuit affirmed the award of statutory prejudgment interest. *Id.* at 219-20. Relying on *Wolens*, the Fourth Circuit noted that the ICCTA shared a similar deregulatory purpose with the ADA. *Id.* at 219.

B. An Award Of Prejudgment Interest Would Not Constitute Improper Equitable Relief.

FedEx's reliance on *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665 (N.D. Ga. 1997) is misplaced. The district court in *Deerskin Trading Post* did not address prejudgment interest in its opinion, instead holding that plaintiff's claims for punitive damages and injunctive relief were preempted because they would remove the plaintiff's contract claim "from the realm

of '*routine* breach of contract actions.'" 972 F. Supp. at 673. Unlike punitive damages and injunctive relief, prejudgment interest is considered part of compensatory damages to be awarded routinely in "almost all cases" to a successful plaintiff. *See Scholz*, 40 S.W.3d at 81; *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 928 (Tenn. 1998); *In re Estate of Fetterman v. King*, 206 S.W.3d 436, 446 (Tenn. Ct. App. 2006).

Tennessee case law describing the trial court's obligation to reach an "equitable" decision in determining an award of prejudgment interest merely requires consideration of whether an interest award is "fair" under the circumstances of the case. *Myint*, 970 S.W.2d at 927 ("Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case."). This analysis bears no relation to the traditional equity analysis (irreparable harm, adequate remedy at law, etc.) addressed in the *Deerskin Trading Post* opinion. Accordingly, the *Deerskin Trading Post* opinion has no application to the prejudgment interest issue in this case.

CONDITIONAL CROSS-APPEAL POINTS

ATA presents the following conditional cross-appeal points. If the Court affirms the final judgment, there is no need to address these points. However, if the final judgment is reversed and the case is remanded for a new trial, ATA respectfully submits that its cross-appeal points should be considered and determined in order that they can be presented in a second trial.

I. The District Court Erred In Excluding Evidence Of ATA's DC-10 Costs Incurred As A Result Of FedEx's Breach Of Contract.

ATA asserted in its Complaint that, in reliance on FedEx's commitments to allocate half of the FedEx Team's share of the FedEx Team's passenger business award to ATA for FY07-09, ATA purchased in late 2006 a number of McDonnell Douglas DC-10-30 aircraft and McDonnell Douglas DC-10-30 airframes from Northwest Airlines in order to be in a position to fulfill its contractual obligations. (R.1 at 5-6) The amount of ATA's DC-10 damages, as shown by ATA's Second Amended Statement of Special Damages and the excluded testimony of ATA's damages expert Lawrence Morriss, totaled $27,842,748. (R.109 at 2-3; ATA.App.24-26)

Although FedEx never sought judgment on the pleadings or moved for summary judgment on this basis, FedEx argued in a motion in limine that ATA could not recover lost profits and DC-10 damages because ATA's claimed DC-10 losses were "quintessential reliance damages" and, as such, were merely an alternative to lost profits or expectation damages. (R.139 at 4) The District Court granted FedEx's motion in limine and excluded the proffered testimony of Morriss. (ATA.App.14-18) For the reasons set forth below, the District Court abused its discretion in excluding ATA's DC-10 damages evidence.

A. Standard Of Review.

Review of whether the District Court applied the appropriate legal standard in making its decision to admit or exclude expert testimony is *de novo*. *Smith v. Ford Motor Co.*, 215 F.3d 713, 717 (7th Cir. 2000). This Court reviews for abuse of

discretion the District Court's "choice of factors to include within that framework as well as its ultimate conclusions regarding the admissibility of expert testimony." *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).).

B. ATA's DC-10 Damages Are Not Reliance Damages.

The evidence proffered at trial showed that ATA acquired the DC-10 aircraft in order to perform its contract with FedEx. (ATA.Supp.App.5-88, 564-65) These costs represented fixed-cost capital expenditures that were properly included as part of ATA's expectation damages, or the full amount that ATA should have been able to recover to receive the benefit of its bargain. This Court has recognized that where a contract requires a party to incur significant fixed costs or capital expenditures, that party reasonably expects to make a profit to recoup those costs, and such fixed costs should not be deducted from the party's recovery for breach of contract. *See Autotrol Corp. v. Cont'l Water Sys. Corp.*, 918 F.2d 689, 694 (7th Cir. 1990) ("If the plaintiff can either cut his overhead expenses or recover them in a substitute contract, then he indeed has not lost them as a result of the breach and they should not be figured in his damages. But if he cannot do either of these things – if in other words these really are fixed costs – then the breach gives him no scope to economize and there should be no deduction.").

This measure of damages has long been recognized under Tennessee law. *See Porelon*, 874 F.2d at 1113. Under this measure of damages, because a defendant's breach precludes a plaintiff from recouping his investment of fixed costs, the plaintiff is entitled to recover these fixed costs as part of his expectation damages so

that the plaintiff may be made whole. *Id.* (concluding that a variable cost approach was the "approach best calculated to make FHC [the plaintiff] whole"). Because ATA's costs in acquiring DC-10 aircraft in order to perform its agreement with FedEx represent fixed-cost capital expenditures, such costs are properly classified as expectation damages and should be recoverable by ATA.

C. The DC-10 Damages Claimed By ATA Do Not Duplicate ATA's Lost Profits Damages.

FedEx argued at the pretrial conference that the DC-10 damages ATA seeks to recover are duplicative of ATA's lost profits damages. (ATA.Supp.App.546) An examination of the proffered testimony and expert report of ATA's damages expert Morriss shows that there is no factual basis for FedEx's double recovery argument. In fact, Morriss stated in his expert report that he took pains to make certain that the DC-10 damage and lost profit damage calculations did not overlap. (ATA.Supp.App.502 n.95)

In addition, Morriss testified in his deposition that the costs associated with the DC-10 aircraft appeared on the balance sheet as capital expenditures or leasehold improvements not included in arriving at net income, rather than on the income statement, where lost profits reside. (ATA.Supp.App.536-37, 539) Thus, there is no duplication between ATA's DC-10 damages and its lost profits damages.

D. Even If ATA's DC-10 Damages Are Reliance Damages Recoverable Only As An Alternative To Lost Profits Damages, It Was Improper To Exclude ATA's Evidence Of Either Type Of Damages.

Even if ATA's DC-10 damages are properly considered reliance damages recoverable only as an alternative to lost profits damages, it was improper to

exclude ATA's evidence of either type of damages, as the alternative damages should have been submitted to the jury and an election required of ATA after the jury rendered its verdict. This Court addressed the question of election of remedies in *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363 (7th Cir. 1990), noting in a breach of contract and fraud case that requiring an election of remedies before trial and verdict was "unsound" and could be "prevented by confining the doctrine of election of remedies to the limited office of preventing duplicative damages awards." 908 F.2d at 1372. *See also Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 908 (Tenn. 1999) When anticipated lost profits are not proven, an aggrieved party may recover based on his or her reliance interest, which includes expenditures made in preparation for performance or in performance. *Silva v. Crossman*, No. 95-2607 II, 1996 WL 631492 at *3 (Tenn. Ct. App. Nov. 1, 1996) (citing RESTATEMENT (SECOND) OF CONTRACTS § 349)).

On appeal, FedEx has challenged ATA's right to recover lost profits damages, arguing among other things that Morriss has not properly proved the amount of such damages. If this Court were to determine that ATA's proof of lost profits damages were inadequate, ATA may rely on its DC-10 damages as an alternative on remand. The District Court's exclusion of ATA's DC-10 damages evidence, and ATA's corresponding inability to submit the DC-10 measure of damages to the jury, prevented ATA from establishing damages it was entitled to in this case.

II. The District Court Erred In Granting FedEx's Motion For Partial Judgment On The Pleadings And Dismissing ATA's Promissory Estoppel Claim.

ATA asserted claims for breach of fiduciary duty; breach of duty of good faith and fair dealing; equitable estoppel; promissory estoppel; and constructive fraud/fraudulent concealment. (R.1 at 8-17) FedEx moved for partial judgment on the pleadings, arguing that it was entitled to judgment on the pleadings on all of ATA's affirmative claims except for its breach of contract claim. (R.76-2) FedEx's motion was based on ADA preemption.

The District Court granted FedEx's motion. (ATA.App.1-13) For the reasons set forth below, the District Court erred in dismissing ATA's promissory estoppel claim.

A. Standard Of Review.

Review of the District Court's grant of FedEx's motion for judgment on the pleadings is *de novo*. *Medmarc Cas. Ins. Co. v. Avent Am., Inc.*, 612 F.3d 607, 612 (7th Cir. 2010). This standard requires the Court to view the facts in the complaint in the light most favorable to the nonmoving party and to grant the motion "only if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). *See also Travel All*, 73 F.3d at 1433 ("[W]e must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes or services.")

B. The Statute And Its Scope.

The ADA preemption provision has been construed to apply to state common law claims. *Mesa Airlines, Inc.*, 219 F.3d at 607 ("State common law counts as an 'other provision having the force and effect of law' for purposes of this statute."). The District Court held that the ADA required the dismissal of ATA's promissory estoppel claim because it "relates to" routes or services of air carriers. (ATA.App.11) The Supreme Court has held that the preemption clause does not "shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Wolens*, 513 U.S. at 228.

In *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390 (1992), the Supreme Court noted that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner" to have pre-emptive effect." (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n.21 (1983)). *See also Travel All*, 73 F.3d at 1433 ("Only those tort claims that refer to or have a connection with airline rates, routes, or services can be preempted by the ADA.").

In *Travel All*, this Court addressed the question of when a claim relates to the "services" of an air carrier as follows:

> "Services" generally represent a bargained-for or anticipated provision of labor from one party to another. . . . [This] leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself.

73 F.3d at 1433.

C. Under Applicable Legal Standards, ATA's Promissory Estoppel Claim Does Not "Relate To" Routes Or Services Of An Air Carrier And Is Not Preempted.

This Court's *Travel All* decision holds that "services" represent "a bargained-for or anticipated provision of labor from one party to another" and that the court must concern itself with "the contractual arrangement between the airline and the user of the service." 73 F.3d at 1433. In addition, the Court identified "elements of the air carrier service bargain" as including "items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." *Id.*

Under this standard, the matters addressed in ATA's promissory estoppel claim bear no relation to the preemption inquiry. ATA did not provide labor to FedEx under the agreements at issue in this case. Rather, ATA provided its services to the CRAF program. The "users of the service" provided by ATA to the U.S. military were members of the U.S. armed forces and their dependents, not FedEx. It is apparent from a cursory examination of the "elements of the air carrier service bargain" that FedEx and ATA did not provide to each other any items such as ticketing, boarding procedures, and the like. The relationship between ATA and FedEx described in ATA's Complaint has nothing to do with services of an air carrier under the Airline Deregulation Act. Therefore, ATA's promissory estoppel claim should not have been dismissed.

D. The Purposes Of The Airline Deregulation Act Are Not Implicated In This Case And Would Not Be Served By The Dismissal of ATA's Promissory Estoppel Claim.

The fundamental purpose of the Airline Deregulation Act is "[t]o ensure that the States would not undo federal deregulation [of the airline industry] with regulation of their own." *Wolens*, 513 U.S. at 222 (citing *Morales*, 504 U.S. at 378)). The Supreme Court's decisions limit the preemptive scope of the Act to barring "state-imposed regulation of air carriers" while "allow[ing] room for court enforcement of contract terms set by the parties themselves." *Wolens*, 513 U.S. at 222. *Morales* makes clear that state actions affecting rates, routes, and services "in too tenuous, remote, or peripheral a manner" are not preempted. 504 U.S. at 390.

The factual basis for ATA's promissory estoppel claim bears no relation whatsoever to anything that could reasonably be considered "state-imposed regulation of air carriers" as required by the preemption analysis. ATA's promissory estoppel claim does not implicate the purposes of the Airline Deregulation Act. Indeed, the focus in *Wolens* on "the airline's alleged breach of its own, self-imposed undertakings," 513 U.S. at 228, forms the basis of a promissory estoppel claim under Tennessee law. *See Amacher v. Brown-Forman Corp.*, 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991) ("The key element in finding promissory estoppel is, of course, the promise."). Accordingly, ATA's promissory estoppel claim should not have been dismissed on preemption grounds.

CONCLUSION AND PRAYER

For these reasons, ATA respectfully requests that the Court affirm the District Court's judgment. If the District Court's judgment is reversed and this case remanded for a new trial, ATA respectfully requests that its conditional cross-appeal points be sustained and that ATA be permitted to seek recovery of its DC-10 costs as well as recovery under its promissory estoppel claim on retrial. ATA further requests that it be awarded all such other and further relief to which it may be justly entitled.

Dated: September 2, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on September 2, 2011, I electronically filed the Brief of Plaintiff-Appellee and Cross-Appellant ATA Airlines, Inc. and Required Appendix with the Clerk of the above Court by using the CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the above-described documents by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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RULE 32(a) CERTIFICATION

The undersigned certifies, pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure that this Brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 16,480 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this Brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6). It was prepared with a proportionally spaced typeface using Microsoft Word 2003 in 12 point Century for the text and 11 point Century for footnotes.

Dated: September 2, 2011.

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RULE 30(d) CERTIFICATION

The undersigned certifies, pursuant to Rule 30(d) of the Federal Rules of Appellate Procedure, that all of the materials required by FED. R. APP. P. 30(a) are included in the required Appendix, and that all of the materials either required or permitted by FED. R. APP. P. 30(b) are included in the Supplemental Appendix, as those materials exceed the 50-page limitation of the required Appendix.

Dated: September 2, 2011.

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INDEX TO APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ATA AIRLINES, INC., Plaintiff,	)	
vs.	)	1:08-cv-0785-RLY-DML
FEDERAL EXPRESS CORP., Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Defendant, Federal Express Corp. ("FedEx"), moves for judgment on the pleadings on Counts B-G of Plaintiff, ATA Airlines, Inc.'s ("ATA"), Complaint. For the reasons set forth below, the court **GRANTS** the motion.

I. Background

The United States Department of Defense contracts with commercial airlines to provide nearly all of the airlift requirements for its personnel through the Civil Reserve Air Fleet ("CRAF") program. (Complaint ¶ 7). Through the commercial airlines' participation in the CRAF program, the airlines are able to fly military charter missions, and to contract with the General Services Administration, which purchases seats on their scheduled service flights. (*Id.* ¶ 7).

At the time of the filing of ATA's Complaint, the CRAF program consisted of two large teams, the Federal Express Team Arrangement (the "FedEx Team") and the

Alliance Team Arrangement (the "Alliance Team"). (*Id.* ¶ 8). ATA was a member of the FedEx Team, and had flown as a member of the team for over twenty years. (*Id.* ¶ 9). ATA and one other airline, Omni Air International ("Omni"), flew most of the passenger requirements for the FedEx Team. (*Id.* ¶ 9).

In 2005, FedEx, ATA, and Omni agreed to split the FedEx Team's passenger business on a 50-50 basis for fiscal years 2007, 2008, and 2009 (the "2005 Agreement"). (*Id.* ¶ 10). The following year, the parties memorialized the agreement in a document known as the FedEx Letter Agreement. (*Id.*).

In reliance on the FedEx Letter Agreement, ATA paid Northwest Airlines $25 million for seven McDonnell Douglas DC-10-30 aircraft and two McDonnell Douglas DC-10-30 airframes. (*Id.* ¶ 11). In addition, ATA incurred expenses in excess of $20 million for training pilots and associated personnel and other expenses related to the purchase. (*Id.*).

ATA and FedEx also executed two additional agreements related to the FedEx Team Arrangement. The first was entitled "Contractor Team Arrangement Agreement" (the "2008 Team Arrangement Agreement"). (*Id.* ¶ 25). That agreement authorized FedEx to bind ATA and Omni to military contracts with the United States Transportation Command, a component of the Defense Department, for CRAF participation. (*Id.*). The second, drafted by FedEx, was entitled "Contractor Team Arrangement Fee Agreement" (the "2008 Fee Agreement"). That agreement provided that FedEx would receive all revenue derived from the parties' participation in the CRAF program, and that FedEx

would then pay ATA its allotted share. (*Id.* ¶ 28).

In January 2008, FedEx abruptly and unexpectedly notified ATA that FedEx would no longer permit ATA to be a member of the FedEx Team for flying military charters for government fiscal year 2009. (*Id.* ¶ 14). FedEx instead intended to use Northwest Airlines to fulfill ATA's duties for government fiscal year 2009. (*Id.* ¶ 15). The disruption of the military charter business caused ATA to file for bankruptcy protection in April 2008. (*Id.* ¶ 18).

On June 11, 2008, ATA filed the present lawsuit against FedEx, alleging: (1) breach of contract (Count A); breach of fiduciary duty (Count B); breach of duty of good faith and fair dealing (Count C); equitable estoppel (Count D); promissory estoppel (Count E); and constructive fraud/fraudulent concealment (Count F). ATA also seeks extracontractual punitive damages (Counts B and F) and attorney's fees (Count G). FedEx moves for partial judgment on the pleadings as to Counts B-G on grounds that those claims are preempted by the Airline Deregulation Act of 1978 (the "ADA").

II. Standard for Dismissal

Federal Rule of Civil Procedure 12(c) permits parties to move for judgment on the pleadings "[a]fter the pleadings are closed – but early enough not to delay trial . . . ." FED. R. CIV. P. 12(c). A court should only grant a motion for judgment on the pleadings "if it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). The court employs the same standard to review a Rule 12(c) motion as it uses to

review a motion to dismiss under Rule 12(b)(6), taking the facts alleged as true and drawing reasonable inferences in favor of the non-moving party. *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007); *United States v. Rathbone Ret. Cmty., Inc.*, 2009 WL 2147878, at *1 (S.D. Ind. July 15, 2009). When the moving party establishes that no material issues of fact need resolution and that it is entitled to judgment as a matter of law, the court should grant its motion for judgment on the pleadings. *Nat'l Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 358 (7th Cir. 1987).

III. Discussion

Congress deregulated the airline industry with passage of the ADA. To prevent states from "undo[ing] federal deregulation with regulation of their own," Congress included a preemption clause in the ADA. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). As re-codified in 1994, the ADA preemption clause states as follows:

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

49 U.S.C. § 41713(b)(1). In *Morales*, the Supreme Court interpreted the phrase "relating to" expansively: "The ordinary meaning of these words is a broad one – 'to stand in relation; to have bearing or concern; to pertain; refer; to bring in association with or connection with,' . . . and the words thus express a broad preemptive purpose." *Morales*, 504 U.S. at 383. Thus, the Court concluded that "State enforcement actions having a

connection with or reference to airline 'rates, routes or services' are preempted . . . ." *Id.* at 384.

In *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995), the Supreme Court discussed what constitutes "enact[ment] or enforce[ment]" of a state "law, regulation or other provision" necessary to trigger preemption in the first instance. *Id.* at 226. The Court held that the broad preemptive effect identified in *Morales* barred all state law causes of action against airlines except for "routine breach-of-contract claims." *Id.* at 232. Further, the *Wolens* Court determined that, under the ADA preemption clause, courts are only allowed – in routine breach-of-contract cases – to enforce "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement[s]":

> The ADA's preemption clause . . . stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.

Id. at 232-33.

A. The State Law Claims Relate to the Routes and Services of Air Carriers

ATA contends that its non-contractual claims do not "relate to" the services of an air carrier because ATA provided its services to the CRAF program (as opposed to FedEx), and pursuant to that program, it provided airline services to members of the

armed forces and their dependents. (Response Brief at 10). ATA misapprehends the scope of the ADA preemption clause.

In *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), the Seventh Circuit considered whether the ADA preempted non-contractual state law claims in a dispute between two air carriers. In that case, Mesa Airlines and its subsidiary provided regional flight operations for United and objected when United chose another regional airline to operate eight routes. *Id.* at 606-07. Relations between the airlines worsened and eventually United terminated the agreement. *Id.* at 607. As in this case, the regional airline "provide[d] labor," not to the major carrier (United), but to the passengers. Nevertheless, "[t]he district court concluded that all three tort claims relate to an air carrier's routes – they concern which carriers fly to which destinations from which airports, and which carriers provide service (and at what rates) on through or joint routes – and therefore are preempted." *Id.* at 607-08 (citing *Travel All Over the World, Inc. v. Saudi Arabia*, 73 F.3d 1423, 1430-35 (7th Cir. 1996)). The Seventh Circuit affirmed this conclusion. As in *Mesa Airlines*, the non-contract claims at issue here also "concern which carriers fly to which destinations from which airports, and which carriers provide service (and at what rates) on through or joint routes." Indeed, the thrust of ATA's Complaint are the allegations that FedEx improperly terminated ATA as a charter services provider to the United States military via the FedEx team. ATA's claims are grounded expressly on FedEx's services, specifically "charter services," "passenger business," or "charter business" for the United States military. (Complaint ¶¶ 2, 10, 11,

14, 15, 17; *see also Travel All Over the World*, 73 F.3d at 1434 ("[Plaintiff's] claims expressly refer to airline 'services,' which include ticketing as well as the transportation itself . . . . Such tort claims clearly 'relate to' the airline's provision of services."). Accordingly, the court finds that the claims at issue here have some "connection with" an airline service. *See Morales*, 504 U.S. at 383.

ATA's Complaint not only implicates airline services, it also implicates airline routes. In fact, the gravaman of ATA's Complaint is the allegation that FedEx did not allow it to fly particular *routes* as part of the FedEx Team. *See Mesa Airlines*, 219 F.3d at 609 (holding extracontractual claims preempted where Plaintiff's allegations arose from United Airlines' choice to replace plaintiff with another regional carrier to operate certain routes).

Moreover, each of the agreements referenced by ATA has a connection with a route or service. In paragraph 4 of the 2008 Team Arrangement Agreement, the parties, including ATA and FedEx, agreed to make aircraft available "for the operation of charter passenger, cargo, and scheduled cargo *services*." (Defendant's Ex. A, 2008 Team Arrangement Agreement ¶ 4) (emphasis added). In paragraph 1 of the 2008 Fee Agreement, ATA agrees to pay FedEx a portion of the revenue "ATA is entitled to receive for transportation *services* provided by ATA." (Defendant's Ex. B, 2008 Fee Agreement ¶ 1) (emphasis added). That agreement also specifies that ATA will be entitled to an allocation of the routes awarded to the FedEx Team by the United States military for the 2008 fiscal year. (*Id.* ¶ 5.A(iv)). The 2005 Agreement and the FedEx

Letter Agreement, according to ATA's own description, also deal with the division of routes among service providers. (Response Brief at 7). Accordingly, the court finds that the relationship between ATA and FedEX was intimately connected with routes and services under the *Morales* analysis.

B. The Non-Contract Claims Seek to Enforce State Law Against FedEx

Pursuant to the Supreme Court's decision in *Wolens*, the full range of state-law claims against air carriers – all statutory and common law claims other than breach-of-contract claims seeking solely to enforce the obligations that air carriers placed on themselves – are preempted when they relate to air carrier prices, routes, or services. *See Mesa Airlines*, 219 F.3d at 607 ("State common law counts as an 'other provision having the force and effect of law' for purposes of this statute."); *Travel All Over the World*, 73 F.3d at 1435 ("The plaintiffs also argue that *Wolens* has liberated all common law claims from the ADA's preemptive scope, but *Wolens*, did not distinguish between common law and statutory claims. Rather, it distinguished between states enforcing private contracts and imposing their own substantive standards external to those contracts."). With that principal in mind, the court now turns to ATA's specific claims.

ATA's claims for breach of fiduciary duty (Count B) and breach of the duty of good faith and fair dealing (Count C) are preempted because the claims impose duties that are implied under state law and beyond the scope of the parties' agreements. *See Mesa Airlines*, 219 F.3d at 610 (finding the ADA "defeats external rules" of fiduciary obligations); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 541-42 (7th Cir. 1993) (holding

state law claim for breach of fiduciary duty was preempted where plaintiff based claims on allegations that the airline collected and withheld taxes for tickets that were then cancelled); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 32, 36 (1st Cir. 2007) (holding ticket purchasers' claims, including breach of fiduciary duty and breach of the covenant of good faith and fair dealing, were preempted where claims were based on airlines' refusal to refund fees and taxes paid in the purchase of non-refundable tickets that were subsequently not used); *Cerdant, Inc. v. DHL Express (USA), Inc.*, 2009 WL 723149, at *2, 5 (S.D. Ohio March 16, 2009) (dismissing plaintiff's non-contract claims including breach of good faith and fair dealing for allegations of improper shipping charges as preempted by the FAAAA[1] because they "would constitute an enlargement or enhancement of the parties' bargain"); *McMullen v. Delta Air Lines, Inc.*, 2008 WL 4449587, at *5 (N.D. Cal. Sept. 30, 2008) (holding plaintiff's claim that Delta breached an implied covenant of good faith and fair dealing by collecting a Mexican non-immigrant tax for each passenger was preempted by the ADA); *Ray v. Am. Airlines, Inc.*, 2008 WL 3992644, at *10 (W.D. Ark. Aug. 22, 2008) (holding passenger's claims of breach of implied covenant of good faith and fair dealing for allegations stemming from a

[1] In 1994, Congress enacted the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), which included preemption provisions for motor carriers virtually identical to the preemption provisions of the ADA. The Supreme Court found that since Congress used the language from the ADA preemption provision in the FAAAA preemption provision after the Court had interpreted the ADA preemption provision in *Morales*, Congress intended to incorporate the *Morales* interpretation into the FAAAA preemption provision. *Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. at 364, 370 (2008). Accordingly, the cases addressing FAAAA preemption also apply preemption under the ADA.

delayed trip were preempted to the extent they claimed relief beyond any specific terms in the airline's conditions of carriage contract). Similarly, ATA's claims for equitable estoppel (Count D), promissory estoppel (Count E), constructive fraud/fraudulent concealment (Count F), and attorney's fees (Count G) are preempted because they seek relief outside the scope of the parties' agreements. *See A.J.'s Wrecker Serv. of Dallas, Inc. v. Salazar* 165 S.W.3d 444, 449 (Tex. Ct. App. 2005) (finding state law claims including equitable estoppel and promissory estoppel preempted by federal law where plaintiff sued towing company for wrongfully towing her car); *see also Cerdant*, 2009 WL 723149, at *4, 5 (dismissing plaintiff's non-contract claims, including promissory estoppel, for allegations of improper shipping charges as preempted by the FAAAA because they "would constitute an enlargement or enhancement of the parties' bargain."); *Osband v. United Airlines, Inc.*, 981 P.2d 616, 623 (Colo. Ct. App. 1998) (finding employees' promissory estoppel claim to reinstate prior travel benefits preempted); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F.Supp. 665, 672-73 (N.D. Ga. 1997) (finding ADA preempts equitable relief); *In re Korean Air Lines Co., Ltd. Antitrust Lit.*, 567 F.Supp.2d 1213, 1221 (C.D. Cal. 2008) (finding state law claims including fraudulent concealment preempted in case alleging violations of antitrust and consumer protection laws as a result of an alleged price-fixing conspiracy); *Wagman v. Fed. Exp. Corp.*, 1995 WL 81686, at *2 (7th Cir. Feb. 17, 1995) (affirming dismissal on preemption grounds of constructive fraud and other claims based on allegations of misleading advertising arising from the late delivery of plaintiff's package); *see also*

Mesa Airlines, 219 F.3d at 610 (noting air carriers are not free to engage in "unscrupulous" or fraudulent practices because the Secretary of Transportation has responsibility to investigate claims of deceit and to issue remedial orders); *Statland*, 998 F.2d 539, 541-42 (7th Cir. 1993) (finding statutory fraud claims preempted where passenger sued regarding non-refunded taxes and fees on a canceled ticket). ATA's request for an award of punitive damages in Counts B and F are likewise preempted, as punitive damages awards are instruments of state public policy. *See Travel All Over the World*, 73 F.3d at 1432 n.8 (holding punitive damages preempted because "[r]ather than merely holding parties to the terms of a bargain, punitive damages represent an 'enlargement or enhancement [of the bargain] based on state laws or policies external to the agreement.'" (quoting *Wolens*, 513 U.S. at 233)); *see also, e.g., Galieo Int'l, L.L.C. v. Ryanair, Ltd.*, 2002 WL 314500, at *6 (N.D. Ill. Feb. 27, 2002) (holding claim for punitive damages to deter allegedly deceptive and misleading conduct related to a consumer reservation system agreement and other claims preempted); *Deerskin Trading Post*, 972 F.Supp. at 673 ("[T]he Supreme Court did state explicitly that the parties should be held to their bargain, with no enlargement or enhancement based on state policy. An award of punitive damages would constitute such an enhancement.").

Based upon the foregoing, the court finds that ATA's non-contractual claims relate to an airline route or service, and are therefore preempted by the ADA. FedEx's Motion for Partial Judgment on the Pleadings must therefore be **GRANTED**.

IV. Conclusion

Because ATA's extracontractual state law claims are preempted by the ADA, the court hereby **GRANTS** FedEx's Motion for Partial Judgment on the Pleadings (Docket # 76).

SO ORDERED this 21st day of April 2010.

RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ATA AIRLINES, INC., Plaintiff,	)	
vs.	)	1:08-cv-0785-RLY-DML
FEDERAL EXPRESS CORP., Defendant.	)	

ENTRY FOR SEPTEMBER 10, 2010

RICHARD L. YOUNG, JUDGE

On July 29, 2010, the parties appeared for the final pre-trial conference. The court heard argument on a number of motions, made its rulings, and, in so doing, took some of the motions under advisement. The court now rules on the motions that were taken under advisement as follows:

1. Plaintiff's Motion to Exclude or Limit the Testimony of Howard A. Zandman (Docket # 113) is **DENIED**;

2. Defendant's Motion in Limine to Exclude DC-10 Damages (Docket # 139) is **GRANTED**;

3. Plaintiff's Motion in Limine (Docket # 144) is **GRANTED** with respect to request number 1 (DC-10 airworthiness), and **DENIED** with respect to requests numbered 21-27 (expert Howard A. Zandman); and

4. Defendant's Supplemental Motion in Limine (Docket # 170) is **GRANTED** with respect to request number 2.

The pretrial rulings made in this case are preliminary in nature, and subject to change given the evidence adduced at trial.

SO ORDERED this 16th day of September 2010.

RICHARD L. YOUNG, CHIEF JUDGE
United States District Court
Southern District of Indiana

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time?

A Yes, but I have to emphasize to you that it's understated.

Q Okay. You've explained why it's understated?

A Right.

MR. KURTH: Your Honor, may I approach?

THE COURT: You may.

(Beginning of bench conference.)

MR. KURTH: I had estimated a half hour; but, obviously, it took a little more time than that. Your Honor, I have DC10 costs that I wanted to either urge the Court to let me ask Mr. Morriss in front of the jury or, alternatively, make an offer of proof. So how would the Court like me to proceed? You've heard our arguments on why we think the DC10 costs are costs that are different from and part of the consequences of this breach. Alternatively, we think they are at least reliance costs, that while we have the jury in the box, they should answer and we can sort it out afterwards as to whether they're includable, excludable. If the jury doesn't smile on me and doesn't give me lost profits, I would like to take a shot at my DC10 costs as part of my consequential damages or my reliance damages. So I'm compelled to want to ask to do that with the jury in the box rather than use it as something to argue to the Seventh Circuit about. That's my thinking. I'll leave it to you, counsel.

MR. BLUMBERG: It has to be as an offer of proof. The whole case has been tried with the Court's motion in limine in place. The law hasn't changed. We've had all the witnesses here and didn't put on the kind of evidence that would show reliance and particularly for consequential damages, which requires that at the time of the contract it was perceived by FedEx. So it would be unfairly prejudicial.

THE COURT: You pick either one or the other, lost profits or reliance. You've gone with the lost profits, so you can make an offer of proof.

MR. KURTH: Thank you, Your Honor.

Your Honor, I think I'm finished. Let me take a moment and look at my notes. Shall we will excuse the jury and do that now?

THE COURT: Sure, I think that will be fine. That will be fine. Then we'll break for lunch.

(End of bench conference.)

MR. KURTH: Just a moment, Your Honor.

Your Honor, with the exception of the matters we discussed off the record, that concludes my examination -- my direct examination of Mr. Morriss.

THE COURT: All right. Thank you.

Members of the jury, it's right before noon. I've got a couple things to do with the lawyers before we all get to go to lunch, but you can go to lunch now. So we'll take

our lunch break at this time.

If you'd come back at one o'clock, we'll be ready with cross-examination of Mr. Morriss by Mr. Blumberg.

Have a nice lunch. Please do not discuss the case among yourselves.

COURT CLERK: All rise.

(Jury out.)

THE COURT: Please be seated.

All right. You have an offer?

MR. KURTH: Yes, Your Honor, I do.

BY MR. KURTH:

Q Mr. Morriss, did you undertake an investigation to account for ATA's DC10 losses?

A Yes, I did.

Q How do you define DC10 losses?

A DC10 losses are the costs associated with acquiring the aircraft in order to fulfill the 2007-2009 agreement.

Q Are you making assumptions with respect to these DC10s as to whether or not they would have been incurred with this ATA FedEx agreement?

A I guess -- I'm sorry?

Q Did you make an assumption as to whether or not the DC10 costs were incurred because of the FedEx-ATA agreement?

A Yes.

Q Okay. What investigation did you and your team do to

calculate ATA's DC10 costs?

A Well, we went through the balance sheet of ATA to be able to determine the capitalized portion of the leasehold improvements. In other words, the DC10s were all leased, but the lease cost was just part of the costs. They made improvements to those. They aren't in any of the expenses; they're all capitalized on the balance sheet. And so we are able to quantify the capitalized part, the asset part of the DC10s that was on the balance sheet; we were able to quantify the lease costs that are associated with that.

Then we were able to determine what profits the DC10 actually gave to ATA, and we reduced our costs by those profits. Then I further reduced it by the L-1011. They sold the L-1011s at the end of the bankruptcy. So I further reduced it by the proceeds of the L-1011s.

Q Were the DC10's costs accounted for in your calculation of lost profits?

A No, they were not.

Q Did the DC10 losses, did they include the nonrecurring DC10 expenses you previously mentioned?

A No, they did not.

Q What costs --

A May I just back up for a second?

Q Go ahead.

A Even if they did, though, they would have been deducted

from my -- they were deducted from my lost profits. So it's not in the mix anywhere.

Q Let me show you what's marked for identification as Exhibits 200 and 250. Since the jury's not here, I guess we can put them up on the screen.

Would you tell us what Exhibit 200 is?

A Sure. Exhibit 200 is just the -- when I was talking about the balance sheet part of the leasehold improvements, this is for the balance sheet part. In other words, ATA actually put in service by December 31st of 2007, four DC10s. And these are the ones that have the Tails 701, 702, 705, and 706. They had paid a certain amount that totaled $19,500,000.

Now, they also owed an additional $3,920,000 on those. Those were obligations that had to be satisfied and ultimately in the bankruptcy court would have to be satisfied.

So the total was 23,420,000. That's the amount on the balance sheet, and from that, there was an integration agreement where VX Capital would pay $2 million for every aircraft that had been activated and put in service and had been fully paid by the people that did the reconditioning and the servicing of the aircraft. Once that certificate was given to VX Capital, they would pay to offset some of these costs $2 million.

To this date in April of 2008, they had paid $4 million for the integration of these -- to offset some of

the cost of these airlines. That's the total of 19,420,000. That's the total DC10 capitalized costs.

Q In terms of your calculation of DC10 losses, is there also provision made for DC10 lease costs; and if so, would you explain what those are?

A Yes. It's not in Exhibit 200, but the DC10 lease costs, we had -- remember we had 7 aircraft that we had, that ATA had leased; and they had four of them placed in service by December 31st of 2001. And by February 8th of 2008, they had transferred three of those over to World Airlines as well.

So the lease costs run from lease inception date through 2008 -- 2009, Your Honor. They run from lease inception date, and if you remember my previous testimony, they staggered January, March -- January, February, March. So it would be a staggering from January, February, March of 2007 through February 9th of 2008 for seven of them. And then for the three that were transferred to World at that date, they drop out of the equation; and then the other four continue to August 31st of 2008, which was the date the leases were terminated by the lessor.

Q Mr. Morriss, you also mentioned a few moments ago some accommodation made in the calculation of DC10 losses for DC10 profits earned through -- is this earned through April 3, 2008?

A That's correct.

Q Please tell us what that number is and how you arrived at it.

A Well, we were able to look at the records of ATA to determine --

Q Let's stop for a minute. Let's work from a document that reflects these. If you would put up Exhibit 250. It would be more helpful to the Court and everybody else if we're on the same page of the prayer book.

All right. Looking at Exhibit 250, we've now gotten through the first two line items? Let's go to the third line item and explain what that is.

A The third line item is the actual profits that ATA earned from the first flight. And the first flight happened in June of 2007 through December 31st of 2007.

Now, remember there was only one and a half full-time equivalent DC10s in place during that particular period of time, and then we were able to quantify that profit, and then actually through January of 2008. And then for February, March, and April, we estimated it based upon the historical profit that we had -- that we had in our lost profits calculation, added those together, and deducted the profits that ATA would have earned from flying the DC10s, which was the 2,858,728 number.

Q All right. Thank you, Mr. Morriss.

Would you explain to the Court the fourth line item

that says less actual L-1011 disposition proceeds, which is part of your calculus for determining the DC10 losses?

A Right. Since the DC10s were replacing the L-1011s, I thought it was fair that we should reduce whatever the DC10 costs were by the proceeds that the L-1011s brought in to the bankruptcy, and that's the 4,050,000.

Q And what is the total amount of DC10 losses that you have calculated based on the assumptions and the information you've given to the Court?

A The total is $27,842,748.

MR. KURTH: For purposes of this offer of proof record, we would offer Exhibits 250, and what is the other one, 249?

THE WITNESS: Yes, 200.

THE COURT: 200 and 250.

(Plaintiff's Exhibit 200 and 250 was received in evidence.)

MR. KURTH: 200 and 250.

No further questions on the offer of proof, Your Honor.

MR. BLUMBERG: No examination.

THE COURT: Very good. Let's take our lunch at this time, and we'll have cross-examination then.

MR. BROUGHTON: Your Honor, we do have some additional offers of proof from depositions.

ATA

DC-10 Aircraft - Capitalized Costs [1]

As of April 2008

MPC, LLC

	DC-10 Spending [2], [3]			
	Paid	Owed	Total	
Leasehold Improvements:				
Tail 701 (Serial #46583)	$ 3,120,000	$ -	$ 3,120,000	
Tail 702 (Serial #46912)	3,950,000	-	3,950,000	
Tail 705 (Serial #46915)	3,400,000	1,280,000	4,680,000	
Tail 706 (Serial #46582)	1,630,000	2,640,000	4,270,000	
Spare Aircraft (fleet related induction costs allocated to spares)	1,800,000	-	1,800,000	
Other DC-10s	-	-	-	
All DC-10s (Unallocated)	-	-	-	
Subtotal	**$ 13,900,000**	**$ 3,920,000**	**$ 17,820,000**	[4]
Rotables	3,500,000	-	3,500,000	[5]
Inventory	2,100,000	-	2,100,000	[6]
Total	**$ 19,500,000**	**$ 3,920,000**	**$ 23,420,000**	[7]
Less cash received from VX			(4,000,000)	
Net paid and/or owed by ATA			$ 19,420,000	

Notes:

(1) Source: P-020901, "Summary of DC10 Spending" as of September 5, 2008

(2) Although this source schedule specifies that these expenditures are dated through September 5, 2008, since ATA filed bankrtupcy in April of 2008, it is assumed that these expenditures were made through April of 2008.

(3) As explained in the document, spending includes related induction costs, or modificaitons necessary to get aircraft consistent with ATA's maintenance program, including engineering/consulting fees, parts and outsource labor. The data does not include any costs to acquire aircraft, as aircraft were financed under operating leases.

(4) According to ATA's balance sheet support records as of December 31, 2007, ATA had capitalized $16,024,446 for DC-10 leasehold improvements and $2,731,181 in DC-10 WIP, a total of $18,755,627. See further explanation in footnote 7 below.

(5) According to ATA's balance sheet support records as of December 31, 2007, ATA had capitalized $2,557,804 for DC-10 rotables. See further explanation in footnote 7 below.

(6) According to ATA's balance sheet support records as of December 31, 2007, ATA had capitalized $1,287,065 for DC-10 inventory. See further explanation in footnote 7 below.

(7) As discussed above, ATA's balance sheet records as of 12/31/07 indicated that ATA had capitalized a total of $22,600,496 for DC-10 assets as of that date. When comparing that amount to the total of $23,420,000 (prior to Vx reimbursement) spent through April of 2008 as shown in above schedule, this amount appears to be accurate.

PLAINTIFF'S EXHIBIT 200

DC-10 Losses

I.	DC-10 Capitalized Costs	$	19,420,000
II.	DC-10 Lease Costs	$	15,331,476
III.	Less: DC-10 Profits Earned Through Damage Date	$	(2,858,728)
IV.	Less: Actual L-1011 Disposition Proceeds	$	(4,050,000)
V.	Total DC-10 Losses	$	27,842,748

PLAINTIFF'S EXHIBIT 250