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United States District Court
For the Northern District of California

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

In re DEEP VEIN THROMBOSIS
LITIGATION

MDL Docket No 04-1606 VRW

ORDER

This Document Relates To:

WARSAW CASES

02-1693	04-0875	05-0369
02-2997	04-1022	05-0381
02-5213	04-1092	05-1131
03-0344	04-1807	05-1320
03-1929	04-3831	05-1733
03-2181	04-3953	05-1790
03-3242	04-4322	05-1895
03-3637	04-4527	05-2476
03-3842	04-4700	05-2493
03-4102	04-4870	05-2608
03-4830	04-4872	05-2748
03-5538	04-4896	05-2592
04-0487		

_____/

Deep vein thrombosis (DVT) is a medical condition that occurs when a thrombus (a blood clot) forms in a deep vein, usually in the extremities of the leg. DVT can lead to serious injury or death if the thrombus breaks off and lodges in the brain, lungs or heart, thereby causing a heart attack, stroke or other debilitating effects. Studies indicate a link between air travel and DVT, which

1 can be attributed to relatively prolonged periods of immobility
2 coupled with low cabin pressure and poor oxygenation (technically,
3 "hypobaric hypoxia"). Plaintiffs in this litigation suffered (or
4 sue on behalf of an individual who suffered) from DVT-related
5 injuries during or after travel aboard commercial aircraft.

6 On June 25, 2004, the Judicial Panel on Multidistrict
7 Litigation centralized pre-trial proceedings in cases involving
8 "complex core questions concerning whether various aspects of
9 airline travel cause, or contribute to, the development of deep
10 vein thrombosis in airline passengers." Doc #1 at 2. Ultimately,
11 all transferred actions were assigned to the undersigned. On
12 February 14, 2005, the court granted summary judgment in favor of
13 Boeing in its capacity as manufacturer of the aircraft in question
14 in 17 cases. Doc #144, 356 F Supp 2d 1055 (ND Cal 2005). All
15 claims against airline defendants arising from domestic flights
16 have been dismissed pursuant to the federal preemption rationale
17 announced in the court's order of March 11, 2005. Doc #151, 2005
18 WL 591241 (ND Cal Mar 11, 2005). See also Witty v Delta Air Lines,
19 Inc, 366 F3d 380 (5th Cir 2004).

20 There are approximately 50 cases pending in MDL 1606 in
21 which plaintiffs allege that they suffered from DVT-related
22 injuries during or after international flights ("Warsaw cases").
23 Before the court are motions for summary judgment filed by airline
24 defendants in 37 Warsaw cases. Doc ##277, 283, 291, 294, 296, 302,
25 307, 312, 317; Doc #28 (04-0487); Doc #17 (05-0369). For reasons
26 discussed below, defendants' motions are GRANTED.

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I

1
2 "Once a properly documented motion has engaged the gears
3 of Rule 56, the party to whom the motion is directed can shut down
4 the machinery only by showing that a trialworthy issue exists."
5 McCarthy v Northwest Airlines, Inc, 56 F3d 313, 315 (1st Cir 1995).
6 That is, the court must determine whether genuine issues of
7 material fact exist, resolving any doubt in favor of the party
8 opposing the motion. "Only disputes over facts that might affect
9 the outcome of the suit under the governing law will properly
10 preclude the entry of summary judgment." Anderson v Liberty Lobby,
11 Inc, 477 US 242, 248 (1986). Further, "summary judgment will not
12 lie if the dispute about a material fact is 'genuine,' that is, if
13 the evidence is such that a reasonable jury could return a verdict
14 for the nonmoving party." Id. And the burden of establishing the
15 absence of a genuine issue of material fact lies with the moving
16 party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986). Summary
17 judgment is granted only if the moving party is entitled to
18 judgment as a matter of law. FRCP 56(c).

19 The nonmoving party may not simply rely on the pleadings,
20 however, but must produce significant probative evidence, by
21 affidavit or as otherwise provided in FRCP 56, supporting its claim
22 that a genuine issue of material fact exists. TW Elec Serv, Inc v
23 Pacific Elec Contractors Ass'n, 809 F2d 626, 630 (9th Cir 1987).
24 The evidence presented by the nonmoving party "is to be believed,
25 and all justifiable inferences are to be drawn in his favor."
26 Anderson, 477 US at 255. "[T]he judge's function is not himself to
27 weigh the evidence and determine the truth of the matter but to
28 determine whether there is a genuine issue for trial." Id at 249.

1 The evidence presented by both parties must be
2 admissible. FRCP 56(e). Conclusory, speculative testimony in
3 affidavits and moving papers is insufficient to raise genuine
4 issues of fact and defeat summary judgment. Thornhill Publishing
5 Co, Inc v GTE Corp, 594 F2d 730, 738 (9th Cir 1979). Hearsay
6 statements in affidavits are inadmissible. Japan Telecom, Inc v
7 Japan Telecom America Inc, 287 F3d 866, 875 n 1 (9th Cir 2004).

II

A

11 The United States adheres to the Convention for the
12 Unification of Certain Rules Relating to International
13 Transportation by Air, concluded at Warsaw, Poland, October 12,
14 1929, popularly referred to as the "Warsaw Convention." 49 Stat
15 3000, reprinted in note following 49 USC § 40105. The purposes of
16 the Warsaw Convention are two-fold: "providing uniformity in
17 respect to documentation and certain procedural matters, and
18 imposing limitations on liability." In re Aircrash in Bali,
19 Indonesia on April 22, 1974, 684 F2d 1301, 1307 (9th Cir 1982).
20 See also Maugnie v Compagnie Nationale Air France, 549 F2d 1256,
21 1259 (9th Cir 1977) ("[T]he Convention functions to protect
22 passengers from the hazards of air travel and also spreads the
23 accident cost of air transportation among all passengers.").

24 "[R]ecovery for a personal injury suffered on board an
25 aircraft or in the course of embarking or disembarking, if not
26 allowed under the Convention, is not available at all." El Al
27 Israel Airlines, Ltd v Tseng, 525 US 155, 161 (1999) (quotations
28 and citation omitted). No plaintiff disputes that the injury he or

1 she sustained (DVT and resultant complications) was triggered
2 during "international transportation" for purposes of Article 1(2).
3 Nor does any plaintiff dispute that the Warsaw Convention applies
4 and preempts all claims arising under local law. Accordingly,
5 plaintiffs can recover from air carriers, if at all, only within
6 the framework established by the Warsaw Convention.

7 Article 17 of the Warsaw Convention provides:

8 The carrier shall be liable for damage sustained in
9 the event of the death or wounding of a passenger or
10 any other bodily injury suffered by a passenger, if
11 the accident which caused the damage so sustained
12 took place on board the aircraft or in the course of
13 any of the operations of embarking or disembarking.

14 49 Stat 3018 (emphasis added).

15 In other words, as explained by the Supreme Court in Air France v
16 Saks, 470 US 392 (1985), a carrier "is liable to a passenger under
17 the terms of the Warsaw Convention only if the passenger proves
18 that an 'accident' was the cause of her injury." Id at 396.

19 In Saks, the Supreme Court defined "accident" for
20 purposes of Article 17 as "an unexpected or unusual event or
21 happening that is external to the passenger." Id at 405. "This
22 definition should be flexibly applied after assessment of all the
23 circumstances surrounding a passenger's injuries." Id. And
24 because any injury "is the product of a chain of causes," a
25 plaintiff need only show that "some link in the chain was an
26 unusual or unexpected event external to the passenger." Id at 406.

27 When, however, "the injury indisputably results from the
28 passenger's own internal reaction to the usual, normal, and
29 expected operation of the aircraft, it has not been caused by an
30 accident, and Article 17 of the Warsaw Convention cannot apply."

1 Id. And because DVT "clearly is the type of internal reaction to
2 the normal operation of the aircraft, with no unusual external
3 event," the development of DVT is not itself an accident within the
4 meaning of Article 17. Rodriguez v Ansett Australia Ltd, 383 F3d
5 914, 917 (9th Cir 2004), cert denied, 544 US 922 (2005). But DVT-
6 related injuries may be compensable under the Warsaw Convention if
7 caused by an Article 17 accident. Plaintiffs in this litigation
8 contend that the airline defendants' failure to warn of the risk of
9 DVT constituted an Article 17 accident. Whether that is correct as
10 a matter of law is the issue to which the court now turns.

11
12 B

13 The Supreme Court decision most relevant to this
14 litigation is Olympic Airways v Husain, 540 US 644 (2004). Husain
15 involved a passenger's fatal reaction to cigarette smoke in the
16 aircraft cabin. Upon boarding the flight, Dr Hanson and his wife,
17 plaintiff Rubina Husain, realized their seats were located near the
18 economy-class smoking section. Given Hanson's history of recurrent
19 anaphylactic reactions to cigarette smoke, Husain notified a flight
20 attendant that Hanson was allergic to smoke and requested that
21 Hanson be reseated further away from the smoking area. Husain
22 repeated her request several times to no avail. Hanson died in
23 flight, apparently due to a reaction to the ambient cigarette
24 smoke. Husain's lawsuit followed.

25 Judge Breyer of this district held that the flight
26 attendant's refusal to reseat Hanson constituted an Article 17
27 accident because it was in "blatant disregard of industry standards
28 and airline policies" and therefore "unexpected or unusual" under

1 Saks. 116 F Supp 2d 1121, 1134 (ND Cal 2000). The Ninth Circuit
2 affirmed, agreeing that the refusal to reseat Hanson "was
3 unexpected and unusual in light of industry standards, Olympic
4 policy, and the simple nature of Dr Hanson's requested
5 accommodation." 316 F3d 829, 837 (9th Cir 2002).

6 The Supreme Court affirmed. Because Olympic did not
7 challenge the lower courts' findings that the flight attendant's
8 refusal to reseat Hanson was unusual or unexpected, the majority,
9 per Justice Thomas, assumed the refusal was unusual or unexpected.
10 Husain, 540 US at 652-53. The remainder of the opinion rejected
11 Olympic's argument that the flight attendant's behavior was
12 properly treated as an omission rather than an affirmative act and
13 therefore could not qualify as "event or happening" under Saks.
14 The majority first observed that the distinction between action and
15 inaction would be more relevant in cases governed by principles of
16 tort law, which are inapposite to the inquiry whether an Article 17
17 accident has occurred. Id at 654. In any event, the majority
18 opined, "rejection of an explicit request for assistance would be
19 an 'event' or 'happening' under the ordinary and usual definitions
20 of these terms." Id at 655.

21 Rather than conclude with the finding that the rejection
22 of Husain's request was an "event," the majority proceeded to
23 refute the broader proposition that inaction cannot constitute an
24 Article 17 accident with the following hypothetical (the "McCaskey
25 hypothetical"):

26 Suppose that a passenger on a flight inexplicably
27 collapses and stops breathing and that a medical
28 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

1 standard and airline policy to divert a flight to
2 the nearest airport when a passenger otherwise faces
3 imminent death. If the plane is within 30 minutes
4 of a suitable airport, but the crew chooses to
continue its cross-country flight, "the notion that
this is not an unusual event is staggering."

5 Id at 656 (quoting McCaskey v Continental Airlines, Inc, 159 F Supp
6 2d 562, 574 (SD Tex 2001)) (alteration omitted).

7 This conclusion was confirmed by other provisions of the Warsaw
8 Convention which "suggest that there is often no distinction
9 between action and inaction on the issue of ultimate liability."

10 Id (discussing Article 25 and Article 20(1)).

11 For purposes of this litigation, the most significant
12 aspect of the majority's discussion of inaction is its express
13 disregard of decisions of intermediate appellate courts of England
14 and Australia, both of which had concluded that failure to warn of
15 DVT cannot constitute an Article 17 accident precisely because an
16 omission cannot be an "event or happening." See Deep Vein
17 Thrombosis and Air Travel Group Litig, [2004] QB 234, ¶25 ("I
18 cannot see, however, how inaction itself can ever properly be
19 described as an accident. It is not an event; it is a non-event.
20 Inaction is the antithesis of an accident."); Qantas Ltd v Povey,
21 [2003] VSCA 227, ¶17 ("The allegations in substance do no more than
22 state a failure to do something, and this cannot be characterised
23 as an event or happening, whatever be the concomitant background to
24 that failure to warn or advise."). The majority first stated that
25 its conclusion was "not inconsistent with" the English and
26 Australian decisions. Husain, 540 US at 655 n 9. But in its next
27 breath the majority stated that to the extent the "precise
28 reasoning" of the foreign courts was inconsistent with the

1 majority's reasoning, "we reject the analysis of those cases for
2 the reasons stated in the body of this opinion." Id (emphasis
3 added). The majority noted the factual differences between the
4 cases and the fact that the courts of last resort of the United
5 Kingdom and Australia had yet to speak. In an unforgiving dissent
6 joined by Justice O'Connor, Justice Scalia rebuked the majority for
7 needlessly placing the United States in conflict with the well-
8 reasoned decisions of sister signatories. Id at 658-63 (Scalia
9 dissenting).

10 Since Husain, the courts of last resort of the United
11 Kingdom and Australia have spoken, affirming the decisions and
12 essentially adopting the reasoning of the intermediate courts. See
13 Deep Vein Thrombosis and Air Travel Litig, [2005] UKHL 72; Povey v
14 Qantas Airways Ltd, [2005] HCA 33.

15
16 C

17 Despite the potential schism between Husain and the DVT
18 decisions abroad, the Fifth and Ninth Circuits have addressed
19 claims for failure to warn of DVT under Article 17, effectively
20 harmonizing the conclusions of sister signatories with the
21 reasoning of Husain.

22
23 1

24 In Blansett v Continental Airlines, Inc, 379 F3d 177 (5th
25 Cir), cert denied, 543 US 1022 (2004), the district court denied
26 Continental's motion to dismiss, holding that the plaintiff stated
27 a claim under Article 17 by alleging that the defendant's "failure
28 to warn of the risk of contracting DVT was an accident because such

1 failure was an abnormal and unreasonable application of routine
2 procedure, and thus, it was unusual and unexpected." 237 F Supp 2d
3 747, 751-52 (SD Tex 2002). The Fifth Circuit, unanimous in all but
4 one respect, reversed. The panel understood Husain as holding that
5 "some kinds of inaction can constitute an 'accident.'" Blansett,
6 379 F3d at 181 (emphasis added). But the panel drew a distinction
7 between the facts of Husain and the McCaskey hypothetical and the
8 failure to warn of DVT: "In Husain and the McCaskey hypothetical,
9 unusual circumstances existed to elevate the willing inaction of
10 airline personnel from mere inertia — from a non-event — to an
11 event both 'unexpected and unusual.'" Id (footnote omitted). This
12 "mere inertia/inertia plus unusual circumstances dichotomy" was not
13 endorsed by one member of the panel. Id at 181 n 4.

14 Similar to plaintiffs in this litigation, the Blansetts
15 alternatively argued that the unexpected event occurred not when
16 flight attendants failed to warn of DVT, but rather when
17 Continental policymakers decided not to mandate DVT warnings on
18 Continental flights. Id at 181. Although "this decision occurred
19 at a time and place distant from Blansett's flight," the panel
20 found it "appropriate to consider the deliberate perpetuation of
21 company-wide policies as potential 'events' within the context of
22 the individual flights in which they are given effect." Id.

23 Proceeding to the question whether Continental's
24 deliberate policy choice was unexpected or unusual, the panel
25 assumed for purposes of appeal that a failure to warn of DVT was a
26 departure from an industry standard. Although the panel recognized
27 that a departure from an industry standard can constitute an
28 unexpected or unusual event under Husain, it refused to create a

1 per se rule to that effect. See *id* at 182 (“Some departures from
2 an ‘industry standard’ might be qualifying accidents under Article
3 17, and some may not.”). Turning to the case before it, the Fifth
4 Circuit found nothing unusual or unexpected because (1) “[alt]hough
5 many international carriers in 2001 included DVT warnings, it is
6 undisputed that many did not” and (2) “Continental’s battery of
7 warnings was in accord with the policies of the [FAA], which
8 prescribes what warnings airlines should issue to passengers.” *Id*
9 at 181-82.

10
11 2

12 In Rodriguez v Ansett Australia Ltd, 383 F3d 914 (9th Cir
13 2004), the Ninth Circuit affirmed summary judgment in favor of the
14 airline on Rodriguez’s DVT-based claims. After concluding that a
15 passenger’s development of DVT is not itself an Article 17
16 accident, *id* at 917, the panel turned to the failure-to-warn claim.

17 Rodriguez argued that the failure to warn of DVT
18 presented a situation factually analogous to Husain and Fulop v
19 Malev Hungarian Airlines, 175 F Supp 2d 651 (SDNY 2001), a case
20 that presented facts similar to the McCaskey hypothetical. The
21 panel found both cases distinguishable: “Both Fulop and Husain
22 involved a response by a flight crew to the passenger’s medical
23 condition. By contrast, in the instant case, there was no response
24 by the flight crew that may or may not have violated industry
25 standards.” Rodriguez, 383 F3d at 918.

26 Ultimately, however, the panel affirmed on the ground
27 that Rodriguez “submitted no evidence to raise a genuine issue of
28 material fact as to whether there was either a clear industry

1 standard or an airline policy at the time regarding DVT warnings.”
2 Id. The Ninth Circuit expressed neither agreement nor disagreement
3 with the rationale and holding of Blansett, expressly declined to
4 address “whether an airline’s failure to warn of DVT can constitute
5 an accident for purposes of Article 17” and confined its holding on
6 the failure-to-warn claim to the insufficiency of the evidence of
7 an industry practice. Id at 919.

8
9 3

10 Following briefing and oral argument on defendants’
11 motions, the Ninth Circuit rendered decision in Caman v Continental
12 Airlines, Inc, ___ F3d ___, 2006 WL 2136623 (9th Cir Aug 2, 2006).
13 Caman sued Continental under the Warsaw Convention for DVT-related
14 injuries, claiming that Continental’s failure to advise him of the
15 risk of DVT constituted an Article 17 “accident.” The district
16 court granted summary judgment in favor of Continental and a
17 unanimous panel of the Ninth Circuit affirmed.

18 After discussing Saks, Husain, Blansett and Rodriguez,
19 the panel distinguished Article 17 from Article 20(1), which
20 provides that a “carrier shall not be liable if he proves that he
21 and his agents have taken all necessary measures to avoid the
22 damage or that it was impossible for him or them to take such
23 measures.” 49 Stat 3019. See also Saks, 470 US at 407 (“The
24 ‘accident’ requirement of Article 17 is distinct from the defenses
25 in Article 20(1), both because it is located in a separate article
26 and because it involves an inquiry into the nature of the event
27 which caused the injury rather than the care taken by the airline

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1 to avert the injury.”). The Caman panel reasoned:

2 Attributing liability to an air carrier for failing
3 to do all it can to prevent an injury that is
4 inherent in air travel * * * improperly shifts the
5 focus of the inquiry from the nature of the event
6 which caused the injury to the alleged failure of
7 the air carrier to avert the same. In addition,
8 interpreting the term “accident” to include a
9 failure to warn of a possible risk of flight would
10 incorporate into Article 17 an inquiry that is
11 properly left to analysis under Article 20(1) once
12 it has been established that an accident has
13 occurred.

14 Caman, 2006 WL 2136623, *4 (citing Husain, 540 US at 649 n 5).

15 Ultimately, the panel held that failure to warn of DVT is
16 not an “event” for purposes of Saks’s definition of “accident,”
17 distinguishing the type of inaction present in Husain. *Id.*
18 Specifically, the panel stated that a failure to warn is “an act of
19 omission (inaction that idly allows an unfolding series of events
20 to reach their natural conclusion)” while Husain involved “an act
21 of commission (inaction that produces an effect, result or
22 consequence).” *Id.*

23 Caman is but the most recent example of the growing
24 international consensus among Warsaw signatories that the absence
25 of a DVT warning does not give rise to liability under Article 17.
26 More important, Caman is the law of the Ninth Circuit and therefore
27 binds this court. And Caman teaches that the failure to provide
28 DVT-related warnings before or during flight is not an “event” and
29 therefore does not qualify as an Article 17 accident, regardless of
30 an industry standard or individual airline policy of providing
31 warnings in light of which the absence of a warning might have been
32 unexpected or unusual. See Caman, 2006 WL 2136623, *3 n 4.

33 Accordingly, the court need neither consider the proffered evidence

1 of an industry practice or airline-specific policies nor address
2 defendants' objections to the same. The court will, however,
3 address related, but distinct, alternative theories advanced by
4 plaintiffs of which Caman does not so readily dispose.

5
6 III

7 A

8 Plaintiffs suggest there is a meaningful difference
9 between a failure to provide any DVT-related warning and "the
10 failure of the warnings [d]efendants did elect." Doc #364 at 21.
11 In other words, plaintiffs focus not on the lack of a warning, but
12 the inefficacy of whatever warnings were given. Plaintiffs
13 analogize "defective" DVT warnings to the malfunction of a seat-
14 belt warning light that has been activated by the flight crew but
15 fails to illuminate because of a faulty bulb. *Id.* The court is of
16 a different view.

17 First, it would be strange indeed if the failure to
18 provide any warning could not give rise to liability under Article
19 17 while the provision of an ineffective warning could. Although
20 deterrence might not be a purpose of Article 17, the court
21 hesitates to give flight to a theory that creates disincentives for
22 warning passengers of risks associated with air travel.

23 Second and more important, plaintiffs' analogy is
24 imperfect. It might very well be the case that the failure of a
25 light bulb to perform as expected would be an Article 17 accident.
26 But that analysis would not necessarily entail inquiry into what
27 more the airline could have done to prevent the accident. The
28 airline might have chosen only the best lamps, replaced them

1 frequently and, yet, unexpectedly, one burned out. In the context
2 of this litigation, however, plaintiffs' repackaged defective
3 warning theory necessarily seeks to attribute "liability to an air
4 carrier for failing to do all it can to prevent an injury that is
5 inherent in air travel." Caman, 2006 WL 2136623, *4. Plaintiffs
6 simply have not demonstrated that their hypothesis is anything but
7 fault-based.

8
9
10 B

11 In their opposing memoranda, plaintiffs shift the focus
12 from the failure to warn of DVT on any given flight to the
13 airlines' decisions not to give such warnings. The essence of
14 plaintiffs' argument is that although an omission on the part of
15 the flight crew may be too passive to qualify as an "event or
16 happening," a policy-level "election" not to give such warnings
17 despite requests by trade associations, among others, is akin to
18 the flight attendant's refusal to reseat Dr Hanson in Husain. In
19 other words, plaintiffs emphasize what happened at the corporate
20 executive level, not what happened (or did not happen) on board the
21 flights in question. No defendant has raised the issue whether
22 plaintiffs improperly attempt to use summary judgment as a vehicle
23 to amend their complaints and the court will not raise the issue
sua sponte.

24 Plaintiffs' "election" theory gains no traction in
25 Article 17, for, on any set of facts, the policy-level decisions
26 upon which plaintiffs draw a bead would have been too remote in
27 time and space from the flights in question to give rise to
28 liability. The text of Article 17 makes clear that an "accident"

1 must have occurred either on board or in the course of "embarking
2 of disembarking" in order for any injury caused thereby to be
3 compensable under Article 17. See Prescod v AMR, Inc, 383 F3d 861,
4 869 (9th Cir 2004) ("[A] passenger's delayed reaction to an Article
5 17 accident resulting in injury or death is actionable so long as
6 the accident itself took place on board the aircraft or in the
7 course of any operations of embarking or disembarking." (quotations
8 omitted)). See also Eastern Airlines, Inc v Floyd, 499 US 530,
9 535-36 (1991) ("[U]nder Article 17, an air carrier is liable for
10 passenger injury only when * * * the accident took place on board
11 the aircraft or in the course of operations of embarking or
12 disembarking.") (dictum). Whether an accident occurred within the
13 temporal and spatial limitations of Article 17 is a question of
14 law. See Schmidkunz v Scandinavian Airlines System, 628 F2d 1205,
15 1207 (9th Cir 1980).

16 In Maugnie, *supra*, the Ninth Circuit suggested a flexible
17 approach "which requires an assessment of the total circumstances
18 surrounding a passenger's injuries, viewed against the background
19 of the intended meaning of Article 17. Location of the passenger
20 is but one of several factors to be considered." Maugnie, 549 F2d
21 at 1262. See also Day v Trans World Airlines, Inc, 528 F2d 31, 35
22 (2d Cir 1975) (opining that the Warsaw delegates eschewed "a rigid
23 rule based solely on location of the accident" and "preferred to
24 provide latitude for the courts to consider the factual setting of
25 each case"); Evangelinos v Trans World Airlines, Inc, 550 F2d 152,
26 155 (3d Cir 1977) (en banc) (stating that "a test that relies upon
27 location alone is both too arbitrary and too specific to have broad
28 application, since almost every situation and every airport is

1 different," and prescribing a three-factor analysis to determine
2 whether an accident occurs in the process of embarking or
3 disembarking). But see McCarthy, 56 F3d at 316 ("The terms
4 'embarking' and 'disembarking' are not infinitely elastic, and we
5 believe it is quite probable that, when the occasion to interpret
6 those terms arises, the Court will prove to be similarly restrained
7 in defining them.").

8 Applying this test, the Ninth Circuit in Maugnie
9 concluded that a passenger who slipped and fell in a hallway
10 between the airline gate and the center of the terminal could not
11 recover because by the time of the accident she had completed the
12 process of disembarking her flight. Maugnie, 549 F2d at 1257,
13 1262. The panel found dispositive the facts that the passenger (1)
14 had proceeded through a boarding lounge to a common corridor that
15 was neither owned nor leased by the air carrier and (2) was no
16 longer under the control of the air carrier. *Id.* at 1262. Applying
17 Maugnie's flexible approach in a subsequent case that presented a
18 factual situation at the opposite end of the embarking-to-
19 disembarking spatial-temporal spectrum, the Ninth Circuit found
20 that an accident occurred before the process of embarking because
21 the passenger had not received her boarding pass and was not
22 "imminently" preparing to board the plane or under the direction of
23 air carrier personnel. Schmidkunz, 628 F2d at 1207.

24 Whether a policy-level decision, which necessarily occurs
25 well before the flight in which it is given effect, can give rise
26 to liability under Article 17 appears to be a question of first
27 impression. Cf Lathigra v British Airways PLC, 41 F3d 535, 539
28 (9th Cir 1994) (declining to decide, in the pre-Tseng landscape,

1 whether "decisions (e g, changes in schedules and frequencies)
2 necessarily occurring hours or days before departure" are beyond
3 the scope of the Warsaw Convention). But elastic as the Maugnie
4 approach may be, the concept of embarking an aircraft simply cannot
5 be stretched so far as to encompass plaintiffs' theory. Clearly,
6 under any set of facts, in terms of location, control and any other
7 salient consideration that would properly comprise the "totality of
8 the circumstances" to be considered under Maugnie, a policy-level
9 decision on the part of airlines not to provide DVT warnings on
10 board would, by definition, have occurred at a time and place so
11 far distant from any particular flight in which the policy was
12 given effect that it could not have taken place on board or in the
13 process of embarking the aircraft.

14 The Fifth Circuit saw matters differently in Blansett.
15 There, the Blansetts recognized that Continental's decision to give
16 DVT warnings was made "at a time and place distant" from the flight
17 but nonetheless invoked Saks's instruction that the definition of
18 "accident" be applied flexibly in light of all the circumstances.
19 Blansett, 379 F3d at 181 (citing Saks, 470 US at 405). Without
20 expressly subscribing to the Blansetts' proffered Saks-derived
21 rationale (but without espousing a different legal justification),
22 the Fifth Circuit found it "appropriate to consider the deliberate
23 perpetuation of company-wide policies as potential 'events' within
24 the context of the individual flights in which they are given
25 effect." *Id.*

26 With all the respect certainly due the Fifth Circuit, the
27 court disagrees. No doubt courts are to take a pliable stance
28 toward the questions whether an accident occurred at all and, if

1 so, whether that accident occurred while the passenger was on board
2 or in the process of embarking or disembarking the aircraft. But
3 Blansett all but collapses those two analytically distinct
4 inquiries into one, thereby rendering nugatory the plain language
5 — and, by the same token, significantly expanding the scope — of
6 Article 17. Under Blansett, so long as (1) an unexpected or
7 unusual event or happening external to the passenger occurs
8 somewhere in the causal chain, (2) there is some identifiable link
9 in the chain between the aforementioned “accident” and the
10 passenger’s injury and (3) that link can be plotted somewhere along
11 the embarking-to-disembarking spectrum, then liability attaches
12 regardless whether the accident itself occurred on board or in the
13 process of embarking or disembarking — or, put another way,
14 regardless whether the link itself was an accident. A flexible
15 approach is one thing; doctrinal prolapsus is quite another. And
16 neither the text of the Warsaw Convention, the ratification
17 proceedings nor the prior case law suggest that Article 17 properly
18 can be used as a vehicle to regulate air carriers’ decisionmaking
19 processes that themselves bear no resemblance whatsoever to an
20 accident that occurs on board an aircraft or in proximity thereto.

21 To the court’s surprise, not one of the dozen-plus
22 airline defendants has questioned whether a policy-level decision
23 can give rise to liability in light of its remote locus in time and
24 space vis-à-vis any particular flight. Perhaps defendants
25 preferred to ignore the obvious rather than cast a shadow upon
26 Blansett. It was not until the last footnote of the last brief
27 submitted on the present motions that plaintiffs broached the
28 issue, seeking the only refuge that Blansett could afford them.

1 See Doc #461 at 5 n 7.

2 À la Blansett, plaintiffs contend that the policy
3 decisions preceded the actual failures to warn on board individual
4 flights "shows no more than that the 'unusual or unexpected'
5 failure to warn effectively on the flight was part of a larger
6 causal chain that extended beyond the parameters of embarking and
7 disembarking." *Id.* But plaintiffs essentially concede that the
8 policy decisions were not made on board or in the course of
9 embarking or disembarking within the meaning of Article 17. And in
10 their next breath, plaintiffs further admit that an unusual or
11 unexpected event must occur "between embarking and disembarking" in
12 order for liability to attach under Article 17. *Id.* At the end of
13 the day, however, plaintiffs do not, and cannot, point to an
14 injury-causing event external to them that occurred on board or in
15 the process of embarking or disembarking.

16 In addition to Blansett, plaintiffs cite Waxman v CIS
17 Mexicana De Avacion, 13 F Supp 2d 508 (SDNY 1998). There, Judge
18 Cote concluded that the failure to remove a hypodermic needle from
19 a seat back was "an unusual, unexpected departure from ordinary
20 procedures" and therefore qualified as an accident. *Id.* at 512.
21 Putting aside that this rationale is on its face at odds with
22 Caman, Waxman is inapposite because Judge Cote apparently assumed
23 that the accident occurred either on board or in the process of
24 embarking or disembarking without discussing the matter. Again,
25 that question is distinct from the question whether an accident
26 occurred *vel non*. And Judge Cote's assumption was, of course,
27 quite reasonable given that the failure to remove the needle from
28 the seat back necessarily occurred on board the aircraft.

1 referring or relating to any airline's actual practices concerning
2 warning passengers of the risks of DVT or the risks associated with
3 prolonged immobility in aircraft") and individual airline policies
4 (specifically, "[a]ll documents referring or relating to the
5 individual airline's actual practices or policies concerning
6 warning" its passengers, pilots and crewmembers "of the risks of
7 DVT or the risks associated with prolonged immobility in
8 aircraft"). Doc #165 at 6-7. The court fashioned these discovery
9 limitations in light of Rodriguez's (1) focus upon the lack of an
10 industry practice or individual policy of providing DVT-related
11 warnings and (2) rejection of "negligence-type" evidence. See
12 Rodriguez, 383 F3d at 918-19.

13 Plaintiffs now contend in Rule 56(f) affidavits that this
14 discovery is insufficient and seek to continue summary judgment
15 proceedings pending additional discovery. Doc #365 (Danko Decl).
16 See also Doc #364 at 22-25. "The party seeking a Rule 56(f)
17 continuance should demonstrate that: (1) it has set forth in
18 affidavit form the specific facts that it hopes to elicit from
19 further discovery; (2) the facts sought actually exist; and (3)
20 these sought-after facts are essential to resist the summary
21 judgment motion." In re Deep Vein Thrombosis, 356 F Supp 2d 1055,
22 1060 (ND Cal 2005) (citing California v Campbell, 138 F3d 772, 779
23 (9th Cir 1998)).

24 According to the declaration of Michael Danko, plaintiffs
25 seek discovery pertaining to

26 the actual policy and procedure of defendants
27 concerning warning passengers of the risks of DVT;
28 whether or not that policy or procedure was followed
by defendants; communications between each defendant
and other airlines and airline industry associations

1 concerning the risks of airline flight and DVT,
2 recommendations to warn passengers about the risks
3 of DVT from internal and external sources;
4 documentation in defendants' files concerning the
5 efficacy of advising passengers to perform DVT
6 preventative exercises; prior warnings given related
7 to DVT by defendant but then withdrawn for monetary
8 reasons and/or collusion with other airlines; and
9 the recommendations of defendants' own in-house
10 health experts to provide the necessary warnings and
11 instructions.

12 Danko Decl at 3.

13 Plaintiffs submit that apart from industry practice or individual
14 airline policies, the foregoing evidence is reasonably likely to
15 show that (1) "defendants disregarded requests to effectively warn
16 about DVT," (2) "defendants' ineffective DVT warnings resulted from
17 a cover-up of the dangers of DVT" and (3) "defendants' discussions
18 of DVT risks were so extensive and informed as to render their
19 failure to effectively warn the functional equivalent * * * of the
20 failure to respond to requests for assistance in issue in Husain."
21 Id at 4.

22 The discovery plaintiffs seek is not essential to oppose
23 the present motions. First of all, some of the discovery
24 plaintiffs now seek was encompassed by the discovery that has been
25 allowed regarding industry practice and individual airline policy.
26 To the extent plaintiffs believe that defendants have not been
27 forthcoming with documents that fall into the categories described
28 in the court's discovery order, Caman's disregard of such evidence
moots plaintiffs' complaint. See Caman, 2006 WL 2136623, *3 n 4.
For this same reason, the discovery requested in the declarations
of Brenda Posada and James Furman related to airlines' involvement
in the International Air Transport Association (IATA) and the
International Civil Aviation Organization (ICAO) — "two

1 international entities that set the industry standard" — would not
2 better equip plaintiffs to oppose the present motions. See Doc
3 ##350 ¶13, 353 ¶9, 354 ¶8 (Posada Decls); Doc #361 ¶14 (Furman
4 Decl).

5 Second, even assuming that the discovery plaintiffs seek
6 will yield facts that support a theory of "cover-up" or a
7 "functional equivalent" of the scenario in Husain, to the extent
8 such a theory is not premised on what the airlines could or should
9 have done (as opposed to the occurrence of an accident that
10 occurred on board or in the process of embarking or disembarking),
11 plaintiffs' theory would nonetheless fail as a matter of law for
12 the reasons discussed in part III(B) of this order.

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14 V

15 In sum, plaintiffs' Rule 56(f) applications are DENIED.
16 The airline defendants' motions for summary judgment are GRANTED.

17 This order affects only the named airline defendant(s) in
18 each of the above-captioned Warsaw cases. Further, this order does
19 not affect claims against Delta Airlines, Inc, Northwest Airlines,
20 Inc, or ATA Airlines, Inc. See Doc ##54, 254, 258-266. See also
21 Doc #311 at 3 n 4 ("[D]efendants Delta, Northwest and ATA do not
22 seek any affirmative relief by this motion because of the
23 applicability of automatic stay orders relating to their respective
24 bankruptcy proceedings.").

25 Pursuant to FRCP 54(b), the court finds that there is no
26 just reason to delay entry of judgment in favor of any airline
27 defendant that is both a party to the present motions and against
28 which the only Article 17 accidents alleged are the onset of DVT or

1 the absence or insufficiency of a warning regarding DVT or policy-
2 level decisions regarding the same. Accordingly, the clerk is
3 DIRECTED to enter judgment in favor of the airline defendants
4 except that the clerk shall not enter judgment (1) as to Delta,
5 Northwest and ATA and (2) in the following five actions: 03-1929
6 (Dabulis), 04-3831 (Richelet), 04-3953 (Haltermann), 04-4700
7 (Phillips) and 04-4896 (Menditto). In any action in which the
8 clerk enters judgment in favor of an airline defendant (with the
9 above-noted exceptions) and in which no other active defendant is
10 named, the clerk is further DIRECTED to close the file and
11 terminate all motions.

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13 SO ORDERED.

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16 VAUGHN R WALKER

17 United States District Chief Judge
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