

Honorable Marsha J. Pechman

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

LAURA HUTCHINSON, *et. al.*,  
  
Plaintiffs,  
  
v.  
  
BRITISH AIRWAYS Plc,  
  
Defendant.

NO. C07-1370 MJP  
  
**DEFENDANT’S MOTION TO DISMISS  
PURSUANT TO FED. R. CIV. P. 12(b)(6)**  
  
**Noted for Consideration: February 8, 2008**  
  
**ORAL ARGUMENT REQUESTED**

**I. INTRODUCTION AND RELIEF REQUESTED<sup>1</sup>**

This is a lawsuit seeking class action treatment for claims arising out of defendant British Airways Plc’s alleged reckless conduct in the mishandling of their passengers’ checked bags. Plaintiffs concede and specifically allege that their claims are governed by the Montreal Convention, an international treaty signed by the United States and over 80 other countries, which creates a uniform set of passenger rights and airline obligations in all the signatory countries. Despite its length, plaintiffs’ amended complaint contains a single cause of action and presents a single overriding legal issue: whether BA’s alleged conduct in handling plaintiffs’ checked baggage was done recklessly and with knowledge that damage would probably result“ under Article 22(5) of the Convention.

In this motion, BA will show that no plausible theory consistent with the amended

<sup>1</sup> Contemporaneous with this motion, BA is filing a motion to dismiss or transfer. BA suggests that the Court consider the forum-related motion first, and consider this merits-related motion only if the Court first determines that the case should remain in this jurisdiction.

1 complaint's factual allegations can make out a case that BA acted either "recklessly" or "with  
2 knowledge that damage would probably result" as those terms are used in the Convention and  
3 construed by decades of precedent. Thus, the amended complaint should be dismissed pursuant  
4 to Fed. R. Civ. P. 12(b)(6) and *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 167 L.Ed.2d 929  
5 (2007).

## 6 **II. STATEMENT OF ALLEGED FACTS**<sup>2</sup>

7 Each named plaintiff alleges that his or her checked luggage was lost, damaged, and/or  
8 delayed while flying with BA. *Amended Class Action Complaint* (Dkt. No. 11) ¶ 83 (hereafter  
9 "amended complaint"). Some plaintiffs also allege that BA provided unhelpful customer service,  
10 made misrepresentations about the status of lost bags, and failed to provide adequate pre-flight  
11 notice that bags might be lost or delayed. *E.g. id.*, ¶¶ 8-9 and § IV (B). In the amended  
12 complaint, plaintiffs concede that the Montreal Convention applies and limits a passenger's  
13 recovery for lost, damaged or delayed baggage to 1,000 Special Drawing Rights<sup>3</sup> unless the  
14 passenger shows that the airline acted "with intent to cause damage or recklessly and with  
15 knowledge that damage would probably result." 49 U.S.C.A. § 40105 (reprint), at Art.s 22(2) and  
16 (5), 24, and 25.<sup>4</sup> As none of the plaintiffs allege that BA acted with intent to cause damage, the  
17 crux of plaintiffs' factual allegations is two-fold: (1) that each plaintiff incurred more than 1,000  
18 SDR's in damage and (2) that British Airways acted "recklessly" and "with knowledge that  
19 damage would probably result . . ." *Id.*, Art. 22(5).

20 Plaintiffs allege the following facts in support of their allegation that each plaintiff's  
21 damages should not be subject to the Convention's 1,000 SDR presumptive limitation:  
22

23 \_\_\_\_\_  
24 <sup>2</sup> Pursuant to Fed. R. Civ. P. 12(b)(6), this motion relies only on facts alleged in plaintiffs' complaint, and assumes  
the truth of all facts alleged in the complaint and all reasonable inferences therefrom.

25 <sup>3</sup> A Special Drawing Right is an international accounting unit created and tracked by the International Monetary  
Fund. See <http://www.imf.org/external/np/exr/facts/sdr.htm>. Currently, 1,000 SDR's equals \$1,581.66. *Id.*

26 <sup>4</sup> Hereafter, all citations to the Montreal Convention are to the official version adopted by the United States, found at  
49 U.S.C.A. §40105.

1 According to their recent report, the Air Transport Users Council (AUC)  
 2 determined that British Airways loses (temporarily or permanently) 23 bags per  
 3 1,000 passengers carried – over 60% more lost baggage than the already alarming  
 industry average.

4 Amended Complaint, ¶ 4. In real percentage terms this allegation is stating that BA loses 2.3%  
 5 of its passengers’ bags, compared to the industry average of about 1.4%. The amended  
 6 complaint also alleges that in April, May and June of 2007, “Defendant lost one piece of baggage  
 7 for every 36 passengers it carried – significantly worse than any other airline, and twice the rate  
 8 of the worst U.S. airline . . .,” *Id.*, ¶ 37 Again, in real percentage terms this constitutes a 2.8%  
 9 lost baggage rate over the three-month period. Finally, plaintiffs allege that “baggage is  
 10 misrouted, misplaced, abandoned, damaged, left in pouring rain, placed into the wrong plane or  
 11 no plane at all, lost permanently or for extended periods of time, and generally handled with  
 12 reckless disregard for its well-being.” *Id.*, ¶ 34.

13 Plaintiffs allege a single cause of action, described in paragraph 103 of the amended  
 14 complaint as follows:

15 By recklessly acting and/or failing to act despite knowledge of the likelihood that  
 16 significant numbers of passengers would have their baggage delayed, lost and/or  
 17 damaged by its flawed, inadequate system of baggage handling, the Defendant  
 18 invited additional liability equal to the damages sustained by the Plaintiffs.  
 Plaintiffs are also entitled, under the Convention, Art. 22(6), to “the whole or part  
 of the court costs and of the other expenses of the litigation incurred by the  
 plaintiff, including interest.

19 The named plaintiffs seek to exercise these alleged rights on behalf of themselves and all BA  
 20 passengers similarly situated for a two-year period.

21 Plaintiffs request relief in the form of “damages in the amount equal to their actual  
 22 damages, including all costs associated with the loss, damage, or delay of their baggage, with  
 23 interest,” along with costs and attorneys fees. *Id.*, p. 26. All plaintiffs (with one possible  
 24 exception) appear to concede that they have already been compensated by BA,<sup>5</sup> but seek

25 \_\_\_\_\_  
 26 <sup>5</sup> A substantial issue in this litigation, if it is allowed to proceed, will be whether the doctrine of accord and  
 satisfaction and other legal doctrines prohibit each plaintiff from seeking an additional recovery beyond the

1 additional compensation nonetheless.<sup>6</sup>

### 2 **III. AUTHORITY AND ANALYSIS**

3 Although the amended complaint details various grievances, it ultimately asserts only one  
 4 cause of action under the Montreal Convention, which the plaintiffs concede governs their  
 5 claims. *See* Amended Complaint, ¶ 80. This is no doubt because plaintiffs recognize that the  
 6 Montreal Convention provides their exclusive remedy and does not allow any other claims,  
 7 whether in tort or contract, or recovery of damages such as emotional distress absent bodily  
 8 injury, or punitive damages. *King v. American Airlines, Inc.*, 284 F.3d 352, 357 (2d Cir. 2002)  
 9 (plaintiffs “must bring their claims under the terms of the Convention or not at all”) (citing *El Al*  
 10 *Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 161, 175-76 (1999)); *see also Cruz v. American*  
 11 *Airlines*, 193 F.3d 526 (D.C. Cir. 1999) (plaintiffs who alleged that an airline lost their luggage  
 12 were not allowed to plead a separate claim alleging that the airline wrongfully denied their lost-  
 13 baggage claim); *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141-42 (2d Cir. 1998) (rejecting  
 14 an attempt to plead around the Warsaw limitations by asserting a claim for “tortious denial of  
 15 medical care”); *Booker v. BWIA West Indies Airways Ltd*, 2007 WL 1351927 (E.D.N.Y. 2007)  
 16 (claims for emotional distress in connection with lost baggage not allowed under Montreal  
 17 Convention). Moreover, plaintiffs’ single cause of action is limited to a request for damages

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 19 compensation already paid under the damages law governing that plaintiff’s claims. For example, under the law of  
 20 Wisconsin, which BA believes applies to plaintiff Kayserili, BA is entitled to dismissal based on accord and  
 21 satisfaction. *See Butler v. Kocisko*, 479 N.W.2d 208, 210 (Wis. Ct. App. 1991) (“Payment in full settlement of a  
 22 claim that is disputed as to amount discharges the entire claim”); *Porter v. Regdab, Inc.*, 1991 U.S. App. LEXIS 814  
 23 at \*5 (7<sup>th</sup> Cir. 1991) (where creditor accepts payment while aware of debtor’s intent to make payment in full and  
 24 final settlement of claim, debtor is entitled to accord and satisfaction). Other states’ laws applicable to other plaintiffs  
 25 may have different law regarding accord and satisfaction.

26 <sup>6</sup> *Complaint*, ¶ 43 (plaintiff Hutchinson “has yet to be compensated commensurate with the damages she suffered”);  
 ¶47 (BA “has refused to fully compensate Ms. Dannert for her substantial loss caused by its recklessness”); ¶ 55  
 (“British Airways has not provided full compensation to the Smiths.”); ¶ 60 (plaintiff Kayserili “has yet to be fully  
 compensated for her losses caused by British Air’s recklessness.”); ¶ 64 (plaintiff McQueen has not “been fully  
 compensated for her damages.”); ¶ 66 (BA has “failed to provide Mr. Virgil full compensation for his damages.”); ¶  
 68 (plaintiff Smith “has not been fully compensated for her loss.”); ¶ 72 (admitting plaintiff Sanford eventually  
 received his baggage and not mentioning damages or compensation); ¶ 74 (BA “has refused to compensate [the  
 McAvoy plaintiffs] for their damaged baggage); ¶ 76 (BA stated it “would not be providing [plaintiff Sanchez-  
 Martinez] full compensation for her damages.”); ¶ 79 (“complete compensation for [plaintiff Kerr’s] damages has  
 not been paid” by BA).

**DEFENDANT’S MOTION TO DISMISS**  
**PURSUANT TO FED R. CIV. P. 12(b)(6) - 4**  
 (Cause No. C07-1370 MJP)

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1 above the 1,000 SDR presumptive liability limit – damages the amended complaint concedes can  
2 be obtained only by showing that BA acted both “recklessly” and “with knowledge that damage  
3 would probably result.”

4 The amended complaint repeatedly offers the conclusion that BA’s conduct in handling  
5 plaintiffs’ baggage was “reckless,” but the factual allegation offered to support that conclusion –  
6 that BA lost or delayed 0.9% to 1.4% more of its passengers’ bags than the industry average –  
7 cannot satisfy the minimum legal standard for establishing treaty liability above the 1,000 SDR  
8 cap. In addition, the amended complaint contains no facts supporting the contention that BA  
9 knowingly caused the damage for which plaintiffs are seeking recovery – a required element of  
10 Article 22(5) of the Convention. Finally, plaintiffs do not state facts supporting the contention  
11 that they suffered “damage” as that term is used in Article 22(5). Thus, the amended complaint  
12 fails to present a plausible claim upon which the Court can grant relief and so should be  
13 dismissed.

14 **A. Standard for Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6)**

15 Rule 12(b)(6) empowers federal courts to dismiss a complaint for failure to state a claim  
16 upon which relief can be granted. As a result of the Supreme Court’s decision in *Bell Atlantic*  
17 *Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007), the standard applicable to such motions has  
18 recently changed. Now, “[a]lthough a complaint challenged by a Rule 12(b)(6) motion to  
19 dismiss need not provide detailed factual allegations, it must offer ‘more than labels and  
20 conclusions’ and contain more than a ‘formulaic recitation of the elements of a cause of action.’”  
21 *Sadler v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 2778257 at \*2 (W.D. Wash.) (slip op.)  
22 (quoting *Twombly*, 127 S.Ct. at 1964-65 (2007)). “The complaint must indicate more than mere  
23 speculation of a right to relief.” *Id.* (citing *Twombly*, 127 S. Ct. at 1965). Where, as here, the  
24 amended complaint fails to adequately state a claim, such deficiency should be “exposed at the  
25 point of minimum expenditure of time and money by the parties and the court.” *Twombly*, 127 S.  
26

1 Ct. at 1966. This can occur for one of two reasons: (i) absence of a cognizable legal theory, or  
2 (ii) insufficient facts under a cognizable legal claim. Sadler, 2007 WL at \*2 (citing *Robertson v.*  
3 *Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)). The second rationale supports  
4 dismissal here.

5 In *Twombly*, the U.S. Supreme Court “retired” the traditional test that a complaint should  
6 not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in  
7 support of his claim which would entitle him to relief.” 127 S. Ct. at 1968-69 (quoting *Conley v.*  
8 *Gibson*, 355 U.S. 41, 45-46 (1957)). Now, a complaint is subject to dismissal unless it alleges  
9 “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

10 In ruling on a Rule 12(b)(6) motion, a court should not accept legal conclusions cast in  
11 the form of factual allegations if those conclusions cannot reasonably be drawn from the facts  
12 alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan*  
13 *v. Allain*, 478 U.S. 265, 286 (1986); *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643  
14 n. 2 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986); *Western Mining Council v. Watt*, 643 F.2d  
15 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981)). Moreover, “conclusory allegations of  
16 law and unwarranted inferences are not sufficient to defeat a [Rule 12(b)(6)] motion to dismiss.”  
17 *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

## 18 **B. The Montreal Convention**

19 The Montreal Convention's stated purpose is to promote uniformity in the laws governing  
20 airline liability for the “international carriage of persons, baggage or cargo performed by  
21 aircraft.” 49 U.S.C.A. § 40105, Art. 1. The Convention comprehensively and carefully defines  
22 the standards applicable to claims for delay of passengers and baggage, and for damage or loss of  
23 baggage or cargo. As to checked baggage, Article 17 imposes presumptive liability on airlines  
24 for its loss or destruction “upon condition only that the event which caused the destruction, loss  
25 or damage took place on board the aircraft or during any period within which the checked  
26

1 baggage was in the charge of the carrier.” Art. 17(2). Article 17 also provides that the airline is  
 2 not liable for “inherent defect, quality, or vice of the baggage.”

3 Bags are deemed lost either if the airline admits they are lost, or if they are not delivered  
 4 within 21 days. *Id.* In the case of delayed baggage, the airline is presumptively liable unless the  
 5 airline “proves that it and its servants and agents took all measures that could reasonably be  
 6 required to avoid the damage or that it was impossible for it or them to take such measures.” Art.  
 7 19. Finally, the Convention renders an airline liable for loss or damage to carry-on bags only if  
 8 resulted from the airline’s fault or that of its servants or agents. Thus, the Convention carefully  
 9 balances the various parties’ rights and creates standards to govern the airline’s treaty liability to  
 10 passengers.

11 Critical to the issues in this case, the Convention tempers the airline’s presumptive  
 12 liability for destruction, loss, damage or delay of checked baggage by capping that liability at  
 13 1,000 SDR’s,<sup>7</sup> unless the passenger declares a higher value and pays an additional fee. Art. 22(2).  
 14 There is a single exception to the 1,000 SDR limit for loss or damage to baggage not declared at  
 15 a higher value:

16 The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it  
 17 is proved that the damage resulted from an act or omission of the carrier, its  
 18 servants or agents, **done with intent to cause damage or recklessly and with**  
 19 **knowledge that damage would probably result**; provided that, in the case of  
 20 such act or omission of a servant or agent, it is also proved that such servant or  
 21 agent was acting within the scope of its employment.

22 Art. 22(5) (emphasis added). This is the provision upon which plaintiffs rely.

23 The term “reckless” as used in the Montreal Convention has a long history in airline  
 24 liability litigation. Article 25 of the Warsaw Convention (replaced by Montreal Convention  
 25 Article 22) also had a liability cap for passenger for injury or death suffered in an aviation  
 26 accident, but contained an exception stating that the cap did not apply to an accident caused by

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<sup>7</sup> The cap is reviewed at five-year intervals. Art. 24.

1 the airline's "wilful misconduct."<sup>8</sup> Courts came to interpret the "wilful misconduct" exception to  
 2 include both intentionality and acting with "reckless disregard" of the probable consequence of  
 3 that death or injury would result.<sup>9</sup> To bring the text of the treaty in line with these interpretations,  
 4 Art. 22 of the Montreal Convention generally replaced the "wilful misconduct" standard with the  
 5 phrase "done with intent to cause damage or recklessly and with knowledge that damage would  
 6 probably result." *Husain v. Olympic Airways*, 316 F.3d 829, 839 (9th Cir. 2002) (citing *Carey v.*  
 7 *United Airlines*, 255 F.3d 1044, 1047 n. 11 (9th Cir. 2001) (citations and internal quotations  
 8 omitted). Thus, cases interpreting the Montreal Convention have consistently held that the  
 9 "reckless" standard

10 clarifies the definition of willful misconduct under Art. 25, rather than effecting a  
 11 substantive change in the law. The amended language provides a more precise  
 12 articulation of the standard, requiring a passenger to prove that the carrier, or its  
 13 servants or agents, acted (1) "with intent to cause damage," or (2) "recklessly and  
 with knowledge that damage would probably result."

14 *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1290 (11th Cir. 1999); *see also Bayer*  
 15 *Corp. v. British Airways, LLC*, 210 F.3d 236 (4th Cir. 2000).<sup>10</sup> Accordingly, the standard for  
 16 obtaining unlimited damages in excess of the 1,000 SDR limit is the same under both treaties,  
 17 and case law interpreting Art. 25 of the Warsaw Convention informs analysis of Article 22 of the  
 18 Montreal Convention.

19 <sup>8</sup> The Warsaw Convention limited the airline's liability for lost or damaged baggage much more severely than does  
 the Montreal Convention – to \$9.07 per pound. 39 Fed.Reg. 1526 (1974).

20 <sup>9</sup> *See, e.g., Shah v. Pan Am. World Servs., Inc.*, 148 F.3d 84, 93 (2d Cir. 1998) (carrier must have acted either (1)  
 21 with knowledge that its actions would result in injury or death, or (2) in conscious or reckless disregard of the fact  
 22 that death or injury would be the probable consequences of its actions), *cert. denied*, 525 U.S. 1142 (1999); *Koirala*  
 23 *v. Thai Airways Int'l, Ltd.*, 126 F.3d 1205, 1209-10 (9th Cir. 1997) (air carrier must intentionally perform an act, or  
 fail to perform an act, with knowledge that it probably will result in injury or harm, or intentionally perform an act in  
 some manner as to imply a reckless disregard of the consequences of its performance); *Saba v. Compagnie Nationale*  
*Air France*, 78 F.3d 664, 667 (D.C. Cir. 1996) ("To be sure, from our earliest cases under the Warsaw Convention,  
 we have treated reckless disregard as equivalent to willful misconduct."); *In re Air Crash Disaster*, 86 F.3d 498, 544  
 (6th Cir. 1996) (same).

24 <sup>10</sup> This is consistent with Congress' intent in adopting the Montreal Convention. *Weiss v. American Airlines, Inc.*,  
 25 147 F. Supp. 2d 950, 952-53 (N.D. Ill. 2001) ("In the proceedings leading to the Senate's ratification of that Montreal  
 Protocol, its Committee on Foreign Relations reported that the new language reflected a clarification rather than any  
 26 intended change in the standard . . . so that the Protocol simply replaced the earlier 'wilful misconduct' term with  
 the common law definition of 'wilful misconduct.' (internal citations omitted).

1 In appropriate circumstances, courts have not hesitated to reject as a matter of law  
 2 attempts to invoke the “recklessness and with knowledge that damages will likely result”  
 3 exception to the cap on treaty liability.<sup>11</sup> This litigation is such an appropriate circumstance  
 4 because plaintiffs fail to allege facts sufficient to satisfy the high legal standard required to defeat  
 5 the treaty limitation of liability, requiring dismissal pursuant to Fed. R. Civ. P. 12(b)(6).

6 **C. Plaintiffs Have Not Alleged Facts Sufficient To Establish That BA’s Conduct Was**  
 7 **Reckless.**

8 Courts place a heavy burden on passengers attempting to avoid the Montreal or Warsaw  
 9 Convention liability caps. *Republic National Bank of N.Y. v. Eastern Airlines, Inc.*, 815 F.2d  
 10 232, 238-239 (2d Cir. 1987); *Bayer Corp. v. British Airways, LLC*, 210 F.3d 236, 239 (4th Cir.  
 11 2000). The law is clear that obtaining damages above 1,000 SDR’s requires more than mere  
 12 negligence or even gross negligence. *Bayer*, at 239; *Saba v. Compagnie Nationale Air France*,  
 13 78 F.3d 664, 667 (D.C. Cir. 1996); *Perera Co. v. Varig Brazilian Airlines, Inc.*, 775 F.2d 21, 23-  
 14 24 (2d Cir.1985).

15 For example, in *Saba v. Compagnie Nationale Air France*, 78 F.3d 664 (D.C. Cir.  
 16 1996)(construing Warsaw Convention), plaintiff sought to avoid the treaty limit for the loss of  
 17 valuable carpets that had been improperly packed by the airline in violation of its own cargo-  
 18 handling regulations and that its baggage handlers had left outside in the rain, causing many to be  
 19 ruined. Although the district court found the airline’s conduct to be reckless, the Court of  
 20 Appeals reversed, concluding that this conduct did not, as a matter of law, constitute recklessness  
 21 as that term is used in the Convention. The *Saba* Court recognized the temptation for courts to

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 24 <sup>11</sup> See, e.g., *Nipponkoa Ins. Co., Ltd. v. GlobeGround Services, Inc.*, 2007 WL 2410292 (N.D. Ill. 2007) (slip op.)  
 25 (granting summary judgment in favor of the carrier on the issue of whether the “willful misconduct” exception  
 26 applied to a carrier’s liability for the theft of laptop computers in storage at O’Hare International Airport);  
*Schopenhauer v. Compagnie Nationale Air France*, 255 F. Supp. 2d 81 (E.D.N.Y. 2003) (passenger’s claim that  
 airline committed “willful misconduct” within the meaning of Warsaw Convention did not stand in the way of  
 summary judgment where claim was unsupported by any facts or legal analysis).

1 erode the treaty's liability limitation when faced with acts of obvious negligence, and warned  
2 against such erosion:

3  
4 It is not all that easy to avoid the Convention's limitations by establishing willful  
5 misconduct (or reckless disregard). But the signatories obviously thought the  
6 economics of air travel, and therefore the overall welfare of passengers, dictated  
7 those limitations. It simply will not do for courts to chip away at that liability  
8 limit, out of a natural desire to remedy the negligence that can be all too apparent  
9 in any individual case.

10 *Id.* at 671.<sup>12</sup>

11 In *Dazo v. Globe Airport Security Services*, 295 F.3d 934 (9th Cir. 2002) (Warsaw  
12 Convention), a plaintiff's carry on bag containing jewelry worth more than \$100,000 was stolen  
13 as it passed through a security checkpoint. In a suit against three airlines and others, plaintiffs  
14 sought damages above the liability limit based on claims of wilful misconduct and recklessness,  
15 alleging that the airline "knew that similar thefts had occurred at the airport but failed to make  
16 reasonable efforts to prevent such thefts, thereby subjecting her to an unreasonable degree of risk.

17 *Id.* at 940. The Ninth Circuit affirmed a Rule 12(b)(6) dismissal for failure to state a claim,  
18 holding:

19 Dazo does not allege that defendants had a positive intent to harm her, or that they  
20 had a positive, active and absolute disregard, or even reckless disregard, for the  
21 consequences of any lapses in security. Thus, the district court's conclusion that  
22 Dazo's allegations do not rise to the level of wilful misconduct<sup>13</sup> is not erroneous.

23 *Id.* at 941.<sup>14</sup>

24  
25 <sup>12</sup> See also *Chukwuma v. Groupe Air France, Inc.*, 767 F. Supp. 43, 49 (S.D.N.Y. 1991)(where passenger's bags  
26 arrived days late and were found to have been pilfered, allegedly causing more than \$10,000 in damages, court  
stated: "The Court is not without sympathy for plaintiff. However, 'the fact remains that the Convention is a treaty  
to which the United States is bound, and the federal courts regularly enforce its damage limitations.')" (quoting  
*Barkanic v. General Administration of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 964 (2d  
Cir.1991)); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 256, 104 S.Ct. 1776, 80  
L.Ed.2d 273 (1984) ("The Convention's first and most obvious purpose was to set some limit on a carrier's liability  
for lost cargo.").

<sup>13</sup> The Court noted that the result was the same under either the "willful and wanton" standard in the Warsaw  
Convention, of the "recklessness with knowledge that damage would probably occur" standard now part of the  
Montreal Convention. *Id.* at 941 n.5.

<sup>14</sup> See also *Bayer Corp. v. British Airways, LLC*, 210 F.3d 236, 239 (4th Cir. 2000)(no reckless conduct where  
British Airways employees failed to refrigerate shipment of sensitive chemical reagents labeled "REFRIGERATE,

1           The mere fact that baggage is lost or stolen does not give rise to a presumption of  
 2 recklessness sufficient to invalidate the Convention’s liability cap. In *Chukwuma v. Groupe Air*  
 3 *France, Inc.*, 767 F. Supp. 43, 48 (S.D.N.Y. 1991), the court found that plaintiff’s numerous  
 4 affidavits and exhibits contained nothing more than “conclusory allegations” and “mere  
 5 speculation [and] conjecture,” in asserting recklessness solely on the basis that some of plaintiff’s  
 6 luggage was lost or stolen. In so holding, the court noted that presuming liability whenever bags  
 7 are lost would “severely undercut” the liability limitations of the Convention. *Id.* at 48.

8           The *Chukwuma* court’s warning is applicable to this case. Other than simply alleging that  
 9 bags were lost or damaged and repeatedly labeling BA’s conduct reckless, the amended  
 10 complaint contains only the following factual allegations of BA’s alleged conduct leading to the  
 11 mishandling of plaintiffs’ bags:

- 12           • BA admitted its baggage handling performance “has not been up to an acceptable  
 13 standard” ¶ 5
- 14           • BA failed to warn travelers or provide notice of its alleged “inability to make good on  
 15 its promise to transport personal property to its assigned destination” ¶ 6;
- 16           • BA showed “habitual indifference . . . to the fate of its passengers’ baggage,  
 17 commonly allowing such baggage to fall off the backs of ‘tugs’ (carts) . . .” ¶ 39;
- 18           • BA acted “with foreseeable knowledge that damage, delay and loss of passenger  
 19 baggage would continue unabated as a result of its inadequate, careless system of  
 baggage transport.” ¶ 86; and
- 20           • Between 0.9% and 1.4% more bags were lost or damaged by BA than the industry  
 21 average. ¶¶ 4, 37.

22           These allegations are inadequate as a matter of treaty law to meet the requirements of  
 23 Article 22(5) necessary to obtain excess compensation. First, courts applying the “reckless” or  
 24 “wilful misconduct” standard have repeatedly rejected plaintiffs’ contention that inadequate

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25           DO NOT FREEZE, URGENT, FRAGILE MEDICAL SUPPLIES," then walked past shipment 10-50 times a day for  
 26 nine days; court noted: “saying that British Airways could have taken further steps is a far cry from finding "wilful  
 misconduct."")

1 procedures for handling baggage constitutes recklessness. In *Nipponkoa Ins. Co., Ltd. v.*  
 2 *GlobeGround Services, Inc.*, 2007 WL 2410292, \*6 (N.D. Ill. 2007) (slip op.), the plaintiffs  
 3 sought compensation above the treaty limit for laptop computers stolen at O’Hare International  
 4 Airport on the ground that the airline’s security procedures were deficient. The court held that  
 5 plaintiffs failed to present evidence that the theft was “the result of anything beyond negligence,”  
 6 and that “evidence of deficiencies in [a carrier’s] procedures is insufficient to infer willful  
 7 misconduct.” *Id.* at \*7.<sup>15</sup>

8 Second, neither negligent conduct by employees, nor negligent supervision by their  
 9 management, constitutes recklessness. In *Locks v. British Airways*, 759 F. Supp. 1137, 1141  
 10 (E.D. Pa. 1991), BA was alleged to have allowed needless damage to a valuable sculpture when  
 11 US Custom agents drilled holes in it to check for contraband. Such conduct was, the court held,  
 12 insufficient as a matter of law to justify damages above the cap. Moreover, the court held that  
 13 while BA may have negligently supervised its employees, negligent supervision does not mean  
 14 that BA “possessed the kind of awareness of a likelihood of probable harm that is necessary to  
 15 sustain a finding of willful misconduct.” *Id.* at 1141.

16 A close examination of the amended complaint similarly reveal that plaintiffs’ claims are  
 17 based exclusively on concepts such as BA’s “level of service . . . not . . . up to an acceptable  
 18 standard,” its “indifference,” and “[t]he careless way that passengers’ luggage is treated.”  
 19 Amended Complaint, ¶¶ 5, 9, 38, and 39. While these charges, if proven, might constitute  
 20 negligence, they clearly do not constitute recklessness as a matter of treaty law.

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 25 <sup>15</sup> See also *Simo Noboa v. Iberia Lineas Aereas de Espana*, 383 F.Supp.2d 323, 325-27 (D. Puerto Rico  
 26 205)(airline’s alleged failure to adopt or follow appropriate procedures causing it to lose plaintiff’s deceased  
 mother’s ashes not reckless as matter of law).

1 **D. Plaintiffs Have Not Alleged Facts Sufficient To Establish That BA Acted With**  
 2 **Knowledge That Damage Would Probably Result**

3 While many courts implied a scienter requirement into the Warsaw Convention,<sup>16</sup> this  
 4 requirement was made explicit in the Montreal Convention by addition of the requirement that  
 5 airline must be proven to have “knowledge that damage would probably result” to obtain  
 6 damages above the liability cap. This standard requires subjective knowledge on the part of the  
 7 airline’s responsible employees.<sup>17</sup> The term “probably” is equivalent to “more likely than not.”  
 8 *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851 (1995); *see Committee for an Independent P-I*  
 9 *v. Hearst Corp.*, 704 F.2d 467, 478 (9<sup>th</sup> Cir. 1983)(“probable danger of financial failure” means  
 10 “suffering losses which more than likely cannot be reversed”).

11 To obtain unlimited compensation for baggage losses under Montreal, plaintiffs must  
 12 show that the airline had actual subjective knowledge that each individual plaintiff’s baggage  
 13 would probably be lost or destroyed. Generalized knowledge about an increased risk of  
 14 mishandling passengers’ bags is insufficient. In *Republic Nat’l Bank of New York v. Eastern*  
 15 *Airlines*, 815 F.2d 232 (2d Cir. 1987), plaintiff’s checked bag containing \$2 million in currency  
 16 was stolen while being handled by the airline. The plaintiff presented evidence that the airline  
 17 had accepted the baggage in violation of its own rule against checking currency and that argued  
 18 that this should constitute recklessness. The court found no wilful misconduct as a matter of law,  
 19 holding that:

20 The “simple acceptance of currency as checked baggage . . . does not alone create a  
 21 probability of its loss. Rather, other factors must be established indicating that such a loss  
 22 is likely to occur and that defendant was aware of the probability when it accepted  
 23 plaintiff’s valuables. Republic has failed to produce any evidence that the mere acceptance

23 <sup>16</sup> See discussion in *Piamba Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1284-87 (11<sup>th</sup> Cir. 1999)(citing  
 24 numerous cases considering whether Warsaw convention required proof of knowledge that damage would probably  
 25 result).

25 <sup>17</sup> *Burner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2nd Cir. 1965), *cert. denied*, 382 U.S. 983  
 26 (1966); *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 668 (D.C. Cir. 1996) (requiring plaintiff to show  
 actor’s subjective state of mind in order to prove “willful misconduct.”); *Piamba*, 177 F.3d at 1291; *Husain v.*  
*Olympic Airways*, 316 F.3d 829, 839 (9th Cir. 2002).

1 of its currency bags as checked baggage was likely to result in loss and that Eastern was  
2 aware of this likelihood. Summary judgment was, therefore, proper as to this claim.

3 *Id.* at 239.

4 Here, no individual plaintiff was able to allege that British Airways acted with knowledge  
5 that damage to his or her particular bags would probably result. Rather, the amended complaint  
6 is carefully phrased as follows:

7 By recklessly acting and/or failing to act despite **knowledge of the likelihood**  
8 **that significant numbers of passengers would have their baggage delayed, lost**  
9 **and/or damaged** by its flawed, inadequate system of baggage handling, the  
Defendant invited additional liability equal to the damages sustained by the  
Plaintiffs.

10 Amended Complaint, ¶ 103. Even if plaintiffs could prove that BA knew of a “likelihood” that  
11 significant numbers of the putative class action passengers’ baggage would be mishandled, this  
12 does not meet the requirement that BA accepted plaintiff’s bags knowing that each of them  
13 would more likely than not be mishandled, and nonetheless acted recklessly in disregard of that  
14 knowledge. To the contrary, plaintiffs’ own allegations show that BA mishandled 2.3% to 2.8%  
15 of checked bags – about one-twentieth of the loss rate necessary to meet the “knowledge that  
16 damage would probably result” requirement.

17 Under the Convention, mishandling more bags than the industry average means that BA  
18 pays more passengers’ baggage claims up to the 1,000 SDR limit. It does not mean that BA  
19 acted recklessly or with knowledge that damage to any particular plaintiff would probably result  
20 as required by the Convention before BA can be held liable beyond the limit.

21 **E. Plaintiffs Have Not Alleged The Type of Damage Required To Invoke Article 22(5).**

22 In the amended complaint, plaintiffs allege substantial detail about the inconvenience and  
23 cost they suffered due to arriving at their destination without their baggage. However, the  
24 damages they describe are typical of the inconvenience and added expense that any traveler  
25 endures if his or her bags are lost, damaged, or delayed. For this reason, cases construing  
26

1 Montreal and Warsaw have specified that to meet the “knowledge that damage would probably  
2 occur” standard, plaintiff must show that the damage must be “serious” as well as “likely to  
3 occur.” *Nipponkoa Ins. Co., Ltd. v. GlobeGround Services, Inc.*, 2007 WL 2410292, \*6 (N.D. Ill.  
4 2007) (slip op.) (citing *Saba*, 78 F.3d at 670). It also is noteworthy that the “serious risk” giving  
5 rise to a finding of recklessness usually involves personal injury or death. For example, in  
6 *Prescod v. AMR, Inc.*, 383 F.3d 861 (9th Cir. 2004), an airline refused to allow an elderly  
7 passenger to carry on a bag containing essential medical equipment, despite being repeatedly told  
8 that the passenger needed to keep the bag with her. The bag was checked, delayed, and although  
9 the airline promised the passenger’s son that it would arrive on several subsequent flights, it did  
10 not. As a result, the plaintiff died due to respiratory failure. The Ninth Circuit held that this  
11 made out a case of recklessness because the damage the airline was warned would flow from  
12 mishandling plaintiff’s bag was serious injury or death. *Id.* at 870; *see also Koirala v. Thai*  
13 *Airways Int’l, Ltd.*, 126 F.3d 1205, 1209-10 (9th Cir. 1997) (wilful misconduct for the crew to  
14 have “failed to discern anytime during the six minutes after the 360-degree turn and before  
15 impact that the plane was heading north into known dangerous terrain instead of south,” resulting  
16 in plane crash causing multiple deaths); *Butler v. Aeromexico*, 774 F.2d 429 (11th Cir. 1985),  
17 *reh’g denied*, 781 F.2d 905 (deactivation of radar despite signs of bad weather and fact that  
18 crew could have aborted approach after losing visibility but deliberately continued descent,  
19 resulting in deadly plane crash, supported finding of wilful misconduct).

20 As these cases recognize, the term “damage,” as used in Warsaw and Montreal must  
21 mean something more than the inconvenience and expense associated with every lost bag.  
22 Otherwise, the “knowledge that damage would probably result” restriction would be meaningless  
23 since it would exist in every instance. Treaties must, if possible, be construed to give “full force  
24 and effect” to all their parts. *Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205, 208 (5th Cir. 1994)  
25 (citing *United States v. Reid*, 73 F.2d 153, 155 (9th Cir. 1934)). The Convention already holds  
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1 airlines presumptively liable for the inconvenience and expense inherent in every incident of  
2 mishandled baggage, but it subjects that liability to a reasonable 1,000 SDR limit. The  
3 mishandling itself cannot create a waiver of that limit.

4 Plaintiffs' amended complaint incorrectly suggests that every delayed bag must be due to  
5 some fault or failure of the airline. In reality, an airline may legitimately fail to deliver a checked  
6 bag to the passenger at his or her destination due to issues such as aircraft performance and  
7 loading limitations, air traffic control requirements, the need to avoid inconveniencing hundreds  
8 or thousands of other passengers, overloaded airport facilities caused by increased passenger  
9 traffic or inadequate public investment, security requirements or concerns, and no doubt many  
10 other reasons. Nonetheless, the Convention provides passengers a presumptive right to a  
11 reasonable amount of compensation for the inconvenience and extra expense that will inevitably  
12 result from mishandled baggage, regardless whether a bag is mishandled due to the airline's  
13 misconduct or for any other reason. This presumptive liability, up to the 1,000 SDR limitation,  
14 strikes a reasonable compromise between passenger interests and the practical needs of our  
15 system of international air travel. The delegates to the Convention concluded that this  
16 compromise should be upset only in truly extraordinary circumstances where the airline acts  
17 "recklessly and with knowledge that damage would probably occur," and the U.S. Congress  
18 agreed. Since plaintiffs' own amended complaint shows that such circumstances are absent here,  
19 the Court should dismiss plaintiffs' attempt to avoid the treaty limitation of liability as a matter of  
20 law.

#### 21 **IV. CONCLUSION**

22 Plaintiffs' cause of action depends upon the Court accepting the legal conclusion that  
23 loss, damage, or delay of 2.3% to 2.8% of checked baggage constitutes "recklessness" committed  
24 "with knowledge that damage would probably result" as a matter of treaty law. The Amended  
25 Complaint states no specific facts to support its legal claim – other than repeatedly and in a  
26

1 conclusory fashion labeling BA’s conduct reckless – and, accordingly, cannot meet the *Twombly*  
 2 standard set by the Supreme Court. As the extensive body of case law construing the Montreal  
 3 Convention and its predecessor shows, generalized knowledge of loss, damage or delay affecting  
 4 2.8% of checked bags cannot meet the Montreal Convention’s requirement that BA must have  
 5 acted recklessly and with knowledge that damage to these plaintiffs’ bags would probably occur.  
 6 At most, the Amended Complaint states a cause of action for negligence. However, negligence  
 7 claims are pre-empted by the Montreal Convention and do not, under the plain terms of the  
 8 Convention, entitle plaintiffs to recover any damages above the 1,000 SDR limit. Accordingly,  
 9 the Court should dismiss Plaintiffs’ Amended Class Action Complaint with prejudice pursuant to  
 10 Fed. R. Civ. P. 12(b)(6).

11 DATED this 10th day of January, 2008.

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32 **DEFENDANT’S MOTION TO DISMISS**  
**PURSUANT TO FED R. CIV. P. 12(b)(6) - 17**  
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PURSUANT TO FED R. CIV. P. 12(b)(6) - 18**  
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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on January 10, 2008, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Washington using the CM/ECF system which will send notification of such filing to the following:

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Signed at Seattle, Washington on January 10, 2008.

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