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**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

In re Deep Vein Thrombosis Litigation:

MIKE BIANCHETTI, INDIVIDUALLY
AND AS REPRESENTATIVE TO THE
ESTATE OF MARY BIANCHETTI,
CHRISTOPHER MICHAEL BIANCHETTI
AND BRIAN GILBERT BIANCHETTI,

Plaintiffs,

v.

DELTA AIRLINES, INC., A Corporation,

Defendant.

No. 04-4860 VRW

[MDL-1606]

BRIEF IN OPPOSITION TO THE
MOTION FOR SUMMARY
JUDGMENT OF DELTA AIR
LINES, INC. (BIANCHETTI)

Date: September 6, 2007

Time: 2:00 p.m.

Courtroom: 6 – 17th Floor

Honorable Vaughn R. Walker

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INTRODUCTION

Plaintiffs Mike Bianchetti, Individually and as a Representative to the Estate of Mary Bianchetti, Christopher Michael Bianchetti and Brian Gilbert Bianchetti (collectively “the Bianchettis”) respectfully submit this Brief in Opposition to the Motion for Summary Judgment of Defendant Delta Airlines, Inc. (“Delta”).

Mary Bianchetti (hereinafter “Mary”) died of deep vein thrombosis (hereinafter “DVT”) that developed aboard Delta Flight 11 from London to Atlanta on December 9, 2002. Although she collapsed in the aisle of the plane, was unable to rise and walk, was gasping for air, repeatedly exclaimed “I can’t breathe,” and was otherwise clearly in grave medical distress, the pilot did not divert the plane from the original destination (Atlanta) to a closer airport (Cincinnati) when informed of Mary’s situation. Despite her serious condition, testimony from her husband Mike Bianchetti (hereinafter “Mike”) indicates that EMS personnel were forced to wait 10-20 minutes until the plane’s other passengers deplaned before they were allowed to board and reach Mary. And though a passenger with some medical background who assisted Mary realized that Mary had a blood clot, Delta did not ensure that medical personnel ready and able to treat DVT met the flight and immediately began treating her.

These lapses by Delta – failure to divert the plane, failure to expedite care to Mary upon landing in Atlanta, and failure to ensure that appropriate personnel able to provide the correct care met the flight – were all unusual and unexpected events because they deviated from airline industry standards and/or Delta’s own policies. As such, they were “accidents” under Article 17 of the Warsaw Convention. At the least, there is a fact question as to whether accidents occurred aboard Flight 11 that were links in the causal

chain resulting in Mary's death. Delta's motion for summary judgment, which argues that there is no dispute about whether accidents occurred during and immediately after the flight, should therefore be denied.

STATEMENT OF THE ISSUE TO BE DECIDED

The issue to be decided is whether there is a factual question as to whether Mary's death resulted in part from unusual and unexpected events aboard Flight 11, namely, Delta's deviation from its own policies and industry standards in failing to divert Flight 11, expedite medical treatment to Mary, or arrange for appropriate ground-based medical care upon landing.

STATEMENT OF FACTS

I. Mary's Collapse and Treatment Aboard Flight 11

On December 9, 2002, the Bianchettis were on Delta Flight 11 bound from London to Atlanta. Mary was then 46 years old. *See* Declaration of Richard G. Grotch in Support of Motion for Summary Judgment of Delta Airlines, Inc. (Bianchetti) (hereinafter "Grotch Dec."), Exh. F (Mary Bianchetti Death Certificate). Sometime before 1:15 p.m., Mary, who had remained in her seat during the several hours of the flight, rose to go to the restroom. *See* Grotch Dec., Exh. B (John Bianchetti Deposition Excerpts) at 8.¹ She told Mike she felt dizzy but proceeded toward the rear of the plane. *See id.* at 13. On her way to the restroom, Mary collapsed or fainted in the aisle. *See* Declaration of Christine R. Tepovich in Support of Motion for Summary Judgment of

¹ The page numbers from the Grotch Declaration cited herein refer to the those listed by Delta at the top of each page of the entire declaration and attachments, rather than those deriving separately from each attached document, *e.g.*, the pages of the deposition transcript.

Delta Airlines, Inc. (Bianchetti) (hereinafter “Tepovich Dec.”), ¶ 3 (“collapsed”); *id.*, Exh. A (Tepovich F.A.C.T.S. Report) (“fainted”).

The lead flight attendant, Christine Tepovich, first learned of Mary’s condition at approximately 1:15-1:20 when told by another flight attendant. *See id.*, ¶ 2. After a member of the flight crew made an announcement seeking medical assistance, two passengers came to Mary’s assistance. *See id.*, ¶ 4. One was Bob Killough, a physician’s assistant. *See id.*, ¶ 4. Tepovich refers to the other passenger as a doctor, *see id.*, but in its discovery responses Delta acknowledges that the identity of this second passenger is actually unknown. *See Declaration of Craig Eiland in Opposition to the Motion for Summary Judgment of Delta Airlines, Inc. (Bianchetti) (hereinafter “Eiland Dec.”), Exh. A (Defendant’s Further Response to Plaintiff’s Requests for Production of Documents), Response to Request 3 at 4.* Mike concluded from his conversation with the second passenger that he was not a doctor: “I don’t know if he said at the time he was going to be a doctor or – but I don’t believe he was a doctor.” Grotch Dec., Exh. B at 16. Moreover, Delta’s policies require the flight crew to record the name and medical credentials of passengers with medical training who assist during emergencies, but Delta did not obtain or record that information in this case. *See Eiland Dec., Exh. C at DL 000012-13; Declaration of Stanley Ross Mohler in Opposition to Delta Motion for Summary Judgment (hereinafter “Mohler Dec.”), ¶ 7.*

When Mike reached his wife, she was conscious and able to speak but told Mike and the two passengers assisting her that she was having great difficulty breathing. *See Grotch Dec., Exh. B at 17.* “What she kept saying was I can’t breathe. I can’t breathe... [She] was sweating. Her hands were clammy. She was panicky.” *Id.* at 19-20. Because

Mary was asthmatic, one of the passengers assisting her suggested that she be given her inhaler. *See id.* at 17-18. The other assisting passenger felt under Mary's calves close to her knees and explained that he thought she had a blood clot. As Mike testified:

Q. Now, you said that the gentleman who was by her feet grabbed onto her calf by her knees and told you that she – that he thought she had a blood clot?

A. Uh-huh (affirmative response.)

Q. "Yes"?

A. Yes.

Q. At what point was that in, say, with relation to the time that you first got to your wife?

A. It wasn't – not too long afterwards. And I'm not going to be able to tell you in minutes how long it was, but it was – it was relatively soon when they were looking to find what potentially was wrong with her.

Q. Did the person say why he thought that?

A. He – what I remember is he said that because when he put pressure behind her legs and that, that – that she was in pain. He didn't say – he really didn't explain to me why he thought that other than he told me, you know, when he grabbed her calves that he could tell.

Id. at 18-19. In addition, Mary's symptoms – pain in her chest and legs, the collapse or fainting, an accelerated pulse of 130 and rapid breathing of 32 – indicated that she was suffering from a blood clot, something known to Delta given the industry's knowledge of DVT. *See Mohler Dec.*, ¶ 14.

Mary was given her inhaler, but it had no effect. *See Grotch Dec.*, Exh. B at 18. At some point, Tepovich called the University of Pittsburgh Medical Center ("UPMC"), the ground service Delta contracts with for advice during medical emergencies, and Killough spoke to the doctor assisting Delta on the ground, Dr. McCausland. Tepovich

Dec., ¶ 5; Eiland Dec., Exh. B (Center for Emergency Medicine of Western Pennsylvania Records) at 4. McCausland's notes of the consultation record that Mary had pain in both legs and then in the left leg only. *See id.* McCausland's notes also indicate that Mary was in and out of consciousness, *see id.*, though Tepovich and Mike testified that she was conscious until the plane landed. *See* Tepovich Dec., ¶ 6; Grotch Dec., Exh. B. at 27. McCausland advised the passengers to give Mary aspirin ("ASA") and albuterol, which were administered. *See* Eiland Dec., Exh. B at 3; Tepovich Dec., Exh. A.

The plane was near the Cincinnati airport when Tepovich informed the plane's captain, Rodney Hinds, of Mary's situation.² At that point, Hinds faced the choice of diverting the plane to an airport closer than Atlanta, such as Cincinnati, or continuing on to Atlanta. According to Tepovich, that decision was effectively made by the passenger she believed to be a doctor:

The captain told me that he could declare a medical emergency, which would enable him to land in Atlanta in approximately 25-30 minutes. The captain asked me to ask the doctor who was assisting us whether that would be acceptable. The doctor said that would be fine and I reported that information back to the captain.

Tepovich Dec., ¶ 6. Consequently, the plane continued on to Atlanta.

Delta's flight Operations Manual dictates that "UPMC assistance should be considered primary guidance, onboard medical assistance secondary guidance," and that "the final decision to divert rests with the Captain." Eiland Dec., Exh. C (Flight Operations Manual) at 7-4.2 (Bates No. DL000004); Mohler Dec. ¶¶ 5-9. Yet in this case the captain appears to have deferred to a passenger of uncertain medical qualifications

² In his report regarding the flight, Captain Hinds referred to the plane being "abeam" of the Cincinnati airport. *See* Grotch Dec., Exh. E at 84. "Abeam" means "at right angles to the keel of a ship." *American Heritage Dictionary* (2d College ed. 1991).

who decided that there was no need to divert to an airport closer than the one in Atlanta. *See id.* Because airphone contact with Dr. McCausland at UPMC was interrupted during this period, she learned of the decision to continue to Atlanta after the fact when she regained telephone contact with “Fred from F/C” (presumably a reference to a Delta flight control employee). *See* Eiland Dec., Exh. B at 3. This occurred despite Delta’s obligation, as set forth in its contract with UPMC, to “provide adequate means of communications to access the medical consultation services to Delta staff.” Eiland Dec., Exh. D (Delta-UPMC Agreement at 4 (Bates No. DL000146)). In his report, called a Crew Operations Report or “COR,” Captain Hinds states simply: “After contacting UPMC the medical personnel advised that continuing to ATL was approved.” Grotch Dec., Exh. E at 84.

According to Dr. Stanley Ross Mohler, a longtime expert in the subject of aerospace medicine and the former president of the Aerospace Medical Association, *see* Mohler Dec., Exh. A (Mohler C.V.), the standard in the airline industry is to divert flights to the nearest airport that can accommodate the plane if a passenger faces a serious illness or the possibility of death. *See id.*, ¶ 10. Mohler explains:

When a passenger is stricken with a life-threatening or extremely serious medical condition aboard a commercial flight, the standard and regular practice within the airline industry is to divert the flight to the nearest suitable airport and land the plane as soon as is safely possible, so that ground-based medical care can most rapidly be provided to the ailing passenger. Although diverting a flight and landing at a destination other than the original one imposes inconvenience on other passengers and expense on the airline, it is understood and widely accepted in the industry that these costs must be tolerated in cases of serious medical emergency, such as stroke or cardiac arrest.

Id., ¶ 10. Mohler believes that Flight 11 could have been diverted to the closer destination of Cincinnati (coincidentally a Delta hub), saving valuable minutes, and that

the evident seriousness of Mary's condition clearly called for diversion. *See id.*, ¶¶ 11-

12. As he concludes:

I believe that Delta's failure to divert Flight 11 and land at a destination closer than Atlanta, such as Cincinnati, was a departure from the standards in the airline industry that govern how to respond to serious medical events onboard commercial flights. It is also my opinion that substantial time would have been saved by diverting to Cincinnati, the closest airport, and that had appropriate medical care of the sort described herein been provided to Mrs. Bianchetti during this extra period, she would have had a probability of surviving the blood clot that ultimately took her life.

Id., ¶ 13.

Throughout the remainder of the flight, Mike and the two assisting passengers remained with Mary, who lay flat in the aisle where she had collapsed, and attempted to make her comfortable. *See* Grotch Dec., Exh. B. at 21-22; Tepovich Dec., ¶ 8. They gave her the inhaler again, but it did nothing to ease her breathing. *See* Grotch Dec., Exh. B. at 27.

II. Mary's Treatment and Death Following Landing

Flight 11 landed in Atlanta and reached the gate at 1:56 p.m. *See* Declaration of Jon Tovani in Support of Motion for Summary Judgment of Delta Airlines, Inc. (Bianchetti) (hereinafter "Tovani Dec."), ¶ 8. Although Captain Hinds had declared a "medical emergency" in order to ensure priority clearance at the airport, the plane was delayed near the gate for approximately three minutes while it waited for a "block-in crew." *See* Grotch Dec., Exh. E. at 84 (COR Report).

It is unclear whether EMS personnel awaiting Flight 11 boarded the flight as soon as it landed in order to provide emergency care to Mary as soon as possible, or whether they were required to wait until the other passengers deplaned before they could board and reach her. Mike testified:

A. They deplaned everybody. All the passengers got off.

Q. And what happened next?

A. After everybody got off, then the EMS came on.

Q. So the EMS came on only after all the passengers were off?

A. That's what I remember.

Q. Were the crew members still on?

A. I do not know. There was some flight attendants on. If that's considered part of the crew.

Q. And then when the EMS – do you know about how long it was from the time that you landed until the EMS came on?

A. Exact time, no. I – whatever time it took to deplane the whole plane and get everybody out. And then after everything was empty, they came on. So 10, 15, 20 minutes. It's just a guess.

Grotch Dec., Exh. B at 29-30. By contrast, Tepovich asserts that EMS boarded the plane and proceeded to Mary down one aisle of the plane while the passengers were exiting using the other aisle. *See* Tepovich Dec., ¶ 9.

In cases where the passenger's condition is considered "a life threatening situation," Delta policy governing requests for medical assistance upon arrival requires the flight crew to clearly communicate the gravity of the condition "to the Dispatcher and/or the arrival station to ensure appropriate medical personnel will meet the flight." Eiland Dec., Exh. C at 7-4.4 (Bates No. DL 000006). In *all* cases "[w]hen medical assistance is required on landing," Delta policy requires crew members to "[e]nsure clear passage for EMS personnel" and to "consider making a PA asking the passengers to remain seated upon arrival at the gate to allow EMS personnel swift access to ill or injured passengers." *Id.*

Once EMS personnel reached Mary, they began evaluating her and treating her for asthma, using a mask to administer oxygen. *See* Grotch Dec., Exh. B at 30-31. After approximately twenty minutes of attempted treatment, EMS paramedics asked Tepovich for the plane's medical kit in order to give Mary epinephrine. *See* Tepovich Dec., Exh. A. They also asked for a second oxygen bottle. *See id.* Eventually, the paramedics indicated that they wanted Mike to help to prop her back up so they could use the inhaler. *See* Grotch Dec., Exh. B at 32. When Mike did so, Mary stopped breathing – prompting Mike and the paramedics to perform CPR. *See id.* at 32-33. Paramedics also tried using “a blue resuscitation bag” and to insert a breathing tube into her mouth. Tepovich Dec., Exh. A.

As paramedics continued to try to resuscitate Mary, Mike was guided away from the spot where she lay. *See* Grotch Dec., Exh. B at 33-34. “We seemed to be on [the plane] for quite a while while they were trying to get her on a backboard,” Mike remembered. *Id.* at 34-35. The paramedics then transferred Mary to an ambulance parked outside the plane, and he traveled with them to South Fulton Hospital. *See id.* at 35-36. Mary reached the hospital emergency room at 3:15 p.m. *See* Eiland, Dec., Exh. E (South Fulton Medical Center records) at 7. Approximately twenty minutes later, Mike was told Mary had died. *See* Grotch Dec., Exh. B at 36-37. She was pronounced dead at 3:28 p.m. Eiland Dec., Exh. E at 9.

Throughout their treatment of Mary, the paramedics did nothing to address a blood clot or DVT. Delta is well aware that DVT is an extremely serious, life-threatening condition, and that every minute is critical when it comes to addressing DVT. *See* Mohler Dec., ¶ 14. As Dr. Mohler opines:

Delta recognizes in its video training materials that every minute is critical “in a strong chain of survival”. In addition to this, specifically, when a person has a DVT/blood clot on board a plane, has “sharp pain in chest- Shortness of breath- passed out... been having pain in both legs. Pulse- 130- regular- Respiratory-32 labored. Has asthma. In and out of conscious” Delta and the airline industry are well aware that the person is in critical need of clot busting drugs such as Heparin or streptokinase. The rapid pulse of 130 and rapid breathing of 32 and labored indicates the stress of the blood clots impairing circulation in the lungs and impairing oxygenation. Attached as Exhibit B are three widely known articles discussing DVT/blood clots from 1994, 1997, 2002. These publications were and are widely distributed and relied upon by airline industry in their operations and crew training. Heparin typically can be administered by nurses, physician assistants or medical doctors. Heparin works rapidly to begin dissolving blood clots.

Id.

In this case, EMS appears not to have been informed that Mary might have been at risk of rapid death as a result of a blood clot, despite the assisting passenger’s early recognition that she likely suffered from a clot and her rapid pulse and breathing. This occurred though Delta’s Flight Operations Manual requires the flight crew to clearly communicate the gravity of a life-threatening situation to dispatchers and to “ensure that *appropriate* medical personnel will meet the flight.” Eiland Dec., Exh. C at 7-4.4 (Bates No. DL 000006) (emphasis added); Mohler Dec. ¶ 15. “I believe that Heparin or streptokinase could have and should have been administered upon arrival if Delta’s policies and procedures were followed and ‘the appropriate medical personnel’ had been advised of her blood clots and vital signs.” Mohler Dec., ¶ 14. “If Delta would have properly followed their policies and procedures, [Mary] would have timely received proper medication and emergency room support and in reasonable medical probability would have survived.” Mohler Dec. ¶ 19.

ARGUMENT

I. The Summary Judgment Standard

The Ninth Circuit recently summarized the familiar standard to be applied in assessing Delta's motion:

A grant of summary judgment is appropriate only where the moving party has demonstrated that there is no genuine issue of material fact. *Lindsey v. Tacoma-Pierce County Health Dep't*, 195 F.3d 1065, 1068 (9th Cir.1999). Once the moving party demonstrates the absence of a genuine issue of material fact, the nonmoving party must come forward with evidence creating a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Although a mere scintilla of evidence is insufficient, "the issue of material fact... is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)). Because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

Giles v. General Motors Acceptance Corp., ___ F.3d ___, 2007 WL 2283593 at * 4 (9th Cir., August 10, 2007) (ellipses in original). "[I]f a rational trier of fact might resolve the issue in favor of the nonmoving party, summary judgment must be denied." *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007) (quoting *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir.1987)).

II. Deviations from Airline Policies or Industry Standards in Responding to Medical Emergencies Can Constitute "Accidents" Under the Warsaw Convention

Delta's argument centers on the claimed absence of an "accident" under the Warsaw Convention. It maintains that the Bianchettis cannot prove Mary's death was

caused by something unusual or external. *See* Delta Mem. at 14. A departure from industry standards and/or airline policies in the course of addressing a passenger's medical situation can constitute an "accident" under the Convention, however. As Delta observes, the Bianchettis' complaint alleges that the accidents in this case consist of the failure to divert Flight 11 and the failure to ensure immediate, appropriate medical care for Mary upon landing. *See id.* at 10 (quoting Complaint, ¶¶ 21-23). Because there are factual issues as to whether Delta violated its own policies and standards within the industry when deciding not to divert and when arranging for the care Mary experienced on the ground after landing in Atlanta, Delta's motion must be denied. A jury must be permitted to decide whether accidents occurred aboard Flight 11.

Because this Court is well acquainted with the applicable framework under Article 17 of the Warsaw Convention, *see, e.g., In re Deep Vein Thrombosis Litigation*, 2006 WL 2547459 (N.D. Cal., August 21, 2006), review of the more general legal background is unnecessary. To summarize, this Court's prior DVT decisions recognize that: (i) liability attaches where a passenger's injury is caused by an unexpected or unusual event external to the passenger; (ii) the definition of "accident" is flexibly applied after assessment of all the circumstances surrounding a passenger's injuries; and (iii) an injury is the product of a chain of causes, and courts require only that that passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger. *Id.* at *3 (citing and quoting *Air France v. Saks*, 470 U.S. 392, 405-06 (1985)).

This Court has also taken note of the importance of *Olympic Airways v. Husain*, 540 U.S. 644 (2004), in DVT cases. *See id.* at **3-4. In *Husain*, the Supreme Court

rejected the airline's claim that a passenger's death following refusal of requests to be reseated away from cigarette smoke was solely internal to the passenger, holding instead that the crew's failure to address the situation was an "event" or "happening" that "contributed to the passenger's death." 540 U.S. at 654-55. As this Court recognized, the Supreme Court also adopted the reasoning of an earlier decision, *McCaskey v. Continental Airlines, Inc.*, 159 F. Supp. 2d 562 (S.D. Tex. 2001), with facts similar to those at bar:

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

540 U.S. at 656 (quoting *McCaskey*, 159 F. Supp. 2d at 574); see *In re DVT Litig.*, 2006 WL 2547459 at * 4. Here, as is discussed below, what this Court called "the *McCaskey* hypothetical," 2006 WL 2547459 at * 4, encapsulates one of the plaintiff's theories of recovery – that is, that an accident occurred in the form of Delta's refusal to divert Flight 11, in violation of industry standards.

Husain echoed earlier, lower court decisions holding that an airline's aggravation of a passenger's illness through its mishandling of the medical response can qualify as an accident under the treaty. Thus, in *Fishman v. Delta Air Lines*, 132 F. 3d 138 (2d Cir. 1998), the Second Circuit held that an accident under the Convention occurred when a flight attendant mistreated an infant's decompression-related ear pain by using an excessively hot compress: "[T]he injury here is not the earache, but the application of

scalding water to treat it. The earache was caused by the change in air pressure, which is part of the normal operation of the plane as it descends, and was not an accident. All the harm alleged by both plaintiffs flows from the scalding, which is easily seen as accidental.” *Id.* at 142; accord *Turturro v. Continental Airlines, Inc.*, 128 F. Supp. 170, 178 (S.D.N.Y. 2001) (“here, the ‘accident’ included Continental’s act of delaying the return of the plane to the gate and its employees’ comments directed to plaintiff and to fellow passengers” in response to plaintiff’s anxiety attack on board before departure); *Carey v. United Airlines, Inc.*, 77 F. Supp. 2d 1165, 1170-71 (D. Ore. 1999) (accident under Article 17 where crew prevented parent from changing seats to address his young children’s earaches), *aff’d*, 255 F.3d 1044 (9th Cir. 2001).

More specifically, several decisions hold that failing to respond to a passenger’s illness by not diverting the plane and landing more quickly states an Article 17 claim. For example, in *Gupta v. Austrian Airlines*, 211 F. Supp. 2d 1078 (N.D. Ill. 2002), “the plaintiffs contend[ed] that the accident was not the heart attack [suffered by the passenger] itself, but the alleged aggravation of decedent’s condition by defendants’ failure to render him adequate medical assistance.” *Id.* at 1082. The *Gupta* court agreed that liability could be predicated on the airline’s unexpected mismanagement of the medical emergency. *See id.* at 1085.

The court reached the same conclusion in *Fulop v. Malev Hungarian Airlines*, 175 F. Supp. 2d 651 (S.D.N.Y. 2001), where the plaintiff alleged that the airline should have responded to his heart attack by diverting the flight and making an earlier landing. *See id.* at 652. “Read in the light most favorable to Fulop as the non-movant,” the court held, “the unusual or unexpected event or happening that occurred here which caused the

accident was not Fulop's heart attack... Rather, it may be viewed as the alleged aberrant conduct of Malev's employees in handling the occurrence, the failures of which aggravated Fulop's initial heart attack." *Id.* at 663. In particular, the *Fulop* court held that the carrier's departure from its own procedures and industry norms constituted the unexpected event necessary for liability under the Convention:

This Court is not persuaded, however, that a carrier's alleged violation of its own operations and procedures in handling an emergency when it did occur and the alleged attendant delay in obtaining adequate medical care that may ensue when the occasion arises, could objectively be deemed normal, usual or expected. To the contrary by definition a measure of normal is adherence to norms; conversely, what is aberrant reflects departure from the norm at issue. Any major deviation from a standard articulated in recognized practices and procedures represents the exceptional case – the unusual or unexpected happening...

It also requires no reliance on authority to assert that, viewing the circumstance objectively as the *Saks* inquiry demands, the ordinary traveler reasonably would expect that – as the normal, usual and expected response to such urgencies, and as a fair balancing of interests and risks characteristic of air travel – in handling life-threatening exigencies, airlines rendering services as common carriers would be particularly scrupulous and exacting in complying with their own industry norms, internal policies and procedures, and general standards of care.

* * * *

Whether in the final analysis of the flight crew's acts under these circumstances were culpably negligent is beside the point. What does matter, in this Court's view, is that the Flight and the air carrier's operation were not routine or normal in the sense that they allegedly deviated from the compliance with expected procedures and that the departure and its associated delay in bringing emergency relief sooner may have aggravated Fulop's injury. To this extent, Fulop's injury may be causally traced to the carrier's fateful choice, and represented an "external" factor that brought about at least the particular aggravation injury here in contention.

Id. at 665, 671.

Finally, in *McCaskey*, the decision approvingly cited in *Husain*, the court denied Continental Airlines's motion for summary judgment, holding that its failure to divert a flight in light of a passenger's stroke could constitute an accident subjecting the airline to liability under Article 17. See 159 F. Supp. at 572-74; accord *Louie v. British Airways, Ltd.*, 2003 WL 22769110 at * 7 n. 5 (D. Alaska 2003) (finding for carrier but noting that "[s]everal courts have held that the flight crew's response to an otherwise internal event may be considered an accident... But discovery in Louie's case did not point to any conduct by the flight crew that would support such a claim"); *Seguritan v. Northwest Airlines, Inc.*, 86 A.D.2d 658 (N.Y. Sup. Ct., App. Div. 1982) ("the 'accident' is not the heart attack suffered by the decedent. Rather, it is the alleged aggravation of decedent's condition by the negligent failure of defendant's employees to render her medical assistance... Thus, this case falls squarely within the terms and conditions of the Convention"), *aff'd*, 440 N.E.2d 1339 (N.Y. 1982).

In sum, *Husain* and the lower court decisions preceding it leave no doubt that an accident may occur for purposes of Article 17 when an airline deviates from its own policies and/or industry norms in addressing a medical emergency that, like DVT, may otherwise be internal to the passenger. While the development of DVT itself is not an Article 17 accident, the analysis differs when the carrier's response is a link in the chain causing or exacerbating injury. The Ninth Circuit recognized as much in *Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, 544 U.S. 922 (2005), when it distinguished mere development of DVT from an airline's subsequent mishandling of it: "Both *Fulop* and *Husain* involved a response by the flight crew to the passenger's medical condition. By contrast, in the instant case, there was no response by

the flight crew that may or may not have violated industry standards.” *Id.* at 918. This Court presumably meant the same thing when it observed in its August 21, 2006 decision in the consolidated DVT litigation that “DVT-related injuries may be compensable under the Warsaw Convention if caused by an Article 17 accident,” even if a carrier’s failure to warn of DVT is not such a case. *In re DVT Litig.*, 2006 WL 2547459 at * 3.

Delta does not directly contest the principle that departing from company policy or industry standards in handling a medical emergency can qualify as an Article 17 accident. Rather, it argues simply that, under the convention, its liability cannot be premised on negligence. *See Delta Mem.* at 14-16. Delta’s point is off the mark because the Bianchettis do not base their case on negligence. They agree with Delta that the question is whether an unusual or unexpected event formed a link in the chain causing injury – not whether Delta injured Mary by breaching a duty owed to her or acting “unreasonably.” *See id.* at 16. As in *Fulop*, therefore, the question of negligence is “beside the point.” 175 F. Supp. 2d at 671. By the same token, however, Delta cannot use a superficial similarity between one element in both the negligence and “accident” inquiries – whether Delta’s conduct departed from its own policies or industry standards – to evade liability under the Convention. If the Bianchettis can show that Delta failed to adhere to its policies or the industry’s norms when addressing Mary’s condition, and that this unexpected happening contributed to her death, they will have established an accident under the Convention regardless of whether, in theory, the same evidence could also be used to argue that Delta acted negligently.

III. The Existence of Fact Questions Regarding the Unusual Nature of Delta's Response to Mary's DVT Precludes Summary Judgment

Summary judgment is inappropriate in this case because there are unresolved questions of material fact as to whether Delta diverged from its own policies and airline industry standards in the way it handled Mary's in-flight emergency. Hence, a factual dispute exists as to the single element Delta claims the Bianchettis cannot prove: whether Mary's death was caused in part by an "accident" under Article 17.

A. A Factual Dispute Exists As to Whether Delta Should Have Diverted Flight 11

There is a factual dispute as to whether Delta should have diverted the Bianchettis' flight to Cincinnati or another airport closer to the plane's location when Mary collapsed than Atlanta. Summary judgment on the question of whether an "accident" occurred is therefore inappropriate.

In his declaration, the Bianchettis' expert Dr. Mohler opines that the standard in the airline industry requires diverting flights to the nearest suitable airport if a passenger faces a serious illness or the possibility of death. *See* Mohler Dec., ¶ 10. "Diversions are not common events in commercial air travel, but pilots do not hesitate to execute them when necessary." *Id.*

Here, one of the passengers assisting Mary voiced the belief that she was suffering from a clot, *see* Grotch Dec., Exh. B at 18-19, a grave condition known to Delta and the other airlines to be life-threatening. *See* Mohler Dec., ¶ 14. The possibility of a clot was also apparent from Mary's condition – her collapse, chest and leg pain, shortness of breath and accelerated pulse. *See id.* Even in the absence of this suspicion, Mary was obviously suffering from an especially serious ailment that caused her to unexpectedly

faint or collapse in the aisle and which left her gasping for air, unable to stand up and walk, and repeatedly saying “I can’t breathe.” *See* Grotch Dec., Exh. B at 17-20. Her inhaler had no effect on the condition. *See id.* at 18. Given the estimated location of Flight 11 when Captain Hinds was told of Mary’s condition, the plane could have landed “more quickly, probably in a matter of a few minutes, in Cincinnati, than it could be landed after continuation to Atlanta, which required continued flight over Kentucky, Tennessee and northern Georgia before descent into Atlanta.” *Id.*, ¶ 11. Dr. Mohler has reasonably concluded that Delta’s failure to divert was a departure from the standard governing responding to emergency medical situations that formed a link in the causal chain leading to Mary’s death. *See id.*, ¶ 13.

Moreover, there is evidence Delta violated its own policy in determining whether to divert Flight 11. Delta’s Flight Operations Manual provides that guidance from UPMC doctors is to be followed over the recommendation of people onboard who may offer medical assistance. *See* Eiland Dec., Exh. C at 7-4.2 (Bates No. DL0000004). But Tepovich makes clear that the primary decision-maker on the subject of continuing to Atlanta was the person she believed to be a doctor. As she avers: “The captain asked me to ask the doctor who was assisting us whether [continuing to Atlanta] would be acceptable. The doctor said that would be fine and I reported that information back to the captain.” Tepovich Dec., ¶ 6. While Captain Hinds may have acted as final authority on the issue, the substance of the decision appears to have been farmed out to a passenger. This is likely because Flight 11 had lost contact with Dr. McCausland at UPMC – itself a violation of Delta’s duty under the agreement with UPMC to maintain reliable communication with ground consultants, *see* Eiland Dec., Exh. D at 4 (Bates No.

DL000146) – who only learned of the decision to continue to Atlanta after the fact. *See id.*, Exh. B at 3. Thus, there are factual questions a jury must resolve as to whether Delta adhered to its own policy in making the crucial determination about diversion.

Of course, the expert who submitted a declaration in support of Delta's motion, Jon Tovani, holds a different view. He opines that "it would have been very unlikely that Flight 11 could have diverted to any other airport capable of accommodating that aircraft so that medical attention could have been obtained any sooner than was possible when Flight 11 continued to Atlanta and was at the gate at 1:56 p.m." *See* Tovani Dec., ¶ 8. Tovani gives no reason why continuing on through Tennessee, Kentucky and northern Georgia added no appreciable time to the flight, and why Flight 11 could not have simply landed much more quickly at the apparently closer airport in Cincinnati. *See id.* Nonetheless, the dispute between Tovani and Dr. Mohler presents a classic factual question for the jury, not for this Court on a pretrial motion. *See, e.g., Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001) ("Authority to determine the victor in... a 'battle of expert witnesses' is properly reposed in the jury").

As discussed at length above, an airline's failure to address a serious medical emergency by diverting the flight may be found to be an unexpected and unusual event external to the passenger that, as such, constitutes an accident under the Convention. *See, e.g., Gupta, Fulop, McCaskey, supra.* Indeed, this is the very scenario cited by the Supreme Court in *Husain* as an example of an accident under Article 17, as this Court has recognized. *See* 540 U.S. at 656. Here, the factual question about whether Delta should have responded to Mary's condition by diverting the Bianchettis' flight necessarily precludes entry of summary judgment based on the absence of the accident element.

B. A Factual Dispute Exists As to Whether Delta Sufficiently Expedited EMS Care

A factual dispute also exists as to whether Delta followed its own policy on expediting medical care on the ground for Mary. This rules out summary judgment as well.

Initially, Captain Hinds declared a medical emergency when told of Mary's condition, but by his own admission the plane was delayed by approximately three minutes while it waited for appropriate crew to assist with the docking at the gate in Atlanta. *See* Grotch Dec., Exh. E at 84. Thus, Delta apparently failed to meet its own requirement regarding medical emergencies and the necessity of achieving the most rapid termination of the flight in this case, costing Mary a few minutes of care. And Delta's own training videos acknowledge that every minute is essential when responding to medical emergencies. *See* Mohler Dec., ¶ 14.

More importantly, Delta policy provides that, "[w]hen medical assistance is required on landing," crew members must "[e]nsure clear passage for EMS personnel" and "consider making a PA asking the passengers to remain seated upon arrival at the gate to allow EMS personnel swift access to ill or injured passengers." Eiland Dec., Exh. C at 4.4 (Bates No. DL000006). Far from ensuring clear passage for the paramedics or considering an announcement instructing passengers to remain seated, Mike testified that EMS did not board the plane and reach his wife until other passengers deplaned. *See* Grotch Dec., Exh. B at 29-30. If a jury puts credence in Mike's testimony, as it would be fully permitted to do at trial, it will necessarily find that Delta violated its own Flight Operations Manual in the way it made vital medical care available to Mary. Mike

guessed that the delay caused by holding back the paramedics lasted 10-20 minutes. *See id.*

The delay in getting medical care to Mary proved critical. Although the plane landed at 1:56 p.m., she did not arrive at the South Fulton Medical Center until 3:15 p.m. *See* Eiland. Dec., Exh. E at 9; Mohler Dec., ¶ 19. Administration of the drugs necessary to save Mary's life never occurred, and a jury could reasonably find that this failure was due in part to paramedics' delay in getting to her and their subsequent floundering attempted treatment of the wrong illness (asthma). With timely and relevant treatment, Dr. Mohler opines, there is a likelihood that Mary could have been saved. *See* Mohler Dec., ¶ 19.

True, Tepovich has a different recollection of how rapidly EMS personnel reached Mary when the plane landed. She believes that EMS boarded the plane immediately, while the passengers exited down a different aisle. *See* Tepovich Dec., ¶ 9. This is not a factual dispute the Court can resolve on summary judgment, however. If a jury determines that Mike is correct, it will necessarily have concluded that Delta violated its own policy about speeding relief to ailing passengers.

Just as Delta's violation of industry norms governing diverting the flight would be an unanticipated event constituting an accident under Article 17, so too would Delta's failure to adhere to the rules set forth in its own manual governing the immediate provision of necessary medical care to stricken passengers. *See, e.g., Husain, Fishman, Turturro, Carey, supra.* Summary judgment based on the absence of a factual dispute concerning the accident element is therefore inappropriate.

C. **A Factual Dispute Exists As to Whether Delta Arranged for Adequate Medical Assistance Upon Landing**

Finally, there is also an important factual dispute about whether Delta followed its policy requiring Flight 11's crew to ensure that Mary received the appropriate medical care upon landing in Atlanta.

The Delta Flight Operations Manual provides that, when the passenger's condition is considered "a life threatening situation," the flight crew must clearly communicate the seriousness of the condition "to the Dispatcher and/or the arrival station to ensure *appropriate* medical personnel will meet the flight." Eiland Dec., Exh. C at 7-4.4 (Bates No. DL 000006) (emphasis added). "Delta and the airline industry are well aware that the person [with DVT] is in critical need of clot busting drugs such as Heparin or streptokinase." Mohler Dec., ¶ 14. Mohler states:

In Ms. Bianchetti's condition, the medical assistance that she immediately required, and every minute counted, was being given clot-busting drugs such as Heparin or streptokinase. The "appropriate medical personnel" that she needed to meet the flight was medical personnel that could immediately administer Heparin or other clot busting drugs and to evacuate her immediately, with haste and without delay, to proper emergency treatment facility. Documentation in this case shows that Delta failed to follow that policy and procedure leading to Ms. Bianchetti's death. And there is no indication that the EMTs/Echo 1 medical personnel knew that she had been identified as having a blood clot on board, knew of the medical treatment to provide, or had the medications available to administer. Thus, Delta violated its own policies and procedures in this regard...

It is documented that Mrs. Bianchetti's DVT/blood clot began to manifest itself around 1:15. She did not arrive to a hospital emergency room until 3:15. She was pronounced dead at 3:28. She was never given the medication or treatment that could have saved her life. If Delta would have properly followed their policies and procedures, she would have timely received proper medication and emergency room support and in reasonable medical probability would have survived.

Id., ¶¶ 15, 19.

Hence, there is at least a factual question as to whether Delta conformed to its policy requiring provision of the appropriate care to seriously ailing passengers in this case. Rather than meet Flight 11 with medical personnel immediately ready and able to administer the clot-busting drugs that could have saved Mary's life, paramedics with no apparent inkling of the possibility that Mary was suffering from DVT squandered all-important minutes evaluating her case and attempting to treat her asthma. Additionally, over one hour elapsed before Mary made it to a hospital and died, though presumably the medical personnel there would have been better positioned to treat DVT. This occurred despite Mary's symptoms of DVT, a passenger's identification of a clot as the likely source of her problems, and Delta's and other carriers' extensive knowledge of DVT and how to treat it. In light of these facts, a jury must be permitted to evaluate whether Delta transgressed its policy requiring crew to ensure appropriate medical care for stricken passengers.

If Delta violated its own rules regarding provision of necessary medical care to ailing passengers, that event would be unexpected and unusual and thus an accident under the Convention, for the reasons and under the authority discussed throughout. A trial is therefore necessary to determine if this accident occurred, precluding entry of summary judgment.

CONCLUSION

For the foregoing reasons, the Court should deny Delta's summary judgment motion.

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PROOF OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to all counsel of record via electronic mailing on this the 24th day of August, 2007.

/s/

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