Preemption: An Effective Tool to Use in Transportation Cases

Below is part of our Motion for Summary Judgment dismissing a motor-carrier's suit to collect transportation charges.

I. LAW AND ARGUMENT

A. Law Applicable to Freight Brokers

1. GENERAL PRINCIPLES OF PREEMPTION

Article VI, section 2, of the U.S. Constitution contains the Supremacy Clause, which provides that the Constitution and laws of the United States are the supreme law of the land, the laws of any state to the contrary notwithstanding. U.S. Const. art VI, sec. 2. In applying the Supremacy Clause, the Supreme Court has recognized two types of preemption:

> Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit preemptive language, we have recognized at least two types of implied preemption: field preemption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict preemption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Gade v. National Solid Wastes Management, 505 U.S. 88, 98 (1992) (internal citations and punctuation omitted). The Supreme Court has also held that state common law, specifically tort actions, qualifies as a state law subject to preemption under the Supremacy Clause, absent a demonstration of a contrary intent by Congress. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-24 (1992). In analyzing preemption claims, the Court has recognized two governing principles: (1) Congress' intent is the ultimate touchstone in every preemption case and (2) the courts must begin with the presumption that the states' plenary police powers are not to be preempted by federal legislation unless that was the clear and manifest purpose of Congress.

Wyeth v. Levine, 555 U.S. 555, 565 (2009).

2. EXPRESS PREEMPTION OF CLAIMS AGAINST FREIGHT BROKERS

In 1980, Congress deregulated interstate trucking so that the rates and services offered by trucking companies and related entities would be set by the market rather than by government regulation. *See* Motor Carrier Act of 1980, 94 Stat. 793. Later, in 1994, to bolster deregulation, Congress included a provision within the Federal Aviation Administration Authorization Act ("FAAAA"), 108 Stat. 1605-06, which expressly provides that state regulation of the trucking industry is preempted:

> a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a **price, route, or service** of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, **broker**, or freight forwarder with respect to the transportation of property.

49 U.S.C. § 14501(c)(1) (emphasis added).

In interpreting § 14501(c)(1), the Supreme Court has determined:

> (1) that [s]tate enforcement actions having a connection with, or reference to carrier rates, routes, or services are preempted; (2) that such preemption may occur even if a state law's effect on rates, routes, or services is only indirect; (3) that, in respect to preemption, it makes no difference whether a state law is consistent or inconsistent with federal regulation; and (4) that preemption occurs at least where state laws have a significant impact related to Congress' deregulatory and preemption-related objectives.

Rowe v. New Hampshire Motor Transport Ass'n, 552 U.S. 370, 370-71 (2008) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992)) (internal citations and punctuation omitted). Therefore, under *Rowe*, FAAAA preemption is broad in scope, and occurs even if the state law's effect on "rates, routes, or services is only indirect." *Id.* Although the outer limits of FAAAA preemption have not been articulated, the Supreme Court has recognized that some state laws, such as those that affect trucking in only a tenuous, remote, or peripheral manner, such as those

forbidding gambling, are not preempted. *Id.* at 371. Following *Rowe*, the courts continue broadly to apply FAAAA preemption against state laws that fall within the preemption clause's reach.

See, e.g., American Trucking Associations, Inc. v. City of Los Angeles, 133 S.Ct. 2096 (2013) (holding certain local ordinances governing transportation from the port of Los Angeles were preempted). Importantly, the FAAAA preempts not only state statutes and administrative regulations governing the trucking industry but also state-law private causes of action which come within its terms. *See, e.g., Smith v. Comair, Inc.*, 134 F.3d 254 (4th Cir. 1998); *Deerskin Trading Post, Inc. v. United Parcel Service of America, Inc.*, 972 F. Supp. 665, 672 (N.D. Ga. 1997). "State common law counts as an 'other provision having the force and effect of law.'"

Non Typical, Inc. v. Transglobal Logistics Grp. Inc., Nos. 10–C–1058, 11–C–0156, 2012 WL 1910076, at *2 (E.D.Wis. May 28, 2012) (citing *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 n. 8, (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992)).

In determining which state causes of action are preempted by the FAAAA, the lower courts have applied the Supreme Court's guidance by crafting at least two distinct approaches, each of which focuses on the type of activity on the part of the airline/motor carrier/broker which forms the basis for the causes of action raised in the plaintiffs' complaint. One approach draws a distinction between activity that is related to "services" furnished by an airline and conduct connected with "operation and maintenance" of the aircraft. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5th Cir. 1995) (en banc). Under this view, causes of action arising from the operation and maintenance of an aircraft are not preempted, while causes of action related to airlines' services are. A second approach rejects the operations/services distinction and focuses on Congress' intent to achieve deregulation of the airline and trucking industries. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (en banc). The courts adopting this approach conclude that Congress used "services" in reference to the "prices, schedules, origins and

destinations of the point-to-point transportation of passengers, cargo, or mail." *Id.* at 1261. Thus, under this approach, "service" refers to things such as "the frequency and scheduling of transportation and the selection of markets for that activity, in short, in a public utility sense." *Id.*

In *Rowe,* the seminal case on FAAAA preemption in the trucking context, the Supreme Court adopted the latter approach. There, the Court examined a Maine statute which prohibited licensed tobacco retailers from employing a delivery service unless that service followed particular delivery procedures designed to control the distribution of tobacco products in the interest of public health and safety. *Rowe,* 552 U.S. at 371. More specifically, the Maine statute required motor carriers to offer a system of services for the delivery of tobacco which verified the licensing of the retailer and provided for certain labeling on the shipments of tobacco. *Id.* at 368-69. The Court found that these requirements had a significant and adverse impact on Congress' goals in enacting the FAAAA preemption provision. This was so because the Maine statute required motor carriers to utilize certain procedures and to offer a system of services that they would prefer not to offer, and which, in a free and deregulated market, they would not offer.

"The Maine law thereby produces the very effect that the federal law sought to avoid, namely, a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." *Id.* at 372. In other words, "the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate." *Id.* It thereby "regulates a significant aspect of the motor carrier's package pickup and delivery service." *Id.* at 373. Because, under FAAAA, the states cannot re-regulate what Congress has chosen to de-regulate, the Court found the Maine statute to be preempted by the FAAAA.

Like the Maine law at issue in *Rowe*, claims against brokers for negligent hiring and negligent entrustment seek to dictate the manner in which the broker provides services, i.e. the selection of a carrier, thereby displacing the market-driven means chosen by brokers. When analyzing whether these claims are preempted as impacting, either directly or indirectly, a broker's services, courts must look beyond the bare labeling of the causes of action alleged to "the facts underlying the specific claim." *Smith*, 134 F.3d at 259.

B. Plaintiffs' State Law Claims for Breach of (Oral) Contract, Unjust Enrichment, Fraud, Violations of Florida Deceptive Trade Practice Act, and Conspiracy are Preempted by Federal Law and Must be Dismissed

It is undisputed that All Points is a transportation broker and acted as a transportation broker for its shipper customers for all of the shipments that are the subject matter of this lawsuit. As defined in 49 U.S.C. § 13102(2) a transportation "broker" is a person, "other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation."

Maria Isabel Martinez is All Points' President, Secretary and Registered Agent. *Maria Isabel Martinez Aff.*, ¶ 3. Maria Isabel Martinez's sole duties at All Points include cooking lunch for family members and for the employees, depositing the company's receivables in the bank, signing corporate checks, and checking Tcheks/Advances after they have been issued. *Id.* at ¶ 5. Maria Isabel Martinez never entered into any oral contracts on behalf of All Points with any motor carrier. *Id.* at ¶ 6. Plaintiffs' complaint fails to allege that either Maria Martinez or Julio Martinez entered into any oral contracts with plaintiffs. *See Complaint. Counts I and II for Breach of Contract.* Julio Martinez is the dispatcher at All Points. *Julio Martinez Aff.*, ¶ 3. He solicits business for All Points from shippers and consignees, arranges transportation for All Points' customers' shipments through motor carriers willing to provide transportation service,

and confirms the engagement of the motor carrier with the motor carrier and shipper providing information needed to pick up and deliver the shipment. *Id.* at ¶ 5. Mr. Martinez had no authority as dispatcher to enter into any oral contracts on behalf of All Points with motor carriers. *Id.* at ¶ 17.

Under Federal Statute claims relating to the transportation of property preempt state law because "a State…may not enact or enforce a law, regulation or other provision having the force and effect of law related to a **price, route, or service** of any motor carrier…or any motor private carrier, **broker**, or freight forwarder with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). Plaintiffs' claims relate to the price of motor carrier transportation.

In the case of *Delta Leasing, Inc. v. American Fast Freight, et al.*, Alaska Superior Court, Case No. 3AN-07-10226 (May 14, 2008), a shipper sued a broker, carrier, and others in connection with significant damage to a manufactured housing unit being transported intrastate in Alaska. The shipper sued for breach of contract, promissory estoppel, intentional misrepresentation, **negligent misrepresentation**, negligence, and **violation of Alaska's Unfair Trade Practices and Consumer Protection Act** and sought punitive damages, attorneys' fees, etc. The Court held that based on the ICCTA [Interstate Commerce Commission Termination Act's] plain meaning and the court's broad interpretation of its preemptive scope, the shipper's claims related to dissatisfaction with a shipping service provided by a broker. Therefore, under the preemptive force of the ICCTA, the shipper's claims, other than breach of the bill of lading contract for the shipment pursuant to 49 U.S.C. § 14706, impermissibly sought to extend the shipper's recovery beyond the terms of the contract and were preempted. In this case no claim is made by plaintiffs that All Points issued, signed or breached a bill of lading contract. In this case all bills of lading contracts were between the shipper and the motor carrier plaintiffs.

The fact is that Federal Law preempts state law claims for all matters related to transportation of property. There are numerous cases interpreting the Carmack Amendment, 49 USC 14706, that illustrate the vast scope of preemption, and these cases unanimously hold that the Carmack Amendment's broad preemptive effect extends to all state and common law claims arising from the transportation and delivery of goods, whether such claims contradict or supplement Carmack remedies. *W.D. Lawson & Co. v. Penn. Cent. Co.*, 456 F.2d 419, 421[1]

[1]*See also Chatelaine, Inc. v. Twin Modal, Inc.*, 737 F. Supp. 2d 638 (N.D. Tex 2010)(state law claims for **negligence, negligent hiring practices, and violation of the Texas Deceptive Trade Practices Act (TDTPA)** were preempted); *Huntington Operating Corp. v. Sybonney Express, Inc.*, 2010 U.S. Dist. Lexis 55591 (S.D. Tex. 2010) (claims against broker for violations of the **Texas Deceptive Trade Practices Act, negligence, and negligent misrepresentation** were preempted and dismissed); *Rowe v. New Hampshire Motor Transport Association*, 128 S.Ct. 989 (2008) (U.S. Supreme Court struck down a Maine statute that imposed burdens on motor carriers delivering cigarettes into the state as preempted); *Dynamic Movers v. Paul Arpin Van Lines, Inc.*, 956 F.Supp. 836 (E.D. Wis. 1997)(court unmistakably held that claims relating to the provision of transportation and logistics constituted claims that relate to a service and were, therefore, preempted). (6th Cir. 1972) ("As to the . . . issue . . . [of] whether or not the Carmack Amendment preempted common law suits[,] . . . we hold that it did."); *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5th Cir. 2003) ("Congress intended for the Carmack Amendment to provide the exclusive cause of action for loss or damages to goods arising from the interstate transportation of those goods by a common carrier."; *Smith v. United Parcel Serv.*, 296 F.3d 1244, 1247 (11th Cir. 2002) ("Because the [plaintiffs] base all of their [state law tort] claims on allegations concerning UPS's failure to provide them with transportation and delivery services, the Carmack Amendment preempts their claims."); *Cleveland v. Beltman N. Am. Van Lines Co.*, 30 F.3d 373, 379 (2d Cir. 1994) (stating that one of the primary purposes of the Carmack Amendment is to provide uniformity in the disposition of claims brought under a bill of lading); *Moffit v. Bekins Van Lines Co.*, 6 F.3d 305, 306-07 (5th Cir. 1993) (holding that the Carmack Amendment preempted state law claims including intentional and negligent infliction of emotional distress, breach of contract, misrepresentation, fraud, negligence, and gross negligence); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 706-07 (4th Cir. 1993) ("[T]he Carmack Amendment was intended by Congress to create a national uniform policy regarding the liability of carriers under a bill of lading for goods lost or damaged in shipment."); *Hughes Aircraft v. N. Am. Van Lines*, 970 F.2d 609, 613 (9th Cir. 1992) ("Hughes wisely concedes that federal law preempts any state common law action against North American acting solely as a common carrier. It is clear that the Carmack Amendment established a uniform national policy for interstate carriers."); *Underwriters at Lloyds of London v. N. Am. Van Lines*, 890 F.2d 1112, 1121 (10th Cir. 1989) ("[W]e . . . hold that the Carmack Amendment preempts state common law remedies against common carriers for negligent loss or damage to goods shipped under a lawful bill of lading."); *Intech, Inc. v. Consol. Freightways, Inc.*, 836 F.2d 672, 677 (1st Cir. 1987) ("Even if [plaintiff] had sought to recover damages incidental to [the carrier's] refusal to unload, the Carmack Amendment provides the exclusive remedy for such a suit."); *Hughes*, 829 F. 2d at 1415 ("We . . . hold that the remedy provision of the Carmack Amendment preempts all state and common law remedies inconsistent with the Interstate Commerce Act. . . ."); *Air Prods. & Chems., Inc. v. Ill. Cent. Gulf R. Co.*, 721 F.2d 483, 484-85 (5th Cir. 1983)("[T]he Carmack Amendment, as judicially interpreted, provides an exclusive remedy for a breach of a contract of carriage provided by a bill of lading . . . ."); *Howe v. Allied Van Lines, Inc.*, 622

The case of *Ameriswiss Technology, LLC v. Midway Line of Illinois, Inc.*, 888 F. Supp. 2d 197 (D.N.H. 2012) is equally compelling authority in support of preemption. In that case, the plaintiff sued broker C.H. Robinson Worldwide, Inc. ("CHRW") for negligence and breach of contract. *Id.* at 200. The plaintiff's action was consolidated with that of its insurer, which asserted three causes of action: breach of contract of transportation, breach of duty of care as a common carrier, and breach of duty of care as a bailee. *Ameriswiss*, 888 F. Supp. 2d at 201. CHRW moved for summary judgment.

Ameriswiss also considered the issue of preemption under 49 U.S.C. sections 14706 and 14501(c)(1):

> Based on the foregoing, and as Judge Lindsay's opinion in *Chatelaine, Inc. v. Twin Modal, Inc.*, 737 F. Supp. 2d 638 (N.D. Tex. 2010) explains quite clearly, there are two potential theories of preemption available in this area of the law. The first is based on implied preemption and the Carmack Amendment. *See id.* at 641. The second is based on express preemption and the ICCTA [Interstate Commerce Commission Termination Act]. *See id.* at 641-42.
>
> If Robinson was a carrier rather than a broker, as Ameriswiss appears to contend, then Ameriswiss's negligence claim would certainly be barred by the implied preemptive effect of the Carmack Amendment. [Citation omitted.] Thus, Ameriswiss's argument that Robinson was a carrier would seem to undermine its argument that its negligence claim against Robinson is not preempted. Be that as it may, the court need not determine whether Robinson was a carrier or a broker *because even* if *Robinson was a broker, Ameriswiss's negligence claim and all*

F.2d 1147, 1157 (3d Cir. 1980) ("Congress in the Carmack Amendment . . . federalized, and thus made uniform, the law of common carrier liability in interstate commerce transactions."); *Automated Window Mach., Inc. v. McKay Ins. Agency, Inc.*, 320 F.Supp. 2d 619, 620 (N.D. Ohio 2004)("State law causes of action against an interstate motor carrier for fraud, tort, intentional and negligent infliction of emotional stress, breach of contract, breach of implied warranty, breach of express warranty and state deceptive practices acts, etc., are preempted [by the Carmack Amendment]"); *Carr v. Olympian Moving & Storage*, 2006 WL 2294873 *2 (N.D. Ohio June 6, 2006)("[t]he Carmack Amendment is the sole remedy available seeking damages from a carrier resulting from the interstate shipment of goods").

> *three of MB Insurance's claims are impliedly preempted by the Carmack Amendment and expressly preempted by the ICCTA.*
>
> However, even if those claims are not subject to implied preemption under the Carmack Amendment, they are expressly preempted by the ICCTA. In *Kashala v. Mobility Services International, LLC*, in which the plaintiff brought a negligence claim against a transportation broker, Judge Hillman ruled that "any negligence claim against Mobility in its capacity as a broker is preempted by another section of the ICCTA, namely, 49 U.S.C. § 14501(b)(C) [sic]," Civ. No. 07-40107-TSH, 2009 U.S. Dist. LEXIS 64334, 2009 WL 2144289, at *5 (D. Mass. May 12, 2009).

Ameriswiss, 888 F. Supp. 2d at 204-05 (emphasis added).

The *Ameriswiss* court cited to the reasoning of numerous other district courts—no federal circuit court has addressed the issue. The court observed:

> District courts in other circuits have reached similar conclusions with respect to a variety of state common-law tort claims against brokers. In *Non Typical, Inc. v. Transglobal Logistics Group, Inc.*, after noting that "the [preemption] statute expressly lists brokers," Nos. 10-C-1058 & 11-C-0156, 2012 U.S. Dist. LEXIS 73452, 2012 WL 1910076, at *3 (E.D. Wis. May 28, 2012), Judge Griesback granted judgment on the pleadings to a broker because the shipper's negligence claims were preempted by the ICCTA, *see id.* Judge Griesback is not alone. *See, e. g., Chatelaine*, 737 F. Supp. 2d at 642-43 (granting broker's motion to dismiss claims for negligence and negligent hiring, based on express preemption); *Huntington Operating Corp. v. Sybonney Express, Inc.*, Civ. No. H-08-781, 2010 U.S. Dist. LEXIS 55591, 2010 WL 1930087, at *3 (S.D. Tex. May 11,2010) (grantingbroker'smotionfor summaryjudgmentonshipper's claims fornegligenceand negligentmisrepresentation, based on express preemption). Finally, in an opinion that is instructive but not precisely on point, Judge Davis granted a broker's motion to dismiss a motor carrier's tort claims against it, explaining that the "applicability [49 U.S.C. § 14501(c)(1)] hinges on the subject matter and effect of each claim, rather than on the identity of the parties in the litigation." *Yellow Transp., Inc. v. DM Trans p. Mgmt. Servs., Inc.*, No. Civ.A.2:06CV1517-LDD, 2006 U.S. Dist. LEXIS 51231, 2006 WL 2871745, at *3 (E.D. Pa. July 14, 2006). Here, of course, the subject matter of the litigation is the destruction of Ameriswiss's machines while they were being transported from one state to another. *In sum, not only are the claims asserted in Ameriswiss's Count I and MB Insurance's Counts I-III impliedly preempted by the Carmack Amendment, those claims are expressly preempted by 49 U.S.C. § 14501(c)(1).*

Ameriswiss, 888 F. Supp. 2d at 205-06 (emphasis added).

Recently, another federal district court accepted the reasoning of *Ameriswiss* and *Chatelaine*. In *AIG Europe Ltd. v. General System, Inc.*, 2014 WL 3671566 (D. Md. July 22, 2014), the court held:

> The Plaintiff's claim against TBB Global is expressly preempted by the Interstate Commission Termination Act, 49 U.S.C. § 14501 ("ICCTA"). Enacted in 1995, the ICCTA includes a broad preemption clause, which provides:
>
> [A] State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> 49 U.S.C. § 14501(c)(1).

1. <u>Most of Plaintiffs' Claims Are Time-Barred</u>

Chapter 135 of Section 49 of the United States Code Service provides in pertinent part that "the Secretary [of Transportation] and the [Surface Transportation] Board have jurisdiction, as specified in this part, over transportation by motor carrier and the procurement of that transportation, to the extent that passengers, property, or both, are transported by motor carrier …" in interstate or foreign commerce. See 49 U.S.C. § 13501.

The ICC Termination Act of 1995 ("ICCTA") distinguishes between the terms "broker" and "motor carrier." It defines the term "motor carrier" as "a person providing commercial motor vehicle (as defined in 49 U.S.C. §31132) transportation for compensation." 49 U.S.C., §13102(14). MC Liberty and PS Trucking are duly licensed motor carriers. *MC Liberty Response to Admissions Requests*, No. 4; *P.S. Trucking Response to Admissions Requests, No. 12.* Pursuant to 49 U.S.C. § 14705(a), a motor carrier providing transportation or service subject to jurisdiction under chapter 135 <u>must</u> begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues, and a claim related to a

shipment of property accrues under this section on delivery or tender of delivery by the carrier. 49 U.S.C. § 14705(g).

All of the shipments involved in this lawsuit were interstate shipments from Florida to California and from California to Florida. *MC Liberty Response to 2nd Set of Interrogatories*, No. 7; *P.S. Trucking Response to 2nd Set of Interrogatories*, *No. 12*. Plaintiffs MC Liberty and PS Trucking are motor carriers that filed this civil action on January 14, 2014 to recover transportation charges for shipments for which they were allegedly underpaid through October 2013. *See generally, Complaint*. Since most of those shipments accrued before July 2012, plaintiffs have failed to state a cause of action upon which relief can be granted because they have failed to allege that they filed this suit in a timely manner as to any of the shipments that accrued before July 2012. In fact, the only claims that would have accrued within 18 months of the filing of this lawsuit would have been for the time period between July 2012 to October 2013; for a total of 96 shipments.

Because Federal Law requires that a motor carrier must begin a civil action to recover charges for transportation or service provided by the carrier within 18 months after the claim accrues, all of plaintiffs' state law causes of action as to any claims prior to July 14, 2012 are preempted and are therefore invalid, and must be dismissed. *See e.g., Emmert Indus. Corp. v. Artisan Assocs.*, 497 F. 3d 982 (9th Cir. 2007) In *Emmert, supra*, the Ninth Circuit affirmed the district court which held that claims seeking reimbursement for services governed by the Interstate Commerce Commission Termination Act ("ICCTA") were untimely under the 18 month limitations period of 14705(a). *Emmert* at 988-89. *See also Excel Transp. Servs. v. Sigma Vita, Inc.,* 288 Ga. App. 527 (Ga. Ct. App. 2007)(motor carrier's state law claims for breach of contract and recovery on open account were subject to the federal statute of limitation).

2. <u>Julio Martinez and Maria Isabel Martinez must be dismissed as defendants in this lawsuit.</u>

Julio Martinez and Maria Isabel Martinez are not proper parties to this lawsuit and must be dismissed. As shown earlier in this brief, state law claims for fraud, negligence, gross negligence, negligent hiring practices, intentional and negligent infliction of emotional distress, breach of contract, misrepresentation, and state law Deceptive Trade Practices Acts are preempted. *See Chatelaine, Inc. v. Twin Modal, Inc.*, 737 F. Supp. 2d 638 (N.D. Tex 2010)(state law claims for **negligence, negligent hiring practices, and violation of the Texas Deceptive Trade Practices Act (TDTPA)** were preempted); *Huntington Operating Corp. v. Sybonney Express, Inc.*, 2010 U.S. Dist. Lexis 55591 (S.D. Tex. 2010) (claims against broker for violations of the **Texas Deceptive Trade Practices Act, negligence, and negligent misrepresentation** were preempted and dismissed); *Rowe v. New Hampshire Motor Transport Association*, 128 S.Ct. 989 (2008) (U.S. Supreme Court struck down a Maine statute that imposed burdens on motor carriers delivering cigarettes into the state as preempted); *Dynamic Movers v. Paul Arpin Van Lines, Inc.*, 956 F.Supp. 836 (E.D. Wis. 1997)(court unmistakably held that claims relating to the provision of transportation and logistics constituted claims that relate to a service and were, therefore, preempted).

Under federal law if there was any liability at all for underpayment of transportation charges the only party that could have been properly sued in a timely manner was All Points, the transportation broker, and not the transportation broker's employees as individuals. Bringing state law claims against Julio and Maria Isabel Martinez as individuals is analogous to bringing state law claims against truck drivers for damage or loss to property they transported, and is unsustainable because the state law claims are preempted by federal statute. *See e.g., Parramore v. Tru-Pak Moving Sys.*, 286 F. Supp. 2d 643 (M.D.N.C. 2003); *Schultz v. Auld*, 848 F. Supp. 1497

(U.S.D.C. ID. 1993) (state law claims were preempted and claims brought against moving company driver as an individual were dismissed).

3. Plaintiffs Have Produced No Competent Evidence of the Alleged Oral Agreement or of Fraudulent Records.

Plaintiffs complaint they were entitled to 90% of the transportation charges but only a few of the claims show they were paid slightly under 90% of the charges, many of the claims show they were paid more than 90% of the charges, and a few of the claims show they were paid exactly 90% of the charges, which does not establish that plaintiffs are owed any money on the remaining claims. What these facts show is that plaintiffs accepted more than 90% than they claim they were entitled to on many of the shipments that are not time-barred, and therefore these amounts should be offset against the amounts that plaintiffs are claiming; on nine of the claims plaintiffs received exactly 90%, so they are owed nothing, and on 43 of the remaining claims plaintiffs were paid slightly under 90%; the facts contradict their claim that there was an oral agreement to pay them 90% of the transportation charges on every shipment. In fact, the verified interrogatory answers state, "10% of original price of the load from customers and immediate production of his confirmations from those customers to Plaintiff."

Plaintiffs have failed to establish an oral agreement to pay 90%. The fact that plaintiffs accepted rate quotes and transported shipments on which they are now claiming they were underpaid, and the fact they admit they cashed every check tendered to them for over seven years without complaining, and continued to transport shipments, also destroys their ability to establish an essential element of the contract, that there was an oral agreement for them to receive 90%. Why would any motor carrier continue to work for a company for over seven years if it did not get what it was supposed to for transporting shipments? This, coupled with the fact that the plaintiffs have not asserted under oath that Maria Isabel Martinez was involved with entering

into the oral agreement, and because plaintiffs can present no evidence that Julio Martinez was authorized to enter into any oral agreements on behalf of All Points, refutes plaintiffs' claims and indicates that the alleged oral agreement was just made up to try to extract money plaintiffs are not entitled to from the defendants.

A party who asserts an oral contract must prove its existence by a preponderance of the evidence. *Batista v. Walter & Bernstein, P.A.*, 378 So. 2d 1321, 1322 (Fla. 3d DCA 1980). Plaintiffs have produced no competent evidence of an alleged oral agreement. *South Carolina Ins. Co. v. Wolf*, 331 So.2d 337 (Fla. 1st DCA 1976) (competent substantial evidence needed to support finding of existence of oral contract).

The thrust of Plaintiffs' complaint alleges that MC Liberty and PS Trucking each had oral contracts with All Points in which All Points would pay them 90% of the transportation charges that All Points received from its customers. *See generally, Complaint*. Plaintiffs allege that in derogation of the oral contract(s), All Points systematically told plaintiffs it was receiving lower fees than it actually did, and to carry out this scheme, All Points created fraudulent confirmations listing the reduced rate. *Complaint,* ¶ 21, 35. However, all of the records in evidence produced by All Points show the rate quoted and agreed to with plaintiffs, and the attached Excel spreadsheets that were prepared from All Points' shipment records list all shipments made by MC Liberty and PS Trucking for All Points between July 2012 and October 31, 2013. *See Elizabeth Martinez-Schlotzhauer Aff.*, ¶ 18, *Exhibit "1B*." In every case All Points issued checks to plaintiffs after the shipments were delivered, and these checks were cashed and kept by the plaintiffs. *MC Liberty's Response to Admissions Requests, No. 9* and *P.S. Trucking Response to Admissions Requests, No. 17*.

Plaintiffs allege that Julio and Maria Martinez would create fraudulent invoices listing the reduced rate for shipments. *Complaint,* ¶¶ 50, 68. However, contrary to any statements plaintiffs may make in opposition to this motion, plaintiffs have failed to produce any documents in response to defendants' requests for production to support plaintiffs' allegations, and the only record evidence shows that plaintiffs agreed to the rates that were quoted and cashed every check given to them for the services they provided without ever making a complaint, and it was not until over seven years later that plaintiffs ever claimed in writing there was a discrepancy in the rates they were quoted and received to transport shipments. *See Elizabeth Martinez-Schlotzhauer Aff.,* ¶ 21.

All Points arranges transportation with approximately 30 to 50 motor carriers on behalf of its shipper/consignee customers. *Id.* at ¶ 7. These motor carriers are owner-operator truckers and independent contractors. *Id.* All throughout these years, All Points has dealt with these motor carriers on exactly the same basis, i.e.: quoting the motor carrier a rate to transport the loads for All Points' customers, confirming those rates in writing when requested by the motor carrier, and then paying the motor carrier upon completion of the transportation, consistent with those rates. *Id.* at ¶ 10. Upon information and belief, before plaintiffs filed this lawsuit plaintiffs asked a number of other motor carriers to join them as plaintiffs in this lawsuit, but none of them agreed.

4. <u>There has been no agreement as to essential terms of the alleged oral contract, and therefore an enforceable oral contract does not exist</u>.

An oral contract is subject to the basic requirements of contract law such as offer, acceptance, consideration and sufficient specification of essential terms. *St. Joe Corp. v. McIver*, 875 So. 2d 375, 379 (Fla. 2004) citing to *W.R. Townsend Contracting, Inc. v. Jensen Civil*

Constr., Inc., 728 So. 2d 297, 302 (Fla. 1st DCA 1999) (mentioning basic contract principles as applied to an oral contract claim). The fact that nonessential terms remain open is not fatal to an oral contract. *See W.R. Townsend Contracting, Inc.*, 728 So. 2d at 301; *Winter Haven Citrus Growers Ass'n v. Campbell & Sons Fruit Co.*, 773 So. 2d 96, 97 (Fla. 2d DCA 2000).

A party seeking to establish the existence of an oral contract must present a preponderance of evidence. *Metropolitan Dade County v. Estate of Hernandez*, 591 So.2d 1124 (3d DCA 1992) citing *Theocles v. Lytras*, 518 So. 2d 936 (Fla. 3d DCA 1987); *see also Batista v. Walter & Bernstein*, P.A., 378 So. 2d 1321 (Fla. 3d DCA 1980); *Smith v. Smith*, 375 So. 2d 1138 (Fla. 3d DCA 1979); *South Carolina Ins. Co. v. Wolf*, 331 So. 2d 337 (Fla. 1st DCA 1976). For an agreement to be enforceable there must be competent and substantial evidence that the parties agreed on essential terms. *Theocles v. Lytras*, 518 So. 2d at 936; *Batista v. Walter & Bernstein*, 378 So. 2d at 1321.

Based upon plaintiffs' interrogatory responses regarding the terms of the alleged oral contract, there was no agreement as to the alleged contract's essential terms, and therefore an enforceable oral contract does not exist, as will be shown below. *See, e.g. Jacksonville Port Auth. v. W.R. Johnson Enters.*, 624 So. 2d 313 (Fla. 1st DCA 1993).

Defendants' Second Set of Interrogatories to Plaintiff MC Liberty, No. 4, asked as follows:

> **No. 4**: With respect to the Plaintiff's claim of an oral contract entered into between Plaintiff and Defendants, set out all of the terms that Plaintiff claims was in the oral contract.
>
> **RESPONSE:** 10% of original price of the load from customers and immediate production of his confirmations from those customers to Plaintiff.

Similarly, *Defendants' Second Set of Interrogatories to Plaintiff PS Trucking*, No. 9, asked as follows:

No. 9: With respect to the Plaintiff's claim of an oral contract entered into between Plaintiff and Defendants, set out all of the terms that Plaintiff claims was in the oral contract.

RESPONSE: 10% of original price of the load from customers and immediate production of his confirmations from those customers to Plaintiff.

These terms as stated by the Plaintiffs of the alleged oral contract are vague and ambiguous and do not relate to any alleged 90% figure, and do not clearly specify what the obligations of Plaintiffs are or what the obligations of Defendants are, and therefore the obligations cannot be ascertained, as is required in order for there to be an enforceable oral agreement. *See Jacksonville Port Auth., supra.* Moreover, plaintiffs must prove by the preponderance of the evidence that there is an oral agreement. *Batista, supra*.

Admission request No. 5 to MC Liberty states as follows:

No. 5 MC Liberty has no written document in their possession that indicates the terms of the oral contracts between the Plaintiff and the Defendants.

RESPONSE: Plaintiff hereby denies Paragraphs 1, 3, 5, 6, 7, and 10.

Similarly, admission request No. 13 to PS Trucking states as follows:

No. 13 PS Trucking has no written documents in their possession that indicates the terms of the oral contracts between the Plaintiff and the Defendants.

RESPONSE: Plaintiff hereby denies Paragraphs 1, 4, 7, 9, 10, 11, 13, 14, 15, 16, and 18.

By denying these admissions requests, Plaintiffs represented that they have documents showing the terms of the oral contracts, but no such documents have been produced by Plaintiffs. *See Composite Exhibit "4"* attached hereto, which contains all of the documents produced by plaintiffs in response to defendants' *1st and 2nd Requests for Production*, none of which relate to any disputes regarding payment.

Respectfully submitted,

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*If anyone reading this document needs a full copy of the Memoranda of Law, it is filed in the Circuit Court of Dade County under Case No.: 14-001031-CA-01 or call Hyman Hillenbrand (561)381-3274.