

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE AIR CRASH NEAR PEGGY'S COVE,
NOVA SCOTIA ON SEPTEMBER 2, 1998

MDL No. 1269

This Document Relates To:
ALL CASES

**PLAINTIFFS' MEMORANDUM OF LAW IN RESPONSE
AND OPPOSITION TO THE MOTION OF DEFENDANTS
BOEING AND MCDONNELL DOUGLAS TO DISMISS CLAIMS FOR
PUNITIVE DAMAGES BASED ON THE DEATH ON THE HIGH SEAS ACT**

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE DEATH ON THE HIGH SEAS ACT APPLIES ONLY ON THE HIGH SEAS AND NOT INSIDE CANADIAN TERRITORY	4
A. DOHSA ADOPTED THE UNIVERSAL MEANING OF HIGH SEAS AS NON-SOVEREIGN WATERS USED BY THE SUPREME COURT IN MARITIME ACCIDENT CASES	7
B. DOHSA'S DRAFTING HISTORY SHOWS THAT "HIGH SEAS" MEANS NON-SOVEREIGN WATERS AND EXCLUDES THE FOREIGN TERRITORIAL WATERS	15
1. In 1912, after text is dropped from prior bills that applied DOHSA to foreign waters, the drafters confirm "[w]e leave out the territorial waters of foreign countries."	16
2. In 1914, on the House floor, DOHSA's drafters confirmed the meaning of high seas as non-sovereign waters	17
3. In 1916, when U.S. state waters were removed from the legislation, the drafters confirmed again that foreign territorial waters, in particular Canadian waters, had been excluded as "extraterritorial."	19
4. In 1916, Section 7 is added to make it clear that the state waters were not in any way affected by the bill	22
5. In 1919, federal territorial waters are removed from the bill and DOHSA finally applies only "on the high seas." Furthermore, to complete the conformity with international law, Section 4 is added to preserve foreign law for foreign vessels.	23
6. Throughout the drafting history, the MLA confirmed that high seas	

	meant non-sovereign waters as used by the Supreme Court in maritime accident cases.	25
7.	1920: The bill's title is narrowed to apply only "on the high seas."	27
II.	THE CRASH OCCURRED INSIDE CANADA'S WATERS AND NOT ON THE HIGH SEAS	27
III.	THE FOREIGN WATERS CASES CITED BY DEFENDANTS ARE ERRONEOUS AND SHOULD NOT BE FOLLOWED	29
IV.	THE ANCIENT ADMIRALTY CRIMINAL JURISDICTION MEANING OF HIGH SEAS HAS NO RELEVANCE TO DOHSA	36
V.	IN 1920, THERE WAS NO VOID OR LEGAL VACUUM IN FOREIGN TERRITORIAL WATERS. TODAY, AMERICAN GENERAL MARITIME LAW CAN APPLY THERE	41
VI.	THE DEFENDANTS' MOTION IS ALSO PREMATURE, GIVEN CONGRESS' SERIOUS INTENT TO AMEND DOHSA TO EXCLUDE AVIATION CASES FROM ITS REACH	46
	CONCLUSION	48

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Plaintiffs' Committee respectfully submits its memorandum in response and opposition to the motion of defendants Boeing and McDonnell Douglas to dismiss claims for punitive damages based on the Death on the High Seas Act.¹

Plaintiffs are the surviving relatives and estate representatives of 195 passengers killed in the Swissair Flight 111 disaster on September 2, 1998. Flight 111 crashed in the Canadian territorial waters of St. Margaret's Bay off Peggy's Cove, Nova Scotia.

SUMMARY OF ARGUMENT

The 1920 Death on the High Seas Act (DOHSA) does not govern this case because the Swissair Flight 111 disaster occurred in Canadian territorial waters.

¹ Defendants Swissair, Delta Airlines, Inc., SAirGroup, SR Technics AG, E.I. DuPont de Nemours & Co., Interactive Flight Technologies, Inc., Hollingsead International, Inc., and DeCrane Aircraft Holdings, Inc., have joined in this motion. Plaintiffs agree not to contest the nonavailability of punitive damages against carriers Swissair and Delta in those cases governed by the Warsaw Convention.

DOHSA applies only to accidents "on the high seas."² DOHSA incorporated the classic, international definition of high seas - non-sovereign waters - previously adopted by the Supreme Court in a series of landmark maritime accident cases. In the Court's words, the high seas were: "within no other territorial jurisdiction"; "outside the territory"; "where the law of no particular State has exclusive force, but all are equal...."; "a place belonging to no sovereign"; and, "regions subject to no sovereign."³ Supreme Court authority mandates that the term "high seas" be defined according to its meaning in these maritime accident cases.⁴

DOHSA's history shows that Congress used the term "high seas" to refer to nonsovereign waters, expressly affirmed "[W]e leave out the territorial waters of foreign countries...,"⁵ and, specifically with regard to Canadian waters, concluded that they were outside DOHSA's scope because "we cannot legislate about it," and it would be "extraterritorial."⁶ Early bills which would have applied the legislation to foreign waters were rejected.

DOHSA's purpose was to fill a unique legal gap which existed only on the high seas. When

² 46 U.S.C. §761.

³ American Banana Co. v. United Fruit Co., 213 U.S. 347, 355 (1909); The Hamilton, 207 U.S. 398, 403 (1907); The Scotland, 105 U.S. 24, 29 (1881).

⁴ McDermott International, Inc. v. Wilander, 498 U.S. 337, 342 (1991).

⁵ Actions for Death on the High Seas and Suits for Damages Caused by Government Vessels: Hearing Before the Committee on the Judiciary, 62nd Cong., 10 (1912) (hereinafter "1912 Hearing") (Ex. 11) (References to Exhibits refer to the accompanying Appendix submitted in support of Plaintiffs' Response and Opposition).

⁶ Right of Action For Death on the High Seas: Hearing Before the Committee on the Judiciary, 64th Cong., 16-17 (1916) (hereinafter "1916 Hearing") (Ex. 22).

DOHSA was enacted, conflicts of law in tort cases was routinely determined by the law of the place of the accident. State law applied to deaths in state waters,⁷ and foreign territorial waters were governed by foreign law.⁸ But the high seas, because they were sovereignless, had no lex loci. DOHSA filled this void.

DOHSA's text does not contain any reference to foreign territorial waters and Supreme Court authority dictates the presumption that DOHSA does not apply on such waters absent an express declaration of such purpose.⁹

When DOHSA was enacted in 1920, international law recognized that each nation's sovereign territorial sea extended 3 miles, or one marine league, from shore.¹⁰

By 1982, an international consensus was reached to recognize every coastal state's right to claim a 12-mile territorial sea.¹¹ In conformity with international law, Canada declared its 12-mile territorial sea and enjoys the same sovereignty over that territorial sea as it has over its land territory and internal waters.¹²

⁷ See, e.g., City of Norwalk, 55 F. 98 (S.D.N.Y. 1893), aff'd sub. nom., The Transfer, 61 F. 364 (2d Cir. 1894).

⁸ See, e.g., Smith v. Condry, 42 U.S. 28, 33 (1843).

⁹ E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); Jackson v. The Archimedes, 275 U.S. 463, 470 (1928).

¹⁰ Manchester v. Massachusetts, 139 U.S. 240, 258 (1891).

¹¹ 1982 U.N. Convention of the Law of the Sea, Dec. 10, 1982, art. 3, I.L.M. 1261 (1982) (Ex. 40); Restatement (Third) of the Foreign Relations Law of the United States § 511 (1987).

¹² Canadian Federal Oceans Act (1996) C.31 (Ex. 38).

While the defendants rely on cases which applied DOHSA on foreign waters, those cases, like defendants' motion, overlook DOHSA's language and history and the rules of statutory construction prescribed by the Supreme Court.

Defendants' motion addresses only punitive damages, but the application of DOHSA would further limit plaintiffs' recovery to strict pecuniary losses, and bar other compensatory damages available under general maritime law and state statutes.

Since the Swissair 111 disaster occurred inside Canadian territory, under the current choice of law test for maritime law claims¹³ these wrongful death actions may be governed by American general maritime law, supplemented by state or foreign law. The Supreme Court has recognized a "remedy for wrongful death under general maritime law in situations not covered by [DOHSA]..."¹⁴ and subsequently held that such remedy could be supplemented by state death law when appropriate.¹⁵

ARGUMENT

I. THE DEATH ON THE HIGH SEAS ACT APPLIES ONLY ON THE HIGH SEAS AND NOT INSIDE CANADIAN TERRITORY

Under its title and terms, DOHSA's prerequisite is conduct "on the high seas" which causes death. Section 1 of DOHSA applies to a "wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the territories or dependencies of the United States..." 46 U.S.C. §761. The term "high seas" is repeated in Section 4,

¹³ Lauritzen v. Larsen, 345 U.S. 571 (1953); Neely v. Club Med Management Services, Inc., 63 F.3d 166 (3d Cir. 1995) (en banc).

¹⁴ Moragne v. States Marine Lines, 398 U.S. 375, 402 (1970).

¹⁵ Yamaha Motor Corporation v. Calhoun, 516 U.S. 199, 215 (1996).

which permits the application of foreign law for conduct "occurring upon the high seas...." 46 U.S.C. §764.

DOHSA's central requirement that the accident occur "on the high seas" must be given effect; otherwise, those words would be rendered meaningless, contrary to basic principles of statutory construction. United States v. Menasche, 348 U.S. 528, 538-39 (1955) (Court recognized its "duty 'to give effect, if possible, to every clause and word of a statute....'"); In re Air Crash Off Long Island, New York, on July 17, 1996, 1998 W.L. 292333 at *3 (S.D.N.Y. June 2, 1998) (claim of Boeing and TWA that DOHSA defines high seas as all waters beyond one marine league "render[s] the phrase 'high seas' mere surplusage, in contravention of the norm that all words of a statute are meaningful....").

The Supreme Court has declared several rules of statutory construction which have special relevance to maritime statutes and to the interpretation of DOHSA.

First, the Court has mandated that maritime terms of art be given a meaning consistent with their use in the case law upon which the statute was based. McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991). McDermott addressed the meaning of the term "seaman" in DOHSA's companion statute, the 1920 Jones Act. It was enacted to remove the bar on seaman's tort remedies created by the 1903 decision in The Osceola, 189 U.S. 158 (1903). McDermott held that the term "seaman" should be defined according to its use by The Osceola:

The Jones Act does not define "seaman." Neither does The Osceola; it simply uses the term as had other admiralty courts. We assume that the Jones Act uses "seaman" in the same way....The Jones Act, responding directly to The Osceola, adopts without further elaboration the term used in The Osceola. Moreover, "seaman" is a maritime term of art. In the absence of contrary indication, we assume that when a statute uses such a term, Congress intended it to have its established meaning.

Id. at 342.

Second, the Supreme Court has ruled that maritime statutes should be construed in harmony with international law. Lauritzen v. Larson, 345 U.S. 571, 578 (1953) (citing The Charming Betsy, 6 U.S. 64, 118 (1804), and stating that this international rule is founded in the duty that each sovereign has to respect the authority of other sovereigns to legislate for matters occurring within their own territory, with special significance to maritime law which is “in a peculiar sense an international law.”); Neely v. Club Med Management Services, Inc., 63 F.3d 166, 186 (3d Cir. 1995) (en banc) (Lauritzen requires “construing American law in harmony with international law.”).¹⁶

Third, the court has ruled that statutes are not presumed to apply on foreign territory, absent clear proof of Congress' contrary intent. E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (to avoid international discord, there must be “the affirmative intention of the Congress clearly expressed....”); New York Cent. R. Co. v. Chisholm, 268 U.S. 29, 31-32 (1925) (although FELA applies to railroad employees employed in foreign commerce, act did not provide remedy for work-related death of employee on train in Canada, since act contained no words giving it express extraterritorial effect); Jackson v. The Archimedes, 275 U.S. 463, 470 (1928) (1920 amendments to Seaman's Act “expressed no intention to extend the provisions of the statute to advance payments made by foreign vessels while in foreign ports....”); Canada So. Ry. Co. v. Gebhard, 109 U.S. 527,

¹⁶ In Neely, 63 F.3d at 183, the Third Circuit adopted the Restatement (Third) of Foreign Relations Law “for the relevant principles of international law.” The Restatement defines international law as “rules and principles of general application dealing with the conduct of states and...their relations inter se...” Section 101. International law has an existence in our common law, independent of acts of Congress. The Nereide, 13 U.S. 388, 422 (1815); The Paquete Habana, 175 U.S. 677, 700 (1800).

536 (1883) (“That the laws of a country have no extraterritorial force is an axiom of international jurisprudence....”).

A. DOHSA ADOPTED THE UNIVERSAL MEANING OF HIGH SEAS AS NON-SOVEREIGN WATERS USED BY THE SUPREME COURT IN MARITIME ACCIDENT CASES

DOHSA was enacted in response to a series of landmark Supreme Court maritime accident cases which consistently used the term “high seas” in its international sense to mean non-sovereign waters, a place "outside the territory" where the laws of no single nation had precedence. These cases grappled with the legal conundrums raised when foreign and American ships met disaster in a legal "no-man's land."

The high seas as non-sovereign waters “outside the territory” and its companion principle of the territorial sea were long established in our caselaw. In 1793, Secretary of State Thomas Jefferson claimed for the United States a sovereign territorial sea in accordance with established international law. The United States claimed a territorial sea extending to “the utmost range of a cannon ball, usually stated as a sea league...” or three nautical miles. Opinion of the Office of Legal Counsel, U.S. Department of Justice, October 4, 1988, reprinted at 1 Terr. Sea J. 1, 9-10 (1990) (Ex. 37). In 1803, the Supreme Court recognized the sovereignty of nations over their territorial seas under international law, and adopted the marine league territorial sea as part of our law. Church v. Hubbard, 6 U.S. (2 Cranch) 187, 234 (1804) (Marshall C.J.) (“a nation’s sovereign territory includes its marine league sea....”); see also Manchester v. Massachusetts, 139 U.S. 240, 258 (1891) (as between nations, the “minimum limit of territorial jurisdiction” is one marine league from shore). The Supreme Court located the high seas as lying directly beyond the territorial sea. Church, 6 U.S. at 234; Manchester, 139 U.S.

at 258. See also State of Louisiana v. State of Mississippi, 202 U.S. 1, 52 (1906) (the marine league sea is under the exclusive authority of the riparian state and is in contradistinction to the high sea).

By the late 1800's, maritime accident cases consistently used high seas in an international sense, as those waters outside each nation's own territorial seas. The high seas were defined by the void of sovereignty and no readily applicable law. By contrast, the territorial seas were sovereign waters governed by the lex loci law.

The Scotia, 81 U.S. 170 (1871), involved the applicable navigational rules for a collision on the high seas between a U.S. and British vessel. The Supreme Court ruled that the high seas is the place where "no statute of one or two nations can create obligations for the world. Like all the laws of nations, it [law of the sea] rests upon the common consent of civilized communities." Id. at 187.

In The Scotland, 105 U.S. 24 (1881), a British steamship departed New York "and after reaching the high sea," collided with an American boat. Id. at 25. Property damage claims were filed, and the Court established conflict of laws rules "for when a collision occurs on the high seas, where the law of no particular State has exclusive force, but all are equal." Id. at 29. The court ruled that the law of the forum was favored on procedural issues such as the limited liability statute and in cases in which the laws of the vessels were in conflict. In other instances, the law of the vessel's flag applied on the high seas. Id. at 29-30. The rule of lex loci obviously does not apply in the non-sovereign high seas.¹⁷

Maritime cases began to address the serious question of what law, if any, existed for deaths on

¹⁷ Other collision cases also used the term high seas to refer to non-sovereign waters. Id. at 29-30. The Chattahoochee, 173 U.S. 540, 550 (1899) (the Court contrasts "acts done on the high seas" to those "in the waters of the United States"); The Belgenland, 114 U.S. 355, 369 (1885) ("on the high seas, not within the jurisdiction of any nation").

the high seas. That question was unique to the high seas, where no sovereign had exclusive authority to establish the applicable law. By contrast, for accidents in U.S. or foreign territorial waters, it was well established that the lex loci supplied the death remedy.¹⁸ The Corsair, 145 U.S. 335, 344, 347 (1892) (lower U.S. courts apply state law for deaths in territorial waters); American Steamboat Co. v. Chase, 83 U.S. 522, 532 (1872) (actions for deaths in state waters may be brought in state court under state law); Smith v. Condry, 42 U.S. 28, 33 (1843) (British law applies to collision between U.S. vessels in Liverpool waters); Robinson v. Detroit & C. Steam Nav. Co., 73 F. 883, 894-5 (6th Cir. 1896) (Ontario law applied to a collision between U.S. vessels in Canadian waters of Ontario); Geoghegan v. Atlas Steamship Co., 22 N.Y.S. 749, 751 (N.Y. City and Co. Ct., 1893) aff'd 146 N.Y. 369 (1895) (it was “an obvious and undeniable proposition” under international law and Supreme Court authority that a death on a British vessel within a marine league of Savanilla, Colombia “was within the dominion and subject to the laws of the United States of Colombia....”); City of Norwalk, 55 F. 98 (S.D.N.Y. 1893), affd. sub nom., The Transfer, 61 F. 364 (2d Cir. 1894) (federal court could apply state law to action for death in state waters); Holmes v. O&C. Ry. Co., 5 F. 75, 82-83 (D. Ore. 1880) (state law gave right of action for death in state waters).

¹⁸ According to the Supreme Court's adoption of the vested rights or lex loci rule, the only source capable of creating tort obligations enforceable in U.S. courts was “the law of the place of the act.” Slater v. Mexican National R. Co., 194 U.S. 120, 126 (1904) (Holmes, J.). See also Justice Holmes decision in Cuba R. Co. v. Crosby, 222 U.S. 473, 479 (1912). In 1953, in Lauritzen v. Larsen, 345 U.S. 571 (1953), the Supreme Court completely overhauled conflicts of law in maritime law and discarded lex loci delicti, replacing it with a flexible interest analysis conflicts of law rule. Today, our general maritime law can apply in foreign waters. See Neely, 63 F.3d at 182 (American general maritime law and Jones Act applied to accident in waters of St. Lucia); Public Administrator v. Angela Compania Naviera, 592 F.2d 58 (2d Cir. 1979) (American general maritime law applied to a death action in foreign territorial waters). See Point V, infra.

The question of applicable death remedies law on the high seas was also of particular concern in the United States because, the Supreme Court had held that general maritime law did not recognize a death remedy. The Harrisburg, 119 U.S. 199, 213 (1886). The Harrisburg involved a death on the Massachusetts waters of the Atlantic Ocean. The plaintiff in the Harrisburg, however, had failed to timely file a claim under the lex loci law of Massachusetts. The Supreme Court held that absent a statute, the general maritime law was not competent to recognize a wrongful death remedy, based on the English common law maxim that a personal injury action does not survive the victim's death. Id.

The Alaska, 130 U.S. 201, 209 (1889), subsequently applied The Harrisburg to dismiss five wrongful death actions brought under general maritime law arising from a ship collision which "occurred on the high seas" near Long Island. The court observed that New York law did not provide an in rem death remedy on the high seas. Id.

Lacking a general maritime law remedy, in 1907, the Supreme Court held, however, that the wrongful death law of the shipowner's domicile could govern the ship's liability outside territorial waters. The Hamilton, 207 U.S. 398 (1907). In The Hamilton, two Delaware ships had collided on the high seas. Justice Holmes defined the high seas as "outside the territory of the State" and "within no other territorial jurisdiction." Id. at 403. Nonetheless, he concluded that Delaware law should extend:

to citizens domiciled within the State, even when personally on the high seas....In short, the bare fact of the parties being outside the territory in a place belonging to no sovereign would not limit the authority of the State, as accepted by civilized authority. No one doubts the power of England or France to govern their own ships upon the high seas.

Id. at 403.¹⁹ The Hamilton cited with approval McDonald v. Mallory, 77 N.Y. 546 (1879), in which New York's highest court applied New York law to govern a wrongful death aboard a New York vessel on the high seas and defined the high seas as that place "not within the actual territorial limits of any State or Nation." 77 N.Y. at 551.

The following year, the Supreme Court extended its ruling in The Hamilton to foreign ships, applying French death law to govern the liability of a French ship, as the "death occurred on the high seas on board of the vessel" and "the right of action given by the law of the domicile or flag will be enforced in an admiralty court of the United States...." La Bourgogne, 210 U.S. 95, 138 (1908). The court cited to The Scotland's definition of high seas as the place "where the law of no particular state has exclusive force, but all are equal." Id. at 115.

In 1914, the Supreme Court faced claims arising from the Titanic disaster. In accord with The Hamilton and La Bourgogne, the Court held that any recovery for death on the British ship would be based on British tort law, since "Congress does not control or profess to control the conduct of a British ship on the high seas...." Oceanic Steam Navigation Co., Ltd. v. Mellor, 233 U.S. 718, 732 (1914) (hereinafter "The Titanic"). But reaffirming The Scotland, the Court applied United States law to limit the damages available in our courts to the salvage value of the ship. The passengers' families

¹⁹ In Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923), the Supreme Court explained that Delaware law had applied in The Hamilton, not under a theory that the vessel was a floating extension of the physical territory of Delaware, but rather under the principle that a state may exercise legislative authority over its citizens on the high seas under the rule of "personal. . .[not] territorial sovereignty." Id. at 123. See also Just v. Chambers, 312 U.S. 383, 390 (1941) (the law of defendant's domicile, whether American law or foreign law, creates a legal obligation that can follow the defendant on the high seas).

were left with no recovery.

As a result of these rulings, United States courts were faced with applying a patchwork of state and foreign law together with the federal limited liability act statute to death cases on the high seas.

Starting in 1903, the Maritime Law Association (MLA), a group of expert maritime lawyers, advocated the enactment of a federal death law and prepared the drafts of the DOHSA legislation.

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986) (Court gives weight to MLA's interpretation of DOHSA's Section 7); Whitelock, A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts, 22 Harv. L. Rev. 403, 416 & n.3 (1909) (MLA prepared and submitted the first bill in 1903) (hereinafter "Whitelock") (Ex. 34).²⁰

The decision in The Hamilton gave urgency to the legislation. The MLA was concerned over the application of state laws to the high seas, calling the lack of a uniform federal death law a "legal embarrassment" and an "anomalous" situation. See Whitelock, at 414. By contrast, the MLA did not object to the existing case law applying the lex loci on "strictly territorial waters." Id. at 411.²¹

The MLA's lawyers made numerous submissions and presentations to Congress which cited The Scotland, The Hamilton, The Harrisburg, The Alaska, La Bourgogne, and The Titanic and

²⁰ The cited 1909 Harvard Law Review article was distributed to the Senate Judiciary Committee in 1910. The article dealt with "extra-territorial marine torts," reviewed the legal problems raised by The Hamilton and La Bourgogne and drew a contrast between "territorial waters" and the "high seas of all nations." Whitelock, supra, at 411-12 (Ex. 34).

²¹ For example, Mr. Whitelock, in his article explaining the MLA's drafting of the DOHSA legislation, approved of the opinions in City of Norwalk, 55 F.98, (applying state law to state waters) and Robinson v. Detroit & C. Steam Nav. Co., 73 F. 883 (applying Canadian law to a collision in Canadian waters), because "[t]hese two cases, it will be observed, were instances of torts on strictly territorial waters, and the application of the local law was made by the court only thereto, but not to the high seas." Id. at 411.

repeatedly used the term “high seas” in its international sense, consistent with this case law, to refer to non-sovereign waters. H.R. Rep. No. 66-674, at 1-4 (1920) (Ex. 30); S. Rep. No. 66-216, at 2-4 (1919) (Ex. 28); H.R. Rep. No. 64-1419, at 1-4 (1917) (Ex. 25); S. Rep. No. 64-741, at 1-5 (1916) (Ex. 24); H.R. Rep. No. 63-160, at 1-5 (1913) (Ex. 15); 1912 Hearing at 5-7, 13-15 (Ex. 11); Amendments to Admiralty Law: Hearings Before the Subcomm. of the Senate Comm. on the Judiciary, 61st Cong., 8-10 (1910) (hereinafter “1910 Hearing”) (Ex. 8).

Fitz-Henry Smith, chairman of the MLA, described to Congress the legal issues raised by the current cases:

Recognizing that there should be a recovery for death in maritime cases, the Supreme Court of the United States has been able to work out justice for negligence on the high seas by applying the law of the flag, so called, in some cases involving foreign vessels...La Bourgogne...and by applying the statute of the state of ownership....The Hamilton...Americans make up a large part of the public traveling on the high seas, and the loss of the Titanic has shown that even in these times there is still danger of marine disasters. While the Supreme Court could readily apply the State law when both vessels belonged to the same State, as was the case in the Hamilton, the facts are not always so simple. Nor is it always easy to determine just what State is the State where the vessel is owned....And it is anomalous to say that one ship may carry with her upon the high seas one statute law and another vessel another law, although both fly the American flag. The purpose of the proposed bill is to remedy the present situation by a Federal law furnishing a right of action for death, applicable to the courts of admiralty.... In so far as the high seas are concerned the bill provides the exclusive remedy for death to be available in this country....

H.R. Rep. No. 63-160, at 3 (1913) (Ex. 15). He also addressed the need for the United States to stake out its own law for the high seas:

The maritime law of a country, so far as the high seas are concerned, may be described as the law of the forum for that part of the globe

governing all vessels when brought before its courts - in the absence of treaty stipulations...[O]ur courts now take jurisdiction of injuries on a foreign ship and of collisions between foreign ships even when they take place on the high seas.

H.R. Rep. No. 64-1419, at 2 (1917) (Ex. 25).

In sum, Congress adopted DOHSA in response to a line of Supreme Court cases and adopted the established meaning of high seas as non-sovereign waters used in those cases. That meaning must be given force and effect. McDermott International Inc. v. Wilander, 498 U.S. 337 (1991).²²

While the Supreme Court has not had the opportunity to rule on the question of DOHSA's inapplicability to foreign waters, it has repeatedly observed that DOHSA was enacted to fill the legal "void" on the high seas. The Supreme Court has concluded that Congress legislated only to "the extent of the problem" of the lack of a federal death action "on the high seas," and acted to cure that "void." See Miles v. Apex Marine Corp., 498 U.S. 19, 24-25 (1990) ("DOHSA filled this void, creating a wrongful death action for all persons killed on the high seas..."); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 230 (1986) ("The reach of DOHSA's substantive provisions was explicitly limited to actions arising from accidents on the high seas..."; Congress acted to remedy "the void" that existed); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 622 (1978) ("Congress confined DOHSA to the high

²² The international definition of the high seas as non-sovereign waters has prevailed since DOHSA's enactment. United States v. Louisiana, 394 U.S. 11, 23 (1969) ("Outside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation."); Maul v. United States, 274 U.S. 501, 511 (1927) ("The high sea is common to all nations and foreign to none..."); Cunard Steamship Co. v. Mellon, 262 U.S. 100, 122-3 (1923) ("on the high seas...there is no territorial sovereign..."). The United States ratified the Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, 2314, which codified the pre-existing international law rule defining high seas as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Art. 1.

seas,” while the general maritime death remedy of Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) applies only to “coastal waters....”); Moragne v. States Marine Lines, 398 U.S. 375, 397-8 n.13 (1970) (DOHSA's purpose was to cure the “void” of lack of a federal remedy on the “high seas” and that was “the extent of the problem.”).²³

In 1924, one of the first decisions to apply DOHSA repeatedly used the term to refer to non-sovereign waters, citing cases describing the high seas as "the common ground of all nations" and (from The Scotland) "where the law of no particular State has exclusive force, but all are equal...." The Buenos Aires, 5 F.2d 425, 435-6 (2d Cir. 1924). The Buenos Aires is in full conformity with the drafting history.

B. DOHSA'S DRAFTING HISTORY SHOWS THAT “HIGH SEAS” MEANS NON-SOVEREIGN WATERS AND EXCLUDES THE FOREIGN TERRITORIAL WATERS

DOHSA’s drafting history shows that Congress considered legislation which included not only the high seas but also United States and foreign territorial waters. But the comprehensive scope of the early proposals was pared back significantly. In the end, only the high seas were covered by DOHSA. Indeed, the only phrase that remained constant from the first draft in 1903 through the enacted statute in 1920 was the central requirement “on the high seas.” The history demonstrates that Congress understood that foreign waters were specifically excluded from the bill’s coverage and that the term

²³ In a dissent by Justice Stevens in Smith v. United States, 507 U.S. 197 (1993), which addressed the issue of whether the Federal Tort Claims Act extended the government’s liability to torts in the non-sovereign region of Antarctica, Justice Stevens noted that the U.S. government was already liable under DOHSA for torts on the “sovereignless high seas.” Id. at 209 (J. Stevens, dissenting). Justice Stevens considered it obvious that DOHSA's term “high seas” meant the sovereignless high seas.

“high seas” meant non-sovereign waters.

- 1. In 1912, after text is dropped from prior bills that applied DOHSA to foreign waters, the drafters confirm “[w]e leave out the territorial waters of foreign countries.”**

From 1904 to 1911, the first bills, drafted by the MLA, specifically designated the high seas, the Great Lakes and United States territorial waters and also included broad coverage of U.S. vessels in “whatsoever waters.” H.R. 9880 (1904) (Ex. 1); H.R. 11486 (1906) (Ex. 3); H.R. 15810 (1909) (Ex. 4); S. 8397 (1909) (Ex. 6); S. 6291 (1910) (Ex. 7); S. 2673 (1911) (Ex. 9).²⁴

In these first drafts, the term “whatsoever waters” would have extended the Act to deaths on U.S. vessels on foreign territorial waters. In 1912, however, the “whatsoever waters” coverage was dropped from the bill.²⁵ At a House hearing, an MLA lawyer confirmed that the new proposal did not apply on foreign territorial waters. The defendants cite to this hearing but fail to direct the Court to the relevant discussion. (Def. Br. at 20-21 n.7).

The MLA lawyer was asked whether text should be added to prevent suits under the Act for collisions “in foreign waters on foreign ships and under the jurisdiction of foreign countries.” He made it clear that foreign waters were excluded from the Act:

No: we only say on the high seas, the Great Lakes, and other navigable waters of the United States. We leave out the territorial waters of

²⁴ The MLA drafts from 1904 through 1911 applied the act to injuries sustained “on the high seas, the Great Lakes, or any navigable waters of the United States, or if happening to any of the passengers or crew on board of any vessel of the United States, then in whatsoever waters such vessel may have been at the time of such injury....” See, e.g., H.R. 9880 (1904) (Ex. 1); S. 5564 (1904) (Ex. 2); S. 2673 (1911) (Ex. 9) (emphasis added).

²⁵ The 1912 draft applied “on the high seas, the Great Lakes or any navigable waters of the United States.” H.R. 24764 (1912) (Ex. 10) and S. 6930 (1912) (Ex. 12).

foreign countries.

1912 Hearing at 10 (Ex. 11) (emphasis added).

2. In 1914, on the House floor, DOHSA's drafters confirmed the meaning of high seas as non-sovereign waters.

The bill was addressed in a session on the floor of the House of Representatives in 1914.

Congressman McCoy, one of the bill's key sponsors, observed that "[t]he primary purpose of the bill is to create a cause of action for death on the high seas...where no cause of action now exists." 51 Cong. Rec. H1928 (1914) (Ex. 16).

Congressman Bryan directly questioned the meaning of the term high seas because of his concern that a court could construe the statute to preempt state court remedies in certain state waters, such as Puget Sound.²⁶ In response, DOHSA's drafters told Mr. Bryan that he was wrong and confirmed that the term high seas did not include state waters but referred to the waters "outside of the 3-mile limit," a shorthand reference to the then existing boundary between the high seas and territorial waters:

²⁶ The version of the bill being discussed (H.R. 6143, Ex. 14) was awkwardly written to apply to U.S. waters and the high seas, but was exclusive only for the high seas under Section 7, while Section 8 preserved the right to plead state law for deaths in U.S. waters. Congressman Bryan did not believe that the bill was clear enough to preserve state law for the Puget Sound. In later comments, Mr. Bryan objected to the 1914 bill on the grounds that its remedy was too limited, the decedent's contributory negligence operated to reduce damages, the vessel owner could curtail his liability under the limited liability act, and state law was not fully preserved even for the high seas. 52 Cong. Rec. App. H31-37 (1914) (Ex. 19). Thus, Mr. Bryan drafted his own more generous bill, which Congress never considered, which expressly left to suitors the right to go to state court for a remedy under state law for deaths on the high seas or elsewhere. H.R. 12807 (1914) (Ex. 33). Mr. Bryan certainly did not support a definition of high seas as including foreign or state territorial waters. Significantly, his fear that high seas in DOHSA could include state waters was not shared by anyone else in Congress.

MR. McCOY. Puget Sound is not a part of the high seas. It is subject to admiralty jurisdiction but the term 'high seas' refers to that part of the ocean outside of the 3-mile limit.

MR. BRYAN. Unless the gentleman is quite sure about that, I think he is mistaken. The arms of the sea are deemed a part of the high seas. The 3-mile limit is a different proposition altogether.

MR. McCOY. No: the high seas, as I understand it, are that part of the ocean outside of the 3-mile limit.

MR. COX. The States have no jurisdiction.

* * *

MR. McCOY. I will say to the gentleman this...I am assured by Judge Putnam, than whom there is no higher authority in admiralty law in this country...and the gentleman from Virginia [MR. MONTAGUE], who has a great deal of experience in these matters, assures me that the jurisdiction over Puget Sound would not be affected in any way by this bill and that Puget Sound is not part of the high seas although of course it is a part of the navigable waters of the United States for admiralty purposes.²⁷

51 Cong. Rec. H1929 (1914) (Ex. 16).

In his comments, Congressman Bryan (like the defendants here) confused the term “high seas,” as incorporated in the bill from maritime accident cases, with the question of the broader scope of admiralty jurisdiction. The corrections made by Congressmen McCoy and Cox, explaining that Mr. Bryan’s worries were groundless, plainly show that the term “high seas” was used to refer to non-sovereign waters. In later remarks, Mr. Bryan cited cases based on more broadly written criminal

²⁷ It is important to note that Mr. McCoy was using the term “outside of the 3-mile limit” to define the high seas prior to the “marine league” language being added to Section 1 of the Act in 1916. S. 4288 (1916) (Ex. 23).

admiralty statutes dating back to 1790 which incorporated a distinctly different, and more ancient, basis of jurisdiction to prosecute crimes committed on board U.S. vessels by American crew. 52 Cong. Rec. App. H34 (1914) (Ex. 19). As explained further at Point IV, *infra*, these cases have no relevance to the maritime case law to which Congress was responding and do not define high seas for purposes of DOHSA.²⁸

3. In 1916, when U.S. state waters were removed from the legislation, the drafters confirmed again that foreign territorial waters, in particular Canadian waters, had been excluded as “extraterritorial.”

At a 1916 hearing, the MLA again confirmed that foreign territorial waters were excluded. A legislative compromise had been reached to eliminate U.S. state waters from the bill’s reach. H.R. 6143 (1915) (Ex. 20); S. 4288 (1916) (Ex. 23). The bill still applied “on the high seas” and also specifically included “any navigable waters” of U.S. territories. The phrase “beyond a marine league from the shore of any State...” was added after “on the high seas.” This phrase did not change the meaning of high seas, but simply confirmed the agreement that had been reached to carve out state waters from the bill.

This is confirmed by the exchange which followed between MLA lawyer Mr. Hughes and the House Judiciary Committee, in which they discussed Canadian waters and concluded that “we cannot legislate about it, “ because it would be “extraterritorial.” 1916 Hearing at 16-17 (Ex. 22). Mr.

²⁸ The defendants also incorrectly imply that the U.S. Attorney General's Office defined high seas as all waters seaward of the low water mark for the purposes of DOHSA. (Def. Br. at 27). To the contrary, the assistant attorney did not render any opinion or analysis on DOHSA. He merely presented the definitions found from his research, including criminal law definitions, stating that “some of these definitions are not entirely consistent, and this probably may be accounted for by the context of the law where the term is used.” 52 Cong. Rec. App. H34 (1914) (Ex. 19) (emphasis added).

Hughes testified:

The Canadian law certainly applies up to their boundary. That is a foreign country, and I do not believe that we could pass an act that would apply to Canadian waters. I do not believe the States or the Congress could pass an act that would apply to Canadian waters, certainly as to collisions between Canadian vessels, or between a Canadian vessel and an American vessel....[The bill] does not apply to the Canadian part [of the Great Lakes], because it is covered by the Canadian statutes and we can not cover it.

1916 Hearing. at 16-17 (Ex. 22).

Congressman Graham agreed and further observed that applying the statute to foreign waters "would be extraterritorial, so far as we are concerned." *Id.* at 17 (Ex. 22). Congressman Montague, one of the sponsors of the bill, previously referred to as having "a great deal of experience in these matters,"²⁹ agreed, and said that the only way to have a law which reached any vessel in foreign territory "would be by convention or treaty." *Id.* (Ex. 22).

These statements are, of course, obvious references to the established international law rule that legislation is presumptively territorial (see p. 6, supra), and one way to cover foreign waters without international discord is by the consent of the foreign state through treaty.³⁰

In American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909), Justice Holmes, citing to his decision a year earlier in The Hamilton, drew a sharp contrast between applying an American law on the high seas as opposed to in sovereign foreign territory. He concluded that Congress could

²⁹ 51 Cong. Rec. H1929 (1914) (Ex. 16) (statement of Mr. McCoy to Mr. Bryan).

³⁰ Ross v. McIntyre, 140 U.S. 453, 465 (1891), is an example of a case involving a treaty that extended American criminal jurisdiction to crimes committed on U.S. vessels by American seaman in foreign waters. There, a treaty with Japan expressly permitted U.S. consuls to try Americans for crimes committed on board American vessels in the sovereign territorial waters of Japan.

legislate “in regions subject to no sovereign, like the high seas,” but that given the lex loci rule and international law comity principles, American statutes should not be extended to foreign territory:

No doubt in regions subject to no sovereign, like the high seas...countries may treat some relations between their citizens as governed by their own law, and keep, to some extent, the old notion of personal sovereignty alive....But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done....For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.

213 U.S. at 355-56 (citations omitted). Consequently, the Supreme Court has repeatedly held that a statute will not be construed to apply to foreign territory absent Congress’ express intention to the contrary. See, e.g., E.E.O.C. v. Arabian American Oil Co., 499 U.S. at 248-49; see also p. 6, supra.

There is no reference in DOHSA to foreign territorial waters and the marine league language was not added in 1916 to include foreign waters, which had already been removed in the 1912 bill. Such a radical addition in the bill’s coverage, which would require an express provision by Congress in the statute, is missing from DOHSA’s text and history. To the contrary, the drafters expressly reaffirmed that foreign territorial waters were not part of DOHSA.³¹

4. In 1916, Section 7 is added to make it clear that the state waters were not in any way affected by the bill.

³¹ Judge Sweet in In re Air Crash Off Long Island found that defendants could “cite no direct legislative history to support their conclusion that the ‘marine league’ language defines high seas, or that the ‘high seas’ requirement should be ignored.” 1998 WL 292333,*4 (S.D.N.Y., June 2, 1998).

In 1916, a new section (which in the act's final version became Section 7) provided that the Act did not apply on state waters or the Great Lakes. When Section 7 was introduced by the MLA lawyer, the only discussion which took place dealt with the fact that the bill would not apply to either the American or Canadian waters of the Great Lakes, because state waters on the U.S. side had been deleted from the bill, and Canada had sovereignty and its law applied on its waters. 1916 Hearing, supra at 16-17 (Ex. 22).

Several years later, there was substantial debate on the House floor that this provision was "superfluous," because Section 1 already provided that the Act applied only on the high seas. 59 Cong. Rec. H4482-3 (1920) (Ex. 31). Congressman Montague responded that the section was added "out of abundant caution, to calm the minds," referring to "[a] gentleman once here from an extreme Western state...", undoubtedly Mr. Bryan of Washington. Id. at 4483. Mr. Montague continued:

[Section 7] is intended...to put that matter at rest, namely, that the territorial waters of the States shall be retained within the jurisdiction and sovereignty of the States and their courts. I agree...that there is no necessity for it except to put at rest the minds of people who see dangers everywhere they turn.

Id. (emphasis added).

In Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), the Supreme Court acknowledged that Section 7 was added to confirm that state law was preserved and would not be preempted by the landmark decision, Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917). Section 7, therefore, is a by-product of our federalism and has nothing to do with foreign law. Tallentire said that Section 7 was the "product of perhaps overabundant caution," but the MLA lawyers, "an expert body of maritime lawyers, had reason to fear that absent a saving clause specifically recognizing the continued

viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts.” Tallentire, 477 U.S. at 223-24. The Court noted the concerns that the MLA would have had about the Jensen decision which had preempted state worker’s compensation laws, despite the saving clause of the 1789 Judiciary Act. Id. Thus, acknowledged Tallentire, the MLA lawyers added Section 7 to make sure that Jensen would not deter state remedies for deaths in U.S. waters. Id. at 224.

5. In 1919, federal territorial waters are removed from the bill and DOHSA finally applies only "on the high seas." Furthermore, to complete the conformity with international law, Section 4 is added to preserve foreign law for foreign vessels.

In 1919, final changes were made to the bill to harmonize it with international law and to make DOHSA apply only on the high seas. In one change, all United States territorial waters were finally excluded from DOHSA's scope. Second, a new Section 4 was added to preserve foreign law remedies on the high seas. After reviewing presentations from the MLA, which addressed The Scotland, La Bourgogne and The Titanic, the Senate Judiciary Committee disagreed with the MLA on the point that Congress could legislate even for foreign vessels on the high seas and concluded:

From a review of the authorities, it is not believed that the Congress has the power to create a substantive right of action to recover damages against foreigners and their vessels for wrongful death on the high seas.

S. Rep. 66-216, at 4 (1919) (Ex. 28). This conclusion was consistent with the case law at the time. See, e.g., The Titanic, 233 U.S. at 732 (“Congress does not control or profess to control the conduct of a British ship on the high seas”); The Hamilton, 207 U.S. at 403 (“No one doubts the power of England or France to govern their own ships upon the high seas.”).

As a result, Congress added Section 4 to complete DOHSA's conformity to international law. Section 4 recognizes that on the high seas equal status must be given to foreign law in our courts. As stated by the Supreme Court, Section 4 was intended to "preserve the right to recover under the law of another sovereign for whatever measure of damages that law might provide, regardless of any inconsistency with the measure of damages provided by DOHSA...." Tallentire, 477 U.S. at 222.

The Supreme Court's decision in La Bourgogne, applying foreign wrongful death remedies on the high seas to a foreign vessel, was reaffirmed and now codified. But, because the Supreme Court had allowed foreign vessels to invoke the U.S. limited liability act to limit their damages, language was added to Section 4 to prohibit this result.

Section 4 provides further irrefutable proof that Congress could not have meant the term "high seas" to include foreign territorial waters, as defendants claim. Assuming such a reading, Section 4 would mandate that the foreign laws of one nation be given extraterritorial effect in the territorial waters of a second foreign state, an absurd result. See American Banana Co., 213 U.S. at 355-6. A term repeated in a statute should be given a consistent meaning. Gustafson v. Alloyd Company, Inc., 513 U.S. 561, 568 (1995). Section 4 plainly confirms DOHSA's international context and adoption of the international meaning of high seas as non-sovereign waters.

6. Throughout the drafting history, the MLA confirmed that high seas meant non-sovereign waters as used by the Supreme Court in maritime accident cases.

Throughout the history, there were discussions concerning the power of Congress to enact a statute covering the high seas. Citing The Scotland, 105 U.S. 24 (1881), an MLA lawyer explained to Congress that it had the legislative authority to create a federal law for the high seas, because on the

high seas “[e]ach nation may declare what it will accept, and by its courts enforce as the law of the sea....” S. Rep. No. 64-741 at 4 (1916) (citing The Scotland) (Ex. 24). This theme was repeated the next year, when an MLA lawyer stated: “[t]he maritime law of a country, so far as the high seas are concerned, may be described as the law of the forum for that part of the globe governing all vessels....” H.R. Rep. No. 1419 at 2 (1917) (Ex. 25). See also S. Rep. No. 741, p. 2 (1916) (Ex. 24). Earlier, an MLA lawyer explained: “Any country has the right to say what shall be the law of the high seas.” 1912 Hearing at 8 (Ex. 11).³²

The MLA repeatedly addressed the need for a statute to fill the legal void and provide a single U.S. law for the high seas. The drafting history is replete with instances of the MLA's objections to The Hamilton and its application of state laws on the high seas. See H.R. Rep. No. 66-674, at 3-4 (1920) (Ex. 30); S. Rep. No. 66-216, at 3-4 (1919) (Ex. 28); H.R. Rep. No. 64-1419, at 3-4 (1917) (Ex. 25); S. Rep. No. 64-741, at 2-4 (1916) (Ex. 24); 1916 Hearing, at 6-8, 13-16 (Ex. 22); H.R. Rep. No. 63-160, at 2-3 (1913) (Ex. 15); 1912 Hearing, at 7-15 (Ex. 11); 1910 Hearing, at 9-10 (Ex. 8).

By contrast, the MLA had no objection to the application of the lex loci in state waters or foreign territorial waters. At the 1910 Hearing, the MLA told Congress that where death occurs in “territorial waters,” the applicable law is “the law of the particular jurisdiction where the negligent killing has occurred.” 1910 Hearing at 8 (Ex. 8). The examples presented to Congress included City of Norwalk, 55 F. 98 (S.D.N.Y. 1893), aff'd sub. nom., The Transfer, 61 F. 364 (1894) (applying state

³² In In re Air Crash Off Long Island, Judge Sweet concluded that “[t]he weight of authority establishes that the term ‘high seas’ at the time DOHSA was enacted meant non-sovereign waters.” 1998 WL 292333 at *7.

law in state territorial waters) and Robinson v. Detroit & C. Steam Nav. Co., 73 F. 883 (6th Cir. 1896), where, the MLA noted, President Taft, in his prior career as a U.S. circuit judge, applied a statute of Canada to a collision between U.S. vessels in Canadian waters.

The MLA representative then proceeded to distinguish these “territorial waters” cases from the “high seas” cases that were the problem:

Those [City of Norwalk and Robinson] were both instances of territorial waters only, but recently in two cases of notable importance which came before the Supreme Court of the United States at the October Term, 1907, the court was asked to say whether or not statutes foreign to the forum would be applied to sustain the right of recovery for death in cases where the collision or accident occurred on the high sea itself. The cases were The Hamilton (207 U.S. 398) and La Bourgogne (210 U.S. 95)

...I shall state the facts, so that you will see why we are contending that we should have a single authority and will see the embarrassments arising from want of uniformity.

Id. at 8-9 (emphasis added).

7. 1920: The bill's title is narrowed to apply only "on the high seas."

The title of the legislation from 1912 until shortly before DOHSA's enactment was "A Bill relating to the maintenance of actions for death on the high seas and other navigable waters." H.R. 24764 (1912) (Ex. 10); H.R. 6143 (1915) (Ex. 20); H.R. 9919 (1916) (Ex. 21) S. 4288 (1916) (Ex. 23). At the end of the day, the title was narrowed to cover only "death on the high seas." (Ex. 32). The Supreme Court has held that the title of a statute can be “a useful aid” to determine its purpose, Federal Trade Commission v. Mandel Brothers, 359 U.S. 385, 388-89 (1959), and DOHSA’s title reflects its limited application.

* * *

In sum, the drafting history shows that Congress recognized that DOHSA did not apply on foreign territorial waters. The words “high seas” were chosen deliberately and used in accord with their accepted meaning in maritime accident cases. Congress extended its authority over non-sovereign waters but no further, and acted with deference to foreign and international law, and with respect for the existing rights of action on foreign waters.

II. THE CRASH OCCURRED INSIDE CANADA’S WATERS AND NOT ON THE HIGH SEAS

It is uncontroverted that the crash of Swissair Flight 111 occurred on Canadian territorial waters. By the 1980's, international law recognized each nation’s right to claim a 12-mile territorial sea.³³ Milde Aff. at 7 (Ex. 36)³⁴; Restatement (Third) of the Foreign Relations Law of the United States, §§ 511, 512 (1987) (international law allows nations to exercise sovereignty over its internal waters and its territorial sea which may not exceed 12 nautical miles); 1982 U.N. Convention on the Law of the Sea, Art. 3. (Ex. 40). The vast majority of the world’s nations, including Canada and the United States, have exercised their right to claim a 12-mile territorial sea. Milde Aff. at 7-8 (Ex. 36); Section 4(a) of the Canadian Federal Oceans Act (1996) c. 31 (Ex. 38); Proclamation No. 5928, 54 Fed. Reg. 777 (1988) (Ex. 39); Justice Opinion at 3 (Ex. 37).

³³ International law must be applied as it exists currently. The Paquete Habana, 175 U.S. 677, 694 (1800); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

³⁴ Professor Dr. Michael Milde is a professor of law at the McGill University in Montreal, Canada, the former Director of the McGill Institute and Centre of Air and Space Law, and for 25 years was a Canadian government senior representative to the International Civil Aviation Organization (ICA), a United Nations agency. His credentials are summarized in Attachment 1 to Ex. 36.

Canadian law provides that the 12-mile territorial sea constitutes “internal waters of Canada” and that “the internal waters of Canada and the territorial sea of Canada form part of Canada.” Canadian Federal Ocean Act, § 7 (Ex. 38). Canada has the same sovereignty over its territorial sea, and over the air space thereof, as it has in respect of its land territory and internal waters. Restatement (Third) of the Foreign Relations Law of the United States §§511, Comment b; §512 (1987).

The 1944 Convention on International Civil Aviation (“Chicago Convention”), ratified by the United States, Canada and 183 other countries, likewise recognizes that the sovereignty of a state extends to the territorial sea and the airspace above it. Chicago Convention, 61 Stat. 1180 (1944) (Ex. 41). Article 2 of the Chicago Convention provides that “the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.” (Ex. 41). Under Article 26, the contracting state in whose territory the crash occurs is obliged to investigate the accident. (Ex. 41). The civil investigation of Swissair Flight 111 is being conducted by Canada.

Had this accident occurred on the high seas, the Chicago Convention would have obliged Switzerland, as the state of registry of the aircraft, to conduct the investigation. Milde Aff. at ¶ 10 (Ex. 36).

III. THE FOREIGN WATERS CASES CITED BY DEFENDANTS ARE ERRONEOUS AND SHOULD NOT BE FOLLOWED

The foreign waters cases cited by defendants were wrongly decided. Those cases form a house of cards built on flawed precedent without a foundation in DOHSA’s language or history. None of the cases addressed the accepted meaning of the term “high seas” as non-sovereign waters that was

incorporated in DOHSA; or the legislative history that territorial waters were intentionally excluded from DOHSA's reach; or the rules of construction established by the Supreme Court which reject extension of DOHSA to foreign territorial waters.

The cases were decided at a time when courts understood that general maritime or state law claims could be brought together with a DOHSA action. See Dugas v. National Aircraft Corp., 438 F.2d 1386 (3d Cir. 1971) (Pennsylvania survival action permitting recovery of decedent's lifetime earnings regardless of actual support could supplement suit governed by DOHSA). But the Supreme Court subsequently held that DOHSA and general maritime law remedies are not concurrent. DOHSA provides "the exclusive recovery for deaths on the high seas." Dooley v. Korean Air Lines, 524 U.S. 116 (1998). By contrast, actions arising on foreign territorial waters may be governed by general maritime law, which may be supplemented by state or foreign law. See Point V, infra.

Moreover, contrary to defendants' assertion that there is an "unbroken line" of cases applying DOHSA to foreign waters, the Second Circuit has applied general maritime law, and not DOHSA, on foreign territorial waters. Public Administrator v. Angela Compania Naviera, 592 F.2d 58, 63 (2d Cir. 1979) (general maritime law applied to death inside territorial waters; death occurred in Greek waters).³⁵ It has also applied The Scotland to define the "high seas" for maritime tort and DOHSA purposes as nonsovereign waters. The Buenos Aires, 5 F.2d at 435-6. See also In re Air Crash Off

³⁵ Defendants also incorrectly suggest that commentators concur with the cases applying DOHSA in foreign waters. Def. Br. at p. 12. These commentators merely cite to the cases applying DOHSA to foreign waters without providing their own analysis. See 2 Benedict on Admiralty, §81b n.2 (7th ed. rev. 1999); 1 Thomas J. Schoenbaum, Admiralty and Maritime Law, §8-2, at 469-70 (2d ed. 1994).

Long Island, 1998 W.L. 292333, * 7 (“The weight of authority establishes that the term ‘high seas’ at the time DOHSA was enacted meant non-sovereign waters.”).

The defendants place their main reliance on Jennings v. Boeing Company, 660 F.Supp. 796 (E.D. Pa. 1987), aff’d without op., 838 F.2d 1206 (3d Cir. 1988), a decision granting a motion for forum non conveniens dismissal of a death action arising on Scottish territorial waters. Jennings stated that if the case had proceeded in the United States, DOHSA would apply. The reasoning underlying this conclusion, however, was repudiated four years later by the Supreme Court in McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991).

Jennings acknowledged that “[i]f Congress intended to incorporate the generally accepted meaning of ‘high seas,’ this accident would not be within the scope of [DOHSA],” since territorial waters are not “within the classic definition of ‘high seas.’” Id. at 803.

In McDermott, the Supreme Court held that terms of art used in maritime statutes must be defined according to their “established meaning” in the case law to which Congress is responding. Jennings did not consider, as McDermott required, that DOHSA responded directly to a series of Supreme Court cases, including The Hamilton, which defined high seas as non-sovereign waters.

Instead, without conducting any review of DOHSA’s history (despite the court’s concession that the classic high seas definition did not include territorial waters), Jennings opined that “the term high seas was used to refer to all waters beyond the United States coast” rather than “in the generally accepted international sense,” because “otherwise the phrase ‘beyond a marine league’ would be superfluous.” Id.

Jennings put the cart before the horse, as its interpretation stripped the central words “on the

high seas" of their independent meaning. Jennings ignored that the phrase "high seas" was the central provision of the statute and that the "marine league" text was added late in the drafting process to appease states rights advocates such as Congressman Bryan. See pp. 18-19, supra. Nor did Jennings consider that the drafting history contained explicit statements that the legislation did not cover foreign territorial waters.

Jennings also overlooked that DOHSA's drafters were aware of the time-honored presumption against application of U.S. laws on foreign territory, and that the statute would not have such extraterritorial effect. 1916 Hearing, supra, at 16-17 (Ex. 22); American Banana Co., 213 U.S. at 355-56.

This presumption was upended by In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978, 531 F.Supp. 1175, 1184 (W.D. Wash. 1982), which surmised that "once Congress has unequivocally chosen to extend its power outside the territorial boundaries of the United States, that power should be presumed to extend to its fullest extent unless specifically restricted...." This statement is directly contrary to Supreme Court authority that any "lingering doubt" about a statute's territorial reach must be resolved against applying a statute to torts committed in foreign territory. Smith v. United States, 507 U.S. 197, 203-4 (1993). Nor did Bombay address Supreme Court case law holding that the only region outside a nation's territory where each nation has an equal right to legislate was on the non-sovereign high seas. American Banana Co., 213 U.S. at 355-6 (in contrast to applying forum law to "regions subject to no sovereign, like the high seas....," there is a strict presumption against applying American law to foreign sovereign territory.); see also The Scotland, 105 U.S. at 29-30.

Without citing to DOHSA's history, Bombay made the sweeping and incorrect statement that

nothing in DOHSA “or its legislative history supports the position that Congress intended to limit the scope of this remedy to deaths occurring in international waters.” 531 F.Supp. at 1183. But the legislative history shows that Congress used the words “high seas” according to their accepted international meaning and expressly rejected the application of DOHSA to foreign waters.

The first case which considered the foreign waters issue was a Ninth Circuit decision which observed that the application of DOHSA in foreign waters was questionable and subject to doubt. Roberts v. United States, 498 F.2d 520, 525 (9th Cir.), cert. denied, 419 U.S. 1070 (1974).³⁶ In a footnote, the court hypothesized that because each nation has the power to declare its own territorial waters, perhaps Congress wanted all waters beyond a marine league from U.S. shores to be within DOHSA. Id. at 524 n. 7. The footnote did not reference DOHSA’s history but cited a law review article which stated that it was unclear whether DOHSA applied in foreign territorial waters, but the scope of admiralty jurisdiction does extend to such waters and “presumably the scope of [DOHSA] would be the same....” Id. at 524, citing Ball, Comment: Wrongful Death at Sea - The Death on the High Seas Act, 51 Cal. L.R. 389 (1963) (hereinafter “Ball article”).

Roberts' off-handed dicta not only overlooked that DOHSA’s drafters specifically addressed foreign waters, but ignored that a state’s power to claim a territorial sea is constrained by international law. See pp. 7-8, 27, supra. The Ball article confused admiralty jurisdiction, which covers all navigable waters, with the accepted meaning of the term “high seas” as non-sovereign waters. See pp. 7-11, 18, supra. Indeed, Roberts and the Ball article were sharply criticized on these grounds by a law

³⁶ That doubt was expressed again in Williams v. United States, 711 F.2d 893, 895 n.3 (9th Cir. 1983).

review article which concluded that Congress did not intend “to usurp the already existing foreign causes of action arising within a foreign sovereign's territorial waters.” Doherty, The Death on the High Seas Act: Two Remaining Problems, 41 La. L. Rev. 1214, 1221-22 (1981).

Nevertheless, the first case to actually apply DOHSA to foreign waters swept away the doubt expressed by the Roberts court and relied on its dicta as authoritative. Cormier v. Williams/Sedco/Horn Constructors, 460 F.Supp. 1010 (E.D. La. 1978), somehow extended DOHSA to a death on an inland river in Peru. Cormier improperly surmised that DOHSA applied to any waters “outside the reach of state law,” id. at 1012, ignoring DOHSA’s central requirement that the death occur on the high seas.

Mancuso v. Kimex, Inc., 484 F.Supp. 453, 455 (S.D. Fla. 1980), relied merely on Roberts and Cormier with no independent analysis. As one commentator observed, Cormier and Mancuso ignore that application of foreign law in sovereign waters “was recognized by the initiators of DOHSA in 1920” and that “[t]he understanding of international law accepted during the era was that each sovereign created the laws applicable within its territory and other sovereigns respected this exercise of power.” 41 La. Rev. at 1223.

The next decisions continued to follow the line of flawed precedent started by Roberts, Cormier and Mancuso. First & Merchants National Bank v. Adams, 1979 U.S. Dist. LEXIS 9039 (E.D. Va. 1979), aff'd in part and rev'd in part, 644 F.2d 878 (4th Cir. 1980) (unpublished),³⁷ involved a crash in the Canadian Bay of Bundy. Adams repeated the erroneous logic of Cormier by stating that “the term

³⁷ Reliance on unpublished Fourth Circuit decisions is “disfavored.” 4th Cir. FRAP 36(c).

‘high seas’ would appear to embrace all navigable waters outside of those specifically excluded by the Act.” The court failed to refer to DOHSA’s history or the established meaning of the term high seas. And, while Adams held that general maritime law remedies were available in a DOHSA case, this conclusion was later overturned by the Supreme Court.

In Kuntz v. Windjammer Barefoot Cruises, Ltd., 573 F.Supp. 1277 (W.D. Pa. 1983), aff’d without op., 738 F.2d 423 (3d Cir.), cert. denied, 469 U.S. 858 (1984), both parties agreed to the application of American law. The court, following the Third Circuit decision in Dugas, held that damages could be recovered under Pennsylvania law and general maritime law in addition to DOHSA. Kuntz treated the issue as a simple choice of law between “federal admiralty law” and the law of the Bahamas, where the accident occurred. The court did not examine DOHSA’s language or history, but instead declared that Congress desired “uniformity” in enacting DOHSA, without considering that the statute established a uniform federal rule only on non-sovereign waters.³⁸

In Howard v. Crystal Cruises, Inc., 41 F.3d 527 (9th Cir. 1994), cert. denied, 514 U.S. 1084 (1995), the Ninth Circuit applied DOHSA to a death in Mexican waters based on the logic that “there is nothing inherently absurd with the notion of an American court applying American law to an action filed by an American plaintiff against an American defendant....” Id. at 530. Howard did not conduct any analysis of DOHSA’s text or review its legislative history, but relied on a list of prior cases, including two decisions which applied general maritime law, without DOHSA, on foreign waters.³⁹

³⁸ Kunreuther v. Outboard Marine Corp., 757 F.Supp. 633 (E.D. Pa. 1991), applied DOHSA without any discussion whatsoever.

³⁹ These included the Second Circuit decision in Public Administrator and Hammill v. Olympic Airways, S.A., 398 F.Supp. 829, 830, 833, 836 (D.D.C. 1975), which applied general

Although the defendants rely on Jacobs v. Northern King Shipping Co., Ltd., 180 F.3d 713 (5th Cir. 1999), it did not address the foreign waters issue. The parties agreed that DOHSA applied, and the issue in dispute was whether plaintiff could supplement DOHSA with a survival action. While the appeal was pending, Dooley, 524 U.S. 116, held that a DOHSA claim did not include a survival action. Jacobs followed Dooley and never addressed whether or not DOHSA was properly applied in the case.

Another case cited by defendants, Sanchez v. Loffland Brothers Co., 626 F.2d 1228 (5th Cir. 1980), cert. denied, 452 U.S. 962 (1981), is simply unclear. The court appeared to apply general maritime law to a death on foreign waters, but in a footnote cited cases applying DOHSA to foreign waters. Id. at 1230 n.4. There is no discussion of the issue.

In sum, the only support for the foreign waters cases cited by the defendants is the line of erroneous precedent following the dicta footnote in the Roberts case. Continued perpetuation of the error of these cases should end.

IV. THE ANCIENT ADMIRALTY CRIMINAL JURISDICTION MEANING OF HIGH SEAS HAS NO RELEVANCE TO DOHSA

There is no evidence to support the defendants' theory that Congress adopted an ancient English admiralty criminal jurisdiction meaning of high seas as "all waters on the coast [beyond] the boundaries of [the] low water mark." (Def. Brief at 25). The DOHSA drafting history, see Point I.B., supra, proves beyond doubt that the drafters adopted the meaning of high seas as waters outside the

maritime law to an aviation accident in Greek waters, ruling that it was unnecessary to determine whether DOHSA applied.

territory of any nation, consistent with the Supreme Court maritime collision and death cases presented to Congress -- The Scotland, The Hamilton, La Bourgogne and The Titanic. Under McDermott, 498 U.S. 337, it is this use of the term “high seas” that governs.

While defendants correctly concede that this Court must examine “the historical use of the term ‘high seas’ in contexts like DOHSA . . .” (Def. Brief at 16 (emphasis added)), they somehow ignore the numerous references in the drafting history to the maritime collision and death cases which were the precise context of the legislation. Instead, defendants rely on admiralty crime statute cases that have no relevance to DOHSA and were not adopted by DOHSA's drafters.⁴⁰

In United States v. Wiltberger, 18 U.S. 76, (1820), the Supreme Court traced the history of the admiralty’s criminal jurisdiction back to ancient times in England when the common law and the admiralty courts disagreed vehemently over their respective jurisdiction to prosecute crimes. Id. at 106 endnote. The compromise was to create a “divided empire” with “all waters seaward of the low water mark” belonging to the admiralty criminal jurisdiction realm. Id. This also became the full scope of admiralty’s criminal jurisdiction in the United States. Whether a statute incorporated the full extent of that jurisdiction depended on the language of the statute. Id.

Thus, in Wiltberger the pertinent section of the admiralty crime statute only covered a crime

⁴⁰ One case defendants cite, Ross v. McIntyre, 140 U.S. 453 (1891) (Def. Brief at 25-27, 30) did not even adopt a definition of high seas. The defendants cite to the court’s recitation of an argument made by the losing counsel. Id. at 470-1. In Ross, the court held that a seaman was properly tried and convicted for murder committed aboard a U.S. vessel while the vessel was in a Japanese port. Under a special treaty with Japan, the U.S. consul was permitted to try criminal cases involving American seaman in Japan. The Supreme Court held that the trial in Japan by the U.S. consul was proper under the treaty, and confirmed that the territory of Japan includes Japan’s territorial waters. Id. at 472.

committed on the “high seas.” The court held that the phrase “high seas” could never cover the river Tigris in China even for a crime on board a United States vessel. Id. at 98-99.

In other cases, the relevant statutory language was more comprehensive and as a whole was interpreted to incorporate the full scope of ancient English admiralty criminal jurisdiction. Thus, in United States v. Rodgers, 150 U.S. 249 (1893), the statutory language covered crimes committed “upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States” Id. at 258. This statute was applied to a crime committed on board a U.S. vessel located on a Canadian river that connected to the Great Lakes, which the Rodgers court held were similar enough to seas to be included within the statute. Id. at 256.⁴¹ Although acknowledging the generally accepted meaning of “high seas” as the “highway of all nations,” Rodgers concluded, however, that this statutory language had been historically interpreted to incorporate the full extent of ancient English admiralty criminal jurisdiction. Id. at 254, 256. The court concluded that the statute was:

intended to extend protection to persons on vessels belonging to citizens of the United States, not only upon the high seas, but in all navigable waters of every kind, out of the jurisdiction of any particular state

Id. at 258.⁴²

⁴¹ Three years before Rogers, but after the relevant crime was committed, Congress amended the crime statute and specifically included the Great Lakes. 26 Stat. 424 (1890).

⁴² Rodgers actually highlights the extent to which DOHSA’s drafters confined the reach of DOHSA and incorporated a completely different concept of high seas. Originally the DOHSA legislation was drafted to cover accidents on board U.S. vessels located in “whatsoever” waters. This reach of the act over “whatsoever waters” was, however, the first text deleted from DOHSA. Also, the early drafts included the Great Lakes, and these waters were always listed as separate from the high

In 1909, the admiralty crime statute was simplified, perhaps to render unnecessary the complex analysis of cases like Rodgers, to apply on “the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States” 35 Stat. 1142 (1909). This language was coextensive with the Constitutional grant “to all cases of admiralty and maritime Jurisdiction.” U.S. Const. Art. III §2.⁴³ It is not surprising, then, that the ancient English criminal jurisdiction concept of high seas as waters seaward of the low water mark has not been mentioned in any Supreme Court opinion since 1903.

These admiralty crime statute cases are simply inapposite.⁴⁴ First, DOHSA is not a crime

seas and separate from U.S. navigable waters. See, e.g., H.R. 6143 (1913) (Ex. 14). Congressman Montague, a DOHSA sponsor with recognized experience in maritime matters, emphasized on the House floor in 1920 that “[t]he Great Lakes are not the high seas.” 59 Cong. Rec. H4486 (1920) (Ex. 31). DOHSA's drafters did not adopt the full scope of criminal admiralty jurisdiction and rejected the meaning of high seas in the crime statute discussed in Rodgers.

⁴³ Contrary to the defendants' claims, the Constitution plainly uses the term high seas in an international context, providing that Congress has the power “[t]o define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations.” U.S. Const. Art. I, § 8, cl. 10. This provision was one of several concerning “the intercourse with foreign nations” and was established because only the federal government was in a position to deal with these matters in a uniform way. The Federalist No. 42 (James Madison).

⁴⁴ The other admiralty crime or prize cases cited by the defendants are equally irrelevant. For example, Murray v. Hildreth, 61 F.2d 483 (5th Cir. 1932), involved a prosecution for a crime committed on a U.S. vessel while the vessel was 200 feet off the Florida coast. It is not a high seas case. United States v. Black, 291 F. Supp. 262 (S.D.N.Y. 1968), involved whether the U.S. could exercise admiralty criminal jurisdiction to prosecute gambling on the high seas more than twelve miles off the coast. These waters were indisputably the high seas. United States v. Libelants and Claimants of the Schooner Amistad, 40 U.S. 518 (1841), did not involve whether or not a vessel was on the high seas. The case involved whether slaves who had liberated themselves could be deemed property. United States v. Dewey, 188 U.S. 254 (1903), is a prize case, involving the status of Spanish vessels taken as prize in Philippine waters during the Spanish American war. Under international law, in time of war, the territorial sea of the enemy nation may be invaded and enemy vessels may be captured there, or on the high seas, or in the territorial seas of the defending nation. By contrast, the three-mile

statute subject to the ancient English doctrine of the divided empire, a concept that appears nowhere in DOHSA's drafting history. The admiralty's duty to prosecute crimes committed on board the nation's vessels even when located in foreign waters existed because the foreign states had no interest or duty to prosecute these crimes. See United States v. Flores, 289 U.S. 137, 159 (1933). This concern had nothing to do with tort law, where the injured victim brought the action, not the state, and the court would recognize and enforce the law of the place of the wrong. See Cuba R. Co., 222 U.S. at 478; American Banana Co., 213 U.S. at 356; Slater, 194 U.S. at 126; Smith, 42 U.S. at 33.

Second, DOHSA is confined to the high seas. The early draft language that would have applied DOHSA to deaths on U.S. vessels in "whatsoever waters" was rejected. See Point I.B.1., supra. Yet, this is precisely what defendants are attempting to tack onto DOHSA. That is not the law that Congress enacted. DOHSA does not incorporate in its text the additional language of arms of the seas "or all waters within the admiralty and maritime jurisdiction of the United States." In fact, proposed

Third, the legislative history shows that the drafters adopted The Scotland's and The Hamilton's definition of high seas and knowingly and expressly rejected DOHSA's application to foreign waters. The only time that the Rodgers case came up was in 1914 when Congressman Bryan expressed his fear that the awkward and ambiguous language in the 1914 bill (H.R.6143 Ex. 14) might result in a mistaken use of the Rodgers case. 52 Cong. Rec. App. H33 (1914) (Ex. 19). His fear was

territorial sea of a neutral nation may not be invaded. The Joseph, Sargeant, Master, 12 U.S. 451, 455 (1814). The prize cases follow their own international law rules, and even they distinguish the high seas from the territorial seas.

considered to be groundless, and the response to his concern was that the “high seas...are that part of the ocean outside of the 3-mile limit.” 51 Cong. Rec. H1928 (Ex. 16) (Statement of Mr. McCoy).

Language was subsequently added to the legislation to make it redundantly clear that the state waters that Mr. Bryan was concerned about would remain unaffected by DOHSA.

The admiralty crime statute cases do not define the reach of DOHSA.

V. IN 1920, THERE WAS NO VOID OR LEGAL VACUUM IN FOREIGN TERRITORIAL WATERS. TODAY, AMERICAN GENERAL MARITIME LAW CAN APPLY THERE

Defendants correctly concede that the purpose of DOHSA was to fill a particular gap where there was no American law and where Congress expected that American law could apply. Def. Brief, pp. 4, 16. Defendants are absolutely wrong, however, in claiming that application of The Scotland's and The Hamilton's definition of high seas creates a void, gap, or legal vacuum for foreign territorial waters, and that, furthermore, in 1920 Congress expected American law to apply in such waters.

Nothing can be further from the truth.

Foreign countries were not legal vacuums in 1920. Their own laws applied in their own internal and territorial waters and U.S. courts of that era routinely applied the well-established rule of lex loci delicti. See pp. 8-9, supra.

The lex loci delicti rule continued to dominate conflict of laws in maritime territorial waters tort cases until the 1950's. The Restatement (First) on Conflict of Laws, published in 1934, adopted the conflict of laws rules and meaning of high seas as non-sovereign waters as established in the maritime collision and death cases. Thus, Sections 404 and 409 provide that liability for torts committed on board vessels in the territorial waters of a foreign state is governed by the law of that state, consistent

with Smith v. Condry and Robinson. Section 406 adopted the rules of The Scotland, The Titanic and La Bourgogne, providing that liability for torts on board vessels “on the high seas outside the territorial waters of any state is determined by the law of the state whose flag the vessel flies.” Comment a to Section 406, consistent with landmark maritime death cases, states that the term “‘high seas’ is used in the international sense and does not include seas which are the territorial waters of any state.”

DOHSA was enacted in complete conformity with the conflict of laws rules of that era, which were rigidly based on principles of territoriality. See R. D. Carswell, Vested Rights in International Law, 8 Int’l L. & Comp. L. Q. 268, 271 (1959). There was no void in foreign territorial waters. Lex loci applied there and in 1920 that was the only remedy that U.S. courts recognized. See Cuba R. Co. v. Crosby, 222 U.S. 473, 479 (1912).

Today, however, international law and conflicts of law have broadened. There is still no gap or legal void in foreign territorial waters, and, there is now a broader choice in applicable maritime law as a result of the landmark Supreme Court decision Lauritzen v. Larsen, 345 U.S. 571 (1953). While the high seas are still defined as outside the internal and territorial waters of any state, and thus DOHSA still cannot apply to this accident, under Lauritzen and other Supreme Court case law, American general maritime law, as supplemented by state or foreign law, can now apply in foreign waters. Defendants are completely wrong to conclude that if DOHSA does not apply, there is no other American law that can apply.

Defendants well know that general maritime law provides a death remedy in cases where DOHSA is inapplicable. In 1970, in Moragne v. States Marine Lines, 398 U.S. 375 (1970), the Supreme Court overruled The Harrisburg, 119 U.S. 199 (1886), and declared the existence of a

general maritime law death remedy which is available “in situations not covered by the Act (DOHSA).” Id. at 402. A few years later, in Sea-land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), the court ruled that the Moragne death remedy was broader than DOHSA and permitted recovery for pecuniary losses and loss of society and companionship. Id. at 584-587. In 1978, the Supreme Court in Mobil Oil v. Higginbotham, 436 U.S. at 618, acknowledged that Moragne and Gaudet apply where DOHSA does not apply and that the general maritime death remedy applies in coastal waters.

In 1996, in another landmark maritime decision, Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996), the Supreme Court, affirming the Third Circuit, ruled that the general maritime law death remedy may be supplemented by state tort law. Id. at 207.

To determine whether general maritime law can reasonably apply in foreign territorial waters, courts must apply the interest analysis conflict of laws test developed in Lauritzen, as further refined in Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) and Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970) (the “Lauritzen triad”), and extended to all general maritime law claims, not only Jones Act claims.⁴⁵

⁴⁵ Unlike DOHSA, the Jones Act is not confined to any specific waters. Its literal words allow any seaman to sue any shipmaster for work-related injuries on board the vessel. It is a classic law of the flag statute governing matters pertaining purely to the internal discipline and economy of a vessel. Lauritzen, 345 U.S. at 584. The Jones Act and general maritime law can apply in foreign waters if the seaman is American, the vessel is a U.S. flag vessel or the vessel is controlled by U.S. owners. The following are American plaintiff cases applying the Jones Act and general maritime law: Zipfel v. Halliburton Co., 832 F.2d 1477 (9th Cir. 1987), amended on other grounds, 861 F.2d 565 (9th Cir. 1988); Sevison v. Cruise Ship Tours, Inc., 1997 U.S. Dist. LEXIS 12728 (D.V.I. 1997); Williams v. Gleneagle Ship Management Co., 1991 U.S. Dist. LEXIS 14497 (E.D. Pa. Oct. 8, 1991); Sablic v. Armada Shipping APS, 973 F. Supp. 745 (S.D. Tex. 1997); Nye v. A/S D/S Svendborg, 358 F. Supp. 145 (S.D.N.Y. 1973) aff'd in part and rev'd in part, 501 F.2d 376 (2d Cir. 1974), cert. denied, 420 U.S. 964 (1975); Rode v. Sedco, Inc., 394 F. Supp. 206 (E.D. Tex. 1975). See also the

In Neely v. Club Med Management Services, Inc., 63 F.3d 166 (3d Cir. 1995) (en banc), the court analyzed the Lauritzen triad and set forth a comprehensive choice of law procedure to determine the applicability of general maritime law in foreign waters in “nontraditional” maritime contexts. Id. at 171. While the parties will be offering their respective choice of law positions in the defendants’ forum non conveniens motion and response briefs, it is relevant to point out here that the Neely decision fully supports the application of American general maritime law to torts in foreign waters, if the case involves American plaintiffs or dependents, American defendants, American manufactured vessels, or foreign corporations which derive substantial revenue from American-based tourism, especially if the tort claim is related to that tourism business. Id. at 171, 182, 190-95. Indeed, once the plaintiff satisfies a threshold inquiry that American general maritime law can apply consistent with international law rules,⁴⁶ the burden shifts to the defendant to show that foreign contacts exist, the content of foreign law and that a conflict exists in the policies underlying the competing laws. Id. at 187-88. In Neely the court applied general maritime law and the Jones Act to an accident in the waters of St. Lucia involving an American seaman, several American defendants, and a vessel built in America according to American

following cases involving U.S. vessels or U.S. controlled vessels: Moncada v. Lemuria Shipping Corp., 491 F.2d 470 (2d Cir. 1974); Solano v. Gulf King 55, Inc., 30 F. Supp. 2d 960 (S.D. Tex. 1998); Castanho v. Jackson Marine, Inc., 484 F. Supp. 201 (E.D. Tex. 1980); Groves v. Universe Tankships, Inc., 308 F. Supp. 826 (S.D.N.Y. 1970). Defendants cite these cases for the erroneous proposition that if the Jones Act applies in foreign waters, so can DOHSA. The Jones Act, however, is not confined to the high seas. Moreover, defendants overlook that these cases hold that American general maritime law can apply in foreign waters.

⁴⁶ The threshold for internationally acceptable application of American law is met by proof of any of the following: injury to an American or a foreigner with American dependents; injury in American territory; American defendants; an American vessel; or a contractual forum selection clause. Neely, 63 F.3d at 182.

specifications and owned by a foreign corporation deriving substantial revenues from American tourism. Id. at 197. In Neely, the plaintiff was seriously injured by the vessel, and the place where the vessel was built was more significant than what flag she flew. Id.

Neely strongly supports application of American general maritime law in this case on the question of punitive damages, and under Yamaha that law may be supplemented by state law. Cf. Public Administrator, 592 F.2d at 59-50 (applying general maritime law, not DOHSA, to a death in foreign waters.)

Punitive damages are available under general maritime law and under relevant state law. General maritime law permits recovery of punitive damages in tort cases. See CEH Inc. v. F/V Seafarer, 70 F.3d 694, 699 (1st Cir. 1995); In re Marine Sulphur Queen, 460 F.2d 98, 105 (2d Cir.), cert. denied, 409 U.S. 982 (1972).

The relevant state laws that can supplement general maritime law in this litigation include California, Missouri, Delaware and Ohio law, all of which permit punitive damages in death cases. California law, the place where defendant McDonnell Douglas manufactured the MD-11 permits punitive damages in a survival action, even if economic loss is nominal. Cal. Prob. Code §573; In re: Air Crash Disaster at Sioux City, Iowa on July 19, 1989, 1991 U.S. Dist. Lexis 18643 (N.D. Ill. Dec. 26, 1991); Grimshaw v. Ford Motor Co., 119 Cal.App.3d 757 (Cal. App., 4th Dist., 1981); Stencel Aero Eng. Corp. v. Superior Court of the City and County of San Francisco, 56 Cal.App.3d 978 (Cal. App., 1st Dept., 1976).

Missouri, the location of McDonnell Douglas' principle place of business, permits punitive damages, known there as "aggravating circumstances damages," in a wrongful death action. Bennett v.

Owens-Corning Fiberglass Corp., 896 S.W.2d 464 (Mo. 1995); Letz v. Turbomeca Engine Corp., 975 S.W.2d 155 (Mo. App. 1997).

Defendant Dupont is incorporated in Delaware, which permits punitive damages under its survival action. 10 Del. Code §3701; In Re Trial Group Asbestos Litigation, 669 A.2d 108 (Del. 1995); Reynolds v. Willis, 209 A.2d 760 (Del. Supr. 1965).

The law of Ohio, where Dupont likely manufactured the metallized mylar and its other aviation products, such as kapton wiring, also permits punitive damages as part of a survival claim. Sheets v. Norfolk Southern Corp., 671 N.E.2d 1364 (Ohio App. 1996). Even nominal property damage, such as damage to decedents' clothing is sufficient to submit the question to the jury.

Given the limited scope of defendants' motion and the lack of discovery, a full choice of law analysis on punitive damages is not warranted or possible at this time. Defendants' motion is limited to the question whether punitive damages are unavailable as a matter of law because DOHSA applies in this litigation. DOHSA does not apply to fatal injuries sustained in foreign territorial waters, but, under the Lauritzen/Neely interest analysis choice of law rules, general maritime law, as supplemented by state law, can apply in these foreign waters, and punitive damages are not prohibited under that law. Defendants' motion to strike punitive damages claims must be denied.

VI. THE DEFENDANTS' MOTION IS ALSO PREMATURE, GIVEN CONGRESS' SERIOUS INTENT TO AMEND DOHSA TO EXCLUDE AVIATION CASES FROM ITS REACH

As presently enacted, DOHSA does not apply to crashes occurring in foreign territorial waters. Congress, however, may amend DOHSA to exclude from its scope all aviation accidents. The House of Representatives has already passed a bill to exclude all aviation cases from DOHSA's reach. H.R.

603 (March 3, 1999) (Ex. 44). The House Bill was passed by an overwhelming bipartisan majority vote of 412 to 2 in favor of the measure. (Ex. 44). The bill would apply to pending litigation.

In the Senate, Senator Specter of Pennsylvania has introduced a bill which mirrors the House Bill and exempts all aviation accidents from DOHSA occurring on or after January 1, 1995. See Senator Specter's November 19, 1999 statement reprinted in the Congressional Record (Ex. 46).⁴⁷ Both bills would cover this litigation.

Senator McCain, the Chairman of the Commerce Committee, which has jurisdiction over this bill, has vowed to push for the legislation to reach the Senate floor in early 2000. See Senator McCain's November 17, 1999 statement reprinted in the Congressional Record. (Ex. 45). Senator McCain stressed that the Commerce Committee would conduct hearings on the issue "as soon as Congress reconvenes in 2000" and that he will take the lead "to ensure that legislation to limit the application of the Death on the High Seas Act to aviation accidents moves as quickly as possible through Congress." Id. The matter is one of high priority for Senators McCain and Specter.

Senator McCain explained that

[t]he families of aviation accident victims over international waters have waited far too long for Congress to make sure that their losses are accorded the same respect as those associated with accidents over land. Family members should know that their children have value in the eyes of the law. The recent aviation tragedies only highlight the need for prompt action.

(Ex. 45).

⁴⁷ According to Senator Specter, his legislation would amend federal law to "clarify that federal aviation law does not limit remedies in the same manner as maritime law, and permits international flights to be governed by the same laws as domestic flights." (Ex. 46).

It is very likely that hearings, floor debate and a vote will be completed by the Senate prior to the close of the next Congressional session. Therefore, the defendants' motion is premature and its resolution should be stayed to await Congressional action.

CONCLUSION

For all these reasons, the defendants' motion to strike punitive damages claims must be denied.

DATED: January 28, 2000

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