UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE: AIR CRASH AT BELLE HARBOR, NEW YORK ON NOVEMBER 12, 2001

MDL NO. 1448 (RWS)

O P I N I O N

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This multidistrict litigation has resulted from the crash at Belle Harbor, New York of an Airbus aircraft, operated as American Airlines Flight 587, on November 12, 2001. All two hundred sixty persons on board the aircraft died, five residents of Belle Harbor were killed, additional residents suffered injuries, and personal property was damaged.

The defendants Airbus Industrie G.I.E. ("Airbus")[1], American Airlines, Inc. ("American"), and AMR Corporation ("AMR") have moved for a determination that (1) New York law applies to unsettled passenger, crew, and ground cases; (2) the Warsaw Convention, as supplemented by intercarrier agreements incorporated in American's tariff, applies to all passenger claims against American; and (3) French law applies to punitive damage claims against Airbus.

These motions present difficult issues arising out of a tragic aircraft disaster. These issues -- the role of the Court, determination of jurisdiction, and the choice of law -- have proved difficult for the courts over the years. To achieve a just outcome under these circumstances is a complex and challenging undertaking. The contribution of preeminent and able counsel, experienced in

[1] Airbus is now known as Airbus S.A.S.

aircraft disaster litigation, even when presenting contradictory views, is much appreciated.

For the reasons set forth below, general maritime law is applicable to the passenger claims in a Moragne action, the Warsaw Convention applies to the passenger claims against American, factual determinations are required to determine whether or not French law applies to the passenger punitive damage claims against Airbus, and New York law is applicable to the punitive damage ground claims against Airbus.

Prior Proceedings

Numerous lawsuits were commenced following the disaster. The first action was filed in this district on January 17, 2002. Those actions commenced in, or removed to, other federal courts were transferred to this Court pursuant to 28 U.S.C. § 1407 and were consolidated with the cases commenced here for coordinated and consolidated pretrial purposes by order of the Judicial Panel on Multidistrict Litigation ("JPML") in its initial transfer order and subsequent tag-along orders. See In re Air Craft at Belle Harbor, N.Y. on Nov. 12, 2001, 203 F. Supp. 2d 1379, 1380-81 (J.P.M.L. 2002) ("initial transfer order").

In a number of instances, multiple lawsuits were commenced by different parties seeking recovery of damages for the

same passenger. By order of this Court dated January 12, 2004, all wrongful death actions for the same decedent, whether originally filed in or transferred to this District, were consolidated for pretrial purposes.

After the initiation of litigation, Airbus and American sought settlement of the claims made. The defendants and the Plaintiffs' Executive Committee agreed upon the resolution of ten protypical cases and the description of these cases, which formed the outline of a matrix, were made available to all counsel. Where agreements were reached, settlements were approved. Where the parties did not agree, mediation with the Court took place. This process was so successful that only cases involving eight passengers remain unresolved, as well as twenty-four cases involving death, injury or property damage on the ground. The time and dedication of counsel and the commitment of resources devoted to this process was extensive and extraordinary and provided certainty, resolution, and substantial recoveries to all but a handful of plaintiffs.

Because this process required the analysis of individual cases, it also provided a direct experience into the emotional and financial effect of the crash on individuals and families. It mirrors the experience reported by Kenneth R. Feinberg, Esq. in his account of administering the 9/11 Victim Compensation Fund. See Kenneth R. Feinberg, What Is Life Worth?: The Unprecedented Effort

to Compensate the Victims of 9/11 (2005).[2] The searing emotional impact of this process cannot be divorced from the issues now presented.

In order to facilitate settlement, discovery was stayed by order of the Court in June 2003, although certain demands and requests were permitted to be exchanged. The stay on discovery was extended by orders of the Court dated March 24, 2006 and April 14, 2006 until May 6, 2006, and a particular discovery issue has been addressed in a companion opinion also issued on this date.

The defendants' motions were heard and marked fully submitted on January 25, 2006.

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[2] All participants in the settlement of these actions experienced the emotions described by Feinberg:

> During these hearings I encountered every imaginable emotion, from despair to anger to resignation to uncontrollable grief. One day, the 9/11 hearing room would serve as a kind of psychiatrist's office, the next day as a confessional, the day after that as a forum for an impassioned debate about terrorism. On more than one occasion, it became a type of family court with arguing family members disputing each other's claim to the funds. These difficult situations placed me in the role of a psychiatrist, family counselor, grief expert, rabbi and priest -- often on the same day and even during the same hearing, as the kaleidoscope of human emotions played out before my eyes.

Feinberg, What is Life Worth?, at 97-98.

The Parties

The plaintiffs are representatives of the estates of those who perished on the plane or those residents of Belle Harbor who were killed, and those who have alleged injury or property damage on the ground.

Defendants American and AMR are corporations organized and existing under the laws of the State of Delaware, with their principal places of business in the State of Texas. American is a certified air carrier with extensive domestic and international routes. All of American's common stock is owned by AMR, whose stock is publicly traded on the New York Stock Exchange.

Airbus is the manufacturer of a line of large commercial aircraft, and is responsible for the aircrafts' design, development, certification, fabrication, assembly, and product support. Airbus is organized and governed under French law as a limited liability company or "S.A.S." (Societe par Actions Simplifiee). It is headquartered in Toulouse, France and has its design, assembly, and marketing headquarters there.

The Facts

The facts set forth below are undisputed except as noted and are derived from the parties' submissions, including the

affidavit of Steven R. Pounian, Esq. ("Pounian Affid.") and accompanying exhibits.

On the morning of November 12, 2001, an Airbus A-300-605R aircraft bearing manufacturer's serial number 420 and registration number N14053 (the "Aircraft"), operated as American Flight 587 ("Flight 587"), took off from John F. Kennedy International Airport in Queens, New York ("JFK"), with a scheduled destination of Santo Domingo, Dominican Republic. The planned route of flight was for the Aircraft to depart on runway 31L to the northwest, make a left turn over Jamaica Bay, pass over Rockaway Peninsula, a strip of land less than three-quarters of a mile wide, and then fly 1500 miles over the Atlantic Ocean to the Dominican Republic.

Less than two minutes after takeoff, at an altitude of approximately 2,500 feet over Jamaica Bay, the Aircraft's vertical stabilizer and rudder separated in flight and fell into the water, where they were later recovered. Without a vertical stabilizer, the Aircraft no longer was capable of flight. As the Aircraft descended, it suffered the further loss of both engines, which broke apart from the wings. The remaining fuselage and wings pitched downward. Roughly seventeen seconds after the loss of the vertical stabilizer, the Aircraft and the detached engines crashed into the residential neighborhood of Belle Harbor on Rockaway Peninsula ("the Accident").

The Accident resulted in the deaths of all two hundred sixty persons on board and five individuals on the ground, personal injuries to other individuals on the ground, and property damage. A Level One emergency was declared by New York City officials. All available police, fire, and emergency personnel were mobilized, and all three major New York area airports were closed for several hours.

Following the Accident, the National Transportation Safety Board ("NTSB") conducted an extensive investigation. On October 26, 2004, the NTSB released a nearly 200-page report (the "Report") that reviewed all aspects of the Accident and issued recommendations for action to prevent similar disasters in future. Nat'l Transp. Safety Bd., NTSB/AAR-04/04, In-Flight Separation of Vertical Stabilizer, American Airlines Flight 587, Airbus Industrie A300-605R, N14053, Belle Harbor, New York, November 12, 2001 (Oct. 26, 2004). The Report found that the separation of the vertical stabilizer occurred after the Aircraft encountered wake turbulence from another departing airplane. Relying on recorded flight data, the Report concluded that the Aircraft's first officer, who was piloting the plane, attempted to counter the effects of turbulence by moving the Aircraft's rudder repeatedly from side to side, a maneuver known as rudder reversal. These rudder reversals created stress on the vertical stabilizer in excess of the design limits and caused it to break off in flight.

The NTSB cited several contributing factors to the first officer's excessive use of the rudder controls. As an initial matter, the NTSB found that, prior to the Accident, many commercial pilots did not fully understand the potential dangers of large rudder movements during normal flight. This problem was compounded by issues of pilot training and product design. The Report noted that the design of the Airbus A-300-605R rudder controls led to unusual sensitivity to pilot input at high airspeeds, and that pilots generally were not well trained regarding this feature of the A-300-605R aircraft. Furthermore, the NTSB concluded that elements of American's pilot training program encouraged inappropriately the use of the rudder as a control technique, particularly in situations involving the kind of wake turbulence experienced by Flight 587.

Since 1988, American has maintained a fleet of Airbus A-300-605R planes for flights from the United States to Caribbean islands. At all relevant times, American has maintained a major operations and maintenance base at JFK, where the Aircraft was maintained and inspected.

The Airbus North America Safety and Technical Affairs operation, located in Washington, D.C., provides engineering and technical support for Airbus in North America including Product Safety and Engineering and "maintains close liaison" with the FAA (regarding certification of Airbus aircraft in the United States)

and the NTSB (regarding accidents and incidents involving Airbus aircraft). Airbus S.A.S., Airbus North America: Overview, at http://www.airbusnorthamerica.com/about/location.asp (last visited May 8, 2006).

Airbus sought and received airworthiness certification for the Aircraft from the FAA under Federal Aviation Regulation Part 25, so that the Aircraft could operate in the US.

A previous incident involving the in-flight upset of an Airbus A300 aircraft operated by American occurred in 1997. The NTSB and Airbus conducted an investigation of that flight upset and specifically addressed the issue of rudder reversal, among other matters.

I. THE SELECTION OF APPLICABLE LAW IN AIRCRAFT DISASTERS

The selection of the applicable law in aircraft disaster litigation has been a vexing issue for courts over time. As one district court stated:

> The choice of law problems inherent in air crash and mass disaster litigation cry out for federal statutory resolution. We urge Congress to pursue enactment of uniform federal tort law to apply to liability and damages in the context of commercial airline disasters and other mass torts. While the issues we address are significant due to the current posture of federal law, the burden these decisions place on judicial resources frustrates

> the early and orderly resolution of issues which should demand greater attention-compensating the victims or vindicating accused commercial entities. . . . Uncertainty on the choice of law question requires a considerable expenditure of time, money and other resources . . . by litigants and counsel. Federal law would eliminate costly uncertainty and create uniformity. This approach would lead to a quick and efficient resolution of mass disaster cases.

In re Air Crash Disaster at Stapleton Intern. Airport, Denver, Colo., 720 F. Supp. 1445, 1455 (D. Colo. 1988), rev'd on other grounds, Johnson v. Continental Airlines Corp., 964 F.2d 1059 (10th Cir. 1992). This view has been echoed by commentators[3] and, at least privately, any court faced with determining the applicable law.

In In re Air Crash Off Long Island, N.Y. on July 17, 1996, Nos. 96 Civ. 7986, MDL 1161 (RWS), 1998 WL 292333 (S.D.N.Y. June 2, 1998) ("TWA Flight 800"), the determination of the applicability of the Death on the High Seas Act, 46 U.S.C. App. § 761 et seq. ("DOHSA"), provided sufficient clarity to permit

[3] U.S. Senator Joseph Tydings, writing in 1969, noted that: "[C]onflicts of laws problems may be, and most frequently are, tremendous obstacles to the disposition of aircraft crash claims. The determination of the proper law to be applied can involve much waste of money and time by both the litigants and the courts. . . . Furthermore, the uncertainty as to the proper law to be applied tends to inhibit settlements and to force more cases to trial. Because parties are not certain as to whether or not limits on recovery may be applied, they do not have a realistic basis for reaching settlements. . . . Inevitably, . . . long delays so postpone relief that the ultimate settlement is of little assistance to the dependents during the time of their greatest need." Joseph D. Tydings, Air Crash Litigation: A Judicial Problem and a Congressional Solution, 18 Am. U. L. Rev. 299, 300 (1969).

settlement of the claims resulting from the deaths of the 230 persons on board the aircraft when it exploded. The Court's participation in the settlement process of that action and the instant actions, as well as the authorities cited by the parties, have established certain principles which undergird the determinations which follow: First, the desirability of and the need for uniformity in the resolution of aircraft disaster litigation. Second, the application of the same standard to all claimants in a particular air crash disaster, from the point of view of both fairness and certainty of resolution.[4]

Complicating the application of these principles here are questions of jurisdiction, differing standards for choice of law, and the applicability of depecage -- a procedural principle brought forcefully to this Court's attention in Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786 (2d Cir. 1980) ("CVF"). In addition, the capacity of the Court to deal with these issues in light of Lexecon Inc. v. Milberg Weiss Bershad Hynes &

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[4] The Court in In re Air Crash near Cali, Colom., which adhered to the same Restatement choice-of-law test used in Texas and Massachusetts, applied Florida law on compensatory damages in all cases commenced in the Southern District of Florida, except where otherwise stipulated by the parties, in part to: (1) ensure that all plaintiffs in the mass air disaster litigation would achieve the same measure of recovery; and (2) comport with the concern for administrative efficiency, without undermining any other jurisdiction's interests. No. 96 MDL 1125, 1997 U.S. Dist. LEXIS 14143, at *74-*75 (S.D. Fla. Aug.13, 1997). The Cali court noted that "(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." Id. at *63.

Lerach, 523 U.S. 26 (1998), has also been raised and must be resolved.

Certain questions raised initially are no longer at issue. No ground plaintiff has opposed defendants' motion to apply New York law on compensatory damages to the claims of the ground plaintiffs.

None of the plaintiffs in any of the unsettled passenger cases have contested the motion by American and AMR to the extent that it seeks application of the Warsaw Convention, as supplemented by the terms of a series of Intercarrier Agreements incorporated in American's tariffs, to all passenger claims against American, although some contested the specific consequences of such application. Accordingly, in the passenger cases against American: (1) claims for compensatory damages against American are limited to provable damages up to 100,000 Special Drawing Rights if American succeeds in proving its Article 20(1) all-necessary measures defense; and (2) punitive damages are not recoverable.

II. THE ISSUES ARE APPROPRIATE FOR RESOLUTION

In transferring the instant cases to this Court for coordinated or consolidated pretrial proceedings, the JPML stated, in relevant part, as follows:

> On the basis of the papers filed and hearing session held, the Panel finds that the 33 actions in this litigation involve common questions of fact, and that centralization under Section 1407 in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. All actions concern the cause or causes of the crash of American Airlines Flight 587 on November 12, 2001. Centralization under Section 1407 is thus necessary in order to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.
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> . . .
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> IT IS THEREFORE ORDERED that pursuant to 28 U.S.C. § 1407, the actions listed on the attached Schedule A and pending outside the Southern District of New York are transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable Robert W. Sweet for coordinated or consolidated pretrial proceedings with the actions listed on Schedule A and pending in that district.

203 F. Supp. 2d 1379, 1380-81 (J.P.M.L. 2002).

Defendants Airbus and American have now moved for a determination of certain choice-of-law issues. The majority of the plaintiffs expressly request a choice-of-law ruling and do not contest this Court's authority to make such a ruling in this multidistrict litigation. However, certain of the plaintiffs have questioned or opposed the Court's authority in this regard in cases transferred to it by the JPML. Although no case authority has been cited holding that an MDL transferee court cannot make choice-of-

law rulings, the objecting plaintiffs' position appears to be based upon an extension of Lexecon, 523 U.S. 26.[5]

The issue before the Court in Lexecon was whether an MDL transferee court could assign to itself, for trial, cases transferred to it pursuant to 28 U.S.C. § 1407 for coordinated and consolidated pretrial proceedings. 523 U.S. at 28. While observing that such transfer of cases for trial was not uncommon, and had been approved by the JPML, id. at 32-33, the Supreme Court held that the practice was not permitted by the statute, id. at 28. The Court ruled that transferred cases, if not resolved by the conclusion of the coordinated proceedings, must be remanded to the transferor courts, which would hear any motion to return individual cases to the MDL transferee court. Id. at 39-40.

By its terms, Lexecon does not preclude the MDL court from deciding choice-of-law motions, or dispositive motions such as for summary judgment.

Post-Lexecon authoritative commentary establishes that this Court has authority to decide choice-of-law motions and dispositive motions in the cases transferred to it pursuant to 28 U.S.C. § 1407. Various provisions in the Manual for Complex

[5] Congress has repeatedly considered, and failed to pass, legislation clarifying or overruling Lexecon. See, eg., H.R. 1768, 108th Cong. (2004); H.R. 860, 107th Cong. (2001); H.R. 5562, 106th Cong. (2000); S. 1748, 106th Cong. (1999); H.R. 2112, 106th Cong. (1999); S. 2163, 105th Cong. (1998); H.R. 1252, 105th Cong. (1998).

Litigation explain that, post-Lexecon, the transferee court remains empowered to rule on dispositive motions and lacks jurisdiction only to transfer to itself for trial a case transferred to it for pretrial proceedings pursuant to § 1407. See, e.g., Manual for Complex Litigation (Fourth) § 20.132 (2004) ("Although the transferee judge has no jurisdiction to conduct a trial in cases transferred solely for pretrial proceedings, the judge may terminate actions by ruling on motions to dismiss, for summary judgment, or pursuant to settlement, and may enter consent decrees."); id. § 22.36 ("An MDL transferee judge has authority to dispose of cases on the merits -- for example, by ruling on motions for summary judgment or trying test cases that had been originally filed in the transferee district or refiled in or transferred to that district.").

In MDL cases after Lexecon, courts in this district and elsewhere have continued to decide choice-of-law and dispositive motions in transferred cases, including aviation litigation. In In re Air Crash Off Point Mugu, California, on January 30, 2000, the court decided choice-of-law issues in a multidistrict aviation litigation. 145 F. Supp. 2d 1156, 1163 (N.D. Cal. 2001). In In re Air Crash Disaster Near Peggy's Cove, Nova Scotia on September 2, 1998, the court granted defendants' motion to dismiss claims for punitive damages as precluded by DOHSA. 210 F. Supp. 2d 570, 571-72 (E.D. Pa. 2002). In TWA Flight 800, this Court concluded that DOHSA was inapplicable. 1998 WL 292333, at *11.

In the decision in In re Global Crossing, Ltd. Securities Litigation, the court explained the impact of Lexecon as follows:

> That case held that a federal court conducting consolidated multidistrict pretrial procedures pursuant to 18 U.S.C. § 1407(a) has no power to transfer cases to itself for trial. But nothing in Lexecon prohibits the dismissal of actions on proper grounds during the pretrial phase of the case. To the contrary, the Supreme Court specifically recognized in Lexecon that the requirement that the MDL panel remand cases back to transferor courts after conclusion of consolidated pretrial proceedings is limited to cases not "previously terminated during the pretrial period," such as cases "already concluded by summary judgment . . . or dismissal." . . . Since the case has been dismissed, Lexecon has no application.

No. 02 Civ. 910 (GEL), 2004 WL 2584874, at *2 (S.D.N.Y. Nov. 12, 2004). See also In re WorldCom, Inc. Sec. Litig., Nos. 03 Civ. 4498, 04 Civ. 233 (DLC), 2005 WL 2403856, at *3 (S.D.N.Y. Sept. 30, 2005) ("nothing in Lexecon prohibits the dismissal of actions on proper grounds during the pretrial phase of the case" (quoting In re Global Crossing, 2004 WL 2584874, at *2)).

Deciding choice-of-law issues in this MDL proceeding, rather than after remand, will prevent inconsistent pretrial determinations on common legal issues and will result in greater efficiency after remand of any unsettled actions to their original transferor courts for trial. See generally In re Air Crash off Long Island, N.Y. on July 17, 1996, 27 F. Supp. 2d 431 (S.D.N.Y. 1998) (granting 28 U.S.C. § 1292(b) certification for interlocutory appeal of choice-of-law issue in TWA 800 litigation and discussing

efficiency of consolidated decisions in cases with common legal issues and advantage of avoiding duplicative efforts).

III. THERE IS ADMIRALTY JURISDICTION IN CASES INVOLVING PASSENGER DECEDENTS

As a threshold question, the Court must decide whether there is admiralty jurisdiction for the claims arising from the deaths of Flight 587 passengers. With admiralty jurisdiction comes the application of substantive admiralty law. Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 206 (1996); Pope & Talbot, Inc. v. Heron, 346 U.S. 406, 410-11 (1953) (substantive admiralty law follows from admiralty jurisdiction even if suit is filed under diversity jurisdiction); Preston v. Frantz, 11 F.3d 357, 358 (2d Cir. 1993). The court would be obligated to raise the jurisdictional issue sua sponte even if not addressed by the parties. Wahlstrom v. Kawasaki Heavy Industries, Ltd., 4 F.3d 1084, 1087 (2d Cir. 1993); cert. denied, 510 U.S. 1114 (1994).

Federal courts long have struggled with the issue of when aviation accidents are properly encompassed within admiralty jurisdiction. Understandably, no direct precedent on the facts presented here has been cited, and the defendants have appropriately noted the difficulties in applying maritime law in these circumstances. Nevertheless, examination of the relevant precedent compels the conclusion that the claims involving Flight

587 passengers fall within the admiralty jurisdiction of the federal courts.

A. The Standard for Admiralty Jurisdiction

Any discussion of aviation cases coming within admiralty jurisdiction must begin with the Supreme Court's decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), which involved an accident that resulted from an aircraft striking a flock of birds during takeoff from a lakefront airport in Cleveland, Ohio. The aircraft, which was scheduled to pick up passengers in Portland, Maine, before continuing to White Plains, New York, lost power and crashed into the navigable waters of Lake Erie, just off the end of the runway. There were no personal injuries, but the aircraft sank. The plaintiff argued that because the aircraft landed in navigable waters, maritime law applied. Id.

The district court held that there was no maritime locality since the alleged wrong took effect while the aircraft was over land, and the fact that the aircraft crashed into Lake Erie was largely fortuitous. Id. at 251-52. In addition, the district court held that admiralty jurisdiction was inappropriate because there was no significant relationship between the wrong and maritime navigation or commerce. Id. at 252. The Sixth Circuit affirmed on the basis of the traditional locality test, holding that the alleged wrong "was given and took effect" on or over land,

before the aircraft reached navigable water. Executive Jet Aviation, Inc. v. City of Cleveland, 448 F.2d 151, 154 (6th Cir. 1971).

On review, the Supreme Court held:

> [T]he mere fact that the alleged wrong "occurs" or "is located" on or over navigable waters -- whatever that means in an aviation context -- is not of itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity.

Executive Jet, 409 U.S. at 268.

Noting the difficulties of deciding the location of the wrong based on the facts of Executive Jet, the Court based its finding of no admiralty jurisdiction solely on the lack of a significant relationship to traditional maritime activity. Shaping a general rule, the Court concluded that "there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States." Id. at 274.

Notably, the Court did not foreclose admiralty jurisdiction for all aviation accident claims. Without deciding the question, the Court suggested that a significant relationship to traditional maritime activity might be found in the hypothetical

case of a transoceanic flight crashing in the mid-Atlantic, or in other circumstances where an aircraft could be considered to be "performing a function traditionally performed by waterborne vessels." Id. at 271. Fourteen years later, in Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986), the Court applied this standard in finding admiralty jurisdiction over the crash at sea of a helicopter ferrying workers to an offshore oil platform. Id. at 218-219.

In cases following Executive Jet, the Court extended the requirement of a significant relationship to traditional maritime activity -- often referred to as the "connection" or "nexus" test -- beyond the aviation context. Sisson v. Ruby, 497 U.S. 358 (1990) (fire caused by defective washer/dryer aboard yacht docked at marina likely to disrupt maritime commerce and substantially related to traditional maritime activity); Foremost Ins. Co. v. Richardson, 457 U.S. 668 (1982) (collision of two pleasure boats created potential disruption of maritime commerce and involved traditional maritime concern for navigation).

In Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995), the Court held that admiralty jurisdiction extended to claims for damages caused by a vessel's pile-driving activities in the Chicago River, which weakened underground tunnels and caused flooding in several Chicago buildings. Id. at 529. Summing up the state of the law, the Court

in Grubart noted that "a party seeking to invoke federal admiralty jurisdiction . . . over a tort claim must satisfy conditions both of location and of connection with maritime activity." Id. at 534. Furthermore, the connection, or nexus, test required two distinct inquiries: "A court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." Id. at 534 (citations and internal quotations omitted).

1. The Maritime Nexus Test Is Satisfied

The Supreme Court's decision in Tallentire established that the ferrying of persons across an ocean from the shore to an island has a significant relationship to traditional maritime activity because it is "a function traditionally performed by waterborne vessels," 477 U.S. at 219. Preston, 11 F.3d at 359; Point Mugu, 145 F. Supp. 2d at 1165; In re Air Disaster Near Honolulu, 792 F. Supp. 1541, 1543 (N.D. Cal. 1990).

Federal courts have concluded nearly unanimously that transoceanic or island voyages that, but for air travel, would have been conducted by sea have a significant relationship to maritime activity. Miller v. United States, 725 F.2d 1311, 1315 (11th Cir.

1984) (flight between Bahamas and Florida), cert. denied, 469 U.S. 821 (1984); Williams v. United States, 711 F.2d 893, 896 (9th Cir. 1983) (flight from California to Hawaii); Roberts v. United States, 498 F.2d 520, 524 (9th Cir. 1974) (cargo flight from Los Angeles to Viet Nam), cert. denied, 419 U.S. 1070 (1974); Hammill v. Olympic Airways, S.A., 398 F. Supp. 829, 834 (D.D.C. 1975) (flight across Mediterranean Sea from Greek Island of Corfu to Athens). The only federal case to the contrary, American Home Assurance, Co. v. United States, 389 F. Supp. 657 (D.C. Pa. 1975), was decided without the benefit of the Supreme Court's holding in Tallentire and "does not seem to represent the state of the law at present." See 14A Charles Alan Wright et al., Federal Practice and Procedure § 3679 n.32 (3d ed. 1998).

In this case, the Aircraft was scheduled to make a 1500-mile transoceanic flight from New York City to the Dominican Republic. There can be no question that, but for the development of air travel, this trip -- or some portion thereof -- would have been conducted by a waterborne vessel, and that it therefore bears a significant relationship to traditional maritime activity.

Although the Supreme Court in Foremost, Sisson, and Grubart did not specifically exempt aviation cases from the first prong of the nexus test -- requiring that the type of incident at issue have a potentially disruptive effect upon maritime commerce -- most courts that have found admiralty jurisdiction for aviation

disasters have not addressed the issue. See Preston, 11 F.3d at 359 (finding maritime nexus without explicitly considering potential impact of accident on maritime commerce); Point Mugu, 145 F. Supp. 2d at 1164-65 (same). Those courts have followed Tallentire, in which the Court noted that admiralty jurisdiction was warranted because the accident had a maritime location and occurred "in furtherance of an activity bearing a significant relationship to a traditional maritime activity," 477 U.S. at 218-19, without inquiring whether the incident had any potential disruptive effect on maritime commerce.

Nevertheless, some of the cases cited by Defendants for the proposition that transoceanic flights do not establish a maritime nexus seem to rely implicitly on the lack of such potential disruptive effect. In Kapar v. Kuwait Airways Corp., 845 F.2d 1100 (D.C. Cir. 1988), which involved the hijacking over the high seas of a flight from the United Arab Emirates to Pakistan, the court remarked that the test for admiralty jurisdiction would be hard to satisfy because the hijacking -- which did not result in a crash -- was only "incidentally connected to navigable waters." Id. at 1104 n.14 (quoting Executive Jet, 409 U.S. at 273). Likewise, the court in Feenerty v. Swiftdrill, Inc., 706 F. Supp. 519 (E.D. Tex. 1989) found no maritime nexus for an assault that occurred during a flight from England to Africa.

These results comport with the oft-repeated statement that the primary purpose of admiralty jurisdiction is "the protection of maritime commerce." See, e.g., Sisson, 497 U.S. at 364 n.2 (citing Foremost, 457 U.S. at 674-75). This principle requires that admiralty jurisdiction extend beyond actual commercial maritime activity, Foremost, 457 U.S. at 674-75 (noting potential effect of collision of two pleasure boats on maritime commerce), but cannot be interpreted to mean that every tort occurring in the skies above navigable waters must fall within admiralty.

Because, as Defendants note, nearly all of the aviation cases governed by maritime law involve actual crashes of aircraft in navigable waters, the potential effects upon maritime commerce are very great, and these cases are properly included within admiralty jurisdiction. In contrast, cases like Kapar and Feenerty, in which the general features of the incident at issue (a plane hijacked and diverted to a new destination, or an assault in the passenger cabin of a plane) create no potential effect on maritime commerce, are properly excluded.

As the Court stressed in Grubart, the "potential effects" test looks not to the "particular facts of the incident" but to its "general features." 513 U.S. at 538. The essential question is "whether the incident [can] be seen within a class of incidents

that pose[] more than a fanciful risk to commercial shipping." Id. at 539.

The general features of the Accident in this case support a finding of a potential impact on maritime commerce. In actual fact, the Aircraft's vertical stabilizer, a large metal and composite structure, plummeted into Jamaica Bay from an altitude of approximately 2500 feet, and was later retrieved with the use of a crane. The general features of the incident may be described fairly as a large piece of an aircraft sinking in navigable waters. As the Court stated in Foremost, "an aircraft sinking in the water could create a hazard for the navigation of commercial vessels in the vicinity." 457 U.S. at 675 n.5. Because the inquiry looks to the general features of the incident, it is of no consequence whether Jamaica Bay was "seldom, if ever, used for commercial traffic." Id. at 670 n.2.

Defendants have contended that the maritime nexus test is met only if a plane crashes in the high seas, far from land. This argument conflates the two prongs of the test for admiralty jurisdiction. The maritime nexus is satisfied here because (1) the Accident falls within a class of incidents that have potential effects on maritime commerce and (2) the activity giving rise to the Accident was a transoceanic flight that bears a significant relationship to traditional maritime activity. The requirement

that the tort occur on or over navigable waters is addressed by the location test, which is considered below.

2. The Location Test is Satisfied

The traditional locality test for admiralty jurisdiction encompassed only torts occurring on the navigable waters of the United States. Executive Jet, 409 U.S. at 254. In Executive Jet, the Supreme Court noted two difficulties in applying the traditional test to aviation cases. First, because aircraft "are not limited by physical boundaries and can and do operate over both land and water," id. at 266, whether an accident occurred on or over navigable water could be described in many circumstances as "wholly fortuitous." Id. Second, "[u]nder the locality test, the tort occurs where the alleged negligence took effect." Id. Because, as in this case, many aviation accidents involve mechanical failures or human errors in midair that result in physical injury and death upon impact, "that locus is often most difficult to determine." Id.

On the facts of the Accident in this case, a determination of locality requires the Court to face the very dilemma the Supreme Court declined to resolve in Executive Jet; namely, where does a tort involving contacts with both land and water "occur." Plaintiffs urge the court to conclude that the wrong in this case occurred over Jamaica Bay, when the Aircraft

lost its vertical stabilizer and was rendered incapable of flight. Defendants argue that the locality requirement cannot be met because the relevant injuries occurred when the Aircraft struck land in Belle Harbor.[6]

In Executive Jet, the Supreme Court reviewed several "perverse and casuistic borderline situations" involving contacts with both land and water. 409 U.S. at 255. In Smith & Son v. Taylor, 276 U.S. 179 (1928), a longshoreman standing on a pier was struck by a ship's cargo sling and knocked into the water, where he was found dead. No admiralty jurisdiction existed because the Court ruled that "the occurrence which gave rise to the cause of action took place on land." Id. at 229. Where a longshoreman on board a vessel similarly was struck and knocked to the pier, however, admiralty jurisdiction was found because the cause of action arose on the ship. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935).

In The Admiral Peoples, decided the same day as Minnie v. Port Huron, a steamship passenger was disembarking via a

[6] Defendants also contend that plaintiffs have not shown that the area of Jamaica Bay over which the vertical stabilizer separated constitutes navigable waters for the purposes of admiralty jurisdiction. This question was resolved in the affirmative by United States v. Schmitt, 999 F. Supp. 317 (E.D.N.Y. 1998). Defendants point to 33 U.S.C. § 59w, which declares two specific portions of Jamaica Bay to be nonnavigable waters, but fail to note that the areas referred to are located at the easternmost edge of the Bay, far from the path of Flight 587. See Staff of House Comm. on Pub. Works and Transp., 99th Cong., Data Relating to H.R. 6 (Comm. Print 1986).

negligently maintained gangplank when she stumbled and was "forcibly thrown forward upon the dock in such manner as to cause the injuries hereinafter set forth." 295 U.S. 649, 650-51 (1935) (internal quotations omitted). Admiralty jurisdiction existed because the plaintiff was on the ship when the cause of action arose from the defendant's breach of duty and injury somewhere was inevitable. Id. at 652. The opinion held that this result was "supported by the weight of authority in the federal courts," and cited in particular the Second Circuit's The Strabo, 98 F. 998 (2d Cir. 1900), which it quoted extensively.

The Strabo involved a worker who was climbing a negligently secured ladder on the ship when he was thrown off the ladder and fell to the dock, receiving severe physical injuries. The Second Circuit ruled that the case fell within admiralty jurisdiction for the following reasons:

> In this case it is highly probable that the libelant sustained some damage from nervous shock while precipitated through the air, and before he fell upon the wharf. A person of sensitive nervous organization would, without doubt, receive such an injury. The injury commenced when, by the slipping of the ladder, the libelant was thrown into the air. Whether or not this throw was damnum absque injuria cannot be told, but it is true, as the district judge said, that the whole wrongful agency was put in motion and took effect on the ship, and thereby the libelant was hurled from his position on the ship, and before he reached the dock was subjected to conditions inevitably resulting in physical injury, wherever he finally struck. The cause of action originated and the injury had commenced on the ship, the consummation somewhere being inevitable. It is not of

> vital importance to the admiralty jurisdiction whether the injury culminated on the stringpiece of the wharf or in the water.

Id. at 1000.

Minnie, The Admiral Peoples, and The Strabo are applicable to the facts of Flight 587. It is undisputed that the loss of the vertical stabilizer and rudder over Jamaica Bay left the Aircraft incapable of flight. From that moment forward, the deaths of all those aboard the Aircraft were inevitable. Just as in The Strabo, where the plaintiff suffered physical injuries after falling to the pier, the "whole wrongful agency was put in motion and took effect" over navigable water, and physical injury was bound to result no matter where the Aircraft crashed. Accordingly, the Accident meets the locality requirement of the test for admiralty jurisdiction.[7]

The defendants have relied upon the Extension of Admiralty Jurisdiction Act ("Extension Act"), 46 U.S.C. App. § 740, to support their opposition to the invocation of admiralty jurisdiction. The Act extended admiralty jurisdiction to cases involving property or personal injury damage consummated on land if

[7] A similar result was reached in Brown v. Eurocopter, 38 F. Supp. 2d 515 (S.D. Tex. 1999). The Honorable Samuel B. Kent noted that "the precise point of a plaintiff's death is not the lynchpin for determining whether the locality requirement is satisfied. Instead, the Court looks to whether the alleged negligence 'became operative while the aircraft was on or over navigable waters.'" Id. at 518 (quoting Smith v. Pan Air Corp., 684 F.2d 1102, 1109 (5th Cir. 1982).

caused by a vessel on navigable waters. However, Congress passed the Act to overrule the result of cases such as Taylor, which was the shoreward converse of Minnie, The Strabo, and The Admiral Peoples and, under general maritime law, fell outside admiralty jurisdiction. See Executive Jet, 409 U.S. at 255-56, 260; Victory Carriers, Inc. v. Law, 404 U.S. 202, 205-06 n.3 and n.4, 208-09 (1971); Boudloche v. Conoco Oil Corp., 615 F.2d 687, 688 (5th Cir. 1980). With respect to the locality prong of the admiralty jurisdictional test, therefore, no cure was needed for cases such as Minnie, The Admiral Peoples, and The Strabo. They were and continue to be admiralty cases. What Executive Jet added to the jurisdictional test was the additional requirement of a maritime activity nexus, which has been met here.

A finding of admiralty jurisdiction in this case is consistent with the thrust of the Supreme Court's discussion in Executive Jet of the difficulties in determining the location of the tort for purposes of the locality test. As the Court noted, determining jurisdiction based on the location of the crash site would lead to unacceptably anomalous results; for instance, in the hypothetical case of two aircraft colliding in midair, where one crashed on land and the other in navigable waters.[8] Executive Jet,

[8] The same anomaly is illustrated in Executive Jet's quotation from Moore's Federal Practice, which questions why the location of the crash of a transoceanic flight should determine jurisdiction when the aircraft develops engine trouble far out to sea. Executive Jet, 409 U.S. at 272 n.21 (quoting 7A James W. Moore, Moore's Federal Practice, ¶ 330(5) (2d ed. 1972)).

409 U.S. at 267. The Court also said that the test adopted in The Admiral Peoples and The Strabo -- as well as by the district and circuit courts in Executive Jet -- could lead to "totally fortuitous" results depending on "whether the plane happened to be flying over land or water when the original impact of the alleged negligence occurred." Id. In the instant case, however, involving a 1500-mile route, of which only a few miles were not over navigable waters, the maritime location of the separation of the vertical stabilizer can hardly be said to be adventitious. Indeed, the Defendants' argument regarding locality turns Executive Jet on its head, by making admiralty jurisdiction depend on precisely the sort of fortuity that case decried.

Therefore, those cases involving passenger decedents fall within the admiralty jurisdiction of the federal courts.

B. State Law Is Inapplicable to Compensatory Damages In This Instance

With admiralty jurisdiction comes the application of substantive admiralty law. Yamaha, 516 U.S. at 206; East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 (1986); Wahlstrom, 4 F.3d at 1087. However, as the Supreme Court has repeatedly commented, the exercise of admiralty jurisdiction "does not result in automatic displacement of state law." Yamaha, 516 U.S. at 206 (quoting Grubart, 513 U.S. at 545). Indeed, in the area of maritime torts in particular, extensive regulatory

authority is left to the States. See Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 375 (1959); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 313 (1955).

This concurrent authority has given rise to a complicated maritime preemption doctrine. The classic statement of the doctrine is that state legislation is not applicable where it "contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." S. Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). As many courts and commentators have noted, the Jensen rule has done little to clarify the issue. See, e.g., Am. Dredging Corp. v. Miller, 510 U.S. 443, 459 (1994) (Stevens, J., concurring) ("The unhelpful abstractness of those words leaves us without a reliable compass for navigating maritime pre-emption problems."); see generally David P. Currie, Federalism and the Admiralty: "The Devil's Own Mess", 1960 Sup. Ct. Rev. 158 (detailing the unpredictable and inconsistent development of maritime preemption law in the first half of the twentieth century).

The factual situation with respect to the passengers of Flight 587 -- specifically, the deaths of non-seamen in state territorial waters -- has proved particularly troublesome for choice-of-law purposes. Prior to the Supreme Court's decision in

Moragne, federal courts sitting in admiralty "routinely applied state wrongful-death and survival statutes in cases involving maritime accidents within territorial waters." Yamaha, 516 U.S. at 206. This practice was a result of the Court's decision in The Harrisburg, 119 U.S. 199 (1886), which held that there was no federal maritime cause of action for wrongful death, id. at 213, although claims for personal injury could be maintained under theories of negligence and unseaworthiness.

In 1920, Congress enacted DOHSA, which provided a federal wrongful death remedy for all persons killed on the high seas, and the Jones Act, 46 U.S.C. App. § 688, which supplied a wrongful death remedy sounding in negligence for the death of a seaman that resulted from injuries sustained during the course of employment. As the Third Circuit stated, "between 1920 and 1970, deaths on the high seas were remedied by DOHSA, deaths in territorial waters were remedied by state wrongful death statutes, and deaths of seamen (whether on the high seas or in territorial waters) were remedied by the Jones Act." Calhoun v. Yamaha Motor Corp., U.S.A., 40 F. 3d 622 (3d Cir. 1994) ("Calhoun I"), aff'd, Yamaha, 516 U.S. at 202.

This patchwork scheme became problematic after the Court "transformed the maritime doctrine of unseaworthiness into a strict-liability rule," Yamaha, 516 U.S. at 208, creating three serious anomalies: "First, in territorial waters, general maritime law allowed a remedy for unseaworthiness resulting in injury, but

not for death." Miles v. Apex Marine Corp., 498 U.S. 19, 26 (1990). Second, survivors of seamen killed on the high seas had access to a federal wrongful death action based on unseaworthiness, while survivors of seamen killed in state territorial waters did not. Moragne, 398 U.S. at 395. Third, survivors of longshoremen who died in territorial waters could bring state wrongful death claims, while survivors of similarly situated seamen could not. Id. at 395-96.

In Moragne, "the widow of a longshoreman killed in Florida's territorial waters . . . brought suit under Florida's wrongful-death and survival statutes, alleging both death and unseaworthiness." Yamaha, 516 U.S. at 208. Both the district and circuit courts disposed of her unseaworthiness claim because Florida's statute did not permit a finding of liability on that basis. Id. at 209. Seeing a chance to eliminate the anomalies plaguing the maritime law, the Court overruled The Harrisburg and declared a general maritime action "for death caused by violation of maritime duties." Id. (quoting Moragne, 398 U.S. at 409).

Because there is no admiralty statute for the wrongful death of non-seafarers in territorial waters, the general maritime death action recognized in Moragne is applicable here. Yamaha, 516 U.S. 210 n.7, at 215; see also Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) (Moragne action applies to recreational boater); Wahlstrom, 4 F.3d 1084 (Moragne action applies to jet skier); Point

Mugu, 145 F. Supp. 2d 1156 (Moragne action applies to airplane passengers killed in the territorial waters of California).

The Moragne action for wrongful death encompasses claims sounding in negligence, unseaworthiness, and strict products liability. Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811 (2001) (Moragne provides for liability based on negligence); East River, 476 U.S. at 865 (maritime law incorporates strict products liability); Moragne, 398 U.S. at 409 (general maritime law recognizes an action for wrongful death based on unseaworthiness); Neilson v. United States, 639 F.2d 469, 473 (9th Cir. 1980) (Moragne action may be based on strict products liability).

The general maritime law also recognizes an estate survival cause of action. Preston, 11 F.3d at 358; Anderson v. Whittaker Corp., 894 F.2d 805 (6th Cir. 1990); Evich v. Morris, 819 F.2d 256 (9th Cir.), cert. denied, 484 U.S. 914 (1987); Azzopardi v. Ocean Drilling & Exploration Co., 742 F.2d 890, 893 (5th Cir. 1984); Barbe v. Drummond, 507 F.2d 794, 799 (1st Cir. 1974); Spiller v. Thomas M. Lowe, Jr. & Assoc., 466 F.2d 903, 909-10 (8th Cir. 1972); Greene v. Vantage S.S. Corp., 466 F.2d 159, 161-62 (4th Cir. 1972); Ward v. Union Barge Line Corp., 443 F.2d 565, 569 (3d Cir. 1971). The availability of a survival cause of action for deaths in territorial waters is not in question. See also Yamaha,

516 U.S. at 210 n.7 ("Similarly, as in prior encounters, we assume without deciding that Moragne also provides a survival action").

The availability of a general maritime wrongful death action created a new dilemma: whether state wrongful-death and survival statutes remained applicable in territorial waters or were preempted by the Moragne cause of action. The Second Circuit initially concluded that "the development of a general maritime law [wrongful-death and] survival action necessarily precludes the application of state . . . statutes." Preston, 11 F.3d at 358 (citing Wahlstrom, 4 F.3d at 1089).

In Yamaha, the Supreme Court addressed the question "whether it was Moragne's design to terminate recourse to state remedies when nonseafarers meet death in territorial waters," 516 U.S. at 211 n.7, and endorsed the judgment of the Third Circuit that "Moragne . . . showed no hostility to concurrent application of state wrongful death statutes." Id. at 214 (quoting Calhoun I, 40 F.3d at 641-42).

In Yamaha, a twelve-year-old girl was killed when her rented jet ski collided with a moored vessel in the territorial waters of Puerto Rico. 516 U.S. at 201-02. Her parents sought recovery under, among other things, the Pennsylvania wrongful death statute. Relying on Moragne, the manufacturer of the jet ski argued that maritime law provided the sole remedy for the young

girl's death. Id. In a unanimous decision, the Supreme Court rejected this argument, "preserv[ing] the application of state statutes to deaths within territorial waters." Id. at 216.

Defendants here contend that Yamaha requires exclusive application of state wrongful-death remedies for the deaths of non-seamen in territorial waters. Plaintiffs argue Yamaha held that the general maritime wrongful death action provides a uniform "floor" for recovery, and that while courts are free to supplement the maritime remedy with more generous state law on damages, they may not apply state law that would narrow recovery. For the reasons that follow, the compensatory damages available for the remaining cases involving deaths of Flight 587 passengers are properly determined by general maritime law.

The Yamaha Court grounded its decision on the longstanding maritime precept that "'it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.'" Id. at 213 (quoting The Sea Gull, 21 F. Cas. 909, 910 (C.C.Md. 1865, Chase, C.J.). Although there is "no cause for enlargement of the damages statutorily provided" where the legislature has established a "comprehensive tort recovery regime," the Court noted that "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters." Id. at 215. In this context, to read Moragne

as "placing a ceiling on recovery for wrongful death, rather than a floor, is somewhat ahistorical." Id. at 214.

Subsequent federal courts, consistent with the rationale of Yamaha, have allowed more generous state law to supplement the Moragne death action and rejected arguments by defendants that Yamaha requires application of state law even when that law is narrower than the Moragne cause of action. See Voillat v. Red & White Fleet, No. 03 Civ. 3016 (MHP), 2004 WL 547146, at *5 n.5 (N.D. Cal. Mar. 18, 2004) (denying defendant's motion for application of narrower California law, because Yamaha did "not limit plaintiffs' request for relief under a general maritime survival action"); Point Mugu, 145 F. Supp. at 1165 ("Yamaha does not mandate the application of state law to deaths in territorial waters."); Brateli v. United States, No. 95 Civ. 003 (JWS), 1996 AMC 1980, 1982-85 (D. Alaska May 16, 1996) (court rejected defendant's argument that Yamaha required application of Alaska death law, which did not permit recovery for loss of society, and held that Alaska law could not apply because it conflicted with general maritime's recognition of recovery for loss of society).

Under the Constitution's Supremacy Clause, Article VI, Cl. 2, and Article III, § 2, granting the Supreme Court the judicial power to declare federal maritime law, the issue is always whether federal maritime law displaces or preempts state law or allows supplementation with non-conflicting state law. The

question is not whether state law displaces or preempts federal maritime law in an admiralty jurisdiction case. See United States v. Locks, 529 U.S. 89, 108-09, 111 (2000) (in maritime matters and under the Supremacy Clause there is a beginning assumption of state law preemption; local laws, even those that are an exercise of police powers, cannot apply when in conflict with the federal structure); Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917) (in view of the constitutional provisions, maritime law may not be affected by state law in such a way that it works prejudice to characteristic features of general maritime law or interferes with the proper harmony and uniformity of that law).

Defendants' interpretation of Yamaha, conflicting as it is with the Constitution, explains why they can cite no case law to support their argument that narrower state law displaces more generous federal maritime law in a Moragne wrongful death action. The case law interpreting Yamaha correctly holds that a state death statute providing a narrower recovery than general maritime law conflicts with general maritime law and cannot apply. See, e.g., Brateli, 1996 AMC at 1982-1985.

In this case, a decision as to the proper measure of compensatory damages requires a preliminary determination of which state law is available to supplement the plaintiffs' Moragne claims. Upon consideration of the issues left unresolved by the Supreme Court's opinion in Yamaha, the Third Circuit held that

federal courts sitting in admiralty should apply admiralty choice-of-law rules to determine which state law could supplement the general maritime death action. Calhoun v. Yamaha Motor Corp, U.S.A., 216 F.3d 338, 345 (3d Cir. 2000) ("Calhoun II"). These rules were first articulated in Lauritzen v. Larsen, 345 U.S. 571 (1953), a case involving the application of the Jones Act, but as the Court explained in Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959), the factors "were intended to guide courts in the application of maritime law generally." 358 U.S. at 382. The seven factors enunciated in Lauritzen are:

> (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) the allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum.

Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 308 (1970); see Lauritzen, 345 U.S. at 583-92. The "shipowner's base of operations" was added to the list as an eighth factor in Rhoditis. 398 U.S. at 309.

"The Lauritzen test, however, is not a mechanical one." Rhoditis, 398 U.S. at 308. Several of the factors are of limited utility for the purposes of determining which state's law might supplement the measure of compensatory damages under Moragne. In particular, the law of the flag, the place of contract, and the

inaccessibility of a foreign forum are inapplicable here. The Third Circuit has noted that the most significant factors for the determination of compensatory damages are place of injury and domicile of the parties. Calhoun II, 216 F.3d at 347.

In this case, the relevant Lauritzen factors indicate that New York law provides the relevant point of comparison to the remedial provisions of the Moragne action. New York was the place of injury in all passenger suits. Decedents in all but two of the remaining passenger cases were domiciled in New York.[9] Since most of the remaining cases were commenced in the Southern and Eastern Districts, consideration of the law of the forum generally favors application of New York law. In situations where multiple lawsuits were commenced on behalf of the same decedent, at least one action was brought in New York for each decedent.[10]

The allegiance of the defendants here points toward French law for Airbus and Texas law for American. No party seeks application of French law on compensatory damages. Some, but not all, of the cases regarding passengers Angel Celestino and Luis Arturo Pichardo Rodriguez -- both New York domiciliaries -- seek

[9] Passenger Acension Sosa was a domiciliary of Pennsylvania, while passenger Kathleen Williams was domiciled in California.

[10] Actions involving decedents Angel Celestino and Luis Arturo Pichardo Rodriguez were brought in this district as well as the Southern District of Texas, and actions involving decedent Eduardo George were commenced here and in the Southern District of Florida.

application of Texas law. However, allegiance of the defendants is of minimal weight in determining the relevant law for compensatory damages. See Calhoun II, 216 F.3d at 346.

New York law is therefore the appropriate state law to supplement the measure of compensatory damages available in a Moragne action. As plaintiffs have noted, New York is not among the majority of states that permit recovery in wrongful death actions of non-pecuniary damages such as loss of society. See EPTL § 5-4.3(a); Gonzalez v. New York City Housing Authority, 77 N.Y.2d 663, 668 (N.Y. 1991). Because, as detailed below, such non-pecuniary damages are permitted in a Moragne action, New York law is inapplicable here. See Voillat, 2004 WL 547146, at *5-*7; Point Mugu, 145 F. Supp. 2d at 1166; Brateli, 1996 AMC at *1982-*1985; see also Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953) ("While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."). Therefore, the extent of plaintiffs' compensatory damages here is properly measured by general maritime law.

C. Loss of Society Is Recoverable in a Moragne Action

The Supreme Court articulated the elements of recovery of the Moragne wrongful death action in Sea-Land Services Inc. v.

Gaudet, 414 U.S. 573 (1974),[11] holding that recovery is permitted for funeral expenses and loss of decedent's support, household services, parental nurture, training, education and guidance to his children, and loss of society. Id. at 584-88. See also Moore v. M/V Angela, 353 F.3d 376, 383 (5th Cir. 2003); Sutton v. Earles, 26 F.3d 903, 914-15 (9th Cir. 1994); Public Administrator of County of New York v. Angela Compania Naviera, S.A., 592 F.2d 58, 62-63 (2d Cir. 1979), cert. dismissed, 443 U.S. 929 (1979); In re Air Crash Off Point Mugu, 145 F. Supp. 2d at 1166.

In fashioning the scope and content of the Moragne remedy, Gaudet guided itself by reference to state wrongful death statutes and the "humane and liberal" policies inherent in maritime law. Id. at 583, 587-88. The court observed that the majority of state wrongful death laws provide recovery for loss of society. Id. at 587-88 (The "decision to permit recovery for loss of society aligns the maritime wrongful-death remedy with a majority of state wrongful-death statutes.") Id. The court added, "But in any event, our decision 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.

[11] The Gaudet court observed that "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." 414 U.S. at 588, n.22 (quoting Fitzgerald v. United States Lines Co., 374 U.S. 16, 20 (1963)). The Supreme Court's responsibility to declare general maritime law is vested in Article II of the Constitution. Fitzgerald, 374 U.S. at 20.

The Court in Gaudet chose to allow recovery for loss of society under the Moragne action with the awareness that this policy choice created a disparity with the admiralty statute DOHSA. Id. at 588 n.22 ("We recognize, of course, that our decision permits recovery of damages not generally available under the Death on the High Seas Act"). The Court made this policy choice because it had the responsibility to fashion the scope and content of the Moragne death action consistent with longstanding maritime policies, DOHSA did not apply to territorial waters, and DOHSA did not "foreclose or preempt any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." Id. at 589 (quoting Moragne, 398 U.S. at 400). The Court said:

> Congress' insistence that the Act [DOHSA] not extend to territorial waters indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occurring within admiralty's jurisdiction, for in many instances state wrongful death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act.

Id. at 588 n.22 (citations omitted). Simply put, effectuating longstanding maritime policies trumped uniformity with DOHSA.

In Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978), the Court reaffirmed Gaudet's ruling permitting recovery for loss of society in the Moragne action, explaining that,

> the accident in Gaudet, like that in Moragne, took place on territorial waters, where DOHSA does not apply. The Court chose not to adopt DOHSA's pecuniary loss standard; instead, it followed the "clear majority of states" and the humanitarian policy of the maritime law, both of which favored recovery for loss of society. In sum, the Court made a policy determination in Gaudet which differed from the choice made by Congress when it enacted the Death on the High Seas Act.

Higginbotham, 436 U.S. at 622. In explaining that it could not, however, extend the maritime common law rule allowing loss of society damages to actions governed by DOHSA, the court said:

> It is true the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, a desire for uniformity cannot override the statute.

Id. at 629.[12]

In Miles, 498 U.S. 19, the Court held that the Gaudet loss-of-society rule could not supplement a Jones Act death action, which is limited to pecuniary losses. Miles concluded that because the case involved the death of a seaman, and Congress prescribed

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[12] See also Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116, 122 (1998) (In Gaudet "we further held that such [Moragne] wrongful death awards could include compensation for loss of support and services and for loss of society . . . ," and in Higginbotham "[we] limited to territorial waters those cases in which we had permitted loss of society damages under general maritime law"); American Export Lines, Inc. v. Alvez, 446 U.S. 274, 281 (1980) (in extending loss of society recovery to non-fatal accidents, the court said: "more importantly, Gaudet provides the conclusive decisional recognition of a right to recover for loss of society.").

those remedies in the Jones Act, the court was not free to supplement the Jones Act. By contrast, said Miles, because Gaudet involved the death of a longshoreman in territorial waters, Gaudet had no need to consider the limitations of DOHSA or the Jones Act. Id. at 30-31.[13]

The same distinction between statutory and maritime common law remedies was made in Tallentire, 477 U.S. 207, which involved the application of state law to DOHSA claims. The court recognized that supplementing DOHSA with state laws that allow recovery for loss of society "would bring [plaintiffs'] 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," id. at 233, but held that it was not free to supplement DOHSA with conflicting state laws. These decisions underscore the Court's concern with uniformity of maritime remedies in the face of applicable Congressional statutes, but do not show a corresponding concern where there is no applicable statute.

Yamaha, 516 U.S. 199, sheds further light on Moragne and admiralty's lack of concern for uniformity of remedies between the general maritime death action and DOHSA and the Jones Act. Yamaha observed that the Moragne death remedy for territorial waters was

[13] Miles noted that the holding of Gaudet was applicable only in territorial waters and only to longshoremen. 498 U.S. at 31. That statement was made merely to point out that, by contrast, the Miles case involved the death of a Jones Act seaman and the Court could not ignore that distinction.

created to provide a uniform basis of liability so that plaintiffs "would all be treated alike." Id. at 214. As noted above, Yamaha further recognized that the Moragne action placed a "floor" on death recoveries based on the longstanding maritime precept that "it better becomes the humane and liberal character of proceedings in admiralty to give them to withhold the remedy, when not required to withhold it by established and inflexible rules." Id. at 213, quoting The Sea Gull, 21 F. Cas. 909, 910 (C.C. Md. 1865, Chase, C.J.). This "floor" recovery for territorial waters is not, however, adversely impacted by supplementation with more generous state law. Id. at 214-15. Yamaha explained that the Moragne ruling was prompted by the court's strong concern for uniformity in the bases of liability, id. at 210-11, 213, and not a concern about excessive awards in maritime wrongful-death cases in which the remedies were supplemented by state law. Id. at 211.

Defendants contend that Supreme Court case law has banned loss-of-society damages under the general maritime Moragne action for deaths of nonseafarers and that the Supreme Court Miles decision[14] forecloses recovery for nonpecuniary losses in a general maritime action, see Def. Reply Mem. at 44, but acknowledge that the Second Circuit found to the contrary in Wahlstrom. In that case, which addressed the availability of loss-of-society damages under general maritime law for nondependent parents of a nonseafarer killed in territorial waters, the Second Circuit

[14] Miles v. Apex Marine Corp., 498 U.S. 19 (1990).

distinguished Miles and found that "no Supreme Court ruling bars the award of loss of society damage[s]." Id. at 1091.

In Miles, the mother of a seaman killed on the high seas sought loss-of-society damages. The Miles Court observed that Gaudet, which held that loss of society damages are recoverable under the general maritime Moragne death action, did not settle the question because "Gaudet involved the death of a longshoreman in territorial waters. Consequently, the court had no need to consider the preclusive effect of DOHSA for deaths on the high seas or the Jones Act for deaths of true seamen." Miles, 498 U.S. at 30-31; see also id. at 31-32 ("Gaudet did not consider the preclusive effect of the Jones Act for deaths of true seamen. We do so now.").

Miles was distinguishing Gaudet as a territorial waters case not governed by the "preclusive" effect of DOHSA and as a nonseafarer case not governed by the preclusive effect of the Jones Act. At no time did Miles overrule Gaudet's interpretation of the elements of the Moragne cause of action for deaths of nonseafarers in territorial waters.[15] Indeed, Gaudet is the only Supreme Court

[15] It is true that Miles recognized that since the Gaudet decision, Congress amended the LHWCA to set forth an exclusive statutory recovery for survivors of longshoremen (Miles, 498 U.S. at 30 n.1), but even in noting this, Miles did not so much as hint in dicta that Gaudet's analysis of general maritime remedies for territorial deaths of nonseafarers was flawed or in doubt. See, e.g., In re Morehead Marine, 844 F. Supp. 1193, 1196-97 (S.D. Ohio 1994) (post-Miles, the underlying reasoning of Gaudet is wholly applicable for cases not governed by DOHSA, the Jones Act or the

case which sets forth the elements of the general maritime Moragne action when no preclusive admiralty statute applies.

Defendants have cited Friedman v. Cunard Line Ltd., 996 F. Supp. 303 (S.D.N.Y. 1998), for the proposition that loss-of-society damages are not available in this Moragne action. Friedman involved an injury on the high seas and addressed whether the husband of an injured cruise ship passenger could recover loss of consortium damages. Friedman acknowledged that there was no Supreme Court or Second Circuit precedent on point, and ruled that for the sake of uniformity with the Jones Act and because the plaintiff husband was not dependent on his wife, he could not recover "for loss of society and consortium caused by an injury occurring on the high seas." Id. at 312. See also Palmieri v. Celebrity Cruise Lines, Inc., No. 98 Civ. 2037 (LAP)(HBP), 1999 WL 494119 (S.D.N.Y. July 13, 1999) (following Friedman and denying loss of consortium in a high seas injury case).[16] Friedman and

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LHWCA).

[16] Defendants also cite Fifth Circuit, pre-Yamaha, personal injury and wrongful death cases (Nichols v. Petroleum Helicopters, Inc., 17 F.3d 119 (5th Cir. 1994); Walker v. Braus, 995 F.2d 77 (5th Cir. 1993)), but ignore the Fifth Circuit's post-Yamaha death case holding that loss of society damages are allowed for territorial waters deaths, despite the fact that they are not allowed in cases governed by DOHSA or the Jones Act. See Moore, 353 F.3d at 383. Similarly, they cite a Ninth Circuit personal injury case (Chan v. Society Expeditions, Inc., 39 F.3d 1398 (9th Cir. 1994)), which did not allow loss-of-society damages for an injury on the high seas, without citing the Ninth Circuit's territorial waters death case, Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994), which allowed recovery for loss-of-society damages for the death of a nonseafarer in territorial waters.

Another case cited by Defendants on the issue of loss of

Palmieri are doubly distinguishable, as they involve injuries on the high seas, and not deaths in territorial waters.

Defendants have contended that recovery in the passenger cases should be limited to Jones Act remedies on the principle that nonseafarers should not receive more generous recoveries than a seafarer. Def. Rep. Mem. at 46.[17] The statutory remedies for seafarers comprise a comprehensive body of law specifically tailored for the needs of seafarers and reflect Congress's considered judgment on the scope of protection to be afforded seafarers.

Yamaha made clear that uniformity of remedies is not required in actions involving deaths of nonseafarers in territorial waters, because such "variations" in remedies are "compatible with federal maritime interests." Yamaha, 516 U.S. at 211, 213. Accordingly, more generous state wrongful death laws may supplement the federal maritime remedies. See id. It is the contrary for

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society is In re Amtrak "Sunset Limited" Train Crash in Bayou County, Alabama, on September 22, 1993, 121 F.3d 1421 (11th Cir. 1997), which held that personal injury victims are not covered by the Moragne or Yamaha cases and do not recover loss-of-society damages. However, the court went on to note that wrongful death plaintiffs are covered by Moragne and can recover nonpecuniary punitive damages upon a showing of intentional or wanton and reckless conduct.

[17] Defendants cite, for example, Tucker v. Fearn, 333 F.3d 1216 (11th Cir. 2003), cert. denied, 540 U.S. 1149 (2004), in which the court relied on the Jones Act to hold that a nondependent father of a nonseafarer killed in territorial waters should not have a general maritime remedy broader than that allowed to a Jones Act seaman's family.

cases governed by DOHSA and the Jones Act, observed Yamaha. The Court said:

> When Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is, we have generally recognized, no cause for enlargement of the damages statutorily provided. See Miles, 498 U.S. at 30-36, 111 S.Ct. at 324-328 (Jones Act, rather than general maritime law determines damages recoverable in action for wrongful death of seamen); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 232, 106 S.Ct. 2485, 2499, 91 L.Ed.2d 174 (1986) (DOHSA, which limits damages to pecuniary losses, may not be supplemented by nonpecuniary damages under a state wrongful-death statute); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624-625, 98 S.Ct. 2010, 2014-2015, 56 L.Ed.2d 581 (1978) (DOHSA precludes damages for loss of society under general maritime law). But Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters.

Id. at 215.

Yamaha analyzes Miles, Tallentire, and Higginbotham as statements about the preclusive effect of the Jones Act and DOHSA and not as statements about general maritime law for deaths of nonseafarers in territorial waters. See, In re Horizon Cruises Litigation, 101 F. Supp. 2d 204, 214 (S.D.N.Y. 2000) (explaining that Yamaha sheds light on Miles and Wahlstrom, concluding that "Yamaha makes clear that this uniformity principle does not sweep away the common law unless Congress has spoken"); Gravatt v. City of New York, 53 F. Supp. 2d 388, 427-29 (S.D.N.Y. 1999), rev'd on other grounds, 226 F.3d 108 (2d Cir. 2000).

Pursuant to Gaudet, reference to state laws and the humane character of general maritime law are the appropriate guideposts in shaping the Moragne remedies. It is therefore noteworthy that the majority of state wrongful death statutes allow nondependent parents to recover loss of society damages. See Thomas R. Hower, Note, Loss of Society as a Maritime Wrongful Death Remedy: Is a Federal Financial Dependency Requirement for Beneficiary Parents Viable where State Law Loss of Society Claims Provide Supplementary Relief?, 27 Rutgers L.J. 793, 821 n.133 (1996) (noting that 35 states allow nondependent parents to recover for loss of society). For the reasons set forth above, loss of society damages are recoverable.

D. Punitive Damages Are Recoverable Under Admiralty Law

In contending that punitive damages are not recoverable in admiralty, Airbus fails to take note of the history of punitive damages in maritime cases, dating back to the decision of the Supreme Court in The Amiable Nancy, 16 U.S. 546 (1818). Airbus also overlooks the decision of the Second Circuit in In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir.), cert. denied, 409 U.S. 982 (1972), which held that a defendant could be punished with monetary penalties for "gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct." Id. at 105.

Airbus has addressed this Court's decision in Gravatt, which cited Marine Sulfur and held that punitive damages were recoverable under federal maritime law. While Airbus states that Gravatt was "inapposite" because it was a maritime personal injury rather than a maritime death case, Def. Reply. Mem. at 81, the fact remains that this Court considered and rejected the identical arguments made by Airbus in this case.

For instance, Airbus claims that the Supreme Court decision in Miles "precludes an award of punitive damages against Airbus under general maritime law." Def. Rep. Memo at 79. But this Court found that "Miles does not preclude an award of punitive damages on all claims arising under the general maritime law." Gravatt, 53 F. Supp. 2d at 395. This Court found that Miles, which involved a Jones Act seaman who died on the high seas, applied to impose a uniform rule only "in the face of applicable legislation." Id. (citing CEH, Inc. v. F/V Seafarer, 70 F.3d 694, 700 (1st Cir. 1995)). This Court allowed a punitive damages award in Gravatt because no governing admiralty legislation barred such a recovery.

Similarly, there is no statutory bar to punitive damages in this case, and following Miles and Yamaha, the majority of courts have held that punitive damages are recoverable in death cases governed by general maritime law, as opposed to an admiralty statute. See, e.g., Amtrak, 121 F.3d at 1427-28 (holding that plaintiffs in general maritime wrongful death actions "may recover

punitive damages upon a showing of 'intentional or wanton and reckless conduct' on the part of defendants amounting to 'a conscious disregard of the rights of others.'"); Point Mugu, 145 F. Supp. 2d 1156 (holding that punitive damages claims were available in death cases arising from the crash of an Alaska Airlines flight in territorial waters off the coast of California); Silivanch v. Celebrity Cruises, Inc., 171 F. Supp. 2d 241, 262 (S.D.N.Y. 2001) (upholding a $7 million punitive damages award under federal maritime law against manufacturer for falsely representing that product met certain safety standards); Liner v. Dravo Basic Materials Co., 2000 WL 1693678 (E.D.La. Nov. 7, 2000) (in maritime death action, "[t]he current trend in the case law supports a punitive damages claim under the general maritime law when there is no overlap with federal statutes"); Voillat, 2004 WL 547146 (upholding availability of punitive damages in death cases under general maritime law).

Airbus also cites Gravatt for the proposition that Wahlstrom barred punitive damages in maritime cases. Def. Reply Mem. at 81. However, Gravatt actually concluded that Wahlstrom would allow punitive damages in a situation such as that presented at bar. 53 F. Supp. 2d at 428.

Before the 1996 Supreme Court decision in Yamaha, Wahlstrom held that general maritime law preempted state law remedies in general maritime death cases. 4 F.3d at 1080.

Wahlstrom then proceeded to find that non-dependent relatives in general maritime territorial waters death cases could not recover damages for loss of society, and that "plaintiffs who are not allowed by general maritime law to seek nonpecuniary damages for loss of society should also be barred from seeking nonpecuniary punitive damages." Id. at 1094.

But Yamaha overturned Wahlstrom's first holding by recognizing that state law could supplement general maritime law in territorial waters. See Yamaha, 516 U.S. at 211, 214-16; see also Taylor v. Costa Cruises, Inc., No. 90 Civ. 2360 (AGS), 1996 U.S. Dist. LEXIS 22510 (S.D.N.Y. Mar. 13, 1996) (following Yamaha, state law punitive damages are recoverable in general maritime cases).

Furthermore, this Court recognized in Gravatt that punitive damages would be allowed under Walhstrom where the plaintiff was eligible to recover maritime nonpecuniary damages. Gravatt adopted the argument that the "corollary to [the rule in Wahlstrom] is that plaintiffs who are entitled to seek non-pecuniary damages for loss of society should be allowed to seek non-pecuniary punitive damages." 53 F. Supp. 2d at 428. Punitive damages are therefore recoverable under a maritime cause of action.

IV. THE LAW OF FRANCE MAY APPLY TO PUNITIVE DAMAGES CLAIMS AGAINST AIRBUS IN THE PASSENGER ACTIONS

Conflict-of-law issues should be decided under an issue-specific approach, called depecage, which "recognizes that in a single action different states may have different degrees of interests with respect to different operative facts and elements of a claim or defense." Simon v. Philip Morris, Inc., 124 F. Supp. 2d 46, 75 (E.D.N.Y. 2000). "Depecage occurs where the rules of one legal system are applied to regulate certain issues arising from a given transaction or occurrence, while those of another system regulate the other issues. The technique permits a more nuanced handling of certain multistate situations and thus forwards the policy of aptness." Arthur Taylor von Mehren, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 Harv. L. Rev. 347 (1974). See generally Willis L.M. Reese, Depecage: A Common Phenomenon in Choice of Law, 73 Colum. L. Rev. 58 (1973). The doctrine is commonly applied by federal courts in this circuit, see, e.g., Fieger v. Pitner Bowes Credit Corp., 251 F.3d 386, 397 (2d Cir. 2001); CVF, 629 F.2d 786, and is appropriate in admiralty cases, Calhoun v. Yamaha Motor Corporation, USA, No. 90 Civ. 4295, 1998 WL 717430, at *1 (E.D. Penn. Sept. 25, 1998), aff'd, Calhoun II, 216 F.3d 338 (2000).[18]

[18] This is not the first time that this Court has been confronted with the principle of depecage, see CVF, 629 F.2d at 794. Once bitten, twice wise.

A modern-day choice-of-law analysis does not require that all claims must be governed by the same law, as this is contrary to the very essence of the doctrine of depecage. See generally Simon, 124 F. Supp. 2d at 75 (holding that depecage "permits severance of statutes of limitations, questions of individual causation, damages, and affirmative defenses in accordance with different states' law"). Since punitive damages serve a completely different purpose than compensatory damages, it is only logical that courts have determined that the issue of punitive damages is distinct from the issue of compensatory damages and, therefore, the application of different laws to these different issues may be appropriate. See Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 47 (1991) (O'Connor, J., dissenting) ("Unlike compensatory damages, which are purely civil in character, punitive damages are, by definition, punishment."). Indeed, it is well settled that the law applicable to issues of compensatory damages may be different than the law applicable to standard of conduct. LaPlante v. Am. Honda Motor Co., Inc., 27 F.3d 731, 741 (1st Cir. 1994).

The appropriate choice-of-law rules for punitive damages in this admiralty case are those laid out in the Lauritzen trilogy. As previously stated, however, the test is not a mechanical one, and not all of the factors are of equal importance in determining the applicable law for punitive damages. Whereas the place of injury and the domicile of the decedent assumed great importance in determining the applicable law for compensatory damages, the

conduct-regulating aspect of punitive damages suggests that the dominant factors should be those that touch on the defendant's actions. See Calhoun II, 216 F.3d at 347-48 ("Punitive damages, on the other hand, are intended to punish wrongdoers and deter future conduct.").

A key factor in choice-of-law determinations relating to punitive damages issues in cases involving manufacturer defendants is the principal place of business. In fact, one recent decision found that "the most important contacts in determining the punitive damages law to be applied in an aircrash case are: (1) the defendant's principal place of business, and (2) the place where the misconduct that is the subject of the punitive damages claim took place." Roselawn, 1997 U.S. Dist. LEXIS 13794, at *9. The manufacturing defendants in Roselawn maintained their principal place of business in France. Id. at *16. Although plaintiffs in that case alleged that some of the defendants' misconduct occurred outside France, the Roselawn court applied French law because:

> where some or most of the alleged misconduct occurs in the state that is also the principal place of the defendants' business, that state's interest in having its own law of punitive damages applied outweighs the interests of states where some misconduct occurred. This rule requires the imposition of French law on punitive damages here.

Id. at *17 (citing In re Air Crash Disaster Near Chicago, Ill. On May 25, 1979, 644 F.2d 594, 614-15 (7th Cir. 1981) ; Lewis-DeBoer

v. Mooney Aircraft Corp., 728 F. Supp. 642, 645-46 (D. Colo. 1990); Stapleton, 720 F. Supp. at 1453 (finding law of compensatory damages also governs prejudgment interest).

In a similar vein, the court in Stapleton applied Texas law to the issue of punitive damages claims arising from the Colorado crash of an airline operated by defendant Texas-based airline. The Stapleton court found that "Texas . . . has the most significant relationship to the parties and occurrence in regard to the issue of punitive damages." Id. at 1453. The court reasoned that the following rule applied in "air crash -- choice of law cases":

> Because the place of injury is much more fortuitous than the place of misconduct or the principal place of business, its interest in and ability to control behavior by deterrence or punishment, or to protect defendants from liability is lower than that of the place of misconduct or the principal place of business.

Id. at 1453 (quoting Chicago, 644 F.2d at 615). Furthermore, the Stapleton court noted that "Texas is both the site of the conduct to which an award of punitive damages could attach and defendants' principal place of business thus its relationship to this litigation is most significant." Id. at 1453 (citing Emmart v. Piper Aircraft Corp., 659 F. Supp. 843, 845-46 (S.D. Fla. 1987)). Finally, the Stapleton court rejected the airline's argument for application of the punitive damages law of Colorado as the place of injury because "[t]he shared goal of safe air travel is served by

applying the law of a home state to an airline like Continental." Id. at 1453. Accordingly, the Stapleton court applied the punitive damages law of the defendant's state of incorporation and principal place of business.

Likewise, Wesolek v. Canadair, Inc., No. 85 Civ. 693 (TFGD), 1987 U.S. Dist. LEXIS 13010 (D. Conn. Mar. 11, 1987) applied Quebec law to the issue of strict products liability arising from an Idaho crash that killed a New York resident. The court reasoned that "defendants' design, manufacture, assembly, inspection, testing, distribution and sale of the aircraft" occurred entirely in Quebec. Id. at *19. Further, the court found that "Quebec has a specific interest in regulating the conduct of manufacturers within its borders." Id. at *25. Finally, the court noted that although Quebec law did not allow product liability actions, "Quebec would allow plaintiff some means of redress." Id. at *25 n.16. Accordingly, the Wesolek court rejected the law of Idaho has the fortuitous place of injury, instead applying the law of Quebec as both the place of conduct and principal place of business. Id. at *24-25.

The Second Circuit affirmed the importance of this choice-of-law factor in Saloomey v. Jeppesen & Co., 707 F.2d 671, 676 (2d Cir. 1983). Saloomey was a wrongful death action arising from an air crash in West Virginia that was allegedly caused by defective navigational charts. The Second Circuit found that

Colorado had the most significant relationship to the parties and events because: (1) Colorado was the place of incorporation and the principal place of business of the defendant manufacturer, and (2) Colorado was the location in which plaintiff purchased the charts from defendant. Id. at 676. Accordingly, the defendant manufacturer "cannot contend that the application of Colorado substantive law to actions involving alleged defects in those charts was unforeseeable, unpredictable, or fortuitous." Id. at 676.

Lewis-DeBoer applied Texas law to the issue of strict products liability in an action arising from an air crash in Colorado. The court reasoned that Texas, as the state of incorporation and principal place of business of the defendant manufacturer, "has a greater policy interest in applying its laws and providing deterrence than Colorado has in preventing a windfall to its citizens." 728 F. Supp. at 645. The court further noted: "[t]he importance of defendant's place of business is heightened because this is a products liability case." Id. at 645. As for the relative policy interests in safety, the court found: "Colorado's interest in providing safe travel through its airspace is advanced by applying Texas law." Id. at 646. Finally, the court found that the parties' expectations dictated application of Texas law; "[i]n terms of the parties' reasonable expectations for unplanned events such as airplane crashes . . . there is no injustice to a corporation in applying the law of the state where

it has chosen to locate its principal place of business." Id. at 646. Similarly, as to the passenger cases, France has a greater policy interest in providing deterrence for its corporations than does New York.

Since the most important factors in determining the applicable law for punitive damages are the place of the relevant conduct and the defendant's place of business, whether the principle of depecage is appropriate in this instance depends upon a factual determination: namely, the place of the conduct to be regulated, the place of the design and manufacture of the product.

Airbus has asserted that:

> With respect to Airbus, the alleged misconduct plaintiffs contend caused the Accident occurred in France. The engineering, product safety, marketing, and other personnel involved with the Aircraft worked at Airbus' headquarters in France. The Aircraft was designed, manufactured, assembled, certified, and marketed in France. The corporate managerial decisions relating to those activities and to the instructions and warnings given regarding the Aircraft were made in France.

Def. Memo in Support, at 32-33.

On the other hand, according to certain of the plaintiffs, the multinational composition and character present factual issues:

> Airbus is described in its website as follows: "The four national entities which [prior to 2001] formed the Airbus consortium transferred their Airbus-related assets to the new company and became shareholders of Airbus -- [These were] Airbus France, Airbus Deutschland and Airbus Espana merging as the European Aeronautic Defense and Space Company (EADS) with 80% shares and BAE SYSTEMS [UK] with 20%.
>
> Manufacturing, production and sub-assembly of party for Airbus aircraft and distributed around 16 sites in Europe with final assembly in Toulouse and Hamburg (emphasis added)."
>
> According to a chart in the website, Airbus has a substantial presence in six countries besides France, including three places in the United States. Of the nearly 50,000 persons on the Airbus payroll, more than 61% are employed outside France. Although Airbus is incorporated in France, the Corporate Governance in EADS' website states that "EADS N.V. is a Dutch company governed by the laws of the Netherlands."

Opposing Brief in Ground Victim Cases, at 4.

Therefore, it is appropriate to note that in the context of the instant motion, the facts concerning the place of the relevant conduct are in contention. A decision as to whether or not the law of France is applicable to punitive damages must await an appropriate factual record.

The Plaintiffs have cited Calhoun II for the proposition that the place of accident should determine the applicable law on punitive damages in the admiralty context. However, in Calhoun II the court noted that its decision was guided in part by the determination that the accident location was not fortuitous. Calhoun II, 216 F.3d at 347. The only jurisdiction in which that

accident could have occurred was in Puerto Rico's territorial waters. Here, the accident location of Flight 587 was fortuitous as to the passengers. Furthermore, the Calhoun II court did not choose between the laws of the place of manufacture and the place of injury because the manufacturer itself argued for application of Puerto Rico law. Therefore, it cannot be said that Calhoun II applied Puerto Rico law for punitive damages on a principled basis because Puerto Rico's interests were never compared with those of Japan, where the defendant manufactured the jet ski involved in the accident.

And although In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978, 531 F. Supp. 1175 (W.D. Wash. 1982), did apply the law of India to an air crash in Indian territorial waters, the Bombay court focused on the interest of compensating the passengers rather than on punishing the manufacturer, and the decision does not mention the issue of punitive damages.

For the reasons stated, it may be appropriate to apply depecage to the punitive damage claims of passengers against Airbus.

V. NEW YORK LAW APPLIES TO THE PUNITIVE DAMAGE CLAIMS AGAINST AIRBUS IN THE GROUND CASES

There is no dispute between the parties as to the applicability of New York law to claims for compensatory damages in

the ground cases. Although Airbus has not focused directly on the punitive damage claims against it in the ground cases, the motion of Airbus to apply the law of France to all punitive damage claims is directly stated. Considering the prematurity of rulings on liability choice of law issues, Airbus has stated:

> [A] determination on the law (other than the Warsaw Convention as to American and punitive damages as to Airbus) applicable to liability claims against American (including ground claimant punitive damage claims), AMR, and Airbus is premature.

Def. Reply Memo, p. 114.

If the relief sought by Airbus as to ground claimant punitive damage claims is perhaps somewhat unclear based on the above, the conclusion of the Defendants' Reply memo is more definitive:

> Airbus's motion should be granted with respect to all punitive damages issues and an order entered applying French law to all punitive damages claims against Airbus in the remaining passenger, crew, and ground cases. If the Court finds admiralty jurisdiction over any case, an order should be entered that punitive damages are not recoverable against Airbus in the remaining passenger, crew, and ground cases under maritime common law or under the law of France as directed by admiralty or other choice-of-law rules.

Def. Reply Memo, p. 118.

It is therefore evident that a ruling on the applicable law as to the ground punitive damage claims is sought. The difficulty in resolving the issue does not, under the circumstances, permit its avoidance. For the reasons that follow, New York law applies.

The claims brought by ground plaintiffs in this multidistrict litigation are within the diversity jurisdiction of the federal courts, pursuant to 28 U.S.C. § 1332. As such, choice-of-law issues in the ground cases are governed by the law of New York, the forum state. Van Dusen v. Barrack, 376 U.S. 612 (1964); Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Cargill, Inc. v. Charles Kowsky Resources, Inc., 949 F.2d 51, 55 (2d Cir. 1991). Application of New York's choice-of-law rules mandates that punitive damages be determined by the law of New York.[19]

Punitive damages do not constitute a separate cause of action under New York law, Mayes v. UVI Holdings, 733 N.Y.S.2d 151, 161 (1st Dept. 2001). Unless otherwise barred by statute or treaty, the right to claim punitive damages is an integral part of

[19] Plaintiffs argue that the use of depecage to apply different law to compensatory and punitive damages is inappropriate under New York law. Defendants note that there is some authority to the contrary. See, e.g., James v. Powell, 19 N.Y.2d 249, 259-60 (N.Y. 1967) ("Although it is clear that the measurement of compensatory damages is determined by the same law under which the cause of action arises, this is not necessarily true with regard to exemplary damages.") (citations omitted). Because New York choice-of-law rules require that New York law govern both compensatory and punitive damages, it is unnecessary to decide this issue of state law.

and not to be severed from the basic right to seek redress because of another's wrongdoing. If New York law applies to issues of the defendant's ordinary negligence, it applies with equal effect to issues of defendant's liability for alleged wrongdoing of an extraordinary nature. Absent extraordinary circumstances, situs law will apply to all issues of fault. Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698 (1978). Moreover, since the Accident, resulting injury, deaths, and destruction, as well as the flight operation itself, took place within New York's borders, New York is the jurisdiction with the paramount governmental interest in having its law applied to all issues of fault and damages, Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China, 293 F.2d 957 (2d Cir. 1991) (applying situs (China) law under rule No. 2 expressed by New York's Court of Appeals in Neumeier v. Kuehner, 31 N.Y.2d 121, 335 N.Y.S.2d 64 (1972)). Finally, it is not against New York's public policy for its law to be applied under the circumstances of these cases. O'Rourke v. Eastern Air Lines, 730 F.2d 842 (2d Cir. 1984).

When presented with choice-of-law questions, New York courts apply the law of the state with the most significant interest in the litigation. Lee v. Bankers Trust Co., 166 F.3d 540, 545 (2d Cir. 1999); Padula v. Lilarn Properties Corp., 84 N.Y.2d 519, 521 (N.Y. 1994). In deciding which state has the greater interest New York distinguishes between "conduct regulating" and "loss allocating" rules. See Sheldon v. PHH Corp.,

135 F.3d 848, 853 (2d Cir. 1998); Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 73 (N.Y. 1993). Conduct-regulating laws define standards of conduct and are designed to prevent injuries from occurring. Padula, 84 N.Y.2d at 522. In contrast, loss-allocating rules "prohibit, assign, or limit liability after the tort occurs." Id. If conduct-regulating rules are in conflict, New York law usually applies the law of the place where the tort occurred ("lex loci delicti"). See Sheldon, 135 F.2d at 853 (citing Padula, 84 N.Y.2d at 522); Cooney, 81 N.Y.2d at 74 (for conduct-regulating conflicts, "the traditional rule of lex loci delicti almost invariably obtains"). However, if loss-allocating rules conflict, the choice of law analysis is governed by the so-called Neumeier rules. See Padula, 84 N.Y.2d at 522; Neumeier v. Kuehner, 31 N.Y.2d 121, 128 (1972).

Laws governing punitive damages are generally considered to be conduct-regulating rather than loss-allocating. See Chicago, 644 F.2d at 617 (noting that "the purpose of a decision to impose or not impose punitive damages has to do with regulation of conduct"); Saxe v. Thompson Med. Co., No. 83 Civ. 8290, 1987 WL 7362, at *1 (S.D.N.Y. Feb. 20, 1987) ("[P]unitive damage awards are essentially conduct-regulating rather than loss-allocating."); Wilson v. Chevron Chem. Co., No. 83 Civ. 762, 1986 WL 14925, at *3 (S.D.N.Y. Dec. 17, 1986) ("The issue of punitive damages is clearly conduct regulating. Such damages are not meant to compensate the plaintiff, but rather are designed to punish the defendant for

egregious conduct.") Thus, absent extraordinary circumstances, see Cousins, 44 N.Y.2d at 699, the rule of lex loci delicti should apply in this diversity action.

Airbus claims that the place of the tort for purposes of plaintiffs' punitive damages claims is France, the place where the alleged misconduct occurred,[20] and not New York, the site of the Accident. However, under New York law, where "defendant's negligent conduct occurs in one jurisdiction and the plaintiff's injuries are suffered in another, the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred." Schultz v. Boy Scouts of America, Inc., 65 N.Y.2d 66, 195 (N.Y. 1985). See also Hunter v. Derby Foods, Inc., 110 F.2d 970 (2d Cir. 1940); Kramer v. Showa Denko K.K., 929 F. Supp. 733, 741 (1996). The place of the last event necessary to make Airbus liable on the ground cases is incontrovertibly Belle Harbor, New York, the site of the Accident. New York is therefore the place of the tort for purposes of determining the applicable law.

Airbus also contends that there is good reason to depart from the traditional rule of lex loci delicti in this case. Airbus argues chiefly that the place where the underlying conduct occurred -- in this case, France, where Airbus asserts the Aircraft was

[20] As noted above, no findings of fact have been made as to the location of the relevant conduct of Airbus. That determination can only be made after the completion of discovery in this case.

designed, manufactured, and certified -- has the greatest interest in applying its punitive damages law. As previously noted, this is an approach that has been followed by a number of courts in aviation disaster cases. See, e.g., In re Air Crash Disaster at Sioux City, Iowa, on July 19, 1989, 734 F. Supp. 1425, 1430 (D. Ill. 1990) ("The choice of law question [for punitive damages] depends entirely on activities conducted by defendants."); Dickerson v. USAir, Inc., No. 96 Civ. 8560 (JFK), 2001 WL 12009, at *9 (S.D.N.Y. Jan. 4, 2001) (affirming decision of MDL court to apply punitive damages law of Washington, rather than Pennsylvania, the location of the crash, when the "overwhelming majority" of aircraft design and manufacturing activities took place in Washington).

Departure from the traditional rule is inappropriate here for two reasons. First, "[o]ur task is to determine what law New York courts would apply in this situation rather than a 'rule we [might] think better or wiser.'" O'Rourke, 730 F.2d at 847 (quoting Hausman v. Buckley, 299 F.2d 696, 704-05 (2d Cir.), cert. denied, 369 U.S. 885 (1962)). As the Second Circuit has stated, "[W]e do not believe that claims arising out of an airplane crash require the application of the Cousins 'extraordinary circumstances' exception simply because of the transitory nature of the tort." O'Rourke, 730 F.2d at 849 (citing Grancaris v. J.I. Hass Co., 79 A.D.2d 551, 553 (1st Dept. 1980) ("Tort cases, though

transitory, still remain subject, in choice-of-law matters, to the rule of lex loci delicti . . . .")).

Second, New York, as the site of the Aircraft's departure, the Accident, the resulting deaths, injuries, and property damage, and the domicile of all of the ground plaintiffs, has a dominant interest in determining punitive damages. This case presents a contrast to Dickenson, in which the Honorable John F. Keenan upheld the MDL court's determination that punitive damages should be governed by the law of Washington, where the "overwhelming majority" of design, manufacturing, and certification activities occurred. Although the MDL court noted that Pennsylvania -- the site of the crash -- had a "not insignificant" interest in the action, it also downplayed that interest on the basis that the location of the crash was largely fortuitous. It is also important to note that neither plaintiffs nor decedents in that case were domiciled in Pennsylvania. Here, by contrast, the site of the crash cannot be said to be fortuitous with respect to the ground victims, and New York, the forum state, is also the domicile of all decedents and all plaintiffs.

Other cases cited by Airbus to support its contention that the law of the place of conduct should apply are inapposite for a number of reasons. Several cases did not involve New York choice-of-law rules at all, see, e.g., In re Aircrash Disaster near Roselawn, Ind. On Oct. 31, 1994, 948 F. Supp 747 (N.D. Ill. 1996);

In re Air Crash Disaster at Mannheim, Germany on Sept. 11, 1982, 769 F.2d 115 (3d Cir. 1985), while others were applying the Neumeier analysis appropriate only for loss-allocating rules, see, e.g., Smith v. Bell Sports, Inc., 934 F. Supp 70 (W.D.N.Y. 1996).

Four of the 13 district court cases cited in support of the Airbus motion in the ground cases were decided by courts situated in Illinois, Roselawn, 948 F. Supp. 747; Sioux City, 734 F. Supp. 1425, Colorado, Stapleton, 720 F. Supp. 1445, and the District of Columbia, Keene Corp. v. INA, 597 F. Supp. 934 (D.D.C. 1984).

The Roselawn decisions are cited for propositions that are not controverted; specifically, that "French civil law does not recognize punitive damages as they exist in this country" and that "many authorities suggest that the place of the misconduct and the defendants' domiciles have the greatest interest . . ." Def. Mem. Supp. at 31, 35.

The last non-New York federal decision cited by defendants is that by the Honorable Sherman G. Finesilver of the District of Colorado in the Stapleton litigation. The choice of law analysis followed by Judge Finesilver was fashioned after the approach used by the Seventh Circuit in the Chicago DC-10 litigation, except that the conflict was not deemed irreconcilable and was resolved against the air carrier on the basis of its Texas

domicile. The analysis in Stapleton was done without reference to New York's choice-of-law rules and without any indication that issues of ordinary and extraordinary fault were separated. Significantly, as did Judge Sprecher, the district court concluded its opinion with a plea for Congressional intervention in the belief that "[f]ederal law would eliminate costly uncertainty and create uniformity" in air disaster litigation. 720 F. Supp. at 1455.

Only two of the eight cited decisions by district courts situated in New York involve the application of New York's substantive law. Those decisions are Diehl v. Ogorweac, 836 F. Supp. 88 (E.D.N.Y. 1993), applying forum law to a seat belt defense in the absence of any conflict with situs law; and Saxe, 1987 WL 7362, applying New York law to all issues of fault, including punitive damage issues. Four of these eight decisions (namely, Dobelle v. Nat'l R.R. Passenger Corp., 628 F. Supp. 1518 (S.D.N.Y. 1986); Smith v. Bell Sports, Inc., 934 F. Supp. 70 (W.D.N.Y. 1996); Carlenstolpe v. Merck & Co., 638 F. Supp. 901 (S.D.N.Y. 1986); and Elam v. Ryder Auto Operations, Inc., 1994 WL 705290 (W.D.N.Y. 1994)), said to support application of the law of the place of the conduct or manufacture, involve fact patterns substantially different from the facts in the Flight 587 ground victim cases. None involves death or injury to a New York domiciliary. More significantly, none of the four cases supports displacing forum law in favor of the law of a foreign defendant's domicile where the

forum is also the site of the injury and the plaintiff's domicile. To the extent that Airbus relies on any of these cases for the proposition that the law of the place of manufacture always applies to punitive damages issues, that reliance is misplaced.

It may seem strange to conclude that punitive damages against Airbus are governed by New York law in the ground cases but may be governed by French law in the passenger cases. Analytically, however, the ground cases are distinct from aviation disaster cases brought by the estates and surviving relatives of passenger decedents. Unlike the passengers, the ground victims had no relationship with the Defendants until tragedy struck and the Aircraft or one of its engines fell upon their property. From the perspective of victims on the ground, the Accident is described most accurately not as an aviation disaster but as a terrible explosion, not unlike that caused by the crash of hijacked planes into the World Trade Center towers on September 11, 2001, only two months before. Addressing the claims of ground victims in that tragedy in In re September 11 Litigation, 280 F. Supp. 2d 279 (S.D.N.Y. 2003), the Honorable Alvin K. Hellerstein found that under New York choice-of-law rules, conduct-regulating issues were governed by the substantive law of New York. 280 F. Supp. 2d at 289. For the reasons set forth above, the same result should be reached in this case. Thus, punitive damages against Airbus in the ground cases are to be determined under New York law.

Conclusion

For the reasons set forth above, general maritime law applies to the unresolved passenger cases, the Warsaw Convention applies to the passenger claims against American, factual determinations will determine whether or not the law of France applies to punitive damage claims against Airbus in the passenger cases, and New York law applies to the punitive damage claims against Airbus in the ground cases.

It is so ordered.

New York, NY
May 9, 2006

s/s
ROBERT W. SWEET
U.S.D.J.