Ninth Circuit Case No. 19-55295

# United States Court of Appeals
## Ninth Circuit

———— | ————

**LINDSAY R. COOPER, et al.,**

*Plaintiffs-Appellants*

**v.**

**TOKYO ELECTRIC POWER COMPANY, INC., et al.,**

*Defendants-Appellees*.

———— | ————

On Appeal from the United States District Court
for the Southern District of California – San Diego
The Honorable Janis L. Sammartino, District Judge, Presiding
District Court Case No. 3:12-cv-03032-JLS-MSB

———— | ————

## APPELLANTS' OPENING BRIEF

PAUL C. GARNER
c/o LAW OFFICES OF
BONNER & BONNER
475 Gate Five Road, Suite 212
Sausalito, California 94965
Telephone: (760) 671-8143

CHARLES A. BONNER
A. CABRAL BONNER
LAW OFFICES OF
BONNER & BONNER
475 Gate Five Road, Suite 212
Sausalito, California 94965
Telephone: (415) 331-3070

JOHN R. EDWARDS (*pro hac vice*)
CATHARINE E. EDWARDS
EDWARDS KIRBY, LLP
3201 Glenwood Avenue, Suite 100
Raleigh, North Carolina 27612
Telephone: (919) 780-5400

*Attorneys for Appellants*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Cases

Statutes



Other Authorities



Rules

## INTRODUCTION

On March 11, 2011 a 9.0 magnitude earthquake struck off the coast of Japan, giving rise to a tsunami with waves more than 40 feet high. These waves slammed into the Fukushima-Daiichi Nuclear Power Plant ("FNPP") and caused substantial damage, damage that led to a core meltdown and the release of radioactive waste into the atmosphere. Japan requested assistance from the United States, which responded by sending in ship-borne military personnel and land-based service personnel in a mission known as "Operation Tomodachi." Many of these individuals were severely harmed by the radioactive discharge. It is undisputed that the owner and operator of the FNPP, Tokyo Electric Power Company Holdings ("TEPCO"), was negligent, and that negligence was the principal cause of the meltdown and the resultant harm suffered. As a result, some 239 people ("Plaintiffs") filed individual and class action claims in federal district court in this case, asserting numerous causes of action ranging from negligence to wrongful death.[1]

Prior to this Court's affirmance of the district court's decision not to dismiss Plaintiff's claims against TEPCO, Plaintiffs added General Electric Company ("GE") as a party-defendant. On remand, the district court decided – despite the

[1] *Bartel, et al. v. Tokyo Electric Power Company Holdings, Inc., et al.*, No. 19-55442, is a related case in which nearly 200 additional named plaintiffs asserted similar claims. Those claims are not the subject of this appeal.

absence of discovery and inadequate legal briefing – that Japan provided an adequate alternative forum and that Japanese law should apply. It then dismissed Plaintiffs' claims against GE with prejudice and dismissed Plaintiffs' claims against TEPCO without prejudice to them being refiled in Japan. It is from these erroneous rulings that Plaintiffs have timely appealed.

## STATEMENT OF JURISDICTION

Plaintiffs filed the underlying action in federal district court on December 21, 2012. CR 1. The district court had jurisdiction based on diversity of citizenship under 28 U.S.C. § 1332. *Ibid*. The district court granted without prejudice Defendant's motion to dismiss the first complaint, then denied (in part) its motion to dismiss the second amended complaint ("SAC"). ER 6. Following this Court's affirmance, on interlocutory appeal, of the district court's denial of the second motion to dismiss, Plaintiffs filed a third amended complaint ("TAC"), adding four more party-defendants, three of whom Plaintiffs voluntarily dismissed. *Ibid*.

On April 25, 2018, both remaining Defendants filed motions to dismiss, arguing lack of jurisdiction, failure to state a claim, international comity, and *forum non conveniens*.[2] ER 6, 370, 832. After Plaintiffs had filed their response in opposition (ER 282) and Defendants their replies in support (ER 142, 77) of the motions to dismiss, the district court conducted a hearing with oral argument on November 14, 2018. CR 163. On March 4, 2019, the district court granted Defendants' motions to dismiss (ER 5), and entered final judgment thereon three

[2] Defendant General Electric Company ("GE") also asserted the political question doctrine as part of its motion to dismiss. ER 873.

days later. ER 40. Plaintiffs timely filed their Notice of Appeal on March 8, 2019. ER 1. This Court has jurisdiction under 28 U.S.C. § 1291.

## FACTS AND PRIOR PROCEEDINGS[3]

The district court summarized the relevant facts as follows:

> On March 11, 2011, an earthquake struck Japan, giving rise to tsunami waves that struck Japan's Fukushima-Daiichi Nuclear Power Plant ("FNPP"). The plant's radioactive core melted down causing severe damage to the plant and releasing radiation as a result. Plaintiffs are members of the U.S. Navy crews of the U.S.S. RONALD REAGAN, crews of other vessels participating in the Reagan Strike Force, land-based service personnel, and/or their dependents. Plaintiffs were deployed to Japan as part of a mission known as "Operation Tomodachi." Plaintiffs allege that the FNPP released radioisotopes and exposed them to injurious levels of ionizing radiation during the mission. The release of radiation and subsequent injuries resulted from "negligently designed and maintained" Boiling Water Reactors at the FNPP.
>
> Plaintiffs initiated this action against TEPCO, the owner and operator of the FNPP, on December 21, 2012. TEPCO moved to dismiss. The Court granted TEPCO's motion without prejudice. Plaintiffs filed a Second Amended Complaint, which TEPCO moved to dismiss, and the Court granted in part and denied in part this motion, again permitting Plaintiffs to file an amended complaint. Plaintiffs filed their Third Amended Complaint ("TAC"), naming GE as an additional defendant, along with three other manufacturer defendants EBASCO, Toshiba, and Hitachi.[4] TEPCO then moved for reconsideration of the Court's order regarding its second motion to dismiss. The Court amended its order and granted TEPCO's motion for certification of interlocutory appeal and stayed the case at the district court level. The Ninth Circuit affirmed the Court's denial of

---

[3] This section combines the Statement of the Case and the Statement of Facts sections required by Fed. R. App. P. 28(a)(6), (7) and 9th Cir. R. 28-1(a).

[4] As the district court noted, the plaintiffs voluntarily dismissed EBASCO, Toshiba, and Hitachi as party-defendants. ER 6 (citing CR 139).

> TEPCO's Motion to Dismiss Plaintiffs' SAC. *See* [*Cooper v. TEPCO,*] 860 F.3d 1193 [9th Cir. 2017].
>
> Plaintiffs' TAC asserts both individual and class action claims. Their causes of action include negligence, strict products liability, strict liability for ultrahazardous activities, res ipsa loquitur, negligence per se, loss of consortium, and survival and wrongful death. Plaintiffs make these claims against TEPCO as the owner and operator of the FNPP, and against GE as the designer of the Boiling Water Reactors within the FNPP. Both GE and TEPCO have moved to dismiss this case against them.

ER 5-6 (internal citations and footnote omitted).

In support of their motions to dismiss, Defendants argued lack of jurisdiction (personal jurisdiction on the part of TEPCO, subject matter jurisdiction on the part of GE), failure to state a claim, international comity, and *forum non conveniens*. ER 6, 370, 832. As previously noted, GE also asserted the political question doctrine as part of its motion to dismiss. ER 873. On November 14, 2018, the district court conducted a hearing with oral argument on both Defendants' motions to dismiss. CR 163. Nearly four months later, the district court handed down its decision, granting both Defendants' motions to dismiss. ER 5. The court granted GE's motion with prejudice, based on its conclusion that Japanese law governed with respect to third-party (i.e., non-operator) liability and, under that law, GE as a non-operator was not liable. *Id*. at 20. The court granted TEPCO's motion without prejudice to the case being refiled in Japan, based on its reconsideration of foreign

and public policy interests and its conclusion that Japanese law applied. *Id*. at 30. Plaintiffs timely appealed from both of these rulings on March 8, 2019. ER 1.

## STATEMENT OF THE ISSUE(S) PRESENTED

This appeal largely stands or falls on the answer to a single – albeit multi-part – question: *Did the district court commit legal error and thereby abuse its discretion by granting Defendants' motions to dismiss, based on its determination that Japanese law should govern the outcome of this case and that Japan was the more appropriate forum for resolving Plaintiffs' claims?* For the reasons set forth below, Plaintiffs respectfully submit that the answer is "Yes" and the case should be reversed and remanded.

## STANDARDS OF REVIEW

A district court's ruling on a motion to dismiss for want of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) is reviewed *de novo*. *Prather v. AT&T, Inc.*, 847 F.3d 1097, 1102 (9th Cir.), *cert. denied*, 137 S. Ct. 2309 (2017). The same applies to a district court's decision on a motion to dismiss for lack of personal jurisdiction, *Lazar v. Kroncke*, 862 F.3d 1186, 1193 (9th Cir. 2017), as well as on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Wilson v. Lynch,* 835 F.3d 1083, 1090 (9th Cir. 2016). With respect to the latter, all allegations of material fact must be taken as true and construed in the light most favorable to the nonmoving party. *Ibid*.

A district court's ruling on a motion to dismiss on *forum non conveniens* grounds is reviewed for an abuse of discretion. *Ayco Farms, Inc. v. Ochoa*, 862 F.3d 945, 948 (9th Cir. 2017). The same applies to a decision based on international comity. *Mujica v. Airscan, Inc.*, 771 F.3d 580, 589 (9th Cir. 2014).

> We follow a two-part test to determine whether a district court abused its discretion. [T]he first step of our abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, we must conclude it abused its discretion. If the district court identified the correct legal rule, we move on to the second step of the test and determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.

*Ibid*. (internal citations and quotations omitted).

A district court's ruling on the existence *vel non* of a political question is subject to *de novo* review. *Cooper v. Tokyo Elec. Power Co*., 860 F.3d 1193, 1212 (9th Cir. 2017). The same applies to a district court's determination as to which law applies in a choice-of-law situation. *Sarver v. Chartier*, 813 F.3d 891, 897 n.1 (9th Cir. 2016); *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1072 (9th Cir. 2009). Although arguably not here relevant (because Plaintiffs' factual allegations are taken as true), underlying factual determinations are reviewed for clear error. *Zinser v. Accufix Research Inst., Inc*., 253 F.3d 1180, 1187 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001). Finally, a district court's determination and interpretation of foreign law are questions of law subject to *de novo* review. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 959 (9th Cir. 2017).

## SUMMARY OF ARGUMENT

**GE:**

1) Because all of the relevant criteria under the Class Action Fairness Act were met, the district court properly determined that it had subject matter jurisdiction over GE. *See* 28 U.S.C. § 1332(d).

2) Because the factual record remains to be developed and the parties have not adequately briefed the complex legal issues underlying choice-of-law, the district court erred in deciding the question of what law should apply – and in concluding that Japanese law, rather than the law of the forum, California, should govern.

**TEPCO:**

1) The district court properly found that it had personal jurisdiction over TEPCO, which had waived any such defense by having appeared and litigated the matter for five years without asserting a personal jurisdiction defense.

2) The district court erred by concluding that "changed circumstances" warranted dismissing Plaintiffs and their claims and consigning them to Japan under the doctrine of international comity when, in fact, there were no real "changed circumstances" and the interests of the United States,

Plaintiffs, and the forum state (California) strongly militated in favor of non-dismissal.

## ARGUMENT[5]

Although the arguments advanced by GE and TEPCO overlap in places, each will be addressed separately.

### I. GE's Motion To Dismiss

#### A. Subject Matter Jurisdiction Does Exist, As The District Court Correctly Found

GE argued below that the district court lacked subject matter jurisdiction on three separate grounds: (1) there was incomplete diversity between Plaintiffs and GE under 28 U.S.C. § 1332(a); (2) the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, *codified at* 28 U.S.C. § 1332(d) ("CAFA"), did not apply because, *inter alia*, Plaintiffs identified their case as being more of a "mass tort case" than a "class action;" and (3) the Convention on Supplementary Compensation for Nuclear Damage, IAEA (1997) ("CSC") granted exclusive jurisdiction to the courts of the country where the disaster occurred, *viz*., Japan. ER 853-55.

With respect to the first point, Plaintiffs tacitly conceded a lack of complete diversity for purposes of section 1332(a), *see* ER 7, but vigorously argued that subject matter jurisdiction did exist under the CAFA. *Id*. at 292-93. The district

[5] Per 9th Cir. R. 28-2.5, all of Plaintiffs' arguments presented herein were timely and properly raised before the district court in their opposition memoranda (with exhibits). *See* ER 142-369.

court agreed with Plaintiffs and rejected GE's argument concerning the CAFA, noting that all of the statutory requirements of section 1332(d) were met: (1) there were more than 100 named Plaintiffs, (2) no claims had been asserted against any state or governmental entity, (3) the amount in controversy exceeded the statutory threshold of $5,000,000, and (4) the requirements of "minimal jurisdiction" were satisfied by virtue of the fact that Lindsay Cooper was a citizen of California while GE was a citizen of New York (state of incorporation) and Connecticut (principal place of business). ER 8. *See also Bush v. Cheaptickets, Inc*., 425 F.3d 683, 684 (9th Cir. 2005) and *Abrego v. Dow Chem. Co.*,443 F.3d 676, 680-82 (9th Cir. 2006) (discussing changes to federal diversity jurisdiction with the adoption of the CAFA).

Although the district court declined to address GE's third argument – *viz*., that the CSC foreclosed the district court from exercising jurisdiction over Plaintiffs' action – based on its conclusion that Japanese law should otherwise apply, *see* ER 7 at n.2, it is reasonable to assume that GE may reassert that argument on appeal as an alternative ground for affirmance. *Cf. Cassirer*, 862 F.3d at 974 (appellate court may affirm on any ground supported by the record, even if not relied upon by the district court). Accordingly, Plaintiffs reiterate their opposition on this point:

The law-of-the-case doctrine provides that a court should not reexamine an issue previously decided in that case by the same court or a higher court. *Richardson v. United States*, 841 F.2d 993, 996 (9th Cir. 1988) (citations omitted). The previous order in the case must have "decided explicitly or by necessary implication" the issue that is in question. *Milgard Tempering, Inc., v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990). The doctrine holds particular force in the remand context. Under the law of the case doctrine a decision of the court in a prior appeal must be followed in all subsequent proceedings in the same case. *Eichman v. Fotomat Corp*., 880 F.2d 149, 157 (9th Cir. 1989).

Here, although not technically a party to TEPCO's appeal to the Ninth Circuit, GE was an active participant and advocate in the appellate process. During the pendency of the appeal, GE was not only a party to the instant action, but most significantly, submitted an amicus brief advocating its positions to the Ninth Circuit. *Firth v. United States,* 554 F.2d 990, 993 (9th Cir. 1977) (on remand, a trial court can only consider "any issue not expressly or impliedly disposed of on appeal"). Of course, this Court can, as it must, rely on the Ninth Circuit's ruling to deny the arguments that GE makes herein that, although re-contextualized into a choice of law argument, are the same arguments that the Ninth Circuit has previously considered and rejected. *Vizcaino v. United States Dist. Court* 173 F.3d 713, 719 (9th Cir. 1999) (district courts must implement both the letter and the *spirit* of the mandate, taking into account the appellate court's opinion and the *circumstances* it embraces) (emphasis added).

In its published June 22, 2017 Opinion, the Ninth Circuit held that "applying normal rules of construction to Article XIII (of CSC), we do not believe that it strips U.S. courts of jurisdiction over claims arising out of nuclear incidents that occurred prior to the CSC's entry into force." The Court concluded, "the CSC's text, structure, and ratification history dictate that Article XIII's jurisdiction-stripping provision applies only to claims arising out of nuclear incidents occurring after the CSC's entry into force." [*Cooper v. Tokyo Elec. Power Co*., 860 F.3d 1193,] 1205 [9th Cir. 2017].

ER 294-95.

Accordingly, and in light of the above, the district court correctly found that it had subject matter jurisdiction over GE.

### B. The District Court Erred In Its Conclusion That Japanese Law Should Apply.[6]

#### 1. A Decision On Choice-of-Law Was And Remains Premature

Before turning to the merits of the district court's determination that Japanese law should apply, Plaintiffs reiterate their contention that such a determination requires a level of factual development and detailed legal briefing that was not and is not present in the instant case.

This Court has previously held that circumstances may exist where a district court would be required to conduct a choice-of-law analysis at the motion to dismiss stage and even resolve disputed issues of fact in order to make its determination. *Villar v. Crowley Maritime Corp*., 782 F.2d 1478, 1479 (9th Cir. 1986) (upholding district court's resolution of factual disputes on a motion to dismiss in order to decide choice-of-law and *forum non conveniens* issues).

[6] Plaintiffs note that the district court declined to address GE's other arguments in favor of dismissal, including *forum non conveniens* and the political question doctrine. *See* ER 7 n.2. Because GE may elect to reassert these arguments in its Answering Brief ("AAB") – and, even if not, this Court may choose to address one or more of them as possible alternative grounds for affirmance per *Cassirer* (cited above) – each will be discussed briefly in section C, *infra*.

Nevertheless, "[t]he question of whether a choice-of-law analysis can be properly conducted at the motion to dismiss stage depends on the individual case." *Czuchaj v. Conair Corp.*, No. 13-cv-1901 BEN (RBB), 2014 WL 1664235, at *9 (S.D. Cal. Apr. 18, 2014). Thus, many courts reserve ruling on the issue until after discovery, when the choice-of-law analysis can be informed by a fully developed factual record. *See, e.g., Brazil v. Dole Food Co.*, No. 12-CV-01831-LHK, 2013 WL 5312418 at *11 (N.D. Cal. Sept. 23, 2013); *Dean v. Colgate-Palmolive Co.*, No. EDCV 15–0107 JGB, 2015 WL 3999313 at *11 (C.D. Cal. June 17, 2015) (finding that the choice-of-law analysis "is not appropriate at this stage of litigation," but should instead be conducted "after the parties have engaged in discovery"); *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1007 (N.D. Cal. 2014) (finding that a "choice of law analysis is a fact-specific inquiry which requires a more developed factual record than is generally available on a motion to dismiss"); *Won Kyung Hwang,* 2013 WL 1632697, at *21 ("Such an inquiry is most appropriate at the class certification stage of the case, after the parties have engaged in discovery").

In deciding to go forward with its choice-of-law determination, the district court declared:

> As long as a court has sufficient information to analyze the choice-of-law issue thoroughly, and discovery will not likely affect the analysis, it is appropriate for the Court to undertake a choice-of-law analysis at the motion-to-dismiss stage. Here, GE and Plaintiffs fully

> briefed the issues, and discovery will not affect the analysis. Thus, the Court finds that there is adequate information to analyze the specific choice-of-law determination as to the issue of GE's liability.

ER 10-11 (internal citations omitted). With all due respect to the district court, Plaintiffs do not believe that the parties had "fully briefed the issues," nor do they believe that "discovery will not affect the analysis."

As was argued below, discovery and development of a factual record would have greatly assisted the court in its analysis. To note only a few of the examples flagged below, neither Plaintiffs nor the court were privy to the terms of the contract between GE and TEPCO regarding not only the design, manufacture and installation of the boiling water reactors at the FNPP but also possible choice-of-law and venue provisions therein. Questions regarding the breakdown in operational responsibilities at FNPP, including the role GE played in the plant's operation and maintenance, might be critical. In addition, discovery could shed light on exactly what information TEPCO had about the incoming U.S. naval vessels that carried Plaintiffs to the area, when it had that information, and what were the details regarding the dissemination of that information. When as here such information is under Defendants' exclusive control, Plaintiffs ought to have the right to discover that information prior to briefing. Simple fairness dictates

that a "complete factual record must be before the court for it to conduct the thorough and complex choice-of-law analysis required here." ER 304.

### 2. The District Court Erred in Concluding that Japanese Law Rather Than California Law Should Govern This Case

Assuming that this Court accepts the district court's decision to rule on the choice-of-law question at the motion to dismiss stage, Plaintiffs contend that the lower court erred by holding that Japanese law rather than California law should apply.

At the outset, Plaintiffs agree with the district court that the law of the forum determines the choice-of-law rules to be applied in a diversity jurisdiction case. ER 9 (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496 (1941) and *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484 (9th Cir. 1987)). California being the forum, it necessarily follows that California's choice-of-law rules will govern.

Plaintiffs also agree that California applies a three-part "governmental interest" test in these situations:

> First, the court examines the substantive law of each jurisdiction to determine whether the laws differ as applied to the relevant transaction. Second, if the laws do differ, the court must determine whether a "true conflict" exists in that each of the relevant jurisdictions has an interest in having its law applied. "If only one jurisdiction has a legitimate interest in the application of its rule of decision, there is a 'false conflict' and the law of the interested

> jurisdiction is applied." On the other hand, if more than one jurisdiction has a legitimate interest, "the court must move to the third stage of the analysis, which focuses on the 'comparative impairment' of the interested jurisdictions. At this stage, the court seeks to identify and apply the law of the state whose interest would be the more impaired if its law were not applied.

ER 10 (quoting *Abogados v. AT&T Inc.*, 223 F.3d 932, 934 (9th Cir. 2000) (internal citations omitted)). "The law of California will therefore dictate which forums [sic] law will apply to this case." *Id*. at 11.

Where Plaintiffs part company with the lower court is in its conclusion that Japan's Act on Compensation for Nuclear Damage, Act No. 147 of 1961 ("Compensation Act"), and in particular its "channeling" provision, is substantive rather than procedural in nature because its application to the facts of this case would have a significant bearing on the outcome of the case. ER 11 (citing *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) for the proposition that an issue is substantive if the application of foreign law, rather than the law of the forum, "significantly affect[s] the result of a litigation"). In reaching this conclusion, the district court stated that "Plaintiffs have provided no authority to support their assertion that application of the Compensation Act's channeling provision is procedural." *Ibid*. That is incorrect.

Plaintiffs argued at considerable length that the application of the Compensation Act's channeling provision would be inappropriate under choice-

of-law analysis, as it would effectively strip the district court of jurisdiction over GE, because under the Compensation Act, "only the licensed operator of a nuclear power plant is exclusively responsible for damages from a nuclear accident[,]" and TEPCO, not GE, is the operator thereof. ER 295.

> Such stripping of "jurisdiction," as with all jurisdictional questions, are a result and determination that lies outside of choice of law considerations. It is well established that jurisdiction and choice of law constitute different analyses. *Tucci v. Club Mediterranee*, 89 Cal. App. 4th 180, 185-86 (2001) (California courts distinguish jurisdictional considerations and choice of law principles).
>
> Underlying this distinction between jurisdiction and choice of law is an understanding that choice of law only concerns itself with which ***substantive*** law is most appropriate to apply, i.e., the law of the state whose interest would be the more impaired if its law were not applied. *Tucci,* 89 Cal. App. 4th at 189; *In re Pizza Time Theatre Sec. Litig*., 112 F.R.D. 15, 18 (N.D. Cal. 1986). Jurisdictional considerations on the other hand are considered ***procedural*** laws, which are merely the mode by which a legal substantive right, i.e., that part of the law which creates, defines and regulates rights and duties of the parties, is enforced. *World Wide Imports, Inc. v. Bartel,* 145 Cal. App. 3d 1006, 1012 (1983). The question of jurisdiction is procedural and not substantive. *McGee v. International Life Insurance Company*, 355 U.S. 220, 224 (1957); *Chavez v. Keat,* 34 Cal. App. 4th 1406 (1995); *World Wide Imports., Inc.*, 145 Cal. App. 3d at 1012-13 (it is well established that while the courts generally enforce the substantive rights created by the laws of other jurisdictions, the procedural matters are governed by the law of the forum).
>
> Therefore, GE's choice of law argument requesting this Court to adopt the Japanese Compensation Act's channeling provision is merely a request for this Court to adopt a foreign jurisdictional restriction, which, as it is procedural in nature, is unavailing in a

> choice of law analysis. *See, World Wide Imports*, 145 Cal. App. 3d at 1012 (a foreign procedural provision should not be applied by the forum in which the litigation is prosecuted)**.** Thus, under the first prong of California's choice of law "government interest" test, GE fails to show that there is indeed a true "conflict" of substantive law and, as the following will show, only California has an interest in applying its law (and/or federal law). *See, Wash. Mut. Bank v. Superior Court*, 24 Cal. 4th 906 (Cal. 2001) (even when a material difference exists between the laws, no true conflict exists where only one state has an interest in applying its law to the case at hand.) Accordingly, choice of law counsels against application of the Japanese Compensation Act's channeling provision.

ER 295-96 (emphasis in original).

With respect to the first prong of California's choice-of-law "governmental interest" test, the parties agree, and the district court found, that the relevant laws of Japan and California seriously differ. "Under Japanese law, the Compensation Act applies. The Compensation Act channels liability for nuclear damage exclusively to the licensed operator of a nuclear installation. The Parties agree that, if the Court were to apply this Act, it must dismiss all claims against GE." ER 11-12 (internal citation omitted). By way of contrast, "California law holds the manufacturer liable if a product is defective." *Id*. at 12 (citing *Hufft v. Horowitz*, 4 Cal. App. 4th 8, 13 (1992) (citing *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 428 (1978)).

Turning to the second prong of California's "governmental interest" test, the district court correctly determined that California has a strong interest in seeing

that its strict products liability laws be applied to the instant case. ER 12-14. The purpose behind California's strict products liability law

> "is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." . . . The other purposes, or public policies, behind the creation of the doctrine of strict products liability in tort as a theory of recovery are: "(1) to provide a 'short cut' to liability where negligence may be present but difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce the reallocation of resources toward safer products; and (4) to spread the risk of loss among all who use the product."

ER 13 (quoting *Barrett v. Super. Ct.*, 222 Cal. App. 3d 1176, 1186 (1990) (internal citations omitted). The court went on to note the forum's strong interest in other areas, including protecting U.S. servicemen and servicewomen who are citizens of and/or stationed in California, as well as the state's strong interest in encouraging businesses to manufacture safe products, "regardless of whether these products will affect California residents." *Ibid*. (citing *Hurtado v. Super. Ct.*, 11 Cal. 3d 574, 583-84 (1974)). Perhaps most importantly, "California also has an interest in deterring defective nuclear power plants, both through the strict liability imposed in California for defective products and the availability of punitive damages. These are significant interests that apply whether or not Plaintiffs reside in California." *Id*. at 13-14.

The district court then identified three areas of interest for Japan in seeking to apply its own law to the case: (1) determining the allocation of liability for the harm occurring on Japanese territory; (2) Japan as the place of the wrong; and (3) applying Japanese law in the form of the Compensation Act. While Plaintiffs agree that these interests may exist for Japan, they strongly disagree with the court's conclusion "that Japan also has a *strong* interest in resolving the issues surrounding the incident[.]" ER 15 (emphasis added).

We now turn to the third and final "comparative impairment" prong of California's choice-of-law test. It is most definitely here that Plaintiffs disagree with the lower court's analysis and especially its conclusion that "Japan's interests would be 'more impaired' if its law was not applied to this matter." ER 18.

The district court began by declaring that it "finds no convincing support for Plaintiffs' assertion that Japanese law will leave them with 'minimal and insufficient damages' requiring the U.S. Government or California to pick up the financial balance." ER 16. However, Plaintiffs expressly pointed out – and GE conceded – that the Compensation Act was designed to protect businesses by limiting their liability, not remunerate individuals who suffered loss; thus,

Plaintiffs as individual servicemen and servicewomen are not the types of "persons" contemplated by the Act for remuneration.[7] ER 297-98.

As for the location of the tort being a factor, Plaintiffs pointed out that the place of the tort was not only in Japan but on the naval vessels themselves and where the harm was suffered. More to the point,

> it is a longstanding tenet of California law that "when application of the law of the place of the wrong would defeat the interests of the litigants and of the states concerned, [courts] have not applied that law." *Reich v. Purcell*, 67 Cal. 2d 551, 554 (1967); see Restatement § 6 cmt. j (simplicity of choice-of-law inquiry "should not be overemphasized, since it is obviously of greater importance that choice-of-law rules lead to desirable results"). Similarly, courts have also foreclosed a non-resident corporation from relying on a foreign damage law to limit damages. *See, Marsh v. Burrell*, 805 F. Supp. 1493, 1499 (N.D. Cal. 1992); *Munguia v. Bekins Van Lines LLC*, 2012 U.S. Dist. LEXIS 151596, at *25-30 (E.D. Cal. Oct. 19, 2012) (where the connection between Defendants and the foreign forum is so limited, foreign interests are minimal); *Reich*, 67 Cal. 2d at 552 (the state of the place of the wrong has little or no interest in compensation for negligent conduct when none of the parties reside there.) Thus, GE, a U.S. corporation without formal residence in Japan is foreclosed from relying on the Japanese Compensation Act as grounds for excusing itself from holding any responsibility for Plaintiffs' damages.

ER 301-302.

---

[7] *See also* ER 300 & n.2, arguing that uncompensated and undercompensated Plaintiffs facing mounting medical and pension costs as a result of the Fukushima disaster will necessarily become a burden on the state of California and the federal government.

Simply put, there is no comparison under the "comparative impairment" prong. California has an overwhelming interest in seeing that this case remains here and GE continue as a party-defendant, subject to the laws of California regarding liability for its wrongdoing. Allowing the lesser interests of Japan to trump those of California will allow GE to escape, scot-free. Accordingly, the district court erred by concluding that Japanese law should apply to allow GE to evade liability.

### C. GE's Remaining Arguments Are Meritless[8]

#### 1. The Case Ought Not Be Dismissed For Forum Non Conveniens

It has long been recognized that dismissal under the doctrine of *forum non conveniens* is a drastic remedy that should only be applied rarely, and then only narrowly and under "exceptional circumstances." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 509 (1947). *Accord, Colorado River Conserv. Dist. v. United States*, 424 U.S. 800, 813 (1976); *Quackenbush v. Allstate Ins. Co*., 517 U.S. 706, 722 (1996). "A party moving to dismiss based on *forum non conveniens* bears the burden of showing (1) that there is an adequate alternative forum, and (2) that the

[8] For the reasons set forth in footnote 6, *supra*, Plaintiffs briefly discuss in this section the other arguments raised by GE in support of its motion to dismiss despite their not having been addressed by the district court.

balance of private and public interest factors favors dismissal." *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002).

Plaintiffs do not concede that Japan is an adequate forum. However, in light of the Ninth Circuit's ruling in the prior appeal, Plaintiffs will focus their arguments on the public and private factors.

> The private factors include the following:
> (1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive.

*Cooper v. Tokyo Elec. Power Co*., 860 F.3d at 1211. All Plaintiffs and GE reside in the United States, as well as nearly all witnesses, which means (obviously) that California is a far more convenient forum than would be Japan. Because Plaintiffs' claims against GE turn on design and manufacturing defects, most of which occurred in the United States, access to physical evidence would be easier here than in Japan. GE has proffered no evidence of unwilling witnesses being compelled to appear and testify. As for the remaining factors, neither cost nor enforceability of judgment nor other issues pose any problem if the case remains in California. *See* ER 307-309 for a more detailed treatment of these factors.

The public interest factors relevant to a *forum non conveniens* analysis also favor maintaining the action in California. These include "(1) the local interest in the lawsuit, (2) the court's familiarity with the governing law, (3) the burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular forum." *Cooper,* 860 F.3d as 1211. Ultimately these turn on choice-of-law and, for the reasons already set forth above in section B.2 and at ER 309-311, Plaintiffs respectfully submit that GE's argument on *forum non conveniens* fails.

**2. The Case Ought Not Be Dismissed For A Political Question**

This argument need not detain the panel, as it was already decided — and rejected — in this Court's prior decision. *See Cooper,* 860 F.3d at 1215-17 (effectively holding that no political question was raised by the allegations in Plaintiffs' complaint, and that further factual development and a determination of the relevant law were necessary to make any such ruling). With no discovery and only limited briefing on the choice-of-law issue, any ruling on political question at this stage would be, at best, premature and at worst improper. *See also* ER 311-14.

**3. GE's Remaining Arguments Are Unavailing**

At the risk of being accused of giving short shrift to arguments the district court did not touch on and GE may not even (re)assert in its Answering Brief

("AAB"), Plaintiffs would respectfully direct the Court to pages 314-34 of the ER for a full and detailed treatment of GE's other asserted grounds for dismissal. Should GE (re)assert any or all of these in its AAB, Plaintiffs will address them in its Reply Brief ("ARB").

---

## II. TEPCO's Motion To Dismiss

TEPCO urged three grounds for dismissing Plaintiffs' TAC: (1) want of personal jurisdiction under Fed. R. Civ. P. 12(b)(2); (2) *forum non conveniens* and international comity; and (3) failure to state a claim under Fed. R. Civ. 12(b)(6). ER 371. Each of these arguments will be addressed in its turn.[9]

### D. The District Court Properly Found That It Had Personal Jurisdiction Over TEPCO, And That TEPCO Had Waived Any Such Defense

In its motion to dismiss, TEPCO argued at length that it should be allowed to assert the defense of lack of personal jurisdiction – despite the fact that it had appeared and vigorously defended the case for five years – because an intervening decision now provided it with a jurisdictional defense it lacked before. *See* ER 384-400. In a nutshell, TEPCO argued that the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. –,137 S. Ct. 1773 (2017), which rejected the California Supreme Court's expansive "sliding scale" approach to specific personal jurisdiction in favor of a "straightforward application . . . of

[9] In saying this, Plaintiffs note that the district court did not squarely touch on TEPCO's third (and alternative) ground, *viz.*, dismissal for failure to state a cognizable claim. However, implicit throughout the lower court's handling of TEPCO's arguments is the recognition that Plaintiffs' claims are legally cognizable and therefore not subject to dismissal under Fed. R. Civ. P. 12(b)(6). *See* ER 20-30. Accordingly, Plaintiffs will not address that contention here. However, the 12(b)(6) argument is discussed at length in Plaintiffs' Memorandum in Opposition. *See* ER 194-97.

settled principles of personal jurisdiction," 137 S. Ct. at 1778, 1783, undercut prior Ninth Circuit law upon which jurisdiction over TEPCO had rested. *See* ER 392 (*citing Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemittisme*, 433 F.3d 1199, 1210 (9th Cir. 2006) (en banc)). That is incorrect.

It is black letter law that "a defendant waives any personal jurisdiction objection if it omits it from a previous motion filed under Rule 12 or fails to raise the issue in its responsive pleading." ER 20 (citing Fed. R. Civ. P. 12(h)(1) and *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983)). Fed. R. Civ. P. 12(g)(2) provides an exception for those situations in which a particular defense or objection was unavailable at the time. The question, therefore, is whether *Bristol-Myers* created something that did not exist before and only became "available" afterwards.

The district court's analysis on this point bears quoting at length:

> The Court is not convinced that the *Bristol-Myers* opinion constituted a change in the law adequate to revive TEPCO's personal jurisdiction defense. TEPCO claims that its business relationship with GE would have been enough to assert personal jurisdiction over it under then-current Ninth Circuit precedent, which, according to TEPCO, applied the same "sliding scale" approach the Supreme Court rejected. TEPCO MTD at 20 (citing *Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 433 F. 3d 1199, 1210 (9th Cir. 2006) (en banc)). But in *Bristol-Myers*, the Supreme Court specifically noted that it has previously held that "'a defendant's relationship with a . . . third party, standing alone, is an insufficient basis for jurisdiction.'" *Bristol-Myers*, 137 S. Ct. at 1781 (quoting *Walden v. Fiore*, 571 U.S.

277, 286 (2014) (citing *Rush v. Savchuk*, 444 U.S. 320, 332 (1980) ("Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe,* however, must be met as to each defendant over whom a state court exercises jurisdiction")) (emphasis added). Indeed, the Supreme Court has long held that "[d]ue process requires that a defendant be haled into court in a forum State based on [its] own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts [it] makes by interacting with other persons affiliated with the State." *Walden*, 571 U.S. at 286 (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462*,* 475).

Moreover, a fair reading of *Yahoo!* does not support TEPCO's contention that raising a personal jurisdiction defense would have been futile prior to *Bristol-Myers*. In *Yahoo!*, the Ninth Circuit noted that, "[i]n a specific jurisdiction inquiry, we consider the extent of the defendant's contacts with the forum and the degree to which the plaintiff's suit is related to those contacts. A strong showing on one axis will permit a lesser showing on the other." *Yahoo! Inc.*, 433 F.3d at 1210. In the context of that case, this unremarkable statement merely meant "[a] single forum state contact can support jurisdiction if 'the cause of action . . . arises out of that particular purposeful contact of the defendant with the forum state,'" *id.* (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987), a holding not in disagreement with *Bristol-Myers*. The Court is unable to find a case stretching *Yahoo!* to
find specific jurisdiction in a case factually similar to *Bristol-Myers*. Thus, nothing in *Yahoo!* convinces the Court that, had TEPCO raised a personal jurisdiction defense earlier in the litigation, the Court would have had no choice but to assert jurisdiction over TEPCO on the current facts.

Because TEPCO previously filed a motion to dismiss and failed to raise the personal jurisdiction defense there, *see* ECF No. 26, TEPCO waived its jurisdictional challenge and may not raise it here. *See Alvarez v. NBTY, Inc.*, 2017 WL 6059159, at *6-7 (S.D. Cal. Dec. 6, 2017) (finding defendants waived personal jurisdiction defense because *Bristol- Myers* did not change Ninth Circuit law); *see also*

*Sloan v. General Motors LLC*, 287 F. Supp. 3d 840, 854 (N.D. Cal. 2018) (same).

ER 21-23. Accordingly, and for the reasons set forth more fully in Plaintiffs' detailed treatment of this line of argument, *see* ER 157-76, TEPCO's belated argument that personal jurisdiction was somehow lacking must fail.

### E. The District Court Erred By Dismissing Plaintiffs' Claims Against TEPCO On International Comity Grounds, Based On Its Determination That Japanese Law Should Apply

For the reasons already set forth above and as explained more fully (and in considerable detail) in Plaintiffs' Memorandum in Opposition, the district court erred both by deciding the choice-of-law question at this stage (i.e., without discovery and based on inadequate briefing) and in concluding that Japanese law ought to apply. *See* arguments set forth at pp. 14-23 above and in ER 176-94.

Both the district court and this Court on appeal previously held that private as well as public *forum non conveniens* factors tilt in favor of maintaining these claims here in the United States. After a thorough and comprehensive analysis of all the relevant factors, the lower court concluded that "although Japan is an adequate alternative forum, the balance of the private and public interest factors suggests that it would be more convenient for the parties to litigate in a U.S. court." *Cooper v. Tokyo Elec. Power Co., Inc.*, 166 F. Supp. 3d 1103, 1136 (S.D. Cal. 2015). This Court agreed, upholding the district court's determination that

policy considerations do not require dismissal based on *forum non conveniens*. *Cooper,* 860 F.3d at 1211. *See also* ER 182-87 for a searching and careful analysis of the private and public interest factors as specifically applicable to TEPCO.

After erroneously concluding that Japanese law ought to govern based on its choice-of-law analysis, the district court noted the following:

> Prior to the Ninth Circuit appeal in these proceedings, neither the Japanese government nor the United States government expressed an interest in the location of this litigation. This Court cited that fact as a reason for maintaining jurisdiction, and the Ninth Circuit subsequently noted that, "when a country in question expresses no preference [to the location of the litigation], the district court can take that fact into consideration." *Cooper*, 860 F.3d at 1206. When "a foreign county[] request[s] that the United States court dismiss a pending lawsuit in favor of a foreign forum[, it] is a significant consideration weighing in favor of dismissal." *Id.* (citing *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2nd Cir. 1998)).

ER 27-28.

That changed when, during the pendency of the first appeal, the Japanese government submitted an *amicus* brief indicating that it now wanted these claims to be litigated in Japan. *Id*. at 28. The U.S. government's position, however, did not change, nor have the interests of any of the parties – most especially not those of the 239 Plaintiffs. Thus, there is no "new" development after years of litigating this case, other than

the fact that the Japanese government changed its mind about where these claims ought to be litigated and what law should control.

With all due respect to the district court, nothing has changed except for the court's willingness to revisit the issue of international comity and decide to punt this case to Japan.[10] The U.S. government's interest is that the case remain here, the interests of the 239 Plaintiffs are that the case remain here, and California's interest in having this case – which has now been litigated here for years – be resolved here. Simply put, by erroneously concluding that Japanese law ought to apply, the district court abused its discretion by deciding that the case should be dismissed, albeit without prejudice to its being refiled in Japan.

---

This case is a factually and legally complex one, but to avoid missing the forest by focusing on the trees, Plaintiffs ask that this Court keep certain key points in mind:

1) Regardless whether this case is seen as a "class action" or as a combination of "mass tort lawsuits," there is no reason why it should not continue

[10] TEPCO identified two other "significant changes" since the first round of litigation, *viz*., TEPCO's altered ties to California during the preceding five years and the shift from a civil tort case based on negligence to one grounded in strict liability under Japanese law. *See* ER 29. The district court correctly rejected both of these contentions, pointing out that they did not shift the scales in favor of dismissal. *Ibid*.

to be venued in California. Witness, for example, the fact that the numerous lawsuits filed against Monsanto on behalf of U.S. nationals are venued in San Francisco, even though Monsanto, a Missouri corporation, is now owned by Bayer, a foreign – *viz*., German – for-profit corporation.

2) Just as Monsanto lied about the potential carcinogenic effects of its product, Roundup, and manipulated science and public opinion, so TEPCO lied about the situation at the FNPP and the safety of its production of nuclear power, then sought – and continues to attempt – to manipulate public opinion as well as the district court about the manner and scope of compensation paid to victims in its efforts to dismiss Plaintiffs' legitimate claims.

3) Defendants' *forum non conveniens* arguments, while not squarely addressed by the district court, do not satisfy the conditions set forth by this Court in *Mujica*, and the lower court's conclusion that Japan affords an alternative *adequate* jurisdiction was based solely upon *ipse dixit* arguments from Defendants' experts and counsel.

4) The onus was upon Defendants to present clear and incontrovertible evidence that the Japanese forum does not deprive Plaintiffs of due process and equal protection of law to which they are entitled. As a practical and legal matter, the disparities between the American justice system and Japan's with regard to the

prosecution of Plaintiffs' claims and the opportunity to seek complete compensation are too voluminous to ignore.

Finally, the recent Supreme Court decision in *Apple, Inc. v. Pepper*, 587 U.S. –, 139 S. Ct. 1514 (2019), while not directly relevant to the instant appeal, is illustrative of an emerging trend in class actions. That trend is to permit third parties who are harmed, even indirectly, by a product to sue the manufacturer of that product as well as the retailer to seek redress for the harm suffered. Plaintiffs, who were indirectly harmed by a product (Mark 1 GE reactors), should be allowed to sue both GE as the manufacturer and TEPCO as the seller of nuclear power here in the US to seek redress for that harm. Simply put, our U.S. service member class in their federal lawsuit should enjoy the same right as Apple cell phone purchasers.

## CONCLUSION

For the reasons set forth above, the decision of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted this 24th day of July, 2019.

By: /s/ Charles A. Bonner, Esq. /

Charles A. Bonner, Esq.
Law Office of Bonner & Bonner
475 Gate Five Road, Suite 212
Sausalito, CA 94965
(415) 331-3070

By: /s/ John R. Edwards, Esq. /

John R. Edwards, Esq.
Edwards Kirby, LLP
3201 Glenwood Avenue, Suite 100
Raleigh, NC 27612
(919) 780-5400

*Of Attorneys for Appellants*

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 9th Cir. R. 32-1, I certify that the attached opening brief is proportionately spaced, has a typeface of at least 14 points, including headings and footnotes, and contains 8,048 words.

Respectfully submitted this 24th day of July, 2019.

By: /s/ Charles A. Bonner, Esq. /

Charles A. Bonner, Esq.
Law Office of Bonner & Bonner
475 Gate Five Road, Suite 212
Sausalito, CA 94965
(415) 331-3070

By: /s/ John R. Edwards, Esq. /

John R. Edwards, Esq.
Edwards Kirby, LLP
3201 Glenwood Avenue, Suite 100
Raleigh, NC 27612
(919) 780-5400

*Of Attorneys for Appellants*

## STATEMENT OF RELATED CASES

Appellants are aware of one other appeal involving some of the same parties and raising similar legal issues: *Dustin Bartel, et al. v. Tokyo Electric Power Company Holdings, Inc. and General Electric Co.,* No. 19-55442

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a member of the bar of this Court in good standing, and that he electronically filed the foregoing Appellants' Opening Brief 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 this 24th day of July, 2019. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ Charles A. Bonner, Esq. /

Charles A. Bonner, Esq.
Law Office of Bonner & Bonner
475 Gate Five Road, Suite 212
Sausalito, CA 94965
(415) 331-3070

*Of Attorneys for Appellants*