UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

M. VICTORIA CUMMOCK, in her own right, and as personal representative of the ESTATE of JOHN CUMMOCK, deceased; CHRISTOPHER JOHN CUMMOCK; MATTHEW DAVID CUMMOCK; and ASHLEY MICHELLE CUMMOCK,	)	
Plaintiffs,	)	
v.	)	**Case No. 96-CV-1029 (CKK)**
THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA; LIBYAN EXTERNAL SECURITY ORGANIZATION, a/k/a JAMAHIRIYA SECURITY ORGANIZATION; LIBYAN ARAB AIRLINES; ABDEL-BASSET ALI AL-MEGRAHI, a/k/a MR. BASET, a/k/a AHMED KHALIFA ABDUSAMED, a/k/a ABD AL-BASIT AL-MAQRAHI; and LAMEN KHALIFA FHIMAH, a/k/a AL AMIN KHALIFA FHIMAH, a/k/a MR. LAMIN,	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BASED ON COLLATERAL ESTOPPEL AS TO DEFENDANT ABDEL BASET AL-MEGRAHI

June 3, 2005

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INTRODUCTION

On December 21, 1988, Pan American Airlines Flight 103 (hereinafter "PA103"), traveling en route from Heathrow Airport in London, England to John F. Kennedy International Airport in New York, was destroyed when an explosive device stored in baggage contained in the cargo bay detonated causing the plane to break apart at an altitude of 31,000 feet scattering debris from the fuselage over Lockerbie, Scotland. As a result of the crash, all of the 259 passengers and crew members aboard the flight perished in addition to eleven residents of Lockerbie who perished as a result of falling debris from the explosion. Among those on board who perished in the explosion of PA103 was John Cummock.

In 1991, criminal indictments were issued against the two individual Libyan national defendants in this action, Abdel Baset Ali Al-Megrahi (hereinafter "Megrahi") and Al-Amin Khalifah Fhimah (hereinafter "Fhimah"), by both the United States Government and the respective authorities in Scotland. Libya, however, refused to extradite Megrahi or Fhimah to the United States or Scotland to stand trial. One of the reasons for Libya's refusal was that it did not believe that the defendants could receive a fair trial before a jury comprised of Scottish or American citizens. Libya also objected to any criminal trial in either the United States or Scotland. After lengthy negotiations, the United Kingdom and Libya agreed that Megrahi and Fhimah would be extradited to a neutral country and tried before a Scottish court applying Scottish law. At Libya's insistence the countries also agreed that the trial would be conducted before a panel of judges rather than to a jury of Scottish citizens.

The United States and the United Kingdom then negotiated and reached agreement with the government of the Netherlands. The countries agreed that the trial would be held at Kamp van Zeist under Scottish law. These agreements were presented to the United Nations.

In order for the agreement between Libya and the United Kingdom to take legal effect, a special procedure was employed whereby an Order of Council was entered by the Queen in Council on September 16, 1998. This agreement permitted a departure from Scottish criminal procedure to accommodate Libya's extradition demands. After years of negotiation, the Libyan government permitted the extradition of Megrahi and Fhimah in 1998—nearly ten years after the bombing of Pan Am Flight 103.

The criminal trial of Megrahi and Fhimah commenced on May 3, 2000. The trial consisted of eighty-four days of testimony including summation. On January 31, 2001, the three-judge panel issued its verdict of guilty as to defendant Megrahi for the murder of the passengers and crew aboard the flight and also for the murder of those residents of Lockerbie who were killed by debris falling to the ground. The three-judge panel also acquitted defendant Fhimah of the criminal charges levied against him. A copy of the decision issued by the Scottish Court is attached to Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue as Exhibit A. Defendant Megrahi filed an appeal of the judgment with the Appeal Court of the Scottish High Court of Justiciary. The appeal commenced on January 23, 2002. The judgment of the three-judge trial panel was affirmed by the five-judge panel of the Appeal Court on March 14, 2002. A copy of the decision issued by the Scottish appeal court is attached hereto as Exhibit A.

The procedures utilized by the Scottish Court in the Netherlands comport closely with those utilized by criminal courts in the United States, and, in some instances, the Scottish procedures are even more stringent than those utilized within the United States. The Declaration of Professor Alistair Bonnington (the "Bonnington Declaration"), an expert in Scottish criminal procedure who monitored the criminal trial for the University of Glasgow School of Law, is

attached hereto as Exhibit B. The Declaration of Dana D. Biehl, Esq. (the "Biehl Declaration), senior litigation counsel within the Counterterrorism Section of the U.S. Department of Justice and a member of the Lockerbie prosecution team in the Netherlands, is attached hereto as Exhibit C. The Declaration of Professor Julie Rose O'Sullivan (the "O'Sullivan Declaration"), a professor of criminal law and procedure at the Georgetown University Law Center and former federal prosecutor, is attached hereto as Exhibit E. The trial court issued extensive findings of fact regarding evidence submitted against both Megrahi and Fhimah. The motivation for defend both Megrahi and Fhimah to defend was arguably greater in the criminal trial than in this civil case because their personal freedom was at stake. Megrahi and Fhimah are parties to both actions. The interests of the victims of the bombing of PA103 were identical with the Scottish government which prosecuted Megrahi and Fhimah for causing the detonation of the bomb aboard PA103.

Based on the findings of fact and the ultimate conviction rendered by the Scottish High Court of Justiciary against Defendant Megrahi, and for the reasons presented herein, this Court should grant Plaintiffs' Motion for Summary Judgment based on the principles of collateral estoppel and international comity as to Defendant Megrahi.

ARGUMENT

I. COLLATERAL ESTOPPEL PURSUANT TO *PARKLANE HOSIERY* IS APPROPRIATE IN THIS CASE

Plaintiffs in the instant case seek summary judgment as to Defendant Megrahi through the vehicle of offensive collateral estoppel. The landmark Supreme Court jurisprudence in this area of the law is embodied in *Parklane Hosiery Company, Inc. v. Shore*, 439 U.S. 322 (1979). Offensive collateral estoppel involves a plaintiff "seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Parklane*

Hosiery, 439 U.S. at 329. In short, the plaintiff in the second case need not have been a party to the initial suit; however, the defendant must have been a party and the issues to be estopped must have been fully argued and decided in the prior case. *See McLaughlin v. Bradlee*, 803 F.2d 1197, 1202 (D.C. Cir. 1986); *Otherson v. Department of Justice*, 711 F.2d 267, 273 (D.C. Cir. 1983). The doctrine of offensive collateral estoppel further promotes the dual purposes of "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery*, 439 U.S. at 326.

The Court gave "broad discretion" to trial courts to apply offensive collateral estoppel. 439 U.S. at 331. Furthermore, the Court set forth a general rule as to the use of offensive collateral estoppel that "in cases where a plaintiff could easily have joined in the earlier action or where … the application of offensive collateral estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel." 439 U.S. at 331.

The D.C. Circuit has further explained the *Parklane* ruling by stating "The doctrine of collateral estoppel prohibits relitigation of an issue of fact or law that has been decided in earlier litigation." S.E.C. v. Bilzerian, 29 F.3d 689, 694 (D.C. Cir. 1994). The D.C. Circuit has applied offensive collateral estoppel in a civil suit based on a defendant's criminal conviction on similar charges in another action. *S.E.C. v. Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994). In that case, the Securities and Exchange Commission (SEC) instituted a civil proceeding in equity against the defendant and urged the Court to grant collateral estoppel because the defendant was criminally convicted on the same set of operative facts. The trial court granted partial summary judgment, and the D.C. Circuit stated "[o]ur review of the record indicates that Bilzerian's criminal

convictions conclusively established all of the facts the SEC was required to prove with respect to the specific claims." 29 F.3d at 694.

The D.C. Circuit has developed a three-prong standard for determining whether collateral estoppel should be applied in a particular case: (1) the issue must have been litigated, "that is contested by the parties and submitted for determination by the court"; (2) the issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first instance; and (3) the use of offensive collateral estoppel "must not work an unfairness" against the defendant. *Jack Faucett Associates, Inc. v. AT&T*, 744 F.2d 118, 125 (D.C. Cir. 1984); *see also Otherson v. Department of Justice*, 711 F.2d 267, 273 (D.C. Cir. 1983). These arguments will be addressed in turn.

A. The Issues Were Fully Litigated in the Scottish High Court of Justiciary

The first prong of the three-prong test for applying offensive collateral estoppel is that the issue to be estopped has actually been litigated in the first action. In the present case, the three-judge panel of the Scottish High Court of Justiciary issued an 82-page opinion based on an eighty-four day trial. As the Bonnington Declaration (Exhibit B) explains in great detail, Megrahi was given every opportunity to put forth a defense, and through the assistance of Scottish legal advisors, he *did* mount a defense. *See also generally*, Biehl Declaration, Exh. C. The Court heard both sides of the argument regarding the indictment against Megrahi for the murder of 270 individuals. *See generally* Bonnington Declaration, Exh. B; Biehl Declaration, Exh. C; *see also* Section III, *infra.*, for further details on the trial itself. On January 10, 2001, the prosecution concluded its summation arguments. On January 18, 2001, the defendants concluded their summation arguments. Therefore, in accordance with the requirements of the

first prong of offensive collateral estoppel, the criminal prosecution of Megrahi was "contested by the parties and submitted for determination by the court."

B. The Issues Were Actually and Necessarily Determined by a Court of Competent Jurisdiction

In the Scottish criminal action, the issue at hand was the indictment of Megrahi on charges of murder of the passengers and crew of PA103 and the murder of those residents of Lockerbie who were killed by debris from the explosion of PA103. These are the precise issues that are involved in the present case. The Scottish Court necessarily determined the guilt of Megrahi based on the same set of operative facts that Plaintiffs in the present action have alleged. The D.C. Circuit has held that, in the event that the basis for the first decision upon which estoppel is sought is unclear, then "it is thus uncertain whether the issue was actually and necessarily decided in that litigation." *Connors v. Tanoma Min. Co., Inc.*, 953 F.2d 682, 684 (D.C. Cir. 1992). That is not the case here. In 82 pages, the Scottish Court's opinion sets forth the basis for its decision in full. The decision discusses, in depth, the evidence presented before the Court and the Court's rulings as to the admissibility or credibility of such evidence. The Court found substantial factual evidence germane to the conviction of Megrahi and set forth these findings in its extensive decision. There is no question before this Court as to the basis for the decision convicting Megrahi of murder. Therefore, the issues were actually and necessarily determined by a court of competent jurisdiction.

Furthermore, the Scottish High Court of Justiciary is a court of competent jurisdiction. During the period in which Libya refused to extradite Megrahi and Fhimah, the United Nations commissioned a study of the Scottish judicial system. The U.N. representatives concluded that:

> The accused would receive a fair trial under the Scottish judicial system. Their rights during pre-trail, trial, and post-trial proceedings would be protected in accordance with international standards.

Report of the U.N. Secretary-General by Enoch Dumbutshena and Professor Henry G. Schermers on the Scottish Judicial System, U.N. Doc. S/1997/991, at 15, attached hereto as Exhibit D.

Moreover, the protections described in the U.N. Report were, in fact, provided to defendants Megrahi and Fhimah. *See generally,* Bonnington Declaration, Exh. B; Biehl Declaration, Exh. C.

C. Collateral Estoppel Will Not "Work An Unfairness" Against the Defendants

In *Parklane Hosiery*, the Court enumerated a non-inclusive list of factors to determine whether granting collateral estoppel against a defendant would be unfair. These included the following: "(1) where the party asserting it easily could have joined in the action upon which reliance is placed; (2) where the party against whom it is to be applied had no incentive to defend vigorously the first action; (3) where the second action offers procedural opportunities unavailable in the first action; (4) where the judgment relied on is inconsistent with other decisions." *Jack Faucett Associates, Inc. v. AT&T Co.*, 744 F.2d 118, 125-26 (citing *Parklane Hosiery*, 439 U.S. at 328-31). None of these circumstances exist here.

1. Plaintiffs Could Not Have Been Joined in the Scottish Criminal Action

In the instant case, Plaintiffs could not have joined the criminal action taking place in the Netherlands on behalf of the Scottish Government. As the Supreme Court stated in *Parklane Hosiery*, plaintiffs who did not seek to join in a suit for purely equitable relief were not barred from seeking collateral estoppel in a separate case seeking money damages. 439 U.S. at 331-32. In the same manner, plaintiffs seeking money damages are barred from joining in a prosecution whose intents are purely penal in nature. Furthermore, Scottish criminal law forbids the

intervention of civil litigants in a criminal trial. *See* Bonnington Declaration, Exh. B at 17. As reported by the United Nations in its report on the Scottish judicial system:

> Civil and criminal proceedings in Scotland are quite distinct and no order for compensation can be made in a criminal proceeding in respect of a death. The pursuit of any civil action is a matter for those pursuing a claim and would not involve the Government.

U.N. Report, Exh. D, at 11.

Therefore, the Plaintiffs in this action could not have joined in the first action through which they seek to obtain collateral estoppel in this the second action.

2. Defendants Had Incentive to Fully Litigate the Issues in Scotland

A secondary safeguard for defendants against the application of offensive collateral estoppel is the concept that the defendant(s) possessed the requisite incentive to fully litigate the issues in the first case. This safeguard first arose in *Parklane Hosiery* as an attempt to stem any unfairness that may result from applying offensive collateral estoppel against a defendant where the plaintiff(s) was not involved in the prior litigation. In that case, the Court held that "there is no unfairness to the petitioners in applying offensive collateral estoppel in this case. First, in light of the serious allegations made in the SEC's complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful Government judgment, the petitions had every incentive to litigate the SEC lawsuit fully and vigorously." *Parklane Hosiery*, 439 U.S. at 332.

The D.C. Circuit has adopted this prong of the fairness analysis in weighing cases seeking the use of offensive collateral estoppel. *See Otherson v. Department of Justice*, 711 F.2d 267, 275-76 (D.C. Cir. 1983); *Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992). In the present case, based on the seriousness of the charges and the potential

impact of a finding of guilt, the Libyan government, on Megrahi's and Fhimah's behalf, extensively negotiated for a trial in a neutral location, before a panel of judges and under a body of criminal law and procedure which afforded the greatest due process protections. Moreover, Defendant Megrahi was facing extended penal incarceration as a result of the outcome of the trial and, based on the record of the trial which took in excess of 80 days to conduct, it is obvious that Megrahi fully and vigorously defended against a guilty verdict. Megrahi and Fhimah were afforded continuances to pursue new leads in their defense. One such continuance occurred right in the middle of the trial. Megrahi and Fhimah also fought and were granted the right to have the Scottish government interview, at its expense, all potential witnesses which might have exonerated the defendants. Furthermore, Megrahi appealed the trial court's decision to the Appeal Court of the High Court of Justiciary. In *Otherson*, the Court held that Otherson possessed the incentive to litigate in the first cause based on the following:

> Although he did withhold some of his evidence, he obviously thought the charge a serious one, for he pursued his appeal on the legality of his conviction all the way to the Supreme Court. Therefore, preclusion is much more appropriate here than in a case where a defendant put up no resistance at all because the misdemeanor was too trivial to worry about.

Otherson, 711 F.2d at 276.

In the present case, not only was Megrahi indicted on a much more serious charge than a misdemeanor, but he also pursued his case vigorously at a lengthy trial with full benefit of counsel. Furthermore, he has availed himself of the appellate processes available to him in Scotland and the United Kingdom. *See* Bonnington Declaration, Exh. B at 13-14, 16; Biehl Declaration, Exh. C, at 3.[1] Megrahi's incentive to litigate in the first action provides additional

[1] It appears that Megrahi has petitioned the Scottish Criminal Cases Review Commission to review his conviction. Bonnington Declaration, Exh. B, at 16. As Professor Bonnington states in his declaration, "The Scottish Criminal Cases Review Commission will only refer a case back to the High Court of Justiciary for the hearing of a second appeal if there is a prima facie case that there may have been a miscarriage of justice." *Id.* Based on Professor

weight to the argument that he should be estopped from relitigating these issues and that summary judgment based on collateral estoppel should be granted as to Megrahi.

3. Megrahi Was Not Denied Any Procedural Opportunities That Could Have Caused a Different Result

As set forth in more detail at Section III, *infra.*, Megrahi was afforded the same procedural opportunities that would be afforded to a criminal defendant in the United States in a criminal trial. *See generally*, Biehl Declaration, Exh. C; O'Sullivan Declaration, Exh. E. He was provided with a written indictment. He was allowed representation by competent counsel. He possessed the ability to confront his accusers and to rebut any evidence proffered by the prosecution. He retained the right to appear as a witness in his own defense. He retained the right to remain silent. He preserved and exhaustively exercised his right to appeal his conviction. There is no conceivable procedural opportunity not afforded to Megrahi in the criminal trial that would have caused a different result.

4. The Judgment is Not Inconsistent With Other Prior Judgments

Megrahi cannot claim that it would work an unfairness to him to apply collateral estoppel due to inconsistencies with prior judgments in his favor because no such judgments exist.

Therefore, based on the standard set forth by the Supreme Court and the D.C. Circuit, offensive collateral estoppel would be properly applied in this case to assert liability over Defendant Abdel Baset Al-Megrahi based on his Scottish criminal conviction for the bombing of PA103. The issue of Megrahi's guilt for the murder of 270 individuals as a result of the explosion aboard PA103 was fully litigated in the criminal trial. The issue of guilt for the

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Bonnington's characterization of this petition, it would mirror a petition for a writ of habeas corpus in the United States. Such a petition, however, is a collateral attack on the conviction and would not render the judgment of the trial court and the appellate court non-final.

murders was actually and necessarily determined by a court of competent jurisdiction. Finally, the criminal conviction did not cause any unfairness to Megrahi.

II. COLLATERAL ESTOPPEL DOES NOT OFFEND DEFENDANTS' SEVENTH AMENDMENT RIGHTS TO A TRIAL BY JURY

The Seventh Amendment accords the right to a trial by jury. Nevertheless, the lack of a jury in the criminal trial that took place in the Netherlands does not rise to the level of a violation of the defendants' right to trial by jury in the present case. The D.C. Circuit has read the *Parklane Hosiery* jurisprudence as stating that "[t]he presence or absence of a jury as factfinder … in itself is a 'basically neutral' factor" in the collateral estoppel analysis. *Whelan v. Abell*, 953 F.2d 663, 669 (D.C. Cir. 1992) (citing *Parklane Hosiery*, 439 U.S. at 332 n.19). The Court in *Whelan* actually implied that, had the findings of fact been made from the bench, then "we might have greater reason to question the district court's refusal to accord preclusive effect to findings." 953 F.2d at 669.

In the present case, three judges from the Scottish High Court of Justiciary came to a unanimous opinion with regard to findings of fact based on evidence shown at trial. They applied their legal acumen to the situation and assessed the evidence much in the same manner that would be accomplished by a jury of peers. The findings were set forth in an 82-page opinion that incorporated both findings of fact and also findings of law as to various forms of evidence. Their opinion was subject to an appeal to the Appeal Court of the Scottish High Court of Justiciary which affirmed the opinion of the three-judge trial panel.

The Libyan government, on Megrahi's behalf, strenuously objected to any criminal proceedings brought before a jury of Scottish or American citizens. This was one of the basis by which Libya refused to extradite the defendants. These objections continued even though the United Nations' representatives concluded that "a trial by jury would not prejudice the accused's

right to a free trial." The U.N. Report also concluded, however, that if "the accused could reasonably establish that their right to a free trial would be prejudiced by a jury trial, we suggest that the idea of dispensing with a jury be pursued with the government of the United Kingdom." U.N. Report, Exh. D, at 15.

Libya, as suggested by the U.N. Report, petitioned the United Kingdom to permit the trial to proceed before a panel of Scottish judges rather than a jury of Scottish citizens. The criminal case was tried before a three-judge panel of the Scottish High Court of Justiciary based on carefully negotiated agreements between the Governments of the United Kingdom and the Socialist People's Libyan Arab Jamahiriya. *See* Bonnington Declaration, Exh. B, at 7; Biehl Declaration, Exh. C, at 4-5. Counsel for Defendant Megrahi opined that his client might wish to avail himself of the trial by a jury process that is the norm for criminal cases before the Scottish High Court of Justiciary. *See* Bonnington Declaration, Exh. B, at 11; Biehl Declaration, Exh. C, at 5. However, the failure by Megrahi to request trial before a jury in his criminal prosecution acted as a waiver to his right to trial by jury under the Scottish system. Therefore, it would be error for counsel for Megrahi to now claim that failure to hold a jury trial in the Netherlands before the Scottish court in the criminal prosecution would now work as a bar to collateral estoppel in this action.

In addition, the Supreme Court of the United States has specifically held that the concept of non-mutual offensive collateral estoppel, as a principle, does not violate the Seventh Amendment's right to a jury trial in the same manner that directed verdicts, retrial limited to the question of damages, and summary judgment do not violate the Seventh Amendment. *Parklane Hosiery*, 439 U.S. at 336-37. Therefore, there is no fear that the grant of summary judgment as

to Defendant Megrahi based on collateral estoppel would offend the principles of the Seventh Amendment's right to a trial by jury.

The protections afforded to Megrahi and Fhimah to waive their right to a trial by jury are consistent with the protections afforded to defendants in the United States. In the United States, a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. *Patton v. United States*, 281 U.S. 276 (1930), holds that a criminal defendant in a federal case may waive his right to a trial by jury, but that there is no constitutional barrier to conditioning a waiver of this right on the consent of both the trial judge and the jury. The Supreme Court, in *Singer v. United States*, 380 U.S. 24 (1965), stated that Rule 23 of the Federal Rules of Criminal Procedure sets forth a reasonable procedure governing an attempted waiver of a jury trial. The Rule provides that the waiver must be in writing, that the government must consent, and that the court must approve of the waiver. *See* Fed. R. Crim. P. 23. All of the protections were afforded to Megrahi and Fhimah. The details of the agreement to permit a trial before a panel of judges were presented in writing and required a special act of Council. All the parties agreed to the special provision after months of negotiation. Moreover, the trial court approved of the procedure and the issue was never raised on appeal.

It would certainly be a strange twist of fate, were defendant to argue now, after his employer and government negotiated on his behalf for years for the right to a trial before a panel of judges, for Megrahi to state that the very right he fought so hard to obtain was unfair. *See also* O'Sullivan Declaration, Exh. E, at 6-11, for a discussion of the right to trial by jury in American jurisprudence and how Megrahi's trial without a jury does not offend this jurisprudence.

III. MEGRAHI IS ESTOPPED BASED ON PRINCIPLES OF INTERNATIONAL COMITY FROM RELITIGATING ISSUES ALREADY FULLY AND FAIRLY LITIGATED IN THE SCOTTISH CRIMINAL COURT

It is undisputed that Defendant Megrahi was indicted, tried and convicted for the murder of 270 individuals, including Plaintiffs' husband and father, as a result of the bombing of PA103 on December 21, 1988. The charges alleged against Defendant Megrahi in the Scottish indictment mirror the allegations alleged against Megrahi in the Complaint in this civil action. Megrahi will likely argue that the criminal conviction rendered by the Scottish High Court of Justiciary on January 31, 2001, which was affirmed by a five-judge panel of the Appeal Court of the Scottish High Court of Justiciary on March 14, 2002, is not entitled to full faith and credit in the United States.

The Supreme Court of the United States has stated the following with regard to according comity to a foreign judgment in domestic federal courts:

> 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

Though application of comity as a method of estoppel in domestic courts is a matter of discretion, the Court has also stated that such judgments are enforceable

> where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting.

Hilton, 159 U.S. at 202-03.

The D.C. Circuit has adopted the reasoning of the Supreme Court in *Hilton* as the governing case with regard to international comity issues. *See Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981); *see also In re Arbitration Between Int'l Bechtel Co., Ltd. and Dep't of Civil Aviation of Gov't of Dubai*, 300 F. Supp.2d 112 (D.D.C. 2004).

The application of comity to the criminal conviction of Defendant Megrahi is appropriate according to the test set forth in *Hilton* and as demonstrated by the Bonnington, Biehl, and O'Sullivan Declarations.

Professor Bonnington was a member of the Lockerbie Trial Briefing Unit at the Glasgow University School of Law in Glasgow, Scotland. As set forth in Professor Bonnington's affidavit, the Lockerbie Trial Briefing Unit was established to provide information to the press and the public on Scottish procedural law as it pertained to the criminal trial of defendants Megrahi and Fhimah before a Scottish court in the Netherlands. Furthermore, Professor Bonnington is an Honorary Professor of Law at the Glasgow University School of Law and served as a post-graduate lecturer in criminal procedure.

Mr. Biehl is currently employed as senior litigation counsel in the Counterterrorism Section of the United States Department of Justice. He has served as a prosecuting attorney within the Department of Justice for 30 years. Prior to occupying his current position, Mr. Biehl was Deputy Chief for International Terrorism in the Terrorism and Violent Crime Section of the Department of Justice where his case load included the investigation and indictment of the bombing of Pan Am 103 over Lockerbie Scotland. In 1989, Mr. Biehl was tasked to the grand jury investigation into the bombing of PA103 and, in 1991, he was responsible for issuing the U.S. indictment against Megrahi and Fhimah. From 1999 until 2000, he was detailed to the

Crown Prosecution Office of Scotland as a member of the Lockerbie prosecution team at Kamp van Zeist in the Netherlands. Mr. Biehl directly participated as part of the Scottish Crown Office Trial Team in the criminal proceedings at Kamp van Zeist in the Netherlands. Based on his extensive prosecutorial experience in American courts and his intimate involvement with the investigation in the bombing of PA103 and the interviewing of witnesses and review of evidence in that case, Mr. Biehl is properly suited to provide his expert opinion on this subject.

Professor Julie O'Sullivan is currently a tenured professor of criminal law at the Georgetown University Law Center in Washington, D.C. After graduating from Cornell Law School, Professor O'Sullivan worked as a law clerk for the Hon. Levin H. Campbell, Chief Judge of the United States Court of Appeals for the First Circuit prior to serving as a law clerk to Justice Sandra Day O'Connor of the United States Supreme Court. After working as a white-collar criminal-defense attorney in New York, in 1991, Professor O'Sullivan became an Assistant United States Attorney in the Criminal Division of the United States Attorneys' Office for the Southern District of New York. Since joining the full-time faculty at Georgetown in 1994, Professor O'Sullivan has taught courses in criminal procedure, advanced criminal procedure, substantive criminal law, federal white-collar criminal law, and international criminal law.

In the present case, as affirmed by Professor Bonnington, Mr. Biehl, and Professor O'Sullivan, Megrahi was afforded rights and protections consistent with similarly situated defendants in the United States. In fact, in some circumstances, Megrahi was provided with even greater protections vis-à-vis the Scottish criminal law system than he would have been afforded in the United States. *See* Bonnington Declaration, Exh. B, at 17; Biehl Declaration, Exh. C, at 4-6; O'Sullivan Declaration, Exh. E, at 5, 13, 16, 17.

- Megrahi was made aware of the charges against him by means of a formal indictment filed by the Scottish authorities. Bonnington Declaration, Exh. B, at 9.

- Megrahi was appointed a Scottish legal adviser more than a year prior to the commencement of the trial. Bonnington Declaration, Exh. B, at 12.

- Megrahi was entitled to a speedy trial; however, he opted to continue the trial date on multiple occasions as was his right. Bonnington Declaration, Exh. B, at 12; Biehl Declaration, Exh. C, at 4.

- Pursuant to Scottish criminal law, Megrahi was presumed to be innocent. Bonnington Declaration, Exh. B, at 3-4; Biehl Declaration, Exh. C, at 4.

- The prosecution bore the burden of proof as to guilt. Bonnington Declaration, Exh. B, at 4; Biehl Declaration, Exh. C, at 4.

- The standard of proof to be applied in Scottish criminal law is that of "beyond a reasonable doubt." Bonnington Declaration, Exh. B, at 4; *see also* Statement of Material Facts, Exh. A, at 75 ("before either could be convicted we would have to be satisfied beyond reasonable doubt as to his guilt and that evidence from a single source would be insufficient").

- Scottish criminal law requires that "all of the important elements of the crime libeled against" a defendant be corroborated by evidence from two separate sources. Bonnington Declaration, Exh. B, at 4-5.

- In addition to guilty and not guilty, the Scottish criminal law system has a third verdict option of "not proven" that works as an acquittal for a defendant. Bonnington Declaration, Exh. B, at 5-6.[2]

- Megrahi possessed the right for his trial to be decided by a factfinding jury of 15 Scottish citizens; however, negotiations between the governments of the United Kingdom and the Socialist People's Libyan Arab Jamahiriya resulted in the compromise that, to avoid prejudice against the Libyan citizen defendants, the trial would be held without a jury and presided over by a panel of three Scottish judges. Bonnington Declaration, Exh. B, at 6-7; Biehl Declaration, Exh. C, at 4-5.[3]

- At trial, Megrahi was permitted to cross-examine each witness proffered by the prosecution. Bonnington Declaration, Exh. B, at 9; Biehl Declaration, Exh. C, at 4.

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[2] The verdict of "not proven" was established as to Defendant Fhimah based on a failure by the Crown to provide corroborative evidence of his guilt.

[3] The insistence on the trial being held without a jury came from the Libyan government. As Professor Bonnington states in his affidavit, as a result of this insistence, an Order in Council was issued by the Queen in Council in September 1998 allowing that the trial would be held in the Netherlands pursuant to Scottish law before a panel of three Scottish judges. Exh. B, at 7-8; *see also* Exh. B, Exh. 8.

- The prosecution was prohibited from posing leading questions to its witnesses; however, Megrahi was permitted to pose leading questions to these same witnesses on cross-examination. Bonnington Declaration, Exh. B, at 9.

- Prior to trial, Scottish criminal law permits depositions of witnesses under oath known as precognitions on oath. Bonnington Declaration, Exh. B, at 10.

- The verdict of guilty issued by the trial court as to Megrahi was unanimous. Bonnington Declaration, Exh. B, at 12.

- After his conviction, Megrahi possessed a right to appeal his conviction to the Appeal Court of the Scottish High Court of Justiciary. Bonnington Declaration, Exh. B, at 13.

- Megrahi availed himself of the appeal process, and introduced new evidence of his innocence. Nevertheless, his appeal before the Appeal Court of the Scottish High Court of Justiciary was denied. Bonnington Declaration, Exh. B, at 13-14; Biehl Declaration, Exh. C, at 3.

- Had Megrahi alleged that his trial had been unfair, he possessed the right to appeal to the Privy Council of the European Convention of Human Rights; however, he did not so appeal. Bonnington Declaration, Exh. B, at 14-15.

- Megrahi was afforded right to counsel and was represented by competent Scottish counsel at trial. Bonnington Declaration, Exh. B, at 12; Biehl Declaration, Exh. C, at 4.

In short, Megrahi was afforded a full and fair opportunity to litigate his claims of innocence before Scottish High Court of Justiciary sitting at Kamp van Zeist in the Netherlands. The trial was conducted upon regular proceedings over the course of a two-year period including Megrahi's appeal. Megrahi was provided due citation of the charges against him in the form of a written indictment. The Scottish criminal justice system was likely to "secure an impartial administration of justice between the citizens of its own country and those of other countries" in accordance with the precepts set forth in *Hilton*. Finally, there is no showing that the administration of the Scottish criminal laws against Megrahi was prejudicial. *See generally*, O'Sullivan Declaration, Exh. E, for information regarding the accord with American due process considerations in the Scottish criminal trial and appeal.

At trial, the prosecutor called 231 witnesses, of which 132 were cross-examined by counsel for Megrahi and Fhimah. Furthermore, counsel for the defense called 3 witnesses of their own in order to raise a reasonable doubt in the minds of the panel of three judges. Megrahi has vigorously attested his innocence; however, where the defendant possessed a full and fair opportunity to litigate in the first instance, "'the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or on appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.'" *Tahan v. Hodgson*, 662 F.2d at 864 quoting *Hilton,* 159 U.S. at 158-59.

Even if Megrahi was successful in arguing that he was not afforded every due process protection guaranteed in the United States, the factual findings beyond a reasonable doubt should be accorded comity and collateral estoppel should apply.

The Tenth Circuit has upheld an Iranian conviction for murder where the individual against whom the conviction was obtained claimed various due process violations including failure to deliver Miranda warnings and that she was subjected to "continual torture and abuse" during her pre-trial detention. *Cooley v. Weinberger*, 518 F.2d 1151, 1153 (10th Cir. 1975). The Court concluded:

> In the instant case, after listening to Mrs. Cooley's version of events, and after consideration of the opinion of the Iranian appellate tribunal, the statements made by Mrs. Cooley's Iranian lawyer, and other documentary evidence before him, the administrative law judge found, in effect, that the procedure followed in Iran was not "so shocking to the forum community that it cannot be countenanced." We think there is substantial evidence to support this finding and we are not inclined to disturb it. *Gardner v. Bishop*, 362 F.2d 917 (10th Cir. 1966). The fact that Iranian procedures may not be consistent with due process protections guaranteed in United States criminal proceedings will not in itself prevent effect being given a judgment rendered in Iran in accord with Iranian law. *See United States v. Mundt*, 508 F.2d 904 (10th Cir. 1974), and *Holmes v. Laird*, 148 U.S.Exh.D.C. 187, 459 F.2d 1211 (1972).

In the case against Megrahi, he has not alleged torture or duress of any kind. He was convicted in a process that comported with Scottish law and delivered by a Scottish court. In his appeal to the Appeal Court of the High Court of Justiciary, the Court stated the following regarding Megrahi's grounds for appeal which were denied:

> [4] In support of his appeal the appellant has tabled a considerable number of grounds of appeal. At the trial it was not submitted on the appellant's behalf that there was insufficient evidence in law to convict him. In its judgment the trial court rejected certain parts of the evidence relied upon by the Crown at the trial. Nevertheless, it was not contended in the appeal that those parts of the evidence not rejected by the trial court did not afford a sufficient basis in law for conviction. A few of the grounds of appeal maintain that the evidence was not of such character, quality or strength to enable a certain conclusion to be drawn or to justify a particular finding. However, the great majority of the grounds are directed to the trial court's treatment of the evidence and defence submissions. More specifically it is maintained that the trial court misinterpreted evidence, had regard to "collateral issues" and wrongly treated certain factors as supportive of guilt. It is also said that in regard to certain matters it failed to give adequate reasons. In many cases it is maintained that it failed to take proper account of, or have proper regard to, or give proper weight to, or gave insufficient weight to, certain evidence, factors or considerations. It is also maintained that the trial court misunderstood, or failed to deal with, or properly take account of, certain submissions for the defence. In one of the grounds of appeal the appellant seeks to found on the existence and significance of evidence which was not heard at the trial.

Exh. A, at 6. After an extensive hearing on appeal, including the introduction and review of new evidence offered by the defendant to prove his innocence, the Appellate Court denied Megrahi's appeal in a lengthy opinion.

Megrahi has been afforded all appropriate procedural mechanisms within the Scottish criminal justice system. Nevertheless, he has failed to obtain a judgment in his favor, and his conviction continues to stand. Therefore, if he argues that his due process rights were violated through a procedure that is uniform within the Scottish criminal justice system, then he will not be afforded relief from the application of comity to his case.

Therefore, on the basis of international comity, the Scottish criminal conviction is entitled to estoppel effect against Megrahi's attempts to relitigate his guilt, and summary judgment should be awarded to Plaintiffs against Megrahi.

IV. ACCORDING ESTOPPEL EFFECT OR COMITY TO MEGRAHI'S CRIMINAL CONVICTION FAVORS JUDICIAL EFFICIENCY

Megrahi's criminal trial consisted of eighty-four days of testimony before the Court at great expense to both the United Kingdom and the United States who jointly prosecuted the action. One of the objectives of offensive collateral estoppel and international comity is to encourage judicial economy. See *Parklane Hosiery*, 439 U.S. at 326. The essential elements of Plaintiffs' case have been argued and decided in criminal prosecution in the Netherlands. To require the parties to relitigate the case would work an unfairness upon Plaintiffs who would be forced to bear the expense of relitigation. Such unfairness would be prejudicial to Plaintiffs in the sense that the costs of relitigation including travel expenses for witnesses who have already testified under oath in the criminal proceedings and obtaining depositions abroad for those who are unable to attend trial would be highly burdensome. Nevertheless, Plaintiffs believe that the issues of collateral estoppel and international comity are ripe for consideration and that Plaintiffs shall prevail.

V. ESTOPPEL EFFECT OF THE DECISION ON THE LIBYAN GOVERNMENT DEFENDANTS AND FHIMAH

In addition to providing collateral estoppel as to Megrahi on the issue of liability, the Scottish criminal proceedings also established Megrahi as an agent of the Socialist People's Libyan Arab Jamahiriya ("Libya"). The decision of the Scottish High Court of Justiciary at the trial stage states:

> We accept the evidence that [Megrahi] was a member of the [Jamahiriya Security Organization], occupying posts of fairly high rank. One of these

> posts was head of airline security, from which it could be inferred that he would be aware at least in general terms of the nature of security precautions at airports from or to which [Libyan Arab Airlines] operated. He also appears to have been involved in military procurement.

See Statement of Material Facts, Exh. A, at 80.

Megrahi's status as an agent of Libya is further solidified by a public letter issued to the President of the United Nations Security Council by the chargé d'affaires of the Libyan Permanent Mission to the United Nations on August 15, 2003, which states that Libya has cooperated with the international community with regard to combating terrorism and "Has facilitated the bringing to justice of the two suspects charged with the bombing of Pan Am 103 and accepts responsibility for the actions of its officials." United Nations Security Council Doc. S/2003/818, *Letter dated 15 August 2003 from the Chargé d'affaires a.i. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations addressed to the President of the Security Council*, August 15, 2003. This qualifies as a statement against interest in that Libya has claimed, post-conviction of Megrahi, that he is/was an agent and official of Libya at the time of the acts in question.

In conjunction with the findings of fact established by the Scottish High Court of Justiciary that Megrahi was an agent of Libya in his capacity as a member of the JSO in the post of airline security and his role in military procurement, Plaintiffs request the Court to find that Libya cannot now argue that Megrahi was not its agent. Libya negotiated the terms of Megrahi's trial and surrender. Further proof of the official and agency relationship between Megrahi and Libya is the Libyan guaranty to pay any judgments against Megrahi or Fhimah which are unsatisfied by the individuals. The presence of this guaranty – made to the United Nations – is

an admission by Libya that Megrahi and Fhimah were agents of Libya at the time of the events alleged in the Complaint.[4]

CONCLUSION

For the foregoing reasons, Plaintiffs hereby request that summary judgment be granted as to Defendant Megrahi on the basis of collateral estoppel and/or international comity. Plaintiffs further request that Libya be estopped from denying the agency relationship that it held with Megrahi. Plaintiffs respectfully submit they should not be required to relitigate issues that were fully determined and decided by the Scottish High Court of Justiciary in the criminal trial.

Respectfully submitted,

Dated: June 3, 2005

/S/

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[4] Though Fhimah was acquitted by the Scottish High Court of Justiciary, Plaintiffs intend to show that, under a burden of proof that does not require a showing beyond a reasonable doubt (or multiple corroborating evidence prior to admissibility of evidence) but rather a showing of preponderance of the evidence, Fhimah may be found liable based on the record established in the Scottish criminal proceedings. As such, Plaintiffs seek to obtain leave of this Court to allow the record of the Scottish criminal proceedings to be entered into evidence and to passed upon as evidence in these proceedings. If Fhimah was given the opportunity to rebut evidence and that opportunity was passed upon in the criminal trial, Plaintiffs respectfully request that Fhimah be estopped from relitigating these issues in this Court when they could have been litigated previously in the court of first instance. By Order of this Court dated March 8, 2005, Fhimah was required to file his answer to the Complaint by April 15, 2005. Counsel for Fhimah requested an additional ten days to file an answer through a written request from Megrahi's counsel to Plaintiffs which stated, "The General Counsel wrote to us today if she could have 10 more days to arrange for the filing of Fhimah's Answer apparently because of the need for travel and the language difference." Letter from Dante Mattioni to Jodi Westbrook Flowers, April 15, 2005. Plaintiffs' agreed to this request, but also responded that irrespective of Plaintiffs' position leave of Court was required to further expand this date. No such leave of Court was sought. In that Fhimah has defaulted by failing to answer as ordered, this issue may be moot.

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