No. 07-1824

United States Court of Appeals for the First Circuit

JOHN D. CERQUEIRA,
PLAINTIFF-APPELLEE,

v.

AMERICAN AIRLINES, INC.,
DEFENDANT-APPELLANT,

JOHN DOE 1, the Captain; J. DOE 2, the Flight Attendant;
DELILAH DOE, the Ticket Agent; NICOLE DOE, the Ticket Counter Supervisor,
DEFENDANTS.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. WILLIAM G. YOUNG, U.S. DISTRICT JUDGE]

BRIEF OF THE PLAINTIFF-APPELLEE JOHN D. CERQUEIRA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

SUMMARY OF THE ARGUMENT 14

ARGUMENT 16

I. The District Court Properly Instructed the Jury on the Issue of Liability. . 16

A. The District Court Did Not Err by Omitting a Requested Instruction. 17

1. The district court instructed the jury that an airline may lawfully deny service for legitimate safety reasons. 18

2. The district court did not err by declining to explicitly invoke the arbitrary and capricious standard because the court charged the jury that Cerqueira was required to prove intentional discrimination on account of race. 20

3. American did not object to the omission of an instruction that the jury consider only the facts known at the time the decisions at issue were made, and the principle was substantially covered in the charge as a whole. 22

4. American never objected to the district court's mixed-motive instruction, and the instruction was correct. 24

B. The District Court Did Not Err by Instructing the Jury on *Respondeat Superior* 25

1. The *respondeat superior* instruction was correct 26

2. Even if the *respondeat superior* instruction suggested the cat's paw doctrine, the district court did not err because the doctrine is correct as a matter of law. 29

a. The cat's paw doctrine is based on agency, not negligence, and the court's instructions on *respondeat superior* did not inject a negligence theory into this case. 30

b. American's claim that the cat's paw doctrine does not apply in aviation is based on arguments that are wrong as a matter of law and irrelevant under the facts of this case. 31

c. *Dasrath* did not apply a subjective good faith standard and is easily distinguished on its facts. 35

3. ATA's arguments for not applying agency principles to airline denial of service decisions are flawed. 37

4. Even if the district court had erred by suggesting the cat's paw doctrine, the error was harmless because the jury did not need to rely on the doctrine. 39

II. The District Court Did Not Abuse Its Discretion By Admitting the DOT Consent Order for a Limited Purpose and With a Strict Limiting Instruction. 41

A. Rule 408 Does Not Bar the Admission of the Consent Order Because It Was Not Admitted to Prove Liability. 43

B. Rule 404(b) Does Not Bar the Admission of the Consent Order Because It Was Not Admitted to Prove Propensity, and It Had Special Relevance to the Issue of Notice. 47

C. Rule 403 Does Not Bar Admission of the Consent Order Because It Is Highly Probative on the Issue of Notice, and the District Court's Forceful Limiting Instruction Reduced Any Risk That the Consent Order Might Unfairly Prejudice American. 48

III. American Is Not Entitled to Judgment as a Matter of Law. 52

IV. American Is Not Entitled to a New Trial Based on the Admission of the Consent Order or the District Court's Jury Instructions. 56

V. There Is No Basis to Vacate the Jury's Award of Punitive Damages. 57

CONCLUSION 59

Certificate of Compliance 60

Certificate of Service 61

TABLE OF AUTHORITIES

CASES

Adamsons v. American Airlines, Inc.,
58 N.Y.2d 42, 444 N.E.2d 21 (N.Y. 1982) 34, 35

Al-Qudhai'een v. America West Airlines, Inc.,
267 F. Supp. 2d 841 (S.D. Ohio 2003) 38

Alshrafi v. American Airlines, Inc.,
321 F. Supp. 2d 150 (D. Mass. 2004) 21, 37

Arguello v. Conoco, Inc.,
207 F.3d 803 (5th Cir. 2000) 27

Bayaa v. United Airlines, Inc.,
249 F. Supp. 2d 1198 (C.D. Cal. 2002) 21

Bisbal-Ramos v. City of Mayaguez,
467 F.3d 16 (1st Cir. 2006) 46, 58

Burton v. Town of Littleton,
426 F.3d 9 (1st Cir. 2005) 25

Cariglia v. Hertz Equipment Rental Corp.,
363 F.3d 77 (1st Cir. 2004) 29, 30

Carpenter v. Yellow Cab Co.,
No. 95-SPA-0033, 2001 WL 1602758 (MCAD Feb. 23, 2001) 28

Chowdhury v. Northwest Airlines Corp.,
238 F. Supp. 2d 1153 (N.D. Cal. 2002) 21

Christel v. AMR Corp.,
222 F. Supp. 2d 335 (E.D.N.Y. 2002) 38

College-Town, Div. of Interco, Inc. v. MCAD,
400 Mass. 156, 508 N.E.2d 587 (Mass. 1987) 28

Cordero v. CIA Mexicana de Aviacion, S.A.,
681 F.2d 669 (9th Cir. 1982) 33, 34, 35

Dasrath v. Continental Airlines, Inc.,
467 F. Supp. 2d 431 (D.N.J. 2006) 21, 35, 36

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 25

EEOC v. BCI Coca-Cola Bottling Co.,
450 F.3d 476 (10th Cir. 2006) 29, 30, 32

Goodman v. Bowdoin College,
380 F.3d 33 (1st Cir. 2004) 26

Gray v. Genlyte Group, Inc.,
289 F.3d 128 (1st Cir. 2002) 17, 23, 24

Green v. Dillard's, Inc.,
483 F.3d 533 (8th Cir. 2007) 27

Greer v. Miller,
483 U.S. 756 (1987) 50

Harlow v. Potter,
353 F. Supp. 2d 109 (D. Me. 2005) 29

Inmates of Suffolk County Jail v. Kearney,
928 F.2d 33 (1st Cir. 1991) 45

Kinan v. City of Brockton,
876 F.2d 1029 (1st Cir. 1989) 50

Kolstad v. America Dental Association,
527 U.S. 526 (1999) 46, 57

Levinsky's, Inc. v. Wal-Mart Stores, Inc.,
127 F.3d 122 (1st Cir. 1997) 26

Local Finance Company of Rockland v. MCAD,
355 Mass. 10, 342 N.E.2d 536 (Mass. 1968) 54

Marrero v. Goya of Puerto Rico, Inc.,
304 F.3d 7 (1st Cir. 2002) 57

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 24

McDonough v. City of Quincy,
452 F.3d 8 (1st Cir. 2006) 46, 52, 58-59

McInnis v. A.M.F., Inc.,
765 F.2d 240 (1st Cir. 1985) 45, 46

Mole v. University of Massachusetts,
442 Mass. 582, 814 N.E.2d 329 (Mass. 2004) 32

Muniz-Olivari v. Stiefel Laboratories, Inc.,
--- F.3d ----, 2007 WL 2192965 (1st Cir. Aug. 1, 2007) 26

Norman v. Trans World Airlines, Inc.,
No. 98-7419, 2000 WL 1480367 (S.D.N.Y. Oct. 6, 2000) 38, 39

Pinkham v. Maine Central Railroad Company,
874 F.2d 875 (1st Cir. 1989) 50

Porrata v. Gonzalez-Rivera,
958 F.2d 6 (1st Cir. 1992) 45

Powell v. Alexander,
391 F.3d 1 (1st Cir. 2004) 57

Richardson v. Marsh,
481 U.S. 200 (1987) 49

Romano v. U-Haul International,
233 F.3d 655 (1st Cir. 2000) 39

Sarvis v. Boston Safe Deposit & Trust Co.,
47 Mass. App. Ct. 86, 711 N.E.2d 911 (Mass. App. Ct. 1999) 28

Scott v. Macy's East, Inc.,
No. 01-10323-NG, 2002 WL 31439745 (D. Mass. Oct. 31, 2002) . . . 53, 54

Smith v. Massachusetts Institute of Technology,
877 F.2d 1106 (1st Cir. 1989) 23

Smith v. Wade,
461 U.S. 30 (1983) 46

Toscano v. Chandris, S.A.,
934 F.2d 383 (1st Cir. 1991) 23

United States v. Boston Scientific Corp.,
167 F. Supp. 2d 424 (D. Mass. 2001) 45

United States v. Gilbert,
181 F.3d 152 (1st Cir. 1999) 41

United States v. Landrau-Lopez,
444 F.3d 19 (1st Cir. 2006) 47, 48, 49

United States v. Lemmerer,
277 F.3d 579 (1st Cir. 2002) 50

United States v. Olano,
507 U.S. 725 (1993) 24

United States v. Pierre,
484 F.3d 75 (1st Cir. 2007) 49

Weeks v. Angelone,
528 U.S. 225 (2000) 49

Wilder v. Diamond Cab Co.,
No. 97-SPA-0789, 2001 WL 1602757 (MCAD Feb. 23, 2001) 28

Williams v. Lindenwood University,
288 F.3d 349 (8th Cir. 2002) 54

Williams v. Trans World Airlines,
509 F.2d 942 (2nd Cir. 1975) 20, 33, 34, 38

Wilson v. Maritime Overseas Corp.,
150 F.3d 1 (1st Cir. 1998) 17

Zades v. Lowe's Home Centers, Inc.,
446 F. Supp. 2d 29 (D. Mass. 2006) 29, 32

Zimmerman v. Direct Federal Credit Union,
262 F.3d 70 (1st Cir. 2001) 18, 57

STATUTES

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 1367 1

42 U.S.C. § 1981 . . . . . 2, 11

49 U.S.C. § 44902(b) . . . . . *passim*

Federal Rule of Civil Procedure 51(c)(1) 23

Federal Rule of Civil Procedure 61 18

Federal Rule of Evidence 403 . . . . . 48, 49

Federal Rule of Evidence 404(b) 47, 48

Federal Rule of Evidence 408 . . . . . 43, 44, 48

Massachusetts General Laws ch. 151B, § 9 46

Massachusetts General Laws ch. 272, § 98 . . . . . 2, 11, 46

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action under 28 U.S.C. § 1331 (federal question), § 1343 (civil rights), and § 1367 (supplemental jurisdiction). This Court has jurisdiction under 28 U.S.C. § 1291. For the reasons set forth in appellant's jurisdictional statement, the appeal is timely.

STATEMENT OF ISSUES

1. Whether the district court, which instructed the jury to return a verdict for American if its treatment of Mr. Cerqueira was motivated by rational safety concerns rather than discrimination, erred by failing to specifically instruct the jury on the provisions of 49 U.S.C. § 44902(b) and the arbitrary and capricious standard.
2. Whether the district court erred by instructing the jury that American is vicariously liable for actions driven by the discriminatory animus of its employees.
3. Whether the district court abused its discretion by admitting a Department of Transportation Consent Order for the limited purpose of establishing notice.
4. Whether the evidence that American took action against Mr. Cerqueira because his perceived race or ethnicity was sufficient to support the jury's verdict.
5. Whether the evidence supports an award of punitive damages.

STATEMENT OF THE CASE

This is a racial profiling case brought by plaintiff John D. Cerqueira against defendant American Airlines, Inc. On December 28, 2003, American caused Mr. Cerqueira to be removed from American Flight 2237, detained, and interrogated by the Massachusetts State Police. After Mr. Cerqueira was released from police questioning and cleared for further travel, American refused to rebook Mr. Cerqueira on any American flight.

Mr. Cerqueira brought this action under 42 U.S.C. § 1981 (prohibiting discrimination in the making and enforcement of contracts) and Mass. Gen. Laws ch. 272, § 98 (prohibiting discrimination in a place of public accommodation). Mr. Cerqueira alleged that American discriminated against him because of his perceived race or ethnicity. American claimed that its treatment of Mr. Cerqueira was justified by security concerns.

The jury returned a verdict for Mr. Cerqueira. App. 212. American filed two post-judgment motions: a renewed motion for judgment as a matter of law (App. 217) and a motion for a new trial (App. 221). The district court rejected all of American's arguments:

> This was a quintessential jury trial. Cerqueira and American were both ably represented by vigorous advocates and our system gave, as it ought, the final judgment on a difficult issue of racial discrimination to the

> trusted institution of collective wisdom—the jury. The jury spoke in favor of Cerqueira.

Memorandum and Order of April 9, 2007, App. 244 (484 F. Supp. 2d at 240). This appeal followed.

STATEMENT OF FACTS

Plaintiff John D. Cerqueira was born in Portugal and immigrated to the United States with his family at age six. He is a United States citizen. Mr. Cerqueira attended public schools in Fall River, Massachusetts, and earned his bachelor's degree at Stanford University. He completed several post-graduate certification programs and is a self-employed computer consultant. His work requires frequent air travel. App. 256-57, Tr. 36-38. Mr. Cerqueira has dark hair and an olive complexion. App. 281, Tr. 52. Although he is of Portuguese national origin, Mr. Cerqueira is often mistakenly perceived to be Middle Eastern. App. 257, Tr. 39.

On December 28, 2003, Mr. Cerqueira was a ticketed passenger scheduled to fly from Boston to Ft. Lauderdale on American Airlines Flight 2237. Mr. Cerqueira was planning to return to his home in Florida following a holiday visit to his parents' home in Fall River. *Id.*, Tr. 39, 41. On the morning of December 28, 2003, Mr. Cerqueira went to Logan airport, checked a bag curbside, received his boarding pass, and proceeded to his gate. He passed through the security checkpoint without

incident. App. 257-58, Tr. 41-42. Flight attendant Sally Walling was the first American employee to arrive at the gate. Because Ms. Walling was in an American uniform and standing at the computer terminal behind the gate counter, and because it was at a time when a gate agent typically is available for flight check-in, Mr. Cerqueira thought Ms. Walling was a gate agent. Mr. Cerqueira approached the counter and requested a seat change to an exit row or bulkhead for more leg room. Mr. Cerqueira is a frequent flyer, and it is his custom to ask for such a seat change at the gate counter. Mr. Cerqueira did not make his request in an insistent or hostile manner. App. 258, Tr. 42-44. Ms. Walling told Mr. Cerqueira that she could not help him and asked him to sit down and wait. Mr. Cerqueira followed Ms. Walling's instructions. Once a gate agent arrived, Mr. Cerqueira was assigned seat number 20F, which was a window seat in an exit row. *Id.*

Mr. Cerqueira boarded when his group was called. He found his seat, stowed his carry-on items, used the lavatory, then returned to his seat and began working on his laptop computer. *Id.*, Tr. 45. About ten minutes after Mr. Cerqueira took his seat, two men, Mr. Ashmil and Mr. Rokah, boarded and sat next to Mr. Cerqueira in seats 20D and 20E. Either Mr. Ashmil or Mr. Rokah had a ponytail. Mr. Cerqueira did not know either man, and he did not speak to them or interact with them in any way. Mr. Ashmil and Mr. Rokah, like Mr. Cerqueira, had dark hair and olive complexions. Mr.

Ashmil and Mr. Rokah were speaking loudly to each other, partly in English and partly in a foreign language. Mr. Cerqueira later learned that Mr. Ashmil and Mr. Rokah are Israeli. Mr. Cerqueira did not laugh or otherwise react to anything that Mr. Ashmil or Mr. Rokah said or did. When the announcement was made to turn off electronic devices, Mr. Cerqueira stowed his laptop and fell asleep. App. 259, Tr. 46-48.

Mr. Cerqueira was awakened by Mr. Ynes Flores, a customer service manager for American. Mr. Flores asked all three men in the row for their boarding passes. Mr. Cerqueira was unable to immediately locate his boarding pass, but he handed Mr. Flores his itinerary, and Mr. Flores indicated that it was sufficient. Mr. Flores left with Mr. Cerqueira's itinerary and the boarding passes of Mr. Ashmil and Mr. Rokah. *Id.*, Tr. 48-49.

Soon after Mr. Flores left, four uniformed troopers from the Massachusetts State Police boarded the airplane and demanded that Mr. Cerqueira, Mr. Ashmil, and Mr. Rokah immediately deplane with their carry-on bags. Neither the police nor any American representative told Mr. Cerqueira why he was being removed from the plane. It was a full flight, but only Mr. Cerqueira, Mr. Ashmil, and Mr. Rokah were taken off the plane. App. 259-60, Tr. 49-50; App. 310, Tr. 8. The three men were questioned by the troopers on the jet bridge. Mr. Cerqueira informed the troopers that

he did not know, and was not traveling with, Mr. Ashmil and Mr. Rokah. App. 260, Tr. 50-51.

After initial questioning on the ramp, the troopers escorted the three men to a small room where they were held and interrogated for about two hours. Mr. Cerqueira repeatedly told the troopers that he was traveling home, by himself, after a family visit for the holidays, and that he did not know Mr. Ashmil or Mr. Rokah. *Id.*, Tr. 52-53. The troopers completed their investigation and released Mr. Cerqueira, Mr. Ashmil, and Mr. Rokah. App. 262, Tr. 60. The investigation revealed no security threat. App. 443, Trial Exh. 22; App. 382, Tr. 127. American admits that Mr. Cerqueira was cleared for further travel by the Massachusetts State Police. Stipulation S, Joint Pretrial Memorandum [Doc. 57] at 15. Flight 2237 was delayed for nearly three hours and Mr. Cerqueira was cleared by the police more than 30 minutes before Flight 2237 pushed back from the gate, but Mr. Cerqueira was not returned to Flight 2237. App. 320-21, Tr. 49-50; App. 443, Trial Exh. 22; App. 286, Tr. 72; App. 382, Tr. 127-29.

The troopers escorted Mr. Cerqueira, Mr. Ashmil, and Mr. Rokah to the American ticket counter and expected that the three would be rebooked. App. 443, Trial Exh. 22. The troopers told the ticket agent that Mr. Cerqueira and the other two men were "all set to go." App. 286, Tr. 72; *see also* App. 382, Tr. 129. The ticket

agent told Mr. Cerqueira that he could be accommodated on a flight from Boston to Fort Lauderdale departing that afternoon, but she had to check with a supervisor. App. 262, Tr. 60-61.

Customer service manager Nicole Traer arrived at the ticket counter and spoke first to Mr. Ashmil and Mr. Rokah. She told them that American was refunding their tickets. Mr. Cerqueira was called to the counter and Ms. Traer told him that American was refunding the cost of the Boston to Ft. Lauderdale portion of his ticket. Mr. Cerqueira asked why, and Ms. Traer replied that American had made a corporate decision to deny him service based on something he had said on the plane and that she had no further information. Ms. Traer told Mr. Cerqueira that if he wanted further information he should contact American directly. Ms. Traer was unable to tell Mr. Cerqueira how long the denial of service would last. App. 263, Tr. 62-64; App. 285-86, Tr. 67-70.

Mr. Cerqueira attempted to find another flight home to Florida but he was unable to find a reasonably priced ticket for travel that day. Mr. Cerqueira called his parents, and they drove back to Logan airport to pick him up. The next day, Mr. Cerqueira flew home on U.S. Airways. App. 263-64, Tr. 65-66; App. 286, Tr. 70.

On December 28, 2003, while still in Boston, Mr. Cerqueira contacted American by e-mail in an attempt to determine why he had been removed from Flight

2237, why he had been denied further service after being questioned and cleared for travel, and how long the denial of service would last. App. 264, Tr. 67-69. On January 5, 2004, not having received a response, Mr. Cerqueira again contacted American by e-mail to cancel a reservation he had for a future American flight and to request a refund for that ticket. App. 264-65, Tr. 69-70.

On January 6, 2004, American sent Mr. Cerqueira an e-mail response to his inquiry of December 28, 2003, in which American stated that Mr. Cerqueira was removed from Flight 2237 because "our personnel perceived certain aspects of your behavior which could have made other customers uncomfortable on board the aircraft." American further stated that there "is no indication that you will be denied boarding in the future." App. 265, Tr. 72; App. 420, Trial Exh. 7.

As a result of the treatment he experienced on December 28, 2003, Mr. Cerqueira suffered severe emotional distress. Mr. Cerqueira testified that due to depression, anxiety, and fear, he had difficulty performing even basic living activities. App. 265-66, Tr. 73-76. Less than three weeks after the incidents, Dr. Barry Blumenthal, Mr. Cerqueira's primary care physician, diagnosed Mr. Cerqueira with Post Traumatic Stress Disorder and referred Mr. Cerqueira to a psychiatrist for treatment. Mr. Cerqueira later began treatment with Dr. Richard Faulk, a board-certified psychiatrist. App. 270, Tr. 6-9. Dr. Blumenthal and Dr. Faulk

testified at trial and corroborated Mr. Cerqueira's emotional distress claims. Dr. Faulk testified that he diagnosed Mr. Cerqueira with an anxiety disorder caused by the incidents of December 28, 2003, and prescribed Zoloft to treat Mr. Cerqueira's condition. App. 336-338; 342-351.

Mr. Cerqueira also testified that he was unable to work for the first four months of 2004 because of a deep depression and fear of air travel caused by the incidents of December 28, 2003, and he worked a reduced schedule for the remainder of 2004. This resulted in lost income of about $111,748, as shown by comparing Mr. Cerqueira's average earnings for 2002, 2003, and 2005 with his income for 2004. App. 271-72, Tr. 10-17; Trial Exhs. 11-14.

Mr. Cerqueira did nothing that could justify his removal from Flight 2237 or the denial of further service after he had been cleared for travel by the police. It was firmly established at trial that American's flight attendants perceived Mr. Cerqueira and the other two men seated in his row to be Middle Eastern and traveling together because the three men have a similar appearance. None of the flight attendants saw Mr. Cerqueira talk to Mr. Ashmil or Mr. Rokah or interact with them in any way. App. 333, Tr. 98; App. 373, Tr. 90; App. 378, Tr. 113. Flight attendant Walling thought the three men looked similar because they were "dark" and had "dark hair" and, in her written report of the incident, Ms. Walling referred to the three passengers

collectively as "them" and "they." App. 372, Tr. 89-90; App. 428-30, Trial Exh. 17. Similarly, flight attendant Lois Sargent grouped the three men together in her reports and wrote that they "seemed to be foreign nationals (later confirmed/Middle East passports)," and noted (incorrectly) that "these 3 passengers had Israeli passports but Arabic names." App. 431-33, Trial Exh. 18; App. 452-54, Trial Exh. 25. Flight Attendant Amy Milenkovic testified that all three men had dark hair and she thought the man with the ponytail might be Middle Eastern. App. 378-79, Tr. 113-14. Her report noted that the man with the ponytail spoke with a "heavy accent," and she testified that, since the terrorist attacks of September 11th, she pays close attention to whether a passenger has an accent. App. 376-77, Tr. 105-08; App. 434-36, Trial Exh. 19. American asserted that Mr. Cerqueira was "refused service because his behavior and that of persons *with whom he appeared to be traveling* caused concerns among the passengers and crew of Flight 2237." App. 356, Tr. 25 (emphasis added).

It is undisputed that Mr. Cerqueira, Mr. Ashmil, and Mr. Rokah were treated differently from all the other passengers on Flight 2237. American admitted that its employees caused the three men to be removed from the flight and refused further service. App. 295, Tr. 109 (judicial admission that "Capt. [John] Ehlers made the decision to have Mr. Cerqueira removed from the flight"); App. 356, Tr. 23 (judicial admission that Mr. Craig Marquis made the decision to deny rebooking to Mr.

Cerqueira). American further admitted that its treatment of Mr. Cerqueira involved a contract (*see* 42 U.S.C. § 1981) and a place of public accommodation (*see* Mass. Gen. Laws ch. 272, § 98). App. 401, Tr. 46. The only disputed element of liability was whether American removed Mr. Cerqueira from Flight 2237 and refused to rebook him because of his perceived race or ethnicity. American argued that its treatment of Mr. Cerqueira was justified by "security issues," but the testimony of American's employees did not support its theory.

Capt. John Ehlers was the pilot of American Flight 2237. Capt. Ehlers testified that, in the terminal before the flight, the passenger with the ponytail—either Mr. Ashmil or Mr. Rokah—asked Capt. Ehlers if he was the pilot to Fort Lauderdale. When Capt. Ehlers confirmed that he was, Mr. Ashmil or Mr. Rokah said: "That's good. I'm going with you. We're going to have a good trip today." App. 296, Tr. 111-12.

After the crew and passengers had boarded, Capt. Ehlers called Ms. Walling and asked her to check on the passenger with the ponytail. Ms. Walling later came to the front of the plane and told Capt. Ehlers that some passengers were uncomfortable with comments that had been made by the men in seats 20D and 20E, including the man with the ponytail. App. 297-98, Tr. 117-19. According to Ms. Walling, passengers had complained that Mr. Ashmil and Mr. Rokah—but not Mr.

Cerqueira—had wished other passengers a "happy new year" and "were speaking in a different language." App. 362, Tr. 48; App. 371-72, Tr. 85-86; *see also* App. 378, Tr. 110-11. Ms. Walling thought Mr. Cerqueira was traveling with Mr. Ashmil and Mr. Rokah, and she told Capt. Ehlers that she had some concerns about Mr. Cerqueira. App. 299, Tr. 122; App. 372, Tr. 88-89. Specifically, Ms. Walling told Capt. Ehlers that Mr. Cerqueira had requested a seat change in an insistent manner, might have boarded early, used the lavatory, and appeared to be feigning sleep. App. 300, Tr. 128; App. 363, Tr. 50. Capt. Ehlers knew that Ms. Walling was not in a position to know whether Mr. Cerqueira boarded early and Capt. Ehlers knew that it is common for passengers to use the lavatory upon boarding.[1] Capt. Ehlers asked the first officer, Donald Ball, to check the lavatory. Mr. Ball did so and reported that nothing was amiss. App. 299-300, Tr. 124-26.

In addition to Ms. Walling's concerns, flight attendant Lois Sargent reported to Capt. Ehlers that Mr. Ashmil and Mr. Rokah—but not Mr. Cerqueira—had joked

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[1]American made a judicial admission that "Mr. Cerqueira boarded the aircraft when his assigned group was called." App. 295, Tr. 109. Under cross-examination, Ms. Walling admitted that 1) she did not think her exchange with Mr. Cerqueira at the gate was a security issue (App. 366, Tr. 65); 2) she did not hear the boarding announcements (App. 367, Tr. 68); 3) it is common for passengers to use the lavatory upon boarding (App. 368, Tr. 71); and 4) she did not know if Mr. Cerqueira was asleep (App. 368, Tr. 72). Ms. Walling also admitted that none of these behaviors normally results in removal and denial of service. App. 366-70, Tr. 62-71.

during the exit row briefing. Ms. Sargent testified that Mr. Cerqueira did not laugh while the other passengers were "clowning around" but that he seemed amused. App. 327-28, Tr. 77-80; App. 329, Tr. 85; App. 331, Tr. 91-93. Capt. Ehlers asked if the person who was joking was the same man who had spoken to him in the terminal, and Ms. Sargent said she did not know, whereupon Capt. Ehlers "pointed out the passengers in the exit row." App. 326, Tr. 70; *see also* App. 328, Tr. 80.

Based on the concerns reported to him by the flight attendants, Capt. Ehlers called for a gate agent. App. 301, Tr. 130. Mr. Flores came to the plane. Capt. Ehlers pointed out the three passengers that were the focus of concern, and Mr. Flores went and got their boarding passes. App. 334, Tr. 103. Capt. Ehlers testified that he does not remember pointing out the passengers in the exit row but that he "may or may not have done that." App. 301, Tr. 132.

Capt. Ehlers testified that before he had Mr. Cerqueira, Mr. Ashmil, and Mr. Rokah removed for police questioning, he did not check to see if the three had purchased their tickets together, requested to sit together, been together in the gate area, or boarded the plane together. App. 302, Tr. 134-35. After the three passengers were removed, Capt. Ehlers called Craig Marquis, the manager on duty at American's system operations control in Dallas, and gave Mr. Marquis a full report of the crew's concerns. App. 302, Tr. 136-37.

Mr. Marquis decided that Mr. Cerqueira would not be rebooked on any American flight. Mr. Marquis testified that he has no recollection of the reasons for his decision. An entry in Mr. Cerqueira's computerized Passenger Name Record states that Mr. Cerqueira was denied boarding on Flight 2237 due to unspecified "security issues" and that Mr. Cerqueira should not be rebooked on American. App. 321-23, Tr. 51-59; App. 423, Trial Exh. 9.

SUMMARY OF THE ARGUMENT

The district court did not err by omitting a requested instruction, drawn from 49 U.S.C. § 44902(b), that airlines may refuse to transport passengers for rational reasons related to safety, because the district court gave an equivalent instruction. The district court charged the jury that if American's treatment of Mr. Cerqueira was motivated by rational security concerns, the jury should find for American. Similarly, the district court did not err by declining a request that it specifically instruct the jury that airline denial of service decisions are lawful if they are not arbitrary and capricious, because the district court charged the jury to apply a standard that is more favorable to American. Specifically, the district court told the jury to find for Mr. Cerqueira *only* if he proved that American intentionally discriminated against him because of his race. Because decisions driven by racial animus are necessarily arbitrary and capricious, a finding of intentional discrimination satisfies the standard.

The district court properly instructed the jury that a corporate defendant is vicariously liable for actions driven by the discriminatory animus of its employees. Contrary to American's assertion, the instruction was a correct statement of the law, and the agency principle of *respondeat superior* applies to airlines. Indeed, American's argument for excepting aviation from ordinary agency principles is based on the assertion that, in some circumstances, time constraints or security concerns might prevent a pilot from inquiring into the facts underlying a crewmember's claim that a passenger is dangerous. No such circumstances were present here for a simple, dispositive reason: Mr. Cerqueira was denied service even *after* the police had investigated and cleared Mr. Cerqueira for travel. Moreover, in this case, the pilot caused Mr. Cerqueira to be removed from the flight based on concerns that—on their face—were insufficient to justify such action.

The district court did not abuse its discretion by admitting a Consent Order entered in an administrative enforcement action brought by the Department of Transportation (DOT), because the district court did not allow the Consent Order to be used to prove liability or propensity. Rather, the district court forcefully instructed the jury that it could consider the Consent Order only as evidence that American knew that the type of discrimination alleged by Mr. Cerqueira violates the law. Such knowledge is relevant because Mr. Cerqueira sought punitive damages under a

reckless indifference theory that requires the plaintiff to show that the defendant was on notice that the type of discrimination complained of violates the law. Indeed, contrary to American's assertion that the punitive damages award should be vacated for insufficient evidentiary support, the Consent Order shows that such an award is necessary to punish and deter American's conduct.

ARGUMENT

I. The District Court Properly Instructed the Jury on the Issue of Liability.

American and its amicus, the Air Transport Association of America (ATA), argue that the district court erred by declining to instruct the jury that 49 U.S.C. § 44902(b) protects denial-of-service decisions that are based on rational concerns for safety. Their argument fails as a matter of fact because the district court *did* instruct the jury that American could not be found liable if American's treatment of Mr. Cerqueira was motivated by rational safety concerns. American also complains that the district court did not explicitly instruct the jury that denial of service decisions are protected unless they are arbitrary and capricious. But a separate charge on the arbitrary and capricious standard was unnecessary because the district court charged the jury to find for Mr. Cerqueira *only* if Mr. Cerqueira proved that American engaged in intentional discrimination because of race or ethnicity. Because such

discrimination is *necessarily* arbitrary and capricious, an instruction on the arbitrary and capricious standard would have served no purpose.

American and ATA further argue that the district court erred by instructing the jury, over American's objection, on the principle of *respondeat superior*. American and ATA assert that air carriers should not be subject to vicarious liability for the discriminatory acts of their agents. Their theory is novel, unsupported, and would effectively legalize racial discrimination in air travel. Their theory is also irrelevant because it would apply—if at all—only where 1) the report of the biased subordinate, if true, would justify the pilot's removal decision, and 2) time constraints or security considerations prevented the pilot from making further inquiry. Neither circumstance is present here.

A. The District Court Did Not Err by Omitting a Requested Instruction.

Where an appellant has properly preserved its objection to the omission of a requested jury instruction, this Court's review is *de novo*. *Gray v. Genlyte Group, Inc.*, 289 F.3d 128, 133 (1st Cir. 2002). The district court's wording of a jury instruction is reviewed only for abuse of discretion. *Id.* (citing *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 10 n.7 (1st Cir. 1998)). This Court "will set aside the verdict only if the omitted instruction was (1) correct as a matter of substantive law,

(2) not substantially covered in the charge as a whole, and (3) integral to an important point in the case." *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70, 78-79 (1st Cir. 2001) (citations omitted); *see also* Fed. R. Civ. P. 61 (requiring the court to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

1. The district court instructed the jury that an airline may lawfully deny service for legitimate safety reasons.

American asserts that the district court erred by omitting American's requested instruction, based on § 44902(b), that "'the law endows the airline with discretion in accepting or rejecting a passenger, based upon considerations of safety and problems inherent to air travel, and that such discretion, if exercised in good faith and for a rational reason, must be accepted.'" Am. Br. 24 (quoting Requested Instruction No. 9, App. 168). Likewise, ATA claims that the district court "fail[ed] to instruct the jury about the limited immunity afforded airlines by section 44902(b)." ATA Br. 6; *see also id.* at 3 (asserting that "the district court in this case completely disregarded the compelling security concerns relevant here").

American and ATA are wrong as a matter of fact. Airlines are not liable for denial-of-service decisions based on rational safety concerns, and the district court so charged the jury. Specifically, the court instructed the jury that "Mr. Cerqueira

bears the burden of proving by a fair preponderance of the evidence that he was intentionally discriminated against because of the perception of his race or ethnicity." App. 394, Tr. 20; *see also id.*, Tr. 18. The court explained that in determining why American treated Cerqueira differently from other passengers, the jury should "consider that American Airlines is expected to operate its airlines with the primary goal of the safety and well-being of the traveling public." *Id.*, Tr. 19. The court further explained that

> [W]e expect of American Airlines that they're going to behave themselves in a way that puts the safety of the traveling public and their employees first. But they cannot, they're forbidden by the law from acting to discriminate—let's use that word—to discriminate against someone based upon their perception that that person is a certain race or a certain ethnic heritage. If that's why they did what they did, that's forbidden by the law.

Id.

Moreover, the court reiterated these instructions in response to a jury question:

> In this case, if you believe that Mr. Cerqueira was treated differently, taken off the plane, denied rebooking, that may be perfectly all right because the airline, as I've already told you, has every right; has the duty to ensure the safety of the flying public and its own ground and air crews. . . . [The issue is] why? Why did they do it? There may be an appropriate motivation: safety, security of the flight; there may be an inappropriate, indeed illegal motivation because there's the perception that—of the person's race or ethnic background.

App. 412, Tr. 3-4.

Thus, the court properly charged the jury to determine "why people did what they did" (App. 394, Tr. 20), and told the jury that if American was motivated by concerns about safety, the jury should find for American.

2. The district court did not err by declining to explicitly invoke the arbitrary and capricious standard because the court charged the jury that Cerqueira was required to prove intentional discrimination on account of race.

American next asserts that the district court erred by declining to charge the jury that it "'must return a verdict for American unless you find that its actions were "arbitrary and capricious" as those terms have been defined.'" Am. Br. 24 (quoting Requested Instruction No. 12, App. 170). In its brief, American refers to this instruction as "the *Williams* test" because it is based on *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2nd Cir. 1975), which held that § 44902(b) allows an airline to lawfully deny service to a passenger for safety reasons so long as the decision is not arbitrary and capricious. Am. Br. 23-26. American never attempts to explain how it was harmed by the lack of any specific invocation of the arbitrary and capricious standard. Indeed, American suffered no prejudice because the district court instructed the jury to apply a standard more favorable to American than the arbitrary and capricious standard.

The district court instructed the jury that Mr. Cerqueira could prevail only if he proved "by a fair preponderance of the evidence that he was intentionally discriminated against because of the perception of his race or ethnicity." App. 394, Tr. 20. Because he had to prove that American's decisions were motivated by discrimination, Mr. Cerqueira had to do more than show that the decisions were arbitrary and capricious. Although actions that are arbitrary and capricious may be motivated by something other than racial animus, "actions motivated by racial or religious animus are necessarily arbitrary and capricious, and therefore beyond the scope of the discretion granted by Section 44902." *Alshrafi v. American Airlines, Inc.*, 321 F. Supp. 2d 150, 162 (D. Mass. 2004); *see also Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431, 434 (D.N.J. 2006) ("A decision based on race would be arbitrary and capricious."); *Chowdhury v. Northwest Airlines Corp.*, 238 F. Supp. 2d 1153, 1154 (N.D. Cal. 2002) ("[T]here is no apparent conflict between the federal statutes prohibiting racial discrimination and the federal law giving air carriers the discretion to refuse to carry passengers for safety reasons."); *Bayaa v. United Airlines, Inc.,* 249 F. Supp. 2d 1198, 1205 (C.D. Cal. 2002) (finding "no merit" to airline's argument that civil rights laws conflict with § 44902(b) and holding that § 44902(b) "does not grant [the airline] a license to discriminate").

In contrast to American's claim that the district court erred by declining "to instruct the jury on the 'arbitrary and capricious' standard" (Am. Br. 29), ATA agrees that the arbitrary and capricious standard is "satisfied by a finding of intentional discrimination." ATA Br. 12; *see also id.* at 18 (acknowledging that "[a] captain whose decision to deny boarding to a passenger is motivated by racial animus acts arbitrarily and capriciously and neither the captain nor the captain's employer is shielded from suit by § 44902(b)."). ATA asserts that the jury instructions were deficient under "the second element of *Williams*, which limits the analysis to information known to the decision-maker." *Id.* According to ATA, "[t]he district court offers no explanation as to why it ignored the second element." *Id.* at 13. As explained in more detail below, the explanation is simple—American never objected to the lack of an instruction on "the second element of *Williams*."

3. American did not object to the omission of an instruction that the jury consider only the facts known at the time the decisions at issue were made, and the principle was substantially covered in the charge as a whole.

American complains that "the court's instructions did not . . . confine the jury to the facts Captain Ehlers and Mr. Marquis had before them at the time of their decision[s]," but American never objected to the lack of an instruction on that issue. In its brief, American quotes its Requested Instruction No. 12, (Am. Br. 24), which

includes such language, but the relevant post-charge objection was limited to a request for further instruction on "44902, your Honor, the arbitrary and capricious standard." App. 397, Tr. 32. The district court replied: "I'm not going to mention arbitrary and capricious. I've emphatically instructed about the duty of American to preserve its passengers and air crews. And that was a very forceful instruction and that's all you're getting." *Id.*

This Court strictly interprets Rule 51, which requires that a party who objects to the failure to give an instruction state "distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51(c)(1). "'Objection' means to the instruction as given; thus, even if the initial *request* is made in detail, the party who seeks but did not get the instruction must object *again* after the instructions are given but before the jury retires for deliberations." *Gray*, 289 F.3d at 134 (citing *Smith v. Mass. Inst. of Tech.*, 877 F.2d 1106, 1109 (1st Cir. 1989)) (emphasis in original). Because American did not preserve its objection to the lack of an instruction that the jury consider only the facts known at the time of the decisions, this Court's review is for plain error. *Id.* "[P]lain error is 'confined to the exceptional case.'" *Id.* (quoting *Toscano v. Chandris, S.A.*, 934 F.2d 383, 385 (1st Cir. 1991)). The party claiming plain error must "demonstrate (1) that there was error, (2) that it was plain, (3) that it likely altered the outcome, and (4) that it was sufficiently fundamental to

threaten the fairness or integrity or public reputation of the judicial proceeding." *Id.* (citing *United States v. Olano*, 507 U.S. 725, 735-36 (1993)).

American cannot meet the plain error standard because the requested instruction was substantially covered in the charge as a whole. The district court repeatedly and emphatically told the jury to determine "why people did what they did." App. 394, Tr. 20; *see also id.* Tr. 19; App. 412, Tr. 4. Because the jury was charged to determine the motivation for American's decisions, the jury had to examine only the information available at the time the decisions were made. Information revealed after the decisions was irrelevant. Thus, a separate instruction on the "second element of *Williams*" was not required and it is highly unlikely that the lack of such an instruction could have altered the outcome of the case.

4. American never objected to the district court's mixed-motive instruction, and the instruction was correct.

In its brief, American complains for the first time that "[r]ather than give an instruction based on the *Williams* test, the district court gave a burden-shifting instruction based on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." Am. Br. 26. American is wrong. The instruction American discusses at pages 27-29 of its brief was not a *McDonnell Douglas* burden-shifting instruction; rather, it was a mixed-motive instruction to which American never objected. Indeed, not only did

American fail to object, but after the court gave a supplementary charge on mixed motive, it asked counsel if the supplementary charge was satisfactory. Counsel for American replied: "Yes, it is, your Honor. Thank you." App. 398, Tr. 34. Because American did not preserve an objection to the mixed-motive instruction, this Court will review it only for plain error. Regardless of the standard of review, the district court did not err because its mixed-motive instruction closely tracked the jury instruction approved by the Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 96-97 (2003). *Compare* App. 394, Tr. 20-21; App. 397, Tr. 33; App. 398, Tr. 34; and App. 413, Tr. 6, *with* 539 U.S. at 96-97; *see also Burton v. Town of Littleton*, 426 F.3d 9, 19 (1st Cir. 2005).

B. The District Court Did Not Err by Instructing the Jury on *Respondeat Superior*.

American and ATA claim that the district court erred when it instructed the jury that a corporate defendant may be vicariously liable for the discriminatory acts of its employees. American refers to corporate liability for decisions driven by subordinate employees as the "cat's paw" doctrine; ATA more accurately describes it as "the mechanism of *respondeat superior*."[2] ATA Br. 6.

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[2]The "cat's paw" doctrine applies to the specific situation in which an innocent corporate decisionmaker, unaware of the plaintiff's protected characteristics and a subordinate employee's discriminatory motive, acted against the plaintiff based on the report of the biased subordinate. As explained below, the district court instructed

This Court reviews a challenged jury instruction *de novo*. The Court considers the charge as a whole to determine whether the district court's instructions "adequately illuminated the pertinent law without unduly confusing matters or misleading the jury." *Muniz-Olivari v. Stiefel Laboratories, Inc.*, --- F.3d ----, 2007 WL 2192965, *7 (1st Cir. Aug. 1, 2007) (citations omitted). If this Court finds that the district court gave an erroneous instruction, it will order a new trial only if "'the preserved error, based on a review of the entire record, can fairly be said to have prejudiced the objecting party.'" *Goodman v. Bowdoin College*, 380 F.3d 33, 47 (1st Cir. 2004) (quoting *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 135 (1st Cir. 1997)).

1. The *respondeat superior* instruction was correct.

The district court instructed the jury that the law forbids discrimination on the basis of race or ethnicity, and if such discrimination drove American's treatment of Mr. Cerqueira, American is liable. The court explained:

> Now, American Airlines is a company. I can't go anywhere—I can't go to Texas and shake Mr. American Airlines' hand. I can't find the company. Companies are people and they're bureaucracies and they operate hierarchically; in other words, there are higher-ups in the

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the jury on the more general principle of *respondeat superior*, and the jury's verdict did not depend on the cat's paw doctrine because there was ample evidence that the decisionmakers knew of Mr. Cerqueira's protected characteristics and that the reports of the flight attendants were insufficient to justify American's actions against him.

> company and lower down people. But all are employees of the company and they're—if you think they're acting within the scope of their employment and they're doing what they are doing as employees of American Airlines, then that conduct is attributed to American Airlines. That is American Airlines. It's the sum total of the people that work for it.

App. 393-94, Tr. 17-18.

The court instructed the jury to determine whether "American Airlines, through its agents, through the people who work for it, did they intentionally discriminate against Mr. Cerqueira on the basis of perceived race or ethnicity." App. 393, Tr. 14-15. The court further explained:

> And let's say that's why a lower-level person acted as she did with respect to this. If that action is transformed into the action of the higher corporate people, if that's what drives the action of the higher corporate people, American's stuck with it because American should take care that they're not acting against a person based on the perceived race or ethnicity. The law forbids that.

App. 394, Tr. 19-20; *see also* App. 397, Tr. 33.

The district court's instructions were an accurate statement of *respondeat superior* and, under the doctrine, American is vicariously liable for the acts of its employees that violate 42 U.S.C. § 1981. *See, e.g.*, *Green v. Dillard's, Inc.*, 483 F.3d 533, 540 (8th Cir. 2007) (holding that retailer can be vicariously liable under § 1981 for the discriminatory acts of its employees); *Arguello v. Conoco, Inc.*, 207 F.3d 803, 810 (5th Cir. 2000) (same). Similarly, American is liable under *respondeat superior*

for actions of its employees that violate the Massachusetts Civil Rights Act (MCRA). *See, e.g., College-Town, Div. of Interco, Inc. v. MCAD*, 400 Mass. 156, 165, 508 N.E.2d 587, 593 (Mass. 1987) ("It is clear that the Legislature intended that an employer be liable for discrimination committed by those on whom it confers authority"); *Sarvis v. Boston Safe Deposit & Trust Co.*, 47 Mass. App. Ct. 86, 97, 711 N.E.2d 911, 921 (Mass. App. Ct. 1999) ("We conclude that the Legislature intended corporations to be vicariously liable under the MCRA for civil rights violations committed by their agents acting in the scope of their employment."); *Carpenter v. Yellow Cab Co.*, No. 95-SPA-0033, 2001 WL 1602758, at *2 (MCAD Feb. 23, 2001) (holding taxi company "liable for any acts of discrimination by its taxi drivers"); *Wilder v. Diamond Cab Co.*, No. 97-SPA-0789, 2001 WL 1602757, at *3 (MCAD Feb. 23, 2001) (same).

Nevertheless, American and ATA assert that *respondeat superior* should not apply to airlines because, according to American and ATA, agency principles conflict with § 44902(b). Am. Br. 30; ATA Br. 21. The arguments advanced by American and ATA to support their theory lack legal or factual support.

2. Even if the *respondeat superior* instruction suggested the cat's paw doctrine, the district court did not err because the doctrine is correct as a matter of law.

American repeatedly characterizes the district court's explanation of *respondeat superior* as "the 'Cat's Paw' instruction" (Am. Br. 30-34), even though the district court never specifically stated that American would be liable even if its decisionmakers were unbiased but acted in good faith on reports from biased subordinates. But even if the court's *respondeat superior* instruction suggested the cat's paw doctrine, there was no error because this Court has held that "corporate liability can attach if neutral decisionmakers . . . rely on information that is inaccurate, misleading, or incomplete because of another employee's discriminatory animus." *Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 83 (1st Cir. 2004); *accord EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484-88 (10th Cir. 2006) (explaining that a defendant may be liable even though the decisionmaker lacked discriminatory intent, if the decisionmaker acted on information supplied by a biased subordinate), *cert. dismissed*, 127 S. Ct. 1931 (2007); *Zades v. Lowe's Home Ctrs., Inc.*, 446 F. Supp. 2d 29, 40 (D. Mass. 2006) (holding that discriminatory motive may be shown where a neutral decisionmaker acts on biased information); *Harlow v. Potter*, 353 F. Supp. 2d 109, 116-18 (D. Me. 2005) (explaining that a defendant is liable for discrimination if the decisionmaker who took the adverse action relied on

information tainted by another's discriminatory animus "even if the decisionmaker lacked discriminatory intent"). In such cases, a subordinate without decisionmaking authority may have "impermissibly tainted the decisionmaking process with his animus." *Cariglia*, 363 F.3d at 88. If not for the cat's paw doctrine, a corporate defendant could always escape responsibility for intentional discrimination simply by placing formal decisionmaking authority in the hands of an official insulated from personal knowledge of the protected characteristics of the affected individual.

American makes three arguments in support of its claim that the cat's paw doctrine should not apply to discrimination in aviation. None have merit.

a. The cat's paw doctrine is based on agency, not negligence, and the court's instructions on *respondeat superior* did not inject a negligence theory into this case.

First, American asserts that the cat's paw doctrine is based on a negligence theory and that "it is clear that § 44902(b) does not permit carriers to be subject to liability for negligence." Am. Br. 30-31. American is wrong. The cat's paw doctrine is drawn from the application of common-law agency principles. *See, e.g.*, *BCI Coca-Cola*, 450 F.3d at 485 ("These subordinate bias theories comport with [] basic agency principles."). Vicarious liability is imposed where the corporate defendant's agents engaged in unlawful *intentional* discrimination that caused the challenged action. Moreover, contrary to American's claim that "the district court's instruction

on a negligence standard fundamentally misstated the proper focus for evaluating Captain Ehler's decision" (Am. Br. 31), the district court never instructed the jury on negligence and Mr. Cerqueira never pursued a negligence theory. Rather, the court instructed the jury to determine whether "American Airlines, through its agents, through the people who work for it, did they intentionally discriminate against Mr. Cerqueira on the basis of perceived race or ethnicity." App. 393, Tr. 14-15.

b. American's claim that the cat's paw doctrine does not apply in aviation is based on arguments that are wrong as a matter of law and irrelevant under the facts of this case.

American next asserts that the cat's paw doctrine "imposes, legally and practically, a duty on the Pilot-in-Command to conduct his or her own investigation of the events in question." Am. Br. 31. From this premise, American argues that airlines should not be liable where a pilot acts on reports that are the product of discriminatory animus because, in some circumstances, it may not be feasible for the pilot to make further inquiry before taking action. *Id.* at 31-33. American's premise is incorrect and, under the facts of this case, its feasibility argument is irrelevant.

The cat's paw doctrine does not impose a duty to investigate. Rather, courts have noted that a defendant "can avoid liability by conducting an independent investigation of the allegations" because, as a result of such investigation, the

defendant "has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated." *BCI Coca-Cola*, 450 F.3d at 488; *see also Zades*, 446 F. Supp. 2d at 40 ("[T]his 'causal connection' is not broken where a decisionmaker acts on biased information without conducting his own independent investigation."); *Mole v. University of Massachusetts*, 442 Mass. 582, 598-600, 814 N.E.2d 329, 343-44 (Mass. 2004). The chain of causation is broken because the discriminatory animus is no longer a substantial factor for the challenged action. Thus, the causation standard gives the defendant an *incentive* to investigate, but the defendant is not *required* to investigate.

In any event, American's policy argument that airlines should be immune from subordinate bias claims because investigations are not always feasible is irrelevant in this case. American's theory would apply only where 1) the report of the biased subordinate—if true—would justify the pilot's removal decision, and 2) time constraints or security considerations prevented the pilot from making further inquiry. Neither circumstance is present here.

First, to the extent Capt. Ehlers decided to have Mr. Cerqueira removed from Flight 2237 based on information reported by the flight attendants, that information was insufficient on its face to support the removal decision. Indeed, the flight attendants did not report that Mr. Cerqueira had engaged in any behavior that was

irregular, threatening, or unusual. Rather, the flight attendants reported that Mr. Cerqueira had engaged in common passenger behavior that does not ordinarily result in removal and denial of service. App. 366-70, Tr. 62-71.

Second, before Flight 2237 departed, Capt. Ehlers had ample time to verify that Mr. Cerqueira posed no threat to safety. Capt. Ehlers delegated the investigation to the Massachusetts State Police and, more than 30 minutes before Flight 2237 pushed back from the gate, the police had cleared Mr. Cerqueira for travel. App. 443, Trial Exh. 22; App. 286, Tr. 72; App. 382, Tr. 127-29.

Similarly, American's theory for not applying the cat's paw doctrine to decisions made by *pilots* is wholly inapposite when applied to the systems manager in Dallas (Mr. Marquis) who decided that Mr. Cerqueira would not be rebooked on American even after Mr. Cerqueira had been cleared by the police. Mr. Marquis is not a pilot and had none of the time constraints or security considerations that might prevent a pilot from making further inquiry into the basis for crewmember reports.

Even if American's theory were relevant to the facts of this case, it finds little support in the cases American cites. American claims that several courts have "expressly rejected" the idea that pilots have a duty to investigate, rather than accept without inquiry the reports of their subordinates. *Id.* at 31-32 (citing *Williams*, 509 F.2d at 948; *Cordero v. CIA Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir.

1982); *Adamsons v. American Airlines, Inc.*, 58 N.Y.2d 42, 49, 444 N.E.2d 21, 25 (N.Y. 1982)). The cases do not go nearly that far.

For example, *Williams* did not involve a situation where a pilot acted on the report of a subordinate crewmember. Rather, in *Williams*, the president of the airline (TWA) made the decision to refuse to transport a ticketed passenger whom the FBI reported was a dangerous fugitive, known to carry firearms, who had been diagnosed as schizophrenic. 509 F.2d at 945. The court found no evidence of discrimination by any TWA employee and held that the airline "was entitled to accept at face value the oral and written representations made by the FBI" because "there was nothing on the face of them or connected with them to put TWA on further investigation or inquiry" and "a common carrier has a right to presume that official representations made by the FBI in the course of its duties are substantially true and accurate." *Id.* at 948-49.

In *Cordero*, a pilot excluded a passenger based on a flight attendant's report that the passenger had uttered an obscenity and had raised his arm as if to strike the flight attendant. 681 F.2d at 671. The passenger claimed that he was the victim of mistaken identity, and the airline was held liable. Although the court found that the pilot had "no duty to conduct an *in-depth* investigation," it concluded that the airline acted unreasonably in excluding the passenger "without even the most cursory inquiry

into the complaint against him." *Id.* at 672 (emphasis added). Thus, *Cordero* cannot support American's position.

Adamsons involved the refusal to transport a passenger who arrived at the airport by ambulance 45 minutes before her flight, totally paralyzed from the waist down from an undiagnosed and possibly contagious illness, "and obviously experiencing extreme discomfort." 444 N.E.2d at 23. The court held that, in such a situation, an airline is not required to "make a thorough investigation into the nature and extent of a person's illness before reaching th[e] decision" not to transport a passenger. *Id.* at 25.

c. *Dasrath* did not apply a subjective good faith standard and is easily distinguished on its facts.

American asserts that "*Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431 (D.N.J. 2006), is instructive" because, according to American, *Dasrath* reasoned that "it is the subjective good faith belief of the actual decision-maker that is singularly germane." Am. Br. 33. To the contrary, *Dasrath* held that "the standard for reviewing a carrier's decision [to remove a passenger] is an *objective* one and the carrier's discretion is protected so long as it acted in good faith and its decision was rational." 467 F. Supp. 2d at 445 (emphasis added).

American does not explain the relevance of *Dasrath* to its objection to the *respondeat superior* instruction, and no connection is apparent. In *Dasrath*, the district court granted summary judgment to the airline after finding, based on an extensive review of the *undisputed* facts, that the plaintiff had not "presented sufficient evidence that would permit a reasonable jury to infer that Continental's proffered reason was not the real reason and that a motivating factor in Mr. Dasrath's removal was his race." *Id.* at 446. The court in *Dasrath* found "ample undisputed evidence" other than race that linked the plaintiff to two other men who "engaged in conduct that raised reasonable concerns in [the pilot's] mind that justified, perhaps required, that he remove them from the flight." *Id.* Although the plaintiff in *Dasrath* was linked to the other men because of misidentification, the court held that "a jury would be compelled to find that security considerations were the sole reason for [the pilot's] decision." *Id.* Thus, the court concluded that the pilot, who conducted a substantial investigation to gather the relevant facts and assess witness credibility, "acted reasonably when he removed [the plaintiff], that he removed him solely for security reasons, and that [the plaintiff's] race was not a motivating factor." *Id.* at 449.

In contrast, the jury in this case found that but for Mr. Cerqueira's perceived race, he would not have been removed from Flight 2237 and barred from any

American flight. The jury rejected American's claim that it acted for legitimate reasons related to safety and found that discriminatory animus motivated American's actions. Moreover, American presented no evidence that Mr. Cerqueira was mistaken for another passenger who had behaved in a manner justifying removal. Rather, the evidence showed and the jury found that the flight attendants would not have linked Mr. Cerqueira to Mr. Ashmil and Mr. Rokah but for Mr. Cerqueira's protected characteristics.

3. ATA's arguments for not applying agency principles to airline denial of service decisions are flawed.

ATA argues, based on what it calls "the second element of *Williams*," that "§ 44902(b) immunity protects airlines from suit even where the information underlying a decision is the product of an actionable bias or discrimination." ATA Br. 15. Essentially, ATA argues that the enactment of § 44902(b) legalized race discrimination by airline employees. ATA's argument lacks merit. "Fundamentally, it is beyond dispute that Congress cannot enact any law that would effectuate, directly or indirectly, the private racial biases of airline employees." *Alshrafi*, 321 F. Supp. 2d at 162.

First, ATA claims that § 44902(b) and *Williams* limit "the analysis to the information known to the decision-maker." ATA Br. 13. But § 44902(b) and

Williams refer to the decisions and knowledge of airlines, not individual decisionmakers. 509 F.2d at 948. As the district court instructed the jury, the actions of an airline employee acting within the scope of employment are the acts of the airline. App. 393-94, Tr. 17-18.

Second, ATA claims support from *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 338 (E.D.N.Y. 2002), *Al-Qudhai'een v. Am. W. Airlines, Inc.*, 267 F. Supp. 2d 841 (S.D. Ohio 2003), and *Norman v. Trans World Airlines, Inc.*, No. 98-7419, 2000 WL 1480367 (S.D.N.Y. Oct. 6, 2000), but none of those cases addresses the issue of *respondeat superior*, and all are distinguishable from the circumstances here. In *Christel*, a tort action with no allegation of discrimination, a flight attendant told the pilot that the passenger who was later removed was angry, hostile, and would not follow instructions. 222 F. Supp. 2d at 337-38. In *Al-Qudhai'een*, the pilot's removal decision was based on undisputed evidence that the plaintiff 1) disobeyed a flight attendant's instructions and changed seats without permission; 2) entered the first class cabin and touched the cockpit door; 3) appeared anxious, irritated, and uneasy when informed that the flight was not a nonstop; and 4) asked questions, uncommon for a passenger, about whether the same airplane would be used for the second leg of the trip. 267 F. Supp. 2d at 847. In *Norman*, also a tort action with no claim of discrimination, a passenger was removed because a flight attendant insisted that he

could not perform his safety-related duties if the passenger remained on board, and "an FAA safety regulation requir[ed] a minimum number of flight attendants on every flight." 2000 WL 1480367, *3. In contrast to the cases cited by ATA, the flight attendants in this case reported information about Mr. Cerqueira that, on its face, was insufficient to justify a removal decision. Indeed, Ms. Walling admitted that Mr. Cerqueira's behavior was not of the type that ordinarily results in removal and denial of service. App. 366-70, Tr. 62-71.

4. Even if the district court had erred by suggesting the cat's paw doctrine, the error was harmless because the jury's verdict did not depend on the doctrine.

An erroneous jury instruction is harmless error where "the judgment was likely unaffected." *Romano v. U-Haul Int'l*, 233 F.3d 655, 667 (1st Cir. 2000) (citations omitted). In this case, even if the district court had given a cat's paw instruction, and even if that instruction had been error, it would not have affected the jury's determination that American discriminated against Mr. Cerqueira. To the extent the cat's paw doctrine was injected into the case, it was only because American claimed that "Captain Ehlers and Craig Marquis, the two decision-makers, lacked knowledge about the Cerqueira's ethnicity, national origin or even his appearance when they made their decisions." Am. Br. 55; *see also* ATA Br. 26 (asserting that neither Capt. Ehlers nor Mr. Marquis "saw Mr. Cerqueira before making any decisions about him"

and claiming that racial bias "is plainly impossible absent such awareness."). At trial, this claim unraveled as a matter of fact.

First, the evidence showed that Capt. Ehlers saw the passenger with the ponytail and heard him speak with a heavy accent, knew that the flight attendants thought Mr. Cerqueira was traveling with Mr. Ashmil and Mr. Rokah, and knew that nothing linked Mr. Cerqueira to the other men except his Middle Eastern appearance. Second, Mr. Flores and Ms. Sargent testified that, on two separate occasions, Capt. Ehlers pointed out the passengers in the exit row. App. 326, Tr. 70; App. 334, Tr. 103. Capt. Ehlers did not deny that he did so, but testified that he "may or may not have done that." App. 301, Tr. 132. Third, because the flight attendants thought it was important that their contemporaneous written reports include their concern that the three men were traveling together and had foreign appearances, Middle Eastern passports, Arabic names, and heavy accents, the flight attendants likely expressed these concerns to Capt. Ehlers.

Similarly, although Mr. Marquis testified that he could not recall what he knew about Mr. Cerqueira, the evidence showed that Mr. Marquis made his decision after speaking with Capt. Ehlers, and Capt. Ehlers testified that he gave Mr. Marquis a full report of the crew's concerns. App. 302, Tr. 136-37. Thus, the jury could properly infer that the basis for the flight attendants' concerns were relayed to Mr. Marquis,

especially in light of American's failure to offer any rational explanation for refusing to rebook Mr. Cerqueira even after the police had cleared him for travel.

II. The District Court Did Not Abuse Its Discretion By Admitting the DOT Consent Order for a Limited Purpose and With a Strict Limiting Instruction.

American claims that the district court erred by admitting—for a limited purpose—a Consent Order (Trial Exh. 26) entered in an administrative enforcement action brought by the DOT against American. This Court reviews a district court's evidentiary rulings for abuse of discretion. *United States v. Gilbert*, 181 F.3d 152, 160 (1st Cir. 1999). Even if the district court erred in admitting challenged evidence, this Court will not disturb the judgment unless the error was prejudicial. When reviewing a trial court's Rule 403 balancing test for an abuse of discretion, only in "extraordinarily compelling circumstances" will this Court reverse a district court's judgment concerning the probative value and unfair effect of the proffered evidence. *Id.* at 160-61 (citation omitted).

Eight months *before* the incidents on which this case is based, the DOT brought an enforcement action against American based on eleven separate instances in which American unlawfully discriminated against passengers perceived to be of Arab, Middle Eastern, or South Asian descent by either removing them from flights or denying them boarding. The enforcement action was resolved ten months later by

entry of a Consent Order finding that American acted in a manner inconsistent with the requirements of federal civil rights law. At trial, Mr. Cerqueira attempted to introduce two public records related to the DOT enforcement action: 1) the Notice of Enforcement Proceedings and Proposed Assessment of Civil Penalties, with attached Enforcement Complaint (marked as proposed Trial Exh. T); and 2) the Consent Order (marked as proposed Trial Exh. U and admitted as Trial Exh. 26).

Mr. Cerqueira sought to introduce the documents for two purposes. First, Mr. Cerqueira asked that the documents be admitted to show a discriminatory atmosphere as evidence of intent and motive. Second, Mr. Cerqueira asked that the documents be admitted to show that American was on notice that the law prohibits air carriers from denying service to passengers on the basis of perceived race or ethnicity.

The Court ruled before trial that Mr. Cerqueira would be allowed to introduce *one* of the two proposed exhibits, but *only* for the limited purpose of showing notice and not to prove liability. The Court explained:

> The fact of the enforcement action, not for the truth but for notice to American Airlines, is admissible. That will come as no surprise. The question is how most fairly to accommodate that. And I've decided to proceed, as follows. And I'm going to ask American Airlines. One of these documents is going to get in. Either the complaint. Now, the complaint is more detailed factually, but I will give a charge that this is not for the truth of anything, it's just for the fact of the existence of the complaint and that, notice to American Airlines that the authorities made this complaint. Or the order. But not both. So, I'll give American

> Airlines its choice on which it thinks is least prejudicial. There will be a cautionary instruction in any case. But either the complaint or the order will be admissible.

App. 188. American chose to have the Consent Order entered in evidence. App. 190.

At the time it was admitted, the district court instructed the jury that the Consent Order was admitted for the limited purpose of showing that American was on notice that the DOT had complained that American's employees had engaged in discrimination and that American was "on notice of what the requirements are under the law." App. 357, Tr. 28. The court emphasized: "And so for that limited purpose, that American was on notice that the Department of Transportation was investigating it about allegations of discrimination, you may consider it, but not for [the truth of] anything that's recited in the order." App. 357, Tr. 29; *see also id.* at Tr. 28 ("It's not to be considered by you that anything in here is true because American Airlines doesn't admit it."). When the district court charged the jury, it again emphasized that the Consent Order was admitted for a limited purpose. App. 391, Tr. 7-8.

A. Rule 408 Does Not Bar the Admission of the Consent Order Because It Was Not Admitted to Prove Liability.

American argues that the Consent Order was inadmissible under Fed. R. Evid. 408. American is wrong. Rule 408 bars the admission of settlement agreements to prove liability for the claim underlying the agreement, but the Rule does not require

exclusion of a settlement agreement used for another purpose. In this case, the court instructed the jury that it could not consider the Consent Order for purposes of liability or the truth of the underlying claims, but only to establish that American was "on notice of what the requirements are under the law." App. 357, Tr. 28.

Even though Rule 408 explicitly provides that settlement agreements may be admissible for certain purposes, American argues that the Consent Order's own terms prohibit its use. American's argument fails for at least two reasons.

First, American rests its argument on a provision of the Consent Order that provides: "This order makes no findings of violations with respect to any individual incident of alleged civil rights violations and the findings herein shall have no effect in proceedings not before the Department of Transportation." App. 459, ¶ 6. This provision of the Consent Order is inapposite because the district court explicitly and emphatically instructed the jury that it could consider the document for the limited purpose of establishing notice, "but not for [the truth of] anything that's recited in the order." App. 357, Tr. 29; *see also id.* at Tr. 28 ("It's not to be considered by you that anything in here is true because American Airlines doesn't admit it.").

Second, the district court's admissibility determination is not controlled by recitations in the document itself; rather, admissibility is determined under the Federal Rules of Evidence. Indeed, the three cases cited by American to support its

claim that the terms of a Consent Order can preclude its use in another case have nothing to do with that issue; rather, they are cases where one party to a consent order alleged a violation of the order by another party. *See Porrata v. Gonzalez-Rivera*, 958 F.2d 6 (1st Cir. 1992); *Inmates of Suffolk County Jail v. Kearney*, 928 F.2d 33 (1st Cir. 1991); *United States v. Boston Scientific Corp.*, 167 F. Supp. 2d 424 (D. Mass. 2001).

American's reliance on *McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir. 1985), is similarly misplaced. In *McInnis*, this Court found that the trial court erred in admitting evidence of the plaintiff's settlement with a third-party joint tortfeasor. Because the settlement "was offered as relevant to the issue of causation," and "without causation there can be no liability," the settlement was inadmissible under Rule 408. *Id.* at 248. In contrast, the Consent Order at issue here was admitted to show notice and not to prove liability.

Finally, American asserts that notice "could be relevant only to some claim that American was negligent in selection or training of its employees, which was not made in this case." Am. Br. 41. American fails to grasp the relevance of notice to the issue of punitive damages.

Mr. Cerqueira sought punitive damages on the basis that American's actions demonstrated a reckless or callous indifference to Mr. Cerqueira's rights protected by

federal and state law. Punitive damages are available in a federal civil rights case "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves recklessness or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983) (emphasis added); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535 (1999) (explaining that "'reckless indifference' pertain[s] to the [defendant]'s knowledge that it may be acting in violation of federal law"); *Bisbal-Ramos v. City of Mayaguez*, 467 F.3d 16, 25 (1st Cir. 2006) (upholding an award of punitive damages because the decisionmaker knew that the type of discrimination complained of violates the law). Similarly, under Massachusetts law, punitive damages are available to any person subjected to discrimination in a place of public accommodation. *See* Mass. Gen. Laws ch. 272, § 98 (providing for recovery of the damages enumerated in Mass. Gen. Laws ch. 151B, § 9) and Mass. Gen. Laws ch. 151B, § 9 (allowing recovery of "actual and punitive damages"). Punitive damages are authorized under Massachusetts law on the same basis as federal law. *McDonough v. City of Quincy*, 452 F.3d 8, 24 n.10 (1st Cir. 2006). The Consent Order was properly admitted to show that American was on notice that the type of discrimination proved by Mr. Cerqueira violates the law.

B. Rule 404(b) Does Not Bar the Admission of the Consent Order Because It Was Not Admitted to Prove Propensity, and It Had Special Relevance to the Issue of Notice.

American next claims that the district court abused its discretion by admitting the Consent Order under Rule 404(b). Because Rule 404(b) allows the admission of evidence of prior bad acts for purposes other than showing the defendant's propensity to commit such acts, and the district court admitted the Consent Order only to show that American had notice of its obligations under civil rights law, American's claim lacks merit. As explained above, the Consent Order was admitted for a limited purpose, and the jury was forcefully instructed to consider it for no other purpose.

Contrary to American's assertion, the Consent Order has special relevance exclusive of showing American's propensity to discriminate against passengers perceived to be Middle Eastern. *See United States v. Landrau-Lopez*, 444 F.3d 19, 23 (1st Cir. 2006) (explaining that under Rule 404(b), "a court must determine whether the evidence in question has any special relevance exclusive of defendant's character or propensity") (citations omitted). The Consent Order shows that American knew that the type of discrimination proved by Mr. Cerqueira violates civil rights law. Such knowledge is relevant because, as explained above, Mr. Cerqueira sought punitive damages under a reckless indifference theory that requires plaintiff

to show that the defendant was on notice that the type of discrimination complained of violates the law.

In assessing the "special relevance" of Rule 404(b) evidence, this Court focuses on two factors: "the remoteness in time of the other act and the degree of resemblance" to the act at issue. *Id.* Both of these factors support the district court's decision to admit the Consent Order. First, the Consent Order shows that eight months before the incidents on which this case is based, American was put on notice by the filing of the DOT Enforcement Action. Moreover, the eleven incidents of discrimination alleged by DOT—which form the predicate for the Consent Order—took place no more than 27 months before the incidents at issue here. Second, the type of discrimination complained of is identical to that charged by Mr. Cerqueira. Thus, the Consent Order shows that American had notice that such discrimination is unlawful.

C. Rule 403 Does Not Bar Admission of the Consent Order Because It Is Highly Probative on the Issue of Notice, and the District Court's Forceful Limiting Instruction Reduced Any Risk That the Consent Order Might Unfairly Prejudice American.

American next argues that even if the Consent Order was admissible for a limited purpose under Rules 408 and 404(b), the district court abused its discretion by admitting the document because even admissible evidence "may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. American's argument fails for several reasons.

First, Rule 403 provides for the exclusion of evidence "only when its probative value is *substantially* outweighed by its potential unfairly to prejudice the defendant." *Landrau-Lopez*, 444 F.3d at 24 (emphasis in original) (citations omitted). American's argument is based on its erroneous claim that "the Consent Order had no probative value in this case." Am. Br. 44. As explained above, the Consent Order was admitted for the limited purpose of notice, and notice was relevant to show that American's actions demonstrated a reckless or callous indifference to Mr. Cerqueira's civil rights.

Second, American asserts that the court's limiting instruction "was insufficient to remove the inevitable perception in jurors' minds . . . that American was guilty of a pattern and practice" of discrimination. Am. Br. 45. American provides no support for this assertion and ignores the well-settled principle that "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)); *see also United States v. Pierre*, 484 F.3d 75, 85 (1st Cir. 2007) ("'We normally presume that a jury will follow an instruction'" and "[o]nly if there is an overwhelming probability that the jury could not have followed the instruction and a strong likelihood that the evidence was

devastating to the defendant will we assume otherwise.") (quoting *Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987)); *United States v. Lemmerer*, 277 F.3d 579, 593 (1st Cir. 2002) (recognizing the "longstanding presumption that jurors normally follow the instructions given them by the trial court") (citations omitted); *Pinkham v. Maine Cent. R.R. Co.*, 874 F.2d 875, 882 (1st Cir. 1989) (holding that "it must be presumed that the jurors understood the instructions, followed them correctly, and based their verdict on the instructions") (citations omitted).

Third, American argues that *Kinan v. City of Brockton*, 876 F.2d 1029, 1034-35 (1st Cir. 1989), supports its claim that the Consent Order should not have been admitted, but *Kinan* is easily distinguished from this case. In *Kinan*, this Court held that the district court did not abuse its discretion in excluding two agreed judgments that the plaintiff sought to introduce to prove that the defendant City had a custom or practice of violating constitutional rights. This Court held that because "[t]he two cases that plaintiff sought to introduce focused on the excessive use of force, . . . [t]hey were not relevant to the issue here, the effect of an allegedly improper broadcast." *Id.* at 1035. *Kinan* is inapposite because, contrary to American's claim, the district court in this case did not admit the Consent Order "to establish that American condones a pattern or practice of unlawful discrimination against

passengers who belong to a protected class." Am. Br. 47. Rather, the district court admitted the Consent Order for the limited purpose of notice.

Finally, American argues that if the district court abused its discretion by admitting the Consent Order it was "harmful error" because the district court's limiting instructions were insufficient to prevent the jury from misusing the Consent Order. Am. Br. 47-51. This Court need not reach these arguments because, as explained above, admission of the Consent Order was proper under Rules 408, 404, and 403. Moreover, American's arguments presume that the jury disregarded the district court's forceful limiting instructions. In any event, American's "harmful error" argument is weak because it is based on the claim that the Consent Order set forth DOT's factual allegations and legal positions that are contrary to those of American. But as the district court explained:

> The Consent Order itself mitigated some of these concerns, however, by providing a detailed discussion of the positions of both the DOT and American with respect to the discrimination complaints. Thus, the Consent Order included American's arguments against a finding of liability for those alleged instances of racial discrimination. The existence of arguments on both sides of this issue counseled against redaction of the document for fear that redaction would itself cause the prejudice it sought to prevent.

App. 238 (484 F. Supp. 2d at 238).

III. American Is Not Entitled to Judgment as a Matter of Law.

American claims that the district court should have granted American's motion for judgment as a matter of law because any reasonable jury would have believed that American removed Mr. Cerqueira from Flight 2237 and refused to rebook him because of rational safety concerns. In support of this claim, American simply repeats the arguments rejected by the jury.

This Court reviews *de novo* the denial of a motion for judgment as a matter of law, but examines the evidence presented at trial in the light most favorable to preservation of the jury's verdict. This Court "may not consider the credibility of witnesses, resolve conflicts in testimony or evaluate the weight of the evidence," but "must affirm unless the evidence was so strongly and overwhelmingly inconsistent with the verdict that no reasonable jury could have returned it." *McDonough*, 452 F.3d at 17 (citations omitted).

American asserts that "Captain Ehlers had personal 'odd' interactions that morning with the 'pony tail' passenger, who ended up sitting in an exit row with Cerqueira, and whom the crew reasonably believed was traveling with Cerqueira." Am. Br. 53. Contrary to American's assertion, there was no reason to believe that the ponytailed passenger was traveling with Mr. Cerqueira except for the fact that they both had a Middle Eastern appearance and were seated in the same row. None of the

flight attendants saw Mr. Cerqueira talk to Mr. Ashmil or Mr. Rokah or interact with them in any way. App. 333, Tr. 98; App. 373, Tr. 90; App. 378, Tr. 113.

American next argues that Ms. Walling "had an early morning encounter with Cerqueira when he wanted to change his seat assignment" and she was "concerned by Cerqueira's going to the lavatory." Am. Br. 53. But Ms. Walling testified that she did not think her exchange with Mr. Cerqueira at the gate was a security issue and that it is common for passengers to use the lavatory upon boarding. Ms. Walling further testified that neither of these behaviors normally results in a denial of service. App. 366-70, Tr. 65-71.

American also asserts that passengers were concerned about comments made by Mr. Ashmil and Mr. Rokah and that Ms. Sargent was concerned that Mr. Ashmil and Mr. Rokah joked with her during the exit row briefing, but neither of these matters have anything to do with Mr. Cerqueira. *Id.* Indeed, the behavior of Mr. Ashmil and Mr. Rokah was imputed to Mr. Cerqueira solely because of his Middle Eastern appearance.

Next, American asserts that Mr. Cerqueira failed "to prove that American intended to discriminate against him on the basis of his race or origin" because a "plaintiff's subjective belief that he was a victim of racial profiling," standing alone, is "insufficient to prove intent to discriminate." Am. Br. 54-55 (citing *Scott v. Macy's*

East, Inc., No. 01-10323-NG, 2002 WL 31439745 (D. Mass. Oct. 31, 2002). *Scott* is inapposite because Mr. Cerqueira presented far more evidence of discrimination than did the plaintiff in *Scott*.

In *Scott*, the court granted summary judgment for defendants in a case alleging racial profiling because the plaintiff presented no admissible direct evidence of discrimination, and the plaintiff did not present any evidence from which racial discrimination could be inferred. In this case, direct evidence of discriminatory animus was admitted at trial, including flight attendant reports making observations about foreign appearances, Middle Eastern passports, Arabic names, and heavy accents. Had discrimination played no role in the decision to remove Mr. Cerqueira, the flight attendant reports would not have mentioned these matters. *See Williams v. Lindenwood Univ.*, 288 F.3d 349, 356 (8th Cir. 2002) (holding that "injecting racial language at all into the decision-making process creates the inference that race had something to do with the decision-making process"); *Local Fin. Co. of Rockland v. MCAD*, 355 Mass. 10, 16, 342 N.E.2d 536, 539-40 (Mass. 1968) (holding that distinguishing loan applicants by color was evidence of discrimination even though loan company claimed that it recorded color only for identification purposes).

Moreover, the jury in this case could easily infer discrimination. Mr. Cerqueira proved that the only passengers American removed from Flight 2237 and refused to

rebook had a Middle Eastern appearance. The jury observed Mr. Cerqueira, and Mr. Cerqueira testified that he is often mistakenly perceived as Middle Eastern on account of his color and physical characteristics. Mr. Cerqueira also testified that Mr. Ashmil and Mr. Rokah, who are from the Middle East and were speaking loudly to each other in a foreign language, looked like him because they had dark hair and olive complexions. Apart from their protected characteristics, no evidence was introduced to link the three men. Mr. Cerqueira did not ask for any particular seat, was not with Mr. Ashmil or Mr. Rokah in the gate area, did not board with them, and did not talk to them or interact with them in any way before he was removed from the flight. Nevertheless, American's employees perceived Mr. Cerqueira to be traveling with Mr. Ashmil and Mr. Rokah because the three men have a similar appearance.

In addition, Mr. Cerqueira proved that he did nothing but engage in common airline passenger behavior that does not ordinarily result in a denial of service. And he showed that American's assertion that he was removed and denied further service because of "security issues" was simply not believable, because American's explanations for its actions were riddled with inconsistencies and a pattern of embellishment. In the end, the jury concluded that, but for the perception that Mr. Cerqueira was from the Middle East and traveling with the Middle Eastern men

seated next to him, American would not have removed him from Flight 2237 and refused to rebook him on any other American flight.

Finally, it is simply not true that "[t]he evidence was uncontroverted that Captain Ehlers did not even see Cerqueira prior to deciding to have him removed for questioning" or that "Mr. Marquis had no opportunity to acquire any knowledge about the plaintiff's race." Am. Br. 55-56. Rather, the evidence showed that Capt. Ehlers saw and heard the ponytailed passenger with the foreign accent and knew that the flight attendants thought Mr. Cerqueira was traveling with the ponytailed passenger because they both looked Middle Eastern. Further, both Mr. Flores and Ms. Sargent testified that Capt. Ehlers pointed out the passengers in the exit row (App. 326, Tr. 70; App. 334, Tr. 103) and Capt. Ehlers did not deny that he did so. App. 301, Tr. 132. Moreover, the flight attendants reported their concern that the three men had foreign appearances, Middle Eastern passports, Arabic names, and heavy accents, and the jury could properly infer that Capt. Ehlers relayed the flight attendants' concerns to Mr. Marquis. App. 302, Tr. 136-37.

IV. American Is Not Entitled to a New Trial Based on the Admission of the Consent Order or the District Court's Jury Instructions.

American briefly argues that it should have been granted a new trial based on its claims that the district court erred in admitting the Consent Order and instructing

the jury on the issue of liability. Am. Br. 58-59. This Court reviews the district court's denial of American's request for a new trial for an abuse of discretion, "recognizing that a new trial should be ordered only if the court believes that the outcome is against the clear weight of the evidence such that upholding the verdict will result in a miscarriage of justice." *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 14 (1st Cir. 2002) (citations omitted). For the reasons set forth in the sections I and II above, American is not entitled to a new trial.

V. There Is No Basis to Vacate the Jury's Award of Punitive Damages.

American seeks to vacate the jury's award of punitive damages. Am. Br. 60-61. This Court reviews *de novo* both the amount of the punitive damage award and "the sufficiency of the evidence on which it is premised." *Zimmerman*, 262 F.3d at 81; *accord Powell v. Alexander*, 391 F.3d 1, 15 (1st Cir. 2004). "When all is said and done, a punitive damage award will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct." *Id.* (citations omitted).

American does not object to the *amount* of punitive damages nor does it dispute that punitive damages are available where a defendant acts with reckless indifference to a plaintiff's civil rights. Am. Br. 60 (citing *Kolstad*, 527 U.S. at 535). Indeed, American never objected to the district court's charge on punitive damages

or the district court's response to the jury's request for further explanation of "reckless disregard of civil rights." *See* App. 396, Tr. 27; App. 414, Tr. 11. American simply asserts that "[t]here is no evidence in the record to support an award of punitive damages." *Id.*

Contrary to American's assertion, the Consent Order establishes that American was on notice that the type of discrimination alleged by Mr. Cerqueira is unlawful. App. 455-59, Trial Exh. 26. Further, both of American's formal decisionmakers—Capt. Ehlers and Mr. Marquis—testified that, on December 28, 2003, they were aware that if a passenger was refused service because of his perceived race or ethnicity, such a refusal of service would violate civil rights laws. App. 302, Tr. 137; App. 323, Tr. 59. Moreover, Mr. Marquis testified that he knows of situations in which pilots for American were concerned about serving certain passengers because of their ethnic or religious backgrounds (App. 323, Tr. 58), and yet American admitted that, during the last five years, it has not disciplined any employee for engaging in such discrimination. App. 358, Tr. 30-31. Thus, there was adequate evidence to support an award of punitive damages. *See Bisbal-Ramos*, 467 F.3d at 25 (upholding an award of punitive damages because the decisionmaker knew that the type of discrimination complained of violates the law); *McDonough*, 452 F.3d

at 24 (holding that reckless indifference concerns the defendant's knowledge that it is acting in violation of the law).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (WordPerfect), the brief (not including those parts excluded by Fed. R. App. P. 32(a)(7)(B)(iii)) contains 13,912 words.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on September 10, 2007, two copies of this brief were served by first-class U.S. mail, postage prepaid, on the following counsel of record:

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