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;* 1:16-cv-01048-KBJ *Zhang, et al. v. Malaysia Airlines Berhad;* 1:16-cv-01062-KBJ *Kanan, et al. v. Malaysia Airlines System Berhad;* 1:16-cv-01063-KBJ *Huang, et al. v. Malaysia Airlines Berhad.*

MDL Docket No: 2712

Misc. No. 16-1184 (KBJ)

DEFENDANTS ALLIANZ GLOBAL CORPORATE & SPECIALTY SE AND HENNING HAAGEN'S MEMORANDUM IN SUPPORT OF THEIR RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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DEFENDANTS ALLIANZ GLOBAL CORPORATE & SPECIALTY SE AND HENNING HAAGEN'S MEMORANDUM IN SUPPORT OF THEIR RULE 12(b)(6) MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Without waiver of any rights, privileges and defenses, subject to their objection to the exercise of personal jurisdiction in any United States forum, and without conceding the appropriateness of any United States forum for resolution of the above captioned actions, Defendants, ALLIANZ GLOBAL CORPORATE & SPECIALTY SE ("AGCS SE"), incorrectly sued as "Allianz Global Corporate and Specialty", and HENNING HAAGEN ("Mr. Haagen"), an individual sued solely on the basis of his alleged status as an executive of AGCS SE (collectively the "Reinsurer Defendants"), submit this Memorandum of Law in Support of their Fed. R. Civ. P. 12(b)(6) Motion to Dismiss the above captioned actions[1] (the "Lawsuits") for failure to state a claim upon which relief can be granted.

INTRODUCTION

Plaintiffs' Lawsuits against AGCS SE and Mr. Haagen are riddled with fatal defects. This Motion is brought in response to plaintiffs' attempts in the *Huang, Kanan, Smith,* and *Zhang* actions ("Plaintiffs") to contrive a cause of action against the Reinsurer Defendants that creates jurisdiction in the United States even though the loss of Malaysia Airlines Flight MH370 ("Flight MH370") on March 8, 2014 took place over the Southern Indian Ocean (the "Accident") and no connection exists between the cause of the Accident and the Reinsurer Defendants and Plaintiffs do not allege that such a connection exits.

[1] This Memorandum and Motion apply to the following four actions transferred to this Court for consolidated or coordinated proceedings: *Min Huang, et al. v. Malaysia Airlines Berhad, et al.,* 1:16-cv-01063 (First Amended Complaint) ("*Huang FAC*"); *Elizabeth Smith v. Malaysia Airlines Berhad, et al.,* 1:16-cv-00439 (Original Complaint) ("*Smith OC*"); *Jianguo Zhang, et al. v. Malaysia Airlines Berhad, et al.,* 1:16-cv-01048 (Second Amended Complaint) ("*Zhang SAC*"); and *Sri Devi Kanan, et al. v. Malaysia Airlines System Berhad, et al.,* 1:16-cv-01062 (Original Complaint) ("*Kanan OC*").

Even taking all of Plaintiffs' allegations in the Lawsuits as true, Plaintiffs fail to allege facts or law sufficient to sustain any cause of action against the Reinsurer Defendants. Plaintiffs' Lawsuits against AGCS SE and Mr. Haagen rely on a legally unsupported interpretation of the Montreal Convention[2] that requires a finding that an air carrier's alleged insurer can be made, at plaintiffs' election, an involuntary legal representative of the air carrier and then argue that because the insurer is in the United States – which is denied – this creates a further available jurisdiction under the Montreal Convention. Moreover, the Montreal Convention requires dismissal of the Lawsuits because the Montreal Convention addresses liability of air carriers and their agents for the death or bodily injury of a passenger, and not the air carrier's insurer as alleged by Plaintiffs. More fundamentally – looking beyond the Montreal Convention – the laws in Plaintiffs' chosen forums, California, New York, the District of Columbia, and Malaysia, are unanimous and well-settled in prohibiting third parties from pursuing a direct action against the alleged liability insurer of a potentially liable defendant in the absence of an unsatisfied prior judgment.

Finally, Plaintiffs' alleged causes of action cannot survive because they are, at the outset, predicated on Plaintiffs' request that this Court invalidate or disregard, in derogation of the Act of State Doctrine, Malaysian domestic law as embodied in Laws of Malaysia Act 765, Malaysian Airline System Berhad (Administration) Act 2015 ("Malaysia Act 765" or the "Act"). *See* Malaysia Act 765, attached hereto as **Exhibit 1**. Instead, Plaintiffs would have this Court allow them to impose a system of redress of their own invention permitting them to make the Reinsurer Defendants the involuntary legal representatives of Malaysian Airline System Berhad

[2] The full name of the Montreal Convention is the Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force on Nov. 4, 2003), *reprinted in* S. Treaty Doc. 106-45, 1999 WL 33292734 (hereinafter "Montreal Convention" or "Convention").

(Administrator Appointed) and to create Montreal Convention jurisdiction in the United States where none exists. However, the Act of State Doctrine prohibits Plaintiffs from challenging the domestic laws of Malaysia in a United States Court, and thus also requires dismissal. Accordingly, even in the light most favorable to Plaintiffs' claims, Plaintiffs fail to state a claim upon which relief can be granted against the Reinsurer Defendants and their claims must be dismissed with prejudice.

FACTUAL BACKGROUND

Flight MH370 was a scheduled international passenger flight operated by Malaysian Airline System Berhad ("MAS") that departed from Kuala Lumpur International Airport bound for Beijing Capital International Airport on March 8, 2014. *Huang FAC* at ¶ 15; *Smith OC* at ¶ 24; *Zhang SAC* at ¶ 27; *Kanan OC* at ¶ 14. MAS is a Malaysian corporation headquartered in Kuala Lumpur, Malaysia. *Huang FAC* at p. 5; *Smith OC* at p. 3; *Zhang SAC* at p. 6; *Kanan OC* at p. 1. Less than 40 minutes after takeoff, Air Traffic Controllers lost radar contact with Flight MH370 after it passed navigational waypoint IGARI, between Malaysia and Vietnam. *Huang FAC* at ¶ 14; *Smith OC* at ¶ 25; *Zhang SAC* at ¶ 27; *Kanan OC* at ¶ 14. Flight MH370 never arrived at Beijing Capital International Airport. *Huang FAC* at ¶ 14, 16; *Smith OC* at ¶ 25, 27; *Zhang SAC* at ¶ 27, 29; *Kanan OC* at ¶ 14, 16. All 227 passengers and 12 crew members perished in the loss of Flight MH370. *Id.*

In January of 2015, the Malaysian Government enacted Malaysia Act 765, placing MAS into corporate administration and authorizing the formation of a new airline, Malaysia Airlines Berhad ("MAB"). *Huang FAC* at ¶¶ 23 – 24, 80, 86; *Zhang SAC* at ¶¶ 36 – 37, 93, 97; *Smith OC* at ¶¶ 34 – 35, 91, 95; *Kanan OC* at ¶¶ 23 – 24, 36, 42. On December 30, 2014, the Government of Malaysia affixed the Royal Assent to Malaysia Act 765, and on January 5, 2015, Malaysia Act

765 was published in the Federal Government Gazette. *See* **Exhibit 1**. The Act states, *inter alia*, that MAB is not a successor corporation of MAS and does not assume any liabilities in connection with Flight MH370. *See* **Exhibit 1** at §25(1)(a); *see also Huang FAC* at ¶ 92; *Zhang SAC* at ¶ 92; *Smith OC* at ¶ 101; *Kanan OC* at ¶ 48.

Plaintiffs in all four actions (*Huang*, *Smith*, *Zhang*, and *Kanan*) have brought suit against AGCS SE on behalf of decedent passengers travelling on Flight MH370 and their eligible beneficiaries, and against Mr. Haagen, solely on the basis of his status as an alleged executive of AGCS SE, in two of the four actions (*Huang* and *Kanan*). *Huang FAC* at ¶ 3, 5-7, 86-96, 103; *Smith OC* at ¶ 3, 5-7, 97-105, 113; *Zhang SAC* at ¶ 3, 5-7, 30, 97-107, 111; *Kanan OC* at ¶ 3, 5-7, 41-52, 60.

The *Smith* action was originally filed in the District of the District of Columbia; the *Huang amd Kanan* actions were originally filed in the Southern District of New York; and the *Zhang* action was originally filed in the Central District of California. Because these actions involve multiple common issues of law and fact, these actions, along with other related actions, were transferred to the District of the District of Columbia by the Judicial Panel on Multidistrict Litigation for consolidated or coordinate pretrial proceedings, on June 2, 2016.

LEGAL STANDARD

A court must dismiss a complaint that fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a claim. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). Dismissal may be based on the lack of a cognizable legal theory or on a plaintiff's failure to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007) ("*Twombly*"). When assessing a Rule 12(b)(6) motion, a court must take as true

allegations of material fact and must construe them in the light most favorable to the non-moving party. *Browning*, 292 F.3d at 242. However, a court need not accept as true pleadings that are no more than legal conclusions or the "formulaic recitation of the elements" of a cause of action. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("*Iqbal*"). Factual allegations, even though assumed to be true, must still "be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Moreover, the court "need not accept inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). "Nor must the court accept legal conclusions cast in the form of factual allegations." *Id.* "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679.

ARGUMENT

Plaintiffs' claims against the Reinsurer Defendants fail as a matter law. Although Plaintiffs allege their Lawsuits are based on the provisions of the Montreal Convention, the Montreal Convention neither creates nor contemplates a direct cause of action against an air carrier's liability insurer, let alone a reinsurer or one of that reinsurer's executives sued solely on his status as an alleged executive of the reinsurer. In these Lawsuits Plaintiffs seek to give life to a new form of derivative liability based upon the theory that an act of Malaysian domestic law, Act 765, caused the legal "death" of MAS, and somehow as a result, AGCS SE and Mr. Haagen may be made, at Plaintiffs' election, the involuntary "legal representatives" of MAS' "estate" for reasons unexplained. Plaintiffs' claims are wholly unsupported by the plain text of the Montreal Convention, the Montreal Convention's drafting histories, any case law, or apparently any legal or academic authority whatsoever.

Additionally, the Montreal Convention imposes liability on air carriers, not insurance companies and their executives. Although other plaintiffs in other aviation cases have tried to expand the scope of the Montreal Convention to other types of defendants, these efforts failed. United States courts have consistently rejected invitations to expand the scope of the Montreal Convention to apply to defendants other than air carriers, such as airline service providers or airline holding companies. Plaintiffs' allege the Montreal Convention as the sole basis for their Lawsuits, but the Montreal Convention does not allow for direct actions against insurance companies in the airline's stead and thus the Lawsuits fail to state a viable cause of action for this reason as well.

Plaintiffs' claims fare no better under the laws of any of the jurisdictions where Plaintiffs filed suit in the United States or in Malaysia. Malaysia and the District of Columbia both prohibit all types of direct actions against insurers, and New York and California only allow actions against an insurer when the plaintiff is seeking to enforce an unsatisfied judgment obtained against an insured. Thus, in addition to Plaintiffs' failed attempt to allege a cause of action under the Montreal Convention that does not exist, Plaintiffs also fail to plead facts giving rise to any cause of action against AGCS SE and Mr. Haagen under the laws of the jurisdictions invoked.

Finally, the Plaintiffs' purported causes of action are, at the outset, predicated on allegations in the Lawsuits that impermissibly would require this Court to review and invalidate the domestic laws of a Malaysia in derogation of the Act of State doctrine. In the Lawsuits the Plaintiffs take aim at Malaysia Act 765, seeking to challenge the operation of Malaysian domestic law by alleging, *inter alia,* that Act 765 was "introduced and approved to help MAS avoid its liabilities." *Huang FAC* at ¶ 23; *Smith OC* at ¶ 34; *Zhang SAC* at ¶ 36; *Kanan OC* at ¶ 23. Plaintiffs' allegation directly challenges the purpose and effect of Act 765, as stated by the

Parliament of Malaysia. Plaintiffs further contend that, contrary to the explicit language of Act 765, they should be permitted to unilaterally elect to bring suit against the Reinsurer Defendants as MAS's involuntary legal representatives. However, the Act of State Doctrine requires that this Court reject Plaintiffs' attempt to directly challenge the domestic laws of Malaysia. For these reasons, and as set forth in more detail below, the Montreal Convention, the laws of the United States, and the laws of Malaysia require the dismissal of the Lawsuits for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

I. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST THE REINSURER DEFENDANTS UNDER THE MONTREAL CONVENTION

Plaintiffs Lawsuits erroneously seek support from Article 32 of the Montreal Convention as a basis for their actions against the Reinsurer Defendants.[3] Article 32 provides that:

> In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

In an attempt to twist the plain words of Article 32 into creating a new cause of action against the alleged insurer of the air carrier, Plaintiffs allege the following legal conclusions as fact: MAS is "dea[d]" for purposes of Article 32; MAS, a corporate entity currently in administration under Malaysian law, falls under the definition of "person" in Article 32; and AGCS SE and Mr. Haagen, as MAS' alleged insurers, are the "legal[] representat[ives]" of MAS's "estate." *See Huang FAC* at ¶¶ 3, 5-7, 86-96, 103; *Smith OC* at ¶¶ 3, 5-7, 97-105, 113; *Zhang SAC* at ¶¶

[3] In the event that this Court accepts the Plaintiffs' unprecedented allegation that AGCS SE is the legal representative of MAS, which AGCS SE expressly denies, AGCS SE would still stand in the shoes of MAS for purposes of determining whether proper jurisdiction in the United States under Article 33 of the Montreal Convention. AGCS SE and Mr. Haagen adopt and incorporate by reference each and every argument asserted by MAS in its Motion to Dismiss Plaintiffs' claims under the Montreal Convention. Accordingly, because Plaintiffs' claims against the Reinsurer Defendants derive from their claims for which there is no Montreal Convention jurisdiction in the United States for claims against MAS, there likewise can be no Montreal Convention jurisdiction over the Reinsurer Defendants. *See, e.g., Olaya v. Amercian Airlines, Inc.,* No. 08-CV-4853, 2009 WL 3242116 (E.D.N.Y. Oct. 6, 2009) (holding that if a claim falls within scope of the Montreal Convention, then it must be brought under its terms).

3, 5-7, 30, 97-107, 111; *Kanan OC* at ¶¶ 3, 5-7, 41-52, 60. Lacking from Plaintiffs' claims, however, is any factual or legal support for this interpretation of Article 32. The plain language of Article 32 simply does not create a cause of action against an air carrier's liability insurer – let alone an executive working for that insurer. In fact, no Article of the Montreal Convention creates such a cause of action. Article 17 of the Montreal Convention, most relevantly, sets forth the available recourse to a passenger in the event of death or injury sustained during international carriage by air, and provides as follows:

> The *carrier* is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Art. 17, Montreal Convention (emphasis added). Moreover, courts interpreting the Montreal Convention have consistently held that its terms apply exclusively to air carriers (and, in limited circumstances, their direct agents) for bodily injury or death arising out of international air travel. Indeed, efforts to read the terms of the Montreal Convention more expansively in order to assert causes of action against an entity other than the actual operator of the accident aircraft or its agents have routinely been rejected.

A. The Plain Text of Article 32 of the Montreal Convention Does Not Support Plaintiffs' Purported Cause of Action

Even taking as true the allegation that AGCS SE and Mr. Haagen are MAS's insurer and legal representatives – which AGCS SE and Mr. Haagen expressly deny – the Reinsurer Defendants are unaware of a single case in the United States supporting Plaintiffs construction of Article 32 (or its predecessor, Article 27 of the Warsaw Convention[4]) as the basis to assert a

[4] The full name of the Warsaw Convention is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* note following 49 U.S.C.A. § 40105 (1997)("Warsaw Convention"). Courts interpreting the Montreal Convention

direct cause of action against an air carrier's liability insurer. Instead, to support these legal contentions, Plaintiffs' plead a series of baseless allegations to bolster their theory of liability against the Reinsurer Defendants, all of which amount to classic examples of legal conclusions couched as factual allegations, which this Court is not bound to accept as true. *See Kowal*, 16 F.3d at 1276; *Iqbal*, 556 U.S. at 678.

1. MAS is not Dead

Plaintiffs first request this Court determine that "[Malaysia] Act 765 left MAS 'dead.'" *Huang FAC* at ¶ 80; *Smith OC* at ¶ 91; *Zhang SAC* at ¶ 93; *Kanan OC* at ¶ 36. To be clear, Plaintiffs' are requesting that this Court find that Malaysia Act 765 operated to cause the legal "death" of MAS for the express purpose of depriving Plaintiffs of any remedy in connection with the Accident. Thus, Plaintiffs' argue, this Court should ignore the legal status and protections afforded to MAS by the Malaysian Government under Malaysia Act 765. Given that the actual language of Malaysia Act 765 states that its purpose is to govern the administration of MAS, not its dissolution, Plaintiffs are asking the Court to explicitly ignore the effect of this domestic legislation of the Malaysian Government. *See* **Exhibit 1** at pp. 5-6. Further, as set forth more fully below, "[t]he Act of State doctrine prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory." *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1208 (9th Cir. 2007) citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). Therefore, because nothing in Act 765 states or declares that MAS is legally dead or that persons claiming damages as a result of the Flight MH370 Accident are deprived of compensation, this Court may reject Plaintiffs' legally-conclusory allegations of fact to the contrary. *See Iqbal*, 556 U.S. at 678.

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routinely rely on precedent involving the Warsaw Convention when interpreting the Montreal Convention. *See Baah v. Virgin Atl. Airways Ltd.*, 473 F. Supp. 2d 591, 596-97 (S.D.N.Y. 2007).

2. The Reinsurer Defendants Are Not the Legal Representatives of Malaysian Airline System Berhad (Administrator Appointed)

As the next step down the contrived path in Plaintiff's Lawsuits, Plaintiffs allege that, because MAS is "dead," MAS's "estate" is now by Plaintiffs' unilateral election or designation "legally represented" by AGCS SE and Mr. Haagen. *Huang FAC* at ¶ 80; *Smith OC* at ¶ 91; *Zhang SAC* at ¶ 93; *Kanan OC* at ¶ 36. However, Plaintiffs again allege no facts (*e.g.*, an agreement between the parties or a legal determination by any court) or law in support of its theory that the Reinsurer Defendants now act as MAS's legal representatives. Indeed, Plaintiffs do not – and cannot – point to any article of the Montreal Convention which operates to effect the appointment of an air carrier's insurer as its legal representative because no such article exists, nor have Plaintiffs identified a legal basis under the laws of any involved jurisdiction. Indeed, nowhere does the Montreal Convention speak to the duties owed by a liability insurer to its insured air carrier. Thus, as it pertains to the Montreal Convention, an air carrier's liability insurer is not an involuntary legal representative, and stands in no different position to the air carrier than any other vendor of the air carrier, such as a caterer or fuel supplier. Plaintiffs' assertion that the Reinsurer Defendants are MAS's involuntary legal representatives is further undercut by Plaintiffs' repeated reference to, and acknowledgement of, the true representative of MAS, the MAS Administrator.[5] *See Huang FAC* at ¶¶ 81, 83 – 85, 87 -88, 92; *Smith OC* at ¶¶

[5] While it is a matter for another day, the Reinsurer Defendants are not MAS' representatives because MAS already has a legal representative, the Administrator. Pursuant to the Malaysia Act 765 placing MAS into administration, Dato' Mohammad Faiz Azmi was appointed and is currently the acting Administrator charged with managing the company's administration process. Indeed, at least the Plaintiffs represented by the Motley Rice firm have acknowledged the appointment and existence of the Administrator and the requirements of Malaysia Act 765 through several actions, including, but not limited to, submitting requests to the Administrator pursuant to the Act seeking leave to initiate legal proceedings against MAS. Plaintiffs in all of these actions have named MAS as a defendant in each of their U.S. lawsuits and in their concurrent Malaysian lawsuits. MAS has appeared in each suit and is currently participating as a defendant in all of Plaintiffs' Lawsuits in the U.S. and Malaysia. *See e.g.* Declaration of Saranjit Singh and Exhibit A thereto attached to Defendants' Joint Motion to Dismiss on the Ground of *Forum Non Conveniens* filed concurrently herewith in which AGSC SE has joined.

92, 94, 96 -97, 101; *Zhang SAC* at ¶¶ 94, 96, 98, 99, 103; *Kanan OC* at ¶¶ 37, 39 – 44, 48. The existence of an Administrator, appointed according to an Act of in the Malaysian Government, obviates the contrived need for Plaintiffs to seek the involuntary appointment of the Reinsurer Defendants as legal representatives of MAS.

Thus, in the absence of "enough facts to state a claim to relief that is plausible on its face", *Twombly*, 550 U.S. at 569, Plaintiffs' allegations regarding the alleged appointment of the Reinsurer Defendants as MAS' legal representatives are nothing more than "legal conclusions cast in the form of factual allegations" and must therefore be dismissed. *Kowal*, 16 F.3d at 1275.

3. Article 32 Does Not Allow Direct Actions Against Insurers

The only authority Plaintiffs cite in an effort to legitimize their interpretation of Article 32 is a single, isolated comment offered by one delegation during the comment period for an earlier *draft* of the Montreal Convention's terms. Specifically, Plaintiffs' allege that Volume Three of the Convention's drafting history provides that "the term 'person' encompasses both legal and natural persons." *Huang FAC* at ¶ 47; *Smith OC* at ¶ 100; *Zhang SAC* at ¶ 102; *Kanan OC* at ¶ 47. Plaintiffs' citation of the passage is incomplete and without context, thereby omitting information that demonstrates the comment's lack of relevance to the issue before the court. For clarity, the full text of the isolated comment reads as follows: "As regards Article 26, one delegation stated that the term 'person' *should* encompass both legal and natural persons." *See* International Civil Aviation Organization, International Conference on Air Law, *Volume III, Montreal, 10-28 May 1999, Preparatory Material*, ICAO Doc. 9775-DC/2 at 4:247 (1999) (emphasis added), copies of the cited page attached hereto as **Exhibit 2.** However, this suggestion by one delegation was never discussed further. The language of the draft Article 26 –

which never contained the definition of a "person" which Plaintiffs urge – was ultimately adopted verbatim as the text of Article 32 of the Montreal Convention.

It is axiomatic that where the text of a treaty is clear, a court may not "alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989) (citation omitted). Significantly, the "most natural meaning" of the text may be contradicted only by "clear drafting history." *Id.* at 134 n.5. Nothing within the Montreal Convention's preparatory materials indicates that the definition proposed by the comment was adopted by the Convention's signatories or even if any other delegation agreed with it. Nor is there any indication within the plain text of the Montreal Convention that the term "person" under Article 32 encompasses legal entities. This conclusion is buttressed by the fact that the final clause of Article 27 of the Warsaw Convention read "legally representing *his* estate"; whereas Article 32 of the Montreal Conventions was amended to read "legally representing *his or her* estate." *Compare* Warsaw Convention Art. 27, *with* Montreal Convention Art. 32. As a result, the minor amendment actually supports the conclusion that the Montreal Convention's framers considered the Article's language, amended it to add the pronoun "her" for the likely purpose of gender neutrality, and thereby rejected any alternative suggestion to broaden the scope of the Article to include legal persons such as insurance companies.

Consequently, Plaintiffs fail to plead any legal basis supporting their contention that Article 32 of the Montreal Convention permits the involuntary appointment of AGCS SE and Mr. Haagen as MAS' legal representatives. Because this contention fails, Plaintiffs' Lawsuits as a whole fail to state a claim, and must be dismissed.

B. The Montreal Convention is Limited to Claims Against Air Carriers

Plaintiffs' Lawsuits also require dismissal because courts have repeatedly held that the Montreal Convention only provides a cause of action against *carriers* or their agents in connection with accidents occurring during an international flight, and not to third parties such as governments, holding companies, or manufacturers. *See* Montreal Convention Chapter III ("Liability of the *Carrier*), Art. 30(1) ("If an action is brought against a servant or agent of the *carrier..."*). Indeed, courts considering the question have uniformly rejected attempts to expand the Montreal Convention's definition of "carrier" to include non-air carrier defendants. *See In Re Air Crash at Taipei, Taiwan, on Oct. 31, 2000,* No. MDL1394GA, 2002 WL 321155476 at *7.

In *Maranga v. Abdulmutallab,* an injured passenger brought suit against Air France-KLM ("AF-KLM"), the holding company of KLM Royal Dutch Airlines ("KLM"), seeking to recover injuries sustained when he helped subdue a terrorist threat aboard Northwest Airlines Corp. ("Northwest") Flight 253 from Amsterdam to Detroit. 903 F. Supp. 2d 270, 271 (S.D.N.Y. 2012). The injured passenger subsequently brought suit against AF-KLM, KLM's holding company, under the Montreal Convention on the premise that AF-KLM was the contracting carrier of Flight 253. AF-KLM moved to dismiss the lawsuit on several grounds, including that it is not an airline carrier within the meaning of the Montreal Convention and therefore not a proper defendant in the suit. *Id.* at 273. The court held that "[t]he Montreal Convention provides strict liability for airline carriers, and *only* carriers, for bodily injury arising out of international air travel" and dismissed the case. *Id.* (emphasis in original). The court reasoned that "AF-KLM is not an airline 'carrier' in any sense of the word, but rather a holding company." *Id.* The *Marenga* Court held that "[t]herefore, Plaintiff has no claim against AF–KLM under the Montreal Convention, which is the only method of recovery." *Id.*

Similarly, in *Pflug v. Egyptair Corp*, 961 F.2d 26, 31-32 (2nd Cir. 1992), a passenger injured during the hijacking of an Egyptair flight brought suit against Egyptair Corp., a subsidiary of Egyptair. In *Pflug*, Egyptiair Corp. moved to dismiss on the grounds that it was not an airline carrier and did not operate the hijacked plane. *Id.* The Second Circuit held that Egyptair Corp. was not a proper defendant because under the Warsaw Convention only "a carrier that transports passengers injured on an international flight is liable for injuries in the event that an accident occurs on board the aircraft." *Id.* at 32; s*ee also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 162 (1999) ("the convention addresses and concerns, only and exclusively, the *airline's* liability for passenger injuries'") (emphasis added) (quoting Warsaw Convention, Art. 17, 49 Stat. 3018); *In re Air Crash Near Nantucket Island, Mass., on Oct. 31, 1999*, 340 F. Supp. 2d 240 (E.D.N.Y. 2004) ("*Nantucket*") ("[t]he express purpose of the Convention was to regulate litigation between passengers and carriers").

Indeed, the Warsaw Convention's drafters codified their intended limitations in this regard into the final text: Article 1 states that Warsaw Convention applies to "international carriage" which it defines as "any carriage in which, *according to the contract made by the parties*, the place of departure and the place of destination … are situated … within the territories of two High Contracting Parties." Warsaw Convention Art. 1(2) (emphasis added). By making the Warsaw Convention's application contingent on a contract of carriage, the Warsaw Convention's drafters guaranteed that it would apply only to parties that entered into such contracts – namely, carriers and their customers. The Montreal Convention does not alter this limitation. *See* Montreal Convention Art. 1(2).

While the Convention does not define "carrier" specifically, courts have interpreted it to include three potential groups of air carriers: (1) the "actual carrier," (2) the "contracting carrier,"

and (3) the successive carrier." *See* Montreal Convention, Arts. 36, 39; s*ee also Pflug*, 961 F.2d at 31; *Nantucket*, 340 F. Supp. 2d at 240. As a result, this Court should reject Plaintiffs' attempt to impose liability on the Reinsurer Defendants as they were neither the actual, nor the contracting, nor the successive carriers involved with Plaintiffs' decedents or Flight MH370.

Further, in their pleadings Plaintiffs admit that "Malaysia Airlines was the 'actual carrier' of Flight MH370." *Huang FAC* at ¶ 102; *Smith OC* at ¶ 111; *Zhang SAC* at ¶ 114; *Kanan* at ¶ 58. This means that MAS is the only proper defendant under the Montreal Convention and forecloses the possibility of Plaintiffs asserting a Montreal Convention claim against any party other than MAS as the actual carrier. Therefore, this Court must dismiss Plaintiffs' Montreal Convention claims against the Reinsurer Defendants for failure to state a claim with prejudice.

II. UNDER BOTH U.S. AND MALAYSIAN LAW A DIRECT ACTION AGAINST AN INSURER IS NOT PERMITTED

As shown above, Plaintiffs cannot state a claim against AGCS SE and Mr. Haagen as MAS's alleged insurer or make them the involuntary legal representatives of MAS under the Montreal Convention. But equally important is the fact that none of the United States jurisdictions invoked by plaintiffs – New York, Washington D.C., or California – or Malaysia recognize a cause of action or permit a direct suit against a potentially-liable party's insurer in these circumstances. The Court need not engage in a choice-of-law analysis because none of the jurisdictions invoked by plaintiffs are in conflict. Under any potentially-applicable law, Plaintiffs' claims fail as a matter of law.

Plaintiffs' lawsuits potentially implicate the laws of three U.S. jurisdictions and the law of Malaysia which is the place of incorporation and principle place of business of MAS, and where Plaintiffs have also brought suit against MAS. The three States' laws that are implicated are: New York, where Plaintiffs filed the *Huang* and *Kanan* actions; the District of Columbia,

where Plaintiffs filed the *Smith* action; and California where Plaintiffs filed the *Zhang* action. The laws of Malaysia, California and New York strictly prohibit – in the absence of an unsatisfied judgment – as a matter of law direct actions by injured third-parties against the insurer of a potentially-liable insured. Here there is no judgment and none is alleged by Plaintiffs. The law of the District of Columbia is even more restrictive because it prohibits such direct actions in their entirety, regardless of the existence of an underlying judgment. Because there is no conflict between the laws of New York, California, the District of Columbia and Malaysia, the court need not make a choice of law ruling. The law of these four potentially implicated jurisdictions is the same and requires the same result. *See Chicago Ins. Co. v. Paulson & Nace, PLLC*, 37 F. Supp. 3d 281, 290 (D.D.C. 2014), *aff'd sub nom. Chicago Ins. Co. v. Paulson & Nace, PLLC*, 783 F.3d 897 (D.C. Cir. 2015) ("If no conflict exists, the court need not proceed with the choice of law analysis").

A. The District of Columbia Does Not Allow Plaintiffs' Direct Actions Against the Reinsurer Defendants

The *Smith* Plaintiffs have no right to assert a direct action against the Reinsurer Defendants under District of Columbia law. *See Sidibe v. Traveler's Ins. Co*., 468 F. Supp. 2d 97, 101 (D.D.C. 2006) ("a stranger to a contract may not sue to enforce its terms") (citing *Flack v. Laster*, 417 A.2d 393 n. 11 (D.C. 1980)). In *Sidibe*, an injured party sued the alleged tortfeasor, West Auto, together with its insurance carrier, Travelers Insurance Company ("Travelers"). *Id.* at 99. In that first suit, Travelers filed a successful Motion for Summary Judgment based on the argument that the District of Columbia does not allow direct action against insurers of alleged tortfeasors. *Id.* However, after successfully obtaining a judgment against West Auto, Plaintiff then filed a declaratory judgment action against Travelers "for breach of contract, alleging that [Travelers'] failure to pay plaintiff, pursuant to the insurance policy defendant issued to West

Auto, constituted a breach that plaintiff, as a third party beneficiary of the policy, can enforce." *Id.* However, the Court again granted summary judgment in Traveler's favor, finding that because plaintiff was not named in the contract of insurance and because the record did not show any intent by West Auto or Travelers that the contract of insurance should "unequivocally benefit this particularly plaintiff," the "[p]laintiff has no standing to sue defendant to enforce the insurance contract between defendant and West Auto." *Id.* at 101 (citations omitted). As the *Sidibe* cases illustrates, the District of Columbia strictly prohibits direct actions against liability insurers.

B. California Law Does not Allow Plaintiffs' Direct Actions Against the Reinsurer Defendants

Plaintiffs' claims likewise fail under California law. California, where the *Zhang* Plaintiffs filed their claims, adheres to the "general rule that, absent an assignment or final judgment against the insured, a third party claimant may not bring a direct action against an insurance company on the contract because the insurer's duties flow to the insured." *San Diego Hous. Comm'n v. Indus. Indem. Co.*, 95 Cal. App. 4th 669, 685 (2002) (internal citation omitted); *see also Transcon. Ins. Co. v. Martinelli*, No. 07-CV-01056-AWI-GSA, 2008 WL 115189, at *5 (E.D. Cal. Jan. 10, 2008) (same); *Royal Surplus Lines Ins. Co. v. Ranger Ins. Co.*, 100 Cal. App. 4th 193, 200 (2002) ("an insurer may not be joined as a party-defendant in the underlying action against the insured by the injured third party"); *Shaolian v. Safeco Ins. Co.*, 71 Cal. App. 4th 268, 271 (1999) (same).

Although California Insurance Code Section 11580 ("Section 11580") subdivision (b)(2) does authorize direct actions in the event a final judgment has been secured against the insured, that situation does not exist under the facts of this case. *See* Cal. Ins. Code § 11580(b)(2); *Rose v. Royal Ins. Co. of America*, 2 Cal. App. 4th 709, 488 (1992), *citing Billington v. Interinsurance*

Exchange of So. California, 71 Cal. 2d 728, 744-745. Further, the provisions of Section 11580 only apply to contracts of insurance issued in California, whereas the policies at issue here were issued to MAS in Malaysia. *See* Cal. Ins. Code § 11580(b)(2) (West). Thus, the *Zhang* Plaintiffs also fail to state a claim because California is not a direct action state.

C. New York Law Does Not Allow Plaintiffs' Direct Actions Against the Reinsurer Defendants

Similarly, the *Huang* and *Kanaan* Plaintiffs fail to state a claim against the Reinsurer Defendants under New York law. Like California, an injured tort-plaintiff in New York possesses no cause of action directly against the insurer of the alleged tortfeasor/potentially-liable defendant absent an assignment or final judgment against the insured. *Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 353 (2004). In *Lang*, the New York Court of Appeals made clear that an injured tort plaintiff has no cause of action at common law against an insurer under New York law, except under New York Insurance Law Section 3420, in derogation of the common law, granting an injured third party a right to sue an insurer for damages if they first obtain a judgment against the tortfeasor. *Lang*, 3 N.Y.3d at 352; *see also* N.Y. Ins. Law § 3420 (McKinney). Because the *Huang* and *Kanaan* Plaintiffs have not obtained a final judgment or an assignment from MAS, their claims against the Reinsurance Defendants as the alleged insurer fail under New York law. Additionally, in a similar manner to California insurance law, the New York Insurance law Section 3420 only applies to policies of insurance "issued or delivered in [New York]." Thus, Section 3420 has no application to the policy of insurance issued to MAS in Malaysia, which is also the policy that allegedly provides the foundation for Plaintiffs' claims against the Reinsurer Defendants.

D. Malaysian Law Does Not Allow Plaintiffs' Direct Actions Against the Reinsurer Defendants

Plaintiffs' claims fare no better under Malaysian law, which likewise bars a third party from claiming directly against an insurance company under a liability insurance policy to which it is not a party. *See* **Exhibit 3**, Declaration of Tharminder Singh Ginder Singh ("Singh Decl."). The general rule in Malaysia is that insurance purchased by a policyholder is a contract between the policyholder and the insurer. *Id.* at ¶ 14. Accordingly, once an insurance policy is issued, a privity of contract exists between the policyholder and the insurer. The English common law doctrine of privity of contract as enunciated in the House of Lords decision of *Dunlop Pneumatic Tyre Co. Ltd. v Selfridge & Co. Ltd* [1951] AC 847 is incorporated into Malaysian law by Section 2(d) of the Contracts (Malay States) Ordinance 1950. *Id.* at ¶ 15. The privity of contract doctrine generally provides that a contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it. *Id.* at ¶ 16. Since the advice of the Privy Council in *Kepong Prospecting Ltd & Ors v. Schmidt* [1968] 1 MLJ 170, the requirement of privity of contract has been applied in numerous Malaysian reported court decisions. *Id.* at ¶ 17; s*ee e.g., Suwiri Sdn Bhd v. Government of the State of Sabah* [2008] 1 MLJ 743 and *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, a copy of which are attached hereto as Exhibit B to **Exhibit 3**. Malaysian courts have also applied the privity of contract rule to contracts of insurance between insurers and insureds. *Id.* at ¶ 18. Based on the required privity of contract under Malaysian law no common law or statutory cause of action authorizes Plaintiffs in the *Huang, Smith, Zhang* or *Kanan* cases to assert a cause of action directly against a potentially-liable party's liability insurer because the relationship between an insurer and its insured is contractual, and the tort plaintiff is a stranger to that relationship. *Id.* at ¶¶ 19 -22.

Additionally, notwithstanding Plaintiffs' allegation that MAS is "dead," under Malaysian law, the alleged or actual insolvency, bankruptcy or administration of a defendant does not eliminate or otherwise alter the prohibition against a plaintiff asserting legal claims directly against a potentially liable party's liability insurer. *Id.* at ¶ 20. Consequently, Plaintiffs' claims against AGCS SE and Mr. Haagen are legally insufficient under Malaysian law because neither the Plaintiffs nor their decedents are parties to the MAS Policy, the contract of insurance, nor are they parties to any policy of reinsurance related thereto. *Id.* at ¶ 21. Therefore, there is no privity of contract between Plaintiffs and AGCS SE or Mr. Haagen which is fatal to their claims. *Id.* Further, there is no statutory provision in Malaysian law that could provide a basis for Plaintiffs to circumvent the privity of contract rule to assert a cause of action against AGCS SE and Mr. Haagen in the above-captioned actions. *Id.* at ¶ 22. Therefore, under Malaysian law the Plaintiffs cannot state a cause of action against the Reinsurance Defendants and their claims must be dismissed with prejudice.

III. THE ACT OF STATE DOCTRINE ALSO REQUIRES DISMISSAL OF PLAINTIFFS' CLAIMS

Plaintiffs' claims against the Reinsurer Defendants, is predicated on allegations that Malaysia Act 765 was orchestrated by the Malaysian Government to assist MAS in evading liability in connection with the Flight MH370 Accident. Such allegations require dismissal under the Act of State Doctrine of Plaintiffs' claims.[6] In bringing these Lawsuits, Plaintiffs seek to have this Court invalidate Malaysian Act 765 providing for the administration of MAS,

[6] A motion to dismiss based on the Act of State Doctrine is properly considered under Rule 12(b)(6), not Rule 12(b)(1). *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 337 (D.D.C. 2007). In order to dismiss a complaint under Rule 12(b)(6) based on the Act of State Doctrine, a district court "must be satisfied that there is no set of facts favorable to the plaintiffs and suggested by the complaint which could fail to establish the occurrence of an act of state." *Temistocles Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1534 (D.C.Cir.1984), *rev'd on other grounds*, 471 U.S. 1113 (1985).

because contrary to the purposes of the Act as stated by the Malaysian Parliament,[7] Plaintiffs contend that Malaysia Act 765 was "introduced and approved to help MAS avoid its liability, responsibility and damages to MH370 (and other) passengers." *Huang FAC* at ¶ 23; *Smith OC* at ¶ 34; *Zhang SAC* at ¶ 36; *Kanan OC* at ¶ 23. In particular, Plaintiffs seek to have the Court consider and invalidate several provisions of Malaysian Act 765 by making the following allegations regarding the Act:

- Defendants' reliance on Malaysia Act 765 is an evasive measure utilized to thwart the rights and abilities of the families of MH370 passengers to seek legal redress for their losses. *Huang FAC* at ¶ 89; *Smith OC* at ¶ 98; *Zhang SAC* at ¶ 100; *Kanan OC* at ¶ 45;

- Act 765 of the Laws of Malaysia was enacted to assist Malaysia Airlines, both MAS and MAB, defeat their liabilities, obligations, responsibilities, and damages owed to the passengers of MH370 (and presumably also to the passengers of MH17). *Huang FAC* at ¶ 80; *Smith OC* at ¶ 91; *Zhang SAC* at ¶ 93; *Kanan OC* at ¶ 36;

- Act 765 impaired the rights and abilities of the families to seek redress for the loss of their loved ones and left no viable airline defendant as defined by M99 and no assets other than the aviation liability insurance now controlled by Defendant Allianz. *Id.;*

- Act 765 left MAS "dead." *Id.*

Plaintiffs ultimately make the conclusory allegation that because "Defendants [MAS and MAB] have asserted that they are entitled to the protections and limitations on liability, jurisdiction and damages under Act 765," Plaintiffs are entitled to file the above-captioned actions "notwithstanding … Act 765." *Huang FAC* at ¶ 89; *Smith OC* at ¶ 98; *Zhang SAC* at ¶ 100; *Kanan OC* at ¶ 45.

[7] "An Act to provide special laws for the administration of the Malaysian Airline System Berhad, its wholly owned subsidiary companies, and its partially owned subsidiary companies providing goods or carrying out services or both that are essential to the operations of the Malaysia Airline System Berhad and the appointment of an administrator with the powers to administer and manage the Malaysia Airline System Berhad, its wholly owned subsidiary companies, and its partially owned subsidiary companies providing goods or carrying out services or both; to provide for the establishment of a new entity which will replace the Malaysia Airline System Berhad as the national carrier; and to provide for related matters." Preamble to Laws of Malaysia Act 765, Malaysian Airline System Berhad (Administration) Act 2015.

Without question, Plaintiffs' allegations would require the Court to rule on the effect or validity of Act 765 itself, which provides for the functions and the powers of the Administrator to: (1) Manage and compromise liabilities (§§9(1)(b) – (e) of the Act); (2) Defend MAS in litigation, include hiring counsel (§§10(h) and (g) of the Act); (3) Effect and maintain policies of insurance (§10(j) of the Act); (4) Transfer assets from MAS to MAB (§10(o) of the Act); and (5) Liquidate the assets of MAS (§10(e) of the Act).[8]

Plaintiffs' claims must be dismissed on the basis of these allegations which are a predicate to their purported cause of action and because "[t]he act of state doctrine prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed within its own territory." *Sarei,* 487 F.3d at 1208 (internal citation omitted). Considerations of international comity and principles of foreign sovereignty compel this Court to reject the Plaintiffs' request and avoid wading into the validity of a foreign state's domestic legislation. Indeed, "an action may be barred if (1) there is an 'official act of a foreign sovereign performed within its own territory'; and (2) 'the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign's] official act.'" *Id.* at 1208 (citing *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.,* 493 U.S. 400, 405 (1990)). Challenges to, and interpretation of, Malaysian law should be the exclusive province of the Malaysian courts. *See Underhill v. Hernandez,* 168 U.S. 250, 252 (1897)("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.") This doctrine applies when a lawsuit "requires the

[8] By attaching Act 765 as **Exhibit 1** to this Motion to Dismiss the Reinsurer Defendants make no substantive arguments regarding the validity, interpretation or application of Act 765. The Reinsurer Defendants attach Act 765 to advise the Court of the existence of this Malaysian law so that the Court can determine if the Act of State Doctrine requires dismissal.

Court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign." *W.S. Kirkpatrick & Co.*, 493 U.S. at 405 (quoting *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310 (1918)). The acts of the Malaysian government in question – *i.e.*, passing and enforcing Malaysia Act 765 – are quintessential acts of state that may not be adjudicated by this Court.

Taken as a whole, Plaintiffs' allegations with respect to Malaysia Act 765 necessarily request that this Court examine and nullify various provisions of the Act or to permit Plaintiffs to proceed against the Reinsurer Defendants in this Court in derogation of Act 765. The Act of State Doctrine, considerations of international comity and principles of foreign sovereignty compel this Court to reject the Plaintiffs' request and avoid invading the sovereignty of a foreign state's domestic legislation. Challenges to, and interpretation of, Malaysian law are the exclusive province of the Malaysian government, including its courts.

CONCLUSION

Plaintiffs' claims against the Reinsurer Defendants fail as a matter law. Neither Article 32 of the Montreal Convention, nor any other Article, create a direct cause of action against a carrier's liability insurer. Further, nothing within the Montreal Convention authorizes a cause of action against a non-carrier. Plaintiffs' claims against the Reinsurer Defendants are equally non-existent under U.S. and Malaysian law. Plaintiffs have failed to plead any facts that, if true, would support a common law or statutory right to seek relief under the laws of the District of Columbia, New York, California, or Malaysia directly against AGCS SE and Mr. Haagen, as MAS' alleged insurers. Finally, Plaintiffs Lawsuits impermissibly seek to challenge the interpretation, operation, and legality of Malaysian Act 756, an Act passed by the Parliament of Malaysia to establish the administration of MAS which requires dismissal under the Act of

State doctrine. WHEREFORE, for all the reasons set forth above, Plaintiffs' allegations against AGCS SE and Mr. Haagen should be dismissed in their entirety with prejudice.

October 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on October 1, 2016, pursuant to Fed. R. Civ. P. 5 and LCvR 5.3, a true and correct copy of Defendants Allianz Global Corporate & Specialty SE and Henning Haagen's Memorandum in Support of Their Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim, together with supporting exhibits, were 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/ Richard A. Walker
Richard A. Walker