UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SEPTEMBER 11 LITIGATION	21 MC 97 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF AIRPORT OPERATOR DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' MASTER COMPLAINTS

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January 17, 2003

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Defendants Massachusetts Port Authority ("Massport"), the Metropolitan Washington Airport Authority ("MWAA"), and the City of Portland, Maine ("Portland") (collectively, the "Airport Operators") submit this memorandum of law in support of their motion to dismiss the Master Complaints pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Defendants Massport, Portland and MWAA are the respective operators of Logan International Airport, the Portland International Jetport, and Washington Dulles International Airport.[1] The plaintiffs assert claims against the Airport Operators and other defendants seeking to recover for wrongful death, personal injuries, and property damage arising out of the September 11th attacks on the United States. The central theory of the plaintiffs' Master Complaints is that the hijackers were not properly screened at security checkpoints and were not prevented from carrying weapons aboard the aircraft. (See Master Compls. at 2.) Plaintiffs thus seek to hold the Airport Operators liable for any alleged deficiencies in passenger and property screening at the security checkpoints and in the selection of the security companies. That theory of liability, however, runs directly counter to federal law, which assigned solely to air carriers responsibility for screening passengers and property. Because the Airport Operators had no duty to conduct or oversee the screening process, all claims asserted against them must be dismissed.

The Air Transportation Safety and System Stabilization Act established a federal cause of action as the exclusive remedy for damages arising from the attacks. Pub. L. 107-42, § 408(b), 115 Stat. 230 (2001) (codified as amended at 49 U.S.C. § 40101 note (§ 408(b)))

[1] American Airlines Flight 11 ("FL 11") and United Airlines Flight 175 ("FL 175"), the two hijacked planes that were flown into the World Trade Center towers, originated at Logan. Two of the hijackers on FL 11 apparently had flown from the Jetport to Logan earlier that morning on U.S. Airways Flight 5930. American Airlines Flight 77 ("FL 77"), which was flown into the Pentagon, originated at Dulles.

("ATSSSA"). Congress provided that the rules for decision in an action under ATSSSA were to be "derived from" the law of the state where the crash occurred, but did not adopt state law without reservation. Instead, Congress provided that state law may not serve as a source of law if it is preempted by or inconsistent with federal law. Here, application of state law must yield to federal aviation law based on both preemption by and an inconsistency with the comprehensive and exclusive federal framework governing aviation security.

Even prior to September 11th, allocation of responsibility for aviation security in the United States was not subject to the variations of state law or deviations among the practices of individual airports or airlines. Rather, aviation security was completely federalized and highly structured, with specific and detailed duties assigned to specific parties under the supervision of the federal government. Pursuant to the Federal Aviation Act of 1958, 49 U.S.C. §§ 40101 et seq. (the "Aviation Act"), Congress directed the Administrator of the Federal Aviation Administration ("FAA") to implement this pervasive and uniform federal scheme and specified that the regulations had to require screening of all passengers and property that would be carried in the cabin of an aircraft. Congress further dictated that "[t]he screening [had to] take place before boarding and be carried out by a weapon-detecting facility or procedure used or operated by an employee or agent of an air carrier, intrastate air carrier, or foreign air carrier." 49 U.S.C. § 44901(a) (1997), amended by 49 U.S.C. § 44901(a) (2002). Thus, as the FAA observed shortly before September 11th, "[f]ederal law assign[ed] solely to aircraft operators the responsibility for passenger screening." Airport Security, 66 Fed. Reg. 37274 (2001). Airport operators' involvement with security checkpoints was limited to providing law enforcement support to respond to incidents encountered by the air carrier's employee or agent. In short, airport operators had no duty to conduct or oversee passenger screening.

Accordingly, the plaintiffs' allegation that the Airport Operators had a duty with respect to the performance of the screening function is inconsistent with and contrary to the mandatory federal scheme. As such, any claims for liability premised thereon fail to state a claim for which relief can be granted and must be dismissed as a matter of law. Moreover, nothing in the Master Complaints sets forth any specific allegation that the plaintiffs' injuries arose because the Airport Operators neglected or failed to perform any of the duties assigned to them under federal law. Accordingly, under Rule 12(b)(6), these defendants are entitled to have the Master Complaints and all claims therein against them dismissed.[2]

MASTER COMPLAINTS

The Master Complaints contain sweeping and conclusory allegations as to joint obligations, making no distinction among the various defendants and without regard for the delineation of responsibilities made by federal law.[3] The central theory of liability is that on September 11th the hijackers "passed through the airline and airport security system at [the airports] . . . carrying dangerous and deadly weapons capable of causing injury and death."[4] (FL 175 Compl. ¶ 56; FL 11 Compl. ¶ 59; FL 77 Compl. ¶ 29; accord Prop. Am. Compl. ¶ 87.) More specifically, it is alleged "that the airline and airport security systems and those who

[2] In filing this motion, the Airport Operators do not intend to waive any further motions with respect to other legal defenses including, but not limited to, sovereign immunity, discretionary function, etc., as with regard to the Plaintiffs' Master Complaints.

[3] On December 3, 2002, Plaintiffs filed Plaintiffs' Flight 11 Master Liability Complaint ("FL 11 Compl."), Plaintiffs' Flight 175 Master Liability Complaint ("FL 175 Compl."), and Plaintiffs' Flight 77 Master Liability Complaint ("FL 77 Compl."). On Dec. 12, the Property Plaintiffs' First Amended Master Liability Complaint ("Prop. Am. Compl.") was filed. These master pleadings are collectively referred to as the "Master Complaints." The appendices to the Master Complaints identify the individual plaintiffs asserting claims against the various defendants.

[4] The other theories of liability directed to the aviation defendants concern the design of the aircraft and the in-flight response to the hijackings. (See FL 175 Compl. ¶¶ 66, 69; FL 11 Compl. ¶¶ 69, 72; FL 77 Compl. ¶¶ 38, 41; Prop. Am. Compl. ¶¶ 130, 133.) However, the Master Complaints do not appear to assert that the Airport Operators are liable for these claims. Most notably, they do not allege, nor could they, that the Airport Operators designed or operated the aircraft. Moreover, air carriers (through the pilot in command) were responsible for prevention and management of hijackings in accordance with FAA requirements set forth in their security programs. See 14 C.F.R. § 108.10. Accordingly, the Airport Operators could not be held liable for alleged deficiencies in the operation of the flights or in safeguarding the cockpit in-flight.

implemented, operated and maintained them routinely failed to detect dangerous weapons capable of causing injury or death passing through so-called security checkpoints." (FL 175 Compl. at 2; FL 11 Compl. at 2; FL 77 Compl. at 2; accord Prop. Am. Compl. at 2.)

The Master Complaints contain three claims that are relevant for the purposes of this motion. First, the plaintiffs assert that the Airport Operators were negligent as a result of various failures relating to the passenger screening process. Second, the plaintiffs assert a claim for negligent selection based on the Airport Operators' purported selection and employment of the security companies. (FL 175 Compl. ¶ 72; FL 11 Compl. ¶ 75; FL 77 Compl. ¶ 44; cf. Prop. Am. Compl. ¶ 131.) Third, some plaintiffs assert a claim for *res ipsa loquitur*. (FL 175 Compl. ¶ 85; FL 11 Compl. ¶ 88; FL 77 Compl. ¶ 51.)

In support of their claims, the plaintiffs allege that the airlines, security companies, and Airport Operators "jointly and severally undertook and were required to develop, implement, own, operate, manage, supervise, staff, equip, maintain, control and/or oversee the airline and airport security system at [the airports] (including, but not limited to passenger screening, security checkpoint operations, pre-boarding passenger and luggage inspections, controlling access to secure areas and other security activities, ticketing purchase and check-in procedures and passenger identification and document checks for the subject flights), to ensure the safety of persons traveling in air transportation against acts of criminal violence and air piracy." (FL 175 Compl. ¶ 46; FL 11 Compl. ¶ 49; FL 77 Compl. ¶ 20; accord Prop. Am. Compl. ¶ 78.) They contend that the Airport Operators breached their duty by, *inter alia*, failing to properly screen the hijackers and allowing them to board the aircraft with dangerous and deadly weapons, and failing to properly monitor the security checkpoints. (FL 175 Compl. ¶ 69; FL 11 Compl. ¶ 72; FL 77 Compl. ¶ 41; Prop. Am. Compl. ¶ 133.)

The plaintiffs further allege that the airlines and Airport Operators entered into contractual relationships with the security companies to provide security screening services at the airports and that the security companies and Airport Operators "selected, hired, trained, instructed and supervised the security checkpoint screeners, metal detector and x-ray machine monitors and others who operated, maintained and controlled the security checkpoints." (FL 175 Compl. ¶¶ 47-48; FL 11 Compl. ¶¶ 50-51; FL 77 Compl. ¶¶ 21-22; accord Prop. Am. Compl. ¶ 80.) They assert that the Airport Operators failed to exercise reasonable care in the selection of competent and careful security contractors. (FL 175 Compl. ¶ 72; FL 11 Compl. ¶ 75; FL 77 Compl. ¶ 44; cf. Prop. Am. Compl. ¶ 131.)

Finally, some plaintiffs allege that all of the defendants had exclusive management and control of the aircraft and security systems through which the terrorists penetrated. Accordingly, they assert that the "general circumstances alleged herein" create an inference of negligence by the defendants. (FL 175 Compl. ¶ 85; FL 11 Compl. ¶ 88; FL 77 Compl. ¶ 51.)

Inasmuch as the claims asserted against the Airport Operators are premised on alleged failures relating to the passenger screening process, those claims are fatally flawed because, as a matter of federal law, airport operators had no duty to conduct or oversee any part of the passenger screening process. The plaintiffs have therefore failed to state a claim upon which relief can be granted. Accordingly, dismissal of these claims is appropriate.

ARGUMENT

In deciding a motion under Rule 12(b)(6), the Court must dismiss the claim when it appears beyond doubt that a plaintiff can prove no set of facts in support of its claim that would entitle it to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Leatherman

v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); Intellective, Inc. v. Mass. Mut. Life Ins. Co., 190 F. Supp. 2d 600, 607 (S.D.N.Y. 2002). Although the Court must accept the factual allegations in the complaint as true and draw all reasonable inferences in the non-movant's favor, see Conley, 355 U.S. at 45, mere conclusory allegations without factual support are insufficient to survive a motion to dismiss. See De Jesus v. Sears, Roebuck & Co., 87 F.3d 65, 70 (2d Cir. 1998).

A motion under 12(b)(6) "streamlines litigation by dispensing with needless discovery and factfinding." Neitzke v. Williams, 490 U.S. 319, 326-327 (1989); see also Zeising v. Kelly, 152 F. Supp. 2d 335, 343 (S.D.N.Y. 2001) (a motion to dismiss "is intended to weed out meritless claims, avoiding needless efforts on the parts of the parties and the Court and avoiding needless discovery").

As the Airport Operators demonstrate below, the plaintiffs can prove no set of facts that would result in a successful claim relating to passenger screening. As such, dismissal of all claims against the Airport Operators is proper as a matter of law, and would dispense with unnecessary discovery and superfluous factfinding in an already complex litigation.

I. THE AIRPORT OPERATORS' DUTY OF CARE IS DEFINED BY FEDERAL AVIATION LAW.

When Congress created a federal cause of action as the exclusive remedy for damages arising out of the September 11th attacks, it specified that "[t]he substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law." 49 U.S.C. § 40101 note (§ 408(b)(2)) (emphasis added). The plaintiffs' causes of action under ATSSSA are premised on state tort law. Specifically, the plaintiffs assert claims sounding in negligence.

Under familiar principles of state common law, a plaintiff asserting a claim for negligence must establish a duty of care. See Mastriano v. Blyer, 779 A.2d 951, 954 (Me. 2001); Spinner v. Nutt, 631 N.E.2d 542, 544 (Mass. 1994); Pulka v. Edelman, 40 N.Y.2d 781,782, 390 N.Y.S.2d 393, 394 (1976); Yuzefovsky v. St. John's Wood Apts., 540 S.E.2d 134, 139 (Va. 2001). In the absence of a duty, there can be no liability. See Mastriano, 779 A.2d at 954; Pulka, 40 N.Y.2d at 782, 390 N.Y.S.2d at 395; Yuzefovsky, 540 S.E.2d at 139. The question of whether a member of society owes a duty of care to another is a question of law. See Denman v. Peoples Heritage Bank, Inc., 704 A.2d 411, 413 (Me. 1998); De Angelis v. Lutheran Med. Center, 58 N.Y.2d 1053, 1055, 462 N.Y.S.2d 626, 627 (1983); Yuzefovsky, 540 S.E.2d at 139.

Here, the Airport Operators' duty of care is governed exclusively by federal aviation law for two reasons. First, federal law preempts state law with respect to the duty of care. Federal law has preemptive effect both because it occupies the field of aviation security and because application of state law would conflict with the federal scheme. Second, ATSSSA expressly precludes application of state law that would be "inconsistent" with the comprehensive framework established pursuant to congressional mandate.

A. Federal Law Preempts State Law with Respect to the Duty of Care.

Federal law preempts state law with respect to the duty of care applicable to a claim concerning aviation security under ATSSSA. The power of Congress to preempt state law has its source in the Supremacy Clause of the Constitution, which provides that the laws of the United States "shall be the supreme Law of the Land." U.S. Const. Art. VI, cl. 2. Preemption will be found in three situations: (1) where Congress includes an explicit congressional command in statutory language; (2) where federal law so pervasively occupies a legislative field "as to make reasonable the inference that Congress left no room for the States to supplement it;" or (3) when state law actually conflicts with federal law such that compliance with both

regulations is a physical impossibility, or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58 (1978) (citations omitted). Here, federal law preempts any state law duty of care both because the comprehensive federal scheme occupies the field of aviation security and by virtue of conflict preemption.

1. Federal Law Occupies the Field of Aviation Security and Preempts State Law with Respect to the Airport Operators' Duty of Care.

a. History of Federal Control Over Aviation Safety and Security.

The federal government has historically exercised significant control over commercial aviation. The Supreme Court has acknowledged this on more than one occasion, stating: "Federal control is intensive and exclusive." City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633 (1973) (quoting Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)); accord Chicago & Southern Air Lines, Inc., 333 U.S. 103, 107 (1948) (in contrast with other modes of transportation, air travel "call[s] for a more penetrating, uniform and exclusive regulation by the nation"). The Aviation Act codified this principle. With the passage of the Aviation Act, Congress sought to promote safe and efficient use of airspace through the creation of a unified federal agency headed by an Administrator who had "plenary authority" to make and enforce safety regulations. H.R. REP. NO. 2360 (1958), reprinted in 1958 U.S.C.C.A.N. 3741, 3742; see also Abdullah v. American Airlines, Inc., 181 F.3d 363, 368 (3d Cir. 1999) ("Congress found the creation of a single system of regulation vital to increasing air safety."). Thus, the Aviation Act established a congressional mandate for the Federal Aviation Administration (FAA) to promulgate regulations affecting aviation safety and security.[5] See Federal Aviation Act of 1958, Pub. L. 85-726, § 601(a), 72 Stat. 775 (recodified at

[5] Congress significantly amended the Aviation Act after September 11th. Most notably, under the Aviation and Transportation Security Act, Congress established the Transportation Security Administration (TSA) to assume

49 U.S.C. § 44701(a)). In delegating to the FAA exclusive authority to regulate aviation safety, Congress recognized the inherently federal character of aviation:

> [A]viation is unique among transportation industries in its relation to the federal government--it is the only one whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by State or local authorities. Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest.

Abdullah, 181 F.3d at 368 (quoting S. REP. NO. 1811 (1958)); see also Schaeffer v. Cavallero, 29 F. Supp. 2d 184, 185 (S.D.N.Y. 1998) (recognizing federal government's "paramount interest" in regulating aviation).

Federal control over commercial aviation is most prominent in the area of hijackings. In response to the first hijacking of an American commercial aircraft in 1961, Congress immediately amended the Aviation Act to make hijackings and related acts federal crimes and to authorize air carriers to refuse to transport passengers for the safety of the flight. Pub. L. No. 87-197, §§ 1, 4, 75 Stat. 466-67 (1961) (codified as amended at 49 U.S.C. §§ 44902, 46502). An increase in domestic hijackings in 1968 then led to a "major governmental effort to meet the threat," culminating in the first anti-hijacking system under the direction of the FAA. United States v. Davis, 482 F.2d 893, 897-98 (9th Cir. 1973). As the courts have recognized, the federal government "significantly involved itself . . . from the beginning." Davis, 842 F.2d at 897 (citation omitted) (government participation in airport search program since 1968 has been of such significance as to bring any search conducted pursuant to program within Fourth Amendment); see also Wagner v. Metropolitan Nashville Airport Auth., 772 F.2d 227, 230 n.2 (6th Cir. 1985) ("Courts have recognized the federal nature of airline security actions."). The

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responsibility for carrying out chapter 449 of the Act relating to civil aviation security and federalized the security workforce. Pub. L. No. 107-71, 115 Stat. 597 (2001). The Act and accompanying regulations are herein referred to as they existed on September 11th unless indicated otherwise. For the convenience of the Court, a compendium of relevant historical authorities accompanies this memorandum.

FAA later issued rules requiring air carriers to implement a screening system "acceptable" to the FAA, Aircraft Security; Screening System, 37 Fed. Reg. 2500, 2501 (Feb. 2, 1972) (to be codified at 14 C.F.R. pt. 121), amended by Aviation Security, 37 Fed. Reg. 4904 (Mar. 7, 1972) (to be codified at 14 C.F.R. pt. 121), modified Aviation Security, 37 Fed. Reg. 5254 (Mar. 11, 1972) (to be codified at 14 C.F.R. pt. 121), and requiring airport operators to implement procedures to control access to air operation areas and to provide law enforcement support, Airport Security, 37 Fed. Reg. 5689, 5690 (Mar. 16, 1972) (to be codified at 14 C.F.R. pt. 107); Law Enforcement Officers, 37 Fed. Reg. 25934 (Dec. 6, 1972) (to be codified at 14 C.F.R. pt. 107). Congress followed suit, statutorily ratifying these policies and procedures. Anti-Hijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (codified as amended in scattered sections of 49 U.S.C.); see also H.R. REP. NO. 93-855 (Mar. 7, 1974), reprinted in 1974 U.S.C.C.A.N. 3975-76.

b. The Governing Federal Scheme.

The longstanding rules discussed above formed the foundation for the system in place on September 11th. This federal system, which assigned detailed duties to specific parties, occupies the field of aviation security and ultimately controls the Airport Operators' duty of care in the September 11th Litigation.

The Aviation Act as amended required the Administrator of the FAA to prescribe rules and regulations to protect persons and property aboard an aircraft from acts of criminal violence and aircraft piracy. 49 U.S.C. § 44903(b). The Aviation Act specifically delineated security responsibilities by:

- directing the Administrator to prescribe regulations requiring pre-boarding screening of all passengers and property that would be carried in an aircraft cabin, which screening had to be carried out by a weapon-detecting facility or procedure used or operated by an employee or agent of the air carrier, 49 U.S.C. § 44901(a); see also id. § 44902 (setting forth circumstances under which air carrier is required or allowed to refuse to transport passengers and property);

- requiring the Administrator to prescribe rules and regulations addressing access control by air carriers and airport operators and to take measures to improve the system of access control, 49 U.S.C. § 44903(c)(2)(A), (g);

- directing the Administrator to prescribe regulations requiring airport operators to provide a law enforcement presence and capability, 49 U.S.C. § 44903(c)(1);

- directing the Administrator to establish Federal Security Managers at airports at which the Administrator decided a Manager was necessary for security and assigning to the Managers the duty to "oversee and enforce the carrying out by air carriers and airport operators of United States Government security requirements . . . ", 49 U.S.C. § 44933(a), (b)(3);

- directing the Administrator to assess and monitor security threats to the domestic air transportation system with the FBI Director, conduct periodic threat and vulnerability assessments on security at each airport, and take necessary actions to improve domestic air transportation security by correcting any deficiencies discovered, 49 U.S.C. § 44904; and

- empowering the Administrator to conduct investigations and to impose civil penalties for security violations, 49 U.S.C. §§ 40113(a), 46301(d)(2).

Pursuant to its broad authority under the Aviation Act, the Administrator established a comprehensive system of rules and regulations promoting safety and security. These regulations set forth the specific duties of airport operators and air carriers with respect to matters such as passenger screening, law enforcement support and access control, which were to be carried out in accordance with mandated security programs. See 14 C.F.R. pt. 107 (Airport Security); 14 C.F.R. pt. 108 (Airplane Operator Security). The Administrator also established regulations which preserved an ongoing role for the FAA. See, e.g., 14 C.F.R. §§ 107.3(a)(4), 107.5 and 108.7 (requiring submission and FAA approval of security program); id. §§ 107.11, 108.25 (allowing FAA to amend security programs); id. § 108.18 (requiring response to FAA security directives and information circulars).

This comprehensive "scheme of mandatory federal regulation" so pervasively occupies the field of aviation security as to make reasonable the inference that Congress left no room for states to supplement it. Sprietsma v. Mercury Marine, 123 S. Ct. 518, 529 (2002)

(discussing Ray, 435 U.S. at 165, wherein the scheme of mandatory federal regulations issued by Secretary of Transportation under Title II of Ports and Waterways Safety Act of 1972 implicitly preempted field of tanker design standards). The Aviation Act and the accompanying Federal Aviation Regulations clearly delineated the responsibilities of various parties, leaving no gap to be filled by reference to state law. Accordingly, the Airport Operators' duties cannot be "derived from" state law.

c. Judicial Interpretation of the Aviation Act.

Judicial interpretation of the Aviation Act supports the conclusion that federal law preempts the field of aviation security with respect to the duty of care. The courts have long recognized the preemptive effect of the Aviation Act with respect to matters of aviation safety. See City of Burbank, 411 U.S. at 633 (holding city curfew invalid because Federal Aviation Act as amended by Noise Control Act preempted state and local regulation of aircraft noise); Abdullah, 181 F.3d at 371 (Aviation Act preempts any state or territorial standard of care relating to aviation safety); French v. Pan Am Express, 869 F.2d 1, 6 (1st Cir. 1989) (pilot regulation related to air safety preempted); Curtin v. Port Authority of New York & New Jersey, 183 F. Supp. 2d 664, 671 (S.D.N.Y. 2002) (standard of care applicable to air carrier in negligence action arising out of emergency evacuation is preempted). Cf. Schaeffer, 29 F. Supp. 2d at 185 (passenger's right to relief on most claims arising out of expulsion from flight is governed by provision of Aviation Act authorizing air carriers to refuse to transport passengers for the safety of the flight). With respect to duties in the field of aviation security, where there is a comprehensive federal scheme as well as direct, ongoing oversight by the government, the basis for recognizing preemption is even more compelling.

While some courts have decided that the Aviation Act does not preempt state claims related to aviation safety, they relied on considerations that are not implicated by a cause

of action under ATSSSA.[6] In Cleveland v. Piper Aircraft Corp., 985 F.2d 1438 (10th Cir.), cert. denied 510 U.S. 908 (1993), for example, the Tenth Circuit considered whether the Aviation Act preempted a design defect claim against an aircraft manufacturer and barred all recovery. Applying the presumption against preemption, the court concluded that Congress had not indicated a "clear and manifest" intent to occupy the field of airplane safety. Id. at 1441, 1443-44. The court considered it significant that Congress included a savings clause[7] in the Aviation Act that preserved "other remedies provided by law" and later added an express preemption provision that did not address safety.[8] Id. at 1442-44. Here, however, Congress has expressly preempted state actions in favor of an exclusive federal cause of action under ATSSSA; the question before the Court is therefore limited to whether federal regulation of security-related duties precludes using state law to determine the applicable duty of care. A finding of preemption does not eliminate a plaintiff's right to recovery but rather requires a plaintiff to allege and prove that its injury arises from a violation of a duty imposed on that defendant under the federal scheme.[9]

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[6] A number of courts in this circuit have concluded that the Aviation Act does not preempt state law claims. See, e.g., Sakellaridis v. Polar Air Cargo, Inc., 104 F. Supp. 2d 160 (E.D.N.Y. 2000) (even assuming a claim for on-ground injuries by a mechanic falls within "aviation safety," the Act does not preempt state statutory claims); Rombom v. United Air Lines, Inc., 867 F. Supp. 214, 225 (S.D.N.Y. 1994) (Aviation Act does not implicitly preempt claims relating to air carrier's ejection of passenger). However, the court in Sakellaridis relied on In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 635 F.2d 67, 74 (2d Cir. 1980), where the parties had stipulated to application of New York law. See Curtin, 83 F. Supp. 2d at 670-71 (distinguishing Sakellaridis). Other courts have relied on the addition of an express preemption provision in the Aviation Act, see Rombom, 867 F. Supp. at 225, and are distinguishable for the same reasons as Cleveland v. Piper Aircraft Corp., 985 F.2d 1438, 1441, 1443-44 (10th Cir.), cert. denied 510 U.S. 908 (1993), discussed infra.

[7] The savings clause provides that "[a] remedy under this part is in addition to any other remedies provided by law." 49 U.S.C. § 40120(c).

[8] Pursuant to the Airline Deregulation Act (ADA), laws "related to a price, route, or service of an air carrier" are preempted. 49 U.S.C. § 41713(b)(1).

[9] Even in the absence of ATSSSA, Cleveland would not be controlling as a result of subsequent Supreme Court decisions. See Geier v. American Honda Motor Co., 529 U.S. 861, 869 (2000) (recognizing that the inclusion of an express preemption provision or a savings clause does not foreclose implied preemption); United States v. Locke, 529 U.S. 89, 108 (2000) (presumption against preemption is inapplicable to "an area where there has been a history of significant federal presence"); see also Abdullah, 181 F.3d at 368, 375 (concluding Congress' intent to preempt aviation safety is not affected by the ADA and limited preemption of standard of care does not implicate savings clause); Curtin, 183 F. Supp. 2d at 671 (finding that "the ADA's economic deregulation to promote competition is distinct and separate from the larger overreaching safety issue that originally motivated passage of the FAA").

In sum, a finding of federal preemption of the Airport Operators' duty of care logically follows from the comprehensive federal regulatory scheme in the field of aviation security. This comprehensive scheme together with the inherently federal character of aviation security demonstrates that the duty of care in this litigation is a matter of federal, not state, law.

2. Federal Law Governs the Airport Operators' Duty of Care By Virtue of Conflict Preemption.

Pervasive federal regulation in the field of aviation security indicates that Congress intended to exercise exclusive control in the field and, thus, federal law defines the Airport Operators' duties. But even if the field were not preempted, federal law would still preempt any state law duties in a cause of action under ATSSSA, based on a conflict with the federal scheme.

The purpose of the Aviation Act was to promote safe air travel through a single system of regulation under the direction of the Administrator. This included security regulations to protect passengers and property aboard the aircraft. While granting the Administrator broad authority in carrying out the Act, Congress codified a mandatory framework of responsibilities. Consistent with the statute, the Administrator issued comprehensive rules concerning aviation security and, more specifically, the delineation of responsibilities. Thus, the statutory and regulatory pattern demonstrates that Congress intended to create a uniform national regime and foreclose state regulation of duties. See, e.g., Geier, 529 U.S. at 881 (imposition of duty under state tort law requiring automobile manufacturers to install airbags would impose conflicting obligations and present obstacle to installation of a variety of restraint systems sought by federal regulation); cf. Ray, 435 U.S. at 163 (finding that statutory pattern of federal regulation of oil

Moreover, aviation security has had a significant federal presence from the very beginning and, in view of the close and intensive government involvement, is inherently federal in character.

tanker design indicated a congressional intent of uniform national design standards that would foreclose the imposition of different or more stringent state requirements).

Using state law as a source of law to determine the Airport Operators' duties would "stand as an obstacle to the creation of a single system of regulation" in the area of aviation security. Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941) (finding that state law requiring registration of aliens conflicted with congressional purpose and objective to regulate immigration and was therefore preempted). Accordingly, federal law preempts state law with respect to the Airport Operators' duty of care.

B. Irrespective of the Preemption Analysis, ATSSSA Requires Application of Federal Law With Respect to the Airport Operators' Duty of Care.

The preemption analysis requires application of federal aviation law to determine the duties of the Airport Operators in the September 11th Litigation. This outcome is even clearer under the first prong of section 408(b)(2) of ATSSSA. While Congress provided that the rules for decision in a federal action under ATSSSA were to be "derived from" state law, "Congress did not adopt in wholesale fashion state law." O'Conner v. Commonwealth Edison Co., 13 F.3d 1090, 1100 (7th Cir.) (discussing a federal cause of action under Price-Anderson Amendments Act, wherein substantive rules for decision are "derived from" state law unless inconsistent with other parts of the Act), cert. denied, 512 U.S. 1222 (1994).[10] Rather, state law

[10] The interpretation of the Price-Anderson Amendments Act, 42 U.S.C. §§ 2014, 2210, which resembles ATSSSA in significant part, is instructive. This legislation created a federal cause of action for "public liability actions," a legal liability action arising out of or resulting from a nuclear incident or precautionary evacuation, with substantive rules for decision to be "derived from" the law of the state in which the incident occurs unless inconsistent with other parts of the Act. In re TMI Cases Consolidated II, 940 F.2d 832, 837 (3d Cir.1991), cert. denied sub nom. Gumby v. General Pub. Utils. Corp., 503 U.S. 906 (1992). Courts interpreting the Price-Anderson scheme have consistently held that pervasive federal regulations concerning nuclear safety "provide the sole measure of defendants' duty in public liability cause of action." O'Conner, 13 F.3d at 1105 (federal occupation of field of nuclear safety prevents application of state standard "at odds with" federal standards; additionally, imposing a standard other than the federal regulations is "inconsistent with" Price-Anderson scheme because it would disturb the balance Congress achieved between private involvement and safety); accord Roberts v. Florida Power & Light Co., 146 F.3d 1305, 1308 (11th Cir. 1998) (federal safety regulations exclusively establish the duty of care owed in a public liability action), cert. denied, 525 U.S. 1139 (1999); In re TMI, 940 F.2d at 859-60 (duty of care in public

serves as the basis for the cause of action only if it is not "inconsistent with or preempted by Federal law." 49 U.S.C. § 40101 note (§ 408(b)(2)) (emphasis added). This represents a clear statement of congressional intent to have a state rule yield to federal law, even under circumstances that might not satisfy traditional preemption analysis.

Pursuant to the Aviation Act, Congress achieved a single, exclusive system of regulation in the area of aviation security. In recent amendments to the Aviation Act, Congress has reaffirmed its intention to exercise exclusive control over aviation security. Most notably, Congress established a new federal agency to assume the FAA's responsibility for carrying out chapter 449 of the Act relating to civil aviation security and transferred responsibility for conducting passenger screening to federal employees. See, e.g., Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001). Thus, while the distribution of responsibility has changed, a single system of federal regulation persists. Accordingly, any state law purporting to define the Airport Operators' duties is inconsistent with the deliberately imposed federal scheme and cannot be applied to a cause of action under ATSSSA.

II. THE AIRPORT OPERATORS HAD NO DUTY TO PERFORM OR OVERSEE THE SCREENING FUNCTION UNDER FEDERAL LAW.

Federal law in effect on September 11th governs the duties of the Airport Operators in a cause of action under ATSSSA. Parts 107 and 108 of the Federal Aviation Regulations set forth the respective responsibilities of airport operators and air carriers. 14 C.F.R. pt. 107 (Airport Security); 14 C.F.R. pt. 108 (Airplane Operator Security). As demonstrated below, under Part 107 the Airport Operators had no duty to either conduct or oversee screening.

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liability action arising out of nuclear incident is dictated by federal law); Corcoran v. Westinghouse Elec. Corp., 935 F. Supp. 376, 386 (S.D.N.Y. 1996) (same).

Air Carrier's Role

The Aviation Act specifically dictated that the screening function had to be carried out by air carriers. 49 U.S.C. § 44901(a) (requiring screening of passengers and property by weapon-detecting facility or procedure used or operated by an employee or agent of air carrier); see also S. REP. NO. 106-388, at 1 (2000), reprinted in 2000 U.S.C.C.A.N. 2252 ("The air carriers are responsible for screening passengers and their baggage before they are permitted onto an aircraft."). Pursuant to that directive, Part 108 charged air carriers with screening passengers and property and monitoring and securing sterile areas — areas such as the concourse where gates are located and access is controlled through inspection — under the air carriers' control. 14 C.F.R. § 108.7(b) (airplane operator security program); see also 14 C.F.R. § 108.9 (screening of passengers and property).[11] The screening function, as prescribed by the detailed regulatory regime, encompassed:

- implementing, operating and maintaining a system for the screening of passengers and property, see 14 C.F.R. § 108.9 (screening of passengers and property); id. § 108.17 (use of X-ray systems); id. § 108.20 (use of explosives detection systems); Aircraft Operator Security, 66 Fed. Reg. 37330, 37341 (2001) ("Metal detection devices (MDD's) (such as walk-through metal detectors) have long been an integral part of the passenger screening system. Testing, calibration, and operational requirements for MDD's are currently incorporated in the air carrier's security program."); cf. 49 U.S.C. § 44903(c)(2)(C)(i) (requiring amendment to air carrier security programs to require manual process at certain locations to augment automated profiling system by selecting additional checked bags for screening);
- selecting, hiring, training, and instructing screeners, see 14 C.F.R. § 108.9(d) (requiring air carrier to staff security checkpoints with non-supervisory personnel); id. § 108.31 (setting forth mandatory employment standards for screening personnel used by air carrier); and
- supervising screeners and checkpoint operations, see 14 C.F.R. § 108.9(d) (requiring air carriers to staff checkpoints with supervisory personnel); id. § 108.10 (requiring air

[11] Air carriers were also responsible for ticketing and check-in procedures for their passengers. See, e.g., 49 U.S.C. § 44909 (directing Secretary of Transportation to require air carriers to provide passenger manifest to Secretary of State in case of aviation disaster); 14 C.F.R. pt. 243 (requiring air carriers to collect passenger information in case of aviation disaster); Passenger Manifest Info., 63 Fed. Reg. 8258, 8271 (1998) (adopting 14 C.F.R. pt. 243) (disagreeing with comment that airport operators may at times be responsible for passenger information, as "airport operators would have no way of knowing the names of passengers who had boarded").

carriers to provide and use a Ground Security Coordinator (GSC) for prevention and management of hijackings); id. § 108.29 (requiring air carrier to ensure GSC reviews on daily basis all security-related functions performed, whether by direct employee or contractor, for effectiveness and compliance and immediately initiates corrective action); id. § 108.31(d) (requiring air carrier to ensure GSC conducts and documents an annual evaluation of screeners and allowing air carriers to continue that person's employment in screening capacity only upon determination by GSC that person has physical ability, satisfactory record and demonstrated knowledge and skill); see also 50 Fed. Reg. 28892 (1985) (codified at 14 C.F.R. § 108.10) (commenting that GSC's duties would include monitoring security requirements in effect for screening for flight).

Air carriers typically contracted with private screening companies, which performed the screening on behalf of and under the supervision of the carriers. See generally Certification of Screening Companies, 65 Fed. Reg. 560 (proposed Jan. 5, 2000). Cf. 148 CONG. RECORD H.9113 (daily ed. Nov. 22, 2002) (statement of Rep. Armey) (noting, during debate on amendment to ATSSSA, that "[a]t the time of the attacks, aviation passenger screening companies were the agents of the airlines. That is, they were under contract to perform these services and were, therefore, subject to the airlines' control, supervision and direction.").[12]

Air carriers carried out their obligations subject to direct oversight and regulation by the federal government. See 49 U.S.C. § 44933(b)(3) (federal security managers shall oversee and enforce security requirements); id. § 40113(a) (inspection authority); id. § 46301 (penalty provision); 14 C.F.R. pt. 13 (investigative and enforcement procedures); 14 C.F.R. § 108.7 (requiring submission and FAA approval of security program); id. § 108.25 (allowing FAA to amend security program); id. § 108.18 (requiring air carrier response to FAA security

[12] The security company defendants that performed screening were necessarily the designated agents of the air carriers. See 49 U.S.C. § 44901(a) (requiring screening by an employee or agent of air carrier). In recognition of this relationship, Congress extended the limitation on liability under ATSSSA to certain security companies, simply amending the definition of "air carrier" to include their "employees and agents (including persons engaged in the business of providing air transportation security and their affiliates) . . ." Homeland Security Act of 2002, Pub. L. 107-296, § 890 (2002).
The plaintiffs' assertions as to joint obligations and purported agency relationships (see FL 175 Compl. ¶ 50; FL 11 Compl. ¶ 53; FL 77 Compl. ¶ 24; Prop. Am. Compl. ¶ 82) are incorrect as a matter of law and insufficient to give rise to a duty on the part of the Airport Operators. See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 771 (2d Cir. 1994) (under FED. R. CIV. P. 12(b)(6), "conclusions of law or unwarranted deductions of fact are not admitted").

directives and information circulars). Airport operators had no duty to oversee the performance of screening duties that fell strictly under Part 108. Cf. Wagner, 772 F.2d at 229-30 (airport, by submitting both its own security program and Delta Airlines' program to the FAA for approval, "functioned merely as a conduit of information rather than a regulator"). At the time, this was reasonable in view of the increasing role of the federal government. Adding another layer of supervision and management to this already complex framework would have only undermined the FAA's authority and frustrated the Aviation Act's purpose of promoting safety and efficiency.

Airport Operator's Role

Airport operators' primary area of responsibility under Part 107 was to control access to those areas of the airport where airplanes land, taxi and takeoff — the Air Operations Area (AOA) — and adjacent, "behind the scenes" locations that were not open to the general public. See 14 C.F.R. § 107.3(b)(4); see also 14 C.F.R. § 107.13 (security of AOA); id. § 107.14 (access control system for secured areas); id. § 107.25 (airport identification media for security identification area (SIDA)); id. § 107.31 (background checks for unescorted access to SIDA).[13] This responsibility included installing physical barriers to these areas, such as fences and alarmed, locked doors; providing identification media to individuals whose jobs required access; and implementing procedures to ensure the protection of the areas, such as training individuals with access to challenge others who enter without apparent authorization. See, e.g., Airport Security, 66 Fed. Reg. 37274 *passim* (2001).

Airport operators also provided law enforcement support for the airport security program and the passenger screening system. See 49 U.S.C. § 44903(c)(1); 14 C.F.R. § 107.15(a). Law enforcement responsibilities in support of the screening system consisted of

[13] For a discussion by the FAA of the secured area, AOA, and SIDA, see Airport Security, 66 Fed. Reg. 37274, 37275-76 (2001).

responding to checkpoints when a Part 108 screener determined that a problem existed and summoned for assistance. See, e.g., Revision of Part 107, 43 Fed. Reg. 60786 (1978) (adopting 14 C.F.R. § 107.15 in furtherance of a "flexible response system"); 42 Fed. Reg. 30766, 30767 (proposed June 16, 1977) (suggesting that, within flexible response system, law enforcement officers could patrol and support other sensitive areas of terminal "while remaining ready to respond promptly to the screening point should the need arise"); see also Davidson v. Shreveport Airport Auth., 645 So. 2d 244, 246-247 (La. App. 2 Cir. 1994) (responsibilities of airport security officers include responding to security checkpoints when called by screeners who operate checkpoint).[14] Other law enforcement responsibilities included patrolling the airport terminal, AOA, and perimeter in support of the airport's access control requirements and responding to apparent intrusions thereof, see 42 Fed. Reg. 30767, as well as investigating reports of criminal activity occurring at the airport, see, e.g., 62 Fed. Reg. 41760, 41776 (1997) (law enforcement officers investigate theft incidents in baggage make-up areas). Airport operators did not have a duty to conduct or oversee the screening function under Part 107.

FAA Interpretive Guidance on the Respective Roles

The FAA's interpretation of security responsibilities under the federal scheme is instructive in this regard. The FAA has consistently affirmed that airport operators did not have responsibility for performing or overseeing the screening function. In 1998, the FAA described responsibilities in the aviation security system as follows:

> The FAA is responsible for establishing and enforcing regulations, policies and procedures; identifying potential threats and countermeasures; deploying Federal Air Marshals on selected U.S. air carrier flights; and providing overall guidance to ensure the security of passengers, crew, baggage, cargo, and aircraft . . .

[14] In 1978, the FAA made clear that the requirement of law enforcement support did not involve stationing law enforcement officers at the checkpoint location. Rather, law enforcement officers were to patrol but be available to respond when summoned by checkpoint personnel. See 43 Fed. Reg. 60786, 60790, 60793 (adopting 14 C.F.R. § 107.15).

> Air carriers bear the primary responsibility for applying security measures to passengers, service and flight crews, baggage, and cargo. Airports, run by State or local government authorities, are responsible for maintaining a secure ground environment and for providing law enforcement support for implementation of airline and airport security measures.

FEDERAL AVIATION ADMIN., U.S. DEP'T OF TRANSPORTATION, STUDY AND REPORT TO CONGRESS ON CIVIL AVIATION SECURITY RESPONSIBILITIES AND FUNDING 9-10, 14 (1998) ("FAA 1998 REPORT").[15] The FAA further commented during a rulemaking process shortly before September 11th:

> The FAA believes that the delineation of authorities, for example the screening of passengers or the provision of law enforcement response, are properly assigned based on statute, regulation, reasonable attachment of liability, and the authority possessing the appropriate resources . . . Federal law assigns solely to aircraft operators the responsibility for passenger screening. That law cannot be overcome by regulation. Rather, the intent [of the amendment] is to emphasize the airport operator's role in supporting the screening system in cooperation with aircraft operators.

Airport Security, 66 Fed. Reg. 37274, 37286 (2001);[16] accord Certification of Screening Companies, 65 Fed. Reg. 560, 565 (proposed Jan. 5, 2000) ("The responsibility of air carriers and foreign air carriers to ensure that screening is conducted on persons and property to be carried in the cabin of an aircraft is in the statute (49 U.S.C. 44901(a)) and cannot be changed by the FAA."). Simply stated, "airport operators [were] not responsible for screening." Criminal History Records Checks, 66 Fed. Reg. 63474, 63477 (2001) (explaining why amendment to rule on background checks under Part 107, issued after September 11th, still did not apply to

[15] Issued in response to the statutory mandate for a study of and report on the allocation of security responsibilities, Pub. L. 104-264, § 301 (1996), the FAA considered, but ultimately did not recommend, transferring air carrier security responsibilities to airport operators or the federal government. FAA 1998 Report at 4, 20-30, 51. Thus, air carriers retained responsibility for the screening function pursuant to 49 U.S.C. § 44901 and the accompanying regulations. When Congress at last decided to amend the statute after September 11th, it transferred the screening function to the federal government and not to airport operators.

[16] Shortly before September 11th, the FAA issued amendments to Parts 107 and 108 which were to become effective on November 14, 2001. See Aircraft Operator Security, 66 Fed. Reg. 37330, 37340 (2001) (to be codified at 14 C.F.R. pt. 108); Airport Security, 66 Fed. Reg. 37274, 37286 (2001) (to be codified at 14 C.F.R. pt. 107). The FAA confirmed early in this rulemaking process that airport operators still would not be responsible for screening. As discussed above, the support function consisted of a law enforcement response when a Part 108 screener called for assistance.

individuals who perform screening functions).

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Therefore, the plaintiffs' allegation that the Airport Operators had a duty with respect to the screening process is inconsistent with and contrary to the federal scheme. Because the plaintiffs cannot establish that the Airport Operators had a duty with respect to the screening process, they cannot establish liability on the part of the Airport Operators for alleged deficiencies therein. Accordingly, claims premised on alleged failures in the screening process and in the selection and training of screeners must be dismissed.

III. THE MASTER COMPLAINTS FAIL TO ADEQUATELY PLEAD A CAUSE OF ACTION WITH RESPECT TO ANY DUTY APPLICABLE TO THE AIRPORT OPERATORS.

As shown above, the federal regulatory scheme mandates dismissal of claims purporting to impose Part 108 passenger screening duties on the Airport Operators. Moreover, a close reading of the Master Complaints reveals that the plaintiffs have otherwise failed to adequately plead any other claim for relief against the Airport Operators.

Despite conclusory, random allegations of negligence on the part of the Airport Operators, the Master Complaints are devoid of any factual allegations that would give rise to liability. The passing and ambiguous reference to an alleged duty relating to "controlling access to secure areas and other security activities" is of no significance, as there is no allegation that any of the hijackers boarded the flights in any manner other than through the checkpoints. While alleging that "the hijackers passed through the airline and airport security system" carrying weapons (FL 175 Compl. ¶ 56; FL 11 Compl. ¶ 59; FL 77 Compl. ¶ 87; accord Prop. Am. Compl. ¶ 57), the Master Complaints define the "airline and airport security system" as including screening duties that fell under Part 108 and specifically allege that various deficiencies relating

to the passenger screening process permitted the hijackers to board the aircraft with dangerous weapons (FL 175 Compl. ¶¶ 46, 69; FL 11 Compl. ¶¶ 49, 72; FL 77 Compl. ¶¶ 20, 41; Prop. Am. Compl.¶¶ 78, 133; see also Master Compls. at 2).

The assertion by some plaintiffs of a "claim" for *res ipsa loquitur* is similarly unavailing.[17] *Res ipsa loquitur* permits an inference of negligence where a plaintiff establishes, among other things, that the event was caused by an agency or an instrumentality within the exclusive control of the defendant. See, e.g., Calabretta v. National Airlines, Inc., 528 F. Supp. 32, 34 (E.D.N.Y. 1981). Notwithstanding the vague reference to the "aircraft and airport security systems" (FL 175 Compl. ¶ 85; FL 11 Compl. ¶ 88; FL 77 Compl. ¶ 51), passenger screening (including security checkpoints) is the only instrumentality identified in the Master Complaints. Because federal law assigns solely to air carriers the responsibility for passenger screening, the Airport Operators lacked control as a matter of law and cannot be held liable for this claim.

Simply put, if there is a theory based on any neglect or breach of a legal duty borne by the Airport Operators under Part 107, it is not articulated in the Master Complaints in a manner sufficient to state a claim for relief. See De Jesus, 87 F.3d at 70 (mere conclusory allegations without factual support are insufficient to survive a motion to dismiss). Accordingly, the claims against the Airport Operators set forth in the Master Complaints must be dismissed in their entirety.

CONCLUSION

For the reasons set forth above, the Court should grant the Airport Operators' motion to dismiss.

[17] The Airport Operators do not concede that *res ipsa loquitur* is in fact an independent claim. Because such a claim would fail for the reasons discussed in the text, there is no need for the Court to reach the issue at this time.

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CERTIFICATE OF SERVICE

I, SAMANTHA L. HETHERINGTON, hereby certify that on January 17, 2003, I caused true and correct copies of the NOTICE OF MOTION TO DISMISS PURSUANT TO FED.R. CIV. 12(B)(6), MEMORANDUM OF LAW IN SUPPORT OF AIRPORT OPERATOR DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' MASTER COMPLAINTS, and COMPENDIUM OF RELEVANT HISTORICAL AND REGULATORY AUTHORITIES to be served by hand delivery upon the following parties:

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