

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JEANETTE McMAHON, as Personal CASE NO: 6:05CV1002-ORL-28JGG
Representative of the Estate of Michael
McMahon, TRACY GROGAN, as Personal
Representative of the Estate of Travis
Grogan, and SARAH MILLER, as Personal
Representative of the Estate of Harley Miller,

Plaintiffs,

v.

PRESIDENTIAL AIRWAYS INC., a Florida
corporation, AVIATION WORLDWIDE
SERVICES, LLC, a Florida limited liability
Company, STI AVIATION, INC., a Florida
Corporation, AIR QUEST, INC., a Florida
Corporation,

Defendants

**DEFENDANTS' 12(b)(6) MOTION TO DISMISS
AND INCORPORATED MEMORANDUM OF LAW**

Even as Defendants Presidential Airways, Inc., Aviation Worldwide Services LLC, STI Aviation, Inc., and Air Quest, Inc. (collectively “Presidential”), prepare to pursue the Political Question Doctrine roadmap provided by the 11th Circuit for dismissing this matter on constitutional grounds,¹ Presidential submits this Motion to

¹ See, e.g., *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 & n. 36 (11th Circ. 2007) (“We expressly do not (and could not) hold that this litigation will not at some point present a political question. The existence of a political question deprives a court of jurisdiction. As a result, Presidential remains free to assert the argument at any time, and the district court has an independent obligation to make sure that the disposition of the case will not require it to decide a political question. . . . We emphasize that our decision is based only on the record considered by the district court: the complaint, the contract, and the SOW. Presidential remains free to argue that other evidence justifies dismissal on political question grounds.” (internal citation omitted)); see also *id.* at 1351 (“[P]rivate contractor agents may be entitled to some form of immunity that protects their making or executing sensitive military judgments, and that overlaps and possibly extends beyond the protection provided by the political question doctrine.”).

Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) and the doctrine that "federal courts should avoid reaching constitutional questions if there are other grounds upon which a case can be decided." *BellSouth Telecomms., Inc. v. Town of Palm Beach*, 252 F.3d 1169, 1176 (11th Cir. Fla. 2001). This approach is consistent with "the prudential concern that constitutional issues not be needlessly confronted,"² as well as the interest of "saving the parties as well as the court time and expense."³

Presidential therefore hereby moves for dismissal of the Plaintiffs' Amended Complaint on the non-constitutional grounds that even assuming the accuracy of all facts alleged in the Amended Complaint, Plaintiffs have failed to state a cause of action under applicable law. Specifically, Plaintiffs' Amended Complaint is governed by the law of Afghanistan, which does not recognize causes of action based on *respondeat superior* and indirect liability. Accordingly, the Amended Complaint does not state a viable claim upon which relief may be granted as to the named corporate Defendants.

I. BACKGROUND FACTS

Defendant Presidential Airways, Inc. entered into a contract with the United States military under which Presidential provided airlift support to the Department of Defense in Afghanistan. (Amended Compl. at ¶ 13.)⁴

On November 27, 2004, a Presidential aircraft engaged in Operation Enduring Freedom was providing air cargo services and carrying three members of the United States military from Bagram, Afghanistan to Farah, Afghanistan. (Amended Compl. at ¶

² *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *United States v. Valenti*, 999 F.2d 1425, n 1 (11th Cir. 1993) (acknowledging "time honored principle that courts should avoid rendering sweeping constitutional decisions when a more narrow path is available").

³ *Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1010 (11th Cir. 1992) (internal quotes and cites omitted).

⁴ All factual allegations are from the Plaintiffs' Amended Complaint and, solely for purpose of this motion, are deemed accurate. Incidentally, Presidential still provides airlift support to the United States Armed Forces in Afghanistan.

17.) The military passengers were Michael McMahon, Travis Grogan, and Harley Miller. (Amended Compl. at ¶ 26.) The aircraft crashed en route to Farah, Afghanistan (Amended Compl. at ¶ 17.), resulting in the deaths of the three active duty servicemen and the three members of the Presidential flight crew on the mission. (Amended Compl. at ¶ 30.)

The Plaintiffs assert that the immediate causes of the crash were the flight crew's negligence in failing to wear available oxygen masks, failing to properly plan and execute the flight, failing to maintain sufficient air speed and altitude above terrain, failing to maintain adequate terrain clearance appropriate for the route of flight, failing to prevent a stall, and failing to comply with what Plaintiffs claim are applicable Federal Aviation Regulations. (Amended Compl. at ¶¶ 33h, i, k, l, r and s). Through the doctrine of *respondeat superior*, the Plaintiffs claim that Presidential is vicariously liable for the alleged in-flight negligence of the crew in Afghanistan. (Amended Compl. at ¶ 25.)

The Plaintiffs also allege that Presidential is indirectly liable for the actions of Presidential's flight operations personnel in Afghanistan, who allegedly failed to use reasonable care in entrusting the aircraft to the flight crew, failed to properly conduct and supervise route planning and flight planning activities, failed to adequately brief the flight crew, failed to provide the flight crew with adequate equipment, and failed to have in place procedures for locating the flight. (Amended Compl. at ¶¶ 33 a-g, j, m-q, and t.)

II. ARGUMENT

A. Legal Standard

A motion to dismiss pursuant to Rule 12(b)(6) operates to test the sufficiency of a complaint and is designed to eliminate counts or complaints that fail to state a claim upon

which relief can be granted. *Palmer v. Santa Rosa County*, 2005 U.S. Dist. LEXIS 34314 (D. Fla. 2005). Dismissal for failure to state a claim is appropriate if the plaintiff fails to plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007). A plaintiff’s obligation to set forth the grounds for its entitlement to relief “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Id.* at 1964-65. “Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 1965; *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1057 (11th Cir. 2007).

When ruling on a motion to dismiss, the court is not required to accept as true the plaintiff’s conclusions of law. See *Solis-Ramirez v. United States Dept. of Justice*, 758 F.2d 1425, 1429 (11th Cir. 1985). Neither should a court accept a plaintiff’s “conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts” to avoid dismissal. *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).

Dismissal must be granted if, even assuming the factual allegations of the plaintiff’s complaint are true, there is a dispositive legal issue which precludes relief. *Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1010 (11th Cir. 1992) (“Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a complaint on the basis of a dispositive issue of law.” (internal quotes and citations omitted)).

B. Plaintiffs’ Amended Complaint, Based on Claims of Presidential’s Indirect Liability for Alleged Negligent Conduct in Afghanistan is Governed by the Law of Afghanistan

On August 11, 2006, this Court recognized the threshold nature of the choice of law issue when it asked, “why we would be looking to Florida Law.” Hearing on Motion to Dismiss August 11, 2006, p.3. In fact, as explained below, the Court should

apply the law of Afghanistan to the Plaintiffs' claims of *respondeat superior* and indirect liability against Presidential, and based upon this "dispositive issue of law" the Court should dispose of this entire matter forthwith "[i]n the interest of judicial economy." *Brown v. Crawford County*, 960 F.2d at 1010 ("By prolonging this case, the district court failed to serve the purported goals of its local 'procedure' of saving the parties as well as the court time and expenses. This case should not have been prepared for trial; moreover, it should not have undergone discovery.").

As a starting point for this analysis, a federal court exercising federal question jurisdiction must apply the federal conflict of laws rule, which follows the "significant relationships test" as set forth in the Restatement (Second) of Conflict of Laws. *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1296 n.19 (11th Cir. 1999).

Section 175 of the Restatement (Second) of Conflict of Laws provides that, "[i]n an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied." Restat 2d of Conflict of Laws, § 175.

The Restatement's § 145 provides that the following four "contacts," and the significance of their relationships to the issues, may be weighed and considered:

- (1) the place where the injury occurred;
- (2) the place where the conduct causing the injury occurred;
- (3) the domicil, residence, nationality, place of incorporation and place of business of the parties, and

- (4) the place where the relationship, if any, between the parties is centered.

See also Cymrot v. Smith Barney, Harris Upham & Co, Inc., 1994 U.S. Dist.

LEXIS 20134, *49 (S.D. Fla. 1994).

Once the contacts are identified, Section 6 of the Restatement (Second) of Conflict of Laws provides guidance for further analysis as follows:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
 - (a) the needs of the interstate and international systems;
 - (b) the relevant policies of the forum;
 - (c) the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue;
 - (d) the protection of justified expectations;
 - (e) the basic policies underlying the particular field of law;
 - (f) certainty, predictability and uniformity of result; and
 - (g) ease in the determination and application of the law to be applied.

Importantly, “[t]he doctrine of depeçage may call for application of different bodies of law to different issues in the litigation.” *In re Air Crash Near Cali, Colombia*, 1997 U.S. Dist. LEXIS 14143 (S.D. Fla. 1997). *See* Restatement (Second) § 145 comment d. (“Each issue is to receive separate consideration if it is one which would be resolved differently under the local rule of two or more of the potentially interested states.”) *See also Emmart v. Piper Aircraft*, 659 F. Supp. 843 (S.D. Fla. 1987) (analyzing separate state interests for compensatory and punitive damages).

Based on the foregoing, in the Eleventh Circuit, the conflict-of-laws analysis is issue-based and focuses primarily on factors (b) and (c) of § 6 of the Restatement (Second) of Conflict of Laws which looks to the relevant policies underlying the competing laws. *Judge v. American Motors Corp.*, 908 F.2d 1565, 1570 (11th Cir. 1990). ("As a general proposition, it is fitting that the state whose policy interests are most deeply affected should have its local law applied.").

In the instant wrongful death case, the dispositive issue concerns the application of the doctrines of *respondeat superior* and indirect liability. The jurisdictions with policy interests implicated by these liability issues are readily identifiable. Primarily, however, the policy interests of Afghanistan must be considered as it is undisputed that it is the place where the injuries occurred. Further, the alleged negligent conduct, from the planning and scheduling of the accident mission to the alleged operational errors, took place in Afghanistan. Accordingly, Afghanistan's law must be given preference pursuant to the wrongful death rule of Section 175 of the Restatement (Second) of Conflict of Laws. *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1004 (9th Cir. 1987) (Applying Polish law, the Court held that "the comments to the Restatement recognize that applying the law of the state where the injury occurred 'furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the state where the injury occurred will usually be readily ascertainable, of ease in the determination and application of the applicable law.' Restatement § 175 comment d.").

In aviation accidents, the place of actual injury may be disregarded by courts on the assumption that the accident site is wholly "fortuitous and unimportant." *See Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 675 (2nd Cir. 1983). However, where a crash

occurs in the area of an aircraft's intended destination, it cannot be said to have occurred in an entirely fortuitous location. *In re Air Crash Near Cali*, 1997, U.S. Dist. LEXIS 14143, *16. In *Wert v. McDonnell Douglas Corp.*, 634 F. Supp. 401 (D. Mo. 1986) the Court rejected the argument that the location of a military aircraft crash was fortuitous in light of the fact that the accident happened in Arizona, where the pilot was conducting training runs. *Id.* at 404.

Like the accident in *Wert*, the accident location herein was not fortuitous. The mission originated in Bagram Airfield, Afghanistan and was en route to Farah, Afghanistan. There was no place other than Afghanistan where this accident could have occurred. Afghanistan therefore maintains its significant interest as the place where the injury occurred and as the location of the relevant conduct.⁵ In fact, no place or entity, other than the U.S. military, has a more significant relationship to the occurrence and the parties than Afghanistan.

Plaintiffs may ask this Court to recognize the interests of other jurisdictions. Under the Restatement analysis, the only other “contacts” that may be considered are the place where the relationship between the parties is centered and the place where the parties are domiciled. The first of these two considerations mandates Afghanistan, as it is the only jurisdiction where a relationship between the decedents and Presidential existed. The Plaintiffs’ Amended Complaint only references contacts between the decedents and

⁵ The Plaintiffs may argue that negligent conduct occurred in Florida, where the corporate Defendants were initially domiciled. However, in their Amended Complaint, the Plaintiffs specifically allege that the accident flight crew in Afghanistan negligently caused the crash by failing to wear oxygen masks, failing to properly execute the flight, failing to maintain sufficient air speed and altitude, and failing to maintain adequate terrain clearance. Moreover, to the extent Plaintiffs alleged negligence relating to Presidential's operations, those claims are also centered in Afghanistan. Presidential maintained an operations center at Bagram for the purpose of overseeing flights and flight crews, from mission briefings to assignments, aircraft loadings, departures and completion. Of the numerous allegations of wrongful conduct alleged by the Plaintiffs, very few, if any, actions occurred outside of Afghanistan.

Presidential in Afghanistan. Clearly, the plaintiffs' decedents accepted services provided by Presidential in Afghanistan and boarded the flight in Afghanistan, pursuant to a military mission. Courts have routinely identified centers of relationships based on fewer contacts. *See Leiske v. United States*, 2001 U.S. Dist. LEXIS 2390 (D. Ill. 2001) (holding that passengers who boarded a plane in Wisconsin for an interstate flight established a relationship with the carrier in Wisconsin).

Generally, courts find that the relationship between a passenger and an aircraft operator is centered either in the flight's point of departure or point of return. *Bryant v. Silverman*, 146 Ariz. 41, 703 P.2d 1190, 1195 (1985); Rest. (Second) Conflict of Laws § 145, comment e. *See also In re Air Crash Disaster at Washington*, 559 F. Supp. 333, 355 (D.D.C. 1983) (the center of the parties' relationship was found to be either at the origin or destination of the flight). In this case, the origin and destination of the flight were in Afghanistan, which is therefore the geographical center of the parties' relationships.

A review of the various domiciles of the parties and decedents establishes that there is no one domicile state with a more significant interest in the liability issues herein than Afghanistan. (See this Court's Order denying Plaintiffs' motion for remand [Dkt. No. 66] at p. 6, wherein the Court notes that "the parties in the instant case apparently are completely diverse.") Decedent Michael McMahon and his surviving family maintained their permanent residence in Connecticut. Decedent Travis Grogan and his surviving family resided in Virginia. Decedent Harley Miller and his surviving family lived in Washington. There is no basis to assert that any of these states would have an interest in

determining the liability, or regulating the conduct, of non-resident companies outside each of these state's borders.⁶

Florida, as the forum state and the state of incorporation for each of the corporate Defendants may have some interest in the liability issues. However, the Defendants are no longer domiciled in the State of Florida, as they have moved their corporate offices and operations to North Carolina and, as a result, the Defendants would not justifiably expect protection from Florida laws. *See* U.S. Department of Transportation, Federal Aviation Administration, Airline Certificate Database, <http://av-info.faa.gov/OpCert.asp> (Certificate Number P4YA652I issued to Presidential Airways, Inc.). Florida's interest as the incorporating state is minimal when there is little if any in-state conduct to be controlled, protected, or deterred. *See Schneider National Transport v. Alexander and Alexander of New York, Inc.*, 280 F.3d 532, 536 (5th Cir. 2002) ("The mere fact of appellant's incorporation in Pennsylvania does not lead this Court to believe that that state has the most significant relationship to the substantive issues to be resolved here."). *See also NL Industries, Inc. v. Commercial Union Insurance Company*, 154 F.3d 155, 159 (3rd Cir. 1998) (rejecting application of New Jersey law where "New Jersey's only connection with this litigation is that NL was incorporated and had some operations there.").

In contrast, the relevant policy interests of Afghanistan are significant. Afghan law is largely religion-based and evidences a strong concern for ensuring moral responsibility, and deterring violations of obligations within its borders. (Declaration of

⁶ These states may have a more significant interest in ensuring adequate recovery for their citizens, but they have no significant interest in regulating conduct or establishing the liabilities of nonresident companies. Thus, while their law may become relevant, such will not occur, if at all, until a proper defendant is before this Court.

Ian David Edge, attached hereto as Exhibit A, ¶¶ 3, 9.) A jurisdiction has a substantial interest and paramount responsibility to protect the welfare of persons within its borders. *Wert v. McDonnell Douglas Corp.*, 634 F. Supp. 401, 405 (D. Mo. 1986). Accordingly, Afghanistan has a great interest in ensuring that conduct within its borders complies with Islamic law such that negligent and dangerous actions are deterred by the threat of full responsibility for any consequences.⁷

No United States public policy would be violated by the application of foreign law based on strict rules of proximate causation, limiting only the extent to which indirect liability may be extended. The application of Afghanistan law, however, would facilitate the working of the international system because Afghanistan would also apply the law of the place of injury. *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1004 (9th Cir. 1987) (In a conflicts of law analysis, the Court noted that "choosing Poland's damages law facilitates the working of the international system because Poland would apply the same law under its choice-of-law rule, *lex loci delicti*.").

Given Afghanistan's ties to the claims at issue, the fact that it is the site of the accident and the conduct complained of, and the fact that it provides the geographical nexus for the relationship between the parties, Afghanistan has more significant contacts than any of the states, and more compelling interests than any of the states in governing the Plaintiffs' state law claims.

Bridas Corp v. Unocal Corp., 16 S.W. 3d 893 (Tex. App. 2000) provides the

⁷ Notably, Afghan law does not limit Plaintiffs' available recovery. Neither would Afghan law preclude a lawsuit for the negligence of the individuals responsible for training, equipment, and operating procedures. Under the law of Afghanistan, Plaintiffs feasibly would retain the ability to litigate their claims against the individuals involved in the allegedly wrongful conduct, and the Plaintiffs feasibly would have the ability to recover for their economic and noneconomic losses.

relevant guidance for the application of the Restatement's analysis in a case involving actions of a domestic company on foreign soil. In *Bridas*, a Texas corporation was accused of tortious interference with contracts in Turkmenistan and Afghanistan. The plaintiff, a Texas corporation, had obtained oil and gas exploration contracts with the governments of those two countries and claimed that the defendant caused those governments to breach the contracts. The plaintiff argued that, because the defendant's foreign acts were conceived in and directed from its Texas headquarters, Texas had an interest in applying its law.

The Court rejected the plaintiff's argument because "both the quantity and quality of the contacts identified in [Restatement Second] § 145 mandates the application of foreign law to all tort claims asserted by [the plaintiff] because the parties and the subject matter of this litigation have a more significant relationship to the nations of Turkmenistan and Afghanistan than to Texas." *Id.* at 899. The plaintiff argued that, because of the difficulty in ascertaining and predicting Turkmen and Afghan law, the law of Texas should apply. The court rejected this argument as well, citing to an eight-day evidentiary hearing on the choice of law issue and the testimony of nine foreign-law experts, and concluded that Turkeman and Afghan law are "readily and reliably ascertainable." *Id.* at 903, 906. Thus, the appellate court reversed the trial court and determined that Islamic law applied to the Plaintiffs' tort law claims. *Id.* at 899.

The analysis of the facts before this Court, as set forth in detail above, calls for the same conclusion. If any state law is to be applied, the Court should apply the law of Afghanistan to the Plaintiffs' claims of *respondeat superior* and indirect liability against Presidential.

C. Under the Law of Afghanistan, Plaintiffs' Amended Complaint Fails to State a Viable Claim Against Presidential

On August 11, 2006, plaintiffs' counsel stated at oral argument, "Here there is no law, there is no civil law system in the country of Afghanistan, which is where the crash occurred." Transcript of Hearing on Motion to Dismiss, August 11, 2006, page 4. The discussion which follows herein makes it clear that on the relevant issues raised by this motion, Afghan law is well developed.

In determining the law of a foreign country, the court may consider any relevant material or source, "whether or not submitted by a party or admissible under the Federal Rules of Evidence." *Forzley v. AVCO*, 826 F.2d 974 (11th Cir. 1987) (citing Rule 44.1 of the Federal Rules of Civil Procedure). *See also Locals 302 & 612 of the Intl Union of Operating Engineers-Employers Constr. Indus. Retirement Trust v. Blanchard*, 2005 U.S. Dist. LEXIS 17679 (D.N.Y. 2005).

The attached declaration of Professor Ian David Edge establishes that Afghanistan's legal system consists of Islamic law and state-enacted legislation. (Edge Declaration, ¶¶ 3-9.) Professor Edge, a law professor, London barrister, and noted consultant on Islamic law, explains that the traditional rules of Islamic law are referred to as the Shari'a, and they are interpreted not by judges, but by scholars. *Id.* In most areas of Afghanistan, the Shari'a courts rely to a great extent on Islamic law, as written in the Qur'an, the Sunna, and the Mejjelle. *Id.* The recently codified Afghan civil code is based on the most important principles of the Shari'a. *Id.*

Under Afghan law, liability attaches to a person when the harm caused is direct and the causation principles are strict. *Id.* ¶¶ 12-15. (*See also* Declaration of Mark Hoyle, attached hereto as Exhibit B.) In other words, ordering a person to do something

illegal does not make the person making the order liable because there is no causation as to the person giving the order under the Shari'a. (Edge Declaration, ¶¶ 12-15.) This is evidenced by Afghanistan Civil Code Article 787, which states: "An act is attributed to its doer not to the one who commands it, unless the doer is under compulsion. As to actual behavior, what is regarded as compulsion is complete compulsion only." *Id.*, ¶ 13. Article 551 of the Afghanistan Civil Code defines "compulsion" as "intimidation of a person unreasonably to execute an action without his consent, whether it may be material or spiritual."

Further, Article 1510 of the Mejlle states: "The judgment for an act is made to fall on the person who does it. And it does not fall on the person who gives the order, as long as he does not compel the doing of the act." *Id.*, ¶ 14. The Mejlle provides the following illustration: "A instructs B to throw certain property into the sea. B does so knowing that the property in question belongs to someone else. The owner of the property can call upon B to make good the loss. The person who gave the instruction is not liable unless he used compulsion." *Id.* Accordingly, Afghan law, following Shari'a principles, does not recognize the doctrine of *respondeat superior* or the concept of indirect liability except where the direct actor is intimidated or coerced. *Id.*, ¶ 15.

(See also Declaration of Mark Hoyle, attached hereto.)

In *Bridas v. Unocal Corp.*, Professor Edge was accepted by the Court as an expert on Afghan law. *Bridas*, 16 S.W. 3d at 903. Based largely on the testimony of Professor Edge, the Court acknowledged Afghanistan's legal principles which place liability squarely and solely on the direct actor:

The concept is a profound one actually. The law is linked with morality and the onus for acts is placed on the person

who has sort of got the point for the decision, that is, the one who takes it upon himself to perform the wrongful act, who voluntarily goes ahead and does something immoral.

So the person who has ordered it offers no excuse for the person who does it. The person who does it is going to be held liable. The law is religious law, and they feel that the person who makes the fateful step to do the wrongful thing had a point of decision, and he should have withheld the act.

We may make a moral judgment somewhat differently. But they have felt to accentuate the moral responsibility of the individual, this ought to be the rule.

Id. at 905. Based on these conclusions, the *Bridas* Court held that Defendant Unocal was entitled to judgment because the applicable foreign law did not recognize the stated tort causes of action. *Id.* at 906. In doing so, the Court rejected any argument that the subject Islamic law violated public policies:

Briefly, we return our attention to the issue of public policy, which permeates the respective provisions contained in section 6 of the RESTATEMENT (SECOND) CONFLICT OF LAWS and is heavily relied upon by *Bridas* in assailing the trial court's summary judgment. We observe that Texas courts will not enforce a foreign law that violates good morals, natural justice or is prejudicial to the general interests of our citizens. See *Gutierrez*, 583 S.W. 2d at 321. As the Supreme Court recognized in *Gutierrez* in analyzing the public policy ramifications of applying the laws of Mexico and in rejecting the "dissimilarity doctrine," it is clear that the laws of Turkmenistan and Afghanistan, respectively are different than ours in many respects. *Id.* However, these differences by no means render the laws of Turkmenistan and Afghanistan violative of Texas public policy. *Id.* The laws of these nations have been in place and followed for many years, if not many centuries. Their laws are well-established, predictable, and certain.

Id. at 906.

Professor Edge's current declaration underscores and supports the *Bridas* Court's

interpretation of Afghanistan's long-standing legal precedent. Under these principles, Plaintiffs' claims against Presidential, based on *respondeat superior* and indirect liability, are not cognizable.⁸

WHEREFORE, Defendants Presidential Airways, Inc., Aviation Worldwide Services LLC, STI Aviation, Inc., and Air Quest, Inc. respectfully request that the Court, pursuant to Rule (12)(b)(6), dismiss the Plaintiffs' Amended Complaint on the grounds that it does not state a claim against these corporate defendants under the applicable law.

Dated: April 30, 2008

Respectfully submitted,

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*Attorneys for Defendants Presidential
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LLC, STI Aviation, Inc. and Air Quest, Inc.*

⁸ This is not to say that the plaintiffs have no cognizable claim under Afghan law against any party arising from this incident. The Plaintiffs may have a viable claim against the estates of the flight crew or other operations personnel for their direct actions, under the Afghan laws stated above. The determination of damages for such a claim may be governed by the law of the forum state or the laws of states where the Plaintiffs are domiciled, based on an issue-based analysis of the applicable conflict-of-laws principles.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 1, 2008, I electronically filed the foregoing **Defendants' 12(b)6 Motion to Dismiss and Incorporated Memorandum of Law** with the Clerk of Court, U.S. District Court, Middle District of Florida, by using the CM/ECF system which will send a notice of electronic filing to all counsel of record who are CM/ECF users in this case.

I FURTHER CERTIFY that I mailed the foregoing document and the notice of electronic filing by First Class Mail to the following CM/ECF participant:

Justin Chretien
Aviation & Admiralty Litigation
Torts Branch, Civil Division
Department of Justice
P.O. Box 14272
Washington, DC 20044-4271

s/ Monica L. Irel
Monica L. Irel, Esq.

IN THE UNITED STATES DISTRICT COURT
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Defendants

DECLARATION OF IAN DAVID EDGE

I, Ian David Edge, being duly sworn, hereby state and affirm as follows:

1. I am a practicing Barrister-at-Law in Chambers at 3 Paper Buildings in the Inner Temple in London and am a member of the Middle Temple. I have appeared as Counsel in many cases involving civil and commercial law before the English courts and before international arbitral tribunals and have acted as an International Arbitrator. I am a member of the panel of arbitrators of the Egyptian International Arbitration Board by invitation.

I am also a lecturer in law at the School of Oriental and African Studies (SOAS), which is one of the constituent colleges of the University of London, where I have taught and researched Islamic Law, and particularly its application in the Islamic states in the modern world. I have acted as supervisor for at least 25 doctoral students in their doctoral theses pertaining to different aspects of Islamic and Middle East Law, and am frequently called upon as an external examiner for doctoral theses on Islamic law subjects for other Universities in the UK. I was the founding Director and am the present Director of the Centre of Islamic and Middle East Law at SOAS which is recognized as one of the pre-eminent centers for the holding of lectures, seminars, conferences and for publications on Islamic and Middle East law. We publish an annual volume entitled the "Yearbook of Islamic and Middle East Law" which acts as a work of reference on changes in Islamic and Middle East Law during the previous year. The Centre is at the moment co-sponsoring (with the Inner and Middle Temples) a series of important lectures on "Islam in English Law" the first of which was the much-publicized lecture given by the Archbishop of Canterbury on the accommodation of religious law in English Law. I have taught Islamic Law as a visiting Professor for the University of Notre Dame and the Ismaili Institute in the Aga Khan University in London.

I am frequently asked to give advice on matters of Islamic law in cases in England, Europe and elsewhere. I have advised governments (including the UK Government, the US Government Department of Justice and the Malaysian Government) on matters of Islamic and Middle East law as well as the ruling families of many of the Gulf States. As a Consultant on Islamic and Middle East matters, I have studied and

developed expertise with respect to the law of Afghanistan and I state the following based upon my research and knowledge of that law.

2. I have been asked by the firm Dombroff, Gilmore, Jaques and French P c to consider the Amended Complaint and the Defendant's Motion to Dismiss and to provide an Expert Opinion with respect to whether certain causes of action **in tort** may be brought by the Plaintiffs against the Defendants under the Law of Afghanistan.

What is the Shari'a?

3. The Shari'a is the Arabic word for Islamic Law. It comprises the written sources of the Qur'an (which Muslims accept as the word of Allah as revealed to the Prophet Muhammad in the 7th Century AD) and the Sunna (which comprises collections of stories containing the sayings and decisions of the Prophet Muhammad during his lifetime). After the Prophet Muhammad died, Islamic religious figures and jurists (called faqih pl fuqaha) used and built upon these two sources by interpretation (ijtihad), by extension by analogy (qiyas) and by consensus (ijma'). In this way they produced a set of legal rules which became the Shari'a or Islamic Law. It is a system which although having some similarities with Western Law is based fundamentally on religious texts and is a system which it is the moral and religious duty of Muslims to follow. Its compass is wider than law in the narrower Western sense. For example, the medieval law books of Islamic jurists begin with chapters on the right way to pray, the rituals of purity, what is permitted and prohibited to eat, and to wear and how to behave generally. These subjects are considered to be no less legal than the issues of marriage, inheritance, contracts and

wrongs which follow. This indicates the universality of the scope of the Shari'a which is intended to be at the core of a Muslim's life.

4. As there were different interpretation by medieval jurists in different regions of the Islamic world of the two original written sources of the Qur'an and the Sunna then inevitably different legal rules developed in different regions with the result that Islamic Law grew into a number of distinct though related Schools of Law. An early split occurred between the Shia and the Sunnis which was based upon the political and legal question of who should rule over the Islamic community after the death of the Prophet Muhammad. The Sunnis won this argument and became the main orthodoxy in Islam; whereas Shiism was confined to and continues to be a minority School. The Sunnis produced four main Schools of Islamic Law which exist today. These are the Hanafi, Maliki, Shafi'i and Hanbali in order of numerical magnitude. The Hanafi School is the main Sunni School and hence the main School of Islamic Law in the Islamic world. The reason for this is that the Hanafi School (which was developed in Iraq) was adopted as the official School of Islamic Law by the Ottoman Empire which was therefore applied throughout the Middle East covered by the Ottoman Empire. Moreover it was also taken beyond the bounds of the Ottoman Empire by a number of Muslim conquerors. In this way, Central Asia and the Indian sub-continent when it fell to the Muslim sword adopted the Hanafi School of Islamic Law. For this reason, the present day states of Central Asia (including Afghanistan) and those of the Indian sub-continent all adhere to the Hanafi School of Islamic Law.

5. At the end of the life of the Ottoman Empire in the 19th Century, an attempt was made to codify parts of Hanafi law to provide a Shari'a alternative to Western Codes of law. The most famous of these codifications was the production of the so-called Ottoman Civil Code (known as the "Mejelle i-ahkam i-adliyye" or "Code of just decisions" normally abbreviated to the "Mejelle") which was completed in 1876. This was a distillation of a large number of different medieval juristic writings into a single set of legal principles which could be applied by modern Shari'a courts. The Mejelle applied throughout the Middle East until recently being replaced in Kuwait in 1961 and in Jordan as recently as 1976 (where it is still applicable if there is no provision to be found in the new Jordanian Civil Code). Certain of its provisions still apply in Israel, Palestine and Cyprus. It has had an immense influence and continues to be used and referred to as a valid expression of the civil law rules of Islamic Law as developed in the major Hanafi School.

6. Since the end of the Ottoman Empire in 1917 then each Islamic country in the Arab world and beyond has had its own different political and legal history. However, certain countries have been very influential in reforms that have been made and the most important and influential has been the legal system of Egypt. This country was already in the 19th Century quasi-independent from the Ottoman Empire and so was one of the few countries where the Mejelle never applied. Instead from the 1870's Egypt drafted civil and commercial laws based upon French law which became operable alongside the Shari'a. When Egypt obtained its independence from Britain in 1948 then it adopted a new Civil Code which was said to be a mixture of Shari'a and French and other civil

laws. This Code has also had an enormous influence in the development of other codes of the Arab world and the Egyptian jurisprudence of case law and reference texts is used to interpret similar textual provisions all over the Arab world.

Shari'a and Law in Afghanistan

7. In the past and present century, Afghanistan has experienced considerable political and legal upheaval. This has been characterized by periods of reform and counter-reform, civil war and considerable legal discontinuity. In the early years of the last century (1919-1929) a program of reform was undertaken based largely upon the model of Ottoman reforms but which was firmly rooted in the acceptance of the Shari'a as the vital and leading component of the new system. The 1923 Constitution provide for the first time for the state organization of the Shari'a courts and also provide that legislation was not to contravene the principles of Islam. A similar clause has been adopted subsequently by all the Constitutions of Afghanistan: for example, the Constitutions of 1931 (Article 65), 1964 (Article 64), 1977 (Article 64), 1990 (Article 2) and most recently Article 3 of the 2004 Constitution.

8. The reforms of 1919 to 1929 adopted many of the Ottoman models of legislation into Afghan law. It was discussed to apply the Mejlle as the civil code for Afghanistan but this never actually occurred. In 1931, after a period of unrest in the country, the reforming laws were replaced and the new Constitution provided that Hanafi law was the only law which was to be generally applied by the courts. It was at this time that the Afghan Civil Code was prepared which is a compilation of Islamic law, rules

taken from the Hanafi School and based upon the Mejlle although there are also many new provisions which come from Egyptian law. This was the legal situation until the 1960s and 1970s when a new Constitution provided this time for secular government and the promulgation of new laws. This situation was again reversed by the Taliban who ruled Afghanistan in the late 1980s and 1990s. Since the defeat of the Taliban by an International Force under the leadership of the US then a new political system had been set up which was presaged by the Bonn Agreement in 2001. This Agreement provided in Article II that the legal framework until the adoption of a new Constitution was that the 1964 Constitution would remain in effect (as far as not inconsistent with the Agreement) and that the existing laws and regulations would continue (again as far as not inconsistent with the Agreement) until such time as a new Constitution and new laws were promulgated. A new Constitution was promulgated and accepted in 2004 which is the basis of the present political and legal regime in Afghanistan. The new Ministry of Justice has begun a program of reform of the laws which are published in the Official Gazette and may be accessed on the Ministry's website. As yet the area of civil law has been untouched and the website still refers to the Afghan Civil Code as applicable.

The Present Legal System in Afghanistan

9. The present legal system in Afghanistan therefore consists of the principles of the Shari'a as found in the Hanafi School of law (except in the areas of the country which remain overwhelmingly Shia such as the Hazarat) and state-enacted legislation. Some aspects of the Shari'a have been codified (including the civil law) but where the codified texts are not clear or are insufficient then reference may still be made to the traditional

rules of the Shari'a which are found in the Mejlle and the works of medieval Islamic jurists of the Hanafi School.

10. Although the recent history of Afghanistan has been politically very uncertain, the courts have continued as best they can to settle disputes and administer justice in accordance with the basic principles of law which they have taken from the Hanafi School of the Shari'a. Afghan courts continue to operate effectively, consistently and autonomously in applying these principles, even in the face of ongoing civil unrest and are now supported by the new regime and the new Ministry of Justice.

11. The Shari'a law of the Hanafi School would apply to the determination of the issues of tortious liability in this case if they were to be heard in Afghanistan. A court in Afghanistan would refer to the Afghan Civil Code, to the Mejlle and if necessary to works by the jurists of the Hanafi School to answer the legal questions that arise. Article 1 of the Afghan Civil Code (hereinafter "ACC") states as follows as regards the sources a judge should follow

"(1) When there is a provision in this law, ijtihaad [Islamic juristic interpretation] is not permitted. The provisions of this law are to be applied in their express words and in their inferred implication.

(2) When there is no provision in this law, the court shall give its judgment in accordance with the general principles of the Islamic Shari'a of the Hanafi School. The judge is to seek the best way to achieve justice."

12. The Shari'a rules on tortious liability are very specific and limited, in that they only provide for liability for wrongful acts. Moreover, the main realm of compensation for wrongful acts is physical injury to the person or property. Islamic law

does not know of any legal principle to protect reputation nor did it develop any rules of compensation beyond those relating to directly caused physical loss or damage to the person or property. Hence, Islamic law does not recognize any extended remedy for consequential damages. Article 774 ACC is the general rule "One who harms another person by his carelessness or fault is obliged to pay compensation" as is Article 788 ACC "No harm or causing of harm". The latter is a famous legal dictum from the Shari'a and is found in the Mejjelle at Article 19. Furthermore, liability attaches to a person only when the harm is caused directly by him: Article 779 ACC provides "The court shall determine the payment of compensation in proportion to the damage occurring in fact, on condition that this damage is the direct result of the harmful action". What is a direct action is complex and the causation principles are strict.

13. Therefore, ordering a person to do something does not make the person giving the order liable for the action ordered because there is no causation as to the person giving the order under the Shari'a. This is evidenced by Article 787 ACC which states: "An act is attributed to its doer not to the one who commands it, unless the doer is under compulsion. As to actual behavior, what is regarded as compulsion is complete compulsion only". Article 551 ACC defines "compulsion" as "intimidation of a person unreasonably to execute an action without his consent, whether it may be material or spiritual."

14. The first sentence of Article 787 ACC is taken from Article 89 of the Mejjelle which states: "The responsibility for an act falls upon the author thereof; it does not fall upon the person ordering such act to be performed, provided that such person does not compel the commission thereof." Again this is a well known Shari'a principle. Article 1510 of the Mejjelle gives the following illustration: "A instructs B to throw certain property into the sea. B does so knowing that the property in question belongs to someone else. The owner of the property can call upon B to make good the loss. The person who gave the instruction is not liable unless he used compulsion."

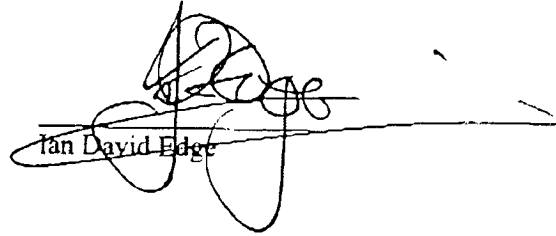
15. The underlying policy behind these principles is deeply based in the Shari'a which emphasizes the immediate act rather than giving any consideration to detailed notions of cause. Hence, Afghan law, following Shari'a principles, does not recognize the doctrine of *respondeat superior* or the concept of indirect liability for injury to the person except where the direct actor is intimidated or coerced so as to be subject to compulsion. Limited exceptions to this principle are provided in the ACC for specific cases where liability will be cast upon third parties for the actions of others; however none of these exceptions apply to the facts of this case.

16. Based on the foregoing, it is my opinion that the Plaintiffs in this litigation would have no cause of action against the Defendants herein under Afghan law.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed at London, England, UK

Dated: 30/4/2008


Ian David Edge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JEANETTE McMAHON, as Personal
Representative of the Estate of Michael
McMahon, TRACY GROGAN, as Personal
Representative of the Estate of Travis
Grogan, and SARAH MILLER, as Personal
Representative of the Estate of Harley Miller,

CASE NO: 6:05CV1002-ORL-28JGG

Plaintiffs,

v.

PRESIDENTIAL AIRWAYS INC., a Florida
corporation, AVIATION WORLDWIDE
SERVICES, LLC, a Florida limited liability
Company, STI AVIATION, INC., a Florida
Corporation, AIR QUEST, INC., a Florida
Corporation,

Defendants

DECLARATION OF MARK HOYLE

I, Mark Hoyle, being duly sworn, hereby state and affirm as follows:

1. I am a practicing Barrister in Chambers at Tanfield Chambers in London, specializing in commercial and international law. I also act as an expert on Arab and Islamic Law. I am a certified mediator and chartered arbitrator; most of my work as an arbitrator relates to issues involving Middle Eastern and Islamic law. I have over twenty years experience as an expert consult on Islamic law and culture to private entities and governmental organizations in and from the Middle East and throughout Europe. I was the co-founder and am current editor-in-chief of the Arab Law Quarterly and have written articles and given talks regarding Arab & Islamic Law.

2. I have been asked to provide this declaration regarding the law of Afghanistan as it applies to legal liability for alleged negligent acts. I have considered the question and give my expert opinion as set out below

3. Under the Shari'a and the codified law of Afghanistan, it is necessary for a party to have actually committed a harmful act before liability attaches to that party. Absent a showing of a harmful act by a party, under Afghan law there would be no basis for liability against that party.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed at 2-5 WARWICK COURT, LONDON

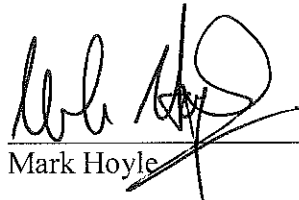
Dated: 30.11.2008

Before me
CHARLES H. JOSEPH

Barrister



30.11.2008.



Mark Hoyle

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