UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

LEWIS LIPNICK	:	
	:	
Plaintiff,	:	
vs.	:	**Civil Action No. 12 – 1277 (RLW)**
	:	
UNITED AIR LINES, INC., et. al.	:	
	:	
Defendants.	:	
	:	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The Plaintiff responds here to both Defendants' motions for summary judgment, since they have similar bases and are meritless for similar reasons.

First, the Defendants ask this Court to take the unprecedented step of contracting the meaning of "accident" under the Montreal Convention to exclude an instance where an airline places a passenger in a foreseeably dangerous situation that causes the passenger to be injured. The federal courts, including the Supreme Court, have unanimously found that when an airline places a passenger in a dangerous situation or refuses the passenger's request to be removed from the danger, and the passenger is then injured, the airline is responsible.

Second, the Defendants also ask this Court to take fact-finding out of the jury's hands, and determine that Mr. Lipnick was solely responsible for his own injuries. The Court, in looking at the facts in the light most favorable to the Plaintiff, as it must, cannot determine as a matter of law that Mr. Lipnick acted negligently and contributed in any significant degree to his own injury, let alone that he was solely responsible for his own injuries (since the Montreal Convention applies comparative negligence). In fact, the evidence favors Mr. Lipnick on the reasonableness of his conduct when he was placed into a position of danger by the decision of

the Defendants' boarding agent.

Third, Mr. Lipnick has properly designated his treating physicians to testify about his injuries, including the cause of his injuries and his prognosis. The federal rules do not require that these physicians provide written reports on the cause of his injuries and his prognosis, as long as those opinions were formed in their course of their treatment of Mr. Lipnick, which in this case they were. In addition, Mr. Lipnick could establish both the causation and permanency of his injuries through his own lay testimony, under the law of the District of Columbia.

For these reasons, the Court should deny the Defendants' motions for summary judgment.

MATERIAL FACTS IN DISPUTE

In their "undisputed facts" of this case, the Defendants have left out key details, which Plaintiff adds below. In addition, Plaintiff disputes Lufthansa's "undisputed facts" Nos. 16-18. (Lufthansa Mtn. at 6.) Mr. Lipnick did not decide "on his own to descend both escalators in a single trip while holding all three of his carry-on items." In fact, Mr. Lipnick was instructed to do so by a Lufthansa employee. (Ex. 1, Lipnick Declaration at ¶ 2 and 4; Ex. 2, Lipnick Depo. 10/12/11 at 81:20-24.)

Here are the additional important facts for the Court's consideration:

1. The Plaintiff Lewis Lipnick, the principal contra-bassoon player of the National Symphony Orchestra, was injured on September 18, 2010, when he fell at the bottom of a downward-moving escalator that led from gate H-48 at the Munich Airport to the jetway of the aircraft for which he had two business-class tickets (one for himself and one for his contraforte musical instrument) for United Airlines Flight 903. (See Ex. 1,

Lipnick Declaration ¶ 2[1]; Ex. 2, Lipnick Depo. 10/12/11 at 52:21 – 105:13.)

2. Mr. Lipnick showed his two boarding passes to the Lufthansa gate agent, who ran Mr. Lipnick's boarding passes through a machine that scanned the boarding passes. (Ex. 2, Lipnick Depo. 10/12/11 at 74:24 – 76:20.)

3. Mr. Lipnick was then directed onto the top section of this two-section escalator by this Lufthansa employee, who was in charge of embarkation at gate H-48. (Ex. 2, Lipnick Depo. 10/12/11 at 81:20-24; Ex. 1, Lipnick Declaration at ¶ 4.) (See also photos of the two sections of the escalator attached to Mr. Lipnick's declaration and described at ¶ 9.)

4. Persons wearing Lufthansa uniforms operated all gate embarkation functions at gate H-48 for United flight 903, which was a joint United/Lufthansa flight. (Ex. 3, Lufthansa's Answers to Interrogatories at 7; Ex. 1, Lipnick Declaration at ¶ 2.)[2]

5. Mr. Lipnick twice asked the Lufthansa gate agent, who appeared to be in charge of the gate, if he could use a nearby elevator to descend from the gate to the aircraft jetway.[3] (Ex. 2, Lipnick Depo. 10/12/11 at 67:17 – 72:19.) The Lufthansa employee refused this

[1] This declaration was made by Mr. Lipnick on January 2, 2012, to address matters on which he was never questioned in his deposition. The declaration was made when this case was pending in U.S. District Court for the Eastern District of Virginia, to respond to points in the Defendants' motions for summary judgment filed in that case (which the Court did not decide because it dismissed the case on Plaintiff's motion for voluntary dismissal).

[2] Discovery is still ongoing, and the Plaintiff still plans on conducting Rule 30(b)(6) depositions of the Defendants. However, the Plaintiff believes that he has sufficiently made a prima facie case at the present state of discovery.

[3] In its motion, Lufthansa avoids describing what its employees were doing at gate H-48. In its "Listing of Undisputed Facts" with the motion, Lufthansa mentions all the United-related aspects of flight 903 but, concerning its own role, says only that Mr. Lipnick had been at a Lufthansa lounge before proceeding to the gate. (Lufthansa Mtn. for Summary Judgment at 5 paragraph 11.) Nowhere in its description of what happened does Lufthansa say which air carrier operated the gate.

request and directed Mr. Lipnick to the escalator. (Ex. 2, Lipnick Depo. 10/12/11 at 81:20-24.) The Lufthansa employee offered no help or assistance for Mr. Lipnick to descend the escalator with his baggage, which consisted of his heavy and bulky contraforte case, a roller bag with his clothing and a laptop computer. (Ex. 2, Lipnick Depo. 10/12/11 at 52:22 – 54:16.) (See also photographs attached to Mr. Lipnick's declaration showing the instrument and its case.) Moving as cautiously as he could, Mr. Lipnick pushed the contraforte case ahead of him and held it with one hand, while holding his roller case and laptop with the other hand behind him on the escalator. (Ex. 2, Lipnick Depo. 10/12/11 at 85:18 – 94:15.) He successfully navigated the first, longer section of the escalator, but as he attempted to exit the bottom of the second section of the escalator, Mr. Lipnick fell, and his contraforte case fell on top of him. He injured his left arm, neck and shoulders. (Ex. 2, Lipnick Depo. 10/12/11 at 94:16 – 114:13.)

6. Lufthansa has identified four employees who were on duty at Gate H48 for Flight 903. (Ex. 3, Lufthansa's Answers to Interrogatories at 3, Ex. 4, Lufthansa Employee Statements). None of these employees has any memory of "the incident" involving Mr. Lipnick or of speaking with Mr. Lipnick at all. (Ex. 3 and 4.)

7. None of United's employees, except for a flight attendant on board Flight 903 named Kim Kent, have any memory of this incident either. (Ex. 5, United's Answers to Interrogatories at 4-5.)

8. Mr. Lipnick has been treated for his injuries by Dr. Drachman, a neurologist, Dr. Cherrick, a physiatrist, and Dr. Waletzky, a psychiatrist. These doctors have been disclosed as Plaintiff's experts and their records provided to the Defendants.

(Lufthansa Ex. D.)

9. When he was refused passage on the elevator, Mr. Lipnick did not consider asking any other passengers to help him because he thought it would be improper and imprudent. (Ex. 2, Lipnick Depo. 10/12/11 at 97:21 – 98:8.) As any air traveler knows, airport announcements regularly advise passengers not to accept baggage from another passenger. (Ex. 1, Lipnick Declaration at ¶ 6.)

10. He did not ask any of the other Lufthansa personnel at the gate to overrule the person who had directed him to the escalator, because that person appeared to him clearly to be in charge and he did not want to aggravate her. (Ex. 2, Lipnick Depo. 10/12/11 at 77:8-24.)

11. It would have been foolish and illegal for Mr. Lipnick to try to take his bags from the gate to the jetway in multiple trips. Mr. Lipnick knew that passengers in German airports – and in other countries for that matter -- are not allowed to leave behind personal possessions, even temporarily. Any bags left at the gate would have been subject to official confiscation or private theft. Mr. Lipnick would not have considered leaving the contraforte out of his possession because he had just purchased this unique instrument new at a cost of $36,000. In addition, as he has learned on subsequent trips, the process of getting from the gate at the Munich airport with the contraforte case onto the airplane, even using the gate elevator, is quite time-consuming, requiring approximately 25 minutes. (Ex. 1, Lipnick Declaration at ¶ 6.)

12. A United flight attendant on board Flight 903 named Kim Kent, who assisted Mr. Lipnick once he boarded the plane, testified in regard to the elevators at the Munich Airport that Mr. Lipnick was denied the use of, “Typically, the elevator is used for people that

need assistance or handicap, wheelchair, strollers." (Ex. 6, Kim Kent Depo. at 22:21-23:14.)

13. On his later trips from Munich back to Dulles, Lufthansa employees have escorted Mr. Lipnick from the gate to the aircraft jetway via the gate elevator. These same employees told him that it was improper for the other Lufthansa employee to have directed him to the escalator and denied him passage on the elevator. (Ex. 1, Lipnick Declaration at ¶ 7-8; Ex. 7, Lipnick Depo. 04/29/13 at 325:8-18.)

14. Mr. Lipnick made several complaints about his fall to United employees, including Mr. Kent, and Ms. Anhita Vahedi, who "debriefed" Mr. Lipnick at Dulles Airport and to whom he later sent an email about this incident. (Ex. 2, Lipnick Depo. 10/12/11 at 137:24 – 140:13.) Mr. Kent himself sent a report about this incident to a United manager named Denise Robinson-Palmer, whom he had spoken with directly about this incident. (Ex. 6, Kim Kent Depo. at 11:1-17.) Mr. Kent had also notified a United customer service representative about Mr. Lipnick's fall immediately after Mr. Lipnick boarded Flight 903. (Ex. 6, Kim Kent Depo. at 28:7-33:16.) Yet the Defendants' performed no investigation into this incident following these complaints, or at least have never produced any report of any investigation into this matter by either United or Lufthansa.

15. Mr. Lipnick's injuries have made playing his instrument in the orchestra over the last three years very painful. (Ex. 2, Lipnick Depo. 10/12/11 at 156:2-9). Mr. Lipnick's pain increased and worsened to the point that earlier this year, Mr. Lipnick could no longer perform his instrument at a professional level, and took a temporary leave of absence from the National Symphony Orchestra. (Ex. 7, Lipnick Depo. 4/29/13 at

284:4-8.) This caused Mr. Lipnick depression and anxiety (including suicidal thoughts), and led to his recently being checked into the Johns Hopkins University Psychiatric Pain Clinic for nearly a month. (Ex. 8, Plaintiff's Supplemental Answers to Interrogatories at 3-4.) After undergoing a difficult and traumatic withdrawal from his previous medication regimen at Johns Hopkins, Mr. Lipnick was placed on a new regimen, which has caused him to feel somewhat better. (Ex. 8.) Though he still experiences pain in his arm, neck, and shoulder, Mr. Lipnick has returned to performing with the NSO. (Ex. 8.)

ARGUMENT

I. Mr. Lipnick Has Made a Prima Facie Case Under the Montreal Convention

In this case, the Defendants face two burdens. They must meet the usual standards of Fed.R.Civ.P. 56(a) in showing that undisputed facts entitle them to judgment. But also, under the unique burden-shifting provisions of the Montreal Convention, the airlines have the burden of proving non-liability. Under the Montreal Convention, which governs liability for injuries suffered by international airline travelers, a showing of injury from an accident makes the Defendants strictly liable for Mr. Lipnick's injuries.

A. Background of the Montreal Convention's Strict Liability Scheme

The Montreal Convention's predecessor, the Warsaw Convention, was negotiated in 1929 with the purpose of limiting liability and applying uniform liability rules to international air transport of passengers, cargo, and mail. By 1999, seventy years of various treaties, agreements, and amendments had transformed the Warsaw Convention's system of liability into a confusing "hodgepodge of supplementary amendments and intercarrier agreements." *Smith v. Am. Airlines, Inc.*, 2009 WL 3072449 (N.D. Cal. Sept. 22, 2009), citing *Ehrlich v. American Airlines, Inc.*, 360

F.3d 366, 371 n.4 (2nd Cir. 2004).

The Convention for International Carriage by Air, Done at Montreal May 28, 1999, S. Treaty Doc. No. 106-45, 1999 WL 33292734 (hereinafter cited to as "Montreal Convention") was "an entirely new treaty that unifies and replaces the system of liability that derives from the Warsaw Convention." *Ehrlich*, 360 F.3d at 371 n.4.

> Whereas the "primary aim of the contracting parties to the [Warsaw] Convention" was to limit "the liability of air carriers in order to foster the growth of the . . . commercial aviation industry," *Sulewski v. Federal Express Corp.*, 933 F.2d 180, 184 (2d Cir. N.Y. 1991) (internal citations and quotation marks omitted), the contracting parties to the Montreal Convention expressly approved that treaty because, among other reasons, they recognized "the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution." Montreal Convention, pmbl. The Senate has similarly recognized that "the new Montreal Convention represents the culmination of decades of efforts by the United States and other countries to establish a regime providing increased protection for international air travelers and shippers." S. Exec. Rep. No. 108-8, at 2 (2003). Hence, commentators have described the Montreal Convention as a treaty that favors passengers rather than airlines. See, e.g., Thomas J. Whalen, *The New Warsaw Convention: The Montreal Convention*, 25 Air & Space L. 12, 14 (2000) ("The Montreal Convention is no longer a Convention for airlines. It is a Convention for consumers/passengers."); J.C. Batra, *Modernization Of The Warsaw System -- Montreal 1999*, 65 J. Air. L. & Com. 429, 443 (2000) ("the Montreal Convention recognizes the importance of ensuring protection of the interests of consumers in international air carriage").

Id.

"The Montreal Convention represents a significant shift away from a treaty that primarily favored airlines to one that continues to protect airlines from crippling liability, but shows increased concern for the rights of passengers and shippers." *Weiss v. El Al Isr. Airlines, Ltd.*, 433 F. Supp. 2d 361, 365 (S.D.N.Y. 2006).

Article 17 of the Montreal Convention provides strict carrier liability for "damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the

operations of embarking or disembarking." The Supreme Court has defined the term "accident" as an "unexpected or unusual event or happening that is external to the passenger." *Air France v. Saks*, 470 U.S. 392 (1985).

The Montreal Convention establishes a two-tiered system of recovery: Article 21(1) makes a carrier absolutely liable for the first 113,000 "Special Drawing Rights" (known as SDR) of damages (equivalent under the current exchange rate to around $170,000 US Dollars)[4]; Article 21(2) presumes that further damages above that level can be recovered by the injured passenger, placing the burden on the carrier to rebut this presumption by either proving "such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents" or "such damage was solely due to the negligence or other wrongful act or omission of a third party."[5]

B. Applicability of the Montreal Convention's Rules to this Case

[4] "Special Drawing Rights" are a valuation of currency established by the International Monetary Fund ("IMF"). The exchange rate for SDR can be found at http://www.imf.org/external/np/fin/data/rms_five.aspx.

[5] **Article 21 - Compensation in case of death or injury of passengers**

> 1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
>
> 2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:
>
> (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
>
> (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.
>
> *Note – Article 21 was amended in 2009 to change "100,000 Special Drawing Rights" in Sections 1 and 2 to "113,000 Special Drawing Rights."

The Montreal Convention applies in a straightforward way to the event that caused injury to Mr. Lipnick on September 18, 2010.

First, there can be no question that the event happened "in the course of any of the operations of embarking." Therefore Montreal Article 17 applies when it says, "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."[6]

Second, the liable carrier or carriers have absolute liability for the first 113,000 SDR's of Mr. Lipnick's damages under Montreal Article 21(1), which says that up to this level the carrier "shall not be able to exclude or limit its liability."

Third, for damages above this level, to prevail at summary judgment, the carriers must show that no reasonable jury could find either that the damages were due to "negligence or other wrongful act or omission of the carrier or its servants or agents," Article 21(2)(a), or that "such damage was solely due to the negligence or other wrongful act or omission of a third party." Article 21(2)(b). The Court will recall that neither prong of Article 21(2) limiting liability is triggered until "the carrier proves" that one of these two conditions apply. (See Article 21(2), introductory clause.)

Neither United nor Lufthansa comes anywhere close to meeting their burden of exculpating themselves from liability for this second layer of damages. They also fail to extricate themselves from absolute liability for the first layer.

Mr. Lipnick was injured when he fell down an escalator as he embarked through a

[6] Both Defendants are liable as "carriers" within the meaning of the Montreal Convention. Carriers within the scope of the Convention are those performing services in furtherance of the contract of carriage. *See* Montreal Convention Articles 39, 40, and 41; *see also McCarthy v. Am. Airlines, Inc.*, 2008 WL 2704515 (S.D. Fla. June 27, 2008); *Lathigra v. British Airways PLC*, 41 F.3d 535, 538 (9th Cir. 1994).

Lufthansa-controlled gate at the Munich Airport in an attempt to board United Airlines Flight 903 on September 18, 2010. Lufthansa and United had exclusive control over Mr. Lipnick's boarding once he arrived at the gate, and handed over his tickets to be scanned by Lufthansa's agent. Prior to descending the escalator, Mr. Lipnick asked this Lufthansa employee several times if he could use a nearby elevator to descend from the gate to the jetway. At first, this employee tried to bar him from bringing the instrument case through the gate onto the plane, and relented only when he showed her that he had purchased a business-class seat and had a boarding pass for it to sit in the seat next to him on the aircraft. (Ex. 2, Lipnick Depo. 10/12/11 at 67:17 – 70:16.) The Lufthansa employee, who by all appearances was in charge of the gate boarding operations, refused use of the elevator and pointed Mr. Lipnick to use the escalator instead.[7] The Lufthansa employee offered no assistance for Mr. Lipnick to descend the escalator with his luggage, which consisted of the contraforte instrument case, almost as tall as he was (see photo attached to his declaration), and his rolling suitcase and laptop computer. Because he was forced to descend holding his instrument case with one hand and his other bags with his other hand, he ultimately fell and suffered a significant injury.

In arguing for summary judgment, the Defendants cast numerous aspersions on Mr. Lipnick's credibility, claiming that he has been "targeting an anonymous woman" (United Mtn. at 2) and commenting on Mr. Lipnick's account: "even assuming the truth of the implausible scenario that Lufthansa employee refused to allow Plaintiff to use an elevator. . . " (Lufthansa Mtn. at 14.) These kinds of libels on Mr. Lipnick's character – accusing him of fabricating his

[7] The Defendants contend that Mr. Lipnick's testimony would not be sufficient to support his claims at trial (United Mtn. at 15, "even if plaintiff could establish the truth of what he alleges, with competent evidence . . ."), without actually saying why Mr. Lipnick's testimony would be inadmissible. Regardless, any testimony by Mr. Lipnick about what he was told by Lufthansa's employee would be admissible, and is not hearsay, because it is an opposing party's statement through an agent acting in the scope of employment. See Fed. R. Evid. 801(d)(2)(D).

story, despite their own failure to offer any contradictory fact witnesses or evidence – have no place in a motion for summary judgment. Furthermore, the Defendants performed no investigations into this matter (or at least have not produced any investigative reports), which would have documented or memorialized what happened, despite several complaints and reports made by Mr. Lipnick and Mr. Kent about this incident. (Ex. 2, Lipnick Depo. 10/12/11 at 137:24 – 140:13; Ex. 6, Kim Kent Depo. at 11:1-17 and 28:7-33:16.) Had the Defendants made such an inquiry, there might now be additional evidence supporting Mr. Lipnick. Instead, the Defendant conveniently claims that this incident never happened, and asks the Court to find that Mr. Lipnick has fabricated his version of events.

"When considering a motion for summary judgment, the court may not make credibility determinations or weigh the evidence; the evidence must be analyzed in the light most favorable to the nonmoving party, with all justifiable inferences drawn in his favor." *Obaseki v. Fannie Mae*, 840 F. Supp. 2d 341, 344 (D.D.C. 2012) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "If material facts are at issue, or, though undisputed, are susceptible to divergent inferences, summary judgment is not available." *Moore v. Hartman*, 571 F.3d 62, 66 (D.C.Cir.2009). These basic rules apply to any summary judgment motion, and the Defendants do not explain why they break the rules.

United also sprinkles its motion with other irrelevant and inappropriate "facts," such as that Mr. Lipnick "tapp[ed] his frequent flyer account" to pay for his tickets (United Mtn. at 3) and that the plaintiff has been "generous in his praise" of United. (United Mtn. at 7, fn.5.) United does not explain how these facts support its motion for summary judgment.

United then raises another gratuitous point by citing to Mr. Lipnick's deposition testimony about *why* he brought suit against both United and Lufthansa. (United Mtn. at 7 fn. 5.)

United argues that Mr. Lipnick "made clear that the reason he sued United was in the event it were responsible for the conduct of the woman who said not to use the elevator." (United Mtn. at 8 fn. 5.) United further quotes Mr. Lipnick: "I mean it all started from that. That was the whole cause of this," referring to the Lufthansa employee's refusal to let him use the elevator. United further complains that Plaintiff never gave "any description of what *United* did or omitted to do that amounted to an 'accident.'" (United Mtn. at 7 [emphasis in original].)

These statements are peculiar, because United appears to try to elevate the reason why Mr. Lipnick was motivated to sue United into a defective legal rationale. Yet nowhere in its papers does United ever challenge that it *is* in fact legally responsible for the Lufthansa employee's conduct under the Montreal Convention, and largely because Mr. Lipnick's lay intuition is correct: the carrier that sold him the ticket is legally responsible for the agents it hires to run its boarding gates. *See McCarthy v. Am. Airlines, Inc.*, 2008 WL 2704515 (S.D. Fla. June 27, 2008) ("Under the Convention, where there is a contracting carrier and an actual carrier, both carriers 'shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the contract, the latter solely for the carriage which it performs.'" [quoting Article 40]). In this case, United was the contracting carrier, liable for any injuries suffered by Mr. Lipnick during the course of the flight, including embarkation. Lufthansa is the actual carrier for the embarkation, which it handled through its staff at gate H-48. United does not challenge this, and even admits that it is liable under the Montreal Convention if Mr. Lipnick can show that he was injured in an "accident." (United Mtn. at 2-3.)

It appears that these comments by United in its motion, along with its arguments about Mr. Lipnick's credibility, and its inclusion of irrelevant facts, are intended to distract from the

weakness of the actual issues raised by its motion. In any case, United's argumentative aspersions on Mr. Lipnick have no place in this motion.

The actions of the Lufthansa employee in refusing to allow Mr. Lipnick to use the elevator, and directing him to use the escalator without any offer of assistance, directly and proximately caused Mr. Lipnick to fall. Her actions were "unexpected and unusual" in that she unreasonably instructed Mr. Lipnick to engage in the unsafe activity of transporting his cumbersome luggage down an escalator, by himself, when an elevator was available nearby.

This qualifies as an "accident" under the Montreal Convention, and the Defendants are liable for Mr. Lipnick's injuries. But both carriers try to parse the word "accident" in the Montreal Convention beyond any logical meaning, and assert that the Court should set aside the gate agent's role in sending Mr. Lipnick onto a precarious pathway and should instead hold as a matter of law that Mr. Lipnick was required to figure out a safer means of getting onto the aircraft than the one offered by the airline.

C. Mr. Lipnick's Fall was an "Accident" Under the Montreal Convention

The Defendants say they are not liable for Mr. Lipnick's injuries because his injuries did not result from an "accident" as it has been defined under the Montreal Convention and Warsaw Convention before it.

Both the Montreal Convention and Warsaw Convention before it use the term "accident" in a similar plain-English way. Article 17 of the Warsaw Convention provides:

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

In *Saks*, the Supreme Court held that an "accident" under Article 17 is "an unexpected or unusual event or happening that is external to the passenger," and not "the passenger's own

internal reaction to the usual, normal, and expected operation of the aircraft." 470 U.S. at 405. "This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries." *Id*. "In cases where there is contradictory evidence, it is for the trier of fact to decide whether an 'accident' as here defined caused the passenger's injury." *Id*. (Internal citations omitted.)

Defendants ignore that Lufthansa's employee directly and proximately caused Mr. Lipnick's injury by unreasonably directing him to transport himself and his visibly cumbersome luggage, without assistance, down an escalator after he requested the use of a nearby elevator. Instead, Defendants rely solely on cases that held that no "accident" had occurred in situations in which no action on the part of the defendants contributed to the plaintiffs' injuries. But the Supreme Court, among others, has ruled that an "accident" includes an instance in which a passenger requests help, the defendant refuses help, and the passenger is then harmed, exactly as in this case.

In *Olympic Airways v. Husain*, 540 U.S. 644 (2004), the Supreme Court analyzed an "accident" in the context of an airline employee consciously failing to provide assistance to a passenger in need. On a flight from Europe to the United States, a passenger with asthma was seated three rows in front of a smoking section. *Id*. at 647. The passenger's wife made three requests to the flight attendant to move her husband but was refused. *Id*. The flight attendant denied the passenger's requests, claiming that the plane was full, even though there were some unoccupied seats, but eventually permitted the passenger to switch seats with another passenger. *Id*. at 647-648. The passenger subsequently moved toward the front of the plane to get some fresher air, but he died after receiving medical assistance. *Id*. at 648.

The Supreme Court upheld the Ninth Circuit's decision, affirming that the flight

attendant's refusal to move the passenger constituted an "accident" within the meaning of Article 17. *Id*. Notably, the District Court found, and petitioner air carrier did not later appeal the finding, that the flight attendant's conduct in refusing to move the plaintiff three times was "unusual or unexpected" in light of the relevant industry standard and the petitioner's own company policy. *Id*. at 652. Instead, the airline argued that the flight attendant's conduct was irrelevant for the purposes of the "accident" inquiry and that the only relevant event was the presence of the ambient cigarette smoke in the aircraft's cabin. *Id*. at 652-653. The Supreme Court held that the defendant's focus on the ambient cigarette smoke as the injury producing event was misplaced:

> Petitioner's "injury producing event" inquiry—which looks to "the precise factual 'event' that caused the injury"—neglects the reality that there are often multiple interrelated factual events that combine to cause any given injury. In Saks, the Court recognized that any one of these factual events or happenings may be a link in the chain of causes and—so long as it is unusual or unexpected—could constitute an "accident" under Article 17. Indeed, the very fact that multiple events will necessarily combine and interrelate to cause any particular injury makes it difficult to define, in any coherent or non-question-begging way, any single event as the "injury producing event."

Id. at 653 (internal citations omitted).

In this case, the Defendants make a similar error of logic. Just as the Olympic airline wasn't responsible for the other passengers smoking – this in a prior era of travel when it was allowed – United and Lufthansa seize on the escalator having no defect in its operation. But the issue is that they exposed Mr. Lipnick to the danger of an unassisted trip down a two-flight escalator with bulky bags, at the bottom of which, the predictable happened.

The Court in *Husain* explained that in a case such as this one, the denial of assistance can cause an "accident":

> The rejection of an explicit request for assistance would be an "event" or "happening" under the ordinary and usual definitions of these terms. See

> American Heritage Dictionary 635 (3d ed. 1992) ("event": "[s]omething that takes place; an occurrence"); Black's Law Dictionary 554-555 (6th ed. 1990) ("event": "Something that happens"); Webster's New International Dictionary 885 (2d ed. 1957) ("event": "The fact of taking place or occurring; occurrence" or "[t]hat which comes, arrives, or happens").

Id. at 655. The Court therefore rejected the position that an "accident" cannot take the form of an airline employee's failure to take action in response to a passenger's requests for help. *Id*.

In *Gezzi v. British Airways PLC*, 991 F.2d 603 (9th Cir. 1993), a plaintiff who slipped on water on stairs used for embarkation was injured due to an Article 17 "accident." The court identified two "accidents" for the purposes of the Warsaw Convention:

> An "accident" causing plaintiff's injury was the presence of water on the steps of the staircase. **Another "accident" causing plaintiff's injury was the refusal of defendant's attendant accompanying the plaintiff, to assist the plaintiff down the staircase.** Each of these was a proximate cause of the injuries to plaintiff.

Id. at 604 (emphasis added).

In *Prescod v. AMR, Inc.*, 383 F.3d 861 (9th Cir. 2004), a passenger's death from an airline's negligent delay in returning luggage containing passenger's prescription inhaler was an Article 17 "accident." "Just as in *Husain*, 'the rejection of an explicit request for assistance would be an "event" or "happening" under the ordinary and usual definitions of these terms.'" *Id*. at 868. The delay in returning the bag was "unusual or unexpected" and external to the passenger, in light of the fact that the defendants' employees had been warned of the passenger's reasonable needs, agreed to accommodate them, then failed to do so. *Id*.

The facts of this case, as described in the Complaint, in Mr. Lipnick's Depositions (Ex. 2 and Ex. 7), in his Interrogatory Answers (Ex. 9 at 5-6), and in the attached Declaration of Mr. Lipnick (Ex. 1), which the Court must accept as true for the purposes of this Motion, are that a Lufthansa employee forbade Mr. Lipnick from using an elevator to transport his encased contraforte, which was nearly five feet tall and weighed 70 pounds, and his other two pieces of

luggage, to embark onto United flight 903. Mr. Lipnick made repeated requests, but the Lufthansa employee refused to allow Mr. Lipnick to use the elevator, and instructed him to proceed down the escalator. The Lufthansa employee was, or should have been, fully aware that Mr. Lipnick required assistance getting his bulky luggage through the gate to the aircraft. Instructing a passenger to carry such luggage down an escalator instead of a nearby functioning elevator is the "unusual or unexpected" event that occurred in this case that directly and proximately caused Mr. Lipnick's injuries.

Defendants rely on the cases *Ugaz v. American Airlines, Inc.*, *Sethy v. Malev-Hungarian Airlines, Inc.*, and *Rafailov v. El Al Israel Airlines, Ltd.*, but none of these district court cases involves an airline employee directly instructing a passenger into an unsafe mode of embarkation that resulted in injuries.

In *Ugaz v. American Airlines, Inc.*, an injured passenger reached an inoperable escalator, was urged by fellow passengers to climb the escalator, and then fell after climbing several steps of the escalator. 576 F. Supp 2d 1354, 1359 (S.D. Fla. 2008). The court characterized the question before it as "whether an inoperable escalator, ***standing alone***" is unreasonably unsafe when "there is no evidence that the Defendants had actual or constructive notice of its condition." *Id*. at 1357. (emphasis added). Thus, in *Ugaz*, the defendants didn't actually do anything to cause the plaintiff's injuries, and were not aware of any problem with their escalator.

In *Sethy v. Malev-Hungarian Airlines, Inc.*, an injured passenger tripped and fell over a piece of luggage left in the aircraft's aisle. 2000 WL 1234660 (S.D.N.Y. Aug. 31, 2000). The court ruled that "there is nothing 'unexpected or unusual' about the presence of a bag in or near the aisle during the boarding process," stating "plaintiff cannot point to any act or omission by the airline's crew or passengers that could have caused his alleged injury." *Id*.

In *Rafailov v. El Al Israel Airlines, Ltd.*, like *Ugaz* and *Sethy*, an injured passenger fell as the result of a dangerous condition that the defendant was completely unaware of – a plastic bag on the floor of an aircraft. 2008 WL 2047610 (S.D.N.Y. May 13, 2008). The court ruled that "after four hours in flight, it would seem customary to encounter a certain amount of refuse on an airplane floor, including blanket bags discarded by passengers." *Id*. The plaintiff argued that the airline had failed to properly clear the aisle for passengers, but the court ruled that under the Montreal Convention, the term "accident" requires only an inquiry into the cause of the injury, and not any preliminary precautions taken by an airline to avert an injury. *Id*.

The common thread running through all of the cases cited by the Defendants is that the defendants had done nothing whatsoever to cause the plaintiffs' injuries. The best that the plaintiffs could argue in those cases was that the airline failed to take some preliminary precaution to prevent a future injury. That is not the case here.

Indeed, there is no case law that states that an airline is not liable for the actions of its employees that unreasonably put a passenger in harm's way. In fact, the above-cited cases of *Husain, Gezzi,* and *Pescod* all confirm that an airline employee's instructions to a passenger or refusal of assistance that result in harm to a passenger are "accidents" under the Montreal Convention.

The Lufthansa employee who denied Mr. Lipnick the use of the elevator knew, or should have known, that Mr. Lipnick was travelling alone with his luggage (since he had two tickets), and did nothing to offer Mr. Lipnick assistance while he descended the escalator. She knew, or should have known, that she was sending Mr. Lipnick to take his three pieces of luggage, including a large and heavy contraforte case, down an escalator in one trip with no assistance. While United argues that the Lufthansa employee's instruction to Mr. Lipnick that he could not

use the elevator was "routine," (United Mtn. at 17), both Mr. Lipnick's subsequent experiences and Mr. Kim Kent's testimony show that these elevators were typically used for passengers in need of assistance, such as Mr. Lipnick. (Ex. 1, Lipnick Declaration at ¶ 7-8; Lipnick Depo. 4/29/13 at 325:8-18; Ex. 6, Kim Kent Depo. at 22:21-23:14.) Therefore, by any measure, the Defendants' conduct was unreasonably dangerous, and was "unusual and unexpected" within the definition of "accident."

Under Defendants' definition of "accident," an airline would never be liable for instructing its passengers into an unsafe situation. This would be an absurd result, especially in light of the Montreal Convention's purpose of providing protection to passengers injured while embarking on international flights.

D. The Plaintiff Can Prove That the Defendants' Failure to Provide Him With Assistance Caused Him to Fall

The Defendants also argue that Mr. Lipnick cannot prove causation because he cannot prove that the elevator in question was operating. (United Mtn. at 16-17.) This argument ignores the basis of the Plaintiff's case, which is the Defendants' failure to assist him down to the plane in light of his request for assistance. The most obvious form of assistance would have been allowing him to use the elevator, assisting him with his baggage as occurred on subsequent flights out of Munich. (Ex. 7, Lipnick Depo. 4/29/13 at 325:8-18, 374:18-376:16.) If the elevator was not operating, the Defendants still could have offered Mr. Lipnick assistance down the escalator by having an employee help with one or more of his bags. Directing him to descend unaccompanied on the escalator with his baggage was unreasonable, and is the basis of Mr. Lipnick's claim.

Additionally, under District of Columbia law, a fact-finder is permitted to draw reasonable inferences from the testimony and evidence at trial. *See Morrison v. U. S.*, 417 A.2d

409, 413 (D.C. 1980) (finding that a jury could reasonably infer that a gun was operable despite it not being fired or presented as evidence at trial).

In this case, a jury could - and likely would - make the reasonable inference that the elevator in question was operating properly. The Lufthansa employee told Mr. Lipnick "The elevator is for our use only," but did not tell Mr. Lipnick that the elevator was broken. (Ex. 2, Lipnick Depo. 10/12/11 at 72:2-3.) Nor was there a sign on the elevator indicating that it was out of order. (Ex. 2, Lipnick Depo. 10/12/11 at 73:3-8.) Simply put, there is every reason to assume that the elevator was operating in the normal matter, and no reason to believe otherwise. Therefore, a juror would be able to reasonably infer that the elevator was operating properly, which is an inference that the Court must accept for purposes of considering the Defendants' motions for summary judgment.

E. The Court Cannot Rule that Mr. Lipnick was Contributorily Negligent as a Matter of Law

The Defendants ask this Court to find that Mr. Lipnick was the sole cause of his own injuries, as a matter of law, severing the causal chain from the Defendants' negligence in denying him assistance and leaving him to take his burdensome luggage down to Flight 903 via escalator.

Article 20 of the Montreal Convention provides for comparative negligence, allowing the finder of fact to determine the degree to which a defendant should be exonerated based on the plaintiff's negligence.[8]

[8] **Article 20 - Exoneration**
If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, **the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.** When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly

As a general matter, "[i]ssues of contributory negligence, like issues of negligence, present factual questions for the trier of fact 'unless the evidence is so clear and undisputed that fair-minded men can draw only one conclusion.'" *Lyons v. Barrazotto*, 667 A.2d 314, 322 (D.C.1995) (internal citations omitted). "Only in the exceptional case is evidence so clear and unambiguous that contributory negligence should be found as a matter of law." *Id*. (quoting *Washington v. A. & H. Garcias Trash Hauling*, 584 A.2d 544, 547 (D.C.1990)); *see also Paraskevaides v. Four Seasons Wash.*, 292 F.3d 886, 893 (D.C.Cir.2002) ("Only in exceptional cases will questions of negligence [and] contributory negligence ... pass from the realm of fact to one of law,"); *Hsieh v. Consol. Eng'g Servs.*, 569 F.Supp.2d 159, 182–83 (D.D.C. 2008) ("Contributory negligence is virtually always a question of fact for the jury," quoting *Andrews v. Wilkins*, 934 F.2d 1267, 1272 (D.C. Cir. 1991)).

The Defendants reveal the absurdity of their defense by claiming that Mr. Lipnick was the sole cause of his injuries, as a matter of law, because of the numerous "decisions" he failed to make, which allegedly would have allowed him to avoid injury. A review of these arguments shows that they rely on hindsight reasoning, most of them defy common sense, and none of them provides the Court with a basis for ruling that Mr. Lipnick was the sole cause of his injuries:

Argument 1: Mr. Lipnick should have checked his bags instead of carrying them on the plane. (United Mtn. at 19.)

Response: Mr. Lipnick's primary piece of luggage, his new contraforte, was an extremely delicate musical instrument that cost over $30,000, which is why he had purchased an extra seat. Checking it would have defeated the purpose of purchasing a separate seat, and would have

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exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21. (emphasis added.)

exposed the instrument to damage in the plane's hold.

Furthermore, Mr. Lipnick had no reason to believe he was going to be denied safe access onto the aircraft by airline employees whose job it was to ensure that passengers embarked safely, and who exclusively controlled access to the plane. When he checked in, and had the opportunity to check baggage, Mr. Lipnick expected that he would be able to board the aircraft with his contraforte and carry-on baggage without having to navigate an escalator or stairway. But rather than assisting this passneger in need, Lufthansa's employee gave Mr. Lipnick only the option of taking the escalator or stairs.

Therefore, Mr. Lipnick's "decision" not to check his bags was reasonable, and is no basis for judging Mr. Lipnick to be the sole cause of his injuries as a matter of law.

Argument 2: Mr. Lipnick should have recognized the danger of going down the escalator, since he admitted he was hesitant about descending the escalator. (United Mtn. at 19, Lufthansa Mtn. at 14.)

Response:

In making this argument, the Defendants cut off their noses to spite their faces, claiming that Mr. Lipnick faced such a dangerous situation going down the escalator, that he should have known it was unsafe and found an alternative way down the escalator. (United's Mtn. at 19.) The Defendant ignores that its employees and agents also should have realized the danger to Mr. Lipnick, when he presented it to them, and offered him the use of the elevator or assisted him with his bags, instead of leaving him to descend the escalator alone.

The Defendants also take quotations from Mr. Lipnick out of context to show that he "knew" he was going into a dangerous situation. For example, Lufthansa makes a selective quotation on page 14, footnote 11 of its motion, in an attempt to show that Mr. Lipnick was

unsure about how he was going to get his luggage safely onto the escalator. Lufthansa implies that Mr. Lipnick knew the situation was dangerous because he thought to himself "how the hell am I going to get this thing on a fairly quickly moving escalator, me on and then my carry-on without having a disaster." Yet a full reading of Mr. Lipnick's testimony shows that Mr. Lipnick, after several "dry runs," was able to arrange his luggage and safely descend the first escalator to the landing below. (Ex. 2, Lipnick Depo. 10/12/11 86:24 - 92:4.) Mr. Lipnick had answered his own internal concerns, and therefore he had no reason to believe that he could not do the same thing with the second escalator, which he ultimately fell on.

Of course Mr. Lipnick knew that it would be difficult to move his luggage down the two escalators. But the point is that the Defendants gave him no safer alternative, and he was forced to make the best of his situation, which he did, taking every precaution possible as he moved down the escalators.

Therefore, not only does this argument not provide the Court with a basis for ruling that Mr. Lipnick was the sole cause of his injuries, but it is actually the very reason why the Defendants were the sole cause of Mr. Lipnick's injuries.

Argument 3: Mr. Lipnick should have taken the stairs, which would have offered him "a more controlled descent." (United Mtn. at 19, Lufthansa Mtn. at 13.)

Response: The idea that Mr. Lipnick would have been safer descending the stairs with his luggage, compared to the escalator, is absurd. This would have involved Mr. Lipnick picking up his 70-pound instrument - in addition to his other luggage - and moving it down step by step, having to keep his balance on each step or risk falling down an entire flight of stairs. The Defendants want the Court to find that the very idea of taking the escalator over the stationary stairs was so unreasonable as to constitute sole negligence. They want this Court to rule that no

"fair-minded juror" could find that it was reasonable to think that it would be safter to take heavy and burdensome luggage down an escalator instead of picking it up and attempting to move it down stairs. Such an argument defies common sense.

Along the same lines, Lufthansa implies that Mr. Lipnick should have held onto the handrail of the escalator to keep his balance, remarking, "escalators have handrails for a good reason." (Lufthansa Mtn. at 15.)

Lufthansa apparently believes Mr. Lipnick should have carried all three pieces of his luggage with one hand, while holding onto the handrail with another. Not only would this have been impossible, but it would have been a much more dangerous option, as it would have dramatically increased the chances that Mr. Lipnick would have lost control of his baggage, causing it to spill down the escalator, potentially pulling him down with it or causing him to trip. No reasonable person could think that this would be a reasonable approach, much less that Mr. Lipnick's decision to use both hands to hold onto his luggage was so unreasonable as to justify sole negligence.

Argument 4: Mr. Lipnick should have made multiple trips down the escalator with some of his baggage left unattended at either end. (United Mtn. at 19, Lufthansa Mtn. at 14.)

Response: The Defendants' suggestion that Mr. Lipnick should have figured out how to get his baggage into the aircraft with multiple trips or "stages" from the gate down the escalator is as absurd as the argument that Mr. Lipnick was unreasonable in thinking the escalator would be safter than the stairs. Under the ordinary rules of airport security that apply in both Germany and the United States, any bags that Mr. Lipnick had left at the top of the escalator would have been quickly confiscated or stolen. (Ex. 1, Lipnick Declaration at ¶ 6.) In addition, the passage from gate to aircraft in this airport with a separately ticketed bag like Mr. Lipnick's contraforte

instrument case is time-consuming and has required him at least 25 minutes under similar circumstances, even using the gate elevator. (Ex. 1, Lipnick Declaration at ¶ 6.) Thus, leaving aside the legal impossibility of doing as the Defendants suggest, it would have been wildly impractical.

Argument 5: Mr. Lipnick should have asked strangers for assistance. (United Mtn. at 19.)

Response: United indicates in its motion that Mr. Lipnick should have asked "anyone" for help, including fellow passengers. United overlooks that Mr. Lipnick did ask somebody for help: a Lufthansa employee in charge of boarding the aircraft who denied him assistance through the use of the elevator, leaving him to take the escalator. Rather than accept responsibility for not helping Mr. Lipnick, the Defendants argue that Mr. Lipnick was solely responsible for his own injuries by not asking private individuals to move his valuable and delicate luggage. But as Mr. Lipnick's testimony makes clear, he was simply doing the best he could in the dangerous situation that the Defendants put him in. Given this, and Mr. Lipnick's justified trepidation at asking strangers to handle his valuable baggage, the Court cannot rule that Mr. Lipnick's decision to try the second escalator alone was unreasonable, much less so unreasonable as to constitute contributory negligence as a matter of law.

Argument 6: Mr. Lipnick should have brought a "second person" to assist him to carry all of his luggage. (United Mtn. at 19.)

Response: Once again, Mr. Lipnick had no reason to believe that he was going to be denied assistance and safe passgage onto Flight 903 until the moment he was told he could not use the elevator, after he had already checked in and arrived at the gate. Therefore, it would not have been reasonable for him to hire an assistant, as the Defendant seems to suggest he should

have done, much less is it so unreasonable that it constitutes contributory negligence as a matter of law.

* * *

On the current state of the evidence in this case, the Defendants' efforts to claim that Mr. Lipnick is solely responsible for his own injury are so lacking in common sense or credibility that any fact finder would be hard-pressed to find for the Defense. Yet the Defendants ask this Court to hold that they are now entitled to judgment because no reasonable fact finder could fail to side with these air carriers. Their arguments are frivolous, but in any event, should be directed to the trier of fact.

Therefore, Mr. Lipnick has established that he was injured in an "accident" while embarking on to United flight 903 on September 18, 2010, through gate H-48 of the Munich Airport, which was under the control of the carriers United Airlines and Lufthansa.

II. Plaintiff Has Established Causation

The Defendants also argue that Mr. Lipnick cannot establish that the physical and emotional pain he has experienced since his fall in Munich were caused by that fall, through the testimony of his treating physicians, since they did not provide reports written for purposes of this lawsuit. But the Plaintiff has done everything required under the federal rules to designate his treating physicians as experts to testify about his physical and emotional pain, its causes and his prognosis. In addition, both Mr. Lipnick's physicians and Mr. Lipnick himself, through his own testimony about his injuries, can establish causation and the permanency of his injuries.

A. Plaintiff Did Not Need to Produce Rule 26(a)(2)(B) Written Reports for His Treating Physicians

The Defendants misstate the law in this jurisdiction regarding whether a treating physician must provide a Rule 26(a)(2)B) written report to testify about causation and prognosis.

Courts in this district - including in the cases cited by the Defendants - have held that treating physicians are not required to provide a Rule 26(a)(2)(B) written report to offer opinions of causation and prognosis, when those opinions are formed in the course of treating the plaintiff. *See Kirkham v. Societe Air France*, 236 F.R.D. 9 (D.D.C. 2006); *Riddick v. Washington Hosp. Ctr.*, 183 F.R.D. 327, 330 (D.D.C. 1998). Although the Defendants rely on *Bynum v. MVM, Inc.*, 241 F.R.D. 52, 54 (D.D.C. 2007), this case actually suggests that a treating physician may testify about causation and prognosis if, as is the case with Mr. Lipnick, those opinions were formed in the course of treatment. *Bynum* ruled that the expert in question could "testify solely as to information learned from his actual treatment, examination, or analysis of [the plaintiff's] condition" and noted, "The majority rule is that "an expert report is not required from treating physicians except when that physician will testify to matters learned outside the scope of treatment." (citing Moore's Federal Practice § 26.23[2][b][iii] (3d Ed.2002)). 241 F.R.D. at 54

A more complete discussion of this issue comes in *Kirkham*, 236 F.R.D. at 12-13, which ruled that a treating physician could testify about causation and prognosis without a written litigation report. In *Kirkham*, the court said, "there are widely divergent views within the federal courts on whether a treating physician providing expert testimony is required to provide an expert report in advance of testifying under Rule 26(a)(2)(B)." *Id*. at 11. But, the court noted, "Despite the disagreement, there is consensus on a few principles. First, whether the expert was 'retained or specially employed' in connection with the litigation must be considered, given the plain language of Rule 26(a)(2)(B) . . . Second, a treating physician who testifies solely as to information learned from his actual treatment of a patient is not subject to the expert report requirement-the written report requirement would apply, if at all, only to causation, prognosis, and permanency." *Id*. at 12. The *Kirkham* Court then cited favorably to two cases which allowed

treating physicians to testify about causation and prognosis without a report: *Sullivan v. Glock*, Inc., 175 F.R.D. 497, 500 (D. Md. 1997) and *Riddick v. Washington Hosp. Ctr*., 183 F.R.D. 327, 330 (D.D.C. 1998).

Kirkham cited *Sullivan* for the proposition that "[the] written report requirement does not apply to causation and prognosis testimony, but only if treating physician's opinion is based on facts 'obtained from actual treatment'" 236 F.R.D. 9 (citing *Sullivan*, 175 F.R.D. at 508).

Kirkham ruled that a treating physician could testify about causation, prognosis, and permanency of injuries, but first the court needed to consider factors such as whether the experts prepared their opinons at the request of counsel; whether the opinion was based solely information learned from his actual treatment and care of plaintiff; whether the physician expected to receive compensation for time spent preparing for testimony and/or providing testimony; and whether the physician review the medical records of another care provider or information supplied by counsel in order to prepare his opinion. *Id*.

In *Riddick*, 183 F.R.D. at 330, which Lufthansa cites in support of its motion (Lufthansa Mtn. at 21), the court ruled that a treating physician could testify about issues of causation and permanency if she "reached her opinions about causation and injury directly through her treatment of [the plaintiff]" *Id*. The court in *Riddick* quoted *Shapardon v. W. Beach Estates*, 172 F.R.D. 415, 416-17 (D. Haw. 1997), which said, "Treating physicians commonly consider the cause of any medical condition presented in a patient, the diagnosis, the prognosis and the extent of disability, if any, caused by the condition or injury. Opinions as to these matters are encompassed in the ordinary care of a patient and do not subject the treating physician to the report requirement of Rule 26(a)(2)(B)."

Shapardon cited numerous other courts around the country that have ruled similarly:

Piper v. Harnischfeger Corp., 170 F.R.D. 173, 175 (D. Nev. 1997) (no written report required if treating physician's testimony as to "causation, future treatment, extent of disability and the like" is based on knowledge acquired in the course of treatment); *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D. Colo. 1995) (opinions of treating physicians as to the cause of an injury or degree of future injury based on an examination of the patient "are a necessary part of the treatment of the patient."); see also *Wreath v. U.S.*, 161 F.R.D. 228, 229 (D. Kan. 1995); *Mangla v. University of Rochester*, 168 F.R.D. 137, 139 (W.D.N.Y. 1996).

In fact, "the majority of other courts in the country have concluded that Rule 26(a)(2)(B) reports are not required as a prerequisite to a treating physician expressing opinions as to causation, diagnosis, prognosis and extent of disability where they are based on the treatment." *Sprague v. Liberty Mut. Ins. Co.*, 177 F.R.D. 78, 81 (D.N.H. 1998); *see also Washington v. Arapahoe Cnty. Dep't of Soc. Servs.*, 197 F.R.D. 439, 442 (D. Colo. 2000), (*citing* Christopher W. Dyer, Note, "Treating Physicians: Fact Witnesses or Retained Expert Witnesses In Disguise? Finding a Place for Treating Physician Opinions in the Iowa Discovery Rules," 48 *Drake L.Rev.*, 719, 727–31 (2000) which found that "The majority of federal courts considering the issue of whether treating physicians are subject to reporting requirements when presented to provide opinion testimony on prognosis, causation, or standard of care, have concluded treating physicians are not subject to these requirements, so long as the opinions stem from treatment.").

The court in *Sprague* explained the rationale for why treating physicians are not required to generate Rule 26(a)(2)(B) written reports:

> The unretained experts, who formed opinions from pre-litigation observation, invariably have files from which any competent trial attorney can effectively cross-examine. The retained expert, who under the former interrogatory rule frequently provided sketchy and vague answers, has no such files and is thus required to provide the report to enable effective cross-examination. This reading puts unretained experts, because of their historical file, and retained experts,

> because of the required report, on equal footing for cross-examination purposes. *Sprague.*

177 F.R.D. at 81.

Therefore, as most courts have recognized, including this court, a treating physician is not required to provide a written report to support opinions of causation and prognosis, if those opinions were formed in the course of treatment..

In Mr. Lipnick's case, his three treating physicians have all formed opinions about causation and permanency of his injuries in the course of their treatment of Mr. Lipnick. Plaintiff's expert disclosure (Lufthansa's Ex. D) indicates that Dr. Cherrick and Dr. Drachman will testify that Mr. Lipnick has suffered from a chronic pain syndrome since his fall at the Munich Airport, and that his injuries are likely to be permanent. Dr. Waletzky will testify that Mr. Lipnick has suffered from severe depression and anxiety since his fall, which is based on his observations and treatment of Mr. Lipnick.

These physicians all began treating Mr. Lipnick shortly after his fall (or in the case of Dr. Drachman and Dr. Waletzky, had also seen him for unrelated issues prior to the fall), and were never retained by counsel to provide opinions in this case. These physicians continued to see Mr. Lipnick for some time, and in the case of Dr. Drachman, supervised his medical care as recently as his May 2013 admission to Johns Hopkins. Though these physicians will likely expect to be compensated for their time testifying at deposition and trial (as virtually all physicians, retained or otherwise, do), the Plaintiff expects that their opinions will be based on their own experience treating Mr. Lipnick.

The need for written reports is particularly unnecessary in this case, where the physicians in question have written about Mr. Lipnick's condition in the medical records that have already been provided to the Defendants, and the Defendants have the opportunity to depose these

witnesses to explore their opinions further.[9] These medical records also show that these physicians developed their opinions during the course of treating Mr. Lipnick, and give the Defendants the basis for cross-examining these physicians, as discussed in *Sprague*. 177 F.R.D. at 81

Shortly after the incident, in December 2010, Dr. Drachman noted:

> [Mr. Lipnick] had a fall on 9/18 and apparently landed on his left elbow at that time, with a sensation of a "crack" and pain going down the arm to the hand as well. as electric shock sensations. He initially had fatigue of the left hand when playing the contrabassoon for an hour or so. . . .
>
> This patient clearly had a fall followed by symptoms of weakness of the left hand and possibly the L. arm. He has been seen by a surgeon who is considering transposing the left ulnar nerve. EMG done elsewhere apparently showed some evidence of denervation in the left upper extremity, especially hand and forearm but no evidence of conduction block or slowing of the ulnar nerve . . . .
>
> Problems/Diagnoses:
> Trauma to the left upper extremity with apparent recovery. Mild tenderness over the left supraclavicular fossa. L. C8 and T1 radiculopathy mild ulnar N. compression R> L.

(Ex. 10)

In other words, from the beginning, Dr. Drachman recognized that Mr. Lipnick had suffered a traumatic injury to Mr. Lipnick's left arm, which had caused him pain and tenderness.

When Dr. Cherrick first saw Mr. Lipnick in February 2011, he commented about the causation of the injury, noting that he had been impaired since his fall:

> Since the fall that occurred on September 18, 2010, the patient has gone through numerous treatments, but he remains impaired. He cannot play his instrument effectively. He continues to work through the chronic neuropathic pain that he has.

(Ex. 12.)

[9] At present the parties are scheduling the depositions of these witnesses, where the Defendants will have the opportunity to explore the opinions they formed during their treatment of Mr. Lipnick.

In October, 2012, Dr. Cherrick commented in his record on the permanency of Mr. Lipnick's injuries:

> This patient here to be assessed his chronic pain. He has chronic neuropathic pain involving left upper extremity some neck pain. Recent attempts at epidurals were complicated by post injection pain.
>
> We talked about this symptom acceleration and his level of disability in impairments. I believe he is reached MMI [Maximum Medical Improvement]. He is tried every conceivable nonsurgical approach to his pain problem. I would not suggest that he have a cervical fusion which would include multilevel decompression laminectomy and fusion.
>
> We also talked about psychological factors affecting his physical impairments. We talked about some of his reported symptoms with medications including the transdermal medications. I am inclined to approach this from an MMI point of view and continue with medication management. believe he is no longer able to improve beyond where he is at.

(Ex. 13.)

By February of this year, Mr. Lipnick could no longer perform his instrument at a professional level, and took a temporary leave of absence from the National Symphony Orchestra. (Ex. 7, Lipnick Depo. 4/29/13 at 284:4-8.) This caused Mr. Lipnick depression and anxiety (including suicidal thoughts), and led to his being checked into the Johns Hopkins University Psychiatric Pain Clinic for nearly a month. (Ex. 8, Plaintiff's Supplemental Answers to Interrogatories at 3-4.) After undergoing a difficult and traumatic withdrawal from his previous medication regimen at Johns Hopkins, Mr. Lipnick was placed on a new regimen, which has caused him to feel somewhat better. (Ex. 8.) Though he still experiences pain in his arm, neck, and shoulder, Mr. Lipnick has returned to performing with the NSO. (Ex. 8.)

Dr. Drachman saw Mr. Lipnick regularly during his admission to Johns Hopkins. While some of the records related to Mr. Lipnick's admission to Johns Hopkins have been produced by the hospital, the parties are awaiting the rest of those records, which will undoubtedly provide

the Defendants with more material to cross-examine Dr. Drachman on his opinions regarding the prognosis and permanency of Mr. Lipnick's injuries.

The records quoted above are only a sample of the notes created by Mr. Lipnick's physicians regarding his care. But these samples alone demonstrate that these physicians have developed their opinions in the course of treating Mr. Lipnick, and are also sufficient to give the Defendants fair notice of the opinions and an opportunity to inquire further. The Defendants can explore these opinons further at deposition, but Mr. Lipnick has made the prima facie case that his fall caused his subsequent injuries, and that these injuries are likely to be permanent. The issue is certainly not appropriate for summary judgment.

Therefore, the Plaintiff has provided the Defendants with all that is required under the federal rules for disclosing the opinions of his treating physicians.

B. Mr. Lipnick Can Testify as to the Causation and Permanency of His Injuries

In addition, Mr. Lipnick can testify about the causation and permanency of his own injuries. In the District of Columbia, a lay person can testify as to the causal connection between an accident and an injury "1) when the injury develops within a reasonable time after the accident; 2) when causation is clearly apparent; or 3) when the cause of injury relates to matters of common experience, knowledge, or observation of laypersons." *Lewis v. Washington Metro. Area Transit Auth.*, 19 F.3d 677, 679 (D.C. Cir. 1994).

In this case, Mr. Lipnick would satisfy any of the three areas in which lay testimony is allowed to establish the causation of an injury. When a person falls on their arm, and then experiences immediate and new pain in that arm, shoulder, and part of their neck, when they never experienced such pain before, and that pain continues over time, it is apparent that the fall caused the injury.Mr. Lipnick can also testify about his depression and anxiety which he has

suffered as a result of his physical pain, and the prospect of losing his career. These injuries do not require a physician to establish that they were caused by the fall in Munich.

In addition, in the District of Columbia, a jury may conclude from the facts and circumstances of the case and the nature and duration of the injury, that a Plaintiff has suffered a permanent injury, even without medical testimony. See D.C. Standardized Civil Jury Instruction 13.02; *Estate of Underwood v. National Credit Union Administration*, 665 A.2d 621, 643 (D.C. 1995). In this case, Mr. Lipnick has now had pain in his arm, shoulder, and neck for nearly three years. Although Mr. Lipnick has underlying disc disease (as most individuals have), there is no question from the evidence that the injury that Mr. Lipnick suffered began on September 18, 2010, when he fell at the Munich Airport. Prior to that time he had not been treated for any similar pain or discomfort in his arm, neck and back.

* * *

The testimony of Mr. Lipnick's treating physicians, as well as his own personal account of his injury, clearly establishes that the physical pain and accompanying emotional depression and anxiety that he has suffered since his fall were caused by that fall, and the duration of his pain following his fall and injury provide a basis for a jury to find that the injury is permanent.

Conclusion

This is a substantial and obvious case of liability under the Montreal Convention. The Defendants' arguments rely on a contortionistic meaning of the word "accident" and a variety of absurd propositions about what Mr. Lipnick might have done to avoid the injury, any of which could have caused a worse injury, resulted in seizure of his property, or otherwise made matters much worse for him. The argument about his treating doctors is similarly flawed, and does not accurately state the law in this jurisdiction, which permits the type of designation of treating

physicians that the Plaintiff has made here. For the foregoing reasons, both Defendants' motions for summary judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2013, a true and correct copy of the foregoing was sent to the following parties via electronic service:

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