STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FIRST JUDICIAL CIRCUIT
)
) CASE NO.: 2014-CP-38-1164
Rebecca McCutcheon,)
Plaintiff,) **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**
vs.)
)
United Parcel Service, Inc. and John Doe,)
Defendant.)

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SC Court of Appeals

Plaintiff's Attorney:	Defendant's Attorney:
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WINNIE B. CLARK
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ORANGEBURG, SC
2016 MAY -3 P 3:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/☐ Defendant — 3/3/2016 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ _____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE CODE _____
Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

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CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	CIVIL ACTION NO. 2014-CP-38-01164
	)	
Rebecca McCutcheon,	)	
	)	
Plaintiff,	)	**PLAINTIFF'S RULE 59(e), SCRCP. MOTION TO RECONSIDER, ALTER OR AMEND**
	)	
v.	)	
	)	
United Parcel Service, Inc. and John Doe,	)	
	)	
Defendants.	)	
	)	

Plaintiff Rebecca McCutcheon ("Plaintiff") moves this Court pursuant to Rule 59(e), SCRCP, to reconsider, alter, or amend its February 2, 2016 Order granting Defendant United Parcel Service, Inc.'s ("UPS") motion to dismiss. This Motion is based on the memorandum of law below and any exhibits filed along with this Motion, the pleadings, and applicable law, as well as any other memorandum of law that Plaintiff may submit to the Court at or prior to a hearing on this Motion. For the reasons stated below, Plaintiff requests the Court reconsider its Order and deny UPS's motion.

FACTUAL BACKGROUND

Plaintiff is the wife of Cortland James Eggleston, a veteran who suffers from a serious thyroid condition and received his medication via UPS. (Cmplt. ¶ 5). On April 11, 2013, the VA hospital in Charleston, South Carolina, shipped the medication overnight delivery to Plaintiff's home in rural Eutawville, Orangeburg County, South Carolina. *Id.* at ¶¶ 1, 7; Exh. to Memo. in Opp. to Mot. to Dismiss. When the package did not arrive until over thirteen days later, Eggleston suffered a life-threatening "thyroid storm" that resulted in severe pain and surgical intervention. (Cmplt. ¶ 13; Memo. in Opp. to Mot. to Dismiss pp. 1-2).

When the medication had not arrived by April 15, Plaintiff called the VA, which noted in Eggleston's file that "UPS records . . . states package being held because a correct street name is needed. Called UPS . . . Spoke with Joseph @ UPS who contacted local driver to make contact with patient and redeliver today." (Exh. to Memo. in Opp. to Mot. to Dismiss). "[F]or many years" prior to the event at issue, UPS successfully delivered the medication from the VA to Plaintiff's home. (Cmplt. ¶ 7). Despite this, UPS told Plaintiff "that her address could not be located." *Id.* at ¶ 11.

After her husband suffered severe injuries and medical intervention from the absence of his medication, Plaintiff filed this action against UPS and John Doe (the delivery person) for negligence, negligent entrustment, and loss of consortium. Plaintiff does not seek recovery of loss or damage to property.

UPS filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6), SCRCP, arguing Plaintiff's claims are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c), or the Carmack Amendment, 49 U.S.C. § 14706. Plaintiff submitted a Memorandum in Opposition to Defendant's Motion to Dismiss. On September 28, 2015, the Court held a hearing on Defendant's motion. On February 2, 2016, the Court signed an Order granting the motion based on (1) a lack of subject matter jurisdiction under Rule 12(b)(1), SCRCP and (2) failure to state a claim under Rule 12(b)(6)[1], SCRCP. Both rulings are based on the Court's finding that the FAAAA preempts Plaintiff's claims. Plaintiff argues below that finding is incorrect and, therefore, challenges the Court's decision as to subject matter jurisdiction and failure to state a claim.

[1] The Order states the Complaint is dismissed "pursuant to SCRCP 12(b)(1)" for failure to state facts sufficient to constitute a valid cause of action. Plaintiff assumes the Court intended to refer to Rule 12(b)(6), SCRCP.

Plaintiff received a copy of the Order on February 22, 2016, and timely serves this motion to reconsider, alter, or amend under Rule 59(e), SCRCP.

STANDARD

In ruling on a Rule 12(b)(6), SCRCP, motion to dismiss, the court must consider all well-pled allegations as true." *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (internal quotation marks omitted). "[N]ovel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion." *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015).

A challenge to subject matter jurisdiction is raised by a motion to dismiss under Rule 12(b)(1), SCRCP. *Ballenger v. Bowen*, 313 S.C. 476, 478, 443 S.E.2d 379, 380 (1994). Evidence outside the pleadings may be considered in deciding a motion to dismiss based on lack of jurisdiction. *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

ARGUMENT

The Court should alter or amend its judgment for any one of these independent reasons: (1) Plaintiff's claims are not related to a UPS "service", (2) finding preemption under the facts of this case is contrary to the Congressional intent and purpose of the FAAAA, and (3) the intrastate shipment of a household good at issue in this case is excepted from preemption.

49 U.S.C. § 14501(c)(1) states:

> ***Except as provided in paragraphs (2)*** and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law ***related to a price, route, or service*** of any motor carrier (other than a carrier affiliated with a direct

> air carrier covered by section 41713(b)(4) [49 USCS § 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). UPS argued only that Plaintiff's claims are based on a service, and the Court's ruling is based only a finding that the claims are based on a service. Therefore, there is no issue regarding whether the claims relate to a price or route.

As an initial matter, cases interpreting the Airline Deregulation Act ("ADA") are persuasive authority as to the interpretation of the FAAAA because Congress used language in the FAAAA that is identical to the predecessor ADA. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 369 (2008) (stating in a case interpreting the FAAAA, "we follow *Morales* [interpreting the ADA] in interpreting language in the 1994 Act before us here. . . . Here, the Congress that wrote the language before us copied the language of the air-carrier pre-emption provision of the" ADA).

I. Plaintiff's Claims are Not "Related To" UPS's Services

The Court's interpretation and application of the phrase "related to" is overly broad and not supported by the law. "The broad preemptive scope of the phrase 'related to,' [in the FAAAA] is not without limits." *Gaines Motor Lines, Inc. v. Klaussner Furniture Indus.*, 734 F.3d 296, 307 (4th Cir. 2013) (holding a breach of contract case not preempted under the FAAAA where "[n]o state law or regulation governing the Motor Carriers' prices, routes, or services is implicated"). "[T]he breadth of the words 'related to' does not mean the sky is the limit."[2] *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013) (holding the FAAAA did not preempt state-law

[2] "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere. But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

claims against a towing company for the company's post-towing disposal of the vehicle). Rather, when determining the effect of a state regulation on carriers, "the appropriate inquiry in such a case is whether the provision, directly or indirectly, ***binds*** the . . . carrier to a particular price, route or service and ***thereby interferes with competitive market forces*** within the . . . industry." *Sanchez v. Lasership, Inc.*, 937 F. Supp. 2d 730, 740 (E.D. Va. 2013) (internal quotation marks omitted) (emphasis added) (holding state statute on independent contractors preempted).

Plaintiff's common law negligence and loss of consortium claims are not "related to" UPS's services within the meaning of the FAAAA. UPS presented no argument in this case that the South Carolina common law at issue binds UPS or interferes with competitive market forces. Further, UPS presented no argument as to any effect of this lawsuit on its services. Rather, UPS solely argued, and the Court found, that the claims are based on the delivery of packages, which is a service that UPS provides. This is too general and tenuous of a connection and is not the effect Congress intended.

In *Morales*, the Supreme Court recognized that some state action may have "too tenous, remote, or peripheral" an affect to be pre-empted.[3] 504 U.S. at 390. In *Wolens*, the Supreme Court expanded upon this principle by holding that a breach of contract claim based an airline's "self-imposed undertakings" was not pre-empted because it involved "privately ordered obligations" and not the State's enforcement of any a law, rule, regulation, or other provision of law. 513 U.S. at 228-29. The Fourth Circuit took that one step further in *Smith v. Comair, Inc.*, 134 F.3d 254

[3] This holding in *Morales*, and the number of courts that have cited it, demonstrate that UPS incorrectly stated in its memorandum in support of the motion to dismiss that there is "a single narrow exception" to preemption for "breach-of-contract claims." (Def. Memo. in Opp. pp. 5, 7). Rather, whether preemption applies is a case-specific inquiry, and the United States Supreme Court has found preemption not to exist in cases not involving breach of contract. *See Dan's City Used Cars*, 133 S. Ct. at 1778 (holding the FAAAA did not preempt state-law claims against a towing company for the company's post-towing disposal of the vehicle).

(4th Cir. 1998), by holding that the plaintiff's claims for false imprisonment and intentional infliction of emotional distress were not preempted "to the extent [the] claims are based on conduct distinct from Comair's determination not to grant permission to board" but instead on "outrageous conduct on the part of an airline toward of a passenger" that "too tenuously relates or is unnecessary to an airline's services." *Id.* at 259. "If, for example, an airline held a passenger without a safety or security justification, a claim based on such actions would not relate to any legitimate service and would not be preempted." *Id.*

Plaintiff's case is not limited to the allegation that UPS negligently delivered the package untimely. Plaintiff also alleges that UPS held the medication without any justification, even going so far as to tell Plaintiff that, despite numerous successful deliveries to her home in the past, "her address could not be located." (Cmplt. ¶ 11). Such action is not related to any legitimate service and should not be preempted.

"[T]he state laws whose 'effect' is 'forbidden' under federal law are those with a '*significant* impact' on carrier rates, routes, or services." *Rowe*, 552 U.S. at 375 (quoting *Morales*, 504 U.S. at 388, 390). UPS does not argue, and the Court did not find, that South Carolina common law on negligence and loss of consortium has a significant impact on carrier services. That is because there is no impact, significant or otherwise, to UPS's services as a result of this case. Rather, UPS's prices, routes, and services would remain unchanged in the event Plaintiff prevailed.

In factually similar cases involving personal injury incidental to delivery, the courts have held Congress did not intend to preempt common law negligence claims. In *Huertas v. United Parcel Serv., Inc.*, 974 N.Y.S.2d 758 (N.Y. App. Div. 2013), the plaintiff brought suit for negligence to recover for personal injuries sustained when she tripped and fell over stacked boxes that she asked the UPS delivery person to place on the counter so no one would trip on them. *Id.*

at 758-59. The Court held the claim was not preempted under the FAAAA because the facts dealt "with the manner in which a delivery person stacked packages; it is not related to a 'service' governed by the ADA or the FAAAA." *Id.* at 762. "It is not the intent of Congress to preclude such common law negligence claims when it enacted the ADA or FAAAA." *Id.* at 762-63.

There is no evidence that Congress intended to extend the reach of the FAAAA to personal injury incidental to a delivery. There is no explicit textual reference regarding damage to persons. Therefore, there is not support for finding a Congressional intent to supplant state law concerning personal injury in this case. Plaintiff's claim is separate and apart from the loss or damage of the prescription goods—it relates solely from the personal injuries suffered when UPS unjustifiably retained Eggleston's medication, failed to locate Plaintiff's address, and did not timely deliver the medication.

For these reasons, the Court should reconsider its Order and deny UPS's motion.

II. Congress Did Not Intend to Preempt State Common Law That Does Not Affect Competitive Market Forces or a Carrier's Operations

The Court's decision is inconsistent with Congress's purpose in enacting the FAAAA. "The target at which [the FAAAA] aimed was '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.'" *Dan's City Used Cars*, 133 S. Ct. at 1780 (quoting *Rowe*, 552 U.S. at 372) (emphasis added); *see also Thompson v. UFP Eastern Div., Inc.*, 2012 U.S. Dist. LEXIS 120129, *8, 2012 WL 3686064 (D.S.C. Aug. 24, 2012) ("The FAAAA was promulgated in order to protect the competitive market forces from state regulation." (internal quotation marks omitted)). "Congress sought to relieve motor carriers from the absurd inefficiencies in their operations, which made it difficult to efficiently conduct a standard way of

doing business and impeded their ability to compete and provide quality services to their customers." *Sanchez*, 937 F. Supp. 2d at 743.

In *Dan's City Used Cars*, the Supreme Court held that state consumer protection and tort laws regarding the disposal of a towed vehicle were not preempted by the FAAAA because

> The state laws in question hardly constrain participation in interstate commerce by requiring a motor carrier to offer services not available in the market. Nor do the state laws invoked by [plaintiff] freez[e] into place services that carriers might prefer to discontinue in the future. New Hampshire's laws on disposal of stored vehicles, moreover, will not open the way for a patchwork of state service-determining laws, rules, and regulations.

Dan's City Used Cars, 133 S. Ct. at 1780 (internal quotation marks and citation omitted). The same conclusion is warranted in this case. Plaintiff's common law negligence and loss of consortium claims do not (1) constrain participation in interstate commerce by requiring UPS to offer services not available in the market, (2) freeze into place services that UPS might want to discontinue in the future, or (3) create a patchwork of state service-determining laws, rules, and regulations. Plaintiff's action is simply "not the kind of burdensome state economic regulation Congress sought to preempt." *Id.* at 1780 (internal quotation marks omitted). Therefore, the Court should reconsider its Order and deny UPS's motion.

III. Intrastate Shipment of a "household good" is Excepted from Preemption

Section 14501(c)(2)(B) states that "Paragraph (1)-- . . . does not apply to the intrastate transportation of household goods." 49 U.S.C. § 14501(c)(2)(B). The Court's Order does not address Plaintiff's argument that this case involves the intrastate transportation of household goods. It is undisputed that the medication traveled only within the state of South Carolina.

> The term "household goods", as used in connection with transportation, means personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is--

(A) arranged and paid for by the householder, except such term does not include property moving from a factory or store, other than property that the householder has purchased with the intent to use in his or her dwelling and is transported at the request of, and the transportation charges are paid to the carrier by, the householder; or

(B) arranged and paid for by another party.

49 U.S.C. § 13102(10). Eggleston's medication is a personal effect and property to be used in Plaintiff's dwelling. The transportation of the medication was arranged and paid for by the VA hospital, "another party." *Id.* Therefore, the medication meets the criteria for a household good that is excepted from preemption under the FAAAA.

The Court's Order does not address this argument by Plaintiff, and she requests the Court alter or amend the Order to rule on this raised issue and deny UPS's motion to dismiss.

CONCLUSION

For the reasons stated above, the Court should reconsider its Order and deny UPS's motion to dismiss.

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