NO. 05-1598

IN THE
Supreme Court of the United States

THE TOKIO MARINE & FIRE INSURANCE COMPANY, LTD., A CORPORATION,

Petitioner,

v.

YUMI ITO, AN INDIVIDUAL ON BEHALF OF HERSELF AND ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant review to reevaluate the Court of Appeals' balancing of the private and public interest factors on Petitioner's motion to dismiss for forum non conveniens in favor of a United States citizen's choice of forum because the focal point of the plaintiff's breach of contract, breach of implied covenant of good faith and fair dealing, and fraud claims was California, and not Japan?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

STATEMENT OF THE CASE

In September 1995, respondent Yumi Ito, an American citizen and a resident of California, was severely injured as a passenger in a car accident. The accident took place in Japan, and was caused by a driver insured by petitioner Tokio Marine and Fire Casualty. During the course of her recovery in Japan, Ms. Ito was forced to return to the United States several times at Tokio Marine's expense, because her temporary visa repeatedly expired. Because her frequent trips to the United States proved costly for Tokio Marine, it sought to enter into an arrangement under which Ms. Ito would complete her recovery and rehabilitation in the United States. Pet. App. 8-9a.

In July 1996, while Ms. Ito was in the United States, Tokio Marine offered to pay Ms. Ito's medical expenses and her lost income, as well as a daily living allowance, but only on the condition that Ms. Ito complete her recovery and rehabilitation in the United States. Ms. Ito agreed, and thereafter located physicians in California who treated her extensive injuries. Ms. Ito's doctors and medical records from 1996 until the present are located in California, as is evidence of her lost income. *Id*.

Tokio Marine paid Ms. Ito's expenses as agreed through August 1997. In September 1997, Tokio Marine discontinued payments to Ms. Ito, citing a variety of discrepancies regarding Ms. Ito's medical care and lost income, as well as alleged concerns about the competence of her physicians in California. During this time, Tokio Marine continually reassured Ms. Ito that it would reimburse her for these costs, as soon as the discrepancies were resolved. Pet. App. 9a.

In 2000, Ms. Ito took steps to file a lawsuit in Japan against Onizuka and Sasaki, the drivers in the 1995 accident. A settlement agreement was entered into in 2002. The

settlement agreement resolved all of Ms. Ito's claims arising out of the accident itself, but did not purport to settle Ms. Ito's claims arising out of Tokio Marine's violation of the 1996 agreement. Pet. App. 9a.

In October 2003, Ms. Ito sued Tokio Marine in California state court, alleging claims for breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, novation, and bad faith. Pet. App. 8a. Ms. Ito sought injunctive relief and damages. Tokio Marine removed Ms. Ito's complaint to the United States District Court for the Central District of California (the "District Court") on the basis of diversity jurisdiction. *See* 28 U.S.C. §§ 1441(a), 1332(a)(1).

Each of the claims alleged in the complaint filed in October 2003 centers on Tokio Marine's failure, under the 1996 agreement, to pay the expenses Ms. Ito incurred in California. These claims do not relate to the earlier car accident.

In the District Court, Tokio Marine moved to dismiss Ms. Ito's complaint based on forum non conveniens. Due to its misunderstanding of Ms. Ito's claims, and without giving any deference to Ms. Ito's choice of forum, the District Court granted Tokio Marine's motion to dismiss. Pet. App. 17a. Ms. Ito appealed the District Court's order to the Ninth Circuit, which reversed. Pet. App. 2a. The Ninth Circuit denied Tokio Marine's petition for rehearing. Pet. App. 20a.

REASONS FOR DENYING THE WRIT

The Petition poses only one question: whether the decision of the Ninth Circuit conflicts with decisions of other circuits. The three areas of claimed conflict are: (1) standard of proof; (2) public policy; and (3) concerns of comity. In fact, Petitioner does not cite any actual conflict, but instead merely raises questions about the Ninth Circuit's application of properly stated rules of law. Petitioner's assertions do not warrant a grant of a writ of certiorari, and thus the Petitioner's request should be denied.

A. The Court Of Appeals' Analysis Is Consistent With Those Of Other Circuits And The Petition For Writ Of Certiorari Should Be Denied.

In reviewing the District Court's order dismissing Ms. Ito's complaint for forum non conveniens, the Court of Appeals properly applied the settled standards under which all courts of appeals review a district court's ruling on a motion to dismiss for forum non conveniens. First, the Court of Appeals correctly identified two distinct errors with the District Court's ruling– the District Court failed to place the burden of proof on Tokio Marine, and it misapprehended the nature of Ms. Ito's claims. The Court of Appeals' conclusion that both errors amounted to an abuse of discretion is entirely consistent with opinions from the other courts of appeals. Then, the Court of Appeals evaluated Tokio Marine's motion to dismiss for forum non conveniens. In so doing, the Court of Appeals correctly applied the factors set forth in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947), and the burden of proof established in *Koster v. Lumbermens Mutual Casualty Company*, 330 U.S. 518 (1947). *See Piper Aircraft v. Reyno*, 454 U.S. 235, 257-60 (1981)

(applying *Gilbert* and *Koster* to a forum non conveniens inquiry).

1. *The Ninth Circuit's Determination That The District Court Abused Its Discretion Is Consistent With The Holdings Of Every Other Circuit.*

The Court of Appeals identified two errors in the District Court's analysis that undermined the District Court's ability to properly engage in the forum non conveniens inquiry.

First, the Court of Appeals determined that the District Court failed to place the burden of proving forum non conveniens on the moving party. This Court has held that the moving party bears the burden of making a "clear showing" of facts that "either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems." *Koster*, 330 U.S. at 524. Not surprisingly, every court of appeals that has considered the question, including the Ninth Circuit, has followed this Court's holding in *Koster* and has placed the burden of proof on the moving party.[1] Petitioner does not dispute this rule of law, but only its

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[1] *See Duha v. Agrium*, 448 F.3d 867, 874 (6th Cir. 2006); *In re Ford Motor Co., Bridgestone/Firestone N. Am. Tire, LLC*, 344 F.3d 648, 652 (7th Cir. 2003); *McLennan v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 424 (5th Cir. 2001); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282 (11th Cir.

(continued...)

application to the facts of this case, which does not warrant granting the writ.

Second, the Court of Appeals determined that the District Court abused its discretion because it misapprehended the nature of the claims before it. The Second Circuit is the only other circuit that has reviewed a district court's order on a motion to dismiss where the lower court has misconstrued the nature of the plaintiff's claim. In a line of cases consistent with the Court of Appeals' opinion in this case, the Second Circuit has repeatedly held that when a district court dismisses for forum non conveniens based on a fundamental misunderstanding of the underlying facts of the case, reversal is warranted. *See DiRienzo v. Philip Servs. Corp*, 294 F.3d 21, 33 (2d Cir. 2002) ("Because the *Gilbert* test is so fact-specific, a district court's erroneous understanding of facts central to a case can preclude a reasonable balancing of the *Gilbert* factors and form the basis for reversal on appeal."); *R. Maganlal & Co. v. M.G. Chem. Co., Inc.*, 942 F.2d 164, 168 (2d Cir. 1991) (holding that the district court abused its discretion in balancing the *Gilbert* factors because that court misunderstood the nature of plaintiff's complaint); *Overseas Programming Co., Ltd. v.*

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[1](...continued)
2001); *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000); *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 719 (1st Cir. 1996); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 993 (10th Cir. 1993); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 632 (3d Cir. 1989); *Kontoulas v. A.H. Robins Co., Inc.*, 745 F.2d 312, 316 (4th Cir. 1984); *Pain v. United Tech. Corp.*, 637 F.2d 775, 784 (D.C. Cir. 1980).

Cinematographische Commerz-Anstalt, 684 F.2d 232, 235 (2d Cir. 1982) (reversing because the district court "failed to identify the basic issue in the lawsuit").

The Court of Appeals' holding is consistent with those Second Circuit opinions. No other circuit has disapproved of the Second Circuit's line of cases. Because there is no split of authority as to whether a district court abuses its authority when it balances the *Gilbert* factors based on a misreading of the plaintiff's claim, this Court should deny Petitioner's request for certiorari.

2. *In Balancing The* Gilbert *Factors, The Ninth Circuit Accorded Proper Weight To The Access To Evidence For Both Parties, Among The Other Relevant Factors.*

The Court of Appeals' balancing of the *Gilbert* factors does not depart from the consistent decisions of the other courts of appeals. Under *Gilbert*, a court faced with a motion to dismiss for forum non conveniens must balance both private and public factors. These private factors include the relative ease of access to sources of proof, the availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, the possibility of viewing the premises, the enforceability of judgment, and the relative advantages and obstacles to a fair trial. *Gilbert*, 330 U.S. at 508. The public interest factors a court should consider include the administrative difficulties from congestion when litigation is not handled at its origin, the imposition of jury duty on a community that has no relation to the litigation, local interest in having localized controversies decided at home, and the benefit of resolving cases in a forum that is familiar with the

governing law. *Id.* at 508-09. Dismissal for forum non conveniens should only be granted if the balance is "strongly in favor of the defendant." *Id.* at 508.

The Court of Appeals properly gave deference to Ms. Ito's choice to sue in her home forum, which the District Court failed to do. Pet. App. 3a (citing *Piper Aircraft*, 454 U.S. at 255). Every court of appeals to consider the question has agreed that a plaintiff's choice to sue in her home forum is entitled to significant deference.[2] The Court of Appeals' conclusion that the District Court abused its discretion in failing to accord proper deference to Ms. Ito's choice of home forum, and its reweighing of factors to give proper deference to Ms. Ito's choice, is thus consistent with the holdings of the other courts of appeals, as well as this Court's opinions in *Gilbert* and *Koster*.

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[2]*See Duha*, 448 F.3d at 873-74; *Gross v. British Broadcasting Corp.*, 386 F.3d 224, 231 (2d Cir. 2004); *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1106 (11th Cir. 2004); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir. 1991); *Reid-Walen*, 933 F.2d at 1394-95; *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991); *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 727 (5th Cir. 1990); *Royal Bed & Spring Co., Inc. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 52 (1st Cir. 1990); *Gschwind v. Cessna Aircraft Co.*, No. 97-3164, 1998 WL 654174, at *2 (10th Cir. Sept. 18, 1998).

B. The Ninth Circuit Followed Well Established Law In Evaluating The Relevance Of Witness Testimony And Did Not Create Any Public Policy Concerns.

Petitioner argues that dismissal for forum non conveniens is necessary because any litigation of Ms. Ito's claims will require testimony and evidence relating to the 1995 accident, and thus asserts that the Court of Appeals opinion "reflects that it disregarded the element of access to evidence as a private interest factor." Pet. at 5. Not so. A close reading of the Court of Appeals' opinion indicates that it explicitly considered access to evidence when balancing the *Gilbert* factors, but held that this factor did not weigh in favor of dismissal, because Tokio Marine failed to present *any* evidence to the district court that documents and records located in Japan are relevant to resolving Ms. Ito's claims. For example, although Tokio Marine stresses that the witnesses to the 1995 accident are located in Japan, there is no reason that their testimony would be material to whether Tokio Marine violated the 1996 agreement.

To the contrary, the vast majority of relevant evidence is located in the United States. Tokio Marine and Ms. Ito entered into the 1996 agreement while Ms. Ito was located in the United States. Her treating physicians, medical records, and proof of lost income, all of which will be relevant to a damages determination, are located in the United States. In light of Tokio Marine's claims that Ms. Ito's California-based physicians were unqualified, evidence of their treatment of Ms. Ito's injuries — which is, of course, located in California — will be vital to the resolution of Ms. Ito's claims. All of the records of her medical treatment and lost wages are in English. Given that litigation in Ms. Ito's home forum will give the

parties access to the vast majority of the relevant evidence, and that Ms. Ito's claims flow from Tokio Marine's refusal to fulfill its obligations under the 1996 agreement, as opposed to the accident itself, Petitioner is incorrect that a significant portion of the relevant evidence is located in Japan.

Petitioner also argues that the Court of Appeals' opinion is a rejection of *Piper Aircraft*'s holding that a moving party is not required to supply the court with detailed proffers of potential witnesses' testimony. This assertion misconstrues the holding in *Piper Aircraft*. *Piper Aircraft* reaffirmed that the moving party must show that litigation in the United States would deny the parties access to "crucial witnesses." In holding that the proper inquiry examines not only the location, but also the materiality and relevance of potential evidence, the Court of Appeals' opinion is entirely consistent with *Piper Aircraft*'s holding that dismissal is appropriate where "many *crucial* witnesses are located beyond the reach of compulsory process." *Piper Aircraft*, 454 U.S. at 258 (emphasis added). It is also consistent with the opinion of every circuit to consider whether the *Gilbert* factors require inquiry into the location of relevant evidence. These courts have sensibly held that, in some cases, it is insufficient simply to tally the number of witnesses and documents that are located in the foreign jurisdiction. Rather, district courts must examine the materiality and importance of the anticipated evidence. *Duha,* 448 F.3d at 877 ("[T]he weighing of the costs of witness attendance should . . . focus on witnesses whose relevance has been established by record evidence."); *Reid-Walen*, 933 F.2d at 1397 (noting that the defendants had not established that there were more "key witnesses" in the foreign forum); *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1520 (11th Cir. 1985) (considering not only the number of witnesses located in the foreign forum, but the significance of those witnesses to future litigation).

Tokio Marine further claims that the Court of Appeals' conclusion that Tokio Marine failed to meet its burden of showing that litigation in the United States would deprive the parties of access to evidence ignores *Piper Aircraft*'s concern that a moving party may be unable to make such a detailed showing with evidence located abroad. Contrary to Petitioner's argument, the Ninth Circuit opinion is entirely consistent with *Piper Aircraft* and reflects this Court's recognition that the amount of proof necessary to establish forum non conveniens will vary from case to case. *Piper Aircraft*, 454 U.S. at 258 (rejecting a *per se* rule requiring a specific level of detail to establish forum non conveniens). Both *Piper*, the Court of Appeals' decision, and the opinions of several other circuits hold that a *per se* rule is inappropriate given the fact-intensive nature of the forum non conveniens inquiry. The flexible standard with which the circuit courts evaluate whether the moving party has met its burden of proof, as well as the fact-intensive nature of the forum non conveniens inquiry, make review by this Court inappropriate.

1. *The Courts Have Established A Flexible Standard In Applying The* Gilbert *Factors, Which Was Followed By The Ninth Circuit.*

Courts have been reluctant to establish a hard and fast rule about the amount of proof a moving party must bring forth to meet its burden of proving that dismissal for forum non conveniens is appropriate. Recognizing that not every case will require the same showing to establish forum non conveniens, this Court has refrained from creating a *per se* rule that would automatically require detailed affidavits and other evidence of the *Gilbert* factors in every case. *Piper Aircraft*, 454 U.S. at 258. This Court emphasized, however, that the moving party

must provide enough information to allow the district court to balance the parties' interests. *Id.*; *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 528-29 (1988) (noting that in considering a motion to dismiss based on forum non conveniens, "the district court's inquiry does not necessarily require extensive investigation, and may be resolved on affidavits presented by the parties").

Other circuit courts have recognized that the amount of additional information the moving party must provide depends on the facts of a particular case. *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 609-10 (10th Cir. 1998); *Lacey v. Cessna Aircraft*, 862 F.2d 38, 44 (3d Cir. 1988); *In re Air Crash Disaster Near New Orleans, La. On July 9, 1982*, 821 F.2d 1147, 1165 n.28 (5th Cir. 1987), *vacated by* 490 U.S. 1032 (1989), *reinstated by* 883 F.2d 17 (5th Cir. 1989). The Court of Appeals' holding that Petitioner has failed to meet its burden does not conflict with any circuit court decision; no court has held that affidavits are never required for the moving party to meet its burden. Furthermore, several courts of appeals have held that dismissal for forum non conveniens is inappropriate when the moving party provides no evidence upon which its claim can be evaluated. *See Rivendell Forest Prods.*, 2 F.3d at 993 (holding that the moving party failed to meet its burden of proving that the evidence was located in the foreign forum when it "provided no evidence on the issue whatsoever"); *Reid-Walen*, 933 F.2d at 1396-97 (holding that the moving party, which provided no evidence to support its assertions, failed to meet its burden of proving that most of the witnesses and evidence were located in the foreign forum); *Lacey*, 862 F.2d at 44 (holding that, on the particular facts of the case, "defendants did not submit sufficient information to undertake the forum non conveniens analysis"). Rather than raising new policy concerns, this line of cases reflects the Court's reasoning in

Piper Aircraft. A moving party is required to provide enough information to enable the court to balance the parties' interests. *See Piper Aircraft*, 454 U.S. at 258-59.

2. *The Forum Non Conveniens Analysis Is Fact-Intensive, And The Balancing Of Facts Was Properly Evaluated By The Ninth Circuit.*

Finally, the Court of Appeals' opinion reflects the fact-intensive nature of the forum non conveniens inquiry. The Court of Appeals reversed the District Court because it disagreed with the lower court's characterization of the nature of Ms. Ito's claim. The Court of Appeals held that dismissal was inappropriate in this case because there was no showing that any of the relevant evidence is in Japan; California's interest outweighs Japan's interest in the litigation, given the nature of the claims; and Ms. Ito chose to sue in her home forum.

Petitioner cites *Howe v. Goldcorp Investments, Ltd.*, 946 F.2d 944 (1st Cir. 1991), in which the First Circuit affirmed a district court's order dismissing an action for forum non conveniens. *Goldcorp* underscores the degree to which the facts of a particular case affect the forum non conveniens analysis. In that case, the plaintiff was a shareholder of a foreign corporation that trades on a foreign stock exchange governed by foreign security law; here, Ms. Ito is a private individual who contracted with a foreign insurance company. In *Goldcorp*, the defendant had virtually no contact with the United States besides the mailing of documents to its shareholders; here, Ms. Ito returned to and sought medical care in the United States at Tokio Marine's insistence. In *Goldcorp*,

all of the relevant evidence was located abroad; here, Petitioner has not demonstrated that the relevant evidence is abroad, and the nature of Ms. Ito's claims strongly suggests that most of the relevant evidence and witnesses are located in California.

The factual differences between this case and *Goldcorp* demonstrate that there is no inconsistency between the Ninth Circuit's opinion and the First Circuit's opinion in *Goldcorp*. In both cases, the courts of appeals properly reviewed the district courts' balancing of the *Gilbert* factors and considered whether the district court gave proper weight to each factor. No further consideration is necessary or desirable, and thus review should be denied. *See* S. Ct. R. 10.

C. The Ninth Circuit Accorded Appropriate Weight To Principles Of Comity In Evaluating The Public Interest Factors.

Petitioner also argues that the Court of Appeals disregarded Japan's interest in the litigation. To the contrary, the Court of Appeals explicitly considered Japan's interest in the litigation. Pet. App. 5a ("Japan may have some interest in protecting its corporate insurers . . . ."). The court expressly found, however, that California's interest outweighs Japan's, insofar as states have a strong interest in providing a forum for their residents who are injured. By giving greater weight to the interests of the plaintiff's home state when the plaintiff alleges fraud, among other things, the Court of Appeals' holding is consistent with that of the Second Circuit, which has held that a state has a great interest in protecting its citizens from fraud. *See, e.g., Alnwick v. Euro. Micro Holdings, Inc.*, 29 F. App'x 781, 784 (2d Cir. 2002). Contrary to Petitioner's characterization, California's interest in this case does not lie in the regulation of foreign insurance companies. Rather,

California has a strong interest in protecting its citizens from fraud and breach of contract, whether perpetrated on its citizens by foreign or domestic entities.

Furthermore, Petitioner's argument that comity required the District Court to refrain from exercising its jurisdiction is misplaced. First, Ms. Ito went to the United States at Tokio Marine's urging; exercising jurisdiction in this case does not unfairly burden Tokio Marine, which purposefully extended the reach of its conduct to the United States. Because Ms. Ito came to and sought medical care in the United States on Tokio Marine's direction, the comity concern addressed in *State Farm Automobile Insurance v. Campbell*, 538 U.S. 408, 421 (2003) — whether comity is offended when one jurisdiction punishes conduct occurring in another jurisdiction — is simply inapplicable here. Second, contrary to Tokio Marine's assertion, this case does not relate to the earlier Japanese lawsuit, which involved only Ms. Ito's claims relating directly to the 1995 accident.[3] Even if the Court of Appeals gave too little weight to Japan's interest in the litigation, that hypothetical error in balancing the *Gilbert* factors would not be grounds for review. *See* S. Ct. R. 10. ("A petition for a writ of

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[3]Tokio Marine argues that, by its terms, the settlement reached in the Japanese litigation resolved all claims between Ms. Ito and Tokio Marine. Ms. Ito disagrees with that characterization of the settlement. In approving the settlement, the Japanese court stated that a California court must determine what, if any, preclusive effect the 2002 settlement would have on Ms. Ito's claims against Tokio Marine that arise out of the insurance company's violation of the 1996 agreement. Ninth Circuit Excerpts of Record 1-0207.

certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Finally, Petitioner challenges the Court of Appeals' citation to *Miskow v. Boeing Co.*, 664 F.2d 205 (9th Cir. 1981), because that decision predates *Piper Aircraft*. Like *Piper Aircraft*, however, *Miskow* simply acknowledges that dismissal for forum non conveniens is appropriate if, in light of private and public interests, the moving party has made a clear showing that litigation in the United States would either be (1) overly oppressive or vexatious to the moving party or (2) inconvenient because of administrative delay in the chosen forum. Both *Piper Aircraft* and *Miskow* recite the standards and factors set forth in *Gilbert* and *Koster*, and those opinions continue to provide the standards with which all courts review motions to dismiss based on forum non conveniens. *See* note 1, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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