No. _____

IN THE

Supreme Court of the United States

OCCIDENTAL PETROLEUM CORPORATION, *et al.*,

Petitioners,

v.

TOMAS MAYNAS CARIJANO, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in an action brought by foreign plaintiffs for alleged injuries occurring in a foreign country to foreign land and foreign citizens, the foreign plaintiffs can obtain a strong presumption in favor of a U.S. forum by adding a nominal U.S. plaintiff for the tactical purpose of defeating a *forum non conveniens* dismissal.

2. Whether a federal court may assume hypothetically that it has Article III jurisdiction for the purpose of *denying* a *forum non conveniens* dismissal and *retaining* a case in federal court.

PARTIES TO THE PROCEEDINGS

Petitioners are Occidental Petroleum Corporation and Occidental Peruana, Inc.

Respondents are Tomas Maynas Carijano, Roxana Garcia Dahua, Rosario Dahua Hualinga, Nilda Garcia Sandi, Rosalbina Hualinga Sandi, Elena Maynas Mozambite, Gerardo Maynas Hualinga, Alan Cariajano Sandi, Pedro Sandi Washington, Elisa Hualinga Maynas, Daniel Hualinga Sandi, Andrea Maynas Cariajano, Cerilo Hualinga Hualinga, Roman Hualinga Sandi, Rosa Hualinga, Rodolfo Maynas Suarez, Horacio Maynas Cariajano, Delmencia Suarez Diaz, Katia Hualinga Salas, Alejandro Hualinga Chuje, Linsa Salas Pisongo, Francisco Panaifo Paima, Milton Panaifo Diaz, Anita Paima Cariajano, Adolfina Garcia Sandi, and Amazon Watch Inc.

RULE 29.6 DISCLOSURE

Occidental Petroleum Corporation is a publicly traded corporation. It has no parent corporations and no publicly traded corporation owns more than 10% of its stock. Occidental Peruana, Inc. is a wholly owned subsidiary of Occidental Petroleum Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Occidental Petroleum Corporation and Occidental Peruana, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 643 F.3d 1216. The court of appeals' order denying rehearing and the respective opinions dissenting from, and concurring in, that denial (Pet. App. 105a-118a) are reported at 686 F.3d 1027. A prior opinion from the court of appeals (Pet. App. 40a-82a), which was subsequently withdrawn and replaced by the current opinion, is reported at 626 F.3d 1137. The district court's order granting dismissal under *forum non conveniens* (Pet. App. 83a-102a) is reported at 548 F. Supp. 2d 823.

JURISDICTION

The Ninth Circuit entered its initial judgment on December 6, 2010. The court of appeals thereafter granted Petitioners' timely petition for panel rehearing and entered a new opinion and judgment on June 1, 2011, without prejudice to filing a renewed petition for rehearing. Petitioners again timely sought rehearing and rehearing en banc, and the court of appeals denied rehearing on May 31, 2012. On August 20, 2012, Justice Kennedy extended the time to file a petition for certiorari until September 28, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, section 2, of the Constitution provides, in relevant part, that the "judicial Power shall extend" to specified "Cases" and "Controversies".

INTRODUCTION

In its 2-1 opinion in this case, the Ninth Circuit rewrote the standards for evaluating *forum non conveniens* motions in a manner that directly conflicts with this Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), that creates a circuit split with the D.C. and Second Circuits, and that threatens substantially to limit the availability of *forum non conveniens* dismissals. Moreover, in order to issue its flawed ruling on *forum non conveniens*, the Ninth Circuit improperly "resurrect[ed]" the "doctrine of hypothetical jurisdiction" by skipping over a jurisdictional issue in order to *retain* a case in a U.S. court—thereby prompting a vigorous published dissent from five judges sharply criticizing the failure to rehear this case en banc. Pet. App. 110a. This Court should grant certiorari to resolve the conflicts of authority created by the Ninth Circuit's decision and to address the important questions presented.

This suit was filed in 2007 by 25 Peruvian citizens (Respondents here), who alleged that the pre-2000 oil operations of Petitioner Occidental Peruana, Inc. ("Oxy Peruana") in Peru had harmed the local environment. In addition to money damages, Respondents sought to have the district court oversee the environmental remediation of Peruvian lands and medical monitoring of hundreds of Peruvian villagers. After Petitioners stated that they would seek dismissal under *forum non conveniens*, Respondents amended their complaint to add a U.S. public interest

organization (Respondent Amazon Watch) as a 26th co-plaintiff asserting only a duplicative claim for injunctive relief. The district court held that the addition of a nominal domestic plaintiff did not merit giving strong deference to Respondents' choice of a U.S. forum. After evaluating the relevant factors, the court dismissed the suit under *forum non conveniens*.

In a 2-1 decision, a panel of the Ninth Circuit reversed. According to the majority, Amazon Watch was "*entitled* to a *strong presumption* that its choice of forum was convenient," Pet. App. 21a (emphasis added), and the majority relied on Amazon Watch's presence in the suit to second-guess nearly every aspect of the district court's analysis. In doing so, the Ninth Circuit directly contravened this Court's decision in *Piper Aircraft*, which held that a foreign plaintiff's choice of a U.S. forum is *not* entitled to strong deference and that this rule applies even where (as in *Piper Aircraft* itself) there is a nominal U.S. plaintiff but the real parties in interest are foreign. Moreover, the panel majority created a circuit split with the D.C. and the Second Circuits, both of which have held that the tactical addition of a single U.S. co-plaintiff to defeat *forum non conveniens* does not merit applying substantial deference to the choice of a U.S. forum. *See Pain v. United Techs. Corp.*, 637 F.2d 775 (D.C. Cir. 1980); *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d. Cir. 2001) (en banc).

This issue is one of exceptional significance given the importance of the doctrine of *forum non coveniens*, particularly in light of the growth of transnational litigation, both in the Ninth Circuit and elsewhere. The Ninth Circuit's decision threatens to eviscerate the utility of this important doctrine, because future plaintiffs can be expected to use this

same artifice of adding a nominal U.S. co-plaintiff in order to defeat a *forum non conveniens* dismissal.

The decision below warrants review for the further reason that, in using Amazon Watch's presence as the sword to reverse the district court's *forum non conveniens* dismissal and to retain this case in federal court, the panel improperly *assumed* that Amazon Watch had Article III standing. The Ninth Circuit's approach directly conflicts with *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007), which held that courts may defer deciding jurisdiction—which otherwise must ordinarily be decided first—only for the purpose of *dismissing* a case on other non-merits grounds. As Chief Judge Kozinski, joined by four other judges, stated in dissent from denial of rehearing en banc, *Sinochem* does not permit courts to engage in the "boot-strap overreach" of assuming hypothetical jurisdiction in order to *deny* a *forum non conveniens* motion and *retain* a case in federal court. Pet. App. 114a.

The Ninth Circuit's departures from the settled law established by this Court are sufficiently clear that this Court should consider granting the petition and summarily reversing the court of appeals' judgment. In all events, the petition should be granted.

STATEMENT OF THE CASE

1. This suit was filed in 2007 in the Los Angeles Superior Court by 25 Peruvian citizens (Respondents here), all of whom are members of the Achuar indigenous group and who reside in a remote region of northeastern Peru. *See* Ct. of App. Excerpts of Record ("ER") 19-24, 27-28, 30-31.

Respondents allege that they have been injured, and run an increased risk of future illness, as a result of their exposure to pollutants allegedly discharged during the operation of certain oil exploration facilities previously operated by Oxy Peruana in a nearby area known as Block 1-AB. ER 27-28. As Respondents' complaint notes, Oxy Peruana ceased operating the facilities when it sold its stake in Block 1-AB to "Pluspetrol, an Argentine oil company" nearly 12 years ago, in 2000. ER 28, 35; *see also* Ct. of App. Supp. Excerpts of Record ("SER") 200.

Respondents allege that Oxy Peruana failed to take reasonable measures to prevent contamination to the environment during the time in which it extracted oil from Block 1-AB. ER 30. Specifically, Respondents allege that Oxy Peruana released "produced water" (*i.e.*, water that is extracted along with oil in the drilling process), which allegedly contained heavy metals in quantities harmful to human health, into the tributaries of nearby rivers. ER 29. Respondents also claim that Oxy Peruana allowed chemical wastes, including heavy metals, to seep into the ground from improperly lined earthen pits. ER 30. Respondents contend that "[c]ontact with these compounds, directly and indirectly, has led to health problems among the Achuar people." ER 31.

Respondents also allege that the current operator, Pluspetrol, which was not named as a defendant, thereafter failed to remedy the alleged pre-2000 pollution and "continues to discharge produced water in the same manner as Oxy, continues to store toxic chemicals and wastes improperly, and continues to spill crude oil and other contaminants." ER 34-35. Respondents nonetheless assert that their injuries were caused by the pre-2000 contamination allegedly

committed by Oxy Peruana, rather than the post-2000 conduct of Pluspetrol. ER 41.

Based on these allegations, Respondents assert a variety of claims against Oxy Peruana and its ultimate parent company, Petitioner Occidental Petroleum Corporation ("OPC").[1] Specifically, Respondents purport to represent two overlapping putative classes, one composed of "all children and young adults" in five Peruvian villages (Antioquia, José Olaya, Nueva Jerusalén, Pampa Hermosa, and Saukí) who "have suffered or will suffer harmful health … impacts from exposure to lead," and the other composed of "all residents" of the same five villages "who have suffered or will suffer harmful health impacts from exposure to cadmium …." ER 42-43. On behalf of these classes, Respondents assert claims under theories of negligence, strict liability, battery, intentional infliction of emotional distress, and fraud, as well as claims for medical monitoring and for injunctive relief. ER 44-52, 54-57. Respondents also assert individual, non-class claims for nuisance and trespass, ER 53-54, and Respondent Adolfina Sandi asserts a claim for wrongful death, ER 50-51.

2. Petitioners timely removed the action to the United States District Court for the Central District of California under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). Petitioners then informed Respondents of their intention to move to dismiss the action based on *forum non conveniens*, and Respondents in turn stated that they intended to amend the complaint. SER 358-59.

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[1] Respondents' complaint contains no allegations of any specific conduct by OPC, and instead alleges, in conclusory terms, that OPC and Oxy Peruana were agents, co-conspirators, and alter egos of one another. ER 25-26.

Respondents' amended complaint retained unchanged the claims asserted by the 25 Peruvian plaintiffs, but it also added Respondent Amazon Watch, a U.S.-based corporation, as a 26th plaintiff.[2] The amended complaint alleges that Amazon Watch is a "Montana non-profit corporation with its principal place of business in San Francisco" and that the mission of the organization is to "defend the environment and rights of the indigenous peoples of the Amazon basin." ER 25. In furtherance of that mission, Amazon Watch accepted the Achuar's invitation in 2001 to visit Peru, and towards the end of that year, "representatives of Amazon Watch attended an assembly of the Achuar to hear community concerns about the impacts of Oxy on the Achuar territory." ER 36-37. Amazon Watch "gathered video footage of Lot 1AB" during that trip and later supported further efforts in 2002 and 2003 to obtain additional video documentation of the alleged "contamination Oxy had left" in Block 1-AB. ER 37. Thereafter, Amazon Watch undertook additional measures "to factually document the problems" around Block 1-AB and "to publicize them to the American public, Oxy shareholders and Oxy officials." ER 39.

Based on these allegations, Respondent Amazon Watch asserted only a single claim—it joined as a co-plaintiff in the *pre-existing* claim for injunctive relief asserted by the 25 individual Peruvian plaintiffs under California's Unfair Competition Law, Cal. Bus. &

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[2] At one point the Ninth Circuit's opinion mistakenly includes Amazon Watch as one of plaintiffs who filed this case in Los Angeles Superior Court. Pet. App. 5a. But as the opinion later confirms, Amazon Watch was not added as a plaintiff until *after* the suit had been removed to federal court. *Id*. at 8a.

Prof. Code § 17200 ("UCL"). ER 54-56.[3] Although Amazon Watch had not been injured by the alleged contamination in Peru and did not begin investigating the asserted pollution until one year *after* Oxy Peruana had ceased operations in Block 1-AB, Amazon Watch nonetheless claimed that it had standing to request injunctive relief. Amazon Watch's theory was that, as a result of Petitioners' alleged conduct, it had suffered "frustration of its mission, loss of financial resources, and diversion of its staff time to investigate and expose [Petitioners'] unlawful and unfair practices, hindering Amazon Watch's ability to carry out its mission of protecting the indigenous peoples of the Amazon." ER 55.[4]

3. Petitioners moved to dismiss the action under *forum non conveniens* and also separately moved to dismiss Amazon Watch on the ground that, *inter alia*, it lacks Article III standing to assert the sole claim it raises. The district court granted the former motion and dismissed the entire action without prejudice to refiling the claims in Peru. Pet. App. 83a-102a. The court did not reach the issue of Amazon Watch's standing, holding that it was moot in light of the *forum non conveniens* dismissal. *Id*. at 102a.

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[3] Although the complaint sought both injunctive and equitable monetary remedies under the UCL, ER 56, Amazon Watch later conceded that it could not obtain monetary relief. ER 293-96.

[4] Contrary to what the panel majority suggested (Pet. App. 19a), the amended complaint did not contend that, as an association, Amazon Watch had standing to assert the claims of its members. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). That theory was unavailable to Amazon Watch here, because California's UCL does not permit an organization to sue on such a theory. *See Amalgamated Transit Union v. Superior Court*, 209 P.3d 937, 944 (Cal. 2009).

In addressing *forum non conveniens*, the district court held that the threshold requirement of an adequate alternative forum was satisfied, because Petitioners were amenable to process in Peru and the evidence submitted in connection with the motion amply demonstrated that Peru provides sufficient remedies for Respondents' asserted injuries. *Id*. at 88a-96a.

In assessing the relative convenience of the fora, the district court considered the relevant "private interest" and "public interest" factors, and concluded that they favored Peru. *Id*. at 97a-102a. In evaluating these factors, the court acknowledged that, under *Piper Aircraft*, "there is a strong presumption in favor of a *domestic* plaintiff's choice of forum, which can be overcome only when the private and public interest factors clearly point towards trial in the alterative forum." *Id*. at 101a (emphasis added). The court held that this "strong presumption" was inapplicable here, because *Piper Aircraft* also held that any such presumption "applies to *foreign* plaintiffs' choice of forum 'with less force.' " *Id*. (quoting *Piper Aircraft*, 454 U.S. at 255) (emphasis added). Although Amazon Watch was a domestic plaintiff, it was named "in only one out of the twelve causes of action" in the amended complaint and the remaining "25 Achuar Plaintiffs are all residents of Peru." *Id*. Accordingly, the district court stated that it would "accord[] only some deference to Plaintiffs' choice of forum." *Id*.

Applying that more limited deference, the district court held that, upon "balancing the private and public interest factors, Peru stands out as the more convenient forum for this litigation." *Id*. at 101a-102a. In addressing the private interest factors—which focus on the parties' ability, in each forum, to obtain

the necessary witnesses and evidence to try the case fairly and conveniently—the district court found that these "factors weigh overwhelmingly in favor of dismissal." *Id*. at 99a. In particular, the court found that, "[a]lthough witnesses and documents are located in both fora, the facts of this case indicate that it centers primarily on Peruvian lands and Peruvian people, thus weighing in favor of dismissal." *Id*. at 97a. The court also noted that Respondents conceded that the many witnesses in Peru "are beyond the reach of compulsory process in the United States." *Id*. at 98a. Turning to the public interest factors—which consider each forum's interest in resolving the dispute—the court held that Peru had a substantially greater interest in the suit, because it "involves Peruvian lands and Peruvian citizens" and "environmental regulation of Peruvian territory." *Id*. at 99a-100a.

Respondents had argued that, if the suit were dismissed, a number of conditions should be imposed on dismissal, including a waiver of statute of limitations and an agreement to abide by the discovery rules contained in the Federal Rules of Civil Procedure. ER 368-77. Petitioners opposed these conditions as unwarranted. *See* D. Ct. Clerk's Record #61, at 3-7. In particular, Petitioners asserted that a waiver of the statute of limitations was unnecessary given that all parties agreed that—to the extent that the Peruvian statute of limitations had not already run when Respondents filed suit in May 2007—the statute was tolled during the pendency of the U.S. suit. *Id*. at 5. In dismissing the suit, the district court agreed with Petitioners that no conditions on dismissal were warranted other than Petitioners' submission to jurisdiction in Peru and the Peruvian court's acceptance of such jurisdiction. Pet. App. 103a-104a (judgment).

4. By a divided vote, a panel of the Ninth Circuit reversed. The panel majority's original opinion held *both* that Peru was an inadequate forum and that the district court's weighing of the public and private interest factors failed to apply the proper degree of deference to Plaintiffs' choice of forum. Pet. App. 44a-76a. The panel, however, subsequently granted Petitioners' petition for rehearing and issued an amended opinion holding that Peru *is* an adequate alternative forum but otherwise adhering to the panel's prior reversal. Pet. App. 5a-36a.[5]

a. The panel majority held that, in weighing the public and private interest factors, the district court erred in applying only "reduced deference" to Respondents' chosen forum. Pet. App. 21a. The majority acknowledged that *Piper Aircraft* had held that "a foreign plaintiff's choice deserves 'less deference,' " 454 U.S. at 255-56, but the panel held that such reduced deference was inapplicable here be-

[5] In its original opinion, the panel majority concluded that Peru was inadequate based in part on its assertion that Petitioners' Peruvian law expert (Dr. Osterling, the Dean of the country's leading law school), in a declaration submitted to the district court, had supposedly "acknowledged that '[c]orruption is present in all aspects of government,' including courts where 'low salaries of Judiciary personnel create a certain degree of tolerance for the phenomenon of corruption.' " Pet. App. 55a, quoting SER 227. But as Petitioners explained in their rehearing petition, the panel majority had flatly misquoted the declaration by taking Dr. Osterling's "summary of the principal criticisms" that *others* have leveled against the Peruvian judicial system (and with which he disagreed) and wrongly attributing them to Dr. Osterling himself. SER 227-29. While otherwise supporting the panel's holding that Peru was inadequate, Respondents' response to the rehearing petition conceded the panel's error in misquoting the declaration. Pltfs.' Resp. to Defts.' Rehearing Pet. 8 n.1, C.A. Dkt. #65 (Mar. 15, 2011).

cause Respondents had amended their complaint to add a *domestic* non-profit corporation (Amazon Watch) as a 26th plaintiff. Pet. App. 18a-21a. The majority instead held that "Amazon Watch was entitled to a strong presumption that its choice of forum was convenient." *Id*. at 21a.

The majority rejected Petitioners' argument that reduced deference was proper here because Amazon Watch had been added as "a 'tactical effort' to defeat a *forum non conveniens* dismissal." *Id*. at 19a. The majority held that, even assuming that Amazon Watch had been added for such tactical purposes, this was irrelevant. According to the panel, a "party's intent in joining a lawsuit is relevant to the balancing of the *forum non conveniens* factors only to the extent that it adds to an overall picture of an effort to take *unfair* advantage of an *inappropriate* forum." *Id*. (emphasis added). That was not the case here, the majority held, because the original 25 foreign plaintiffs had chosen Petitioners' "home forum" and because Amazon Watch had a pre-existing "involvement in the subject matter of the litigation" before it was filed. *Id*. at 20a.

The panel majority held that the district court's application of "reduced deference" and its failure to consider Amazon Watch in its analysis of numerous public and private interest factors "led the district court to misconstrue" multiple factors and "to strike an unreasonable balance between the factors and the deference due a domestic plaintiff's chosen forum." *Id*. at 35a-36a. In reviewing the district court's analysis of such factors, including the residence and convenience of the parties, the availability of witnesses and evidence, and the respective forums' interests in resolving the suit, the panel majority re-

peatedly placed significant weight on Amazon Watch's presence as a plaintiff. *Id*. at 22a-23a, 25a, 28a, 31a. Taken together, the panel held, the relevant factors "fail to outweigh the deference owed to Amazon Watch's chosen forum." *Id*. at 31a. Accordingly, the panel held that, "at this stage of proceedings … this lawsuit should proceed in the Central District of California." *Id*. at 36a.[6]

In so holding, the panel rejected Petitioners' argument that the jurisdictional issue of Amazon Watch's Article III standing—which Petitioners vigorously challenged—had to be resolved first. *Id*. at 16a-18a. Noting that this Court's decision in *Sinochem* allows a court to *dismiss* a suit based on *forum non conveniens* without first resolving jurisdiction, the panel construed *Sinochem* as "not limit[ing] its holding to cases where the district court opts for dismissal" but as also extending to cases in which jurisdiction is assumed in order to *deny* a *forum non conveniens* motion. *Id*. at 17a. Accordingly, the panel stated that it could properly "*assume* that Amazon Watch has standing for the purposes of the *forum non conveniens* analysis only." *Id*. at 18a (emphasis added).

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[6] Having held that the suit was improperly dismissed, the panel further concluded in dicta that the district court should have formally conditioned any *forum non conveniens* dismissal on Petitioners' "waiv[ing] any statute of limitations defenses that would not be available in California," so that the change in forum would not alter the parties' positions vis-à-vis the statute of limitations. Pet. App. 33a. The panel also stated that the district court had "failed to consider" whether Petitioners should be required to consent, in advance, to the enforceability of a Peruvian judgment in the U.S. and had failed adequately to consider whether Petitioners should have been required "to cooperate with discovery requests pursuant to the Federal Rules of Civil Procedure," even in Peru. *Id*. at 33a-34a.

b. Judge Rymer dissented from the panel's judgment and from most of its reasoning. In particular, she dissented from the panel's holding that Amazon Watch's addition to the suit required a strong presumption in favor of a U.S. forum:

> [The district court] took into account that 25 out of the 26 plaintiffs are Peruvian and that Amazon Watch is only one plaintiff on one out of the 12 causes of action. Amazon Watch was not originally a plaintiff in California state court, having been added only after the Peruvian plaintiffs learned that Occidental was going to move for dismissal based on *forum non conveniens*. The court could find that these circumstances lessen the deference due to the plaintiffs' choice of forum.

Pet. App. 37a. Applying reduced deference, Judge Rymer concluded that she could not "say that the district court abused its discretion in weighing the public and private interest factors," and she faulted the majority for instead "reanalyz[ing] whether to dismiss on grounds of *forum non conveniens* from scratch." *Id*.

5. On May 31, 2012, the en banc Ninth Circuit denied rehearing by a divided vote. Pet. App. 109a. Chief Judge Kozinski, joined by four other judges, dissented from the denial of rehearing, concluding that the panel's decision to assume Amazon Watch's standing for purposes of "let[ting] the entire case stay in federal court" amounted to an improper "resurrection" of the discredited "doctrine of hypothetical jurisdiction." *Id*. at 110a (internal quotation marks omitted). In the dissenters' view, *Sinochem*'s holding and rationale were limited to cases in which the jurisdictional issue was skipped so that the case could

"*ultimately be dismissed*" on other grounds. *Id*. at 111a (emphasis in original; internal quotation marks omitted).

Three judges issued an opinion concurring in the denial of rehearing en banc. *Id*. at 114a-118a.[7] The concurring judges disputed the dissenters' view that the panel's actions contravened *Sinochem*. In the concurrence's view, the panel could properly assume jurisdiction *arguendo* in order to deny a *forum non conveniens* motion, because such a ruling does not "touch upon the merits of the claims alleged in the complaint in any manner whatsoever." *Id*. at 114a.

REASONS FOR GRANTING THE PETITION

In holding that the tactical addition of a single domestic plaintiff requires a district court considering a *forum non conveniens* motion to apply a "strong presumption" in favor of a U.S. forum, the Ninth Circuit's decision sharply conflicts with *Piper Aircraft*, creates a split with two other circuits, and threatens seriously to undermine the availability of *forum non conveniens* in the Nation's largest and busiest circuit. *See* Section I *infra*. Moreover, by invoking the doctrine of hypothetical jurisdiction to *reject* a *forum non conveniens* dismissal, and to retain a case, the Ninth Circuit's decision directly conflicts with this Court's decision in *Sinochem*. *See* Section II *infra*. Certiorari should be granted.

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[7] The concurring judges were the two judges in the original panel majority and Judge Gould, who was drawn to replace Judge Rymer after she passed away in September 2011. The reconstituted panel, however, did not issue a new opinion or judgment when it denied the second rehearing petition, and the 2-1 decision issued in June 2011 remains the Ninth Circuit's opinion and judgment in this matter.

I. The Ninth Circuit Contravened *Piper Aircraft*, and Created a Circuit Split, in Holding That a "Strong Presumption" Applies in Favor of a U.S. Forum Even When a U.S. Plaintiff Is Added for the Tactical Purpose of Defeating *Forum Non Conveniens*

After being informed that Petitioners would file a *forum non conveniens* motion to dismiss their claims, the individual Respondents—25 Peruvian citizens seeking environmental remediation of Peruvian lands and medical monitoring of Peruvian citizens—added Respondent Amazon Watch as a nominal 26th co-plaintiff on only one of the 25 Peruvian plaintiffs' causes of action—namely, their claim for injunctive relief under California's Unfair Competition Law ("UCL"). Even though Amazon Watch has (at best) a redundant claim for injunctive relief, the panel majority rewarded Respondents' tactical maneuver by allowing Amazon Watch's presence to be the tail that wags the dog of this suit. In doing so, the panel rewrote settled *forum non conveniens* law in a way that warrants this Court's review.

A. The Ninth Circuit's Ruling Directly Contradicts *Piper Aircraft*

1. Under the doctrine of *forum non conveniens*, "a federal district court may dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem*, 549 U.S. at 425. As the first step in "any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *Piper Aircraft*, 454 U.S. at 254 n.22. If (as here) the foreign forum is adequate, then the district court must consider a variety of "private and public

interest factors," *id*. at 255, that reflect a "range of considerations, most notably the convenience of the parties and the practical difficulties that can attend the adjudication of a dispute in a certain locality," *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 723 (1996).[8] "[I]f the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Piper Aircraft*, 454 U.S. at 256 n.23.

Piper Aircraft held that, in weighing the private and public interest factors, a district court's analysis should be guided by certain presumptions that establish the appropriate level of deference to be given to the plaintiff's choice of a U.S. forum. 454 U.S. at 255-56. Where a *domestic* plaintiff has chosen its "home

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[8] In a footnote, the Court in *Piper Aircraft* listed a number of different "private" and "public" interest factors that may warrant consideration, depending upon the facts of a particular case:

> The factors pertaining to the private interests of the litigants include[] the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." … The public factors bearing on the question include[] the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

454 U.S. at 241 n.6 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)).

forum," it is "reasonable to assume that this choice is convenient" and there would ordinarily be "a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alterative forum." *Id*. "When the plaintiff is *foreign*, however," the assumption that convenience motivated the choice of forum "is much less reasonable." *Id*. at 256 (emphasis added). Accordingly, *Piper Aircraft* held that, "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice [of forum] deserves less deference." *Id*.

Applying these standards to the facts in *Piper Aircraft*, the Court held that the district court's decision to apply reduced deference to the "plaintiff's choice of forum was appropriate." 454 U.S. at 255. The claims in *Piper Aircraft* arose from a plane crash in Scotland that involved U.S.-made aircraft. The nominal plaintiff was a California resident who had been appointed executrix of the estates of the foreign decedents killed in the crash, and the defendants were U.S. companies that had manufactured the aircraft. The executrix filed suit in the Los Angeles Superior Court, later acknowledging that she had chosen a U.S. forum rather than a Scottish one because Scotland does not recognize strict liability in tort and limits standing and the scope of damages in wrongful death actions. *Id*. at 240. After the case was removed to federal court and transferred to the Middle District of Pennsylvania, the district court in *Piper Aircraft* held that, because the nominal U.S. plaintiff represented "*foreign* citizens" and was seeking the advantages of more favorable U.S. law, "plaintiff's choice of forum was entitled to *little weight*." *Id*. at 242 (emphasis added). The Third Circuit reversed, holding that "the plaintiff's

choice of forum deserved *substantial weight*," *id*. at 244 (emphasis added), but this Court reversed the court of appeals. The Court held that the district court's "distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified" and that the district court's application of a reduced level of deference "was appropriate." *Id*. at 255.

2. The Ninth Circuit directly contradicted *Piper Aircraft* in holding that strong deference must be given to a U.S. forum in a suit filed by foreign citizens, merely because a nominal domestic plaintiff has been added for the purpose of defeating *forum non conveniens*.

The relevant circumstances that led to the application of reduced deference in *Piper Aircraft* are all present here. As in *Piper Aircraft*, where the real parties in interest were foreign citizens suing a U.S. defendant in a U.S. court, 454 U.S. at 242, 255-56, here the action was filed by foreign plaintiffs against a U.S. defendant in a U.S. court, Pet. App. 8a. Likewise, in both cases, there was a U.S. person as a nominal plaintiff. In *Piper Aircraft*, the foreign plaintiffs were represented by an executrix who was a U.S. citizen, 454 U.S. at 242, and here Amazon Watch is merely a redundant co-plaintiff in the same injunctive-relief claim asserted by the other 25 foreign plaintiffs, *see supra* at 7-8. And in both cases, the plaintiffs sought relief for alleged harms that occurred entirely in the foreign plaintiffs' home country, but brought suit in the U.S. in part to avoid limitations on relief in that foreign country's laws. In *Piper Aircraft*, the plaintiff sought to avoid Scottish law's lack of strict liability and its restrictive standing and damages in wrongful death cases. 454 U.S. at 240. Here, in arguing vigorously—but ultimately unsuccessfully—that Peru was

an inadequate forum for this suit, Respondents confirmed that their preference for a U.S. forum over a Peruvian one rested in large measure on the fact that Peruvian law does not permit U.S.-style class actions and would not allow punitive damages in this case. *See* Pet. App. 13a, 91a.

Accordingly, as in *Piper Aircraft*, the district court properly applied reduced deference to Respondents' choice of forum. Pet. App. 101a (stating that it would only apply "some deference"). Indeed, if anything, the deference afforded by the district court in this case was overly generous: the level of deference applied by the district court in *Piper Aircraft*—which this Court expressly stated was an "appropriate" level of deference, 454 U.S. at 255—was described by this Court as giving "*little weight*" to the plaintiff's choice of forum, *id*. at 242 (emphasis added). The Ninth Circuit's statement that the mere presence of a single nominal domestic plaintiff *requires* a "strong presumption" in favor of a U.S. forum directly conflicts with *Piper Aircraft* and warrants this Court's review.

3. The various reasons given by the Ninth Circuit for failing to apply the reduced deference required by *Piper Aircraft* are all legally flawed.

First, the Ninth Circuit held that the presence of a single domestic plaintiff is sufficient to trigger *Piper Aircraft*'s presumption that "when a domestic plaintiff chooses its home forum, 'it is reasonable to assume that this choice is convenient.' " Pet. App. 18a-19a. According to the panel, this "strong presumption" is not "somehow lessened" when "both domestic and foreign plaintiffs are present." *Id*. at 19a. This rationale cannot be reconciled with the reasoning or the result in *Piper Aircraft*. The Ninth Circuit overlooked the fact that, in *Piper Aircraft* (as

here), *there was a nominal plaintiff who was a U.S. citizen*. 454 U.S. at 239-40; *see also Nolan v. Boeing Co.*, 919 F.2d 1058, 1060, 1068 (5th Cir. 1990) (same). Indeed, this Court has already squarely rejected the view that the mere presence of a single local plaintiff is sufficient to warrant a presumption in favor of the local forum: "Where there are hundreds of potential plaintiffs, …, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Koster v. (American) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 524 (1947).

Moreover, *Piper Aircraft*'s rationale for applying deference is plainly inapplicable here. The strong deference in favor of a U.S. citizen's choice of a U.S. forum is based on the presumption that the choice of the plaintiff's home forum is presumptively motivated by *convenience*. 454 U.S. at 256; *see also id*., n.24 ("[C]itizenship and residence are proxies for convenience."). Here, Amazon Watch did not choose the forum at all—the Peruvian plaintiffs did when they filed suit *without* Amazon Watch in the Los Angeles Superior Court, and under *Piper Aircraft*, the assumption that the Peruvian plaintiffs were motivated by convenience "is much less reasonable." *Id*. What is more, the record makes quite clear that Amazon Watch's addition to this suit was *not* motivated by convenience, but rather by a desire to defeat a *forum non conveniens* dismissal. As explained earlier, Amazon Watch is merely a co-plaintiff in a single duplicative claim for injunctive relief, and it therefore adds literally *nothing* to the scope of relief that is sought in this case. *See supra* at 7-8; *see also* Pet. App. 37a (Rymer, J., dissenting). The notion that Amazon Watch's joinder in this suit was pre-

sumptively motivated by convenience cannot be reconciled with the record or with common sense.

Second, the Ninth Circuit held that any concern that Respondents were engaged in a tactical maneuver was "muted" here because Respondents chose the *defendants'* home forum and because Amazon Watch had a pre-existing connection with the suit before it was filed. Pet. App. 20a. But nothing in *Piper Aircraft* supports the Ninth Circuit's view that the choice of the *defendants'* home forum is presumptively convenient. Indeed, that is exactly what the Third Circuit erroneously held, and this Court rejected, in *Piper Aircraft*. *Compare Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 159 (3d Cir. 1980) (holding that foreign plaintiff's choice of forum should not be given less weight where defendant was "on its homeground") *with Piper Aircraft*, 454 U.S. at 260 (reversing and upholding reduced deference). *See also Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 74 (2d Cir. 2003) (rejecting presumption in favor of *defendants'* home forum, which "provides a much less reliable proxy for convenience" because "litigants rarely are concerned with promoting their adversary's convenience"). Moreover, where, as here, the dispute arises from harms that occurred in a foreign country, to foreign persons and land, and the relief sought includes remediation of foreign sites and medical monitoring of hundreds of foreign villagers, the notion that it is presumptively "convenient" to try such a suit in the U.S. city where the defendant happens to have its home office is absurd.[9]

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[9] It is irrelevant that the Ninth Circuit speculated that some of the decisions about Peruvian operations may have been made in Los Angeles, Pet. App. 23a. In *Piper Aircraft*, the acts that were the very basis of the plaintiff's strict liability claim—the manu-

The Ninth Circuit's view that Amazon Watch's prior connection to the suit "mute[s]" any concern about "forum-shopping," Pet. App. 20a, is both legally and factually erroneous. That Amazon Watch assisted the Peruvian plaintiffs in their *pre-litigation investigation* does not in any way lessen concerns about tactical maneuvering. What is critical is that Amazon Watch lacked any prior connection to the *underlying dispute* about alleged environmental contamination in Peru, because it did not first become involved in investigating the matter until one year *after* Oxy Peruana had ceased operating Block 1-AB. *See supra* at 7. The Ninth Circuit's decision would allow any domestic non-governmental organization to investigate a dispute in which it has no prior involvement, to join the ensuing lawsuit as a co-plaintiff, and then to automatically obtain a strong presumption in favor of a U.S. forum. Nothing in *Piper Aircraft* supports this approach, which creates obvious opportunities for abuse.

B. The Ninth Circuit's Decision Also Creates a Circuit Split

Review is warranted for the further reason that the Ninth Circuit's decision conflicts directly with the D.C. Circuit's holding in *Pain*, 637 F.2d 775, and with the Second Circuit's en banc holding in *Iragorri*, 274 F.3d 65. This circuit split provides a further powerful reason for granting certiorari.

1. In *Pain*, the D.C. Circuit adopted the precise rule that the Ninth Circuit rejected here—that less

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facture of the aircraft and its propellers—*did* occur in the U.S., but this Court still reversed the Third Circuit's holding that suing in the defendants' home forum was presumptively convenient.

deference should be accorded to the choice of forum made by foreign plaintiffs who strategically added an American plaintiff in order to defeat a *forum non conveniens* motion. *Pain*, like this case and *Piper Aircraft*, involved tort claims that arose on foreign soil. *See Pain*, 637 F.2d at 779 (suit involved helicopter crash off the coast of Norway that killed five foreigners). Of the 16 plaintiffs who brought suit against the U.S. defendant, just one resided in this country, and "there [was] some suggestion in the record that that plaintiff may have been made a party precisely to defeat dismissal on *forum non conveniens* grounds." 637 F.2d at 797; *see also id*., n.130 (noting that "the inclusion of … the only American resident as a plaintiff can arguably be interpreted as an attempt by plaintiff's counsel to gain the benefits of an American forum for a lawsuit purely foreign in original impetus"). *Pain* held that, under these circumstances, plaintiffs "cannot expect the court to defer automatically to their forum choice merely because one of their number is an American resident." *Id*. at 798.

Pain remains good law today; indeed, its analysis as to when a presumption of convenience should and should not be applied was cited and relied upon repeatedly by this Court in *Piper Aircraft*. 454 U.S. at 256 nn. 23, 24.[10] Moreover, numerous courts around

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[10] In *Nemarian v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390 (D.C. Cir. 2003), the D.C. Circuit held that *Piper Aircraft* had overruled *Pain*'s unrelated suggestion that the "*public* interest" factors could not, by themselves, warrant a *forum non conveniens* dismissal. *Id*. at 393 (emphasis added). This has no bearing on *Pain*'s analysis of presumptions, which *Piper Aircraft* specifically endorsed.

the country continue to follow *Pain*.[11] The Ninth Circuit's opinion here cannot be reconciled with *Pain*'s holding that reduced deference to a U.S. forum is warranted when a U.S. plaintiff is added to defeat *forum non conveniens*.

2. The Ninth Circuit's holding likewise irreconcilably conflicts with the Second Circuit's standards for determining when to apply a presumption in favor of a U.S. forum.

In *Iragorri*, the Second Circuit, sitting en banc, adopted a flexible approach under which "the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations." 274 F.3d at 71. Under the Second Circuit's approach, the more it appears that the choice of a U.S. forum was motivated by *convenience* or other legitimate factors, "the greater the deference that will be given to the plaintiff's forum choice." *Id*. at 72. By contrast, "the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons … the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion." *Id*.

The Ninth Circuit's rigid, binary approach to deference conflicts with the en banc Second Circuit's flexible, "sliding scale" standard. Had this case arisen in the Second Circuit, the district court's application of reduced deference to a U.S. forum would have been affirmed. As explained above, *see supra* at 21-23,

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[11] *See, e.g., In re Air Crash Over Taiwan Straits on May 25, 2002*, 331 F. Supp. 2d 1176, 1190 (C.D. Cal. 2004); *Victoria-Tea.com v. Cott Beverages Canada*, 239 F. Supp. 2d 377, 381 (S.D.N.Y. 2003).

Amazon Watch adds nothing to this suit, and the inference is inescapable that its addition to this suit "was motivated by tactical advantage." *Iragorri*, 274 F.3d at 73. *Accord Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 612 (2d Cir. 1998) ("Because the real parties in interest are foreign corporations, there is not a strong presumption in favor of plaintiffs' choice of forum."). This well-defined conflict with the Second Circuit provides yet additional justification for granting review.

C. The Question Is Important and Likely to Recur

The erroneous legal standards adopted by the Ninth Circuit in this case threaten substantially to eviscerate the doctrine of *forum non conveniens* in the western United States. If the Ninth Circuit's decision is allowed to stand, future foreign plaintiffs will be able to obtain "strong deference" to a U.S. forum merely through the artifice of joining nominal domestic plaintiffs who add nothing of substance to the action. Foreign plaintiffs will have every incentive to do so: U.S. courts are already "extremely attractive to foreign plaintiffs," *Piper Aircraft*, 454 U.S. at 252, and the Ninth Circuit's decision would only make U.S. forums "even more attractive," resulting in "the flow of litigation into the United States [that] would increase and congest already crowded courts," *id*. As Lord Denning famously observed, "[a]s a moth is drawn to the light, so is a litigant drawn to the United States." *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (C.A. 1982) (Eng.). *See Piper Aircraft*, 454 U.S. at 252 n.18 (summarizing reasons why litigants are drawn to the U.S.).

In addition, the Ninth Circuit's suggestion that deference should be given to a plaintiff's tactically motivated choice of the *defendant's* home forum, *see supra* at 22, will even further dramatically limit the availability of *forum non conveniens* in that circuit. As the Ninth Circuit itself has previously recognized, "foreign plaintiffs seeking to avoid their home forums" typically sue in "the [U.S.] defendant's home forum." *Ravelo Monegro v. Rosa*, 211 F.3d 509, 513 (9th Cir. 2000). Unless this Court intervenes, the Ninth Circuit's decision will invite the very forum-shopping that *Piper Aircraft* sought to prevent, and unnecessarily involve U.S. courts in disputes that are more properly adjudicated in a foreign court.

Moreover, in the more than 30 years since *Piper Aircraft* was decided, this Court has not had occasion squarely to address the substantive standards that govern the *forum non conveniens* inquiry. Given "[t]he tremendous growth in international commerce, travel and interdependence since World War II," which "has increased the number and varieties of cases in which a foreign court would be a more convenient forum," 14D WRIGHT, MILLER & COOPER, FEDERAL PRACTICE & PROCEDURE § 3828 (3d ed. 2007), this is an area of the law that cries out for further clarification from this Court. And this case, with its well-developed record and clearly defined issues, presents an excellent vehicle for doing so.

D. The Court May Wish to Consider Summary Reversal

For the reasons set forth above, the Ninth Circuit's disregard of *Piper Aircraft* is so clear, and its holding is so palpably incorrect, that the Court may wish to consider summary reversal. Indeed, by invoking a

strong presumption in favor of a U.S. forum, and then relying upon that presumption, and Amazon Watch's presence in the suit, to second-guess every aspect of the district court's analysis of the public and private interest factors, the Ninth Circuit did exactly with this Court criticized the Third Circuit for doing in *Piper Aircraft*:

> Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.

454 U.S. at 257. As Judge Rymer explained in dissent, the panel majority improperly reanalyzed "*forum non conveniens* from scratch." Pet. App. 37a. The Ninth Circuit's flawed analysis warrants summary reversal.

II. The Ninth Circuit's Holding That Hypothetical Jurisdiction May Be Invoked to *Retain* a Case Also Warrants Review

Certiorari review is also warranted because, as Chief Judge Kozinski pointed out in dissenting from denial of rehearing *en banc*, the panel decision below directly conflicts with a long line of precedents of this Court holding that jurisdiction cannot be assumed for the purpose of retaining, rather than dismissing, a case.

A. The Ninth Circuit's Decision Conflicts with *Steel Co.* and *Sinochem*

1. It is a bedrock principle of federal law that "[w]ithout jurisdiction the court cannot proceed at all

in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id*.

In *Sinochem*, this Court recognized a limited exception to this principle, holding that, because a "*forum non conveniens* dismissal 'den[ies] audience to a case on the merits' " and is instead "a determination that the merits should be adjudicated elsewhere," 549 U.S. at 432, a "court need not resolve whether it has authority to adjudicate the cause (subject matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case," *id*. at 425. Thus, "[w]here subject-matter jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal," the district court will in either event "inevitably dismiss the case without reaching the merits," and the court may "properly take[] the less burdensome course" of dismissing under *forum non conveniens*. *Id*. at 435-36.

The Court in *Sinochem* emphasized, however, that jurisdictional issues still should ordinarily be decided *first*. "In the mine run of cases, jurisdiction 'will involve no arduous inquiry' and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum 'should impel the federal court to dispose of [those] issue[s] first.' " *Id*. at 436 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 587-88 (1999)).

The Ninth Circuit's decision contravenes these settled principles. Unlike *Sinochem*—and unlike the

district court in this case—the Ninth Circuit did not skip over jurisdiction so that it could *dismiss* the case on alternative grounds that rendered standing irrelevant. 549 U.S. at 435-36.[12] Instead, the Ninth Circuit affirmatively used Amazon Watch's hypothetical standing as the *basis* for rejecting the district court's *forum non conveniens* dismissal. As a result, any grounds for applying *Sinochem*'s exception evaporated. Far from serving "scant purpose," 549 U.S. at 435, the normal rule that jurisdiction should be addressed first is fully applicable here, because a finding that Amazon Watch lacks Article III standing would completely vitiate the Ninth Circuit's *forum non conveniens* analysis and require affirmance of the district court's dismissal in favor of a Peruvian forum. *See supra* at 12-13, 27-28. By invoking " 'hypothetical jurisdiction' " in order "to resolve contested questions of law when its jurisdiction is in doubt," *Steel Co*., 523 U.S. at 101, the Ninth Circuit did precisely what *Sinochem* and *Steel Co.* forbid.

As stated by the five judges who dissented from the denial of rehearing en banc, *Sinochem* reaffirms the general rule that a court "must first make sure [it] ha[s] jurisdiction before speaking at all in any matter" and *Sinochem* merely "carve[s] out a narrow exception to this rule, which applies only as an alternative way to *stop* speaking." Pet. App. 113a-114a. "By allowing the case to go forward, once [its] jurisdiction has been called into question," the Ninth Circuit panel contravened "what is perhaps the most fundamental principle of federal jurisdiction." *Id*. at 114a.

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[12] For the same reason, *Sinochem* would allow this Court to summarily reverse the Ninth Circuit, and uphold the district court's *dismissal*, without having to decide the issue of Amazon Watch's standing.

Moreover, the Ninth Circuit went further still beyond the limited *Sinochem* exception by addressing, in dicta, the question whether the district court abused its discretion by not imposing conditions on dismissal, including a waiver of statute of limitations. *See* note 6 *supra*. *Sinochem* expressly declined to decide whether a court could impose conditions on a *forum non conveniens* dismissal without first ascertaining its jurisdiction. 549 U.S. at 435. The question reserved in *Sinochem* is easy: because the imposition of conditions—particularly a condition that touches upon the merits, such as a waiver of statute of limitations—necessarily entails the exercise of coercive power over the parties and may affect their substantive rights, such conditions cannot be imposed in the absence of jurisdiction. *Steel Co.*, 523 U.S. at 94 (absent jurisdiction, there is no "power to declare the law"). That the Ninth Circuit's invocation of hypothetical jurisdiction transgressed this additional limitation provides yet further grounds for granting certiorari.

B. The Court May Wish to Consider Summary Reversal on This Issue as Well

Because *Sinochem* clearly states that jurisdictional issues should ordinarily be decided first, and recognizes only a limited exception where a case may be *dismissed* on other grounds, *see supra* at 28-29, the Court may also wish to consider summary reversal on this issue. Moreover, because Amazon Watch plainly lacks standing as a matter of law, the Court should so hold and remand with instructions to affirm the district court's *forum non conveniens* dismissal.

Amazon Watch claimed Article III standing on the ground that, one year *after* Petitioners ceased opera-

tions in Block 1-AB, Amazon Watch chose to undertake an investigation of Petitioners' conduct, and Petitioners' refusal to admit to its alleged environmental contamination in Peru caused Amazon Watch to "expend[] financial resources and staff time to investigate and expose Oxy's activities." ER 36. There is no support whatsoever for this bootstrap theory of standing, under which *anyone* could acquire standing with respect to *any* controversy simply by choosing to expend resources investigating it. On the contrary, such an "injury" does not satisfy Article III standards because it is not "fairly … trace[able] to the challenged action of the defendant." *Lujan v. Defenders of Wildlife, Inc.*, 504 U.S. 555, 560 (1992). Any "harm" occasioned by such investigative costs is "'self-inflicted'; it results not from any action taken by [the defendant], but rather from [the plaintiff's] own budgetary choices." *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp*., 28 F.3d 1268, 1276 (D.C. Cir. 1994). Given that Amazon Watch had no connection to, and was not injured by, the underlying alleged conduct of Petitioners in Block 1-AB, Amazon Watch cannot manufacture standing by *later* choosing to investigate that conduct. *Cf. Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378 (1982) (organization has Article III standing when the defendant's ongoing harmful conduct immediately causes a diversion of the organization's resources to address those harms).

The Ninth Circuit's decision to deny *forum non conveniens* dismissal and to retain this case in federal court—all based on a patently invalid assumption of Article III standing—warrants summary reversal. *See* this Court's Rule 10(a) (review warranted where a court of appeals has "so far departed from the ac-

cepted and usual course of judicial proceedings … as to call for an exercise of supervisory power").[13]

CONCLUSION

The petition for a writ of certiorari should be granted. As noted, the Court may wish to consider summary reversal.

Respectfully submitted,

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September 27, 2012

[13] The panel judges' flawed suggestion, in their opinion concurring in the denial of rehearing en banc, that the parties on remand should undertake extensive discovery to address Amazon Watch's standing (Pet. App. 115a) weighs in *favor* of granting review and summarily reversing. This case, which otherwise is a "textbook case for immediate *forum non conveniens* dismissal," *Sinochem*, 549 U.S. at 435, should not remain trapped in the U.S. courts while the parties spend years pursuing the unicorn of Amazon Watch's non-existent standing.

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 08–56187

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA, a minor, by her guardian Rosario Dahua Hualinga; ROSARIO DAHUA HUALINGA, personally and on behalf of her minor child Roxana Garcia Dahua; NILDA GARCIA SANDI, a minor, by her guardian Rosalbina Hualinga Sandi; ROSALBINA HUALINGA SANDI, personally and on behalf of her minor child Nilda Garcia Sandi; ELENA MAYNAS MOZAMBITE, a minor, by her guardian Gerardo Maynas Hualinga; GERARDO MAYNAS HUALINGA, personally and on behalf of his minor child Elena Maynas Mozambite; ALAN CARIAJANO SANDI, a minor, by his guardian Pedro Sandi; PEDRO SANDI WASHINGTON, personally and on behalf of his minor child Alan Cariajano Sandi; ELISA HUALINGA MAYNAS, a minor, by her guardians Daniel Hualinga Sandi and Andrea Maynas Cariajano; DANIEL HUALINGA SANDI, personally and on behalf of his minor child Elisa Hualinga Maynas; ANDREA MAYNAS CARIAJANO, personally and on behalf of her minor child Elisa Hualinga Maynas; CERILO HUALINGA HUALINGA, a minor, by his guardians Roman Hualinga Sandi and Rosa Hualinga; ROMAN HUALINGA SANDI, personally and on behalf of his minor child Cerilo Hualinga Hualinga; ROSA HUALINGA, personally and on behalf of her minor child Cerilo Hualinga Hualinga; RODOLFO MAYNAS SUAREZ, a minor, by his guardians Horacio Maynas Cariajano and Delmencia Suarez Diaz; HORACIO

MAYNAS CARIAJANO, personally and on behalf of his minor child Rodolfo Maynas Suarez; DELMENCIA SUAREZ DIAZ, personally and on behalf of her minor child Rodolfo Maynas Suarez; KATIA HUALINGA SALAS, a minor, by her guardians Alejandro Hualinga Chuje and Linda Salas Pisongo; ALEJANDRO HUALINGA CHUJE, personally and on behalf of his minor child Katia Hualinga Salas; LINDA SALAS PISONGO, personally and on behalf of her minor child Katia Hualinga Salas; FRANCISCO PANAIGO PAIMA, a minor, by his guardians Milton Panaigo Diaz and Anita Paima Cariajano; MILTON PANAIGO DIAZ, personally and on behalf of his minor child Francisco Panaigo Paima; ANITA PAIMA CARIAJANO, personally and on behalf of her minor child Francisco Paniago Paima; ADOLFINA GARCIA SANDI, personally and on behalf of her deceased minor child Olivio Salas Garcia; AMAZON WATCH, INC., a Montana corporation,

Plaintiffs–Appellants,

v.

OCCIDENTAL PETROLEUM CORPORATION, a Delaware Corporation; OCCIDENTAL PERUANA, INC., a California Corporation,

Defendants–Appellees.

No. 08–56270

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA, a minor, by her guardian Rosario Dahua Hualinga;

ROSARIO DAHUA HUALINGA, personally and on behalf of her minor child Roxana Garcia Dahua; NILDA GARCIA SANDI, a minor, by her guardian Rosalbina Hualinga Sandi; ROSALBINA HUALINGA SANDI, personally and on behalf of her minor child Nilda Garcia Sandi; ELENA MAYNAS MOZAMBITE, a minor, by her guardian Gerardo Maynas Hualinga; GERARDO MAYNAS HUALINGA, personally and on behalf of his minor child Elena Maynas Mozambite; ALAN CARIAJANO SANDI, a minor, by his guardian Pedro Sandi; PEDRO SANDI WASHINGTON, personally and on behalf of his minor child Alan Cariajano Sandi; ELISA HUALINGA MAYNAS, a minor, by her guardians Daniel Hualinga Sandi and Andrea Maynas Cariajano; DANIEL HUALINGA SANDI, personally and on behalf of his minor child Elisa Hualinga Maynas; ANDREA MAYNAS CARIAJANO, personally and on behalf of her minor child Elisa Hualinga Maynas; CERILO HUALINGA HUALINGA, a minor, by his guardians Roman Hualinga Sandi and Rosa Hualinga; ROMAN HUALINGA SANDI, personally and on behalf of his minor child Cerilo Hualinga Hualinga; ROSA HUALINGA, personally and on behalf of her minor child Cerilo Hualinga Hualinga; RODOLFO MAYNAS SUAREZ, a minor, by his guardians Horacio Maynas Cariajano and Delmencia Suarez Diaz; HORACIO MAYNAS CARIAJANO, personally and on behalf of his minor child Rodolfo Maynas Suarez; DELMENCIA SUAREZ DIAZ, personally and on behalf of her minor child Rodolfo Maynas Suarez; KATIA HUALINGA SALAS, a minor, by her guardians Alejandro Hualinga Chuje and Linda Salas Pisongo; ALEJANDRO HUALINGA CHUJE, personally and on behalf of his minor child Katia Hualinga Salas; LINDA SALAS PISONGO, personally and on behalf of her minor child

Katia Hualinga Salas; FRANCISCO PANAIGO PAIMA, a minor, by his guardians Milton Panaigo Diaz and Anita Paima Cariajano; MILTON PANAIGO DIAZ, personally and on behalf of his minor child Francisco Panaigo Paima; ANITA PAIMA CARIAJANO, personally and on behalf of her minor child Francisco Paniago Paima; ADOLFINA GARCIA SANDI, personally and on behalf of her deceased minor child Olivio Salas Garcia; AMAZON WATCH, INC., a Montana corporation,

Plaintiffs–Appellees,

v.

OCCIDENTAL PETROLEUM CORPORATION, a Delaware Corporation; OCCIDENTAL PERUANA, INC., a California Corporation,

Defendants–Appellants.

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted
March 3, 2010—Pasadena, California

Filed June 1, 2011

Before: Mary M. Schroeder, Pamela Ann Rymer, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Wardlaw;
Partial Concurrence and Partial Dissent by
Judge Rymer

ORDER

The petition for panel rehearing is granted.

The opinion filed December 6, 2010, and reported at 626 F.3d 1137 (9th Cir. 2010), is hereby withdrawn. It may not be cited as precedent by or to this court or any district court of the Ninth Circuit.

The clerk shall file the attached opinion and partial concurrence, partial dissent in place of the prior opinion and partial concurrence, partial dissent. The parties are free to file new petitions for rehearing or rehearing en banc pursuant to Ninth Circuit General Order 5.3 and Federal Rule of Appellate Procedure 40.

Occidental's motion for leave to file a reply in support of its petition for panel rehearing and rehearing en banc is therefore dismissed as moot.

IT IS SO ORDERED.

OPINION

WARDLAW, Circuit Judge:

These cross-appeals arise from the petroleum and oil exploration operations conducted by defendant Occidental Peruana ("OxyPeru"), an indirect subsidiary of defendant Occidental Petroleum Corporation (collectively "Occidental"), along the Rio Corrientes in the northern region of Peru. Plaintiffs, 25 members of the Achuar indigenous group dependent for their existence upon the rainforest lands and waterways along the river, and Amazon Watch, a California corporation, sued Occidental in Los Angeles County Superior Court for environmental contamination and release of hazardous waste. Although Occidental's headquarters is located in Los Angeles County, Occi-

dental removed the suit to federal district court where it successfully moved for dismissal on the ground that Peru is a more convenient forum. Plaintiffs timely appeal the dismissal of their suit. Occidental cross-appeals from the district court's determination that its Rule 12 motion to dismiss Amazon Watch for lack of standing is moot.

Because Occidental failed to meet its burden of demonstrating that Peru is a more convenient forum, and the district court gave insufficient weight to the strong presumption in favor of a domestic plaintiff's choice of forum, the district court abused its discretion by dismissing the lawsuit without imposing mitigating conditions for the dismissal.

I. FACTUAL AND PROCEDURAL BACKGROUND

We accept as true the facts alleged in the Achuar Plaintiffs' and Amazon Watch's ("Plaintiffs") First Amended Complaint ("FAC"). *See Vivendi SA v. T–Mobile USA, Inc.,* 586 F.3d 689, 691 n.3 (9th Cir. 2009); *Aguas Lenders Recovery Group v. Suez, S.A.,* 585 F.3d 696, 697 (2d Cir. 2009) (accepting the facts alleged in the complaint as true where the case was dismissed on *forum non conveniens* grounds without a factual hearing).

Occidental is among the largest oil and gas companies in the United States. Its Peruvian operations began in the early 1970s with the development of a pair of lots near the Ecuadorean border known as "Block 1–AB." Its subsidiary, OxyPeru, built Block 1–AB into a thriving extraction, processing, and distribution site, providing 26 percent of Peru's total historical oil production from 1972 to 2000, at which point Occidental sold its stake in Block 1–AB to the Argentine oil company Pluspetrol. The Peruvian govern-

ment granted Occidental its first concession in the region in 1971; oil was found the next year. The company built dozens of wells, a 530–kilometer network of pipelines, refineries, and separation batteries for processing crude oil, as well as roads, heliports and camps to support the operation at Block 1–AB.

The Achuar are indigenous people who have long resided along the rivers of the northern Peruvian rainforest. Block 1–AB encompasses significant portions of the Corrientes and Macusari rivers, home to several Achuar communities. The inhabitants use the rivers and their tributaries for drinking, fishing, and bathing. The region is remote, with access typically limited to small planes, helicopters, small boats, and canoes.

The complaint alleges that, during its thirty years in the Achuar territories, Occidental knowingly utilized out-of-date methods for separating crude oil that contravened United States and Peruvian law, resulting in the discharge of millions of gallons of toxic oil byproducts into the area's waterways. Achuar children and adults came into frequent contact with the contaminants by using polluted rivers and tributaries for drinking, washing and fishing. Tests have shown potentially dangerous levels of lead and cadmium in the blood of a significant number of affected individuals. Achuar Plaintiffs have reported gastrointestinal problems, kidney trouble, skin rashes, and aches and pains that they attribute to the pollution.

Plaintiffs further allege that the pollution led to decreasing yields of edible fish, and that the animals hunted by the Achuar have been turning up dead or diseased after drinking river water. The pollution has also allegedly harmed agricultural productivity and land values. Plaintiffs contend that Occidental was

aware of the dangers posed by the contamination but failed to warn residents.

The complaint also details the Block 1–AB–related activities of Amazon Watch, a nonprofit Montana corporation headquartered in San Francisco, California, which began working with the Achuar communities in 2001. Representatives of Amazon Watch traveled to the region several times in the ensuing years and helped produce a documentary film about the contamination. Amazon Watch officials also communicated with Occidental representatives in Los Angeles throughout 2005 and 2006, both at public shareholder events and in private meetings. Amazon Watch organized public relations campaigns in both Peru and Los Angeles designed to respond to statements by Occidental about its Peruvian operations.

Several dozen Achuar adults and children filed a complaint in Los Angeles County Superior Court against Occidental on May 10, 2007. Plaintiffs assert claims for common law negligence, strict liability, battery, medical monitoring, wrongful death, fraud and misrepresentation, public and private nuisance, trespass, and intentional infliction of emotional distress, as well as a violation of California's Unfair Competition Law. They seek damages, injunctive and declaratory relief, restitution, and disgorgement of profits on behalf of the individual plaintiffs and two proposed classes. On August 3, 2007, Occidental removed the action to United States District Court pursuant to 28 U.S.C. § 1332(d)(2). On September 10, 2007, the complaint was amended to name Amazon Watch as a plaintiff.

On April 15, 2008, the district court granted Occidental's motion to dismiss based on the doctrine of *forum non conveniens.* It did so without the benefit of

oral argument, and while simultaneously denying Plaintiffs the opportunity to conduct limited discovery on the adequacy of Peru as an alternative forum, the current location of witnesses and evidence, and limited depositions to ascertain information about Occidental's Peruvian operations, which had ceased in 2000. In denying Plaintiffs' discovery request the district court concluded "it has enough information to sufficiently weigh the parties' interests and determine the adequacy of the foreign forum ... [h]aving reviewed Defendants' *forum non conveniens* motion and all related documents and exhibits."

Based on Occidental's evidence, principally the Declaration of Doctor Felipe Osterling Parodi ("Dr. Osterling"), the district court found that Peru is an adequate alternative forum and that the public and private interest factors pointed toward trial in Peru sufficiently to overcome the strong presumption of a domestic plaintiff's choice of forum. It dismissed the case, concluding that Occidental's motion to dismiss Amazon Watch's unfair competition claim was thereby rendered moot.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 28 U.S.C. §§ 1332(d)(2) & 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's order dismissing the lawsuit on the basis of *forum non conveniens* for an abuse of discretion. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257 (1981). A district court abuses its discretion by identifying an incorrect legal standard, or by applying the correct standard illogically, implausibly, or in a manner without support in inferences that may be drawn from facts in the record. *United States v. Hinkson,* 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). In the *forum non con-*

veniens context, a "district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of relevant factors." *Ravelo Monegro v. Rosa,* 211 F.3d 509, 511 (9th Cir. 2000).

III. DISCUSSION

"The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507 (1947). Historically, the doctrine's purpose is to root out cases in which the "open door" of broad jurisdiction and venue laws "may admit those who seek not simply justice but perhaps justice blended with some harassment," and particularly cases in which a plaintiff resorts "to a strategy of forcing the trial at a most inconvenient place for an adversary." *Id.; see also Piper,* 454 U.S. at 249 n.15 ("[D]ismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law."). The doctrine "is based on the inherent power of the courts to decline jurisdiction in exceptional circumstances." *Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber,* 513 F.2d 667, 670 (9th Cir. 1975).

The doctrine of *forum non conveniens* is a drastic exercise of the court's "inherent power" because, unlike a mere transfer of venue, it results in the dismissal of a plaintiff's case. The harshness of such a dismissal is especially pronounced where, as here, the district court declines to place any conditions upon its dismissal. Therefore, we have treated *forum non conveniens* as "an exceptional tool to be employed spar-

ingly," and not a "doctrine that compels plaintiffs to choose the optimal forum for their claim." *Dole Food Co. v. Watts,* 303 F.3d 1104, 1118 (9th Cir. 2002) (quoting *Ravelo Monegro,* 211 F.3d at 514) (internal quotations omitted). The mere fact that a case involves conduct or plaintiffs from overseas is not enough for dismissal. *See Tuazon v. R.J. Reynolds Tobacco Co.,* 433 F.3d 1163, 1181–82 (9th Cir. 2006) ("Juries routinely address subjects that are totally foreign to them, ranging from the foreign language of patent disputes to cases involving foreign companies, foreign cultures and foreign languages.")

To prevail on a motion to dismiss based upon *forum non conveniens,* a defendant bears the burden of demonstrating an adequate alternative forum, and that the balance of private and public interest factors favors dismissal. *See Dole Food Co.,* 303 F.3d at 1118. In determining whether the district court abused its discretion in concluding that Occidental satisfied its burden, we examine: (1) the adequacy of the alternate forum; (2) the private and public factors and the deference owed a plaintiff's chosen forum; and (3) the district court's decision to dismiss Plaintiffs' case without imposing any conditions on the dismissal.

A. Adequacy of the Forum

The district court properly determined that Peru provides an adequate alternative forum for Plaintiffs to pursue their claims against Occidental. An alternative forum is deemed adequate if: (1) the defendant is amenable to process there; and (2) the other jurisdiction offers a satisfactory remedy. *See Piper,* 454 U.S. at 254 n.22; *Leetsch v. Freedman,* 260 F.3d 1100, 1103 (9th Cir. 2001) ("The foreign court's jurisdiction over the case and competency to decide the legal questions involved will also be considered. We make

the determination of adequacy on a case by case basis, with the party moving for dismissal bearing the burden of proof.") (citation omitted).

1. Whether Occidental is Amenable to Process in Peru

The district court concluded that Occidental is amenable to process in Peru based on the company's past activities in the country, as well as its stipulation to service of process and consent to jurisdiction there. It correctly determined that Occidental's "voluntary submission to service of process" suffices to meet the first requirement for establishing an adequate alternative forum. *Tuazon,* 433 F.3d at 1178.

2. Whether Peru Offers a Satisfactory Remedy

The district court correctly concluded that Occidental met its burden of proving that Peru could offer Plaintiffs a satisfactory remedy. A "dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery," but an alternate forum offering a "clearly unsatisfactory" remedy is inadequate. *Piper,* 454 U.S. at 250, 254 n.22; *see also Lueck v. Sundstrand Corp.,* 236 F.3d 1137, 1144 (9th Cir. 2001) ("The effect of *Piper Aircraft* is that a foreign forum will be deemed adequate unless it offers no practical remedy for the plaintiff's complained of wrong."). The parties offered conflicting expert affidavits that focused on two remedial issues: (a) Peruvian law itself, both substantive and procedural; and (b) special barriers confronting indigenous plaintiffs and general corruption in the Peruvian judicial system.

a. Peruvian Law

The district court did not abuse its discretion by weighing the evidence presented by the parties' experts and concluding that the Peruvian legal system can adequately resolve Plaintiffs' claims. The affidavit of Occidental's expert, Dr. Osterling, provides an in-depth exploration of Peruvian statutory law and civil procedure, concluding that "Peruvian law has analogies for all the substantive legal theories on which the lawsuit filed in the Los Angeles jurisdiction is based," while also offering analogous remedies. In contrast, Plaintiffs submitted expert declarations, including that of Peruvian lawyer and professor Dante Apolín Meza, who cautioned that damages fulfill a purely compensatory—not punitive—function in Peru, and that it may be difficult for an "indeterminate group of persons (or class) such as the 'Achuar communities' " to recover.

The district court disregarded Plaintiffs' expert declaration and credited Dr. Osterling's account, quoting the conclusion that "Peruvian substantive norms on civil liability allow a lawsuit for damages to be processed on the facts set forth in the complaint." This was a proper exercise of the broad discretion trial courts possess to weigh such evidence in this context. *See Cheng v. Boeing Co.,* 708 F.2d 1406, 1410–11 (9th Cir. 1983). Moreover, the requirement that the alternative forum provide "some remedy" for plaintiff's complained of wrong is "easy to pass; typically, a forum will be inadequate only where the remedy provided is 'so clearly inadequate or unsatisfactory, that it is no remedy at all.' " *Tuazon,* 433 F.3d at 1178 (quoting *Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir. 1991)). Therefore, the district court did not err in reaching

the conclusion that the Peruvian legal system can offer some remedy for Plaintiff's claims.

b. Discrimination and Corruption

The district court did not abuse its discretion by weighing both sides' declarations and concluding that Peru is not an inadequate forum due to discrimination or corruption. Plaintiffs' experts described unique barriers confronting the Achuar Plaintiffs in Peru due to their ethnicity, poverty, and isolation. Peruvian lawyer and professor Wilfredo Ardito Vega characterized his nation's judiciary as "one of the governmental institutions that has not only abstained from intervening in cases of discrimination, but it has contributed to reinforcing discrimination." He stated that, beyond such intentional bias, impoverished and geographically isolated litigants such as the Achuar Plaintiffs are frequently deterred from vindicating their rights in Peruvian courts because of logistical barriers such as filing fees and documentation requirements. The district court properly considered these arguments, but credited Dr. Osterling's more specific affidavit, which noted the availability of fee waivers for the indigent, as well as outreach programs to indigenous groups and legal doctrines that could address the barriers posed by discrimination and documentation requirements.

To demonstrate that a foreign nation is an inadequate forum due to corruption, a party must make a "powerful showing" that includes specific evidence. *Tuazon,* 433 F.3d at 1179 (noting that the court was aware of only two federal cases holding alternative forums inadequate because of corruption). Plaintiffs' expert Dr. Ardito asserted that the Peruvian judiciary suffers from "institutionalized" corruption, including widespread lobbying of judges, third party in-

formal "intermediaries" between magistrates and parties, and the exchange of improper favors and information. He added that the problem is exacerbated by structural features of the judicial system, such as the proliferation of provisional and substitute judges who lack independence and are especially susceptible to improper influences.

All of Plaintiffs' experts suggested that these institutional flaws lead to tangible harm for litigants, including inconsistent judgments and favoritism for powerful interests, which could place isolated, indigenous plaintiffs at a special disadvantage. In response, Occidental's expert, Dr. Osterling, acknowledged such allegations of corruption but insisted that the reliability of the Peruvian judiciary has "increased ostensibly in recent years." He described efforts by the Peruvian government to fight corruption that have included the removal and sanctioning of numerous judges as well as improvements in judicial selection procedures and court infrastructure.

The district court concluded that the evidence contained in Plaintiffs' expert affidavits was too generalized and anecdotal "to pass value judgments on the adequacy of Peru's judicial system." The district court correctly noted that "one of the central ends of the *forum non conveniens* doctrine is to avert 'unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations.' " (quoting *Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine,* 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001)). We agree that the evidence here does not "support the conclusion that [the Peruvian] legal system is so fraught with corruption, delay and bias as to provide 'no remedy at

all.' " *Tuazon,* 433 F.3d at 1179 (quoting *Piper,* 454 U.S. at 254).

B. Balance of Private and Public Interest Factors

In weighing the relevant factors, the district court consistently understated Occidental's heavy burden of showing that the Los Angeles forum results in "oppressiveness and vexation ... out of all proportion" to the plaintiff's convenience. *Piper,* 454 U.S. at 241 (quoting *Koster v. Lumbermens Mut. Cas. Co.,* 330 U.S. 518, 524 (1947)). The district court assumed that Amazon Watch was a legitimate domestic plaintiff, but then ignored the group in its consideration of numerous factors, while affording only reduced deference to Amazon Watch's decision to proceed in a local forum. "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Id.* at 255.

1. Deference to Plaintiff's Chosen Forum

When a domestic plaintiff initiates litigation in its home forum, it is presumptively convenient. *Id.* at 255–56. A foreign plaintiff's choice is entitled to less deference, but "less deference is not the same thing as no deference." *Ravelo Monegro,* 211 F.3d at 514. Here the district court acknowledged that Amazon Watch "is a California plaintiff" for the purposes of its *forum non conveniens* analysis. Occidental contends that the district court erred because it should have dismissed Amazon Watch for lack of standing under both Article III of the Constitution and the statute under which it sued, California Business & Professions Code § 17200, the Unfair Competition Law. However,

the district court was not required to decide the standing question before ruling on the *forum non conveniens* motion. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422 (2007).

In *Sinochem,* the Supreme Court held that federal district courts may decide *forum non conveniens* motions even though jurisdictional issues remain unresolved. *Id.* at 425. Article III standing is a species of subject matter jurisdiction. *See Chandler v. State Farm Mut. Auto. Ins. Co.,* 598 F.3d 1115, 1122 (9th Cir. 2010) ("Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss."); *Cetacean Cmty. v. Bush,* 386 F.3d 1169, 1174 (9th Cir. 2004) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit."). Unlike this case, *Sinochem* involved a "textbook case for immediate *forum non conveniens* dismissal," in which a Malaysian shipping company sued a Chinese importer in the Eastern District of Pennsylvania. *Sinochem,* 549 U.S. at 435. The only connection to the U.S. forum was tenuous: cargo involved in the dispute underlying the case had been loaded at the Port of Philadelphia. *Id.* at 426. The *Sinochem* Court therefore promoted judicial economy by allowing the district court to dismiss the case without first having to address complicated jurisdictional issues. *Id.* at 425. However, the Supreme Court did not limit its holding to cases where the district court opts for dismissal. Rather it held that "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," including matters of personal or subject matter jurisdiction. *Id.* at 425. The Court did

not dictate how district courts must respond to such pleas.

Under *Sinochem,* then, the district court had the discretion to rule on the *forum non conveniens* motion based on the assumption that Amazon Watch was a proper plaintiff, but without conducting a full standing analysis. Occidental asks us to conduct this analysis ourselves and hold that Amazon Watch lacks standing under both Article III and California's Unfair Competition Law. However, we believe that it would be improper for us to rule on the issue before any consideration by the district court, which "is in the best position to resolve [the standing question] in the first instance." *Ibrahim v. DHS,* 538 F.3d 1250, 1256 n.9 (9th Cir. 2008). We therefore do not reach the issue, and like the district court, we assume that Amazon Watch has standing for the purposes of the *forum non conveniens* analysis only.[1]

Despite operating under that assumption, the district court explained that because Amazon Watch was but one domestic plaintiff alongside 25 foreign plaintiffs, it was entitled to "only some deference." The district court cited no legal authority for the application of this vague intermediate standard of deference. Indeed, the district court's application of that standard is directly contrary to the *Piper* Court's clear instruction that when a domestic plaintiff chooses its home

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[1] We therefore deny Plaintiffs' petition to certify the statutory standing question to the California Supreme Court. *See* Cal. R. Ct. 8.548(a)(1) (limiting certification from the United States Court of Appeals to questions which "could determine the outcome of a matter pending in the requesting court"); *see also Couch v. Telescope, Inc.,* 611 F.3d 629, 634 (9th Cir. 2010) ("[W]e invoke the certification process only after careful consideration and do not do so lightly.").

forum, "it is reasonable to assume that this choice is convenient," but a foreign plaintiff's choice deserves "less deference." *Piper,* 454 U.S. at 255–56. *Piper* does not in any way stand for the proposition that when both domestic and foreign plaintiffs are present, the strong presumption in favor of the domestic plaintiff's choice of forum is somehow lessened. Moreover, the district court treated Amazon Watch as merely one of 26 plaintiffs, failing to consider its status as an organizational plaintiff representing numerous individual members.

In *Vivendi,* the court afforded reduced deference to an American co-plaintiff based on an express finding that the plaintiff had engaged in forum shopping. *See Vivendi,* 586 F.3d at 694. Occidental makes a similar argument here, noting that Amazon Watch was named as a plaintiff after the lawsuit was removed to federal court, and suggesting that its presence in the case reflects a "tactical effort" to defeat a *forum non conveniens* dismissal.

A party's intent in joining a lawsuit is relevant to the balancing of the *forum non conveniens* factors only to the extent that it adds to an overall picture of an effort to take unfair advantage of an inappropriate forum. *See id.* at 695. Vivendi involved litigation between European companies that had no significant connection to the United States. *Id.* at 694. *Vivendi* admitted that it sued in the Western District of Washington "because the United States offers 'proper discovery' and favorable law." *Id.* at 694–95. After defendant T–Mobile filed a motion to dismiss on the basis of *forum non conveniens,* Vivendi added an American co-plaintiff, Vivendi Holding, which claimed an interest in the litigation as the holder of certain bonds. However, the plaintiffs conceded that

Vivendi Holding acquired the bonds after the *forum non conveniens* motion was filed with the partial motivation of strengthening its connection to the case. *Id.* at 694. Moreover, the bonds were "related only incidentally" to the fraud allegations at the heart of the litigation. *Id.*

By contrast, Amazon Watch's involvement in the subject matter of this litigation began in 2001, six years before the case was filed. The complaint includes factual allegations giving rise to claims based on events that took place in Los Angeles involving Amazon Watch, Occidental and the Achuar plaintiffs. Any tactical motivation for Amazon Watch's presence in this case is outweighed by the organization's actual long-standing involvement in the subject matter of the litigation and its assertion of actual injury resulting from defendants' alleged conduct. Moreover, Plaintiffs did not strategically choose a random or only tangentially relevant forum; they chose Occidental's home forum. And while the case concerns past operations and injury in Peru, the complaint includes claims based on decisions made in and policies emerging from Occidental's corporate headquarters in Los Angeles.

Concerns about forum shopping, while appropriately considered in the *forum non conveniens* analysis, are 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. *See Ravelo Monegro,* 211 F.3d at 513–14 (distinguishing *Piper,* where dismissal was granted, by noting that "plaintiffs' chosen forum is more than merely the American defendants' home forum. It is also a forum with a substantial relation to the action"); *Norex Petroleum Ltd. v. Access Indus.,*

Inc., 416 F.3d 146, 155–56 (2d Cir. 2005) (finding that "substantial deference" is appropriate when a plaintiff has sued a defendant in its home forum to obtain jurisdiction over the defendant); *Reid–Walen v. Hansen,* 933 F.2d 1390, 1395 (8th Cir. 1991) ("In this unusual situation, where the forum resident seeks dismissal, this fact should weigh strongly against dismissal.").

Amazon Watch, therefore, was entitled to a strong presumption that its choice of forum was convenient. *See Contact Lumber Co. v. P.T. Moges Shipping Co.,* 918 F.2d 1446, 1449 (9th Cir. 1990) ("[W]hile a U.S. citizen has no absolute right to sue in a U.S. court, great deference is due plaintiffs because a showing of convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown."). The district court abused its discretion by recognizing Amazon Watch as a domestic plaintiff but then erroneously affording reduced deference to its chosen forum.

2. Private Interest Factors

The factors relating to the private interests of the litigants include: "(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." *Boston Telecomms. Grp. v. Wood,* 588 F.3d 1201, 1206–07 (9th Cir. 2009) (quoting *Lueck,* 236 F.3d at 1145).

Without analyzing each individual factor, the district court looked generally at the "witnesses and evi-

dence located in Peru" versus the "witnesses and evidence in California" and concluded that the "private interest factors weigh overwhelmingly in favor of dismissal." In taking this approach, the district court neglected significant relevant evidence and failed to consider an entire factor—the enforceability of the judgment—that together weigh against dismissing this lawsuit.

a. Residence of the Parties

The district court focused on the fact that the contamination allegations at the heart of the complaint took place in the jungles of the Amazon rainforest, but it failed to consider the residence of all of the parties and the true nature of Plaintiffs' claims. Occidental maintains its headquarters and principal place of business in Los Angeles, California.[2] The Achuar Plaintiffs are residents of Peru, but by filing suit in California they indicated a willingness to travel to the United States for trial. Co-plaintiff Amazon Watch is a domestic corporation with its principal place of business in San Francisco, California. Although the group was incorporated in Montana in 1996, it is a registered California non-profit corporation whose main headquarters are in San Francisco. It also maintains an office in Malibu, California, within the Central District of California. Therefore, Amazon Watch is properly considered a resident of the local forum. *See Boston Telecomms.,* 588 F.3d at 1207 (concluding that the residence of the parties fac-

[2] In the personal jurisdiction context, the Supreme Court has recently clarified that "principal place of business" refers to "the place where a corporation's officers direct, control, and coordinate the corporation's activities," and "in practice it should normally be the place where the corporation maintains its headquarters." *Hertz Corp. v. Friend,* 130 S. Ct. 1181, 1192 (2010).

tor weighed against dismissal where a non-California plaintiff sued in a California court, emphasizing that the plaintiff would stand in an even "stronger position were he a California resident"). The district court failed to factor Amazon Watch's residency into its analysis.

Most of Plaintiffs' claims turn not on the physical location of the injury but on the mental state of the Occidental managers who actually made the business decisions that allegedly resulted in the injury. While the district court mentioned in passing "decision-makers at Defendants' headquarters and witnesses with knowledge of OxyPeru's operations," it failed to consider how critical such locally-based evidence is to the litigation, especially given that it has now been a full decade since Occidental has been involved in day-to-day operations in Peru. Under these circumstances, 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.

b. Convenience to the Parties

The district court found it "clear [that] the cost and convenience of travel between Peru and Los Angeles supports dismissal on *forum no[n] conveniens* grounds" because even if all Peruvian witnesses consented to testify in California, airfare from Peru can cost more than $1,000. This reasoning, however, fails to consider the other side of the ledger. California is the home forum of Occidental and Amazon Watch; therefore, local litigation would save witnesses affiliated with those entities the time and expense of traveling to South America. Moreover, the most daunting logistical challenge to this litigation would likely be the extreme isolation of the Achuar territory and

Block 1–AB. Travel between the region and Iquitos, the nearest sizable Peruvian city, can take days, presenting a serious obstacle regardless of whether trial takes place in Peru or California. Rather than clearly supporting dismissal, when all of the evidence is considered this is a neutral factor. *See Boston Telecomms.,* 588 F.3d at 1208 (finding the convenience factor to be neutral where similar logistical considerations would apply in either forum).

c. Evidentiary Considerations

The district court placed great emphasis on the fact that "[m]any of the witnesses are located in Peru and thus are beyond the reach of compulsory process" and that "Plaintiffs do not dispute that these witnesses are beyond the reach of compulsory process in the United States." The district court, however, was focused on the wrong inquiries. "[W]e have cautioned that the focus for this private interest analysis 'should not rest on the number of witnesses ... in each locale' but rather the court 'should evaluate the materiality and importance of the anticipated ... witnesses' testimony and then determine their accessibility and convenience to the forum.' " *Boston Telecomms.,* 588 F.3d at 1209 (quoting *Lueck,* 236 F.3d at 1146). Other circuits have concluded that the initial question is not whether the witnesses are beyond the reach of compulsory process, but whether it has been alleged or shown that witnesses would be unwilling to testify. *See Duha v. Agrium, Inc.,* 448 F.3d 867, 877 (6th Cir. 2006) ("When no witness' unwillingness has been alleged or shown, a district court should not attach much weight to the compulsory process factor."); *Peregrine Myanmar Ltd. v. Segal,* 89 F.3d 41, 47 (2d Cir. 1996). This approach is consistent with *Gulf Oil,* the Supreme Court case that first estab-

lished the *forum non conveniens* factors, which spoke of the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses." *Gulf Oil,* 330 U.S. at 508.

The proponent of a *forum non conveniens* dismissal is not required to identify potentially unavailable witnesses in exact detail. *See Piper,* 454 U.S. at 258. However, here Occidental has not shown, nor does it even represent, that any witness is unwilling to testify. Instead it has produced a declaration identifying categories of witnesses it intends to call who are outside of its control. The district court failed to consider countervailing evidence in the form of five declarations from named former Occidental employees who were in Peru during the relevant time period who indicated a willingness to testify in the Central District.

As far as physical evidence and other sources of proof, the district court failed to consider during the discussion of the private interest factors Occidental's transfer of Block 1–AB to Pluspetrol. That Occidental withdrew from the site in 2000 undermines its argument that evidence found today at the physical site is much more critical to the litigation than evidence associated with Occidental's corporate headquarters, which has been in Los Angeles throughout the relevant period. Finally, the district court also failed to consider Amazon Watch in weighing these private factors. As discussed earlier, Amazon Watch's principal place of business is in California, its executives, key employees and relevant documentary evidence within its control are in California, and many of the events involving the group which form the basis for its claims occurred in the state. Therefore, when all of

the evidence is properly considered, these evidentiary factors are neutral.

d. Enforceability of the Judgment

Most critically, the district court failed to give any consideration to whether a judgment against Occidental could be enforced in Peru. As Occidental correctly points out, California generally enforces foreign judgments, as long as they are issued by impartial tribunals that have afforded the litigants due process. *See* Cal. Civ. Proc. Code § 1716(a)–(d). However, the only other authority Occidental cites on the topic is *In re B–E Holdings, Inc.,* 228 B.R. 414 (Bankr. E.D. Wis. 1999), a case in which the United States Bankruptcy Court for the Eastern District of Wisconsin recognized a Peruvian judgment. As Plaintiffs note, however, the case actually demonstrates the difficulty of enforcing such an award. The Peruvian case began in 1986, ended in default judgment in 1992, and the judgment remained unsatisfied through the U.S. Bankruptcy Court litigation in 1999. *See id.* at 416. Plaintiffs also point to the U.S. State Department's Investment Climate Statement, which deems the enforcement of Peruvian court rulings "difficult to predict." U.S. Dep't of State, 2010 Investment Climate Statement—Peru (March 2010), http://www.state.gov/e/eeb/rls/othr/ics/2010/138128.htm. And Occidental's subsequent withdrawal from the operation of Block 1–AB raises questions about what assets might be available in Peru to satisfy a judgment there. *See Empresa Lineas Maritimas Argentinas, S.A. v. Schichau–Unterweser, A.G.,* 955 F.2d 368, 375 (5th Cir. 1992) (holding that the district court erred by finding this factor favored dismissal when the defendant did not meet its burden of establishing that it

had assets in the foreign jurisdiction that could satisfy a judgment).

As discussed earlier, Occidental's own expert presented compelling evidence of disorder in the Peruvian judiciary. Because the district court did not require Occidental to agree that any Peruvian judgment could be enforced against it in the United States, or anywhere else it held assets, as a condition for dismissal, Occidental remains free to attack any Peruvian judgment on due process grounds under California's foreign judgments statute. The private factor of the enforceability of judgments thus weighs against dismissal.

3. Public Interest Factors

The public factors related to the interests of the forums 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." *Boston Telecomms.,* 588 F.3d at 1211(quoting *Tuazon,* 433 F.3d at 1181).

a. Local Interest

The district court weighed Peru's stake in a case involving its own "lands and citizens" against California's "interest in ensuring that businesses incorporated or operating within its borders abide by the law," and concluded that this factor favored dismissal. It found that a Peruvian tribunal "would be better equipped to handle" the issues raised by the case including "environmental regulation of Peruvian territory, and the allegedly tortious conduct carried out against Peruvian citizens." This conflates a forum's interest in resolving a controversy with its ability to

do so. The factors regarding familiarity with the applicable law, docket congestion, and costs and other burdens on local courts and juries are all concerned with how well-equipped a jurisdiction is to handle a case (as is the separate adequacy of the forum inquiry). The local interest factor has the different aim of determining if the forum in which the lawsuit was filed has its own identifiable interest in the litigation which can justify proceeding in spite of these burdens. *See Piper,* 454 U.S. at 261; *Tuazon,* 433 F.3d at 1182.

In considering this factor, the district court undervalued California's significant interest in providing a forum for those harmed by the actions of its corporate citizens. California courts have repeatedly recognized the state's "interest in deciding actions against resident corporations whose conduct in this state causes injury to persons in other jurisdictions." *Stangvik v. Shiley Inc.,* 819 P.2d 14, 21 n.10 (Cal. 1991); *see also Morris v. AGFA Corp.,* 51 Cal. Rptr. 3d 301, 311 (Cal. Ct. App. 2006) (noting that in California a "corporate defendant's state of incorporation and principal place of business is presumptively a convenient forum"); *cf. Guimei v. Gen. Elec. Co.,* 91 Cal. Rptr. 3d 178, 190 (Cal. Ct. App. 2009) (finding that where defendants were not California-based corporations, the state "has little interest in keeping the litigation in this state to deter future wrongful conduct"). The district court again also failed to consider Amazon Watch. The complaint describes interactions between Amazon Watch and Occidental that took place in California and which form the basis for the Unfair Competition Law claim. There can be no question that the local interest factor weighs in favor of a California forum where a California plaintiff is suing a California defendant over conduct that took place in the state.

Therefore, although both forums have a significant interest in the litigation, the local interest factor favors neither side entirely.[3]

b. Judicial Considerations

The remaining factors all relate to the effects of hearing the case on the respective judicial systems. The district court did not abuse its discretion by concluding that the court congestion and burden factors are neutral because there is evidence that both Peruvian courts and the Central District have similarly crowded dockets. *See Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.,* 61 F.3d 696, 704 (9th Cir. 1995) (finding no abuse of discretion where the district court held these factors to be neutral because both forums' "judiciaries are overburdened").

The district court also properly found the choice of law factor neutral because "both parties have asserted reasonable explanations that either Peruvian or California law applies." California applies a three-part test to determine choice of law in the ab-

[3] There appears to be a difference of opinion about whether it is appropriate to compare the state interests, or whether this factor is solely concerned with the forum where the lawsuit was filed. *Compare Tuazon,* 433 F.3d at 1182 ("[W]ith this interest factor, we ask only if there is an identifiable local interest in the controversy, not whether another forum also has an interest."), *and Boston Telecomms.,* 588 F.3d at 1212 (noting that whether a state "has more of an interest than any other jurisdiction" is not relevant), *with Lueck,* 236 F.3d at 1147 (balancing the interests of the foreign and domestic jurisdictions and finding the factor tipped toward dismissal because the "local interest in this lawsuit is comparatively low"). Here, under the former view, this factor would tip against dismissal, while under the latter it is neutral. However, we find that under either approach the district court erred by undervaluing California's interest in this case.

sence of an effective choice-of-law agreement. *See Wash. Mut. Bank v. Superior Court,* 15 P.3d 1071, 1080 (Cal. 2001). This "governmental interest approach" involves: (1) determining if the foreign law "materially differs" from California law; (2) and if so, next determining each respective state's interest in application of its law; (3) and finally, if the laws materially differ and both states have an interest in the litigation, selecting the law of the state whose interest would be "more impaired" if its law were not applied. *Id.* at 1080–81. The proponent of using foreign law has the initial burden of showing material differences. *Id.* at 1080.

Here the district court acknowledged that Occidental, as the foreign law proponent, presented a choice-of-law analysis that was "lacking," suggesting that it failed to meet its initial burden for the governmental interest test. However, as part of their effort to demonstrate that Peru is not an adequate alternate forum, Plaintiffs themselves argued that California law is materially different from Peruvian law. Therefore, resolving the conflict of law issue would involve a full blown analysis of the state interests and relative impairment. As the district court noted, *forum non conveniens* is designed so that courts can avoid such inquiries at this early stage. *See Piper,* 454 U.S. at 251 ("The doctrine of *forum non conveniens,* however, is designed in part to help courts avoid conducting complex exercises in comparative law."); *Lueck,* 236 F.3d at 1148 (noting that district courts need not make a choice of law determination to decide a *forum non conveniens* motion that does not involve a statute requiring venue in the United States).

4. Weighing the Factors

The private factors based on convenience and evidentiary concerns favor neither side, while the residence of the parties and enforceability of the judgment factors weigh against dismissal. All of the public interest factors are neutral. Taken together, the factors fail to "establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience." *Piper,* 454 U.S. at 241 (quoting *Koster,* 330 U.S. at 524); *Dole Food,* 303 F.3d at 1118 ("The plaintiff's choice of forum will not be disturbed unless the 'private interest' and 'public interest' factors strongly favor trial in the foreign country."). They also fail to outweigh the deference owed to Amazon Watch's chosen forum. Therefore, the district court abused its discretion by "striking an unreasonable balance of relevant factors." *Ravelo Monegro,* 211 F.3d at 511; *see also Boston Telecomms.,* 588 F.3d at 1212 (reversing a *forum non conveniens* dismissal because the "district court did not hold [the defendant] to his burden" of showing the foreign forum was more convenient where "[a]ll but one of the private and public interest factors were either neutral or weighed against dismissal").

C. Absence of Conditions on the *Forum Non Conveniens* Dismissal

Although the district court dismissed the case without prejudice to Plaintiffs' right to re-file in the Central District of California in the event that Occidental does not consent to personal jurisdiction in Peru, or a Peruvian court declines to assert personal jurisdiction over Occidental, it did not place any mitigating conditions on its dismissal. Under the circumstances here, this was an abuse of discretion.

Plaintiffs requested that the district court condition its dismissal by requiring that: (1) any Peruvian judgment be satisfied; (2) Occidental waive any statute of limitations defense in Peru that would not be available in California; (3) Occidental agree to comply with United States discovery rules; and (4) Occidental translate documents from English to Spanish. District courts are not required to impose conditions on *forum non conveniens* dismissals, but it is an abuse of discretion to fail to do so when "there is a justifiable reason to doubt that a party will cooperate with the foreign forum." *Leetsch,* 260 F.3d at 1104.

Here, there is justifiable reason to suspect that Occidental will move to dismiss this lawsuit based on the Peruvian statute of limitations. Occidental emphasizes that the Peruvian statute of limitations is tolled pending this appeal, but coyly adds "to the extent it had not already run." This caveat, together with Occidental's failure to waive the Peruvian statute of limitations, suggests that when Plaintiffs do file in Peru, Occidental intends to argue that the Peruvian statute ran before this lawsuit was filed in 2007. Dr. Osterling's declaration notes that the Peruvian statute of limitations begins to run "as of the day on which the action could have been brought."

"The danger that the statute of limitations might serve to bar an action is one of the primary reasons for the limitation on the court's discretion with respect to the application of the doctrine of *forum non conveniens.*" *Paper Operations,* 513 F.2d at 672–73; *see also Chang v. Baxter Healthcare Corp.,* 599 F.3d 728, 736 (7th Cir. 2010) ("[I]f the plaintiff's suit would be time-barred in the alternative forum, his remedy there is inadequate ... and in such a case

dismissal on grounds of *forum non conveniens* should be denied unless the defendant agrees to waive the statute of limitations in that forum...."); *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV,* 569 F.3d 189, 202 (4th Cir. 2009) ("[I]f the statute of limitations has expired in the alternative forum, the forum is not available, and the motion to dismiss based on *forum non conveniens* would not be appropriate."); *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan,* 273 F.3d 241, 246 (2d Cir. 2001) ("[A]n adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum.").

The district court could have cured this problem by imposing appropriate conditions. We have affirmed *forum non conveniens* dismissals that addressed statute of limitations concerns by requiring waiver in the foreign forum. *See, e.g., Loya v. Starwood Hotels & Resorts Worldwide, Inc.,* 583 F.3d 656, 664 (9th Cir. 2009) (finding no abuse of discretion where the district court conditioned dismissal on the defendant's agreement to accept service "and waive any statute of limitations defenses"); *Paper Operations,* 513 F.2d at 673 (holding that the district court's "conditional dismissal obviously resolves this problem"). Therefore, it was an abuse of discretion to dismiss on the basis of *forum non conveniens* without requiring Occidental to waive any statute of limitations defenses that would not be available in California.

Similarly, the district court failed to consider evidence about the difficulty of enforcing Peruvian judgments and the unique obstacles posed by Occidental's withdrawal from the country and the resulting uncertainty regarding its Peruvian assets. Occidental's own expert provided evidence of corrup-

tion and turmoil in the Peruvian judiciary that could become the basis for a challenge to the enforceability of a judgment based on the procedural deficiencies of a Peruvian proceeding. When there is reason to think that enforcing a judgment in a foreign country would be problematic, courts have required assurances that a defendant will satisfy any judgment as a condition to a *forum non conveniens* dismissal. *See Contact Lumber,* 918 F.2d at 1450.

As for discovery, the district court overemphasized Peruvian geography and lost sight of the importance of California-based witnesses and evidence to resolving the claims alleged in the complaint. Plaintiffs argue that without a condition requiring Occidental to cooperate with discovery requests pursuant to the Federal Rules of Civil Procedure, they might be denied access to important domestic evidence once the case is in a Peruvian court. Where a plaintiff would "have greater access to sources of proof relevant to" its claims if trial were held in the original forum, "district courts might dismiss subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims." *Piper,* 454 U.S. at 257, 258 n.25; *see also Satz v. McDonnell Douglas Corp.,* 244 F.3d 1279, 1283 (11th Cir. 2001) (holding the district court did not abuse its discretion when it conditioned dismissal on the defendant "agreeing to conduct all discovery in accordance with the Federal Rules of Civil Procedure, and voluntarily producing documents and witnesses within the United States"); *Stewart v. Dow Chemical Co.,* 865 F.2d 103, 107 (6th Cir. 1989) (finding no abuse of discretion where the trial judge conditioned dismissal on the defendant allowing "discovery of any evidence which would be discoverable under the Federal Rules

of Civil Procedure, and to make witnesses under its control available to the [foreign] court").

Once again the parties offered dueling expert affidavits as to the sufficiency of Peruvian discovery procedures to ensure that California-based evidence can be obtained and witnesses procured should this case proceed in Peru. While a thorough analysis might reasonably conclude that Peru offers discovery rules that would satisfy Plaintiffs' concerns, the district court erred by rejecting this condition without addressing those legitimate concerns at all. However, the district court did not err by declining to condition the dismissal on Occidental's agreeing to translate all documents into Spanish, as Plaintiffs failed to produce sufficient evidence to show justifiable reason to doubt that such translations would otherwise be available.

IV. CONCLUSION

Where a district court "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Boston Telecomms.,* 588 F.3d at 1206 (citations and internal quotation marks omitted). However, when it fails to hold a party to its "burden of making a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience," *id.* at 1212 (quoting *Ravelo Monegro,* 211 F.3d at 514), or when it "fail[s] to consider relevant private and public interest factors and misconstrue[s] others," *Gates Learjet Corp. v. Jensen,* 743 F.2d 1325, 1337 (9th Cir. 1984), then it abuses its discretion.

Here the district court failed to consider all relevant private and public interest factors, entirely overlooking the enforceability of judgments factor, which weighs heavily against dismissal. It correctly assumed that Amazon Watch was a proper domestic plaintiff, but erroneously afforded reduced deference to its chosen forum and ignored the group entirely in the analysis of numerous factors. These errors led the district court to misconstrue factors that are neutral or weigh against dismissal, and to strike an unreasonable balance between the factors and the deference due a domestic plaintiff's chosen forum. Finally, the district court abused its discretion by failing to impose conditions on its dismissal that were warranted by facts in the record showing justifiable reasons to doubt Occidental's full cooperation in the foreign forum.

Occidental had a substantial burden to persuade the district court to invoke the "exceptional tool" of *forum non conveniens* and deny Plaintiffs access to a U.S. court. *See Ravelo Monegro,* 211 F.3d at 514. Occidental failed to meet that burden, and a proper balance of all the relevant factors at this stage of proceedings clearly demonstrates that this lawsuit should proceed in the Central District of California. We therefore reverse the district court's dismissal on the basis of *forum non conveniens.* We need not reach Plaintiffs' argument that the district court abused its discretion in denying discovery before ruling on Occidental's motion. We remand this case to the district court to consider the question of Amazon Watch's standing, and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

RYMER, Circuit Judge, concurring in part, dissenting in part:

I agree that the district court did not abuse its discretion in determining that Peru is an adequate alternative forum. I also believe that conditions on dismissal might be appropriate, but would not require that any be imposed. Nor would I reanalyze whether to dismiss on grounds of *forum non conveniens* from scratch, because dismissals for *forum non conveniens* may be reversed only when there has been a clear abuse of discretion. *Creative Tech., Ltd. v. Aztech Sys. Pte, Ltd.,* 61 F.3d 696, 699 (9th Cir. 1995). The district court considered the relevant public and private interest factors, its findings are supported in the record, and its balancing of these factors was not unreasonable. Thus, its decision deserves substantial deference. *See id.*

I

I cannot say that the district court abused its discretion in weighing the public and private interest factors. It took into account that 25 out of the 26 plaintiffs are Peruvian and that Amazon Watch is only one plaintiff on one out of the 12 causes of action. Amazon Watch was not originally a plaintiff in California state court, having been added only after the Peruvian plaintiffs learned that Occidental was going to move for dismissal based on *forum non conveniens.* The court could find that these circumstances lessen the deference due to the plaintiffs' choice of forum.

The district court could also find, as it did, that the facts of the case center primarily on Peruvian lands and Peruvian people. It found that many witnesses, including family members and community leaders,

physicians, and consultants, are beyond the reach of compulsory process in the United States. Carijano asserts the court abused its discretion by not specifically stating which witnesses would be unwilling to travel to the United States, but it can be "difficult to identify" specific individuals when many witnesses "are located beyond the reach of compulsory process." *Piper Aircraft,* 454 U.S. at 258. Here, as in *Lueck,* it appears that most of the evidence in the United States would be under the control of Occidental (or alternatively, Amazon Watch), and therefore could be produced no matter what the forum. *Lueck,* 236 F.3d at 1146–47 (noting that private factors favored dismissal where evidence in the United States was under both parties' control, and evidence in New Zealand could not be summoned to the United States). Finally, the district court's balancing is supported by evidence that a trip from the Achuar territory to a Peruvian city is shorter and less costly than that trip followed by a 16–20 hour flight to Los Angeles.

The district court considered the strong interest of both Peru and California in this dispute, but weighted Peru's more heavily given that the suit involves Peruvian land and citizens. This is not a clearly erroneous assessment as both the alleged tort, and injury, occurred there.

II

Carijano suggests that more discovery may have mattered, but has not made a clear showing of actual and substantial prejudice sufficient to demonstrate the district court abused its discretion by denying additional discovery. Carijano simply argues that the parties produced contradictory evidence and speculates that additional discovery might have helped its case. But Carijano's extensive recitation of the evi-

dence it presented in district court demonstrates the court did have enough information to balance the parties' interests. Even when it's possible that discovery might have provided more detail, a district court does not abuse is discretion in denying discovery if the parties have provided "enough information to enable the District Court to balance the parties' interests." *Cheng,* 708 F.2d at 1412 (quoting *Piper Aircraft,* 454 U.S. at 258).

III

While conditions on dismissal are generally not necessary in a *forum non conveniens* dismissal, they may be necessary to ensure that the defendant does not defeat the adequacy of a foreign forum. *Leetsch v. Freedman,* 260 F.3d 1100, 1104 (9th Cir. 2001). Conditions such as accepting service, submitting to the jurisdiction, waiving the statute of limitations, making discovery, and agreeing to enforceability of the judgment may be appropriate here. I would, therefore, remand for the court specifically to consider whether its dismissal should be conditioned. Otherwise, I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 08–56187

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA, a minor, by her guardian Rosario Dahua Hualinga; ROSARIO DAHUA HUALINGA, personally and on behalf of her minor child Roxana Garcia Dahua; NILDA GARCIA SANDI, a minor, by her guardian Rosalbina Hualinga Sandi; ROSALBINA HUALINGA SANDI, personally and on behalf of her minor child Nilda Garcia Sandi; ELENA MAYNAS MOZAMBITE, a minor, by her guardian Gerardo Maynas Hualinga; GERARDO MAYNAS HUALINGA, personally and on behalf of his minor child Elena Maynas Mozambite; ALAN CARIAJANO SANDI, a minor, by his guardian Pedro Sandi; PEDRO SANDI WASHINGTON, personally and on behalf of his minor child Alan Cariajano Sandi; ELISA HUALINGA MAYNAS, a minor, by her guardians Daniel Hualinga Sandi and Andrea Maynas Cariajano; DANIEL HUALINGA SANDI, personally and on behalf of his minor child Elisa Hualinga Maynas; ANDREA MAYNAS CARIAJANO, personally and on behalf of her minor child Elisa Hualinga Maynas; CERILO HUALINGA HUALINGA, a minor, by his guardians Roman Hualinga Sandi and Rosa Hualinga; ROMAN HUALINGA SANDI, personally and on behalf of his minor child Cerilo Hualinga Hualinga; ROSA HUALINGA, personally and on behalf of her minor child Cerilo Hualinga Hualinga; RODOLFO MAYNAS SUAREZ, a minor, by his guardians Horacio Maynas Cariajano and Delmencia Suarez Diaz; HORACIO

MAYNAS CARIAJANO, personally and on behalf of his minor child Rodolfo Maynas Suarez; DELMENCIA SUAREZ DIAZ, personally and on behalf of her minor child Rodolfo Maynas Suarez; KATIA HUALINGA SALAS, a minor, by her guardians Alejandro Hualinga Chuje and Linda Salas Pisongo; ALEJANDRO HUALINGA CHUJE, personally and on behalf of his minor child Katia Hualinga Salas; LINDA SALAS PISONGO, personally and on behalf of her minor child Katia Hualinga Salas; FRANCISCO PANAIGO PAIMA, a minor, by his guardians Milton Panaigo Diaz and Anita Paima Cariajano; MILTON PANAIGO DIAZ, personally and on behalf of his minor child Francisco Panaigo Paima; ANITA PAIMA CARIAJANO, personally and on behalf of her minor child Francisco Paniago Paima; ADOLFINA GARCIA SANDI, personally and on behalf of her deceased minor child Olivio Salas Garcia; AMAZON WATCH, INC., a Montana corporation,

Plaintiffs–Appellants,

v.

OCCIDENTAL PETROLEUM CORPORATION, a Delaware Corporation; OCCIDENTAL PERUANA, INC., a California Corporation,

Defendants–Appellees.

No. 08–56270

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA, a minor, by her guardian Rosario Dahua Hualinga;

ROSARIO DAHUA HUALINGA, personally and on behalf of her minor child Roxana Garcia Dahua; NILDA GARCIA SANDI, a minor, by her guardian Rosalbina Hualinga Sandi; ROSALBINA HUALINGA SANDI, personally and on behalf of her minor child Nilda Garcia Sandi; ELENA MAYNAS MOZAMBITE, a minor, by her guardian Gerardo Maynas Hualinga; GERARDO MAYNAS HUALINGA, personally and on behalf of his minor child Elena Maynas Mozambite; ALAN CARIAJANO SANDI, a minor, by his guardian Pedro Sandi; PEDRO SANDI WASHINGTON, personally and on behalf of his minor child Alan Cariajano Sandi; ELISA HUALINGA MAYNAS, a minor, by her guardians Daniel Hualinga Sandi and Andrea Maynas Cariajano; DANIEL HUALINGA SANDI, personally and on behalf of his minor child Elisa Hualinga Maynas; ANDREA MAYNAS CARIAJANO, personally and on behalf of her minor child Elisa Hualinga Maynas; CERILO HUALINGA HUALINGA, a minor, by his guardians Roman Hualinga Sandi and Rosa Hualinga; ROMAN HUALINGA SANDI, personally and on behalf of his minor child Cerilo Hualinga Hualinga; ROSA HUALINGA, personally and on behalf of her minor child Cerilo Hualinga Hualinga; RODOLFO MAYNAS SUAREZ, a minor, by his guardians Horacio Maynas Cariajano and Delmencia Suarez Diaz; HORACIO MAYNAS CARIAJANO, personally and on behalf of his minor child Rodolfo Maynas Suarez; DELMENCIA SUAREZ DIAZ, personally and on behalf of her minor child Rodolfo Maynas Suarez; KATIA HUALINGA SALAS, a minor, by her guardians Alejandro Hualinga Chuje and Linda Salas Pisongo; ALEJANDRO HUALINGA CHUJE, personally and on behalf of his minor child Katia Hualinga Salas; LINDA SALAS PISONGO, personally and on behalf of her minor child

Katia Hualinga Salas; FRANCISCO PANAIGO PAIMA, a minor, by his guardians Milton Panaigo Diaz and Anita Paima Cariajano; MILTON PANAIGO DIAZ, personally and on behalf of his minor child Francisco Panaigo Paima; ANITA PAIMA CARIAJANO, personally and on behalf of her minor child Francisco Paniago Paima; ADOLFINA GARCIA SANDI, personally and on behalf of her deceased minor child Olivio Salas Garcia; AMAZON WATCH, INC., a Montana corporation,

Plaintiffs–Appellees,

v.

OCCIDENTAL PETROLEUM CORPORATION, a Delaware Corporation; OCCIDENTAL PERUANA, INC., a California Corporation,

Defendants–Appellants.

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Argued and Submitted
March 3, 2010—Pasadena, California

Filed December 6, 2010

Before: Mary M. Schroeder, Pamela Ann Rymer, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Wardlaw;
Partial Concurrence and Partial Dissent by
Judge Rymer

OPINION

WARDLAW, Circuit Judge:

These cross-appeals arise from the petroleum and oil exploration operations conducted by defendant Occidental Peruana ("OxyPeru"), an indirect subsidiary of defendant Occidental Petroleum Corporation (collectively "Occidental"), along the Rio Corrientes in the northern region of Peru. Plaintiffs, 25 members of the Achuar indigenous group dependent for their existence upon the rainforest lands and waterways along the river, and Amazon Watch, a California corporation, sued Occidental in Los Angeles County Superior Court for environmental contamination and release of hazardous waste. Although Occidental's headquarters is located in Los Angeles County, Occidental removed the suit to federal district court where it successfully moved for dismissal on the ground that Peru is a more convenient forum. Plaintiffs timely appeal the dismissal of their suit. Occidental cross-appeals from the district court's determination that its Rule 12 motion to dismiss Amazon Watch for lack of standing is moot.

Because Occidental failed to meet its burden of demonstrating that Peru is a more convenient forum, and the district court gave insufficient weight to the strong presumption in favor of a domestic plaintiff's choice of forum, the district court abused its discretion by dismissing the lawsuit without imposing mitigating conditions for the dismissal.

I. FACTUAL AND PROCEDURAL BACKGROUND

We accept as true the facts alleged in the Achuar Plaintiffs' and Amazon Watch's ("Plaintiffs") First Amended Complaint ("FAC"). *See Vivendi SA v. T–Mobile USA, Inc.,* 586 F.3d 689, 691 n.3 (9th Cir.

2009); *Aguas Lenders Recovery Group v. Suez, S.A.,* 585 F.3d 696, 697 (2d Cir. 2009) (accepting the facts alleged in the complaint as true where the case was dismissed on *forum non conveniens* grounds without a factual hearing).

Occidental is among the largest oil and gas companies in the United States. Its Peruvian operations began in the early 1970s with the development of a pair of lots near the Ecuadorean border known as "Block 1–AB." Its subsidiary, OxyPeru, built Block 1–AB into a thriving extraction, processing, and distribution site, providing 26 percent of Peru's total historical oil production from 1972 to 2000, at which point Occidental sold its stake in Block 1–AB to the Argentine oil company Pluspetrol. The Peruvian government granted Occidental its first concession in the region in 1971; oil was found the next year. The company built dozens of wells, a 530–kilometer network of pipelines, refineries, and separation batteries for processing crude oil, as well as roads, heliports and camps to support the operation at Block 1–AB.

The Achuar are indigenous people who have long resided along the rivers of the northern Peruvian rainforest. Block 1–AB encompasses significant portions of the Corrientes and Macusari rivers, home to several Achuar communities. The inhabitants use the rivers and their tributaries for drinking, fishing, and bathing. The region is remote, with access typically limited to small planes, helicopters, small boats, and canoes.

The complaint alleges that, during its thirty years in the Achuar territories, Occidental knowingly utilized out-of-date methods for separating crude oil that contravened United States and Peruvian law, resulting in the discharge of millions of gallons of toxic

oil byproducts into the area's waterways. Achuar children and adults came into frequent contact with the contaminants by using polluted rivers and tributaries for drinking, washing and fishing. Tests have shown potentially dangerous levels of lead and cadmium in the blood of a significant number of affected individuals. Achuar Plaintiffs have reported gastrointestinal problems, kidney trouble, skin rashes, and aches and pains that they attribute to the pollution.

Plaintiffs further allege that the pollution led to decreasing yields of edible fish, and that the animals hunted by the Achuar have been turning up dead or diseased after drinking river water. The pollution has also allegedly harmed agricultural productivity and land values. Plaintiffs contend that Occidental was aware of the dangers posed by the contamination but failed to warn residents.

The complaint also details the Block 1–AB–related activities of Amazon Watch, a nonprofit Montana corporation headquartered in San Francisco, California, which began working with the Achuar communities in 2001. Representatives of Amazon Watch traveled to the region several times in the ensuing years and helped produce a documentary film about the contamination. Amazon Watch officials also communicated with Occidental representatives in Los Angeles throughout 2005 and 2006, both at public shareholder events and in private meetings. Amazon Watch organized public relations campaigns in both Peru and Los Angeles designed to respond to statements by Occidental about its Peruvian operations.

Several dozen Achuar adults and children filed a complaint in Los Angeles County Superior Court against Occidental on May 10, 2007. Plaintiffs assert claims for common law negligence, strict liability,

battery, medical monitoring, wrongful death, fraud and misrepresentation, public and private nuisance, trespass, and intentional infliction of emotional distress, as well as a violation of California's Unfair Competition Law. They seek damages, injunctive and declaratory relief, restitution, and disgorgement of profits on behalf of the individual plaintiffs and two proposed classes. On August 3, 2007, Occidental removed the action to United States District Court pursuant to 28 U.S.C. § 1332(d)(2). On September 10, 2007, the complaint was amended to name Amazon Watch as a plaintiff.

On April 15, 2008, the district court granted Occidental's motion to dismiss based on the doctrine of *forum non conveniens.* It did so without the benefit of oral argument, and while simultaneously denying Plaintiffs the opportunity to conduct limited discovery on the adequacy of Peru as an alternative forum, the current location of witnesses and evidence, and limited depositions to ascertain information about Occidental's Peruvian operations, which had ceased in 2000. In denying Plaintiffs' discovery request the district court concluded "it has enough information to sufficiently weigh the parties' interests and determine the adequacy of the foreign forum ... [h]aving reviewed Defendants' *forum non conveniens* motion and all related documents and exhibits."

Based on Occidental's evidence, principally the Declaration of Doctor Felipe Osterling Parodi ("Dr. Osterling"), the district court found that Peru is an adequate alternative forum and that the public and private interest factors pointed toward trial in Peru sufficiently to overcome the strong presumption of a domestic plaintiff's choice of forum. It dismissed the case, concluding that Occidental's motion to dismiss

Amazon Watch's unfair competition claim was thereby rendered moot.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction under 28 U.S.C. §§ 1332(d)(2) & 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court's order dismissing the lawsuit on the basis of *forum non conveniens* for an abuse of discretion. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257 (1981). A district court abuses its discretion by identifying an incorrect legal standard, or by applying the correct standard illogically, implausibly, or in a manner without support in inferences that may be drawn from facts in the record. *United States v. Hinkson,* 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc). In the *forum non conveniens* context, a "district court may abuse its discretion by relying on an erroneous view of the law, by relying on a clearly erroneous assessment of the evidence, or by striking an unreasonable balance of relevant factors." *Ravelo Monegro v. Rosa,* 211 F.3d 509, 511 (9th Cir. 2000).

III. DISCUSSION

"The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 507 (1947). Historically, the doctrine's purpose is to root out cases in which the "open door" of broad jurisdiction and venue laws "may admit those who seek not simply justice but perhaps justice blended with some harassment," and particularly cases in which a plaintiff resorts "to a strategy of forcing the trial at a most inconvenient place for an adversary." *Id.*; *see also Piper,* 454 U.S. at 249 n.15

("[D]ismissal may be warranted where a plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law."). The doctrine "is based on the inherent power of the courts to decline jurisdiction in exceptional circumstances." *Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber,* 513 F.2d 667, 670 (9th Cir. 1975).

The doctrine of *forum non conveniens* is a drastic exercise of the court's "inherent power" because, unlike a mere transfer of venue, it results in the dismissal of a plaintiff's case. The harshness of such a dismissal is especially pronounced where, as here, the district court declines to place any conditions upon its dismissal. Therefore, we have treated *forum non conveniens* as "an exceptional tool to be employed sparingly," and not a "doctrine that compels plaintiffs to choose the optimal forum for their claim." *Dole Food Co. v. Watts,* 303 F.3d 1104, 1118 (9th Cir. 2002) (quoting *Ravelo Monegro,* 211 F.3d at 514) (internal quotations omitted). The mere fact that a case involves conduct or plaintiffs from overseas is not enough for dismissal. *See Tuazon v. R.J. Reynolds Tobacco Co.,* 433 F.3d 1163, 1181–82 (9th Cir. 2006) ("Juries routinely address subjects that are totally foreign to them, ranging from the foreign language of patent disputes to cases involving foreign companies, foreign cultures and foreign languages.")

To prevail on a motion to dismiss based upon *forum non conveniens,* a defendant bears the burden of demonstrating an adequate alternative forum, and that the balance of private and public interest factors favors dismissal. *See Dole Food Co.,* 303 F.3d at 1118. In determining whether the district court abused its discretion in concluding that Occidental satisfied its

burden, we examine: (1) the adequacy of the alternate forum; (2) the private and public factors and the deference owed a plaintiff's chosen forum; and (3) the district court's decision to dismiss Plaintiffs' case without imposing any conditions on the dismissal.

A. Adequacy of the Forum

The district court abused its discretion in finding that under the unique circumstances of this case Peru provides an adequate alternative forum for Plaintiffs to pursue their claims against Occidental arising from business operations in Peru that ended 7 years previously. An alternative forum is deemed adequate if: (1) the defendant is amenable to process there; and (2) the other jurisdiction offers a satisfactory remedy. *See Piper,* 454 U.S. at 254 n.22,; *Leetsch v. Freedman,* 260 F.3d 1100, 1103 (9th Cir. 2001) ("The foreign court's jurisdiction over the case and competency to decide the legal questions involved will also be considered. We make the determination of adequacy on a case by case basis, with the party moving for dismissal bearing the burden of proof.") (citation omitted).

1. Whether Occidental is Amenable to Process in Peru

The district court abused its discretion by accepting at face value Occidental's "stipulation and consent to jurisdiction in Peru" without considering the glaring absence of a waiver of the statute of limitations, which Occidental's own expert suggests may have run. Dismissal on the basis of *forum non conveniens* is improper when a lawsuit would be time-barred in the alternative jurisdiction. Moreover, where there is reason to believe that a defendant will seek immediate dismissal based on the foreign forum's statute of

limitations, dismissal should be conditioned on waiving any statute of limitations defenses that would not be available in the domestic forum. *See Chang v. Baxter Healthcare Corp.,* 599 F.3d 728, 736 (7th Cir. 2010) ("[I]f the plaintiff's suit would be time-barred in the alternative forum, his remedy there is inadequate ... and in such a case dismissal on grounds of *forum non conveniens* should be denied unless the defendant agrees to waive the statute of limitations in that forum...."); *Compania Naviera Joanna SA v. Koninklijke Boskalis Westminster NV,* 569 F.3d 189, 202 (4th Cir. 2009) ("[I]f the statute of limitations has expired in the alternative forum, the forum is not available, and the motion to dismiss based on *forum non conveniens* would not be appropriate."); *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan,* 273 F.3d 241, 246 (2d Cir. 2001) ("[A]n adequate forum does not exist if a statute of limitations bars the bringing of the case in that forum.").[1]

Occidental itself emphasizes that the Peruvian statute of limitations is tolled pending this appeal, but coyly adds "to the extent it had not already run." This caveat, together with Occidental's failure to waive the Peruvian statute of limitations, suggests that when Plaintiffs do file in Peru, Occidental in-

[1] The district court could have cured this problem by imposing appropriate conditions. We have affirmed *forum non conveniens* dismissals that addressed statute of limitations concerns by requiring waiver in the foreign forum. *See, e.g., Loya v. Starwood Hotels & Resorts Worldwide, Inc.,* 583 F.3d 656, 664 (9th Cir. 2009) (finding no abuse of discretion where the district court conditioned dismissal on the defendant's agreement to accept service "and waive any statute of limitations defenses"); *Paper Operations,* 513 F.2d at 673 (holding that the district court's "conditional dismissal obviously resolves this problem").

tends to argue that the Peruvian statute ran before this lawsuit was filed in 2007. Dr. Osterling's declaration notes that the Peruvian statute of limitations begins to run "as of the day on which the action could have been brought." "The danger that the statute of limitations might serve to bar an action is one of the primary reasons for the limitation on the court's discretion with respect to the application of the doctrine of *forum non conveniens.*" *Paper Operations,* 513 F.2d at 672–73. Therefore the district court erred by determining that Occidental was amenable to process in Peru based on its qualified stipulation.

2. Whether Peru Offers a Satisfactory Remedy

The district court also abused its discretion in concluding on this record that Occidental met its burden of proving that Peru could offer Plaintiffs a satisfactory remedy. A "dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery," but an alternate forum offering a "clearly unsatisfactory" remedy is inadequate. *Piper,* 454 U.S. at 250, 254 n.22; *see also Lueck v. Sundstrand Corp.,* 236 F.3d 1137, 1144 (9th Cir. 2001) ("The effect of *Piper Aircraft* is that a foreign forum will be deemed adequate unless it offers no practical remedy for the plaintiff's complained of wrong."). The parties offered conflicting expert affidavits that focused on two remedial issues: (a) Peruvian law itself, both substantive and procedural; and (b) special barriers confronting indigenous plaintiffs and general corruption in the Peruvian judicial system. In assessing whether Peru afforded Plaintiffs a satisfactory remedy, the district court erroneously failed to weigh Plaintiffs' expert testimony, which

unequivocally asserts that Peru provides no practical remedy at all for Plaintiffs.

a. Peruvian Law

The district court failed to address critical issues raised by the parties about the Peruvian legal system. Dr. Osterling's affidavit provides an in-depth exploration of Peruvian statutory law and civil procedure, and concludes that "Peruvian law has analogies for all the substantive legal theories on which the lawsuit filed in the Los Angeles jurisdiction is based," while also offering analogous remedies. In contrast, Plaintiffs submitted expert declarations, including that of Peruvian lawyer and professor Dante Apolín Meza, who cautioned that damages fulfill a purely compensatory—not punitive—function in Peru, and that it may be difficult for an "indeterminate group of persons (or class) such as the 'Achuar communities' " to recover.

The district court disregarded Plaintiffs' expert and credited Dr. Osterling's account, quoting the conclusion that "Peruvian substantive norms on civil liability allow a lawsuit for damages to be processed on the facts set forth in the complaint." However, the district court did not find—and it appears it could not on this record—precisely what sort of damages would be available. Given the questions raised by Plaintiffs' expert affidavits, there is no evidence that Plaintiffs could be entitled to anything more than nominal damages, which would mean that Peru would offer "no practical remedy for the plaintiff's complained of wrong." *Lueck,* 236 F.3d at 1144.

Moreover, the district court did not consider whether Peruvian law provides any remedy at all for Amazon Watch's California Unfair Competition

claim. *See Piper,* 454 U.S. at 254 n.22 ("[D]ismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute."). By failing to address these critical questions, fairly raised in the record, the district court relied on an erroneous assessment of the evidence to determine that Peru could offer Plaintiffs a satisfactory remedy.

b. Discrimination and Corruption

While the district court did not err by weighing both sides' declarations and concluding that discrimination does not make Peru an inadequate forum, it overlooked important evidence related to corruption. Plaintiffs' experts described unique barriers confronting the Achuar Plaintiffs in Peru due to their ethnicity, poverty, and isolation. Peruvian lawyer and professor Wilfredo Ardito Vega characterized his nation's judiciary as "one of the governmental institutions that has not only abstained from intervening in cases of discrimination, but it has contributed to reinforcing discrimination." He stated that, beyond such intentional bias, impoverished and geographically isolated litigants such as the Achuar Plaintiffs are frequently deterred from vindicating their rights in Peruvian courts because of logistical barriers such as filing fees and documentation requirements. The district court properly considered these arguments, but credited Dr. Osterling's more specific affidavit, which noted the availability of fee waivers for the indigent, as well as outreach programs to indigenous groups and legal doctrines that could address the barriers posed by discrimination and documentation requirements.

To demonstrate that a foreign nation is an inadequate forum due to corruption, a party must make a

"powerful showing" that includes specific evidence. *Tuazon,* 433 F.3d at 1179 (noting that the court was aware of only two federal cases holding alternative forums inadequate because of corruption). Plaintiffs' expert Dr. Ardito asserted that the Peruvian judiciary suffers from "institutionalized" corruption, including widespread lobbying of judges, third party informal "intermediaries" between magistrates and parties, and the exchange of improper favors and information. He added that the problem is exacerbated by structural features of the judicial system, such as the proliferation of provisional and substitute judges who lack independence and are especially susceptible to improper influences. All of Plaintiffs' experts suggested that these institutional flaws lead to tangible harm for litigants, including inconsistent judgments and favoritism for powerful interests, which could place isolated, indigenous plaintiffs at a special disadvantage.

The district court concluded that the evidence contained in Plaintiffs' expert affidavits was too generalized and anecdotal "to pass value judgments on the adequacy of Peru's judicial system." While Plaintiffs' evidence may fall short of a specific and "powerful" showing of corruption, the most concrete and alarming suggestions of judicial turmoil ironically come from Occidental's own evidence. Dr. Osterling acknowledged that "[c]orruption is present in all aspects of government," including the courts where "low salaries of Judiciary personnel create a certain degree of tolerance for the phenomenon of corruption." He described admirable efforts within the Peruvian government to eliminate such corruption and bolster the integrity and professionalism of the country's courts. However, his account of the reform efforts paints a picture of a judiciary undergoing a

transition that is, at best, volatile: he noted that the Peruvian Office of Judgeship Control, which investigates misconduct, requested the dismissal of 126 judges in 2007, up from 94 in 2006. The Office's investigations resulted in the temporary suspension of 86 judges in 2007, up from 36 in 2006. The Office issued 1,263 disciplinary sanctions in 2007, and admonished 473 judges and 443 court officers, while fining 84 judges and 67 court officers. Meanwhile, in the same period the Office brought 1,505 disciplinary processes that ended in exonerations and another 940 that were declared inadmissible.

The district court correctly noted that "one of the central ends of the *forum non conveniens* doctrine is to avert 'unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations.' " (quoting *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine,* 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001)). We agree, and do not hold that Peru is categorically an inadequate forum, nor do we make any judgment about corruption in its judicial system. However, under the unique circumstances of this case and on the specific evidence presented, the district court erred by overlooking troubling evidence of potential inadequacy proffered by Occidental, the proponent of the *forum non conveniens* dismissal.

B. Balance of Private and Public Interest Factors

In weighing the relevant factors, the district court consistently understated Occidental's heavy burden of showing that the Los Angeles forum results in "oppressiveness and vexation ... out of all proportion" to the plaintiff's convenience. *Piper,* 454 U.S. at 241 (quoting *Koster v. Lumbermens Mut. Cas. Co.,* 330

U.S. 518, 524 (1947)). It properly considered Amazon Watch's status as a domestic plaintiff, but improperly afforded only reduced deference to the group's choice of forum. "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Id.* at 255.

1. Deference to Plaintiff's Chosen Forum

When a domestic plaintiff initiates litigation in its home forum, it is presumptively convenient. *Id.* at 255–56. A foreign plaintiff's choice is entitled to less deference, but "less deference is not the same thing as no deference." *Ravelo Monegro,* 211 F.3d at 514. Here the district court acknowledged that Amazon Watch "is a California plaintiff" for the purposes of its *forum non conveniens* analysis. Occidental contends that the district court erred because it should have dismissed Amazon Watch for lack of standing under both Article III of the Constitution and the statute under which it sued, California Business & Professions Code § 17200, the Unfair Competition Law. However, the district court was not required to decide the standing question before ruling on the *forum non conveniens* motion. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422 (2007).

In *Sinochem*, the Supreme Court held that federal district courts may decide *forum non conveniens* motions even though jurisdictional issues remain unresolved. *Id.* at 425. Article III standing is a species of subject matter jurisdiction. *See Chandler v. State Farm Mut. Auto. Ins. Co.,* 598 F.3d 1115, 1122 (9th Cir. 2010) ("Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dis-

miss."); *Cetacean Cmty. v. Bush,* 386 F.3d 1169, 1174 (9th Cir. 2004) ("A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit."). Unlike this case, Sinochem involved a "textbook case for immediate *forum non conveniens* dismissal," in which a Malaysian shipping company sued a Chinese importer in the Eastern District of Pennsylvania. *Sinochem,* 549 U.S. at 435. The only connection to the U.S. forum was tenuous: cargo involved in the dispute underlying the case had been loaded at the Port of Philadelphia. *Id.* at 426. The Sinochem Court therefore promoted judicial economy by allowing the district court to dismiss the case without first having to address complicated jurisdictional issues. *Id.* at 425. However, the Supreme Court did not limit its holding to cases where the district court opts for dismissal. Rather it held that "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," including matters of personal or subject matter jurisdiction. *Id.* at 425. The Court did not dictate how district courts must respond to such pleas.

Under *Sinochem*, then, the district court properly ruled on the *forum non conveniens* motion based on the assumption that Amazon Watch was a proper plaintiff, but without conducting a full standing analysis. Resolving that question would require consideration of both Article III and statutory standing to sue under California's Unfair Competition Law. Statutory standing is a merits question, not a jurisdictional matter like constitutional standing, which may be considered for the first time on appeal. *See Noel v. Hall,* 568 F.3d 743, 748 (9th Cir. 2009). We

therefore do not reach the issue, and like the district court, we assume that Amazon Watch has standing for the purposes of the *forum non conveniens* analysis only.[2]

Despite operating under that assumption, the district court explained that because Amazon Watch was but one domestic plaintiff alongside 25 foreign plaintiffs, it was entitled to "only some deference." The district court cited no legal authority for the application of this vague intermediate standard of deference. Indeed, the district court's application of that standard is directly contrary to the *Piper* Court's clear instruction that when a domestic plaintiff chooses its home forum, "it is reasonable to assume that this choice is convenient," but a foreign plaintiff's choice deserves "less deference." *Piper,* 454 U.S. at 255–56. *Piper* does not in any way stand for the proposition that when both domestic and foreign plaintiffs are present, the strong presumption in favor of the domestic plaintiff's choice of forum is somehow lessened. Moreover, the district court treated Amazon Watch as merely one of 26 plaintiffs, failing to consider its status as an organizational plaintiff representing numerous individual members.

In *Vivendi*, the court afforded reduced deference to an American co-plaintiff based on an express finding that the plaintiff had engaged in forum shopping. *See*

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[2] We therefore deny Plaintiffs' petition to certify the statutory standing question to the California Supreme Court. See Cal. R. Ct. 8.548(a)(1) (limiting certification from the United States Court of Appeals to questions which "could determine the outcome of a matter pending in the requesting court"); *see also Couch v. Telescope, Inc.,* 611 F.3d 629, 634 (9th Cir. 2010) ("[W]e invoke the certification process only after careful consideration and do not do so lightly.").

Vivendi, 586 F.3d at 694. Occidental makes a similar argument here, noting that Amazon Watch was named as a plaintiff after the lawsuit was removed to federal court, and suggesting that its presence in the case reflects a "tactical effort" to defeat a *forum non conveniens* dismissal.

A party's intent in joining a lawsuit is relevant to the balancing of the *forum non conveniens factors* only to the extent that it adds to an overall picture of an effort to take unfair advantage of an inappropriate forum. *See id.* at 695. Vivendi involved litigation between European companies that had no significant connection to the United States. *Id.* at 694. Vivendi admitted that it sued in the Western District of Washington "because the United States offers 'proper discovery' and favorable law." *Id.* at 694–95. After defendant T–Mobile filed a motion to dismiss on the basis of *forum non conveniens*, Vivendi added an American co-plaintiff, Vivendi Holding, which claimed an interest in the litigation as the holder of certain bonds. However, the plaintiffs conceded that Vivendi Holding acquired the bonds after the *forum non conveniens* motion was filed with the partial motivation of strengthening its connection to the case. *Id.* at 694. Moreover, the bonds were "related only incidentally" to the fraud allegations at the heart of the litigation. *Id.*

By contrast, Amazon Watch's involvement in the subject matter of this litigation began in 2001, six years before the case was filed. The complaint includes factual allegations giving rise to claims based on events that took place in Los Angeles involving Amazon Watch, Occidental and the Achuar plaintiffs. Any tactical motivation for Amazon Watch's presence in this case is outweighed by the organization's ac-

tual long-standing involvement in the subject matter of the litigation and its assertion of actual injury resulting from defendants' alleged conduct. Moreover, Plaintiffs did not strategically choose a random or only tangentially relevant forum; they chose Occidental's home forum. And while the case concerns past operations and injury in Peru, the complaint includes claims based on decisions made in and policies emerging from Occidental's corporate headquarters in Los Angeles.

Concerns about forum shopping, while appropriately considered in the *forum non conveniens* analysis, are 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. *See Ravelo Monegro,* 211 F.3d at 513–14 (distinguishing *Piper*, where dismissal was granted, by noting that "plaintiffs' chosen forum is more than merely the American defendants' home forum. It is also a forum with a substantial relation to the action"); *Norex Petroleum Ltd. v. Access Indus., Inc.,* 416 F.3d 146, 155–56 (2d. Cir. 2005) (finding that "substantial deference" is appropriate when a plaintiff has sued a defendant in its home forum to obtain jurisdiction over the defendant); *Reid–Walen v. Hansen,* 933 F.2d 1390, 1395 (8th Cir. 1991) ("In this unusual situation, where the forum resident seeks dismissal, this fact should weigh strongly against dismissal.").

Amazon Watch, therefore, was entitled to a strong presumption that its choice of forum was convenient. *See Contact Lumber Co. v. P.T. Moges Shipping Co.,* 918 F.2d 1446, 1449 (9th Cir. 1990) ("[W]hile a U.S. citizen has no absolute right to sue in a U.S. court, great deference is due plaintiffs because a showing of

convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown."). The district court abused its discretion by recognizing Amazon Watch as a domestic plaintiff but then erroneously affording reduced deference to its chosen forum.

2. Private Interest Factors

The factors relating to the private interests of the litigants include: "(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." *Boston Telecomms. Grp. v. Wood,* 588 F.3d 1201, 1206–07 (9th Cir. 2009) (quoting *Lueck,* 236 F.3d at 1145).

Without analyzing each individual factor, the district court looked generally at the "witnesses and evidence located in Peru" versus the "witnesses and evidence in California" and concluded that the "private interest factors weigh overwhelmingly in favor of dismissal." In taking this approach, the district court neglected significant relevant evidence and failed to consider an entire factor—the enforceability of the judgment—that together weigh against dismissing this lawsuit.

a. Residence of the Parties

The district court focused on the fact that the contamination allegations at the heart of the complaint took place in the jungles of the Amazon rainforest, but it failed to consider the residence of all of the parties and the true nature of Plaintiffs' claims. Occi-

dental maintains its headquarters and principal place of business in Los Angeles, California.[3] The Achuar Plaintiffs are residents of Peru, but by filing suit in California they indicated a willingness to travel to the United States for trial. Co-plaintiff Amazon Watch is a domestic corporation with its principal place of business in San Francisco, California. Although the group was incorporated in Montana in 1996, it is a registered California non-profit corporation whose main headquarters are in San Francisco. It also maintains an office in Malibu, California, within the Central District of California. Therefore, Amazon Watch is properly considered a resident of the local forum. *See Boston Telecomms.,* 588 F.3d at 1207 (concluding that the residence of the parties factor weighed against dismissal where a non-California plaintiff sued in a California court, emphasizing that the plaintiff would stand in an even "stronger position were he a California resident"). The district court failed to factor Amazon Watch's residency into its analysis.

Most of Plaintiffs' claims turn not on the physical location of the injury but on the mental state of the Occidental managers who actually made the business decisions that allegedly resulted in the injury. While the district court mentioned in passing "decision-makers at Defendants' headquarters and witnesses with knowledge of OxyPeru's operations," it failed to consider how critical such locally-based evidence is to

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[3] In the personal jurisdiction context, the Supreme Court has recently clarified that "principal place of business" refers to "the place where a corporation's officers direct, control, and coordinate the corporation's activities," and "in practice it should normally be the place where the corporation maintains its headquarters." *Hertz Corp. v. Friend,* 130 S. Ct. 1181, 1192 (2010).

the litigation, especially given that it has now been a full decade since Occidental has been involved in day-to-day operations in Peru. Under these circumstances, 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.

b. Convenience to the Parties

The district court found it "clear [that] the cost and convenience of travel between Peru and Los Angeles supports dismissal on *forum no[n] conveniens* grounds" because even if all Peruvian witnesses consented to testify in California, airfare from Peru can cost more than $1,000. This reasoning, however, fails to consider the other side of the ledger. California is the home forum of Occidental and Amazon Watch; therefore, local litigation would save witnesses affiliated with those entities the time and expense of traveling to South America. Moreover, the most daunting logistical challenge to this litigation would likely be the extreme isolation of the Achuar territory and Block 1–AB. Travel between the region and Iquitos, the nearest sizable Peruvian city, can take days, presenting a serious obstacle regardless of whether trial takes place in Peru or California. Rather than clearly supporting dismissal, when all of the evidence is considered this is a neutral factor. *See Boston Telecomms.,* 588 F.3d at 1208 (finding the convenience factor to be neutral where similar logistical considerations would apply in either forum).

c. Evidentiary Considerations

The district court placed great emphasis on the fact that "[m]any of the witnesses are located in Peru and thus are beyond the reach of compulsory process" and

that "Plaintiffs do not dispute that these witnesses are beyond the reach of compulsory process in the United States." The district court, however, was focused on the wrong inquiries. "[W]e have cautioned that the focus for this private interest analysis 'should not rest on the number of witnesses ... in each locale' but rather the court 'should evaluate the materiality and importance of the anticipated ... witnesses' testimony and then determine their accessibility and convenience to the forum.' " *Boston Telecomms.,* 588 F.3d at 1209 (quoting *Lueck,* 236 F.3d at 1146). Other circuits have concluded that the initial question is not whether the witnesses are beyond the reach of compulsory process, but whether it has been alleged or shown that witnesses would be unwilling to testify. *See Duha v. Agrium, Inc.,* 448 F.3d 867, 877 (6th Cir. 2006) ("When no witness' unwillingness has been alleged or shown, a district court should not attach much weight to the compulsory process factor."); *Peregrine Myanmar Ltd. v. Segal,* 89 F.3d 41, 47 (2d Cir. 1996). This approach is consistent with *Gulf Oil,* the Supreme Court case that first established the *forum non conveniens* factors, which spoke of the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses." *Gulf Oil,* 330 U.S. at 508.

The proponent of a *forum non conveniens* dismissal is not required to identify potentially unavailable witnesses in exact detail. *See Piper,* 454 U.S. at 258. However, here Occidental has not shown, nor does it even represent, that any witness is unwilling to testify. Instead it has produced a declaration identifying categories of witnesses it intends to call who are outside of its control. The district court failed to consider countervailing evidence in the form of five declara-

tions from named former Occidental employees who were in Peru during the relevant time period who indicated a willingness to testify in the Central District.

As far as physical evidence and other sources of proof, the district court failed to consider during the discussion of the private interest factors Occidental's transfer of Block 1–AB to Pluspetrol. That Occidental withdrew from the site in 2000 undermines its argument that evidence found today at the physical site is much more critical to the litigation than evidence associated with Occidental's corporate headquarters, which has been in Los Angeles throughout the relevant period. Finally, the district court also failed to consider Amazon Watch in weighing these private factors. As discussed earlier, Amazon Watch's principal place of business is in California, its executives, key employees and relevant documentary evidence within its control are in California, and many of the events involving the group which form the basis for its claims occurred in the state. Therefore, when all of the evidence is properly considered, these evidentiary factors are neutral.

d. Enforceability of the Judgment

Most critically, the district court failed to give any consideration to whether a judgment against Occidental could be enforced in Peru. As Occidental correctly points out, California generally enforces foreign judgments, as long as they are issued by impartial tribunals that have afforded the litigants due process. *See* Cal. Civ. Proc. Code § 1716(a)-(d). However, the only other authority Occidental cites on the topic is *In re B–E Holdings, Inc.,* 228 B.R. 414 (Bankr. E.D. Wis. 1999), a case in which the United States Bankruptcy Court for the Eastern District of Wisconsin recognized a Peruvian judgment. As Plaintiffs note, how-

ever, the case actually demonstrates the difficulty of enforcing such an award. The Peruvian case began in 1986, ended in default judgment in 1992, and the judgment remained unsatisfied through the U.S. Bankruptcy Court litigation in 1999. *See id.* at 416. Plaintiffs also point to the U.S. State Department's Investment Climate Statement, which deems the enforcement of Peruvian court rulings "difficult to predict." U.S. Dep't of State, 2010 Investment Climate Statement—Peru (March 2010), http://www.state.gov/e/eeb/rls/othr/ics/2010/138128.htm. And Occidental's subsequent withdrawal from the operation of Block 1–AB raises questions about what assets might be available in Peru to satisfy a judgment there. *See Empresa Lineas Maritimas Argentinas, S.A. v. Schichau–Unterweser, A.G.,* 955 F.2d 368, 375 (5th Cir. 1992) (holding that the district court erred by finding this factor favored dismissal when the defendant did not meet its burden of establishing that it had assets in the foreign jurisdiction that could satisfy a judgment).

As discussed earlier, Occidental's own expert presented compelling evidence of disorder in the Peruvian judiciary. Because the district court did not require Occidental to agree that any Peruvian judgment could be enforced against it in the United States, or anywhere else it held assets, as a condition for dismissal, Occidental remains free to attack any Peruvian judgment on due process grounds under California's foreign judgments statute. The private factor of the enforceability of judgments thus weighs against dismissal.

3. Public Interest Factors

The public factors related to the interests of the forums 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." *Boston Telecomms.,* 588 F.3d at 1211 (quoting *Tuazon,* 433 F.3d at 1181).

a. Local Interest

The district court weighed Peru's stake in a case involving its own "lands and citizens" against California's "interest in ensuring that businesses incorporated or operating within its borders abide by the law," and concluded that this factor favored dismissal. It found that a Peruvian tribunal "would be better equipped to handle" the issues raised by the case including "environmental regulation of Peruvian territory, and the allegedly tortious conduct carried out against Peruvian citizens." This conflates a forum's interest in resolving a controversy with its ability to do so. The factors regarding familiarity with the applicable law, docket congestion, and costs and other burdens on local courts and juries are all concerned with how well-equipped a jurisdiction is to handle a case (as is the separate adequacy of the forum inquiry). The local interest factor has the different aim of determining if the forum in which the lawsuit was filed has its own identifiable interest in the litigation which can justify proceeding in spite of these burdens. *See Piper,* 454 U.S. at 261; *Tuazon,* 433 F.3d at 1182.

In considering this factor, the district court undervalued California's significant interest in providing a forum for those harmed by the actions of its corporate citizens. California courts have repeatedly recognized the state's "interest in deciding actions against resident corporations whose conduct in this state causes

injury to persons in other jurisdictions." *Stangvik v. Shiley Inc.,* 819 P.2d 14, 21 n.10 (Cal. 1991); *see also Morris v. AGFA Corp.,* 51 Cal. Rptr. 3d 301, 311 (Cal. Ct. App. 2006) (noting that in California a "corporate defendant's state of incorporation and principal place of business is presumptively a convenient forum"); *cf. Guimei v. Gen. Elec. Co.,* 91 Cal. Rptr. 3d 178, 190 (Cal. Ct. App. 2009) (finding that where defendants were not California-based corporations, the state "has little interest in keeping the litigation in this state to deter future wrongful conduct"). The district court again also failed to consider Amazon Watch. The complaint describes interactions between Amazon Watch and Occidental that took place in California and which form the basis for the Unfair Competition Law claim. There can be no question that the local interest factor weighs in favor of a California forum where a California plaintiff is suing a California defendant over conduct that took place in the state.

Therefore, although both forums have a significant interest in the litigation, the local interest factor favors neither side entirely.[4]

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[4] There appears to be a difference of opinion about whether it is appropriate to compare the state interests, or whether this factor is solely concerned with the forum where the lawsuit was filed. *Compare Tuazon*, 433 F.3d at 1182 ("[W]ith this interest factor, we ask only if there is an identifiable local interest in the controversy, not whether another forum also has an interest."), *and Boston Telecomms.*, 588 F.3d at 1212 (noting that whether a state "has more of an interest than any other jurisdiction" is not relevant), *with Lueck*, 236 F.3d at 1147 (balancing the interests of the foreign and domestic jurisdictions and finding the factor tipped toward dismissal because the "local interest in this lawsuit is comparatively low"). Here, under the former view, this factor would tip against dismissal, while under the latter it is neutral. However, we find that under either approach the dis-

b. Judicial Considerations

The remaining factors all relate to the effects of hearing the case on the respective judicial systems. The district court did not abuse its discretion by concluding that the court congestion and burden factors are neutral because there is evidence that both Peruvian courts and the Central District have similarly crowded dockets. *See Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.,* 61 F.3d 696, 704 (9th Cir. 1995) (finding no abuse of discretion where the district court held these factors to be neutral because both forums' "judiciaries are overburdened").

The district court also properly found the choice of law factor neutral because "both parties have asserted reasonable explanations that either Peruvian or California law applies." California applies a three-part test to determine choice of law in the absence of an effective choice-of-law agreement. *See Wash. Mut. Bank v. Superior Court,* 15 P.3d 1071, 1080 (Cal. 2001). This "governmental interest approach" involves: (1) determining if the foreign law "materially differs" from California law; (2) and if so, next determining each respective state's interest in application of its law; (3) and finally, if the laws materially differ and both states have an interest in the litigation, selecting the law of the state whose interest would be "more impaired" if its law were not applied. *Id.* at 1080–81. The proponent of using foreign law has the initial burden of showing material differences. *Id.* at 1080.

Here the district court acknowledged that Occidental, as the foreign law proponent, presented a choice-

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trict court erred by undervaluing California's interest in this case.

of-law analysis that was "lacking," suggesting that it failed to meet its initial burden for the governmental interest test. However, as part of their effort to demonstrate that Peru is not an adequate alternate forum, Plaintiffs themselves argued that California law is materially different from Peruvian law. Therefore, resolving the conflict of law issue would involve a full blown analysis of the state interests and relative impairment. As the district court noted, *forum non conveniens* is designed so that courts can avoid such inquiries at this early stage. *See Piper,* 454 U.S. at 251 ("The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law."); *Lueck,* 236 F.3d at 1148 (noting that district courts need not make a choice of law determination to decide a *forum non conveniens* motion that does not involve a statute requiring venue in the United States).

4. Weighing the Factors

The private factors based on convenience and evidentiary concerns favor neither side, while the residence of the parties and enforceability of the judgment factors weigh against dismissal. All of the public interest factors are neutral. Taken together, the factors fail to "establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience." *Piper,* 454 U.S. at 241 (quoting *Koster,* 330 U.S. at 524); *Dole Food,* 303 F.3d at 1118 ("The plaintiff's choice of forum will not be disturbed unless the 'private interest' and 'public interest' factors strongly favor trial in the foreign country."). They also fail to outweigh the deference owed to Amazon Watch's chosen forum. Therefore, the district court abused its discretion by "striking an unreasonable balance of relevant factors." *Ravelo Monegro,* 211

F.3d at 511; *see also Boston Telecomms.,* 588 F.3d at 1212 (reversing a *forum non conveniens* dismissal because the "district court did not hold [the defendant] to his burden" of showing the foreign forum was more convenient where "[a]ll but one of the private and public interest factors were either neutral or weighed against dismissal").

C. Absence of Conditions on the *Forum Non Conveniens* Dismissal

Although the district court dismissed the case without prejudice to Plaintiffs' right to re-file in the Central District of California in the event that Occidental does not consent to personal jurisdiction in Peru, or a Peruvian court declines to assert personal jurisdiction over Occidental, it did not place any mitigating conditions on its dismissal. Under the circumstances here, this was an abuse of discretion.

Plaintiffs requested that the district court condition its dismissal by requiring that: (1) any Peruvian judgment be satisfied; (2) Occidental waive any statute of limitations defense in Peru that would not be available in California; (3) Occidental agree to comply with United States discovery rules; and (4) Occidental translate documents from English to Spanish. District courts are not required to impose conditions on *forum non conveniens* dismissals, but it is an abuse of discretion to fail to do so when "there is a justifiable reason to doubt that a party will cooperate with the foreign forum." *Leetsch,* 260 F.3d at 1104.

Here, there is justifiable reason to suspect that Occidental will move to dismiss this lawsuit based on the Peruvian statute of limitations. And as Plaintiffs note, Occidental has agreed to waive statute of limitations defenses in the past when a *forum non con-*

veniens dismissal was conditioned on such waiver. *See Kinney v. Occidental Oil & Gas Corp.,* 109 Fed. App'x 135, 136 (9th Cir. 2004). Therefore, it was an abuse of discretion to dismiss on the basis of *forum non conveniens* without requiring Occidental to waive any statute of limitations defenses that would not be available in California.

Similarly, the district court failed to consider evidence about the difficulty of enforcing Peruvian judgments and the unique obstacles posed by Occidental's withdrawal from the country and the resulting uncertainty regarding its Peruvian assets. Occidental's own expert provided evidence of corruption and turmoil in the Peruvian judiciary that could become the basis for a challenge to the enforceability of a judgment based on the procedural deficiencies of a Peruvian proceeding. When there is reason to think that enforcing a judgment in a foreign country would be problematic, courts have required assurances that a defendant will satisfy any judgment as a condition to a *forum non conveniens* dismissal. *See Contact Lumber,* 918 F.2d at 1450.

As for discovery, the district court overemphasized Peruvian geography and lost sight of the importance of California-based witnesses and evidence to resolving the claims alleged in the complaint. Plaintiffs argue that without a condition requiring Occidental to cooperate with discovery requests pursuant to the Federal Rules of Civil Procedure, they might be denied access to important domestic evidence once the case is in a Peruvian court. Where a plaintiff would "have greater access to sources of proof relevant to" its claims if trial were held in the original forum, "district courts might dismiss subject to the condition that defendant corporations agree to provide the rec-

ords relevant to the plaintiff's claims." *Piper,* 454 U.S. at 257, 258 n.25; *see also Satz v. McDonnell Douglas Corp.,* 244 F.3d 1279, 1283 (11th Cir. 2001) (holding the district court did not abuse its discretion when it conditioned dismissal on the defendant "agreeing to conduct all discovery in accordance with the Federal Rules of Civil Procedure, and voluntarily producing documents and witnesses within the United States"); *Stewart v. Dow Chemical Co.,* 865 F.2d 103, 107 (6th Cir. 1989) (finding no abuse of discretion where the trial judge conditioned dismissal on the defendant allowing "discovery of any evidence which would be discoverable under the Federal Rules of Civil Procedure, and to make witnesses under its control available to the [foreign] court").

Once again the parties offered dueling expert affidavits as to the sufficiency of Peruvian discovery procedures to ensure that California-based evidence can be obtained and witnesses procured should this case proceed in Peru. While a thorough analysis might reasonably conclude that Peru offers discovery rules that would satisfy Plaintiffs' concerns, the district court erred by rejecting this condition without addressing those legitimate concerns at all. However, the district court did not err by declining to condition the dismissal on Occidental's agreeing to translate all documents into Spanish, as Plaintiffs failed to produce sufficient evidence to show justifiable reason to doubt that such translations would otherwise be available.

IV. CONCLUSION

Where a district court "has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Boston Telecomms.,*

588 F.3d at 1206 (citations and internal quotation marks omitted). However, when it fails to hold a party to its "burden of making a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience," *id.* at 1212 (quoting *Ravelo Monegro,* 211 F.3d at 514), or when it "fail[s] to consider relevant private and public interest factors and misconstrue[s] others," *Gates Learjet Corp. v. Jensen,* 743 F.2d 1325, 1337 (9th Cir. 1984), then it abuses its discretion.

Here the district court erroneously relieved Occidental of its burden of showing that Peru is an adequate alternative forum. It accepted a flawed stipulation to Peruvian jurisdiction and overlooked strong evidence, including evidence from Occidental's own expert, calling into question the ability of the Peruvian courts to satisfactorily handle this case. The district court failed to consider all relevant private and public interest factors, entirely overlooking the enforceability of judgments factor, which weighs heavily against dismissal. It correctly assumed that Amazon Watch was a proper domestic plaintiff, but erroneously afforded reduced deference to its chosen forum and ignored the group entirely in the analysis of numerous factors. These errors led the district court to misconstrue factors that are neutral or weigh against dismissal, and to strike an unreasonable balance between the factors and the deference due a domestic plaintiff's chosen forum. Finally, the district court abused its discretion by failing to impose conditions on its dismissal that were warranted by facts in the record showing justifiable reasons to doubt Occidental's full cooperation in the foreign forum.

Occidental had a substantial burden to persuade the district court to invoke the "exceptional tool" of *forum non conveniens* and deny Plaintiffs access to a U.S. court. *See Ravelo Monegro,* 211 F.3d at 514. Occidental failed to meet that burden, and a proper balance of all the relevant factors at this stage of proceedings clearly demonstrates that this lawsuit should proceed in the Central District of California. We therefore reverse the district court's dismissal on the basis of *forum non conveniens.* We need not reach Plaintiffs' argument that the district court abused its discretion in denying discovery before ruling on Occidental's motion. We remand this case to the district court to consider the question of Amazon Watch's standing, and for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

RYMER, Circuit Judge, concurring in part, dissenting in part:

I agree that conditions on dismissal might be appropriate. However, I would not re-analyze whether to dismiss on grounds of *forum non conveniens* from scratch, because dismissals for *forum non conveniens* may be reversed only when there has been a clear abuse of discretion. *Creative Tech., Ltd. v. Aztech Sys. Pte, Ltd.,* 61 F.3d 696, 699 (9th Cir. 1995). The district court considered the relevant public and private interest factors, its findings are supported in the record, and its balancing of these factors was not unreasonable. Thus, its decision deserves substantial deference. See *id.*

I

In light of that standard, Carijano has not persuaded me that the district court made a clear error of judgment when it determined that Peru is an adequate alternative forum. "[A] forum will be inadequate only where the remedy provided is 'so clearly inadequate or unsatisfactory, that it is no remedy at all.' " *Tuazon v. R.J. Reynolds Tobacco Co.,* 433 F.3d 1163, 1178 (9th Cir. 2006) (quoting *Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir. 1991)).

In short, Occidental is amenable to service of process in Peru, and furnished evidence that Peru provides "some remedy" for the wrong at issue. *Lueck v. Sundstrand Corp.,* 236 F.3d 1137, 1143 (9th Cir. 2001). Occidental submitted a comprehensive affidavit from Dr. Felipe Osterling Parodi (Osterling), who has been a Peruvian law professor for more than 50 years and who has served as a law school dean, Peruvian Justice Minister, a Senator for the Republic of Peru, and President of the Peruvian Academy of Law. Osterling detailed the background of the Peruvian court system and explained the substantive claims and remedies that would be available under Peruvian law with respect to the wrongs Carijano alleges.

Although Carijano notes that Peru has no cause of action identical to his UCL claim, this is not necessary so long as that country provides some remedy for the alleged wrong. *See Lueck,* 236 F.3d at 1143 (upholding New Zealand as an adequate alternative forum even though plaintiffs were unable to maintain the exact suit they would have in a U.S. court); *Capital Currency Exch., N.V., v. Nat'l Westminster Bank PLC,* 155 F.3d 603, 610 (2d Cir. 1998) ("The availability of an adequate alternate forum does not

depend on the existence of an identical cause of action in the other forum.") (quotation omitted). Osterling avers that it does. He explained that Peruvian law has analogies for all of the substantive legal theories on which the lawsuit in Los Angeles is based. The district court explicitly relied on Osterling's affidavit, which it was entitled to do. *See Cheng v. Boeing Co.,* 708 F.2d 1406, 1410–11 (9th Cir. 1983) (upholding district court's determination that Taiwan was an adequate forum when it considered the affidavits of competing experts and decided that the views of the defendant's expert were more persuasive).

In a similar vein, Carijano faults the district court for having failed to find that Amazon Watch would lack standing in Peru. But there was no evidence that Amazon Watch would *not* have standing, or would otherwise be unable to pursue its claims for injunctive and declaratory relief in that country. Osterling's affidavit indicates that actions whose objective is the defense of the environment may be brought in Peru by any person or association, even when an economic interest is not at stake.

As the Supreme Court stated in *Piper Aircraft Co. v. Reyno,* only in "rare circumstances" would a "remedy offered by the other forum [be] clearly unsatisfactory." 454 U.S. at 240, 255 n.22. Here, Peru permits litigation on the subject matter of the dispute, and there is no indication Amazon Watch would be unable to pursue its claim there. The defendant need not demonstrate that the plaintiff *would succeed* in the alternative forum; Occidental merely had to show that Peru would permit litigation on the subject matter of the dispute. *Id.*

Because a forum will only be deemed inadequate in "rare circumstances," once a defendant has dem-

onstrated he is amenable to process and "some remedy" exists for the alleged wrong, "[a] litigant asserting inadequacy or delay must make a powerful showing." *Tuazon,* 433 F.3d at 1179. Carijano's claims center on whether the law in Peru would be unpredictable, corruption in the judicial system, and discrimination against indigenous people.

Carijano maintains that the district court failed to support the weight it gave to unpredictability of the law as a factor. However, the court was persuaded by Osterling's affidavit that, although Peru is a civil law country, precedent is respected in the overwhelming majority of cases.

After analyzing Carijano's purported evidence of corruption, the district court concluded that it falls short of the "powerful showing" necessary to defeat a *forum non conveniens* motion. *See Tuazon,* 433 F.3d at 1179 ("[T]he argument that the alternative forum is too corrupt does not enjoy a particularly impressive track record.") (citations and quotation and alteration marks omitted). The proof here is neither "specific" nor "sordid." *Id.* (contrasting the proof under review with *Eastman Kodak Co. v. Kavlin,* 978 F.Supp. 1078 (S.D.Fla. 1997)). The district court did not overlook the evidence presented; it just concluded that the evidence consisted of unsupported allegations of corruption that did not counsel in favor of Carijano. Carijano has not shown that the district court relied on either an erroneous view of the law or on a "clearly erroneous assessment of the evidence" in holding that Carijano's evidence of corruption was insufficient to render Peru an inadequate alternative forum. *See K.V. Mart Co. v. United Food & Commercial Workers Int'l Union, Local 324,* 173 F.3d 1221, 1223 (9th Cir.1999) (quotation omitted).

Nor did the district court believe that claims of discrimination can never render a forum inadequate, as Carijano submits; rather, it simply held that Carijano's conclusory allegations and claims of discrimination were not sufficient to render a Peruvian forum inadequate. Although Carijano argues that some plaintiffs lacked identity papers necessary to bring suit and would be unable to afford filing fees, the district court credited Osterling's opinion that Peru had taken substantial steps to protect indigenous rights, including waiving filing fees and allowing plaintiffs to bring suit if they demonstrate their inability to obtain identity papers. *Altmann v. Austria,* 317 F.3d 954, 972–73 (9th Cir. 2002), *aff'd on other grounds,* 541 U.S. 677 (2004) (observing that the "mere existence of filing fees, which are required in many civil law countries, does not render the forum inadequate as a matter of law.").

Carijano further contends that Occidental's contract clauses that explicitly avoid Peruvian courts (like arbitration and forum selection clauses) demonstrate that Peru is an inadequate forum. However, available evidence demonstrates that OxyPeru actually used forum selection clauses favoring Peru in the past, *see Sudduth v. Occidental Peruana, Inc.,* 70 F. Supp. 2d 691, 694 (E.D. Tex. 1999), and OxyPeru has been sued many times in Peruvian courts.

II

I cannot say that the district court abused its discretion in weighing the public and private interest factors. It took into account that 25 out of the 26 plaintiffs are Peruvian and that Amazon Watch is only one plaintiff on one out of the 12 causes of action. Amazon Watch was not originally a plaintiff in California state court, having been added only after

the Peruvian plaintiffs learned that Occidental was going to move for dismissal based on *forum non conveniens*. The court could find that these circumstances lessen the deference due to the plaintiffs' choice of forum.

The district court could also find, as it did, that the facts of the case center primarily on Peruvian lands and Peruvian people. It found that many witnesses, including family members and community leaders, physicians, and consultants, are beyond the reach of compulsory process in the United States. Carijano asserts the court abused its discretion by not specifically stating which witnesses would be unwilling to travel to the United States, but it can be "difficult to identify" specific individuals when many witnesses "are located beyond the reach of compulsory process." *Piper Aircraft,* 454 U.S. at 258. Here, as in Lueck, it appears that most of the evidence in the United States would be under the control of Occidental (or alternatively, Amazon Watch), and therefore could be produced no matter what the forum. *Lueck,* 236 F.3d at 1146–47 (noting that private factors favored dismissal where evidence in the United States was under both parties' control, and evidence in New Zealand could not be summoned to the United States). Finally, the district court's balancing is supported by evidence that a trip from the Achuar territory to a Peruvian city is shorter and less costly than that trip followed by a 16–20 hour flight to Los Angeles.

The district court considered the strong interest of both Peru and California in this dispute, but weighted Peru's more heavily given that the suit involves Peruvian land and citizens. This is not a clearly erroneous assessment as both the alleged tort, and injury, occurred there.

III

Carijano suggests that more discovery may have mattered, but has not made a clear showing of actual and substantial prejudice sufficient to demonstrate the district court abused its discretion by denying additional discovery. Carijano simply argues that the parties produced contradictory evidence and speculates that additional discovery might have helped its case. But Carijano's extensive recitation of the evidence it presented in district court demonstrates the court did have enough information to balance the parties' interests. Even when it's possible that discovery might have provided more detail, a district court does not abuse is discretion in denying discovery if the parties have provided "enough information to enable the District Court to balance the parties' interests." *Cheng,* 708 F.2d at 1412 (quoting *Piper Aircraft,* 454 U.S. at 258).

IV

While conditions on dismissal are generally not necessary in a *forum non conveniens* dismissal, they may be necessary to ensure that the defendant does not defeat the adequacy of a foreign forum. *Leetsch v. Freedman,* 260 F.3d 1100, 1104 (9th Cir.2001). Conditions such as accepting service, submitting to the jurisdiction, waiving the statute of limitations, making discovery, and agreeing to enforceability of the judgment may be appropriate here. I would, therefore, remand for the court specifically to consider whether its dismissal should be conditioned. Otherwise, I would affirm.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Tomas Maynas Carijano et al.
v.
Occidental Petroleum Corp. et al.

No. CV 07–5068 PSG (PJWx)

April 15, 2008

Proceedings: (In Chambers) Order DENYING Plaintiff's Motion to Conduct Limited Discovery and GRANTING Defendants' Motion to Dismiss based on Forum Non Conveniens

PHILIP S. GUTIERREZ, District Judge.

Before this Court is Defendants' Motion Pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(e) and (f) [*sic*]. The Court finds the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local R. 7–15. Accordingly, the hearing set for August 27, 2007 [*sic*] on the present motion is removed from the Court's calendar. After considering the moving and opposing papers, the Court DENIES [*sic*] Defendants' Motion.

I. *BACKGROUND*

Plaintiffs are 25 members of the Achuar indigenous group who live along the Rio Corrientes River in the northern region of Peru, and Amazon Watch, Inc. ("Amazon"), an environmental rights group which works to defend the rights of the indigenous peoples

in the Amazon basin. Defendants are Occidental Petroleum Corporation ("Occidental") and Occidental's indirect subsidiary, Occidental Peruana, Inc. ("OxyPeru") (collectively "Defendants"), both American corporations headquartered in Los Angeles.

From the early 1970's to 2000, OxyPeru operated a petroleum and oil exploration operation in Peru in an area known as Block 1–AB. (FAC, ¶¶ 39, 42.) Block 1–AB encompassed traditional Achuar communities as well as lands upstream from such communities. (FAC, ¶¶ 38, 44.) Plaintiffs allege that Defendants' operations in Block 1–AB contaminated the environment, by releasing "produced waters" into streams and tributaries of the Rio Corrientes that degraded the waters and soil, harmed the fish, plants, and animals, and caused Plaintiffs to suffer various ailments. (FAC, ¶¶ 48–50, 63–69.) Plaintiffs further allege that Defendants released or disposed of hazardous substances which harmed the environment. (FAC, ¶ 45.)

On May 10, 2007, Plaintiffs filed a complaint in state court alleging, among other things, negligence, strict-liability, medical monitoring and trespass. Defendants removed the action to federal court, and Plaintiffs filed a First Amended Complaint ("FAC") containing twelve causes of action: (1) negligence, (2) strict-liability, (3) battery, (4) medical monitoring, (5) injunctive relief or damages in lieu of injunction, (6) wrongful death, (7) fraud, (8) public nuisance, (9) private nuisance, (10) trespass, (11) violation of California's Unfair Competition Law ("UCL"), Bus. & Prof.Code § § 17200 *et seq.* and (12) intentional infliction of emotional distress.

Defendants now seek dismissal of the action based on forum non conveniens and international comity. In

a separate motion, Defendants seek dismissal of Amazon Watch's claim pursuant to Rule 12(b)(1) and 12(b)(6). In addition, Plaintiffs move to conduct limited discovery prior to the Court's ruling on Defendants' motion to dismiss based on forum non conveniens and international comity.

II. *MOTION TO CONDUCT LIMITED DISCOVERY*

Plaintiffs request that prior to issuing a ruling on Defendants' motion to dismiss based on forum non conveniens, the Court afford Plaintiffs an opportunity to conduct limited discovery regarding the proper forum for this action. Plaintiffs' proposed discovery includes (1) discovery regarding the Peruvian legal system, including Defendants' experiences with the system and their awareness of corruption; (2) discovery regarding the location of witnesses and evidence; and (3) limited depositions of Defendants' representatives concerning the direction and control of Defendants' Peruvian operations, the current location of documents relevant to those operations, the involvement of Defendants in any bribery or corrupt transactions or accusations of such involvement, and Defendants' litigation history in Peru. (Discovery Motion at 5–1.)

A. *Legal Standard*

Under Fed. R. Civ. P. 26(d)(1), "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)...." Despite this general prohibition, the rule recognizes the court's broad power over discovery by permitting authorization of discovery before a Rule 26(f) conference "when authorized ... by court order." Fed. R. Civ. P. 26(d)(1); *see also Gillespie v. Civiletti,* 629 F.2d

637, 642 (9th Cir. 1980). Therefore, the Court does have authority to entertain Plaintiffs' Motion.

B. *Discussion*

Defendants contend that discovery on the issue of forum non conveniens is generally unnecessary and at odds with the doctrine's purposes. Noting that the forum non conveniens doctrine is grounded in concern for the costs of litigation and convenience of the parties, Defendants argue that "[m]otions to dismiss based on forum non conveniens usually should be decided at an early stage in the litigation, so that the parties will not waste resources on discovery and trial preparation in a forum that will later decline to exercise its jurisdiction over the case." *Lony v. E.I. Du Pont de Nemours & Co.,* 935 F.2d 604, 614 (3rd Cir. 1991). While Defendants' contentions are generally correct, they do not preclude this Court from granting the opportunity to conduct limited discovery if doing so would "enable the District Court to balance the parties' interests." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 258, 102 S.Ct. 252 (1981). Moreover, the district court is accorded substantial flexibility in evaluating a forum non conveniens motion, *id.,* at 249, 102 S.Ct. 252, and "[e]ach case turns on its facts." *Williams v. Green Bay & Western R. Co.,* 326 U.S. 549, 557, 66 S.Ct. 284, 90 L.Ed. 311 (1946). So although in certain cases, the forum non conveniens determination will not require significant inquiry into the facts and legal issues presented by a case, other cases may well require some discovery to allow the court to weigh the parties' interests or determine the adequacy of the foreign forum.

Having reviewed Defendants' forum non conveniens motion and all related documents and exhibits, the Court concludes it has enough information to suffi-

ciently weigh the parties' interests and determine the adequacy of the foreign forum. Therefore, Plaintiffs' request to conduct additional discovery is DENIED. The Court now turns to the merits of Defendants' motion to dismiss based on forum non conveniens and international comity.

III. *MOTION TO DISMISS BASED ON FORUM NON CONVENIENS AND INTERNATIONAL COMITY*

A. *Legal Standard: Forum Non Conveniens*

A federal court has discretion to decline to exercise jurisdiction on the grounds of forum non conveniens where litigation in the foreign forum would be more convenient for the parties. *Tuazon v. R.J. Reynolds Tobacco Co.,* 433 F.3d 1163, 1177 (9th Cir. 2006) (quoting *Lueck v. Sundstrand Corp.,* 236 F.3d 1137, 1142 (9th Cir. 2001); *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 504, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). "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 balance of private and public interest factors favors dismissal." *Dole Food Co., Inc. v. Watts,* 303 F.3d 1104, 1118 (9th Cir. 2002) (citing *Lueck,* 236 F.3d at 1142–43). Private factors include ease of access to sources of proof, compulsory process to obtain the attendance of hostile witnesses and the cost of transporting friendly witnesses, and other problems that interfere with an expeditious trial. *Contact Lumber Co. v. P.T. Moges Shipping Co.,* 918 F.2d 1446, 1451–52 (9th Cir. 1990). Public interest factors include court congestion, the local interest in resolving the controversy, and the preference for having a forum apply a law with which it is familiar. *Id.*

There is a strong presumption in favor of a domestic plaintiff's choice of forum, which can be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. *Piper Aircraft,* 454 U.S. at 253–57; *Ravelo Monegro v. Rosa,* 211 F.3d 509, 514 (9th Cir. 2000) "Forum non conveniens is 'an exceptional tool to be employed sparingly, [not a] ... doctrine that compels plaintiffs to choose the optimal forum for their claim.' " *Dole Food,* 303 F.3d at 1118 (9th Cir. 2002) (quoting *Cheng v. Boeing Co.,* 708 F.2d 1406, 1410 (9th Cir. 1983)).

B. *Discussion*

1. Availability and Adequacy of Peru as an Alternative Forum

Defendants bear the burden of demonstrating that an alternative forum exists and that it is adequate. *Dole Food,* 303 F.3d at 1118. An alternative forum ordinarily exists when defendants are amenable to service of process in the foreign forum, and the foreign forum provides a plaintiff with a sufficient remedy for his or her wrong. *See Lueck,* 236 F.3d at 1143 (citations omitted). Typically, a forum will be inadequate only where the remedy provided is "so clearly inadequate or unsatisfactory, that it is no remedy at all." *Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 768 (9th Cir. 1991) (quoting *Piper Aircraft,* 454 U.S. at 254).

Defendants assert that OxyPeru is unquestionably subject to jurisdiction in Peru based on its past activities there. (Osterling Dec., § 3.1.) As for Occidental, the parent company, Defendants state that for purposes of this motion, they will stipulate to service of process and consent to jurisdiction in Peru. (Forum Non Conveniens Motion ("FNC Motion") at 6.) When

a defendant agrees to waive jurisdiction in the alternative forum, a court may dismiss the case on forum non conveniens grounds, retain jurisdiction, and reinstate the case if the foreign forum refuses to accept jurisdiction. *Leon v. Million Air, Inc.,* 251 F.3d 1305, 1313 (11th Cir. 2001). Given Defendants' stipulation and consent to jurisdiction in Peru, they have sufficiently shown that Peru is an available forum to Plaintiffs.

Defendants also meet their burden of establishing that Peru is an adequate forum by offering the extensive affidavit of expert Dr. Felipe Osterling Parodi ("Dr. Osterling"), an attorney with litigation experience in the Peruvian courts since 1955. (Declaration of Dr. Felipe Osterling Parodi ("Osterling Dec."))[1] Dr. Osterling details the background of the Peruvian court system and the availability of tort relief. (Id.) Dr. Osterling explains that "[c]ivil liability in Peru is sustained on two major pillars: the liability system based on negligence and the liability system based on created risk." (McEvoy Dec., Ex. A at 32.) Dr. Osterling opines that "beyond the precise and analogical recognition of the theories of civil liability invoked in the complaint, the Peruvian substantive norms on civil liability allow a lawsuit for damages to be processed on the facts set forth in the complaint." (Id. at 34.)

Plaintiffs argue, however, that several barriers prevent the Achuar Plaintiffs from full participation

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[1] The English translation of Dr. Osterling's declaration and supplemental declaration can be found in Exhibit A attached to the declaration of Bernadette McEvoy ("McEvoy Dec."), and Exhibit B attached to the Supplemental Declaration of Bernadette McEvoy ("Supp. McEvoy Dec.").

in the judicial system. For example, because all of the minors and five of their adult guardians do not have identity papers, known as DNI (National Identity Document), a necessary requirement to bringing a lawsuit in Peru, they cannot maintain this suit there. (See Simons Dec., ¶ 16). These Plaintiffs cannot secure a DNI since doing so requires a requires a birth certificate, which many indigenous people do not have. (Opp'n at 7.) Plaintiffs further contend that the extreme poverty in the Achuar community acts as a practical barrier, since the Achuar cannot afford DNIs and filing fees, which total more than an Achuar family would earn in one year. (Ardito Dec., attached as Ex. 2 to Simons Dec., ¶ 2, § 7.2 and 7.3.) In addition, Plaintiffs point to Peru's history of discrimination against indigenous people as demonstrating that litigation in Peru would be unfair. (Ardito Dec. at 19–20.) Plaintiffs' expert, Wilfredo Ardito Vega, a Pervian lawyer and university professor, states that "[w]ithin the Judiciary, there can be racism towards indigenous peoples on the part of guards, secretaries, officials, and the judges themselves...." (Id. at 20.)

According to Dr. Osterling, however, Peru has taken substantial measures to protect indigenous rights, including waiving litigation expenses for persons living in geographic zones of poverty (Supp. Osterling Dec. at 8), and authorizing Peruvian judges to admit a complaint filed by persons who do not have a DNI for its processing if they demonstrate material impossibility of obtaining the DNI. (Supp. Osterling Dec. at 4.) Furthermore, "[t]he mere existence of filing fees, which are required in many civil law countries, does not render a forum inadequate as a matter of law." *Altmann v. Republic of Austria,* 317 F.3d 954, 972–973 (9th Cir. 2002) (citations omitted). As for the

discrimination claim, the few cases that have examined comparable claims have rejected them. *See Parex Bank v. Russian Sav. Bank,* 116 F.Supp.2d 415, 425 (S.D.N.Y. 2000) ("conclusory allegations of judicial bias are insufficient to support a finding that Russia is not an adequate alternate forum"); *Shields v. Mi Ryung Const. Co.,* 508 F.Supp. 891, 894 (S.D.N.Y. 1981) (Saudi Arabia was an adequate forum even though the plaintiff claimed "religious discrimination would prevent him from receiving fair consideration of his claims").

Plaintiffs also argue that Peru is an inadequate forum because it has no form of action equivalent to the American class action. As evidence of this, they proffer the declaration of Ludwig Apolín Meza, a Peruvian lawyer and University professor specializing in procedural law. (Apolín Dec., attached as Ex. 8 to Simons Dec. at 4–5, 7.) Apolín asserts that the Peruvian "Rules of Civil Procedure do not allow for filing cases whose goal it is to obtain compensation for an **indeterminate group of persons** ... this implies that there are no legal measures in Peru that are similar to a *class action for damages.*" (Id. at 3.)

The fact that Peru lacks a class action mechanism does not make it inadequate for forum non conveniens purposes. *See Aguinda v. Texaco, Inc.,* 142 F.Supp.2d 534, 540–41 (S.D.N.Y. 2001) ("The class action mechanism, added to the Federal Rules of Civil Procedure in 1937, is ultimately nothing more than a 'convenient procedural device,' which most of the world's nations have chosen not to adopt and the merits of which continue to be debated even in the United States. Its absence does not ordinarily render a foreign forum 'inadequate' for purposes of forum non conveniens analysis." (internal citations omit-

ted)); *see also Gilstrap v. Radianz Ltd.,* 443 F.Supp.2d 474, 482 (S.D.N.Y. 2006) ("It is well-established, and plaintiffs acknowledge, ... that the unavailability of such procedural mechanisms as class actions and contingent fees, while it may be relevant to the balancing of the public and private interest factors addressed below, does not render a foreign forum inadequate as a matter of law" (citations omitted)). In addition, while Peruvian law may not recognize Rule 23 class actions, Dr. Osterling opines that Peru offers alternatives to an American-style class action. (Supp. McEvoy Dec., Ex. B at 33–36.) For example, if Plaintiffs can demonstrate their claims arise out of the same facts, they may join together in a single lawsuit. (Id. at 35–36.) *See Aguinda v. Texaco, Inc.,* 303 F.3d 470, 478 (2d Cir. 2002) ("... Ecuador permits litigants with similar causes of action arising out of the same facts to join together in a single lawsuit. While the need for thousands of individual plaintiffs to authorize the action in their names is more burdensome than having them represented by a representative in a class action, it is not so burdensome as to deprive the plaintiffs of an effective alternative forum.")

Plaintiffs call into question the representations by Dr. Osterling, given the "fundamental unpredictability of the Peruvian legal system, including numerous contradictory decisions and apparent disregard for statutes." (FNC Opp'n at 8.) According to the U.S. Dep't of State's 2006 Investment Climate Statement—Peru (2007), *available at http://www.state.gov/e/eeb/ifd/2007/80730.htm,* "contracts are often difficult to enforce in Peru." (Id.) Plaintiffs argue that "[i]f ordinary contracts face such difficulties, complex tort actions, untested in Peru's courts, cannot hope to fare better." (Id.)

As a civil law country, "Peru allows for the existence of contradictory decisions and changes of opinion, provided they are duly supported." (Supp. McEvoy Dec., Ex. B at 9.) Unlike common law countries, in civil law countries, precedents are generally not binding. (Id.) Nonetheless, Dr. Osterling avers that "in the overwhelming majority of cases, precedent has been and continues to be respected, as compared to those cases in which this alleged irregularity has occurred." (Id.)

Plaintiffs further contend that Peru's "generalized picture of corruption" and climate of intimidation are sufficient to render it an inadequate forum. (FNC Opp'n at 9.) A number of courts have rejected this position in forum non conveniens motions for a variety of reasons. *See, e.g. Tuazon,* 433 F.3d 1163; *In the Matter of the Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine,* 311 F.3d 488, 499 (2d Cir. 2002); *Blanco v. Banco Indus. de Venezuela, S.A.,* 997 F.2d 974, 981 (2d Cir. 1993) (refusing, despite charges of corruption, to find Venezuelan courts an inadequate alternative forum where parties' contract contained a forum selection clause naming Venezuela as parties' forum of choice); *Torres v. Southern Peru Copper Corp.,* 965 F.Supp. 899, 903 (S.D.Tex. 1996) (finding that Peruvian judicial system was not so corrupt as to render Peru an inadequate alternative forum), *aff'd,* 113 F.3d 540 (5th Cir. 1997); *Mercier v. Sheraton Int'l, Inc.,* 981 F.2d 1345, 1351 (1st Cir. 1992) (finding Turkey to be an adequate alternative forum despite plaintiff's claim that Turkish courts had a profound bias against Americans and foreign women), *cert. denied,* 508 U.S. 912, 113 S.Ct. 2346, 124 L.Ed.2d 255 (1993); *Banco Mercantil, S.A. v. Hernandez Arencibia,* 927 F.Supp. 565, 567 (D.P.R. 1996) (rejecting claim that courts of

Dominican Republic were so corrupt as to provide an inadequate alternative forum).

Plaintiffs acknowledge that the " 'alternative forum is too corrupt to be adequate' argument does not enjoy a particularly impressive track record." *Eastman Kodak Co. v. Kavlin,* 978 F.Supp. 1078, 1084 (S.D.Fla. 1997). Nevertheless, Plaintiffs analogize the instant case to *Eastman Kodak,* where the court held that corruption and delay in the Bolivian courts made a fair trial impossible. *Id.* There, the court found plaintiffs' evidence—statements by Bolivia's own Minister of Justice that "the current judicial system is a collection agency and the penal system an agent of extortion [sic]," and "[t]he administration of justice in the nation, in many cases, is clouded by the intrusion of powerful pressures by political and economic groups ..."—to be "compelling evidence that [the] Bolivian system may not be suitable for the adjudication of plaintiffs' claims." *Id.* at 1085. The plaintiffs further buttressed these allegations of corruption with "an extensive record" of statements by professors, Bolivian attorneys, and World Bank and State Department reports identifying widespread corruption in Bolivian courts, as well as specific allegations of "abusive influence-peddling by [defendant] in the filing of criminal charges against ... other Kodak employees." *Id.* at 1086.

Here, Plaintiffs' record falls short of the "extensive record" described in *Eastman Kodak,* and is more akin to evidence proffered by the plaintiff in *Tuazon,* 433 F.3d at 1178. In *Tuazon,* the Ninth Circuit rejected the plaintiff's claims that the Philippine courts were too corrupt and plagued with delays to provide an adequate forum for his civil case. *Tuazon,* 433 F.3d at 1178. The court reasoned that plaintiff's evi-

dence—"anecdotal evidence of corruption and delay," and State Department Country Reports focused on the criminal justice system and referencing corruption, judicial bias and inefficiency—provided an insufficient basis for finding the Philippine courts were an inadequate forum for the civil case. *Id.* Explaining that "[a] litigant asserting inadequacy or delay must make a powerful showing," the court distinguished *Eastman Kodak,* where the court described plaintiffs' evidence as "both specific and sordid." *Id.*

Plaintiffs' support their general attack on the Peruvian justice system with (1) the declarations of Ardito Vega and Apolín Meza, both Peruvian lawyers and university professors; (2) the declaration of Eliana Ames Vega ("Ames Dec." attached as Ex. 5 to Simons Dec.), a Peruvian lawyer with ten years experience in environmental law; (3) internet news and newspaper articles from 1996, and 2005–2007 (Simons Dec., Exs. 19–22); and the 2007 Global Corruption Report by Transparency International, a non-governmental organization (Simons Dec., Ex. 23.) According to Ardito, widespread institutionalized corruption during the Fujimori regime still lingers over the Peruvian judicial system, and "[c]orruption is evident in lobbying [and] illicit networks (that offer themselves to act as intermediaries with magistrates)...." (Ardito Dec. at 14.) Ames states that "there is evidence in by the Executive Branch in the Judiciary in several socio-environmental conflicts," including a mercury contamination case by Newmont Mining Corporation in 2000, where a governmental minister went to the affected population and told them "they should not hire lawyers." (Ames Dec. at 2.) Recordings captured high level Peruvian officials successfully bribing a Peruvian Supreme Court judge to rule in favor of Newmont. (Simons Dec., Ex. 21.)

Plaintiffs' evidence of corruption falls short of the "powerful showing" of corruption necessary to defeat a forum non conveniens motion. The Transparency International report only analyzes respondents' perceived corruption, and thus is not indicative of actual corruption. Moreover, unlike in *Eastman Kodak,* where the plaintiffs coupled State Department reports with allegations of corruption by the specific defendants, here, Plaintiffs' specific evidence of bribery of a Supreme Court judge took place nearly eight years ago back in 2000, and did not involve Occidental or OxyPeru. Furthermore, while Plaintiffs allege "on information and belief" that Defendants have bribed unnamed Peruvian officials, Plaintiffs fail to allege any facts, cite to any newspaper articles, or provide any declarations or affidavits to support such a sweeping denunciation. Accordingly, the Court accord little weight to Plaintiffs' conclusory allegations.

The Court also bears in mind that one of the central ends of the forum non conveniens doctrine is to avert "unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations." *See Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine,* 158 F.Supp.2d 377, 385 (S.D.N.Y. 2001) (citations omitted). "[I]t is not the business of our courts to assume a responsibility for supervising the integrity of the judicial system of another sovereign nation." *Blanco v. Banco Indus. de Venezuela, S.A.,* 997 F.2d 974, 982 (2d Cir. 1993). Armed with nothing more than unsupported allegations of corruption by Defendants, the Court declines to pass value judgments on the adequacy of Peru's judicial system. *Monde Re,* 158 F.Supp.2d at 384. Based on the foregoing, the Court concludes that Peru is an adequate alternative forum.

2. Private Interest Factors

The private interest factors that the Court considers in a forum non conveniens analysis include: (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." *Gulf Oil,* 330 U.S. at 508, *Contact Lumber,* 918 F.2d at 1449.

Defendants focus on witnesses and evidence located in Peru, including Plaintiffs' family members, neighbors, teachers, employers, community and tribal leaders, and physicians; employees and consultants of Pluspetrol; Peruvian civil servants and consultants responsible for monitoring the environmental conditions in Block 1–AB; and research underlying the epidemiological reports referenced in the FAC which appear to have been prepared by the Peruvian government. Plaintiffs, on the other hand, focus on the witnesses and evidence in California, including decisionmakers at Defendants' headquarters and witnesses with knowledge of OxyPeru's operations. Although witnesses and documents are located in both fora, the facts of this case indicate that it centers primarily on Peruvian lands and Peruvian people, thus weighing in favor of dismissal.

Defendants further argue that they cannot compel non-party witnesses resident in Peru to comply with a subpoena for documents or deposition. In support of this proposition, Defendants cite *Lueck,* where the Ninth Circuit noted that because witnesses and documents were under the control of the New Zealand

government, "the district court [could not] compel production of much of the New Zealand evidence." *Lueck,* 236 F.3d at 1146–1147. Indeed, the Supreme Court has observed that "to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants." *Gulf Oil,* 330 U.S. at 511. Moreover, courts continue to affirm that it is not fair to make U.S. manufacturers proceed to trial without foreign witnesses who cannot be compelled to attend. *See, e.g., Piper Aircraft,* 454 U.S. at 242–243; *Lueck,* 236 F.3d at 1146–1147; *Carney v. Singapore Airlines,* 940 F.Supp. 1496, 1498, 1502 (D.Ariz. 1996). Many of the witnesses are located in Peru and thus are beyond the reach of compulsory process, including, among others, physicians who treated Plaintiffs, and Peruvian civil servants and consultants responsible for monitoring the environmental conditions in Block 1–AB. Plaintiffs do not dispute that these witnesses are beyond the reach of compulsory process in the United States.

Defendants also maintain that the cost of transporting Peruvian witnesses to the United States weighs in favor of dismissal. Plaintiffs concede that many of the witnesses and evidence are located in remote areas of Peru, but argue that this does not mean Peru is a more convenient forum than Los Angeles. Because it can take three to four days to travel to the Achuar communities in the Amazon from the nearest Peruvian city of Iquitos (Simons Dec., ¶¶ 24–26), and because travel between Los Angeles and Lima or Iquitos is "relatively quick and easy," Plaintiffs assert that there is only a marginal difference in ease of access to witnesses and evidence between Peru and Los Angeles. (FNC Opp'n at 15.)

Plaintiffs further argue that there are likely to be numerous witnesses as well as documentary evidence in California since Occidental and Amazon Watch are both located here.

While Plaintiffs downplay the relative ease and access to witnesses factor, it is clear the cost and convenience of travel between Peru and Los Angeles supports dismissal on forum no conveniens grounds. Even if all the witnesses identified by defendants were willing to testify in Los Angeles, the expense of bringing them here could be prohibitive. The price of a round-trip, coach airline ticket to Iquitos purchased three weeks in advance runs over $1000, and takes approximately 16 to 21 hours. (Cachan Dec., ¶ 16, Ex. 1.) Additionally, the Achuar Plaintiffs and most third-party witnesses likely do not speak English, so the cost of translating oral and written evidence is likely to be costly and time-consuming. (Id. ¶ 2.) Thus, the private interest factors weigh overwhelmingly in favor of dismissal.

3. Public Interest Factors

Public interest factors include court congestion, local interest in resolving the controversy, and preference for having a forum apply a law with which it is familiar. *See Lockman Found. v. Evangelical Alliance Mission,* 930 F.2d 764, 771 (9th Cir. 1991).

Here, Peru has a strong interest in this dispute, because Block 1–AB and the Achuar Plaintiffs are located there, and because the suit involves Peruvian lands and citizens. Although California, too, has an interest in ensuring that businesses incorporated or operating within its borders abide by the law, the Court cannot say this interest overrides Peru's concerns. To the contrary, the instant action raises is-

sues such as the environmental regulation of Peruvian territory, and the allegedly tortious conduct carried out against certain Peruvian citizens, both of which a Peruvian tribunal would be better equipped to handle. On balance, this factor weighs in favor of Defendants.

Court congestion is a neutral factor. Plaintiffs' evidence shows that in 2006, the number of new cases filed per judge in Lima and Iquitos was greater that the number filed in the Central District of California in 2006. (Ardito Dec., Pt. I, 7.2.) However, Defendants provide evidence that Peruvian courts in 2006 cleared 80% of the cases they filed in the same year; whereas in the Central District, approximately 12% of the cases have been pending for over three years. (Supp. Osterling Dec. 33; Supp. Cachan Dec. Ex. G.) The most the Court can glean from this information is that both courts have crowded dockets.

The parties disagree about which law would apply in this case. In analyzing choice of law questions, California courts apply a three-part "governmental interest" test. *Arno v. Club Med Inc.,* 22 F.3d 1464, 1467 (9th Cir. 1994). First, the court determines whether the foreign state law actually differs from the law of California. *Id.* If so, the court determines whether a "true conflict" exists between their interests. *Id.* Third, if each state had a legitimate interest, the court compares the extent to which each state's interests will be impaired if the other state's law is applied. *Id.*

Defendants presume that the laws differ, that there is a "true conflict" which would be resolved in favor of Peruvian law, and that Peru has a far greater interest than California in regulating environmental conditions in its own territory and addressing allegedly

tortious conduct carried out against Peruvian citizens. Plaintiffs, on the other hand, argue that the Court must presume California law applies since Defendants have failed to do a proper choice of law analysis showing Peruvian law applies. Although Defendants' choice-of-law analysis is lacking, the Court need not engage in a full choice of law analysis at this stage of the litigation. *See Piper Aircraft,* 454 U.S. at 251 ("The doctrine of forum non conveniens ... is designed in part to help courts avoid conducting complex exercises in comparative law.") *Id.* at 260. Given that both parties have asserted reasonable explanations that either Peruvian or California law applies, this factor remains neutral.

4. Deference to Plaintiffs' Choice of Forum

As stated earlier, there is a strong presumption in favor of a domestic plaintiff's choice of forum, which can be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. *Piper Aircraft,* 454 U.S. at 253–57; *Ravelo Monegro,* 211 F.3d 509 at 514. However, in *Piper Aircraft,* the Supreme Court implied that the degree of deference given to a domestic plaintiff's choice of forum "ordinarily" applies to foreign plaintiffs' choice of forum "with less force." *Id.* at 255. "But less deference is not the same thing as no deference." *Ravelo Monegro,* 211 F.3d at 514.

Although Amazon Watch is a California plaintiff, the fact that the 25 Achuar Plaintiffs are all residents of Peru lessens the degree of deference owed to their choice of forum. Furthermore, Amazon Watch is a plaintiff in only one out of the twelves causes of action listed in the FAC. The Court thus accords only some deference to Plaintiffs' choice of forum. With this in mind and balancing the private and public in-

terest factors, Peru stands out as the more convenient forum for this litigation. Accordingly, the Court hereby GRANTS Defendants' motion to dismiss based on forum non conveniens, and need not address Defendants' argument for dismissal based on international comity.

IV. *CONCLUSION*

For all the reasons stated above, the Court hereby DENIES Plaintiffs' motion to conduct limited discovery, and GRANTS Defendants' motion to dismiss based on forum non conveniens. This ruling renders MOOT Defendants' motion to dismiss Amazon Watch's UCL claim.

IT IS SO ORDERED.

APPENDIX D

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Tomas Maynas Carijano et al.
v.
Occidental Petroleum Corp. et al.

No. CV 07–5068 PSG (PJWx)

E-FILE 6/25/08

[PROPOSED] JUDGMENT

For the reasons stated in this Court's April 15, 2008 Order, IT IS ORDERED, ADJUDGED, AND DECREED that this action is DISMISSED without prejudice to Plaintiffs' right to proceed on this matter in the appropriate Peruvian courts and without prejudice to Plaintiffs' right to refile this action in this Court in the event that Defendants do not consent to personal jurisdiction in this matter in the appropriate Peruvian courts or in the event that the Peruvian courts decline to assert personal jurisdiction over Defendants.

The parties shall bear their own costs.

IT IS SO ORDERED.

DATED: ~~May __, 2008~~
06/25/08

PHILIP S. GUTIERREZ
Hon. Philip S. Gutierrez
United States District Judge

Presented by:

MUNGER, TOLLES & OLSON LLP
LATHAM & WATKINS LLP
By: */s/ Daniel P. Collins*
Daniel P. Collins
Attorneys for Defendants
OCCIDENTAL PETROLEUM CORPORATION
and OCCIDENTAL PERUANA, INC.

APPENDIX E

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 08–56187

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA, a minor, by her guardian Rosario Dahua Hualinga; ROSARIO DAHUA HUALINGA, personally and on behalf of her minor child Roxana Garcia Dahua; NILDA GARCIA SANDI, a minor, by her guardian Rosalbina Hualinga Sandi; ROSALBINA HUALINGA SANDI, personally and on behalf of her minor child Nilda Garcia Sandi; ELENA MAYNAS MOZAMBITE, a minor, by her guardian Gerardo Maynas Hualinga; GERARDO MAYNAS HUALINGA, personally and on behalf of his minor child Elena Maynas Mozambite; ALAN CARIAJANO SANDI, a minor, by his guardian Pedro Sandi; PEDRO SANDI WASHINGTON, personally and on behalf of his minor child Alan Cariajano Sandi; ELISA HUALINGA MAYNAS, a minor, by her guardians Daniel Hualinga Sandi and Andrea Maynas Cariajano; DANIEL HUALINGA SANDI, personally and on behalf of his minor child Elisa Hualinga Maynas; ANDREA MAYNAS CARIAJANO, personally and on behalf of her minor child Elisa Hualinga Maynas; CERILO HUALINGA HUALINGA, a minor, by his guardians Roman Hualinga Sandi and Rosa Hualinga; ROMAN HUALINGA SANDI, personally and on behalf of his minor child Cerilo Hualinga Hualinga; ROSA HUALINGA, personally and on behalf of her minor child Cerilo Hualinga Hualinga; RODOLFO MAYNAS SUAREZ, a minor, by his guardians Horacio Maynas Cariajano and Delmencia Suarez Diaz; HORACIO

MAYNAS CARIAJANO, personally and on behalf of his minor child Rodolfo Maynas Suarez; DELMENCIA SUAREZ DIAZ, personally and on behalf of her minor child Rodolfo Maynas Suarez; KATIA HUALINGA SALAS, a minor, by her guardians Alejandro Hualinga Chuje and Linda Salas Pisongo; ALEJANDRO HUALINGA CHUJE, personally and on behalf of his minor child Katia Hualinga Salas; LINDA SALAS PISONGO, personally and on behalf of her minor child Katia Hualinga Salas; FRANCISCO PANAIGO PAIMA, a minor, by his guardians Milton Panaigo Diaz and Anita Paima Cariajano; MILTON PANAIGO DIAZ, personally and on behalf of his minor child Francisco Panaigo Paima; ANITA PAIMA CARIAJANO, personally and on behalf of her minor child Francisco Paniago Paima; ADOLFINA GARCIA SANDI, personally and on behalf of her deceased minor child Olivio Salas Garcia; AMAZON WATCH, INC., a Montana corporation,

Plaintiffs–Appellants,

v.

OCCIDENTAL PETROLEUM CORPORATION, a Delaware Corporation; OCCIDENTAL PERUANA, INC., a California Corporation,

Defendants–Appellees.

No. 08–56270

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA, a minor, by her guardian Rosario Dahua Hualinga;

ROSARIO DAHUA HUALINGA, personally and on behalf of her minor child Roxana Garcia Dahua; NILDA GARCIA SANDI, a minor, by her guardian Rosalbina Hualinga Sandi; ROSALBINA HUALINGA SANDI, personally and on behalf of her minor child Nilda Garcia Sandi; ELENA MAYNAS MOZAMBITE, a minor, by her guardian Gerardo Maynas Hualinga; GERARDO MAYNAS HUALINGA, personally and on behalf of his minor child Elena Maynas Mozambite; ALAN CARIAJANO SANDI, a minor, by his guardian Pedro Sandi; PEDRO SANDI WASHINGTON, personally and on behalf of his minor child Alan Cariajano Sandi; ELISA HUALINGA MAYNAS, a minor, by her guardians Daniel Hualinga Sandi and Andrea Maynas Cariajano; DANIEL HUALINGA SANDI, personally and on behalf of his minor child Elisa Hualinga Maynas; ANDREA MAYNAS CARIAJANO, personally and on behalf of her minor child Elisa Hualinga Maynas; CERILO HUALINGA HUALINGA, a minor, by his guardians Roman Hualinga Sandi and Rosa Hualinga; ROMAN HUALINGA SANDI, personally and on behalf of his minor child Cerilo Hualinga Hualinga; ROSA HUALINGA, personally and on behalf of her minor child Cerilo Hualinga Hualinga; RODOLFO MAYNAS SUAREZ, a minor, by his guardians Horacio Maynas Cariajano and Delmencia Suarez Diaz; HORACIO MAYNAS CARIAJANO, personally and on behalf of his minor child Rodolfo Maynas Suarez; DELMENCIA SUAREZ DIAZ, personally and on behalf of her minor child Rodolfo Maynas Suarez; KATIA HUALINGA SALAS, a minor, by her guardians Alejandro Hualinga Chuje and Linda Salas Pisongo; ALEJANDRO HUALINGA CHUJE, personally and on behalf of his minor child Katia Hualinga Salas; LINDA SALAS PISONGO, personally and on behalf of her minor child

Katia Hualinga Salas; FRANCISCO PANAIGO PAIMA, a minor, by his guardians Milton Panaigo Diaz and Anita Paima Cariajano; MILTON PANAIGO DIAZ, personally and on behalf of his minor child Francisco Panaigo Paima; ANITA PAIMA CARIAJANO, personally and on behalf of her minor child Francisco Paniago Paima; ADOLFINA GARCIA SANDI, personally and on behalf of her deceased minor child Olivio Salas Garcia; AMAZON WATCH, INC., a Montana corporation,

Plaintiffs–Appellees,

v.

OCCIDENTAL PETROLEUM CORPORATION, a Delaware Corporation; OCCIDENTAL PERUANA, INC., a California Corporation,

Defendants–Appellants.

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Filed May 31, 2012

Before: Mary M. Schroeder,
Kim McLane Wardlaw, and Ronald M. Gould,
Circuit Judges.

Order;
Dissent by Chief Judge Kozinski;
Concurrence by Judge Wardlaw

ORDER

The panel unanimously voted to deny the petition for panel rehearing. Judges Wardlaw and Gould also voted to deny the petition for rehearing en banc and Judge Schroeder so recommended.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R.App. P. 35. Judge Bea was recused.

The petition for rehearing en banc is DENIED

Chief Judge KOZINSKI, with whom Judges O'SCANNLAIN, CALLAHAN, IKUTA and N.R. SMITH join, dissenting:

For nearly 150 years, the Supreme Court has consistently and repeatedly held that, " '[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' " *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868)). It is therefore hornbook law that, " '[o]n every ... appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is *bound* to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.' " *Id.* (quoting *Great S. Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 453 (1900)) (emphasis added).

Tossing this instruction aside, the majority refuses to address Defendants' claim that Amazon Watch lacks Article III standing—"a threshold matter central to our subject matter jurisdiction." *Bates v. United Parcel Serv., Inc.,* 511 F.3d 974, 985 (9th Cir. 2007) (en banc). Instead, the majority "assume[s] that Amazon Watch has standing for the purposes of [conducting] the *forum non conveniens* analysis." *Carijano v. Occidental Petroleum Corp.,* 643 F.3d 1216, 1228 (9th Cir. 2011). Then, assigning great weight to Amazon Watch's status as a domestic plaintiff, the majority lets the entire case stay in federal court. *Id.* at 1234. On remand, Amazon Watch might be dismissed for lack of standing, but the rest of the case may proceed to the merits. *Id.* at 1236–37.

If this sounds familiar, that's because it is. Until the Supreme Court put a stop to it, "[t]he Ninth Circuit ... denominated this practice—which it characterize[d] as 'assuming' jurisdiction for the purpose of deciding the merits—the 'doctrine of hypothetical jurisdiction.' " *Steel Co.,* 523 U.S. at 94 (citing *United States v. Troescher,* 99 F.3d 933, 934 n.1 (9th Cir. 1996)). The Supreme Court "decline[d] to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.; see also id.* at 95 ("Just last Term, we restated this principle in the clearest fashion, unanimously setting aside the Ninth Circuit's merits decision in a case that had lost the elements of a justiciable controversy....").

In support of its resurrection of "hypothetical jurisdiction," the majority points to the Supreme Court's statement in *Sinochem International Co. v. Malaysia International Shipping Corp.,* 549 U.S. 422, 425

(2007), that "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." *See Carijano,* 643 F.3d at 1227. The majority cherry-picks this language from *Sinochem*'s opening paragraph and turns a blind eye to the rest of the opinion, including the immediately subsequent sentence. Here's the Court's holding, as it appears in full:

> We hold that 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. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant *if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.*

Sinochem Int'l Co., 549 U.S. at 425 (emphasis added).

As we've previously recognized, "[i]n *Sinochem,* the Supreme Court offered the lower courts a practical mechanism for resolving a case that *would ultimately be dismissed.*" *Provincial Gov't of Marinduque v. Placer Dome, Inc.,* 582 F.3d 1083, 1088 (9th Cir. 2009) (emphasis added). The Court left intact our "independent obligation to examine our own and the district court's jurisdiction." *Id.* at 1087 (internal quotation marks omitted). Indeed, it reaffirmed that "[w]ithout jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case." *Sinochem Int'l Co.,* 549 U.S. at 431 (internal quotation marks omitted). Consistent with this longstanding rule, the Court held that we have "leeway to choose among threshold grounds for denying audience to a case on

the merits," because "[d]ismissal short of reaching the merits means that the court will not proceed at all to an adjudication of the cause." *Id.* (internal quotation marks and citations omitted).

Even when *dismissing* a case, our leeway to choose among threshold grounds is limited. The Court explained in *Sinochem* that, "[i]n the mine run of cases, jurisdiction will involve no arduous inquiry and both judicial economy and the consideration ordinarily accorded the plaintiff's choice of forum should impel the federal court to dispose of [those] issue[s] first." *Sinochem,* 549 U.S. at 436 (internal quotation marks omitted) (alteration in original). We may skip over jurisdiction only "where [it] is difficult to determine, and *forum non conveniens* considerations weigh heavily *in favor of dismissal*...." *Id.* (emphasis added). In other words, *Sinochem* was the exception to the rule: Because it was "a textbook case for immediate *forum non conveniens* dismissal," the Court found it unnecessary to decide jurisdiction. *Id.* at 435. Here, by contrast, the majority believes the *forum non conveniens* factors weigh so heavily *against dismissal* that it reverses for abuse of discretion. *See Carijano,* 643 F.3d at 1234. Under these circumstances, *Sinochem* compels us to address jurisdiction first.

The majority also "believe[s] that it would be improper for us to rule on the [standing] issue before any consideration by the district court, which 'is in the best position to resolve [it] in the first instance.' " *Id.* at 1228 (quoting *Ibrahim v. DHS,* 538 F.3d 1250, 1256 n.9 (9th Cir. 2008)). But, as explained above, " '[o]n every ... appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.' " *Steel Co.,* 523 U.S. at 94 (quoting *Great S. Fire Proof Hotel*

Co., 177 U.S. at 453). We may remand jurisdictional questions only when we would not, by doing so, allow the case to "proceed at all in any cause." *Id.* (quoting *Ex parte McCardle,* 74 U.S. at 514). In *Ibrahim,* on which the majority relies, we reversed the district court's dismissal for lack of statutory jurisdiction, then remanded as to the unrelated jurisdictional issue of Article III standing. *Ibrahim,* 538 F.3d at 1256 & n.9. We didn't, as my colleagues do here, assume standing for the purpose of deciding a non-jurisdictional issue, thereby allowing the case to proceed.

If the majority really wants to give the district court first bite at the jurisdictional apple, it can simply remand for the district court to consider that issue, without making any other ruling in the case. By *assuming* jurisdiction instead, the panel gives itself license to write a precedential opinion on a difficult *forum non conveniens* question, based on the hypothesis that Amazon Watch has standing and its interests can be weighed in the *forum non* analysis. Federal courts have no authority to opine on other issues when their jurisdiction has been seriously called into question; their obligation is to remain silent on those other issues until the jurisdictional question has been put to rest. That the district court may eventually dismiss Amazon Watch for lack of standing will not undo the precedent written by the panel based on its incorrect assumption that Amazon Watch has standing.

* * *

Jurisdiction is the power to speak; in its absence, we must remain silent. Perforce, we must first make sure we have jurisdiction before speaking at all in any matter. The Supreme Court has carved out a narrow exception to this rule, which applies only as

an alternative way to *stop* speaking. By allowing the case to go forward, once our jurisdiction has been called into question, the majority puts us at odds with what is perhaps the most fundamental principle of federal jurisdiction. Our court commits a serious error by failing to take the case en banc to correct the panel's boot-strap overreach.

WARDLAW, Circuit Judge, with whom SCHROEDER and GOULD, Circuit Judges join, concurring in denial of rehearing en banc:

Whoa!!! The Chief has put the proverbial cart before the horse. The district court did not touch upon the merits of the claims alleged in the complaint in any manner whatsoever, and neither did our panel's disposition. Nor did we or the district court invoke the doctrine of "hypothetical jurisdiction" in an effort to reach the merits, quite contrary to the dissent's assertion. Rather, based on the record before the district court, the panel concluded only that the district court abused its discretion when it dismissed this action under the *forum non conveniens* doctrine. This was, by definition, "a non-merits ground for dismissal." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 432 (2007) (internal quotation marks omitted). Occidental is free, on remand, to renew its motion to dismiss on the ground that Amazon Watch may not have standing to assert its claim under California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code § 17200 *et seq.,* and, should the district court dismiss Amazon Watch, Occidental may once again seek to dismiss the case on *forum non conveniens* grounds.

The question of standing cannot be resolved on the bare pleadings, which is all we have before us given the procedural posture of this appeal. And whether the district court has jurisdiction will necessarily require some factual development as to whether and how alleged misrepresentations and other conduct by Occidental during its Peruvian operations harmed and continue to harm Amazon Watch. *See Ibrahim v. Dep't of Homeland Sec.,* 538 F.3d 1250, 1256 n.9 (9th Cir. 2008). "In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Augustine v. United States,* 704 F.2d 1074, 1077 (9th Cir. 1983). Here, Occidental disputes the existence, the cause and the redressability of the harm alleged by Amazon Watch. Resolving these issues will require factual development on a number of fronts. For example, to show harm, Amazon Watch may produce evidence of the manner in which Occidental's conduct forced it to divert resources from its central mission of protecting the rainforest and advancing the rights of the indigenous people of the Amazon. *See Kwikset Corp. v. Superior Court,* 51 Cal.4th 310, 322–24 (2011) (requiring economic harm to prove UCL standing). To show causation, Amazon Watch may also produce evidence linking Occidental's alleged deceptive practices to Amazon Watch's diminished ability to carry out its mission. *See id.* at 326 (affirming that fraud or reliance is a causal mechanism recognized under the UCL). Further, Amazon Watch may prove a continuing injury, which may be redressed through, for example, injunctive relief compelling Occidental to research and remediate environmental harms or to conduct outreach and education about health risks

with the indigenous people. *See id.* at 336–37 (standing under the UCL is not dependent on the availability of restitution as a remedy).

The district court did not address standing, and we need not—indeed, could not—do so in the first instance here. The district court did not do so because the Supreme Court has explained that a "district court has discretion to respond at once to a defendant's *forum non conveniens* pleas, and need not take up first any other threshold objection," including jurisdiction. *Sinochem,* 549 U.S. at 425. That is precisely what happened here. The district court granted defendants' motion to dismiss on *forum non conveniens* grounds without ruling on the merits of the concurrent motion to dismiss for lack of standing. Applying the *forum non conveniens* test of *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981), we reversed and remanded the case to the district court to consider the issue of standing in the first instance. *Carijano v. Occidental Petroleum Corp.,* 643 F.3d 1216, 1236–37 (9th Cir. 2011).

The dissent from denial of rehearing en banc cries foul, citing the general rule that federal courts must *sua sponte* evaluate their own jurisdiction. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83 (1998). Chief Judge Kozinski asserts that we have "[t]oss[ed] this instruction aside" in our *forum non conveniens* analysis. But it was the Supreme Court that created this exception to our ordinary practice of addressing jurisdictional issues before we reach the merits of a claim, and it did so specifically in the context of ruling on a party's assertion of *forum non conveniens. Sinochem,* 549 U.S. at 432. The reason for the exception identified in *Sinochem* is clear—neither district courts nor we reach the merits of a case when we de-

cide issues of *forum non conveniens,* and thus we need not conduct the jurisdictional analysis as a preliminary matter.

The dissent from denial of rehearing en banc also claims that we "cherry pick" language from *Sinochem* and ignore the Court's explanation that: "In particular, a court need not resolve [jurisdictional issues] if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case." 549 U.S. at 425. This statement in *Sinochem* explains why the district court need not address jurisdiction before it rules on a *forum non conveniens* motion, but it does not address, much less dictate, how appellate review must proceed after a district court makes this election. *See, e.g., Provincial Gov't of Marinduque v. Placer Dome, Inc.,* 582 F.3d 1083, 1087–88 (9th Cir. 2009) (noting some of the unanswered questions about appellate review and potential remands to state court raised by *Sinochem*'s *forum non conveniens* holding). *Sinochem* is silent on how an appellate court is to proceed when a district court declines to address jurisdictional issues, but errs in its *forum non conveniens* analysis.

Finally, contrary to the dissent's assertions, the panel opinion does not trap Occidental in federal court. Our opinion does not preclude Occidental from renewing its *forum non conveniens* motion should the district court rule that Amazon Watch lacks standing to assert its claims under California's UCL. *See, e.g., Van Schijndel v. Boeing Co.,* 434 F. Supp. 2d 766 (C.D. Cal. 2006). In *Van Schijndel,* the district court dismissed the case on *forum non conveniens* grounds. *Id.* at 768. We reversed the dismissal in an unpublished disposition, and on remand the district court again dismissed the case based on the *forum non con-*

veniens doctrine in light of "substantially changed circumstances." *Id.* at 769 ("The Court concludes that the Ninth Circuit held only that the Court erred in the manner in which it conducted its analysis, but did not intend to preclude the Court from further consideration of the issue in light of its ruling."). We affirmed the second dismissal.

The panel opinion faithfully applies the Supreme Court's *Sinochem* opinion to reverse the district court's *forum non conveniens* decision based on the record before that court. There was no "boot-strap" or "overreach" here, and our court properly decided not to rehear this appeal en banc.