

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUNE COLAIO, as Administrator of the Estate of Mark J. Colaio, Deceased, VICTOR J. COLAIO, as Administrator of the Estate of Stephen J. Colaio, Deceased, FRANK JOHN AQUILINO, as Administrator of the Estate of Frank Thomas Aquilino, Deceased, GERALDINE DAVIE, as Administrator of the Estate of Amy O'Doherty, Deceased, JOANNE LOVETT, as Administrator of the Estate of Brian F. Nunez, Deceased, NANCY N. PEDICINI, as Administrator of the Estate of Thomas E. Pedicini, Deceased, and MARIA A. WARING, as Administrator of the Estate of James A. Waring, Deceased, on behalf of themselves and all other similarly situated "eligible individuals" under 49 U.S.C. § 40101,

Plaintiffs,

- against -

KENNETH R. FEINBERG, Special Master of the September 11th Victim Compensation Fund of 2001, JOHN ASHCROFT, Attorney General of the United States, and the UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

CLASS ACTION COMPLAINT

Civ. No.

Plaintiffs June Colaio, as Administrator of the Estate of Mark J. Colaio, deceased; Victor J. Colaio, as Administrator of the Estate of Stephen J. Colaio, deceased; Frank John Aquilino, as Administrator of the Estate of Frank Thomas Aquilino, deceased; Geraldine Davie, as Administrator of the Estate of Amy O'Doherty, deceased; JoAnne Lovett, as Administrator of the Estate of Brian F. Nunez, deceased; Nancy N. Pedicini, as Administrator of the Estate of Thomas E. Pedicini, deceased; and Maria A. Waring, as Administrator of the Estate of James A. Waring, deceased, on behalf of themselves and all other similarly situated "eligible individuals"

under 49 U.S.C. § 40101, as and for their Class Action Complaint against Defendants herein, allege as follows:

BACKGROUND

1. September 11, 2001 left an indelible scar on the American psyche. Never before had American civilians been attacked in our homeland by foreign nationals or terrorists with such devastating effectiveness. Never before had our government failed so completely to discharge its basic duty to provide domestic security. Thousands of our fellow citizens were murdered and fell victim to treachery simply because they went about the mundane task of reporting to their places of work on that fateful, crystal-clear morning.

2. Even before the second of the Twin Towers of the World Trade Center collapsed in what *The New York Times* would call “a hellish storm of ash, smoke and leaping victims,” the nation and our government realized that a crisis of grave proportions involving national security was at hand. Our country was on “red alert.” As President Bush was whisked around the country in Air Force One and Vice President Cheney was ushered into the White House bunker, the Federal Aviation Administration shut down all air travel from the airports serving New York City, and soon thereafter Secretary of Transportation Norman Mineta ordered the grounding of all United States air traffic, wherever located. Approximately 2,200 planes were grounded within two hours, and the nation’s airports and runways were completely shut down.

3. The horrific events of September 11 also precipitated an economic and financial crisis, the most immediate victim of which was the United States airline industry. With planes grounded, the public fearful of flying, and insurers and lenders balking, the need for emergency federal legislation became apparent, and within twenty-four hours of the terrorist

attacks, Congress began discussing comprehensive rescue legislation. The potentially devastating liability of the airlines was quickly limited. With lightning speed, the House of Representatives and the Senate proposed, debated, and passed such legislation, and on September 24, 2001, President Bush signed into law the Air Transportation Safety and System Stabilization Act of 2001 (Public Law 107-42, 115 Stat. 230, 49 U.S.C. § 40101) (the “Act”). The Act provides the airlines with loan guarantees, loss reimbursements, safeguards against increased insurance premiums, and, most importantly, limitations of liability and uniformity with respect to any privately instituted litigation arising out of September 11.

4. Title IV of the Act establishes the “September 11th Victim Compensation Fund of 2001” (the “Fund”), the purpose of which, according to Section 403 of the Act, is “to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.” This class action lawsuit arises out of the implementation and administration of the Fund by the involved federal officers, and the regulations and methodologies for computing Fund compensation promulgated and sought to be enforced by the Defendants.

NATURE OF THE ACTION

5. Plaintiffs seek a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. § 2201, setting forth their rights because of Defendants’ violations of Title IV of the Act, and a finding pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, that Defendants’ conduct has been arbitrary, capricious, an abuse of discretion, and not in accordance with law. Defendants’ promulgation of rules and regulations, their proposed implementation of the Act, and their decisions, guidelines, criteria and methodologies for computing Fund compensation, as developed and published by the Special Master, are in clear violation of the

Act, its explicit purpose, and the intent of Congress. As Special Master of the Fund, Kenneth R. Feinberg has run roughshod over the Act's mandate that eligible Fund claimants are to receive compensation for their economic and non-economic loss, as statutorily defined in plain and unambiguous terms, and in arrogating unto himself a level of discretion that is not found in the Act, Feinberg has threatened the success of the Fund. Feinberg has further upset the delicate balance Congress struck between limiting the statutory and common law rights of September 11 victims and insuring that they receive compensation for the "extent of [their] harm, including any economic loss and noneconomic losses," under Section 405 of the Act.

6. As a result of Defendants' actions, and Special Master Feinberg's tutelage of the Fund, only a fraction of eligible individuals have filed formal applications with the Fund and only a relative handful of awards have actually been rendered in the past year. As the expiration dates under both the New York two-year wrongful death statute and for filing a formal application for compensation from the Fund approach later this year (September 10, 2003, and December 21, 2003, respectively), Plaintiffs, the class they represent, and their advisors find themselves in a legal no-man's land, uncertain of their choices and unsure of their seemingly clear-cut entitlements under the Act.

7. In numerous public statements, private meetings, and so-called "test case" submissions, Special Master Feinberg has alienated and disenfranchised the very constituency he was appointed to serve. His statements and commentaries on the Act and the rules and regulations promulgated thereunder; his criteria, methodologies for computation of Fund awards and presumptive award charts; his periodic postings of Fund applications and individual Fund awards to date; and his opinions on the "progress" of the Fund to date are all contained on his

website (www.usdoj.com/victimcompensation) (the “Official Website”), and the same is incorporated herein and into this class action complaint by reference.

JURISDICTION AND VENUE

8. This Court has jurisdiction over this civil action pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States. This Court also has jurisdiction pursuant to 28 U.S.C. § 1361 because this is an action seeking to compel federal officers to perform a duty owed to the Plaintiffs and the class they represent.

9. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) and (e)(2) because the Southern District of New York is a judicial district in which a substantial part of the events or omissions giving rise to the claims occurred and will occur. Moreover, since the Act explicitly provides that private civil suits arising out of the airplane crashes of September 11, 2001 be filed exclusively in this Court, it is altogether fitting that this action involving the Fund be filed in this Court as a related case.

THE PARTIES

Plaintiffs

10. Plaintiff June Colaio is the Administrator of the Estate of Mark J. Colaio, deceased, and is a resident of the County and State of New York. Plaintiff June Colaio is an eligible claimant for an award of compensation from the Fund because she is the Personal Representative of said decedent, Mark J. Colaio. Plaintiff’s decedent died as a result of the terrorist attacks on the World Trade Center on September 11, 2001, and immediately prior to his death, he was employed by Cantor Fitzgerald in and at the north tower of the World Trade Center in New York City. On September 11, 2001, Plaintiff June Colaio was the wife of Mark J. Colaio, who was 34 years of age when he died. In addition to being married to Plaintiff June

Colaio, decedent Mark J. Colaio had two children, ages 19 months and 3 years, at the time of his death.

11. Plaintiff Victor J. Colaio is the Administrator of the Estate of Stephen J. Colaio, deceased, and is a resident of the County of Suffolk, State of New York. Plaintiff Victor J. Colaio is an eligible claimant for an award of compensation from the Fund because he is the Personal Representative of said decedent, Stephen J. Colaio. Plaintiff's decedent died as a result of the terrorist attacks on the World Trade Center on September 11, 2001. Immediately prior to his death, he was employed by Cantor Fitzgerald in and at the north tower of the World Trade Center in New York City. On September 11, 2001, Plaintiff Victor J. Colaio was the father of Stephen J. Colaio, who was 32 years of age when he died. Decedent Stephen J. Colaio was single and had no children, but was engaged to be married, at the time of his death.

12. Plaintiff Frank John Aquilino is the Administrator of the Estate of Frank Thomas Aquilino, and is a resident of the County of Richmond, State of New York. Plaintiff Frank John Aquilino is an eligible claimant for an award of compensation from the Fund because he is the Personal Representative of said decedent, Frank Thomas Aquilino. Plaintiff's decedent died as a result of the terrorist attacks on the World Trade Center on September 11, 2001, and immediately prior to his death, he was employed by eSpeed, Inc. in and at the north tower of the World Trade Center in New York City. On September 11, 2001, Plaintiff Frank John Aquilino was the father of Frank Thomas Aquilino, who was 26 years of age when he died. Frank Thomas Aquilino was single and had no children at the time of his death.

13. Plaintiff Geraldine Davie is the Administrator of the Estate of Amy O'Doherty, deceased, and is a resident of the County of Westchester, State of New York. Plaintiff Geraldine Davie is an eligible claimant for an award of compensation from the Fund

because she is the Personal Representative of said decedent, Amy O'Doherty. Plaintiff's decedent died as a result of the terrorist attacks on the World Trade Center on September 11, 2001, and immediately prior to her death, she was employed by Cantor Fitzgerald in and at the north tower of the World Trade Center in New York City. On September 11, 2001, Plaintiff Geraldine Davie was the mother of Amy O'Doherty, who was 23 years of age when she died. Amy O'Doherty was single and had no children at the time of her death.

14. Plaintiff JoAnne Lovett is the Administrator of the Estate of Brian F. Nunez, deceased, and is a resident of the County of Richmond, State of New York. Plaintiff JoAnne Lovett is an eligible claimant for an award of compensation from the Fund because she is the Personal Representative of said decedent, Brian F. Nunez. Plaintiff's decedent died as a result of the terrorist attacks on the World Trade Center on September 11, 2001, and immediately prior to his death, he was employed by eSpeed, Inc. in and at the north tower of the World Trade Center in New York City. On September 11, 2001, Plaintiff JoAnne Lovett was the mother of Brian F. Nunez, who was 29 years of age when he died. Decedent Brian F. Nunez was single and had no children at the time of his death.

15. Plaintiff Nancy N. Pedicini is the Administrator of the Estate of Thomas E. Pedicini, deceased, and is a resident of the County of Nassau, State of New York. Plaintiff Nancy N. Pedicini is an eligible claimant for an award of compensation from the Fund because she is the Personal Representative of said decedent, Thomas E. Pedicini. Plaintiff's decedent died as a result of the terrorist attacks on the World Trade Center on September 11, 2001, and immediately prior to his death, he was employed by Cantor Fitzgerald in and at the north tower of the World Trade Center in New York City. On September 11, 2001, Plaintiff Nancy N.

Pedicini was the mother of Thomas E. Pedicini, who was 30 years of age when he died.

Decedent Thomas E. Pedicini was single and had no children at the time of his death.

16. Plaintiff Maria A. Waring is the Administrator of the Estate of James A. Waring, deceased, and is a resident of the County of Queens, State of New York. Plaintiff Maria A. Waring is an eligible claimant for an award of compensation from the Fund because she is the Personal Representative of said decedent, James A. Waring. Plaintiff's decedent died as a result of the terrorist attacks on the World Trade Center on September 11, 2001, and immediately prior to his death, he was employed by Cantor Fitzgerald in and at the north tower of the World Trade Center in New York City. On September 11, 2001, Plaintiff Maria A. Waring was the wife of James A. Waring, who was 49 years of age when he died. In addition to being married to Plaintiff Maria A. Waring, decedent James A. Waring had four children, ages 4, 9, 11, and 14, at the time of his death.

Defendants

17. Defendant Kenneth R. Feinberg ("Feinberg" or the "Special Master") is and at all relevant times was the individual appointed as Special Master of the Fund pursuant to Section 404 of the Act. Feinberg's private firm, The Feinberg Group, LLP, maintains offices in New York City and Washington, D.C. through which he is attempting to discharge his duties as the Special Master of the Fund.

18. Defendant John Ashcroft is and at all relevant times was the Attorney General of the United States. As Attorney General, Ashcroft is charged with the administration and enforcement of all laws of the United States, including its Constitution, the Act at issue herein, and the administrative rules and regulations complained of herein. Under Title IV, Section 404(a)(1)-(3) of the Act, the Attorney General, acting through an appointed Special

Master, is charged with administering the Fund established by that Act, promulgating all procedural and substantive rules for its administration, and employing and supervising hearing officers and other administrative personnel necessary to perform the duties of the Special Master.

19. Defendant United States Department of Justice (the “DOJ”) is and at all relevant times was an agency of the United States government. Together with Feinberg, the DOJ promulgated and published the Interim Final Rule and Final Rule that purport to implement the intent of Congress in enacting the Act, and under which Feinberg claims authority for the actions complained of herein.

CLASS ALLEGATIONS

20. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) on behalf of a class of similarly situated “eligible individuals” under 49 U.S.C. § 40101 who:

- (a) are eligible for compensation from the Fund pursuant to Section 405(c) of the Act in that they are the personal representatives of decedents who died as a result of the terrorist attacks on the World Trade Center in New York, New York on September 11, 2001, and in that they are, under Sections 402 and 405 of the Act, entitled to compensation for the economic and non-economic losses of their decedents under applicable New York state law; and
- (b) have filed, or wish to and are prepared to file, formal applications for such compensation from the Fund with the office of the Special Master and in accordance with the forms issued for same by the Special Master; and
- (c) wish to, and are prepared to, waive their rights to file a civil action, as defined in Section 405(3)(B) of the Act and as permitted under Section 408 of the Act.

21. Upon information and belief, the foregoing defined class (“the Class”) consists of virtually all personal representatives of all victims who died as a result of the September 11, 2001 terrorist attacks on the World Trade Center, in New York, New York. The Class does not include certain other “eligible individuals” under the Act, such as victims who

died at other locations on September 11, 2001, or those who were injured but survived at the World Trade Center site.

22. The members of the Class are so numerous that joinder of all members is impracticable. Approximately 2,800 victims perished in the terrorist attacks on the World Trade Center. While the exact number of Class members is unknown at this time, the number of Class members is believed to be approximately equal to the number of victims who died at the World Trade Center site.

23. Plaintiffs, the named Class representatives herein, comprise a group that includes single and married decedents, decedents with and without children, and decedents whose work experiences and average earnings cover a broad spectrum within and beyond the so-called presumptive award charts and related criteria and methodologies published by the Special Master.

24. Plaintiffs' claims are typical of the claims of the other members of the Class, as all members of the Class are similarly affected by Defendants' clear-cut violation of the various provisions of the Act and by Defendants' arbitrary, capricious and unlawful promulgation of rules, regulations, criteria and methodologies, which were purportedly designed to implement the Act and administer the Fund.

25. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced to prosecute this type of class action litigation.

26. Common questions of law or fact exist as to all members of the Class and predominate over any questions affecting individual members of the Class. The questions of law or fact common to all members of the Class (and/or to subclasses within the Class) include, but

are not limited to, whether the Defendants, in promulgating rules, regulations, criteria and methodologies to implement the Act and administer the Fund, are acting in violation of the provisions of the Act and the intent of Congress, and whether said Defendants are, as they are required to, acting in conformity with Act, in that they purport to regulate and limit Class members' individual compensation awards for economic and non-economic loss from the Fund by, inter alia:

- (a) calculating, limiting and awarding compensation for economic loss on the basis of after-tax earnings in contravention of applicable New York state law;
- (b) calculating, limiting and awarding compensation for economic loss for decedents who were not married at the time of their deaths by applying an arbitrary and unreasonable consumption rate in contravention of applicable New York state law;
- (c) calculating, limiting and awarding compensation for economic loss for decedents by utilizing as "average earnings" a 1998-2000 three-year income average and disregarding annualized earnings for 2001 and relevant earnings growth rates, and refusing to consider any elements of compensation other than salary and bonus in contravention of applicable New York state law; and
- (d) failing to calculate, or to promulgate rules and regulations, or to develop methodologies and schedules for awarding compensation for economic loss for decedents whose "average earnings" exceeded the 98th percentile of individual income in the United States in 2000, and by instituting a de facto, arbitrary, and unreasonable cap on any individual Fund award, in contravention of applicable New York state law.

27. Final declaratory and injunctive relief with respect to the Class as a whole is appropriate because the Defendants have acted arbitrarily, capriciously and unlawfully, in a manner that is generally applicable to the entire Class.

FACTUAL ALLEGATIONS

A. The Act and the Rules

28. Passed only eleven days after the September 11, 2001 terrorist attacks, the Act was adopted by Congress and signed by the President as part of a plan to, inter alia, protect

the nation's airlines from potentially devastating civil lawsuits while at the same time providing full compensation to the families of those who died and to the survivors who were physically injured on that mournful day of American history.

29. Title IV of the Act, headed "Victim Compensation," set up the "September 11th Victim Compensation Fund of 2001," which is an unlimited government fund. The Fund essentially provides a no-fault alternative to private tort litigation against the involved airlines and others, but it is limited to individuals who suffered physical injuries or death as a result of the attacks, defining an "individual" eligible for compensation as a person present at the World Trade Center, the Pentagon, or the crash site near Shanksville, Pennsylvania, at the time of, or in the immediate aftermath of, the September 11 terrorist attacks. The Act provides at Section 409 that the United States government shall have the right of subrogation with respect to any claim paid by the United States and from the Fund.

30. Under the Act, a Special Master appointed by the United States Attorney General, and not subject to Senate confirmation, is to be responsible for all aspects of the Fund's administration. The Special Master's tasks include drafting rules and regulations for the Fund, drafting application forms for claimants, and being the sole decision maker with regard to individual compensation awards. "Eligible individuals" who choose to become Fund claimants are entitled to compensation for economic and non-economic loss, subject only to statutorily mandated limitations.

31. At Section 405(b), the Act directs the Special Master to determine "(i) the extent of the harm to the claimant, including any economic and noneconomic losses; and (ii) the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant."

32. Section 402(5) of the Act defines “economic loss” as “any pecuniary loss . . . to the extent recovery for such loss is allowed under applicable State law.” Insofar as the Class claims herein are concerned, “applicable State law” is the law of the State of New York.

33. “[A]ny pecuniary loss” as referred to in Section 402(5) therefore requires the Special Master to include all forms of compensation that victims had earned, inasmuch as recovery for the same is permitted under New York state law.

34. Section 402(7) of the Act defines “noneconomic losses” as “losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.” Unlike the statutory definition of “economic loss,” the definition of “noneconomic losses” does not refer to “applicable State law.” However, the Act does not otherwise limit recovery for non-economic losses.

35. Under the Act’s “Collateral Compensation” provision, Section 405(6), the Special Master is directed to reduce the amount of a claimant’s compensation computed under Section 405(1)(b)(1) “by the amount of the collateral source compensation the claimant has received or is entitled to receive as a result of” the airplane crashes. “Collateral source” is defined in Section 402(4) as “all collateral sources, including life insurance, pension funds, death benefit programs, and payments by Federal, State, or local governments related to the September 11 terrorist attacks.”

36. Pursuant to Section 405(5) of the Act, no punitive damages may be awarded by the Special Master, and pursuant to Section 405(2), no negligence or any other

theory of liability is to be considered in the award determination. Nothing in the Act suggests that Congress intended it to be anything other than (in the case of deceased persons) a wrongful death compensation fund with economic losses determined on the basis of state law. Unlike other federal and state statutes, the Act does not contain any caps or dollar limitations on the amount of an individual claimant's economic or non-economic losses.

37. In addition to specifying the basic methodology for determining claimants' compensation from the Fund, the Act provides at Section 405(3) that the Special Master's compensation determinations are "final and not subject to judicial review." By electing to proceed with a claim from the Fund, however, a claimant waives all litigation rights (except to recover collateral source obligations) regarding the September 11 crashes, as specified in Section 405(c)(3)(B) of the Act. The Special Master has subsequently established criteria requiring that any such litigation claims instituted by a claimant must be waived and/or dismissed at the point when a claimant's Fund application is deemed "substantially complete."

38. Further, at Section 408 of the Act, Congress capped the airlines' liability (whether for compensatory or punitive damages) arising from the September 11 terrorist attacks to the available limits of their insurance coverage. In the same Section, the Act limits all litigation arising from the attacks to a federal cause of action brought in the United States District Court for the Southern District of New York, where unless preempted by federal law, the substantive law of decision would be derived from the law, including applicable conflict-of-law principles, from the State in which the particular September 11 terrorist attack and airplane crash occurred.

39. On November 19, 2001, Congress and President Bush further limited liability for injury and death suffered in the September 11 terrorist attacks by enacting the

Aviation and Transportation Security Act (Public Law 107-71) (the “ATSA”), which extended certain limitations on liability to aircraft manufacturers, airport operators, persons with property interests in the World Trade Center, and the City of New York.

40. As previously alleged, in creating the “September 11th Victim Compensation Fund of 2001,” Congress decided that no “cap” would be placed on either individual compensation awards or on the total amount of the Fund. Not only does the Act itself contain no cap, but the Congressional debate on the legislation clearly evidences that Congress intended no cap to be placed on individual compensation awards. For example, Representative Richard Gephardt stated: “[T]his bill that caps the airline liability, and this is something we fought for last night, does not cap the damages these families who have lost so much can possibly get.” Another Representative, James Turner, explained:

One of the best provisions of this bill is that this Congress has provided a method whereby all those injured, the victims of those who have died, *will have full recovery for their economic and noneconomic damages by the establishment of a special master. The Treasury of the United States has been opened by the Members of this Congress to ensure that every family will receive just recovery.*

(Emphasis added.) In addition, Representative Jackson-Lee pointed out that while the airlines’ liability was being capped by their insurance limits, “The Federal Government will provide compensation above and beyond carrier liability.” During the debate, Representative John Spratt, a proponent of a cap on victims’ compensation admitted the defeat of that proposal:

Many of the victims in the World Trade Center earned many times the incomes of the firemen and police who died trying to protect them. Under this bill, the heirs of those victims will be eligible for many times more benefits than this bill will allow those brave firemen and police. Quite a few claimants will be able to show substantial incomes. The earning capacity of their decedents will run into millions of dollars. . . . I wanted to propose that we set a fair but generous cap on the victims’ benefits paid by the government . . . H. Resolution 244, the rule allowing this bill to come to the House floor, would not permit me to offer such

an amendment, and for that reason, I voted against the rule. I will vote for the bill, but it would be a much better bill if such an amendment had been made.

41. Plainly, it was the intent of Congress that full recovery for economic and noneconomic losses was the *quid pro quo* for the victims' relinquishment of their rights to seek full compensatory and punitive damages award in a civil litigation and for the concomitant protections afforded to a wide class of potential civil litigation defendants. As well, Congress has achieved this delicate balance in the Act by further providing for the deduction of collateral source compensation and by statutorily mandating that the Special Master's individual award determinations would not be subject to judicial review.

42. On November 5, 2001, the DOJ, through the Attorney General, published a Notice of Inquiry and Advance Notice of Rulemaking, pursuant to Section 407 of the Act (66 Fed. Reg. 55901, No. 214). This Notice of Inquiry initiated the process of mandated rule-making under the Act.

43. On or about November 26, 2001, Attorney General Ashcroft appointed Feinberg to administer the Fund as the Special Master. Ashcroft appointed Feinberg because of his considerable and well-publicized experience in negotiating, structuring and implementing mass tort settlements resulting from well-known cases such as the Agent Orange and Dalkon Shield litigations.

44. Less than a month after Feinberg's appointment, on or about December 21, 2001, the DOJ published its "Interim Final Rule" governing implementation of the Fund. 28 C.F.R. § 104. Upon information and belief, the "Interim Final Rule" was largely the work-product of Feinberg himself. Having the immediate force of law, it permitted Feinberg to begin

accepting applications for recovery. Accompanying the Interim Final Rule was a 13-page “Statement by the Special Master,” a commentary by Feinberg.

45. On or about March 13, 2002, the DOJ published its “Final Rule” for implementation of the Fund, making only slight alterations to certain of the provisions in the Interim Final Rule but otherwise leaving the Interim Final Rule in full force as the law governing the administration of the Fund. (The Interim Final Rule and the Final Rule, read as one set of Rules, are referred to hereinafter as the “Rules.”) Again, a “Statement by the Special Master,” this time extending to more than 40 pages, accompanied the publication of the Final Rule.

46. Feinberg’s statements accompanying the Rules make clear beyond any doubt that the Defendants agreed that the Special Master’s views and pronouncements on what he thought Congress intended and how he interpreted the straightforward statutory language would govern the administration of the Fund and the criteria and methodologies for calculating individual claimant’s compensation awards from the Fund. In reality, the Rules “authorizing” the Special Master to do certain things are nothing more than Feinberg’s views as to what he, as the Special Master, wants to accomplish. Indeed, Feinberg has not been sheepish in expressing his view as to the unbounded level of his discretion. In the November 25, 2002 issue of *The New Yorker*, he is quoted as follows: “The law gives me unbelievable discretion. It gives me discretion to do whatever I want. So I will.”

47. The Rules establish a “presumptive award methodology” for determining claims under the Act. In pertinent part, under 28 C.F.R. § 104.43(a) of the Rules, governing “presumed economic loss for decedents,” the Special Master was authorized to:

develop a methodology and publish schedules, tables, or charts that will permit prospective claimants to estimate determinations of loss of earnings or other benefits related to employment based upon individual circumstances of the

deceased victim, including: the age of the decedent as of September 11, 2001; the number of dependents who survive the decedent; whether the decedent is survived by a spouse; and the amount and nature of the decedent's income for recent years. The decedent's salary/income in 1998-2000 (or for other years the Special Master deems relevant) shall be evaluated in a manner that the Special Master deems appropriate. The Special Master may, if he deems appropriate, take an average of income figures for 1998-2000, and may also consider income for other periods that he deems appropriate The Special Master's methodology and schedules, tables, or charts shall yield presumed determinations of loss of earnings or other benefits related to employment for annual incomes up to but not beyond the 98th percentile of individual income in the United States for the year 2000.

48. As to non-economic loss, § 104.44 of the Rules states that the presumed economic loss for decedents shall be \$250,000 plus an additional \$100,000 for the spouse and each dependent of the deceased victim. These presumed awards for noneconomic loss make it all the more necessary that determinations of "economic loss" must be made fairly, consistent with the Act, and consonant with full recovery for economic loss permitted under state law.

B. Defendants' Rules and Regulations for Implementation of the Act and for the Administration of the Fund Violate the Provisions of the Act and the Intent of Congress

49. The edifice constructed by Feinberg must fall under the plain and unambiguous wording of the Act. While the Act undoubtedly entrusts the Special Master with numerous responsibilities and obligations with respect to the administration of the Fund, there is simply no statutory authority, nor logic, for his autocratic attempts to limit individual compensation awards in defiance of the Act and the intent of Congress. The members of the Class are clearly entitled to compensation equivalent to their economic and noneconomic loss in accordance with the law of New York. There are, without limitation, at least four distinct ways that have emerged to date by which Feinberg's criteria and methodologies for calculating Fund compensation defy both the provisions of the Act and the law of New York, and which operate to reduce arbitrarily awards for individual claimants. They are: (1) calculating, limiting and

awarding compensation for economic loss on the basis of after-tax earnings; (2) calculating, limiting and awarding compensation for economic loss for decedents who were not married at the time of their deaths by applying an arbitrary and unreasonable consumption rate; (3) calculating, limiting and awarding compensation for economic loss for decedents by utilizing as “average earnings” a 1998-2000 three-year income average and disregarding annualized earnings for 2001 and relevant earnings growth rates, and refusing to consider any elements of compensation other than salary and bonus; and (4) failing to calculate, or to promulgate rules and regulations, or to develop methodologies and schedules for awarding compensation for economic loss for decedents whose “average earnings” exceeded the 98th percentile of individual income in the United States in 2000, and by instituting a de facto, arbitrary, and unreasonable cap on any individual Fund award.

1. Undercompensating for economic loss on the basis of after-tax earnings in contravention of applicable New York state law.

50. The Rules formally promulgated by Defendants for use in determining “economic loss” do not explain whether the determination will be based on “pre-tax” or “after-tax” income. However, methodologies published on Feinberg’s Official Website clearly state that “after-tax” income figures will be used. This approach is inconsistent with Section 402(5) of the Act, which requires economic loss to be calculated “to the extent such recovery is allowed under applicable State law.” Feinberg’s determination of “economic loss” ignores New York law by using presumed awards based on “after-tax” income.

51. New York law unambiguously requires that pre-tax earnings be used in calculating a wrongful death award. Under well-settled New York law, the damages component of a wrongful death plaintiff’s award as to lost earnings must be based on gross projected

earnings, and no deduction or consideration for potential tax liabilities on the future income stream is permitted.

52. By using after-tax earnings as opposed to before-tax earnings in calculating the appropriate level of compensation for economic loss, Feinberg effectively reduces each Class member's compensation in contravention of New York law. As an example, and using the discount rate employed by the Special Master himself, for a claimant with average earnings of \$225,000, the Special Master's award computed on an after-tax basis is approximately \$3,350,000, whereas an award calculated before-tax is approximately \$4,475,000. In total disregard of New York law, Feinberg's use of after-tax earnings results in significantly lower awards to Fund claimants.

53. Feinberg has acted arbitrarily, capriciously, and has abused his discretion by calculating awards on the basis of after-tax earnings in contravention of New York law — and thus, the Act.

2. Undercompensating economic loss for single decedents by application of an arbitrary and unreasonable consumption rate in contravention of applicable New York state law.

54. On his Official Website, Feinberg has published an "Explanation of Process for Computing Presumed Economic Loss" which includes a number of tables, one of which (Table Four) enables potential claimants to calculate the consumption rate of the decedent; this rate is then used as a factor to calculate Feinberg's "presumed economic loss." Table Four reveals a shocking disparity between the consumption rate of a single decedent versus a decedent who was married.

55. For example, under Feinberg's methodology, a single decedent with an annual income of \$70,000 has a consumption rate of 60.8 percent, whereas a married decedent

has a consumption rate of only 17.4 percent. The tabular dichotomy between “single” and “married” decedents leads to grossly disproportionate and discriminatory awards under the presumed methodology.

56. While consumption rates are ordinarily and necessarily applied in computing wrongful death awards under state law, New York law does not discriminate between married and unmarried decedents. Many decedents of members of the Class were single when they died on September 11, 2001.

57. Feinberg’s methodology for determining economic loss for decedents who were not married at the time of their deaths is and arbitrary and capricious. It reduces compensation and thus undercompensates for such victims’ deaths by applying an unreasonable and excessive consumption rate in contravention of New York law – and thus, the Act.

3. Undercompensating for economic loss by using a 1998-2000 income average, disregarding annualized 2001 earnings and relevant growth rates, and refusing to consider compensation other than salary and bonus, in contravention of applicable New York state law.

58. On the Official Website, Feinberg’s Explanation of Process states that in determining economic loss, “[g]enerally, the Special Master will consider the past three years of income data,” and that “[f]or some cases the most recent year will be the primary basis of the award – other claims may require analyses of trends adjusted to current dollars.” However, upon information and belief, where there is an earnings history for a decedent, the Special Master has preferred to use 1998-2000 income data.

59. Utilization of this method to compute average earnings undercompensates many Fund claimants for their economic losses, because increases in earnings from 1999 to 2000 and then to 2001 were substantial for many of their decedents.

60. By choosing the years 1998-2000 as the presumptively relevant time-frame for purposes of calculating economic loss, Feinberg again ignores New York law, and again arbitrarily reduces the average earnings of many Class members' decedents. Under New York law, determination of adequate compensation takes into account the decedent's job and income at time of his or her death, the likelihood of his or her advancement and increased earning capacity, the age and work-life expectancy of the decedent, and those he or she was supporting.

61. Feinberg's presumptive, across-the-board use of a three-year average results in an inappropriate average earnings figure for many Class members' decedents. Many September 11 victims, particularly those who were young and died during the first few years of their professional careers, had begun to see significant salary increases in the year 2001.

62. Similarly, many decedents who were victims at the World Trade Center site worked in the financial services, securities, and related industries, in which forms of compensation other than salary and bonus are commonplace. Upon information and belief, and based on many "test cases" before the Special Master, Feinberg has refused to include the same in computing average earnings.

63. Feinberg's methodology for determining average earnings of many decedents of Class members thus ignores the decedents' circumstances and is arbitrary, capricious, and in contravention of New York law – and thus, the Act.

4. **Failing to calculate, or to promulgate rules and regulations, or to develop methodologies and schedules for economic loss compensation for decedents whose “average earnings” exceeded the U.S. 2000 98th percentile for individual income, and imposing a de facto, arbitrary, unreasonable cap in contravention of New York state law.**

64. The Act mandates compensation for economic and non-economic loss, deducting only “collateral source” compensation. Feinberg’s Rules and associated commentary completely undermine that statutory requirement. For instance, 28 C.F.R. § 104.33(f)(2), states that the Special Master, in determining presumptive awards, shall determine whether “[t]he claimant presents extraordinary circumstances not adequately addressed by the presumptive award.” Under this provision, the burden is on the claimant to present such “extraordinary circumstances.” There is no basis in the Act for requiring a demonstration of extraordinary circumstances by the claimants, nor is there any basis in the Act for placing upon them such a high burden of proof. Similarly, the Rule at 28 C.F.R. § 104.41, purports to permit the Special Master to reduce compensation by taking into account the “financial resources of . . . the victim’s dependents and beneficiaries.”

65. Feinberg’s interpretation of the Act also inserts a new, unsupported criterion: the amount of compensation necessary to “rebuild” a life. The Special Master’s commentary to the Final Rule states:

[P]roviding compensation above [the presumed award for the 98th percentile] would rarely be necessary to ensure that the financial needs of a claimant are met. . . . We also note that the Special Master has express authority under the Act to consider the “individual circumstances of the claimant” in fashioning awards, including the *financial needs* of the . . . surviving families in rebuilding their lives. (Emphasis in original.)

66. Feinberg’s approach is contrary to New York law and is thus violative of the Act. Under New York law, damages in a wrongful death action are defined as the “fair and

just compensation for the pecuniary injuries resulting from the decedent's death to the person for whose benefit the action is brought." Such a determination takes into account the decedent's job and income at time of his or her death, the likelihood of advancement and increased earning capacity, the age and work-life expectancy of the decedent, and those he or she was supporting. Under New York law, damages for wrongful death are not reduced according to the "needs" of the deceased's family, and the calculation of such damages does not distinguish between income levels of high earners and other workers.

67. In addition to reducing potential awards on these grounds, Feinberg has consistently refused to publish charts for eligible claimants whose decedents earned incomes in the 98th percentile or higher. In fact, Feinberg has, for many months, played a cat-and-mouse game with Class members whose decedents had average earnings (however computed) above the 98th percentile. It is now clear why Feinberg has done so. Extrapolating from the Special Master's own methodology, a mother of two children who lost a 35 year-old husband with average earnings of \$1,000,000 a year, should expect to receive approximately \$20,000,000. However, notwithstanding his frequent public and private statements to the contrary, Feinberg has decreed that there is a de facto cap on any individual award, and numerous "test cases" before him have revealed that that cap is in the range of \$5,000,000-\$6,000,000.

68. On October 1, 2002, at the Association of the Bar of the City of New York, Feinberg stated that for high earners, "We have not yet posted a methodology or a series of awards that will guide people in how we're gonna treat those awards. That's coming within the next ten days." He later reiterated that "we will set out some of the guidelines to assist individuals with salaries above \$231,000." However, no such guidelines have ever been published.

69. In the Frequently Asked Questions section of his Official Website, item 5.39, Feinberg addresses the question: “Is there a ‘cap’ on economic damages?” with the answer, “No.” However, in Frequently Asked Questions item 5.60, Feinberg states that, no matter how high the victim’s actual earnings would have been over his or her lifetime, it will be “rare” for victims to receive more than \$3,000,000 or \$4,000,000. Moreover, in Frequently Asked Questions item 5.7, Feinberg asserts that “providing compensation above that level [of \$231,000 annual income] would rarely be necessary to ensure that the financial needs of a claimant are met.”

70. In the December 5, 2002 Statement posted on his Official Website, Feinberg stated: “The Act expressly calls for consideration of the ‘individual circumstances’ of the claimants, one of which under the regulation is the financial need of victims and surviving families in rebuilding their lives. A pure calculation of potential lost earnings, without consideration of individual circumstances such as need, would undercompensate some victims’ families relative to their needs while overcompensating others.”

71. The September 9, 2002 issue of *Time*, quoted Feinberg as saying, ‘The absence of a cap means that I’ve got to be aware of what is fair not only from the claimants’ point of view, but from the taxpayers’ point of view.’” The Act does not authorize Feinberg to implement his personal ideas about fairness or the United States Treasury.

72. Feinberg has openly admitted that his de facto cap does not reflect Congress’s statutory mandate but rather reflects his own personal views. In an interview published in the New York Times Magazine of December 8, 2002, Feinberg explained:

It’s a philosophic problem . . . if somebody is earning \$1 million a year and you run the model, and they could, after offsets, get \$10 million – should the taxpayer and this program subsidize a \$10 million lifestyle and a \$10 million tax-free

award? If Congress had thought this through for more than a few hours, I don't believe that's what they would have said.

Feinberg's speculation about what Congress "would have said" under different circumstances, and his determination to substitute his own value judgments for the plain language of the Act, violate the rights of the Class and the victims of September 11.

73. Feinberg's failure to establish criteria and methodologies for compensating those Class members whose decedents had average earnings above the 98th percentile, and his mandating of a de facto cap on any individual Fund compensation award are plainly violative of the Act; are arbitrary capricious, unfair and unreasonable; and are in contravention of applicable New York law – thus, the Act.

FIRST CAUSE OF ACTION
(Violation of Title IV ("Victim Compensation") of
Air Transportation Safety and System Stabilization Act)

74. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 – 73 as if fully set forth herein.

75. In promulgating the Rules and regulations and in purporting to implement the Act and administer the Fund as described herein, Defendants have violated the Act and continue to do so by, without limitation:

- (a) calculating, limiting and awarding compensation for economic loss on the basis of after-tax earnings in contravention of New York law;
- (b) calculating, limiting and awarding compensation for economic loss for decedents who were not married at the time of their deaths by applying an arbitrary and unreasonable consumption rate in contravention of New York law;
- (c) calculating, limiting and awarding compensation for economic loss for decedents by utilizing as "average earnings" a 1998-2000 three-year income average and disregarding annualized earnings for 2001, and refusing to consider any elements of compensation other than salary and bonus in contravention of New York law; and

(d) failing to calculate, or to promulgate rules and regulations, or to develop methodologies and schedules for awarding compensation for economic loss for decedents whose “average earnings” exceeded the 98th percentile of individual income in the United States in 2000, and by instituting a de facto, arbitrary, and unreasonable cap on any individual Fund award in contravention of New York law.

76. Defendants have so violated the Act because the Act requires that awards of economic loss be made in accordance with applicable state law.

77. By reason of the foregoing, a ripe and justifiable controversy exists, and the Plaintiffs have standing to assert their rights under the Act and bring this class action lawsuit.

78. Plaintiffs require and request a declaration, pursuant to 28 U.S.C. § 2201, that Defendants’ actions as aforesaid violate the Act.

SECOND CAUSE OF ACTION
(Judicial Review of Agency Action Under the
Administrative Procedure Act)

79. Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 - 78 as if fully set forth herein.

80. In the Act, Congress directed the Defendants to promulgate and implement rules, regulations, procedures and forms to effectuate the specific terms of the Act.

81. Following the passage of the Act, the Defendants adopted and implemented Rules, promulgated regulations, and adopted criteria and methodologies for determining compensation from the Fund, and have done so in violation of the Act, by, without limitation:

(a) calculating, limiting and awarding compensation for economic loss on the basis of after-tax earnings in contravention of New York law;

(b) calculating, limiting and awarding compensation for economic loss for decedents who were not married at the time of their deaths by applying an arbitrary and unreasonable consumption rate in contravention of New York law;

(c) calculating, limiting and awarding compensation for economic loss for decedents by utilizing as “average earnings” a 1998-2000 three-year income average and disregarding annualized earnings for 2001, and refusing to consider any elements of compensation other than salary and bonus in contravention of New York law; and

(d) failing to calculate, or to promulgate rules and regulations, or to develop methodologies and schedules for awarding compensation for economic loss for decedents whose “average earnings” exceeded the 98th percentile of individual income in the United States in 2000, and by instituting a de facto, arbitrary and unreasonable cap on any individual Fund award contravention of New York law.

82. Plaintiffs are aggrieved by violations of the Act and the implementation of arbitrary and capricious Rules because they reduce the amount of the awards to which Plaintiffs are entitled.

83. The Rules and regulations and methodologies as aforesaid constitute final agency action, and Plaintiffs have no other adequate remedy. The Act forecloses judicial review of final awards, leaving Plaintiffs no choice but to bring this action prior to the granting of individual Fund awards.

84. Plaintiffs require and request a declaration, pursuant to 28 U.S.C. § 2201, that pursuant to 5 U.S.C. § 701 *et seq.*, the complained of actions of the Defendants are arbitrary, capricious, an abuse of discretion, and not in accordance with law.

WHEREFORE, Plaintiffs, on behalf of themselves and all other similarly situated “eligible individuals” under 49 U.S.C. § 40101, demand judgment herein against the Defendants as follows:

1. On the First Cause of Action, a judgment declaring that the complained of rules and regulations purporting to implement the Air Transportation Safety and System

Stabilization Act of 2001 and to administer the September 11th Victim Compensation Fund of 2001, and the complained of criteria and methodologies for calculation of individual compensation awards developed by the Defendants are in violation of said Act; and

2. On the Second Cause of Action, a judgment declaring that the complained of rules and regulations purporting to implement the Air Transportation Safety and System Stabilization Act of 2001 and to administer the September 11th Victim Compensation Fund of 2001, and the complained of criteria and methodologies for calculation of individual compensation awards developed by the Defendants are in violation of said Act; and

3. Preliminary and permanent injunctive relief mandating that the Defendants rescind the complained of rules, regulations, criteria and methodologies and adopt substitutes therefor that are in compliance with the provisions of the Air Transportation Safety and System Stabilization Act of 2001; and

4. Such other and further preliminary and permanent declaratory and injunctive relief as is necessary to protect and preserve all of their rights and entitlements under law and under the Air Transportation Safety and System Stabilization Act of 2001, including, without limitation, that (i) any previously granted compensation awards from the September 11th Victim Compensation Fund of 2001 be deemed interim and subject to revision based on a final judgment herein; and (ii) no Plaintiff's or Class member's right to file a formal application for a compensation award from the September 11th Victim Compensation Fund of 2001 be abridged pendente lite; and

5. Granting an award of class action attorneys fees and costs; and

6. Granting such other and further relief as this Court deems just and proper.

Dated: New York, New York
January 24, 2003

SALANS

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