

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 ACTIONS LISTED IN
APPENDIX EXHIBIT 1

**MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS' JOINT
MOTION TO DISMISS CLAIMS FILED ON BEHALF OF ALL FRENCH
AND SWISS DECEDENTS ON THE GROUND OF FORUM NON CONVENIENS**

TABLE OF CONTENTS

	Page
Table of Contents	-i-
Summary of Argument	-1-
Statement of Facts	-4-
Potential Liability of American Manufacturers	-5-
Safety Implications of the Delta-Swissair Code-Share and Joint Service Flights	-7-
Defendants Have Interposed Claims Against Each Other and Do Not All Join In this Motion	-7-
Argument	-9-
I. THE MOVANTS FAIL TO ESTABLISH THE PREREQUISITE THRESHOLD THAT FRANCE AND SWITZERLAND ARE AVAILABLE ALTERNATIVE FORUMS FOR THE ENTIRE CASE	-9-
A. Switzerland and France are not available forums for the entire case because three American defendants - IFT, SBA, and Hollingsead - fail to join in the motion	-9-
B. Even if all defendants had consented to appear in Switzerland and France, it is doubtful that Swiss or French courts will accept jurisdiction over claims against the American defendants.	-12-
Switzerland	-12-
France	-15-
II. PLAINTIFFS' CHOICE OF FORUM IS ENTITLED TO GREAT DEFERENCE, BECAUSE SEVEN DEFENDANTS RESIDE HERE, THE THREE FOREIGN DEFENDANTS ARE AMENABLE TO SUIT HERE, LIABILITY EVENTS OCCURRED HERE, AND LIABILITY IS AT ISSUE.	-17-
A. One claim filed on behalf of an American decedent and several filed by American and other non-Swiss and non-French plaintiffs should not have been included in this motion	-17-
B. The Swiss and French plaintiffs' choice of forum is entitled to great weight	-19-

III.	NO PRECEDENT SUPPORTS THE RELIEF DEFENDANTS SEEK BECAUSE THIS FORUM IS THE ONLY ONE CAPABLE OF RESOLVING ALL CLAIMS, AND DISMISSAL WOULD LEAVE SIGNIFICANT LITIGATION HERE.	-21-
IV.	THE PRIVATE INTEREST FACTORS STRONGLY FAVOR RETAINING JURISDICTION.	-25-
	A. Liability issues exist in this forum and would exist in the foreign forums, but this forum has the liability proof	-26-
	B. Defendants' motion ignores that many of the Swiss and French cases seek primarily non-pecuniary damages, making their cases easy to try in this forum	-29-
	C. Key damages proof is located here.	-30-
	D. The relative ease of access to proof and witnesses favors retaining jurisdiction.	-30-
	Trial in France	-31-
	Trial in Switzerland	-33-
	E. Other factors that make a trial easy, expeditious and inexpensive favor retaining jurisdiction; dismissal would create serious hardship for the plaintiffs	-34-
V.	THE PUBLIC INTEREST FACTORS WEIGH HEAVILY IN FAVOR OF RETAINING JURISDICTION	-37-
	A. The United States has the greatest interest in the outcome of this litigation	-37-
	B. Imposition of jury duty is not unfair when the community has a strong interest in the litigation	-39-
	C. Administrative ease overwhelmingly favors retaining jurisdiction	-39-
	D. United States law, not foreign law, should apply to all passenger cases. Foreign courts should not be burdened with complex conflict of law problems.	-40-
	1. Application of U.S. law, including general maritime law, is consistent with our maritime conflict of laws test	-42-
	2. American General Maritime Law guarantees a floor recovery for plaintiffs' loss of support, services, and society and decedent's	

pain and suffering, and does not displace more generous state law
remedies for state domiciliaries -45-

CONCLUSION -48-

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The Plaintiffs' Committee respectfully submits this memorandum of law, and accompanying affidavits, declarations, and exhibits, in opposition to the motion of six defendants, The Boeing Company (Boeing), McDonnell Douglas Corporation (Douglas), Swissair Swiss Air Transport Company, Ltd. (Swissair), SR Technics AG, SAir Group, and Delta Air Lines, Inc. (Delta) (collectively "the movants"), to dismiss on the ground of forum non conveniens claims brought on behalf of 65 of the 215 passengers killed in the crash of Swissair-Delta Flight 111 (Flight 111) near Peggy's Cove, Nova Scotia, Canada on September 2, 1998.

Defendant E.I. DuPont de Nemours & Co. (DuPont) joins in the motion but fully contests its liability. The three remaining defendants, Interactive Flight Technologies, Inc. (IFT), Santa Barbara Aerospace (SBA), and Hollingsead International Inc. (Hollingsead), do not join in the motion and do not consent to appear in any foreign country or honor any foreign judgment. IFT and SBA oppose the motion to dismiss.

Summary of Argument

This motion to dismiss is ill-advised, ill-conceived, and inherently flawed. There is absolutely no authority for the unprecedented relief sought by the movants. No court has ever dismissed foreign passenger death cases when:

- Litigation will continue in the forum on liability and damages for 113 American passengers, for 21 foreign passenger cases which are not included in this motion, and for the claims filed on behalf of the 65 passengers included in this motion against the nonmoving defendants IFT, SBA, and Hollingsead.
- Three defendants do not join in the motion, do not agree to appear in a foreign court or honor a foreign judgment, and two of them (IFT and SBA) vigorously oppose the motion.
- Liability litigation will remain in the forum among all of the defendants because of third-party claims and cross-claims.

The case law prohibits forum non conveniens dismissal when judicially inefficient piecemeal litigation will result. See Point III infra.

The motion must also be denied outright because the movants have failed to meet their threshold burden of proving that an alternative, available foreign forum exists with jurisdiction over all defendants and capable of resolving the entire case. The simple fact that IFT, SBA and Hollingsead will not join in the motion is fatal. See Point I.A. infra. Moreover, the jurisdictional rules in France and Switzerland are much more complex than the movants suggest, and it is doubtful that those courts will accept jurisdiction over the American defendants. See Point I.B. infra. Movants having failed to meet their threshold burden, the Court is powerless to dismiss.

Another threshold issue is the Court's determination of how much deference to give to plaintiffs' choice of forum. The movants are wrong to claim this Court should give plaintiffs' choice little weight. Among the plaintiffs slated for dismissal are U.S. residents suing in their home forum and non-Swiss and non-French plaintiffs who cannot sue in their home forum and for whom Switzerland or France would be inconvenient, burdensome, and unfair. Also, the Swiss and French plaintiffs who have filed suit here did so for reasons of convenience, efficiency, and fairness. This is the one forum capable of hearing and resolving the entire case. Finally, the Swiss and French plaintiffs have treaty rights guaranteeing them equal access to our courts. Comity and our treaty obligations would be violated if we accord

these plaintiffs less deference. See Point II infra.

Not only are movants unable to meet their fundamental threshold, they cannot meet the burden of proving that the private and public interest factors weigh heavily in favor of dismissal. All defendants are in this forum. Liability issues exist in this forum, notwithstanding the offer of some movants to pay compensatory damages. These issues require proof available only here. Liability would also be an issue in France or Switzerland, where courts require proof of the gravity of the fault to assess damages. A liability trial in those countries would raise insurmountable obstacles and create financial hardship. Damages proof in France and Switzerland is obtainable here, and trial here would be fairer and more comprehensive. See Point IV infra.

The public factors overwhelmingly favor denial of the motion. See Point V infra.

- This forum is the only one which can compel collection of all cases arising from this tragedy and ensure uniform resolution of common legal issues. The factor of judicial efficiency favors this forum. The parsing of cases throughout a host of foreign courts contravenes judicial efficiency. See Point V.C. infra.
- The U.S. has the greatest interest in this litigation. The private and public investigations on the cause of the crash are focused on the many dangerous deficiencies in the MD-11, which points to the shared fault of the American defendants Boeing, Douglas, DuPont, IFT, SBA, and Hollingsead. Already our federal government has reacted by imposing new rules.
- This crash has also awakened the American public and federal government to the safety concerns in code-share joint service agreements between American carriers and foreign carriers. New federal requirements have addressed these concerns.

The public factor of applicable law also favors denial of the motion. United States law should uniformly apply to all defendants and plaintiffs. The conflict of laws question would be more complex in France and Switzerland, where the courts would have to apply different substantive law to the carriers and the manufacturers and would have to apply U.S. or Canadian law to the manufacturers, with great uncertainty as to which U.S. or Canadian law to apply.

This motion should be denied.

Statement of Facts

Flight 111 was an international flight operated jointly by the American carrier Delta and the Swiss carrier Swissair pursuant to their Alliance Agreement, approved by the U.S. Department of Transportation (DOT). App. Exh. 2.¹ The aircraft was a Boeing-Douglas MD-11.

Flight 111 departed Kennedy Airport in New York City, bound for Geneva, and crashed a little over an hour later near Peggy's Cove, Nova Scotia, in Canadian internal waters. Because the crash occurred in Canada, the Canadian Transportation Safety Board (TSB) is investigating it, assisted by our National Transportation Safety Board (NTSB), our Federal Aviation Administration (FAA), and the Swiss Bureau for Accident Investigation. Although the investigation is on-going, the circumstances of the crash have already significantly impacted U.S. public safety concerns.

This litigation significantly impacts the United States in many respects. There were 113 American passengers and 102 foreign passengers invited here for business or tourism. Of these 102 foreign passengers, representatives for 86 of them have filed actions in the United States. These 86 foreign passengers comprise 62 families domiciled around the world: France, Switzerland, Italy, Canada, Mexico, Germany, England, Spain, India, Egypt, Saudi Arabia, Afghanistan, Iran, and the former Yugoslavia. This motion addresses 65 allegedly “Swiss” and “French passengers” (or 45 families), although the movants have stated their intent to move to dismiss all foreign cases.²

Potential Liability of American Manufacturers

¹ “App. Exh. __” refers to the plaintiffs' separately bound Appendix of Exhibits, affidavits and declarations submitted in support of this response.

² The motion misidentifies some decedents as Swiss or French. One decedent, Mayline Junod, was a U.S. domiciliary. Several decedents --DeRoussan, Cegar, Scoular, and Baeumer – were not French or Swiss and their plaintiffs cannot sue in their home forum. Other cases slated for dismissal involve U.S. plaintiffs or claimants: Martin, Jegge, Brooks, Noceto, Brown and Salakhoutdinov. The motion should be denied outright as to these plaintiffs. See III.A. infra.

The TSB investigation's focus on product defects as the cause of the Flight 111 crash, points fault at six American defendants, Boeing, Douglas, DuPont, IFT, SBA and Hollingsead. The American interest in this litigation could not be more grave.

Douglas designed and manufactured the MD-11 in California. Boeing now owns Douglas. DuPont makes the Mylar which was used to coat the MD-11's thermal acoustic insulation blankets. The interactive in-flight entertainment (IFEN) system on board the MD-11 that crashed was designed by IFT and installed by Hollingsead. SBA applied for and obtained from the FAA the Supplemental Type Certificate (STC) that is required before “introducing a major change in type design....” Federal Aviation Regulation §21.113.

In interim safety recommendations dated August 11, 1999, the TSB concluded that a cause of this tragedy was the dangerously high flammability characteristics of the MD-11's metallized Mylar-coated insulation blankets, which had an “in-service history [of]...demonstrated flammability.” See App. Exh. 3. Almost 700 U.S.-registered aircraft use these flammable insulation blankets. On the same day, the FAA issued a Notice of Proposed Rulemaking, which, if adopted, would require removal of these insulation blankets from all U.S.-registered MD-11 aircraft. See App. Exh. 4.

Presently, the TSB is sorting through the wreckage of Flight 111 to locate the cockpit map lights. Swissair has reported signs of burning around the map lights in several of its MD-11 aircraft. See App. Exh. 5. The map lights use a halogen bulb which develops high heat. These bulbs are recessed and press against the flammable insulation blankets. Boeing responded by issuing an MD-11 Alert Service Bulletin, urging airlines to check the map lights and install fire-resistant tape to protect from burning. See App. Exh. 6.

On March 2, 2000, the TSB addressed a safety advisory letter to the NTSB, as “the representatives of the State of Manufacture,” stating, “you may decide that the situation warrants a

more comprehensive assessment of the state of the map light installations in the existing MD-11 fleet, and perhaps other aircraft fleets as appropriate.” See App. Exh. 7.

On April 5, 2000, the FAA responded and issued a Safety Order requiring all airlines to unplug the map lights on all MD-11s. This is the twenty-third Safety Order issued by the FAA about wiring on the MD-11 since the Flight 111 crash. See Vancouver Sun article at 1, App. Exh. 5.

Another possible cause of the fire is arcing of electrical wires on the MD-11. As of March 16, 2000, the TSB had found 20 arced wires and is conducting additional wire testing. One of the “hot spots” on the aircraft points to the interactive in-flight entertainment (IFEN) system wiring on the aircraft as the potential source of ignition of the fire. This points to defendants IFT, SBA, and Hollingsead.

Safety Implications of the Delta-Swissair Code-Share and Joint Service Flights

Another American safety concern arises from the fact that Flight 111 was a jointly operated code-share flight between Delta and one of its many foreign alliance partners, Swissair.³ One concern is the possible disparities between the safety records and operating procedures of the American carrier and its foreign code-share partner. One New York Times article reported as follows: “The safety implications of code share, became clearer after Swissair Flight 111 crashed off Halifax, Nova Scotia, in 1998 killing all 229 people aboard.” See App. Exh. 10. A DOT inspector general's report has concluded that, to date, code-share agreements have been judged according to economic criteria, not safety. See App. Exh. 11.

DOT has acted on these concerns. In February of this year, the DOT imposed requirements on American carriers with foreign code-share partners to perform safety audits of their foreign partners

³ Delta provided liability insurance for Flight 111 and included Swissair as an additional insured. See App. Exh. 8. The DOT treats Delta and Swissair as partners, holding them jointly liable for FAA regulation violations on their code-share flights. See App. Exh. 9.

as a condition to operating code-share service. See App. Exh. 12.⁴

**Defendants Have Interposed Claims Against Each
Other and Do Not All Join In this Motion**

On March 14, 2000, IFT moved this Court for leave to file third-party complaints or cross-claims against Swissair and SR Technics AG in all actions filed by plaintiffs against IFT, including the actions filed by the French and Swiss plaintiffs.⁵ IFT opposes this motion and will not consent to appear in a foreign country or honor a foreign judgment.

SBA filed for bankruptcy protection on or about August 6, 1999. The bankruptcy stay was lifted by Order dated January 26, 2000. In the plaintiff's action Bell, et al. v. SBA, et al., PA 99-6075, SBA's answer asserts cross-claims against Boeing, Douglas, Swissair, Delta, SAir Group, and SR Technics AG. SBA has given this Court notice that it also opposes this motion. Hollingsead has also not joined in the motion. DuPont joins, but contests its liability.

In their motion papers, the movants -- Boeing, Douglas, Swissair, Delta, SAir Group, and SR Technics AG -- state that they will not seek contribution or indemnity from any third parties in actions refiled in Switzerland or France. Their conduct suggests otherwise. Swissair, SAir Group, and SR Technics AG have filed "Statements of Claim" in Zurich, Switzerland against defendants IFT and SBA, American corporations with no residence in Switzerland.

There is further evidence that casts doubts on the movants' intentions. In the August 10, 1999 Practice and Procedure Order #1, this Court directed that "no discovery requests shall be served or

⁴ Legislation was also introduced in the House (H.R. 2024 - the Aviation Code-Share Safety Act of 1999) to mandate safety audits of foreign carrier code-share partners.

⁵ Third-party actions for contribution or indemnification by a non-passenger against a carrier are not governed by the contract of transportation between the passenger and the carrier and therefore fall outside the requirements of Article 28 of the Warsaw Convention. In re Air Crash Near Agama, Guam, MDL 1237, CV 98ML7211 (HLH) (C.D. Cal. Jan. 25, 1999).

need be responded to prior to the issuance of such [further] Order.” This Court has not yet entered an order allowing discovery. Yet, without notice to this Court, or to the plaintiffs, or even to SBA's liability counsel, on January 28, 2000, Boeing and Swissair appeared before the Bankruptcy Court in the Central District of California on behalf of Boeing's motion for an emergency order to allow an examination of all of SBA's records and an oral examination of Robert Chickering, SBA's Chairman. See App. Exh. 13.⁶

To support its claim of “emergency,” Boeing alleged that the proposed sale of SBA's assets, already approved by the Bankruptcy Court, was possibly contrary to Boeing's interest in seeking contribution or indemnification from SBA in the Flight 111 litigation, because the sale of SBA's assets “would include the sale of a potential alter ego claim SBA had against its insider parent Quaker Holdings, Inc. (Quaker).” App. Exh. 13 at 2.⁷

Boeing was given three days to conduct its document discovery and examination of SBA's Chairman. Boeing proceeded to inspect and copy documents, but the examination of Mr. Chickering was canceled when SBA's liability counsel, Rose Walker, L.L.P., appeared at the deposition to stop it.

⁶ App. Exh. 13 is an unofficial transcript of the January 28, 2000 hearing. The official transcript was ordered several months ago and upon receipt will be substituted for the unofficial transcript. A copy of the Bankruptcy Court's original audio-cassette tapes have been filed with the court.

⁷ The Bankruptcy judge granted the request, but expressed the following reservations: Boeing's request was “very broad”; Boeing could get the documents from SBA's liability lawyers, Rose Walker, L.L.P.; the documents would in any event pass to the new owner who would have a duty to preserve them; and the court had not seen “any evidence” of an alter ego claim. Boeing replied that it “just want[ed] to know whether there's [an alter ego] claim or not” and with respect to pursuing the documents directly from SBA's liability counsel, Boeing stated: “It's not feasible to go there first. We're obviously going to go to both places, Your Honor.” (emphasis added). See App. Exh. 13 at 6, 20, 22, 26, 30-32, 47.

Argument

I. THE MOVANTS FAIL TO ESTABLISH THE PREREQUISITE THRESHOLD THAT FRANCE AND SWITZERLAND ARE AVAILABLE ALTERNATIVE FORUMS FOR THE ENTIRE CASE.

A. Switzerland and France are not available forums for the entire case because three American defendants - IFT, SBA, and Hollingsead - fail to join in the motion.

The requirements of a forum non conveniens motion are well-established. The defendant must initially prove that an adequate and available alternative foreign forum exists for the entire case. Piper Aircraft v. Reyno, 454 U.S. 235, 254 n. 22 (1981); Lacey v. Cessna Aircraft Co., 862 F.2d 38, 43 (3d Cir. 1988) (Lacey I); In re Air Crash Disaster Near New Orleans, Louisiana, 821 F.2d 1147, 1165 (5th Cir. 1987) (New Orleans). If the movant meets this prerequisite, it must then further establish that the private and public interest factors “weigh heavily in favor of dismissal” and “decidedly in favor of trial in the foreign forum.” Lacey v. Cessna Aircraft Co., 932 F.2d 170, 180 (1991) (Lacey II). The “ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice.” Lacey I, 862 F.2d at 42, quoting Koster v. American Lumbermens Mutual Cas. Co., 330 U.S. 518, 527 (1947).

“[A] foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum.” New Orleans, 821 F.2d at 1165. As stated by the Third Circuit in Lacey II, “[t]he defendant must establish initially, that an adequate forum exists as to all defendants.” 932 F.2d at 179 (emphasis added) (citation omitted). The Third Circuit emphasizes the primary significance of having one “judicial roof” for the comprehensive litigation. Lacey II, 932 F.2d at 183 n.10, 190.⁸

⁸ See also Jota v. Texaco, Inc., 157 F.3d 153, 159 (2d Cir. 1998) (“a court must satisfy itself [among other things] that the litigation may be conducted elsewhere against all defendants.”) (internal quotes omitted); Calavo Growers of Cal. v. General Belgium, 632 F.2d 963, 968 (2d Cir. 1980), cert. denied, 449 U.S. 1084 (1981) (all defendants must consent); Madanes v. Madanes, 981 F.Supp. 241, 264-66 (S.D.N.Y. 1997) (Swiss courts and Argentinian courts did not have jurisdiction

This case law is dispositive. For example, New Orleans affirmed denial of Pan American's motion to dismiss "because no other forum could entertain the plaintiffs' actions against all of the defendants." 821 F.2d at 1168. Pan American had moved to dismiss all plaintiffs' claims -- all plaintiffs were Uruguayan -- insisting that its agreement "to pay any judgment rendered in an alternative forum...made an alternative forum available." Id. (emphasis added). The court disagreed, stating that because co-defendant United States had not joined in the promise, "Pan American's conditional promises simply fail to make all defendants available to plaintiffs in the Uruguayan forum." Id. at 1169.

The movants incorrectly attempt to distinguish New Orleans by claiming that Pan American had not agreed to pay full compensatory damages awarded in plaintiffs' favor. Defendants' Mem. at 14. This is wrong, as Pan American agreed "to pay any judgment rendered in the alternative forum," but the court still affirmed denial since Pan American could not "make all defendants available to plaintiffs in the [foreign forum]." Id. at 1168-69 (emphasis added).

The movants confuse a plaintiff's right to sue with the prohibition against collecting a double recovery against multiple tortfeasors. Plaintiffs are entitled to sue all joint tortfeasors and have a jury hold them legally accountable, just as defendants have the right inter se to seek contribution. No joint tortfeasor may avoid a finding of liability, and no defendant can choose for plaintiff which joint tortfeasors to sue. Yet, this is what the movants suggest when they argue that their promise to compensate (except for joining defendant DuPont) "renders moot plaintiffs' claims against other parties

over all defendants and "it would be improper to dismiss the case absent a proffer by all of the Defendants that they would be willing to consent to the jurisdiction of the Argentine court, as well as agree to satisfy any judgment reached by that court."); In re Disaster at Riyadh Airport, Saudia Arabia on August 19, 1980, 540 F.Supp. 1141, 1144 (D.D.C. 1982) ("As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case.") quoting Pain v. United Technologies, Corp., 637 F.2d 775, 784-85 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1981).

than these Defendants.” Defendants' Mem. at 15.

Plaintiffs' claims against other defendants can only be dismissed if found to lack merit, upon a motion to dismiss on summary judgment or directed verdict. Yet, even Boeing believes the claims against the IFEN defendants are viable, as judged by Boeing's aggressive use of the SBA bankruptcy proceeding to conduct discovery, despite this Court's stay on discovery.

Because the movants fail to establish the threshold requirement, this Court is powerless to dismiss. Lacey II, 932 F.2d at 180; New Orleans, 821 F.2d at 1165.

B. Even if all defendants had consented to appear in Switzerland and France, it is doubtful that Swiss or French courts will accept jurisdiction over claims against the American defendants.

Switzerland

Professor Andreas Bucher, a highly regarded expert on Swiss law,⁹ retained by the plaintiffs, has concluded that it is doubtful that Swiss courts will accept jurisdiction over the American movants Boeing, Douglas, and DuPont. Ordinarily, Swiss courts have jurisdiction over tort claims only when the defendant is Swiss or the tort occurred in Switzerland. Bucher declaration ¶27, attached as App. Exh. 14 (hereafter “Bucher ¶__”). Neither basis of jurisdiction exists over any American defendant.

Jurisdiction of Swiss courts over the American movants also cannot be based on an agreement on jurisdiction under Article 17 of the Lugano Convention or Article 5 of the Swiss Private International Law Act (PILA). Bucher ¶¶28-39. In Switzerland, Lugano Convention Article 17 could apply to American defendants, as long as the plaintiffs are Swiss, but requires that the agreement on Swiss court

⁹ Prof. Dr. Andreas Bucher is a full professor of private international law and civil law at the University of Geneva School of Law, where he has been director of several departments (Civil Law and International Law) before becoming President of the Section on Private Law. He has been a lecturer at the Hague Academy for International Law and is the author of many highly respected articles and books on Civil Law and Private International Law (conflict of laws). He served the Swiss Government in drafting the Swiss Statute on Private International Law (PILA). He is the expert of the Swiss delegation at all sessions of the Hague Conference on Private International Law.

jurisdiction be based on the parties' mutual consent and meet one of the requirements of formality, such as “evidenced in writing.” Bucher ¶¶ 30-31. Mutual consent does not exist here. If the Swiss cases were to be dismissed over plaintiffs' objections, the plaintiffs would be compelled to refile in Switzerland or forgo relief. *Id.* at ¶¶ 32-33, 39. Refiling in Switzerland under compulsion of a U.S. dismissal is not an exercise of free consent *Id.* Similarly, Article 5 of PILA, which could apply to non-Swiss plaintiffs suing a non-Swiss defendant, also requires mutual consent, which does not exist. *Id.* at ¶ 37.

The only remaining basis for Swiss court jurisdiction over the American movants is their voluntary appearance. *Id.* at ¶42.¹⁰ Article 5(3) of PILA, however, provides that the court has discretion to decline such a case, unless at least one party is domiciled in the forum canton or Swiss law applies. *Id.* at ¶45. There are non-Swiss plaintiffs who would be forced to file their contractual Warsaw Convention suits in Switzerland against the carriers Swissair and Delta (because the decedents' tickets were purchased there and Geneva was the destination), but who would face a significant risk of having their tort claims against the American movants declined because they are not Swiss and Swiss courts will not apply Swiss law to the product liability claims against the American defendants. *Id.* at ¶¶ 46-48, 59-62.¹¹ See also pp. 40-41 *infra*.

¹⁰ This, of course, does not apply to defendants SBA, IFT, and Hollingsead, who do not consent to appear in a foreign court.

¹¹ Non-Swiss plaintiffs would have to sue the carriers in Switzerland but could not sue the American movants there include: **Alleaume** (PA 99-5854, PA 99-6150) (French); **Baeumer** (PA 00-960) (German); **Brooks** (PA 99-4190, PA 99-5863, PA 99-6105) (Virginia); **Brown** (PA 99-6014, PA 99-6326) (New York); **Calvet** (PA 99-6009, PA 99-6432, PA 99-6105) (French); **Cegar** (PA 99-6152, PA 99-6105, PA 99-6107) (Serbian); **DeRoussan** (PA 99-6019, PA 99-6438, PA 99-6105) (Brazilian); **Gardner, et al.** (PA 99-6110, PA 99-6058) (England); **Lesachot** (PA 99-4234, PA 99-5864, PA 99-5812, PA 99-6110, PA 99-6057); **Mehraraban-Samit** (PA 99-6110, PA 99-6043) (French); **Noceto** (PA 00-420) (Florida); **Rossi** (PA 99-6110, PA 99-6046) (Italy); and **Salakhoutdinov** (PA 99-6110, PA 99-6059) (Ohio).

Bucher also expresses significant doubt that a Swiss court will entertain even the Swiss plaintiffs' actions, when it is so clearly not their “will to have the claim decided by that Court.” *Id.* at ¶

49. He states:

In a hypothesis where the motion to dismiss claims on the ground of forum non conveniens would be granted, Plaintiffs, when introducing their claim before a Swiss court on the basis of the Defendant's appearance, will and are entitled to explain that they are doing so exclusively for reasons related to forum non conveniens, which is a doctrine unknown under Swiss law. Thus, Plaintiffs' will would appear to be still directed to have the claim entertained by a U.S. court. This may have as a consequence that a Swiss court might qualify the filing of the claim as purely conditional and, therefore, refuse to entertain the matter. It is certain that no Swiss court will accept to comply with any foreign decision qualifying Swiss jurisdiction as convenient for Plaintiffs; such a decision would not be recognized in Switzerland.

When doubt exists that a foreign court will accept U.S. dismissed cases against U.S. defendants, forum non conveniens dismissal cannot be granted. Machline v. National Helicopter, 1995 WL 251540 (S.D.N.Y. May 1, 1995) (no plaintiff should “be compelled to explore murky waters of [foreign forum's] jurisprudence to pursue the claims asserted in the complaint”).¹²

France

It is also seriously doubtful that under the circumstances of this litigation French courts will accept jurisdiction in actions filed by French plaintiffs against foreign defendants. According to

¹² Concerns about how a dismissed case will fare in a foreign country should be evaluated according to actual studies. *See, e.g.*, Robertson, “Forum Non Conveniens in America and England: A Rather Fantastic Fiction,” 103 U. Tex. Quarterly L. Review, 398, 419 (July 1987) (In a study of 85 dismissed cases, none resulted in a plaintiff's verdict in a foreign court; of the three tried and lost, two were lost on the ground of statute of limitations, despite defendant's express waiver of that defense).

Movants' suggestion that a conditional dismissal avoids the need to worry about jurisdictional complexities and doubts is absurd and insensitive. Movants would have this Court dismiss these cases, despite jurisdictional doubts, require plaintiffs to hire new counsel in Switzerland, only to have their cases declined and then hopefully refiled in the United States. The plaintiffs are individuals who have lost a loved family member; they are not foreign corporate entities who can more easily refile without emotional hardship and with less financial hardship. **The plaintiffs are not ping-pong balls who should bounce from court to court waiting to see which court will accept them.**

Professor Pierre Mayer, an esteemed expert on French law, retained by the plaintiffs,¹³ French law contains “ordinary” rules of jurisdiction and rules based on “privilege.” Declaration of Professor Mayer ¶7, attached as App. Exh. 15 (hereafter “Mayer ¶__”). Under the ordinary rules, a court has jurisdiction over a tort case when the defendant is French or the tort or harm occurred in France. Mayer ¶8. Neither applies here. *Id.* at ¶ 9.¹⁴ The site of plaintiffs' damages is Canada, not France; the fact that plaintiffs feel their loss in France is irrelevant, according to case law in France and from the Court of Justice of the European Communities, and according to the French legal experts referred to as the “doctrinal writers.” *Id.*

Mayer further concludes that while jurisdiction for claims against foreign defendants may be based on the “privilege” of the French plaintiff's nationality (pursuant to Article 14 of the Civil Code), that privilege can only be invoked by the plaintiff possessing the privilege, not by the foreign defendant. *Id.* at ¶¶ 10, 16.

Mayer states that this problem is not cured by movants' willingness to appear in France:

¹³ Prof. Dr. Pierre Mayer is a full professor at the University of Paris I (Panthéon-Sorbonne), where he teaches civil law, private international law, and arbitration law. He is an international arbitration counsel and arbitrator. He is the author of a comprehensive and leading treatise on Private International Law (conflict of laws), now in its 6th edition. He has authored numerous authoritative articles on Private International Law (conflict of laws), International Jurisdiction, and International Arbitration. He holds many important editorial positions and committee positions (e.g., Committee on International Commercial Arbitration of the International Law Association, French Committee on International Private Law, European Council of the London Court of International Arbitration, Committee on Private International Law of the International Union of Lawyers).

¹⁴ Jurisdiction in France over the contractual Warsaw Convention claims are determined separately under Article 28 of the Convention, which gives French courts international jurisdiction over the contract claim and also determines the venue of the action. Mayer ¶5. In France, the French plaintiffs must sue the carriers Swissair and Delta in the city in which the ticket was purchased or the city of destination. *Id.* For some French plaintiffs, if dismissed from the U.S., they would have to sue the carriers in Switzerland, because the tickets were purchased there and the destination was Geneva. This applies to: **Alleaume** (PA 99-5854, PA 99-6150); **Calvet** (PA 99-6009, PA 99-6432, PA 99-6105); **Lesaihot** (PA 99-4234, PA 99-5864, PA 99-5812, PA 99-6110, PA 99-6057); **Mehraraban-samit** (PA 99-6110, PA 99-6043), and possibly others.

As regards the non-carrier defendants, the French courts would, according to Article 92 of the New Code of Civil Procedure, have the *discretion to decline* their jurisdiction if the plaintiffs did not invoke Article 14 of the Civil Code (see *supra* N° 10), even if the defendants accepted such jurisdiction. It is most likely that they would in fact decline their jurisdictions in order to favor the plaintiff's use of the jurisdiction of the defendants' domicile, since that is a normal standard of international competence according to French law.

French courts would have to retain their jurisdiction only in the case when both parties consent to accept, even tacitly, said jurisdiction.

Any tacit extension of competence is, however, doubtful here when the defendant accepts the competence of the French courts, while at the same time, the plaintiffs contest their competence. This scenario has not been precisely envisioned either by law or by jurisprudence; it is, in fact, unusual to see the plaintiffs address French judges and, at the same time, contest their international competence. I do believe, however, that the French courts would most certainly take this contestation in account, since there would obviously be no mutual consent to extend their international competence.

Id. at ¶16.

In sum, movants have not met their threshold burden to prove that Switzerland and France are available forums for the entire case. This Court is without authority to dismiss.

II. PLAINTIFFS' CHOICE OF FORUM IS ENTITLED TO GREAT DEFERENCE, BECAUSE SEVEN DEFENDANTS RESIDE HERE, THE THREE FOREIGN DEFENDANTS ARE AMENABLE TO SUIT HERE, LIABILITY EVENTS OCCURRED HERE, AND LIABILITY IS AT ISSUE.

The second threshold issue in a *forum non conveniens* motion is for the court to determine the amount of weight to be accorded to a foreign plaintiff's decision to sue here. Lony v. E.I. DuPont de Nemours & Co., 886 F.2d 628, 633-34 (3d Cir. 1989) (Lony I). The assumption that a foreign plaintiff's choice of a U.S. forum may not be based on convenience is entirely rebuttable. When the "foreign plaintiff has made a strong showing of convenience," the court can place that plaintiff "on the same footing as a domestic plaintiff." *Id.* at 634.

Before addressing the Swiss and French plaintiffs' choice of an American forum, it is necessary to discuss those plaintiffs' claims which should never have been included in this motion. As to these

plaintiffs, this motion should be denied outright.

A. One claim filed on behalf of an American decedent and several filed by American and other non-Swiss and non-French plaintiffs should not have been included in this motion.

One claim identified for dismissal involves an American domiciliary:

- Decedent Mayline Junod (PA 99-2528, PA 99-5236) had moved to New York City from Switzerland to accept a managerial position with a manufacturer of fragrances and flavors. See Schwartz aff. attached as App. Exh. 19. She had no intent to return to Switzerland. Her employment records, bank records, and the witnesses knowledgeable about her employment are here.

Several other cases involve American plaintiffs:

- The Martin case (PA 99-6007) involves American plaintiffs from Texas who lost their son Joseph Martin, a U.S. citizen residing and working in Paris and filing U.S. and French tax returns. There is no loss of support claim.
- Decedent Heidi Kretschmer (PA 99-6014, PA 99-6326) was a British citizen who had four adult children. The plaintiff is her son Colin Brown, a resident of Brooklyn, New York. There is no loss of support claim.
- Plaintiff Marat Salakhoutdinov (PA 99-6110, PA 99-6059), a domiciliary of Ohio, originally from Russia, lost his sister Elvira, who had moved from Russia to Geneva. The decedent's parents still live in Russia.
- Veronique Noceto (PA 00-420), a resident of Orlando, Florida, lost her mother and father, who lived in France. She is an only child.
- Chantal Brooks (PA 99-4190, PA 99-5863, PA 99-6105), a resident of Virginia, lost her parents, who were retired and residing part-time in Geneva, and spent other portions of their time in Virginia and in Sri Lanka, where they had a farm.

These plaintiffs have sued in their home forum, and their choice is entitled to great deference.

Another case involves a Swiss plaintiff, Rudolf Jegge, suing for the death of his wife Evelyn and 16-year-old daughter Isabelle, both of whom were dual U.S.-Swiss citizens living in Geneva. (PA 99-6106, PA 99-6105, PA 00-129). Rudolf and Evelyn's son Alexander, a dual U.S.-Swiss citizen, is a claimant and resides in Denver, Colorado, where he attends college. Evelyn's surviving parents are also claimants and are U.S. citizens, residing in Puerto Rico. These claims do not involve loss of support.

Great deference should be accorded to Mr. Jegge's choice of forum.

Great deference is also due to a foreign plaintiff's choice of an American forum when the chosen and alternative forums are both foreign to the plaintiff. Lacey I, 862 F.2d at 46. In other words, these plaintiffs cannot sue at home. Several plaintiffs fall in this category and have brought suit in the most convenient forum.

- Plaintiff Marie-Luise Baeumer (PA 00-960), is a citizen and domiciliary of Germany, who lost her husband Dr. Ludwig Baeumer, a high level functionary of the World Intellectual Property Organization (WIPO), another United Nations organization. Dr. Baeumer was stationed to work for WIPO in Geneva and his work required frequent international trips throughout Europe and to the United States. His domicile was Germany.
- Plaintiff Maria Leite De Roussan (PA 99-6019, PA 99-6438, PA 99-6105), is a citizen and domiciliary of Brazil. She lost her husband Yves De Roussan, a citizen and domiciliary of Montreal, Canada. Yves worked for UNICEF in Eastern Europe and resided in Geneva for purposes of this assignment. U.N. staff may not change domicile when they are assigned to a foreign post. Yves' personnel file is kept at U.N. headquarters in New York City. Witnesses familiar with Yves' work are located in New York City, Africa, Brazil, Switzerland, Eastern Europe and Canada. Yves' children from his first marriage are citizens and domiciliaries of Montreal, Canada.
- Plaintiffs Djuradj and Biserka Cegar, domiciliaries of present-day Serbia and Montenegro (formerly Yugoslavia) (PA 99-6152, PA 99-6105, PA 99-6107), also cannot bring suit in their home forum. These plaintiffs lost their daughter Natasa, a gifted physicist. Just before her death she had performed research at the State University of New York in Stony Brook. She was returning to Lausanne, Switzerland to continue her doctoral studies at the Ecole Polytechnique Federale de Lausanne. Natasa was raised and had done part of her undergraduate work in Sarajevo (now part of Bosnia-Herzegovina); then, after outbreak of war, she and her family fled to Belgrade, now part of Serbia, where she completed her undergraduate degree. The family then fled to Montenegro. Six months before her death, Natasa then obtained a student visa to study in Lausanne. People familiar with decedent's research work are in New York, Florida, Washington, New Jersey, Germany and Switzerland.

Other foreign plaintiffs for whom neither France or Switzerland is home include: Plaintiff Rossi (PA 99-6110, PA 99-6046), who resides in Italy and whose decedent resided in Switzerland; plaintiffs Gardner, et al. (PA 99-6110, PA 99-6058), who reside in England and whose decedent resided in England.

B. The Swiss and French plaintiffs' choice of forum is entitled to great weight.

Courts do not discount a foreign plaintiff's choice of an American forum when defendants reside here and significant events occurred here. Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996) (strong presumption in favor of plaintiff's choice "especially if the defendant resides in the chosen forum"); Lony I, 886 F.2d at 634 (foreign plaintiff's choice favored when it is the defendant's forum and place of misconduct); Schertenleib v. Traum, 589 F.2d 1156, 1164 (2d Cir. 1978) (choice of defendant's forum weighs heavily against dismissal).

The Swiss and French plaintiffs have chosen the most convenient forum. It is the only one capable of resolving the entire case against all defendants, because seven of the ten corporate defendants reside in the forum, the three Swiss defendants can be sued here, significant liability events occurred here, liability issues are contested (see pp. 26-28 infra), and three of the American defendants -- IFT, SBA, and Hollingsead -- do not join in the motion or agree to appear in any foreign court and honor a foreign judgment.

Our Constitution protects the comity right of foreigners to sue American defendants in our courts. In The Sapphire, 78 U.S. 164 (1870), a case involving the collision between a French and American ship, the Court stated:

The first question raised is as to the right of the French Emperor to sue in our courts. On this point not the slightest difficulty exists. A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling The Constitution expressly extends the judicial power to controversies between a State, or citizens thereof, and foreign States, citizens, or subjects, without reference to the subject-matter of the controversy.

Id. at 167 (emphasis added).

Bilateral treaties between the United States and Switzerland and the United States and France

also grant to Swiss and French plaintiffs equal access to our courts. When our treaty relations guarantee to a foreign state's nationals equal treatment in and access to our courts, the district court must apply the same forum non conveniens standards to a foreign plaintiff that a U.S. plaintiff enjoys. Blanco v. Banco Ind. de Venezuela, 997 F.2d 974, 981 (2d Cir. 1993); Irish National Ins. Co., Ltd. v. Aer Lingus Teoranta, 739 F.2d 90, 91-92 (2d Cir. 1984); Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978); In re Maritima Aragua, S.A., 823 F.Supp. at 149. Article 1 of the 1850 Treaty of Friendship between the U.S. and Switzerland, 11 Stat. 587 (1850), provides that citizens of Switzerland and the United States “shall have free access to the tribunals, and shall be at liberty to prosecute and defend their rights before courts of justice in the same manner as native citizens....” The 1800 Treaty of Friendship and Commerce with France, 8 Stat. 178 (1800), extends to each state's nationals the privilege of “most-favoured nation” status and forbids discrimination in business and commerce.

All plaintiffs' choice of forum is entitled to full deference.

III. NO PRECEDENT SUPPORTS THE RELIEF DEFENDANTS SEEK BECAUSE THIS FORUM IS THE ONLY ONE CAPABLE OF RESOLVING ALL CLAIMS, AND DISMISSAL WOULD LEAVE SIGNIFICANT LITIGATION HERE.

Even had the movants met their threshold burden, they cannot meet their burden of proving that the private and public interest factors weigh “heavily” in favor of dismissal. Lacey II, 932 F.2d at 180.

In fact, there is no precedent for the relief the movants seek. No court has ever dismissed foreign passenger cases when related litigation would continue in the forum for American passenger claims (in this litigation 113 claims); for foreign plaintiffs' claims not included in this motion; for the claims of the foreign plaintiffs included in this motion against non-moving defendants; and for the cross-claims among the defendants. A further complication of dismissal is that several foreign countries would

themselves have litigation parsed out to multiple local forums.¹⁵ No court has ever dismissed when the United States is the only forum capable of providing one judicial roof for the entire case, and dismissal only burdens numerous foreign courts without significantly lessening the work to be done in the forum.

In short, defendants seek piecemeal litigation in contravention of judicial efficiency and the purposes of forum non conveniens. The doctrine exists to serve the convenience of the parties and the ends of justice, not to burden court systems. Koster, 330 U.S. at 527.

Accordingly, courts deny dismissal when piecemeal litigation would be the result. Friends for All Children, Inc. v. Lockheed Aircraft Corp., 717 F.2d 602, 609 (D.C. Cir. 1983) (dismissal denied when American claims would remain); In re Air Crash off Long Island, New York on July 17, 1996, 65 F.Supp.2d 207, 217-218 (S.D.N.Y. 1999) (“Air Crash off Long Island”) (“the piecemeal litigation that would be created by dismissing the French actions...weighs against dismissal as a public interest factor as well as a private interest factor”); In re Maritima Aragua, S.A., 823 F.Supp. 143, 147 (S.D.N.Y. 1993) (dismissal denied when related U.S. admiralty action would remain); Ruchti v. Boeing Co., 18 Avi. 17,153, 17,154 (E.D. Pa. 1983) (jurisdiction was retained in European passenger cases, 34 out of the 46 passengers, because the court would still hear American passenger cases); In re Air Crash Near Cali, Colombia, December 20, 1995, 96-MD-1125, unreported Omnibus Order dated Jan. 17, 1997, pp. 40-41, 53-54 (S.D. Fla. 1997) (“Air Crash Near Cali”) (no dismissal of foreign passenger cases when dismissal would burden foreign courts without significantly reducing forum's

¹⁵ The Second Circuit in Boosey & Hawkes Music Pub. Ltd. v. Walt Disney, 145 F.3d 481 (2d Cir. 1998), questioned, but did not answer, “whether forum non conveniens dismissal requires the dismissing court to ascertain “a single alternative court with jurisdiction over the claims.” Id. at 492, 495 (emphasis added). The question is relevant here where defendants seek to dismiss all foreign passenger cases to multiple foreign forums and within each foreign country there is not one forum for the entire case. Whether or not it is part of the prerequisite of establishing an alternative available forum for the entire case, the mere fact that dismissal would sprinkle cases all over the world is contrary to the equitable doctrine of forum non conveniens.

work).

The result of piecemeal litigation precludes dismissal. It impacts the private interest factors because plaintiffs cannot coordinate work and share expenses, as they can in a U.S. MDL action. It impacts the public factors, because a host of foreign tribunals will be burdened, without meaningfully reducing the work of the chosen forum. Air Crash off Long Island, 65 F.Supp.2d at 217.

The fact that jurisdiction over all parties exists in the United States,¹⁶ that significant litigation would continue in this forum, and that not all defendants join in the motion distinguish this case from every case movants cite. Defendants rely on the following inapposite cases:

1. Piper Aircraft v. Reyno, 454 U.S. 235 (1981), involving a crash in Scotland, Scottish decedents, and an inability of the manufacturer to implead Scottish defendants being sued by survivors in Scotland. The entire litigation was dismissed. Scotland was an available forum for the entire case. The flight did not involve the United States.
2. Gschwind v. Cessna Aircraft Co., 161 F.3d 602 (10th Cir. 1998), cert. denied, 119 S.Ct. 1755 (1999), involving a flight and crash in France and an action on behalf of the French-Belgian pilot who was contributorily negligent. The sole lawsuit was dismissed.
3. Magnin v. Teledyne Continental Motors, 91 F.3d 1424 (11th Cir. 1996), involving a flight and crash in France and a lawsuit brought on behalf of the deceased French pilot. The cause of the crash was disputed and all the evidence pertaining to the crash and decedent's damages was located in France. The sole lawsuit was dismissed.

¹⁶ Swissair does not move to dismiss any foreign passenger case based on Warsaw Convention Article 28. See Declaration of Michael Holland at ¶13 in support of this motion and Swissair's motion to dismiss all punitive damages claims under the Warsaw Convention. Mr. Holland, counsel for Delta and Swissair, explained that an Article 28 dismissal would still leave pending actions against Boeing and Douglas. He added "Because SWISSAIR and BOEING have agreed to share liability for full compensatory damages, Article 28(1) dismissals would not terminate SWISSAIR'S obligation vis-a-vis its sharing agreement with BOEING with respect to these claims." Swissair is obligated vis-a-vis Boeing to share in the compensation and will remain in this forum because of that sharing agreement. See also September 13, 1999 transcript of conference before this Court (Comments of Des Barry, counsel for Delta and Swissair, at p. 18, that despite any Article 28 problem "both sides -- Boeing and -- and the airline, have said, we're here, we're available for full damages, if the court decides [in the forum non conveniens motion] that the cases stay here" and, at p. 44, that because of the sharing agreement, "[t]he foreign plaintiffs, ultimately, could sue Boeing without worrying about Article 28 against us...."). Moreover, Swissair is also in this forum because of the third-party claims and cross-claims interposed, or to be interposed, by SBA and IFT.

4. Torreblanca deAguilar v. Boeing, Co., 47 F.3d 1404 (5th Cir.), cert. denied, 516 U.S. 865 (1995), involving a Mexican flight and crash, a Mexican carrier not subject to suit in the United States because of its foreign sovereign immunity status, and Mexican plaintiffs. The entire case was dismissed.
5. Baumgart v. Fairchild Aircraft Corp., 981 F.2d 824 (5th Cir.), cert. denied, 508 U.S. 973 (1993), involving all German plaintiffs, a German crash, a German flight, and an inability to implead the German airline in the United States. The entire litigation was dismissed.
6. Kryvicky v. Scandinavian Airlines, Sys., 807 F.2d 514 (6th Cir. 1986), involving a flight and crash in Spain, one plaintiff whose decedent had been domiciled in Spain, and foreign defendants who could not be impleaded in the United States. The one case was dismissed and no litigation remained in the forum.
7. Ahmed v. Boeing, Co., 720 F.2d 224 (1st Cir. 1983), involving Pakistani decedents killed on a Pakistani carrier flight from Saudi Arabia to Pakistan. The Pakistani carrier was not joined in the suit. The entire case was dismissed.
8. Cheng v. Boeing, 708 F.2d 1406 (9th Cir. 1983), affirming 555 F.Supp. 9 (N.D. Cal. 1982), involving a Taiwan crash, an inability to implead the foreign airline, and a non-U.S. flight. The entire litigation was dismissed.
9. Miskow v. Boeing, 664 F.2d 205 (9th Cir. 1981), cert. denied, 455 U.S. 1020 (1982), involving a Canadian flight and crash, a Canadian airline, Canadian decedents, and significant litigation activity that had already occurred in Canada. Thirty actions had been filed in Canada, where a Coroner's jury had already found the airline and the Canadian air traffic control to be at fault and the plane's engine to have had a defect. In Canada, the Canadian government, Boeing and the Canadian airline had agreed to settle with the claimants. All U.S. cases were dismissed.
10. Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980), cert. denied, 454 U.S. 1128 (1982); Dahl v. United Technologies, Corp., 632 F.2d 1027 (3d Cir. 1980); and Fosen v. United Technologies, Corp., 484 F.Supp. 490 (S.D.N.Y. 1980), aff'd without op., 633 F.2d 203 (2d Cir. 1980), all involving a helicopter crash in Norway, and an unavailable Norwegian third-party defendant. All plaintiffs' cases in these litigations were dismissed.
11. Kern v. Jeppesen Sanderson, Inc., 867 F.Supp. 525 (S.D. Tex. 1994), involving foreign passenger death cases arising from two foreign flights and crashes near Nepal. The foreign carriers were held to be indispensable parties not amenable to suit in the forum. The manufacturer of the aircraft was a foreign corporation unamenable to process in the forum. There was no personal jurisdiction over any defendant in the forum. After dismissing all defendants on jurisdictional grounds, the court also granted dismissal based on forum non conveniens, in what appears to be dicta.

12. Jennings v. Boeing Co., 660 F.Supp. 796 (E.D. Pa.), amended 677 F.Supp. 803 (E.D.Pa. 1987), aff'd without op., 838 F.2d 126 (3d Cir. 1988), involving one suit for one British citizen killed in a helicopter crash in the North Sea. The helicopter owner and other foreign defendants were not amenable to suit in the forum. The one lawsuit was dismissed.
13. Chhawchharia v. Boeing Co., 657 F.Supp. 1157 (S.D.N.Y. 1987), involving a crash in Japan, a non-party Japanese airline, and all foreign plaintiffs. All cases were dismissed.
14. In re Disaster at Rihadh Airport, Saudi Arabia on August 19, 1980, 540 F.Supp. 1141 (D.C.C. 1982), involving a foreign flight and crash, all foreign plaintiffs, and an inability to implead the foreign airline. All cases were dismissed.
15. Bouvy-Loggers v. Pan American World Airways, 15 Avi. 17,154 (S.D.N.Y. 1978), involving a Tenerife crash caused by a collision between a non-party foreign airline and Pan American. The plaintiffs were foreigners and had accepted defendant's offer to pay compensation damages in exchange for plaintiffs' waiver of punitive damages. All cases were dismissed.

In truth, these cases cited by movants support denial of their motion.

IV. THE PRIVATE INTEREST FACTORS STRONGLY FAVOR RETAINING JURISDICTION.

The defendants can not meet their heavy burden to show that the private factors “weigh heavily in favor of dismissal” and “decidedly in favor of trial in the foreign forum.” Lacey II, 932 F.2d at 180. If the factors “are in equipoise, or even if they lean only slightly toward dismissal, the motion to dismiss must be denied.” Id.

The private factors must also be assessed in terms of the claims and defenses likely to be raised at trial, without narrowing the inquiry to what movants claim are the issues or to only “one paramount issue.” Id. at 182. Each individual case turns uniquely on its facts, and the court must assess the “relative ease” of access to relevant proof and witnesses “in each forum,” not merely note difficulties present in the chosen forum. Lacey I, 862 F.2d at 43, 46. Where relevant proof and witnesses are located in each forum, the proof in each can be made available in the other through the Hague Convention. Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604, 609 (3d Cir. 1991) (Lony II);

Lony I, 886 F.2d at 640.

A. Liability issues exist in this forum and would exist in the foreign forums, but this forum has the liability proof.

Liability is at issue in several respects, notwithstanding the movants' promise (except DuPont) to pay full compensatory damages. First, the availability of punitive damages against the American manufacturers and against SR Technics AG and SAir Group is not resolved. Plaintiffs contend that United States law applies to all cases, and that law should be general maritime law, not DOHSA. See plaintiffs' response memorandum of law in opposition to the Boeing-Douglas motion to dismiss punitive damages claims based on DOHSA, at pp. 41-45. General maritime law permits recovery of punitive damages. See pp. 47-48 infra. The evidence required to prove punitive damages against movants Boeing, Douglas, and DuPont, and non-movants SBA, IFT, and Hollingsead, is located in the United States. The liability proof against SR Technics is located in Zurich and the United States, because SR Technics supervised the IFEN system design and installation work performed here by SBA, IFT, and Hollingsead. Because SR Technics is a party to this litigation, this Court can compel production of proof.¹⁷

Second, four American defendants, movant DuPont and non-movants SBA, IFT and Hollingsead, fully contest their liability for any damages, and the proof of their liability is here. Also, SBA and IFT have asserted cross-claims and third-party claims against the movants. Thus, liability issues among the defendants will also remain in this forum, where the proof is located. Evidence

¹⁷ Availability or not of punitive damages will also be at issue in Switzerland and France. Under Swiss conflict of laws rules, Swiss courts will apply American law to the American manufacturers. See Bucher ¶¶60-62. The majority view among the Swiss legal experts is that Swiss courts will not recognize punitive damages under a foreign law, although a minority of experts disagree. Id. at ¶57 and n.31. Swiss court could also assimilate an American law punitive damages claim into a claim for moral damages, since both are linked to the gravity of fault. Id. at ¶62. French courts will apply Canadian law to the American manufacturers under France's lex loci delicti rule. Mayer ¶22. In France, the issue of availability of punitive damages under foreign law is also debated. Id. at ¶23.

concerning the crash investigation is in Canada, not Switzerland or France. That evidence is readily available here, since the investigation is focusing on American product defect issues, and our DOT, NTSB and FAA have been intimately involved. This is the only convenient forum for liability issues. Lony II, 935 F.2d at 609 (liability issues against DuPont favored motion's denial).

Third, liability would even be at issue in Switzerland and France. DuPont's decision to contest its liability would force any dismissed plaintiff to conduct a full liability trial against DuPont in Switzerland and France, which is extremely unfair when the liability evidence is here and the American cases will also conduct a parallel liability case.

The movants also misconstrue Swiss law in key respects and ignore the opinions of their own Swiss law experts, Professors Vischer, Werro and Koller, when they claim that their agreement to pay compensatory damages eliminates any need for Swiss courts to determine liability. Plaintiffs' expert, Professor Bucher, states that a Swiss court will only waive plaintiffs' burden of proof on liability "when a defendant accepts the facts referred to by the claimant." Bucher ¶72 n.37. Defendants do not admit any liability facts. Their agreement to pay damages does not include any admission of fault or gravity of fault. Their answers to complaints consist of denials of liability.

A Swiss court will require proof of the gravity of fault to assess damages. Article 43(1) of the Swiss Code of Obligations provides: "the judge determines the mode and extent of the compensation according to the circumstances and the gravity of the fault." Bucher ¶75; see also declarations of movants' experts: Vischer at ¶6(ii), Werro/Koller at p. 10 n.29. Under Swiss law, proof of the gravity of fault is especially relevant in the award of moral damages, for the next-of-kin's physical or mental suffering as a result of the death of someone dear. See Declaration of plaintiffs' Swiss law expert Louis

Gaillard ¶7, attached as App. Exh. 16 (hereafter “Gaillard ¶__”).¹⁸ Moral damages are a distinct cause of action from the claim for pecuniary loss. Swiss courts do not determine moral damages without proof of fault, since “the more serious the fault, the higher the compensation.” Gaillard ¶¶9-10.¹⁹

B. Defendants' motion ignores that many of the Swiss and French cases seek primarily non-pecuniary damages, making their cases easy to try in this forum.

Of the 65 decedents' case slated for dismissal, at least 34 involve claims in which the plaintiffs do not make a loss of support claim and principally seek non-pecuniary damages for their loss of decedents' services, love, care, comfort and companionship, survival action damages for decedent's pre-death pain and suffering, and, if available under the applicable law, punitive damages.²⁰ See

¹⁸ Louis Gaillard is a highly regarded expert on Swiss law and Swiss procedural law. He is a former Judge of the Geneva Court of First Instance and served as the Chief Judge from 1989 to 1991. He is a former partner of the law firm Baker & McKenzie, and is the founding partner of the law firm B.M.G in Geneva. He serves as a surrogate judge of Geneva's Court of Appeal. He authored a highly regarded three-volume comprehensive commentary on Geneva's Civil Procedure Law, as well as several articles on procedural issues.

¹⁹ Under French law, moral damages are also awarded and, as a matter of practice, the courts will award higher amounts depending on the gravity of the fault. Bernard ¶51; see also In re Air Disaster at Lockerbie, Scotland on December 21, 1988, 928 F.2d 1267, 1281 (2d Cir.), cert. denied, 502 U.S. 902 (1991). (“French law considers fault in those cases where it is awarding <dommage moral,> or moral damages, which are usually equivalent to damages for pain and suffering, grief, shame or disfigurement”) [citations omitted]; Air Crash off Long Island, 65 F.Supp.2d at 216 (recognizing that French courts will examine gravity of fault to award moral damages).

²⁰ The following cases do not raise loss of support issues: **Amposta** (PA 00-328, PA 99-6010) (decedent Amposta); **Benjamin** (PA 99-6174) (decedents Wahkyn, Jesse-James, Whitney and Stacey Benjamin); **Brooks** (PA 99-4190, PA 99-5863, PA 99-6105) (decedents Joyce and Victor Ratnavale); **Brown** (PA 99-6014, PA 99-6326 (decedent Kretschmer); Burrus (PA 99-6084, PA 99-6109, PA 99-6087) (decedent Theirry and Dominique Burrus); **deGraef** (PA 99-6031, PA 99-6449, PA 99-6097) (decedent deGraef); **Dunareanu/Dumitru** (PA 99-6096, PA 99-2294, PA 99-6103, PA 99-6090, PA 99-5514) (decedent Christian Dumitru); **Dwek/Mancel/Guely** (PA 99-2293, PA 99-6102, PA 99-5857 (decedents Chantal, Houchang and Astrid Miralai); **Hoel/Delarouche** (PA 99-6005, PA 99-6431, PA 99-6168, PA 99-6177, PA 99-6105, N.D. Cal. 99-CV-4104) (decedents Francois, Anne, Paul, Marie-Francoise and Olivia Hoel); **Jackman** (PA 99-6106, PA 99-6105, PA 00-129) (decedent Jackman); **Jegge** (PA 99-6105, PA 99-6023, PA 99-6440) (decedents Evelyn and Isabelle Jegge); **Kohler** (PA 99-6011, PA 99-6098, PA 00-329) (decedent Kohler); **Lemaitre** (PA 99-6105, PA 99-6447, PA 99-6029) (decedent Lamaitre); **Makarevitch** (PA 99-6176) (decedent Manuel Makarevitch); **Martin** (PA 99-6007) (decedent

Kushlefsky aff., attached as App. Exh. 18; Rosenberg aff., attached as App. Exh. 20; Richter aff., attached as App. Exh. 21; Capone aff., attached as App. Exh. 22.

Contrary to the movants' sweeping and exaggerated claims that trial of these foreign decedent cases will require testimony from a legion of non-party witnesses, such as employers, accountants, and business associates, and third-party employment, bank, and income tax records, a trial of these cases will focus instead on testimony from the claimants and perhaps a few close friends, who, given their relationship to the next-of-kin and the decedents, could hardly be expected to refuse to appear voluntarily.

C. Key damages proof is located here.

Contrary to movants' unsubstantiated conjecture, in many of the cases that do raise loss of support, key damages witnesses and proof are located in the United States. See Kushlefsky aff.

D. The relative ease of access to proof and witnesses favors retaining jurisdiction.

Obviously, relevant damages proof is located in Switzerland and France.²¹ Such items are within plaintiffs' ability to obtain. Plaintiffs' counsel have already obtained numerous damages documents from non-parties, contrary to movants' claim that relevant non-party damages proof will be difficult to obtain. See Kushlefsky aff.

Joseph Martin); **Monay** (PA 99-6111, PA 99-5855, PA 99-6094, PA 99-2292) (decedent Natasha Monay); **Perroud** (PA 99-6028, PA 99-6441 PA 99-6098) (decedent Perroud); **Reynard** (PA 99-6020, PA 99-6445) (decedent Nathalie Chevey); **Sequi** (PA 99-6012, PA 99-6433, PA 99-6105) (decedent Sequi); **Tschudin/Thioudellet** (PA 99-2291, PA 99-5856, PA 99-6101) (decedents Alexandre and Emmanuel Thioudellet); and **Villet** (PA 99-6015, PA 99-6327, PA 99-6105) (decedent Villet).

²¹ Any necessary translation of damages documents will not be burdensome. Unlike liability documents, damages documents are not voluminous or technical. Most cases were filed in New York and California, both convenient locations for obtaining services of competent French-speaking translators. The courts can fashion appropriate remedies for the costs of translation, so that this does not become a hardship for any defendant.

Indeed, movants do not identify a single document that cannot be made available here. Nor do they identify any witness unwilling to be deposed in Switzerland or France or appear for trial here. Defendants also fail to acknowledge that trials in Switzerland and France will not be more comprehensive, both because French and Swiss courts do not have the compulsory process over witnesses that exists in the U.S. legal system, and because trials in France or Switzerland are conducted on considerably less evidence and testimony than is used and considered in a U.S. trial. Movants' claim of a more comprehensive damages trial in Europe is highly dubious.

Trial in France

There is no pre-trial discovery in France. Production of documents is allowed at trial, but is strictly controlled by the judge. See Declaration of plaintiffs' French law expert, Patrick Bernard, an expert in French civil and procedure law, at ¶15, attached as App. Exh. 17 (hereafter “Bernard ¶15”).²² Non-party document production is very infrequent. Id. Requests for documents must be limited to specifically identified documents, and the party requesting a document must know who possesses it. Id. at ¶ 16. Without pre-trial discovery, these conditions are difficult to meet. There is also much less reliance on oral testimony in France. Ordinarily, a witness will supply only a handwritten statement. Id. at ¶18. In the unusual case when the judge orders oral testimony, the judge, not the attorneys, examines the witness. Id. at ¶¶ 17-18. The attorney can suggest questions, but the judge decides whether to ask them or not. Id. There is no effective compulsory process for witnesses; at worst a non-appearing witness will be fined up to 10,000 French Francs (U.S.\$1,500). Id. at ¶ 19.

²² Patrick Bernard is an expert on French civil law and procedure. He is the senior partner of the law firm Bernard - Hertz - Béjot in Paris. He is a frequent international lecturer and has addressed the American Bar Association regarding the taking of evidence in France for use in litigation in the United States. He also frequently lectures on International Law issues at the University of Paris XI and the University of Paris II.

Trial in France is very cumbersome, being held on an intermittent basis whenever the judge orders a hearing and decides what or who should be produced. *Id.* at ¶34. The trial hearings can take up to two years or more of time. *Id.* The judge conducts fact-finding on a much narrower basis than, and with use of less proof than, an American jury would use. *Id.* at ¶21.

To prove liability against a non-French defendant, the plaintiffs would have to request the assistance of U.S. courts under the Hague Convention and 28 U.S.C. §1782, while at the same time parallel liability litigation would take place in the U.S. for the American cases. This makes no sense.

Bernard points out that, by contrast, more evidence and a fuller trial are available to the parties should the French cases remain in this forum. *Id.* at ¶ 23. The French Blocking Statute will not prevent damages witnesses from travel to the U.S. for trial or depositions. The statute only blocks testimony on matters of French public policy. *Id.* at ¶¶ 24-25. French witnesses who consent to be deposed in France can be deposed pursuant to U.S. deposition rules under Chapter II of the Hague Convention. *Id.* at ¶ 27. Such authorizations are routinely granted on an expedited basis. *Id.*

In the very unlikely event that a damages witness is unwilling to appear, France is a friendly forum in which to request a compulsory deposition under Chapter I of the Hague Convention. *Id.* at ¶28. This deposition is conducted before a French judge in procedures reasonably close to a U.S.-style deposition. *Id.* The measure of compulsion under Chapter I of the Hague Convention is the exact same measure of compulsion that exists under French procedure. *Id.* at ¶29. These measures are negligible, since there is no “contempt of court” rule in France, and consist of a mild penalty. *Id.* This same lack of effective compulsory process exists, however, if the case were to be tried in France, but with the added disadvantage that a French judge will usually not order non-party testimony.

If a non-party is unwilling to produce documents, U.S. lawyers can use the Hague Convention to obtain documents, provided the requested documents are enumerated and have a direct and clear

nexus to the subject matter of the litigation. Id. at ¶32. The scope of documents available under the Hague Convention would never be less than what a party could obtain in France and can be broader. Id.

Trial in Switzerland

Swiss law also does not allow pre-trial discovery. Gaillard ¶24. Each party has the burden to produce documents in its favor, and the Court will not determine what evidence is needed or cure any deficiency in the plaintiffs' cases by requiring that defendants produce documents. Id. Plaintiff has the burden to prove the damages and the fault. Id. at ¶¶24-26; see also Bucher ¶72-73. This is a problem, since it is not in defendants' interest to produce documents that establish fault, and the Swiss courts will not order production. Bucher ¶74; Gaillard ¶¶24, 26.

There is no compulsory process in Geneva. Gaillard ¶ 25. If a judge believes that a party has failed to disclose a document without a valid reason, the judge can impose a mild penalty, up to 2000 Swiss francs (U.S.\$1,290), or can assume that the documents do not favor that party. The judge cannot fine a non-party. Id. Thus, whether the cases are pending in the U.S. or Switzerland, the parties will have to rely on voluntary production of non-party damages documents. Id. at ¶26. Defendants gain nothing by dismissal.

Witnesses are heard live in a Geneva trial, but there are no pre-trial depositions and no effective compulsory process. Id. at ¶¶28-29. If the witness refuses to appear, that person is fined 100 Swiss Francs (U.S.\$65) on first summons and up to 300 francs (U.S. \$195) on second summons. Id. at ¶29. A testifying witness has no obligation to disclose documents. Id. For witnesses domiciled in another canton or outside the country, the judge must address a rogatory letter to the judge of the witness' domicile. Id. at ¶28.

If the actions remain in the U.S., Swiss non-parties can voluntarily produce documents and

appear for trial or depositions. There is no Blocking Statute to prevent this. Gaillard ¶¶47, 53. For unwilling witnesses, the U.S. lawyers can proceed under the Hague Convention and conduct U.S. style pre-trial depositions in Switzerland before a commissioner. *Id.* at ¶¶ 50. Under the Hague Convention, a document request tailored to the case and consistent with Swiss law will be honored. *Id.* at ¶¶ 51-52. In no case will less documents be available because the case remains in the United States. *Id.* at ¶¶54-55. See Lony I, 886 F.2d at 640 (noting that the Hague Convention procedures assure that some evidence from each forum will be available in the other).

With respect to liability proof -- necessary to prove DuPont's liability and relevant to assess damages under Swiss law -- it is irrefutable that the chosen forum provides easier access, and a broader scope of access ease, to the relevant proof. The relative ease of access to proof favors the United States.²³

E. Other factors that make a trial easy, expeditious, and inexpensive favor retaining jurisdiction; dismissal would create serious hardship for the plaintiffs.

Defendants do not show how these cases can be resolved more expeditiously and efficiently in Switzerland or France. They provide no information on court docket congestion in Switzerland or France or the expected length of time that an aviation trial against multiple American manufacturers would take. They do not discuss the problem of venue in Switzerland or France, and do not tell this court that there is no statute in either country requiring consolidation of all cases in one judicial proceeding. See Mayer ¶¶18-19; Bucher ¶¶50-56.

A district court must also consider the plaintiff's financial burden in filing a new lawsuit, particularly since France and Switzerland do not allow contingency fees. See Gaillard ¶41; Bucher

²³ The movants incorrectly claim (Def. Mem. at p. 21), that plaintiffs would have no authority to settle a case in the U.S., if a Swiss social agency has a lien for payment of benefits, such as pension or death benefits. Any lien rights these agencies have will not be lost by a settlement. Gaillard ¶ 48.

¶77; Bernard ¶46. While this factor is never dispositive, it weighs against dismissal. Murray v. British Broadcasting Corp., 81 F.3d 287, 292 (2d Cir. 1996); Reid-Walen v. Hansen, 933 F.2d 1390, 1398 (8th Cir. 1991); Wilson v. Humphreys (Clayman) Ltd., 916 F.2d 1239, 1246 (7th Cir. 1990), cert. denied, 499 U.S. 947 (1991); McKrell v. Penta Hotels (France), S.A., 703 F.Supp. 13, 14 (S.D.N.Y. 1989). This, combined with a need to seek new counsel unfamiliar with the case, “may compromise the plaintiffs’ ability to make themselves whole in a damages trial.” Air Crash Near Cali, Omnibus Order at p. 49, citing Friends, 717 F.2d at 609.

While French and Swiss courts can award legal costs to the winner, that determination is made at a separate proceeding brought by the winner, and the recovery never equals the winner's actual out-of-pocket expenses. Gaillard ¶¶ 13, 43-46; Bernard ¶49. Moreover, in a settlement the usual practice is that each party bears its own costs. Gaillard ¶ 13.

The plaintiffs must still personally advance all costs and legal fees. The plaintiff bears the burden of significant filing fees. In Geneva, an action for damages claiming U.S.\$2,000,000 will give rise to an up-front filing fee of U.S.\$21,883. Gaillard ¶ 39. Attorney's fees in Geneva for an action claiming damages in excess of 1,000,000 Swiss Francs (U.S.\$645,160) can be set at 800 Swiss Francs per hour (U.S.\$516). Id. at ¶¶41-42.²⁴ The plaintiff also advances the costs for experts and translations. Gaillard ¶40; Bernard ¶8(f).

The French legal system further requires that parties hire specialized attorneys for the various stages of a litigation. Bernard ¶¶45-48. Plaintiffs will need an “Avoue” at the appellate court and an “Avocat au Conseil” at the Cour de Cassation (Supreme Court). Id.

Delays are frequent in Switzerland and France. In Geneva, there are interlocutory appeals, and

²⁴ In this litigation, the plaintiffs' attorneys have already invested monies in investigatory work. Plaintiffs have hired five experts who have performed investigatory work on, among other things, the kapton wires, the plane's electronic system, and the metallized Mylar insulation.

defendants can also seek stays to await the outcome of another proceeding (e.g., the Canadian TSB investigation or another pending related case). Gaillard ¶¶19-23, 35-36. While the motion is pending, the action is suspended. *Id.* at ¶21. Aviation cases in Switzerland have lasted well beyond the 4 ½ years that movants' expert Vischer estimated for a generic lawsuit. One aviation case that Professors Werro\Koller discuss for the issue of moral damages took 11 years and 9 months from the crash date to be resolved at the Supreme Court. Gaillard ¶ 33. Judgments from the Alitalia 1990 crash near Kloten Airport in Zurich were delivered in 1999 for a proceeding in which all evidence was in Switzerland. *Id.* at 34.

In France, appeals are commonly heard by the court of appeals and the Cour de Cassation (Supreme Court), with a two-year period being typical at each of the three court levels. Bernard ¶¶34-37.

All of the practical concerns that make trial of a case easy, expeditious, and inexpensive favor retaining jurisdiction.

V. THE PUBLIC INTEREST FACTORS WEIGH HEAVILY IN FAVOR OF RETAINING JURISDICTION.

A. The United States has the greatest interest in the outcome of this litigation.

When resident defendants have committed wrongful conduct in the U.S. involving products manufactured and designed here, this forum has the greatest interest in the litigation. That interest is not diminished because those killed include foreign citizens invited to our country for business or tourism. Reid-Walen, 933 F.2d at 1400 (“[t]he defendant’s home forum always has a strong interest in providing a forum for the redress of injuries caused by its citizens”); Lony I, 886 F.2d at 642 (the public’s interest is great in the place of harm and manufacture); In re Air Crash Disaster Near Palembang, Indonesia on December 19, 1997, MDL No. 1276, unreported opinion at p. 5 (W.D. Wash. 2000) (public factors favor retaining foreign and American cases against Boeing for an

Indonesian crash of a foreign flight); Slight v. E.I. Dupont de Neumours & Co., 979 F.Supp. 433, 441 (S.D. W. Va. 1997) (interest of safety of product manufactured here, injuring foreigners abroad, is more significant than domiciliary foreign country's interest).

A total of six American manufacturers may have been responsible for both the match that set the fire on Flight 111 and the tinder that spread the fire throughout the aircraft. Strong American public safety issues are presented by the following:

- The aircraft's metallized Mylar-coated insulation blankets were highly flammable and caused the fire to spread rapidly. DuPont manufactures Mylar. The FAA has proposed a rule to require replacement of these blankets in nearly 700 U.S.-registered MD-11s.
- The cockpit's map lights may have been the ignition source for the fire. Boeing has already issued an Alert Service Bulletin on the MD-11 map lights. On April 5, 2000, the FAA ordered all airlines to unplug the cockpit map lights.
- Since the Flight 111 crash, the FAA has issued 23 safety orders about MD-11 wiring deficiencies.
- The source of the ignition may also have been the IFEN system, designed and installed on the aircraft by non-movants IFT, SBA, and Hollingsead. After the crash, the FAA banned the IFEN installation. Plaintiffs' litigation against these defendants and these defendants' own cross-claims will remain.
- The Flight 111 crash raises American concerns about the safety of joint service and code-share flights between U.S. carriers and their foreign partners, whose safety procedures and records may not meet those of the U.S. carriers. The DOT recently imposed new safety requirements on American carriers to audit their foreign partners.

These U.S. public safety concerns are not diminished because foreigners were also on the plane. We do not impose such an offensive double standard. To deny the foreign plaintiffs the right to remain here with American plaintiffs to hold defendants accountable is to deny them equal justice and makes a mockery of our treaty relations and our judicial system. It also lessens the effectiveness of

damages awards in restraining corporate misconduct.²⁵ No community interest of Switzerland or France will be in the slightest impaired by retaining jurisdiction, since American damages awards will surely compensate foreign passengers fairly.

The forum's interest in the litigation, judicial efficiency and comity are all served by retaining jurisdiction.

B. Imposition of jury duty is not unfair when the community has a strong interest in the litigation.

Imposing jury duty in the plaintiffs' chosen forum will not be unfair, given the important American interests involved and the fact that jury duty will be imposed in any event for the non-French and non-Swiss passengers. Air Crash Off Long Island, 65 F. Supp.2d at 217.

Moreover, imposition of jury duty is only potentially burdensome if the forum is unrelated to the litigation, not because the plaintiffs or decedents are foreigners. Gilbert, 330 U.S. at 508-09 (courts must examine “the interest in avoiding the unfair imposition of jury duty on citizens of an unrelated forum”) (emphasis added). The American forum is intimately related to the litigation. The movants are wrong to suggest that jury duty is unfair because foreigners are involved.

C. Administrative ease overwhelmingly favors retaining jurisdiction.

There is no single forum in Switzerland or France that can hear all of these claims. There is nothing comparable in those countries to 28 U.S.C. §1407. Mayer ¶¶18-19; Gaillard ¶16; Bucher ¶51. Only in the United States does there exist a compulsory, consolidated proceeding for all pre-trial

²⁵ American jury damages awards in product defect cases involving American manufacturers act as an effective restraint on corporate misconduct. See “An Economic Approach to Forum Non Conveniens Dismissal Requested by U.S. Multinational Corporations,” 22 Geo. Wash. J. Int'l. L.&E. Con. 215, 241 (1988). In this regard, this court can also consider that a forum non conveniens motion may be motivated by no more than a desire of an American defendant to avoid accountability before U.S. juries and seek the advantage of lower damages awarded in a foreign court. See Fiacco v. United Technologies Corp., 524 F. Supp. 858, 862 (S.D.N.Y. 1981), cert. denied, 456 U.S. 976 (1982).

proceedings, including discovery and dispositive motions, and the possibility of a joint liability trial, even after Lexecon v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 39 (1998). The fact that this forum was selected by the Judicial Panel on Multi-district Litigation (JPMDL) also establishes its convenience.

The MDL treatment of this case and the Lexecon decision also counsel against forum non conveniens dismissal in another way. The Lexecon case held that at the conclusion of pre-trial proceedings, the JPMDL must remand the transferred cases to the transferor courts for trial. 523 U.S. at 39. The transferor courts can then rule on a 28 U.S.C. §1404 motion to transfer venue to the transferee court for trial. The broadest implication of Lexecon is that the denial of the transferee court's authority to decide where trial shall take place undermines the transferee court's authority to dismiss for forum non conveniens in favor of a foreign trial, an even more drastic result. A more narrow implication of Lexecon is that, at a minimum, when analyzing the public interest factors, the MDL court must act with great restraint, because it is most likely not the court in which a damages trial will occur.

D. United States law, not foreign law, should apply to all passenger cases. Foreign courts should not be burdened with complex conflict of law problems.

The plaintiffs agree with the movants that U.S. law applies to this litigation. The position of Boeing/Douglas and Swissair/Delta is that any case remaining in this forum, including foreign passenger cases, should be governed by U.S. law, and they claim that the applicable U.S. law is DOHSA. See excerpts from August 5, 1999 Transcript of Conference before this Court, attached as Appendix Exhibit 25 (Comments of Keith Gerrard, attorney for Boeing/Douglas) and Boeing/Douglas' Memorandum of Law in Support of their Motion to Dismiss Claims for Punitive Damages on the Basis of DOHSA. In the within motion, however, the movants inconsistently claim that this forum should apply Swiss law to the Swiss passenger cases and Swiss law or French law to the French passenger cases, which they claim would also be the result in Switzerland and France.

The movants are wrong. They were right the first time when attorney Keith Gerrard stated that U.S. law should apply in this forum to all cases. The movants offer no foreign law expert opinion on the conflict of laws analysis in Switzerland and France, and thus do not realize that under Switzerland's product liability rules, Swiss courts will apply U.S. law to the American manufacturing defendants, not Swiss law. Bucher ¶¶60. Furthermore, Swiss courts, which lack experience applying U.S. law, would face great difficulties trying to determine which U.S. law to apply – state law, federal statutes, or general maritime law. *Id.* at 61.²⁶ France applies lex loci delicti to tort claims, and its courts would apply Canadian law to the products liability claims against the American defendants, not French or Swiss law. Mayer ¶¶22. It would be difficult for French courts to determine which Canadian law to apply, as this crash occurred in internal waters of Canada, and province law, Canadian federal law or Canada's maritime law can apply.

Further complicating matters is the fact that the Swiss and French courts would have to apply different law to the carriers Swissair and Delta. France and Switzerland will treat the carrier claims as contractual claims under the Warsaw Convention, not as tort claims. Thus, contract conflict of laws rules apply, not tort rules. Swiss courts would apply Swiss law to the carriers, with the possibility in France that French or Swiss law would apply. Bucher ¶¶58; Mayer ¶¶20-21. By contrast, the United States is the one forum in which a court can make a uniform choice of law ruling for the entire case.

While plaintiffs agree that U.S. law should apply across the board to all defendants and all plaintiffs in this forum, plaintiffs disagree, however, that the applicable U.S. law is the admiralty

²⁶ Civil law countries such as Switzerland and France have one national law applicable to both land torts and maritime torts. Their courts do not face the complicated domestic conflict of laws problems that common law courts in the United States and Canada face because of their federal legal system and distinctions between land law and law of the sea.

DOHSA statute; rather, plaintiffs contend that U.S. general maritime law applies.²⁷

It is noteworthy that the recent amendment to DOHSA, made law on August 5, 2000, and expressly made applicable to pending litigation, narrows the differences that existed between death remedies under general maritime law and under the unamended DOHSA. The amendment, attached as App. Exh. 26, provides that for aviation crashes on the high seas, plaintiffs may additionally recover non-pecuniary losses of decedent's care, comfort and companionship.

The important thing is that whichever U.S. law applies, that law should apply to all defendants and plaintiffs.

1. Application of U.S. law, including general maritime law, is consistent with our maritime conflict of laws test.

This accident meets the locality and maritime nexus test for a maritime tort and application of federal maritime law, including the maritime conflict of laws test²⁸ With admiralty jurisdiction over a maritime tort comes the application of any relevant admiralty statutes or substantive general maritime law. Because in this case the admiralty statute DOHSA does not apply, a court can apply general maritime law. East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 (1986) (“Absent a relevant statute, the general maritime law, as developed by the judiciary, applies”).²⁹

Application of general maritime law in this litigation is the logical result under our maritime

²⁷ Plaintiffs' memorandum in opposition to the Boeing-Douglas motion to Dismiss All Claims For Punitive Damages Based on DOHSA explains why DOHSA does not apply.

²⁸ The accident has a maritime locality because it occurred on navigable waters; and it has a maritime nexus because overseas flights relate to the traditional maritime activity of ocean liners and the accident had the potential to disrupt maritime commerce. Jerome B. Grubart Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 533-34 (1995); Sisson v. Ruby, 497 U.S. 358, 363 (1990).

²⁹ East River defined general maritime law as follows: “Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.” Id. at 865. East River is also a landmark admiralty tort case because it recognized that admiralty law incorporates principles of product liability including strict liability, based in warranty and tort, as defined in §402A of the Restatement (Second) of Torts. Id. at 865-66.

conflict of laws test. It promotes the admiralty goal of uniformity in interstate and international maritime cases (see Yamaha, 526 U.S. at 211-12; Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 272 (1972)); provides judicial ease in determination and application of the law; and furthers the basic policies underlying tort law, including the equity and justice in providing a fair and uniform remedy to the survivors of victims of a common tragedy.³⁰

Our maritime conflict of laws test has developed from what we now call the “Lauritzen triad.”³¹ The Third Circuit decision Neely v. Club-Med Management Services, Inc., 63 F.3d 166 (3d Cir. 1995) (en banc), has synthesized the Lauritzen triad into a two-fold test. First, the party seeking to apply American maritime law must meet an internationally acceptable threshold for the application of American law, which is met by proof of any one of the following: injury to an American or a foreigner with American dependents; injury in American territory; injury by American defendants; injury from an American-made vessel; or a contractual forum selection clause. Neely, 63 F.3d at 182. The threshold prerequisite exists here, because this case involves deaths of Americans, deaths of foreigners with American survivors, as well as deaths of foreigners with foreign survivors; there are seven American defendants; there is a foreign carrier defendant who is in a joint venture with an American carrier defendant; and the aircraft is American-made.

³⁰ See, e.g., Air Crash Near Cali, Omnibus Order at p. 46 (Florida law should apply, in part, because “[t]here is a powerful systemic interest in ensuring that victims of a single airplane crash – virtually all of whom perished at the same moment and under the same circumstances – be compensated by resort to a single set of rules. From this perspective, lawsuits arising out of an airline disaster may be unique in the field of mass tort litigation”); In re Paris Air Crash on March 3, 1994, 399 F. Supp. 732, 745, 747-48 (C.D. Cal. 1975) (in an aviation case involving multi-state and multi-national interests and an American-made defective airplane, the court should apply U.S. law, especially when there is no showing that foreign interests are greater than American interests).

³¹ The basic test in a seafarer's Jones Act case was set forth in Lauritzen v. Larsen, 345 U.S. 571 (1953), and that test was modified and further explained in Romero v. Int'l. Terminal Operating Co., 358 U.S. 354 (1959), and Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970).

The second inquiry is whether it is reasonable to apply American law. Id. at 171. In this regard the Lauritzen factors are applied flexibly, not mechanically, and are applied according to their relevance to the case and the context of the incident. Id. at 182. The Lauritzen factors, which were created for Jones Act seafarer claims, are applied differently in a non-traditional (i.e. non-seafarer) maritime tort case. Id. at 182, 191, 191 n.25. In the non-traditional, non-seafarer context, the factors of law of the flag, place of injury, inaccessibility or not of the foreign forum, and place of contract diminish in importance. Id. at 171, 190-93.

The factors that increase in importance are: the American domicile of the manufacturers whose defective product caused the injury; the fact that the foreign vessel-owner has significant business contacts with the United States, profits from U.S. tourism, and is affiliated with a U.S. co-defendant to solicit business here; and the injury relates to that U.S. business. Id. at 171, 194-95. The factor of law of the forum is never dispositive, but remains relevant. Id. at 190 and n. 27.

Accordingly, in Neely, American maritime law applied, because the defendants included U.S. defendants and a foreign shipowner associated with a U.S. co-defendant for U.S. tourism, and the vessel that injured the victim was built in the U.S. by U.S. defendants, according to American specifications. Neely is dispositive here and supports application of American maritime law.

Moreover, movants show no conflict between the policies underlying American maritime law and Swiss or French law. When American interests exist favoring application of American law, the burden then shifts to the defendants to show that the policies underlying the competing foreign laws are in conflict with American law; standing alone, the existence of foreign contacts is of extremely limited value. Neely, 63 F.3d at 188. See also Romero, 358 U.S. at 387.

General maritime law, as explained in more detail infra at pp. 45-48, allows recovery of pecuniary and non-pecuniary damages (loss of support, services, society and pre-death pain and

suffering). The laws of France and Switzerland also allow recovery of pecuniary and non-pecuniary losses (loss of support, services, moral damages for pain and suffering and loss of familial relations). Gaillard ¶¶7-10; Bernard ¶52; see also declarations of movants' foreign law experts, Delbecque at ¶21; Vischer at ¶¶6(i)-6(ii); and Werro/Koller, at pp. 6-10. The policies underlying tort recovery are not in conflict.

2. American General Maritime Law guarantees a floor recovery for plaintiffs' loss of support, services, and society and decedent's pain and suffering, and does not displace more generous state law remedies for state domiciliaries.

Moragne v. States Marine Lines, 398 U.S. 375 (1970) recognized a general maritime law death remedy for deaths on territorial (non-high seas) waters. Application of general maritime law and Moragne in territorial waters cases do not, however, displace more generous state damages law for U.S. domiciled plaintiffs, provided the deceased was not a seafarer or maritime worker, whose deaths are covered by admiralty statutes (e.g. Jones Act). Yamaha Motor Corp. U.S.A. v. Calhoun, 516 U.S. 199, 202 (1996). Allowing supplementation by more generous remedies under state law for American domiciliaries is not at odds with maritime policies, because Moragne did not create a federal death remedy “out of concern that state monetary awards in maritime wrongful-death cases were excessive, or that variations in the remedies afforded by the States threatened to interfere with the harmonious operation of maritime law. Variations of this sort had long been deemed compatible with federal maritime interests.” Yamaha, 516 U.S. at 211.³²

The Yamaha Court agreed with the Third Circuit opinion of Judge Becker that Moragne placed

³² Instead, Moragne's principal concern was the vindication of uniform maritime liability policies by extending the strict liability maritime remedy of unseaworthiness to deaths on territorial waters. Yamaha, 516 U.S. at 213. Yamaha therefore recognized that as to liability issues -- e.g., the doctrine of seaworthiness, the maritime comparative negligence rule or burdens of proof-- the need for uniformity and vindication of maritime policies does demand “uniform adherence to a federal rule of decision.” Id. at 210.

“a floor” on death recoveries, it was not “placing a ceiling on recovery for wrongful death.” Id. at 214-15.

Yamaha is also important because the Supreme Court presumed, without deciding, that the federal courts were correct in extending the Moragne death remedy to non-seafarers, and it assumed, without deciding, that Moragne also provides a survival remedy. Yamaha, 516 U.S. at 625 n.7; see also Miles v. Apex Marine Corp., 498 U.S. 19, 34 (1990).³³

Moragne and “the policies of maritime law” guarantee a floor recovery for “loss of support, services and society, as well as funeral expenses.” Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 584 (1973). Gaudet held that “[t]he term ‘society’ embraces a broad range of mutual benefits each family member receives from the others continued existence, including love, affection, care, attention, companionship, comfort, and protection.” Id. at 585. Gaudet held that allowing society damages is in keeping with the majority rule in the states, and, “in any event, . . . is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show ‘special solicitude’ for those who are injured within its jurisdiction.” Id. at 588.³⁴

The Supreme Court reaffirmed Gaudet in Dooley v. Korean Air Lines Co., 524 U.S. 116

³³ No federal appellate court has ever denied a survival action for pain and suffering in a general maritime law case. See Barbe v. Drummond, 507 F.2d 794, 799-800 (1st Cir. 1974); Wahlstrom v. Kawasaki Heavy Indust., Ltd., 4 F.3d 1084, 1093 (2d Cir. 1993) cert. denied, 510 U.S. 1114 (1994); Ward v. Barge Line Corp., 443 F.2d 565, 593 (3d Cir. 1971), overruled in part on other grounds, Cox v. Dravo Corp., 517 F.2d 620 (3d Cir. 1975) (en banc); Greene v. Vantage SS Corp., 466 F.2d 159, 166 (4th Cir. 1972); Miles v. Melrose, 882 F.2d 976, 986 (5th Cir. 1989); aff’d. sub nom., Miles v. Apex Marine Corp., 498 U.S. 19 (1990); Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc., 466 F.2d 903, 909 (8th Cir. 1972); Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985), cert. denied, 484 U.S. 914 (1987); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1549 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988).

³⁴ Gaudet disagreed with lower federal courts that had disallowed loss of society and services to adult children. 414 U.S. at 588, n.23, disagreeing with Simpson v. Knutsen, 444 F.2d 523 (9th Cir. 1971) and Petition of United States Steel Corp., 436 F.2d 1256 (6th Cir. 1970).

(1998) (noting that in Gaudet the Court “further held that . . . wrongful death awards could include compensation for loss of support and services and for loss of society.” Id. at 1984, n.1. See also Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 233 (1986) (citing Gaudet to observe that had DOHSA allowed loss of society, it would “bring respondents’ DOHSA recovery into line with the damages available to a beneficiary of a federal Moragne maritime cause of action arising from a death on territorial waters”).

Punitive damages are also allowed in appropriate cases. In re Amtrak, 121 F.2d at 1423 (general maritime law allows punitive damages); accord CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 699 (1st Cir. 1995); Maizoro, S.A. de C.V. v. Sea-Land Service, Inc., 1999 WL 1009092 (N.D. Tex. Oct. 20, 1999); see also Gravatt v. The City of New York, 1999 WL 111922 (S.D.N.Y. March 3, 1999) (punitive damages available in a maritime tort case under federal law and state law); Powers v. Bayliner Marine Corp., 855 F. Supp. 199 (W.D. Mich. 1994), aff’d, 83 F.3d 789 (6th Cir.), cert. denied, 519 U.S. 992 (1986) (loss of society and punitive damages are recoverable from manufacturer for deaths of non-seafarers).

The public interest factor of choice of law favors denial of this motion.

CONCLUSION

Movants fail to meet their fundamental burden to prove that an available foreign forum exists capable of hearing the entire case, since three defendants do not join in the motion, and two of them, IFT and SBA, oppose this motion. Moreover, it is doubtful that the foreign courts would accept jurisdiction over the American movants.

Movants also fail to meet their heavy burden to establish inconvenience, and they improperly argue that plaintiffs' choice of forum is entitled to little weight. Some plaintiffs included in this motion are American, some are non-Swiss and non-French, and their choice of forum is entitled to great

deference. The Swiss and French plaintiffs' choice of forum is also entitled to great deference. All of these plaintiffs have sued in the only forum anywhere that provides a single judicial roof for the entire case. By contrast, dismissal would result in piecemeal litigation and negatively impact the private and public interest factors and judicial inefficiency. Indeed, there is no precedent for the relief the movants seek.

The private factors weigh heavily in favor of retaining jurisdiction. All defendants are in this forum. Any evidence in France or Switzerland is obtainable here, and this forum permits pre-trial discovery and a fuller trial of the facts. Liability issues exist that require evidence only available in this forum. A liability trial in France or Switzerland would raise insurmountable obstacles of proof and financial hardship for plaintiffs.

The public interest factors also overwhelmingly favor retaining jurisdiction for reasons of judicial efficiency, the significant and manifold American interests in this litigation, and application of one uniform American law to all plaintiffs and defendants.

This motion should be denied in its entirety.

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On the Brief:
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Respectfully submitted,

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