No. _____

In The
Supreme Court of the United States

ALLAN CAMPBELL,

Petitioner,

v.

AIR JAMAICA LTD. AND
CARIBBEAN AIRLINES LIMITED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May an airline's departure from its own policies or industry standards be relevant to the inquiry of whether an event was "unexpected or unusual" for purposes of establishing that an "accident" occurred under Article 17 of the Montreal Convention?

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The opinion of the court of appeals (App., *infra*, 1-27) is reported at 760 F.3d 1165. The opinion of the district court (App., *infra*, 28-37) is reported at 891 F. Supp. 2d 1338.

JURISDICTION

The court of appeals' judgment was entered on July 8, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL TREATY PROVISION INVOLVED

Article 17(1) of the Montreal Convention provides:

> The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Montreal Convention for the Unification of Certain Rules for International Carriage by Air, art. 17(1), May 28, 1999, reprinted in S. TREATY DOC. No. 106-45 (2000), 2242 U.N.T.S. 309, *available at* 1999 WL 33292734, at *33.

INTRODUCTION

Last year alone, more than 181 million passengers flew on international flights into and out of the United States.[1] The Eleventh Circuit decision below establishes a categorical rule that any of these passengers who suffer bodily injury in connection with an international flight covered by the Montreal Convention may not assert the airline's departure from its own policies or industry standards as a basis for proving that the injury-causing event was unusual or unexpected, such that it qualifies as an "accident" under Article 17 of the Convention. This pronouncement directly conflicts with the approaches of the Second and Fifth Circuits, and seemingly the Ninth Circuit as well.

As a result, divergent standards now exist for international air travel at many of the nation's busiest airports. Four of the top fifteen U.S. passenger gateways to the world are located within the Eleventh Circuit, and the Second, Fifth and Ninth Circuits encompass six of the other busiest airports.[2]

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[1] U.S. Dep't of Transp., *U.S. Int'l Air Passenger & Freight Statistics* (Dec. 2013), *available at* http://www.dot.gov/sites/dot.gov/files/docs/US%20International%20Air%20Passenger%20and%20Freight%20Statistics%20Report%20for%20December%202013.pdf, at 3.

[2] *Id.* at Table 6 (listing rankings as: (1) New York City, (2) Miami, (3) Los Angeles, (6) Atlanta, (7) San Francisco, (8) Houston, (10) Dallas, (14) Orlando, (15) Fort Lauderdale, (16) Seattle). In fact, twenty-four of the top forty are within these four circuits.

The inquiry into determining whether an "accident" occurred in connection with a covered international flight into or out of New York City, Houston, or Dallas, for instance, now differs from identical flights to or from Atlanta, Miami, Orlando or Fort Lauderdale. And it is unclear what rule governs international flights departing or arriving at airports in Los Angeles, San Francisco, and Seattle.

This situation cries out for the imposition of order. Not only does the Eleventh Circuit's inflexible rule deprive injured passengers of an important mode of proof that the airline's conduct gave rise to a compensable "accident," but because passengers who can bring suit in venues like New York or Texas do not face the same evidentiary restriction, air carriers are now subject to conflicting standards, dependent in large part upon the happenstance of which U.S. airport was on the itinerary. This divergence of standards creates incentives for forum-shopping by plaintiffs, and undoubtedly will affect the predictability of airlines' exposure to liability. Both concerns chafe at the purposes of the Montreal Convention – of establishing a uniform and predictable legal regime for accidents in international air travel.

STATEMENT OF THE CASE

A. This case arises out of an incident that began on September 8, 2009 at the Norman Manley International Airport in Kingston, Jamaica, where 66-year-old Allan Campbell, a U.S. permanent-resident

alien, sought to board an Air Jamaica flight back to Fort Lauderdale, Florida. App. 3; DE 9 (¶¶ 12, 15, 17).[3] Mr. Campbell was seeking to return home to Florida in time to renew his permanent-resident alien status, set to expire the next day. DE 9 (¶ 15). He arrived at the airport three hours early for the 4:10 p.m. flight. App. 3; DE 9 (¶¶ 2, 4). At the check-in counter, he was given a boarding pass with an assigned seat number. App. 3. He proceeded through the security checkpoints to the departure lounge where he waited for the boarding call. *Id.*; DE 9 (¶¶ 2, 4). The flight was delayed for about four hours. App. 3.

When the airline finally issued the boarding call for the flight, Mr. Campbell proceeded to embark, was searched once again, and then was given "the go-ahead to board" the aircraft. App. 3-4; DE 9 (¶ 7). As he sought to board, an Air Jamaica agent then recalled him back to the boarding gate and informed him that "he would not be accommodated on the flight and should arrange to depart on the next flight, the following day." App. 3-4. At that point, Mr. Campbell became anxious because "'his permanent resident alien card would expire on September 9, 2009 and he would encounter problems with immigration upon arrival in the United States.'" App. 33 (quoting DE 9 (¶ 15)). He expressed this "anxiety to

[3] Citations to documents in the district court record other than those in the Appendix ("App.") are listed by the docket entry ("DE") number from No. 1:11-CV-23233-JLK (S.D. Fla.).

make the flight" to "the [Air Jamaica] agent, at the boarding gate." DE 9 (¶ 15). Nevertheless, the agent refused to allow him to board the ticketed flight. *Id.* (¶ 9).

When Mr. Campbell returned to the check-in counter, he was required to pay a $150 change fee to travel on a flight the next day. App. 4. According to Air Jamaica's policy, passengers are not supposed to be charged "any additional amounts" for rebooking unless they request a flight change or are late for a flight. DE 9 (Exhibit A thereto). Mr. Campbell, however, had arrived hours early for the flight and certainly had not requested a flight change. Nor was it apparent that had he been "bumped" according to Air Jamaica's policy since "the airline does not charge for rebooking" when a passenger has been "bumped." *Id.* Mr. Campbell eventually paid the $150 fee. App. 4. At this point it was nighttime. Even though Mr. Campbell had been denied boarding involuntarily, Air Jamaica "refused to accommodate [him] at a hotel that night, which left him stranded at the airport." App. 4. Because the airport terminal building was under construction, Mr. Campbell had to spend the night outside under "adverse weather" conditions. *Id.*; DE 9 (¶ 12).

Mr. Campbell's *pro se* complaint alleged that he may have suffered a heart attack sometime during this travail at the Kingston airport. Although his pleading is not precise as to when, he alleged that at some point after having been denied access to the aircraft, he "became ill at the airport in Kingston,

Jamaica." DE 9 (¶¶ 12, 16). When he arrived at the Fort Lauderdale-Hollywood Airport the next day, he sought medical attention. *Id.* (¶ 16). He collapsed later that day and was transported to a hospital. *Id.* (¶¶ 12, 16). He was diagnosed as having suffered a heart attack, which the treating cardiologist attributed to his treatment at the airport in Jamaica. *Id.* (¶ 12).

B. Mr. Campbell filed suit *pro se* against Air Jamaica Ltd. and Caribbean Airlines Limited in federal court in Miami, invoking jurisdiction under the Montreal Convention and seeking damages primarily for the injury he suffered as a result of the heart attack. The defendants moved to dismiss for lack of subject-matter jurisdiction, failure to state a cognizable claim under the Montreal Convention, and on timeliness grounds. App. 4-5. Since the present petition focuses only on Mr. Campbell's Article 17 claim against Air Jamaica, we omit further discussion of the litigation concerning other issues.

The district court construed Mr. Campbell's amended complaint as alleging claims under Articles 17 and 19 of the Montreal Convention (App. 31 & n.5), but dismissed the case with prejudice for lack of subject matter jurisdiction (App. 5). The district court reasoned that Article 17 did not provide Mr. Campbell any relief because he had not "sufficiently alleged the occurrence of an 'accident'" under the Convention. App. 34. That analysis turned on two propositions: that merely suffering a heart attack "does not in itself constitute" an "accident" and that "neither the delay

of a flight nor the 'bumping' of a passenger constitute[s] an 'accident.'" App. 34-35 (citations and quotation marks omitted).

Mr. Campbell appealed the dismissal order to the Eleventh Circuit. App. 6. After a round of *pro se* briefing, the court of appeals designated the case for argument, appointed the undersigned as counsel for Mr. Campbell, ordered new briefing, and held oral argument. App. 6 n.2. Mr. Campbell contended that the district court's conclusion that he had merely been "bumped," and that such treatment is routine and not unexpected, was improper for resolution on a motion to dismiss. In particular, he noted that the circumstances alleged in his amended complaint departed from the district court's definition of "bumping" – *i.e.*, "'a well-established industry practice whereby passengers are denied seats due to intentional overselling, which is intended to minimize the number of empty seats due to cancellations.'" App. 35 (quoting *Weiss v. El Al Israel Airlines, Ltd.*, 433 F. Supp. 2d 361, 363 n.3 (S.D.N.Y. 2006), *aff'd*, 309 Fed. App'x 483 (2d Cir.), *cert. denied*, 129 S. Ct. 2797 (2009)).

Mr. Campbell first challenged the notion that a court could even take judicial notice of what "bumping" is as a starting point of reference for the "accident" inquiry. He added that the circumstances he alleged differed materially from the court's assumed definition of what constitutes a routine bumping: there was no indication that Air Jamaica ever announced that the flight was oversold; the airline

permitted Mr. Campbell to begin boarding the aircraft, rather than inform him in advance that no seat was available to him; and he was compelled to pay a change fee. Indeed, an email from an Air Jamaica/ Caribbean Airlines agent attached to the amended complaint states that if "a passenger is denied boarding (bumped), the airline does not charge for rebooking." DE 9 (Exhibit A thereto).

In light of these allegations, Mr. Campbell argued that a violation of industry standards or Air Jamaica's own policies should be relevant to the determination of whether a particular event is "unusual or unexpected" for purposes of Article 17, citing *Olympic Airways v. Husain*, 540 U.S. 644, 652, 656 (2004) and *Blansett v. Continental Airlines, Inc.*, 379 F.3d 177, 181-82 (5th Cir. 2004), *cert. denied*, 543 U.S. 1022 (2004), among other authorities. In an effort to illustrate the plausibility of his position, Mr. Campbell adverted the Eleventh Circuit to the type of evidence that could be developed on remand, pointing to the Federal Aviation Administration's regulations governing overbooking (on domestic flights), 14 C.F.R. § 250, *et seq.* (2008), which require airlines to request volunteers before bumping a passenger, as well as Caribbean Airlines' similar policy on overbooking, posted on the company's website.

The Eleventh Circuit affirmed in part, vacated in part, and remanded.[4] As to the Article 17 claim presented for review here, the court of appeals affirmed the dismissal. It reasoned that "the practice of 'bumping' . . . is systematic, widely practiced, and widely known," so "[a]s a general matter," bumping does not give rise to an Article 17 "accident." App. 15-16. The court rejected Mr. Campbell's contention that because the airline did not "follow standard procedures for bumping" "his was no run-of the-mill bumping." App. 16-17.[5] Specifically, the court held that the "alleged irregularities are *irrelevant* to Article 17 analysis, . . . which measures *only* whether the event was unusual from the viewpoint of the passenger, not the carrier." App. 17 (emphasis added). "Therefore," the court added, "whether internal airline records documented a bumping *in no way* informs whether an accident occurred." *Id.* (emphasis added). The court

[4] As to the other issues not presented in this petition, the court of appeals held that Mr. Campbell's amended complaint did "relate back to his timely original complaint" (App. 21), and that the district court erred in dismissing Mr. Campbell's Article 19 claim for economic loss occasioned by the delay of the flight insofar as he "adequately alleged economic damages in the form of the $150 change fee" (App. 11). The court affirmed the dismissal of the claims against Caribbean Airlines for want of adequate pleading (App. 10), but Mr. Campbell does not waive his right to challenge that ruling should this Court grant certiorari and reverse.

[5] The court may have viewed this argument with some skepticism, as Mr. Campbell happened to employ the term "bumping" at one point in his *pro se* pleading. App. 16; *see* DE 9 (¶ 13).

went on to hold that the events surrounding Mr. Campbell's treatment once he left the boarding gate did not alter its analysis, since those events did not occur "during the process of embarkation or disembarkation." App. 17-18. In light of these conclusions, the court did not address the parties' fulsome debate over whether the heart attack, that Mr. Campbell would seek to prove occurred during the course of embarkation, may be considered a legally cognizable "bodily injury" under Article 17.

REASONS FOR GRANTING THE PETITION

This case squarely presents the issue the Court left open ten years ago in *Olympic Airways v. Husain*, 540 U.S. 644 (2004): whether an international air carrier's departure from industry standards or its own policies is relevant to determining whether an "accident" occurred under Article 17 of the Montreal Convention.[6] In the decade since *Husain*, a circuit

[6] *Husain* involved the predecessor Warsaw Convention, but Article 17 of the Montreal Convention, which entered into force in the United States on November 4, 2003, U.S. DEP'T OF STATE, TREATIES IN FORCE 346 (2011), is substantively identical to Article 17 of the Warsaw Convention. *Phifer v. Icelandair*, 652 F.3d 1222, 1224 n.1 (9th Cir. 2011) ("any differences between the provisions are immaterial"); S. TREATY DOC. No. 106-45, 1999 WL 33292734, at *16 ("It is expected that [Article 17] will be construed consistently with the precedent developed under the Warsaw Convention and its related instruments."); *White v. Emirates Airlines, Inc.*, 493 Fed. App'x 526, 529 (5th Cir. 2012) (citing commentary in Senate Treaty Document and applying

(Continued on following page)

split has opened over this question implicating significant federal concerns. The Montreal Convention, like its predecessor, the Warsaw Convention, was designed to "achiev[e] uniformity of rules governing claims arising from international air transportation." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991). The treaty seeks to balance the rights of passengers injured in connection with air travel to and from the United States with air carriers' interests in having clear and defined rules of liability governing bodily injuries caused by "accidents," *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 170 (1999), a term defined as an "unexpected or unusual event or happening . . . external to the passenger," *Air France v. Saks*, 470 U.S. 392, 405 (1985).

The Eleventh Circuit's decision has opened a circuit split, departing from the holdings of the Fifth and Second Circuits that an air carrier's violation of industry standards or its own policies may, in appropriate circumstances, bear on whether or not an event was "unexpected or unusual." *See Blansett*, 379 F.3d at 181-82; *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 142-43 (2d Cir. 1998). The Eleventh Circuit below held unequivocally that an airline's alleged failure "to follow standard procedures" is categorically "irrelevant to Article 17 analysis" (App. 17), at least for purposes of circumstances involving the recalling

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Warsaw Convention case law to Article 17 claim under Montreal Convention).

of a ticketed passenger who is in the process of embarking on an aircraft. The court went on to emphasize that "Article 17 analysis . . . measures only whether the event was unusual from the viewpoint of the passenger, not the carrier." *Id.*

This divergent view threatens the uniformity of interpretation of important international treaty rights and liabilities. Given the significance of the federal interests at stake in litigation over international aviation accidents, this Court has not hesitated in the past to step in to impose order when divergent opinions arose concerning the interpretation of Article 17 of the predecessor Warsaw Convention.[7] Respectfully, the Court should do the same now concerning this significant analytic issue that affects a broad array of future Montreal Convention claims.

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[7] *See*, *e.g.*, *Husain*, 540 U.S. at 646 (granting certiorari to decide "whether the 'accident' condition precedent to air carrier liability under Article 17 is satisfied when the carrier's unusual or unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger's pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin"); *Floyd*, 499 U.S. at 534 & n.3 (granting certiorari to decide whether "purely mental injuries" are compensable under Article 17); *Saks*, 470 U.S. at 394 (granting certiorari to resolve conflict "as to the proper definition of the word 'accident' "); *cf. Tseng*, 525 U.S. at 160-62 & n.3 (granting certiorari to resolve conflict over the exclusivity of the remedial provisions of the Warsaw Convention).

I. The Eleventh Circuit's Decision Creates a Circuit Split Over How to Determine Whether an Event Was "Unexpected or Unusual" Such That It Constitutes an "Accident" for Purposes of Article 17.

Three circuits have now addressed the question of whether an air carrier's violation of industry standards or its own policies is relevant to the essential Article 17 inquiry into the unexpected or unusual nature of an event, and they have reached diametrically opposite conclusions.

A. The Second Circuit appears to have been the first to have held that departures from an airline's own policy may be relevant to the "accident" inquiry. In the context of a suit arising out of injuries a young child suffered aboard a flight to New York, when a flight attendant dripped scalding water on her while attempting to apply a hot compress to her ear, the Second Circuit concluded that the air carrier's deviation from a routine and expected procedure could give rise to an "accident" under Article 17 of the Warsaw Convention. *Fishman*, 132 F.3d at 142-43. Drawing upon an earlier case involving an invasive but routine security search of a passenger, *Tseng v. El Al Israel Airlines, Ltd.*, 122 F.3d 99 (2d Cir. 1997), *rev'd on other grounds*, 525 U.S. 155 (1999), the Second Circuit explained that the "routine security search" in *Tseng* did not give rise to an "accident" in part because "the particular search . . . was called for by the airline's normal, everyday procedure, and did not deviate from it." *Fishman*, 132 F.3d at 142-43.

District courts within the Second Circuit have thus permitted inquiry into such deviations, but have fashioned a narrow aperture, only permitting Article 17 claims when the injury was caused by a "significant departure" from airline policy or industry standards.[8]

B. When this Court decided *Husain*, in 2004, it expressly declined to address the question of whether the flight attendant's conduct – refusing a severely asthmatic passenger's repeated requests to be moved away from the smoking section – was "unusual or unexpected in light of the relevant industry standards or [the carrier's] own company policy." 540 U.S. at 652. The issue had not been preserved by the air carrier below, *id.*, so the Court concluded that it "need not dispositively determine whether the flight attendant's conduct qualified as 'unusual or unexpected' under *Saks*, but may assume that it was for purposes of th[e] opinion." *Id.* at 653. Even though the *Husain* Court did not confront this issue, some of its language suggests a consensus among the members of that Court that industry standards and airline policy can be relevant considerations to the "accident" inquiry. Justice Thomas' opinion for a six-member majority employed the following hypothetical to illustrate why an airline crew's inaction might constitute an "event"

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[8] *See*, *e.g.*, *Safa v. Deutsche Lufthansa AG, Inc.*, No. 2:12-cv-02950-ADS-SIL, ___ F. Supp. 2d ___, 2014 WL 4274071, at *7 (E.D.N.Y. Aug. 28, 2014); *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651, 665 (S.D.N.Y. 2001).

or "happening" sufficient to give rise to an Article 17 "accident":

> Suppose that a passenger on a flight inexplicably collapses and stops breathing and that a medical doctor informs the flight crew that the passenger's life could be saved only if the plane lands within one hour. *Suppose further that it is industry standard and airline policy to divert a flight to the nearest airport when a passenger otherwise faces imminent death.* If the plane is within 30 minutes of a suitable airport, but the crew chooses to continue its cross-country flight, "[t]he notion that this is not an unusual event is staggering."

Id. at 656 (emphasis added) (quoting *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562, 574 (S.D. Tex. 2001)). This passage bespeaks a tacit recognition that industry standards and airline policies may well form part of the necessary context of an assessment of whether an air carrier's conduct was unusual or unexpected for purposes of Article 17.

The two dissenters also appeared predisposed to treat airline policy and industry standards as relevant considerations to the "accident" inquiry. *See id.* at 665-66 (Scalia, J., dissenting) (faulting the district court for failing to make sufficiently contextual "findings as to airline and industry policy" and suggesting that more particularized evidence concerning "company policy" would have been relevant). Thus,

four of the five members of the present Court who were on the Court in *Husain*[9] appear to have indicated a view that airline policy and industry standards are relevant criteria for evaluating whether an event was unexpected or unusual for Article 17 purposes.

C. In the immediate wake of *Husain*, the Fifth Circuit held that an airline's policies and industry standards are potentially relevant criteria to this Article 17 inquiry. *Blansett*, 379 F.3d at 181-82. At issue was whether the airline's failure to warn passengers of the risk of developing deep vein thrombosis (DVT) could constitute an unusual or unexpected event, giving rise to Article 17 liability for the passenger's resulting stroke aboard a flight from Houston. The court of appeals refused to "depart from the demonstrated will of the Supreme Court by creating a *per se* rule that any departure from an industry standard of care must be an 'accident'" and, instead, acknowledged that "[s]ome departures from an 'industry standard' might be qualifying accidents under Article 17, and some may not." 379 F.3d at 182.

A subsequent panel of the Fifth Circuit extended *Blansett* to the context of a Montreal Convention case involving a flight crew's response to a medical emergency aboard a Houston-bound flight. In *White v. Emirates Airlines, Inc.*, the court of appeals held that "the inquiry for purposes of Article 17 is not whether

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[9] Justices Scalia, Kennedy, Thomas, and Ginsburg. Justice Breyer did not participate.

[the carrier] failed precisely to adhere to its procedures, but whether any such failure constituted an 'unexpected or unusual event or happening that is external to the passenger.'" 493 Fed. App'x 526, 534 (5th Cir. 2012) (quoting *Saks*, 470 U.S. at 405). Thus, consistent with the Second Circuit's view articulated in *Fishman*, the Fifth Circuit holds that departures from industry standards or company policies may be relevant to whether an event was unexpected or unusual for purposes of Article 17 claims.

D. The Ninth Circuit has studiously avoided deciding the issue, although its pronouncements seem to share the same hospitableness to the notion that industry standards and company policies are relevant that seems to emanate from the opinions in *Husain*. In *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914, 918-19 (9th Cir. 2004), *cert. denied*, 125 S. Ct. 1665 (2005), the court of appeals declined to decide whether a failure to warn of DVT on a flight from Los Angeles could constitute an "accident" because the plaintiff had failed to introduce any competent evidence establishing the existence of an industry standard to issue such warnings. Implicit in the Ninth Circuit's apparent receptiveness to considering such evidence, had it been submitted, is the recognition that it might be relevant to the Article 17 inquiry in certain circumstances.

Two years later, the Ninth Circuit confronted another DVT case arising from an outbound flight from Los Angeles. In *Caman v. Continental Airlines, Inc.*, 455 F.3d 1087, 1091 (9th Cir. 2006), *cert. denied*,

127 S. Ct. 1333 (2007), the court observed that the issue of "whether an air carrier's departure from either industry standard or its own company policy are the appropriate benchmark for determining whether an event is 'unexpected or unusual' under Article 17" is "salient to . . . [the Article 17] inquiry," but remained "unresolved." The case did not require the court to address the issue. *Id.* at 1091 n.4. Nor did the multi-district litigation concerning passengers who suffered DVT at issue in *Twardowksi v. American Airlines*, 535 F.3d 952 (9th Cir. 2008). The Ninth Circuit again deferred consideration of this issue in that case because the "[p]assengers present[ed] no substantial evidence of an industry standard with respect to warning about the risks of DVT." *Id.* at 961.

Most recently, the Ninth Circuit suggested even greater solicitude towards the relevance of this kind of evidence by holding that "FAA requirements may be relevant to the . . . 'accident' analysis" for Article 17 claims under the Montreal Convention. *Phifer v. Icelandair*, 652 F.3d 1222, 1224 (9th Cir. 2011). The district court in that case had assumed that even if the airline's departure from its own policies or industry standards were relevant to the inquiry, a violation of FAA requirements was a prerequisite to the finding of an "accident." *Id.* Akin to the Fifth Circuit's reasoning in *Blansett* regarding departures from industry standards, the Ninth Circuit held that a violation of an FAA standard "may be relevant" but is "not dispositive" of the inquiry. *Phifer*, 652 F.3d at 1224.

E. The Eleventh Circuit's decision in the case before the Court stands in stark contrast to the foregoing cases. The court of appeals employed broad language to hold that an airline's alleged failure "to follow standard procedures" is "*irrelevant* to Article 17 analysis," App. 17 (emphasis added). It issued this pronouncement in the face of Mr. Campbell's citation to the Fifth Circuit's decision in *Blansett* that company policy and industry standards can be relevant to the "unexpected or unusual" inquiry, yet made no attempt to reconcile its holding with that decision. The Eleventh Circuit's additional pronouncement that the "Article 17 analysis . . . measures only whether the event was unusual from the viewpoint of the passenger, not the carrier" (App. 17), only broadens the scope of its holding. That novel point-of-view test appears intended to preclude resort to "internal airline records" or other evidence of compliance with company policy, which the court intimated "in no way" bears on the Article 17 "accident" analysis. *Id.*

This precedential decision in the Eleventh Circuit threatens to create disarray around the country in this important area of federal concern. Disparate standards now govern the claims for bodily injury of passengers on covered international flights depending upon the American airport that was their point of departure or entry. Indeed, because jurisdiction under the Montreal Convention is permissible in multiple venues – the domicile of the carrier, the principal place of business of the carrier, the domicile of the passenger, the place of contracting, and the place of

destination, Montreal Convention, art. 33 – the current divergence of legal standards invites forum-shopping, where circumstances permit. The present situation is at odds with the overriding purposes of stability and predictability that the Montreal Convention was designed to create for this important avenue of international commerce and intercourse.

II. The Court Should Seize This Occasion to Clarify That a Violation of an Airline Policy or Industry Standard May Form Part of the Totality of the Circumstances Relevant to Whether an Event Was "Unexpected or Unusual" Such That It Constitutes an "Accident" Under Article 17.

The Eleventh Circuit's categorical approach is inconsistent with this Court's insistence upon flexibility in the Article 17 "accident" analysis. Nearly thirty years ago, when this Court definitively established that an "accident" under Article 17 of the Warsaw Convention is "an unexpected or unusual event or happening that is external to the passenger," it cautioned courts that "[t]his definition should be *flexibly applied* after assessment *of all the circumstances surrounding a passenger's injuries*." *Saks*, 470 U.S. at 405 (emphasis added). Fourteen years later, the Court reiterated that admonition. *Tseng*, 525 U.S. at 165 n.9.

Fifteen years since *Tseng*, another reminder is due – from today's Court. The Eleventh Circuit's categorical rule that departures from airline policy or industry standards are "irrelevant to Article 17

analysis" fails to acknowledge that those policies or standards may inform a passenger's reasonable expectations, or an objective assessment of what is usual or unusual. It cannot be fairly said that in all cases of a passenger sustaining a bodily injury in the course of being precluded from boarding an aircraft, after having begun the process of embarkation, that an airline's violation of its own policy or an industry standard is categorically immaterial. As this Court said in *Saks*, "all of the circumstances surrounding a passenger's injuries" are pertinent to the inquiry. 470 U.S. at 405. The Second and Fifth Circuits' precedents regarding consideration of policy and custom are harmonious with this totality-of-the-circumstances approach. And this Court's most recent foray into Article 17, in *Husain*, applied that approach in concluding that a flight attendant's failure to permit an asthmatic passenger to move away from the smoking section on an international flight could give rise to an "accident." *See* 540 U.S. at 653-55.

As the district court in *Husain* reasonably observed, "[w]hen a passenger boards an airplane, he or she should be able to expect that the flight crew will comply with accepted procedures and rules. A failure to do so is unexpected." *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1134 (N.D. Cal. 2000), *aff'd*, 316 F.3d 829 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004). Company policies and industry standards quite logically may form benchmark points of reference against which particular events may be judged to have been unusual or unexpected.

The Eleventh Circuit's absolutist condemnation of such an inquiry, in the context of the involuntary exclusion of a ticketed passenger from an international flight, wrongly curtails consideration of all potentially relevant information. Particularly considering that this Court has envisioned the "accident" inquiry as a fact-sensitive one, amenable "[i]n cases where there is contradictory evidence" to decision by "the trier of fact," *Saks*, 470 U.S. at 405, the Eleventh Circuit's use of a newly minted, rigid standard to affirm the dismissal of a *pro se* complaint at the pleading stage should not be permitted to stand. Passengers like Mr. Campbell, injured in international travel, should be afforded greater opportunity in U.S. courts to make their case that they have a cognizable claim under Article 17 of the Montreal Convention.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant review of this matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-14860

D.C. Docket No. 1:11-cv-23233-JLK

ALLAN CAMPBELL,

Plaintiff-Appellant,

versus

AIR JAMAICA LTD.,
CARIBBEAN AIRLINES,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 8, 2014)

Before MARCUS, Circuit Judge, and COOGLER* and BOWEN,** District Judges.

MARCUS, Circuit Judge:

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* Honorable L. Scott Coogler, United States District Judge for the Northern District of Alabama, sitting by designation.

** Honorable Dudley H. Bowen, Jr., United States District Judge for the Southern District of Georgia, sitting by designation.

First, Allan Campbell's Air Jamaica flight from Kingston to Fort Lauderdale was delayed. Hours passed. Once given the go-ahead to board, he says, he was recalled to the boarding gate and forced to reschedule to another departure the next day – when his permanent resident alien card would expire. Air Jamaica charged him a $150 fee to change flights and refused to put him up in a hotel. Terminal repairs left him to spend the night outside, exposed to the elements. As Campbell put it in his complaint, the ordeal took its toll: he was hospitalized with a heart attack after falling ill during the delay, seeking medical help upon arrival, and collapsing at his home.

Campbell's claims for damages are governed by the Montreal Convention, a multilateral treaty setting rules for international air travel. He seeks recovery against Air Jamaica and Caribbean Airlines under Article 19, which concerns damages due to delay, and Article 17, which addresses accidents that injure passengers on board a plane or during the course of embarkation or disembarkation. The district court dismissed Campbell's amended complaint for lack of subject matter jurisdiction. We disagree because Article 33 of the Montreal Convention grants the district court the power to hear his claims. Nevertheless, we affirm the dismissal on alternative grounds to the extent that Campbell failed to state claims against the defendants. Campbell did state an Article 19 claim against Air Jamaica, but only for economic damages from the $150 change fee. He

stated no Article 17 claim, however, because he did not allege injuries caused by an "accident" that occurred "on board the aircraft or in the course of any of the operations of embarking or disembarking." And Campbell stated no claim against Caribbean Airlines, which he did not name in the substance of the amended complaint. We therefore vacate the dismissal of the Article 19 claim against Air Jamaica for damages from the $150 fee, and remand only as to that issue. We affirm the dismissal of all other claims.

I.

On December 12, 2011, *pro se* plaintiff Allan Campbell filed an amended complaint against Air Jamaica Ltd. and Caribbean Airlines (collectively, "Defendants") that alleged the following essential facts.[1] Campbell had a ticket for a September 8, 2009, Air Jamaica flight from Kingston, Jamaica, to Fort Lauderdale, Florida. He arrived three hours early for the flight, which was then delayed four hours. Campbell was cleared to board at the check-in counter and given a boarding pass with a seat number. After passing through security and getting "the go-ahead to

[1] Campbell filed his initial complaint on September 7, 2011, which the district court *sua sponte* dismissed before service was effectuated for failure to state a claim and failure to state adequate grounds for subject matter jurisdiction. The court denied Campbell's motion to vacate its judgment but allowed Campbell fifteen days to file an amended complaint.

board," he proceeded to embark on the flight, but was recalled back to the boarding gate, where he was told that he would not be accommodated on the flight and should arrange to depart on the next flight, the following day. When Campbell returned to the check-in counter, an agent told him to pay a $150 change fee to travel on a flight the next day. He eventually paid the fee. Meanwhile, the agent refused to accommodate Campbell at a hotel that night, which left him stranded at the airport. Because of airport construction, Campbell claimed, he spent the night outside the terminal building in adverse weather.

The complaint alleged that the airline agent acted negligently by "bumping [Campbell] from the flight and abandoning" him, as well as by charging him for rebooking. Campbell stated that the delay and abandonment were the sole cause of his heart attack. He claimed that he started feeling ill from the effects of the initial four-hour flight delay at the Kingston airport, that he sought medical attention at the Fort Lauderdale airport, and that he collapsed at home in Miami, where he was ultimately taken to a hospital. Campbell stated that his injuries were aggravated by additional delay when his daughter was unable to leave work to pick him up from the airport. The amended complaint alleged that Defendants had breached Article 19 of the Montreal Convention, which caused Campbell to suffer $5,000,000 in general, unspecified damages.

Air Jamaica moved to dismiss the amended complaint, arguing that the district court lacked

subject matter jurisdiction because Campbell did not state a cognizable Montreal Convention claim, that any such claims were time-barred, and that Campbell failed to state a claim for negligence or breach of contract under state law. Caribbean Airlines moved to dismiss on the ground that Campbell's action was time-barred, though it conceded that the district court had subject matter jurisdiction pursuant to the Montreal Convention. Campbell responded to Air Jamaica's motion by arguing that both Articles 17 and 19 of the Montreal Convention covered this case, since the "accident" occurred when Campbell was in the process of boarding the flight. He also argued that his action was not time-barred because the amended complaint did not constitute the filing of a new case and his original complaint was filed within the statute of limitations. Air Jamaica and Caribbean Airlines replied, reiterating their earlier arguments.

The district court dismissed the case with prejudice for lack of subject matter jurisdiction, concluding that Campbell did not state claims under the Montreal Convention. The court found that he sought only "damages for the suffering of pure emotional distress and anxiety, which are not recoverable under Article 19." In addition, the district court explained that Article 17 provided Campbell no relief because neither flight delay nor bumping constitute a requisite "accident." The court did not reach the question of

whether the claims were time-barred. Campbell filed a timely appeal.[2]

II.

A.

We review *de novo* the district court's dismissal for lack of subject matter jurisdiction. *Foy v. Schantz, Schatzman & Aaronson, P.A.,* 108 F.3d 1347, 1348 (11th Cir. 1997). We also review *de novo* whether the district court properly construed the terms of the Montreal Convention. *Piamba Cortes v. Am. Airlines, Inc.,* 177 F.3d 1272, 1280 (11th Cir. 1999).

We hold the allegations of a *pro se* complaint to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner,* 404 U.S. 519, 520 (1972). Accordingly, we construe Campbell's pleadings liberally. *Alba v. Montford,* 517 F.3d 1249, 1252 (11th Cir. 2008). "Yet even in the case of *pro se* litigants this leniency does not give a court license to serve as *de facto* counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action." *GJR Invs., Inc. v. Cnty. of Escambia, Fla.,* 132 F.3d 1359, 1369 (11th Cir. 1998) (citations omitted).

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[2] After initial briefing from the parties, we set the case for oral argument and appointed Stephen F. Rosenthal, of the law firm Podhurst Orseck, P.A., to represent the previously *pro se* Appellant. We commend the exceptional *pro bono* service Rosenthal provided his client and this Court.

B.

The district court stated that it dismissed Campbell's claims "with prejudice . . . for lack of subject matter jurisdiction." But the Montreal Convention grants the district court the power to hear the case. Article 33 provides that a plaintiff may bring an action for damages under the Convention "before the court at the place of destination." The amended complaint alleges, and the Defendants do not dispute, that Campbell's flight landed in Fort Lauderdale, Florida, making the United States District Court for the Southern District of Florida a court of competent jurisdiction.

Despite describing its order as jurisdictional, the district court justified dismissal on the ground that Campbell failed to state a claim under the Convention.[3] In other words, at issue was not whether the district court had the power to adjudicate Montreal Convention claims brought by Campbell, but instead whether Campbell had alleged sufficient facts to support a claim under Articles 17 or 19. Such a failure to state a cause of action does not defeat jurisdiction. *Bell v. Hood,* 327 U.S. 678, 682 (1946). After all, "[w]hether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not

[3] For example, the district court noted that "Defendant Air Jamaica argues that this Court lacks subject matter jurisdiction, because the Amended Complaint fails to allege a claim under the Montreal Convention."

before the court has assumed jurisdiction over the controversy." *Id.*; *accord Barnett v. Bailey,* 956 F.2d 1036, 1040-41 (11th Cir. 1992); *Delta Coal Program v. Libman,* 743 F.2d 852, 855 (11th Cir. 1984). While "a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," those exceptions do not apply here. *Bell,* 327 U.S. at 682-83.

Defendants' arguments for dismissal thus sound in Rule 12(b)(6) ("failure to state a claim upon which relief can be granted"), not 12(b)(1) ("lack of subject-matter jurisdiction"). The district court recognized this, regardless of the label it applied, because the court dismissed with prejudice, which is fitting for failure to state a claim, instead of without prejudice, which is appropriate for jurisdictional decisions. *See Hitt v. City of Pasadena,* 561 F.2d 606, 608 (5th Cir. 1977)[4] (per curiam) ("Dismissal with prejudice for failure to state a claim is a decision on the merits and essentially ends the plaintiff's lawsuit, whereas a dismissal on jurisdictional grounds alone is not on the merits and permits the plaintiff to pursue his claim in the same or in another forum."); *see also Betty K*

[4] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1341 (11th Cir. 2005) ("[I]f the district court actually lacked jurisdiction . . . , the court would have lacked the power to dismiss . . . *with prejudice.*").

Though the district court suggested that it lacked subject-matter jurisdiction, we can affirm the dismissal with prejudice on the alternate ground that Campbell failed to state a claim upon which relief could be granted. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.,* 561 U.S. 247, 254-55 (2010) ("The District Court here had jurisdiction. . . . Since nothing in the analysis of the courts below turned on the mistake, a remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion. . . . [W]e proceed to address whether petitioners' allegations state a claim."); *Bell v. Health-Mor, Inc.,* 549 F.2d 342, 345 (5th Cir. 1977) ("The district court . . . should not have dismissed the complaint for lack of subject matter jurisdiction. However, if the district court is correct . . . , then the plaintiffs' claims are subject to dismissal for failure to state a claim upon which relief could be granted. Therefore, in the interests of judicial economy we will discuss the substantive issues raised in the district court's opinion."); *see also, e.g., Powers v. United States,* 996 F.2d 1121, 1123 (11th Cir. 1993) ("We affirm the judgment of the district court dismissing this action, but for reasons other than those used by the district court.").

Therefore, we turn to whether Campbell's amended complaint stated a claim under Articles 17 or 19 of the Montreal Convention.

C.

We can quickly dispense with Campbell's action against one defendant because he has not stated a claim against Caribbean Airlines. While the amended complaint names "Carribean Airlines" as a defendant in the case heading, it at no other point mentions Caribbean Airlines. Instead, the amended complaint states that Campbell purchased a ticket from "Air Jamaica" for a flight on "Air Jamaica airline." Campbell makes no allegations that Caribbean Airlines took any actions toward him, much less caused him any injuries cognizable under the Montreal Convention. Nor does the amended complaint allege that the two companies were associated or connected in any way that would make Caribbean Airlines liable for Campbell's harm. We affirm the dismissal with prejudice of all claims against Caribbean Airlines.

III.

A.

We next take up Campbell's argument that he stated an Article 19 claim for damages against Air Jamaica. Articles 17 and 19 of the Montreal Convention are found in Chapter III, which addresses the "Liability of the Carrier and Extent of Compensation for Damage." Article 19, titled "Delay," provides:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by

> delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) art. 19, May 28, 1999, S. Treaty Doc. No. 106-45, 2242 U.N.T.S. 350.

The parties agree that Article 19 permits the payment of economic damages but does not contemplate compensation for emotional loss or physical injury. *See, e.g., Vumbaca v. Terminal One Grp. Ass'n L.P.,* 859 F. Supp. 2d 343, 367 (E.D.N.Y. 2012) ("Article 19 only applies to *economic* loss occasioned by delay in transportation." (quotation omitted)). The district court found that Campbell did not plead any economic injuries and therefore could not recover any Article 19 damages.

Campbell first argues that the amended complaint pled economic loss in the form of the $150 change fee charged for the replacement flight. Air Jamaica concedes that "perhaps a $150 change fee" is compensable, though it argues that such a *de minimus* claim should not be allowed to proceed on its own.

The district court erred in failing to acknowledge that Campbell adequately alleged economic damages in the form of the $150 change fee. The court did not mention the change fee in its order, but the fee meets

each of the Article 19 requirements. As pled, it constituted economic loss. The complaint can be construed as claiming that the fee was "occasioned by" the delay: he was forced to pay $150, which would not have occurred had he not been forced by the airline to take the next day's flight. And Campbell alleged that the Defendants' agents did not take reasonable measures in avoiding the delay, as he claimed that they were "negligent in recalling the plaintiff to the boarding gate while the plaintiff was embarking and bumping the plaintiff from the flight and abandoning the plaintiff."

Moreover, there is no *de minimis* bar to Article 19 jurisdiction. In the lone case cited by Air Jamaica in support of its *de minimis* argument, a district court denied leave to amend a complaint when a party sought to add low-value claims not originally included. *See Vumbaca,* 859 F. Supp. 2d at 361 ("[W]hile plaintiff now seeks to add claims for economic harm, these claims will not be considered because they are *de minimis* and were not sought in the complaint."). The Convention does not mention, and we know of no court that has imposed, a *de minimis* requirement for an otherwise validly pled Article 19 claim. Here, Campbell's amended complaint identified the fee. Construing this pleading liberally, we conclude that Campbell adequately stated an Article 19 claim against Air Jamaica for economic damages in the form of the $150 fee.

B.

However, Campbell did not state a claim under Article 19 for any other damages caused by delay. Campbell expressly concedes that medical expenses are "carve[d] out . . . from the range of damages compensable under Article 19 flowing from flight delays."

Campbell instead contends that inconvenience from a delayed flight can support a cognizable claim for Article 19 damages. Courts have disagreed about whether and to what degree inconvenience damages may be recovered under Article 19.[5] But we need not address today whether and to what degree inconvenience damages are recoverable under Article 19 because Campbell has not pled that he suffered any harm due to inconvenience. While he mentioned delays that, in theory, could have caused inconvenience, he at no point claimed that he actually suffered an inconvenience injury. Instead, liberally construed, Campbell's *pro se* amended complaint alleged that the delay caused him damages in the forms of physical illness, mental anxiety, and the $150 fee. Campbell

[5] For example, in *Vumbaca,* a district court concluded after surveying cases that "[m]ere inconvenience does not support a claim under Article 19." 859 F. Supp. 2d at 367-68. Another district court reached the opposite result in *Daniel v. Virgin Atlantic Airways, Ltd.,* 59 F. Supp. 2d 986 (N.D. Cal. 1998): "Time is money, after all, and . . . the inconvenience of being trapped for hours in an unfamiliar airport is a compensable element of damages for delay in air travel . . . even in the absence of economic loss or physical injury." *Id.* at 993.

does not state an Article 19 claim for inconvenience damages.

IV.

Campbell did not state a claim under Article 17 of the Montreal Convention. That article, titled "Death and Injury of Passengers – Damage to Baggage," provides in relevant part that "[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking." Montreal Convention art. 17, S. Treaty Doc. No. 106-45. An Article 17 claim thus has three elements: (1) an accident; (2) that caused death or bodily injury; (3) that took place on the plane or in the course of any of the operations of embarking or disembarking.

Campbell's allegation that he was rescheduled to a later flight does not amount to an Article 17 "accident," which the Supreme Court defines as "an unexpected or unusual event or happening that is external to the passenger." *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 165 n.9 (1999) (quoting Air *France v. Saks,* 470 U.S. 392, 405 (1985)). "This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Air France,* 470 U.S. at 405. To determine whether an event is "unexpected or unusual," we "look at a purely factual description of the events that

allegedly caused the aggravation injury suffered by the plaintiff." *Krys v. Lufthansa German Airlines,* 119 F.3d 1515, 1521 (11th Cir. 1997). The fact that a series of events is alleged to have been caused by "crew negligence" does not affect whether or not the event itself, as experienced by the passenger, was unexpected.

Rare is the passenger unacquainted with the ubiquity of air travel delay. *See In re Deep Vein Thrombosis Litig.,* MDL 04-1606 VRW, 2007 WL 3027351 (N.D. Cal. Oct. 12, 2007) *aff'd sub nom. Twardowski v. Am. Airlines,* 535 F.3d 952 (9th Cir. 2008) ("[D]elays in air travel are a 'reality.' "). The Supreme Court has recognized that "routine travel procedures" do not amount to Article 17 accidents. *Air France,* 470 U.S. at 404-05. The practice of "bumping" – when an airline intentionally causes a passenger to reschedule to a later flight shortly before departure – falls into this category because it is systematic, widely practiced, and widely known. There is nothing accidental about it. *See Weiss v. El Al Isr. Airlines, Ltd.,* 433 F. Supp. 2d 361, 363 (S.D.N.Y. 2006) *aff'd sub nom. Weiss v. El Al Isr. Airlines,* 309 F. App'x 483 (2d Cir. 2009) ("Bumping is an airline industry practice whereby passengers are denied seats due to intentional overselling, which is intended to minimize the number of empty seats due to cancellations."). Like routine delays for weather or maintenance, bumping may be unpleasant, but it is not unexpected or unusual. As a general matter, then,

an Article 17 accident does not occur merely because a passenger is bumped from a flight.

Indeed, no case has found bumping to be an Article 17 accident under the Montreal Convention or the previous and corresponding Warsaw Convention. Instead, the decisions that discuss bumping either treat it as delay under Article 19 or label it contractual non-performance that is not preempted by the Montreal Convention. *See, e.g., Wolgel v. Mexicana Airlines,* 821 F.2d 442, 445 (7th Cir. 1987) ("We conclude that the Warsaw Convention does not provide a cause of action for bumping."); *Igwe v. Nw. Airlines, Inc.,* CIV.A. H-05-1423, 2007 WL 43811 (S.D. Tex. Jan. 4, 2007) ("[U]nder the facts of this case, Article 19 does encompass 'bumping,' and the [plaintiffs'] claims fall directly within the scope of the Convention."); *Weiss,* 433 F. Supp. 2d at 366 (holding that bumping claims are "not preempted by the Montreal Convention"); *Sassouni v. Olympic Airways,* 769 F. Supp. 537, 540 (S.D.N.Y. 1991) ("Very few courts have confronted the issue of the application of Article 19 to being 'bumped' from an airline flight. However, those that have, hold uniformly that damages arising from a delay in transportation caused by being bumped, are governed by Article 19.").

Campbell, then, cannot recover under Article 17 based on bumping. He argues, however, that his was no run-of the-mill bumping, even though his amended complaint states that the airline's agent was negligent in "bumping the plaintiff." Campbell insists that the airline did not follow standard procedures for

bumping: Campbell had been given a boarding pass with a seat number; he was required to pay a change fee; and two years later airline records indicated he had flown on September 8, not the next day when he actually traveled. These alleged irregularities are irrelevant to Article 17 analysis, however, which measures only whether the event was unusual from the viewpoint of the passenger, not the carrier. *See Krys,* 119 F.3d at 1522 (describing a passenger's allegation that flight crew negligently failed to make an emergency landing for his heart attack as "the continuation of the flight to its scheduled point of arrival"). Therefore, whether internal airline records documented a bumping in no way informs whether an accident occurred. In addition, in framing the facts, we look only to "what precise event or events allegedly caused the damage sustained by the plaintiff." *Id.* at 1521 n.10. For example, it does not matter whether Campbell had been issued a boarding pass with a seat assignment because he does not allege that this fact aggravated his injuries. At bottom, then, Campbell states that he "proceeded to embark on [the] flight but was recalled back to the boarding gate" and "was told that he would not be accommodated on the flight." These allegations do not state a claim for an Article 17 accident because it is not unusual or unexpected for an airline to prevent passengers from boarding and to force them to reschedule on a later flight.

Campbell's amended complaint also states that "[t]he defendant refused to accommodate the plaintiff

at a hotel," which left Campbell stranded at the airport. He further alleges that he was forced to spend the night outside because the airport was under repairs and that he became ill when exposed to adverse weather. But Campbell cannot recover under Article 17 because, whether or not this amounted to an "accident," he does not allege that the airline abandoned him while he was aboard the aircraft or during the process of embarkation or disembarkation.

The Montreal Convention does not define "embarking" or "disembarking." In applying these terms, we consider the totality of the alleged circumstances. *Marotte v. Am. Airlines, Inc.,* 296 F.3d 1255, 1260 (11th Cir. 2002). Three factors are particularly relevant: "(1) the passenger's activity at the time of the accident; (2) the passenger's whereabouts at the time of the accident; and (3) the amount of control exercised by the carrier at the moment of the injury." *Id.* No individual factor is dispositive. Instead, they form a single analytical base. *Id.* We have also noted that we consider the imminence of a passenger's actual boarding of a flight because embarking requires "a close connection between the accident and the physical act of boarding the aircraft." *Id.*

None of these factors suggest that the alleged abandonment occurred during embarkation. First, Campbell was not engaged in an activity characteristic of boarding when he was refused overnight accommodations. *Compare Schroeder v. Lufthansa German Airlines,* 875 F.2d 613, 618 (7th Cir. 1989) ("[Police were] questioning Schroeder about a bomb

threat. This activity is not even remotely related to a passenger's embarking or disembarking from an airplane."), *and Martinez Hernandez v. Air France,* 545 F.2d 279, 282 (1st Cir. 1976) ("[T]he passengers had already emerged from the aircraft, descended the stairs from the plane to the ground, traveled via bus or foot from the plane to the terminal, and presented their passports to the Israeli authorities. On these facts we do not believe it can be said that the passengers were still engaged in any activity relating to effecting their separation from the aircraft."), *with Marotte,* 296 F.3d at 1260 (11th Cir. 2002) ("[T]he party had their boarding passes in hand and were attempting to board the plane when the attack took place."), *and Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 33 (2d Cir. 1975) ("[T]he plaintiffs had already surrendered their tickets, passed through passport control, and entered the area reserved exclusively for those about to depart on international flights. They were assembled at the departure gate, virtually ready to proceed to the aircraft.").

Second, the location of the alleged abandonment was considerably removed from the point of boarding. Campbell claims that the airline left him stranded at the Kingston airport, where he was forced to spend the night outside the terminal exposed to the elements. The overnight events "happened at a considerable distance from the departure gate." *McCarthy v. Nw. Airlines, Inc.,* 56 F.3d 313, 317-18 (1st Cir. 1995). Campbell does not claim that he was in a restricted or secure area, or that he spent the night "in a section

of the airport that is not open to the general public." *Marotte,* 296 F.3d at 1260; *see McCarthy,* 56 F.3d at 318 ("We believe it is no mere happenstance that the plaintiff has not cited – and we have been unable to deterrate – a single instance in which Article 17 has been found to cover an accident that occurred within the public area of a terminal facility.").

Third, Air Jamaica exercised no control over Campbell when it declined to pay for his hotel. After being turned away from his original flight, Campbell "was acting at [his] own direction and was no longer under the 'control' of" Air Jamaica. *Maugnie v. Compagnie Nationale Air France,* 549 F.2d 1256, 1262 (9th Cir. 1977). Campbell was a "free agent[ ] roaming at will through the terminal" – and beyond it. *Day,* 528 F.2d at 33. Finally, the alleged abandonment occurred long before Campbell's boarding was imminent. If anything, Campbell complains that boarding was *not* imminent, and that the airline refused to make his wait more manageable.

After examining location, activity, control, and imminence, we conclude that the airline's alleged refusal to provide accommodations, and Campbell's overnight stay outside the terminal, did not occur in the course of any of the operations of embarking or disembarking. All told, Campbell states no Article 17 claim upon which relief can be granted.

V.

Defendants urge that we affirm the dismissal of Campbell's claims on the alternative ground that his amended complaint was untimely because it was not filed within the Montreal Convention's two-year limitations period. We decline their invitation because Rule 15(c) allows Campbell's amended complaint to relate back to his timely original complaint.

Campbell filed his initial complaint on September 7, 2011, within the two-year limitations period. After the district court *sua sponte* dismissed without prejudice and with leave to file an amended complaint within fifteen days, Campbell filed an amended complaint on December 12, 2011, outside of the two-year window. Though the district court dismissed on other grounds, it noted that it was "inclined to reject the limitations' period argument, because it would be patently unfair to bar a plaintiff's suit on the basis of the limitations period where the initial Complaint was filed within the applicable period and dismissed without prejudice to refile."

Article 35 of the Montreal Convention specifies that "[t]he right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to arrive, or from the date on which the carriage stopped." Montreal Convention art. 17, S. Treaty Doc. No. 106-45. But Article 35 also provides that "[t]he method of calculating that period shall be determined by the

law of the court seised of the case." *Id.* Meanwhile, Federal Rule of Civil Procedure 15(c) allows an amended pleading to relate back to the date of a complaint filed within the limitations period when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). This condition for relation back is satisfied here because Campbell's original complaint alleged the same essential facts that formed the basis for the claims pled in his amended complaint. However, the parties dispute whether the Montreal Convention permits Rule 15(c) relation back.

Our Circuit has not previously addressed the application of Rule 15(c) to the two-year limit in the Montreal Convention or its predecessor, the Warsaw Convention. Courts that have confronted similar problems generally distinguish between two doctrines: tolling, deemed impermissible, and relation-back, considered to be consistent with the Convention. Tolling occurs when a party invokes equitable principles to stop the running of a statute of limitations so that an untimely claim may still be asserted. *See, e.g., Ellis v. Gen. Motors Acceptance Corp.,* 160 F.3d 703, 706 (11th Cir. 1998) ("'Equitable tolling' is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances."). With tolling, no claim need be filed within the limitations period. Courts have refused to apply

local tolling rules to Convention claims. *See, e.g., Husmann v. Trans World Airlines, Inc.,* 169 F.3d 1151, 1154 (8th Cir. 1999); *Fishman v. Delta Air Lines, Inc.,* 132 F.3d 138, 143-45 (2d Cir. 1998). By contrast, relation back can occur only when amendments are made to a timely filed claim that involved the same facts and circumstances. *See* Fed. R. Civ. P. 15(c).

Therefore, when an original complaint is timely filed and the only effect of amendment is to allow the plaintiffs to conform their pleading to the requirements of the Convention, "[g]ranting leave to amend has no prohibited tolling effect." *Pennington v. British Airways,* 275 F. Supp. 2d 601, 606-07 (E.D. Pa. 2003); *see In re Air Crash Near Rio Grande P.R. on Dec. 3, 2008,* 11-MD-02246-KAM, 2012 WL 3962906, at *3-4 (S.D. Fla. Sept. 11, 2012) (unpublished) ("[Plaintiffs] seek to bring a claim pursuant to the Montreal Convention, rather than state law, based upon the same conduct, transaction and occurrence set out in the original complaint. [Plaintiffs] seek to apply the relation-back doctrine, not tolling. . . . Rule 15(c) permits application of the relation-back doctrine."); *Raddatz v. Bax Global, Inc.,* 07-CV-1020, 2008 WL 2435582 (E.D. Wis. June 16, 2008) (unpublished) ("[T]he court finds that Rule 15(c) applies to any amendments to Raddatz's original complaint and his cause of action would be timely under the two-year limitation period set forth in the Warsaw Convention."). In *Motorola, Inc. v. MSAS Cargo Int'l, Inc.,* 42 F. Supp. 2d 952, 955-56 (N.D. Cal. 1998), a district court refused to allow a plaintiff to use Rule 15(c) to

add a new defendant after the limitation period expired. But, as a later court observed, "the real evil at issue in *Motorola* . . . was the fact that the plaintiff . . . was attempting to use the complaint amending mechanism of Rule 15(c) in order to commence an entirely new and separate suit against a party otherwise protected by the" limitations period. *Pennington,* 275 F. Supp. 2d at 606. Here, where the alleged facts and the named defendants are consistent across the two complaints, there is "no prohibited tolling effect." *Id.* at 607.

Our review of the Montreal Convention leads us to agree with this trend permitting Rule 15(c) relation-back in cases like Campbell's. Treaty interpretation starts with the text. *Medellín v. Texas,* 552 U.S. 491, 506 (2008). But the language alone does not tell us whether Rule 15(c) concerns the method of calculating the two-year period, which the Convention leaves to the court of the forum. *See Fishman,* 132 F.3d at 144 ("[T]he language of Article [35] is reasonably susceptible to conflicting interpretations."). Rule 15(c) does not involve computation in a narrow sense, which could cover only questions like the time of day by which filings must be entered. But Rule 15(c) does address the calculation of the limitations period for amended claims when a plaintiff raised similar issues in an earlier filing.

When the text is ambiguous, we turn to the treaty's drafting history. *Saks,* 470 U.S. at 396 ("Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look

beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (quoting *Choctaw Nation of Indians v. United States,* 318 U.S. 423, 431-432 (1943)); *Zicherman v. Korean Air Lines Co.,* 516 U.S. 217, 226 (1996)) ("Because a treaty ratified by the United States is not only the law of this land . . . , but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history *(travaux préparatoires)* and the postratification understanding of the contracting parties.").

The preliminary draft of the Warsaw Convention presented at a 1925 Paris conference on private aeronautical law provided that "[t]he method of calculating the period of limitation, as well as the causes of suspension and interruption of the period of limitation, shall be determined by the law of the court having taken jurisdiction." *Second International Conference on Private Aeronautical Law Minutes* 267 (Robert C. Horner & Didier Legrez trans., 1975). In other words, the original version would have allowed the application of local tolling rules. At the 1929 Warsaw Conference, however, the Italian delegation proposed an amendment that would replace that provision in the interests of predictability and simplicity with "a plea in bar; that is to say, that after two years any action dies and is no longer admissable." *Id.* at 110. The French delegation, while "not at all opposed to the Italian proposal," noted that there was still a need to indicate that "the law of the

forum court . . . will fix how, within the period of two years, the court will be seized, because in all the countries of the world suits are not brought in the same way." *Id.* at 111. The delegates ultimately voted to remove the allowance for forum courts to determine "the causes of suspension and interruption of the period of limitation." But the delegates retained the provision instructing that "[t]he method of calculating the period shall be determined by the law of the court having taken jurisdiction." *Id.* at 219. This same language was carried over into Article 35 of the Montreal Convention.

This drafting history suggests that the delegates intended to avoid the application of tolling rules, which would make it "very difficult for the shipper . . . to know when the interruption or suspension begins." *Id.* at 110; *see Fishman,* 132 F.3d at 144 ("Almost every court that has reviewed the drafting minutes of the Convention, including the district court in this case, has rejected the contention that Article [35] incorporates the tolling provisions otherwise applicable in the forum."). On the other hand, the delegates showed no opposition to principles of relation-back. To the contrary, the Italian delegation described its bright-line proposal as having the following effect: "if two years after the accident no action has been brought, all actions are extinguished." Campbell did bring an action within two years, avoiding the foreseeability problems characteristic of tolling. Moreover, the adopted language specifically permits a forum court to set methods of calculating the

two-year period. In sum, we agree with the consensus of courts that the Montreal Convention permits the application of Rule 15(c) relation back, at least when the amending plaintiff identifies the same defendants named in the original complaint. Campbell's amended complaint was timely under Article 35.

VI.

We vacate the dismissal of Campbell's Article 19 claim against Air Jamaica for economic damages in the form of the $150 change fee and remand only for proceedings concerning this claim. Because Campbell pled no other claims for damages cognizable under Articles 17 or 19, and he stated no claim against Caribbean Airlines, we affirm on alternative grounds the dismissal with prejudice of the remainder of the claims raised in Campbell's complaint.

AFFIRMED in part, **VACATED** in part, and **REMANDED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 11-CV-23233-KING

ALLAN CAMPBELL,

Plaintiff,

v.

AIR JAMAICA LTD. and
CARIBBEAN AIRLINES,

Defendants. /

FINAL ORDER OF DISMISSAL WITH PREJUDICE

(Filed Aug. 17, 2012)

THIS MATTER comes before the Court upon Defendant Air Jamaica Ltd.'s Motion to Dismiss (DE #20) and Defendant Caribbean Airlines Limited's Motion to Dismiss (DE #22), filed June 22, 2012 and June 27, 2012, respectively. Therein, Defendant Air Jamaica Ltd. ("Air Jamaica") seeks dismissal of the above-styled action for lack of subject matter jurisdiction, while Defendant Caribbean Airlines Limited ("Caribbean Airlines") seeks dismissal of the above-styled action as time-barred. The Court is fully briefed on the matter[1] and proceeds with the benefit

[1] Plaintiff Campbell filed his Responses (DE #23, 24) on July 9 and July 16, 2012, respectively, and Defendants filed Replies (DE #26, 32) on July 18 and July 24, 2012, respectively.

of oral argument.[2] Upon careful consideration of the allegations of Plaintiff Campbell's Amended Complaint (DE #9) and the arguments set forth in the Parties' briefings and at oral argument, the Court finds it must dismiss the above-styled action for lack of subject matter jurisdiction.

The above-styled action arises from Defendants' alleged refusal to allow Plaintiff Campbell to board a flight for which he was ticketed, which Plaintiff Campbell alleges caused him to suffer a heart attack. Plaintiff Campbell, proceeding *pro se,* filed the initial Complaint (DE #1) on September 7, 2011. Before service was effectuated, the Court *sua sponte* dismissed the Complaint without prejudice for failure to state a claim and for failure to state adequate grounds for subject matter jurisdiction. (DE #4). Plaintiff Campbell filed the Amended Complaint (DE #9) on December 12, 2011, which is now the operative pleading.

In the Amended Complaint, Plaintiff Campbell alleges that he had a ticket for a flight on Air Jamaica scheduled to depart from the Norman Manley Airport in Kingston, Jamaica on September 8, 2009, and arriving at the Fort Lauderdale-Hollywood Airport in Fort Lauderdale, Florida on the same day. (Am. Compl. ¶¶ 1&2). When "plaintiff proceeded to embark on said flight . . . [he] was recalled back to the boarding gate . . . [and] told that he would not be

[2] The Court heard oral arguments on August 1, 2012.

accommodated on the flight and should return to the check-in counter to arrange to depart on the next flight." (*Id.* ¶¶ 8&9). Plaintiff Campbell alleges that "defendant[s] acted negligently" by "recalling the plaintiff to the boarding gate while the plaintiff was embarking," "bumping the plaintiff from the flight," delaying Plaintiff Campbell's travel to Ft. Lauderdale, "refus[ing] to accommodate the plaintiff at a hotel, [and] leaving plaintiff stranded at the airport until the following day," when he could eventually board a flight to Ft. Lauderdale upon payment of a $150.00 change fee. (*Id.* ¶¶ 11-13). Plaintiff Campbell seeks $5,000,000.00 in damages for a heart attack he suffered allegedly as a result of the delay. As a basis for federal jurisdiction, Plaintiff Campbell asserts that federal jurisdiction is proper under Article 33 of the Montreal Convention, because he asserts claims for damages for personal injury.[3] (Am. Compl. ¶¶ 18&19). Convention for the Unification of Certain Rules Relating to International Transportation by Air art. 33, done at Montreal on 28 May 1999, ICAO Doc. No. 9740 (entered into force on Nov. 4, 2003), *reprinted in* S. Treaty Doc. No 106-45, 1999 WL 33292734 [hereinafter "Montreal Convention" or "Convention"] (conferring subject matter jurisdiction on courts located in

[3] The Montreal Convention confers exclusive subject matter jurisdiction in federal court over three types of claims for damages against an international carrier: 1.) injury to passengers (Article 17); 2.) damage/loss of luggage (Article 18); and 3.) delay to passengers or luggage (Article 19). Montreal Convention art. 17-19, 24.

the location of the plaintiff's permanent residence if claiming damages for death or personal injury). Before the Court now is Defendants' Motions to Dismiss. (DE #20, 22).

With the instant Motions, Defendants present contradictory arguments as to why this Court should dismiss the above-styled action with prejudice. Defendant Air Jamaica argues that this Court lacks subject matter jurisdiction, because the Amended Complaint fails to allege a claim under the Montreal Convention. (DE #20). By contrast, Defendant Caribbean Airlines concedes that this Court has subject matter jurisdiction under the Montreal Convention, but argues that the above-styled action should be dismissed nevertheless under the limitations' period of Article 35 of the Convention.[4] (DE #22). Upon careful consideration of the pleadings, the procedural history of this matter, and the Parties' arguments, the Court finds that it must dismiss the action for the lack of subject matter jurisdiction.

In the Amended Complaint, Plaintiff Campbell purports to assert claims for damages under both Article 17 and Article 19 of the Convention.[5] Article

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[4] Defendant Air Jamaica makes the limitations' period argument in the alternative, in the event that this Court finds jurisdiction proper under the Montreal Convention. (DE #20).

[5] Although Plaintiff Campbell does not specifically allege damages under Article 17 of the Convention, taking the allegations of the Amended Complaint in the light most favorable to

(Continued on following page)

19 provides for carrier liability "for damage occasioned by delay in the carriage by air of passengers, baggage or cargo." Montreal Convention, art. 19. Damages for delay under Article 19 are limited to economic damages, such as taxi fare that a passenger must pay if he is forced to find alternate transportation from the airport due to flight delays. *See generally Vumbaca v. Terminal One Group Ass'n L.P.,* No. 11-5535, 2012 WL 1377074, *16 (E.D.N.Y. Apr. 20, 2012) (stating that the types of damages recoverable under Article 19 are economic losses occasioned by delay such as taxi fare or replacement of personal items); *Sobol v. Cont'l Airlines,* No. 05-8992, 2006 WL 2742051, *5 (S.D.N.Y. Sept. 26, 2006) (stating that Article 19 only applies to "economic loss occasioned by delay in transportation"). In other words, damages for emotional distress caused by delay are not recoverable under Article 19. *See, e.g., Lee v. American Airlines Inc.,* Case No. CIV.A. 301CV1179P, 2002 WL 1461920, at *3 (N.D. Tex. July 2, 2002) (denying emotional damages caused by delay that resulted in, among other inconveniences, passengers "being trapped in a 'holding area' without adequate food, water, restroom facilities, and . . . being forced to spend the night in substandard, dirty, and unsafe motels. . . ."), *aff'd* 355 F.3d 386 (5th Cir. 2004).

Here, Plaintiff Campbell seeks $5,000,000.00 in damages allegedly incurred as a result of the delay of

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the *pro se* Plaintiff, the Court's analysis will address Article 17, as well as Article 19.

his travel from Kingston, Jamaica to Ft. Lauderdale, Florida. More specifically, Plaintiff Campbell alleges that "[t]he defendant acted negligently due to the delay and abandonment of the plaintiff who had to remain at the airport overnight outside the terminal building, which was under repairs, under adverse weather and became ill at the airport in Kingston, Jamaica." (Am. Compl. ¶ 12). He also alleges that he had "anxiety to make the flight since his permanent resident alien card would expire on September 9, 2009 and he would encounter problems with immigration upon arrival in the United States." (*Id.* at ¶ 15). It was not, however, until Plaintiff Campbell arrived at the Fort Lauderdale-Hollywood Airport that he sought medical attention. (*Id.* at ¶ 16). Further, Plaintiff Campbell does not allege any physical manifestations of his anxiety and emotional distress until his "collaps[e] at home in Miami," and subsequent "admi[ssion] to Jackson Memorial Hospital [in Miami, Florida] suffering from a heart attack." (*Id.* at ¶¶ 12 & 16). Upon careful consideration of the Amended Complaint, the Court finds that the Amended Complaint does not sufficiently allege that Plaintiff Campbell suffered any physical manifestation of his emotional distress and anxiety until his travel to South Florida was complete and he had successfully been admitted to the United States with his permanent resident alien card. Accordingly, the Court finds that Plaintiff Campbell is seeking damages for the suffering of pure emotional distress and anxiety, which are not recoverable under Article 19 of the Montreal Convention.

Plaintiff Campbell's second asserted ground for jurisdiction under the Montreal Convention is under Article 17. To satisfy Article 17's carrier liability provision for personal injury, a plaintiff must plead and establish three requirements: (1) an "accident" must have occurred; (2) injury or death must have occurred; and (3) the preceding two conditions must have occurred while "embarking or disembarking" or during the flight itself. *Marotte v. Am. Airlines, Inc.,* 296 F.3d 1255, 1259 (11th Cir. 2002). Upon review of the Amended Complaint, the Court finds that Plaintiff Campbell has not sufficiently alleged the occurrence of an "accident" to invoke Article 17.

"An 'accident' under Article 17 is 'an unexpected or unusual event or happening that is external to the passenger.'" *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 165 n.9 (1999) (citing *Air France v. Saks,* 470 U.S. 392, 405 (1985)). For instance, the Ninth Circuit Court of Appeals has held that the seizure and forced checking of a passenger's carry-on bag that contained a breathing device and medication constituted an "accident" under Article 17, while the Second Circuit Court of Appeals has held that the searching of a passenger before boarding does not. *Compare Prescod v. AMR, Inc.,* 383 F.3d 861, 868 (9th Cir. 2004), *with Tseng v. El Al Israel Airlines, Ltd.,* 122 F.3d 99, 103-04 (2d Cir. 1997), *reversed on other grounds by* 525 U.S. 155 (1999). That Plaintiff Campbell suffered a heart attack does not in itself constitute the occurrence of an "accident" under Article 17. *See generally Saks,* 470 U.S. at 398 ("[T]he text of

Article 17 refers to an accident which caused the passenger's injury, and not to an accident which is the passenger's injury."); *see, e.g., Cardoza v. Spirit Airlines, Inc.,* No. 10-61668, 2011 WL 2447523, *4 n.2 (S.D. Fla. June 15, 2011) ("Ms. Cardoza-Sori's cardiac arrest, alone, does not constitute an 'accident' under the Montreal Convention."). In addition, there is a general consensus that neither the delay of a flight nor the "bumping" of a passenger constitute an "accident" under Article 17. *See, e.g., In re Deep Vein Thrombosis Litigation,* No. 04-1606, 2007 WL 3027351, *14-16 (N.D. Cal. Oct. 12, 2007) (stating that delays in air travel are a reality and cannot reasonably be said to be unusual or unexpected); *Weiss v. El Al Isr. Airlines, Ltd.,* 433 F. Supp. 2d 361, 363 n.3 (S.D.N.Y. 2006) ("'Bumping' is by now a well-established airline industry practice whereby passengers are denied seats due to intentional overselling, which is intended to minimize the number of empty seats due to cancellations."). Accordingly, construing the Amended Complaint in the light most favorable to *pro se* Plaintiff Campbell, none of the facts alleged constitute an "accident" to invoke jurisdiction under Article 17 of the Montreal Convention. As the Court has determined that the above-styled action does come within either Article 17 or Article 19 of the Montreal Convention, it need not reach Defendant Caribbean Airlines' limitations' period argument.[6]

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[6] The Court notes, however, that if the Amended Complaint had stated a claim under the Montreal Convention, the Could [sic]

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Accordingly, after a careful review of the record and being otherwise fully advised, it is **ORDERED**, **ADJUDGED** and **DECREED** as follows:

1. Defendant Air Jamaica's Motion to Dismiss **(DE # 20)** be, and the same is, hereby **GRANTED**.

2. Plaintiff Campbell's Amended Complaint **(DE #9)** is **DISMISSED with prejudice** as to both Defendant Air Jamaica and Defendant Caribbean Airlines for lack of subject matter jurisdiction.

3. The Clerk shall **CLOSE** this case.

4. All pending motions are **DENIED as moot**.

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice Building in Miami, Florida this 17th day of August, 2012.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE
SOUTHERN DISTRICT
OF FLORIDA

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would be inclined to reject the limitations' period argument, because it would be patently unfair to bar a plaintiffs suit on the basis of the limitations' period where the initial Complaint was filed within the applicable period and dismissed without prejudice to re-file. *See generally* Montreal Convention art. 35 ("Questions as to calculation of the period of limitations are left to the court of the forum.").

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