

PROPOSED CLASS PROCEEDING

Action No: T-_____ -18

FEDERAL COURT

BETWEEN:

Dora Berenguer

Plaintiff

AND:

WOW Air ehf

SATA Internacional – Servicios e Transportes Aereos, S.A.

SATA Internacional - Azores Airlines, S.A.

Defendants

STATEMENT OF CLAIM TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served

within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

August 14, 2018

Issued by: _____
(Registry Officer)

Address of local office: 30 McGill Street
Montréal, Quebec
H2Y 3Z7

TO: **WOW Air ehf**
c/o Richard Look
6500 Trans-Canada Highway Suite 400
Pointe Claire, Québec H9R 0A5

SATA Internacional – Servicios e Transportes Aereos, S.A.
c/o Carlos P. Martins
33 Yonge St, Suite 201
Toronto, Ontario M5E 1G4

SATA Internacional - Azores Airlines, S.A.
c/o Carlos P. Martins
33 Yonge St, Suite 201
Toronto, Ontario M5E 1G4

CLAIM

1. The Plaintiff claims, on her own behalf and on behalf of other members of the Class (as defined below):
 - a. An Order pursuant to Rules 334.16(1) and 334.17 of the *Federal Courts Rules* (the “**Rules**”) certifying this action as a class proceeding and providing any ancillary directions;
 - b. an Order pursuant to Rules 334.12(3), 334.16(1)(e) and 334.17(b) appointing the Plaintiff as the representative plaintiff for the Class;
 - c. a declaration that the Defendants breached the express and/or implied terms of their contract of carriage to pay cash compensation in accordance with EU 261/2004 (as further defined below); or
 - d. an Order that the Defendants pay compensation to each Class Member in the form of standardized and/or liquidated damages of:
 - i. 300 euros for delay of more than three hours but less than four hours in arriving at the Class Member’s final destination; and
 - ii. 600 euros for delay of more than four hours in arriving at the Class Member’s final destination;
 - e. an Order pursuant to Rule 334.28(1) and (2) for the aggregate assessment of monetary relief, conversion to Canadian currency as of the time of trial, and such distribution to the Plaintiff and members of the Class;
 - f. pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the *Federal Courts Act*, RSC 1985, c. F-7; and
 - g. such further and other relief as this Honourable Court deems just.

THE PARTIES

2. The Plaintiff, Dora Berenguer, is a retired individual residing in the province of Alberta.
3. The Defendant, WOW Air ehf, is a company incorporated pursuant to the laws of Iceland, with a principal place of business in Iceland at 12 Katrinartun Reykjavik 105 Islande (hereinafter “**WOW Air**”). WOW Air’s agent in Canada, pursuant to s. 84 of the *Canada Transportation Act*, S.C. 1996, c. 10, is Richard Look, 6500 Trans-Canada Highway, Suite 400 Pointe Claire, Québec H9R 0A5 with an address of service in Québec at c/o SERVICES BLAKES QUÉBEC INC. 3000-1 Place Ville-Marie Montreal, Québec, H3B4N8.

4. WOW Air is a commercial airline headquartered in Iceland that operates scheduled passenger flights to and from various cities in Canada including Toronto and Montréal. WOW Air's main hub is at Keflavík, Iceland, where some passengers transfer directly to another flight to be transported to their final destination by the Defendant.
5. The Defendants, SATA Internacional – Servicos e Transportes Aereos, S.A. and SATA Internacional - Azores Airlines, S.A. are related companies incorporated pursuant to the laws of Portugal, with a principal place of business in Portugal at Av. Infante D. Henrique, 55, 9504-528 Ponta Delgada, São Miguel - Azores – Portugal (hereinafter “**SATA**”).
6. The corporate relationship between SATA Internacional – Servicos e Transportes Aereos, S.A. and SATA Internacional - Azores Airlines, S.A. are within the exclusive knowledge of these parties.
7. SATA's agent in Canada, pursuant to s. 84 of the *Canada Transportation Act*, S.C. 1996, c. 10, is Carlos P. Martins, 33 Yonge St, Suite 201, Toronto, Ontario M5E 1G4.
8. SATA is a commercial airline headquartered in Portugal that operates scheduled passenger flights to and from various cities in Canada including Toronto and Montréal. SATA's main hub is at Ponta Delgada in Azores, Portugal, where some passengers transfer directly to another flight to be transported to their final destination by the Defendant.
9. The distance between each of the Defendants' scheduled flights from Canada to their hubs in Portugal or Iceland, and vice-versa, are greater than 3,500km.

THE CLASS

10. This Action is brought on behalf of members of a class consisting of the Plaintiff and all individuals anywhere in the world who, from August 14, 2012, have travelled on an aircraft (or two aircrafts in the case of direct connections) operated by a Defendant to and/or from Canada and arrived at the final destination more than three hours after the scheduled arrival time, but excluding individuals who already received full cash compensation from the respective Defendant in accordance with EU 261/2004 (hereinafter the “**Class**” or “**Class Member(s)**”).
11. It is estimated that the Class includes at least thousands of passengers, consisting of hundreds of passengers for each delayed flight.

THE DEFENDANTS' INCORPORATED EU 261/2004 INTO THEIR CONTRACTS OF CARRIAGE

12. The European Union Flight Compensation Regulation 261/2004 (hereinafter the "EU 261/2004") is a consumer protection measure that provides standardized levels of cash compensation for various matters including flight delays and/or denied boarding.
13. Each of the Defendants incorporated EU 261/2004 into their respective contracts of carriage for passenger flights to/from Canada and have contractually agreed to apply EU 262/2004 in the event of long flight delays.

I. SATA's Contract of Carriage

14. The Defendant SATA's current contract of carriage applicable to/from Canada expressly provides at Rule 16 – Responsibility for Schedules and Operations that:

Applicable to / from Canada, the carrier fully complies EC Regulation 261/2004 dated 11th February 2004, published in the 17th February 2005, in what concerns rules for indemnity and assistance to passengers in case of denied boarding and cancellation or considerable flight delays.

II. WOW Air's Contract of Carriage

15. The Defendant WOW Air's contract of carriage also references EU 261/2004 under Rule 90: Schedule Irregularities:

Note: Except where it is inconsistent with this rule, WOW prevails itself of the EU Regulation 261/2004 and applies it on its flights.

16. EU 261/2004 cannot be contracted out of, limited, or waived, as provided in Article 15 - Exclusion of Waiver under EU 261/2004:

1. Obligations vis-à-vis passengers pursuant to this Regulation may not be limited or waived, notably by a derogation or restrictive clause in the contract of carriage.

2. If, nevertheless, such a derogation or restrictive clause is applied in respect of a passenger, or if the passenger is not correctly informed of his rights and for that reason has accepted compensation which is inferior to that provided for in this Regulation, the passenger shall still be entitled to take the necessary proceedings before the competent courts or bodies in order to obtain additional compensation.

17. WOW Air's contract of carriage, under Rule 121(E) – Overriding Law, recognize that terms that are contrary to law are severed and unenforceable.

If any provision contained or referred to in the ticket or this tariff is found to be contrary to an applicable law, government regulation, order or requirement, which cannot be waived by agreement of the parties, such provision, to the extent that it is invalid, shall be severed from the ticket or tariff and the remaining provisions shall continue to be of full force and effect.

III. The Montreal Convention Reinforces Contractual Application of EU 261/2004

18. The *Convention for the Unification of certain Rules for International Carriage by Air* (also known as the *Montreal Convention*) is an international treaty in respect of an airline's liability for international transport that is incorporated into Canadian law by virtue of the *Carriage by Air Act*, R.S.C., 1985, c. C-26.
19. Article 27 of the *Montreal Convention* reiterates the freedom to contract principle and provides that airlines may enter into a contract of carriage that exceeds the minimum requirements under the *Montreal Convention*.
20. By voluntarily incorporating EU 261/2004 into their own contracts of carriage, the Defendants contractually agreed to apply EU 261/2004, as permitted under Article 27 of the *Montreal Convention*.

IV. Interpretation of EU 261/2004

21. The European Court of Justice (CJEU), the highest court of the European Union in respect of all matters under European Union law, including EU 261/2004, has provided guidance on the proper interpretation of EU 261/2004 in a number of decisions. Decisions of the CJEU are binding interpretations of EU law.
22. The amount of cash compensation each passenger shall receive under Article 7 of EU 261/2004 is measured by the delay between the passenger's scheduled arrival time at the "final destination" and the time the subject aircraft's door is opened for disembarkment at the "final destination":
 - a. Delay between three to four hours: 300 euros to each Class Member.
 - b. Delay greater than four hours: 600 euros to each Class Member.
23. The CJEU confirmed that the arrival time for purposes of EU 261/2004 is not the time the aircraft "touched down" but rather the time the first aircraft door is opened (*Germanwings GmbH v Ronny Henning* (C-452/13)).
24. In the case of two directly connecting flights, a passenger's "final destination" is the destination of the last flight as provided under Article 2(h) of EU 261/2004 (*Air France v Folkerts* (C-11/11)) and re-confirmed recently by the England and Wales

Court of Appeal (*Gahan v Emirates* [2017] EWCA Civ 1530).

25. The CJEU confirmed that the standardized cash compensation in Article 7 of EU 261/2004 applies to flights that are delayed more than three hours because long delays of more than three hours amounts to a “cancellation”:

Sturgeon v Condor, and Bock v Air France (C-402/07 and C-432/07) – November 19, 2009

2. Articles 5, 6 and 7 of Regulation No 261/2004 must be interpreted as meaning that passengers whose flights are delayed may be treated, for the purposes of the application of the right to compensation, as passengers whose flights are cancelled and they may thus rely on the right to compensation laid down in Article 7 of the regulation where they suffer, on account of a flight delay, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

Nelson v Deutsche Lufthansa AG and R (TUI Travel, British Airways, easyjet and IATA) v Civil Aviation Authority (2012) C-581/10 and C-629/10

1. Articles 5 to 7 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, must be interpreted as meaning that passengers whose flights are delayed are entitled to compensation under that regulation where they suffer, on account of such flights, a loss of time equal to or in excess of three hours, that is, where they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier. Such a delay does not, however, entitle passengers to compensation if the air carrier can prove that the long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

26. The Defendant airlines can avoid paying compensation only if the Defendants themselves can establish that the delay for the subject flight was due to “extraordinary circumstances”. The Defendants bear the burden to prove the “extraordinary circumstances” as provided in Article 5(3) of EU 261/2004:

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

27. “Extraordinary circumstances” does not include technical problems which come to light during maintenance of aircraft or on account of failure to carry out such maintenance (*Wallentin-Hermann v Alitalia—Linee Aeree Italiane SpA* (Case C-549/07)).

28. The express provisions of EU 261/2004 do not require a Class Member to make a demand directly with a Defendant airline or to file a complaint with the aviation regulators before being entitled to receive cash compensation.

29. The Defendants' decision to not pay Class Members their cash compensation under EU 261/2004 were made at their respective places of business that are outside of both the provinces of Québec and Ontario.

THE PLAINTIFF'S CIRCUMSTANCES

30. The Plaintiff held a confirmed reservation and a boarding pass for flight #320 operated by SATA departing from Toronto, Ontario to Ponta Delgada, Azores, Portugal for September 1, 2017 (hereinafter the "**Flight**").

31. The Plaintiff presented herself for travel on the Flight in accordance with SATA's contract of carriage.

32. The Flight was scheduled to depart at 9:00PM on September 1, 2017 but was delayed and rescheduled to depart on September 2, 2017 at 7:30AM. The Plaintiff was transported to the destination on the Flight and arrived at her destination more than four hours after the originally scheduled arrival time.

33. The delay of the Flight was not due to extraordinary circumstances.

34. The Plaintiff wrote to SATA demanding compensation in respect of the Flight in accordance with EU 261/2004 but was not provided the 600 euros compensation, as required under the Defendant SATA's contract of carriage.

THE DEFENDANTS' FAILURE TO PAY COMPENSATION TO CLASS MEMBERS

35. The Defendant WOW Air's flights were delayed more than three hours on numerous occasions, including, *for example*:

Date	Flight Number	Origin and Destination	Length of Delay
December 30, 2016	WW213	Keflavik to Toronto	5 hours and 2 minutes
January 8, 2018	WW214	Toronto to Keflavik	6 hours and 35 minutes
December 23, 2016	WW251	Keflavik to Montreal	4 hours and 13 minutes
February 24, 2017	WW251	Keflavik to Montreal	3 hours and 29 minutes
February 26, 2017	WW251	Keflavik to Montreal	3 hours and 21 minutes
January 2, 2017	WW251	Keflavik to Montreal	3 hours and 36 minutes
December 30, 2016	WW251	Keflavik to Montreal	5 hours and 11 minutes
January 8, 2018	WW252	Montreal to Keflavik	6 hours and 59 minutes

December 23, 2016	WW252	Montreal to Keflavik	3 hours and 22 minutes
December 30, 2016	WW252	Montreal to Keflavik	3 hours and 44 minutes

36. The Defendant SATA's flights were delayed more than three hours on numerous occasions, including, *for example*:

Date	Flight Number	Origin and Destination	Length of Delay
September 6, 2017	S4322	Toronto to Ponta Delgada	4 hours and 55 minutes
July 1, 2017	S4321	Ponta Delgada to Toronto	3 hours and 13 minutes
July 2, 2017	S4332	Toronto to Lajes Field	5 hours and 5 minutes

37. The Defendants have failed to pay the Class Members their EU 261/2004 cash compensation when the Class Members' flights arrived more than three hours at their final destination.

38. The number of Defendants' flights that are delayed and the length of each delay are within the knowledge of the Defendants and/or the respective airports.

39. The number of passengers on each flight, their identities, and if they received any compensation, are within the exclusive knowledge of the respective Defendants.

40. All passengers on a particular commercial flight arrive at their destination at the same time and are delayed by exactly the same amount of time.

41. The Class Members' circumstances are similar or identical to the Plaintiff's circumstances.

42. Each of the Defendants' breach of the terms of the contract of carriage arose outside of a province and s. 39(2) of the *Federal Courts Act* applies.

Jurisdiction

43. This Action concerns aeronautics with a subsisting body of federal laws including:

- a. *Aeronautics Act*, R.S.C., 1985, c. A-2
- b. *Carriage by Air Act*, R.S.C., 1985, c. C-26
- c. *Canada Transportation Act*, S.C. 1996, c. 10
- d. *Air Transportation Regulations*, SOR/88-58
- e. Federal common law, including the law relating to breach of contracts

44. Section 23(c) of the *Federal Court Act* provides that the Federal Court has jurisdiction.

45. The members of the Class are within the territorial jurisdiction of this Court as the respective flights originate from Canada or have Canada as its destination and there is a "real and substantial connection" with Canada.

Location of Trial

The Plaintiff proposes that this action be tried at Montréal, Québec.

Dated: August 14, 2018

(s) CHAMPLAIN AVOCATS

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Me. Sébastien A. Paquette
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