UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

JEAN PERRENOD MAMAKOS
Plaintiff,
Case No. 2:14-cv-07294-JFB-AKT
-against-
UNITED AIRLINES, INC.,
Defendant.

# MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT UNITED AIRLINES, INC.'S PARTIAL MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) 

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.................................................................ii, iii, iv
I. INTRODUCTION .1
II. STATEMENT OF THE CASE 2

## III. ARGUMENT

A. Standard of Review........................................................................... 3
B. Plaintiff's Breach of Contract Claim Against United Must Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6) Because United's Contract of Carriage Constitutes the Sole Terms Upon Which United Agreed to Provide Air Carriage to Plaintiff and Plaintiff has not properly pled a breach of any term of the subject Contract of Carriage .5
C. Plaintiff's Conclusory Claims That She Was Discriminated Against Based Upon Her Age and Sex Should be Dismissed.7
D. Plaintiff's claims of "negligent hiring, training and supervision" are preempted by federal law
.8
IV. CONCLUSION......................................................................................... 13

## TABLE OF AUTHORITIES

## Cases:

Abdullah v. American Airlines 181 F.3d 363 (3d. Cir. 1999) ..... 10
Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P. 737 F.3d 166, 176 (2d Cir. 2013) ..... 3
Altria Group, Inc. v. Good
555 U.S. 70, 76 (2008) ..... 8
Am. Airlines V . Wolens
513 U.S. 219, 232 (1995) ..... 5
Arista Records, LLC v. Doe 3
604 F. 3d 110, 120 (2d Cir. 2010) ..... 4
ASARCO LLC v. Goodwin
756 F.3d 191, 198 (2d Cir. 2014) ..... 4
Ashcroft v. Iqbal
556 U.S. 662, 678, (2009) ..... 3, 4
Bell Atl. Corp. v. Twombly
550 U.S. 544 (2007) ..... 3
Chacko v. Worldwide Flight Services, Inc. 2010 LEXIS U.S. Dist. LEXIS 9103, 08-CV-2363, at *15-16 (E.D.N.Y. 2010) ..... 8
Chambers v. Time Warner, Inc. 282 F.3d 147, 152-53 (2d Cir. 2002) ..... 4
Crosby v. Nat'l Foreign Trade Council 530 U.S. 363, 372 (2000) ..... 9
Elassaad v. Independence Air, Inc. 613 F.3d at 119, 126 (3d. Cir. 2010) ..... 9
Goodspeed Airport, LLC v. East Haddam Inland Wetlands \& Watercourses Comm'n 634 F.3d 206, 209 (2d. Cir. 2011) ..... 9
Grullon v. City of New Haven
720 F.3d 133, 139 (2d Cir. 2013) ..... 3
Cases-continued:
In Re: Air Crash Near Clarence Center, New York, on February 12, 2009 798 F. Supp.2d 481, 486 (W.D.N.Y. 2010) ..... 9,10
In Re: Air Crash Near Clarence Center, New York on February 12, 2009 951 N.Y.S.2d 841 (N.Y. App. Div. 2012) ..... 11
In Re: Air Crash Near Clarence Center, New York, on February 12, 2009 2013 U.S. Dist. LEXIS 160224, *12-13 (W.D.N.Y. 2013) ..... 11
Kruger v. Virgin Atl. Airways, Ltd.
976 F. Supp. 2d. 290, 316 (E.D.N.Y. 2013) ..... 5
Lizardo v. Denny's Inc.
270 F.3d 94, 104 (2d Cir. 2001) ..... 8
Martin v. New York State Dep't of Mental Hygiene 588 F.2d 371, 372 (2d Cir. 1978) ..... 8
Maryland v. Louisiana
451 U.S. 725, 746 (1981) ..... 8
Morales v. TWA
504 U.S. 374, 386 (1992) ..... 9
Norman v. Trans World Airlines, Inc.
2000 U.S. Dist. LEXIS 14618, at *6 (S.D.N.Y. 2000) ..... 6
Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic
Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc. 712 F.3d 705, 729-30 (2d Cir. 2013) ..... 4
Ruston v. Town Bd. for Town of Skaneateles 610 F.3d 55, 59 (2d Cir. 2010) ..... 4
Ruta v. Delta Airlines, Inc. 322 F. Supp. 2d 391, 399 (S.D.N.Y. 2004) ..... 5
Schulz v. United Airlines, Inc.
797 F. Supp. 2d 1103, 1104 (W.D. Wash. 2011) ..... 5
Star Varga v. United Airlines, Inc.
2009 U.S. Dist. LEXIS 64000, No. C09-02278SI, at *14 (N.D. Cal. 2009). ..... 5
Rules
Code of Federal Regulations -- Title 14:
§60 et seq ..... 10
§61 et seq ..... 11
§91 et seq ..... 11
§91.1053 ..... 10
§91.1067. ..... 10
§91.1067(b) ..... 10
§91.1083 ..... 10
§91.1083(3)(iv) ..... 10
§91.1105. ..... 10
§91.1107. ..... 10
§121 et seq ..... 11
§135.150 ..... 10
§141 et seq ..... 11
§ 142 et seq ..... 11
§253.4. ..... 5
§253.5(b)(4) ..... 5
§44703 ..... 10
Federal Rules of the Civil Procedure:
Rule 12(b)(6) ..... 3, 4, 7, 8
United States Code - Title 28:
§1332 ..... 1
Statutes
Airline Deregulation Act. ..... 9
Federal Aviation Act of 1958
49 U.S.C. §40101 et. seq ..... 9, 11
Federal Aviation Regulations ..... 11
Other Materials
United Airlines Contract of Carriage:
Rule 5(B) ..... 6
Rule 6(B) ..... 6
Rule 6 (K)(1) (2) \& (4) ..... 6
Rule 21 (A) ..... 6
Rule 21 (F) ..... 6
Rule 27(1)(c) ..... 7
Rule 27(c) ..... 7

## I. INTRODUCTION

Defendant United Airlines, Inc. ("United") files the instant partial Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for Plaintiff's failure to state a claim upon which relief can be granted. A true and correct copy of Plaintiff's Complaint is appended as Exhibit A. United files this partial motion to dismiss seeking to dismiss Plaintiff's claims for breach of contract, discrimination and negligent hiring, training and supervision as set forth in greater detail below. United reserves its defenses with regard to Plaintiff's negligent expulsion and/or ejectment claim described in more detail below. This claim is encompassed in, at the very least, Paragraphs 18, 19, 21, 25 and 26 of Plaintiff's Complaint.

Plaintiff alleges that on March 1, 2013, she was inexplicably removed from United flight $1603 Y$ departing from Seattle, Washington, bound for Anchorage, Alaska. Upon boarding the flight in Seattle, Plaintiff alleges that she attempted to move from her assigned seat to another seat which she found more appealing. She alleges that United's subsequent "expulsion" of her from the plane without explanation or any justification led to her arrest and other consequential damages.

On December 15, 2014, this civil action was removed to this Court pursuant to the terms of 28 U.S.C. $\S 1332$, there being complete diversity of citizenship and the amount in controversy in excess of $\$ 75,000 .{ }^{\prime}$ For the reasons stated herein, Plaintiff's breach of contract claim fails to state a viable claim under the applicable agreement, United's Contract of Carriage. Plaintiff's claims of discrimination based on age and sex should also be dismissed because there are no facts alleged to support her conclusory assertion. Finally, Plaintiff's claims that United negligently hired, trained or supervised its employees are preempted by federal law. For these reasons, United's partial motion to dismiss should be granted.

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## II. STATEMENT OF THE CASE

Plaintiff alleges that she purchased a round trip ticket from United for travel from New York City to Alaska via flights UA 384 Y and 1603Y. Exhibit A at 16 . Plaintiff alleges that upon United's sale of each ticket to Plaintiff, a contract was formed wherein United was "obligated" to provide round trip travel services to and from New York City and Anchorage. Id. at 17. Plaintiff alleges that on March 1, 2013, she boarded United Airlines flight 384Y to Houston and later changed to United flight 1603Y from Houston to Anchorage with a scheduled stop in Seattle, Washington. Id. 【9. She claims that when the flight landed in Seattle, the passengers and crew disembarked. Id. $\$ 10$. Plaintiff alleges that she later "legally re-boarded the aircraft and proceeded to her assigned seat." Id. $\mathbb{1} 11$.

Thereafter, Plaintiff says that she moved to another seat because she discovered that the aircraft had many "open seats." However, she alleges that a United flight attendant approached her and requested that she pay a "premium fare for the seat." Id. $\mathbb{\$ 1 2}$. Plaintiff said she was unaware she was in a premium fare seat, declined to pay and returned to her assigned seat. Id. T13. Plaintiff then alleges that the Captain made an announcement over the public address system that there was a passenger who "did not want to fly to Alaska." Id. $\mathbb{1} 15$. She goes on to allege that she was ejected from the plane without explanation and "forcibly and wrongfully removed" from the aircraft. $I d . \$ 18$.

Plaintiff alleges that she was subsequently arrested, and spent three days in jail, all as a result of the bad faith and intentional conduct of United. Id. Mq25-26. Plaintiff alleges that United was in breach of its contract because it did not provide her with safe passage, refused to refund the unused portion of her airfare, and canceled the remainder of her roundtrip ticket. Id. T927-28. Plaintiff also alleges that United discriminated against her based upon age and sex and
was negligent in its hiring, training and supervision of its own employees as it pertains to her wrongful ejection from the aircraft which led to her arrest and "detention." Id. $9\{133-35$.

## III. ARGUMENT

## A. Standard of Review

The standard of review on a motion made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is that a plaintiff plead sufficient facts "to state a claim for relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. $662,678,(2009)$. The plausibility standard requires more than a mere possibility that a defendant has acted unlawfully. Id.

A pleading that offers conclusions or a mere recitation of the elements of a cause of action is deficient. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" Id. (quoting Twombly, 550 U.S. at 557). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 544.

In deciding a motion pursuant to Rule $12(\mathrm{~b})(6)$, the court must liberally construe the claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P., 737 F.3d 166, 176 (2d Cir. 2013) (quotations and citation omitted); Grullon v. City of New Haven, 720 F.3d 133, 139 (2d Cir. 2013). A court considering a motion to dismiss can certainly identify pleadings which
are not entitled to the assumption of truth. Id.; see also Ruston $v$. Town Bd. for Town of Skaneateles, 610 F.3d 55, 59 (2d Cir. 2010).

Nonetheless, a plaintiff is not required to plead "specific evidence or extra facts beyond what is needed to make the claim plausible." Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010); see also Pension Benefit Guar. Corp. ex rel. St. Vincent Catholic Med. Ctrs. Ret. Plan v. Morgan Stanley Inv. Mgmt. Inc., 712 F.3d 705, 729-30 (2d Cir. 2013) (accord). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Iqbal, 556 U.S. at 679.

In deciding a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must limit itself to the facts alleged in the complaint, which are accepted as true; to any documents attached to the complaint as exhibits or incorporated by reference therein; to matters of which judicial notice may be taken; or to documents upon the terms and effect of which the complaint "relies heavily" and which are, thus, rendered "integral" to the complaint. Chambers $v$. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002); see also ASARCO LLC v. Goodwin, 756 F.3d 191, 198 (2d Cir. 2014).

## B. Plaintiff's Breach of Contract Claim Against United Must Be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(6) Because United's Contract of Carriage Constitutes the Sole Terms Upon Which United Agreed to Provide Air Carriage to Plaintiff and Plaintiff has not properly pled a breach of any term of the subject Contract of Carriage.

Plaintiff's breach of contract claim in the Complaint ${ }^{2}$ should be dismissed because United's Contract of Carriage is the exclusive controlling contract in the instant matter. A true and correct copy of United's Contract of Carriage is appended as Exhibit B. ${ }^{3}$

An airline is permitted to incorporate by reference in a ticket or other written instrument the terms of their contract of carriage. Am. Airlines v. Wolens, 513 U.S. 219, 232 (1995). Such incorporation is governed by federal regulation and specifically 14 C.F.R. $\S 253.4$ which allows each air carrier, with proper notice, to include on a ticket or other written instrument issued to a passenger that the airline's contract of carriage is incorporated by reference (without stating the full text of the contract).

Indeed, 14 C.F.R. $\S 253.5(\mathrm{~b})(4)$ allows an airline to incorporate by reference terms relating to "refusal to carry." Courts frequently examine an air carrier's contract of carriage to determine the scope of relief which should be afforded a passenger-plaintiff. Kruger v. Virgin Atl. Airways, Ltd., 976 F. Supp. 2d. 290, 316 (E.D.N.Y. 2013) (finding that passenger was not entitled to refund due to contract of carriage's clear terms regarding requirements for timely boarding). Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391, 399 (S.D.N.Y. 2004) (granting summary judgment for the airline on plaintiff's breach of contract claim as the plaintiff did not suffer any damages and airline's liability was limited based on its own contract of carriage);

[^1]Norman v. Trans World Airlines, Inc., 2000 U.S. Dist. LEXIS 14618, at *6 (S.D.N.Y. 2000) (noting that plaintiff's "remedy for any breach of the contract of carriage between the parties is limited to the remedies set forth in that contract").

In the instant matter, Plaintiff has alleged that United was "obligated" to provide her with transportation from New York City to Anchorage; that it breached its contractual terms in refusing to transport her to Anchorage and improperly canceled the remainder of her round trip ticket; and refused to refund the unused portion of her airfare. What Plaintiff fails to consider is that when she purchased a ticket from United as she alleges, she was thereby on notice of the airline's Contract of Carriage and therefore bound by all its terms.

A closer examination of United's Contract of Carriage delineates that United did not breach any contractual term and that Plaintiff has not properly pled any breach. Notably, Rule 5(B) of the Contract of Carriage states that:

UA has the right to cancel reservations (whether or not confirmed) due to the Passenger's failure to comply with the rules set forth herein, including but limited to, the Passenger's failure to pay for the applicable Ticket under the conditions applicable for such travel.

See Exhibit B at p. 10. Rule 6 (B) similarly allows United to deny transport "until the Passenger has paid the applicable fare." $I d$. at p. 11. Rule 21(F), under the section title "Refusal to Transport," is titled "Failure to Pay" and states that United has the right to refuse transport or shall have the right to remove from the aircraft at any point, any Passenger who has not paid the appropriate fare for a Ticket, Baggage, or "applicable service charges for services required for travel," (emphasis added). Id. at 19. Rule $6(\mathrm{~K})(1)$, (2) and (4) allow United certain remedies in cases where a customer has violated the airline's rules on ticketing including invalidating the ticket, cancelling the passenger's itinerary and refusing to board the passenger. Id. at 11 . Along those lines, Rule 21(A) also allows for refusal of transportation if a Passenger fails to comply
with the terms of United's Contract of Carriage, Id. at 19. Rule 27(A)(1)(c) states that "a refund will be made in accordance with this Rule, provided request for such refund has been made prior to the expiration of Ticket, where required." Id. at p. 39.

Plaintiff's breach of contract claim cannot survive the scrutiny of United's 12 (b)(6) motion. There is no other contract which Plaintiff can rely on to support her claims. There is no provision in United's Contract of Carriage which calls for an absolute duty of United to transport Plaintiff to her destination and especially in a scenario where Plaintiff admits she tried to sit in a seat which was not assigned to her and for which she had not paid the applicable fare. Therefore, United was within its rights to refuse to transport Plaintiff based on her conduct in sitting in a seat for which she had not paid the applicable fee. Furthermore, United did have any absolute obligation to reimburse Plaintiff for the unused portion of her fare as she alleges. Nowhere has Plaintiff alleged that she made a timely request for a refund pursuant to the requirements of Rule 27(c). There is no other term in the Contract of Carriage which would bear upon United's alleged improper removal of Plaintiff from her seat and supposed denial of a refund for her unused ticket. For the reasons cited, Plaintiff has not stated a viable breach of contract claim, and therefore these allegations should be dismissed.

## C. Plaintiff's Conclusory Claims That She Was Discriminated Against Based Upon Her Age and Sex Should be Dismissed

In Paragraph 33 of the Complaint, Plaintiff alleges that "defendant discriminated against the Plaintiff based upon her age and sex." There are absolutely no facts in the Complaint which would support that conclusory assertion. As stated above, legal conclusions are not sufficient to withstand a motion pursuant to Federal Rule of Civil Procedure 12(b)(6). Plaintiff's statement that she suffered discrimination is not entitled to the assumption of truth. At the very least, Plaintiff must offer some factual support that she was subject to discrimination based on her age
and sex. The Complaint is absent of any such allegations as it relates to any statements or other conduct on the part of United which would support a discrimination claim. Plaintiff is not even close to pleading a cognizable claim of discrimination due to age or gender.

A "complaint consisting of nothing more than naked assertions, and setting forth no facts upon which a Court could find a violation . . fails to state a claim under 12(b)(6)." Martin v. New York State Dep't of Mental Hygiene, 588 F.2d 371, 372 (2d Cir. 1978). Plaintiff's allegations do "little more than cite to [her] mistreatment and ask the court to conclude that it must have been related" to the alleged discrimination. Lizardo v. Denny's Inc., 270 F.3d 94, 104 (2d Cir. 2001) (dismissing complaint for meager and unsupported discrimination claims based on race). See also Chacko v. Worldwide Flight Services, Inc., 2010 U.S. Dist. LEXIS 9103, No. 08-CV-2363, at *15-16 (E.D.N.Y. 2010) (noting that unsupported discrimination allegations without facts warrant dismissal pursuant to Rule 12(b)(6)). In short, the allegations in the Complaint do not plausibly give rise to a claim for discriminatory treatment and United's motion seeking dismissal should therefore be granted.

## D. Plaintiff's claims of "negligent hiring, training and supervision" are preempted by federal law.

Plaintiff's allegations of negligent hiring, training and supervision of its employees in Paragraph 35 of its Complaint should be dismissed. In Paragraph 35, Plaintiff claims:

Defendant, its agents and employees were negligent in its hiring, training and supervision of its employees in that plaintiff was wrongfully ejected without cause and caused the airline to encourage and urge the arrest, handcuffing, detention and searching of the plaintiff.

This claim is clearly preempted by federal law. State laws that conflict with federal regulations are preempted and, therefore, "without effect." Altria Group, Inc. v. Good, 555 U.S. 70,76 (2008) (citing Maryland v. Louisiana, 451 U.S. 725,746 (1981)). This rule applies to
state common law tort actions. See, e.g., Morales v. TWA, 504 U.S. 374, 386 (1992) (holding common-law tort suits can be preempted by Airline Deregulation Act ("ADA")). When considering a claim of federal preemption, courts focus on whether Congress intended to displace an area of state law. See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000). There are three ways in which federal law may preempt state law: express preemption, conflict preemption and field preemption.

Express preemption requires that Congress' intent to preempt be explicitly stated in the statute's language or implicitly contained in its structure and purpose. Conflict preemption occurs when state law actually conflicts with federal law, such that it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Field preemption occurs when a field is reserved for federal regulation, leaving no room for state regulation, and congressional intent to supersede state laws is clear and manifest.

Elassaad v. Independence Air, Inc., 613 F.3d at 119, 126 (3d. Cir. 2010) (citations omitted).
Plaintiff's allegations in Paragraph 35 seek to impermissibly apply a state standard of care to the field of aviation safety when only a federal standard of care applies. Specifically, Plaintiff alleges that the conduct of United, including its flight crew (and presumably the Captain) was negligent. Congress intended "to occupy the entire field of air safety, thereby preempting state regulation of that field." Goodspeed Airport, LLC v. East Haddam Inland Wetlands \& Watercourses Comm'n, 634 F.3d 206, 209 (2d. Cir. 2011). Based on the authority of Goodspeed, the Second Circuit has found that Congress intended the Federal Aviation Act of 1958, 49 U.S.C. $\S 40101$ et. seq., to entirely preempt state regulation of air safety. Id. at 212. As it pertains to the scope of the federal preemption, the Federal Aviation Act of 1958 and the corresponding regulations constitute an "overarching general standard of care." In re Air Crash Near Clarence Center, New York, On February 12, 2009, 798 F.Supp.2d 481, 486 (W.D.N.Y.
2010) (citations omitted). Thus, the comprehensive aviation safety regulations in Title 14 preempt state law standards of care in the field of aviation safety. Id. See also Abdullah v. American Airlines, 181 F.3d 363 (3d. Cir. 1999)(federal law establishes applicable standard of care in field of aviation safety, thus preempting entire field from state standard of care).

United, like all airlines, remains subject to the comprehensive scheme of federal regulations that govern air safety and the specific standards of care therein. This includes the training received by flight crew members and pilots and particularly as it relates to the flight crew's handling of passenger conduct inside the aircraft. For example, 14 C.F.R. $\S 91.1067$ is titled "Initial and recurrent flight attendant crewmember testing requirements." Subsection (b) of that section addresses that training must include "Passenger handling, including procedures to be followed in handling deranged persons or other persons whose conduct might jeopardize safety." Similarly, 14 C.F.R. $\S 91.1083$ is titled "Crewmember emergency training." Subsection (3)(iv) of that section requires emergency training pertaining to "abnormal situations involving passengers or crewmembers." Indeed, Section 91 is replete with examples of how federal regulations intend to address the training and other qualifications of crewmembers. See 14 C.F.R. $\S 91.1053$ (crew member experience); 14 C.F.R. $\S 91.1105$ (flight attendants: initial and transition ground training), and 14 C.F.R. $\S 91.1107$ (recurrent training). Notably, 14 C.F.R. $\S 135.150$ is titled "Public address and crewmember interphone systems" which contemplates the use of a public address system for crewmembers to communicate within the aircraft.

Also included in the federal framework are measures governing pilot training, certification and hiring (which Plaintiff also implicitly claims was insufficient as it relates to the Captain's "announcement" on her flight). For example, see 14 C.F.R. § 44703 (requirements for airman certificates); 14 C.F.R. $\S 60$ et seq., (requirements for flight simulator training devices,
qualification and use); 14 C.F.R. § 61 et seq., (pilot certification which also includes pre-flight and emergency operations); 14 C.F.R. § 91 et seq., (pilot operations); 14 C.F.R. § 121 et seq. (domestic carrier operations); 14 C.F.R. § 141 et seq., (pilot schools) and 14 C.F.R. § 142 et seq., (aviation training centers).

In re Air Crash Near Clarence Center, New York on February 12, 2009, 951 N.Y.S.2d 841 (N.Y. App. Div. 2012) illuminates the scope of federal preemption. There, the plaintiffs' decedents were among fifty individuals who were killed when Continental Connection Flight 3407 crashed in Clarence Center, New York. Id. at 842. Plaintiffs' claims ventured outside the scope of mere allegations that the pilot of the airplane was negligent in his operation of the aircraft. Instead, the plaintiffs alleged that the airline defendants were directly negligent in hiring, training and retaining the pilot, who they claim, had a history of failed flight tests and exhibited other unsafe tendencies as a pilot. $I d$. at 842-843. The court held that the Federal Aviation Act of 1958 ("FAACT") and the Federal Aviation Regulations ("FARS") impliedly preempt all state standards of care and that the plaintiffs had to prove that defendants violated a federal standard of care as established by the FAACT and FARS. Id. at 844-846. The court agreed that with respect to pilot training, certification and hiring, the regulations were "exhaustive" and that the pervasiveness and completeness of the federal regulatory scheme left no room for state standards of care. Id. at 845-846.

There can be no question that the allegations in Plaintiff's Complaint alleging negligent hiring, training and supervision fall squarely within the field of air safety even if they do not fall within the narrow scope of "operation" of an aircraft. In re: Air Crash Near Clarence Center, New York, on February 12, 2009, 2013 U.S. Dist. LEXIS 160224, *12-13 (W.D.N.Y. 2013)
(noting preemption applied to negligent hiring, training and supervision claim even if not directly involving actual navigational "operation" of the aircraft).

Plaintiff alleges that United's conduct, through its employees, caused her "ejectment" and arrest. Whether or not true, the federal regulations exclusively establish the standard of care as it relate to United's employee hiring, training and supervision and particularly regarding how employees should address passengers (including denying them boarding) who chose to occupy seats which are not assigned to them. Yet, Plaintiff has not alleged that United violated any federal standard of care. For these reasons, the allegations of Paragraph 35, which sound in state law negligence principles, should be dismissed.

## IV. CONCLUSION

For the reasons cited here, United Airlines, Inc. respectfully requests that the Court grant the instant partial motion to dismiss and enter the form of Order appended. To reiterate, United files this partial motion to dismiss seeking to dismiss Plaintiff's claims for breach of contract, discrimination and negligent hiring, training and supervision as set forth above. United reserves its defenses with regard to Plaintiff's negligent expulsion and/or ejectment claim. This claim is encompassed in, at the very least, Paragraphs $18,19,21,25$ and 26 of Plaintiff's Complaint.

Dated: New York, New York
December 22, 2014
Respectfully submitted
GOLDBERG SEGALLA LLP

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## CERTIFICATE OF SERVICE

I hereby certify that, on December 22, 2014, I caused to be served the foregoing Memorandum of Law in Support of Defendant United's Motion to Dismiss and all accompanying attachments by Federal Express, Overnight Delivery, on the following counsel for plaintiff and also served the same by electronic filing using the Court's ECF filing system:

Patricia A. Swicicki, Esq.<br>The Law Office of Patricia A. Swicicki<br>83 Third Avenue<br>Huntington Station, NY 11746

/s/ Dennis J. Brady
Dennis J. Brady

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

JEAN PERRENOD MAMAKOS
Plaintiff,
Case No. 2:14-cv-07294-JFB-AKT
-against-
UNITED AIRLINES, INC.,
Defendant.

## ORDER

And NOW, this $\qquad$ day of $\qquad$ , 2015, upon consideration of the Motion of Defendant United Airlines, Inc. pursuant to Federal Rule of Civil Procedure (12)(b)(6) to dismiss certain claims in Plaintiff's Civil Action Complaint, and any response hereto, and for good cause shown, it is hereby ORDERED and DECREED that the said Motion is GRANTED. Furthermore, the Court grants the following relief as requested in Defendant's partial motion to dismiss:
a) Plaintiff's claims asserting breach of contract are dismissed with prejudice and specifically, Paragraphs 7, 8, 31, 32 of the Civil Action Complaint are dismissed with prejudice;
b) Plaintiff's claim asserting discrimination based on age and gender in Paragraph 33 is dismissed with prejudice;
c) Plaintiff's claim in Paragraph 35 of the Complaint regarding negligent hiring, training and supervision of United employees is dismissed with prejudice;
d) Defendant reserves all defenses regarding Plaintiff's negligent expulsion claims as encompassed in Paragraphs 18, 19, 21, 25 and 26.
J.


[^0]:    ${ }^{1}$ In her complaint, Plaintiff seeks damages in the amount of $\$ 5,000,000$.

[^1]:    ${ }^{2}$ At paragraph 31, Plaintiff alleges "Defendant breached its contract obligations to the Plaintiff." There are no conventionally structured counts in the Complaint.
    ${ }^{3}$ This document is presently, and was as of the date Plaintiff purchased her ticket, available on United's website (http://www.united.com/web/en-US/content/contract.aspx). Exhibit B was the contract in effect at all times material to this action. Courts have previously taken judicial notice of United's Contract of Carriage. See Schulz v. United Airlines, Inc., 797 F. Supp. 2d. 1103, 1104 (W.D. Wash. 2011); Star Varga v. United Airlines, Inc., 2009 U.S. Dist. LEXIS 64000, No. C09-02278SI, at *14 (N.D. Cal. 2009).

