A-57305-7

IN THE SUPREME COURT
STATE OF FLORIDA

JOHN K. VREELAND,
Administrator Ad Litem for the
Estate of JOSE MARTINEZ, and
the Personal Representative of the
Estate of JOSE MARTINEZ,
Deceased,

Petitioner,
vs.

AEROLEASE OF AMERICA,
INC., a corporation,

Respondent.
_____/

CASE NO. SC10-694
L.C. CASE NO. 2D08-248

ANSWER BRIEF OF RESPONDENT AEROLEASE OF AMERICA, INC.,

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STATEMENT OF THE CASE AND FACTS [1]

Overview

Martinez was a passenger in an aircraft under a long-term lease to Ferrer,[2] and operated by a pilot (Palas) who worked for Ferrer and had free access to all his aircraft. (AA. 1 at Ex. D p. 9, 11, 12, 21, 23, 87) Vreeland, the administrator ad litem and personal representative of Martinez, sued not only the lessee/operator of the aircraft (Ferrer) and his pilot, but also the long-term lessor, Aerolease.

After completion of relevant discovery, Aerolease sought summary judgment on the basis that it has no liability for this plane crash based on undisputed facts and controlling law. (A. 52-54, 60-61) The trial court held that pursuant to the plain wording of 49 U.S.C. § 44112 (formerly codified as 49 U.S.C. § 1404), Aerolease is immune from all claims. The district court affirmed that Aerolease is immune from any claim of vicarious liability for a lessee's operation of the aircraft on which Vreeland's decedent

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[1] The parties utilized appendices in lieu of the original record below. The symbol "A" refers to Vreeland's appendix, and the symbol "AA" refers to Aerolease's appendix as they were submitted in the district court and transmitted to this Court. The symbol "RA" refers to Respondent's appendix that accompanies this brief. All emphasis is added unless noted to appear in the original.

[2] "Ferrer" refers to Danny Ferrer individually and d/b/a Ferrer Aviation.

was a passenger. *Vreeland v. Ferrer*, 28 So.3d 906 (Fla. 2nd DCA 2010) Both courts agreed that the aircraft lease agreement between Aerolease and Ferrer fell squarely within the terms and conditions of 49 U.S.C. § 44112, because Aerolease had no control of the aircraft, and therefore was not subject to any vicarious liability claim but disagreed as to whether the claim of negligent pre-lease maintenance was also preempted. (A. 52-54, 60-61; *Vreeland v. Ferrer, supra*).

Unrebutted testimony established that Ferrer leased this aircraft from Aerolease with an option to purchase it. (AA. 1 at Ex. D p. 6; AA. 5 at p. 9, 22, 23) Ferrer wanted to set up a flight school and had other aircraft in addition to this one. (AA. 1 at Ex. E p. 14, 18, 19, 23, 81, 90) Prior to the lease to Ferrer, the instant aircraft was in California and Ferrer was in Lakeland, Florida. (AA. 4 at p. 163, 164) The contract provided (and testimony confirmed), Ferrer was in exclusive possession and control of this plane at the time of the crash: "… the operation of the Aircraft shall at all times be under the exclusive control and in the possession of Lessee;" (AA. 1 at Ex. C ¶5(a); AA. 5 at p. 9, 22, 23)

As part of the negotiations for the aircraft, Ferrer hired SkyBlue Air to survey and inspect the aircraft prior to signing the lease. (AA. 1 at Ex. D p. 12-13, 42-43, 49; AA. 5 at p. 9, 22, 23, 49) Ferrer was adamant that he

wanted a "prebuy" inspection[3] prior to signing anything. (AA. 1 at Ex. D p. 49) He specifically testified that he did not sign the lease until the aircraft was inspected and any "squawks" (discrepancies) were resolved. (AA. 3 at p. 143, 149) Ferrer authorized a prebuy inspection costing $1,200. (AA. at p. 142) Both SkyBlue's president and the individual who performed the inspection confirmed this evidence. (AA. 4 at 9, 22, 23, 49, 62-63, 87-88, 123-124) The inspection revealed that various repairs and/or maintenance were required to the aircraft. (AA. 4, 6) SkyBlue would not permit the plane to be flown for either a test flight or a cross country ferry flight until the necessary work was done. (AA. 4 at p. 165, 166, 186; AA. 6 at p. 86, 88) SkyBlue determined the aircraft as airworthy before releasing it for a test flight and for its cross-county ferry flights to Ferrer. (AA. 4 at p. 165-167; AA. 6 at p. 86) The Sky Blue Aircraft and Powerplant ("A & P") mechanic[4] specifically certified the aircraft as repaired and inspected in

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[3] A "prebuy" inspection is a full inspection of the aircraft to identify any maintenance or repairs that should be considered and/or performed. The buyer and seller (or long-term lessee and lessor) then determine what repairs to effect and who will pay for them). (AA. 5 at p. 22; AA 6 at p. 62) Ferrer negotiated with Aerolease regarding who would pay for specific repairs. (AA. 1 at Ex. D p. 86)

[4] Pursuant to FAR 65.85 and 65.87, only a certificated airframe or mechanic may approve and return to service a powerplant, airframe, or any related part or appliance.

accordance with applicable Federal Aviation Regulations (FARs), and that the aircraft was approved for return to service. (AA. 4 at p. 168-169; AA. 4 at Ex. 4-9)

After the prebuy inspection and essential repairs were completed, and before the plane was ferried cross country to Ferrer, the SkyBlue pilot completed a test flight in California to become familiar with the aircraft. (AA. 7 at p. 48) The cross-country ferry flight accomplished by two SkyBlue pilots required four fuel stops plus an overnight rest. (AA. 7 at p. 33) There were no mechanical problems during the two pre-flight flights or during the flight to Florida. (AA. 7 at p. 58-59, 67) Ferrer hired Sky Blue Air to perform the ferry flight and paid for it. (AA. 1 at Ex. D p. 13, 87; AA. 6 at p. 88) Ferrer testified that when the plane arrived "the pilots reported that it flew like a dream." (AA. 1 at Ex. D p. 91) Within thirty minutes' of the plane's arrival in Florida from California, Palas went for a flight with the ferry crew. (AA. 1 at Ex. D p. 39) The plane was put in a hanger where Ferrer's mechanic and pilot then inspected it. (AA. 1 at Ex. D p. 12-13, 39; AA. 7 at p. 33, 34) The plane was subsequently flown several other times between its arrival in Lakeland on January 12 and the accident two days later. (AA. 1 at Ex. D p. 91, 92; AA. 1 at Ex. B)

The lease agreement

The lease agreement between Ferrer and Aerolease plainly provides that Aerolease offered this aircraft "as is" and made no representations as to its airworthiness:

> 4. REPRESENTATION AND WARRANTIES
>
> (a) Representation and Warranties of Lessor
>
> Lessor represents and warrants to Lessee that (i) Lessor has full power and authority to execute and deliver this Lease and perform its obligations hereunder and that the title to the Aircraft has been duly registered by the Federal Aviation Administration in the name of Lessor. *Lessor makes no other representations, promises, statements, or warranties, express or implied, with respect to the value, condition, suitability, airworthiness or fitness for a particular use of the Aircraft.*

(AA. 1 at Ex. C; AA 6 at p. 87, 88)

The lease agreement further provided that Ferrer had *sole* responsibility for repairs, and/or maintenance of this aircraft. (AA. 1 at Ex. C at ¶6; Ex. D at p. 13)

Inspection and repair of the aircraft by Ferrer

Pursuant to the lease terms, Ferrer retained SkyBlue to inspect and perform any needed maintenance on the aircraft prior to signing the lease and taking delivery of the aircraft. Ferrer testified:

> A. … I had a verbal agreement with either Stan Shaw or his son [Aerolease] stating that there would be a – you know, I wanted a prebuy inspection prior to signing anything.

(AA. 1 at Ex. D p. 49)

> Q. Had you ever been in the airplane when it was on the ground?
>
> A. Briefly once.
>
> Q. When was that?
>
> A. When the airplane was delivered.
>
> Q. Do you remember who it was that delivered it?
>
> A. The company that did the prebuy inspection, I subsequently hired them to ferry the aircraft from, I believe it was California. And there were two pilots that flew, excuse me, two pilots that flew that aircraft in.
>
> Q. I have a quote here … from SkyBlue Air, Inc. …
>
> A. This is a [sic] company that ferried the plane, yes.
>
> Q. Now, do I understand that they also did the prebuy inspection?
>
> A. Yes, they did.

(AA. 1 at Ex. D. p. 12-13) Ferrer said that he did not discuss with Aerolease the inspection or review of the aircraft while it was out west because "that's what I hired SkyBlue Air to do." (AA. 1 at Ex. D. p. 42) Rather, he discussed the issues of the prebuy inspection and the aircraft's airworthiness only with SkyBlue's licensed aircraft and powerplant mechanics. (AA. 4 at p. 142-149, 168-168; AA 5 at p. 23, 49) SkyBlue also confirmed that its pre-buy inspection contract was made solely with Ferrer:

A. I'll make this very direct without trying to insult you. Again, as I said earlier, we are hired to go through an airplane and make a list of squawks that we find, which is airworthy – really airworthy items is really what we look at. Okay. *Once we make that list, here's what we found, that would go directly to the person that hired us to do the pre-buy. It's never Stan Shaw [Aerolease]. It's always* – and I think we've only maybe done three totals in our existence – *it would be the customer such as Danny Ferrer*. He would get a conversation either with our mechanic or whoever to say this is what's wrong. At that point we've done our job. If Mr. Ferrer now wants me to fix items A, B, C and D, he can hire me to fix A, B, C and D. If he doesn't I don't fix A, B, C. and D.

(AA. 7 at p. 62-63)

Q. Okay. In this situation, a *pre-buy inspection being conducted for an individual such as Mr. Ferrer, who was a customer of AeroLease of America, Mr. Ferrer orders the pre-buy inspection and pays for it, correct*?

A. *Correct*.

Q. He [Ferrer] *negotiates with whatever appropriate delegated employee of SkyBlue*, deals with him on that subject matter for the price of that service, correct?

A. *Correct*.

Q. *When the service is completed SkyBlue Air reports the findings to the customer*?

A. *Correct*.

(AA. 6 at p. 87-88)

Ferrer made it clear that a satisfactory inspection by SkyBlue's federally licensed mechanics and completion of any necessary repairs was required before he would sign the lease. (AA. 1 at Ex. D p. 49) SkyBlue's

testimony agreed with what Ferrer said: prior to the time Ferrer signed the lease contract, SkyBlue provided Ferrer with a written document outlining the prebuy inspection with a list of all discrepancies and the results of the engine run-up, damage history, AD (Airworthiness Directives) compliance records, and the like, and all necessary work was performed. (AA. 2 p. 30-31; AA. 4, 5, 6) The deposition of the SkyBlue employee confirmed that the prebuy inspection was completed before any repairs were made. The California test flight and the cross-country flight to Florida occurred only after it was confirmed that the aircraft was safe and airworthy. (AA. 2 p. 30-33; AA. 4, 5, 6) The SkyBlue personnel testified:

> Q. Now, when was it that you physically sent him [Ferrer] copies of the work product that you generated in your pre-buy inspection with the list of discrepancies and the results of the engine run-up, damage history, AD [Airworthiness Directives] compliance record and so forth?
>
> A. Exact date, I don't know.
>
> Q. All right. Certainly it was well before the plane was flown back to Florida, correct?
>
> A. Absolutely.
>
> Q. At least a couple weeks before that?
>
> A. Yes, sir.

(AA. 4 at p. 143

Q. You know that he received them because you discussed with him on the telephone the information and conclusions contained in Exhibit 2 to your deposition today, correct?

A. That one, yes, sir.

(AA. 4 at p. 144)

The SkyBlue employee performing the prebuy inspection testified that he advised Ferrer that this aircraft was due for its next annual inspection approximately four to five months after the time frame of the prebuy inspection.[5] (AA. 4 at p. 142-143) Ferrer refused SkyBlue's proposal to perform the annual inspection because it already had the aircraft and was performing certain work in the course of the prebuy. (AA. 2 at p. 29; AA. 4 at p. 141-143)

Q. So you saw that the aircraft was due for its next annual inspection in April, approximately four to five months after the time frame of your pre-buy inspection?

A. Yes sir

Q. You communicated that to Mr. Ferrer?

A. Yes sir.

…

Q. So you proposed SkyBlue Air perform their annual inspection. Since you had the aircraft there, you had already had certain work done in the course of the pre-

[5] The aircraft was airworthy without performing this annual inspection because it was not yet due. (AA. 6 at p. 130-131)

> buy and to complete the other work necessary for an annual, but Mr. Ferrer refused?
>
> A. Refused.

(AA. 4 at p. 141-143) Though Ferrer authorized repair of various items, he refused to pay for repair of the autopilot or the pressurization system because he thought that was too expensive. (AA. 4 at p. 182-183, 187) It was Ferrer's choice to decide what squawks identified on the prebuy inspection that he wanted to pay to repair. (AA. 6 at p. 87-88)

After SkyBlue completed its prebuy inspection, the authorized repairs, and the other work it did (such as checking compliance with Airworthiness Directives), the plane was airworthy. (AA. 4 at p. 165, 166; AA. 6 at p. 86) SkyBlue would not have permitted anyone to fly the aircraft for either a test flight or for a cross-country ferry from California to Florida if the plane was unsafe:

> Q. Is it your testimony that Mr. Minear [pilot for the ferry flight], your friend and your coworker, that you would knowingly allow him to fly a plane that you believed to be unsafe or unairworthy?
>
> A. *I would not let him do that*.
>
> Q. On a test flight or a cross-country flight?
>
> A. On any flight.
>
> Q. So you didn't stop him from flying the aircraft on a test flight, did you?
>
> A. I did not stop him.

(AA. 4 at p. 165)

Q. As an A & P, as far as you were concerned, was that *aircraft safe for ferry flight based on all systems and equipment being operational, to your knowledge*?

A. *Yes*.

Q. That was the policy at SkyBlue Air when it came to any aircraft being released for any flight, correct? … For any pilot taking an aircraft up in the air after it had been worked upon by SkyBlue Air, regardless of whether an annual inspection was done or not, that if the aircraft were not safe for flight, there would be written notice to the owner or the pilot about that correct?

A. Written notice, no.

Q. Verbal notice or written notice, then?

A. Yes. Verbal.

(AA. 4 at p. 166-167)

Q. *Was it the policy of SkyBlue Air that any aircraft flown for a customer such as Mr. Ferrer, before being put on a ferry flight was in proper airworthy condition for flight*?

A. *Absolutely*.

Q. And to your knowledge, was that the working policy of Mr. Boles, *not to release an aircraft for a test flight or a ferry flight without it being in proper airworthy condition*?

A. *Absolutely*.

Q. To our knowledge, was that the practice of Mr. Minear, the ferry pilot, that he would perform all proper reviews and checks of a pilot in command before taking an aircraft on a ferry flight for a customer?

A. More so.

> Q. In other words, you found him to be, to your knowledge, an experienced – a competent, reliable pilot who was serious about all safety matters?
>
> A. Absolutely. Along with Mark Hughes who was with him, who was the same.

(AA. 6 at p. 86)

The SkyBlue president and CEO explained that maintenance and upkeep of an aircraft is not static – a plane that is in perfect order one day may develop a maintenance problem just a few flight hours later:

> A. … a guy down the road [after a pre-buy inspection], he'll take an airplane out. He'll fly it 100 hours and his alternator goes out, and he goes, "Why didn't you catch it on the pre-buy? …"

(AA. 5 at p. 19)

Lower courts proceedings

The allegations of the third amended complaint that were directed against Aerolease asserted negligent maintenance or inspection of the aircraft prior to offering it for sale or lease to Ferrer, and that defects led to the crash during the time Ferrer allowed Pallas to fly it. (AA. 3) Count I asserted that Aerolease was liable for Palas' operation of the aircraft based on the "dangerous instrumentality doctrine." Count II claimed that

Aerolease negligently maintained and inspected the aircraft and leased it to Ferrer in an allegedly defective condition. [6]

Aerolease moved for summary judgment on the basis of undisputed facts that it was not in possession or control of the aircraft at the time of the crash as the "lessee once removed." (AA. 1) Aerolease showed that it was immune from suit because of the federal preemption afforded by 49 U.S.C. § 44112. The trial court agreed that § 44112 preempts Florida's dangerous instrumentality doctrine as it pertains to owners or lessors who are not in actual control of an airplane and granted summary judgment on all counts against Aerolease. (A. 51-52) The district court agreed that "under 49 U.S.C. § 44112, Aerolease cannot be held vicariously liable for the negligence of others committed when the aircraft was not in Aerolease's possession or control." *Vreeland v. Ferrer*, 28 So.3d at 912. However, the district court said that "49 U.S.C. § 44112 does not preempt Florida negligence law insofar as Vreeland seeks to recover for Aerolease's active negligence in maintaining and inspecting the airplane while it was in Aerolease's possession or control" and therefore reversed the summary

[6] The third amended complaint had also included a third count that was also resolved by the trial court's summary judgment ruling in favor of Aerolease, but Vreeland withdrew Count III and does not challenge the correctness of that aspect of the ruling. (AA. 2 at p. 67)

judgment as to Count II. In reaching this ruling, the district court apparently did not consider the contractual provisions of Aerolease's lease agreement with Ferrer and the unrebutted evidence that should have provided an alternative basis for affirmance of the summary judgment as to the pre-lease maintenance and inspections.

In agreeing that 49 U.S.C. § 44112 preempts state law regarding application of the "dangerous instrumentality doctrine" as to leased aircraft, the district court readily distinguished the case of *Orefice v. Albert*, 226 So.2d 15 (Fla. 3rd DCA 1969); 237 So.2d 142 (Fla. 1970), noting that

> [a]lthough 49 U.S.C. §1404 [the predecessor to §44112] was in effect at that time, the *Orefice* court did not mention or discuss it. We can only surmise that the possible preemptive effect of the federal statute on the dangerous instrumentality law was not raised in either the supreme court or in the underlying case before the district court of appeal. *See Orefice v. Albert*, 226 So.2d 15 (Fla. 3d DCA 1969). As such, *the supreme court did not address the issue presented here*. Moreover, the *Orefice* court's ruling that the dangerous instrumentality law imposed vicarious liability on owners of aircraft was based in part on its observation that Chapter 330, Florida Statutes (1970), reflected "a specific policy by the State of Florida to license and otherwise see after aircraft safety." *Orefice*, 237 So.2d at 145. The Florida statutes addressing aircraft safety have since been repealed. *Compare* ch. 330, Fla. Stat. (1970) *with* ch. 330, Fla. Stat. (2004).

Vreeland, 28 So.3d at 912.

This Court then accepted Vreeland's petition for discretionary review.

ISSUE ON APPEAL

WHETHER THE TRIAL AND DISTRICT COURTS CORRECTLY HELD THAT 49 U.S.C. § 44112 PREEMPTS STATE LAW REGARDING VICARIOUS LIABILITY CLAIMS AGAINST LESSORS OF AIRCRAFT WHO ARE NOT IN POSSESSION OR CONTROL OF THE AIRCRAFT, AND WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE NEGLIGENCE COUNT BASED ON THE "AS IS" CONTRACT

STANDARD OF REVIEW

The standard of review is *de novo.*

ARGUMENT SUMMARY

49 U.S.C. § 44112 preempts state law and prohibits application of the "dangerous instrumentality doctrine" to impose vicarious liability for the negligent operation of aircraft when the aircraft owners or lessors are not in possession or control of the aircraft. Both the plain wording of the statute as well as its legislative history establish the Congressional intent for federal preemption of this issue.

The specific terms and conditions of the contractual agreement between Aerolease and Ferrer establish that the aircraft was leased "as is." The factual record confirms that pursuant to the terms of the lease, the lessee relied upon the work of the FAA licensed personnel he hired, paid to inspect, repair, and certify the aircraft for flight. Therefore the trial court properly ruled that there could be no claim of negligent maintenance against Aerolease.

The district court correctly stated that the instant decision does not conflict with *Orefice* because § 44112 was not considered by the *Orefice* court and a state statute that also formed the basis for that decision no longer exists.

ARGUMENT

THE TRIAL AND DISTRICT COURTS CORRECTLY HELD THAT 49 U.S.C. § 44112 PREEMPTS STATE LAW REGARDING VICARIOUS LIABILITY CLAIMS AGAINST LESSORS OF AIRCRAFT WHO ARE NOT IN POSSESSION OR CONTROL OF THE AIRCRAFT, AND THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE NEGLIGENCE COUNT BASED ON THE "AS IS" CONTRACT

Legislative history of § 44112

Whether 49 U.S.C. § 44112 is viewed independently or in its historical context, it is clear that Congress intended to preempt state law on the issue of liability for owners, lessors, or secured parties who are not in possession and control of an aircraft at the time of an incident.

Congress created the Civil Aeronautics Authority in 1938 when it enacted the Civil Aeronautics Act. A decade later, this Act was amended by the addition of § 504 to limit "the liability of certain persons not in possession of the aircraft" (RA. 1):

> *No person* having a *security interest* in, or *security title* to, any civil aircraft under a contract of *conditional sale,* equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no such *lessor* of any such aircraft under a bona fide *lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft so leased*, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, or by the ascent, descent, or flight of such aircraft or by the dropping or falling of an object therefrom, *unless such aircraft is in the*

> *actual possession or control of such person at the time of such injury, death, damage, or loss*.

Civil Aeronautics Act of 1938, ch. 482, sec. 501, § 504, 62 Stat. 470, 470 (1948); (RA. 1, 2).

According to the House report, § 504 was enacted, in part, because of concern about the Uniform Aeronautics Act which had been adopted in ten states[7] and which made an aircraft owner liable "whether such owner was negligent or not." H.R. Rep. No. 80-2091 (1948); (RA. 1). The House report also explains that it wanted to *prevent* any interpretation or construction of the Uniform Aeronautics Act that would "impose liability upon any person registered as owner, even though he holds title only as security under a mortgage … or as a lessor under an equipment trust … for operation of the aircraft." H.R. Rep. No. 80-2091 (1948); (RA. 1). The stated purpose of § 504 was to "*remove this doubt by providing clearly that such persons have no liability under such circumstances*." H.R. Rep. No. 80-2091 (1948); (RA. 1).

During decade following the end of World War II, the aviation industry underwent tremendous growth. As part of the response to this expanse, Congress passed the Federal Aviation Act of 1958, which among

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[7] Delaware, Indiana, North Carolina, North Dakota, New Jersey, South Carolina, South Dakota, Tennessee, Vermont, and Wisconsin.

other things, created the Federal Aviation Agency to assume the responsibilities of the Civil Aeronautics Administration. Title V of the Civil Aeronautics Act, including its § 504 limitation on liability, was retained in Title V of the Federal Aviation Act and was codified at 49 U.S.C. § 1404. As originally enacted in 1958, § 1404 "included a provision to exempt persons whose sole interest therein is a security interest from liability arising out of the operations of the civil aircraft." H.R. Rep. No. 86-445 (1959); (RA. 3 at p. 2. 4) This original legislation did not, however, include those with "security interests in specific aircraft propellers, as well as aircraft engines [even though] propellers for modern transport-type aircraft are complex and expensive, sometimes costing as much as $25,000 each, and usually are readily interchangeable from one engine to another." H.R. Rep. No. 86-445 (1959) (R.A. 3 at p. 2)

The next year, in 1959, Congress wanted to clarify that the exemption from liability applied not only to those who were financing and leasing aircraft but also to those entities who were financing or leasing engines and propellers. Federal Aviation Act of 1958, Pub. L. No. 86-81, §503-504, 73 Stat. 180, 180-181 (the purpose of the amendment is to "facilitate financing of certain aircraft engines and propellers"); H.R. Rep. 86-445 (1959) (RA.

3). The House report shows a continuing intention to preempt claims against owners, lessors, or lenders:

> Since those interested in leasing or separately financing aircraft engines and propellers interpret the so-called absolute liability laws enacted by various states as applying to them, they are unwilling to enter into such arrangements *unless the law is amended to provide them with the* ***same*** *protections now afforded to holders of security interest in aircraft*.

H.R. Rep. No. 86-445, at 2 (1959); (RA. 3). The revised § 1404 reiterated the clear Congressional intent to preempt state law claims against owners, lessors, or lenders of aircraft and/or its major components who were not in possession at the time of an incident:

> *No person* having a *security interest* in, or *security ti*tle to, any civil aircraft, aircraft engine, or propeller under a contract of *conditional sale*, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no *lessor* of any such aircraft, aircraft engine, or propeller under a *bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased*, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, *unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss.*

The clear wording of § 1404 refutes Vreeland's position at p. 9-11 of his brief that individual *states* could allow vicarious liability claims even

though the *federal* law would not do so. *See also: In re Lawrence W. Inlow Accident Litigation*, 2001 WL 331625 at *15 (S.D. Ind. 2001).

The Federal Fifth Circuit Court of Appeals agreed that "on its face it [§ 1404] was enacted to facilitate financing of the purchase of aircraft by providing that those holding security interests would not be liable for injuries caused by falling planes or the parts thereof. This provision appears clearly and forthrightly to preempt any contrary state law which might subject holders of security interest to liability for injuries so incurred." *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389, 1394 (5th Cir. 1970)

In 1994, Congress revised Title 49 (which broadly deals with transportation) in "an Act to revise, codify, and enact *without substantive change*, certain general and permanent laws, related to transportation, as subtitles II, III, and V-X of title 49, United States Code, 'Transportation", and to make other *technical improvements* in the Code." PL 103-272 (HR 1758) (RA. 5). The relevant portion of this revision is 49 U.S.C. § 44112, the statute now in issue. § 44112 clearly and unequivocally continues the Congressional intention to preempt state law on the issue of claims of liability against an owner, lessor, or financier of an aircraft who is not in possession at the time of any incident. This statute states in its entirety:

(a) **Definitions** – In this section –

(1) "Lessor" means a person leasing for at least 30 days a civil aircraft, aircraft engine, or propeller.

(2) "Owner" means a person that owns a civil aircraft, aircraft engine, or propeller.

(3) "Secured Party" means a person having a security interest in, or a security title to, a civil aircraft, aircraft engine, or propeller under a conditional sales contract, equipment trust contract, chattel or corporate mortgage, or similar instrument.

(b) **Liability** – A *lessor, owner, or secured party is liable for personal injury, death*, or property loss or damage on land or water ***only*** *when a civil aircraft, aircraft engine, or propeller is in the actual possession or control of the lessor*, owner, or secured party, *and the personal injury, death, or property damage or loss occurs because of*

(1) the *aircraft*, engine, or propeller, or

(2) the *flight* of, *or* an object falling from, the aircraft, engine or propeller.

49 U.S.C. § 44112.[8]

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[8] The House notes regarding this section state, in their entirety:

In subsection (a), clauses (1) and (3) are derived from 49 App.:1404 (2nd-57th words). Clause (2) is added for clarity. In clause (1), the words "bona fide" are omitted as surplus. In clause (3), the word "nature" is omitted as surplus.

In subsection (b), before clause (1), the words "personal injury, death" are substituted for "any injury to or death of persons", and the words "on land or water" are substituted for "on the surface of the earth (whether on land or water)", to eliminate *unnecessary* words. In clause (2), the words "ascent, descent, or" and "dropping or" are omitted as *surplus*.
H.R. Rep. 103-180, 322-328, 1993 WL 287624, 197-200 (R.A. 5 at p. 8)

History of automobile vicarious liability law

Vreeland's argument begins by partially tracing the concept of vicarious liability for automobiles that developed through the dangerous instrumentality doctrine. In his abbreviated history, Vreeland wholly fails to mention the Graves Amendment, 49 U.S.C. § 30106.[9]

The legislative debate preceding the Graves Amendment raised similar economic and commercial issues as raised in the legislative history of vicarious liability for aircraft. In the House debate of the Graves Amendment, the proponents argued:

> Mr. Chairman, I am here today to correct an inequity in the car and truck renting and leasing industry. By reforming vicarious liability *to establish a national standard* that all but a small handful of States already follow, we will restore fair competition to the car and truck renting and leasing industry
>
> and lower costs and increase choices for all consumers. Currently, a small number of States impose vicarious liability or limitless liability without fault, on companies and their affiliates simply because they own a vehicle involved in an

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[9] The Graves Amendment provides, in pertinent part:
(a) In general – an *owner of a motor vehicle that rents or leases the vehicle* to a person (or an affiliate of the owner) *shall not be liable* under the law of any State or political subdivision thereof, *by reason of being the owner* of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease if –
(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner). (RA. 9)

> accident. … Vicarious liability laws apply where the accident occurs. It does not matter where the car or truck was rented or leased. Since companies cannot prevent their vehicles from being driven to a vicarious liability State, they cannot prevent their exposure to these laws and must raise their rates accordingly. … While this amendment seeks to level the playing field, I want to emphasize, I want to be very clear about this, that this provision will not allow car and truck renting and leasing companies to escape liability if they are at fault.

151 Cong. Rec. H1199-1202 at p. 2. (RA. 7)

> Those against the legislation noted:
>
> … This amendment, if passed, would nullify the laws of 15 States[10] and the District of Columbia and would have the disastrous effect of allowing rental car companies to lease vehicles to uninsured drivers with no recourse for innocent victims should an accident occur. … We are going to preempt the law of New York, of California, of Florida, wherever, because we know better. …

151 Cong. Rec. H1199-1202 at p. 5. (RA. 7)

The Florida decisions have agreed that the Graves Amendment controls and preempts the field of all lawsuits alleging vicarious liability of vehicle lessors and bars any such suits in state court.[11] *See, e.g.:*

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[10] Arizona, Connecticut, Delaware, Iowa, Maine, Nevada, New York, Rhode Island, District of Columbia, California, Florida, Idaho, Michigan, Minnesota, Oklahoma, and Wisconsin.

[11] The issue of whether the Graves Amendment, 49 U.S.C. § 30106, preempts section 324.021(9)(B)(2), Florida Statutes (2007) has been certified to this Court. *See, e.g.: Fair v. Reese*, 6 So.3d 73 (Fla. 5th DCA 2009); *Francis v. Dollar Rent a Car Systems, Inc.*, 37 So.3d 264 (Fla. 5th

Kumarsingh v. PV Holding Corp., 983 So.2d 599 (Fla. 3rd DCA 2008); *Cruz v. Hertz Corp.*, 5 So.3d 758 (Fla. 3rd DCA 2009); *Rosado v. Daimler Chrysler Financial Services Trust*, 1 So.3d 1200 (Fla. 2nd DCA 2009); *West v. Enterprise Leasing Co.*, 997 So.2d 1196 (Fla. 2nd DCA 2008); *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F.Supp.2d 821 (M.D. Fla. 2007). Multiple other courts have generally agreed. *See, e.g.: Johnson v. Agnant*, 480 F.Supp.2d 1 (D.C. 2006); *Green v. Toyota Motor CreditCorp*, 605 F.Supp.2d 430 (E.D.N.Y. 2009); *Carton v. General Motors Acceptance Corp.*, 639 F.Supp.2d 982 (N.D. Iowa 2009); *Flagler v. Budget Rent A Car System, Inc.*, 538 F.Supp.2d 557 (E.D.N.Y. 2008); *Chapman v. Herren*, 2010 WL 292737 (Conn. Super. 2010); *Johnson v. XTRA Lease LLC*, 2010 WL 706037 (N.D. Ill. 2010); *Meyer v. Nwokedi*, 777 N.W.2d 218 (Minn. 2010); *Askew v. R & L Transfer, Inc.*, 676 F. Supp.2d 1298 (M.D. Ala. 2009).

Public policy favors federal preemption

For decades, aircraft leasing (whether a financing or operating lease) has been an important part of the aviation industry. A significant portion of the world's aircraft are operated today under some form of lease, with

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DCA 2009); *Parker v. Enterprise Leasing Company of Orlando*, 37 So.2d 389 (Fla. 5th DCA 2010).

estimates ranging from 30% to over 50%. The Airline Monitor, Financial Characteristics of Airlines (2006); Bureau of Transp. Stats., U.S. Dept. of Transp., Schedule B-43 Aircraft Inventory 46-58, 173-78 (2006). Any ability for states to independently create laws relating to liability of owners, lessors, or lenders who are not in control of the aircraft opens the door for precisely the type of inconsistency and vagaries that Congress abolished through enactment of § 44112 and its predecessors.

These concerns affect all levels of the aviation industry – not just the large airlines that come to mind when one thinks of the "aviation industry," but also smaller commercial aviation enterprises such as the instant long term lease of this aircraft from Aerolease to Ferrer. There is fundamentally no difference between the lease of an aircraft to a large, commercial airline or to a smaller operation like Ferrer's. In both instances, the owner does not possess or control the aircraft that is subject to the long term lease and realistically has no ability to dictate day-to-day use, flight plans, pilots, passengers, maintenance, or other aspects of the aircraft's operation.

It is also critically important to note that § 44112 does *not* wholly and completely relieve an owner, lessor, or secured party from liability. Rather, § 44112 applies *only* in those situations in which they are not in possession or control of the aircraft at the time of the incident. Any owner or other

entity who is actually operating the aircraft or otherwise in possession or control of the aircraft (such as through the actions of employees or agents) is *not* subject to the protection and preemption established by § 44112, and this statute is not a bar to pursuing a claim of liability and damages in that situation. This statute does *not* apply, for example, to Ferrer, whose employee was piloting and in control of the aircraft.

The decisional law relating to § 44112 and/or its predecessor statute

The provisions of § 44112 leave no doubt that Florida law is preempted for any claim of vicarious liability against a long-term lessor who neither possesses nor controls an aircraft. Here, both the trial court and district court properly recognized that the provisions of § 44112 federally preempt and prohibit any claim against Aerolease based on assertions of vicarious liability for the operation of this dangerous instrumentality.

Even the same lawfirm who is representing Vreeland in this appeal does not dispute the "absolute" immunity afforded to an aircraft lessor by this statute as explained in footnote 4 in the case of *Escheva v. Siberia Airlines,* 499 F.Supp.2d 493, 499 (S.D.N.Y. 2007). Mirroring the instant case where the argument is whether this immunity supersedes Florida law, the argument raised on plaintiff's behalf in *Escheva* was that this immunity is inapplicable only if Russian law applied to that case.

As decisional law explains, Congress enacted § 44112 with the clear intent to preclude vicarious liability against lessors of aircraft to "facilitate financing of the purchase of aircraft by providing that those holding security interests would not be liable for injuries caused by falling planes or the parts thereof. This *provision appears clearly and forthrightly to preempt* ***any contrary state law*** which might subject holders of security interests to liability for injuries so incurred." *Rogers v. Ray Gardner Flying Service, Inc.*, 435 F.2d 1389, 1394 (5th Cir. 1970). Despite this clear and unequivocal statement, Vreeland's brief argues at page 11 that this language does not show Congressional intent to preempt state law in this area. Vreeland then erroneously focuses on the *Rogers* discussion of a *different* provision – 49 U.S.C. §1301 of the original Civil Aeronautics Act – that did not preempt state bailment law and ignores the fact that the *Rogers* court explains that the original statute is no longer viable due to legislative changes enacted in 1948. *Id.* at 1392. The *Rogers* court then states:

> The House Committee Report on the amendment [49 U.S.C. § 1404] as the reason for exempting security holders and certain lessors stated: 'Provisions of present Federal and State law might be construed to impose upon persons who are owners of aircraft for security purposes only, or who are *lessors of aircraft*, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. *This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances.*"

Rogers v. Ray Gardner Flying Service, Inc., 435 F.2d at 1392, fn. 6. *Rogers* then says it *does "**not** question that under its commerce clause powers Congress could pre-empt state law with regarding to the liability for injuries resulting from air crashes*." *Id.* at 1393.

Vreeland attempts to support his erroneous interpretation of the *Rogers* case with inaccurate statements about three other decisions. The case of *Lockwood v. Astronautics Flying Club, Inc.*, 437 F.2d 437 (5th Cir. 1971) not only was an action in admiralty under the Death on the High Seas Act (DHSA) (and therefore factually distinguishable), it states that the *Rogers* decision is equally applicable in a DHSA case to prohibit vicarious liability against an aircraft owner. *Id.* at 439. The decision in *McCord v. Dixie Aviation Corp.*, 450 F.2d 1129 (10th Cir. 1971) *agreed* that *no* cause of action existed against an aircraft lessor for vicarious liability for its operation and dismissed plaintiffs' suit. Similarly, in *Sanz v. Renton Aviation, Inc.*, 511 F.2d 1027 (9th Cir. 1975) the court once again *agreed* that an aircraft lessor or owner has *no* vicarious liability for a pilot's negligent operation of the plane.

Later case law agrees that Congress and federal law has preempted this area of law and precludes any state-based claims of vicarious liability against lessors of aircraft. *Matei v. Cessna Aircraft Co.*, 1990 WL 43351

(N.D. Ill. 1990); 35 F.3d 1142 (7th Cir. 1994).[12] Citing to the same Congressional House Report 2091 as referenced in *Rogers, supra*, the *Matei* district court agreed that § 1404 preempts any contrary state law and bars any claims of vicarious liability against an aircraft lessor. *Id.* at *5. The appellate court affirmed all aspects of the district court's ruling.

Case law interpreting § 44112 holds that this statute creates a federal preemption and bar to any claim of vicarious liability against an aircraft lessor under state laws. In *In re Lawrence W. Inlow Accident Litigation*, *supra,* the district court agreed that 49 U.S.C. § 44112 of the "Federal Aviation Act preempts[13] the Inlow plaintiffs' claims against CIHC [the

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[12] Vreeland admits that *Matei* applied § 1404 (the predecessor to § 44112) in a claim that, like Count II here, alleged that the aircraft was leased in a dangerous and defective condition. Just as the *Matei* court found no evidence to support the plaintiff's contention, the instant facts show that the "as-is" lease contract specifically relieved Aerolease of any responsibility for the aircraft's condition and that Ferrer specifically declined to perform certain maintenance and/or repairs as recommended by *his* inspection/repair company, SkyBlue, when he entered the lease. More importantly, if § 44112 applies to preempt a state claim of *active* negligence, it most certainly applies to preempt a claim of *vicarious* liability.

[13] Vreeland attempts to suggest at page 22 of his brief that this decision is distinguishable because Inlow's "injury occurred, not in the aircraft, but on the ground – i.e., on the 'surface of the earth.'" In fact, the instant injury *also* occurred on the "surface of the earth" when the plane crashed. Vreeland's attempt to create an artificial distinction between an injury occurring to persons or property "on the surface of the earth" from those occurring within the aircraft is nonsensical because: (1) Vreeland's

aircraft lessor] because the undisputed facts show that CIHC was only the lessor of the aircraft without operational control." *Id.* at *2. The court's explanation succinctly summarizes the history of this Act and the reasons a plaintiff is barred from claiming vicarious liability against an aircraft lessor:

> Summary judgment is appropriate because the Federal Aviation Act shields CIHC from liability in its role as the lessor of the helicopter. On this defense the court agrees with Conseco Group.
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> *Under the FAA, in a section titled "limitation of liability," an aircraft lessor can be liable for personal injuries caused by the*

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version would mean that § 44112 could apply only to in-flight, mid-air collisions' injuries or deaths, and not to injuries or deaths resulting from crashes into the earth or its surface waters, and (2) his interpretation contradicts and ignores the plain and unequivocal language in the House report for § 1404 that the statute applies to any "damage to or loss of property, on the surface of the earth (whether on land or water) *caused by such aircraft*, or by the *ascent*, *descent*, or *flight* of such aircraft or by the dropping or falling of an object therefrom…" (A. 1) Vreeland's factually incorrect assertion is apparently a "fall-back" position that recognizes his earlier efforts to distinguish this case were legally incorrect. In his district court brief, Vreeland proposed at footnote 3 that this decision "does not disclose whether Indiana state law provided for the vicarious liability of an aircraft owner …" Indiana, as a signatory to the Uniform Aeronautics Act, obviously *did* provide for such vicarious liability. But for this fact, there would have been no need for the federal court to decide the applicability of the preemption to preclude the claim. The opinion notes that § 1404, as the predecessor to § 44112, was "a direct response to the Uniform Aeronautics Act, which was in force in ten states (including Indiana) in 1948) … [and that] the statutory provision was plainly intended, and plainly written, to preempt such state statutes and parallel common law clams." *In re Lawrence W. Inlow Accident Litigation*, 2001 WL 331625 at *14.

> *aircraft only if the lessor is in actual possession or control of the aircraft.* [cites and footnote omitted]
>
> *The plain language of § 44112 establishes that it preempts state common law claims against covered lessors*. Federal common law generally does not provide a remedy for those injured in aircraft accidents. The word "only" could have effect only if the statute preempts claims against lessors arising under state law.
>
> In addition, if there were any doubts about the meaning of the word "only" in § 44112(b), the legislative history of the original provision should put them to rest. The House Report shows that the bill was a direct response to the Uniform Aeronautics Act, which was in force in ten states (including Indiana) in 1948. Those state laws declared the "owner" of every aircraft "absolutely liable" for the injuries caused by the flight of the aircraft, regardless of the owner's degree of control over a lessee. [cite omitted] *The statutory provision was plainly intended, and plainly written, to preempt such state statutes and parallel common law claims*.

Id. at *14. The court then concluded that the "parties have not cited and the court is not aware of any federal case holding that § 44112 or its predecessor do not preempt contrary state law." *Id.* at 15. Because § 44112 was enacted to facilitate the financing of aircraft purchases, federal preemption applies. *Id.* at *14.

In *Ellis v. Flying Boat, Inc.*, Case #06-20066-Civ-Seitz/McAliley, a federal district judge in Miami agreed that § 44112 federally preempts and bars any claim of vicarious liability against the lessor of an aircraft. (AA. 1 at Ex. E) Consistent with the other decisions and the plain wording of § 44112, this district court held that because Seaplane Adventures did not have

actual possession or control of an aircraft it leased to Chalks, the plaintiffs could not pursue any claim of vicarious liability against Seaplane.

Vreeland has attempted to distance his position from some of these on-point federal court opinions by arguing that these are "single judge" decisions, trying to imply that they are somehow "rogue" or inaccurate analyses of the issue. No doubt Vreeland would describe these same opinions as "learned" if they had agreed with his position, as evidenced by his description of the "thoughtful analysis of the issue" that appears in the unreported, single-judge decision of *Coleman v. Windham*, 2005 WL 1793907 (R.I. Super. 2005). In the unpublished *Coleman* opinion, the aircraft that crashed was rented for a single day (to practice take-off and landing procedures) and thus fell outside of the 30-day minimum lease established by § 44112. *Id.* at *6. Moreover, the court only reached its result because it used a flawed and tortured analysis and did not apply the plain language of the statute and intent of Congress.

Vreeland agrees that his position regarding the scope of § 44112 was rejected in the case of *Mangini v. Cessna Aircraft Co.*, 2005 WL 3624483 (Conn. Super. 2005). Vreeland attempts to distance himself from that decision by characterizing the court as relying on "truncated snippets of the statue and the cases" but fails to note that all *relevant* and *material* portions

of the statutes and cases are quoted within that decision. After careful analysis of the legislative history of § 44112 the court determined that there was a "'clear and manifest' purpose to supersede state and local authority." *Id.* at *6.

The *Mangini* case also explains why Vreeland is wrong in suggesting that Congress did not intend to preempt state laws under the Uniform Aeronautics Act of 1938 when it enacted 49 U.S.C. § 1404 that later was recodified as 49 U.S.C. § 44112. *Mangini* carefully analyzes the language of §1404, explains how it specifically applies to bar vicarious liability of aircraft lessors, and how it directly and/or implicitly includes a prohibition of vicarious liability claims against aircraft owners. *Id.* at *2-3. The *Mangini* court traces how the specific language used in § 44112 clearly applies to preclude vicarious liability claims against *either* owners *or* lessors of aircraft no matter how the predecessor statute was worded. If one assumes, *arguendo*, that the wording of § 1404 is ambiguous, the court resolves the question by stating:

> Repealing 49 U.S.C. § 1404 and replacing it with 49 U.S.C. § 44112 may be seen as a response to the confusion and ambiguity created by the language of the former statute. In this sense, 49 U.S.C. § 44112 *simply clarifies* that the word "owner" in 49 U.S.C. § 1404 was meant literally and was not confined to mean holders of security interests only. The clarification accomplished this by listing three classes of exempt persons in series with equal grammatical position and statute, viz. "lessor,

> owner, or secured party," and by specifically defining each class, including a definition of "owner" which omits any connection to security interest and instead declares an owner to be one who "owns a civil aircraft, engine, or propellor." [sic] … By taking hold of the legislative admonitions that no substantive change was intended, one can infer that 49 U.S.C. § 1404 was always designed to include the owners that 49 U.S.C. § 44112 so clearly and definitely describes. This approach effectuates the plain text of 49 U.S.C. § 44112 while comporting with the legislative statements surrounding its enactment.

Mangini, supra, at *3-4. If, on the other hand, one assumes that the wording of § 1404 was less inclusive than § 44112, the court resolves the issue by explaining:

> The inclusion of all owners of aircraft within the list of entities entitled to liability protection under 49 U.S.C. § 44112 "is a change too clearly apparent to disregard." Assuming, arguendo, that the earlier version, 49 U.S.C. § 1404, excluded owners from its protection, then 49 U.S.C. § 44112 clearly expresses a substantive change sufficient to rebut the presumptions against such construction.

Mangini, supra, at *5. The opinion then concludes:

> The most compelling argument for preemption are the House and Senate Reports concerning the passage of 49 U.S.C. § 1404 in 1948. "Provision of present Federal and *State law* might be construed to impose upon persons … liability …' *Rosdail v. Western Aviation, Inc.*, [297 F.Supp. 681 (D.C. Col. 1969)] at 685. (Emphasis added by the *Mangini* court) *"This bill would remove this doubt by providing clearly that such persons have no liability*
>
> …" *id.* Thus, Congress announced that it intended 49 U.S.C. § 1404 and its present version, 49 U.S.C. § 44112, to preempt state law and to exempt from liability those persons who met the other criteria of those statutes.

Mangini, supra, at *6.

Vreeland misplaces reliance on the two other cases he cites as support for his position. *Storie v. Southfield Leasing, Inc.*, 282 N.W.2d 417 (Mich. App. 1979), *aff'd sub nom. Sexton v. Ryder Truck Rental*, 320 N.W. 843 (Mich. 1982) agrees that "to the extent … [the Michigan state law] would impose liability for such an injury or loss upon the lessor of the airplane, the statute directly conflicts with federal law *and is preempted by it.*" *Storie,* 282 N.W.2d at 421. The issue of federal preemption was relegated to one terse phrase in footnote 2 of the *Sexton* opinion and was never analyzed by the Michigan Supreme Court. Though the Michigan district court had a minimally longer discussion of this point, it failed to consider the legislative history and intent from the time of the 1938 Civil Aeronautics Act through § 1404. It also said the deaths caused by this airplane crash were outside the scope of § 1404 preemption (*not* § 44112, which clarified the scope of relief from vicarious liability claims) because the "injury occurred inside the aircraft and not upon the surface of the earth" (*Storie* 282 N.W.2d at 421) even though the injury occurred when the plane hit the ground and was a direct result of the "ascent, descent, or flight of such aircraft." This construction of perhaps some inartful language in § 1404 (which was clarified in § 44112(b) to cover anything occurring because of the aircraft or

its flight) leads to the nonsensical, if not absurd finding that Congress intended to preempt injuries and deaths "on the surface of the earth" only if a person situate on the surface of the earth is struck by an aircraft. *Storie/Sexton's* holding was not only simply wrong, it cannot apply here because the complete federal preemption of vicarious liability claims was clarified in § 44112 so as to leave no doubt that any lessor, owner, or secured party who is not in possession of the aircraft at the time of the incident is not subject to vicarious liability. Furthermore, there is nothing in the legislative histories showing an intent to retreat from the original intent of preemption of liability for accidents caused by or arising out of the "ascent, descent, or flight" of aircraft within the scope of the statute as set forth in § 504 of the Civil Aeronautics Act of 1938.

Vreeland's reliance on the case of *Retzler v. Pratt & Whitney Co.*, 309 Ill. App.3d 906, 723 N.E.2d 345, 243 Ill. Dec. 313 (1999) fares no better. The *Retzler* decision, which relied on *Sexton/Storie,* grounded its opinion on the complicated method of ownership of the aircraft used for an American Eagle flight where the lease was not reduced to writing until long after the

incident occurred and suit had been filed.[14] *Id.* at 910, 916. The *Retzler* court distinguished its facts from *Matei, supra*, by saying that "the defendant in *Matei* was merely the owner of the aircraft. In the present case, defendant AMR sold the aircraft to MB and also leased the aircraft to Simmons." *Id.* at 916. The facts of the instant case follow *Matei* (both as to the ownership and airworthiness of the aircraft) and therefore are equally distinguishable from *Retzler*.

Not only is federal preemption and prohibition of vicarious liability claims against aircraft lessors plain and unambiguous in the wording of § 44112, it parallels the rationale for federal preemption of vicarious liability claims against automobile lessors established by the Graves Amendment. Florida has been one of a minority of states whose common law imposed strict vicarious liability for operation of a motor vehicle on the basis of the dangerous instrumentality doctrine, starting with *Cotton Oil Co. v. Anderson*, 80 So.629, 631 (Fla. 1920).

Vreeland's limited historical focus in the application of this doctrine to aircraft is precisely why the case of *Orefice v. Albert*, 237 So.2d 142, 145

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[14] ATR first sold the aircraft to AAMR. AMR immediately sold the plane to MB (a French company) who then leased it back to AMR. AMR then sub-leased the plane to Simmons by an oral agreement that was reduced to writing more than two years after the accident and approximately two weeks after Retzler's suit was filed. *Id.* at 910.

(Fla. 1970) does *not* conflict with the instant decision and the application of federal preemption under § 44112: federal preemption as required by § 44112 (or its predecessors) was simply never considered in *Orefice*. The instant district court decision points out that "[a]lthough 49 U.S.C. § 1404 was in effect at that time, the *Orefice* court did *not* mention or discuss it." (*Vreeland*, 906 So.3d at 912). This is not surprising, especially given the fact that the "*Orefice* court's ruling that the dangerous instrumentality law imposed vicarious liability on owners of aircraft … based in part" on a state licensing statute that has since been repealed. *Vreeland,* 28 So.3d at 912. Because of this, the instant case is *not* in conflict with *Orefice* and the preemption provision of § 44112 – which was enacted in 1994, over two decades *after* the *Orefice* decision – must apply to bar the vicarious liability claim against Aerolease.

Vreeland cannot defeat federal preemption by arguing that the claims against Aerolease arise "solely" under Florida statutory or common law. The United States Supreme Court has long held that exercise of federal question jurisdiction over federal issues in state law claims is not avoided "simply because they appear in state raiment." *Grable & Sons Metal Products, Inc. v Darue Engineering & Manufacturing*, 125 S.Ct. 2363, 2368 (2005); *Nicodemus v. Union Pacific Corp.*, 440 F.3d 1227, 1232 (10th Cir.

2006) (though a plaintiff asserts only a claim under state law, federal question jurisdiction may be appropriate if the state-law acclaims implicate significant federal issues); *Christianson v. Colt Industries Operating Corp.*, 108 S.Ct. 2166 FN3 (1988) ("merely because a claim makes no reference to federal patent law does not necessarily mean the claim does not 'arise under' patent law. Just as 'a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint,' … so a plaintiff may not defeat §1338(a) jurisdiction by omitting to plead necessary federal patent law questions").

Aerolease is entitled to summary judgment on the negligence claim

Based on the facts and record, the instant trial court was equally correct in granting summary judgment on Vreeland's claim of negligent inspection of the aircraft prior to the sale because that claim arises out of the "as-is" lease agreement. Even ignoring the application of § 44112 to the negligence claim of this lessor-not-in-possession, the facts of this case unequivocally establish that (1) this aircraft was leased to Ferrer "as is," (2) it was flown across the United States without incident, (3) the long-term lessee (Ferrer) assumed all liability for inspection, repair, and maintenance of the aircraft, (4) SkyBlue and its federally licensed airframe and powerplant mechanics were the entities Ferrer hired to inspect, repair, and

deliver the aircraft to Ferrer in airworthy condition, and (5) Ferrer relied on the representations of SkyBlue, which certified the plane for service as airworthy. The trial court properly recognized that Aerolease could not be vicariously liable for any actions or inactions of SkyBlue, SkyBlue's mechanics, Ferrer, or Ferrer's mechanic, none of whom were hired or controlled by Aerolease, in the inspection and/or maintenance of the aircraft. The trial court further recognized that because Ferrer was not in or operating the aircraft at the time of the accident that there could be no claim against Aerolease based on a theory of breach of the "as-is" contract, and indeed, Ferrer could only rely on the results of his prebuy inspection by SkyBlue in deciding to lease this aircraft. Logically, if Aerolease could be vicariously liable – despite Aerolease's complete absence of control for the condition of the aircraft – then the chain of liability for previous owners, lessors, or lessees would go back as far as a theory could be marshaled concerning the existence of an alleged defect in the aircraft.

Under the narrow, "as is" terms of Aerolease's contract with Ferrer, Aerolease had no duty relating to the status of the aircraft – even before Ferrer contracted with SkyBlue to inspect the aircraft for airworthiness, perform certain repairs, and fly it across the country – and therefore could have no duty to anyone "downstream" from Ferrer. *Florida Power Corp. v.*

McCain, 593 So.2d 500 (Fla. 1992) (existence of duty is a matter of law for the court); *see also: Tanner v. Rebel Aviation, Inc.*, 245 S.E.2d 463 (Ga. App. 1978) (former owners of aircraft who allegedly were negligent in its maintenance had no liability for its condition); *Jarmuth v. Aldridge*, 747 N.E. 2d 1014 (Ill. 1st DCA 2001) (Part 91[15] aircraft owner is not responsible for work of licensed repair facility); *White v. Orr Leasing, Inc.*, 436 S.E. 2d 693 (Ga. App. 1993); *Cosgrove v. McDonnell Douglas Helicopter Co.*, 847 F.Supp. 719 (Minn. App. 1994) (aircraft owner is not responsible for acts of licensed mechanics or authorized pilots).

Where no representations about the aircraft were made by Aerolease to Ferrer, it makes no logical or legal sense for Aerolease to have liability for the condition of the aircraft after under the facts of this case. Vreeland is asking this Court not only to hold Aerolease liable for the work of an independent contractor (SkyBlue), but also wants Aerolease to be liable for SkyBlue's work when *Ferrer* hired this independent contractor, dictated the scope of work done by SkyBlue, and relied upon SkyBlue's certification pursuant to federal aviation regulations. Furthermore, Vreeland improperly posits that Aerolease, as the owner/lessor of this general aviation aircraft,

[15] The instant aircraft falls under Part 91 rather than Part 121, which applies to commercial aircraft.

even where the inspections and maintenance were performed by non-Aerolease, federally licensed professionals.

If the provisions of § 44112 are considered in answering the negligence claim against Aerolease, they are supportive of the summary judgment. 49 U.S.C. § 44112(b) states that an owner or lessor who is *not* in actual possession or control of the aircraft has no liability for "personal injury, death, or property damage or loss occur[ing] because of (1) the *aircraft, engine,* or *propeller,* or (2) the *flight* of, or an object falling from, the aircraft, engine, or propeller." In the *Ellis v. Flying Boat* case, *supra*, the complaint alleged that the aircraft was negligently leased in a dangerous and defective condition because it "had not undergone a proper, safe and sufficient aging aircraft overhaul program, that was beyond its safe operational life expectancy; that was comprised of structures that were fatigued, cracked, corroded and otherwise in conditions that were likely to lead to failure of the aircraft's structure, and/or that lacked proper and adequate instructions for the inspection, maintenance and repair damage tolerance assessments of the aircraft." (AA. 1 at Ex. G p. 9) The federal district court ruled that because the lessor did not have "actual possession or control of the aircraft when the accident occurred," § 44112 "shields Seaplane from liability for Plaintiffs' losses." (AA. 1 at Ex. E p. 2) The

same result should occur here whether the Court relies on § 44112 or the facts of this case. *Dade County School Board v. Radio Station WQBA*, 731 So 2d 638 (Fla. 1999).

CONCLUSION

For the reasons set forth herein, the instant case does not conflict with the decision in *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970).

Vreeland proposes an artificially narrow and wholly unsupportable interpretation of 49 U.S.C. § 44112 where there would be no federal preemption unless a person or property on the surface of the earth is injured by an airplane or its components falling from the sky. This is both illogical and wholly contrary to both the plain wording of § 44112 and its legislative history.

It is respectfully requested that this Honorable Court (1) affirm the decision of the District Court of Appeal that the federal preemption set forth in 49 U.S.C. § 44112 precludes Vreeland's claim for vicarious liability of Aerolease who did not possess or control the aircraft at any relevant time, and (2) affirm the trial court's decision that there is no viable negligence claim against Aerolease because (a) the unambiguous terms of Aerolease's lease to Ferrer contractually relieved Aerolease of liability for the condition of the aircraft, (b) SkyBlue (who was hired and paid by Ferrer and not by

Aerolease) was the entity that inspected, repaired, and certified the aircraft was airworthy, and/or (c) 49 U.S.C. § 44112 federally preempts this claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO Fla. R. App. P. 9.210(a)(2); 9.100(1)

Counsel for the Respondent, AEROLEASE OF AMERICA, INC., certifies the following:

Pursuant to Fla. R. App. Pro. 9.210(a)(2); 9.100(1), the attached brief for Respondent is printed using a proportionally spaced 14 point Times New Roman typeface.

Dated: 9/20/10 */s/ Shelley H. Leinicke*
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 20th day of September, 2010 to all parties on the attached service list.

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