

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Docket No.: 21 MC 100 (AKH)

IN RE: WORLD TRADE CENTER DISASTER SITE
LITIGATION

-----X

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
THE MOTION BY THE CITY OF NEW YORK, THE BOARD OF
EDUCATION OF THE CITY OF NEW YORK, THE NEW YORK
CITY DEPARTMENT OF EDUCATION, THE NEW YORK CITY
SCHOOL CONSTRUCTION AUTHORITY, THE CITY
UNIVERSITY OF NEW YORK AND THE BOROUGH OF
MANHATTAN COMMUNITY COLLEGE.**

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UNITED STATES DISTRICT COURT
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IN RE: WORLD TRADE CENTER DISASTER SITE
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PRELIMINARY STATEMENT

Plaintiffs respectfully offer the within Memorandum of Law in Opposition to the pending motion brought by defendants the City of New York, The Board of Education of the City of New York, the New York City Department of Education, The New York City School Construction Authority, the City University of New York and the Borough of Manhattan Community College (collectively, “defendants”).

ARGUMENT

POINT I.

THIS COURT SHOULD NOT APPLY A PROCEDURAL ASPECT OF NEW YORK STATE LAW TO INTERFERE WITH A FEDERAL RIGHT CREATED BY THE ATSSSA.

Before addressing the question of whether individual plaintiffs filed or timely filed a Notice of Claim against the City or its individual agencies, the first and more important issue this Court must decide is whether the New York State Notice of Claim provisions—an area of New York State *procedural* law, should even be applied to these cases brought under a federal cause of action. Plaintiffs submit that the plain language of the Air Transportation Safety and System Stabilization Act of 2001, 49 USC § 40101 (“ATSSSA”) and ample relevant case precedent militate in favor of a finding that that the Notice of Claim provisions—procedural aspects of state law -- should not apply. Accordingly, the remainder of the issues raised on the instant motion(s) should be denied as moot.

**A. Local Notice Of Claim Provisions Are Inapplicable To An
Action Brought Pursuant To ATSSSA**

The question presented here is whether General Municipal Law (“GML”) § 50-e(1) is applicable at all to claims brought under The Air Transportation Safety and System Stabilization Act of 2001 (“ATSSSA”). GML § 50-e(1) requires the service of a notice of claim upon a public corporation as a condition precedent to filing suit. *Williams v. Nassau County Med. Ctr.*, 6 NY3d 531, 535 (2006). By enacting ATSSSA, Congress created a “federal cause of action as the exclusive judicial remedy for damages arising out of [September 11 aircraft crashes].” *In re: WTC Disaster Site* (“McNally”), 414 F3d 352, 373 (2d Cir. 2005). Under that federal cause of action, the ATSSSA directs, in relevant part: “[t]he *substantive law* for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.” ATSSSA, §408(b)(2) (emphasis added).

Given the foregoing, and since suits brought in this Court pursuant to the ATSSSA are brought pursuant to a federal cause of action—a federal right -- the applicability of the state *procedural* laws regarding notice of claim provisions need not be adhered to by this Federal Court. “It is not incumbent upon a federal court to apply a procedural rule of the forum state when doing so would effectively extinguish an important federal right.” *See, Williams v. Allen*, 616 F.Supp. 653, 658 (E.D.N.Y. 1985); *Davis v. Krauss*, 478 F.Supp. 823, 825 (E.D.N.Y. 1979)(“If applied, such a notice of claim provision would substantially interfere with the exercise of an important federal right”). To the same effect, *see, e. g., Paschall v. Mayone*, 454 F.Supp. 1289, 1297-98 (S.D.N.Y. 1978); *Glover v. City of New York*, 401 F.Supp. 632, 635 (E.D.N.Y. 1975); *Carrasco v. Klein*, 381 F.Supp. 782, 787 & n. 12 (E.D.N.Y. 1974); *Laverne v. Corning*, 316 F.Supp. 629, 636-37 (S.D.N.Y. 1970).

Nothing in the language of the ATSSSA provides for the New York State Notice of Claim provisions of GML §50-e to be followed—indeed, the ATSSSA expressly states that state substantive state law should be applied, leading to the inescapable corollary, *i.e.*, *that state procedural law should not be applied*. In fact, there are a number of instances where the Federal Courts have determined that causes of action brought under other federal statutes do not require that the plaintiffs comply with the Notice of Claim provisions of GML 50-i. For example, it is well settled that notices of claim need not be filed in Civil Rights actions brought under 42 U.S.C. § 1983. *See, e.g., Finley v. Giacobbe*, 827 F.Supp. 215, 219 (S.D.N.Y.,1993); *Felder v. Casey*, 487 U.S. 131 (1988) (“Casey”).

The U.S. Supreme Court found that the notice-of-claim requirement was “inconsistent in both the purpose and objective of federal civil rights law [and that p]rinciples of federalism as well as the Supremacy Clause, dictate that such a state law must give way to vindication of a federal right.” *Id.* 487 U.S. at 153. The *Casey* Court also wrote that it “fully agree[d] with the near unanimous conclusion of the federal courts” that notice-of-claim provisions are inapplicable to § 1983 actions brought in federal court. *Id.* 487 U.S. at 140; *see Brown v. United States*, 742 F.2d 1498 (D.C.Cir.1984) *cert. denied*, 471 U.S. 1073 (1985). Similarly, the New York Supreme Court, Appellate Division, Second Department has held that because an action governed by general maritime law and State statutes may not operate so as to interfere with plaintiff’s substantive admiralty rights, the notice of claim provisions of the General Municipal Law are inapplicable. *Scholl v. Town of Babylon*, 95 A.D.2d 475, 483 (2d Dep’t 1983).

The Second Circuit has defined the standard for determining whether the New York state notice of claim provision would be applied:

While the absence of a notice-of-claim provision generally does not render a federal statute deficient, *see Felder [v. Casey]*, 487

U.S. at 140, 108 S.Ct. 2302; *AT & T*, 736 F.Supp. 496, 499, we will apply such a provision to a federal action *where there is evidence that Congress intended us to do so*.

Hardy v. New York City Health & Hosp. Corp., 164 F.3d 789, 793 (2d Cir. 1999) (emphasis added). Here, we have evidence that Congress intended precisely the opposite—the plain language of ATSSSA stating that state substantive law should be applied—accordingly, state procedural law should not.

In federal civil rights actions pursuant to 42 U.S.C. § 1983, federal and state courts have concurrent jurisdiction, and federal law preempts state law to the extent that a state *may not require a Notice of Claim* as a prerequisite to recovery. *Casey*, 487 U.S. at 138; *Wanczowski v. City of New York*, 186 A.D.2d 397 (1st Dep't 1992). While the City has argued in other motions related to WTC Disaster Site litigation that this is limited to federal civil rights actions under 42 U.S.C. §1983, that is plainly not the case. Citing *Casey* and *Ahern*, the Appellate Division, Third Department has held to the same effect in a case arising from an alleged violation of the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*):“We note that plaintiffs are correct in their assertion that Federal law preempts State and municipal notice of claim statutes.” *Mitchell v. La Barge*, 257 A.D.2d 834, 835 (3d Dep't 1999).

The question of whether a federal law preempts state law is fundamentally a matter of Congress's intent. *See, e.g., English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Since the existence of preemption turns on Congress's intent, this Court should“begin as we do in any exercise of statutory construction[,] with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs.”*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645, 655 (1995); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983).

It is well established that state law is preempted under the Supremacy Clause, U.S. CONST., ART. VI, CL. 2, in any of several circumstances. The applicable instance at issue here is when, acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. *McNally*, 414 F.3d at 371-372 citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

‘If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.’ *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Where the language of the statute plainly indicates that Congress intended preemption, “[w]e must give effect to th[e] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.” *Shaw*, 463 U.S. at 97. If the text of the statute is ambiguous, either as to Congress's intent to preempt at all or as to the extent of an intended preemption, the meaning of the statute may be gleaned from its context and from the statutory scheme as a whole, or by resort to the normal canons of construction and legislative history. *See Shaw*, 463 U.S. at 100 (finding that federal statute preempted state law based on the statute's “plain language ..., [its] structure ..., and its legislative history”); *see generally K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 57 (2d Cir. 2003); *Auburn Housing Authority v. Martinez*, 277 F.3d 138, 143-44 (2d Cir. 2002).

As noted, *supra*, the plain language of ATSSSA’s §408 does not require that the plaintiffs file a Notice of Claim on this Federal cause of action *or that they comply* with any other *procedural* aspect of New York law. Rather, quite the contrary, the statute expressly requires

that the *substantive* law of the state where the planes crashed on September 11, 2001 be applied by the United States District Court:

408 (b) Federal cause of action.--

(1) Availability of action.--There shall exist a Federal cause of action for damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001. Notwithstanding section 40120(c) of title 49, United States Code [49 U.S.C.A. § 40120(c)], this cause of action shall be the exclusive remedy for damages arising out of the hijacking and subsequent crashes of such flights.

(2) Substantive law.--The substantive law for decision in any such suit shall be derived from the law, including choice of law principles, of the State in which the crash occurred unless such law is inconsistent with or preempted by Federal law.

(3) Jurisdiction.--The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction *over all actions* brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001.

ATSSSA, §408(b) (emphasis added). The *procedural* law to be applied is that of the Federal Rules of Civil Procedure, and the local rules for the United States District Court for the Southern District of New York.

B. Application of New York’s Notice of Claim Provision Unfairly Limits Plaintiffs’ Time To Commence Their ATSSSA Claims.

In a decision granting an injured World Trade Center worker leave to file a late notice of claim, a New York State Supreme Court Justice questioned whether the federal cause of action created by ATSSSA required the application of the federal “catch all” four-year statute of limitations provided by 28 U.S.C. § 1658 (“§ 1658”) for causes of action arising out of Acts of Congress rather than the year and ninety days provided by the General Municipal Law. *See*

Antine v. City of New York, 14 Misc.3d 161, 165 (Sup. Ct., N.Y. Cty. 2006) (Stallman, J.).

Addressing the issue, Justice Stallman wrote:

It should no longer be assumed that the one-year-and-90-day limitations period of General Municipal Law § 50-i applies to petitioners' claims. In *In re WTC Disaster Site* (414 F3d 352 [2005], *supra*), the United States Court of Appeals for the Second Circuit held that section 408 (b) of the ATSSSA is the exclusive remedy for "claims of respiratory injuries by workers in sifting, removing, transporting, or disposing of [World Trade Center] debris" (414 F3d at 377.) On its face, section 408 of the ATSSSA does not set forth a specific limitations period for the federal cause of action. Federal law provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." (28 USC § 1658 [a]; *see Jones v R. R. Donnelley & Sons Co.*, 541 U.S. 369 [2004].) Thus, in light of *WTC*, an issue arises as to whether the limitations period should be four years, not one year and 90 days.

Antine, 14 Misc.3d at 165.

Prior to Congress' enactment of 28 U.S.C. § 1658 (§ 1658') (four-year "catch-all" statute of limitations for actions arising out of Acts of Congress) in 1990, federal courts applied the borrowing doctrine to actions arising out of federal law. The District of Columbia Circuit Court explained the borrowing doctrine: "[t]o effectuate the goals of federal law, courts, when faced with deficiencies in federal schemes, look to other sources of law to 'borrow' appropriate provisions." *Brown v. United States*, 742 F.2d 1498, 1503 (D.C. Cir. 1984). This concept was echoed in *Wilson v. Garcia*, 471 U.S. 261, 266 (1985), specifically with respect to time limitations: "[w]hen Congress has no established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. The Supreme Court explained the impact of § 1658 on the borrowing doctrine in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004): "Prior to the enactment of § 1658, the 'settled practice [was] to adopt a local time limitation as federal law.'" *Id.*

at 377 (quoting *Wilson v. Garcia*, 471 U.S. at 266-267). Even though the borrowing doctrine is no longer applied in federal courts following § 1658's enactment, the analysis under the doctrine is still relevant and enlightening, especially in two contexts: (1) the analysis of whether a federal cause of action is deficient, requiring the "borrowing" of other law to fill in the deficiency; and (2) the courts' consistent view that notice of claim provisions are inapplicable and unnecessary in federal causes of action.

The initial step in borrowing doctrine analysis is whether the federal statute at issue is deficient with respect to time limitations for the cause of action. *423 S. Salina St., Inc. v. City of Syracuse*, 68 N.Y.2d 474, 491 (1986) ("Borrowing is to be indulged in only when there is a deficiency in the federal scheme"). If so, the question then becomes what state law should be "borrowed" to cure this deficiency in the federal scheme. In *Felder v. Casey*, 487 U.S. 131 (1988), the Supreme Court addressed the question of whether state notice of claim provisions should be borrowed for a 42 U.S.C. § 1983 civil rights action. While the Court noted that statutes of limitations are "considered indispensable to any scheme of justice", the Court contrasted notice of claim provisions:

Notice of claim provisions...are neither universally familiar nor in any sense indispensable prerequisites to litigation, and there is thus no reason to suppose that Congress intended federal courts to apply such rules, which 'significantly inhibit the ability to bring federal actions.'

Id. at 140 (quoting *Brown*, 742 F.2d at 1507).

In *Brown*, the District of Columbia Circuit Court also examined whether notice of claim provisions were applicable to a federal cause of action. The Court similarly contrasted state statutes of limitations and notice of claim provisions, stressing at the outset that "we must emphasize that [notice of claim provisions] borrowing does not have the same support in tradition that the borrowing of the statute of limitations would have." *Id.* at 1506. The Court found

that while the absence of a statute of limitations from a federal scheme was a deficiency, requiring the “borrowing” of state law time limitations, notice of claim provisions were distinguished: “nothing in federal borrowing doctrine leads us to believe that state law can precondition the accrual of federal rights of action [through a notice of claim provision].” *Id.* at 1508. The New York Court of Appeals expounded on the distinction the *Brown* Court made between notice of claim provisions and the statute of limitations:

[T]he borrowing of State procedural rules has been limited to rules that “clearly establish the point at which a cause of action ends”, that a notice of claim provision has a purpose quite distinct from Statutes of Limitation, . . . that the application of a local procedural rule “that would significantly limit the ability to bring federal actions” was not reasonable[.]

423 *S. Salina St., Inc.*, 68 N.Y.2d at 491 (internal citations omitted).

Further support of the inapplicability of GML § 50-e can be found in Justice Stallman’s decision in *Antine*. Justice Stallman questioned “whether a notice of claim is required for claims governed by the ATSSSA,” noting that the issue had “never been squarely addressed.” *Antine*, 14 Misc.3d at 168. Justice Stallman further addressed the issue of the applicability of notice of claims in ATSSSA cases, and supported his point with citation to *Casey*: “[t]he ATSSSA’s preemption of state law remedies and the exclusive jurisdiction of the federal court raise the issue of whether a notice of claim must be served as a condition precedent to lawsuits governed by ATSSSA.” *Id.*, 14 Misc.3d at 168 *citing Casey*, 487 U.S. 131.

Here, the City Defendants contend that the claimants at issue are required to comply with GML § 50-e in these ATSSSA causes of action. However, as discussed *supra*, where a federal cause of action arises out of federal law that is facially silent with respect to time limitations, the absence of a notice of claim provision in a federal cause of action is not deemed a deficiency.

ATSSSA is silent with respect to any period of time limitations: “[o]n its face, Section 408 of the ATSSSA does not set forth a specific limitations period for the federal cause of action.” *Antine*, 14 Misc.3d at 165. Because of this deficiency of time limitations in ATSSSA, the four year “catch-all” statute of limitations under 28 U.S.C. § 1658 should fill the deficiency¹; by contrast, however, the notice of claim provisions of GML § 50-e should not apply to the federal ATSSSA cause of action for the reasons discussed above.

The Defendants contend that *Taunus Corp. v. City of New York*, 279 F. Supp. 2d 305 (S.D.N.Y. 2003) and *In re Felder v. City of New York*, 53 A.D.3d 401 (1st Dep’t 2008) conclusively establish that “[t]here can be no dispute that GML § 50-e applies to these ATSSSA actions.” See Defs.’ Brf. at p. 11. Notably, however, this Court’s decision in *Taunus* is silent as to ATSSSA and does not even address the question of whether GML § 50-e is applicable to a federal cause of action. Review of the relevant language of ATSSSA provides that the cause of action created under its §408 (b) are for cases seeking “damages arising out of the hijacking and subsequent crashes of American Airlines flights 11 and 77, and United Airlines flights 93 and 175, on September 11, 2001.” Under that language, *Taunus* does not present a cause of action properly brought under ATSSSA.

In *Taunus*, this Court wrote that “the plaintiffs allege that the City is liable for their injuries based on its negligent inspection and storage of diesel tanks in 7 World Trade Center before the attacks and the City’s activities in the disaster area for three months after the attacks.” *Taunus*, 279 F.Supp.2d at 307 (emphasis added). Accordingly, the fact that the fires in 7 WTC

¹ § 1658. Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

were precipitated by the planes crashing on September 11 was utterly tangential to the claimed bases for the City's liability, *i.e.*, negligent inspection, negligent storage of flammable material and negligent control of the premises. "Plaintiffs allege that the City was negligent in inspecting, controlling, and/or occupying space in 1, 2, 4, and 7 World Trade Center ('WTC') and in its activities in the Frozen Zone during the three months following the attacks." *Taurus*, 279 F.Supp.2d at 307.

Matter of Felder was an appeal from a decision by Justice Stallman to grant leave to file a late notice of claim. Initially, the Appellate Division was asked to define the standard for proof needed to bring a successful motion for such leave, and in a decision later recalled by that Court, it incorrectly held that applications for leave to file late notices of claim should be brought before this Court, in abrogation of the express language of the governing statute. That decision, which was initially reported at 43 A.D.3d 749 (1st Dep't 2007) was vacated in July 2008 by the decision upon reargument, which recognized the initial error and held the application had to be made in the Supreme Court of the State of New York. *Matter of Felder*, 53 A.D.3d 401.

While the *Felder* Court held that ATSSSA did not "pre-empt" New York's Notice of Claim provisions (*see* 53 A.D.3d at 402), we submit that Court was mistaken, given the plain language of the relevant portion of the statute. We respectfully submit that this Court is in a far better position to interpret and construe the intent of the United States Congress in drafting a federal statute creating a federal cause of action in language that expressly requires the application of *federal* procedural rules to the litigation of matters brought thereunder. Indeed, New York State Supreme Court Justice Stallman properly urged that the issue of applicability of notice of claim provisions to ATSSSA suits "would be appropriately raised in federal court." *Antine*, 14 Misc.3d at

168-169. Justice Stallman expounded upon the myriad reasons that federal court should properly hear the issues of applicability raised here:

[S]trong policy reasons and prudential concerns weigh in favor of deferring to the federal court's jurisdiction. Reaching the statute of limitations issues would only subvert the Congressional intent of the ATSSSA "to ensure consistency and efficiency in resolving the many expected actions arising from the events of September 11", when Congress designated federal District Court to preside over the claims. A determination of this Court might have issue preclusion effect in the plenary actions in federal court, thus undermining the federal court's jurisdiction over ATSSSA claims.

Antine, 14 Misc.3d at 167 (internal citations omitted).

The U.S. Supreme Court also stressed this point when it stated, "this Court has generally recognized that the problem of characterization [of the applicable statute of limitations] 'is ultimately a question of federal law.'" *Wilson*, 471 U.S. at 269. The issue of the *applicability* of GML § 50-e on an ATSSSA cause of action is not one requiring the interpretation of New York state law, where federal courts will largely yield to the New York State courts to be the authority on New York State law. Rather, the issue is one of Federal preemption and the construction of the plain language of a federal statute that expressly states the procedural aspects of an ATSSA litigation should be those of the federal courts. Therefore, this Court should properly address the applicability of GML § 50-e to these ATSSSA claims and upon doing so, should find that it is inapplicable here.

C. The Purpose Of The Notice Of Claim Provision Conflicts With The Purposes Of ATSSSA

Even assuming, *arguendo*, that a state's notice of claim provisions are applicable in a federal cause of action, they should not be applied where, as here, those provisions conflict with the purpose of the federal cause of action, resulting in preemption. The ATSSSA provides: "[t]he substantive law for decision in any such suit shall be derived from the law . . . of the State in which

the crash occurred *unless* such law is inconsistent with or preempted by Federal law.” ATSSSA § 408(b)(2) (emphasis added).

Defendants argue that notice of claim procedures are *substantive*, rather than *procedural* law and thus are properly applicable here pursuant to § 408(b)(2) of ATSSSA. They are mistaken. As the Restatement, 2d, Conflicts of Law, explains, “each state has local law rules prescribing *the procedure* by which controversies are brought into its courts and by which the trial of these controversies is conducted. These rules for conducting lawsuits and administering the courts’ processes vary from state to state.” See Restatement, 2d, Conflict of Law § 122 (emphasis added). The notice of claim procedure is clearly a “procedure by which controversies are brought into . . . courts.” Indeed, the New York State Court of Appeals refers to notice of claim provisions as *state procedural rules* throughout its opinion in *423 S. Salina St., Inc.*, 68 N.Y.2d 474. Similarly, in *Brown v. United States*, 742 F.2d 1498, 1503, the D.C. Circuit similarly refers to rules other than statutes of limitation, *such as notice of claim provisions*, as *procedural* rules. *Brown*, 742 F.2d 1498 at 1503.

However, *even if* this Court finds that GML § 50-e is substantive New York law and potentially applicable, the Court may not apply GML § 50-e to ATSSSA actions if the GML section conflicts with Federal law. The concepts of inconsistency and preemption in this ATSSSA provision are based in the United States Constitution: “Under the Supremacy Clause of the Federal Constitution, [t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” *Felder v. Casey*, 487 U.S. at 138 (*quoting Free v. Bland*, 369 U.S. 663, 666 (1962)). “Such a conflict arises when ‘compliance with both federal and state regulations is a physical

impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when state law 'stands as an obstacle to the accomplishment and objectives of Congress.'" *In re: WTC Disaster Site*, 414 F3d at 373 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The New York Court of Appeals commented on the effect of applying notice of claim provisions to federal actions: "the notice of claim provision. .had its roots in sovereign immunity which is antithetical to the Federal scheme." 423 S. *Salina St., Inc.*, 68 N.Y.2d at 491.

In *Casey*, 487 U.S. 131, the Court's inquiry also focused on the "purpose and nature" of the federal law and whether the state notice of claim statute conflicts with the "purpose and nature" of the federal law. *Casey*, at 139. This inquiry applies regardless of whether the federal cause of action was brought in state court or in federal court, where "courts are occasionally called upon to borrow state law." *Id.* The Court noted that the purpose of § 1983 "is to provide compensatory relief to those deprived of their federal rights by state actors." *Id.* at 141. By contrast, the purpose of Wisconsin's notice of claim provisions is, to "condition the right of recovery. and .minimize governmental liability." *Id.* In finding that the notice of claim requirements were inapplicable as inconsistent with the purposes of the federal law, the Court stated: "We think it plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." *Id.* at 142.

Similarly, in *Brown*, 742 F.2d 1498, the Court weighed the purposes of the notice of claim provisions with the purpose of the federal cause of action. The Court found that purpose of the notice of claim provision "is to compel notice so that the municipal defendant may investigate early, prepare a stronger case, and perhaps reach an early settlement." *Id.* at 1506. The Court was not persuaded that this purpose was consistent with the federal law at issue, holding that the

plaintiffs“noncompliance with [the notice of claim provision] cannot bar his federal claims.” *Id.* at 1509.

Here, the purpose of GML § 50-e must be pitted against the purpose of ATSSSA to determine whether that purpose is inconsistent with Congressional intent. The purpose of GML § 50-e, according to the Appellate Division, is“to protect the municipality from unfounded claims and to ensure that it has an adequate opportunity ‘to explore the merits of the claim while information is still readily available.” *Porcaro v. City of New York*, 20 A.D.3d 357 (1st Dept 2005), quoting *Teresta v. City of New York*, 304 N.Y. 440, 443 (1952).

As for ATSSSA, the Second Circuit explained that“[t]he purpose of Section 408(b)(3)... was to ensure consistency and efficiency in resolving the many expected actions arising from the events of September 11.” *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F3d 52, 58 (2d Cir. 2003). This Court has also recognized the importance of consistent outcomes among the claims brought under ATSSSA:

[ATSSSA] vests the Southern District of New York with“original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death)” arising from the September 11th attacks. *Id.* at § 408(b)(3). This court's exclusive jurisdiction over the Underlying Cases further supports supplemental jurisdiction. *A state court would not have the power to hear the whole dispute.* Thus, if I declined to exercise supplemental jurisdiction and no independent basis for jurisdiction is found, *this dispute would have to be filed in state court and heard separately and apart from the cases that control claims made under the policies. This would contradict Congress' desire for uniformity and expertise in dealing with these cases. See* 147 Cong. Rec. S. 9589, 9594 (Sept. 21, 2001), 9594 (remarks of Sen. McCain) (‘the bill attempts to provide some sense to the litigation by consolidating all civil litigation arising from the terrorist attacks of September 11 in one court’); *id.* at 9595 (remarks of Sen. Hatch) (‘we consolidated the causes of action in one Federal court so that there will be some consistency in the judgments awarded’). *Requiring a state court to hear this case would create the*

possibility of inconsistent and inefficient judgments regarding the amount of damages available to plaintiffs in the Underlying Cases.

In re September 11th Liability Ins. Coverage Cases, 333 F.Supp.2d 111, 117 (S.D.N.Y., 2004) (all emphasis added), *citing Canada Life*, 335 F.3d at 55.

The legislative history of ATSSSA supports the Second Circuit's explanation as Senator Hatch commented: "For those who seek to pursue the litigation route, I am pleased that we consolidated the causes of action in one Federal court so that there will be some consistency in the judgments awarded." 147 Cong. Rec. S9595 (Sept. 21, 2001). As laid out above, the Congressional intent for ATSSSA is centered on the consistent and efficient resolution of claims.

Sadly, the history of the litigation of the Notice of Claim issue has already resulted in vastly inconsistent outcomes. Originally, the *Felder* appeal arose out of a series of petitions brought in the Supreme Court (as required by the statute) seeking leave to file late notices of claim on behalf of persons who were exposed to toxic substances while working at the site of the World Trade Center ["Ground Zero" and related sites including the Fresh Kills landfill] in the weeks and months following September 11, 2001, but who, due to the nature of exposure-related illnesses, did not initially understand that they had incurred serious and life threatening injuries. In many cases, even upon diagnosis, these petitioners did not immediately seek legal representation for various reasons. Each such motion was supported by the affirmation of the petitioner's attorney, a copy of the duly signed Notice of Claim sought to be filed and documentary evidence setting forth the particular facts and circumstances of the exposure-related injuries suffered by Ground Zero workers.

A large number of the petitions were never opposed by the City of New York. Another group were opposed, with the City's attorneys contending that the petitions were defective if they were not supported by the petitioner's own affidavit and/or an affidavit by his or her physician

attesting to the merit of the petitioner's underlying claim, including information relating to the dates of diagnosis. *Such affidavits were necessary, defendants argued, so they could ascertain whether the claim was time barred.* As petitioners argued before the Appellate Division on the first appeal (resulting in the September 2007 order later vacated by that court), the authority the City cited for this contention—a decision by another Justice of the Supreme Court—was based on an incorrect interpretation of case law that was wholly inapposite to the matters at bar.

Both Justice Stallman and the Appellate Division were provided with extensive briefing on the issues at hand, including a detailed discussion of the case law addressing the proof that is necessary to properly support a petition for leave to file a late notice of claim. The Appellate Division ultimately determined that the motion for leave to file a late notice of claim did require a petitioner's affidavit—but the inconsistent determination by the City as to which applications to file late notices to oppose, and the fact that hundreds of notices of claim were timely filed without such proof being required, demonstrates that the GML provisions have not been consistently applied on the ATSSSA claims.

It cannot be disputed that the litigation at bar is unusual and procedurally complex. There are nearly *ten thousand* plaintiffs, each of whose claims are being tried as a separate case (as opposed to one class action). There are well over two hundred defendants in the 21 MC 100 and 21 MC 102 dockets. In addition to the City of New York, some of the defendants are quasi-municipalities or divisions or agencies of the City, further complicating the litigation with notice of claim statutes at issue here. Indeed, the accrual date for the purpose of calculating the statute of limitations alone is an intensely complex and fact-sensitive inquiry: almost every plaintiff has multiple injuries, each injury often with a different onset date of symptoms and each injury often with a different diagnosis date; the knowledge of which injury is the “primary” injury for the

purposes of accrual is confusing even for seasoned attorneys and many of the plaintiffs' injuries were initially attributed by their physicians to some non-World Trade Center related cause such as the common cold, influenza or allergies. These issues highlight the critical importance of utilizing Congress' intent of consistency and efficiency to streamline and to minimize—to the extent possible -- the vast complexity of this litigation.

Congress' first goal of consistency in judgments will be thwarted for off-site clean-up and demolition workers if the possibility of recovery hinges upon precisely the building in which the plaintiff worked—specifically whether that building was owned or controlled by a municipality or quasi-municipality as opposed to a private owner or leaseholder. If a plaintiff who worked in a City-owned building finds his claim barred due to a failure to comply with notice of claim provisions and a plaintiff who worked in a privately owned building is unaffected by that notice of claim provision in the same litigation, there is a clearly a glaring and unjust inconsistency.

Simply put, GML § 50-e operates in direct abrogation of Congressional intent for the claims brought under the ATSSSA. The provision has and will continue to result in inconsistent judgments, often because the particular plaintiff does not have the legal acumen of an attorney or the diagnostic and causal connection ability of a doctor.

Congress' second goal, *i.e.*, financial and procedural efficiency, has also been thwarted. For example, each plaintiff who seeks leave to serve a late notice of claim must do so in state court by purchasing an index number for \$210.00 and a Request for Judicial Intervention for \$95.00. This additional cost is in addition to the cost of purchasing an individual docket number for \$350.00 in this Court. The process of this application from filing to judgment often takes months, and the statute of limitations is tolled in the process. The substantial additional costs and burden of filing in multiple courts is extremely inefficient and again, results in inconsistency.

In short, applying the GML § 50-e Notice of Claim requirement results in inconsistent judgments for litigants for a number of reasons including the identity and status of the defendant that owns the building in which plaintiff was exposed and the plaintiffs' confusion in grasping the legally complex notion of accrual dates. Continued compliance with § 50-e further renders litigation under ATSSSA inefficient due to the additional involvement of New York State courts, tolling provisions during pending late-notice-of-claim applications, New York State Court decisions and the time and expense involved with filing and litigating a late-notice-of-claim application. Plainly stated, the entire point of Congress selecting this Court as the Court with 'original and exclusive jurisdiction' under § 408(b)(3) will only be properly served if this Court finds that GML § 50-e is inapplicable to ATSSSA claims. Otherwise, GML § 50-e will "stand[] as an obstacle to the accomplishment and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. at 67.

In addition, the purpose of the City's notice of claim provisions must be viewed in the context of the unique nature of this litigation. Where the purpose of the notice of claims is to enable municipalities to pass upon the merits of a claim before the initiation of litigation and thereby forestall unnecessary lawsuits—here much of this purpose has already been satisfied. The City Defendants have been served with Master Pleadings and "short-form" complaints; they have received extensive discovery from plaintiffs, including medical records and Core Discovery Responses; the City Defendants have already held countless "50-h" hearings of plaintiffs and continue to do so. These defendants have long been aware of the circumstances and claims involved in the Ground Zero litigation, having had almost *eight years* to investigate the facts and circumstances of the toxic exposure claims brought by persons working at or near the World Trade Center site. *The purpose of the notice of claim is not to reach the merits of the case* and in

each of the cases cited in their moving papers and the appendices thereto, the City Defendants have received information far beyond the basic type of information required in a notice of claim.

Therefore, since GML § 50-e operates as an obstacle to Congressional intent and the purposes of GML § 50-e have largely already been satisfied, this Court should unequivocally hold that GML § 50-e is inapplicable to these ATSSSA actions.

POINT II.

SERVICE UPON THE CITY IS SUFFICIENT WITHOUT SERVICE UPON THE INDIVIDUAL AGENCY UNLESS THE CAUSE OF ACTION IS ALLEGED AGAINST AN INDIVIDUAL OFFICER, APPOINTEE OR EMPLOYEE OF THE CITY OR AGENCY.

The plain language of GML §50-e requires only that the City be provided notice of the claim sufficient to allow the City to investigate a claim for which it will be liable. It does not require notice to be served upon each individual agency of the city. The exception to this rule is when the claim is brought against an individual“officer, appointee or employee” of the city one of its agencies, in which case that individual“officer, appointee or employee” must be provided Notice of Claim. Specifically, the statute provides that

In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section.

General Municipal Law § 50-e(1)(a). The statute goes on to state that

3. How served; when service by mail complete; defect in manner of service; return of notice improperly served.

(a) The notice shall be served on the public corporation against which the claim is made by delivering a copy thereof personally, or by registered or certified mail, to the person designated by law as one to whom a summons in an action in the supreme court issued against such corporation may be delivered, or to an attorney regularly engaged in representing such public corporation.

General Municipal Law § 50-e (3)(a). The individual agencies named as movants on this motion are each a division of City government; in no case has an individual officer appointee or employee of any of those agencies been named as an individual defendant in these actions. Accordingly, service of the Notice of Claim on the City, if necessary at all on this federal cause of action, is sufficient notice to the individual agencies.

POINT III.

THE STATUTE OF LIMITATIONS AGAINST A NEW YORK CITY MUNICIPALITY IN A FEDERAL CAUSE OF ACTION SHOULD BE FOUR YEARS THUS EXTENDING PLAINTIFFS' TIME TO MOVE FOR PERMISSION TO FILE A LATE NOTICE OF CLAIM

The time limitation to file an application for leave to file a late notice of claim in an action arising out of federal law should not be the one year and ninety days defined in GML § 50-i. While the City Defendants correctly state in their motion papers that if a plaintiff fails to timely serve a notice of claim within ninety days of accrual under GML § 50-e(1), then the plaintiff may seek leave of court to serve a late notice of claim pursuant to GML § 50-e(5). However, the City Defendants incorrectly assert that the time limit to file the late-notice-of-claim application is simply one year and ninety days.

GML § 50-e(5) explains the length of the extension of time for the filing of a late-notice-of-claim applications: “[t]he extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation.” In contrast, the language of GML § 50-i clearly sets out a year and ninety day period for pursuing a case against a municipality: “the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based.”

The juxtaposition of the language of these two subdivisions of the GML is particularly revealing. In drafting § 50-e(5), the legislature did *not* reference § 50-i as the time limit to file the late-notice-of-claim application, nor did the legislature explicitly state that the extension shall not exceed one year and ninety days. Thus, if the time limit to commence an action against a public corporation is longer than one year and ninety days, then the time limit to file the late-notice-of-claim application is likewise extended. Federal law provides a four-year “catch-all” limitations period for actions arising under Act of Congress. 28 U.S.C. § 1658 (a) (“§ 1658”). When § 50-e(5) is combined with § 1658, the limitations period for filing a late-notice-of-claim application is thus extended to four years. This fact will be further developed in the analysis of *423 S. Salina St., Inc.*, discussed below.

Justice Stallman explained this framework in *Antine*, 14 Misc.3d 161 as follows:

It should no longer be assumed that the one year and 90 day limitations period of General Municipal Law § 50-i applies to petitioners’ claims. Federal law provides that “[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the date the cause of action accrues.”. Thus, an issue arises as to whether the limitations period should be four years, not one year and 90 days.

(quoting § 1658 (internal citations omitted)). Since the time to commence an action against a public corporation may be extended to four years under 28 U.S.C. § 1658 (a), then the time to commence a late-notice-of-claim application would likewise be extended to four years pursuant to GML § 50-e(5).

In *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004), the Supreme Court applied the federal “catch-all” four year statute of limitations to a race discrimination action brought under the Civil Rights Act of 1991. The Supreme Court defined whether a cause of action “arises under” for the purposes of § 1658: “.a cause of action ‘aris[es] under an Act of Congress enacted’ after

December 1, 1990, if the plaintiff's claim against the defendant was made possible by a post-1990 enactment.” *Id.* 541 U.S. at 382. The court applied the same “deficiency” analysis as utilized in the borrowing doctrine to determine whether the “catch-all” period should be applied to the federal cause of action, in that case, a 42 U.S.C. § 1981 action as amended in 1991. Since § 1981 was silent as to a period of limitations, and thus deficient, the Court held that the § 1658 “catch-all” period was applicable instead of the relevant two-year Illinois statute of limitations.

Here, as the federal statute in *Jones*, the ATSSSA is facially silent with respect to the statute of limitations², rendering it procedurally deficient. Thus, the § 1658 four-year statute of limitations should be applied to actions arising under ATSSSA, which was enacted well after 1990. It follows, then, that since the period for commencement against a public corporation would then be four years instead of the year and ninety days of GML § 50-i, the period for the commencement of a late-notice-of-claim application is likewise four years. It should also be noted that GML § 50-e(5) provides that “[a]n application for leave to serve a late notice of claim shall not be denied on the ground that it was made after the commencement of an action against the public corporation.” Thus, the commencement of actions against the City Defendants does should not preclude the Plaintiffs at issue from seeking leave to serve a late notice of claim, if this Court finds the Notice of Claim provision even applies to this federal cause of action, if the motion for leave to file a late notice of claim is filed within the four year federal statute of limitations.

The New York Court of Appeals addressed the question of the length of time in which a plaintiff may commence a late-notice-of-claim application in a federal cause of action in *423 S. Salina St., Inc.*, 68 N.Y.2d 474 (1986). There, plaintiff brought an action under the Federal Civil

²*See Antine, supra.* “On its face, Section 408 of the ATSSSA does not set forth a specific limitations period for the federal cause of action.”

Rights Act of 1871 in New York State court. The City there argued “that the three-year provision of CPLR 214 (5) should not be applied because to do so will, in light of GML § 50-e(5), also extend to three years the time to apply for permission to serve a late notice of claim.” *Id.* 68 N.Y.2d at 487. The Court’s reply was as follows:

That the shorter one-year 90-day provision of General Municipal Law § 50-i would limit the permissible extension as to a notice of claim relating to personal injury claim against a municipality is *simply irrelevant* under *Wilson’s* reasoning. If the shorter statute governing public employee torts is not to be applied to bar the action altogether, it should not be applied to bar an application for extension of time to file a notice of claim.

68 N.Y.2d at 487 (emphasis added). The Court of Appeals, in applying the borrowing doctrine and *Wilson*, 471 U.S. 261, concluded that the applicable statute of limitations for the federal action was three years, and thus also the period in which plaintiff could make a late-notice-of-claim application, *not* a year and ninety days.

The purpose of the analysis of *S. Salina St.* here is to refute the City Defendant’s claim that “[a]fter the one-year-and-ninety day mark, the court has no discretion to grant leave to serve a late notice of claim”, not to suggest that a three-year time limitation should be applied to late-notice-of-claim applications. Clearly, as the foregoing case law shows, the year-and-ninety day mark is not absolute when a federal cause of action is at bar.

Plaintiffs stress that no notice of claim, and thus no late-notice-of-claim application is applicable in a cause of action arising under ATSSSA. However, in the alternative, if the Court finds that GML § 50-e is applicable to these claims, Plaintiffs submit that this Court should hold that the late-notice-of-claim application may be commenced within four years pursuant to §1658.

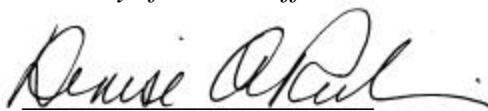
CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the City Defendants' motion for summary judgment and for such other relief as this Court deems just and proper.

Dated: New York, New York
June 19, 2009

Respectfully Submitted,

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A handwritten signature in cursive script, appearing to read "Denise A. Rubin", is written over a horizontal line.

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**ATTORNEY'S DECLARATION/AFFIRMATION OF
SERVICE**

Denise A. Rubin, an Attorney duly licensed to practice before the Courts of the State of New York, hereby affirms/declares the following under penalty of perjury:

I am associated with the law firm Worby Groner Edelman & Napoli Bern, LLP and as such represent the plaintiffs in the within action. On June 19, 2009, I duly served a true copy of the within PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE TO DEFENDANT CITY'S AND CITY AGENCIES' MOTION FOR SUMMARY JUDGMENT on the persons listed below by e-mail.

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