C.A. No. 15-56424

In the United States Court of Appeals for the Ninth Circuit

LINDSAY R. COOPER, *ET AL.*,
Plaintiffs/Appellees,

v.

TOKYO ELECTRIC POWER COMPANY, INC.,
Defendant/Appellant.

On Appeal Under 28 U.S.C. § 1292(b)
From the United States District Court for the
Southern District of California, Case No. 12-cv-3032-JLS-JLB
The Honorable Janis L. Sammartino, United States District Judge

OPENING BRIEF OF APPELLANT TOKYO ELECTRIC POWER COMPANY, INC.

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CORPORATE DISCLOSURE STATEMENT

Tokyo Electric Power Company, Inc. is a publicly traded Japanese corporation. A majority of its shares are owned by the Nuclear Damage Liability and Decommissioning Facilitation Corporation, which is an agency or instrumentality of the Government of Japan. No publicly traded corporation owns more than 10% of TEPCO's stock.

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INTRODUCTION

Defendant-Appellant Tokyo Electric Power Company, Inc. ("TEPCO") appeals, under 28 U.S.C. § 1292(b), the district court's June 11, 2015 amended order denying TEPCO's motion to dismiss this action ("Order").

Plaintiffs are U.S. Navy servicemembers (or those claiming through them) who allegedly were injured by radiation exposure when U.S. Naval commanders allegedly positioned a "Strike Force" consisting of the *U.S.S. Ronald Reagan* and "other vessels" too close to the damaged Fukushima-Daiichi Nuclear Power Plant ("FNPP") after the 9.0 earthquake and tsunami that struck Japan on March 11, 2011. (ER 802-04.)[1] Plaintiffs were deployed off the Japanese coast as part of the U.S. effort to provide earthquake relief, named Operation "Tomodachi" (Japanese for "friend"). (ER 804, 858.)

Plaintiffs brought this putative class action (seeking to represent 70,000 servicemembers) against TEPCO, the FNPP's owner and operator. The district court denied TEPCO's motion to dismiss the action, but it authorized an immediate appeal, which this Court accepted. (ER 114.) For four reasons, the Order declining to dismiss this action should be reversed.

First, this case should be dismissed under the doctrine of international comity in light of the U.S.'s and Japan's strong interests in ensuring that all claims

[1] "ER" refers to the Excerpts of Record, followed by the page number. "CR" refers to the Clerk's Record and is followed by the docket and page numbers.

for injury arising from the FNPP accident are resolved in Japan. Here, the relevant international comity factors all strongly favor a Japanese forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 603 (9th Cir. 2014) (describing factors).

In particular, the foreign policy interests of both the U.S. and Japan favor centralizing claims from nuclear accidents in the courts of the country where the nuclear plant is located, *i.e.*, Japan. This shared foreign policy interest reflects the strong international consensus that has formed around a core set of principles designed to address the unique concerns presented by nuclear power. These principles include centralizing all claims in a single court system, strict liability for damages, and fair and prompt payment of meritorious claims pursuant to a government-supported funding system. Here, consistent with those principles (which have now been codified in a multilateral treaty to which both the U.S. and Japan are parties), Japan has a well-funded system for compensating nuclear damage pursuant to a statutorily created regime of strict liability. Indeed, the Japanese Government has already paid more than *$48 billion* to provide compensation to tens of thousands of claimants, including persons who are not nationals of Japan. Both the U.S. and Japan have a strong foreign policy interest in ensuring that Japan's robust, government-supported compensation system is respected and that any claims arising from the FNPP accident are handled in a consistent manner according to uniform standards and procedures in Japan.

The remaining comity factors also favor a Japanese forum: the relevant conduct took place in Japan; that conduct implicates Japan's strong interests in regulating nuclear power plants on its soil; the primary defendant (TEPCO) is a Japanese corporation; and the public policy interests of both countries favor a Japanese forum. The district court's refusal to apply international comity rested on multiple legal and factual errors and should be reversed. *See infra* at 17-33.

Second, for related reasons, the district court abused its discretion in declining to dismiss this case under *forum non conveniens*. *See infra* at 33-37.

Third, this case alternatively should have been dismissed under the political question doctrine. Given the U.S. Navy's awareness of the risk of radiation exposure and its exclusive control over the locations of its ships and personnel, the Navy had an independent "duty to prevent harm" to its servicemembers, and Plaintiffs' allegations necessarily posit that the Navy failed to prevent that harm. In order to determine whether the Navy's actions constitute a "superseding cause," *see* RESTATEMENT (SECOND) OF TORTS § 452(2),[2] a U.S. court would need to

[2] Plaintiffs below invoked the common law, without always specifying whether California or federal common law was intended. TEPCO assumed Plaintiffs' position *arguendo* and noted that there was no apparent material difference in California or federal common law concerning the relevant issues. (CR 55-1 at 10.) Nor would there be any apparent material difference if a U.S. court were to apply Japanese law to those issues. (*E.g.*, ER 601 (discussing Japanese law on causation and assumption of risk).) By assuming Plaintiffs' position *arguendo*, TEPCO does not intend to suggest any position on choice-of-law issues, and TEPCO's view is that, if this case proceeds, aspects of Plaintiffs' claims may well be governed by

evaluate the Navy's discretionary decisions concerning the deployment and protection of military personnel and assets. Any such inquiry is barred by the political question doctrine. *See infra* at 37-49.

Fourth, the long-established "firefighter's rule" bars suits, such as this one, by emergency responders for injuries that were within the known risks of the emergency to which they responded. The case law confirms that this rule extends to cases in which the emergency that summons the rescuers (here, the earthquake and tsunami) produces a *further* consequence (*e.g.*, the release of radiation) due to a defendant's alleged fault. Application of the rule is particularly appropriate here, where the Navy knew of the risk of radiation from the FNPP. *See infra* at 49-57.

The Order should be reversed, and the case should be dismissed.

JURISDICTIONAL STATEMENT

To the extent this case raises political questions, there is no Article III jurisdiction. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979-83 (9th Cir. 2007). The district court otherwise had jurisdiction under 28 U.S.C. § 1332(d)(2)(C), because (1) the matter in controversy exceeds $5,000,000, exclusive of interest and costs; and (2) TEPCO is a citizen of Japan with its principal place of business in Japan, and Plaintiffs are citizens of various U.S. States. (ER 802-14.)

This Court has jurisdiction under 28 U.S.C. § 1292(b). The district court's

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Japanese law. Because Plaintiffs' claims fail under the law Plaintiffs invoke, there is no need to address any issue concerning choice of law.

order certifying an appeal under § 1292(b) was entered on June 11, 2015. (ER 4.) TEPCO's petition for permission to appeal was timely filed in this Court on Monday, June 22, 2015. 28 U.S.C. § 1292(b); Fed. R. App. P. 5(a)(2), 26(a)(1)(C). This Court's order granting the petition, which serves as the notice of appeal under Fed. R. App. P. 5(d)(2), was filed on September 16, 2015. (ER 114.) This Court's jurisdiction extends to the entire Order under review, and not merely to the controlling questions of law identified by the district court. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996).

STATEMENT OF ISSUES

1. Whether the doctrines of international comity or *forum non conveniens* require that this action be dismissed in favor of a Japanese forum.

2. Whether, in adjudicating claims that a defendant's conduct allegedly created hazardous conditions that tortiously injured U.S. servicemembers who were sent into the area of the hazard during an overseas humanitarian operation, the Court would be required to evaluate the discretionary decisions of military commanders in a manner that raises a political question and thereby deprives the Court of subject matter jurisdiction.

3. Whether the common-law "firefighter's rule" applies to military servicemembers providing humanitarian aid to a foreign country after a natural disaster, and if so, whether that rule bars recovery for injuries to servicemembers

from hazardous conditions that were allegedly created by the combined effects of the natural disaster and a defendant's alleged tortious conduct or whether the rule is instead limited to risks inherent in the servicemembers' mission.

STATEMENT OF FACTS

I. Plaintiffs' Underlying Factual Allegations

On March 11, 2011, an unprecedented 9.0 earthquake and a resulting massive tsunami struck Japan, killing at least 15,000 people, leaving more than 100,000 homeless, and damaging hundreds of thousands of buildings. (ER 813; CR 55-1 at 8 n.6.) Among the structures damaged was TEPCO's FNPP. (ER 814-17.) Plaintiffs allege that "the first meltdown" at the FNPP "occurred 5 hours after the earthquake," and that "Fukushima Unit 1" allegedly "blew up" that same day, March 11. (ER 816, 833.)[3] The news media reported the risk of "possible radiation leaks" almost immediately (ER 699), and by March 12 the unfolding events at the FNPP were already being described in the *N.Y. Times* as "one of the worst nuclear accidents in over two decades." (ER 704.)

In response to the widespread devastation, the U.S. Navy ordered the *U.S.S.*

[3] TEPCO takes Plaintiffs' factual allegations as true *solely* for purposes of its motion to dismiss. For example, contrary to Plaintiffs' core allegations of radiation-related injuries, a Defense Department report commissioned by Congress concluded that "the radiation exposures to the sailors serving aboard the RONALD REAGAN were very low" and that "it is implausible that these low-level doses are the cause of the health effects reported[.]" (ER 206-07.) Likewise, contrary to what Plaintiffs allege, the U.S. Nuclear Regulatory Commission reported that the explosion occurred at Unit 1 on March 12, 2011, not March 11. (ER 230.)

Ronald Reagan and other vessels, which had been on their way to South Korea, to instead head towards Japan. (ER 505, 804.) Even before the *Reagan* carrier group arrived on March 12, 2011 (ER 816), the Navy was aware that the ships would need "to stay clear of the area of the potential plume" of radioactive emissions from the FNPP, and the *Reagan* was therefore instructed to stay at least "50 miles outside of the radius … of the plant[.]" (CR 59 at 2-3.) Plaintiffs nonetheless allege that, when it arrived on March 12, the *Reagan* was positioned "two miles off the coast." (ER 833.) As a nuclear aircraft carrier, the *Reagan* was equipped with "sensitive instruments" and "automatic detectors" (ER 832; CR 59 at 4), and Plaintiffs allege that on March 14, 2011, those instruments detected elevated "contamination in the air" and on "aircraft operating in the area," and that, as a result, the *Reagan*, the other Navy ships, and their aircraft were then "repositioned" away from the FNPP. (ER 832; *see also* ER 804 n.3.)

Plaintiffs allege that, notwithstanding the Navy's monitoring, the crews of the Navy ships, as well as other Navy personnel or dependents in the area, "were repeatedly exposed to ionizing radiation" from the FNPP. (ER 804.) As a consequence, Plaintiffs allegedly suffered severe injuries. (ER 846.)

II. Proceedings in the District Court

A. The District Court's Dismissal of the First Amended Complaint

Nine Plaintiffs initially filed this action (CR 1), but before TEPCO was

required to respond, a First Amended Complaint ("FAC") was filed on behalf of 49 Plaintiffs. (ER 865.) The FAC alleged that "TEPCO and the government of Japan conspired … to create an illusory impression that the extent of the radiation that had leaked from the site of the FNPP was at levels that would not pose a threat" to human health; that TEPCO "failed to alert public officials, including the U.S. Navy, the Plaintiffs, and the general public, to the danger of coming too close to the FNPP"; and that the Navy relied on TEPCO's misrepresentations in deciding where to position the ships. (ER 875-76, 879, 885, 889; *see also* ER 97.) Plaintiffs asserted claims for, *inter alia*, fraud, negligence, and strict liability. (ER 874-913.)

At the hearing on TEPCO's subsequent motion to dismiss, the district court stated that it tentatively agreed that the action was "nonjusticiable under the political question doctrine" (ER 107); that "Plaintiffs have failed to allege facts plausibly establishing causation" (ER 109); that "Plaintiffs' claims are likely barred by the so-called Firefighter's Rule" (ER 111); that each of Plaintiffs' claims failed on other grounds (ER 110-11); and that "this suit should be dismissed under the doctrines of *forum non conveniens* and international comity" (ER 111).

On November 26, 2013, the district court issued a written order dismissing the FAC solely on political question grounds. (ER 96.) Because Plaintiffs' claims would require them to show that, "but for TEPCO's allegedly wrongful conduct, the military would not have deployed personnel near the FNPP or would have

taken additional measures to protect service members from radiation exposure," the court held that adjudication of Plaintiffs' claims would entail an impermissible inquiry into "the propriety of the military's discretionary decisionmaking during 'Operation Tomodachi.'" (ER 101-02.) In addition, Plaintiffs' theory that the Japanese Government had conspired with TEPCO to deceive the U.S. would improperly intrude on "diplomacy and foreign relations." (ER 104.) The court granted leave to amend. (*Id*.)

B. The District Court's Initial Order Denying in Part TEPCO's Motion to Dismiss the Second Amended Complaint

On February 6, 2014, Plaintiffs filed their Second Amended Complaint ("SAC") on behalf of 83 Plaintiffs and, for the first time, styled the suit as a putative class action. (ER 800.) Plaintiffs dropped their fraud-based claims and instead asserted only claims rooted in negligence, strict liability, nuisance, and intentional infliction of emotional distress, all based on TEPCO's alleged tortious design, construction, and operation of the FNPP. (ER 832-60.)

Shortly before the hearing on TEPCO's renewed motion to dismiss, Plaintiffs sought leave to amend the complaint to add additional Plaintiffs and Defendants. (CR 65.) TEPCO opposed that motion on the ground that Plaintiffs' proposed amendment was futile. (CR 67.)

At the hearing on TEPCO's motion to dismiss, the district court announced its tentative ruling to again dismiss the case as nonjusticiable. (ER 92-95.) The

court explained that the "decisive consideration" was that "Plaintiffs were brought into the vicinity" of the FNPP "by the United States Navy, pursuant to the discretionary decisions of military commanders regarding deployment of personnel and assets in support of Operation Tomodachi." (ER 94.) If those discretionary decisions were undertaken "independently" of TEPCO, the court stated, then those decisions would "constitute[] an independent supervening cause of Plaintiffs' injuries," thereby breaking the chain of causation. (*Id*.) The court therefore tentatively concluded that, because it could not "assess the military's contribution to causation without confronting … nonjusticiable political questions" concerning the Navy's discretionary decisionmaking, the court "lacks jurisdiction over Plaintiffs' suit." (ER 94-95.) The court also stated that it again tentatively agreed that the SAC alternatively "should be dismissed on the merits and pursuant to the doctrine of *forum non conveniens* and international comity." (ER 95.)

Nonetheless, the district court on October 28, 2014 entered an order rejecting all of TEPCO's arguments based on the political question doctrine, the firefighter's rule, international comity, and *forum non conveniens*, and denying, in large part, TEPCO's motion to dismiss the SAC. (ER 58.) The court's order also granted leave for Plaintiffs to file a further amended complaint. (ER 89-90.)

TEPCO timely moved for reconsideration of the court's order. (CR 73.) The district court granted reconsideration and on June 11, 2015 entered the

amended Order that is the subject of this appeal. (ER 4.) By its terms, this Order supersedes, in its entirety, the court's prior order of October 28, 2014. (ER 5.)

C. The District Court's Amended Order Denying in Part TEPCO's Motion to Dismiss the Second Amended Complaint

1. Political Question Doctrine

The Order rejected TEPCO's argument that the issue of causation of injury would require a nonjusticiable inquiry into the reasonableness of "'the U.S. Navy's independent decisionmaking about where to locate the vessels and what protective measures to take'" in response to the known risk of radiation. (ER 13.) The court held that, because the "SAC alleges that the Navy's actions were reasonable" and "foreseeable," the court was not persuaded "that the U.S. military's decision-making could constitute a superseding cause of Plaintiffs' injuries." (ER 17-18.) As the court explained, the reasonableness of the Navy's decisionmaking "come[s] into play" only in evaluating the "potential affirmative defense" of superseding causation, and because the Navy's actions "appear to be reasonable in light of Plaintiffs' SAC" and were "foreseeable," that defense "is likely not viable." (ER 18-20.) Adjudication of this suit thus would only "ask the court to judge TEPCO's policies and actions, not those of the military or Executive Branch." (ER 20.)

2. International Comity and *Forum Non Conveniens*

The district court rejected TEPCO's argument that international comity warranted dismissal in favor of a Japanese forum. (ER 42-49.) As a threshold

matter, the court agreed that Japan was "an adequate alternative forum." (ER 34-35, 49.) In weighing the strength of the U.S.'s and Japan's interests in using a Japanese forum, the district court applied the multi-factor test articulated by this Court in *Mujica* and concluded that, in light of these factors, the "United States has a strong interest" in keeping the case in a U.S. court. (ER 49.)

The court declined to dismiss the case under *forum non conveniens*, concluding that "the balance of private and public interest factors suggests that it would be more convenient for the parties to litigate in a U.S. court." (ER 42.)

3. Firefighter's Rule

The district court also rejected TEPCO's argument that Plaintiffs' claims were barred by the "firefighter's rule." (ER 25-27.) The court held that it would not apply the firefighter's rule "outside of the context of domestic first responders such as firefighters or police officers" in the absence of precedent for doing so. (ER 27.) The court alternatively held that the rule was inapplicable here "based on the scope of the scene and the associated scope of risk." (*Id*.) The court reasoned that, in contrast to providing assistance in connection with "a fire or a car accident," the provision of "humanitarian aid to a country after a natural disaster" involves a wider "geographic area" and a less "confined" set of "anticipated risks." (*Id*.) Moreover, the court concluded, the risk of radiation exposure "was not a risk inherent in the Navy's mission of providing humanitarian assistance[.]" (*Id*.)

4. Remaining Grounds for Dismissal Raised by TEPCO

The court dismissed, on claim-specific grounds, Plaintiffs' claims for strict liability for design defect and for intentional infliction of emotional distress. (ER 29-31.) The court expressed "serious concerns" about Plaintiffs' negligence and failure-to-warn claims, but did not dismiss those claims. (ER 28 n.5.) The court denied TEPCO's remaining challenges to the SAC. (ER 22-25, 31-32.)

D. The District Court's Certification of This Interlocutory Appeal

In its amended Order, the district court granted TEPCO's request to certify an interlocutory appeal under 28 U.S.C. § 1292(b). (ER 51-53.) Specifically, the court held that the issues concerning the political question doctrine and the firefighter's rule raised "controlling questions of law" as to which there was a substantial ground for difference of opinion and that an immediate appeal would advance the ultimate termination of this litigation. (*Id*.). In its Petition for Review, TEPCO noted that an immediate appeal also would allow this Court to review the district court's refusal to dismiss the suit under international comity. (CR 113, Ex. 1 at 20.) This Court granted TEPCO's Petition. (ER 114.)

E. The District Court's Order Staying the Litigation Pending Appeal

Like its October 28, 2014 order, the district court's amended Order granted leave to file a Third Amended Complaint ("TAC"). (ER 49-50.) The Order noted that the TAC had been filed while the court was reconsidering the initial order. (ER 53; *see also* ER 286.) In the TAC, Plaintiffs dropped two of the prior 83

Plaintiffs and added 158 new Plaintiffs, bringing the total to 239. (ER 291-309.) Plaintiffs' TAC abandoned their claims for nuisance and failure-to-warn, leaving (as to TEPCO) only claims based on negligence and on strict liability for ultrahazardous activities. (ER 355-64, 368-78.) The TAC named General Electric ("GE"), Ebasco, Toshiba, and Hitachi as additional Defendants. (ER 311-12.)

While the district court was reconsidering its initial order, TEPCO filed a protective duplicative motion to dismiss the TAC, raising the same arguments as in its reconsideration motion. (CR 76.) GE was served and appeared, and it also filed a motion to dismiss the TAC. (CR 87.) (No other Defendant has appeared.) But after the court issued its Order and certified it for appeal, the court dismissed the motions directed to the TAC as "moot," "pending resolution of the interlocutory appeal." (ER 3.) The court then entered a complete stay. (ER 2.)

SUMMARY OF ARGUMENT

1. The district court abused its discretion in declining to dismiss the case under the doctrine of international comity. All of the relevant comity factors favor litigating this suit in Japan. *Mujica*, 771 F.3d at 604.

a. In particular, the foreign policy interests of both the U.S. and Japan strongly favor centralizing all claims arising from a nuclear incident in the courts of the country in which the relevant facility is located, particularly where (as here) the scope of the nuclear incident has triggered the need for the foreign

government's funding. This principle was recently codified in a multilateral treaty to which both the U.S. and Japan are parties, but the U.S. has made clear that, on this point, the treaty is declarative of *existing* U.S. foreign policy. Moreover, Japan's robust government-funded system for redressing claims arising from the FNPP accident gives it a very strong interest in asserting exclusive jurisdiction over all such claims. The district court committed multiple legal and factual errors in disregarding these weighty foreign policy interests. *See infra* at 18-28.

b. The remaining comity factors also favor Japan. The relevant conduct occurred in Japan; Japan has strong interests in regulating nuclear power plants on its soil; the primary defendant is a Japanese corporation; and the public policy interests of both countries favor of a Japanese forum. *See infra* at 28-33.

2. For similar reasons, the district court likewise abused its discretion in refusing to dismiss this case under *forum non conveniens*. Moreover, the district court contravened Ninth Circuit precedent by placing dispositive weight on the erroneous premise that Plaintiffs would need to physically travel to Japan in order to assert claims there. *See infra* at 33-37.

3. Alternatively, the district court should have dismissed the case as barred by the political question doctrine. Adjudication of the issue of *causation* in this case inevitably would entail an impermissible inquiry into the reasonableness of the military's discretionary decisionmaking with respect to the placement of

troops, and the measures taken to protect them. In a long line of cases, courts have generally deemed such decisions concerning deployment of military personnel to be nonjusticiable. *See infra* at 37-49.

4. The district court erred in holding that the common-law firefighter's rule did not bar Plaintiffs' claims. Under that rule, professional rescuers may not recover for certain injuries associated with emergencies to which they respond. *See Vasquez v. N. Cnty. Transit Dist.*, 292 F.3d 1049, 1056 (9th Cir. 2002) (police officers); *Maltman v. Sauer*, 530 P.2d 254, 257-58 (Wash. 1975) (Army servicemembers). The district court erred in holding that the rule did not apply in the context of military personnel on a humanitarian mission overseas or to the types of risks presented here. *See infra* at 49-57.

STANDARDS OF REVIEW

The district court's refusal to dismiss under international comity or *forum non conveniens* is reviewed for abuse of discretion. *Mujica*, 771 F.3d at 589 (comity); *Ravelo Monegro v. Rosa*, 211 F.3d 509, 511 (9th Cir. 2000) (*forum non conveniens*). A district court abuses its discretion, *inter alia*, "'if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact.'" *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011).

This Court reviews *de novo* the district court's resolution of legal issues, including the scope of the firefighter's rule. *Vasquez*, 292 F.3d at 1054.

The district court's application of the political question doctrine raises a jurisdictional issue and is reviewed *de novo*. *Corrie*, 503 F.3d at 979. When presented with a motion to dismiss directed to the face of the complaint, the Court applies the ordinary rules of pleading. *Doe v. Holy See*, 557 F.3d 1066, 1073-74 (9th Cir. 2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). The Court may properly consider materials that are subject to judicial notice. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

ARGUMENT

I. The District Court Erred in Declining to Dismiss the Case in Favor of a Japanese Forum Under the Doctrine of International Comity

"Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 543 n.27 (1987). The "strain of the doctrine" applicable here is "adjudicatory comity, which 'may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.'" *Mujica*, 771 F.3d at 599.[4] Application of adjudicatory comity requires a court to consider "'[1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the

[4] The other strain is "prescriptive comity," which addresses whether deference to a foreign state's interests warrants limiting the "extraterritorial reach of federal statutes." *Mujica*, 771 F.3d at 598. The district court did not address that aspect.

adequacy of the alternative forum.'" *Mujica*, 771 F.3d at 603 (quoting *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1232 (11th Cir. 2004)) (alterations added by *Mujica*). Here, the district court correctly concluded that Japan provides an adequate alternative forum. (ER 34, 39.) The district court, however, abused its discretion in concluding that the U.S. and Japan did *not* have a strong interest in having this dispute heard in a Japanese forum.

In evaluating whether U.S. interests favor the use of a Japanese forum, this Court considers a nonexclusive list of comity factors, including "(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the United States, and (5) any public policy interests." *Mujica*, 771 F.3d at 604. The same factors would be considered in assessing the strength of Japan's interests. *Id*. at 607. Here, consideration of these factors confirms that the interests of *both* countries overwhelmingly favor a Japanese forum.

A. The Foreign Policy Interests of Both the U.S. and Japan Strongly Favor a Japanese Forum

1. Longstanding Principles of Nuclear-Liability Policy Favor Centralizing All Claims for Nuclear Damage in the Courts of the Country Where the Facility Is Located

To address the unique concerns presented by the civilian use of nuclear power, several "basic principles of nuclear liability law … have been developed in the United States and other nuclear countries over the past half century." *See*

Treaties: Hearing Before the S. Comm. on Foreign Relations, S. HRG. 109-324, 109th Cong. 22 (2005) (statement of James McRae, Asst. Gen. Counsel, Dep't of Energy, concerning the Convention on Supplementary Compensation for Nuclear Damage) ("CSC Hearing") (reprinted at ER 151, 176). "These principles include: (1) making operators of nuclear facilities exclusively liable for nuclear damage; (2) imposing strict liability and thereby eliminating protracted litigation over fault or negligence; (3) *consolidating all claims in a single forum* with the focus on expedited compensation of victims; and (4) prohibiting discrimination among victims on the basis of nationality, domicile, or residence." (ER 176, emphasis added.) Moreover, to ensure the availability of adequate funds for the prompt compensation of victims of a nuclear accident, special financial security arrangements are necessary, such as minimum insurance requirements coupled with public funding to address a major incident that exhausts available insurance. *See* Int'l Atomic Energy Agency, HANDBOOK ON NUCLEAR LAW 114 (2003) (http://www-pub.iaea.org/MTCD/Publications/PDF/Pub1160_web.pdf).

The exclusive-jurisdiction principle ensures that the comprehensive financial-liability regime established by a country to provide fair and prompt redress for nuclear damage claims would not be undermined by forum shopping, legal uncertainty, or improper competition among claimants. *See id*. at 115-16. The principle is an essential corollary of having a *government-funded* backstop that

will pay claims in the event of a significant nuclear accident that exceeds the available insurance: no government could reasonably be expected to provide such a backstop absent an expectation that all claims will be fairly and consistently treated according to identical standards and procedures established in that country.

This longstanding principle was recently codified by the U.S. in the Convention on Supplementary Compensation for Nuclear Damage ("CSC"), which the U.S. ratified in 2006. *See* 152 Cong. Rec. S8901 (daily ed. Aug. 3, 2006). The CSC was accepted by Japan on January 15, 2015 (*see* https://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf), and the CSC entered into force on April 15, 2015. *See* Convention on Supplementary Compensation for Nuclear Damage, Sept. 12, 1997, art. XVIII(2), XX(1), S. TREATY DOC. NO. 107-21, at 20-21 (2002) (http://www.gpo.gov/fdsys/pkg/CDOC-107tdoc21/pdf/CDOC-107tdoc21.pdf). Article XIII, paragraph 1 of the CSC expressly states that "jurisdiction over actions concerning nuclear damage from a nuclear incident shall lie only with the courts of the Contracting Party within which the nuclear incident occurs." *See* CSC, art. XIII, ¶ 1, *id*. at 16; *see also* CSC, art. XIII, ¶ 3, *id*. (where nuclear incident occurs outside territory of contracting parties, jurisdiction lies only with the courts of the country where the installation is situated).

The U.S. Government has previously made clear that its adherence to this centralization principle is an aspect of U.S. foreign policy that exists apart from its

codification into particular international agreements. During the Senate hearings on the CSC, Executive Branch officials confirmed that the CSC's exclusive-jurisdiction provision was declaratory of *existing* U.S. policy. Specifically, in response to a question from the Chairman of the Foreign Relations Committee as to whether the CSC would "in effect limit the right of U.S. persons to bring suit against entities or companies in the United States courts or against U.S. companies for accidents overseas," the State Department's Senior Coordinator for Nuclear Safety, Warren Stern, testified:

> Mr. Chairman, the short answer is yes, the treaty could limit the rights of U.S. citizens to sue in U.S. courts. The general rule under the CSC is, vis-à-vis courts of other parties, only the courts of the parties within the incident, within the state in which the incident occurs, should have jurisdiction. *As a practical matter, in today's legal framework, where there is no CSC, we would expect that if a nuclear incident occurs overseas U.S. courts would assert jurisdiction over a claim only if they concluded that no adequate remedy exists in the court of the country where the accident occurred.*

CSC Hearing, S. HRG. 109-324, at 27 (ER 181) (emphasis added). That is, because longstanding U.S. policy supports adjudicating all claims from a nuclear incident "in a single forum," *id*. at 17 (ER 171), existing U.S. legal doctrines—such as comity and *forum non conveniens*—would *already* require such centralization, provided that the forum provides an adequate remedy. *Cf*. *Mujica*, 771 F.3d at 607-08 (international comity requires an adequate alternative forum).

Similarly, in discussing the "potential and the concern" that "there could be

multiple forums for lawsuits" arising from a nuclear incident, James Bennett McRae, the Assistant General Counsel for Civilian Nuclear Programs in the U.S. Department of Energy, testified that under long-established nuclear-liability policy, "the normal rule would be that the court in the country where an accident occurred should have jurisdiction." CSC Hearing, S. HRG. 109-324 at 25 (ER 179); *see also id*. at 17 (ER 171). Thus, under existing law, "[t]hat is usually the case, even with U.S. courts," except where "there is the perception or the reality that there is not an adequate remedy in the country where the accident occurred." *Id*. at 25 (ER 179).

2. Japan's Comprehensive Efforts to Address the Consequences of the FNPP Accident Confirm Both the Applicability of This Claims-Centralization Policy and Japan's Very Strong Interest in Exclusive Jurisdiction

This nuclear-claims-centralization policy is fully applicable here, because Japan has a robust system in place to compensate victims of the FNPP accident and a strong interest in asserting exclusive jurisdiction over FNPP-related claims.

In 1961, Japan enacted the "Act on Compensation for Nuclear Damage" ("ACND") to provide a statutory cause of action to redress injuries from any nuclear accident. (ER 603, 657.) Under the ACND, the nuclear operator is strictly liable, meaning that a claimant need prove only causation and damages. (ER 595-96; ER 659, § 3(1).) Damages are not limited to physical injuries, but include "any damage caused by," *inter alia*, "the effects … of the radiation from nuclear fuel." (ER 660, § 2.) To enable the operator to cover "a possibly huge amount of

compensation" from a serious incident, the ACND sets certain insurance and indemnity requirements and provides that the Japanese Government shall give the operator "such aid as is required" if the available insurance and indemnity are exhausted. (ER 604-05; *see also* ER 664, § 16(1).)

Anticipating a flood of claims from the FNPP accident, particularly in light of the disruption caused by the mandatory evacuation of the surrounding area, the Japanese Government moved quickly to ensure adequate funding. In August 2011, Japan enacted the "NDF Act," which established what is now known as the "Nuclear Damage Liability and Decommissioning Facilitation Corporation" ("NDF"), which currently owns a majority of the voting rights of TEPCO's shares. (ER 638.) As contemplated by the ACND, the NDF Act established a mechanism for Japan to provide "Special Financial Assistance" to cover nuclear damage claims in excess of the available insurance and indemnity. (ER 678-85.) As of March 2014, TEPCO had received, through NDF, more than ¥3.6 trillion ($35 billion) in Special Financial Assistance from the Japanese Government, to be used only for compensation of claims resulting from the FNPP accident. (ER 678-79, 683-84; *see also* ER 638.) As of March 2014, NDF further received government bonds in the total amount of ¥5 trillion ($49 billion), and that amount was expected to increase to ¥9 trillion ($88 billion). (ER 638-39.)[5]

[5] As of January 22, 2016, TEPCO has received more than ¥5.7 trillion ($48 billion)

The Japanese Government and TEPCO also sought to ensure efficient resolution of claims. Claimants can and have brought suits against TEPCO in the Japanese courts. (ER 635.) An Alternative Dispute Resolution ("ADR") Center was also established, and it has received thousands of claims and disposed of most of them. (ER 632-35.) The ADR Center is available to anyone who allegedly suffered damage, even non-Japanese nationals and persons living outside Japan, and several such claims have been filed. (ER 635.) TEPCO also continues to handle an enormous number of claims submitted directly to the company. (ER 636-37.) The overwhelming majority of claims from individuals thus far have been for economic damages resulting from the evacuation and for "consolation damages" (pain and suffering). (ER 601, 636.) There have been very few claims for physical injury triggered by radiation exposure. (ER 636-37.)[6] As of January 2016, more than 2 million claims, totaling more than ¥2.9 trillion ($24 billion),

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in Special Financial Assistance. *See* http://www.tepco.co.jp/en/press/corp-com/release/2016/1266357_7763.html.

[6] International organizations have concluded that "[o]n the whole, the exposure of the Japanese population was low, or very low, leading to correspondingly low risks of health effects later in life." (CR 55-1 at 9 n.8.) This has been attributed to several factors, including the relatively gradual nature of the radiation releases from the FNPP, the effectiveness of the evacuation program, and the long latency period for many illnesses. *See*, *e.g.*, IAEA, THE FUKUSHIMA DAIICHI ACCIDENT, Technical Volume 1, Description and Context of the Accident, at 153-54 (2015) (http://www-pub.iaea.org/MTCD/Publications/PDF/AdditionalVolumes/P1710/Pub1710-TV1-Web.pdf); UNSCEAR, SOURCES, EFFECTS AND RISKS OF IONIZING RADIATION, Volume 1, at 6 (2013) (http://www.unscear.org/docs/reports/2013/13-85418_Report_2013_Annex_A.pdf).

have been paid to individuals. *See* http://www.tepco.co.jp/en/comp/images/jisseki-e.pdf. Several hundred thousand claims, totaling more than ¥2.7 trillion ($22 billion), have been paid to affected businesses. *Id*. Of further note, in 2013, the Japanese legislature extended the statute of limitations for FNPP-related nuclear damage claims in Japan from three years to ten years. (ER 573.)

Given Japan's ample system of compensation, the U.S.'s strong foreign policy interest in centralizing nuclear damage claims is fully applicable. *See supra* at 18-22. Indeed, that policy applies with particular force here, given that the claims have far exceeded the available insurance and indemnity amounts, the Japanese Government itself has provided tens of billions of dollars to pay claims, and the Japanese Diet has enacted legislation to establish a special entity (NDF) to exercise a controlling interest in TEPCO.

3. The District Court Erred in Disregarding This Strong Foreign Policy Interest in Favor of a Japanese Forum

The district court gave three reasons for concluding that U.S. foreign policy interests favored a U.S. forum. (ER 45-47.) All of them are flawed.

First, the district court held that "TEPCO does not provide any evidence that the Court's jurisdiction of this lawsuit would in any way harm U.S.-Japanese foreign relations." (ER 46.) There is no support for the district court's suggestion that a showing of *actual diplomatic friction* is required before international comity may be invoked. The question instead is whether continued adjudication of the

action in the U.S. would be "harmful to U.S. foreign *policy*" by directly conflicting with an identifiable "*foreign policy interest[]*" of the U.S. and the foreign country. *Mujica*, 771 F.3d at 606 (emphasis added); *see also Ungaro-Benages*, 379 F.3d at 1238 (comity analysis focuses on the strength of each country's interest "in using a foreign forum"). That standard is met when, as here, the lawsuit squarely contravenes a long-standing U.S. foreign-policy position concerning the subject matter of the litigation. *See*, *e.g.*, *Mujica*, 771 F.3d at 609-11 (foreign-policy interests weighed in favor of Colombian forum under international comity in light of conflict with U.S. foreign policy towards Colombia and risk of diplomatic friction); *Ungaro-Benages*, 379 F.3d at 1238-39 (dismissing World-War-II-related claims under international comity because adjudicating such claims in U.S. directly conflicted with U.S. and German foreign policy that such claims be resolved through a foundation established by bilateral agreement).

Moreover, the district court erred in suggesting that the Japanese Government had not "expressed interest in the location of this litigation." (ER 46-47.) TEPCO alerted the court both at the hearing on its motion for reconsideration and in a subsequently filed declaration that the Government of Japan *had* expressed an interest in the litigation to the State Department. (ER 116, 138.) Furthermore, the district court should have solicited the views of the U.S., as TEPCO requested. (CR 73-1 at 13.) *See Mujica*, 771 F.3d at 586, 610 (finding the

U.S.'s statement of its views, which the district court had requested, to be of significant assistance).

Second, the district court held that the CSC and the policy reflected in it were entitled to "minimal weight" because the CSC "ha[d] not yet been ratified." (ER 46-47.) This assertion is both wrong and irrelevant. The district court was informed at the hearing on TEPCO's motion for reconsideration that Japan had accepted the CSC and that it would enter into force on April 15, 2015. (ER 138.) In any event, it is irrelevant whether the CSC had entered into force or whether, by its own terms, it would require dismissal of this action.[7] What matters is that the CSC codifies and confirms a *pre-existing* foreign policy to centralize claims of nuclear damage. The district court itself recognized as much in its August 24, 2014 tentative ruling that it subsequently and inexplicably abandoned. As the court then explained, the CSC reflected "a strong, clearly articulated policy … favoring centralization of claims for nuclear damage in the courts of the nation where the nuclear incident occurred," and "[t]he United States' adherence to the [CSC] suggests that the United States has a strong interest in seeing claims arising from the FNPP incident adjudicated in Japan, even if that means that United States citizens are shunted to a foreign court system." (ER 113.)

[7] TEPCO's motion to dismiss Plaintiffs' SAC, and its motion to reconsider, did not have occasion to address whether the CSC, once it took effect, would by its own terms require dismissal. That issue was subsequently raised in GE's motion to dismiss (CR 87-1), but has not yet been addressed by the district court.

Third, the district court held that the CSC was irrelevant because "the supplemental remedy written into the treaty is not yet available to these Plaintiffs," namely, the requirements for "'substantial compensation, and … rules that allow victims to get compensation quickly and without litigating questions like fault or negligence.'" (ER 47, quoting CR 90-3 at 30.) This assertion is inapposite, because Japan already had (and has) in place the sort of "substantial compensation" remedies that allow for recovery based on strict liability, as the CSC contemplates. *See supra* at 22-25. Indeed, because the Japanese Government has provided ample funding by itself, it is irrelevant that the CSC's *international-level funding mechanism* is unavailable with respect to an event (such as the FNPP accident) that occurred before the treaty's entry into force.

The district court thus clearly erred in concluding that U.S. and Japanese foreign policy interests did not favor a Japanese forum.

B. The Remaining *Mujica* Factors Also Support Dismissal

1. Location of the Conduct

"Comity is most closely tied to the question of territoriality," so courts must "consider where the conduct in question took place." *Mujica*, 771 F.3d at 604-05. Here, as the district court acknowledged, "TEPCO's allegedly negligent actions took place in Japan." (ER 44.) The accident itself also took place in Japan. Moreover, taking Plaintiffs' allegations as true, they were in Japanese territorial

waters "two miles" offshore when they were allegedly exposed to radiation (ER 833)—meaning that, under Plaintiffs' allegations, that conduct also took place in Japan. Accordingly, this factor weighs strongly in favor of Japan.

2. Nationality of the Parties

This factor requires the Court to assess "whether any of the parties are United States citizens or nationals, and also whether they are citizens of the relevant state." *Mujica*, 771 F.3d at 605. The district court clearly erred in concluding that Plaintiffs' status as U.S. servicemembers alone outweighed the fact that all of the relevant conduct occurred in Japan and that the lead defendant is a Japanese corporation. (ER 43-44.) Because TEPCO is a Japanese corporation and the Plaintiffs are U.S. citizens, each nation has a legitimate interest in adjudicating the case based on the citizenship of the parties and this neutral factor cannot outweigh the foreign locus of the conduct at issue and the strong foreign policy interests favoring Japan. *Ungaro-Benages*, 379 F.3d at 1240 (dismissing claims of U.S. citizen plaintiff under international comity); *Mujica*, 771 F.3d at 609, 615 (dismissing claims against U.S. corporations under international comity).

In reaching a contrary conclusion, the district court stated that "TEPCO is a large corporation with a significant physical presence in the United States and is registered as a foreign corporation in California." (ER 44.) These assertions are entirely unsupported by the record. As Plaintiffs acknowledged, TEPCO, although

once nominally registered in California, surrendered that status many years ago. (ER 437.) TEPCO has no employees permanently based in California, and as of 2014 had only one employee temporarily in the state at a research facility. (ER 643.) Although TEPCO has a small office in Washington, D.C., the record contains no evidence concerning that office, much less evidence establishing that it constitutes a "significant physical presence in the United States." (ER 44.)

The district court also erred in giving weight to the contention that Plaintiffs have "illnesses that might prohibit international travel." (ER 44.) A similar argument was raised by the *Mujica* plaintiffs, who claimed that they could not pursue their claims in Colombia for fear of their physical safety. 771 F.3d at 612-13. This had no impact on the comity analysis, this Court held, because Plaintiffs had "'not shown that their physical presence in [Colombia] is required to pursue the civil action.'" *Id.* at 614 (quoting *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 327 (9th Cir. 1996) (further internal quotation marks omitted)). Similarly, Plaintiffs do not have to be physically present in Japan to assert claims there. (ER 610 (declaration of Japanese law expert) (because parties appear through counsel, "the plaintiff's role as the party does not require him or her to appear in person"); ER 613-15 (describing available measures for taking party testimony abroad "when it is difficult financially or otherwise to travel to Japan").)

3. Nature of the conduct

Under this factor, "[t]he closer the connection between the conduct and core prerogatives of the sovereign, the stronger that sovereign's interest." *Mujica*, 771 F.3d at 606. Thus, courts should consider "whether the action is civil or criminal; whether it sounds in tort, contract, or property; and whether the conduct is a regulatory violation or is a violation of international norms against torture, war crimes, or slavery." *Id.* *Mujica* also cited the factors considered in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976), namely "'the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, ... and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.'" 771 F.3d at 606.

The conduct at issue here, concerning the operation and regulation of a Japanese nuclear power plant, is strongly connected to the core prerogatives of Japan, which has set up substantial systems to regulate that activity and to address any harms caused by it. *See supra* at 22-25. The action is civil, not criminal, and Plaintiffs do not allege any violations of international norms. The relative significance of effects was far greater in Japan than anywhere else, a fact that the district court expressly acknowledged. (ER 45.) There was certainly no "explicit purpose to harm or affect American commerce," and none of Plaintiffs' allegations

pertain to any conduct by TEPCO within the U.S. *Mujica*, 771 F.3d at 606. This factor also weighs strongly in favor of a Japanese forum.

The district court plainly erred in holding that Japan's substantial interests were supposedly counterbalanced by the U.S.'s more general interest "in the safe operation of nuclear power plants around the world, especially when they endanger U.S. citizens." (ER 45.) This is merely another way of saying that Plaintiffs' U.S. nationality should outweigh the other weighty considerations that overwhelmingly favor a Japanese forum. As explained above, that is wrong. *See supra* at 29.

4. Public Policy

Under this factor, courts must weigh the "public policy interests" of both countries. *Mujica*, 771 F.3d at 607. With respect to the U.S., this factor focuses on whether extending comity to a Japanese forum "'would be *contrary* to the policies … of the United States.'" *Id.* (emphasis added). As such, this factor must be applied "cautiously," and it weighs against a foreign forum only when extending comity would *violate* "strongly-held state or federal public policy." *Id.*

Instead of determining whether comity would violate a strongly-held state or federal policy, the district court simply summarized various arguments made by each side, pronounced those arguments to be not "especially compelling," and declared this factor to be "neutral." (ER 48.) Under the proper analysis set forth in *Mujica*, this factor clearly weighs in favor of Japan. Dismissing this case in

favor of a Japanese forum would not be "*contrary* to the policies … of the United States," *Mujica*, 771 F.3d at 607 (emphasis added), given the U.S.'s longstanding policy favoring centralization of nuclear damages claims in the country where the facility is located. Indeed, *maintaining* jurisdiction in this case would directly conflict with U.S. policy. Moreover, maintaining jurisdiction would plainly contravene Japan's interest in "regulating conduct that occurs within [its] borders, involves [its] nationals, [and] impacts [its] public and foreign policies." *Id*.

* * *

Given its multiple legal and factual errors, the district court abused its discretion in holding that international comity does not favor dismissal of this suit.

II. The District Court Abused its Discretion in Refusing to Dismiss Under *Forum Non Conveniens*

A dismissal under *forum non conveniens* is proper if (1) there is "an adequate alternative forum" and (2) "the balance of private and public interest factors favors dismissal." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). The district court correctly held that Japan is an adequate forum, *see supra* at 18, but it abused its discretion in concluding that the private and public interest factors weigh against dismissal. (ER 35-42.) Here, the balance of factors weighs very heavily in favor of Japan and rebuts the presumption of convenience that arises when, as here, a U.S. plaintiff sues in his or her home forum. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1234 (9th Cir. 2011).

A. The Relevant Private Interest Factors Heavily Favor Dismissal

The relevant private interest factors include "(1) the residence of the parties and witnesses, (2) the forum's convenience to the litigants, (3) access to physical evidence and other sources of proof, (4) whether unwilling witnesses can be compelled to testify, (5) the cost of bringing witnesses to trial, (6) the enforceability of the judgment, [and] (7) any practical problems or other factors that contribute to an efficient resolution." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1180 (9th Cir. 2006). Here, the district court found that every private interest factor *except one* is either neutral or favored dismissal. That one factor—convenience to the litigants—"strongly favors retaining jurisdiction in this forum," the court held, in light of Plaintiffs' "alleged medical conditions and ability to travel." (ER 37.) But as explained earlier, that conclusion overlooks that Plaintiffs *would not need to travel to Japan* to file claims there or to offer testimony that would be admissible in court. *See supra* at 30.

With that weight correctly removed from the scale, the private interest factors overwhelmingly favor dismissal. The district court found that four factors—residence of the parties and witnesses, ability to access documents, enforceability of the judgment, and other practical considerations—are neutral (ER 36, 38, 40) and that two factors—ability to compel unwilling witnesses and cost of bringing witnesses to trial—favor dismissal (ER 39-40). In particular, the district

court noted that a U.S. court would have no power to compel the testimony of critical third-party witnesses located in Japan, whereas a Japanese court *would* have that authority. (ER 38-41.) Moreover, the costs associated with obtaining testimony of TEPCO employees or any willing third-party witnesses would be much higher in a U.S. forum: Plaintiffs would not need to travel to Japan to testify in a proceeding there, but in a proceeding in San Diego "any willing witnesses in Japan would almost certainly have to travel to the U.S. for trial or provide pre-trial depositions through the expensive and cumbersome process specified by Japanese law." (ER 39-40.)

B. The Relevant Public Interest Factors Heavily Favor Dismissal

If "the balance of *private* interest factors favor[s] dismissal," that alone may be sufficient to warrant dismissal. *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 376 (5th Cir. 1992) (emphasis added). But here, the *public* interest factors[8] also strongly favor dismissal, and the district court abused its discretion in holding otherwise. *Lueck*, 236 F.3d at 1147.

The predominant public interest factor here is Japan's strong interest in asserting exclusive jurisdiction over all claims for damages arising from the FNPP incident. *See supra* at 22-25. No interest of the Southern District of California

[8] These factors include: "(1) local interest of lawsuit; (2) the court's familiarity with governing law; (3) burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum." *Lueck*, 236 F.3d at 1147.

sufficiently counterbalances Japan's very powerful interest especially where (as here), the U.S. has the *same* interest in promoting centralization of nuclear damages claims in the country where a nuclear facility is located. *See supra* at 18-22. The district court stated that the U.S. has an interest in ensuring "that members of the Armed Forces are compensated for their service" (ER 41), but that venue-neutral interest would be equally addressed by having Plaintiffs' claims adjudicated in Japan. Given Japan's ample system of compensation, Plaintiffs' claims would be fully redressed in Japan if they are meritorious. *See supra* at 22-25. The district court abused its discretion in concluding that this factor favored retaining jurisdiction.

The other pertinent public interest factors all favor dismissal. The district court acknowledged that retaining jurisdiction "would add to an already busy docket and would require time and resources to be dedicated to the matter" (ER 42), but it gave no weight to those considerations because a suit in Japan would also "impose significant costs" on Japanese courts. But given Japan's very strong connection to the dispute and its well-funded system of compensation, any costs associated with resolving Plaintiffs' claims in Japan would not arise from "a dispute unrelated to [the] forum." *Lueck*, 236 F.3d at 1147. And given that neither side had briefed what law would apply to the case as a whole, *see* note 2 *supra* (noting that, for purposes of the issues in the motion to dismiss, there was no

conflict warranting a decision as to choice of law), the district court had no basis to speculate that some form of U.S. law would apply to the case as a whole. (ER 42.)

Because Japan is an adequate alternate forum, and the public interest and private interest factors both tilt sharply in favor of dismissal, the district court abused its discretion by declining to dismiss under *forum non conveniens*.

III. The Political Question Doctrine Bars Adjudication of Plaintiffs' Claims

Alternatively, the Order should be reversed, and the case should be dismissed, under the political question doctrine.

A. Application of the *Baker* Tests Confirms That Plaintiffs' Claims Raise Nonjusticiable Political Questions

The Supreme Court has identified six alternative tests under which a case raises a nonjusticiable political question:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; *or* [2] a lack of judicially discoverable and manageable standards for resolving it; *or* [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; *or* [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; *or* [5] an unusual need for unquestioning adherence to a political decision already made; *or* [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Baker v. Carr, 369 U.S. 186, 217 (1962) (emphasis added). If any "one of these formulations is inextricable from the case at bar," the court should dismiss the suit as nonjusticiable. *Id.*; *Alperin v. Vatican Bank*, 410 F.3d 532, 547 (9th Cir. 2005) ("[A]ny single [*Baker*] test can be dispositive"). Determining whether a case

involves a nonjusticiable political question requires a "discriminating inquiry into the precise facts and posture of the particular case," *Baker*, 369 U.S. at 217, and an evaluation of "the particular question posed." *Id*. at 211-12. Here, the requisite discriminating inquiry confirms that adjudication of this case would inevitably require an improper review of the U.S. Navy's discretionary decisionmaking, thereby raising a political question under the first, second, third, and fourth *Baker* tests.

In particular, *superseding causation* is unavoidably a key issue in light of Plaintiffs' distinctive role as military servicemembers. Unlike Japanese civilians who were already residing in the area of the FNPP, Plaintiffs allegedly were exposed to radiation *only* because the U.S. Navy made the decision to *bring* Plaintiffs into the area and to deploy them where it did and for the length of time that it did, and because (if Plaintiffs' theory is to be believed) the Navy presumably failed to take sufficient measures to *protect* its personnel from the known danger of radiation exposure. (ER 804, 833-34, 842, 847-48.) *See supra* at 6-7. Thus, to adjudicate this case, the courts would need to determine whether the Navy's "failure … to prevent such harm is a superseding cause." RESTATEMENT (SECOND) TORTS, § 452(2). Given the Navy's control over servicemembers, its obligation to ensure their well-being, and its sophisticated capabilities, the Navy had a responsibility to ensure that Plaintiffs were not injured by the already damaged

FNPP, and any *negligent* failure to discharge that duty would be a superseding cause. *Id*., cmt. *f*. Accordingly, adjudication of this case would require a judicial evaluation of the *reasonableness* of the Navy's actions.

That inquiry, however, raises a political question. In a long line of cases, courts have generally deemed such decisions concerning the deployment of military personnel and assets to be unreviewable exercises of executive discretion, in which military officers weigh the risks of a particular mission in the context of the broader foreign-policy and humanitarian objectives of that mission. *See*, *e.g.*, *Taylor v. Kellogg, Brown & Root Servs., Inc.*, 658 F.3d 402, 411-12 (4th Cir. 2011) (alleged negligence in construction of wiring box at military base camp raised nonjusticiable questions because need to adjudicate causal contribution of military decisions "would require the judiciary to question 'actual, sensitive judgments made by the military'"); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1286 (11th Cir. 2009) (claim that private contractor caused servicemember's death raised nonjusticiable issues where resolution of causation issue would require courts to review whether "military judgments and policies … were either supervening or concurrent causes of the accident"); *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 474 (3d Cir. 2013) (to the extent defense was available under applicable law, issue of military's contributory fault in causing death of plaintiff's decedent raised nonjusticiable political question); *see also*

Corrie, 503 F.3d at 983 (decision to "grant military or other aid to a foreign nation" is a political question); *Bancoult v. McNamara*, 445 F.3d 427, 436-37 (D.C. Cir. 2006) ("specific tactical measures" taken to construct a military base overseas were nonreviewable); *Aktepe v. United States*, 105 F.3d 1400, 1403-04 (11th Cir. 1997) (military's conduct of training exercise with foreign ally raised nonjusticiable political questions); *cf. Lane v. Halliburton*, 529 F.3d 548, 561, 567-68 (5th Cir. 2008) (plaintiffs' claims against a military contractor were justiciable only because there was a legally viable theory of causation that did *not* require consideration of military's causal role, but cautioning that, "[i]f we must examine the Army's contribution to causation, 'political question' will loom large").

Under this precedent, adjudication of Plaintiffs' claims would require the courts to intrude into a discretionary matter constitutionally delegated to the political branches, and those claims are therefore nonjusticiable under the first *Baker* test. *Baker*, 369 U.S. at 217; *see also Carmichael*, 572 F.3d at 1288. Moreover, absent "an initial policy determination of a kind clearly for nonjudicial discretion"—*i.e.*, absent a *statutory* legal framework created by the federal political branches that would supply judicially enforceable standards for evaluating such military decisions—there are no "judicially discoverable and manageable" standards for adjudicating this suit. *Baker*, 369 U.S. at 217 (second and third *Baker* tests); *Taylor*, 658 F.3d at 412 & n.13; *Carmichael*, 572 F.3d at 1292; *cf.*

Koohi v. United States, 976 F.2d 1328, 1331-32 (9th Cir. 1992) (no political question where standards applicable under Federal Tort Claims Act allowed court to conclude that Act did *not* authorize suit concerning military strike against civilian airliner). And adjudication of Plaintiffs' claims would entail a "lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217 (fourth *Baker* test); *Taylor*, 658 F.3d at 412 & n.13. The political question doctrine bars this case.

B. The District Court's Contrary Conclusion Rests on Multiple Legal Errors

The district court agreed that "deployment decisions regarding military personnel operating in a disaster zone are essentially professional military judgments" (ER 19) and that, if adjudication of Plaintiffs' claims *would* require the court "to evaluate the discretionary actions of the U.S. military" in assessing proximate causation, then those claims would be barred by the political question doctrine. (ER 13.) Indeed, the district court had dismissed the First Amended Complaint on such grounds. (ER 102.) Nonetheless, the court wrongly held that Plaintiffs' amended complaint avoided any political question. (ER 13-22.)

1. The District Court Wrongly Evaluated the Political Question Doctrine Based Solely on Plaintiffs' View of the Case, Without Considering Defenses

The district court erred at the outset by holding that the political question doctrine is inapplicable if the nonjusticiable issue relates only to an affirmative

defense. Specifically, the court held that no political question was presented here because the "Navy's choices" about deployment and protection of troops were not the "crux of the case," but "only incidentally come into play as a potential *affirmative defense* to Plaintiffs' theory of negligence." (ER 19-20, emphasis added.) That is, because "*Plaintiffs* ask the court to judge TEPCO's policies and actions, not those of the military or Executive branch," the court concluded that adjudication of the specific issues raised by Plaintiffs would not require the court to review "whether the decision to deploy or the actions taken during the deployment were reasonable." (*Id*., emphasis added.) Under Plaintiffs' view of the case, the district court reasoned, all that mattered was whether Plaintiffs were exposed to radiation released from the FNPP, and the court could decide that discrete issue by "hear[ing] evidence with respect to where certain ships were located and what protective measures were taken without passing judgment on the executive's decisions." (ER 21.) The district court's analysis is contrary to well-settled law.

Under *Baker*, the question of justiciability turns on whether a political question "is inextricable from the *case* at bar," and not merely from the subset of issues that the plaintiff would like to raise. *Baker*, 369 U.S. at 217 (emphasis added). In our adversary system, a plaintiff's claims cannot be adjudicated without also resolving the defendant's responses, and application of the political question

doctrine therefore necessarily requires courts to undertake a "discriminating inquiry into the facts and legal theories making up the plaintiff's claims *as well as the defendant's defenses*." *Harris*, 724 F.3d at 466 (emphasis added). A court "must look beyond the complaint, considering how the Plaintiffs might prove their claims and how [the defendant] would defend." *Lane*, 529 F.3d at 565; *see also Carmichael*, 572 F.3d at 1286 (suit was nonjusticiable in light of defendant's inevitable defense "that unsound military judgments and policies … were either supervening or concurrent causes of the accident"); *Taylor*, 658 F.3d at 411-12 (case was nonjusticiable because defendant's contributory negligence defense would "invariably require the Court to decide" whether the military "made a reasonable decision" with respect to the management of back-up power supply at Camp Fallujah in Iraq). The district court thus clearly erred in holding that the application of the political question doctrine could be based solely on Plaintiffs' view of the case.

The district court committed a related legal error in concluding that, because Plaintiffs had *alleged* that "the Navy's actions were reasonable," that rendered any defense of superseding causation "likely not viable." (ER 18, 20.) Because the Navy's actions would have to be *found* to be reasonable in order to reject a defense of superseding causation, litigating this case would require a nonjusticiable inquiry into whether the Navy's discretionary judgments *were* reasonable.

2. The District Court's Analysis Rested on a Legally Flawed Concept of Superseding Causation

The district court's political question analysis was erroneous for the further reason that it was based on a flawed understanding of superseding causation. The district court held that, because Plaintiffs had alleged that it was "*foreseeable*" that "foreign military and aid-workers" would arrive to provide humanitarian assistance and would therefore "would be among those in the vicinity" of the FNPP, it "would be improper" to use the doctrine of superseding causation to "supplant TEPCO's negligence." (ER 17-18.) This analysis rests on multiple legal errors.

The court's analysis was faulty, because it failed to consider whether the specific actions of the Navy *that are alleged by Plaintiffs to have caused injury* were foreseeable and reasonable. Plaintiffs alleged that they were placed "*two miles* off the coast"—not the minimum "100 nautical miles" that the Navy has publicly reported (*see* ER 217-18)—and that the Navy, without undertaking an "independent inspection or evaluation of the area," placed them this close to the FNPP *after* one of the units at the FNPP "blew up." (ER 833, 847-48, emphasis added.) These allegations, which form a critical part of Plaintiffs' theory of injury, posit alleged behavior by the Navy that (if true) would be neither foreseeable nor reasonable. Given that the risk of radiation was known almost immediately and before the Navy's arrival, *see supra* at 6, and given Plaintiffs' concession that the *Reagan*—which is a *nuclear* aircraft carrier—had highly sensitive radiation

detection equipment (ER 832), it would *not* be foreseeable that the Navy would place the *Reagan* "two miles" from the FNPP into an alleged area of very high radiation exposure and would do so without taking appropriate precautions. (ER 804 n.3; ER 833.) Such behavior would be a superseding cause even under the district court's erroneous, foreseeability-based view.

The district court's contrary conclusion ignored Plaintiffs' actual allegations and instead made the irrelevant observation that it was "foreseeable that foreign military and aid-workers would be among those in the vicinity" after the earthquake. (ER 19.) The question is not whether it was foreseeable that the Navy would be in the "vicinity"; the question is whether it was foreseeable that the Navy would choose the too-close deployment location that Plaintiffs allege resulted in substantial radiation exposure. The district court speculated that it is not "mutually exclusive that the Navy acted reasonably and that harm also resulted" (ER 19), but this supposition presumes a hypothetical set of facts that has not been pleaded and, TEPCO submits, cannot plausibly be pleaded. *Twombly*, 550 U.S. at 555.

The district court's superseding causation analysis fails for the further reason that the court erroneously placed controlling weight on the issue of foreseeability in the first place. In the typical case, the foreseeability of another person's potential negligence will usually be sufficient to preclude the application of the superseding cause doctrine. *See*, *e.g.*, *USAir Inc. v. U.S. Dep't of Navy*, 14 F.3d

1410, 1413 (9th Cir. 1994) (cited at ER 18) (foreseeable negligence of flight attendant in opening overhead bin was not a superseding cause that absolved Navy employee's negligence in manner of placing briefcase in bin). But this is not a typical case. The doctrine of superseding cause comprises multiple rules set forth in "sections 442-453 of the Restatement of Torts," *see id*., and not all of these rules place dispositive weight on foreseeability. RESTATEMENT (SECOND) OF TORTS, § 442 (listing foreseeability as only one of several factors); *see also Galen v. County of Los Angeles*, 477 F.3d 652, 663 (9th Cir. 2007) (without discussing the (obvious) foreseeability, Court held that judicial officer's "independent judgment" is a "superseding cause that breaks the chain of causation linking law enforcement personnel to the officer's decision").

As stated earlier, the pertinent rule is set forth in Restatement § 452(2), which addresses situations in which, "because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person." RESTATEMENT, § 452(2). The commentary notes that there is no "comprehensive rule" as to when the "duty to prevent harm to another" will constitute a superseding cause. *Id.*, cmt. f. Rather, a court must consider various factors, including "the degree of danger and the magnitude of the risk of harm, the character and position of the third person who is to take the responsibility, his knowledge of the danger and the likelihood

that he will or will not exercise proper care, his relation to the plaintiff or to the defendant, the lapse of time, and perhaps other considerations." *Id*. Consideration of these factors confirms that, if Plaintiffs were injured by high levels of radiation, then the Navy's alleged "failure … to prevent" that harm to Plaintiffs would be a superseding cause, regardless of foreseeability. RESTATEMENT, § 452(2).

Given its considerable operational capabilities, the Navy's "character and position" clearly enabled it to "take the responsibility" to prevent Plaintiffs from being exposed to injurious radiation, and it is reasonable to expect that the Navy ordinarily would "exercise proper care" in such a matter. RESTATEMENT, § 452(2), cmt. f. The Navy exercised exclusive control over the placement of the vessels, and had available "sensitive instruments" for "detect[ing] contamination." (ER 832.) Indeed, the district court agreed that the Navy would be expected to exercise "proper care over the servicemembers," but it failed to recognize that this factor weighs in *favor* of a superseding duty by the Navy. (ER 19.)

The Navy's "relation" to Plaintiffs also strongly confirms its superseding duty. RESTATEMENT, § 452(2), cmt. f. The Navy exercised complete control over Plaintiffs' locations, and it alone was in a position to implement any protective measures. (ER 833.) The military's substantial operational control gives rise to an obligation to protect servicemembers' physical well-being. *See*, *e.g.*, *O'Neil v. Secretary of Navy*, 76 F. Supp. 2d 641, 645 (W.D. Pa. 1999) (upholding mandatory

anthrax vaccination, because "defendants have an overriding responsibility to protect the health and safety of American military personnel").

The Navy's superseding duty to avoid radiation exposure to Plaintiffs is further supported by the fact that the "lapse of time" between the tsunami and the commencement of Operation Tomodachi was sufficient to ensure that the Navy had, before it acted, actual "knowledge of the danger" of radiation exposure. RESTATEMENT § 452(2), cmt. f. Judicially noticeable materials confirm that the risk of radiation from the FNPP was widely publicized *before* the *Reagan* arrived in the area. *See supra* at 6. *See also Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010) (court may take judicial notice of when matters were publicized). The district court wrongly discounted this factor because it concluded that the Navy was likely unaware of the precise "magnitude of danger." (ER 19.) This conclusion disregards Plaintiffs' own allegation that the Navy *was* monitoring radiation levels. (ER 804 n.3.) Moreover, as the court recognized, the very source of the danger—a "nuclear power plant"—meant that, after a disaster of this scope, "the degree of danger and the magnitude of the risk of harm were great." (ER 19.) The Navy had ample information to know that it would need to take proactive measures to protect anyone it sent into the vicinity.

In view of these factors, the Navy would have had a duty to take steps to prevent harm to Plaintiffs, and its alleged negligent failure to prevent such harm

would be a superseding cause under § 452(2). Indeed, the district court's analysis conflicts with decisions that have applied § 452(2) to much less compelling circumstances. *See Schreffler v. Birdsboro Corp.*, 490 F.2d 1148, 1154 (3d Cir. 1974) (third party's role as plaintiff's employer, as well as its control over plaintiff's actions, made the third party's conduct a superseding cause of plaintiff's injuries); *see also Siggers v. Barlow*, 906 F.2d 241, 245-47 (6th Cir. 1990) (defendant physician's negligence in misdiagnosing patient was superseded by failure of other medical personnel to fulfill their responsibility of notifying patient after the initial error); *cf. Straley v. Kimberly*, 687 N.E.2d 360, 365 (Ind. Ct. App. 1997) (third party gas company's decision to keep plaintiffs, its employees, in area of leaking gas line was a superseding cause).

Because resolution of the issue of superseding cause would require a nonjusticiable inquiry into the Navy's decisionmaking, this case is barred by the political question doctrine.

IV. The Firefighter's Rule Bars Plaintiffs' Claims

The district court further erred by failing to dismiss Plaintiffs' claims under the well-settled common-law "firefighter's rule." (ER 25-27.) Under that rule, a professional rescuer generally may not recover for injuries associated with an emergency situation to which he or she has responded. *See*, *e.g.*, *Vasquez*, 292

F.3d at 1054-55; *Neighbarger v. Irwin Industries, Inc.*, 882 P.2d 347, 352-53 (Cal. 1994); *White v. Edmond*, 971 F.2d 681, 682-83 (11th Cir. 1992).

As the complaint acknowledges, Plaintiffs were acting as "rescuers" in "carrying out their assigned duties and humanitarian mission." (ER 806, 820, 825-26.) In that capacity, Plaintiffs were exposed to the expected consequences of the earthquake and tsunami, which included a wide range of anticipated risks—including the risk of exposure to harmful substances from damaged facilities. Consequently, all of their claims fail as a matter of law. The district court's contrary conclusion rests on several legal errors.

A. The District Court Erred in Holding That the Firefighter's Rule Applies Only to *Domestic* First Responders

The district court erred in holding that, because there was "no authority extending" the firefighter's rule "outside of the context of domestic first responders such as firefighters or police officers," the rule did not apply here. (ER 27.) The absence of any directly applicable precedent addressing whether the firefighter's rule applies to overseas emergency missions reflects, not a limitation on the rule, but the sheer novelty of Plaintiffs' claims. Under these circumstances, the proper analysis is to consider whether the rule's rationale applies equally to military personnel and to the international context. The answer is clearly yes.

"The principal reason for the firefighter's rule is assumption of the risk, namely, that one who has knowingly and voluntarily confronted a hazard cannot

recover for injuries sustained thereby." *Vasquez*, 292 F.3d at 1055 (internal quotation marks omitted). The rule reflects a "public policy decision" that, by employing specialized personnel for the *express* purpose of responding to dangerous situations, the government should "'meet the public's obligation to its officers collectively through tax-supported compensation rather than through individual tort recoveries.'" *Calatayud v. California*, 959 P.2d 360, 363 (Cal. 1988). That is, a government that knowingly sends first responders into harm's way should itself compensate its employees for resulting injuries (as the U.S. would do here under programs administered by the Defense and Veterans Affairs Departments). *See*, *e.g.*, *In re Air Crash Disaster at Detroit Metro. Airport*, 737 F. Supp. 409, 411 (E.D. Mich. 1989). The rule also serves the policy of "efficient judicial administration" by eliminating litigation over "[c]omplex determinations of causation" in favor of public "cost-spreading mechanism[s] 'allow[ing] the public to insure against the injuries that its officers will inevitably sustain in the performance of their duties.'" *Calatayud*, 959 P.2d at 363; *see also Young v. Sherwin-Williams Co., Inc.*, 569 A.2d 1173, 1175 (D.C. 1990) ("The professional rescuer doctrine also seeks to avoid a potential proliferation of lawsuits, … and thus represents a policy decision that the tort system is an inappropriate mechanism for compensating professional rescuers injured in the course of their inherently risky employment.").

These bases for the rule are equally applicable to the full range of public officers who provide emergency services, and it is therefore unsurprising that the rule has been applied to a wide variety of publicly employed first responders, including military personnel. *See Maltman v. Sauer*, 530 P.2d 254, 257-58 (Wash. 1975) (applying rule to Army servicemembers injured while en route to providing helicopter airlift to person injured in traffic accident). Indeed, precisely because its rationale extends to all such first responders whose job entails confronting dangers, many courts more accurately refer to the firefighter's rule as the "professional rescuer doctrine." *See*, *e.g.*, *Young*, 569 A.2d at 1175; *Maltman*, 530 P.2d at 257-58 (same); *see also Farnam v. California*, 101 Cal. Rptr. 2d 642, 645 (Cal. Ct. App. 2000) ("The appellation 'firefighter's rule' can be misleading because its application is not limited to situations involving fires or firefighting.").

Moreover, "the modern rationale for the doctrine"—which "is that a professional rescuer has assumed the risks of his or her employment and is compensated accordingly by the public, both in pay and in worker's compensation benefits in the event of injury"—applies equally regardless of whether the particular defendant is a taxpayer in the relevant jurisdiction. *Young*, 569 A.2d at 1175. Accordingly, the district court's refusal to apply the firefighter's rule "outside the domestic context" was incorrect.

B. The District Court Erred in Holding That Radiation Exposure Was Outside the Scope of the Risks Covered by the Rule

The district court also erred in holding that the firefighter's rule applies only to the "anticipated risks" that "are confined to th[e] fixed situation" of an incident in which the relevant "geographic area is limited." (ER 27.)

Where, as here, the specific risk at issue—radiation exposure—was known by the Navy (and the world at large) before Plaintiffs were deployed, *see supra* at 6, 48, there is no reason why that *actually anticipated risk* should be excluded from the rule. *See*, *e.g.*, *Rowland v. Shell Oil Co.*, 224 Cal. Rptr. 547, 549 (Cal. Ct. App. 1986) (rule applies to an incident's dangers "*which are known* or can reasonably be anticipated") (emphasis added). The district court suggested that the rule should be limited to risks that were "inherent in the Navy's mission" (ER 27), but once the risk of radiation was known, that risk *was* "inherent" in *this* mission.

Moreover, ample case authority supports the conclusion that the rule applies where (as here) professional rescuers respond to an event, and that event combines with another party's prior alleged tortious conduct to produce additional dangerous consequences that are known or can reasonably be anticipated. To be sure, many firefighter's rule cases involve the simpler situation in which a rescuer arrives to address a particular condition and is injured by that condition itself: a firefighter, for example, might be burned by the fire that he or she was called to extinguish. But the rule is broader and applies unless the condition that injures a rescuer is

"independent" from the condition to which he or she is responding. *Vasquez*, 292 F.3d at 1056 (finding genuine issue of fact as to whether the injury-producing separate design defect was "unrelated" to the mechanical failure that summoned transit police officers); *Rowland*, 224 Cal. Rptr. at 549-50 (rejecting as "artificial" an argument that negligent driving of chemical truck, which resulted in accident to which firefighters responded, was independent from ultrahazardous activity of handling chemicals). Thus, where, as here, the *same* event that draws the emergency responders (a fire, an accident, or an earthquake and tsunami) also causes, *in combination with another's alleged tortious conduct*, a further consequence that is within the range of the anticipated risks and that then injures the responders, the rule applies because such consequences are not "independent" from the emergency.

The Eleventh Circuit's analysis in *White v. Edmond*, 971 F.2d at 689, illustrates this principle. There, the firefighter's rule barred a firefighter's claim against Volvo for injuries that he suffered while responding to a house fire that caused the shock absorbers on a Volvo parked in the garage to explode. He brought a claim against Volvo based on the allegation that the shock absorbers were negligently designed, arguing that the firefighter's rule did not apply to that claim because "the explosion of the Volvo's shock absorbers was not the reason for his presence at the fire." *Id.* at 685. The court rejected that argument because

"[i]t would require a perverse logic to apply the Fireman's Rule to bar suit against the manufacturer whose negligently-designed product causes a fire, and at the same time allow suits for negligence against the makers of products that cause injury after being exposed to, or burnt in, a fire." *Id.* at 689. Such explosions were not always the result of a fire, but the "possibility of an unexpected explosion" was among the "'anticipated risks of firefighting.'" *Id.*[9]

Similar reasoning underlies the analysis in *Stapper v. GMI Holdings*, 86 Cal. Rptr. 2d 688 (Cal. Ct. App. 1999). There, the firefighter's rule did not bar the claims of a plaintiff who was trapped in a smoke-filled garage by a malfunctioning door while fighting a fire only because the plaintiff did "*not* contend that the fire caused the garage door to malfunction." *Id.* at 695 (emphasis added). That is, she alleged that the malfunction was "not caused by the fire" and "manifested itself coincident with, but not because of, the fire." *Id.* at 691-92 & n.2. The court was careful to note that if the plaintiff had in fact contended "that the fire caused the garage door to malfunction," its holding that the firefighter's rule was inapplicable "would not govern that fact situation." *Id.* at 692 n.2 (emphasis added).

[9] A Georgia appellate decision, *Gaither v. Metro. Atlanta Rapid Transit Auth.*, 510 S.E.2d 342, 344 n.7 (Ga. Ct. App. 1998), questioned *White* in *dicta* but had no occasion to accept or reject the holding in *White*. Unlike *White* and unlike the present case, *Gaither* involved alleged negligence that occurred *after* the responder (there, a campus police officer) was already on the scene. *Id.* at 344. The allegation here is that conduct by TEPCO *before* Plaintiffs arrived had already created the underlying risk of radiation exposure, just as the shock absorbers in *White* had been designed and installed before the firefighter came to the house.

As these cases make clear, the "independent cause exception" to the firefighter's rule excludes only those injuries that result from tortious acts that "'are independent from those which necessitated the summoning'" of the emergency responder, *Vasquez*, 292 F.3d at 1055, and the exception therefore does not apply where (as here) the summoning event *combines* with tortious conduct to produce a type of injury that is within the scope of the anticipated risks. *White*, 971 F.2d at 689.

In the more typical fact pattern, in which the summoning event is caused by *negligence* (as opposed to a natural disaster), application of the independent cause exception means that the firefighter's rule will apply only to injuries "caused by the very misconduct which created the risk which necessitated [the rescuer's] presence." *Lipson v. Superior Court*, 644 P.2d 822, 826 (Cal. 1982). But that articulation of the rule in that distinct context has no application in a case, such as this one, in which the event that "created the [condition] which necessitated [the rescuer's] presence" is not "misconduct," but a natural disaster. *See Farnam*, 101 Cal. Rptr. 2d at 645 ("The language in some cases ... appears to restrict the firefighter's rule to conduct that necessitated summoning an officer. But a review of the applications of the rule to specific facts in other cases demonstrates it is not so limited.") (citations omitted); *see also Rowland*, 224 Cal. Rptr. at 550 (rejecting effort to "narrowly and artificially isolate the occurrence which necessitated the

presence" of the firefighters). Where the summoning event is a natural occurrence (such as a medical emergency or a natural disaster), the independent-cause exception turns on whether the injury was outside the range of anticipated risks and separately resulted from tortious acts that "'are independent from those which necessitated the summoning'" of the rescuer. *Vasquez*, 292 F.3d at 1055 (quoting *Lipson*, 644 P.2d at 826); *see also*, *e.g.*, *Madonna v. American Airlines, Inc.*, 82 F.3d 59, 61-62 (2d Cir. 1996) (firefighter's rule barred claim by airport police officer who tripped over allegedly negligently maintained sidewalk curb while carrying sick passenger on a gurney; because injury resulted from the fact that the "gurney blocked [the officer's] forward vision of the curb," it arose from the officer's emergency duties).

Because the summoning event—the earthquake and tsunami—triggered the damage to the FNPP that resulted in the radiation release, and because the potential risk of radiation was within the scope of anticipated risks from the outset of Operation Tomodachi, the firefighter's rule bars Plaintiffs' claims.

V. The District Court Erred in Granting Leave to Amend

In the Order under review, the district court also granted leave to file an amended complaint. (ER 49-50.) Because the court should instead have dismissed the action, and because none of the amendments Plaintiffs sought to make addressed the multiple alternative grounds for dismissal, the court erred in granting

leave to amend. *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002) ("futile amendments should not be permitted"). Accordingly, the case should be remanded with instructions to dismiss the action.

CONCLUSION

The Order should be reversed, and the case remanded with instructions to dismiss the action.

DATE: January 27, 2016

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: /s/ *Daniel P. Collins*
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STATEMENT OF RELATED CASES

TEPCO is not aware of any related cases that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,998 words.

Dated: January 27, 2016

/s/ Daniel P. Collins
Daniel P. Collins

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: January 27, 2016

By: */s/ Daniel P. Collins*
Daniel P. Collins