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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BELL HELICOPTER TEXTRON, INC., Defendant Below, Appellant, v. ANDRES ARTEAGA, individually, and as Co-Representative of the Estate of Leonardo Andrews Arteaga (deceased); and SOCORRO ARTEAGA, individually, and as Co-Representative of the Estate of Leonardo Andres Arteaga (deceased), et al., Plaintiffs Below, Appellees.	No. 333,2014 Appeal from the Superior Court of New Castle County Case No. N12C-05-008 JRJ (Consolidated)

APPELLANT'S "CORRECTED" OPENING BRIEF

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NATURE OF PROCEEDINGS

These are seven consolidated products liability actions filed by or on behalf of twenty Mexican citizens (collectively, "the Mexican Claimants") against Bell Helicopter Textron Inc. ("Bell"), a Delaware corporation, in the Superior Court of Delaware, New Castle County. Three of the actions were filed on May 1, 2012; the other four actions were filed on May 7, 2012.[1] The Superior Court Civil Case Information Statement ("CIS") for each of the suits filed on May 1, 2012 identified two automobile rollover cases as "related cases now pending in the Superior Court" but did not "explain the relationship(s)" on the CIS form. (A68, A70, A72). The CIS for each of the cases filed on May 7, 2012 identified the three cases filed the week before and the two automobile cases as "related cases" but, once again, did not "explain the relationship(s)"on the CIS form. (A74, A76, A78, A80).

The seven cases were consolidated, by agreement, for purposes of *forum non conveniens* motions. (A65). Bell moved to dismiss on *forum non conveniens* grounds, supporting the motion with a declaration from a Mexican lawyer, Alfonso J. Sepulveda Garcia. (A83-A104). The Mexican Claimants opposed the motion, supporting their response with a declaration of another Mexican lawyer, Alberto

[1] The Mexican Claimants include survivors of decedents Arteaga, Barrera, Gonzalez, Gutierrez, Hernandez, Montes, and Salas. In addition to Bell, the original pleadings named Bristow Helicopters, Inc., a Delaware corporation. The amended pleadings named Bristow Helicopters, Inc., and Bristow US LLC. Both Bristow entities ultimately were voluntarily dismissed.

Chavez Bustos, and arguing that Mexican courts would not entertain a lawsuit against U.S. corporations on *competencia* (jurisdictional) grounds. (A107-A175). Bell replied, submitting a rebuttal declaration from a retired Mexican Supreme Court Justice, Felipe Lopez-Contreras. (A177-A220). The Superior Court allowed the Mexican Claimants to file a sur-reply, including a second declaration from Chavez, which did not rebut Justice Lopez-Conteras' opinions, and a declaration from Jorge Luis Guevara Coubert, a sitting judge in Mexico who dismissed an action filed by one of the Mexican Claimants, attesting to the propriety of his own dismissal order. (A223-A227, A228-A235).

The Superior Court denied the motion on November 30, 2012, holding, as it had in previous cases filed by Mexican plaintiffs, that Mexico was not an available alternate forum[2] and expressing the view that Mexican courts would not exercise jurisdiction over U.S. corporations. (A298-A305). The Superior Court denied Bell's motion without reaching or analyzing the *Cryo-Maid* factors. *See Arteaga v. Bell Helicopter Textron Inc.*, 2012 WL 5992810 (Del. Super. Ct. Nov. 30, 2012).

In the interim, the Mexican Claimants filed amended complaints of right, which Bell answered after disposition of its *forum non conveniens* motion. (A236-297; A306-A361). Bell gave notice pursuant to Rule 44.1 that it intended to raise

[2] The Court of Chancery, in a recent *forum non conveniens* decision, held that the threshold issue of the availability of an alternate forum is **not** part of the Delaware *forum non conveniens* test. *VTB Bank v. Navitron Projects Corp.*, 2014 WL 1691250 (Del. Ch. Apr. 28, 2014).

the applicability of the substantive law of a foreign jurisdiction on one or more issues. (A313, A321, A329, A337, A345, A353, A361).

The cases were thereafter consolidated for all purposes and a briefing schedule set for the filing of choice of law motions. (A36-A37, A36). Bell moved for a determination that Mexican law applies to the remedies sought by the Mexican Claimants. (A362). The Mexican Claimants moved for the application of Texas law to liability and damages. (A590). Oral argument was held on February 10, 2014. (A847-A892). The Superior Court allowed additional briefing on the effect of *Martinez v. E. I. du Pont de Nemours & Co.*, 86 F.3d 1102 (Del. 2014), which was handed down after oral argument. (A893).

On June 10, 2014, the Superior Court granted the Mexican Claimants' motion and denied Bell's motion, determining that Texas law applied to liability and damages and to the remedies sought in all the cases. (A894-A911).

As to the motion filed by the Mexican Claimants, the Superior Court concluded that "Texas has the most significant relationship with the liability and damages at issue." (Opinion at 7). The Superior Court found the place of injury to be "fortuitous." (Opinion at 8). Though recognizing that "Mexico has contacts with the accident helicopter and inboard strap fitting," the Superior Court found "that the place where the conduct that caused the injury occurred is particularly relevant with respect to products liability under these circumstances." (Opinion at

10). Suggesting that Mexican law "severely limit[s]" recovery and noting that it does not allow for a survival cause of action by a decedent's estate, the Superior Court "infer[red] that the purpose of these laws is to shield resident defendants from potentially large financial burden associated with these causes of action" and found that "Mexico does not have a strong policy interest in the application of Mexican law here due to Bell's status as a non-resident defendant." (Opinion at 12). The Superior Court concluded that it would "be able to apply and determine Texas law with greater ease than Mexican law" "due to the need for interpreters and experts on Mexican law." (Opinion at 12-13).

As to Bell's motion, the Superior Court did not separately engage in an analysis of the Section 145 factors or the Section 6 factors, despite noting earlier in the opinion that it "looks to the motions individually." (Opinion at 4). The Superior Court found that "Texas has the most significant relationship according to Section 145 and viewed in light of the Section 6 factors." (Opinion at 16). The Superior Court concluded that "Mexican policy shielding resident defendants from paying potentially large survival claims is not implicated here" and that "[a]pplying Mexican law would likely be more complicated and expensive due to the need for interpreters and Mexican law experts." (Opinion at 16).

Bell filed an application for certification on June 19, 2014. (A912-A927). This Court accepted Bell's interlocutory appeal on July 29, 2014.

SUMMARY OF ARGUMENT

1. Comity and established law require courts to defer to other nations' legislative choices, which are foreign acts of state, without passing judgment thereon. The Superior Court's conclusion that Mexico affords no remedy—or that it affords remedies the Superior Court deemed inferior or inadequate—misapplies Mexican law and offends principles of comity. Subjective judgment on the wisdom of legislative decisions made by a foreign sovereign is fundamentally at odds with principles of settled law and comity.

2. There is a rebuttable presumption under Sections 146 and 175 of the Restatement (Second) of Conflict of Laws that the law of the place of injury applies unless some other state has a more significant relationship to the discrete issue before the court. The place of injury is the place where the injury is felt; that is, the place where the consequences of the tort are suffered. In each of these consolidated cases, the place where the injury was felt is Mexico, whose law is presumptively applicable to liability, remedies, and damages. The presumption was not rebutted herein and should have been applied in these circumstances under settled Delaware law.

3. The place of injury was not fortuitous. The helicopter was exported to Mexico in 1979 and had been owned, operated, and maintained in Mexico since 1979. The helicopter was owned by a Mexican company. The helicopter and its

pilots were licensed in Mexico. The part at issue was installed on the helicopter in Mexico. The accident occurred when the helicopter was ferrying passengers along a regularly scheduled route entirely within Mexico. An accident, if it was going to happen anywhere, was going to happen inside the borders of Mexico.

4. The place of the alleged wrong is one of the Section 145 factors, but it is not the only factor, and its relative importance must be weighed in relation to the Section 6 policy principles, the particular issue before the court, and under the facts and circumstances of any given case. In this case, the alleged injury-causing conduct took place in multiple locations, including Mexico. Insofar as some of that conduct took place in Texas, the law of the place where the conduct causing the injury has no interest in damages awarded to non-residents for injuries suffered elsewhere, and is given limited weight in assessing what law applies to remedies or damages. Texas courts have repeatedly and consistently held that Texas has no interest in the damages awarded to Mexican claimants for injuries suffered in Mexico.

5. The policy considerations embodied in Section 6, when properly weighed in light of the Section 6 factors, point to Mexico. The Superior Court erred in its determination that Texas has the most significant relationship to damages, remedies, and liability.

STATEMENT OF FACTS

Bell manufactured the subject Model 212 helicopter in 1979. (A790). The helicopter was manufactured in Texas for export to Mexico and was continuously operated in Mexico since that time. (A788-A791). The helicopter had a Mexican registration number and was owned and operated by Heliservicio Campeche S.A. de CV ("Heliservicio"), a company based in Mexico, which is in the business of providing helicopter transportation services for hire within Mexico under the auspices of a license issued by the Mexican government and subject to Mexican federal regulatory oversight. (A628, A642, A643). The helicopter was contracted out to provide transportation services to the oil and gas industry and was providing transportation services when the accident occurred. (A512).

The helicopter was transporting mechanics and technicians from Ciudad del Carmen, in the Mexican state of Campeche, to Minatitlán, in the Mexican state of Veracruz, when it crashed on October 15, 2010. (A628). The two pilots and seven passengers were fatally injured. The accident was investigated by the Dirección General de Aerońautica Civil ("DGAC"), the Mexican federal civil aviation authority, which determined that the accident was caused by a fractured tension torsional (TT) strap fitting, which is part of the main rotor system of the helicopter. (A636-A637). Bell manufactured the TT strap fitting. (A640).

The decedents all were Mexican citizens. (A663-A670). Three of the named plaintiffs (in the Gonzalez, Montes, and Salas actions) sued as surviving spouses but were in fact "concubinas" (concubines), as defined by Mexican law, who did not have marriages that are legally recognized in Mexico. (A519).

Estates nevertheless were raised in New Castle County, Delaware. (A364-A485). The personal representatives did not appear in person. Instead, each filed a petition pursuant to Chancery Court Rule 190 seeking to be excused from appearing in person because it would be an "unusual inconvenience" to do so. (A373, A391, A413, A429, A443, A459, A480). The seven petitions were supported by affidavits of personal representatives, each stating it was executed in Hidalgo County, Texas, on March 2, 2012. (A380, A398, A418, A434, A448, A464, A485). The Register of Wills issued letters of administration on May 1, 2012, the day the first three lawsuits were filed in Superior Court. (A376, A394, A415, A431, A444, A461, A482).

ARGUMENT

I. THE CHOICE OF LAW ORDER OFFENDS PRINCIPLES OF INTERNATIONAL COMITY

A. Question Presented

Did the Superior Court err by prejudging the adequacy of sovereign Mexican legislative policy decisions in its choice of law analysis? The issue was preserved below at A912-A927.

B. Standard and Scope of Review

The Superior Court's determination and interpretation of Mexican law is treated as a ruling on a question of law, subject to *de novo* review. *Chan Young Lee v. Choice Hotels Int'l, Inc.*, 992 A.2d 1236 (Del. 2010).

C. Merits of Argument

The outcome of the parties' competing choice of law motions below was essentially preordained once the cases were assigned to the trial court,[3] which has repeatedly and consistently found Mexico's legal system to be inadequate. Prior to the commencement of these actions in 2012, the trial court had ruled that Mexico's legal system is inadequate for prosecution of personal injury and wrongful death claims because it fails to adequately compensate victims, provides no survival

[3] The Mexican Claimants' CISs identified these cases as "related" to several automotive rollover cases pending before the same Superior Court judge; however, the only relationship between this action and those is that they all involve accidents that occurred in Mexico.

action, is too business-friendly, and offers its own citizens no recourse against foreign defendants. *See*, *e.g.*, *Pena v. Cooper Tire & Rubber Co.*, 2010 WL 1511709, at *3 (Del. Super. Ct. Apr. 15, 2010); *Ortega v. Yokahama Corp. of N. Am.*, 2010 WL 1534044, at *3 (Del. Super. Ct. Mar. 31, 2010); *Cervantes v. Bridgestone/Firestone N. Am. Tire Co.*, 2010 WL 431788, at *3 (Del. Super. Ct. Feb. 8, 2010).[4] Bell therefore faced the insurmountable burden of persuading the Superior Court to apply the laws of a foreign sovereign already prejudged to be subpar—a subjective judgment that flies in the face of comity and domestic law.

Comity is a well-developed and longstanding tenet of domestic and international choice of law, "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Justice Joseph Story argued that comity supplied the critical justification for applying foreign law in a domestic court. JOSEPH STORY, COMMENTARIES ON CONFLICT OF LAWS 44-46 (5th ed. 1857). Because all nations are, as a matter of principle, equal sovereigns when enacting legislation evidencing national policy choices, comity considerations preclude courts from

[4] Other courts, such as the United States Court of Appeals for the Fifth Circuit, have held that Mexico is an available forum for litigation against U.S. corporations as a matter of law, regardless of its policy choice on damages. *See Ibarra v. Orica United States Inc.*, 493 F. App'x 489 (5th Cir. 2012); *Saqui v. Pride Cent. Am. LLC*, 595 F.3d 206 (5th Cir. 2010); *In re Ford Motor Co.*, 591 F.3d 406 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 3467 (2010); *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785 (5th Cir. 2007); *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665 (5th Cir. 2003); *Gonzalez v. Chrysler Corp.*, 301 F.3d 377 (5th Cir. 2002).

passing judgment on the quality of a foreign justice system. *See*, *e.g.*, *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 73 (2d Cir. 1998).

Comity and established law also require courts to defer to other nations' legislative choices—foreign acts of state—without passing judgment thereon. "The courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (quoting *Salimoff & Co. v. Standard Oil Co.*, 262 N.Y. 220, 224, 186 N.E. 679, 681 (1933)). Indeed, to permit "the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918).[5]

Yet, that is precisely what happened here. If the Superior Court's decision is upheld, Delaware will be viewed as hostile to Mexico and Mexican law, imperiling Delaware companies' access to justice in Mexico, which is by no means desirable, necessary, or appropriate.

[5] The act of state doctrine is a rule of federal common law that is binding on state and federal courts alike. *Sabbatino*, 376 U.S. at 423-25. It applies to legislative enactments by foreign governments. *See* Restatement (Third) of Foreign Relations Law of the United States § 443 Reporter's Note (1987).

II. THE COURT BELOW ERRED IN HOLDING THAT TEXAS HAS THE MOST SIGNIFICANT RELATIONSHIP TO DAMAGES AND REMEDIES

A. Question Presented

Under a proper choice of law analysis, should the Superior Court have determined that the law of Mexico, presumptively applicable as the place where the injury is suffered, governs issues of remedies and damages? The issue was preserved below at A362, A912-A927.

B. Standard and Scope of Review

The Superior Court's decision to apply Texas law to the damages and remedies available to Mexican Claimants is subject to *de novo* review. *SIGA Techs., Inc. v. Pharmathene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of Argument

Delaware applies a two-part inquiry to determine the applicable law on a particular issue in a specific case. *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 43, 47-48 (Del. 1991). The court first must determine whether there is an actual conflict. *Deuley v. DynCorp. Int'l, Inc.*, 8 A.3d 1156, 1161 (Del. 2010). If there is no actual conflict, "the Court should avoid the choice-of-law analysis altogether." *Id.* Where, however, a conflict exists, Delaware has adopted the Restatement (Second) of Conflict of Laws ("the Second Restatement") in determining what law should apply. *Travelers Indem. Co.*, 594 A.2d at 47.

The law of the place where the injury occurred is presumed to apply unless another jurisdiction has a more significant relationship. Restatement (Second) of Conflict of Laws § 146 (personal injury); *id*. § 175 (wrongful death). To determine which state has the most significant relationship, the court must examine various factors and policy considerations set forth in Sections 6 and 145 of the Second Restatement. *Travelers Indem. Co.*, 594 A.2d at 47.

The parties agree, and the Superior Court found, that an "actual conflict exists" between Texas and Mexico with respect to the available remedies and damages. (Opinion at 4-5). While both jurisdictions provide civil remedies for wrongful death, they differ as to the persons eligible to recover for wrongful death, the available causes of action, and the character and kinds of damages recoverable.

Although Mexican law does not provide remedies for decedent's estates, it provides remedies for survivors, who may recover material (economic) damages and moral (non-economic) damages. (A514, A516-A518). The decedents in this case were both pilots and passengers. Under Mexican federal law, the computation of the damages available to a person injured during a flight is dependent upon whether the victim was a crewmember or a passenger. (A512).

The survivors in the crew cases (Arteaga and Montes) may recover under Mexico's Federal Civil Code (Codigo Civil Federal or "CC"), which provides a congressionally-defined formula for the computation of material (economic)

damages. (A515). The survivors in the passenger cases (Barrera, Gonzalez, Gutierrez, Hernandez, and Salas) may recover material (economic) damages as provided under Article 62 of Mexico's Civil Aviation Law (Ley de Aviacion Civil or "LAC"). (A515-A516). In other words, the material (economic) damages available to the pilots are liquidated whereas the same damages available to passengers are, for all intents and purposes, unliquidated.[6]

In the case of both pilots and passengers, survivors with "close emotional and economic ties" to the victim are entitled to recover moral (non-economic) damages under Mexican law include surviving spouses, children, and parents. (A517). Mexican law recognizes survivor rights for concubinas; that is, persons who lived with a decedent as if they were spouses even though not legally married. (A519). Concubinas also may recover material and moral damages. (A519).

Concubine status is not recognized in Texas. *Nevarez v. Bailon*, 287 S.W.2d 521, 523 (Tex. Civ. App. 1956). Wrongful death actions in Texas are authorized for the exclusive benefit of the deceased's surviving spouse, children, and parents. Tex. Civ. Prac. & Rem. Code § 71.004(a). Texas also recognizes survival actions on behalf of a decedent's estate. Tex. Civ. Prac. & Rem. Code § 71.021(b).

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[6] Article 62 provides that passengers who perish, suffer injuries, or lose property in the course of a flight operated by a private concessionaire, are entitled to three times the amount of economic damages recoverable under the CC. (A515). The Mexican Supreme Court, however, has declared the formula in Article 62 to be unconstitutional insofar as it conflicts with international aviation conventions and treaties. (A515-A516).

In the face of an actual conflict between the laws of Mexico and Texas, the Superior Court erred in not applying the presumption found in Sections 146 and 175, which was not rebutted, and in its application of Section 6 policy principles in light of the Section 145 factual contacts.

1. The Law of Mexico is Presumptively Applicable

The Second Restatement "directs the court, as a general rule, to *apply the law of the state where the injury occurred … unless* some other state has a more 'significant relationship' under Section 6 principles, to the occurrence and the parties." *Turner v. Lipschultz*, 619 A.2d 912, 914-15 (Del. 1992) (emphasis in original); *see also* Restatement (Second) of Conflict of Laws, §§ 146, 175. To that end, "Delaware courts place considerable emphasis on 'the place where the injury occurred.'" *Alten v. Ellin & Tucker*, *Chartered*, 854 F. Supp. 283, 287 (D. Del. 1994); *Whitwell v. Archmere Acad., Inc.*, 463 F. Supp. 2d 482, 486 (D. Del. 2006) (the "default rule … is to apply the law of the state where the injury occurred").

The injury occurred in Mexico. Mexican law is presumed to apply unless another jurisdiction has a more significant interest in the remedies available to the Mexican Claimants and the damages available to them. Mexico—the place of the injury and domicile of the Mexican Claimants and their decedents—has the most significant relationship to the parties and the occurrence.

2. The Section 145 Contacts Favor Mexico

Section 145 of the Second Restatement lists four contacts to be taken into consideration in determining what law governs and whether any state other than the place of the accident has a more significant relationship to the occurrence and parties: (1) the place of the injury; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and (4) the place of business of the parties and the place where the relationship, if any, between the parties is centered. Restatement (Second) of Conflict of Laws § 145. "Choice-of-law determinations must be made as to each issue when presented, not to the case as a whole." *Laugelle v. Bell Helicopter Textron, Inc.*, 2013 WL 5460164, at *3 (Del. Super. Ct. Oct. 1, 2013).

With respect to the law applicable to damages, the location of the injury and the domicile of the plaintiffs are "determinative." *Id.* at *4. Mexico is both the location of the injury and the domicile of all the surviving family members. Properly analyzed, as set forth below, the Section 145 contacts overwhelmingly point to Mexico with respect to the law applicable to damages and remedies.

The location of the injury weighs heavily in favor of Mexican damages law. The first contact considered under Section 145 is "the place where the injury occurred." Restatement (Second) of Conflict of Laws § 145(2)(a). The place where the injury occurred "plays an important role in the selection of the state of

the applicable law." *Id.* at cmt. e. Indeed, the place of the injury is generally considered to be the most significant factor, particularly where—as here—it coincides with the place of the plaintiff's domicile. *Id.* at cmt. f. This factor weighs heavily in favor of application of Mexican law.

It is undisputed that the accident occurred in Mexico, the only place it could happen, yet the Superior Court found the place of accident to be "fortuitous." (Opinion at 8). The accident was not pure happenstance but occurred in the course and scope of the decedents' employment in Mexico. The fact that the decedents were from different Mexican states is of little relevance insofar as Mexican *federal* aviation law governs, regardless where in Mexico an aircraft accident occurs. (Opinion at 8) (aviation accidents are "a matter of Mexican federal jurisdiction").

The location of the conduct causing injury has little to no relevance to the issue of damages. The second contact under the Section 145 analysis is "the place where the conduct causing the injury occurred." Restatement (Second) of Conflict of Laws § 145(2)(b). The Superior Court determined Texas to be the place of the conduct causing the injury because Texas is where the "fitting was designed, manufactured, and tested." (Opinion at 9). The conduct causing the injury is not a significant factor with regard to the issues of compensatory damages and remedies. Restatement (Second) of Conflict of Laws § 75, cmt. c. Rather, "what is critical is

that the consequences of that tortfeasor's conduct are suffered in" Mexico. *State Farm Auto Ins. Co. v. Patterson*, 7 A.3d 454, 459 (Del. 2010).

In *Laugelle*, for example, a resident of Massachusetts brought a wrongful death action against Bell and other defendants, seeking recovery for the death of her husband, who sustained fatal injuries in a helicopter crash that occurred off the coast of Texas. 2013 WL 5460164, at *1. In granting a motion to apply Massachusetts law to damages, the court recognized that while the helicopter accident and alleged torts occurred elsewhere, "the survivor Plaintiffs' injuries—the loss to be compensated—occurred and will be experienced in Massachusetts, where they are domiciled." *Id.* at *4 (further noting that Massachusetts was "where the Pilot's loved ones experienced and still experience the economic difficulties, the pain, and the suffering this loss has visited upon him").

The domicile of the parties favors application of Mexican damages law. The third contact to be considered under Section 145 is "the domicil, residence, nationality, place of incorporation and place of business of the parties." Restatement (Second) of Conflict of Laws § 145(2)(c). The domicile of the injured party is a "substantial factor in any choice of law analysis," but particularly with respect to the issue of damages. *Emmons v. Tri Supply & Equip. Co.*, 2012 WL 5432148, at *3 (Del. Super. Ct. Oct. 17, 2012) (law of injured party's domiciled applied, as the plaintiff suffered "from the effects of his injury in Delaware").

There is no relationship between the Mexican Claimants and Bell as relates to damages. The final Section 145 contact to be considered is "the place where the relationship, if any, between the parties, is centered." Restatement (Second) of Conflict of Laws § 145(2)(d). This factor applies only "[w]hen there is a relationship between the plaintiff and the defendant and when the injury was caused by an act done in the course of the relationship." *Id.* at cmt. e. There is no relationship between the Mexican Claimants and Bell. *Laugelle*, 2013 WL 5460164 at *4 (finding no relationship between the plaintiffs and manufacturer "as it relates to damages" and, thus, final Section 145 factor "is of little moment").

3. The Section 6 Policy Considerations Also Favor the Application of Mexican Law to Damages and Remedies

In addition to considering the Section 145 contacts, the court must also consider various policy factors set forth in Section 6 of the Second Restatement. As with the factual contacts of Section 145, the seven policy considerations of Section 6 compel the application of Mexican law to damages and remedies.

The needs of interstate and international systems are satisfied by application of Mexican damages law. The first policy factor to consider under a Section 6 analysis is "the need of the interstate and international systems." Restatement (Second) of Conflict of Laws § 6(2)(a). "[T]he most important function of choice-of-law rules is to make the interstate and international systems work well." *Id.* at

cmt. d. Delaware must respect other jurisdictions, especially the interest of a sovereign nation such as Mexico in seeing that its citizens are "'made whole by recovery of the full measure of compensatory damages *to which they are entitled under the law of their domicile*.'" *In re Aircrash Disaster near Roselawn*, 926 F. Supp. 736, 745 (N.D. Ill. 1996) (quoting *In re Air Crash Disaster Near Chicago, Ill. on May 15, 1979*, 644 F.2d 594, 613 (7th Cir. 1981)) (emphasis supplied).

Delaware has no interest in the compensation of foreign plaintiffs for injuries occurring in a foreign country. The second Section 6 policy consideration is "the relevant policies of the forum." Restatement (Second) of Conflict of Laws § 6(2)(b). The only connection with the forum is that Bell is incorporated in Delaware and suit was filed here. There is "no countervailing local interest" where a plaintiff is not a resident of Delaware and was not injured in Delaware. *Martinez v. E.I. DuPont de Nemours & Co.*, 86 A.3d 1102, 1107 (Del. 2014). Thus, "the only relevant policies … will be embodied in [Delaware's] rules relating to trial administration." Restatement (Second) of Conflict of Laws § 6 cmt. e.

Texas has no interest in the compensation of foreign plaintiffs whereas Mexico has a strong interest in ensuring its citizens are compensated pursuant to its laws. The third policy consideration is "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 6(2)(c). In examining this

consideration, the court should "seek to reach a result that will achieve the best possible accommodation of these policies." *Id.* at cmt. f. As between Mexico and Texas, Mexico's interest in ensuring that its citizens are compensated *pursuant to Mexican law* overwhelmingly trumps any interest Texas may possess.

Indeed, three of the survivors—the concubinas—will have no remedy under Texas law, because Texas does not afford them one. Texas has no interest in depriving non-residents of remedies that they would be entitled to under the law of their domicile. Although Mexican law provides different rights and remedies to the pilots and passengers, that is a balance made in light of its culture, economy, and legal system. A "state's interest in applying its compensatory damages rules involves a careful balancing of concerns and is not limited solely to ensuring some level of minimum recovery for its domiciliaries." *Roselawn*, 926 F. Supp. at 745. "Mexico has made a deliberate choice in providing a specific remedy" which should not be questioned or disturbed by a Delaware court. *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 381-82 (5th Cir. 2002).

The justified expectations of the parties were that Mexican damages law would apply to injuries sustained by Mexican nationals in Mexico. The fourth policy consideration under Section 6 is "the protection of justified expectations." Restatement (Second) of Conflict of Laws § 6(2)(d). No party had any expectation that injury to Mexican nationals in Mexico would be governed by Texas law.

The policies underlying tort law favor Mexico. The fifth policy consideration is "the basic policies underlying the particular field of law." Restatement (Second) of Conflict of Laws § 6(2)(e). Under both Mexican and Texas law, the purpose of wrongful death damage awards is to compensate the victim. Mexico, however, has the greatest interest in the compensation of its citizens for injury suffered within its borders. *Patterson*, 7 A.3d at 458-59; *Laugelle*, 2013 WL 5460164 at *4; *Emmons*, 2012 WL 5432178, at *4.

Application of Mexican damages law promotes certainty, predictability, and uniformity and discourages forum shopping. Under the sixth policy consideration, the court must look at the "certainty, predictability, and uniformity of result." Restatement (Second) of Conflict of Laws § 6(2)(f). The choice of law ruling in these cases is directly at odds with the legal rule applied in *Laugelle*, even though Bell is a party to both cases, now pending in the same courthouse.

The application of Texas law is no easier than the application of Mexican law. The final policy consideration under Section 6 is the "ease in the determination and application of the law to be applied." Restatement (Second) of Conflict of Laws § 6(2)(g). In the case of the pilots, Mexican law provides a formula for their damages. In the case of the passengers, economic experts will testify to their damages, just as they would under Texas law.

III. THE COURT BELOW ERRED IN HOLDING THAT TEXAS HAS THE MOST SIGNIFICANT RELATIONSHIP TO LIABILITY

A. Question Presented

Under a proper choice of law analysis, should the Superior Court have determined the law of Mexico, presumptively applicable as the place of injury, governs issues of liability? The issue was preserved below at A912-A927.

B. Standard and Scope of Review

The Superior Court's decision to apply Texas law to liability is subject to *de novo* review. *J.S. Alberici Constr. Co. v. Mid-W Conveyor Co.*, 750 A.2d 518, 520 n.2 (Del. 1990) (citation omitted).

C. Merits of Argument

There is an actual conflict insofar as Texas recognizes strict products liability and Mexico does not recognize strict liability against product manufacturers. *Thompson v. Reinco, Inc.*, 2004 WL 1426971, at *1 n.1 (Del. Super. Ct. June 15, 2004) (choice of law issue could be critical because Delaware is not a strict tort liability state whereas the other states implicated are strict liability states). The Superior Court erred in resolving the conflict by not properly applying the Section 6 policy principles in light of the Section 145 contacts.

1. The Law of Mexico is Presumptively Applicable

In personal injury actions, the law of the place where the injury occurred is presumed to apply unless another state has a more significant relationship. *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (citations omitted). Sections 146 and 175 of the Second Restatement create "the functional equivalent of a rebuttable presumption" that the tort law of the place of injury applies. *Patterson*, 7 A.3d at 462 (Steele, C.J., dissenting). *See also Turner*, 619 A.2d 915, 916 (characterizing Section 146 as both a "general rule" and a "presumption"); *Smith v. Daimlerchrysler Corp.*, 2002 WL 31814534, at *1 (Del. Super. Ct. Nov. 20, 2002) (Section 146 of the Second Restatement establishes a "rebuttable presumption in favor of the law of the state where the injury occurred, unless another state has a more significant relationship to the action").

"Although the presumption in Section 146 exists, the trial court still must analyze the seven factors enumerated in Section [6] before concluding that the presumption has not been overcome." *McBride v. Whiting-Turner Contracting Co.*, 625 A.2d 279 (Table), 1993 WL 169110, at *4 (Del. Apr. 27, 1993) (citing *Turner*, 619 A.2d at 914-15) (other citations omitted). Properly analyzed, "the factual predicate of this case did not call for a departure from section 146's general directive." *Sinnott v. Thompson*, 32 A.3d 351, 356 (Del. 2011) (discussing *Turner*,

619 A.2d at 915-16). The Superior Court committed legal error by not applying Mexican federal law to liability under the circumstances.

2. The Section 145 Contacts Favor Mexico

The Section 145 contacts favor application of Mexican law, not Texas law, which is the law the Superior Court applied to liability. It is not simply the number of contacts with Mexico that compels this conclusion, although there are many.[7] Rather, it is the "qualitative aspect" of the contacts that favors application of Mexican law. *Travelers Indem. Co.*, 594 A.2d at 48 n.6.

The injuries occurred in Mexico, which was not fortuitous. The place of injury is either fortuitous or it is not. The Superior Court determined the place of injury to be "fortuitous" because "only some, and not all, of the decedents resided in the Mexican state of Veracruz, the location of the accident." (Opinion at 8). Under the Superior Court's formulation—that place of domicile is determinative on the question of fortuity—the helicopter accident *was* fortuitous as to the decedents domiciled outside Veracruz but *was not* fortuitous as to the decedents

[7] The Mexican Claimants are, and their decedents were, residents and citizens of Mexico; the helicopter at issue was registered in Mexico and had been operated there since the 1970s; the helicopter was owned, operated and maintained in Mexico by Mexican companies; at the time of the accident, the helicopter was operated by Mexicans flying in Mexican airspace; the accident occurred while the Mexican Claimants' decedents were working in their native Mexico, for a Mexican enterprise which served as a contractor to the Mexican federal government; and at the time of the accident, the helicopter was under the exclusive jurisdiction of Mexican federal law and operated under the oversight of Mexican federal regulatory authorities responsible for airworthiness, aircraft maintenance standards and control of Mexican airspace.

domiciled in Veracruz. The Superior Court resolved this inherent inconsistency by imposing the additional requirement that *all* plaintiffs be injured in the state where they reside before the place of injury will considered anything other than fortuitous.[8] In so doing, the Superior Court rendered the place of injury presumption meaningless when applied in a multi-plaintiff accident litigation.

The Superior Court's analysis also overlooked the particular circumstances of this workplace accident. The helicopter was transporting oil industry personnel to a job site. It was by no means fortuitous that the accident occurred in the course and scope of employment in the place of the decedents' employment. The decedents were in a location they intended to be in when the accident occurred; they were not in a location whose only relationship to the occurrence was mere chance. *See Calhoun v. Yamaha Motor Corp., U.S.A.*, 216 F.3d 338, 347 (3d Cir. 2000) (because the plaintiff intentionally traveled to Puerto Rico, "there was no possibility that [the boating] accident could have occurred anywhere other than in Puerto Rico").

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[8] The trial court has ruled similarly in other accidents involving Mexican plaintiffs, holding the place of injury to be fortuitous where the accident occurred in a state other than the place of domicile. *See Caballero v. Ford Motor Co.*, 2014 WL 2900959, at *4 (Del. Super. Ct. June 24, 2014) (place of injury is fortuitous because the plaintiffs neither resided in the Mexican state of Durango, where the accident occurred, nor alleged that any of the defendant's culpable conduct occurred there); *Orteaga*, 2010 WL 1534044, at *2 (place of injury is fortuitous because neither plaintiffs nor defendants are residents of Mexican state of Michoacan, where accident occurred). *But see Pena*, 2010 WL 1511709, at *2 ("the place of injury, Chihuahua, is not fortuitous because Chihuahua is also the place in which *all* plaintiffs reside") (emphasis supplied).

This is not a situation where a Texas-registered aircraft strayed into Mexican airspace and crashed there. The helicopter had been continuously operated in Mexico since 1979. If an accident was going to happen, it was going to happen in Mexico. Whether the accident occurred at the point of origin (in Campeche) or at the intended destination (in Veracruz), the location of the accident in Mexico was not fortuitous, because the flight began in Mexico and the flight was to end in Mexico. *Cf. Campanella v. GMC*, 1996 Del. Super. LEXIS 493, at *3 (Del. Super. Ct. Oct. 25, 1996) ("the journey commenced in Delaware and was to be completed in Delaware").

Moreover, the competing laws of Mexican states are not at issue here. The Superior Court acknowledged that "[a]viation activities in Mexican airspace are a matter of Mexican federal jurisdiction." (Opinion at 8). Mexican federal law is the governing Mexican law regardless of where in Mexico an aircraft accident happens—in the state of domicile, outside the state of domicile, or some combination of both. Even under the Superior Court's formulation, there was no fortuity because *Mexican federal law is in fact the law of the place of domicile of all the survivors*. As between one Mexican state and another, the location of an accident involving a Mexican-registered helicopter, operated by Mexican pilots traveling in Mexican airspace while ferrying Mexican passengers for their Mexican

employers from one place in Mexico to another place in Mexico was by no means fortuitous.

The conduct claimed to have caused the injury occurred in Texas and Mexico, among other places. The helicopter and the part at issue were manufactured in Texas. The place of manufacturing in Texas certainly is afforded some weight to the extent that the Mexican Claimants advance manufacturing defect claims, but certainly not the dispositive significance afforded by the Superior Court.

The theory of liability against Bell includes manufacturing defect and design defect. "Modern choice of law considerations suggest that the jurisdiction where the product is marketed has a greater interest than a jurisdiction where a product is manufactured, developed, or tested." *Rasmussen v. Uniroyal Goodrich Tire Co.*, 1995 WL 945556, at *3 (Del. Super. Ct. Aug. 18, 1995).

The helicopter was exported to Mexico. The part was shipped to an operator in Louisiana that operates Bell 212 helicopters throughout the world. The part was delivered to, and installed in, Mexico. The installation of the part and ultimate failure of the part in Mexico is what caused the injury. *Thompson*, 2004 WL 1426971, at *2 (place of manufacture not significant in design defect case where product was manufactured in New Jersey, sold in Pennsylvania, and delivered to a company in Delaware "presumably" for use in Delaware).

Put another way, Mexico is where the decedents were exposed to the product causing injury. Under an "exposure" approach, the place of exposure to the product, and not the place where the product was manufactured, may be found to be the place of injury-producing conduct. *See In re W.R. Grace & Co.*, 418 B.R. 511, 519 (D. Del. 2009) ("the actual installation—and thus the conduct causing the injury—occurred in California").

In addition to design and manufacturing defect claims, the Mexican Claimants have advanced failure to warn claims. A failure to warn occurs at the place a plaintiff could reasonably have been warned regardless of where the decision not to warn takes place. *Sulak v. Am. Eurocopter Corp.*, 901 F. Supp. 2d 834, 844 (N.D. Tex. 2012) ("the failure to warn would have arisen in Hawaii because that is where the helicopter was operated [and not in France where it was designed and manufactured]"). *But see Caballero*, 2014 WL 2900959, at *4 (holding failure to warn occurs at place where decision not to warn was made); *Cervantes*, 2010 WL 431788, at *3 (same). This particular helicopter with this particular part was operated in Mexico. The Mexican Claimants seek to hold Bell accountable for warnings not given in Mexico and, as to this part installed on this helicopter, the failure to warn occurred in Mexico, the place where each decedent could reasonably have been warned. *Sulak*, 901 F. Supp. 2d at 844.

Although the Superior Court determined all "the injury-producing conduct occurred in Texas," (Opinion at 14), the conduct at issue reasonably can be said to have taken place in multiple locations, inside and outside Texas. "Consequently, the fact that the product was manufactured in [Texas] is not very significant under the facts of this particular case." *Thompson*, 2004 WL 1426971, at *1.

The parties' residence and places of business are in different places. Bell is a Delaware corporation with places of business throughout Texas. The Mexican Claimants, twenty in all, are domiciled in Mexico. Their seven decedents were domiciled in Mexico. The effects of the accident are felt only in Mexico, where the survivors all reside. Delaware courts clearly consider the place where the injury is felt to be a substantial factor in any choice of law analysis in a tort case. *Emmons*, 2012 WL 5432148, at *4 (resolving conflict between pure contributory negligence and comparative negligence schemes).

The relationship of the parties, if centered anywhere, is centered in Mexico. The Superior Court found the relationship of the parties to be centered in Texas, where the part was manufactured.[9] But Bell did not sell any part to any of the

[9] This holding is consistent with other holdings by the trial court in cases filed by Mexican plaintiffs. *See Ortega*, 2010 WL 1534044, at *3 ("the court concludes the state where the relationship between the parties is centered is Virginia … [where] the tire came into existence, where it was both designed and made"); *Pena*, 2010 WL 1511709, at *2 ("[t]he relationship between the parties in this case is centered in the United States"). *Cf. Cervantes*, 2010 WL 431788, at *3 ("[t]he relationship of the parties is centered in Delaware, where the suit is filed. The factor weighs in favor of application of U.S. law, not Mexican law.") (internal footnote

decedents or their survivors. Even if it had, the sale of a product alone does not create a relationship centered in the state where Bell is physically located. *Cf. Smith*, 2002 WL 31814534, at *1 ("relationship" between parties consisted of Maryland car dealer selling car to Delaware resident, which was not enough to overcome the presumption that the law of the place of injury will govern).

The relationship among all the parties, on the issue of liability, was that of helicopter manufacturer and persons flying on the helicopter within Mexico. *Michaud v. Fairchild Aircraft, Inc.*, 2004 WL 1172897, at *1 (Del. Super. Ct. May 13, 2004) (parties' relationship was aircraft manufacturer and pilots flying the aircraft in Quebec). The parties' relationship, on this particular issue, may reasonably be said to be centered where the aircraft was owned and operated and the helicopter accident occurred. *Cf. Turner*, 619 A.2d at 915 (the relationship of the occupants of the vehicles is centered in Delaware, where the collision occurred); *Campanella*, 1996 WL 769769, at *1 ("[t]he relationship of these parties is centered in Delaware where the allegedly defective Chevy Blazer was"); *Rasmussen*, 1995 WL 945556, at *3 (Delaware plaintiffs traveled to Missouri to visit Missouri relative who purchased allegedly defective tire for use in Missouri owned and registered vehicle purchased in Missouri and operated by a Missouri

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omitted). *But see Thompson*, 2004 WL 1426971, at *2 ("[a]lthough the injury actually occurred in Maryland, it was the delivery of the product to a Delaware resident for use in Delaware that provides the pivotal moment which ultimately brought all the parties together").

resident when the accident occurred so their relationship could therefore be viewed as "having assumed a Missouri mantle"). The relationship of the parties and the occurrence in this case is by no means centered in Texas.

3. The Section 6 Principles Favor Mexico

Under the Second Restatement approach, the factual contacts of Section 145 are weighed along with the policy considerations embodied in Section 6. The Section 6 policy considerations compel the application of Mexican law to liability.

As for needs of interstate and international systems, international relations would be facilitated by application of Mexican law in a case with the most significant contacts to Mexico. From the perspective of comity, Delaware would expect other jurisdictions to recognize Delaware's interest under similar circumstances. So, too, must Delaware respect other jurisdictions, especially a sovereign nation such as Mexico, which has a national interest in regulating its airspace. *Cf. Martinez*, 86 A.3d at 1107 ("the policy issue underlying this case implicates important interests of Argentina itself").

Delaware, the state of the forum, has no significant interest in this case. "[N]o countervailing local interest exists in this case because 'the Plaintiff is not a resident of Delaware, was not injured in Delaware, and … the Defendant's state of incorporation has no rational connection to the cause of action.'" *Martinez*, 86 A.3d at 1109. This is a case where the state of the forum has no interest in the case

apart from the fact that it is the place of the trial of the action. Here, "the only relevant policies … will be embodied in [Delaware's] rules relating to trial administration." Restatement (Second) of Conflict of Laws § 6 cmt. e.

Mexico has the strongest policy interest in this controversy. As this Court recognized in *Martinez*, 86 A.3d at 1107, when a matter implicates important interests of a foreign jurisdiction—here, the Mexican aviation statute and its liability scheme—foreign law must apply. (A189-A191). The place where a product was made does not trump the overwhelming local interest of Mexico in having this controversy adjudicated under its own public interest laws designed to govern activity related to its sovereign airspace. *Martinez* reinforces the presumption under Delaware law that the law of the place of injury governs absent special circumstances by highlighting the policy considerations that underlie the presumption.

The expectations of the parties point to the law of Mexico. To the extent this factor is of much significance in a tort case, it points to the law of Mexico because the accident occurred as the helicopter was traversing Mexican airspace. *Cf. Eby v. Thompson*, 2005 WL 1653988, at *3 (Del. Super. Ct. Apr. 20, 2005) (plaintiffs "expected Delaware law to apply as they traveled Delaware's highways"). Neither the decedents nor their survivors had any expectation that the

law of Texas, where most have never been, would or could govern their rights to tort relief.

The basic policies of tort law point toward Mexico. Mexico has the greatest interest in tort rules governing its sovereign skies, yet the Superior Court viewed the policy interest as being to protect resident defendants from large monetary damages awards, looking to its prior decisions in the rollover cases. That conclusion—which is based only on supposition—is clearly erroneous on this record and is not a policy consideration germane to the discrete issue of liability.

Certainty, predictability, and uniformity all point to Mexico. "[T]he most important function of choice-of-law rules is to make the interstate and international systems work well." *Sinnott*, 32 A.3d at 358 (quoting Restatement (Second) of Conflict of Laws § 145 cmt. d). Applying the law where the injury occurred, where the consequences of the tort are felt, and where at least some of that conduct occurred fosters this most important function.

Ease of application favors Mexico. The underlying Mexican federal law sounds in negligence, a tort concept familiar to Delaware courts.

CONCLUSION

For all the foregoing reasons, the order entered June 10, 2014 should be reversed and the law of the federal republic of Mexico applied.

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/s/ Joseph J. Bellew

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