UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-61389-CIV-DIMITROULEAS/SNOW

WILHELMINA WARRICK *et al.*,

Plaintiffs,

vs.

CARNIVAL CORPORATION *et al.*,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS BASED ON FORUM SELECTION CLAUSE AND FORUM NON CONVENIENS

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss Based on Forum Selection Clause and Forum Non Conveniens [DE 23]. The Court has carefully considered the Motion, Plaintiffs' Response in Opposition [DE 35], and Defendants' Reply [DE 38], and is otherwise fully advised in the premises.

FACTS

When ruling on a motion to dismiss for improper venue, this Court may make factual findings. *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008). For the purposes of this motion only, the Court makes the following findings of fact:

Plaintiffs booked a cruise on the ill-fated *Costa Concordia*. It ran aground near the coast of Giglio Island, Italy on January 13, 2012. The ship had 3,206 passengers at the time, of which approximately 100 were U.S. citizens. Two-thirds of the passengers were Italian or other Europeans. None of the crewmembers were U.S. citizens.

After running aground, the Costa Concordia took on water and the ship was abandoned. The accident attracted worldwide attention. Italian authorities quickly began investigations. As part of a criminal investigation, the Italian Public Prosecutor seized the vessel and most physical evidence relating to the accident. There have been investigations into several Costa employees as well. The judge presiding over the criminal investigation has ordered experts to report on how the wreck occurred; what the vessel's route was; whether the vessel complied with international, Italian, and industry standards; and how the vessel was navigated on the bridge at the time of the accident. To date, the vessel remains grounded off Giglio Island and is under the jurisdiction of Italian officers.

All of the Plaintiffs in this action are related and are Massachusetts residents. Three of the five plaintiffs are siblings who claim that they were injured in the wreck. They boarded the vessel on January 9, 2012. Curiously, the other two plaintiffs, the parents of the siblings, are suing because they were not allowed to board the *Costa Concordia*.

The Defendants are Costa Crociere S.p.A. ("Costa"), Costa Cruise Lines, Inc. ("CCL"), Carnival Corporation, and Carnival plc. Costa is an Italian company. It was the sole owner and operator of the *Costa Concordia*, which was an Italian-flagged vessel regulated by the Italian government and an Italian classification society. Costa's principal place of business is Genoa, Italy. It has no offices in the United States. Two percent of its customers are U.S. citizens.

Carnival plc is Costa's parent company. It is incorporated in England and Wales and has its principal place of business in England. Carnival Corporation is a Panamanian corporation with its principal place of business in Florida. Like Carnival plc, it is an umbrella organization over Carnival policies, but it did not own, operate, charter, manage, or staff the Costa Concordia

and does not direct or control Costa's day-to-day operations. CCL is a marketing subsidiary of Costa. It is incorporated under the laws of Florida and has its principal place of business in Florida.

The father of the Plaintiffs' family booked the family's trip through a California-based travel agency, Avoya Travel, on December 2, 2011. The travel agent made the reservation and paid fully using CCL's call center. At the time of the booking, CCL advised the travel agent that the Plaintiffs would not receive their tickets until their passport numbers and contact information had been inputted into Costa's online web check-in form. Either the travel agent or the Plaintiffs could have input this information.

CCL sent 18 notices to the travel agent confirming ticketing and reminding the travel agent to complete the web check-in. One confirmation was sent on December 2, 2011. The cruse confirmation document stated in plain font that "GUEST'S PERSONAL DATA IS MISSING" and included an invitation to complete the web check-in form. [DE 23-3 at 44]. The second page included a reminder that "All mandatory personal data are required for issuing of travel documents." *Id.* at 45. It also stated, "Please take note and be aware of Costa's General Information and Conditions found on Costa's website (www.costacruises.com). The General Information and Conditions describe your rights and responsibilities when booking a Costa cruise." *Id.* A similar confirmation was sent the next day. It was sent again on December 7, 2011. This process was repeated on the same days for the children's bookings.

CCL also sent emails to the travel agent on December 5, 7, 9, 12, 14, 16, 19, 21, 23, 26, 28, and 30, as well as January 2 and 4. *See* [DE 23-3 at 65-142]. These emails stated, "**PLEASE NOTE -** unissued travel documents due to missing mandatory personal information."

These emails invited the travel agent to complete the booking through Costaclick, the travel agent's website, or through www.costacruise.com.[1]

Web check-in occurred on January 4, 2012, more than a month after the first confirmation was sent indicating that personal information was necessary prior to tickets being issued. The tickets were issued to the travel agent on January 5, 2012, four days before the Plaintiffs were to board the vessel.

Page six of the cruise ticket contained a forum selection clause. [DE 23-3 at 15]. The title of the page reads, "General Conditions of Passage Ticket Contract." At the top of the page, there is an image of a blue hand in the "stop" position." Just below that image, in bold, all capital letters but in relatively small font, it states, "**IMPORTANT NOTICE; THIS IS YOUR PASSAGE TICKET CONTRACT. READ IT CAREFULLY AS SOON AS YOU RECEIVE IT AS IT GOVERNS YOUR LEGAL RIGHTS. PAY PARTICULAR ATTENTION TO PARAGRAPHS 1 THROUGH 9 WHICH LIMIT THE CARRIER'S LIABILITY AND YOUR RIGHT TO SUE.**"

Paragraph 2, under the heading "**CHOICE OF FORUM; ARBITRATION OF CERTAIN CLAIMS; NO ARREST OF VESSEL**," the contract reads in relevant part, "All claims, controversies, disputes, suits, and matters of any kind whatsoever arising out of, concerned with or incident to any voyage ... or to this Contract if issued in connection with such a voyage, shall be instituted only in the courts of Genoa, Italy, to the exclusion of the courts of any other county, state or nation. Italian law shall apply to any such proceedings."

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[1] The Court notes that this web address omits the terminal "s" included in the confirmation documents describing the web address.

The Plaintiffs did not attempt to cancel their voyage and did not complain about any of the terms and conditions. On January 9, 2012, the siblings boarded the vessel. The mother lacked a proper visa and could not board. The father decided to stay with the mother. Four days later, the *Costa Concordia* ran aground.

The parents have sued the Defendants for breach of contract, fraudulent misrepresentation, and unjust enrichment. The siblings have sued for fraudulent misrepresentation, maritime negligence, gross negligence, intentional infliction of emotional distress, negligent hiring, fraudulent inducement, and deceptive trade practices. They assert vicarious liability and actual and apparent agency.

DISCUSSION

A. Forum Non Conveniens

The Court will begin by analyzing Defendants' *forum non conveniens* argument. To obtain dismissal for *forum non conveniens*, "the moving party must demonstrate that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice." *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1310-11 (11th Cir. 2001). Defendants bear a "heavy burden in opposing the plaintiff's chosen forum." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping*, 549 U.S. 422, 430 (2007). The burden is even higher if the plaintiffs are U.S. residents, as in this case. *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1101 (11th Cir. 2004). Indeed, to overcome the strong presumption in favor of a U.S. citizen's choice of a U.S. forum, there must be "positive evidence

of unusually extreme circumstances" and the Court should be "thoroughly convinced that material injustice is manifest" before denying U.S. citizens access to this country's courts. *Id.*

Because of the importance of properly considering the strong presumption in favor of the Plaintiffs' choice of forum, the Eleventh Circuit has provided further guidance on how a court should properly consider motion to dismiss for forum non conveniens. First, the trial court should determine whether there is an adequate alternate forum which possesses jurisdiction over the whole case, including all of the parties. *Wilson v. Island Seas Invs., Ltd.*, 590 F.3d 1264, 1268 (11th Cir. 2009). If so, then the Court should evaluate whether all relevant factors of private interest favor the alternate forum, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice. *Id.* Third, if the balance of private interests is at or near equipoise, the court should consider whether factors of public interest tip the balance in favor of trial in the alternate forum. *Id.*[2] Fourth, the Court must ensure that the plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice. *Id.* The Court will now walk through this process.

1. Availability and Adequacy of an Italian Forum

A forum is available if the foreign court can assert jurisdiction over the litigation and the defendant is amenable to process in that jurisdiction. *Leon*, 251 F.3d at 1311; *King v. Cessna Aircraft Co.*, 562 F.3d 1375, 1382 (11th Cir. 2009) (finding Italy to be an available and adequate forum). Defendants agreed as a condition of dismissal to stipulate that they would submit to the jurisdiction of Italian civil courts and accept process. [DE 23 at 2 n.3]. Italian courts will

[2] Somewhat contrary to what *Wilson* suggests, the Eleventh Circuit has also said that "the better rule is to consider both [private and public interests] in all cases." *Leon*, 251 F.3d at 1311. The Court will consider both private and public interests.

recognize this consent to jurisdiction, according to the expert on Italian law that Defendants have proffered. [Cavallone Dec., DE 23-4 ¶ 37]. That makes Italy an available forum. *See King*, 562 F.3d at 1382 ("In this case, Italy is an available forum because Cessna is willing to submit to jurisdiction and is amenable to process there.").

The Italian forum must also be adequate. A forum that "provides for litigation of the subject matter of the dispute and potentially offers redress for plaintiffs' injuries" is adequate. *King*, 562 F.3d at 1382. "Some inconvenience or the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (quotation omitted). The Court credits the declaration of Professor Cavallone that Italian courts offer multiple avenues for recovering for the injuries in the Plaintiffs' complaint. [Cavallone Dec., DE 23-4 at ¶¶ 40-45]. As the *King* court before it, this Court concludes that Italy is an adequate forum. *See King*, 562 F.3d at 1382; *see also Giglio Sub s.n.c. v. Carnival Corp.*, No. 12-21680, 2012 WL 4477504, at *9 (S.D. Fla. Sept. 26, 2012) (listing cases finding Italy to be an available and adequate forum).

2. Private and Public Factors in Favor of Dismissal

a. Private Interest Factors

Next, the Court must consider whether the private interests in this litigation are in favor of dismissal. While weighing the private interests, a "plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). The presumption in favor of the plaintiff's forum choice is strongest when the plaintiff is a United States citizen, resident, or corporation. *See SME Racks*, 382 F.3d at 1101. The fact that the Plaintiffs are U.S. residents

does not, however, compel the Court to honor their choice of forum. "[D]ismissal [is] not automatically barred when a plaintiff has filed suit in his home forum." *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 256 n.23 (1981). Throughout the Court's consideration of the private interest factors, the Court will weigh whatever interests tip in favor of Italy against the strong presumption in favor of Plaintiffs' choice of a federal forum in Florida.

Private-interest factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 448 (1994) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

"A correct 'private interest' analysis begins with the elements of the plaintiff's causes of action. The court must then consider the necessary evidence required to prove and disprove each element. Lastly, the court should make a reasoned assessment as to the likely location of such proof." *Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003). Plaintiffs brought numerous counts. For clarity, the Court will first address those counts for which the Court finds there is no inconvenience in litigating here. The Court will then analyze the remaining counts, which constitute the bulk of the Complaint, for which the Court finds great inconvenience in litigating here.

Counts for Which Defendants Do Not Show an Inconvenient Forum

Count I is brought by the parents. They claim that the Defendants breached a contract because the mother was not allowed to board the *Costa Concordia* with her documentation. Generally speaking, the elements of a breach of contract action are the existence of a contract, breach of that contract, and damages resulting from the breach. *E.g. Beck v. Lazard Freres & Co.*, 175 F.3d 913, 914 (11th Cir. 1999). To prove this evidence, Plaintiffs will need evidence about what was said on the phone between the Californian travel agency and CCL, documents sent back and forth between the parties, and information on whether the parents were allowed to board the vessel. All of this evidence is easily acquired and presented before this Court in Florida. Nothing about Count I would induce the Court to dismiss for forum non conveniens.

Count II for unjust enrichment, or quasi-contract, is very similar to Count I and the Court reaches the same conclusion. The relative ease of access on this count does not favor dismissal, particularly when considered in light of the strong presumption in favor of Plaintiffs' choice of forum.

Count X is similar to Counts I and II, alleging that the Defendants fraudulently induced the siblings to purchase tickets because they hid terms of the contract on the Defendants' website. This legal argument could be evaluated by reference to evidence easily obtained in the United States and in this Court, so this claim also does not overcome Plaintiffs' strong presumption in favor of this forum.

Count VIII and IX are not true causes of action, but merely assert that some of the Defendants gave others actual and apparent authority to act. Like Count I and II, this could be resolved by reference to relatively few documents and perhaps by calling certain corporate

officers. The Court would not find that the inconvenience related to these counts would overcome Plaintiff's strong presumption in favor of its selected forum.

Counts for Which Defendants Do Demonstrate Inconvenience

Count III, entitled "fraudulent misrepresentation," is brought by all of the Plaintiffs. The misrepresentation to which they refer is that Costa "strictly complies with all safety regulations regarding passenger safety and security." In particular, they fault the Defendants because Plaintiffs claim that they knew that the captain of the *Costa Concordia* navigated in unsafe ways, that the crew was not properly trained, and that safety drills were not properly held. Plaintiffs claim that Defendants made these misrepresentations in order to trick the Plaintiffs into agreeing to limit Defendants' ordinary obligations, such as including a forum selection clause and limitation on class actions.

The elements of fraudulent misrepresentation are a false statement of material fact, known to be false, made to induce reliance and causing reliance, then proximately causing injury. *Roberts v. Rayonier, Inc.*, 135 F. App'x 351, 362 n.8 (11th Cir. 2005). Evidence relating to this count is found primarily in Italy. Plaintiffs and Defendants will dispute whether Costa misrepresented that it complies with safety regulations. The *Costa Concordia* was an Italian-flagged vessel monitored by Italian regulators and an Italian classification society. Their evidence about safety compliance will be found in Italy. Whether the crew was properly trained will depend on evidence from trainers and the crew. None of the crewmembers are U.S. citizens, so they will not be found in the Southern District of Florida. Whether the crew was following regulations will also depend on the testimony of crewmembers. Whether Costa, an Italian company with its principal place of business in Italy, knew about the *Costa Concordia*'s

navigation practices, will depend on evidence from officers of that Italian company. Physical evidence about how the vessel was navigated is all in Italy and under the custody of the Italian Public Prosecutor.

The Court further notes that much of the evidence will be in the Italian language and would require translation if heard in this Court. *Leetsch v. Freedman*, 260 F.3d 1100, 1103, 1105 (9th Cir. 2001) (finding an inconvenient forum based in part on issues related to translation). *But see Paolicelli v. Ford Motor Co.*, 289 F. App'x 387, 391 (11th Cir. 2008) (per curiam) (minimizing the weight given to issues related to translation). Though there may be some evidence available in Florida or Massachusetts, the vast majority relevant to the fraudulent misrepresentation count is in Italy. *See Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1294 n.4 (11th Cir. 2009) ("Even assuming that there were some witnesses in the United States in addition to the appellants, it would nevertheless remain true that the vast majority of the witnesses were located in Guatemala. Similarly, even if there were some evidence in the United States beyond the appellants' testimony, it would nonetheless remain true that the vast majority of the evidence was to be found in Guatemala."). The Defendants have stipulated to produce any U.S. witnesses in Italy, making the U.S. evidence available to an Italian court. *See Paolicelli*, 289 F. App'x at 391 (noting that a stipulation to make witnesses available lessened the problems with transferring to a foreign forum).

Considering ease of access to evidence pertinent to Count III, the Court finds that this private interest factor weighs heavily in favor of an Italian forum. The Court considers this against the strong presumption in favor of Plaintiffs' choice of forum. The Court recognizes that it would not be impossible to present the evidence in Ft. Lauderdale, because some evidence

could be reduced to reports or pictures, but transforming the evidence into a form useful in Ft. Lauderdale would be considerably more difficult and time consuming than it would take to present in an Italian court. Even considering the presumption in favor of Plaintiffs, the Court finds that Defendants presented positive evidence that litigating in this court would result in a material, manifest injustice due to the comparative cost and difficulty of presenting relevant evidence here. It is important to note that this is one of the most important factors, and it favors Italy. *Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003).

As for the second factor, availability of compulsory process, this issue also favors Italy in Count III. Nonparty witnesses in this case could include Italian safety inspections and safety certifications, the designers and manufacturers of the vessel, rescuers, witnesses, and individuals who trained *Costa Concordia* officers and crew. If the case were tried here, the Defendants would have to use the Hague Convention to gather this evidence and this process can be "unduly time consuming and expensive." *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court*, 482 U.S. 522, 542 (1987). It is even more difficult to obtain evidence in Italy under the Hague Convention, because Italy does not implement letters rogatory for pretrial discovery. [Cavallone Dec., DE 23-4 ¶ 34]. Based on a review of Professor Cavallone's declaration, the entire process is slow and costly and there is no right to cross-examination. *Id.* ¶ 35.

The difficulty of obtaining witnesses and evidence here is sharply contrasted to the situation if an Italian court heard the matter. An Italian court could compel attendance by Italian entities. Moreover, the Defendants have stipulated to produce relevant evidence in Italy. This Court's lack of ability to compel witnesses and evidence to attend indicates that an Italian forum would be much more convenient. *See Strategic Value Master Fund v. Cargill Fin. Servs.*, 421 F.

Supp. 2d 741, 769 (S.D.N.Y. 2006) (citing Second Circuit precedent that lack of compulsory process indicates a forum non conveniens dismissal is proper).

The cost of compelling attendance of these witnesses in Florida also weigh in favor of an Italian forum. It will be much less expensive for the five Plaintiffs to travel to Italy than for the entire cadre of relevant Italian and European witnesses to travel to the United States. *See Beaman v. Maco Caribe, Inc.*, 790 F. Supp. 2d 1371,1378 (S.D. Fla. 2011) ("Plaintiffs cannot seriously contend that the inconvenience and expense of several damages witnesses traveling to Mexico is greater than the inconvenience and expense of all the liability witnesses, *as well as* all the damages witnesses, traveling to Miami from Mexico, Texas, and elsewhere in the United States."). The Court concludes that the second consideration of private interest factors on Count III weighs in favor of an Italian forum. The strong presumption in favor of Plaintiff's choice of forum does not compensate for the cost, expense, and difficulty of obtaining evidence from Italian sources in this case.

Because the accident occurred in Italy, if there is a need to view the site of the accident to better understand whether the captain's navigation was negligent or whether it was feasible to follow certain safety protocol, Italy is a somewhat more convenient forum. In light of modern media that could transmit images to this Court in Florida, however, this element is only weakly in favor of an Italian forum for Count III.

As for other issues that make trial of a case easy, expeditious and inexpensive, Defendants argue that it would be easier for an Italian civil court to order joinder of potentially liable third parties. This can indicate dismissal is proper. *Piper Aircraft*, 454 U.S. at 259 ("The District Court correctly concluded that the problems posed by the inability to implead potential

third-party defendants clearly supported holding the trial in Scotland."). Italian courts would also be able to prevent inconsistent verdicts more easily by allowing third parties to be impleaded into this case. The Court is not particularly persuaded by either of these arguments because there is little evidence that Defendants are planning on impleading third-party defendants.

Considering all of the private interest factors together for Count III, the Court is thoroughly convinced that the severe inconvenience, cost, and delay of litigating that Count in this Court would result in a manifest injustice. Though the third and fourth private interest factors only mildly suggest that an Italian forum is preferable, the first two considerations regarding ease of access to the evidence and ability and cost of compelling witness are in favor of dismissal, even in the face of the strong presumption afforded to Plaintiffs in their choice of forum. This case is one of the unusually extreme circumstances in which the Plaintiffs' choice of forum should be disturbed in order to greatly reduce the cost and time necessary to resolve the controversy.

Count IV and V both allege variants of negligence: maritime negligence and gross negligence. The familiar elements of negligence are duty, breach, causation, and damages. *E.g. Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1325 (11th Cir. 2012). The private factor analysis for these counts is substantially the same as what the Court just stated for fraudulent misrepresentation. Italian regulators could opine on the standard of care and safety on the vessel, the non-U.S. citizen crew and witnesses can testify as to how the ship was navigated and how the evacuation was conducted, the physical evidence in Italy can demonstrate additional information on how the vessel was navigated. True, evidence of Plaintiffs' damages are likely located in the United States, but this consideration does not create a substantial difference in light of the

Court's prior analysis. As with Count III, the Court is thoroughly convinced that the Defendants have presented positive evidence demonstrating a material injustice would occur if Counts IV and V were heard in this Court due to the inconvenience of litigating here, which overcomes the strong presumption in favor of Plaintiffs' choice of forum.

Count VI alleges intentional infliction of emotional distress. The elements of intentional infliction of emotional distress are intentional or reckless infliction of mental suffering through outrageous conduct causing severe distress. *E.g. Rubio v. Lopez*, 445 F. App'x 170, 175 (11th Cir. 2011). Essentially, the Plaintiffs are alleging that Defendants' negligence was so careless and outrageous as to be reckless, causing severe emotional distress. The factual predicate for this claim is identical to the negligence claims discussed in the prior paragraph, and for the same reasons the Court is thoroughly convinced that a manifest injustice would occur if this count were heard in this Court.

Count VII alleges that the Defendants were negligent in hiring, supervising, and retaining the *Costa Concordia*'s crew and captain. "To state a claim for negligent selection or negligent retention of an independent contractor, a plaintiff must generally plead ultimate facts showing: (1) the contractor was incompetent or unfit to perform the work; (2) the employer knew or reasonably should have known of the particular incompetence or unfitness; and (3) the incompetence or unfitness was a proximate cause of the plaintiff's injury." *McLaren v. Celebrity Cruises, Inc.*, No. 11-23924, 2012 WL 1792632, at *4 (S.D. Fla. May 16, 2012). Because the crew and captain are all foreign, an inquiry into their competence and fitness will depend on haling those individuals from abroad into this Court. What the Defendants knew or should have known about the crew and captain's conduct will likely depend on testimony from Costa's Italian

officers and will likely depend on testimony of those who had observed their conduct, which no one argues are available in the United States. As with the other negligence claims, whether the conduct of the crew or captain caused any injury is heavily dependent on facts predominantly available in Italy. Reincorporating the analysis set forth in analyzing Count III, the Court is thoroughly convinced that a manifest injustice would occur if Count VII were heard in this Court.

Conclusion on Private Interest Factors

The positive evidence Defendants produced to this Court persuade it that the private interest factors indicate that dismissal for forum non conveniens is proper. The Court reiterates that not all of the Plaintiffs' counts need Italian evidence. However, all plaintiffs have joined in counts that are dependant on facts surrounding the crash itself. For example, even the parents' third count alleges fraudulent misrepresentation regarding compliance with safety regulations, which is bound up in the evidence related to the accident. Because all Plaintiffs need evidence predominantly in Italy, held by Italians, likely written it Italian, all of which is difficulty, costly, and slow to produce here, the Court finds that the private interest balance is in favor of Italy, even in light of the strong presumption in favor of Plaintiffs' choice of forum.

b. Public Interest Factors

The Court next considers the public interest factors. Although "private factors are generally considered more important" than public ones, courts should consider both public and private factors "in all cases." *See Leon*, 251 F.3d at 1311. There are several possible factors to consider:

> the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action;

> the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness in burdening citizens in an unrelated forum with jury duty.

Piper Aircraft, 454 U.S. at 241 n. 6 (internal quotation marks omitted).

The Court begins by noting that the Southern District of Florida is one of the busiest districts in the nation, but the Court affords little weight to administrative difficulties arising from any inconvenience that might arise from keeping this case. As for the localization of the controversy, though there are some passengers who were U.S. citizens, the great majority of the harm in this case occurred in Italy and can fairly be said to be localized in and around Italy. Though recognizing that the United States has an interest in protecting its citizens and providing courts to them, Italy has a stronger interest in the accident than the United States or Florida because the accident occurred in its territory, especially considering that the vessel did not enter U.S. waters and has few U.S. customers. *Loya v. Starwood Hotels*, 583 F.3d 656, 665 (9th Cir. 2009); *Beaman v. Maco Caribe, Inc.*, 790 F. Supp. 2d 1371,1380 (S.D. Fla. 2011). Italy has a substantial interest in the accident as shown by its administrative and criminal investigations into it. Italian law will likely apply in this case.[3] An Italian court would be more at home with the law that will likely govern this action.

[3] In maritime cases, choice of law is determined by considering (1) the place of the wrongful act; (2) the vessel's flag; (3) allegiance or domicile of the injured party; (4) domicile of defendants; (5) place of contract between parties; (6) accessibility of a foreign forum; (7) law of the forum; and (8) defendants' base of operations. *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1174 (11th Cir.2009) (citations omitted). These factors weigh in favor of Italian law, though the Court is not ruling definitively that Italian law applies. The Court also notes that the Plaintiffs agreed to Italian law in a choice of law provision in their ticket contract.

The joinder of U.S. corporations as defendants does not materially change the calculation, because though Carnival Corporation set company-wide policies, but Costa implemented them.[4] CCL's conduct in arranging for the sale of the tickets does give the United States a strong interest in regulating business transactions occurring between U.S. citizens, but the contract claims play a relatively minor role in this case, minimizing the effect of this strong interest. All Plaintiffs joined in a count regarding the ship wreck, so all of the Plaintiffs have joined in a claim with the wreck at the central focus and Italy has a much stronger interest in that claim. As for burdening citizens in an unrelated forum with jury duty, because both Italy and the United States have interests in the case, this element is a wash.

In sum, the Court concludes that the public interest considerations also favor an Italian forum.

3. Ability to Reinstate Claim without Undue Burden

The final consideration is Plaintiffs' ability to reinstate their claims in Italy without undue burden. Defendants have stipulated that Plaintiffs can refile in Italy within 120 days of this Court's dismissal and that they will toll the applicable statute of limitations as if this proceeding had been filed in Italy. *See Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1334-35 (11th Cir. 2011) (finding this factor in favor of dismissal when there was a similar stipulation). The Court finds 120 days insufficient and instead will require 270 days to afford the Plaintiffs an ability to reinstate their claim without undue burden. *See Giglio Sub*, 2012 WL 4477504, at *10 (imposing a similar extension).

[4] The Court acknowledges that Plaintiffs are alleging that the U.S. Defendants exercised such control over the foreign Defendants that they should be liable. Italy would still have a stronger interest in the case because the U.S. Defendants' conduct was manifesting itself in Italy.

4. Conclusion

Having now considered all of the *forum non conveniens* factors, the Court is thoroughly convinced that dismissal in favor of an Italian forum is proper. The Court reaches this conclusion after having carefully considered the balance of the factors against the strong presumption in favor of Plaintiffs' choice of forum. *See SME Racks*, 382 F.3d at 1101. Defendants produced positive evidence to demonstrate that a material injustice would occur if this litigation were forced to proceed here. Recognizing that "dismissal should not be automatically barred when a plaintiff has filed suit in his home forum" "if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court," *Piper Aircraft Co.*, 454 U.S. at 255 n. 23, the Court concludes that dismissal is proper because of the burden of litigating here. This case represents the sort of unusually extreme circumstances supporting a forum non conveniens dismissal in favor of a foreign forum, even for U.S. citizens.[5]

The Court will therefore grant Defendants' motion, contingent on their honoring their stipulations set forth in footnote 3 of their motion to dismiss, including their consent to the enforceability of a final judgment. [DE 23 at 2 n.3]. The Court also will condition dismissal on Defendants' consent to reinstating this suit in this forum if the Italian court does not exercise jurisdiction. *See Leon*, 251 F.3d at 1313. Furthermore, dismissal is conditioned on an extension

[5] Though the Court noted that some of the counts could proceed in this forum had they been brought alone, the Court further finds that it would create material, manifest injustice to keep those claims in this forum. Such a course would require Plaintiffs and Defendants to litigate a common nucleus of fact in two separate forums simultaneously.

of the 120 day period for the effectiveness of Defendants' stipulations to 270 days to allow Plaintiffs adequate time to refile.

B. Forum Selection Clause

As an alternative ground for dismissal, the Defendants argue that the forum selection clause in the Passage Ticket Contract requires dismissal in favor of an Italian forum. Forum selection clauses are presumptively valid and the burden of proving their unreasonableness is a heavy one. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) The presumption of enforceability may be overcome only by a showing that the clause is unreasonable under the circumstances. *Bremen*, 407 U.S. at 10. Plaintiffs argue that the forum selection clause in this case is unreasonable because it was the product of fraud or overreaching.

The Eleventh Circuit has explained how a court should analyze whether incorporation of the clause was the product of fraud or overreaching:

> In determining whether there was fraud or overreaching in a non-negotiated forum-selection clause, we look to whether the clause was reasonably communicated to the consumer. A useful two-part test of "reasonable communicativeness" takes into account the clause's physical characteristics and whether the plaintiffs had the ability to become meaningfully informed of the clause and to reject its terms.

Krenkel v. Kerzner Int'l Hotels, Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009). The vacationer must be able to reject the clause with impunity. *Shute*, 499 U.S. at 595; *Sun Trust Bank v. Sun Int'l Hotels, Ltd.*, 184 F. Supp. 2d 1246, 1261 (S.D. Fla. 2001).

The Court begins by noting that the clause's physical characteristics satisfy the first part of the reasonable communicativeness test. The forum selection clause is in readable print on a

page with an image of a hand warning the reader to pause and take note. The words **IMPORTANT** appear at the top of the page and the heading to the forum selection clause also appear in bold, all capital letters.

The Court finds, however, that it cannot resolve on the factual basis in the record whether the Plaintiffs had the ability to become meaningfully informed of the clause and to reject its terms. If it were simply a question of actual notice, the Court would be comfortable concluding that the forum selection clause was not reasonably communicated to the Plaintiffs in time for them to reject the clause with impunity. They did not receive the Passage Ticket Contract until four days before their voyage. Cancelling at that time would have resulted in a forfeiture of the entire price of their tickets. [DE 1 ¶ 215]. Being unable to reject with impunity, the forum selection clause would be unenforceable if the analysis were merely based on actual notice.

The question that the Court cannot answer on the record, however, is whether the Plaintiffs should be charged with constructive notice of the terms in this case. "It is settled law that travel agents are to be construed as agents of ticket purchaser, and passengers are accordingly charged with constructive knowledge of ticket terms and conditions while the tickets are in their agent's possession." *Lurie v. Norwegian Cruise Lines, Ltd.*, 305 F. Supp. 2d 352, 360 n.1 (S.D.N.Y. 2004). The problem with charging Plaintiffs with constructive knowledge based on what the travel agent knew is that the record is not clear on what the travel agent knew. The passage ticket contracts in this case were not sent until four days before the voyage, so the agent's knowledge, even if imputed to the Plaintiffs, would still not give Plaintiffs sufficient time to reject the forum selection clause with impunity. The Defendants suggest that the travel agent has booked hundreds of Costa cruises and thus should have been aware of the terms from prior

bookings, but the Court would require an evidentiary hearing to determine what the agent actually knew. The Court is also not persuaded that the confirmation documents or string of almost-daily emails reminding the agent to complete registration put the agent on notice. The confirmation documents and emails simply stated that the personal information was necessary so that travel documents would issue. Neither the confirmation documents nor emails contained the passage ticket contract or forum selection clause language nor said that the travel documents would include that clause.

Because the Court is thoroughly convinced that this case should be dismissed for forum non conveniens, it need not hold an evidentiary hearing to reach a conclusion on an alternative basis for dismissing this action. The Court will therefore pass on reaching a final conclusion on the enforceability of the forum selection clause in this case.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendants' Motion to Dismiss Based on Forum Selection Clause and Forum Non Conveniens [DE 23] is **GRANTED**, subject to the following conditions:
2. The Defendants will file on the record a separate filing containing the stipulations set forth in footnote 3 of their motion to dismiss, including their consent to the enforceability of a final judgment. [DE 23 at 2 n.3].
3. The Defendants will agree to extend the period for those stipulations to 270 days.
4. The Defendants will consent to reinstating this suit in this forum if the Italian court does not exercise jurisdiction.
5. The aforementioned filing must be made on or before February 8, 2013.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 4th day of February, 2013.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record