UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIO DEL RIO, JACK MURPHY, STEVEN BIXBY, ALICIA KIRBY, PHILIP KIRBY, JENNIE AGUAYO, CHRISTOPHER HARLAN, and SARA HARLAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CROWDSTRIKE, INC. and CROWDSTRIKE HOLDINGS, INC.,

Defendants.

Case No. 1:24-cv-00881-RP

CLASS ACTION

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STRIKE

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I. INTRODUCTION

As a result of Defendants CrowdStrike, Inc. and CrowdStrike Holdings, Inc.'s (together, "CrowdStrike" or "Defendants") actions, Plaintiffs Julio del Rio, Jack Murphy, Steven Bixby, Alicia Kirby, Philip Kirby, Jennie Aguayo, Christopher Harlan, and Sara Harlan ("Plaintiffs") and tens of thousands of other travelers were left stranded in airports for hours or days. CrowdStrike has admitted that it pushed a faulty security update to millions of computers worldwide, which the airline industry relied upon, that caused significant delays and cancellations of flights throughout the United States. CrowdStrike could have avoided this disaster by conducting basic testing. Instead, it acted recklessly, causing harm to people throughout the country.

Through its Motion to Dismiss (ECF No. 31) (the "Motion"), CrowdStrike attempts to escape liability for its admitted failings (despite briefing these public admissions as merely allegations) and the mass harm that it caused. CrowdStrike seeks to expand preemption under the Airline Deregulation Act of 1978 ("ADA"), 92 Stat. 1705, to actions not reasonably related to airline services, an expansion that would be contrary to the statute. It argues for dismissal on the basis of a lack of choice-of-law analysis in Plaintiffs' complaint, despite the faulty update and fix based in Texas, which has not been recognized as a ground for dismissal by any court in the Fifth Circuit. CrowdStrike also asks the Court to strike Plaintiffs' class allegations, a premature issue best left for class certification, when briefing relating to these issues is ripe and ordered by the Court. Finally, CrowdStrike argues that Plaintiffs fail to state their negligence and public nuisance claims, despite the detailed and plausible factual allegations in Plaintiffs' well-pleaded complaint.

II. BACKGROUND

This case arises out of "a global tech disaster" caused by the predictable failures of CrowdStrike that resulted in the grounding and delay of thousands of flights across the United

States. *See* ¶¶ 2, 5.[1]

On July 19, 2024, CrowdStrike released a defective security software update for its Falcon platform, a software product intended to keep computers safe from cyberattacks and malware, that caused millions of computers around the world to repeatedly crash and become inoperable (the "CrowdStrike Outage"). ¶¶ 1-3. The CrowdStrike Outage was completely preventable had CrowdStrike followed industry-standard processes and basic testing procedures or heeded the lessons when the same issue occurred at the CEO's prior company. ¶¶ 112-37, 148.

The CrowdStrike Outage caused devastating consequences in the airline industry, leaving travelers stranded for hours or days. ¶ 5. Plaintiffs are among the tens of thousands (or more) of airline passengers whose flights were delayed or canceled. ¶¶ 12, 21, 27, 32, 42, 53, 61, 68. As a result of the delays and cancellations, Plaintiffs were forced to expend money they would not have otherwise spent, such as on alternate transportation, food, clothes, lodging, and gas. *E.g.*, ¶¶ 13, 17, 23, 34, 38, 44, 46, 49, 54, 56, 63, 64, 70-72. Plaintiffs del Rio, Murphy, and Aguayo all suffered personal injury as a result of the CrowdStrike Outage. ¶¶ 15, 24, 57.

III. LEGAL STANDARD

"A motion to dismiss under [R]ule 12(b)(6) is viewed with disfavor and is rarely granted." *Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009) (internal quotations omitted). A complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible

[1] Standalone references to "¶" or "¶¶" are references to Plaintiffs' Consolidated Class Action Complaint, ECF No. 23.

on its face.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. The court must "accept[] all well-pleaded facts as true and view[] those facts in the light most favorable to the plaintiffs." *Warren v. Chesapeake Expl., L.L.C.*, 759 F.3d 413, 415 (5th Cir. 2014).

IV. ARGUMENT

A. The ADA Does Not Preempt Plaintiffs' Claims

1. Legal Standard

Section 41713(b)(1) of the ADA states:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

49 U.S.C. § 41713(b)(1). Congress enacted this preemption "[t]o prevent the states from frustrating the goals of deregulation by establishing or maintaining economic regulations of their own." *Hodges v. Delta Airlines*, 44 F.3d 334, 335 (5th Cir. 1995). "Laws of general applicability . . . are preempted if they have the 'forbidden significant effect' on rates, routes or services." *Id.* at 336 (quoting *Morales v. TWA*, 504 U.S. 374, 388 (1992)). The Supreme Court has held that some state actions are "too tenuous, remote, or peripheral" to be preempted by the ADA, but did not set the dividing line for preemption. *See Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines*, 463 U.S. 85, 100 n.21 (1983)). The Fifth Circuit has provided the following definition for "services" under the ADA:

> 'Services' generally represent a bargained-for or anticipated provision of labor from one party to another. If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. These matters

> are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as 'services' and broadly to protect from state regulation.

Hodges, 44 F.3d at 336.

2. Plaintiffs' Claims Do Not Relate to a Service Under the ADA

Plaintiffs' claims against CrowdStrike are not preempted by the ADA because they relate to CrowdStrike's actions in providing cybersecurity services to airlines, which is not an "airline service" under the ADA. For a state law to be preempted by the ADA, it must be "related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b)(1). "Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself." *Hodges*, 44 F.3d at 336. CrowdStrike argues that because Plaintiffs seek damages related to delayed or cancelled flights, their claims relate to "airline services" under the ADA. *See* Motion at 8. However, the basis of Plaintiffs' claims against CrowdStrike is that CrowdStrike pushed a software update that caused its customers' computers running Microsoft Windows to crash. *See*, *e.g.*, ¶ 112. CrowdStrike's cybersecurity services are not designed specifically for or provided exclusively to airlines, and it has customers in many other sectors of the economy. *See* ¶ 81. The software update that caused the CrowdStrike Outage was one that was designed to "detect possible threats on a device." ¶ 92. Had CrowdStrike performed basic due diligence to confirm that the update was not defective prior to pushing it to all of its customers, the CrowdStrike Outage would not have occurred. *See* ¶ 147.

CrowdStrike notes that Plaintiffs allege that the CrowdStrike Outage "affected many separate [airline] systems, such as those used for calculating aircraft weight, checking in customers, and phone systems in [airline] call centers." Motion at 9. However, CrowdStrike conflates the aftermath of the CrowdStrike Outage with the actual services that CrowdStrike

provides. Plaintiffs do not allege that CrowdStrike's software is, for example, flight planning software that has some direct effect on the timing of flights, software that checks in customers, or software that aids in airlines' call centers. Plaintiffs allege that CrowdStrike "offers commercial data protection and cybersecurity services and products intended to keep computers safe from cyberattacks and malware." ¶ 1. CrowdStrike's services are not specific to the airline industry. In providing this service to all of its customers, CrowdStrike caused an outage that affected the computer systems of many of its customers across a range of industries—including certain airline systems. This cybersecurity service is too attenuated from "airline services," such as ticketing, boarding procedures, the provision of food and drinks, baggage handling, or the transportation itself for Plaintiffs' claims to be preempted by the ADA. *See Hodges*, 44 F.3d at 336 (defining services as relating to these categories).

3. Plaintiffs' Claims Would Not Have the Forbidden Significant Effects Required for Preemption

Plaintiffs' claims would not lead to "forbidden significant effects" on air carriers. General laws are only preempted by the ADA when they have a "forbidden significant effect on rates, routes or services." *Hodges*, 44 F.3d at 336. CrowdStrike does not explain how holding a third-party cybersecurity company liable for the damages it caused by pushing a defective software update would impose these forbidden significant effects on air carriers. Instead, Plaintiffs' claims are similar to the claims that the Tenth Circuit held were not preempted in *Day v. SkyWest Airlines*, 45 F.4th 1181 (10th Cir. 2022). In *Day*, a plaintiff brought claims for negligence and breach of contract against SkyWest for injuring her while pushing a beverage cart down the aisle of a plane. *Id*. at 1182-83. The *Day* court held that "a finding in Day's favor would not govern any central matters of SkyWest's services, but would only require SkyWest, like all other businesses, to honor its contractual obligations and to comply with the general duty of care toward those who might be

foreseeably injured by its affirmative acts." *Id.* at 1190. Similarly, here, Plaintiffs' claims only relate to CrowdStrike (not an airline) violating a standard of ordinary care that led to foreseeable harm to Plaintiffs and the putative class. *See*, *e.g.*, ¶¶ 173, 185, 196, 208, 221. Plaintiffs are not attempting to impose some separate economic duty on the airlines through state laws that would affect their services to consumers. Indeed, the result of this litigation will not have any effect on airlines' provision of services, let alone impose forbidden significant effects. Plaintiffs only seek to hold CrowdStrike liable for its faulty software update that caused harm to Plaintiffs.

Contrast Plaintiffs' claims against CrowdStrike and the *Day* plaintiff's claims against SkyWest with the plaintiff's claim in *Tobin v. Fed. Express Corp.*, 775 F.3d 448 (1st Cir. 2014). In that case, FedEx wrongly delivered a package containing marijuana to the plaintiff due to a labeling error at FedEx, which she claimed caused her emotional distress. *Id*. at 449-50. The First Circuit held that the *Tobin* plaintiff's claims related to "FedEx's package handling, address verification, and delivery procedures" and that these services "plainly concern the contractual arrangement between FedEx and the users of its services." *Id*. at 454. The First Circuit then analyzed whether the claims would have a forbidden significant effect on FedEx, finding "where the duty of care alleged drills into the core of an air carrier's services and liability for a breach of that duty could effect [sic] fundamental changes in the carrier's current or future service offerings, the plaintiff's claims are preempted by the ADA." *Id*. at 456. The duty of care that Plaintiffs allege CrowdStrike must follow is not one that will affect changes in an air carrier's services to its customers. In fact, this duty will have no effect on any air carrier's services other than helping to prevent future mass shutdowns of computer systems across the world.

CrowdStrike's cited cases highlight this same distinction. In *Pica v. Delta Air Lines, Inc.*, No. CV 18-2876-MWF (Ex), 2019 U.S. Dist. LEXIS 65985 (C.D. Cal. Feb. 14, 2019), the plaintiff

brought claims against Delta and a vendor that provided voice and chat services related to sales and support to Delta's customers for a data breach that the vendor experienced. *See id*. at *3. The *Pica* court held that "[s]ince [Delta's vendor] provides voice and chat services related to 'sales and support' for Delta, the Court has little trouble concluding that [Delta's vendor]'s services relate to Delta's 'rates, routes, or services.'" *Id*. at *27-28. Similarly, in *In re Am. Airlines, Inc., Privacy Litig.*, 370 F. Supp. 2d 552 (N.D. Tex. 2005), the services that the vendor provided to the defendant airline related directly to airline services. *See id*. at 564-65 ("Plaintiffs allege that American authorized AAI-whom plaintiffs assert plays a role in maintaining American's website -- to disclose passenger information to TSA . . . . Their claims against [defendants] are based on conduct that relates to American's ticketing service and its reservation component and for that reason are preempted."). Here, CrowdStrike's cybersecurity services provide no services that relate to any of the airlines "rates, routes, or services." In fact, the same services are provided to its customers in many other sectors. Preempting Plaintiffs' claims is not what Congress envisioned when drafting the ADA, especially here where the airline is not a party or alleged to have caused wrong.

4. Plaintiffs' Lawsuit Would Not Be Preempted by the ADA if Brought Against an Airline

Plaintiffs dispute CrowdStrike's argument that the ADA would preempt their claims if they were brought against an airline. *See* Motion at 9. The services at issue here are CrowdStrike's cybersecurity software services, not an airline service. *See*, *e.g.*, ¶ 84. Even actions taken by airlines that are not considered "airline services" under the ADA are not preempted by the statute. *See*, *e.g.*, *Day*, 45 F.4th at 1190. Whether Plaintiffs' claims would be preempted in a hypothetical suit against a hypothetical defendant not named in this case is irrelevant. CrowdStrike's cited regulations governing air carriers' conduct and government communications are similarly irrelevant as they are inapplicable to CrowdStrike, a software company. *See* Motion at 9-10.

CrowdStrike again ignores that Plaintiffs' claims are based on CrowdStrike initiating a preventable faulty software update that caused computers in many sectors of the United States economy to shut down. *See* ¶¶ 2-3. That Plaintiffs' harm resulted out of delays and cancellations is simply a foreseeable consequence of CrowdStrike's negligent actions. ¶ 81. CrowdStrike's negligent software update is the basis of Plaintiffs' case, and their claims are not preempted by the ADA.

5. Claims Involving Personal Injury Are Not Preempted by the ADA

The ADA does not preempt Plaintiffs del Rio, Murphy, and Aguayo's claims because they suffered personal injuries in addition to economic injuries as a result of CrowdStrike's actions. "[N]either the ADA nor its legislative history indicates that Congress intended to displace the application of state tort law to personal physical injury inflicted by aircraft operations, or that Congress even considered such preemption." *Hodges*, 44 F.3d at 338. The Fifth Circuit confirms this reading of the statute by noting that the Federal Aviation Administration requires air carriers to maintain insurance and "complete preemption of state law in this area would have rendered any requirement of insurance coverage nugatory." *Id*. The court goes on to note that Congress did not provide a remedy for these injuries and states, "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id*. (quoting *Silkwood v. Kerr-Mcgee Corp.*, 464 U.S. 238, 266 (1984)). Other circuit courts agree. *See*, *e.g.*, *Day*, 45 F.4th at 1189 (denying that the ADA preempted personal injury claims and noting the difference between these claims and claims related to economic competition); *Charas v. TWA*, 160 F.3d 1259, 1266 (9th Cir. 1998) (same); *Tobin*, 775 F.3d at 455 (noting the difference between "everyday personal injury claims" and claims that have an impact on "future service offerings").

Plaintiffs del Rio, Murphy, and Aguayo all allege that they suffered personal injury as a result of the delays and cancellations caused by CrowdStrike's actions. *See* ¶ 15 ("Plaintiff del Rio developed pain in his neck and back which lasted for several days."); ¶ 24 ("The disruption to

Plaintiff Murphy's sleep schedule caused him to suffer a migraine," causing "dizziness, pains in his head, sensitivity to light, and nausea."); ¶ 57 ("Plaintiff Aguayo experienced anxiety, chest pains, and headaches due to the stress caused by the CrowdStrike Outage impact on her travel."). Plaintiffs' common law claims are the type described by the Fifth Circuit as those that Congress certainly did not intend to preempt with the passing of the ADA. *See Hodges*, 44 F.3d at 338. Plaintiffs del Rio, Murphy, and Aguayo's claims are not preempted by the ADA because they are ordinary personal injury claims that were not meant to be preempted by the statute.

B. Plaintiffs Need Not Allege Choice of Law in Their Complaint

CrowdStrike next argues that Plaintiffs' complaint should be dismissed because they do not allege which state law applies to their claims in their complaint. *See* Motion at 10-11. CrowdStrike's argument is misplaced. Courts often rule on which law should apply to claims through motion to dismiss briefing and in some cases do not rule on what law shall apply to claims until after a motion to dismiss. *See Ganpat v. E. Pac. Shipping PTE, Ltd.*, No. 18-13556, 2022 U.S. Dist. LEXIS 12946, at *4 (E.D. La. Jan. 25, 2022) (noting that in some cases, courts cannot rule on choice of law until after a motion to dismiss in the event a more developed factual record is required); *Caploc LLC v. Liberty Mut. Ins. Eur.*, No. 3:20-CV-3372-B, 2021 U.S. Dist. LEXIS 115721, at *21 (N.D. Tex. June 22, 2021) (analyzing choice of law following motion to dismiss briefing and stating that because "this determination is such a fact-sensitive inquiry with the potential to dispose of Plaintiff's claim, it is not suited for resolution at the motion-to-dismiss stage"); *Energy Coal S.P.A. v. Citgo Petroleum Corp.*, 836 F.3d 457, 459 (5th Cir. 2016) ("Choice-of-law decisions can be resolved at the motion to dismiss stage when factual development is not necessary to resolve the inquiry.").

CrowdStrike cites to no Fifth Circuit cases holding that a complaint needs to declare which law should be applied to the claims within. CrowdStrike's one case from a district court in the

Fifth Circuit states, "[i]n Defendant's motion to dismiss and Plaintiff's response, the parties fail to adequately address which state's law controls this purported class action." *Heritagemark, LLC v. Unum Life Ins. Co. of Am.*, No. 4:22-cv-04513, 2023 U.S. Dist. LEXIS 237283, at *4-5 (S.D. Tex. Oct. 2, 2023). The court there did not dismiss the plaintiff's complaint for failure to allege state law in the complaint. *See id*. In a different case from a District Court in the Fifth Circuit, which CrowdStrike's motion omits, a court explicitly denied the same argument that CrowdStrike makes here, stating:

> While courts have granted 12(b)(6) motions by applying a particular state's substantive law under the 'most significant relationship' test, Signal does not cite, and the undersigned cannot find, any binding Fifth Circuit authority for a 12(b)(6) dismissal because the complaint fails to plead the particular state's law at issue for the pendent state law claims.

Samuel v. Signal Int'l L.L.C., No. 1:13-CV-323, 2014 U.S. Dist. LEXIS 37536, at *9-10 (E.D. Tex. Feb. 18, 2014). CrowdStrike's few cited cases from California federal courts dismissing a complaint for failure to specify which law applies are not binding and do not comport with this Circuit's precedent. Choice-of-law is an issue that can be decided through motion to dismiss briefing and is not required to be pleaded in a complaint.

C. Plaintiffs' Class Allegations Are Well-Pleaded and CrowdStrike's Argument to Strike the Allegations is Premature

CrowdStrike's argument that the Court should strike Plaintiffs' class allegations on the grounds that Plaintiffs' complaint does not establish predominance and commonality is premature and defective. *See* Motion at 11-16. "When the defendant 'has not answered, discovery has not commenced' and 'no motion for class certification has been filed,' courts often deny motions to strike class allegations as premature." *Haynes v. Shonaz Foods, Inc.*, No. 1:24-cv-407-RP, 2025 U.S. Dist. LEXIS 29537, at *21 (W.D. Tex. Feb. 19, 2025) (Pitman, J.) (quoting *Delarue v. State Farm Lloyds*, No. 1:09-CV-237, 2010 U.S. Dist. LEXIS 151646, at *12 (E.D. Tex. Mar. 10,

2010)). "A court may strike the class allegations on the pleadings only '[w]here it is *facially apparent* from the pleadings that there is no ascertainable class.'" *Id.* (emphasis in original) (quoting *John v. Nat'l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007)). Plaintiffs allege both a nationwide class and various state subclasses, as well as all of the elements required as prerequisites for class actions. *See* ¶¶ 161-62, 164-71. Plaintiffs note common questions of law and fact that predominate over individual question. ¶ 166. Plaintiffs' complaint sufficiently alleges the elements required under Fed. R. Civ. P. 23.

None of CrowdStrike's arguments demonstrate that it is facially apparent, even at this early stage of litigation where discovery has yet to take place, that Plaintiffs will not be able to certify a class or classes in this case. CrowdStrike's arguments against a nationwide class center around choice-of-law issues, arguing that Plaintiffs claims cannot be certified due to variations in state law. *See* Motion at 12-16. This argument is premature. *Jones v. Depuy Synthes Prods.*, 330 F.R.D. 298, 314 (N.D. Ala. 2018) ("Here, the Court agrees with Plaintiffs that it is premature to determine that the state law variations identified by Defendants preclude certification of the proposed nationwide class."). Further, Courts certify classes even when there are differences in state law if the differences do not make the case unmanageable. *See In Re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 315 (3d Cir. 1998) (holding that "choice of law issues . . . [did] not render this class action unmanageable" where negligence claims, among others, were pled); *Advance Tr. & Life Escrow Servs. v. N. Am. Co. for Life & Health Ins.*, 592 F. Supp. 3d 790, 809 (S.D. Iowa 2022) (granting class certification despite minor variations in state law). This analysis will require more than what is appropriate in a motion to dismiss. *See Sims v. Allstate Fire & Cas. Ins. Co.*, 650 F. Supp. 3d 540, 546 (W.D. Tex. 2023) (finding "arguments to strike any class allegations are more appropriately resolved at class certification stage of proceedings" where

discovery had not commenced and no motion for class certification had been filed).

CrowdStrike also argues that Plaintiffs' proposed state subclasses should also be stricken because they "require individualized investigation into where they each suffered their purported harm." Motion at 15-16. Plaintiffs dispute that determining choice-of-law would require individualized analysis, as a rule could be applied to the class as a whole. The existence of some individual issues does not mean those individual issues predominate over common issues. *See Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 602 (5th Cir. 2006) (noting that "the necessity of calculating damages on an individual basis will not necessarily preclude class certification"); *Smith v. Triad of Ala., LLC*, No. 1:14-CV-324-WKW, 2017 U.S. Dist. LEXIS 38574, at *33 (M.D. Ala. Mar. 17, 2017) ("Minor individualized issues do not defeat predominance where the common issues are at the crux of the action to be certified."). It is not facially apparent that Plaintiffs' proposed state subclasses are uncertifiable and the Court should not strike them.

CrowdStrike finally argues only in a footnote that "Plaintiffs' proposed classes under Rule 23(c)(4) must also be stricken" for the same reasons that it argues Plaintiffs' proposed Rule 23(b)(3) class should be stricken. Motion at 16 n.7. For the same reasons stated above, analyzing this issue at the motion to dismiss stage is premature. These issues can be addressed on the basis of a fully developed factual record in a future motion for class certification.

D. Texas Choice of Law Analysis Applies Here

Federal courts follow choice of law rules for the state in which they sit. *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242, 249 (5th Cir. 1990) (citing *Klaxon Co. v. Stentor Elect. Mfg.*, 313 U.S. 487, 487 & 496 (1941)). If relevant states' laws conflict, Texas courts apply the "most significant relationship" test from Sections 145 and 6 of the Restatement (Second) of Conflict of Laws. *Black v. Toys R US-Delaware, Inc.*, No. 4:08-cv-3315, 2010 U.S. Dist. LEXIS 119460, at

*21 (S.D. Tex. Nov. 10, 2010); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979).

To apply that test, courts consider four kinds of contacts to decide which state possesses the most significant relationship to the case:

(a) the place where the injury occurred,

(b) the place where the conduct causing the injury occurred,

(c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and,

(d) the place where the relationship, if any, between the parties is centered.

Black, 2010 U.S. Dist. LEXIS 119460, at *21 (citing Restatement (Second) of Conflicts of Law § 145 (1971)); *Gutierrez*, 583 S.W.2d at 319.

With those contacts in mind, courts consider the following analytical factors to assess those contacts and their relationships with the states involved:

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

Mitchell, 913 F.2d at 249 (citing Restatement (Second) of Conflict of Laws § 6 (1980)); *Gutierrez*, 583 S.W.2d at 318-19.

Texas courts appropriately emphasize important policies from the legislature and courts (factors (b), (c) and (e)). The importance of protecting resident consumers' safety and regulating Texas businesses gives Texas a substantial interest in negligence claims and defenses:

> The Texas legislature and courts have developed an almost paternalistic interest in the protection of consumers and the regulation of the conduct of manufacturers that have business operations in the state.

Mitchell, 913 F.2d at 250. For example, as the forum state, Texas had "a significant interest in protecting resident defendants" when plaintiffs sued Texas businesses based on the explosion of a multi-state pipeline's Mississippi section, and Texas law applied since Mississippi's damages cap did not further Mississippi's interests in attracting business or providing adequate recoveries for its citizens. *Enter. Prods. Ptnrs., L.P. v. Mitchell*, 340 S.W.3d 476, 481-82 (Tex. Ct. App. 2011).

Similarly, in this case, Texas has a strong interest in applying its policies to regulate the conduct of Texas corporations through its negligence law. CrowdStrike has its principal place of business in Austin, Texas. ¶¶ 73-74. The facts suggest that CrowdStrike's misconduct in poorly designing, managing, and failing to test its software services and pushing its defective updates out to other computer systems occurred in Texas. The facts suggest CrowdStrike prepared and implemented both its defective update and its update rollback from Texas. Texas negligence law applies to this case.

In contrast, a state has a strong interest in preventing, abating, and deterring public nuisances in their own state. Therefore, factors (a) (interstate needs), (e) (policies of states where effects are felt), and (g) (developing law of those states), support applying the law of Plaintiffs' home states, if there is a conflict. However, as discussed later, the affected states in this case frequently follow public nuisance provisions of the Restatement (Second) of Torts, making material interstate conflicts unlikely.

Should the Court conclude that more fulsome choice-of-law briefing is needed at the pleading stage, Plaintiffs respectfully request that the Court grant them leave to amend their complaint.

E. Plaintiffs Adequately Plead Their Negligence Claims

A successful negligence claim requires circumstances giving rise to the defendant's legal duty to the plaintiff, a breach of that duty, and damages proximately caused by that breach. *See Shakeri v. ADT Sec. Servs., Inc*., 816 F.3d 283, 292 (5th Cir. 2016) (quoting *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001)). CrowdStrike questions only the choice of law (discussed above), its legal duties, and the damages it caused. CrowdStrike owed legal duties to Plaintiffs under Texas law and but-for CrowdStrike's conduct, Plaintiffs would not have suffered damages.

1. CrowdStrike Owed Legal Duties to Plaintiffs

To evaluate negligence duties, Texas courts consider "the risk, foreseeability, and likelihood of injury weighed against" the misconduct's social utility, along with "the burden of guarding against the injury and consequences of placing that burden" on the defendant. *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983); *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 460 (Tex. Ct. App. 2007). CrowdStrike owed legal duties to Plaintiffs because, under these circumstances, the risk of an outage stranding travelers was foreseeable in light of CrowdStrike's situational knowledge, its previous experience, and its testing and implementing software updates, each done negligently, but with full knowledge of their necessity. CrowdStrike's undertaking to control updates to its customers' computers directly and regardless of customers' computer settings and its resulting control over those updates each give rise to negligence duties.

a. The Foreseeability of Stranded Travelers Created a Duty

A risk's foreseeability is "the foremost consideration" in finding a legal duty. *Alcoa,* 235 S.W.3d at 460. The duty to use ordinary care not to injure others "arises when there is reason to anticipate danger." *Collins v. Pecos & N.T. Ry.*, 212 S.W. 477, 478 (Tex Comm'n App. 1919) (opinion adopted). The injury should be "of such a general character as might reasonably have

been anticipated," and the "injured party should be so situated with relation to the wrongful act that injury to him or one similarly situated might reasonably have been foreseen." *Alcoa*, 235 S.W.3d at 460. Foreseeability includes events likely enough in modern life that a reasonably thoughtful person would consider them in guiding their practical conduct. *See In re Signal Int'l, LLC*, 579 F.3d 478, 492 (5th Cir. 2009) (maritime case).

Here, CrowdStrike knew or should have known failing to implement and maintain adequate software, tests, and procedures would cause a flawed software update that would cause a massive outage of its customers' computer systems. ¶¶ 138-39. CrowdStrike knew and acknowledged its system "may contain defects or errors that are not detected until after deployment." ¶ 140. Its CEO told investors and analysts that many airlines used its technology and "don't want to send out an IT person to go fix a kiosk that has a Microsoft blue screen[.]" ¶¶ 141-42 & n.138. CrowdStrike knew, including from its CEO's previous experience at McAfee, that "a defective update of its software would crash numerous customer airline computer systems, including those of its airline customers." ¶¶ 149-50. The risk of an event like the CrowdStrike Outage affecting airlines and numerous travelers was both foreseeable and foreseen by CrowdStrike, as shown by its own admissions; that foreseeability gave rise to CrowdStrike's legal duty to use ordinary care not to injure Plaintiffs.

b. CrowdStrike Assumed a Duty of Care by Taking Control of Its Customers' Computers and Pushing Defective Updates

"One who voluntarily enters an affirmative course of action affecting the interests of another is regarded as assuming a duty to act and must do so with reasonable care." *Otis Eng'g. Corp.*, 668 S.W.2d at 309; *Osuna v. Southern Pac. R.R.*, 641 S.W.2d 229, 230 (Tex. 1982) ("Having undertaken to place a flashing light at the crossing for the purpose of warning travelers, the railroad was under a duty to keep the signal in good repair, even though the signal was not

legally required."). A defendant acquires legal duties by taking and retaining control of a situation. For example, a subcontracted plumber "assumed an *implied duty* not to flood or otherwise damage the [owner's] house while performing its contract with the builder." *Shakeri*, 816 F.3d at 293 (quoting *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716, 718 (Tex. 2014)) (emphasis in *Shakeri*). Similarly, a general contractor's duty to subcontractors' employees arises "if the general contractor retains some control over the manner in which the independent contractor performs its work." *Lee Lewis Const., Inc.*, 70 S.W.3d at 783. Its duty of care "is commensurate with the control it retains over the independent contractor's work." *Id.* Determining whether a defendant exercised such actual control "is generally a question of fact for the jury." *Id.*

Here, CrowdStrike designed its software to operate within the vulnerable "kernel" level of the Windows operating system. ¶¶ 86-87. CrowdStrike knew its system created risks of software failures, including for airports and airlines. ¶¶ 138-52. CrowdStrike arranged to push its channel file updates, including the update that caused the CrowdStrike Outage, directly to customers' computers "regardless of any settings meant to prevent such automatic updates." ¶¶ 131, 200. CrowdStrike used "continuous integration and continuous delivery . . . such that software updates are deployed at once for many customers at scale." ¶ 132. This process was contrary to standard software development practices of testing updates before deployment, using a "staging environment," and "gradual and staged deployment of updates sent to customers." ¶ 133. Therefore, CrowdStrike undertook to send updates to airline and airport networks, computers, and other devices, with no customer checks, taking control of airline and airport computer systems to do so and knowing its system (and inadequate testing) risked a widespread outage. Like the plumber in *Chapman* or the railroad in *Osuna*, CrowdStrike undertook duties of reasonable care for persons like Plaintiffs who would predictably be affected by the outages CrowdStrike risked.

2. The Economic Loss Doctrine Does Not Limit CrowdStrike's Negligence Liability to Plaintiffs

A party's conduct may implicate both contractual and tort duties. *See Shakeri,* 816 F.3d at 292. The economic loss doctrine may bar tort recovery for a defendant's failure to perform its contract when the conduct "consists *only* of the economic loss of a contractual expectancy." *Id.* (citing *Chapman,* 445 S.W.3d at 718) (emphasis added). If the defendant's misconduct creates liability only because it breaches the parties' agreement, then the claim sounds only in contract. *Id.* However, when the defendant's duty is independent of the contract, as here, or the injury "would give rise to liability independent of the fact that a contract exists between the parties, the plaintiff's claim may also sound in tort." *Id.* (quotation omitted).

In *Chapman,* the duty implied by the plumber's taking control of the houses' plumbing was "independent of any obligation" from the plumber's agreement with its customers and the damages it caused "extend[ed] beyond the economic loss of any anticipated benefit under the plumbing contract." *Id.* at 293 (quoting 445 S.W.3d at 719). As the Fifth Circuit noted, such duties "may be implied by the relationship between the parties." *Id*. Further, "a party [cannot] avoid tort liability to the world simply by entering into a contract with one party [otherwise the] economic loss rule [would] swallow all claims between contractual and commercial strangers." *Chapman,* 445 S.W.3d at 718 (quoting *Sharyland Water Supply Corp. v. City of Alton,* 354 S.W.3d 407, 419 (Tex. 2011)) (alterations in original).

In this case, CrowdStrike took control of its customers' networks to push updates directly and created a foreseeable and foreseen hazard by imposing carelessly tested updates suddenly and at scale, knowing its updates could be defective. ¶¶ 141-42 & n.138. CrowdStrike taking such control and creating such a risky and foreseeable hazard for airline customers created negligence duties independently from any agreement CrowdStrike might have with its airline customers.

Moreover, and not surprisingly, CrowdStrike identifies no ability an airline customer had to negotiate a contract with CrowdStrike to allocate risks and losses. Therefore, the economic loss doctrine does not apply here.

Further, personal injury or physical harm to another's property creates tort liability "regardless of whether the negligence occurs in the performance of a contract between the parties." *Shakeri*, 816 F.3d at 292 (quotation omitted). In this case, the CrowdStrike Outage stranded Plaintiffs at airports or hotels. ¶¶ 14, 15, 22, 32, 42, 45, 55, 63, 70. In addition to the inconvenience and associated costs, getting stranded at an airport is a dignitary affront akin to false imprisonment, trapping a traveler in unfamiliar and often uncomfortable surroundings, unable to go where one prefers or live their daily life as planned. Some Plaintiffs experienced physical injury as a result. ¶ 15 (neck and back pain), ¶ 24 (migraine), ¶ 57 (anxiety, chest pain, headaches). Some Plaintiffs' personal property was inaccessible or delayed. ¶ 29 (luggage delayed), ¶¶ 36, 46, 47 (luggage inaccessible); ¶ 47 (medication issue). Plaintiffs' time was lost and wasted. ¶¶ 12, 18, 21, 22, 23, 28, 32, 33, 39, 43, 49, 50, 53, 55, 61, 68, 72; *see also* ¶ 58 (wage loss specified). Plaintiffs' harms and damages differ from the contractual damages that CrowdStrike's corporate customers sustained from any contractual breach by CrowdStrike. Accordingly, the nature of Plaintiffs' damages render the economic loss doctrine inapplicable to Plaintiffs' negligence claims.

F. Plaintiffs' Public Nuisance Claim is Well-Pleaded

A public nuisance "involves an unreasonable interference with a right common to the general public." *Cox v. City of Dallas*, 256 F.3d 281, 289 (5th Cir. 2001); Restatement (Second) of Torts § 821B(1) (1979) (defining a public nuisance as "an unreasonable interference with a right common to the general public"). CrowdStrike committed such a public nuisance in this case.

1. CrowdStrike Committed an Actionable Public Nuisance

Plaintiffs' public nuisance claims are for three states where they reside, and classes for those states. Those states cite or follow the Restatement (Second) of Torts (the "Restatement") for public nuisance claims. *See In re Nat'l Prescription Opiate Litig*., 440 F. Supp. 3d 773 (N.D. Ohio 2020) (Ohio follows Restatement, quoting § 821B); *Atl. Richfield Co. v. Cnty. of Lehigh*, 299 A.3d 181 (Pa. Commw. Ct. 2023) (noting that Pennsylvania courts rely on Restatement § 821B in analyzing public nuisance claims); *Freeman v. Grain Processing Corp*., 848 N.W.2d 58, 66 (Iowa 2014) (nuisance theory for environmental harms endorsed by Restatement, citing Restatement § 821B-821E). Therefore, factors (a) (interstate needs), (e) (policies of states where effects are felt), and (g) (developing law of those states), support applying the law of Plaintiffs' home states. *See Mitchell,* 913 F.2d at 249. Given the Restatement's guidance in this area, material conflicts of law are unlikely.

As noted, the Restatement states, a public nuisance "is an unreasonable interference with a right common to the general public." Restatement (Second) Torts § 821B(1).[2] Restatement § 821B (2) sets forth three sets of circumstances "that may sustain a holding that an interference with a public right is unreasonable[.]" Since they are "listed in the disjunctive," any one set of such circumstances "may warrant a holding of unreasonableness." *Id.* cmt. e. As pertinent here, circumstances supporting a public nuisance include "[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience[.]" *Id.* § 821B(2) & (a). To recover damages in a public nuisance action, a plaintiff "must have suffered harm of a kind different from that suffered by other members of the

[2] Iowa's Supreme Court also described the elements of a public nuisance claim as, "(1) unlawful or anti-social conduct that (2) in some way injures (3) a substantial number of people." *Pottawattamie Cnty. v. Iowa Dept. of Env't*, 272 N.W.2d 448, 453 (Iowa 1978).

public exercising the right common to the general public that was the subject of interference." *Id.* § 821C(1). Physical harm to a plaintiff or his real or personal property and pecuniary loss are normally different in kind from that suffered by the public generally. *Id*. cmts. d, h.

Here, CrowdStrike substantially interfered with the public's comfort and convenience, as two members of the United States Congress noted in a July 22, 2024 letter sent to CrowdStrike's CEO George Kurtz, noting "major impacts to key functions of the global economy, including aviation, healthcare, banking, media, and emergency services" from the CrowdStrike Outage. ¶ 153. CrowdStrike disrupted the public's normal reliance on business and government entity's performance of services that depended on their computer systems. By crashing millions of computers across the globe, ¶ 153, CrowdStrike unreasonably interfered with several sectors of our economy and committed unreasonable and anti-social conduct.

CrowdStrike also interfered with Plaintiffs' narrower and more specific right to travel. "The constitutional right to travel from one state to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1965). A citizen's right to enter and leave a state is a component of this right to travel. *See Harris v. Hahn*, 827 F.3d 359, 369 (5th Cir. 2016). The "right of interstate travel is a right secured against interference from any source whatever, whether governmental or private." *Guest*, 383 U.S. at 759 n.17.

The right to travel is an appropriate right to enforce by way of a public nuisance claim. *See, e.g.*, *Commonwealth v. VonBestecki*, 30 Pa. D. & C. 137, 146 (C.P. 1937) (erection of towers that interfered with airplanes landing or taking off from an airport was a public nuisance). Some earlier public nuisance cases involved encroachments on public highways. Restatement § 821B, cmt. a; *see also State v. Kaster*, 35 Iowa 221 (Iowa 1872) (noxious smells near highway and homes). More

recent cases also find obstructions of roadway actionable as public nuisances. *Sisco v. Iowa-Illinois Gas & Electric Co.*, 368 N.W.2d 853 (1985) (utility pole support wire near roadway); *Jamail v. Stoneledge Condo. Owners Ass'n*, 970 S.W.2d 673, 675, 677 (Tex. Ct. App. 1998) (finding jury issue); *Kjellander v. Smith*, 652 S.W.2d 595, 597, 599 (Tex. Ct. App. 1983); *Chang v. City of Milton*, No. 18-EV004442-E, 2023 Ga. State LEXIS 3683, *10 (Fulton Cnty., GA St. Ct. Sep. 21, 2023) (upholding jury verdict involving planter on roadway shoulder as nuisance); *Town of Ackley v. Central States Elec. Co.*, 214 N.W. 879 (Iowa 1927) (affirming temporary injunction against wires above streets).

CrowdStrike's conduct that caused the CrowdStrike Outage was also antisocial. Antisocial means unsociable or generally harmful to the welfare of the people. Webster's New World Dictionary 32 (Second Concise Ed. 1975). CrowdStrike's failure to use reasonable quality assurance and testing before deploying a defective update to government, infrastructure, banking, health, and airline computer systems after claiming "an extensive QA process" when it knew the risks of its software errors and skipping staged deployment put many systems and people at risk and interrupted the lives of millions of travelers through a predictable outage. ¶¶ 6, 112-15, 127, 135, 138-52. CrowdStrike's conduct was sufficiently antisocial to be actionable. *See, e.g.*, *Sisco*, 368 N.W.2d 853 (maintaining unlabeled utility pole support wire); *Kuehl v. Sellner*, 965 N.W.2d 926 (Iowa Ct. App. 2021) (zoo with exotic animals and inhumane animal conditions); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) ("under the Restatement's broad definition, a public nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public"); *Graham Oil Co. v. BP Oil Co.*, 885 F. Supp. 716, 723 (W.D. Pa. 1994) (gas station's leaking underground tanks).

CrowdStrike's misconduct delayed over 46,000 flights and cancelled 5,171 or more. ¶ 156. CrowdStrike violated Plaintiffs' specific right to interstate travel by causing cancellation of their interstate airline flights and delays in securing replacement flights. As previously described, this stranded Plaintiffs at airports, a dignitary violation justifying nominal damages. Plaintiffs sustained pecuniary losses for hotels, food, and alternate transportation. ¶¶ 13, 16-17, 34 (replacement ticket), ¶ 35 (hotel), ¶ 36 (replacement clothes and toiletries), ¶ 38 (car rental), ¶ 44 (replacement tickets), ¶ 45 (hotel), ¶ 47 (replacement medication), ¶ 48 (Lyft rides), ¶ 54 (replacement ticket), ¶ 56 (meals), ¶ 58 (wage loss), ¶ 63 (hotel), ¶ 64 (Uber ride), ¶ 65 (extra airport parking), ¶ 70 (hotel). Some had property in their luggage that was lost or delayed. ¶¶ 29, 36, 46, 47. The CrowdStrike Outage stole irreplaceable hours and days of Plaintiffs' time by forcing them to deal with replacing medications, hotels, or Uber or Lyft, affecting Plaintiffs more than it affected most members of the public. ¶¶ 12, 18, 21, 22, 23, 28, 32, 33, 39, 43, 49, 50, 53, 55, 61, 68, 72. In sum, Plaintiffs sustained damages that were different or greater than those of the public in general, due to CrowdStrike's public nuisance.

2. The Economic Loss Doctrine Does Not Limit the Nuisance Claim

As previously noted, the economic loss doctrine bars tort recovery for failure to perform a contractual duty. *See Shakeri*, 816 F.3d at 292; *Van Sickle Const. Co. v. Wachovia Com. Mortg., Inc.*, 783 N.W.2d 684, 692 (Iowa 2010) (doctrine "conceived to prevent litigants with contract claims from litigating them inappropriately as tort claims"). In contrast, the doctrine clearly should not apply when, as here, the defendant breached a duty "that did not arise solely from a contract." *In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d at 813. Applying that doctrine is inappropriate for a public nuisance claim, where the defendant owed a duty to the public in general, rather than to a contractual partner. *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1480 (E.D. Pa. 1993) ("the economic loss doctrine is not applicable to public nuisance claims"), *rev'd*

on other grounds sub nom Federal Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (1993). Among other considerations, the risk allocation assumed by the economic loss doctrine "is not possible where, as here, the harm alleged is caused by involuntary interactions between a tortfeasor and a plaintiff." *In re Nat'l Prescription Opiate Litig*., 440 F. Supp. 3d at 813. Similarly, the doctrine does not apply to lost wages or property incidental to personal injuries or dignitary violations like getting stranded in an airport or nearby hotel. *See Cont'l W. Ins. Co. v. Cont'l Fire Sprinkler Co.*, No. 4:10-CV-00584-TJS, 2013 U.S. Dist. LEXIS 192065, at *10 (S.D. Iowa Mar. 27, 2013).

The economic loss doctrine does not apply to intentional conduct since such conduct creates an absolute public nuisance. *In re Nat'l Prescription Opiate Litig*., 440 F. Supp. 3d at 814; *see id.* at 799 (defendants' misstatements to TPAs and PBMs about addictiveness intending plaintiffs to overpay); *Kramer v. Angel's Path, L.L.C.,* 882 N.E.2d 46, 50, 52 & 55-56 (Ohio App. 2007) (absolute or per se nuisance from intentional conduct or abnormally dangerous condition) (material fact issues regarding nuisance from blowing dirt and mud). Here, CrowdStrike intentionally pushed updates to its customers' computers while only performing inadequate testing despite knowing that a defective update "would have a debilitating effect on the security and safety of [American] citizens." ¶¶ 112-137 (inadequate testing); ¶¶ 138, 140, 141, 143 (guilty knowledge); ¶¶ 100, 112 (implementation). CrowdStrike's acts are intentional for public nuisance purposes.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion in its entirety. Should the Court grant any portion of Defendants' Motion, Plaintiffs respectfully request that the Court grant them leave to amend their complaint.

Dated: April 7, 2025

/s/ Ben Barnow

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2025, I caused a true and correct copy of the foregoing to be filed with the Clerk of the Court via the Court's CM/ECF system, which will cause a copy to be electronically served upon all counsel of record.

/s/ Ben Barnow
Ben Barnow

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JULIO DEL RIO, JACK MURPHY, STEVEN BIXBY, ALICIA KIRBY, PHILIP KIRBY, JENNIE AGUAYO, CHRISTOPHER HARLAN, and SARA HARLAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

CROWDSTRIKE, INC. and CROWDSTRIKE HOLDINGS, INC.,

Defendants.

Case No. 1:24-cv-00881-RP

CLASS ACTION

[PROPOSED] ORDER DENYING DEFENDANTS CROWDSTRIKE, INC.'S AND CROWDSTRIKE HOLDINGS, INC.'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STRIKE

The Court, having considered Defendants CrowdStrike, Inc.'s and CrowdStrike Holdings, Inc.'s Motion to Dismiss, or in the Alternative, to Strike, Plaintiffs' Response in Opposition, and all other relevant documents, hereby ORDERS:

1. Defendants CrowdStrike, Inc.'s and CrowdStrike Holdings, Inc.'s Motion to Dismiss, or in the Alternative, to Strike is denied in its entirety.

SO ORDERED.

Dated: _____

_____
Hon. Robert Pitman
United States District Court Judge