IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

In re BRIDGESTONE/FIRESTONE, INC. ATX, ATX II AND WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION _____ This Document Relates To: **Colombian Cases:** IP 00-5083-C-B/S; IP 00-5089-C-B/S IP 00-5090-C-B/S; IP 00-5098-C-B/S IP 00-5099-C-B/S **Venezuelan Cases:** IP 00-5011-C-B/S; IP 00-5013-C-B/S IP 00-5078-C-B/S; IP 00-5079-C-B/S IP 00-5080-C-B/S; IP 00-5081-C-B/S IP 00-5082-C-B/S; IP 00-5084-C-B/S IP 00-5085-C-B/S; IP 00-5086-C-B/S IP 00-5088-C-B/S; IP 00-5092-C-B/S IP 00-5093-C-B/S; IP 00-5094-C-B/S IP 00-5095-C-B/S; IP 00-5096-C-B/S IP 00-5097-C-B/S; IP 00-5100-C-B/S IP 00-5101-C-B/S; IP 00-5102-C-B/S IP 00-5103-C-B/S; IP 00-5104-C-B/S IP 00-5105-C-B/S; IP 00-5106-C-B/S IP 00-5107-C-B/S; IP 00-5108-C-B/S IP 00-5109-C-B/S; IP 00-5110-C-B/S IP 00-5111-C-B/S; IP 00-5112-C-B/S IP 00-5113-C-B/S; IP 00-5114-C-B/S IP 00-5115-C-B/S; IP 00-5116-C-B/S IP 00-5117-C-B/S; IP 00-5118-C-B/S IP 00-5119-C-B/S; IP 00-5120-C-B/S IP 01-5177-C-B/S; IP 01-5178-C-B/S IP 01-5180-C-B/S; IP 01-5181-C-B/S IP 01-5182-C-B/S; IP 01-5183-C-B/S IP 01-5184-C-B/S; IP 01-5185-C-B/S IP 01-5186-C-B/S; IP 01-5187-C-B/S IP 01-5188-C-B/S; IP 01-5189-C-B/S IP 01-5190-C-B/S; IP 01-5191-C-B/S IP 01-5193-C-B/S; IP 01-5219-C-B/S IP 01-5220-C-B/S; IP 01-5221-C-B/S IP 01-5222-C-B/S; IP 01-5223-C-B/S	Master File No. IP-00-9373-C-B/S MDL No. 1373 (centralized before Hon. Sarah Evans Barker, Judge)

IP 01-5224-C-B/S; IP 01-5225-C-B/S
IP 01-5231-C-B/S; IP 01-5232-C-B/S
IP 01-5266-C-B/S; IP 01-5267-C-B/S
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REPLY MEMORANDUM OF DEFENDANTS FORD AND FIRESTONE TO PLAINTIFFS' RESPONSE TO MOTIONS TO DISMISS ON *FORUM NON COVENIENS* GROUNDS (VENEZUELAN AND COLOMBIAN CASES)

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Defendants Ford Motor Company ("Ford") and Bridgestone/Firestone, Inc. ("Firestone") respectfully submit this reply memorandum to plaintiffs' response to defendants' motions to dismiss on *forum non coveniens* grounds foreign accident cases by Venezuelan and Colombian plaintiffs.

INTRODUCTION

Defendants have moved to dismiss 121 lawsuits arising from automobile accidents that occurred on the roads of Venezuela or Colombia.[1] These foreign accident cases do not belong in the courts of the United States, particularly not in the forums selected by plaintiffs – Florida, Alabama, Mississippi and California.[2] Plaintiffs do not even pretend that those states have the least connection to or interest in the events or issues raised in the complaints, other than the location of their U.S. counsel. By contrast, the extensive discovery demanded and taken by the plaintiffs has confirmed that these claims are overwhelmingly tied to Venezuela and Colombia:

- In every one of these lawsuits, the plaintiffs or real parties in interest are residents of Venezuela or Colombia, or another foreign country.
- Virtually all of the many hundreds of persons identified by plaintiffs who are witnesses to the issues of causation – including persons who maintained or repaired the tires and vehicles at issue, the drivers and passengers of the vehicles, immediate and post-accident

[1] Defendants' original, supplemental and second supplemental motions to dismiss encompassed 134 Venezeulan and Colombian accident cases. Plaintiffs have indicated that they intend to dismiss eight of these actions. Defendants have, for the time being, withdrawn their motion to dismiss four additional cases: IP 00-5065-C-B/S (Brzobohaty); IP 00-5091 (Correa-Rodriguez); IP 01-5260-C-B/S (Padilla); IP 01-5357-C-B/S (Torres). In each of these four cases, discovery has resulted in evidence – as yet unconfirmed – that one or more of the plaintiffs may be residents of one or more of the United States. Defendants reserve their right to renew their motions to dismiss on *forum non coveniens* grounds any of these four cases, based on the results of additional discovery and investigation.

[2] All five of the Colombian accident cases subject to this motion were filed in the Southern District of Florida. Of the 116 Venezuelan accident cases subject to this motion, 111 were filed in the Southern District of Florida. Three of the Venezuelan accident cases subject to this motion were filed in Mississippi, one in California, and one in

witnesses, and investigating personnel – live in Venezuela or Colombia and speak Spanish. All of these non-party witnesses are beyond the compulsory powers of this Court, and only a handful have been deposed at this point.

- Most of the damages witnesses, including relatives, co-workers and friends, investigating officers, emergency personnel and medical providers reside in Venezuela or Colombia and speak Spanish.
- All potential third-party defendants are located in Venezuela or Colombia.
- A large percentage of the tires and vehicles at issues were either manufactured or assembled in Venezuela. Virtually all were purchased in Venezuela or Colombia.

It is true that evidence relating to the issues of the design, testing and production of the subject tires and vehicles is located in Michigan, Ohio and Tennessee, defendants' home states. Defendants have never disputed that. However, virtually all of the discovery that plaintiffs hope to attain from defendants on these issues has been or will be completed shortly. It is hard to imagine a body of cases more appropriate for dismissal under the *forum non coveniens* doctrine.

Despite the fact that attempting to actually try each of these 121 Venezuelan and Colombian cases in forums completely unconnected to both plaintiffs and defendants will be monumentally inconvenient to the parties and the courts, plaintiffs and their U.S. counsel strenuously resist the suggestion that these claims be brought where they arose, in Venezuela and Colombia. It is undeniable that the United States is "already extremely attractive to foreign plaintiffs" for a variety of reasons, including: the "primarily . . . American innovation" of strict liability; the potential to forum shop between 50 jurisdictions; the availability of jury trials; the fact that most foreign jurisdictions do not allow contingent attorneys fees; and the availability of

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Alabama.

extensive pre-trial discovery. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 252 n. 18 (1981). However, the Supreme Court has rejected these as reasons for denying dismissal on *forum non coveniens* grounds.

As the Court noted, if the prospect of an unfavorable change in the law were sufficient to justify denial, "[t]the American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts." *Id.* at 252. Indeed, a denial of defendants' motions in these cases would serve as an invitation for plaintiffs worldwide to file product liability cases in U.S. courts against any U.S. company that played a role in designing or manufacturing any component of a product – even where the product was ultimately made, sold and used in the foreign country where the accident occurred.

As established in this reply brief, and in defendants' accompanying factual statements, plaintiffs offer no convincing rationale to clog the courts of Florida, Mississippi, Alabama and California with lawsuits such as these that have no connection to the forum. Rather, plaintiffs

- advance meritless procedural objections;
- misstate the test clearly established by the Supreme court for *forum non conveniens* determinations;
- disparage and deny the availability of adequate remedies provided by the courts of their own countries; and
- alternately disregard or misapply every relevant private and public factors.

The forums provided by the plaintiffs' home countries are available, adequate, and convenient to the parties and witnesses, and dismissal of these actions in favor of Venezuela or

Colombia will serve the convenience of the parties and the ends of justice. *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 802 (7th Cir. 1997). Defendants' motions should be granted.

I. PLAINTIFFS' SELF-SERVING PROCEDURAL ARGUMENTS ARE MANIFESTLY WRONG.

Before turning to the substantive issues before this Court, it is necessary to address a number of plaintiffs' procedural arguments that are simply in error. Throughout their brief, plaintiffs attempt to twist nonexistent or minor procedural issues, or statements made in *dicta* by other courts, into sweeping and issue-determinative rules. These arguments are ultimately no more than mere distractions, and should be rejected so this Court may turn to the primary task of applying the basic case law on *forum non coveniens.*

A. Defendants Motions Are Not Premature.

In an effort to avoid a ruling on the merits of defendants' motions, plaintiffs argue that the motions are "inappropriate" for this MDL proceeding, "premature", and that this Court should dismiss them without prejudice to refiling in the individual transferee courts when the cases are remanded for trial. (Plaintiff's Consolidated Memorandum in Response, ("Pl. Mem.") at 3.). If plaintiffs' suggestion is accepted by the Court, when these cases are ultimately remanded for trial defendants will be required to file – and plaintiffs to respond to – separate motions to dismiss in 121 separate cases. This bizarre suggestion should be rejected. Not only would it tremendously inconvenience the parties and the transferee courts on remand, it would result in unnecessary inconvenience in these MDL proceedings as well. Assuming that defendants' motions have merit, these cases should be dismissed now, before innumerable witnesses from Venezuela and Colombia are forced to travel to the United States for deposition, before thousands of documents are translated unnecessarily from Spanish into English, and

before this Court is required to rule on additional motions concerning these cases. It is precisely to avoid such inconvenience that courts have ruled that cases should be dismissed on *forum non coveniens* grounds at an early stage, not on the eve of trial. *See, e.g., Lony v. E.I. DuPont de Nemours & Co.*, 935 F.2d 604, 614 (3d Cir. 1991) ("Motions to dismiss based on *forum non coveniens* usually should be decided at an early stage in the litigation, so that the parties will not waste resources on discovery and trial preparation in a forum that will later decline to exercise its jurisdiction over the case."). Indeed, the Seventh Circuit encourages the filing of *forum non coveniens* motions sooner rather than later. *See Kamel*, 108 F.3d at 802 (chastising defendant's "lackadaisical pursuit of its *forum non coveniens* motion" seventeen months after filing the complaint was filed.)

It is thus unsurprising that the Judicial Panel on Multidistrict Litigation has held that *forum non coveniens* motions are among the pretrial proceedings that are appropriate for consideration by a transferee court. *See In re Oil Spill by the "Amoco Cadiz" off the Coast of Fr. on Mar. 16, 1978*, 471 F. Supp. 473, 476-78 (J.P.M.L. 1979) (noting presence of *forum non coveniens* motions in case adjudged appropriate for transfer for multidistrict litigation). Any other rule would put the parties and the transferee court in multidistrict litigation through all the inconveniences whose elimination is precisely the point of a motion to dismiss on *forum non coveniens* grounds.

Incomprehensibly, plaintiffs cite the decision in *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. 1469 (N.D. Ala. 1995) to support their argument that dismissal by an MDL court is inappropriate if it would increase the judicial labor by dividing the cases between two or more forums. Pl. Mem. at 3 n. 4. In fact, the case stands for the exact opposite proposition, and serves as a model for the dismissal of these actions.

Plaintiffs mischaracterize the *Silicone Gel Breast Implants* case as one "where the court would have to keep most of the cases, and 'only a few' would be tranferred by granting the motion, those few 'would be an insignificant burden' upon the forum court, which therefore denied the motion." Pl. Mem. at 6-7. In fact, the court ***granted*** the motions to dismiss on *forum non conveniens* grounds the claims of well over a thousand individual foreign plaintiffs from three separate countries.[3] *Id.* at 1478. Indeed, the court even granted dismissal as to plaintiffs from the United States who had their implant procedures performed in other countries. *Id.* The court noted that "virtually all of the discovery plaintiffs might need from defendants" had been gathered in the MDL proceeding, and that the remaining evidence "will largely come from persons outside the United States and, indeed, from the countries where the cases would be tried if defendants' motions are granted." 887 F. Supp. at 1476. That is precisely the posture of these proceedings, and it is appropriate for this MDL Court to make a similar ruling dismissing these cases.

B. These Cases Cannot Be Tried Under One "Judicial Roof."

Speaking out of the other sides of their mouths, plaintiffs also argue that dismissal is inappropriate because the Court must find "one 'judicial roof'" under which all of these cases can be litigated. (Pl. Mem. at 5-7.) Of course, in individual product liability cases such as these, where each case will turn on individual issues of causation and damages, that is not possible. Each case will be tried separately by the transferor court in which it originated. *See e.g., In re Silicone Gel Breast Implants*, 887 F. Supp. at 1477 (acknowledging that "many, many trials involving this 'common evidence' will be needed – with the time required for presentation of

[3] While granting dismissal of claims by Australian, British and Canadian citizens, the MDL court denied without prejudice the motion to dismiss once case by 40 New Zealand plaintiffs based on questions regarding the adequacy of the New Zealand forum. 887 F. Supp. at 1478-79.

such evidence at each trial consuming weeks or even months.") In fact, as plaintiffs and the Court are well aware, hundreds of similar personal injury lawsuits by U.S. plaintiffs are being litigated in separate courts throughout the country. There is no single "judicial roof" under which these claims can be tried together. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 37 (1998) (noting that at the close of discovery any remaining cases will be remanded to ***separate*** transferee courts for ***separate*** trials.)

None of the cases cited by plaintiffs stand for the broad proposition that *forum non coveniens* dismissal is meritorious only if it results in a single "judicial roof" under which all claims can be litigated, as plaintiffs contend. Most involve a limited source of recovery, such as a single res, *see, e.g. Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1452 (9th Cir. 1990) (taking into account "advantages in having all parties interest in apportioning a limited source of recovery assert their claims in one forum"); or a single accident giving rise to multiple claims, *see, e.g. Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602 (D.C. Cir. 1983) (involving claims by plaintiffs in single airplane crash); *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 190 (3d Cir. 1991) (same). By contrast, the cases at issue here involve individual accidents, and will be tried separately, whether here or abroad. Indeed, the decision in *In re Silicone Gel Breast Implants*, upon which plaintiffs rely, stands for the proposition that lawsuits by foreign plaintiffs can be dismissed on *forum non coveniens* grounds to a variety of foreign forums, even while claims of U.S. plaintiffs and other foreign plaintiffs are not dismissed. 887 F. Supp. at 1478-79 (dismissing claims of British, Australian and Canadian plaintiffs, while retaining actions by U.S. and New Zealand plaintiffs).

C. Defendants Are Not Estopped From Seeking Dismissal.

Plaintiffs suggest that defendants are estopped from seeking dismissal of the Venezuelan and Colombian lawsuits because they sought transfer of these cases to the MDL proceeding. Pl. Mem. at 3. This argument is absurd, and it reflects ignorance of the nature and purpose of multidistrict litigation. Multidistrict litigation is not based on the assertion that common issues of law and fact predominate, but merely that "***one*** or more common questions of fact" arise in those cases. 28 U.S.C. § 1407(a) (emphasis added). Indeed, one of the questions of law common to the Venezuelan and Colombian cases, and for which defendants sought MDL treatment, is whether they should be dismissed on *forum non coveniens* grounds. *See In re Oil Spill*, 471 F. Supp. at 476-78; *In re Silicone Gel Breast Implants*, 887 F. Supp. at 1479.

D. Plaintiffs Erroneously Argue That Defendants Are Required To Submit Detailed Descriptions Of The Sources And Locations Of Proof.

Finally, plaintiffs argue that these motions should be denied because defendants did not present detailed descriptions of the sources and locations of proof. Pl. Mem. at 3-4. Plaintiffs' argument runs afoul of the Supreme Court's observation in *Piper* that "affidavits identifying the witnesses [defendants] would call and the testimony these witnesses would provide" is "not necessary." 454 U.S. at 258.[4] Indeed, defendants may seek *forum non coveniens* dismissal "precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of [the] motion." *Id.*

To be sure, as this Court has noted, "adequate information" is required for the Court to make its determination whether *forum non coveniens* dismissal is appropriate. *In re*

[4] Plaintiffs are equally misleading as to how heavy a burden lies with defendants. Plaintiffs argue generically that defendants have the burden of ***proof*** as to all elements of the *forum non coveniens* analysis; more accurately,

Bridgestone/Firestone, Inc., ATX, ATX II & Wilderness Tires Prods. Liab. Litig., 131 F. Supp. 2d 1027, 1029 (S.D. Ind. 2001). However, the amount of information needed to perform its balancing test under the *forum non coveniens* inquiry "depends on the facts of the particular case." *Lacey*, 862 F.2d at 44; *Florian v. Danaher Corp.*, No. Civ. A. 300CV897(CFD), 2001 WL 1504493, at *1 n.4 (D. Conn. Nov. 20, 2001) (noting that while additional evidence might have been useful, single affidavit and limited additional evidence were sufficient in this case to allow district court to balance parties' interests); *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 371-72 (5th Cir. 1992) (rejecting blanket affidavit requirement). Defendants have satisfied their burden.

The face of the complaints reveals that each of these automobile accidents occurred in Venezuela or Colombia. Given the location of the accidents, evidence critical to the issues of causation and defendants' defenses to liability is necessarily located in those countries. Appendix A hereto contains a chart showing on a case by case basis the nature, location, and general character of the witnesses, documents, and potential third parties in each of the cases that is a subject of defendants' motions. Appendix A hereto summarizes information found in the discovery responses received to date from the plaintiffs about their claims. Because discovery of Venezuelan and Colombian witnesses is only beginning, defendants believe that Appendix A significantly understates the actual number of relevant witnesses and sources of proof located in Venezuela and Colombia. Copies of the actual discovery responses received to date are being provided to the Court separately in compact disc form as Appendix B.

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however, defendants have the burden of ***persuasion*** only. *See* Pl. Br. at 2, 5 (citing *Lacey*, 862 F.2d at 43-44).

Moreover, defendants have been willing to concede from the start the presence of significant witnesses and evidence in the United States. In addition, defendants have supplied expert affidavits relating to the laws of Venezuela and Colombia.

Plaintiffs' objection to defendants' use of their discovery responses completely ignores the fact that at the time defendants filed their motions this Court had stayed discovery in these cases, but that subsequently both parties have engaged in discovery on *forum non coveniens* issues. While relying on the discovery they conducted against defendants, plaintiffs want this Court to turn a blind eye to plaintiffs' own responses. As discussed below, plaintiffs' discovery responses overwhelmingly confirm what was apparent at the start – that a large percentage of the critical sources of proof are located in Venezuela and Colombia beyond the compulsory powers of U.S. courts. Significantly, plaintiffs never objected to or moved to quash defendants' discovery requests on the ground that they were irrelevant, or that defendants were not entitled to take discovery on *forum non coveniens* issues to supplement the record. Accordingly, plaintiffs' objection to defendants' use of that evidence at this late date smacks of the grossest form of procedural gamesmanship. If plaintiffs believe that they are prejudiced by defendants' use of evidence that they themselves insisted on developing, they can request the right to file a surreply. *See, e.g., Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1457 (E.D. Wis. 1993) (denying motion to strike and noting that court can grant plaintiffs opportunity to file surreply).

In sum, plaintiffs' various procedural objections to defendants' *forum non coveniens* motions are mere diversionary tactics lacking any merit.

II. PLAINTIFFS' MISSTATEMENTS NOTWITHSTANDING, THIS COURT'S TEST ON A *FORUM NON COVENIENS* MOTION IS CLEAR.

Plaintiffs also try to complicate this Court's job by misstating the analysis relevant to defendants' motions. Plaintiffs' mischaracterization of the *forum non coveniens* analysis should be soundly rejected. This Court should refocus its attention on the ***proper*** test, which the Supreme Court and the Seventh Circuit have set out in clear and easy to follow steps.

A. The Correct Test For Consideration of *Forum Non Coveniens* Motions.

The test this Court is to apply in deciding defendants' motions is clearly and concisely set out in the Supreme Court's opinions in *Piper* and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and the Seventh Circuit's binding instructions in *Kamel*.[5]

The Supreme Court has held that the fundamental purpose of the *forum non coveniens* doctrine is to provide for dismissal where an "alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience."' *Piper Aircraft*, 454 U.S. at 241 (alterations in original). The Seventh Circuit echoes this view. *See Kamel*, 108 F.3d at 802 ("The principle of *forum non coveniens* comes down to this: a trial court may dismiss a suit over which it would normally have jurisdiction if it best serves the convenience of the parties and the ends of justice.").

With this overarching question in mind, this Court must first determine whether "an adequate alternative forum is available to hear the case," according to the factors of "availability and adequacy." *Id.*; *see also Piper*, 454 U.S. at 254 n.22 ("At the outset of any *forum non coveniens* inquiry, the court must determine whether there exists an alternative forum."). Once

[5] Plaintiffs cite volumes of cases under the jurisprudence of 28 U.S.C. § 1404 in support of their motion. Those cases are entirely irrelevant, as the Supreme Court pointed out in *Piper*, 454 U.S. at 253-54.

an adequate alternative forum is found to exist, "the district court must then balance the private and public interest factors that emerge in a given case." *Kamel*, 108 F.3d at 803 *see also Gilbert*, 330 U.S. at 508-09 (setting out public and private interest factors). In making this balancing determination, a "distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified." *Piper*, 454 U.S. at 255.

B. Plaintiffs' Restatement Of The *Forum Non Coveniens* Test Is Erroneous.

Despite the simplicity of the *forum non coveniens* test, plaintiffs find ample opportunity for mischief in their attempt at a restatement of the test. Because their version of the test is rife with error, the Court should disregard it.

1. Friendship Treaties Do Not Entitle Plaintiffs To A Presumption In Favor Of Their Chosen Forum.

Plaintiffs mistakenly argue that treaties of friendship between the United States and Venezuela and Colombia require that they "be afforded the same presumption of correctness [given to U.S. plaintiffs] in their initial choice of forum." Pl. Mem. at 4, 14-15. This argument fails for multiple reasons.

To begin with, plaintiffs conspicuously ignore the Supreme Court's holding in *Piper* that different presumptions apply to "***resident*** or citizen plaintiffs" than to "***foreign*** plaintiffs." 454 U.S. at 255 (emphasis added). In holding that "foreign" plaintiffs are entitled to "less deference" than "resident" plaintiffs, *Piper*, 454 U.S. at 256, the Supreme Court was not "condemning" or "attack[ing]" foreign nationalities, as plaintiffs' suggest. Pl. Mem. at 4, 15.[6] Rather, the

[6] The principle that a foreign plaintiff's choice of forum is entitled to less deference "stems not from an antipathy towards foreign nationals – indeed, it should likewise apply when a citizen of one state brings an action in another state. Rather, the presumption that plaintiffs have selected the most convenient forum is considered less reasonable when that forum is not their home forum." *In re Silicone Gel Breast Implants*, 887 F. Supp. 1469, 1473 (N.D. Ala. 1995).

Supreme Court was emphasizing the practical underpinnings of the convenience analysis. Because the "the central purpose of any *forum non coveniens* inquiry is to ensure that the trial is convenient," it follows that "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." *Piper*, 454 U.S. at 255-56.

The same conclusion was reached by the D.C. Circuit in *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980). The foreign plaintiffs in *Pain,* like those here, argued that they were entitled to a higher presumption of convenience "[b]ecause the United States has signed treaties of trade, or of friendship and cooperation, with many nations guaranteeing equal access of one nation's citizens to courts of the other." 637 F.2d at 795-96. The court rejected this argument and dismissed the case, holding that "plaintiffs have not established that any special weight should have been accorded to their choice of forum." *Id.* at 799. The Supreme Court relied on the decision in *Pain* in establishing the rule that a foreign plaintiffs' choice of forum is entitled to less deference. *Piper,* 454 U.S. 256 n. 24. Accordingly, plaintiffs' argument that treaties of friendship with Venezuela and Colombia entitle them to the same presumption of convenience afforded U.S. residents or citizens runs directly counter to the Supreme Court's reasoning.

Consistent with *Piper,* the Seventh Circuit has affirmed the dismissal of claims by non-resident foreign plaintiffs, while noting that "because the primary objective of any *forum non coveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice of forum deserves less deference." *Kamel,* 108 F.3d at 803 (claims brought by Saudi Arabian residents dismissed); *see also CNA Reinsurance Co. v. Trustmark Ins. Co.,* 2001 WL 648948 at *8 (N.D. Ill. June 5, 2001) (claims of U.K. residents dismissed).

Plaintiffs' argument is further undercut by the plain language of the treaty with Venezuela upon which plaintiffs rely lends no support to the contention that their choice of forum is entitled to deference. The treaty distinguishes between Venezuelans living in Venezuela, and those who are resident in the United States, by providing access to U.S. courts "on the same terms which are usual and customary with the natives or citizens of the country ***in which they may be***." Treaty of Peace, Friendship, Navigation and Commerce, Jan. 20, 1836, U.S.-Venez., art. 13, 8 Stat. 466 (emphasis added.) Thus, the treaty only provides that Venezuelan citizens who may be residing in the United States (for example, resident aliens) are entitled to the same access to U.S. courts enjoyed by U.S. citizens. It confers no special access to U.S. courts for Venezuelans residing in Venezuela.

Plaintiffs' sole support for their treaty argument comes from a number of cases from the Second Circuit holding that treaties of peace and friendship, including the treaty with Venezuela, require U.S. courts to apply the same standard that it would apply to a U.S. citizen. *See, e.g., Blanco v. Banco Indus. de Venez.,* 997 F.2d 974, 981 (2d Cir. 1992) (holding that in light of treaty with Venezuela no discount may be imposed on Venezuelan plaintiff's choice of forum); *In re Maritima Agagua, S.A.*, 823 F. Supp. 143, 150 (S.D.N.Y. 1993)(same). Not only are these cases directly counter to the holdings of *Piper* and *Kamel,* their validity has been thrown into doubt by a recent *en banc* decision of the Second Circuit, *Iragorri v. United Technologies Corp.*, 2001 WL 1538928 (2d Cir. Dec. 4, 2001). In *Iragorri,* a Colombian plaintiff who was a permanent resident of the United States filed a tort claim against to U.S. defendants, who moved to dismiss on *forum non conveniens* grounds. One of the issues raised *sua sponte* by the Second Circuit was the impact of friendship treaties on the weight to be accorded a foreign plaintiffs'

choice of forum in a *forum non conveniens* analysis.[7] The Second Circuit solicited the opinion of the Department of Justice on this issue. While the Department did not provide a definitive answer, its response noted that "any right to court access afforded to a foreign nation plaintiff by treaty will generally be only a right to the same access that would be accorded to a U.S. national plaintiff who is otherwise similarly situated." *Id.* n. 2.

This comment is significant in light of the Second Circuit's observation that in the situation of "an expatriate U.S. citizen residing permanently in a foreign country" (who would be "similarly situated" in geography to the Venezuelan and Colombian plaintiffs in these cases) "it would be less reasonable to assume the choice of forum is based on convenience." *Id.* n. 5. Indeed, the Second Circuit concluded that even a U.S. citizen or resident who files a lawsuit in the U.S. outside of his or her home forum (*i.e.* in a different state) may not be entitled to deference in his or her choice of forum. *Accord, In re Dow Corning Corp.*, 255 B.R. 445, 526-27 (E.D. Mich. 2000) (rejecting foreign plaintiffs' argument that treaties of friendship, commerce and navigation "essentially overturn[]" *Piper* and reaffirming that "there is a distinction between resident or citizen plaintiffs and foreign plaintiffs, such that a foreign plaintiff's choice of forum deserves less deference than that of a resident or citizen plaintiff.")

The treaties of friendship with Venezuela and Colombia are simply irrelevant to the claims of the non-resident foreign plaintiffs in these cases.

[7] The Second Circuit's treaty discussion appears to be *dicta*, as it noted that "the instant case [involving a Colombian national] does not implicate any treaty obligations." This note in itself calls into some question the assertion of the Colombian plaintiffs in these cases that the friendship treaty with Colombia should impact the *forum non conveniens* analysis.

2. Plaintiffs Misstate The Standard For Balancing The Public And Private Interest Factors.

Working from the flawed assumption that their choice of forum is entitled to the same deference as that afforded U.S. citizens or residents, plaintiffs mistakenly argue that the balance of public and private factors must "***clearly*** point" to Venezuela and Colombia. Pl. Mem. at 9 (emphasis added). The Supreme Court rejected this heightened standard in regard to claims by foreign plaintiffs. *Piper*, 454 U.S. at 256. Rather, dismissal is justified based on a simple finding that the private interest factors "point towards" trial in Venezuela and Colombia, or that the public interest factors "favor[]" trial in those forums. *Id.* at 255. Consistent with this standard, the Seventh Circuit has affirmed dismissal where "the district court simply concluded that the *Gilbert* factors balanced in favor of Saudi Arabia." *Kamel*, 108 F.3d at 805.

Plaintiffs' attempt to hold defendants and the court to a more stringent balancing analysis should be rejected.

III. VENEZUELA AND COLOMBIA ARE ADEQUATE ALTERNATIVE FORUMS FOR THESE CLAIMS.

The inquiry into whether an alternative forum exists is not a demanding one: "Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Blanco*, 997 F.2d at 981 (quoting *Gilbert*, 330 U.S. at 506-07). As long as the parties are amenable to process and within the forum's jurisdiction, the alternative forum is available. *Kamel*, 108 F.3d at 803. The alternative forum is considered adequate "when the parties will not be deprived of all remedies or treated unfairly." *Id.* There is no doubt that "dismissal on grounds of *forum non coveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery." *Piper*, 454 U.S. at

250; *see also id.* at 255 (dismissal permissible where unfavorable change in law is possible and potential damage award may be smaller); *Kamel*, 108 F.3d at 803.

There is no doubt that under these guidelines, Venezuela and Colombia are adequate alternative forums for these claims.

A. Venezuela Is An Adequate Alternative Forum.

Although plaintiffs are withering in their criticism of defendants' Venezuelan law experts, they concede a critical point of Venezuelan law: namely, that Article 40 (subparagraph 3) of the Venezuelan Private International Law Statute allows Venezuelan courts to exercise jurisdiction over these claims if all parties expressly submit to jurisdiction. Pl. Mem. at 18. Defendants have expressly agreed to submit to the jurisdiction of Venezuelan courts. Nonetheless, plaintiffs disingenuously argue that Venezuela is not "available" because if these cases are dismissed plaintiffs themselves might refuse to refile their actions there.

Of course, no one can ***force*** plaintiffs to refile these actions in Venezuela after they are dismissed in the United States. If plaintiffs willfully elect not to pursue their claims in Venezuela, that is their choice, just as it is any plaintiff's choice to voluntarily abandon claims. But the critical point is that ***if*** these actions are dismissed, plaintiffs ***can*** file their claims in Venezuela. And if they do, defendants have agreed not to challenge the Venezuelan court's jurisdiction, thus satisfying Article 40 (subparagraph 3). There is no dispute that a Venezuelan forum is available, should plaintiffs choose to avail themselves of it.

The Venezuelan forum is adequate. Venezuelan courts provide remedies for claims such as plaintiffs. Ford's expert has testified that Venezuela recognizes causes of action for breach of warranty (analogous to the causes of action plaintiffs have asserted here). *See* Rengel Decl. ¶ 14. Plaintiffs do not dispute this. There is also no dispute that Article 1.185 of the Venezuelan Civil

Code provides a cause of action in tort against one who negligently or intentionally causes harm to another. *See* Cottin Decl. ¶¶ 16-17. Indeed, plaintiff's own expert, James Rodner unequivocally asserted in the leadings (and according to plaintiffs, only) law review article on the subject, that Article 1.185 provides a cause of action in product liability against a manufacturer:

> Liability in tort is consecrated in Article 1.185 of the Civil Code: 'He who, by intent, negligence or fraud, has caused damage to another, is obligated to pay restitution.' If the damage caused to the victim comes from ***a manufacturing defect***, the manufacturing defect is due to the fault of the manufacturer, and ***the manufacturer must indemnify the victim for all damage***, forseen and even unforseen, including pain and suffering (C.C. Art. 1.196), with the only exception of indirect damage (C.C. Art. 1.275).

James O. Rodner, *Manufacturer's Liability in Venezuelan Law and Angel Rojo's Monograph*, Journal of the School of Law, University Catolica Andres Bello, at 10 (1976-77) (emphasis added) (Appendix C hereto). Given the clear langauge of the statute, Mr. Rodner's last minute attempt to disavow his prior published opinion for purposes of this litigation calls into question his credibility and should not be taken seriously. *See* Pl. Mem. at 20.

Faced with these undisputed facts, plaintiffs resort to arguing that the Venezuelan forum is inadequate because there is no published case law imposing strict liability on a manufacturer. Pl. Mem. at 20. Plaintiffs' argument fails on two grounds. First, it is undisputed that Venezuela is a civil law – not a common law – jurisdiction. Cottin Supp. Decl. ¶ 4 (Appendix D hereto). Unlike the laws of the United States, the law of Venezuela derives principally from the written codes, not published case law. *Id.* Thus, the fact that Venezuelan case law does not discuss product liability actions is of little moment.[8]

[8] Plaintiffs and their expert attempt to make hay from the fact that under questioning during his deposition, Ford's expert, Pedro Rengel, was able to identify a number of cases in which Venezuelan courts had found corporate defendants liable for injuries caused by their products or premises. *See* Pl. Mem. at 20; Rodner Aff. ¶ 6-11. While

Second, and more significantly, the Seventh Circuit has rejected the argument that the absence of product liability case law precludes dismissal of claims such as these. *See Macedo v. Boeing Co.*, 693 F.2d 683 (7th Cir. 1982). In that case, which involved claims by Portuguese plaintiffs, none of the parties' experts could point to specific cases under Portuguese law where products liability awards had been made or refused. *Id.* at 688. Nonetheless, the court held that Portugal provided an adequate forum, reasoning that plaintiffs claims were at least "cognizable in theory," even though "[t]he absence of reference suggests that similar products liability cases are not common in Portugal" *Id.* The Seventh Circuit also noted that "[i]f there is a real possibility of a rejection of plaintiffs' cases against the manufacturers" by Portuguese courts, "plaintiffs are protected by reinstatement of their case here." *Id.* at 687. The Seventh Circuit's approach to the adequacy issue in *Macedo* is eminently sensible, and should be followed by this Court. *Accord, Leon v. Millon Air, Inc.* 251 F.3d 1305, 1313 (11th Cir.) ("the District Court would presumably reassert jurisdiction over the case in the event that jurisdiction in the Ecuadorian courts is declined.")[9]

Venezuela provides an adequate alternative forum for these lawsuits.

B. Colombia Is An Adequate Alternative Forum.

Plaintiffs do not dispute that all parties are amenable to process in Colombia, effectively conceding that Colombia is an alternative forum. *Piper*, 454 U.S. at 254 n. 22. Rather, plaintiffs

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plaintiffs are wrong that defendants relied on these cases in their papers (they did not), the cases Mr. Rengel identified affirm that Venezuelan courts have the means and ability to deal with the issues raised in these cases, and to provide relief to injured parties.

[9] Plaintiffs also argue that the unavailability of contingency fees may make Venezula an inadequate forum. Pl. Mem. at 33-34. However, plaintiffs have made no showing that they lack the means to retain counsel in Venezuela. Numerous courts, including the Supreme Court, have rejected the available of contingency fees as a significant factor in the *forum non conveniens* analysis. *See Piper*, 252 n. 18; *Coakes v. Arabian American Oil Co.*, 831 F.2d 572, 576 (5th Cir. 1987) ("If the lack of a contingent-fee system were held determinative, then a case could almost never be dismssed because contingency fees are not allowed in most foreign forums"); *Murray v. British Broadcasting Corp*., 81 F.3d 287 (2d Cir. 1996) (same); *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424,

generally argue that Colombia is an inadequate alternative because of recent political instability and violence. This identical argument was rejected recently by the court in *Iragorri v. International Elevator, Inc.* 203 F.3d 8 (1st Cir. 2000). In that case, the First Circuit upheld the *forum non coveniens* dismissal of claims brought by a native Colombian residing in Florida. Citing the State Department advisory warning against travel in Colombia, plaintiff had claimed that violence in Colombia (and in particular Cali, where the claims arose) rendered the Colombian forum inadequate. *Id.* at 13. The court held that this was insufficient to prove the inadequacy of the Colombian forum, particularly because the plaintiff had failed to present any evidence that she herself would be specifically targeted for danger if she travelled in Colombia. *Id.* This rationale applies with even greater force here, where all plaintiffs or real parties in interest already reside in Colombia, and where no plaintiff has provided any evidence that they would be targeted for violence for attempting to bring a lawsuit for damages arising from an automobile accident.

Plaintiffs also argue in passing that "[t]here are no rules governing this type of litigation to orient a Colombian judge, who would be forced to construct such rules from scratch." Pl. Mem. at 21. This is simply wrong. As defendants' experts have established, Colombia gives accident victims the right to bring tort actions against potentially liable parties. Gamboa Decl. ¶ 12. In addition, the Colombian consumer law gives consumers the right to bring claims against manufacturers, importers and/or dealers for breach of warranty and breach of quality standards. Gamboa Reply Decl. ¶ 3a.[10]

Colombia provides an adequate alternative forum for plaintiffs' claims.

1430 (11th Cir. 1996) (same).

[10] Plaintiffs once again erroneously assume that the absence of published case law relating to product liability claims indicates that such claims are not cognizable under Colombian law. Because Colombia, like Venezuela, is a

IV. THE PRIVATE INTEREST FACTORS FAVOR DISMISSAL.

A. The Relative Ease Of Access To Sources Of Proof Favors Dismissal.

There is, of course, evidence relevant to these claims in the United States as well as in Venezuela and Colombia. But the fact that the evidence may be found in more than one jurisdiction does not mean, as plaintiffs appear to claim, that all things are therefore equal, and that plaintiffs' choice of forum must prevail. The Supreme Court rejected that contention in *Piper*:

> Particularly with respect to the question of the relative ease of access to sources of proof, the private interests point in both directions. As respondent emphasized, records concerning the design, manufacture, and testing of the propeller and plane are located in the United States. She would have greater access to source of proof relevant to her strict liability and negligence theories if trial were held here.

454 U.S. at 257. Nevertheless, the Supreme Court affirmed the dismissal of the suit because a "large proportion" of the evidence was located in a foreign forum and fewer evidentiary problems were posed by trial where the accident had occurred. *Id.* In other words, the *relative* availability of the evidence must be compared and evaluated.

As to evidence in the United States, the plaintiffs have already had the benefit of extensive discovery in these proceedings. That discovery is now largely complete. And just as the *Piper* Court suggested that defendant corporations might obviate concerns about the availability their records in foreign proceedings by agreeing to provide records relevant to the plaintiff's claims, 454 U.S. 257 n. 25, the defendants in this action have stipulated that the

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civil law country, the Court must look to the Code, not case law, to determine what causes of action Colombian law provides.

plaintiffs in these proceeding may continue to have access the discovery generated in these proceedings.

It does not follow, as plaintiffs appear to suggest, that the retention of these cases for trial in the United States would provide plaintiffs with any greater access to U.S. sources of proof. Specifically, none of the witnesses employed by Ford and Firestone work or reside within the subpoena power of the U.S. district court here in Indianapolis or within the subpoena power of the federal courts in which these actions were originally filed and to which that will likely by remanded. What is even more certain is that neither this Court, nor any of the transferor courts has the power to compel the testimony of the large number of witnesses in Venezuela and Colombia, only some of whom plaintiff's "pledge" to make available for trial.

With the exception of a few vehicles and tires that plaintiffs have made available for inspection in the United States, it is apparent that much of the physical evidence relating to these accidents remains in South America. Although the Podhurst firm's plaintiffs have produced some of the vehicles and tires involved in the accidents, much physical evidence (including missing tire components) remains in South America or has been lost or destroyed in South America. Moreover, other plaintiffs, such as Hyeon Seong Kim, object to producing the tire at issue on the grounds that "it is overly burdensome and harassing," and offer to produce the tire "if available" only in Venezuela. Kim objects to the producing the vehicle on the same grounds, claiming production is "costly." *See* Discovery Responses attached as Appendix F, hereto. The factual investigation that remains in these cases necessarily centers on the events, transactions and evidence that remain in South America. Clearly, these investigations could be more efficiently conducted in the countries where the accidents occurred.

Under these circumstances the relative ease of access to evidence is unbalanced and favors dismissal of these actions in deference to suits in Venezuela and Colombia.

B. Unavailability Of Compulsory Process For Attendance Of Unwilling Witnesses In Venezuela and Colombia Favors Dismissal.

The plaintiffs do not contend that either this Court or any transferor court has the power to compel the attendance of witnesses residing in Colombia and Venezuela. They seek to mitigate this fact, by submitting miscellaneous affidavits of various witnesses chosen by the plaintiffs who express their willingness to come to the United States to testify "upon reasonable notice" or "upon reasonable notice and if such trip is scheduled at a time when I am authorized by my Direct Superiors." Others state they have "no problem" giving their testimony in the United States and "upon prior and timely notice, I have no problem whatsoever making the necessary arrangements and traveling to the United States." Pl. Mem. Tab 14. Regardless of how these statements may be qualified, they fall well short of guaranteeing the presence in the United States of non-plaintiff witnesses who could testify about the facts. So does plaintiffs' ambiguous "pledge to secure at their expense the testimony of investigating police officers and damages witnesses in the U.S. in any ultimate damage trial." *See Leon*, 251 F.3d at 1315 (plaintiffs' undertaking to appear in the federal courts and to assume the cost of deposing witnesses in Ecuador, does not guarantee presence in United States of key defense witnesses).[11] And plaintiffs make no respresentations as to witnesses who are unwilling to come to the United

[11] Furthermore, it is apparent from a review of the declarations in Plaintiffs' Exhibit 14, that many of the witnesses willing to come to the United States could only testify with the aid of a translator, another factor favoring trial in South America. *See Vasquez v. Bridgestone/Firestone*, No. 1:010CV-168, slip op. (E.D. Tex. Aug. 7, 2001) ("most of the witnesses who are Mexican citizens who are willing to appear in person would require translators to testify, again at greater expense and at the risk of loss of accuracy. Such translation requirements would certainly slow the case and perhaps introduce confusion among the jurors.") (Appendix G hereto.)

States, nor as to any foreign liabity witnesses. Instead, plaintiffs' undertaking is one limited to producing plaintiffs to their own liking.[12]

And for those witnesses who are unwilling to come to the United States, the theoretical availability of letters rogatory is hardly a satisfactory substitute. "The procedure presents difficulties in obtaining adequate deposition testimony, is expensive, and is time consuming. Further, relying on depositions instead of live testimony would deprive the court and the trier of fact from evaluating the credibility of the witnesses." *Vasquez v. Bridgestone/Firestone*, No. 1:010CV-168 slip op. at 16 (E.D. Tex. Aug. 7 2001) (Appendix G hereto).

This factor favors dismissal.

C. The Cost Of Obtaining Attendance Of The Willing Witnesses Favors Dismissal.

The plaintiffs have already deposed numerous Ford and Firestone employees with knowledge of the design, development, and manufacture of the Ford Explorer and Firestone tires. They now belatedly "pledge" to secure at their expense the testimony of the investigating police officers and damage witnesses in the U.S. in any ultimate damage trial. Pl. Mem. at 30. Missing from this undertaking, however, is any offer to pay for the transportation of those liability witnesses who reside in South America and any explanation as to how defendants can secure the testimony of police, vehicle repair and maintenance witnesses, occurrence witnesses, investigating officers and damages witnesses who are unwilling to come to the United States. With the huge number of witnesses identified from plaintiffs' initial discovery responses, *see* Appendix A hereto, the cost of obtaining the testimony of even those witnesses willing to cooperate promises to be enormous. Whether those costs are borne by plaintiffs or the defendants, the expense and inconvenience they represent do not disappear. The costs and

[12] Even as to those witnesses, plaintiffs are unable to guarantee that their witnesses will be able to obtain valid visas.

inconvenience would be greatly reduced if these cases were tried where these accidents occurred. This factor favors dismissal.

D. The Possibility Of A View Of The Premises Of The Foreign Accidents If The Cases Are Tried In Venezuela And Colombia Favors Dismissal.

Plaintiffs broadly dismiss a view of the accident scene as unnecessary in a products case. But this is not a case like an aircraft crash where location of the accident is largely fortuitous. A view of the accident scene may aid the trier of fact to determine what truly caused plaintiffs' injuries, and whether the alleged product defects had any causal role. The depositions in these cases coming out of Venezuela and Colombia paint a picture of road conditions and driving practices that would be difficult for an American to imagine: High-speed driving over rough road conditions with steep shoulders with sharp drop-offs. A view of the premises of such conditions may very well help the fact finder determine whether the cause of an accident was a design defect or, instead, the conditions to which a vehicle and its components were subjected. Under such conditions, a view of the premises may greatly assist the trier of fact in understanding the circumstances and conditions that caused the accident.

Courts facing similar claims have found that a view of the premises may be appropriate. There is no question that trial of these cases in the United States would preclude any possibility of a view of the premises if the court trying a case determines that a view would be helpful. As the court noted in dismissing a similar claim on the grounds of *forum non coveniens* in *Danser v. Firestone Tire & Rubber Co.*, 86 F.R.D. 120, 123 (S.D.N.Y. 1980):

> . . . the possibility of either the court or the jury viewing the accident scene all require that the action be commenced in a more appropriate forum. . . .
>
> [A] view of the scene may be possible in the case at bar. Indeed, defendant contends that the rupture of its tire occurred during or after the accident in issue. A view of the accident scene

> may prove helpful in resolving this issue. At any rate, a viewing would only be possible if the action were in an appropriate West German court.

This factor favors dismissal.

E. All Other Practical Problems That Make Trial Of A Case Easy, Expeditious And Inexpensive Favor Dismissal.

1. The Enforceability of Any Foreign Judgments

Firestone and Ford have already agreed to submit unconditionally to the personal jurisdiction of the appropriate Venezuelan and Colombian courts as a condition of dismissal. Having consented to that jurisdiction, it never would have occurred to them that they might then turn around and dispute the enforceability of a judgment rendered by those tribunals. To obviate any concern by the plaintiffs and by the Court on this subject, however, Firestone and Ford explicitly consent that any dismissal be conditioned upon their agreement to satisfy any final judgment entered by the courts of Venezuela or Colombia in favor of the plaintiffs. This factor favors dismissal.

2. The Inability to Implead Third Parties

Plaintiffs claim that "No court has found that the inability to implead a third party was sufficient to justify an FNC transfer." Pl. Mem. at 31. To the extent plaintiffs' argument is that the inability to implead is not in and of itself decisive, they merely state the obvious. The *forum non coveniens* determination is made on the consideration of a host of relevant factors, all of which must be considered and balanced. But to the extent that plaintiffs contend that the inability to implead is insignificant, they are clearly incorrect. The Supreme Court has held that the inability to implead potentially responsible parties clearly supports dismissal on the ground of *forum non coveniens*.

> The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland. Joinder of [third parties] is crucial to the presentation of petitioners' defense. If [defendants] can show that the accident was caused not by a design defect, but rather the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. . . . It would be far more convenient . . to resolve all claims in one trial."

Piper, 454 U.S. at 259.

The evidence shows that numerous potential third parties, not subject to the jurisdiction of the United States courts, are potentially responsible in virtually all of these cases. Discovery is not yet complete in these cases and in many case the defendants have been hampered by the failure of plaintiffs to retain or safeguard the vehicles or tires allegedly involved. Nevertheless, based upon the discovery received to date, numerous potential third party defendants have been identified. Each resides or does business in South America and none is subject to the jurisdiction of this court. These include:

- Drivers of the vehicles involved in the accidents. In many cases, the plaintiffs were passengers in cars driven by others. Although some of those drivers may also have filed suit against defendants, they have not agreed to accept service of third party complaints as part of these proceedings.

- Ford of Venezuela ("FoV"). In many cases, the manufacturer of the Ford Explorer involved in an accident was not, as plaintiffs allege, Ford Motor Company but FoV. Plaintiffs' own Statement of Facts purports that FoV was actively involved in the issues raised by plaintiffs' complaints.

- Firestone Venezuela ("BFVZ"). Approximately 2/3 of the Firestone tires installed on Ford Explorers in Venezuela were manufactured in Venezuela by BFVZ. Indeed, most of the tires allegedly involved the these foreign accident cases were produced by BFVZ. Again, plaintiffs' own Statement of Facts purports that BFVZ was actively involved in issues raised in the complaints.

- Tire and vehicle dealers and tire and vehicle repairers. Plaintiffs' discovery responses reveal that many tires of vehicles at issue have seemingly been destroyed. Of the tires that have been produced for inspection by the plaintiffs, many bear evidence of improper repair or maintenance. (*See* Appendix K.) Alterations to tires or vehicles may have contributed to the failures that allegedly caused plaintiffs injuries.

The disadvantage to the defendants from the inability to obtain jurisdiction over these potential third party defendants cannot be overstated. By virtue of litigation in a forum distant from these accidents, the plaintiffs would prevent the defendants from presenting a complete explanation of the conditions and causes of the accidents, and from pursuing those responsible. This factor favors dismissal.

3. The Burden of Translation

The burden of translation has both public and private impacts. Only the private aspects of translation will be addressed in this section. The plaintiffs have already had the benefit of access to defendants' document facilities supplemented by additional documents produced in response to plaintiffs' numerous document requests. Although plaintiffs complain there are million of pages of documents, the documents have now been subjected to the examination and scrutiny and screening by teams of plaintiffs lawyers. From these millions, only about 2,000 Ford and Firestone documents have been marked as deposition exhibits and it can be fairly predicted that at the time of trial, barely a tenth of these will likely be marked for introduction into evidence. Thus the number of defendants' documents that plaintiffs will introduce and will actually require translation will be, at most, several hundred. Plaintiffs' claim to require the translation of millions of documents is a gross exaggeration.

The number of documents that the defendants will need to translate will be far greater: police reports, medical records, purchase and maintenance records, and other documents relating to damages will need to be translated for every plaintiff for every case. With the number of foreign plaintiffs at more than 120 and continuing to grow, this means thousands of documents, almost all of which are in Spanish. Thus, although it is true that the burden of translation will be

borne by both sides, that burden will be disproportionately borne by Ford and Firestone. This factor also favors dismissal.

F. Balance of Private Factors.

In *Lueck v. Sundstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001), the court affirmed the dismissal of a case in favor of the plaintiff's administrative remedy for damages under New Zealand's "no fault" system. Despite the plaintiff's complaint that New Zealand had abolished the law of torts, the court – in words that apply equally to these Venezuelan and Colombian cases – found that the balance of the private factors favored New Zealand as a forum:

> Although crucial documents and witnesses exist in both forums, the private interest factors are not in equipose. The documents and witnesses in the United States are all under the control of the Plaintiffs and Defendants, so they can be brought to court, no matter what the forum. The documents and witnesses in New Zealand, however, are not so easily summoned to the United States. Though some of the New Zealand evidence is under Plaintiffs' control, including Plaintiffs' medical and employment records, many of the documents and witnesses are under the control of the New Zealand governments or [third parties]. The district court does not have the power to order the production or appearance of such evidence and witnesses. . . . .
>
> It is clear that evidence important to this dispute exists in the United States and New Zealand. However, because the district court cannot compel production of much of the Colombia and Venezuela evidence, whereas the parties control, and therefore can bring, all the United States evidence to New Zealand, the private interest factors weigh in favor of dismissal.

236 F.3d at 1146-47. *Accord, Iragorri v. In'l Elevator, Inc.*, 203 F.3d 8, 15 (1st Cir. 2000) ("convenience, efficiency and fairness all militated in favor of a trial in Colombia."); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279 (11th Cir. 2001) (dismissal proper where crash wreckage, witnesses, and important documentary evidence, facts relevant to defendant's defenses, in Argentina.); *Leon*, 251 F.3d at 1315 (the evidence necessary to determine whether

the deaths or injuries were caused by the crashing airplane or the debris from it and the extent of the damages were located in Ecuador and the major sources of proof were in Spanish). The relevant private factors weigh in favor of dismissal.

V. THE PUBLIC INTEREST FAVORS DISMISSAL OF THE FOREIGN ACTIONS.

A. Administrative Difficulties Flowing From Court Congestion Favor Dismissal.

In declining to prohibit any *forum non coveniens* dismissal that would remit a plaintiff to a jurisdiction with laws less favorable to plaintiffs, the Supreme Court noted that such a rule would make U.S. courts "even more attractive" to foreign plaintiffs, and "further congest already crowded courts." *Piper*, 454 U.S. at 251-52. The impact of an influx of foreign cases upon the docket of the courts in this country is not hypothetical. Since the defendants' original *forum non conveniens* motions were filed, the number of Venezuelan cases has doubled, and cases from foreign countries continue to be filed in the Southern District of Florida and other federal courts around the country. The defendants estimate that the total number of foreign cases filed in federal courts by foreign residents arising out of foreign accidents involving Ford Explorers equipped with Firestone tires now exceeds 175.

With products designed or manufactured in the United States now being distributed to virtually every corner of the globe and each controversy between a U.S. based company and a foreign national potentially new business for the federal courts under the courts' alienage jurisdiction, every federal court must carefully consider the policy implications of decisions that would create further incentives for foreign nationals involved in foreign accidents alleging personal injuries.

In this case, should this Court decide to deny the defendants' motions to dismiss, the impact of that decision will be that more than 110 cases will ultimately be remanded to the United States District Court for the Southern District of Florida for trial at the conclusion of the consolidated pretrial proceedings. *See Lexecon,* 523 U.S. at 37. The Southern District of Florida is already "one of the busiest Federal trial courts in the Country" ranking "sixth nationwide in the number of total weighted case filings per judge among all district courts, and . . . first in total weighted case filings per authorized judgeship among the ten largest district courts in the Country." 2000 State of the Court, Southern District of Florida, at 7 (Appendix H hereto). Remand to that district would mean at least 8 new cases for each and every regular full-time district judge presently hearing cases in the Southern District of Florida. Moreover, as the steady flow of new foreign cases into this proceeding suggests, this number may significantly increase. The impact of these foreign cases upon the already congested dockets of the Southern District of Florida and the other courts in which these actions were originally filed cannot be ignored, as plaintiffs would have this court do. *See* Pl. Mem. at 38 n. 46 (contending the dockets of the courts of the Southern District of Florida are irrelevant to the pending motions.)

This factor favors dismissal.

B. The Local Interest In Having Localized Controversies Decided At Home Favors Dismissal.

The plaintiffs' response to the *forum non coveniens* motions entirely ignores the substantial interests of Colombia and Venezuela in these actions. The plaintiffs are residents of these countries. The accidents giving rise to the claims occurred on their roads and highways. The economic impact of where plaintiff received medical treatment and suffered economic losses was overwhelming centered in plaintiffs' home countries. Officials of those countries not only

investigated these accidents, but several government investigations have been launched to determine the causes of the accidents in South America. Clearly Colombia and Venezuela have strong and substantial interest in determining the compensatory damages payable to their residents. *See Leon*, 251 F. 3d at 1315 (11th Cir. 2001). Under similar circumstances the U.S. Supreme Court has held that whatever incremental interest Americans might have in deterring American manufacturers from producing defective products by trying the claim in American courts was "insignificant" and "simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Piper*, 454 U.S. at 260-61. *See also Satz*, 244 F.3d 1284 (11th Cir. 2001). This factor favors dismissal.

C. The Interest In Having The Trial Of A Diversity Case In A Forum That Is At Home With The Law That Must Govern The Action Favors Dismissal.

Plaintiffs' discussion of the choice of law issues presented by defendants' motions serve only to obfuscate this issue. Where no federal statutory venue requirements are present, there is no requirement that each and every choice of law conceivably presented by a claim be identified and definitively determined as a condition precedent to dismissing a case on the grounds of *forum non coveniens*. *Lueck*, 236 F.3d 1148. *See also Piper, 4*54 U.S. at 259-60 (unnecessary to resolve disagreement between district and appellate courts regarding which country's law would apply where all other public interest factors favored trial in Scotland); *Satz* 244 F.3d at 1284 (affirming dismissal on the ground of *forum non coveniens* because, *inter alia*, "there is a possibility that the district court would have to apply Argentine law to decide this case").

As the following section confirms, the laws of Venezuela and Colombia will govern issues of liability and compensatory damages in each of these cases. But for present purposes,

the most telling point relevant to this factor is the following: Although these cases were filed and, if tried in the United States, will be tried in federal courts in Florida, Alabama, Mississippi and California, nothing in plaintiffs' response even suggests that the laws of any of these states would supply the rule of decision in any of these cases. Whether the court looks to the laws of Colombia and Venezuela, or to the laws of Michigan and Tennessee, if these cases are tried in the United States, the courts that will be trying these cases will be required to apply the laws of different states or countries. There is no basis for assuming that the laws of Florida, Alabama, Mississippi, or California have anything to do with the rights and obligations of the parties.[13]

This factor favors dismissal.

D. The Avoidance Of Unnecessary Problems In Conflict Of Laws Or In The Application Of Foreign Law Favors Dismissal.

Although not always essential to the *forum non coveniens* analysis, the identification of the source of controlling law is a significant factor in many *forum non coveniens* determinations because of the considerable expenditures of time, money, and effort needed to understand and apply unfamiliar law. *See, e.g.*, *Piper*, 454 U.S. at 260 & n.29 ("[T]he need to apply foreign law point[s] towards dismissal."); *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1226 (3d Cir. 1995) ("[C]ourts should prefer to have cases adjudicated in the forum familiar with the law to be applied, instead of taking it upon themselves to become educated about foreign law.").

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[13] For example, the only connections between most of the cases filed in Florida and state of Florida are the allegations that Firestone and Ford were "authorized to do business in the State of Florida and . . . doing business in offices in the State of Florida, by and through business agents resident in the State of Florida." Although these allegations might be sufficient to establish personal jurisdiction over the defendants, they provide no basis whatsoever for assuming that the law of Florida supplies the rule of decision for determining the defendants' duties and obligations to the plaintiffs. *Cf. Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (due process requires that a state electing to apply its substantive law to a controversy has significant contacts creating government interests such that its choice of law is neither arbitrary nor fundamentally unfair.) The only apparent nexus between the forums chosen by the plaintiffs and their claims is their attorneys have offices in those states. But the convenience of counsel has never been regarded as a factor relevant to the *forum non coveniens* determination. *Cf. AAR Int'l,*

It is reasonable to assume that neither this Court, nor the several transferor courts to which these cases will be returned for trial if they are tried in the United States, is intimately familiar the laws of Colombia and Venezuela. Indeed, most the federal judges who will preside over these cases are unlikely to be fluent in Spanish. For these reasons, the burden of trying these cases in the United States will be exacerbated and the courts and the parties will have to resort, as they have in connection with these *forum non coveniens* motions, to the cumbersome and costly use of foreign law "experts" as the means of ascertaining the governing law. Thus the burden of applying the laws of these foreign countries will be far greater than a "garden variety" diversity case raising choice of law questions concerning the laws of the several states. *Cf. Leetsch v. Freedman*, 260 F.3d 1100 (9th Cir. 2001) ("Not only is the district court unfamiliar with German law, were it to hear the case it would be required to translate a great deal of that law from the German language, with all the inaccuracy and delay that such a project would necessarily entail.")[14]

"Where a transferee court presides over several diversity actions consolidated under the multidistrict rules, the choice of law of each jurisdiction in which the transferred actions were originally filed must be applied." *In re Air Disaster at Ramstein Air Base, Germany*, 81 F.3d 570, 576 (5th Cir.). This court recognized this rule in its Order Granting in Part and Denying in Part the Motion to Dismiss the Master Complaint at 5, "In MDL proceedings, the forum state generally is the state in which the transferor court of each individual action sits; in other words,

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Inc. v. Nimelias Enterprises, S.A., 250 F.3d 510, 522-23 (7th Cir. 2001) ("The proper inquiry is the relative inconvenience of the competing fora to the parties, not to their lawyers"), *cert. denied*, 70 U.S. L.W. 3315 (2001).

[14] Plaintiffs suggest that this Court need not approach the choice of law issue because defendants have not identified any differences between the laws of the "implicated jurisdictions," thus resulting in a "false conflict" that "obviates the necessity of any choice-of-law analysis." Pl. Mem. at 43-46. This argument is absurd, given that one of plaintiffs' principle justifications for filing these lawsuits in U.S. courts is that on liability issues, the laws of Venezuela and Colombia do not provide causes of action comparable to product liability claims in the U.S. As defendants experts have testified, the laws of Venezuela and Colombia do provide plaintiffs an avenue for relief,

the transferee court must make an independent choice of law determination for each state from which a case was transferred into the MDL proceeding."[15] In assessing the sufficiency of the Master Complaint, the parties had agreed that Indiana's choice of law rules governed because the Master Complaint had been filed in Indiana. A different rule applies here, however, because the actions that are the subject of the motions to dismiss were filed in four different jurisdictions: Florida, Alabama, California and Mississippi. The choice of law rules of each of these jurisdictions all point to the laws of the countries of Colombia and Venezuela to supply the substantive law applicable to the issues of liability and compensatory damages in these actions.[16]

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even if it is not identical to that available under U.S. law.

[15] In its order on the Master Complaint, this Court applied Indiana's choice of law rules to determine the sufficiency of the allegations of the claims for diminished value of plaintiffs who did not experience personal injuries in rollover accidents. The Master Complaint filed on behalf of a nationwide (but not worldwide) class of Ford and Firestone owners specifically excluded any claims for personal injury or wrongful death resulting from accidents cause by the allegedly defective products. The purported class was so defined for the simple reason that such accidents and injuries raise a host of ***localized*** questions, such as the road and weather conditions at the place of injury, the condition of the specific vehicles, including non-party vehicles, and the conduct of the actors on the scene, including the purported victims, the drivers of any other automobiles involved in the accident (if any), and the conduct of medical and police personnel. Of course, ***all*** of those considerations are relevant here. The cases at issue in this motion do not comprise a class action, nor are they non-accident cases; rather, they are a series of disparate cases involving ***actual accidents and personal injuries*** – precisely the sort of cases in which the most significant relationship for liability is to the place of injury. This Court noted that "the place of the tort typically is the state in which the injury to the plaintiff occurred," Order at 7, but concluded that as to the non-accident class action, "any place where the tort manifested itself other than the point of manufacturing and marketing has little connection to the tort claims asserted in the Master Complaint." *Id*. at 10. The Court expressly contrasted the property damage cases before it with cases alleging personal injuries and wrongful death "in which the courts have held that the place of the tort did bear a significant connection to the lawsuit: *Cox v. Nichols*, 690 N.E.2d 750 (Ind. Ct. App. 1998)(place where automobile collision occurred bore significant connection to lawsuit arising out of the collision). . . ." *Id*. at 11 n.9.

[16] Plaintiffs would have this Court believe that Ford has somehow conceded that the law of Michigan and/or Tennessee should apply in all cases litigated before this Court and as to all issues, and has thus "effectively retract[ed] its prior choice-of-law arguments." (Pl. Mem. at 40.) Plaintiffs' description of Ford's prior arguments in other briefing before this Court is so distorted that it calls into question whether plaintiffs' counsel have actually read these briefs. As this Court knows from its own reading of the briefing on these issues, plaintiffs' characterization of Ford's position is quite simply false. Plaintiff ignore the very clear distinction drawn in Ford's brief as to the choice of law on punitive damages:

> When what is at issue is a tort rule designed to compensate plaintiffs for personal injuries – for instance, the standards of liability for damages, the elements of any defense to such purported liability, the measures of compensatory damages – then, under the RESTATEMENT approach, the most significant contacts often focus on the ***plaintiff*** – the place at which ***plaintiffs'*** alleged injury occurred and/or the ***plaintiff's*** residence . . .

Although only one of those jurisdictions continues to rigidly follow the traditional choice of law rule of the *lex loci delecti*, the place of the injury remains a significant, indeed decisive, factor in the choice of law analysis for several reasons. South America is not just the place of the accident and the place where plaintiffs sustained their injuries, it is also the place where the plaintiffs reside, where they purchased the subject vehicles and tires, where they maintained and serviced those products, and whose governments have a predominant interest in providing a means to secure adequate compensation for their injuries.[17]

1. Florida

In actions for personal injury and wrongful death, Florida follows the "most significant contacts" approach of the Restatement (Second) of Conflict of Laws. *See* Restatement (Second) of Conflict of Laws §§ 145, 146, 175. In this case, Colombia and Venezuela, where the plaintiffs

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> This analysis, however, is different with respect to tort rules aimed primarily at punishment or deterrence. For those issues, there is a singular focus on the ***defendant***; the states with the most significant interest are generally the place of the ***defendant's*** misconduct and the ***defendant's*** principal place of business or incorporation.

Mem. in Support of Def. Ford Motor Co.'s Mot. to Strike Pl. Request for Punitive Damages at 5 (emphasis added). Similarly, they ignore the following clear statement from Ford's brief:

> When what is at issue is a tort rule designed to ***assign fault*** and allocate losses – for instance, a rule ***defining liability*** or awarding compensatory damages – then, under the RESTATEMENT approach and others like it, the most significant contacts are usually those with ***the place of the injury to the plaintiff*** and the plaintiff's residence. *See* RESTATEMENT § 145 cmt. c.

Id. at 5 (emphasis added). Plaintiffs likewise ignore Ford's statement that "[t]he place in which a plaintiff is injured may have a distinct interest in defining and assigning fault and in allocating losses incurred within its borders." *Id*. at 6.

It is frankly difficult to imagine what more Ford could have done to make clearer its basic point – that under the Restatement's most significant relationship test, the law of the place of injury is almost always the most appropriate law in determining such basic issues as liability, defenses to liability, and compensatory damages, while a different law may apply to extraordinary damages such as punitive damages, whose aim is the secondary one of deterrence and not the primary one of assigning liability.

[17] *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999) (In an era of increasing international commerce, travel and communication the *lex loci delicti* is of increasing relevance. *Lex loci delicti* is the only choice of law

lived and were injured, are presumptively and actually the jurisdictions with the most significant contacts to the plaintiffs' claims. Under the Florida choice of law rules for reasons of uniformity and ease in determination and application of the law, the place of the accident or place of the injury determines the substantive law in the absence of any factors outweighing that consideration. *State Farm Mut. Auto Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981). *See, e.g.*, *Murphy v. Thornton*, 746 So. 2d 575, 575-76 (Fla. App. 1999) ("In actions for personal injury, the law of the state where the injury occurred applies unless, with respect to the matter at issue in the litigation, another state has a more significant interest."), *review denied*, 763 So. 2d 1046 (Fla. 2000); *Lincoln Nat'l Health Ins. Co. v. Mitsubishi Motor Sales of Am., Inc.*, 666 So.2d 159 (Fla. App. 1995) ("Under these principles, the law of the state where the accident occurred . . . determines the rights and liabilities of the parties unless, with respect to a particular issue, another state has a more significant relationship to the occurrence.").

Plaintiffs' analysis of the Restatement misguided and misleading. Their selective quotations from the Restatement hardly convey the full import of the rules set out there. For example, in their § 145 analysis, plaintiffs ignore the Restatement's view that "[i]n the case of personal injuries or of injuries to tangible things, the place where the injury occurred is a contact that, as to most issues, plays an important role in the selection of the state of the applicable law." Restatement (Second) Conflicts of Laws § 145(2), cmt. e. Nor do they note the later statement that "the place of injury is of ***particular importance in the case of personal injuries*** . . . ." *Id.* § 145(2), cmt. f (emphasis added).

More strikingly, plaintiffs gloss over § 146 of the Restatement, which lays down the applicable default rule here: that in actions for personal injury, "***the local law of the state where***

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rule that won't impose potentially debilitating legal uncertainties on international businesses while selecting the rule

the injury occurred determines the rights and liabilities of the parties." *Id*. § 146 (emphasis added). The Restatement's commentary goes on to make clear that where, as plaintiffs allege in these cases, conduct and personal injury occur in different states, the values of providing a readily ascertainable rule and ensuring that persons who cause an injury in a state should not escape liability imposed by the local law of the state in which the injury occurred demand that "the local law of the state of injury will usually be applied to determine most issues involving the tort." *Id*. § 146, cmt. e.

Section 146 of the Restatement indisputably applies to the Florida cases here. *See, e.g.*, *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980) (adopting sections 145 and 146 of Restatement). Indeed, in adopting that test, the Florida Supreme Court foretold the proper result in these cases:

> The conflicts theory set out in the Restatement does not reject the "place of injury" rule completely. The state where the injury occurred would, under most circumstances, be the decisive consideration in determining the applicable choice of law. Indeed, the rationale for a strict *lex loci delicti* rule is also reflected in the same Restatement's section 6, where "certainty, predictability and uniformity of result," and "ease in the determination and application of the law to be applied" are cited as major factors in determining the proper choice of law.

Bishop, *id.* at 1001. Thus, plaintiffs' discussion of the values to be weighed in considering section 6 of the Restatement here misses the mark entirely: under Florida law – indeed, under ***any*** proper reading of the Restatement – those values require the application of the law of the place of injury here.

The presumption that the law of the place of the accident will apply is not overcome by the fact that a defendant resides and can be found in Florida. *Ryder Truck Rental, Inc. v. Rosenberger*, 699 So. 2d 713 (Fla. App. 1997). *See also Steele v. Southern Truck Body Corp.*,

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of decision most likely to optimize safety).

397 So. 2d 1209, 1211 (Fla. App. 1981) (wrongful death action arising out of an accident in West Virginia which killed a West Virginia resident is governed by West Virginia law: "The only relationship Florida has to the litigation is that the conduct of appellees which allegedly caused his death occurred in Florida.").

2. Mississippi

Mississippi's choice of law rules for personal injury and wrongful death cases are substantially the same as Florida's. *See, e.g., Wayne v. Tenn. Valley Auth.*, 730 F.2d 392, 399 (5th Cir. 1984) (action arising out of defective concrete blocks manufactured in Mississippi used for construction in Tennessee governed by Tennessee law: "Ordinarily, the local law of the state where the injury occurred will determine the rights and liabilities of the parties, unless with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties. . . ."") (quotation omitted); *Allison v. ITE Imperial Corp.*, 928 F.2d 137, 144 (5th Cir. 1991) (action by Mississippi residents against out of state manufacturer for injuries sustained in electrical fire in Tennessee governed by Tennessee's statute of repose: "no State, including Mississippi, has a more significant relationship to the occurrence and the parties than Tennessee, the place of the injury."); *Price v. Litton Sys., Inc.*, 784 F.2d 600 (5th Cir. 1986) (wrongful death actions arising out of helicopter crash in Alabama governed by Alabama law); *Siroonian v. Textron, Inc.*, 844 F.2d 289, 292 (5th Cir. 1988) (wrongful death action arising out of helicopter crash in Kentucky governed by Kentucky's statute of limitations: "While other states have some contact with the occurrence and the parties to this action, none have a more significant relationship than Kentucky."). The cases filed in Mississippi, therefore, will be governed by Venezuelan law with regard to liability and compensation.

3. Alabama

"In tort and wrongful death actions, Alabama continues to apply the traditional choice of principles of *lex loci delicti*." *Morris v. SSE, Inc.*, 912 F.2d 1392, 1396 (11th Cir. 1990). "Under this principle, an Alabama court will determine the substantive rights of an injured party according to the law of the state where the injury occurred." *Fitts v. Minn. Mining & Mfg. Co.*, 581 So. 2d 819, 820 (Ala. 1991). The case filed in Alabama, therefore, will be governed by Venezuelan law with regard to liability and compensation.

4. California

California makes choice of law decisions somewhat differently than most states by comparing the relevant "government interests" at issue in applying the laws of different jurisdictions. In this case, however, the result of assessing the different "government interests" is the same as under the other choice of law tests because California has no interest in providing compensation to foreign residents and no interest in regulating conduct that occurred beyond its borders. *See, e.g., Offshore Rental Co. v. Cont'l Oil Co.*, 148 Cal. Rptr. 867, 874 (1978) ("although the law of the place of the wrong is not necessarily the applicable law for all tort actions, the situs of the injury remains a relevant consideration. At the heart of Louisiana's denial of liability lies the vital interest in promoting freedom of investment and enterprise within Louisiana's borders, among investors incorporated both in Louisiana and elsewhere.") (citation omitted); *Hernandez v. Burger*, 102 Cal. Rptr. 564, 568 (App. 1980) (where plaintiff was a citizen and resident of Mexico at the time of the accident and the accident occurred in Mexico, California had no interest in applying its laws to the case: "It is true that the place of the wrong is no longer treated as a controlling factor where application of the law of another jurisdiction having a connection with the accident will serve a legitimate interest or policy of the other

jurisdiction. However, the situs of the injury remains a relevant consideration. . . . Indeed, with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest."); *Tucci v. Club Mediterranee*, 107 Cal. Rptr. 2d 401, 411 (App. 2001) ("critical goal of fostering business investment and development, its legitimate interest in seeing that its law determines the consequences of action within its borders causing injury to people there and its interest in predictability and finally limiting liability predominate. . . . "). The casesfiled in California, therefore, will be governed by Venezuelan law with regard to liability and compensation.

Plaintiffs contend that it is "U.S. law" that controls these actions, but they provide no reasoned argument that supports this conclusion. Pl. Mem. at 40 *ff*. There is no federal common law of personal injury, wrongful death, or products liability and the plaintiffs have not identified the law of any state that has any greater interest in these lawsuits than plaintiffs' home countries. The U.S. Supreme Court and the federal courts have repeatedly stressed that the need to apply foreign law favors dismissal. *Piper,* 454 U.S. at 260-61. Here, application of the choice of law rules of each of the states in which the plaintiffs chose to file their actions directs the courts to apply the laws of Colombia and Venezuela. This factor favors dismissal.

E. The Unfairness Of Burdening Citizens In An Unrelated Forum With Jury Duty Favors Dismissal.

As previously mentioned, if these cases are tried in the United States, more than 110 will be returned for trial to the Southern District of Florida at the conclusion of these pretrial proceedings. The number and duration of trials – especially jury trials – in Florida's Southern District "is unparalleled throughout the Federal system." 2000 State of the Court, Southern District of Florida, at 9 (Appendix H hereto). The district has the second highest number of

jurors reporting for service on petit juries in the country (15,168), *id*. at 18, and paid over $1,750,000 in juror attendance and mileage fees in fiscal year 2000. *Id*. at 17-18. The plaintiffs would add to that burden and expense by demanding many additional jury trials requiring the time and consideration of hundreds of jurors. Although less numerous, the other cases that are the subject of this motion would impose that burden as well as the citizens and federal courts of Alabama, California, and Mississippi.

Plaintiffs address the burden of jury duty only in passing. They dismiss jury service as a merely "subsidiary factor" and claim that "imposing jury duty on the community 'is not implicated" given "the forum's strong interest" in this litigation. Pl. Mem. at 39. Plaintiffs' Response at 39. But unlike the case upon which plaintiffs rely, *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41 (2d Cir. 1996), plaintiffs have identified not a single fact – much less any critical facts – that occurred in Florida, Alabama, California, or Mississippi, and not a single witness who lives in those states. "Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation." *Gilbert*, 330 U.S. at 508-09. This factor favors dismissal.

F. Balance of Public Factors

Each of the public factors relevant to any *forum non coveniens* determination favors dismissal of these actions. Retaining these cases in the United States will clog the already busy courts of the Southern District of Florida and other districts, trouble the U.S. courts with the costly and time consuming job task of identifying and applying the laws of the civil law countries of Colombia and Venezuela, burden United States citizens with numerous jury trials to resolve the damage claims of foreign residents arising out of foreign accidents, and encourage additional foreign plaintiffs with claims against U.S. companies to flood the U.S. courts with still

more lawsuits. The public factors, therefore, reinforce what a balancing of the private factors already suggested: These actions can be more conveniently tried in the countries in which they arose. They should be dismissed on the grounds of *forum non coveniens*.

CONCLUSION

For all of the above reasons, and for convenience of the parties and the ends of justice, these cases should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing was made by hand delivery or by placing a copy of the same into the United States Mail, first class postage prepaid, this _____ day of _____, 2001, addressed to all counsel of record appearing on the Panel Attorney Service List, and others, as necessary.

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