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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re: CHC GROUP LTD., *et al.*, Debtors.	Chapter 11 Case No. 16-31854 (BJH) (Jointly Administered)
ECN CAPITAL (AVIATION) CORP., Plaintiff, v. AIRBUS HELICOPTERS, S.A.S., Defendant.	Adv. Pro. No. 16-3151 (BJH)

DEFENDANT AIRBUS HELICOPTERS, S.A.S.'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER AND PERSONAL JURISDICTION, AND *FORUM NON CONVENIENS*

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INTRODUCTION

This adversary proceeding is a complex tort and aviation products liability lawsuit. Plaintiff ECN Capital (Aviation) Corp. ("ECN") owns five *Super Puma* helicopters that were designed and manufactured in France by Defendant Airbus Helicopters S.A.S. ("AH"). AH sold and delivered the helicopters in France to European purchasers, not ECN, which later purchased them from third parties. The helicopters are registered and located outside of the United States. ECN asserts that it has suffered economic loss due to an alleged defect in the helicopters. Its claim is based on an unfinished investigation being conducted by European authorities into a Super Puma accident in Norway and precautionary flight bans imposed on Super Puma helicopters by European and other authorities, many of which have been lifted.

This is a standalone lawsuit about ECN's dissatisfaction with its Super Pumas, and it was not properly brought as an adversary proceeding. ECN concedes that it is a non-core proceeding, as it must since the lawsuit does not involve claims arising under the Bankruptcy Code, does not involve any of the debtors in the above-captioned main bankruptcy proceedings of the CHC Group debtor entities (the "CHC Debtors" or "Debtors"), does not pertain to Debtors' property, and its resolution will not affect the bankruptcy proceeding. The adversary proceeding is not "related to" the bankruptcy, and because there is no other basis for federal jurisdiction, the action should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). The action is also unrelated to any contacts between France-based AH and the United States. AH should therefore be dismissed pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.

Even if the Court finds that it has jurisdiction, it should exercise its discretion to abstain from hearing this foreign-centered dispute under 28 U.S.C. § 1334(c)(1) or on the grounds of *forum non conveniens*. Abstention is appropriate because the parties to this noncore proceeding do not

consent to the bankruptcy court's orders or judgments, and have demanded a jury trial, and the tort claims are not governed by bankruptcy laws. This Court has previously abstained in the interest of comity and judicial efficiency under very similar circumstances. Dismissal on *forum non conveniens* grounds is appropriate because the action does not involve parties from the United States, does not pertain to events or property in the United States, will almost certainly be governed by foreign law, and involves witnesses and evidence located entirely outside of the United States, much of it in a foreign language. France has a far superior interest in adjudicating claims made by a Canadian company against a French company over alleged conduct that, if it occurred at all, happened in France.[1]

STATEMENT OF FACTS

ECN is an Ontario corporation headquartered in Toronto, Canada. [Complaint, ¶ 5.] AH is a French company organized and existing under the laws of France. [Declaration of Michel Gouraud, ¶ 3. (Appx. Ex. A, at 2)] AH designs, obtains certification of, manufactures, sells and supports certain Airbus Helicopters model helicopters in France, including the Super Puma, and it maintains a website and produces marketing materials for the helicopters it distributes in France. [*Id*. (Appx. Ex. A, at 2-3)] AH does not sell helicopters through its website. [*Id.* at ¶ 4 (Appx. Ex. A, at 3).] AH conducts aircraft certification and technical activities, including accident investigation, from France. [*Id.* at ¶ 3 (Appx. Ex. A, at 3).] AH has never temporarily moved its

[1] AH has also filed a motion to withdraw the reference as it relates to this adversary proceeding. AH agrees with ECN that this proceeding is non-core, and AH does not consent to the entry of final orders or judgments by the Bankruptcy Court in, nor in matters connected with, this adversary proceeding. Further, AH's motion to dismiss is brought without prejudice to the right to later supplement it with additional information and without waiver of any rights, privileges, or defenses including, but not limited to the arbitrability of ECN's claims.

primary offices or these business operations to the United States. [*Id.* at ¶ 5 (Appx. Ex. A, at 3).] AH has no real property, offices, phone numbers, bank accounts, or employees who are permanently assigned in the United States. [*Id*.] AH is not licensed to do business in the United States and does not transact its business in the United States. [*Id.*] AH does not sell Super Puma helicopters in the United States. [*Id.* at ¶ 9 (Appx. Ex. A, at 3).] Two Airbus affiliated entities are located in the United States – Airbus Group, Inc. ("AGI"), headquartered in Virginia, and Airbus Helicopters, Inc. ("AHI"), headquartered in Texas. [*Id.* at ¶¶ 11-12 (Appx. Ex. A, at 4).] However, both are separate and independent companies from AH, are not owned by AH, and have their own separate management, facilities, bank accounts, employees and internal operational control. [*Id.* (Appx. Ex. A, at 4).]

AH designed and manufactured the following Super Puma helicopters in France: AS332 L2, Serial No. 2467, U.K. Reg. No. G-PUMO; AS332 L2, Serial No. 2474, Norway Reg. No. LN-OHE; AS332 L2, Serial No. 2477, U.K. Reg. No. G-PUMM; AS332 L2, Serial No. 2504, U.K. Reg. No. G-PUMS; EC225 LP, Serial No. 2878, U.K. Reg. No. G-OAGA. [*Id.* at ¶ 6 (Appx. Ex. A, at 3).] AH sold and delivered the first four of these helicopters (Serial Nos. 2467, 2474, 2477 and 2504) in France to CHC Scotia Limited of Great Yarmouth in Norfolk, Great Britain. [*Id.* at ¶ 7 (Appx. Ex. A, at 3).] Helicopter Serial No. 2878 was sold and delivered by AH in France to CHC Leasing (Ireland) Limited, of Dublin, Ireland. [*Id*.] AH's standard sale agreements are governed under French law, and mandate as a first step an attempt to resolve any dispute by negotiation lasting no less than three months. [AH Obj. to ECN Mot. for 2004 Examination of Debtors, Case No. 16-31854-bjh11, ¶ 11 (ECF No. 862).] If that requirement is satisfied and the dispute is not yet resolved, disputes must be resolved pursuant to binding arbitration in Paris,

France, conducted in accordance with International Chamber of Commerce ("ICC") international arbitration rules. [*Id*.]

ECN alleges that it purchased these five helicopters from a company called CHC Helicopters (Barbados) Limited ("CHCB"), and then leased them back to CHCB, which is a debtor in the CHC Group bankruptcy cases. [Complaint, ¶ 34.] Debtors report the physical location of the helicopters in Canada, Poland and Scotland. [May 5, 2016 Omnibus Mot., Case No. 16-31854, at Schedule 1 – Page 6-7 (ECF No. 20); May 27, 2016 Omnibus Mot., Case No. 16-31854, Schedule 1 – Page 24 (ECF No. 210).] As part of its efforts to reduce its fleet by as much as 90 helicopters by rejecting leases, including other manufacturer's helicopters such as Sikorsky and Augusta Westland, Debtors rejected their leases for ECN's five Super Pumas. [Oct. 28, 2016 Omnibus Mot., Case No. 16-31854, ¶ 12 and generally Schedule 1 (ECF No. 1090).] Debtors explained the reason for the lease rejections:

> As part of their ongoing efforts to reduce costs and maximize fleet flexibility, the Debtors have identified Excess Equipment that no longer fits into the Debtors' business plan and, accordingly, will no longer be utilized by the Debtors and have no utility or value to the Debtors. The Debtors entered into the Leases and related agreements in a different economic climate than the one facing the Debtors' industry today. Today, with the ongoing downturn in the Debtors' industry, these same helicopters are no longer necessary to the Debtors' operations.

[May 5, 2016 Omnibus Mot., Case No. 16-31854, ¶ 40 (ECF No. 20); May 27, 2016 Omnibus Mot., Case No. 16-31854, ¶ 41 (ECF No. 210).] At a May 6, 2016 hearing in the Bankruptcy Court, the CHC Debtors further explained:

> A few important points about CHC: Its principal business is to provide those helicopter services for large, long-distance, crew changes on offshore production facilities and drilling rigs for major national and international oil and gas companies. Although CHC manages its operations in Irving, Texas, it operates a global business across six continents. As a result, CHC's business is closely tied to the state of the oil and gas industries.

> The rapid and unexpected decline in oil prices that the industry has had in the past couple years has led to a significant decline in offshore oil exploration, cost reduction measures for production, operation, and there's been a substantial decrease in the demand for those offshore drilling services. As a result, the demand for helicopter services has declined.

[Transcript of May 6, 2016 Hearing, Case No. 16-31854, 17:5-19 (ECF No. 1435-19).]

On April 29, 2016 a Super Puma helicopter operated by a CHC-related entity crashed in Norway killing all on board. [Complaint, ¶ 14.] The cause of that accident is under investigation by the Civil Aviation Authority of Norway (the "CAAN") and the Accident Investigation Board of Norway ("AIBN"). [*Id.* at ¶¶ 17-18.] AH has provided technical support to investigative and certification authorities from its place of business in France. [Gouraud Decl., ¶ 3 (Appx. Ex. A, at 3).] Following the lead of the European Aviation Safety Agency ("EASA"), civil aviation authorities in various parts of the world issued temporary flight restrictions following the accident while its cause is investigated. [Complaint, ¶ 17.] EASA has since lifted the flight ban, subject to certain maintenance requirements. [*Id.* at ¶ 24.]

On November 17, 2016, citing the Norway accident and grounding as evidence of a defect, ECN filed this adversary proceeding asserting negligence, strict products liability, breach of implied warranty of merchantability, negligent misrepresentation and fraud causes of action against AH seeking economic loss. [*Id.* at ¶¶ 42, 44, 46-111.] ECN's Complaint states that it is a non-core proceeding, that ECN does not consent to the entry of final orders or judgment by this Court, and that ECN demands a jury trial. [*Id.* at ¶ 13, p. 31.]

ARGUMENT

I. The Court Lacks Subject Matter Jurisdiction over this Action

This action between two foreign corporations lacks diversity of citizenship jurisdiction, and does not involve a claim arising under federal law. 28 U.S.C. §§ 1331, 1332(a). ECN concedes that it is a non-core proceeding that does not arise under title 11. [Complaint, ¶¶ 8, 13.] ECN asserts that federal jurisdiction exists under 28 U.S.C. § 1334(b) because it is "related to" the bankruptcy and because the Court can exercise its supplemental jurisdiction. [*Id.* at ¶¶ 8-10.] Neither basis for federal jurisdiction exists.

A matter is related to bankruptcy when "the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy." *Matter of Walker*, 51 F.3d 562, 569 (5th Cir. 1995) (internal citations omitted). A proceeding could conceivably affect the estate "if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.' Conversely, 'bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor.'" *Id.* at 569 (internal citations omitted).

While it may be broad, "related to" jurisdiction "cannot be limitless." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984); *In re TMT Procurement Corp.*, 764 F.3d 512, 526 (5th Cir. 2014). Bankruptcy jurisdiction does not extend, for example, to actions based on state law between non-debtors over non-estate property because it would not have any effect on the bankruptcy. *In re TMT Procurement Corp.*, 764 F.3d at 526. The Fifth Circuit has explained:

> We note that a bankruptcy court does have jurisdiction to resolve a dispute between third parties 'if it is impossible to administer completely the estate of the bankrupt without determining the controversy.' Even if resolution of the

> controversy might have a 'chilling effect' on the financing of the arrangement plan, or might reduce claims against the debtor's estate, exercising jurisdiction over a collateral controversy is improper where it is 'possible' to administer the estate without resolving the controversy.

Matter of Paso Del Norte Oil Co., 755 F.2d 421, 425 (5th Cir. 1985) (internal citations omitted).

Moreover, "[b]ankruptcy courts do not ordinarily have jurisdiction over disputes between non-debtors where the dispute does not involve property of the estate, does not affect the administration of the estate and the resolution of the inter-creditor dispute will not affect the recovery of creditors under a confirmed plan." *Harbour Oaks Dev. Corp. v. Southtrust Bank, N.A.*, 224 B.R. 228, 230 (Bankr. M.D. Fla. 1998) (citations omitted). Further, "'[a] bankruptcy court only has jurisdiction over property owned by or in the actual or constructive possession of the debtor.'" *Herd v. Herd*, Case Nos. 06-10851, 06-1128, 2007 Bankr. LEXIS 2958, *14 (U.S. Bankr. E.D. Tenn. Aug. 28, 2007) (quoting *Weng v. Farb (In re K & L Ltd)*, 741 F.2d 1023 (7th Cir. 1984)). "When property is no longer part of a bankruptcy estate and when the determination of rights thereto would not affect any dispute by creditors over property that was part of the estate, the bankruptcy court lacks jurisdiction to determine the rights to the property." *Id.* (citing *Matter of Edwards*, 962 F.2d 641, 643 (7th Cir. 1992)).

ECN's action does not involve claims against the CHC Debtors and does not involve their estates' property. The helicopters are owned by ECN, and the leases have already been rejected by the CHC Debtors. Whether ECN can recover from AH for its own, separate alleged economic loss caused by the groundings will have no effect on the Debtors' estates. The sources of damages to ECN in the proceedings are completely separate – rejected leases (bankruptcy) versus the grounding (adversary). Moreover, to the extent ECN recovers damages from AH in this lawsuit,

that money would go to ECN, not the CHC Debtors. Courts decline to find "related to" jurisdiction in such circumstances:

> Likewise, if Yashiro succeeds against the Non-Debtor Defendants on its breach of contract and fraud claims, its recovery will not effect debtor's estate because it will be payable to Yashiro, and Yashiro does not allege or demonstrate otherwise. Non-Debtor Defendants are correct that because Yashiro's claims against them will not impact Falchi's estate, they are not "related to" his chapter 11 case and must be dismissed pursuant to Rule 12(b)(1).

Yashiro Co. v. Falchi (In re Falchi), Case Nos. 97 B 43080, 97-9057A, 1998 Bankr. LEXIS 622, *17-20 (U.S. Bankr. S.D.N.Y. May 26, 1998) (citations omitted); *Singer v. Adamson*, 334 B.R. 1, 11 (Bankr. D. Mass. 2005) ("if Singer were to prevail on her claims against the non-debtor defendants, any damages she could recover would not be available for distribution to the Debtor's creditors as they would not be assets of the bankruptcy estate").

ECN's assertion that the Court may exercise supplemental jurisdiction contravenes clear Fifth Circuit law. *Matter of Walker*, 51 F.3d at 573; *Matter of Bass*, 171 F.3d 1016, 1023-24 (5th Cir. 1999) ("we have held that bankruptcy courts cannot exercise supplemental jurisdiction"). This Court lack subject matter jurisdiction over this action.

II. The Court Should Abstain from Hearing this Foreign Dispute

Even if the Court finds jurisdiction, it should exercise its discretion to abstain from hearing this matter. Title 28 U.S.C. § 1334(c)(1) states: "nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or relating to a case under title 11." While this statute speaks in terms of the states, the Fifth Circuit has explained that it applies to foreign tribunals. *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 833 (5th Cir. 1993); *see also In re Regus Bus. Ctr. Corp.*, 301 B.R. 122, 127-29 (Bankr. S.D.N.Y. 2003)

(bankruptcy court abstained from hearing dispute between two English corporations over a transaction that negotiated in England and governed by English law).

This Court abstained from hearing claims asserted in an adversary proceeding against a non-debtor defendant under very similar circumstances. *See Kimpel v. Meyrowitz*, Nos. 06-31660-BJH-11, 10-03227, 2010 Bankr. LEXIS 4853, at *18-23 (U.S. Bankr. N.D. Tex. Dec, 20, 2010) (Houser, J.). The Court abstained for multiple reasons, including: abstention would have no effect on the efficient administration of the bankruptcy and would not affect the adversary proceeding's parties' rights in the bankruptcy; the Complaint raised purely state law claims; there was no federal jurisdiction other than "related-to" bankruptcy jurisdiction; the claims had little to do with the bankruptcy; the claims were non-core; it was feasible for the claims to proceed in a non-bankruptcy court; a jury trial was demanded; one party did not consent to the Court's entry of final judgment; and the Court knew nothing more about the claims other than what was alleged in the Complaint, which any other judge could learn. *Id.*

"It is a burden on this Court's docket to litigate state law claims against non-debtor defendants," the Court explained, "when the outcome of that litigation will have such little effect on the bankruptcy estate, causing this factor to weigh in favor of abstention." *Id.* at *21-22. Further, "resources are better spent hearing live disputes in (i) [the Court's] active bankruptcy cases, and (ii) 'related to' proceedings that have a more substantial impact upon an active bankruptcy estate. If [the adversary proceeding plaintiffs] believe that they have legitimate claims against the non-debtor defendants, they can sue them in whatever other forum they believe is appropriate and credit their claim here with any recoveries received in that other forum." *Id.* at *23.

ECN's action presents many of the same reasons for abstention that compelled this Court to abstain in *Kimpel*. It is a dispute between non-debtors that will have no effect on the efficient administration of the CHC Debtors' bankruptcy cases. There is no possible basis for federal jurisdiction other than "related-to" bankruptcy jurisdiction. This matter involves complex aviation product liability claims that are highly technical and can take years to prepare for trial, with discovery taking place in at least two foreign countries, and could take several weeks to try to a jury. It does not involve rights arising under bankruptcy or federal law, is non-core, and involves parties who demand a jury trial and do not consent to this Court's entry of orders or final judgment. There is no reason for this Court to expend its resources on this matter having no United States connection when a French forum has a far greater interest in adjudicating claims of alleged misconduct by a French company that will likely be governed by French law.

Other judges in this district have abstained under similar circumstances. *See, e.g., Efurd v. Baylor Health Care Sys.*, No. 3:14-cv-556, 2015 U.S. Dist. LEXIS 179080, at *10 (N.D. Tex. March 25, 2015) (abstaining from hearing non-core action based solely on state law medical malpractice claims where there was no independent basis for jurisdiction other than "related to" jurisdiction); *Barbee v. Colonial Healthcare Ctr., Inc.*, No. 3:03-cv-1658-N, 2004 U.S. Dist. LEXIS 4868, at *8-9 (N.D. Tex. March 22, 2004) (affirming bankruptcy court's permissive abstention of cross-claim between two non-debtors where there was no federal jurisdiction absent the bankruptcy case, and the action involved state law matters, resolution of the matter would not affect the bankruptcy and would be better accomplished in alternative forum); *P.O'B. Apollo Tacoma, L.P. v. TJX Cos.*, No. 3:02-cv-0222-H, 2002 U.S. Dist. LEXIS 18702, at *2-5 (N.D. Tex. Oct. 3, 2002) (abstaining from hearing non-core proceeding where remand of claims between non-

debtors would have little or no effect on the efficient administration of the estate of the debtor, the matter involved purely state law).

III. The Court Lacks Personal Jurisdiction over AH

Even if the Court has subject matter jurisdiction, it should dismiss AH because ECN cannot meet its burden of establishing personal jurisdiction over AH. *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 270 (5th Cir. 2006) (plaintiff bears the burden on personal jurisdiction). When subject matter jurisdiction is premised on bankruptcy jurisdiction, the relevant inquiry for personal jurisdiction, under the nationwide contacts standard of Fed. R. Bankr. P. 7004(f) in cases involving a foreign defendant, is whether the defendant has constitutionally-sufficient minimum contacts with the United States. *Searcy v. Knight*, 2009 Bankr. LEXIS 5586, at *18-22 (U.S. Bankr. W.D. La. Dec. 22, 2009).

A court may exercise either general or specific jurisdiction. *Id.* at *21. For general jurisdiction, the defendant's contacts with the United States must be so continuous and systematic as to render it "at home" in the United States. *Daimler AG v. Bauman*, 134 S. Ct. 746, 761 (2014); *Patterson v. Aker Solutions Incorporated*, 826 F.3d 231, 234 (5th Cir. 2016). For specific jurisdiction, the plaintiff's causes of action must arise out of or result from the defendant's purposeful contacts with the United States. *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432-33 (5th Cir. 2014).

ECN asserts that AH is subject to personal jurisdiction because it has appeared as a creditor in the bankruptcy proceeding, because AH has placed Super Puma helicopters into the stream of commerce knowing that they might be operated or owned by entities in Texas, and because an affiliated company, AHI, has sold Super Puma helicopters with contracts calling for jurisdiction

in Texas. [Complaint, ¶ 11.] None of these allegations, if true, would establish personal jurisdiction over AH.

A. AH Did Not Consent to Personal Jurisdiction

ECN asserts personal jurisdiction exists over AH because it filed proofs of claim and briefing in the bankruptcy proceeding and participated in related meetings. Courts recognize that by filing a proof of claim a creditor may submit itself to personal jurisdiction for counterclaims asserted by the debtor. *See, e.g., In re Schwinn Bicycle Co.*, 182 B.R. 526, 530–31 (U.S. Bankr. N.D. Ill. 1995); *see also In re Sun W. Distributors, Inc.*, 69 B.R. 861, 864 (U.S. Bankr. S.D. Cal. 1987). This principal does not extend to unrelated claims by co-creditors. If filing a proof of claim in the jurisdiction selected by a debtor meant that a creditor submitted to the bankruptcy court's jurisdiction for any claims by co-creditors, then every time a foreign creditor like AH protected its rights in a United States bankruptcy proceeding, said defendant would be subjecting itself to the general jurisdiction of United States courts. This result would violate a fundamental tenet of personal jurisdiction law – that jurisdiction must be based on the *defendant's* purposeful contacts with the forum, not third party actions. *Pervasive Software, Inc. v. Lexware GMBH & Co. KG*, 688 F.3d 214, 220 (5th Cir. 2012); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75 (1985) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.")).

B. The Court Lacks General Jurisdiction Because AH is not "At Home" in the US

In *Daimler*, the Supreme Court explained that the general jurisdiction inquiry "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State.'" 134 S. Ct. at 761 (quoting

Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)). Only in an "exceptional case," will a corporation be deemed "at home" in a place other than its principal place of business or place of incorporation. *Id.* at 761 n.19. The Court cited to *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952) as an example of such an exceptional case where the Court found general jurisdiction over a Philippines company whose president had temporarily moved the company's headquarters to Ohio during the Second World War, from where the president conducted the company's day-to-day business activities. *Id.* at 756 n.8. The Fifth Circuit recognizes that after *Daimler* it is "incredibly difficult to establish general jurisdiction in a forum other than the place of incorporation or principal place of business." *Monkton*, 768 F.3d at 432.

AH's place of incorporation and principal place of business are in France. [Complaint, ¶ 6; *see also* Gouraud Decl., ¶ 3 (Appx. Ex. A, at 2).] ECN does not allege any facts showing this to be an "exceptional case," as in *Perkins*, and AH has never temporarily moved its operations to the United States [Gouraud Decl., ¶ 5 (Appx. Ex. A, at 3).] That two separate and independent Airbus affiliated companies (AGI and AHI) are located in the United States does not support the exercise of general jurisdiction over AH. *Daimler*, 134 S. Ct. at 759-62 (no general jurisdiction over a German manufacturer whose exclusive United States distributor was "at home" in the forum); *see also Patterson*, 826 F.3d at 234-37 (no general jurisdiction over Norwegian company that had an American affiliate in Houston, and had agreements to assign employees to the affiliate). Moreover, AH structures its transactions by conducting them in France and selling helicopters with contracts governed by French arbitration forum clauses and French law provisions specifically to avoid being subject to the general jurisdiction of courts outside of France. *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370, 375-76 (5th Cir. 1987) ("But Beech exercised its right to

structure its affairs in a manner calculated to shield it from the general jurisdiction of the courts of other states such as Texas, carefully requiring the negotiation, completion, and performance of all contracts in Kansas. Beech has not afforded itself the benefits and protections of the laws of Texas, but instead has calculatedly avoided them.").

C. The Court Lacks Specific Jurisdiction Over AH for ECN's Claims

1. AH Has No United States Contacts Related to ECN's Causes of Action

Specific jurisdiction "focuses on the relationship among the defendant, the forum, and the litigation." *Monkton,* 768 F.3d at 432–33 (quoting *Walden v. Fiore,* 134 S.Ct. 1115, 1121 (2014)). "For a [forum] to exercise jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the [forum]." *Id*. at 433; *Pervasive Software,* 688 F.3d at 220 ("Specific jurisdiction . . . depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.") (internal quotation omitted).

To establish specific jurisdiction, ECN must show that AH "purposely directed its activities toward the [United States] or purposefully availed itself of the privileges of conducting activities [here]" and that each of its causes of action "arises out of or results from the [AH's] forum-related contacts." *Monkton,* 768 at 433 (quoting *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 271 (5th Cir. 2006)). AH has not purposefully directed activity or purposefully availed itself of the United States in any way related to ECN's claims.

ECN's design and manufacturing defect claims arise out of AH's actions in France. *See Sulak v. American Eurocopter Corp.*, 901 F. Supp. 2d 834, 837, 844 (N.D. Tex. 2012) (finding for choice of law purposes that AH designed the helicopter at issue in France and that "any defects in the helicopter would have occurred where it was designed and manufactured: France.") (citing

Perez v. Lockheed Corp. (In re Air Disaster at Ramstein Air Base, Ger.), 81 F.3d 570, 577 (5th Cir. 1996) (holding strict-liability place of conduct is where product was designed, manufactured, and entered the commerce stream)). ECN's failure to warn claim arises where the helicopters are operated, which is not the United States. *Id.* Further, the Super Puma accidents that ECN alleges are proof of the defect took place outside of the United States and were investigated by foreign authorities with assistance from AH in France. To the extent ECN can assert a warranty claim as a subsequent purchaser of used goods, it would be for a breach of a warranty that allegedly occurred when the helicopters left AH's possession as part of their original sale in France. *See, e.g., Shows v. Man Engines & Components, Inc.*, 364 S.W.3d 348, 354 (Tex. App. 2012).[2]

ECN's claims for negligent misrepresentation and fraud also arise from alleged conduct by AH that would not have occurred in the United States. Maintaining a passive website in France does not subject AH to personal jurisdiction in the United States. *McFadin v. Gerber*, 587 F.3d 753, 762 (5th Cir. 2009); *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 336-37 (5th Cir. 1999). Moreover, even if ECN had shown that AH made a false statement in the United States, ECN is located in Canada, and none of the relevant transactions occurred in or involved parties from the United States. *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 869-70 (5th Cir. 2001) (affirming district court's finding of no specific jurisdiction when plaintiff made only conclusory jurisdictional allegations that were unrelated to defendant's claims); *cf. Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999) (contrasting exercise of personal jurisdiction over defendant where the actual content of the communication with the forum gives rise to the tort from cases where it did not); *Fairchild v. Barot*, 946 F. Supp.2d 573, 578-79 (N.D.

[2] AH cites Texas law for illustrative purposes only and does not contend or otherwise concede that Texas law applies to ECN's claims.

Tex. 2013) (applying Fifth Circuit's approach in *Wien* to find specific jurisdiction because communications to the forum formed the basis of the claim).

2. Stream of Commerce Jurisdiction Over AH Does Not Exist

Stream of commerce jurisdiction may exist if a nonresident defendant "delivered the product into the stream of commerce with the expectation that it *would be purchased by or used by consumers in the forum state*." *Ainsworth v. Moffett Eng'g, Ltd.*, 716 F.3d 174, 177 (5th Cir. 2013) (emphasis added). ECN does not allege that the helicopters were owned, operated or caused an injury in the United States, as they are registered and located abroad.

ECN asserts that AHI in Texas has sold other Super Puma helicopters manufactured by AH. Even if ECN had alleged that these helicopters are located in the United States, the United States Supreme Court and the Fifth Circuit have rejected stream of commerce jurisdiction when the claim is not related to the actual product in the forum. *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 564 U.S. 915, 927, 930 n.6 (2011) (no jurisdiction over French tire manufacturing defendant in North Carolina for injuries caused by a defective tire located in France where other tires manufactured by the defendant were found in North Carolina – "even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."); *cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (where "the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise *has there been the source of injury to its owner or to others*") (emphasis added)); *Alpine View Co. Ltd. v. Atlas Copco AB*, 205 F.3d 208, 216 (5th Cir. 2000) (no specific jurisdiction over a Swedish corporation whose products entered the forum when the alleged harm in the forum did not stem

from the corporation's delivery of products into the stream of commerce); *Bearry*, 818 F.2d 370 at 375 ("We disagree with the district court's conclusion that the 'stream of commerce' will support a finding of general jurisdiction. In specific jurisdiction cases, the defendant may have, at a minimum, one contact with the forum state – *the product or conduct that caused injury there*.") (emphasis added).

3. The Exercise of Jurisdiction Would Offend Traditional Notions of Fair Play and Substantial Justice

If this Court finds that ECN's claims arise from purposeful contacts by AH in the United States, it should still decline to exercise jurisdiction because doing so would be unreasonable and unfair to AH. *Seiferth*, 472 F.3d at 276. To make this determination, the Court should evaluate:

> (1) the burden on the nonresident defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in the most efficient resolution of controversies; and (5) the shared interests of the several states in furthering fundamental social policies.

Id. All of these factors weigh heavily against the exercise of personal jurisdiction over AH in this case. As discussed, the United States has no interest in hearing a dispute between a Canadian company and a French company regarding helicopters that were designed, manufactured and sold in France, were not owned or operated in the United States, and did not cause an injury in the United States. ECN's interest in efficient relief may be met using dispute resolution procedures available in France, where AH and its documents and witnesses are located, which can efficiently apply French law, and which have a great interest in resolving ECN's claim that a French company designed, manufactured and sold a defective product and made false statements about the product on French soil. Under these circumstances, it would be unfair to force AH to defend against these claims in a court in Texas, where its witnesses would be forced to testify in a second language,

when AH has done nothing in or directed at Texas, or the United States, related to the helicopters, ECN's claims or its alleged damages.

IV. This Action Should Be Dismissed Pursuant to the Doctrine of *Forum Non Conveniens*

The doctrine of *forum non conveniens* allows a court to decline jurisdiction if after weighing private and public interest factors it decides that the case should be heard in an alternative forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); *Moreno v. LG Elecs., USA Inc*., 800 F.3d 692, 699 (5th Cir. 2015). "The essence of the *forum non conveniens* doctrine is that a court may decline jurisdiction and may actually dismiss a case, even when the case is properly before the court, if the case more conveniently could be tried in another forum." *In re Volkswagen of Am., Inc*., 545 F.3d 304, 313 (5th Cir. 2008). An adversary proceeding may be dismissed on *forum non conveniens* grounds. *Baumgart,* 981 F.2d at 834 (bankruptcy code venue provisions do not abrogate the doctrine of *forum non conveniens* in the context of foreign transfers); *Bancredit Cayman Ltd. v. Santana,* Nos. 06-11026, 08-1147, 2008 Bankr. LEXIS 3544, at *24-28 (U.S. Bankr. S.D.N.Y. Nov. 25, 2008).

A. France is an Available, Alternative Forum That Offers an Adequate Remedy

France is alternate forum is because AH is amenable to process there and its tribunals offers some remedy. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22 (1981); *Moreno*, 800 F.3d at 699. Federal courts in the United States recognize that the French legal system provides an adequate alternative forum. *E.g.*, *Reyno,* 454 U.S. at 252 n.18 ("[r]ules roughly equivalent to American strict liability are effective in France").[3]

[3] *See also of* ("the Court concludes that France is an adequate, alternative forum" for claims involving French airline and French aircraft manufacturer over foreign aircraft accident) (citing *Dattner v. Conagra Foods, Inc.*, 91 Fed. Appx. 179, **2 (2d Cir. 2004) (affirming district court dismissal on *forum non conveniens* grounds following conclusion that France was an adequate

(Footnote continued on next page)

B. The Public and Private Interest Factors Weigh Heavily in Favor of Dismissal

1. The Private Interest Factors

The private-interest factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Gilbert*, 330 U.S. at 508; *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 766-67 (5th Cir. 2016).

The evidence relevant to ECN's claims against AH is located in France, including documents and witnesses related to: the design, manufacture, certification of and sale of the helicopters; statements made on AH's website or in its marketing materials; AH's involvement with investigation of the Norway accident and related Super Puma technical issues. [Gouraud Decl., ¶ 3 (Appx. Ex. A, at 2-3).] What little is not in France is likely elsewhere in Europe (where European authorities are investigating the Norway accident) or in Canada where ECN is located; none of it would be in the United States. *See supra* at 2-5. The cost and burden of bringing evidence and witnesses from Europe to Texas for a matter having no connection with Texas or the United States weigh heavily in favor of dismissal. *See, e.g., Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1381 (5th Cir. 1988) ("Compulsory process for Brazilian witnesses is unavailable in a Texas forum. The cost of bringing Brazilian witnesses to Houston is very high. All the information regarding the Plaintiff's damages is in Brazil. The rig was and still is in

alternative forum); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 606-07 (10th Cir. 1998) (France is an adequate forum)); *Mediterranean Golf, Inc. v. Hirsh*, 783 F. Supp. 835, 841, 841 n.6 (D.N.J. 1991) (observing that "French law does permit recovery for claims based in fraud, breach of fiduciary duty and breach of contract," and has "a very broad statutory basis for tort liability.").

Brazil. The local interest of Brazil in determining a case involving the death of one of its citizens is great; Texas courts have no comparable interest in the case."); *Automated Marine Propulsion Sys. v. Aalborg Ciserv Int'l A/S*, 859 F. Supp. 263, 268 (S.D. Tex. 1994) ("The only evidence before the Court indicates that almost all of the activities forming the basis of this lawsuit occurred in Sweden and other European countries . . . Obviously, therefore, access to these sources of proof will be much less burdensome in Sweden than in Galveston.").

Moreover, third party witnesses and documents located in Europe related to the Norway accident and groundings are outside the compulsory subpoena power of this Court. Likewise, third party witnesses and documents related to ownership, operation, and maintenance of the helicopters are presumably located in Poland, Scotland, and Canada. *See supra* at 4. Even if discovery from such witnesses could be obtained under this Court's auspices, such witnesses still could not be compelled to attend trial in Texas, depriving the jury the opportunity to assess their demeanor and veracity. *See, e.g., Gilbert*., 330 U.S. at 511 ("to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants"); *Seguros Comercial Americas, S.A. de C. V. v. American Pres. Lines*, 933 F. Supp. 1301, 1312 (S.D. Tex. 1996) ("conducting a substantial portion of a trial on deposition testimony. . . precludes the trier of fact from the important function of evaluating the credibility of witnesses"). A French court would face none of these problems. *See In re Air Crash over the Mid-Atlantic*, 760 F. Supp. 2d at 844 n.8 (finding in lawsuit against French defendants from foreign aircraft accident that "France is also the location of significant amounts of relevant damages evidence, and it will likely be easier in France to obtain damages evidence from the other Europeans in these lawsuits.") (citing European Council Regulation 1206/2001; *Magnin v. Teledyne Cont. Motors*, 91 F.3d 1424, 1429-30 (11th Cir. 1996)

("Witnesses such as the crash investigators, eyewitnesses to the crash, the owner of the aircraft, those who maintained it, and the damage witnesses, are all in France.")). At best, these third-party witnesses and documents would only be available in the United States, if at all, through reliance on the Hague Convention or letters rogatory, but the need to rely on these "incredibly burdensome" processes supports dismissal. *Vivendi S.A. v. T-Mobile USA, Inc.*, No. C06-1524, 2008 WL 2345283, at *3 (W.D. Wash. June 5, 2008), *aff'd* 586 F.3d 689 (9th Cir. 2009).

The United States Supreme Court has stated, and the Fifth Circuit agrees, that a *forum non conveniens* "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981); *Moreno v. LG Elecs., USA Inc.*, 800 F.3d 692, 699 (5th Cir. 2015). In terms of "practical problems that make trial of a case easy, expeditious and inexpensive," *Gilbert*, 330 U.S. at 508, this forum selected by ECN is very inconvenient for AH and the Court. In this case, convenience could not have been a reason supporting ECN's choice of a Texas forum. Moreover, the Supreme Court and Fifth Circuit agree that, as a foreign plaintiff, ECN's choice of forum is subject to less deference than would a resident plaintiff. *Reyno*, 454 U.S. at 255-56; *Moreno*, 800 F.3d at 699. [4]

[4] Addressing U.S. companies with international operations, the Fifth Circuit has instructed that "'parties who choose to engage in international transactions should know that when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.'" *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 795 (5th Cir. 2007) (per curiam) (quoting *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd.*, 918 F.2d 1446, 1450 (9th Cir. 1990)). This injunction applies with even greater force where, as here, ECN also is a foreign company that seeks to use U.S. courts to litigate claims arising from a foreign transaction against another foreign company.

2. The Public Interest Factors

The public-interest factors include "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Reyno*, 454 U.S. at 241 n.6 (quoting *Gilbert*, 330 U.S. at 509). "The central question a court must answer when considering the public interest is whether the case has a general nexus with the forum sufficient to justify the forum's commitment of judicial time and resources to it." *Seguros Comercial Americas*, 933 F. Supp. at 1313.

The taxpayers of the United States, this Court, and jurors within this district should not be burdened with this dispute brought by a Canadian company against a French company that relates to the sales of helicopters built and sold in France. *Boonma v. Bredimus*, No. 3:05-cv-0684-D, 2005 U.S. Dist. LEXIS 15587, at *17 (N.D. Tex. July 29, 2005) ("Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. Texas jurors have little connection with the case because the plaintiff is Thai and all the conduct occurred in Thailand.") (quoting *Gulf Oil*, 330 U.S. at 508-09); *Pain v. United Tech. Corp.*, 637 F.2d 775, 792 (D.C. Cir. 1980) (where helicopter that was owned, operated and maintained by a Norwegian corporation crashed in Norwegian waters and the resulting investigation evidence and wreckage were located in Norway, "jury duty for this matter ought not be imposed upon the people of the District of Columbia, nor should local dockets be clogged by appeals in this case.").

France, by contrast, has a strong interest in a claim regarding alleged misconduct committed in France by a French company subject to French and European regulations. *E.g.*,

Jennings v. The Boeing Co., 660 F. Supp. 796, 808 (E.D. Pa. 1987) (dismissing a Scottish helicopter crash case, recognizing that "the English and Scottish governments have an intensely local interest in regulating the sale and operation of aircraft within their territory"); *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1031-1033 (3d Cir. 1980) (finding that Norway's interest in regulating aircraft safety was equal if not superior to the United States' even where the aircraft was manufactured in the United States).

French tribunals are also in a far better position to apply what will most likely be French laws and/or European regulations on the claims against AH. The Fifth Circuit "has not determined whether the independent judgment test or the forum state's choice-of-law rules should be applied in bankruptcy." *MC Asset Recovery LLC v. Commerzbank A.G.*, 675 F.3d 530, 536 (5th Cir. 2012) (citing *Woods—Tucker Leasing Corp. v. Hutcheson—Ingram Dev. Co.*, 642 F.2d 744, 748 (5th Cir. 1981)). Because the most significant relationship test that Texas courts apply to tort claims and the independent judgment test are "essentially synonymous," this Court need not decide which applies in this case. *Id.* (citations and quotations omitted). Under either test, it is clear on the facts discussed herein that the laws of France would apply to these claims against a French manufacturer for conduct that occurred in France, where not a single interest of the United States is involved. *In re Air Crash over the Mid-Atlantic*, 760 F. Supp. 2d at 847 (noting that while "the Court need not definitively determine which law will apply to these actions before dismissing on forum non conveniens grounds . . . the possibility that French law will apply is an additional factor favoring dismissal") (citations omitted); *Simcox v. McDermott Int'l, Inc.*, 152 F.R.D. 689, 697-698 (S.D. Tex. 1994) ("It would be far more practical to try this case in the courts of a country well-versed in the applicable law."); *Villar v. Crowley Maritime Corp.*, 780 F. Supp. 1467, 1485 (S.D. Tex.

1992) ("A Philippine court is better placed to apply Philippine law, and at least as well placed to apply Panamanian and Saudi Arabian law, than is a Texas court.").

The United States Supreme Court and the Fifth Circuit have affirmed many dismissals of product liability lawsuits on *forum non conveniens* grounds when the controversy centers in another country and involves foreign products, foreign plaintiffs and foreign injuries. *See, e.g.*, *Reyno*, 454 U.S. at 257-61 (dismissal of Scottish air crash products liability action brought by foreign plaintiffs where the crash and most of the evidence was located abroad); *Moreno*, 800 F.3d at 699 (dismissal of action by Mexican resident against Mexican defendants over injuries that occurred in Mexico); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672-73 (5th Cir. 2003) (same); *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 382–83 (5th Cir. 2002)(dismissal where victim and plaintiff were Mexican, the accident took place in Mexico, where the car was purchased, and the car was not manufactured in Texas); *Baumgart*, 981 F.2d at 836-37 (dismissal of German air crash products liability case involving foreign plaintiffs – "The airline crash itself and other principal events surrounding the accident took place in Germany, the vast majority of the expected evidence and anticipated witnesses are located in Germany, and Germany is the residence of all plaintiffs and of three potential third-party defendants."); *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 370-76 (5th Cir. 1992) (dismissal of action brought by Argentinian company against Dutch company over boat that sank off Bermuda while en route to the United States). This Court should do the same and dismiss this action on *forum non conveniens* grounds.

CONCLUSION

For the foregoing reasons, Defendant Airbus Helicopters, S.A.S. requests that this Court dismiss ECN's adversary proceeding and award AH all further relief to which it may be entitled.

DEMAND FOR JURY TRIAL

Without waiver of its objection to the Court's personal jurisdiction, the convenience of the forum, or any other rights, privileges, or defenses, including but not limited to the arbitrability of the claims, AH hereby demands a trial by jury on all issues and claims so triable, and does not consent to jury trial before the bankruptcy court.

Dated: January 3, 2017.

Respectfully submitted,

HIERSCHE, HAYWARD, DRAKELEY & URBACH, P.C.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on January 3, 2017, a true and correct copy of the above and foregoing document was filed with the court via CM/ECF and served on all parties requesting electronic notification.

/s/ Jason M. Katz
Jason M. Katz