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

In the Matter of the Claim of	
5 U.S.C. 552(b)(6)	Claim No. LIB-III-036
	Claim No. LIB-III-037
	Claim No. LIB-III-038
	Claim No. LIB-III-039
ESTATE OF OSCAR SHANKS CLIPPARD, DECEASED; JANET F. CLIPPARD, PERSONAL REPRESENTATIVE	Claim No. LIB-III-040
5 U.S.C. 552(b)(6)	Claim No. LIB-III-041
	Claim No. LIB-III-042
	Claim No. LIB-III-043
	Claim No. LIB-III-045
	Claim No. LIB-III-046
	Claim No. LIB-III-047
	Claim No. LIB-III-048
	Claim No. LIB-III-049
	Claim No. LIB-III-050
	Claim No. LIB-III-051
	Claim No. LIB-III-052
	Claim No. LIB-III-053
ESTATE OF THOMAS RICHARD MCCOOL,	

DECEASED; MARIA MACHELL BALLENA, EXECUTRIX } Claim No. LIB-III-054

5 U.S.C. 552(b)(6)

} Claim No. LIB-III-056

} Claim No. LIB-III-058

} Claim No. LIB-III-059

} Claim No. LIB-III-060

} Claim No. LIB-III-061

} Claim No. LIB-III-063

} Claim No. LIB-III-065

} Claim No. LIB-III-066

} Claim No. LIB-III-068

} Claim No. LIB-III-069

} Claim No. LIB-III-070

} Claim No. LIB-III-071

} Claim No. LIB-III-072

} Claim No. LIB-III-073

} Claim No. LIB-III-074

} Claim No. LIB-III-075

} Claim No. LIB-III-076

} Claim No. LIB-III-077

} Claim No. LIB-III-078

} Claim No. LIB-III-080

} Claim No. LIB-III-081

} Claim No. LIB-III-084

} Claim No. LIB-III-086

5 U.S.C. 552(b)(6)	Claim No. LIB-III-087
	Decision No. LIB-III-045
Against the Great Socialist People's Libyan Arab Jamahiriya	

Counsel for Claimant: Joanne W. Young, Esq.
Kirstein & Young, PLLC

FINAL DECISION

Claimants, known collectively as the "Abbott Group," object to the Commission's Proposed Decision denying their claims against the Great Socialist People's Libyan Arab Jamahiriya ("Libya"). Claimants are former employees of Pan American World Airways, Inc. ("Pan Am"), who lost their jobs when Pan Am ceased operations and liquidated in December 1991. They contend 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 them losing their jobs. They claim that because Libya bears responsibility for the Lockerbie bombing, it should therefore also be held liable for their job losses.

In the Proposed Decision, the Commission denied the claims for two independent reasons: (1) Claimants had failed to demonstrate that their claims were not extinguished by a 2005 settlement between Pan Am and Libya; and (2) they had failed to demonstrate that the Lockerbie bombing caused their job losses. The Proposed Decision also raised the question of whether Claimants had a property interest in their jobs, but did not decide the issue because it was unnecessary to the resolution of these claims.

On objection, Claimants have submitted additional evidence and argument in support of their claims. Claimants argue that (1) the 2005 Libya-Pan Am settlement did not extinguish their claims against Libya, (2) the Proposed Decision's causation analysis

was erroneous, and (3) they did in fact have a compensable property interest in their jobs. Claimants thus maintain that they are entitled to damages in the amount of the income they would have earned until retirement (including pension plan contributions) if Pan Am had not liquidated and had continued to employ them.

After carefully considering all of Claimants' arguments and evidence, we conclude that these claims must still be denied. Although Claimants have shown that the 2005 Libya-Pan Am settlement did not extinguish their claims, they have still not shown that the Lockerbie bombing caused their job losses. We therefore affirm the denial of these claims.

BACKGROUND

Claimants brought these 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 their claims, Claimants alleged that the 1988 Lockerbie bombing ultimately forced Pan Am to cease operations and liquidate in December 1991, resulting in Claimants losing their jobs as pilots[2] for the airline, which in turn caused them to lose several years' worth of income and benefits they otherwise would have earned. Claimants

[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 [hereinafter 2013 Referral].

[2] With one exception, all claimants in the Abbott Group allege to have been employed as Pan Am pilots. The exception is the Claimant in Claim No. LIB-III-086, who alleges that she was a Pan Am flight attendant.

asserted that, but for the terrorist bombing, Pan Am would have continued operations and that they would have continued to work for Pan Am.

The Commission denied the claims in a Proposed Decision dated August 16, 2016 ("Consolidated Proposed Decision"), concluding that Claimants had failed to meet their burden of proving that their damages were "compensable under the applicable legal principles," as required by Category F of the 2013 Referral. The claims addressed in the Consolidated Proposed Decision involved facts essentially identical to those in another Abbott Group claim that the Commission had previously decided, Claim No. LIB-III-044, Decision No. LIB-III-044 (2016) ("Initial Proposed Decision").[3] The evidentiary record at the time of the Consolidated Proposed Decision was substantially the same as it was at the time of the Initial Proposed Decision except for the addition of a handful of documents. Because the new evidence was not dispositive to the fundamental legal question, the Commission denied the claims in the Consolidated Proposed Decision for the same reasons as in the Initial Proposed Decision.[4]

On September 13, 2016, these Claimants (those whose claims were denied in the Consolidated Proposed Decision) filed a Consolidated Notice of Objection and requested

[3] The day before the Consolidated Proposed Decision, August 15, 2016, the claimant in Claim No. LIB-III-044 filed a notice of objection to the Initial Proposed Decision and requested an oral hearing.

[4] On that same date, August 16, 2016, the Commission issued separate Proposed Decisions in all of the remaining Abbott Group claims. Those claims presented special estate-related issues ("Estate Proposed Decisions"). *See ESTATE OF EDGAR LEE MOBLEY, JR.*, Claim No. LIB-III-055, Decision No. LIB-III-046 (2016); *ESTATE OF STANLEY A. ROITZ*, Claim No. LIB-III-057, Decision No. LIB-III-047 (2016); *ESTATE OF ROLF SUNDE VON LORENZ*, Claim No. LIB-III-062, Decision No. LIB-III-048 (2016); *ESTATE OF RICHARD L. WENTZ*, Claim No. LIB-III-064, Decision No. LIB-III-049 (2016); *ESTATE OF ROBERT A. RICH*, Claim No. LIB-III-079, Decision No. LIB-III-050 (2016); *ESTATE OF JAMES STEPHENSON*, Claim No. LIB-III-082, Decision No. LIB-III-051 (2016); *ESTATE OF HOWARD STANTON THOMAS*, Claim No. LIB-III-083, Decision No. LIB-III-052 (2016). In each of those Estate Proposed Decisions, the Commission denied the claim because the Claimant had failed to submit sufficient evidence to show that the claim had been brought by a legally authorized estate representative. The Commission further stated that, even if the claims had been brought by legally authorized estate representatives, it would deny the claims for the same reasons explained in the Initial Proposed Decision and the Consolidated Proposed Decision. In two of those Estate Proposed Decisions, the Commission further held that the Claimant had not satisfied the requirement of continuous U.S. nationality. *See* Claim No. LIB-III-064, Decision No. LIB-III-049; Claim No. LIB-III-082, Decision No. LIB-III-051.

an oral hearing.[5] The Consolidated Notice of Objection included extensive argument explaining why Claimants viewed the Consolidated Proposed Decision as wrongly decided. The Commission then scheduled a consolidated hearing for December 14, 2016, to address all of the Abbott Group claims.

Claimants filed a Hearing Brief on November 23, 2016. The brief was filed on behalf of all Abbott Group claimants who had filed objections to their respective Proposed Decisions, and it included numerous exhibits. Although some of these exhibits were new, most were not, and the Commission had thus considered most of them before issuing the Consolidated Proposed Decision.[6]

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. Several witnesses testified at the hearing, and Claimants' attorneys argued extensively on Claimants' behalf. Following the hearing, on December 22, 2016, Claimants submitted a written statement from one of the witnesses. 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

[5] On that same date, September 13, 2016, Claimants in the Estate Proposed Decisions also filed notices of objection in which they incorporated by reference all of the objections and asserted errors detailed in the consolidated notice of objection filed by the Claimants who objected to the Consolidated Proposed Decision.
[6] On that same date, November 23, 2016, Claimants also filed a separate "Memorandum in Support of the Claimant's Standing" in support of the claims of the *ESTATE OF ROBERT A. RICH*, Claim No. LIB-III-079, *ESTATE OF JAMES STEPHENSON*, Claim No. LIB-III-082, and *ESTATE OF HOWARD STANTON THOMAS*, Claim No. LIB-III-083, which were among the claims denied for failure to identify a legally authorized estate representative.

closed."[7] A few days later, on January 13, 2017, Claimants submitted another written statement from one of the witnesses at the hearing. They then wrote to the Commission on January 23, 2017, indicating that they had not received the Commission's January 10th letter until that day, and asking for confirmation that the Commission would consider the January 13th witness statement. In a January 27, 2017 letter, the Commission granted this request, and in a written response on January 30, 2017, counsel for the Claimants indicated that she "now understand[s] that the record is closed."[8]

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

DISCUSSION

Claimants have the burden to prove that their claims are "compensable under the applicable legal principles."[9] The Commission must thus determine whether Claimants' evidence suffices to meet that burden.

In their Consolidated Notice of Objection and Hearing Brief, Claimants contend, *inter alia*, that the 2005 settlement between Pan Am and Libya did not extinguish their claims, and that the Commission employed a faulty causation analysis. Claimants' counsel

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[7] 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.

[8] In the months since then, Counsel has also submitted documents from the Estate of Thomas Richard McCool, Claim No. LIB-III-054, including letters testamentary and Mr. McCool's death certificate (evidencing his death on December 18, 2016); and documents from the Estate of Oscar Shanks Clippard, Claim No. LIB-III-040, including letters of administration and Mr. Clippard's death certificate (evidencing his death on June 21, 2017). Based on this evidence, the estates of both Mr. McCool and Mr. Clippard have established their standing to bring their decedents' claims before the Commission. On December 12, 2017, the Commission was informed that Claimant Fitzgerald (Claim No. LIB-III-072) had also passed away, on September 25, 2017. Counsel submitted, *inter alia*, a copy of Mr. Fitzgerald's death certificate; a letter from the decedent's wife, the purported estate representative, authorizing counsel to proceed with the decedent's claim; a Petition for Probate; and a Notice of Petition to Administer Estate of Richard S. Fitzgerald. However, as of the date of this decision, the Commission has not received any letters of administration. The claim is therefore denied for lack of standing. However, even if such documentation had been provided, and the estate had proved its standing, the claim would still be denied for the reasons articulated in this decision.

[9] 2013 Referral, *supra* note 1, at ¶ 8.

amplified and supplemented these arguments during the consolidated oral hearing held on December 14, 2016. We detail and address Claimants' arguments below.

After carefully considering all of Claimants' evidence and argument in light of the applicable legal principles in these claims, we again conclude that Claimants have failed to meet their burden of proving their claims.

I. Claimants' New Evidence

January 25, 2005 Libya-Pan Am Settlement Agreement: On objection, Claimants provided a copy of the 2005 settlement agreement between Pan Am and Libya.

Witness Oral Testimony and Written Statements: On objection, Claimants also submitted several witness statements: a statement, 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; and an unsworn statement, dated November 22, 2016, from Peter A. Pappas, former Vice President of Strategic Planning for Pan Am.

At the oral hearing, the Commission heard live testimony from several witnesses. Dr. Tulinda Larsen, an aviation economist who had previously submitted a written statement, testified, as did three former Pan Am executives: Mr. Thomas G. Plaskett, former Chairman and CEO of Pan Am, Mr. Pappas, and Mr. Punwani. Finally, three of the Claimants—5 U.S.C. 552(b)(6)

—also testified in compelling, personal terms. 5 U.S.C. 552(b)(6) testimony focused on

[10] Although 5 U.S.C. 552(b)(6) is not one of the claimants in these claims, he is one of the Abbott Group claimants. 5 U.S.C. 552(b)(6) claim was denied in the Initial Proposed Decision, and we affirm that denial in a separate decision. *See* Claim No. LIB-III-044, Decision No. LIB-III-044 (2018) (Final Decision).

the period after Pan Am liquidated and how he was unable to find another job despite his best efforts. 5 U.S.C. 552(b)(6) also focused on the impact of losing his job, describing the financial and psychological toll on him and his family. 5 U.S.C. 552(b)(6) testimony focused on the impact the Lockerbie bombing had on him personally. In December 1988, he was the chief accident investigator for the Pan Am pilots' union group, and he testified about his experience in Lockerbie less than 24 hours after the bombing. He also movingly described his friendship with the pilot of Pan Am Flight 103 and how he saw his friend's "final resting place" on the ground near the airplane wreckage.

Following the hearing, Claimants submitted two additional exhibits: a second 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; and a third unsworn statement from Dr. Larsen, dated January 13, 2017, withdrawing the earlier analysis set forth in her previous statements and adopting Mr. Punwani's views.

Additional Documentary Evidence: On objection, Claimants also submitted excerpts from a 1992 SEC Form 10-K from Continental Airlines; and a copy of a January 2, 1989, *Time* magazine article entitled "Terror in the Night."

II. Analysis

2005 Settlement Agreement

The Commission must first determine whether the 2005 settlement agreement between Libya and Pan Am ("Settlement Agreement"), which arose from a lawsuit Pan Am brought against Libya in Scotland, extinguished these claims. In the Proposed Decisions, we held that Claimants failed to proffer sufficient probative evidence about the actual contents of the Settlement Agreement to meet their burden on this issue.

Because Claimants had not submitted a copy of the Settlement Agreement, the Initial Proposed Decision looked to a motion that Pan Am had filed in U.S. bankruptcy court when seeking approval of the settlement. That motion included language stating that the agreement was made "in full and final satisfaction" of the "Pan Am Losses Claim."[11] We noted that, depending on the scope of the "Pan Am Losses Claim," the 2005 settlement might cover, and thus preclude, these claims: the Settlement Motion described 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*.'"[12]

The Commission also stated that, because Pan Am's employees were creditors of Pan Am and thus beneficiaries of the settlement, the agreement could have included terms requiring them to waive all claims related to the Lockerbie disaster, including those beyond the "Pan Am Losses Claim."[13] Because of this possibility, we noted that former Pan Am employees who had administrative claims in bankruptcy may have given "at least their tacit approval to" the Settlement Agreement when the agreement was submitted to and approved by the bankruptcy court without apparent objection.[14]

Because these issues could not be conclusively determined "[w]ithout concrete evidence about the actual contents of the Settlement Agreement," the Initial Proposed Decision and the Consolidated Proposed Decision denied the Claimants' claims.[15]

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[11] Initial Proposed Decision, *supra*, at 27-28. Specifically, the Settlement Motion indicated 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." *Id*. at 27. The Commission stated that the Claimants' claim did not seem to be a "Hull Claim," which only involved claims relating to "the physical loss of the [aircraft's] hull . . . ." *Id*.
[12] *Id*. at 28 (quoting Settlement Motion) (emphases added).
[13] *Id*.
[14] *Id*.
[15] *Id*. at 29; Consolidated Proposed Decision, *supra*, at 14.

On objection, Claimants provided a copy of the 2005 Settlement Agreement.[16] Having now had the opportunity to examine the agreement, we conclude that it did not extinguish these claims.

First, the Settlement Agreement does not include any terms requiring Pan Am's creditors or employees to waive claims against Libya. Rather, the only term that could arguably constitute a waiver or release applies only to the "second party" to the Agreement—*i.e.*, Pan Am and Minmar (495) Ltd.[17]—and provides that, upon Libya's payment of the settlement sum, Pan Am and Minmar shall "abandon definitively and immediately all current Scottish judicial proceedings and shall not advance future claims before any body against [Libya] as a result of the [Lockerbie] incident." In contrast, with respect to third-party claims, the Settlement Agreement provides that "[n]o other pending case filed by parties other than [Pan Am and Minmar] shall be affected by this agreement."

Second, Claimant's claims do not appear to fall within the scope of the 2005 settlement. Although the Settlement Agreement does not use or define the term "Pan Am Losses Claim," it does state that the settlement constitutes "full and final compensation" for all "damages and losses incurred by [*Pan Am*] as a result of the Lockerbie incident ...." The claims that Claimants bring here—for their lost future wages and benefits—would not ordinarily be considered losses or damages incurred by *Pan Am*. On the contrary, by the time the Settlement Agreement was concluded in 2005, Pan Am had long since discharged

[16] The Settlement Agreement includes a "Minute of Agreement" and three accompanying schedules. The substantive terms of the settlement are contained in Schedule 1, "Memorandum of Agreement," which is incorporated by reference into the Minute of Agreement. Because distinguishing among these documents is not relevant for these claims, we refer to all of them collectively as the "Settlement Agreement."

[17] Minmar (495) Ltd. had been assigned the rights to payments made by various hull insurers for the physical loss of Pan Am Flight 103.

in bankruptcy any responsibility it may have had for such claims.[18] The wages and benefits that Claimants seek are losses incurred by Claimants themselves as a result of Pan Am's liquidation. Such claims fall outside the "full and final" settlement reached in 2005 and were therefore not extinguished by that agreement. By their express terms, the provisions requiring the dismissal of pending claims and barring future claims do not apply to Pan Am's creditors and/or employees, including former employees such as Claimants. The specific terms of the 2005 Settlement Agreement thus do not preclude Claimants from seeking damages against Libya here.

Accordingly, the 2005 Settlement Agreement between Pan Am and Libya did not extinguish Claimants' claims against Libya under Category F of the 2013 Referral.

Causation

1. *Applicable Law and Summary of Conclusions*

To prevail under Category F of the 2013 Referral, a Claimant must show that his or her claim is "compensable under the applicable legal principles."[19] Under the Commission's authorizing statute, the applicable legal principles are, in order, "'the applicable principles of international law, justice and equity.'"[20] Here, the applicable principles of international law conclusively determine the resolution of these claims.

Under the international law of state responsibility, a State committing an internationally wrongful act is "'under an obligation to make full reparation for the injury caused by the internationally wrongful act.'"[21] And since "'the mid-air destruction of an

[18] *See* Order Approving Settlement of Certain Employee Claims Issues, Establishing Employee Claims Allowance Process and Expunging Administration Claims at 19, *In re* Pan Am Corp., No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Sept. 30, 1994).
[19] 2013 Referral, *supra* note 1, ¶ 8.
[20] Consolidated Proposed Decision, *supra*, at 12 (quoting 22 U.S.C. § 1623(a)(2) (2012)).
[21] Initial Proposed Decision, *supra*, at 25 (quoting *Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third*

aircraft by terrorists in such circumstances as are present here is an internationally wrongful act,'[22] Libya must 'make full reparation' for any injury 'caused by' the downing of Pan Am Flight 103."[23] To establish that a claimant's injury was "caused by" an internationally wrongful act under international law, the claimant must prove two things. First, the claimant must establish factual causation, also known as but-for causation.[24] Second, the claimant must establish legal causation, also known as proximate causation.[25] Thus, in order to demonstrate that the Lockerbie bombing caused their injury, Claimants must show, under the applicable international-law principles, *both* but for ("factual") and proximate ("legal") causation. In other words, they must show both that, as a factual matter, if not for the Lockerbie bombing, they would not have lost their jobs with Pan Am, and that, as a legal matter, their job losses were directly connected to, and not too remote from, the bombing.

Relying largely on our earlier analysis in the Initial Proposed Decision, the Consolidated Proposed Decision found that Claimants had failed to meet their burden[26] to

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Session 43, art. 1, UN GAOR, 56th Sess., Supp. No. 10, at 43, 51, UN Doc. A/56/10 (2001) [hereinafter ILC Draft Articles]).

[22] *Id.* (quoting *Claim of INTERLEASE, INC.*, Claim No. LIB-II-023, Decision No. LIB-II-163, at 8 (2012)).

[23] *Id.* at 25-26.

[24] *See* ILC Draft Articles, *supra* note 21, at 227 cmt. 10 ("[C]ausality in fact is a necessary…condition for reparation."). "Factual cause" is defined as "[t]he cause without which the event would not have occurred." *Black's Law Dictionary* 250 (9th ed. 2009).

[25] *See* Initial Proposed Decision, *supra*, at 29 (citations omitted); *Claim of ESTATE OF VIRGEN MILAGROS FLORES*, Claim No. LIB-II-065, Decision No. LIB-II-043, at 9 (2011); ILC Draft Articles, *supra* note 21, at 43, 227 cmt. 10, UN Doc. A/56/10 (2001) (citing, *inter alia*, Administrative Decision No. II, 7 R.I.A.A. 23, 29-30 (U.S.-Ger. Mixed Claims Comm'n 1923)); *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; Decision No. 7: Guidance Regarding Jus ad Bellum Liability, 26 R.I.A.A. 10, 15 (Eri.-Eth. Claims Comm'n 2007); *see also* ILC Draft Articles, *supra* note 21, at 227 cmt. 10 ("[C]ausality in fact is a necessary but not a sufficient condition for reparation.")

[26] *See* 45 C.F.R. § 509.5(b) (2016) ("The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.").

Related to Claimants' burden, they argue that the Proposed Decisions failed to assess their claims under a preponderance-of-the-evidence standard and thus improperly used the wrong *standard* of proof. *See* Hr'g Br. 9-11, Nov. 23, 2016. We need not determine the precise standard of proof here. Even under a

show that the bombing of Pan Am Flight 103 was either a but-for cause of their injury[27] or a proximate cause of their injury.[28] The Commission therefore concluded that, under the applicable legal principles, Claimants had failed to prove the necessary causal connection between Libya's actions and their injury, and that Libya was thus not liable for Claimants' injury.[29]

On objection, Claimants contend that the Proposed Decisions' causation analysis was flawed. In their Consolidated Notice of Objection and Hearing Brief, Claimants make numerous overlapping arguments. During the oral hearing, Claimants' counsel consolidated those arguments, framing them around five points: 1) The Proposed Decisions failed to understand the importance of cash to an airline's ability to operate; 2) The airline industry is unique in its need to forecast future performance based on recent past performance; 3) Nothing broke the causal chain connecting the Lockerbie bombing in December 1988 to Pan Am's closure in December 1991; 4) Under international law, proximate cause was established because Libya's attack was intentional and it was

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preponderance-of-the evidence standard, Claimants have failed to meet their burden: they have failed to prove that it is more likely than not that Pan Am would have survived if not for Lockerbie. *See* 2 Kenneth S. Broun, *McCormick on Evidence* § 339 (7th ed. 2013) ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence."); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 3:5 (3d ed. 2007) ("By the prevailing view, [the preponderance of the evidence] standard means the jury is persuaded (acting as reasonable persons) that the points to be proved are more probably so than not.")

[27] *See* Consolidated Proposed Decision, *supra*, at 15-16 ("Claimants have failed to establish that, but for the Lockerbie bombing, they would not have suffered their alleged losses …."); Initial Proposed Decision, *supra*, at 30 ("Claimant has failed to establish that Libya's actions were even a [but-for] cause, let alone a proximate cause, of any damages he suffered.").

[28] Initial Proposed Decision, *supra*, at 26 ("[H]e 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."); Consolidated Proposed Decision, *supra*, at 13 (2016) ("[T]hey have 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 Claimants' damages).").

[29] We use the phrase "their injury" throughout to mean the damages Claimants seek in these claims (*i.e.*, any financial losses Claimants suffered due to losing their jobs upon Pan Am's liquidation).

foreseeable that Pan Am would go out of business; and 5) Claimants' claims are unique and will not create any future precedent.

Having reviewed the newly submitted evidence along with all of the evidence Claimants previously submitted, we conclude that none of Claimants' arguments undermine the Consolidated Proposed Decision's determinations on causation.[30] The Commission therefore affirms its holding that, under the applicable legal principles, Claimants have failed to establish that Libya's actions caused their injury. For that reason, we affirm our denial of their claims.

2. *Claimants Have Not Shown That Cash Lost Due to Lockerbie Caused Pan Am's Demise*

On objection, Claimants argue that, "but for Lockerbie, Pan Am *would have had enough cash assets to remain viable and pursue strategic alternatives* regardless of whether it sought Chapter 11 protection and notwithstanding the geopolitical events experienced by the entire industry beginning in July 1990."[31] Claimants' principal objection to the Proposed Decisions on this point is their argument that the Proposed Decisions failed to "[u]nderstand the [c]ritical [i]mportance of [c]ash to an [a]irline's [a]bility to [o]perate."[32]

[30] We address Claimants' first two points in Part 2, the third and fourth points in Parts 3 and 4, and the fifth point in Part 5.
[31] Claimants' Consolidated Notice of Objection at 7, Sept. 13, 2016 [hereinafter CNO] (emphasis in original); *see also id.* at 10 ("The evidence amply supports Claimants' position that the depletion of cash directly following Lockerbie was *the* critical factor leading step by step to the ultimate closure of Pan Am."); *id.* at 11 ("In the end, the significant drop in cash directly attributable to Lockerbie eliminated the additional cash Pan Am would have had to acquire NWA in 1989, or to provide sufficient backstop to offset the impact of the industry downturn in mid-1990."); *id* at 14 ("Lockerbie directly caused a substantial drop in the cash position of Pan Am, *that it never regained,* which made it uniquely vulnerable to the economic forces that affected the airline industry beginning in the second half of 1990 and ultimately forced the company into Chapter 7 liquidation.") (emphasis in original).
[32] *Id.* at 9.

In support of this argument, Claimants have submitted several different estimates of the amount of cash Pan Am would allegedly have had if not for Lockerbie. In addition to the written statements from aviation economists Dr. Larsen and Sanford Rederer submitted by Claimants before the Consolidated Proposed Decision, the issue of Pan Am's projected cash was also discussed in the additional written statements and live testimony from Dr. Larsen, as well as the live testimony and post-hearing unsworn statement from Ramesh Punwani.

Each of these witnesses put forward different estimates of cash lost due to Lockerbie. Mr. Rederer concluded that Lockerbie caused Pan Am to lose $304 million in cash. Prior to the hearing, Dr. Larsen opined that the figure was $861 million. Mr. Punwani's oral testimony pegged the number at about $650 million, and his unsworn statement then settled at $618 million. Following the hearing, Dr. Larsen abandoned her previous testimony and stated that she agreed with Mr. Punwani. To come up with these figures, all of Claimants' witnesses focused their financial analysis almost entirely on 1988, and in particular the third quarter of 1988, just before Lockerbie, and assumed that Pan Am's relatively strong performance then was the only relevant aspect of Pan Am's past financial performance.

Claimants argue that the Proposed Decisions erred in concluding that their witnesses' forecasts of lost cash were speculative.[33] They argue that those forecasts were fully justified.[34] In particular, they argue that the Proposed Decisions failed to understand that the airline industry is unique in its need to forecast future performance based on "recent

[33] *See* CNO, *supra* note 31, at 15.
[34] *See id.* at 23-26.

past performance and projected growth."[35] Claimants thus argue that the Commission should limit its consideration of Pan Am's financial performance to a single profitable quarter just before Lockerbie, rather than the several years preceding the attack, when Pan Am's finances were much worse and fluctuated dramatically. Claimants contend that the improved 1988 third-quarter performance was the result of a turnaround plan that Pan Am's then-new CEO, Mr. Plaskett, implemented and that Pan Am's finances would have continued to improve if not for the Lockerbie bombing.

Claimants contend that the uniqueness of the airline industry justifies using projections of future performance based on immediate past performance and assumptions about future growth because, as they put it, "[t]he methodologies used by Dr. Larsen and Mr. Rederer are the same tools the airlines use in their operational planning process to determine where they will fly, what size aircraft to use, what prices to charge and how to adjust those prices to maximize revenue (yield management)."[36] Claimants also assert that the Proposed Decisions wrongly assumed that an airline can never surpass its prior financial performance.[37] They further argue that, in the airline industry, the fixed costs are high and the marginal costs relatively low and that, unlike other retail businesses, lost revenue from an empty seat can never be recovered. Thus, lost revenue translates to mostly lost profit, which in turn translates to lost cash.

There are several problems with Claimants' projections about how much cash Pan Am would have had if not for Lockerbie: (a) Claimants' estimates are not based on

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[35] Oral Hr'g, pt. 1, at 31:07. To support this argument, they cite the opinion of Professor Vasigh, who states that the recent past is more important in such forecasts than historic performance. *See* Hr'g Br. 13.
[36] *See* CNO, *supra* note 31, at 16.
[37] *See id.* at 20 (referring to the Proposed Decisions' supposedly "absurd proposition" that "Pan Am could not have [had] a cash balance of close to $500 million at the end of 1989 because that would have been better than the company did in any year post 1978 except 1984."); Hr'g Br. 13 ("The Proposed Decisions incorrectly assert, without any basis, that Pan Am could not have become profitable even without Lockerbie because it was not profitable in the 1980s.").

consistent past performance; (b) Claimants' projections rely on methodologies not shown to be reliable predictors of actual performance; and (c) Claimants' witnesses' estimates are not consistent and are not supported by contemporaneous evidence.

a. Claimants' estimates are not based on consistent past performance.

Under the international law of state responsibility, recovery for financial losses such as future lost profits can only be based on consistent past performance and may not rely solely, as Claimants seek to do here, on performance during a single quarter or year, along with assumptions of growth built on that short time period.[38] As the Commission stated in a previous program, claims for prospective growth or profits should be "based strictly on documented past performance of the entity involved or existing contractual obligations . . . ."[39] The United Nations Compensation Commission ("UNCC") has similarly noted that such claims should *not* be based on "forecasts and projections into the future."[40] Moreover, claims for a decline in business should demonstrate a "consistent level of income and profitability. . . . A mere showing of past earnings . . . in the

[38] Although Claimants do not seek to recover Pan Am's lost profits and/or lost cash, the law related to lost profits is directly applicable here because Claimants' theory of causation necessarily depends on their establishing the amount of money Pan Am lost due to Lockerbie. Claimants' theory of causation is that, but for Lockerbie, Pan Am would have had sufficient cash to survive. Thus, as they themselves acknowledge, they must establish facts about Pan Am's financial losses due to Lockerbie in order to establish a causal link between Libya's actions and Pan Am's liquidation. Thus, even though they are not seeking to recover Pan Am's financial losses due to Lockerbie, they still must prove that those losses were so great that, without them, Pan Am would have survived.

[39] *Claim of AMERICAN INTERNATIONAL GROUP, INC.*, Claim No. E-002, Decision No. E-030, at 8 (1987) (Proposed Decision); *see also Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting, held on 6th March 1992*, ¶ 19, UN Doc. S/AC.26/1992/9, 6 March 1992 [hereinafter *UNCC Governing Council Decision 9*] (noting that claims for "loss of future earnings and profits" should be "focus[ed] on past performance rather than on forecasts and projections into the future."); *Report and Recommendations Made by the Panel of Commissioners Concerning the Second Instalment of "E2" Claims*, ¶ 83, U.N. Doc. S/AC.26/1999/6, 19 March 1999 [hereinafter *UNCC Category E2 Second Instalment Report*].

[40] *UNCC Governing Council Decision 9*, *supra* note 39, ¶ 19; *UNCC Category E2 Second Instalment Report*, *supra* note 39, ¶ 83.

compensable area will be insufficient . . . ."[41] A showing of short-term revenues is thus insufficient to show a company's future revenues.[42]

Indeed, the case on which Claimants most heavily rely, *Lemire v. Ukraine*,[43] supports this very point. Claimants cite the decision as an example of a case where future lost profits were awarded; however, in *Lemire*, the applicant had consistent and growing profits prior to the wrongful act, and there were no other known causes for the harm. Such is not the case here. As we described in detail in the Initial Proposed Decision, Pan Am struggled for years prior to the Lockerbie bombing,[44] and even Claimants do not argue that Lockerbie was the only known cause of their harm.

Here, Claimants and all of their witnesses rely on Pan Am's *very recent* past performance (*i.e.*, its "relatively good performance in 1988"),[45] and its "strong projected growth"[46] (growth that was projected to build off a single good quarter, the third quarter of 1988, and assumptions that Mr. Plaskett's turnaround plan would save the airline). However, Claimants have not shown that any aspect of Pan Am's financial performance (including its cash position) prior to the Lockerbie bombing had been consistent over the long term. In fact, Pan Am had been a money-losing venture with inconsistent cash

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[41] *Report and Recommendations Made by the Panel of Commissioners Concerning the Third Instalment of "E2" Claims*, ¶ 105, U.N. Doc. S/AC.26/1999/22, 9 December.
[42] *See* Asian Agric. Prods. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶¶ 104-106 (June 27, 1990) 4 ICSID Rep. 250 (1997), *available at* https://perma.cc/X6RJ-LBLH.
[43] *Lemire* was an arbitration held under the auspices of the International Centre for Settlement of Investment Disputes (ICSID). ICSID Case No. ARB/06/18, Award, ¶ 164 (Mar. 28, 2011), *available at* https://perma.cc/LM7L-57Z6. The case involved business losses allegedly caused by Ukraine's violation of a bilateral investment treaty with the United States. An American investor in a Ukrainian commercial radio station alleged his applications for radio frequencies had been denied because he was a foreigner and did not have the same domestic political connections as his competitors.
[44] *See* Initial Proposed Decision, *supra*, at 6-9.
[45] Hr'g Br. 13 (quoting Vasigh Statement).
[46] *Id.* (quoting Vasigh Statement).

positions throughout the decade prior to the Lockerbie bombing.[47] Thus, even if, as Claimants assert, "recent past performance and projected growth" might "form[] the basis for projecting future performance[]" in the airline industry,[48] and even if Pan Am's recent performance would have been "the basis for strong projected growth in 1989 and moving forward[,]"[49] this would be insufficient to hold Libya liable under the law of causation. Moreover, the mere possibility that Pan Am "*could . . . have* become profitable . . . without Lockerbie" and surpassed its prior financial performance, as Claimants put it,[50] would not suffice to meet the legal standard required to prevail in these claims.

b. Claimants' projections rely on methodologies not shown to be reliable predictors of actual performance.

Claimants failed to establish that their witnesses' forecasts were accurate predictions of what Pan Am's performance *would actually have been*, because Claimants presented no evidence that any forecast using their witnesses' methodology was ever borne out by reality *post hoc*: they made no showing that any "projection" done using similar methodology ever accurately predicted Pan Am's actual performance. Thus, even assuming Claimants are correct that the airline industry must make projections for "operational planning" purposes (for things such as "where they will fly, what size aircraft to use, what prices to charge and how to adjust those prices to maximize revenue (yield management)"),[51] that does not mean such projections establish what Claimants themselves say they need to establish here, which is the amount of additional cash Pan Am would in fact have had if not for the Lockerbie bombing. In other words, Claimants made

[47] *See* Initial Proposed Decision, *supra*, at 6-9, 37-38; *id.* at 37-38 (citing Agis Salpukas, *Bankruptcy Petition Is Filed by Pan Am to Get New Loans*, N.Y. Times, Jan. 9, 1991, at A1, chart); Consolidated Proposed Decision, *supra*, at 21-22.
[48] Hr'g Br. 13 (quoting Vasigh Statement).
[49] *Id.* (quoting Vasigh Statement).
[50] *See supra* note 37 (quoting Hr'g Br. 13) (emphasis added).
[51] *See supra* at 16-17 (quoting CNO, *supra* note 31, at 16).

no showing that their witnesses' forecasts would have matched (or even approximated) Pan Am's *actual* performance.

That is why the law of causation requires a showing of *consistent* past performance (whether of profits, revenue, or cash). Projections are just that, and the law does not permit recovery based on projections unless there is a strong basis for believing that the projections are based on well-documented, consistent past realities. As the Commission stated in a previous program,

> The projection of future increases in business or profitability, regardless of how well informed or how authoritative, are, in the end only guesses. . . . The Commission has found, therefore, that . . . 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. . . .[52]

Although this quotation comes from an expropriation case rather than one involving a terrorist attack, the principle applies equally here because Claimants' theory relies entirely on an alleged causal connection between Libya's wrongful act and Pan Am's financial performance. Moreover, as the Claimants and their own witnesses have attested, the airline industry is notoriously cyclical,[53] making the witnesses' predictions even more questionable.

c. Claimants' witnesses' estimates are not consistent and are not supported by contemporaneous evidence.

Claimants' three witnesses provided widely divergent estimates of the amount of additional cash Pan Am would have had if not for Lockerbie, rendering their estimates suspect. Indeed, the fact that these estimates diverge demonstrates that not all of them can

[52] *Claim of AMERICAN INTERNATIONAL GROUP, INC.*, Claim No. E-002, Decision No. E-030, at 8 (1987) (Proposed Decision).
[53] *See* Vasigh Statement 2; Oral Hr'g, pt. 1, at 1:22:40-55; CNO, *supra* note 31, at 11.

be correct and that the methodologies on which Claimants rely contain inherent subjectivity.[54]

Moreover, the testimony of each of Claimants' three witnesses (Dr. Larsen, Mr. Rederer, and Mr. Punwani) was lacking in a number of ways. The Proposed Decisions detailed the inadequacies of Dr. Larsen's and Mr. Rederer's previous opinions[55] and noted their inconsistency with Pan Am's contemporaneous record.[56]

Dr. Larsen's hearing testimony and subsequent statement did nothing to cure the defects in her earlier statements. Indeed, her live testimony and statement completely undermined her previous written statement, acknowledging the flaws in her opinion that the Proposed Decisions had identified.[57] In particular, in her original opinion and hearing testimony, Dr. Larsen effectively ignored the fact that Pan Am's expenses would have been higher if not for Lockerbie, and she thus wrongly concluded that any lost revenue would have amounted to a dollar-for-dollar equal loss in cash.[58] Although Claimants disputed that Dr. Larsen had made such a mistake,[59] Dr. Larsen herself conceded at the oral hearing that this is exactly what she had done.[60] She thus acknowledged that she had significantly overstated the amount of cash Pan Am would have had if not for Lockerbie. Indeed, using Dr. Larsen's own numbers in light of her concession, Pan Am would have had, if not for Lockerbie, only $47 million more in cash than it actually did.[61] Even Claimants do not

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[54] For instance, in her testimony, Dr. Larsen acknowledged that the differences between her projections and Mr. Rederer's could be explained in part by the fact that she relied on different assumptions. In addition, she conceded that the growth rate she projected for Pan Am in 1989, 11%, was "an assumption that [she] made[,]" and was not based on any actual company records. Oral Hr'g, p. 1, at 1:33:09-27.
[55] *See* Initial Proposed Decision, *supra*, at 34-39; Consolidated Proposed Decision, *supra*, at 21-25.
[56] *See* Consolidated Proposed Decision, *supra*, at 19-20; Initial Proposed Decision, *supra*, at 34.
[57] *See* Oral Hr'g, pt. 1, at 1:15:30-pt. 2, at 30:15; Initial Proposed decision, *supra*, at 33-38, 39.
[58] *See* Initial Proposed Decision, *supra*, at 36-37.
[59] *See* CNO, *supra* note 31, at 15 ("[C]ontrary to the assertions in the CPD, Dr. Larsen did adjust costs to offset the projected 11% growth in 1989-90" (emphasis in original).).
[60] *See* Oral Hr'g, pt. 2, at 19:27- 21:43.
[61] Dr. Larsen's estimate of lost revenue for 1989 was $450 million, and she originally opined that, if not for Lockerbie, every penny of this lost revenue would have been in Pan Am's cash coffers at the end of 1989.

contend that this amount of cash would have sufficed to prevent Pan Am's liquidation.[62] In light of this fundamental error, Dr. Larsen then withdrew her opinion altogether after the oral hearing. Having done so, she then simply stated that she now agrees with Mr. Punwani's testimony.

Mr. Punwani's testimony and subsequent statement, however, also fail to adequately establish the amount of cash lost due to the 1988 bombing.

First, Mr. Punwani's conclusions depend on a factual premise that has no basis in the documentary record. His estimate of how much cash Pan Am lost due to Lockerbie depends entirely on his testimony that, as Pan Am's Chief Financial Officer in the fall of 1988 (prior to the Lockerbie bombing), he forecast that Pan Am would break even in 1989 and 1990,[63] *i.e.*, that the company would end its streak of annual operating losses, losses it had suffered regularly over the previous decade[64]. Yet, Claimants have provided no documentary support for Mr. Punwani's testimony that he actually forecast that Pan Am would break even in 1989 and 1990. For such a crucial linchpin to his conclusion, oral

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She thus concluded that, but for Lockerbie, Pan Am would have had $612 million, rather than the $162 million Pan Am actually had. But, since she herself also posited that Pan Am's operating expenses would have been $403 million higher if not for Lockerbie, her estimate of cash on hand at the end of 1989 was overstated by that amount. Thus, using Dr. Larsen's own numbers, Pan Am would have had $403 million less than she opined. Thus, rather than $612 million, Pan Am would have had $209 million in cash at the end of 1989. That would have been $47 million more than the $162 million Pan Am actually had.

[62] *See infra* p. 34 (Claimants relying on Mr. Rederer for the claim that Pan Am needed at least $66 million more to consummate Delta deal).

[63] Although Mr. Punwani's estimate of Lockerbie-related cash losses at the oral hearing was about $650 million, *see* Oral Hr'g, pt. 3, at 52:07-32, his post-hearing submission concluded that the number was $618 million. To arrive at this number, Mr. Punwani started with the assumption that if not for Lockerbie, Pan Am would have had "breakeven operating profit in 1989." Punwani Post-Hr'g Statement 2. He then made a similar assumption for his projection for 1990. *See id.* at 6. Based on these estimates, Mr. Punwani concluded that *all* of Pan Am's operating losses for 1989, as well as all of 1990's operating losses except those he attributed specifically to the Iraqi invasion of Kuwait and accompanying oil spike, were attributable to Lockerbie. *See id.* at 5. These operating losses were $328 million in 1989 and $290 million in 1990. This amounts to $618 million in total losses for the period, which Mr. Punwani attributed entirely to Lockerbie.

[64] *See* Initial Proposed Decision, *supra*, at 41; Ted Reed, *Pan Am Hopes Miami Strategy Will End Era of Crisis*, Chi. Trib., Dec. 3, 1989, at G22C (in a 1989 news article, noting that "[f]or a decade, Pan Am has been teetering on the brink"); *id.* (further noting that "[d]uring the 1980s, Pan Am … had two barely profitable years[] and seven years of losses" and that "[t]he plague seems likely to continue in 1989").

testimony standing alone is insufficient to establish that this was in fact Pan Am's official contemporaneous forecast in the fall of 1988.[65]

Moreover, Mr. Punwani's estimate of the cash lost because of the Lockerbie bombing is not supported by the contemporaneous record. For instance, Mr. Punwani asserts that Lockerbie-related losses were $328 million in 1989 because Pan Am's total operating losses that year were that same amount, $328 million. Yet, in December 1989, a Pan Am spokesman estimated Lockerbie-related losses to be $186 million.[66] Mr. Punwani also concluded that Lockerbie was still affecting Pan Am's finances in 1990 because Pan Am's operating losses were higher in the first six months of 1990 than in the first six months of 1988.[67] He attributed this entire difference to Lockerbie. While contemporaneous documentary evidence does support Mr. Punwani's claim that Pan Am's operating losses for the first six months of 1990 were about $100 million higher than for

[65] Claimant's reliance on Mr. Punwani's recall of information is contrary to the "best evidence" rule, *see* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 320-22 (Cambridge University Press 2006) (1953), which requires documentary evidence to prove factual claims about a major public company's finances. *Cf. id.* at 318-19 (noting that "due to the frailty of human contingencies," testimonial evidence "is most liable to arouse distrust" but that "[o]n the other hand, [contemporaneous documentary evidence] written or executed … by persons having direct knowledge [of the relevant facts], and for purposes other than the presentation of a claim or the support of a contention in a suit, is ordinarily free from this distrust and considered of higher probative value"). The need for contemporaneous documentary evidence is especially important here given the nature of the factual claim: here, Claimants are seeking to establish Pan Am's official forecast from the fall of 1988, and they have adduced evidence from Pan Am's Chief Financial Officer at the relevant time. Further undermining Claimant's contention that Pan Am was forecasting break-even years in 1989 and 1990 is the fact that the only contemporaneous corporate records we have, Pan Am's SEC filings, contain no reference to Mr. Punwani's alleged forecast. While Mr. Punwani did appear to be holding a piece of paper as he testified (his own notes perhaps), he did not submit any documentary evidence to support his claim.

[66] *See* Reed, *supra* note 64 (quoting a Pan Am spokesman as stating that the Lockerbie-related losses "included $150 million in lost revenues from passengers who didn't fly and from losses due to fare reductions implemented as a result, $30 million for increased security costs, and $6 million for new security equipment," for a total of $186 million).

[67] In comparing 1990 with 1988, Mr. Punwani focused on the first half of the year rather than the entire year, because, as he acknowledged, the second half of "1990 was clearly impacted by the Iraq invasion of Kuwait …." Post-Hr'g Statement 3.

the first six months of 1988,[68] that does not necessarily mean that the Lockerbie bombing was the cause of this disparity.

Indeed, what contemporaneous and documentary evidence there is suggests that the reasons for Pan Am's steep operating losses in the first half of 1990 were unconnected to Lockerbie. Pan Am's SEC reports from 1990 mention several factors other than Lockerbie that adversely affected Pan Am's financial position. Its first quarter 1990 report points to "sharply increased fuel prices" and increased foreign exchange losses related to the weakening of the Brazilian currency, as well as increased expenses for purchased services, labor, and aircraft and ground rentals,[69] as well as foreign exchange rates.[70] Yet, neither Mr. Punwani nor any of Claimants' other evidence discusses any of these factors in any meaningful way or attempts to isolate those losses from those caused by the Lockerbie bombing. Indeed, Pan Am seemed to go even further in its second quarter report, strongly implying that the effect of Lockerbie had worn off by then. The report stated that "[t]he improvement in Pan Am's results of operations [in the first half of 1990 is] primarily the result of increased revenues, reflecting improved traffic and yield compared to the same periods in 1989 *when revenue was adversely affected by the public's concern about terrorism*[.]"[71] Indeed, Pan Am even noted that improvement in system revenues for the first half of 1990 was "primarily" due to "renewed strength" in the Atlantic division,[72] the division that would have been most affected by the Lockerbie bombing. Although Mr. Punwani testified that, even with improved traffic, the operating costs were much higher,

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[68] *See* Pan American World Airways, Inc., Quarterly Report for Q2 (Form 10-Q), at 3 (1990) (operating loss of approximately $160 million) [hereinafter Pan Am Airways Q2 Quarterly Report 1990]; Pan American World Airways, Inc., Quarterly Report for Q2 (Form 10-Q), at 3 (1988) (operating loss of about $55 million).
[69] *See* Pan American World Airways, Inc., Quarterly Report for Q1 (Form 10-Q), at 8 (1990) [hereinafter Pan Am Airways Q1 Quarterly Report 1990].
[70] *See, e.g.*, *id.* at 11.
[71] Pan Am Airways Q2 Quarterly Report 1990, *supra* note 68, at 9 (emphasis added).
[72] *Id.* at 12; *see also* Pan Am Airways Q1 Quarterly Report 1990, *supra* note 69, at 9.

the report's reference to the Atlantic division's "renewed strength" and the concomitant "increase in system revenues"[73] undermines Claimants' arguments about the residual impact of the Lockerbie bombing. Indeed, Claimants have presented no contemporaneous or documentary evidence that the operating losses in the first half of 1990 (which necessarily affected cash-on-hand) were due to the Lockerbie bombing. The only evidence appears to be Mr. Punwani's assumption that no other factors significantly depressed Pan Am's profits in the first half of 1990.[74] This assumption is insufficient to overcome the weight of the contemporaneous documentary evidence.

In sum, Claimants have failed to establish that the Lockerbie bombing caused the cash losses posited by their witnesses.

3. *Claimants Have Not Shown That Cash Lost Due to Lockerbie Prevented Pan Am from Acquiring Northwest Airlines*

Claimants have failed to show that they can prevail based on a claim that Pan Am would have purchased Northwest Airlines. Claimants argue that, if not for Lockerbie, Pan Am would have acquired Northwest Airlines in 1989 and that this purchase would have prevented Pan Am from going out of business (thus preserving their jobs). Before the Consolidated Proposed Decision, Claimants had submitted two pieces of evidence to support this claim: (1) an affidavit from Mr. Plaskett, Pan Am's CEO at the time, that contained one paragraph that alluded to a possible purchase of Northwest; and (2) a statement from Mr. Rederer, an economist, who opined that, but for the cash lost due to the Lockerbie bombing, Pan Am could have acquired Northwest. Both Proposed Decisions

[73] Pan Am Airways Q2 Quarterly Report 1990, *supra* note 68, at 12.

[74] When addressing whether factors other than the Lockerbie bombing could have caused Pan Am's losses in the first part of 1990, Mr. Punwani testified that "other things could have happened, but I was right there on the scene and I don't know of any other things that happened during that 12-month period [i.e., from the first half of 1989 to the first half of 1990]. It was Lockerbie that was literally dictating our fortunes or lack of fortune." Oral Hr'g, pt. 3, at 1:09:36-53.

concluded that this evidence was insufficient to establish that, but for Lockerbie, Pan Am would have purchased Northwest and that, in any event, any hypothetical purchase of Northwest was too speculative to satisfy the law of proximate causation.[75]

On objection, Claimants introduced new evidence to support their claim that, if not for Lockerbie, Pan Am would have purchased Northwest. In particular, Claimants rely on the testimony of three former Pan Am executives: Mr. Plaskett, Mr. Punwani, and Mr. Pappas. All three testified at the hearing, and Mr. Punwani reiterated in his unsworn post-hearing statement, that, if not for the Lockerbie bombing, Pan Am would have had enough cash to leverage a higher bid for Northwest and that Pan Am ultimately would have prevailed in what was in effect a competitive bidding process at the time. Mr. Punwani and Mr. Pappas also claimed that, but for the security concerns related to Lockerbie, KLM, a Dutch airline that helped finance the deal for the Checchi Group (Northwest's purchaser), would have helped Pan Am, rather than the Checchi Group, finance an acquisition of Northwest. Finally, Mr. Pappas testified that, had Pan Am acquired Northwest, it would have avoided Chapter 11 bankruptcy altogether.

This evidence is insufficient to establish that, but for Lockerbie, Pan Am would have acquired Northwest and, on that basis, avoided liquidation. Even with Claimants' new evidence, they have still failed to show as a factual matter that, but for Lockerbie, Pan Am would have purchased Northwest.[76] Although the contemporaneous evidence does indicate that Pan Am bid for Northwest in 1989, it does not support Claimants' contention that, but for the Lockerbie bombing, Pan Am would have acquired Northwest.

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[75] *See* Initial Proposed Decision, *supra*, at 41; Consolidated Proposed Decision, *supra*, at 22-23.

[76] Claimants have also failed to show that an acquisition of Northwest would have kept Pan Am from liquidating. Claimants speculated that because Northwest survived until 2005 (when it filed for bankruptcy before merging with Delta), a combined Pan Am-Northwest company would have also survived at least that long. However, Claimants have failed to provide sufficient evidence to establish this conjecture.

First, Claimants have failed to show the amount of cash Pan Am lost due to the Lockerbie bombing[77] and have thus failed to show that the additional cash if not for Lockerbie would have been enough for Pan Am to leverage into an offer to match or exceed the purchase price the Checchi Group ultimately paid for Northwest at the time (*i.e.*, in mid-1989).

Second, even if Pan Am's cash position had been sufficient for it to be able to match or outbid the Checchi Group's offer, Claimants have not shown that the Checchi Group (or any other bidder) would not have raised its bid and offered more. The contemporaneous evidence suggests that Pan Am was not the only other bidder or even the only other serious bidder.[78] It is far too speculative for us simply to assume, as Claimants would have us do, that in a competitive bidding situation, the rest of the bidders would have left their bids unchanged if Pan Am had offered more. Claimants rely, for instance, on Mr. Rederer's claim that the Checchi Group and its backers "would have been skeptical of carrying a larger debt load based on Northwest's standalone cash flow."[79] But that is pure speculation, solely "based on Northwest's standalone cash flow," not the Checchi Group's own assessment of the true worth of Northwest and/or what it was willing to pay for the airline.

Third, contemporaneous evidence also suggests that factors other than insufficient funding led Northwest to reject Pan Am as a suitor. In particular, Northwest's labor unions

[77] *See supra* Part 2.
[78] *See* Initial Proposed Decision, *supra*, at 41; Carol Jouzaitis, *NWA accepts $4.05 Billion Takeover Bid*, Chi. Trib., June 20, 1989, at C1; *L.A. Investor Wins Northwest Bidding, $4.05-Billion Offer for Airline Defeats Competing Suitors*, L.A. Times, June 19, 1989, at A3.
[79] CNO, *supra* note 31, at 26-26 (citing Rederer Supplemental Op. 3, Sept. 12, 2016).

opposed a Pan Am acquisition, and there were potential antitrust concerns that could have derailed the deal as well.[80]

Finally, Claimants failed to provide sufficient evidence to support their contention that, if not for Lockerbie, KLM would have helped Pan Am acquire Northwest. Both Mr. Punwani and Mr. Pappas maintained that, but for the security concerns related to Lockerbie, KLM would have helped Pan Am, rather than the Checchi Group, finance a Northwest acquisition. However, Claimants' witnesses' testimony is insufficient to establish what KLM would or would not have done. Claimants have not submitted any independent evidence, contemporaneous or otherwise, describing the reasons KLM decided to invest in the Checchi Group bid, rather than Pan Am. The only evidence they have submitted—the written and oral testimony of Mr. Pappas and Mr. Punwani—is hearsay and unsupported by any independent, contemporaneous documentation.

The evidence is thus insufficient to prove as a factual matter that, but for the bombing of Flight 103, Pan Am would have acquired Northwest Airlines. It is thus also insufficient to establish that any putative purchase of Northwest would have prevented Pan Am from liquidating.[81]

Moreover, Claimants' theory that, if not for Lockerbie, Pan Am would have acquired Northwest and thus staved off liquidation runs counter to international law

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[80] *See* Eric N. Berg, *Northwest Airlines Accepts Offer of $3.6 Billion by Investor Group*, N.Y. Times, June 20, 1989, at A1; Eric Weiner, *Pam Am's Bold Bid to Survive*, N.Y. Times, June 11, 1989, at F1; Eric N. Berg, *2 More Bidders Enter NWA Contest*, N.Y. Times, June 17, 1989, at 33; Judith Valente & Susan Carey, *NWA Union's Restructuring Proposal Would Include Payout, Employee Stake*, Wall St. J., June 2, 1989, at A4.

[81] Claimants have also failed to show that, but for Lockerbie, Pan Am would have pursued any other opportunities that would have kept Pan Am from liquidating. For instance, Claimants allege that, if not for Lockerbie, Pan Am would have acquired a hub in Miami in March 1989 following Eastern Air Lines' bankruptcy and that such an acquisition would have saved Pan Am. However, Claimants have provided no contemporaneous documentary evidence to support this claim, relying solely on Mr. Pappas's testimony and written statement. This evidence is insufficient to establish that the loss of cash resulting from Lockerbie prevented Pan Am from acquiring Eastern's Miami hub or to establish that any putative purchase of that hub would have prevented Pan Am's liquidation.

jurisprudence drawing a distinction between business opportunities lost as a direct result of a wrongdoer's action and downstream opportunities lost because of the subsequent consequences of such action. Importantly, Claimants' theory requires that they establish not simply that Pan Am would have acquired Northwest but also that the acquisition would have in turn prevented Pan Am's liquidation. But analogous claims before the UNCC make clear that the link between the Lockerbie bombing and the loss of any future financial benefit from a putative purchase of Northwest is too speculative and remote to permit recovery. Such claims are simply not connected directly enough to the Lockerbie bombing to hold Libya liable for them.

When addressing claims for lost profits, the UNCC made a clear distinction between, on the one hand, losses that were a *direct* result of Iraq's violation of international law—its invasion and occupation of Kuwait—and, on the other hand, those that arose secondarily because of a company's inability to secure a business opportunity the company might otherwise have been able to secure if not for the invasion and occupation. Only losses in the first category—direct losses—were recoverable.

For example, in one case, a construction company, Continental Construction, Ltd. ("CCL"), sought recovery for profits from a contract that it allegedly would have concluded if not for Iraq's invasion and occupation of Kuwait. CCL alleged that it was unable to submit a bid for the contract because of "its inability to secure the necessary bid bonds, which itself resulted from the economic losses it suffered in Iraq during the relevant period."[82] A UNCC panel rejected CCL's claim because the failure to bid on the contract did not result from "the acts of the invasion and occupation themselves."[83] That is, the

[82] *See Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E2" Claims*, ¶ 141, U.N. Doc. S/AC.26/1998/7, 3 July 1998.
[83] *Id.*

losses were not sufficiently connected to Iraq's actions to meet the law's direct loss requirement.

Also on point was a claim involving a company that went bankrupt during the Iraqi occupation of Kuwait. That company, NRM, claimed that, just before the Iraqi invasion, it was "in the final stages of an initial public offering ('IPO') of its common stock[,]"[84] and that because of the invasion, NRM lost contracts in Iraq, which in turn "caused the failure of the IPO and led to [its] subsequent bankruptcy."[85] Even though the bankruptcy occurred while the occupation was still in place and a mere four months after the Iraqi invasion, and even though NRM submitted a contemporaneous news report attributing the IPO's failure to the "uncertainty caused by Iraq's invasion and occupation of Kuwait,"[86] the UNCC panel rejected NRM's claim. Among the reasons the panel gave was that "[t]he actual loss to NRM is from future profits which could have been generated by the company if funds from the IPO had been received[]" and that "such a loss [could not] be said to be a direct result of Iraq's invasion and occupation of Kuwait."[87]

Here, that distinction is the difference between the cash losses Pan Am suffered directly because of Lockerbie and any hypothetical financial benefit Pan Am would have received if it had used the Lockerbie-related losses to purchase Northwest. While Libya can be held accountable for cash lost directly because of Lockerbie, it cannot be held responsible for any financial gains that Pan Am might hypothetically have obtained from

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[84] *See Report and Recommendations Made by the Panel of Commissioners Concerning the Twenty-Fifth Instalment of "E3" Claims*, ¶ 900, U.N. Doc. S/AC.26/2003/11, 26 June 2003.
[85] *Id.* ¶ 901.
[86] *Id.* ¶ 911.
[87] *Id.* ¶ 913(c). In another claim, a UNCC panel determined that a claim for the "future revenues [the claimant] expected to earn from its investment in a second vessel, which it would have allegedly acquired from the profits generated from the cargo vessel had it not been damaged" were "speculative and too remote" to establish causation. *Report and Recommendations Made by the Panel of Commissioners Concerning the Ninth Instalment of "E2" Claims*, ¶¶ 105, 110 U.N. Doc. S/AC.26/2001/27, 14 December 2001.

a Northwest acquisition. Claimants thus cannot recover against Libya based on a theory that a Pan Am acquisition of Northwest would have prevented Pan Am's liquidation.

4. *Claimants Have Failed to Show That, But for the Lockerbie Bombing, Pan Am Would Have Reorganized and Survived the 1990 Recession and First Gulf War in 1990-91*

Claimants have also failed to show that they can prevail based on the theory that, but for Lockerbie, Pan Am would have had enough cash to create Pan Am II (*i.e.* consummate the deal Pan Am struck with Delta Air Lines in July 1991—after its Chapter 11 bankruptcy filing—to reorganize the carrier) and thereby avoid liquidation in December 1991. Both the Initial Proposed Decision and the Consolidated Proposed Decision concluded that this claim was too speculative.[88]

On objection, Claimants argue that the Proposed Decisions failed to realize that the impact of the 1988 Lockerbie bombing lasted throughout the three-year period until Pan Am's liquidation in December 1991 and that nothing subsequent to Lockerbie broke the causal chain.[89] The thrust of this argument is that the Proposed Decisions erred by overemphasizing the role played by the First Gulf War, recession, and other events of 1990-91, rather than attributing Pan Am's December 1991 liquidation to the cash lost due to the 1988 Lockerbie bombing.[90] They argue that "[t]he [u]nique [h]arm [c]aused by the Lockerbie [b]ombing is [c]lear when [c]ompared with [s]imilarly [s]ituated [a]irlines

[88] *See* Initial Proposed Decision, *supra*, at 42-44; Consolidated Proposed Decision, *supra*, at 23-26.
[89] *See* CNO, *supra* note 31, at 27 ("Lockerbie and [n]ot the [e]vents of 1990-91 was the [p]rimary [c]ause of Pan Am's [d]emise."); Hr'g Br. 16 ("Industrywide [p]roblems [b]eginning in mid-1990 did [n]ot [b]reak the [c]ausal [c]hain.").
[90] *Cf.* Hr'g Br. 19 ("Although the events of mid-1990 to mid-1991 contributed to Pan Am's financial difficulties, the Proposed Decisions have not and cannot show that the causal link between Libya's attack and the closing of Pan Am was severed at any point. At best the 1990-91 events were contributing factors to the downfall of Pan Am.").

[d]uring the [s]ame [p]eriod," pointing in particular to Continental.[91] They argue that like other airlines, Pan Am would have weathered the challenges of the Gulf War, recession, and oil price spikes.

Incorporated into Claimants' factual argument (*i.e.*, that nothing broke the causal chain between the 1988 Lockerbie bombing and Pan Am going out of business in 1991) is their legal argument that because Libya's attack was intentional and it was foreseeable that Pan Am would go out of business, Libya must be held liable for Claimants' damages, irrespective of the three-year gap and the numerous intervening events.[92] They contend that, under international law, liability extends to more remote consequences when a state's act is intentional; they therefore argue that their claims are compensable based on the theory that a showing of intentionality and foreseeability can overcome whatever shortcomings exist with regard to remoteness, directness, or any of the other facets of the proximate cause standard. Thus, under Claimants' theory, when a state actor commits an intentionally wrongful act, that state is responsible for the damages even if the state did not foresee the *specific* damages (presumably, in this case, referring to either Claimants' lost future wages and benefits or even Pan Am liquidating).

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[91] *See* CNO, *supra* note 31, at 13 ("Continental's operating history firmly disproves the Commission's assertion that an airline which consistently operates at a loss will inevitably be forced to shut down. Indeed, the historical record for the industry is just the opposite: major airlines almost never go out of business."). They also point to TWA, *id.*, but TWA was not in Chapter 11 during the same period; it did not enter Chapter 11 bankruptcy until 1992.

[92] *See id.* at 28 (arguing that the Proposed Decisions "ignore[d] the longstanding principle under international law that compensation for remote consequences of a wrongful act will be denied only '*in the absence of evidence of deliberate intention to injure*'" (quoting *Dix Case (U.S. v. Venez.)*, 9 R.I.A.A. 119 (U.S.-Venez. Comm'n 1903) (emphasis in CNO)); *id.* at 29 (arguing that "if there was **any** question about causation, given the intentional nature of the terrorist act, the Commission must favor the victims and conclude that the bombing by Libya was the proximate cause" (emphasis in original)).

Claimants have failed to prove the facts necessary to establish that, if not for Lockerbie, Pan Am would have survived by reorganizing, and their legal argument about proximate causation is also mistaken.

But-for Causation

As a factual matter, Claimants have failed to prove that the impact of the Lockerbie bombing on Pan Am's operations or its cash position was significant enough that Pan Am would otherwise not have gone out of business in 1991, *i.e.*, they have not proven that, but for the Lockerbie bombing, Pan Am would have weathered the challenges of the Gulf War, recession, and oil price spike in 1990-91.

Claimants' core factual claim about the connection between the Lockerbie bombing and Pan Am's liquidation three years later is that Lockerbie led to Pan Am having less cash than it otherwise would have had and that that additional cash would have prevented Pan Am from liquidating. But even assuming the cash lost due to the 1988 Lockerbie bombing would have been available to Pan Am in December 1991, Claimants have not shown that the amount of cash lost was enough to prevent Pan Am from liquidating. In his statement, Mr. Rederer asserted that $100 million in cash in late 1991 would have been enough to save Pan Am from liquidation.[93] However, contemporaneous evidence suggests that Pan Am may have needed at least $523 million: In a bankruptcy filing just two days before Pan Am's closure, Pan Am explained that it needed to have sufficient funds to pay its administrative claims as a requirement of confirmation of the reorganization plan,[94] and

[93] *See* Consolidated Proposed Decision, *supra*, at 23-24 (quoting Mr. Rederer as "assert[ing] that Delta Airlines would have continued to participate in the reorganization of Pan Am 'if Pan Am's cash position had been … $100 million or more, but Pan Am had only $34 million.'").

[94] *See* Debtors' Memorandum of Law in Support of their Verified Motion for an Order Authorizing the Modification of Debtors' Collective Bargaining Agreements Pursuant to Section 1113 of the Bankruptcy Code at 13, *In re* Pan Am Corp., No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Dec. 2, 1991).

the Liquidating Trustee's Final Report valued these claims at about $523 million.[95] Other evidence, described in the Consolidated Proposed Decision and unrefuted by—indeed, unaddressed by—any of Claimants' evidence or arguments, suggests that Pan Am may have needed $624 million in cash (close to $600 million more than the $34 million Pan Am actually had).[96] Even Mr. Rederer's estimate does not posit that Lockerbie caused a loss of cash that great.[97]

Moreover, as the Consolidated Proposed Decision explained, insufficient cash was by no means the only factor in the breakdown of the 1991 deal with Delta Airlines to create a "Pan Am II."[98] Other factors included acts that Delta itself allegedly took to undermine the deal, Delta's own financial problems, and labor relations issues. To support their claim that the Delta deal would have gone through if Pan Am had had $100 million, Claimants point to one piece of contemporaneous evidence discussing Pan Am's cash shortfall, the 1994 *Pan Am v. Delta Air Lines* decision.[99] That decision does state that, just days before Pan Am's closure, Delta's Chief Financial Officer and Delta's investment banker agreed that more than $100 million in liquidity was needed for the reorganization plan to be feasible.[100] However, nothing in the decision indicates that a $100 million liquidity cushion would, *by itself*, have been sufficient to salvage the proposed deal. Indeed, as we noted in the Consolidated Proposed Decision, the 1994 *Pan Am v. Delta Airlines* decision cites other factors that contributed to Delta's withdrawal from the plan; it noted "concerns about Pan Am II's reduced revenue forecasts (resulting from numerous factors unrelated

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[95] *See* Liquidating Trustee's Report on Final Distribution at 2, *In re* Pan Am Corp., No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. May 21, 2008).
[96] *See* Consolidated Proposed Decision, *supra*, at 25 & n.58.
[97] *See supra* p. 16.
[98] *See* Consolidated Proposed Decision, *supra*, at 24-26.
[99] 175 B.R. 438 (S.D.N.Y. 1994).
[100] *See id.* at 460.

to Lockerbie, including 'general economic conditions and vigorous competition from American Airlines[]'), increased projected expenses for Pan Am II, and difficulties with negotiating new labor union agreements."[101] Claimants have presented no evidence about any of these other factors.

Indeed, after Pan Am shut down in December 1991, the airline placed much of the blame squarely on Delta. In its court filings against Delta, Pan Am detailed Delta's allegedly wrongful conduct at length. Pan Am noted that its operating losses in September and October 1991 increased faster than anticipated, but it attributed these losses "in large part to Delta's failure to bolster Pan Am with marketing support . . . ."[102] In addition, Pan Am alleged that various actions taken by Delta to undermine the deal, described in great detail in the Complaint, "further impaired Pan Am's ability to continue operating . . . ."[103] Pan Am further alleged that Delta essentially "controlled" Pan Am leading up to its closure, and that "Delta placed [Pan Am] in a position where [it was] certain to run out of cash on or about the date scheduled for plan confirmation, December 3, 1991."[104] Pan Am also maintained that, at the last minute, Delta refused to provide certain debtor-in-possession financing.[105]

Moreover, as we noted in the Consolidated Proposed Decision, Delta had problems of its own: it was having trouble absorbing Pan Am's assets, its "'bond ratings were sliding[,] and it was contemplating an economy that didn't show many signs of

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[101] Consolidated Proposed Decision, *supra*, at 24 (quoting *Pan Am v. Delta Air Lines*, 175 B.R. at 458-61, 464). On objection, the only new evidence Claimants adduced to suggest that $100 million in cash would have, by itself saved the deal is Mr. Punwani's testimony, but even he specifically acknowledged that "several factors affected [Delta's] decision" to withdraw from the deal. Punwani Pre-Hr'g Statement 3.
[102] Consolidated Amended Complaint at 27, 31, *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438 (S.D.N.Y. 1994) (No. 93 Civ. 7125).
[103] *Id.* at 67-68.
[104] *Id.* at 5.
[105] *See id.* at 5-6.

recovery.'"[106] Indeed, after Delta pulled out of the agreement on December 3, 1991, its spokesman explained that "Pan Am was performing below projections,[107] travel agents were avoiding the carrier, the economy had worsened, and competition was heating up in South America."[108] Again, Claimants do not discuss any of these other factors—none of which is connected with the Lockerbie bombing—in sufficient detail to warrant the conclusion that more cash, by itself, would have prevented the collapse of the Pan Am/Delta deal.

In addition, as noted in the Consolidated Proposed Decision, there is evidence that labor disputes also played a role in Pan Am's closure. For instance, in November 1991, Pan Am filed a motion in the bankruptcy proceedings to modify the collective bargaining agreements with its union employees, noting that it had been negotiating with the unions, including the pilots union (ALPA), for over a month, and that if the agreements were not modified, the airline would have no choice but to liquidate.[109] Pan Am went so far as to accuse the unions of being "unwilling or unable" to do what was necessary to save their own jobs.[110] Claimants have addressed none of this on objection, despite the fact that the Consolidated Proposed Decision discussed issues surrounding labor negotiations as one of the factors underlying Delta's decision to withdraw from the agreement with Pan Am.[111]

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[106] Consolidated Proposed Decision, *supra*, at 25 (quoting Martha M. Hamilton, *Flying on the Edge of Extinction*, Wash. Post, Dec. 5, 1991, at B11).

[107] The fact that Pan Am was performing below projections provides further support for our conclusion that, despite Claimants' protestations, projections of future profits not based on a consistent history of past performance are inherently speculative. *See supra* Part 2. At least in this one example, Pan Am's projections were wrong.

[108] Alison Leigh Cowan, *Delta's Pan Am Dealings a Puzzle to Many*, N.Y. Times, Dec. 9, 1991, at D1 (citing a Delta spokesman's explanation for Delta's withdrawal from the agreement).

[109] *See* Consolidated Proposed Decision, *supra*, at 28; Verified Motion for an Order Authorizing the Modification of Debtors' Collective Bargaining Agreements Pursuant to Section 1113 of the Bankruptcy Code at 1-2, *In re* Pan Am Corp., No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Nov. 25, 1991) [hereinafter Motion for Order to Modify CBAs].

[110] *See* Motion for Order to Modify CBAs, *supra* note 109, at 12.

[111] *See* Consolidated Proposed Decision, *supra*, at 24. To be sure, Pan Am's CEO Thomas Plaskett did testify that he did not recall any discussions about renegotiating the Pan Am-ALPA contract from the time Pan Am

Finally, Claimants have failed to establish that, if not for Lockerbie, Pan Am would have been similarly situated to Continental Airlines or any other carrier that survived the 1990 recession and 1990-91 Gulf War. In their Hearing Brief, Claimants maintain that TWA and Continental "were very comparable to Pan Am, and endured the impact of the Gulf Crisis and the 1990-1991 Recession. However they were not victimized by Lockerbie, and therefore were spared liquidation."[112] In support of this, Claimants point to Continental's 1992 10-K, an excerpt of which they have submitted, to demonstrate that, with approximately $150 million at the time of Continental's Chapter 11 bankruptcy petition, Continental was able to survive and avoid liquidation. Claimants argue that with the cash lost due to Lockerbie, Pan Am too would have survived and eventually emerged from Chapter 11 proceedings. However, there is no reason to think that the only relevant difference between the two airlines was their cash positions, and Claimants have provided no other detailed analysis of other factors (such as revenues or other aspects of financial performance) that might explain why Continental (or any other airline) did not liquidate. There could thus easily have been numerous material differences between Continental and Pan Am other than Lockerbie. Therefore, Claimants have failed to meet their burden to establish that, if not for Lockerbie, Pan Am would have, like Continental, emerged from Chapter 11 and not liquidated.

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entered Chapter 11 bankruptcy to the time he resigned as CEO in October 1991, *see* Oral Hr'g, pt. 1, at 1:08:44-1:10:45, but the contemporaneous documentary evidence does suggest that labor issues played some role in Delta's decision.

[112] Hr'g Br. 20.

Proximate Causation

In addition, as a legal matter, any injury based on hypothetical lost cash due to the 1988 Lockerbie bombing—cash that might have helped Pan Am three years later—is too speculative, depending as it does on far too many unknowns and imponderables.[113]

Under international law, proximate causation requires that Claimants' injury not be too remote from the tortious act, either factually or temporally.[114] Even where an act is intentional, the law of proximate causation limits a State's liability to consequences that are sufficiently close in time. Indeed, the UNCC has denied requests for damages based on insufficient temporal proximity in cases very similar to these claims. In one set of claims before the UNCC, former employees of a bank sought damages because they had been "made redundant" as a result of Iraq's intentional violation of international law—its invasion and occupation of Kuwait. The UNCC only allowed recovery for damages incurred within 17 months of the invasion (and within 11 months of the end of the occupation) because any losses incurred after that period "were too remote and did not meet direct causal requirements …."[115] Here, Pan Am's liquidation was nearly three years after the Lockerbie bombing and is thus far too long after the bombing to hold Libya liable.

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[113] *See* Consolidated Proposed Decision, *supra*, at 23-26.

[114] In describing the necessary causal link, the commentary to the International Law Commission's ("ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts contrasts "losses 'attributable to [the wrongful] act as a proximate cause'" with "damage which is 'too indirect, remote, and uncertain to be appraised.'" The commentary further notes that, beyond the requirement of causality in fact, "[t]here is a further element, associated with the exclusion of injury that is too 'remote' or 'consequential' to be the subject of reparation." ILC Draft Articles *supra* note 21, at 43; *see also* Initial Proposed Decision, *supra*, at 29; Consolidated Proposed Decision, *supra*, at 14-15.

[115] *Report and Recommendations Made by the Panel of Commissioners Concerning the Seventh Instalment of "C" Claims*, ¶¶ 280-281, U.N. Doc. S/AC.26/1999/11, 24 June 1999; *see also Report and Recommendations Made by the Panel of Commissioners Concerning the Third Instalment of Individual Claims for Damages Above US$100,000 (Category "D" Claims)*, ¶ 32, U.N. Doc. S/AC.26/1999/9, 24 June 1999 (rejecting a claim for damages based on a job loss that occurred between two and three years after the end of Iraq's occupation of Kuwait).

A 1903 international arbitration on which Claimants rely, the *Dix* case,[116] does not undermine this crucial principle that a claimant's injury may not be too remote from the tortious act. Claimants cite *Dix* to support their argument that when a state actor commits an intentionally wrongful act, it is responsible for the damages even if it did not foresee the *specific* damage. They quote *Dix* as articulating the "longstanding principle under international law that compensation for remote consequences of a wrongful act will be denied only 'in the absence of evidence of deliberate intention to injure.'"[117] The point, presumably, is that, because Libya had a "deliberate intention to injure," it should be held liable even though it did not foresee Pan Am's liquidation or Claimants' job losses.

Claimants fail, however, to put the language they quote from *Dix* in context. In *Dix*, the American-Venezuelan Commission *denied* the relevant portion of the claim. The claimant, an American cattle rancher in Venezuela, sought to prevent the revolutionary Venezuelan army from confiscating some of his cattle by selling the cattle at a loss after the army had already taken some of his other cattle without providing any compensation. Yet, the commission denied his claim for the difference between the true value of the cattle and the sale price because the army did not "compel him to sell his remaining cattle to third parties at an inadequate price."[118] This holding therefore provides no basis to argue that *all* damages are compensable when a wrongful act is deliberate. Even under the broadest reading of *Dix*, the wrongdoing state still must have possessed an intent to cause the specific harm in question. Here, Claimants have presented no evidence that Libya's intent was to put Pan Am out of business, much less to cause Claimants to lose their future wages and benefits. Thus, *Dix* does not help Claimants' proximate causation argument.

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[116] Dix Case (U.S. v. Venez.), 9 R.I.A.A. 119 (U.S.-Venez. Comm'n 1903).
[117] CNO, *supra* note 31, at 28 (quoting *Dix*).
[118] *Dix*, 9 R.I.A.A. at 121.

Claimants also cite *Amco Asia Corporation v. Republic of Indonesia*[119] for the proposition that "under international law, when there is an intentional attack the precise nature of the damage does not need to be specifically foreseeable."[120] However, Claimants misstate this decision too. The arbitral panel in *Amco Asia* stated that "foreseeability goes to causation and damages, and normally not the quantum of profit[,]" and that the "principle of foreseeability does not require that the party causing the loss [be] at that moment of time able to foresee the precise *quantum* of the loss actually sustained."[121] Thus, under *Amco Asia,* the party causing the loss—here, Libya—still needs to have been able to foresee the loss itself—here, that Claimants would lose their jobs—just not the precise quantum of the loss—here, the precise amount of wages and benefits lost. Since Claimants have presented no evidence that, at the time of the Lockerbie bombing in December 1988, Libya (or anyone else) could have foreseen Pan Am's liquidation—let alone Claimants' losing their jobs—three years later, Claimants' injury is too remote to be viewed as proximately caused by the bombing.

Claimants further argue that several specific events that clearly had a significant impact on Pan Am's finances in 1990 and 1991 should not be considered in the Commission's proximate cause analysis, citing a 1928 arbitral decision, the *Angola* case.[122] Claimants quote the case as stating that "only another more significant proximate cause should preclude an award."[123] They argue that the post-Lockerbie events did not break the

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[119] ICSID Case No. ARB/81/1, Resubmitted Case: Award, (May 31, 1990), 1 ICSID Rep. 569 (1993).
[120] Hr'g Br. 16.
[121] 1 ICSID Rep. 569, ¶ 175 (emphasis in original). Elsewhere, the panel held that "[s]o far as international law is concerned, it is clear that damages are due for harm caused by wrongful acts[,]" but that "the loss must be attributable to the wrongful act and foreseeable." *Id.* ¶ 172.
[122] Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal contre Allemagne) (Naulilaa), 2 R.I.A.A. 1011 (1928) (Port-Ger. Arb. Trib.).
[123] The original decision appears to be in French, and Claimants have not submitted a translated version. They may, however, be citing English-language excerpts of the case that appear in *Lemire v. Ukraine*, ICSID

chain of causation because, as they characterize it, the 1990-91 events were not as significant as the Lockerbie bombing.[124]

There are two problems with this argument. First, it is factually wrong: Pan Am's immediate losses from the Gulf War and recession were far closer in time and thus more proximately related to the company's liquidation. Second, the *Angola* decision also holds that "'the arbitrators . . . have not hesitated to refuse all indemnity in respect of injuries which, though standing in causal relation to the acts committed by [the wrongdoing state], also resulted from other and more proximate causes.'"[125] Because Pan Am was harmed by significant events that were temporally "more proximate" than, and unrelated to, the destruction of Flight 103—namely, the 1990 recession and the First Gulf War in 1990-91—the *Angola* decision undermines, rather than helps, Claimants' argument. Here, Claimants have failed to show that the Lockerbie-related losses suffered by Pan Am were more significantly related to Pan Am's liquidation than the more temporally proximate losses arising from the 1990-91 events.

In sum, while the existence of multiple links in the causal chain is not dispositive in determining proximate cause,[126] the wrongful act must still not be too remote in both a

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Case No. ARB/06/18, Award, ¶ 170 (Mar. 28, 2011), a case they also discuss. *See supra* text accompanying notes 43 to 44; *see also infra* note 124.

[124] Similarly, they argue that Lockerbie was at least a concurrent cause of Pan Am's liquidation, suggesting that, "[a]t most," the events of 1990-91 "could be concomitant causes, which might affect the *level* of damages, but *does not* break the causal chain." *See* CNO, *supra* note 31, at 32 (emphases in original). While a state may at times be held responsible when its actions were one of several factors causing the harm, ILC Draft Articles, *supra* note 21, art. 31 cmt. 12, Claimants must still establish that the state's actions were a but-for cause of their injury, and they have failed to do so here. *See supra* pp. 34-38.

[125] CHENG, *supra* note 65, at 242 (translating 2 R.I.A.A. at 1031).

[126] Hr'g Br. 18 (citing Administrative Decision No. II, 7 R.I.A.A. 23, 29 (U.S.-Ger. Mixed Claims Comm'n 1923)). In its decision, the U.S.-German Mixed Claims Commission stated that "[i]t matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act." 7 R.I.A.A. at 29-30. However, in the next sentence, the commission stated,

> But the law can not consider . . . the "causes of causes and their impulsion one on another." Where the loss is far removed in causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling

temporal and factual sense, and here it is too remote in both senses. Claimants have therefore failed to prove that the bombing of Pan Am Flight 103 was the proximate cause of Pan Am's liquidation (and thus of their injury).

In sum, Claimants have failed to prove that the 1988 Lockerbie bombing was either a but-for cause or a proximate cause of Pan Am's failure to reorganize in 1991 (and thus of Pan Am's liquidation in December of that year).

5. *The Supposed Uniqueness of Claimants' Claims Is Not Relevant*

Claimants' argument that their claims are "unique" and that "an award of damages would not create a precedent for future claims"[127] is mistaken and, in any event, is irrelevant for the adjudication of these claims. Claimants cite four "unique facts" in support of this argument:

> 1) Libya targeted Pan Am as a global American Icon; 2) a U.S. federal statute mandated that pilots retire at age 60; 3) the highly unionized airline industry required that job status and compensation be based on seniority; and 4) highly specialized senior pilot skills and training do not transfer to other employment opportunities.[128]

Even assuming all this is correct, however, this point does not help Claimants here. This is not a substantive argument as to any alleged error in the Proposed Decisions, but is instead a plea that we not be concerned with the implications of awarding Claimants the damages they seek. Our decision to deny recovery in these claims, however, is not based

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> labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss.

Id. at 30 (internal citation omitted). These principles were cited approvingly in the *Lemire* decision, where the panel stated that "[t]ransitive causal links do not exclude the responsibility of the wrongdoer … . But the victim must prove that the chain of events is neither too remote nor too aleatory." *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, ¶ 166 (Mar. 28, 2011), *available at* https://perma.cc/6RQB-ARD6 (internal citations omitted).

[127] Hr'g Br. 4.

[128] *Id.*

on the implications of awarding damages. It is based solely on the "applicable legal principles"—in this case, the international law of causation.

In any event, Claimants' argument is mistaken. Claimants' theory of causation is based on their claim that Libya bears legal responsibility for Pan Am's liquidation three years later. It would thus create a relevant precedent not just for these Claimants, who had to retire at age 60 because of a federal statute, but rather for *all* employees,[129] as well as possibly Pan Am bond holders, and others who had contracts with Pan Am that were not fully paid because Pan Am went out of business.[130] It might even create precedent for Pan Am itself, or perhaps even its shareholders. More importantly, however, it would undermine the law of state responsibility generally by creating a nearly limitless liability regime.

In addition, none of Claimants' "unique facts" plays any role under the standard for causation in international law. In particular, the last three of the four facts Claimants point to are irrelevant to the alleged causal connection between the Lockerbie bombing and Pan Am going out of business, the causal connection Claimants have failed to establish. While Claimants' first "unique fact"—that Libya targeted Pan Am as a global icon of American power—may be true,[131] it likewise does not distinguish these claims from those that could theoretically be brought by any individual or entity who could be said to have had a

[129] Indeed, one of the Claimants, the Claimant in LIB-III-086, is a flight attendant, not a pilot.
[130] During the oral hearing, counsel for the Claimants was asked whether "under [their] theory of causation … every employee who loses their job [because of Pan Am's liquidation] ha[s] a claim[.]" Oral Hr'g, pt. 5, at 3:46-4:00. Counsel acknowledged that, yes, "in theory … every employee would have suffered damage," effectively conceding that, under their theory of causation, every employee would have a potential claim. *Id.* at 5:48-5:58. The Commission also asked whether this would also apply to Pan Am's bondholders. Counsel responded that "a bondholder may have a property interest. Maybe, in the bigger scheme of things, they should be compensated when Libya blows them out. I don't have a problem with that." *Id.* at 17:20-17:31; *cf. also id.* at 16:51-17:04 (arguing that part of what a ruling in Claimants' favor would do is to deter state sponsors of terrorism by holding them "responsible for every single person who had a contract and [suffered damages]").
[131] We need not and therefore do not make any finding on this point.

property interest in their dealings with Pan Am, such as any employee, bond holder, supplier, or other creditor of Pan Am. Claimants' "unique facts" are thus not relevant to the law of causation, which simply does not extend to Claimants' injury.[132]

CONCLUSION

These claims involve two important events in the history of Pan Am, one of twentieth-century America's most storied companies: the bombing of Pan Am Flight 103 over Lockerbie, Scotland, in 1988, and Pan Am's liquidation three years later, in 1991. The bombing killed 270 people and touched the lives of countless others, and the pain and suffering it caused its many victims is beyond description. There is certainly no question that Libya bears legal responsibility for that harm.

The second major event at issue in these claims is the 1991 liquidation of Pan Am, and it had a major impact too. When Pan Am ceased its operations and liquidated, the reverberations were felt far and wide: shareholders lost their entire investment, and creditors lost much, if not all, of what they were owed. Claimants and countless other employees lost their jobs and, for many, their only source of income, along with the dignity that came with being a vital part of a company that shaped aviation history. As the testimony in these claims has shown, the job losses from Pan Am's liquidation were significant and took both a personal and family toll.

The fundamental question in these claims, however, is whether Claimants have established that the first of these two events, the 1988 Lockerbie bombing, caused the

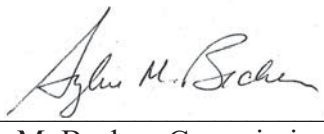
[132] In the Consolidated Proposed Decision, we addressed Claimants' argument that they had a "protected property interest in their jobs and careers." Consolidated Proposed Decision, *supra*, at 27. On objection, Claimants restated their argument that under international law and the Commission's own precedent, they had a property interest in their continued employment under their collective bargaining agreement with Pan Am because their employment would not have expired under the agreement and because the agreement provides that they could only be terminated for "just cause." However, because Claimants have failed to establish that the Lockerbie bombing caused their loss of employment, we need not decide whether they had a compensable property interest in their lost future wages and pension plan contributions.

second, Pan Am's 1991 liquidation and the resultant loss of Claimants' jobs. The answer to that question is "no." Claimants failed to prove that, if not for Lockerbie, Pan Am would have remained in business. Pan Am's 1991 liquidation was too remote, both factually and temporally, from the 1988 bombing; and far too much happened in the intervening three-year period to hold Libya liable for Pan Am's liquidation. Under the international law of causation—which, in our authorizing statute, Congress has specifically directed us to apply—these claims must therefore be denied.

In sum, although the 2005 Libya-Pan Am settlement did not extinguish their claims, Claimants have still failed to establish that the Lockerbie bombing caused their job losses, as required under the applicable legal principles the Commission must apply pursuant to the 2013 Referral. Accordingly, the denial of these claims set forth in the Proposed Decision must be and is hereby affirmed. This constitutes the Commission's final determination in these claims.

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

Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

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)	}	
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	}	Claim No. LIB-III-038
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} Claim No. LIB-III-084
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} Claim No. LIB-III-086
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} Claim No. LIB-III-087
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}

Against the Great Socialist People's Libyan Arab Jamahiriya	}	Decision No. LIB-III-045

Counsel for Claimant: Joanne W. Young, Esq.
Kirstein & Young, PLLC

PROPOSED DECISION

Claimants bring these claims against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") based on economic losses they assert were sustained as a result of the bombing of Pan Am Flight 103 over Lockerbie, Scotland, on December 21, 1988. They allege that the bombing ultimately forced Pan American World Airways, Inc. ("Pan Am") to cease operations nearly three years later, resulting in them losing their jobs as pilots[1] for the airline, which in turn caused them to lose several years' worth of income and benefits that they otherwise would have earned. Claimants assert that, but for the terrorist bombing, Pan Am would have continued operations, and they would not have lost their employment and suffered the losses which they now claim. Because Claimants have failed to demonstrate (1) that their claims were not extinguished by a 2005 Settlement Agreement in a lawsuit brought by Pan Am against Libya in Scotland; and (2) that the Lockerbie bombing proximately caused any of their alleged economic losses, their claims are 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. Claimants state that, at the time of the bombing, they were employed by Pan Am. They allege that "[t]his act of Libyan

[1] The exception is Claimant in Claim No. LIB-III-086, who alleges that she was a flight attendant with Pan Am.

terrorism ultimately closed [Pan Am] on December 4, 1991[]"— nearly three years after the bombing. As a result, they claim, "the bombing ended their professional careers. . . . result[ing] in the immediate loss of income" as well as "substantially all their pension and medical benefits."

Claimants 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.[2] 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 Claimants 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. 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 . . . ."[3] Two months later, in October 2008, the President issued an Executive Order, which,

[2] *See Abbott v. Socialist People's Libyan Arab Jamahiriya*, No. 1:94cv2444 (D.D.C.).
[3] *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).

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.[4]

The Secretary of State has statutory authority to refer "a category of claims against a foreign government" to this Commission.[5] 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.[6] 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."[7]

On December 13, 2013, the Commission published notice in the *Federal Register* announcing the commencement of the third Libya Claims Program pursuant to the ICSA and the 2013 Referral.[8]

In June 2014, the Commission received from Claimants completed individual Statements of Claim seeking compensation under Category F of the 2013 Referral, together with exhibits, many of them common to all the Claimants, supporting the elements of their claims.

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[4] *See* Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008).
[5] *See* International Claims Settlement Act of 1949 ("ICSA"), 22 U.S.C. § 1623(a)(1)(C) (2012).
[6] *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").
[7] 2013 Referral, *supra* note 6, at ¶ 8.
[8] *Notice of Commencement of Claims Adjudication Program,* 78 Fed. Reg. 75,944 (2013).

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA,[9] 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.[10]

Commercial Claim

Category F is limited to commercial claims. Commerce is generally viewed as the exchange of goods and services.[11] Claimants allege that they provided the service of their labor to Pan Am and that Libya's actions unlawfully precluded them from continuing to do so. Moreover, the remedy they seek is money damages to compensate for what they otherwise would have earned but for Libya's actions. The commercial aspect of their claims is further evidenced by the fact that, in the *Abbott* complaint, they alleged as causes of action tortious interference with contractual relations and tortious interference with 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-

[9] 22 U.S.C. § 1623(a).
[10] 2013 Referral, *supra* note 6, ¶ 8.
[11] *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.").

III-001, Decision No. LIB-III-001, at 5-6 (2014). Each of the Claimants has provided documentation on this aspect of their respective claims, including, variously, current U.S. passports, cancelled U.S. passports, U.S. birth certificates, and/or voter registration verifications, which evidence their U.S. nationality at the time of the terrorist attack as well as at the time of the Claims Settlement Agreement. They therefore satisfy 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. Claimants have provided a certified copy of the complaint in that litigation, filed in the United States District Court for the District of Columbia, which names them as plaintiffs and sets forth their commercial claims against Libya. Based on this evidence, Claimants have satisfied this requirement as well.

In summary, these claims are within the Commission's jurisdiction pursuant to the 2013 Referral and are entitled to adjudication on the merits.

Merits

Claimants base their claims upon the closure of Pan Am on December 4, 1991.[12] They assert that the 1988 Lockerbie bombing forced Pan Am to shut down operations three years later, which they claim in turn led to the end of their careers as Pan Am pilots (or as a flight attendant, in the case of the claimant in Claim No. LIB-III-086). This, they claim, resulted in their suffering damages consisting of the income and most of the pension and medical benefits they would have earned after Pan Am's closure. In support of their claims, Claimants have submitted detailed allegations and two experts' economic

[12] Claimants 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."

analyses of Pan Am's actual and projected financial performance shortly before and in the wake of the Lockerbie bombing.

The factual background to these claims was set forth in detail in Claim No. LIB-III-044, Decision No. LIB-III-044 (2016) (Proposed Decision). Given that the relevant facts are the same for these claims as for Claim No. LIB-III-044, that background is incorporated by reference here.[13]

Claimants' Allegations and Argument

Claimants assert that they worked for Pan Am for many years prior to the Lockerbie bombing and that the terrorist attack forced Pan Am to shut down on December 4, 1991. The bombing, they claim, ended their careers and resulted in a loss of income as well as most of their pension and medical benefits. Their claims are for the salaries they allege they would have earned with Pan Am, based on the formula set forth in the collective bargaining agreements between Pan Am and the Claimants' unions (for the pilots, the Air Line Pilots Association ("ALPA") and for the flight attendant, the Independent Union of Flight Attendants ("IUFA")), "until their retirement, or through the year 2001, whichever is the earlier, less any earned income (mitigation) they were able to make during those same years." They also claim "pension plan contributions that would have been made by Pan Am." For the pilot Claimants, the asserted loss in wages and benefits assumes that they "would have . . . [continued] to fly as . . . flight engineer[s] from age 60 to 65." The flight attendant Claimant (Claim No. LIB-III-086) appears to assume that she would have continued to work for Pan Am until age 51.

Key to Claimants' arguments is their contention that the Lockerbie bombing was the proximate cause of Pan Am's closure in 1991, and that there "is an unbroken chain of

[13] *See* Claim No. LIB-III-044, Decision No. LIB-III-044, at 6-21 (2016) (Proposed Decision).

events, from the Lockerbie bombing to the closure of Pan Am." In their brief, Claimants assert that "[p]rior to Lockerbie, Pan Am was doing well." They note that Pan Am hired a new CEO in January 1988, who "immediately instituted a growth program." But, Claimants allege, the Lockerbie bombing "immediately ended the airline's rapidly improving financial position as passengers . . . abandoned the company and its flights." They further allege that "the U.S. government and private companies advised employees not to fly Pan Am on transatlantic flights." Claimants argue that the Lockerbie bombing "sounded the death knell[]" for Pan Am. They also cite a 2001 decision of the United States Court of Appeals for the Second Circuit, which they state concluded that the Lockerbie disaster caused Pan Am's bankruptcy.[14] As to the legal principles, Claimants contend 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." They assert that the evidence presented meets this standard, thus entitling them to their lost income and benefits said to have resulted from the Lockerbie bombing.

With specific regard to their economic losses, Claimants argue that such losses are compensable under the applicable legal principles. They note that their employment with Pan Am was governed by the ALPA and IUFA contracts. Claimants maintain that because their contracts "did not expire[,]"they could only be dismissed for "just cause" after notice and a hearing. Thus, they argue, their contracts "established a property/commercial interest of continued employment." Citing decisions from the

[14] 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).

Commission's Iran Claims Program, they assert that the "Commission compensates employees for lost compensation and benefits where an employment contract creates a property interest in future employment." They also argue that "[international] tribunal decisions worldwide support the claimants by granting lost income, pensions, profits, and other awards based on intangible property rights."

Supporting Evidence

Claimants have submitted numerous exhibits in support of their claims. These include the same exhibits that were considered in connection with Claim No. LIB-III-044, and include an expert opinion, dated June 4, 2014, from Dr. Tulinda Larsen, an aviation 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 Claimants' income and benefits.[15]

Following the issuance of the Proposed Decision in Claim No. LIB-III-044, Claimants supplemented their claims with additional evidence. These include a copy of a Motion to Reopen Case for Limited Purpose of Unsealing Confidential Settlement Agreement, dated July 19 2016, filed in the Pan Am bankruptcy case in the Southern District of New York; an additional expert opinion from Sanford Rederer, an aviation economist, further opining on the impact of the Lockerbie bombing on Pan Am's bankruptcy; a supplemental statement from Dr. Larsen addressing some of the issues raised during the development of these claims; a supplemental consolidated brief addressing the merits of their claims; and a chart highlighting selected financial data from Pan Am for the years 1986 to 1990.

Analysis

To prevail under Category F of the 2013 Referral, Claimants must show that their claim is "compensable under the applicable legal principles."[16] Although the 2013 Referral does not define "applicable legal principles," the International Claims Settlement Act ("ICSA") establishes the law the Commission is required to apply. Thus, as we have in this and several other previous programs, we interpret the phrase "applicable legal principles" in Category F of the 2013 Referral to mean the Commission's statutorily mandated law.[17]

[15] 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.
[16] 2013 Referral, *supra* note 6, ¶ 8.
[17] *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 ICSA, 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.[18] 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.

Under international law, "[e]very internationally wrongful act of a State entails the international responsibility of that State."[19] Moreover, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."[20] Since "the mid-air destruction of an aircraft by terrorists in such circumstances as are present here is an internationally wrongful act,"[21] Libya must "make

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[18] 22 U.S.C. § 1623(a)(2) (2012).

[19] *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].

[20] *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….'").

[21] *INTERLEASE*, *supra* note 20, 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
> (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 . . . .

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."[22] Thus, the damages alleged by Claimants, which consist of lost earnings and benefits, are in principle recoverable.[23]

As we explain in more detail below, however, we deny Claimants' claims for two reasons. First, they have failed to establish that their claims were not extinguished by a 2005 settlement between Pan Am and Libya. Second, they have 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 Claimants' damages). Finally, to the extent this claim is based on a "property interest in continued employment," there remain serious questions as to whether or not Claimants had such a right and thus whether their claims come within the terms of the Claims Settlement Agreement. Because these claims are denied on other grounds, however, the Commission makes no findings or conclusions on this issue.

Claim extinguished: Claimants have failed to establish that their 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 their current claims, Claimants would not be entitled to an award from the Commission.

As we explained in the Proposed Decision in Claim No. LIB-III-044, the "fundamental problem is that we do not have access to a copy of the Settlement

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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.

[22] *See* ILC Draft Articles, *supra* note 19, art. 36

[23] *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.

Agreement and so cannot conclusively determine whether it precludes [Claimants'] claims here."[24] Moreover, as we also noted, some of the evidence about the settlement suggests that the current claims were extinguished, while other evidence suggests the opposite.[25] Since that decision, Claimants have not submitted any new evidence regarding the contents of the settlement agreement. Therefore, our reasoning in that decision applies equally here. Although Claimants have submitted a copy of a motion they have recently submitted before the bankruptcy court to reopen the Pan Am bankruptcy case and unseal the agreement, this motion does not provide further information regarding the contents of the agreement. The Commission does not know when or if the motion to reopen will be granted, and, if so, when a decision will be made regarding when to unseal the agreement. Thus, for the reasons set forth in our Proposed Decision in Claim No. LIB-III-044, and because the burden to establish the elements of the claim rests on the Claimants,[26] we must deny their claims.

Proximate Cause: International law[27] requires that a claimant establish that an alleged wrongdoer have "proximately caused" the claimant's damages.[28] Claimants here must thus show that Libya's actions proximately caused their damages. In international

[24] Claim No. LIB-III-044, Decision No. LIB-III-044, at 26 (2016) (Proposed Decision).
[25] *Id.*
[26] *See* 45 C.F.R. § 509.5(b) (2015).
[27] 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 3, 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).
[28] *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 19, 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?").

law, "proximate" is often contrasted with "remote"[29] or "indirect."[30] Another way to characterize a wrongdoer's actions as "proximately causing" a claimant's damages is to say that those damages were reasonably "foreseeable" to the wrongdoer.[31] This approach excludes any damages, including lost earnings or income, that are "speculative" or "contingent."[32] 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.[33]

As noted above, most of the evidence provided in support of these claims is identical to that submitted in support of Claim No. LIB-III-044. To the extent the Claimants rely on this same evidence, the Commission's analysis and conclusions in that decision apply equally here, and are incorporated by reference into this decision. Specifically, Claimants have failed to establish that, but for the Lockerbie bombing, they

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[29] *See* ILC Draft Articles, *supra* note 19, 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.")

[30] *See* ILC Draft Articles, *supra* note 19, 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 . . . .").

[31] *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 . . . .");

[32] III Marjorie M. Whiteman, *Damages in International Law* 1765 (1937) ("'[s]peculative' 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.

[33] *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 19, art. 36, cmt. 27.

would not have suffered their alleged losses and that Libya's actions were a proximate cause of the harm they suffered. As we explained in our earlier decision, Claimants' 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 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. Again, for the reasons set forth in our earlier Proposed Decision,[34] Claimants have failed to provide sufficient evidence to support this theory of causation, and thus have failed to establish a sufficiently proximate causal connection between the 1988 Lockerbie bombing and Pan Am's closure three years later in December 1991.

The newly submitted evidence does nothing to undermine this conclusion. While it provides some additional information concerning Pan Am's finances, the new evidence largely duplicates evidence previously submitted. The primary piece of new evidence is the opinion of Sanford Rederer, an aviation economist, dated July 21, 2016, in which Mr. Rederer reaches conclusions similar to Dr. Larsen's, including that "the decreased traffic and revenue that Pan Am experienced in 1989 ultimately caused the downfall of the

[34] *See* Claim No. LIB-III-044, Decision No. LIB-III-044, at 31-45 (2016) (Proposed Decision).

airline." More specifically, Mr. Rederer opines that, "but for the loss of traffic and revenue directly linked to Lockerbie, Pan Am would have had sufficient cash available in 1989 to possibly acquire Northwest Airlines, or in 1991 to meet the cash requirements set by Delta for completion of the Pan Am reorganization as part of its Asset Purchase Agreement [APA]." Moreover, Mr. Rederer asserts that, "but for Lockerbie, Pan Am could have weathered the losses it experienced in 1989, 1990 and 1991, and would have had funds well in excess of the $66 million additional cash it needed to close the Delta transaction."

The Larsen and Rederer opinions are similar in some ways. Like Dr. Larsen, Mr. Rederer focuses largely on the revenue said to have been lost as a result of the Lockerbie bombing and the additional cash on hand he says Pan Am would have had but for the bombing. He notes that Pan Am's financial situation was improving in 1987 and 1988, just prior to the bombing, and that, as the result of the turnaround plan implemented by the new CEO, Thomas Plaskett, the airline witnessed "record revenue levels."

The Rederer opinion differs, however, from Dr. Larsen's opinion in several salient respects. First, the two opinions posit vastly different amounts of revenue lost due to the bombing. Dr. Larsen assumes that due to the Lockerbie bombing Pan Am lost $450 million in Atlantic revenue in 1989 and an additional $511 in 1990. Mr. Rederer, on the other hand, posits that, after the bombing, "Pan Am's Atlantic revenues dropped $247 million (12%) from $2.059 billion in 1988 to $1.812 billion in 1989."[35] Moreover, while Dr. Larsen does not appear to claim any revenue loss outside Pan Am's Atlantic Division, Mr. Rederer does. He states that "[th]e loss extended to the domestic network, which carried a large volume of passengers connecting to and from Atlantic flights,

[35] In his report, Mr. Rederer describes the $450 million figure as "credible," but states that he has used a "more conservative estimate" of $247 million.

estimated at $60 million (25% of the Atlantic Division impact), and another $60 million in 1990 for a total of $367 million."

Further, unlike Dr. Larsen, Mr. Rederer acknowledges that "[t]he cash cost to Pan Am was not as much as the lost revenue." He says that the bombing would have resulted in "$63 million (17% of revenues) in savings on revenue- and passenger-related expenses (*e.g.*, commissions, food and other passenger handling activities)." In contrast, Dr. Larsen does not account for any such savings, and instead calculates—based on her lost revenue figures for 1989 and 1990—that Pan Am's cash position would have been $911 million at the end of 1990, instead of the actual $50 million. Thus, while Dr. Larsen effectively posits a 1989-1990 cash loss of $861 million (*i.e.*, the $911 million projected cash position less the actual $50 million cash position), Mr. Rederer estimates "[t]he direct 1989-1990 cash cost to Pan Am from the Lockerbie bombing" at $304 million, "based on $367 million of lost revenue over the two years 1989-1990, offset in part by an estimated costs saving of $63 million (17%)." Mr. Rederer concludes that, "[w]ithout the $304 million drop in lost cash caused by the Lockerbie bombing, Pan Am's cash balance would have been close to $500 million at the end of 1989, and the airline might have achieved breakeven or a small profit."

The Rederer and Larsen opinions also differ in their treatment of Pan Am's performance in 1990. Mr. Rederer recognizes that in August 1990, the Iraqi invasion of Kuwait "creat[ed] a world crisis and caus[ed] fuel prices to double"; however, he contends that this was only one of the events that led to Pan Am's closure, stating that "the combination of Lockerbie losses with other geopolitical events turned the company in 1990 to desperate asset sales just to keep the airline flying." Again, he emphasizes that, "[w]ith access to the more than $300 million of cash lost to the Lockerbie bombing,"

as well as what was raised through asset sales, Pan Am would have had enough resources to remain open. He maintains that it "was this lost cash that deprived Pan Am of the cash cushion it needed to survive the mounting operating losses and geopolitical events encountered in 1989, 1990 and 1991." Finally, Mr. Rederer asserts that the $304 million cash lost in 1989 deprived Pan Am of the resources it needed to "achieve a merger or other strategic alternatives, including the acquisition of Northwest or the reorganization contemplated in the Delta [APA] in late 1991." Indeed, Mr. Rederer maintains that Delta would have continued with the reorganization of Pan Am had the airline had at least $100 million in cash, rather than the mere $34 million it actually had.

Although Mr. Rederer's estimates are, as he states, "more conservative" in some respects than those used by Dr. Larsen, his opinion ultimately suffers from the same weaknesses found in the Larsen opinion. To be sure, Mr. Rederer's basic assertion regarding the lost revenue resulting from the Lockerbie tragedy in 1989—$247 million in the Atlantic Division—finds much more support in Pan Am's financial records than the $450 million loss cited in Dr. Larsen's opinion and Mr. Plaskett's 2014 affidavit. Indeed, as we noted in the Proposed Decision in Claim No. LIB-III-044, Pan Am's 1989 10-K report cites a $258 million loss in the Atlantic Division,[36] a figure cited elsewhere by the company around that time.[37] However, as we also noted, Pan Am attributed this loss not only to the Lockerbie bombing, but also to other factors, including higher costs due to FAA-mandated security procedures—which the airline asserted caused some flyers to switch to foreign carriers[38]—as well as "increased competition in the North Atlantic and

[36] *See* Pan American World Airways, Inc., Annual Report (Form 10-K), at 1 (1989) [hereinafter Pan Am Airways 10-K 1989].
[37] *See, e.g.*, Pan Am Corp. Annual Shareholders' Meeting, May 8, 1990, at I-1 (1990) (on file with Commission) [hereinafter Shareholders Meeting].; Agis Salpukas, *Bankruptcy Petition Is Filed by Pan Am to Get New Loans*, N.Y. Times, Jan. 9, 1991, at A1.
[38] *See* Shareholders' Meeting, *supra* note 37, at I-1.

Internal German markets[]"[39] and "the strengthening of the U.S. dollar against most European currencies."[40] Thus, while it seems highly likely that the Lockerbie bombing had an impact on Pan Am's 1989 revenues—as contemporaneous financial records suggest—the available evidence does not support the assertion that all of this loss was attributable to the attack.

Moreover, even assuming that the Lockerbie tragedy caused a substantial drop in passenger revenue in 1989, other statements by Mr. Rederer about lost revenue are problematic and unsupported by the available public records. One of these is Mr. Rederer's assertion that the Lockerbie attack also caused revenue losses of $60 million in Pan Am's *domestic* network, which Mr. Rederer states "carried a large volume of passengers connecting to and from Atlantic flights . . . ." It is entirely unclear where this figure comes from or how it was calculated; Mr. Rederer only states that this is "25% of the Atlantic Division impact . . . ." This estimate is all the more perplexing because Pan Am's 1989 10-K indicates that domestic scheduled passenger revenue actually *increased* nearly 16% that year, from $584.6 million in 1988 to $677.7 million in 1989, with domestic revenue passenger miles (RPMs)[41] increasing from 6,206 million to 6,691 million.[42] Mr. Rederer states that the Lockerbie bombing also had a $60 million impact on domestic revenues in 1990, even though domestic RPMs went up again that year, to 6,916 million, with only a modest drop in domestic operating revenue of approximately $3 million.[43] These actual domestic revenue figures highlight the importance of knowing how Mr. Rederer determined his asserted $60 million loss in domestic revenue for each

[39] Pan Am Airways 10-K 1989, *supra* note 36, at 1.
[40] Pan Am Corp., Annual Report to Stockholders 13 (1989) [hereinafter 1989 Annual Report].
[41] Revenue passenger miles "are determined by multiplying the number of revenue passengers carried by the miles flown." *Id.* at 8 n.1.
[42] *See id.* at 33.
[43] *See* Pan American World Airways, Inc., Annual Report (Form 10-K), at 13, F-59 (1990).

of those two years. Because Claimants have provided no factual support for these asserted domestic losses, Mr. Rederer's opinion is insufficient to demonstrate any such losses.

Mr. Rederer's approach to determining the amount of cash Pan Am would have had available had the Lockerbie bombing not occurred is also problematic. He appears to have understated the increase in expenses Pan Am would have had to have incurred to increase its revenues by $367 million. Mr. Rederer indicates that the "cash cost to Pan Am was not as much as the lost revenue," thereby recognizing that there are invariably costs associated with increasing revenue.[44] But the amount of expenses he posits—$63 million (17% of revenues)—is based simply on food and "other passenger handling activities." It completely omits numerous other expenses that would almost certainly have been associated with such a posited $367 million increase in revenue, expenses such as fuel, labor costs, asset depreciation/replacement or any number of other expenses that would be critical in projecting how much cash would have been available. This is of particular interest to the Commission given the massive operating losses Pan Am sustained in 1989—approximately $328 million.

Moreover, Mr. Rederer's posited cash position for Pan Am in 1989 would have been close to unprecedented in the post-deregulation era. Pan Am's actual available cash was approximately $191 million at the beginning of 1989, and $162 million at the end of the year, as Mr. Rederer acknowledges. However, he asserts that "[w]ithout the $304 million drop in lost cash caused by the Lockerbie bombing, Pan Am's cash balance

[44] This is in contrast to Dr. Larsen who appears not to have included any expenses when making conjectures about Pan Am's hypothetical cash position had the Lockerbie bombing not occurred. *See* Claim No. LIB-III-044, Decision No. LIB-III-044, at 36-38 (2016) (Proposed Decision).

would have been close to $500 million at the end of 1989."[45] (An odd assertion, since the $304 million in losses includes, by Mr. Rederer's own estimation, $60 million in lost domestic revenue for 1990.) This would be nearly three times what the company actually had and more than it ever had in the post-deregulation era, except once, in 1984.[46] In short, the projection of "close to $500 million" in cash available at the end of 1989 is unsupported by any facts in the current record.

Mr. Rederer, like Dr. Larsen, appears to carry over the projected lost cash from 1989 and 1990 into 1991, as if the cash would simply have remained in Pan Am's coffers. For the reasons discussed at length in Claim No. LIB-III-044, this assumption is also highly problematic: the available evidence provides no support for the claim that any lost cash from 1989 would have remained available when the recession and Gulf War hit in mid- to late-1990, or during Pan Am's attempt at reorganization during its bankruptcy in 1991. As Mr. Rederer acknowledges, 1990 was a tumultuous time for the airlines, and the price of fuel doubled. Yet, he fails to discuss Pan Am's balance sheet during this time period altogether. Because it fails to incorporate the impact of those events on the company's finances during that time, Mr. Rederer's opinion that Pan Am would have had $304 million more in cash all the way through until late 1991 is unsupported by the factual record. This is especially the case given that Pan Am Corporation's consolidated net loss for 1990 was $662.9 million, nearly double its loss from the previous year, 1989, the year right after the Lockerbie bombing.[47]

Mr. Rederer's view that, but for the Lockerbie bombing, Pan Am would have been able to purchase Northwest Airlines in 1989 is also unsupported by any facts in

[45] Although he never gives a precise figure, we assume he means $466 million, the $162 million it actually had, plus the $304 million in additional cash he posits Pan Am would have had but for the bombing.
[46] *See* Claim No. LIB-III-044, Decision No. LIB-III-044, at 37-38.
[47] *See id.* at 11.

evidence. He asserts that, but for the lost revenue resulting from Lockerbie, Pan Am would have had sufficient resources to acquire Northwest Airlines, which it attempted to do. He states that this "effort was unsuccessful because of the combination of losses on operations and diminished cash balances[,]" and notes that another business entity was able to outbid Pan Am in the summer of 1989. Citing Mr. Plaskett's affidavit, Mr. Rederer indicates that Pan Am could have won the bidding if it had had enough cash reserves, which would have helped its Atlantic market recover.[48] This statement is far too speculative to establish a causal link between the Lockerbie bombing and Claimants' losses.[49] The only evidence available is that Pan Am attempted this acquisition and that it was outbid, but there is no basis on which to conclude that it would have prevailed had the airline simply had more cash.[50] There are simply too many imponderables to reach this conclusion, not the least of which is whether other prospective buyers would have raised their bids. The evidence simply does not support Claimants' assertion that, but for the Lockerbie bombing, Pan Am would have acquired or merged with Northwest Airlines.

Mr. Rederer's opinion regarding the unsuccessful "Pan Am II" reorganization is similarly speculative and unfounded. He asserts that Delta Airlines would have continued to participate in the reorganization of Pan Am "if Pan Am's cash position had been . . . $100 million or more, but Pan Am had only $34 million." The source of the

[48] This argument is also premised on Mr. Rederer's claim that, but for the Lockerbie tragedy Pan Am would have had $500 million in available cash towards the end of 1989. At the same time, he states that, "short of cash, Pan Am was forced to sell off valuable assets to stay alive." But these very sales injected cash into Pan Am's coffers. So, for example, in 1989, Pan Am sold Pan Am World Services for $165 million. *See* 1989 Annual Report, *supra* note 40, at 11, 16. Without that sale, though, Pan Am would not have had that $165 million. Mr. Rederer does not indicate whether he believes this particular sale was necessary because of the losses sustained after Lockerbie, or for some other reason, but had the sale not taken place, Pan Am would necessarily have had less cash on hand, and his estimate of $500 million, based on the actual cash available at the end of 1989, would have to be adjusted downward. It is not clear whether he believes that would have left the company with sufficient cash to successfully acquire Northwest Airlines.

[49] *See* Claim No. LIB-III-044, *supra* note 13, at 30 & n.144.

[50] *See id.* at 41.

$34 million estimate is unclear, although Pan Am's SEC filings indicate that the corporation had approximately $36 million in available cash at the beginning of the third quarter of 1991 (which is the estimate Dr. Larsen used when making the same argument in her opinion).[51] He further contends that "[b]ut for the $304 million in lost cash . . . caused by Lockerbie, Pan Am could have covered the $66 million shortfall needed to close the deal with Delta."

This conclusion lacks credibility because it focuses too narrowly on liquidity. While there is evidence that Pan Am's diminishing cash reserves may have played some role in Delta's decision to pull out of the reorganization plan, the public record also includes several other factors. At some point prior to the decision to withdraw, according to a decision in a district court lawsuit filed by Pan Am against Delta, Delta's Chief Financial Officer indeed did tell Delta's investment banker that a $100 million liquidity cushion was needed for Pan Am II to be viable.[52] However, there is certainly no suggestion that this was the only concern. To the contrary, the decision also cites concerns about Pan Am II's reduced revenue forecasts (resulting from numerous factors unrelated to Lockerbie, including "general economic conditions and vigorous competition from American Airlines[]"), increased projected expenses for Pan Am II, and difficulties with negotiating new labor union agreements.[53] In a December 4, 1991 memorandum to employees, a copy of which the Commission has obtained, then-Pan Am CEO Russell Ray said that, "[w]ith the cash problem, the dismal economic climate, and the projections of reduced revenues as well as that of Delta's, our future is too risky to find the sources to

[51] *See* Pan Am Corp., Quarterly Report for Q2 (Form 10-Q), at 4 (1991).
[52] Pan Am Corp. v. Delta Air Lines, Inc. 175 B.R. 438, 460 (S.D.N.Y. 1994).
[53] *See id.* at 458-61, 464.

fund the new company. Optimism and prayer could not overcome the reality of these poor industry market conditions and recession in our country."[54]

In addition, one contemporaneous news article indicates that "Delta was having problems of its own absorbing the assets that it had acquired from Pan Am, including its European routes. Meanwhile, Delta's bond ratings were sliding and it was contemplating an economy that didn't show many signs of recovery."[55] Delta's attorney further indicated that "[t]he economy was still stagnant, Pan Am's advance bookings were almost nonexistent and travel agents had lost confidence in Pan Am . . . ."[56]

In sum, it appears from the available evidence that there were numerous factors that contributed to the failure of the Pan Am II deal, only one of which was insufficient liquidity.[57] The questions regarding how much cash Pan Am would have had but for the Lockerbie bombing only add to the uncertainty on this issue. So does contemporaneous evidence that Pan Am would have needed $624 million in cash to consummate the deal to create Pan Am II, far more than the $100 million Mr. Rederer contends would have sufficed.[58] Moreover, even assuming Mr. Rederer is correct that, but for Lockerbie, Pan Am would have had enough cash to "close the deal" with Delta, he does not opine that if the deal had closed, Claimants' terms of employment would have remained the same in the new organization (assuming they would have been employed at all).[59] Thus, for the reasons given above, Claimants have failed to establish that, even if Pan Am had had the

[54] Letter from Russell L. Ray, Jr., President & Chief Exec. Officer, Pan Am. World Airways, Inc., to All Pan Am Employees (Dec. 3, 1991) (on file with the Commission); *see also* Pan Am Corp. v. Delta Air Lines, Inc. 175 B.R. at 467.
[55] Martha M. Hamilton, *Flying on the Edge of Extinction*, Wash. Post, Dec. 5, 1991, at B11.
[56] *Id.*
[57] *See* Claim No. LIB-III-044, Decision No. LIB-III-044, at 17 (2016) (Propose Decision).
[58] *See* Memorandum from Robert Usadi & William B. Gannett, Cahill Gordon & Reindel, to Members of the Official Retirees Comm. of Pan Am (Oct. 1, 1990) [hereinafter Memo to Retirees Comm.] (on file with the Commission) (attorneys for the Official Pan Am Retirees Committee noting in a memo to the Committee that "at confirmation [of the proposed plan to establish the New Pan Am,] Pan Am [would] need approximately $624 million of cash").
[59] *See supra* p. 27-28.

additional cash presumed by Mr. Rederer, Delta would have definitely gone through with the Pan Am II deal in a way that would maintain claimant's employment contracts.

Mr. Rederer has included an appendix briefly discussing the differing circumstances underlying the various airline bankruptcies that took place between 1989-1991. Although the Commission recognizes that each of these bankruptcies necessarily involved a distinct set of facts, the information provided does little to address the root causes of these bankruptcies. It was precisely these generalized conditions that raised questions in our earlier Proposed Decision about whether the Lockerbie bombing was responsible for Pan Am's closure. Because Mr. Rederer's opinion contains no additional evidence that would change the Commission's conclusions on this aspect of the claim, we reaffirm and incorporate our reasoning and conclusions from the Proposed Decision in Claim No. LIB-III-044.

Claimants have submitted a consolidated supplemental memorandum in support of their contention that the Lockerbie bombing was the proximate cause of the Pan Am bankruptcy. Most of the points they make were addressed by the Commission in Claim No. LIB-III-044, and the Commission finds no reason to reach different conclusions. The brief does include a statement from a former Secretary of Transportation who was also a member of the Pan Am Board of Directors, who states, "I personally believe that it was Lockerbie that sealed Pan Am's eventual demise." However, he does not identify the empirical data, if any, on which his opinion is based, or how he otherwise reached this conclusion. This opinion thus provides no support for Claimants' argument that the Lockerbie bombing was the proximate cause of Pan Am ceasing its operations three years later.

Claimant's supplemental memorandum also includes a discussion of the legal standard to be applied, particularly the proximate cause standard that the Commission noted in Claim No. LIB-III-044 is the prevailing standard in international law and the Commission's prior decisions. It also includes a discussion on the issue of concurrent causes, citing the International Law Commission (ILC) and the United Nations Compensation Commission (UNCC). This discussion focuses on the assessment of liability where multiple acts working together cause a particular injury. The Commission has considered these and other sources of international law, but does not find that the evidence submitted requires an analysis of concurrent causation. As we noted in Claim No. LIB-III-044, the evidence in the record is insufficient to prove that, but for the Lockerbie bombing, Claimants would not have suffered their alleged economic losses, or that Libya's actions were a proximate cause of these losses. The Commission therefore need not address whether the bombing was also a concurrent cause of Pan Am's bankruptcy, and thus of Claimants' lost future wages and pension benefits.

Property Interest: Finally, there remains an open question as to whether Claimants had a compensable property interest within the meaning of the Claims Settlement Agreement. Claimants have argued that they had a "protected property interest in their jobs and careers[.]" The premise of that argument is that their employment with Pan Am was based on non-expiring collective bargaining agreements and that those agreements prevented Pan Am from terminating them except for "just cause" after exhaustion of certain procedural remedies. However, it is not entirely clear that Claimants did in fact have a property interest in their continued employment or, if they did, whether any such interest would have been subject at all times to Pan Am's rights under the bankruptcy laws. Under the U.S. Bankruptcy Code, a company seeking

reorganization under Chapter 11 has the right to "assume or reject a collective bargaining agreement."[60] According to the docket in Pan Am's bankruptcy proceedings, Pan Am sought to modify its collective bargaining agreements on November 22, 1991. ALPA, the pilots' union, objected to this motion on November 29, 1991. While we do not have sufficient evidence to determine whether the bankruptcy court ever did in fact modify the collective bargaining agreement,[61] Pan Am's bankruptcy petition certainly had the potential to modify any putative contractual or property rights Claimants previously had.

Moreover, even if Pan Am had survived and the "Pan Am II" deal been finalized, Claimants have not shown that their terms of employment would have been the same under Pan Am II as they were under their previous contracts. Presumably, if the Delta deal had been consummated, Pan Am II would not have adopted the ALPA or IUFA collective bargaining agreements *in toto* but, rather, would have negotiated new agreements, with the potential for substantially different terms. Claimants do not address this issue at all, nor do either Dr. Larsen or Mr. Rederer in their opinions.

In short, it is unclear whether Claimants had a compensable property interest in continued employment with Pan Am until retirement under the same terms outlined in their union contracts. Because the Commission denies this claim on other grounds, however, it need not and does not make any findings or conclusion on this issue.

CONCLUSION

For the reasons discussed above, the Commission concludes that Claimants have failed to carry their burden of proving that their alleged harm is compensable under the

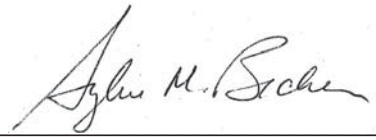
[60] 11 U.S.C § 1113 (1994).

[61] *But cf.* 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 9, *In re* Pan Am Corp., No. 91 B 10080 (CB) through 91 B 10087 (CB) (Bankr. S.D.N.Y. Feb. 15, 1996) (noting that "any executory contract or unexpired lease shall be, and hereby is, rejected by the Debtors"); NLRB v. Bildisco and Bildisco, 465 U.S. 513, 516 (1984) (noting that the term "executory contract" as used in the bankruptcy code includes collective bargaining agreements).

applicable legal principles, as required under Category F of the 2013 Referral. First, they have failed to establish that their claims were not extinguished by the 2005 settlement of the lawsuit Pan Am brought again Libya in Scotland. Second, they have failed to prove that the bombing of Pan Am Flight 103 was the proximate cause of their 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 Claimants' economic losses. For the reasons detailed above, we conclude that they did not. Accordingly, these claims must be and are hereby denied. The Commission finds it unnecessary to make determinations with respect to other elements of these claims.

Dated at Washington, DC, August 16, 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).