IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Refugio Cano Pena, Individually and as Representative of the Estate of Patricia Lopez Nares, Deceased and Next Friend of Adrian Cano Lopez, a Minor, and Denise Cano Arenas, Individually, as Next Friend of Nahi Adrianna Arenas, a Minor, and as Heir to the Estate of Patricia Lopez Nares, and Eric Cano, Individually and as an Heir to the Estate of Patricia Lopes Nares,	:	
Plaintiffs	:	
v.	:	C.A. No. 07C-06-059-JRJ
Cooper Tire & Rubber Co., Inc. and Ford Motor Company,	:	
Defendants.	:	

Date Submitted: March 20, 2009
Date Decided: March 31, 2009

Upon Defendants' Joint Motion to Dismiss on the Grounds of Forum Non Conveniens: **DENIED**

Timothy E. Lengkeek, Esquire, Richard A. Zappa, Esquire, and Julian C. Gomez, Esquire attorneys for plaintiffs Refugio Cana Pena, Estate of Patricia Lopez Nares, Adrian Cano Lopez, Denis Cano Arenas, Nahi Adriana Arenas, and Eric Cano.

Christian J. Singewald, Esquire, attorney for defendant Ford Motor Company.

Somers S. Price, Jr., Esquire, attorney for defendants Cooper Tire & Rubber Co., Inc.

Jurden, J.

I. Introduction

This products liability action arises from an accident involving a Ford Aerostar equipped with a Cooper Roadmaster Custom A/S tire ("the Roadmaster"). Plaintiffs allege that as a result of a tire tread separation the Aerostar lost control, rolled over, and caused the death of Patricia Lopez Nares. Defendants jointly move to dismiss this suit based on *forum non conveniens*.

II. The Defendants, the Vehicle and the Tire

Ford Motor Company ("Ford") is a Delaware corporation with its principal place of business in Michigan. Ford designed the Aerostar line in Michigan. Ford manufactured, assembled, and placed the Aerostar into the stream of commerce in Missouri.[1] Ford then sold the Aerostar to a Ford dealership in Iowa. The Aerostar ended up in Texas, where the plaintiff then purchased it.[2]

Cooper Tire & Rubber Co., Inc. ("Cooper") is a Delaware corporation with its principal place of business in Ohio. Cooper designed the Roadmaster line in Ohio. Cooper manufactured and placed the Roadmaster tire into the stream of commerce in Mississippi.[3] The Roadmaster was allegedly on the Aerostar when the plaintiff purchased the vehicle in Texas.[4]

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[1] Defs.' Op. Br. In Support of Jt. Mot. to Dismiss on Grounds of Forum Non Conveniens ("Defs.' Op. Br.") at 3, Docket Item ("D.I.") 47.
[2] *Id*.
[3] *Id*.
[4] *Id*.

III. The Accident

On September 1, 2006, Plaintiff Refugio Cano Pena was driving the Aerostar on southbound highway 45 in the Mexican state of Chihuahua. Plaintiff's decedent, Patricia Lopez Nares, Refugio Cano Pena's wife, was seated in the front passenger seat. Family members and plaintiffs Adrian Cano Lopez, Nahi Adrianna Arenas, and Eric Cano were passengers in the backseat. The Roadmaster was allegedly mounted in the rear passenger side position. According to plaintiffs, Patricia Lopez Nares died as a result of injuries sustained when the Roadmaster suffered a sudden tread separation which caused the Aerostar to roll over.

IV. Discussion

A. Introduction

Application of the doctrine of *forum non conveniens* "presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."[5] Thus, the first step in the *forum non conveniens* analysis is to determine whether there is an available alternative forum in which to hear the case.[6] The determination of *forum non conveniens* must be made at the time plaintiff brings suit.[7] A defendant's offer to appear voluntarily in

[5] *Harry David Zutz Ins. v. H.M.S. Assoc. Ltd*., 360 A.2d 160, 165-66 (Del. 1976); *Cervantes v. Bridgestone/Firestone North American Tire, LLC*, 2009 WL 457918, at *1 (Del. Super. Jan. 29. 2009).
[6] *See In re Bridgestone/Firestone, Inc*., 305 F. Supp.2d 927, 932 (S.D. Ind. 2004).
[7] *Cervantes*, 2009 WL 457918, at *1; *Dietrich v Texas Nat'l. Petroleum Co.*, 193 A.2d 579, 589 (Del. Super. 1963) (holding that the determination of *forum non conveniens* must be made as of the time plaintiff brings suit and there must be a choice of jurisdictions in which to sue).

the supposedly more convenient forum "does not change the situation."[8]

This Court recently held in *Cervantes*[9] that Mexican[10] courts have determined that they are not the proper forum for suits of this kind against non-resident defendants, and denied defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*. The defendants here "respectfully disagree" with *Cervantes*, and argue that "this is a different case involving differently situated Plaintiffs."[11] According to defendants, this case is factually distinguishable from *Cervantes* because (1) the location of the accident here was not fortuitous, and (2) since the filing of defendants' opening brief, "at least two other courts have dismissed similar suits by Mexican plaintiffs against U.S. manufacturers."[12] Plaintiffs argue here, as they did in *Cervantes*, that because defendants are not domiciled in Mexico, "*competencia*"[13] cannot exist and therefore Mexico is not an available forum. According to plaintiffs, "since the requisite alternative forum

[8] *See Parvin v. Kaufmann*, 236 A.2d 425, 427-28 (Del. 1967) (citing *Dietrich*, 193 A.2d at 588-89); *Batista v. Goodyear Dunlop Tires of North America, LLC*, C.A. 2:06-CV-00820-KJD-GWF, at 4 (D. Nev. July 3, 2007).
[9] 2009 WL 457918, at *1; *Cervantes v. Bridgestone/Firestone North American Tire, LLC*, 2008 WL 3522373, at *3 (Del. Super. Aug. 14, 2008).
[10] The Court recognizes that Mexico is a federal republic, comprised of 31 states and one federal district, each of which has its own laws. However, in order "[t]o avoid undue complexity…[the Court will] refer in general to 'Mexico,' 'Mexican law,' and 'Mexican Courts.'" *In re Bridgestone/Firestone, Inc*., 305 F.Supp. 2d at 932 n.3.
[11] Defs.' Reply Br. in Support of Jt. Mot. to Dismiss on the Grounds of Forum Non Conveniens ("Defs.' Reply Br.") at 1, D.I. 67.
[12] *Id*.
[13] Under Mexican law, "*competencia* refers to the power of the Court to assert jurisdiction over both the parties ***and*** the subject matter of the dispute before it." Pls.' Sur-Reply and Br. to Defs.' Jt. Motion to Dismiss on the Grounds of Forum Non Conveniens ("Pls.' Sur-Reply") at 3, Ex. 5, D.I. 75.

does not exist, this Court's decision is simple – deny defendants' motion…."[14]

In *Cervantes*,[15] the Court held the location of the accident was fortuitous because the plaintiff's decedent lived in a different Mexican state than the state in which the accident occurred.[16] In this case, the accident occurred in the plaintiffs' state of residence, Chihuahua, the vehicle at issue was owned by a Chihuahuan resident, and the vehicle was primarily driven in Chihuahua. The Court agrees with defendants that there are factual differences between *Cervantes* and *Pena*. The question is, are those differences germane to the analysis of whether an adequate alternative forum exists? The answer is they are not. As for the two cases decided since defendants filed their opening brief, they, like this case, involve motions to dismiss on grounds of *forum non conveniens* filed by U.S. corporations against Mexican plaintiffs. However, the Courts in those cases did not apply the Delaware *forum non conveniens* standard and did not discuss the *competencia* issue.[17] Those cases do not persuade the Court that Mexico is an available alternate forum.

B. Defendants Must Establish That Mexico is an Available Alternative Forum

Defendants argue, as they did in *Cervantes*, that Mexico is an available forum because they are willing to submit themselves to the jurisdiction of a

[14] Pls.' Resp. to Defs.' Jt. Mot to Dismiss on the Grounds of Forum Non Conveniens ("Pls.' Resp.") at 4, D.I. 61.
[15] 2008 WL 3522373.
[16] *Cervantes*, 2008 WL 3522373, at *1.
[17] *See* Pls. Sur-Reply at 1; Defs.' Reply Br., Exs. 5 & 6.

Mexican court, thus making them amenable to process.[18] Plaintiffs argue that the defendants' consent cannot make Mexico an available forum because availability is determined at the time of filing, "and even if it was not, non-Mexican domiciled defendants cannot confer *competencia* after the accident."[19] The plaintiffs' argument on this point is based on *Detrich v. Texas Nat'l Petroleum Co.*[20] and *Parvin v. Kaufmann*.[21] *Dietrich* and *Parvin* are based upon the language in *Gulf Oil Corp. v. Gilbert*,[22] that the *forum non conveniens* doctrine presupposes at last two forums in which the defendant is amenable to process.[23] Defendants argue that *Gilbert* "has never been interpreted by the U.S. Supreme Court as somehow preventing a defendant faced with a suit in an inconvenient forum to later consent to jurisdiction."[24] In support of this particular argument, defendants point to cases in which Argentina, France, India, the Philippines, and Portugal were deemed available alternative forums when defendants consented to jurisdiction.[25] The defendants, however, do not overcome the express holding in *Dietrich*:

> that defendant's unilateral offer to submit to another jurisdiction…could not govern where defendant was not subject to service of process in such other jurisdiction

[18] Defs.' Reply Br. at 7.
[19] *Id*. at 3-4, Ex. 1, Ex. 2 ¶¶ 6-14; *see Cervantes*, 2009 WL 457918, at *1.
[20] 193 A.2d 579, 588-89 (Del. Super. 1963).
[21] 236 A.2d 425, 427 (Del. 1967).
[22] 330 U.S. 501 (1947).
[23] *Id*. at 506-07.
[24] Defs.' Reply Br. at 8-9.
[25] *See Id*. at 9 n.36.

when plaintiff brought his suit.[26]

Furthermore, Defendants undermine the strength of their own arguments by failing to submit to the Court any automotive products liability cases that a U.S. court dismissed and that a Mexico court accepted.[27]

Defendants next argue that the "sole basis for Plaintiffs' proposition that the court of Chihuahua would not accept Defendants' submission to its jurisdiction is Plaintiffs' expert's, Mr. Bustos, opinion affidavit – entirely void of citation to authority."[28] According to Mr. Bustos, in a personal injury case (called an "extra contractual" case under Mexican law), a U.S. defendant's offer to consent to the jurisdiction of a Mexican Court after an accident does not confer jurisdiction on the Mexican Court.[29] As explained by Mr. Bustos:

> In Mexican Courts, both State and Federal, one Judge must have jurisdiction over all the parties, including the defendant in order to adjudicate a case. If the Judge (State or Federal), does not have jurisdiction over one of the parties, including the defendant, it may not adjudicate a case. Jurisdiction over the defendant is determined based on his domicile. The domicile of a corporate defendant is the place where it conducts the administration of its business. If a defendant has a foreign domicile, as such, by means of a contract, in a contractual case, it can renounce its domicile and be subject to the jurisdiction of a specific court, but only if

[26] 193 A.2d at 589 (citing *Hill v. Mississippi Towing Corp.*, 252 Minn. 165 (1958)); *see also Gilbert*, 330 U.S. at 506.
[27] Pls.' Sur-Reply at 2.
[28] Defs.' Reply Br. at 9.
[29] Pls.' Resp., Ex. 2 at ¶8, Aff. of Lic. Adalberto Chávez Bustos.

> the defendant makes such an expressed renunciation, in writing, in the original sales contract of the product involved. If a defendant accepts subjecting itself to the jurisdiction of the Court, in writing, after the accident, but not in the original sales contract, the renunciation will not grant jurisdiction over the defendant to such Court. In an extra-contractual case, the consent of the defendant to submit to a specific Court, in writing, after an accident as well as in the original sales contract of a product, in itself, does not grant jurisdiction to a Court over a defendant. If the plaintiff and the defendant are not in privity of an agreement, the consent of the defendant to acquiesce in a sales contract of a product to the jurisdiction of the Court, does not grant jurisdiction to a Court over the defendant.

To rebut Mr. Bustos' affidavit, defendants offer an affidavit from their Mexican law expert, Professor Castillo.[30] Professor Castillo opines that plaintiffs would be able to file and pursue their claims against the defendants in a Mexican court "if they took the appropriate steps to establish the territorial competence of the Mexican Court."[31] According to Professor Castilla, the courts of Chihuahua could obtain *competencia* "based on the parties' express or tacit agreement."[32] Relying on this affidavit, defendants argue that if plaintiffs filed this suit in Chihuahua, defendants could (and would) choose not to raise the defense of lack of *competencia* and thus submit themselves to the *competencia* of the Chihuahuan Court. After careful review of all the authorities submitted by the parties on

[30] Defs.' Jt. Mot. to Dismiss on Grounds of Forum Non Conveniens, Ex. 43, Aff. of Gonzalez De Castilla, D.I. 47.
[31] *Id*. at 3.
[32] *Id*.

Mexican law, the Court is not persuaded that defendants can confer *competencia* on the Chihuahuan Court in this manner. According to Mexican Supreme Court Justice Jose Ramón Cossió, "*competencia*" refers to the power of the court to assert jurisdiction over the subject matter and the parties.[33] A Mexican court determines if *competencia* exists based solely on the petition and its attachments.[34] Under Mexican law, a defendant cannot appear until and unless the Court determines it has *competencia*.[35] Thus, defendants' offer to submit to the *competencia* of the Court in Chihuahua is worthless because this lawsuit, against U.S. defendants, will be dismissed without defendants ever having had the opportunity to appear and voluntarily submit to the Court's jurisdiction.[36] This Court concludes, again,[37] that defendants, both U.S. corporations, cannot unilaterally confer *competencia* on a Mexican court.[38]

Buttressing Lic. Bustos' opinion on this point are all the automotive tire products liability cases listed by him in his affidavit which were dismissed by Mexican courts after the cases were dismissed by U.S. courts on grounds of *forum non conveniens* and re-filed in the supposed available alternative forum –

[33] *See* Pls.' Sur-Reply at 3, (citing STEPHEN ZAMORA, JOSÉ RAMÓN COSSIÓ, LEONEL PEREZNIETO, JOSÉ ROLDÁN-XOPA, DAVID LOPEZ, MEXICAN LAW 686 (1st ed. 2005)).
[34] Pls.' Sur-Reply at 3.
[35] *Id*. (citing Dec. of Armando Garcia Estrada, Ex. 4 at 4).
[36] *Id*. (citing Dec. of Armando Garcia Estrada, Ex. 4 at 3 ¶9).
[37] *See Cervantes*, 2009 WL 457918.
[38] Pls.' Sur-Reply at 3, (citing Dec. of Armando Garcia Estrada, Ex. 4 at 5 ¶11).

Mexico.[39] According to plaintiffs' counsel's knowledge, "Mexican courts have dismissed every single automotive products liability case that a US court dismissed for *forum non conveniens* to Mexico and that a plaintiff has refilled [sic] in Mexico."[40] Further, according to plaintiffs, "every single Mexican court has held that what defendants via Professor Castilla ***wish could be done in theory*** **cannot be done in practice**."[41]

Defendants rely on two cases, decided after they filed their opening brief, in support of their argument that Mexico is an available alternative forum.[42] In these cases, decided by the same judge, the California Superior Court granted defendants' motion to dismiss on *forum non conveniens*, having determined that Mexico was an available forum.[43] In *Martinez* and *Jurado-Reyes*, however, the Court did not discuss the *competencia* issue.[44] The Court is not persuaded by *Martinez* or *Jurado-Reyes*. First, in Delaware, "availability" is determined at the time plaintiff files suit.[45] Second, based on the affidavits and legal authority submitted, the Court doubts that defendants' offer to submit to the *competencia* can confer *competencia* on the Mexican court. Third, it appears that Mexican courts

[39] Pls.' Resp., Ex. 2 at ¶10, Aff. of Lic. Adalberto Chávez Bustos.
[40] Pls.' Sur-Reply at 4.
[41] *Id*.
[42] *Martinez v. Ford Motor Co.*, Ca. No. JCCP 4292, slip op. (Cal. Super. Jan. 21, 2009) (Mohr, J.); *Jurado-Reyes v. Ford Motor Co.*, Ca. No. JCCP 4292, slip op. (Cal. Super. Nov. 26, 2008) (Mohr, J.).
[43] *Id*.; *see also* Pls.' Sur-Reply, Exs. 4 & 5.
[44] *Id*.
[45] *Cervantes*, 2009 WL 457918, at *1.

have dismissed every automotive products liability case that a U.S. court has dismissed on *forum non conveniens* to Mexico and plaintiffs have re-filed in Mexico.[46] Based on all this, the Court remains convinced that a Mexican court will not entertain this products liability suit because the defendants are domiciled in the U.S.[47]

C. Analysis of Overwhelming Hardship and Inconvenience

Dismissal of an action based on the doctrine of *forum non conveniens* lies within the sound discretion of the trial court.[48] Under Delaware law, a plaintiff's choice of forum is presumed proper.[49] This Court has noted "a clear preference in favor of a plaintiff's choice of forum, particularly where there are no previously filed actions pending elsewhere."[50] This preference "has been expressed in the form of a 'presumption' that the plaintiff's choice of forum will be respected unless the defendant carries the 'heavy burden' of establishing that Delaware is not an appropriate forum for the controversy."[51] The fact that a plaintiff is not a resident of Delaware does not deprive him of the presumption that his choice of

[46] Pls.' Sur-Reply at 4.
[47] *See Cervantes*, 2009 WL 457918; Pls.' Sur-Reply at 1-4, Exs. 4 & 5.
[48] *Warburg, Pincus Ventures, L.P. v. Schrapper*, 774 A.2d 264, 269 (Del. 2001); *In re Asbestos Litigation*, 929 A.2d 373, 380 (Del. Super. 2006).
[49] *See e.g. Mar-Land Indus. Contractors,Inc. v. Caribbean Petroleum Refining, L.P.*, 777 A.2d 774, 778 (Del. 2001).
[50] *In re Asbestos*, 929 A.2d at 382 (citing *Mar-land Indus. Contractors, Inc.*, 777 A.2d at 778).
[51] *Id*. at 380. *See Ison v. E.I. DuPont de Nemours and Co*., 729 A.2d 832, 835 (Del. 1999) (holding the defendant must show "that this is one of those rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship to the defendant.")

forum should be respected.[52] For defendants to overcome the presumption, they must show with particularity that litigating in Delaware will cause them "overwhelming hardship and inconvenience."[53] It is well established that Delaware Courts assess hardship to the defendant using the following six "*Cryo-Maid*" factors:

> (1) the relative ease of access to proof;
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> (2) the availability of compulsory process for witnesses;
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> (3) the possibility of viewing the premises;
>
> (4) whether the controversy is dependant upon the application of Delaware law, which the courts of this State more properly should decide than those of another;
>
> (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and
>
> (6) all other practical problems that would make the trial of the case easy, expeditious and inexpensive.[54]

"Analysis of the *Cryo-Maid* factors is not quantitative. The Court does not take a

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[52] *See Ison*, 729 A.2d at 835 ("The fact that the plaintiffs are foreign nationals does not deprive them of the presumption that their choice of forum should be respected. Although that presumption is not as strong in the case of a foreign national plaintiff as in the case of a plaintiff who resides in the forum, we need not rest our decision on that issue because of the defendant's weak showing of hardship"); *Fisher v. Government Employees Ins. Co.*, 1999 WL 1427809, at *1 (Del. Super. Dec. 10, 1999); *In re Asbestos Litigation*, 929 A.2d 373, 382 (Del. Super. 2006) ("Plaintiffs in tort cases are entitled to the same respect for their choice of forum as plaintiffs in corporate and commercial cases receive as a matter of course in Delaware.")

[53] *See Ison*, 729 A.2d at 835 (holding that overwhelming hardship is the "central criterion" of Delaware Supreme Court jurisprudence on *forum non conveniens*); *Warburg, Pincus Ventures, L.P.*, 774 A.2d at 267 ("our jurisprudence is clear that a complaint will not be dismissed on the ground of *forum non conveniens* without a showing of overwhelming hardship."); *Mar-Land Indus. Contractors, Inc.*, 777 A.2d at 778.

[54] *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964); *Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 136 (Del. 2005).

tally of the number of factors that favor either part."[55] The factors simply provide the framework for the analysis of hardship and inconvenience.[56] In conducting the analysis, the Court is not permitted to compare the plaintiff's chosen forum, Delaware, with the proposed alternate forum and decide which forum is more appropriate.[57] Such a comparison is irrelevant to the analysis.[58] "Instead, when deciding a motion to dismiss on *forum non conveniens*, the Court must base its determination solely upon 'whether any or all of the *Cryo-Maid* factors establish that defendant will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware.'"[59]

1. Relative Ease of Access to Proof

Defendants claim that because there is no evidence relevant to this action in Delaware, this factor overwhelmingly favors dismissal.[60] Plaintiffs counter by arguing that defendants have failed to "articulate with particularity" what, if any, documentary evidence is not now in the U.S.[61] For example, the vehicle and a "large number of documents from Mexico" are now in Delaware (some are

[55] *In re Asbestos*, 929 A.2d at 381 (citations omitted).
[56] *Id*. (citations omitted).
[57] *Mar-Land Indus. Contractors,Inc.*, 777 A.2d at 779; *In re Asbestos*, 929 A.2d at 381.
[58] *Id*.
[59] *In re Asbestos*, 929 A.2d at 381 (quoting *Taylor v. LSI Logic Corp.*, 689 A.2d 1196, 1199 (Del. 1996)).
[60] Defs.' Op. Br. at 11.
[61] Pls.' Resp. at 8.

attached to defendants' motion to dismiss).[62] Plaintiffs also argue that defendants have not met their burden of establishing that the relevant evidence is unavailable in Delaware,[63] and point out that defendants, their lawyers, and their experts will have to travel to Mexico regardless of whether this case is litigated in Mexico or the U.S.[64] Plaintiffs further argue that the "core liability" evidence is in the U.S., not Mexico, and it will be expensive to transport it to Mexico.[65]

Defendants, have not established with particularity what evidence would be unavailable or inaccessible to them if this case is litigated in Delaware.[66] Instead, they merely offer a list of documents they intend to obtain,[67] and state conclusively that "[p]laintiffs cannot ensure that evidence controlled by non-parties will be available in this state…."[68] Defendants do not indicate what documents on that list have already been produced or obtained. Defendants identify potential witnesses not by name, but by type, and do not indicate which witnesses could not be produced by plaintiffs in Delaware or why testimony of potentially unavailable witnesses could not be presented by deposition.[69] Although some witnesses may

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[62] *Id*.
[63] *Id*.
[64] *Id*. at 9.
[65] *Id*.
[66] *See Mar-Land Indus. Contractors,Inc.*, 777 A.2d at 782; *Warburg, Pincus Ventures, L.P.*, 774 A.2d at 269 ("The trial court held, correctly in our view, that this argument does not support a claim of hardship. Warburg's motion to dismiss does not specify any of the witnesses that are alleged to be beyond its reach and whose absence would adversely affect Warburg's defense.")
[67] Defs.' Op. Br. at 12-13.
[68] *See* Defs.' Op. Br., Ex. 41.
[69] *Id*.

not be subject to subpoena in the U.S., defendants fail to establish that those witnesses would not agree to testify without a subpoena or that it would present an overwhelming hardship to procure their testimony through the Hague Convention procedures.[70]

Although such "circuitous routes to accessing evidence are somewhat cumbersome," and would place most of the burden on defendants, this factor does not present defendants with an overwhelming hardship.[71] Defendants' arguments on this factor ignore the fact that all evidence relevant to plaintiffs' claims of negligent design and manufacture is in the U.S. and not Mexico, and that, regardless of where the case is tried, defendants' lawyers and experts will probably have to travel to Mexico. Because defendants "fail to make a particularized showing that witnesses, documents, or other evidence necessary to defend the allegations contained in…[the] complaint cannot be brought to or otherwise produced in Delaware,"[72] this factor does not weigh in favor of defendants.

2. The Availability of Compulsory Process for Witnesses

Most, if not all, of the damages witnesses are in Mexico. And some of the witnesses with potentially relevant information about the decedent's alleged contributory negligence are also in Mexico. All of the witnesses with relevant

[70] *See Warburg, Pincus Ventures, L.P.*, 744 A.2d at 217 ("Warburg has not demonstrated with particularity that true hardship would result if it is forced to resort to Hague Convention procedures to obtain discovery.")
[71] *See Ison*, 729 A.2d at 843.
[72] *Mar-Land Indus. Contractors,Inc.*, 777 A.2d at 781.

information about the alleged defective design and manufacture of the vehicle and tire are in the U.S., but none are in Delaware. Defendants contend that, if forced to litigate in Delaware, they will have to try their case on deposition testimony because many witnesses are in Mexico and thus beyond the Court's compulsory subpoena power. "To justify dismissal under this factor, Delaware law requires a defendant to identify specifically the witnesses not subject to compulsory process. . . ."[73] Defendants do not specify by name any witnesses that are alleged to be beyond their reach and whose absence would adversely affect their defense. Nor do defendants proffer the specific substance of their testimony.[74] The unavailability of compulsory process from Delaware, under these circumstances, does not support a claim of overwhelming hardship.[75]

3. View of the Premises

The Court is not persuaded that the fact-finder must or will view the accident scene in person. If such a view of the scene is desirable or necessary, it "can be captured photographically or digitally and then be displayed to the Court or the fact-finder as needed."[76] This factor does not predominate in favor of

[73] *See In re Asbestos*, 929 A.2d at 385.
[74] *See Warburg, Pincus Ventures, L.P.*, 774 A.2d at 269; *Fres-Co System USA, Inc*. v *The Coffee Bean Trading-Roasting, LLC*, 2005 WL 1950802 (Del. Super. July 22, 2005) at *3 ("Delaware law requires the defendant to identify the witnesses not subject to compulsory process and the specific substance of their testimony.")
[75] *See Fres-Co System USA, Inc.*, 2005 WL 1950802 at *3; *Ison*, 729 A.2d at 843; *E.I. du Pont Nemoirs & Co. v. Admiral*, 577 A.2d 305, 309 (Del. Super. 1989).
[76] The defendants dispute their liability, claiming plaintiffs' decedent was contributorily negligent. Witnesses with potentially relevant information as to any contributory negligence are located in Mexico.

defendants.[77]

4. Applicability of Delaware Law

The next factor to be considered is whether the controversy is dependant upon the application of Delaware Law which the courts of this state more properly should decide than those of another jurisdiction. This Court has yet to decide which law will apply to plaintiffs' claims in this case.[78] Unlike in *Cervantes*, the place of injury does not appear to be fortuitous. Notwithstanding this, given the claims asserted by plaintiffs, it seems that the U.S. has a significant relationship to the action. And the defendants, both Delaware corporations, conduct extensive business in Delaware. While it is premature for the Court to say whether any of the claims are dependant upon application of Delaware law, it can say that it is possible that U.S. law, rather than Mexican law, will apply at this juncture. Having said this, even if Mexican law applies, this factor will not weigh overwhelmingly in favor of defendants. Delaware courts are "frequently called upon to apply the law of other states in deciding litigation in this state."[79] Indeed, it "is not unusual for courts to wrestle with open questions of the law of…foreign countries," and the "application of foreign law is not sufficient reason to warrant dismissal under the

[77] *See Ison*, 729 A.2d at 843.
[78] The Court ruled in *Cervantes*, 2008 WL 3522373 that U.S. and not Mexican Law would apply to plaintiffs' claims in that case. Separate briefing on the choice of law issue has been completed in this case but the Court has not yet reached a decision.
[79] *Admiral*, 577 A.2d at 308. *See In re Asbestos*, 929 A.2d at 386 ("the fact that Delaware law likely will not apply in these cases, standing alone, is not sufficient to warrant dismissal. Delaware courts regularly interpret and apply the laws of other states….")

doctrine of *forum non conveniens*."[80] Consequently, this factor does not weigh in favor of defendants.

5. Pendency or Non-Pendency of Other Actions

There is no action pending elsewhere. The absence of pending action elsewhere "is an important, if not controlling, consideration."[81] "[I]f not dispositive, this fact weighs *heavily* against dismissal."[82]

6. Other Practical Considerations

The last *Cryo-Maid* factor is "all other practical problems that would make the trial of the case easy, expeditious and inexpensive."[83] Defendants argue that they will not be able to implead potential third parties if forced to litigate this case in Delaware.[84] This case has been pending for over 21 months. Defendants have not acted to implead any third party defendant,[85] have not specified by name any potential third party defendant,[86] and thus have failed to persuade the Court that an inability to implead third parties would result in overwhelming hardship to them.[87]

V. Conclusion

Based on the foregoing, the Court finds that defendants have not met their

[80] *Taylor v. LSI Logic Corp*., 689 A.2d 1196, 1200 (Del. 1997).
[81] *In re Asbestos*, 929 A.2d at 387 (citation omitted).
[82] *Id*.
[83] *Cryo-Maid, Inc*., 198 A.2d at 684.
[84] Defs.' Op. Br. at 21.
[85] *See Ison*, 729 A.2d at 846.
[86] Defs.' Op. Br. at 21.
[87] *See Ison*, 729 A.2d at 846.

burden of establishing that they will suffer overwhelming hardship and inconvenience if forced to litigate this case in Delaware. Accordingly, defendants' Joint Motion to Dismiss is **DENIED**.

IT IS SO ORDERED.

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Judge, J.