

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

**Case Number: 14-24277-CIV-MARTINEZ-GOODMAN**

COMPANHIA ENERGÉTICA POTIGUAR,

Plaintiff,

vs.

CATERPILLAR INC., CATERPILLAR  
AMERICAS SERVICES CO. and  
CATERPILLAR AMERICAS CO.,

Defendants.

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**ORDER DENYING DEFENDANTS CATERPILLAR INC., CATERPILLAR AMERICAS  
SERVICES COMPANY, AND CATERPILLAR AMERICAS COMPANY'S JOINT  
MOTION TO DISMISS ON GROUNDS OF *FORUM NON CONVENIENS***

THIS CAUSE came before the Court upon Defendants Caterpillar Inc. ("CAT"), Caterpillar Americas Services Company ("CASC"), and Caterpillar Americas Company's ("CAC['s]") Joint Motion to Dismiss on the Grounds of *Forum Non Conveniens* [ECF No. 27]. Defendants CAT, CASC, and CAC ("Defendants") seek dismissal of Plaintiff Companhia Energética Potiguar's ("Plaintiff['s]") Complaint on grounds of *forum non conveniens*. [ECF No. 27 at 7]. The Court has considered Defendants' motion [ECF No. 27], Plaintiff's response [ECF No. 38], Defendants' reply [ECF No. 46], and Plaintiff's sur-reply [ECF No. 47-2]. For the reasons set forth herein, Defendants' motion is denied.

**I. Relevant Factual and Procedural Background**

This action arises out of Plaintiff's allegations of fraud, negligent misrepresentation, promissory estoppel, breach of express and implied warranties, strict product liability, unfair

trade practices, and revocation of acceptance against Defendants. [ECF No. 1 ¶ 1]. Plaintiff alleges that these causes of action arise out of the failure, malfunction, and inadequacy of 144 CAT manufactured generators installed at Plaintiff's power plants in Brazil. *Id.* As a result of Brazil's energy crisis, local and foreign companies bid on lucrative energy production agreements with the Brazilian government. *Id.* at ¶ 14. Plaintiff's predecessor, Termoelétrica Potiguar S/A ("TEP"), acquired such an agreement to build and operate two diesel generator power plants in Brazil. *Id.* at ¶¶ 17-21. In order to generate the electricity needed at these plants, TEP negotiated with Sotreq S/A, one of the largest Caterpillar dealers in Brazil, for the purchase of 144 CAT generators. *Id.* at ¶¶ 24-63. Caterpillar designed and manufactured the engines and assembled the generator sets. [ECF No. 27 at 6]. CASC and CAC neither designed, manufactured, assembled, sold, repaired nor maintained the generator sets. *Id.*

The generator sets have experienced a series of failures and malfunctions. [ECF No. 38 at 4]. In response to these problems, Defendants assembled a large team from the United States in an attempt to rectify the issues. *Id.* at 5. Plaintiff identifies 119 employees of Defendants who were involved in these matters. *Id.* Additionally, on June 3, 2011, CAT and CASC promised Plaintiff that the 144 generator sets would perform as originally promised after completing service updates and repairs. *Id.* Since August 2012, more than 25 generator sets have exploded. *Id.* The explosions propelled shards of metal creating holes in the generator engines. *Id.* at 6. Additionally, 20 other generator sets have had serious failures and are out of service. *Id.* Plaintiff now seeks damages as a result of the engines' alleged failure.

## II. Legal Analysis

District courts have the discretion to dismiss a case on forum non conveniens grounds “when trial in the chosen forum would establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff’s convenience, or when the chosen forum [is] inappropriate because of consideration affecting the court’s own administrative and legal problems.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249. “Dismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court and where the plaintiff is unable to aver any specific reasons of convenience supporting its choice.” *Id.* On a motion to dismiss for *forum non conveniens*, a defendant must demonstrate that “(1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice.” *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). “A defendant has the burden of persuasion as to all elements of a *forum non conveniens* motion.” *Id.* “Ordinarily, [there is ] a strong presumption in favor of the plaintiff’s choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.” *Piper*, 454 U.S. at 255. Albeit, “the presumption applies with less force when the plaintiffs or real parties in interest are foreign.” *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983).

Because the Court finds that the private interests factors weigh heavily in Plaintiff’s favor, the Court denies Defendants’ motion. When considering the private interest factors, courts look to the “relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of

view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Piper*, 454 U.S. at 241 n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

Defendants argue that most of the relevant evidence in this case is located in Brazil. [ECF No. 27 at 12]. Defendants submit that the allegedly defective generator sets, witnesses with knowledge of the sale, delivery, installation, service, operation, maintenance, repair, and any post-sale modifications of the generators, as well as damage evidence are located in Brazil. *Id.* The Court, however, finds the private interest factors weigh in favor of denying dismissal for several reasons. First, Defendants acknowledge that evidence relating to the generator sets’ design is located in the United States. *Id.* Second, Plaintiff indicates that Defendant has 119 U.S. employees who have information specific to the 144 generators Plaintiff purchased. [ECF No. 38]. Third, Defendants have failed to demonstrate why their 22 Brazilian witnesses are critical or relevant to this case and why these witnesses would be unwilling to travel to the United States. The Court thus finds that Defendants have failed to meet their burden in order to demonstrate that the private interest factors weigh in favor of dismissal. As a result, the Court does not need to consider the other *forum non conveniens* factors, as the analysis of the private interests factors alone is dispositive.

### **III. Forum Selection Clause Analysis**


In Defendants’ reply, Defendants, for the first time, raise a forum selection clause argument. [ECF No. 46]. Essentially, Defendants’ argument is that Defendants are third-party beneficiaries of the CEP and Sotreq contract. *Id.* at 3. Accordingly, Defendants argue that the forum selection clause of the CEP-Sotreq contract is applicable and leads to a modified *forum*

*non conveniens* analysis. *Id.* at 7 (citing *Atlantic Marine Construction Co. v. United States Dist. Court*, 134 S.Ct. 568, 580 (2013)). Defendants, however, are unable to cite to a single case enforcing a forum selection clause based upon a third-party beneficiary theory against a non-signatory to the contract. The Court is thus unpersuaded by Defendants' "last ditch" attempt to move the case to Brazil and rejects Defendants' forum selection clause argument.

#### IV. Conclusion

After careful consideration, it is hereby **ORDERED AND ADJUDGED** that Defendants' Motion to Dismiss [ECF No. 27] is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 22 day of July, 2015.

  
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JOSE E. MARTINEZ  
UNITED STATES DISTRICT JUDGE

Copies provided to:  
Magistrate Judge Goodman  
All Counsel of Record