UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ALICE CONWAY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil Docket No. 96-207-P-H***
	)	
UNITED AIR LINES, INC.,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, who uses a wheelchair for mobility, seeks damages and injunctive relief under the Federal Aviation Act, 49 U.S.C. § 40101 *et seq*., the Air Carrier Access Act ("ACCA"), 49 U.S.C. § 41705, and state law in connection with her allegations that the defendant unlawfully deprived her of her wheelchair, damaged her wheelchair, deprived her of her mobility and otherwise acted tortiously in connection with her air travel between Mexico City, Mexico and Portland, Maine aboard the defendant's airline in August 1994. Now pending is the defendant's motion for summary judgment. For the reasons that follow, I recommend that the motion be granted in part and denied in part.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the

potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

At all times relevant to this litigation, the plaintiff required the use of a wheelchair for mobility. Complaint (Docket No. 1) ¶ 6; Defendant's Statement of Undisputed Material Facts ("Defendant's SMF") at unnumbered ¶ 2.[1] She also requires the use of a urostomy bag. Complaint

[1] The Defendant's SMF appears at pages 2-6 of its Motion for Summary Judgment with Incorporated Statement of Undisputed Facts and Memorandum of Law ("Defendant's Memorandum") (Docket No. 35). The defendant is reminded that, effective March 1, 1997, such (continued...)

at ¶ 9; Defendant's SMF at unnumbered paragraph 2.

In July 1994 the plaintiff flew from Portland, Maine to Mexico City, Mexico — via Chicago — as a passenger of the defendant. Complaint at ¶ 13; Defendant's SMF at unnumbered ¶ 3. The defendant also transported the plaintiff's wheelchair. *Id.* The plaintiff made her travel arrangements through a travel agency, Mobility International, to which she communicated special needs for vegetarian meals, transportation of her own wheelchair, wheelchair assistance getting on and off aircraft, assistance in transfers between airport gates, and wheelchair assistance aboard all aircraft so she could have access to on-board bathroom facilities. Deposition of Alice Conway ("Conway Dep."), appended to Defendant's Memorandum, at 91 and 93[2]; Affidavit of Alice Conway ("Conway Aff."), Exh. 2 to Plaintiff's Responsive Statement of Disputed Material Facts ("Plaintiff's SMF II") (Docket No. 40),[3] ¶ 3. She specifically requested that her own wheelchair be delivered to her at the gate in Chicago and Portland. Conway Aff. ¶ 3.

The plaintiff's trip from Portland to Mexico City was without incident for present purposes, and none of her allegations relate to the outbound half of her journey. Conway Dep. at 140, 142.

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[1](...continued)
a factual statement is required to be filed separately from the motion and memorandum it supports. Loc. R. 56.

[2] Both parties have submitted excerpts from the Conway Deposition to the summary judgment record. References are to the excerpts submitted by the defendant unless otherwise specified.

[3] This Statement of Material Facts responds, paragraph by paragraph, to the factual statement furnished by the defendant. The plaintiff has filed a separate factual statement that adds assertions that the plaintiff contends establish genuine issues of material fact for trial. Plaintiff's Statement of Material Facts in Dispute ("Plaintiff's SMF I") (Docket No. 39). Although I have considered both factual statements, the plaintiff is reminded that the Local Rules contemplate the filing of only one such document, setting forth the disputed factual issues from the plaintiff's perspective. Loc. R. 56.

Her return trip, which began on August 1, 1994, is the focus of this litigation.[4] After arriving on another carrier's flight from the Mexican city of Oaxaca, the plaintiff arrived at the defendant's passenger gate at the Mexico City airport. *Id.* at 163-64. The check-in process — including the checking in of the plaintiff's wheelchair — occurred without incident. *Id*. at 164. Her wheelchair was functional and not broken when she entrusted it to the defendant at the Mexico City Airport. Conway Aff. ¶ 4. She "pre-boarded" the Chicago-bound flight uneventfully.[5] Conway Dep. at 165. The takeoff of the flight was delayed. *Id*. at 165, 191. The plaintiff was left unattended by the defendant's employees for more than 30 minutes, although she was in the company of other disabled passengers and one passenger who had no outward appearance of disability. *Id*. at 165-69, 190. Prior to being left unattended, she had told airline personnel that if the delay was going to be a significant one, she would like to leave the aircraft. *Id*. at 191.

The flight was diverted to Indianapolis because it was low on fuel. *Id*. at 169-70. The passengers were not permitted to leave the plane in Indianapolis. Complaint ¶ 17; Defendant's SMF at unnumbered ¶ 6. Both during the trip to Indianapolis and during the stop there, the plaintiff made requests to use an on-board wheelchair so she could go to the lavatory on the aircraft. Conway Dep. at 200, 205. Airline personnel told the plaintiff that there was no on-board wheelchair in the aircraft

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[4] The summary judgment record, as cited by the parties in their respective factual statements, does not establish the date on which the plaintiff left Mexico City. The parties appear to agree that the relevant date is August 1, 1994. Complaint ¶ 15; Defendant's SMF at unnumbered ¶ 5.

[5] The parties' factual statements do not establish that the flight was bound for Chicago, but that fact is not in dispute. Likewise, although the record does not establish what 'pre-boarding' is, I assume it is common enough knowledge — and therefore appropriate for judicial notice — that airlines begin the process of boarding commercial flights by 'pre-boarding' passengers who require assistance in situating themselves aboard the aircraft.

and that none could be boarded in Indianapolis.[6] *Id*. A flight attendant refused the plaintiff's request during the flight to permit her to "scoot" her way to the bathroom without using a wheelchair, telling her that she could be arrested in Chicago if she attempted to do so. *Id*., Exh. 11 to Plaintiff's SMF II, at 200. Eventually, a flight attendant furnished the plaintiff with a blanket, which another passenger held up to conceal the plaintiff as she emptied her urine into a bottle at her seat. *Id*. Exh. 11 to Plaintiff's SMF II, at 212-14. Later, she defecated into her pants. *Id*., Exh. 11 to Plaintiff's SMF II, at 217.

Once the flight finally landed in Chicago, the plaintiff had to wait on the aircraft for between 30 and 45 minutes when the defendant's personnel brought an "aisle chair" to her that allowed her to exit the plane. *Id*., Exh. 11 to Plaintiff's SMF II, at 224; Deposition of Sheila Thomas-Akhtar, Exh. 18 to Plaintiff's SMF II, at 47. She was ultimately transported to the baggage claim area. Complaint ¶ 23; Defendant's SMF at unnumbered ¶ 8. Because of the flight's late arrival, the defendant arranged for the plaintiff to travel from Chicago to Portland the following day — August 2, 1994 —on one of the defendant's flights. Complaint ¶ 29; Defendant's SMF at unnumbered ¶ 9. The Chicago-to-Portland flight was uneventful from the plaintiff's perspective; en route, she asked a flight attendant to make sure that a wheelchair would be available to her at the arrival gate and she received an assurance that the request had been transmitted. Conway Dep., Exh. 11 to Plaintiff's

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[6] The question of whether there was an on-board wheelchair available on the aircraft is a disputed issue of material fact. The plaintiff has testified that a member of the flight crew told her no such wheelchair was on board. Conway Dep. at 200. Relying on the deposition testimony of a woman who is apparently an employee of the defendant, the defendant takes the position that "[t]here is an on-board wheelchair on every United Air Lines flight." Defendant's SMF at unnumbered ¶ 13, citing Deposition of Georgene Ross ("Ross Dep."), appended to Defendant's Memorandum, at 132, 182. (Both parties have submitted excerpts from the Ross Deposition; references are to the excerpts submitted by the defendant unless otherwise specified.)

SMF II, at 305. Upon arrival in Portland, the plaintiff left the aircraft using an "aisle chair" supplied by the defendant for this purpose. *Id*., Exh. 11 to Plaintiff's SMF II, at 308. Her own wheelchair — which she had observed being unloaded from the Mexico City-to-Chicago flight — was apparently lost, mishandled or otherwise delayed by the defendant between Chicago and Portland because it was not returned to her until August 5, 1994 — three days after her arrival in Portland. *Id*., Exh. 11 to Plaintiff's SMF II, at 226; Complaint ¶ 33-34; Defendant's SMF at unnumbered ¶ 10. The plaintiff discovered the wheelchair in her yard on that date, with one of its wheels bent and its seat ripped down the middle. Conway Dep., Exh. 11 to Plaintiff's SMF II, at 326.

The plaintiff wrote a complaint letter to the defendant a few weeks after her trip. Letter of Alice M. Conway to United Airlines dated Aug. 28, 1994, Exh. 4 to Conway Dep., Exh. 11 to Plaintiff's SMF II. The defendant reimbursed the plaintiff for expenses associated with the repair of her wheelchair, the cost of renting a wheelchair while her own wheelchair was out of service, the cost of hiring a personal care attendant and certain transportation expenses.[7] Letter of Peter Congdon to Sharon G. Miller dated Nov. 21, 1994, appended to Defendant's Memorandum. The plaintiff also received some travel vouchers from the defendant. Conway Dep. at 445.

Since the plaintiff's return to Maine from Mexico, she has experienced nightmares, panic attacks, claustrophobia, sensitivity to the smell of urine, breathing problems that the plaintiff believes

[7] The plaintiff contends that the defendant did not inform her in its written response to her complaint that she had the right to pursue an enforcement action with the U.S. Department of Transportation ("DOT") pursuant to the ACCA, and that it is the defendant's policy not to so inform passengers in these circumstances. Plaintiff's SMF I at ¶ 38. What the record actually reveals is that the defendant's practice is to enclose with such responsive letters a brochure entitled "Air Travel Tips," which includes such information, and that the defendant sent the brochure with the letter it wrote to the plaintiff. Letter of Debra Stritzke to Alice M. Conway dated Sept. 23, 1994, Exh. 5 to Conway Dep., Exh. 11 to Plaintiff's SMF II, at 2; Deposition of Debra J. Stritzke ("Stritzke Dep."), Exh. 16 to Plaintiff's SMF II, at 115.

are related to her panic attacks, and nausea — all of which she attributes to the experiences she had on her travel from Mexico City to Portland aboard the defendant's airline. Conway Dep., Exh. 11 to Plaintiff's SMF II, at 409-17.

Neither the defendant's flight attendants nor its cabin service crew have procedures for checking to see that an on-board wheelchair is, in fact, stowed in the cabin of one of the defendant's passenger aircraft prior to its departure. Deposition of Donna Michele Bettencourt, Exh. 8 to Plaintiff's SMF II, at 70; Deposition of Elaine Bolanowski ("Bolanowski Dep."), Exh. 9 to Plaintiff's SMF II, at 62. The defendant does not train its flight attendants concerning what action to take when the on-board wheelchair is missing. Bolanowski Dep. at 62; Deposition of Robert J. Buess, Exh. 10 to Plaintiff's SMF II, at 45. The timely delivery of wheelchairs to aircraft arrival gates has been an ongoing problem for the defendant. Stritzke Dep. at 53; Ross Dep., Exh. 14 to Plaintiff's SMF II, at 116-17. The defendant's procedure for recording passenger requests for disability-related services is a difficult one, requiring the entry of elaborate codes into the defendant's computer system. Ross Dep., Exh. 14 to Plaintiff's SMF II, at 185; 263-64. The defendant has no standards for evaluating whether employees are promptly delivering wheelchairs to airport gates pursuant to passenger requests, and no procedures for disciplining customer service representatives who are responsible for violations of the ACCA. Ross Dep., Exh. 14 to Plaintiff's SMF II, at 166, 171-72. Both before and after the air travel that gives rise to this litigation, the defendant has received numerous complaints about the services it has provided to disabled passengers. Affidavit of Sharon Miller, Exh. 4 to Plaintiff's SMF II.[8] It has failed to consult with

[8] The Miller Affidavit, filed under seal, purports to provide a statistical analysis of complaint data provided by the defendant in discovery. That the defendant has received numerous complaints, (continued...)

organizations representing persons with disabilities in developing training programs, policies and procedures for providing services to disabled passengers.[9]

Notwithstanding her unsatisfactory trip between Mexico City and Portland, the plaintiff intends to make use of the defendant's airline as a passenger in the future. Conway Aff. ¶ 2.

III. Discussion

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[8](...continued)
both before and after the plaintiff's trip, is a fair inference from this data.

[9] At paragraph 40 of its SMF I, the plaintiff cites the following data from the summary judgment record in support of this proposition: In a supplemental answer to an interrogatory asking it to "[i]dentify each individual, organization, or entity who participated in formulating United's policies or training program regarding any aspect of the provision of air travel or services to individuals with disabilities," the defendant replied:

> Georgene Ross [an employee of the defendant] and the Training Department at United helped formulate policies and training manuals. Robert White who in the earlier 90s was President of the Paralyzed Veterans of America and his staff assisted United as consultants in designing a video and in subsequent development of training materials. United has also had a close relationship with other groups including MDA, Illinois Rehabilitation Institute of Chicago, Paralysis Society, Travelers with Disabilities and Disabled Sports, among others. United has been involved in conferences and other programs for disabled passengers. Please see documents produced in response to supplemental response #1.

Defendant's Supplemental Answers to First Set of Interrogatories, Exh. 20 to Plaintiff's SMF II, ¶ 4. The defendant's supplemental answer to Interrogatory No. 1 provided data concerning the employees of the defendant who participated in responding to the plaintiff's interrogatories. *Id*. ¶ 1. The plaintiff also cites an affidavit executed by Robert White, in which he identifies himself as president of the Chicago chapter of Paralyzed Veterans of America, states that he has never been president of the national organization, that no one named Robert White has ever been president of the national organization, and that neither he nor anyone on his staff has ever consulted with the defendant in the manner described in its supplemental interrogatory answer. Affidavit of Robert White, Exh. 6 to Plaintiff's SMF II, ¶¶ 1-3. In the circumstances, consistent with the requirement to view the record in a plaintiff-favorable light, I draw the inference that the defendant has not consulted with organizations representing persons with disabilities in the development of its policies and programs related to disabled passengers.

a. The Warsaw Convention

The plaintiff's complaint asserts four causes of action. Count I alleges violation of the Federal Aviation Act, the ACCA and certain regulations promulgated thereunder. Counts II-IV assert state-law causes of action for negligence, breach of contract and intentional infliction of emotional distress. The defendant contends it is entitled to summary judgment on the state-law claims because they are preempted by the Warsaw Convention, formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), note following 49 U.S.C. § 40105.[10]

Six years ago, the Court of Appeals for the Second Circuit ruled that punitive damages are not available to a plaintiff who asserts a claim under the Warsaw Convention. *In re Air Disaster at Lockerbie, Scotland on Dec. 21, 1988*, 928 F.2d 1267, 1288 (2d Cir. 1991). In the course of reaching that determination, the Second Circuit crafted a thorough and thoughtful analysis of the Warsaw Convention's history and purposes, from which I borrow extensively.[11]

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[10] I have previously denied the defendant's motion to amend its answer to assert Warsaw Convention preemption as an affirmative defense. The defendant has requested reconsideration of this determination (Docket No. 43). In its opposition to the summary judgment motion, the plaintiff contends that assertion of the preemption defense is untimely given its non-assertion in the pleadings. The answer does assert a general "fail[ure] to state a claim upon which relief may be granted" defense pursuant to Fed. R. Civ. P. 12(b)(6). Answer (Docket No. 5) at 7. Given the totality of the circumstances presented by this case, which include no suggestion by the plaintiff that she was unaware the Warsaw Convention might arise as an issue, it is my view that the assertion of the Rule 12(b)(6) defense is sufficient to preserve the preemption issue so that the defendant may invoke it here. *See Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 593 (1st Cir. 1995) (court should examine "totality of the circumstances" and "make a practical, commonsense assessment" of whether safeguards against surprise and unfair prejudice satisfied).

[11] Our own circuit conducted a similar historical inquiry, by way of discerning whether an escalator mishap at an international airline terminal was "in the course of any of the operations of embarking or disembarking" and thus covered by the Convention. *McCarthy*, 56 F.3d at 315-17. (continued...)

> The Warsaw Convention was drafted when the airline industry was in its infancy. It was the product of two international conferences — the first held in Paris in 1925 and the second in Warsaw in 1929 — and four years of work by the interim Commité International Technique d'Experts Juridique Aériens (CITEJA) formed at the Paris Conference. The Convention had two primary goals: first, to establish uniformity in the aviation industry with regard to the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims, as well as with regard to documentation such as tickets and waybills; second — clearly the overriding purpose — to limit air carriers' potential liability in the event of accidents.
>
> The liability limit was believed necessary to allow airlines to raise the capital needed to expand operations and to provide a definite basis upon which their insurance rates could be calculated. The nations drafting this provision had a direct interest in establishing liability limits since nearly all existing airlines were either owned or heavily subsidized by the various contracting states. The drafters also believed that a liability limit would lessen litigation.

Id. at 1270-71 (citations and internal quotation marks omitted). Although the United States did not participate in the drafting of the original Warsaw Convention, it formally adopted the treaty in 1934. *Id*. at 1271. The document has undergone modification since then, but its "basic structure" remains intact. *Id*.

For present purposes, that basic structure consists of Articles 17-19 of the Convention. Article 17 provides in its entirety:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.[12]

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[11](...continued)
This case implicates none of the issues discussed in *McCarthy*.

[12] The governing text of the Warsaw Convention is actually in French. *Air France v. Saks*, 470 U.S. 392, 397 (1985). However, the parties do not contend, nor do I find, that the issue of preemption turns on anything particular to the language of the Convention in its original, non-translated form. *Cf. id.* at 397-400; *Zicherman v. Korean Air Lines Co.*, 116 S.Ct. 629, 632-33 (continued...)

Warsaw Convention, Art. 17. Article 18 establishes liability for damages relating to the destruction of checked baggage or goods, as well as their loss or damage. *Id*. at Art. 18(1). In contrast to the provision governing death or bodily injury, which explicitly permits recovery stemming from an accident, Article 18 creates a right to recovery "if the *occurrence* which caused the damage so sustained took place during the transportation by air." *Id*., Art. 18(1) (emphasis added). Article 19 recites in its entirety that a carrier "shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods." *Id*., Art. 19.

The contrast between Articles 17 and 18 of the Warsaw Convention is the subject of the Supreme Court's opinion in *Saks*. At issue in that proceeding was a passenger who had become deaf in one ear as a result of the normal operation of the pressurization system of an aircraft in which the plaintiff had flown as a passenger from Paris to Los Angeles. *Saks*, 470 U.S. at 394, 396. Because the claim arose under the Warsaw Convention, it became necessary for the Supreme Court to determine the extent to which an "accident" sufficient to permit recovery for an injury under Article 17 differed from an "occurrence" that might generate liability in connection with baggage or goods under Article 18, noting that in light of the history of the drafting of the treaty "an accident must mean something different than an 'occurrence.'" *Id*. at 403. The Court resolved the case by defining "accident" within the meaning of Article 17 as "an unexpected or unusual event or happening that is external to the passenger," noting that the definition should be "flexibly applied." *Id*. at 405. Although the Court suggested that "torts committed by terrorists or fellow passengers" would trigger Article 17 liability, it held that an injury which "indisputably results from the passenger's own

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[12](...continued)
(1995) (construing meaning of certain French words in text). I therefore confine my discussion of the Convention to the official English translation as it appears in the United States Code Annotated.

internal reaction to the usual, normal, and expected operation of the aircraft" is not an accident within the meaning of the treaty. *Id*. at 405-06.

The plaintiff unequivocally asserts that none of her claims arise under the Warsaw Convention. Plaintiff's Objection to Defendant's Motion for Summary Judgment With Incorporated Memorandum of Law (Docket No. 38) at 2. The defendant, in its reply memorandum, takes the position that any personal injury suffered by the plaintiff (as distinct from damage to her wheelchair) was caused by an accident within the meaning of Article 17. The court must therefore resolve that question — and also determine the broader issue of whether the Congress, in ratifying the Warsaw Convention, intended to preempt the entire field of state-law tort liability for personal injury aboard international commercial airplane flights[13] even though, as made clear in *Saks*, liability for passenger injury under the Convention is more limited than that which might obtain under state law.

The Supreme Court has not resolved the latter question, and it apparently has not previously arisen in the reported case law of this circuit. Regrettably, the parties to this litigation have provided inadequate assistance to the court deciding the matter; each side has failed to cite reported cases from other circuits that, if adopted here, would be dispositive of the issue. I refer particularly to *Potter v. Delta Air Lines, Inc*., 98 F.3d 881 (5th Cir. 1996), and *Tandon v. United Air Lines*, 926 F. Supp. 366 (S.D.N.Y. 1996). I find it particularly disturbing that the latter case does not appear in the written arguments of the defendant, given that it was a party to *Tandon* and thus has no basis

[13] Even though at least some of the injuries claimed by the plaintiff occurred in connection with the leg of her trip that involved a connecting flight between Chicago and Portland, the plaintiff does not contend that any aspect of her journey falls outside the geographic scope of the convention. This is an appropriate concession. *See* Warsaw Convention, Art. 1(2) (defining "international transportation" as any trip between signatory nations, "whether or not there be a break in the transportation").

whatsoever for contending that it is unaware of the proceeding — especially in light of its representation here that it has completed a "thorough review of all case authority" arising under the Warsaw Convention. Defendant's Reply Memorandum in Support of Summary Judgment ("Defendant's Reply Memorandum") (Docket No. 42) at 4. Although, as I shall discuss, *Tandon* is not favorable to the defendant's position, an appropriate posture would have been for the defendant to cite the case and then to seek to distinguish it and/or to argue otherwise against its adoption here. *See United States v. Quin*, 836 F.2d 654, 656 n.4 (1st Cir. 1987) ("good lawyering, indeed, often a duty to the court, calls for disclosing unfavorable decisions"); *United States v. Gonzalez Vargas*, 585 F.2d 546, 547 (1st Cir. 1978) ("It is the responsibility of counsel to keep abreast of the law and to inform the court of the correct state of the law.") (citations omitted).

Since the Supreme Court defined an accident within the meaning of Article 17 as "an unexpected or unusual event or happening that is external to the passenger," *Saks*, *supra*, the Southern District of New York has had numerous opportunities to apply this definition to the myriad of misadventures that can occur during international air travel in a complicated world. I find the reported case law of that district to be particularly instructive. For example, the court has recently determined that an erroneously conducted body search met the *Saks* definition of accident. *Tseng v. El Al Israel Airlines, Ltd.*, 919 F.Supp. 155, 158 (S.D.N.Y. 1996); *but see Curley v. American Airlines, Inc.*, 846 F.Supp. 280, 283 (S.D.N.Y. 1994) ("[t]he highly unusual happenstance of being falsely suspected and accused of smoking marijuana in an aircraft lavatory is hardly a characteristic risk of air travel" and thus not an Article 17 accident). In *Chendrimada v. Air-India*, 802 F.Supp. 1089 (S.D.N.Y. 1992), the court found a genuine issue of material fact as to whether an Article 17 accident had occurred where a weather delay had led to the confinement of passengers to the cabin

of a grounded aircraft, without food, for eleven hours. *Id*. at 1092-93. The court reasoned that the bad weather was not an unexpected or unusual event, but that the alleged involuntary confinement was. *Id*. at 1093. And, in what I find to be a most thoughtful discussion of the applicable principles, the court determined that no Article 17 accident had taken place in a case involving allegations that the defendant airline had conspired with others to secret a child aboard an international flight in violation of the custodial rights of the plaintiff, who was the child's father. *Pittman v. Grayson*, 869 F. Supp. 1065, 1071 (S.D.N.Y. 1994). The court reasoned:

> While the issue of whether [the defendant airline's] conduct qualifies as an "accident" is a close question, inasmuch as the alleged action is literally "unexpected", "unusual" and "external to the passenger", a thorough examination of relevant legal precedent persuades us that defendant's conduct should not be regarded as an "accident" under the Warsaw Convention. First, in applying the *Saks* test, courts have focused on whether the alleged conduct constitutes a "risk inherent in air travel". *See Curley*, 846 F.Supp. at 283. This criteria both explains why instances such as aircraft collisions, terrorist activities, or even intentional torts by other passengers qualify as accidents . . . . The risk that airline personnel will smuggle a passenger onto an international flight in violation of a court order, or will otherwise commit intentional torts against a passenger, hardly constitutes a "risk inherent in air travel". *See Curley*, 846 F.Supp. at 283.

Pittman, 869 F. Supp. at 1071.

For similar reasons, I believe it would be an improvident contortion of the language of Article 17 to hold that the wrongs allegedly inflicted on the plaintiff during her trip home from Mexico City comprise an accident within the meaning of the treaty. The harms reflected in the summary judgment record bear no relationship to the inherent risks of air travel but rather relate to the defendant's alleged failure to make good on a commitment to permit a person who requires a wheelchair for mobility to pass her time comfortably while traveling with the defendant. Surely it is common knowledge that the needs of such passengers were not on the agenda of the Warsaw

Convention drafters, working nearly 70 years ago at a time when the rights of the disabled did not enjoy their present level of recognition. In another context, the First Circuit has referred to "sound policy reasons to confine [Article 17] liability to the letter of the text, narrowly construed." *McCarthy*, 56 F.3d at 316 (citation omitted; noting that Article 17 liability is strict). What happened to the plaintiff was literally unexpected, unusual and external to her. Although, pursuant to *Saks*, such qualities are necessary elements of an Article 17 accident, the cases construing *Saks* suggest they are not sufficient — and that certain external harms are nevertheless beyond the Article 17 ambit when its text is construed in the appropriately narrow fashion. These harms are among them.[14]

Nor do I agree with the defendant that, even if the injuries sustained by the plaintiff were not caused by an Article 17 accident, the Warsaw Convention preempts the entire field of torts occurring in the context of international airline travel. The second clause of Article VI of the United States Constitution provides that the Constitution and laws of the United States, "'shall be the supreme Law of the Land,' notwithstanding contrary state laws." *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 504 (1st Cir. 1997) (quoting U.S. Const. art. VI, which also applies to "all Treaties made, or which shall be made, under the Authority of the United States"). When the issue is whether a federal statute is preempted by state law, the inquiry begins with the assumption that the powers of the states are not superceded unless this was "the clear and manifest purpose of Congress." *Id*. (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)). I see no reason why construction of a treaty, duly ratified by the United States Senate, should not proceed along the same lines, although I am

[14] In arguing to the contrary, the defendant's reliance on *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991), is misplaced. In that case, which established that damages for mental or psychic injuries, when unaccompanied by physical harm, are not compensable under the Warsaw Convention, the plaintiff conceded the existence of an accident (i.e., aircraft engine failure) within the meaning of Article 17. *Id*. at 536.

mindful of the principle that treaties "are construed more liberally than private agreements" and may be construed in light of their history and "practical construction adopted by the parties." *Saks*, 470 U.S. at 396; *see also Zicherman*, 116 S.Ct. at 634.

The preemption provisions of the Warsaw Convention appear in Article 24, which provides that:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

Warsaw Convention, Art. 24. Article 24 does not expressly preempt state-law causes of action. But this is only the beginning of the inquiry, because courts may still discern in the treaty an implicit preemption. *See Rini*, 104 F.3d at 504 ("scheme" of regulation "may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," treaty "may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws in the same subject" or "object sought to be obtained" by treaty and state law "may reveal the same purpose.") (citation omitted).

Applying these principles, but without reference to the "clear and manifest purpose" requirement, the Fifth Circuit concluded in *Potter* that "the subject matter of the Convention requires uniformity and thus provides the exclusive cause of action under article 17 for personal injuries and death" occurring during international air travel. *Potter*, 98 F.3d at 885. Like the present case, *Potter* involved an incident that the court determined was not an Article 17 accident. *Id*. at 884. The plaintiff twisted her knee during her flight because she feared awakening the "intimidating"

passenger in the seat in front of her to ask him to move his seat forward. *Id*. at 883. The Fifth Circuit reached its determination on the preemption question based on the Convention's "underlying goals of uniformity and certainty," the notion that "recourse to state law 'would sink federal courts into a Syrtis bog where they would not know whether they were at sea or on good dry land when deciding what law a plaintiff can rely upon [and] what law the court itself should apply,'" and the danger that plaintiffs "could forum-shop for jurisdictions with friendly substantive laws on recovery of damages for personal injury." *Id*. at 885-87 (quoting *Lockerbie*, 928 F.2d at 1276).

In a case presenting more compelling circumstances, the Southern District of New York recently reached the opposite conclusion on the preemption question. *Tandon*, 926 F. Supp. at 370-71. *Tandon* involved a passenger who suffered a fatal heart attack during a London-to-New York flight; she died after the portable oxygen container supplied by the flight crew and with which her physician-son-in-law had been treating her ran out of oxygen. *Id*. at 368. The court first concluded that the failure to provide additional oxygen to the plaintiff was not an accident within the meaning of Article 17. *Id*. at 369. Quoting from a prior case and explicitly finding no inconsistency with the Second Circuit's views as expressed in *Lockerbie*, the court held:

> [T]he mere fact that a passenger was traveling on an international air flight does not mean that every claim the passenger might have against the air carrier for death or bodily injury is preempted by the Warsaw Convention; rather, only those claims that fall within the scope of the Convention are preempted. Logic and fairness support the result, as a contrary rule would shield airlines from liability for negligence that does not involve an accident. It is highly doubtful that the drafters of the Warsaw Convention intended such a far-reaching limitation of liability.

Tandon, 926 F.2d at 370 (quoting *Walker v. Eastern Air Lines, Inc.*, 775 F. Supp. 111, 115 (S.D.N.Y. 1991), and 785 F. Supp. 1168, 1171-72 (S.D.N.Y. 1992)).

In my opinion, *Tandon* represents the better-reasoned view. It is obvious that a major airline,

like any business enjoying the privilege of doing business in many different states, would prefer to live by a uniform set of legal rules rather than confront the necessity of compliance with every state's substantive laws. The attendant risks — confusion, complexity, forum-shopping — are inherent in our federal system of government rather than in the airline industry per se. The Warsaw Convention does not immunize airlines from such risks. *See Zicherman*, 116 S.Ct. at 634 (noting that even under Article 17, the "substantive questions of who may bring suit and what they may be compensated for" are "to be answered by the domestic law selected by the courts of the contracting states"). The case law makes clear that the Warsaw Convention was not intended as a license for international airlines to ignore all state law, but rather — at least insofar as risks to passengers are concerned — to limit and standardize liability for the kind of tragedy reflected in the *Lockerbie* case.

The defendant also invokes the Warsaw Convention in an effort to defeat the plaintiff's claims under the Federal Aviation Act and the ACCA. The defendant's position on the relationship between the Convention and the federal statutes presents something of a moving target: In the memorandum of law accompanying its motion, confusingly placed under a heading captioned "The Applicable Articles of the Warsaw Convention Preempt All *State* Common Law Causes of Action Alleged in the Complaint," the defendant contends that any claims for punitive damages arising under the federal statutes should not be permitted "given the scope of the Warsaw Convention." Defendant's Memorandum at 7, 10 (emphasis added). Later, in its reply memorandum, the defendant cites *Kapar v. Kuwait Airways Corp.*, 845 F.2d 1100 (D.C.Cir. 1988), and *Stanford v. Kuwait Airlines Corp.*, 705 F.Supp. 142 (S.D.N.Y. 1989), to argue that where Articles 17-19 of the Convention apply, for the same reasons it argues that the state-law claims are preempted, "alternative federal causes of action are likewise unavailable." Defendant's Reply Memorandum at 2.

Rule 7 of the Local Rules of this court makes clear that a reply memorandum must be "strictly confined to replying to new matter raised in the objection or opposing memorandum." Loc. R. 7(c). The defendant's reply argument based on the *Kapar* and *Stanford* cases presents, in essence, an entirely new asserted ground for summary judgment and I therefore do not consider it. In any event, *Kapar* is inapposite because it deals not with preemption but the question of whether a plaintiff could invoke the admiralty jurisdiction of the federal court in a case where the United States would not otherwise be an appropriate forum under Article 28 of the Convention. *Kapar*, 845 F. Supp. at 1104-05. *Stanford* is a companion case to *Kapar* and, likewise, addresses only jurisdictional issues in the context of a case that indisputably arises under the Convention. *Stanford*, 705 F. Supp. at 143-44.

The defendant's position on punitive damages under the federal statutes does not withstand scrutiny. While punitive damages are unavailable under the Warsaw Convention, *Lockerbie*, *supra*, I am aware of no authority for the proposition that the "scope" of the Convention precludes recovery of punitive damages on non-Warsaw Convention claims simply because they are connected to international air travel.[15]

Finally, I cannot agree with the defendant that it is entitled to summary judgment to the extent the plaintiff seeks to recover damages in connection with damage to her wheelchair. In contrast to

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[15] In a cursory footnote, the defendant also takes the position that the plaintiff is not entitled to punitive damages because they would be unavailable to her under the Maine law governing tort claims or breach-of-contract actions. The plaintiff addresses this issue at length in her opposition to the motion. As the defendant impliedly concedes, resolving this issue would require the court to determine which jurisdiction's law would apply to the plaintiff's non-federal claims. Since the defendant has opted not to address this preliminary and crucial issue, it has not demonstrated it is entitled to judgment as a matter of law on the plaintiff's request for punitive damages. It would be inappropriate to assume Maine law applies here.

the plaintiff's claims concerning her personal injuries, there is certainly the possibility that her claim for wheelchair damage arises under the Convention, because Article 18 governs any "occurrence" which causes damage to goods transported internationally by air. Warsaw Convention, Art. 18(1). Article 18 makes clear that "transportation by air" consists of "the period during which the goods are in charge of the carrier, whether in an airport or on board an aircraft." *Id*. at ¶ (2).

> The period of the transportation by air shall not extent to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Id. at ¶ 3. In other words, to remove her wheelchair-damage claim from the ambit of the Warsaw Convention he plaintiff may introduce evidence to rebut the presumption that the damage occurred during the wheelchair's air travel. In my opinion, viewing the facts of record in the light most favorable to the plaintiff, a reasonable factfinder could conclude she has rebutted the presumption. Accordingly, there is a genuine issue of material fact concerning the applicability of the Warsaw Convention to this aspect of the plaintiff's claims.

b. Section 41310(a) of the Federal Aviation Act

In her complaint, the plaintiff invokes two specific provisions of the Federal Aviation Act: 49 U.S.C. § 41705, also known as the ACCA, and 49 U.S.C. § 41310(a). The former contains a general prohibition of disability discrimination in the provision of "air transportation." 49 U.S.C. § 41705. The latter provides, in its entirety, that "[a]n air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination." 49 U.S.C. § 41310(a).

Relying on *Diefenthal v. Civil Aeronautics Bd.*, 681 F.2d 1039 (5th Cir. 1982), the defendant contends it is entitled to summary judgment to the extent the plaintiff seeks relief under section 41310(a) because the provision protects only the right of access to air travel — as distinct from any harms that may arise once a disabled person has received such access. I am unpersuaded. In *Diefenthal*, the plaintiffs sued under the predecessor to section 41310(a) because they were not permitted to smoke while seated in the First Class section of their flight. *Diefenthal*, 681 F.2d at 1051. To permit such a cause of action to go forward, the court reasoned, could make "every failure to treat each passenger similarly" a violation of the statute. *Id*. But the court also noted that "burdening the potential user with special requirements not applied to the general public" would constitute a violation. *Id*. (quoting *Polansky v. Trans World Airlines*, 523 F.2d 332, 335-36 (3d Cir. 1975)). Assuming that denial of "access" would be the key to section 41310(a) liability in this circuit, the burdens imposed on the plaintiff during her trip are an order of magnitude greater than the inability to smoke. Moreover, the version of section 41310(a) under which *Diefenthal* was decided ceased to have effect in 1983 pursuant to the Airline Deregulation Act of 1978. *See United States Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 601 (1986) (noting that, as of 1983, antidiscrimination provision of Federal Aviation Act had lapsed). *Diefenthal* therefore does not suggest the defendant is entitled to judgment as a matter of law concerning her section 41310(a) claim.

The defendant also takes the position, in cursory fashion, that Congress could not have intended section 41310(a) to provide protection for disability discrimination because it enacted the ACCA to provide such protection. The legislative history of both provisions belies this theory. Congress enacted the ACCA in 1986, to clarify that disability discrimination was prohibited from

all airlines, after the Supreme Court ruled in the *Paralyzed Veterans* case that such protections only applied to airlines receiving federal subsidies. *See generally* S. Rep. 99-400 (1986), reprinted in 1986 U.S.C.C.A.N. 2328. As I have already noted, the Supreme Court made clear in its *Paralyzed Veterans* opinion that the predecessor to section 41310(a) had lapsed; indeed, *Paralyzed Veterans* turned on section 504 of the Rehabilitation Act. *Paralyzed Veterans*, 477 U.S. at 603-04. Section 41310, in turn, became part of the U.S. Code in the 1994 recodification of Title 49; its sweep was explicitly limited to foreign air travel precisely because it is the successor to the anti-discrimination provision that had lapsed in 1983. H.R. Rep. No. 103-180 at 1, 290, reprinted in 1994 U.S.C.C.A.N. 818, 1107. This is a somewhat confusing legislative provenance, but it by no means yields the conclusion that Congress intended persons who believe they suffered disability discrimination during international air travel to seek recourse only under the ACCA.

c. The ACCA

The defendant further contends it is entitled to summary judgment to the extent the plaintiff alleges violation of the ACCA because the summary judgment record discloses no cognizable violations of the regulations relied upon by the plaintiff in her complaint. The defendant relies principally on *Adiutori v. Sky Harbor Int'l Airport*, 880 F. Supp. 696 (D.Ariz. 1995), *aff'd*, 103 F.3d 137 (9th Cir. 1996) (table). In *Auditori*, the District Court for the District of Arizona observed that the ACCA is "not a strict liability statute," and it therefore determined that an airline passenger could not maintain a claim for violation of the ACCA based on the allegation that he had to wait for "five or ten minutes" after arriving at the Phoenix airport before his requested wheelchair arrived. *Id*. 880 F. Supp. at 701. The court noted the lack of evidence "that the plaintiff suffered any adverse

consequences from the de minimis delay." *Id*.

Here, the plaintiff has framed her allegations concerning violation of the ACCA by pointing to the specific DOT regulations promulgated thereunder that she contends the defendant transgressed, before, during and after the journey in question. Invoking *Auditori*, the defendant takes the position that most of these allegations represent violations that are too de minimis to permit a jury to consider them.

I begin by noting that it is entirely appropriate that the plaintiff should use the DOT regulations as a roadmap to what constitutes a violation of the ACCA. As the First Circuit has recently reemphasized in the context of educational discrimination, when Congress has expressly delegated to an administrative agency the task of implementing a particular statute by regulation, the courts should accord the resulting regulations controlling weight. *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (citation omitted), *cert. denied*, 117 S.Ct. 1469 (1997). The regulations implementing the ACCA were created pursuant to such express authority, and a violation of the regulations is therefore tantamount to a violation of the ACCA. *Rowley v. American Airlines*, 885 F.Supp. 1406, 1410-11 (D.Or. 1995), *aff'd sub nom. Gee v. Southwest Airlines*, 1997 WL 155133 (9th Cir. Apr. 4, 1997). The regulations in question, which appear at 14 C.F.R. Part 382, set forth a variety of specific standards with which airlines must comply, without reference to whether some violations thereof would be considered non-sanctionable by virtue of their de minimis character. In that sense, notwithstanding the dictum in *Auditori*, the ACCA *is* a strict liability statute; the relevant standards simply do not speak to the issue of discriminatory intent or, for that matter, the kind of fault that distinguishes a negligence action

from a tort action in which strict liability would apply. I read the determination in *Auditori* — that a ten-minute wait for a wheelchair is too de minimis to sanction — as resting on 14 C.F.R. § 382.39(a)(3), which enjoins a carrier from leaving a disabled passenger unattended and in a non-independently mobile state for more than 30 minutes. I cannot agree with the defendant that it is entitled to summary judgment on any aspect of the plaintiff's ACCA claim simply because it may ultimately emerge that her damages are less than extensive.

The defendant further contends that the summary judgment record is missing a critical element concerning the plaintiff's allegation that it violated an obligation to provide an on-board wheelchair during the Mexico City-to-Chicago flight and that it failed to provide her with assistance in using such a wheelchair to gain access to the aircraft lavatory, all as set forth in 14 C.F.R. §§ 382.21(a)(4)(ii) (requirement of on-board wheelchair on certain aircraft) and 382.39(b)(3) (requirement to provide assistance in use of on-board wheelchair when such equipment on board). The defendant notes that section 382.21(a), including the requirement of an on-board wheelchair, applies by its terms only to aircraft ordered after the effective date of the regulations or delivered to the carrier more than two years after that date. I agree with the defendant that the plaintiff has failed to come forward with any evidence concerning the age of the aircraft, and thus there is nothing from which a factfinder could conclude that the aircraft in question is new enough to come within the temporal scope of section 382.21(a). Therefore, to the extent the plaintiff's claim for relief turns on an alleged violation of section 382.21(a)(4)(ii), the defendant is entitled to summary judgment. The same cannot be said of the plaintiff's contention that the defendant violated section 382.39(b)(3), which requires a carrier to provide

"assistance with the use of the on-board wheelchair to enable the person to move to and from a lavatory" "[i]f there is an on-board wheelchair on the aircraft." Because the question of whether such a wheelchair was on board is a disputed issue of material fact, summary judgment on this aspect of the plaintiff's claim is inappropriate.

d. Injunctive Relief

Finally, the defendant contends that it is entitled to summary judgment to the extent the plaintiff seeks injunctive relief. Both parties agree that the First Circuit's opinion in *Lopez v. Garriga*, 917 F.2d 63 (1st Cir. 1990), states the appropriate rule. The plaintiff contends that the record generates the necessary prerequisites to injunctive relief as set forth in *Lopez*. I disagree.

The *Lopez* decision sets forth three preconditions to an entitlement to permanent injunctive relief. First, the plaintiff must establish that she "'has sustained or is immediately in danger of sustaining some direct injury'" as the result of the defendant's wrongful conduct; this injury or threat of injury "must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Id*. at 67 (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)). Second, the plaintiff must "state a sound basis for equitable relief," which requires a showing "either that some past unlawful conduct has continuing impact into the future" or "a likelihood of future unlawful conduct on the defendant's part." *Lopez*, 917 F.2d at 67 (citations and internal quotation marks omitted). And, even after meeting these preconditions, the plaintiff "must show that [s]he is subject to continuing irreparable injury for which there is no adequate remedy at law." *Id*. at 68 (citations omitted).

The plaintiff's request for permanent injunctive relief is premised on two assertions: first, that she intends to make future use of the defendant's airline, and, second, that the defendant's failure to comply with the requirements of the ACCA is a chronic one stemming from inadequate training of its personnel. In my opinion, this scenario is too hypothetical to warrant the exercise of the court's extraordinary equitable powers. Even assuming that the defendant has in place an inadequate regime for assuring its compliance with the ACCA, any threatened future injury to the plaintiff is baldly conjectural because it is premised on the assumption that the plaintiff will make good on her intent to use the defendant's airline in the future (as opposed to doing business with another of the major commercial airlines that serve Maine) and that the defendant will not take note of this plaintiff's keen interest in asserting her rights under the ACCA and take care to comply with its requirements when she next becomes a customer of the airline.[16] Moreover, even if the court could credit as non-conjectural the plaintiff's assertions concerning the likelihood of future injury, she has made no showing as to why money damages are an inadequate remedy. *See, e.g., Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (irreparable harm a "natural sequel" if plaintiff "suffers a substantial injury that is not accurately measurable or adequately compensable by money damages"). Finally, I agree with the defendant that to employ injunctive relief in the circumstances of the case would be to embark upon the kind of policymaking odyssey that is properly left to the administrative agency that Congress charged with enforcing the ACCA. *See Shinault v. American Airlines, Inc.*, 936 F.2d 796, 805 (5th Cir. 1991) (declining to grant permanent

[16] In support of her request for permanent injunctive relief, the plaintiff would have the court credit the data she has received from the defendant in discovery suggesting that the defendant may have committed similar ACCA violations in connection with numerous other disabled passengers. This is not a class-action suit. Thus, pursuant to *Lopez,* the only relevant inquiry concerns the potential for future injury to the plaintiff herself.

injunctive relief in ACCA case); *Indian Motocycle Assoc. III L.P. v. Massachusetts Hous. Fin. Agency*, 66 F.3d 1246, 1251 (1st Cir. 1995) ("courts must be especially cautious about embarking upon a lawmaking exercise" when "efficacious alternative forms of relief" may exist). Even assuming that the plaintiff's ACCA claim has merit, as the court must at this stage given the state of the summary judgment record, a plaintiff-favorable view of the record still reveals that the necessary underpinnings for permanent injunctive relief are lacking. Therefore, in my opinion, the defendant is entitled to summary judgment to the extent the plaintiff seeks injunctive relief.[17]

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be **GRANTED IN PART AND DENIED IN PART** as follows: granted to the extent the plaintiff's claim under the Air Carrier Access Act is premised on a violation of 14 C.F.R. § 382.21(a)(4)(ii), granted to the extent that the plaintiff seeks permanent injunctive relief, and otherwise denied.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this ___ day of May, 1997.

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[17] The defendant also seeks a determination that the plaintiff is not entitled to recover attorney fees. Resolution of that issue, if necessary, is properly left to post-trial proceedings.

David M. Cohen
United States Magistrate Judge