Nos. 08-56187 & 08-56270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMAS MAYNAS CARIJANO, *et al.*, Plaintiffs-Appellants-Cross-Appellees,

vs.

OCCIDENTAL PETROLEUM CORP., *et al.*, Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court
for the Central District of California, No. cv 07-5068 PSG (PJWx)
The Honorable Philip S. Gutierrez

PLAINTIFFS-APPELLANTS-CROSS-APPELLEES' RESPONSE TO DEFENDANTS-APPELLEES-CROSS-APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

The panel followed the well-established principle that where a defendant is sued in its hometown, in a forum with strong connections to the subject matter of the case, and without any showing that evidence would be unavailable here, *forum non conveniens* should not deprive plaintiffs of their chosen forum.

Defendants' Petition for Rehearing (PFR) misleadingly suggests that the panel contravened settled caselaw and ignored the abuse of discretion standard, but they identify no actual inter- or intra-circuit conflict, and the panel only reexamined the district court's analysis where it found a failure to consider material facts – not because the district court had improperly weighed the evidence.

The panel properly determined that the district court erred by, *inter alia*, ruling "without considering" Defendants' refusal to waive the statute of limitations; "fail[ing] to address critical issues" regarding Peru's legal system, including the fact that the "the district court did not find — and it appears it could not on this record" find that Plaintiffs would be entitled to anything more than nominal damages in Peru; failing to "consider" whether Amazon Watch had a remedy in Peru; "overlook[ing] important evidence related to corruption"; and considering the private interests "[w]ithout analyzing each individual factor" and thus "neglect[ing] significant relevant evidence and fail[ing] to consider an entire

factor — the enforceability of the judgment — that together weigh against dismissing this lawsuit." Slip op. at 19465, 19467-68, 19475.

Simply put, the district court did not conduct the required analysis. The panel's well-reasoned, case-specific decision does not warrant further review.

ARGUMENT

I. The panel's ruling on Defendants' failure to waive statute of limitations defenses is consistent with existing law.

The panel found that the district court abused its discretion regarding whether Defendants are amenable to process in Peru because it failed to consider the absence of a statute of limitations waiver. Slip op. at 19465. Defendants refused to waive pre-2007 statute of limitations defenses. . Far from "creat[ing] a circuit split," PFR at 3, this accords with the general *forum non conveniens* analysis. "[A]n adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum." Slip op. at 19466 (quoting *Bank of Credit & Commerce Int'l (Overseas) Ltd. [BCCI] v. State Bank of Pak.*, 273 F.3d 241, 246 (2d Cir. 2001)). The panel did not err by not considering the exception to the general rule adopted in *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 737 (7th Cir. 2010), because neither Defendants nor the district court relied on that exception, and because it does not apply here.

Chang acknowledged the general rule, 599 F.3d at 736, and this Court has approved of requirements to waive all statute of limitations defenses, not just those arising since the U.S. filing. *E.g.*, *Ceramic Corp. of Am. v. Inka Maritime Corp.*, 1 F.3d 947, 949 (9th Cir. 1993). Because Defendants maintained that this case might be untimely in Peru and would not waive that defense, there was no error in the panel's ruling.

Defendants nonetheless argue that, under *Chang*, no timeliness waiver beyond the filing date could be required here. *Chang* declined to apply the general waiver rule where the suit would be equally timely (or untimely) in both fora. 599 F.3d at 737. *Chang* refused to consider the possibility that the plaintiff's claim might have been time-barred in Taiwan because it would have been equally time-barred in the U.S. under California's borrowing statute. *Id.*

Defendants' claim that the panel's decision creates a circuit split with *Chang* is misplaced, because it depends entirely on the contention that the timeliness analysis here is the same in California and Peru. This is an argument that Defendants never before raised, and that the district court did not consider. The panel did not reject the argument, and rule that Defendants were required to waive a limitations defense that would be available in either forum; it simply did not consider the argument. Defendants improperly seek to manufacture a conflict

with *Chang* by assuming that an inquiry no court has made would necessarily have been resolved in their favor.

In fact, this case does not fall within the narrow exception outlined in *Chang* because Defendants have not shown that the timeliness analysis would be the same in both fora. Defendants argue that California's borrowing statute, Cal. Code Civ. Proc. § 361, entails that any shorter Peruvian limitations period would apply in California. But section 361 does not apply to claims arising in California, or claims brought by California citizens. Cal. Code Civ. Proc. § 361. Because the injuries here resulted largely from actions taken and decisions made in California, many of Plaintiffs' claims may arise wholly or partially within California, thus precluding application of the borrowing statute. *See McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 86 (2010) (noting that the question of where a claim accrued is complicated when injury in one jurisdiction is the product of conduct elsewhere at a different time). And the borrowing statute does not apply to the claims of Amazon Watch, a California citizen.

Even if section 361 requires the application of a Peruvian limitations *period*, California law still governs when a cause of action *accrues*, which is critical in this delayed-discovery case. *See Lien Huynh v. Chase Manhattan Bank*, 465 F.3d 992 (9th Cir. 2006); *McCann*, 48 Cal. 4th at 86 & n.5. Nor is it clear that Peruvian *tolling* rules would apply to the exclusion of California's. For example, while

claims of minors are tolled in California, *see* Cal. Code Civ. Proc. § 352(a), Defendants' Peruvian law expert opined that minority tolling does not apply when a minor is "under the protection of his legal representative (parents, guardians, caretakers)." SER 252. Thus, even if the same limitations *period* applies in California and Peru, different tolling and accrual rules may lead to different conclusions as to timeliness.

Thus, unlike in *Chang*, Plaintiffs' claims will *not* receive equal treatment in two alternative forums; rather, Plaintiffs' claims fit a scenario in which the *Chang* court would not apply *forum non conveniens*: they may be time-barred in the Defendants' chosen forum but not in the U.S., and there is no evidence that Peru's choice of limitations period represents a substantive policy choice rather than a procedural, institutional preference. *See* 599 F.3d at 737. Regardless, because this question was never addressed by the district court or the panel, there is no inherent conflict between the panel's decision and *Chang*.

Finally, even if Defendants are correct that the timeliness analysis is the same in both fora, they will have suffered no prejudice by the denial of dismissal. They will have ample opportunity to argue that Plaintiffs' case is untimely, based on both California and Peruvian law.

II. The panel properly found abuse of discretion in the conclusion that Peru offers a satisfactory remedy because the district court failed to consider the evidence.

The availability of an adequate remedy in the foreign forum "must be clear before the case will be dismissed." *Cheng v. Boeing Co.*, 708 F.2d 1406, 1411 (9th Cir. 1983). Although Defendants correctly note that ordinarily the test for an adequate remedy should be "easy to pass," PFR at 9 (quoting *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006)), they ignore the fact that *Tuazon* and the panel applied the same test: whether a "remedy" is clearly unsatisfactory. Slip op. at 19467.

The panel gave proper deference to the district court's findings but held that it had not properly analyzed whether Peru provided an adequate forum and remedy *under the unique circumstances of this case*, based on two well-established propositions: 1) it is Defendants' burden to clearly establish an adequate remedy in the alternative forum; and 2) it is an abuse of discretion to overlook evidence and fail to make determinations necessary to underpin a *forum non conveniens* dismissal. *See, e.g.*, *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 39 (3d Cir. 1988); *BCCI*, 273 F.3d at 248. The district court failed to consider evidence from Defendants' own expert that Peru's judicial system was too unstable to provide a remedy *in this case*, slip op. at 19470, and further erred by recognizing an

adequate remedy where Defendants had failed to introduce evidence suggesting that such a remedy existed for all Plaintiffs' injuries. *Id.* at 19468.

A. The panel did not err in concluding that the district court ignored important evidence relating to corruption.

Defendants argue that the panel decision conflicts with *Tuazon*, which requires a "powerful showing" in order to conclude that a forum is too corrupt to be adequate. PFR at 7. But the panel here did *not* make a categorical determination that the forum was corrupt, merely that it was inadequate *under the facts presented here*. Slip op. at 19470. Defendants argue that it was error for the panel to undertake a case-specific determination of adequacy, rather than a categorical assessment, PFR at 8, but nothing in *Tuazon* requires a court to find that a foreign forum would be inadequate in every case — indeed, the generally cautious approach to pronouncing judgment on other judicial systems counsels against such a requirement.

The panel properly deferred to each ruling that the district court actually made, finding no error in crediting Defendants' expert declaration over Plaintiffs' on issues of discrimination and judicial corruption. Slip op. at 19468-69. The panel only faulted the district court because it "overlooked important evidence," slip op. at 19468, in that it did not even weigh evidence of "judicial turmoil" from Defendants' own expert. Slip op. at 19469, 19470. This evidence, which is

sufficiently specific to meet *Tuazon*'s standards, *see* 433 F.3d at 1179, includes statistics on judges who have been fined or suspended for misconduct.[1] This evidence of disarray in the Peruvian judicial system, which is in the midst of a campaign to root out systemic corruption, was not even considered by the district court. Thus, the panel merely held that the district court was required to consider this evidence in determining whether Peru is an inadequate forum, and since it did not, the district court erred "under the unique circumstances of this case and on the specific evidence presented." Slip op. at 19470.

B. The panel properly found that under the facts of this case an adequate remedy had not been shown.

Defendants mischaracterize the panel opinion, which found the adequacy of a remedy to be lacking for two reasons: first, because under the unique circumstances of this class action case, Defendants had not shown that Peru would offer more than nominal damages; second, that the district court had failed to conclude that Amazon Watch was entitled to any remedy. In both instances, the panel properly faulted the district court for failing to consider the evidence or address the issue.

[1] Defendants argue that it is not for this Court to tell the district court what conclusions to draw from expert testimony, correctly pointing out that Dr. Osterling did not explicitly endorse the criticisms of the Peruvian judiciary quoted in the panel's opinion. PFR at 8-9. That overstates the panel's opinion, which found error in the fact that the district court had not considered the evidence at all.

Contrary to Defendants' assertion, the panel did not find that Peru generally offers only nominal damages, PFR at 9-10; instead it found that in *this case* — an environmental health class action — the only evidence suggested that compensatory damages would not be available. Slip op. at 19468. The uncontested record evidence referenced by the panel supports this conclusion, ER 181[2]; the district court also ignored evidence indicating that there would be significant barriers to bringing multiple individual claims for compensation rather than a group action. ER 182.

Defendants do not even dispute that the district court overlooked the adequacy of Amazon Watch's remedy; instead they latch onto Judge Rymer's suggestion that Defendants' expert declaration *could* be interpreted to conclude that Amazon Watch could bring an action "whose objective is the defense of the environment." Slip op. at 19489. But nothing in the district court opinion supports this contention, which even Defendants never made. In fact, Amazon Watch seeks not only environmental remediation but an end to Defendants' deceptive practices.

III. The panel's consideration of Amazon Watch as a domestic plaintiff was not error, and did not affect the outcome.

[2] Defendants' expert agreed that a group environmental claim could not result in compensation of the Plaintiffs. SER 235.

Defendants argue that the panel incorrectly found that deference was due to Amazon Watch's choice of forum because, they contend, the panel should have ruled on Amazon Watch's standing first and because Amazon Watch is a "nominal" domestic plaintiff. Neither argument is correct, but neither would affect the outcome here. Even if Amazon Watch lacks standing or should otherwise have been ignored, the panel concluded that Defendants had not shown that Peru was an adequate and available forum for *all* Plaintiffs' claims, not just Amazon Watch's. The panel did not err.

A. In the absence of any facts that Amazon Watch is a nominal plaintiff, the panel did not err in affording deference to its choice of forum.

The panel correctly noted that Amazon Watch has "had actual long standing involvement in the subject matter of this litigation," slip op. at 19473-74, and found that its choice of forum should have been afforded substantial deference. Defendants rely on *Vivendi S.A. v. T-Mobile USA, Inc*., 586 F.3d 689, 694-95 (9th Cir. 2009), which suggested that "eleventh-hour efforts to strengthen connections with the United States allow the district court to reduce" deference. PFR at 14. Unlike in *Vivendi*, however, there is neither evidentiary support nor a district court finding in favor of Defendants' position that Amazon Watch was added for tactical reasons.[3] *Vivendi* is highly distinguishable; that case considered a domestic

[3] The same distinction applies to *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), which Defendants cite, which found evidence "in the record that

plaintiff whose only interest in the controversy between the main European parties was in bonds acquired after the motion to dismiss had been filed, where none of the parties had any connection to the forum and none of the operative facts occurred in the forum. Amazon Watch, by contrast, has engaged in extensive advocacy efforts on behalf of the Achuar and their communities since at least 2001— six years prior to the filing of this lawsuit — and has expended considerable money and resources as a result of Defendants' refusal to take responsibility for polluting Plaintiffs' homeland. ER 36-41, 55.

Defendants also argue that deference should be diminished due to alleged forum-shopping, which also depends on facts that the district court did not find here. Although Defendants rely on *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc), that case also advises courts to be skeptical of local defendants who move to dismiss for tactical reasons. *Id.* at 75. Consistent with *Iragorri*, the panel considered forum shopping, but found such concerns to be "muted in a case such as this where Plaintiffs' chosen forum is both the defendant's home jurisdiction, and a forum with a strong connection to the subject matter of the case." Slip op. at 19474 (citing *Ravelo Monegro v. Rosa*, 211 F.3d 509, 513-14 (9th Cir. 2000)).

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plaintiff may have been made a party precisely to defeat" *forum non conveniens*. *Id.* at 797-98.

Finally, Defendants suggest that Amazon Watch should be disregarded because it "adds literally nothing" to this suit. PFR at 14. No caselaw supports the view that a plaintiff with valid claims can be ignored if it seeks identical relief to other plaintiffs; Amazon Watch has a due process right to litigate its own case.[4] Nonetheless, Amazon Watch may be able to seek relief that the Achuar Plaintiffs cannot; for example, Amazon Watch may be better situated to request prospective injunctive relief ending deceptive practices. The panel did not err in declining to adopt Defendants' position.

B. The panel was not required to rule on Amazon Watch's standing before reviewing the district court's *forum non conveniens* ruling.

Defendants challenge Amazon Watch's standing and claim that a court may not deny a *forum non conveniens* motion before considering standing objections, although it may *grant* such a motion. PFR at 11. This argument is at odds with *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), and with the ordinary rule that an appellate court may permit a district court to decide questions in the first instance.

Under *Sinochem,* "a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other

[4] Indeed, this right is so strong that, in the collateral estoppel context, due process prohibits barring the claims of parties who never appeared in a prior action, even if "adjudications of the identical issue [] stand squarely against their position." *Blonder-Tongue Lab. v. Univ. Found.*, 402 U.S. 313, 329 (1971).

threshold objection." 549 U.S. at 425. "The critical point here, rendering a *forum non conveniens* determination a threshold, nonmerits issue in the relevant context, is simply this: Resolving a *forum non conveniens* motion does not entail any assumption by the court of substantive law-declaring power." 549 U.S. at 433 (citations and internal quotes omitted). The panel correctly noted, "the Supreme Court in *Sinochem* did not limit its holding to cases where the district court opts for dismissal" and "did not dictate how district courts must respond to such pleas." Slip op. at 19472. The panel was allowed to review the ruling that the district court actually made — ruling on *forum non conveniens* while assuming Amazon Watch's standing — while remanding to the district court to address the standing issue in the first instance.[5]

Defendants' contrary position makes little sense. According to Defendants, a court may analyze *forum non conveniens* prior to standing, but may issue a ruling only if it decides the issue in favor of dismissal. Such a rule would be inefficient and unnecessarily limit a court's flexibility by rigidly dictating the order in which it must resolve issues, including those it has already analyzed.

Moreover, since the district court never addressed standing, Defendants' position that the panel was required to address it first contravenes the ordinary rule

[5] Contrary to Defendants' assertion, the panel did not state that it could not address statutory standing prior to addressing the issue of *forum non conveniens*. Rather, the panel simply held that under the circumstances of this case, it was proper to rule on *forum non conveniens* prior to addressing standing. Slip op. at 19472.

that an appellate court "has discretion to remand issues, even jurisdictional ones, to the trial court when that court has not had the opportunity to consider the issue in the first instance." *Salmon Spawning & Recovery Alliance v. United States Customs & Border Prot.*, 550 F.3d 1121, 1134 (Fed. Cir. 2008). Indeed, an *en banc* panel of this Court recently remanded a case for consideration of a non-jurisdictional threshold issue (exhaustion of remedies), without first addressing the jurisdictional basis (political question) on which the district court had dismissed the case. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832-33 (2008). As *Sinochem* held, there is no requirement that jurisdictional issues must be disposed of before other threshold issues are addressed.

Nor are Defendants correct that standing should have been decided first because it is an "easy" question. PFR at 12. Indeed, one of their principal arguments against standing — that California's Unfair Competition Law (UCL) requires a "restitution claim," and Amazon Watch lacks such a claim, PFR at 12 — was recently rejected by the California Supreme Court in *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 337 (2011). Defendants have since abandoned this argument.[6] *Kwikset* further explains that there is a low threshold for UCL standing and that to show injury, the plaintiff need only plead that he spent money that he otherwise would not have spent because of the defendant's conduct. *Id*. at

[6] *See* Defendants' Rule 28(j) letter, January 28, 2011, Docket No. 69.

323. Amazon Watch has alleged that as a result of Defendants' conduct, it "has lost money or property, and will continue to lose money or property, due to the frustration of its mission, loss of financial resources, and diversion of its staff time to investigate and expose Defendants' unlawful and unfair practices, hindering Amazon Watch's ability to carry out its mission of protecting the indigenous peoples of the Amazon." ER 55. Under *Kwikset*, these allegations are sufficient for UCL standing; they are also sufficient to establish Article III standing. *See, e.g.*, *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (non-profit organization "has direct standing to sue because it showed a drain on its resources from both a diversion of its resources and frustration of its mission"). The standing question is "easy" only if resolved in Amazon Watch's favor.

IV. The panel applied settled principles in its analysis of the private and public interest factors.

Defendants admit that the panel stated the law correctly with respect to the private and public interest factor analysis, but argue that the panel misapplied that standard. PFR at 15. If this were true, such an error would not meet the threshold for *en banc* review. Nonetheless, the panel did properly defer to the district court's weighing of the evidence on each factor; it found error only where the district court had failed to consider material evidence. *Cf. Ravelo Monegro*, 211

F.3d at 511 (noting that a district court abuses discretion on *forum non conveniens* by relying on "a clearly erroneous assessment of the evidence").

Residence of the parties: Defendants latch onto one statement in which the panel characterized the claims here differently from the district court, PFR at 15, but this is not what the panel found to be abuse of discretion. The panel correctly found that the district court had ignored Amazon Watch's status as a local plaintiff, and held that "with a local defendant, a local plaintiff, and the foreign plaintiffs willing to travel to the forum they chose, this factor weighs against dismissing the action in favor of a Peruvian forum." Slip op. at 19477. The panel did not "re-weigh" the district court's conclusion, PFR at 16, but found that it was incomplete.

Convenience of the parties: Defendants focus on the cost of a trip *from the Achuar communities*, but the panel correctly found that the district court failed to consider the cost of trips *from California to Peru* if the case were dismissed. Slip op. at 19477.

Evidentiary considerations: The panel applied the same passage from *Piper* that Defendants cite, *compare* PFR at 16 *with* slip op. at 19478, but faulted the district court for failing to consider witnesses' willingness to testify (among other things). The panel's ruling is consistent with other circuits, *see Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006), and caselaw from this Circuit.

See Lueck v. Sundstrand Corp., 236 F.3d 1137, 1146 (9th Cir. 2001) (holding that courts should "evaluate the materiality and importance of the anticipated [evidence and] witnesses' testimony and then determine [ ] their accessibility and convenience to the forum") (internal quotation marks omitted; alterations in original)). Unlike in *Lueck*, it is not the case here that "all the United States evidence" is in the possession of the defendant, *id.* at 1147: there is no indication that the relevant U.S. witnesses, regarding acts dating back over 30 years, remain under Defendants' control. In *Lueck*, moreover, the defendants provided specific evidence that key witnesses were unavailable in the foreign forum. *Id.* at 1146.

Enforceability of the judgment: The panel rightly emphasized that the district court failed to consider enforceability of the judgment *entirely*. The panel found that Defendants' lack of assets in Peru raised questions about enforcement there. Defendants are incorrect that the panel ignored enforceability of a Peruvian judgment in the U.S.; it held that Defendants' caselaw showed how difficult the enforcement process in the U.S. could be. Slip op. at 19479. Far from immunizing Plaintiffs to engage in fraud, PFR at 17, the panel concluded that enforcement of a U.S. judgment in U.S. courts is more certain than enforcement of judgments from Peruvian courts. Slip op. at 19480. The panel did not, as Defendants claim, reverse the district court for failing to require Defendants to waive objections to enforcement.

Local interest: The panel correctly found that the district court again entirely failed to consider Amazon Watch's interest, thus undervaluing the Californian interest in this case. Slip op. at 19481.

Conditions on dismissal: The panel properly held that under *these facts*, where there was significant evidence of the deficiencies in civil discovery in Peru, the district court should have addressed discovery conditions; this does not conflict with other cases declining such conditions under different facts. Slip op. at 19486.

CONCLUSION

Defendants fail to identify any errors, let alone intra- or inter-circuit conflicts justifying *en banc* review, in the panel's analysis. Their petition should be denied.

Dated: March 15, 2011

Respectfully submitted,

By: s/ Marco Simons
Marco Simons
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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify, pursuant to Ninth Circuit Rules 35-4 and 40-1, that the attached Response to Defendants-Appellees-Cross-Appellants' Petition for Rehearing and Rehearing En Banc is proportionately spaced, has a typeface of 14 points, and contains 4,196 words, which is less than the 4,200 words permitted by Ninth Circuit Rule 40-1(a).

Dated: March 15, 2011

/s/ Marco Simons
Marco Simons

9th Circuit Case Number(s) 08-56187 & 08-56270

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