B225393

In the Court of Appeal of the State of California

Second Appellate District, Division Three

Toyota Motor Corporation, *et al.*,

Defendants and Petitioners,

v.

Superior Court of the State of California, County of Los Angeles,

Respondent,

Michael Stewart and Shawna Stewart, etc., *et al.*,

Real Parties In Interest.

Los Angeles County Superior Court; Case No. BC407415
Honorable Conrad Richard Aragon

Amici Curiae Brief in Support of Petitioners Toyota Motor Corporation, Toyota Motor North America, Inc., and Toyota Motor Sales, U.S.A., Inc.

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INTEREST OF AMICI CURIAE

Amicus curiae International Association of Defense Counsel (IADC) is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

IADC and NAM have a particular interest in the discovery issues raised by this writ proceeding, which will impact the conduct of litigation in an increasingly global commercial setting. As the United States Supreme Court has observed, "We cannot have trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts." (*M/S*

Bremen v. Zapata Off-Shore Co. (1972) 407 U.S. 1, 9.) Where relevant, the interests of foreign states, their laws, and the concerns of foreign individuals must also be considered in connection with litigation in American courts.

INTRODUCTION

Amici curiae IADC and NAM submit this brief in response to this Court's January 21, 2011 post-argument invitation for *amicus* briefing.[1]

Petitioners Toyota Motor Corporation, Toyota Motor North America, Inc., and Toyota Motor Sales, U.S.A., Inc. (collectively, "Toyota") have extensively briefed the relevant legislative history and statutes and explained how the Legislature has limited to witnesses residing within California the California courts' power to compel the attendance of individual witnesses at deposition or trial in this state. We do not repeat those arguments. Instead, *amici* show that (1) California courts similarly lack inherent authority to compel nonresidents to attend depositions within state borders and (2) even if the trial court here did have discretionary authority under Code of Civil Procedure section 2025.260 to order Toyota's individual Japanese employees to attend depositions in California, that discretion must be

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[1] Pursuant to California Rules of Court, rule 8.200(c)(3), IADC and NAM certify that (1) no party or any counsel for a party has authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief and (2) IADC and NAM are the only persons or entities funding the submission of this brief.

exercised consistent with principles of international comity as well as the factors enumerated in section 2025.260 itself.

LEGAL DISCUSSION

I

Trial courts' inherent power to control litigation, rooted in the historic powers of courts of equity, is circumscribed by relevant statutory authority.

A. California courts' authority to manage litigation includes powers historically held by courts of equity.

The California Supreme Court has recognized "that courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 (*Rutherford*); see also *Cottle v. Superior Court* (1992) 3 Cal.App.4th 1367, 1377 ["Inherent powers of the court are derived from the state Constitution and are not confined by or dependent on statute"].) The exercise of inherent authority "derives in part from the court's historic powers in equity." (*Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 763 (*Slesinger*); see also *id.* at p. 758 ["The doctrine of inherent judicial power – that is, the existence of power vested in courts by their creation, and independent of legislative grant – developed early in English common law along two paths, namely, . . . punishment for contempt of court and of its process, and . . . regulating the practice of the court and preventing the abuse of its process"]; *Asbestos Claims Facility v.*

Berry & Berry (1990) 219 Cal.App.3d 9, 19 (*Asbestos Claims*) ["In addition to their inherent equitable power derived from the historic power of equity courts, all courts have inherent supervisory or administrative powers which enable them to carry out their duties, and which exist apart from any statutory authority"].)

"There are, of course, limits on the inherent authority of California courts – inherent power may only be exercised to the extent not inconsistent with the federal or state Constitutions, or California statutory law." (*Slesinger, supra*, 155 Cal.App.4th at p. 762.) For example, a rule or procedure adopted by a trial court must be consistent with the constitutional requirement of due process (*Asbestos Claims, supra*, 219 Cal.App.3d at p. 24) and "'trial judges have no authority to issue courtroom local rules which conflict with any statute' or are 'inconsistent with law'" (*Rutherford, supra*, 16 Cal.4th at p. 967).

B. Courts of equity had the power to compel depositions of witnesses abroad, but not to order witnesses to come to England for deposition.

The first step in determining whether an act is within a trial court's inherent authority is to "ascertain whether courts at common law had this power, for 'The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.' (Civ. Code, § 22.2)." (*Ferguson v. Keays* (1971) 4 Cal.3d 649, 654 (*Ferguson*).)

"The matter of the taking of depositions was one of the ordinary and most frequent proceedings of a court of equity . . . ." (*Burns v. Superior Court of San Francisco* (1903) 140 Cal. 1, 7.) Indeed, "Blackstone mentions as one of the defects in the administration of justice in the common-law courts the want of power to examine witnesses abroad, or who are about to go abroad to remain until after trial, and says that such evidence could be obtained by the law courts only through the channel of a court of equity, and by means of an independent proceeding." (*Id.* at p. 6.) As to the mode of taking testimony at trial, Blackstone elaborated: "This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing, *wherever they happen to reside.* If therefore the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm; any of these cases lays a ground for a court of equity to grant a commission to examine them . . . ." (2 William Blackstone & Thomas M. Cooley (1871) *Commentaries on the Laws of England* at p. 273, emphasis added.)

Courts of equity routinely issued such commissions to depose witnesses abroad. (See, e.g., *Bowden v. Hodge* (1818) 36 Eng. Rep. 614 [2 Swans. 259] [ordering commissions for witnesses, including two in Riga, Latvia and Hamburg, Germany]; *Macauley v. Shackell* (Ch. 1827) 4 Eng. Rep. 809 [1 Bligh N.S. 96] [commissions for witnesses in Sierra Leone];

Oldham v. Carleton (1792) 29 Eng. Rep. 792 [4 BRO. C.C. 88] [commission to examine witnesses in Bermuda].)

The traditional power of equity courts, therefore, was consistent with the method Toyota proposes to follow here: taking the deposition of foreign witnesses in their home country, rather than compelling them to visit the United States to provide testimony.

C. In any event, trial courts' inherent authority could not be exercised contrary to the existing statutory framework governing depositions.

"[I]nherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy. [Citation]." (*Ferguson, supra,* 4 Cal.3d at 654.) Thus, even if the court's inherent power could be found to include requiring nonresident witnesses to come to California to be deposed, that authority would still be cabined by the statutory framework of Civil Code section 1989. As Toyota explained at length in its briefing and argument before this Court, section 1989 simply does not extend trial court authority to compel witnesses who reside beyond California's borders to enter the state to be deposed or to testify at trial. The Legislature's limitation on the Court's power controls.

II

Even if the trial court had some discretion to compel the depositions of foreign workers in California, the court should only do so after taking into account principles of international comity.

Should this Court nonetheless conclude that the trial court possesses some discretionary statutory authority to compel foreign witnesses to come to California for deposition, this Court should require that comity considerations play a key role in the analysis of where to depose them.

Code of Civil Procedure section 2025.260 sets forth seven factors for a trial court to consider in determining whether to grant a party's motion for an order compelling a deponent to appear at a deposition over 150 miles from his place of residence. (Cal. Code Civ. Proc. § 2025.260(b).) The factors listed are not exclusive. "In exercising its discretion [under this section,] . . . the court shall take into consideration any factor tending to show whether the interests of justice will be served by requiring the deponent's attendance at that more distant place, including, *but not limited to*," the listed factors. (*Id.*, emphasis added.)

In a case such as this, principles of international comity should be included in the analysis. "International comity requires courts to balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns." (Joel R. Paul, *The Transformation of International Comity* (2008) 71 Law & Contemp. Probs. 19.) Comity has been characterized variously as

"a synonym for private international law, a rule of public international law, a moral obligation, expediency, courtesy, reciprocity, utility, [and] diplomacy" (*id.* at pp. 19-20), and has evolved from a principle of respect for a forum's public policy, to a measure of deference for private autonomy and a method of creating much-needed harmony in an increasingly global, interdependent commercial world (*id.* at pp. 20-37).

Comity has been described in a number of ways, including "a nation's voluntary recognition and execution of another nation's laws where the rights of individuals are concerned," and "a willingness to grant a privilege . . . out of deference and good will." (*Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln* (N.D. 1990) 462 N.W.2d 164, 167; see also Michael Wells, *The Role of Comity in the Law of Federal Courts* (1981) 60 N.C. L. Rev. 59, 61 n.5 [noting that the doctrine is used to minimize friction in disputes between nations, states, branches of government, agencies, courts, and judges].) "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 Dist. Court for S. Dist. of Iowa* (1987) 482 U.S. 522, 544 n.27 (*Societe Nationale*).

"'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of

another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." (*Hilton v. Guyot* (1895) 159 U.S. 113, 163-164.) Thus, comity encompasses the "respect sovereign nations afford each other by limiting the reach of their laws." (*Hartford Fire Ins. Co. v. California* (1993) 509 U.S. 764, 817.) It is "the true foundation and extent of the obligation of the laws of one nation within the territories of another." (*Id.*)

"Comity is based on the belief that the laws of a state have no force, *proprio vigore*, beyond its territorial limits, but the laws of one state are frequently permitted by the courtesy of another to operate in the latter for the promotion of justice, where neither that state nor its citizens will suffer any inconvenience from the application of the foreign law. This courtesy, or comity, is established, not only from motives of respect for the laws and institutions of the foreign countries, but from considerations of mutual utility and advantage. . . . The comity principle requires that we exercise our power . . . in a foreign court sparingly . . . ." (*Advanced Bionics Corp. v. Medtronic, Inc.* (2002) 29 Cal. 4th 697, 705–708 [declining to issue a temporary restraining order to enjoin a concurrent suit in a sister-state based on the principles of comity and judicial restraint]; see also *Evans v. Morrow* (1951) 234 N.C. 600 [68 S.E.2d 258, 262], and cases cited ["[a] court of equity will not enjoin judicial proceedings in the court of another state through distrust of the competency of such court to do justice in cases within its jurisdiction"]; *Carpenter, Baggott & Co.*

v. Hanes (1913) 162 N.C. 46 [77 S.E. 1101, 1101] [power to enjoin prosecution of suit in foreign jurisdiction should not be used "because of more favorable laws"].)

Comity principles are implicated where one party seeks to enlist the court's powers in one jurisdiction to obtain discovery within the territorial limits of a foreign sovereign. (*Societe Nationale, supra,* 482 U.S. at pp. 543-44.) In the discovery context, where one nation seeks to obtain evidence located in another country, "[p]rinciples of comity require a particularized analysis of the interests of the foreign nation and the requesting nation." (*Id. at* pp. 543-44; see also Rest.3d of the Foreign Relations Law of the U.S., § 442a., comment a ["Before issuing an order for production of documents, objects, or information located abroad, the court . . . should scrutinize a discovery request more closely than it would scrutinize comparable requests for information located in the United States"].) "American courts should therefore take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state." (*Societe Nationale, supra,* 482 U.S. at p. 546.)

Likewise, comity principles should be implicated when one party seeks a court order to require citizens of another country to travel to the United States to be deposed. (Compare *Custom Form Mfg., Inc. v. Omron Corp* (N.D. I.N. 2000) 196 F.R.D. 333, 337 [granting motion to compel 30(b)(6) depositions of Japanese

company's employees in United States because, *inter alia*, Japan's sovereignty was not implicated by depositions being taken in the United States]; *In re Honda American Motor Co.* (N.D. MD 1996) 168 F.R.D. 535, 537-42 [denying motion to quash depositions of Japanese employees on American soil who were managing agents but sustaining motion as to a former employee who was not such an agent]. See generally Reply Brief in support of petition for writ of mandate, at pp. 37-38 [distinguishing these cases].)

As the United States Supreme Court has observed, the factors relevant to any comity analysis include those set forth in the Restatement (Third) of Foreign Relations Law of the United States, Section 442: "('1) the importance to the . . . litigation of the documents or other information requested; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternative means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.'" (*Societe Nationale, supra,* 482 U.S. at p. 544 n.30.

"In making the necessary determination of foreign interests," a Court "should take into account not merely a general policy of the foreign state to resist 'intrusion upon its sovereign interests,' or to prefer its own system of litigation, but

whether producing the requested information would affect important substantive policies or interests of the foreign state." (Rest. 3d, Foreign Relations Law, Comment C.) Factors courts should consider include: "expressions of interest by the foreign state, as contrasted with expressions of the parties; to the significance of disclosure in the regulation by the foreign state of the activity in question; and to indications of the foreign state's concern for confidentiality prior to the controversy in connection with which the information is sought." (*Id.*) An assessment of the countervailing interests of the United States should include: "[T]he long-term interests of the United States generally in international cooperation in law enforcement and judicial assistance, in joint approach to problems of common concern, in giving effect to formal or informal international agreements, and in orderly international relations. (*Id.*)

This Court should require trial courts to balance these interests when applying the provisions of Code of Civil Procedure section 2025.260 in an international context such as this.[2]

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[2] The parties and other Amici have analyzed these interests in prior briefs. See, e.g., Brief Amici Curiae of Hyundai Motor America and Hyundai Motor Company at pp. 9-13 (analyzing several of these comity elements). Amici do not reweigh these interests here.

CONCLUSION

For the foregoing reasons, and the reasons expressed in Petitioners' briefing, the petition for writ of mandate should be granted.

Dated: March 31, 2011

Respectfully submitted,

SNELL & WILMER L.L.P.

By: _____

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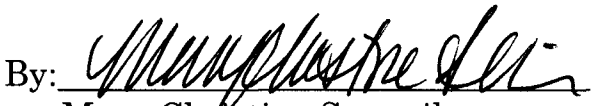
Certificate of Word Count

The undersigned certifies that pursuant to the word count feature of the word processing program used to prepare this [brief/petition], it contains 2,921 words, exclusive of the matters that may be omitted under rule 8.204(c)(3).

Dated: March 31, 2011

Respectfully submitted,

SNELL & WILMER L.L.P.

By: 

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Proof of Service

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, California 92626-7689.

On March 31, 2011, I served, in the manner indicated below, the foregoing document described as **Amici Curiae Brief in Support of Petitioners Toyota Motor Corporation, Toyota Motor North America, Inc., and Toyota Motor Sales, U.S.A., Inc.** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

Please see attached Service List

☒ BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).

☒ BY ELECTRONIC SERVICE: C.R.C., rule 8.212(c)(2)(A)) as indicated on the service list.

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☐ BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)), as indicated on the service list.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 31, 2011, at Costa Mesa, California.

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