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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

LINDSAY R. COOPER; *et al*.,

Plaintiffs,

vs.

TOKYO ELECTRIC POWER COMPANY, INC.; and Does 1 through 200,

Defendants.

Case No. 12-cv-3032 JLS MDD

DEFENDANT TOKYO ELECTRIC POWER COMPANY, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, TO DISMISS UNDER THE DOCTRINES OF *FORUM NON CONVENIENS* AND INTERNATIONAL COMITY

Judge: Hon. Janis L. Sammartino

Date: July 8, 2014
Time: 10:00 A.M.
Crtrm.: 4A (Schwartz Building)
221 West Broadway
San Diego

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INTRODUCTION

The Court previously dismissed Plaintiffs' First Amended Complaint ("FAC"), holding that "this case is nonjusticiable under the political question doctrine," but the Court granted Plaintiffs leave to amend to attempt "to add new allegations and causes of action that purportedly do not run afoul of the constitutional limitations on this Court's jurisdiction." *See* Order Granting Motion to Dismiss ("Order"), Dkt. #46 (attached as Ex. B to the accompanying Declaration of Bryan H. Heckenlively ("Heckenlively Decl.")), at 9. Plaintiffs' Second Amended Complaint ("SAC") wholly fails in that effort. Rather than cure the flaws previously identified by the Court, Plaintiffs again rely upon legal theories that suffer from the very same defects. As a result, the reasoning set forth in the Court's prior Order remains controlling and requires that the SAC should also be dismissed. And because the SAC confirms that Plaintiffs cannot plead around the insuperable deficiencies noted in the Court's Order, the case should now be dismissed with prejudice.

Moreover, as the Court indicated in the more extensive tentative views it expressed at the November 20, 2013 hearing, there were several additional problems raised by Plaintiffs' FAC, *see* Reporter's Transcript of Nov. 20, 2013 Hearing ("R.T."), Dkt. #52 (Heckenlively Decl., Ex. A) at 2-9, and these same issues provide multiple alternative grounds for dismissing Plaintiffs' SAC. As explained below, several of those grounds provide further justification for dismissing the case *with prejudice*. The remaining grounds noted in the Court's tentative ruling support the alternative disposition that, because Japan is the more convenient and suitable forum for resolution of any claims that Plaintiffs may have, the Court should dismiss the SAC without prejudice to Plaintiffs' filing a suit in the courts of Japan.

The SAC Should Be Dismissed With Prejudice

Plaintiffs are members of the U.S. military, one military contractor, and three children of three Plaintiffs, who assert that they were injured by radiation exposure when a U.S. naval "Strike Force" consisting of the *U.S.S. Ronald Reagan* and "other

vessels," as well as "land-based service personnel," allegedly were positioned too close to the damaged Fukushima-Daiichi Nuclear Power Plant ("FNPP") in the days immediately succeeding the disastrous 9.0 earthquake and tsunami that struck Japan on March 11, 2011. (SAC, ¶ 2.) Like Plaintiffs' FAC, the SAC rests on the extraordinary theory that Defendant Tokyo Electric Power Company, Inc. ("TEPCO"), the owner and operator of the FNPP, "allowed false and misleading information concerning the true condition of the FNPP to be disseminated to the public, including the U.S. Navy, Air Force, and Marines" (*id*., ¶ 144), with the result that "the U.S. Navy, and other branch services were unaware of the true levels of such risks" and "in reliance upon the veracity and completeness of representations," the U.S. Navy "operate[d] the *U.S.S. Reagan* (CVN-76) with its crew of approximately 5,500 aboard, as well as other vessels in the waters adjacent to the FNPP, without the benefit of independent inspection or evaluation of the area for defects" (*id*., ¶ 208). Plaintiffs contend that, by thus influencing the Navy's decisionmaking about where to position the *Reagan* Strike Force and other personnel in connection with humanitarian relief efforts during "Operation Tomodachi," as well as by influencing what precautions to take concerning the safety of personnel, TEPCO ultimately caused Plaintiffs to be exposed to injurious levels of radiation.

As this Court has already held, the political question doctrine bars any such claims, because their adjudication "would undoubtedly require the Court to weigh in on the propriety of the military's discretionary decisionmaking during 'Operation Tomodachi.'" *See* Order at 6. To succeed on such claims, "Plaintiffs must 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." *Id*. at 7. Because "Plaintiffs' success inevitably hinges on the conclusion that the military's precautions were inadequate or unreasonable and that, had it not been for TEPCO's misstatements, military commanders would have adopted a different course of action," Plaintiffs' claims

would require the Court to undertake an improper "inquiry into the reasonableness of the Executive's policy choices in the spheres of military affairs and foreign relations." *Id*. That is, by requiring the Court to assess "the military's 'contribution to causation," Plaintiffs' claims would improperly require the Court to review "purely discretionary judgments made by military commanders." *Id*. at 6-7 (quoting *Lane v. Halliburton*, 529 F.3d 548, 561 (5th Cir. 2008)). Because adjudication of these claims would thus "enlarge the power of the Court beyond the boundaries prescribed by Article III of the U.S. Constitution," the Court held that "this case is nonjusticiable under the political question doctrine." *Id*. at 9.

Plaintiffs' SAC makes no effort whatsoever to articulate "allegations and causes of action that purportedly do not run afoul of the constitutional limitations on this Court's jurisdiction." *See* Order at 9. Ignoring the Court's holding that the justiciability problem lies in the theory of *causation* upon which Plaintiffs' claims inevitably must rest, Plaintiffs have done nothing to address that insuperable problem and have instead loaded up the SAC with additional predicate details about alleged underlying problems in the design and operation of the FNPP. (*See, e.g.*, SAC ¶¶ 105-28, 130-37). But the FAC *already* alleged that the FNPP had been defectively designed and negligently operated (*see* FAC ¶¶ 144-53 (Heckenlively Decl., Ex. C)), and so adding additional factual detail on that previously pleaded point does not in any way address the fundamental justiciability problem in Plaintiffs' theory of causation. On the contrary, the SAC only serves to *underscore* that problem: it alleges that the Plaintiffs, as "first responders," were injured only because the Navy, as a result of TEPCO's alleged misstatements about "the levels of contamination to which the PLAINTIFFS would be exposed," was "unaware of the true levels of such risks" and placed Plaintiffs "too close to the FNPP" "without the benefit of independent inspection or evaluation of the area for defects" and without taking measures so that Plaintiffs "could protect themselves" from radiation exposure. (SAC ¶¶ 124, 185, 207-08, 212.) Accordingly, for the same reasons the

Court previously dismissed the FAC as nonjusticiable, the Court should dismiss the SAC with prejudice. *See* Argument, Section I *infra*.

Even if this jurisdictional impediment could be overcome, further defects require dismissal of the SAC with prejudice. Plaintiffs' SAC fails to allege the proximate causation required to establish its claims. *See* Section II(A). In addition, Plaintiffs' claims are all barred by the "firefighters' rule," which generally prohibits first responders from suing for dangers associated with the type of emergency to which they responded. *See* Section II(B). And, unsurprisingly, Plaintiffs' effort to squeeze their novel theories into the available tort-law doctrines stretches them past the breaking point: each of Plaintiffs' claims suffers from claim-specific defects that, collectively, require dismissal as a matter of law. *See* Argument, Section II(C). For all of these reasons, the SAC should be dismissed with prejudice.

Alternatively, the SAC Should Be Dismissed Without Prejudice in Favor of a Japanese Forum

Alternatively, under either the doctrine of *forum non conveniens* or the doctrine of international comity, Plaintiffs' claims should be dismissed without prejudice to Plaintiffs' refiling them in the courts of Japan.

Under the doctrine of *forum non conveniens*, a "district court has discretion to decide that a foreign forum is more convenient" if (1) the foreign forum is adequate; and (2) the balance of public and private interest factors sufficiently favors the foreign forum so as to outweigh the plaintiffs' choice of a U.S. court. *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 665 (9th Cir. 2009). Here, Japan indisputably would provide an adequate alternative forum, because TEPCO is subject to jurisdiction in Japan, the Japanese courts have been consistently recognized as fair and impartial, and Japanese law would provide an adequate remedy if Plaintiffs have meritorious claims. *See* Argument, Section IV(A).

In addition, the balance of public and private interest factors weighs heavily in favor of a Japanese forum. The relevant records and documentary evidence

concerning the FNPP will be located overwhelmingly in Japan and be written in Japanese, and most of the relevant witnesses concerning the FNPP would also be in Japan and would have to testify in Japanese. Trying this case in the U.S. would thus require exorbitant translation costs that would far exceed the translation costs that would be occasioned by translating the more limited volume of English-language documents and testimony into Japanese. And obtaining evidence in a U.S. court from the Government of Japan—which, although not a party, plays a critical role in the events alleged in the SAC—would be all but impossible, because Government witnesses and documents in Japan are beyond the reach of this Court's subpoena power. The same is true of evidence in the possession of private third-parties in Japan. Although limited evidence might be available through issuing letters rogatory, that process is cumbersome and time-consuming. *See* Argument, Section IV(B).

Furthermore, Japan has a far stronger interest than the U.S. in adjudicating this dispute. The earthquake, tsunami, and ensuing accident at the FNPP were enormously significant and unprecedented events in Japan, and the Government of Japan has acted proactively to address claims arising from the FNPP and has committed to provide substantial funds to support the implementation of compensation measures. Within months after the damage to the FNPP, the Japanese legislature (the "National Diet") enacted special legislation to "ensure the swift and appropriate implementation of compensation for nuclear damage." (Act No. 94 of August 10, 2011 ("NDF Act") (Heckenlively Decl., Ex. E).) Pursuant to that legislation, the Japanese Government has sought to address claims for compensation in a comprehensive and orderly fashion. Although the U.S. certainly has an interest in the health and well-being of its servicemembers, that interest can be sufficiently vindicated (if Plaintiffs' claims have merit) in the Japanese forum that is the alleged source of these injuries. *See* Argument, Section IV(C).

For similar reasons, this action should also be dismissed based on international comity. Longstanding principles of comity allow dismissal in deference to a foreign

forum where (1) the U.S. has a strong policy interest in favor of allowing the foreign forum to address the claims; (2) the foreign forum has a much stronger interest in resolving the matter; and (3) the foreign forum is adequate. These considerations all strongly favor a Japanese forum. *See* Argument, Section V.

FACTUAL AND PROCEDURAL BACKGROUND

I. Plaintiffs' Underlying Factual Allegations

The SAC alleges that the approximately 80 named Plaintiffs[1] were members of the U.S. military (and one naval contractor[2]) who were serving on the *U.S.S. Ronald Reagan* or on other vessels in the *Reagan* Strike Force, were land-based service personnel, or were the dependents of these servicemembers. (SAC, ¶ 1.) Although the SAC is not entirely clear on the point, it appears that all servicemember Plaintiffs are under the jurisdiction of the Department of the Navy. (*Id*., ¶ 1.)[3] The remaining three Plaintiffs are minors, one of whom (Plaintiff A.G.) was presumably *in utero*

[1] The SAC is unclear as to the precise number and identities of the Plaintiffs. Paragraph 2 lists 80 Plaintiffs, and then Paragraphs 3-82 describe the Plaintiffs listed in Paragraph 2. But five of the Plaintiffs listed in Paragraph 2 are not listed in Paragraphs 3-82 or anywhere else in the text of the SAC (Jason Henry, Skyler Warnock, Wyatt Binderup, Daniel Pretto, and Michael Warnezponton). Instead, Paragraphs 3-82 add three Plaintiffs *not* listed in Paragraph 2 (Michael Zitella, Jonathan Zavitz, and Jedediah Irons). (SAC, ¶¶ 79-81.) Also, two of the Plaintiffs, Daniel Hair and Daniel Lawver, are listed twice in Paragraphs 3-82, with Lawver described with two different birthdates, job titles, and states of citizenship. (SAC, ¶¶ 23, 38, 46, 77.) Moreover, four Plaintiffs have first names in Paragraph 2 that differ from the later paragraphs (David/Daniel Hahn, Joseph/Johnathan Medina, Mallory/Michael Morrow, and Donald/Ronald Rairigh). (SAC, ¶¶ 52, 56, 58, 61.)

[2] The SAC alleges that Plaintiff Benito Serentas was serving aboard the *Reagan* as a "USN-Contractor Tarp Representative for Lerdos [*sic*] Corporation." (SAC ¶ 40.) The reference is presumably to Leidos Corporation, which supplies military support services. *See* <http://www.leidos.com/natsec>.

[3] All of the servicemember Plaintiffs described in the SAC appear to be U.S. Navy personnel or affiliated with the Navy. The SAC identifies two of those Plaintiffs (Nathan Piekutowski and Shane Gallagher) as marines (SAC, ¶¶ 16, 35), and the Marine Corps is located within the Department of the Navy. *See* 10 U.S.C. § 5061. One Plaintiff (Benito Serentas) is described as a "USN-Contractor." (SAC, ¶ 40.) The SAC provides no individual information about five of the Plaintiffs listed in Paragraph 2. Nonetheless, because the SAC alleges that Plaintiffs' harms resulted from TEPCO's actions towards "the U.S. Navy and its personnel" (*id*., ¶ 147), it appears that all of the servicemember Plaintiffs are affiliated with the Navy. In any event, it makes no difference to these Motions what branch of the U.S. Armed Forces the Plaintiffs are affiliated with; the legal deficiencies remain the same.

while her mother (Plaintiff Kim Gieseking) was serving on the *Reagan* (*id*., ¶ 6); another of whom (Plaintiff K.S.) is the son of Plaintiff Michael L. Sebourn, a servicemember who was assigned as a "decontamination coordinator in Japan" (*id*., ¶¶ 19-20); and the third of whom (Plaintiff D.J.) likewise lived with his servicemember father (James Jackson) in Yokosuka, Japan (*id*., ¶¶ 53-54).

The gravamen of Plaintiffs' SAC is that, after a massive earthquake struck Japan on March 11, 2011, resulting in a tsunami that seriously damaged the FNPP, TEPCO "created 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 "first responders" such as Plaintiffs, and other persons in the vicinity, and that TEPCO thereby "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." (SAC, ¶¶ 104, 124, 129, 185.)[4] Plaintiffs also allege that TEPCO's "agents within the [G]overnment of Japan" participated in these same "negligent acts and omission[s] regarding the safety of those operating within the zone of radiation." (*Id*., ¶ 165.) Thus, for example, Plaintiffs assert that the Government publicly "downplay[ed]" the disaster, and that the Government's "nuclear safety agency had hidden key details" from the Prime Minister. (*Id*., ¶¶ 113, 160 n.51.)

Plaintiffs' theory is that the U.S. Navy, in providing emergency "food, blankets and water to the inhabitants of the ravaged city of Sendai"[5] as part of

[4] Although Plaintiffs allege (and TEPCO accepts as true for purposes of its Motions to Dismiss) that the Navy placed the *Reagan* "two miles off the coast" where the FNPP is located (SAC ¶ 146), the allegation is apparently false. Mapping data published by the Department of Defense indicates that the ship was well more than 100 kilometers (*i.e.*, well more than 60 miles) offshore. *See* Operation Tomodachi Registry, Dose Assessment and Recording Working Group, Defense Threat Reduction Agency, U.S. Department of Defense, *Radiation Dose Assessments for Fleet-Based Individuals in Operation Tomodachi, available at* <https://registry.csd.disa.mil/registryWeb/docs/registry/optom/DTRA-TR-12-041.pdf> (hereafter "DoD Fleet Report"), at p.52.

[5] The SAC incorrectly states that Sendai is "located within the prefecture of Fukushima." (SAC, ¶ 147.) It is located within the prefecture of Miyagi. *See* <http://www.jnto.go.jp/eng/location/regional/miyagi/sendai.html> (Heckenlively Decl., Ex. F).

Operation "Tomodachi," supposedly relied on TEPCO's inaccurate information (rather than on the radiation detection equipment contained on the *Reagan*—a sophisticated nuclear-powered aircraft carrier), and thus allegedly "operate[d] … in the waters adjacent to the FNPP[] without the benefit of independent inspection or evaluation of the area." (SAC, ¶¶ 1, 147, 208, 258.)[6] Plaintiffs assert that the Navy and other branch services "were unaware of the true levels of such risks," against which they were allegedly incapable of protecting themselves or even discovering absent warning from TEPCO. (*Id*., ¶ 212.) As a result, the Navy was unable to take "precautions that would have been required to avoid the contamination of Plaintiffs with radiation." (*Id*, ¶ 185.) The *Reagan* and the other vessels that were part of its "Strike Force," as well as land-based personnel, allegedly remained too close to the FNPP for two days until, "[o]n March 14, 2011, the U.S. 7th Fleet, U.S. Navy personnel, and aircraft aboard the vessels were repositioned away from Japan's FNPP" after the Navy's equipment detected "contamination in the air and on the helicopters returning to the *U.S.S. Ronald Reagan* … from ferrying supplies to the land." (*Id*., ¶ 2 n.3 (italics added).)[7]

Notwithstanding the Navy's subsequent exhaustive examination of radiation exposure during Operation Tomodachi—which determined that no servicemembers

[6] The SAC correctly acknowledges that the earthquake and tsunami "ravaged" areas of Japan. Official estimates underscore the grave extent of the devastation, with more than 15,000 persons killed, more than 100,000 left homeless, and literally hundreds of thousands of buildings destroyed or damaged. *See* <http://earthquake.usgs.gov/earthquakes/eqinthenews/2011/usc0001xgp/#summary>.

[7] Plaintiffs' express concession that the Navy was able promptly to detect radiation, and to reposition the *Reagan*, is confirmed by the Navy's contemporaneous official statements. As early as March 13, 2011, the Commanding Officer of the *Reagan* issued a public announcement on the ship's Facebook page stating that the *Reagan* had "extensive technical expertise onboard to properly monitor such types of risks, and if necessary, rapidly resolve the situation" and that, after the Navy detected "very low levels" of radiation, the *Reagan* was "repositioned away from the Fukushima Dai-Ichi Nuclear Power Plant." *See* <http://www.facebook.com/notes/uss-ronald-reagan-cvn-76/from-uss-ronald-reagan-commanding-officer/196001977088322>. The SAC itself quotes an official Navy statement from March 14, 2011, stating that the Navy's "sensitive instruments" had detected radiation, and that the 7th Fleet had been repositioned. (SAC, ¶ 141.)

were exposed to dangerous levels of radiation[8]—the SAC alleges that Plaintiffs were allegedly exposed to very high levels of radiation that supposedly have already produced "severe and serious personal injuries to mind and body." (SAC, ¶ 198.)

II. This Court's Order Dismissing the FAC With Leave to Amend

Plaintiffs brought suit against TEPCO, asserting common-law claims for negligence, fraud, strict liability, nuisance, and intentional infliction of emotional distress. (FAC, ¶¶ 51-221.) TEPCO moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim, and in the alternative under the doctrines of *forum non conveniens* and international comity. *See* Dkt. 26. At the hearing on the motions, the Court announced from the bench its tentative conclusions with respect to the principal grounds raised. (R.T. 2-9.) The Court's tentative views were to dismiss the case on political question grounds, finding that adjudicating the case would likely require the Court to evaluate the military's discretionary decision-making, as well as communications between the Japanese and U.S. Governments. (R.T. 3-4.) The Court stated it was "troubled by the potential for disclosure of classified information," but was reluctant to apply the *Totten* bar. (R.T. 4-5.) The Court also tentatively found that Plaintiffs had failed plausibly to allege causation, that TEPCO owed no duty to Plaintiffs, and that Plaintiffs had failed to state claims

[8] *See*, *e.g.*, DoD Fleet Report, *supra* note 4, at p.3 ("The reported radiation doses to the fleet-based individuals are at least one order of magnitude less than any dose associated with adverse health effects."). Among many other points, the DoD analysis concluded that, contrary to the speculation of one Plaintiff (SAC ¶ 139), there was no basis for concluding that "drinking water" on any of the ships was "contaminated with radioactive material." *Id*. at 38. The U.N. Scientific Committee on the Effect of Atomic Radiation more broadly concluded that "[r]adiation exposure following the nuclear accident at Fukushima-Daiichi did not cause any immediate health effects"; that "[n]o radiation-related deaths or acute effects have been observed among nearly 25,000 workers (including TEPCO employees and contractors) involved at the accident site"; and 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." *See* <http://www.unis.unvienna.org/unis/en/pressrels/2013/unisinf475.html>. Nonetheless, consistent with the applicable standard of review, *see infra* at 11, TEPCO takes as true, for purposes of these Motions, the (false) allegation that Plaintiffs were exposed to injurious levels of radiation that supposedly have already produced physical symptoms. (*See*, *e.g.*, SAC, ¶ 198.)

for design defect, fraud, or intentional infliction of emotional distress. (R.T. 5-7.) The Court also tentatively concluded that Plaintiffs were acting as professional rescuers, and their claims were barred by the firefighter's rule. (R.T. 7.) The Court was also inclined to agree that, in the alternative, the case should be dismissed under the doctrines of *forum non conveniens* and international comity. (R.T. 7-9.)

The Court subsequently issued a detailed written order dismissing the FAC on political question grounds. *See* Order at 9. Because the case could be "disposed of exclusively on jurisdictional grounds," the Court declined to address the additional arguments for dismissal. *Id.* at 3. Plaintiffs were granted leave to amend. *Id.* at 9.

III. Plaintiffs' Claims in Their SAC

Plaintiffs' SAC omitted the fraud claim, added a claim for loss of consortium, and recast the lawsuit as a class action. (SAC, ¶¶ 142-270.)[9] As in the SAC, Plaintiffs seek recovery of compensatory damages, including the establishment of a $1 billion medical monitoring fund, as well as punitive damages and attorneys' fees. (SAC, Prayer, ¶¶ 1-6.)

STANDARDS GOVERNING MOTIONS TO DISMISS

In deciding a motion to dismiss for lack of jurisdiction under FED. R. CIV. P. 12(b)(1), the Court may properly determine its jurisdiction, as TEPCO requests here, "on the face of the complaint." *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009). When presented with such a "facial attack," the Court applies the ordinary rules of pleading that generally apply to evaluating the adequacy of a complaint's factual allegations. *Id*. at 1073-74 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Accordingly, as with any motion challenging the facial sufficiency of a pleading's factual allegations, the Court may properly consider materials that are subject to judicial notice. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

[9] The SAC is ambiguous as to the source of the substantive law on which Plaintiffs' common-law claims are based, but there is no relevant difference in the applicable tort principles that would apply under federal or California common law.

To survive a motion to dismiss for failure to state a claim, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A plaintiff meets this standard only if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level, … on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (citations omitted). Claims "grounded in fraud" must satisfy the particularity requirements of FED. R. CIV. P. 9(b).

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction Because the SAC Raises Nonjusticiable Political Questions

As this Court held with respect to the FAC, the SAC must be dismissed for lack of jurisdiction, because Plaintiffs' claims raise nonjusticiable political questions. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007) ("[T]he presence of a political question deprives a court of subject matter jurisdiction.").[10] Just as in the FAC, Plaintiffs' claims in the SAC rest on a theory of causation of injury that would improperly require the Court to evaluate discretionary decisions made by the U.S. Navy as well as communications between the Governments of the U.S. and Japan.

A. A Case Presents a Political Question if Any One of the Six Alternative Tests Set Forth in *Baker* v. *Carr* Is Satisfied

The federal judiciary has long acknowledged that certain disputes raise "political questions" that are not the proper domain of the courts. *See Baker v. Carr*,

[10] A federal court has "leeway" to determine the order in which it wishes resolve various jurisdictional issues and other "threshold grounds" for dismissing a case. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (*forum non conveniens* may be decided before jurisdiction). Accordingly, the Court could choose to dismiss this suit based on a jurisdictional or threshold issue, and it would have no obligation to decide any of the other issues. *Id*. ("there is no mandatory 'sequencing of jurisdictional issues'"). Of course, the Court could also choose to dismiss the suit on both jurisdictional and merits grounds.

369 U.S. 186, 210-17 (1962) (reviewing cases). This doctrine is rooted in several distinct aspects of the Constitution's separation of powers. *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (plurality). Most notably, the Constitution's grant of certain discretionary powers to the political branches, rather than to the courts, means that a case whose resolution calls for the "exercise of [such] a discretion" is nonjusticiable. *Baker*, 369 U.S. at 211. Moreover, Article III's limitation of the "judicial Power" to "Cases" or "Controversies" establishes that the courts may not proceed to decide a case where there is a "'lack of satisfactory criteria for a judicial determination.'" *Id.* at 210 (citation omitted). In addition, the political question doctrine also rests in part on "'prudential concerns calling for mutual respect among the three branches of Government'"—concerns that, in a specific case, may "assist [the courts] in the difficult task of discerning which cases the Constitution forbids them from hearing." *Corrie*, 503 F.3d at 981 (citations omitted).

The political question doctrine thus rests on three separate concerns arising from the Constitution's separation of powers: (1) that the courts not encroach on the political branches' constitutional authority; (2) that the courts not exceed their institutional competence; and (3) that the courts exercise prudential restraint with respect to certain important issues that fall within the authority of the political branches. *Wang v. Masaitis*, 416 F.3d 992, 995 (9th Cir. 2005). Reflecting these distinct concerns, the Supreme Court has distilled that doctrine into six alternative tests. *Baker*, 369 U.S. at 217. Thus, a case is nonjusticiable if there is:

> [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.

Id. (emphases added). If any "one of these formulations is inextricable from the case

at bar," the court should dismiss the suit as nonjusticiable on the ground that it involves a political question. *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, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id*. at 211-12.

B. Application of the *Baker* Tests Shows That Plaintiffs' Claims Raise Nonjusticiable Political Questions

The "discriminating inquiry" mandated by *Baker* confirms that Plaintiffs' claims would require the Court to resolve issues that are nonjusticiable.

1. The Navy's Decisionmaking Concerning the Deployment of an Aircraft Carrier and Directions to Troops Raises Political Questions

Under well-established precedent, Plaintiffs' claims are nonjusticiable because they would improperly require the Court to intrude into discretionary decisions made by military commanders about the deployment of assets and personnel in the context of an international humanitarian disaster. The Court dismissed the FAC for just this reason, and Plaintiffs' amendments in the SAC make no serious effort to address this critical deficiency identified in the Court's Order.

Plaintiffs' theory of causation of injury continues to rest entirely on the decisionmaking of the U.S. Armed Forces as to the deployment of an aircraft carrier strike force and as to the mission and tasks of various military personnel associated with that strike force. Specifically, Plaintiffs contend that TEPCO's alleged statements and omissions affected discretionary military decisions in two respects and that, as a result of those decisions, Plaintiffs were exposed to excessive radiation and suffered injury. First, Plaintiffs allege that, because TEPCO allegedly failed to

warn the Navy about the radiation levels, the Navy made deployment decisions about how to supply "humanitarian assistance" to "the ravaged city of Sendai" without undertaking an "independent inspection or evaluation of the area" that would have detected the high levels of radiation around the FNPP (SAC, ¶¶ 147, 208), and that, as a result, the Navy sent the *Reagan* and "other vessels participating as part of the *Reagan* Strike Force, 7th Fleet, as well as land-based service personnel" into locations "too close to the FNPP" (*id.*, ¶¶ 2, 185). Second, Plaintiffs allege that, because TEPCO purportedly failed to disclose information regarding "the levels of radiation [that] existed within the area where Plaintiffs and their vessels or rescue missions were operating" and failed to advise the Navy as to "the kind of detailed directions and precautions that would have been required to avoid contamination of PLAINTIFFS with radiation," the Navy allowed Plaintiffs to remain in that area, without taking measures to allow Plaintiffs to "protect themselves against" the risk of radiation exposure. (*Id.*, ¶¶ 141, 160, 185, 212.) Some of the words in the SAC are different from the FAC, but the import of the allegations is the same because Plaintiffs have offered no alternative theory of causation of injury. As to causation, Plaintiffs have merely removed some of the redundant allegations that had made their Navy-focused theory even more apparent in the FAC. Moreover, the new allegations added to the SAC focus on the *antecedent* issue of whether the FNPP was negligently constructed or operated (*see, e.g.*, SAC ¶¶ 105-28, 130-37), and such allegations do nothing to address the nonjusticiability of Plaintiffs' theory of *causation* of injury. The FAC already alleged that the FNPP was negligently designed, and adding more such allegations wholly fails to address the justiciability problems identified by this Court.

Accordingly, it remains the case, as the Court found in dismissing the FAC, that "[t]o prevail in this suit, Plaintiffs must show, not only that TEPCO misrepresented the condition of the FNPP and the risk to soldiers operating near the damaged facility, but also that TEPCO's allegedly wrongful conduct, as opposed to

other factors, caused the commanding officers of the *Reagan* '(1) to move the strike force and associated personnel into an area of dangerous radiation exposure; (2) to do so without undertaking radiation testing and research; and (3) to fail to order the necessary precautions'" once they were there. (Order at 6 (quoting Motion to Dismiss the FAC).) The Court would be required to examine the factual basis and rationale for discretionary judgments made by military commanders on all three points. Specifically, the Court would need to determine, *inter alia,* what information concerning radiation levels was available to the relevant commanders and from what sources, and the role (if any) that information from TEPCO may have played in the commanders' ultimate decisions about where and how to deploy specific military assets and personnel in the midst of a serious humanitarian crisis. Under well-settled law, however, Plaintiffs' effort to litigate the decisionmaking processes of the U.S. military raises nonjusticiable political questions.

As the Court has observed, such a "free-form inquiry into the reasonableness of the Executive's policy choices" in the sphere of military and foreign relations "exceeds the appropriate boundaries of the judicial function and implicates several of the *Baker* tests." (Order at 7.) For that reason, in a long line of cases, courts have generally deemed decisions concerning the deployment of military assets and personnel to be unreviewable exercises of executive discretion. *See*, *e.g.*, *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 411 (4th Cir. 2011) (alleged negligence in construction of wiring box at military base camp raised nonjusticiable questions because it "would require the judiciary to question 'actual, sensitive judgments made by the military'"); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842-45 (D.C. Cir. 2010) (en banc) ("decision to launch a military strike abroad" was a nonjusticiable political question because judicial review would improperly "call into question the prudence of the political branches in matters of foreign policy or national security [that are] constitutionally committed to their discretion" and court may not "guess[] how [political branches] would have

conducted the nation's foreign policy had they been better informed"); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1282 (11th Cir. 2009) (decision to organize a convoy mission in Iraq involved "exercise of military expertise and judgment" and was nonjusticiable); *Corrie*, 503 F.3d at 983 (decision to "grant military or other aid to a foreign nation is a political decision inherently entangled with the conduct of foreign relations"); *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). Because resolution of the causation-of-injury issue would require this Court to consider the causal role of the military's discretionary decisions about where and how to deploy assets and servicemembers, and to do so in light of the information available to the military from its own equipment and other sources, Plaintiffs' claims are nonjusticiable. *Taylor*, 658 F.3d at 411-12 (need to adjudicate causal contribution of discretionary military decisions established that servicemember's claims against private contractor raised nonjusticiable political questions); *Carmichael*, 572 F.3d at 1286 (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").

Under the principles established in these cases, adjudication of Plaintiffs' claims would improperly require the courts to intrude into a discretionary matter that is committed by the Constitution 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 is a lack of "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) (determination that the Federal Tort Claims Act did *not* permit suit concerning military strike against civilian airliner did not present a political question); *cf. also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (interpretation of a statute ordinarily presents no political question). 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.

Plaintiffs' only previous response on this issue was to cite *Lane v. Halliburton*, 529 F.3d 548, 561 (5th Cir. 2008), in which the Fifth Circuit allowed a suit alleging false statements by a government contractor to proceed. But as this Court recognized in dismissing the FAC, *Lane* is inapposite because the theory of causation there did not depend on military judgments by the United States. (Order at 6-7.) It required the plaintiffs to prove only that the contractor had made misleading statements about the safety of working in Iraq that resulted in the plaintiffs accepting jobs there. *Lane*, 529 F.3d at 561-62. If the theory of causation had required an inquiry into the U.S. military's "contribution to causation," it would have been a different case—one in which the Fifth Circuit acknowledged that the political question would have "loom[ed] large." *Id.* Because that is precisely the type of inquiry Plaintiffs' claims require here, they must be dismissed.

2. The Government of Japan's Crucial Involvement in Providing Information to the U.S. Government Further Confirms That Plaintiffs' Claims Are Nonjusticiable

The role of the Japanese Government in Plaintiffs' theory of causation further confirms that their claims are nonjusticiable. There is no allegation in the SAC that the Plaintiffs' relief efforts as part of Operation Tomodachi provided any direct assistance to TEPCO itself or to the FNPP. Instead, as the SAC admits, the Navy

was there to supply "humanitarian assistance" to "the ravaged city of Sendai." (SAC, ¶ 147.) Plaintiffs do not allege, nor could they, that the U.S. decided to engage in Operation Tomodachi or station an aircraft carrier strike force off the coast of Sendai without first consulting the Government of Japan, a longstanding U.S. ally.[11]

Although Plaintiffs no longer explicitly allege that the Japanese Government was TEPCO's "co-conspirator" in providing misleading information to the U.S. Navy, the SAC (like the FAC) continues to allege that the Government of Japan also supplied misleading information concerning the dangers presented by the FNPP. Thus, for example, Plaintiffs specifically allege "negligent acts and omissions" by TEPCO's alleged "agents within the government of Japan" in communicating about "the safety of those operating within the zone of radiation." (SAC, ¶ 165.) They further allege that TEPCO and Japan's "nuclear safety agency" together concealed key details from Prime Minister of Japan as the FNPP incident unfolded. (*id*., ¶ 113.) And they allege that the Japanese Government's "downplaying of the disaster" contributed to the "informational uncertainty" on the day the earthquake and tsunami struck Japan. (*id*., ¶ 160 n.51).

Evaluating whether Japanese officials provided the U.S. (or others within their own Government) with misleading information would further implicate a number of political questions. *See El-Shifa*, 607 F.3d at 847-48 (court could not review veracity or accuracy of foreign intelligence on which military strike was based). The Court

[11] Indeed, on the day the earthquake and tsunami occurred, the Japanese Foreign Minister promptly relayed a request to the U.S. Ambassador to Japan that the U.S. military provide desperately needed humanitarian assistance, *see* <http://www.mofa.go.jp/j_info/visit/incidents/pdfs/tomodachi.pdf>, and within 24 hours the President of the United States personally telephoned the Prime Minister of Japan to relay the U.S.'s firm commitment to provide all possible assistance, *see* <http://www.kantei.go.jp/foreign/kan/statement/201103/12denwakaidan_e.html>. Thereafter, Japanese and U.S. military commanders shared information and exchanged views almost daily throughout Operation Tomodachi. *See* <http://www.nids.go.jp/english/event/symposium/pdf/2011/e_01.pdf>, at p.13. The FAC admitted as much by alleging that the Japanese Embassy in Washington immediately relayed a request for help to the "[A]ssistant [S]ecretary of [S]tate for East Asian and Pacific [A]ffairs," who promptly turned to the "Chairman of the Joint Chiefs of Staff" and the "US Nuclear Regulatory Commission." (FAC, ¶ 54.)

would be required to evaluate TEPCO's alleged statements about the FNPP in the context of the broader communications between the Government of Japan and the U.S. military about that same subject and about the logistics of Operation Tomodachi more generally. Plaintiffs' theory would thus inescapably require this Court to sit in review of foreign diplomacy and to set and enforce standards for the completeness and integrity of a foreign government's communications with the United States military. Indeed, the Court would presumably need to inquire into, and evaluate, the adequacy and veracity of communications between the President of the United States and the Japanese Prime Minister in order to determine whether Japan's request for assistance contained the disclosures that Plaintiffs insist should have been included—namely, a warning about the risks of radiation—and the Court would then presumably have to inquire whether the President relayed any such disclosure to his military subordinates. As this Court held in dismissing the FAC, "[p]assing judgment on a foreign government's communications in this manner interferes with the Executive's conduct of diplomacy and foreign relations, and therefore implicates several of the *Baker* tests." Order at 9 (citing *Corrie*'s invocation of the "first, fourth, fifth, and sixth *Baker* tests"); *see also, e.g.*, *Corrie*, 503 F.3d at 983-84 (courts could not review decision to grant foreign aid to Israel and could not override U.S. diplomacy by criticizing Israeli policies); *Alperin*, 410 F.3d at 559-62 (relying on first and third *Baker* tests in holding that court could not sit in review of Vatican's wartime diplomacy or of U.S. diplomatic response to Vatican's wartime actions); *Aktepe*, 105 F.3d at 1403 ("courts are unschooled in 'the delicacies of diplomatic negotiation'").

Even if Plaintiffs had not alleged that the Government of Japan set out to provide *misleading* information, the result would be the same. Plaintiffs' theory of causation, once again, is that the incomplete or misleading information provided by TEPCO led the U.S. military to put its personnel and equipment in danger without conducting any independent testing or taking necessary precautions. *See supra* at

13-15. In order to determine whether that theory has merit, the Court would need to assess what *other* information the Navy had in addition to the information allegedly supplied by TEPCO. The Court, therefore, would need to know what information the Navy received from other sources, including most obviously the Japanese Government. This would once again place the Court in the position of assessing intergovernmental communications in the course of determining the effect of TEPCO's alleged misstatements to the U.S. military. Deciding the import of those communications, like reviewing the Navy's decisionmaking, would intrude into a discretionary matter that is committed by the Constitution to the political branches. And it would demonstrate a lack of respect for those coordinate branches' work. *Baker* requires dismissal for both reasons. *See* Order at 8-9; *see also Taylor*, 658 F.3d at 412 & n.13.[12]

II. Plaintiffs' Claims Fail to State a Claim on Which Relief May Be Granted

For multiple reasons, Plaintiffs' claims fail on the merits as a matter of law.

A. Plaintiffs Fail to State a Claim Because They Cannot Allege Actual Proximate Causation

The SAC should also be dismissed because, as the Court had tentatively concluded with respect to the FAC, "Plaintiffs have failed to allege facts plausibly establishing causation." (R.T. 5.)

To establish the required element of proximate causation, Plaintiffs must plead and prove, *inter alia*, that there is a "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). The requisite directness is absent, however, if an independent

[12] TEPCO respectfully submits that Plaintiffs' SAC presents a second jurisdictional problem in that the "very subject matter" of this suit involves state secrets in violation of the so-called "*Totten* bar." *See Mohamed v. Jeppesen DataPlan, Inc.*, 614 F.3d 1070, 1077-78 (9th Cir. 2010) (en banc). However, in view of the Court's previously stated tentative view that the applicability of the *Totten* bar was not entirely clear on the face of the FAC, *see* R.T. 4-5, TEPCO does not renew that argument at this time but instead reserves the issue in the event that the SAC were not otherwise to be dismissed on the multiple grounds raised here.

intervening cause "'breaks' the chain of causation." *Stoot v. City of Everett*, 582 F.3d 910, 926 (9th Cir. 2009). Plaintiffs have failed to allege sufficient facts to support a "plausible inference" that the U.S. military's deployment decisions were caused by TEPCO's statements, as opposed to its own independent radiation measurements on its nuclear-powered aircraft carrier. *Iqbal*, 556 U.S. at 682. On the contrary, it is wholly *im*plausible—absent some additional facts that the SAC does not (and cannot) allege—to posit that military commanders in charge of thousands of personnel and armed with some of the world's most sophisticated equipment, relied instead only on the press releases and public statements of a foreign electric utility company. (SAC, ¶ 208 (*Reagan* had crew of 5,500).) TEPCO made the same argument in moving to dismiss the FAC, and the Court tentatively agreed that "Plaintiffs' conclusory allegations are hardly sufficient to raise this theory to the level of plausibility." (R.T. 5-6.) That remains the case. The "threadbare" allegations in the SAC "are not entitled to be accepted as true and thus 'do not suffice' to prevail over a motion to dismiss." *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1181 (9th Cir. 2013) (citation omitted). Plaintiffs have added pages of new allegations about TEPCO's alleged negligence in operating the FNPP before March 2011, but those allegations address an element of their claims *other than* causation.

Moreover, the SAC's continued reliance on a chain of causation that runs through the military's decisionmaking imposes an additional pleading burden on Plaintiffs. The courts have held that, when the decisionmaking of a government body is an essential step in the chain of causation of injury, a plaintiff's burden to plead and prove proximate causation requires a showing that the government's decisionmaking was not the result of its own independent judgment. Thus, for example, in *Jacob v. Curt*, 898 F.2d 838 (1st Cir. 1990), the plaintiff alleged that her son died when, due to the false and disparaging statements made by the defendant about the clinic that was providing allegedly needed health care to plaintiff's decedent, the Bahamian Government decided to close the clinic. *Id*. at 839. The

Court held that the plaintiff's complaint was properly dismissed for failure to state a claim, because the complaint failed to allege sufficient facts to establish that the Bahamian Government did not make an *independent* decision to close the clinic: "Even if the Bahamian government officials relied on Curt's research and opinions, the independent decision to credit his views and close the facility stands as a superseding cause of plaintiff's claimed harm." *Id*.

Similarly, in *Galen v. County of Los Angeles*, 477 F.3d 652 (9th Cir. 2007), the Ninth Circuit affirmed summary judgment for Los Angeles County on a § 1983 claim of a plaintiff who argued that the officers arresting him for domestic violence caused excessive bail to be set. Under California law, the commissioner setting bail had "exclusive authority to enhance or reduce bail," so the officers could not be the "actual and proximate cause" of the plaintiff's enhanced bail. *Id.* at 663. That is, under "traditional tort law principles of causation," the bail commissioner's "exercise of independent judgment in the course of his official duties is a superseding cause that breaks the chain of causation." *Id.* at 663-64. The plaintiff could have avoided that result only by showing that the officers "prevented the Commissioner from exercising his independent judgment." *Id.* at 663.

The defect in the present case is directly analogous to *Jacob* and *Galen*. Like the government officials in those cases, Navy commanders are public officials who possess the capacity and the authority to make independent judgments in carrying out their official duties. Plaintiffs do not and cannot allege sufficient facts to warrant a plausible conclusion that TEPCO "prevented the [Navy] from exercising [its] independent judgment." *Galen*, 477 F.3d at 663.

B. <u>All of Plaintiffs' Claims Are Barred by the Firefighter's Rule</u>

Plaintiffs' claims fail for the independently sufficient reason that Plaintiffs are professional rescuers and therefore cannot recover for injuries caused by a hazard incident to the situation to which they responded. As the Court recognized in its tentative ruling, this common law "firefighter's rule" would have barred the claims

in the FAC. (R.T. 7.) Nothing in the SAC changes that result.

Addressing the firefighter's rule in the context of a negligence claim, the California Supreme Court has explained that the rule reflects the fact that "[i]t is the firefighter's business to deal with the hazard of fire" and that such public officers "are presumably adequately compensated (in special salary, retirement, and disability benefits) for undertaking their hazardous work." *Neighbarger v. Irwin Industries, Inc.*, 882 P.2d 347, 352-53 (Cal. 1994) (citation and internal quotation marks omitted); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 24, Reporter's Note to cmt. a; RESTATEMENT (SECOND) OF TORTS § 523.[13] Consistent with the justification for the rule, courts have extended it beyond firefighters to police officers, *Neighbarger*, 882 P.2d at 351; *see also Lee v. Luigi, Inc.*, 696 A.2d 1371, 1373-74 (D.C. 1997) (referring to "professional rescuers, such as police or firefighters" who "are compensated by the public"), and to Army servicemembers responding to accidents, *Maltman v. Sauer*, 530 P.2d 254, 257-58 (Wash. 1975).

Plaintiffs, in their role as members of the U.S. Navy carrying out Operation Tomodachi, were acting as professional rescuers. *Cf. Maltman*, 530 P.2d at 257-58 (Army). According to the SAC, Plaintiffs "were carrying out their assigned duties and humanitarian mission" by providing assistance to those located near the FNPP after the massive earthquake and tsunami. (SAC, ¶ 104; *see also id.*, ¶ 129.) Thus, by virtue of Plaintiffs' employment-related task of responding to the earthquake, the tsunami, and their aftermath, Plaintiffs were exposed to all of the consequences of those natural disasters, which included a wide range of risks—including the risk of exposure to harmful substances from damaged facilities. *See, e.g., Farnam v. State of Calif.*, 101 Cal. Rptr. 2d 642, 647-48 (Cal. Ct. App. 2000) (firefighter's rule bars claim by police officer bitten by dog of California Highway Patrol officer involved

[13] TEPCO does not concede that California law may properly be applied to the common-law claims that Plaintiffs assert here. But with respect to the general principles of tort law discussed here, there is no basis to conclude that federal common law would produce a different result that would be favorable to Plaintiffs.

in same arrest); *Scott v. E. L. Yeager Constr. Co.*, 91 Cal. Rptr. 232, 235 (Cal. Ct. App. 1970) (firefighter's rule barred recovery, regardless of whether the injury was specifically caused by fire or by an explosion).[14] Because Plaintiffs were responding as professional rescuers, all of their claims fail as a matter of law.

C. Plaintiffs' Claims Fail for Additional Reasons Specific to Each Claim

Each of Plaintiffs' claims also fails as a matter of law for additional reasons.

1. As a Matter of Law, the Negligence, Negligence Per Se, *Res Ipsa Loquitur*, Failure to Warn, and Nuisance Claims Fail Because TEPCO Owed No Duty

"Absent a legal duty, any injury is an injury without actionable wrong." *Romero v. Superior Court*, 107 Cal. Rptr. 2d 801, 808 (Cal. Ct. App. 2001). "The existence of a duty depends on the foreseeability of the risk and a weighing of policy considerations for and against imposition of liability." *Id*. at 809.[15] For a number of reasons, TEPCO owed no duty to Plaintiffs here.

First, the U.S. Supreme Court has cautioned that common-law principles

[14] The firefighter's rule has been held not to bar a fraud claim when the defendant allegedly misrepresented the type of the hazard to which the firefighter would be exposed. *Lipson v. Superior Court*, 644 P.2d 822, 829 (Cal. 1982). In the SAC, Plaintiffs have dropped the fraud claim that they previously asserted, and their negligent misrepresentation claim fails for all of the reasons set forth in the text. *See infra* at 26-28. Nor is this a situation in which the responding organization was wholly unaware of the hazard and the alleged harm was "independent from that which was responsible for the summoning" of the military. *Lipson*, 644 F.3d at 831-32. Here, the earthquake caused the tsunami, which caused the FNPP accident, and the accident was thus one of the myriad consequences of the earthquake; as such, the accident was not independent of the earthquake that summoned the U.S. Navy. Moreover, although Plaintiffs were not themselves responding to the FNPP, the allegations in the SAC and public information subject to judicial notice make clear that the possibility of nuclear damage was contemplated as one of the consequences of the earthquake to which Plaintiffs were responding. *See infra* at n.16.

[15] These considerations include "'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.'" *O'Neil v. Crane Co.*, 266 P.3d 987, 1006 (Cal. 2012) (citation omitted).

should not be invoked to create novel duties that encroach on the domain of the political branches, particularly in a context with significant foreign policy implications. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 726-28 (2004); *cf. also Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) (courts creating novel private rights of action causes "grave separation of powers concerns" because of the "policy choices" bound up in such a decision). For the reasons explained earlier in the context of the political question doctrine, *see supra* at 15-20, it would be inappropriate, as a matter of substantive tort law, for the Court to recognize an innovative judge-made duty of foreign sovereigns and foreign entities to provide disclosures to other sovereigns in the context of a large-scale humanitarian crisis. As this Court put it in the tentative ruling, "[t]he relationship between foreign citizens or sovereigns and the United States Military during a natural disaster should not be dealt with by an inflexible judicial rule of liability." (R.T. 6.)

Second, TEPCO had no duty to warn a sophisticated entity such as the U.S. Armed Forces, because it would be obvious to the Navy and other military branches that there were risks to operating in the post-earthquake and tsunami zone. "[T]here is no need to warn of known risks under either a negligence or strict liability theory," especially where (as here) a "sophisticated" entity is involved. *Johnson v. American Standard, Inc.*, 179 P.3d 905, 911-12 (Cal. 2008). The *Reagan* and her crew were responding to an enormous earthquake and tsunami that "ravaged" sections of Japan (SAC, ¶ 147), and Plaintiffs' SAC acknowledges the incontrovertible fact that the *Reagan* had capabilities for detecting radiation (*id.*, ¶¶ 2 n.3, 41). Especially given the almost immediate awareness of the damage to the FNPP and the risk of radiation—as the SAC itself acknowledges (*see* SAC, ¶ 129 (alleging that TEPCO "created an illusory impression" regarding "*the extent of the radiation* that had leaked from the FNPP" (emphasis added))—the need for the Navy to consider

precautions to detect and avoid radiation were obvious.[16]

2. Plaintiffs' Negligence Claim Also Fails Because Plaintiffs Do Not Adequately Allege Actual and Justifiable Reliance

Plaintiffs' negligence claim also fails to the extent that it is based on a theory of negligent misrepresentation, as it is in large part. (*See, e.g.*, SAC, ¶ 144 (alleging TEPCO "negligently caused, permitted and allowed false and misleading information concerning the true condition of the FNPP to be disseminated"). To prevail on that claim, Plaintiffs must plead and prove that the U.S. Armed Forces both actually and *justifiably* relied on information from TEPCO in determining where to position the *Reagan* and other assets and personnel. *See, e.g.*, *Bily v. Arthur Young & Co.*, 834 P.2d 745, 772 (Cal. 1992) (cause of action for negligent misrepresentation requires "actual, justifiable reliance"). As the Court recognized in its tentative ruling, Plaintiffs have failed to do so as a matter of law. (R.T. 6-7.)

First, for the same reasons that Plaintiffs have failed to establish any sufficient causal connection between TEPCO's alleged statements and the Armed Forces' decisionmaking, Plaintiffs have failed to plead actual reliance. *See supra* at 20-22.

Second, even if Plaintiffs had pleaded facts to show actual reliance upon statements by TEPCO, their claims would nonetheless be subject to dismissal because the Armed Forces' reliance would not have been justified under the circumstances. Justifiable reliance depends on whether "'the conduct of the plaintiff

[16] Judicially noticeable public information supports this conclusion. On March 11, 2011, the *New York Times* noted mounting concerns "over possible radiation leaks," and by the following day described the situation at FNPP as "one of the worst nuclear accidents in over two decades." *See* Martin Fackler, *Powerful Quake and Tsunami Devastate Northern Japan*, N.Y. TIMES (Mar. 11, 2011), *available at* <http://www.nytimes.com/2011/03/12/world/asia/12japan.html?pagewanted=all> (Heckenlively Decl., Ex. G); Anahad O'Connor, *Nuclear Emergency is Worst in Decades*, N.Y. TIMES (Mar. 12, 2011), *available at*, <http://www.nytimes.com/2011/03/13/world/asia/13accidents.html?_r=0> (Heckenlively Decl., Ex. H). The Court may take judicial notice that the radiation leak was apparent enough to be in the public discussion during those days. *See Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010) (taking judicial notice of news articles "as an indication of what information was in the public realm at the time").

in relying upon a misrepresentation in the light of his own intelligence and information was manifestly unreasonable'" and may be decided as a matter of law "'if the facts permit reasonable minds to come to just one conclusion.'" *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1163 (9th Cir. 2012) (citation and alterations omitted).

It is an insult both to logic and to the U.S. Navy and other military branches to suggest that commanding officers could have or would have justifiably relied solely on a foreign electric company's representations about the risk of exposure to radiation rather to rely upon the sophisticated resources available to them. As explained above, the SAC itself confirms that the Navy had the capability to detect radiation and did so. *See supra* at 8 & n.7. The SAC likewise notes that the *Reagan* had a "crew of approximately 5,500 aboard." (SAC, ¶ 208.) Given the Navy's responsibilities for safeguarding the thousands of members on its ships, it would have been entirely unreasonable for the Navy and other military branches to forego "independent inspection or evaluation" (*id.*), or fail to take measures so that servicemembers could "protect themselves" against the risk of radiation exposure, all in reliance upon "the absence of sufficient warnings by" TEPCO, a foreign utility company. (*Id.*, ¶ 212). That is particularly true where, as here, there was immediate awareness of the possibility of radiation in the area. *See supra* at n.16.

Plaintiffs' negligent misrepresentation claim fails for the further reason that it is "grounded in fraud" but does not satisfy the "particularity" requirement of FED. R. CIV. P. 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-27 (9th Cir. 2009). Even if the term "fraud" is not used, Rule 9(b) applies to any claim where the plaintiff chooses to "allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of [the] claim." *Id.* That is true of Plaintiffs' negligent misrepresentation claim here, which is based on the assertion that Plaintiffs were injured because of false or misleading information disseminated by TEPCO. (SAC, ¶¶ 144, 146). At times, Plaintiffs go so far as to claim the misrepresentations

were "intentional" or "knowing." (*See, e.g.*, SAC, ¶ 144 ("TEPCO *knowingly* and negligently" disseminated); *id.*, ¶ 164 ("TEPCO was also aware that the potential health risk was far greater than its agents were reporting"); *id.*, ¶ 168 ("TEPCO intentionally and knowingly made misleading environmental claims"). In tentatively agreeing with TEPCO that the fraud claim in the FAC should be dismissed, the Court observed that Plaintiffs had not "indicat[ed] the specific contents of the alleged misrepresentation" or "identif[ied] the speaker, beyond the generalized references to TEPCO as a corporate entity." (R.T. 7.) Although the SAC has added a few new allegations of what TEPCO said, it still fails to identify a speaker more specific than "TEPCO" and "TEPCO management." (SAC, ¶¶ 116, 146, 161.) This remains insufficient to satisfy Rule 9(b), which requires Plaintiffs to plead with "particularity" "'the *who*, what, when, where, and how' of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (emphasis added). *See In re Countrywide Financial Corp. Mortgage-backed Sec. Litig*, 943 F. Supp. 2d 1035, 1056-57 (C.D. Cal. 2013) (allegations of oral misrepresentations insufficient under Rule 9(b) because they attributed statements to "senior executives at Countrywide" and "First Franklin" without naming specific employees).

3. The Strict Liability Design Defect Claim Fails Because the Doctrine Does Not Extend to the FNPP

To recover for a strict liability cause of action, "plaintiff must ordinarily show: (1) the product is placed *on the market*; (2) there is knowledge that it will be *used* without inspection for defect; (3) the product proves to be defective; and (4) the defect causes injury." *Nelson v. Superior Court*, 50 Cal. Rptr. 3d 684, 688 (Cal. Ct. App. 2006) (citation and internal quotation marks omitted). The SAC's design defect claim alleges that the "defectively designed product" was "the FNPP" (SAC, ¶ 223), but that theory is legally untenable. Notwithstanding their conclusory allegation that TEPCO put the FNPP "on the market" (SAC, ¶ 222), Plaintiffs allege no facts to support a plausible conclusion to that effect. "The concept of

marketing—of placing a product in the stream of commerce—necessarily involves transfer of property or some property right." *United Pac. Ins. Co. v. Southern Cal. Edison Co.*, 209 Cal. Rptr. 819, 823 (Cal. Ct. App. 1985). Plaintiffs allege no such transfer; to the contrary, Plaintiffs allege that "[a]t all times herein mentioned, the Defendant TEPCO was one of the owners of the FNPP." (SAC, ¶ 91.) Moreover, here, as in *United Pacific*, the defendant "is the only user of the product claimed to be defective." 209 Cal. Rptr. at 823. As this Court indicated in its tentative ruling (R.T. 6), strict liability does not apply in such circumstances. *See also United Pac.*, 209 Cal. Rptr. at 823 (utility not strictly liable for fire caused by high-voltage power lines owned by the utility because lines were not placed on the market).

4. Plaintiffs' Claim for Intentional Infliction of Emotional Distress Fails as a Matter of Law

For multiple reasons, Plaintiffs' claim for intentional infliction of emotional distress fails as a matter of law.

As the Supreme Court has held, it would be "anomalous" for a judicially created cause of action to sweep "beyond the bounds [Congress] delineated for comparable *express* causes." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 180 (1994) (emphasis added). The principle that the courts should "look for legislative guidance before exercising innovative authority over substantive law" applies with special force here, where Plaintiffs seek to invoke common-law principles to fashion a cause of action in a context that presents significant "risks of adverse foreign policy consequences." *Sosa*, 542 U.S. at 726-28. Under the Price-Anderson Act, a statutory scheme that Congress has established to provide "the exclusive means of compensating victims for any and all claims arising out of nuclear incidents" in the United States, *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1009 (9th Cir. 2008), a cause of action for emotional distress in the absence of physical injury is statutorily prohibited, *In re Berg Litig.*, 293 F.3d 1127, 1131 (9th Cir. 2002), and "exposure to radiation"

without a physical "disease" does *not* constitute the requisite "physical injury," *Dumontier v. Schlumberger Tech. Corp.*, 543 F.3d 567, 570-71 (9th Cir. 2008).[17] Accordingly, under the Ninth Circuit's construction of the Price-Anderson Act, recovery for emotional distress is not permitted as a stand-alone cause of action, but only as an item of damage on a different claim for a plaintiff who has *otherwise* established a cause of action for physical injury. *In re Berg Litig.*, 293 F.3d at 1130. It would be highly "anomalous" and inappropriate to use judge-made common-law principles to create an extraterritorial cause of action that imposes only on *foreign* nuclear power plants a form of liability that Congress has *expressly* excluded for *U.S.* nuclear power plants. *Cf. Central Bank*, 511 U.S. at 180.

Plaintiffs' claim fails for the further reason that, as a matter of law, Plaintiffs cannot plead and prove key elements of such a cause of action. A claim for intentional infliction of emotional distress requires that the plaintiff establish that, *inter alia*, the defendant engaged in "'[1] extreme and outrageous conduct' [2] which is directed at the plaintiff." *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 821 (Cal. 1993); *see also* RESTATEMENT (SECOND) OF TORTS § 46 & cmt. *i* (same); *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841-42 (9th Cir. 2002) (relying upon Restatement § 46 in describing scope of intentional infliction of emotional distress under maritime law). The element of "extreme and outrageous" conduct "is extremely difficult to meet" and requires a showing of conduct "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Wallis*, 306 F.3d at 841-42 (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d) (emphasis omitted). The requirement that the conduct be "*directed at the plaintiff*" is likewise a demanding standard. *Potter*, 863 P.2d at 819 (emphasis in original). It is

[17] As *Berg* explains, because the Price-Anderson Act requires that the plaintiff plead and prove "bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property," 42 U.S.C. § 2014(q), "[p]hysical harm to persons or property" is a "prerequisite." 293 F.3d at 1131.

not sufficient to show that the defendant "realized that its misconduct was almost certain to cause severe emotional distress to any person who might foreseeably" be affected. *Id*. at 820. Rather, the plaintiff must plead and prove that the defendant's conduct was "directed *at these particular plaintiffs*." *Id*. (emphasis added); *see also id*. (plaintiff must show that defendant aimed its conduct with "knowledge of *these particular plaintiffs*") (emphasis in original).

Just as the Court suggested in its tentative ruling concerning the comparable claim in the FAC (R.T. 7), Plaintiffs' allegations in the SAC fall far short of these standards. In particular, Plaintiffs' reliance upon TEPCO's alleged conduct in *promoting nuclear power* prior to the massive earthquake and tsunami (SAC, ¶ 241(a)-(b)) was not "directed at these particular plaintiffs," *Potter*, 863 P.2d at 820. (*See also* R.T. 7.) Nor does such alleged conduct constitute "extreme and outrageous conduct" that is "atrocious" and "utterly intolerable in a civilized community," *Wallis*, 306 F.3d at 841 (emphasis omitted). The remaining conduct upon which Plaintiffs' claim rests is the same set of alleged misrepresentations on which their negligence claim rests. (SAC, ¶ 241(c)-(h).) But as the Ninth Circuit's decision in *Wallis* confirms, the "extreme and outrageous conduct" element is *not* satisfied simply by alleging that the defendant engaged in conduct that was wrongful or tortious. Rather, as noted, this test is "extremely difficult to meet" and is satisfied only by pleading conduct "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Wallis*, 306 F.3d at 841-42 (quoting RESTATEMENT (SECOND) OF TORTS § 46, cmt. d) (emphasis omitted).[18] Here,

[18] "'Whether a defendant's conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court ….'" *McKenna v. Permanente Med. Group, Inc.*, 894 F. Supp. 2d 1258, 1273 (E.D. Cal. 2012). Courts readily dismiss such claims at this stage if the alleged conduct cannot reasonably be found to be outrageous. *See, e.g., C.B. v. Sonora School Dist.*, 691 F. Supp. 2d 1123, 1157-58 (E.D. Cal. 2009); *Berkley v. Dowds*, 61 Cal. Rptr. 3d 304, 318 (Cal. Ct. App. 2007).

Plaintiffs have alleged that, at worst, TEPCO *negligently* concealed radiation-exposure risks from the U.S. military, an extraordinarily sophisticated entity that Plaintiffs concede has the means to detect radiation on its own (SAC, ¶ 2, n.3). There is no basis in law or in logic for the view that such conduct, even if negligent, rises to the demanding level of extreme outrageousness required for the tort of intentional infliction of emotional distress.

5. The Claims Based on Ultrahazardous Activity Also Fail

Plaintiffs allege that TEPCO is strictly liable for harm proximately caused by the FNPP incident because operating a nuclear power plant should be deemed to be an ultrahazardous activity under common-law principles. (SAC, ¶¶ 245-50.) But as explained earlier, it would be "anomalous" for a judicially created cause of action to sweep "beyond the bounds [Congress] delineated for comparable *express* causes," *Central Bank*, 511 U.S. at 180 (emphasis added), and this principle that the courts should "look for legislative guidance before exercising innovative authority over substantive law" applies with special force in the context of liability for injuries occurring overseas, given the risk of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," *Sosa*, 542 U.S. at 726-27. Viewed in this light, Plaintiffs' proposed claim fails in two respects.

First, Plaintiffs' ultrahazardous activities claim improperly seeks to invoke common-law principles to impose extraterritorial liability on foreign entities that is broader than the *statutorily limited* common-law liability that Congress has allowed for U.S. entities. As discussed above, the Price-Anderson Act establishes an exclusive regime for compensating victims of nuclear accidents in the United States, and therefore a strict-liability suit related to a nuclear accident is permitted only if authorized by the Act itself. *See In re Hanford*, 534 F.3d at 1003, 1009. In a suit under the Act, "the substantive rules for decision … shall be derived from the law of the State in which the nuclear accident involved occurs, *unless* such law is inconsistent with the provisions of" the Act. 42 U.S.C. § 2014(hh) (emphasis added).

Because the Price-Anderson Act establishes dosage limits applicable to the operation of nuclear power plants, "[e]very federal circuit that has considered the appropriate standard of care under the [Price-Anderson Act] has concluded that nuclear operators are not liable *unless they breach federally-imposed dose limits*." *In re Hanford*, 534 F.3d at 1003 (emphasis added); *O'Connor v. Boeing N. Am., Inc.*, 2005 WL 6035255, at *39 (C.D. Cal. Aug. 18, 2005) ("An essential element of any [public liability action] is that the plaintiff's exposure exceed the federal dose limits."). Federal law thus "preempts" any state law, including common law, "from imposing a more stringent standard of care than federal safety standards." *In re Hanford*, 534 F.3d at 1003. As a result, the Price-Anderson Act's authorization to use state common law as the rule of decision may not be invoked to impose strict liability for releases of radiation *below* the federal limits "because any federal authorization would preempt state-derived standards of care." *Id*.; *see also McLandrich v. Southern Cal. Edison Co.*, 942 F. Supp. 457, 465 n.7 (S.D. Cal. 1996) (finding that the Act preempts state law imposing strict liability for ultrahazardous activities). Here, Plaintiffs have not pleaded any facts to establish that their exposures to radiation exceeded the federally prescribed dosage limits that would apply under the Price-Anderson Act. *In re Hanford*, 534 F.3d at 1003; *see also McLandrich*, 942 F. Supp. at 465 & n.7 (declining to "forge new ground at this juncture by labeling nuclear power generation as an 'ultrahazardous activity,' because such strict-liability principles could not be applied to override the Price-Anderson Act's "dose limits regulations"). Because Plaintiffs' common-law claim based on ultrahazardous activity goes beyond what the Price-Anderson Act would allow for such a claim against a U.S. power plant, a U.S. court could not properly apply that stricter standard to a foreign plant.

Second, as explained below, United States law and policy, as reflected in the Convention on Supplementary Compensation for Nuclear Damage, specify that all claims concerning a nuclear accident should be resolved exclusively in the country in which the accident occurred or the facility is located. *See infra* at 57-60. Plaintiffs'

effort to create a *transnational* strict-liability claim directly contravenes these principles, which confirm that it is for the host country's courts to exclusively determine and apply the proper extent of strict-liability principles with respect to nuclear power. *See id.* It would be particularly inappropriate to create such a novel common-law cause of action in light of the serious foreign policy implications. *Cf. Sosa*, 542 U.S. at 726-28; *Central Bank*, 511 U.S. at 180.

6. The Loss of Consortium Claim Fails as a Matter of Law

"'A cause of action for loss of consortium is, by its nature, dependent on the existence of a cause of action for tortious injury to a spouse.'" *LeFiell Mfg. Co. v. Superior Ct.*, 282 P.3d 1242, 1246 (Cal. 2012) (citation omitted). Because all of the claims for tortious injury to the Plaintiffs fail for the numerous reasons set forth in this Memorandum, any loss of consortium claims would likewise fail. *See Hahn v. Mirda*, 54 Cal. Rptr. 3d 527, 531 (Cal. Ct. App. 2007) (a loss of consortium claim "stands or falls based on whether the spouse of the party alleging loss of consortium has suffered an actionable tortious injury").[19]

III. The SAC's Claims on Behalf of "Doe" Plaintiffs Should Be Dismissed

Like the FAC, the SAC purports to assert claims on behalf of '"JOHN & JANE' DOES 1-70,000" (SAC, ¶ 84), but these Doe Plaintiffs must be dismissed because the Federal Rules do not permit the use of such placeholder plaintiffs.[20]

The SAC does not contain any allegations suggesting that these 70,000 Doe

[19] The loss of consortium claims fail for the further reason that the aggrieved spouses have not been named as plaintiffs, and it is not even clear that Plaintiffs' counsel here has authority to sue on behalf of these separate individuals.

[20] Unlike the FAC, the SAC purports to bring this suit as a class action. (SAC, pp. 2-3.) TEPCO does not concede that the claims are appropriate for class treatment, but the Court need not reach that issue at this time. Regardless of whether a suit is or is not brought as a class action, it is improper to attempt to list in a complaint, *as if they were actual parties to the litigation*, 70,000 "Doe" Plaintiffs. That is what the SAC does here. In violation of LOCAL CIV. R. 23.1(b), which requires that a putative class action complaint "must include a statement describing the class or classes on behalf of which the action is sought to be maintained," the SAC contains no such definition and instead confusingly and improperly asserts that the 70,000 Doe Plaintiffs are additional actual *parties* to the case. (SAC, ¶ 84.) For the reasons TEPCO sets forth, this is wholly improper, and the 70,000 Doe Plaintiffs should be dismissed.

Plaintiffs are proceeding pseudonymously—*i.e.*, that they are actual, but unnamed individuals with whom Plaintiffs' counsel has an attorney-client relationship and authorization to sue on their behalf. *Cf. Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1042-46 (9th Cir. 2010) (describing the demanding standards for individual plaintiffs to obtain leave to proceed pseudonymously). Rather, the inclusion of the reference to "Doe" Plaintiffs is nothing more than a placeholder inserted by Plaintiffs' counsel in the hope of enlisting 70,000 *future* clients that they do not yet have authorization to represent. The Federal Rules of Civil Procedure flatly prohibit such an unorthodox procedure. The Rules expressly state that all suits must be brought in the "name" of the real party in interest, FED. R. CIV. P. 17(a)(1), and that "the complaint must name all the parties," FED. R. CIV. P. 10(a). Indeed, the advisory committee notes to Rule 17 explicitly state that the Rules do not permit anticipatory complaints on behalf of hoped-for prospective clients. To illustrate what the Rules do *not* permit, the advisory committee notes posit a situation in which, after a plane crash, an action is filed "in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim." FED. R. CIV. P. 17, advis. comm. notes (1966 amend.); *see also* 6A WRIGHT, MILLER, ET AL., FEDERAL PRACTICE & PROCEDURE § 1555 (3d ed.) ("Moreover, the provision is not intended to authorize suits in the name of fictitious parties in the hope that at a later time the attorney filing the action may discover the real parties to the action."). The "Doe" Plaintiffs must be dismissed.

IV. Alternatively, the SAC Should Be Dismissed on the Ground of *Forum Non Conveniens*

A dismissal on *forum non conveniens* grounds is proper if (1) there is "an adequate alternative forum" in which to try Plaintiffs' claims, and (2) "the balance of private and public interest factors favors dismissal." *Lueck v. Sundstrand Corp.*, 236

F.3d 1137, 1142 (9th Cir. 2001). As this Court had tentatively concluded with respect to the FAC (R.T. 7-8), both elements of that test are present here.

A. Japan Is an Adequate Alternative Forum

1. TEPCO Is Subject to Jurisdiction in Japan

As an initial matter, the Japanese forum can be adequate only if it is available to the parties. This threshold requirement is generally satisfied by showing that the defendant is "amenable to process" in the foreign forum. *E.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). Here, there can be no dispute that TEPCO is subject to jurisdiction in Japan, where TEPCO has its principal place of business and conducts most of its activities. (*See* May 31, 2013 Declaration of Professor Yasuhei Taniguchi ("May 31 Taniguchi Decl.") (attached as Exhibit A to the March 26, 2014 Declaration of Professor Taniguchi ("Mar. 26 Taniguchi Decl.")), ¶¶ 6, 9, 17 (noting that, because TEPCO's principal office is in Tokyo, any kind of action against it may be brought in the Tokyo District Court).)

2. Japan's Courts Provide an Adequate Forum

If the defendant is amenable to process in the foreign forum, that forum will be deemed adequate so long as it provides "'some remedy' for the wrong at issue." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006) (citations omitted); *see also Lueck*, 236 F.3d at 1143. This test only "requires the defendant to establish that the foreign forum's laws provide potential redress for the injury alleged; the fact that the substantive law may be less favorable is relevant only if it would *completely deprive plaintiffs of any remedy* or would result in unfair treatment." *Tuazon*, 433 F.3d at 1178 (emphasis added). "This test is easy to pass; typically, a forum will be inadequate only where the remedy provided is 'so clearly inadequate or unsatisfactory, that it is no remedy at all.'" *Id.* (quoting *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 768 (9th Cir. 1991)); *see also Lueck*, 236 F.3d at 1144 ("The effect of *Piper Aircraft* is that a foreign forum will be deemed adequate unless it offers no practical remedy for the plaintiff's complained

of wrong."). A Japanese forum readily meets these standards.

Substantively, it cannot be said that Japanese law "would completely deprive plaintiffs of any remedy" in this case. *See Tuazon*, 433 F.3d at 1178. On the contrary, Japanese law recognizes general principles of tort liability that provide redress for injuries that are proximately caused by wrongful conduct. (May 31 Taniguchi Decl., ¶¶ 40-53.) Moreover, Japanese law provides a special statutory cause of action in the courts of Japan for recovery, from a nuclear operator, of any damages resulting from a nuclear accident. (*Id.*, ¶¶ 54-58.) In fact, scores of plaintiffs have filed suits against TEPCO in the Japanese courts seeking relief for damages allegedly suffered because of the accident at the FNPP. (Declaration of Michitaka Kondo ("Kondo Decl."), ¶¶ 14, 16-17.)[21] This is more than sufficient to demonstrate that, if Plaintiffs have meritorious claims, Japanese law "provides 'some remedy' for the wrong at issue." *Tuazon*, 433 F.3d at 1178 (citation omitted). It is irrelevant that TEPCO might have meritorious defenses in Japan—as it asserts it has in the courts of the U.S., *see supra* at 11-35. *See Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390, 395 (D.C. Cir. 2003) (question is whether foreign forum provides remedies for a "meritorious claim" or a "valid claim").[22]

[21] Notably, of the many claimants who have filed lawsuits in Japanese courts, none has asserted a claim seeking damages from TEPCO for any specific physical disorder directly triggered by exposure to radiation from the FNPP; instead, the claims have been for "consolation" damages, loss of earnings, or relocation costs, damages related to business operations, etc. (Kondo Decl., ¶¶ 16-17.) The absence of such physical-injury claims is not in any way due to the lack of a remedy, because Japanese law *would* permit recovery of damages for a *meritorious* claim of physical injury caused by tortious conduct. (May 31 Taniguchi Decl., ¶¶ 54-58.) Rather, it is more likely due to the lack of any such meritorious claims. *Cf.* "No Immediate Health Risks from Fukushima Nuclear Accident Says UN Expert Science Panel," *available at* <http://www.unis.unvienna.org/unis/en/pressrels/2013/unisinf475.html> ("'Radiation exposure following the nuclear accident at Fukushima-Daiichi did not cause any immediate health effects. It is unlikely to be able to attribute any health effects in the future among the general public and the vast majority of workers,' concluded the 60th session of the Vienna-based United Nations Scientific Committee on the Effect of Atomic Radiation (UNSCEAR).").

[22] Because the applicable statute of limitations in Japan was recently extended from three years to ten years, *see* Mar. 26 Taniguchi Decl., ¶ 3, Plaintiffs would have ample time to refile their claims in Japan.

Where (as here) the defendant carries its burden to show that the alternative forum is available and provides "some remedy," the plaintiff who nonetheless "assert[s] inadequacy or delay must make a powerful showing." *Tuazon*, 433 F.3d at 1178-79. Plaintiffs cannot carry that burden. The Japanese judicial system is held in high regard and has consistently been found to be adequate for *forum non conveniens* purposes. It provides robust procedural protections, including an appeal as of right to a higher court and discretionary appeal to the Supreme Court of Japan. (May 31 Taniguchi Decl., ¶¶ 10-37.) The courts are at all levels staffed by impartial career judges, as in the European tradition. (*Id.*, ¶ 5.) Although (like almost every other country in the world) Japan does not have the sort of wide-ranging and permissive discovery allowed in the U.S., its judges have ample power to ascertain the relevant facts through their active oversight of the production of documents and of witness testimony, as well as through their power to issue document production orders, and, if necessary, orders compelling witness to appear. (*Id.*, ¶¶ 24-33.) No serious issues of corruption have been recognized among their ranks, and Japanese judges are highly regarded for their impartiality. (*Id.*, ¶ 5.)[23]

It is therefore no surprise that "[f]ederal courts have consistently found that Japan provides an adequate alternative forum to litigation in the United States." *Lockman Found.*, 930 F.2d at 769 & n.3 ("We have found no reported cases holding Japan to be an inadequate forum."). *See also, e.g., USO Corp. v. Mizuho Holding*

[23] Japan, like most countries, does not permit U.S.-style class actions. However, Japanese law permits interested plaintiffs to combine their claims in one proceeding should they so choose (*see* Oct. 11, 2013 Supplemental Declaration of Professor Yasuhei Taniguchi ("Oct. 11 Taniguchi Decl.") (attached as Ex. B to Mar. 26 Taniguchi Decl.), ¶¶ 2-4), and it also permits a "representative action," which is akin to an opt-in class action, in which one or more parties act as representatives asserting the claims of enumerated and identified non-parties. (*See* Mar. 26 Taniguchi Decl., ¶¶ 4-19.) In any case, it is well-settled that the lack of class actions does not render a foreign forum inadequate. *See, e.g., Wong v. PartyGaming Ltd.*, 589 F.3d 821, 831 (6th Cir. 2009); *see also Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 540-41 (S.D.N.Y. 2001) ("The class action mechanism … is ultimately nothing more than a 'convenient procedural device,' which most of the world's nations have chosen not to adopt …. Its absence does not ordinarily render a foreign forum 'inadequate' for purposes of *forum non conveniens* analysis.") (internal citations omitted).

Co., 547 F.3d 749, 755 (7th Cir. 2008); *Borden, Inc. v. Meiji Milk Prods. Co., Ltd.*, 919 F.2d 822, 829 (2d Cir. 1990); *Philippine Packing Corp. v. Maritime Co. of Philippines*, 519 F.2d 811, 812 (9th Cir. 1975) (per curiam); *J.C. Renfroe & Sons, Inc. v. Renfroe Japan Co., Ltd.*, 515 F. Supp. 2d 1258, 1269-70 (M.D. Fla. 2007); *Creager v. Yoshimoto*, No. 05-1985, 2006 WL 680555, at *2 (N.D. Cal. Mar. 14, 2006); *Abbott Labs. v. Takeda Pharmaceutical Co. Ltd*, No. 05-C-3758, 2006 WL 539341, at *4-5 (N.D. Ill. Feb. 24, 2006); *Fluoroware, Inc. v. Dainichi Shoji K.K.*, 999 F. Supp. 1265, 1271 (D. Minn. 1997); *Morrison Law Firm v. Clarion Co. Ltd.*, 158 F.R.D. 285, 287 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 811 (2d Cir. 1995).[24]

B. The Relevant Private Interest Factors Favor Dismissal

Because an adequate foreign forum is available in Japan, the Court should "decline to exercise jurisdiction" if the Japanese forum would "be more convenient for the parties." *Lueck*, 236 F.3d at 1142; *see also Piper Aircraft*, 454 U.S. at 256. Although there is a presumption of convenience when a U.S. plaintiff sues in his or her home forum, that presumption may be overcome where (as here) the relevant "private interest" and "public interest" factors reveal that the chosen forum is not convenient. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1227-29, 1234 (9th Cir. 2011). Thus, for example, in *Loya*, the Ninth Circuit affirmed the district court's dismissal, under *forum non conveniens*, of a suit brought by a U.S. citizen against a U.S. company over a scuba accident in Mexico. 583 F.3d at 665-66. As the Court explained, the district court properly considered the balance of public and private interest factors and held that any presumption in favor of a U.S. court had been rebutted because the "nucleus" of the plaintiff's case was "where [the] accident occurred." *Id*. at 665.

[24] The filing fees charged by Japanese courts (*see* May 31 Taniguchi Decl., ¶¶ 11-12) do not render the Japanese forum inadequate. *See Altmann v. Republic of Austria*, 317 F.3d 954, 972-73 (9th Cir. 2002) ("The mere existence of filing fees, which are required in many civil law countries, does not render a forum inadequate as a matter of law."). Here, as in *Altmann*, the foreign forum permits indigent plaintiffs to apply for relief from such fees. *See id.* (*See also* May 31 Taniguchi Decl., ¶ 13.)

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*, 433 F.3d at 1180; *see also Boston Telecomms. Grp. v. Wood*, 588 F.3d 1201, 1206-07 (9th Cir. 2009); *Lueck*, 236 F.3d at 1145. These factors weigh in favor of dismissal here.

1. The Critical Witnesses Reside in Japan

Plaintiffs' SAC alleges that employees of TEPCO in Japan misrepresented and concealed the levels of radiation emanating from the FNPP, and that TEPCO negligently designed, built, and maintained the FNPP and other nuclear facilities in Japan. (SAC, ¶¶ 104-39.) Because the FNPP and TEPCO are located in Japan, and virtually all of the conduct underlying the SAC took place there, adjudication of these claims will depend largely on the testimony of Japanese witnesses, including current and former TEPCO directors and employees, Japanese officials, and others involved with addressing the situation of the FNPP. To the extent that such persons are current TEPCO directors or employees, none of them are located in the Southern District of California; they are virtually all in Japan. (*See* Declaration of Mitsutoshi Hinata ("Hinata Decl."), ¶ 10 (no active TEPCO employees in California other than one individual who is seconded to another company).) Likewise, numerous third-party witnesses, including former TEPCO directors and employees, Japanese Government officials, and those involved in the operation of various nuclear power plants discussed in the SAC[25] would also be located in Japan.

[25] Plaintiffs allege that "TEPCO had a history of negligently causing other nuclear accidents," and list eleven events that allegedly took place at Japanese nuclear power plants *other than the FNPP*. (SAC, ¶ 138.) Plaintiffs, however, acknowledge that a number of these incidents took place at facilities *not* operated by TEPCO (*see* SAC ¶138(b), (c) (referencing conduct by "State-run operator Donen" with no mention of TEPCO). Indeed, at least seven of the 11 incidents listed involved operators other

The SAC alleges that Plaintiffs, who were allegedly injured, reside in California and elsewhere in the United States. But their testimony has no direct bearing on the antecedent questions of whether TEPCO engaged in tortious conduct, what levels of radiation were released from the FNPP in the first several days following the earthquake and tsunami, or the manner in which TEPCO's facilities were designed, built, or maintained. Plaintiffs do not allege that TEPCO made statements uniquely to them, but to the Japanese Government (SAC ¶ 113), to the U.S. Navy (*id*., ¶ 208), and "to the public" (*id*., ¶ 144). Plaintiffs also do not allege that they had any first-hand experience with the design, building, or operation of the FNPP or other facilities noted in the SAC.

To be sure, Plaintiffs may be required to testify regarding their alleged injuries, but that testimony would be relevant only to the issues of damages and would have no bearing on the logically antecedent issues of *liability*—such as TEPCO's alleged misconduct and the alleged causation of Plaintiffs' alleged injuries. As the Ninth Circuit has explained, "the focus for this private interest analysis should not rest on the number of witnesses in each locale but rather the court should evaluate the *materiality and importance of the anticipated witness' testimony* and then determine their accessibility and convenience to the forum." *Carijano*, 643 F.3d at 1231 (emphasis added) (internal quotation marks and alterations omitted). Because TEPCO and third-party witnesses in Japan are essential to any fair assessment of the liability issues, they clearly are the more critical witnesses in assessing this private interest factor concerning the residence and convenience of witnesses.[26]

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than TEPCO. *See* Heckenlively Decl., ¶¶ 30-32. Such incidents obviously have no relevance to this suit, but even if they did, they would only serve to confirm that the vast bulk of relevant evidence would be located in Japan.

[26] The citizenship and residence of the commanding officers who decided what safety procedures to implement and where to deploy assets and personnel in connection with Operation Tomodachi are ultimately neutral factors in the analysis. Because the SAC seeks to intrude into sensitive matters of military capability and decisionmaking, the testimony of U.S. military officials may be unavailable in *either* forum. Moreover, as explained below, the so-called *Touhy* doctrine limits the

The Ninth Circuit's decision in *Carijano* strongly confirms this point. In *Carijano*, the Court reversed a *forum non conveniens* dismissal in favor of Peru, where the plaintiffs lived and had allegedly been injured, in part because the defendant's corporate headquarters was in Los Angeles and key witnesses were located there. As the Court explained, "[m]ost of Plaintiffs' claims turn not on the physical location of the injury but on the mental state of the Occidental managers who actually made the business decisions that allegedly resulted in the injury." 643 F.3d at 1230. The same reasoning leads to the opposite result here. Plaintiffs' claims turn upon the "mental state" and conduct of TEPCO employees and Japanese officials in Japan. It would be exceedingly burdensome for such persons to travel to San Diego to testify at trial, and a Japanese forum is substantially more convenient.

The inconvenience would not be limited to these witnesses' trial testimony. Any attempt to take pretrial depositions of Japanese witnesses in connection with an action in this Court would be hampered by a number of factors that render this forum highly inconvenient. In particular, Japan is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, March 18, 1970, 23 U.S.T. 2555, *reprinted as a note to* 28 U.S.C. § 1781. *See* U.S. Dep't of State, TREATIES IN FORCE, at 410 (2013), *available at* <http://www.state.gov/documents/organization/218912.pdf> (Heckenlively Decl., Ex. I). And there are strict rules under the U.S.–Japan Consular Convention governing depositions taken on Japanese soil for foreign actions, even for willing witnesses. *See* 15 U.S.T. 768, 795, art. 17(1)(e)(ii) (1964). As the U.S. Department of State has explained, it is "the *mutually agreed upon* interpretation of the U.S.–Japan bilateral Consular Convention" that the Convention "permits the taking of a deposition of a willing witness for use in a court in the United States *only*[:]

"• if the deposition is presided over by a U.S. consular officer;

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parties' ability to obtain evidence from U.S. officials even as to matters that are not, strictly speaking, confidential. *See infra* at 44-45.

"• is conducted on U.S. consular premises[;]

"• is taken pursuant to an American court order or commission;

"• and if any non-Japanese participant travelling to Japan applies for and obtains a Japanese Special Deposition visa."

U.S. Dep't of State, *Japan Judicial Assistance* ("*Japan Judicial Assistance*"), "Taking Voluntary Depositions of Willing Witnesses," *available at* <http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/japan.html > (Heckenlively Decl., Ex. J) (emphasis added). Moreover, Japan does not allow video or telephone depositions. *Id*. Nor does it permit depositions on American military bases. *Id*.

As a practical matter, this means that the deposition must be conducted in one of two rooms at the U.S. Consulate in Osaka or one room in the U.S. Embassy in Tokyo. One San Diego lawyer who recently took depositions in Japan reported that "[a] significant amount of lead time is required" to reserve one of these rooms; he made a reservation approximately nine months in advance of the depositions. *See* Paul Reynolds, *Taking Depositions in Japan*, Ass'n of Business Trial Lawyers San Diego Report, at 7, 12-15 (2013) (Heckenlively Decl., Ex. K). At the moment, the backlog is not quite so dire and the U.S. Embassy's website reflects that the deposition room in Tokyo is presently available with a reservation made approximately 6 weeks or more in advance. (Heckenlively Decl., ¶ 13.) Even efforts to gather evidence informally and conduct witness interviews must, in Japan's view, be approved by the Japanese Ministry of Foreign Affairs. *See Japan Judicial Assistance*, *supra*. Japan may require a special visa for Americans seeking to gather evidence informally, and it may require that requests be submitted through formal letters rogatory. *Id*.

For two reasons, it is no answer to say that these problems could be mitigated by ordering TEPCO to make witnesses available for deposition in the United States. First, the point of this private interest factor is to assess the relative *convenience* of

the respective fora, and requiring innumerable TEPCO directors or employees to travel 11,000 miles round-trip to the U.S. for deposition (and then again for trial) would be extraordinarily inconvenient. Given the nature of certain aspects of Plaintiffs' claims, the number of Japanese directors or employees who could be important witnesses is likely to be substantial. Second, this contention is inapplicable to third-party witnesses (such as Japanese government officials) or to *former* TEPCO directors or employees. *See, e.g.*, *Rundquist v. Vapiano SE*, 277 F.R.D. 205, 210 (D.D.C. 2011) ("a corporation cannot be compelled to produce a former employee for a deposition"). Given the passage of time since the 2011 earthquake and tsunami, there are already a significant—and growing—number of persons who have left TEPCO and who would have potentially significant or material testimony relating to that incident. (*See* Hinata Decl., ¶ 7; Declaration of Gregory P. Stone ("Stone Decl."), ¶ 3(b).)

Accordingly, these considerations weigh sharply in favor of dismissal.

2. <u>Critical Documentary Evidence Is Located in Japan</u>

The most critically relevant documents in this case will also be located in Japan. Again, the allegation is that TEPCO failed to disclose accurate information about radiation levels from the FNPP and was negligent in the construction, design, maintenance, and operation of the FNPP in Japan. *See supra* at 7-9, 14. Just as the *witnesses* likely to have information on these issues are located in Japan, the key *documents* likely to prove or disprove such allegations are also necessarily located in Japan. Plaintiffs do not allege any facts to suggest that *Plaintiffs* have admissible documents in the U.S. that would shed light on TEPCO's alleged tortious conduct.

To the extent the Navy has relevant documents in the U.S. reflecting what TEPCO or the Japanese Government told the Navy, what the Navy knew about radiation risks, or whether the Navy acted in reliance on TEPCO, this factor is only a weak consideration in the private interest analysis. Under the *Touhy* doctrine and applicable federal regulations, the Navy has considerable discretion to decide

whether to make evidence or witnesses available in private civil litigation. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); 32 C.F.R. §§ 97.1-97.6 (Department of Defense regulations); 32 C.F.R. §§ 725.1-725.11 (Department of the Navy regulations). Among other provisions in the regulations, the Navy may refuse to disclose any matters that are classified or would be "inappropriate" to disclose. 32 C.F.R. § 725.8. The Navy's regulations also incorporate the Freedom of Information Act exemptions to disclosure, *id.*, which means that the Navy may withhold information concerning matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1).

Accordingly, the principal relevant documentary evidence likely to be in the U.S. is in the possession of the Navy, and the Navy may refuse to disclose that evidence. Moreover, the *Touhy* regulations state that the Navy will equally make appropriate evidence available in foreign proceedings. *See* 32 C.F.R. § 725.4(d). The overwhelming remainder of the relevant documentary evidence will be located in Japan. This factor thus weighs in favor of dismissal. *See Online Payment Solutions Inc. v. Svenska Handelsbanken AB*, 638 F. Supp. 2d 375, 388 (S.D.N.Y. 2009) (while "the costs of transporting documents are not as prohibitive as they once were," where "the majority of relevant evidence is located abroad, the burden imposed on the parties is still significant and favors dismissal").

3. Critical Evidence from the Japanese Government and Others in Japan Is Likely to Be Unavailable in a U.S. Court

In addition to the sheer inconvenience of attempting to try, in San Diego, a case in which the documents and witnesses are overwhelmingly located in Japan, there is the significant factor that any documents and witnesses not in the control of TEPCO are likely to be *unavailable* in a U.S. court.

In an effort to avoid dismissal, Plaintiffs have removed their prior allegation

that the Japanese Government was TEPCO's "co-conspirator." Yet their story is fundamentally the same, and Plaintiffs' revisions do not remove the Japanese Government from the SAC. Among other things, Plaintiffs allege that the relevant conduct is not only that of TEPCO, but of "its agents within the government of Japan" (SAC, ¶ 165), and that the Japanese Government's "downplaying of the disaster" contributed to the "informational uncertainty" on the day the earthquake and tsunami struck Japan (*id*., ¶ 160 n.51). Plaintiffs further claim that TEPCO and Japan's "nuclear safety agency" together concealed key details from the Japanese Prime Minister as the FNPP incident unfolded. (*Id*., ¶ 113.)

As these allegations demonstrate, Plaintiffs contend that the Japanese Government played a key role in the communications that lie at the heart of the SAC. Adjudicating Plaintiffs' claims could require evidence concerning the mental state of relevant Japanese Government officials, the information available to those officials, communications between Japanese Government officials, and the statements such officials actually made to the public, the Navy, and others who chose where the Navy's vessels—and thus Plaintiffs—would go. This information could likely come only from witnesses within the Japanese Government or documents in the possession, custody, or control of the Japanese Government. At a trial in this matter, TEPCO's ability to refute Plaintiffs' allegations in this regard would necessarily depend upon its ability to present such witnesses and documents.

Just as with the U.S. Government, *see supra* at n.26, the Japanese Government is unlikely to disclose, in either forum, highly sensitive and confidential information concerning, for example, the actions of the Japanese executive or Self-Defense Forces or Japan's high-level diplomatic and intergovernmental communications. (*See* May 31 Taniguchi Decl., ¶ 26 (noting government secret documents as falling within an exception to document production obligations).) But while some governmental witnesses and documents could be made available in a Japanese court, it is very unlikely that the Japanese Government would voluntarily make witnesses

or documents available in this Court. *Cf. Carijano*, 643 F.3d at 1231 (defendant must "allege[]" or "show[]" that relevant categories of witnesses will be unwilling to testify before determining whether compulsory process is available). Japan does not permit American civil litigants to conduct depositions of willing *civilian* witnesses in Japan except under tightly circumscribed circumstances. *See supra* at 42-43. In light of Japan's consistently strict position on obtaining evidence for foreign litigation from willing private parties in Japan, there is no reason to believe that it would agree to produce Government witnesses or documents in the U.S.

Moreover, this Court would be unable to compel such testimony or documents from Japanese Government sources. As an initial matter, a subpoena generally may require a third-party to comply only within 100 miles of where that person resides, is employed, or regularly transacts business, except that a trial subpoena generally may require anyone working or residing in California to attend the trial. *See* FED. R. CIV. P. 45(c)(1), (2). Although 28 U.S.C. § 1783 expands the power to subpoena individuals located in foreign countries, it does so only when the person served is "a national or resident of the United States." 28 U.S.C. § 1783(a). There is no reason to believe any of the witnesses or document custodians in Japan fit this description. Moreover, the Court would have no jurisdiction to issue subpoenas to the Japanese Government, which is immune from this Court's jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. *See U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("Federal Rule of Civil Procedure 45 grants a district court the power to issue subpoenas as to witnesses and documents, but the subpoena power of a court cannot be more extensive than its jurisdiction."); *Sachs v. Republic of Austria*, 737 F.3d 584, 590 (9th Cir. 2013) (en banc) ("The FSIA establishes a presumption of immunity for foreign states but carves out specified exceptions to that grant of immunity," none of which applies in the present case). And even assuming that the FSIA does not prohibit this Court from issuing letters rogatory *requesting* that the Japanese

Government supply information, it could not *compel* the Japanese Government to comply with the request. *Lantheus Med. Imaging, Inc. v. Zurich American Ins. Co.*, 841 F. Supp. 2d 769, 777 (S.D.N.Y. 2012).

For similar reasons, the inability to *compel* evidence from non-party non-governmental witnesses in Japan weighs heavily against a U.S. forum. As explained earlier, the witnesses in this category include individuals who worked for TEPCO prior to and during the aftermath of the FNPP incident, but who are no longer with the company today. (*See* Hinata Decl., ¶¶ 7-9; Stone Decl., ¶ 3(b); *see also supra* at 44.) Other such persons would likely leave the company in the ordinary course (through retirement, etc.) between now and the time this case proceeded to trial. Many, if not most such former directors or employees might decline to testify voluntarily for a U.S. suit, particularly if testifying required a long trip to San Diego.

As explained above, Japan is not a signatory to the Hague Convention on Taking Evidence Abroad. *See supra* at 42. The Consular Convention between the U.S. and Japan permits a U.S. consular officer to "obtain copies of or extracts from documents *of public registry*" but has no provision for obtaining non-public documents. 15 U.S.T. 768, 795, art. 17(1)(f) (emphasis added). Accordingly, parties in U.S. litigation must ask the U.S. court to issue a letter rogatory—including a Japanese translation—asking for the Japanese court's assistance in obtaining evidence. Japan will respond to such requests in the manner prescribed by Japanese domestic law. *See Lantheus Med. Imaging*, 841 F. Supp. 2d at 777; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 473, reporter's note 1. Under Japanese law, even a successful letter rogatory requesting witness testimony will not enable *counsel* to examine a witness or to obtain a video recording of the witness's testimony. A Japanese judge in possession of a letter rogatory can compel a witness in Japan to appear, but will do so only to allow the judge to ask the witness written questions attached to the letter rogatory. After the questioning is complete, the judge will prepare a written report of the testimony in Japanese and

send it to the U.S. court. Jeffrey Soble & Masahiro Tanabe, *Conducting Discovery in Japan; Depositions, Letter Rogatory, and Production of Documents*, 20 BUSINESS CRIMES BULLETIN 1, 3 (Dec. 1, 2012) (Heckenlively Decl., Ex. L). Letters rogatory will not provide any help at all in obtaining documents because Japanese courts are not authorized as a matter of Japanese law to compel production of documents from a party for foreign litigation. *Id.*

In a similar situation, the Ninth Circuit held that the inability to compel crucial evidence from third parties in New Zealand—including the government—weighed in favor of dismissal based on *forum non conveniens*. *Lueck*, 236 F.3d at 1146-47. As the Court explained:

> The documents and witnesses in the United States are all under the control of Plaintiffs and Defendants, so they can be brought to court, no matter the forum. The documents and witnesses in New Zealand, however, are not so easily summoned to the United States. Though some of the New Zealand evidence is under Plaintiffs' control, including Plaintiffs' medical and employment records, many of the New Zealand documents and witnesses are under the control of the New Zealand government or [a third-party company]. *The district court does not have the power to order the production or appearance of such evidence and witnesses.*

Id. (emphasis added). The Ninth Circuit held that, because "the district court cannot compel production of much of the New Zealand evidence, whereas the parties control, and therefore can bring, all the United States evidence to New Zealand, the private interest factors weigh in favor of dismissal." *Id*. at 1147.

What is more, even if TEPCO could somehow obtain all of the evidence it needed from non-parties in Japan while defending itself in a U.S. court, it would be far more convenient to obtain such access in Japan.[27] That convenience is the relevant consideration in deciding a *forum non conveniens* motion. *Syndicate 420 at Lloyd's, London v. Glacier General Assur. Co.*, 604 F. Supp. 1443, 1448 (E.D. La.

[27] Indeed, Japanese courts have mechanisms to compel third party testimony by issuing fines or, in certain circumstances, arrest warrants. (May 31 Taniguchi Decl., ¶ 31; *see also* Oct. 11 Taniguchi Decl., ¶ 9.)

1985) (finding private interest factors called for dismissal in favor of London forum in part because "the process of using letters rogatory to request the courts in London to issue subpoenas for depositions of foreign witnesses is a cumbersome, expensive and time-consuming process that should be avoided when possible"). For that reason, several courts have held that even where (unlike here) the Hague Convention does apply, the process of obtaining evidence from third parties is so slow and burdensome that a foreign forum would be more convenient. *See, e.g., Mastafa v. Australian Wheat Bd. Ltd.*, No. 07-cv-7955(GEL), 2008 WL 4378443, at *8 (S.D.N.Y. Sept. 25, 2008); *Do Rosario Veiga v. World Meteorological Organisation*, 486 F. Supp. 2d 297, 306 (S.D.N.Y. 2007); *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 526 (S.D.N.Y. 2006); *Seguros Comercial Americas S.A. de C.V. v. Am. President Lines, Ltd.*, 933 F. Supp. 1301, 1312 (S.D. Tex. 1996); *Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139, 144 (E.D. Tex. 1992).

4. A Trial in the United States Would Entail Unnecessary Costs

Given the location of the witnesses and the documentary evidence, a trial in the U.S. would incur a range of costs that would be avoided if the trial were in Japan. If the trial were held in San Diego, all the TEPCO witnesses living in Japan would have to travel internationally to testify, as would any third-party witnesses in Japan (including the Japanese Government witnesses) who might voluntarily agree to testify. An economy-class, non-refundable, roundtrip airline ticket from Tokyo to San Diego, purchased three weeks in advance, currently costs $1,413. (Heckenlively Decl., ¶ 16.) More likely, however, any government witnesses who agreed to provide testimony would not agree to travel to the U.S., which means that U.S. counsel would be required to bear the expense of traveling to Japan and complying with the cumbersome deposition process described above. In addition to travel costs, the U.S. consulate charges a non-refundable $1,283 reservation fee for a deposition room, $309 per hour in consular fees to attend the deposition (which is required), $231 per hour for any additional consular time required for clerical work, and $415

to certify the deposition. *See* 22 C.F.R. § 22.1 (items 52 and 75); *see also* Embassy of the United States, Tokyo, Japan, *Taking Depositions at U.S. Consulate General Osaka-Kobe - Specific Information*, *available at* <http://japan.usembassy.gov/e/acs/tacs-osakadepositions.html> (Heckenlively Decl., Ex. M); Embassy of the United States, Tokyo, Japan, *Detailed Information on Deposition Taking in Tokyo, available at* <http://japan.usembassy.gov/e/acs/tacs-deposition_detail.html> (Heckenlively Decl., Ex. N). These considerations weigh in favor of dismissal here. *Palacios v. The Coca-Cola Co.*, 757 F. Supp. 2d 347, 361-62 (S.D.N.Y. 2010).

5. The Enforceability of the Judgment Favors a Japanese Forum

Because TEPCO is headquartered in Japan, conducts most of its business there, and has most of its assets there, *see supra* at 36, a judgment rendered by a Japanese court would clearly be enforceable in Japan. This factor favors a Japanese forum. *See Carijano*, 643 F.3d at 1232 (enforceability factor looks at whether the defendant has assets in the foreign country to satisfy a judgment there or, if not, whether the judgment could be enforced in another country).

6. "Other Practical Problems" Weigh in Favor of Dismissal

In addition to the costs just described, trying this case in the U.S. would require extensive use of translators. As a whole, the witnesses from TEPCO and the Japanese Government are likely to have limited or no knowledge of English and would have to testify in Japanese. Most of the relevant documents will also be in Japanese. It would be enormously time-consuming and very expensive to translate the testimony and documentary evidence into English. (Heckenlively Decl., ¶¶ 19-23.) Trying the case before a court that speaks and understands Japanese would be much more efficient in both respects. This is yet another factor strongly supporting dismissal in favor of a Japanese forum. *See Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkassen AG (Erste Bank)*, 535 F. Supp. 2d 403, 412 (S.D.N.Y. 2008) (the analysis of private factors "must include the private cost of providing

certified translations of hundreds of pages of documentary evidence"); *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 541 (S.D.N.Y. 2002) (dismissing for *forum non conveniens* where "the translation requirements alone, of testimony and documents, would double the length of the trial").

C. The Relevant Public Interest Factors Also Favor Dismissal

If this Court concludes that "the balance of private interest factors favor[s] dismissal," it may dismiss the case even without weighing the "public interest" factors. *Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 376 (5th Cir. 1992); *see also Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 837 (5th Cir. 1993). In any event, the public interest factors here also strongly support a dismissal in favor of a Japanese forum on *forum non conveniens* grounds. The relevant public interest factors here are Japan's far stronger interest in the dispute; the impact on local courts and juries; and the cost to this Court of resolving a dispute unrelated to the Southern District. *See Lueck*, 236 F.3d at 1147.

1. Japan Has a Very Strong Interest in This Dispute

Japan has demonstrated a strong commitment to resolving issues concerning nuclear reactors operating on its soil, and the FNPP in particular. When the country's first nuclear power plant was under construction in 1961, Japan enacted the Act on Compensation for Nuclear Damages ("ACND") to provide a remedy sufficient to redress the serious harms that can result from a nuclear accident. (May 31 Taniguchi Decl., ¶ 55; Heckenlively Decl., Ex. D.) Notably, the ACND generally requires the Government to provide the operator with necessary aid if its liability for compensation exceeds the financial security amount as provided under the ACND and the Government deems it necessary in order to attain the objectives of the ACND. (May 31 Taniguchi Decl., ¶ 59.) Moreover, after the damage to the FNPP as a result of the tsunami caused by the earthquake, Japan responded by enacting the "NDF Act," which establishes mechanisms for addressing the claims of those assertedly harmed by the FNPP accident. (Heckenlively Decl., Ex. E; *see also* May

31 Taniguchi Decl., ¶ 60.)

Under this framework of laws, a series of suits are currently pending against TEPCO in the Japanese courts. (Kondo Decl., ¶ 14.) In addition, the Government created a Dispute Reconciliation Committee to identify mechanisms for processing these claims. (*Id.*, ¶ 5.) The Committee opened an alternative dispute resolution center that has already received approximately 9,568 applications for relief and disposed of approximately 7,203 cases. (*Id.*, ¶ 8, 10.) TEPCO has handled many claims internally as well, and continues to do so. (*Id.*, ¶ 19.) Moreover, the Japanese legislature recently extended the statute of limitations for asserting claims for nuclear damages caused by the FNPP accident against TEPCO in Japan from the customary three years to ten years. (Mar. 26 Taniguchi Decl., ¶ 3.) In short, Japan has taken comprehensive action to ensure that claims relating to the accident at the FNPP are handled in an appropriate, coordinated, and consistent manner. As the U.S. has recognized, the country in which a nuclear incident occurs has a powerful interest in ensuring that all litigation arising from the incident is centralized in its courts, so that any compensation that is due can be administered in a coordinated, orderly, and efficient fashion. *See infra* at 57-60.

There is a further important respect in which Japan has a strong interest in this dispute. The NDF Act established the Nuclear Damage Liability Facilitation Fund ("NDF"), which, in light of its public function and strong relationship with the Japanese Government, qualifies as an "agency or instrumentality" of Japan under the FSIA, 28 U.S.C. § 1603(b).[28] The NDF now owns a majority of the voting rights of

[28] The NDF is a special entity that was established by statute in order to accomplish the public functions of "ensur[ing] the swift and appropriate implementation of compensation for nuclear damage and the smooth operation of the stable supply of electric power ..., and thereby contribut[ing] to the stability and improvement of national life." *See* NDF Act, art. 1. The President of NDF is appointed by the competent government ministers, and the other directors of NDF are "appointed by the President with the approval of the competent government ministers." *See* NDF Act, art. 25; *see also* May 31 Taniguchi Decl., ¶ 60. As a result, NDF is deemed to be an "agency or instrumentality" of Japan even under the narrow definition of that term in the FSIA. *See EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*,

TEPCO's shares, as the SAC acknowledges. (SAC, ¶ 86 ("the government of Japan is [TEPCO's] principal shareholder"); *see also* Kondo Decl., ¶ 25.) Under the NDF Act, TEPCO has received more than ¥3.6 trillion ($35 billion) in "Special Financial Assistance," a category of aid that is funded by the Japanese Government through the issuance of bonds to NDF, and such funds must be used for compensation of nuclear damage. (*See* NDF Act (Heckenlively Decl., Ex. E), art. 41, 48; *see also* Kondo Decl., ¶ 25.) And in order for these government bonds to be issued, TEPCO and NDF jointly prepared and submitted for approval by the competent government ministers, as required under the NDF Act, a detailed "Special Business Plan" covering numerous aspects of its operations and finances. (*See* NDF Act, art. 45; *see also* Kondo Decl., ¶¶ 24-26.) Pursuant to that Special Business Plan (as amended), NDF has received government bonds in the total amount of ¥5 trillion ($49 billion), and that amount is expected to increase to ¥9 trillion ($88 billion). (Kondo Decl., ¶ 26.) Furthermore, under the NDF Act, TEPCO has also received ¥1 trillion ($9.8 billion) through subscription of TEPCO's shares by NDF. (Kondo Decl., ¶ 25.) Under these circumstances, Japan has very strong interests in this dispute.

Apart from these measures specifically addressed to claims arising from the FNPP, the Japanese Government has also been heavily involved in the overall response to the earthquake, the tsunami, and the FNPP accident. On March 15, 2011, the Government and TEPCO established the Integrated Headquarters for Response to the Incidents at the Fukushima Nuclear Power Stations at TEPCO's head office, pursuant to the instruction of the Japanese Government, in order to promptly take an appropriate action to manage the FNPP accident. *See generally* Investigation Committee on the Accident at Fukushima Nuclear Power Stations of Tokyo Electric Power Company, Final Report at 230-37 (2012), *available at* <http://www.cas.go.jp

322 F.3d 635, 640 (9th Cir. 2003) (Japanese corporation was "agency or instrumentality" of Japan because it was created by the Government to perform public function of purchasing distressed assets from failed banks at the request of Japan's deposit insurance corporation, and it received funding and loss-reimbursement from Japan).

/jp/seisaku/icanps/eng/final-report.html>. TEPCO directors or employees met repeatedly with Government officials during that time to provide information and to coordinate the response. *Id.* at 219-24. The Government's involvement continued well past the initial days after the accident, demonstrating the seriousness of its interest in all aspects of the problem. On April 11, 2011, the Government established the Nuclear Power Station Accident Economic Impact Response Headquarters, which began authorizing emergency support measures just one month later. *See Emergency support measures for nuclear sufferers*, <http://www.meti.go.jp/english/earthquake/nuclear/pdf/20110512_provisional_payment_1.pdf> (Heckenlively Decl., Ex. Q). Both the Japanese cabinet and the National Diet commissioned detailed studies to evaluate the causes of the FNPP accident and the quality of the response. *See id.*; The National Diet of Japan, *The Official Report of the Fukushima Nuclear Accident Independent Investigation Commission* (2012), *available at* <http://warp.da.ndl.go.jp/info:ndljp/pid/3856371/naiic.go.jp/en/report/>.

The Japanese Government has continued to address the effects of the accident at the FNPP. On February 1, 2013, for example, the Government opened the General Office for Fukushima Reconstruction and Rehabilitation in Fukushima to supervise efforts to rebuild Fukushima. *See* Ida Torres, *Japan's Disaster Reconstruction Agency revamps on its anniversary*, THE JAPAN DAILY PRESS (Feb. 6, 2013), *available at* <http://japandailypress.com/japans-disaster-reconstruction-agency-revamps-on-its-anniversary-0622781> (Heckenlively Decl., Ex. R.) And, as noted earlier, the Japanese National Diet recently extended the statute of limitations for nuclear damages claims relating to the FNPP incident. (Mar. 26 Taniguchi Decl., ¶ 3.)

No interest of the Southern District of California can compare to the singular importance of the FNPP accident to Japan and its Government. Given the military's significant presence in this district, there is of course a local interest in the health of servicemembers. But that local interest is addressed more to the *outcome* of the

suit—*i.e.*, that Plaintiffs receive compensation *if* they have meritorious claims—and less to the question of *which forum* decides that issue. By contrast, Japan has a distinct and uniquely powerful interest in seeing that all claims arising from the FNPP are resolved in a consistent manner as part of Japan's overall coordinated efforts to address the consequences of one of the greatest natural disasters ever to befall that country.

2. Litigating Here Will Place an Undue Burden on This Court

Given the relatively weaker local interest in adjudicating this dispute, proceeding in this forum will impose an undue burden on the Court and potential jurors. The Court is well aware of the budget shortfalls facing federal courts, and of the very high caseloads in this District. *See generally* Admin. Off. of the U.S. Courts, THE THIRD BRANCH NEWS, *Judicial Conference Reports Show Sequestration Impact, Detail Court Space Savings* (Mar. 11, 2014), *available at* <http://news.uscourts.gov/judicial-conference-reports-show-sequestration-impact-detail-court-space-savings> (Heckenlively Decl., Ex. S). TEPCO respectfully submits that the scarce resources available to this Court would be best spent on disputes more directly related to local issues. Similarly, "[t]he interest in protecting jurors from sitting on cases" with no direct "relevance to their own community weighs heavily in favor of" dismissal on grounds of *forum non conveniens*. *Alfadda v. Fenn*, 159 F.3d 41, 46-47 (2d Cir. 1998).

* * *

Because the private and public interest factors clearly demonstrate that Japan is the more convenient forum for this dispute, the Court should dismiss in favor of that forum under the doctrine of *forum non conveniens*.

V. Alternatively, International Comity Requires Dismissal of the SAC

The doctrine of international comity also warrants dismissal of this action in favor of a Japanese forum.

"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." *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 543 n.27 (1987). Application of the international comity doctrine normally takes the form of "a discretionary act of deference," in which a U.S. court "decline[s] to exercise jurisdiction in a case" that would be more "properly adjudicated in a foreign state." *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996); *see also, e.g., Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519-21 (11th Cir. 1994) (dismissing in favor of German proceedings); *Allstate Life Ins. Co. v. Linter Group, Ltd.*, 994 F.2d 996-97 (2d Cir. 1993) (affirming dismissal in favor of proceeding in Australia).

Under the international comity doctrine, the court may dismiss Plaintiffs' action based on "[1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).[29] All three factors weigh in favor of dismissal here.

First, the United States has long expressed its strong interest in ensuring that all claims arising from a nuclear incident are handled in a comprehensive and coordinated fashion by centralizing all such claims in the courts of the country where the nuclear incident occurred. This longstanding U.S. policy is reflected both in the

[29] The aspect of international comity doctrine invoked here—which is rooted in abstention in favor of a foreign forum with a clearly greater interest in the dispute—should not be confused with the separate strand of comity doctrine that rests on *conflicts* in the applicable laws of two countries. *Cf. Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 765 (1993) (suggesting that, in such a case, comity would require dismissal only when there is a "true conflict" between domestic and foreign law); *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1998). "*Hartford Fire* did *not* forbid abstention on comity grounds in the absence of conflicting laws." *Freund v. Republic of France*, 592 F. Supp. 2d 540, 574 (S.D.N.Y. 2008) (emphasis added) (declining to require a conflict of laws when considering whether to abstain from exercising jurisdiction on comity grounds). A conflict in the applicable substantive law of the two countries (which was the asserted ground for comity in *Hartford Fire*) is one ground for invoking comity, but it is not the sole ground, as the cases cited in the text illustrate.

U.S.'s ratification of the Convention on Supplementary Compensation for Nuclear Damage ("Convention"), S. TREATY DOC. NO. 107-21, 36 I.L.M. 1473, 1997 WL 33474927 (1997) (ratified Aug. 3, 2006, *see* 152 Cong. Rec. S8901), and in the official statements made by U.S. officials in connection with the consideration of that treaty. Although the Convention will not formally take effect until it is ratified by one more country,[30] Japan recently announced its intention to join the Convention. (Heckenlively Decl., Ex. U.) Moreover, regardless of whether the Convention has or has not formally taken effect, it nonetheless reflects the U.S.'s explicit endorsement of the view that, so long as the country in question has adequate mechanisms for providing compensation, claims arising from a nuclear incident should be centralized in the courts of the relevant country. *See* Convention, art. XIII, ¶ 1, 36 I.L.M. at 1480 ("Except as otherwise provided in this article, 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.") (emphasis added); *see also id*., art. XIII, ¶ 3, 36 I.L.M. at 1480 (where nuclear incident occurs outside territory of contracting parties, "jurisdiction over actions concerning nuclear damage from the nuclear incident shall lie *only* with the courts of the Installation State"—*i.e.*, the country where the relevant nuclear installation is situated) (emphasis added).

Moreover, during the Senate's consideration of the Convention, one of the Executive Branch officials testifying in support of the treaty specifically addressed the Convention's jurisdiction-centralizing provision and confirmed that it was not a novel provision but instead was *declarative of existing U.S. law and policy apart from the Convention*. Specifically, in response to a question from the Chairman of the Senate Foreign Relations Committee as to whether this provision of the Convention would "in effect limit the right of U.S. persons to bring suit against

[30] Under article XX, ¶ 1, the Convention will formally take effect when at least five countries have ratified it. *See* 36 I.L.M. at 1482. Presently, four countries (*i.e.*, the U.S., Argentina, Morocco, and Romania) have ratified the Convention. *See* <http://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf>.

entities or companies in the United States courts or against U.S. companies for accidents overseas," the U.S. State Department's Senior Coordinator for Nuclear Safety, Warren Stern, acknowledged that it would, but that this result would already obtain under existing U.S. law and policy:

> 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 a 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.*

Treaties, Hearing Before the S. Comm. on Foreign Relations, S. HRG. 109-324 at 27 (2005) (emphasis added); *see also id*. at 22 (statement of James Bennett McRae, Assistant General Counsel, Civilian Nuclear Programs, U.S. Dep't of Energy) (stating that this provision reflects a "basic principle[] of nuclear liability law that ha[s] been developed in the United States and other nuclear countries over the past half century"). Thus, on this point, the Convention embodies the United States' settled view that, in order to foster a "predictable process" for addressing compensation without the burdens of "multiple forums for lawsuits," nuclear incidents should be adjudicated in the jurisdiction in which the accident took place. *Id*. at 25 (statement of McRae). Accordingly, U.S. interests strongly favor adjudicating this suit in Japan, where the incident took place.

The second factor likewise weighs heavily in favor of a Japanese forum. As explained above, *see supra* at 52-56, the Japanese courts have a far stronger interest in this case than do U.S. courts. *See, e.g.*, *Ungaro-Benages*, 379 F.3d at 1238-39 (German tribunal has more interest than U.S. court in trying case related to compensation for acts of German corporations during the Nazi era). The earthquake, tsunami, and their aftermath were cataclysmic events in Japan, and the Government of that country has taken extensive steps to provide redress in a coordinated and comprehensive manner. *See supra* at 52-55. Plaintiffs' claims should be resolved as

part of that coordinated process in Japan and not apart from it.

The third factor likewise clearly weighs in favor of a Japanese forum. The standards for evaluating the adequacy of a foreign forum are the same under the international comity doctrine as they are under *forum non conveniens*. *See, e.g.*, *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998); *Ford v. Brown*, 319 F.3d 1302, 1304 n.3 (11th Cir. 2003) (international comity and forum non conveniens analysis are "intertwined"). Accordingly, Japan is an adequate forum for Plaintiffs' suit under the international comity doctrine for the same reasons that it is an "adequate alternative forum" for *forum non conveniens* purposes. *See supra* at 36-39.

Because all three factors weigh heavily in favor of a Japanese forum, this suit should be dismissed under the doctrine of international comity.

CONCLUSION

For the foregoing reasons, this Court should dismiss the SAC with prejudice. Alternatively, under the doctrines of *forum non conveniens* and comity, the Court should dismiss the SAC without prejudice to Plaintiffs' refiling the action in the courts of Japan.

DATED: Mar. 27, 2014

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP

By: */s/ Daniel P. Collins*
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Attorneys for Defendant TOKYO ELECTRIC POWER COMPANY, INC.

CERTIFICATE OF SERVICE

I, Daniel P. Collins, am an attorney at Munger, Tolles & Olson LLP, counsel of record for Defendant Tokyo Electric Power Company, Inc. in this action. I certify that on March 27, 2014, I caused the attached document to be served via this Court's Electronic Filing System on Paul C. Garner, Charles A. Bonner, and A. Cabral Bonner, counsel for Plaintiffs, who are registered users of that system. See Local Civil Rule 5.4.

DATED: March 27, 2014

/s/ Daniel P. Collins
Daniel P. Collins