UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALMEDINA SPAHIC, administrator of the Goods, Chattels and Credits of Himzir Ziga, HIMZO ZIGA, and NURA ZIGA, Plaintiffs, - against - INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE INC., Defendant.	18-cv-0057 (ALC) (RWL) **REPORT AND RECOMMENDATION: MOTION TO DISMISS**

ROBERT W. LEHRBURGER, United States Magistrate Judge.

TO: THE HONORABLE ANDREW L. CARTER, United States District Judge.

The parents of Himzir Ziga ("Ziga") and the administrator of his estate bring this wrongful death and survivorship action against the International Center for Transitional Justice, Inc. located in New York, New York ("ICTJ-NY"). Plaintiffs claim that ICTJ-NY is responsible for Ziga's death from malaria contracted while on a work assignment in the Cote D'Ivoire, Africa. ICTJ-NY has moved to dismiss the case based on the doctrine of *forum non conveniens*, arguing that this case should be litigated in Belgium where its Belgian affiliate organization is located.

For the following reasons, I recommend that ICTJ-NY's motion to dismiss be GRANTED and the case dismissed conditioned on (1) Defendant's consent to the jurisdiction of the appropriate Belgian courts (which ICTJ-NY already has provided); (2) Defendant's agreement to waive any statute of limitations defense by virtue of passage of time since the commencement of this action in the Southern District of New York (which

ICTJ-NY already has provided); and (3) the Belgian courts' willingness to exercise jurisdiction over Defendant.

Factual Background[1]

A. The Parties and Their Places of Residence

At all relevant times, Ziga was a French citizen residing and domiciled in Belgium.[2] Ziga's parents, Himno and Nura, are both citizens of Bosnia and residents of France.[3] Plaintiff Spahic, the administrator of Ziga's estate, is a U.S. citizen residing in Missouri.[4]

Defendant ICTJ-NY is a not-for-profit organization, "the primary goal of which is to promote accountability by helping countries develop effective responses to human-rights

[1] When a court considers a *forum non conveniens* motion without an evidentiary hearing, it draws the facts from the operative complaint and affidavits submitted by the parties. *See, e.g., Lenders Recovery Group LLC v. Suez, S.A.*, 585 F.3d 696, 697-98 n.1 (2d Cir. 2009) (basing facts on complaint, supplemented with information from affidavits); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 149 (2d Cir.1980) (en banc) (taking *forum non conveniens* motion "on submission, based on the pleadings, affidavits and briefs" is "a practice long recognized as acceptable and followed from time immemorial in the busy Southern District of New York"); *RIGroup LLC v. Trefonisco Management Ltd.*, 949 F. Supp.2d 546, 549 (S.D.N.Y. 2013) ("the following facts are drawn from the Complaint and assumed to be true or, where noted, from affidavits submitted by the parties"). Here, the Court applies that standard by drawing the facts from the Amended Complaint, dated February 7, 2018, Dkt. No. 5 ("Amended Complaint") as well as from the affidavits submitted in connection with this motion. Plaintiffs submitted all of their exhibits as attachments to their opposing brief without any sponsoring affidavit (see Dkt. No. 49); Defendant did the same with respect to Exhibit N, attached to its Memorandum of Law In Reply (Dkt. No. 50). The parties have not asserted any objections to the Court's considering these exhibits, and the Court has done so.

[2] Defendants' First Request For Admissions, dated Nov. 27, 2018 (Karpousis Aff. Ex. E) ("Plaintiffs' Admissions"), Nos. 6, 10; Amended Complaint at ¶ 3.

[3] Plaintiffs' Admissions Nos. 11-14; Amended Complaint at ¶ 4.

[4] Plaintiffs' Admissions No. 15; Amended Complaint at ¶ 2.

abuse arising from repressive rule, mass atrocity or armed conflict."[5] ICTJ-NY is incorporated in Delaware and identifies its headquarters as New York, New York.[6]

B. ICTJ and Its Affiliate Organizations

Consistent with its mission, ICTJ-NY has affiliates in a number of countries. One of those affiliates is the International Center For Transitional Justice Brussels ("ICTJ-Brussels").[7] ICTJ-Brussels is an entity constituted in Belgium, with its own board of directors and corporate requirements in accordance with Belgian law.[8] ICTJ-NY

[5] International Center For Justice Inc., Consolidated Financial Statements, March 31, 2014 and 2013, Ex. 8 to Plaintiffs' Memorandum Of Law In Opposition To Defendant's Motion To Dismiss (Dkt. 49) ("Pl. Mem."), at 6; Amended Complaint at ¶ 5.

[6] Pl. Mem., Ex. 8 at 6; Pl Mem., Ex. 12 (ICTJ-NY website page); *see also* Ex. 11 at 1029 (ICTJ Website page referring to "central office" in New York).

[7] Constitution of ICTJ-Brussels, Karpousis Aff., Ex. A; Deposition of Fernando Trevesi, Karpousis Aff, Ex. B ("Trevesi Depo.") at 11. Trevesi is the Executive Director of ICTJ-NY. (Karpousis Aff. at ¶ 5.)

[8] Karpousis Aff, Ex. A; Trevesi Depo. at 11,15.

"oversees" the work of its affiliates but does not direct the operations of ICTJ-Brussels.[9] ICTJ-Brussels has a branch location in Cote d'Ivoire.[10]

ICTJ-NY generates consolidated financial statements that include the financial statements of its affiliates.[11] Those statements distinguish between ICTJ-NY's foreign *offices* in such places as Colombia and Nepal, and its "international *affiliates*," such as ICTJ-Brussels, but "all of which have a common mission as [ICTJ-NY] in their respective countries."[12] ICTJ-NY publishes an employee handbook that includes information directed to both U.S. staff and "staff abroad."[13] ICTJ-NY also has as separate "ICTJ Travel Policy" for both "New York and International."[14]

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[9] Trevesi Depo. at 17-18. The Amended Complaint alleges that ICTJ's foreign affiliates are "purely extensions of ICTJ headquarters in New York, fully and completely owned and controlled by ICTJ headquarters." Amended Complaint at ¶ 8. This conclusory allegation is belied by the uncontradicted evidence submitted through affidavits and deposition testimony. *See DHL Global Forwarding Management Latin America, Inc. v. Pfizer, Inc.*, No. 13 Civ. 8218, 2014 WL 5169033, at *4 (S.D.N.Y. Oct. 14, 2014) (for purposes of a motion to dismiss, a court "need not accept as true any allegations that are contradicted by documents deemed to be part of the complaint, or materials amenable to judicial notice") (quoting *In re Yukos Oil Co. Securities Litigation*, No. 04 Civ. 5243, 2006 WL 3026024, at *12 (S.D.N.Y. Oct. 25, 2006) (same)); *VTech Holdings, Ltd. v. Pricewaterhouse Coopers, LLP*, 348 F. Supp. 2d 255, 263 (S.D.N.Y. 2004) ("To be sure, a court is not required to accept as true allegations that are contradicted by documentary evidence that may be considered on a motion to dismiss").

[10] Trevesi Depo. at 11, 20; Karpousis Aff., Ex. F (2012 meeting minutes from ICTJ-Brussels Board of Directors approving establishment of branch in Cote d'Ivoire).

[11] Pl. Mem., Ex. 8 at 6.

[12] Pl. Mem., Ex. 8 at 6 (emphasis added); *but see* Pl. Mem., Ex. 111 at 1029 (ICTJ website page stating "We . . . maintain offices in The Hague and Brussels").

[13] Pl. Mem., Ex. 9.

[14] Pl. Mem., Ex. 10.

C. Ziga's Employment with ICTJ Entities

In August 2013, Ziga entered into a one-year term employment contract with ICTJ-Brussels for the period August 26, 2013 to August 25, 2014 (the "Term Employment Contract").[15] The Term Employment Contract was entered into between Ziga, as employee, and ICTJ-Brussels, as employer.[16] The Term Employment Contract recites that the place of execution of the contract is ICTJ-Brussels in Brussels.[17] The Term Employment Contract is signed by Ziga and Santa Falsca, the head of ICTJ-Brussels.[18] A travel receipt reflects a trip that Ziga made to ICTJ-NY in September 2013. Near the beginning of his employment, Ziga would have participated in an "on-boarding" process that included briefing on grants, policies, his duties, and the responsibilities of various employees.[19]

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[15] Karpousis Aff., Ex. C. The Term Employment Contract is in French. The Amended Complaint alleges that Ziga was employed by ICTJ in New York in 2001 when ICTJ-NY was first organized. (Amended Complaint at ¶ 9.) There is nothing in the evidentiary record concerning this allegation (not even an employment contract). Moreover, there are no allegations, and nothing in the record, indicating any relevant events transpiring between 2001 and 2013 when Ziga entered into the Term Employment Contract with ICTJ-Brussels. Neither party refers to this more than 10-year gap in their briefs. Accordingly, for purposes of this motion, the Court does not ascribe any relevance to events prior to the time Ziga entered into the Term Employment Contract.

[16] Karpousis Aff., Ex. C at 1.

[17] Karpousis, Ex. C at 2, 3.

[18] Karpousis Aff., Ex. C at 3.

[19] Pl. Mem., Ex. 16 (hotel receipt); Trevesi Depo. at 44-48 (Trevesi was not present when Ziga began his employment and testified to what the practice would have been at the time); Amended Complaint at ¶ 9 ("All manner of employee relations, including employment contracts and employee training, was conducted in-person at ICTJ headquarters in New York."). Trevesi did not know whether Ziga's on-boarding took place in New York, Brussels, or both. (Trevisi Depo. at 49.) For purposes of this motion, the Court accepts as true that some of Ziga's on-boarding took place at ICTJ-NY.

Ziga and ICTJ-Brussels then entered into an employment contract of indeterminate term, starting August 26, 2014 (the "Employment Contract").[20] Again, the "employer" is identified as "International Center For Transitional Justice In Brussels" with a Brussels address, and Ziga is identified as the "worker" being hired as "Finance Officer."[21] As with the earlier Term Employment Contract, the Employment Contract recites that the place of performance is the location of the ICTJ-Brussels office.[22] The Employment Contract is made subject to Belgian law and was signed by Ziga and Falsca on behalf of ICTJ-Brussels.[23]

From August 2014 until the time of his death in January 2016, Ziga was employed pursuant to the Employment Contract. His duties as Finance Officer, as outlined by the Employment Contract, included, among others, ensuring financial management of projects financed by the European Union, ensuring supervision of the financial and administrative management of the Cote d'Ivoire office, ensuring the performance and follow-up of the administrative tasks of the Brussels office, and ensuring preparation of monthly financial reports "regarding all the expenses of the Brussels office, according to the Belgian procedure and the internal reconciliation procedure with the New York office."[24]

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[20] Pl. Mem., Ex. 19. The first three pages of Exhibit 19 are an English translation of the Employment Contract, which is written in French.

[21] Pl. Mem., Ex. 19 at 944.

[22] Pl. Mem., Ex. 19 at 946.

[23] Pl. Mem., Ex. 19 at 946; Travesi Depo. at 52.

[24] Karpousis Aff, Ex. D. at 1-2.

Ziga regularly communicated with personnel from ICTJ-NY to coordinate audit activities between ICTJ-Brussels and ICTJ-NY.[25] For example, in June 2015, the New York office emailed Ziga an agenda for a meeting to discuss numerous logistical topics, including, among others, the need for sign off – by both Ziga and someone from the New York office – on internal controls for payable/payroll accounts; "setting up recurring Skype call with [Ziga]"; exchange of monthly finance reports between New York and Brussels; "recurring meetings between the finance team and [Ziga]"; and a trip report from Ziga on his visit to Cote d'Ivoire "for NY finance purposes."[26] Ziga was supervised by Falsca in Brussels as well as personnel from the ICTJ-NY Finance Department.[27]

D. Ziga's Trips to Cote d'Ivoire and Death From Malaria

In connection with his grant auditing work for ICTJ-Brussels, Ziga made multiple trips to the Cote d'Ivoire.[28] His last trip was in late 2015.[29] After approximately two weeks

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[25] Pl. Mem., Ex. 6-7; Amended Complaint at ¶ 9 (alleging "daily communication").

[26] Pl. Mem., Ex. 6 at 3.

[27] Plaintiffs' Supplemental Response to Defendant's First Request For Admissions (Pl. Mem., Ex. 20) at No. 7; *see also* Pl. Mem., Ex. 5 (May 12, 2015 email from Ziga to departing Controller of ICTJ-NY referring to her as a "valuable supervisor and colleague."); *but see* Travesi Depo. at 52 (asserting that Ziga was not supervised by anyone from New York). The parties dispute whether Ziga was supervised by anyone from New York. Again, for purposes of this motion, the Court accepts as true the allegation that some supervision took place from New York.

[28] Travesi Depo. at 67 (referring to first trip in 2014), 71 (explaining that audit work was done in connection with ICTJ-Brussels grant obligations); Amended Complaint at ¶ 14 (referring to trip in November 2015).

[29] Amended Comp. at ¶ 14.

at the Cote d"Ivoire office, Ziga returned to the Brussels office.[30] Just days after returning, Ziga fell ill and was treated by a Belgian doctor.[31] Some days later, Ziga's brother took him back to France, where he was admitted to a hospital, diagnosed with malaria, and died on January 13, 2016.[32] Following his death, Ziga was compensated in accordance with Belgian labor law in the amount of about 9,750 Euros, which was deducted from the account of ICTJ-Brussels.[33]

Procedural Background

In or about November 2016, Ziga's parents, brother and sister sought counsel from a French attorney about the possibility of initiating action in Belgium and France against ICTJ with respect to Ziga's death.[34] By letter dated January 18, 2017, French counsel reported that litigation was possible in both France and Belgium, although as between French and Belgian courts, the claim would be easier to bring in Belgium (because no criminal proceeding would be required to support their civil claim as would be required in France).[35] In reaching that conclusion, French counsel noted that "the wrongful act (the

[30] Amended Complaint at ¶ 15.

[31] Amended Complaint at ¶ 16.

[32] Amended Complaint at ¶ 17. Plaintiffs have produced to ICTJ-NY approximately 800 pages of medical records from a hospital in France, all of which are in French. (Karpousis Aff. at ¶ 29.)

[33] Karpousis Aff. at ¶ 31 and Ex. I.

[34] Defendant's Memorandum of Law in Reply to Plaintiffs' Opposition to Motion to Dismiss For Forum Non Coveniens, ("Pl. Reply"), Ex. N at 1073. As clarified at oral argument, Exhibit N is a translation produced by Plaintiff.

[35] Pl. Reply, Ex. N. at 1091.

lack of obligation of prevention and safety by the employer) occurred in Belgium."[36] The letter further reported that Belgian law would apply to any tort claim because, among other reasons, Ziga resided in Belgium, as did his employer.[37] French counsel later looked into American law and reached out to two U.S.-based lawyers.[38]

On January 3, 2018 Plaintiffs' American counsel filed the initial complaint in this case. The only plaintiffs in that initial complaint were Ziga's parents, and the sole claim was for wrongful death.[39] Two weeks earlier, on December 20, 2017, their counsel had filed a verified petition in New York County Surrogate's Court to appoint Spahic as the administrator, with limitations, of Ziga's estate.[40] Plaintiffs' counsel requested expedited treatment of the application, attesting that expedited treatment was needed "[t]o preserve a wrongful death claim under the 2-year statute of limitations" and amend the initial complaint in this action.[41] On February 5, 2018, the Surrogate's Court granted the application.[42] Two days later, on February 7, 2018, Plaintiffs filed the Amended Complaint, adding Spahic as a plaintiff in her capacity as administrator of Ziga's estate, and adding a survivorship cause of action.[43]

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[36] Pl. Reply, Ex. N. at 1091.

[37] Pl. Reply, Ex. N. at 1092.

[38] Pl. Reply, Ex. N. at 1076.

[39] Dkt. No. 1.

[40] Karpousis Aff. at ¶ 40 and Ex. J.

[41] Karpousis Aff. at ¶ 443 and Ex. L.

[42] Karpousis Aff. at ¶ 41 and Ex. K.

[43] Karpousis Aff. at ¶ 42; Dkt. No. 5.

ICTJ-NY answered the Amended Complaint on March 9, 2018.[44] At ICTJ-NY's urging, the Court directed the parties' to frontload discovery to focus on the *forum non* conveniens issue; when the parties completed that portion of discovery, the Court stayed further discovery pending determination of ICTJ-NY's instant motion to dismiss.[45]

Defendant's Motion To Dismiss

ICTJ-NY filed its motion on February 4, 2019.[46] ICTJ-NY argues that Belgium is a far more convenient and appropriate forum than New York for this case. ICTJ-NY contends that ICTJ-Brussels was Ziga's employer and emphasizes that Ziga had little to no relationship with ICTJ-NY; that Ziga was a French citizen working in Belgium; that Ziga contracted malaria abroad, was treated by doctors in Belgium and France, and died in France; that Ziga's parents are Bosnian citizens residing in France; and that most fact witnesses reside abroad, while all of Ziga's medical records are in French.[47] Further, ICTJ-NY contends that the initial complaint filed by Ziga's parents was defective when filed and that appointment of the administrator of Ziga's estate in New York was a contrivance to support forum shopping. Based on these assertions, ICTJ-NY argues that

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[44] Dkt. No. 7.

[45] Dkt. No. 10 at p. 6; Dkt. No. 44.

[46] Dkt. No. 46.

[47] French is one of Belgium's three official languages, the other two being Dutch and German. *See* "Languages Across Europe," BBC News Online Country Profile, http://www.bbc.co.uk/languages/european_languages/countries/belgium.shtml (last visited April 21, 2019); Stella Burch Elias, *Regional Minorities, Immigrants, and Migrants: The Reframing of Minority Language Rights in Europe*, 28 BERKELEY J. INT'L L. 261, 312 n. 52 (2010) (discussing language usage in different Belgium territories).

Plaintiffs' choice to bring suit in New York is entitled to little deference; that Belgium is an adequate forum for the claims at issue; and that the interests of the parties and the public weigh in favor of Belgium as a forum for this litigation. ICTJ-NY expressly consents to submit to jurisdiction in Belgium. (Pl. Mem. at 8; Pl. Reply at 6.)

Plaintiffs filed their opposition papers on February 25, 2019.[48] Plaintiffs contend that the case should be litigated in New York because their choice of forum must be accorded deference; that Belgium is not an adequate forum because, among other issues, Plaintiffs' claims would be barred by statute of limitations; and that the private and public interests favor New York. In support of these arguments Plaintiffs assert that ICTJ-NY and ICTJ-Brussels are an "integrated enterprise" headquartered in New York, thus grounding the case in New York; that Ziga's tort claims are governed by New York law; that although located in Belgium for work, Ziga communicated with the ICTJ-NY; that employee training took place in New York; and that ICTJ-NY travel policies and employee handbook applied worldwide. Plaintiffs also have submitted three expert reports – one from an expert in global human resources addressing duty of care, one from an infectious disease specialist addressing Ziga's cause of death due to malaria, and the third from a consulting economist addressing damages.[49]

ICTJ filed a reply on March 4, 2019.[50] The Court held oral argument on April 24, 2019.

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[48] Dkt. No. 49.

[49] Pl. Mem., Ex. 2-4.

[50] Dkt. No. 50.

Legal Framework

A decision whether to dismiss an action for *forum non conveniens* "is confided to the sound discretion of the district court, to which substantial deference is given." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 70 (2d Cir. 2003) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)); *Lazare Kaplan International Inc. v. KBC Bank N.V.*, 337 F. Supp.3d 274, 296 (S.D.N.Y. 2018) (ALC) (quoting and applying *Piper Aircraft*).

In exercising that discretion, courts in the Second Circuit apply a three-step analysis: "At step one, a court determines the degree of deference properly accorded the plaintiff's choice of forum. At step two, it considers whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum." *Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146, 153 (2d Cir. 2005) (citations omitted); *accord Waldman v. Palestine Liberation Organization*, 835 F.3d 317, 334 n.12 (2d Cir. 2016) (citing *Norex*).

"An action should be dismissed on the ground of *forum non conveniens* 'only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable,' taking into account the balance of private and public interests." *Mayer v. Time, Inc.*, No. 17 Civ. 5613 (DLC), 2018 WL 1738322, at *3 (S.D.N.Y. April 9, 2018) (citing *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 74-75 (2d Cir. 2001)).

Discussion

A. Degree of Deference to Plaintiffs' Chosen Forum

At the first step of the *forum non conveniens* analysis, the court determines the extent of deference to be given the plaintiff's choice of forum.[51] Here, Plaintiffs' choice of New York merits moderate deference at best.

1. Legal Principles Applicable to Plaintiffs' Choice of Forum

The Second Circuit has instructed that "the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale." *Iragorri,* 274 F.3d at 71; *accord Norex*, 416 F.3d at 154. A "plaintiff's choice of forum is generally entitled to great deference when the plaintiff has sued in the plaintiff's home forum." *Iragorri*, 274 F.3d at 71; *accord Norex*, 416 F.3d at 154. That is because a plaintiff's home forum "is presumed to be convenient." *Iragorri*, 274 F.3d at 71 (*citing Piper Aircraft*, 454 U.S. at 255-56). "The greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States," the more deference a court affords to the plaintiff's choice of forum. *Iragorri*, 274 F.3d at 72.

In contrast, a "'plaintiff's choice of the defendant's home forum' does not provide a 'reliable proxy for convenience.'" *Mayer*, 2018 WL 1738322, at *2 (quoting and applying *Pollux*, 329 F.3d at 74). Rather, "a plaintiff's choice to initiate suit in the defendant's home forum – as opposed to any other where the defendant is also amenable to suit – only

[51] Plaintiffs' brief places this step last in its analysis and egregiously misstates that "Defendant failed to address this last step in its FNC analysis in its Memorandum." To the contrary, Defendant's opening brief discussed the extent of deference accorded Plaintiffs' choice of forum at pages 3-7. Why Plaintiffs made such a glaring misrepresentation is unfathomable.

merits heightened deference to the extent that the plaintiff and the case possess *bona fide* connections to, and convenience factors favor, that forum." *Pollux,* 329 F.3d at 74.

"[T]he more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons . . . the less deference the plaintiff's choice commands." *Iragorri,* 274 F.3d at 72; accord, *Norex*, 416 F.3d at 154. Thus, "the choice of a United States forum by a foreign plaintiff is entitled to less deference" because in such cases "a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries" or, in any event, there is "little reason to assume that it is convenient" for that plaintiff. *Iragorri*, 274 F.3d at 71. (citations omitted).

Factors considered in determining whether a plaintiff's choice of forum was likely to have been motivated by convenience include: "(1) the convenience of the plaintiff's residence in relation to the chosen forum, (2) the availability of witnesses or evidence to the forum district, (3) the defendant's amenability to suit in the forum district, (4) the availability of appropriate legal assistance, and (5) other reasons relating to convenience or expense." *Norex*, 416 F.3d at 154 (citing *Iragorri*, 274 F.3d at 72). Evidence of forum shopping includes: "(1) attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, (2) the habitual generosity of juries in the United States or in the forum district, (3) the plaintiff's popularity in the region, or (4) the inconvenience and expense to the defendant resulting from litigation in that forum." *Norex*, 416 F.3d at 155 (citing *Iragorri*, 274 F.3d at 72).

2. Plaintiffs' Choice of Forum is Entitled to Moderate Deference

Consideration of the relevant factors strongly suggest that despite some connections to New York, Plaintiffs engineered a lawsuit in New York for other reasons. Indeed, most factors point to Belgium or France as a more convenient forum.

The locus of this case is Europe, not the United States. Ziga, the decedent, was a French citizen residing in Belgium. His parents are Bosnian citizens residing in France. His place of employment was Belgium; he was dispatched to the Cote d'Ivoire from Belgium; he allegedly contracted malaria in Cote d'Ivoire; he was treated by doctors in Belgium and France; and he died in France.

In light of those facts, France and Belgium each would be a more convenient forum than New York for both of Ziga's parents, the sole plaintiffs in the initial complaint. Although the papers for appointment of an administrator to Ziga's estate were filed in New York County Surrogate's Court, the administrator does not reside in New York. While she is a U.S. citizen, she resides in Missouri. Thus, two of the three plaintiffs are French citizens residing in France, and the third plaintiff is not a resident of New York. Moreover, Plaintiff Spahic, the administrator, is not even a real party in interest in the sense that the estate application papers affirm that Ziga's parents, not Spahic, will inherit his estate and be the distributees for any survivorship or wrongful death claim.[52] In short, Plaintiffs' places of residence hardly suggest that New York is convenient or was chosen for that reason. *See Piper Aircraft*, 454 U.S. at 261 (holding that district court properly discounted

[52] *See* Karpousis Aff., Ex. J at ¶¶ 6(d) and 7(a); *see also* Def. Mem. at 20 (Ziga's parents "are the estate's sole distributees").

deference to plaintiff's forum because "the real parties in interest" were foreign heirs, not the U.S. citizen who was appointed the estate's administratrix but was not an heir).

As for the availability of evidence and witnesses, New York of course is the home of ICTJ-NY, the named Defendant. Some evidence thus resides in New York as demonstrated by ICTJ-NY having produced documents and Plaintiffs having deposed ICTJ-NY's Executive Director. But no doubt far more evidence resides in Belgium, France and the Cote d'Ivoire. Witnesses there would likely include, at the very least, Ziga's parents and other family members; Ziga's supervisor in Belgium; and Ziga's doctors who treated him. Those sources also are likely to have relevant documents, including medical records as well as email and correspondence between Ziga and his Brussels supervisor and with Cote d'Ivoire personnel.

The ability to obtain relevant evidence also makes New York an inconvenient forum. ICTJ-NY has already committed to jurisdiction in Belgium; the availability of its witnesses and documents thus is the same whether in New York or Belgium. In contrast, to obtain relevant evidence from non-parties in Belgium (or France), the parties – mostly ICTJ-NY – likely would have to implement letters rogatory, a cumbersome and time-consuming process. *See Rabbi Jacob Joseph School v. Allied Irish Banks, P.L.C.*, No. 11-CV-05801, 2012 WL 3746220, at *7 (E.D.N.Y. Aug. 27, 2012) ("Courts in the Second Circuit have widely recognized that obtaining evidence through the Hague Convention and letters rogatory are cumbersome and inefficient, and hardly make litigation in the United States convenient") (collecting cases). Meanwhile, Plaintiffs have no less access to competent legal counsel in France or Belgium as they do in New York, as evinced by

their already having obtained and received guidance from legal counsel in both countries in regard to this very matter.

The fact that ICTJ-NY is located in Plaintiffs' chosen forum is not a "reliable proxy for convenience," particularly given the factors discussed above. *Pollux*, 329 F.3d at 74; *see also Mayer*, 2018 WL 1738322, at *2. To the contrary, these and several additional factors suggest that Plaintiffs' chose New York as a result of forum shopping.

First, Ziga's family received advice early on that litigation would be viable in Belgium and France. That opinion also concluded that the family potentially could recover an estimated potential amount of between 90,000 and 170,000 Euros.[53] Although there is no direct proof, it would not be surprising if Plaintiffs ultimately pursued their litigation in New York instead to seek a potentially greater recovery given "the habitual generosity of juries in the United States." *Lazare Kaplan,* 337 F. Supp.3d at 297. Indeed, Plaintiffs' damages expert here estimates Plaintiffs' economic loss at more than $520,000, more than twice the value projected by French counsel as recoverable in France.[54]

Second, although ICTJ-NY is the organization's headquarters, the evidence generated during discovery taken to date demonstrates that ICTJ-NY Brussels would be a more natural choice of forum, not only because of convenience as discussed above, but also because Ziga's employment contract was with ICTJ-Brussels, not ICTJ-NY, and Brussels was the place of his employment and residence. (Def. Ex. 19 at 944, 946.)

[53] Karpousis Aff., Ex. N at 1105. At present exchange rates, that amount equals approximately $109,000 to $206,000. *See* https://www.travelex.com/currency/currency-pairs/usd-to-eur, viewed as of April 21, 2019.

[54] Pl. Ex. 4 at 4.

Plaintiffs strain to make ICTJ-NY the hook for litigation in New York by focusing on ICTJ headquarters in New York and ICTJ-NY's having employee and travel policy manuals that apply both in the U.S. and abroad. Plaintiffs contend that ICTJ-NY and ICTJ-Brussels are an "integrated enterprise," making ICTJ-NY responsible for Ziga's death despite Ziga's having contracted with and worked for ICTJ-Brussels.[55] As support for this theory, Plaintiffs point to the report of their global human resources expert who offers as one of her conclusions that "[b]ased on the integrated enterprise test (whether two or more units of an enterprise are considered a single employer), the Brussels' office of ICTJ is controlled by the U.S. entity in NY."[56] Plaintiffs, however, do not offer any legal authority for either what constitutes an "integrated enterprise" or the implications of such a label. Rather, Plaintiffs provide only the say-so of their human resources expert who is neither qualified nor permitted to offer legal conclusions. But even accepting, for purposes of this motion, Plaintiffs' integrated enterprise theory and ICTJ-NY's culpability in Ziga's death, it does not lessen the many facts pointing to Belgium or France as a more convenient forum. In other words, regardless of which entity may be held liable, New York is a less convenient forum.

Third, New York is hardly a natural forum for the filing for appointment of an administrator of Ziga's estate. Ziga died in France, and his parents live there. There is no suggestion that Ziga had any assets in New York, and Ziga's parents are the only designated distributees of his estate. The only conceivable reason, based on the

[55] Def. Mem. at 7, 16.

[56] Def. Mem. at 7, quoting from Def. Ex. 2 at 19.

evidence before the Court, that Ziga's parents made the estate filing in New York was to engineer another New York (and American) nexus to support this lawsuit.

Indeed, it appears that Plaintiffs used the administrator appointment process to save a lawsuit that was improperly filed in the first place. Under New York law, a wrongful death claim must be brought by a personal representative of the estate.[57] *Albert v. City of New York*, No. 17-CV-3957, 2018 WL 5084824, at *13 (E.D.N.Y. Oct. 18, 2018) ("under New York law, only the 'personal representative, duly appointed in this state . . . of a decedent who is survived by distributes may maintain an action to recover damages for a wrongful act, negligent or default which causes the decedent's death'") (quoting N.Y. Estates Powers & Trusts Law § 5-4.1(1)); *Wiwa*, 2009 WL 464946 at *7 and n. 28(same); *Estate of Misselli v. Silverman*, 606 F. Supp. 341, 344 (S.D.N.Y. 1985) (same). When Ziga's parents filed the initial complaint on January 3, 2018, just ten days before expiration of the two-year statute of limitations for the wrongful death claim, no personal representative had been appointed. Accordingly, the initial complaint was not properly filed. *See Wiwa*, 2009 WL 464946 at *7 (plaintiffs lacked capacity to sue because they were not personal representatives of their relatives' estates at the time they filed their wrongful death claims; "[t]he requirement that a wrongful death plaintiff be a legal representative of the decedent's estate . . . is a condition precedent to bringing such a claim"); *Carrick v. Central General Hospital*, 50 N.Y.2d 242, 249 n.2 (1980) ("statutory right to recover for wrongful death does not even arise until an administrator has been

[57] A "personal representative" is "a person who has received letters to administer the estate of a decedent." *Wiwa v. Royal Dutch Petroleum*, No. 96-CV-8386, 2009 WL 464946, at *7 (S.D.N.Y. Feb. 25, 2009) (quoting N.Y. Estates Powers & Trusts Law § 1-2.13).

named through the issuance of letters of administration"). Nine days after the two-year statute of limitations expired, on January 22, 2018, Plaintiffs' counsel requested expedited treatment of the application specifically to "[t]o preserve a wrongful death claim under the 2-year statute of limitations" that Plaintiffs' counsel knew already had expired.[58] Plaintiffs' tactical maneuvering warrants diminished deference to their choice of forum.

ICTJ-NY correctly observes that the relevant facts of this case are similar to those of a recent case from this district granting defendant's motion to dismiss based on *forum non conveniens*. (*See* Def. Mem. at 5, discussing *Mayer*) In *Mayer*, the plaintiff was a citizen of both the U.S. and the United Kingdom. 2018 WL 1738322 at *1. The plaintiff resided in the U.K. and worked in London for a company organized under U.K. law. *Id*. The plaintiff's employer was a wholly-owned subsidiary of another U.K. company, which in turn was a wholly-owned subsidiary of Time, Inc., a U.S. company with its principal place of business in New York. *Id*. Although the plaintiff executed her assignments in London, she reported directly to supervisors in the New York office, who assigned her various projects. *Id*. Plaintiff filed a lawsuit in New York alleging that during the course of her work in London, she was the victim of a hostile work environment. *Id.* at 1-2. Defendant Time invoked *forum non conveniens* and moved to dismiss. *Id.* at 2.

[58] Karpousis Aff. Ex. L. Plaintiffs argue that the Amended Complaint relates back to the original Complaint, which was timely filed. (Def. Mem. at 20.) The problem with that argument is that, as explained above, the initial complaint was improperly filed to begin with. The cases that Plaintiffs' cite to support their relation back argument involved complaints that had been properly filed in the first instance. *See Caffaro v. Trayna*, 35 N.Y.2d 245, 249-50 (1974) (otherwise time-barred wrongful death claim related back to properly filed malpractice claim); *D'Angelo v. Kujawski*, 164 A.D.3d 648 (2nd Dep't 2018) (amendment to substitute plaintiff in representative capacity in place of individual capacity related back to properly filed initial complaint).

The court granted the motion and found that the plaintiff's choice of forum was "entitled to significantly reduced deference" for several reasons. *Id.* at 4. Those reasons included: (1) Although a U.S. citizen, plaintiff was also a U.K. citizen and resided in London; (2) plaintiff's claims arose from work performed in London for a U.K. employer; (3) New York was not a convenient forum for the plaintiff; and (4) plaintiff's choice of forum appeared to have been motivated by forum shopping and the expectation that a damages award would be greater in a U.S. court. *Id*.

The facts here are similar to those in *Mayer*. The real parties in interest, Ziga's parents, are non-U.S. citizens residing France while only the third plaintiff, the estate administrator, is a U.S. citizen residing in the U.S. (though in Missouri, not New York). Ziga was a citizen of France living in Belgium, where he worked pursuant to a contract with a Belgian company. Plaintiffs' claims arise from Ziga's work in Belgium and Cote d'Ivoire. And, New York is not a convenient forum for Plaintiffs, who appear to have engaged in forum shopping. As in *Mayer*, the "defendant has succeeded in showing that any deference to which the plaintiff's choice of forum is entitled is substantially reduced by the strong connections this litigation has to a foreign venue, its limited connection to this forum, the convenience of the parties, and the evidence that the plaintiff has engaged in forum shopping." *Id.* at 4. Tellingly, Plaintiffs nowhere mention *Mayer* in their opposition, despite it being cited throughout ICTJ-NY's moving brief.[59]

[59] *See* Pl. Mem. at 4, 5-6, 7, 8, 11, 14-15, 16.) Plaintiffs also entirely ignore any mention of *Lazare Kaplan*, a highly relevant *forum non conveniens* case in which the District Judge presiding over this case recently issued dismissing an action in favor of litigation in Belgium. ICTJ-NY cites *Lazare Kaplan* throughout its brief as it does with the *Mayer* case. (*See* Pl. Mem. at 7, 8, 9, 10, 13, 14, 15.) And when asked by the Court at oral argument whether he wished to comment on either case, Plaintiffs' counsel declined to do so.

Considering all the foregoing, this is not a case that "possess *bona fide* connections to and convenience factors favor[ing Plaintiff's choice of] forum." *Pollux,* 329 F.3d at 74. Accordingly, Plaintiff's choice of New York is due moderate deference at best.

B. Adequacy of Alternative Forum

At the second step of the *forum non conveniens* analysis, a court assesses the adequacy of the alternative forum proffered by defendant as the more convenient location for the litigation. *Norex*, 416 F.3d at 153. Here, Defendant's proffered alternative forum, Belgium, is sufficiently adequate.

1. Legal Principles Applicable to Adequacy of Alternative Forum

The defendant "bears the burden of establishing that a presently available and adequate alternative forum exists." *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009) (citations omitted); *Lazare Kaplan,* 337 F. Supp. at 299 (quoting and applying *Abdullahi*). "An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute." *Pollux*, 329 F.3d at 75.

A forum that satisfies these criteria "may nevertheless be inadequate if it does not permit the reasonably prompt adjudication of a dispute, if the forum is not presently available, or if the forum provides a remedy so clearly unsatisfactory or inadequate that it is tantamount to no remedy at all." *Lazare Kaplan,* 337 F. Supp.3d at 299 (quoting and applying *Abdullahi*). In this analysis, however, "[t]he availability of an adequate alternative forum does not depend on the existence of the identical cause of action in the other forum,

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Plaintiffs' failure to address both of these cases that ICTJ-NY relies on so extensively is curious to say the least.

nor on identical remedies." *Norex*, 416 F.3d at 158 (internal citations omitted). Thus, "the fact that a plaintiff might recover less in an alternate forum does not render that forum inadequate." *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 391 (2d Cir. 2011). Moreover, "a plaintiff may not escape *forum non conveniens* dismissal by taking actions that render the alternative forum defective or imperfect." *Mayer*, 2018 WL 1738322 at *3 (citing cases from 4th, 5th, 7th and D.C. Circuit courts of appeals).

Although the defendant "'bears the ultimate burden of persuasion as to the adequacy of the forum . . . .the plaintiff bears the initial burden of producing evidence of corruption, delay or lack of due process in the foreign forum" because 'considerations of comity preclude a court from adversely judging the quality of a foreign justice system.'" *Lazare Kaplan,* 337 F. Supp.3d at 299 (quoting *Abdullahi*). "'[C]onclusory submissions, bare denunciations, and sweeping generalizations about the alternative forum's legal system do not satisfy the plaintiff's burden on this issue.'" *Lazare Kaplan,* 337 F. Supp.3d at 299 (quoting *RIGroup LLC v. Trefonisco Mgmt., Ltd.*, 949 F.Supp.2d 546, 554 (S.D.N.Y. 2013) (citing *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002))).

2. Belgium is an Adequate Alternative Forum

Belgium fulfills the requirement of an adequate alternative forum. ICTJ-NY is amenable to service of process in Belgium, because it has expressly consented to submit to jurisdiction there. (Pl. Reply Mem. at 6.) *See Pollux,* 329 F.3d at 75 (recognizing England as adequate alternative forum in part because defendants agreed at trial to submit to jurisdiction there as condition to dismissal); *Rentokil-Initial Pension Scheme v.*

Citigroup Inc., 614 F. App'x 27, 28 n. 1 (2d Cir. 2015) (district court conditioned dismissal on defendants' consent to jurisdiction in alternative forum, which defendants provided); *Mayer*, 2018 WL 1738322 at *4 (same).

The second prong of the adequate alternative forum inquiry asks whether Belgium permits litigation of the subject matter, which in this case is recompense for Ziga's death due to alleged negligence. The cases cited by ICTJ-NY for the proposition that courts often find Belgium to be an adequate alternative forum involve business disputes, not wrongful death or tort cases. *See Calavo Growers of California v. Belgium*, 632 F.2d 963 (2d Cir. 1980) (breach of contract and fraud); *Lazare Kaplan,* 337 F. Supp.3d 274 (conspiracy, racketeering and fraud); *Alliance Assurance Co. v. Luria Brothers & Co.*, No. 86 Civ. 1151, 1987 WL 10031 (S.D.N.Y. April 22, 1987) (contract rescission). Courts have, however, found other countries to be adequate alternative fora in wrongful death cases like this one. The Supreme Court's decision in *Piper Aircraft* is such a case. 454 U.S. at 238 (finding Scotland an adequate alternative forum); *see also, Reers v. Deutsche Bahn AG*, 320 F. Supp.2d 140, 159 (S.D.N.Y. 2004) (finding France as adequate alternative forum); *Chhawchharia v. Boeing Company*, 657 F. Supp. 1157, 1160 (S.D.N.Y. 1987) (finding India adequate alternative forum).

Here, Plaintiffs' foreign counsel determined that Plaintiffs' claims could be litigated in Belgium.[60] Moreover, Belgian courts are adequate regardless of whether Belgian law applies or New York applies. It has been recognized that Belgian courts can adequately

[60] Karpousis Aff., Ex. N at 1074, 1091. As noted earlier, foreign counsel's opinion is presented through an uncertified translation. Even if the Court were not to consider the translation, the Court's conclusion would be no different, particularly as Plaintiffs nowhere argue that Belgium would not permit litigation of the subject matter of the dispute.

apply foreign law to adjudicate claims, because Belgian courts give foreign law "the actual interpretation given to it in the foreign country." *Lazare Kaplan,* 337 F. Supp.3d at 300. And, as noted above, Belgium would still be an adequate forum even if it does not have identical causes of action or less favorable remedies. *See Norex*, 416 F.3d at 158; *Figuiredo Ferraz*, 665 F.3d at 391. Plaintiffs acknowledge as much by stating that "[a] foreign court is generally deemed 'adequate' for FNC purposes unless the potential remedy it off 'is so inadequate . . . that it is no remedy at all.'" (Def. Mem. at 10, quoting *Piper Aircraft*, 454 U.S. at 254 and n.22.) Meanwhile, Plaintiffs have not presented any evidence that "corruption, delay or lack of due process" would present any impediment to proceeding in Belgium. *Lazare Kaplan,* 337 F. Supp.3d at 299. Nowhere do Plaintiffs' filings contend that Belgium would not permit litigation of the subject matter of the dispute.

Rather, Plaintiffs offer other arguments, none of which warrant a different conclusion. First, Plaintiffs argue that Belgium courts are not "available" for their claims because "it is uncertain whether Belgium courts would even exert jurisdiction over the New York based Defendant." (Def. Mem. at 13.) This statement is not supported with any authority and is entirely speculative. ICTJ-NY has consented to submitting to the Belgian courts' jurisdiction, and Plaintiffs offer no rationale as to why the Belgian courts would not exercise that jurisdiction. In any event, this concern can and will be addressed by granting Defendant's motion on condition both that ICTJ-NY consent to jurisdiction in Belgium, and that the Belgian court exercises jurisdiction over ICTJ-NY.[61]

[61] While the Court is not convinced that imposing this final condition is necessary here, it recommends doing so in an abundance of fairness to Plaintiffs. In granting motions to dismiss on grounds of *forum non conveniens*, courts sometimes include a condition that the court in which the action would be refiled actually agrees to hear it. *See, e.g.*, *BMR & Associates, LLP v. SFW Capital Partners, LLC*, 92 F. Supp. 3d 128, 143 (S.D.N.Y. 2015)

Second, Plaintiffs argue that Belgium would not be adequate because Plaintiffs' claims will be time-barred, at least under New York law. (Def. Mem. at 13.) This argument is problematic in at least two respects. Initially, it is based on the questionable assumption that New York law applies.[62] More significantly, however, this is a problem of Plaintiffs' own making. Ziga died on January 13, 2016. Plaintiffs contend that dismissal at this point would render their claims untimely given a two-year statute of limitations for their wrongful death claim and a three-year period for their survivorship claim. (Pl. Mem. at 13, 20.) Plaintiffs could have avoided the issue by acting earlier. By correspondence dated December 21, 2017 and January 19, 2017,[63] French counsel informed Ziga's family that litigation could be pursued in Belgium. French counsel also reported that during a phone call with personnel from ICTJ-NY and ICTJ-Brussels held on February 16, 2017, he warned that "we were about to initiate a complaint against ICTJ in France, Belgium and the United States, shortly."[64] Yet Plaintiffs did not file this action until January 3, 2018, nearly a year later.

The court in *Mayer* addressed a similar time-bar argument made by Plaintiffs here:

(dismissing case on conditions, including "that the Indian courts are willing to hear the case"); *see also Blanco v. Banco Industries de Venezuela, S.A.*, 997 F.2d 974, 984 (2d Cir. 1993) (modifying dismissal order to condition dismissal on acceptance of parties' proposed trustee by the Venezuelan Bankruptcy Court); *Calavo*, 632 F.2d at 968 (affirming dismissal, but noting in dicta that "we believe that it would have been wiser [for the district court] to make the dismissal conditional upon the willingness of the Belgian courts to hear this case, and upon the consent of all of the defendants to submit to jurisdiction in Belgium").

[62] Neither Plaintiffs nor Defendant have identified the applicable statute of limitations under Belgian law.

[63] Def. Ex. N at 1073-76, 1083-1105.

[64] Def. Ex. N at 1075.

> "To the extent that any of plaintiff's claims are time-barred in the U.K., that limitation is a result of plaintiff's decision to pursue legal remedies in the United States in the months after her employment was terminated, rather than bring claims in the United Kingdom. Plaintiff should not be rewarded for this choice. . . . . Accordingly, given her own delay in initiating litigation in her chosen forum there is no unfairness in observing that a dismissal here may well result in her loss of a cause of action."

2018 WL 1738322 at *4. The same can be said of Plaintiffs: their time-bar argument arises from their own choice to file in the U.S. and their own delay in filing anywhere. Plaintiffs "should not be awarded for this choice." *Id*.

Notwithstanding the foregoing, the Second Circuit has deemed it appropriate in some cases to condition a *forum non conveniens* dismissal on waiver of a statute of limitations defense arising since commencement of the action in which dismissal is being granted. *See, e.g.*, *Calavo Growers,* 632 F.2d at 968; *Awadallah v. Western Union Company*, No. 14-CV-3493, 2016 WL 11469858, at *5 (E.D.N.Y. March 30, 2016) (citing and following *Calavo* in imposing condition to waive post-action statute of limitations defense); *BMR & Associates, LLP v. SFW Capital Partners, LLC*, 92 F. Supp.3d 128, 143 (S.D.N.Y. 2015) (same).

Although Plaintiffs delayed and have pursued a course indicative of forum shopping, the Court recommends imposing the same condition applied by the Second Circuit in the foregoing cases. Accordingly, dismissal should be conditioned on ICTJ-NYs waiver of any statute of limitations defense based on passage of time since filing of this action.[65] At oral argument, ICTJ-NY agreed to exactly that.

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[65] Plaintiffs' other arguments are either without merit or irrelevant. (*See* Def. Mem. at 13-14.) For instance, Plaintiffs challenge what they perceive as ICTJ-NY's attempt to portray ICTJ-Brussels as the proper defendant in place of ICTJ-NY. The Court need not and does not address that issue for present purposes and, for purposes of this motion only, deems ICTJ-NY to be a proper defendant.

C. Balance of Private and Public Factors

The third step of the *forum non conviens* analysis requires the court to consider the balance of private and public factors. *Norex*, 416 F.3d at 153. The balance in this case favors dismissal.

1. Private Interest Factors

Private interest factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Iragorri*, 274 F.3d at 73-74 (2d Cir. 2001) (quoting *Gulf Oil*, 330 U.S. at 508). "The private interest factors are considered in light of the particular issues likely to be tried, including whether the plaintiff's damages are disputed and where the evidence of damages is likely to be more accessible." *Mayer*, 2018 WL 1738322 at *3 (citing *Iragorri*, 274 F.3d at 73-74). "In this analysis, the Court must compare 'the hardships defendant would suffer through the retention of jurisdiction' with 'the hardships the plaintiff would suffer as the result of dismissal and the obligation to bring suit in another country.'" *Lazare Kaplan*, 337 F. Supp.3d at 301 (quoting *Iragorri*, 274 F.3d at 74).

The relative ease of access to sources of proof favors dismissal in favor of litigation in Belgium. Ziga lived and worked in Belgium. Ziga was locally supervised in Belgium by Falasca, who likely has the most direct knowledge concerning Ziga's travel and work.[66]

[66] Plaintiffs maintain that Ziga was supervised from New York. That may be true to some extent, and the Court accepts that contention for purposes of this motion. But "[e]ven if some decisions with respect to [Ziga]'s employment were made in New York, those decisions were implemented and felt in [Belgium]" where Ziga worked. *Mayer,* 2018 WL 1738322 at *5.

Although there are some witnesses in New York, the majority are located abroad, including several members of Ziga's family in France, Ziga's colleagues in Belgium and Cote d'Ivoire, and doctors in Belgium and France. *See Mayer*, 2018 WL 1738322 at *5 ("Regardless of where this lawsuit is finally litigated, there are undoubtedly witnesses that will need to travel. Most of the relevant evidence and witnesses, however, is either in the U.K. or easily obtained in the U.K.).

Similarly, issues of compulsory process also weigh in favor of dismissal. ICTJ-NY has committed to making its witnesses available in Belgium. The same cannot be said of witnesses abroad. For instance, whether ICTJ-Brussels will be or can be required to make its witnesses available in New York has not been determined. And witnesses such as Ziga's doctors live abroad and are not under the control of any party. Plaintiffs argue that witnesses can be available by "remote means." (Def. Mem. at 15.) This ignores, however, that no testimony can be taken without compulsory power over those witnesses. Moreover, "[t]he Second Circuit has held that a witness's live in-court testimony is the preferred method of presenting his or her testimony." *Strategic Value Master Fund, Ltd. v. Cargill Financial Services, Corp.*, 421 F.Supp.2d 741, 769 (S.D.N.Y. 2006) (citing *DiRienzo v. Philip Services Corp.*, 294 F.3d 21, 30 (2d Cir. 2002)). Thus, "where the number of nonparty witnesses is large, coupled with the Court's natural preference for live testimony and the time-consuming nature of using letters rogatory, a district court's decision to weigh this factor in favor of dismissal will not be overturned." *Id.* (internal citations omitted); *see also Pollux*, 329 F.3d at 75; *Strategic Value Master Fund*, 421 F.Supp.2d at 768 (collecting cases).

Neither party has presented evidence of the relative costs of litigation as between New York and Belgium. Accordingly, the Court deems this factor largely neutral in the three-step analysis. Plaintiffs broadly state that litigating in Belgium rather than New York "would be far more expensive for Plaintiffs." (Pl. Mem. at 14.) But they provide no factual support for that contention; nor does it make sense. Two of the three Plaintiffs reside in France and would have to travel to New York. If the litigation moves to Belgium, then ICTJ-NY would have to pay for transporting its employees there, but that is not a cost to Plaintiffs. Plaintiffs ask the Court to consider the parties' relative resources to absorb costs (Pl. Mem. at 14). In doing so, Plaintiffs refer to Defendant's "superior resources and its insurance funded defense." *Id*. Plaintiff does not provide any basis to assess Plaintiffs' resources in comparison to ICTJ-NY (other than noting the reported value of Defendant's assets), and ignores the above considerations suggesting that continuing to litigate in New York will be *more* costly to Plaintiffs, not less.

What's more, by litigating in Belgium, Plaintiffs will have the ability to sue ICTJ-Brussels as a defendant. Although Plaintiffs bank on their "integrated enterprise" theory, Plaintiffs could be left without a defendant should that theory fail while the litigation proceeds in New York. By bringing suit in Belgium, Plaintiffs will be able to bring in both ICTJ-Brussels and ICTJ-NY, as the latter has consented to jurisdiction there. Pursuing litigation in New York thus strikes the Court as counter to Plaintiffs' interests in this respect.

Finally, Plaintiffs argue that proceeding in Belgium is inconvenient and undermines their private interest because "discovery is over" and the parties will be forced to "relitigate this case." (Def. Mem. at 15.) These statements are incorrect and misrepresent the

record. The Court stayed discovery on January 29, 2019 because discovery for *forum non conveniens* purposes had been completed. There is still considerable discovery on the merits of the action to do. Only one deposition (of ICTJ-NY) has been taken; ICTJ-NY has made clear that it intends to depose both of Ziga's parents, his other family members, doctors and possibly others. Plaintiffs have the option of pursuing no further discovery, although that would seem a questionable strategy. While some of the discovery taken to date is clearly relevant to the merits, nothing suggests that it could not be used if the case is filed anew in Belgium.

2. Public Interest Factors

Public interest factors include "administrative difficulties associated with court congestion; the unfairness of imposing jury duty on a community with no relation to the litigation; the interest in having localized controversies decided at home; and avoiding difficult problems in conflict of laws and the application of foreign law." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

Here, the public interest factors weigh favor of litigation in Belgium, although to a lesser degree than the private interests. First, "this Court has an interest in preventing unnecessary congestion of the court's docket." *BMR*, 92 F.Supp.3d at 142. "While not dispositive, 'it should be noted that this Court sits in one of the busiest districts in the country, ... making this one of the congested centers of litigation referred to in [*Gulf Oil*].'" *Lazare Kaplan*, 337 F. Supp.3d at 303 (quoting *BMR*, 92 F. Supp.3d at 142).

Second, a New York jury has some interest in this matter as ICTJ-NY is located in New York, Ziga received his initial "on-boarding" at ICTJ-NY, and, notwithstanding the

circumstances by which it came about, the appointment of Ziga's estate administrator occurred in New York. New Yorkers have an interest in seeing that organizations such as ICTJ-NY implement appropriate international travel procedures for its employees. However, these interests are diminished given the locus of events taking place in Belgium, including Ziga's having entered into his employment contract with Belgian entity ICTJ-Brussels; as well as having worked in Belgium, lived in Belgium, and received supervision in Belgium; and his having been dispatched from Belgium to Cote d'Ivoire where he allegedly contracted the illness that led to his death. This case is hardly a "localized dispute" in New York. *Aguinda,* 303 F.3d at 480. Rather, it only "peripherally touches New York or the United States" thus diminishing the public interest in having it heard here. *Lazare Kaplan*, 337 F. Supp.3d at 303 (citing *Online Payment Solutions Inc. v. Svenska Handelsbanken AB*, 638 F.Supp.2d 375, 391 (S.D.N.Y. 2009) (collecting cases)).

Third, the dispute ultimately may require application of foreign law. Plaintiffs' allege that New York law applies. But that is far from certain given that Ziga was a French citizen who died in Belgium, his place of employment was Belgium, his employment contract was with a Belgian entity, and the employment contract calls for application of Belgian law. Plaintiffs brush those facts aside and assert that their claim sounds in tort, not breach of contract. But that ignores the criteria for determining what law applies. In a diversity jurisdiction case such as this, a federal court applies the choice of law principles of the forum in which it sits. *Beth Israel Center v. Horizon Blue Cross & Blue Shield of New Jersey, Inc.*, 448 F.3d 573, 582 (2006) (citing *Klaxon Co. v. Stentor Electrical Manufacturing Co.*, 313 U.S. 487, 496 (1941)); *Pierre v. Gts Holdings, Inc.*, No.

15 Civ. 143, 2015 WL 7736552, at *2 (S.D.N.Y. Nov. 30, 2015). In New York, courts "'seek to apply the laws of the jurisdiction with the most significant interest in, or relationship to, the dispute.'" *White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281, 284 (2d Cir. 2006) (quoting *Lazard Freres & Co. v. Protective Life Insurance Co.*, 108 F.3d 1531, 1539 (2d Cir. 1997). Although this Court need not and does not decide at this juncture which jurisdiction's law applies, suffice it to say that there are many factors pointing toward Belgium. *See Lazare Kaplan*, 337 F. Supp.3d at 304 (considering in the public interest analysis that "while the Court need not resolve the choice-of-law issue in a [*forum non conveniens*] analysis, Belgian law may very well apply to these proceedings").

In sum, balancing the private and public interests weighs in favor of dismissal so that this case can be pursued in Belgium. Plaintiffs' choice of New York as their forum merits some but not strong deference, particularly given the various indications that the choice of New York was tactical and not a matter of convenience. Contrary to Plaintiffs' contention that "New York is at the origin and epicenter of this case" (Pl. Mem. at 15), this case has far more grounding it in Belgium than in New York. *See Mayer*, 2018 WL 1738322 at *6 ("Even if New York has an interest in the case because the defendant is a corporation that has significant ties to New York, New York's interest is substantially less than the U.K.'s. This is, at its core a local case that should be tried at home, in the U.K."). Under these circumstances, dismissal is warranted.

D. Conditional Dismissal

Dismissing a case based on *forum non conveniens* presupposes that the defendant would be amenable to litigation in the alternative forum. Accordingly, courts often place conditions on a *forum non conveniens* dismissal, particularly conditions concerning jurisdiction, statutes of limitations and the alternative forum's willingness to hear the case. *See, e.g., Blanco*, 997 F.2d at 984 ("forum non conveniens dismissals are often appropriately conditioned to protect the party opposing dismissal") (collecting cases); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 203-04 (2d Cir.1987) (affirming dismissal on condition that defendant consent to personal jurisdiction and waive statute of limitations defense in India); *Calavo Growers*, 632 F.2d at 968 (finding that district court should have made dismissal conditional on defendants' consent to submit to jurisdiction in Belgium and waiver of any statute of limitations defense that had arisen since commencement of district court action); *BMR*, 92 F. Supp.3d at 143 (S.D.N.Y. 2015) (conditioning dismissal on defendant's consent to jurisdiction, defendant's waiver of post-filing statute of limitation defense, and Indian courts' willingness to hear the case); *Mayer*, 2018 WL 1738322 at *3 (granting dismissal conditioned on defendant's consenting to service of process and submitting to jurisdiction in the U.K.).

As explained above in discussing adequacy of Belgium as a forum, similar conditions are appropriate here. Those conditions are that (1) Defendant consents to the jurisdiction of the appropriate Belgian courts (which ICTJ-NY already has provided); (2) Defendant agrees to waive any statute of limitations defense that has arisen since the commencement of this action in the Southern District of New York (which ICTJ-NY

already has provided); and (3) the Belgian courts' willingness to exercise jurisdiction over Defendant.

The parties' additional arguments not expressly addressed above have been considered by the Court and found to be without merit.

Conclusion

For the foregoing reasons, I recommend that Defendant's motion to dismiss be GRANTED and the case dismissed on the conditions that (1) Defendant consents to the jurisdiction of the appropriate Belgian courts; (2) Defendant agrees to waive any statute of limitations defense that has arisen since the commencement of this action in the Southern District of New York; and (3) the Belgian courts' willingness to exercise jurisdiction over Defendant.[67]

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the Chambers of the Honorable Andrew L. Carter, United States Courthouse, 40 Foley Square, Room 435, New York, New York 10007, and to the Chambers of the undersigned, at United States Courthouse, 500 Pearl Street, Room 1960, New York, New York 10007. **Failure to file timely objections will result in a waiver of objections and will preclude appellate review.**

[67] In a dismissal order, the Court may indicate that the case can be reinstated in the event the Belgian courts do not exercise jurisdiction over ICTJ-NY despite its having given consent. *See, e.g., BMR*, 92 F. Supp. at 143 (dismissing and terminating case but permitting reinstatement in the event conditions are not met).

Respectfully submitted,

ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: April 25, 2019
New York, New York

Copies transmitted to all counsel of record.