APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
SEVENTH CIRCUIT

Nos. 23-2358 & 23-2359

IN RE: LION AIR FLIGHT JT 610 CRASH

Appeal of: Laura Smith, as duly appointed representative and Independent Administrator of the Estate of Andrea Manfredi, deceased, et al.

Appeal of: Terrence Buehler, Personal Representative and Independent Administrator of the Estate of Liu Chandra, deceased.

Argued February 16, 2024
Decided August 6, 2024

Opinion

Ripple, Circuit Judge.

These two consolidated cases arose from the crash of a Boeing commercial jet aircraft into the Java Sea off the coast of Indonesia. Everyone on board died. The plaintiffs are family members and representatives of the estates of two passengers on that flight. They brought these actions against Boeing and other defendants.

Boeing filed pretrial motions in each of these cases, raising two issues, both of which are properly before us in this interlocutory appeal certified under 28 U.S.C. § 1292(b). First, is the Death on the High Seas Act

("DOHSA"), 46 U.S.C. §§ 30301–08, the sole source of potential recovery for the plaintiffs, or can the plaintiffs assert other claims as well? Second, are the plaintiffs entitled to a jury trial? The district court concluded that the plaintiffs can only proceed under DOHSA and that they are not entitled to a jury trial. We agree with the district court and affirm its rulings.

I

BACKGROUND

On October 29, 2018, Lion Air Flight JT 610 took off from Jakarta, Indonesia. Almost immediately after takeoff, the passengers began experiencing the aircraft's erratic movements and fluctuations in altitude due to mechanical issues with the plane, a Boeing 737 MAX. After a few minutes, the plane flew out over open water, and approximately five minutes after that, it crashed into the Java Sea, about eighteen miles off of the coast of Indonesia. There were no survivors. Boeing has admitted that a manufacturing defect in its 737 MAX plane caused the crash.

The two cases before us were brought by the families and representatives of the estates of two passengers who died in the crash: Liu Chandra, an Indonesian businessman, and Andrea Manfredi, an Italian entrepreneur and professional cyclist. The Chandra case was filed initially in Illinois state court. Boeing subsequently removed it to the United States District Court for the Northern District of Illinois without objection. The sole plaintiff in the Chandra matter is a representative of both Mr. Chandra's estate and Mr. Chandra's heirs. In the operative amended complaint, the representative has named as defendants two United States government agencies, three individuals, and four private entities, one of which is Boeing. The

representative asserted claims on behalf of both Mr. Chandra's estate and Mr. Chandra's family members under DOHSA; the Suits in Admiralty Act, 46 U.S.C. §§ 30901–18; and Illinois state law. He demanded a jury trial and asserted that the district court has jurisdiction based on diversity; DOHSA; the Suits in Admiralty Act; and the Multiparty, Multiforum Trial Jurisdiction Act ("MMTJA"), 28 U.S.C. § 1369.

The Manfredi case was filed initially in the United States District Court for the Northern District of Illinois. The plaintiffs in that case are family members of Mr. Manfredi and a representative of Mr. Manfredi's estate (collectively, the "Manfredi Plaintiffs"). The Manfredi Plaintiffs asserted claims under state law and under the Consumer Fraud and Abuse Act, 18 U.S.C. § 1030, on behalf of both Mr. Manfredi's estate and Mr. Manfredi's family members. The Manfredi Plaintiffs demanded a jury trial and alleged that the district court has jurisdiction based on both diversity and the MMTJA.

Boeing filed motions in both cases asking the district court to rule that DOHSA applies, preempts all of the plaintiffs' non-DOHSA claims, and mandates a bench trial. The district court granted Boeing's motions. The district court first explained that DOHSA applies to all cases, like this one, where the decedent died on the high seas. The court then held that DOHSA preempted the plaintiffs' non-DOHSA claims. It explained that, where DOHSA applies, it is generally the exclusive remedy. The court reasoned that, under this principle, the plaintiffs' claims for their decedents' pre-death pain and suffering and lost property could not proceed. Accordingly, the court dismissed all state-law-based claims for pre-death pain and suffering, emotional

distress, and lost property. It also dismissed all federal and state fraud claims.

The district court then considered whether the plaintiffs were entitled to a jury trial. The court ruled that Congress has "explicitly limited DOHSA to 'a civil action in admiralty,' which does not carry the right to a jury trial." *In re Lion Air Flight JT 610 Crash*, No. 18-cv-07686, 2023 WL 3653218, at *7 (N.D. Ill. May 25, 2023) (quoting 46 U.S.C. § 30302). It rejected the plaintiffs' argument that their DOHSA claims could be brought as non-admiralty claims because there were non-admiralty sources of jurisdiction. It accordingly concluded that DOHSA precluded a jury trial on the plaintiffs' claims and granted Boeing's request for a bench trial.

The plaintiffs asked the district court to certify an interlocutory appeal under 28 U.S.C. § 1292(b). They identified the question of whether they are entitled to a jury trial as the question warranting interlocutory review. The representative in the Chandra case additionally submitted that the question of whether DOHSA preempted their non-DOHSA claims was another question warranting interlocutory review. The court certified for immediate interlocutory appeal the question whether a plaintiff is entitled to a jury trial under DOHSA. The district court declined to certify the preemption issue.

II

DISCUSSION

A.

A court of appeals may, in its discretion, permit an appeal to be taken from an order certified for interlocutory appeal by a district court. *See* 28 U.S.C. § 1292(b).

The order must present a "controlling question of law," difficult enough to leave "substantial ground for difference of opinion," and whose resolution will "materially advance the ultimate termination of the litigation." *Id.* In such an appeal, although the district court must identify a "controlling question of law," our authority extends past answering that question. *Id.*; *see Martin v. Goodrich Corp.*, 95 F.4th 475, 478 (7th Cir. 2024). The appeal presents *the order* for appellate decision, and a court of appeals "may address any issue fairly included within the certified order." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996).

Here, the district court certified the jury trial question for interlocutory review. We agree with the district court that this issue is suitable for interlocutory review. As we noted earlier, the district court declined to certify the preemption question for interlocutory review. But, because that issue was decided in the same order, we can decide that question, and indeed should resolve it because resolution of that issue will influence significantly our decision on the jury trial question. There is authority that parties in admiralty cases can have a jury trial on claims that would otherwise be tried by the court, if their claims arise out of the same set of facts as a claim that can be tried before a jury. *See Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 21, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963) (concluding that, when a Jones Act claim and a maintenance and cure claim arise from the same accident, district courts must allow a jury trial, even if the maintenance and cure claim is cognizable only in admiralty); *Red Star Towing & Transp. Co. v. The "Ming Giant,"* 552 F. Supp. 367, 374–75 (S.D.N.Y. 1982) (concluding that a jury should decide both DOHSA and Jones Act claims, in case in which plaintiffs asserted

both types of claims); *Gvirtsman v. W. King Co.*, 263 F. Supp. 633, 634–35 (C.D. Cal. 1967) (same). Therefore, if the plaintiffs have valid non-DOHSA claims, then the district court presumably should have allowed the plaintiffs to try those claims and their DOHSA claims before a jury. On the other hand, if DOHSA preempts the other claims, then the availability of a jury trial turns on whether DOHSA permits the plaintiffs to demand a jury trial. Accordingly, we will address both issues, starting with preemption.

B.

Before 1920, relatives of persons who died on the "high seas"—waters far enough from any coast to be outside the territorial waters of a state or country—generally had no remedy. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). As a result, the family members of victims of high-seas disasters like the sinking of the Titanic had no means of recovery. *See* Robert M. Hughes, *Death Actions in Admiralty*, 31 Yale L.J. 115, 117 (1921).

DOHSA, enacted in 1920, helped to fill this void. DOHSA provides that, "[w]hen the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas …, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible." 46 U.S.C. § 30302. Claims under DOHSA can be brought in federal court or in state court. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986).

DOHSA functions as a wrongful-death statute in that it gives "surviving relatives a cause of action for losses *they* suffered as a result of the decedent's death." *Dooley v. Korean Air Lines Co.*, 524 U.S. 116, 123, 118

S.Ct. 1890, 141 L.Ed.2d 102 (1998). Survivors whose losses can be remedied in a DOHSA action include "the decedent's spouse, parent, child, or dependent relative." § 30302. DOHSA is not a survival statute. A survival statute "permits a decedent's estate to recover damages that the decedent would have been able to recover but for his death." *Dooley*, 524 U.S. at 123, 118 S.Ct. 1890. Unlike survival statutes, "DOHSA does not authorize recovery for the decedent's own losses." *Id.* at 122, 118 S.Ct. 1890.

The Supreme Court has held that, where DOHSA applies, it preempts all wrongful-death remedies otherwise available under state law and general maritime law. *See Offshore Logistics*, 477 U.S. at 232, 106 S.Ct. 2485 (state law); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624–25, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978) (general maritime law). Although the plaintiffs included in their complaints many state-law wrongful-death claims, they now concede that DOHSA preempts those claims.

They continue to contend, however, that some of their state-law *survival* claims are not preempted by DOHSA. As they acknowledge, this contention must grapple with *Dooley v. Korean Air Lines, supra.* In *Dooley*, plaintiffs sought to recover damages under state law for pain and suffering that their relative, who died on the high seas, experienced shortly before his death. The plaintiffs argued that DOHSA did not preempt their claims because, in their view, DOHSA had no "bearing on the availability of a survival action." *Id.* at 123, 118 S.Ct. 1890. The Supreme Court disagreed, stating that "DOHSA expresses Congress' judgment that there should be no such cause of action in cases of death on the high seas." *Id.* The Court explained that, in DOHSA, "Congress provided the

exclusive recovery for deaths that occur on the high seas." *Id.* Because "Congress ha[d] spoken on the availability of a survival action," *id.* at 124, 118 S.Ct. 1890, the Court held that the plaintiffs could not pursue their state-law survival claims for their decedent's pre-death pain and suffering.

The plaintiffs contend that, despite *Dooley*, they can seek two types of damages on behalf of their decedents' estates. First, the plaintiffs contend that they can seek damages for the pain and suffering that their decedents experienced on the over-land portion of the flight. It is difficult, however, to see how this could be a separate claim than a claim for pain and suffering the decedents experienced over water, minutes later. This position is also inconsistent with decisions of other courts that plaintiffs cannot avoid DOHSA preemption merely by showing that a fatal accident on the high seas had some connection to land. *See, e.g., LaCourse v. PAE Worldwide Inc.*, 980 F.3d 1350, 1357 (11th Cir. 2020) (accident was governed by DOHSA because the plane crashed into the high seas, even though the alleged negligence occurred on land and much of the flight was scheduled to be over land). Further, much of the language in *Dooley*—especially the reference to the congressional judgment that "there should be no [survival] cause of action in cases of death on the high seas," 524 U.S. at 123, 118 S.Ct. 1890—broadly indicates that DOHSA preempts all survivor actions grounded in state law or general maritime law that are based on the same facts as the fatal accident. Second, the plaintiffs contend that they can seek damages for property their decedents lost in the crash. This claim, too, is foreclosed by the

reasoning in *Dooley* regarding survival-based claims.[1] The plaintiffs' non-DOHSA claims grounded in state law thus cannot go forward.

C.

We now turn to the jury trial question (the question certified by the district court). We start with some background.

1.

This background can suitably begin in the years immediately before the Founding. In that era, individuals in the colonies with maritime claims could bring those claims either in vice admiralty courts created by Britain or in the local colonial courts. Steven L. Snell, *Courts of Admiralty and the Common Law: Origins in the American Experiment in Concurrent Jurisdiction* 204–05 (2007). This arrangement "provided the litigants with a choice," and a "potential plaintiff was able to weigh the alternatives between" the types of courts. *Id.* at 205. The vice admiralty courts had the advantage of different remedial mechanisms and often greater expertise, but, unlike in the local colonial courts, claims there were tried without juries. *Id.* at 182.

The Judiciary Act of 1789 preserved the substance, but not the precise forms, of this arrangement. In that statute, Congress gave the federal circuit courts jurisdiction over diversity cases. 1 Stat. 73, § 11. It also gave federal district courts exclusive jurisdiction over

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[1] Some courts have held that, under DOHSA, plaintiffs are able to recover damages approximating the value of their decedents' lost property if they can establish that the property would have become part of their inheritance. *See Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1093 (5th Cir. 1988); *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983). We have no occasion to address that issue today.

"all civil causes of admiralty and maritime jurisdiction," including those "upon the high seas," but from this grant of exclusive jurisdiction it "sav[ed] to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." *Id.* § 9.[2]

This carve-out has been called the saving-to-suitors clause. It "saves" all *in personam* claims. *See The Moses Taylor*, 71 U.S. 411, 431, 4 Wall. 411, 18 L.Ed. 397 (1867). Thus, the Judiciary Act of 1789 made federal district courts the exclusive arbiter of all *in rem* maritime claims, but not of all *in personam* maritime claims. Moreover, because of the saving-to-suitors clause, unless another statute provided to the contrary, maritime plaintiffs with *in personam* claims were not required to sue in the federal district courts. Instead, if they so chose, they could sue in state court, or, if there was diversity, in federal circuit courts. *See Norton v. Switzer*, 93 U.S. 355, 356, 23 L.Ed. 903 (1876) ("Parties in maritime cases are not ... compelled to proceed in the admiralty at all, as they may resort to their common-law remedy in the State courts, or in the Circuit Court, if the party seeking redress and the other party are citizens of different states."). In cases brought "at law" in state courts or the circuit courts, either party could demand a jury trial. *The Sarah*, 21 U.S. 391, 394, 8 Wheat. 391, 5 L.Ed. 644 (1823). But in cases brought "in admiralty" in the federal district

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[2] Congress has since revised the language of the saving-to-suitors clause, but "its substance has remained largely unchanged." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 444, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001). The statute now states that "the district courts shall have original jurisdiction, exclusive of the courts of the States, of: [a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*" 28 U.S.C. § 1333(1) (emphasis added).

courts, absent a statute to the contrary, the trial was by the court. *Id.*

The organizational landscape of the federal courts changed over time, but the basic choices available to admiralty plaintiffs generally did not. One significant change came in the Judicial Code of 1911, when Congress eliminated the federal circuit courts and transferred those courts' original jurisdiction to the federal district courts. Pub. L. No. 61-475, §§ 1, 24, 36 Stat. 1087, 1087, 1091. Consequently, common law, equity, and admiralty cases were now all brought in the same federal court. Because of the differences in the procedures formerly employed in litigating various types of cases, each federal district court now was seen as having a law side, an equity side, and an admiralty side. *See Puget Sound Nav. Co. v. Nelson*, 41 F.2d 356, 357–58 (9th Cir. 1930). As before, absent a statute to the contrary, plaintiffs with *in personam* actions could sue in admiralty, in state court, or on the law side (if diversity existed). *See Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 363, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959). Cases brought on the law side carried the right to a jury trial, whereas cases brought on the admiralty side generally did not. *Compare Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962) ("This suit being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury."), *with Fitzgerald*, 374 U.S. at 20, 83 S.Ct. 1646 (noting that "the Seventh Amendment does not require jury trials in admiralty cases").

In the ensuing years, a unification process took place in federal district court practice. By 1966, this unification was complete, and since then the Federal Rules of Civil Procedure have governed all civil

actions, including admiralty actions. Fed. R. Civ. P. 1, cmt. (1966). The United States district courts no longer have separate "sides." *Id.* Critically, this merger of the law, equity, and admiralty spheres of federal district court practice did not change materially the choices available to plaintiffs with maritime claims. *See* David W. Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 Mich. L. Rev. 1627, 1630–31 (1976). Federal Rule of Civil Procedure 9(h), which became effective at the same time as the unification, has helped to ensure as much. Under Rule 9(h), a party whose claim is "within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground" can designate his claim as a non-admiralty, common law claim or as an admiralty claim. Fed. R. Civ. P. 9(h)(1). "One of the important procedural consequences [of that designation] is that in the civil action either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute." Fed. R. Civ. P. 9, cmt. (1966).

To summarize: For a long time, maritime plaintiffs generally have been able to choose the forum in which they bring *in personam* claims. Such plaintiffs generally could sue in federal admiralty courts, in state court, or if diversity existed, in the federal circuit courts (1789–1911), on the "law side" of the federal district courts (1911–1966), or by refraining from designating their claims as admiralty claims under Rule 9(h) (since 1966). In these various eras, unless a statute provided otherwise, if the plaintiff sued at law, either party could demand a jury trial, but if they sued in admiralty, the case would be tried by the court.

2.

With this background, we now address whether the plaintiffs are entitled to a jury trial. The plaintiffs contend that they need not assert their DOHSA claims "in admiralty," as admiralty claims. They analogize their DOHSA claims to the causes of action described in the previous section, which, as we explained, can be brought as common-law claims if there is a non-admiralty source of jurisdiction. They contend that non-admiralty sources of jurisdiction such as diversity and the MMTJA allow them to assert their DOHSA claims "at law" and to demand a jury trial.[3] The defendants, for their part, maintain that plaintiffs with DOHSA claims in federal court can only proceed "in admiralty," without a jury trial.

Several considerations lead us to the conclusion that the defendants have the better reading of the statute. *First*, DOHSA states in its first section that a plaintiff "may bring a civil action *in admiralty.*" § 30302 (emphasis added). In its original form, it similarly stated that a plaintiff "may maintain a suit for damages in the district courts of the United States, *in admiralty.*" Pub. L. No. 66-165, § 1, 41 Stat. 537, 537 (1920) (emphasis added). DOHSA has never expressly

[3] Some scholars have, over the years, agreed with various versions of the plaintiffs' position. *See* Steven F. Friedell, *Death at Sea and the Right to Jury Trial*, 48 Tul. Mar. L.J. 156 (2024) (criticizing the district court's decision in this case on the jury trial issue); Louis F. Nawrot, Jr., Note, *Admiralty: Death on the High Seas by Wrongful Act*, 47 Cornell L.Q. 632, 637 (1962) (stating that a "[p]reliminary analysis" of DOHSA "unquestionably favors concurrent jurisdiction with state and federal civil courts"); Calvert Magruder & Marshall Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 Yale L.J. 395, 420 (1926) (stating that "a common law action [under DOHSA] ... probably" could "be brought in the federal courts").

stated that plaintiffs with DOHSA claims can maintain a suit at law or with the right to a jury trial. The most natural inference to draw from the combination of the express reference to a suit in admiralty and the absence of a reference to a suit at law or with a jury trial is that the cause of action created by DOHSA is to be brought in admiralty.[4] This natural, ordinary reading of DOHSA's first section supports the defendants' interpretation. *See Leocal v. Ashcroft*, 543 U.S. 1, 9, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (quoting *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)).

Second, courts have construed language similar to DOHSA's "may bring a civil action in admiralty" language to require cases to be brought in admiralty. Under the Ship Mortgage Act, which was enacted in 1920, mortgagees can in certain cases bring "a civil action in personam in admiralty." 46 U.S.C. § 31325(b)(2)(A). Under the Public Vessels Act, which was enacted in 1925, "[a] civil action in personam in admiralty may be brought ... against the United States for damages caused by a public vessel of the United States." 46 U.S.C. § 31102(a). Both of these statutes, like DOHSA, do not specifically address the jury trial issue. Nevertheless, claims brought under those provisions do not carry the right to a jury trial. *See* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4:4 (5th ed. 2011). Courts "normally presume

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[4] A different provision in DOHSA (46 U.S.C. § 30308(a)) allows plaintiffs to bring DOHSA claims in state court, *see Offshore Logistics*, 477 U.S. at 232, 106 S.Ct. 2485, but that section does not address whether DOHSA claims that are in federal court must be brought in admiralty.

that the same language in related statutes carries a consistent meaning." *United States v. Davis*, 588 U.S. 445, 458, 139 S.Ct. 2319, 204 L.Ed.2d 757 (2019); *see Azar v. Allina Health Servs.*, 587 U.S. 566, 574, 139 S.Ct. 1804, 204 L.Ed.2d 139 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes."). That presumption applies here and supports the defendants' position.

Third, many other courts have for a long time agreed with the defendants that, if a case involving only DOHSA claims is in federal court, it must proceed in admiralty, without a jury trial. *See Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 680 (2d Cir. 1957); *Higa v. Transocean Airlines*, 230 F.2d 780, 782–85 (9th Cir. 1955); *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F. Supp. 2d 1309, 1314–15 (S.D. Fla. 2012); *In re Air Disaster Near Honolulu, Hawaii on Feb. 24, 1989*, 792 F. Supp. 1541, 1547 (N.D. Cal. 1990); *Friedman v. Mitsubishi Aircraft Int'l, Inc.*, 678 F. Supp. 1064, 1065–66 (S.D.N.Y. 1988); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 481 (N.D. Cal. 1987); *Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459, 1471 (D.R.I. 1986); *Rairigh v. Erlbeck*, 488 F. Supp. 865, 867 (D. Md. 1980).[5] The plaintiffs and the amici supporting them have not identified any decisions to the contrary.

These cases matter, in part because of the maxim that, if Congress leaves in place a unanimous or near-

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[5] *See also LaCourse v. Def. Support Servs. LLC*, No. 16-cv-170, 2018 WL 7342153, at *2 (N.D. Fla. Oct. 31, 2018); *Modica v. Hill*, No. 96-cv-1121, 1999 WL 52153, at *2 (E.D. La. Jan. 29, 1999). *Cf. Choy v. Pan-American Airways Co.*, 1941 A.M.C. 483, 487 (S.D.N.Y. 1941) (concluding that DOHSA claims could be brought on the law side of the federal courts), *expressly abrogated by Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677, 680 (2d Cir. 1957).

unanimous judicial interpretation for a sufficiently long period of time, it can be deemed to have acquiesced in or ratified that judicial interpretation. *See Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 536, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015) ("If a word or phrase has been ... given a uniform interpretation by inferior courts ..., a later version of that act perpetuating the wording is presumed to carry forward that interpretation."); *United States v. Sanapaw*, 366 F.3d 492, 495 (7th Cir. 2004) (relying on Congress's thirty-year acquiescence in decisions from circuit courts).[6] Here, Congress has not made any material changes to DOHSA's first section in the nearly eighty years since the Second and Ninth Circuits decided this issue in accord with the defendants' position. Much has changed in admiralty law in the years since, but, with the exception of two minor alterations not relevant here,[7] Congress has left DOHSA's first section unchanged. This history provides additional support for our conclusion that the defendants have the better reading of DOHSA.

The plaintiffs rely on what the Supreme Court has called "the historic option of a maritime suitor pursuing a common-law remedy to select his forum." *Romero*, 358 U.S. at 371, 79 S.Ct. 468. They contend that, in admiralty law, plaintiffs bringing tort claims are presumed to be able to proceed at law, with a jury trial, and that our reading of DOHSA would violate that

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[6] *See also Manhattan Props., Inc. v. Irving Tr. Co.*, 291 U.S. 320, 336, 54 S.Ct. 385, 78 L.Ed. 824 (1934) (concluding that congressional amendments that did not change relevant provision, in the face of consensus interpretation given by courts of appeals, ratified that judicial interpretation).

[7] *See* Pub. L. 106-181, § 404(a)(1), 114 Stat. 61, 131 (2000); Pub. L. 109-304, § 6(c), 120 Stat. 1485, 1511 (2006).

presumption. Our task in interpreting DOHSA, however, is not necessarily to neatly harmonize that statute with other areas of admiralty law. Instead, our task is to interpret the statute, starting with its text and the rules of construction aimed at effectuating Congress's intent. For the reasons we have provided, we think that the defendants' reading is most consistent with DOHSA's text and Congress's intent.

We recognize the potential anomaly in allowing defendants to effectively extinguish a plaintiff's jury trial right by removing a case to federal court. DOHSA claims, like other wrongful-death tort claims, are typically tried by juries when they are in state court. *See, e.g., Curcuru v. Rose's Oil Serv., Inc.*, 441 Mass. 12, 802 N.E.2d 1032, 1039 (2004); *Khung Thi Lam v. Global Med. Sys.*, 127 Wash.App. 657, 111 P.3d 1258, 1260, 1262 n.20 (2005). But our analysis indicates that Congress has spoken on the issue of the availability of a jury trial on DOHSA claims in federal court.[8]

Conclusion

For the reasons stated in this opinion, we affirm the district court's rulings.

AFFIRMED

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[8] We note the possibility that the Chandra plaintiffs, whose claims were filed initially in state court, could have tried to object to removal, relying on certain authorities that interpret the saving-to-suitors clause to block removal of otherwise removable admiralty claims. *See Lu Junhong v. Boeing Co.*, 792 F.3d 805, 818 (7th Cir. 2015) ("Perhaps it would be possible to argue that the saving-to-suitors clause itself forbids removal, without regard to any language in § 1441."); *Riyanto v. Boeing Co.*, 638 F. Supp. 3d 902, 911 (N.D. Ill. 2022) (in a case arising out of a different plane crash in the Java Sea, relying on saving-to-suitors clause for conclusion that Boeing could not remove the case from state court to federal court). We have no occasion to address that possibility here.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION.

No. 18 C 07686

Case No. 19 C 01552,

Case No. 19 C 07091

IN RE LION AIR FLIGHT JT 610 CRASH

Signed May 25, 2023

MEMORANDUM OPINION AND ORDER

Thomas M. Durkin, United States District Judge

This consolidated action arises out of an aviation accident involving a Boeing commercial jet, which resulted in the death of everyone on board. On December 20, 2022, this Court issued a Memorandum Opinion and Order ("the Order") holding that the Death on the High Seas Act, 46 U.S.C. §§ 30301–08 ("DOHSA"), applies to the two remaining actions (*Chandra v. Boeing*, case no. 19 C 01552, and *Smith v. Boeing*, case no. 19 C 07091), preempts Plaintiffs' other claims, and rests in this Court's admiralty jurisdiction such that Plaintiffs are not entitled to a jury trial. R. 1460. Plaintiffs in both actions and Defendant Xtra Aerospace, LLC ("Xtra") have moved this Court to amend the Order to certify for immediate interlocutory appeal under 28 U.S.C. § 1292(b) the issue of Plaintiffs'

right to a jury trial. R. 1468, 1471, 1474.[1] Plaintiffs in the *Chandra* matter ("Chandra Plaintiffs") also request that the preemption question is certified for interlocutory appeal. For the reasons stated below, the Court will amend the Order to certify the right to a jury trial question under § 1292(b) but will not certify the issue of preemption.

Background

On October 29, 2018, Lion Air Flight JT 610 crashed into the Java Sea at a high rate of speed just minutes after takeoff from Jakarta, Indonesia. R. 1391 ¶¶ 43, 44. There were no survivors. *Id.* at ¶ 5. The crash was caused by a faulty automatic flight control system which overrode the pilots and turned the plane into a nosedive. *Id.* at ¶¶ 4, 45.

The resulting litigation involved 87 individual actions against Boeing and other defendants asserting wrongful death and other claims arising out of the accident on behalf of 186 decedents. All actions were either filed in or removed to this Court and eventually consolidated under the master docket, *In Re Lion Air Flight JT 610 Crash*, 18 C 07686. Boeing has fully settled the claims of 184 decedents. The remaining two actions are those brought by the families and representatives of two decedents: Liu Chandra, an Indonesian businessman (*Chandra v. Boeing*); and Andrea Manfredi, an Italian professional cyclist and entrepreneur (*Smith v. Boeing*).

Chandra Plaintiffs originally filed suit in the Circuit Court of Cook County, Illinois. *See Chandra*, No. 19 C

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[1] Throughout this Opinion, "R" denotes citations to the record in the consolidated case, *In Re Lion Air Flight JT 610 Crash*, 18 C 07686.

01552, Dkt. 1. They alleged wrongful death arising under DOHSA. *See, e.g.*, R. 1391 at pp. 15–24. They also made survival claims for property damage and pre-death fear and injury. *Id.* Boeing removed the case to this Court under the Multiparty, Multiforum Trial Jurisdiction Act ("MMTJA"), 28 U.S.C. § 1369, and the Court's admiralty jurisdiction under 28 U.S.C. § 1333(1). *Chandra*, No. 19 C 01552, Dkt. 1. The operative Third Amended Complaint demands a jury trial and alleges the Court has subject matter jurisdiction in diversity and under the MMTJA and DOHSA. R. 1391 ¶¶ 16, 18–19; *id.* at p. 57. Mr. Manfredi's family and the administrator of Mr. Manfredi's estate, Laura Smith, ("Manfredi Plaintiffs") filed suit in this Court, invoking its diversity jurisdiction. *See Smith*, No. 19 C 07091, Dkt. 1. The Second Amended Complaint asserts wrongful death and survival claims and demands a jury trial. *See id.* at pp. 4, 118–19.

Defendants the Boeing Company, Rockwell Collins, Inc., and Rosemount Aerospace, Inc. (collectively, "Defendants") filed motions in the *Chandra* and *Smith* cases, seeking the Court's determination that DOHSA applies, preempts each Plaintiffs' non-DOHSA claims, and mandates a bench trial.[2] *See* R. 1399, 1400, 1401, 1402. The Court granted those motions in the Order. R. 1460. Chandra and Manfredi Plaintiffs now request that the Court amend the Order to certify the issue of the jury trial right for interlocutory appeal. R. 1468, 1471. Five admiralty law professors from around the country, Professors Martin Davies, Robert Force, Steven F. Friedell, Thomas Galligan, and Thomas J. Schoenbaum, filed an *amici* brief in support of Manfredi Plaintiffs' motion. R. 1470. Xtra, without

[2] Xtra filed a response to the motions stating that it took no position. R. 1421.

taking a position on the merits of the parties' substantive positions, also joins Plaintiffs' request to certify this issue, arguing that an immediate appeal would promote judicial efficiency. R. 1474. Chandra Plaintiffs also ask the Court to certify whether DOHSA preempts non-DOHSA causes of action for physical destruction of property and personal injuries to an aircraft passenger sustained over land during a flight that ultimately led to a fatal crash. R. 1471.

Though the parties in the *Chandra* and *Smith* cases have informally exchanged some discovery in furtherance of settlement discussions, they have not engaged in formal written or expert discovery. Boeing has informed the Court that, if the Order stands, it would stipulate to its liability to pay damages such that the only issue at trial would be the amount of damages. Feb. 22, 2023 Letter to the Court.

Legal Standard

The Circuit Court of Appeals may not entertain appeals from interlocutory (non-final) orders except in very limited circumstances. Under 28 U.S.C. 1292(b), a district court can certify an issue for interlocutory appeal if the movant shows that (1) there is a question of law; (2) the question is controlling; (3) the question is "contestable," that is, there is substantial grounds for differences of opinion; and (4) immediate appeal would speed up the ultimate termination of the litigation. *See Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000). All four criteria must be met. *Id.* at 676. Even if a district court certifies an issue for appeal, the Circuit Court has discretion to accept or reject the appeal. 28 U.S.C. § 1292(b).

Discussion

I. Certification of Right to a Jury Trial Issue

Plaintiffs desire to challenge on interlocutory appeal this Court's holding that "Congress ... has explicitly limited DOHSA to 'a civil action in admiralty,' which does not carry the right to a jury trial." Order at 13 (citing *Tallentire v. Offshore Logistics, Inc.*, 800 F.2d 1390, 1391 (5th Cir. 1986) (where the "sole predicate" for liability is DOHSA, the plaintiff "is not entitled to a jury trial")). Specifically, Manfredi Plaintiffs seek the certification of the following issue:

> Does a DOHSA claim in a case asserting diversity rather than admiralty jurisdiction carry a jury-trial right as a "suit at common law" within the meaning of the Seventh Amendment, the saving-to-suitors clause of 28 U.S.C. § 1333(1), and *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962)?

R. 1468 at 1. And Chandra Plaintiffs seek certification of a similar question:

> In a diversity case, is a DOHSA plaintiff entitled to a jury trial under the saving-to-suitors clause and DOHSA's savings clause when the plaintiff originally files suit in a state common law court pursuant to *Offshore Logistics v. Tallentire*, demands a jury trial, and reasserts his jury demand post-removal?

R. 1472 at 2. These questions are substantively the same. At bottom, they ask whether a plaintiff in federal court is entitled to a jury trial under the Seventh Amendment when the plaintiff's sole claim arises under DOHSA, and the plaintiff has a concurrent basis for common law jurisdiction (such as

diversity). Defendants do not contest that the issue of Plaintiffs' right to a jury trial under DOHSA is a pure question of law.[3] Therefore, to determine whether an interlocutory appeal is appropriate, the Court examines whether the question fulfills the remaining three factors of the test laid out in § 1292(b) and *Ahrenholz*.

A. "Controlling" Question

For a district court to certify a question under § 1292(b), the movant must show that the question is "controlling." The Seventh Circuit does not read this requirement literally. Instead, it asks whether the resolution of the question is "quite likely to affect the further course of the litigation," *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996), and is "serious to the conduct of the litigation, either practically or legally." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (quoting *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974)). Therefore, "a question is controlling ... if interlocutory reversal might save time for the district court, and time and expense for the litigants." *Johnson*, 930 F.2d at 1205–06 (quoting 16 Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, Federal Practice and Procedure § 3930, at pp. 159–60 (1977)).

The resolution of the proper factfinder—whether judge or jury—will likely affect the course of the

[3] Indeed, determining whether DOHSA claims are limited exclusively to this Court's admiralty jurisdiction would likely require an analysis of the Seventh Amendment, the provisions of DOHSA and 28 U.S.C. § 1333(1), the Federal Rules of Civil Procedure, and persuasive case law. The Seventh Circuit would not need to hunt through the record—the facts of the case are irrelevant.

litigation at least practically, with substantial differences in decision-making authority, jury selection, the way evidentiary issues are handled, objections, and jury instructions. Defendants argue that, since Boeing will stipulate to liability, and the only role of the factfinder will be to compute damages, the identity of the factfinder will have no material impact on the outcome of the litigation. But the issue need not affect the litigation's outcome to be controlling—it need only be "serious to the conduct of the litigation," even if only in a practical sense. *Johnson*, 930 F.2d at 1206.

Other considerations make this question a controlling one. For example, an interlocutory reversal would save substantial time for this Court and expenses for the litigants. In *Johnson*, the Seventh Circuit accepted a question of proper service as a controlling question on interlocutory appeal. *Id.* The Seventh Circuit noted that, without taking the issue on interlocutory appeal, the case would have gone through to judgment, followed by an appeal that would have resulted in throwing the entire case out for want of proper service, and requiring a remand back to the district court to start at square one. *Id.* Similarly here, if this case were to proceed to a bench trial, and Plaintiffs were to appeal in the regular course and obtain reversal on the jury trial issue, the case would be remanded back to this Court to hold *another* trial, this time by jury. The Seventh Circuit has explained that avoiding such inefficiencies is why it takes a flexible approach to determining whether a question is "controlling." *Id.*

Defendants cite two cases which they purport show that the denial of a jury trial is not the sort of controlling decision that warrants immediate appeal, *Caldwell-Baker Co. v. Parsons*, 392 F.3d 886 (7th Cir. 2004) and *National Bank of Waukesha v. Warren*, 796

F.2d 999 (7th Cir. 1986). However, neither of those cases considered whether an interlocutory appeal was proper under the § 1292(b) standard, but rather, under the standard for a writ of mandamus, which is a "drastic remedy traditionally used to confine a lower court to the lawful exercise of its jurisdiction or to compel it to exercise its authority when it has a duty to do so." *United States v. Lapi*, 458 F.3d 555, 560–61 (7th Cir. 2006); *see also Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) ("Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy."). And in both cases, the situations would have required the Circuit Court to conduct factual analyses such that a § 1292(b) appeal would not have been proper in the first place. *See Caldwell-Baker*, 392 F.3d at 888 (district court's refusal to withdraw reference to personal bankruptcy not reviewable because the issue was not "the procedural decision about which court would make the initial substantive decision, but review of the substantive decision itself."); *Warren*, 796 F.2d at 1001 (determining right to jury trial depended on the characterization of banking transactions and other factual questions on which the Circuit Court did "not have a complete record on which to resolve them").

Defendants also cite a number of bankruptcy cases in which district courts have refused to certify the question of a jury trial right for appeal under § 1292(b). But the right to a jury trial in a bankruptcy case turns on different rules, appellate procedures, and factual questions, such as whether a jury request is waived or timely raised. *See, e.g.*, *In re Beale*, 410 B.R. 613, 617 (N.D. Ill. 2009) ("[T]he legal question of whether Defendants are still entitled to a jury trial under the Seventh Amendment is not before this court. This is important, for the Bankruptcy Court concluded

that the right had been waived...."); *In re Glenn*, Nos. 04 A 4493, 02 B 4081, 06 C 3565, 2006 WL 2252529, at *2 (N.D. Ill. Aug. 3, 2006) (interlocutory appeal only "raises the questions of whether the [jury] demand was timely and the judge properly exercised discretion" in light of "the court's schedule, prejudice to the adverse party, and the reason for the moving party's delay."). No such questions are at issue here.

And where the question of a jury trial right is properly raised and meets the other requirements of § 1292(b), the Supreme Court and the Seventh Circuit have accepted the question as controlling on a § 1292(b) appeal. *See, e.g.*, *Lehman v. Nakshian*, 453 U.S. 156, 159 (1981) (right to jury trial in ADEA case determined on interlocutory appeal); *Lorillard v. Pons*, 434 U.S. 575, 576–577 (1978) (same); *Ross v. Bernhard*, 396 U.S. 531, 532 (1970) (right to a jury trial in stockholder derivative action reached Supreme Court on interlocutory appeal); *Pavey v. Conley*, 544 F.3d 739, 740 (7th Cir. 2008) (interlocutory appeal on right to jury trial in prisoner litigation); *In re Grabill Corp.*, 967 F.2d 1152, 1152-53 (7th Cir. 1992) (right to a jury trial in bankruptcy proceeding on interlocutory appeal).[4] In

[4] Plaintiffs also point to cases in other circuits which accepted appeals under § 1292(b) on the right to a jury trial, most notably, *Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371, 371 (9th Cir. 1969), which decided the question of a DOHSA plaintiff's right to a jury trial on interlocutory appeal under § 1292(b). Other cases dealing with a right to a jury trial on interlocutory appeal include: *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389, 391 (2d Cir. 1983); *Rex v. Cia. Pervana de Vapores, S.A.*, 660 F.2d 61, 62 (3d Cir. 1981); *Singletary v. Enersys, Inc.*, 57 F. App'x 161, 162 (4th Cir. 2003); *Luera v. M/V Alberta*, 635 F.3d 181, 186 (5th Cir. 2011); *Smith v. Dowden*, 47 F.3d 940, 941 (8th Cir. 1995); *Zahn v. Geren*, 245 F. App'x 696, 697 (9th Cir. 2007); *Adams v. Cyprus Amax*

sum, none of Defendants' cited cases create a *per se* rule that a right to a jury trial is not a controlling question. Instead, the determination is heavily case and context specific. And here, the question is controlling in the practical sense.

B. "Contestable" Question

A question is "contestable" when substantial grounds for a difference of opinion exist. 28 U.S.C. § 1292(b); *Ahrenholz*, 219 F.3d at 675. For a question to be appealable under § 1292(b), it must be a "difficult central question of law which is not settled by controlling authority," and there must exist a "substantial likelihood" that the district court's ruling will be reversed. *In re Brand Name Prescription Drugs Antitrust Litig.*, 878 F. Supp. 1078, 1081 (N.D. Ill. 1995) (citations omitted).

First and foremost, there is no controlling Seventh Circuit or Supreme Court authority which decides this question. According to Plaintiffs, the Order therefore "entrenches" a conflict among courts regarding the right to a jury trial under DOHSA, which makes an interlocutory appeal especially suitable. In the Order, this Court followed cases from other district and circuit courts around the country that have held that there is no jury trial right under DOHSA unless there is also a non-DOHSA cause of action that carries the right to a jury trial or that allows the litigant to invoke diversity jurisdiction. *Tallentire*, 800 F.2d at 1391 (on remand) (where the "sole predicate" for liability is DOHSA, the plaintiff "is not entitled to a jury trial"); *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F. Supp. 2d 1309, 1313 (S.D. Fla. 2012) (collecting cases); *In re*

Minerals Co., 149 F.3d 1156, 1158 (10th Cir. 1998); *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522, 1524 (11th Cir. 1996).

Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989, 783 F. Supp. 1261, 1266 (N.D. Cal. 1992); *Friedman v. Mitsubishi Aircraft Int'l, Inc.*, 678 F. Supp. 1064, 1066 (S.D.N.Y. 1988); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 481 (N.D. Cal. 1987). Though most courts which have confronted the question hold this view,[5] Defendants rightly point out that other courts have held that there is a jury trial right under DOHSA, provided diversity or some other basis for common law jurisdiction exists. *Tozer v. LTV Corp.*, No. HM81-2134, 1983 WL 705, at *6–7 (D. Md. May 27, 1983) ("Although an admiralty claimant is not generally entitled to a jury trial, where an independent basis for jurisdiction exists, a claimant may under the saving to suitors clause, 28 U.S.C. § 1333, assert an admiralty claim as a nonmaritime civil action ... [and] obtain a jury trial."); *see also In re Korean Air Lines Disaster of Sept. 1, 1983*, 704 F. Supp. 1135, 1157 (D.D.C. 1988), *affirmed in part*, 932 F.2d 1475 (D.C. Cir. 1991); *Cucuru v. Rose's Oil Serv., Inc.*, 441 Mass. 12, 20 (2004).

Second, though the Court believes the Order is rightly decided, there are substantial grounds for a difference of opinion on a plaintiff's jury trial right under DOHSA. The Court's ruling was based on the language of DOHSA, 46 U.S.C. § 30302, which states that, in the case of wrongful death on the high seas, the personal representative of the decedent "may bring a civil action in admiralty." This language, by the Court's reading, stands for the principle that DOHSA

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[5] According to Defendants, 14 cases have decided a plaintiff's entitlement to a jury trial under DOHSA; 12 have ruled that DOHSA rests exclusively in admiralty jurisdiction such that a plaintiff does not have a Seventh Amendment jury trial right. Whether or not this count is correct, the fact remains that this Court followed the majority view.

exclusively provides a remedy in admiralty. Therefore, the saving-to-suitors provision in 28 U.S.C. § 1333(1), which in most admiralty cases reserves the right to common law remedies, including a trial by jury, is not applicable. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454–55 (2001) ("Trial by jury is an obvious ... example of the remedies available to suitors."); *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962) ("This suit [for breach of a maritime contract] being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury.").

According to *amici*,[6] the Order misreads the language in DOHSA that the personal representative "may bring a civil action in admiralty." 46 U.S.C. § 30302. *Amici* instead argue that the permissive "may" modifies "in admiralty" such that a claimant may elect to bring the claim in admiralty or at common law under the maritime saving clause statute, 28 U.S.C. § 1333(1). This Court reads the provision to mean that the personal representative "may" file suit at his or her discretion, but if a case is brought, it is limited to a civil action in admiralty. And though this Court believes its reading is the most reasonable,[7] there is certainly enough room for a difference of opinion.

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[6] *Amici* include Prof. Schoenbaum, who wrote the treatise that this Court referenced to support its holding that the general saving-to-suitors clause does not apply to DOHSA actions. Thomas J. Schoenbaum, 1 Admiralty & Mar. Law § 4:2 (6th ed.) ("[§ 1333(1)] is subject to [ ] qualifications.... [One is that] Congress, by statute, has vested exclusive admiralty jurisdiction in the federal courts for certain admiralty claims....").

[7] The Jones Act, which was passed the same year as DOHSA, expressly provides that a plaintiff "may elect to bring a civil action at law, with the right of a jury trial." 46 U.S.C. § 30104.

Plaintiffs also point to *Offshore Logistics v. Tallentire*, 477 U.S. 207, 231–32 (1986), in which the Supreme Court held that DOHSA's own saving-to-suitors clause allows for concurrent state common law jurisdiction over DOHSA actions. *Id.* at 232. Noting that "the resolution of DOHSA claims does not normally require the expertise that admiralty courts bring to bear," the Supreme Court held that "DOHSA actions are clearly within the competence of state courts to adjudicate." *Id.* It would be incongruous, Plaintiffs therefore argue, for DOHSA claimants to have the right to a jury trial in state common law courts under *Tallentire*, but not have the right in federal court once the case is removed.

Further, Plaintiffs point to dicta in a footnote in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), in which the Supreme Court stated:

> If we found from the legislative history [of DOHSA] that Congress imposed exclusive [admiralty] jurisdiction because of a desire to avoid the presentation of wrongful-death claims to juries, that might support an inference that Congress meant to forbid nonstatutory maritime actions for wrongful death, which might come before state or federal juries. *Cf. Fitzgerald v. United States Lines*, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963). However, that is not the case.

Id. at 400 n.14. Though this footnote is not directly on point, it does note that the legislative history of DOHSA is void of any indication that Congress intended to foreclose the right to a trial by jury. *Id.*

No such language explicitly mentioning the right to a jury trial is found in DOHSA.

This, combined with the language of § 1333(1), the minority view espoused by other courts, and the *amici* argument on the meaning of DOHSA, creates uncertainty. There are substantial grounds for a difference of opinion, and the Seventh Circuit might reasonably side with Plaintiffs. The question of Plaintiffs' entitlement to a jury trial under DOHSA is therefore contestable.

C. Resolving the Question Would Speed Up Litigation

The final § 1292(b) element is satisfied if "an immediate appeal may materially advance the ultimate termination of the litigation." *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 536 (7th Cir. 2013). First, Plaintiffs and Xtra primarily assert that, if the jury question is not certified, and the Seventh Circuit later concludes, after a bench trial, that Plaintiffs have a right to a jury trial, the case will need to be retried in front of a jury. In that circumstance, the bench trial will have been a costly waste of resources for the parties and the Court. Defendants do not contest this is true. Instead, they argue that, because Boeing has stipulated to liability for compensatory damages under DOHSA, the case should proceed expeditiously to a bench trial on the only remaining issue—that of damages.[8] But this case can proceed

[8] Plaintiffs imply that they may not accept Boeing's stipulation and may instead insist on their right to prove liability, which would further extend discovery. *United States v. Allen*, 798 F.2d 985, 1001 (7th Cir. 1986) ("[A] party is not required to accept a judicial admission of his adversary, but may insist on proving the fact.... [A] cold stipulation can deprive a party of the legitimate moral force of his evidence, and can never fully substitute for tangible, physical evidence or the testimony of witnesses."). Whether or not Plaintiffs will accept Boeing's stipulation or insist on further liability discovery is immaterial to the certification issue before the Court. Either way, discovery can commence

with discovery while an interlocutory appeal is taken. Though there may be some disagreement over the length and extent of the discovery necessary, discovery is not affected by the jury trial right and can continue apace while the interlocutory appeal is pending. The concern that the proceedings would "grind[ ] to a halt" is therefore unfounded. *Ahrenholz*, 219 F.3d at 676.

As a final note, Plaintiffs also argue that certifying the issue for appeal would promote settlement because, with clarity on whether the cases will be tried before juries or not, the parties will have a better idea of the value of their claims. *See Sterk*, 672 F.3d at 536 (promotion of settlement by way of clearing uncertainty is "enough to satisfy the 'may materially advance' clause of section 1292(b)."). Defendants, however, argue that an interlocutory appeal would "halt settlement discussions for a year or more," depending on the length of the appeal. But if the only issue to be decided by the trier of fact is the amount of damages, it is unclear why the valuation of the parties' cases would differ drastically depending on the trier of fact or how an appeal on that issue would either speed up or halt settlement. It is therefore the Court's expectation that the parties will continue to negotiate a settlement in good faith while an interlocutory appeal is pending.

In sum, this Court will certify for interlocutory appeal under 28 U.S.C. § 1292(b) the question of whether a plaintiff in federal court is entitled to a jury trial under the Seventh Amendment when the plaintiff's sole claim arises under DOHSA, and the plaintiff has a concurrent basis for common law jurisdiction. It is a "controlling question of law as to

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during the pendency of the appeal. Plaintiffs can seek a ruling on the stipulation issue in separate motions if they so desire.

which there is substantial ground for difference of opinion and ... an immediate appeal ... may materially advance the ultimate termination of the litigation." § 1292(b).

II. Preemption Question

Chandra Plaintiffs also ask this Court to certify whether DOHSA preempts their causes of action for physical destruction of property and personal injuries to the decedent allegedly sustained over land during the flight that ultimately led a fatal crash. The issue of DOHSA's preemptive scope, however, does not meet the requirements for certification under § 1292(b) because it is neither controlling nor contestable.

Chandra Plaintiffs argue that the viability of their survival personal injury and property damage claims will impact the course of the litigation by determining whether additional categories of damages are available and whether additional discovery will be needed. But any property lost is minor and incidental. Chandra Plaintiffs' Third Amended Complaint does not specify what property was damaged, but it is likely that only Mr. Chandra's personal effects and luggage were lost. *See generally* R. 1391. Further, Chandra Plaintiffs have not pled a pre-impact physical injury, so their request that the Court certify this question has no real practical effect on the litigation. *Id.*

DOHSA's preemptive effect is also not contestable. As the Order points out, the Supreme Court has already held that DOHSA preempts survival actions for pre-death pain and suffering (without any reference to whether the injury occurred over land or sea) in *Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 123 (1998). There, the Supreme Court stated:

> "[b]y authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas." [Allowing a] survival action would necessarily expand the class of beneficiaries in cases of death on the high seas by permitting decedents' estates ... to recover compensation [and] would expand the recoverable damages for deaths on the high seas.... Because Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages.

Id. And the Supreme Court has stated in no uncertain terms that "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). It is clear, therefore, that Plaintiffs' right to nonpecuniary damages such as property loss and pre-death pain and suffering (even if experienced over land) is not contestable.

Plaintiffs argue that there is at least one case in which DOHSA did not preempt property loss claims, *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir. 1982). But that case is inapplicable. DOHSA by its terms applies only to wrongful death actions brought by personal representatives of the decedent. 46 U.S.C. § 30303. And in *Smith*, a helicopter company, not the personal representative of the decedent's estate, sought recovery for loss of its helicopter. *Id.* at 1112. It is therefore not surprising that DOHSA did not preempt the helicopter company's claim. In the end, Chandra Plaintiffs have not cited any other case showing that the preemption issue is contestable.

Therefore, certifying the issue for interlocutory appeal is inappropriate.

CONCLUSION

For the foregoing reasons, Manfredi Plaintiffs' and Xtra's motions, R. 1468, 1474, are granted in whole, and Chandra Plaintiffs' motion, R. 1471, is granted in part. This Court will amend the Order to include language certifying the issue of Plaintiffs' entitlement to a jury trial for interlocutory appeal under 28 U.S.C. § 1292(b). Chandra Plaintiffs' request to certify the issue of claim preemption is denied.

APPENDIX C

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

No. 18 C 07686
Case No. 19 C 01552, Case No. 19 C 07091

IN RE LION AIR FLIGHT JT 610 CRASH

Signed May 25, 2023

AMENDED MEMORANDUM
OPINION AND ORDER

Thomas M. Durkin, United States District Judge

This consolidated action arises out of an aviation accident involving a Boeing commercial jet which crashed into the Java Sea off the coast of Indonesia, resulting in the death of everyone on board. Defendants Boeing, Rockwell Collins, Inc., and Rosemount Aerospace, Inc. (collectively, "Defendants") filed motions seeking the application of the Death on the High Seas Act, 46 U.S.C. §§ 30301–08 ("DOHSA") to the two remaining actions, *Chandra v. Boeing*, case no. 19 C 01552, and *Smith v. Boeing*, case no. 19 C 07091. R. 1399, 1401. Defendants also seek a ruling that the application of DOHSA preempts all other causes of action and mandates a bench trial in each case. For the foregoing reasons, Defendants' motions are granted.

Background

On October 29, 2018, Lion Air Flight JT 610 began experiencing serious mechanical problems almost

immediately after takeoff from Jakarta, Indonesia. R. 1391 ¶¶ 43, 44. The passengers on board the Boeing 737 MAX 8 experienced erratic movements and fluctuations in altitude due to a faulty automatic flight control system called MCAS, which overrode the pilots and attempted to turn the plane into a nosedive over two dozen times. *Id.* at ¶¶ 4, 45. After a few minutes, the plane headed out over the ocean, and approximately five minutes after that, the plane crashed into the Java Sea at a high speed about 18 nautical miles off the coast of Indonesia. *See id.* ¶ 46. There were no survivors. *Id.* at ¶ 5.

The resulting litigation involved 87 individual actions asserting wrongful death and other claims arising out of the accident against Boeing and other defendants on behalf of 186 decedents. All actions were either filed in or removed to this Court and eventually consolidated under the master docket, *In Re Lion Air Flight JT 610 Crash*, 18 C 07686. Boeing has now fully settled the claims of 184 decedents. The remaining claims are those brought by the families and representatives of two decedents: Liu Chandra, an Indonesian businessman (*Chandra v. Boeing*, case no. 19 C 01552); and Andrea Manfredi, an Italian professional cyclist and entrepreneur (*Smith v. Boeing*, case no. 19 C 07091).[1]

The plaintiffs in the *Chandra* matter (the "Chandra Plaintiffs") originally filed suit in the Circuit Court of Cook County, Illinois. *See Chandra*, No. 19 C 01552, Dkt. 1. They allege wrongful death arising under DOHSA and the Illinois Wrongful Death Act based on

[1] At the time the instant motions were filed, another case was also outstanding. *See Sethi v. Boeing*, case no. 20 C 01152. In that case, the parties stipulated to the application of DOHSA and the Court conducting a damages-only bench trial. *See* R. 1367. Prior to trial, the case settled. R. 1457.

theories of strict products liability, negligence, and negligent failure to warn. *See, e.g.*, R. 1391 at pp. 15–24. They also make survival claims for property damage and pre-death fear and injury. *Id.* Boeing removed the case to this Court, citing the Multiparty, Multiforum Trial Jurisdiction Act ("MMTJA"), 28 U.S.C. § 1369, and the Court's admiralty jurisdiction under 28 U.S.C. § 1331(1). *Chandra*, No. 19 C 01552, Dkt. 1. In its removal paperwork, Boeing included a jury demand. *Id.* The operative Third Amended Complaint demands a jury trial and alleges the Court has subject matter jurisdiction in diversity and under the MMTJA and DOHSA. R. 1391 ¶¶ 16, 18–19; *id.* at p. 57.

Mr. Manfredi's family and the administrator of Mr. Manfredi's estate, Laura Smith, (the "Manfredi Plaintiffs") filed suit in this Court, invoking its diversity jurisdiction. *See Smith*, No. 19 C 07091, Dkt. 1. The operative Second Amended Complaint asserts wrongful death and survival claims under theories of strict products liability, negligence, and breach of implied warranties. R. 1378 ¶¶ 201–320, 468–80, 489–95. The Manfredi Plaintiffs also plead survival claims of pre-death injury, negligent infliction of emotional distress, and claims arising under various fraud statutes, including the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 ("ICFA") and the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA"). *Id.* They seek punitive damages and demand a jury trial. *See id.* at pp. 4, 118–19

Defendants filed motions in each of the *Chandra* and *Smith* cases, seeking the Court's determination that DOHSA applies, preempts each set of Plaintiffs'

non-DOHSA claims, and mandates a bench trial.[2] *See* R. 1399, 1400, 1401, 1402. The Chandra Plaintiffs do not dispute that DOHSA governs their wrongful death claims, but nonetheless insist that their survival claims for property loss and pre-death injury are not preempted by DOHSA and that they retain their right to a jury trial. The Manfredi Plaintiffs dispute DOHSA's application entirely and similarly argue that even if it did apply, their survival claims for pre-death injury and fraud are not preempted and that they have the right to a jury trial. Though the parties in the *Chandra* and *Smith* cases have informally exchanged some discovery in furtherance of settlement discussions, they have not engaged in formal written or expert discovery.

Legal Standard

Defendants do not articulate a standard under which the Court should decide their motions. Defendants base their arguments on the pleadings, however, they do cite to a public crash investigation report by the Indonesian government (the "Report"). *See, e.g.*, R. 1400 at 7; R. 1438 at 8. The Manfredi Plaintiffs, in turn, attach evidentiary material outside the pleadings to their brief in opposition, argue for the application of the summary judgment standard, and request additional discovery under Rule 56(d). R. 1425-1 (attaching expert affidavit). Meanwhile, the Chandra Plaintiffs argue for the application of the Rule 12(b)(6) motion to dismiss standard. R. 1422 at 3.

The Report cited by Defendants is a foreign government report and a matter of public record, and the Court may take judicial notice of it without

[2] Defendant Xtra Aerospace LLC filed a response to the instant motions stating that it takes no position. R. 1421.

converting Defendants' motions to ones for summary judgment. *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper."); *see also Color Switch LLC v. Fortafy Games DMCC*, 377 F. Supp. 3d 1075, 1089 n.6 (E.D. Cal. 2019) (taking judicial notice of Canadian government report). The fact that a plaintiff attaches evidentiary materials outside the pleadings to its brief does not convert a defendant's motion to a summary judgment motion. *Thompson v. Illinois Dept. of Prof'l Regulation*, 300 F.3d 750, 754 (7th Cir. 2002). Furthermore, it is within this Court's discretion to handle this motion as a straightforward motion to dismiss, especially where early resolution of an issue, like the application of DOHSA, would streamline the case. *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998) (holding that it was within the district court's discretion to treat motion as motion to dismiss where judgment on qualified immunity should be decided as early in the case as possible).

Thus, the Court will construe Defendants' motions under the Rule 12(b)(6) standard to decide the application of DOHSA as a matter of law on the face of the pleadings. A Rule 12(b)(6) motion challenges the "sufficiency of the complaint." *Berger v. Nat. Collegiate Athletic Assoc.*, 843 F.3d 285, 289 (7th Cir. 2016). In applying this standard, the Court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of the non-moving party. *Tobey v. Chibucos*, 890 F.3d 634, 646 (7th Cir. 2018).

Discussion

A. DOHSA Applies to the *Smith* (Manfredi) Action.

Though the Chandra Plaintiffs do not dispute DOHSA's application to their wrongful death claims, the Manfredi Plaintiffs do. DOHSA is the source of law for deaths resulting from wrongful acts, neglect, or default on the high seas more than three (or in a commercial aviation accident, twelve) nautical miles from the shore of the United States. 46 U.S.C. §§ 30302, 30307. The Supreme Court has consistently applied DOHSA to aviation accidents occurring on the high seas, like the crash which occurred here. *See Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 118 S.Ct. 1890, 141 L.Ed.2d 102 (1998); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996); *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978); *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 263–64, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972) ("[I]t may be considered as settled today that [DOHSA] gives the federal admiralty courts jurisdiction of such wrongful-death actions" based on aircraft crashes into the high seas); *see also* 46 U.S.C. § 30307 (section of DOHSA governing commercial aviation accidents on the high seas).[3]

The weight of the case law in other circuits is that when a plaintiff is fatally injured over the high seas, DOHSA applies. *LaCourse v. PAE Worldwide Inc.*, 980 F.3d 1350, 1357 (11th Cir. 2020) ("Where a death

[3] Cases interpreting and applying DOHSA are virtually non-existent in this Circuit. Where there is no binding law from the Supreme Court or the Seventh Circuit, this Court considers the persuasive case law of other circuits.

occurs on the high seas, DOHSA applies, full stop."); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348 (9th Cir. 1987); *Kennedy v. Carnival Corp.*, 385 F. Supp. 3d 1302, 1316 (S.D. Fla. 2019) (DOHSA applies where "the injury that led to the Decedent's death occurred in the water); *see also Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 599–600 and n.5, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) (J. Powell, dissenting on other grounds) (DOHSA "by its terms covers deaths caused by injuries inflicted at sea, not simply deaths occurring on the high seas.").

Citing *Motts v. M/V Green Wave*, a case in which the Fifth Circuit held that DOHSA applied when the injury occurred on the high seas but the prior negligence and the later death occurred onshore, the Manfredi Plaintiffs argue that the Court should instead consider the location of where the negligence is consummated into a "first" injury in determining whether DOHSA applies. 210 F.3d 565, 569–71 (5th Cir. 2000). Their argument is that Mr. Manfredi was first injured during the period that the flight was over land—they allege he suffered, at a minimum, emotional distress—and this prevents the application of DOHSA. But the *Motts* court specifically held that the proper test is to "look to the location of the accident in determining whether DOHSA applies." *Id.* at 571. The Manfredi Plaintiffs can point to no other case law which adopts their "first injury" test. Therefore, the situs of a pre-death but non-fatal injury does not matter.

The Manfredi Plaintiffs' argument that over half of the flight occurred over land similarly fails. *LaCourse*, 980 F.3d at 1357 (aviation accident was governed by DOHSA even where the flight was scheduled almost entirely over land and only crashed during the short time when it was "fortuitously" over water). Their

argument that Defendants' negligence occurred on land also fails. *Id.* at 1356; *In re Dearborn Marine Serv., Inc.*, 499 F.2d 263, 272 n.17 (5th Cir. 1974) ("DOHSA has been construed to confer admiralty jurisdiction over claims arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land.").

Even so, the Manfredi Plaintiffs argue that it is too early at this juncture to determine where the fatal injury occurred, whether over land or sea. They maintain that because no discovery has occurred, the record does not show when Mr. Manfredi was fatally injured during the fated flight path. For example, they propose for the first time that Mr. Manfredi may have died over land from a heart attack due to his emotional distress, from extreme G-forces breaking his neck or causing brain injury during the plane's erratic movements, or from a piece of baggage flying out of an overhead compartment. Citing *Bernard v. World Learning, Inc.*, the Manfredi Plaintiffs contend that this is a "metaphysical" factual question on which the Court should not speculate without discovery. No. 09-20309-CIV, 2010 WL 11505188, at *8 (S.D. Fla. June 4, 2010). But the *Bernard* court simply held that the defendant was not entitled to summary judgment on the application of DOHSA because there were genuine evidentiary disputes regarding whether the decedent was mortally injured on land or sea. *Id.* (detailing the parties' dispute over whether the decedent died while swimming in the ocean or on land as a result of a landslide and was then pushed out to sea).

Here, the Court agrees it should not speculate or weigh evidence on the location of Mr. Manfredi's death in deciding a 12(b)(6) motion, but instead takes the facts alleged as true. The Manfredi Plaintiffs' own

Complaint does not state that Mr. Manfredi died prior to impact or as a result of the plane's erratic movements over land. Rather, it specifically alleges that Mr. Manfredi died when the aircraft crashed into the ocean. *See, e.g.*, R. 1378 ¶ 149–153 (describing pre-death terror prior to crash into the water); 229, 246, 265, 278, 290, 309, 351, 368, 387, 400, 412, 431, 442, 486, 502 (all paragraphs alleging that Mr. Manfredi "was able to perceive, process, understand and react to the impact of the aircraft with the ocean."). Based on the pleadings, Mr. Manfredi suffered his fatal injury on the high seas, and thus DOHSA applies.[4] Because

[4] The Manfredi Plaintiffs request leave to amend their Complaint to allege alternative theories of death which include their new land-based scenarios. "The court should freely give leave to amend ... [u]nless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 519–20 (7th Cir. 2015) (cleaned up). An amendment is futile when it "fails to state a valid theory of liability" or "could not withstand a motion to dismiss." *Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir. 1992). Defendants argue that amendment would be futile because the Indonesian Report demonstrates that the Manfredi Plaintiffs' speculated scenarios are very unlikely. For example, the transcript of the Cockpit Voice Recorder shows that the captain and co-captain were alive and still conversing until less than 30 seconds before the crash. *See* Komite Nasional Keselamatan Transportasi Republic of Indonesia, Final Aircraft Investigation Report (2019), https://bit.ly/3xL7Ll5 at 85. While the report makes the Manfredi Plaintiffs' new theories improbable, it does not foreclose them entirely—the report does not discuss what may have happened to any passengers in the main cabin. So long as the Manfredi Plaintiffs have "evidentiary support or ... will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" for any new allegations, Fed. R. Civ. P. 11(b), they are granted leave to amend their complaint, keeping in mind that they may be subject to sanctions if their pleading does not comply with the requirements of Rule 11.

DOHSA applies to the *Smith* and *Chandra* cases as pleaded, the Court will determine whether it preempts Plaintiffs' other claims and whether it forecloses their right to a jury trial.

B. Plaintiffs' Non-DOHSA Claims Are Preempted, and Plaintiffs Are Not Entitled to a Jury Trial.

Defendants argue that DOHSA acts to preempt Plaintiffs' other claims against them, and that Plaintiffs do not have a right to a trial by jury because DOHSA is a claim in admiralty. DOHSA provides that where a death occurs on the high seas as the result of negligence or wrongdoing, the decedent's spouse, parent, child, or dependent relative "may bring a civil action in admiralty" against the wrongdoer. *Id.* § 30302. DOHSA allows recovery of pecuniary and non-pecuniary damages exclusively for those relatives, but explicitly forbids punitive damages. *Id.* § 30307. If a person is injured on the high seas and dies while he or she has a civil action pending to recover for those injuries, "the personal representative of the decedent may be substituted as the plaintiff" and the action proceeds under the provisions of DOHSA. *Id.* at § 30305.

The Seventh Amendment does not require jury trials in cases brought in admiralty. *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963) (citing *Waring v. Clarke*, 46 U.S. 5 How. 441, 46 U.S. 441, 12 L.Ed. 226 (1847)); Fed. R. Civ. P. 38(e). Nevertheless, jury trials in admiralty are not forbidden. *Fitzgerald*, 374 U.S. at 20, 83 S.Ct. 1646. While the case law is murky and often conflicting,[5] it appears that a plaintiff's jury demand in a DOHSA

[5] Indeed, the Supreme Court has described as "tortuous" the development of the law as it pertains to wrongful death claims in the maritime context. *Tallentire*, 477 U.S. at 212, 106 S.Ct. 2485.

case may be granted in two instances: (1) where the plaintiff asserts a non-preempted claim in addition to the DOHSA claim that carries a right to a jury trial; or (2) where, "in addition to asserting a DOHSA claim, a plaintiff also asserts another claim that does not necessarily entitle her to a jury trial, but that invokes the court's diversity jurisdiction." *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F. Supp. 2d 1309, 1313 (S.D. Fla. 2012) (collecting cases).

1. DOHSA Preempts Plaintiffs' Survival Actions

First, both Plaintiffs argue that they plead non-preempted claims which grant them a right to a jury trial. Defendants, however, argue that DOHSA preempts Plaintiffs' other claims against them. These are their wrongful death claims under Illinois law, their pre-death injury and emotional distress claims, the Chandra Plaintiffs' claims for property damage, and the Manfredi Plaintiffs' claims under the ICFA and CFAA.

We start with the principle that where DOHSA applies, it is generally the exclusive source of law and preempts all other state wrongful death claims. *See generally Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174.[6] The Supreme Court in *Dooley* has also held that survival claims for pre-death pain and suffering, like those sought by Plaintiffs, are preempted by the application of DOHSA. 524 U.S. at 124, 118 S.Ct. 1890. Without deciding whether survival claims may *ever* be brought in DOHSA cases, the Court explained:

> DOHSA expresses Congress' judgment that there should be no [pre-death pain and suffering] cause

[6] The Chandra Plaintiffs accordingly concede that their wrongful death claim under Illinois law is preempted. R. 1422 at 3.

> of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas. [Allowing such a] survival action would necessarily expand the class of beneficiaries in cases of death on the high seas by permitting decedents' estates (and their various beneficiaries) to recover compensation. [It also] would expand the recoverable damages for deaths on the high seas by permitting the recovery of nonpecuniary losses Because Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages. As we noted in *Higginbotham*, 'Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements.' The comprehensive scope of DOHSA is confirmed by its survival provision, ... which limits the recovery in such cases to the pecuniary losses suffered by surviving relatives. The Act thus expresses Congress' 'considered judgment,' on the availability and contours of a survival action in cases of death on the high seas.

Id. (quoting *Higginbotham*, 436 U.S. at 625, 98 S.Ct. 2010) (emphasis added). The Court also noted that the Jones Act, which Congress adopted the same year as DOHSA and which permits seamen injured in the course of their employment to recover damages for their injuries, has a specific provision allowing a survival action for pre-death injury. The Court consequently reasoned that Congress was "certainly familiar" with language which would permit a survival

cause of action, and that it likely made a conscious decision not to include a similar provision in DOHSA. *Dooley*, 524 U.S. at 124, 118 S.Ct. 1890. In short, "Congress has spoken on the availability of a survival action, the losses to be recovered, and the beneficiaries, in cases of death on the high seas," and generally, other survival actions are preempted. *Id.* at 123–24, 118 S.Ct. 1890.

Plaintiffs argue that the Supreme Court's holding in *Dooley* does not apply to their pre-death pain and suffering claims, because some of Mr. Chandra's and Mr. Manfredi's injuries occurred while the plane was over land. They cite *Evans v. John Crane, Inc.*, C.A. No. 15-681 (MN) (D. Del. Oct. 24, 2019) and *Hays v. John Crane, Inc.*, Case No. 09-81881-CIV-KAM, 2014 WL 10658453 (S.D. Fla. Oct. 9, 2014), two cases in which the decedents died from asbestos exposure which occurred cumulatively over land and sea. However, these cases are distinguishable—they are "indivisible injury" cases where the fatal injury occurred over many years and partially over land. Plaintiffs here do not allege the decedents suffered "indivisible" fatal injuries (like asbestos exposure) over land and sea.

DOHSA similarly preempts the Chandra Plaintiffs' property damage claim and the Manfredi Plaintiffs' ICFA and CFAA claims. Though the Supreme Court has never directly addressed whether *all* other survival claims arising out of a death on the high seas are preempted by DOHSA, its dicta is instructive. *See, e.g.*, *Tallentire*, 477 U.S. at 232, 106 S.Ct. 2485. ("[T]he conclusion that the state statutes are pre-empted by DOHSA where it applies is inevitable."). It is clear, then, that a survival claim for damages to the estate arising out of a death on the high seas will not lie, absent a clear indication from Congress to the contrary.

Courts around the country have agreed.[7] *See Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1124 (9th Cir. 2010); *Jacobs v. N. King Shipping Co.*, 180 F.3d 713, 717 (5th Cir. 1999); *In re Air Disaster Near Honolulu, Haw. on Feb. 24, 1989*, 792 F. Supp. 1541 (N.D. Cal. 1990) (DOHSA provides only pecuniary damages to surviving dependents and precludes the availability of non-pecuniary damages under either general maritime law or state law, regardless of whether asserted as part of a wrongful death action or as a survival action); *Heath v. Am. Sail Training Ass'n*, 644 F. Supp. 1459, 1471–72 (D.R.I. 1986).

Plaintiffs contend that broad DOHSA preemption could lead to absurd results. For example, the Chandra Plaintiffs claim it would be unjust for DOHSA to preempt an estate from obtaining damages for a pre-accident assault at the airport. But DOHSA's preemption of claims arising out of incidents unconnected to the fatal accident is not at issue here. Their citation of *Ostrowiecki v. Aggressor Fleet, Ltd.* is similarly inapposite, because the emotional distress in that case was not preempted because it was "predicated on entirely different acts of defendants from those which allegedly caused [the decedent's] death." Nos. 07-6598, 07-6931, 2008 WL 3874609, at *5–6 (E.D. La. Aug. 15, 2008).

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[7] The few cases which have allowed survivor claims to be brought concurrently with a DOHSA claim were decided pre-*Dooley* and were brought under the Jones Act, which was designed to "work together" with DOHSA, and the Warsaw Convention. *See Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371, 372 (9th Cir. 1969); *In re Korean Air Lines Disaster*, 704 F. Supp. 1135, 1152-53 (D.D.C. 1988); *Tozer v. LTV Corp.*, 1983 WL 705, at *7 (D. Md. May 27, 1983). Neither the Chandra nor the Manfredi Plaintiffs plead such claims.

The Manfredi Plaintiffs also argue that the CFAA is a federal statute and that federal statutes cannot preempt each other. However, the Ninth Circuit, in deciding that DOHSA preempted survival claims under the federal Alien Tort Statute, explained that "*Dooley* ... held that DOHSA preempts *all* survival claims for deaths on the high seas unless there is clear indication that Congress intended otherwise." *Bowoto*, 621 F.3d at 1124 (emphasis in original). Here, in contrast to DOHSA's comprehensive scope, the CFAA is a criminal statute that creates a private right of action. *See* 18 U.S.C. § 1030. It has a punitive purpose and does not even speak to the issue of survival claims. *Id.* Congress passed the CFAA after DOHSA, and if it intended such claims to be allowed in conjunction with a DOHSA claim, it would have said so. Like the Alien Tort Statute, there is thus "no evidence that Congress intended [CFAA] survival claims to remain viable" upon application of DOHSA. *Bowoto*, 621 F.3d at 1124.[8]

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[8] The Court dismisses the Manfredi Plaintiffs' ICFA and CFAA claims because DOHSA preempts them. Nevertheless, those claims are also meritless as pleaded. Mr. Manfredi was not a "consumer" of the Boeing 737 MAX 8 aircraft, nor can he make a claim under the "consumer nexus test." *Tile Unltd., Inc. v. Blanke Corp.*, 788 F. Supp. 2d 734, 740 (N.D. Ill. 2011) (argument that consumer can state a claim under ICFA because he or she ultimately used a product has been "soundly, repeatedly, and correctly rejected"). Their CFAA claim also suffers from a host of deficiencies, the most egregious being that the CFAA specifically bars claims for negligent design of a computer system, which is precisely what the Manfredi Plaintiffs allege. 18 U.S.C. § 1030(g). Further, the Manfredi Plaintiffs lack standing because only an entity which suffered loss related to its computer system may state a claim under the CFAA. *Von Holdt v. A-1 Tool Corp.*, 714 F. Supp. 2d 863, 876 (N.D. Ill. 2010). And the Act prohibits only unauthorized activities. *See* 18 U.S.C. § 1030(g). Here, the Manfredi Plaintiffs allege that Boeing loaded the negligently designed MCAS

The Court consequently concludes that the Plaintiffs' other causes of action are preempted by DOHSA and should be dismissed.

2. "Saving to Suitors" Clauses and Existence of Diversity Do Not Preserve Right to a Jury Trial for DOHSA Claims

Plaintiffs next argue that two "saving to suitors" clauses preserve their right to a jury trial. First, they argue that 28 U.S.C. § 1331(1), which allows a plaintiff with a general maritime claim to pursue any other remedies at law he might have, carries the right to a jury trial into any suit in admiralty where the court also sits in diversity. *See Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359-60, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962) ("This suit [for breach of a maritime contract] being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury."). Plaintiffs cite many general maritime cases for this argument.[9] However,

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software on its *own* aircraft, which is obviously authorized, and which does not affect Mr. Manfredi's computer systems.

[9] *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001); *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962); *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 665 (7th Cir. 1999); *Bhd. Shipping Co. v. St. Paul Fire & Marine Ins.*, 985 F.2d 323, 326 (7th Cir. 1993); *Luera v. M/V Alberta*, 635 F.3d 181, 188 (5th Cir. 2011); *In re Lockheed Martin Corp.*, 503 F.3d 351, 354–55 (4th Cir. 2007); *Ghotra ex rel. Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054–55 (9th Cir. 1997); *Odeco Oil & Gas Co., Drilling Div. v. Bonnette*, 74 F.3d 671, 674 (5th Cir. 1996); *Coronel v. Victory*, 1 F. Supp. 3d 1175, 1181–82 (W.D. Wash. 2014); *Manrique v. Fagan*, 2009 U.S. Dist. LEXIS 61794, at *24, 2009 WL 700999 (S.D. Fla. 2009); *Sea-Land Serv., Inc. v. J & W Imp./Exp., Inc.*, 976 F. Supp. 327, 330 (D.N.J. 1997); *Neal v. McGinnis, Inc.*, 716 F. Supp. 996, 998-99 (E.D. Ky. 1989).

none are applicable to a DOHSA case. A plaintiff in a general maritime claim may have a right to a jury trial for "suits at common law" under the Seventh Amendment because § 1331(1) allows *in personam* maritime claims to be brought "at law." Congress, however, has explicitly limited DOHSA to "a civil action in admiralty," which does not carry the right to a jury trial. *Tallentire v. Offshore Logistics, Inc.*, 800 F.2d 1390, 1391 (5th Cir. 1986) (on remand) (where the "sole predicate" for liability is DOHSA, the plaintiff "is not entitled to a jury trial"). As the Manfredi Plaintiffs' brief acknowledges, there is an exception to § 1331(1) for claims that can only be brought in admiralty. *See* R. 1425 at 6 (citing 1 Schoenbaum § 4-4, pp. 239–40) (explaining that § 1331(1) does not apply to statutes where Congress "has conferred exclusive admiralty jurisdiction upon the federal courts."). DOHSA, by its terms, is one of those statutes. *Friedman v. Mitsubishi Aircraft Int'l, Inc.*, 678 F. Supp. 1064, 1066 (S.D.N.Y. 1988) ("[S]ince DOHSA provides a remedy in admiralty, admiralty principles are applicable and a DOHSA plaintiff has no right to a jury trial"); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 481 (N.D. Cal. 1987) ("DOHSA actions, according to the terms of the statute, lie in admiralty.... Therefore, plaintiffs are not entitled to a jury under DOHSA.").

Plaintiffs also argue that DOHSA's § 7, its own "saving to suitors clause," which provides "[t]his chapter does not affect the law of a state regulating the right to recover for death," preserves their right to a jury trial. 46 U.S.C. § 30308(a). But the Supreme Court has already decided the meaning of § 7 of DOHSA in *Tallentire.* 477 U.S. at 232, 106 S.Ct. 2485. There, the plaintiffs argued that a state wrongful death statute was available to supplement recovery under DOHSA because, they argued, state law applied to the high

seas and was "saved" by Section 7 of DOHSA. The Supreme Court held, however, that Section 7 of DOHSA was only intended to provide concurrent jurisdiction to state courts to adjudicate DOHSA claims. *Id.* It does not, as Plaintiffs contend, allow state law causes of action to be brought in federal court concurrently with DOHSA, or allow Plaintiffs to invoke common law jurisdiction. *Id.*

Plaintiffs argue that, under § 7 of DOHSA and *Tallentire*, they could (and the Chandra Plaintiffs did) bring their claims in Illinois state court. In state court, they could potentially obtain a right to a trial by jury. It would be inconsistent, they argue, to be deprived of that right by accident of the case being removed to or filed in federal court. They cite *Cucuru v. Rose's Oil Serv., Inc.*, 441 Mass. 12, 802 N.E.2d 1032, 1035 (Mass. 2004), a case in which the Massachusetts Supreme Court held that DOHSA's § 7 gave the plaintiffs a jury trial right in state court. But the *Cucuru* decision turned on Massachusetts constitutional and procedural law. Here, however, "federal procedural law controls the question of whether there is a right to a jury trial" in federal court. *Int'l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc.*, 356 F.3d 731, 735 (7th Cir. 2004). And federal procedural law holds that cases brought in admiralty do not carry a right to a jury trial. *See* Fed. R. Civ. P. 38 (e) ("These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim").

Plaintiffs also reason that this Court has concurrent diversity jurisdiction over their claims, which means their cases can be brought "at law" and they have a right to a jury trial under the Seventh Amendment. But the jury trial right turns not on whether the parties for the DOHSA claim are diverse, but on

whether another claim in diversity is being tried concurrently with the DOHSA claim. *Lasky*, 850 F. Supp. 2d at 1313. For example, the court in *Friedman* addressed whether a plaintiff is entitled to a jury trial on his or her DOHSA claims because the parties are diverse and held that "[t]he existence of an additional jurisdictional predicate in this case, *i.e.*, diversity of citizenship, can lead to no different result. Diversity of citizenship creates only an additional basis for federal jurisdiction; it does not enlarge the parameters of the substantive remedy upon which a claim is based." 678 F. Supp. at 1066 n.5; *see also Lasky*, 850 F. Supp. 2d at 1314–15 (holding in part that a plaintiff who brought a death action under DOHSA was not entitled to a jury trial notwithstanding the fact that there was diversity of citizenship). Here, although the parties are diverse, as discussed above, Plaintiffs' only remaining claims arise under DOHSA, which under its clear terms, limits the claims to this Court's admiralty jurisdiction.

3. The Presence of a Jury Demand Does Not Necessitate a Trial by Jury

Finally, the Chandra Plaintiffs argue that they made a jury demand in their complaint and that Boeing, too, made a jury trial demand in its removal of the case. Boeing responds that its jury demand was a nullity and all Defendants assert that the Chandra Plaintiffs' jury demand is waived by virtue of their invocation of this Court's admiralty jurisdiction. Defendants are correct that "there is no basis for" a jury demand "to the extent that any other causes of action ... are effectively preempted by DOHSA." *In re Air Disaster v. Honolulu, Haw. on Feb. 24, 1989*, 792 F. Supp. at 1547; *see also LaCourse v. Def. Support Servs. LLC*, No. 3:16cv170-RV/CJK, 2018 WL 7342153, at *2 (N.D. Fla. Oct. 31, 2018) (striking jury demand where

plaintiff's claims were preempted by DOHSA). A jury demand by either party does not convert an admiralty claim to a nonadmiralty claim. *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 668 (7th Cir. 1998). "In such cases the district court should simply deny the request." *Id.* The Court does so here.

C. Certification of Jury Trial Issue for Interlocutory Appeal

For the reasons stated in the Court's Opinion granting Plaintiffs' and Defendant Xtra's motions for certification entered herewith, R. 1489, the Court certifies for immediate interlocutory appeal under 28 U.S.C. § 1292(b) the issue of Plaintiffs' right to a jury trial. Namely, the issue of "whether a plaintiff in federal court is entitled to a jury trial under the Seventh Amendment when the plaintiff's sole claim arises under DOHSA, and the plaintiff has a concurrent basis for common law jurisdiction (such as diversity)," R. 1489 at 5, "involves a controlling question of law as to which there is substantial ground for difference of opinion and ... an immediate appeal from the order may materially advance the ultimate termination of the litigation." § 1292(b).

CONCLUSION

For the foregoing reasons, Defendants' motions, R. 1399, 1401, are granted. All pre-death pain and suffering, emotional distress, property damage, and state and federal fraud claims in the *Chandra* and *Smith* cases are dismissed. Both cases will be tried exclusively under DOHSA. Because DOHSA mandates the cases to be tried pursuant to the Court's admiralty jurisdiction, Defendants' requests for bench trials in each case are granted. The lone issue of Plaintiffs' entitlement to a jury trial is certified for immediate

interlocutory appeal under 28 U.S.C. § 1292(b). Plaintiffs may take an appeal within ten days of entry of this amended order. *Id.*

APPENDIX D

UNITED STATES DISTRICT COURT,
N.D. ILLINOIS, EASTERN DIVISION

No. 18 C 07686
Case No. 19 C 01552,
Case No. 19 C 07091

IN RE LION AIR FLIGHT JT 610 CRASH

Signed December 20, 2022

MEMORANDUM OPINION AND ORDER

Thomas M. Durkin, United States District Judge

This consolidated action arises out of an aviation accident involving a Boeing commercial jet which crashed into the Java Sea off the coast of Indonesia, resulting in the death of everyone on board. Defendants Boeing, Rockwell Collins, Inc., and Rosemount Aerospace, Inc. (collectively, "Defendants") filed motions seeking the application of the Death on the High Seas Act, 46 U.S.C. §§ 30301–08 ("DOHSA") to the two remaining actions, *Chandra v. Boeing*, case no. 19 C 01552, and *Smith v. Boeing*, case no. 19 C 07091. R. 1399, 1401. Defendants also seek a ruling that the application of DOHSA preempts all other causes of action and mandates a bench trial in each case. For the foregoing reasons, Defendants' motions are granted.

Background

On October 29, 2018, Lion Air Flight JT 610 began experiencing serious mechanical problems almost immediately after takeoff from Jakarta, Indonesia. R. 1391 ¶¶ 43, 44. The passengers on board the Boeing 737 MAX 8 experienced erratic movements and fluctuations in altitude due to a faulty automatic flight control system called MCAS, which overrode the pilots and attempted to turn the plane into a nosedive over two dozen times. *Id.* at ¶¶ 4, 45. After a few minutes, the plane headed out over the ocean, and approximately five minutes after that, the plane crashed into the Java Sea at a high speed about 18 nautical miles off the coast of Indonesia. *See id.* ¶ 46. There were no survivors. *Id.* at ¶ 5.

The resulting litigation involved 87 individual actions asserting wrongful death and other claims arising out of the accident against Boeing and other defendants on behalf of 186 decedents. All actions were either filed in or removed to this Court and eventually consolidated under the master docket, *In Re Lion Air Flight JT 610 Crash*, 18 C 07686. Boeing has now fully settled the claims of 184 decedents. The remaining claims are those brought by the families and representatives of two decedents: Liu Chandra, an Indonesian businessman (*Chandra v. Boeing*, case no. 19 C 01552); and Andrea Manfredi, an Italian professional cyclist and entrepreneur (*Smith v. Boeing*, case no. 19 C 07091).[1]

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[1] At the time the instant motions were filed, another case was also outstanding. *See Sethi v. Boeing*, case no. 20 C 01152. In that case, the parties stipulated to the application of DOHSA and the Court conducting a damages-only bench trial. *See* R. 1367. Prior to trial, the case settled. R. 1457.

The plaintiffs in the *Chandra* matter (the "Chandra Plaintiffs") originally filed suit in the Circuit Court of Cook County, Illinois. *See Chandra*, No. 19 C 01552, Dkt. 1. They allege wrongful death arising under DOHSA and the Illinois Wrongful Death Act based on theories of strict products liability, negligence, and negligent failure to warn. *See, e.g.*, R. 1391 at pp. 15–24. They also make survival claims for property damage and pre-death fear and injury. *Id.* Boeing removed the case to this Court, citing the Multiparty, Multiforum Trial Jurisdiction Act ("MMTJA"), 28 U.S.C. § 1369, and the Court's admiralty jurisdiction under 28 U.S.C. § 1331(1). *Chandra*, No. 19 C 01552, Dkt. 1. In its removal paperwork, Boeing included a jury demand. *Id.* The operative Third Amended Complaint demands a jury trial and alleges the Court has subject matter jurisdiction in diversity and under the MMTJA and DOHSA. R. 1391 ¶¶ 16, 18–19; *id.* at p. 57.

Mr. Manfredi's family and the administrator of Mr. Manfredi's estate, Laura Smith, (the "Manfredi Plaintiffs") filed suit in this Court, invoking its diversity jurisdiction. *See Smith*, No. 19 C 07091, Dkt. 1. The operative Second Amended Complaint asserts wrongful death and survival claims under theories of strict products liability, negligence, and breach of implied warranties. R. 1378 ¶¶ 201–320, 468–80, 489–95. The Manfredi Plaintiffs also plead survival claims of pre-death injury, negligent infliction of emotional distress, and claims arising under various fraud statutes, including the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1 ("ICFA") and the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030 ("CFAA"). *Id.* They seek punitive damages and demand a jury trial. *See id.* at pp. 4, 118–19.

Defendants filed motions in each of the *Chandra* and *Smith* cases, seeking the Court's determination that DOHSA applies, preempts each set of Plaintiffs' non-DOHSA claims, and mandates a bench trial.[2] *See* R. 1399, 1400, 1401, 1402. The Chandra Plaintiffs do not dispute that DOHSA governs their wrongful death claims, but nonetheless insist that their survival claims for property loss and pre-death injury are not preempted by DOHSA and that they retain their right to a jury trial. The Manfredi Plaintiffs dispute DOHSA's application entirely and similarly argue that even if it did apply, their survival claims for pre-death injury and fraud are not preempted and that they have the right to a jury trial. Though the parties in the *Chandra* and *Smith* cases have informally exchanged some discovery in furtherance of settlement discussions, they have not engaged in formal written or expert discovery.

Legal Standard

Defendants do not articulate a standard under which the Court should decide their motions. Defendants base their arguments on the pleadings, however, they do cite to a public crash investigation report by the Indonesian government (the "Report"). *See, e.g.*, R. 1400 at 7; R. 1438 at 8. The Manfredi Plaintiffs, in turn, attach evidentiary material outside the pleadings to their brief in opposition, argue for the application of the summary judgment standard, and request additional discovery under Rule 56(d). R. 1425-1 (attaching expert affidavit). Meanwhile, the Chandra Plaintiffs argue for the application of the Rule 12(b)(6) motion to dismiss standard. R. 1422 at 3.

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[2] Defendant Xtra Aerospace LLC filed a response to the instant motions stating that it takes no position. R. 1421.

The Report cited by Defendants is a foreign government report and a matter of public record, and the Court may take judicial notice of it without converting Defendants' motions to ones for summary judgment. *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies is proper."); *see also Color Switch LLC v. Fortafy Games DMCC*, 377 F. Supp. 3d 1075, 1089 n.6 (E.D. Cal. 2019) (taking judicial notice of Canadian government report). The fact that a plaintiff attaches evidentiary materials outside the pleadings to its brief does not convert a defendant's motion to a summary judgment motion. *Thompson v. Illinois Dept. of Prof'l Regulation*, 300 F.3d 750, 754 (7th Cir. 2002). Furthermore, it is within this Court's discretion to handle this motion as a straightforward motion to dismiss, especially where early resolution of an issue, like the application of DOHSA, would streamline the case. *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998) (holding that it was within the district court's discretion to treat motion as motion to dismiss where judgment on qualified immunity should be decided as early in the case as possible).

Thus, the Court will construe Defendants' motions under the Rule 12(b)(6) standard to decide the application of DOHSA as a matter of law on the face of the pleadings. A Rule 12(b)(6) motion challenges the "sufficiency of the complaint." *Berger v. Nat. Collegiate Athletic Assoc.*, 843 F.3d 285, 289 (7th Cir. 2016). In applying this standard, the Court accepts all well-pleaded facts as true and draws all reasonable inferences in favor of the non-moving party. *Tobey v. Chibucos*, 890 F.3d 634, 646 (7th Cir. 2018).

Discussion

A. DOHSA Applies to the *Smith* (Manfredi) Action.

Though the Chandra Plaintiffs do not dispute DOHSA's application to their wrongful death claims, the Manfredi Plaintiffs do. DOHSA is the source of law for deaths resulting from wrongful acts, neglect, or default on the high seas more than three (or in a commercial aviation accident, twelve) nautical miles from the shore of the United States. 46 U.S.C. §§ 30302, 30307. The Supreme Court has consistently applied DOHSA to aviation accidents occurring on the high seas, like the crash which occurred here. *See Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 118 S.Ct. 1890, 141 L.Ed.2d 102 (1998); *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996); *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978); *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 263–64, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972) ("[I]t may be considered as settled today that [DOHSA] gives the federal admiralty courts jurisdiction of such wrongful-death actions" based on aircraft crashes into the high seas); *see also* 46 U.S.C. § 30307 (section of DOHSA governing commercial aviation accidents on the high seas).[3]

The weight of the case law in other circuits is that when a plaintiff is fatally injured over the high seas, DOHSA applies. *LaCourse v. PAE Worldwide Inc.*, 980

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[3] Cases interpreting and applying DOHSA are virtually non-existent in this Circuit. Where there is no binding law from the Supreme Court or the Seventh Circuit, this Court considers the persuasive case law of other circuits.

F.3d 1350, 1357 (11th Cir. 2020) ("Where a death occurs on the high seas, DOHSA applies, full stop."); *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1348 (9th Cir. 1987); *Kennedy v. Carnival Corp.*, 385 F. Supp. 3d 1302, 1316 (S.D. Fla. 2019) (DOHSA applies where "the injury that led to the Decedent's death occurred in the water); *see also Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 599–600 and n.5, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974) (J. Powell, dissenting on other grounds) (DOHSA "by its terms covers deaths caused by injuries inflicted at sea, not simply deaths occurring on the high seas.").

Citing *Motts v. M/V Green Wave*, a case in which the Fifth Circuit held that DOHSA applied when the injury occurred on the high seas but the prior negligence and the later death occurred onshore, the Manfredi Plaintiffs argue that the Court should instead consider the location of where the negligence is consummated into a "first" injury in determining whether DOHSA applies. 210 F.3d 565, 569–71 (5th Cir. 2000). Their argument is that Mr. Manfredi was first injured during the period that the flight was over land—they allege he suffered, at a minimum, emotional distress—and this prevents the application of DOHSA. But the *Motts* court specifically held that the proper test is to "look to the location of the accident in determining whether DOHSA applies." *Id.* at 571. The Manfredi Plaintiffs can point to no other case law which adopts their "first injury" test. Therefore, the situs of a pre-death but non-fatal injury does not matter.

The Manfredi Plaintiffs' argument that over half of the flight occurred over land similarly fails. *LaCourse*, 980 F.3d at 1357 (aviation accident was governed by DOHSA even where the flight was scheduled almost

entirely over land and only crashed during the short time when it was "fortuitously" over water). Their argument that Defendants' negligence occurred on land also fails. *Id.* at 1356; *In re Dearborn Marine Serv., Inc.*, 499 F.2d 263, 272 n.17 (5th Cir. 1974) ("DOHSA has been construed to confer admiralty jurisdiction over claims arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land.").

Even so, the Manfredi Plaintiffs argue that it is too early at this juncture to determine where the fatal injury occurred, whether over land or sea. They maintain that because no discovery has occurred, the record does not show when Mr. Manfredi was fatally injured during the fated flight path. For example, they propose for the first time that Mr. Manfredi may have died over land from a heart attack due to his emotional distress, from extreme G-forces breaking his neck or causing brain injury during the plane's erratic movements, or from a piece of baggage flying out of an overhead compartment. Citing *Bernard v. World Learning, Inc.*, the Manfredi Plaintiffs contend that this is a "metaphysical" factual question on which the Court should not speculate without discovery. No. 09-20309-CIV, 2010 WL 11505188, at *8 (S.D. Fla. June 4, 2010). But the *Bernard* court simply held that the defendant was not entitled to summary judgment on the application of DOHSA because there were genuine evidentiary disputes regarding whether the decedent was mortally injured on land or sea. *Id.* (detailing the parties' dispute over whether the decedent died while swimming in the ocean or on land as a result of a landslide and was then pushed out to sea).

Here, the Court agrees it should not speculate or weigh evidence on the location of Mr. Manfredi's death

in deciding a 12(b)(6) motion, but instead takes the facts alleged as true. The Manfredi Plaintiffs' own Complaint does not state that Mr. Manfredi died prior to impact or as a result of the plane's erratic movements over land. Rather, it specifically alleges that Mr. Manfredi died when the aircraft crashed into the ocean. *See, e.g.*, R. 1378 ¶ 149–153 (describing pre-death terror prior to crash into the water); 229, 246, 265, 278, 290, 309, 351, 368, 387, 400, 412, 431, 442, 486, 502 (all paragraphs alleging that Mr. Manfredi "was able to perceive, process, understand and react to the impact of the aircraft with the ocean."). Based on the pleadings, Mr. Manfredi suffered his fatal injury on the high seas, and thus DOHSA applies.[4] Because

[4] The Manfredi Plaintiffs request leave to amend their Complaint to allege alternative theories of death which include their new land-based scenarios. "The court should freely give leave to amend ... [u]nless it is certain from the face of the complaint that any amendment would be futile or otherwise unwarranted." *Runnion ex rel. Runnion v. Girl Scouts of Greater Chicago & Nw. Indiana*, 786 F.3d 510, 519–20 (7th Cir. 2015) (cleaned up). An amendment is futile when it "fails to state a valid theory of liability" or "could not withstand a motion to dismiss." *Bower v. Jones*, 978 F.2d 1004, 1008 (7th Cir. 1992). Defendants argue that amendment would be futile because the Indonesian Report demonstrates that the Manfredi Plaintiffs' speculated scenarios are very unlikely. For example, the transcript of the Cockpit Voice Recorder shows that the captain and co-captain were alive and still conversing until less than 30 seconds before the crash. *See* Komite Nasional Keselamatan Transportasi Republic of Indonesia, Final Aircraft Investigation Report (2019), https://bit.ly/3xL7Ll5 at 85. While the report makes the Manfredi Plaintiffs' new theories improbable, it does not foreclose them entirely—the report does not discuss what may have happened to any passengers in the main cabin. So long as the Manfredi Plaintiffs have "evidentiary support or ... will likely have evidentiary support after a reasonable opportunity for further investigation or discovery" for any new allegations, Fed. R. Civ. P. 11(b), they are granted leave to amend their complaint, keeping

DOHSA applies to the *Smith* and *Chandra* cases as pleaded, the Court will determine whether it preempts Plaintiffs' other claims and whether it forecloses their right to a jury trial.

B. Plaintiffs' Non-DOHSA Claims Are Preempted, and Plaintiffs Are Not Entitled to a Jury Trial.

Defendants argue that DOHSA acts to preempt Plaintiffs' other claims against them, and that Plaintiffs do not have a right to a trial by jury because DOHSA is a claim in admiralty. DOHSA provides that where a death occurs on the high seas as the result of negligence or wrongdoing, the decedent's spouse, parent, child, or dependent relative "may bring a civil action in admiralty" against the wrongdoer. *Id.* § 30302. DOHSA allows recovery of pecuniary and non-pecuniary damages exclusively for those relatives, but explicitly forbids punitive damages. *Id.* § 30307. If a person is injured on the high seas and dies while he or she has a civil action pending to recover for those injuries, "the personal representative of the decedent may be substituted as the plaintiff" and the action proceeds under the provisions of DOHSA. *Id.* at § 30305.

The Seventh Amendment does not require jury trials in cases brought in admiralty. *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963) (citing *Waring v. Clarke*, 46 U.S. 5 How. 441, 12 L.Ed. 226 (1847)); Fed. R. Civ. P. 38(e). Nevertheless, jury trials in admiralty are not forbidden. *Fitzgerald*, 374 U.S. at 20, 83 S.Ct. 1646.

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in mind that they may be subject to sanctions if their pleading does not comply with the requirements of Rule 11.

While the case law is murky and often conflicting,[5] it appears that a plaintiff's jury demand in a DOHSA case may be granted in two instances: (1) where the plaintiff asserts a non-preempted claim in addition to the DOHSA claim that carries a right to a jury trial; or (2) where, "in addition to asserting a DOHSA claim, a plaintiff also asserts another claim that does not necessarily entitle her to a jury trial, but that invokes the court's diversity jurisdiction." *Lasky v. Royal Caribbean Cruises, Ltd.*, 850 F. Supp. 2d 1309, 1313 (S.D. Fla. 2012) (collecting cases).

1. DOHSA Preempts Plaintiffs' Survival Actions

First, both Plaintiffs argue that they plead non-preempted claims which grant them a right to a jury trial. Defendants, however, argue that DOHSA preempts Plaintiffs' other claims against them. These are their wrongful death claims under Illinois law, their pre-death injury and emotional distress claims, the Chandra Plaintiffs' claims for property damage, and the Manfredi Plaintiffs' claims under the ICFA and CFAA.

We start with the principle that where DOHSA applies, it is generally the exclusive source of law and preempts all other state wrongful death claims. *See generally Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174.[6] The Supreme Court in *Dooley* has also held that survival claims for pre-death pain and suffering, like those sought by Plaintiffs, are preempted by the application of DOHSA. 524 U.S. at

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[5] Indeed, the Supreme Court has described as "tortuous" the development of the law as it pertains to wrongful death claims in the maritime context. *Tallentire*, 477 U.S. at 212, 106 S.Ct. 2485.

[6] The Chandra Plaintiffs accordingly concede that their wrongful death claim under Illinois law is preempted. R. 1422 at 3.

124, 118 S.Ct. 1890. Without deciding whether survival claims may *ever* be brought in DOHSA cases, the Court explained:

> DOHSA expresses Congress' judgment that there should be no [pre-death pain and suffering] cause of action in cases of death on the high seas. **By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas.** [Allowing such a] survival action would necessarily expand the class of beneficiaries in cases of death on the high seas by permitting decedents' estates (and their various beneficiaries) to recover compensation. [It also] would expand the recoverable damages for deaths on the high seas by permitting the recovery of nonpecuniary losses.... Because Congress has already decided these issues, it has precluded the judiciary from enlarging either the class of beneficiaries or the recoverable damages. As we noted in *Higginbotham*, 'Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements.' ... The comprehensive scope of DOHSA is confirmed by its survival provision, ... which limits the recovery in such cases to the pecuniary losses suffered by surviving relatives. The Act thus expresses Congress' 'considered judgment,' on the availability and contours of a survival action in cases of death on the high seas.

Id. (quoting *Higginbotham*, 436 U.S. at 625, 98 S.Ct. 2010) (emphasis added). The Court also noted that the Jones Act, which Congress adopted the same year as

DOHSA and which permits seamen injured in the course of their employment to recover damages for their injuries, has a specific provision allowing a survival action for pre-death injury. The Court consequently reasoned that Congress was "certainly familiar" with language which would permit a survival cause of action, and that it likely made a conscious decision not to include a similar provision in DOHSA. *Dooley*, 524 U.S. at 124, 118 S.Ct. 1890. In short, "Congress has spoken on the availability of a survival action, the losses to be recovered, and the beneficiaries, in cases of death on the high seas," and generally, other survival actions are preempted. *Id.* at 123–24, 118 S.Ct. 1890.

Plaintiffs argue that the Supreme Court's holding in *Dooley* does not apply to their pre-death pain and suffering claims, because some of Mr. Chandra's and Mr. Manfredi's injuries occurred while the plane was over land. They cite *Evans v. John Crane, Inc.*, C.A. No. 15-681 (MN) (D. Del. Oct. 24, 2019) and *Hays v. John Crane, Inc.*, Case No. 09-81881-CIV-KAM, 2014 WL 10658453 (S.D. Fla. Oct. 9, 2014), two cases in which the decedents died from asbestos exposure which occurred cumulatively over land and sea. However, these cases are distinguishable—they are "indivisible injury" cases where the fatal injury occurred over many years and partially over land. Plaintiffs here do not allege the decedents suffered "indivisible" fatal injuries (like asbestos exposure) over land and sea.

DOHSA similarly preempts the Chandra Plaintiffs' property damage claim and the Manfredi Plaintiffs' ICFA and CFAA claims. Though the Supreme Court has never directly addressed whether *all* other survival claims arising out of a death on the high seas

are preempted by DOHSA, its dicta is instructive. *See, e.g.*, *Tallentire*, 477 U.S. at 232, 106 S.Ct. 2485. ("[T]he conclusion that the state statutes are pre-empted by DOHSA where it applies is inevitable."). It is clear, then, that a survival claim for damages to the estate arising out of a death on the high seas will not lie, absent a clear indication from Congress to the contrary. Courts around the country have agreed.[7] *See Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1124 (9th Cir. 2010); *Jacobs v. N. King Shipping Co.*, 180 F.3d 713, 717 (5th Cir. 1999); *In re Air Disaster Near Honolulu, Haw. on Feb. 24, 1989*, 792 F. Supp. 1541 (N.D. Cal. 1990) (DOHSA provides only pecuniary damages to surviving dependents and precludes the availability of non-pecuniary damages under either general maritime law or state law, regardless of whether asserted as part of a wrongful death action or as a survival action); *Heath v. Am. Sail Training Ass'n*, 644 F. Supp. 1459, 1471–72 (D.R.I. 1986).

Plaintiffs contend that broad DOHSA preemption could lead to absurd results. For example, the Chandra Plaintiffs claim it would be unjust for DOHSA to preempt an estate from obtaining damages for a pre-accident assault at the airport. But DOHSA's preemption of claims arising out of incidents unconnected to the fatal accident is not at issue here. Their citation of *Ostrowiecki v. Aggressor Fleet, Ltd.*

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[7] The few cases which have allowed survivor claims to be brought concurrently with a DOHSA claim were decided pre-*Dooley* and were brought under the Jones Act, which was designed to "work together" with DOHSA, and the Warsaw Convention. *See Peace v. Fidalgo Island Packing Co.*, 419 F.2d 371, 372 (9th Cir. 1969); *In re Korean Air Lines Disaster*, 704 F. Supp. 1135, 1152–53 (D.D.C. 1988); *Tozer v. LTV Corp.*, 1983 WL 705, at *7 (D. Md. May 27, 1983). Neither the Chandra nor the Manfredi Plaintiffs plead such claims.

is similarly inapposite, because the emotional distress in that case was not preempted because it was "predicated on entirely different acts of defendants from those which allegedly caused [the decedent's] death." Nos. 07-6598, 07-6931, 2008 WL 3874609, at *5–6 (E.D. La. Aug. 15, 2008).

The Manfredi Plaintiffs also argue that the CFAA is a federal statute and that federal statutes cannot preempt each other. However, the Ninth Circuit, in deciding that DOHSA preempted survival claims under the federal Alien Tort Statute, explained that "*Dooley* ... held that DOHSA preempts *all* survival claims for deaths on the high seas unless there is clear indication that Congress intended otherwise." *Bowoto*, 621 F.3d at 1124 (emphasis in original). Here, in contrast to DOHSA's comprehensive scope, the CFAA is a criminal statute that creates a private right of action. *See* 18 U.S.C. § 1030. It has a punitive purpose and does not even speak to the issue of survival claims. *Id.* Congress passed the CFAA after DOHSA, and if it intended such claims to be allowed in conjunction with a DOHSA claim, it would have said so. Like the Alien Tort Statute, there is thus "no evidence that Congress intended [CFAA] survival claims to remain viable" upon application of DOHSA. *Bowoto*, 621 F.3d at 1124.[8]

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[8] The Court dismisses the Manfredi Plaintiffs' ICFA and CFAA claims because DOHSA preempts them. Nevertheless, those claims are also meritless as pleaded. Mr. Manfredi was not a "consumer" of the Boeing 737 MAX 8 aircraft, nor can he make a claim under the "consumer nexus test." *Tile Unltd., Inc. v. Blanke Corp.*, 788 F. Supp. 2d 734, 740 (N.D. Ill. 2011) (argument that consumer can state a claim under ICFA because he or she ultimately used a product has been "soundly, repeatedly, and correctly rejected"). Their CFAA claim also suffers from a host of deficiencies, the most egregious being that the CFAA specifically

The Court consequently concludes that the Plaintiffs' other causes of action are preempted by DOHSA and should be dismissed.

2. "Saving to Suitors" Clauses and Existence of Diversity Do Not Preserve Right to a Jury Trial for DOHSA Claims

Plaintiffs next argue that two "saving to suitors" clauses preserve their right to a jury trial. First, they argue that 28 U.S.C. § 1331(1), which allows a plaintiff with a general maritime claim to pursue any other remedies at law he might have, carries the right to a jury trial into any suit in admiralty where the court also sits in diversity. *See Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 359–60, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962) ("This suit [for breach of a maritime contract] being in the federal courts by reason of diversity of citizenship carried with it, of course, the right to trial by jury."). Plaintiffs cite many general maritime cases for this argument.[9] However,

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bars claims for negligent design of a computer system, which is precisely what the Manfredi Plaintiffs allege. 18 U.S.C. § 1030(g). Further, the Manfredi Plaintiffs lack standing because only an entity which suffered loss related to its computer system may state a claim under the CFAA. *Von Holdt v. A-1 Tool Corp.*, 714 F. Supp. 2d 863, 876 (N.D. Ill. 2010). And the Act prohibits only unauthorized activities. *See* 18 U.S.C. § 1030(g). Here, the Manfredi Plaintiffs allege that Boeing loaded the negligently designed MCAS software on its *own* aircraft, which is obviously authorized, and which does not affect Mr. Manfredi's computer systems.

[9] *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001); *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962); *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 665 (7th Cir. 1999); *Bhd. Shipping Co. v. St. Paul Fire & Marine Ins.*, 985 F.2d 323, 326 (7th Cir. 1993); *Luera v. M/V Alberta*, 635 F.3d 181,

none are applicable to a DOHSA case. A plaintiff in a general maritime claim may have a right to a jury trial for "suits at common law" under the Seventh Amendment because § 1331(1) allows *in personam* maritime claims to be brought "at law." Congress, however, has explicitly limited DOHSA to "a civil action in admiralty," which does not carry the right to a jury trial. *Tallentire v. Offshore Logistics, Inc.*, 800 F.2d 1390, 1391 (5th Cir. 1986) (on remand) (where the "sole predicate" for liability is DOHSA, the plaintiff "is not entitled to a jury trial"). As the Manfredi Plaintiffs' brief acknowledges, there is an exception to § 1331(1) for claims that can only be brought in admiralty. *See* R. 1425 at 6 (citing 1 Schoenbaum § 4-4, pp. 239–40) (explaining that § 1331(1) does not apply to statutes where Congress "has conferred exclusive admiralty jurisdiction upon the federal courts."). DOHSA, by its terms, is one of those statutes. *Friedman v. Mitsubishi Aircraft Int'l, Inc.*, 678 F. Supp. 1064, 1066 (S.D.N.Y. 1988) ("[S]ince DOHSA provides a remedy in admiralty, admiralty principles are applicable and a DOHSA plaintiff has no right to a jury trial"); *Favaloro v. S/S Golden Gate*, 687 F. Supp. 475, 481 (N.D. Cal. 1987) ("DOHSA actions, according to the terms of the statute, lie in admiralty.... Therefore, plaintiffs are not entitled to a jury under DOHSA.").

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188 (5th Cir. 2011); *In re Lockheed Martin Corp.*, 503 F.3d 351, 354–55 (4th Cir. 2007); *Ghotra ex rel. Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1054–55 (9th Cir. 1997); *Odeco Oil & Gas Co., Drilling Div. v. Bonnette*, 74 F.3d 671, 674 (5th Cir. 1996); *Coronel v. Victory*, 1 F. Supp. 3d 1175, 1181–82 (W.D. Wash. 2014); *Manrique v. Fagan*, 2009 U.S. Dist. LEXIS 61794, at *24, 2009 WL 700999 (S.D. Fla. 2009); *Sea-Land Serv., Inc. v. J & W Imp./Exp., Inc.*, 976 F. Supp. 327, 330 (D.N.J. 1997); *Neal v. McGinnis, Inc.*, 716 F. Supp. 996, 998-99 (E.D. Ky. 1989).

Plaintiffs also argue that DOHSA's § 7, its own "saving to suitors clause," which provides "[t]his chapter does not affect the law of a state regulating the right to recover for death," preserves their right to a jury trial. 46 U.S.C. § 30308(a). But the Supreme Court has already decided the meaning of § 7 of DOHSA in *Tallentire.* 477 U.S. at 232, 106 S.Ct. 2485. There, the plaintiffs argued that a state wrongful death statute was available to supplement recovery under DOHSA because, they argued, state law applied to the high seas and was "saved" by Section 7 of DOHSA. The Supreme Court held, however, that Section 7 of DOHSA was only intended to provide concurrent jurisdiction to state courts to adjudicate DOHSA claims. *Id.* It does not, as Plaintiffs contend, allow state law causes of action to be brought in federal court concurrently with DOHSA, or allow Plaintiffs to invoke common law jurisdiction. *Id.*

Plaintiffs argue that, under § 7 of DOHSA and *Tallentire*, they could (and the Chandra Plaintiffs did) bring their claims in Illinois state court. In state court, they could potentially obtain a right to a trial by jury. It would be inconsistent, they argue, to be deprived of that right by accident of the case being removed to or filed in federal court. They cite *Cucuru v. Rose's Oil Serv., Inc.*, 441 Mass. 12, 802 N.E.2d 1032, 1035 (Mass. 2004), a case in which the Massachusetts Supreme Court held that DOHSA's § 7 gave the plaintiffs a jury trial right in state court. But the *Cucuru* decision turned on Massachusetts constitutional and procedural law. Here, however, "federal procedural law controls the question of whether there is a right to a jury trial" in federal court. *Int'l Fin. Servs. Corp. v. Chromas Techs. Canada, Inc.*, 356 F.3d 731, 735 (7th Cir. 2004). And federal procedural law holds that cases brought in admiralty do not carry a right to a jury

trial. *See* Fed. R. Civ. P. 38 (e) ("These rules do not create a right to a jury trial on issues in a claim that is an admiralty or maritime claim....").

Plaintiffs also reason that this Court has concurrent diversity jurisdiction over their claims, which means their cases can be brought "at law" and they have a right to a jury trial under the Seventh Amendment. But the jury trial right turns not on whether the parties for the DOHSA claim are diverse, but on whether another claim in diversity is being tried concurrently with the DOHSA claim. *Lasky*, 850 F. Supp. 2d at 1313. For example, the court in *Friedman* addressed whether a plaintiff is entitled to a jury trial on his or her DOHSA claims because the parties are diverse and held that "[t]he existence of an additional jurisdictional predicate in this case, *i.e.*, diversity of citizenship, can lead to no different result.... Diversity of citizenship creates only an additional basis for federal jurisdiction; it does not enlarge the parameters of the substantive remedy upon which a claim is based." 678 F. Supp. at 1066 n.5; *see also Lasky*, 850 F. Supp. 2d at 1314-15 (holding in part that a plaintiff who brought a death action under DOHSA was not entitled to a jury trial notwithstanding the fact that there was diversity of citizenship). Here, although the parties are diverse, as discussed above, Plaintiffs' only remaining claims arise under DOHSA, which under its clear terms, limits the claims to this Court's admiralty jurisdiction.

3. The Presence of a Jury Demand Does Not Necessitate a Trial by Jury

Finally, the Chandra Plaintiffs argue that they made a jury demand in their complaint and that Boeing, too, made a jury trial demand in its removal of the case. Boeing responds that its jury demand was a

nullity and all Defendants assert that the Chandra Plaintiffs' jury demand is waived by virtue of their invocation of this Court's admiralty jurisdiction. Defendants are correct that "there is no basis for" a jury demand "to the extent that any other causes of action ... are effectively preempted by DOHSA." *In re Air Disaster v. Honolulu, Haw. on Feb. 24, 1989*, 792 F. Supp. at 1547; *see also LaCourse v. Def. Support Servs. LLC*, No. 3:16cv170-RV/CJK, 2018 WL 7342153, at *2 (N.D. Fla. Oct. 31, 2018) (striking jury demand where plaintiff's claims were preempted by DOHSA). A jury demand by either party does not convert an admiralty claim to a nonadmiralty claim. *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 668 (7th Cir. 1998). "In such cases the district court should simply deny the request." *Id.* The Court does so here.

CONCLUSION

For the foregoing reasons, Defendants' motions, R. 1399, 1401, are granted. All pre-death pain and suffering, emotional distress, property damage, and state and federal fraud claims in the *Chandra* and *Smith* cases are dismissed. Both cases will be tried exclusively under DOHSA. Because DOHSA mandates the cases to be tried pursuant to the Court's admiralty jurisdiction, Defendants' requests for bench trials in each case are granted. Should either of the Plaintiffs decide they want to amend their complaint, they should submit a proposed amended complaint with a redline showing any changes and a memorandum of less than five pages explaining those changes and why they cure the deficiencies identified in this Opinion within 21 days of this Order.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 10, 2024

Before

KENNETH F. RIPPLE, *Circuit Judge*
MICHAEL B. BRENNAN, *Circuit Judge*
CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 23-2358
No. 1:18-cv-07686
(Consolidated with No. 1:19-cv-07091 and
No. 19-cv-01552)

IN RE: LION AIR FLIGHT JT 610 CRASH

LAURA SMITH, as duly appointed representative and Independent Administrator of the ESTATE OF ANDREA MANFREDI, deceased, *et al.*,

Plaintiffs-Appellants,

v.

THE BOEING COMPANY, *et al.*,

Defendants-Appellees.

Thomas M. Durkin,
Judge.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

ORDER

On consideration of the Petition for Rehearing or Rehearing En Banc, filed by the Manfredi Plaintiffs-Appellants on August 20, 2024, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to DENY the petition for rehearing[1].

Accordingly, the petition for rehearing or rehearing en banc filed by the Manfredi Plaintiffs-Appellants is DENIED.

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[1] Circuit Judge Thomas L. Kirsch and Circuit Judge John Z. Lee did not participate in the consideration of this petition.