NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ABDIKARIM KARRANI, Plaintiff-Appellant, v. JETBLUE AIRWAYS CORPORATION, a Delaware corporation, Defendant-Appellee.	No. 19-35739 D.C. No. 2:18-CV-01510-RSM MEMORANDUM* (Filed Oct. 16, 2020)

Appeal from the United States District Court
for the Western District of Washington
Ricardo S. Martinez, Chief District Judge, Presiding

Submitted October 6, 2020**
Seattle, Washington

Before: GRABER and W. FLETCHER, Circuit Judges, and FREUDENTHAL,*** District Judge

Following an unrelated emergency medical landing, Abdikarim Karrani, a Somali by birth and an African American citizen, was removed from a JetBlue

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.

flight after an alleged altercation with a flight crew member. JetBlue refused to re-board him. On summary judgment, the district court dismissed Karrani's claims of unlawful discrimination under 42 U.S.C. § 1981. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We assume that Karrani established a prima facie case. Karrani argues that summary judgment was improper because he raised triable issues of fact which reasonably support the conclusion that race was a motivating factor in JetBlue's decisions to remove and then to refuse to reboard him. Reviewing de novo, *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004), the district court correctly determined that JetBlue's reliance on 49 U.S.C. § 44902 constitutes a legitimate and non-discriminatory reason for its decisions. Section 44902 provides an air carrier with permissive authority to "refuse to transport a passenger or property the carrier decides is, or *might be*, inimical to safety." 49 U.S.C. § 44902(b) (emphasis added).

Karrani argues that the airline exceeded its § 44902 authority because the removal decision was made without further investigation and was based on the report of a biased flight attendant. However, the airline pilot was entitled to accept the attendant's report when the pilot made the decision to refuse transport. *See, Cordero v. Cia Mexicana De Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) ("[T]he test . . . 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. . . ." (quoting with approval *Williams v. Trans*

World Airlines, 509 F.2d 942, 948 (2d Cir. 1975) (internal quotation marks omitted))). Considering the attendant's report even if, on hindsight, it is exaggerated, the airline pilot's opinion under § 44902 was justified by a reasoned and rational appraisal of the facts known to the pilot at the time and was not arbitrary or capricious.

Karrani also challenges the denial of his Federal Rule of Civil Procedure 59(e) motion to amend the judgment due to evidence that Karrani asserts is newly discovered and was withheld by JetBlue. Because Karrani admits that he was in possession of this evidence before summary judgment was entered, the district court did not abuse its discretion in denying the motion.

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIKARIM KARRANI, Plaintiff, v. JETBLUE AIRWAYS CORPORATION, a Delaware corporation, Defendant.	Case No. C18-1510-RSM ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT AND DENYING REQUEST FOR SANCTIONS (Filed Nov. 19, 2019)

I. INTRODUCTION

This matter comes before the Court on Plaintiff Abdikarim Karrani's Motion to Alter or Amend Judgment. Dkt. #87. On July 31, 2019, this Court granted summary judgment dismissal of Plaintiff's claims against Defendant JetBlue Airways Corporation ("JetBlue") and entered judgment for JetBlue. Dkts. #84, #85. On August 28, 2019, Plaintiff moved to alter or amend the judgment on the basis that JetBlue withheld key documents that would have changed the outcome of the Court's decision. Dkt. #87 at 3. JetBlue opposes Plaintiff's Motion. Dkt. #100. Plaintiff separately moved for sanctions, Dkt. #86, which JetBlue also opposes. For the reasons set forth below, the Court DENIES Plaintiff's Motion to Alter or Amend Judgment and his request for sanctions.

II. BACKGROUND

On July 31, 2019, this Court granted summary judgment dismissal of Plaintiff's claims against JetBlue for unlawful discrimination under 42 U.S.C. § 1981. Dkt. #84. The same day, the Court entered judgment for JetBlue that dismissed all claims in the underlying lawsuit. Dkt. #85. On August 28, 2019, Plaintiff filed the instant motion claiming that JetBlue improperly withheld three "critical" documents: (1) Section 7 of the Flight Attendant Manual ("FAM § 7"); (2) the Pilot Manual ("PM") and (3) various pilot training materials "that may provide guidance to pilots on addressing issues like race and implicit bias" related to alleged passenger misconduct. Dkt. #87 at 2-3.

A. Production of SSI Documents

On December 12, 2018, parties submitted their joint status report and discovery plan. Dkt. #10. The plan discussed the potential need for parties to secure approval from the Transportation Security Administration ("TSA") for production of material marked as Sensitive Security Information ("SSI"), as required by federal law. Dkt. #10 at 3-4 (citing 49 C.F.R. § 1520 *et seq*.). TSA reviews documents containing SSI under "the 525(d) process," wherein individuals may obtain access to SSI in civil litigation if they can demonstrate substantial need for the information in preparation of their case and pass a TSA background check. *See* Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 525, 120 Stat. 1382 (Oct.

4, 2006). Parties agreed that because Plaintiff would potentially seek documents containing SSI in discovery, JetBlue would produce a log of all material withheld as SSI so that Plaintiff could evaluate whether he would request access to those documents from TSA. Dkt. #10 at 4.

B. Plaintiff's Discovery Requests

On February 6, 2019, Plaintiff served his first set of discovery requests on JetBlue. This included Request for Production ("RFP") 24, which requested "all documents related to the rules, policies, procedures, contract provisions, federal or state regulations or laws in effect at JetBlue or governing JetBlue's actions for the removal of a passenger from a flight before during, or after the flight." Dkt. #88-1 at 17. In its response dated March 15, 2019, JetBlue stated that an excerpt from its Flight Operations manual—the FAM § 7—contained information responsive to RFP 24. Dkt. #88-1 at 35. However, because this excerpt of the manual was designated as SSI, TSA needed to approve its production to Plaintiff. *Id.* Discovery closed on April 29, 2019. Dkt. #11. On May 1, 2019, Plaintiff's counsel contacted TSA regarding access to the FAM § 7. Dkt. #88-1 at 64. Counsel was redirected to various TSA staff until finally reaching TSA attorney Kate Gannon on May 22, 2019, who initiated the SSI review process. *See id.* at 60-64. On June 10, 2019, TSA asked JetBlue to provide them with FAM § 7 so that TSA security experts could identify and redact the SSI with specificity. *Id.* at 86. TSA notified Plaintiff's counsel that if

counsel determined he had a substantial need for the SSI after seeing the redacted version of the FAM § 7, Plaintiff could contact TSA again to initiate the Section 525(d) process. *Id.* JetBlue provided the documents to TSA one week later, on June 17, 2019. *Id.* at 101. TSA returned the redacted version of the FAM § 7 to JetBlue on July 3, 2019, who in turn produced FAM § 7 with TSA-approved redactions to Plaintiff on July 8, 2019. *Id.* at 116. On July 11, 2019, counsel for Plaintiff contacted TSA explaining that Plaintiff needed information contained in the redacted material. Dkt. #81 at ¶ 6. The next day, JetBlue produced a second version of FAM § 7 which Plaintiff filed under seal in support of the instant motion. Dkt. #88-1 at 133-34.

On July 21, 2019, Plaintiff's counsel "realized that Section 7 of the FAM, would likely be the same procedures for pilots" and asked JetBlue whether a manual existed for pilots similar to the manual for flight attendants. Dkt. #88 at ¶ 8; Dkt. #88-1 at 136. JetBlue confirmed that JetBlue's Flight Operations Manual, which included the FAM § 7, contained separate excerpts that applied to pilots (referred to hereafter as "the PM"). Plaintiff then notified TSA that JetBlue would provide TSA with the PM for review and redaction. Plaintiff also asked that TSA conduct the review "as soon as possible" given parties' late August trial date. Dkt. #88-1 at 136. On July 28, 2019, Plaintiff sent TSA a follow-up message asking whether JetBlue had provided them with the PM. *Id.* at 143. In this same email, Plaintiff asked JetBlue whether there were any training materials for the pilots for addressing

customer disturbances and, if so, to also provide those to TSA for review. *Id.* On July 29, 2019, JetBlue confirmed that it had submitted the PM to TSA that morning but did not mention any training materials. *Id.* at 146. On July 31, 2019, the Court dismissed this case on summary judgment before JetBlue produced the PM or any pilot training materials to Plaintiff. *See* Dkt. #84.

III. DISCUSSION

A. Motion to Strike

As an initial matter, JetBlue moves to strike Plaintiff's Proposed Findings of Fact and Conclusions of Law ("the PFF"). Dkt. #99 at 12; Dkt. #100 at 8. Plaintiff filed the PFF as an exhibit to both his Motion to Amend and Motion for Sanctions. *See* Dkts. #86-1, #87-1. The PFF totals forty-four pages and includes both proposed factual findings and legal argument. JetBlue argues that the Court must strike Plaintiff's PFF pursuant to the local rules, which limit motions to twelve pages unless the party successfully moves to file an overlength brief. Dkt. #99 at 12 (citing Local Rules W.D. Wash. LCR 7(e)(4) and 7(f)). Plaintiff responds that "findings of fact are appropriate in sanctions motions" and the PFF therefore aids the Court in reaching its decision. Dkt. #108 at 5 (citing *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 n.2 (9th Cir. 1983)). Plaintiff does not respond to JetBlue's Motion to Strike the PFF with respect to his Rule 59(e) Motion. *See* Dkt. #110.

The Court finds nothing in *Wyle* supporting Plaintiff's argument that he may file a forty-four-page document containing legal argument and proposed factual findings to support either his Motion for Sanctions or his Rule 59(e) Motion. Instead, *Wyle* stands for the proposition that an appellate court reviews a district court's factual findings on a motion for sanctions under the clearly erroneous standard. *Wyle*, 709 F.2d at 589 n.2. Given that Plaintiff declined to move to file an overlength brief, the Court must grant JetBlue's Motion to Strike the PFF as to both of Plaintiff's motions. To do otherwise would condone Plaintiff's effort to circumvent the twelve-page limit *See* Local Rules W.D. Wash. LCR 7(e)(4). Accordingly, JetBlue's Motions to Strike, Dkts. #99, #100, are GRANTED.

B. Standard of Review

A district court has considerable discretion when considering a motion to alter or amend a judgment under Rule 59(e). *Turner v. Burlington N. Santa Fe R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003). There are four grounds upon which a Rule 59(e) motion may be granted: (1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in controlling law. *Id.* Vacating a prior judgment under Rule 59(e) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v.*

Nakatani, 342 F.3d 934, 945 (9th Cir. 2003). "A Rule 59(e) motion may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Id.*

C. "Newly Discovered" Evidence under Rule 59

Plaintiff does not argue manifest error by the Court in its prior ruling, nor does he identify a change in the controlling law. Instead, Plaintiff submits the FAM § 7 as "new evidence" compelling the Court to reverse its previous ruling. Dkt. #87 at 3. Plaintiff also contends that the PM and training materials likely contain information that would change the Court's summary judgment analysis. *Id.* at 2.

The Court finds that the FAM § 7 is not "newly discovered" evidence for the purposes of Rule 59. Plaintiff admits that he received Version 2 of the FAM § 7 on July 12, 2019 but failed to raise it before the Court's summary judgment ruling on July 31, 2019. Dkt. #87 at 2. He justifies his delay on the basis that he anticipated discussing the manual at oral argument. Dkt. #110 at 2. The local rules, however, clarify that all motions are decided without oral argument unless otherwise ordered by the court. Local Rules W.D. Wash. LCR 7(b)(4). Plaintiff also argues that since he discovered the evidence only after briefing was complete on the summary judgment motion, he could not reasonably have used the information before the Court dismissed the case. Dkt. #110 at 2.

The first criterion for reconsideration based on "newly discovered evidence" requires that the evidence in question was not in the moving party's possession at the time of "trial." *Albuquerque v. Arizona Indoor Soccer, Inc.*, 880 F.2d 416 (9th Cir. 1989). In cases where the court dismisses the case on summary judgment, the moving party must not have had possession of the evidence prior to the court's disposition on the motion for summary judgment. 11 Wright & Miller, Fed. Prac. & Proc. Civ. § 2859 (3d ed.2019) ("Under both rules [59 and 60], if [the evidence] was in the possession of the party before the judgment was rendered it is not newly discovered and does not entitle the party to relief."); *see also Branch Banking & Tr. Co. v. Frank*, No. 2:11-CV-1366 JCM CWH, 2013 WL 6669100, at *7 (D. Nev. Dec. 17, 2013) (citing *Engelhard Indus., Inc. v. Research Instrumental Corp.*, 324 F.2d 347, 352 (9th Cir.1963)). Since Plaintiff possessed this evidence prior to the court granting summary judgment, these documents are not "newly discovered."

After briefing on a motion is complete, parties may bring matters to the attention of the court by requesting leave to file a sur-reply or a supplement. Here, Plaintiff possessed the FAM § 7 prior to the Court's order of dismissal yet failed to bring it to the Court's attention until now. By not requesting leave to file a surreply or a supplement, Plaintiff relinquished his ability to have the FAM § 7 considered as part of the summary judgment motion. *See Pac. Aerospace & Elecs., Inc. v. SRI Hermetics, Inc.*, No. CV-05-0155-AAM, 2006 WL 47540, at *3 (E.D. Wash. Jan. 9, 2006) (Rejecting

plaintiff's argument that no mechanism allowed it to present evidence prior to entry of order of dismissal); *see also Frank*, 2013 WL 6669100, at *7 (same). Moreover, the same flowchart Plaintiff now relies on in the instant motion was produced as early as June 11, 2019—six days before Plaintiff filed his response brief—but was not referenced until this point. Dkt. #102 at ¶ 4; Dkt. #105 at 29. To allow a party to present available evidence after an adverse ruling has been made "would contradict every notion of judicial economy" and cannot be considered "newly discovered." *Frank*, 2013 WL 6669100, at *7.

Plaintiff also argues that the Court must vacate its judgment based on the missing PM and training materials, since they "likely contain[] specific procedures for the captain to follow" that were applicable to Mr. Karrani's removal from the flight. Dkt. #87 at 3. Again, the Court is not convinced by Plaintiff's argument. On July 21, 2019, Plaintiff notified TSA of the PM and requested that it conduct its review for SSI "as soon as possible" because of the upcoming trial date. Dkt. #88-1 at 136. Despite urging TSA to expedite its review because of the approaching trial date, Plaintiff declined to file a Rule 56(d) declaration to request that the Court either deny or defer consideration of JetBlue's summary judgment motion to allow Plaintiff time to receive and review the materials. *See* Fed. R. Civ. P. 56(d). For that reason, when the Court ruled on JetBlue's motion, it had no knowledge of any of the materials that Plaintiff now contends would have changed the outcome of this case. Plaintiff again

requests reconsideration for reasons he could have raised before an adverse ruling. Granting such a request undermines both the purpose of Rule 56 and judicial economy. *See Ross v. F/V MELANIE*, C95-654Z, 1996 WL 521413, at *1 (W.D. Wash. Aug. 8, 1996) (Denying motion to amend judgment where plaintiff failed to submit affidavit under Fed. R. Civ. P. 56 to request additional time to respond at summary judgment stage).

For these reasons, Plaintiff's failure to file a surreply, supplement, Rule 56 affidavit, or any other notice that would have advised the Court of these discovery issues prior to ruling is sufficient to warrant denial of Plaintiff's Motion under Rule 59(e).

D. Discovery Misconduct under Rule 60(b)(3)

Although Plaintiff does not expressly reference Fed. R. Civ. P. 60(b)(3), his allegations of discovery abuse by JetBlue and motion for sanctions require that the Court also consider his Motion under Rule 60(b)(3). When misconduct in discovery is alleged, courts apply the Rule 60(b)(3) standard for Rule 59 motions. *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990). Rule 60(b)(3) permits a court to relieve a party of a final judgment obtained through "fraud . . . misrepresentation, or misconduct by an opposing party." Fed. R. Civ. P. 60(b)(3). To prevail under Rule 60(b)(3), the moving party must (1) establish by clear and convincing evidence that a judgment was obtained by fraud, misrepresentation, or misconduct, and (2) that the conduct

complained of prevented the moving party from fully and fairly presenting the case. *Hausman v. Holland Am. Line-U.S.A.*, No. CV13-0937 BJR, 2016 WL 51273, at *2 (W.D. Wash. Jan. 5, 2016) (citing *Bunch v. United States*, 680 F.2d 1271, 1283 (9th Cir. 1982)). Rule 60(b)(3) "is aimed at judgments that were unfairly obtained, not at those that are merely factually incorrect." *Id.* (citing *In re MIV Peacock on Complaint of Edwards*, 809 F.2d 1403, 1405 (9th Cir. 1987)). In the context of discovery disputes, failure to disclose or produce materials requested in discovery may constitute misconduct under Rule 60(b)(3). *Jones*, 921 F.2d at 879. Courts disagree on whether such misconduct includes accidental omissions or is limited to instances where the non-moving party engaged in intentionally malicious behavior. *Hausman*, 2016 WL 51273, at *3 (collecting cases).

i. The FAM § 7

Upon review of the record, the Court finds that JetBlue's delayed production of the FAM § 7 cannot be blamed on unilateral discovery misconduct by JetBlue. On the contrary, it appears that parties' joint failure to develop a clear discovery process regarding SSI-designated material resulted in the delays. Plaintiff alleges that JetBlue "used the SSI objection as a sword by falsely claiming that the FAM § 7 had to be withheld in entirety" and should have produced a redacted version of the FAM § 7 on March 15, 2019. *Id.* at 7. Plaintiff is incorrect. The information that constitutes SSI changes depending on factors such as timing and

proposed recipients of the material. *See* Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 525, 120 Stat. 1382 (Oct. 4, 2006); *see also* 49 C.F.R. § 1520 *et seq*. For that reason, federal law authorizes only TSA—not private airlines—to determine what material must be redacted as SSI versus what may be produced to litigants:

> Congress has delegated to the TSA the determination of what information would be detrimental to the safety of air transportation if disclosed. . . . Sensitive security information, by its very nature, cannot be precisely identified in advance. Moreover, . . . what is sensitive security information, that is, what information would be detrimental to air transportation if disclosed, changes with the circumstances.

Chowdhury v. Nw. Airlines Corp., 226 F.R.D. 608, 612 (N.D. Cal. 2004). 49 C.F.R. § 1520.5(b)(1) designates security plans in flight operation manuals as "information constituting SSI," and the footer on every page of the FAM § 7 plainly reads, in part: "*No part of this record* may be disclosed to persons without a 'need to know,' as defined in CFR parts 15 and 1520, except with the written permission of the administrator of the Transportation Security Administration or the Secretary of Transportation." *See generally* Dkt. #90 (emphasis added). Accordingly, JetBlue properly withheld the FAM § 7 until TSA could determine which portions of the document should be redacted as SSI. JetBlue therefore did not engage in misconduct by refusing to

produce the FAM § 7 before TSA could conduct the SSI review.

Other issues that delayed the production of FAM § 7 cannot be blamed solely on JetBlue. JetBlue timely notified Plaintiff about the FAM § 7 on March 15, 2019, but Plaintiff's counsel waited until May 1, 2019—more than six weeks later—to contact TSA about SSI redactions. Dkt. #88-1 at 64. Production was further delayed by Plaintiff's counsel's lack of knowledge regarding how to contact TSA for SSI review. *See id.* at 60-64 (Plaintiff was redirected to various TSA staff before reaching attorney Kate Gannon on May 22). Because of this delay, TSA did not receive the materials from JetBlue until mid-June, and it took several weeks for TSA to review the information and provide their redactions to JetBlue for production in early July. *Id.* at 86.

JetBlue undoubtedly could have expedited this process by reaching out directly to TSA counsel or, at a minimum, providing Plaintiff with the proper contact information for TSA's attorneys. However, despite Plaintiff's argument that "typical procedure" for SSI material required JetBlue to send its requests directly to TSA, Dkt. #108 at 2, both parties' actions comported with their discovery plan. Dkt. #10 at 4 ("JetBlue will produce a log of any responsive Sensitive Security Information in discovery so that Plaintiff can evaluate whether to pursue obtaining access."). Based on this language, JetBlue was not obligated to do more than simply identify the responsive material containing SSI in its privilege log and allow Plaintiff to decide whether he would request access to the material. Such

delays could have been avoided had parties developed a more detailed discovery plan for production of SSI material, including how parties would coordinate with TSA to review and redact the material. Accordingly, given Plaintiff's delays in reaching out to TSA and parties' mutual failure to develop an appropriately detailed discovery plan for SSI material, Plaintiff cannot blame production delays on misconduct by JetBlue.

ii. The PM and Training Materials

Plaintiff also alleges discovery misconduct by JetBlue with respect to withholding the PM and training materials for pilots. Dkt. #87 at 2-3. On July 19, 2019, Plaintiff's counsel notified JetBlue's counsel that upon review of the Flight Attendant Manual, "it occurred to [him] that there must be a Pilot manual that discusses removal and threat levels." Dkt. #104 at 6. On July 21, 2019, counsel conferred telephonically on multiple matters, including whether there were excerpts from the FOM that applied separately to pilots. *Id.* at ¶¶ 4-5. Counsel for JetBlue agreed to inquire into manual excerpts and, on July 29, 2019, produced the PM to TSA for review. Dkt. #88-1 at 146. Plaintiff claims that JetBlue should have initially listed the PM in its March 15, 2019 privilege log, which only listed the manual for flight attendants without reference to the corresponding manual for pilots. *Id.* at 27; Dkt. #87 at 2. JetBlue does not dispute that the PM should have been listed in the privilege log alongside the FAM, but counters that "neither JetBlue personnel assisting in our discovery nor our office, as counsel had thought to

inquire as to manual excerpts related to passenger removals that were specific to pilots" because "the overwhelming focus of Plaintiff's discovery had been on the actions of the Inflight crewmembers" rather than pilots. Dkt. #104 at ¶ 5.

On one hand, given that JetBlue's summary judgment briefing focused heavily on pilots' authority to remove passengers, the Court is skeptical that it "never occurred" to JetBlue staff or its counsel to inquire about a manual for pilots. *See generally* Dkt. #52. However, not even Plaintiff's counsel thought to inquire about a pilot manual until mid-July—despite the fact that JetBlue had produced documents on the regulatory framework and contract of carriage provisions for pilots months earlier, as well as other excerpts from the Flight Attendant Manual. *See* Dkt. #104 at ¶ 5. Plaintiff's counsel likewise failed to file a Rule 56 affidavit to delay consideration of the summary judgment motion once JetBlue confirmed that it had a manual for pilots. Moreover, while the term "misconduct" under Rule 60(b)(3) may cover even accidental omissions, *see Jones*, 921 F.2d at 879, JetBlue was in the process of producing the document to Plaintiff when the Court granted summary judgment dismissal. *See* Dkt. #88-1 at 146 (confirming JetBlue sent PM to TSA for review). This fact distinguishes this case from others addressing alleged misconduct under Rule 60(b)(3), wherein withholding parties repeatedly denied the existence of a document despite specific inquiries from the movant. *See, e.g.*, *Hausman*, 2016 WL 51273, at *2 (Non-movant deleted and withheld emails, tampered with witness

testimony, fabricated injuries and testified falsely); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928 (1st Cir. 1988) (Defendant repeatedly "played possum" in response to interrogatories and Rule 34 requests); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1341 (5th Cir. 1978) (Nonmovant withheld document in violation of Court's discovery order). In contrast, JetBlue promptly agreed to search for and produce the document once Plaintiff asked whether a pilot corollary to the FAM § 7 existed. For these reasons, the Court finds that Plaintiff has failed to establish by clear and convincing evidence that JetBlue committed discovery misconduct warranting the extraordinary remedy sought by Plaintiff.

The Court likewise finds that Plaintiff has failed to establish that JetBlue unlawfully withheld pilot training materials. Plaintiff's Motion claims that JetBlue improperly withheld pilot training materials that "may provide guidance to pilots on addressing issues like race and implicit bias in the context of allegations of customer misconduct." Dkt. #87 at 2-3. This Court previously compelled JetBlue to produce all documents "related to the training received by JetBlue employees on or relating to (a) race or national origin discrimination and (b) implicit bias that were current at the time of Flight 263. . . ." Dkt. #50 at 9. On July 28, 2019, Plaintiff's counsel wrote to JetBlue: "Since there were training materials for the flight attendants, one would think there are training materials for the pilots right? If so, if any of them require TSA review, please send them along too or produce them." Dkt. #88-1 at 143. Counsel for JetBlue replied the following day, "[W]e are

conferring with JetBlue regarding any related training materials." *Id.* at 146. Neither Plaintiff's original request nor JetBlue's response references material related to race or implicit bias training. For that reason, Plaintiff's contention that JetBlue withheld anti-bias or anti-discrimination training material, in violation of this Court's previous order, is unfounded. JetBlue's response likewise provides no indication that JetBlue improperly withheld any pilot training materials. On the contrary, JetBlue's email simply indicates that it would search for additional pilot training materials to see if responsive documents existed.

Accordingly, the Court finds that Plaintiff has failed to provide clear and convincing evidence of discovery misconduct under Rule 60(b)(3).

E. Effect of Procedural Manuals on Summary Judgment Analysis

The Court finds that Plaintiff has failed to meet his respective burdens under Rule 59(e) or Rule 60(b)(3) to obtain the extraordinary remedy he seeks. Nevertheless, given the lengthy process of accessing SSI-designated material and the numerous discovery disputes between these parties, the Court finds it necessary to address the merits of Plaintiff's motion to determine if granting his requested relief would prevent any manifest injustice. Having reviewed the FAM § 7 and Plaintiff's descriptions of the PM and training materials, the Court is not persuaded that procedures for flight attendants and pilots contained in the FAM § 7,

nor the anticipated information in the PM or training materials, would have changed the Court's analysis.

In granting summary judgment for JetBlue, the Court found that Plaintiff failed to raise a triable issue that JetBlue removed him from Flight 263 because of his race and/or ethnicity. Dkt. #84 at 9. Plaintiff offered no direct evidence of discrimination by Ms. Pancerman, Captain Ouillette, or other members of the JetBlue flight crew. *Id.* at 6. For that reason, Plaintiff's Section 1981 claim hinged entirely on whether circumstantial evidence created an inference of discrimination against Mr. Karrani. *Id.* (citing Dkt. #69 at 20-21). Circumstantial evidence for individual claims of discrimination is evaluated under the *McDonnell Douglas* framework. *White v. Cal.*, 754 Fed. Appx. 575, 576 (9th Cir. 2019). If a plaintiff establishes a prima facie case, then the burden shifts to the defendant to demonstrate a legitimate, non-discriminatory reason for the adverse action. Upon doing so, the burden shifts back to plaintiff to prove, with "specific and substantial" evidence, that the reason was merely pretext for intentional discrimination. *Id.* at 1152. On summary judgment, the Court found that Plaintiff had not offered "specific and substantial" evidence raising a triable issue of pretext. Dkt. #84 at 9.

Plaintiff claims that the FAM § 7 provides "specific and substantial" evidence that JetBlue's reasons for removing Mr. Karrani were merely pretext, and that the missing PM and training materials would likely provide such evidence. *See* Dkt. #86 at 10. Plaintiff's argument relies on a line of employment law cases

wherein an employer's deviation from established policy or practice in terminating an employee constitutes circumstantial evidence of discrimination. Dkt. #110 at 2 (citing *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108 (9th Cir. 2011); *Anderson v. Wal-Mart Stores, Inc.*, No. 2:16-CV-00072-SAB, 2017 WL 1960673 (E.D. Wash. May 11, 2017); *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201 (9th Cir. 2008); *Brennan v. GTE Gov't Sys. Corp.*, 150 F.3d 21 (1st Cir. 1998)). The courts in these employment cases found evidence of pretext where an employer deviated from company policy or practice in deciding to terminate an employee. Under this reasoning, Plaintiff argues, any deviation by JetBlue crewmembers from the Flight Operations Manual, which includes the FAM § 7 and the PM, should likewise constitute evidence of pretext. Dkt. #110 at 2-3. Plaintiff points to two flowcharts provided in the FAM § 7 and describes various ways in which JetBlue's flight crew—specifically Ms. Pancerman and Captain Ouillette deviated from these step-by-step procedures. Dkt. #87 at 5-7. Plaintiff also argues that Ms. Pancerman violated FAM § 7.2.7, despite the fact that this subsection refers to unwanted touching between passengers. *Id.* at 6. With respect to the missing PM, Plaintiff contends that the manual "likely contains specific procedures" breached by Captain Ouillette with respect to Mr. Karrani's removal. *Id.* at 2.

The Court fmds Plaintiff's arguments unavailing. First, the FAM § 7 explicitly preserves the flight crew's discretion to deviate from its procedures. When responding to customer disturbances, flight attendants

may skip directly to the step of notifying the flight deck. *Id.* at 6 ("Depending on the severity of the disturbance, Crewmembers may need to bypass steps on the flow chart."). The manual also states that "[s]ecurity incidents may require the use of irregular procedures that may deviate from established policies in the Flight Attendant Manual. . . ." Dkt. #90 at 14. Accordingly, Plaintiff's claim that the FAM § 7 required the crewmembers on Flight 263 to follow the same steps set forth in the flow chart is unsupported. *See* Dkt. #87 at 5 (arguing that the incident with Mr. Karrani was required to end "in the air" at Step 1 of Flow Chart 7-1.) Moreover, the FAM § 7 does not specify—nor does it attempt to specify—the proper procedure for responding to the unique conditions on Flight 263, which involved a crewmember's conflict with a passenger during an emergency landing. Accordingly, while Plaintiff presents these employment cases as dispositive case law, he fails to provide a sufficient basis for applying them here. The Court is therefore unpersuaded by Plaintiff's argument that the procedures set forth in the FAM § 7 raise a triable issue of pretext that saves Plaintiff's discrimination claim from summary judgment.

Furthermore, none of the materials referenced in Plaintiff's Motion change the Court's analysis that the captain's decision to remove Mr. Karrani was proper as a matter of law. *See* Dkt. #84 at 9. The undisputed fact remains true that Captain Ouillette, who held exclusive decision-making authority to remove passengers from the flight, did not personally witness the

interaction between Mr. Karrani and Ms. Pancerman. Dkt. #84 at 11-12 (citing 14 C.F.R. § 91.3(a)). It likewise remains undisputed that Captain Ouillette based his decision on Ms. Pancerman's account of the incident that was corroborated by a second flight attendant. *See id.* at 12; *see also* Dkt. #54 at §§ 7-8 ("Based on the report of the physical contact by a passenger with a crewmember and failure to abide by a crewmember's instruction, I made the decision to remove the involved passenger from the flight."). Even in instances where flight attendants have provided exaggerated or false information to the captain, a court's inquiry "nevertheless depends on the reasonable belief of the captain." Dkt. #84 at 13 (collecting cases). The guidance provided in non-binding operation manuals or training materials therefore cannot eliminate a captain's discretion to rely on the representations of his flight crew.

For the reasons set forth above, neither the FAM § 7 nor the anticipated information in the PM or training materials justify the "extraordinary remedy" requested by Plaintiff. *Carroll*, 342 F.3d at 945. Accordingly, the Court DENIES Plaintiff's Motion to alter or amend the judgment.

F. Sanctions

Finally, the Court will address Plaintiff's Motion for Sanctions. Dkt. #86. Plaintiff argues that sanctions are appropriate given JetBlue's misleading and bad faith representations related to the FAM § 7, the PM, and the training materials, which he claims

constituted "a complete failure to respond" and unfairly tainted the summary judgment process. *Id.* at 9-10. Plaintiff requests that the Court take several actions: (1) strike the summary judgment order; (2) order JetBlue to produce the PM and any responsive pilot training materials; (3) strike JetBlue's Answer and enter default judgment for Plaintiff; (4) award Plaintiff costs and fees to date for prevailing under his § 1981 claim; (5) order JetBlue to post all court orders on its Welcome webpage for ninety consecutive days under the heading "Court Sanctions JetBlue"; and (6) set a trial date on the damages question. *Id.* at 10-11. Plaintiff states that the factors "weigh in favor of the harshest sanction; no other lesser sanctions will do." *Id.* at 13.

Federal Civil Rule 37 provides that a court may order sanctions against a disobedient party, including entry of a judgment by default, where the party fails to respond to interrogatories or requests for document production. Fed. R. Civ. P. 37(d). Courts have refrained from awarding sanctions under Rule 37(d) "unless there is a total failure to respond to the discovery requests." *Badalamenti v. Dunham's, Inc.*, 896 F.2d 1359, 1363 (Fed. Cir. 1990) (citing *Fjelstad v. Am. Honda Motor Co.*, 762 F.2d 1334, 1339-40) (9th Cir. 1985)). As set forth above, the Court is not persuaded that JetBlue engaged in discovery misconduct warranting the extraordinary remedy of vacating the judgment, nor that the summary judgment process was unfairly tainted. Accordingly, the Court DENIES Plaintiff's request for sanctions.

IV. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff has failed to present new evidence warranting relief under Rule 59(e) or clear and convincing evidence of discovery misconduct warranting relief under Rule 60(b)(3).

Accordingly, and after having reviewed the relevant briefing and the remainder of the record, the Court hereby finds and ORDERS that:

(1) JetBlue's Motions to Strike, Dkts. #99, #100, are GRANTED. Plaintiff's Proposed Findings of Fact and Conclusions of Law, Dkts. #86-1, #87-1, are stricken.

(2) Plaintiff's Motion to Alter or Amend the Judgment, Dkt. #87, is DENIED.

(3) Plaintiff's Motion for Sanctions, Dkt. #86, is DENIED.

DATED this 19 day of November 2019.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIKARIM KARRANI, Plaintiff, v. JETBLUE AIRWAYS CORPORATION, a Delaware corporation, Defendant.	Case No. C18-1510 RSM ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (Filed Jul. 31, 2019)

I. INTRODUCTION

This matter comes before the Court on Defendant JetBlue Airways Corporation ("JetBlue")'s Motion for Summary Judgment. Dkt. #52. Plaintiff Abdikarim Karrani opposes JetBlue's Motion in entirety. Dkt. #69. The Court has determined that oral argument is not necessary. Having reviewed the Motion, Plaintiff's Response, Defendant's Reply, and all documents submitted in support thereof, the Court GRANTS Defendant's Motion for Summary Judgment.

II. BACKGROUND

Plaintiff claims that JetBlue discriminated against him on the basis of his race, national origin, and/or ethnicity under 42 U.S.C. § 1981 by wrongfully removing him from an airline flight. Mr. Karrani is an 81-year-old U.S. citizen born in Somalia who now resides in

Washington state. On January 20, 2018, Mr. Karrani was returning home on JetBlue Flight 263 from New York bound for Seattle when a medical emergency occurred in Row 1. Dkt. #53-2 at 5. The medical emergency required the plane to make an emergency landing in Billings, Montana shortly thereafter. During the plane's descent into Billings, Mr. Karrani—whose age and diabetic condition causes him to experience sudden and urgent needs to use the restroom—attempted to use the lavatory at the front of the plane and found it occupied by another passenger. Dkt. #53-7 at 4. After shutting the door, Mr. Karrani proceeded to stand outside the bathroom. Noticing Mr. Karrani waiting next to the restroom, JetBlue flight attendant Cynthia (i.e. Cindy) Pancerman approached to direct him to the back lavatory. *Id.*

The precise details of what happened between Ms. Pancerman and Mr. Karrani remain a dispute of fact. Ms. Pancerman claims that she attempted to guide Mr. Karrani towards the back lavatory and, in response, Mr. Karrani hit her. Dkt. #68-1 at 50-51. Mr. Karrani, in contrast, claims that Ms. Pancerman initiated physical contact by pushing him towards the back and, startled and anxious, he attempted to brush her hand off him. Dkt. #53-7 at 5. According to Mr. Karrani, Ms. Pancerman did not say anything else to him except: "Go to the back one." *Id.* After this interaction, Mr. Karrani proceeded to the back of the plane to use the back lavatory. It is undisputed that the plane's captain, Captain Mitchell Ouillette, was not a witness to the event.

During the plane's final descent into Billings, the pilots in the cockpit—Captain Ouillette and co-pilot Michael Cheney—received a call from Ms. Pancerman. While the parties dispute what details Ms. Pancerman provided to the pilots regarding her interaction with Mr. Karrani, it is undisputed that during the plane's final approach into Billings, a call was made from the cockpit requesting law enforcement to meet the airplane upon landing. Dkt. #68-1 at 10-11. Once the plane landed, airport police boarded the plane and escorted Mr. Karrani off the plane. Dkt. #537 at 6.

After interviewing witnesses, airport police officer Randy Winkley issued an incident report and determined that he would not charge Mr. Karrani with assault. Dkt. #68-1 at 106, 116. However, Captain Ouillette did not allow Mr. Karrani to re-board the flight. *Id.* at 111. As a result, while the remaining passengers were transported to Seattle, Mr. Karrani was driven by police to a hotel in Billings to stay overnight. The next day, he purchased a new flight on Delta from Billings to Seattle which JetBlue did not refund, even after he reported his ordeal to a JetBlue supervisor at Seattle Tacoma airport. Dkt. #1 at 5. On October 15, 2018, Mr. Karrani filed this lawsuit. JetBlue now seeks summary judgment on Plaintiff's claims under 42 U.S.C. § 1981 on the basis that Mr. Karrani has not raised a triable issue of fact that his removal from Flight 263 was because of his race, ethnicity, or national origin.

III. DISCUSSION

A. Plaintiff's Request for Judicial Notice

As a preliminary matter, Plaintiff requests that this Court take judicial notice of several documents published by the U.S. Department of Transportation ("DOT"). *See* Dkt. #60. Specifically, Plaintiff requests judicial notice of two DOT guidance documents related to passenger discrimination in air travel, *see* Dkt. #60-1 at 4-15, and four Consent Orders issued by DOT against domestic airline carriers for discriminatory removal of minority passengers from aircrafts, *see* Dkt. #60-1 at 16-35. Federal Rule of Evidence 201 provides that courts may take judicial notice of adjudicative facts "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (quoting Fed. R. Evid. 201) (internal quotations omitted). JetBlue does not dispute that the records at issue are self-authenticating pursuant to Fed. R. Evid. 902(5), Dkt. #66 at 2, so the remaining issue is whether the documents are a proper subject of judicial notice.

Plaintiff's request the Court take judicial notice with respect to the existence of these materials—specifically, that DOT has issued non-binding policy guidance that airlines may use to prevent discrimination against passengers, and that DOT has adjudicated various claims against airlines alleging discriminatory

removal. *See Interstate Nat. Gas Co. v. S. California Gas Co.*, 209 F.2d 380, 385 (9th Cir.1953) (A court "may take judicial notice of records and reports of administrative bodies."). While JetBlue opposes judicial notice of these materials, its opposition chiefly addresses what inferences and conclusions the Court may draw from their contents. Whether to take judicial notice in the first instance is a separate inquiry from how the Court may rely on the contents of the documents. Accordingly, the Court grants Plaintiff's request.

B. Parties' Motions to Strike

Pursuant to Fed. R. Civ. P. 56(e) and Local Rule 7(g), Plaintiff and JetBlue move to strike various documents on the grounds that a court may not consider improper lay opinions, unauthenticated documents, or inadmissible hearsay statements on summary judgment. Dkt. #69 at 16; Dkt. #72 at 10-11. Because the Court does not rely on any of the cited documents in its decision to grant summary judgment, the issue is moot.

C. Legal Standard for Summary Judgment

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those which might affect the outcome of the suit under governing law. *Id.* at 248. In ruling on

summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994) (citing *Federal Deposit Ins. Corp. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992)).

On a motion for summary judgment, the court views the evidence and draws inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Sullivan v. U.S. Dep't of the Navy*, 365 F.3d 827, 832 (9th Cir. 2004). The Court must draw all reasonable inferences in favor of the non-moving party. *See O'Melveny & Meyers*, 969 F.2d at 747, *rev'd on other grounds*, 512 U.S. 79 (1994). However, the nonmoving party must make a "sufficient showing on an essential element of her case with respect to which she has the burden of proof" to survive summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

D. Discriminatory Removal of Airline Passengers under 42 U.S.C. § 1981(a)

Mr. Karrani claims that his removal from Flight 263 constitutes discrimination under 42 U.S.C. § 1981(a). Section 1981 provides, in relevant part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ." 42 U.S.C. § 1981(a). A

claim under Section 1981 requires a plaintiff to show intentional discrimination on account of race. *Evans v. McKay*, 869 F.2d 1341, 1344 (9th Cir. 1989) (citing *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 376 (1982)). To establish a prima facie case under Section 1981, a plaintiff must prove: "(1) that they are members of a racial minority; (2) that the defendants had an intent to discriminate on the basis of race; and (3) that the discrimination concerned one or more activities enumerated in the statute." *Modoc v. W. Coast Vinyl, Inc.*, No. 10-cv-05007-RJB, 2011 WL 1363785, at *7 (W.D. Wash. Apr. 11, 2011). There is no dispute that Plaintiff, a man of Somali origin with an accent, meets the first element. Parties likewise do not dispute the third element, since Plaintiff claims discrimination in his right to contract with JetBlue through purchase of an airline ticket. The Court's focus on this summary judgment motion is therefore the second element: whether a reasonable dispute of fact exists as to whether JetBlue intended to discriminate against Mr. Karrani on the basis of race, ethnicity, or national origin.

To prove intentional discrimination under Section 1981, a plaintiff must prove racial animus either through direct evidence, such as derogatory or offensive comments, or through circumstantial evidence. *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1152 (9th Cir. 2006). Plaintiff offers no direct evidence of discrimination by Ms. Pancerman, Captain Ouillette, or any other member of the JetBlue flight crew. *See generally* Dkt. #69. Consequently, Plaintiff s Section 1981

claim hinges on circumstantial evidence to create an inference of discrimination against Mr. Karrani. *Id.* at 20-21.

Circumstantial evidence for individual claims of discrimination is evaluated under the *McDonnell Douglas* framework. *White v. Cal.*, 754 Fed. Appx. 575, 576 (9th Cir. 2019). Under this burden-shifting framework, a plaintiff must first establish a prima facie case proving (1) he is a member of a protected class; (2) he attempted to contract for certain services; (3) he was denied the right to contract for those services; and (4) such services remained available to similarly-situated individuals who were not members of plaintiff's protected class. *Lindsey*, 447 F.3d at 1144-45 (9th Cir. 2006). If a plaintiff establishes a prima facie case, then the burden shifts to the defendant to demonstrate a legitimate, non-discriminatory reason for the adverse action. Upon doing so, the burden shifts back to plaintiff to prove, with "specific and substantial" evidence, that the reason was merely pretext for intentional discrimination. *Id.* at 1152.

1. Mr. Karrani's prima facie case of discrimination

Parties do not dispute that Plaintiff satisfies the first three elements. On the fourth element, Plaintiff does not attempt to argue that he was treated differently from similarly-situated individuals on his flight. Instead, he contends that the "similarly-situated" standard "is not an appropriate requirement for a

prima face [sic] case and is unnecessary here[.]" Dkt. #69 at 27. Plaintiff urges this Court to follow Sixth Circuit precedent and convert this fourth element to the standard of whether plaintiff received services in a markedly hostile manner and a manner in which a reasonable person in plaintiff's circumstances would find objectively discriminatory. Dkt. #69 (citing *Christian v. Wal–Mart Stores, Inc.*, 252 F.3d 862, 872 (6th Cir.2001)). However, the Ninth Circuit has not expressly adopted this modification of the *McDonnell Douglas* framework. *Lindsey*, 447 F.3d at 1145 (9th Cir. 2006) ("Although we find the Sixth Circuit's reasoning compelling, we need not decide today whether its modification of the fourth element of a *prima facie* case under section 1981 is required in many or all cases arising in a commercial, non-employment context."). Because of this open question, courts within the Ninth Circuit have continued to apply the traditional "similarly-situated" standard while acknowledging that the outcome would not change under the "reasonable person" standard. *See Portfolio Investments, LLC v. First Sav. Bank*, No. C12-104 RAJ, 2013 WL 1187622, at *5 (W.D. Wash. Mar. 20, 2013), *aff'd sub nom. Portfolio Investments LLC v. First Sav. Bank Nw.*, 583 F. App'x 814 (9th Cir. 2014); *Harrison v. Wells Fargo Bank, N.A.*, No. C18-07824 WHA, 2019 WL 2085447, at *3 (N.D. Cal. May 13, 2019).

Here, however, the Court is faced with two different outcomes depending on the standard applied. Under the traditional "similarly situated" standard, there is no question that Plaintiff has failed to establish a

prima facie case. He has provided no evidence of "similarly situated" passengers on Flight 263, nor does he attempt to. However, application of the "similarly situated" standard to this case gives rise to the very concern identified by the Ninth Circuit in *Lindsey*—that in the commercial, non-employment context such as an airline flight, the "similarly situated" requirement is perhaps "too rigorous." *Lindsey*, 447 F.3d at 1145. It would require Mr. Karrani to identify passengers on Flight 263 meeting an extremely specific set of requirements: those who attempted to use the front lavatory during the medical emergency but received different treatment from the flight attendants, or those who engaged in an alleged conflict with a flight attendant but were allowed by the captain to continue flying. In contrast, under the "reasonable person" standard, a jury viewing the facts in a light most favorable to Plaintiff could reasonably conclude that an 81-year-old man was treated by JetBlue in a "markedly hostile manner" based on a flight attendant initiating physical contact with him and lying about the events to the Captain, culminating in his removal from the aircraft by airport police and stranding him overnight in an unfamiliar city. *See Christian*, 252 F.3d at 871 (6th Cir.) (setting forth "markedly hostile" factors). Given these two disparate outcomes and the Ninth Circuit's open question regarding the proper standard, the Court finds it necessary to proceed through the remainder of the *McDonnell Douglas* framework to evaluate Plaintiff's claim.

2. JetBlue has articulated a legitimate, non-discriminatory reason for Mr Karrani's removal.

Having found that Plaintiff has presented a triable issue of fact as to his prima facie case of discrimination, the burden shifts to JetBlue to provide a legitimate, non-discriminatory reason for the adverse action. It is undisputed that JetBlue has articulated such a reason under Section 44902 of the Federal Aviation Act, which provides that an air carrier "may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902. *See* Dkt. #52 at 6-7.

3. Plaintiff has not raised a triable issue of fact that his removal from Flight 263 was because of his race.

Once a defendant presents a legitimate, non-discriminatory reason for its actions, the presumption of discrimination "drops out of the picture" and the burden shifts back to plaintiff to prove the proffered reasons were a pretext for discrimination. *Lindsey*, 447 F.3d at 1148 (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993)) (internal quotations omitted). Plaintiff may prove pretext one of two ways: (1) indirectly, by showing the defendant's proffered explanation is "unworthy of credence," or (2) directly, by showing that unlawful discrimination more likely motivated the defendant. *Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1127 (9th Cir. 2000). The Court finds that (1) JetBlue's decision to remove Mr.

Karrani was proper as a matter of law; and (2) Plaintiff has presented no triable issue of fact that unlawful discrimination more likely motivated JetBlue. Accordingly, Plaintiff has not raised a triable issue of fact that his removal from Flight 263 was because of his race, and summary judgment in favor of JetBlue is warranted. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 890-91 (9th Cir. 1994), *as amended on denial of reh'g* (July 14, 1994) ("[W]hen evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* case based on a *McDonnell Douglas* type presumption.").

a. The undisputed facts establish that Captain Ouillette appropriately exercised his discretion under Section 44902 in removing Mr. Karrani and prohibiting him from re-boarding.

As a matter of law, JetBlue appropriately exercised its discretion to remove Mr. Karrani from the flight pursuant to its authority under Section 44902. Section 44902 provides that an air carrier "may refuse to transport a passenger or property the carrier decides is, *or might be*, inimical to safety." 49 U. S.C. § 44902 (emphasis added). The Ninth Circuit has interpreted this provision as follows:

> The test of whether or not the airline properly exercised its power under § 1511 [now § 44902] to refuse passage to an applicant

> or ticket-holder 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 whether or not the opinion and decision were rational and reasonable in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.

Cordero v. Cia Mexicana De Aviacion, S.A., 681 F.2d 669, 672 (9th Cir. 1982) (*quoting Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d. Cir. 1975)).

The threshold for an airline determining that a passenger presents a possible safety issue is very low, given the countervailing interest of the airline to ensure the safety and security of its other passengers and flight crew. For that reason, courts grant airlines broad latitude to determine what constitutes a "safety risk"—even if the matter seems innocuous. *See Shaffy v. United Airlines, Inc.*, 360 F. App'x 729, 730 (9th Cir. 2009) (Upholding summary judgment for airline where passenger who repeatedly removed dog from carrier—against flight attendant instruction to keep it contained—posed "safety risk" justifying removal from aircraft). This is because in the business of commercial air travel, "the highest priority is assigned to safety, even though the federal aviation statute also has a general prohibition on race and national origin discrimination." *Cerqueira*, 520 F.3d at 11 (1st Cir. 2008).

The pilot in command holds the decision-making authority to remove a passenger from a flight. 14 C.F.R. § 91.3(a). A passenger's removal is proper under

Section 44902 so long as the pilot's decision is not arbitrary or capricious. *Cordero*, 681 F.2d at 671-72 ("[I]f the passenger is excluded because the opinion of the pilot is arbitrary or capricious and not justified by any reason or rational appraisal of the facts, then the denial of passage is discriminatory."). Plaintiff relies on dicta from *Eid v. Alaska Airlines, Inc.* to argue that *Cordero* actually applied a standard of reasonableness—not arbitrariness/capriciousness—to passenger removal from domestic flights. Dkt. #69 at 30 (citing 621 F.3d 858, 868 (9th Cir. 2010)). However, as affirmed in *Shaffy, Cordero* plainly adopted the arbitrary and capricious standard set forth by the Second Circuit in *Williams. Shaffy*, 360 F. App'x at 730 ("The test for whether a refusal to transport is permissible 'rests upon . . . whether or not the opinion and decision were *rational and reasonable and not capricious or arbitrary*.") (citing *Cordero*, 681 F.2d at 672). Accordingly, this Court follows the binding precedent in *Shaffy* and applies the arbitrary and capricious standard to passenger removal from domestic flights under 49 U.S.C. § 44902. *Accord Mercer v. Sw. Airlines Co.*, No. 13-CV-05057-MEJ, 2014 WL 4681788, at *3 (N.D. Cal. Sept. 19, 2014) (understanding *Cordero* as applying arbitrary and capricious standard).

Under the arbitrary and capricious standard, Captain Ouillette's decision to remove Mr. Karrani was proper as a matter of law. Taking Mr. Karrani's account of the incident to be true, Ms. Pancerman pushed Mr. Karrani after he refused to use the back lavatory and then falsely reported to the captain that Mr. Karrani

pushed her. Although several passengers contested Ms. Pancerman's account of events, *see, e.g.*, Dkt. #68-1 at 10-11; 166, a second flight attendant corroborated her story. *Id.* at 155. Parties dispute what details Ms. Pancerman reported to the cockpit and at what point the captain made his decision to remove Mr. Karrani—whether during the descent into Billings, or upon landing. *See* Dkt. #69 at 9-10. There is likewise a dispute of fact as to the type of physical touch that Ms. Pancerman claims occurred—specifically, whether it was a hit or a push. *See id.* However, it is undisputed that Captain Ouillette did not personally witness the interaction between Mr. Karrani and Ms. Pancerman. It is likewise undisputed that he based his decision to remove Mr. Karrani on a flight attendant's account, corroborated by a second flight attendant, that Plaintiff touched her in an inappropriate way that she considered assault after she directed him to use the back lavatory. *See* Dkt. #68-1 at 20.

Plaintiff argues that 49 U.S.C. § 44902 required Captain Ouillette to do more than defer to his flight attendants—rather, he should have independently investigated the different versions of events when deciding whether to remove Mr. Karrani. Dkt. #69 at 28-30. The cases cited by Plaintiff do not support this proposition. Unlike *Cordero*, where the flight attendant identified the wrong passenger for removal, this case does not involve a problem of mistaken identity requiring more careful action by the Captain—it is undisputed that Mr. Karrani had the alleged conflict with Ms. Pancerman. *Cf. Cordero*, 681 F.2d at 670-72. *Id.*

Likewise, *Eid* addresses removal of passengers under the Tokyo Convention, not the Federal Aviation Act, wherein the court applied a standard of "reasonableness." *Cf. Eid*, 621 F.3d at 869-71. Plaintiff also cites to language in DOT's guidance documents and administrative orders to show that Captain Ouillette was obligated to conduct an independent factual investigation. However, as Plaintiff acknowledges, such material does not set forth legally binding law. *See* Dkt. #69 at 29 (arguing that DOT materials should be entitled to deference).

On the contrary, courts analyzing the lawfulness of a captain's removal decision routinely consider only that information acted upon by the captain—not the information "he reasonably *should have* known." *Cerqueira*, 520 F.3d at 14-15 (1st Cir. 2008) (emphasis added); *see also Dasrath*, 467 F.Supp. 2d at 446 ("[I]f [the Captain] reasonably believed that something had taken place (even if it had not), his reasonable belief is what is critical, not what actually took place."). Consequently, in instances such is this one, where flight attendants may have provided exaggerated or false information to the captain, the inquiry nevertheless depends on the reasonable belief of the captain. *See Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002) (Granting summary judgment for airline where plaintiff/passenger claimed pilot who ordered removal was provided with false information by a member of the flight crew, despite thirteen passengers offering to corroborate passenger's story); *see also Al-Qudhai'een v. Am. W. Airlines, Inc.*, 267 F. Supp. 2d

841, 848 (S.D. Ohio 2003) ("[Captain] is entitled to rely on the information provided to him by his crew despite any exaggerations or false representations."). As a matter of law, Captain Ouillette's decision to believe his flight attendants—without conducting his own factual investigation—was not arbitrary and capricious.

Lastly, Plaintiff argues that JetBlue was obligated to allow Mr. Karrani to re-board the flight after he spoke with police. In support of this proposition, Plaintiff again relies on language from non-binding DOT administrative orders. Dkt. #69 at 29. Even if these administrative orders are entitled to a level of deference, they do not support Plaintiff's proposition that JetBlue was required to allow Mr. Karrani to re-board after he spoke with police about his conflict with Ms. Pancerman. The referenced orders involve passengers initially removed from an aircraft to conduct secondary security screening. *See* Dkt. #60-1 at 27-28; 32. Here, Plaintiff was removed after an alleged physical altercation with a flight attendant—not so that the airline could conduct secondary screening. Mr. Karrani's meeting with police is not analogous to a secondary security screening that effectively "clears" an individual to fly upon further inspection. Accordingly, Plaintiff has raised no material dispute that JetBlue exceeded its authority under Section 44902 in prohibiting Mr. Karrani from re-boarding.

b. Plaintiff has not raised a triable issue of fact that unlawful discrimination more likely motivated JetBlue's actions.

Plaintiff has likewise failed to raise a material dispute of fact that unlawful discrimination more likely motivated JetBlue's actions. As proof of racial animus, Plaintiff relies on testimony from a passenger on a 2016 JetBlue flight who claimed that Ms. Pancerman racially discriminated against her two years prior to Mr. Karrani's flight. Dkt. #69 at 10. While courts typically view past complaints by others within a protected class as only "collaterally relevant" to private, non-class action discrimination lawsuits, such evidence may be relevant "in *limited circumstances* where a plaintiff can make some showing to connect it to his or her claims." *Walech v. Target Corp.*, No. C11-254 RAJ, 2012 WL 1068068, at *7 (W.D. Wash. Mar. 28, 2012) (emphasis added). Likewise, DOT has indicated that in evaluating claims against airlines for discriminatory removal, prior complaints of discrimination by a crew member can be "essential" evidence for investigating such claims. Dkt. #60-1 at 24. In accordance with this view, this Court granted Plaintiff's request to compel production of unredacted passenger complaints filed against Ms. Pancerman in the last ten years to determine whether Mr. Karrani's removal fit a larger pattern of Ms. Pancerman mistreating and/or unfairly removing racial minorities from JetBlue flights. *See* Dkt. #77 at 4. This discovery order compelled JetBlue to produce the names of all persons who submitted

complaints against Ms. Pancerman, which Plaintiff estimated could amount to seven individuals who complained about her conduct on six flights. Dkt. #36 at 3.

Despite this broad scope of discovery of complaints against Ms. Pancerman, Plaintiff only proffers testimony from Fatima Wachuku, who was removed from a JetBlue flight in 2016, as evidence of Ms. Pancerman's racial animus against Mr. Karrani. In recalling her interaction with Ms. Pancerman, Ms. Wachuku concludes that her mistreatment could only be explained by racial animus: "[T]here's no other reason why you would sit here and try to create a commotion like this. . . . So what would be the cause for you to do this other than my race?" Dkt. #68-1 at 88. Although Plaintiff also references removal of a second black woman from Ms. Wachuku's 2016 flight, *see* Dkt. #68-1 at 88, Plaintiff does not allege that Ms. Pancerman was involved. *See* Dkt. #69 at 12. Moreover, this Court previously determined that the removal of the second woman had no clear connection to Ms. Pancerman. *See* Dkt. #77 at 8. In sum, Plaintiff's circumstantial evidence is predicated on one individual's testimony that Ms. Pancerman's animus towards her could only be explained by racial animus.

No reasonable jury could find that Ms. Wachuku's testimony amounts to specific or substantial evidence of racial animus against Mr. Karrani. It is not specific, as it merely states a conclusion drawn by a passenger on a flight, two years prior to Mr. Karrani's. Nor is it substantial, as it represents one story out of what Plaintiff has indicated are multiple complaints against

Ms. Pancerman for unfairly demanding passengers' removal. *See* Dkt. #36 at 3. On the contrary, another person's circumstantial evidence of discrimination by the same bad actor is hardly sufficient to establish even a prima facie inference of discriminatory animus. *See Santos v. Peralta Cmty. Coll. Dist.*, No. C-07-5227 EMC, 2009 WL 3809797 (N.D. Cal. Nov. 13, 2009) (Holding evidence insufficient to establish prima facie discrimination case where both plaintiff and co-worker alleged mistreatment by supervisor). Given that Plaintiff has not raised a material dispute of fact regarding Ms. Pancerman's racial animus towards Mr. Karrani, it is unnecessary to reach the question of whether a flight attendant's racial bias is imputable to Captain Ouillette, who held the ultimate decision-making authority on Plaintiff's removal from the flight.

For the foregoing reasons, while the Court is sympathetic to the ordeal suffered by Mr. Karrani during his travels home, he has not raised a triable issue of fact that JetBlue's decision to remove him from the flight was due to his race. Given the power held by flight attendants to report safety issues to a plane's captain, the disputed facts of this case raise the question of whether flight attendants who routinely request removal of passengers should be subject to closer scrutiny by an airline's management to ensure such issues are reported with honesty and integrity. However, such a question lies outside the scope of this case and is not within the province of this Court to answer.

IV. CONCLUSION

Having reviewed the relevant briefing, attached declarations, and the remainder of the record, the Court hereby finds and ORDERS that Defendant JetBlue's Motion for Summary Judgment (Dkt. #52) is GRANTED in entirety. This case is now CLOSED.

DATED this 31 day of July 2019.

/s/ Ricardo S. Martinez
RICARDO S. MARTINEZ
CHIEF UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ABDIKARIM KARRANI, Plaintiff-Appellant, v. JETBLUE AIRWAYS CORPORATION, a Delaware corporation, Defendant-Appellee.	No. 19-35739 D.C. No. 2:18-cv-01510-RSM Western District of Washington, Seattle ORDER (Filed Nov. 25, 2020)

Before: GRABER and W. FLETCHER, Circuit Judges, and FREUDENTHAL,* District Judge.

The panel judges have voted to deny Appellant's petition for rehearing. Judges Graber and Fletcher voted to deny the petition for rehearing en banc, and Judge Freudenthal recommended denying the petition for rehearing en banc.

The full court has been advised of Appellant's petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellant's petition for panel rehearing and rehearing en banc, Docket No. 61, is DENIED.

* The Honorable Nancy D. Freudenthal, United States District Judge for the District of Wyoming, sitting by designation.