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

PAUL HOFFMAN, SBN 07244
BENJAMIN SCHONBRUN, SBN 118244
MICHAEL D. SEPLOW, SBN 150183
SCHONBRUN DESIMONE SEPLOW
HARRIS HOFFMAN & HARRISON LLP
723 Ocean Front Walk
Venice, CA 90291
Telephone: (310) 396-0731
Facsimile: (310) 399-7040

MARCO SIMONS, SBN 237314
RICHARD HERZ
JONATHAN KAUFMAN
EARTHRIGHTS
INTERNATIONAL
1612 K Street NW, Suite 401
Washington, DC 20006
Telephone: 202-466-5188
Facsimile: 202-466-5189

NATALIE BRIDGEMAN FIELDS, SBN 223717
LAW OFFICES OF NATALIE BRIDGEMAN FIELDS, ESQ.
450 Mission Street, Suite 500
San Francisco, CA 94105
Telephone: (415) 412-6704
Facsimile: (415) 520-0140

Attorneys for Plaintiffs-Appellants-Cross-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal cases

State cases

State statutes

Other authority

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 case, and without any showing that evidence would be unavailable here, *forum non conveniens* should not deprive plaintiffs of their chosen forum.

Contrary to contentions in Defendants' Renewed Petition for Rehearing (RPFR), the panel correctly applied the abuse of discretion standard. A district court abuses its discretion when it fails to balance the relevant *forum non conveniens* factors. The panel properly determined that the district court erred by, *inter alia*, 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 7140. The panel reexamined the relevant factors only where the district court failed to consider material facts.

Likewise, the panel properly held that the district court erred in affording less deference to Amazon Watch's (AW) choice of forum than is generally due U.S. plaintiffs. Regardless, that decision did not affect the outcome, because the panel's holding that the public and private factors do not support dismissal did not depend on the level of deference.

The panel also appropriately attributed error where the district court failed to consider standard conditions like a statute of limitations waiver. That decision too, however, did not affect the outcome, because the panel overturned dismissal.

Defendants identify no misapplications of law or actual inter-circuit conflicts in these holdings. The panel's well-reasoned, case-specific decision does not warrant further review.

ARGUMENT

I. The panel's treatment of Amazon Watch as a domestic plaintiff was not error.

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

Defendants claim that the panel could not deny the *forum non conveniens* motion before considering Amazon Watch's standing, although it could *grant* dismissal. RPFR at 3. Defendants' argument conflicts 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 first.

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 threshold objection." 549 U.S. at 425. The "critical point" is that "[r]esolving a *forum non conveniens* motion does not entail any assumption by the court of

substantive law-declaring power" and is thus a "a threshold, nonmerits issue." *Id.* at 433. Thus, the rationale of *Sinochem* was that "jurisdiction is vital only if a court intends to render a determination on the merits." *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009). Because the panel did not rule on the merits, it was allowed to review the ruling that the district court made — a ruling on *forum non conveniens* that assumed Amazon Watch's standing — while remanding standing questions that the district court never addressed.

Defendants' position contravenes the ordinary rule that an appellate court "has discretion to remand issues, even jurisdictional ones," where the trial court has not considered the issue in the first instance. *Salmon Spawning & Recovery Alliance v. United States Customs & Border Prot.*, 550 F.3d 1121, 1134 (Fed. Cir. 2008) (collecting cases). Indeed, an *en banc* panel of this Court remanded a non-jurisdictional threshold issue (exhaustion of remedies), without first addressing the jurisdictional basis (political question) for the district court's dismissal. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 832-33 (2008). Although *Placer Dome* suggests that an appellate court *could* decide a jurisdictional question in the first instance, it did not hold that a court *must* do so. *See* 582 F.3d at 1087; *see also Ibrahim v. DHS*, 538 F.3d 1250, 1256 n.9 (9th Cir. 2008) (remanding for consideration of Article III jurisdiction). The panel here appropriately held that the district court is

best positioned to resolve standing questions in the first instance. Slip op. at 7137.

Furthermore, Amazon Watch has standing. Defendants cite *La Asociación de Trabajadores v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010), but, in stating that an organization has standing where it has been required to expend resources it otherwise would spend in other ways (thus diverting its resources and frustrating its mission), that case adopts earlier cases such as *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002), and *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Rev.,* 959 F.2d 742, 748 (9th Cir. 1992). Amazon Watch meets their test. Pls.' Reply Br. on Appeal & Ans. Br. on Cross-Appeal ("Reply") at 52-56; ER 55.

Finally, UCL standing does not require *proximate* cause. RPFR at 5. It requires only "a causal connection," *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (2011); proximate causation also considers whether policy considerations limit responsibility. *Jackson v. Ryder Truck Rental Inc.,* 16 Cal. App. 4th 1830, 1847 (1993); *see* Reply at 48-51. Regardless, proximate causation is a context-specific inquiry that, if undertaken, should be addressed by the district court in the first instance. *See Ibrahim*, 538 F.3d at 1256 n.9; Reply at 50-51.

B. The panel did not err in ruling that Amazon Watch's choice of forum was entitled to substantial deference, and this ruling did not affect the outcome.

The panel properly held that Amazon Watch's forum choice was entitled to the substantial deference ordinarily afforded a U.S. plaintiff, but the panel would have ruled the same way even if it found that choice was entitled to reduced deference. The panel considered the appropriate level of deference separately from the public and private interest factors. Slip op. at 7135-40; 7140-48. Its holding that these factors failed to establish vexation to Defendants out of proportion to Plaintiffs' convenience was a basis for reversal entirely distinct from its conclusion that the factors "*also* fail to outweigh the deference owed to Amazon Watch's chosen forum." *Id.* at 7148 (emphasis added).

A domestic plaintiff's choice of its home forum is entitled to a "strong presumption" of convenience, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981), which is even stronger where the forum is also the defendants' home. *Ravelo Monegro v. Rosa*, 211 F.3d 509, 513-14 (9th Cir. 2000). Without citing any caselaw, Defendants argue that "Amazon Watch did not choose the forum" because the Peruvian Plaintiffs filed suit first, RPFR at 6; but Amazon Watch was not bound by the Peruvian Plaintiffs' choice, and both Amazon Watch and the Peruvians chose to file the amended complaint in Los Angeles.

Defendants also suggest that AW was somehow forum-shopping — even

though it filed in its own and Defendants' home forum. RPFR at 6. But that claim depends on facts that the district court did not find. Although Defendants cite *Iragorri v. United Technologies Corp.*, that case advises courts to be skeptical of local defendants who move to dismiss for tactical reasons, because *they* may be forum shopping. 274 F.3d 65, 75 (2d Cir. 2001) (en banc). Moreover, a plaintiff's choice merits "substantial deference" when dictated by where courts have jurisdiction. *Norex Petroleum, Ltd. v. Access Indus.*, 416 F.3d 146, 156 (2d Cir. 2005). That is so here, since Defendants no longer operate in Peru. 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 7139.

Defendants cite *Vivendi S.A. v. T-Mobile USA, Inc.*, 586 F.3d 689 (9th Cir. 2009), which suggested that "eleventh-hour efforts to strengthen connections with the United States allow the district court to reduce" deference. *Id.* at 695; *see* RPFR at 7. Unlike *Vivendi*, however, there is neither evidentiary support for nor a district court finding that Amazon Watch was added for tactical reasons. Also unlike the domestic plaintiff in *Vivendi*, whose interest in the case began after the motion to dismiss was filed, Amazon Watch has been "involve[d] in the subject matter of this litigation," since at least 2001— six years prior to the filing of this

lawsuit. Slip op. at 7138-39. Defendants' reliance on *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), is similarly misplaced; like *Vivendi*, the court in *Pain* found *evidence* that the party had been added solely to defeat *forum non conveniens*, *id.* at 797-98. Moreover, *Pain* preceded *Piper*; while *Piper* agreed that the existence of a U.S. plaintiff was not *dispositive*, 454 U.S. at 256 n. 23, *Pain* cannot overrule *Piper*'s emphasis on deference to a plaintiff who sues in its home forum. *Id.* at 255-56.

Thus, the panel considered exactly the factors Defendants suggest. The panel's conclusion that a suit brought in Amazon Watch and Defendants' home forum and that had a strong connection to the subject matter of the case did not raise forum shopping concerns, in the absence of any contrary finding by the district court, is correct, and is the kind of fact-based conclusion that does not warrant *en banc* review.

Defendants suggest that Amazon Watch should be disregarded because it "adds nothing" to this suit. RPFR at 8. No caselaw supports the view that a plaintiff can be ignored if it seeks identical relief to other plaintiffs; Amazon Watch has a due process right to litigate its own case.[1] Nonetheless, AW may be able to seek relief that the Achuar Plaintiffs cannot; for example, Amazon Watch

[1] This right is so strong that it 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).

may be better situated to request injunctive relief ending deceptive practices. The panel did not err in declining to adopt Defendants' position.

Finally, Defendants' argument that the district court should have severed Amazon Watch's claim was raised for the first time in a summary footnote in their cross-appeal, and abandoned when it was not raised in Defendants' first PFR, and is therefore not preserved. *See MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1086 (9th Cir. 2006); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996). Regardless, severance makes no sense given the panel's determination that the factors favor retention of *all* plaintiffs' claims, independent of Amazon Watch's resident plaintiff status. Slip op. at 7140-41, 7145-46. Defendants cite one district court case, in which some foreign plaintiffs had no tie to the forum. *Blum v. Gen. Elec. Co.,* 547 F. Supp. 2d 717, 724, 726 (W.D. Tex. 2008). Here, by contrast, the panel found that all plaintiffs' claims are tied to the forum, which Defendants do not contest; in fact, they underline the similarities between the two groups' claims. RPFR at 8. Much more persuasive than *Blum* is *Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88, 103 (2d Cir. 2000), which overturned dismissal for both resident and foreign plaintiffs with similar claims — partly based on the deference due to the forum choice of the U.S. resident.

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

A. An erroneous application of the abuse of discretion standard would not meet the standard for *en banc* review.

The panel's analysis of the private and public factors was correct, but there is no reason to consider the question. The panel applied the proper, "abuse of discretion" standard; any error in application would not justify review. Defendants erroneously suggest that the Supreme Court heard *Piper* to correct an error in application of this standard, RPFR at 8-9; in fact, the Court granted *certiorari* to determine whether an unfavorable change in law automatically bars dismissal. 454 U.S. at 246 n.12. The Court did consider whether the Court of Appeals appropriately applied the abuse of discretion standard, but this was necessary "to properly dispose of the cases." *Id. Piper* does not suggest that extraordinary review is available merely to correct allegedly erroneous, fact-specific applications of a well-established standard.

B. The panel properly analyzed the public and private factors.

The panel found error only where the district court failed to consider material evidence. This is proper abuse-of-discretion review, which requires the panel to examine the district court's "rationale." *Blue Cross & Blue Shield v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007). Failure to

balance the relevant *forum non conveniens* factors is an abuse. *Gates Learjet Corp. v. Jensen,* 743 F.2d 1325, 1334 (9th Cir. 1984). A court of appeals cannot defer to a decision the district court did not make, and is entitled to re-weigh the evidence where, as here, the court fails to consider "significant relevant evidence and . . . an entire factor." Slip op. at 7140. *See, e.g.*, *Gates Learjet*, 743 F.2d at 1336; *Boston Telecomms. Group, Inc. v. Wood*, 588 F.3d 1201, 1208-10 (9th Cir. 2009); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 39, 46-49 (3d Cir. 1988).

1. Residence of the parties and witnesses.

The panel correctly found that the district court 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 7141. The panel did not "re-analyze[]" the district court's conclusion, RPFR at 8, but found it incomplete.

Tazoe v. Airbus S.A.S., 631 F.3d 1321 (11th Cir. 2011), which Defendants cite, does not discuss the parties' residence as a private interest factor, and actually supports Plaintiffs' position. The Eleventh Circuit found that the district court had properly considered *both* the plaintiffs' and defendants' theories, and decided based on *all* "likely claims and defenses" that Brazil offered superior access to proof. *Id.* at 1331-32. Here, by contrast, the district court ignored the residency of

the California plaintiff and defendants, the fact that Oxy has been absent from Peru for a decade, and the centrality of Oxy managers resident in California as witnesses. *See also Boston Telecomms.*, 588 F.3d at 1207; *Neuralstem, Inc. v. ReNeuron, Ltd.*, No. 08-56546, 2010 U.S. App. LEXIS 2824, at *4-5 (9th Cir. Feb. 11, 2010) (district court erred in not weighing U.S. residence of plaintiff and importance of U.S. resident third-party witnesses).

2. Convenience to the parties.

In concluding that the cost of travel between Peru and Los Angeles supports dismissal, the district court failed to consider "the other side of the ledger": the cost of trips by witnesses from their home forum in California to Peru if the case were dismissed. Slip op. at 7141-42. Defendants provide the same incomplete analysis, focusing exclusively on the cost of a trip *from the Achuar communities*. RPFR at 13.

3. Availability of witnesses and evidence.

The panel properly faulted the district court for failing to consider witnesses' willingness to testify (among other things). Slip op. at 7143. It did not require Defendants to identify "'with specificity the evidence they would not be able to obtain.'" RPFR at 10 (quoting *Piper*, 454 U.S. at 258). It recognized *Piper* but declined to give weight to the absence of potential witnesses from the jurisdiction in the face of Plaintiffs' evidence that out-of-jurisdiction witnesses were willing to

be deposed in California — evidence the district court overlooked — absent some indication that such witnesses would not be willing to testify. Slip op. at 7143. Defendants suggest their "circumstantial evidence" was adequate to show unwillingness. RPFR at 11. But they provided no evidence, only a naked assertion that the categories of witnesses identified would be loathe to appear.[2]

The panel's decision is consistent with *Lueck v. Sundstrand Corp.*, 236 F.3d 1137 (9th Cir. 2001), in which all of the U.S. evidence was in the parties' possession. *Id.* at 1147. By contrast, here there is no indication that the relevant U.S. witnesses to acts dating back over 30 years remain under Defendants' control such that they could guarantee their production in Peru.

4. Enforceability of a Peruvian judgment.

Defendants do not dispute that the district court should have considered enforceability of a judgment in Peru, RPFR at 12-13, which it failed to do *entirely*. Slip op. at 7144. Nor do they dispute that the panel properly found that Defendants' lack of assets in Peru raised questions about enforcement there, *see id.*, or that the panel's decision accords with the authority it cited. RPFR at 12-13.

Instead, Defendants argue that *California* law provides for the enforcement of foreign judgments. RPFR at 12-13. Defendants overlook the key consideration:

[2] Defendants' bare assertions are questionable on their face. It does not defy common sense that Peruvian witnesses who may be hostile to Defendants would appear voluntarily, RPFR at 11; they might be highly motivated to participate.

the fact that the enforcement of a Peruvian judgment would necessarily require further litigation in the U.S. weighs against dismissal, because no ancillary enforcement proceedings would be required if the case remains here.

Moreover, Defendants' own caselaw "demonstrates the difficulty of enforcing such an award" in California. Slip op. at 7144. California law provides numerous bases to deny enforcement, and thus many potential arguments for creative lawyers, regardless of their merit. Cal. Code Civ. Proc. § 1716.[3] Other defendants, including an Occidental subsidiary, have resisted enforcement in similar cases. In *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002), plaintiffs re-filed oil pollution claims in Ecuador after *forum non conveniens* dismissal from the Southern District of New York. Now that a multi-billion dollar judgment has been entered against Texaco's successor Chevron Corporation, Chevron has returned to the Southern District, challenging the competency of the Ecuadorian forum it had requested, and seeking to bar enforcement of the judgment anywhere in the world. *See* ER 416-17; *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *appeal pending*, No. 11-1150 (2d Cir.).

Similarly, Occidental Chemical Corp. was one of several defendants who successfully challenged enforcement of a Nicaraguan judgment, arguing that

[3] Furthermore, these provisions only allow for enforcing money judgments, not the injunctive relief sought here. *See id.* § 1715(a)(1).

Nicaragua's courts lacked subject-matter jurisdiction and due process, *Osorio v. Dole Food Co.*, No. 07-22693, 2009 U.S. Dist. LEXIS 713, *44-46, 51-53 (S.D. Fla. Jan. 5, 2009) even though, in a similar case, they had previously procured *forum non conveniens* dismissal to Nicaragua. *Delgado v. Shell Oil Co.,* 890 F. Supp. 1324 (S.D. Tex. 1995).

Far from denying this could happen here, Defendants assert that courts cannot require assurances that they will satisfy a judgment, claiming the right to challenge any judgment on due process grounds — the very grounds *Plaintiffs* now raise. RPFR at 13-15; slip op. at 7144-45. Thus, despite arguing that "there is no reason to expect that a Peruvian judgment would not be enforced [in California]," RPFR at 12-13, Defendants would surely mount a protracted and expensive challenge to enforcement. Because none of this would be necessary if the case is litigated here, the panel did not err in finding that this weighs against dismissal, and that the district court abused its discretion.

5. Local interest.

Defendants focus on Peru's interest. RPFR at 13. But the question is "only if there is an identifiable local interest in the controversy, not whether another forum also has an interest." *Boston Telecomms.*, 588 F.3d at 1212. Once it established that California had a legitimate interest, the panel's work was done; even recognizing Peru's interest, this factor favors retention. The district court

erroneously "conflated a forum's interest in resolving a controversy with its ability to do so." Slip op. at 7145. It also failed to consider Amazon Watch's allegations, thus undervaluing California's interests. Slip op. at 7146.

III. The panel properly analyzed the district court's failure to place certain conditions on dismissal.

Defendants claim the panel erred in holding that the district court should have imposed conditions on dismissal. RPFR at 13-18. But since the panel overturned dismissal, the conditions discussion did not alter the outcome.

Regardless, Defendants concede that, in holding that a district court abuses its discretion if it fails to impose conditions on *forum non conveniens* dismissal when "'there is a justifiable reason to doubt that a party will cooperate with the foreign forum,'" the panel applied the correct standard. RPFR at 14 (quoting *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001)); slip op. at 7149. The panel's finding of an abuse of discretion "[u]nder the circumstances here," slip op. at 7149, does not warrant review.

A. The panel properly faulted the district court for failing to consider evidence regarding the difficulty of enforcing a Peruvian judgment.

The panel held that requiring that defendant satisfy any judgment may be appropriate where "enforcing a judgment *in a foreign country* would be problematic." Slip op. at 7150 (emphasis added) (citing *Contact Lumber Co. v.*

P.T. Moges Shipping Co., 918 F.2d 1446, 1450 (9th Cir. 1990)); *see also Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (affirming dismissal with such condition); *Stewart v. Dow Chem. Co.*, 865 F.2d 103, 104-05 (6th Cir. 1989) (same). It found that the district court abused its discretion in failing to even consider evidence of the "obstacles posed by Occidental's withdrawal" from Peru, and thus of the difficulty of enforcing a judgment in Peru. *Id.* The panel also noted that the district court failed to consider evidence of "turmoil in the Peruvian judiciary that could become the basis for a challenge to the enforceability of a judgment," and thus of the difficulty of enforcing a judgment *in the United States*. *Id.* at 7144-45, 7150. Defendants challenge only the latter statement. RPFR at 14. They do not contest that the failure to consider enforceability in Peru was an abuse of discretion.

Defendants argue that there is no requirement that a trial court always impose such conditions, RPFR at 14, but the panel *agreed*; it held that the district court failed to consider relevant evidence under *Leetsch*'s fact-specific standard. Slip op. at 7149. Although Defendants further suggest, RPFR at 15, that *any* enforcement conditions conflict with *In re: Union Carbide Corp. Gas Plant Disaster*, that case reversed such a condition based on specific defects in the district court's order; it did not hold that conditions are never proper. 809 F.2d 195, 204-05 (2d Cir. 1987). If it had, a split would pre-date this case between the

Sixth, Eleventh and Ninth Circuits and the Second, which *en banc* review cannot resolve.

Defendants assert that enforceability review would deter or redress fraud in any Peruvian proceedings. RPFR at 15. Baseless innuendo aside, California does not recognize a challenge on those grounds. Cal. Code Civ. Proc. § 1716(c)(2) (fraud must deprive party of "adequate opportunity to present its case"). Fraud regarding the merits, such as fraudulent evidence, is "dealt with in the rendering court." Uniform Foreign-Country Money Judgments Recognition Act, cmt. ¶ 7 (commenting on provision adopted by California as section 1716(c)(2)).[4]

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

The district court's decision not to condition dismissal on a waiver of statute of limitations defenses not available in California constituted a failure to secure an adequate forum, and thus a basis for reversal. *See, e.g., Dole Food Co. v. Watts*, 303 F.3d 1104, 1120 (9th Cir. 2002) (declining to uphold dismissal because, *inter alia*, defendants failed to waive statutes of limitations). While Defendants argue that Plaintiffs only asked for a post-filing limitations waiver, RPFR at 17, Plaintiffs asked the district court to condition dismissal on waiver of "*any* statute of limitations arguments that would not have been available had the court retained jurisdiction." ER 93.

[4]Available at http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.pdf.

Defendants argue that, in light of California's borrowing statute, the panel should have remanded the issue. RPFR at 17. But remand on a conditions-of-dismissal question makes no sense where the panel reversed dismissal. Moreover, Defendants fail to explain how they would be prejudiced by a requirement to waive "limitations defenses that would not be available in California." Slip op. at 7150. If California borrows Peruvian law, then such a defense *would* be available in California. Nothing in *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728 (7th Cir. 2010) requires remand, and in *Dole Food*, 303 F.3d at 1120, this Circuit determined that the failure to waive statutes of limitations created the possibility of leaving plaintiffs without an adequate forum, without asking the district court to first address the matter. *See also King v. Cessna Aircraft Co.*, 562 F.3d 1374 (11th Cir. 2009) (modifying dismissal to add statute of limitations waiver condition, without making additional findings).

CONCLUSION

No errors, let alone intra- or inter-circuit conflicts, justify *en banc* review. Defendants' petition should be denied.

Dated: August 8, 2011

Respectfully submitted,

By: s/ Marco Simons
Marco Simons
EARTHRIGHTS INTERNATIONAL
Attorneys for all Plaintiffs

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 4200 words, as permitted by Ninth Circuit Rule 40-1(a).

Dated: August 8, 2011

/s/ Marco Simons
Marco Simons

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

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Aug 8, 2011 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Marco Simons

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)