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, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	Multnomah County Circuit Court No. 0909-12350 CA No. A147028 SC No. S062903 **BRIEF ON THE MERITS OF PETITIONER ON REVIEW EVERGREEN HELICOPTERS, INC.**
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, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review,	Multnomah County Circuit Court No. 0909-12777 CA No. A147028 SC No. S062903

May 2015

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, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	Multnomah County Circuit Court No. 0909-13294 CA No. A147028 SC No. S062903
FLOR DE MARIA GAMBOA ALVAREZ, Personal Representative of the Estate of Fernando Cesar Nunez Del Prado Reynoso, Deceased, for her own benefit as the surviving spouse and for the benefit of Caroline Anthuanet Nunez Del Prado Gamboa and Fernando Junior Nunez Del Prado Gamboa, surviving children of the deceased, and Margarita Severiana Reynoso Quispe and Ricardo Cesar Nunez Del Prado Saavedra, surviving parents of the deceased,	Multnomah County Circuit Court No. 0910-15153 CA No. A147028 SC No. S062903

Plaintiff-Appellant,
Respondent on Review,

vs.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

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

Defendant.

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,

Plaintiff-Appellant,
Respondent on Review,

vs.

EVERGREEN HELICOPTERS, INC., an Oregon corporation,

Defendant-Respondent,
Petitioner on Review,

and

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

Defendant.

Multnomah County
Circuit Court
No. 0910-15154

CA No. A147028

SC No. S062903

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, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	)	Multnomah County Circuit Court No. 0912-17035 CA No. A147028 SC No. S062903
BRENDA VILMA HOYLE DE CASTRO, Personal Representative of the Estate of Miguel Max Castro Gutierrez, Plaintiff-Appellant, Respondent on Review, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	)	Multnomah County Circuit Court No. 1002-02814 CA No. A147028 SC No. S062903

GIOVANNA PATRICIA OTERO DE VASQUEZ, Personal Representative of the Estate of Jhon Henry Vasquez Lopez, Deceased, for her own benefit as the surviving spouse of the deceased 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; and Pablo Wilfredo Vasquez Meza, surviving father of the deceased; and Catalina Lopez De Vasquez, surviving mother of the deceased, Plaintiff-Appellant Respondent on Review, vs. EVERGREEN HELICOPTERS, INC., an Oregon corporation, Defendant-Respondent, Petitioner on Review, and BOBBI CRANN, Personal Representative of the Estate of Alan Crann, Deceased, Defendant.	)	Multnomah County Circuit Court No. 1003-03637 CA No. A147028 SC No. S062903

BRIEF ON THE MERITS OF PETITIONER ON REVIEW EVERGREEN HELICOPTERS, INC.

On the Petition for Review of the Decision of the
Court of Appeals on Appeal from a Judgment of the
Multnomah County Circuit Court

Honorable Jerry B. Hodson, Judge

Opinion Filed: October 8, 2014
Author of Opinion: Armstrong, P.J.
Concurring: Nakamoto, J. and Egan, J.

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QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

A. Jurisdiction.

To establish appellate jurisdiction to modify multiple judgments entered in separate cases, may parties join in a single notice of appeal from a single judgment?

No. Any party seeking to establish appellate jurisdiction to modify a judgment must timely file and serve a notice of appeal from the judgment sought to be modified.

B. Presumed Convenience.

In deciding whether to dismiss an action because it would be more convenient to try it in another forum, should a court presume the convenience of the forum in which the action was filed for no reason other than that the plaintiff chose it—even when the plaintiff does not reside in that forum?

No. It is not reasonable to assume that a forum is convenient simply because the plaintiff chose it—not when the plaintiff is neither a citizen nor resident of the forum.

C. "Going to the Merits."

In deciding such a motion, may a court make decisions that "go to the merits" of the underlying claims?

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.

NATURE OF THE ACTIONS AND JUDGMENTS

This review proceeding arises from the dismissal of eight wrongful death actions filed in Oregon concerning a helicopter crash in Peru. Finding that

"trial of this lawsuit will largely center on, and depend upon, witnesses and documents regarding circumstances in Peru at the time of the crash, rather than circumstances in Oregon or the United States," the trial court entered judgments dismissing the actions without prejudice to their maintenance in Peru (ER 69; e.g., CR 47).[1]

STATEMENT OF FACTS

A. The Facts.

Plaintiffs are citizens of Peru who claim that their decedents, also citizens of Peru, died when the helicopter in which they were traveling crashed in Peru "while attempting to operate in extreme adverse weather conditions" (CR 1, ¶¶ 2, 3, 8; CR 7, ¶ 2; CR 8, ¶ 8). The helicopter was operated by Helinka S.A.C., a Peruvian company (CR 7, ¶ 3; CR 8, ¶ 4, Exs 1, 2). Helinka acquired the helicopter through a series of leases running first from the helicopter's Delaware owner to Evergreen Equity, Inc., and then to Evergreen Helicopters, Inc. (defendant, an Oregon company), Aeronautics Exports, S.A. (Helinka's subsidiary, a Canadian company), and, finally, Helinka (CR 8, ¶ 3, Ex 2). Helinka used the helicopter to perform its obligations under a contract with a Peruvian mining company to transport employees to and from the company's worksites (*id*., ¶ 2 & Ex 1 at 2).

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[1] "ER __" refers to pages in the excerpt of record filed with plaintiffs' opening brief on appeal. "CR __" refers to items in the case register in the first action filed, *Espinoza v. Evergreen Helicopters, Inc.* (No. 0909-12350). A copy of that register, printed before the county adopted electronic filing (when entries were still numbered), was appended to Evergreen's petition for review.

Helinka had operational control of the helicopter at all times, and was "the sole judge of flying safety" (*id*., Ex 1 at 4-5, § 3.1; *id*., ¶ 4 & Ex 2 at 5, ¶ 4). Helinka was also responsible for maintaining the helicopter (*id.*, ¶ 6). Evergreen provided Helinka with some pilots and maintenance personnel (*id*., ¶ 4); other pilots and maintenance personnel were Helinka's own (*id*., ¶¶ 4, 6). All pilots and the helicopter itself were certified by Peruvian authorities for operation in Peru, and the accident is subject to Peruvian law (CR 7, ¶¶ 4-8, Exs 1-3; CR 8, ¶ 7, Exs 3-4).

B. The Proceedings.

The Complaints. Over the course of several months, eight plaintiffs filed eight complaints in Multnomah County Circuit Court against Evergreen and the estate of the helicopter's pilot, Alan Crann, a California resident (CR 1, ¶ 6). Crann was one of the pilots Evergreen had provided to Helinka, and was subject to Helinka's supervision while in Peru (CR 8, ¶¶ 4, 7 & Ex 2). Helinka was not named in any of the cases. Seven of the cases were consolidated for pretrial and trial purposes. 266 Or App at 31 n 1 (see CR 11).[2]

Motions to Dismiss. Based on the facts above and others—including the inability of an Oregon court to assert jurisdiction over Helinka or compel the live testimony of its employees—Evergreen moved to dismiss the actions based on the doctrine of *forum non conveniens*, asserting that it would be much fairer and more convenient to try the cases in Peru than in Oregon (ER 2, 6-20).

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[2] The parties and the court proceeded on the assumption that the eighth case—*Hoyle de Castro v. Evergreen Helicopters, Inc.* (No. 1002-02814)—was also consolidated, but the docket in that case reflects no consolidation order.

Evergreen framed its motion in accordance with the standard long applied in federal court, which asks first whether an alternative, adequate forum exists; and second, whether consideration of various factors[3] establish that it would be more convenient and just to litigate the matter in that alternative forum. *See Gulf Oil Corp v. Gilbert*, 330 US 501, 508-09, 67 S Ct 839, 91 L Ed 1055 (1947); *Piper Aircraft Co. v. Reyno*, 454 US 235, 241 & n 6, 102 S Ct 252, 70 L Ed 2d 419 (1981).

Plaintiffs' Opposition. Plaintiffs obtained an extension of over six months to conduct discovery before responding (CR 30; 6/29/10 Tr 67). When they finally filed that response, they stated that their opposition was "twofold" (ER 26). They said the court should deny the motions because:

1) Oregon has not adopted the *forum non conveniens* doctrine (ER 26-39), and
2) alternatively, the federal standard required dismissal (ER 39-65).

The Trial Court's Decision. After rejecting plaintiffs' contention that the court lacked authority to dismiss based on *forum non conveniens*, the trial court determined that dismissal was appropriate. 266 Or App at 32-34 (see ER 68-69, 70-75).[4] Applying the agreed-upon federal standard, the court determined that litigation would "largely center on, and depend upon, witnesses and documents regarding circumstances in Peru at the time of the crash, rather

[3] The Court of Appeals' opinion lists the factors. *Espinoza v. Evergreen Helicopters, Inc.*, 266 Or App 24, 44, 337 P3d 169 (2014).

[4] The court dismissed the claims against the pilot's estate for lack of personal jurisdiction (ER 68), a ruling not challenged on appeal.

than circumstances in Oregon or the United States." 266 Or App at 32-33. Judgments of dismissal were separately signed, filed, and entered in each case, with dismissal conditioned on, among other things, a Peruvian court's acceptance of jurisdiction and Evergreen's waiver of any statute of limitations defense. *Id*. at 33-34 (see, e.g., CR 47).

The Appeal. Despite entry of separate judgments in each case, plaintiffs filed a single notice of appeal "from the judgment entered in these consolidated cases," attaching to the notice the judgment entered in Case No. 0910-15153. Evergreen unsuccessfully moved to dismiss the appeals of the seven plaintiffs who failed to timely appeal from the judgments in their cases. After the court denied Evergreen's reconsideration request, Evergreen raised the issue again in its brief.

The Court of Appeals' Decision. In its opinion, the Court of Appeals ignored the jurisdictional question and turned to plaintiffs' assertion that the trial court had erred by dismissing their actions because an Oregon court "cannot decline jurisdiction," even if doing so best serves the convenience of the parties and the ends of justice. After reviewing this Court's decisions and its own, the Court of Appeals rejected that contention. 266 Or App at 34-41.

Having concluded that the trial court properly reached the merits of Evergreen's motions, the Court of Appeals proceeded to announce the standard it said the court should have applied in deciding them. 266 Or App at 42-51. In doing so, the court reached several issues the trial court never considered because they had never been raised. Among the issues decided were these:

First, the court held that in assessing forum convenience, a plaintiff's choice of a foreign forum should be granted the same "deference" that would be granted a plaintiff who resided in the forum. 266 Or App at 45. In either circumstance, the court said, the forum should be presumed equally convenient because "[i]t is a reasonable assumption that plaintiffs are in the best position to determine what is for them a convenient and appropriate forum * * *." *Id*. With that, the court "reject[ed]" U.S. Supreme Court's contrary view. *Id*. (rejecting *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 US 422, 430, 127 S Ct 1184, 167 L Ed 2d 15 (2007) and *Piper*, 454 US at 255-56).

Second, the Court of Appeals held that when a trial court analyzes forum convenience, it may not touch on a claim's "underlying merits." 266 Or App at 50. What the court *meant* by that statement is explored below, as are federal decisions rejecting it (pp 27-39 below). The Court of Appeals did not mention those decisions, perhaps because the court was unaware of them, as neither party had briefed or argued the issue.

Having formulated a standard at odds with the one the trial court had applied without objection, the Court of Appeals remanded for reconsideration. *Id*. at 51. This Court allowed review.

SUMMARY OF ARGUMENT

A. Jurisdiction.

It is fundamental to appellate jurisdiction that an appellant timely appeal from the judgment sought to be modified. Here, there were eight judgments entered in eight cases, but only a single appeal from a single judgment. The seven plaintiffs who failed to appeal from the judgments entered in their cases

failed to establish appellate jurisdiction to modify those judgments. Their appeals should be dismissed.

B. Presumed Convenience.

The Court of Appeals has ordered trial courts to assume the convenience of an Oregon forum for no other reason than that the plaintiff has chosen that forum—even though the plaintiff does not reside in that forum. There is a reason why nearly every court that has considered the same issue has rejected that conclusion: it's not rational. And regardless, because the trial court in this case never had the opportunity to consider the issue, the Court of Appeals should not have reached it.

C. "Going to the Merits."

The Court of Appeals' conclusion that the trial court made improper "factual determinations that go to the underlying merits of plaintiffs' claims," 266 Or App at 50, is factually and legally infirm.

As a matter of fact, the trial court did not make any decision that could possibly interfere with the subsequent litigation of plaintiffs' claims. Nor did the court disregard any evidence submitted, or presume what evidence *not* submitted "might show." The court merely made a determination based on the record presented that trial of these lawsuits would be far more convenient in Peru than in Oregon.

As a matter of law, a court cannot evaluate the convenience of alternative forums without "going to the merits" of the underlying dispute. That does not mean that the court *resolves* any aspect of a plaintiff's claims and, again, the trial court did not do so here.

ARGUMENT

Before turning to the merits of the Court of Appeals' decision, we address that court's jurisdiction.

A. The Court of Appeals Erred by Permitting a Single Notice of Appeal to Create Appellate Jurisdiction to Modify Multiple Judgments in Multiple Actions.

"[A] notice of appeal must be served and filed within 30 days after the judgment appealed from is entered in the register." ORS 19.255(1). Here, eight judgments were entered in the registers of eight cases, but only one notice of appeal was filed from one judgment. The Court of Appeals erred in exercising appellate jurisdiction to modify the seven judgments not appealed.

There is no question that plaintiffs filed a single notice of appeal from a single judgment—their notice stated that:

- all appellants appealed "from *the judgment* entered in these consolidated cases";
- all appellants were "parties to *this appeal*"; and
- the notice was timely "because the circuit court entered its final *judgment* in these cases less than thirty (30) days prior to this filing."

Finally, the notice stated that it "[a]ttached * * * a copy of *the* general judgment of dismissal being appealed." Only one judgment was attached. Seven judgments went unappealed. To establish appellate jurisdiction, each plaintiff had to give notice of appeal from the judgment dismissing her case.

The trial court consolidated the cases for pretrial and trial purposes only (CR 11).[5] That did not make the cases one, which is why a separate judgment was signed, filed, and entered in each case. "[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Railway Co.*, 289 US 479, 496-97, 53 S Ct 721, 77 L Ed 1331 (1933); *Rath v. Haycock*, 137 Or App 456, 465, 905 P2d 854 (1995) (same; citing *Johnson*); *see also Interstate Roofing, Inc. v. Springville Corp.*, 217 Or App 412, 422, 177 P3d 1 ("consolidating cases for trial does not make multiple cases into one case for the purpose of determining the conclusiveness of the judgments entered in each case."), *adh'd to as modified on recons*, 220 Or App 671 (2008), *aff'd in part and rev'd in part on other grounds*, 347 Or 144 (2009).

ORAP 2.10(1) states the point directly: "If the trial court consolidated two or more cases, a party must file a separate notice of appeal in each case in which the party seeks to appeal the judgment." As this Court has explained, that rule "specifically requires that [multiple] notices of appeal be filed" from multiple judgments entered in multiple cases. *South Beach Marina, Inc. v. Dept. of Revenue*, 301 Or 524, 526, 724 P2d 788 (1986) (interpreting *former* ORAP 2.03(2)). The Court of Appeals, however, concluded that that rule "is not a jurisdictional requirement, nor does it embody or implement a

[5] As noted (note two above), only seven of the cases were actually ordered consolidated.

jurisdictional requirement in ORS chapter 19," and so it "waived" the rule (Order Determining Jurisdiction ("Order") at 5).[6]

The court was mistaken. ORAP 2.10(1) reflects the most fundamental prerequisite of appellate jurisdiction: timely appeal from the judgment sought to be modified. The court to which an appeal is made may only "affirm, reverse or modify *the judgment or part thereof appealed from* * * *. ORS 19.420(1) (emphasis added). Filing a notice of appeal from a judgment "as provided in ORS 19.240(3), within the time limits prescribed by ORS 19.255" is a jurisdictional requirement, and one that "may not be waived or extended * * *." ORS 19.270(2)(b).

This Court certainly did not deem that requirement one that could be "waived" in *South Beach*. There, two cases were consolidated in the Tax Court, but, as here, separate judgments were entered in each. 301 Or at 526. After noting that *former* ORAP 2.03(2) "specifically requires that two notices of appeal be filed in such event," the court explained that two notices *were* filed, but one was untimely. *Id*. at 526-27. That, the Court said, was a "jurisdictional defect," and so it dismissed the untimely appeal. *Id*. at 527.

The Court of Appeals said *South Beach* was distinguishable, because it "concerned a single appeal from two non-identical judgments" (Order at 5 n 4), but that misses the point. While their *terms* are identical, there is no question that there are eight distinct judgments here, separately signed and entered, with

[6] The Appellate Commissioner's order is the only statement from the court explaining the denial of Evergreen's motion to dismiss. Evergreen appended the order to its petition for review (Appendix C).

each judgment resolving a separate case. Eight judgments were entered in eight different cases, but only one notice of appeal was filed from one judgment.

Nor is this a situation in which the appellant mistakenly described the judgment appealed, or attached the wrong document. The problem is not one of defective content at all—these appellants filed a *single* notice of appeal from a *single* judgment, stating that *all* appellants were "parties to *this* [single] appeal." *No* appeals—timely or untimely—were taken from seven of the eight judgments.

The plaintiffs in those seven cases have no right to appeal from the judgment in the eighth—a case to which they were never parties. Only "a party to the judgment of the circuit court * * * ha[s] a right to appeal from the judgment entered against her." *In re Grimes' Estate*, 170 Or 204, 218, 131 P2d 448 (1942) (rejecting non-party's appeal). Each of the purported appellants to this appeal had the right to appeal from the judgment entered in the case to which she was a party, and no other. *See*, *e.g.*, ORS 19.245(1) ("any party *to* a judgment may appeal *from* the judgment"); 19.250(1)(c) (requiring notice "that an appeal is taken from *the judgment* or some specified part thereof"); 19.255(1) ("*a* notice of appeal must be served and filed within 30 days after *the* judgment appealed from is entered in the register").

The Court of Appeals seemingly believed the only issue was whether Evergreen was prejudiced, and reasoned that it was not, because "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." (Order at 5.) In truth, the court itself lacked such notice—if it had known "that

each of the appellants was appealing from the judgment entered in each of the eight cases," it would have docketed *eight* appeals, not one. The court was "on notice" that all plaintiffs had taken a single appeal from a single judgment and that all were, as they purported, "parties to *this* appeal."

Regardless, the issue turns not on prejudice, but on the prerequisites to appellate jurisdiction. "If anything within the notice of appeal is jurisdictional, * * * it must be a description of what action of the trial court is appealed from, because other than the title of the case, that it is the most important thing which the notice contains." *Stahl v. Krasowski*, 281 Or 33, 39, 573 P2d 309 (1978). Otherwise, "any document entitled 'notice of appeal' which was filed within the required time would be sufficient to give the court jurisdiction whether it contained anything at all, because it could be inferred therefrom that the party filing it intended to appeal *and there is rarely any prejudice involved*." *Id*. at 38 (emphasis added).

The Court more recently explained that while not all statutory requirements concerning appeal are jurisdictional, "at least two are":

> First, a defendant must serve and file the notice of appeal within 30 days after the trial court enters *the judgment that the defendant seeks to appeal*. [Citations.] Second, the notice of appeal *must specify the judgment from which the appeal is taken*. [Citations, including *Stahl*.]

State v. Fowler, 350 Or 133, 137, 252 P3d 302 (2011). Here, there are eight judgments in eight separate cases, but only a single notice of appeal was filed. That notice specified that it was taken from a single judgment—the judgment in Multnomah County Circuit Court Case No. 0910-15153, dismissing the claims of Flor de Maria Gamboa Alvarez. No authority permits a party in one case to join in the notice of appeal filed by a party in another case. The plaintiffs who

failed to appeal from the judgments in their respective cases failed to create appellate jurisdiction to modify their judgments.

B. The Court of Appeals Erred by Requiring "Deference" Be Given a Litigant's Selection of an Objectively Inconvenient Forum.

The Court of Appeals held that in analyzing forum convenience, the trial court must start with the presumption that the forum in which the plaintiff filed the action is, in fact, convenient—whether the plaintiff lives 5,000 miles from the courthouse or next door to it. That holding makes no sense. It is also one the court should never have reached, because the trial court was not given the opportunity to consider it.

1. The issue was unpreserved and should not have been reached.

As the Court of Appeals noted, plaintiffs' second assignment of error asserted "that the trial court erred when it applied to this case the federal *forum non conveniens* factors outlined in *Gulf Oil* and *Piper*." 266 Or App at 42. Plaintiffs could not show where that "issue was raised and the challenged ruling was made," ORAP 5.45(4)(a)(ii), because the issue never *was* raised and, thus, never ruled on. The Court of Appeals wrongly decided the unpreserved assignment, including its assertions concerning the "deference" to grant a plaintiff's selection of a foreign forum.

In moving to dismiss, Evergreen invited the trial court to apply the standard the U.S. Supreme Court adopted in *Gulf Oil* nearly 70 years ago and elaborated upon in *Piper* roughly 35 years later. In response, plaintiffs argued that (1) *forum non conveniens* should not apply at all in Oregon, and (2) if it *did* apply, did not require dismissal here (p 4 above). With respect to the second

point, plaintiffs did *not* argue that the federal standard Evergreen advanced was inappropriate; to the contrary, they relied on that standard to support their claim that the motions should be denied (ER 40 & n 11 ("Plaintiffs cite to federal *forum non conveniens* authority in responding to, and refuting, [Evergreen's] arguments that a '*forum non conveniens*' dismissal is appropriate under the facts of this case."), 49-65). Plaintiffs did not assert that the trial court should depart from *Piper* in any respect.

In particular, plaintiffs expressed no disagreement with *Piper*'s holding that a court is "fully justified" in drawing a "distinction between resident or citizen plaintiffs and foreign plaintiffs * * *." *Piper*, 454 US at 255. As Justice Marshall explained in *Piper*:

> When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Id. at 255-56; *see also Sinochem*, 549 US at 430 ("When the plaintiff's choice is not its home forum * * *, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable.") (citing *Piper*; internal quotations omitted).

In the trial court, plaintiffs did not challenge that view. They did not argue, as on appeal, that the trial court was wrong to "give any lesser deference to a foreign plaintiff's choice of forum" (see Pl Br 39-43). Rather, they *conceded* "that 'a foreign plaintiff's [forum] choice deserves less deference'

than the forum choice of a domestic plaintiff." (ER 49 (quoting *Ravelo Monegro v. Rosa*, 211 F3d 509, 514 (9th Cir 2000) (quoting *Piper*)).

To be sure, plaintiffs added the comment (again from *Ravelo Monegro*) that "less deference is not the same thing as no deference" (*id*.). Their counsel said the same thing at the hearing on the motion:

> We've talked a little bit about the victims because they're not from Oregon, they should not be entitled to the same deference coming into Court here. Well, it dances around, again, why we give plaintiffs deference in their forum. And there is not a single case in the world that says that foreign plaintiffs are entitled to no deference, *maybe less deference than a citizen of Oregon, but they are still entitled to deference*.

(6/29/10 Tr 57 (emphasis added).) But Evergreen had not argued that plaintiffs' selection of an Oregon forum was entitled to *no* deference. It had argued, consistent with the federal cases, that a foreign plaintiff's forum choice was entitled to *less* deference than a resident plaintiff's choice. And plaintiffs voiced no disagreement with that proposition.

Unsurprisingly, the trial court applied *Piper* as the parties had invited it to do.[7] Also unsurprising was the Court of Appeals' comment that it could not *tell* "whether the trial court gave appropriate deference to plaintiffs' choice of forum." 266 Or App at 51. The issue not having been raised, the trial court didn't comment on it.

The record offers no support—none—for the Court of Appeals' statement that plaintiffs "argued that their choice of forum should *not* be given

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[7] The Court of Appeals also had invited that application when it did "not take issue with the trial court's use of the [*Piper*] test" in *Novich v. McClean*, 172 Or App 241, 252, 18 P3d 424, *rev den*, 332 Or 137 (2001).

less deference due to their status as foreign plaintiffs[.]" 266 Or App at 42 (emphasis added). The court never should have addressed the unpreserved issue, let alone declared that the U.S. Supreme Court (and nearly every other court that has considered the issue) wrongly decided it.

"Preservation gives a trial court the chance to consider and rule on a contention, thereby possibly avoiding an error altogether or correcting one already made, which in turn may obviate the need for an appeal." *Peeples v. Lampert,* 345 Or 209, 219, 191 P3d 637 (2008) (citing *Shields v. Campbell,* 277 Or 71, 77, 559 P2d 1275 (1977)). Here, the trial court had *no* chance to consider plaintiffs' assertion that their "choice of forum should not be given less deference due to their status as foreign plaintiffs." The Court of Appeals' decision to entertain plaintiffs' assertion that appropriate deference was not given their "choice of forum" impedes "an efficient administration of justice and the saving of judicial time." *Id*. at 220 (quoting *Shields,* 277 Or at 77-78).

The real oddity here is that it's not even a close call. In their reply brief, plaintiffs told the Court of Appeals that *Hitz* should rescue them, because they had "preserved the broad legal issue * * * that the trial court erred in granting defendant's motion to dismiss." (Reply Br 10 (citing *State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988).) But if *Hitz*'s rule were that broad, it would swallow preservation whole. Saying "we oppose" something does not give parties leave to raise any argument that later occurs to them. Plaintiffs did not preserve any argument regarding the deference due their selection of a foreign forum, and the

Court of Appeals had no basis for deciding that issue or any other challenge to *Piper*.[8]

2. It is not "reasonable" to assume the convenience of a forum selected by a nonresident plaintiff.

The Court of Appeals held that when a court analyzes forum convenience, it must assume at the outset that the forum is, in fact, convenient—whether the plaintiff resides in the forum or not. The court's rationale for that holding was that "plaintiffs are in the best position to determine what is for them a convenient and appropriate forum"—or, at least, it is "reasonable" to assume as much. 266 Or App at 45. The "reasonableness" of that assumption is not at all apparent and, indeed, has escaped nearly every court that has considered the issue.

It has certainly escaped the U.S. Supreme Court. As noted (p 14 above), the court in *Piper* found it "*much less* reasonable" to assume a forum is as convenient when a plaintiff does not reside in the forum as when she does. 454 US at 255-56 (emphasis added). More recently, Justice Ginsburg hewed to the

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[8] The Court of Appeals claimed plaintiffs urged *other* "departures from *Piper*," 266 Or App at 42, including "that Evergreen has a heavy burden to establish oppression and vexation out of proportion to plaintiffs' convenience" *Id*. That is no "departure": *Piper says that*. 454 US at 241 (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 US 518, 524, 67 S Ct 828, 91 L Ed 1067 (1947), which further explains that, in performing that proportional analysis, a plaintiff's "convenience * * * may be shown to be slight or nonexistent").

The Court of Appeals also said that plaintiffs told the trial court that "it should not rely on public-interest factors to dismiss a case, but should focus, instead, on private-interest factors in determining convenience." 266 Or App at 42. Wrong again. After completing their analysis of the private interest factors, plaintiffs told the trial court that those factors "weigh so heavily in favor of litigating these actions in Oregon, there should be no need to weigh the public interest factors" (ER 40). That was simply another argument that plaintiffs *win* under *Piper*, not a contention that *Piper* was wrong.

same line, noting that "[w]hen the plaintiff's choice is not its home forum * * *, the presumption in the plaintiff's favor applies with less force, for the assumption that the chosen forum is appropriate is in such cases less reasonable." *Sinochem Int'l*, 549 US at 430 (citing *Piper*; internal quotations omitted).

The inquiry's "central purpose," after all, is "to ensure that the trial is convenient." *Piper*, 454 US at 256. If the plaintiff's selected forum is *presumed* convenient, the defendant's requisite showing of *in*convenience is necessarily enhanced. Requiring a heightened showing makes sense when the plaintiff resides in the forum, but none when she does not. *Sinochem*, 549 US at 430. From the federal perspective, then, the Court of Appeals' view is decidedly *un*reasonable. *See, e.g., Vivendi SA v. T-Mobile USA Inc.*, 586 F3d 689, 694 (9th Cir 2009) ("[i]n cases concerning foreign plaintiffs, this court rarely has reversed a district court's grant of a motion to dismiss for *forum non conveniens*"). And nearly every *state* court that has considered the issue is of the same mind.[9]

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[9] *Parra v. Cont'l Tire N. Am., Inc.*, 222 Ariz 212, 213 P3d at 364 n 4 (Ariz Ct App 2009) ("a foreign plaintiff's choice of forum deserves less deference"); *Stangvik v. Shiley Inc.*, 54 Cal 3d 744, 819 P2d 14, 20 n 7 (1991) ("It is difficult to justify giving preferential status to a plaintiff's choice of forum if the plaintiff is not a resident."); *Durkin v. Intevac, Inc.*, 258 Conn 454, 782 A2d 103, 123 (2001) (foreign plaintiff's chosen forum entitled to less deference); *Ison v. E.I. DuPont de Nemours & Co.*, 729 A2d 832, 842 (Del 1999) (the "presumption [in favor of a plaintiff's chosen forum] is not as strong in the case of a foreign national plaintiff as in the case of a plaintiff who resides in the forum * * *."); *Cortez v. Palace Resorts, Inc.*, 123 So 3d 1085, 1096 (Fla 2013), *reh'g den* (Oct 1, 2013) (applying *Piper* to non-U.S. plaintiffs); *Dawdy v. Union Pac. R.R. Co.*, 207 Ill 2d 167, 797 NE2d 687, 694 (2003) ("a foreign plaintiff's choice deserves less deference" and "it is reasonable to conclude that [a foreign] plaintiff engaged in forum shopping to suit his

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Indeed, if any "assumption" is to be drawn from a plaintiff's selection of a foreign forum, it is that the selection is for *improper* reasons. *See, e.g., Iragorri v. United Technologies Corp.*, 274 F3d 65, 71 (2d Cir 2001) ("In such circumstances, a plausible likelihood exists that the selection was made for forum-shopping reasons, such as the perception that United States courts award higher damages than are common in other countries."). Plaintiffs in these cases

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(continued)
individual interests, a strategy contrary to the purposes behind the venue rules"); *Boudreaux v. Able Supply Co.*, 19 So 3d 1263, 1269 (La App 3 Cir 2009) ("Courts give less deference to a plaintiff's choice to sue outside his home forum"); *Radeljak v. Daimlerchrysler Corp.*, 475 Mich 598, 719 NW2d 40, 48 (2006) (finding it "appropriate, in light of the continuing globalization of our economy, to follow *Piper* and indicate that a foreign plaintiff's choice of venue is entitled to less deference than a domestic plaintiff's choice of venue."); *Bergquist v. Medtronic, Inc.*, 379 NW2d 508, 512 (Minn 1986) (approving *Piper*); *In re Vioxx Litig.*, 395 NJ Super 358, 928 A2d 935, 938 (App Div 2007) ("less deference is accorded to plaintiffs' forum choice in this case than would normally be accorded because of plaintiffs' residence in the U.K., not in this State"); *Marchman v. NCNB Texas Nat'l Bank*, 120 NM 74, 898 P2d 709, 720 (1995) ("A foreign plaintiff's choice of forum, however, deserves less deference than a local plaintiff's selection of his or her home forum"); *Chambers v. Merrell-Dow Pharm., Inc.*, 35 Ohio St 3d 123, 519 NE2d 370, 373 (1988) ("a foreign plaintiff's choice deserves less deference") (quoting *Piper*); *Bochetto v. Piper Aircraft Co.*, 2014 PA Super 120, 94 A3d 1044, 1056 (2014), *rev den*, 112 A3d 648 (Pa Feb 25, 2015) ("foreign plaintiffs enjoy 'less deference' with regard to their choice of forum") (quoting *Piper*); *Rothluebbers v. Obee*, 2003 SD 95, 668 NW2d 313, 318 (2003) ("Clearly, a foreign plaintiff's choice of a forum that is not his own would be less convenient for him and therefore be entitled to less deference"); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 SW3d 28, 31 (Tex 2010) ("the forum-non-conveniens doctrine generally affords substantially less deference to a nonresident's forum choice" (citation and internal quotation marks omitted); *Energy Claims Ltd. v. Catalyst Inv. Grp. Ltd.*, 2014 UT 13, 325 P3d 70, 78 (2014) ("A foreign plaintiff who sues in the United States, however, is generally entitled to less deference."); *State ex rel Mylan, Inc. v. Zakaib*, 227 WVa 641, 713 SE2d 356, 363 (2011) ("the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state") (quoting W Va Code § 56-1-1a(a)).

acknowledged their forum shopping (Pl Br 14 ("Numerous substantive and procedural safeguards exist for foreign plaintiffs when American courts acquire jurisdiction. These include broader discovery, specialized counsel who accept contingent fee representation, potentially more favorable law, and less restrictions on the recovery of both compensatory and punitive damages.").

Forum shopping should be *dis*couraged, not *en*couraged. A nonresident suing in Oregon receives all the benefits of a judicial system supported by Oregon taxpayers, while contributing nothing besides filing fees to that system's maintenance. By holding that courts should ignore a forum's objective *in*convenience simply because plaintiffs are "in the best position to determine what is for them a convenient and appropriate forum," the Court of Appeals only adds to the burdens of an already overburdened system. *See Bergquist v. Medtronic, Inc.*, 379 NW2d 508, 512 (Minn 1986) ("Why should the * * * taxpayers of Minnesota * * * be presumed to pay for the costs of trial for a plaintiff who is a citizen of a foreign nation; who has a remedy in his own country; and whose defendant consents to being sued in the foreign country?"). Indeed, one of the reasons noted for forum deference is that "a state has a strong interest in assuring *its own residents* an adequate forum for the redress of grievances." *Stangvik v. Shiley Inc.*, 54 Cal 3d 744, 819 P2d 14, 20 (1991) (emphasis added, citation omitted).

Rather than confront *Piper*'s commonsensical underpinnings, plaintiffs opted in the Court of Appeals to argue that the analysis was founded on "xenophobia and discrimination against foreign plaintiffs" (Pl Br 24-25). That claim ignores the rule's rational foundation. The "lesser degree of deference

typically afforded foreign plaintiffs * * * is not intended to create difficulties for foreign plaintiffs, but is based instead on realistic doubts about the ultimate convenience of a foreign plaintiff's choice to litigate in the United States." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F3d 64, 73 (2d Cir 2003), *cert den*, 540 US 1149 (2004).

What is more, those "realistic doubts" can support dismissing actions *by U.S. citizens*. *See id*. ("the selection of a U.S. forum by a U.S. citizen living abroad would be entitled to less deference than the choice of the same forum by a citizen residing in the forum because * * * it would be less reasonable to assume the choice of forum is based on convenience.") (internal quotations and citation omitted). How is *that* conclusion dictated by xenophobia?

The same point was overlooked by the court in *Myers v. Boeing Co.*, 115 Wash 2d 123, 794 P2d 1272 (1990), one of the very few cases offering any support for the Court of Appeals' decision. That court there said:

> The [*Piper*] 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 foreign plaintiff's choice of forum is convenient. Why is it less reasonable to assume that a plaintiff from British Columbia, who brings suit in Washington, has chosen a less convenient forum than a plaintiff from Florida 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?

794 P2d at 1281. The Washington court's belief that *Piper* was founded on an irrational treatment of aliens—including *resident* aliens—was mistaken. *Piper* granted "lesser deference" to plaintiffs *not* "based solely on their status as

foreigners," but based on their status as residents of a forum foreign to the one in which they chose to sue. 454 US at 255 ("distinction between *resident or citizen plaintiffs* and foreign plaintiffs is fully justified") (emphasis added), 255 n 23 ("Citizens *or residents* deserve somewhat more deference than foreign plaintiffs"). Several courts have expressly recognized the point that *Myers* missed.[10] By the same token, contrary to *Myers*'s rhetorical hypotheses, numerous courts have applied the doctrine to dismiss claims brought by U.S. citizens who reside in other states.[11]

In response to Evergreen's petition for review, plaintiffs mistakenly claimed that decisions *other* than *Myers* supported the Court of Appeals' decision in this case (Resp 7 (citing *Stangvik*, 54 Cal 3d 744, 819 P2d 14; *Picketts v. Int'l Playtex, Inc.*, 215 Conn 490, 576 A2d 518 (1990); *Ison v. E.I. DuPont de Nemours & Co.*, 729 A2d 832 (Del 1999); *Burrington v. Ashland Oil Co.*, 134 Vt 211, 356 A2d 506 (1976)). In fact, none of those cases offers any support.

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[10] *E.g.*, *Parra v. Cont'l Tire N. Am., Inc.*, 222 Ariz 212, 213 P3d 361, 364 n 4 (Ariz Ct App 2009) ("Although a foreign plaintiff's choice of forum deserves less deference, a resident alien is entitled to the same deference as a citizen.") (internal punctuation and citations omitted); *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F3d 1163, 1177 n 6 (9th Cir 2006) ("a resident alien such as Tuazon is entitled to the same deference as a citizen") (citing *Piper*); *see also Pollux Holding*, 329 F3d at 73 ("selection of a U.S. forum by a U.S. citizen living abroad would be entitled to less deference").

[11] *E.g.*, *Nat'l Football League v. Fireman's Fund Ins. Co.*, 216 Cal App 4th 902, 157 Cal Rptr 3d 318, 321 (2013) (New York residents); *Wieser v. Missouri Pac. R. Co.*, 98 Ill 2d 359, 456 NE2d 98, 104 (1983) (Arkansas resident); *Boudreaux v. Able Supply Co.*, 19 So 3d 1263, 1270 (La App 3 Cir 2009) (Texas residents); *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 SW3d 28, 35 (Tex 2010) (Michigan resident).

- *Stangvik* expressly adopted *Piper*, noting that "[i]t is difficult to justify giving preferential status to a plaintiff's choice of forum if the plaintiff is not a resident." 819 P2d at 20 n 7.[12]
- *Picketts* also followed *Piper*, simply noting in addition, as do other courts, that "less" deference does not mean "no" deference. 576 A2d at 525 ("While the weight to be given to the choice of a domestic forum by foreign plaintiffs is diminished, their entitlement to a preference does not disappear entirely.").
- *Ison* also followed *Piper*. *See* 729 A2d at 835 (the "presumption [in favor of a plaintiff's chosen forum] is not as strong in the case of a foreign national plaintiff as in the case of a plaintiff who resides in the forum * * *.").
- Finally, *Burrington* predates *Piper*; in addition, while the *Burrington* plaintiff was not a resident—he was the administrator of an estate who resided in Massachusetts—the real parties in interest, the decedent's surviving spouse and children, resided in Vermont. *See* 356 A2d at 509.

Perhaps recognizing that its mandated presumption of convenience was not as "reasonable" as it claimed, the Court of Appeals sought to bolster its position by emphasizing that Oregon is *Evergreen's* home forum:

> 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.

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[12] The court *also* noted that a *defendant's* residence factors into the convenience analysis, *id*. at 20-21, but as subsequent cases have made clear, that factor is simply "to be weighed and balanced by the trial court along with all the other pertinent factors, * * * and has no direct bearing on the moving defendant's burden of proof." *Nat'l Football League*, 157 Cal Rptr 3d at 340.

266 Or App at 45. Again, however, the logic of that statement is not self-evident, and the only case the court offered to support it is one holding that "[c]oncerns about forum shopping, while appropriately considered * * *, are muted in a case such as this where Plaintiffs' chosen forum is *both* the defendant's home jurisdiction, *and* a forum with a *strong connection* to the subject matter of the case." *Id*. (quoting *Carijano v. Occidental Petroleum*, 643 F3d 1216, 1229 (9th Cir 2011), *cert den*, 133 S Ct 1996 (2013) (emphasis added)).

But *Carijano* offers no support here, because Oregon does not *have* "a strong connection" to the subject matter of these cases—that's why the trial court recognized it would be far more convenient to try them in Peru. The Court of Appeals did not suggest otherwise—it conceded that the cases have only "a" connection to Oregon, not a "strong" one, but that leaves unanswered why it is "particularly appropriate" to assume the reasonableness of an Oregon forum.

Furthermore, the Ninth Circuit in *Carijano* did *not* retreat from the view that "[a] foreign plaintiff's choice is entitled to less deference[.]" 643 F3d at 1227. It expressly endorsed that point, and focused instead on the fact that one of the plaintiffs in the case was a domestic plaintiff *residing in the forum*. *Id*. at 1227-29.

In the end, then, the Court of Appeals holds that a trial court should "defer" to a plaintiff's choice of a foreign forum for no reasons other than (1) she chose it and (2) a defendant resides there. Such reasoning involves "an untenable leap of logic." *Pollux Holding*, 329 F3d at 74.

> It is reasonable for a court to assume that a plaintiff's choice of her own home forum is motivated by convenience. The plaintiff's choice of the defendant's home forum provides a much less reliable proxy for convenience. * * *

Id. "Accordingly," the Second Circuit explained, a nonresident's choice to bring an action in the defendant's home forum "only merits heightened deference to the extent that the plaintiff and the case possess *bona fide* connections to, and convenience factors favor, that forum." *Id*. Here, by contrast, the Court of Appeals requires that a nonresident's forum choice be granted deference *at the outset*, before *any* consideration is given to the forum's actual connection to the case.

Of course, nothing prevents a plaintiff from showing that a forum is, in fact, convenient; the question is whether the matter should be assumed. The defendant in *Piper* also was sued in its home forum, but the Supreme Court saw no reason to "defer" to the foreign plaintiff's choice of that forum. A forum is either convenient or it is not, and "the central purpose" of the inquiry "is to ensure that the trial is convenient * * *." 454 US at 256. Simplified,

> [w]hen the plaintiff wants to sue on the defendant's home turf, and the defendant wants to be sued on the plaintiff's home turf, all really that the court is left to weigh is the relative advantages and disadvantages of the alternative forums. In such a case there is no reason to place a thumb on the scale, since there is no prima facie reason to think a plaintiff discriminated against by being sent to his home court or a defendant discriminated against by being forced to stay and defend in *his* home court.

Abad v. Bayer Corp., 563 F3d 663, 667 (7th Cir 2009) (emphasis in original). The Court of Appeals erred by placing its thumb on the scale.

C. The Court of Appeals Erred by Concluding That the Trial Court Made Improper Findings "Going to the Merits" of Plaintiffs' Claims.

The Court of Appeals also held that when a trial court decides a *forum non conveniens* motion, it "may not make factual determinations that go to the underlying merits of plaintiffs' claims." 266 Or App at 50. The trial court violated that rule, the court said, because it disregarded evidence relevant to plaintiffs' "direct-liability allegations" concerning negligent maintenance of the helicopter's navigation systems, and thereby deviated from its fundamental job: "to assess *where* that evidence would be located and its accessibility, not *what* that evidence might show once obtained." *Id*. (emphasis in original). The flaws in the court's reasoning are both factual and legal.

First, the record does not provide any support for the court's claims that the trial court "disregarded" any evidence, or that it decided "*what* that evidence might show once obtained." The trial court merely observed—correctly—that plaintiffs had failed to show that *any* material evidence regarding their "direct-liability allegations" was likely to be found in Oregon, and that such evidence was more likely to be found in Peru.

Second, the Court of Appeals' prohibition against findings that "go to the merits" of a claim is a shorthand lacking legal foundation. Deciding a *forum non conveniens* motion necessarily "entangle[s]" a court in the merits of a cause, *see Van Cauwenberghe v. Biard*, 486 US 517, 528, 108 S Ct 1945, 100 L Ed 2d 517 (1988), but such "entanglement" does not "interfere with a party's right to a trial on disputed questions of material fact." *See Black v. Arizala*, 337 Or 250, 265, 95 P3d 1109 (2004). The trial court in this case did not interfere

with plaintiffs' right to a trial on their claims, or any disputed issue material to them.

1. The record is not as the Court of Appeals described it.

To fully grasp the Court of Appeals' errors, it is necessary to start with a review of the facts and proceedings below.

a. Plaintiffs' complaints do not allege any negligent conduct in Oregon.

All plaintiffs alleged that Evergreen was negligent in various respects regarding the helicopter's operation on the day of the crash. *See* 266 Or App at 31-32. Seven of the eight plaintiffs also alleged that Evergreen was negligent in "[f]ailing to properly maintain, inspect, test and/or repair the subject helicopter and ensure that the subject helicopter was kept in a safe condition[.]" *Id*. at 31. Those complaints did not specify *where* that alleged negligence took place, or identify any particular maintenance or mechanical issue that contributed to the crash. *See id*.

b. In opposing Evergreen's motions, plaintiffs asserted—without evidentiary support—that the crash resulted from faulty navigation systems installed in Oregon.

In its motions to dismiss, Evergreen relied on plaintiffs' allegations, and showed that it would be far more convenient to try them in Peru. Evergreen showed that most of the witnesses and documents concerning the helicopter's operation and maintenance (as well as all sources of proof concerning plaintiffs' alleged damages) were located in Peru (see ER 3-5, 8-9).

In response, plaintiffs noted that the helicopter's altimeter system and "Enhanced Ground Proximity Warning System" (EGPWS) were installed and

tested at Evergreen's facilities in Oregon (ER 55; CR 30, Ex P). That was important, plaintiffs said, because those systems were "potentially malfunctioning" and "were a proximate cause of this crash" (ER 39, 41). Plaintiffs offered no evidence that those systems had, in fact, malfunctioned, or that such alleged malfunction had contributed to the crash.

In fact, as Evergreen noted in reply (CR 32 at 9-10), the evidence on which plaintiffs relied pointed to the *opposite* conclusion. The final report of the Peruvian Aircraft Accident Investigation Commission (the "CIAA Report"), submitted by plaintiffs, included the following findings:

> During the analysis of the technical documentation of the aircraft and of the maintenance work performed, no indication was found that could have contributed to the accident occurrence.
>
> * * *
>
> From the analysis of the data extracted from the [Flight Data Recorder], it was possible to establish that until the moment of the accident, all helicopter systems were operating normally, ruling out that any system recorded by the [Flight Data Recorder] could have contributed to the accident occurrence.

(CR 30, Ex R at 26, 44.) In addition, a "physical discrepancy notice" prepared by the Peruvian General Directorate of Civil Aeronautics ("DGAC") in connection with the helicopter's airworthiness certification months before the crash did not identify the EGPWS or altimeter as non-compliant, and in any case, as Evergreen showed, evidence of DGAC's inspection of those systems would be located in Peru (CR 33, ¶ 20, Ex 20).

c. At the hearing, plaintiffs said there were problems with the helicopter's navigation systems, but again could not identify any record support for that assertion.

At the hearing on Evergreen's motions, plaintiffs' counsel continued to assert, without evidence, that there were problems with the helicopter's EGPWS and altimeter systems, stating that "we understand that there were some squawks,[13] there were some discrepancies, there were some problems with" those navigational systems (6/29/10 Tr 67-68). Plaintiffs' counsel argued that further discovery was needed to determine whether "any parts [were] requested from McMinnville to fix this system" and whether any of the "discrepancies" were "reported here" (*id*. at 68; see also *id*. at 73-74). Plaintiffs' counsel admitted, however, that he could not "tell the Court right now what the import of this is" (*id*. at 68).

When the trial court inquired "[w]here in the record [it would] find * * * the squawks that [plaintiffs' counsel] referred to[,]" plaintiffs' counsel admitted, "[u]nfortunately, we don't have the squawks" (*id*. at 76). The trial court again pressed plaintiffs' counsel to identify "what evidence [plaintiffs] have that there was potentially some issue associated with" the navigational systems, and plaintiffs' counsel stated that his only basis for that assertion was that "there were some communications [with the DGAC] about the * * * enhanced ground proximity warning system" (*id*. at 77-78). Plaintiffs' counsel confessed, however, that plaintiffs did not know what "the substance of [the DGAC's questions] were" (*id*. at 78). Plaintiffs' counsel further admitted that the

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[13] In aviation parlance, a "squawk" means a maintenance problem that requires repair or attention. *See* http://en.wikipedia.org/wiki/Squawk.

questions raised were "not about really how [the EGPWS] was installed[,]" but instead related to "the [terrain] databases being updated for South America[,]" which plaintiffs' counsel asserted—again without evidence—"was done through here" (*id*. at 78-79).[14] Plaintiffs' counsel also claimed "maintenance records" indicated some problem with the altimeter system at some point, but he was unable to identify such records (*id*. at 79-80).

In truth, the record is devoid of evidence that the EGWPS or the altimeter systems experienced any "squawks." The DGAC identified 42 items of additional documentation needed before it could certify the helicopter for operation in Peru, including documentation concerning installation of the EGWPS and altimeter systems (CR 33, Ex 19 (items 22, 24)). Nothing in that communication indicated any problem with the operation of those systems, which, as noted, were not identified as non-compliant in the physical discrepancy notice the DGAC prepared after inspection (see *id*., Ex 20).

In granting Evergreen's motions, the trial court found that, despite plaintiffs' bald assertions that material evidence concerning the EGPWS or altimeter systems was located in Oregon, the record showed that the majority of the evidence relevant to the case was located in Peru:

> The materials submitted by the parties persuade me that trial of this lawsuit will largely center on, and depend upon, witnesses and documents regarding circumstances in Peru at the time of the crash, rather than circumstances in Oregon or the United States. At oral argument, based on what counsel referred to as "squawks," plaintiffs suggested that with further discovery they may find

[14] Evergreen's counsel pointed out that, contrary to that unfounded assertion, the EGWPS terrain database "was updated in Ecuador," not Oregon (*id*. at 80).

> evidence of a malfunction in the warning or altimeter systems installed by Evergreen in the United States. I decline to base my decision on such possibilities, especially given the record that is before me.

(ER 69). Even so, the court did not deny plaintiffs the opportunity to explore their unfounded theory, as it conditioned dismissal on the "cooperation by Evergreen in making available witnesses and documents located in the United States" (*id*.; see also ER 75, ¶ 4).

d. On appeal, plaintiffs contended that the trial court disregarded "evidence" of "direct liability" relating to navigation systems installed in Oregon.

On appeal, plaintiffs sought to draw a distinction between what they described as *Evergreen's* theory of the case (that the helicopter had crashed due to circumstances in Peru at the time of the crash) and "*Plaintiffs' theory of the case*" (that navigational equipment caused the crash) (Op Br 6-8 (emphasis in original)). Plaintiffs contended—without citing any evidence—that:

- "the best inference based on available evidence, without any merits discovery,[15] was that the helicopter crashed into a hillside in adverse weather conditions most likely because of navigational-instrument failure" (*id*. at 7);
- "the location of proof and witnesses evidencing [Evergreen's] direct liability for equipment failure" was largely in Oregon (*id*. at 7-8); and
- the trial court "accepted [Evergreen's] argument that the focus of the case concerned vicarious liability of its pilot for an alleged failure to use due

[15] Although plaintiffs complained repeatedly about their lack of "merits discovery," they never moved to compel any discovery and did not assign error to any discovery ruling.

> care in adverse weather, rather than the Plaintiffs' presentation, before merits discovery, that the lawsuit would largely focus on [Evergreen's] direct liability arising from negligent performance of the maintenance of helicopter systems, avionics and electronic warning devices while the aircraft was maintained in Oregon" (*id*. at 9-10).

The Court of Appeals bought into plaintiffs' distinction between allegations of (a) "vicarious" liability (based on pilot error) and (b) "direct" liability (based on instrument failure). 266 Or App at 49-50. The court said that in concluding that trial would most likely focus on "circumstances in Peru at the time of the crash[,]" the trial court "completely disregarded" plaintiffs' "direct negligence" claims "supported by witnesses and documents located in the United States." *Id*. at 50.

> 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. *Cf. Munson* [*v. Valley Energy Inv. Fund, U.S.*], 264 Or App [679,] 694–95[, 333 P3d 1102] (2014) (in considering a motion to dismiss, a trial court's determination of facts relevant to that consideration "may not 'interfere with a party's right to a trial on disputed questions of material fact'" (quoting *Black*, 337 Or at 265). Here, the trial court improperly disregarded the materiality of witnesses and evidence relevant to plaintiffs' direct-liability allegations in assessing the relative convenience of Oregon and Peru, because the court's task was to assess *where* that evidence would be located and its accessibility, not *what* that evidence might show once obtained.

Id. (emphasis in original).

2. The trial court did not "improperly disregard[ ]" the materiality of any evidence or make any assessment of "what that evidence might show once obtained."

The unvarnished record offers no support for the Court of Appeals' assertion that the trial court "improperly disregarded" any evidence located in Oregon or prejudged "*what* that evidence might show once obtained." 266 Or App at 50 (emphasis in original). Plaintiffs made no showing that there *is* material evidence in Oregon, offering nothing more than the following series of unsupported conjectures:

1) something *may* have been wrong with the helicopter's EGPWS or altimeter systems;
2) those (unsubstantiated) problems *may* have materially contributed to the crash; and
3) there *may* be evidence in Oregon relating to the installation or repair of those systems that would be material to those (unsubstantiated) causes of the crash.

Plaintiffs offered no evidence supporting any of that speculation. The trial court thus had no occasion to assess "*what* the evidence might show once obtained" because plaintiffs had not shown that there was any evidence in Oregon to *be* obtained.

Indeed, even if the trial court had indulged plaintiffs' "theory of the case"—that the crash was attributable to problems with the navigation systems (a theory contradicted by the official accident report plaintiffs themselves had submitted)—the record shows that evidence relevant to that "theory" is at least as likely to be found in Peru as in Oregon. Plaintiffs themselves attributed their

theory to questions raised by the Peruvian DGAC and unspecified "maintenance records" (6/29/10 Tr 77-80), but Evergreen showed that evidence relating to the DGAC inspection and certification of the helicopter, as well as many of the helicopter's maintenance records, were located in *Peru*, and were not in Evergreen's possession (CR 8, ¶ 6; CR 33, ¶¶ 19-21, Exs 19-21).

Furthermore, the trial court did not "disregard[ ]" the possibility that evidence supporting plaintiffs' theory might be located in Oregon—it crafted its order to ensure that plaintiffs would have access to any such evidence (even though plaintiffs made no showing that there *was* such evidence). The trial court conditioned its dismissals on Evergreen's agreement "to make available in Peru all employee witnesses and documents located in the United States" (ER 75, ¶ 4). The only sources of proof that plaintiffs identified as potentially relating to their "faulty instrument" theory were Evergreen's own documents and witnesses (6/29/10 Tr 67-68, 73-74), so the court's order effectively ensured that plaintiffs would have access in Peru to *all* evidence relevant to that theory—whether located in the United States or in Peru. Had the trial court *denied* the motions, plaintiffs would have been able to obtain evidence located in the United States, but may not have been able to obtain documents and witnesses located in Peru.

Obviously, the Court of Appeals was misled by plaintiffs' false dichotomy between Evergreen's purported theory of "vicarious" liability (due to pilot error) and plaintiff's theory of "direct" liability (due to instrument malfunction). Of course, *both* theories are plaintiffs'—their complaints (or, at least, seven of them) specify negligence in the helicopter's operation on the day

of the crash *and* in its maintenance and repair. 266 Or App at 31-32. Plaintiffs certainly did not suggest that they were abandoning their claims that Evergreen is liable for alleged errors in the helicopter's operation.

The trial court properly evaluated the location of *all* evidence likely to be presented at trial, and concluded "that trial of this lawsuit will largely center on, and depend upon, witnesses and documents regarding circumstances in Peru at the time of the crash, rather than circumstances in Oregon or the United States" (ER 69). The Court of Appeals erred in holding that the trial court abused its discretion in reaching that conclusion.

3. The Court of Appeals erred in holding that a trial court may not make determinations "that go to the underlying merits of plaintiffs' claims."

As shown, the record does not support the Court of Appeals' reading of the trial court's decision. But its analysis was wrong for another reason. By holding that a trial court cannot make determinations "that go to the underlying merits of plaintiffs' claims[,]" 266 Or App at 50, the court crafted an analysis that will permit a plaintiff to defeat a *forum non conveniens* motion based on nothing more than an unsupported assertion that relevant evidence *might* be found in the forum in which the action has been filed. Such a departure from conventional analysis would eviscerate the *forum non conveniens* doctrine and, contrary to the Court of Appeals' suggestion, is not supported by this Court's decisions.

a. *Forum non conveniens* analysis generally requires "entanglement" in the merits.

The practical realities of the *forum non conveniens* inquiry cannot be reconciled with a broad prohibition of decisions that "go to the merits." As the U.S. Supreme Court has explained, it is "clear that in assessing a *forum non conveniens* motion, the district court generally becomes entangled in the merits of the underlying dispute." *Biard*, 486 US at 528 (rejecting appeal of *forum non conveniens* ruling under "collateral order doctrine," which bars appeals from interlocutory orders "enmeshed in the merits of the dispute"); *see also Sinochem*, 549 US at 433 (*forum non conveniens*, like "other threshold issues[,] may * * * involve a brush with 'factual and legal issues of the underlying dispute.'") (quoting *Biard*, 486 US at 529).

For example, analyzing the "relative ease of access to sources of proof and the availability of witnesses" requires a court to "scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action." *Biard*, 486 US at 528. Analysis of other factors similarly "thrust[s] the court into the merits of the underlying dispute," requiring it to "consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum." *Id*.; *see also Carlenstolpe v. Merck & Co., Inc.*, 819 F2d 33, 36 (2d Cir 1987) ("the determining factors in a *forum non conveniens* motion are 'enmeshed' in the underlying cause of action, * * *, and necessarily involve an inquiry into the merits of the action")

(citations omitted). Indeed, plaintiffs themselves implored the trial court to "scrutinize the substance of the dispute" (ER 41 (quoting *Biard*)).

The federal decisions are also clear that, in evaluating the accessibility of sources of proof, a court need not uncritically accept assertions that evidence of speculative importance may be found in the existing forum. Rather, "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 re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F3d 488, 500 (2d Cir 2002) (quoting *Iragorri*, 274 F3d at 74) (emphasis added). Given the limited record before it, a court is not expected to definitively "determine what the ultimate focus of the trial will be," but still must "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." *Lacey v. Cessna Aircraft Co.*, 932 F2d 170, 181 (3d Cir 1991); *see id*. at 182 ("the examination of certain private and public interest factors requires the district court to determine what issues and proof will likely be advanced at trial.") (citation omitted).

Lacey, like this case, involved a foreign aircraft crash. The plaintiff contended that the crash was due to a faulty exhaust system, and "that the products liability aspect of this case will predominate." *Id*. at 180-81. The defendants, by contrast, argued "that the central issue instead will be pilot error and negligent maintenance." *Id*. at 181. Both sides submitted evidence in support of their theories. *Id*. The Third Circuit found that the trial court was

not required "to select one paramount issue" that would dominate, and that it had appropriately "immersed itself in the record, found support for both [the plaintiff's] products liability claim and defendants' assertions of pilot error and negligent maintenance, and then proceeded to examine the necessary sources of proof." *Id*. at 182.

Two lessons may be drawn from the Third Circuit's analysis. First, it is appropriate for a trial court to require a party to "support" a claim that a particular theory is likely to be advanced at trial.[16] Second, the court need not blindly accept claims that any particular theory will "predominate," but should consider the accessibility of evidence material to *all* theories that are likely to be advanced.

Here, the trial court's decision reflects just that analytical framework. The court considered the likely theories to be advanced at trial, and plaintiffs' failure to substantiate its theory that installation or repair of navigation systems

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[16] Moreover, even if a trial court concludes that a party's theory of the case has a substantial basis, the party still must show that material evidence relating to that theory is more accessible in the party's preferred forum. If the party's showing on that score is "speculative[,]" it is "not entitled to significant weight." *See Network Protection Sciences, LLC v. Juniper Networks, Inc.*, No. 2:10-CV-224-JRG, 2012 WL 194382, at *4 (ED Tex Jan 23, 2012); *see also Steward Int'l Enhanced Index Fund v. Carr*, No. 09-CV-5006 (DMC), 2010 WL 336276, at *8 (D NJ Jan 22, 2010) ("Speculation" regarding existence of U.S. witnesses "does not overcome the fact that the majority of witnesses will undoubtedly be located in the U.K."); *Varnelo v. Eastwind Tranport, Ltd.*, No. 02 Civ. 2084 (KMW)(AJP), 2003 WL 230741, at *23 (SDNY Feb 3, 2003) ("because the Court may not base its decision on speculation that New York-based witnesses *may* possess relevant information, the alleged existence of any New York-based witnesses will be deemed at best a neutral factor") (emphasis in original). Here, plaintiffs offered nothing more than speculation that material evidence regarding their negligent maintenance theory would be located in Oregon, as opposed to Peru, where the helicopter was inspected, certified, and maintained.

in Oregon was likely to be a focus. The court then concluded "that trial of this lawsuit will largely center on, and depend upon, witnesses and documents regarding circumstances in Peru at the time of the crash, rather than circumstances in Oregon or the United States" (ER 69).

The Court of Appeals, however, rejected that approach, holding that a trial court "may not make factual determinations that go to the underlying merits of plaintiffs' claims." 266 Or App at 50. According to the Court of Appeals, a trial court must simply accept, at face value, a plaintiff's assertion—no matter how speculative—that material evidence supporting its "well-pleaded allegations" is more accessible in Oregon than in the alternate forum. *See id*. That holding is not only inconsistent with the well-settled standards for deciding a *forum non conveniens* motion, but enables a plaintiff to defeat such a motion with no showing whatsoever.

b. Contrary to the Court of Appeals' claim, its holding does not follow from this Court's precedent.

The Court of Appeals 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. *See* 266 Or App at 50. *Black*, however, does not support the peculiar rule announced in this case.

In *Black*, this Court held that ORCP 21 A(1) authorizes a court to dismiss an action based on a contractual forum selection clause. 337 Or at 266. The Court observed that that rule expressly permits a trial court to rely on sources outside the complaint, including "affidavits, declarations, and other evidence[,]" but cautioned that "the court must use care to insure that its determination of the

facts on a motion to dismiss does not interfere with a party's right to a trial on disputed questions of material fact." *Id*. at 265.

The Court in *Black* did not elaborate on what would constitute "interfere[nce] with a party's right to a trial on disputed questions of material fact[,]" but the concern is presumably a practical one—that a decision dismissing a case so that it may be litigated in another forum not have the untoward effect of *precluding* litigation in the other forum. If, for example, a defendant sought to dismiss based on a forum selection clause contained in a contract that the plaintiff claimed was procured by fraud, the trial court's decision to *enforce* that clause (and, thus, that contract) might, through principles of issue preclusion, prohibit the plaintiff from litigating its fraudulent inducement theory in a case later brought in the forum specified in the contract.

That, in fact, was the scenario presented in *Munson*. There, the Court of Appeals held that a trial court's decision on a motion to enforce a forum selection clause "may not, at that stage, decide disputed facts that go to the merits of the underlying claim because to do so would deprive a party of its entitlement to a trial 'on disputed questions of material fact.'" 264 Or App at 695 (quoting *Black*, 337 Or at 265).

In this case, however, the Court of Appeals took *Munson*'s rephrasing of *Black* as prohibiting rulings that "go to the merits" of a claim, and divorced it from its underlying rationale. That is, the purpose of *Black* (and *Munson*) is to protect a party's *right to trial* on disputed factual issues. Here, the Court of Appeals has applied the rule to preclude decisions that concern the merits in any

way—even decisions that could have no impact whatsoever on a subsequent trial of disputed factual issues. That distorts *Black* beyond recognition.

A *forum non conveniens* ruling addresses "a threshold, non-merits issue[.]" *Sinochem*, 549 US at 433. While it may "involve a brush with 'factual and legal issues of the underlying dispute[,]'" it "does not entail any assumption by the court of substantive 'law-declaring power.'" *Id*. (citations omitted). Dismissal under the doctrine is "not a judgment on the merits because it [does] not resolve 'the respective rights and duties of the parties[ ]'"; it merely constitutes a "refus[al] to exercise jurisdiction over the controversy in order to permit the parties to litigate in another forum." *Vasquez v. YII Shipping Co., Ltd.*, 692 F3d 1192, 1199 (11th Cir 2012); *see also Vasquez v. Bridgestone/Firestone, Inc.*, 325 F3d 665, 677 (5th Cir 2003) (*forum non conveniens* dismissal "does not resolve the substantive merits" of claims).

Because such dismissal is a ruling that a trial of the merits should occur in another venue—*not* a substantive ruling on the merits themselves—the decision would generally have no impact on any party's right to a trial of any disputed issues of fact. That is certainly the case here. Regardless of whether the trial court's ruling reflects a "preliminary view of the merits of a particular allegation[,]" plaintiffs still will be entitled to pursue their theory, including their theory concerning "the merits of [that] particular allegation[,]" *in Peru*. The Court of Appeals' prohibition against any "factual determinations that go to the underlying merits of plaintiffs' claims"—regardless of their impact on plaintiffs' right to trial on disputed factual issues—lacks a foundation in law or common sense.

D. Correction of the Court of Appeals' Errors Requires Affirmance of the Trial Court's Decision.

If this Court reverses the Court of Appeals, as it should for the reasons articulated above, it should affirm the appealed judgment, rather than remand to the Court of Appeals or trial court for further proceedings. While the Court of Appeals' remand was in part to allow the trial court to make "findings" on factors that, according to the Court of Appeals, the trial court "was required to consider[,]" 266 Or App at 50-51, a proper application of the review standard establishes that no further findings are necessary.

As the Court of Appeals purported to acknowledge, 266 Or App at 45-46, the standard for reviewing a trial court's factual findings is highly deferential. Even when reviewing for errors of law—as opposed to abuse of discretion, the applicable standard here—an appellate court is "bound by a trial court's factual findings, if the record contains evidence to support them." *State v. Serrano*, 346 Or 311, 326, 210 P3d 892 (2009) (citation omitted). Moreover,

> [i]f the trial court failed to articulate a factual finding on a pertinent issue, [the appellate court] assume[s] that the trial court decided the facts "in a manner consistent with the court's ultimate conclusions, as long as there is evidence in the record, and inferences that reasonably may be drawn from that evidence," that would support its conclusion.

Id. (citation omitted); *see also*, *e.g.*, *State ex rel. Oregon Health Sciences University v. Haas*, 325 Or 492, 498, 942 P2d 261 (1997) (same) (citation omitted). Here, however, the Court of Appeals failed to "assume" that the trial court's unstated findings on the *forum non conveniens* factors accorded with its decision to grant the motion, and instead "assumed" that the trial court had *not made* such findings—it said that the trial court "made no findings, implicit or

explicit, about the availability of, or ease of access to, witnesses and documents located in Peru." 266 Or App at 50.

> A trial court cannot merely look at the location of witnesses or evidence; it must assess the availability and ease of access to material witnesses and evidence to the 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. * * *

Id. at 50-51 (citations omitted).

The trial court, however, had ample evidence to support a finding that for purposes of an Oregon trial, documents and witnesses located in Peru were unavailable or inaccessible without undue burden. All parties acknowledged that unwilling non-party witnesses located in one country could not be compelled to attend trial in the other, and that international letters rogatory were the only means of obtaining testimony or documents from such third parties (see ER 9; ER 59-60; CR 32 at 24-25; 6/29/10 Tr 25-27, 32-33). The unavailability of live testimony in the existing forum is a significant factor favoring a *forum non conveniens* dismissal.[17] By the same token, obtaining evidence through letters rogatory is, at best, a "cumbersome" process.[18] Given

[17] *See*, *e.g.*, *Iragorri*, 274 F3d at 75 ("live testimony of key witnesses is necessary so that the trier of fact can assess the witnesses' demeanor.") (citation omitted).

[18] *See*, *e.g.*, *Vivendi*, 586 F3d at 696 ("the Hague Convention's letters rogatory process, which would be necessary to produce proof for an American trial, is more cumbersome than European Commission Regulations for taking evidence within Europe, which would be necessary to produce proof for a European trial"); *Scottish Air Int'l, Inc. v. British Caledonian Group, PLC*, 81 F3d 1224, 1233 (2d Cir 1996) ("Plaintiffs also point out that any witnesses located outside the district court's jurisdiction can be deposed if they will not appear voluntarily. Even if this is true, it still was not error for the trial court to find that obtaining testimony would be inconvenient for the parties"); *Reers v.*

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the undisputed record, the Court of Appeals should have "assume[d]" that the trial court found that the private interest factors concerning the relative ease of access to sources of proof and the availability of compulsory process for attendance of unwilling witnesses favored dismissal. *See Serrano*, 346 Or at 326.

The Court of Appeals also took the trial court to task because it "did not discuss any other factors that we now conclude it was required to consider before dismissing plaintiffs' case * * *." 266 Or App at 51. Presumably, the "other factors" to which the court referred were the various *Gulf Oil* private and public interest factors with which the court noted agreement earlier in its opinion. *See* 266 Or App at 44. But there is no question the trial court considered those factors.

The trial court expressly stated that the analysis (upon which the parties had agreed) required the court to "*weigh[ ] a number of private and public interest factors* to determine whether trying the action in Peru would best serve the convenience of the parties and the ends of justice." (ER 69 (emphasis added).) And the court ultimately concluded that the "*the private and public interest factors weigh in favor of dismissal*, but conditioned on those concessions offered by Evergreen, including an effective waiver of the statute

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Deutsche Bahn AG, 320 F Supp 2d 140, 162 (SDNY 2004) ("The massive inefficiency and inconvenience that [the letters rogatory process] would create for defendants and plaintiffs is all the more striking given the existence of an alternative forum where many of these problems would not arise.").

of limitations, and cooperation by Evergreen in making available witnesses and documents located in the United States." (*Id*. (emphasis added).)

Again, each of the various factors was thoroughly vetted by the parties. It was undisputed, for example, that the cost of attendance of willing witnesses from one country at trial in the other would be substantial (see ER 9, 60). It was likewise undisputed that the relevant premises were located in Peru (see ER 9-10, 60).[19] As for other "practical problems" associated with trial of the case, it was undisputed that documents and witness testimony would have to be translated from Spanish to English for purposes of an Oregon trial (see ER 10; ER 61-62; CR 32 at 26-27).[20] With respect to the public interest factors, Evergreen showed that the Peruvian courts are less congested than the Oregon courts; that the "local interest in having localized controversies decided at home" favored venue in Peru; and that Peruvian law would apply to plaintiffs' claims (see ER 11-19; CR 32 at 27-32). Again, the Court of Appeals should have "assume[d]" that the trial court found those factors favored dismissal. *See Serrano*, 346 Or at 326.

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[19] Evergreen pointed out that, given the roles of the weather and the physical topography in the helicopter crash, viewing the premises might be useful to the factfinder (ER 9-10; CR 32 at 26). Plaintiffs argued that such evidence would "likely" be presented through expert testimony, but they did not dispute that, to the extent viewing the site was relevant, it was located in Peru (ER 60).

[20] Evergreen also showed that there were serious questions regarding the ability of the trial court to exercise jurisdiction over all the relevant parties: Evergreen would be unable to implead Helinka, and the trial court lacked personal jurisdiction over Crann's estate (ER 10; CR 32 at 26-27). Plaintiffs unconvincingly argued that Evergreen could implead Helinka pursuant to forum selection clauses in those parties' agreements—even though no dispute existed under those agreements—but they had no response to the issue of jurisdiction over Crann's estate (ER 62).

The trial court's decision not to expressly discuss each and every *Gulf Oil* factor—particularly those as to which the facts were undisputed—is hardly surprising. "[S]ome factors may not be relevant in the context of a particular case." *Biard*, 486 US at 528-29; *see also*, *e.g.*, *Piper*, 454 US at 257-61 (courts should consider "all *relevant* public and private interest factors"; discussing many, but not all, of the *Gulf Oil* factors) (emphasis added); *Lueck v. Sundstrand Corp.*, 236 F3d 1137, 1145-46 (9th Cir 2001) ("The district court should look to *any or all* of the above factors which are *relevant* to the case before it, giving appropriate weight to each.") (citation omitted, emphasis added). The trial court expressly indicated that it had, in fact, considered all of the public and private interest factors (ER 69), and under the applicable standard of review, the Court of Appeals should have presumed that its findings on those factors supported dismissal. *See Serrano*, 346 Or at 326.

CONCLUSION

The Court should reverse the decision of the Court of Appeals. The Court should dismiss the appeal of each plaintiff who failed to appeal from the judgment entered in her individual case. Any judgment of the trial court from which an appeal was properly taken should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WITH ORAP 5.05(2)(d)

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I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 13,467 words.

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s/ Thomas W. Sondag
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing brief on the merits of petitioner on review by causing it to be electronically filed with the Appellate Court Administrator on May 21, 2015, through the appellate eFiling system.

I further certify that, through the use of the electronic service function of the appellate eFiling system, on May 21, 2015, I served the foregoing document on the following: Richard S. Yugler, Arthur C. Johnson.

s/ Thomas W. Sondag
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