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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Iddy M. Pierre-Canel and Emmanuel J. Simeus, )

9

Plaintiffs, )

No. 4:17-CV-122-CKJ

10

vs. )

**ORDER**

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American Airlines, et al. )

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Defendants. )

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Pending before the Court is the Motion for Summary Judgment (Doc. 63) filed by Defendant American Airlines, Inc. (“American”). Plaintiffs Iddy M. Pierre-Canel (“Pierre-Canel”) and Emmanuel J. Simeus (“Simeus”) (collectively, “Plaintiffs”) have filed a response (Doc. 65) and American has filed a reply (Doc. 67). Oral argument has been requested. However, the issues are fully presented in the briefs and the Court finds it would not be assisted by oral argument. The Court declines to schedule this matter for oral argument. LRCiv 7.2(f).

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*I. Factual and Procedural Background*

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On February 8, 2016, Pierre-Canel’s child Carm-Idrelle Casseus (“Casseus”) died in Tucson, Arizona. Adair Funeral Home arranged for Casseus’s remains to be flown from Tucson, Arizona to Snowden Funeral Home in Baltimore, Maryland for cremation and for memorial services.

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Pierre-Canel’s return flight to Tucson, with a layover in Dallas/Fort Worth, was booked with American for March 5, 2016. Simeus returned to Tucson a few days earlier.

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1 Pierre-Canel had Casseus's cremated remains placed in a sealed screw top urn ("the  
2 Urn"). Plaintiffs assert Pierre-Canel packed the Urn, her daughter's pictures, jewelry box  
3 and jewelry, personal items, and a yellow envelope containing numerous sympathy cards and  
4 monetary gifts in her Louis Vuitton duffel bag (the "LV Bag"). During her deposition  
5 testimony, Pierre-Canel testified that the LV Bag contained the Urn, three suits, ten dresses,  
6 two pairs of jeans, four pairs of dress pants, four pairs of shoes, cosmetics, one purse, two  
7 wallets, lingerie, undergarments, sandals and Casseus's \$24,000 in jewelry. Simeus testified  
8 during his deposition that he did not know what Pierre-Canel packed. Pierre-Canel planned  
9 to carry the LV Bag and a red roller bag (the "Red Bag") as carry-on baggage on the aircraft.  
10 Pierre-Canel asserts she arrived at the Baltimore-Washington International Airport ("BWI")  
11 with three bags; she checked a large gray bag at the ticket counter. American asserts its  
12 baggage records indicate Pierre-Canel checked one bag at 4:20 p.m. at the ticket counter.  
13 Plaintiffs point out that this assertion by American assumes their baggage records are  
14 accurate. American's customer service records and an American Senior Investigator admit  
15 American mishandled the bag(s) in question.

16 Pierre-Canel asserts she carried the remaining two bags (the LV Bag and the Red Bag)  
17 and proceeded towards the departure gate. At the TSA screening area, the TSA agent  
18 requested Pierre-Canel open the bags. The TSA agent noticed the Urn in the LV Bag and  
19 inquired about its contents. Pierre-Canel told the TSA agent the Urn contained the ashes of  
20 her daughter, Casseus; the TSA agent told Pierre-Canel not to carry the Urn outside the bag,  
21 just to keep it in her carry-on bag and proceed to the departure gate.

22 At the American departure gate, Pierre-Canel checked in. She asserts she then sat in  
23 the waiting area at the gate and, mourning the loss of her daughter, began crying quietly.  
24 Plaintiffs assert a gate agent approached Pierre-Canel three (3) different times and asked her  
25 if she could check Pierre-Canel's bags. Plaintiffs assert Pierre-Canel specifically told a gate  
26 agent that her daughter's ashes were in an urn in her LV Bag and refused to have her bags  
27 checked. As Pierre-Canel prepared to board the plane at the jetway door, a woman who was  
28 later identified as Gate Agent Rosann McCormack ("McCormack") took both carry-on bags

1 from Pierre-Canel. Plaintiffs also assert that neither McCormack nor anyone else told Pierre-  
2 Canel to remove valuable items from her bags. Pierre-Canel states she believed the gate  
3 agent was going to carry Pierre-Canel's bags on the airplane for her. Plaintiffs assert that,  
4 after Pierre-Canel took her seat in first class and the plane doors closed, a Gate Agent gave  
5 Pierre-Canel two baggage claim tickets.

6 American asserts its baggage records indicate Pierre-Canel checked one bag at the  
7 gate at 4:57 p.m. Plaintiffs assert the bag shown on American's records to have been  
8 checked in at 4:57 p.m. likely belonged to a different passenger whose luggage was also mis-  
9 tagged.<sup>1</sup> Plaintiffs assert, "[American's] own records show that their baggage service  
10 operators had only six minutes time to manipulate the bags from the time it was checked and  
11 the time it was loaded onto the plane. Therefore, Pierre-Canel's luggage could not have been  
12 checked at 4:57, as alleged by [American.]" Pl. SOF (Doc. 66, p. 5). The records further  
13 indicate the gate-checked bag was a red American Tourister bag and not a Louis Vuitton bag.  
14 American points out this was a full hour before the plane was boarded at 5:48 p.m. American  
15 also points out that Pierre-Canel testified that in all the times she has ever flown, she has  
16 never had a gate agent walk bags onto the plane for her.

17 Wendy Yang ("Yang"), McCormack, and Michael Bailey ("Bailey"), the American  
18 gate agents/customer service representatives working Pierre-Canel's flight, testified that they  
19 have no recollection of a woman from Pierre-Canel's flight telling them she was carrying an  
20 urn in a Louis Vuitton bag. They also testified that it would have stuck out in their minds if  
21 they had been told an urn was in a bag. However, neither McCormack nor Yang remember  
22 working Pierre-Canel's flight on March 5, 2016, and Bailey testified he was not at Pierre-  
23 Canel's gate on March 5, 2016. McCormack, the American employee identified by Pierre-  
24 Canel as the one who she believed would carry her bags onto the plane, testified that she has  
25 offered to carry a passenger's bags to the plane for them; however, McCormack also testified

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27 <sup>1</sup>American asserts Plaintiffs' use of the word "likely" shows that Plaintiffs have no  
28 evidence to support this statement.

1 that, in her opinion, if a person had carried their bags from the ticket counter to the gate  
2 agent, they would not need assistance to carry those same bags onto the plane.

3         Yang, McCormack, and Bailey also testified that, if a bag is checked there will always  
4 be a computerized record. However, Bailey testified that a computer record may not exist  
5 (for example, when there is no remaining overhead space or when systems are down).  
6 American asserts that even where there was an error (i.e., the wrong tag was placed on the  
7 Red Bag), a record is made of the event, unlike the alleged checking of the LV Bag, of which  
8 there is no record in American's computer system.

9         The LV Bag and the Red Bag, which Plaintiffs assert were checked by American  
10 personnel, did not timely arrive at the Tucson International Airport ("TIA"). Pierre-Canel  
11 went to the baggage claim department and told the American baggage personnel her bags had  
12 not arrived. Pierre-Canel asserts she immediately requested assistance from American  
13 personnel to locate the Urn containing the ashes of Casseus, as well as her lost bags  
14 containing other valuable property. Plaintiffs asserts Pierre-Canel retrieved the LV Bag at  
15 TIA the next day. However, Plaintiffs assert the Urn was not in the LV Bag and that the bag  
16 had been torn and the zipper broken. Pierre-Canel hoped the Urn would be located because  
17 she asserts American personnel told her that, because the LV Bag had been damaged, the Urn  
18 and other belongings may have been placed in the Red Bag. Simeus testified that he went  
19 with Pierre-Canel to TIA that next day; he testified the LV Bag was at the airport, was  
20 damaged and a lot of stuff was missing.

21         Pierre-Canel contacted American almost daily, but asserts American had no  
22 explanation and could not locate the Red Bag. A March 8, 2016 email from Pierre-Canel  
23 states, "'[u]pon checking in at BWI, I checked two bags. When I arrived to Tucson at  
24 approximately 11:20 p.m., I proceeded to luggage claims, where I could find only one of my  
25 two bags." Am. SOF, Ex. 10 (Doc. 64-10). Plaintiffs assert in context, this statement was  
26 referring to the two bags that were checked at the gate.

27         Pierre-Canel did not provide receipts for the property (e.g., jewelry) alleged to have  
28 been missing from the luggage. Pierre-Canel testified that some of the items had not been

1 recently purchased.

2 On or about March 11, 2016, American's Dallas warehouse informed Pierre-Canel  
3 that the Red Bag had been found but the Urn was missing. Plaintiffs assert American's  
4 employees also told Pierre-Canel she had been given the wrong baggage claim tickets for her  
5 carry-on baggage at BWI. Pierre-Canel received the Red Bag via Federal Express on or  
6 about March 16, 2016. Pierre-Canel asserts she discovered that not only was the Urn  
7 missing, but also missing were the jewelry, the sympathy cards, and the monetary gifts.

8 Pierre-Canel continued to contact American on almost a daily basis, via emails and  
9 telephone calls, regarding the lost Urn. Plaintiffs assert American agreed to fix the damaged  
10 LV Bag. American asserts there is no evidence that the LV Bag was ever damaged –  
11 Although American issued a “call tag” for the LV Bag, Pierre-Canel never sent the bag to  
12 be examined.

13 Plaintiffs assert that, after the Urn was lost, the grief from the death of Casseus  
14 remarkably magnified and caused intense strain on Plaintiffs' relationship with each other.  
15 Simeus testified that Pierre-Canel was withdrawn, would not talk and spent hours by herself  
16 following the death of Casseus. When asked to specify the difference between the distress  
17 from the death of Casseus and the distress from losing the Urn, Simeus did not know how  
18 to separate the two. However, he did testify that both he and Pierre-Canel emotionally felt  
19 that they lost Casseus twice and that it was difficult to describe. American asserts  
20 Pierre-Canel and Simues both testified that, as a result of losing the Urn, neither have seen  
21 a psychiatrist or psychologist for counseling and have not had to take any medication.  
22 Plaintiffs point out that Pierre-Canel and Simeus actually testified that they were not on  
23 medication and that American's attorney cut-off Pierre-Canel's response to this deposition  
24 question. Additionally, Pierre-Canel did receive counseling from church leaders. However,  
25 Plaintiff's counsel refused to allow Plaintiffs to testify as to the counseling they received

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1 from church leaders.<sup>2</sup> American asserts Plaintiffs admitted to not having experienced the  
2 “necessary physical symptoms” to constitute severe emotional distress. Plaintiffs object to  
3 the characterization of “necessary physical symptoms” to constitute severe emotional  
4 distress.

5 American’s Conditions of Carriage states, *inter alia*:

6 . . . In the event it is necessary to check carry-on bags, ensure that fragile or  
7 valuable items, such as keys, medication or computers are carried in your  
8 personal item . . .

8 \* \* \* \* \*

9 American’s liability for loss, damage or delayed delivery of checked baggage,  
10 including transfer baggage, is limited to the actual value of the baggage or  
11 \$3,500, whichever is less, unless the passenger declares a higher value for loss  
12 of baggage, not to exceed \$5,000.00 . . . Excess valuation coverage is not  
13 available for and does not apply to items excluded in our liability below.

12 \* \* \* \* \*

13 American does not assume liability for any of the following items in or as  
14 checked baggage: antiques, artifacts, artwork, books, and documents, china,  
15 computers and other electronic equipment, computer software, fragile items,  
16 furs, heirlooms, keys, liquids, money, orthotics, surgical supports, perishable  
17 items, photographic, video and optical equipment, precious metals, stones or  
18 jewelry (time pieces), securities and negotiable papers, silverware, samples,  
19 unique or irreplaceable items or any other similar valuable items.

17 Am. SOF, Ex. 15 (Doc. 64-15). Counsel for American asserts the following provision is also  
18 included in the Conditions of Carriage, but such language is not included in the exhibit:

19 American does not accept these items in or as checked baggage and assumes  
20 no responsibility or liability for such items, regardless of whether American  
21 knew or should have known of the presence of such items in checked or  
22 transferred baggage. If any such items are lost, damaged or delayed, you will  
23 not be entitled to any reimbursement under American's standard baggage  
24 liability, or under any declared excess valuation.

23 Am. SOF (Doc. 64, p. 6).<sup>3</sup> Plaintiffs assert, “Defendant’s Contract specifically states, ‘When

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24 <sup>2</sup>American asserts a privilege cannot be used as both a sword and a shield under  
25 Arizona law.

26 <sup>3</sup>An American Conditions of Carriage located online includes this language.  
27 [https://www.american-airlines.nl/intl/es/footer\\_en/conditionsOfCarriage.jsp?v\\_locale=en\\_US&v\\_mobileUAFlag=AA](https://www.american-airlines.nl/intl/es/footer_en/conditionsOfCarriage.jsp?v_locale=en_US&v_mobileUAFlag=AA). However, as the language is not included in the exhibit  
28 provided by American, it is not known if this language was included in the Conditions of

1 you travel with human remains, they'll be treated **as carry-on baggage.**' CSOF 24  
2 (emphasis added)." Pl. Resp. (Doc. 65, p. 14).

3 On March 16, 2017, Plaintiffs filed a Complaint against American and unnamed Doe  
4 defendants for claims of breach of the Conditions of Carriage contract, negligence and gross  
5 negligence, intentional infliction of emotional distress, and bailment. Plaintiffs' prayer for  
6 relief includes a request for punitive damages.

7 On May 30, 2018, American filed a Motion for Summary Judgment (Doc. 63).  
8 Plaintiffs filed a response (Doc. 65) on June 29, 2018, and American filed a reply (Doc. 67)  
9 on July 16, 2018.

## 10 11 II. *Summary Judgment Legal Standard*

12 Summary judgment may be granted if the movant shows "there is no genuine dispute  
13 as to any material fact and the movant is entitled to judgment as a matter of law."  
14 Fed.R.Civ.P. 56(c). The moving party has the initial responsibility of informing the court  
15 of the basis for its motion, and identifying those portions of "the pleadings, depositions,  
16 answers to interrogatories, and admissions on file, together with the affidavits, if any," which  
17 it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v.*  
18 *Catrett*, 477 U.S. 317, 323 (1986); *Scheuring v. Traylor Bros.*, 476 F.3d 781, 784 (9th Cir.  
19 2007).

20 Once the moving party has met the initial burden, the opposing party must "go beyond  
21 the pleadings" and "set forth specific facts showing that there is a genuine [material] issue  
22 for trial." *Celotex Corp.*, 477 U.S. at 248 (internal quotes omitted); *see also United States*  
23 *v. \$133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) ("a plaintiff cannot rely  
24 on mere allegations but rather must "set forth" by affidavit or other evidence "specific  
25 facts"). The nonmoving party must demonstrate a dispute "over facts that might affect the  
26 outcome of the suit under the governing law" to preclude entry of summary judgment.

27 \_\_\_\_\_  
28 Carriage in effect at the time of events of this case.

1 *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). Further, the disputed facts must  
2 be material. *Celotex Corp.*, 477 U.S. at 322-23. Further, "a party cannot manufacture a  
3 genuine issue of material fact merely by making assertions in its legal memoranda." *S.A.*  
4 *Empresa de Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kiddle & Co.*, 690 F.2d  
5 1235, 1238 (9th Cir. 1982).

6 The dispute over material facts must be genuine. *Anderson*, 477 U.S. at 248, 106  
7 S.Ct. at 2510. A dispute about a material fact is genuine if "the evidence is such that a  
8 reasonable jury could return a verdict for the nonmoving party." *Id.* A party opposing a  
9 properly supported summary judgment motion must set forth specific facts demonstrating a  
10 genuine issue for trial. *Id.* "[M]ere allegation and speculation do not create a factual dispute  
11 for purposes of summary judgment." *Loomis v. Cornish*, 836 F.3d 991, 997 (9th Cir. 2016)  
12 (citation omitted). "If the evidence is merely colorable or is not significantly probative,  
13 summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. However, the evidence  
14 of the nonmoving party is to be believed and all justifiable inferences are to be drawn in his  
15 favor. *Id.* at 255. Further, in seeking to establish the existence of a factual dispute, the non-  
16 moving party need not establish a material issue of fact conclusively in his favor; it is  
17 sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the  
18 parties' differing versions of the truth at trial." *Giles v. Gen. Motors Acceptance Corp.*, 494  
19 F.3d 865, 872 (9th Cir. 2007) (citation omitted).

### 20 21 III. *Consideration of Admissible Evidence*

22 The Court is only to consider admissible evidence. *Moran v. Selig*, 447 F.3d 748,  
23 759-60 (9th Cir. 2006) (pleading and opposition must be verified to constitute opposing  
24 affidavits). Moreover, "[a]t the summary judgment stage, [courts] do not focus on the  
25 admissibility of the evidence's form. [They] instead focus on the admissibility of its  
26 contents." *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003).

27 A "genuine" issue of "material" fact cannot be created by a party simply making  
28 assertions in its legal memoranda. *Varig Airlines*, 690 F.2d at 1238. Declarations and other



1 evidence that would not be admissible may be stricken. *FDIC v. New Hampshire Ins. Co.*,  
2 953 F.2d 478, 484 (9th Cir. 1991). Additionally, the court is to review the record as a whole,  
3 but must disregard evidence favorable to the moving party that the jury is not required to  
4 believe and must give credence to the uncontradicted and unimpeached evidence of the  
5 moving party, at least “to the extent that that evidence comes from disinterested witnesses.”  
6 *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 150-51 (2000) (citation omitted).

7 The Court will only consider the admissible evidence that is supported by specific  
8 facts that may show a genuine issue of material fact. *See Anderson*, 477 U.S. at 248 (1986).

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10 *IV. Genuine Issue of Material Fact*

11 Throughout its request for summary judgment, American argues there is no genuine  
12 issue of material fact regarding the events of Pierre-Canel’s flight/baggage. In support of this  
13 argument, American points to contradictions in Pierre-Canel’s statements, documents and  
14 testimony. Similarly, American asserts there is no evidence to support some of Plaintiffs’  
15 claims. For example, American asserts it is an assumption that the “Urn and Jewelry were  
16 in Ms. Pierre-Canel’s bag in the first place, even though there is no evidence of that.” MSJ  
17 (Doc. 63, p. 10 n. 7). However, Pierre-Canel testified that she packed such items in the LV  
18 Bag. Am. SOF, Ex. 8 (Doc. 64-8, p. 11 of 54). The evidence of a nonmoving party is to be  
19 believed and all justifiable inferences are to be drawn in favor of the nonmoving party.  
20 *Anderson*, 477 U.S. at 255. The Court is concerned that Pierre-Canel’s deposition testimony  
21 is contradicted by her affidavit as to the contents packed in the LV Bag. *Allstate Indemnity*  
22 *Co. v. Ridgely*, 214 Ariz. 440, 444, 153 P.3d 1069, 1073 (App.2007) (holding that “when  
23 a party's affidavit is submitted to defeat summary judgment and contradicts the party's own  
24 deposition testimony, it should be disregarded in deciding the motion.”). The sham affidavit  
25 rule recognizes that, “because deposition testimony is subject to cross-examination, it is  
26 inherently more reliable than an affidavit.” *Allstate Indem. Co. v. Ridgely*, 214 Ariz. 440,  
27 443, 153 P.3d 1069, 1072 (Ct. App. 2007). However, “certain exceptions exist to the sham  
28 affidavit rule, for instance, ‘if the affiant was confused at the deposition and the affidavit

1 explains those aspects of the deposition testimony . . .” *Id.* at 442. The determination of  
2 whether an affidavit is a sham is to be addressed on a case-by-case basis. *Id.* at 444. Here,  
3 the quantity of items to which Pierre-Canel testified fit in a carry-on bag is simply incredible.  
4 The Court finds it likely that Pierre-Canel’s explanation in the affidavit, that she could not  
5 state which items were in which bag, is more credible than the deposition testimony. The  
6 Court finds this deposition testimony does not warrant concluding that genuine issues of fact  
7 do not exist.

8         Moreover, when placed in context, Pierre-Canel has maintained a consistent series of  
9 events. For example, although American argues that Pierre-Canel admitted “that she had  
10 never had a gate agent carry her bags onto the plane before[,]” Reply (Doc. 67, p. 3), Pierre-  
11 Canel’s deposition testimony could be interpreted as meaning prior to the flight at issue. Am.  
12 SOF, Ex. 8, 65:4-14 (Doc. 64-8, p. 18 of 54). Further, discrepancies may be attributed to  
13 Pierre-Canel’s use of English, as argued by Plaintiffs.

14         Additionally, while American’s documentary evidence (e.g., baggage records) appears  
15 compelling, Bailey testified that there may be some circumstances where a computer record  
16 may not be generated. Moreover, McCormack testified that she has assisted passengers onto  
17 a plane and also carried carry-on bags to the plane for passengers. Where, as here,  
18 McCormack does not specifically recall Pierre-Canel’s flight, a jury could reasonably  
19 conclude that Pierre-Canel was such a passenger. Lastly, although American argues that  
20 there is nothing to corroborate Pierre-Canel’s version of events, Simeus does corroborate that  
21 the LV Bag was retrieved from the airport the day after Pierre-Canel’s flight arrived. The  
22 significance of any bias or self-interest based on being Pierre-Canel’s spouse or co-plaintiff  
23 is more appropriately weighed by a trier of fact. Similarly, it is up to a jury to weigh Pierre-  
24 Canel’s testimony that she could have been mistaken as to which items were in a bag – i.e.,  
25 the cremated remains were not in a checked bag as opposed to she does not recall which  
26 items were in the LV Bag or the Red Bag. *See* Pl. SOF, Ex. 29 (Doc. 66-29).

27         While the documentary evidence before the Court at this time appears strong, the  
28 Court recognizes that “summary judgment should not be used as a substitute for jury trials

1 simply because the trial judge may believe the moving party will probably win the jury's  
2 verdict, nor even when the trial judge believes the moving party should win the jury's verdict.  
3 *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990) (citing *Cox v.*  
4 *English–American Underwriters*, 245 F.2d 330, 333 (9th Cir.1957)).

5  
6 *V. Limitation of Liability*

7 American argues that its coverage is limited to \$3,500 or \$5,000 based on the  
8 Conditions of Carriage. Indeed, a passenger is to “ensure that fragile or valuable items . . .  
9 are carried [in the passenger’s] personal item.” Am. SOF, Ex. 15 (Doc. 64-15). Further,  
10 liability is limited under the Conditions of Carriage to \$3,500 or \$5,000, depending on  
11 whether a passenger has declared a higher value. Additionally, American points out that  
12 Yang, McCormack and Bailey all testified that gate agents remind passengers to remove any  
13 and all valuable items when their bags are being checked.

14 However, Plaintiffs argue that Yang and McCormack do not recall working that day.  
15 While this arguably supports American’s argument that if, anything such as a crying woman  
16 telling them she was carrying her daughter’s cremated remains in an urn had occurred, they  
17 would have remembered the event, such evidence is not as strong as an affirmative memory.  
18 In other words, the weight to be placed on this evidence is better left to a trier of fact.  
19 Additionally, Plaintiffs argue that the choice to check the LV Bag and Red Bag was taken  
20 from Pierre-Canel when McCormack took the LV Bag and the Red Bag from her. *See e.g.*  
21 *Coughlin v. Trans World Airlines, Inc.*, 847 F.2d 1432, 1434 (9th Cir. 1988) (“[I]t is clear  
22 that TWA cannot now attempt to enforce a provision of the contract it has violated. TWA's  
23 refusal to allow Mrs. Coughlin to protect her valuables by carrying them personally  
24 effectively denied her the benefit of her bargain with respect to the tariff agreement.”). If a  
25 jury were to accept Pierre-Canel’s entire version of events, it follows they would conclude  
26 the bags were checked without Pierre-Canel’s knowledge or consent. While Pierre-Canel  
27 did acknowledge that a gate agent was “insisting” she check her bags, Pierre-Canel  
28 consistently has stated that she repeatedly rebuffed those efforts. Although American argues

1 this shows Pierre-Canel knew, based on the insistent gate agent, that her bags were being  
2 checked, a jury could just as reasonably conclude that Pierre-Canel believed that the gate  
3 agent had acquiesced to Pierre-Canel’s insistence that she keep the bags with her.

4  
5 VI. *Intentional Infliction of Emotional Distress*

6 “A plaintiff suing for intentional infliction of emotional distress must prove the  
7 defendant caused severe emotional distress by extreme and outrageous conduct committed  
8 with the intent to cause emotional distress or with reckless disregard of the near-certainty that  
9 such distress would result.” *Watkins v. Arpaio*, 367 P.3d 72, 74–75 (Ariz. Ct. App. 2016);  
10 *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 517, 115 P.3d 107, 111 (2005); *Wells Fargo*  
11 *Bank v. Arizona Laborers, Teamsters, and Cement Masons Local No. 395 Pension Trust*  
12 *Fund*, 201 Ariz. 474, 38 P.3d 12 (2002) (discussing difference between negligent and  
13 intentional torts). “The trial court determines whether the alleged acts are sufficiently  
14 extreme and outrageous to state a claim for relief.” *Wallace v. Casa Grande Union High*  
15 *Sch. Dist. No. 82 Bd. of Governors*, 909 P.2d 486, 495 (Ariz. Ct. App. 1995); Restatement  
16 (Second) of Torts § 46, comment h.

17 American asserts there is no material issue of fact to establish intentional infliction  
18 of emotional distress. American argues that, because the documented evidence shows that  
19 the LV Bag was never checked, it cannot be liable because the Urn was never in American’s  
20 possession. However, under the version of events as presented by Plaintiffs, *see Anderson*,  
21 477 U.S. at 255 (the evidence of a nonmoving party is to be believed), an American  
22 employee knew the LV Bag contained the cremated remains of Pierre-Canel’s daughter, and  
23 checked the LV Bag against Pierre-Canel’s objection without affording Pierre-Canel an  
24 opportunity to remove the Urn. *See e.g. A.G. v. Paradise Valley Unified Sch. Dist. No. 69*,  
25 815 F.3d 1195, 1208–09 (9th Cir. 2016) (“Arizona courts have traditionally considered  
26 ‘defendant’s knowledge that the plaintiff is peculiarly susceptible to emotional distress by  
27 reason of some physical or mental condition.’”) (citations omitted). There is a material issue  
28 of fact whether such conduct is extreme and outrageous and whether it was committed with

1 reckless disregard of the near certainty emotional distress would result.

2 American also argues that Arizona courts have held that crying, being stressed and  
3 upset or having occasional trouble sleeping is not enough to establish severe emotional  
4 distress. *Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 199, 650 P.2d 496 (App. 1982).  
5 American asserts that “[s]evere emotional distress requires anxiety that results in physical  
6 symptoms such as high blood pressure, a nervous tic, chest pains, fatigue and dizziness. *Ford*  
7 *v. Revlon*, 153 Ariz. 38, 41, 734 P.2d 580, 583 (1987); *Pankratz v. Willis*, 155 Ariz. 8, 12, 17,  
8 744 P.2d 1182 (App. 1987).” MSJ (Doc. 63, p. 13). The Court of Appeals, however, has  
9 recognized that the Restatement negates a requirement of bodily harm. *See Pankratz*.  
10 Nonetheless, the *Pankratz* court found a material issue of fact where anger and depression,  
11 *coupled with physical ailments* such as headaches and hemorrhoids, supported a claim for  
12 emotional distress. More recently the appellate court stated:

13 [Plaintiff asserted defendant’s [actions had aggravated Plaintiff’s existing medical  
14 condition (a vertebral artery blockage) “to the point of [it] being an emergent  
15 condition,” but he did not explain how (or if) the supposed exacerbated condition had  
16 any physical manifestations or avow that he had received any medical treatment for  
17 it. Moreover, [plaintiff] claimed he suffered from insomnia due to “job stress and  
18 anxiety” but did not offer any evidence that it was [defendant’s] conduct, and not  
19 other employment-related stressors, that caused the stress and anxiety leading to the  
20 insomnia.

21 This evidence did not create a material question of fact regarding whether  
22 [defendant’s] actions caused [plaintiff’s] severe emotional distress.

23 *Harding v. Sternsher*, No. 1 CA-CV 16-0127, 2017 WL 3138184, at \*3 (Ariz. Ct. App. July  
24 25, 2017), as amended on reconsideration (Oct. 25, 2017), review denied (May 8, 2018).  
25 Additionally, the Court is not aware of any Arizona Supreme Court authority that adopts a  
26 view that does not require a physical manifestation of the emotional harm.

27 Plaintiffs cite to *Allen v. Jones*, 104 Cal. App. 3d 207 (Cal. App. 1980), in support  
28 of their assertion that emotional distress was suffered in this case. However, Plaintiffs fail  
to acknowledge that the court stated “that damages are recoverable for mental distress  
without physical injury for *negligent* mishandling of a corpse . . .” 104 Cal. App. 3d at 214  
(emphasis added). Indeed, that court concluded that a claim for the intentional infliction of  
emotional distress had not been stated.

1           The Court finds a genuine issue of material fact has not been presented as to the  
2 intentional infliction of emotional distress claim. Summary judgment will be entered in favor  
3 of American and against Plaintiffs as to this claim. *See Harding*.

4  
5 VII. *Punitive Damages*

6           In Arizona, a plaintiff must prove by clear and convincing evidence that the defendant  
7 engaged in “reprehensible conduct combined with an evil mind over and above that required  
8 for commission of a tort” to obtain an award of punitive damages. *Linthicum v. Nationwide*  
9 *Life Ins. Co.*, 150 Ariz. 326, 332, 723 P.2d 675, 681 (1986). “The key is the wrongdoer’s  
10 intent to injure the plaintiff or his deliberate interference with the rights of others,  
11 consciously disregarding the unjustifiably substantial risk of significant harm to them.” *Id.*  
12 at 331, 723 P.2d at 680 (citing *Rawlings v. Apodaca*, 151 Ariz. 149, 160, 726 P.2d 565, 576  
13 (1986)); *see also Volz v. Coleman Co.*, 155 Ariz. 567, 570, 748 P.2d 1191, 1194 (1987)  
14 (recognizing that recklessness or even gross negligence is insufficient to support punitive  
15 damages). Furthermore, in Arizona, punitive damages are not ordinarily available as a  
16 remedy in breach of contract actions. *Continental Nat’l Bank v. Evans*, 107 Ariz. 378, 382,  
17 489 P.2d 15, 19 (1971) (holding that punitive damages cannot be awarded for breach of  
18 contract). Rather, punitive damages are only available when an action sounds in tort. *See In*  
19 *re Marriage of Benge*, 151 Ariz. 219, 224, 726 P.2d 1088, 1093 (App. 1986). “[A]lthough  
20 punitive damages do not lie for breach of contract, they are recoverable where the breach of  
21 contract constitutes a tort.” *Lerner v. Brettschneider*, 123 Ariz. 152, 156, 598 P.2d 515, 519  
22 (App. 1979).

23           American argues that, even if the Urn and Jewelry were checked, American Airlines  
24 made an honest mistake by temporarily sending the bag to Dallas; i.e., American’s actions  
25 do not rise to the level of “evil.” However, this fails to acknowledge that Plaintiffs assert the  
26 LV Bag was detained one day and the Urn and Jewelry disappeared from that bag. In  
27 conjunction with asserting it never had possession of the LV Bag, American does not provide  
28 any explanation for where the LV Bag was until Pierre-Canel and Simeus picked it up at the

1 airport the day after the flight arrived. If the jury believes the events occurred as asserted by  
2 Plaintiffs, there is a genuine dispute as to whether American’s conduct warrants an award of  
3 punitive damages.

4  
5 VIII. *Negligence/Gross Negligence*

6 American points out that Plaintiffs must show that any negligence or gross negligence  
7 actually caused harm to Plaintiffs for Plaintiffs to establish a claim for negligence or gross  
8 negligence. *See e.g. Quiroz v. ALCOA Inc.*, 243 Ariz. 560, 563, 416 P.3d 824, 827 (2018).  
9 American argues that Plaintiffs cannot establish that any negligence of American caused any  
10 harm to Plaintiffs because Plaintiffs cannot establish that American ever had possession of  
11 the LV Bag or its contents – that American may have negligently diverted Pierre-Canel’s Red  
12 Bag to Dallas does not show any harm to Plaintiffs. Again, this fails to consider that a jury  
13 may accept Pierre-Canel’s version of events.

14  
15 IX. *Breach of Contract*

16 A breach-of-contract claim requires a plaintiff to show (1) the existence of a contract,  
17 (2) breach of that contract, and (3) resulting damages. *Thomas v. Montelucia Villas, LLC*,  
18 302 P.3d 617, 621 (Ariz. 2013). American argues that, because the LV Bag, the Urn and the  
19 Jewelry were never checked, American did not breach the Conditions of Carriage by  
20 checking the LV Bag. As a genuine issue of material fact is in dispute, summary judgment  
21 of this claim is not appropriate.

22  
23 X. *Bailment*

24 To establish a bailment there must be “a delivery by the bailor and acceptance by the  
25 bailee of the subject matter of the bailment. It must be placed in the bailee's possession,  
26 actual or constructive. *Webb v. Aero Int’l, Inc.*, 130 Ariz. 51, 52–53, 633 P.2d 1044, 1045–46  
27 (Ct. App. 1981) (citation omitted). Although American argues Plaintiffs cannot, as a matter  
28 of law, establish bailment because American never took custody or possession of the LV Bag,

1 the Urn or the Jewelry, the Court finds that a material issue of fact is in dispute.

2  
3 XI. *Damages*

4 American asserts Plaintiffs cannot establish damages with any reasonable certainty.  
5 However, American has not cited any authority which indicates that documentary evidence,  
6 as opposed to testimonial evidence is needed to establish damages. The Court finds summary  
7 judgment as to damages is not appropriate.

8  
9 Accordingly, IT IS ORDERED:

10 1. The Motion for Summary Judgment (Doc. 63) filed by American Airlines, Inc.,  
11 is GRANTED IN PART AND DENIED IN PART.

12 2. Summary judgment is awarded in favor of American Airlines, Inc., and against  
13 Plaintiffs as to Count III, the claim for Intentional Infliction of Emotional Distress. Summary  
14 judgment is denied as to all other claims.

15 3. The Court's Order that the parties are to submit a Joint Pretrial  
16 Statement/Proposed Order within thirty (30) days of the date of a ruling on dispositive  
17 motions, *see* February 26, 2018 Order (Doc. 53), is modified pending resolution of additional  
18 discovery as discussed in the Order addressing the Motion for Leave to Supplement  
19 Summary Judgment Record with Newly Discovered Evidence.

20 DATED this 21st day of March, 2019.

21  
22 

23 \_\_\_\_\_  
24 Cindy K. Jorgenson  
25 United States District Judge  
26  
27  
28