

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
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5 U.S.C. 552(b)(6)	}	Claim No. LIB-III-044
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	}	Decision No. LIB-III-044
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	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	

Counsel for Claimant:

Joanne W. Young, Esq.
Kirstein & Young, PLLC

FINAL DECISION

Claimant, one of several similarly situated claimants known collectively as the “Abbott Group,” objects to the Commission’s Proposed Decision denying his claim against the Great Socialist People’s Libyan Arab Jamahiriya (“Libya”). Claimant is a former employee of Pan American World Airways, Inc. (“Pan Am”), who lost his job when Pan Am ceased operations and liquidated in December 1991. He contends that the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988, caused Pan Am’s liquidation three years later, and that this in turn led to him losing his job. He thus claims that because Libya bears responsibility for the Lockerbie bombing, it should also be held liable for his job loss.

In the Proposed Decision, the Commission denied the claim for two independent reasons: (1) Claimant had failed to demonstrate that his claim was not extinguished by a 2005 settlement between Pan Am and Libya; and (2) he had failed to demonstrate that the Lockerbie bombing caused his job loss. On objection, Claimant has submitted additional evidence and argument in support of his claim. Claimant argues that (1) the 2005 Libya-Pan Am settlement did not extinguish his claim against Libya; and (2) the Proposed Decision's causation analysis was erroneous. Claimant also asserts that the Commission erroneously suggested, in a separate proposed decision addressing claims identical to Claimant's, that the claimants covered by that decision did not have a compensable property interest in their lost future wages and benefits. Claimant thus maintains that he is entitled to damages in the amount of the income (including pension plan contributions) he would have earned until retirement if Pan Am had not liquidated and had continued to employ him.

After carefully considering all of Claimant's arguments and evidence, we conclude that this claim must still be denied. Although Claimant has shown that the 2005 Libya-Pan Am settlement did not extinguish his claim, he has still not shown that the Lockerbie bombing caused his job loss. We therefore affirm the denial of this claim.

BACKGROUND

Claimant brought this claim against Libya under Category F of the November 27, 2013 letter from the State Department's Legal Adviser referring several categories of claims against Libya to this Commission ("2013 Referral"). Category F of the 2013 Referral consists of "commercial claims of U.S. nationals provided that (1) the claim was set forth by a claimant named in *Abbott et al. v. Socialist People's Libyan Arab Jamahiriya*

(D.D.C.) 1:94-cv-02444-SS; and (2) the Commission determines that the claim would be compensable under the applicable legal principles.”¹

In support of his claim, Claimant alleged that the 1988 Lockerbie bombing ultimately forced Pan Am to cease operations and liquidate in December 1991, resulting in Claimant losing his job as a pilot for the airline, which in turn caused him to lose several years’ worth of income and benefits that he otherwise would have earned. Claimant asserted that, but for the terrorist bombing, Pan Am would have continued operations and that he would have continued to work for Pan Am.

The Commission denied the claim in a Proposed Decision dated July 13, 2016 (“Proposed Decision” or “Claimant’s Proposed Decision”), concluding that Claimant had failed to meet his burden of proving that his damages were “compensable under the applicable legal principles,” as required by Category F of the 2013 Referral. On August 15, 2016, Claimant filed a notice of objection to the Proposed Decision and requested an oral hearing.

The next day, August 16, 2016, the Commission issued a Proposed Decision for most of the remaining “Abbott Group” claims (“Consolidated Proposed Decision”), all of whom are represented by the same counsel as the claimant in this claim.² The claims addressed in the Consolidated Proposed Decision involved facts essentially identical to those in Claimant’s claim, and the evidentiary record was substantially the same except for

¹ *Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* ¶ 8.

² *See* Claim No. LIB-III-036 et al., Decision No. LIB-III-045 (2016) (“Consolidated Proposed Decision”). On that same date, August 16, 2016, the Commission issued separate Proposed Decisions in the remaining Abbott Group claims, all of which presented special estate-related issues (“Estate Proposed Decisions”). *See* Claim No. LIB-III-055, Decision No. LIB-III-046; Claim No. LIB-III-057, Decision No. LIB-III-047; Claim No. LIB-III-062, Decision No. LIB-III-048; Claim No. LIB-III-064, Decision No. LIB-III-049; Claim No. LIB-III-079, Decision No. LIB-III-050; Claim No. LIB-III-082, Decision No. LIB-III-051; Claim No. LIB-III-083, Decision No. LIB-III-052.

the addition of several documents, including an additional economist's opinion. The Commission denied the claims in the Consolidated Proposed Decision for the same reasons as those detailed in Claimant's Proposed Decision, because the additional evidence did not undermine those reasons. On September 13, 2016, the claimants whose claims were addressed in the Consolidated Proposed Decision filed a consolidated notice of objection and requested an oral hearing.

A formal hearing brief was filed on November 23, 2016, on behalf of all Abbott Group claimants who had filed objections to their respective Proposed Decisions,³ and it included numerous exhibits. Most of these exhibits had been submitted previously and were considered in Claimant's Proposed Decision and the Consolidated Proposed Decision. The new exhibits included a copy of the 2005 settlement between Pan Am and Libya; an opinion, dated November 1, 2016, from Bijan Vasigh, Ph.D, a professor of economics and finance with expertise in the aviation industry; an unsworn statement, dated November 22, 2016 from Ramesh Punwani, former Chief Financial Officer, Senior Vice President Finance and Information Systems/Controller for Pan Am; an unsworn statement, dated November 22, 2016, from Peter A. Pappas, former Vice President of Strategic Planning for Pan Am; excerpts from a 1992 SEC Form 10-K from Continental Airlines; and a copy of a *Time* magazine article from January 1989.

The hearing brief also incorporated by reference, *inter alia*, the consolidated notice of objection filed on September 13, 2016, by the Abbott Group claimants whose claims were addressed in the Consolidated Proposed Decision. That consolidated notice of objection (which incorporated by reference Claimant's August 15, 2016 notice of

³ These included Doss and all claimants whose claims were the subject of the Consolidated Proposed Decision and the Estate Proposed Decisions.

objection), included extensive argument explaining why the claimants viewed the Consolidated Proposed Decision as wrongly decided.

The Commission held an eight-hour consolidated hearing on the objections of all Abbott Group claimants on December 14, 2016, at the E. Barrett Prettyman Federal Courthouse in Washington, D.C. At the hearing, Claimant and two other claimants who were also formerly employed as pilots by Pan Am, 5 U.S.C. 552(b)(6)

, provided sworn testimony. Several other witnesses also testified: Thomas G. Plaskett, former Chairman and CEO of Pan Am; Dr. Tulinda Larsen, an aviation economist who had submitted a written opinion prior to Claimant's Proposed Decision; Mr. Pappas; and Mr. Punwani. Claimant's counsel presented oral argument on behalf of all of the claimants.

Following the hearing, on December 22, 2016, the Abbott Group claimants (including Claimant) submitted an additional, unsworn statement from Mr. Punwani, dated December 21, 2016, addressing several of the issues covered in the oral hearing and in the Commission's Proposed Decisions. The Commission responded with a letter dated January 10, 2017, acknowledging receipt of the statement; noting that the statement had been accepted in the record because it had been submitted in response to specific "questions raised by the Commissioners during the December 14, 2016 hearing"; and indicating that "the record in these proceedings is now closed."⁴ A few days later, on January 13, 2017, the Abbott Group claimants submitted an additional, unsworn statement from Dr. Larsen, dated January 13, 2017, withdrawing the earlier analysis set forth in her opinion and adopting the opinion of Mr. Punwani set forth in his statements and testimony. Claimants

⁴ At the conclusion of the oral hearing, the Commission had indicated that it would leave the record open "for some potential follow-up, both on some of the items we mentioned here and possibly some follow-up questions that we may have" Oral Hr'g, pt. 5, at 1:22:34-1:22:55.

then wrote to the Commission on January 23, 2017, indicating that he had not received the Commission's January 10th letter until that day, and asking for confirmation that the Commission would consider Dr. Larsen's January 13th statement. In a January 27, 2017 letter, the Commission granted this request, and in a written response on January 30, 2017, claimants' counsel indicated that she "now understand[s] that the record is closed."

The Commission has considered all of Claimant's evidence and arguments, both from before Claimant's Proposed Decision was issued and on objection.

DISCUSSION

To prevail in this claim, Claimant has the burden to prove that his claim is "compensable under the applicable legal principles." Thus, to decide this claim, the Commission must determine whether Claimant's evidence, which now includes the additional written statements, his live testimony, and the testimony of Mr. Abbott, Mr. Savage, Mr. Plaskett, Dr. Larsen, Mr. Pappas, and Mr. Punwani, suffices to meet this burden.

Claimant has failed to meet his burden to prove his claim. We considered this exact question in our Final Decision in Claim Nos. LIB-III-036, *et al.*, Decision No. LIB-III-045 (2018) (Final Decision). That decision involved most of the other Abbott Group claimants and was based on allegations, evidence, and legal arguments identical to those relied on by Claimant here. In that decision, we denied the claims of those other Abbott Group claimants. We thus deny this Claim for the same reasons stated in that decision, which we incorporate by reference: although the 2005 Pan Am-Libya settlement did not extinguish his claim, Claimant has still failed to establish that the Lockerbie bombing caused his job

loss, as required under the applicable legal principles the Commission must apply pursuant to the 2013 Referral.

CONCLUSION

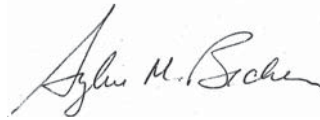
Having considered all of Claimant's evidence and arguments, the Commission concludes that Claimant's claim is not compensable under the applicable legal principles. Accordingly, the denial of this claim set forth in the Proposed Decision is hereby affirmed.

This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, January 16, 2018
and entered as the Final Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

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PROPOSED DECISION

Claimant 5 U.S.C. §552(b)(6) brings this claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") based on economic losses he claims to have suffered due to the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. He alleges that the bombing ultimately forced Pan American World Airways, Inc. ("Pan Am") to cease operations nearly three years later, resulting in his losing his job as a pilot for the airline, which in turn caused him to lose several years' worth of income and benefits that he otherwise would have earned. Claimant asserts that, but for the terrorist bombing, Pan Am would have continued operations, and he would not have lost his employment and suffered the losses which he now claims. Because Claimant has failed to demonstrate (1) that his claim was not extinguished by a 2005 Settlement Agreement between Pan Am and Libya; and (2) that the Lockerbie bombing proximately caused any of his alleged economic losses, his claim is denied.

BACKGROUND AND BASIS OF CLAIM

On December 21, 1988, Pan Am Flight 103, en route from London to New York, exploded in the skies over Lockerbie, Scotland. A Scottish court later found a Libyan intelligence agent guilty of murder for the bombing. Claimant states that, at the time of the bombing, he was a pilot for Pan Am. He alleges that “[t]his act of Libyan terrorism ultimately closed [Pan Am] on December 4, 1991[.]”—nearly three years after the bombing. As a result, he claims, “the bombing ended [his] professional career[.] . . . [.] result[ing] in the immediate loss of income” as well as “substantially all [of his] pension and medical benefits.”

Claimant and a number of other former Pan Am employees who lost their jobs after Pan Am’s demise sued Libya and others in United States federal court in 1994 for damages due to the Lockerbie bombing; their causes of action included, *inter alia*, tortious interference with contractual relations and tortious interference with advantageous business relations.¹ Libya was dismissed from the case on jurisdictional grounds in 1995.

In 1993, Pan Am too had sued Libya, though in Scotland, for both the destruction of its aircraft as well as a variety of other direct and consequential damages allegedly suffered because of the Lockerbie bombing. Among the claims Pan Am made was one based on a theory of causation similar to that advanced by Claimant here—that the Lockerbie bombing caused Pan Am to go out of business. In 2005, Pan Am and Libya settled that case.

A few years later, in August 2008, the United States and Libya concluded an agreement (the “Claims Settlement Agreement”) that settled numerous claims of U.S.

¹ See *Abbott v. Socialist People’s Libyan Arab Jamahiriya*, No. 1:94cv2444 (D.D.C.).

nationals against Libya, including claims “aris[ing] from . . . property loss caused by . . . aircraft sabotage . . . or the provision of material support or resources for such an act”² Two months later, in October 2008, the President issued an Executive Order, which, among other things, directed the Secretary of State to establish procedures for claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.³

The Secretary of State has statutory authority to refer “a category of claims against a foreign government” to this Commission.⁴ The Secretary delegated that authority to the State Department’s Legal Adviser, who, by letters dated December 11, 2008, January 15, 2009, and November 27, 2013, referred several categories of claims to this Commission in conjunction with the Libyan Claims Settlement Agreement.

It is the third of those referral letters, the 2013 Referral, that is relevant here.⁵ In particular, one of the 2013 Referral’s categories of claims, Category F, is at issue in this case. That category consists of “commercial claims of U.S. nationals provided that (1) the claim was set forth by a claimant named in *Abbott et al. v. Socialist People’s Libyan Arab Jamahiriya* (D.D.C.) 1:94-cv-02444-SS; and (2) the Commission determines that the claim would be compensable under the applicable legal principles.”⁶

² *Claims Settlement Agreement Between the United States of America and the Great Socialist People’s Libyan Arab Jamahiriya* Art. I (“Claims Settlement Agreement”), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008; *see also* Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999 (Aug. 4, 2008).

³ *See* Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008).

⁴ *See* International Claims Settlement Act of 1949 (“ICSA”), 22 U.S.C. § 1623(a)(1)(C) (2012).

⁵ *Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* (“2013 Referral” or “November 2013 Referral”).

⁶ 2013 Referral, *supra* note 5, at ¶ 8.

On December 13, 2013, the Commission published notice in the *Federal Register* announcing the commencement of the third Libya Claims Program pursuant to the ICOSA and the 2013 Referral.⁷

On June 11, 2014, the Commission received from Claimant a completed Statement of Claim seeking compensation under Category F of the 2013 Referral, together with exhibits supporting the elements of his claim.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICOSA,⁸ the Commission's jurisdiction here is limited to the category of claims defined by the November 2013 Referral. Therefore, in order to come within the Commission's jurisdiction, claimants filing under Category F of the 2013 Referral must establish that their claim (1) is a commercial claim, (2) is held by a U.S. national, and (3) was set forth by a claimant named in the *Abbott* case.⁹

Commercial Claim

Category F is limited to commercial claims. Commerce is generally viewed as the exchange of goods and services.¹⁰ Claimant alleges that he provided the service of his labor to Pan Am and that Libya's actions unlawfully precluded him from continuing to do so. Moreover, the remedy he seeks is money damages to compensate for what he otherwise would have earned but for Libya's actions. The commercial aspect of his claim is further evidenced by the fact that, in the *Abbott* complaint, he alleged as causes of action tortious interference with contractual relations and tortious interference with

⁷ *Notice of Commencement of Claims Adjudication Program*, 78 Fed. Reg. 75,944 (2013).

⁸ 22 U.S.C. § 1623(a).

⁹ 2013 Referral, *supra* note 5, ¶ 8.

¹⁰ *Claim of SUBROGATED INTERESTS TO PAN AMERICAN WORLD AIRWAYS, INC.*, Claim No. LIB-II-171, Decision No. LIB-II-161 (2012) (Proposed Decision); *see also Black's Law Dictionary* 304 (9th ed. 2009) (Commerce is the "exchange of goods and services, esp. on a large scale involving transportation between cities, states, and nations.").

advantageous business relations. Accordingly, this claim is a “commercial claim[]” within the meaning of the 2013 Referral.

Nationality

This claims program is limited to “claims of U.S. nationals.” Here, that means that a claimant must have been a national of the United States continuously from the date the claim arose until the date of the Claims Settlement Agreement. *See* Claim No. LIB-III-001, Decision No. LIB-III-001, at 5-6 (2014). Claimant has provided a copy of his current U.S. passport, which evidences his birth in the United States and his U.S. nationality at the time of the Claims Settlement Agreement. He therefore satisfies the nationality requirement.

Claimant Named in Abbott

To fall within Category F of the 2013 Referral, the claim must have been set forth by a claimant named in the *Abbott* case. Claimant has provided a certified copy of the complaint in that litigation, filed in the United States District Court for the District of Columbia, which names him as a plaintiff and sets forth his commercial claims against Libya. Based on this evidence, Claimant has satisfied this requirement as well.

In summary, this claim is within the Commission’s jurisdiction pursuant to the 2013 Referral and is entitled to adjudication on the merits.

Merits

Claimant bases his claim upon the closure of Pan Am on December 4, 1991.¹¹ He asserts that the 1988 Lockerbie bombing forced Pan Am to shut down operations three years later, which he claims in turn led to the end of his career as a Pan Am pilot. This,

¹¹ Claimant worked for Pan American World Airways, Inc., the principal airline unit of a holding company created in 1984, the Pan Am Corporation. *See* Leslie Wayne, *Pan Am, Still Hurting, Now Tackles the Unions*, N.Y. Times, Sept. 23, 1984, at F1. Except where a distinction is necessary, we will refer to both interchangeably as “Pan Am.”

he claims, resulted in his suffering damages consisting of the income and most of the pension and medical benefits he would have earned after Pan Am's closure. In support of his claim, Claimant has submitted detailed allegations and an expert's economic analysis of Pan Am's actual and projected financial performance shortly before and in the wake of the Lockerbie bombing.

Given the breadth and complexity of Claimant's arguments, we begin with an overview of what the evidence shows about Pan Am's financial and economic position—both prior to Lockerbie and continuing through its bankruptcy proceedings—and then summarize the factual allegations specific to his claim. We then turn to an analysis of the legal principles as they apply to the evidence.

Factual Backdrop to Claimant's Allegations

Pan Am's Finances Prior to Lockerbie Bombing: Pan Am was long considered America's flagship international airline. Until deregulation of the airline industry in 1978, it enjoyed a virtual monopoly on international routes among U.S. carriers, insulating it from competitive pressures it otherwise would have faced.¹² Pan Am began to experience financial problems in the 1960s, however, attributable in part to its purchase of dozens of Boeing 747 jumbo jets; its problems were further aggravated by surging jet fuel prices brought about by the 1973 Arab oil embargo.¹³ The dynamics of the entire aviation industry changed even more dramatically, however, with the passage of the Airline Deregulation Act of 1978.¹⁴ More domestic carriers entered the international market, feeding into overseas routes with their extensive domestic networks;

¹² Agis Salpukas, *Bankruptcy Petition Is Filed by Pan Am to Get New Loans*, N.Y. Times, Jan. 9, 1991, at A1; Dan Reed, *Pan Am About to Make Its Final Exit*, USA Today, Oct 31, 2006, at 1B.

¹³ See *Spellacy v. Airline Pilots Ass'n-Int'l*, 156 F.3d 120, 123 (2d Cir. 1998); Reed, *supra* note 12.

¹⁴ Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

these carriers also had more flexibility than Pan Am in setting their own fares.¹⁵ They also sought to assemble new domestic route networks, ultimately resulting in the now-familiar “hub-and-spoke” system.¹⁶ In the years that followed, domestic passenger numbers increased substantially; at the same time, fares fell by 20%.¹⁷

Pan Am had difficulty adjusting to this new environment. Without a strong domestic network, it faced competition internationally from U.S. carriers that could now operate overseas with passengers from their own domestic feeder flights.¹⁸ In 1980, Pan Am sought to remedy this by acquiring National Airlines, an airline with a domestic route network, but it apparently “grossly overpaid” for National, only adding to its financial problems.¹⁹ Soon thereafter, the company decided to begin selling assets in order to raise capital. In 1980, it sold its New York office tower for \$400 million,²⁰ and in 1981, it sold the Intercontinental Hotel chain for \$500 million.²¹ A few years later, in April 1985, Pan Am sold its entire Pacific Division to United Airlines for \$750 million.²² During this time, Pan Am also sought from its employee unions, including its pilot union, various concessions, such as wage cuts, elimination of overtime pay for flight attendants, and a reduction in the number of flight engineers for certain flights.²³ An effort to freeze

¹⁵ See Reed, *supra* note 12.

¹⁶ See *Ground Control, We Seem to Have a Problem; The World's Airlines Are Facing Their Biggest-ever Shake-out*, Economist, Jan. 26, 1991, at 57 [hereinafter *Ground Control*].

¹⁷ *Id.*

¹⁸ See Reed, *supra* note 12; Martha M. Hamilton, *Aviation Pioneer Pan Am Folds Its Wings at Age 64*, Wash. Post, Dec. 5, 1991, at A1; Scott McCartney, *The Middle Seat: Return of Pan Am, for a Weekend*, Wall St. J., Oct. 27, 2011, at D1.

¹⁹ See Hamilton, *supra* note 18; Reed, *supra* note 12.

²⁰ Thomas Easton, *Years of Losses Land Pan Am in Bankruptcy*, Baltimore Sun, Jan. 9, 1991, at 1A.

²¹ Pan Am. World Airways, Inc., 1982 Annual Report 27 (1983); Robert A. Bennett, *Pan Am's Disappearing Act*, N.Y. Times, Jan. 18, 1987, at F1.

²² Pan Am Corp., Annual Report (Form 10-K), at 28, 40, F-10 (1987) [hereinafter Pan Am Corp. 10-K 1987].

²³ See Brett Pulley, *Lost Horizons: A Grand Tradition Can Make a Fall That Much Harder*, Wall St. J., Sept. 16, 1991, at A1; Mark Potts, *Pan Am Strife Dramatized by Walkout*, Wash. Post, Aug. 17, 1984, at E1.

employee pension funds in 1984 resulted in a brief strike.²⁴ Another employee strike took place in 1985 as a result of a wage dispute.²⁵

The following year, several events outside of Pan Am's control had a further negative impact on the airline's finances. These included the terrorist bombing of a Trans World Airlines jetliner and the hijacking of a Pan Am jet in Karachi, Pakistan, as well as the nuclear disaster in Chernobyl, USSR, all occurring in 1986.²⁶ In its 1987 Annual Report on Form 10-K filed with the U.S. Securities and Exchange Commission (SEC),²⁷ Pan Am took note of these events, indicating that "the public's concern regarding terrorist activity and the Chernobyl nuclear accident" had slowed international air travel, with a particular effect on Pan Am's Atlantic flights.²⁸ Consequently, Pan Am suffered net losses of \$463 million in 1986 and \$265 million in 1987.²⁹ In early 1987, some industry analysts questioned whether Pan Am was headed for bankruptcy, noting that the airline only had enough cash (a reported \$212 million) to operate through the first quarter of 1987.³⁰

A year later, in January 1988, Pan Am hired Thomas G. Plaskett as its new CEO; Mr. Plaskett implemented a turnaround plan that, according to Pan Am, focused on changes to the airline's route system and improvements in customer service.³¹ In the wake of these changes, Pan Am's third-quarter net income for 1988 increased more than

²⁴ See Potts, *supra* note 23.

²⁵ See Bennett, *supra* note 21.

²⁶ See *id.*

²⁷ The Form 10-K is a "financial report filed annually with the SEC by a registered corporation[.]" which "typically includes an audited financial statement, a description of the corporation's business and financial condition, and summaries of other financial data." *Black's Law Dictionary* 1607 (9th ed. 2009).

²⁸ Pan Am Corp. 10-K 1987, *supra* note 22, at 1-3.

²⁹ See *id.* at 1, 27, 28, F-3, F-7.

³⁰ Bennett, *supra* note 21.

³¹ See Voluntary Petition for Relief Under Chapter 11, Title 11, United States Code, exhibit C at 6, *In re Pan Am Corp.*, No. 91 B 10080 (Bankr. S.D.N.Y. Jan. 8, 1991) [hereinafter Bankruptcy Petition].

6% over the previous year to \$67.4 million from \$63.4 million.³² Nevertheless, as the airline would later explain in court proceedings, its “labor and other costs [in 1988] increased as a consequence of efforts to improve the service product and the effectiveness of the operation.”³³ In order to remain viable, Pan Am explored potential transactions with other carriers, including the possible sale of Pan Am to another carrier, but nothing came of this effort.³⁴

The Lockerbie Bombing: On December 21, 1988, Pan Am Flight 103, en route from London to New York, exploded in the skies over Lockerbie, Scotland, killing all 259 people on board as well as 11 more people on the ground.³⁵ The subsequent criminal investigation revealed that an explosive device had been placed inside an unaccompanied suitcase stored in the plane’s cargo hold.³⁶

The impact of the bombing on the aviation industry was significant. International air traffic fell dramatically, and bookings on Pan Am “evaporated.”³⁷ In 1991, CEO Plaskett would claim that the bombing had cost the airline approximately \$250 million in lost bookings for 1989.³⁸ Pan Am would report during the 1990 shareholders meeting

³² See Pan Am Corp., Annual Report (Form 10-K), at F-19 (1988); *Profits Up for Pan Am and T.W.A.*, N.Y. Times, Oct. 27, 1988, at D17.

³³ First Amended Disclosure Statement with Respect to the Revised Joint Consolidated Plan of Reorganization Proposed by the Debtors and the Official Committee of Unsecured Creditors for Pan Am Corp. and its Affiliated Debtors at 31, *In re Pan Am Corp.*, No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Oct. 24, 1991) [hereinafter Reorganization Plan].

³⁴ *Id.* at 13-14.

³⁵ George Lardner, Jr., *2 Libyans Indicted in Pan Am Blast*, Wash. Post, Nov. 15, 1991, at A1; President’s Comm’n on Aviation Sec. & Terrorism, Report to the President 14 (1990) [hereinafter Report of President’s Comm’n].

³⁶ Lardner, *supra* note 35; Report of President’s Comm’n, *supra* note 35, at 14-15. Although a Scottish court convicted a Libyan intelligence agent of the Pan Am 103 bombing, *see* Reed, *supra* note 12, a Presidential Commission found that Pan Am itself bore some of the responsibility for the tragedy, *see* Report of President’s Comm’n, *supra* note 35, at i, 6. And, in a lawsuit brought by relatives of the Lockerbie bombing victims, a jury agreed. *See* Macquarrie v. Alert Mgmt. Sys., Inc. (*In re Air Disaster at Lockerbie, Scotland on December 21, 1988*), 811 F. Supp. 89, 90 (E.D.N.Y. 1993); *see also* Pagnucco v. Pan Am. World Airways, Inc. (*In re Air Disaster at Lockerbie Scotland on December 21, 1988*), 37 F.3d 804 (2d Cir. 1994) (upholding the verdict on appeal).

³⁷ Hamilton, *supra* note 18; *see also* McCartney, *supra* note 18.

³⁸ *See* Salpukas, *supra* note 12.

that revenues for 1989 were down in the Atlantic division 14.5%, or \$258 million, from the previous year, and that “the [Lockerbie] bombing, and the resulting public reluctance to fly U.S. carriers, was the principal cause of the \$243 million year-over-year increase in the Corporation’s operating loss.”³⁹ Pan Am also cited higher costs due to FAA-mandated security procedures—which it asserted caused some flyers to switch to foreign carriers⁴⁰—as well as “increased competition in the North Atlantic and internal German markets”⁴¹ To maintain liquidity during this time, the company sold additional assets, including its subsidiary Pan Am World Services, Inc.⁴² Recognizing the need to expand its route network, Pan Am sought to partner with other major carriers, but, as the airline noted in 1991, such efforts proved fruitless due to its significant liabilities.⁴³

The Gulf Crisis and the Economic Recession: Pan Am’s finances began to improve at the beginning of 1990. In a March 9, 1990 press release, the airline noted that, despite continuing losses (again, resulting largely from declines in traffic in the Atlantic division), passenger traffic improved in the first part of the year: it was up 23% in January 1990 and up 26% in February 1990 over the same months a year earlier.⁴⁴ Even as late as the third quarter of 1990, the airline still managed to make an operating profit.⁴⁵ However, two events in the second half of the year had a calamitous effect on

³⁹ Pan Am Corp. Annual Shareholders’ Meeting, May 8, 1990, at I-1 (1990) (on file with Commission) [hereinafter Shareholders Meeting].

⁴⁰ *See id.*

⁴¹ Reorganization Plan, *supra* note 33, at 14, 31.

⁴² Pan Am Corp., Quarterly Report for Q1 (Form 10-Q), at 26 (1991) [hereinafter Q1 Quarterly Report 1991].

⁴³ *See* Bankruptcy Petition, *supra* note 31, exhibit C at 7.

⁴⁴ Shareholders Meeting, *supra* note 39, at A-1.

⁴⁵ *See* Pan Am Corp., Annual Report (Form 10-K), at F-61 (1990) [hereinafter Pan Am Corp. 10-K 1990]; Hamilton, *supra* note 18.

the airline industry. First, an economic recession struck the United States in July 1990.⁴⁶ Then, on August 2, 1990, Iraq invaded Kuwait.

The impact of these two events was enormous. Jet fuel prices skyrocketed from 60 cents a gallon to more than \$1.30 per gallon,⁴⁷ and passenger traffic fell sharply.⁴⁸ The airline industry as a whole posted record losses; indeed, one news report indicated that the jet fuel price hike and the recession “dealt carriers their biggest financial losses in history.”⁴⁹ Pan Am, of course, was not immune to these developments. In the quarter ending September 30, 1990, Pan Am lost \$29.1 million, or 19 cents a share; it had only lost \$18 million, or 12 cents a share, during the same period in 1989, the third quarter after the Lockerbie bombing.⁵⁰ Notably, although 1990 revenues had increased over the previous two years, most of this increase occurred prior to the invasion of Kuwait, after which revenues declined precipitously.⁵¹ The company’s consolidated net loss for that year was \$662.9 million, nearly double its loss from the previous year, 1989, the year right after the Lockerbie bombing.⁵² The company would later state that the “spike in fuel prices and [the] decline in traffic caused a substantial weakening of Pan Am’s liquidity and capital resources and effectively undermined Pan Am’s restructuring efforts.”⁵³

As a result of these losses, Pan Am was again forced to sell assets to remain afloat. On October 26, 1990, the airline sold its Internal German Service (IGS)—a

⁴⁶ Press Release, Nat’l Bureau of Econ. Research, NBER Business Cycle Dating Committee Determines that Recession Began in July 1990 (Apr. 25, 1991), available at <https://perma.cc/LZ7T-YT9A>.

⁴⁷ *Ground Control*, *supra* note 16.

⁴⁸ Reorganization Plan, *supra* note 33, at 14.

⁴⁹ Dirk Beveridge, *In Bankruptcy Court, Pan Am Quietly Puts End to Storied History*, Charlotte Observer, Dec. 5, 1991, at 2D.

⁵⁰ See *Pan Am Cites Losses, Fuel Prices in Filing for Bankruptcy*, Deseret News, Jan. 8, 1991, at A3; Pan Am Corp., Quarterly Report for Q3 (Form 10-Q), at 3 (1990).

⁵¹ Reorganization Plan, *supra* note 33, at 30.

⁵² *Id.*

⁵³ *Id.* at 14.

network of scheduled air services between the former West Germany and West Berlin—to Lufthansa for \$150 million.⁵⁴ More significantly, however, on November 14, 1990, Pan Am agreed to sell its lucrative London-Heathrow landing rights, along with other assets, to United Air Lines for \$400 million in cash.⁵⁵ The transaction would take place in two phases. Under Phase I, United paid Pan Am \$110 million in cash for the transfer of two aircraft and other assets between November 1990 and January 25, 1991.⁵⁶ Phase II of the agreement comprised the sale of the London routes and other property to United for \$290 million in cash.⁵⁷ However, a delay in the implementation of the second phase, which required regulatory approval,⁵⁸ put Pan Am in a difficult financial bind. The airline would later explain that, “[a]s the effects of the Middle East crisis and the recession became more pronounced and it became clear that regulatory approval of Phase II of the United Transaction would not occur by mid-January 1991, [Pan Am] faced an acute cash shortfall.”⁵⁹

Chapter 11 Bankruptcy Petition: On January 8, 1991, Pan Am voluntarily filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code.⁶⁰ According to Pan Am, it took this action “[i]n light of extremely limited cash resources, demands for payment from numerous creditors and defaults under various agreements,” after which “Pan Am determined that [Chapter 11 bankruptcy was] the best course of action”⁶¹ In an affidavit accompanying the bankruptcy petition, Pan Am Executive Vice President Peter T. McHugh expressed optimism about the future of the company given the “tangible

⁵⁴ Pan Am Corp. 10-K 1990, *supra* note 45, at 7; Q1 Quarterly Report 1991, *supra* note 42, at 26.

⁵⁵ See Bankruptcy Petition, *supra* note 31, exhibit C at 5; Q1 Quarterly Report 1991, *supra* note 42, at 11.

⁵⁶ Reorganization Plan, *supra* note 33, at 14; Q1 Quarterly Report 1991, *supra* note 42, at 11.

⁵⁷ Q1 Quarterly Report 1991, *supra* note 42, at 11.

⁵⁸ See Bankruptcy Petition, *supra* note 31, exhibit C at 12.

⁵⁹ Reorganization Plan, *supra* note 33, at 14.

⁶⁰ See Bankruptcy Petition, *supra* note 31.

⁶¹ Reorganization Plan, *supra* note 33, at 14.

operational progress” it had achieved as a result of a strategic plan implemented in 1989.⁶² Nevertheless, he explained that

[Pan Am] has been unable to realize the full benefits of [its strategic plan] because of extraordinary, external events beyond our control, including the terrorist bombing of Flight 103, soaring jet fuel prices caused by the Persian Gulf crisis and deteriorating economic conditions worldwide which have temporarily reduced the level of commercial air travel. . . . The confluence of these events has resulted in increased corporate expenses and decreased corporate revenues and [has] hindered the company’s ability to repay its existing, outstanding debts without the protection of this country’s bankruptcy laws.⁶³

Under a heading titled “Obstacles to Further Progress,” McHugh further explained that

[w]ere it not for two extraordinary, external events that occurred within the past year, 1990 would have been a year of solid progress Unfortunately, the abrupt and steep rise in oil prices on the heels of the Iraqi invasion of Kuwait has given us little time to rejoice in our successes.⁶⁴

McHugh noted that Pan Am “continue[d] to be haunted by the terrorist attack of Flight 103 in December 1988, which . . . exacted a tremendous financial toll on Pan Am which has exceeded \$350 million.”⁶⁵ However, he also made reference to “nearly two decades of operating losses caused by deregulation and radical changes in the world aviation markets.”⁶⁶ Similar statements were made both to the press and in Pan Am’s filings with the SEC at the time. McHugh reported that Pan Am only had \$30 million in available cash at the time of the bankruptcy petition,⁶⁷ which was described in one news report as a “very small amount by industry standards.”⁶⁸ Moreover, the company stated in its first

⁶² See Bankruptcy Petition, *supra* note 31, exhibit C at 2.

⁶³ *Id.* at 2.

⁶⁴ *Id.* at 13.

⁶⁵ *Id.* at 14.

⁶⁶ *Id.* at 4.

⁶⁷ *Id.* at 15.

⁶⁸ See Salpukas, *supra* note 12.

quarterly report of 1991 that “no significant assets remain which the Company could sell without severely impairing the Company's ability to continue as a going concern.”⁶⁹

Pan Am, it should be noted, was not the only airline that declared bankruptcy during this time period. Braniff Airlines filed for bankruptcy protection in 1989 and closed that same year.⁷⁰ Eastern Airlines filed for bankruptcy in March 1989, and it would eventually close on January 18, 1991.⁷¹ Continental Airlines filed for bankruptcy in December 1990, although it emerged in 1993 and continued to operate.⁷² On March 26, 1991, Midway Airlines filed for bankruptcy protection, and it was forced to close later that year.⁷³ America West Airlines filed on June 28, 1991, although it would later emerge from bankruptcy on August 25, 1994.⁷⁴ Trans World Airlines (TWA) filed for bankruptcy protection on January 31, 1992, although it too would emerge in 1993.⁷⁵

Pan Am's financial position continued to deteriorate after it filed the bankruptcy petition, which coincided with the start of ground operations in the First Gulf War against Iraq. Operating revenues for the airline dropped \$150.1 million in the first quarter of 1991 over the same quarter in 1990, a decrease of 19%.⁷⁶ Passenger revenue also fell, which the airline said “was primarily a result of the public's concern with overseas travel due to the recent crisis in the Middle East as well as the sale of the [Internal German

⁶⁹ Q1 Quarterly Report 1991, *supra* note 42, at 17.

⁷⁰ See Ivan L. Pitt & John R. Norsworthy, *Economics of the U.S. Commercial Airline Industry: Productivity, Technology and Deregulation* 77 tbl. 4.7 (1999).

⁷¹ See Pan American World Airways, Inc., Annual Report (Form 10-K), at 25 (1990) [hereinafter Pan Am Airways 10-K 1990]; *Pan Am Fights for Its Life*, *Economist*, Jan. 26, 1991, at 58.

⁷² See Pan Am Airways 10-K 1990, *supra* note 71, at 25; *America West Emerges from Bankruptcy*, *L.A. Times*, Aug. 26, 1994, at D2.

⁷³ See Pan Am Airways 10-K 1990, *supra* note 71, at 25; *America West Emerges from Bankruptcy*, *supra* note 72, at D2.

⁷⁴ See *America West Airlines Files for Chapter 11 Bankruptcy*, *N.Y. Times*, June 28, 1991, at D1; *America West Emerges from Bankruptcy*, *supra* note 72.

⁷⁵ See Jesus Sanchez & Victor F. Zonana, *TWA Seeks Bankruptcy Protection*, *L.A. Times*, Feb. 1, 1992, at A1; *America West Emerges from Bankruptcy*, *supra* note 72.

⁷⁶ Pan American World Airways, Inc., Quarterly Report for Q1 (Form 10-Q), at 27 (1991) [hereinafter Pan Am Airways Q1 Quarterly Report 1991].

Service] in the fourth quarter of 1990”⁷⁷ As of March 31, 1991, the airline had only \$5.9 million in cash, versus \$50.4 million on December 31, 1990—a drop of \$44.5 million, nearly 90%, in a mere three months.⁷⁸ Pan Am fared no better in the second quarter of 1991. Its operating revenues decreased 31.2% over the same quarter in 1990; passenger revenues alone decreased \$306.1 million during the second quarter to \$524.7 million from \$830.8 million in the second quarter of 1990.⁷⁹ Again, the airline attributed these decreases to public concerns regarding overseas travel in the wake of the Gulf Crisis, the weakness of the U.S. economy, and the IGS sale to Lufthansa, as well as the sale of the London routes to United (the last two presumably resulting in a decrease in passenger numbers).⁸⁰ In addition, the airline subsidiary’s available cash remained very low at the end of the second quarter; although it was up from the end of the first quarter, cash available was still only \$10.4 million, versus \$50.4 million at the end of 1990.⁸¹

Meanwhile, Pan Am had been actively seeking a buyer for some or all of its assets since the spring of 1991.⁸² On July 27, 1991, Pan Am and Delta Airlines entered into an Asset Purchase Agreement, amended August 12, 1991, pursuant to which Pan Am “agreed to sell [the Pan Am Shuttle] and a substantial portion of Pan Am’s international route authorities and other assets to Delta for \$416 million in cash[,] . . . and Delta agreed

⁷⁷ *Id.*

⁷⁸ *Id.* at 31.

⁷⁹ Pan American World Airways, Inc., Quarterly Report for Q2 (Form 10-Q), at 35 (1991) [hereinafter Pan Am Airways Q2 Quarterly Report 1991].

⁸⁰ *See id.* Pan Am did report a second quarter profit of \$99.9 million, *see id.* at 3; however, contemporaneous news reports indicated that the airline would have reported a loss for this period had it not been for the \$260 million gain realized from the one-time sale of its London-Heathrow landing rights to United, *see* Asra Q. Nomani, *Pan Am Plans 5,000 Layoffs; More Possible*, Wall St. J., Aug. 5, 1991, at A3. (Payment under Phase II of the United Transaction did not take place until April 3, 1991. *See* Reorganization Plan, *supra* note 33, at 14.)

⁸¹ *See* Pan Am Airways Q2 Quarterly Report 1991, *supra* note 79, at 40.

⁸² *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 461 (2001).

to assume certain liabilities and made certain other undertakings”⁸³ The routes sold included “virtually all of Pan Am’s service across the Atlantic and beyond.”⁸⁴ The transaction occurred in two phases, the second of which was scheduled to close on November 1, 1991.⁸⁵ The agreement was conditioned on, *inter alia*, Delta hiring 6,600 Pan Am employees, including approximately 774 pilots and flight engineers who were to be selected on the basis of seniority.⁸⁶ In addition, in a separate letter agreement dated August 11, 1991, Delta agreed to invest in a reorganized Pan Am (“Pan Am II” or “New Pan Am”), conditioned on the completion of transactions outlined in the Asset Purchase Agreement.⁸⁷ As part of this reorganization, Delta agreed that Pan Am II would employ 6,900 more of Pan Am’s existing employees.⁸⁸

Pan Am was still sustaining “substantial operating losses” during the fourth quarter of 1991; it therefore entered into another agreement with Delta on October 22, 1991, this one for additional debtor-in-possession financing in order to keep the airline afloat.⁸⁹ A subsequent amendment a few days later, on October 25, 1991, increased the amount and allowed for advances with certain conditions.⁹⁰ During this time, the employee unions complained of various concessions demanded of them by Pan Am,

⁸³ Reorganization Plan, *supra* note 33, at 23; *see also* Pan Am Corp., Quarterly Report for Q2 (Form 10-Q), at 18 (1991) [hereinafter Q2 Quarterly Report 1991].

⁸⁴ Beveridge, *supra* note 49.

⁸⁵ Reorganization Plan, *supra* note 33, at 23.

⁸⁶ Order Pursuant to Sections 105, 363 and 365 of the Bankr. Code Authorizing Pan Am Corp., Pan American World Airways, Inc. & Pan Am Shuttle, Inc. to Sell to Delta Air Lines, Inc. Certain Int’l Route Auths. & Certain Other Assets Free & Clear of All Liens, Claims & Encumbrances Except as Permitted in the Asset Purchase Agreement & the Assumption and Assignment of Executory Contracts & Unexpired Leases with Respect thereto Pursuant to the Asset Purchase Agreement Dated July 27, 1991, at *8-10, 1991 Bankr. LEXIS 1063 (Bankr. S.D.N.Y. Aug. 12, 1991) (No. 91 B 10080 (CB) through 91 B 10087 (CB)) [hereinafter Order Authorizing Delta Transaction]; Q2 Quarterly Report 1991, *supra* note 83, at 20; *Abdu-Brisson v. Delta Air Lines, Inc.*, No. 94 Civ. 8494(HB), 1999 WL 944505, at *1 (S.D.N.Y. Oct. 19, 1999).

⁸⁷ Q2 Quarterly Report 1991, *supra* note 83, at 18, 26-27; Order Authorizing Delta Transaction, *supra* note 86, at *11-12; *Pan Am Corp. v. Delta Air Lines, Inc.* 175 B.R. 438, 446-47 (S.D.N.Y. 1994).

⁸⁸ Q2 Quarterly Report 1991, *supra* note 83, at 28; *Pan Am Corp. v. Delta Air Lines*, 175 B.R. at 446-47.

⁸⁹ *See* Pan Am Corp., Quarterly Report for Q3 (Form 10-Q), at 12, 18 (1991).

⁹⁰ *Id.* at 12.

including wage freezes and other cutbacks, as a condition of leaving bankruptcy.⁹¹ For its part, Pan Am, through its spokesman, said that it ““must have a new labor agreement in place to emerge from bankruptcy.””⁹² Meanwhile, the transfer of Pan Am’s Atlantic assets to Delta took place as anticipated on or about November 1, 1991, with Pan Am having received by that point the full \$416 million in cash.⁹³

Closure of Pan Am: On December 3, 1991, Delta decided that it would not provide further funding to Pan Am or invest in Pan Am II.⁹⁴ The next day, on December 4, Pan Am ceased all operations.⁹⁵ Approximately 10,000 Pan Am employees lost their jobs, along with their wages and benefits.⁹⁶ News reports at the time suggested that Delta pulled out of the deal because it learned that the cost required to keep Pan Am afloat was millions more than originally anticipated, and that the reorganization plan, in light of increasing losses both at Pan Am and in the industry in general, was simply not feasible.⁹⁷

Employee Claims in Bankruptcy: During the bankruptcy proceedings but prior to Pan Am ceasing operations, the employees of Pan Am, as creditors of the bankruptcy estate, had filed various claims for wages and benefits earned.⁹⁸ The employees were represented by various unions, including the Air Line Pilots Association (“ALPA”), which represented all but one of the Pan Am pilot claimants currently before the

⁹¹ See Glenn Kessler, *Pan Am's Troubled Flight From Bankruptcy*, Newsday, Oct. 31, 1991, at 53.

⁹² *Id.*

⁹³ Pan Am Corp. v. Delta Air Lines, 175 B.R. at 452.

⁹⁴ See Hamilton, *supra* note 18; Brett Pulley, *Bidders for Pan Am Routes Face Off In Court*, U.S. Transportation Agency, Wall St. J., Dec. 9, 1991, at A5.

⁹⁵ O’Connor v. Pan Am Corp. (*In re Pan Am Corp.*), 1999 U.S. Dist. LEXIS 14612, at *5 (S.D.N.Y. Sept. 22, 1999); Pan Am Corp. v. Delta Air Lines, 175 B.R. at 488.

⁹⁶ See Luedke v. Delta Airlines, Inc., 155 B.R. 327, 329 (S.D.N.Y. 1993).

⁹⁷ See Beveridge, *supra* note 49; Hamilton, *supra* note 18; Martha M. Hamilton, *Flying on the Edge of Extinction*, Wash. Post, Dec. 5, 1991, at B11.

⁹⁸ See Debtors’ Omnibus Objection to Certain Proofs of Claim Filed by Debtors’ Employees as Priority Claims at 2, *In re Pan Am Corp.*, No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Nov. 26, 1991) [hereinafter *Objection to Priority Claims*].

Commission.⁹⁹ The claims filed included priority claims under 11 U.S.C § 507(a)(3), which encompassed “allowed unsecured claims . . . earned within 90 days before the date of the filing of the petition . . . for – (A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual”¹⁰⁰ Employees also filed administrative claims under § 507(a)(1), which gave first priority to “administrative claims” under § 503(b), which included “the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case”¹⁰¹

After Pan Am ceased operations, it became clear that it would not be able to pay the administrative claims in full, or make any distribution at all to pre-petition unsecured creditors, including those with priority claims.¹⁰² After negotiations with various employee unions over the next few years, Pan Am petitioned the bankruptcy court to allow it to make distributions to its former employees of about 9.6% of their administrative claims.¹⁰³ The petition was granted and the distributions were made to all former employees on December 19, 1994.¹⁰⁴

A little more than a year later, on February 15, 1996, the bankruptcy court created the Pan Am Liquidation Trust, appointed a trustee, and established a procedure for the

⁹⁹ See Reorganization Plan, *supra* note 33, exhibit J.

¹⁰⁰ 11 U.S.C § 507(a)(3) (1994); see *Objection to Priority Claims*, *supra* note 98, at 2; *Verified Motion for Order Approving Settlement of Certain Employee Claims Issues, Establishing Employee Claims Allowance Process and Expunging Administrative Claims* at 2-3, *In re Pan Am Corp.*, No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. June 23, 1994).

¹⁰¹ 11 U.S.C §§ 503(b)(1)(A), 507(a)(1).

¹⁰² *Motion for Entry of an Order Pursuant to Federal Rule of Bankruptcy Procedure 9019 Approving Settlement of Litigation Between Pan Am and Libya* at 3, *In re Pan Am Corp.*, No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Mar. 11, 2005) [hereinafter *Settlement Motion*]; *O'Connor v. Pan Am Corp.* (*In re Pan Am Corp.*), 1999 U.S. Dist. LEXIS 14612, at *5-6 (S.D.N.Y. Sept. 22, 1999).

¹⁰³ *Evergreen Int'l Airlines, Inc. v. Pan Am Corp.* (*In re Pan Am Corp.*), 1995 U.S. Dist. LEXIS 8402, at *3 (S.D.N.Y. June 20, 1995).

¹⁰⁴ *Id.* at *4-5.

distribution of Pan Am's assets.¹⁰⁵ Under the process outlined in the order creating the trust, only allowed administrative claims under § 507(a)(1) would receive a distribution; other creditors would not receive anything, including those who held pre-petition unsecured claims.¹⁰⁶ Moreover administrative claims would only be paid approximately 22 cents to the dollar.¹⁰⁷ Pan Am transferred all of its remaining assets to the Liquidation Trust, which then paid the holders of administrative claims approximately 22% of their claims.¹⁰⁸

The Order establishing the Liquidation Trust also included a provision stating that “[i]f on or before April 15, 2006, the Trustee . . . has won or received any recovery in or from any litigation pertaining to the loss of Flight 103 over Lockerbie, Scotland, including . . . any recovery from the Libyan government . . . in an amount equal to at least \$10,000,000, the Trustee shall make a distribution to each holder of an Administrative Claim of its Pro Rata Share of such recovery”¹⁰⁹

Scottish Action and Settlement Between Libya and Pan Am: Meanwhile, on October 6, 1993, Pan Am had filed suit against Libya in the Scottish Court of Session, claiming monetary damages for both the physical loss of the plane and the subsequent loss of business.¹¹⁰ In the lawsuit, Pan Am alleged that “[b]ut for the destruction of Flight 103, the bankruptcy would not have occurred.”¹¹¹ Libya responded that Pan Am could not prove that the bombing caused its economic losses and bankruptcy and that,

¹⁰⁵ See Order Pursuant to 11 U.S.C. § 105(a) to Establish a Procedure for the Distribution of Funds, to Wind Up the Debtors' Estates and to Appoint a New Responsible Officer, *In re Pan Am Corp.*, No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Feb. 15, 1996) [hereinafter Order Establishing Trust]; *O'Connor*, 1999 U.S. Dist. LEXIS 14612, at *9.

¹⁰⁶ See Order Establishing Trust, *supra* note 105; Settlement Motion, *supra* note 102, at 3-4; *O'Connor*, 1999 U.S. Dist. LEXIS 14612, at *9-10.

¹⁰⁷ See Order Establishing Trust, *supra* note 105, at 4; Settlement Motion, *supra* note 102, at 4.

¹⁰⁸ *O'Connor*, 1999 U.S. Dist. LEXIS 14612, at *10-11.

¹⁰⁹ Order Establishing Trust, *supra* note 105, at 6; see also Settlement Motion, *supra* note 102, at 5.

¹¹⁰ See Settlement Motion, *supra* note 102, at 1-2, 7, 9-10.

¹¹¹ *Id.* at 10 (citing Closed Record, *Pan American World Airways v. Al Megrahi*).

instead, “the effective causes of any cessation of [Pan Am’s] operations in December 1991 were the commercial consequences of the Iraqi invasion of Kuwait and the increase in oil prices that year.”¹¹²

Years later, on February 18, 2005, Libya and Pan Am concluded a settlement in that lawsuit (the “Settlement Agreement”), under which Libya paid an undisclosed sum to Pan Am’s insurers and \$33 million to Pan Am, about \$30 million of which was to go to Pan Am’s administrative creditors, including approximately 15,000 former employees.¹¹³ A few weeks later, on March 11, 2005, Pan Am filed a motion (the “Settlement Motion”) in the U.S. Bankruptcy Court “for approval by this Court of [the Settlement Agreement] resolving all controversies with respect to that certain litigation commenced on October 6, 1993 by Pan Am against [Libya] in Scotland.”¹¹⁴

Despite a request from the Commission, Claimant’s counsel has not provided a copy of the Settlement Agreement. Although the settlement motion is publicly available, the agreement itself is not: the bankruptcy court sealed it as confidential, and we have been unable to locate any copy of it.¹¹⁵ Our knowledge regarding the Settlement Agreement is therefore limited to statements in the Settlement Motion.

The Settlement Motion referred to two portions of Pan Am’s claims against Libya covered by the Settlement Agreement: 1) the “Hull Claim”; and 2) the “Pan Am Losses Claim.” The Hull Claim was defined as those portions of the claim relating to “the physical loss of the hull[,]” and specifically, the “value of the hull of the destroyed

¹¹² *Id.* at 11 (quoting Closed Record at 29).

¹¹³ *See id.* at 2, 12; Reed, *supra* note 12.

¹¹⁴ Settlement Motion, *supra* note 102, at 1-2.

¹¹⁵ *See* Order Pursuant to Sections 105 and 107 of the Bankruptcy Code and Bankruptcy Rule 9018 Providing that a Confidential Settlement Agreement Between Pan Am and Libya Shall Not Be Made Publicly Available on the Court’s Electronic Filing System, *In re* Pan Am Corp., No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Mar. 11, 2005) [hereinafter Order of Confidentiality].

Aircraft”¹¹⁶ The Pan Am Losses Claim, meanwhile, encompassed the “direct and consequential losses arising as a result of the physical loss of the Aircraft,” including, *inter alia*, “losses to shareholders and employees”¹¹⁷ In defining these claims, the Settlement Motion cited the Closed Record in the Scottish proceedings, stating that “[a]s a result of the bankruptcy, Pan Am’s creditors were left with unpaid claims. These included the claims of lenders, as well as those of employees who lost their employment, pensions and health insurance benefits as a result of the bankruptcy.”¹¹⁸

The Settlement Motion states that the agreement was made “in full and final satisfaction of the Hull Claim and the Pan Am Losses Claim.”¹¹⁹ It further states that

[t]he Hull Claim and Pan Am Losses Claim are the only claims that are the subject of the Settlement. No other claims of any other person against the Defenders, whether or not asserted in the Scottish action or whether or not they have been or could be asserted in any other action or proceeding, are released or affected by the Settlement.¹²⁰

On March 22, 2005, the bankruptcy court granted the motion to approve the settlement, stating that “Pan Am is authorized and directed to distribute the net proceeds of the Settlement in accordance with the Order of this Court dated February 15, 1996.”¹²¹ The Settlement’s final payments were made in December 2006 and amounted to approximately 5-6% of what Pan Am owed its employees when the company ceased operations.¹²²

¹¹⁶ *Id.* at 6-7, 9.

¹¹⁷ *Id.* at 7, 10.

¹¹⁸ *Id.* at 9-10 .

¹¹⁹ Settlement Motion, *supra* note 102, at 12.

¹²⁰ *Id.* at 7.

¹²¹ Order Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure Approving Settlement of Litigation Between Pan Am and Libya, *In re Pan Am Corp.*, No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Mar. 22, 2005).

¹²² See Reed, *supra* note 12; Liquidating Trustee’s Report on Final Distribution, Notes to Financial Statements, at 6, *In re Pan Am Corp.*, No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. May 21, 2008) [hereinafter Trustee’s Final Report]; PanAmLiquidationTrust.com, <https://perma.cc/GU9J-9YSA>.

Factual Allegations and Argument Specific to Claimant

Claimant attests that he began working as a pilot for Pan Am in 1966, and held several flight and management positions over his ensuing 25-year career with the airline. He alleges that the Lockerbie bombing forced Pan Am to shut down on December 4, 1991, which he claims ended his career and resulted in loss of income as well as most of his pension and medical benefits. Specifically, his claim is for the salary he would have earned with Pan Am, based on the formula set forth in the collective bargaining agreement between Pan Am and the Air Line Pilots Association (“ALPA”), “until [his] retirement, or through the year 2001, whichever is the earlier, less any earned income (mitigation)” he made during that time. He also claims “pension plan contributions that would have been made by Pan Am.” Claimant asserted loss in wages and benefits assumes that he “would have . . . [continued] to fly as a flight engineer from age 60 to 65.”

Key to Claimant’s arguments is his contention that the Lockerbie bombing was the proximate cause of Pan Am’s closure in 1991, and that there “is an unbroken chain of events, from the Lockerbie bombing to the closure of Pan Am.” In his brief, Claimant asserts that “[p]rior to Lockerbie, Pan Am was doing well.” He notes that Pan Am hired a new CEO in January 1988, who “immediately instituted a growth program.” But, Claimant alleges, the Lockerbie bombing “immediately ended the airline’s rapidly improving financial position as passengers . . . abandoned the company and its flights.” He further alleges that “the U.S. government and private companies advised employees not to fly Pan Am on transatlantic flights.” Claimant argues that the Lockerbie bombing “sounded the death knell[]” for Pan Am. He also cites a 2001 Second Circuit decision,

which he states concluded that the Lockerbie disaster caused Pan Am's bankruptcy.¹²³ As to the legal principles, Claimant contends that both international law and the Commission's own precedent support a "proximate cause" standard, stating that the "natural sequence also requires only that the terrorist state could anticipate some measure of damage from its act." He asserts that the evidence presented meets this standard, thus entitling him to his lost income and benefits said to have resulted from the Lockerbie bombing.

With specific regard to his economic losses, Claimant argues that such losses are compensable under applicable legal principles. He notes that his employment with Pan Am was governed by the ALPA contract. Claimant maintains that this contract "did not expire[.]" and that, under the contract, he "could only be discharged for just cause after notice and hearing." Thus, he argues, the contract "established a property/commercial interest of continued employment." Citing decisions from the Commission's Iran Claims Program, he asserts that the "Commission compensates employees for lost compensation and benefits where an employment contract creates a property interest in future employment." He also argues that "[international] tribunal decisions worldwide support the claimants by granting lost income, pensions, profits, and other awards based on intangible property rights."

Supporting Evidence

Claimant has submitted numerous exhibits in support of his claim. This evidence includes an expert opinion, dated June 4, 2014, from Dr. Tulinda Larsen, an aviation

¹²³ The case in question was an age discrimination case brought against Delta Air Lines by several former Pan Am pilots who had been hired by Delta in accordance with the July 1991 Asset Purchase Agreement. In the section of the opinion setting forth the factual background, the court stated that, "[i]n January 1991, Pan Am finally succumbed to two years of crushing financial pressures caused by the bombing of Pan Am Flight 103 over Lockerbie, Scotland, and the dismal economic conditions that followed." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 461 (2d Cir. 2001).

economist, opining on the causes of Pan Am's bankruptcy; a June 6, 2014 affidavit from Thomas G. Plaskett, former Chairman and CEO of Pan Am, similarly opining on the impact of the Lockerbie bombing on Pan Am, including its finances; a copy of the complaint in the *Abbott* litigation; various letters in support of the Abbott Group's claims; several newspaper articles discussing the Lockerbie incident and the demise of Pan Am; a copy of a letter from the Libyan Chargé d'affaires at the United Nations to the Secretary-General, dated August 15, 2003, agreeing to Security Council demands, taking responsibility for the actions of its officials, and agreeing to pay compensation; a transcript of an address by CEO Plaskett to shareholders of the Pan Am Corporation in May 1990; a letter from Mr. Plaskett to all Pan Am employees, dated December 4, 1991, announcing the closure of Pan Am and the termination of all employees; a copy of the Pan Am-ALPA employment agreement in effect at the time of Pan Am's closure; and various other documents describing Claimant's income and benefits.¹²⁴

Analysis

To prevail under Category F of the 2013 Referral, Claimant must show that his claim is "compensable under the applicable legal principles."¹²⁵ Although the 2013 Referral does not define "applicable legal principles," the International Claims Settlement Act of 1949 ("ICSA") establishes the law the Commission is required to apply. We thus interpret the phrase "applicable legal principles" in Category F of the 2013 Referral to mean the Commission's statutorily mandated law.¹²⁶

¹²⁴ The vast majority of these documents were part of a general submission for all of the claimants who filed under Category F of the 2013 Referral, who were all alleged to have been former employees of Pan Am who lost their jobs when the airline ceased operations.

¹²⁵ 2013 Referral, *supra* note 5, ¶ 8.

¹²⁶ See *Claim of SUBROGATED INTERESTS TO PAN AMERICAN WORLD AIRWAYS, INC.*, Claim No. LIB-II-171, Decision No. LIB-II-161, 9-10 (2012) (Proposed Decision).

Under subsection 4(a) of the ICOSA, the Commission is directed to apply, in the following order, “the provisions of the applicable claims agreement” and “the applicable principles of international law, justice and equity” in its deliberative process.¹²⁷ The “applicable claims agreement” here is the 2008 U.S.-Libya Claims Settlement Agreement. By its provisions, the Claims Settlement Agreement covers claims that arise from injury, death, and property loss. However, the Agreement does not specify which legal principles to apply in determining the compensability of commercial claims, as Category F requires. The LCRA and Executive Order 13,477 are similarly silent. Since “the provisions of the applicable claims agreement” do not define the “applicable legal principles” to be applied in this Category F case, the Commission must turn to “the applicable principles of international law, justice and equity.” We turn first to international law and conclude that international law suffices to decide this case.

Under international law, “[e]very internationally wrongful act of a State entails the international responsibility of that State.”¹²⁸ Moreover, “[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”¹²⁹ Since “the mid-air destruction of an aircraft by terrorists in such circumstances as are present here is an internationally wrongful act,”¹³⁰ Libya must

¹²⁷ 22 U.S.C. § 1623(a)(2) (2012).

¹²⁸ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session* 43, art. 1, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001) [hereinafter ILC Draft Articles].

¹²⁹ *Id.* at 43, 51; see also *Claim of INTERLEASE, INC.*, Claim No. LIB-II-023, Decision No. LIB-II-163 (2012) (quoting Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 241-42 (Cambridge University Press 2006) (1953)) (“an unlawful act implies an obligation to make reparations to the injured party....”).

¹³⁰ *INTERLEASE*, *supra* note 129, at 8; see also *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Sabotage)*, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 (“Montreal Convention”). A person commits an offense under the Montreal Convention if he or she, *inter alia*,

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

“make full reparation” for any injury “caused by” the downing of Pan Am Flight 103. “The compensation [for an internationally wrongful act] shall cover any financially assessable damage including loss of profits insofar as it is established.”¹³¹ Thus, the damages alleged by Claimant, which consist of lost earnings and benefits, are in principle recoverable.¹³²

As we explain in more detail below, however, we deny Claimant’s claim for two reasons. First, he has failed to establish that his claim was not extinguished by a 2005 settlement between Pan Am and Libya. Second, he has failed to prove that the December 1988 bombing of Pan Am Flight 103 was a proximate cause of Pan Am ceasing its operations three years later (and, thus, of Claimant’s damages).

Claim extinguished: Claimant has failed to establish that his claim was not extinguished by the 2005 Settlement Agreement that ended the case Pan Am brought against Libya in Scotland. If the Settlement Agreement extinguished his current claim, Claimant would not be entitled to an award from the Commission

The fundamental problem is that we do not have access to a copy of the Settlement Agreement and so cannot conclusively determine whether it precludes his claim here. While some evidence we have about the settlement suggests that his current

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight

Montreal Convention, *supra*, at 568. At the time of the bombing, Libya, the United States, and the United Kingdom were all parties to the Convention. *See* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1998 I.C.J. 115, 121 (Feb. 27); Montreal Convention, *supra*, 24 U.S.T. at 601, 974 U.N.T.S. at 178, 180.

¹³¹ *See* ILC Draft Articles, *supra* note 128, art. 36

¹³² *Cf. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Judgment, 2012 I.C.J. 324, ¶ 40 (June 19) (holding that “in general, a claim for income lost as a result of unlawful detention is cognizable as a component of compensation.”) *available at* <https://perma.cc/BUD8-CUVV>.

claim was not extinguished, other evidence suggests that it was. Because the burden to establish the elements of his claim rests on Claimant,¹³³ we must deny his claim.

On the one hand, some aspects of the evidence indicate that the settlement was limited and did not cover the claim he is currently bringing before this Commission. The Settlement Motion Pan Am filed in U.S. bankruptcy court to approve the 2005 settlement includes language supporting this view: The Settlement Motion states that, “[t]he Hull Claim and Pan Am Losses Claim are *the only claims* that are the subject of the Settlement[.]” and “[n]o other claims . . . are released or affected by the Settlement.” Since the “Hull Claim” only involves claims relating to “the physical loss of the hull,” Claimant’s current claim seems not to be a “Hull Claim.” Arguably, his current claim is not a “Pan Am Losses Claim” either if the phrase “Pan Am Losses Claim” is limited to the administrative claims that Pan Am’s creditors had in bankruptcy.¹³⁴ While those administrative claims include some claims brought by “employees who lost their employment, pensions and health insurance benefits as a result of the bankruptcy,”¹³⁵ Claimant’s current claim is not based on his being a Pan Am creditor in the bankruptcy proceeding. In particular, the Pan Am employee claims in bankruptcy encompassed only wages and benefits actually earned prior to Pan Am ceasing operations, and not lost future wages and benefits for the period after Pan Am stopped operating. Thus, Claimant argues, the Pan Am Losses Claim includes only the claims employees like him might have had as creditors of Pan Am in bankruptcy, not any separate claims employees might

¹³³ See 45 C.F.R. § 509.5(b) (2015).

¹³⁴ The motion refers to the Pan Am Losses Claim by citing the Scottish court record, which states that “[a]s a result of the bankruptcy, Pan Am’s creditors were left with unpaid claims[.]”

¹³⁵ The 1996 Order establishing the Liquidation Trust included a provision stating that any recovery of more than \$10 million from Libya by the trustee with respect to Lockerbie bombing would be used to pay the holders of administrative claims. Since Pan Am received more than \$10 million (about \$33 million) under the 2005 settlement, *supra* p. 21; *see also* Trustee’s Final Report, *supra* note 122, exhibit A, at 8, it seems that the money would have gone to pay the holders of administrative claims in bankruptcy.

have directly against Libya, such as the one he brings here seeking only lost future wages and benefits.

On the other hand, without the language of the Settlement Agreement itself, we simply cannot be certain. The Settlement Motion describes the Pan Am Losses Claim as encompassing the “direct *and consequential* losses arising as a result of the physical loss of the aircraft,” including “losses to ... employees.” Moreover, since creditors were beneficiaries of the settlement, the Settlement Agreement might have contained a waiver clause covering all of Pan Am’s creditors, including former employees such as Claimant. It is possible that Pan Am’s creditors had to waive any and all claims related to the Lockerbie disaster, including those beyond the “Pan Am Losses Claim,” if the settlement were approved. On this point, it should be noted that the Settlement Motion states that notice of the settlement “has been provided to all interested creditors[]” and invites objections to the motion to be filed with the court.¹³⁶ An examination of the docket appears to indicate that no objections were filed, thus suggesting that former employees who had administrative claims in bankruptcy were aware of, and gave at least their tacit approval to, the Settlement Agreement.

Of course, the best way to resolve this lack of clarity would be to examine the Settlement Agreement itself as the “best evidence” of its contents.¹³⁷ However, Claimant has not provided a copy of the agreement. We have only the Settlement Motion seeking the bankruptcy court’s approval for the settlement. Moreover, Claimant himself states that, because the agreement was sealed by the court as confidential, “[t]here is no way to know the precise terms of the settlement.” He thus appears to concede that there is “no way to know” whether the settlement extinguished his claim. The problem, though, is

¹³⁶ See Settlement Motion *supra* note 102, at 17-18; Fed. R. Bankr. P. 9019.

¹³⁷ See Cheng, *supra* note 129, at 320-22.

that Claimant has the burden to establish that his claim has not been extinguished.¹³⁸ Without concrete evidence about the actual contents of the Settlement Agreement, Claimant cannot meet that burden.

Accordingly, because Claimant has failed to establish that the 2005 settlement did not extinguish his claims against Libya, we deny his claim. However, for the sake of administrative efficiency, and considering the relatively late stage of claims processing under this program, the Commission will nonetheless proceed to review and decide the other elements of the claim.

Proximate Cause: International law¹³⁹ requires that a claimant establish that an alleged wrongdoer have “proximately caused” the claimant’s damages.¹⁴⁰ Claimant here must thus show that Libya’s actions proximately caused his damages. In international law, “proximate” is often contrasted with “remote”¹⁴¹ or “indirect.”¹⁴² Another way to characterize a wrongdoer’s actions as “proximately causing” a claimant’s damages is to

¹³⁸ See 45 C.F.R. § 509.5(b) (2015).

¹³⁹ The Claims Settlement Agreement settles claims for property loss and other injuries “caused by” terrorist acts such as the Lockerbie bombing, *see* Claims Settlement Agreement, *supra* note 2, art. 1, but it does not provide any definition for “caused by” or further explanation of what is meant by the phrase. We thus must turn to international law. *See* 22 U.S.C. § 1623(a)(2)(B) (2012).

¹⁴⁰ *See Estate of VIRGEN MILAGROS FLORES*, Claim No. LIB-II-065, Decision No. LIB-II-043, at 9 (2011) (noting that the general standard for causation in international law is one of “proximate cause”); *see also* ILC Draft Articles, *supra* note 128, art. 31 cmt. 10 (“reference may be made to losses ‘attributable to [the wrongful] act as a proximate cause’”); *Administrative Decision No. II*, 7 R.I.A.A. 23, 29-30 (U.S.-Ger. Mixed Claims Comm’n 1923) (“The simple test to be applied in all cases is [the following]: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany’s act as a proximate cause?”).

¹⁴¹ *See* ILC Draft Articles, *supra* note 128, art. 31 cmt. 10 (“[t]here is a further element, associated with the exclusion of injury that is too ‘remote’ or ‘consequential’ to be the subject of reparation.”); *Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US\$100,000 (Category “C” Claims)* 21, U.N. Doc. S/AC.26/1994/3, 21 December 1994 (noting that “the most commonly used test in damage claims is whether the act of a State was the ‘proximate cause’ of the loss suffered, or whether that act was too remote to create liability.”)

¹⁴² *See* ILC Draft Articles, *supra* note 128, art. 31 cmt. 10 (citing, *inter alia*, *Administrative Decision No. II*, 7 R.I.A.A. 23, 29-30 (U.S.-Ger. Mixed Claims Comm’n 1923)) (“reference may be made to losses ‘attributable to [the wrongful] act as a proximate cause’, or to damage which is ‘too indirect, remote, and uncertain to be appraised’, or to ‘any direct loss . . . as a result of’ the wrongful act” (emphasis added)); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶ 462 (Feb. 26) (asking “whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent’s breach . . . and the injury”);.

say that those damages were “foreseeable” to the wrongdoer.¹⁴³ This approach excludes any damages, including lost earnings or income, that are “speculative” or “contingent.”¹⁴⁴ Moreover, “claims based on the loss of prospective earnings are generally not allowed under international law,” because such earnings are typically viewed as speculative and dependent on future uncertain contingencies.¹⁴⁵

Claimant has failed to establish that Libya’s actions were even a cause, let alone a proximate cause, of any damages he suffered. Claimant argues that because Libya is responsible for the Lockerbie bombing, it is also responsible for the damages he suffered from losing his job with Pan Am three years later when Pan Am ceased operations. His theory of causation appears to be based on a chain of events with several links: (1) Libya is responsible for the Lockerbie bombing; (2) because of the Lockerbie bombing, people flew less on Pan Am, and in particular, on Pan Am’s transatlantic routes, than they otherwise would have flown but for the Lockerbie bombing; (3) because people flew less on Pan Am, Pan Am received less in revenue in 1989 and 1990 than it otherwise would have received but for the Lockerbie bombing; (4) because Pan Am received less in revenue in 1989 and 1990, it had less “cash available” at the end of 1990 than it otherwise would have had but for the Lockerbie bombing; (5) because Pan Am had less cash available at the end of 1990 than it otherwise would have had but for the Lockerbie

¹⁴³ *Decision No. 7: Guidance Regarding Jus ad Bellum Liability*, 26 R.I.A.A. 10, 15 (Eri.-Eth. Claims Comm’n 2007) (stating that “the necessary connection is best characterized through the commonly used nomenclature of ‘proximate cause[.]’” and that “the Commission [would] give weight to whether particular damage reasonably should have been foreseeable . . .”);

¹⁴⁴ III Marjorie M. Whiteman, *Damages in International Law* 1765 (1937) (“[‘speculative’ and ‘contingent’ damages are usually disallowed”). The principle that damages are not recoverable if they are “speculative” applies specifically to claims of lost income. See *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Judgment, 2012 I.C.J. 324, ¶ 18 (June 19) (“Guinea’s claim with respect to Mr. Diallo’s post-expulsion remuneration is highly speculative and assumes that Mr. Diallo would have continued to receive US\$25,000 per month had he not been unlawfully expelled. While an award of compensation relating to loss of future earnings inevitably involves some uncertainty, such a claim cannot be purely speculative . . .”), available at <https://perma.cc/BUD8-CUVV>.

¹⁴⁵ *Claim of TWENTIETH-CENTURY FOX FILM CORP.*, Claim No. CU-2114, Decision No. CU-6050, at 10 (1971); see also generally ILC Draft Articles, *supra* note 128, art. 36, cmt. 27.

bombing, it had to seek reorganization under Chapter 11 in January 1991; (6) because it had to seek reorganization under Chapter 11 in January 1991, it had to cease operations in December 1991.

We address each link in Claimant's alleged causal chain in turn:

1. Libya is responsible for the Lockerbie bombing.

In 2001, a Libyan official was found by a Scottish court sitting in the Netherlands to be responsible for the Pan Am 103 bombing. For purposes of this case, we accept this finding as establishing this first link in the chain of Claimant's allegation that Libya's actions proximately caused his damages.

2. Because of the Lockerbie bombing, people flew less on Pan Am, and in particular, on Pan Am's transatlantic routes, than they otherwise would have flown but for the Lockerbie bombing.

The evidence suggests that people flew less on Pan Am, and in particular, on its transatlantic routes, because of the Lockerbie bombing. In assessing the causes of Pan Am ceasing its operations three years later, however, this mere fact does not suffice. The issue is not simply whether people flew less on Pan Am than they otherwise would have, but rather the extent to which they did so and just as importantly, for how long. Claimant has not provided any evidence of the extent and length of time the Lockerbie bombing's effect on reduced passenger loads lasted—a key inquiry given the three-year time period that elapsed between the bombing and the airline's closure.¹⁴⁶

¹⁴⁶ Moreover, the UNCC has rejected claims based on the existence of a general climate of fear caused by a State's wrongful action, stating that "it is the wide, indeed global, range over which such non-specific and widely diffused perceptions of threat are felt that makes them alone an inadequate basis for meeting the directness requirement" *Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of "E2" Claims*, ¶ 69, U.N. Doc. S/AC.26/1999/6, 19 March 1999 [hereinafter *UNCC Category E2 Second Instalment Report*]; see also *Kunhardt & Co. Case*, 9 R.I.A.A. 171 (U.S.-Venez. Comm'n 1903-1905) ("But that portion of the claim based upon [losses resulting from] the civil disorder which prevailed in the district does not appear to be well founded. The situation of claimants' property in that regard did not differ from that of other property within the same district, and no government is immune from the occurrence of civil commotions.").

The evidence we have suggests that the bulk of the effect of the Lockerbie bombing on Pan Am's passenger traffic levels was over by the end of 1989, about a year after the Lockerbie bombing. Passenger traffic improved by the beginning of 1990: In the Atlantic division, Pan Am's 1990 revenue passenger miles¹⁴⁷ were nearly identical to 1988, suggesting a recovery in miles flown since the Lockerbie bombing.¹⁴⁸ Indeed, Pan Am's 1989 annual report to the Securities and Exchange Commission on Form 10-K specifically mentions a "recovery of traffic in the Atlantic Division in the fourth quarter of 1989"¹⁴⁹ Moreover, Pan Am's total revenue passenger miles had even gone up—30,678 million in 1990 versus approximately 28,900 million in both 1988 and 1989.¹⁵⁰

Claimant contends that the U.S. government and many private companies advised their employees not to fly on Pan Am in the wake of the Lockerbie bombing. Claimant's only evidence to support this allegation is the Plaskett affidavit,¹⁵¹ which is simply insufficient to support specific factual claims of this sort. Claimant failed to submit, for example, copies of any U.S. government travel warning or documents from IBM or any other employer that allegedly told its employees not to fly on Pan Am. Moreover, in view of the evidence that the effect of the bombing on Pan Am's passenger traffic appeared to be largely over by the end of 1989, this would be of little consequence in any event.

¹⁴⁷ Revenue Passenger Miles (RPMs) are "the basic measure of airline passenger traffic. [They] reflect how many of an airline's available seats were actually sold. For example, if 200 passengers fly 500 miles on a flight, this generates 100,000 RPMs." MIT Global Airline Industry Program, *Airline Data Project*, <https://perma.cc/L5FY-P64F>.

¹⁴⁸ See Pan Am Corp. 10-K 1990, *supra* note 45, at 14.

¹⁴⁹ See Pan Am Corp., Annual Report (Form 10-K), at 2 (1989) [hereinafter Pan Am Corp. 10-K 1989] ("Despite . . . recovery of traffic in the Atlantic Division in the fourth quarter of 1989, the revenue losses in the Atlantic markets during the first three quarters of 1989 caused Pan Am's passenger revenues for the year to decline by 3.4 percent").

¹⁵⁰ See Pan Am Corp. 10-K 1990, *supra* note 45, at 14.

¹⁵¹ See Plaskett Aff. at ¶ 6 ("Immediately after the attack the U.S. government advised its employees not to fly Pan Am[,] and private companies advised employees to avoid the airline on the Transatlantic. I personally spoke to the CEO of IBM to request that they withdraw the notice to its employees.").

3. Because people flew less on Pan Am, Pan Am received less in revenue in 1989 and 1990 than it otherwise would have received but for the Lockerbie bombing.

Two important problems render Claimant's evidence insufficient to prove this alleged link in the causal chain: First, the claim is a factual claim that needs to be proven with evidence, not assumptions. Second, even if true, the important question is not *whether* Pan Am received less revenue than it otherwise would have received but for the Lockerbie bombing, but rather *how much* less revenue; and on that question, Claimant's evidence is decidedly unhelpful.

First, we cannot simply assume that any reduction in Pan Am's passenger traffic (perhaps in the first part of 1989) necessarily led to a reduction in the revenue Pan Am would have received but for the Lockerbie bombing. Claimant must establish the reduction of revenue as a factual matter.

But the key problem with this aspect of Claimant's alleged causal chain is not the basic claim that Pan Am received less revenue than it otherwise would have but for the Lockerbie bombing, but rather the magnitude of any putative reduction in revenue. Dr. Larsen claims that Pan Am's revenue would have been \$450 million higher in 1989 and \$511 million higher in 1990 but for the Lockerbie bombing. She bases her conclusion on two facts: (1) Pan Am's total operating revenue decreased from 1988 to 1989, whereas it increased from 1987 to 1988 and from 1989 to 1990; and (2) operating revenue from Pan Am's Atlantic routes decreased from 53% of Pan Am's total operating revenue in 1988 to 46% in 1989 and then returned to 53% again in 1990. She then assumes that, but for the Lockerbie bombing, (1) total operating revenues would have increased from 1988 to 1989 by the same percentage as the increase from 1989 to 1990, 11%, rather than decreasing by 2%, as actually occurred; and (2) operating revenue from Pan Am's Atlantic routes would have made up 53% (rather than 46%) of that (much higher)

projected total. From there, she calculates that, but for the Lockerbie bombing, the revenue from Pan Am's Atlantic routes in 1989 would have been \$450 million higher than it otherwise was.¹⁵²

Yet, Pan Am's own 10-K form reported that Atlantic division revenue was only \$258 million lower in 1989 than it was in 1988, a claim repeated during the 1990 shareholders' meeting.¹⁵³ And even then, this reduction was attributed not only to the bombing, but also increased competition, as well as FAA-mandated security procedures.¹⁵⁴ Dr. Larsen posits a \$450 million increase over the actual 1989 revenue based solely on her assumption of identical revenue growth percentages and identical Atlantic Division revenue share over a selectively chosen three-year period. While the bombing most probably had some impact on Pan Am's 1989 revenues—as the contemporaneous financial records suggest—Dr. Larsen's figure of \$450 million is based on assumptions that are unsupported by the evidence in the record.

Dr. Larsen's 1990 revenue projection suffers from the same flaw, and indeed, compounds the problem by building off her projected 1989 figures. Dr. Larsen estimates 1990 revenues would have been \$511 million higher but for the Lockerbie bombing. She apparently bases this estimate on her \$450 million estimate for 1989 lost revenue, as well as an assumption that the actual 1990 growth rate of 11% and the 53% Atlantic share of revenue would have remained the same. This estimate is problematic, however, because it is based on a flawed projection for 1989 revenues. Moreover, the 1990 growth rate of 11% cannot be assumed in the hypothetical world without the Lockerbie bombing,

¹⁵² The figure may also come from a 1993 academic article that cites an oral statement made by Pan Am's former spokesman during a private interview on July 8, 1991. See Chris Sipika & Denis Smith, *From Disaster to Crisis: The Failed Turnaround of Pan America Airlines*, 1 J. Contingencies & Crisis Mgmt. 138, 145 (1993)..

¹⁵³ See *supra* pp. 9-10.

¹⁵⁴ See *id.*

because Pan Am's 11% increase in operating revenues for 1990 may have been a result of it starting 1990 from a lower baseline than it started 1989. If the baseline had been, as Dr. Larsen maintains, \$450 million higher (i.e., nearly 14% higher) than it actually was, there is little reason to think Pan Am would have had the same 1990 growth rate.

Indeed, Dr. Larsen's assumption that Pan Am was destined for inevitable revenue growth through this period is itself questionable and appears to be based on the assumption that the new CEO, Mr. Plaskett, was going to dramatically transform what had been flat/fluctuating revenues into continuous, consistent growth. Dr. Larsen's analysis does not begin until 1987, but if we broaden the time frame, Pan Am's revenue trajectory looks decidedly different. Through the 1980s, Pan Am's revenues were not consistently increasing in the manner Dr. Larsen hypothesizes for the 1987-1990 period. In fact, Pan Am's revenues had dropped significantly in the years before 1987, the year in which Dr. Larsen's analysis begins: from 1980 to 1983, Pan Am World Airway's total operating revenue was consistently between \$3.7 and \$3.8 billion, whereas by 1986, it had dropped about a third, down to \$2.5 billion; though the figure increased to \$2.9 billion in 1987, that was still more than 20% lower than it had been four years earlier.¹⁵⁵ As best we have been able to determine, operating revenue in the post-deregulation era had *never* been \$4.1 billion, the figure Dr. Larsen posits for 1990. Dr. Larsen's approach simply ignores the many challenges that confronted Pan Am prior to 1987, as if its woes prior to that time were irrelevant to its prospects going forward.

In short, Dr. Larsen's projections that Pan Am would have received \$450 million more in revenue in 1989 and \$511 million more in 1990 are unsupported by the

¹⁵⁵ See Pan Am Airways 10-K 1990, *supra* note 71, at 43; Pan Am. World Airways, Inc., 1982 Annual Report 21 (1983).

evidentiary record. Her opinion is thus insufficient to establish the extent to which the Lockerbie bombing affected Pan Am's revenues in 1989 and 1990.

4. Because Pan Am received less in revenue in 1989 and 1990, it had less "cash available" at the end of 1990 than it otherwise would have had but for the Lockerbie bombing.

Even if we were to accept Dr. Larsen's conclusions about the revenue Pan Am would have received but for the Lockerbie bombing, that increase in revenue would not necessarily translate directly into an equivalent increase in "cash available." Dr. Larsen appears to have assumed that the entire amount of her hypothetical projected increase in revenue would have remained in Pan Am's coffers at the end of 1990 when it sought reorganization under Chapter 11. Dr. Larsen indicates that Pan Am's cash position at the end of 1989 was \$162 million, a fact confirmed by the airline's SEC filings. She projects that, had the bombing not occurred, Pan Am would have instead had \$612 million in cash on hand—a difference of exactly \$450 million. It appears that Dr. Larsen simply added the projected revenue of \$450 million to Pan Am's actual 1989 cash-on-hand to arrive at her projected cash position for 1989.¹⁵⁶

This aspect of Dr. Larsen's opinion is baffling. On the one hand, Dr. Larsen seems to recognize that a projected increase in *revenue* of X does not necessarily translate directly to a projected increase in *profit* of X. She posits an increase in revenue of \$450 million in 1989 and an increase in profit (or, more precisely, a decrease in loss) of \$47 million for that same year because, as she notes, operating expenses would have increased by \$403 million. But, on the other hand, she treats the projected increase in

¹⁵⁶ More precisely, it appears as though she simply added the \$450 million to the "Operating Cash Flow." Since no change other than the increase in Operating Cash Flow affected the cash-on-hand, this amounts to the same thing.

revenue (as opposed to the projected increase-in-profit/decrease-in-loss) as a projected increase in “available cash.”

The projected cash position for 1990 suffers from similar shortcomings. It appears that Dr. Larsen again assumed that the increased revenue would have translated into increased cash on hand, without any consideration that expenses would have increased as well. She appears to have simply calculated her projected increase in operating revenue for 1990 (\$410,756,000) and added that to the actual cash flow for that year (-\$222,487,000), resulting in a projected cash flow for 1990 of \$188,269,000. Adding this to the actual 1990 figures for investing cash flow, financing cash flow, and the projected \$612,062,000 in cash she presumes Pan Am would have had at the beginning of 1990, she arrives at \$911,116,000 —almost \$1 billion— in cash had the Lockerbie bombing not occurred. This is more than eighteen times the actual figure of \$50 million. Dr. Larsen concludes this while also projecting that the company would have suffered a \$596 million net loss for the year (rather than the actual \$654 million net loss). As with the previous year’s projection, the additional operating revenue appears to have simply been added, dollar for dollar, to the projected 1989 end-of-year cash on hand. This approach to “cash available” incorrectly assumes a projected increase in revenue without any projected increase in expenses, and thus provides a mistaken picture of what Pan Am’s “cash available” would have been had the Lockerbie bombing not occurred.

Moreover, Dr. Larsen’s projected “cash available” at the end of 1990, \$911 million, is nearly twice the amount of cash Pan Am *ever* had in the years since deregulation—the high point being approximately \$470 million in 1984.¹⁵⁷ Furthermore,

¹⁵⁷ See Salpukas, *supra* note 12, chart.

Pan Am's cash position deteriorated rapidly between 1985 and 1987 (although there was improvement in 1988).¹⁵⁸ Dr. Larsen's opinion fails to consider any of these important aspects of Pan Am's financial history. Her projections about Pan Am's cash position had the Lockerbie bombing not occurred are thus unsupported and based on unduly optimistic assumptions that have no precedent for Pan Am in the post-deregulation era.

In sum, Dr. Larsen's contention that Pan Am would have had \$911 million in cash on hand at the end of 1990 is highly speculative and unsupported by the evidentiary record.

5. Because Pan Am had less cash available at the end of 1990 than it otherwise would have had but for the Lockerbie bombing, it had to seek reorganization under Chapter 11 in January 1991.

Whatever difference the Lockerbie bombing may have made to Pan Am's cash position at the end of 1990,¹⁵⁹ the evidence is insufficient to demonstrate that that difference would have prevented Pan Am from seeking reorganization under Chapter 11 in January 1991. While Pan Am's lack of cash may have been the most immediate "cause" of its Chapter 11 filing, the evidence indicates that numerous causes other than the reduction in cash due to the Lockerbie bombing would likely have sufficed to lead Pan Am to seek reorganization under Chapter 11.

Both the effects of the economic recession that began in July 1990 and Iraq's invasion of Kuwait the next month played a far greater and more immediate role in Pan Am's financial troubles in the run-up to its Chapter 11 filing than the Lockerbie bombing.¹⁶⁰ These two events had a catastrophic effect on the entire airline industry.

¹⁵⁸ See *supra* at Pan Am Corp. 10-K 1988, *supra* note 32, at F-4; Pan Am Corp. 10-K 1987, *supra* note 22, at F-5.

¹⁵⁹ As explained above, we are not willing to assume Pan Am would have had nearly \$1 billion in cash, *see supra*, when the most it ever had in the post-deregulation era was \$470 million and most of the time, its cash on hand was in the \$245 million to \$425 million range. See Salpukas, *supra* note 12, chart.

¹⁶⁰ See *supra* pp. 10-12.

Pan Am was by no means the only airline affected: Eastern Airlines went out of business in January 1991 (the same month Pan Am sought Chapter 11 protection), and Midway in November 1991 (the month before Pan Am ceased operations); two other airlines, Continental and America West, also sought to reorganize under Chapter 11 in the same period, Continental in December 1990 (the month before Pan Am) and America West six months later, in June 1991.

Although Pan Am had enjoyed revenue increases earlier in 1990 relative to the previous two years, its revenues after Iraq's invasion of Kuwait fell dramatically.¹⁶¹ The effect on Pan Am's cash reserves was also striking. In its own reorganization plan in the bankruptcy proceedings, Pan Am indicated that it had suffered an "acute cash shortfall" resulting from the Middle East crisis and the recession.¹⁶² While Dr. Larsen indicates that Pan Am's cash reserves fell by 75% from 1988 to 1990—perhaps implying that the drop could all be attributed to the Lockerbie bombing—what she fails to address is how much of this decrease occurred in the wake of the Iraqi invasion. The company's financial records show that Pan Am's cash-on-hand dropped more during the recession and the Gulf War than it did in the year following Lockerbie—nearly \$138 million over the course of 1990, versus only \$85 million during 1989.¹⁶³ While Claimant argues that Pan Am's cash-on-hand but for the Lockerbie bombing would have been high enough to forestall bankruptcy despite the Gulf War, recession, etc., this relies on an assumption that a measurable proportion of the reduction in cash available between December 1988 and July 1990 (the start of the recession) was caused by the bombing of Flight 103. Given Pan Am's past performance and its continuing net losses during that time,

¹⁶¹ *Id.*

¹⁶² *See supra* p. 12.

¹⁶³ *See* Pan Am Corp. 10-K 1990, *supra* note 45, at F-5; Q1 Quarterly Report 1991, *supra* note 42, at 5; Pan Am Corp. 10-K 1989, *supra* note 149, at 38.

Claimant has not shown this. Indeed, Pan Am's largest quarterly operating loss in the years leading up to the bankruptcy was in the fourth quarter of 1990, when Pan Am lost more than twice what it lost in the first quarter of 1989, right after the Lockerbie bombing.¹⁶⁴

Claimant makes much of the turnaround plan Mr. Plaskett instituted in 1988, arguing that the immediate results reveal evidence of likely future growth. He does not, however, offer the type of evidence of consistent growth necessary to prove, under international law, the connection between the Lockerbie bombing and any change in Pan Am's financial fortunes.¹⁶⁵ Pan Am did have a profitable third quarter in 1988, but

¹⁶⁴ See Pan Am Corp. 10-K 1990, *supra* note 45, at F-63.

¹⁶⁵ Although Claimant is of course not claiming damages for any of Pan Am's lost profits, the international law jurisprudence addressing lost business profits is relevant here because Claimant's claim of causation depends on an assumption that Pan Am would have otherwise been profitable enough to survive. So, Pan Am's putative lost profits become relevant. Under international law, it is exceedingly difficult to prove lost profits. See generally *supra* text accompanying note 145; see also *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), available at <https://perma.cc/DCC2-L5DE> ("Claimant did not have a viable business . . . and could not have made a profit regardless of whether [the alleged wrongdoing occurred]."); *Report and Recommendations Made by the Panel of Commissioners Concerning the Sixth Instalment of "F1" Claims*, ¶ 57, U.N. Doc. S/AC.26/2002/6, 13 March 2002 (denying a claim for lost revenue because "[t]he evidence [did] not demonstrate any consistent growth in the Claimant's revenues in the years immediately prior to Iraq's [wrongdoing] . . ."). The Commission itself has previously addressed whether and how to award lost profits, stating in a case in the Iran Claims Program that "'in determining whether lost profits should be paid in the event of termination of a contract by one party it is necessary to consider whether the other party could have reasonably expected to earn profits if the contract had not been terminated.'" *Claim of TERRAQUIP, INC.*, Claim No. IR-0917, Decision No. IR-0488, at 10 (1992) (citations omitted). A particularly detailed treatment of this issue by the Commission was provided in the *Claim of AMERICAN INTERNATIONAL GROUP, INC.*, Claim No. E-002, Decision No. E-030 (1987) (Final Decision), in the Ethiopian Claims Program. There, the Commission explained that

[The Commission's] responsibility to treat all claimants equitably requires that it exercise the utmost concern to insure that the value of assets asserted by the claimants are established by clear, accurate and unequivocal evidence. The projection of future increases in business or profitability, regardless of how well informed or how authoritative, are, in the end only guesses. The prospects in any individual case are dependent on numerous economic and political factors which may be reasonable to assume, but which are subject to complete change or reversal the day after the nationalization of the claimant's business. The Commission has found, therefore, that in order to insure that all claimants obtain fair and equal treatment in the consideration of their claims, projections of prospective growth or profits, however conservative in their estimates, which are not based strictly on documented past performance of the entity involved or existing contractual obligations, may not be used as the basis for a determination of value for losses due to nationalization.

operating losses for that year were still \$84 million.¹⁶⁶ Although changes to Pan Am's route system, as well as to its organizational and management structure may have led to an increase in income in 1988,¹⁶⁷ Claimant has not explained how these or any other changes made at that time would have, but for the Lockerbie bombing, ensured sufficiently improving profits or cash available to have staved off Pan Am's Chapter 11 filing. Moreover, the only recent year the airline turned a profit was in 1985 and even then, Pan Am had an operating *loss* of \$181.5 million: it only managed to eke out a profit of \$52 million by including the revenue from the one-time sale of its Pacific route network to United.¹⁶⁸ A company that is consistently operating at a loss like this, no matter what its cash position, will at some point have to cease operations.

In his affidavit, Mr. Plaskett argues that the lack of cash forced Pan Am to sell assets such as its valuable Heathrow routes and Internal German Service. But these sales, along with the more precipitous drop in cash, took place in 1990, not 1989, and were thus more proximately connected to what was happening in 1990. He also argues that the lack of cash prevented Pan Am from buying Northwest Airlines. Other than Mr. Plaskett's affidavit, however, Claimant has not submitted any evidence about a putative purchase of Northwest. Pan Am's 1989 Annual Report does refer to the possibility, but simply says that Pan Am "could not match a competing bid."¹⁶⁹

Id. at 7-8 (Proposed Decision).

¹⁶⁶ Operating income for the quarter ending September 30, 1988, was approximately \$89.2 million, *see* Pan American World Airways, Inc., Annual Report (Form 10-K), at F-28 (1989) [hereinafter Pan Am Airways 10-K 1989], while, as noted in the text, the operating loss for the year was approximately \$84 million, *see id.* at F-3. The operating loss for the fourth quarter was \$117.8 million. *See id.* at F-28.

¹⁶⁷ *See* Bankruptcy Petition, *supra* note 31, exhibit C at 6.

¹⁶⁸ *See supra* p. 8. *See* Hamilton, *supra* note 18; Beveridge, *supra* note 49; Pan Am Corp. 10-K 1987, *supra* note 22, at 1, 27.

¹⁶⁹ Pan Am Corp., Annual Report to Stockholders 8 (1989).

6. Because it had to seek reorganization under Chapter 11 in January 1991, it had to cease operations in December 1991.

The evidence about what happened in 1991 suggests that the road from Pan Am's Chapter 11 filing in January 1991 to its ceasing operations in December of that year was not an inevitable result of its Chapter 11 filing; rather, it had complex causes, many of which were specific to events in 1991 itself. More importantly, the evidence is insufficient to show any connection with the Lockerbie bombing. First, the importance of the Gulf War to Pan Am's fortunes while under Chapter 11 cannot be understated. Ground operations began just as Pan Am sought to reorganize in January 1991. Coinciding with this, Pan Am's first two quarters of 1991 were disastrous. It suffered a precipitous drop in cash available, from \$66 million to \$30.5 million, between the first and second quarters of 1991. Although its cash position did rebound to \$52.5 million by the beginning of the fourth quarter (after the end of both the recession and the Gulf War), that was no doubt largely attributable to the one-time cash infusion of \$290 million from the closing of Phase II of the United Transaction.¹⁷⁰ It is only then, not before, that the company failed.¹⁷¹ Importantly, Pan Am at the time blamed its financial situation not on the Lockerbie bombing, but rather on the public's fears of overseas travel during the Gulf War, the weakness of the U.S. economy, and the sale of Internal German Service and the Heathrow routes.¹⁷²

Even the final death blow when Delta pulled out of the deal to invest in "Pan Am II" appears to have had nothing to do with the Lockerbie bombing, or even, in any direct sense, with Pan Am's Chapter 11 reorganization. Claimant argues that Delta's pull-out was simply the final link in the chain of causation that started with the Lockerbie attack.

¹⁷⁰ *see supra* note 57 and accompanying text.

¹⁷¹ *See* Q1 Quarterly Report 1991, *supra* note 42, at 5.

¹⁷² *See supra* at 15.

Events in 1991, however, were clearly intervening, and, in a legal sense, suffice to sever any possible causal link with the Lockerbie bombing.¹⁷³ Delta must certainly have been aware of (and long since incorporated into its decision to invest) the impact of the Lockerbie bombing on Pan Am's prospects when it agreed to the "Pan Am II" deal, which envisioned Pan Am II retaining 6,900 of Pan Am's employees and thus might have saved Claimant's job. Delta had already bought the rights to Pan Am's Heathrow route network, including the very transatlantic routes that Pan Am claims were most tainted in the flying public's mind (including Pan Am 103's London-New York route). So, Delta clearly understood the connection between the Lockerbie bombing and the value of Pan Am when it decided it would invest in the prospective reorganized "Pan Am II" in August 1991. Delta pulled out of the "Pan Am II" deal in December nonetheless, when it learned that the cost to keep Pan Am afloat was going to be millions more than originally anticipated and that the reorganization plan, in light of increasing losses both at Pan Am and in the industry in general, was simply not feasible.¹⁷⁴ There is simply no evidence that any of Delta's decisions in 1991 (whether to abandon its prospective investment in

¹⁷³ As long as they are not foreseeable, "[i]ntervening acts or decisions, as a general rule, break the chain of causation[,] and losses resulting therefrom are not compensable." *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the Fourth Instalment of "F4" Claims* ¶ 47, U.N. Doc. S/AC.26/2004/16, 9 December 2004. *But cf. UNCC Category E2 Second Instalment Report, supra* note 146, ¶ 72 ("[u]nder generally accepted principles of law, intervening acts of a third person that are a reasonable and foreseeable consequence of the original act do not break the chain of causation, and hence do not relieve the original wrongdoer of liability . . ."). The International Court of Justice has also spoken to this issue, finding in one case that the respondent state's wrongful act did not give rise to a corporation's insolvency, since it would still not have been able to carry out an orderly liquidation. The claim, brought by the United States, addressed the alleged frustration by Italy of an orderly liquidation in bankruptcy of a certain company, allegedly violating a provision of a friendship, commerce, and navigation treaty, by requisitioning it. *See Elettronica Sicula S.P.A. (ELSI) (U.S. v. It.)*, Judgment, 1989 I.C.J. 15 (July 20). In rejecting the claim, the court noted that "[i]f . . . [the company] . . . had no practical possibility of carrying out successfully a scheme of orderly liquidation under its own management[,] . . . it cannot be said that it was the requisition that deprived it of this faculty of control and management." *Id.* ¶ 101. The court also pointed out "the uncertain and speculative character of the causal connection . . . between the requisition and the results attributed to it[,]" and explained that "the underlying cause [of the harm claimed] was ELSI's headlong course towards insolvency; which state of affairs it seems to have attained even prior to the requisition." *Id.* Indeed, the court concluded that "the possibility . . . of orderly liquidation . . . is purely a matter of speculation." *Id.*

¹⁷⁴ *See supra* at 17.

“Pan Am II” or to withhold additional debtor-in-possession financing) were affected by the Lockerbie bombing almost three years earlier.

In short, Claimant has failed to establish a sufficiently proximate causal connection between the 1988 Lockerbie bombing and Pan Am’s closure three years later in December 1991. Pan Am’s finances and passenger traffic were improving before the recession and the Gulf War in 1990. It was those two events that sent the company into the relevant downward spiral, and the airline’s losses from that time period eclipsed those from immediately following Lockerbie. Furthermore, to the extent that one can trace the chain of causation to some point prior to the summer of 1990, Pan Am’s troubles appear to have been a result of deregulation and other financial pressures over the decade or so prior to the Lockerbie bombing, as evidenced by the sales of its New York headquarters building (1980), the Intercontinental Hotel Chain (1981), and the Pacific Division (1985), as well as the union concessions and other initiatives that led to strikes in 1984-85. Moreover, as its own records show, Pan Am was reeling from external shocks in 1986-87 (the TWA bombing; the Pan Am 73 hijacking in Karachi, Pakistan; the nuclear disaster in Chernobyl, USSR), well before the Lockerbie bombing. Whenever Pan Am’s problems began, it was not in December 1988.

We by no means imply that causation always follows a linear path. We understand that the “causes” of Pan Am ceasing its operations were no doubt numerous and complex. Put another way, we have no doubt that a number of factors played some role. We cannot—nor do we—say that the Lockerbie bombing played no role whatsoever. However, Claimant has not met his burden to prove that Libya’s role in the Lockerbie bombing was a “proximate cause” of his damages. Three years and innumerable intervening events, as well as many events *prior* to the Lockerbie bombing,

make the connection between the Lockerbie bombing and Pan Am's eventual demise far too attenuated to warrant holding Libya legally responsible for Claimant's lost wages and benefits.¹⁷⁵

CONCLUSION

For the reasons discussed above, the Commission concludes that Claimant has failed to carry his burden of proving that his alleged harm is compensable under the applicable legal principles, as required under Category F of the 2013 Referral. First, he has failed to establish that his claim was not extinguished by the 2005 settlement of the lawsuit Pan Am brought against Libya in Scotland. Second, he has failed to prove that the bombing of Pan Am Flight 103 was the proximate cause of his economic harm. We emphasize that Libya's responsibility for the bombing of Pan Am Flight 103 is not at issue in this claim. The principal question, rather, is whether Libya's actions proximately caused Claimant's economic losses. For the reasons detailed above, we conclude that they did not.

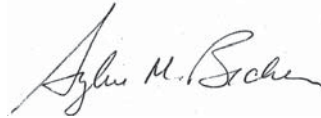
¹⁷⁵ As noted earlier in this decision, a federal jury found in 1992 that Pan Am itself had "had engaged in wilful misconduct and that such wilful misconduct was 'a substantial factor in causing the disaster.'" *See supra* note 36. The President's Commission on Aviation Security and Terrorism had made similar findings in 1990. *See id.* In light of these findings, the Commission staff asked counsel in a February 2015 letter to address the impact of Pan Am's own misconduct on Libya's liability for the economic losses complaint of by Claimant and the other *Abbott* claimants. Counsel responded in writing in May 2015. However, because the Commission holds that Libya's actions were not the proximate cause of Claimant's economic losses, we need not, and do not, make any findings on this aspect of the claim.

Accordingly, this claim must be and is hereby denied. The Commission finds it unnecessary to make determinations with respect to other elements of this claim.

Dated at Washington, DC, July 13, 2016
and entered as the Proposed Decision
of the Commission.



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days of delivery of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2015).