UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

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ETHEL HURST, *et al.*,

Plaintiffs,

02 Civ. 2147 (HHK)

-against-

THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, *et al.*,

Defendants.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST AL-MEGRAHI

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Plaintiffs respectfully submit this motion for partial summary judgment against Defendant Abdel-Basset Ali Al-Megrahi ("Al-Megrahi"). Because Al-Megrahi has already been convicted by a court of competent jurisdiction of 270 counts of murder (a conviction affirmed on appeal), Al-Megrahi should be estopped from denying his responsibility for the deaths of Walter Porter, John Mulroy, Bridget Concannon and Roger Hurst. The Court should grant judgment with respect to liability in favor of Plaintiffs and against Al-Megrahi on Plaintiffs' federal law claims under the Flatow Amendment, the Torture Victim Protection Act, and the Antiterrorism Act, and on their state law claim for intentional infliction of emotional distress.

PRELIMINARY STATEMENT

It has already been conclusively proven that Defendant Abdel-Basset Ali Al-Megrahi murdered 270 people on December 21, 1988 by bombing Pan Am Flight 103 -- including the brothers, sisters, and children of the Plaintiffs herein. These facts were proven beyond a reasonable doubt at Al-Megrahi's criminal trial, which lasted 84 days, in which 231 witnesses testified, which afforded him even *greater* due process protections than he would have received in the U.S., and which was affirmed after an extraordinarily exhaustive appeal.

The question presented in this motion is whether the victims of Al-Megrahi's cold-blooded terrorist acts should be forced to start from scratch – to build the case against Al-Megrahi anew by engaging in years of expensive and painstaking discovery, to endure the unspeakable emotional toll of a second, highly sensational trial, and to burden (if not overwhelm) this Court's judicial resources – all in order to demonstrate what has already been fully and fairly determined: that Al-Megrahi caused the deaths of Plaintiffs' family members.

Thankfully, the law of collateral estoppel shields both the Plaintiffs and this Court from the obligation of engaging in such a herculean and entirely redundant exercise by precluding Al-Megrahi from relitigating his responsibility for the deaths of the victims of Pan Am Flight 103. Summary judgment on the issue of Al-Megrahi's responsibility for the deaths Walter Porter, John Mulroy, Bridget Concannon, and Roger Hurst – an essential element of each of Plaintiffs' claims – should be granted. Discovery and trial in this matter should be limited to damages issues only.

FACTUAL BACKGROUND

I. The Bombing of Pan Am Flight 103

On December 21, 1988, Pan Am Flight 103, en route from London to New York, exploded over the town of Lockerbie, Scotland. All 259 people on board the flight were killed. Eleven residents of Lockerbie were also killed from falling debris. The cause of the explosion was the detonation of an explosive device within the fuselage. It has since been conclusively proven at a criminal trial, conducted in the Netherlands under Scottish criminal law, that Al-Megrahi carried out this terrorist attack. The Scottish Court found that Al-Megrahi, acting as an agent of the Libyan Government, was guilty of 270 counts of murder. *See* Declaration of Sarah Netburn ("Netburn Decl."), dated May 1, 2006, ¶ 8.

Plaintiffs are family members who lost loved ones as a result of the bombing of Flight 103. James Mulroy lost his brother John Mulroy and his sister Bridget Concannon; Mary Diamond and her five children lost Walter Porter, their son and brother, respectively; and Ethel Hurst and her three children lost Roger Hurst, their son and brother, respectively. *See* Netburn

Decl., ¶¶ 2-4. At the time of each decedent's death, Plaintiffs had an intimate and special relationship with the decedent – just as one would expect of any brother, sister, or parent. Al-Megrahi's murderous acts have caused Plaintiffs to endure unspeakable suffering.

II. Criminal Conviction by the Scottish Court

In 1991, a grand jury in the United States returned an indictment charging Al-Megrahi and Al-Amin Khalifa Fhimah ("Fhimah") with the bombing of Pan Am Flight 103 and the murder of 270 innocent victims. *See* Declaration of Dana D. Biehl ("Biehl Decl.") at ¶12, attached to the Netburn Decl. as Exhibit D.[1] The Libyan government, however, refused to extradite these officers unless they would be tried before a panel of judges outside of Scotland or the United States. *Id.* at ¶ 24. Eventually, an agreement was reached between the governments of the United States, the United Kingdom and Libya, pursuant to which Al-Megrahi and Fhimah would be tried at Kamp van Zeist in the Netherlands before a panel of three Scottish judges of the High Court of Justiciary. *Id.* This agreement was approved by the United Nations. *Id. See also* Declaration of Alistair J. Bonnington ("Bonnington Decl.") at ¶¶ 19-20.[2] In order to fulfill

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[1] Mr. Biehl is a Senior Litigation Counsel in the Counterterrorism Section of the U.S. Department of Justice. In 1989, he was an Assistant United States Attorney responsible for the grand jury investigation into the bombing of Pan Am Flight 103. For over 10 years, he participated in the U.S. and Scottish investigation of the bombing, and was part of the Scottish Crown Office Trial Team in the criminal proceedings at Kamp van Zeist in the Netherlands. He attended the entire criminal trial and reviewed transcripts of the proceedings daily. *See generally* Biehl Decl. ¶¶12-13.

[2] Mr. Bonnington is a Scottish lawyer and an expert on Scottish criminal procedure. As a professor at the Glasgow University School of Law, he was also a member of the University's Lockerbie Trial Briefing Unit ("LTBU"). The LTBU was established to provide impartial advice on the trial process and the trial itself to journalists and interested persons. Specifically, Mr. Bonnington was responsible for explaining the rules that the Scottish court was following in (continued...)

the agreement between the United States, the United Kingdom and Libya, a Special Order of Council was entered by the government of the United Kingdom to allow the Scottish court to sit outside of Scotland. Biehl Decl. ¶ 25; Bonnington Decl. ¶ 21. The Special Order of Council also made provision for the fact finders of the trial to be three Scottish High Court judges, rather than a jury of 15 Scottish citizens. Bonnington Decl. ¶ 21. Except as amended by the Special Order of Council, the Lockerbie trial proceeded under the terms of the Criminal Procedure (Scotland) Act 1995. *Id.*

A. Scottish Criminal Law Affords Criminal Defendants Extraordinary Protections

Under Scottish criminal procedure, criminal defendants are granted exceptional rights and protections -- ones that *exceed* the protections provided to criminal defendants in the United States. *See* Biehl Decl. ¶¶ 18, 31. The rights and protections that were afforded to Al-Megrahi in his criminal trial include the following:

- Al-Megrahi was made aware of the charges against him by means of a formal written indictment filed by the Scottish authorities. Bonnington Decl. ¶¶ 23-24.
- A competent Scottish legal advisor was appointed to Al-Megrahi more than one year prior to the commencement of the trial. *Id.* at ¶ 38. Al-Megrahi was also permitted the assistance of Libyan lawyers. Biehl Decl. ¶ 22.
- In Scottish criminal procedure, where the accused person is held in custody, the criminal trial must proceed within 110 days to avoid prejudice to the accused. On two occasions, Al-Megrahi's counsel requested and was granted an extension of

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[2](...continued)
terms of the Criminal Procedure (Scotland) Act and any other legal rules that applied to the Lockerbie trial. He attended numerous preliminary hearings as well as trial days at Kamp van Zeist. In addition to observing the trial proceedings, he read the trial transcripts for the purpose of updating the LTBU's website. *See generally* Bonnington Decl. ¶¶ 1-4.

the 110-day rule in order to prepare for trial and pursue additional investigations. Bonnington Decl. at ¶ 38.

- Pursuant to Scottish law, Al-Megrahi was presumed to be innocent. *Id.* at ¶ 6.

- The burden of proof remained with the Crown (the prosecutor) throughout the trial and never shifted to Al-Megrahi. The Crown must prove guilt beyond a reasonable doubt. *Id.* at ¶¶ 7-8.

- Under Scottish law – unlike under the law of the United States – all evidence submitted to prove a critical element of a crime must be independently corroborated. Thus, an essential fact cannot be proved by the testimony of one witness alone. Instead, that witness's testimony must be proved by corroborative evidence. The requirement of corroborative evidence is a fundamental tenet of Scottish law. *Id.* at ¶¶ 10-11.

- Al-Megrahi possessed the right to a trial by jury of 15 Scottish citizens. However, he elected – indeed, he insisted – that his case be tried not before a jury but rather before a three-judge panel of judges from the Scottish High Court of Justiciary. A trial by a panel of judges was a prerequisite to Libya's willingness to extradite its officials to stand trial for the bombing of Pan Am Flight 103. *Id.* at ¶¶ 19-20.

- Prior to trial, Scottish criminal law permits depositions of witnesses under oath (known as "precognitions" on oath). The purpose of the precognition is to provide an opportunity for the prosecution *and the defense* to learn before trial what the witness intends to testify to so that the parties can better prepare their examinations. *Id.* at ¶¶ 30-33.

- Al-Megrahi was also provided copies of all potentially incriminating and exculpatory documents in advance of trial. Biehl Decl. ¶ 22.

- At trial, Al-Megrahi was permitted to cross-examine each witness proffered by the prosecution. Bonnington Decl. ¶ 28.

- Although the prosecution was prohibited from posing leading questions to its witnesses, Al-Megrahi was permitted to pose leading questions to those same witnesses on cross-examination. *Id.*

- Al-Megrahi was granted a continuance during the trial in order to pursue further investigation. Biehl Decl. ¶ 22.

- Under the Scottish criminal law, the court may enter three verdicts: guilty, not guilty or not proven. Both not guilty and not proven act as an acquittal for a defendant. Bonnington Decl. ¶ 15.

- The three-judge panel, sitting as the trial court, issued a unanimous verdict of guilty of 270 counts of murder. *Id.* at ¶ 39.

- Al-Megrahi retained, and exercised, his right to appeal his conviction to the Appeal Court of the Scottish High Court of Justiciary. *Id.* at ¶ 48.

- As was his right, on appeal Al-Megrahi introduced additional evidence to establish his innocence that was not introduced at the trial court. In this regard, Al-Megrahi was afforded *greater* protections than would have been afforded him in the U.S. courts. *Id.*

- A five-judge panel of judges of the High Court of Justiciary rejected Al-Megrahi's appeal and affirmed the conviction. *Id.* at 49.

- Had Al-Megrahi alleged that his trial had been unfair – which he undisputedly did not – he possessed the right to appeal to the Privy Council of the European Convention of Human Rights. Al-Megrahi did not pursue such an appeal. *Id.* at ¶¶ 52-54.

Based on these and other protections, it is plain not just that Al-Megrahi was afforded due process in his criminal trial, but that he received a *higher* degree of procedural protections than he would have in a U.S. court. *See generally* Declaration of Julie R. O'Sullivan, attached to the Netburn Decl. as Exhibit E (comparing American and Scottish criminal law and concluding that Al-Megrahi's trial and appeal fully satisfied American legal standards for due process in criminal trials).[3]

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[3] Professor O'Sullivan is a professor of law at Georgetown University Law Center. She submits this declaration as an expert on, *inter alia*, criminal procedure, criminal appellate procedure, and international criminal law.

B. Al-Megrahi Was Afforded a Fair Trial

The criminal trial was conducted over 84 days. Bonnington Decl. ¶ 56. The prosecution called 231 witnesses, of which 132 were cross-examined by counsel for Al-Megrahi and Fhimah. Counsel for the defense called three witnesses in an attempt to raise a reasonable doubt in the minds of the panel of judges. The trial court carefully weighed the evidence presented at trial. With respect to several prosecution witnesses, the court concluded that they were unreliable and/or incredible, and disregarded their testimony. *See, e.g.*, Opinion, ¶ 43, attached as Exhibit 3 to the Bonnington Decl. After evaluating all of the evidence, the Court concluded that:

> we are satisfied that it has been proved that the primary suitcase containing the explosive device was dispatched from Malta, passed through Frankfurt and was loaded onto PA103 at Heathrow. It is . . . clear that with one exception the clothing in the primary suitcase was the clothing purchased in Mr. Gauci's shop on 7 December 1988. The purchaser was, on Mr. Gauci's evidence, a Libyan. The trigger for the explosion was an MST-13 timer of the single solder mask variety. A substantial quantity of such timers had been supplied to Libya.

Opinion, ¶ 82.

The principal piece of evidence against Fhimah came from his 1988 diary, which was recovered from the offices of Medtours, a company set up by Fhimah and an associate. Opinion, ¶ 84. These diary entries, made in the days prior to the bombing, indicated that Fhimah was working with Al-Megrahi and that Fhimah was responsible for securing baggage tags from the Malta Airport to facilitate the loading of luggage without security screening. *Id.* The trial Court held that this evidence – which was uncorroborated – was insufficient to support the charges brought against Fhimah, and acquitted him on all counts. Opinion, ¶ 85. Because

Fhimah's diary entries were found to be legally insufficient, they could not be used against Al-Megrahi. Opinion, ¶ 86.

By contrast, there was overwhelming, corroborated evidence against Al-Megrahi. The trial Court accepted evidence that Al-Megrahi traveled to Malta on December 20-21, 1988 under a Libyan issued "coded passport" that bore the name Ahmed Khalifa Abdusamad. Opinion, ¶ 87. The Court concluded that the evidence disclosed no apparent reason for this visit. Opinion, ¶ 88. The Court also accepted evidence that Al-Megrahi traveled to Malta on December 7-9, 1988 under a passport bearing his true name. *Id.* From Mr. Gauci's testimony, the Court concluded that Al-Megrahi was the person who bought the clothing that surrounded the explosive device, and that the date of the purchase of the clothing was December 7, 1988. On that day, Al-Megrahi arrived in Malta where he stayed until December 9, 1988. Opinion, ¶ 88.

The Court accepted the evidence that Al-Megrahi was a "member of the JSO, occupying posts of fairly high rank," and that one of those 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 the security precautions at airports from or which LAA operated." *Id.* The Court further concluded that Al-Megrahi "appears to have been involved in military procurement." *Id.*

Based on all of the evidence, the Court reached a unanimous verdict of guilty of 270 counts of murder against Al-Megrahi. The Court wrote:

> having considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, we are satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of an item of baggage from Malta to London, the identification of [Al-Megrahi] (albeit not absolute), his movements under a false name at or around the material, and the other background circumstances such as his association

> with Mr. Bollier and with members of the JSO or Libyan military who purchased MST-13 timers, does fit together to form a real and convincing pattern. There is nothing in the evidence which leaves us with any reasonable doubt as to the guilt of [Al-Megrahi], and accordingly we find him guilty of the remaining charge [of 270 counts of murder] in the Indictment as amended.

Opinion, ¶ 89. *See also* Plaintiffs' Statement of Material Facts Not in Dispute.

Al-Megrahi appealed his conviction to the Appeal Court of the Scottish High Court of Justiciary. At this appeal, as was his right, Al-Megrahi introduced *new* evidence to establish his innocence. Bonnington Decl. ¶ 48. The appeal hearing proceeded at Kamp Van Zeist in front of five senior Scottish judges of the High Court of Justiciary. Bonnington Decl. ¶ 49. The Appeal Court heard oral argument from Al-Megrahi's counsel from January 23 to February 14, 2002. *Id.* Their decision, which was accompanied by a 200-page written opinion, rejected Al-Megrahi's appeal. The Opinion of the Appeal Court is attached as Exhibit 4 to the Bonnington Declaration.

ARGUMENT

Given the prosecution's onerous burden – to prove beyond a reasonable doubt, with corroborated evidence, that Al-Megrahi was guilty of 270 counts of murder – and given the protections afforded Al-Megrahi during his trial and appeal, the Court should preclude Al-Megrahi in this civil action from contesting his responsibility for the deaths of Walter Porter, John Mulroy, Bridget Concannon, and Roger Hurst arising out of the terrorist attack of Pan Am Flight 103 – an element of each of Plaintiffs' claims. Well-established precedent, and justice, require the Court to grant Plaintiffs' motion for partial summary judgment on this issue.

I. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THEIR FEDERAL CLAIMS UNDER THE FLATOW AMENDMENT, THE TORTURE VICTIM PROTECTION ACT, AND THE ANTITERRORISM ACT

There is no doubt that with respect to federal claims, federal preclusion law governs whether a prior judgment should be afforded collateral estoppel in a subsequent suit. *See, e.g., Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 324 n.12 (1971) (in federal-question cases, federal collateral estoppel law controls); *Gambocz v. Yelencsics*, 468 F.2d 837, 841 n.4 (3rd Cir. 1972) (state issue preclusion law is inapplicable where case is based upon federal question jurisdiction); *Johnson v. Daggett, Van Dover, Donovan & Perry, PLLC*, 99 F. Supp. 2d 1008, 1016 (E.D. Ark. 2000) (federal law applies to the issue of collateral estoppel in case based on federal question jurisdiction); *Alfadda v. Fenn*, 966 F. Supp. 1317 (S.D.N.Y. 1997) ("When applying principles of issue preclusion to federal law claims, courts in this circuit have generally applied federal law) (citing *Omega Importing Corp. v. Petri-Kine Camera Co.*, 451 F.2d 1190, 1195 (2d Cir. 1971)).

The seminal case on federal issue preclusion law is *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). In *Parklane Hosiery*, the plaintiffs in a stockholder class action suit invoked "offensive collateral estoppel" to prevent the defendants from relitigating an issue that had been determined by a different court in a prior suit brought by the Securities and Exchange Commission. The Court concluded that the application of offensive collateral estoppel was proper because it (1) would not reward the plaintiffs for waiting to prosecute their claims, as the plaintiffs could not have joined the injunctive action brought by the SEC, and (2) would not be unfair to the defendants, as they had every incentive to litigate the SEC lawsuit fully, the

judgment in the SEC action was not inconsistent with any previous decision, and there were no procedural opportunities available in the second action that were unavailable in the first action. *Id.* at 332.

Thus, the Supreme Court held that in cases presenting federal questions, where a party has had a "full and fair" opportunity to litigate an issue of fact in a prior action, that party is collaterally estopped from relitigating the same issue in a subsequent action. *Id.* at 332-33. *See also United States v. Mendoza*, 464 U.S. 154, 158 (1984) ("[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation."); *McCord v. Bailey*, 636 F.2d 606, 608 (D.C. Cir. 1980) (collateral estoppel "prohibits parties who have litigated one cause of action from relitigating in a second cause of action matters of fact which were . . . determined in the first litigation") (citations omitted).

Collateral estoppel promotes important policy concerns. It "serves to relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Mendoza*, 464 U.S. at 158 (internal citations omitted). *See also Parklane Hosiery*, 439 U.S. at 326 (collateral estoppel "has the dual purpose 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"). Consistent with these policies, the plaintiff in the second cause of action need not have been a party to the earlier action. *McLaughlin v. Bradlee*, 803 F.2d 1197, 1202 (D.C. Cir. 1986).

Because Plaintiffs have brought three federal claims, and because the *Parklane Hosiery* requirements are plainly met, Plaintiffs are entitled to summary judgment with respect to liability – and more specifically Al-Megrahi's responsibility for the deaths of Walter Porter, John Mulroy, Bridget Concannon, and Roger Hurst – on Plaintiffs' federal claims.

A. Plaintiffs' Claims Under the Flatow Amendment, the Antiterrorism Act, and the Torture Victim Protection Act Present Federal Questions

Plaintiffs seek summary judgment against Al-Megrahi with respect to liability on federal claims brought under the Flatow Amendment, the Antiterrorism Act, and the Torture Victim Protection Act.

The Flatow Amendment provides that an "official, employee, or agent of a foreign state designated as a state sponsor of terrorism" – such as Libya – "shall be liable" for injuries caused by terrorist acts and for money damages, including for solatium. 28 U.S.C. § 1605 note. The D.C. Circuit has held that the Flatow Amendment "provides a private right of action against officials, employees, and agents of a foreign state." *Cicippio-Puleo v. Islamic Republic of Iran,* 353 F.3d 1024, 1033 (D.C. Cir. 2004). *See also Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003) (claims under the *Flatow* Amendment "are based on a federal statute, [and] their 'extent and nature' are 'federal questions.'"). Thus, Al-Megrahi is liable to Plaintiffs for the injuries he caused as a result of the bombing of Pan Am Flight 103.

The Antiterrorism Act of 1991 (the "ATA") provides a federal cause of action for United States nationals injured by an act of international terrorism. 18 U.S.C. § 2333(a). Courts in this Circuit routinely permit family members to bring a civil action in federal court against terrorist actors for injuries, including emotional injury, caused by terrorist acts. *See, e.g., Biton v.*

Palestinian Interim Authority, 310 F. Supp. 2d 172, 182 (D.D.C. 2004) (plaintiff states a federal ATA claim for emotional injury resulting from her husband's death in a bombing attack in the Gaza Strip). Plaintiffs state a claim under the Antiterrorism Act for the emotional distress and loss of solatium cause by Al-Megrahi's terrorist acts resulting in the bombing of Pan Am Flight 103.

Notably, not only does the ATA provide a federal cause of action for injuries caused by international terrorism, but it expressly provides that a foreign criminal conviction shall, consistent with federal law, collaterally estop the defendant from contesting liability in a subsequent civil lawsuit:

> A final judgment or decree rendered in favor of any foreign state in any criminal proceeding shall, to the extent that such judgment or decree may be accorded full faith and credit under the law of the United States, estop the defendant from denying the essential allegations of the criminal offense to any subsequent civil proceeding under this section.

18 U.S.C. § 2333(c). Thus, the ATA provides an independent statutory basis for giving preclusive effect to the final judgment of the Scottish High Court of Justiciary convicting Al-Megrahi of 270 counts of murder.

Finally, the Torture Victims Protection Act, 28 U.S.C. § 1350 note, "provides a federal cause of action for torture and execution committed anywhere in the world." *Doe v. Islamic Salvation Front (FIS)*, 993 F. Supp. 3, 9 (D.D.C. 1998). It authorizes a federal statutory cause of action against certain individuals for acts of extrajudicial killing. *See Dammarell v. Islamic Republic of Iran*, 01 Civ. 2224, 2005 WL 756090, at * 31 (D.D.C. Mar. 29, 2005). Like under the Flatow Amendment and the ATA, Al-Megrahi is also liable to Plaintiffs under the

Torture Victims Protection Act for the injuries he caused as a result of the extrajudicial killings of Walter Porter, John Mulroy, Bridget Concannon, and Roger Hurst.

With respect to each of these federal claims, federal collateral estoppel law governs whether Al-Megrahi's criminal conviction entitled Plaintiffs to summary judgment. *See Blonder-Tongue Labs.*, 402 U.S. at 324 n.12; *Gambocz*, 468 F.2d at 841 n.4; *Johnson*, 99 F. Supp. 2d at 1016; *Alfadda*, 966 F. Supp. at 1327.

B. The Requirements of *Parklane Hosiery* Are Readily Met

In the D.C. Circuit, three conditions must be satisfied before one party may collaterally estop another party from relitigating an identical issue decided in previous litigation: (1) the issue must have been "actually 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 trial; and (3) preclusion in the second trial must not "work an unfairness." *Jack Faucett Assocs. v. American Tel. & Tel.*, 744 F.2d 118, 125 (D.C. Cir. 1984). Consideration of each of these factors confirms that the Court should estop Al-Megrahi from relitigating the issue of his responsibility for the murders of Walter Porter, John Mulroy, Bridget Concannon, and Roger Hurst.

1. The Issue of Al-Megrahi's Responsibility for the Murder of 270 Individuals was "Actually Litigated" by the Scottish Court

There can be no legitimate dispute that the issue of Al-Megrahi's liability for the deaths of Plaintiffs' family members was "actually litigated" during the criminal trial. To determine whether an issue was "actually litigated," courts in this Circuit look to whether the

issue was "contested by the parties and submitted for determination by the court." *Jack Faucett*, 744 F.2d at 125; *see also Beverly Health & Rehabilitation Services, Inc. v. N.L.R.B.*, 317 F.3d 316, 323 (D.C. Cir. 2003).

Al-Megrahi obviously contested the charges against him. He was appointed competent Scottish counsel more than a year before his trial and was also afforded the assistance of Libyan lawyers. He twice sought an extension of the 110-day "speedy trial" rule so that he could better prepare his case and pursue possible exculpatory evidence. In addition, the defense was allowed an adjournment during the proceedings in order to pursue a line of investigation that the defense contended might have required offering additional documents and calling further witnesses. Al-Megrahi's counsel cross examined 132 of the prosecution's 231 witnesses. Counsel for the defense called three witnesses in an attempt to create a reasonable doubt with respect to his guilt.

Following an 84-day trial on the merits, the three-judge panel of the Scottish High Court of Justiciary issued an 82-page decision finding Al-Megrahi guilty of 270 counts of murder for his role in the bombing. That conviction was affirmed on appeal by a five-judge panel of the Appeal Court, High Court of Justiciary.

It is plain that the issue of Al-Megrahi's responsibility for the terrorist attack on Pan Am Flight 103 and the resulting murder of 270 innocent victims was "actually litigated" by the Scottish High Court of Justiciary. Al-Megrahi fully litigated his innocence, and then some. He lost. He should be precluded from wasting the resources of the parties and the judiciary by relitigating this issue from scratch.

2. The Issue of Al-Megrahi's Responsibility for the Murder of the Victims of Flight 103 Was "Actually and Necessarily Determined" By a Court of Competent Jurisdiction

In the Scottish criminal case, Al-Megrahi was charged with 270 counts of murder. The High Court of Justiciary found Al-Megrahi guilty on all counts. In order to reach this unanimous verdict, the Scottish trial court considered precisely the same operative facts that would have to be presented to this Court were it to deny Plaintiffs' motion. Specifically, the trial court was satisfied "beyond reasonable doubt that the cause of the disaster was the explosion of an improvised explosive device, that the device was contained within a Toshiba radio cassette player in a Samsonite suitcase along with various items of clothing, that that clothing had been purchased in Mary's House, Sliema, Malta, and that the initiation of the explosion was triggered by the use of an MST-13 timer." Opinion, ¶ 15. With respect to defendant Al-Megrahi, the Court concluded:

> having considered the whole evidence in the case, including the uncertainties and qualifications, and the submissions of counsel, we are satisfied that the evidence as to the purchase of clothing in Malta, the presence of that clothing in the primary suitcase, the transmission of an item of baggage from Malta to London, the identification of [Al-Megrahi] (albeit not absolute), his movements under a false name at or around the material time, and the other background circumstances such as his association with Mr. Bollier and with members of the JSO or Libyan military who purchased MST-13 timers, does fit together to form a real and convincing pattern. There is nothing in the evidence which leaves us with any reasonable doubt as to the guilt of [Al-Megrahi], and accordingly we find him guilty of the remaining charge [of 270 counts of murder] in the Indictment as amended.

Opinion, ¶ 89.

It would be a considerable understatement to say that the basis for the prior court's decision is clear. *See Connors v. Tanoma Mining Co.*, 953 F.2d 682, 684 (D.C. Cir. 1992) (if the

"basis" of a prior decision is "unclear, and it is thus uncertain whether the issue was actually and necessarily decided in [the prior] litigation, then relitigation of the issue is not precluded") (internal quotation and emphasis omitted). The Scottish High Court relied on the very same factual assertions and legal theories as Plaintiffs do here. That Court ruled that Al-Megrahi, acting as an agent of the Libyan government, carried out a terrorist attack and murdered 270 people. This is the precise issue to be decided in Plaintiffs' claims under the Flatow Amendment, the Antiterrorism Act, and the Torture Victims Protection Act. Al-Megrahi should therefore be precluded from relitigating his responsibility for the deaths of Plaintiffs' family members.

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

> the accused would receive a fair trial under the Scottish judicial system. Their rights during pre-trial, 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 to the Netburn Decl. as Exhibit A. Indeed, Libya refused to extradite its officials unless and until a competent court was selected in which its citizens would receive a fair trial. After years of international negotiations at the highest levels of government, Libya eventually agreed to turn over Al-Megrahi and Fhimah for a trial in the Netherlands by a three-judge panel of judges from the Scottish High Court of Justiciary. The agreement between and among Libya, the United Kingdom, and the United States

was reviewed and affirmed by the United Nations. Defendants cannot now claim that the court *they* selected to ensure a fair and impartial trial was not competent to rule on these murder charges.

As the United States Supreme Court explained more than one century ago:

> [W]e are satisfied that where there has been an 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 by 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 was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh. . . .

Hilton v. Guyot, 159 U.S. 113, 202-03 (1895).

3. Applying Preclusive Effect to the Scottish Criminal Conviction Would Not Be "Unfair" to Al-Megrahi

In *Parklane Hosiery*, the Court identified four examples in which the application of offensive collateral estoppel would be "unfair." Offensive estoppel should be applied unless (1) the party asserting it easily could have joined in the action upon which reliance is placed; (2) the party against whom it is to be applied had no incentive to defend vigorously the first action; (3) the second action offers procedural opportunities unavailable in the first action; and (4) the judgment relied on is inconsistent with other decisions. *Parklane Hosiery*, 439 U.S. at 330-31. Here, Al-Megrahi cannot legitimately argue that the application of collateral estoppel would work an unfairness against him.

Plaintiffs undisputedly could not have joined the criminal action brought by the Scottish government. *See* Bonnington Decl. ¶ 68 ("It is not possible for third parties to intervene under Scottish procedure. The criminal trial is a forensic contest as between the prosecution and defense. There can be no intervention from third parties"); *see also* U.N. Report at 11, attached as Exhibit A to the Netburn Decl. ("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"). Thus, "the application of offensive collateral estoppel will not here reward a private plaintiff who could have joined in the previous action" but did not. *Parklane Hosiery*, 439 U.S. at 331-32.

Al-Megrahi had every incentive to fully and vigorously defend against the murder charges brought against him. And his actions make plain that he did. With both Scottish and Libyan counsel, he spent more than a year preparing for trial and was granted several adjournments and extensions of time to further investigate evidence and pursue leads to prove his innocence. He cross-examined 132 of the 231 prosecution witnesses, and offered three witnesses in his defense. After the unanimous verdict of guilt, he appealed to the Appeals Court of the Scottish High Court of Justiciary, where he presented new evidence not introduced at trial and was afforded several days of oral argument to persuade the court that there had been an error. His appeal was rejected and his conviction affirmed. Al-Megrahi now sits in a Scottish prison serving a life sentence for the murder of 270 innocent victims. Thus, he plainly had an incentive to fully litigate these charges. He did. He lost. He should be precluded from relitigating these issues in the U.S. courts.

Nor are there are any procedural opportunities available in this action that were unavailable in the Scottish criminal proceeding "that might be likely to cause a different result." *Parklane Hosiery*, 439 U.S. at 332. Al-Megrahi was provided with a formal written indictment setting forth the charges against him. He had the right to depose witnesses under oath (known as "precognitions" on oath). He was also provided copies of all potentially incriminating and exculpatory documents in advance of trial. Thus, there are no opportunities afforded to Al-Megrahi in this civil matter that were not afforded to him in the criminal case which would likely cause a different result in this case. *See also In-Tech Marketing Inc. v. Hasbro*, 719 F. Supp. 312, 317 (D.N.J. 1989) ("the fairness of the Dutch court procedures does not depend on its similarity or dissimilarity with United States court procedure but only upon its basic fairness") (citing *Ingersoll Milling Machine Co. v. Granger*, 833 F.2d 680, 688 (7th Cir. 1987)).

Moreover, at his criminal trial in Scotland, Al-Megrahi was afforded substantial additional protections to avoid even the remotest possibility of a miscarriage of justice. These protections are unavailable in this civil matter. Most significantly, throughout his criminal trial, the prosecution bore a substantial burden: to prove "beyond reasonable doubt" that Al-Megrahi carried out the terrorist bombing of Flight 103 and committed these murders. By contrast, in this civil matter, Plaintiffs' burden is only to prove this fact by a preponderance of the evidence. Under Scottish law, all evidence submitted to prove a critical element of a crime must have been independently corroborated; he could not be convicted based only on the testimony of a single witness. Here, in contrast, the testimony of a single witness is sufficient for the proof of any fact, and would alone justify a verdict in accordance with such testimony. In his criminal case, Al-Megrahi had an unquestioned right to counsel, whereas no such right exists in civil cases.

Finally, Al-Megrahi retained, and exercised, his right to remain silent in his criminal trial, which he does not retain in a civil action where Plaintiffs can call him to testify.

In any event, given the overwhelming evidence that Al-Megrahi committed these murders, it is unlikely that there will be a different result in this civil action. *See Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981) (the merits of a prior case should not "be tried afresh, as on a new trial or appeal, upon the mere assertion of the party that the judgment was erroneous in law or fact").

Finally, there are no prior decisions that are inconsistent with Al-Megrahi's criminal conviction.

Al-Megrahi will likely argue that his conviction is "on appeal" and, therefore, that it would be unfair and premature to preclude him from relitigating the issue of his guilt of the 270 murders in this court. This argument is flawed for two reasons, one factual and one legal. First, Al-Megrahi's petition to the Scottish Criminal Cases Review Commission is not an appeal. The Commission's own website makes this plain. *See* http://www.sccrc.org.uk/applications/what-we-cant-do.htm ("The Commission is not a court of appeal"); *see also* Bonnington Decl. ¶¶ 55-57. Second, courts have given preclusive effect to issues decided in a foreign court even where the foreign judgment was on appeal (which is not the case here). In *Alfadda v. Fenn*, for example, the court concluded that "[t]he fact that the French judgment is on appeal to France's highest court does not bar application of the doctrine of issue preclusion to the judgment." 966 F. Supp. 1317, at 1325 n.9 (S.D.N.Y. 1997) (citing *Williams v. Commissioner of Internal Revenue*, 1 F.3d 502, 504 (7th Cir. 1993) (Posner, J.); Restatement (Second) of Judgments § 13, comment f, at p. 135 (1980)).

C. Courts Routinely Grant Collateral Estoppel Under Similar Circumstances

Numerous cases have found that foreign judgments – both criminal and civil – serve to preclude parties from relitigating issues determined by foreign courts in prior proceedings. These cases confirm that Al-Megrahi's prior criminal conviction precludes him from contesting in this civil action whether he murdered Walter Porter, John Mulroy, Bridget Concannon, and Roger Hurst in a terrorist bombing.

Alfadda v. Fenn, 966 F. Supp. 1317 (S.D.N.Y. 1997), provides a comprehensive analysis of the preclusive effect of a foreign judgment in a domestic case brought under federal question jurisdiction. In *Alfaada*, the defendants moved to dismiss all of the claims against them on the ground that the doctrine of issue preclusion barred relitigation of facts that were resolved by an earlier French judgment. 966 F. Supp. at 1319. The plaintiffs had previously initiated a criminal proceeding in France against the same defendants for securities violations. *Id.* at 1322. The French trial court determined that there had been no deception in the sale of the stock and that there was no proof of any false statements concerning the number of shares. *Id.* at 1324. After failing to obtain a judgment in the French criminal courts, the plaintiffs attempted to pursue federal securities fraud claims against the defendants in the U.S. courts.

In determining whether to accord preclusive effect to the French judgment, the court wrote that "a federal court should normally apply either federal or state law, depending on the nature of the claim, to determine the preclusive effect of a foreign judgment." *Id.* at 1329. In *Alfadda* – as here – the claims were based on federal law, and so the court applied the federal law of issue preclusion. *Id.* at 1330; *see also id.* at 1327 ("When applying principles of issue preclusion to federal law claims, courts in this circuit have generally applied federal law"). The

court then applied the Second Circuit's test for issue preclusion – a test essentially identical to the test applied in the D.C. Circuit, *see Jack Faucett*, 744 F.2d at 125 – barred the relitigation of the securities fraud issues, and granted summary judgment in favor of the defendants. *Alfadda*, 966 F. Supp. at 1332.

In *Donnelly v. FAA*, 411 F.3d 267 (D.C. Cir. 2005), the D.C. Circuit affirmed the "collateral use" of a Japanese criminal conviction (attempting to import drugs into Japan) as a basis for the Federal Aviation Administration's revocation of a pilot's airman certification. Before relying on the criminal conviction, the court evaluated whether the pilot had a "full and fair" opportunity to litigate the issues in Japan. *Id.* at 271. It noted that: "Japanese criminal protections and procedures . . . were modeled on United States procedures and adopt fundamental protections including informing the defendant of the nature of his charges, an immediate right to counsel, a privilege against self-incrimination, confrontation of witnesses, testimony under oath, cross-examination, and the right to object to evidence and appeal the judgment." *Id.* Given these protections, the court held that the foreign criminal conviction was dispositive in the American proceeding. *Id.* at 270-71.

Similarly, in *Cooley v. Weinberger*, 518 F.2d 1151 (10th Cir. 1975), the Tenth Circuit affirmed the preclusive effect of an Iranian conviction in a U.S. administrative proceeding. Mrs. Cooley had been convicted in Iran of the "willful homicide" of her husband. *Id.* at 1152. When she returned in the United States after serving her sentence in Iran, she petitioned for Social Security benefits. *Id.* The regulations governing such benefits, however, bar any individual convicted "of the felonious and intentional homicide of an insured individual." *Id.* Mrs. Cooley argued that the Iranian conviction should not be recognized by the U.S. courts,

and that she therefore should not be barred from receiving Social Security benefits, because her conviction was obtained by methods that did not comport with due process. *Id.* at 1154. The court rejected this view – finding that the criminal process of Iran was similar to that in the United States – and also held that "[t]he 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." *Id.* at 1555.

Each of these cases involve the preclusive effect of a foreign criminal conviction in a subsequent U.S. civil proceeding. In each, the court estopped a party from relitigating issues that were "fully and fairly" litigated in the foreign court and resulted in a criminal conviction. Based on these cases, this Court should preclude Al-Megrahi from relitigating his responsibility for the deaths of Walter Porter, John Mulroy, Bridget Concannon, and Roger Hurst.

Equally instructive are cases in which U.S. courts have granted preclusive effect to the findings from a foreign *civil* judgment in a subsequent U.S. proceeding. For example, in *Pony Express Records v. Bruce Springsteen*, 163 F. Supp. 2d 465 (D. N.J. 2001), the defendant, a popular recording artist, sought to estop the plaintiffs from asserting claims of copyright infringement where the issue of copyright ownership had already been litigated in the United Kingdom. The court applied federal issue preclusion law and held that "plaintiffs are estopped from relitigating issues that were already decided in the UK judgment." *Id.* at 475.

In *Feist v. Debmar Publishing Co.*, 232 F. Supp. 623 (E.D. Pa. 1964), the plaintiff filed an action under federal copyright laws. The defendants moved for summary judgment on the ground that the matter had been judicially determined in their favor in a prior copyright infringement action based on English law and adjudicated in an English court. *Id.* The

court wrote that "courts of the United States accord conclusive effect to matters litigated in foreign countries between the parties to a suit in America." Thus, based on the doctrine of collateral estoppel, the court was "compelled to enter summary judgment in favor of the defendants." *Id.*

These cases demonstrate overwhelmingly what *Parklane Hosiery* and *Jack Faucett* themselves make clear: that because the issue of Al-Megrahi's responsibility for the deaths of the victims of Flight 103 was "actually litigated" in the prior Scottish criminal proceeding, because that issue was "actually and necessarily determined by a court of competent jurisdiction," and because affording collateral estoppel would not even remotely "work an unfairness," Al-Megrahi should be precluded from relitigating that issue in this civil proceeding. *See Securities and Exchange Comm'n. v. Bilzerian*, 29 F.3d 689, 694 (D.C. Cir. 1994) (defendant was collaterally estopped from contesting the facts set forth in the SEC's civil claims because the defendant's "criminal convictions conclusively established all of the facts the SEC was required to prove with respect to the specified claims").

II. PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THEIR STATE CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In addition to the federal claims addressed above, Plaintiffs have also asserted a state law claim for the intentional infliction of emotional distress. It is axiomatic that a "terrorist attack on civilians is of course intended to cause emotional distress to the victims' families." *Burnett v. Al Baraka Inv. and Development Corp.*, 274 F. Supp. 2d 86, 108 (D.D.C. 2003)

(denying defendants' motion to dismiss plaintiffs' claims of intentional infliction of emotional distress in case brought by family members of victims of September 11 terrorist attacks);

In terrorism cases, the D.C. Circuit looks to section 46 of the Restatement (Second) of Torts. *See Bettis*, 315 F.3d at 331. The Restatement provides that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." Restatement (Second) of Torts, § 46(1) (2006). Where such outrageous conduct is directed at a third person, the actor is subject to liability "to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm." *Id.* at § 46(2)(a). Every terrorism case to consider an intentional infliction of emotional distress claim has, however, relaxed the presence requirement. In *Burnett. v. Al Baraka Inv. and Development Corp.*, the court denied defendants' motion to dismiss claims for intentional infliction of emotional distress brought by family members of the 9/11 victims, finding that although they "were not physically present at the World Trade Center, or at the Pentagon, or at Shanksville . . . the whole world was virtually present, and that is enough." 274 F. Supp. 2d at 108. *See also Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 50 (D.D.C. 2001); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d. 27, 35-36 (D.D.C. 2001), *aff'd sub nom. Bettis*, 315 F.3d at 335.

Courts have awarded damages for the intentional infliction of emotional distress to a decedent's spouse, *see Sutherland*, 151 F. Supp. 2d at 48-51; parents, *see Campuzano v. Islamic Republic of Iran*, 281 F. Supp.2d 258 (D.D.C. 2003); and siblings, *see Jenco*, 154 F. Supp. 2d. at 36, *aff'd sub nom. Bettis*, 315 F.3d at 335, and have rejected intentional infliction of emotional distress claims brought by more distant relatives, such as nieces and nephews. *See*,

e.g., *Bettis*, 315 F.3d at 333. Because the Plaintiffs here – the mothers, brothers, and sisters of John Mulroy, Bridget Concannon, Walter Porter, and Roger Hurst – are the immediate family of the decedents, they have asserted valid claims for intentional infliction of emotional distress against Al-Megrahi.

Thus, the Court should grant Plaintiffs partial summary judgment on the question whether Al-Megrahi engaged in "extreme and outrageous conduct" by murdering Plaintiffs' family members.

Plaintiffs acknowledge that, whereas it is abundantly clear that federal preclusion law governs whether to afford the Scottish criminal conviction collateral estoppel with respect to Plaintiffs' federal claims, the preclusion issue is somewhat more nuanced when it comes to Plaintiffs' state law claims for intentional infliction of emotional distress because, arguably, choice of law issues are introduced.

As we demonstrate below, however, collateral estoppel must apply to the emotional distress claims as well. First, for reasons of uniformity and international relations, the Court should apply the same *Parklane Hosiery* analysis to Plaintiffs' state law claims as it undoubtedly must apply to Plaintiffs' federal claims. Second, even if state preclusion law applies to Plaintiffs' emotional distress claims, choice of law analysis compels the conclusion that the Court should apply the preclusion law of the District of Columbia, which plainly requires the application of collateral estoppel to the prior criminal conviction. Third, there is no basis for applying Scottish preclusion law. Finally, regardless of the results of any choice of law analysis, this Court should exercise its inherent discretion to give the criminal conviction an even greater preclusive effect than the rendering court would give it.

A. For Reasons of Uniformity and International Relations, the Federal Common Law of Issue Preclusion Should Be Applied to Plaintiffs' State Law Claims

Where state law claims are at issue, some courts look to state collateral estoppel rules to determine the preclusive effect of a prior foreign judgment. *See, e.g.*, *Alfadda*, 966 F. Supp. at 1326 ("Federal courts in this district have generally applied New York's law of issue preclusion to determine the preclusive effect of foreign judgments on state law claims.") (citing cases). Notwithstanding this case law, however, this Court has discretion to apply federal issue preclusion law to Plaintiffs' state law claims for intentional infliction of emotional distress. *See Parklane Hosiery*, 439 U.S. at 331 (granting "trial courts broad discretion to determine when [offensive collateral estoppel] should be applied"); *Blonder-Tongue Laboratories*, 402 U.S. at 334 (holding that there is no set formula when applying estoppel, and that the ultimate decision is a matter of "the trial court's sense of justice and equity"). Here, there unquestionably are strong policy reasons to apply a uniform federal rule in evaluating the preclusive effect of the prior *foreign* judgment.

A foreign judgment is an act of a foreign sovereign. Relations between the United States and foreign sovereigns are matters normally committed to the federal, not the state, government. Therefore, the choice of law rule for determining the effect in the U.S. of a foreign country's judgment should be derived from federal law, not state law. *See Toronto-Dominion Bank v. Hall*, 367 F. Supp. 1009, 1011 (E.D. Ark. 1973) ("It is observed that suits of this kind necessarily involve to some extent the relations between the United States and foreign governments and for that reason perhaps should be governed by a single uniform [federal common law] rule.").

Thus, the application of federal law – rather than the law of one of the several states – promotes uniform national treatment more suitable for the recognition of foreign judgments. In the present case, failing to apply the federal law of issue preclusion would make no sense given the number of potential fora that could, in theory, supply the collateral estoppel rule. Plaintiffs reside in Florida, Missouri, California, New York, England, and the West Indies. There is no legitimate reason why the determination of whether Al-Megrahi can relitigate the issue of his responsibility for the 270 deaths should turn on the fortuity of domicile, location at time of crash, or any other arbitrary forum. Nor is there any legitimate reason why the prior judgment of a foreign sovereign should be given preclusive effect with respect to some Plaintiffs, but not others, in a single litigation.

For these reasons, a single federal common law preclusion rule should be applied to Plaintiffs' emotional distress claims. And for the reasons set forth in Sections I.B and I.C, *supra*, federal common law plainly requires that Al-Megrahi's prior criminal conviction be given preclusive effect in this litigation.

B. In the Alternative, District of Columbia Preclusion Law Should Be Applied to Plaintiffs' State Law Claims

If the Court concludes that state law – as opposed to federal common law – should control the question of collateral estoppel with respect to Plaintiffs' emotional distress claims, the Court should apply the law of the District of Columbia.

A federal court sitting in diversity must apply the choice of law rules of the jurisdiction in which it sits. *See Eli Lilly and Co. v. Home Insurance Co., et al.*, 764 F.2d 876, 882 (D.C. Cir. 1985) (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496-97

(1941)). The District of Columbia follows a modified "interest analysis" approach to resolving choice of law issues. *See Eli Lilly and Co.*, 764 F.2d at 882. Pursuant to the choice of law rules of the District of Columbia, a court must first determine whether there is a conflict of laws between the relevant jurisdictions. *See GEICO v. Fetisoff*, 958 F.2d 1137, 1141 (D.C. Cir. 1992). Upon finding such a conflict, a court should apply the law of the jurisdiction that has the "more substantial interest." *See Eli Lilly and Co.*, 764 F.2d at 882.

Under District of Columbia law, Al-Megrahi's criminal conviction plainly bars his relitigation of the issue of his guilt of 270 counts of murder. In *Napolean v. Heard*, 455 A.2d 901 (D.C. 1983), the District of Columbia Court of Appeals stated:

> In the District of Columbia, a person against whom a judgment has been rendered clearly establishing certain facts can not thereafter relitigate those same facts in a second legal action for a different purpose but turning on those same facts. This doctrine of collateral estoppel is applied in the District to prevent a person who has been convicted in a criminal action from relitigating the case.

The seminal District of Columbia case on the collateral estoppel effect of criminal convictions in subsequent civil proceedings is *Ross v. Lawson*, 395 A.2d 54 (D.C. 1978). In *Ross*, an assault victim brought a civil action for damages against the defendant, who had been found guilty by a jury of assault with a dangerous weapon, and whose conviction had been affirmed on appeal. *Id.* at 54-55. At the start of the trial, the plaintiff asked for a directed verdict on the issue of liability, asserting that the defendant, by reason of his criminal conviction, was collaterally estopped from contesting his liability. *Id.* at 55. The trial court denied the request for a directed verdict and instead instructed the jury that the prior criminal conviction constituted a prima facie case for the plaintiff, merely shifting the burden to the defendant to rebut the plaintiff's prima facie case. *Id.* After the defendant presented evidence that he acted in self-

defense, the jury returned a verdict in the defendant's favor. *Id.* The plaintiff appealed the trial court's refusal to apply the doctrine of collateral estoppel to the previous conviction. *Id.*

The Court of Appeals first noted that "a number of jurisdictions have held under the doctrine of collateral estoppel or issue preclusion that in some factual situations a prior conviction may conclusively establish in a civil action the issue adjudged in the criminal case." *Id.* The court went on to identify three trial judges in civil actions that have held that a prior criminal conviction may conclusively bar relitigation of an issue determined in the criminal case. *Id.* at 56. The court also recognized the compelling policy reasons for granting preclusive effect to a criminal conviction in a subsequent civil action. The court wrote that "common sense and good judicial administration dictate that the civil court shall not retry at length, more than two years after the occurrence, issues which were fairly determined in a criminal proceeding, when the evidence was fresh, by a competent tribunal after full litigation by the party against whom the conviction is offered in evidence." *Id.*

Thus, the Court of Appeals held that "having been convicted by a jury of assault with a dangerous weapon and that conviction having been affirmed on appeal, appellee, when sued in a civil action for damages resulting from that assault, could not relitigate the issue of liability for the assault." *Id.* at 57.

The rule announced in *Ross* remains the law in the District of Columbia. In *Davidson v. United States*, 467 A.2d 1282, 1284 (D.C. 1983), addressing the effect of a criminal misdemeanor conviction on a subsequent civil action, the court wrote that, "[i]t is clear that this criminal conviction could be used in any subsequent civil action for damages which the owner might bring against appellant. The judgment would be conclusive evidence of the appellant's

guilt." *See also Lassiter v. District of Columbia*, 447 A.2d 456, 459 (D.C. 1982) (in a civil suit for assault, a plaintiff "could use *Ross* to establish liability solely on the basis" of the criminal conviction for assault).

Given the undeniable force of District of Columbia collateral estoppel law, Al-Megrahi will undoubtedly argue that the only jurisdiction with an interest in the resolution of this case is Scotland, not the District of Columbia, and that Scottish issue preclusion law should therefore apply. The only reason that Al-Megrahi will make this argument is opportunistic: Scottish law arguably grants less preclusive effect than U.S. federal or state courts would. Issue preclusion in Scotland is governed by Section 10 of the Law Reform (Miscellaneous Provisions) Act 1968, which states:

> In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall . . . be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that the committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible by virtue of this section.

Section 10 further states that "he shall be taken to have committed that offence unless the contrary is proved," thus creating a rebuttable presumption and shifting the burden of proof to the defendant in the civil proceedings to establish his innocence in the face of the presumption of liability stemming from a prior criminal conviction. This rebuttable presumption and shifting of burden is discussed in two cases in the Bonnington Declaration ¶¶ 64-65 (*King v Paterson,* 1971 SLT (Notes) p40; *Ameen v Hunter*, 2000 SLT (Reports) p954).

Thus, a conflict plainly exists between the issue preclusion law of the District of Columbia (under which full preclusive effect would be afforded) and Scotland (under which the

criminal conviction would provide only a rebuttable presumption of liability). This Court must therefore determine which jurisdiction has a "more substantial interest." In determining which jurisdiction has the more substantial interest, District of Columbia courts evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be more advanced by the application of its law to the facts of the case. *District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995).

Importantly, the precise question presented, properly framed, is not which forum has the more substantial interest in applying its *emotional distress* law, but rather which forum has the more substantial interest in applying its *issue preclusion* law. Viewed this way, there can be no serious claim that Scotland has a significant interest in the outcome of the collateral estoppel question.

The Supreme Court has made clear that the doctrine of collateral estoppel has a "dual purpose": (1) "protecting litigants from the burden of relitigating an identical issue"; and (2) "promoting judicial economy by preventing needless litigation." *Parklane Hosiery*, 439 U.S. at 326; *see also Mendoza*, 464 U.S. at 158 (collateral estoppel "serves to relieve parties of the cost and vexation of multiple lawsuits" and to "conserve judicial resources"). Scotland has no interest on either front. None of the litigants in this case is a Scottish citizen (or has any connection to Scotland whatsoever), and Scotland therefore has no interest, one way or the other, in whether these Plaintiffs should be "protect[ed] . . . from the burden of relitigating an identical issue." Nor does Scotland have any interest at all in whether *this* Court should enforce a rule designed to promote judicial economy by conserving *its own* judicial resources.

The District of Columbia, on the other hand, has obvious and compelling interests both in protecting these Plaintiffs from the burdens of unnecessary relitigation and in conserving its own judicial resources. Plaintiffs are inexorably tied to the District of Columbia by virtue of 28 U.S.C. § 1391(f)(4), through which Congress selected the District of Columbia as the sole and exclusive venue for bringing emotional distress claims against a foreign state. In addition, a Grand Jury in the District of Columbia returned a criminal indictment against Al-Megrahi. Biehl Decl ¶ 12. Finally, it is axiomatic that this Court has a far greater interest than any Scottish court in avoiding the supervision of *years* of unnecessary discovery proceeding and *months* of unnecessary trial time. For these reasons, it cannot seriously be disputed that the District of Columbia has a greater interest in having *its* preclusion law applied rather than Scottish preclusion law.

Indeed, although the question of which jurisdiction is more interested in applying its own *substantive* emotional distress law is entirely irrelevant to the *collateral estoppel* choice of law issue, it bears emphasis that Scotland has almost no connection at all to the facts underlying this case. None of the Plaintiffs, none of their deceased family members, and none of the Defendants is a Scottish citizen or resident. The bombing occurred on an American flagship airline, en route from Frankfurt, Germany via London, England, to New York. The bomb itself was placed in a suitcase which was loaded onto an aircraft in Malta. The only connection to this entire terrorist attack is the fortuity that, at the time of the explosion, the airplane was in Scottish airspace and fell onto Scottish soil. The crash on Scottish soil, however, is not determinative for choice-of-law principles. *See In re Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736 (N.D. Ill. 1996). And although Scottish judges applied Scottish criminal law in the

prosecution against Al-Megrahi, the trial occurred in the Netherlands, and only after extensive international negotiations in which Libya refused to surrender the accused if they were to be tried under U.S. law.

Finally, under D.C.'s choice-of-law analysis, "[i]f the interests of [multiple] jurisdictions in the application of their law are equally weighty, the law of the forum will be applied." *Bledsoe v. Crowley*, 849 F.2d 639, 641 n.1 (D.C. Cir. 1988) (citing *Kaiser-Georgetown Community Health Plan v. Stutsman*, 491 A.2d 502, 509 & n.10 (D.C. 1985)); *see also Coleman*, 667 A.2d at 816. Therefore, even assuming the choice between D.C. law and Scottish law were a close call – which it manifestly is not – then this Court would be bound to defer to the forum and apply D.C. law.

For all of these reasons, this Court should apply District of Columbia issue preclusion law, which plainly requires that Al-Megrahi be estopped, by virtue of his prior criminal conviction, from contesting his responsibility for the deaths of Plaintiffs' loved ones.

C. In Any Event, This Court Has Inherent Discretion to Afford the Criminal Conviction More Preclusive Effect Than the Rendering Court Would

No matter how the choice of law issue is resolved, this Court remains entirely free to – and, on these extraordinary facts, plainly should – give preclusive effect to the prior Scottish criminal conviction even if doing so would amount to giving that judgment *greater* preclusive effect than a Scottish court would. *See also Vas-Cath Inc. v. Muhurkar*, 745 F. Supp. 517, 526 (N.D. Ill. 1990) (Easterbrook, J.), *rev'd on other grounds*, 935 F. 2d 1555 (Fed. Cir. 1991) ("When deciding the force to be given to foreign judgments, the Federal Circuit has crafted its own common law, without reference to the rules of preclusion applied in the rendering nations.").

To be sure, collateral estoppel issues are often analyzed based upon the premise that a court should afford a prior judgment the same preclusive effect as the rendering court would – no more, and no less. The origin of that premise, however, is the federal full faith and credit statute, which compels courts to give prior state court judgments "*the same* full faith and credit . . . as they have by law or usage in the courts of" the rendering state, *see* 28 U.S.C. § 1738 (emphasis added) – a statute that indisputably does not apply here. By its own terms, the plain language of the full faith and credit statute applies only to prior judgments of any "State, Territory, or Possession of the United States," and not to prior judgments rendered by a foreign nation. *See, e.g., Jaffe v. Accredited Surety and Casualty Co.*, 294 F.3d 584, 591 (4th Cir. 2002) ("Neither the full faith and credit statute, nor the Full Faith and Credit Clause of the Constitution, applies to judgments issued from foreign countries."); *Vas-Cath*, 745 F. Supp. at 526 ("Section 1783 refers only to state judgments . . . which means that federal common law supplies the rules of preclusion" when deciding the preclusive effect of a foreign judgment); Ruth B. Ginsberg, *Judgments in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 805 (1969) ("Of course, significant differences come into play when we move from the federal system to the international arena. In the latter, no full faith and credit clause is operative.").

The underlying common law collateral estoppel rule – that courts are free to give prior judgments more or less preclusive effect than the rendering court would – is displaced by section 1738 *only* with respect to prior *state court* judgments, and not with respect to prior foreign judgments. As the United States Supreme Court has observed, section 1738 "*goes beyond the common law* and commands a federal court to accept the [collateral estoppel] rules

chosen by the State from which the judgment is taken." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (quoting *Kremer v. American Construction Corp.*, 456 U.S. 461, 481-83 (1982)) (emphasis added). Indeed, *Marrese* emphasized that the collateral estoppel rules of the rendering court would *not* be dispositive to the extent that an exception to section 1738 applies. *Id.* at 381 ("[A]bsent an exception to § 1738, state law determines at least the issue preclusive effect of a prior state judgment."). Where, as here, not only is there an exception to section 1738, the statute indisputably does not apply *at all*, the very premise that prior judgments are entitled to "the same" collateral estoppel as the prior court is inapplicable.

Several courts have applied "American standards of preclusion" where the rendering country would give less preclusive effect to a foreign conviction than a U.S. court. For example, in *S.A. Andes v. Versant Corp.*, 878 F.2d 147 (4th Cir. 1989), the American court enforced an English judgment against the defendants even though enforcement against them was precluded under English law. The Fourth Circuit's application of "American standards of preclusion," rather than those of the rendering foreign state, promoted the policy reasons for the doctrine itself – namely, to prevent unnecessary litigation and preserve judicial resources *in the U.S. court*. Thus, "a United States court should not be confined to using the foreign court's mechanisms or else forgo achieving its own objectives." *Alfadda*, 966 F. Supp. at 1329; *see also Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 908 (S.D.N.Y. 1968) (noting that federal courts would not be prevented from according preclusive effect to West German judgment merely because West German courts would not give such effect to them), *aff'd*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905, 91 S. Ct. 2205 (1971).

The Restatement of Foreign Relations Laws likewise confirms that U.S. courts are free to give greater preclusive effect to a foreign judgment than a rendering foreign court would. Although recognizing that a foreign judgment should ordinarily have no greater effect than it has in the country in which it was rendered, the Restatement confirms that "no rule prevents a court in the United States from giving greater preclusive effect to a judgment in a foreign state than would be given in the courts of that state." Restatement (Third) Foreign Relations Law § 481, Comment c.

The District of Columbia has also evidenced its strong public policy in favor of enforcing foreign judgments to the greatest possible degree by adopting the Uniform Foreign Money-Judgments Recognition Act. *See* D.C. St. § 15-381 *et seq.* The Prefatory Note to the Uniform Act states in no uncertain terms that the statute "makes clear that a court is privileged to give the judgment of a court of a foreign country *greater effect* than it is required to do by the provisions of the Act" (emphasis supplied). Citing Maryland's adoption of the Uniform Act and this language from the Prefatory Note in particular, the Fourth Circuit in *S.A. Andes* held that a Maryland court would not give effect to an English rule of preclusion that would have barred the plaintiff's claims. 878 F.2d at 149. Although the District of Columbia's Foreign Money-Judgments Recognition Act is not directly applicable because this is not a foreign money-judgment case, the existence of the Act signals that the District of Columbia has a strong policy in favor of giving foreign judgments greater preclusive effect than the rendering court would if circumstances so warrant.

Here, the policy reasons for giving preclusive effect to the Scottish criminal conviction – regardless of what a Scottish court might do – are both obvious and compelling. Al-

Megrahi has already had his day in court, and then some. The Scottish High Court of Justiciary presided over an 84-day trial and issued an exhaustive 82-page opinion. If anything, Al-Megrahi was given even *greater* procedural rights in his Scottish trial than he would have been given had he been tried here in the United States. *See generally* Declarations of Bonnington, Biehl and O'Sullivan. Now, having defended himself assiduously and lost, Al-Megrahi cannot be heard to suggest that the victims of his horrible terrorist acts – the family members of those who perished – must endure the onerous emotional and financial costs of presenting the very same evidence against him from scratch, a process that will take many months or longer and exact an untold cost on them psychologically.

Numerous other courts have exercised their inherent discretion to give a prior judgment greater preclusive effect than the rendering court would. For example, in *Williams v. Ocean Transport Lines*, 425 F.3d 1183 (3rd Cir. 1970), the forum court's collateral estoppel rules favored affording preclusive effect to a prior judgment, although the prior rendering court's collateral estoppel rules did not. After weighing the policies supporting both alternatives, the Third Circuit held that the forum court's collateral estoppel rules should be honored and that the prior judgment should be given preclusive effect. The court observed that where a "substantial federal interest is involved," a "federal court should be able to decide for itself whether or not a greater preclusionary effect may be given to a prior judgment than would be given in the state of the first forum." *Id.* at 1189-90; *see also In re Transocean Tender Offer Sec. Lit.*, 445 F. Supp. 999, 1005 (N.D. Ill. 1978) (holding that "this court may give the Delaware judgment greater preclusive effect than would the courts of Delaware").

Finley v. Kesling, 433 N.E.2d 1112 (Ill. App. 1982), is similarly instructive. There, the issue was whether to enforce a prior Indiana judgment where it was undisputed that Indiana courts would not do so because mutuality of parties was lacking. The Illinois court held that the prior Indiana judgment would be given preclusive effect – even though it would not have been given preclusive effect in Indiana – reasoning that a second court is always free, in light of the public policy considerations of the forum, to give greater preclusive effect to a prior judgment than the rendering court would. *See id.* at 1117. Here, this point is even stronger than it was in *Finley*, for *Finley* was governed by the full faith and credit statute (which the court held was no bar to giving greater preclusive effect), whereas here the "same full faith and credit" language from section 1738 does not apply.

For all of these reasons, this Court clearly has ample discretion to give preclusive effect to the Scottish criminal judgment (even assuming *arguendo* that choice of law analysis suggests that Scottish preclusion law applies, which it does not) and should exercise that discretion to do so here.

CONCLUSION

For all these reasons, the Court should grant Plaintiffs' motion for partial summary judgment and preclude Al-Megrahi from contesting his responsibility for the deaths of Walter Porter, John Mulroy, Bridget Concannon and Roger Hurst. Discovery and trial in this matter should be limited to damages issues only.

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