

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

IN RE: AIR CRASH OVER THE
SOUTHERN INDIAN OCEAN ON MARCH
8, 2014

This Document Relates To:

1:16-cv-00439-KBJ

Smith v. Malaysia Airlines Berhad et al;

1:16-cv-01048-KBJ

Zhang, et al, v. Malaysia Airlines Berhad et al;

1:16-cv-01063-KBJ

Huang, et al. v. Malaysia Airlines Berhad et al.

2:17-CV-00608-KBJ

Keith v. The Boeing Company

1:16-cv-01062-KBJ

*Kanan, et al. v. Malaysia Airlines System
Berhad et al.*

MDL Docket No: 2712

Misc. No. 16-1184 (KBJ)

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT MALAYSIAN
AIRLINE SYSTEM BERHAD (ADMINISTRATOR APPOINTED)'S MOTION TO
DISMISS PLAINTIFFS' COMPLAINTS ON THE GROUND OF LACK OF SUBJECT
MATTER JURISDICTION PURSUANT TO THE MONTEAL CONVENTION**

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MEMORANDUM

I. BACKGROUND INFORMATION

This response applies to Defendant Malaysian Airline Systems' (MAS) Motion and Memorandum in support of its Rule 12(b)(1) Motion to Dismiss Plaintiffs' Complaint pursuant to the Montreal Convention and to Defendants Malaysian Airline Systems Berhad's (MAB) [D.E. 38] and Allianz Global Corporate and Specialty's (AGCS) Motion for Joinder on the ground of the Montreal Convention [D.E. 40].

Plaintiffs incorporate by reference as though fully set forth herein these Plaintiffs' Opposition to Defendants AGCS Motion to Dismiss for Lack of Jurisdiction [D.E. 46].

Plaintiffs also incorporate by reference as though fully set forth herein their responses to Defendants Motion to Dismiss on the basis of Forum Non Conveniens and Foreign Sovereign Immunity Act and their exhibits thereto.

Plaintiffs also incorporate by reference all other Plaintiffs' responses and exhibits in support thereof to all Defendants Motions to Dismiss pursuant to Foreign Sovereign Immunity Act, Forum Non Conveniens, and Montreal Convention (Subject Matter Jurisdiction).

II. INTRODUCTION

Defendants malign both the Plaintiffs and their decedents claiming they are attempting to confuse the record. They are not. Defendants criticize Plaintiffs for stating Nicole and Leo Meng were U.S. citizens who were born in the U.S.A. As so many of their family members were lost with them on MH370), it is impossible to document Nicole's and Leo's intent and their family's intent to reside in the U.S.A. They were not dual citizens – they were not also citizens of the People's Republic of China; they were only citizens of the U.S.A. So when their parents and

siblings and grandparents were lost with them on MH370, recollections of other relatives of their future intentions is all that was left to recite.

Meng Zhang was granted Legal Permanent Resident Status by the U.S.A. in 2008. She returned to China to get married and had been living there with her husband – a fact Plaintiffs told the Defendants. No one tried to hide that beautiful wedding and marriage. Far from trying to obfuscate and confuse, if there was not as much information as Defendants (and Plaintiffs) wished, it is because Plaintiffs alleged what they knew or thought at the time the Complaints were filed, and Meng died with her husband on the instant flight.

Facts of the U.S. citizenship and lawful permanent resident status were not alleged to confuse – they are important facts. Defendants also filed Foreign Sovereign Immunity Act and Forum Non Conveniens motions to dismiss. As U.S. citizens or lawful permanent residents, their choice of forum is entitled to greater deference. Therefore, their status was raised as an important fact, and it is unnecessary to demean Plaintiffs for proudly stating some of them were U.S. citizens and/or lawful permanent residents. No Plaintiffs claimed citizenship or lawful permanent resident status if it was not true.

Besides the U.S. citizens and the legal permanent resident, these Plaintiffs' decedents included world renowned artists, teachers, scientists, mathematicians, engineers, managers, government officials, businesswomen and men, newlyweds and couples reaching silver and golden anniversaries. They were American and Chinese. Most of them were their surviving parents' or grandparents' (as some died with their parents) only child. Some left infant children without parents.

III. THE PLAINTIFFS AND THE LOST

Exhibit A contains more information about these Plaintiffs family members lost on MH370, but specifically, the Plaintiffs and their decedents herein are the following:

1. NICOLE MENG and LEO MENG, when lost on MH370, were ages 3 years and 18 months. They are citizens of the United States of America. They were born in California. It was the dream of their parents, YAN ZHANG and BING MENG, who were both employed by multinational corporations, to raise their children in the United States. They were very proud that their children were United States citizens. YAN and BING had already taken steps to sell their home in Tianjin, China and planned on immigrating to the United States in 2014 where they were in the process of purchasing a home in Los Angeles, California. Tragically, NICOLE and LEO along with their parents YAN ZHANG and BING MENG and fraternal grandparents, FANQUAN MENG and CHUANE XU – three generations of the same family were all lost on MH370.

2. MENG ZHANG was a lawful permanent resident (a/k/a “green card” holder) of the United States of America, and continued to maintain her permanent resident status until the day of her death. MENG lived and worked with her mother, Min Huang, in Setauket, New York and returned to China for a brief period to marry PENG YAN and to do market research and source suppliers for her mother’s New York food import business. MENG ZHANG and PENG YAN intended to return to the United States, within a few months after the March 2014 vacation trip that ended their young lives on MH370.

3. YUANHUA BAO was a talented artist enjoying a new phase in her life after retiring as a vice president at the Bureau of Statistics City Development Planning Commission. She was traveling with her husband, also an artist. She took care of her 87 year old mother who lived with her and depended on Yuanhua for physical, financial and emotional support.

4. JUNZHANG CHE was a retired grandmother and artist traveling with her husband JINQUAN ZHANG was also an artist. Between them they had 20 distinctive art pieces to exhibit. Their artwork was shipped in advance to Malaysia for an art exhibit, but returned with them on flight MH370. All of their artwork was lost on the plane. Their deaths have left a large void in their family as well as the art community.

5. GUOWEI DONG, was a High School teacher and a prolific artist whose works are well known in his community. In addition to being a devoted husband and father, he taught art students in his home. His talent and energy while he was alive enabled him to take care of his parents and in-laws and his disabled sister.

6. TAO GAN was a Chief Engineer employed by Haliburton Energy Services. He and his father hold a patent for specialized oil exploration equipment. Tao Gan was traveling home to see his devoted wife and a daughter. After the plane was lost his daughter was so devastated that she could not talk about him to anyone and chose to attend school in England to avoid being asked about the loss of her father to people who knew he was on the lost plane.

7. YUCHEN LI was a brilliant engineer earning his Ph. D. in Geomechanics at the University of Cambridge, United Kingdom. “Yuchen has made a very significant contribution to the theory and practice of geotechnical engineering. I have no doubt that he will become a leading figure in the industry. It is extremely sad that he will not be here to enjoy the recognition that his excellent work will bring” said Prof. Bolton, Rankine Lecturer of the UK. He married Mingfei Ma in China one month prior to the loss of MH370 and had only worked two weeks as an employee of Schlumberger Technology Services before his young promising life was ended on MH370. His loss left a devastated young widow and his parents were left without their only child.

8. ZHI LI was an expert in sales and manufacturing and co-partner with his brother in a booming plastics extruding/recycling business in Malaysia. In addition to the gigantic loss his wife and special needs daughter suffered from his death, his business with his brother has suffered dramatically by his absence and consequently impacted his entire family.

9. WENZHI MA was an innovative and very successful self-employed businesswoman. She was always looking for new ideas and opportunities and left behind a devoted husband and adult son and daughter.

10. TUGUI MAO was a famous artist attending an art exhibit in Malaysia. Over the last several decades he has created many works of art in Chinese painting and printmaking. His work has been part of many art exhibitions in China and abroad and he has received many awards and honors. He shared his love of art by teaching classes at Qijiang County Cultural Hall and serving as the Assistant Dean and Secretary General of Qijiang Nazhou Painting and Calligraphy Academy. He leaves behind a widow and as a result of his death his daughter was forced to close her tea shop to care for family members.

11. PUSPANATHAN SUBRAMANIAN was born on May 24, 1980. He is survived by his wife, Sri Devi A/P Kanan, whom he married on February 25, 2008. He leaves behind two minor children: Haresh Varmer A/L Puspanathan and Thashvarman A/L Puspanathan. At the time of the disappearance of MH370, his children were one and three years old respectively. His children will never know their father, nor will they grow up with his influence and guidance in their lives. Prior to his death, he was employed as an IM Governance Specialist for Worley Parson. He was traveling for work in order to support his family at the time the plane went missing.

12. QINGYUAN YANG was the Deputy Secretary of the Discipline Inspection

Commission of Radio, Film and Television Design and Research Institute. He and his wife, XUEZHU TANG, a retired pharmacist, were returning from a trip to Nepal with a photographer's group. Their only child, a son, lost both his parents at a time when he was just beginning a family of his own.

13. LIJUN WANG was a successful Sales Representative and translator for a Steel Silo company. He was returning home from a profitable job assignment in Australia. His loss has had far reaching consequences on his widow and adult son who was studying at university in Sweden.

14. LINSHI WANG was an artist and retiree from the Nanjing Economic Restructuring Committee. He along with his wife, DEMING XIONG, a retiree from Jiangsu Province Silk Import and Export Company, were enjoying a new phase in their lives. They traveled to Malaysia to attend an art exhibit. Their only child, a son, now struggles to take his parents place in the support and care of his grandparents.

15. JIANFANG YAO was an ingenious artist who sold hundreds of pieces of his artwork yearly. He and his wife MEIHUA YANG, a retired nurse, attended an art exhibit in Malaysia. They leave behind two adult sons, a granddaughter and a 96 year old father who was a citizen of the People's Republic of China. They are represented by Plaintiff YI YAO, the son of JIANFENG YAO, on behalf of himself and JIANFENG YAO'S son, Plaintiff QIANG YAO, and father, Plaintiff BORONG YAO, and all other family.

16. ZHONG HAI ZHANG was a prominent calligraphy teacher and taught at several schools in his community as well as teaching private lessons in his home. At least 300 pieces of his artwork remain. He leaves behind a wife and teenage son who is unable to discuss the loss of his father and his elderly parents who he helped support.

17. ZHAOFENG ZHAO, is a retired Mathematics instructor at the Nanjing Sport Institute. She was recognized as an excellent academic teacher and wrote curriculum for secondary mathematics. She was a member of the Jiansgu Art Association and vice president of the Jiangsu Yangzi Calligraphy and Painting Association. She was traveling with her husband, BAOTANG LOU to an art exhibit in Malaysia. BAOTANG LOU, was a retired expert in mapping and surveying. His work experiences included military surveying and mapping, overseas foreign aid, national boundaries and surveying, scientific and technical information, foreign affairs management and disaster prevention research. He was an editor for a book titled Summary of the Earthquake Disaster in China published in 1996. He was also an accomplished calligrapher and painter with his works included in more than 100 art books. He received gold awards and first place prizes in international calligraphy and painting exchange events and national calligraphy and painting contests. The loss of both of their parents has been monumental for their two sons, and daughter. Their daughter is a lawful permanent resident of the U.S.A. and their granddaughter is a U.S. citizen.

18. JINLING ZHOU was a very successful General Manager and Senior Consultant for the Sunshine Insurance Company of China. He and his wife, FENG ZHOU, retired from working at Jiangsu Bank, were enjoying their first trip after retirement and were traveling to Malaysia to attend and art exhibit. JINGLING ZHOU is an accomplished Calligrapher and the Chinese Postal service made a stamp after him in 2012. Their only child has been shattered by the loss of both of her parents.

19. SHIJIE ZHOU was a graduate of Xiangtan University and retired from China Mobile. He was an accomplished calligrapher who has received many awards in domestic and international painting and calligraphy exhibitions. He was returning with other artists from an

exhibit in Malaysia. His loving wife and two adult sons.

20. SHAOHUA ZHANG was a young woman devoted to her husband and minor daughter with an enthusiasm for living. She was the Manager of Zherong Fuyuan restaurants in Fujian Province and was traveling to develop new business contacts. She helped her with the care of her parents and helped them on their farm during the busy growing season.

21. XIANWEN SHI was a manager for a steel silo equipment trading company. He was returning home from a job assignment in Australia and leaves behind a young wife and baby son who will never know his father.

22. LI YANG was a talented and vibrant marketing coordinator for Honeywell (China). She was an only child and leaves a devoted husband who now cares for her aging parents.

23. JIXIN FENG was a husband, father and grandfather who loved his family deeply and shared his artistic talents with his family, community and country.

24. QINGJUN TIAN and his wife, LIPING XIE were returning from Australia where they had helped their only son, Chao Tian, move to pursue his master's degree at Monash University. Their son had to end his education and return to China to take care of his grandparents.

25. WENBO LI was a young extremely talented translator employed by the All-China Federation of Trade Unions. She traveled internationally and was highly recognized by her employer. Her parents have suffered beyond measure as a result of losing their only child.

26. FUXIANG GAN, was also a tremendously talented translator who was fluent in French, English and Japanese. He was employed by the All-China Federation of Trade Unions and travelled internationally for the International Communications Department of the Trade

Union. He was the pride of the entire family for his education and status in his government position. He leaves behind a wife and son who struggle to overcome their grief.

27. XIAODAN YAN was a bright and talented young woman. She worked as a Public Relations Manager for CMC Machipex and was one of the few women in her company that were chosen to work in the company's overseas office. She was planning to marry and is the only child of her parents. Her loss has had a dramatic effect on their lives.

28. QIAO XING had a keen mind for technology and pursued a masters degree in Petroleum Engineering from the University of Southern California (2012). She had a bright future working as an engineer for Shell China Exploration and Production Company. Her parents have lost their only child.

29. HAODONG WEN was a gifted accountant working as a financial officer in the CMC Finance and Accounting Department, Malaysia office. Prior to the crash his widowed mother was looking forward to the future wedding of her only son. Tragically she is now all alone.

IV. A CASE OF FIRST IMPRESSION

These Plaintiffs already set forth in great detail in Plaintiffs' Complaint and in response to Defendants' AGCS and Henning Haagen's Motions to Dismiss [D.E. 38 and 40] how they have a claim in the U.S.A.

This is a case of first impression. No court and no laws have ever interpreted Article 32 of the Montreal Convention. There is not one reported case on Article 32 as Defendants admit [D.E. 36-1, Page 8]. Article 32 has never been modified, questioned, criticized, repealed or refused to be applied. Contrary to Defendants' assertion, no court has ever said Article 32 cannot be applied against a corporation, an insurance company, or a successor airline [D.E. 36-1, page

11]. Plaintiffs pled the Montreal Treaty and Article 32 right from the start and made it clear they intended to use this never before used provision of the Montreal Treaty. They clearly and in great detail cited specific facts why the use of Article 32 is appropriate in each of their Complaints. Obviously the facts were sufficient for the defendants to understand them because, in other motions Defendants went to great lengths to try to argue that the Treaty and Article 32 can only apply to MAS and now try to argue the opposite in Defendants' Motion to Dismiss [D.E. 38] and Allianz Global Corporate Specialty's Motion for Joinder [D.E. 40], despite the plain language to the contrary in Article 32. Now Defendants argue Article 32 *does* apply to them to try to win a dismissal. Defendants clearly understood the facts and importance of Article 32 because like Plaintiffs they did an exhaustive search and found no case law, not even for their Joinder Motion [D.E. 40].

As Defendants admitted, the only discussion about Montreal Article 32 (formerly Article 27) is that the term "persons" should encompass both legal and natural persons. [D.E. 36-3] Therefore, when Defendants summarily stated in 2017 that the law intended only "natural persons," there was no factual or legal support for their assertion. But in these Motions to Dismiss [D.E.s 38 and 40] they sought different application. The only law and in fact the only language and plain language is directly appropriate to Defendants' assertion is the Treaty, and one comment that states, without opposition, that both legal and natural entities are within the purview and reach of Article 32 (formerly Article 27) as alleged in Plaintiffs Complaints. [D.E. 36-3]

Because the treaty language and Article 32 is plain, Defendants instead tried to deflect the attention of the intent of the treaty and define this action as a direct action against the insurance company and in contravention of state law and Malaysia common law. They are

wrong, not only because the only interpretation of Article 32 plainly states both legal and natural persons are included, but also because Malaysia included this Article and did not limit or exclude this Article when Malaysia enacted Act 148, Carriage by Air Act 1974, as last amended June 2015.

V. Malaysia Law Permits Other Nations to Make Army Order Necessary to Enforce Liability Under Montreal

Malaysia also included in its enactment of Montreal and Warsaw a provision enabling foreign courts to make any order, in law or equity, to enforce Montreal Liability:

(2) A court before which proceedings are brought to enforce a liability which is limited by Article 22 of the Convention, Article 22 of the Amended Convention or Articles 21, 22 and 44 of the Montreal Convention may at any stage of the proceedings make any such order as appears to the court to be just and equitable in view of the provisions of that Article and of any other proceedings which have been, or are likely to be, commenced in Malaysia or elsewhere to enforce the liability in whole or in part.

Underscoring added.

Laws of Malaysia, Act 148, Carriage by Air Act 1974, as of June 2015, limitations of liability, page 9, paragraph 6(2), online version accessed July 20, 2017.

IV. Defendants Contradict Themselves on Whether Montreal Should or Should Not Apply

And now, another conundrum. MAB and AGCS SE (and Henning Haagen, who is not included in the Motion of October 3, 2016) have claimed diametrically opposite positions. In their Motions to Dismiss [D.E. 35-38], they claimed the Montreal Treaty and its Article 32 do not apply to AGCS (and Haagen); they claim MAB is not a successor corporation to MAS by virtue of Malaysia Act 765.

But in D.E. 40, their Joinder Motion, they want this Honorable Court to apply Montreal to them so as to dismiss Plaintiffs claims against MAB as well as AGCS using the Montreal Treaty.

There is no language in the Montreal Treaty or case law that a defendant by virtue of Article 32 is entitled to Warsaw or Montreal Jurisdictional defenses.

VI. Other Defendants Did Not Make the Boeing Jurisdiction and Tolling Offer

First it is imperative to note that Defendants MAS, MAB, and AGCS SE did not make the same offer Boeing did, which offer many cases state is a prerequisite for the Court's consideration of the sought-after dismissal, that offer being that the defendants will submit to the jurisdiction of the foreign court, not contest statutes of limitations, submit to discovery, and promptly pay any verdict, judgment, or settlement. MAS, MAB, and AGCS SE (and Haagen) did not submit to this court any such affidavit or stipulation as did Boeing.

What happens if MAS, MAB and AGCS SE (and Haagen) receive Montreal protection and the cases are dismissed from the U.S. to be pursued in Malaysia? We already know there will be no justice – it is stated in Malaysia's Act 765.

Act 765 did not give the Administrator control over the insurance policies covering MAS or over MAB which possesses the assets and information of MAS. The Plaintiffs can bring an action against the Administrator, but there are no assets, no insurance under control of the Administrator (and there is no doubt Allianz counsel is defending these actions against MAS and MAB), no discovery against MAS as there is nothing left of it and no permission to sue MAB. The court in Malaysia is already dismissing claims against MAB. See **Exhibit B**, decision of Malaysian Court. Therefore, the families have no real course of action in Malaysia. It is obvious that Act 765 simply converted MAS into MAB to strip victims of their ability to seek justice.

Plaintiffs Complaints Set Forth Exactly How Malaysia Stripped them of Any Meaningful Remedy

Defendants do not deny there is nothing left of MAS. Defendants do not deny there are no MAS assets. Defendants do not deny all assets were transferred to MAB. Defendants attached the entire Malaysia Act 765 as an Exhibit in multiple submissions in this case. Defendants argue that since Plaintiffs can sue the “Administrator” in Malaysia, despite Act 765 language to the contrary that demonstrates there is nothing left of MAS, that therefore they can enforce their rights in Malaysia.

In fact, what Act 765 did was virtually nullify Montreal. The acts of the government in addition to Act 765 made it clear that it was an orchestrated plan.

CONCLUSION

Wherefore Plaintiffs request this Honorable Court deny defendants MAS’ and MAB’s Motion to Dismiss Plaintiffs’ Complaint on the ground of lack of subject matter jurisdiction for the reason that Act 765 effectively repealed Malaysia Act 148 and since there is nothing left of MAS, Article 32 puts the insurers and MAB in the shoes of MAS. Neither Act 765 nor Act 148 provides or even mentions Montreal jurisdictional protections under Article 32. Plaintiffs have previously briefed the issues at CITE and will await this Honorable Court’s opinion thereon.

Plaintiffs also request this Honorable Court’s Order requiring all Defendants to provide the same assurances as did Boeing (See **Exhibit C**) before entering orders or dismissal.

Dated this 21st day of July, 2017

Respectfully Submitted,

/s/Mary Schiavo

Mary Schiavo

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CERTIFICATE OF SERVICE

The undersigned certifies that, on July 21, 2017, pursuant Fed. R. Civ. P. 5 and LCvR 5.3, a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT MALAYSIAN AIRLINE SYSTEM BERHAD (ADMINISTRATOR APPOINTED)'S MOTION TO DISMISS PLAINTIFFS' COMPLAINTS ON THE GROUND OF LACK OF SUBJECT MATTER JURISDICTION PURSUANT TO THE MONTEAL CONVENTION** was filed with the Clerk of Court using the CM/ECF System, which will send notification of such filing to the attorneys of record at the email addresses on file with the Court.

/s/Mary Schiavo
Mary Schiavo