INTRODUCTION AND STATEMENT OF FACTS

At the outset, it should be noted that defendant's motion to dismiss does not claim that plaintiffs have failed to state a *prima facie* claim of discrimination under 42 U.S.C. §1981, Title IV of the Civil Rights Act of 1964, or the New Jersey Law Against Discrimination. Rather, defendant's motion to dismiss is based on its claim that even assuming that plaintiffs have stated a claim of racial discrimination, defendant is immune from such a claim so long as it asserts that it took the discriminatory action in the name of airline security.

As discussed in Section II of this brief, defendant's claim of sweeping immunity from claims of racial discrimination is not supported in law or reason. Additionally, defendant claims that the Warsaw Convention provides international airlines with absolute protection from prospective injunctive relief. As discussed in Section III, this claim that the Warsaw Convention deprives this Court of the power to enjoin prospective unlawful conduct is not evidenced by the language or purpose of the Convention. Moreover, such an interpretation would eviscerate altogether private enforcement of civil rights protections in the broad category of "international transportation" – in this instant, a flight from Newark, NJ to Tampa, FL.

Defendant's other bases for its motion to dismiss are also without merit. As discussed in Section IV, plaintiffs clearly have standing to seek injunctive relief and their claims are ripe for adjudication. Finally, as discussed in Section V, defendant has no support for its claim that the limitation on remedies in its contract of carriage would apply to a lawsuit that is not based on a breach of contract claim.

Plaintiffs in these lawsuits allege that they were the victims of racial discrimination when they were removed from one of defendant's airplanes by defendant's employees. None of the allegations in plaintiffs' complaints supports defendant's contention that its employees were

justified in removing plaintiffs from the plane. As alleged, the facts in these cases more than support plaintiffs' claims that they were the victims of racial discrimination and defendant's attempts to recast common innocuous behavior as suspicious highlights the untenable nature of this motion to dismiss.

If accepted, defendant's argument would allow airlines to refuse to carry any passenger who is, or is perceived to be, Arab, Muslim, or Middle Eastern based on nothing more than the fact that a fellow passenger deems that person "suspicious" because of his or her own racial prejudice. Based on the allegations made by plaintiffs, a reasonable jury could easily find that plaintiffs were not removed because of any suspicious or wrongful conduct on their own parts, but rather because of the pilot's decision to "give in to" another passenger's conclusory and racially based statement that three "brown-skinned men are behaving suspiciously" and making her uncomfortable.

Contrary to defendant's assertions, neither the language nor purposes of the Federal Aviation Act or of the Warsaw Convention requires that airlines be allowed to engage in unchecked racial discrimination. Preventing such discrimination will neither hinder legitimate security measures nor prevent airlines and their employees from taking appropriate action based on actual suspicious conduct.

Facts Regarding Defendant's Racially Discriminatory Conduct

Michael Dasrath is a thirty-two year old citizen of the United States. *Dasrath Comp.* ¶*8*.[1] He is a native of the Republic of Guyana, South America but moved to Brooklyn, New York at

[1] Throughout this brief plaintiffs will cite references to the complaints with the following abbreviations: references to the complaint of plaintiff Dasrath will be cited as "*Dasrath Comp.*

age one. *Dasrath Comp. ¶8.* Mr. Dasrath is dark-complected and outwardly appears to be of Middle Eastern or Indian descent. *Dasrath Comp. ¶8.* Mr. Dasrath has a Masters in Business Administration and is currently employed as an analyst in the Internal Consulting Service Division of J.P. Morgan Chase in New York City. *Dasrath Comp. ¶9.*

On the afternoon of December 31, 2001, Mr. Dasrath was intending to fly on defendant's airline from Newark, New Jersey to Tampa, Florida so that he could spend New Year's Eve with his wife and two young sons. *Dasrath Comp. ¶12.* Because Mr. Dasrath's wife is an employee of Continental Airlines he is eligible to use "non-revenue" tickets (which allow Mr. Dasrath to fly at significantly reduced rates). *Dasrath Comp. ¶13.* Mr. Dasrath's wife had made him a reservation for a "non-revenue" electronic ticket on Continental Airlines Flight #1218, which was scheduled to depart Newark at 4:10 p.m. and to arrive in Tampa at 7:05 p.m. *Dasrath Comp. ¶14.*

Upon arrival at Newark International Airport, Mr. Dasrath checked in at the Continental ticket counter and checked a suitcase containing a computer that Mr. Dasrath was taking as a present for his children. *Dasrath Comp. ¶15.* Mr. Dasrath cleared the airport security checkpoint after a comprehensive security screening and proceeded to gate C-91 from where Flight #1218 was scheduled to depart. *Dasrath Comp. ¶17.* When Mr. Dasrath checked in at the gate to receive his boarding pass the gate agent informed him that the flight was not fully booked and reassigned Mr. Dasrath to a first-class seat. *Dasrath Comp. ¶18.*

Contrary to defendant's representation of the facts in the complaint, Mr. Dasrath did not engage in any activity that could be considered "suspicious." Rather, Mr. Dasrath simply boarded the plane and took his assigned seat. *Dasrath Comp. ¶18.* Mr. Dasrath did not even

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¶__" and references to the complaint of plaintiffs Cureg and American Arab Anti-Discrimination Committee will be referred to as "*Cureg Comp. ¶__.*"

speak to other passengers on the flight. *Dasrath Comp.* ¶¶*18, 19, 21*. On the plane, the seat in front of Mr. Dasrath was occupied by a passenger who appeared to Mr. Dasrath to be of Asian decent. Mr. Dasrath did not know or recognize this passenger and never spoke with him prior to boarding or at any time while on board the plane. *Dasrath Comp.* ¶*19*. This individual was Edgardo Cureg, who is a thirty-four-year-old Ph.D. student in mathematics at the University of South Florida-Tampa. *Cureg Comp.* ¶¶*8, 29*. Mr. Cureg is a Filipino citizen and a legal permanent resident of the United States. *Cureg Comp.* ¶¶*8*.

While the plane was being boarded, Mr. Dasrath noticed that one passenger, who appeared to Mr. Dasrath to be of Indian descent, stopped briefly to greet Mr. Cureg and then proceeded to his seat in the economy section. *Dasrath Comp.* ¶*20*. This individual was Dr. Saraleesan Nadarajah, a mathematics professor and a colleague of Mr. Cureg at the University of South Florida-Tampa. *Cureg Comp.* ¶¶*18, 27*.

Despite defendant's attempt to characterize the actions of Mr. Dasrath, Mr. Cureg, and Mr. Nadarajah as unusual or suspicious, the facts alleged in the complaint paint a picture of typical airline passengers waiting to depart. For instance, defendant emphasizes that Mr. Cureg made calls to friends and family while waiting to depart. *Defendant's Joint Brief in Support of its Motion to Dismiss the Complaints* at 8 (hereinafter "*Def.'s Br.*"); *see Cureg Comp.* ¶*27*. Similarly, defendant emphasizes the fact that Dr. Nadarajah came back to the first-class cabin and sat in the empty seat beside Mr. Cureg so that the two could chat about mathematics while they waited for the plane to be readied for departure. *Def.'s Br.* at 8; *see Cureg Comp.* ¶¶ *29, 30.*

The first unusual event that took place on the plane was when a white female passenger from coach walked into the first-class section carrying a small dog. *Dasrath Comp.* ¶*22*. Mr. Dasrath noticed this passenger staring at him, Mr. Cureg, and Dr. Nadarajah. *Dasrath Comp.*

¶*22*. She then returned to her seat but almost immediately returned to the first-class cabin, again looked at plaintiffs and Dr. Nadarajah, and exited the plane with a Continental flight attendant she had approached. *Dasrath Comp.* ¶*22*. This passenger again returned to her seat, but within minutes the captain announced that the plane would remain at the gate temporarily while some luggage was re-examined by security personnel. *Dasrath Comp.* ¶*22*.

The white female passenger with the dog then reentered the first-class cabin and signaled to the captain, who was standing outside the cockpit. *Dasrath Comp.* ¶*23*. The captain walked past Mr. Dasrath and spoke with the white female passenger in the aisle, a few feet behind Mr. Dasrath's seat. *Dasrath Comp.* ¶*23.* Mr. Dasrath turned toward the captain and the white female passenger, at which point he saw this passenger pointing toward him, Mr. Cureg, and Dr. Nadarajah and heard her tell the captain that these three "brown-skinned men are behaving suspiciously." *Dasrath Comp.* ¶*23.*

After the white female passenger made this statement to the captain he proceeded toward the cockpit and walked off the plane, staring at Mr. Dasrath, Mr. Cureg, and Dr. Nadarajah as he passed without addressing them. *Dasrath Comp.* ¶*24*. Soon thereafter, the senior Continental gate agent boarded the plane, called for Mr. Dasrath and Mr. Cureg, asked Dr. Nadarajah his name, and asked the three of them to gather their belongings and to deplane. *Dasrath Comp.* ¶*25*. As the three exited the plane, the captain looked at them from head to toe and returned to the plane without speaking. *Dasrath Comp.* ¶*25.*

The senior Continental agent explained that the pilot had stated that a passenger was uncomfortable with their presence on the plane. *Cureg Comp.* ¶*32*. The agent appeared embarrassed by the incident. *Cureg Comp.* ¶*32.* After being ejected from the plane, the three returned to gate C-91 where the gate agents, including the senior gate agent who had ejected

them, apologized profusely for what had occurred. *Cureg Comp.* ¶*28*. Mr. Dasrath overheard one African-American Continental gate agent state to another, in reaction to the incident, "It's a white man's world." *Cureg Comp.* ¶*28.* At one point, the senior Continental agent tried, unsuccessfully, to convince the pilot to allow the three men to fly. *Cureg Comp.* ¶*35*.

After the plane departed, two Continental gate agents worked determinedly to find another flight on which Mr. Dasrath, Mr. Cureg, and Dr. Nadarajah could travel to Florida. *Dasrath Comp.* ¶*29*. They discovered that Continental Flight #1292 from Newark to Orlando had not yet departed, and the three were driven on a courtesy vehicle to the gate from which Flight #1292 was scheduled to depart at 5:00 p.m. *Dasrath Comp.* ¶*29.* When they arrived, the doors to the plane were closed. Mr. Dasrath explained to the Continental agents that they had been removed from Continental Flight #1218 to Tampa because of racial profiling and asked them to call the senior agent at gate C-91 who had removed them from that flight. *Dasrath Comp.* ¶*29.* After the supervising gate agent assigned to Flight #1292 spoke with the agent at gate C-91, she instructed another Continental gate agent to issue first-class boarding passes to the three men for Flight #1292 and ordered that the doors to this flight be opened to permit them to board. *Dasrath Comp.* ¶*29.* When Mr. Dasrath asked how he would get from Orlando to Tampa, where his family awaited him, he was told that Continental would provide a car service to transport him. *Dasrath Comp.* ¶*29.*

Mr. Dasrath, Mr. Cureg, and Dr. Nadarajah were all allowed to board Flight #1292 to Orlando without any additional security screening. *Dasrath Comp.* ¶*30*; *Cureg Comp.* ¶*40*.

The flight landed in Orlando shortly after 8:00 p.m. *Cureg Comp.* ¶*41*. Mr. Cureg obtained his luggage, which had been removed from the Tampa flight and transferred to the Orlando flight. *Cureg Comp.* ¶*41*. Mr. Dasrath was told that his suitcase had not been removed

from Flight #1218. *Dasrath Comp* ¶*31*. Mr. Cureg and Mr. Dasrath were then taken by car to Tampa Airport, a ride that took approximately one hour and fifteen minutes. *Cureg Comp.* ¶*42*. At the Tampa Airport, Mr. Dasrath's suitcase could not be located. *Dasrath Comp.* ¶*31*. When his suitcase was returned to him on January 1, 2002, it had been rummaged through and the computer he had brought his sons had been destroyed. *Dasrath Comp.* ¶*33*.

Mr. Cureg did not arrive home until approximately 11:30 p.m., about three and a half hours later than he was originally scheduled to arrive. *Cureg Comp.* ¶*42*. Because he was upset about what had happened to him and was late, he decided not to go to his sister's New Year's Eve party and spent New Year's Eve alone. *Cureg Comp.* ¶¶*16, 42*. Mr. Cureg has been deeply affected by this incident. *Cureg Comp.* ¶*43*. Beyond ruining what had been a nice vacation, the events that occurred left Mr. Cureg feeling demeaned, humiliated, and violated. *Cureg Comp.* ¶*43*.

By the time Mr. Dasrath arrived home, his two young sons were asleep, and it was too late to spend New Year's Eve with them, which had been the purpose of his trip. *Dasrath Comp.* ¶*32*. Beyond depriving Mr. Dasrath of the opportunity to spend the holiday with his family and to give his children the gift he had brought them, the events that occurred left Mr. Dasrath feeling sickened, humiliated, and violated. *Dasrath Comp.* ¶*34*.

ARGUMENT

I. ON A MOTION TO DISMISS, THE COURT MUST ACCEPT THE FACTS IN THE COMPLAINT AND ALL REASONABLE INFERENCES DRAWN FROM THOSE FACTS.

On a motion to dismiss, a court will "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." *Markowitz v. Northeast Land Co.*, 906

F.2d 100, 103 (3rd Cir. 1990). *See also Milhouse v. Carlson*, 652 F.2d 371, 372 n.2 (3rd Cir. 1981) ("Because this is an appeal from a grant of appellees' motion to dismiss, we are constrained to treat the facts pleaded in the complaint as true.") (*Citing Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Micklus v. Carlson*, 632 F.2d 227, 230 (3rd Cir. 1980); *Giusto v. Ashland Chemical Co.*, 994 F. Supp. 587, 592-93 (E.D.Pa. 1998) ("Generally, the court must accept as true the facts alleged in the complaint and must draw all reasonable inferences from those facts in the light most favorable to the plaintiff.")

In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court made clear that there was no heightened pleading requirement in discrimination cases when it reversed a FRCP 12(b)(6) dismissal based on the claim that plaintiffs had "failed to set forth specific facts to support its general allegations of discrimination." *Id.* at 47. Rather, the Court held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-56. Similarly, in *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993), the Court again rejected the idea that civil rights cases must meet a heightened pleading standard.

Here, much of defendant's basis for this motion to dismiss would require this Court to credit its claim that plaintiffs were removed from their flight because they acted suspiciously rather than because of racial discrimination. Because plaintiffs have alleged that defendant removed them from their flight based on illegitimate racial discrimination and have alleged sufficient facts from which such a conclusion could be drawn, defendant's motion to dismiss should be denied.

II. DEFENDANT HAS FAILED TO MEET ITS BURDEN TO DEMONSTRATE THAT ITS ACTIONS WERE JUSTIFIED AS A MATTER OF LAW.

A. DEFENDANT HAS NOT SHOWN THAT ITS ACTIONS MUST BE DEEMED REASONABLE AS A MATTER OF LAW UNDER 49 U.S.C. § 44902.

Defendant argues that plaintiffs' federal and state discrimination claims should be dismissed pursuant to 49 U.S.C. § 44902(b). Section 44902(b) grants air carriers, subject to certain restrictions, the ability to "refuse to transport a passenger . . . the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b). This discretion, however, is not unfettered. Invocation of this affirmative defense necessitates a fact-based inquiry into the totality of the circumstances surrounding defendant's actions to determine whether its decision to remove plaintiffs was objectively reasonable. *See Williams v. Trans World Airlines*, 509 F.2d 942, 948-49 (2d Cir. 1975). Defendant effectively asks this court to forego its responsibility to examine the propriety of defendant's actions and simply to rubber stamp its removal decisions, despite credible allegations that these decisions were improperly motivated by bias and prejudice. Plaintiffs respectfully submit that such a request is improper and should be rejected by this Court.

At the motion to dismiss stage, the Court must accept as true all of plaintiffs allegations. As such, defendant must prove that no reasonable trier of fact could find that its decision to remove plaintiffs based solely on the single vague, conclusory, and racially based statement of a passenger untrained in airline security matters was unreasonable or motivated by impermissible discriminatory instincts. Defendants clearly fail to meet this burden. Any other finding by this Court would eviscerate defendant's burden under § 44902, at this motion to dismiss stage, to demonstrate the objective reasonableness of its actions. Moreover, as every court to address this

question has held, the inquiry into the reasonableness of an airline's actions under § 44902 is a fact-based one that, at the very least, requires discovery to determine the precise circumstances surrounding the airline's decision to remove a passenger. Of note, not a single case cited by defendant was decided at the motion to dismiss stage or prior to completion of discovery.

Finally, defendant does not dispute that plaintiffs have adequately pled a *prima facie* claim of discrimination. A decision to remove a passenger that is motivated by the race, ethnicity, or national origin of that passenger cannot be deemed reasonable as a matter of law. At the very least, where a defendant asserts an affirmative defense under § 44902 as a non-discriminatory justification for its decision to remove plaintiffs from its flight, plaintiffs are entitled to discovery to rebut this proffered justification.

1. Defendant has not met its burden of demonstrating that its actions were reasonable as a matter of law.

In its motion to dismiss, defendant asks this court to devise a *per se* rule that any airline may allow its passengers to exercise veto authority over other passengers' right to travel, regardless of the circumstances and despite evidence that the decision is infused with discriminatory impulses. Such a rule would directly conflict with Congress's clear intent to ensure that individuals are able to fly free from unreasonable or discriminatory impediments. *See* 49 U.S.C. § 41217 (prohibiting discrimination in air travel); 49 U.S.C. § 44902(b) (subjecting airline discretion to remove passengers due to safety concerns to objective reasonableness standard).

When a passenger alleges that he was improperly removed from a flight, the airline must demonstrate that its decision to remove that passenger was reasonable. *See Cordero v. CIA Mexicana de Aviacion*, 681 F.2d 669, 671-72 (9th Cir. 1982), *citing Williams*, 509 F.2d at 948-49.

Contrary to defendant's assertion, the test as to whether the airline acted reasonably is *not* a subjective one. *See Def.'s Br.* at 15. Rather, like any reasonableness test, it is based on a determination as to whether the airline acted in an objectively reasonable fashion, given the totality of the circumstances in which the decision was made:

> The test of whether or not the airline properly exercised its power . . . to refuse passage . . . rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational in light of those facts and circumstances.

Williams, 509 F.2d. at 948.

That the statute requires airlines to act in an *objectively* reasonable fashion is undeniable. Any other interpretation not only would grant airlines *carte blanche* to remove passengers based on virtually any proffered reason, however unwarranted or absurd, but also would effectively strip courts of their ability to review airline removal decisions for invidious discriminatory motives.

As the *Williams* Court notes, a determination of whether an airline's removal decision was objectively reasonable requires a fact-specific inquiry into the circumstances surrounding the decision. The case law makes clear that this inquiry requires examination of several factors, including but not limited to the nature of the information relied upon by the airlines and the source and credibility of this information. *See, e.g.*, *Williams*, *supra*; *Norman v. Trans World Airlines*, 2000 WL 1480367 (S.D.N.Y. 2000), slip op.; *Sedigh v. Delta Airlines*, 850 F. Supp. 197 (E.D.N.Y. 1994); *Rubin v. United Airlines, Inc.*, 96 Cal.App.4th 364 (Ct. App. 2002). Additionally, courts have looked at the extent to which the airline's failure to consider additional available information that could shed light on the credibility of the allegations is unreasonable or informed by improper motives. *Id.* *See also Cordero*, *supra* (jury question whether airline's

decision to remove falsely accused passenger was reasonable when airline refused to determine whether plaintiff was mistakenly identified as threat).

All the case law on permissive refusal engages in – and demonstrates the need to engage in -- a fact-based inquiry into such matters. *See, e.g.*, *Cordero*, 681 F.2d at 672 ("[I]t is peculiarly within the province of the trier of fact to determine whether the defendant's conduct was reasonable."). Indeed, every permissive refusal case cited by defendant – and every other case found by plaintiffs -- was decided *after* discovery had occurred regarding all of the circumstances surrounding the removal decision.

Nonetheless, defendant cites several cases for the proposition that they create certain *per se* rules of reasonableness. Defendant's arguments, however, are erroneous and misleading. Even a cursory examination of this case law reveals that the courts' holdings were wholly contingent on their assessment of the totality of the particular factual circumstances of the individual cases. Moreover, each of these cases is distinguishable in material ways from plaintiffs' factual pleadings. None establishes a *per se* rule of reasonableness permitting dismissal of plaintiffs' claims at this motion to dismiss stage.

For instance, defendant cites *Williams v. Trans World Airlines, supra*, for the proposition that an airline can remove a passenger based solely on third-party information about the purported security threat a passenger poses, without investigation and regardless of whether the passenger exhibited any threatening behavior. *See Def.'s Br.* at 15-16. The *Williams* decision, however, makes clear that the reasonableness of such a decision depends heavily on the source, credibility, and nature of the information, as well as the process by which the decision is made.

In *Williams*, the evidence showed that the removal decision was made by the president of the airline, after consulting with other airline executives and security personnel regarding

information from the FBI that plaintiff, a volatile political dissident, was a fugitive in a kidnapping case; had a possible history of schizophrenia; was generally considered armed and dangerous; and was a consistent advocate of violence. 509 F.2d at 944-45. Additionally, the FBI informed the airline that plaintiff's wife's return to the United States a few weeks prior had generated an unruly protest demonstration at the airport that had created safety concerns, and that similar demonstrations were expected upon plaintiff's arrival. *Id*.

The *Williams* Court granted summary judgment to the airline, holding that it behaved reasonably in relying on such information from the FBI without making a thorough, time-consuming, independent inquiry into plaintiffs' background, history, and criminal record. *Id*. at 945, 948-49. In *Williams*, TWA made a decision based on credible law enforcement information regarding plaintiff's extensive, documented history of violence and instability after consulting law enforcement and security personnel. The *Williams* Court found that, *based on this detailed evidence*, the airline's decision was reasonable. *Id*. It did not set forth a *per se* rule that an airline's blanket reliance on *any* information about a passenger without further inquiry is reasonable, regardless of its nature, source or credibility.[2]

Unlike the allegations in the instant case, the evidence submitted in *Williams* demonstrated that the defendant airline had a great deal of credible information that would have created concern and caution. Plaintiffs Dasrath and Cureg allege that they were removed based on the single allegation of a layperson that "the brown-skinned men are behaving suspiciously." The probative value and credibility of the information conveyed in this statement is, obviously, qualitatively different from the information relied upon in *Williams*. Nothing in *Williams*

[2] On the contrary, the court's decision was heavily dependent on the source of the information: "TWA . . . was entitled to accept at face value the . . . representations made by the FBI . . . . They were made officially in the course of its duties by a recognized and authorized police force of the United States government, and there was nothing on the face of them or connected with them to put TWA on further investigation or inquiry." *Williams*, 509 F.2d at 949-50.

mandates, or even permits, this Court to determine as a matter of law that reliance on such a subjective, conclusory allegation without further inquiry is *per se* reasonable. On the contrary, sole reliance on such a vague, racially based allegation totally devoid of factual statements is untenable and, at the very least, creates a jury question as to the reasonableness of such reliance.[3]

Similarly, *Sedigh v. Delta Airlines, supra*, supports plaintiffs' argument. In *Sedigh*, evidence demonstrated that flight attendants noticed plaintiff acting nervously and sweating "profusely," despite the fact that the airplane was cool. 850 F.Supp. at 198. They also noticed that he entered the lavatory repeatedly without actually using the facilities and ultimately discovered that plaintiff was smoking in the bathroom despite instructions that such behavior was against FAA regulations. Additionally, flight attendants and passengers observed plaintiff become increasingly agitated, muttering comments such as "kill all the Jews" and promising that he was "going to get them." *Id*. After the flight attendants observed plaintiff behaving in this erratic manner, the pilot requested all available Federal Sky Marshals to monitor his behavior. Based on their observations, the Marshals determined that plaintiff should be removed from the flight.

The court found the airline's decision to remove plaintiff reasonable based on the aforementioned evidence and the fact that the pilot's decision was based solely on the informed recommendation of these trained law enforcement personnel. *Id*. at 199. Though the *Sedigh* Court found no further inquiry into Sedigh's background warranted in these circumstances, it in no way issued a *per se* rule that mandates a finding that Mr. Dasrath's and Mr. Cureg's removal without further inquiry was reasonable as a matter of law. As with *Williams*, the nature of the

[3] The passenger's overt racial comment at least should have caused defendant to question the probity and credibility of the statement.

evidence relied upon by the airline in *Sedigh*, along with the source and credibility of the information, was qualitatively different from that relied upon by defendant in the instant case.

Additionally, in *Norman v. Trans World Airlines, supra*, the court granted the defendant's motion for summary judgment, finding the pilot's decision to remove plaintiff reasonable given the totality of the circumstances. In that case, plaintiff and a flight attendant engaged in a heated argument, and the flight attendant informed the pilot that he could not perform his safety functions if the passenger remained on board. The court's determination that the passenger's removal was reasonable, however, was contingent on the undisputed evidence that (1) the pilot first unsuccessfully attempted to broker an adequate apology between the passenger and flight attendant; (2) removing the flight attendant instead of the passenger would have violated FAA regulations regarding the size of the flight crew because no substitute flight attendants were available; and (3) a rapidly approaching storm required an immediate decision, precluding additional attempts to solve the problem. Thus, though the court held that the pilot need not have inquired further into the flight attendant's justification for wanting the plaintiff removed, this holding was limited to the extenuating circumstances noted above, and did not create a *per se* rule applicable to Mr. Dasrath's and Mr. Cureg's cases. *See Norman*, 2000 WL 1480367, at *3.[4]

None of the other cases upon which defendant relies supports any conclusion but that dismissal of plaintiffs' claims is inappropriate. Rather, each case, like those discussed above, is factually distinguishable in material ways from plaintiffs' allegations and supports the conclusion that discovery is required in this case. *See, e.g., Shaeffer v. Cavallero*, 54 F. Supp.2d 350 (S.D.N.Y. 1999) (*denying* summary judgment based on evidence that permitted reasonable

[4] Significantly, the allegations against the passengers in these cases were factual and specific in nature and, thus, verifiable. This is in sharp contrast to the vague, conclusory allegation defendant relied upon in the instant case that "the brown-skinned men are behaving suspiciously." This allegation is completely devoid of any factual statements that provide any reasonable basis upon which to make a decision about whether plaintiffs posed a safety risk to the flight.

trier of fact to determine that removal was not based on legitimate security concerns); *Zevigon v. Piedmont*, 558 F. Supp. 1305 (S.D.N.Y. 1983) (granting JNOV based on testimony that passengers overheard plaintiffs discussing what appeared to be hijacking plans after one of plaintiffs' companions had been removed from the flight for assaulting a flight attendant); *Rubin v. United Airlines, Inc., supra* (removal decision reasonable where plaintiff behaved in an "irate" fashion; aggressively defied repeated instructions to sit in her assigned economy-class seat rather than in first class or an emergency exit row seat; created a "mob scene" by vociferously refusing to cooperate with airline personnel; and significantly delayed take-off due to her behavior).[5]

Most significantly, the case law makes clear that the reasonableness of an airline's removal decision is dependent on the nature, source, and credibility of the information upon which it relies. Thus, failure to ensure that this decision is based on probative and credible information may be objectively unreasonable.[6] In the instant case, defendant based its removal decision on the wholly subjective, vague, and racially based allegation of a passenger untrained in making airline security assessments.[7] Plaintiffs allege that defendant's exclusive reliance on

[5] Defendant's reliance on *Sanders v. Southwest Airlines*, 86 F. Supp.2d 739 (E.D. Mich. 2000); *Grimes v. Northwest Airlines, Inc.*, 1999 U.S. Dist. LEXIS 11754 (E.D.Pa. 1999) slip op.; and *Brandt v. American Airlines*, 2000 WL 288393 (N.D. Cal. March 13, 2000) is misplaced. None of these opinions discusses the reasonableness of removal decisions under § 44902.

[6] Defendant cites a New York state court opinion, *Adamson v. American Airlines*, 58 N.Y.2d 42 (1982), for the proposition that negligent failure to investigate complaints is insufficient to undermine an affirmative defense under § 44902. *See Def.'s Br.* at 18-19. Defendant, however, misconstrues the essence of the reasonableness analysis under § 44902. The question is not whether the airline has a *per se* duty to investigate complaints. The relevant question is whether the nature and sufficiency of the information upon which the airline relies render the removal decision unreasonable under the circumstances. In the instant case, reliance solely on the subjective, amorphous allegation that the "brown-skinned men are behaving suspiciously" was unreasonable without any further information about the nature or validity of the allegation. Plaintiffs proffer that the nature of this statement should have raised questions about its reliability to any reasonable decision-maker. Again, at best, it creates a factual question about the reasonableness of defendant's actions.

[7] In its motion to dismiss, defendant makes much of the fact that Mr. Cureg used his cell phone to call family and friends from his first-class seat while the plane remained parked at the gate. *See Def.'s Br* . at 2, 7, 8, 14, 20. As defendant is no doubt well aware, passenger use of cell phones on airplanes prior to departure has proliferated dramatically to the point of being routine. At no time did any agent of Continental ask Mr. Cureg to cease using his phone. Nor did Mr. Cureg use his phone in contravention of any instructions or regulations or in any way that disrupted the safety of the flight. Continental's suggestion that Mr. Cureg's routine and authorized use of a cell phone was "suspicious" only supports the allegation that its decision to remove him for purported safety concerns

this single allegation occurred because of plaintiffs' apparent race, ethnicity, or national origin. Such behavior cannot be deemed reasonable as a matter of law without eviscerating the reasonableness requirement of § 44902 and giving airlines a green light to discriminate against passengers based on their immutable physical characteristics in contravention of federal and state law.[8]

Finally, to the extent that defendant attempts to shield itself from plaintiffs' discrimination claims by asserting reliance on a customer's complaints about plaintiffs, such efforts are legally insufficient, particularly in light of the racial nature of that customer's allegation. *See, e.g., Callwood v. Dave & Buster's Inc.*, 98 F. Supp. 2d 694 (D. Md. 2000); *Quinn v. Amtrak*, 1997 U.S. Dist. LEXIS 20532 (N.D. Ill. Dec 17 1997).

2. The § 44902 defense creates a question of fact regarding defendant's discriminatory motive.

Defendant does not dispute that plaintiffs have adequately pled a *prima facie* case of discrimination under federal and state law. *See Brown v. Philip Morris Inc.*, 250 F.3d 789, 797 (3d Cir. 2001) (citing elements of a *prima facie* case). Once a plaintiff has adequately pled a *prima facie* case of discrimination, the burden shifts to the defendant to put forth a non-discriminatory justification for its actions. If defendant meets this burden, plaintiff has the

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was unreasonable and was motivated by his race, ethnicity, or national origin. At best, it creates a factual issue as to whether Continental would similarly view routine use of a cell phone by a white passenger with equal suspicion.

[8] In its motion to dismiss, defendant suggests that plaintiffs' efforts to enforce their right to travel on Continental flights free from discrimination would "undermine[] our nation's . . . aviation security programs" and hinder defendant's ability to protect its passengers. *Def.'s Br*. at 2-3. Like defendant, plaintiffs were greatly saddened by the tragic events of September 11th and, as frequent air travelers, support legitimate efforts to ensure the safety of flights. Plaintiffs, however, respectfully disagree with defendant that effective security mandates toleration of discrimination. Plaintiffs are not alone in their disagreement with defendant on this point. The United States Department of Transportation issued a warning to airlines, including Continental Airlines, that exercising their discretion to remove passengers based on race, ethnicity, or national origin is unlawful, even in the wake of the tragedies of September 11, 2001. *See* Letter from Norman Strickman, Assistant Director for Aviation Consumer Protection, U.S. Dept. of Transportation, 9/21/01, www.dot.gov/airconsumer/20010921.htm (Ex. 1).

obligation to demonstrate that the reason is pretextual, and that defendant's actions were more likely than not motivated by discriminatory animus. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)*; Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133 (2000); *Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 410, 413 (3d Cir. 1999) (citations omitted); *Bethea v. Michael's Family Restaurant & Diner*, No. 00-6216, 2001 U.S. Dist. LEXIS 8665, at * 7-8 (E.D. Pa. June 26, 2001). At best, defendant's § 44902 defense constitutes production of a non-discriminatory justification for its decision to remove plaintiffs from its flight. Plaintiffs, then, are entitled to conduct discovery necessary to demonstrate that a reasonable trier of fact could conclude that this justification is pretextual, and that plaintiffs' race, ethnicity, or national origin was more likely than not a motivating or determinative cause of defendant's actions.

Defendant makes much of the fact that the court in *Williams v. Trans World Airlines*, *supra*, dismissed plaintiff's race discrimination claim under the now-repealed § 1374(b) of the Federal Aviation Act. *Def.'s Br.* at 16. The *Williams* Court, however, only dismissed plaintiff's claim on summary judgment once all the evidence had been submitted to the court. The *Williams* Court affirmed the district court's determination that plaintiff provided "no evidence to show that TWA [removed him from its flight] because of racial prejudice or discrimination . . . . [U]nder the same circumstances, TWA would have taken the same action even if Williams had belonged to the yellow, white, or brown races." 508 F.2d at 947. Only after the trial court found no evidence of racial discrimination did it determine that TWA's decision to remove Williams was reasonable. *Id*.

Based on plaintiffs' allegations in the instant case, it cannot be said as a matter of law that a reasonable fact finder necessarily would conclude that defendant would have removed white

passengers under the same circumstances. If, after discovery, the evidence in the instant case would permit a reasonable trier of fact to conclude that defendant would not have removed plaintiffs under the circumstances but for their race, ethnicity, or national origin, a reasonableness finding by this Court under § 44902 would be impermissible, and the case would have to proceed to trial. *See, e.g., Huggar v. Northwest Airlines*, 1999 WL 59841 (N.D. Ill. Jan. 27, 1999) (in § 1981 claim for discriminatory ejection from flight, reasonableness of passenger removal would be a jury question had plaintiff submitted admissible evidence, rather than mere conclusory statements, that safety justification was pretextual and that, but for his race, he would not have been removed).[9] Plaintiffs have set forth strong, credible allegations of discrimination and have met their *prima facie* burden at this motion to dismiss stage. Plaintiffs respectfully assert that this Court should deny defendant's motion to dismiss and permit the parties to commence discovery.

B. DEFENDANT IS NOT IMMUNE FROM SUIT UNDER 49 U.S.C. § 44941.

Defendant also asserts immunity to plaintiffs' discrimination claims pursuant to 49 U.S.C. § 44941. This statute, however, is wholly inapplicable to this case.

Section 44941 is entitled "Immunity for reporting suspicious activities." It reads in part:

> Any air carrier . . . or any employee of an air carrier . . . who makes a voluntary disclosure of any suspicious transaction relevant to a possible violation of law or regulation, relating to air piracy, a threat to aircraft or passenger safety, or terrorism . . . *to any employee or agent of the Department of Transportation, the Department of Justice, any Federal, State or Local law enforcement officer, or any airport or airline security officer* shall

[9] Like the trial court in *Williams*, the *Huggar* Court looked first to the question of whether plaintiff submitted admissible evidence of discriminatory animus and held that such evidence would have been sufficient to preclude summary judgment, negating or rebutting claims of reasonableness under § 44902 and corresponding FAA regulations. *See Huggar*, 1999 WL 59841, at *5-6.

> not be civilly liable . . . under any law or regulation of the United States . . . *for such disclosure*.[10]

49 U.S.C. § 44941(a) (emphasis added).

By its plain terms, this provision's applicability is limited to claims challenging the propriety of "such disclosure[s]." It is *not* designed to shield air carriers and their employees from liability for removal decisions that impede passengers' ability to travel or enforce contractual rights free from discrimination. As discussed at length above, plaintiffs' federal and state claims challenge the discriminatory manner in which defendant wrongfully removed plaintiffs from its aircraft. These claims do not seek to impose liability for any disclosure covered by § 44941. In fact, plaintiffs' complaints do not contain a *single* allegation of such a disclosure by the defendant or its employees. To the extent that such a disclosure was made in the course of events that give rise to plaintiffs' complaints, it is not the subject of plaintiffs' claims. Defendant, therefore, cannot invoke § 44941 to immunize itself from plaintiffs' discrimination claims regarding its decision to unreasonably remove plaintiffs from its aircraft.

III. THE CLAIMS OF PLAINTIFFS SEEKING ONLY EQUITABLE RELIEF ARE NOT PREEMPTED BY THE WARSAW CONVENTION.

Defendant argues that the federal and state discrimination claims of plaintiffs Cureg and the American-Arab Anti-Discrimination Committee ("ADC") are preempted by the Warsaw Convention. The plain language of the Convention, the relevant case law, the articulated goals of the treaty's signatories, and significant public policy considerations dictate otherwise.

[10] This scope of this immunity is limited by 49 U.S.C. § 44941(b), which precludes immunity when the disclosure is made with actual knowledge of its falsity or with reckless disregard for its truth or falsity.

As discussed *supra*, Mr. Cureg and the ADC bring discrimination claims under federal and state law for wrongful removal from defendant's flights. Unlike Mr. Dasrath, however, Mr. Cureg and the ADC seek only injunctive and declaratory relief. They do not seek damages. This distinction is crucial.

Article 24(1) of the Warsaw Convention, as amended by Montreal Protocol No. 4, states:

> In the carriage of passengers and baggage, any action *for damages*, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice as to who are the persons who have the right to bring suit and what are their respective rights.

Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, S. Exec. Rep. No. 105-20, at 29 (1998) (emphasis added).

As the Supreme Court has noted in prior interpretations of the Convention, "[w]e must be governed by the text . . . whatever conclusions might be drawn from the intricate drafting history. The latter may of course be consulted to elucidate a text that is ambiguous . . . but where the text is clear . . . we have no power to [alter its meaning]." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989). *See also King v. American Airlines*, 284 F.3d 352, 362 (2d Cir. 2002) ("It is not for the courts to rewrite the terms of a treaty between sovereign nations."). In this case, the plain language of Article 24(1), as amended by Montreal Protocol No. 4, clearly limits the preemptive scope of this exclusivity clause to damages actions; it does not encompass actions solely seeking equitable relief.[11] Therefore, even assuming, *arguendo*, that plaintiffs Cureg and ADC's claims

[11] Black's Law Dictionary defines the term "damages" as a "pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." It also defines this term as "a compensation in money for a loss or damage." This legal concept is distinct from that of "damage," which is defined as a "[l]oss, injury, or deterioration, caused by the negligence, design, or accident of one person to another . . . ." BLACK'S LAW DICTIONARY 466 (4th ed. 1957). Article 24's use of the plural "damages," then, indicates the signatories' intent to limit its reach to actions for monetary recovery.

would fall under the substantive scope of the Convention, Article 24 does not preempt their federal and state claims for injunctive and declaratory relief.

The only appellate court decision to have addressed this issue, *Cruz v. American Airlines, Inc.*, 193 F.3d 526 (D.C. Cir. 1999), supports this conclusion.[12] Plaintiffs in *Cruz* brought an action seeking damages for lost luggage under Article 18 of the Warsaw Convention, as well as common law claims seeking damages for fraud and deceit. In addition, they sought injunctive and declaratory relief based on the airline's purported intentional misapplication of a thirty-day rule to declare lost luggage as contained in their contract of carriage with American. *Cruz,*193 F.3d at 527. After addressing several issues of law and affirming dismissal of plaintiffs' common law damages claims, the D.C. Circuit addressed the remaining claims seeking declaratory and injunctive relief:

> [T]he Convention preempts only "any action for *damages*, however founded." Warsaw Convention Art. 24. Accordingly, we conclude that [plaintiffs' declaratory and injunctive claims are] . . . not preempted by the Warsaw Convention.

Cruz, 193 F.3d at 532 (emphasis in original) (citation omitted). [13]

Beyond giving effect to the plain language of the exclusivity clause, this interpretation is warranted because it comports with the purpose of both the clause and the Convention itself. As the Supreme Court has noted, "[b]efore the Warsaw accord, injured passengers could file suits for damages, subject only to the limitations of the forum's laws, including the forum's choice-of-

[12] Plaintiffs cite *King*, *supra*, to support their contention that the Warsaw Convention precludes federal discrimination claims. *King* is the only appellate court to address that question. Significantly, the plaintiffs in *King* only sought money damages. The Second Circuit in *King*, however, appears to have misread Article 24 as precluding "any *cause of action*, however founded." 284 F.3d at 362 (emphasis added). Thus, to the extent that defendant relies on the holding, language, and reasoning of *King* to assert that Article 24 preempts claims for equitable relief, the Second Circuit's materially erroneous reading of the provision undermines its reliability on this question.

[13] It is worth noting that the *Cruz* decision was issued after, and with full cognizance of, the Supreme Court's decision in *El Al Airlines, Ltd. v. Tseng*, 525 U.S. 155, upon which defendant's preemption argument primarily rests. *Cruz*, in fact, applied *Tseng* to affirm dismissal of plaintiffs' common law damages claims. 193 F.3d at 530-32.

law regime. This exposure inhibited growth of the then-fledging airline industry." *Tseng*, 525 U.S. at 170-71. As such, the Court stated, "[t]he primary purpose of the contracting parties to the Convention [was to] limit[] the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry." *Eastern Airlines v. Floyd*, 499 U.S. 530, 546 (1991) (*citing Trans World Airlines, Inc. v. Franklin Mint Co.*, 466 U.S. 243, 256 (1984); *Minutes, Second International Conference on Private Aeronautical Law*, October 4-12, 1929, Warsaw 37 (R. Horner & D. Legrez trans. 1975)); s*ee also King, supra* at 357 ("[the Convention's] remedial system is designed to protect air carriers against catastrophic, crippling liability"); *Curley v. American Airlines, Inc.*, 846 F. Supp. 280, 283 (S.D.N.Y. 1994) (citations omitted) ("The Convention was created to enable the airline industry to withstand financial reverses brought about by the large scale disasters which can occur with this particular mode of travel."); Tory A. Weigand, *Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention*, 16 AMUILR 891 (2001) ("The primary concern was air accidents . . . which could lead to disastrous financial consequences. There was also the concern that insurance would otherwise become too expensive for carriers, and tickets too costly for passengers. At the time, the air carrier industry was financially weak and faced possible, if not inevitable, bankruptcy from a single disaster."); Greg T. Hills, *Comment, Terror in the Sky: Does Terrorism Return Airlines to an Infant Industry?*, 19 Loy. L.A. Int'l & Comp. L.J. 633, 635-40 (April 1997) (citations omitted); Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv.L.Rev. 497, 499 (1967) ("[L]imit[ing] the potential liability of the carrier in case of accidents [was] clearly recognized as the [Convention's] most important goal . . . . [The signatories] expected that [the Convention's limitation of liability] . . . would enable airlines to

attract capital that might otherwise be scared away by the fear of a single catastrophic accident.").

A secondary purpose of the Convention was to create uniformity in the international airline industry. This purpose was twofold. First, given the diverse languages and customs among the signatories, the Convention sought uniformity in the logistical practices of international air travel, such as ticketing and waybills. *See Floyd,* 499 U.S. at 546 n.11, *citing Minutes 85, 87*; Lowenfeld & Mendelsohn, *supra* at 498-99. Second, the Convention sought to provide a certain amount of uniformity with regard to claims arising out of international air travel. *Id*. This second aspect of the goal of uniformity, however, cannot be divorced from the overriding concern of ensuring the financial viability of international carriers. Indeed, the signatories' concern was that a lack of uniformity of liability would deter carriers from traveling to countries in which liability schemes were more favorable to accident victims, where lawsuits could prove financially crippling. *See* Hills, *Comment, Terror in the Sky: Does Terrorism Return Airlines to an Infant Industry?*, 19 Loy. L.A. Int'l & Comp. L.J. at 639 (citations omitted) ("[A]irline and national representatives feared that [] liability [for a single disaster] would be the proverbial 'straw that broke the camel's back' in discouraging airlines from initiating international air travel, especially to countries where negligence law worked in favor of accident victims and harshly against airlines."). Thus, even the Convention's goal of uniformity, which defendant cites in support of its motion, was not meant to implicate prospective claims to enjoin illegal behavior perpetrated by air carriers against passengers.

Plaintiffs do not dispute that the cases relied upon by defendant, and other cases, have broadly construed Articles 17 and 24 of the Convention. *See, e.g., Tseng, supra*; *King, supra*. All but one of these cases, however, like virtually all passenger claims against airlines, involved

damages claims only. *Id*. *See also Gibbs v. American Airlines, Inc.*, 191 F. Supp.2d 144 (D.D.C. 2002); *Turturro v. Continental Airlines*, 128 F. Supp.2d 170, 181 (S.D.N.Y. 2001) (same); *Brandt v. American Airlines, supra*; c*ontra, Waters v. Port Authority*, 158 F.Supp.2d 415 (D. N.J. 2001), discussed *infra*. Nothing in these decisions contradicts or undermines the plain language of Article 24 limiting the Convention's preemptive scope to claims for damages relief.

For instance, in *Tseng*, the Supreme Court held that, because plaintiff's damages claims fell under the substantive reach of Article 17, and the Convention did not permit recovery for emotional damages, she could not seek such damages in tort law. 525 U.S. at 176. In reversing the Second Circuit on this question, the Court noted that permitting such common law damages claims "would encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme *when local law promised recovery in excess of that prescribed by the treaty*." *Id*. at 171 (emphasis added). This explanation comports with the purpose of the Convention to shield airlines from damages suits under multiple regimes that could hinder the industry's ability to thrive. *See* discussion *supra.*

As such, nothing in *Tseng's* holding or underlying rationale – or that of other case law on the reach of Article 24 -- undermines Article 24's plain language permitting claims for injunctive and declaratory relief. *See Tseng*, 525 U.S. at 176 ("we hold that the Warsaw Convention precludes a passenger from maintaining an action for personal injury *damages* . . .) (emphasis added); *see also King, supra* (damages claims preempted); *Turturro v. Continental Airlines*, 128 F. Supp.2d at 181 (S.D.N.Y. 2001) (same). At most, these decisions suggest that the preemptive reach of Article 24 does not depend on the legal theory pled or the nature of the harm suffered, as long as the injury falls within the substantive scope of the Article 17. *See King*, 284 F.3d at 361,

citing Tseng, *supra*. None of these cases holds, or otherwise indicates, that Article 24 preempts all claims irrespective of the *type of relief* sought. This makes sense, as maintenance of this distinction permits furtherance of the Convention's underlying goals without doing harm to its plain language. *See* discussion *supra*.

Plaintiffs have found only one case in which a court's interpretation of Article 24 has resulted in dismissal of injunctive claims. *See Waters v. Port Authority of New York & New Jersey, supra*. Plaintiffs respectfully argue that this decision was decided in error. The plaintiff in *Waters* brought common law and statutory damages claims, as well as claims for damages and injunctive relief under the Air Carrier Access Act (ACAA), which prohibits discrimination by airlines on the basis of a passenger's disability, and § 41310 of the Federal Aviation Act (FAA). After examining case law in which courts found various damages claims precluded by Article 24, the *Waters* Court dismissed all of plaintiff's federal claims on that ground as well. *See Waters*, 158 F. Supp.2d at 428-30. It also found that, in the event the Convention did not preempt plaintiff's FAA and ACAA claims, these claims were barred on alternative grounds. *Id*. at 430-35.

In initially discussing its reasons for dismissing plaintiff's discrimination claims, the *Waters* Court relied on *Tseng*:

> The Court's analysis in *Tseng* leads this Court to conclude that the Convention was likely intended to preempt all local causes of action, including federal causes of action, *to the extent these actions seek damages* against a carrier. *Tseng's* determination that the amendment to Article 24 does not change the scope of the Convention, but merely clarifies it, makes clear that *all actions for damages*, however styled, are preempted.

Waters, 158 F. Supp.2d at 428 (emphasis added).

Respectfully, plaintiffs suggest that the remainder of the *Waters* opinion is somewhat confusing and illogical. After demonstrating a clear understanding, as evident from the passage above, that the preemptive reach of Article 24 is limited to damages claims, the court acknowledged that plaintiff also was seeking injunctive and declaratory relief with regard to his discrimination claims *Id.* at 428. Despite this acknowledgement, however, the court then embarked on an examination of the two district court opinions to have addressed the question of whether the Convention preempts federal discrimination complaints, *neither of which involved claims for equitable relief.*[14] *Id*. at 428-30 (discussing *Brandt v. American Airlines, supra*; *Turturro v. Continental Airlines, supra*).

In *Brandt*, plaintiff exclusively sought damages under the ACAA stemming from an incident in which the airline refused to provide him with food he needed to take with medication. 2000 WL 288393, at *1. In *Turturro*, plaintiff also exclusively sought damages for an alleged violation of the ACAA. The *Waters* Court cited *Brandt* solely for the proposition that the *nature* of federal statutory claims is not logically distinguishable from that of state claims for purposes of the Convention's preemption clause. *Waters*, 158 F. Supp.2d at 428-29. It cited *Turturro* for the same proposition, as well as to point out that the ACAA contains a provision that the *Turturro* Court found indicative of congressional intent to ensure that the ACAA did not conflict with international obligations such as the Warsaw Convention. *Id*. At no time did the *Waters* Court acknowledge that neither *Brandt* nor *Turturro* involved claims for equitable relief, nor did it articulate in any way why the holdings in these cases provided support for any conclusion other than that plaintiff *Waters' damages* claims were precluded, a holding the court reached *before* discussing *Brandt* and *Turturro*. *Id*. at 428.

[14] Plaintiffs' counsel confirmed this fact with counsel for plaintiffs in both the *Brandt* and *Turturro* cases.

It appears that the court in *Waters* either lost sight of its prior recognition of plaintiff's claims for equitable relief or improperly conflated those claims with plaintiff's damages claims. Indeed, the court concluded its analysis of the Convention's preemptive effects by focusing exclusively on plaintiff's damages claims:

> Thus, *Tseng* and the courts which have addressed whether its teachings apply to federal discrimination claims focus on the Convention's goal of providing [sic] comprehensive scheme of liability to ensure predictability of signatories, and the *goal of generally restricting the types of actions for damages which may be brought to ensure uniformity*. *Here, plaintiff seeks to recover damages for alleged injuries sustained as a result of what he claims were acts of discrimination by defendants.* Although his cause of action is grounded in discrimination statutes, the thrust of his claim is one of personal injury. Undoubtedly, this falls within the scope of the Convention . . . .

Waters, 158 F. Supp.2d at 429 (emphasis added).

In sum, the court in *Waters* initially appeared to recognize that dismissal of claims for equitable relief is inappropriate in light of the language of Article 24 and the limited holding in *Tseng*. In its preoccupation with whether federal discrimination claims can *ever* fall under Article 24, however, it offered no justification at all for ignoring the distinction it previously acknowledged between plaintiff's monetary and equitable claims. In light of this significant omission, plaintiffs respectfully urge this Court to reject the portion of the *Waters* opinion dismissing plaintiff's equitable claims and to adopt the D.C. Circuit's reasoning in *Cruz* to hold that plaintiffs may proceed with their equitable claims.[15]

Finally, prohibiting, in particular, the practice of racial discrimination through an injunction does not contravene the Convention's goal of protecting international airlines from economic uncertainty as a result of being subject to suit in multiple jurisdictions. Airlines have no legitimate interest in continuing to engage in illegal activity, and the Warsaw Convention was

[15] Notably, the court in *Waters* did not even cite to the *Cruz* opinion.

certainly not adopted to protect the perpetuation of illegal activity. Thus, while a suit for damages may be preempted, injunctive relief only prevents an airline from engaging, prospectively, in continued illegal behavior. It would indeed be an odd result if international airlines stood alone as being immune from prospective equitable relief.

The Convention reflects a bargain between passengers and airlines. It provides limitations on airline liability in exchange for presumed liability. *See* Lowenfeld & Mendelsohn, 80 Harv.L.Rev. at 500. The Convention was thus intended to "accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability." *Tseng*, 525 U.S. at 170. However, this bargain was "intended to cover solely the *inherent risks of air travel* . . . ." WARSAW CONVENTION 3 § 13 (Elmar Giemulla et al. eds.) (Supp. 9 August 1998).

Discrimination, however, is not a typical risk inherent to air travel. The Convention was not written with the understanding that passengers must accept such treatment, and defendant cannot hide behind the Convention to shield itself from claims seeking prospective relief for its discriminatory actions. To accept defendant's argument would render a court powerless to enjoin a domestic airline from racially segregating passengers on international flights originating from Newark International Airport, or from precluding, across the board, all Arab and Middle Eastern passengers from such flights. Even if the signatories of the Convention sought to shield airlines from damages claims in various legal regimes, they could not have intended to strip courts of their ability to enjoin airlines from engaging in illegal discrimination based on race, ethnicity, or national origin. Any other interpretation of the Convention would profoundly *discourage* the proliferation of international travel by people of diverse places of origin, an ironic

and impermissible result given that the Convention's overriding goal is to foster such travel. This clearly is *not* the "uniformity" that the Convention's signatories contemplated.[16]

IV. THE COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS FOR EQUITABLE RELIEF.

Defendant challenges plaintiffs' ability to seek equitable relief on various grounds, arguing that this Court is without subject matter jurisdiction to hear plaintiffs' claims. With regard to the ADC, defendant asserts that it has no standing under the Warsaw Convention, and that it lacks Article III standing to sue. With regard to all plaintiffs – the ADC, Mr. Cureg, and Mr. Dasrath – defendant argues that their equitable claims are not ripe for adjudication and therefore should be dismissed. For the reasons that follow, all of defendant's arguments should be rejected.[17]

A. THE WARSAW CONVENTION DOES NOT AFFECT PLAINTIFFS' STANDING TO SEEK INJUNCTIVE RELIEF.

As discussed above, the Warsaw Convention does not apply in cases where a plaintiff seeks purely equitable relief. As the relief sought in *Cureg* is solely equitable, the Warsaw Convention has no impact on the issue of standing.

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[16] Moreover, the facts of Mr. Dasrath's and Mr. Cureg's complaints demonstrate the absurd result of applying the Warsaw Convention in this context. The signatories could not have anticipated, nor intended, the anomalous and incongruous circumstances reflected in these cases – that a national court could preclude an air carrier from discriminating against one passenger on the basis of race, ethnicity, or national origin, while permitting it to discriminate on those very bases against another passenger on the *exact same flight*.

[17] While defendant challenges both standing and ripeness with respect to the ADC, it does not specifically challenge Mr. Dasrath's standing to seek injunctive relief and apparently only challenges Mr. Cureg's standing on the basis that all of Mr. Cureg's claims are foreclosed by the Warsaw Convention. The latter conclusion is erroneous and is addressed elsewhere in this brief. Because defendant does not specifically challenge Mr. Dasrath's or Mr. Cureg's Article III standing to seek injunctive relief, those claims remain unaffected, and plaintiffs will not address them here.

B. AT THIS STAGE, THE COURT NEED NOT DETERMINE WHETHER AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE HAS STANDING.

Since at this stage of the proceedings, defendant has not challenged the Article III standing of Mr. Dasrath or Mr. Cureg to seek equitable relief, this Court need not address American-Arab Anti-Discrimination Committee's ("ADC") standing now. The ADC does not seek any relief separate and apart from the injunctive relief plaintiffs Dasrath and Cureg seek. Since at this juncture, the standing of Mr. Dasrath and Mr. Cureg to seek such equitable relief is not in question, the dismissal of the ADC would not change the analysis of the question of equitable relief nor affect this Court's Article III jurisdiction to examine the issue of equitable relief. This approach has been approved by the United States Supreme Court and has the advantage of conserving judicial resources by not requiring courts to decide questions that may ultimately have no material consequences. *Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990) ("since the committee has standing, we need not inquire whether the Department does as well") (*citing Bowsher v. Synar*, 478 U.S. 714, 721 (1986)).

C. PLAINTIFFS' EQUITABLE CLAIMS ARE RIPE FOR ADJUDICATION.

Defendant argues that plaintiffs' injunctive claims are not ripe for adjudication and that the Court should dismiss them for lack of subject matter jurisdiction. *Def.'s Br*. at 33. This contention is wholly without merit and should be rejected.

In assessing whether a claim is "ripe" for adjudication, a court will evaluate "both [1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration." *Texas v. United States*, 523 U.S. 296, 301 (1998)(quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S.

99, 105 (1977)). Under the "fitness" prong, a court may consider the following factors: "whether the claim involves uncertain and contingent events that may not occur as anticipated or at all; the extent to which a claim is bound up in the facts; and whether the parties to the action are sufficiently adverse." *Philadelphia Federation of Teachers v. Ridge*, 150 F.3d 319, 323 (1998). Factors which may be considered under the "hardship" prong are whether the actions challenged

> command anyone to do anything or to refrain from doing anything; . . . grant, withhold, or modify any formal legal license, power, or authority; . . . subject anyone to any civil or criminal liability; . . . [or] create . . . legal rights or obligations.

Ohio Forestry Association v. Sierra Club, 523 U.S. 726, 733 (1998). Under the tests articulated above, plaintiffs' equitable claims are ripe for adjudication.

Plaintiffs' claims clearly satisfy the "fitness" prong of the *Abbott* test because the complaints allege incidents that *already* have occurred and will continue to occur absent an injunction, rather than events that are uncertain and contingent. *See generally Doe v. County of Centre, PA*, 242 F.3d 437, 453 (2001)(claims were ripe for adjudication where plaintiffs alleged defendant had engaged in discriminatory behavior). Moreover, while the facts alleged by plaintiffs provide strong support for their legal claims, the claims are not unduly "bound up" in the facts and stand on their own. Finally, the adversity between the parties is abundantly clear in the pleadings: among other things, plaintiffs allege that defendant violated their civil rights, while defendant denies the allegations.

Plaintiffs also satisfy the "hardship" prong. Plaintiffs seek a declaration that defendant violated their civil rights and an injunction prohibiting such conduct in the future. Without an injunction, plaintiffs' confidence in their right to enter into contracts with defendant, free of discrimination, will be undermined. Defendant essentially argues that it has the right to conduct

its business as it sees fit, to eject passengers from flights for little or no reason, and to do so without being held accountable. Clearly, an adjudication on the merits will affect the parties' future conduct and determine who is correct, whether civil liability attaches to defendant's conduct, and what legal rights and obligations the parties will have based upon the court's ruling. *See Doe v. County of Centre, PA*, 242 F.3d at 453 ("Withholding judicial consideration causes an immediate and significant hardship on [plaintiffs], who will be deprived of their right to present their federal statutory and constitutional claims for redress."). [18]

Additionally, in the section of its brief challenging the ripeness of plaintiffs' equitable claims, defendant further contends that the injunction sought by plaintiffs is overly broad and unspecific, in violation of Fed.R.Civ.P. 65(d). Defendant's claim is not cognizable on a motion to dismiss.

The injunction sought by plaintiffs is legally sufficient.[19] It is now well settled that, in discrimination suits, notice pleading as contemplated under Fed.R.Civ.P. 8 is sufficient to survive a motion to dismiss. *Conley v. Gibson*, 355 U.S. 41 (1957); *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163 (1993).[20] Thus, once plaintiffs have pled their request for

[18] The cases relied on most by defendant -- *N.A.M.I. v. Essex County Board of Freeholders*, 91 F.Supp.2d 781 (D.N.J. 2000) and *The Medical Society of New Jersey v. Herr*, 191 F.Supp.2d 574 (D.N.J. 2002) -- afford it little support. In *N.A.M.I.*, plaintiffs sought to challenge a *plan* to relocate a facility for mental health patients. Because the plan was never adopted, the court held that plaintiffs' claims were not ripe. *N.A.M.I.*, 91 F.Supp.2d at 784. In *Medical Society*, the court held that, in the absence of a *final* agency decision pertaining to plaintiff's members, the plaintiff's claims were not ripe. *Medical Society*, 191 F.Supp.2d at 580. Here, plaintiffs have alleged events that *already* have occurred and that are likely to be repeated unless an injunction is entered.

[19] In both complaints, plaintiffs pray the Court to "[e]nter an injunction directing the defendant and its directors, officers, agents, and employees to take all affirmative steps necessary to remedy the effects of the illegal, discriminatory conduct described herein and to prevent similar occurrences in the future."

[20] *See*, 11A Wright & Miller, *Federal Practice and Procedure 2d.* § 2955 (1995) ("As is true of the other elements [of FRCP Rule 65], the obligation to provide reasonable detail applies only to the order for injunctive relief and does not mean that plaintiff must be any more specific in drafting the complaint than generally is required by Rule 8."). The sufficiency of the complaint, including the prayer for relief, is governed by Rule 8, which requires that a complaint include "a demand for judgment for the relief the pleader seeks . . . ." Fed.R.Civ.P 8(a)(3). "This requirement is not arduous – 'any concise statement identifying the remedies and the parties against whom relief is sought will be sufficient.'" *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11th Cir. 1993)(quoting 5 Wright & Miller, *Federal Practice and Procedure* § 1255 at 366 (2d ed. 1990)).

relief sufficiently to "provide[] adequate notice to the defense" the claim should not be dismissed for lack of specificity. *Weston v. Pennsylvania*, 251 F.3d 420 (3rd Cir. 2001); *Meyer v. Brown & Root Construction Company*, 661 F.2d 369, 373 (5th Cir.1981)("An injunction must simply be framed so that those enjoined will know what conduct the court has prohibited.")

Plaintiffs' prayers for relief, as well as the allegations in their complaints, make it perfectly clear which actions of defendant they find legally objectionable. The requests for relief and the allegations, along with a decision by this Court favorable to plaintiffs, would provide defendant all the information it needs to conform its behavior to the law. *See Virgin Islands Port Authority v. Virgin Islands Taxi Association*, 979 F.Supp. 344, 353 (D.V.I. 1997)("As the trial court and this memorandum opinion make clear, appellants are on notice as to exactly what they must do to comply with Act No. 5231, and, if they so desire, how they may bring their conduct within" the bounds of the law.)

The Supreme Court specifically rejected defendant's argument in *Conley* when it reversed a Fed.R.Civ.P. 12(b)(6) dismissal based on the lack of specificity in the complaint. Indeed, defendant's argument would be tantamount to claiming, in a damages action, that a request for relief styled as "damages in excess of $75,000" would be subject to a motion to dismiss as insufficiently specific. Should an injunction be entered in this case that defendant believes is too broad and unspecific, its remedy lies with the court of appeals. *See McLendon v. Continental Can Co*, 908 F.2d 1171, 1182 (3d Cir.1990)(An injunction that is too broad may be vacated.); *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.*, 824 F.2d 665, 669 (8th Cir.1987)(same).[21] Clearly, this Court, with the input of the parties, may craft a legally

[21] The cases defendant cites in support of its argument are unhelpful to it and instead support plaintiffs' contention that defendant's argument is premature. In those cases – *Payne v. Travenol Labs, Inc.*, 565 F.2d 895 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978); and *Epstein v. Kmart Corp.*, 13 F.3d 762 (3d Cir.1994) – *appellate* courts addressed the breadth of the injunctions *after* they had been entered and upon full evidentiary records.

sustainable injunction at the appropriate stage of this litigation. Accordingly, defendant's argument should be rejected.

V. Defendant's Claim that Plaintiffs are Limited to the Remedies in the Contract of Carriage and the International Tariff are Without Merit.

Defendant's claim that its contract of carriage and international tariff limit plaintiffs' remedies to those recited in the contracts is without merit.[22] Neither the statutes nor the cases on which defendant relies supports its contention that a plaintiff seeking relief for alleged racial discrimination by an airline is only entitled to contract damages. At most, the authority cited by defendant supports the unremarkable proposition that a plaintiff *in a breach of contract action* is limited to the remedies set forth in the contract of carriage. Since, here, plaintiffs have not filed a breach of contract action, defendant's claim is wholly inapplicable to this case.

For instance, in *Guerrero v. American Airlines Inc.*, 97 Civ. 1948 (SHS), 1998 U.S. Dist. LEXIS 5665 (S.D.N.Y. 1998), the plaintiff had only made breach of contract claims. In *Norman v. Trans World Airlines, Inc.*, 98 Civ. 7419 (BSJ), 2000 WL 1480367 (S.D.N.Y. 2000), slip op., the court's holding that the contract of carriage "exclusively and conclusively governs the rights and liabilities" between airlines and passengers was only made in reference to the plaintiff's breach of contract claim. Indeed, the court in *Norman* never indicated that the contract of carriage's limitations would limit the remedies for claims based on a cause of action other than breach of contract and addressed the plaintiff's non-contract claims on the merits without reference to the contract of carriage. Similarly, the court in *Fondo v. Delta Airlines, Inc.*, 00 Civ 2445 (JSM), 2001 U.S. Dist. LEXIS 7098 (S.D.N.Y.), aff'd 2002 U.S. App. LEXIS 1614 (2d Cir. 2002), dealt with the plaintiff's non-contract claims without reference to the contract of carriage.

[22] As discussed *supra*, plaintiffs in *Cureg* only seek equitable relief and not damages, therefore defendant's argument with respect to the International Tariff is inapplicable.

It is absurd to suggest that a contract's limitation of liability for a breach of contract could reach outside of the four corners of a contract and limit the remedies available to a plaintiff for acts never contemplated by the parties in the making of the contract. Here, defendant's legal obligation not to discriminate against Mr. Dasrath derives from anti-discrimination laws, not from the provisions of the contract of carriage. The contract no more limits defendant's liability for violating those laws than it would limit defendant's liability if one of its agents punched Mr. Dasrath in the nose. Simply put, the limitation on defendant's liability in the contract of carriage, if valid, applies only to a claim for breach of contract, not to every cause of action that may arise between plaintiff and defendant whether sounding in contract or not.

Finally, even if the terms of the limitation on liability could be read so broadly as to limit remedies that are available in causes of action not contemplated by the parties at the time of contract formation, applying such a limitation to a cause of action for discrimination would violate public policy. Considering that the purpose of the anti-discrimination laws is to ensure that business entities that deal with the public at large do not engage in invidious discrimination, allowing a defendant to enforce the terms of a contract of adhesion that required consumers to waive their rights under anti-discrimination laws would render such laws a complete nullity.

CONCLUSION

For the reasons discussed above, defendant's motion to dismiss should be denied.

Respectfully submitted,

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