

NO. 09-0345

**IN THE
SUPREME COURT OF TEXAS**

**QUIXTAR INC.,
A MICHIGAN CORPORATION,**

PETITIONER,

VS.

**SIGNATURE MANAGEMENT TEAM, LLC, D/B/A TEAM
A NEVADA LIMITED LIABILITY COMPANY,**

RESPONDENT.

On Petition for Review from the Fifth Court of Appeals

**PETITIONER'S REPLY TO RESPONSE TO
PETITION FOR REVIEW**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Quixtar Inc. (“Quixtar”) files this Reply to the Response filed in opposition to its Petition for Review. After hearing evidence, the trial court exercised its discretion and granted Quixtar’s motion to dismiss based on forum non conveniens. The court of appeals found that Michigan has a greater interest in seeing that Team is compensated for any injuries and that it would be more fair for a Michigan court and jury to bear the time and expense of litigating a business controversy between two Michigan based entities which has its center of gravity in Michigan. After reweighing the evidence measured against “the principle that the plaintiff’s choice of forum must be respected,” the court of appeals held the trial court abused its discretion and reversed.

Quixtar’s Petition for Review presents the critical issue of whether the court of appeals’ holding that a nonresident’s choice of forum “must be respected” unless the defendant meets a “heavy burden” to show that the *Gulf Oil* factors “strongly favor dismissal” is correct in light of *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670 (Tex. 2007), which held a nonresident’s forum choice is afforded “substantially less deference.” It is important for this Court to correct the court of appeals’ clear error because, unless reversed, the court of appeals decision below opens up Texas courts to once again serve as the “courthouse to the world,” this time in commercial disputes. Further, this Court should grant review to clarify for courts and litigants the burden of proof in common law forum non conveniens cases in light of *In re General Electric*, 271 S.W.3d 681 (Tex. 2008).

ARGUMENT

I. *Pirelli's* directive that a nonresident plaintiff's forum choice is afforded "substantially less deference" applies to the common law forum non conveniens analysis.

The court of appeals acknowledged but refused to follow this Court's holding in *Pirelli* that a nonresident's forum choice is afforded "substantially less deference." *Signature Mgmt. Team, L.L.C. v. Quixtar, Inc.*, 281 S.W.3d 666, 671 (Tex. App. – Dallas, 2009, pet. filed). The Petition for Review demonstrates why the court of appeals' dismissive rejection of *Pirelli* as merely this Court's "plurality" opinion is manifestly in error. The Response makes no argument that the court of appeals correctly rejected *Pirelli* as a "plurality" decision. Instead, the Response takes the mistaken position that *Pirelli* is a "statutory forum non conveniens case applicable only to wrongful death and personal injury litigation." (Response at pp. viii, x, 2). That was not the reason given below; the Dallas court said *Pirelli* was a plurality. *Id.* Team says "*Gulf Oil* articulated the common law standard." (Response p. 3). Quixtar submits that the deference to be given a nonresident's forum choice in Texas is, and should be, the same for common law and statutory forum non conveniens. But, the court of appeals – and Team – argue that the standards are, and should be, different. It is important to the jurisprudence of this State for this Court to correct this error.

As this Court explained in *Pirelli*, while the forum non conveniens doctrine in Texas has been codified for wrongful death and injury cases, the doctrine "has deep roots in the common law." *Pirelli*, 247 S.W.3d at 675. Indeed, "the *Gulf Oil* test has guided courts for decades in determining whether a case should be dismissed on forum-non-

conveniens grounds.” *Id.* at 677. Because there is “much overlap” between the common law forum non conveniens analysis and the statutory framework adopted by the Legislature in Tex. Civ. Prac. & Rem. Code § 71.051, *Pirelli* applied the common law analysis to the statutory framework. Thus, there is no difference in the analysis of a motion to dismiss based on common law forum non conveniens than a motion to dismiss under the statute. Contrary to the Response, *Pirelli* applies to this case.

II. Team incorrectly asserts that *Gulf Oil* articulates the proper degree of deference afforded to a nonresident plaintiff’s forum choice.

Team does not defend the court of appeals’ rejection of *Pirelli*’s directive that the forum non conveniens doctrine affords “substantially less deference” to a nonresident plaintiff’s forum choice. Nor does Team argue that the court of appeals correctly relied on *Sarieddine v. Moussa*, 820 S.W.2d 837 (Tex. App. – Dallas 1991, writ denied) for the proposition that a nonresident plaintiff’s forum choice “must be respected.” Instead, Team argues that *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) sets forth the proper degree of deference afforded a nonresident plaintiff: “[U]nless the balance is strongly in favor of defendant, the plaintiff’s choice of forum should rarely be disturbed.” *Gulf Oil*, 330 U.S. at 508. Neither “must be respected” nor “should rarely be disturbed” accurately reflects the proper degree of deference afforded to a nonresident’s forum choice under current forum non conveniens law.

As noted in the Petition for Review, the U.S. Supreme Court modified *Gulf Oil* in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) to clarify that a nonresident’s forum choice “deserves less deference.” *Pirelli* adopts *Reyno*, recognizing that the forum non

conveniens doctrine affords “substantially less deference to a nonresident’s forum choice.” *Pirelli*, 247 S.W.3d at 675, citing *Reyno*, 454 U.S. at 255-56. For these reasons, there is no question the court of appeals applied an inordinate degree of deference to Michigan based Team’s forum shopping choice to file suit in Texas to litigate a Michigan centered business dispute.

III. Team grossly mischaracterizes Quixtar’s argument as advocating that “no deference” be given to a nonresident plaintiff’s forum choice.

Team grossly mischaracterizes Quixtar’s position. Quixtar does not urge that “no deference” be given to a nonresident’s forum choice. Rather, Quixtar asserts the court of appeals erroneously held that the nonresident plaintiff’s forum choice “must be respected” unless the defendant overcomes the “heavy burden” to show that the *Gulf Oil* factors “strongly favor dismissal.” The correct standard is *Pirelli*’s “substantially less deference.” In articulating the wrong standard, the court of appeals gave virtually dispositive deference to Team’s forum choice. Had the court of appeals given Team’s forum choice “substantially less deference” as required, it would have affirmed the trial court’s order of dismissal.

The difference between affording a nonresident’s forum choice “substantially less deference” and enforcing the principle that a nonresident’s forum choice “must be respected” is significant and, in this case, outcome determinative. Indeed, the greater the degree of deference to which the plaintiff’s choice of forum is entitled, the stronger a showing of inconvenience the defendant must make to prevail. *Iragorri v. United Tech. Corp.*, 274 F.3d 65, 74-75 (2d Cir. 2001). After all, when a nonresident chooses to file,

not in its “home” forum, but rather in a foreign forum, the likelihood is that the choice was made for forum shopping purposes and not for convenience. *Id.* at 71. Here, the Opinion below makes clear that it required Quixtar to make a stronger showing of inconvenience than required by a “substantially less deference” standard. By enforcing “the principle that the plaintiff’s choice of forum must be respected,” the court of appeals also lost sight of the standard of review for an abuse of discretion and substituted its opinion for that of the trial court. The court of appeals reweighed the evidence against the “law’s strong preference for respecting the plaintiff’s choice of forum.” *Quixtar*, 281 S.W.3d at 675. Texas law, however, affords “substantially less deference” to Team’s forum shopping choice.

IV. Team’s argument that residency is not a *Gulf Oil* factor misses the point.

Team’s argument at pages 9-13 of the Response that “plaintiff’s residence is not a *Gulf Oil* factor” misses the point. Although a plaintiff’s residence is not a specific *Gulf Oil* factor, the degree of deference given to a plaintiff’s forum choice does, in fact, depend on the plaintiff’s residence.¹ *Pirelli*, 247 S.W.3d at 675. This Court should grant the Petition to correct the court of appeals’ error which gives Team’s forum choice inordinate weight, and indeed, virtually dispositive weight, contrary to *Pirelli*’s directive.

¹ The argument at page 10 of the Response, advanced for the first time here, that Respondent is a Texas resident because it is qualified to do business in Texas is disingenuous. Respondent did not register to do business in Texas until after it filed suit here. (1RR 304). Regardless, it is undisputed, as the court of appeals held, and as Team stated in the trial court, it is a resident of Michigan (1 RR 199).

V. Team incorrectly asserts that Petitioner misconstrues the holding of the court of appeals.

This Court should grant review because the decision below is contrary to *In re General Electric*, 271 S.W.3d 681 (Tex. 2008) and imposes a heavier burden of proof on common law, but not statutory, forum non conveniens dismissals. Team does not dispute that the court of appeals ignored *General Electric*, nor could it, given that it is simply not cited in the Opinion below. Instead, Team again mischaracterizes Quixtar's argument. Quixtar does not intend that *General Electric* "should be applied to eliminate any burden of proof at all on the movant" or to "get around the commandments of *Gulf Oil*." Rather, there is no basis for the court of appeals to impose a different burden of proof to a common law forum non conveniens inquiry than that imposed in statutory forum non conveniens cases.

For example, Quixtar established that twenty-four of the witnesses in this case resided outside of Texas; most of those in Michigan. *General Electric* held that a defendant is not required to show what specific witnesses or evidence the defendant would be unable to obtain. 271 S.W.3d at 690. But, the court of appeals here did exactly that when it required Quixtar to "quantify the actual burden that a Texas trial would impose on it or its witnesses" and to "demonstrate that any necessary witnesses are beyond the subpoena power." Quixtar, 281 S.W.3d at 666. Thus, the court of appeals found Petitioner's evidence of the private interest factors was "weak," when measured against the "law's strong preference for respecting the plaintiff's choice of forum."


The court of appeals also emphasized the lack of evidence of docket congestion to conclude the public interest factors did not “strongly favor” dismissal even though it concluded: 1) this is a dispute between two Michigan based entities with the center of the controversy in Michigan; 2) Michigan had a greater interest than Texas in compensating Respondent for any injuries; and 3) it was arguably more fair for a Michigan court and jury to bear the time and expense of hearing this case. The court of appeals emphasis on the absence of evidence of docket congestion is contrary to *General Electric’s* directive that a movant is not required to prove every factor weighs in its favor. Of course, the trial court is uniquely in position to know its own docket. The Court should grant review to clarify for courts and litigants the burden of proof in common law forum non conveniens cases in light of *General Electric*.

CONCLUSION

The Response fails to address the key issues presented in the Petition for Review; namely, that the court of appeals erred when it held that the nonresident’s choice of forum “must be respected” unless a defendant meets a “heavy burden” to show that the *Gulf Oil* factors “strongly favor dismissal,” contrary to *Pirelli’s* directive that a non-resident’s forum choice is afforded “substantially less deference.” Had the Court of Appeals properly followed this Court’s directive in *Pirelli* and *General Electric*, it would have affirmed the Order of Dismissal. This Court should grant this Petition to address this important issue and give direction to courts and litigants in commercial forum non conveniens cases. For these reasons, Quixtar asks the Court to grant the Petition, order

full briefing, and reverse the court of appeals and affirm the trial court's Order of Dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Response to Petition for Review was forwarded to the following counsel of record via certified mail, return receipt requested, on the 11th day of June, 2009.

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