IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

KIEREN WRAGGE and DAVID BEARD,	)
	) Case No. 1:20-cv-04457
Plaintiffs,	)
	) Judge Franklin U. Valderrama
v.	)
	) Magistrate Judge M. David Weisman
THE BOEING COMPANY,	)
	)
Defendant.	)
	)

AMENDED RESPONSE TO DEFENDANT'S MOTION TO DISMISS ON GROUNDS OF *FORUM NON CONVENIENS*

NOW COME the Plaintiffs, jointly and by and through undersigned counsel, and in response to The Boeing Company's Motion to Dismiss on Grounds of *Forum Non Conveniens* (the "FNC Motion") [Dkt. #21], state as follows:

"The Northern District of Illinois is a proper and convenient forum…."

– The Boeing Company (November 10, 2021) [1]

"It is all but incongruous for defendants to argue that their own home county is inconvenient."

– Supreme Court of Illinois (1992)

INTRODUCTION

The Boeing Company maintains its global corporate headquarters in Chicago, Illinois. Boeing recently agreed that the Federal District Court of the Northern District of Illinois is a "proper and convenient forum" to defend claims against it, even when brought by non-U.S.

[1] *See In re: Ethiopian Airlines Flight ET302 Crash*, Case No 1:19-cv-02170 (N.D. Ill.), Agreed Stipulation of the Parties, dated November 10, 2021, a copy of which is attached as Exhibit A, at ¶D(1).

citizens. Nonetheless, Boeing now asks this Court to find that Seattle, Washington, or possibly Australia, is a more convenient forum. Boeing's argument is untimely, contrary to the law of this Circuit and Boeing's prior position on the issue.

This case involves the claims of two pilots seeking compensation for personal injuries that they suffered while piloting Boeing-designed and manufactured aircraft employing Defendant's defectively designed "bleed air system," a design flaw and health risk that Defendant has been aware of and ignored for decades. Plaintiffs' exposure to the toxic fumes spewed into the cabin as a result of Defendant's "bleed air system" have caused Plaintiffs long-term disabilities that, at least in the case of Plaintiff Wragge, have rendered him unable to work as a pilot or lead a normal, independent life.

Defendant's FNC Motion is untimely.

Defendant moved its global corporate headquarters to Chicago, Illinois in 2001. Plaintiffs originally filed this case in Defendant's home forum, the Circuit Court of Cook County, Illinois County Department, Law Division ("Cook County"), more than one year and three months ago. Defendant transferred the Case to this Court via Defendant's controversial practice of "snap removal." Pursuant to its "snap removal" process, Defendant monitors cases filed in Cook County and, if it is named as a defendant, immediately files a Notice of Removal to federal court before the plaintiff can serve it with a copy of the summons and complaint. So, in a very literal sense, ***Boeing chose this forum – its home forum – the District Court for the Northern District of Illinois*** – to litigate the claims against the Defendant, and it has openly expressed the position that this District ***"is a proper and convenient forum."***

More than fifteen (15) months after removing this case to this District, however, Defendant now seeks to transfer this case a second time to a third forum of their choosing:

Washington state or Australia. Defendant's untimely motion, based on the equitable doctrine of *forum non conveniens*, comes just five months after Plaintiffs provided Defendant with documents, on a confidential basis, supporting their damages claim and their settlement demand. In the Seventh Circuit, selection of the proper forum "should be made at the earliest possible opportunity," and defendants may not delay filing while they weigh their options or as a means of "forum shopping." Therefore, the FNC Motion must be denied because it is untimely.

Defendant's FNC Motion also fails on the merits.

Even if the Court reaches the merits of the Defendant's FNC Motion, Defendant cannot carry its heavy burden of that the equities of this case "strongly favor" litigation in another forum. *First*, this is a products liability case. *All of the documents and witnesses needed to demonstrate* Plaintiffs' allegations, including Defendant's defective design (Count I), defective warnings (Count II), negligence (Count III), fraud (Count IV), and its negligent misrepresentations (Count IV), are located primarily in Illinois and Washington state.

Contrary to its recent admission before this Honorable Court in the Ethiopian Airlines case, Defendant now contends that it would be *inconvenient to it* to litigate this matter in its home forum because many of the documents and witnesses needed to prove Plaintiffs' damages and its possible defenses are located in Australia. The Supreme Court of Illinois and other courts have characterized such arguments presented by defendants (including Boeing, specifically) that litigating in their home forum is somehow inconvenient to them as "incongruous" and "incredulous."[2] Defendant, who chose to move its global corporate headquarters to Cook County and subject itself to this Court's jurisdiction, cannot satisfy the heavy burden that litigating this

[2] Although the FNC Motion does not indicate whether federal or state law should apply, the Seventh Circuit has not addressed the issue and courts have held that there is no material difference between the two standards.

matter 9,000 miles away from its home forum is more convenient to both parties. For the reasons set forth herein, the Defendant's FNC Motion must be denied and this case, already nearly one-and-one-half years old, should be permitted to continue in this District and the Defendant's home forum.

RELEVANT BACKGROUND

1. In 2001, Defendant moved its global corporate headquarters to Chicago, Illinois.

2. On July 24, 2020, the Plaintiffs filed a five-count Complaint against Defendant in Illinois state court, Case No. 2020L007821 (Cook Co.), alleging serious injuries caused by Defendant's defectively designed "bleed air system" (the "Case").

3. Plaintiffs are both residents of Brisbane, Australia.

4. On July 29, 2020, Defendant transferred the Case to the District Court for the Northern District of Illinois by its somewhat controversial practice of "snap removal," *i.e.*, the filed a motion remove the case before Plaintiffs had an opportunity to serve Defendant.

5. On August 11, 2020, Defendant filed its Answer. [Dkt. #11.]

6. On May 20, 2021, Plaintiffs presented Defendant with a settlement offer and produced, on a confidential basis, a secure online repository (the "Sharefile") containing documents substantiating Plaintiffs' injuries, including income tax records, specialist medical reports, workers compensation and medical certificates, medical records, unsigned affidavits from Plaintiffs, and an itemized detail of each of the Plaintiffs' actual damages.

7. On November 4, 2021, which is approximately:

- 15 months after Plaintiffs filed the Case in Cook County,
- 14 months after Defendant filed its answer, and
- 5 months after Plaintiffs provided Defendant with a documented assessment of their injuries of approx. $2.5 million,

Defendant filed a motion to dismiss and transfer the Case a second time based on the equitable doctrine of *forum non conveniens*. [Dkt. ##40, 41.]

RESPONSE

Contrary to the argument set forth in its Motion, Boeing has conceded that "The Northern District of Illinois is a proper and convenient forum." *See* Ex. A (*In re: Ethiopian Airlines Flight ET302 Crash*, Case No 1:19-cv-02170). In addition, Boeing's many motions to dismiss international aviation cases from its home forum based on *forum non conveniens* have been repeatedly denied and, in at least two instances those denials were upheld on appeal, including *Vivas v. The Boeing Co.*, 392 Ill. App. 3d 644 (1st Dist. 2009) and *Arik v. The Boeing Co.*, 2011 IL App (1st) 100750-U.[3]

In *Thornton v. Hamilton Sundstrand Corp. et al.*, for example, Boeing and several other defendants filed a motion to dismiss a products liability claim filed on behalf of several residents of Australia and based on the crash of a Boeing aircraft in Australia. The court denied the motion primarily because Boeing and another defendant were headquartered in Cook County and did business in Illinois, and "in a products liability case the site of the accident is less important." *Thornton v. Boeing*, No. 07L4642 at pp.4-5. The only favorable case from this Circuit cited by Defendant is *Claisse v. The Boeing Co.*, where the court gave no weight to the fact that Boeing, just one of seven defendants scattered throughout the United States, maintained its global

[3] *See Vivas v. The Boeing Co.*, 392 Ill. App. 3d 644 (1st Dist. 2009); *Arik v. The Boeing Co.*, 2011 IL App (1st) 100750-U; *Wadea v. The Boeing Co.*, No. 18L12631 (Cir. Ct. Cook Cty.) (Order dated Nov. 22, 2019, denying Boeing FNC motion); *Reichenbach v. Honeywell Int'l, Inc.*, 2019 IL App (1st) 181380-U (Memorandum Opinion and Order, dated Mar. 22, 2019); *Abboud v. Boeing*, 17L8269 (Cir. Ct. Cook Cty.) (Order dated Feb. 13, 2018); *Stafford v. The Boeing Co.*, 09L13343 (Cir. Ct., Cook Cty.) (Order dated Feb. 17, 2011); *Thornton v. Hamilton Sundstrand Corp., The Boeing Co., et al.*, 07L4642 (Cir. Ct., Cook Cty.) (Order dated Sept. 5, 2008) (denying FNC motion filed by Boeing and other defendants involving plane crash and plaintiffs located in Australia). Copies of unpublished orders attached as Exhibit B.

headquarters in Chicago, Illinois, and an "essential party," Kenya Airways, was not subject to jurisdiction in the United States and could not be joined in an action pending in the United States. 2010 WL 3861073, at *12 (N.D. Ill. Sept. 28, 2010).

I. DEFENDANT'S *FORUM NON CONVENIENS* MOTION IS UNTIMELY.

The Seventh Circuit court has emphasized the need to settle on an appropriate forum early in the litigation process. *Viscofan USA, Inc. v. Flint Group*, 2009 WL 1285529, at *7 (C.D. Ill. 2009) (citing *Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir.1995) ("Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution.")). Thus, courts can consider a defendant's delay in filing a motion to dismiss on the basis of *forum non conveniens* as one of the relevant factors when considering the motion. *Id.* (citing *Bell v. Louisville & Nashville R. Co.*, 106 Ill.2d 135, 88 Ill.Dec. 69, 478 N.E.2d 384, 389 (Ill.1985) (holding that courts should consider a defendant's delay as one of the factors when ruling on a motion to dismiss on the basis of *forum non conveniens*; *forum non conveniens* is an equitable doctrine, and "equity aids the vigilant and not those who sleep on their rights"). A defendant implicitly agrees to the forum when it does not move to transfer the case at the earliest opportunity. *See Winforge, Inc. v. Coachmen Industries*, 2009 WL 5200581, at *2 (S.D. Ind. Dec. 22, 2009) (citing *Cabinetree*, 50 F.3d at 391); *see also New Planet Energy Development LLC v. Magee*, 2020 IL App (4th) 200043, ¶¶23, 39 (2020) (reversing trial court for abuse of discretion where defendant's "motion to dismiss on *forum non conveniens* grounds was not filed until more than a year" after deadline to file answer); *American Patriot Ins. Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884, 888 (7th Cir. 2004) (the right to transfer a case to a new forum can be waived if a litigant stalls to "find out which way the wind is blowing" or if "by words or actions misleads the plaintiff into thinking this or

the court into becoming involved in the case so that there would be wasted judicial effort…."); *Frietsch v. Refco, Inc.*, 56 F.3d 825, 830 (7th Cir. 1995) (denying motion to transfer where defendant waited nearly a year and a half after suit had been filed).

The Defendant has not yet offered the Court an explanation as to why it waited over one year from the "earliest opportunity," *i.e.*, the deadline to respond to the Complaint, to file its FNC Motion. It appears that Boeing was simply weighing its options and, as the Seventh Circuit has observed, "needing time 'to weigh [one's] options… is the worst possible reason for delay.'" Additionally, even according to Boeing, the Northern District of Illinois is not an "inconvenient forum." Boeing has routinely consented to this forum to litigate disputes brought by foreign plaintiffs based on injuries sustained in foreign lands. *See e.g.*, *In re: Ethiopian Airlines Flight ET302 Crash*, Case No 1:19-cv-02170; *Cipagauta v. The Boeing Co.*, Case No. 2020L12676 (Cook Co., Ill.) (pending); *James v. The Boeing Company*, Case No. 1:19-cv-05013 (N.D. Ill.) (pending) (plaintiff is an Australian citizen employed to fly internationally for Samoa Airways). It is also notable in this case that Defendant filed its FNC Motion well over a year from when it had its "earliest opportunity," but only five months after it received confidential documents from Plaintiffs supporting their damages calculation. The timing indicates that Defendant likely decided that another forum might be more favorable because it might not fare well in this forum.

II. ALTHOUGH WASHINGTON STATE AND AUSTRALIA ARE "AVAILABLE FORUMS," THE PLAINTIFFS HAD SUBSTANTIAL REASONS FOR CONCLUDING THAT THEY ARE "LESS ADEQUATE" THAN BOEING'S HOME FORUM.

The Plaintiffs did not choose Illinois as the forum for this Case without carefully considering the available alternatives: Australia and Washington state. Plaintiffs chose to file this Case in Defendant's home forum for a myriad of reasons, including: (A) Illinois courts' far

greater experience with "toxic fumes" cases, like this one, than any other forum; (B) the expanded pre-trial discovery available in U.S. courts, including the use of depositions and expert witnesses and reports; (C) the fee-shifting rules applicable to cases filed in Australia that render cases like this practically untenable; and (D) the availability of punitive damages that may serve as the only effective deterrent to companies, like Boeing, who repeatedly prioritize profits over the safety of the individuals who rely on their products.

First, every "toxic fumes" case brought by pilots, flight crew and passengers based on Boeing's "bleed air system" has been filed in the United States. There are at least nine "toxic fumes cases" currently pending or recently settled against Boeing in Illinois state and Federal courts.[4] Not surprisingly, by filing their case in Illinois, the Plaintiffs anticipated a more efficient, more predictable, and more "adequate" legal process in Illinois courts than they could expect in Washington state or Australia, both of which have little experience with such cases.

Second, nearly all pre-trial discovery in Australian courts is limited to document requests. Interrogatories are used sparingly and pre-trial depositions of potential witnesses or experts is unheard of. This limitation on pre-trial discovery is especially troubling in a complex products liability case, like this one.

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[4] *Curry v. The Boeing Co.*, 20L695 (Cir. Ct. Cook Cty.) (pending); *Milton v. The Boeing Company*, 20L1093 (Cir. Ct. Cook Cty.) (pending); *Cipagauta v. The Boeing Company*, 20L4757 (Cir. Ct. Cook Cty.) (pending); *Weiland v. The Boeing Co.*, 18L8347 (Cir. Ct. Cook Cty.) (pending); *Lane v. The Boeing Co.*, 16L3846 (Cir. Ct. Cook Cty.) (settled); *Sabatino v. The Boeing Corp.*, 09L1056 (Cir. Ct. Cook Cty.) (Order dated Mar. 3, 2010 denying *forum non conveniens* motion to transfer to U.K. or Florida, attached as Exhibit C); *Thornton v. The Boeing Co.*, No. 18L12631; *Woods v. The Boeing Co.*, 15L6324 (Cir. Ct. Cook Cty.) (settled); *see also Bellamy v. Raytheon Technologies Corp.*, 21-cv-04757 (N.D. Ill.) (pending; based on Airbus's similarly designed "bleed air system"); *Williams v. The Boeing Co.*, 09-2-15315 (King Co., Wash.).

Third, unlike U.S. courts, Australian courts apply "fee-shifting" rules to civil litigation; if plaintiff's case is unsuccessful for any reason, the plaintiff would be required to pay the defendant's legal fees and expenses. This risk often operates to chill the legitimate claims of individuals against large corporate defendants. In this case, the Plaintiffs – already in dire economic situations caused by their temporary and, in Plaintiff Wragge's case permanent, inability to work – considered this a risk that they had to avoid by filing their case in the United States, even if it meant filing in the Defendant's (often favorable to *them*) home forum.

Fourth, punitive damages are available only in rare cases and are not intended to punish the defendant or deter future conduct. Boeing has known about the significant risks and the frequency of "toxic fumes" events caused by its flawed "bleed air system" for decades.[6] Yet Boeing has refused to redesign or retrofit its "bleed air systems" because doing so could admit culpability and any collected data would be used by lawyers to "open up a can of worms."[7] The Plaintiffs, including Beard who has recovered sufficiently from his exposure to resume flying, are intent not only on seeking compensatory damages for their injuries, but also compelling Boeing to address this on-going threat to pilots, flight crew, and passengers. Without the award of punitive damages, Boeing is unlikely to take steps to fix the problem with its "bleed air system" and will continue to "place profits over safety." Therefore, although adequate alternative

[6] *See* Plaintiffs' Motion for Leave to Amend Complaint to Include Prayer for Relief Seeking Punitive Damages (the "Punitive Damages Mo."), dated Dec. 5, 2019, *Woods v. The Boeing Company*, 15L6324 (Cir. Ct. Cook Co.), at p.1 ("Bottom line is I think we are looking for a tombstone before anyone with any horsepower is going to take interest." – Boeing Senior Engineer George Bates in reference to Boeing's "bleed air system" design in 2007), a copy of which is attached as Exhibit D.

[7] *Id*. at p.26 (Boeing refuses to collect real-time data on "toxic fumes events" out of fear that it could be used by lawyers and "open up a can of worms.").

forums like Washington state and Australia exist, for the foregoing reasons, the Plaintiffs did not deem them "adequate" alternatives in this case.

III. THIS CASE DOES NOT PRESENT "EXCEPTIONAL CIRCUMSTANCES" NECESSARY TO OVERTURN PLAINTIFFS' CHOICE OF FORUM.

The plaintiff's choice of forum should "rarely" be disturbed unless the defendant has demonstrated "exceptional circumstances" and the balance of the relevant private and public interest factors "***strongly favors***" the defendant's choice of an alternative forum. *See In re National Presto Industries, Inc.*, 347 F.3d 662, 665 (7th Cir. 2003); *Dawdy v. Union Pacfiic R.R. Co.*, 207 Ill. 2d 167, 174-76 (2003). The court's analysis is guided by an "unequal balancing test," where significant deference is afforded the plaintiff's choice of forum. Although some courts have provided less deference to a foreign plaintiff's decision to litigate outside its home forum, other courts have deemed this practice prejudicial and employed a more equitable approach that affords the claims of non-U.S. plaintiffs "the same substantial deference as that afforded a U.S. citizen and resident beneficiary." *Abad v. Bayer Corp.*, 563 F.3d 663, 666 (7th Cir. 2009); *cf. Quaid v. Baxter Healthcare Corp.*, 392 Ill. App. 3d 757, 767 (1st. Dist. 2009) (affording a foreign plaintiff's choice of forum "somewhat less deference, not no deference at all.").

In the often-cited case of *Iragorri v. United Technologies Corp.*, the court held that "it is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff's home district… the more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater deference will be given to the plaintiff's forum choice." 274 F.3d 65, 71-72 (2d Cir. 2001). As set forth in Section I, *supra.*, the Plaintiffs had valid reasons for choosing the Defendant's home forum to file this

Case, and this Court should afford their decision the same "substantial deference" as it would provide to a U.S. resident.

A. Defendant has Not Proven that the Private Interest Factors "Strongly Favor" Dismissal and Transfer of this Case to Defendant's Chosen Forum.

Where there is an adequate alternative forum, dismissal based on *forum non conveniens* is only proper when the balance of private and public interests ***strongly favor*** trial in a foreign country." *Herd v. Airbus*, at *3 (emphasis added); *Kamel v. Hill-Rom Co., Inc*., 108 F.3d 799, 804 (7th Cir. 1997). The private interest factors include the following: (1) the residence of the parties and witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing the witness to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Id.*

1. Boeing and the majority of key witnesses are located in the United States.

The FNC Motion does not address the "residence of the parties" factor for one obvious reason: Illinois is Boeing's home forum. The Supreme Court of Illinois has noted that "it is all but incongruous for defendants to argue that their home [forum] is inconvenient." *Kwasniewski*, 153 Ill. 2d at 555, and "*it is incredulous for... Illinois resident corporations to argue that* their home state is inconvenient to them to litigate this matter." *Ellis*, 357 Ill. App. 3d at 743 (quoting the Circuit Court (emphasis by the Appellate Court)). *See also Wilder Chiropractic, Inc. v. State Farm Fire &Cas. Co.*, 2014 IL App (2d) 130781 (2d Dist. 2014) (presumably it is not inconvenient for a corporate defendant to litigate in the forum in which it has its principal place of business).

With respect to the residence of potential witnesses, when viewed in a light most favorable to the nonmovant, the number of potential witnesses for the Plaintiffs, who likely are

scatted throughout the United States, appears to exceed the number of witnesses for Defendant located in Australia. *See Arik*, 2011 IL App (1st) 100750-U, ¶29 (Boeing failed to prove that location of witnesses and evidence favored any particular forum because they were scattered among different U.S. states and countries), *Eakin*, 408 Ill. App. 3d at 279-80 (finding that plaintiffs' witnesses were "scattered" across the county and not localized). At the very least and without the benefit of discovery on the issue, the number of witnesses located in the United State and Australia appear to be unequal. Therefore, Defendant has not proven that this factor "strongly favors" dismissal and transfer to a Brisbane court.

Further, when weighing the residence of potential witnesses, a court "should evaluate the materiality and importance of the anticipated [evidence and] witnesses' testimony and then determine [ ] the accessibility and convenience to the forum." *See Herd v. Airbus SAS*, 2017 WL 6504162, at *3 (C.D. Cal. 2017). There is a greater number of potential witnesses located throughout the United States than in Australia. The witnesses identified by Defendant who are located in Australia may have testimony limited to damages and Defendant's defenses. Therefore, because Boeing has not and cannot offer any evidence or argument that its residence presents an impediment with litigating this Case down the street from its Global Headquarters and many of its key witnesses are located in Illinois or "scattered" throughout the United States, the first private interest factor does not "strongly favor" Defendant.

2. Boeing has not and cannot contend that litigating in its chosen home forum is inconvenient for Boeing.

"The Defendant bears the burden of showing that the plaintiff's chosen forum is inconvenient to the *defendant* and another forum is more convenient to all parties. The defendant *cannot assert that the plaintiff's chosen forum is inconvenient to the plaintiff*." *Fennell*, 2012 IL 113812, ¶20 (citing *Langenhorst*, 219 Ill. 2d at 444, and *Guierine*, 198 Ill. 2d at 518) (emphasis

added); *see also* Ex. 2 to FNC Mo., *Hatleberg v. The Boeing Company*, Memorandum Opinion and Order, at 8. The defendant fails to meet this burden of proof where it does not submit any affidavit as to its inconvenience. *Lagenhorst*, 219 Ill.2d at 437; *Ammerman*, 379 Ill.App.3d at 887 (same); *see also Vivas*; *Arik*, 2011 IL App. (1st) 100750-U, ¶28 (Boeing "had failed to show that the [Turkish] plaintiff's chosen forum [Cook County was] inconvenient for ***them***.") (emphasis added).

Boeing clearly has not and cannot satisfy its burden of prove that litigating in its home forum is inconvenient. It stated just one month ago that this District is a convenient and proper forum. Boeing's International Headquarters are located less than a 15-minute walk from this Courthouse. The entire focus of Boeing's argument is on the inconvenience to Plaintiffs, a course of argument which the courts – ***even the Hatleberg Order cited by Boeing*** – have flatly rejected. Therefore, this key factor weighs overwhelming against Defendant.

3. The parties have adequate access to evidence and other sources of proof regardless of the forum, especially in this age of remote access.

In considering the third private interest factor, "the court should focus on the precise issues that are likely to be tried," *Iragorri*, 274 F.3d at 74, and "scrutinize the substance of the dispute between the parties to evaluate what proof is required. In a products liability action, the most important site of relevant documents and information is where the product was designed, not where the ultimate injury occurred. *See Iragorri*, 274 F.3d at 74 (noting that "the court might reach different results depending on whether the alleged negligence lay in the conduct of the actors at the scene of the accident, or in the design or manufacture of equipment at a plant distant from the scene of the accident."); *see also In re Air Crash Diaster Near Palembang, Indonesia*, No. MDL 1276, 2000WL 33593202, at *2 (W.D. Wash. Jan. 14, 2000) ("the crash was caused by a design defect… the witnesses and much of the tangible evidence *related to this alleged*

design defect theory is located in Washington state or elsewhere in the United States… not the place where [the Boeing plane] crashed.").

Both parties will need access to evidence supporting or refuting damages, so that is a "wash." Additionally, the accessibility evidence factor "has become less significant because of the modern age of [technology], since [documents] can be easily copied and sent." *Vivas*, 392 Ill. App. 3d at 659 (denying Boeing's motion, in part, because "all evidence relevant to the design, manufacture, and assembly of the aircraft and its engines were located in the United States," even though the accident took place in Peru); *Sabatino v The Boeing Corp.*, Case No. 09L1056 (Cook Co.), at p. 6 (third factor afforded little weight where documents in multiple countries could easily be produced electronically).

As with almost all cases during this age of remote access, all of the documents in this case will be exchanged electronically. The fact that Plaintiffs confidentially and securely produced damages documents to the Defendant seemed a likely trigger for Defendant's untimely motion. Moreover, all of the witnesses in this case will be available if not in person, then via online video platforms, like Zoom, which courts and attorneys, including attorneys in Australia according to the Defendant's expert have come to effectively and routinely utilize for pre-trial proceedings and trials in the COVID era. *See* General Ord. 20-0012 (Final 10th Amd.) None of the decisions Boeing relies on were argued or assessed in the COVID era where most practical difficulties previously associated with cross-border litigation have now been effectively abrogated by the necessity of recourse to technology.

Defendant's FNC Motion, on the other hand, turns this analysis on its head focusing solely on the accessibility of evidence that Boeing needs to defend Plaintiffs' damages claims

and Boeing's defenses. *See* FNC Mo., at pp. 9-11.[8] The focus of the *forum non conveniens* analysis, however, is the location and accessibility of evidence that supports the "issues to be tried." Therefore, the third private interest factor, the availability of evidence, favors this forum or is arguably neutral, and does not "strongly favor" dismissal of the Case and refiling in Australia or Washington state. If this Case is transferred, the parties would simply face different but equal challenges obtaining evidence in support of their claims and defenses.

4. Defendant has not identified any potential witnesses located in Australia who would be unwilling to testify.

To carry its burden of proof on this factor, the defendant must demonstrate that there are actual unwilling witness who must be compelled to testify. *Claerides v. Boeing Company*, 534 F.3d 623, 629 (7th Cir. 2008) (in airline crash in Greece, Cyrpus airline Helios "refused to produce voluntarily in the United States its witnesses and evidence….")[9]; *see also Hatleberg* Op., at p.3 (plaintiffs' key witnesses, their parents, filed affidavit that it would be inconvenient for them to travel to Illinois to testify). Absent ***compelling evidence presented by the defendant***, the Court should assume that the parties will encounter the same costs and difficulties in compelling witnesses to any forum. *See Stafford v. Boeing Co.*, Case No. 09L13343, at p.4.

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[8] Defendant's contention that attorneys and witnesses cannot travel freely between the United States and Australia is based on outdated information and was wrong at the time the Motion was filed (and was based on July 2021 travel restrictions). Even under the quoted (by Boeing) prior travel restrictions, individuals were able to travel between the United States and Australia for necessary business purposes, which would include legal matters such as this Case. Since 1 November 2021, outbound travel for vaccinated Australians is permissible without any exemption. *See clause 11(f) of* *https://www.homeaffairs.gov.au/covid-19/Documents/outward-travel-restrictions-operation-directive.pdf*

[9] At the outset of its FNC Motion, Defendant cites *Clerides* for the proposition that "Courts in the Seventh Circuit and elsewhere routinely grant forum non conveniens dismissal in air travel cases involving foreign flights and plaintiffs." *See* FNC Mo., at p.1. *Clerides* cannot be read to stand for this proposition. It is one case limited to its unique facts and does not declare in any way that dismissal of international aviation cases based on *forum non conveniens* is "routine."

In this case, although Boeing has identified several witnesses located in Australia, it has not identified any Australian witnesses who would refuse or even be reluctant to testify. Therefore, Boeing's speculation regarding the court's ability to compel such testimony is just that: speculation. Additionally, the parties are as likely to encounter similar costs and difficulties compelling U.S. witnesses to Australia they will encounter when compelling Australian witnesses to the U.S. Therefore, this factor is equal, and Defendant has not carried its burden of demonstrating that it "strongly favors" dismissal and re-filing in Australia.

5. The cost of trial and enforceability of the judgment are equal, regardless of forum.

The cost of bringing witnesses to trial appears equal whether witnesses travel from Australia to Chicago, or from Chicago to Australia. Furthermore, the enforceability of the judgment also appears equal. The defendant has presented no evidence that one judgment would be more enforceable than the other depending on the forum.

6. Practical considerations do not "strongly favor" dismissal, compelling the Plaintiffs to start over in Australia or Washington state.

Practical considerations, although not addressed by Defendant, also weigh against dismissal and transfer to Australia or Washington state because doing so would cause the Plaintiffs to essentially start over after nearly two years working on this Case and sharing confidential damages documents with Defendant. *See Abad v. Bayer Corp.*, 563 F.3d 663, 666 (7th Cir. 2009) ("a case should not be lightly shifted from one court to another, forcing plaintiffs to start over…."). The Plaintiffs have devoted substantial time, effort and expense preparing, filing and litigating this Case in this District. Plaintiffs paid filing fees in Cook County, fought to oppose Boeing "snap removal" to this forum, retained a document management company (at great expense) to gather and produce ESI, gathered and produced confidential documents to Defendant supporting their damages calculations, among other efforts and expenses. All of that

effort and expense will be lost if this case is dismissed and transferred to the forum of the Defendant's choice, especially if that choice is Australia where the Complaint likely will have to be redrafted and the time and expense of preparing ESI will be lost.

Additionally, the fact that Plaintiffs' and Defendant's attorneys maintain offices in Chicago, Illinois weighs in favor of the nonmoving party. *See Vivas v. Boeing*, 392 Ill. App. 3d at 660 (denying motion, in part, because both parties' attorneys maintained offices in Cook County); *Arik*, 2011 IL App (1st) 100750-U, ¶33 (same). If the Case is transferred to Australia or Washington state, at least one of the parties will be required to retain additional counsel; Defendant's attorneys have no presence in Australia and Plaintiffs' attorneys have no presence in Washington state. Therefore, Defendant has not demonstrated that the practicalities of this Case "strongly favor" dismissal and re-filing in Australia or Washington state.

In sum, of the seven (7) private interest factors articulated by the Seventh Circuit, five (5) favor deferring to the Plaintiffs' choice of forum and denying the Defendant's FNC Motion, and the remaining two (2) factors are neutral. Pursuant to the applicable legal standard that it is the Defendant's burden to demonstrate that the private interest factors "strongly favor" dismissal, it is even more clear that the FNC Motion must be denied.

III. THE PUBLIC INTEREST FACTORS DO NOT "STRONGLY FAVOR" DISMISSAL.

The public interest factors include (1) the local interest of lawsuit; (2) the court's familiarity with governing law; (3) burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum. *Kamel*, 108 F.3d at 804; *Sabatino*, Case No. 09L1056, at p.7.

A. The residents of the United States and Cook County have an undeniable interest in overseeing Boeing's operations and in this and other "toxic fumes" cases.

"Cook County has, without a doubt, a legitimate interest in litigation arising from the fact that Boeing maintains its world headquarters in Chicago." *See Hatleberg* Op. at p.21, attached as Ex. 2 to FNC Mo. Products liability cases are not "localized." While the country in which the "fumes event" injury occurred has an interest in the lawsuit, "Illinois residents have just as much an interest" in both the "safety of aircraft that fly over Illinois skies" and the "operations of companies that conduct business within Illinois." *Sabatino*, Case No. 09L1056, at p.7.

Boeing is no common corporate citizen, quietly going about its business. Its recent record when it comes to safety is tragic, and its association with Chicago has become an international "black eye" on par with political corruption and Al Capone. In recent months, Boeing has publicly admitted to committing fraud on the United States Federal Aviation Administration in connection with the design and operation of the Boeing 737 MAX, recently entering into a Deferred Prosecution Agreement, wherein it agreed to pay a criminal monetary penalty in the amount of $243,600,000, compensation in the amount of $1,770,000,000 to its airline customers, and $500,000,000 in additional compensation to the victims of two recent crashes linked to its frauds. Additionally, Boeing's former Chief Test Pilot has been criminally indicted, and many of its middle- and senior-level management have resigned and/or been replaced. *See* https://www.justice.gov/opa/pr/former-boeing-737-max-chief-technical-pilot-indicted-fraud.

Specifically, with respect to this Case and Boeing's on-going refusal to remediate or re-design its "bleed air system," Boeing's internal acknowledgements that its "bleed air system" poses a real and consistent threat to pilots, flight crew and passengers, and that it has refused to effectively monitor or correct the problem because it does not want to provide ammunition to lawyers, are now public, thanks to the diligent work of the plaintiffs and their counsel in *Woods v. The Boeing Company*. *See* Exhibit D.

B. Federal and state courts in Illinois are more familiar with the law governing "toxic fumes" cases than the courts of any other forum in the world.

As discussed above in Section I, nearly every active and settled "toxic fumes" case was or is being litigated in either federal or state court in Chicago, Illinois.

C. Illinois courts and juries have an interest in this Case at least equal to the courts and juries of Washington state or Australia.

Product liability actions – specifically in instances involving international aviation – are not "localized" cases; rather, they are cases "with international implications." *Vivas*, 392 Ill. App. 3d at 661 (holding that the interests of the United States in flight safety was at least equal to the interests of this site of the crash: Peru). "Americans… have a specific interest in the safety of the Boeing [ ] aircraft which fly in our skies," and "Illinois's interest in these cases is not unrelated to the interests of the United States as a whole." *Vivas*, 392 Ill. App. 3d at 661.

D. Defendant has not identified a specific forum in Australia or presented any evidence from which the Court could conclude that it is less congested than the courts in the District.

Although Defendant provides some data on the "congestion" in this District, Defendant did not name a specific forum court in Australia or provide a valid comparison of its congestion which is likely substantial considering the global slow down caused by COVID. Indeed the only numbers provided by the Defendant regarding congestion in Australia related to Queensland and do not constitute a valid comparison. Boeing compared a full year of pandemic court numbers in Illinois ND, with only three (3) months during the pandemic of Queensland's court numbers, a fallacious comparison.

This is solely because the 2020-2021 annual report of the Supreme Court of Queensland has not yet been published. The delay may reasonably be partially attributed to the pandemic itself, and staff having to work remotely or other related impacts. The latest annual report upon

which Boeing relies is available at:

https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/670422/sc-ar-2019-2020.pdf

Regardless, the burden to present evidence from which the Court could conclude that a court in Washington state, Australia, or elsewhere is less congested than courts in this District is on Defendant, and its failure to present such evidence does not satisfy its burden to prove that the fourth public interest factor "strongly favors" dismissal and transfer to Australia or Washington state. *See Vivas*, 392 Ill. App. 3d at 660 (denying motion, in part, because Boeing did not name a specific forum in Peru or present any evidence that there was less congestion).

Dated: December 27, 2021

Respectfully submitted,

/s/ Patrick M. Jones

PMJ PLLC

Patrick M. Jones
Sarah M. Beaujour
The National Building
125 South Clark Street, 17th Floor
Chicago, Illinois 60603
Tel: (312) 255-7976
Email: pmj@pmjpllc.com
Email: smb@pmjpllc.com

and

IALPG PTY LTD (t/as International
Aerospace Law & Policy Group)

Joseph C. Wheeler (admitted *Pro Hac Vice*)
1D, 7/139 Junction Road
Clayfield, Queensland, Australia 4011
Tel: +61 7 3040 1099
Email: jwheeler@ialpg.com

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was electronically filed on December 27, 2021 with the Clerk of the Court using the CM/ECF system, which will automatically send an email notification of such filing to all registered attorneys of record.

/s/ Patrick M. Jones

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

IN RE: ETHIOPIAN AIRLINES FLIGHT ET 302 CRASH	Lead Case: 1:19-cv-02170 (Consolidated)
Plaintiffs,	Honorable Jorge L. Alonso
v.	Magistrate Judge M. David Weisman
THE BOEING COMPANY, a Delaware corporation; ROSEMOUNT AEROSPACE, INC., a Delaware corporation; ROCKWELL COLLINS, INC., a Delaware corporation.	*This Stipulation Relates to All Actions*
	CONFIDENTIAL

AGREED STIPULATION OF THE PARTIES

The parties in this consolidated matter have had ongoing discussions regarding the Defendants' responsibility for the subject accident and the jurisdiction whose law shall determine Plaintiffs' damages. As a result of those discussions, the parties have agreed to a stipulation for the purposes of this case only in which Defendant the Boeing Company ("Boeing") admits and stipulates to its liability for the compensatory damages proximately caused by the ET 302 accident, and the parties agree that the measure and elements of Plaintiffs' damages are to be determined under Illinois law without regard to the nationality, citizenship, domicile or residency of Plaintiffs or their decedents.

Specifically, the parties stipulate as follows:

A. Liability:

1. Boeing agrees and stipulates, for purposes of this case only, that it is liable to the estates, survivors, dependents and beneficiaries of the victims of the Ethiopian Airlines Flight 302 accident for all compensatory damages resulting from the deaths of Plaintiffs' decedents.[1] Boeing further stipulates and agrees that it will not argue, in any individual trial for compensatory damages, that any other person or entity is liable to any individual Plaintiff for compensatory damages stemming from the Ethiopian Airlines Flight 302 accident and further shall not ascribe fault to the Pilot (Captain), Co-Pilot (First Officer) or seek contributory or comparative negligence against them in any such individual trial for compensatory damages, except that Boeing may seek contribution and/or indemnity from any other (1) co-defendant, or (2) third party not a party to the litigation.

2. The following Statement of the Case shall be read to the jury as part of this Stipulation at the beginning of any compensatory damages trial:

   Defendant the Boeing Company began to design and develop a new version of its 737 aircraft in 2011 calling it the Boeing 737 Max. In May of 2017, airlines began to fly passengers on the Boeing 737 Max. On November 15, 2018, Defendant the Boeing Company delivered to Ethiopian Airlines, based in Addis Ababa, Ethiopia, a Boeing 737 Max. On March 10, 2019, at about 8:38 in the morning that same 737 Max took off from Bole International Airport in Addis Ababa with 157 passengers and crew onboard. The flight was a regularly scheduled international flight from Addis Ababa to Jomo Kenyatta International Airport in Nairobi, Kenya. The flight crashed about 32 miles southeast of Addis Ababa. All 157 passengers and crew onboard the 737 Max operating as Flight ET 302 were killed and the aircraft was destroyed. The history of the flight and the aircraft's movements will be described to you through expert testimony at our upcoming trial.

   Defendant the Boeing Company admits that it accepts responsibility for the crash of Flight ET 302, which caused the deaths of all onboard the Boeing 737 Max including [name of decedent]. In this trial, Boeing does not blame nor allege that any other person or entity was responsible for Plaintiff's damages arising from the Ethiopian Airlines Flight 302 accident.

   This trial will be limited to you, as jurors, deciding whether Plaintiff has been damaged as alleged and, if so, the amount of fair and reasonable compensation for such damages based on the evidence presented.

3. The Parties further agree and stipulate that, in the event of any compensatory damages trial, they will not object to instructing the jury by reference to Illinois Pattern Jury Instructions

[1] The terms of the stipulation are a bargained-for resolution to this litigation. The parties hereto acknowledge that this stipulation is not made with respect to any particular facts, and that facts related to liability have not been actually litigated and determined in this matter. No agreement made by Boeing in this stipulation is applicable to any other case or matter, including but not limited to all litigation arising from any 737 Max aircraft or accident.

as long as those instructions are given in accordance with the terms of this stipulation and the statements made herein on liability.

B. **Choice of Law:**

1. The parties have stipulated and agreed that each and every Plaintiff is entitled to recover, whether by voluntary settlement or trial, the full measure of damages permitted under Illinois law and pursuant to the elements of recoverable damages under Illinois law—including but not limited to loss of economic support; loss of services; loss of society; grief, sorrow and mental suffering of the decedent's next of kin; loss of consortium; loss of instruction, moral training, and superintendence; burial expenses; pain and suffering and emotional distress of the decedent; and all other damages recognized under Illinois law—regardless of the citizenship, residency, domicile or nationality of any Plaintiff or decedent. The parties further agree that the Court shall instruct the jury accordingly pursuant to Illinois law, and as to each Plaintiff's wrongful death and survival damages, shall specifically instruct the jury pursuant to Chapters 30 and 31 of the Illinois Pattern Jury Instructions. Further, the parties agree that the verdict form will be in accordance with Chapter 45 of the Illinois Pattern Jury Instructions. Plaintiffs understand and agree that, by stipulating to the application to Illinois law, they are waiving any right to recover punitive damages from Boeing stemming from the Ethiopian Airlines Flight 302 accident.

2. Pursuant to the Illinois Wrongful Death Act, at 740 ILCS 180/2(a), wrongful death damages are to be distributed to the decedent's "surviving spouses and next of kin." The parties have stipulated and agreed that "surviving spouses" shall be construed, without limitation, to include any domestic partners of the decedent legally recognized under the laws of the decedent's domicile. The parties have further stipulated and agreed that "next of kin" shall be construed to include all persons who would be recognized as beneficiaries of the decedent under the laws of Illinois and any parents who are or would be recognized as intestate heirs in the decedent's domicile. Appendix A to this Stipulation, the entirety of which (including the preamble) is incorporated by reference herein, contains the complete list of all cases where the Plaintiff(s) allege there may be parents who are not beneficiaries of the decedent under the laws of Illinois but who are or would be recognized as intestate heirs in the decedent's domicile and qualify as beneficiaries under the exception to Illinois law in this stipulation. It is understood and agreed that except in those cases listed on Appendix A, the "next of kin" shall mean only those persons who would be recognized as beneficiaries of the decedent under the laws of Illinois.

3. The parties stipulate and agree that in the event of any disputes under this Stipulation regarding distribution of damages, such disputes may be submitted by agreement of the parties for resolution by the appointed mediator, Hon. Donald P. O'Connell, (Ret.).[2]

[2] Nothing in this agreement is intended to foreclose or govern how plaintiffs distribute settlement or judgment proceeds paid by Boeing.

C. **Confidentiality:**

1. The existence of this stipulation and all of its terms are to remain strictly confidential at all times, until it is filed with the Court or otherwise specifically waived by the parties. Accordingly, upon receipt, the parties and their undersigned attorneys accept and agree that they shall not disclose the terms or provisions of this stipulation to any person, other than the lawyers' agents or employees. In addition, Boeing may disclose the terms and provisions of this stipulation to its agents, employees, insurers and reinsurers, subject to their agreement to keep the terms and provisions confidential. The undersigned attorneys for all Plaintiffs further agree that their clients are bound to this confidentiality provision and shall not distribute or disseminate any information about this stipulation to anyone else. The parties shall specifically not disclose the terms and provisions of this stipulation to any other person with a claim or purported claim against Boeing related to the 737 Max. The terms and provisions of this stipulation shall specifically not be disclosed in the context of any legal proceeding except the instant proceeding, unless necessary to comply with applicable law or a court order. To the extent that disclosure of this stipulation may become legally required in the context of any other legal proceeding, such disclosure shall, to the extent legally permissible, be done under seal and under the maximum available confidentiality protections.

2. The parties stipulate that the above confidentiality provision is a material part of this stipulation. The parties further agree that any controversy or claim arising from an alleged or actual breach of confidentiality will be subject to binding arbitration before the Honorable Donald O'Connell, (Ret.), to determine an award of money damages. Any award rendered by the Arbitrator may be entered for judgment and collection in any court having jurisdiction thereof.

D. **Additional stipulations by the parties[3]:**

1. It is agreed and stipulated that venue in this action is proper in the Northern District of Illinois, that the Northern District of Illinois is a proper and convenient forum for this action, that no party will challenge the propriety of the Northern District of Illinois as a venue or forum for this action, and that the parties object to any change or transfer of forum. Accordingly, all cases that are not otherwise resolved by the time of trial will proceed before a jury in the Northern District of Illinois, consistent with the above stipulation.

2. Plaintiffs agree to release and waive all claims, including but not limited to any claim for punitive or exemplary damages, arising out of or related to the Ethiopian Airlines Flight

[3] These provisions are for the Court and not for the benefit of the jury.

302 accident, other than currently operative claims for compensatory damages as alleged in the Master Complaint.

3. Any trial in this matter between Boeing and any individual Plaintiff shall be limited to the issue of compensatory damages. The jury shall be instructed that Boeing admits liability for the Plaintiff's compensatory damages proximately caused by the Ethiopian Airlines Flight 302 accident, and the jury's role is limited to fixing the amount of money that will fairly and reasonably compensate the beneficiaries and the estate in accordance with Chapters 30 and 31 of the Illinois Pattern Jury Instructions, as well as Illinois Pattern Instructions 1.03B and 23.01B. The parties have agreed that they will jointly propose to the Court the use of Illinois Pattern Jury Instruction 1.03B as tendered in each damages trial: "The defendant, Boeing, has admitted that it produced an airplane that had an unsafe condition that was a proximate cause of Plaintiff's compensatory damages caused by the Ethiopian Airlines Flight 302 accident. Boeing does not blame any other person for the Ethiopian Airlines Flight 302 accident, nor will Boeing argue that anyone else is responsible for Plaintiff's damages, in this trial. There are other issues you will need to decide in this case." The parties have agreed that they will jointly propose to the Court the use of Illinois Pattern Jury Instruction 23.01B as tendered in each damages trial: "Boeing admits that it produced an airplane that had an unsafe condition that was a proximate cause of Plaintiff's compensatory damages caused by the Ethiopian Airlines Flight 302 accident. Boeing does not blame any other person for the Ethiopian Airlines Flight 302 accident, nor will Boeing argue that anyone else is responsible for Plaintiff's damages, in this trial. You need only decide what amount of money will reasonably and fairly compensate Plaintiff for those damages." Except as specifically provided herein, the jury shall not hear evidence on issues of liability. The parties further agree that no evidence or argument about punitive damages will properly be the subject of discovery or be admitted in any compensatory-damages-only trial in this consolidated action between Boeing and any individual Plaintiff.

4. It is agreed and stipulated that the parties will be permitted to introduce all relevant and admissible evidence at trial regarding the decedents and their beneficiaries' alleged compensatory damages. This may include evidence of economic and non-economic damages for the beneficiaries, as well as the pre-impact, pre-death pain and suffering and emotional distress of the decedent as permitted under Illinois law. The parties agree that damages discovery will continue after this stipulation is executed and entered. The parties will have a right to discovery, including discovery propounded on third parties, regarding issues relevant to wrongful death damages and survival damages. The parties are in no way giving up the right to discovery related to compensatory damages. It is understood that the Plaintiffs intend to present an animation of the accident flight, with both interior and exterior views, to the jury. This animation may include, but need not be limited to, Flight Data Recorder data and any animation produced by Boeing. Boeing agrees it will not object under Federal Rule of Evidence 901 to the authenticity of the Flight Data Recorder data or any Cockpit Voice Recorder audio or any animation or simulation it produces.

5. The undersigned attorneys for all Plaintiffs are authorized to enter into this stipulation on behalf of all personal representatives for the estates of the decedents and all Plaintiffs who have brought a case consolidated into this litigation under docket no. 19-cv-2170 to recover wrongful death and/or survival damages sustained as a result of the Ethiopian Airlines Flight 302 accident on March 10, 2019.[4]

[4] The Estate of Samya Stumo and the Estate of Jared Babu currently abstain from agreement or objection to this stipulation at the time of execution, but the position of either or both estates may be revisited at a later date.

PLAINTIFFS

Robert A. Clifford
rac@cliffordlaw.com
Kevin P. Durkin
kpd@cliffordlaw.com
Tracy A. Brammeier
tab@cliffordlaw.com
John V. Kalantzis
jvk@cliffordlaw.com
CLIFFORD LAW OFFICES, P.C.
120 N. LaSalle Street Suite 3600
Chicago, Illinois 60602
(312) 899-9090

Steven C. Marks
smarks@podhurst.com
Ricardo M. Martinez-Cid
rmartinez-cid@podhurst.com
Kristina M. Infante
kinfante@podhurst.com
Pablo Rojas
projas@podhurst.com
PODHURST ORSECK, P.A.
SunTrust International Center, Suite 2300
One S.E. Third Avenue
Miami, Florida 33131

Justin T. Green
jgreen@kreindler.com
Anthony Tarricone
atarricone@kreindler.com
Brian J. Alexander
balexander@kreindler.com
Daniel O. Rose
drose@kreindler.com
Megan W. Benett
mbenett@kreindler.com
Andrew J. Maloney III
amaloney@kreindler.com

DEFENDANTS

By: Dan Webb

One of its Attorneys

Dan K. Webb
dwebb@winston.com
Christopher B. Essig
cessig@winston.com
Julia Mano Johnson
jmjohnson@winston.com
WINSTON & STRAWN LLP
35 W. Wacker Dr.
Chicago, Illinois 60601
(312) 588-5600

Mack H. Shultz, Jr.
MShultz@perkinscoie.com
Bruce D. Campbell
BCampbell@perkinscoie.com
Michael Scoville
MScoville@perkinscoie.com
Christopher M. Ledford
CLedford@perkinscoie.com
PERKINS COIE LLP 1201
Third Avenue Suite 4900
Seattle, Washington 98101-3099
206-359-8000

Jonathan R. Buck
jbuck@perkinscoie.com
Daniel T. Burley
dburley@perkinscoie.com
PERKINS COIE LLP
131 South Dearborn St. Suite 1700
Chicago, IL 60603
312-324-8400

Attorneys for The Boeing Company

Erin R. Applebaum
eapplebaum@kreindler.com
KREINDLER & KREINDLER LLP
485 Lexington Avenue, 28th Floor
New York, NY 10017

On behalf of all Plaintiffs

By:_____
David I. Katzman
dkatzman@klm-law.com
Katzman, Lampert & Stoll
950 West University Drive
#101
Rochester, Michigan 48307

Attorney for Plaintiffs Mohammed Omer Cherchir and Anthony P. Janik

EXHIBIT B

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JOSE L. VIVAS; JOSHELYN VIVAS, a Minor, By her father and next friend, JOSE L. VIVAS; JACQUELYN VIVAS, a Minor by her father and next friend, JOSE L. VIVAS; JHARLENE VIVAS, a Minor, by her father and next friend, JOSE L. VIVAS; GABRIEL VIVAS; and DIANA VIVAS,	)	No. 06 L 005613
	)	Consolidated with:
	)	No. 06 L 005614
	)	No. 06 L 005643
	)	No. 06 L 008545
Plaintiffs,	)	No. 06 L 008890
	)	No. 06 L 012809
v.	)	No. 06 L 012811
	)	No. 06 L 012812
THE BOEING COMPANY, a corporation; TRANSPORTES AEROS NACIONAL DE SELVA, S.A., a sociedad anonima; and UNITED TECHNOLOGIES CORPORATION, A corporation, individually and doing business as PRATT & WHITNEY	)	No. 07 L 007016
	)	No. 07 L 008745
	)	No. 07 L 008889
	)	No. 07 L 008890
	)	No. 07 L 008891
	)	No. 07 L 008905
	)	No. 07 L 008907
Defendants.	)	No. 07 L 008909

ORDER

This matter coming before the court on Defendants', THE BOEING COMPANY and UNITED TECHNOLOGIES CORPORATION, Motion to Dismiss on the basis of *forum non conveniens*, the court having considered the written submissions and oral arguments of the parties, **HEREBY FINDS AS FOLLOWS:**

I. **Procedural Posture**

This case arose when a commuter airplane crashed while approaching an airport in Pucallpa, Peru. Numerous wrongful death and survival actions alleging negligence and products liability were filed in Cook County, Illinois. Currently, sixteen actions remain pending against The Boeing Company ("Boeing") and United Technologies Corporation ("UTC"). The

Defendants brought this joint motion to dismiss and assert that Peru is a more convenient forum to litigate these issues.

II. Defendants' *forum non conveniens* motions are timely.

Plaintiffs in the *Rengifo* and *Rojas de Moral* actions assert that Defendants' *forum non conveniens* motions are untimely. Supreme Court Rule 187(a) states that the time for filing a motion to dismiss or transfer the action under the doctrine of *forum non conveniens* is no later than 90 days after the last day allowed for the filing of that party's answer. Ill. Sup. Ct. R. 187 (West 2008). In the present case, the *Rengifo* and *Rojas de Moral* actions were removed to federal court prior to the running of 90-day limitation. There is no time limitation to filing a *forum non conveniens* motion in federal court. Thus, the 90-day limitation did not begin to run until both cases were remanded back to state court. Defendants' *forum non conveniens* motions were filed within 90-days after the remand. Therefore, this court finds that Defendants' motions in the *Rengifo* and *Rojas de Moral* actions were timely.

III. Peru is an adequate forum.

At the outset of a *forum non conveniens* motion, the court must consider whether there is another adequate alternative forum that can resolve a plaintiff's claims. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). Generally, another forum is adequate if the defendant is amenable to process in the alternative forum. *Piper Aircraft Co.*, 454 U.S. at 255. However, an alternative forum can be inadequate if the application of foreign law would deny the plaintiff a remedy or treat the plaintiff unfairly. *Philips Elecs. N.V. v. New Hampshire Ins. Co.*, 312 Ill. App. 3d 1070, 1085 (1st Dist. 2000). Still, an alternative forum may be considered adequate even if not all of the same remedies are available. *Piper Aircraft Co.*, 454 U.S. at 254-55.

In the present case, the court finds that Peru is an adequate alternative forum. Plaintiffs contend that Peru is not an adequate alternative forum because: (1) a Peruvian court may decline jurisdiction over a re-filed action; (2) Plaintiff's claims may be barred by Peru's two-year statute of limitations; (3) Peruvian laws do not provide for pre-trial discovery; and (4) the Peruvian judicial system does not provide for jury trials and is slow and corrupt. However, Defendants have agreed to consent to jurisdiction in Peru, and Defendants have agreed to waive any statute of limitation issues should they arise. Additionally, any procedural differences, such as the inability to commence pre-trial discovery or the inability hold a jury trial, cannot be given much weight. A lack of pre-trial discovery and the inability to hold jury trials are common procedural difference throughout various judicial forums. And, giving undue weight to these factors would make an American forum more attractive to foreign litigants. *See Id.* at 252. Thus, the differences between Illinois and Peruvian law do not completely deprive the Plaintiffs of a remedy. Finally, there is no real evidence that Plaintiffs would be treated unfairly by a Peruvian court. The public's dislike for the judicial system is not objective evidence of corruption.

Therefore, this court finds that Peru is an adequate alternative forum. The court must next consider the plaintiff's choice of forum and then weigh both private and public interest factors to determine the most appropriate forum.

IV. Plaintiffs' choice of forum deserves less deference in this case given the facts.

Before, weighing the private and public interest factors, the court must determine how much deference should be given to plaintiff's choice of forum. *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d (1st Dist. 2005). While deference is typically accorded to a plaintiff's choice of forum, such deference is given less significance when the plaintiff is foreign to the chosen forum. *See, e.g., First National Bank v. Guerine*, 198 Ill.2d 511, 517 (2002); *Griffith v.*

Mitsubishi Aircraft International, Inc., 136 Ill.2d 101, 106 (1990). Still, the court must keep in mind that *less* deference is not the same as *no* deference. *Ellis*, 357 Ill. App. 3d at 742, *citing Dawdy*, 207 Ill.2d at 174. Therefore, "the defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and another forum is more convenient to all parties." *Id.*

In the present action, the injuries occurred in Peru and none of the decedents were United States citizens or Cook County residents. Six of the personal injury Plaintiffs are United States citizens; however, they are all residents of New York. Given that none of the Plaintiffs are Illinois residents, the court will give less deference to the Plaintiffs' chosen forum.

V. Despite giving less deference to Plaintiffs' choice, the facts of this case illustrate that the private and public interests factors do not favor dismissal for *forum non conveniens*.

The relevant private interest factors include: the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive. *Dawdy v. Union Pacific Railroad Co.*, 207 Ill.2d 167, 172-73 (2003).

The relevant public interest factors include the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; and the interest in having local controversies decided locally. *Id.* In essence, the ultimate test turns on "whether the relevant factors, viewed in their totality, strongly favor transfer to the forum suggested by defendant." *Id.* at 176.

Turning to the private interest factors, the relevant facts include that both of the Defendants in this case are United States corporations. One of the Defendants, Boeing, is

headquartered in Cook County, Illinois. Potential trial witnesses and sources of proof are scattered throughout Washington, Connecticut, Washington D.C., and Peru. The accident site is in Peru. Finally, Plaintiffs' and Defendants' counsel have offices in Cook County, Illinois.

Defendants' main contention is that an Illinois court cannot compel the production of Peruvian witnesses, documents, or records. However, the same is true of the United States if this case was heard in Peru. What is more, when potential trial witnesses are scattered among various states and countries, no single forum can be more convenient than another. Defendants have not submitted any affidavits asserting that a trial in Cook County is inconvenient for any of the witnesses. The court also recognizes that this is a products liability case and the documents relating to the design and manufacturing of the plane and the engine are in the United States. Finally, in a products liability case, the site of the accident is less important because, "there is a more general interest in resolving a claim concerning an allegedly defective product and jury views of the accident site are generally unnecessary." *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 886 (1st Dist. 2008). For these reasons, the court finds that the private interest factors do not weigh strongly in favor of dismissal.

Turning to the public interest factors, the relevant facts include that the accident occurred in Peru, involved numerous Peruvian citizens, and was investigated by Peruvian authorities. However, Boeing is an Illinois corporation, is headquartered in Cook County, and does business in Illinois. Additionally, Defendant UTC does business in Illinois and has its registered agent in Cook County, Illinois.

Again, the court is reminded that in a products liability case the site of the accident is less important. And, while conducting business in a particular forum is more relevant when considering issues of venue rather than *forum non conveniens*, Illinois residents have an interest

in resolving a matter when an Illinois corporation, like Boeing, who takes advantage of Illinois law, is involved in the litigation. Finally, court congestion is only one factor to consider, and Defendants have not shown that a Peruvian trial would take place more quickly than a trial in Cook County. Therefore, Defendants have not shown that the public interest factors strongly favor dismissal.

Accordingly, in applying the above factors to the case at bar, the balance of the private and public interest factors do not strongly favor dismissal and the Plaintiffs' choice of forum should not be disturbed.

IT IS HEREBY ORDERED:

Defendants' Motion to Dismiss on the basis of *forum non conveniens* is denied.

JUDGE WILLIAM D. MADDUX

ENTERED
JUDGE WILLIAM D. MADDUX-1669
SEP 06 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

YAVUZ ARIK, Special Administrator, et al.,	)	
	)	No. 08 L 012539
Plaintiffs,	)	
	)	Consolidated with:
	)	No. 08 L 012599
v.	)	No. 08 L 013207
	)	No. 08 L 012604
	)	No. 08 L 012625
THE BOEING COMPANY, et al.	)	No. 08 L 013147
	)	No. 08 L 013260
Defendants.	)	No. 09 L 006016
	)	

ORDER

This matter coming before the court on Defendants', THE BOEING COMPANY, et al., Motion to Dismiss on the basis of *forum non conveniens*, the court having considered the written submissions and oral arguments of the parties, **HEREBY FINDS AS FOLLOWS:**

I. Procedural Posture

This case arose when a commuter airplane crashed into mountainous terrain while approaching an airport in Isparta, Turkey. Plaintiffs are representatives of thirty-two of the fifty-seven individuals who died in the crash. Plaintiffs brought claims for product liability, wrongful death, and negligence in Cook County, Illinois. The Defendants brought this motion to dismiss and assert that Turkey, or alternatively, the State of Washington, is a more convenient forum to litigate these issues.

II. Turkey is an adequate forum.

At the outset of a *forum non conveniens* motion, the court must consider whether there is another adequate alternative forum that can resolve a plaintiff's claims. *Piper Aircraft Co. v.*

Reyno, 454 U.S. 235, 255 (1981). Generally, another forum is adequate if the defendant is amenable to process in the alternative forum. *Piper Aircraft Co.*, 454 U.S. at 255. However, an alternative forum can be inadequate if the application of foreign law would deny the plaintiff a remedy or treat the plaintiff unfairly. *Philips Elecs. N.V. v. New Hampshire Ins. Co.*, 312 Ill. App. 3d 1070, 1085 (1st Dist. 2000). Still, an alternative forum may be considered adequate even if not all of the same remedies are available. *Piper Aircraft Co.*, 454 U.S. at 254-55.

In the present case, the court finds that Turkey is an adequate alternative forum. Plaintiffs contend that Turkey is not an adequate alternative forum because: (1) a Turkish court may decline jurisdiction over these defendants; (2) Plaintiffs' claims may be barred by Turkey's statute of limitations; (3) Turkish law does not provide for pre-trial discovery; and (4) Turkey's requirement that a claimant pay a court fee of 5.4% of the amount of the substantive claim, one-fourth of which must be paid prior to filing suit, imposes a significant barrier on the Plaintiffs. However, Defendants have agreed to consent to jurisdiction in Turkey and accept service of process there, which establishes availability. Additionally, any procedural differences, such as the inability to conduct pre-trial discovery should not be given much weight. *See id.* at 252 (explaining strict liability remains primarily an American innovation, jury trials are almost always available in an American forum, while they may not be available in a foreign civil law forum, and discovery is more extensive in American than in foreign courts). Thus, giving undue weight to a lack of pre-trial discovery would make an American forum more attractive to foreign litigants. Accordingly, the differences between Illinois and Turkish law do not completely deprive the Plaintiffs of a remedy.

Therefore, this court finds that Turkey is an adequate alternative forum. The court must next consider the Plaintiffs' choice of forum and then weigh both private and public interest factors to determine the most appropriate forum.

III. Plaintiffs' choice of forum deserves less deference in this case given the facts.

Before weighing the relevant private and public interest factors, the court must determine how much deference should be given to plaintiff's choice of forum. *Langenhorst v. Norfolk Southern Ry. Co.*, 219 Ill. 2d 430, 448 (2006). A plaintiff's choice of forum is typically a "substantial" factor in deciding a *forum non conveniens* motion. *Dawdy v. Union Pacific Ry.*, 207 Ill. 2d 167, 172 (2003); *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill.2d 101, 106 (1990). However, such deference is given less significance when the plaintiff is not a resident of the chosen forum. *See, e.g., Dawdy*, 207 Ill. 2d at 173-176; *First National Bank v. Guerine*, 198 Ill.2d 511, 517 (2002); *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill.2d 101, 106 (1990). Therefore, "the defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and another forum is more convenient to all parties." *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d 723, 742 (1st Dist. 2005), *citing Dawdy*, 207 Ill.2d at 174. Still, the court must keep in mind that *less* deference is not the same as *no* deference. *Id.*

In the present action, the accident occurred in Turkey. Thirty-one of the thirty-two decedents represented in this action were Turkish citizens and residents of Turkey. One decedent was a dual Turkish/U.S. citizen but resided in Turkey at the time of the accident and one decedent was a citizen and resident of Austria.

Only one of the Plaintiffs is a United States citizen; however several are United States residents. Yavuz Arik is a citizen and resident of the United States, presently residing in Maryland. Tolga Tezcan is a citizen of Turkey but is currently a resident in Chicago, Illinois.

Vedat Yasar Kurnaz is a citizen and resident of Austria. The overwhelming majority of the plaintiffs reside in Turkey. Given that only one of the plaintiffs resides in Illinois, the court will give less deference to the Plaintiffs' chosen forum.

IV. Despite giving less deference to Plaintiffs' choice, the facts of this case illustrate that the private and public interests factors do not favor dismissal for *forum non conveniens*.

The relevant private interest factors include: the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive. *Dawdy v. Union Pacific Railroad Co.*, 207 Ill.2d 167, 172-73 (2003).

The relevant public interest factors include the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; and the interest in having local controversies decided locally. *Id.* In essence, the ultimate test turns on "whether the relevant factors, viewed in their totality, strongly favor transfer to the forum suggested by defendant." *Id.* at 176.

Turning to the private interest factors, the relevant facts include that all of the Defendants in this case are United States corporations. Two of the Defendants, Boeing and McDonnell Douglas, are headquartered in Cook County, Illinois. Honeywell International Inc., the manufacturer of the Enhanced Ground Proximity Warning System at issue in this case, is a Delaware corporation with its headquarters in New Jersey and does business in Illinois and maintains a registered agent for service of process in Illinois. Potential trial witnesses and

evidence in this case are scattered throughout different countries, including the United States, Turkey, the United Kingdom, and Austria and throughout different states, including Washington, Arizona, Maryland, New York, and Florida. The accident site is in Turkey. Finally, Plaintiffs' and Defendants' counsel have offices in Cook County, Illinois.

Defendants' argue that an Illinois court cannot compel the production of Turkish witnesses, documents, or records. However, the same is true of the United States if this case was heard in Turkey. While Defendants have agreed to produce all of the relevant U.S. product witnesses and documents in Turkey, there may be other documentation and witnesses outside of Defendants' control which Plaintiffs' would not be able to access in a Turkish court. What is more, when potential trial witnesses are scattered among various states and countries, no single forum can be more convenient than another. *See Dawdy*, 207 Ill.2d at 183-84; *Guerine*, 198 Ill.2d at 526. Defendants have not submitted any affidavits asserting that a trial in Cook County is inconvenient for any of the witnesses or that Turkey or Washington is more convenient. The court also recognizes that this is a products liability case and the documents relating to the design and manufacturing of the Enhanced Ground Proximity Warning System is in the United States. Finally, in a products liability case, the site of the accident is less important because, "there is a more general interest in resolving a claim concerning an allegedly defective product and jury views of the accident site are generally unnecessary." *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 886 (1st Dist. 2008). For these reasons, the court finds that the private interest factors do not weigh strongly in favor of dismissal.

Turning to the public interest factors, the relevant facts include that the accident occurred in Turkey, involved all Turkish citizens and one dual Turkish/U.S. citizen, and was investigated by Turkish authorities. However, Boeing and McDonnell Douglas are headquartered in Cook

County and do business in Illinois. Additionally, Honeywell International does business in Illinois and has a registered agent in Illinois.

Again, the court is reminded that in a products liability case the site of the accident is less important. And, while conducting business in a particular forum is more relevant when considering issues of venue rather than *forum non conveniens*, Illinois residents have an interest in resolving a matter when Illinois corporations, like Boeing and McDonnell Douglas, who take advantage of Illinois law, are involved in the litigation. Finally, court congestion is only one factor to consider, and Defendants have not shown that a Turkish trial would take place more quickly than a trial in Cook County. Therefore, Defendants have not shown that the public interest factors strongly favor dismissal.

Accordingly, in applying the above factors to the case at bar, the balance of the private and public interest factors do not strongly favor dismissal to Turkey and the Plaintiffs' choice of forum should not be disturbed.

V. While the State of Washington is an adequate forum, the private and public interest factors do not favor dismissal for *forum non conveniens*.

Plaintiffs contend that the relevant private and public interest factors do not favor dismissal to the State of Washington; however, they have made little, if any, effort to establish that the State of Washington would not be an adequate alternative forum. Accordingly, the court finds the Defendants' offer, as a condition of dismissal, to consent to jurisdiction in Washington sufficiently establishes Defendants' availability in the State of Washington and that the State of Washington would be an adequate forum.

Considering the private and public interest factors, the court finds that they do not weigh strongly in favor of dismissal. Of the private interest factors, Defendants argue that the majority

of documents and witnesses related to the design and manufacture of the Enhanced Ground Proximity Warning System are in or near Washington and also that Washington is more proximately located to California, where McDonnell Douglas designed and manufactured the subject aircraft. However, as stated above, trial witnesses and evidence are scattered throughout different states. Thus, no single forum can be more convenient than another. Similarly, the court does not find the proximity of California to Washington to be a significant factor in this age of telecommunications. Of the public interest factors, Defendants argue that Washington is a more expeditious jurisdiction. However, court congestion is but one factor to consider and can be overcome by strict adherence to a case management order. For these reasons, the private and public interest factors do not weigh in favor of dismissal to the State of Washington.

IT IS HEREBY ORDERED:

Defendants' Motion to Dismiss on the basis of *forum non conveniens* is denied.

JUDGE WILLIAM D. MADDUX

ENTERED
JUDGE WILLIAM D. MADDUX-1559
FEB 18 2010
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

38

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Rani Wadea, et. al, Plaintiffs, v. The Boeing Company, a corporation, Defendant.	No. 18 L 12631 Calendar B Judge Daniel T. Gillespie

ORDER

This matter is before the court on Defendant The Boeing Company's motion to dismiss for *forum non conveniens*. The court must deny Boeing's motion to dismiss because Boeing has not shown that the relevant private and public interest factors "strongly favor" transfer.

I.

The courts of England and Wales are an available and adequate alternative forum.

An alternative forum is generally adequate "when the defendant is amenable to process in the other jurisdiction." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). The adequacy of an alternative forum does not depend upon the availability of the same remedies, but rather upon whether plaintiff will be deprived of a remedy or treated unfairly. *Id.*

Here, the declaration of John Ross, Q.C. establishes that the courts of England and Wales are an available and adequate alternative forum for Plaintiffs to bring their claims against Boeing.

The courts of England and Wales are an available and adequate alternative forum.

II.

The court accords Plaintiffs' choice of forum less deference.

A plaintiff usually has a substantial interest in choosing the forum, however, the plaintiff's interest in choosing the forum receives somewhat less deference when neither the plaintiff's residence nor the site of the accident or injury is located in the

chosen forum. *First Nat'l Bank v. Guerine*, 198 Ill. 2d 511, 517 (2002). Illinois courts have noted that less deference is not the same as no deference. *Elling v. State Farm Mut. Auto. Ins. Co.*, 291 Ill. App. 3d 311, 318 (1997).

Here, none of the Plaintiffs reside in Cook County. The accident did not occur in Cook County. None of the Plaintiffs' sustained injuries in Cook County. As such, the court affords Plaintiffs' choice of forum somewhat less deference in this lawsuit.

For the foregoing reasons, the court accords Plaintiffs' choice of forum less deference.

III.

"A *forum non conveniens* motion causes a court to look beyond the criteria of venue when it considers the relative convenience of a forum." *Dawdy v. Union Pacific R.R.*, 207 Ill. 2d 167, 182 (2003). "An integral part of the *forum non conveniens* analysis is fairness to the litigants and convenience to those that will be called to testify at trial." *Id.* at 184. Focusing on the notions of fairness and convenience, Illinois courts must balance the private and public interests in determining the appropriate forum in which the case should be tried. *Id.* at 172.

IV.

The private interest factors do not strongly favor transfer.

The private interest factors are (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary and real evidence; (3) the availability of compulsory process to secure attendance of unwilling witnesses; (4) the cost to obtain attendance of willing witnesses; (5) the possibility of viewing the premises, if appropriate; and (6) all other practical considerations that make a trial easy, expeditious, and inexpensive. *Id.* at 172.

The first private interest factor, the convenience of the parties, is neutral. The court presumes that Cook County is a convenient venue for Plaintiffs because that is where they filed suit. However, all of the Plaintiffs live in Northern Ireland or England. Moreover, all of the potential independent eyewitnesses and damage witnesses reside in Egypt, England or Northern Ireland. However, Boeing has its corporate headquarters in Cook County, Illinois. It would be all but incongruous for Boeing to argue that its own home county is inconvenient. *Kwasniewski v. Schaid*, 153 Ill. 2d 550, 555 (1992). Additionally, the affidavit of Boeing's Director of Product Safety fails to state that Cook County would be an inconvenient forum for himself or any other potential Boeing witnesses.

The second private interest factor, the relative ease of sources of testimonial, documentary, and real evidence, is neutral. The many potential trial witnesses are scattered across Northern Ireland, England, Egypt and the United States. As was discussed earlier, (i) the court presumes that Cook County is a convenient forum for the Plaintiffs because they filed suit here and (ii) Boeing's motion is void of affidavits establishing that a trial in Cook County would inconvenience their witnesses. As a result, Boeing's contention that a Cook County trial would inconvenience their witnesses is speculative. "While a trial court is within its discretion to consider the inconvenience of witnesses without affidavits from each witness, the possibility of inconvenience wanes ... and the burden remains, at all times, on the defendant to provide proof showing that the requested transfer is strongly favored." *Johnson v. Nash*, 2019 IL App (1st) 180840, ¶ 50 (internal citations omitted).

Regarding the location of documents, the documents are portable. Finally, the location of real evidence is neutral.

The third private interest factor, the availability of compulsory process, is neutral. Although most of the potential witnesses reside in Northern Ireland, England or Egypt and are thus not subject to the subpoena power of any Illinois court, it is unlikely an Illinois court will have to compel any of the 26 Plaintiffs to testify in the event this lawsuit goes to trial. Moreover, Boeing and its potential trial witnesses are subject to the subpoena power of Illinois courts.

The fourth private interest factor, the cost of obtaining the attendance of willing witnesses, is neutral. Although most of the potential trial witnesses reside in Northern Ireland and England, they – not Boeing – will bear the cost of travelling to Cook County for a jury trial.

The fifth private interest factor, the possibility of viewing the aircraft, is neutral. It is unlikely a jury's viewing of the aircraft would illuminate any of the issues of this case because this lawsuit alleges that Boeing is liable to Plaintiffs' for manufacturing a defective Environmental Control System. To hold Boeing liable, a jury would need to hear the testimony of expert witnesses rather than viewing the air-conditioning circuitry of the aircraft.

The sixth private interest factor – other practical considerations that would make trial easy, expeditious, and less expensive – is neutral.

The private interest factors do not strongly favor transfer.

V.

The public interest factors do not strongly favor transfer.

The public interest factors include (1) the interest in deciding localized controversies locally; (2) the unfairness of imposing the expense of trial and the burden of jury duty on residents of a county with little connection to the litigation; and (3) administrative difficulties presented by adding further litigation to the court docket in an already congested forum. *Dawdy* at 173. The need to apply the law of a foreign forum is also a significant public interest factor for interstate *forum non conveniens* motions. *Gridley v. State Farm Mut. Auto. Ins. Co.*, 217 Ill. 2d 158, 175 (2005).

The first public interest factor, the interest in having local matters decided locally, favors trial in Cook County. The residents of Cook County have an interest in deciding this controversy because Boeing has its principal place of business here.

The second public interest factor, the fairness of imposing the expense of trial and the burden of jury duty on a county with little connection to the litigation, is neutral. Because Cook County has a strong connection to this litigation, this factor is not relevant as Cook County does not have only a "little connection" to this litigation.

The third public interest factor – docket congestion – slightly favors transferring this lawsuit to the courts of England and Wales. The amount of time from filing to verdict in jury cases is a relevant statistic for the court to consider. In 2017, the most recent year in which statistics were available, the average delay in Cook County was 32.2 months. In the courts of England and Wales, the average delay is 30 months according to John Ross, Q.C. Because the amount of time between jurisdictions in nominal and John Ross' resolution statistic does not consider jury verdicts in excess of $50,000 USD, this factor carries little weight.

The public interest factors do not strongly favor transfer.

VI.

The burden is on the defendant to show that the relevant private and public interest factors "strongly favor" the defendant's choice of forum to warrant disturbing plaintiff's choice. *Langenhorst v. Norfolk Souther Ry*, 219 Ill. 2d 430, 444 (2006) (internal citation omitted). The private interest factors are not weighed against the public interest factors; rather, the trial court must evaluate the total circumstances of the case in determining whether the defendants have proven that the balance of factors strongly favors transfer. *Id.* (internal citation omitted). The defendants must show that the plaintiff's chosen forum is inconvenient to the defendants and that another forum is more convenient to all parties. *Id.* However, the defendants cannot assert that the plaintiff's chosen forum is inconvenient to the plaintiff. *Id.* Unless the balance of factors strongly favors the defendants' choice of

forum, the plaintiff's choice of forum should rarely be disturbed. *Id.* (internal citation omitted).

Boeing has not met its burden because it has not shown that the relevant private and public interest factors "strongly favor" transfer of this case to the courts of England and Wales.

For the foregoing reasons, IT IS HEREBY ORDERED:

1. The *forum non conveniens* motion is denied. 5007

2. The case is entered and continued for completion of written discovery on _____ at _____ AM.

Associate Judge
Daniel T. Gillespie

ENTERED
NOV 22 2019
Circuit Court 1507

Judge Daniel T. Gillespie No. 1507

2019 IL App (1st) 181380-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).
Appellate Court of Illinois, First District,
SIXTH DIVISION.

Tracy REICHANBACH, Personal Representative of the Heirs of Fabian Reichenbach, Deceased, Plaintiff-Appellee,
v.
HONEYWELL INTERNATIONAL, INC., a Corporation; Friedrich Christian Flick; and Heico Ohmite LLC, a Limited Liability Company, Defendants
(Heico Ohmite LLC, a Limited Liability Company, Defendant-Appellant).

No. 1-18-1380
|
MARCH 22, 2019

Synopsis
Background: Airplane passenger's wife, a resident of Switzerland, brought product liability action against manufacturer of part incorporated into airplane's autopilot, which allegedly failed and caused fatal airplane crash in France. The Circuit Court, Cook County, No. 16 L 11995, Kathy M. Flanagan, J., denied manufacturer's motion to dismiss or transfer on the grounds of forum non conveniens. Manufacturer's petition for leave to file an interlocutory appeal was granted.

The Appellate Court, Cunningham, J., held that the Circuit Court was not required to grant manufacturer's motion to transfer case to adjacent county.

Affirmed.

Procedural Posture(s): Interlocutory Appeal; Motion to Dismiss for Forum Non Conveniens.

Appeal from the Circuit Court of Cook County. No. 16 L 11995. Honorable Kathy M. Flanagan, Judge Presiding.

ORDER

JUSTICE CUNNINGHAM delivered the judgment of the court.

*1 ¶ 1 *Held*: The trial court did not abuse its discretion in denying the defendant's *forum non conveniens* motion to transfer the lawsuit to DuPage County.

¶ 2 The defendant-appellant, Heico Ohmite LLC, appeals from the judgment of the circuit court of Cook County denying its

motion to dismiss or transfer based upon the doctrine of *forum non conveniens*. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 The plaintiff-appellee, Tracy Reichenbach, personal representative of the heirs of Fabian Reichenbach, deceased, is a resident of Switzerland. She initiated this matter after her husband was killed in a plane crash that occurred in France on August 24, 2012. Her husband was flying back to Switzerland on a chartered flight following a business trip in Belgium. The plane encountered severe weather, and ultimately crashed near Solemont, France. All four people on board were killed.

¶ 5 The plaintiff filed an amended complaint against the defendant in the circuit court of Cook County.[1] The complaint alleged that the plane's autopilot, which was designed and assembled by Honeywell, failed during the severe weather and caused the plane to crash. The complaint alleged that the defendant designed, manufactured, and sold to Honeywell, the resistors (define in a footnote) that were incorporated into the autopilot installed on the plane. The complaint further alleged that the resistors were defective and unreasonably dangerous at the time they left the defendant's control.

¶ 6 The defendant filed a motion to dismiss the amended complaint on the grounds of *forum non conveniens*[2] pursuant to Supreme Court Rule 187 (eff. Jan. 1, 2018) (hereinafter, the *forum non conveniens* motion). In its *forum non conveniens* motion, the defendant argued that the lawsuit lacks any connection to Illinois, other than the fact that the defendant's headquarters are located in DuPage County, Illinois. The defendant urged that Switzerland is the jurisdiction with the most connections to the lawsuit and has the greatest interest in the outcome. The defendant alternatively argued that, should the lawsuit remain in Illinois, it should be transferred to DuPage County, where the defendant's headquarters are located, because Cook County has "absolutely no connection" to the lawsuit.

¶ 7 The plaintiff's response to the *forum non conveniens* motion argued that Illinois has a sufficient connection to the lawsuit, primarily because the defendant manufactured the resistors at issue in Illinois. The plaintiff's response did not specifically address the defendant's alternative argument that the lawsuit should be transferred from Cook County to DuPage County. However, the plaintiff did attach a copy of the defendant's registration with the Illinois Secretary of State for the year 2017, which identified Cook County as the location of the defendant's principal office.

*2 ¶ 8 The defendant filed a reply memorandum in support of its *forum non conveniens* motion. The reply memorandum attached an affidavit from its president, which stated that the defendant's headquarters are located in DuPage County, not Cook County.

¶ 9 The trial court then entered an order denying the defendant's *forum non conveniens* motion in its entirety. The trial court's analysis focused primarily on the defendant's claim that Switzerland is the more proper forum. The trial court's order weighed the factors relevant to a *forum non conveniens* analysis. The court found that "[w]hile both Illinois and Switzerland have a significant interest in this matter, it cannot be said that Switzerland has a significantly greater interest." The court noted that the plaintiff is not a resident of Cook County, and neither was her deceased husband, and so her choice of forum is entitled to less deference. Yet, the court acknowledged that "*less* deference does not equate with *no* deference, and a plaintiff's choice of forum must prevail if there is not a sustaining of the burden of proof by the moving party that a balancing of the factors weigh *strongly* in favor of the suggested forum." (Emphasis in original.) The court found that the defendant failed to meet its burden of demonstrating that the relevant factors, when viewed in their totality, strongly favored Switzerland as the lawsuit's forum. The court then concluded: "Further, while the defendant has alternatively argued that the case should be transferred to DuPage County, it has not [met] its burden in showing that the factors strongly weigh in favor of the transfer to the adjacent county." This appeal followed.

¶ 10 ANALYSIS

¶ 11 Although the trial court's order denying the defendant's *forum non conveniens* motion was not a final order, we note that we have jurisdiction to review this matter as the defendant filed a timely petition seeking leave to file an interlocutory appeal pursuant to Supreme Court Rule 306(a)(2) (eff. Nov. 1, 2017), which this court granted. Ill. S.Ct. R. 306(c)(1) (eff. Nov. 1, 2017).

¶ 12 The defendant's brief presents a single issue: whether the trial court abused its discretion when it denied the defendant's *forum non conveniens* motion to transfer the lawsuit to DuPage County.[3] It asks us to reverse the trial court's judgment and transfer the lawsuit to DuPage County.

¶ 13 The defendant argues that the trial court failed to actually undertake any analysis on the issue of whether the lawsuit should be transferred to DuPage County, and instead only focused on whether the lawsuit should be transferred to Switzerland. The defendant claims that, had the court engaged in the proper *forum non conveniens* analysis, it would have transferred the lawsuit to DuPage County, where the defendant's headquarters are located. The defendant also claims that it does not have any corporate offices or facilities in Cook County, that the plaintiff does not live in Cook County, and that there is no other factual link or public interest factor connecting the lawsuit to Cook County.

¶ 14 The plaintiff counters that the trial court did in fact carefully consider all the *forum non conveniens* arguments in the defendant's motion. The plaintiff notes that the factors analyzed in the trial court's order apply equally to both interstate and intrastate *forum non conveniens*. The plaintiff argues that the trial court properly denied the defendant's *forum non conveniens* motion because the defendant could not meet its heavy burden of proof based solely on the fact that its headquarters are located in DuPage County. The plaintiff additionally claims that there is a sufficient connection between the lawsuit and Cook County because the defendant previously manufactured its resistors, possibly including the ones at issue in the lawsuit, in Cook County until it moved its manufacturing facility to Mexico in 2003. The plaintiff also points out that the defendant's corporate registration with the Illinois Secretary of State lists its principal office in Cook County, which the defendant argues is an "administrative oversight."

*3 ¶ 15 If more than one potential forum for a lawsuit exists, the equitable doctrine of *forum non conveniens* may be invoked to determine the most appropriate forum based on fairness and convenience. *Quaid v. Baxter Healthcare Corp.*, 392 Ill. App. 3d 757, 765 (2009). This doctrine allows a trial court to decline jurisdiction when trial in another forum would better serve the ends of justice. *Benedict v. Abbott Labs., Inc.*, 2018 IL App (1st) 180377, ¶ 27. *Forum non conveniens* is applicable when the choice is between interstate forums, as well as when the choice is between intrastate forums. *Id.*

¶ 16 In resolving *forum non conveniens* questions, the trial court must balance private interest factors as well as public interest factors. *Quaid*, 392 Ill. App. 3d at 765–66. Private interest factors include: (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Id.* at 766. The public interest factors include: (1) the interest in deciding localized controversies locally; (2) the unfairness of imposing the expense of a trial and the burden of jury duty on residents of a county with little connection to the litigation; and (3) the administrative difficulties presented by adding further litigation to court dockets in already-congested forums. *Id.*

¶ 17 The trial court must evaluate the total circumstances and facts of the case in deciding whether the defendant has proven that the balance of factors strongly favors transfer. *Id.* A trial court has considerable discretion in ruling on a *forum non conveniens* motion, and its decision to grant or deny that motion will not be reversed absent an abuse of discretion. *Id.* at 765. An abuse of discretion will be found where no reasonable person would take the view adopted by the trial court. *Hale v. Odman*, 2018 IL App (1st) 180280, ¶ 25.

¶ 18 We are not persuaded by the defendant's argument that the trial court did not engage in a *forum non conveniens* analysis before declining the defendant's request to transfer the lawsuit to DuPage County. The trial court stated in its order: "while the defendant has alternatively argued that the case should be transferred to DuPage County, it has not [met] its burden in showing that the factors strongly weigh in favor of the transfer to the adjacent county." The fact that the trial court did not explicitly explain its reasoning does not suggest that the court failed to engage in a thorough analysis. A review of the trial court's order demonstrates that the trial court applied the analysis which the trial court used for Switzerland was also applicable to DuPage County. The trial court spelled out those factors relevant *forum non conveniens* factors in this case. Moreover, the trial court was not required to spell out its reasoning in detail, as trial courts are merely *encouraged* to leave a

better record of their *forum non conveniens* analyses. *First American Bank v. Guerine*, 198 Ill. 2d 511, 520 (2002).

¶ 19 Similarly, the defendant asserts that the trial court should have granted its *forum non conveniens* motion because the plaintiff did not explicitly oppose the defendant's alternative argument to transfer the lawsuit to DuPage County. We reject this argument. First, the plaintiff opposed the defendant's *forum non conveniens* motion in its entirety. And any event, it remained the defendant's burden to prove that the factors weighed strongly in favor of transferring the lawsuit to DuPage County from Cook County, the plaintiff's choice of forum. See *Benedict By & Through Benedict*, 2018 IL App (1st) 180377, ¶ 27 (the burden is always on *the movant* to show the need for a forum transfer).

*4 ¶ 20 When we balance the private factors in this case -- the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; and all other practical problems that make trial of a case easy, expeditious, and inexpensive -- we find that they do not strongly weigh in favor of transferring the lawsuit to DuPage County. As the lawsuit is just now entering the discovery stages, no witnesses or evidence have been identified. Considering that the defendant's current headquarters is located in DuPage County[2], there is a strong possibility that most of the witnesses will be traveling from DuPage County to Cook County for the trial. However, it is well-established that the inconvenience of traveling to an adjacent county is insufficient to overcome the deference given to the plaintiff's choice of forum. See *Dawdy v. Union Pacific R.R. Co.*, 207 Ill. 2d 167, 180 (2003) (trial in an adjacent county is conclusively not inconvenient for a defendant). This is especially true considering that the defendant's primary basis for transferring the case to DuPage County is the fact that most of its likely witnesses will have to travel to Cook County. Our supreme court has repeatedly recognized that no single *forum non conveniens* factor should be accorded central emphasis or conclusive effect. *Id.*

¶ 21 Additionally, the defendant argues that there is not a manufacturing site for the jury to visit in Cook County. Yet, there is not one in DuPage County, either. In fact, the defendant's manufacturing site is now located in Mexico. The defendant repeatedly argues that there is nothing connecting the lawsuit to Cook County. However the factors which defendant highlights as a closer nexus to DuPage County are illusory. In fact it is only the defendant's corporate headquarters which are located in DuPage County that defendant points to as the nexus which warrants transfer of the case to DuPage County. That is not sufficient.

¶ 22 Turning to the public factors in this case -- the interest in deciding localized controversies locally; the unfairness of imposing the expense of a trial and the burden of jury duty on residents of a county with little connection to the litigation; and the administrative difficulties presented by adding further litigation to court dockets in already-congested forums -- we also find that they do not strongly weigh in favor of transferring the lawsuit to DuPage County. While Cook County is undoubtedly more congested than DuPage County, the trial court noted that Cook County "is quite efficient at disposing of its great number of jury cases over $ 50,000." Moreover, the court congestion factor, by itself, is relatively insignificant. *Dawdy*, 207 Ill. 2d at 181. The defendant also argues that "the residents of DuPage County have a strong connection with an action involving a business headquartered in DuPage County and a significant interest in having this controversy decided locally." We reject this argument. The defendant used to manufacture its resistors, possibly including the ones at issue, in Cook County. And although the defendant claims it is an "administrative oversight," its 2017 corporate registration with the Illinois Secretary of State listed a Cook County address for its principal office. More importantly, this court has previously recognized that product liability actions, such as in the lawsuit at issue, are not "localized" cases as they have national and international implications. *Vivas v. Boeing Co.*, 392 Ill. App. 3d 644, 661 (2009). Residents of both Cook County and DuPage County are equally interested in the safety of equipment installed on the planes that fly in our skies.

¶ 23 We emphasize, as the trial court did, that while the plaintiff's choice of forum is entitled to *less* deference because the plaintiff is not a resident in Cook County, that does not equate to *no* deference. *Berry ex rel. Berry v. Electrolux Home Products, Inc.*, 352 Ill. App. 3d 731, 734 (2004). And it is evident that the defendant failed to prove that the balance of the *forum non conveniens* factors *strongly* favors transferring the lawsuit to DuPage County. Under these circumstances, it cannot be said that no reasonable person would take the view adopted by the trial court. Accordingly, the trial court did not abuse its discretion, and we affirm its judgment denying the defendant's *forum non conveniens* motion in its entirety.

¶ 24 CONCLUSION

*5 ¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.

Presiding Justice Delort and Justice Connors concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2019 IL App (1st) 181380-U, 2019 WL 1368403

Footnotes

1 The plaintiff originally filed the complaint also against Honeywell International, Inc., (Honeywell) and Friedrich Christian Flick. However, the plaintiff later voluntarily dismissed the action against Flick, and the action against Honeywell was later dismissed due to lack of jurisdiction. The plaintiff has since filed a new action against Honeywell in Kansas.

2 The *forum non conveniens* doctrine permits a trial court to decline jurisdiction where a trial in another forum with proper jurisdiction and venue would better serve the ends of justice. *Erwin ex rel. Erwin v. Motorola, Inc.*, 408 Ill. App. 3d 261, 273 (2011).

3 The defendant is not appealing the part of the trial court's order which denied its request to transfer the lawsuit to Switzerland.

4 We find that we need not engage in the disputed fact of whether the defendant's headquarters are actually located in DuPage County or Cook County, as it does not affect our analysis.

End of Document

IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

JACOB ABBOUD, IRENE SALVI, DR. SHAHID RASHEED, DR. ANJU RASHEED, AAYSHA SHAHID, a minor by her father and guardian, DR. SHAHID RASHEED, AADIL SHAHID, a minor by his father and guardian, DR. SHAHID RASHEED, LIYANA NAUSHAD, a minor, by her father and guardian, ULOOJI SALAHUDIN NAUSHAD, ABDUL WAHAB HAFFEES, SHAREEN HAFEES, AHMET KANSU, SADIK KURTKAYA, ENDER BARAN DOGAN, UMUT ASLAN, and EMIR ALI ASADBIKLI,	)	No. 17 L 8269
Plaintiffs,	)	
v.	)	
THE BOEING COMPANY, a corporation,	)	
Defendant.	)	

AMENDED COMPLAINT

Plaintiffs Jacob Abboud, Irene Salvi, Dr. Shahid Rasheed, Dr. Anju Rasheed, Aaysha Shahid, a minor, by her father and guardian, Dr. Shahid Rasheed, Aadil Shahid, a minor, by his father and guardian Dr. Shahid Rasheed, Liyana Naushad, a minor, by her father and guardian, Ulooji Salahudin Naushad, Abdul Wahab Haffees, Shareen Hafees, Ahmet Kansu, Sadik Kurtkaya, Ender Baran Dogan, Umut Aslan, and Emir Ali Asadbikli, through their attorneys, Wisner Law Firm, P.C. for their Complaint against defendant The Boeing Company, state as follows:

COUNT I

1. Plaintiffs Jacob Abboud, Dr. Shahid Rasheed, Dr. Anju Rasheed, Aaysha Shahid and Aadil Shahid are citizens and residents of the United Kingdom. Plaintiff Irene Salvi is a citizen and resident of Switzerland. Plaintiffs Liyana Naushad, Abdul Wahab Haffees and Shareen Hafees

are citizens of India and residents of the United Arab Emirates. Plaintiffs Ahmet Kansu, Sadik Kurtkaya, Ender Baran Dogan, Umut Aslan, and Emir Ali Asadbikli are citizens and residents of Turkey.

2. Defendant The Boeing Company ("Boeing") is a corporation which has its principal place of business in, and is a resident of, Cook County, Illinois.

3. On August 3, 2016, plaintiffs were passengers on board a certain Boeing 777-300 aircraft, registration A6-EMW ("the accident aircraft"), being operated on that date as Emirates Air flight EK 521 from Thiruvananthapuram, India to Dubai, United Arab Emirates.

4. On a date prior to August 3, 2016, defendant Boeing designed, manufactured, assembled and sold the accident aircraft and prepared, published and provided to Emirates Air a Flight Operations Manual (FOM).

5. At the time the accident aircraft and its FOM left the custody and control of defendant Boeing, they were defective and unreasonably dangerous in one or more of the following respects, among other defects:

(a) the accident aircraft had a take off/go around (TO/GA) switch which was to be used by the flight crew to apply power to the engines when executing a go around, rather than solely the requirement to move the thrust levers forward;

(b) the accident aircraft's system logic or configuration prevented the operation of the TO/GA switch when the accident aircraft's wheels had touched the runway and/or were below a set altitude;

(c) the accident aircraft's system logic or configuration prevented the operation of the TO/GA switch for several seconds after the accident aircraft had descended below a set height;

(d) the accident aircraft did not provide any aural or other warning to the flight crew that the TO/GA switch had been inhibited and/or was not operating;

(e) the accident aircraft's FOM failed to adequately and unambiguously advise as to the inhibition of the TO/GA switch when there was weight on the accident aircraft's wheels;

(f) the accident aircraft's FOM failed to adequately and unambiguously advise as to the inhibition of the TO/GA switch when the accident aircraft was below a set altitude;

(g) the accident aircraft's FOM failed to adequately and unambiguously advise as to those circumstances in which the TO/GA switch would not operate;

(h) the accident aircraft's FOM failed to adequately and unambiguously advise as to the procedure to be followed by the flight crew when the TO/GA switch had been inhibited or was not operating.

6. On August 3, 2016, the flight crew of the accident aircraft was attempting to execute a go around after attempting to land at Dubai airport when the wheels of the accident aircraft touched the runway or came within a certain altitude from the runway so that the operation of the TO/GA switch was inhibited without warning to, or the knowledge of, the flight crew; the flight crew pushed the TO/GA switch and pulled the accident aircraft up, expecting power to be delivered to the engines; but the TO/GA switch did not operate to provide power to the engines; and the aircraft fell violently back to the ground.

7. As the direct and proximate result of one or more of the above-described defective and unreasonably dangerous conditions in the accident aircraft which caused the accident aircraft to violently impact the ground as described above, plaintiffs suffered serious injuries, both physical and psychological in nature, and sustained and will sustain in the future medical bills, lost earnings, disability, pain and suffering and emotional distress, and loss of enjoyment of life.

WHEREFORE, plaintiffs Jacob Abboud, Irene Salvi, Dr. Shahid Rasheed, Dr. Anju Rasheed, Aaysha Shahid, a minor, by her father and guardian, Dr. Shahid Rasheed, Aadil Shahid, a minor, by his father and guardian Dr. Shahid Rasheed, Liyana Naushad, a minor, by her father and guardian, Ulooji Salahudin Naushad, Abdul Wahab Haffees, Shareen Hafees, Ahmet Kansu, Sadik Kurtkaya, Ender Baran Dogan, Umut Aslan, and Emir Ali Asadbikli, through their undersigned attorneys, pray for the entry of a judgment in their favor against the defendant The

Boeing Company for an amount in excess of the minimum jurisdictional amount of this Court, together with interest, costs and such other amounts as may be allowed by law.

COUNT II

1-4. As paragraphs 1-4 of Count II, plaintiffs reallege paragraphs 1-4 of Count I.

5. At all times relevant hereto, defendant Boeing owed plaintiffs a duty to exercise reasonable care in the design, manufacture, assembly and sale of the accident aircraft and in the preparation, publication and providing to Emirates Air of the accident aircraft's FOM so as not to cause injury to plaintiffs.

6. Defendant Boeing negligently breached its duty of care owed to plaintiffs through one or more of the following negligent acts or omissions:

(a) negligently designed, manufactured, assembled and sold the accident aircraft such that the accident aircraft had a TO/GA switch which was to be used by the flight crew to apply power to the engines when executing a go around, rather than solely the requirement to move the thrust levers forward;

(b) negligently designed, manufactured, assembled and sold the accident aircraft such that the accident aircraft's system logic or configuration prevented the operation of the TO/GA switch when the accident aircraft's wheels had touched the runway and/or were below a set altitude;

(c) negligently designed, manufactured, assembled and sold the accident aircraft such that the accident aircraft's system logic or configuration prevented the operation of the TO/GA switch for several seconds after the accident aircraft had descended below a set height;

(d) negligently designed, manufactured, assembled and sold the accident aircraft such that the accident aircraft did not provide any aural or other warning to the flight crew that the TO/GA switch had been inhibited and/or was not operating;

(e) negligently prepared, published and provided to Emirates Air the FOM which failed to adequately and unambiguously advise as to the inhibition of the TO/GA switch when there was weight on the accident aircraft's wheels;

(f) negligently prepared, published and provided to Emirates Air the FOM which failed to adequately and unambiguously advise as to the inhibition of the TO/GA switch when the accident aircraft had descended below a set altitude;

(g) negligently prepared, published and provided to Emirates Air the FOM which failed to adequately and unambiguously advise as to those circumstances in which the TO/GA switch would not operate;

(h) negligently prepared, published and provided to Emirates Air the FOM which failed to adequately and unambiguously advise as to the procedure to be followed by the flight crew when the TO/GA switch had been inhibited or was not operating.

7. On August 3, 2016, the flight crew of the accident aircraft was attempting to execute a go around after attempting to land at Dubai airport when the wheels of the accident aircraft touched the runway or came within a certain altitude from the runway so that the operation of the TO/GA switch was inhibited without warning to, or the knowledge of, the flight crew; the flight crew pushed the TO/GA switch and pulled the accident aircraft up, expecting power to be delivered to the engines; but the TO/GA switch did not operate to provide power to the engines; and the aircraft fell violently back to the ground.

8. As the direct and proximate result of one or more of the above-described negligent acts or omissions of the defendant Boeing which caused the accident aircraft to violently impact the ground as described above, plaintiffs suffered serious injuries, both physical and psychological in nature, and sustained and will sustain in the future medical bills, lost earnings, disability, pain and suffering and emotional distress, and loss of enjoyment of life.

WHEREFORE, plaintiffs Jacob Abboud, Irene Salvi, Dr. Shahid Rasheed, Dr. Anju Rasheed, Aaysha Shahid, a minor, by her father and guardian, Dr. Shahid Rasheed, Aadil Shahid, a minor, by his father and guardian, Dr. Shahid Rasheed, Naushad Salahudin, Liyana Naushad, a minor, by her father and guardian, Ulooji Salahudin Naushad, Abdul Wahab Haffees, Shareen Hafees, Ahmet Kansu, Sadik Kurtkaya, Ender Baran Dogan, Umut Aslan, and Emir Ali Asadbikli, through their undersigned attorneys, pray for the entry of a judgment in their favor against the defendant The Boeing Company for an amount in excess of the minimum jurisdictional amount of this Court, together with interest, costs and such other amounts as may be allowed by law.

Dated: February 13, 2018

WISNER LAW FIRM, P.C.

By: /s/Floyd A. Wisner
One of the Attorneys For Plaintiffs

Floyd A. Wisner
Alexandra M. Wisner
Wisner Law Firm, P.C.
514 W. State Street
Suite 200
Geneva, Illinois 60134
(630) 262-9434
(630) 262-1066 (fax)
faw@wisner-law.com
awisner@wisne-law.com
Firm ID No. 11151

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PAUL STAFFORD, *et al.*, Plaintiffs, v. THE BOEING CO., a corporation, Defendant.	No. 09 L 13343 Hon. James N. O'Hara
GUS MACMILLAN, *et al.*, Plaintiffs, v. THE BOEING CORP., a corporation, Defendant.	No. 10 L 00388

ORDER

This matter comes before the court on Defendant, The Boeing Company's Motion to Dismiss on the basis of *forum non conveniens*. The cases arose when a British Airways operated Boeing 777 aircraft, en route from Beijing, China, crash-landed short of the runway at London Heathrow Airport. Plaintiffs, 51 of the passengers and crew members who allegedly suffered physical and psychological injuries in the landing, brought claims sounding in product liability in Cook County, Illinois. Defendant moves to dismiss the cases pursuant to Supreme Court Rule 187(c)(2), arguing that the United Kingdom, specifically England, or the state of Washington is a more convenient forum.

I. **The United Kingdom is an adequate alternate forum.**

An alternative forum is generally adequate "when the defendant is amenable to process in the other jurisdiction." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). The adequacy of an alternative forum does not depend upon the availability of the same remedies, but rather upon

whether plaintiff will be deprived of a remedy or treated unfairly. *Piper Aircraft Co.*, 454 U.S. at 255.

In this case, the court finds that the England is an adequate forum. Defendant has agreed to consent to jurisdiction in the United Kingdom and to waive any statute of limitations issues. Plaintiffs do not directly contest that the England is an adequate forum. However, in arguing the England is inconvenient, Plaintiffs point out that it may be more difficult to obtain pre-trial discovery in England, and their strict liability claim would be time-barred. They also argue that they may face financial difficulties with funding the case due to a lack of contingency fees and the "loser pays rule." However, if this case were tried in England, it does not appear that plaintiffs would not be completely deprived of a remedy and there is no evidence that they will be treated unfairly.

Therefore, the court finds that England is an adequate alternative forum.

II. Plaintiffs' choice of forum is entitled to less deference in this case.

A plaintiff usually has a substantial interest in choosing the forum, however, the plaintiff's interest in choosing the forum receives somewhat less deference when neither the plaintiff's residence nor the site of the accident or injury is located in the chosen forum." *First Nat'l Bank v. Guerine*, 198 Ill. 2d 511, 517 (2002). Illinois courts have noted that *less* deference is not the same as *no* deference. *Elling v. State Farm Mut. Auto. Ins. Co.*, 291 Ill. App. 3d 311, 318 (1997).

In this case, none of the plaintiffs are United States citizens and none of the plaintiffs reside in Illinois. Of the fifty-one plaintiffs, 34 reside in the United Kingdom, thirteen reside in China, two in Australia, one in Italy and one in Poland. Additionally, the accident occurred in England. Therefore, the court will give less deference to the plaintiffs' choice of forum.

III. The private and public interest factors do not strongly favor dismissal.

When deciding whether to apply the doctrine of *forum non conveniens*, the court must balance private interest factors affecting the litigants and public interest factors as well. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). The doctrine of *forum non conveniens* is a flexible one which requires evaluation of the total circumstances rather than concentration on any single factor. *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323, 337 (1994). The test is whether the relevant factors, when viewed in their totality, strongly favor transfer to the another forum. *Elling*, 291 Ill. App. 3d at 318.

The relevant private interest factors include: (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) the availability of compulsory process to secure attendance of unwilling witnesses; (4) the cost to obtain attendance of willing witnesses; (5) the possibility of viewing the premises, if appropriate; and (6) all other practical considerations that make a trial easy, expeditious and inexpensive. *Dawdy v. Union Pac. Rr.*, 207 Ill. 2d 167, 172 (2003).

The public interest factors include: (1) the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; (2) the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; and (3) the interest in having local controversies decided locally. *Dawdy*, 207 Ill. 2d at 173.

In this case, Defendant, Boeing, is a United States corporation with its corporate headquarters in Cook County, Illinois. Defendant has not provided the court with any affidavits stating that Cook County, Illinois, is an inconvenient forum. Additionally, it would be all but incongruous for Defendant to argue that its own home county is inconvenient. *Kwasniewski v. Schaid*, 153 Ill. 2d 550, 555 (1992). Further, Plaintiffs reside in the United Kingdom, China, Australia, Italy and Poland. Therefore, England cannot be said to be more convenient to *all* parties.

The ease of access to evidence does not strongly favor dismissal to England, as a significant amount of evidence exists in the United States. First, the accident occurred in England and was investigated by the United Kingdom's Air Accident Investigation Branch (AAIB). Witnesses and documents related to the AAIB's investigation are located in England. The United States participated in the investigation through an appointed Accredited Representative from the National Transportation Safety Board (NTSB). Rolls-Royce, British Airways and Defendant Boeing also assisted in the investigation, along with several other non-party corporations. Several American participants to the investigation are located in Washington D.C. British Airways and Rolls-Royce documents and witnesses pertaining to the investigation are located in the United Kingdom. Boeing's witnesses and documents relating to the investigation are located in the state of Washington.

Additional evidence related to liability, particularly witnesses and documents related to subsequent testing, is located in the United States and the United Kingdom. Evidence relating to the design and manufacture of the aircraft fuel system is located in the United States, within the

state of Washington. Evidence related to other various fuel system components is located in various states within the United States. Witnesses and evidence related to the design and manufacture of the Rolls-Royce engines are located in the United Kingdom. British Airways' records relating to the purchase and installation of the engines are located in the United Kingdom. Possible evidence related to the design and manufacture of the Fuel Oil Heat Exchangers is in Japan. Additionally, some Boeing employees in the Chicago office received periodic updates on the status of the investigation.

Evidence pertaining to damages is located in England, but also likely located in the other various countries in which plaintiffs reside. As witnesses and documents are scattered throughout various states and countries, this factor does not weigh in favor of any particular forum. Additionally, the location of documents, records and photographs has become a less significant factor in *forum non conveniens* analysis in the modern age of email, internet, telefax, coping machines and world-wide delivery services, since they can now be easily copied and sent. *Vivas v. The Boeing Company*, 392 Ill. App. 3d 644, 659 (1st Dist. 2009), citing *Woodward*, 368 Ill. App. 3d at 834.

Next, the availability of compulsory process and the cost of obtaining the attendance of willing witnesses weighs equally against the United States and England. As the parties and potential witnesses are residents of several countries, there would be problems with compelling unwilling witnesses to attend trial in either England or the United States. Second, it will inevitably be costly to bring willing witnesses to either England or the United States.

Counsel for both plaintiffs and defendants maintain offices in the state of Illinois.

Defendant argues that a claim against Rolls-Royce is "more than a theoretical possibility" and that if the case goes forward in Illinois, it will lack access to Rolls-Royce's witnesses and evidence. If the case were tried in the United Kingdom, however, all potentially responsible parties could be joined in one proceeding. However, the court finds that it is premature to dismiss the case on the possibility that a third-party complaint *may* be filed. Additionally, Defendant has not provided any authority stating that Rolls-Royce could not be joined in Illinois. Therefore, the court finds that the relevant private interest factors do not weight strongly in favor of dismissal to the United Kingdom.

Turning to the public interest factors, while Defendant has cited statistics to show that Illinois courts are more congested than courts in England, this is but one factor to consider.

Second, choice-of-law issues are an additional factor to consider, however, they are not usually dispositive. *Vivas*, 392 Ill. App. 3d at 662. Illinois courts are competent to determine which law applies and to apply foreign law if necessary. *Id.*

Additionally, while England certainly has an interest in the litigation, Illinois residents have an interest in the safety of air craft that fly over their skies, particularly when the manufacturer has its headquarters in Cook County and takes advantage of Illinois law. For these same reasons, the court does not find it unfair to impose jury duty upon residents of Cook County.

Further, while the possibility of viewing the accident site favors England, the possibility of viewing the accident site is usually less significant in a product liability case. *Woodward*, 368 Ill. App. 3d at 385.

Therefore, the public interest factors do not weigh strongly in favor of dismissal.

IV. The state of Washington is an adequate forum.

Plaintiffs have not asserted that the state of Washington is an inadequate forum. Further, Defendant has agreed to submit to jurisdiction in Washington and to waive all statute of limitations issues. Therefore, the court finds that the state of Washington is an adequate alternative forum.

V. The public and private interest factors do not strongly favor dismissal for *forum non conveniens*.

The court finds the private and public interest factors do not weigh strongly in favor of dismissal to the state of Washington. As stated above, Defendant Boeing has its corporate headquarters in Plaintiffs' chosen forum, has not provided any affidavits stating that Cook County, Illinois is an inconvenient forum, and the Plaintiffs reside in several different countries. Therefore, the state of Washington is not a more convenient forum for all the parties.

Next, as discussed above, the court finds that witnesses and evidence are located in several states and countries, so that factor does not strongly favor dismissal in favor of Washington. While documents and witnesses related to the design of the aircraft and airframe fuel system are located in the state of Washington, possible witnesses related to the design and manufacture of other various components of the airframe fuel system may be located in the United Kingdom, California, Ohio, Mississippi, Kansas and Massachusetts. Boeing's documents and witnesses related to the accident investigation are located in the state of Washington,

however, witnesses to the accident investigation from the U.S. NTSB and U.S. FAA are located in Washington D.C.

The issue of compulsory process weighs equally against both Illinois and Washington as neither state could compel unwilling foreign witnesses to attend trial. The cost for willing witnesses from foreign countries to attend trial would be equally expensive in Illinois and Washington.

Next, Defendant has cited sources showing that civil cases are resolved faster in Washington than those the Law Division of Cook County. However, the statistics include all civil cases in Washington, not specifically those with a value over $50,000 as in Cook County's Law Division. Additionally, the Cook County court system is well-equipped to handle this case.

As to the interest in deciding local controversies locally, Washington and Illinois each have an interest in the present litigation. Washington has an interest in that the aircraft was designed and manufactured there and testing related to the cause of the crash occurred there. However, both states have an interest in the safety of aircraft flying over their skies, and as stated above, Illinois residents particularly have an interest when the aircraft manufacturer has its headquarters in Cook County and takes advantage of Illinois law.

Finally, while Defendant originally argued that related litigation was pending in the state of Washington, that litigation has since resolved. Therefore, the court will not consider the related litigation as a factor in this *forum non conveniens* analysis.

It is Hereby Ordered:

Defendant's motion to dismiss on the basis of *forum non conveniens* is DENIED.

All parties to appear through counsel on March 18, 2011, at 10:30 a.m. for setting a discovery schedule.

JUDGE JAMES N. O'HARA

Judge James N. O'Hara

FEB 17 2011

Circuit Court - 1983

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

TRAD THORTON, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 07 L 004642
v.	)	
	)	
HAMILTON SUNDSTRAND CORP., et al.,	)	
	)	
Defendants.	)	

ORDER

This matter coming before the court on Defendants' Motion to Dismiss on the basis of *forum non conveniens*, the court having considered the written submissions and oral arguments of the parties, **HEREBY FINDS AS FOLLOWS:**

I. Procedural Posture

This case arose when a commuter airplane crashed while approaching an airport in Lockhart River, Queensland, Australia. Fourteen wrongful death and survival actions were filed in Cook County, Illinois alleging negligence and products liability. Defendants brought this joint motion to dismiss and assert that Australia is a more convenient forum to litigate these issues.

II. Australia is an adequate forum.

At the outset of a *forum non conveniens* motion, the court must first consider whether there is another adequate alternative forum that can resolve a plaintiff's claims. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). Generally, another forum is adequate if the defendant is amenable to process in the alternative forum. *Piper Aircraft Co.*, 454 U.S. at 255. However, an alternative forum can be inadequate if the application of foreign law would deny the plaintiff a remedy or treat the plaintiff unfairly. *Philips Elecs. N.V. v. New Hampshire Ins. Co.*, 312 Ill.

App. 3d 1070, 1085 (1st Dist. 2000). Still, an alternative forum may be considered adequate even if not all of the same remedies are available. *Piper Aircraft Co.*, 454 U.S. at 254-55.

In the present case, the court finds that Australia is an adequate alternative forum. Plaintiffs assert that they may be prevented from bringing claims against three Defendants, Honeywell International Inc. ("Honeywell"), Lambert Leasing ("Lambert"), and Saab Aircraft Leasing, Inc. ("Saab") if the case is transferred to an Australian court. Plaintiffs also have voiced concerns over jurisdictional issues and their ability to depose third-parties to this litigation. Defendants, including Honeywell, Lambert, and Saab, have agreed to consent to jurisdiction in Australia. Although Plaintiffs' remedies may differ in an Australian forum, any procedural difference or differences in the law do not appear to completely deprive the Plaintiffs of a remedy. Finally, there is no evidence that Plaintiffs would be treated unfairly by an Australian court.

Therefore, the court finds that Australia is an adequate alternative forum. The court must next consider the plaintiff's choice of forum and then weigh both private and public interest factors in making its determination.

III. Plaintiffs' choice of forum deserves less deference in this case given the facts.

Before weighing the private and public interest factors, the court must also determine how much deference should be given to plaintiff's choice of forum. *Ellis v. AAR Parts Trading, Inc.*, 357 Ill. App. 3d (1st Dist. 2005). While deference is typically accorded to a plaintiff's choice of forum, such deference is given less significance when the plaintiff is foreign to the chosen forum. *See, e.g., First National Bank v. Guerine*, 198 Ill.2d 511, 517 (2002); *Griffith v. Mitsubishi Aircraft International, Inc.*, 136 Ill.2d 101, 106 (1990). Still, the court must keep in mind that *less* deference is not the same as *no* deference. *Ellis*, 357 Ill. App. 3d at 742 *citing*

Dawdy, 207 Ill.2d at 174. Therefore, "the defendant must show that the plaintiff's chosen forum is inconvenient to the defendant and another forum is more convenient to all parties." *Id.*

In the present action, the injuries occurred in Australia and none of the decedents were United States citizens or Cook County residents. One administrator of a decedent's estate is a United States citizen although she currently resides in Australia. Given these facts, the court will give less deference to the Plaintiffs' chosen forum.

IV. Despite giving less deference to Plaintiffs' choice, the facts of this case illustrate that the private and public interests factors do not warrant dismissal on the basis of *forum non conveniens*.

The court must weigh both private and public interest factors when making a determination. The relevant private interest factors include: the convenience of the parties; the relative ease of access to sources of testimonial, documentary, and real evidence; the availability of compulsory process to secure attendance of unwilling witnesses; the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and all other practical considerations that make a trial easy, expeditious, and inexpensive. *Dawdy v. Union Pacific Railroad Co.*, 207 Ill.2d 167, 172-73 (2003).

The relevant public interest factors include the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; and the interest in having local controversies decided locally. *Id.* In essence, the ultimate test turns on "whether the relevant factors, viewed in their totality, strongly favor transfer to the forum suggested by defendant." *Id.* at 176.

Turning to the private interest factors, the relevant facts in the case at bar demonstrate that all of the Defendants are United States corporations and two Defendants, The Boeing

Company ("Boeing") and Matthew Hier ("Hier") have ties to Illinois. Specifically, Boeing is headquartered in Illinois and Hier resides in Rockford, Illinois. Potential trial witnesses and sources of proof are scattered among various states (Texas, Washington, and Colorado) and countries (United States and Australia). The accident site is in Australia. However, the site is in a remote area and may not be readily accessible. Finally, Plaintiffs' and Defendants' counsel have offices in Cook County, Illinois.

Defendants' main contention is that an Illinois court cannot compel the production of Australian witnesses, documents, or records. However, the same is true of a United States forum if this case was heard in Australia. What is more, when potential trial witnesses are scattered among various states and countries, no single forum can be more convenient than another. Defendants have not submitted any affidavits asserting that a trial in Cook County is inconvenient for any of the witnesses. The court also recognizes that this is a products liability case and the documents relating to the design and manufacturing of the plane, the engine, and the Ground Proximity Warning System are in the United States. Finally, in a products liability case, the site of the accident is less important because, "there is a more general interest in resolving a claim concerning an allegedly defective product and jury views of the accident site are generally unnecessary." *Ammerman v. Raymond Corp.*, 379 Ill. App. 3d 878, 886 (1st Dist. 2008). For these reasons, the court finds that the private interest factors do not weigh strongly in favor of dismissal.

Turning to the public interest factors, the relevant facts include that the Australian government has taken an interest in this particular accident and the litigation following the crash. All of the decedents were Australian residents. However, Boeing is an Illinois corporation, is

headquartered in Cook County, and does business in Illinois. Additionally, Defendant, Hier, is a resident of Illinois.

Again, the court is reminded that in a products liability case the site of the accident is less important. And, while conducting business in a particular forum is more relevant when considering issues of venue rather than *forum non conveniens*, Illinois residents have an interest in resolving a matter when an Illinois corporation, who takes advantage of Illinois law, is involved in the litigation. Finally, court congestion is only one factor to consider, and Defendants have not shown that an Australian trial would take place more quickly than a trial in Cook County. Therefore, Defendants have not shown that the public interest factors strongly favor dismissal.

Accordingly, in applying the above factors to the case at bar, the balance of the private and public interest factors do not strongly favor dismissal and the Plaintiffs' choice of forum should not be disturbed.

IT IS HEREBY ORDERED:

Defendants' Motion to Dismiss on the basis of *forum non conveniens* is denied.

JUDGE WILLIAM D. MADDUX

ENTERED
JUDGE WILLIAM D. MADDUX-1550
SEP 08 2008
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

EXHIBIT C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

SAMANTHA SABATINO, *et al.*,	)	
	)	
Plaintiffs,	)	No. 09 L 1056
	)	
	)	
v.	)	Hon. Thomas P. Quinn
	)	
THE BOEING CORP., a corporation, *et al.*	)	
	)	
Defendants.	)	

ORDER

This matter comes before the court on defendants The Boeing Company, AAR/SSB II, LLC, AAR Parts Trading, Inc., United Technologies Corporation ("UTC") and Hamilton Sundstrand Corporations' motion to dismiss pursuant to Supreme Court Rule 187 and the doctrine of *forum non conveniens*. Plaintiffs are residents of the United Kingdom who were allegedly injured from an exposure to fumes while on board a flight from London to Orlando. The aircraft was manufactured by Boeing and operated by XL Airways. The aircraft was registered in the United Kingdom, but owned by AAR and leased to XL. UTC manufactured the engine of the aircraft and Hamilton Sundstrand manufactured the bleed air system. In counts I-IV plaintiffs allege that Boeing, UTC, and Hamilton Sundstrand are strictly liable and were negligent in the design of the aircraft, its engines, and its bleed air system. Additionally, in count V plaintiffs have brought allegations against the AAR defendants for lessor liability and negligent entrustment of the aircraft to XL.

Boeing is headquartered in Washington and Illinois. UTC and Hamilton are headquartered in Connecticut. AAR is headquartered in Illinois. No official investigation of the

fume event was conducted after the aircraft safely landed in Florida. Some plaintiffs received medical treatment in Florida. Medical treatment was also rendered in the United Kingdom after plaintiffs returned home.

Defendants argue that, as compared to Cook County, the United Kingdom is the significantly more convenient forum. Additionally, defendants contend that if this court determines that the United States is the more appropriate forum, that Florida rather than Illinois is the most fair and convenient forum because Illinois has no significant connection to this case. In support of their motion defendants principally rely on *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In opposition, plaintiffs claim that their right to choose Cook County as their forum should be given deference and that the balance of the relevant factors does not substantially favor dismissal in favor of transfer to either the United Kingdom or Florida.

The doctrine of *forum non conveniens* presupposes the existence of more than one court with authority to hear the case. *Weaver v. Midwest Towing, Inc.*, 116 Ill.2d 279 (1987). Under the doctrine, a court may decline jurisdiction of a case whenever it appears that another forum can better serve the convenience of the parties and the ends of justice. *Id.* In determining whether an application of the doctrine is appropriate, a court must balance certain private and public interest factors. *Id.* The court must look beyond the criteria for venue when deciding a motion to transfer based on *forum non conveniens*. *Dowdy v. Union Pacific Railroad*, 207 Ill.2d 167 (2003).

The doctrine of *forum non conveniens* is a flexible one which requires evaluation of the total circumstances rather than concentration on any single factor. *Peile v. Skelgas, Inc.*, 163 Ill. 2d 323 (1994). The relevant private interest factors to be considered include:

> [1] the convenience of the parties; [2] the relative ease of access to sources of testimonial, documentary, and real evidence; 3] the availability of compulsory

> process to secure attendance of unwilling witnesses; [4] the cost to obtain attendance of willing witnesses; the possibility of viewing the premises, if appropriate; and [5] all other practical considerations that make a trial easy, expeditious, and inexpensive.

Dawdy v. Union Pac. R.R., 207 Ill.2d 167, 172 (2003). The relevant public interest factors to be considered include:

> [1] the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; [2] the unfairness of imposing jury duty upon residents of a county with no connection to the litigation; [ ] [3] the interest in having local controversies decided locally[ ]; . . . [4] the congested conditions of the docket in the plaintiff's chosen forum.

Id. at 172-173, 181.

In the *forum non conveniens* analysis, plaintiff's right to select a forum is substantial and unless the total circumstances of the factors weigh strongly in favor of transfer, plaintiff's choice of forum should rarely be disturbed. *Id.* at 173-174. Plaintiff's choice, however, is given less deference when her choice is neither her home forum nor the site of the event giving rise to the action. *Id.* The movant bears the burden of demonstrating that the private and public interest factors outweigh plaintiff's right to choose a forum. *Weaver*, 116 Ill.2d at 285. A defendant seeking transfer must show that the chosen forum is inconvenient to the defendant and that the other forum is more convenient to all parties based upon the totality of the circumstances. *Langenhorst v. Norfolk Southern Railway Co.*, 219 Ill.2d 430 (2006). In making its decision on a motion to transfer based on the doctrine of *forum non conveniens*, the court must consider all of the factors without giving one undue emphasis. *Id.* at 443.

Initially, it is important to note that the court will address the relevant factors with regard to Illinois as a whole rather than Cook County specifically because defendants are seeking dismissal in favor of a foreign country and another state. *See Woodward v. Bridgestone/Firestone, Inc.*, 368 Ill. App. 3d 827 (2006).

Moving on, the court does not find the *Piper* case to be persuasive in this matter. 454 U.S. 235. In the instant action, unlike in *Piper*, it cannot be said that the connections with the foreign jurisdiction are "overwhelming." *Id.* at 242. Significantly, here, unlike in *Piper* there was not an investigation into the incident in a foreign jurisdiction. *Id.* at 239. Moreover, the court has not been presented with any evidence that any investigation into the incident was conducted in Florida. Furthermore, unlike in *Piper* where it was known where plaintiffs suffered their injuries, here due to the nature of the fume event, it is uncertain exactly when and/or where plaintiffs suffered their injuries while aboard the aircraft. *Id.* at 238.

That being said, the court finds the reasoning contained in *Ellis v. AAR Parts Trading, Inc.* to be instructive. 357 Ill.App.3d 723. In *Ellis*, plaintiff filed suit for injuries that were sustained as a result of an airplane crash in the Philippines. Plaintiff filed a suit in Cook County alleging theories based on negligence as well as product defects. Defendants argued that the case should be dismissed so that it could be litigated in the Philippines primarily because: (1) plaintiffs suffered their injuries as a result of an incident in the Philippines; (2) witnesses were located in the Philippines; and (3) the Cook County docket was congested. On appeal, the appellate court affirmed the trial court's decision denying defendants' *forum non conveniens* motion. *Id.* at 742.

In addressing the relevant private interest factors, the *Ellis* court noted, *inter alia*, that: (1) defendants had their principal places of business in Illinois; (2) the evidence did not show that Illinois was inconvenient to defendants; (3) a jury view of the accident site was neither necessary or possible; (4) the compulsory process of unwilling witnesses and the cost of obtaining the attendance of willing witnesses did not favor one forum over the other; and (5) plaintiff's

theories for recovery would require sources of proof from both the Philippines and Illinois. *Id.* at 743-747.

The *Ellis* court went on to explain, *inter alia*, that with respect to the public interest factors: (1) the residents of Illinois had an interest in the case "because the aircraft was owned and/or operated by corporations that do business in the State of Illinois and take advantage of Illinois law;" (2) "where the potential trial witnesses are scattered among different forums, neither enjoys a predominant connection to the litigation;" (3) it would not be unfair to burden the residents of Illinois with this litigation because "Illinois residents are interested in, and may be affected by, Illinois corporations that manufacture products and engage in financial transactions in the state of Illinois;" and (4) the fact that Cook County has a congested docket is insufficient to justify transfer when none of the other relevant factors strongly favor transfer." *Id.* at 747-748.

In the instant action, plaintiffs' selection of Illinois as their forum is entitled to less deference because all plaintiffs are residents of the United Kingdom. *See Vivas*, 392 Ill.App.3d at 657. "However, less deference is not the same as no deference." *Id.* After weighing and considering the relevant public and private interest factors, the court is of the opinion that defendants have failed to show that plaintiffs' chosen forum (Cook County) is inconvenient and either the United Kingdom or Florida is more convenient to *all* parties. Consequently, the balance of the relevant factors does not strongly favor dismissal in favor of litigation in either the United Kingdom or Florida.

With respect to the relevant private interest factors, the relevant factors are the: (1) convenience of the parties; (2) ease of access to the sources of proof; (3) availability of compulsory process to secure the attendance of unwilling witnesses; (4) costs associated with

securing the attendance of witnesses; and (5) the ability to pursue third party claims. As for the convenience of the parties, because the parties reside in various forums including Illinois, Connecticut, Delaware, and the United Kingdom, one forum cannot be said to be more convenient to *all* the parties. Additionally, a review of the record does not reveal that Illinois is in fact inconvenient to any of the defendants. *See First Nat'l Bank v. Guerine*, 198 Ill.2d 511, 518 (2002).

Next, it cannot be said that the case of access to evidence strongly favors dismissal in favor of either the United Kingdom or Florida. Here, just as in *Ellis*, potential testamentary and documentary evidence exists in multiple forums including Illinois, Florida, Connecticut, Washington, Germany, and the United Kingdom. In this day and age the access to documentary and real evidence is a less significant factor in *forum non conveniens* analysis due to the availability of e-mail, internet, copy machines, interstate highways, bustling airways, telecommunications, etc. *First Nat'l Bank v. Guerine*, 198 Ill.2d 511, 525(2002); *Vivas*, 39 Ill.App.3d at 659.

As for the availability of compulsory process and the cost of obtaining the attendance of willing witnesses, these factors weigh equally against Illinois, Florida, and the United Kingdom. *See Ellis*, 357 Ill.App.3d at 743-744. Regardless of the forum in which this case is litigated, the fact that possible trial witnesses are spread out amongst various states as well as a foreign country ensures that: (1) there may be problems with securing the attendance of unwilling witnesses through compulsory process; and (2) regardless of the witnesses' willingness to travel, the costs of bringing any of them to either Illinois, Florida, or the United Kingdom is going to be costly. *See McClain v. Illinois Central Gulf Railroad Company*, 121 Ill.2d 278, 291(1988).

Concerning the potential of third party claims and a jury view of the scene, the court is of the opinion that neither factor favors dismissal in favor of the United Kingdom or Florida. At this point in the litigation, it would be premature to dismiss the case on the basis that a third party complaint may be filed, because doing so would be based on pure speculation. *See Woodward v. Bridgestone/Firestone, Inc.*, 368 Ill.App.3d 827 (2015). Furthermore, there is no chance of a jury view. Therefore, based on a review of the totality of the relevant private interest factors, it cannot be said that any of the relevant private factors weigh strongly in favor of dismissal in favor of Florida or the United Kingdom.

Turning to the relevant public interest factors, the court does not find that they substantially favor dismissal in favor of either the United Kingdom or Florida. The court recognizes that plaintiffs did not sustain their injuries in plaintiffs' chosen forum (Cook County). However, in a products liability action, the situs of the accident is less important. This is a product liability action with international implications. *See Vivas*, 39 Ill.App.3d at 661. Consequently, the court is of the opinion that the United Kingdom, Illinois, and Florida have equal interests in deciding the controversy surrounding the fume event.

Here, just as in *Ellis*, there is a local aspect and the residents of Illinois do have an interest in this litigation. Residents of Illinois have just as much interest as those in the United Kingdom or Florida in the safety of aircraft that fly in our skies. The court recognizes the interest that the United Kingdom may have in this litigation due to the facts that the aircraft took off from and was registered in the United Kingdom. However, the residents of Illinois also have an interest in this litigation because they are concerned with the operations of companies that conduct business within Illinois and take advantage of Illinois law. *See Ellis*, 357 Ill.App.3d at 747.

Finally, neither the congestion of the court system, nor the possibility of applying foreign law to this action dictates that either the United Kingdom or Florida is the substantially more appropriate forum. First, even though defendants have cited sources showing that court congestion is greater in Cook County than in the United Kingdom, the Cook County court system is well equipped to handle the instant action. Second, "[a]lthough choice-of-law issues are a factor to consider, they are not usually dispositive." *Vivas*, 39 Ill.App.3d at 662. In any event, if foreign law were to apply to this case, the Illinois court system is competent to determine and apply the applicable law. *Id.*

After considering the totality of the circumstances, it is evident that no forum enjoys a predominant connection to the litigation. Therefore, defendants have failed to meet their burden of establishing that the relevant public and private interest factors strongly favor transfer to the United Kingdom or Florida.

Accordingly, defendants' The Boeing Company, AAR/SSB IL, LLC, AAR Parts Trading, Inc., United Technologies Corp. and Hamilton Sunstrand Corporations' motion to dismiss pursuant to the doctrine of *forum non conveniens* is DENIED.

ENTERED
JUDGE THOMAS P. QUINN-0238
MAY 03 2018
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

Judge Thomas P. Quinn

EXHIBIT D

FILED
12/5/2019 3:41 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2015L006324
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**IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT – LAW DIVISION**

VANESSA WOODS, et al.

Plaintiffs,

v.

THE BOEING COMPANY,

Defendant.

No. 15 L 006324
Consolidated with No. 16 L 3846

PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT TO INCLUDE PRAYER FOR RELIEF SEEKING PUNITIVE DAMAGES

"Bottom line is I think we are looking for a tombstone before anyone with any horsepower is going to take interest."

Remarkably, those are Boeing's words. That was the callous but straightforward observation of a senior Boeing engineer, George Bates, in 2007, commenting on Boeing's utter lack of interest or effort in addressing toxic cabin air events on its airplanes—the very such events that, years later, seriously injured the Plaintiffs in this case.[1] Boeing has known that toxic or contaminated air events happen on its airplanes since as early as the 1950s.[2] Toxic cabin air events occur on every type and model of Boeing airplanes that employ the "bleed air" system of cabin

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1 PX 0040, [redacted]

2 PX 0334, 10/11/1955 at p. 2 (Presentation by Henry Redall at the 1955 the Society of Automotive Engineers Golden Anniversary Aeronautic Meeting on *Elimination of Engine Bleed Air Contamination:* On modern turbojet aircraft the compressor bleed air used for air conditioning is "increasingly subject to unacceptable contamination." Conclusion was that "every effort" should be made to minimize or eliminate leakage of engine oil into the air system); PX 1680A - Winder, *Hazardous chemicals on jet aircraft: case study - jet engine oils and aerotoxic syndrome, Current topics in toxicology,* Vol 3, p. 65-88 (2006) p. 2 ("In 1953, The US Aero-medical Association first expressed their concerns about the toxicity risks of cabin air contamination by hydraulics and lubricants")

ventilation.[3] And while Boeing has repeatedly and misleadingly under-reported the number of these events, its internal database confirmed over 1,100 toxic air events from 1999 to 2013, with 823 of those being assessed by Boeing as "potential safety issues."[4] Boeing concedes it is reasonable to expect 4.4 contaminated cabin air events per day in the United States.[5]

The risk is real. Boeing's knowledge of it has been concrete for decades. And the consequences are severe and sometimes fatal. The organophosphate chemicals found in Boeing's jet engine compartments are highly neurotoxic, akin to sarin gas.[6] The World Health Organization (WHO) calls the neurotoxins at issue "major hazards to human health" for which "there is no safe level of ingestion."[7] Boeing is well aware that the kinds of toxic air events at issue can occur when jet engine oil or hydraulic fluid —the source of these neurotoxins—"weeps" or "burps" out of the engine and into the ventilation system.[8] Boeing has acknowledged internally that toxic cabin air

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[3] PX 3877 - Shehadi, M., Jones, B., and Hosni, M., "*Characterization of the frequency and nature of bleed air contamination events in commercial aircraft,*" Indoor Air, Vol 25(3), 478-488 (2015) at p. 10 ("every aircraft make and model represented in any significant number in the US fleet" had contaminated air events); Deposition of Boeing's engineer and designated corporate representative and expert for trial, George McEachen, 11/4/19 at p. 100-101 (Whether the event occurs on a 737 or a 757, the same contamination comes through the same configuration of bleed air into the cabin).

[4] Deposition of Joel Uchiyama, 12/10/18 at p. 102-105 (Boeing's COSP database printout is an 82-page single-spaced document listing contaminated air events. Each item that is listed as "EIB – YES" means the incident was taken to the Engineering Investigation Board, the internal Boeing safety board, because someone at Boeing deemed the incident a "potential safety issue."); PX 0227 - [redacted]

[5] Deposition of Boeing's manager, designated corporate representative and expert, David Space, 11/1/19 at p. 51-52 (the best number for the incidence of oil or hydraulic fluid contamination is one in 10,000); at p. 56 (it would not be unusual to expect 4.4 fume events a day tracked back to oil or hydraulic fluid)

[6] PX 0377A, 8/1/2003 at p. 486-487 (Abou Donia, *Organophosphorus Ester-Induced Chronic Neurotoxicity,* Archives of Environmental Health August 2003 Vol. 589 No. 8: Discusses organophosphate neurotoxicity effects and how victims of the sarin gas terrorist attack in the Tokyo subway showed a "delayed pattern of neurological deficits"); Deposition of Dr. Stumpp, former Boeing medical toxicologist, 4/11/19 at p. 102-103 (Sarin gas is long-acting persistent organophosphate)

[7] PX 041[redacted], 1990 (World Health Organization, International Programme on Chemical Safety concluded that mixtures containing Tricryesl Phosphate (TOCP) are "major hazards to human health" and "there is no safe level for ingestion." Group warned that exposure to TOCP through inhalation should be minimized)

[8] Deposition of David Space, 12/11/18 at p. 284-288 (An oil burp is when oil "seeps across the bearings" and then gets into the bleed air system without there being some major fault or seal failure or

events result in "real symptoms by flight attendants and to a lesser degree passengers."[9] In 2010, the Airline Pilots Association told Boeing that the development and installation of sensors for guarding against toxic cabin air events was "[t]he single most important safety item" for pilots.[10]

The potential fix has always been simple, affordable, and easily at hand: an air converter or filter installed into the air ventilation system to remove or mitigate the toxins. But in the face of undisputed knowledge about the danger posed to flight crews and passengers by toxic cabin air events, Boeing's course has been steady: do nothing and act as if the problem does not exist. "No commitment on the part of Boeing" was the topline summary for a project investigating filters.[11] Similarly, "the money is not going to be there" was the reaction to the attempt to develop converters to remove dangerous compounds from the air before they can enter the cabin.[12] A

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engine freeze-up. When the oil seepage later gets heated, "puffs' of the oil by-products can get into the air cabin. The oil burp residue can be absorbed on surfaces and then "off gas"); PX 3844 -

PX 3990 -

PX 0048-

PX 3843 -

[9] PX 0310 -

[10] PX 2544 –

[11] PX 0911-

[12] PX 1681-

question raised by Boeing management was whether a converter could "buy its way onto the plane;"[13] safety concerns were not the priority.

Flight crew have demanded for years that Boeing at least install sensors in the air system to quickly detect toxic air. With such an alarm, pilots could easily switch off the air flow from the impacted part of the plane and protect the passengers and crew. While pilots have access to pure oxygen masks in the cockpit, and pilots have had to use them during contaminated air events to prevent incapacitation,[14] there is no such protection available for passengers and flight attendants. The masks that fall from the overhead compartment for passengers allow for only 4-15 minutes of oxygen.[15] Being able to switch off the flow of contaminated air into the cabin would provide important safety protection. Boeing internal documents reveal why Boeing refuses to implement sensors: Boeing feared the devices would provide injured passengers and crew with real data on the precise toxins present in a contaminated air event—data Boeing would then have to face "in a court of law."[16] Protecting itself in litigation was more important to Boeing that protecting the flying public.

The tombstone Boeing predicted came in 2012 with the death of a British Airways pilot, Richard Westgate. When Mr. Westgate died, Duke University Professor Mohamed Abou-Donia conducted post-mortem testing and several coroners and toxicologists evaluated the samples.

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[13] Deposition of Tim Arnaud, 8/17/18 at p. 136 (Question raised at air quality team meeting: Does Air Purification provide enough benefit to buy its way onto the plane?")

[14] Deposition of Boeing's engineer and designated expert, George McEachen, 11/4/19 at p. 87-98 (Pilots had to don oxygen masks during "potentially catastrophic" flight when oil fumes entered the flight deck; flight diverted because of "increased hazard." Boeing's internal safety board considered this a "serious incident"); PX 1087 - [redacted] PX 1088 - [redacted]

[15] Deposition of Boeing's engineer and designated expert for trial, George McEachen, 11/4/19 at p. 90 (passenger oxygen masks provide 6-8 minutes of air); Deposition of Boeing senior engineer, George Bates Depo, 9/21/18 at p. 293-295 (masks provided for passengers only provide oxygen for 12-18 minutes, depending on the system. As Mr. Bates explained, the passenger oxygen bottles "are rated for 15 minutes. I've been -- on occasions during flight tests where things have gotten exciting and I've burned through one of those oxygen bottles in less than four")

[16] Deposition of Boeing's senior engineer George Bates, 9/21/18 at p. 259 -261

Professor Abou-Donia found elevated autoantibody markers, indicative of neural degeneration, in Westgate's blood and tissues, results that even Boeing notes "are very strong evidence for nervous system injury."[17] Dr. Abou-Donia and others peer review published in the Journal of Biological Physics and Chemistry[18] their differential diagnosis of Westgate's medical course and confirmed a nervous system injury consistent with organophosphate-induced neurotoxicity.[19] Professor Abou-Donia explained that Westgate's injury was "one of the worst cases of organophosphate [OP] poisoning [he had] come across."[20] In the wake of this death, a senior coroner in England "issued a warning to the industry and urged action to avoid further deaths caused by toxic fumes in cabin air."[21] Subsequent researchers confirmed "there is little doubt that the presence of auto-antibodies relates to the presence of some sort of neurodegenerative process."[22]

Importantly, all five of the Plaintiffs in this case had their blood tested at Duke University by Abou-Donia's team and the results confirm neurodegenerative injury.[23] Boeing must be held

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17 PX 0221 – [redacted]

18 PX 0380, 7/26/2014 (Abou Donia, *Autoantibody markers of neural degeneration are associated with post-mortem histopathological alterations of a neurologically-injured pilot*, Journal of Biological Physics and Chemistry 14:1 (2014); Deposition of Boeing's team manager, David Space, 10/24/18 at p. 268-269 (Technical review for this Abou Donia's published article was conducted by Rick Pleus, (Boeing's designated expert in this litigation)

19 PX 0380, 2014 at p. 13 (Abou-Donia, *Autoantibody markers of neural degeneration are associated with post-mortem histopathological alterations of a neurologically-injured pilot,* Journal of Biological Physics and Chemistry, 14)

20 PX 3825A, 7/31/2014 (Flight Global article: BA Crew Autopsies Show Organophosphate Poisoning)

21 PX 0042 – [redacted]

22 PX 3698A - De Ree, H. et al *Health risk assessment of exposure to TriCresyl Phosphates (TCPs) in aircraft: a commentary* Neurotoxicology, 45 (2014) at p. 211 (The authors acknowledged that in the Abou-Donia 2013 paper it discussed one of the air crew tested who had demonstrated high antibodies after flying and then those antibodies had decreased over subsequent months of non-flying.)

23 PX 6506, PX 6507, PX 6508, PX 6509, PX 6510– Abou Donia's auto-antibody blood testing for all 5 Plaintiffs; PX 6505 - Abou Donia's Report on the cause of Vanessa Woods' Illness at p. 49 ("Using scientific principles to determine toxic causality due to chemical exposure, [there is] no other reasonable cause for Vanessa's medical condition;" Woods "exposure to chemicals in the fume event accident on July 12, 2013 was above the threshold level for nervous system injury leading to neuronal cell death and subsequent development of functional deficits"); at p. 50 ("because the long-term effects of these

accountable for this health hazard that caused decades of injuries. That is precisely and unquestionably the purpose of punitive damages under the law of Illinois: to punish reckless conduct and deter it in no uncertain terms. As one of Plaintiffs' experts, Dr. Whittaker notes, after reviewing decades of Boeing documents showing deliberate indifference to this health and safety problem, "it was actually very sad to see an American company fall so far from grace."[24]

For the reasons described below, pursuant to 735 ILCS 5/2-604.1, Plaintiffs thus move this Court for leave to amend their complaint to include a prayer for relief seeking punitive damages.

LEGAL STANDARD

Illinois law permits plaintiffs, following the close of discovery, to move for leave to amend their complaint to include a prayer for relief seeking punitive damages. *See* 735 ILCS 5/2-604.1. The trial court must allow addition of the punitive damages claim if a plaintiff establishes the reasonable likelihood of proving facts at trial sufficient to support such an award. *See id*; *see also LaSalle Nat'l Bank v. Willis*, 378 Ill. App. 3d 307, 326 (2007). Simply stated, to recover punitive damages at trial, plaintiffs must prove that Boeing acted (or failed to act) with "utter indifference to or conscious disregard for the safety of others." Ill. Pattern Jury Instr. (Civil) 14.01; 35.01 As discussed in detail below, Boeing's conduct here meets and exceeds this standard.

FACTUAL BACKGROUND

Plaintiffs are five flight attendants who suffered acute, chronic, and neurocognitive injuries as a result of their exposure to contaminated cabin air events while aboard Boeing-737 airplanes. Four of the five flight attendant Plaintiffs (Karen Neben, Faye Oskarsdottir, Darlene Ramirez, and Vanessa Woods) were all injured on July 12, 2013 on the same Boeing plane. By the time the

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chemicals are central nervous system injury, it is very unlikely that her symptoms will improve or that they will "recover" even with medication. While at the same time, there is evidence to suggest that their condition and nervous system damage may continue to worsen")

[24] Deposition of Dr. Meg Whittaker, expert toxicologist, 7/29/19 at p. 136 – 137

captain diverted that flight and hastily landed in Chicago, all four were seriously ill, two had lost consciousness, and others were violently vomiting. First responders removed the flight attendants from the plane on gurneys. Plaintiffs went to the emergency room by ambulance for evaluation and treatment. Plaintiff Darlene Ramirez was later re-injured during a second contaminated air event on October 3, 2016 and the fifth Plaintiff (Lara Nadon) was exposed to contaminated air on a Boeing 737 plane on August 13, 2015. The lives—indeed, the minds—of these five women have been forever altered by their exposure to toxic cabin air and resulting injuries.

Not only has Boeing long been aware of the serious danger of toxic cabin air events, but the technology to fix the danger has been available for over a decade. Instead of addressing this safety hazard, Boeing downplayed and misrepresented the risk, refused to adequately study the issue, and repeatedly rejected its own "Air Quality" team's pleas for adequate resources to develop or employ the available and feasible technology. In short, Boeing knew its bleed air system was defectively designed. Boeing knew safety measures existed to mitigate or eliminate the danger and Boeing made affirmative and intentional decisions *not* to employ those measures. Boeing's conduct unquestionably rises to the level of "reckless indifference" or "gross negligence" sufficient to justify submission of the punitive damages question to the jury. *See, e.g., Proctor v. Davis*, 291 Ill. App. 3d 265, 285 (1st Dist. 1997).

To assess Boeing's conduct, Plaintiffs assembled their own "Air Quality" team of experts from varied scientific fields. Each expert was tasked with reviewing the available public information, the published science, Boeing's internal documents produced in discovery, and dozens of depositions taken in this case of Boeing management and its engineers. Each of Plaintiffs' air quality team members applied his or her unique specialty to the overarching question

of what Boeing knew, when Boeing knew it, and how Boeing responded to what it knew. Plaintiffs' air quality team consists of:

- ***Professor Werner Dahm*** –Head of the Aerospace and Mechanical Engineering at Arizona State University and a Professor Emeritus of Aerospace Engineering at the University of Michigan. Professor Dahm is the Chief Scientist of the U.S. Air Force and a member of the United States Air Force Scientific Advisory Board.[25]

- ***Daniel Krueger*** - As a risk and safety manager for Virgin America and Alaska Airlines, Mr. Kruger led investigations on contaminated air events and flight crew injuries for these airlines. Mr. Krueger has created and managed safety programs and overall Safety Management Systems (SMS) including the Aviation Safety Action Program (ASAP) at Virgin America.[26]

- ***Captain Vickie Norton*** - A long-term airline Captain and pilot expert with an engineering background and experience working for an aircraft manufacturer (Boeing's predecessor company, McDonnell Douglas), Captain Norton assessed the risk from the perspective of a captain in charge of a plane full of people.[27]

- ***Meg Whittaker*** – With over twenty years of experience in toxicology and risk assessment, Dr. Whittaker is the Managing Director and Chief Toxicologist of ToxServices LLC. She leads projects for the United States Environmental Protection Agency, Clean Production Action and the Health Product Declaration Collaborative.[28]

- ***Dr. Derek Beauchamp*** - With a doctorate in Supramolecular Inorganic Chemistry, Dr. Beauchamp is the Senior Technical Director of Avomeen.[29] Dr. Beauchamp actually assessed the contaminants present in the pyrolyzed by-products of jet engine oil.[30]

- ***Professor Maloney*** – Clemson University economics professor[31] who evaluated Boeing's financial resources and compared the reality of those resources to the repeated decisions made by senior management to reduce or eliminate funding for various contaminated air projects.[32]

- ***Dr. Robert Harrison*** - Occupational medicine physician who was commissioned by the FAA in 2008 to create the definitive manual on how to diagnose and treat acute and

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25 PX 6201 – Curriculum Vitae of Professor Werner Dahm
26 PX 6202 – Curriculum Vitae of Daniel Krueger
27 PX 6203 – Curriculum Vitae of Captain Vicki Norton
28 PX 6204 – Curriculum Vitae of Meg Whittaker
29 PX 6205 – Curriculum Vitae of Dr. Derek Beauchamp
30 Px 6026 – Expert assessment of jet engine oil by Dr. Beauchamp
31 PX 6206 – Curriculum Vitae of Professor Michael Maloney
32 PX 6025 – Expert financial analysis report of Professor Michael Maloney

chronic injuries of flight crew following exposure to contaminated air events.[33] Because of his work on that manual. Dr. Harrison has evaluated and treated over the years hundreds of flight crew members injured by contaminated air events. Dr. Harrison saw all five plaintiffs in this case and evaluated their injuries and opines that their permanent and serious injuries were caused by contaminated air events aboard Boeing airplanes.[34]

- ***Dr. Richard Perrillo*** – An expert forensic neuropsychologist who tested all 5 flight attendants and confirmed their chronic neurological deficits.[35]

Plaintiffs' panel of experts helped write, create, and edit the Plaintiffs' Master Reference Materials document, a massive and comprehensive document detailing Plaintiffs' liability and scientific evidence.[36] Plaintiffs' experts have cited to and relied on over 1,000 documents as well as medical articles and provided numerous examples to support their every proposition and opinion. On any topic of interest, the Court can find specific and detailed examples in the Plaintiffs' Master Reference Materials document. For the purpose of this motion, Plaintiffs rely upon the entire Master Reference Materials and will describe herein only a few examples to make their points.

1. **Contaminated air events cause health and safety issues.**

It is not in dispute that the chemicals found in Boeing's jet engine compartments include potent neurotoxins, such as tricresyl phosphate (TCP) and its "ortho" isomers such as tri-ortho-cresyl phosphate (TOCP),[37] mono-ortho-cresyl phosphate (MOCP) and di-ortho-cresyl phosphate

33 PX 6207 – Curriculum Vitae of Dr. Robert Harrison
34 PX 6027 – Expert report of Dr. Robert Harrison
35 PX 6208 - Curriculum Vitae of Dr. Richard Perrillo; PX 6028 – Expert report of Dr. Perrillo
36 PX 0001A - [redacted]
37 PX 2510 - [redacted]

(DOCP).[38] These chemicals are highly toxic.[39] Researchers confirm that exposure to the irritating and toxic ingredients of hydraulics and engine oil "can produce symptoms of toxicity," including "impairment of neuropsychological function" which can "become more debilitating after time, with problems of loss of cognitive function and memory problems emerging."[40] The FAA's Office of Aerospace Medicine expert, George Day, describes these events as when "a potentially toxic environment is created by contaminated bleed air."[41]

Boeing admits—outside of the courtroom setting—that flight crew have "real symptoms" from contaminated air events.[42] Studies confirm that contaminated air events cause "toxic

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[38] PX 2616 - Michaelis, *Contaminated Cabin Air,* J of Biological Physics & Chemistry, 11: 132-145 (2011) at p. 3 (The ortho isomers of TCP have long been known to be potent neurotoxins. DOCP and MOCP are multiple times more toxic than TOCP. In fact, Mobil Oil undertook a review of this issue precisely because of the "unexpected high neurotoxic potency" of aviation oils containing TCP)

[39] Deposition of Dr. Meg Whittaker, expert toxicologist, 7/29/19 (The TOCP isomers are "highly toxic"); at p. 66-67 (MOCP and TCP isomers can cause permanent demyelination, a condition "your body can't recover from."); at p. 95 ("exposure to particularly MOCP is going to result in an adverse health effect"); at p. 111 (MOCP is "extremely toxic" as shown by the Henschler study, a "very relevant high-quality study"); at p. 62 (MOCP is ten times as toxic as TOCP specifically for neurotoxicity); PX 0268A – BOE0389312, 2004 (Singh, *In-Flight Smoke and Fumes*, Aviation Safety, 0304 (2004) at p. 1 (Contaminated air events are a "hazard which endangers the health and lives of aircrew"(; at p. 10-13 Many of the contaminants of jet engine oil are "highly toxic, even in extremely small amounts"); PX 2637 - Yang, *Portable and remote electrochemical sensing system for detection of tricresyl phosphate in gas phase*, Sensors and Actuators B 161, p. 564–569 (2012) at p. 1 (TCP is a "highly toxic compound" and can induce "an organophosphorous induced delayed neuropathy (OPIDN)"); PX 1680A - Winder, *Hazardous chemicals on jet aircraft: case study - jet engine oils and aerotoxic syndrome*, Current topics in toxicology, Vol. 3 (2006) at p. 1 ("The oils and hydraulics used in airplane engines are toxic, and specific ingredients of such materials are irritating, sensitising and neurotoxic… If leak incidents occur and the oil/fluid is ingested into bleed air and is passed to the flight deck and passenger cabins of airplanes in flight, aircrew and passengers may be exposed to contaminants that can affect their health and safety")

[40] PX 1071 - Winder, *Aerotoxic Syndrome: a descriptive epidemiological survey of aircrew exposed to in cabin airborne contaminants*, J Occup Health Safety- Aust NZ, 18(4): 321-338 (2002)

[41] PX 0028 (Boeing has withdrawn confidential designation) at p. 2 (George Day from FDA: fume event is a "potentially toxic environment created by contaminated bleed air"); PX 0800 - [redacted] PX 0450- [redacted]

[42] Deposition of Boeing's team manager and corporate representative and expert for trial, David Space, 12/14/18 at p. 82-85 (Flight attendants' "rallying cry" was concerns about contaminated air events. Boeing appreciated that "Cabin air quality is the number one voted issue of the Association of Flight Attendant and International Flight Attendant members); PX 0310 - [redacted]

exposures to, and adverse health effects in, flight crew."[43] University researchers agree that the health risks associated with contaminated bleed air include acute symptoms as well as "more serious effects, such as nervous system disorders and incapacitation."[44] Published articles acknowledge that "exposure to oil fumes especially has been reported to cause both acute and chronic neurological and respiratory symptoms, and has been documented to compromise flight safety."[45] As one study noted, "a clear cause and effect relationship has been identified" linking both acute and chronic exposures to contaminated air events with "a clear pattern of acute and chronic adverse effects" involving the neurological and neurobehavioral systems.[46] Professor Chris Winder concludes that "The oils and hydraulics used in airplane engines are toxic, and specific ingredients of such materials are irritating, sensitising and neurotoxic."[47] Harvard Professor, as well as Boeing consultant and expert, Jack Spengler published that flight crews "complain of headaches and eye, skin and upper airway irritation in the short term but go on to experience neuropsychological impairment," as well as other chronic conditions.[48] The health effects, both acutely and long-term, from contaminated air events are well documented.

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[43] PX 1201 - Michaelis, *A Survey of Health Symptoms in BALPA Boeing 757 Pilots*, J. Occup Health Safety, 19(3): 253-261 (2003)

[44] PX 3475- [redacted]

[45] PX 3837A at p. 1 (Murawski, Case Study: *Oil and Hydraulic Fluid Smoke/Fume Events at One Major US Airline in 2009-10* (2012)

[46] PX 4025 at p. 1, 11 (Michaelis, *Aerotoxic Syndrome: A New Occupational Disease?* Public Health Panorama, Vol 3, Issue 2: 141-356 (2017) (The findings from this study are consistent with previous reports which accept that the Bradford Hill causation criteria are met in eight out of nine categories (the exception was a dose–response relationship). "This study identified a cause-- effect relationship for exposure and symptoms and diagnosis.")

[47] PX 1680A - Winder, *Hazardous chemicals on jet aircraft: case study - jet engine oils and aerotoxic syndrome*, Current topics in toxicology (2006) (Flight crew report immediate or short term symptoms following exposure plus symptoms of a long term nature consistent with the development of an irreversible discrete occupational health condition); PX 0455, 4/11/1997 (CAA reports on fume events: Collection of contaminated air events in several of which pilots became incapacitated)

[48] PX 0027 - Spengler & Wilson, *Air quality in aircraft*, Proc. Instn Mech Engrs, Vol. 217, 323 (2003) at p. 3, 10; Deposition of Professor Spengler, 3/9/11 at p. 4 (Deposed as Boeing's expert in litigation);

The FAA recognizes that exposure to contaminated air events can "result in a spectrum of adverse health effects."[49] In fact, in 2008, the FAA sponsored development of a manual that was eventually sent to all healthcare professionals who might treat flight crew and passengers after a contaminated air event. Dr. Robert Harrison was the lead author on that manual and he now serves as Plaintiffs' causation expert in these cases. In the manual, Dr. Harrison describes the acute and long-term effects of toxic cabin air exposures and explains the correct differential diagnosis protocol that healthcare providers should use to assess, diagnose, and treat exposed patients.[50]

Boeing's consistent response to the mountain of scientific and medical evidence on this issue has been to take no real steps to definitively assess the true scope of this problem. Incredibly, even up to today, Boeing has never captured, documented, evaluated, assessed or analyzed a contaminated air incident in-flight.[51] All in-flight air samples done to date captured only normal flight operations, and even that data is alarming.[52] Boeing cannot tell the public what toxins are even present during a contaminated air event or at what levels. As Boeing's senior engineer George Bates explains, Boeing has "no data of air contamination during a fume or upset event" since all

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Deposition of George McEachen, 11/4/19 at p. 68 (Spengler has "done consulting work for Boeing in the past")

[49] PX 0028, 11/2015 at p. 6 (FAA review of Aircraft Cabin Bleed Air Contaminants)

[50] PX 0061 - Harrison, *Exposure to Aircraft Bleed Air Contaminants Among Airline Workers* (2008)

[51] Deposition of David Space at 12/14/18 at p. 58 (Boeing has never captured an upset event in flight); Deposition of David Space, 12/11/18 at p. 86-87 ("Nobody has ever captured an upset event real-time in flight, not simulated, not on a test bed"); Deposition of Jacob Bowen, 9/25/18 at p. 28 (Mr. Bowen has never seen any data from an actual air sample - during an event - about what are the contaminants in the air cabin. "I have never seen any data off of an actual airplane in one of those events"); Deposition of Richard Johnson, 10/15/18 at p. 97-98 (Boeing has never captured an upset event in flight: "I don't recall capturing an upset event -- in service"); Deposition of Richard Johnson, 12/13/18 at p. 48 (Boeing has never captured an upset event in flight on a Boeing plane); Deposition of George Bates, 9/21/18 at p. 106-107 ("During the event, actually during the flight and the event, in the air" Mr. Bates has seen no data on the contaminants in the air contamination)

[52] PX 1680A - Winder, *Hazardous chemicals on jet aircraft: case study - jet engine oils and aerotoxic syndrome*, Current topics in toxicology (2006) at p. 11 ("No monitoring has occurred during an oil leak"); PX 2730 - [redacted]

air sampling has been done "post-event" or after the contaminated air event is over and the plane has landed.[53] Boeing's typical investigation of a contaminated air event involves examining the plane hours or days after the event, by which time the doors have been opened, the passengers and crew have disembarked and the air sample is totally unrepresentative of what actually occurred in the cabin air during the event.[54] Boeing's chemist Jean Ray acknowledged "unless you're actually there monitoring" during the contaminated air event, "there's no way to know for sure what contaminants were there during that event."[55] This failure to evaluate the toxic gases it knows are present in its planes during fume events is an independently sufficient basis for punitive damages; a company knows it is exposing its customers to various levels of poisonous gas, but does nothing to study the levels of gas present, their varying causes, or their effect on passengers and crew. This is a textbook example of "utter indifference to or conscious disregard for the safety of others." Ill. Pattern Jury Instr. (Civil) 14.01;

Thus, the current scientific information available is based on laboratory data, statistical modeling or the background levels of contaminants in cabin air during normal, non-diversion flights. Even so, the results are shocking: TCP has been reported on airplanes during normal operation.[56] Independent researchers confirm that, when cabin air was tested even under normal flying conditions, "significant concentrations of organophosphate neurotoxins and other noxious

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53 Deposition of George Bates, 9/21/18 at p. 106-107 (Even as today, Mr. Bates he has not seen any data on the air quality during a fume or upset event "in the air")

54 Deposition of Boeing's analytical chemist, Ruby Dytioco, 2/23/19 at p. 61-63 (Explaining how Boeing investigates a reported contaminated air event); PX 0208 – [redacted]

55 Deposition of Jean Ray, 10/17/18 at p. 73

56 Deposition of Boeing senior engineer, George Bates, 9/21/18 at p. 221 – (two television stations, a German and a Swiss station, had put investigative journalists on planes to take samples); at p. 226 ("Out of the 31 samples, 28 were found positive for TCP"); PX 0038- [redacted]

substances in cabin air" were found.[57] And when, in 2009, investigative reporters secretly took wipe samples from inside a number of airplanes, all under normal operations, "out of 31 samples, 28 were found positive for TCP."[58] Boeing will not commit the resources to even get in-flight data on this issue.

2. Boeing has long known that toxic air events occur on its airplanes.

Boeing has long known that contaminated air events are serious enough to cause diversions of scheduled flights.[59] Yet Boeing consistently and deliberately downplayed the incidence rate. As Plaintiffs' airline risk manager expert Daniel Krueger explains, "appropriate allocation of resources to mitigate or resolve a safety issue is based upon analysis of incidence rates and the respective safety risk assessment. If data is misrepresented, the safety risk assessment associated with the data will subsequently also be inaccurate."[60] A necessary first step to fixing any problem is establishing—and being forthright about—the frequency of the problem. But Boeing willfully promoted misleading statistics about the incidence rate of contaminated air events. Professor Werner Dahm explained in his expert report that, "Despite Boeing's knowledge of the truth, Boeing misrepresented the incidence statistics in order to imply that these incidents were rare and

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[57] Deposition of Boeing engineer and designated expert for trial, George McEachen, 11/4/19 at p. 70 (Boeing was aware that Professor Ramsden, the current head of nanotechnology at Cranfield University, commented on the Cranfield study that the report "actually found significant concentrations of organophosphates, neurotoxins, and other noxious substances in cabin air even under normal flying conditions"); PX 0345 - [redacted]

[58] PX 2430- [redacted] PX 2431 - [redacted] PX 0038 - [redacted]

[59] Deposition of Boeing team manager, Richard Johnson, 10/15/18 at p. 75-77 (Diversions because of contaminated air events upset airlines); PX 0375- [redacted]

[60] PX 6024 - Plaintiffs' Answers to Rule 213(f) Interrogatories, 6/28/19, at p. 17 (Daniel Krueger's disclosure); Deposition of Daniel Krueger, 7/19/19 at p.99-100 (Boeing used "an outdated statistic for over a decade" even though that number did not "line up with any other industry numbers" or Boeing's internal data. It was fraudulent to "knowingly" cite that statistic when Boeing knew of more updated and valid statistics)

unexpected, downplay the frequency of incidents, encourage complacency, deter and distract research efforts and impede or prevent development of safer technologies."[61]

For example, Boeing repeatedly stated that the Federal Aviation Administration's (FAA) database confirmed contaminated events were rare, "about 167 events in the last 10 years."[62] Boeing's used this statistic to reassure the public and minimize the risk. In reality, Boeing knew that the company itself had "a vast database of operator reports of cabin/fight desk odors/smoke" events[63] and tracked 1,137 smoke, fume, and contamination events from 1999 to 2013 alone.[64] Importantly, 823 of those incidents qualified as "potential safety issues" and were further referred to Boeing internal safety committee (the Engineering Investigation Board) for additional review.[65] Boeing also knew the FAA data was outdated, and rather than being from the last decade as represented, the information had been collected years ago, from 1988-1999.[66] Boeing also knew that there is significant under-reporting of contaminated air incidents, especially to government

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61 Plaintiffs' Answers to Rule 213(f) Interrogatories, 6/28/19, at p. 8 (Professor Dahm's disclosure)

62 Deposition of Boeing's senior manager and designated expert for trial, Jacob Bowen, 9/25/18 at p. 39-40 (Technical expert at Boeing has created form answers to anticipated questions from the public); at p. 64-65 (Boeing represents that "the FAA flight incident database indicates that 167 events have been reported in the U.S. over a 10-year period); PX 2287-

PX 0058 -

PX 2402-

63 PX 0375-

64 PX 0227 –

65 Deposition of Joel Uchiyama, 12/10/18 at p. 102-104 (Each item that is listed as "EIB – YES" means that the contaminated air incident was taken to the Engineering Investigation Board, a Boeing internal safety board, because someone deemed the incident a "potential safety issue.")

66 PX 2401-

agencies.[67] Despite Boeing's awareness that the "167 events in a decade" statistic was a vast under-estimate and totally outdated, Boeing continued to repeat it.[68] This alone shows "utter indifference to or conscious disregard for the safety of others," Ill. Pattern Jury Instr. (Civil) 14.01, because it gives passengers and airlines a false sense of security.

3. **Boeing failed to act to avoid the danger.**

a. Boeing elected not to install filters or converters.

Feasible and effective filters and converters, either of which could remove or significantly reduce airborne toxins, have been available for a long time. The most well-tested of these is the Combined Hydrocarbon Ozone Converters (CHOC). As Plaintiffs' experts opined, a CHOC converter "should have been on Boeing's airplanes since at least 2003 to mitigate known cabin air contamination events in the interest of the health and safety of all aircraft cabin occupants."[69] Combined Hydrocarbon Ozone Converters are catalytic converters that substantially remove both ozone and hydrocarbons (volatile organic compounds or VOCs) from bleed air through conversion. They function similar to a filter except the CHOC converter captures the toxic chemicals and turns them into more benign chemicals. Since the early 2000s, Boeing knew that CHOC converters could reduce the adverse effects of contaminated air events. Testing on various

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[67] PX 1680A - Winder, *Hazardous chemicals on jet aircraft: case study - jet engine oils and aerotoxic syndrome, Current topics in toxicology* (2006) at p. 11 ("With substantial under-reporting and a culture of complacency between operators and regulators, no aviation regulatory authority can honestly consider that the reports they receive from the industry represent anything other than a very small tip of a very large iceberg of leak events… From review of available sources and reported and accessible information, it is apparent that only a small fraction of the known incidents are reported"); PX 2369- [redacted] PX 3833A - Michaelis, *Contaminated Aircraft Cabin Air*, Journal of Biological Physics and Chemistry 11:132–145 (2011) at p. 4 ("Underreporting of contaminated air events has been widely accepted as occurring…. The regulatory databases are unreliable"); at p. 5 (UK Committee of Toxicity stated that "Underreporting is a systemic industry-wide problem")

[68] PX 2591 - [redacted]

[69] PX 0001A - [redacted]

iterations of CHOC technology confirmed their effectiveness at reducing contaminants, thus making the bleed air system safer for passengers and crew.[70]

Furthermore, and importantly, the technology works. Testing of various filters and converters over the years showed efficacy rates as high as 60-90%. For example, the AirManager converter demonstrated an "almost complete removal of particulates" and "experimental work using pyrolyzed Mobil Jet Oil 11, Skydrol hydraulic fluid and a de-icing fluid demonstrated a 97%-99% reduction in oil pyrolysis products" and total VOCs were reduced by 99%.[71] Boeing knew the CHOC converter out-performed the conversion standards even Boeing set for the technology.[72]

Adding CHOC converters to Boeing planes is easy, as the CHOC slides right into the same slot in the bleed air system as the existing ozone converter.[73] The CHOC unit actually fits into "the same envelope space as the ozone converter" and requires no other changes.[74] As Boeing engineer Tim Arnaud confirmed, the CHOC "unit is essentially a plug-in replacement for the ozone

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[70] PX 2204- [redacted]

[71] PX 2470A - [redacted] see also PX 2470B, 9/15/2009 (Article re AirManager: *BAE systems and Quest international UK lead the way in setting new cabin air standards*); PX 2474 - [redacted]

[72] Deposition of Tim Arnaud, 8/17/18 at p. 200 (results of testing of CHOC converter "under conditions designed to simulate a failure mode in which oil enters the bleed air system due to a leak in the main engine or APU"); Deposition of David Space, 12/14/18 at p. 52 (Depending on the contaminant, the CHOC converter was "20 to 60 percent effective"); .PX 2601 - [redacted] PX 0009 - [redacted] PX 2293 - [redacted]

[73] PX 3898 - [redacted] PX 1205 - [redacted]

[74] Deposition of Richard Johnson, 12/13/18 at p. 192 – 194

converter" which provides advancement "at little to no extra cost or downside to our system."[75] The CHOC has the "same weight" and "volume" as the current ozone converter.[76] CHOC units are a "drop-in replacement" with the same "durable, lightweight design and same long-lasting, high efficiency ozone conversion."[77] Plus the price of the CHOC converter is so close to that of the regular converter "that cost would not be a reason to not use it."[78] As Boeing's lead engineer and Air Distribution & E/E Cooing DER, Jane Vitkuske noted, the benefits of the CHOC technology was "minimal cost," with minimal "weight impact."[79]

Boeing's main competitor, Airbus, began in-flight testing of CHOC converters in 1999[80] and started installing the CHOC on Airbus planes in 2006 to 2007.[81] Although Boeing had access to this same CHOC converter technology,[82] Boeing has still not adopted or implemented this safer alternatives. As Boeing's manager Richard Johnson admitted, if there was a CHOC converter on an Airbus plane, that aircraft "would have better air quality in the cabin than a Boeing plane without a CHOC converter."[83]

But Boeing's management deliberately blocked progress on the development of CHOC

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[75] Deposition of Richard Johnson, 12/13/18 at p.194 (CHOC is "essentially a plug and replacement for the ozone converter") PX 0284 - [redacted]

[76] PX 1205 - [redacted]

[77] PX 1378 - [redacted]

[78] Deposition of Richard Johnson, 12/13/18 at p. 192 – 194

[79] Deposition of Richard Johnson, 12/13/18 at p. 204-205

[80] Deposition of Jacob Bowen (9/25/18) at p. 146-154 (CHOC has been on an Airbus plane flying for United Airlines for the past 24 months, with good qualitative data from the crew); PX 0063 – [redacted]

[81] Deposition of Boeing's manager, David Space, 11/1/10 at p. 209 (Airbus has been using CHOC converters since the CHOC 1. Airbus wanted to be "first to the punch to bring out new technology.")

[82] Deposition of George McEachen, 9/26/18 at p. 164-166 (As soon as the CHOC converter was manufactured and used, then Boeing could buy that same piece of equipment if they wanted to); Deposition of David Space David Space, 10/24/18 at p. 157 – 158 (There would have been no proprietary deal blocking Boeing from buying the CHOC. New equipment is not typically proprietary only to one aircraft manufacturer where "Honeywell would not be allowed to sell it to Boeing")

[83] Deposition of Boeing's manager, Richard Johnson, 12/13/18 at p. 209

converters. Management consistently put funding obstacles in the path of its air quality team. In 2001, Boeing employees complained internally that the converter project had "limited approved funding" and thus no definitive timetable or schedule for completion.[84] Since almost all additions to airplanes are collaboratively developed with suppliers, Boeing reluctance was a death knell. As one sensor manufacturer confirmed, "without a push from Boeing" there could be no momentum.[85] Boeing knew vendors were "reluctant to put forward funding [for a project] without a firm marketing commitment."[86]

Boeing's refusal to put adequate resources and commitment into this issue resulted in over a decade of delay. In 2004, when Boeing's analytical chemist Dale Scheer estimated it would cost $10,000.00 to complete his internal testing on the CHOC, Boeing management limited the company's financial investment "to a maximum of $5,000."[87] Although Boeing ended fiscal year 2005 with cash-on-hand of $5.4 Billion and net profit of $2.2 Billion,[88] the company simply would not approve a $5,000.00 expense for safety testing. When Boeing's air quality team requested funding in 2006 to study air purification and sensor technology, management turned down the team, saying "the money is just not going to be there."[89] And in 2008, when Boeing's product development engineer Charles Stout wanted to evaluate the CHOC technology "for possible use

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84 PX 0911- [redacted]

85 PX 0911- [redacted]

86 PX 2010- [redacted]

87 Deposition of David Space, 12/14/18 at p. 175-176 (While Dale Scheer estimated it would cost $10,000 to complete the CHOC analysis, after reviewing current budget constraints, Boeing decided "to limit the Boeing contribution to the CHOC test to a maximum of $5000); PX 0322 - [redacted]

88 PX 6025 – Expert financial analysis report of Professor Michael Maloney at p. 2 and 5

89 PX 1681- [redacted]

on Boeing aircraft," Boeing severely restricted his budget and permitted him to test only five potential contaminant compounds, no more.[90] Yet Boeing knew there were "hundreds of positively identified compounds" present in contaminated cabin air.[91] By refusing to fund testing on more than five compounds, Boeing ensured that it, its suppliers, customers, and passengers would remain in the dark about the dangerous air on its planes. So adamant was management's funding curtailment that, when Boeing's chemist Jean Ray wanted to add two extra chemicals to the testing regimen, Mr. Stout required her to identify which two compounds already on the testing list should be replaced "because the budget only allows for a fixed number (5) of compounds."[92]

Boeing's air quality team received "the green light" to proceed with CHOC converter evaluation in May of 2009,[93] only to get news a week late that the entire project was again "put on hold" due to budget restrictions.[94] As Boeing's manager David Space describes, the entire team were assembled with "contracts in place" for the "kick off meeting" when they discovered the rug had been pulled from underneath them by management.[95] Funding was delayed not for a few days, or a few weeks, but until 2010.

Tellingly, Boeing deliberately misrepresented its position on this issue to the public. Just a few days after the decision to block funding, on June 10, 2009, Japan Airlines contacted Boeing. Japan Airlines wanted information on what was in "bleed air of engine or APU which contains oil

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90 PX 2342 - [redacted]

91 PX 0994- [redacted]

92 PX 2342 - [redacted]

93 PX 2436 - [redacted]

94 Deposition of Boeing senior manager and designated expert for trial, Jacob Bowen, 9/25/18 at p. 193 (In 2009, CHOC converter project "project has been put on hold until 2010 due to PD budget restrictions"); PX 0070- [redacted]

95 Deposition of David Space, 12/14/18 at p. 189-191 (Space discusses that the CHOC project "began in 2009 but was stopped due to budget reductions" and Boeing had assembled the filtration Boeing team, Honeywell and the Rutgers people with "Contracts in place and were ready to have our kickoff meeting. We found out the day of our kickoff meeting that funding had been delayed until 2010.") PX 0327 - [redacted]

fume" and the "effect of oil fume on the human body."[96] Boeing did not admit to this airline that it had just stopped funding research on that topic. Instead, Boeing falsely claimed it "fully supports the studies being conducted" and "continues to work with industry to eliminate any potential contaminant events."[97] Importantly, Boeing closed out the year 2009 with $5.3 Billion in cash on hand,[98] which yet again was vastly in excess of what was needed to fund this safety project.

Boeing management put the company's cabin environment studies "on hold" once again in 2010.[99] In 2011, even though the CHOC vendor Honeywell offered to pay for contaminated air testing "at their cost," Boeing management decided to put the entire project back "on hold due to lack of budget restoration."[100] Boeing's air quality team futilely tried to change management's mind. The team argued that CHOC converters could provide Boeing with a marketing edge.[101] But Boeing's focus continued to be money, money, and only money. Boeing management demanded proof that a CHOC converter would "provide enough benefit to buy its way onto the plane,"[102] requiring a proven financial benefit before it would invest in safer technology.[103] Boeing

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96 Deposition of George Bates, 9/21/18 at p. 218-220 (Boeing represents to Japan Airlines that it supports scientific research); PX 0037 - [redacted]

97 PX 0037 - [redacted]

98 PX 6025 – Expert financial analysis report of Professor Michael Maloney at p. 5

99 PX 2511 - [redacted]

100 PX 2597 - [redacted]

101 PX 0353 - [redacted]

102 Deposition of Tim Arnaud, 8/17/18 at p. 136 (Question raised at air quality team meeting: Does Air Purification provide enough benefit to buy its way onto the plane?"); PX 0003 - [redacted]

103 Deposition of Tim Arnaud, 8/17/18 at 136-137 (Boeing's determination was whether "the benefit of having air purification" was "worth the cost of carrying it around all the time on the airplane" which made it a money issue: "I guess it boils down to dollars eventually, because the airlines have to buy the fuel to carry the equipment around on the airplane. And then also Boeing has to come up with the expense to

management removed, cut or deferred funding on air quality research and development over and over again, which led to significant delays. Although Boeing has now opted to install CHOC converters on their bleed airplanes, starting in the 2020 / 2021 timeframe, that decision comes too late to save the Plaintiffs.[104]

Knowing toxic air is frequently present in its planes at levels sufficient to cause injury or death and knowing it had the technology to reduce or eliminate the problem, Boeing chose to do nothing. A reasonable jury could find that conduct to be "utter indifference to or conscious disregard for the safety of others." Ill. Pattern Jury Instr. (Civil) 14.01

b. Boeing failed to install sensors.

Boeing's planes have more than fifty sensors onboard and many of them trigger warnings for the pilots in-flight.[105] But Boeing does not have even a single sensor in the bleed air system to warn of a contaminated air event. This is because Boeing's management refused to fund the research and development efforts necessary to implement such technology.

As a threshold step to developing a bleed air sensor, Boeing engineers needed to create a list of possible contaminants the sensor would have to detect.[106] As early as November of 1999, Boeing announced it was "developing a list of chemicals to be recommended for cabin air quality monitoring."[107] But then, for the next twenty years, Boeing used the excuse that this first step was not yet finished to justify lack of any real progress on the entire project. Almost a decade later, in

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develop it. So, it's all those things combined." Boeing wondered if the benefit of this particular technology would justify the expense of Boeing, investing in it.)

[104] Deposition of David Space, 12/14/18 at p. 43-46 (Boeing intends to offer Honeywell's CHOC converters to airlines for both new planes as well as retrofitting older models)

[105] Deposition of Boeing expert Mark Fitzpatrick, 10/25/19 at p. 91-95

[106] PX 0001A - [redacted]; Deposition of Richard Johnson, 10/15/18 at p. 168:1-3 (It was important to understand the potential contaminants are out there so we could engage our supply base to see what sensor technology is available)

[107] PX 0528 - [redacted]

2008, Boeing manager Matthew Schwab was still proposing that Boeing "compile a list of the contaminants we'd want to be able to detect, and what levels we'd need to detect those ... for real-time air quality monitoring."[108] Boeing's excuse in August of 2011 for the delay in "implementing a system to purify the air ... was that a list of all of the compounds that contribution to the symptoms was and still is unknown."[109] By 2015, Boeing amazingly had made absolutely no progress, as the company was still working to "identify bleed air and cabin contaminants or surrogates of interest."[110]

As Plaintiff's aeronautical expert, Professor Werner Dahm, explains, there is an engineering concept known as "crawl – walk – run." When confronting an issue, a company first crawls, that is, it starts by implementing solutions even if they are not optimal because the data and knowledge generated by that first step will help propel better and more advanced solutions over time (walk and then run). But as to sensors, Boeing never even bothered to "crawl," deliberately eschewing in-flight air evaluation sensors that would have provided information on the contaminants in real time, as the FAA had suggested.[111]

A pilot's ability to detect a contaminated air event in-flight is important because, in the cockpit, there is a simple switch that allows the pilot to shut off inflowing air from either engine.

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[108] Deposition of Boeing's analytical chemist, Ruby Dytioco, 10/18/18 at p. 171 (Matt Schwab agrees that Boeing "should compile a list of the contaminants we'd want to be able to detect, and what levels we'd need to detect these"); PX 0194 - [redacted]

[109] PX 2643 - [redacted]

[110] Deposition of Boeing senior manager and designated expert for trial, Jacob Bowen, 9/25/18 at p. 181 (In 2009, Boeing still needed to "identify bleed air and cabin contaminants or surrogates of interest"); PX 0077 – [redacted]

[111] Deposition of Boeing manager Richard Johnson, 12/13/18 at p. 229-230 (Boeing knew in 2004 that the FAA wanted sensors that "were on the plane and transmitting data down to the ground." So sensors that did not just collect samples but where the data could be downloaded "as the plane goes on"); PX 0289 - [redacted]

If the pilot knows contaminants have entered the air supply because of issues from a specific engine, with just a flip of a switch, the pilot can shut the air flow down on that side of the plane and protect passengers and crew from the toxins.[112] Pilots thus want sensors.[113] Pilots consider contaminated air events to be "safety" issues and do not want "passengers used as guinea pigs in seats."[114] The flight crew unions want sensors.[115] The FAA wants sensors.[116] Independent scholarly organizations like the National Research Council recommend sensors.[117] Industry

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[112] Deposition of George Bates, 9/2/18 at p. 263 (If Boeing had "a sensor that told the pilot there's a problem on the right engine, the pilot could just flip a switch and bleed air wouldn't come through that engine anymore… So, one of the reasons why a sensor that gave pilots warnings would be important is because they could stop further contaminated air coming into the cabin"); Deposition of Jacob Bowen, 9/25/18 at p. 138-141 (Boeing's planes have an isolation valve which "essentially closes the left bleed from the right bleed" so pilots can "turn off that specific bleed." If a pilot believes that there is contamination or smoke coming from a specific engine, the pilot "can turn off the bleed air from coming through that engine into the cabin" and "same with the APU as well." That "doesn't impact the safety of the flight" and it is one of the reasons why Boeing has the cockpit switches, "so that if something's happening in one engine, you cannot bring the air in over that engine and just bring the air in over the other").

[113] PX 2544 – [redacted]

[114] PX 2600 - [redacted]

[115] Deposition of Richard Johnson, 12/13/18 at p. 145 (AFA Union has repeatedly told Boeing that they want Boeing to do "whatever it will take for the cabin air to be clean for the flight attendants")

[116] PX 0289 - [redacted] PX 2406 - [redacted]

[117] PX 0749 - [redacted] PX 2451 - [redacted]

organizations such as ASHRAE have demanded sensors.[118] Yet Boeing has still not installed sensors or monitors for contaminated air events in any of its airplanes.[119]

Plaintiffs' experts set forth a detailed timeline and analysis of the history of Boeing's failure to implement sensors.[120] The timeline proves deliberate delays and reckless decisions. By 2005, Boeing knew that Professor Chris van Netten of the University of British Columbia had developed a sensor could "capture sporadic air quality events"[121] and was small, light and easy to use. Professor van Netten is a "worldwide approved toxicologist" with numerous professional publications in the field of bleed air contamination and sensors.[122] Even Boeing agrees that "Professor van Netten is the leading authority in North America on bleed-air contamination of airline cabins, and has published extensively on the pyrolysis products of hydraulic and engine oils."[123]

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118 PX 0314, 4/2/2008 at p. 8 (ASHRAE 161 Standard: Air Quality within Commercial Aircraft): 7.2 – Bleed Air Contaminant Monitoring: "One or more sensors intended to identify a substance or substances indicative of air supply system contamination by partly or fully pyrolyzed engine oil or hydraulic fluid ***shall*** be installed. The indicator substance(s) ***shall*** (1) be shown to be associated with the presence of partly or fully pyrolyzed engine oil or hydraulic fluid; (2) have sufficiently low background level that its presence can be reliably attributed to these contaminants; and (3) be measured with sufficient sensitivity to reliably detect the occurrence of these contamination events. (emphasis added)); PX 2451 - [redacted]

119 Deposition of David Space, 12/14/18 at p. 42-43 (There are "no sensor or monitor on any of Boeing's planes that would detect and warn about contaminated air entering the cabin")

120 PX 0001A - [redacted]

121 PX 1611 - [redacted]

122 PX 0473 - van Netten, *Air Quality and Health Effects Associated with the Operation of BAe146-200 Aircraft*, Appl. Occup. Environ. Hyg, 13(10) (Oct 1998); PX 0830 - van Netten, *Descriptive Epidemiology of Air Quality Incidents Experienced in Aircraft from Three Airline Companies*, National Academy of Sciences (2001)); PX 1619 - [redacted]
PX 2280 - van Netten, *Design of a small personal air monitor and its application in aircraft*, Science of the total environment (2008) at p. 1

123 PX 2413 - [redacted]

As Professor van Netten explained in one of his published paper, "Some flight crew members adhere to the well-established principle in ground based industries that they are entitled to know whether their work environment is safe."[124] By 2008, the sampler had "been approved for use in aircraft during all phases of flight."[125] The VN sampler cost $200-$250[126] and could measure for even trace amounts of TCP.[127] When Professor van Netten analyzed samples taken by German pilots, he "found levels of TCP specific to the engine oils"[128] and confirmed a "fingerprint pattern" to the air contaminants "that's specific to jet engine oil."[129] Professor van Netten has expressed his concern that "engine oil can get into the air that passengers breathe even on normal flights where there are no fume events."[130] The VN Sampler is just one of several technologies that were available and feasible during the relevant times. Boeing kept tabs on the VN sampler, but never took steps to implement it.[131]

Boeing admits, internally, that one reason for its refusal to install sensors has been the fear of litigation. Boeing feared data collected might hurt the company in litigation because flight crew and passengers could definitively prove what toxins they were exposed to.[132] George Bates, Boeing's senior engineer, noted in 2002 that monitors would just "collect data for the lawyers to

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124 *Id.*

125 *Id.* at p. 1

126 Deposition of Professor van Netten, 1/11/11 at p. 263

127 PX 0262 - [redacted]
PX 1612, [redacted]

128 Deposition of Professor van Netten, 1/11/11 at p. 53-56

129 Deposition of Professor van Netten, 1/11/11 at p. 261

130 PX 2285 - [redacted]

131 PX 2732 - [redacted]

132 PX 0360 - Deposition excerpts of George Bates (Boeing was concerned that sensor data would be given to lawyers)

use in court against Boeing."[133] In 2008, Mr. Bates further detailed that the biggest impediment to installation of air quality monitors is the "fact that such data might be called for in a court of law," which could "open a can of worms" for the company.[134] Boeing employees again documented the company's concerns in 2011 that if Boeing implemented "a sensor driven system, how long will it be until the readings have to be recorded and available not only for maintenance but for lawyers?" Boeing's senior engineers considered this "a serious downside to any approach that relies on sensors." The company expressed concern that the recorded data would have "to be given to any crew member or passenger and their legal or medical expert" and called such a circumstance "Crazy!"[135] Boeing's senior engineer George Bates admitted that sensors could provide data that would allow injured travelers or crew to "actually be able to tell their doctor what they were exposed to."[136] Boeing engineers thus suggested that, if sensors were installed, the data should be used solely for maintenance purposes and the sensors should intentionally not "collect any data that doctors and lawyers might use" or which Boeing might have to face "in a court of law."[137] Even though Boeing knew that failing to undertake safety measures in order to protect

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[133] PX 0800- [redacted]

[134] Deposition of George Bates, 9/21/18 at p. 255-256 (Boeing's concern was that if someone got sick on a Boeing plane, they could ask to "see the sensor data" to establish what they were exposed to and Boeing would "have to turn over that sensor data"); PX 0044- [redacted]

[135] Deposition of George Bates, 9/21/18 at p. 257- (With sensors, potentially "passengers and the crew members could actually use this data to go to their doctors and get better treatment"); at p. 260 (Boeing's associate technical fellow Warren Atkey thought it "would be crazy, to let people injured on [Boeing's] "planes know what they were exposed to); PX 0045 - [redacted]

[136] Deposition of George Bates, 9/21/18 at p. 259 -261

[137] Deposition of George Bates, 9/21/18 at p. 259 -261

themselves from litigation was inappropriate,[138] the company did it anyway. This alone would be a sufficient basis for the award of punitive damages—failing to provide a way to reduce gas exposure because the data collected in the process might help the exposed passengers sue. Once again, "conscious disregard for the safety of others." Ill. Pattern Jury Instr. (Civil) 14.01;

Boeing also feared that installing even a single sensor would be a tacit admission that such sensors were necessary for safety. Indeed, when the air freight company DHL demanded that Boeing provide "a plan that includes the development of improved filters / converters and sensors,"[139] Boeing worried that if the company provided sensors to DHL, that technology might "become a requirement for aircraft certification."[140] Then "flight attendant and pilot unions and congressional supporters could use this effort as evidence that sensors are needed" and use the modification "to drive their agenda forward, to have bleed air sensors required on all aircraft."[141] Such an action could also elicit "congressional pressure to incorporate new regulations mandating bleed air sensors."[142] Boeing feared that "If/when word gets out on adding bleed air sensors on 777X, expect unions to pick this up in argument at technical committee meetings and with

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[138] Deposition of Jacob Bowen, (9/25/18) at p. 251-252 (It would be inappropriate for Boeing to not develop or delay the development or implementation of air quality sensors "because lawyers might be able to use it against [Boeing] in a lawsuit" or "because passengers or crew would then be able to know exactly what they were exposed to and could give that information to their doctors")

[139] PX 3806 -

[140] Deposition of Boeing senior manager and designated expert for trial, Jacob Bowen, 9/25/18 at p. 273 (Boeing appreciated that one of the risks of "helping DLH get a sensor, is that sensor technology could become a requirement for aircraft certification); PX 3806

[141] PX 0077–

[142] *Id.* at p. 2-3

congressional supporters."[143] Clearly, Boeing did not want anything it did to be used as proof there was "an issue with bleed air contaminants."[144] So the company opted to do nothing.

Just as it had acted repeatedly to thwart development of CHOC converters, Boeing also worked hard *not* to fund sensors. Boeing publicly declared it was "currently working with several suppliers to develop an on-board system that would be able to detect various air quality parameters."[145] In reality, Boeing's management enforced "budget constraints" that did not "allow for in-depth look at sensor technologies."[146] In 2002, a vendor provided a cost estimate for "air quality sensors" of $130 per sensor and proposed eight sensors per plane, for a total of $1,040.[147] This technology was feasible and certainly cost efficient. Yet Boeing never implemented it.

Boeing noted in July of 2009 that "Airbus is installing air quality sensors" on some of its planes.[148] But when Boeing's team requested $183,000 in funding for sensors the next year, management refused the request and awarded $0 to the project.[149] In January of 2011, Boeing's air quality team noted that they had "accomplished much with very few resources" but confirmed that "with additional funding" the team could actually pursue the development of sensor technology that could greatly benefit Boeing.[150]

143 *Id.*

144 PX 3806 -

145 PX 0682,

146 PX 0907 -

147 PX 0909 -

148 PX 2451 -

149 PX 2502 -

PX 0207 -

That same year, Cranfield University published the results of an air quality study. This research group used a photo-ionization detector (PID), a real-time detector of possible fume events, to take air samples aboard 100 flights.[151] Even though the Cranfield study did not capture a contaminated air event, the researchers still recorded a TOCP level as high as .0228 mg/m3 (228 micrograms/m3),[152] a value that exceeds the current safety threshold for TOCP. Prof Jeremy Ramsden, head of nanotechnology at Cranfield university, explained that the study "actually found significant concentrations of organophosphate neurotoxins and other noxious substances in cabin air even under normal flying conditions."[153] The Cranfield study provided useful information about the success of a PID for in-flight measurements and gave Boeing a roadmap for effective and available sensors.

Boeing thus decided to test a PID sensor in the VIPR study. But rather than rely on its army of in-house engineers (over 45,000) to develop the test sensor, Boeing instead trusted it to an Auburn graduate student who became too "distracted at night playing video games" and never completed the project. So there was no photo-ionization test results in VIPR.[154] But Boeing's expert Ruel Overfelt admits that it might not even have been necessary for Boeing to develop its own PID sensor, as one "could probably be bought off the shelf and then applied directly to this problem."[155]

By 2011, researchers from Boise State University published that there was "a wide variety of sensor types and technologies that can be utilized to understand the aircraft cabin environment

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151 PX 2596 – [redacted]

152 PX 2641, March 2011 at p. 12, 14, 23-25 (Cranfield, *Aircraft Air Sampling Study: Part 1 of the Final Report*. Institute of Environment and Health (2011); PX 2596- [redacted]

153 Deposition of Boeing engineer and designated expert for trial, George McEachen, 11/4/19 at p. 70; PX 0345- [redacted]

154 Deposition of Ruel Overfelt, 9/27/19 at p. 110-111

155 Deposition of Ruel Overfelt, 9/27/19 at p. 55

available on the market" and "a variety of technology options" were available for each type of sensor needed.[156] Boeing never implemented any of those options. Rather, a few months later, Boeing's sensor project was turned "red," or stopped, because it had been put "on hold pending senior manager Mike Sinnett's review."[157]

The following year, Boeing management put the sensor RFI project on another "5 month delay."[158] Boeing's manager David Space noted that "there will be legal ramifications if sensor funding is cut" again, as it was becoming increasingly difficult to "explain the starts/stops of air quality sensor work." David Space announced that if his team did not get the requested funding, he would have to disband the cross-discipline Contaminants team, which would create an "unrecoverable situation as members will move on to other projects" and "Boeing will fall behind the competition" on sensor technology as well as "state of the art."[159] His threats fell on deaf ears.

In 2012, Boeing management cut the BR311 sensor and air purification project research funding - by 100%. Funding "going forward for the remainder of 2012 ... would be limited to payment of existing signed contracts" and some minimal continued work.[160] Boeing management falsely claim "a significant short term budget challenge as a result of multiple business risks" and thus management was "having to make tough decisions." The team was told it was "an opportunity

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156 PX 2631 - Klein, Sing Ming Loo et al, *Survey of Sensor Technology for Aircraft Cabin Environment Sensing, 41st International Conference on Environmental Systems*, published by American Institute of Aeronautics and Astronautics (2011) at p. 1, 13-14

157 PX 0331 - [redacted]

158 PX 2734 - [redacted]

159 PX 0332 - [redacted]

160 PX 2683 - [redacted]

for giving funding back for the "greater good."[161] In reality, Boeing was flush with profits and had large volumes of cash in the bank: over a billion dollars almost every year.[162]

In August of 2015, after a delay of three years when Boeing management would not sign off on the sensor project, Boeing's air quality team finally received approval to start work again. As Boeing's manager David Space noted, "The bleed air sensor [project] was approved in 2012, I believe, but contingent on Mike Sinnett approval. 3 years later... we now have Mike's approval to move forward."[163] Finally, with approval from Mike Sinnett Boeing's head of product development, the team could start work again.[164] Their efforts were too late to save the Plaintiffs.

5. Boeing failed to adequately study this issue or implement safer alternatives.

Knowing of a safety issue, and deliberately failing to study the problem or implement solutions, can justify punitive damages. *Proctor v. Davis*, 291 Ill.App.3d 265 (1997). Boeing management routinely withheld funding over the years for testing, so the frustrated Boeing air quality team finally signed the company up for a consortium project: the VIPR study. The VIPR study was a collaborative project between Boeing, several government agencies including NASA, a number of universities and various converter and sensor vendors.[165] The VIPR research project assessed "engine oil contamination in aircraft bleed air, its characterization, its detection and its migration," the precise issues that had been crying out for research for decades.[166] And finally

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161 PX 2683 - [redacted]

162 PX 6025 – Expert financial analysis report of Professor Michael Maloney (June 2019)

163 PX 0333 - [redacted]

164 Deposition of George McEachen, 9/26/18 at p. 30

165 PX 3809 - [redacted]

166 PX 3809 [redacted]

getting data worked magic: the VIPR study results prodded Boeing to plan on installing converters on its planes in 2021 and provided confirming data on the effectiveness of sensors. With an actual study, came knowledge and action. Sadly, that progress was too late for these Plaintiffs.

Not surprisingly, Boeing funding issues almost stalled the VIPR study and reduced its full potential. In 2014, Boeing learned that the government funding for the study was exhausted. Auburn University had thus been told to not ship the oil delivery and sensor systems necessary for the test.[167] David Space from Boeing expressed strong frustration that Boeing refused to pick up the tab for the budget shortfall; a mere $59,000. But Boeing management held firm and emphasized that "additional funding at Boeing was unfortunately not possible."[168] To date, Boeing had only contributed $1.3 mil to the study but senior management refused to spend any more money.[169] As an aside, at this very moment in time, Professor Maloney confirmed that Boeing had the money (in cash in the bank) to privately conduct the entire VIPR study single-handedly, not just pay the needed $59,000. Indeed, Boeing had $9 ***Billion*** dollars in cash-on-hand at the end of 2013 (which means Boeing was accumulating $25 million per day that year, in just cash).[170] While Boeing's senior manager Jacob Bowen acknowledged it would be inappropriate to have "money be one of the considerations or the barriers to doing a safety test,"[171] this is precisely what Boeing did.

VIPR's new information produced change. The VIPR results caused Boeing to finally decide to put CHOC converters on its planes starting next year as the study confirmed that the CHOC converter reduced "the concentration of engine oil, particulate matter, and low level

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167 PX 3809

168 PX 3809 [redacted]

169 PX 3809 - [redacted]

170 PX 6025 – Expert financial analysis report of Professor Michael Maloney at p. 3, Table 3

171 Deposition of Jacob Bowen, 9/25/18 at p. 190-191

TCP."[172] Boeing thus announced that "bleed air purification technologies" would be offered for the 777X and potential future models.[173] Because of VIPR, Boeing will now offer the CHOC converters on their bleed airplanes starting in the 2020 / 2021 timeframe.[174] VIPR also provided additional evidence about the effectiveness of various sensor options. What the VIPR study proves is that – when actual testing is finally done – Boeing adopted safer alternatives including CHOC converters. Boeing's expert consultant on the VIPR study, Auburn Professor Ruel Overfelt admitted there was no reason, in terms of the engineering or the technical aspects of the study, that VIPR could not have been done twenty years early.[175]

6. Boeing's conduct is worthy of punishment.

Plaintiffs' experts opine that Boeing's conduct was egregious, willful, wanton, reckless and worthy of punishment. According to Dr. Whittaker, after an in-depth review of the published literature and internal Boeing documents, there is sufficient evidence to conclude that "the ortho isomers of TCP get into the cabin and present a health hazard to the people in the cabin."[176] Boeing "willfully, purposefully and recklessly disregarded their responsibility to protect the health and welfare of the crew and passengers on the planes that they designed and built."[177] Dr. Whittaker explained that Boeing knew there was

> an issue with the constituents of TCP that are present in oil that indeed gets into the cabin. It was and is Boeing's responsibility to get a handle on it and to either implement exposure controls or find safer substitutes to protect the health of the workers and the occupants. Instead, reading these e-mails, that go on for decades, it was actually very sad to see an American company fall so far from grace. So

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172 PX 0351- [redacted]

173 PX 0351- [redacted]

174 Deposition of David Space, 12/14/18 at p. 43-46 (Boeing intends to offer Honeywell's CHOC converters to airlines for both new planes as well as retrofitting older models)

175 Deposition of Ruel Overfelt, 9/27/19 at p. 42-43

176 Deposition of Dr. Meg Whittaker, expert toxicologist, 7/29/19 at p. 138-139

177 Deposition of Dr. Meg Whittaker, expert toxicologist, 7/29/19 at p. 135 – 136

> they intentionally didn't want to see what I can clearly see as a toxicologist. There's a health issue here. There's a health risk as well as a health hazard and they could have done something. They've had decades to do something and they've done nothing to date."[178]

Based upon his vast experience, impressive credentials and review of thousands of Boeing's internal documents as well as publicly available and published scientific literature on the relevant topics, Professor Dahm concluded, "It's clear, based on the totality of the evidence, and my professional assessment of that, that Boeing knew, and has known for a very long time, that it's bleed air systems on its aircraft are defective in the sense that it can allow contaminants to enter the cabin."[179] Professor Dahm continued: "It's also true, and the evidence is very clear on this, that Boeing has been aware of the health effects that those contaminants can cause to flight crews, the passengers" and "Boeing had numerous opportunities to address this" but did not.[180] Professor Dahm opined that Boeing "literally, intentionally, consistently, strategically, sought to ensure that its air quality team would not be able to generate the data" needed to fully "understand the problem, evaluate solutions."[181] Professor Dahm noted that "The repeat and consistent pattern that Boeing management exercised, yanking the funding, as I described, that's what raises this, in my professional opinion, to clear gross negligence."[182] Boeing's fear of litigation overwhelmed its duty to the flying public; an unconscionable position.

Daniel Krueger, an industry risk and safety manager, observed that "Boeing did not have a serious commitment from management to push the bleed air system sensor and CHOC converter projects forward" as "Boeing would not commit the necessary resources for that progress."[183] Plus

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178 Deposition of Dr. Meg Whittaker, expert toxicologist, 7/29/19 at p. 136 – 137
179 Deposition of Professor Werner Dahm, 7/19/19 at p. 163-166
180 Deposition of Professor Werner Dahm, 7/19/19 at p. 163-166
181 Deposition of Professor Werner Dahm, 7/19/19 at p. 165
182 Deposition of Professor Werner Dahm, 7/19/19 at p. 163-166
183 PX 6024 - Plaintiffs' Answers to Rule 213(f) Interrogatories, 6/28/19, at p. 20

"Boeing's decision to still not have CHOC converters on their bleed air system planes is unreasonable, inappropriate and negligent. Boeing's continued refusal to install this health and safety equipment, given the weight of evidence available both internally and externally of the health and safety issues associated with contaminated air events, rises to the level of reckless, willful and wanton misconduct."[184] Similarly, pilot and engineering expert Captain Vicki Norton, a 30-year commercial pilot, opined that Boeing's conduct in this case was willful, wanton and reckless and put the flight crew and passenger's health and safety at risk.[185]

LEGAL ARGUMENT

The question of whether a defendant's conduct warrants punitive damages is ultimately for the jury. *See Barton v. Chicago & N. W. Transp. Co.*, 325 Ill.App.3d 1005, 1017 (2001); *Mostafa v. City of Hickory Hills*, 287 Ill.App.3d 160, 170 (1997); *Canning v. Barton,* 264 Ill. App. 3d 952, 955 (1994). Illinois law permits a jury to impose punitive damages when the defendant engaged in "willful and wanton" conduct. *See* Ill. Pattern Jury Instr. (Civil) 35.01; *See also Warren v. LeMay,* 142 Ill.App.3d 550, 579 (1986); *Motsch v. Pine Roofing Co., Inc.*, 178 Ill.App.3d 169, 177 (1989); *Kopczick v. Hobart Corp.*, 308 Ill.App.3d 867, 974 (1999). "Willful and wanton conduct" includes conduct which shows "conscious disregard for the safety of others." Ill. Pattern Jur Instr. (Civil) 14.01.

> [C]onduct characterized as willful and wanton may be proven where the acts have been less than intentional—*i.e.*, where there has been "a failure, after knowledge of impending danger, to exercise ordinary care to prevent" the danger, or a "failure to discover the danger through * * * carelessness when it could have been discovered by the exercise of ordinary care."

184 PX 6024 - Plaintiffs' Answers to Rule 213(f) Interrogatories, 6/28/19, at p. 20
185 Deposition of Captain Vicki Norton, 7/26/19 at p. 146-147

Ziarko v. Soo Line R. Co., 161 Ill. 2d 267, 274 (1994) (quoting *Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946)); *see also Murray v. Chicago Youth Ctr.*, 224 Ill.2d 213, 239 (2007); *Am. Nat. Bank & Trust Co. v. City of Chicago*, 192 Ill.2d 274, 285 (2000); *Mostafa*, 287 Ill.App.3d at 170.

In the context of a products liability claim, "a manufacturer's awareness that its product is unreasonably dangerous coupled with a failure to act to reduce the risk amounts to willful and wanton conduct." *Kopczick v. Hobart Corp.*, 308 Ill.App.3d 867, 974 (1999) (citing *Bass v. Cincinnati, Inc.*, 180 Ill.App.3d 1076 (1989)). Boeing's knowledge of the health and safety implications of contaminated air events is documented dozens and dozens of times in the Plaintiffs' Master Reference Materials. Boeing knew how terrifying it was for passengers and crew to experience a contaminated air events, noting As Boeing notes, "nothing triggers the reptilian (survival mode) as quickly and powerfully as the sense that something is wrong with the air we breathe."[186] And Boeing has failed to act for decades, deliberately side-stepping proven and available technology that could mitigate this danger.

Rather than only requiring proof of intent or specific ill will, Illinois courts have confirmed the opposite and held that omission or failing to do something can also subject a party to punitive damages. "Ill will is not a necessary element of a wanton act. To constitute wanton and willful conduct, the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and conditions, that his conduct will naturally and probably result in an injury." *Lipke v. Celotex Corp.*, 153 Ill.App.3d 498, 505 (1987) (citing *Streeter v. Humrichhouse*, 191 N.E.

186 PX 0799 - [redacted]

684 (Ill. 1934)). The *Lipke* court noted that "Valid jury questions of willful and wanton conduct have been presented for as little as misjudging the distance of an approaching automobile and failing to look before making a left turn." *Lipke*, 153 Ill.App.3d at 505. The court in *Pendowksi v. Patent Scaffolding Company*, reiterated that "failure, after knowing that there is impending danger, to exercise ordinary care to prevent it, or failure to discover danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care, constitutes willful and wanton conduct." 89 Ill.App.3d 484, 488 (1980). Thus, "willful and wanton conduct" is a hybrid between acts considered negligent and behavior found to be intentionally tortious. *Id.* at 276. Illinois courts note that there is a "thin line" between simple negligence and willful and wanton acts. *Mattyasovszky v. West Towns Bus Co.*, 61 Ill.2d 31, 35 (1975). Because "it is a matter of degree, a hard and thin line definition should not be attempted" because depending on the facts of the case, "willful and wanton misconduct may be only degrees more than ordinary negligence." *Myers v. Krajefska,* 8 Ill.2d 322, 329 (1956). Boeing knew for decades contaminated air events caused health and safety issues and did nothing to rectify the situation or mitigate the risk. Over those decades, Boeing documented several reasons for its failure to warn or protect its customers, passengers and crews: (1) false budgetary concerns; (2) fear of FAA interference; if Boeing voluntarily added a safety feature like CHOC converters to one plane model, would the FAA then require that same feature on its entire fleet, a disruptive and expensive proposition; and (3) adding sensors would provide litigants against Boeing definitive courtroom worthy evidence of their exposure which could result in Boeing being held accountable in court for the injuries its bleed air gas inflicted. Each of these excuses shows conscious disregard for the public's safety.

To justify a punitive award, the plaintiff must establish "knowledge of the defect, knowledge or notice that the defect was likely to cause injury and failure to warn of or remedy a

known defect or take some other affirmative action to avoid injury." *Collins v. Interroyal Corp.*, 126 Ill.App.3d 244, 256 (184). Every one of those factors are present in the instant case. Like the International Harvester Company in *Davis,* Boeing knew of the dangerous condition and had a "vast database" of complaints of similar incidents and injuries.[187] *Davis v. International Harvester Co*, 167 Ill.App.3d at 825. Plus failing to properly study a safety issue and downplaying or misrepresenting the risk can justify punitive damages and Boeing did precisely that. In *Proctor v. Davis,* 291 Ill.App.3d 265 (1997), a punitive damage award for a defective product was affirmed because, among other things, Upjohn deliberately failed to study its product or ascertain the true risk of its use for periocular injections. Like Boeing did here, the *Proctor* court highlighted that Upjohn had the resources and funding to conduct the studies needed to appropriately quantify the risks but failed to do so. *Id.* at 274. Upjohn's corporate representative admitted that the studies "could have been performed if the company had wanted to do them" and that the company "had the funding to do so." *Id.* The appellate court noted that if the studies had been done, Upjohn would have "had the results well in advance of the casualty involved in this, and perhaps, other cases." *Id.* Here, Plaintiffs retained a financial analysis expert to directly address this prong of the *Proctor* factors. Professor Maloney concluded that "Boeing had ample, excess or discretionary funds available annually to support significant health and safety research or development."[188]

The *Proctor* Court also found that Upjohn knew, or should have known, of the dangers of its product and it was not enough for Upjohn to merely sit back and wait until "sufficient proof of a cause-effect relationship" developed before it acted. *Id.* at 278. Boeing followed the Upjohn

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[187] Deposition of George McEachen, 11/4/19 at p. 67 (Boeing received reports from a German airline that during a contaminated air vent "TCP came out of the ventilation system, the air system" and "TCP was detected in the cabin air even under normal conditions")

[188] PX 6025– Professor Michael Maloney's "Affidavit and Expert Report re: The Boeing Company"

playbook: sitting back and doing nothing except cast doubt on the validity of independent scientific studies while doing no studies themselves but reassuring the public that "no conclusive evidence" exists as to the danger.[189]

The *Proctor* court affirmed a multi-million-dollar punitive award even though Upjohn's conduct only "potentially endangered" a few people (and thus did not create a significant public health problem). *Id.* at 278. Here, Boeing's conduct puts at risk every member of the flight crews and flying public on every Boeing bleed air system plane in its fleet. Four flights per day in the United States involve contaminated air events.

Post-occurrence or subsequent design changes can be admissible to show willful and wanton conduct. *Collins v. Interroyal Corp.*, 126 Ill.App.3d 244, 251 (1984). This is important because Boeing has now decided to install CHOC converters, years too late for these Plaintiffs. "While post-occurrence changes are insufficiently probative of a manufacturer's prior neglect," such changes are relevant on the issue of punitive damages because, when a company knows of specific defects in design but fails to correct them, such conduct reveals a conscious disregard for the safety of others. *Id.* Furthermore, evidence that the safer measures proposed by the Plaintiff are "in use" by others in the particular industry - and are thus realistically feasible - is another consideration. *Id.* Here, Airbus started using CHOC converters way back in 2006 and Boeing intends to adopt them in 2020 or 2021.[190]

[189] PX 2479 - [redacted]

[190] Deposition of David Space, 11/1/19 at p. 156 ("It's a reasonable target to have the CHOC offered for the 737 starting in 2020, 2021")

Illinois courts have made clear that, where a defendant acted with "conscious disregard or indifference for the consequences when the known safety of others was involved," its conduct is willful and wanton. *Tyler Enterprises of Elwood, Inc. v. Skiver*, 260 Ill. App. 3d 742, 753 (1994). Boeing's conduct fits snugly within that definition. Boeing knew its bleed air system allowed toxic contaminants to enter the cabin air. Instead of being a responsible corporation, like its competitor Airbus, Boeing refused to put filters or converters in the bleed air system. When Boeing internally compared its planes to rival Airbus' fleet, Boeing confirmed that Airbus' planes were "better" and performed at a higher level regarding cabin air gaseous contaminant filtration.[191] Boeing's intentional decision to not implement a feasible and available safer alternative constitutes a flagrant disregard for public safety. *See Kopczick v. Hobart Corp.*, 308 Ill. App. 3d 967, 974 (1999) ("In the context of a products liability claim, a manufacturer's awareness that its product is unreasonably dangerous coupled with a failure to act to reduce the risk amounts to willful and wanton conduct").

WHEREFORE, Plaintiffs respectfully request that this Court grant Plaintiffs leave to amend their complaint to include a prayer for relief seeking punitive damages.

Respectfully submitted,

POWER ROGERS & SMITH, LLP

By: _____

One of the Attorneys for Plaintiffs
Joseph A. Power, Jr.
Kathryn L. Conway
POWER ROGERS & SMITH, LLP
70 West Madison Street, 55th Floor
Chicago, Illinois 60602-4212
Telephone: 312/236-9381

[191] Deposition of Boeing's analytical chemist, Ruby Dytioco, 10/18/18 at p. 163 ("This was an assessment made by somebody who probably had access to that information. So I trust their assessment at that time"); PX 0192-[redacted]

Firm No.: 31444

Rick Friedman, *pro hac vice*
Alisa Brodkowitz, *pro hac vice*
FRIEDMAN RUBIN
1126 Highland Ave.
Bremerton, WA 98337
Tel: (360) 782-4300
rfriedman@friedmanrubin.com
alisa@friedmanrubin.com

Zoe Littlepage (*pro hac vice*)
Rainey Booth (*pro hac vice*)
T. Matthew Leckman (*pro hac vice*)
LITTLEPAGE BOOTH LECKMAN
1912 W. Main St.
Houston, TX 77098
Tel: (713) 529-8000
zoe@littlepagebooth.com
rainey@littlepagebooth.com
matt@leckmanlaw.com

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – LAW DIVISION

CYNTHIA MILTON, DEMITRIOS MAVROGIORGOS-SPENCER and AMANDA CALVERT, Plaintiffs,	)	NO. 2020 L 001093
v.	)	
THE BOEING COMPANY, Defendant.	)	

PLAINTIFFS' MOTION FOR ENTRY OF PROPOSED CASE MANAGEMENT SCHEDULING ORDER

NOW COME Plaintiffs Cynthia Milton, Demitrios Mavrogiorgos-Spencer, and Amanda Calvert, by and through her attorneys, POWER ROGERS, LLP, and LITTLEPAGE BOOTH LECKMAN, and move for entry of the case management scheduling order, attached hereto as Exhibit A, for the reasons set forth herein.

On January 28, 2020, Plaintiffs commenced this action in Cook County and served Defendant The Boeing Company ("Boeing") on that same date. On February 15, 2020, this Court granted Boeing's request for an extension to answer until March 30, 2020. On March 13, 2020, this Court granted the parties' joint request to consolidate the case with another toxic cabin air case, *Curry v. Boeing*, Case No. 2020 L 000695. The pandemic ensued, and Boeing elected not to file an answer. Instead, on May 25, 2020, nearly four months after the filing of the complaint (and three months after the 30-day deadline for removal under the federal rules) Boeing removed the case to the Northern District of Illinois. On August 12, 2020, the district court granted Plaintiffs' motion to remand, finding that Boeing had "waited four months, filing appearances in state court, consolidating the instant case with another, and filing an extension to answer before removing," and that the removal was clearly untimely under the rules. *See Milton et al. v. Boeing*, 1:20-cv-

03089, Doc. No. 30, at *9 (N.D. Ill., Aug. 12, 2020). The district court characterized Boeing's obviously tardy attempt at removal as "**purely gamesmanship.**" *Id.* at *10 (emphasis added).

Following remand, Plaintiffs proposed to Boeing that the parties agree to the scheduling order attached hereto and that Boeing finally answer the complaint. In response, Boeing indicated it will not voluntarily answer the complaint[1] and has countered with a proposed schedule that would delay even initial written discovery until April of 2021 (fourteen months after the filing of the this case), completion of written discovery nearly one year from now (10/15/21), and trial certification in January 2023.

Boeing's desire to stretch this case into 2023 is unwarranted and unnecessary. As this Court is aware, this is not the parties' first rodeo. Boeing, and counsel for these Plaintiffs, have already litigated contaminated cabin air cases for years. Cases on behalf of five flight attendants were set for trial before this Court in February of this year (*Woods v. Boeing* and *Escobedo v., Boeing*). Boeing resolved those cases in late December after all discovery was completed and substantive briefing had already begun. Further, Boeing and counsel for these Plaintiffs are currently litigating another contaminated cabin air case on behalf of a deceased pilot before Judge Karen O'Malley (*Weiland v. Boeing*, 2018-L-8347). The liability discovery wheel does not need to be recreated in this litigation, merely updated, supplemented and some targeted issues fleshed out. In short, this is now a relatively mature litigation, and the parties can easily and efficiently move through discovery to ready this matter for a jury trial by May 2022. To postpone trial certification another two years and three months would exacerbate the "gamesmanship" in which Boeing has already engaged and unfairly prejudice Plaintiffs' interests with further unnecessary delay.

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[1] Boeing's position is that the onus should somehow shift back to Plaintiffs to amend their complaint before any answer is due. No law or procedure supports that position.

For the foregoing reasons, Plaintiffs request that the Court enter Plaintiffs' proposed Category II scheduling order, attached hereto as Exhibit A.

DATED this 28th day of October, 2020.

Respectfully Submitted,

POWER ROGERS, LLP

By: /s/ Kathryn L. Conway
Joseph A. Power, Jr.
Kathryn L. Conway
POWER ROGERS, LLP
70 West Madison Street, 55th Floor
Chicago, Illinois 60602-4212
T: (312) 236-9381
Firm No.: 31444

Zoe B. Littlepage, *Pro Hac Vice*
Rainey C. Booth, *Pro Hac Vice*
T. Matthew Leckman, *Pro Hac Vice*
LITTLEPAGE BOOTH LECKMAN
1912 W. Main St.
Houston, TX 77098
T: (713) 529-8000
zoe@littlepagebooth.com
rainey@littlepagebooth.com
matt@leckmanlaw.com