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HAMILTON YACHTS, LTD.,

Plaintiff,

vs.

INTERNATIONAL PAINT, LLC, INTERNATIONAL PAINT LTD., and AKZO NOBEL COATINGS, INC.,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, UNION COUNTY

Docket No.: UNN-L-2634-10

CIVIL ACTION

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR RENEWED MOTION TO DISMISS ON GROUNDS OF *FORUM NON CONVENIENS*

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SUMMARY OF ARGUMENT

In its Opposition to Defendants' initial motion to dismiss on grounds of *forum non conveniens*, Plaintiff told this Court that this case was centered in New Jersey, "within a few miles of [the] courthouse."[1] Plaintiff represented that "[a]ll of the information regarding the manufacturing of the Topcoat, its admitted defects, complaints by customers about the Topcoat, Defendants' studies and reports about the defects and witnesses related thereto are located in New Jersey."[2] The record in this case has proven that this is not a New Jersey-centered controversy, contrary to what Plaintiff told the Court.

The Court denied Defendants' motion relying on Plaintiff's assurances that "[m]any witnesses are located in the United States," that "all relevant witnesses to...manufacturing are here," that "crucial evidence supporting this claim is located in New Jersey,"[3] and that "little relevant evidence and few witnesses [were] in the UK."[4] Moreover, Plaintiff assured the Court that Blohm & Voss and Rolling Stock had "agreed to make their employees available and to produce relevant documents in New Jersey,"[5] which would "'alleviate all the need for the parties to utilize the Hague Convention procedures to obtain this evidence.'"[6] But Plaintiff has not made critical Blohm & Voss employees available for their deposition in New Jersey or anywhere else. The testimony of these foreign witnesses (and their documents) are critical to issues of liability and damages. Because their testimony cannot be obtained, without which the ends of

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[1] *See* Jan. 24, 2011 Pltf's Initial FNC Opposition, at 1.

[2] *Id.* at 15. *See also id.* at 30 (stating "[t]he defective Topcoat was engineered and manufactured by two Defendants resident in this state. All of their relevant witnesses are located here."); *id.* at 30 (stating "witnesses and documents are predominately in New Jersey and perhaps other locations in the United States"); *id.* at 32 (noting that "crucial evidence about the development, manufacture, and investigation of defects" is in New Jersey).

[3] *Id.*

[4] *Id.* at 31.

[5] *Id.* at 32. As set forth herein, while this representation may have been made in good faith, after the denial of Defendants' initial motion, Plaintiff Hamilton Yachts undermined Defendants by relieving Blohm & Voss of its obligation to produce its witnesses in exchange for €1 million.

[6] *See* Feb. 9, 2011 Statement of Reasons at 32 (quoting Jan. 24, 2011 Pltf's Initial FNC Opposition, at 30).

justice cannot be served, Defendants' reassert their motion to dismiss on grounds of *forum non conveniens*.

There are 13 European witnesses from whom Defendants are unable to procure testimony either by Plaintiff's refusal or by this Court's inability to compel their deposition or appearance at trial. They are:

	Fact Witnesses	Country of Residence	Relevance to Yacht A
1	Thomas Stern	Germany	Blohm & Voss Project Manager for Yacht A during Pinmar Job
2	Thomas Grautstueck	Germany	Blohm & Voss Project Manager for Yacht A during Rolling Stock Job
3	Dirk Hennenberg	Germany	Blohm & Voss Project Manager for Yacht A during Rolling Stock Paint Job
4	Robert Grimm	Germany	Blohm & Voss Project Manager for Yacht A during Rolling Stock Paint Job
5	Herbert Aly	Germany	Blohm & Voss Managing Director during Yacht A Paintworks
6	Dominic Lucius	Germany	Blohm & Voss Managing Director during Yacht A Paintworks
7	Werner Kleyer	Germany	Blohm & Voss Technical Paint Manager for Yacht A
8	Martin Rhode	Germany	Blohm & Voss Paint Procurement Officer
9	Tomas Marutz	Germany	Blohm & Voss Board Member
10	Shaun Pyne	England	Rolling Stock Paint Consultant
11	Michael Worthington-Leese	England	Independent Paint Inspector for Hamilton Yachts and Blohm & Voss
12	Philippe Starck	France	Designer of Yacht A
13	Martin Francis	France	Naval Architect of Yacht A

Plaintiff has not only refused to make these witnesses available but has also opposed Defendants' efforts to depose them. Ten of these 13 witnesses played key roles in the painting of Yacht A for Blohm & Voss, one of them was Rolling Stock's paint consultant, and the remaining two are the architects of Yacht A. Without the testimony (and documents) of these critical witnesses, Defendants cannot obtain a fair trial in New Jersey. In order to obtain the testimony of these witnesses, this case *must* be litigated in Germany or England.

In denying Defendants' initial motion to dismiss, this Court indicated it would reconsider dismissal if Defendants "'provide[d] the court with a record verifying that discovery is unreasonably inadequate for litigating in [New Jersey.]'"[7] Accordingly, with knowledge of this fact, Plaintiff has now shifted its position, arguing that, while there is substantial evidence pointing to Germany or England as the proper forum, this case should remain in New Jersey because the parties have largely completed discovery, even though no critical evidence is located in New Jersey.[8]

Plaintiff's arguments are now based on incorrect assumptions about the use of discovery done thus far and delays in trying this case in Germany or England. Despite the Court's suggestion to the contrary, Defendants have had to resort to the Hague Convention for evidence from many critical European witnesses. To date, Defendants have only received a response from one of these witnesses – inadequate at best – and no responses whatsoever from the others.[9]

The parties have taken 24 fact witness depositions. None of these witnesses reside or work in New Jersey. Only one fact witness even resides or works in the United States.[10] The other 23 fact witnesses all reside in Europe. All of the remaining 13 fact witnesses from whom Defendants seek testimony also reside in Europe. Because Defendants would be denied a fair and just trial without these witnesses, New Jersey is a "demonstrably inappropriate" forum in

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[7] *See* Feb. 9, 2011 Statement of Reasons at 15–16 (quoting *Kurzke v. Nissan Motor Corp.*, 752 A.2d 708, 712 (N.J. 2000)).

[8] *See generally* Aug. 30, 2013 Plf's Renewed FNC Opposition, at 39-52.

[9] *See* Letter Rogatory Response from Thomas Grautstueck (**Exhibit 45 to Kaplan Cert.**).

[10] The parties deposed Patrick Carroll, an ancillary third-party witness, who resides and works in Portsmouth, Rhode Island. Notably, Mr. Carroll has never seen Yacht A; has no idea what products were applied to Yacht A; knows nothing about the paint application to Yacht A; and, knows nothing about tests or experiments performed on Yacht A, stating that "I know absolutely nothing about the paint job." *See* Deposition of Patrick Carroll at 85:10–88:21, 91:23–94:5 (**attached as Exhibit 132 to the Supplemental Certification of Harvey Kaplan (hereinafter "Kaplan Supp. Cert.").**

which to try this case.[11] This case should be dismissed on the basis of *forum non conveniens* because "a weighing of all of the many relevant factors...decisively establishes that there is available another forum where trial will best serve the convenience of the parties and the ends of justice." *Civic S. Factors Corp. v. Bonat*, 322 A.2d 436, 438 (N.J. 1974).

LEGAL ARGUMENT

I. Defendants' Motion to Dismiss is Timely and Should be Resolved on its Merits

In denying Defendants' initial motion, this Court acknowledged that it would be "premature" to dismiss on *forum non conveniens* grounds until "discovery ha[d] reached such a point" where Defendants "'can provide the court with a record verifying that discovery is unreasonably inadequate for litigating in the forum chosen by the plaintiff.'"[12] Plaintiff agreed,[13] arguing that there should be a discovery period before determining the issue.[14] Since this Court's denial of Defendants' motion to dismiss, Defendants have worked diligently to obtain fact discovery to verify and "prove to the trial court's satisfaction that the plaintiff's choice of forum is truly inappropriate."[15]

a. Despite Plaintiff's Arguments, this Court is Free to Consider the Merits of Defendants' Motion to Dismiss

Plaintiff suggests that this Court should deny Defendants' motion "out-of-hand," without considering the merits.[16] Under New Jersey law, this Court may – and should – exercise its "sound discretion" in deciding Defendants' motion to dismiss on its merits. *See Kurzke v. Nissan Motor Corp.*, 752 A.2d 708, 711, 713 (N.J. 2000). Indeed, Plaintiff admits that

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[11] *See* Feb. 9, 2011 Statement of Reasons at 14 (quoting *Kurzke*, 752 A.2d at 715).
[12] *See id.* at 15 (quoting *Kurzke*, 752 A.2d at 712).
[13] *See* Jan. 24, 2011 Plf's Initial FNC Opposition at 11–12.
[14] *See* Feb. 4, 2011 Hr'g Tr. **(attached as Exhibit 133 to Kaplan Supp. Cert.)**, at 37:12–17.
[15] *See Kurzke*, 752 A.2d at 713.
[16] *See* Aug. 30, 2013 Plf's Renewed FNC Opposition, at 38–42.

Defendants' motion cannot be disregarded, regardless of when it was filed.[17] New Jersey law dictates that timing considerations of *forum non conveniens* motions are based on "broad outlines" rather than the narrow one suggested by Plaintiff. *Id.* at 713.

b. Defendants Renewed Motion Was Timely Filed

The New Jersey Supreme Court instructs that:

> "It is apparent that a trial court's disposition of a forum non conveniens motion would be enhanced in such cases if decision were reserved *until discovery has proceeded sufficiently to enable the court to make a better-informed assessment of the private- and public-interest factors.*"

D'Agostino v. Johnson & Johnson, Inc., 559 A.2d 420, 422 n.1 (N.J. 1989) (emphasis added). Plaintiff conceded this fact, noting that "[w]ithout discovery and a record, the Court cannot make a well-informed assessment of the private- and public-interest factors."[18] Indeed, "*parties must have the opportunity* to demonstrate that they have attempted to obtain the discovery necessary to defend an action and *prove to the trial court's satisfaction* that the plaintiff's choice of forum is truly inappropriate." *Kurzke*, 752 A.2d at 713 (emphasis added). This Court's request that Defendants "provide the court with a record verifying that discovery is unreasonably inadequate for litigating in the forum chosen by the plaintiff"[19] is in accord with the instruction of the New Jersey Supreme Court in *Kurzke*. *Id.* In order to adhere to this "broad outline" and present the court with a sufficient record, Defendants filed their motion within three months after the deposition of the last critical witness that Defendants could depose – the co-owner of Yacht A, Aleksandra Melnichenko.[20]

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[17] *See id.* at 41 (quoting *Kurzke*, 752 A.2d at 713).

[18] *See* Jan. 24, 2011 Plaintiff's Initial FNC Opposition at 13.

[19] *See* Feb. 9, 2011 Statement of Reasons at 15 (quoting *Kurzke*, 752 A.2d at 712).

[20] Mrs. Melnichenko's deposition took place on February 12, 2013. *See* Def's 1st Am. Depo Not. of Aleksandra Melnichenko (**attached as Exhibit 134 to Kaplan Supp. Cert.**). Defendants noticed Mrs. Melnichenko's deposition in April 2012 for a date certain of May 8, 2012. *See* Def's Not. of Aleksandra Melnichenko (**attached as Exhibit 135 to Kaplan Supp. Cert.**). Despite her clear importance to this case, Plaintiff refused to produce

Plaintiff's argument that Defendants "wait[ed] approximately one year after the completion of fact discovery" to file their motion is disingenuous.[21] While a technical deadline for completing all fact discovery was May 31, 2012,[22] it has not been possible for the parties to complete discovery despite their best efforts. Both parties have conducted additional fact discovery since May 31, 2012. In fact, eight depositions have taken place,[23] twelve Hague Convention Letters Rogatory have been sent,[24] and nearly 1500 documents have been produced since that date. Indeed, on June 5, 2013, Plaintiff produced a critical contractual document related to other works performed on Yacht A during the Rolling Stock paint job.[25] Plaintiff's claim that fact discovery has been completed for over a year is simply not true.

The cases Plaintiff cites regarding timeliness are distinguishable because they involve motions to dismiss for *forum non conveniens* grounds either in the first instance or on remand after appeal.[26] In this case, (1) Defendants filed a pre-discovery motion to dismiss on *forum non conveniens* grounds; (2) Defendants' motion was denied with a caveat that the Court would reconsider the motion after discovery proceeded sufficiently to provide a record and prove to the Court's satisfaction that Plaintiff's choice of forum is inappropriate; and (3) Defendants renewed their motion to dismiss based on the record the Court requested.

Mrs. Melnichenko - forcing Defendants to move to compel her production for deposition. *See* Aug. 31, 2012 Motion to Compel the Deposition of Aleksandra Melnichenko (**attached as Exhibit 136 to Kaplan Supp. Cert.**).

[21] *See* Aug. 30, 2013 Plf's Renewed FNC Opposition, at 41.

[22] *See* Jan. 13, 2012 Case Management Order (**attached as Exhibit 137 to Kaplan Supp. Cert.**) at 2.

[23] The depositions of Paul Adams, Jeroen De Vries, Peter Disselhorst, Ken Hickling, Ulf Kopf, Otto Linzel, Neil Nicolson, and Aleksandra Melnichenko took place after May 31, 2012.

[24] Letters Rogatory have been sent for Thomas Stern, Tomas Marutz, Michael Worthington-Leese, Phillipe Starck, Martin Francis, Thomas Grautstueck (2), Shaun Pyne (2), Thomas Wunderlich, ThyssenKrupp Marine Services AG ("TKMS"), and Howaldtswerke-Deutsche Werft GmbH ("HDW").

[25] *See* June 5, 2013 Letter from Matt Feser to Harley Ratliff, and accompanying "Schedule E" (**attached as Exhibit 138 to Kaplan Supp. Cert.**).

[26] *See* Aug. 30, 2013 Plf's Renewed FNC Opposition, at 39–41.

c. Plaintiff's Timeliness Arguments are Contradictory

In response to Defendants' initial motion to dismiss, Plaintiff argued that it was "premature."[27] After Defendants renewed their motion to dismiss, Plaintiff again argued that Defendants filed their motion to dismiss *too early*, claiming that the motion "should be filed *after* the close of discovery in August [2013]."[28] Plaintiff then argued that it should not be required to file a response to Defendants' motion until November 7, 2013 – over 5 months from the date Defendants filed their motion.[29] After Plaintiff was given three months to respond to Defendants' renewed motion to dismiss, it now argues that Defendants' motion comes *too late*. Plaintiff's timeliness arguments are both contradictory and without merit.

II. Germany and England are Not Only Adequate but also Superior Alternative Forums

Both Germany and England are adequate alternative forums for Plaintiff's claims, because: (1) Defendants have established their amenability to service of process and jurisdiction in those forums by submitting certifications consenting to the jurisdiction of the English and German courts; and (2) Defendants have established that both English and German law permit litigation of the subject matter of this dispute.[30] *See Varo v. Owens-Illinois*, 948 A.2d 673, 680–81 (N.J. Super. Ct. App. Div. 2008) (noting that under New Jersey law an alternative forum is adequate if the defendants are amenable to process in the alternative forum and the alternative forum would permit litigation of the subject matter of the parties' dispute).[31] Moreover, in either Germany or England, Defendants would be able to present the testimony of the 13 European

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[27] *See* Jan. 24, 2011 Pltf's Initial FNC Opposition, at 11–16.

[28] *See* June 3, 2013 Email from Patrick Salisbury to Judge Dreier **(attached as Exhibit 139 to Kaplan Supp. Cert.)**.

[29] *See* June 18, 2013 Letter from George Schwab to Judge Grispin **(attached as Exhibit 140 to Kaplan Supp. Cert.)**, at 1–2.

[30] *See* Defs.' Renewed FNC Motion at 26–28.

[31] *See also Tech. Dev. Co., Ltd. v. Onischenko*, 174 Fed. Appx. 117, 120 (3d Cir. 2006) (noting that the "[i]nadequacy of the alternative forum is rarely a barrier to *forum non conveniens* dismissal")

witnesses who are not available in New Jersey and whose testimony is necessary for a just and fair determination of the issues of liability and damages.

Plaintiff's arguments that litigation of this dispute in Germany or England would result in delay and additional expenses are factually inaccurate. Furthermore, Plaintiff cites no New Jersey cases holding that these are considerations that bear on the Court's analysis. New Jersey law looks to whether a defendant can be sued in the proposed forum, and whether the law of the proposed forum permits litigation of the subject matter of the parties' dispute. *See Varo*, 948 A.2d at 680–81. Neither Plaintiff nor its foreign law experts – Russell St. John Gardner and Christoph Froning – deny that the English or German courts would take jurisdiction of the parties' dispute given the Defendants' consent. And neither Plaintiff nor its foreign law experts deny that either England or Germany would permit litigation of the subject matter of this dispute.[32] Accordingly, the Court should find that England and Germany are both adequate alternative forums. Indeed, they are the only venues where the ends of justice can be served.

III. Plaintiff is Not Entitled to ANY Deference in its Choice of Forum

As this Court held, and Plaintiff agreed,[33] "[t]he amount of deference given to a plaintiff's choice of forum determines the weight of the burden carried by a defendant in showing that the balance of the private and public-interest factors weigh against a court accepting jurisdiction."[34] Plaintiff Hamilton Yachts is a Bermuda corporation; neither its place of incorporation nor its principal place of business is located in New Jersey. Under New Jersey law, the Court should not give any weight to Plaintiff's choice of New Jersey as a forum because

[32] *See* **May 15, 2013 Certification of Helmut Grothe (hereinafter "Grothe Cert.")** at 3–5, 26–42 (analyzing the German substantive law applicable to Plaintiff's claims); and **May 6, 2013 Certification of Adrian Briggs (hereinafter "Briggs Cert.")** at ¶¶ 10–38 (analyzing the English substantive law applicable to Plaintiff's claims). Neither of Plaintiff's foreign law experts address whether English or German law would allow for the litigation of Plaintiff's claims. *See generally* **Froning Cert.** and **Gardner Cert.** attached to Aug. 30, 2013 Plf's Renewed FNC Opposition.

[33] *See* Jan. 24, 2011 Plf's Renewed FNC Opposition, at 45.

[34] *See* Feb. 9, 2011 Statement of Reasons, at 21 (citing *Varo*, 948 A.2d at 683–84).

"*no deference* need be given to [a foreign corporation's] choice of a forum that is neither its place of incorporation or principal place of business." *Century Indem. Co. v. Mine Safety Appliances Co.*, 942 A.2d 95, 106 (N.J. Super. Ct. App. Div. 2008) (emphasis added) (citing *Kurzke*, 752 A.2d at 714).[35] Because Plaintiff's choice of forum is not entitled to any deference, "the weight of the burden carried by [Defendant] in showing that the balance of the private and public-interest factors weigh against a court accepting jurisdiction" is not a "heavy burden of persuasion."[36] As Plaintiff agreed, "'the less deference the plaintiff's choice commands...the easier it becomes for the defendant to succeed on a *forum non conveniens* motion by showing that convenience would be better served by litigating in another country's courts."[37]

Although Plaintiff claims that it chose New Jersey for convenience, Plaintiff has not deposed a single New Jersey resident. Plaintiff deposed only one employee of Defendant IPLLC, and no employees of Defendant ANCI. Plaintiff did, however, depose four employees of International Paint Belgium, N.V., a non-party located in Vilvoorde, Belgium, which is not a defendant in this case.[38] Based on these facts, and the presumption it chose this forum for reasons other than convenience,[39] plaintiff's choice of New Jersey should be accorded no weight in this Court's *forum non conveniens* analysis.[40]

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[35] *See also Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 522 (S.D.N.Y. 2006) (S.D.N.Y. 2006) (noting that where circumstances indicate that the core operative facts in dispute may have only marginal links to the plaintiff's choice of forum, "that choice of venue is not entitled to special deference, in particular where the claimants are all foreign residents").

[36] *See* Feb. 9, 2011 Statement of Reasons, at 14; *id.* at 21 (citing *Varo*, 948 A.2d at 683–84).

[37] *See* Aug. 30, 2013 Plf's Renewed FNC Opposition, at 45 (quoting *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2d Cir. 2001)).

[38] *See* Defs.' Renewed FNC Motion at 15 (Witness Chart).

[39] *See Miller v. Boston Scientific Corp.*, 380 F. Supp. 2d 443, 450 (D.N.J. 2005).

[40] *See Century Indem. Co.*, 942 A.2d at 106. Even were this Court to ignore the dictate of *Century Indem. Co.*, Plaintiff is entitled to no more than a minimal amount of deference in this Court's analysis. *See Kurzke*, 752 A.2d at 714.

IV. Plaintiff's Arguments Regarding the Private Interest Factors Are Inconsequential and Misplaced

Plaintiff promised the Court that it "[would] show that this case is even more clearly connected to New Jersey then (sic) it appeared to be when Your Honor denied the original *forum non conveniens* motion in 2011."[41] These are empty words, unsupported by the factual record, and Plaintiff's arguments in opposition fall far short of making the "strong showing of convenience"[42] required.

a. Plaintiff Fails to Show that "Relative Ease of Access to Sources of Proof" is More Convenient in New Jersey

Plaintiff's "ease of access" arguments relate to: (1) the current location of produced documents, and (2) the fact that the depositions taken thus far have been videotaped.[43] Defendants will address these arguments in turn.

1. The Current Location and Language of the Documents is Irrelevant Here

That documents produced in discovery are now physically in the possession of counsel for Plaintiff and Defendants does not "strongly favor" New Jersey, as Plaintiff argues.[44] That *some* documents have been produced during the course of discovery in this case is not a reason to reject dismissal on *forum non conveniens* grounds. *See D'Agostino*, 559 A.2d at 422 n.1 (emphasis added) (noting that discovery should "proceed[] sufficiently to enable the court to make a better-informed assessment of the private- and public-interest factors"). Plaintiff is incorrect in claiming that "[t]here are no documents located in the U.K. or Germany that have not been produced in New Jersey."[45] In fact, the opposite is true. Numerous potentially relevant documents from Blohm & Voss and its un-deposed employees have yet to be produced despite

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[41] *See* June 27, 2013 Letter from Patrick Salisbury to Judge Grispin (**attached as Exhibit 141 to Kaplan Supp. Cert.**), at 2.
[42] *Miller*, 380 F. Supp. 2d at 450.
[43] *See* Aug. 30, 2013 Pltf's Renewed FNC Opposition, at 49--52.
[44] *See id.* at 49.
[45] *Id.* at 49.

Defendants' efforts to compel their production.[46] Also, Defendants have been unable to obtain documents that would be requested from the numerous third-party witnesses Defendants have been unable to depose.[47]

Further, Plaintiff claims that "[t]he cost of relocating these documents to either country, having U.K. or German attorneys review them, authenticating them in accordance with the laws of these countries, translating them in to German would be massive."[48] Plaintiff cites no authority for this as a factor for the Court to consider. Moreover, transferring these documents to Germany or England can easily be accomplished through e-mail, electronic transfer, or by uploading them onto a few compact disks and sending them through the mail. The cost associated with these options is zero or nominal at best.

Plaintiff's claim that U.K. or German attorneys would have to review "hundreds of thousands of pages of documents" if this case were litigated in Germany or England is another "red herring."[49] In reality, U.S. attorneys would provide direction to the German or English attorneys as to the universe of documents necessary for review. Indeed, of the depositions taken thus far, only approximately 300 exhibits have been introduced. Translating this small set of documents into German (if necessary) would not be expensive. The minor expense that may be incurred certainly does not outweigh the injustice that would be done if Defendants were forced to try this case in New Jersey without the testimony of the 13 critical European witnesses, and their missing documents, on issues of liability and damages.

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[46] *See* Apr. 2, 2012 Letter from Michael Griffinger to Judge Dreier (**attached as Exhibit 142 to Kaplan Supp. Cert.**), at 5–6 (discussing the production of Blohm & Voss documents concerning topcoat complaints on other vessels); Aug. 31, 2012 Letter from Harley Ratliff to Judge Dreier (**attached as Exhibit 143 to Kaplan Supp. Cert.**), at 6 (same).

[47] *See* Defs.' Renewed FNC Motion at 18-23.

[48] *See* Aug. 30, 2013 Pltf's Renewed FNC Opposition, at 49. Though Plaintiff makes this identical argument later in its Opposition, the point is addressed here. *See id.* at 54.

[49] *Id.*.

2. Videotaped Discovery Depositions of Some Witnesses is Inconsequential When Numerous Critical Witnesses Are Unavailable to Defendants

Plaintiff's assertion that the witnesses it refused to produce are irrelevant is self-serving and speculative. The record demonstrates that the foreign witnesses who are unavailable to Defendants played important roles on the Yacht A project.[50] In New Jersey, the parameters for discovery are broad. *See Longo v. Am. Policyholders' Ins. Co.*, 436 A.2d 577, 579 (N.J. Super. Ct. Law Div. 1981) (noting that "[i]t is axiomatic that justice is best served by affording litigants every reasonable avenue of inquiry before trial"). Whether a witness has relevance to a pending action is a low threshold. *Harmon v. Great Atlantic & Pacific Tea*, 642 A.2d 1042, 1044 (N.J. Super. Ct. App. Div. 1994). Indeed, "[i]n deciding whether evidence is relevant, the focus is on the *logical connection between the proffered evidence and a fact in issue*." *In re Liq. of Integrity Ins. Co.*, 754 A.2d 1177, 1181 (N.J. 2000). The as-yet-incomplete documentary evidence associated with the foreign witnesses indicates that they will have relevant testimony that is essential to a just and fair determination of this case.[51]

Regarding Richard Precious, his deposition was taken on April 24, 2012, in London. Mr. Precious was presented as a former "external consultant" for Blohm & Voss,[52] who has never been an employee of Blohm & Voss.[53] Much later in the litigation, Plaintiff designated Ulf Kopf, Blohm & Voss's General Counsel, as its Rule 4:14-2(c) corporate representative on all but three topics set forth by Defendants.[54] For reasons unknown, Plaintiff chose to designate Richard Precious as its Blohm & Voss "corporate representative,"[55] on the three remaining topics even though Mr. Precious' deposition had been previously taken. Plaintiff initially said that

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[50] *See* Defs.' Renewed FNC Motion at 18-23. *See also* Witness Chart *supra*, at p.2.
[51] *See id.*
[52] *See* Deposition of Richard Precious (**attached as Exhibit 144 to Kaplan Supp. Cert.**) at 7:11–17.
[53] *Id.*
[54] *See* July 2, 2012 Email from George Schwab to Harley Ratliff (**attached as Exhibit 145 to Kaplan Supp. Cert.**).
[55] Blohm & Voss's general counsel, Ulf Kopf, could not confirm that Richard Precious was even authorized to speak for Blohm & Voss. *See* Deposition of Ulf Kopf at 37:3–38:12 (**attached as Exhibit 146 to Kaplan Cert.**).

because "Precious ha[d] already covered [those] topics, his further deposition seems unnecessary."[56] Plaintiff again shifted its position, now arguing that Defendants' unwillingness to re-depose Mr. Precious precludes Defendants' request for critical Blohm & Voss fact witnesses.[57] Defendants are not required to take Mr. Precious's deposition a second time when there are Blohm & Voss employees who have personal knowledge of the facts at issue. Defendants have requested to depose these other Blohm & Voss witnesses and have a right to do so under New Jersey law.[58] *See* NEW JERSEY RULE 4:10–2(a).

Plaintiff's argument that New Jersey allows the use of depositions at trial obscures the fact that Defendants will be forced to trial in New Jersey without the testimony, either by way of depositions or at trial, of several critical witnesses Plaintiff has refused to produce.[59] Proceeding to trial without these witnesses would deny Defendants a just and fair determination of the issues. As to witnesses who have been deposed, but are unavailable for trial, their videotaped depositions are far less satisfactory than being able to compel their appearance at trial. *See Miller v. Boston Scientific Corp.*, 380 F. Supp. 2d 443, 453 (D.N.J. 2005) (noting that "'to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants.'") (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947)).

Moreover, deposition testimony is a poor substitute for live testimony. If this case were tried in Germany or England, there could be live testimony from **all** relevant witnesses, *including all* of the European witnesses Defendants have been unable to depose. As noted previously, if a witness resides in a member state of the European Union, another member state may request

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[56] *See* July 2, 2012 Email from George Schwab to Harley Ratliff (attached as Exhibit 145 to Kaplan Cert.)
[57] *See* Aug. 30, 2013 Plf's Renewed FNC Opposition at 51–52.
[58] *See* Defs.' Renewed FNC Motion at 18–23.
[59] *See* Aug. 30, 2013 Plf's Renewed FNC Opposition at 50–52.

assistance to procure that witness' testimony under the EU's Taking of Evidence Regulation (Regulation EC 1206/2001).[60] Under this Regulation, the member state courts have the ability to procure testimony from a witness residing in any other EU member state.[61] Indeed, Plaintiff's legal experts, Messrs. Gardner and Froning, do not deny this fact – nor could they. Moreover, Plaintiff will not be deprived of access to any sources of proof located in New Jersey.[62] A trial in Germany or England would give both parties access to the critical witnesses who are not subject to jurisdiction of the New Jersey court.

b. Plaintiff Has Failed to Show that "the Availability of Compulsory Process for Attendance of Unwilling Witnesses and the Cost of Obtaining the Attendance of Willing Witnesses" is More Convenient in New Jersey

Plaintiff's analysis is based on its arguments: (1) that most of the witnesses are controlled by Plaintiff or Defendants and thus will appear at trial, and (2) that Defendants should have to reach any un-deposed witnesses through the Hague Convention. Defendants will address these arguments in turn.

1. The Majority of Witnesses are NOT Controlled by Plaintiff or Defendant

In this brief argument, Plaintiff seems to assert that because "most of the witnesses" are controlled by Plaintiff or Defendant, trial of this case would be more convenient in New Jersey.[63] This assertion, however, is incorrect. Only a slim majority of the witnesses *deposed thus far* are "controlled" by either Plaintiff or Defendants. Plaintiff ignores the 13 additional European witnesses whose testimony Defendants have been unable to obtain.[64] Considering those as-yet-

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[60] *See* May 15, 2013 Grothe Cert., at 54–55. *Accord* May 6, 2013 Briggs Cert. at ¶¶ 54–59.

[61] *See id. Accord* May 6, 2013 Briggs Cert. at ¶¶ 54–59.

[62] *See Miller*, 380 F. Supp. 2d at 453 (noting that "[d]ismissal would not impede Plaintiffs' access to sources of proof located in the United States," which weighed against maintaining the case in New Jersey).

[63] *See* Aug. 30, 2013 Pltf's Renewed FNC Opposition, at 52–53.

[64] *See id.* at 19–22. This number does not include Thomas Wunderlich, for whom Plaintiff has filed a Notice of Deposition and requested a Letter Rogatory. *See* Apr. 30, 2012 Depo. Not. of Thomas Wunderlich and Aug.5, 2013 Order Issuing Letter Rogatory for Thomas Wunderlich (attached collectively as Exhibit 147 to Kaplan Supp. Cert.).

undeposed witnesses, the parties only "control" 13 of 37 fact witnesses who might be called to testify at trial.[65] In New Jersey, when crucial witnesses are located in a foreign jurisdiction beyond the subpoena power of a New Jersey Court, it is "a *compelling reason* to deny [a plaintiff's] choice of forum." *Wesnowski v. Johnson & Johnson*, No. L-9819-01, 2004 WL 5108689, at 10 (N.J. Super. Ct. Law Div. June 10, 2004) (emphasis added).[66]

2. Defendants Should Not Be Forced to Try This Case Through Ineffectual Hague Convention Procedures

Plaintiff claims that Defendants "have obtained, will obtain, or should obtain," testimony of European witnesses Plaintiff has refused to produce via Letters Rogatory under the Hague Convention[67] contrary to Plaintiff's previous assurance that it would make Blohm & Voss employees available in New Jersey which would "'alleviate all the need for the parties to utilize the Hague Convention procedures to obtain this evidence.'"[68]

Plaintiff suggests that, because Defendants have not requested Letters Rogatory from 6 of the European witnesses (Messrs. Kleyer, Rhode, Aly, Lucius, Henneberg, or Grimm),[69] they

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[65] Though not included or relied upon in Plaintiff's forum non conveniens analysis, Plaintiff – for the first time – suggests that it intends to call 7 additional witnesses at trial. *See* Aug. 30, 2013 Plaintiff's Renewed FNC Opposition, at 31–32. It defies logic that Plaintiff would call employees and former employees of Defendants to testify at trial without having deposed them. This is a transparent attempt to fabricate a connection to the United States where none exists. Notably, four of the witnesses Plaintiff contends it will call at trial are no longer employed by any Defendant or any other AkzoNobel companies, and one, Neil Plowman, now resides in England. *See* **September 11, 2013 Supplemental Certification of Peter Drucker (hereinafter "Drucker Supp. Cert."),** at ¶¶ 4–5.

[66] *See also Miller*, 380 F. Supp. 2d at 452–53; *Princeton Football Partners LLC v. Football Ass'n of Ireland*, No. 11-5227, 2012 WL 2995199 at *8 (D.N.J. July 23, 2012); *Jacobs v. Syndicat Des Coproprietaires*, No. C-149-07, 2009 WL 1108087 at *4 (N.J. Super. Ct. App. Div. Apr. 27, 2009) (affirming dismissal under *forum non conveniens* grounds due to the unavailability of crucial witnesses that were beyond the subpoena power of the court).

[67] *See* Aug. 30, 2013 Pltf's Renewed FNC Opposition, at 53. Ironically, thus far, Plaintiff has adamantly opposed Defendants' requests for letters rogatory. *See e.g.* Aug. 3, 2012 Letter from George Schwab to Judge Dreier (**Exhibit 37 to Kaplan Cert.**) (opposing Defendants' request for Hague Convention discovery).

[68] *See* Feb. 9, 2011 Statement of Reasons at 32 (quoting Jan. 24, 2011 Plaintiff's Initial FNC Opposition, at 30).

[69] Plaintiff incorrectly included Tomas Marutz in its FNC Opposition, from whom Defendants have requested a letter rogatory. *See* Letters of Request (**Exhibit 44 to Kaplan Cert.**).

cannot be considered crucial to this case.[70] Notably, all of these witnesses are current employees of Blohm & Voss.[71] As noted above, Plaintiff was obligated and agreed to produce the Blohm & Voss employees Defendants requested for deposition. After Plaintiff gave its assurance, however, in October 2011 Plaintiff Hamilton Yachts undermined Defendants by relieving Blohm & Voss of its contractual obligation to produce Blohm & Voss witnesses in exchange for €1 million.[72] Defendants filed motions with Judge Dreier, attempting unsuccessfully, to compel Blohm & Voss witnesses.[73] In response, Plaintiff shifted its previous position, arguing that it had no obligation to produce Blohm & Voss witnesses based on a German privilege, and it even opposed Defendants' efforts to issue of Letters Rogatory to *former* Blohm & Voss employees.[74] Letters Rogatory have proven completely unsatisfactory.[75]

As Judge Dreier noted, "the formal response to letters rogatory is not the same as a deposition[.]"[76] Further, "[i]f answered, letters rogatory require substantial deposition testimony. This process is time consuming and, if the parties fail to cooperate, ineffective. Moreover, conducting a substantial portion of a trial on deposition testimony...precludes the trier of fact from the important function of evaluating the credibility of witnesses." *Seguros Comercial Americas S.A. De C.V. v. American President Lines, Ltd.*, 933 F. Supp. 1301, 1312 (S.D. Tex. 1996). Defendants should not be forced to try this case based on insufficient and inadequate

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[70] *See* Aug. 30, 2013 Pltf's Renewed FNC Opposition, at 53.

[71] *See* Defs.' Renewed FNC Motion, at 20.

[72] *See* Apr. 16, 2012 Letter from Ulf Kopf to Plaintiff **(attached as Exhibit 148 to Kaplan Supp. Cert.)** at 1.

[73] *See* Aug. 31, 2012 Letter from Harley Ratliff to Judge Dreier **(attached as Exhibit 143 to Kaplan Supp. Cert.)**, at 6, Oct. 24, 2012 Supplemental Order **(attached as Exhibit 2 to Kaplan Cert.)**, and Nov. 5, 2012 Letter from Kevin Weber to Judge Dreier **(attached as Exhibit 149 to Kaplan Supp. Cert.)**.

[74] *See e.g.* Aug. 3, 2012 Letter from George Schwab to Judge Dreier **(Exhibit 37 to Kaplan Cert.)** (opposing Defendants' request for Hague Convention discovery).

[75] To date, the only response Defendants have received is from Thomas Grautstueck, who indicated that without access to the relevant documents, he could not recall the specific events in question or refresh his memory accordingly. *See* Letter Rogatory Response from Thomas Grautstueck **(Exhibit 45 to Kaplan Cert.)**. Defendants have re-sent Mr. Grautstueck's Letter Rogatory including relevant documents.

[76] *See* Oct. 5, 2012 Hr'g Tr. at 46:22-24 **(Exhibit 46 to Kaplan Cert.)**.

responses to Letters Rogatory. *See id.*

Importantly, Plaintiff asserts claims assigned to it from Blohm & Voss which constitute approximately €13 million out of its total claimed "out of pocket" damages of €18 million.[77] Thus, the current and former employees of Blohm & Voss are especially important to this case on may issues. They can shed light on why the first painting contractor, Pinmar, was fired and the initial paint job was completed by Rolling Stock,[78] and they can also provide testimony as to the damages Plaintiff seeks in the claim assigned to it by Blohm & Voss.

In sum, it is Plaintiff's responsibility to produce Blohm & Voss witnesses. Plaintiff should be held to its assurances that it would do so.[79]

3. A View of the Mock-up is Uniquely Critical to This Case

Plaintiff's claim that Yacht A was not sufficiently reflective due to a defect in the Awlgrip® topcoat paint.[80] Before Rolling Stock completed the initial paint job on Yacht A, a large mock-up of Yacht A was painted by Rolling Stock and approved by all parties.[81] The Mock-up set the standard for Yacht A.[82] Plaintiff sanded off the topcoat applied by Rolling Stock when it decided to repaint Yacht A in March 2011, almost immediately after this Court denied Defendants' initial *forum non conveniens* motion.[83] For purposes of this case, the Mock-

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[77] *See* Expert Report of Geoffrey H. Osborne (**attached as Exhibit 150 to Kaplan Supp. Cert.**), at Exhibit 3.

[78] Indeed, these current and former Blohm & Voss employees are the only Blohm & Voss-affiliated witnesses who would have any knowledge regarding the Pinmar topcoat paint application to Yacht A from 2006-2008. *See* Deposition of Ulf Kopf at 9:3–6 (noting that he had only been at Blohm & Voss since 2010); Deposition of Richard Precious at 78:23–79:1 (noting that he had not gotten involved with Yacht A until the Rolling Stock job); Deposition of Desmond Jackson at 51:25–53:8 (noting that he had nothing to do with the paintworks performed by Pinmar on Yacht A) (**collectively attached as Exhibit 151 to Kaplan Supp. Cert.**). *See also* Summary of Key Facts (**Exhibit 1 to Kaplan Cert.**), at 2-7.

[79] *See* Feb. 9, 2011 Statement of Reasons, at 32 (quoting Jan. 24, 2011 Plaintiff's Initial FNC Opposition, at 30).

[80] *See generally* Pltf's 1st Am. Compl.

[81] *See id.* at 9; Deposition of Richard Precious (**Exhibit 9 to Kaplan Cert.**), at 171:8–11.

[82] *See* Paint Book for Rolling Stock Mock-Up (**Exhibit 17 to Kaplan Cert.**), at RS11223–RS11225

[83] *See* Summary of Key Facts (**Exhibit 1 to Kaplan Cert.**), at 28.

up is the *only* evidence painted with the Awlgrip topcoat Plaintiff claims was defective.[84] The Mock-up is located in Kiel, Germany where Yacht A was initially painted. It is a critical piece of evidence that cannot be taken to New Jersey.[85]

That "photographs will suffice"[86] is contrary to the testimony of even Plaintiff's causation expert, Nico Roper, who opined that to evaluate the topcoat paint "[y]ou need to have a look in reality and from closer by."[87] Plaintiff's paint consultant, Leo Selter, agreed with Nico Roper, stating that with "[a]ll pictures you can't tell if a paint job is right or wrong."[88] The Melnichenkos, the exclusive users and true owners of Yacht A, have also stated that photographs of Yacht A cannot be used to evaluate the outcome of the initial paint job by Pinmar and Rolling Stock.[89] Mrs. Melnichenko went so far as to say that in order to judge the paint, you must see it "in reality," because photographs "[are not] relevant to give an opinion about [the] paint."[90]

The Yacht A Mock-up is in Kiel, Germany and is available to a fact-finder in Germany or England. A German court can order an inspection of the mock-up, and an English court could obtain assistance from German courts to do the same pursuant to the EU's Taking of Evidence Regulation.[91]

4. Judgments in Germany or England Can Be Enforced Against Defendants

Plaintiff's contention that, if this case were litigated in Germany, it will be unable to

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[84] Defendants also painted various panels with the Awlgrip topcoat paint. However, those assorted panels were not painted to achieve the cosmetic result that Plaintiff claims was lacking on Yacht A (or any cosmetic result), but rather were painted specifically to attempt to create, and investigate, Plaintiff's claimed defect. *See* Deposition of Paul Adams (Vol. II) (**attached as Exhibit 152 to Kaplan Supp. Cert.**) at 204:20–206:1, 215:4–25.

[85] According to Plaintiff's counsel the mock-up "weighs in excess of 10 tons." *See* Dec. 15, 2011 Letter from Patrick Salisbury to Michael Griffinger (**Exhibit 59 to Kaplan Cert.**), at 7.

[86] *See* Aug. 30, 2013 Plaintiff's Renewed FNC Opposition, at 55.

[87] *See* Deposition of Nico Roper (Vol. III) (**Exhibit 56 to Kaplan Cert.**) at 132:17–136:6.

[88] *See* Deposition of Leo Selter (**Exhibit 57 to Kaplan Cert.**) at 396:3-4.

[89] *See* Deposition of Andrey Melnichenko (**Exhibit 11 to Kaplan Cert.**) at 27:18–28:17; Deposition of Aleksandra Melnichenko (**Exhibit 18 to Kaplan Cert.**) at 56:18–57:1 and 64:6–12.

[90] *See* Deposition of Aleksandra Melnichenko (**Exhibit 18 to Kaplan Cert.**) at 56:18–57:1.

[91] *See* **May 15, 2013 Grothe Cert.** at 54-55; **May 6, 2013 Briggs Cert.** at ¶ 58. *Accord* **May 6, 2013 Briggs Cert.**, Annex 2, at § 4, Art. 17.

enforce a judgment against Defendants[92] is legally and factually incorrect. Defendants have consented to the jurisdiction of either English or German courts,[93] and AkzoNobel does business in Germany and has facilities in several locations in Germany.[94]

Importantly, EU Regulations provide that a judgment given in any EU country is recognized and can be enforced in any other EU country.[95] As Defendants' German legal expert, Dr. Grothe, explains, this regulation "bears the same notion as the Full Faith and Credit Clause in Article IV Section 1 of the United States Constitution by ensuring that courts in a member state of the European Union recognize and enforce foreign rulings from fellow member states."[96] Thus, even if Defendants had no assets in Germany, Plaintiff could enforce a judgment against Defendants, whether in Germany, England, or any other EU country.

5. There Are No Practical Problems with Trial in Germany or England

With respect to the last private interest factor, Plaintiff argues that discovery completed in this case would be "completely wasted," and "the effort and expense will be duplicated" if this case were re-filed in Germany or England. To the contrary, as Defendants' German and English legal experts, Dr. Grothe and Professor Briggs, stated that the discovery conducted in this case would result in significant time-savings and efficiencies if this case were re-filed in either Germany or England.[97]

Dr. Grothe notes that the parties "would not have to start from scratch but could instead get straight to the heart of the matter," and that "it remains a fact that...the Regional Court in

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[92] *See* Aug. 30, 2013 Pltf's Renewed FNC Opposition, at 56–57.
[93] *See generally* **May 29, 2013 Certification of Peter Drucker (hereinafter "Drucker Cert.")**
[94] *See* http://www.akzonobel.com/aboutus/locations/.
[95] *See* **Sept. 6, 2013 Supplemental Certification of Dr. Helmut Grothe (hereinafter "Grothe Supp. Cert."), at 6-7; Sept. 10, 2013 Supplemental Certification of Adrian Briggs (hereinafter "Briggs Supp. Cert."), at ¶ 16.**
[96] *See* **Sept. 6, 2013 Grothe Supp. Cert., at 7.**
[97] *See id.* at 5; **Sept. 10, 2013 Briggs Supp. Cert. at ¶ 11–15.**

Kiel would on average schedule a hearing within two months after filing of the complaint."[98] In addition, Plaintiff's argument that Defendants' company witnesses deposed by Plaintiff would not be required to testify in Germany is not supported by its German legal expert's certification. As Defendants' expert, Dr. Grothe, has explained, this is incorrect because the German court can call any relevant witnesses, including those employees.[99] Regardless, Defendants previously certified that they would make discovery conducted in this matter, including witness testimony, available for use in Germany or England. To avoid any doubt, Defendants have certified that they would produce their witnesses in a German or English court if this case were re-filed.[100]

With respect to England, Professor Briggs notes that, while different styles and formats are used, the English pleadings would likely be based on the parties' pre-existing New Jersey pleadings. He opines that "as the work has evidently already been done, and as the causes of action in English law are plain and obvious, I would be rather surprised if it were to take the plaintiffs very long to do this."[101] Professor Briggs adds that the new English rules on disclosure (which took effect in April 2013) were implemented to make discovery and disclosure in England more efficient and less protracted, and that the parties could and would be expected to use the discovery conducted in the United States to expedite proceedings in England – "the idea that the parties would proceed in England as though none of this had happened, or that an English court might pretend that none of this had happened, is not credible."[102]

Similarly, with respect to depositions, Professor Briggs notes that while deposition transcripts would need to be edited to focus on the issues in the English proceedings and

[98] *See* **Sept. 6, 2013 Grothe Supp. Cert.** at 5–6.
[99] *See id.* at 7–11.
[100] *See* **May 29, 2013 Drucker Cert.** at ¶ 5; **Sept. 11, 2013 Drucker Supp Cert** at ¶ 3 ("Defendants agree that they will produce the witnesses deposed in this action and other witnesses employed by Defendants for proceedings in Germany or England, subject to an objection that the witness' testimony is irrelevant or duplicative of the testimony of other witnesses.").
[101] *See* **Sept. 10, 2013 Briggs Supp. Cert.** at ¶ 12.
[102] *Id.* at ¶ 13.

formatted, this is likely to be a minor exercise because the issues in the English litigation are substantially the same as those here.[103] Finally, Professor Briggs concludes that, given the time-savings from discovery conducted in the United States litigation, the time from the close of pleadings to trial in England would be shorter than the six months Plaintiff's expert, Mr. Gardner, suggests for a case started from scratch.[104]

Defendants' foreign law experts have opined that discovery conducted in the United States litigation will result in substantial time savings after the case is re-filed in Germany or England; and the parties would not be starting from scratch, as Plaintiff suggests. Of utmost importance, a trial in Germany or England – unlike New Jersey – will allow Defendants to obtain testimony from critical European witnesses who are essential to a fair and just trial on the issues of liability and damages.

V. The Public Interest Factors Favor Trial of this Matter in Germany or England

Discovery has established that the public interest factors also weigh heavily in favor of dismissal. This is a foreign controversy centered in Germany and England that will require the Court and a New Jersey jury to decide issues of foreign law, without the benefit of critical witnesses and evidence available to the German and English courts.[105]

a. New Jersey Has Little Interest In This Case

New Jersey lacks a significant connection to the events at issue in this case because nearly all the relevant events took place in Germany and England, or were directed by people in those countries.[106] Only one event – the manufacture of two components of Awlgrip® topcoat – occurred in New Jersey. New Jersey's minimal connection is insufficient to justify retaining

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[103] *Id.* at ¶ 14.
[104] *Id.* at ¶ 15.
[105] *See* Defs.' Renewed FNC Motion at 42–49.
[106] *See id.* at 42–48

jurisdiction here, leaving Defendants to try this case without access to critical German witnesses and evidence Defendants could secure in Germany or England.[107]

This is a breach of warranty and breach of contract claim centered in Europe, not a product liability case.[108] The New Jersey Product Liability Act ("NJPLA") governs all claims for "harm" caused by products,[109] and defines "harm," as "personal physical illness, injury or death" or "physical damage to property, other than to the product itself[.]" N.J.S.A. 2A:58C-1(b)(2). Plaintiff's sole complaint is that the Awlgrip® paint did not result in a highly reflective enough finish on Yacht A. That is the only "harm" alleged, [110] and it is not a "harm" as defined by the NJPLA.[111] Plaintiff does not allege that any person suffered personal injuries. Nor does it allege damage to other property. Plaintiff alleges only that the paint applied to Yacht A was not as reflective as Plaintiff (and/or the Melnichenkos) subjectively believes it should have been.[112] Under New Jersey law, that is not a product liability claim, and this is not a product liability case.

Plaintiff also argues that New Jersey has strong public interest in its fraud and New Jersey Consumer Fraud Act ("NJCFA") claims.[113] It relies on a Third Circuit case, *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 643 (3d Cir. 1989). The *Lony* court found that Delaware had an interest in seeing its statutes enforced, noting that the defendant there had not

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[107] *See First England Funding L.L.C. v. Aetna Life Ins. & Annuity Co.*, 790 A.2d 243, 247 (N.J. Super Ct. App. Div. 2002) (when "New Jersey has minimal, if any interest in [a case], it would be manifestly unfair to force the citizens of our state to bear the heavy burden of hosting disputes among numerous residents of other jurisdictions who were involved in out-of-state [controversies] and entered into contracts that have no ties to New Jersey.").

[108] *See* Jan. 24, 2011 Plaintiff's Initial FNC Opposition, at 35–38.

[109] *See* N.J.S.A. 2A:58C-1(b)(3); *Tirrell v. Navistar Int'l*, 591 A.2d 643, 647 (N.J. Super. Ct. App. Div. 1991).

[110] *See* Am. Compl. ¶¶ 67, 110.

[111] As the only harm alleged is this subjective lack of reflectivity in the paint, Plaintiff essentially argues that paint damaged itself. But under the economic loss doctrine, there can be no recovery in a products liability action when the only harm alleged is damage to the product itself. *Dean v. Barrett Homes, Inc.*, 8 A.3d 766, 771 (N.J. 2010).

[112] *See* May 2009 Survey Report of Nico Roper (**Exhibit 119 to Kaplan Cert.**), at 7–8 (stating the cosmetic appearance of Yacht A was unacceptable because of poor reflectivity, and that there were no serious "surface defects" on Yacht A that impacted the cosmetic quality of the paint finish).

[113] *See* Aug. 30, 2013 Plf.'s Renewed FNC Opposition at 59–62.

even argued the inapplicability of Delaware's consumer fraud laws. *Id.* at 642–43. Here, unlike *Lony*, the NJCFA is not at issue, because German law applies to Plaintiff's claims under New Jersey's choice-of-law rules. New Jersey does not have an interest in applying German law to fraud claims centered in Germany.[114]

New Jersey employs a "most significant relationship" test to determine the substantive law that will apply to a particular cause of action. *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 455 (N.J. 2008). Under this test, the court first considers determines whether an actual conflict exists. *Id.* at 460. Here, a conflict exists between the NJCFA and the law of Germany, the country where the alleged misrepresentations occurred and where Yacht A was painted,[115] as the NJCFA has no equivalent in German law.[116] Because there is a conflict, this Court must determine the state with the "most significant relationship" to the alleged consumer fraud claim based upon application of the factors in the Section 148 of the Restatement. *See Cooper v. Samsung Elecs. Am., Inc.*, 374 Fed. Appx. 250, 255 (3d Cir. 2010).[117] The Court must consider: (1) where the Plaintiff allegedly relied on representations; (2) where representations were made

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[114] "[T]he weight of authority counsels against application of the NJCFA to out-of-state consumers." *Moulton v. LG Elecs. USA*, Inc., No. 11-4073, 2012 WL 3598760, at *3 (D.N.J. Aug. 21, 2012) (dismissing plaintiff's NJCFA claims) (quotations marks and citation omitted); *Arlandson v. Hartz Mt. Corp.*, 792 F. Supp. 2d 691, 709 (D.N.J. 2011) (finding Plaintiffs' home states had the most significant relationship where "Plaintiffs received and relied upon the alleged misrepresentations in their home states, the product is located in the Plaintiffs' home states, and the performance of the contract was rendered in Plaintiffs' home states."); *Knox v. Samsung Elecs. America, Inc.*, No. 08-4308, 2009 WL 1810728, at *4 (D.N.J. June 24, 2009) ("Although it is true that New Jersey seeks to prevent its corporations from defrauding out-of-state consumers, it is not clear . . . that New Jersey intended out-of-state consumers to engage in end runs around local law in order to avail themselves of . . . remedies that those states deny.").

[115] New Jersey courts have routinely held that the NJCFA is quite different from even the consumer fraud statutes of other states. *See, e.g., Agostino v. Quest Diagnostics, Inc.*, 256 F.R.D. 437, 462 (D.N.J. 2009) (concluding that "actual conflicts exist between the NJCFA and the consumer protection laws of other states); *Fink v. Ricoh*, 839 A.2d 942 (N.J. Super. Ct. App. Div. 2003), 974-982 (App. Div. 2003) (describing differences between NJCFA and numerous other states). Indeed, "[s]tate consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re Ford Motor Co. E-350 Van Prods. Liab. Litig.*, No. 1687, 2008 WL 4126264, at *22 (D.N.J. Sept. 2, 2008).

[116] *See* **May 15, 2013 Grothe Cert.**, at 41–42 (noting that consumer protection actions in Germany are governed by sections 13 and 474.1 of the BGB, not the NJCFA).

[117] *See also Montich v. Miele USA, Inc.*, 849 F. Supp. 2d 439, 446 (D.N.J. 2012) (dismissing the plaintiff's NJCFA claim upon a finding that New Jersey law did not apply and stating that where "claims sound in fraud and misrepresentation, the Court applies the conflict of laws analysis of Section 148[.]").

and received; (3) where the parties have their domicile, residence, or place of business; (4) where the subject of the transaction between the parties was situated at the time; and (5) where performance was to be rendered.[118]

These factors all point to Germany, not New Jersey. First, the only acts of reliance alleged by Plaintiff related to the decision to use Awlgrip® products to paint Yacht A in Kiel, Germany.[119] Second, nearly all of the alleged representations at issue here were made and received in Germany; none were made or received in New Jersey.[120] Third, the only entity with any connection to New Jersey is International Paint LLC, which operates manufacturing facilities in New Jersey and elsewhere in the United States.[121] No other party is located here, and Plaintiff's assignor, Blohm & Voss, to whom many of the representations were allegedly made, is a German company. Fourth, the subject of the parties' dealings – Yacht A – was located either in the Blohm & Voss shipyard in Kiel, Germany or was sailing throughout the Mediterranean before returning to the shipyard in Kiel, Germany when the alleged representations were made.[122] Finally, the only "performance" allegedly required Plaintiff was to return Yacht A to the shipyard in Kiel, Germany to be painted with Awlgrip® products.[123]

German law applies to Plaintiff's fraud claims; thus, the NJCFA cannot be applied to this foreign dispute.

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[118] *See Restatement (Second) of Conflict of Laws (1971)*, § 148(2).

[119] *See* Am. Compl. at ¶¶ 39, 45, 47.

[120] The representations identified in Plaintiff's Amended Complaint were allegedly made by Michel van Dijck and Klaas Apperlo, employees of International Paint Belgium N.V. to parties working on Yacht A in Germany. *See id.* at ¶¶ 20–21, 31–33, 35–36, and 47.

[121] *See* Excerpts of Deposition of Paul Adams, Vol. I (**Exhibit 21 to Kaplan Cert.**) at 77:12 –79:19, and Am. Compl. at ¶ 3. Akzo Nobel Coatings Inc., also a Delaware corporation, is the parent company of International Paint LLC and has no other connection to this state.

[122] *See* Yacht A Travel Log (**Exhibit 10 to Kaplan Cert.**), at 1–3 (Yacht A was in Kiel, Germany before June 30, 2008 and sailed the Mediterranean between then and October 9, 2008, when it returned to Kiel, Germany).

[123] *See* Am. Compl. at ¶¶ 39–40. Similarly, all the contracts between Plaintiff, Blohm & Voss, and Rolling Stock all related to activities at the Blohm & Voss shipyard in Kiel, Germany. *Id.* at ¶¶ 40–41.

b. Germany and England Have More Significant Interests Than New Jersey

Although Plaintiff acknowledges that Germany has an interest in ensuring that goods sold in Germany are not defective,[124] it argues Germany has "little interest" because no parties are located there and Yacht A is no longer located there.[125] Plaintiff's argument ignores that it seeks to recover €13 million in damages based upon the assigned claim of its German Shipbuilder, Blohm & Voss.[126] Plaintiff stands in Blohm & Voss's shoes in pursuing its assigned claim. More importantly, as set forth above, Germany is where most of the critical evidence in this case is located. Unlike cases cited by Plaintiff, important fact witnesses regarding the painting of Yacht A include Blohm & Voss employees who reside in Germany and are available to testify in Germany but not in New Jersey. Finally, the Mock-Up of Yacht A, painted with the same Awlgrip® paint used on Yacht A, is located in Germany and cannot be moved to New Jersey.

As to England's interest in this case, International Paint Ltd., the primary defendant, is located in England. It managed global Awlgrip® operations from England, and manufactured most Awlgrip® coating system products applied to Yacht A in English factories.[127] Further, nearly all of the witnesses deposed by Plaintiff have been either employees of International Paint Ltd. in England or employees of International Paint Belgium N.V. who reported to their superiors in England. None of these witnesses was deposed in New Jersey or elsewhere in the United States.[128] Only John Black, a British national who was formerly employed by International Paint LLC, was deposed in the United States, but he has since moved back to

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[124] *See* Aug. 30, 2013 Plf's Renewed FNC Opposition, at 62. While Plaintiff suggests that "paint manufactured in New Jersey did widespread damage to over 100 superyachts, many of which were in the U.S.," it fails to identify any superyacht involved in the insurance claim it references that has any connection to New Jersey. Regardless, the issues related to the vessels involved in that insurance claim, related to other batches of paint that was never applied to Yacht A, as numerous witnesses have testified.

[125] *See* Aug. 30, 2013 Plf's Renewed FNC Opposition at 62–64.

[126] None of the cases cited by Plaintiff in support of its argument that the absence of a German party means that German's interest is limited involved such an assignment.

[127] *See* Defs.' Renewed FNC Motion at 3, 11–12.

[128] *Id.* at 14–16.

England.[129] England is home to the primary defendant, and most of the relevant defense witnesses are located in England. It has a significant connection to this case.

c. The Congestion of the Union County Court Weighs In Favor of Dismissal

That the docket in Union County is congested cannot be disputed. This is a factor that weighs in favor of dismissal.[130] Plaintiff asserts that re-filing this case in Germany or England would lead to years of delays because the discovery that has been accomplished here could not be utilized. But, as Defendants' foreign law experts have explained, discovery that has been accomplished in the U.S. litigation will result in significant time-savings and efficiencies if this case were re-filed in either Germany or England. The parties would not be starting from scratch, as Plaintiff suggests. Defendants' experts opine that trial in Germany or England could take place from six months to one year after re-filing.[131] Critically, trial in Germany or England would allow for a fair and just adjudication of this dispute, including critical witnesses and evidence unavailable to a New Jersey jury.

d. The Need to Apply Foreign Law Supports Dismissal

Plaintiff argues that the need to apply foreign law does not weigh in favor of dismissal, but New Jersey courts have held that avoiding conflict of law problems is a reason to dismiss a case on *forum non conveniens* grounds. *Mandell v. Bell Atlantic Nynex Mobile*, 717 A.2d 1002, 1005 (N.J. Super. Ct. Law Div. 1997).[132] As discussed above, German law applies to Plaintiff's fraud claims, and, given the substantial connection of England and Germany to this case, it is likely English or German law will apply to Plaintiff's other causes of action as well.

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[129] *Id.*

[130] *See Mandell v. Bell Atlantic Nynex Mobile*, 717 A.2d 1002, 1007 (N.J. Super. Ct. Law Div. 1997); *First England Funding L.L.C.*, 790 A.2d at 247.

[131] *See* **Sept. 6, 2013 Grothe Supp. Cert.** at 6, 11; **Sept. 10, 2013 Briggs Supp. Cert.** at ¶ 15.

[132] *See also* Defs.' Renewed FNC Motion, at 48–49.

c. Discovery Hearings and Motions Are No Reason to Retain Jurisdiction

Finally, Plaintiff argues that, because Special Discovery Master Drier decided numerous discovery disputes, that weighs against dismissal. The disputes decided by Judge Dreier related only to discovery, as was his mandate, not to substantive legal issues. The number of these discovery disputes was driven largely by Plaintiff's "stone-walling" of Defendants' attempts at discovery from Plaintiff's assignors, Blohm & Voss and Rolling Stock, which necessitated motions to compel and rulings by Special Discovery Master Dreier. Regardless, the parties paid the Special Discovery Master for his services; these issues did not waste New Jersey's judicial resources.

CONCLUSION

New Jersey is an inconvenient and inadequate forum for a full and fair litigation of this case. The record developed through discovery and the relevant law establishes this fact. Ultimately, "the equitable doctrine of forum non conveniens empowers a court to decline to exercise jurisdiction when a trial in another available jurisdiction will best serve the convenience of the parties and the ends of justice." *Yousef v. General Dynamics Corp.*, 16 A.3d 1040, 1048 (N.J. 2011). As Defendants have established, the ends of justice cannot be served by litigating this case in New Jersey. This case belongs in Germany or England. Accordingly, Defendants request that the Court grant their renewed motion and dismiss this case on grounds of *forum non conveniens*.

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HAMILTON YACHTS, LTD.,

Plaintiff,

vs.

INTERNATIONAL PAINT, LLC., INTERNATIONAL PAINT LTD., and AKZO NOBEL COATINGS, INC.,

Defendants.

SUPERIOR COURT OF NEW JERSEY LAW DIVISION, UNION COUNTY

Docket No.: UNN-L-2634-10

SUPPLEMENTAL CERTIFICATION OF HARVEY L. KAPLAN, ESQUIRE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS ON GROUNDS OF *FORUM NON CONVENIENS*

HARVEY L. KAPLAN, by way of certification in lieu of affidavit, says:

1. I am a partner of the law firm Shook, Hardy & Bacon LLP in Kansas City, Missouri, and I represent defendants International Paint Ltd., International Paint LLC, and Akzo Nobel Coatings Inc. in the above-captioned matter. I am admitted before this Court *pro hac vice*, and I make this Certification in support of Defendants' Reply in Support of their Motion to Dismiss on Grounds of *Forum Non Conveniens*. I have personal knowledge of the matters stated in this certification and, if called upon, I could and would competently testify as to these matters.

2. Attached as Exhibit 132 to this Supplemental Certification[1] is a true and correct copy of excerpts from the deposition of Patrick Carroll.

3. Attached as Exhibit 133 to this Supplemental Certification is a true and correct copy of excerpts from the transcript of the February 4, 2011 hearing.

4. Attached as Exhibit 134 to this Supplemental Certification is a true and correct copy of the First Amended Notice of Deposition for Aleksandra Melnichenko, for February 12, 2013.

5. Attached as Exhibit 135 to this Supplemental Certification is a true and correct copy of the Original Notice of Deposition for Aleksandra Melnichenko, for May 8, 2012.

6. Attached as Exhibit 136 to this Supplemental Certification is a true and correct copy of Defendants' August 31, 2012 Motion to Compel the Deposition of Aleksandra Melnichenko.

7. Attached as Exhibit 137 to this Supplemental Certification is a true and correct copy of the January 13, 2012 Case Management Order.

8. Attached as Exhibit 138 to this Supplemental Certification is a true and correct copy of the June 5, 2013 letter from Plaintiff's counsel to Defense counsel attaching "Schedule E."

9. Attached as Exhibit 139 to this Supplemental Certification is a true and correct copy of the June 3, 2013 e-mail from Plaintiff's counsel, Patrick Salisbury, to Special Discovery Master Judge William A. Dreier, attaching Plaintiff's Motion for Emergency Relief.

[1] For convenience, the Exhibits to this Certification are numbered 132–152. My May 30, 2013 Certification attaches Exhibits 1–131.

10. Attached as Exhibit 140 to this Supplemental Certification is a true and correct copy of the June 18, 2013 letter from Plaintiff's counsel, George Schwab, to Hon. Judge Kenneth J. Grispin.

11. Attached as Exhibit 141 to this Supplemental Certification is a true and correct copy of the June 27, 2013 letter from Plaintiff's counsel, Patrick Salisbury, to Hon. Judge Kenneth J. Grispin.

12. Attached as Exhibit 142 to this Supplemental Certification is a true and correct copy of the April 2, 2012 letter brief from Defense counsel, Michael Griffinger, to Special Discovery Master William A. Dreier.

13. Attached as Exhibit 143 to this Supplemental Certification is a true and correct copy of the August 31, 2012 letter brief from Defense counsel, Harley Ratliff, to Special Discovery Master William A. Dreier.

14. Attached as Exhibit 144 to this Supplemental Certification is a true and correct copy of excerpts from the deposition of Richard Precious.

15. Attached as Exhibit 145 to this Supplemental Certification is a true and correct copy of the July 2, 2012 e-mail from Plaintiff's Counsel, George Schwab to Defense Counsel, Harley Ratliff.

16. Attached as Exhibit 146 to this Supplemental Certification is a true and correct copy of excerpts from the deposition of Ulf Kopf.

17. Attached as Exhibit 147 to this Supplemental Certification are true and correct copies of the April 30, 2013 Notice to Take Oral Deposition Duces Tecum of Thomas Wunderlich on June 19, 2013, and the Court's August 5, 2013 Order Granting Plaintiff's July 3, 2013 Request for International Judicial Assistance regarding Thomas Wunderlich.

18. Attached as Exhibit 148 to this Supplemental Certification is a true and correct copy of the April 16, 2012 letter from Ulf Kopf of Blohm & Voss to Plaintiff's counsel, Patrick Salisbury.

19. Attached as Exhibit 149 to this Supplemental Certification is a true and correct copy of the November 5, 2012 letter from Defense Counsel Kevin Weber to Special Discovery Master William A. Dreier.

20. Attached as Exhibit 150 to this Supplemental Certification is a true and correct copy of excerpts of the July 26, 2013 Expert Report and Disclosure of Geoffrey H. Osborne.

21. Attached as Exhibit 151 to this Supplemental Certification are true and correct copies of excerpts from the depositions of Ulf Kopf, Richard Precious, and Desmond Jackson.

22. Attached as Exhibit 152 to this Supplemental Certification is a true and correct copy of excerpts from the deposition of Paul Adams (Vol. II).

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Harvey L. Kaplan

DATED: September 13, 2013

HARVEY L. KAPLAN

CERTIFICATION OF FACSIMILE SIGNATURE

I, **RYAN E. HANLON**, hereby certify as follows:

1. I am an attorney at law in the State of New Jersey and an Associate at the law firm of Gibbons, P.C., counsel for Defendants in the above captioned matter.

2. The attached Supplemental Certification is submitted with the facsimile of the original signature of Harvey Kaplan pursuant to R. 1:4-4(c).

3. I hereby certify that the signature of Harvey Kaplan on the attached certification is genuine and that an original signature shall be filed, if required by the Court.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Ryan E. Hanlon

Ryan E. Hanlon

Dated: September 13, 2012
Newark, New Jersey