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.* 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 TO DEFENDANTS ALLIANZ GLOBAL CORPORATE & SPECIALTY AND HENNING HAAGEN'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF PERSONAL JURISDICTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

INDEX OF EXHIBITS

Exhibit No.	Description
1	First Amended Complaint - *Min Huang et al., v. Malaysia Airlines Berhad et al*., 1:16-cv-01063
2	Original Complaint - *Elizabeth Smith v. Malaysia Airlines Berhad et al*., 1:16-cv-00439
3	Second Amended Complaint - *Jianguo Zhang et al., v. Malaysia Airlines Berhad, et al.*, 1:16-cv-01048
4	Original Complaint - *Sri Devi Kanan v. Malaysian Airline System Berhad et al.*1:16-cv-01062
5	International Law and Agreements: Their Effect Upon U.S. Law, February 18, 2015, Congressional Research Service 7-5700
6	March 4, 2015 correspondence from the Director General of Civil Aviation, Malaysia and May 4, 2015 correspondence from the Under-Secretary for Secretary General Ministry of Transport
7	MAS Responses to Plaintiffs' First Interrogatories and Plaintiffs' Second Requests for Production
8	Aviation Hull Including Spares and Equipment All Risks and Liabilities Insurance for Malaysian Airline System Berhad Issued by Etiqa (partial policy -redacted) MH370-0000200 – 0000217
9	Media articles concerning Allianz and MH370 insurance
10	Etiqa Insurance Berhad Director's Report and Audited Financial Statements 31 December 2014
11	Etiqa Insurance Berhad Director's Report and Audited Financial Statements 31 December 2015
12	XE Currency Converter
13	Online article concerning Allianz Insurance and MH370 claims
14	Allianz Global Corporate & Specialty Global Aviation Safety Study

15	Allianz Global Corporate & Specialty Global Claims Review 2014- Loss trends and emerging risks for global business
16	Allianz Global Corporate & Specialty Global Claims Review 2015: Business Interruption In Focus-Global trends and developments in business interruption claims
17	Allianz Global Corporate & Specialty 2014 – Allianz Global Corporate & Specialty SE Annual Report 2014
18	Allianz Global Corporate & Specialty 2015 – Allianz Global Corporate & Specialty SE Annual Report 2015
19	Allianz Global Offices
20	List of participations of the Allianz Group as of 31 December 2015 according to § 313(2) HGB
21	Allianz reports and notices
22	Lexis Nexis Business Reports for Allianz Global Corporate & Specialty
23	Allianz contact page from website
24	Henning Haagen LinkedIn and Facebook pages as of 1/17/17
25	Malaysia Airlines flight itinerary

Please note that all underlining or yellow highlighting was done by counsel to direct this Honorable Court and opposing counsel to relevant portions.

PLAINTIFFS' RESPONSE TO DEFENDANTS ALLIANZ GLOBAL CORPORATE & SPECIALTY AND HENNING HAAGEN'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND FOR LACK OF PERSONAL JURISDICTION

Plaintiffs request this Honorable Court's order denying defendants' Motions to Dismiss Plaintiffs' Complaint against Defendants Allianz Global Corporate & Specialty (hereinafter AGCS) and ACGS Global Head of Aviation, Henning Haagen, for failure to state a claim and for lack of personal jurisdiction.

The 12(b)(6) Standard

The United States Supreme Court set forth the standard by which to evaluate a Fed. R. Civ. P. Rule 12(b)(6) motion in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (U.S. 2007) ("*Twombly*")and *Ashcroft v. Iqbal*, 556 U.S. 662 (U.S. 2009) ("*Ashcroft*"). Consistent with both *Twombly* and *Ashecroft* as discussed further herein, Plaintiffs' Complaints hereto as **Exhibits 1, 2, 3, and 4** include facts, and not mere legal labels and conclusions, which give rise to plausible, not just conceivable, entitlement for relief. Plaintiffs have plead all elements of a cause of action and plead extensively detailed facts, obvious, sufficiently and substantially detailed as Defendants had to provide additional evidence and affidavits to attempt to attack Plaintiffs' Complaints. If the complaints were so obviously factually insufficient, there should be no cause for Defendants to supplant the record, a fatal wound in a Rule 12(b)(6) motion and self-inflicted by these Defendants, refusal to answer any discovery herein. Not only are Plaintiffs' allegations entitled to an assumption of proof, Plaintiffs herein below and attached hereto provide proof of the same. Clearly the Plaintiffs were not parroting legal standards; the Complaints are very detailed with case-specific acts of these Defendants, all gleaned despite the Defendants refusing any discovery.

As Defendants' motion and brief clearly show, and as their refusal to answer discovery demonstrates, the facts herein are particularly within the possession and control of the defendants. Simply put, and paraphrasing the United States Supreme Court, the complaints contain enough factual matter to suggest the required elements and meet the standard, which simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary elements. *Twombly*, 550 U.S. at 556. These Defendants have forgone the opportunity to participate in discovery and Plaintiffs are therefore entitled to this presumption that discovery will reveal facts to support the allegation.

Defendants choose to supplement the record but claim doing so has not converted their motion into one for summary judgment. Therefore Plaintiffs will supplement the record but assume the motions will be treated as Motions to Dismiss, as these Defendants claimed.

This Is Not a State Direct Insurance Action

Defendants mischaracterize Plaintiffs' Complaint as a Direct Insurance Action against an insurer rather pursuant to Article 32 (or its predecessor Article 27 of the Warsaw Convention[1]) terms of the Montreal Treaty. The Complaints herein against Defendants AGCS and Henning Haagen, (See Exhibits 1, 2, 3 and 4) are based on Article 32 of the Convention of for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal, Canada on May 28, 1999, *reprinted* in S. Treaty Doc. 106-45, 1999 WL 33292734 (hereinafter "Article 32" and "Treaty or M99").

[1] 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, No. 876, 137 L.N.T.S. 11 (1934)*reprinted in* note following 49 U.S.C.A. § 40105 (1997) ("Warsaw Convention")

This is a case of first impression. No court has interpreted Article 32. There is not one reported case on Article 32 as Defendants admit on page 8 of their Motion [D.E. 36-1. 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 an insurance policy. (Defendants' Motion to Dismiss, [D.E. 36-1, page 11]. Plaintiffs pled this Treaty and Article 32 clearly and in great detail and cited specific facts why the use of Article 32 is appropriate. Obviously the facts were sufficient for the Defendants to understand them because they went to great lengths to try to argue that the Treaty and Article 32 can only apply to the airline, despite the plain language to the contrary in Article 32. They clearly understood the facts and importance of Article 32 because like Plaintiffs they did an exhaustive search and found no case law. They clearly understood the alleged facts. See Exhibit 3, ¶ 3 to 26.

As Defendants admitted, the only discussion about 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 state the law intended only natural persons, there is not factual or legal support for their assertion. 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 of reach of Article 32 (formerly Article 27) as alleged in Plaintiffs' Complaints. Defendants attached this commentary as Exhibit 2 [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 the Montreal Treaty is supreme over state and Malaysian law.

Defendants expend the majority of their briefing and a 156 page supplement arguing that the state laws of California, New York and Washington, D.C. and Malaysia do not permit direct action against insurers. Their argument is misplaced. There is no ambiguity about the supremacy of the Montreal treaty over the state laws cited by Defendants. Rarely does a lawyer have the privilege of applying the direct and literal language of the U.S. Constitution, but on this point the U.S. Constitution, Article VI is dispositive:

> "This Constitution, and the Laws of the United States…. and all Treaties… shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding; "
>
> U.S. CONST. art.VI

That these Defendants, or states' laws or Malaysia common law, do not like the outcome of the application of the treaty is irrelevant. The Constitution is clear—the treaty has the effect of being the supreme law of the land. Any other conclusion would be tantamount to attempting to re-write the Constitution. That there be any doubt about the framer's intent, the Tenth Amendment made it clear;

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the State, are reserved for the States respectively,,,"
>
> U.S. CONST. amend. X

State powers were expressly limited to those "powers not delegated to the United States by the Constitution" and those powers not "prohibited by it to the States."

Under Article II, Section 2 of the U.S. Constitution, the President is empowered by and with the Advice and Consent of the Senate to make Treaties. Under Article III, Section 2, the

judicial power extends to all cases arising under Treaties. There is no legal ambiguity—treaty power was expressly delegated to the United States and the federal courts were endowed with the power to enforce it. Nor can the States share in the treaty power. The U.S. Constitution, Article I, Section 10 states that no State shall enter into any Treaty. The Constitution further mandates that as the supreme law, treaties are binding on the State and State judiciary. See Article VI, U.S. Constitution.

Generations of U.S. Supreme Court justices have consistently and unerringly reaffirmed the unequivocal language and reach of the original language and intent of the Constitution. It is not necessary to string cite them here. Mr. Justice Holmes' opinion in *Mo. v. Holland*, 252 U.S. 416 (U.S. 1920) remains the seminal case.

> it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.
>
> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.
>
> The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.
>
> The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and

> that but for the treaty the State would be free to regulate this subject itself.
>
> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act.
>
> *Mo. v. Holland*, 252 U.S. 416, 432 (U.S. 1920)

Like the migratory birds so eloquently described by Justice Holmes, airplanes are only transitorily within a state and that is exactly why the nations of the world have signed the Montreal Treaty. Unchallenged and unquestioned by any court, Article 32 has remained in the treaty throughout its various forms. It is plainly obvious that an airline is a legal entity and its successor is likely to be a legal entity. All international airlines are legal entities. And, like Justice Holmes' migratory birds, the treaty signed by the United States, Malaysia and over 100 other nations, protects their interstate and international flights, commerce, and our lives with its Treaty mandates. See the Montreal Treaty and the Warsaw Convention.

Therefore, not only does state law on direct insurance actions fall to the plain language of the treaty, the common law of Malaysia is subordinate to its treaty with the United States. Defendants submitted a 156-page declaration of a Malaysia lawyer [D.E. 36-4] extolling the common law of Malaysia, which is, according to their own experts, not codified in federal law nor part of a Constitution. Defendants go so far as to include a treatise excerpt, citing *Carhill v. Carbolic Smoke Ball Company*, [D.E. 36-4, p. 12 of 156], further cementing the fact that in Malaysia, the premise that direct insurance action is not allowed and is not codified in the Constitution or in the federal laws of Malaysia.

The United States Congressional Research Service, as recently as 2015, has summarized the lack of persuasiveness of "Reference to Foreign Laws by U.S. Courts"

> In recent years, foreign or international legal sources have increasingly been cited by the Supreme Court when considering matters of U.S. law. While these sources have been looked to for persuasive value; they have not been treated as binding precedent by U.S. courts. See e.g., Sanchez-Llamas v. Oregon, 548 U.S. 331, 354 (2006) (while Optional Protocol of the Vienna convention on Consular Relations, to which the United States was a party, gave the International Court of Justice jurisdiction to settle disputes between parties regarding the treaty's meaning, ruling by the international tribunal was not binding precedent on U.S. courts; if "treaties are to be given effect as federal law… determining their meaning as a matter of federal law is emphatically the province and duty of the judicial department, headed by the one[S]upreme Court established by the Constitution")
>
> Thus far, it does not appear that an American court has based its holding on a question of statutory or constitutional interpretation solely on foreign law.

See **Exhibit 5**, pages 19 and 21, International Law and Agreements: Their Effect Upon U.S. Law, February 18, 2015, Congressional Research Service 7-5700.

It is clear under the United States Constitution that the Montreal Treaty prevails over state insurance law and Malaysia common law. The language of the Treaty, plain on its face, unchallenged, and not limited or questioned by any court, is that when an airline has ceased to exist, its successor, the entity that has any assets of the defunct carrier, be it a legal entity or a natural person, stands in the shoes of the dead airline to answer under the Montreal Treaty.

Is Malaysian Airline System Berhad (MAS) Dead?

Defendants admit there is nothing left of MAS except one "Administrator" who has no assets. All assets were transferred to MAB—facts clearly and extensively pled in the Complaints. Defendants attach the entire Malaysia Act 765, which was extensively pled in Plaintiffs' Complaints to argue why MAS is not dead. They argue because there is an Administrator it is still

in existence, despite Act 765 language to the contrary. Once again, Defendants' argument points out that Plaintiffs' Complaints were extensively detailed with ample facts setting forth details about which Defendants want to argue—actions which clearly show 12(b)(6) is not appropriate.

Plaintiffs clearly pled the following in their Complaints in addition to many more facts:

On August 8, 2014, according to the Malaysian Airlines System Berhad (MAS Company No.: 10601-W) Quarterly Report for the Third Quarter Ended 30 June 2014, the Government of Malaysia through its wholly owned fund the Khazanah Nasional Berhad (KNB), told MAS that it was, "proposing the privatization of the company by way of selective capital reduction and repayment exercise."

See **Exhibit 3, ¶31**

No notice was given to the families of the missing on MH370 about the planned looting of MAS assets, gutting of MAS, delisting of MAS, and death of MAS. Selective payments or transfers of assets were made to creditors (also called "charges") deemed by MAS and/or the Malaysia government to be "relevant" and no passengers or families of passengers of MH370 were included among the creditors or charges listed by MAS 10601-W or by MAB 1116944-X.

See **Exhibit 3, ¶32**

MAS also admitted in its Quarterly Report for the Second Quarter Ended 30 June 2014, and in its Quarterly Report for the Third Quarter ended 30 September 2014, that it intended to leave the passengers and families of MH370 with no recourse other than the Allianz policy, stating as follows:

(ii) Flight MH370

> Following the disappearance of flight MH370, next-of-kin of the passengers are entitled to receive compensation for the losses they suffered upon the announcement of a declaration of loss. The compensation amounts payable to the next-of-kin of the passengers will be covered by the Company's aviation liability insurance policy and will be determinable upon submission and verification of the losses suffered by the respective next-of-kin.
>
> These compensation amounts payable are expected to have no significant impact to the Company's financial statements.

See **Exhibit 3, ¶33**

On November 6, 2014, the "shareholders" of MAS (and the Government of Malaysia,

through its wholly owned government fund KNB) approved the so called "privatization".
See **Exhibit 3, ¶34**

On November 7, 2014, MAB was registered and incorporated.

See **Exhibit 3, ¶35**

On November 27, 2014, a bill was introduced and approved to help MAS avoid its liability, responsibility and damages to MH370 (and other) passengers by the Government of Malaysia (specifically the Dewan Rakat, The House of Representatives or "People's House" of Malaysia). This bill became Act 765 when adopted.

See **Exhibit 3, ¶36**

On December 30, 2014, the Royal Assent of the Government of Malaysia was affixed to Act 765 of the Laws of Malaysia, marking the death and end of MAS.

See **Exhibit 3, ¶37**

Despite claiming that MAS and MAB are separate companies, and that MAB is not a successor company to MAS, according to official filings with the Suruhaujaya Syarikat Malaysia Companies Commission (the Malaysia Registrar of Companies) of Malaysia, Defendant Malaysian Airlines System Berhad (MAS), known as "Malaysia Airlines" Company Number 10601-W, incorporation date April 3, 1971 states that its old name is "Malaysia Airlines Berhad." Defendant Malaysia Airlines Berhad (MAB), which is also known as "Malaysia Airlines" is company number 1116941-X, incorporation date November 7, 2014, is also known as "Malaysia Airlines" and the persons in leadership positions at the alleged two separate Malaysia Airlines are virtually identical, except for one individual who did not transfer from MAS to the MAB Board of Directors, as summarized in the following chart:

	Malaysia Airlines 03-04-1971	**Malaysia Airlines 07-11-2014**
Type	Limited by Shares Public Limited	Limited by Shares Public Limited
Status	Existing	Existing
Directors	Md. Nor Bin Md. Yusof, Tan Sri Mohamadon Bin Abdullah, DR David Lau Nai Pek Tan Boon Seng Sukarti Bin Wakiman Mohamad Morshidi Bin Abdul Ghani	Md. Nor Bin Md. Yusof, Tan Sri Mohamadon Bin Abdullah, DR David Lau Nai Pek Tan Boon Seng Sukarti Bin Wakiman Mohamad Morshidi Bin Abdul Ghani

	Mohd Irwan Serigar Bin Abdullah Mohammad Izani Bin Ashari Mohammed Shazalli Bin Ramly, Dato Mohd Shahazwan Bin Mohd Harris Christopher Romanus Mueller Ahmad Jauhari Bin Yahya	Mohd Irwan Serigar Bin Abdullah Mohammad Izani Bin Ashari Mohammed Shazalli Bin Ramly, Dato Mohd Shahazwan Bin Mohd Harris Christopher Romanus Mueller
Manager	Christopher Romanus Mueller	Christopher Romanus Mueller
Shareholders	Khazanah Nasional Berhad (a fund totally owned by the Government of Malaysia) Total shares – 11,592,389,201	Khazana Nasional Berhad (a fund totally owned by the Government of Malaysia) Total shares – 999,998 Azizah Hanum Binti Haji Md. Tamat Total shares – 1 Rosemun Bin Hassan Total shares - 1
Charges or Obligations of Company[2]	319 Listed 113 satisfied 206 unsatisfied	100 Listed All unsatisfied

Even the Twitter accounts are identical for the alleged two Malaysia Airlines, both using the handle @MAS, including on the same day.

[2] Many are the same for both companies. No claims or damages of any passenger of MH370 (or MH17) and no personal representatives, family member or estate of any MH370 (or MH17) passenger were listed as charges of either company.

See **Exhibit 3, ¶92**

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). 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. Act 765 left MAS "dead."

See **Exhibit 3, ¶93**

In Paragraph 21(3), Act 765 provides in part:

Prior to the implementation of the proposal, the Administrator shall send a copy of the proposal and the report of the Independent Advisor by registered post to the last known address of or through electronic medium to each of the creditors of the Administered Companies affected by the terms of the proposal.

See **Exhibit 3, ¶94**

No Plaintiffs, nor any other family members of Plaintiffs' passengers, nor their personal representatives, nor their attorneys, were sent a copy of the report of the Independent Advisor by registered post or by electronic medium, or by any means whatsoever. No Plaintiffs, the next of kin of passengers of MH370 or other family members of MH370, nor their representatives, were

given any notice under Act 765 or as described in or contemplated by Act 765.

See **Exhibit 3, ¶95**

Act 765 further states, in Paragraph 21(6):

Notwithstanding the failure to notify any creditors of the Administered Companies and persons affected by the terms of the proposal in accordance with the requirements of subsection (3), such failure shall not affect the validity of the proposal.

Therefore Paragraph 21(6) further destroyed any reasonable opportunity for Plaintiffs to be advised that the Administrator under Act 765 could proceed despite ignoring and failing to include among any of the charges (creditors) of the company, the liabilities, obligations, responsibilities and damages owed to families of passengers of MH370.

See **Exhibit 3, ¶96**

Act 765 states that the successor MAB formed on November 7, 2014 is not a successor to the previous MAS, but that provision is not further defined other than to state it addresses employment related issues with Malaysia Airlines' former and or current employees and unions.

See **Exhibit 3, ¶97**

There is no statement in Act 765 that MAB may not be deemed to have successive liability in areas other than employment issues. However, Act 765, Paragraph 29(1), states that any liability that may be transferred to the successor Malaysia Airlines (MAB) must be transferred by the Administrator, but the Administrator has failed and or refused to transfer MAS liability to MAB.
See **Exhibit 3, ¶98**

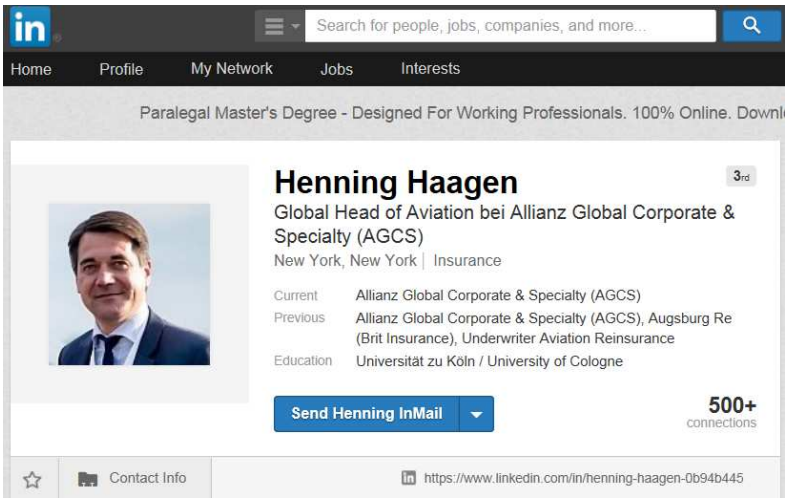
Furthermore, in MH370 cases filed in Malaysia, the Administrator and MAB have insisted that the Malaysia Airlines formed on November 7, 2014 (MAB), is not a successor corporation to MAS and the Administrator and/or MAB have moved to dismiss all such claims and cases.

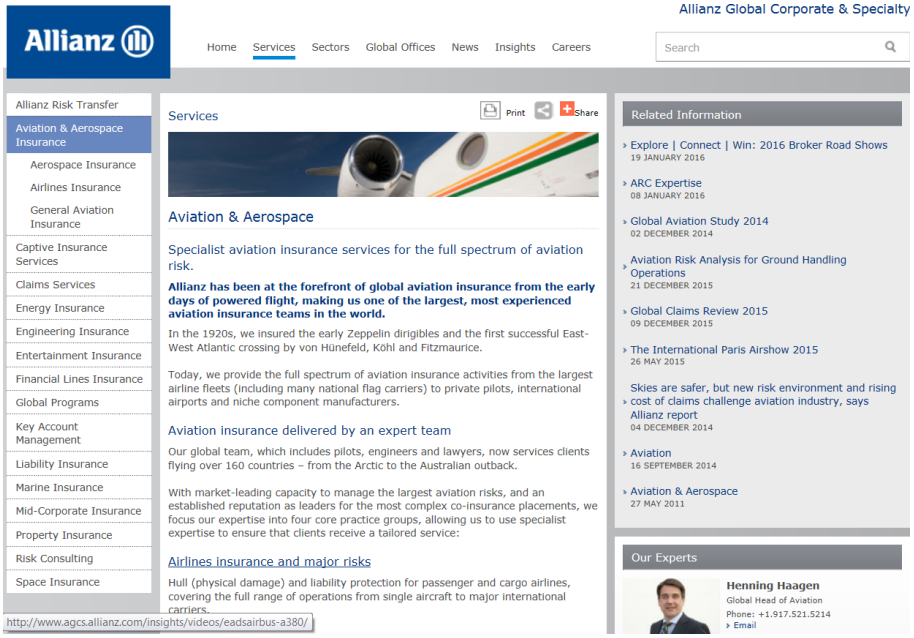
See **Exhibit 3, ¶99**

Therefore, pursuant to the action of the laws of Malaysia, specifically Act 765, Malaysia Airline System Berhad Company Number 10601-W (MAS), the carrying or actual carrier and "the person liable" has ceased to exist and is effectively "dead" under the definitions of M99; all operations have ceased and all assets, shares and equity of MAS have been disposed or assigned; Act 765 states the new Malaysia Airline Berhad Company Number 1116944-X (MAB), is not a successor corporation and is in no way liable for MH370; and the MAS Administrator has moved

to dismiss all cases against the new Malaysia Airlines (MAB). Therefore MAS has "died" and has ceased to exist. There is no entity other than the estate of MAS consisting of the MAS aviation liability insurance policy which is legally represented by Allianz Global Corporation and Specialty (AGCS) and Henning Haagen the self-described "Global Head of Aviation" for AGCS maintains his office in and resides in the United States of America.
See **Exhibit 3, ¶103**

Allianz Global Corporate and Specialty listed MH370 in the Allianz Global Corporate and Specialty, Global Loss Atlas: 10 Major Non-Nat Cat Losses 2014 at http://www.agcs.allianz.com/assets/Infographics/Global%20claims%Review/AGCS-LossAtlas2104_web.png, which lists its liability, responsibility, obligation, damages and losses for MH 370 as "USD [Dollars] TBC."





See **Exhibit 3, ¶105**

AGCS and Henning Haagen Can be Dismissed Only If This Court Finds MAS Is MAB

Ethical rules applicable to all lawyers require counsel to reveal to the court evidence which they find which assists the opposition. Therefore, counsel advises the court that despite Defendant MAS stating it has ceased to exist and Defendant MAB stating it is an entirely

different entity, that is NOT what the government of Malaysia, which wholly owns MAB (which ownership Defendants have already plead as a defense), has stated to Aviation Authorities, that MAB is MAS, and they did this after the passage of Act 765;

> **"…Malaysia Airlines Berhad, takes over operations on 1July 2015 with no major changes in its networks, routes, the Nominated Post Holders and operating personnel, facilities and flight operations procedures as well as maintaining he trading name (doing business as) Malaysia Airlines with ICAO 3-letter designator of MAS and the IATA code of MH. The transfer of the equity ownership…does not create a new entity of Malaysia Airlines. Instead, the DCA teats the restructuring as a re-branding of Malaysia Airlines without major changes…."**
>
> **"….Following the restructuring exercise…a Malaysian Government-owned company has taken full ownership of MAS in December 2014. A newly incorporated company, Malaysia Airlines Berhad (MAB)…will acquire substantially all assets and liabilities of MAS including operational personnel, facilities and fight operations as well as MAS branding."**

Emphasis added. See **Exhibit 6**, Letters from Malaysia Director General of Civil Aviation and Under-Secretary for Secretary General Ministry of Transport.

Genuine issues of material fact, not to mention very serious discrepancies in Defendants claim exist. The Defendants state to this Honorable Court that MAS has vanished; that MAB is not MAS; that MAB cannot be sued, that AGCS cannot be sued, that Henning Haagen cannot be sued and yet the government of Malaysia which is and owns MAB verifies to the aviation authorities of China (and upon information and belief, other nations) that MAB assumed substantially all assets and liabilities and the restructuring was nothing more than a rebranding.

Therefore if as Malaysia has represented to other countries that MAB and MAS are one and the same, MAS would not be dead but instead resurrected like a phoenix, or like a Justice Holmes' migratory bird, to seek to continue to be able to continue to fly under its international treaties of the Five Freedoms of the Air (also pled in Plaintiff's Complaints). These letters at

Exhibit 6 certainly suggest MAS and MAB are one and the same and have engaged in subterfuge to leave behind the responsibility for those the lost and presumed dead passengers which the phoenix MAB sought to leave behind in the MAS ashes.

There is a large and troubling factual discrepancy here, and these facts are exclusively in the hands of these Defendants, which refused to comply with discovery. The most important factual takeaway from the discrepancy is this: Defendants seek to enforce the rights to fly under the Montreal Treaty by disavowing the Laws of Malaysia Act 765. The letters at **Exhibit 6** clearly show the Treaty superseded Act 765. Let us also not forget that the letters to the aviation authorities disavowing the effect of Malaysia Act 765 were sent AFTER the enactment of Act 765. Malaysia made it clear by its own letters that MAS is MAB, or at least as far as the Montreal Treaty is concerned, so they can keep flying to other Treaty nations.

Who Is the Real Insurer?

There is also a huge factual discrepancy about the applicable insurance herein. In their responses to both Rule 26 obligations and the discovery propounded by Plaintiffs, the Defendants have refused to respond to most discovery:

For example, here are some of Plaintiffs' Interrogatories to all four Defendants, but only answered by MAS:

> 6. List all communications between defendant Henning Haagen and MAS or MAB, or with any other insurers or reinsurers of MAS and MAB concerning MH370. Please include in your response a privilege log if any privilege is claimed.

7. List all communications of defendant Allianz and MAS or MAB or with any other insurer or reinsurers of MAS or MAB concerning MH370. Include in your answer a privilege log if any privilege is claimed.

8. Has defendant Allianz paid anything for the search of MH370? If so, state to whom, what for, how much and when. Include in your answer a privilege log if any privilege is claimed.

9. Has defendant Allianz paid any sums to any entity for MH370 losses? If so, state to whom, what for, and how much and when. Include in your answer a privilege log if any privilege is claimed.

10. Did Allianz provide any evaluation of MAS or MAB operations before the disappearance of MH370? If so, state who did the evaluation, when it was done, where it was done and the usual work locations of the evaluators and contact information and job titles and job descriptions of the evaluators. Include in your answer a privilege log if any privilege is claimed.

11. What does Henning Haagen do as the self-described Global Head of Aviation for Allianz? If he is not really the Global Head of Aviation, then state what his title really is, what he really does, where he really does it, where is his office is really located and where he resides.

12. List all insurance or re-insurance applicable to the loss of MH370 and describe all policies or contracts for underwriting of insurance or re-insurance including applicable dates of coverage or contact names and addresses of each insurer or reinsurer, and amounts of coverage. Include a privilege log if you claim any privilege.

The response to all seven interrogatories was as follows:

MAS objects to Interrogatory No. (6-12) on the ground that it exceeds the limit specified in Fed. R. Civ. P. 33(a)(1); and it is unintelligible as to what is meant by "re-insurance coverage applicable to MH370". MAS further objects to their Interrogatory on the ground that it is outside the scope of discovery limited to the determination of the threshold motions filed by MAS individually or jointly on October 1, 2016; it is not reasonably calculated to lead to the discovery of admissible evidence relevant or necessary to the determination of the threshold

> motions filed by MAS individually or jointly on October 1, 2016; it is overly broad and unduly burdensome in the context of discovery relevant or necessary to the determination of the threshold motions filed by MAS individually or jointly on October 1, 2016; and to the extent that it seeks to impose a duty on MAS to provide information not within its possession, custody or control. Further, MAS objects to this Interrogatory on the ground that it is overly braod and beyond the scope of jurisdictional discovery under the Foreign Sovereign Immunities Act; it seeks to impose an undue burden on MAS as a foreign sovereign which is immune from suit; and it is not sufficiently controlled and limited consistent with the protections of the Foreign Sovereign Immunities Act. MAS objects on the additional ground that defendants Allianz Global Corporate & Specialty SE and Mr. Henning Haagen have filed separate threshold Motions to Dismiss for Lack of Personal Jurisdiction and for Failure to State a Claim which render all of the information sought legally irrelevant. If the court should determine that such information is relevant and discoverable, MAS further objects to Interrogatory No. (6-12) to the extent that it may be interpreted to require the disclosure of privileged information. If ordered to disclose such information MAS reserves its right to withhold information from privileged communications or documents.

See **Exhibit 7**.

MAS disclosed the same insurance Etiqa Insurance policy that was disclosed in their Rule 26(a)(1)(D) submission. See **Exhibit 8**.

Instead, Defendants seek to introduce evidence in a motion to dismiss (but not have it treated as a summary judgment motion) while refusing to answer discovery related thereto. Defendants' motions to dismiss should be denied on this point alone.

Defendants State Etiqa is the Only Insurer—It is Not

Defendants have produced only an insurance policy of Etiqua Insurance Berhad. As discussed above, Defendants refused to answer any discovery to AGCS. Yet, the world's press, quoting Allianz officials state that Allianz is the legal insurer and is paying claims. The media

reports, attached hereto as **Exhibit 9** (in lieu of these Defendants responses to any discovery), explain the situation:

Peter Lloyd, *MH370: Malaysia Airlines to hand over top secret records to Australian families suing for compensation,* ABC, Nov. 7, 2016, http://moblile.abc.net.au/news/2016-11-02.

> "Allianz Australia spokesman Nicholas Schofield would say only this, AGCS can confirm its position as the lead reinsurer for the aviation hull and liability coverage.",
>
> "Allianz almost all legally left of the MH brand."
>
> "The compensation case is in any case, a proxy that name the airline for culpability but in reality chases the insurer Allianz for the money, as it carries the hull and liability.
> Allianz is almost all that is legally left of the carrier.

Chinwe Akomah, *Aussie Insurance Industry speaks out on stricken Malaysia Airlines flight,* Insurance Business, Mar. 28, 2014, http://insurancebusinessonline.com.au/news.

> "Allianz SE's wholly owned subsidiary Allianz Global Corporate & Specialitiy is the lead reinsurer for the hull and liability cover, and has already started paying claims. "
>
> "Michael Dalton, regional manager Aviation, Allioanz Global Corporate and Specialty –Pacific told *Insurance business* that the event would not affect the local market: "Cover for hull and liability for major airlines is insured through the London market with local Australian aviation insurance limited to general Aviation.:"

Insurance Journal, *complex Situation Occludes Details on Loss of Malaysian Airliens Flight MH370,* Mar. 27, 2014, http://www.insurancejournal.com/news/international/2014/03/27/324543.htm.

> "Allianz Global Corporate & Specialty has been identified as both the lead insurer and the lead reinsurer. An Allianz spokesperson in London confirmed that it is officially the latter. "
> "Allianz and other major re/insurers will bear the bulk of those claims as much as 99 percent of the insured losses…."
> "Willis' London office brokered both the liability and the hull coverage, representing Malaysian Airlines as it client…..was placed through the London re/insurance company market.."

Rupinder Singh, *Etiqa is lead local insurer for MAS*, theSundaily, Mar. 12, 2014. http://www.thesundaily.my/news/983295

> "Allianz as the lead insurer has the largest portion of the risk."

Ivan Guan, *Who are the insurers for MH370 and how much will the loss be?*, SGMoneymatters, April 6, 2014, http://www.sgmoneymatters.com

> 'Sources said that Etiqa retained only around 4.5 percent of the risk."

Insurance FAC, *Malaysian carrier Etiqa cedes 95% of MH370 risk*, Mar. 21, 2014, http:www.insidefac.com/Malaysian-carrier-etiqa-cedes-95-of-mh370-risk.

> "Sources told *Inside FAC* that Eitqa, which writes the primary insurance cover, retains only around 4.5% of the risk, reinsuring the remainder with the international marketplace.

ProLink Consulting, *Malaysia: US$110 min paid for MH370 which 'ended' in Indian Ocean*, Mar. 25, 2014, http://prolink-consulting.com.

> "Etiqa retained only around 4.5 percent of the risk."

Reuters, *Fitch Affirms Etiqa Insurance at IFS 'A'; Outlook Stable*, http://www.reuters.com/article.

> "Given its reinsurance protection, EIB estimates potential claims associated with the disappearance of Malaysia Airlines Flight MH370 is likely to be manageable."

How can there be such divergent stories? These Defendants state to this Honorable Court that Allianz Global Corporate & Specialty is not an MH370 insurer, and yet Allianz's own spokespeople and their own publications admit they have the financial responsibility and are paying the claims.

The explanation is of course in Etiqa's audited financial statements (conveniently available online, since these Defendants refused to provide any discovery). The Etiqa financial statements are attached hereto as **Exhibits 10 and 11**.

The financial reports amply demonstrate the media reports are not wrong, and are correct. Allianz Global Corporate and Specialty has already picked up the reinsurance. This acceptance of the liability of reinsurance of which AGCS is chief, can be gleaned from the Ernst & Young financial statements of Etiqa for 31 December 2014 and 31 December 2015. As is apparent from the Financial Statements, Etiqa already transferred most of the big increase in liability experienced in 2014 and 2015. As is shown by the underlined portion of the financial statements, most all liability has been "rendered to reinsurers". As explained by Ernst & Young, "The Company [Etiqa] cedes insurance risk in the normal course of its business." See December 2015 report, page 36.

The numbers (in thousands) tell the story

Reinsurance Asset	
2013 (restated)	1,711,403
2014	4,096,708
2015	2,272,164
Claims Ceded to Reinsurance	
2013	213,300
2014	1,207,097
2015	470,429
Change in Contract Liabilities Ceded to Reinsuranec	
2013	11,705
2014	2,299,833
2015	800,234

As is shown on page 87 of the 2015 statement and page 93 of the 2014 statement, the numbers show a huge event in 2014, which was other than 404,674 offset by reinsurance and those liabilities continued into 2015 with all but 455, 637 offset by reinsurance.

For the Court's reference, currency conversion charts from Malaysia Ringgits to U.S. Dollars are attached as **Exhibit 12**.

How Do We Know for Certain the Insurance Liability and the Responsibility for Liability Payments Has Already Been Tendered to AGCS?

We know the insurance liability and the responsibility for liability payments have already been tendered to AGCS because AGCS counsel has taken over the defense of the case and is defending. See **Exhibit 13**. AGCS has also made myriad statements admitting publicly to media that it is the repository of the insurance assets of MAS. See **Exhibits 14 to 18**.

Exhibit 14 -Allianz Global Corporate & Specialty -Global Aviation Safety Study

Exhibit 15 -Allianz Global Corporate & Specialty – Global Claims Review 2014

Exhibit 16 -Allianz Global Corporate & Specialty – Global Claims Review 2015

Exhibit 17 -Allianz Global Corporate & Specialty Annual Report 2014

Exhibit 18 -Allianz Global Corporate & Specialty Annual Report 2015

AGCS and AGCS SE Hold Themselves Out as One and the Same

Since defendants refused to produce any discovery, Plaintiffs attach publicly available documents—only an infinitesimal fraction of the myriad public admissions of Defendant AGCS that it treats and publicly identifies itself as AGCS, including in statements it is the lead reinsurer (and the only remaining assets of MAS once Etiqa rendered the liability to reinsurer). Attached are just a tiny sampling of the documents in which Defendant AGCS identifies itself as AGCS—exactly as it was sued—rather than AGCS-SE:

Exhibit 14, AGCS -Global Aviation Safety Study –see especially page 46

Exhibit 15, AGCS – Global Claims Review 2014 – see especially page 50

Exhibit 16, AGCS – Global Claims Review 2015 – see especially page 38

Exhibit 17, AGCS Annual Report 2014 – see especially the Foreword, pages 4-5

Exhibit 18, AGCS – Global Claims Review 2015 – see especially the Foreword and pages 4-5

The only place in which AGCS includes AGCS-SE in these documents is on its claims of copyright or on their title pages. Most important, its financial statements are combined financial statements—it does not treat its alleged separate identities as separate entities for financial reporting. Naming AGCS rather than AGCS-SE was not a fatal mistake because these Defendants had clear notice and were not misled—AGCS was named exactly as the Defendants identify themselves.

Defendants AGCS and Haagen Both Blatantly Brag and Admit They Are "At Home" in the United States

These Defendants argue there is not jurisdiction against them in the United States. There is. Plaintiffs will not reiterate to this Honorable Court the facts of *Daimler AG v. Bauman*, 134 S. Ct. 746 (U.S. 2014) and of those cases immediately preceding it such as *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (U.S. 2011). This Honorable Court addresses jurisdictional issues on a daily basis. Therefore, in an abbreviated summary, the Supreme Court stated in *Goodyear* and repeated in *Daimler* that "[a]court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliation with the State are so constant and pervasive as to render them essentially at home in the forum state: Goodyear, 564 W.S. at 919, quoted Daimler, 134 S.Ct. at 754.

A corporation's place of incorporation and principal place of business are not the only places Defendants are found "at home." These bases are afforded plaintiffs so they will always have at least one clear and certain forum in which a corporate defendant may be sued on any and all claims. Daimler, 134 S. Ct. at 760. But, Goodyear and Daimler did not conclude that a

corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business. General jurisdiction may be where a "[corporation's] affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State" Daimler quoting Goodyear 564 U.S. at 919, 134 S.Ct. at 754. Unfortunately, that is where the Supreme Court's instruction on "At Home" ends.

Fortunately, despite the Defendants refusing to produce any discovery, we find the Defendants themselves have explicitly admitted in myriad public documents where they claim to be at home. Defendants brag of a retinue of offices in 70 countries and service in 160 countries See **Exhibit 19.** German law requires companies to file a list of their affiliates. AGCS's parent filed such a list. Of the thousand or so affiliates, 136 are in the United States. See **Exhibit 20**. Now, clearly not all those companies are all affiliated with AGCS even though affiliated with the Allianz Group, but some are. Similarly, in AGCS's Annual Reports and Loss Reports AGCS brags it does so much business in the United States that it is embedded in the United States." See **Exhibit 17**. "Embedded" certainly sounds like the equivalent of being at home. One's bed usually is at home, and one is in bed at home. Dictionaries tell us "embedded" stems from the word "bed" and that being embedded is to be fixed firmly and deeply, as in bedrock. Furthermore in its reports it likes to brag that it is at home in the United States. See **Exhibit 21**. AGCS likes to give the impression it is at home in the United States even in its U. S. corporate filing – usually using the name AGCS with no "SE" thereafter even for official government filing. See **Exhibit 22**

AGCS allows U.S. rating agencies to use the name AGCS rather than AGCS-SE, and AGCS puts out press releases in the U.S. using AGCS (with no SE) and bragging of its huge operations in the United States. See Exhibit 23. AGCS's own promotional internet materials deliberately give the impression of a United States home. See **Exhibits 19, 21 22**.

But all we really need to do is to look to what AGCS itself selects as its homes—out of its 230 [sic], 160 or 70 countries and literally countless corporate variations known only to Defendants, what are the places AGCS itself selects to have an interface with the public--its contact offices? AGCS selected just 10 locations, and New York in the United States is one of them. See **Exhibit 23**.

Henning Haagen Is At Home in New York

These Defendants admitted in these pleadings (though they refused to answer discovery or this very question) that Haagen was the "Global Head of Aviation at AGCS" and that he is domiciled, lives in, works in and thus is clearly at home in the United States of America. The Defendants also admitted Haagen has an AGCS team with him in New York. His current LinkedIn and Facebook pages are attached. See **Exhibit 24**. Therefore there is no question general jurisdiction is appropriate over Henning Haagen in the United States of America. Whether he and AGCS ultimately control the sole remaining assets is a question of fact which was extensively plead in the complaints. What is not in doubt is that Defendants admit there is nothing left of MAS other than an Administrator and AGCS self-generated media state it is controlling the only asset—the insurance, any settlements and the defense of this case at this point.

AGCS and Haagen Are Not "At Home" in Malaysia, and MAS and MAB Do Not Operate in Germany

These Defendants suggest this case could be moved to Malaysia or Germany. While their opinion on where it should be moved is irrelevant in a motion to dismiss, there is a very interesting observation to be made. AGCS does by its own documents show it does not have a "home" in Malaysia. And MAS and MAB do not fly to Germany—they route their passengers

onto other carriers to fly to Germany. See **Exhibit 25**. Neither Germany nor Malaysia offers an adequate forum.

Conclusion

Despite refusing to respond to any discovery on issues relevant herein, these Defendants filed an alleged Motion to Dismiss under 12(b)(6) and for lack of jurisdiction and submitted hundreds of pages of documents. Defendants' motions should be dismissed on the basis of their refusal to respond to discovery (which was expressly authorized by this Honorable Court). Nonetheless Plaintiffs also submit documents of these Defendants that Plaintiffs were able to find outside the discovery process. These documents clearly support, indeed prove every fact, allegation and claim in the very detailed Complaints. Plaintiffs have met their burden of pleading far in excess of that required by the Fed. R. of Civ. P., *Daimler, Goodyear, Twombly* and A*shcroft*, to wit:

A. As to these Defendants, AGCS and Haagen, Defendants have claimed they seek the protections of the Montreal Treaty. Plaintiffs also fully plead all elements of a Montreal claim.

B. Defendants complain there is no case law interpreting Article 32, but they cannot deny and do not deny it is in the Treaty. Instead Defendants try to argue the meaning of the language arguing about the meaning is not equivalent to an insufficient pleading. Quite the contrary. The fact that Defendants filed an argument about the meaning of the Treaty language shows the Treaty claim and Article 32 were well and fully pled and 12(b)(6) motion is not appropriate and should be dismissed.

C. Defendants complain AGCS was named in the complaint as AGCS instead of AGCS-SE. Defendants themselves overwhelmingly refer to themselves as AGCS and they were not misled or prejudiced by how they were named in the suit.

D. Defendants complain that state insurance law and Malaysia common law do not allow direct action against insurers. Malaysia common law is irrelevant on this point. Yet, Plaintiffs and Defendants both rely on the Montreal Treaty, have made Treaty claims, and the Treaty language trumps the state law and Malaysia common law (if it was applicable).

E. Defendants admit Haagen is the Global Head of AGCS and his home is in New York, while working with a cadre of other AGCS personnel. General jurisdiction as against him is indisputable.

F. Defendant AGCS in myriad public representations claim the United States and particularly New York City as one of its only 10 contact locations. AGCS is clearly at home in the United States and subject to the general jurisdiction of this Court.

WHEREFORE, Plaintiffs respectfully request Defendants' Motions to Dismiss be denied.

Dated this 19th day of January 19, 2017

Respectfully Submitted,

/s/Mary Schiavo
Mary Schiavo
D.C. Bar No. 440175
MOTLEY RICE LLC
28 Bridgeside Blvd.
Mount Pleasant, SC 29464
Telephone: (843) 216-9000
Facsimile: (843) 216-9450
mschiavo@motleyrice.com

ATTORNEYS FOR SMITH, ZHANG, AND HUANG PLAINTIFFS

Eric J. Rhine
SDTX ID No. 1786163
SPAGNOLETTI & CO.
401 Louisiana Street, 8th Floor
Houston, Texas 77002
Telephone: 713-653-5600
Facsimile: 713-653-5656
Email: erhine@spaglaw.com

ATTORNEYS FOR KANAN PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned certifies that, on January 19, 2017, pursuant Fed. R. Civ. P. 5 and LCvR 5.3, a true and correct copy of the foregoing **Plaintiffs' Response to Defendants Allianz Global Corporate & Specialty and Henning Haagen's Motio to dismiss for Failure to State a Claim and for Lack of Personal Jurisdiction** 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