IN THE SUPREME COURT OF THE STATE OF OREGON

ROSA AURELIA PALACIOS ESPINOZA, Personal Representative of the Estate of Victor Andres Espinoza Horna, Deceased, for her own benefit as the surviving spouse and for the benefit of Micaela Ariana Espinoza and Mariam Andrea Espinoza, surviving children of the deceased,

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation;

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

SC No. S062903

CA No. A147028

Multnomah County Circuit Court No. 090912350

ERIKA CONSUELO MACHADO MERINO, Personal Representative of the Estate of Juan Francisco Garcia Rubio, Deceased, for her own benefit as the surviving spouse and for the benefit of Macarena Garcia Machado and Mariono Garcia Santolalla, surviving children of the deceased, and Arturo Benjamin Garcia Pinillos, surviving father of the deceased,

Plaintiff-Appellant,
Respondent on Review,

SC No. S062903

CA No. A147028

Multnomah County Circuit Court No. 090912777

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Respondent on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

JULY MARLENE CHURATA FERNANDEZ, Personal Representative of the Estate of Christian Martin Querevalu Quiroz, Deceased, for her own benefit as the surviving spouse and for the benefit of Camila Milagros Querevalu Churata, surviving child of the deceased; Freddy Quiroz Dulanto De Querevalu, and Rolandi Querevalu Suarez, surviving parents of the deceased,

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

SC No. S062903

CA No. A147028

Multnomah County Circuit Court No. 090913294

FLOR DE MARIA GAMBOA ALVAREZ, Personal Representative of the Estate of Fernando Cesar Nuñez Del Prado Reynoso, Deceased, for her own benefit as the surviving spouse and for the benefit of Caroline Anthuanet Nuñez Del Prado Gamboa and Fernando Junior Nuñez Del Prado Gamboa, surviving children of the deceased, and Margarita Severiana Reynoso Quispe and Ricardo Cesar Nuñez Del Prado Saavedra, surviving parents of the deceased,

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

SC No. S062903

CA No. A147028

Multnomah County Circuit Court No. 091015153

FLOR KATHERINE SOTO LICAN, Personal Representative of the Estate of Jose Luis Saldana Eustaquio, Deceased, for her own benefit as the surviving spouse and for the benefit of Joseph Saldana Soto, Luiggi Saldana Soto, Miguel Angel Saldana Soto, Maria Elizabeth Saldana Gutierrez, and Alexandra Himena Saldana Gutierrez, surviving children of the deceased, and Amadeo Saldana Narro, surviving father of the deceased,

SC No. S062903

CA No. A147028

Multnomah County Circuit Court No. 091015154

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

OLGA PAULINA CHIBA QUISPE, Personal Representative of the Estate of Peter Michael Liza Chiba, Deceased, for her own benefit as the surviving mother and for the benefit of Jose Armando Liza Nunton, surviving father of the deceased,

Plaintiff-Appellant,
Respondent on Review

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

SC No. S062903

CA No. A147028

Multnomah County Circuit Court No. 091217035

PATRICIA OTERO DE VASQUEZ, Personal Representative of the Estate of Jhon Henry Vasquez Lopez, Deceased, for her own benefit as the surviving spouse and for the benefit of Angie Patricia Vasquez Otero, Henry Gianpierre Vasquez Otero, Karen Elizabeth Vasquez Otero, and Jhon Henry Vasquez Otero, surviving children of the deceased, Pablo Wilfredo Vasquez Meza, surviving father of the deceased, and Catalina Lopez De Vasquez, surviving mother of the deceased,

Plaintiff-Appellant,
Respondent on Review,

v.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased,

Defendant.

SC No. S062903

CA No. A147028

Multnomah County Circuit Court No. 100303637

On Review of the Decision of the Oregon Court of Appeals
Decision filed: October 8, 2014
Author of Opinion: Hon. Rex Armstrong
Joining in Opinion: Hon. James C. Eagan, Hon. Lynn R. Nakamoto
On Appeal from the General Judgment of the
Circuit Court of the State of Oregon for Multnomah County
Hon. Jerry B. Hodson, Judge

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PLAINTIFFS' RESPONSE TO DEFENDANT'S MERITS BRIEF

On review of *Espinoza v. Evergreen Helicopters, Inc.*, 266 Or App 24, 337 P3d 169 (2014) ("*Espinoza*"), Plaintiffs-Appellants, Respondents-on-Review ("Plaintiffs") submit this response to the merits brief of Defendant-Respondent, Petitioner-on-Review ("Defendant"). This response supplements Plaintiffs' opening and reply briefs in the Court of Appeals and response to petition for review.[1]

QUESTIONS PRESENTED and PROPOSED RULES OF LAW

Defendant's Question 1: While Defendant's proposed question is whether appellate jurisdiction is absent when parties in consolidated actions join in a single notice of appeal, the proper question here, *if* review was preserved, is, did the appellate commissioner err in finding non-jurisdictional ORAP 2.10(1)'s provision that each party file a separate notice of appeal and separately attach a judgment?

Plaintiffs' Proposed Rule: No. Review of the commissioner's Order has been improvidently granted contrary to ORAP 7.55. Appellate jurisdiction was correctly determined by the contents of the notice of appeal identifying all

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[1] Plaintiffs' brief in the Court of Appeals is cited here as "PBrf," Defendant's answering brief-"DBrf"; Plaintiffs' reply brief-"RBrf"; Defendant's petition for review-"PFR"; Defendant's merits brief-"MBrf "; Plaintiffs' response to Defendant's petition for review-"RPFR"; *Amicus Curiae* OTLA's brief-"OTLA."

plaintiffs in consolidated cases as appellants, the titles and case numbers for every action appealed, and the date of entry of all judgments, a uniform copy of which was attached.

Defendant's Question 2: While Defendant frames this question as "presumed convenience" "for no reason" other than a non-resident or alien litigant's choice, the proper question is should a non-resident or foreign plaintiff be allowed the same deference given to a resident plaintiff in choosing a resident defendant's home forum?

Plaintiffs' Proposed Rule: Yes. Litigation in a defendant's home forum is presumed convenient regardless of the plaintiff's residence. A "venue privilege" allows a plaintiff to determine the most convenient and appropriate forum for litigating its claims. A plaintiff's choice of forum is no less reasonable merely because of her status as a resident of a different state, as a non-citizen, alien or foreign resident, particularly when the defendant's home forum has a strong connection to the claims alleged. Allowing exactly the same deference to all plaintiffs minimizes xenophobia, discrimination, reverse forum-shopping, and other ills of the *forum non conveniens* doctrine.

Defendant's Question 3: Defendant questions whether a court may make "decisions" that "go to the merits" in a *forum non conveniens* motion, but the proper question is, in reaching an understanding of the merits here, did the trial judge properly exercise his discretion by disregarding some of plaintiff's

allegations and theories of liability, and in failing to make findings about the location, availability, and ease of access to witnesses and documents?

Plaintiffs' Proposed Rule: No. A trial court cannot make factual determinations about the underlying merits of Plaintiffs' claims by picking and choosing which allegations and theories to disregard when assessing the ease of access to witnesses and documents and location of evidence when it weighs convenience factors before any merits discovery is allowed.

CONTINGENT QUESTION and PROPOSED RULE

Plaintiffs presented this question under ORAP 9.10(1) in response to Defendant's petition for review:

Plaintiffs' Question 1: Should this court adopt a doctrine of *forum non conveniens* in Oregon, and is that doctrine barred because of existing principles of comity preventing Oregon judges from dismissing cases of foreign suitors based on the notions of expediency?

Plaintiffs' Proposed Rule: Oregon should reject the doctrine of *forum non conveniens* because there is no "inherent discretionary authority" to decline jurisdiction in damages actions over a local defendant in favor of another venue for the sake of convenience. This doctrine is an exception to principles of comity. The principle of *judex tenetur impertiri judicium suum* applies. Oregon does not close its doors to damages actions brought by foreign suitors based on notions of expediency when there is personal jurisdiction and venue,

except as allowed by statute.

RESPONSE TO STATEMENT OF THE CASE

Nature of the Action. Defendant's description at MBrf 1-2 is appropriate.

RESPONSE TO STATEMENT OF FACTS

Defendant's factual statement at MBrf 2-6 is incomplete. The facts are discussed in *Espinoza* at 30-34, at PBrf 3-10, PBrf 48-52, and more so at ER 40-66. Plaintiffs are compelled to correct the following omissions by Defendant:

- While Helinka's "service" agreement states it has operational control of the helicopter and is judge of its safety, under the "teaming" and "damp lease" agreements Defendant had actual control over all helicopter operations, airworthiness, pilots-in-command, mechanics, spare parts, safety procedures, pilot and mechanic training, and maintenance of the radar altimeter and terrain avoidance systems. Defendant was the sole "prime contractor" for providing helicopter flight services for Rio Tinto from Chiclayo to the La Granja copper mine. Defendant only needed Helinka to obtain the Peruvian operating permit for its helicopter, and, therefore, Defendant guaranteed performance of the service agreement between Helinka and Rio Tinto. Accordingly, Helinka had no experience with the helicopter, pilots, mechanics, or avionics. Defendant's pilots, and only Defendant's pilots, were in operational control of the helicopter

for the purpose of fulfilling Helinka's operating permit. Defendant assumed full responsibility for helicopter flight services under the "teaming" agreement, with Helinka's role limited to providing support and assistance to Defendant. Under the "damp" lease agreement, Defendant leased its helicopter, crew, mechanics, and insured all flight operations. ER 41-49.

- This helicopter was registered and regulated by the FAA Flight Standards office in Hillsboro. Defendant's location in McMinnville is where the EPPWS, GPS, altimeter and radar systems were installed and updated that are alleged to be causally related to the crash. Oregon is where the vast majority of key witnesses and evidence related to Plaintiffs' *direct* liability claims is located, and where much of the vicarious liability evidence is located, as Oregon is where the pilot and mechanic training occurred, the manuals and operating procedures are located, and the supply chain for parts, repairs and maintenance is based. ER 50-58.

- Defendant acknowledged that Oregon was the most favored forum *if* the court accepted Plaintiffs' legal theory that the ground proximity warning system and altimeter systems were the "proximate cause" of the crash. Tr 60; PBrf 43. However, no discovery was allowed regarding liability or the causes of the crash; discovery was limited to determining the location of witnesses and documents. ER30; PBrf n 1.

- For the Defendant's own convenience, any and all disputes arising

between Helinka and Defendant, or related to or under their "teaming" and "damp lease" agreements, were governed by Oregon law and subject to *exclusive* venue and jurisdiction in Oregon. ER 43-44, 46-47.

- Plaintiffs are non-resident personal representatives duly appointed by the probate court for Multnomah County. ER 40.

SUMMARY OF ARGUMENT

Defendant's failure to timely seek review of the appellate commissioner and Chief Judge's Orders, as required by ORAP 7.55, should preclude review of Question 1. The contents of Plaintiffs' Notice of Appeal determined appellate jurisdiction, and here, as correctly determined by those Orders, that Notice complied with all requirements necessary for appellate jurisdiction in all consolidated cases. Any lack of compliance with ORAP 2.10(1) was properly waived by those Orders, which is an alternative ground to affirm the Order that is not challenged here.

It is not unreasonable for a plaintiff to choose "the most appropriate forum" for their claim, provided that jurisdiction and venue are proper, which is a plaintiff's "venue privilege." A nonresident or foreign plaintiff's exercise of this "privilege" is no less reasonable than a resident plaintiff's choice merely because of their status, and particularly when they chose the defendant's home forum. If this court adopts any aspect of the *forum non conveniens* doctrine, a defendant should be entitled to dismissal after demonstrating that plaintiff's

choice of forum was for harassment, oppression or vexation of the defendant out of proportion to plaintiff's own convenience, regardless of the plaintiff's status. Lesser deference merely because of a plaintiff's nonresident or foreign status would prove true those critics who have shown the doctrine is xenophobic, discriminatory, outcome determinative, and, in its effect, has nothing to do with convenience. Absent findings by the trial court about its deference, remand is necessary.

This court should not adopt an "inconvenient forum" doctrine. The origin of *forum non conveniens* is based on an exception to principles of comity, and at common law, judicial abstention is allowed only in cases seeking equitable relief or in admiralty. The doctrine has been soundly criticized notwithstanding that many states, by statute or case law, have adopted some formulation of it after the Supreme Court recognized an "inherent power" for federal courts to decline jurisdiction for the sake of convenience or expediency. Absent express statutory authority, Oregon trial courts are not provided discretion to decline jurisdiction in a damages action brought by foreign suitors against a local defendant for notions of convenience or expediency. A court having jurisdiction is bound to exercise it.

Here, the trial court abused its discretion when, instead of simply gaining an understanding of the merits in order to access the availability and location of witnesses and evidence pertinent to plaintiff's claims, it decided that the focus

"at trial" would center on circumstances at the time of the crash in Peru related to plaintiff's vicarious liability theory. This was in disregard to plaintiff's theories of direct liability for acts and omissions in Oregon and the U.S.A. Merits discovery was not been permitted, no evidence proving the "cause" of the crash had been developed, and, therefore, it is highly likely their issues would remain contested through trial. Thus, the trial court failed to weigh the motion by balancing convenience and accessibility to evidence related to all likely factual disputes, and improperly picked the one issue it believed would be the focus at trial.

ARGUMENT

Response to Defendant's Question 1:

Review of the Commissioner's Order Under ORAP 7.55 Was Improvidently Granted; The Chief Judge Correctly Found Appellate Jurisdiction In All Consolidated Cases.

On January 6, 2015, Defendant petitioned for review of the appellate commissioner's Order of December 12, 2011, denying Defendant's motion to dismiss the appeal/determine jurisdiction. PFR App-C. Review of Defendant's first question in its merits brief (PFR Question "C") has been improvidently granted for three reasons.

First, Defendant seeks review of the commissioner's Order denying the motion to dismiss the appeal, an Order that also granted waiver of ORAP 2.10(1). Reconsideration of *those* determinations was then denied by Order of

the Chief Judge on January 24, 2012. RPRF App-1. By rule, "* * * a decision of the appellate commissioner is not subject to a petition for review in the Supreme Court, but the decision of the Chief Judge or the Motions Department on reconsideration of a ruling of the appellate commissioner is subject to a petition for review." ORAP 7.55(4)(c). Defendant did not assert in its petition or merits brief that the Chief Judge erred in denying reconsideration. Rule 7.55(4)(c) prevents review of the commissioner's Order.

Second, if Defendant contends it has sought review of the Chief Judge's Order because its merits brief asserts error "by the Court of Appeals," then the time gap between that court's decision and its January 6, 2015 petition for review arrived three years too late.

Defendant was required to file its petition for review within 35 days of "the decision by the Chief Judge." ORAP 9.05(2)(a); ORAP 7.55(c). "Decision" means "an order ruling on a motion . . . including an order of the appellate commissioner *together* with the decision of the Chief Judge. . . ." ORAP 9.05(1).

Defendant asserts that it "raised the issue again in its brief" after denial of reconsideration. MBrf 5. However, it never cross-assigned error in its answering brief to this ruling, DBrf, nor made any argument to the Court of Appeals except to note in its Statement of the Case that it "adheres to its view" that jurisdiction was lacking.

Prior to the amendment of ORAP 9.05, "[a]ny decision by the Chief Judge . . . [could] be reviewed by the full court of the Court of Appeals." *Bova v. City of Medford*, 236 Or App 257, 264, 236 P3d 760 (2010). That changed when ORAP 9.05 was amended. "Adhering to its view" in its brief did not preserve review of this issue, because on October 1, 2008, Chief Justice Order 08-056/Chief Judge Order No. 08-10 amended ORAP 9.05(1) to define "decision" to include "an order of the appellate commissioner *together with the decision of the Chief Judge* or Motions Department under ORAP 7.55(4)(b)."

ORAP 9.05(2)(a) required Defendant's petition for review of the commissioner's order "together with the decision of the Chief Judge" to be filed within 35 days of *that decision*. *See State v. Soto,* 268 Or App 822, 823 n 3, 343 P3d 666 (2015) *rev den*, 357 Or 299 (2015) (noting denial of petition for review of Chief Judge's Order and subsequent opening brief in Court of Appeals reiterating arguments previously decided by that Order).

Defendant does not argue any grounds exist to avoid the 35-day time limit. It never requested an extension of time to file its petition for review until after the opinion in *Espinoza* issued. Defendant simply waited too long after the January 24, 2012 "decision" to petition for review of *that* decision.

Third, the commissioner and the Chief Judge agreed that ORAP 2.10(1) was properly waived. This is an independent and alternative ruling that supports the ruling that has not been challenged here. *Strawn v. Farmers Ins.*

Co. of Oregon, 350 Or 336, 366, 258 P3d 1199, *adh'd to on recons*, 350 Or 521 (2011). This court affirms when an appellant fails to challenge all alternative grounds underlying a ruling. *Id.*

Finally, the commissioner correctly determined that ORAP 2.10(1) does not impose any jurisdictional requirement. Attaching a judgment to the Notice of Appeal did not detract from the sufficiency of the contents of the notice itself, which determined appellate jurisdiction in all eight cases. Defendant's motion asserted that noncompliance with ORAP 2.10(1) caused seven appellants' appeals to become jurisdictionally defective.[2] However, there is no jurisdictional requirement that a notice of appeal attach the judgment so long as the content of the notice correctly recites the date of entry of the judgment appealed and the parties to the appeal. *Grant Cnty Fed Credit Union v. Hatch,*

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[2] Defendant's motion asserted, and its brief asserts here, that only the *Alvarez* judgment was appealed. This court has no determination before it, and there is no evidence in the record that the general judgment attached to the Notice of Appeal is from *Alvarez*, except for the opinion of Defendant's counsel. The contents, caption, as well as the date of filing and entry for every one of the general judgments in each case are identical. By using a consolidated caption for an identical general judgment and identical contents, without any discernable signature differences, it appeared to be a duplicate of one signed General Judgment filed in each case. But neither the commissioner's Order at n 3, nor the naked eye, could determine *any* distinction among nuances in the trial judge's handwritten signature.

This unresolved dispute has implications for e-Filing under UTCR 21.090(2), as any future dispute of this kind will concern the signature of a trial judge on judgments and orders electronically filed using a uniform "scanned signature" or the notation "/s/" making discernment among e-Signatures impossible.

98 Or App 1, 6 n 4, 777 P2d 1388, *rev den* 308 Or 592 (1989); *Werline v. Webber,* 54 Or App 415, 635 P2d 15 (1981), *rev den* 292 Or 450, 644 P2d 1128 (1982) (no jurisdictional defect by attaching non-appealable order when notice of appeal recited correct date of appealable judgment); *Ensley v. Fitzwater,* 293 Or 158, 162, 645 P2d 1062 (1982) (no jurisdictional defect in notice of appeal that states appeal is taken from non-appealable order if it also stated that a copy of the "judgment" appealed is attached, which is an appealable judgment). No statute requires attachment of the judgment or order from which an appeal is taken.

The commissioner emphasized that ORAP 2.10(1) is neither a jurisdictional requirement nor does it "embody or implement a jurisdictional requirement in ORS Chapter 19; therefore, appellant's failure to comply with it is not a jurisdictional defect." PFR App-C pp 5-6. Jurisdiction is determined by the *contents* of the Notice of Appeal because ORS 19.270(1) provides that the appellate court "has jurisdiction of the cause when the notice of appeal has been served and filed as provided in ORS 19.240, 19.250 and 19.255." ORS 19.270(2) provides that there are two requirements that "are jurisdictional and may not be waived or extended." Those "non-waivable" requirements are, timely filing of a notice of appeal with the court, and timely service on all parties identified as adverse in the notice.

ORS 19.240(2) further requires that "[t]he appeal shall be taken by

causing a notice of appeal, in the form prescribed by ORS 19.250." ORS 19.250 requires that the notice contain the title of the cause, names of the parties and their attorneys and addresses, designation of record, designation of points for the appeal or designation of the entire record, and a signature of the appellant. This court has never stated that a party may only satisfy jurisdictional requirements of ORS 19.250 by compliance with the "attachment" provision from ORAP 2.10(1). Because ORS 19.250 requires a notice of appeal to identify the parties to the appeal, the title of the cause, and the date of entry of the judgment appealed, all of which were correctly stated here, Plaintiffs' notice complied with all necessary jurisdictional requirements.

Contrary to Defendant's argument at MBrf 8, the commissioner determined that "any ambiguity in the introductory sentence of the notice of appeal is resolved by inspecting both the caption of the notice of appeal and the identification of the parties to the appeal in the body of the notice of appeal." That method of resolution is unchallenged here. The commissioner found the sufficiency of the notice by the four corners of the notice of appeal "and, here, considering the notice of appeal as a whole, there is no question but that the notice of appeal put all parties on notice that each of the appellants was appealing from the judgment entered in each of the eight cases."

Stahl v. Krasowski, 281 Or 33, 39, 573 P2d 309 (1978) held jurisdictional a notice of appeal that contained "a description of what action of the trial court

is appealed from, because, other than the title of the case, that is the most important thing which the notice contains." *State v. Fowler*, 350 Or 133, 137, 252 P3d 302 (2011) found two requirements of ORS 19.250 jurisdictional: 1) a party must file and serve a notice of appeal within 30 days and 2) "the notice of appeal must specify the judgment from which the appeal is taken." A description of the date of entry of "the judgment" was sufficient for purposes of specifying the judgment from which appeal is taken.

Defendant again cites *South Beach Marina, Inc. v. Department of Revenue*, 301 Or 524, 526-527, 724 P2d 788 (1986), which the commissioner found "wholly inapposite to the present situation." It concerned "a single appeal from two non-identical judgments concerning different tax years that were entered on different dates." Nowhere in *South Beach* did the court state that ORAP 2.10(1) is a jurisdictional requirement; it references the 30-day time limit as jurisdictional.

Defendant also newly argues that several ORS Chapter 19 statutes refer to a notice of an appeal from "a" judgment, or "the" judgment, implying that each party to that judgment must file "a" [separate] notice of appeal. Of course, Plaintiffs here were entitled to take an appeal only from their own case; not from the judgment in another case. Also here, each plaintiff served notice that he or she was appealing from the judgment in their own action "entered on October 12, 2010;" they simply attached one identical judgment to the notice of

appeal that had been entered in all of those consolidated cases that contained the identical contents, combined captions, case numbers, parties, and date and time of entry as found on those judgments.

Plaintiffs timely appealed. All parties are identified. Plaintiffs described the action appealed from. They all specified the date of entry of judgment from which their appeals were taken. The notice states that the trial court dismissed all eight actions on *forum non conveniens* through an identical judgment "entered in these consolidated cases on October 12, 2010." To the right of each "appellant's" name is listed the specific case title and case number for each plaintiff, and all adverse parties are identified as respondents. RPFR App-2 p 5. Plaintiffs met all jurisdictional requirements determined by *Krasowski* and *Fowler*.

Finally, Defendant argues the Court of Appeals itself lacked notice, because, had it known that each of the appellants was appealing the judgment entered in each of the eight cases, the court "would have docketed eight appeals, not one." MBrf 11-12. Defendant ignores the very rule at issue here, ORAP 2.10(1): "The Administrator will decide whether to place the notices of appeal in the same appellate file[.]" Thus, Defendant's assertion, that there should be eight appeals docketed if all eight cases were appealed, is incorrect. Plaintiffs' record before the commissioner showed that a filing fee was paid for eight cases, not just one in *Alvarez*. Indeed, the commissioner granted

Plaintiffs' motion to waive ORAP 2.10(1) because: "if appellants had filed separate notices of appeal, the court would have consolidated them into a single appellate case, and no useful purpose would be served by insisting on compliance with the rule now." The Chief Judge agreed.

This question concerns form over substance; not jurisdiction. Even if Defendant timely sought review, no error is present.

In Support of Plaintiffs' Question 1:

The *Forum Non Conveniens* Doctrine Should Not Be Adopted.

Espinoza correctly recognized that Oregon has not previously adopted the "inconvenient-forum" doctrine of *forum non conveniens*, but erred in holding "for the first time that a dismissal based on the inconvenient-forum doctrine is available in Oregon." *Espinoza* at 43. In doing so, *Espinoza* accurately identified the doctrine's original purpose as "reserved for the rare case that exhibits extraordinary circumstances" where venue was selected for "some harassment" pursuant "to a strategy of forcing the trial at a most inconvenient place for an adversary." *Id.* at 35.

Espinoza, nevertheless, avoided any discussion about the dubious origin, discriminatory consequences, and illegitimate purposes of this controversial doctrine as briefed by Plaintiffs. PBrf 13-18. Plaintiffs rely on those previous authorities, as well as OTLA's brief, and now explicate those arguments.

Most pertinent is *Espinoza's* reliance on *Carijano v. Occidental*

Petroleum Corp., 643 F3d 1216 (9th Cir 2011), *reh'g den* 686 F3d 1027 (2012), *cert den*, 133 S Ct 1996 (2013), and cases cited therein, which properly caution that the doctrine is a "drastic exercise of the court's 'inherent power,'" an exceptional tool to be employed sparingly" because of the moving party's "heavy burden of showing that the [defendant's home] forum results in 'oppressiveness and vexation . . . out of proportion' to the plaintiff's convenience." *Id.* at 1224, 1227; *Sinochem Intern. Co., Ltd. v. Malaysia Intern. Shipping Corp.*, 549 US 422, 429-30, 127 S Ct 1184, 167 L Ed 2d 15 (2007). The doctrine "is nothing more or less than a supervening venue provision" derived from a court's discretionary "inherent power to decline to exercise its jurisdiction." *Espinoza, supra* at 35; *Sinochem* at 429-30.

Carijano was constrained by United States Supreme Court precedent creating this common law doctrine. This court, however, is not so constrained. *State of Mo. ex rel. S. Ry. Co. v. Mayfield,* 340 US 1, 4, 71 S Ct 1, 95 L Ed 3 (1950) ("Mayfield") (state courts are free to decide whether or not to adopt, and, if so, to what extent to depart from federal *forum non conveniens* methodology).

Adopted by a divided Supreme Court in 1947 that noted a 1929 article by Wall Street lawyer Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 Colum L Rev 1 (1929) ("Blair"), the "doctrine of forum non conveniens" was announced in *Gulf Oil Corporation v. Gilbert*, 330

US 501, 67 S Ct 839, 91 L Ed 1055 (1947). *Gilbert* relied on the inherent authority of admiralty and equity courts to decline jurisdiction, looked at state courts statutes providing specific grounds for discretionary changes of venue, and, finding no federal law allowing that power, announced that "common law" vests such authority in federal courts in damage actions brought by nonresidents when plaintiffs chose a venue to "vex, harass or oppress" the defendant.

Four dissenters in *Gilbert* found the special problems in admiralty and equity courts inapplicable, with "[n]o such discretionary authority to decline a case . . . before today . . . vested in federal courts in actions for money judgments deriving from statutes of the common law," and, therefore, it concerned "questions of policy which Congress should decide."

In 1948, Congress superseded the doctrine with a domestic venue-transfer statute that, ever since, applies the judicial doctrine to federal cases only when the alternative forum is abroad. *See Quackenbush v. Allstate Ins. Co.*, 517 US 706, 722-23, 116 S Ct 1712, 135 L Ed 2d 1 (1996).

Blair asserted that as a "then nameless legal principal" since the 19th century, the doctrine is derived from *forum non competens* whereby admiralty courts *chose* to decline to exercise jurisdiction in cases brought between foreign parties. Scholars criticize Blair as "a principal source of historical confusion." Robertson, David W., *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions,* 68 Tex L Rev 937,

949-53 (1990) ("Robertson").[3]

In deciding whether to adopt this doctrine, and, if so, under what standards, this court should heed the analysis of academics who have illustrated precisely why it is xenophobic, discriminatory, capricious and inconsistent. It is an outcome-determinative doctrine of reverse forum-shopping that promotes litigation isolationism. It parochially protects multinational corporations in their home forum from their transnational torts. It has been criticized as an out-of-control common law doctrine contrary to international principles of comity.[4] PBrf 11-18; RBrf 2-3.

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[3] "Blair claimed—quite imaginatively in our view—that a *forum non conveniens* doctrine was already well established in United States law—although not by that name—so that the courts needed only to recognize and apply it. Further, he suggested that the *forum non conveniens* doctrine originated in Scotland. * * * The conventional wisdom, to the effect that the Scottish courts pioneered the development of *forum non conveniens* and that much later the United States and then the English courts adopted the doctrine, is somewhat misleading. The early Scottish version of the doctrine was a very narrow, abuse-of-process version bearing little resemblance to the modern doctrine. Notably, the Scottish courts did not use *forum non conveniens* on behalf of a resident defendant until 1979, well after England had done so; the Scottish case relied on the English jurisprudence. * * * * The English cases cited by the Scottish court had relied on the modern United States law."

[4] Plaintiffs' brief discussed a dozen different scholarly articles, most notably, Professors Robertson, Heiser, and Stein. PBrf 14, n 3. More recent critics include Professors: Rutledge, P., *Symposium: With Apologies to Paxton Blair,* 45 NYUJ Int'l & Pol 1063 (2013) ("Rutledge"); Petsche, M., *A Critique of the Doctrine of Forum Non Conveniens,* 24 Fla J Int'l L. 545 (2012); Effron, R., *Atlantic Marine and the Future of Forum Non Conveniens,* 66 Hastings L Rev 693 (2015); Bookman, P., *Litigation Isolationism,* 67 Stan L Rev 1081 (2015).

Espinoza erred in not directly addressing those criticisms, except indirectly by emphasizing the heavy burden on movants to prove "vexation and oppression" out of proportion to convenience, and by providing equal deference to foreign suitors' choice of forum.

Plaintiff argued in the trial court that there was no inherent power to decline jurisdiction under ORS 1.160 because, "[w]hen jurisdiction is, by the Constitution or by statute, conferred on a court . . . all the means to carry it into effect are also given. . . ." ER 32. Professor Robertson aptly summarized the absence of such "inherent power" as embodied by the maxim *judex tenetur impertiri judicium suum* found in Chief Justice Marshall's warning that judges "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." PBrf 18-25.

Espinoza found inapplicable Plaintiffs' further argument, derived from *Gilbert's* dissent, and from *State ex rel. Kahn v. Tazwell,* 125 Or 528, 266 P 238 (1928) ("Kahn"), *overruled in part, Reeves v. Chem Industrial Co.,* 262 Or 95, 495 P2d 729 (1972), decided just one year before Blair's article, where this court held that Oregon courts do not have inherent power to decline to exercise jurisdiction in damage actions.

Espinoza erred, however, by disregarding that part of Plaintiffs' argument, which asserted discretionary authority cannot be exercised "for the sake of convenience" because "principles of comity * * * bind an Oregon court

to proceed to determine transitory actions when foreign parties are properly before it." PBrf 24.

Defendant's brief described Oregon cases where "inherent power" had been declared to avoid cases involving the "internal affairs of foreign corporations," "enforceable forum selection clauses," or "considerations of comity." When Plaintiffs' reply brief sought to distinguish Defendant's equitable abstention cases, citing to *Bowles v. Barde Steel Co.,* 177 Or 421, 434-35, 164 P2d 692 (1945) ("Bowles"), *Espinoza* refused to consider it, wrongly stating that "comity" was a new theory. *Espinoza* at n 3.

Those cases cited by *Espinoza, supra* at 38-41 find the existence of this "inherent power" in Oregon cases, but all are based on abstention doctrines arising in equity or were claims seeking equitable relief.[5] However, Plaintiffs originally argued that *comity* limited any inherent authority to dismiss for "convenience" as found in *Kahn.* PBrf 24.

The dissenters in *Gilbert* were correct about the lack of any common law authority to decline jurisdiction in damages actions brought by a foreign suitor.

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[5] Cases that decline jurisdiction in disputes concerning the "internal affairs of foreign corporations" all involved equitable remedies. Cases declining jurisdiction in declaratory judgment actions also sought to invoke equitable relief to render an advisory opinion. Those cases declining jurisdiction because of "considerations of comity" all concern deferral to a forum that has previously assumed jurisdiction over the parties and dispute, a well-settled aspect of comity. Forum selection clause cases are discussed *infra.*

Oregon common law is no different. Indeed, Blair wrote that *forum non conveniens* "is a principle of exceptions to the doctrine of comity." *Blair* at 33. Comity was not a "new" argument for rejection of the doctrine.

Espinoza failed to recognize that "abstention doctrines and the doctrine of *forum non conveniens* proceed from a similar premise: In rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush v. Allstate Ins. Co., supra* at 722-23. This court in *Bowles* held that premise is inapplicable when a foreign suitor has brought damage claims here.

Only a "misleading" and incorrect understanding of "comity" provides judicial discretion, or any "freedom of choice," to refuse an exercise of home forum jurisdiction in an action seeking money damages. *Bowles* at 433-435. Quoting from another case, this court in *Bowles* held with respect to comity afforded a federal administrator, "[t]he theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligation, which, like other obligations, follows the person, and may be enforced wherever the person may be found." *Id.* at 433.

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless held would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Id.* at 435.

Therefore, abstention is improper when comity is afforded to a foreign suitor's damages action provided that personal jurisdiction and venue is proper in Oregon.

While Defendant's brief, and then *Espinoza* relied on abstention cases to find "inherent authority," this court cannot ignore its own rationale that authority for declining jurisdiction arises only when equitable relief is sought, not when principles of comity oblige a court to proceed with a damages action brought by a foreign suitor. *See McGirl v. Brewer,* 132 Or 422, 445, 285 P 208 (1930) ("[W]hen an action is brought upon a cause arising outside of the jurisdiction, it always should be borne in mind that the duty of the court is not to administer its notion of justice, but to enforce an obligation that has been created by a different law"); *Also see W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp.,* 311 Or 361, 368-69, 811 P2d 627 (1991) (judicial abstention by Oregon Supreme Court in decision to accept certification from federal district court concerned question of comity); *Cunningham v. Klamath Lake R. Co.,* 54 Or 13, 17, 101 P 213 (1909) (comity is an exemption to the common law rule that a corporation could only be sued in its home forum).

Oregon places limitations on the use of "convenience" as grounds for any discretionary declination of jurisdiction when comity has been afforded to a foreign suitor's damages action. Plaintiffs are non-residents appointed personal

representatives by Oregon[6], and were able to pursue wrongful death claims for their Peruvian decedents against an Oregon corporation because comity obliged the trial court to proceed once personal jurisdiction and venue were established.

This court's *own* limitation on whether a trial judge can dismiss a foreign suitor's damages case because of discretionary notions of "expediency and fairness" is inapposite to adoption of the doctrine.[7] *Espinoza* erred when it held various cases support "inherent power" to decline jurisdiction without examining how comity prohibits any exercise of that power for the sake of expediency, particularly where the "common law" origin of the doctrine was limited to equity suits and in admiralty.

Plaintiff in *Espinoza* in reply expanded its references to comity precisely because defendant's abstention cases sought equitable relief; none were damage actions brought by a foreign suitor. RBrf 6-7. Plaintiffs, therefore, argued that *Bowles* supported *Kahn's* decision to not follow those courts that "decline to take jurisdiction of a suit against a foreign corporation on a cause of action arising out of state, especially where plaintiff is a non-resident."

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[6] *See* ORS 113.087(1) ("By accepting appointment, a personal representative, whether a resident or nonresident of this state, submits personally to the jurisdiction of the court . . . ")

[7] Comity also comes into play with respect to the degree of deference afforded a local or foreign resident. *See Egan v. N. Am. Sav., Loan & Bldg. Co.*, 45 Or 131, 136-37, 76 P 774 (1904) ("Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizens of its own state and that of another.")

Kahn held that forum selection clauses are void based on a "federal rule" and "public policy," 125 Or at 543. *Reeves*, which overruled *Kahn's* holding to allow enforcement of a forum selection clause, did not rely on *forum non conveniens* cases, but instead enforces such a clause if "fair and reasonable." 262 Or at 101. In contrast, federal courts are required to evaluate enforcement of a forum selection clause using the standards of a *forum non conveniens* motion. *Atlantic Marine Const. Co., Inc. v. U.S. District Court for the Western Dist. of Texas,* 134 S Ct 568, 580, 187 L Ed 2d 487 (2013); *Also see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 US 614, 629, 105 S Ct 3346, 87 L Ed 2d 444 (1985) (forum selection clause requiring foreign arbitration should be enforced due, in part, to concerns for "international comity").

In order to disregard Plaintiffs' argument, *Espinoza* wrongly held that *Kahn's* opinion "*solely* addressed issues of jurisdiction; it did not address whether a court may decline its established jurisdiction." 266 Or 24 n 3. It said *Kahn's* quotations were out of context. Yet, *Kahn* also discussed whether, in the prosecution of a transitory action arising in another country, "[u]nder principles of comity the courts of one state will enforce rights arising in other states, unless contrary to the laws or public policy of the state in which such enforcement is sought, and will entertain suits brought by citizens of other states." *Kahn* at 544. This court has never disavowed that statement.

Reeves did not repudiate the "principles of comity" cited in *Kahn* for pursuit of a damages claim by a foreign suitor. 125 Or at 544. *Reeves* did not hold that forum selection clauses "ousted" an Oregon court from jurisdiction or that personal jurisdiction existed. *Reeves* affirmed an order quashing service of process by *specifically enforcing* a reasonable forum selection clause – this was an exercise of equitable relief. 262 Or at 101. As discussed by the dissent in *Gilbert, Reeves* reflects the authority of a court where equitable relief is sought to not exercise jurisdiction through judicial abstention. *Reeves* did not pave way for any new common law authority to decline an exercise of jurisdiction in damage actions brought by a foreign suitor for the sake of convenience when it overruled *Kahn*.

Abstention in deference to the legislature was also rejected by *Espinoza.* Plaintiffs argued that venue rules are determined exclusively by the legislature, ER 36, and an announcement of "inherent power" of a trial court to apply its own supervening venue rules would usurp legislative authority. *Espinoza*, at 41 n 5; PBrf 29-35; RBrf 8-10. *See State ex rel. Academy Press, Ltd. V. v. Beckett,* 282 Or 701, 723, n 3, n 4, 581 P2d 496 (1978) (Linde, J., concurring); *Also see State ex rel. Metro. Pub. Defender Servs., Inc. v. Courtney,* 335 Or 236, 238-39, 64 P3d 1138 (2003) (judiciary's "inherent powers" should be exercised "sparingly" when "it appears that the ability of the judicial branch to perform its core functions is at stake"); *Kellas v. Dept. of Corrections,* 341 Or 471, 477,

145 P3d 139 (2006) (the lawmaking authority of the legislature is "plenary" subject only to the Oregon Constitution and federal supremacy).

After *Espinoza* was decided, this court clearly stated in *Couey v. Atkins,* 357 Or 460, ___ P3d ___ (2015) that the judicial power of Oregon courts under Article VII, section 1 of the Oregon Constitution is deliberately unlike the provisions limiting judicial power under the federal constitution. General jurisdiction afforded Oregon courts is unlike limited jurisdiction provided by Congress. Judicial power of Oregon courts is derived from "common law right[s] inherent in courts of general common law jurisdiction." *Id.* at 493. While this court held that constraints based on "justiciability" are prudential, not constitutional as under the federal constitution, it did not mean that there were not "limitations on the exercise of judicial power *in other cases*," which it left for another day.[8] *Id.* at 520.

The Court in *Gilbert* had no federal change of venue statute so the 5-4 majority declared a federal court's own "inherent power" to decline jurisdiction

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[8] Plaintiffs relied on Article VII, section 2 of the Oregon Constitution, without citation to Section 1, as another source for the argument that the legislature possessed exclusive authority to enact laws that "prescribe and define" jurisdiction. PBrf 34. Under *Couey's* analysis, any restriction on the judicial power of a court having general jurisdiction is to be "defined, limited, and regulated by law," as found in Section 1, as follows:

> "The Judicial power of the State shall be vested in a Supreme (sic) Court, Circuits (sic) Courts, and County Courts, which shall be Courts of Record *having general jurisdiction, to be defined, limited, and regulated by law* in accordance with this Constitution. * * *"

by adoption of a doctrine of *forum non conveniens*. The dissenters in *Gilbert* stated that adoption of a doctrine to decline jurisdiction in cases other than admiralty or equity should be left to Congress. Similarly, Plaintiffs argued in the trial court and in *Espinoza* that the legislature enacted only two statutes providing limited authority of a trial court to decline general jurisdiction based on notions of "convenience," ORS 14.110(1)(c) (intrastate transfer to another county based on convenience), and ORS 109.761 (interstate transfer in child custody cases based on convenience).

Espinoza erred when it could "discern nothing" from these two narrow enactments. *Espinoza* at 41. Its reasoning was both circular and contrary to its recognition that the doctrine is "nothing more or less than a supervening venue provision, permitting displacement of the ordinary rules of venue." *Id.* at 34. Plaintiffs found significance in the absence of any other legislative authority. The legislature simply defined and regulated an inconvenient forum "doctrine" of limited application for Oregon.

Espinoza said nothing can be inferred from legislative silence about *forum non conveniens*, and then faulted Plaintiffs for not identifying statutory language specifically restricting a more broadly available "inherent power of courts to dismiss cases on convenience grounds[.]" *Espinoza*, at 41, n 5. However, *State v. Rainoldi*, 351 Or 486, 492-93, 268 P3d 568 (2011) held that while "statutory silence *alone* is not a sufficiently clear indication of legislative

intent . . .[,]" it may be "significant evidence" and "may in some cases strongly suggest such a clear intent" as when an omission indicates intent to dispense with an element of an offense. *Id.* at 504. *See also Smith v. Clackamas County*, 252 Or 230, 233, 448 P2d 512 (1968) ("inclusion of a specific matter tends to imply a legislative intent to exclude related matters not mentioned"), *rev'd on other grounds, Whipple v. Howser*, 291 Or 475, 632 P2d 782 (1981). Without further legislation, no Oregon court should abstain from proceeding for the sake of convenience unless allowed to do so under ORS 14.110(1)(c) or ORS 109.761.

Twenty-two states have adopted some type of inconvenient forum law, like ORS 14.110(1)(c) and ORS 109.76, through their legislature by statute or by rule. ER 29-30.[9] The comments of at least one state's legislature evidences that its *forum non conveniens* statute was adopted only after its appellate court rejected the doctrine, specifically because a change of venue was limited to only when a party could not obtain a fair and impartial trial. *Trahan v. Phoenix Ins. Co.*, 200 So2d 118, 121-122 (La App 1967), *cert den*, 251 La 47, 202 So2d 657 (1967) ("To invoke the doctrine on our own authority, we believe would constitute judicial legislation of the rankest sort."); *See* LSA-CCP Art 123,

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[9] Defendant's only argument in its brief in *Espinoza* for adopting *forum non conveniens* was that the majority of other states have done so in one form or another. DBrf 6. Plaintiffs did not believe that "follow the pack" provided any persuasive rationale. RBrf 2.

Comment 1970 ("Added on the recommendation of the Louisiana State Law Institute to overcome the holding in the case of *Trahan* [.]"). Similarly, the Oregon legislature has limited discretion for a "convenience" change of venue in only two circumstances.

The rule this court should announce is that, when Oregon's courts have personal jurisdiction over a local defendant in an action brought by a foreign suitor for damages in a proper venue, jurisdiction cannot be otherwise declined for the sake of convenience unless allowed by statute.

Response to Defendant's Question 2:

No Less Deference for a Non-Resident Plaintiff's Choice of Forum

If this court adopts an "inconvenient forum" doctrine, it should affirm the standards for application of that doctrine described in *Espinoza*. In this court, Defendant argues that *Espinoza* erred when it determined that "no less deference" should be given to a nonresident/foreign citizen's choice of forum merely because of that status. *Espinoza* held:

> "It is a reasonable assumption that plaintiffs are in the best position to determine what is for them a convenient and appropriate forum in which to litigate their claims and that assumption becomes no less reasonable merely because plaintiffs are not residents of Oregon, nor citizens of the United States. * * * It is particularly appropriate to accord the plaintiff the same deference as a resident plaintiff when the choice of forum, such as in this case, is the home forum of the defendant and has a connection to the subject matter of the case." *Espinoza* at 45.

Defendant argues the trial court allegedly was not given opportunity to

consider the issue of deference, and that *Espinoza's* standard "makes no sense." DBrf 13. Defendant is wrong.

1. Plaintiffs preserved the issue.

Espinoza correctly recognized that Plaintiffs argued in the trial court for departures from the standards announced in *Piper Aircraft Co. v. Reyno*, 454 US 235, 102 S Ct 252, 70 L Ed 2d 419 (1981). *Espinoza* at 42. Defendant is wrong to assert that Plaintiffs agreed they are entitled to less deference. Indeed, Defendant's Court of Appeals brief *conceded* that Plaintiffs preserved arguments about the degree of "deference" that should be afforded and about the heavy burden on Defendant to show "oppression and vexation." DBrf 23-26. Defendant complained that no alternative "methodology" was presented to the trial court. Contrary to Defendant's argument here, Plaintiffs did not concede that a nonresident or foreign plaintiff's choice of forum should receive less deference.

Plaintiffs *specifically* argued in their brief in the trial court that "[t]he plaintiffs' choice of forum is entitled to deference, even if they are foreign plaintiffs." ER 49; *Espinoza*, 266 Or App at 42; RBrf 10-12. In oral argument in the trial court, Plaintiffs conceded no more than the existence of *cases* that hold foreign plaintiffs are entitled to less deference. Tr 57.

In the trial court, Plaintiffs cited *Ravelo Monegro v. Rosa*, 211 F3d 509, 514 (9th Cir 2000) to support their argument that: "[d]eference to plaintiffs'

choice of forum is particularly appropriate here, where plaintiff's claims, [Defendant], and this forum (where [Defendant] is based and where the conduct underlying plaintiffs' claims took place) are so strongly linked." ER 49. After noting that *Piper* held a foreign plaintiff may be entitled to "less deference" and that "less deference is not the same thing as no deference," Plaintiffs then argued that Defendant should be required to carry a "heavy burden" to clearly show "such oppression and vexation of defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or non-existent." *Id.* *Espinoza* correctly determined that Plaintiffs preserved these issues.[10]

Preservation is a non-issue, but even if it might be, in announcing adoption of an inconvenient forum doctrine as a matter of first impression, *Espinoza* was entitled to completely ignore or depart from federal cases. *Mayfield, supra.* Nor is this court constrained by the parties' arguments in

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[10] To bootstrap the weakness of its "preservation" argument, Defendant distorts Plaintiffs' reliance on *State v. Hitz*, 307 Or 183, 766 P2d 373 (1988). Federal cases allow parties to raise post-hearing changes in law or politics *for the first time on appeal* in consideration of a *forum non conveniens* appeal. PBrf 47, 55. *Hitz* was confined to applying the post-hearing determination by the Ninth Circuit that Peru's judicial system is institutionally corrupt. *Carijano v. Occidental Petroleum*, 626 F3d 1137 (9th Cir 2010) *recons* 643 F3d 1216 (9th Cir 2011).

Ironically, preservation is a problem for Defendant's argument here. The specific "Questions Presented" in its Petition for Review say nothing about "preservation." Its brief surely makes preservation the substance of this question in violation of ORAP 9.17(2)(b)(i) (brief may not change substance of questions presented in petition for review).

announcing an entirely new judicially-created doctrine. *Farmers Ins. Co. of Oregon v. Mowry,* 350 Or 686, 698, 261 P3d 1 (2011) ("[T]his court's obligation . . . when formulating the common law is to reach what we determine to be the correct result in each case.").

2. *Espinoza* correctly held that no less deference should be afforded non-resident/foreign plaintiffs when a defendant's home forum is chosen.

Defendant begins its argument by asserting that the "reasonableness" of the assumption that "plaintiffs are in the best position to determine what is for them a convenient and appropriate forum" "has escaped nearly every court" and "the Supreme Court." MBrf 17. Contrary to Defendant's statement, it has not "escaped the Supreme Court." *Id.*

A plaintiffs' "venue privilege" has long been recognized by the Supreme Court, as found in *Atlantic Marine*, 134 S Ct at 581 ("Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the 'plaintiff's venue privilege'")). Plaintiff's ability to commence an action where they consider it most advantageous is also correctly described in *Espinoza* at 45 ("It is a reasonable assumption that plaintiffs are in the best position to determine what is for them a convenient and appropriate forum in which to litigate their claims"). There is nothing earthshaking about this proposition except for Defendant's hyperbole.

The only question of importance presented by Defendant is whether Oregon chooses to provide "lesser deference" to plaintiffs' choice of forum solely on their status as a *foreign plaintiff* or *non-resident plaintiff.* Defendant wants the judicial thumb permanently on its side of the scale, because, under *Gilbert,* and under several other state's decisions, it is *prima facie* not inconvenient for a defendant to be sued in its home forum. *See Tivoli Realty, Inc. v. Interstate Circuit, Inc.,* 167 F2d 155, 157 (5th Cir 1948), *cert den* 334 US 837 (1948) ("It is a fair inference that ordinarily one's domicile is not an inconvenient place for one to be sued. . . *prima facie* . . . it is not vexatious or oppressive to sue a corporation [where incorporated or found to transact business]"). While it may be more convenient for the plaintiff to sue in the plaintiff's home forum, the deference provided to any plaintiff is that a court simply starts with the proposition that the selected forum is *reasonable* because (1) commencing litigation in a local defendant's home forum is not presumed to be inconvenient, vexatious or oppressive and (2) consideration of the most advantageous forum is not an improper purpose. That's the "deference" given to a plaintiff.

Defendant does not say what aspect of this "deference" should be "less." It presents no question here, and has no quarrel with the "oppression and vexation" standard, or the imposition of a "heavy burden" on defendant to show that defendant's home forum was selected for harassment or because it is

oppressive or vexatious. Accordingly, the "lesser deference" can only be that it wants this court to believe that *nonresident plaintiffs and foreign plaintiffs* who have selected the defendant's home forum because it may be advantageous have done so for an improper purpose.

Before *Espinoza* determined that Oregon would adopt a policy of equal access to justice and nondiscrimination against nonresident and foreign plaintiffs, and perhaps in answer to the reasoned criticism of *forum non conveniens,* "it [found it] appropriate to discuss the factors that Oregon courts must apply, now that we have announced for the first time that a dismissal based on the inconvenient-forum doctrine is available in Oregon." *Espinoza* at 43.

Those factors require a moving party to meet the *Gilbert* standard of "oppression and vexation" of the defendant in order to outweigh the deference given to a plaintiff's choice of a presumed convenient forum. Those factors also place a "heavy burden" on Defendant, in reliance on *Sinochem*, 549 US at 430. As noted, Defendant does not attack that standard, likely because it relied on *Gilbert* as did Plaintiffs. Because *Espinoza* could not determine the degree of deference, *if any*, provided by the trial court to Plaintiffs' forum choice, it remanded for consideration under the newly announced doctrine.

Defendant correctly notes that the Supreme Court and some state courts find that nonresident and foreign plaintiffs may be given "less" deference.

Oregon need not follow the pack by wholesale adoption of *Piper*. The four-person majority in *Piper* at 255-56 stated that a resident plaintiff's forum choice is "assumed reasonable," and it is "much less reasonable" to make this same assumption for a foreign plaintiff. It did not say why it is reasonable for a domestic plaintiff to select an advantageous forum but "less reasonable" for a non-resident or foreign plaintiff to do the same.

Defendant argues here that presuming a foreign plaintiff's choice of a defendant's home forum is "less" reasonable is justified because (1) they are engaged in forum shopping, (2) they do not pay taxes that support the courts, and (3) they have remedies in a foreign country, MBrf 20-21.

Defendant contends that the less-deference standard is appropriate because a foreign plaintiff is "forum shopping" when electing to file in a nonresident forum. Yet, the Plaintiff's "venue privilege" is the ability to select a forum that the plaintiff believes is most appropriate. A non-resident or foreign plaintiff is no more or less reasonable than a local plaintiff for doing so.

It could equally be said that when a Defendant seeks a *forum non conveniens* dismissal it is reverse-forum shopping. Every Defendant is counting on a rather fantastic fiction because a *forum non conveniens* dismissal "is most often a complete victory for the defendant * * * [and] discussion of convenience of witnesses takes on a Kafkaesque quality – everyone knows that no witnesses will ever be called to testify." PBrf 16; *Irish Natl Ins. Co v. Aer*

Lingus Teoranta, 739 F2d 90, 91 (2nd Cir. 1984). "[C]onvenience has little to do with why defendants seek a *forum non conveniens* dismissal. The real reason is to force the plaintiff to re-file the lawsuit in another country whose substantive and procedural laws are more favorable to the defendant. No one seriously disputes that this is the real function of the current doctrine." Heiser, Walter W., *Forum Non Conveniens and Choice of Law: Impact of Applying Foreign Law in Transnational Tort Actions,* 51 Wayne L Rev 1161, 1167 (2005)

Defendant states that less deference is required because nonresident plaintiffs and foreign plaintiffs place burdens upon an already overburdened system, and take resources from residents who pay taxes for the cost of those resources. MBrf 20. Those propositions are nothing *but* xenophobic based assertions that scholars have long debunked.[11] PBrf 14-15, 19-20. Clearly, not all Oregon residents or businesses pay taxes. Our courts are not overrun by

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[11] Those arguments are not based on any empirical evidence but rather depend on judges having a "parochial, not a global, perspective when it comes to hearing transnational tort actions . . . [who] are far more concerned about docket control than with some vaguely stated duty to retain jurisdiction based on global responsibilities." *Heiser* p. 1189.

"It is a wrong under international law for a state to deny a foreign national access to domestic courts. * * * Treaties of friendship, commerce, and navigation generally provide that each party shall give to nationals of the other party access to its courts on the same basis as to its own nationals. * * * United States law generally affords aliens access to courts even in the absence of international agreement." Reporters Note, *Restatement (3d) of Foreign Relations Law of the United States,* § 711 (1987).

aliens. Fewer civil jury trials are held than the public imagines. Defendant's justification for discriminating against nonresident or foreign plaintiffs has no bearing on what Defendant asserts is the central purpose of the doctrine's inquiry: "to ensure that the trial is convenient." MBrf 18; *Piper*, 454 US at 256.

Espinoza recognizes that in a technological world of speedy digital communications, cheap video conferencing, and affordable travel, there are far fewer "inconvenient" forums than ever. The world is "flatter" due to demographic changes in population, exponential growth in foreign trade, international conventions, and plentiful Internet access that enhances connections between domestic business and foreign peoples. "The beauty and strength of the common-law system is its infinite adaptability to societal change." *Buchler v. State By & Through Oregon Corr. Div.,* 316 Or 499, 518, 853 P2d 798 (1993) (Peterson, J. concurring). Plaintiffs submit that *Espinoza* was correct to adopt a policy of equal access to our courts without institutional bias towards local multinational companies against foreign or non-resident plaintiffs who chose a defendant's home forum for exactly the same reason chosen by a local plaintiff; the forum is no less reasonable solely by virtue of a plaintiff's status as a nonresident plaintiff or foreign plaintiff.

Our sister state to the north at first squarely rejected the doctrine in *Lansverk v. Studebaker-Packard Corp,* 54 Wash2d 124, 126, 338 P2d 747 (1959), but then, bowing to the "expanding realm of commercial relationships,"

recognized the doctrine in *Werner v. Werner,* 84 Wash2d 360, 378, 526 P2d 370 (1974). After *Werner*, Washington wisely constrained the doctrine in *Meyers v. Boeing Co.,* 115 Wash2d 123, 138, 794 P2d 1272 (Wash 1990), by refusing to adopt a policy of discrimination and xenophobia towards foreign litigants:

> "The [*Piper*] Court's logic does not withstand scrutiny. The Court is comparing apples and oranges. Foreigners, by definition, can never choose the United States as their home forum. The Court purports to be giving lesser deference to the foreign plaintiffs' choice of forum when, in reality, it is giving lesser deference to *foreign plaintiffs*, based solely on their status as foreigners. More importantly, it is not necessarily less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has chosen a less convenient forum than a plaintiff bringing the same suit? To take it one step further, why is it less reasonable to assume that a plaintiff, who is a Japanese citizen residing in Wenatchee, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida bringing the same suit?
>
> The Court's reference to the attractiveness of United States courts to foreigners, combined with a holding that, in application, gives less deference to foreign plaintiffs based on their status as foreigners, raises concerns about xenophobia. This alone should put us on guard."

Myers is not mistaken.[12] It is no less reasonable for a foreign plaintiff,

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[12]Defendant says *Meyers* reasoning if flawed because it ignores *Piper's* distinction between resident plaintiffs and nonresident plaintiffs, not between U.S. citizens and foreign plaintiffs. *Piper* makes no such distinction; it allowed the same deference for both U.S. Citizens and residents: "Citizens or residents deserve somewhat more deference than foreign plaintiffs[.]" *Piper*, 454 US at 255 n 23. Defendant also quotes a Second Circuit case for its distinction between residents and nonresidents. MBrf 21; *Pollux Holding Ltd. v. Chase*

expatriate plaintiff, nonresident plaintiff, or US citizen plaintiff to choose the most appropriate forum for that case than it is for a local plaintiff who picks the defendant's home forum for their case for the same reason.

Also see Radeljak v. Daimlerchrysler Corp., 475 Mich 598, 657, 719 NW2d 40, 70 (2006) (Kelly, J. dissenting) ("The reason that the *Piper* Court is giving less deference to a foreign national's choice of forum is because the foreign national is foreign. Basing access to our courts on such a status is highly suspect and smacks of xenophobia."); *See Dow Chem. Co. v. Castro Alfaro,* 786 SW2d 674, 680 (Tex 1990) (superseded by statute) (Doggett, J. concurring) (Criticizing *Piper* as xenophobic, discriminatory, outcome determinative –"what really is involved is not convenience but connivance to avoid corporate accountability).

The Ninth Circuit in *Carjiano*, while constrained by *Piper*, emphasized the heavy burden in a *forum non conveniens* motion, and the requirement of "oppression and vexation" from *Gilbert.* Defendant contends that *Carjiano* offers "no support" for "no less deference" due to Oregon's lack of a "strong connection" to the subject matter. *Espinoza* found that argument disingenuous - the trial court disregarded Plaintiffs' "direct liability" allegations and the

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Manhattan Bank, 329 F3d 64, 73 (2nd Cir 2003), *cert den*, 540 US 1149 (2004). Yet, in *Pollux*, the Second Circuit suggested that an expatriate should be given less deference than a citizen residing in the forum. 329 F3d at 73.

location of witnesses and documents relevant to those allegations. Those allegations and the location of evidence in Oregon provided a "strong connection" to Defendant's home forum. PBrf 3-10, 49-52. Moreover, as *Carjiano* explains, a home forum has a strong interest in holding its own corporate citizens accountable for transnational torts by properly applying choice-of-law rules. 643 F3d at 1222-33.

Defendant then asserts that "nearly every state court that has considered the issue is of the same mind." MBrf 18, n 9. Not true. There is no universal agreement on *Piper,* let alone providing "less deference," because many courts have departed from *Piper's* formulation in one manner or another. Plaintiffs relied on *Piper* departure cases from Missouri, Vermont, Connecticut, and Montana, PBrf 32-33, 40-42, and noted cases from Delaware, Kentucky, Hawaii, California, Massachusetts and Florida. PBrf 42.[13] Indeed, at least one state addresses "deference" by altogether prohibiting the doctrine unless all litigants are non-residents, *Harbrecht v. Harrison*, 38 Hawaii 206, 209 (Haw 1948).

Plaintiffs agree that many states follow *Piper* in giving a nonresident or

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[13] In addition, Wyoming precludes dismissal if the forum was based on "rational grounds" and "not brought for purposes of harassment. *W. Tex. Utils. Co. v. Exxon Coal USA, Inc.*, 807 P2d 932, 935 (Wyo 1991). Louisiana limits the doctrine to only federal causes of action and prohibits it in Jones Act and federal maritime cases. *Miller v. Am. Dredging Co.*, 595 So2d 615, 617 (La 1992), *aff'd* 510 US 443 (1994).

foreign plaintiff less deference than a resident. Oregon need not conclude that an outsider's choice of forum is less appropriate or reasonable than an insider's choice, particularly since Defendant will succeed under *Epinoza* whenever it shows that the choice of forum was for harassment or is "oppressive or vexatious" out of proportion to a plaintiff's own convenience. *Espinoza* recognized the error of those decisions:

> "[W]e reject the discussion in *Piper* that a foreign plaintiff's choice of forum should be given less deference merely based on the plaintiff's status as a foreigner. It is a reasonable assumption that plaintiffs are in the best position to determine what is for them a convenient and appropriate forum in which to litigate their claims and that assumption becomes no less reasonable merely because plaintiffs are not residents of Oregon, nor citizens of the United States. * * * It is particularly appropriate to accord the plaintiff the same deference as a resident plaintiff when the choice of forum, such as in this case, is the home forum of the defendant and has a connection to the subject matter of the case."

Espinoza, 266 Or App at 44-45.

Espinoza emphasized that equal deference is particularly appropriate when the choice of forum is the home forum of the defendant and has a "strong connection" to the subject matter of this case. *Espinoza*, 266 Or App at 45. As further discussed in the next section, Oregon has a strong connection to the subject matter of the case.

Response to Defendant's Question 3:

The Trial Court Abused its Discretion by Making Factual Determinations About the Merits of Plaintiff's Claim Without Regard to the Location of Evidence and Documents Supporting Plaintiff's Direct Liability Claims.

Espinoza held that the trial court abused its discretion because it "attempted to assess the convenience of the respective forums based on what it believed the focus of the case would be." *Espinoza* at 50; *See Carijano,* 643 F3d at 1224 (a trial court "abuses 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"). Despite plaintiff's well-pled allegations of direct negligence, the trial court completely disregarded those contentions based on its factual determination of "*what* the evidence might show once obtained." *Espinoza* rightly held:

> "A trial court must weigh the convenience and justice factors on a motion to dismiss for an inconvenient forum—which is necessarily brought at the beginning of a case—but in doing so it may not make factual determinations that go to the underlying merits of plaintiffs' claims." *Espinoza* at 50.

The *Espinoza* court emphasized: "That is so because, in seeking to prove their case, plaintiffs will be relying on the same witnesses and documents regardless of the trial court's preliminary view of the merits of a particular allegation." *Id.*

As evidenced by its letter opinion, the trial court failed to even apply the burden of proof on a motion to dismiss. Plaintiffs argued in their *Espinoza* briefing that Defendant's *forum non conveniens* motion was filed as a "motion to dismiss," and, therefore, the trial court was required to assume the truth of all well-pleaded allegations and to construe disputed facts liberally in Plaintiffs' favor to support jurisdiction. PBrf 37; RBrf 11. *Espinoza* noted that standard

was unnecessary in light of its decision, which "already defers to a plaintiff's choice of forum."[14] *Espinoza* 42 n 6. Defendant's brief, however, says nothing here about the standards of consideration of a motion to dismiss or whether that well-settled standard should be abandoned here should this court depart from *Espinoza's* formulation.

Instead, Defendant makes two arguments in response: (1) deciding a *forum non conveniens* motion requires an "entanglement" in the merits and (2) the record does not support *Espinoza's* decision that the trial court decided "*what* the evidence might show once obtained." As shown below, *Espinoza* did not err – a trial court should understand the materiality and import of anticipated witnesses' testimony and documents in order to determine the location and accessibility of the evidence to the convenience to the forum. Nor did *Espinoza* err when it held that a trial court is limited to assessing *where* that evidence is located, but not *what* that evidence might show once obtained, which is exactly how the trial court abused its discretion here.

(1) Defendant's amorphous "entanglement" argument makes little sense. Federal case law supports *Espinoza*.

Defendant presents the question: "In deciding a [*forum non conveniens*]

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[14] *Espinoza*'s statement that Plaintiffs did not preserve that argument is akin to saying a non-moving party waives the well-settled standards for considering a motion for summary judgment by not specifically reminding a trial court to apply those standards. *Espinoza* at 42 n 6.

motion, may a court make decisions that 'go to the merits' of the underlying claims?" It answers: "Yes. Resolving such a motion requires an inquiry into the merits of a case—not to *resolve* issues, but to determine what issues are likely to be tried." MBrf 1. Defendant subsequently argues that "*forum non conveniens* analysis requires 'entanglement' in the merits." MBrf 36.

It is difficult to ascertain exactly what rule is requested by Defendant from this court and how it differs from *Espinoza*. Contrary to Defendant's assertion, *Espinoza* did not prohibit any inquiry into the merits of the action and Plaintiffs did not argue that the trial court should entirely disregard the merits. Indeed, Plaintiffs argued the trial court needed to "understand the nature of the dispute between the parties in order to assess what evidence is relevant to litigate the pending claims." ER 41.

As *Espinoza* recognized, "[t]he trial court must assess the materiality of witnesses and evidence with respect to plaintiffs' well-pleaded allegations[.]" *Espinoza* at 50. That decision by *Espinoza* is a form of "entanglement" in the merits. Thus, Plaintiffs are unsure exactly what Defendants are requesting from this court. What additional degree of "entanglement" does Defendant believe is necessary?

Further, Defendant posits that a trial court is not to "resolve issues" but instead, to decide what issues will likely be tried. Yet, by determining what issues are unlikely to be tried, the trial court is also resolving issues.

Defendant's proposed rule makes little sense, lacks parameters and is ambiguous. A trial court would be hard pressed to follow it as posited.

As well, a review of the cases cited by Defendant shows that those cases in fact support *Espinoza's* ruling that a trial court is limited to assessing "*where* that evidence would be located and its accessibility, not *what* that evidence might show once obtained." *Espinoza* at 50. In *Van Cauwenberghe v. Biard*, 108 S Ct 1945, 1953, 486 US 517, 100 L Ed 2d 517 (1993), the United States Supreme Court recognized that a trial court must assess the substance of the dispute to evaluate "what proof is required, and determine whether pieces of evidence cited by the parties are critical, or even relevant[.]" *See* MBrf 26-27; 36. The Court tasked trial courts with assessing "the availability of witnesses" and "the locus of the alleged culpable conduct," but prohibited trial courts from making determinations based on the merits, such as the likelihood of success of a plaintiff's claim. *Biard*, 127 S Ct at 1953. So did *Espinoza.* The Court reiterated in *Sinochem Int'l Co v. Malaysia Int'l Shipping Corp* that *forum non conveniens* may involve "a brush with 'factual and legal issues of the underlying dispute.'" 127 S Ct 1184, 1192, 167 L Ed 2d 15 (2007), *quoting Biard*, 486 US at 529. However, the Court emphasized that:

> "The critical point here, rendering a *forum non conveniens* determination a threshold, nonmerits issue in the relevant context, is simply this: Resolving a *forum non conveniens* motion does not entail any assumption by the court of substantive 'law-declaring power.'"

Sinochem, 127 S Ct at 1187.

The court's ruling in *Espinoza* is no different from the decisions in *Biard* and *Sinochem*. *Espinoza* held that a trial court must assess "the materiality of witnesses and evidence" "but in doing so it may not make factual determinations that go to the underlying merits of plaintiffs' claims." *Espinoza* at 50. *Espinoza* simply held that the determination is "a threshold, nonmerits issue" that does not entail "substantive law-declaring power." Here, the trial court did exactly what the Supreme Court warned against—it determined the likelihood of success of Plaintiffs' direct negligence claims by deciding those claims would not be the "focus" of Plaintiffs' case at trial.

Defendant finds significant a quotation from *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F3d 488, 500 (2nd Cir 2002) that it takes entirely out of context. MBrf 37. The Second Circuit stated:

> "One set of factors, known as the private interest factors, pertains to the convenience of the litigants—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. *In applying these factors, 'the court should focus on the precise issues that are likely to be actually tried, taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues.' Iragorri*, 274 F3d at 74."

Id. at 500 (emphasis added) (some internal citations omitted). Defendant

distorts the last sentence above to mean that a trial court may decide which claims in a plaintiff's complaint have merit and "are likely to be actually tried." MBrf 37.

Defendant's misinterpretation of that quotation is evidenced upon examination of *Iragorri v. United Technologies Corp*, 274 F3d 65 (2nd Cir 2001), from which the quotation is taken. In *Iragorri*, the Second Circuit explained:

> "Rather than simply characterizing the case as one in negligence, contract, or some other area of law, the court should focus on the precise issues that are likely to be actually tried, *taking into consideration the convenience of the parties and the availability of witnesses and the evidence needed for the trial of these issues*. In a suit alleging negligence, for example, the court might reach different results depending on whether the alleged negligence lay in the conduct of actors at the scene of the accident, or in the design or manufacture of equipment at a plant distant from the scene of the accident. The court should consider also whether the plaintiff's damages are genuinely in dispute and where the parties will have better access to the evidence relating to those damages." (emphasis added)

Id. at 74. Thus, the Second Circuit did not state that a trial court should assess which of a plaintiff's claims will likely make it to trial, but rather that a trial court must look beyond the general categorization of law, *e.g.* negligence, to the specific issues involved in the claims and defenses when considering the *availability* of witnesses and the evidence needed for the trial. From there, the trial court must ascertain *where* the evidence is located *for those issues*, *e.g.,* at the scene of an accident or at a manufacturing plant located somewhere else.

Both *Monegasque De Reassurances* and *Iraggori* support *Espinoza*.

Defendant also urges this court to follow the Third Circuit case of *Lacey v. Cessna Aircraft Co.*, 932 F2d 170 (3rd Cir 1991). MBrf 37. Defendant maintains that *Lacey* stands for the proposition that a party must provide evidentiary support for its claims at the time of a motion to dismiss based on *forum non conveniens*, and the trial court may assess the strength of that evidentiary support. MBrf 38-39 (stating that the trial court correctly followed *Lacey* by determining plaintiffs failed to adequately substantiate their theory of direct negligence). *Lacey* does not stand for the proposition asserted by Defendant.

In *Lacey*, an airplane crash case, the plaintiff argued that the case would center on a product defect, while the defendant contended it would be negligent maintenance and pilot error. Both parties urged the court to find their argument would be the focus of the case. The Third Circuit responded:

> "In order to balance the relevant private and public interest factors, the district court must immerse itself to a certain degree in the facts of the case. We think, nonetheless, that [the plaintiff] has misapprehended the extent of the court's inquiry at this nascent stage of litigation. The record here consists entirely of affidavits. No discovery has taken place; in fact, the defendants have not even answered [the plaintiff's] complaint. The district court, as a result, cannot now determine what the ultimate focus of the trial will be, yet the parties urge the court to do just that. We think, instead, that in resolving a *forum non conveniens* motion, the district court must do no more than delineate the likely contours of the case by ascertaining, among other things, the nature of the plaintiff's action, the existence of any potential defenses, and the essential sources of proof."

Id. at 181.

The Third Circuit went on to state that nothing in the United States Supreme Court's opinion in *Biard* "directs a court to assess the relative strength of the parties' arguments and to select one paramount issue." *Id.* at 182. The Third Circuit noted that in *Piper*, despite there being significant evidence the plane crash was due to pilot error, not mechanical failure, the court did not factor in the strength of the evidence in its *forum non conveniens* analysis. *Id.* "Rather than pigeonhole the case as involving either pilot error or product defect, the court assumed that both would be issues at trial." *Id.*

Here, the trial court did not follow the strictures of *Lacey* or *Biard*, *Piper, Sinochem,* and *Iragorri*. The trial court pigeonholed the case as involving only the vicarious liability of Defendant, rather than assume that both vicarious and direct liability would be issues at trial. Instead of focusing on the location of documents and evidence under both theories, because it was the "nascent stage of litigation," the trial court factored the strength of the evidence of the various theories and determined the paramount issue would be vicarious liability.

In the process, which Defendants fail to address in their briefing, the trial court summarily concluded that "Peru was the convenient forum based merely on witnesses and documents being located there[.]" *Espinoza* at 51. The trial court entirely neglected to make "findings, implicit or explicit, about the availability of, or ease of access to, witnesses and documents located in Peru."

Espinoza correctly explained that a trial court:

> "must assess the availability and ease of access to material witnesses and evidence to litigants in Oregon, which requires taking into account factors such as whether compulsory process will be required to obtain material witnesses and the relative ease of obtaining evidence given modern advances in travel, communication, and electronic discovery."

The trial court here failed to make any assessment about whether the location of evidence "created such a burden on [Defendant] that the plaintiffs' choice of Oregon as a forum is vexatious, harassing, or oppressive by inflicting upon [Defendants] expense or trouble not necessary to its own right to pursue its remedy." *Id.* at 50-51. Accordingly, the trial court abused its discretion.[15]

(2) Defendant omits the trial court's prohibition of merits discovery; the record supports *Espinoza*.

Defendant argues that Plaintiffs did not present evidence of "squawks" to

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[15] Defendant also argues that *Espinoza* erroneously "justified its idiosyncratic approach by reliance on its decision in *Munson*, 264 Or App at 694-95, which in turn relied on *Black*, 337 Or at 265." MBrf 39. Defendant claims that *Black* does not support "the peculiar rule announced in this case." *Id.* Defendant may find the *Espinoza* ruling prohibiting factual determinations that go to the underlying merits "peculiar." However, as shown, *Espinoza* is directly in line with the federal cases cited by Defendant. It does not lack a foundation in law as Defendant asserts. MBrf 41. Moreover, it's a stretch for Defendant to maintain that *Espinoza* justified its approach entirely based on *Munson* [264 Or App 679, 333 F3d 1102 (2014)] in that, *Espinoza* merely cited to *Munson* for comparison purposes. *See Espinoza* at 50 ("*Cf. Munson*"). Further, for Defendant to state that *Espinoza* "distorts *Black* beyond recognition" defies imagination considering *Black* [337 Or 250, 95 P3d 1109 (2004)]concerned a motion to dismiss based on a venue clause.

the trial court, and then leapfrogs from there to conclude that Plaintiffs' theory of direct liability misled the Court of Appeals. It is Defendant's argument that is misleading.

First, Defendant's liability was either vicariously based on its pilot's error under *respondeat superior*, or based on its own direct liability for negligent maintenance, inspection, testing of the helicopter systems, and improper training, supervision and monitoring of its flight crew and pilot. PBrf 3-4, 48-52. It was an abuse of discretion for the trial court to assume that both those issues would not remain contested through trial.

Second, Defendant argued in its motion to dismiss that the only discovery relevant to its motion was the *location* of witnesses and documents, and that the *causes* of the crash were irrelevant; a position that would not have prejudiced Plaintiffs had the court simply limited its analysis to *where* evidence was located. *See* PBrf 10, n 1; ER 52-58. Plaintiffs were well prepared with a detailed, factual response identifying the location of witnesses having knowledge of Defendant's systems that Plaintiffs *alleged* were a substantial factor in causing the crash, as part of their direct liability claims. *Id.*

Instead, during oral argument on the motion, the trial court shifted the determinative issue to *evidence of actual causes for the crash*, prompted by Defendant's reply memo referencing the Peruvian DGAC report that pilot error was the likely cause of the crash. Oral argument at Tr 75-80 demonstrates that

evidence of the squawks was completely thwarted by Defendants when it prohibited all witnesses from testifying about what conduct caused the accident.[16] *Id.* Defendant's recitation of the record omits that it prevented any merits based discovery, as evidenced by defense counsel's consistent, repeated instructions to witnesses to not answer any questions about equipment failures and causes of the crash. *See* ER 30, citing to Ex K at pp 18-19, 23-24, 27-29, 31-33, 35, 60, 64, 66-67, 69-74, 77-78, 82-83, 86-87, 89, 111-112, 129, and 132; Tr 67-68, 77-79, and 89.

Therefore, at oral argument, Plaintiffs' counsel could only cite the Shelby deposition that referenced problems with the radar altimeter and the enhanced ground proximity warning systems that should have called out altitude and warnings to prevent the crash, and that "there were questions about the way it was installed (inaudible) and put together here . . . [Defendant] did the engineering and put the system in the helicopter here [in Oregon]." Tr 77-78.

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[16] It should be clear that the rationale used for later granting the motion by the trial court whipsawed Plaintiffs. Plaintiffs were prevented from and "had no reason to develop evidence" as to actual causation, given Defendant's motion, and then when interjected were not given an opportunity to offer controverting evidence at that point. *See e.g., Johnson v. Employment Dept.,* 177 Or App 464, 475, 34 P3d 716, 721 (2001). Had Defendant been transparent in asserting that the actual causes of the crash were determinative of its motion, as opposed to the *location* of evidence concerning the *alleged* causes of the crash, Plaintiffs would have insisted upon Defendant's presentation of a formal motion for protective order from which separate error could have been assigned.

However, Plaintiffs were not permitted to get to the substance of those issues although "[t]he radar altimeter appears to be a functional problem that it wasn't working correctly. * * * "[w]e just know that there were some squawks; in other words, somebody said [in a deposition] that there was a problem[,] that it was repaired" and "in some of the maintenance records that were provided for the helicopter." Tr 79-80.

The trial court did not simply consider the location of evidence, and the ease of access to and availability of the evidence, in regard to Plaintiffs' claims. ER 69. Instead, the trial court went beyond "entangling" itself in the merits by erroneously making a determination of which issues would be tried based on the strength of the evidence and without the benefit of merits discovery. That determination was an abuse of discretion. *Espinoza* properly remanded for reconsideration, directing the trial court to focus on the location of evidence pertinent to *all* claims and defenses.

Defendant continues to make the same argument here that, absent evidence of squawks, it is speculative to conclude that Oregon is the location of witnesses and evidence relating to: (1) the EPPWS, GPS, altimeter and radar systems; (2) maintenance, repairs, pilot training, operating procedures and installation; and (3) updating of the systems that should have prevented the crash. That presumes, however, there never will be evidence to support the information about problems with those systems, and disregards the key issue on

a *forum non conveniens* motion – the location and accessibility of that evidence. Defendant misleads this court when it states Plaintiffs failed to present evidence of location; Plaintiffs described that evidence in detail in their opposition to Defendant's motion to dismiss. ER 39-62.

Espinoza remanded for the correct reason. It required the trial court to make appropriate findings about the location and accessibility of evidence concerning *all* of Plaintiffs' theories and claims of liability without picking which one would be the focus at trial.

CONCLUSION

For the reasons herein, and as set forth by Plaintiffs in the Court of Appeals, this court should determine that the "inconvenient forum" doctrine will not be adopted, and that if adopted, it was properly articulated and applied by the Court of Appeals.

DATED this 30th day of July, 2015.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.02(2)(d)

Brief Length

I certify that the word count of this brief, as described in ORAP 5.05(2)(a), is 13,905 words.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing **ANSWERING BRIEF** by causing it to be electronically filed with the Appellate Court Administrator on July 30, 2015, through the appellate CM/ECF eFiling system.

I further certify that I served the foregoing **ANSWERING BRIEF** on the following-named counsel on July 30, 2015, via the service function of the appellate CM/ECF eFiling system, and by First Class Mail:

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