

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:)
GULFSTREAM AEROSPACE CORPORATION,)
Petitioner,)
v.)
MAYACAMAS CORPORATION.)

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WASHINGTON, D.C. 20543

No. 86-1329

Pages: 1 through 40
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IN THE SUPREME COURT OF THE UNITED STATES

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GULFSTREAM AEROSPACE CORPORATION, :
Petitioner, :

V. : No. 86-1329

MAYACAMAS CORPORATION :

-----X

Washington, D.C.

Monday, December 7, 1987

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 12:58 p.m.

APPEARANCES:

ELLIOT L. BIEN, ESQ., San Francisco, California;
on behalf of the Petitioner.

GREGORY H. WARD, ESQ., Palo Alto, California;
on behalf of the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

ELLIOT L. BIEN, ESQ.

on behalf of Petitioner

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GREGORY H. WARD, ESQ.

on behalf of Respondent

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ELLIOT L. BIEN, ESQ.

on behalf of Petitioner - Rebuttal

1 PROCEEDINGS

2 (12:58 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument now in
4 No. 86-1329, Gulfstream Aerospace Corporation versus Mayacamas
5 Corporation.

6 Mr. Bien, you may proceed whenever you're ready.

7 MR. BIEN: Mr. Chief Justice, and may it please the
8 Court.

9 I'd like to open this afternoon with a very brief
10 statement of the case and next comment on the nature of the
11 issue as it was faced by the District Court, and then turn to
12 the matter of appellate jurisdiction.

13 As set forth in the briefs, while appellate
14 jurisdiction does not stand or fall on the merits of any
15 particular rule, it seems quite clear that the presence of
16 appellate jurisdiction does turn on both the nature and the
17 importance of the ruling, and on the practicalities of delaying
18 appellate review.

19 Now, the underlying facts and legal issues of this
20 case are completely unremarkable from a Federal point of view.
21 What is remarkable from that standpoint is the notion that a
22 Federal Court should undertake to adjudicate this type of
23 dispute when a competent State court was already doing so on
24 the exact same issues, exact same parties, and when removal had
25 been available to the State Court defendant but had been
foregone.

1 After summarizing the case, I will argue that the
2 Federal suit that resulted was not only identical and
3 duplicative of the State Court lawsuit, but because removal had
4 been available the duplicative Federal suit was wholly
5 unnecessary even from the Federal plaintiff's point of view.
6 And wholly without justification under this Court's decisions
7 or under the intention of Congress since 1789 when Congress
8 created the removal process.

9 QUESTION: Mr. Bien, as I understand it, the Georgia
10 suit went to trial and there's a judgment.

11 MR. BIEN: I will be addressing that.

12 QUESTION: Is that right?

13 MR. BIEN: Yes, Your Honor.

14 QUESTION: And have you filed any motion in the
15 Federal District Court now to dismiss the suit on res judicata
16 grounds or something?

17 MR. BIEN: No. The Georgia case, as I reported in
18 our Reply Brief, went to a jury trial in early November and a
19 verdict for Mayacamas, the respondent, was entered and judgment
20 ensued. I'm advised by counsel for the respondent that today
21 or Friday, Mayacamas has filed papers in the trial court in
22 Georgia seeking a new trial, and because of the outcome, we
23 certainly expect on Gulfstream's part that whatever the outcome
24 of the new trial proceedings in Georgia, it will be followed by
25 an appeal by Mayacamas as well.

 QUESTION: But you haven't reached the appellate

1 stage yet?

2 MR. BIEN: No.

3 QUESTION: Surely you will appeal?

4 MR. BIEN: I can state on Gulfstream's behalf that we
5 will not appeal.

6 QUESTION: You will not appeal?

7 MR. BIEN: We will not appeal. We may cross appeal
8 if Mayacamas appeals, but we will not appeal.

9 So in answering your question, Justice O'Connor, I
10 believe that --

11 QUESTION: No further motions have been filed in the
12 Federal District Court as a result of what's transpired?

13 MR. BIEN: Not as of yet. Not as of yet.

14 QUESTION: You would acknowledge that it's moot if
15 Mayacamas doesn't take an appeal?

16 MR. BIEN: If Mayacamas does not take an appeal and
17 if a Federal Trial Judge, District Judge finds res judicata to
18 be applicable, and if there's a dispute that is resolved in
19 favor of res judicata on appeal, then I think technical
20 mootness would apply.

21 However, I would still argue, as I would argue now,
22 but I think there's more strength --

23 QUESTION: Wait a minute. Before you do that, why do
24 each one of those things have to happen. Part of your argument
25 is that it would be res judicata. I mean, that's essential to
your whole contention here.

1 MR. BIEN: Well, we don't reach the res judicata
2 issue here.

3 QUESTION: You don't think that's essential to your
4 contention that this is duplicative litigation?

5 MR. BIEN: Well, assuming that a final decision in
6 one forum or the other, let's say in a State forum, was reached
7 and there was finality, then we would certainly argue that --

8 QUESTION: Right. So res judicata is assumed. So
9 isn't it the case then that if an appeal is not taken this is
10 over? If Mayacamas does not take an appeal, this litigation is
11 over?

12 MR. BIEN: I think the judgment would have to be
13 afforded full faith and credit in the Federal Court, and that
14 would effectively end the dispute. Unless there were some
15 reason why a res judicata would not follow but I can't envision
16 any such reason at this point.

17 QUESTION: Indeed, you're arguing that there is res
18 judicata, that's part of your argument?

19 MR. BIEN: Well, again, I don't believe that the
20 reason to avoid duplicative litigation is that the prospect of
21 a res judicata now here in the Federal Court, but in either
22 Court, creates the kind of tension and pressure on both courts
23 that's undesirable. So I don't know if I'm quibbling with you,
24 but I'm saying that we don't argue the, and in this particular
25 case, we haven't argued it in the briefs and I'm not arguing it
this morning what the specific res judicata effect would be.

1 I assume, without arguing, that there would be a res
2 judicata effect eventually. But I do want to address the
3 mootness problem in one more step and I think that even if the
4 res judicata did arise as a result of the verdict that was
5 reached in Georgia, I think you have a classic situation where
6 the issues now before this Court would be capable of repetition
7 even as addressed to Gulfstream which is a party which is a
8 large corporation may face that situation. And the issue
9 always arises at the beginning of the lawsuit. And I think
10 it's a classical case where it could evade review if even a
11 technical mootness would have the result of --

12 QUESTION: Between these parties? These parties are
13 planning to go through this --

14 MR. BIEN: Not these particular parties.

15 QUESTION: But isn't that what the capable of
16 repetition requires?

17 MR. BIEN: Well, I believe that under the Roe v. Wade
18 in the pregnancy situation and some others, that it doesn't
19 necessarily have to affect the particular party.

20 QUESTION: But what of the some others?

21 MR. BIEN: I believe the Blumstein case, the Dunn v.
22 Blumstein, where the challenge to election rules where even if
23 the particular plaintiff that brought the case may not have
24 been in a position to vote in a state with a challenged
25 election procedure that there might have been other voters who
are facing the exact same situation which if it was not

1 adjudicated by this Court might once again have the issue evade
2 with you. But I don't believe we'll have to get that far. I
3 just did want to complete my answer to that question.

4 QUESTION: May I ask just one question to be sure I
5 understand the result of the trial.

6 The \$900,000 award to your opponent, is that a net
7 award or a credit against what you claimed.

8 MR. BIEN: No. This is as I understand it a net
9 award.

10 QUESTION: Net award.

11 MR. BIEN: We would have to pay them \$900,000.

12 QUESTION: Okay. That's what I thought but I wanted
13 to be sure.

14 MR. BIEN: Right.

15 Just very briefly in terms of the facts of the
16 underlying case, run through this quickly. It's a garden
17 variety commercial dispute, not a single federal law is
18 involved as to the decision on the merits. Gulfstream makes
19 fine aircraft down in Savannah, Georgia. In June of 1983,
20 Mayacamas, a California Corporation, agreed to buy one of these
21 planes for about \$13 million.

22 The next progress payment was due about two years
23 later by the end of August of 1985. Two weeks before the
24 deadline, Mayacamas claimed that Gulfstream had breached the
25 contract and violated representations made about the production
schedule so that the value of Mayacamas' purchase had been

1 diminished.

2 As the deadline for the second payment, which was
3 equal to the original payment, passed, there were mutual
4 threats of each side being in breach of the contract, threats
5 of litigation on both sides. And about a month and a half
6 later, Gulfstream elected to file a lawsuit for breach of
7 contract in a State Court in Georgia. This came on October 9,
8 1985.

9 Now, its undisputed in this case that Mayacamas being
10 a corporate citizen of the State of California, could have
11 removed Gulfstream's State court action to the Federal Court in
12 the State of Georgia, but did not do so.

13 QUESTION: Do I understand you to say that they could
14 have removed it of course?

15 MR. BIEN: Why is that?

16 QUESTION: You have just said that they could have
17 removed it to Federal Court?

18 MR. BIEN: That's correct.

19 QUESTION: If that step had been taken, could the
20 case have been transferred to the Northern District of
21 California -- is that where it was?

22 MR. BIEN: Mayacamas, if it felt that California was
23 a more convenient forum, certainly had a Motion under Title 28
24 Section 1404 for a transfer for the convenience of parties and
25 in the interests of justice. And I might point out that there
is a concession in its brief on the merits here that Georgia

1 may not have been inconvenient enough a forum to have prevailed
2 on such a motion. That statement is made in the answering
3 brief.

4 QUESTION: And if we thought that the action could
5 have been filed in the California District Court, I guess you
6 could have filed a motion there to change venue back to the
7 Georgia District Court.

8 MR. BIEN: Certainly.

9 QUESTION: Did you ever file such a motion?

10 MR. BIEN: No.

11 QUESTION: No.

12 MR. BIEN: Our position was that the case shouldn't
13 even proceed in California.

14 Well, in that Mayacamas did not exercise their
15 removal right but filed an independent lawsuit in the District
16 Court in Northern California. Gulfstream moved under the
17 Colorado River doctrine for a stay or dismissal of that
18 lawsuit. The motion was in the end of November, 1985. The
19 order of Denial was issued about a month and a half later on
20 February 21, 1986. The District Court said that as it viewed
21 the Colorado River doctrine, notwithstanding the logic of
22 Gulfstream's position about duplicative litigation, the
23 District Court stated in its written order that this Court must
24 exercise its jurisdiction.

25 Gulfstream appealed to the Ninth Circuit. Opinion
emerged some ten months later.

1 QUESTION: Mr. Bien, as a practical matter, what
2 were the consequences to your client of the District Court's
3 denial of your stay motion? Were discovery proceedings started
4 in California or other things done there?

5 MR. BIEN: There were discovery proceedings, as I
6 understand it, going forward in both forums. So you had a
7 typical parallel proceeding in both courts where all the
8 potential for conflicting discovery rulings were taking place.
9 Certainly Gulfstream had to incur the cost of two sets of
10 attorneys and proceeding in the two different courts.

11 So those impacts were certainly taking place.

12 Our primary argument on the practical impact is that
13 when the District Court insisted on proceeding with this
14 duplicative lawsuit, that it was creating a practical impact on
15 Federalism concerns.

16 QUESTION: Of course, you said that they insisted on
17 proceeding with it. The District Court denied a stay and that
18 could have a number of different interpretations. I mean, that
19 doesn't necessarily mean they were just Hell-bent to race for
20 trial with the Georgia State Court.

21 MR. BIEN: I think that at the threshold that the
22 ruling in question on our motion citing the availability of
23 removal and arguing under Colorado River that the District
24 Court shouldn't proceed at all, I think that was -- and I'm
25 anticipating the problem of appealability here -- I think that
was a conclusive type of ruling.

1 There are other kinds of circumstances that might
2 have taken place down the road, the District Court perhaps
3 considering purely prudential matters, looking at the
4 practicalities of one suit or another, may possibly have
5 ordered a stay, a temporary stay or a permanent stay later on.
6 But I think the particular ruling that it made came up squarely
7 and appropriately at the threshold that the suit had no
8 business being allowed to proceed at all, given the duplicative
9 lawsuit in the State Court.

10 And that ruling, I don't think there was any chance
11 that there would have been a reconsideration or reevaluation of
12 that legal ruling based upon any future circumstances. I think
13 that in effect -- I don't know that it would have been a
14 Colorado River motion say a year and a half later -- but
15 perhaps it would have been purely a -- I guess it would have
16 been a discretionary Colorado River motion, after the Court had
17 said that, well the removal factor does not bring this case out
18 of the ordinary realm of discretionary stays.

19 And a year and a half later, it might have said,
20 well, now the Georgia case has proceeded faster or whatever,
21 maybe it would have stayed it, but I think that would have been
22 a fundamentally different kind of ruling down the road. And
23 that is where I think the Moses Cone Hospital analysis does not
24 govern our particular case as far as appealability is
25 concerned.

 Perhaps I should turn to that. In Moses Cone

1 Hospital, you had a Court granting a Colorado River type
2 motion, and the question was at the threshold was is that
3 appealable. And the Court ruled that it was appealable for two
4 different reasons. One was the rationale under the Idlewild
5 case that the plaintiff had been put effectively out of court.
6 But then the Court reached a second ground for appealability,
7 and that is the doctrine that I primarily rely on here. And
8 that is the Cohen collateral order doctrine where the three or
9 perhaps four categories of a narrow class of preliminary
10 orders, of interlocutory orders are deemed appealable.

11 And we certainly I think have all four here. We have
12 an important issue, indeed I would say we have an historically
13 important issue, given the origins and the purpose of the
14 removal jurisdiction. We have an Order that Moses Cone
15 Hospital, itself, held squarely was separate from the merits.
16 I think when you flip and say that we have an order denying a
17 stay, I think it's still equally separate from the merits. We
18 have an order which is not effectively reviewable if you wait
19 until the end of the lawsuit. All the conflicts and tensions
20 between the State and Federal courts are moving along as the
21 case proceeds to the final judgment. And to reverse the
22 judgment at the end I think provides no effective recourse at
23 all for this particular problem.

24 And finally, as I was stating in response to the
25 Chief Justice a little bit earlier, you have a ruling which,
under the analysis of the Moses Cone Hospital, I think is

1 clearly conclusive in that it's a determined, it's a considered
2 judgment on the significance of the removal factor in the
3 context of identical duplicative lawsuits, and I believe that
4 it's conclusive for two kinds of reasons, both found in Moses
5 Cone Hospital.

6 One is if you look at the decision of the District
7 Judge, it's a memorandum opinion. The Judge considered the
8 Colorado River issue, and said the Court must exercise its
9 jurisdiction on those grounds. And I believe it fits Moses
10 Cone Hospital quite clearly.

11 And we also argue in our briefs if you look back at
12 the two companion cases in 1963, one was the Curry case
13 involving National labor relations proceeding, and the one that
14 followed it involving a national bank. You had a trial judge,
15 just as here, making a decision at the threshold simply to
16 proceed with the lawsuit. And the defense, similar to our
17 defense here, was that the very fact that you're proceeding
18 with the lawsuit is inimicable to a very important federal
19 policy. In the one case, the policy to have a labor dispute
20 adjudicated by the Labor Board, and in the second case, in the
21 Langdo case, the policy was not to have a national bank sued in
22 a venue not its home venue.

23 QUESTION: Well, what if the District Court here had
24 said, Mr. Bien, I'm going to deny your motion to dismiss but
25 I'm going to stay all proceedings in this case for six months,
and then you people come back and tell me how the Georgia

1 litigation is coming. Do you think that would be appealable?

2 MR. BIEN: I believe so. Because I think when you
3 have the removal factor -- and this certainly is our primary
4 argument -- there is a preliminary legal determination there
5 that has been made, even if the Court might act differently six
6 months from now. The preliminary determination has been made
7 similar to Curry and Langdo that this case belongs here
8 notwithstanding the availability of a removal action.

9 That situation can never change. It's presented
10 fully at the threshold and its ruled on.

11 QUESTION: Well, you say then that the Northern
12 District of California actually did not have jurisdiction of
13 this action?

14 MR. BIEN: No, no. We concede that there is
15 diversity jurisdiction, concede that there's diversity
16 jurisdiction.

17 QUESTION: So it's just a question whether the Court
18 should have proceeded with the case?

19 MR. BIEN: That's correct. That's similar to
20 Colorado River in 1976. In fact, it's very similar to Iowa
21 Mutual v. LaPlante, which was decided in February of this year
22 where an insurance company in an insurance coverage dispute
23 with some people on an Indian Tribe came to the Federal
24 District Court asserting diversity jurisdiction over a coverage
25 dispute which was in excess of \$10,000.

The same dispute looking on the mirror image side of

1 it had already been before a Tribal Court of the Black Feet
2 Indians, so a Colorado River motion was made and granted. And
3 the reason was, conceding the presence of diversity
4 jurisdiction as certainly we do, that the important Federal
5 policy of I think the way it was framed was of maintaining the
6 ability of the Indians to have their self-government and
7 respecting that self-government, called for a stay and a
8 deferral to the Indian Court system. And I think the analogy
9 is quite close here.

10 We concede jurisdiction, subject matter jurisdiction.
11 I think what takes this case even beyond Iowa Mutual and beyond
12 Colorado River and all five cases that have come up under the
13 Colorado River doctrine since 1976, is that the insurance
14 company in Iowa Mutual had invoked Federal subject matter
15 jurisdiction in the only way it could. There's no removal from
16 the Black Feet Indian Court system. There was no prior pending
17 action in Colorado River or in the San Carlos Apache case where
18 somebody could have removed.

19 These plaintiffs had come to Federal court in the
20 only way they could and if the Federal court didn't exercise
21 its jurisdiction there, the Federal plaintiff would have had no
22 Federal adjudication.

23 In our case, Mayacamas could have had a Federal forum
24 under the diversity jurisdiction by removal. It had an
25 absolute right to that forum. It simply had to file a petition
for removal within 30 days. It would have had its diversity

1 adjudication. Then it could have moved for a transfer and so
2 forth. The reason why this Court has allowed a duplication of
3 efforts when there is concurrent jurisdiction as the reason was
4 explained in the Colorado River case, was that Congress had
5 created the jurisdiction for a reason and that there's a
6 presumptive -- I think the court said -- virtually unflagging
7 obligation to exercise that jurisdiction.

8 Here that jurisdiction could have been exercised, and
9 in way that I think Congress intended since 1789 as a
10 preferable method of exercising diversity jurisdiction in this
11 type of case. As we set forth in our briefs, I think the
12 framers in the debates made quite clear that they were
13 concerned about Federal diversity actions duplicating State
14 court proceedings on the exact same issue and the same parties.
15 And each of the language of that debates is very reminiscent of
16 this Court's language in such cases as San Carlos Apache, where
17 it talks about an unseemly race to decide the same issues first
18 creating concurrent conflicts and tensions between the Federal
19 and State courts.

20 And I think Justice Frankfurter used very similar
21 language in the Brillhart case talking about an exercise of
22 declaratory judgment jurisdiction.

23 QUESTION: Suppose you had filed in the Federal Court
24 when you filed your suit in Georgia.

25 MR. BIEN: Right.,

QUESTION: And then there was a suit filed in

1 California. You'd have had a different argument but would you
2 have objected to going forward in the California court?

3 MR. BIEN: You're assuming a State court?

4 QUESTION: Neither, both Federal Courts, you filed in
5 the Federal court, and the defendant in your suit filed in a
6 Federal court in California.

7 MR. BIEN: I think in that instance, I think we would
8 have objected to having to try the same case twice, but I don't
9 think it would have been so much of a problem. In the Colorado
10 River opinion, the Court noted the general rule which I think
11 is rather unarguable that when there are two cases pending in
12 two Federal courts, the rule is that you don't duplicate, that
13 one is stayed and one is not.

14 QUESTION: One or the other is stayed, isn't it.
15 Now, which one would you -- how do you decide that?

16 MR. BIEN: Well, I think that decision is a
17 prudential one, purely prudential and discretionary.

18 QUESTION: You filed one day in Georgia, and the
19 defendant filed the next day in California. What's the
20 California Judge supposed to do if you move for a stay?

21 MR. BIEN: When there's nothing of the importance of
22 the removal policy involved, I think the Federal judge in that
23 case has to look to a whole panoply of practical
24 considerations. I think there Mayacamas and Gulfstream would
25 have been able to argue to the judge that one suit was a
reaction, a tactical maneuver responding to the other.

1 QUESTION: I take it then that the only difference
2 between the case I posited is that here, removal was available
3 from the State court.

4 MR. BIEN: This is the over arching concern here
5 where you've got an historical policy not to allow duplicative
6 suits like this. That is in fact the heart. Removal does very
7 funny things to the arguments for and against duplication of
8 efforts. It really eliminates the main reason cited in the
9 Colorado River decision for allowing a Federal District Court
10 proceeding to duplicate a State Court.

11 QUESTION: Mr. Bien, I may have missed something here
12 but is jurisdiction over your opposition still contested,
13 jurisdiction of the Georgia Court over your opposition still
14 contested?

15 MR. BIEN: Mayacamas I believe maintains its position
16 that it's not subject to in personam jurisdiction on long arm
17 principles. And it's position on that score has so far been
18 turned down. The Georgia Court certainly felt that in personam
19 jurisdiction lies.

20 QUESTION: What kind of an appearance have they made?
21 A special appearance all the way through the litigation there
22 in Georgia?

23 MR. BIEN: Have they made a special appearance?

24 QUESTION: Yes.

25 MR. BIEN: I believe they have. I assume they've
preserved on a procedural basis their right to continue to

1 press the lack of in personam jurisdiction.

2 QUESTION: So that that issue is undecided in the
3 Georgia litigation?

4 MR. BIEN: That's correct, until the appeal is final.

5 QUESTION: Well, isn't that an important issue?

6 MR. BIEN: I believe it's main importance is deciding
7 whether the proper ruling by this Court -- or if you look from
8 the District Court's point of view -- deciding whether to stay
9 or dismiss.

10 QUESTION: Well, it seems to me that that makes a
11 distinct difference in the State litigation in Georgia on the
12 one hand, and the Federal litigation in California on the
13 other.

14 MR. BIEN: Well, I don't think it does when you
15 consider that on removal to a Federal Court in Georgia, all of
16 Mayacamas' concerns about in personam jurisdiction and
17 inconvenient forum would have been handled by the Federal
18 District Court under the exact same principles, the same
19 Fourteenth Amendment concerns, the same Georgia Statute,
20 presumably, would have been citable in the Georgia Federal
21 District Court.

22 I don't think Mayacamas lost anything, would have
23 lost anything if it had removed its lawsuit. I think all those
24 concerns would have been dealt with equally in Federal District
25 Court in Georgia.

With the Court's permission, I'd like to reserve five

1 minutes for rebuttal.

2 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bien.

3 We'll hear now from you, Mr. Ward.

4 ORAL ARGUMENT OF GREGORY H. WARD, ESQ.

5 ON BEHALF OF RESPONDENT

6 MR. WARD: Mr. Chief Justice and may it please the
7 Court.

8 As Mr. Bien has pointed out, the underlying facts in
9 this particular case are essentially unremarkable. And the
10 issues which are raised, particularly with respect to
11 determining the appealability of this question are also
12 essentially unremarkable.

13 What we have here is a garden variety civil suit and
14 a garden variety procedural question which was resolved by the
15 District Court, and which should not have been appealed under
16 any doctrine which currently exists or which should exist, and
17 which certainly does not expose the District Court Judge to
18 review by the Court on a writ of mandamus.

19 QUESTION: Mr. Ward, can you state categorically at
20 this point whether your client is going to appeal from the
21 Georgia judgment if your motion for a new trial is denied?

22 MR. WARD: Your Honor, it is the intention of
23 Mayacamas to move the trial court for a judgment
24 notwithstanding the verdict.

25 QUESTION: I understand that.

MR. WARD: And also to request a new trial. It is

1 Mayacamas' position that the amount of the award which it
2 received was reduced by local sympathies and that in the event
3 this matter were retried, or tried in California, that the
4 amount of the judgment would be greater.

5 QUESTION: Are you going to answer my question?

6 MR. WARD: Yes.

7 QUESTION: Are you going to appeal if --

8 MR. WARD: Oh, are we going to appeal if those
9 motions are denied?

10 QUESTION: Yes.

11 MR. WARD: Yes, Your Honor.

12 First of all, with respect to the Cohen doctrine
13 which refers to the collateral order exceptions to the final
14 judgment rule, it's Mayacamas' position that this particular
15 issue falls short on all three of the points that must be
16 satisfied for it to be applicable.

17 First of all, the Order of the District Court did not
18 conclusively determine anything. This order was inherently
19 tentative. The Court refused to stay its proceedings. But
20 there is absolutely no reason to believe that the Court could
21 not reconsider that decision throughout the course of the
22 litigation as various circumstances changed. One of the
23 principal circumstances which is to be considered in a Colorado
24 River analysis is the relative progress of the different
25 litigations, and that may very well change during the course of
the litigation.

1 I think that unlike a circumstance where a Court has
2 granted a stay, and there may be a conclusion that can be drawn
3 from that that this is a final ruling, that is conclusive,
4 which was this Court's ruling in the Moses H. Cone Hospital
5 case, where we have a Court merely saying, no, let's proceed.
6 That is much more in the nature of a tentative ruling which can
7 be revisited at any time.

8 I was rather surprised by Mr. Bien's response to the
9 questioning by the Chief Justice that if the Court were to
10 order a stay of six months that that would be an appealable
11 order. It seems under Gulfstream's analysis that any stay of
12 any length granted by a District Court would be an appealable
13 order under this Cohen analysis, and that clearly is an
14 unreasonable interpretation.

15 QUESTION: Mr. Ward, do you agree with your
16 opponent's contention that you could have removed this case?

17 MR. WARD: Yes, Your Honor.

18 QUESTION: Is it clear that you can remove a case
19 even when you're challenging in personam jurisdiction?

20 MR. WARD: I believe that you may remove the case and
21 maintain your jurisdictional challenge, and raise the
22 jurisdictional challenge in Federal court.

23 QUESTION: Do you believe that or do you know that?

24 MR. WARD: I believe that, Your Honor.

25 QUESTION: Do you know cases that hold to that
effect?

1 MR. WARD: No, Your Honor.

2 In this case, Mayacamas' decision was to bring this
3 action in California which it felt was the appropriate forum in
4 light of the fact that all of the transactional events which
5 led up to this particular contract took place in California.
6 Mayacamas felt that it should not be obligated to travel across
7 the country merely because Gulfstream executed its preemptive
8 strike in instituting the action first in Georgia.

9 Gulfstream's argument is that because they were
10 successful, having received notice from Mayacamas that
11 Mayacamas felt that Gulfstream was in breach, that because they
12 were successful in instituting the action in the first instance
13 in Georgia Superior Court that even though Mayacamas as a
14 plaintiff had the statutory right to bring this action in
15 California where jurisdiction over Gulfstream is not contested,
16 that Mayacamas is limited to Federal Court in Georgia.

17 QUESTION: The alternative, which I presume you
18 subscribe to, is that what both lawsuits go ahead full steam as
19 your opponent says, duplicating the legal resources until one
20 finally goes to judgment? That doesn't seem an entirely happy
21 solution.

22 MR. WARD: Well, in this case, Your Honor, both cases
23 went ahead full steam, if you will. There were agreements made
24 between the various parties with respect to use of discovery --
25 excuse me, I'm speaking outside the record now if that's
appropriate -- to use of discovery in both cases. Depositions

1 were taken and conducted in both cases, captioned under both
2 cases.

3 So even though both cases were proceeding full steam,
4 there was no duplication of effort, if you will, with the
5 exception of Mayacamas' effort to stop the Federal case.

6 QUESTION: Is it your position that the District
7 Court in California had no discretion to stay?

8 MR. WARD: No. The District Court did have
9 discretion to stay.

10 QUESTION: And you just suggest that it wasn't
11 required to stay.

12 MR. WARD: Yes. Our position as accepted by the
13 District Court was that there are no exceptional circumstances
14 in this case which would warrant a stay.

15 QUESTION: What did you just say?

16 MR. WARD: There are no exceptional circumstances --

17 QUESTION: So you say that they had no discretion to
18 stay this case, the Federal Court in California.

19 MR. WARD: Well, the District Court in California has
20 to balance the various factors in determining whether or not to
21 stay under the Colorado River analysis. So in that sense, the
22 Court is exercising its discretion in determining the weight to
23 be placed to the various factors.

24 QUESTION: Do you think Colorado River is the only
25 basis for staying the Federal suit?

MR. WARD: No, Your Honor, there are other abstention

1 doctrines, as well. But prior to the Colorado River doctrine,
2 I think that it was rather up in the air.

3 QUESTION: Let me ask you this. If Gulfstream had
4 filed in a Federal Court in Georgia, and then you filed in the
5 Federal Court in California, now I suppose you would concede
6 that the Federal Court in California would have discretion to
7 stay its action?

8 MR. WARD: Yes, Your Honor.

9 QUESTION: Well, why should it be different if the
10 Georgia case was in the State Court?

11 MR. WARD: Well, it should not be any different.

12 QUESTION: Well, there's no Colorado River doctrine
13 in my case under two federal courts.

14 MR. WARD: Your Honor, I have not addressed that
15 particular concept since in this case we do not have --

16 QUESTION: Well, isn't it odd that the District Court
17 in California would have discretion to stay its suit if the
18 Georgia suit were in the Federal Court but it wouldn't have
19 discretion to stay its case when the Georgia suit is in a State
20 Court?

21 MR. WARD: Well, I don't think so, Your Honor,
22 Because a party is entitled to a Federal forum. A party is not
23 entitled to two Federal forums. I think there is a distinction
24 there. And the question is whether or not the statutory set up
25 created by Congress permits Mayacamas to institute its Federal
action in California, rather than remove a State Court case to

1 Federal Court in Georgia.

2 Now, Gulfstream would argue that the Removal Statute
3 somehow has contained in it a limitation on the forum that
4 Mayacamas can choose. And there is just no such limitation
5 built into the removal statute. The Removal Statute was
6 created to allow an out of state defendant to escape the local
7 prejudices by moving into a Federal Court. This is an
8 alternative means of original jurisdiction for the Federal
9 courts.

10 One of the principal means of jurisdiction in the
11 Federal Courts is diversity of citizenship.

12 QUESTION: Well, if you wanted to get into the
13 Federal Court and if you also wanted to have just one suit
14 going, why wouldn't you have asked for removal to the Federal
15 District Court in Georgia, and then moved for a transfer change
16 of venue to California, if you felt the circumstances warranted
17 it?

18 MR. WARD: The difficulty with that, Your Honor, is
19 that the standards for removal on a forum non conveniens basis
20 are limited, and they are limited to issues primarily relating
21 to the convenience of the parties and witnesses.

22 Here we have a much more fundamental concern which is
23 a challenge to the jurisdiction of the Georgia Courts in the
24 first instance which would not be taken into consideration by
25 the Court in deciding a forum non conveniens motion, and the
statutory scheme is set up to allow a plaintiff to have his

1 choice of forum and the forum non conveniens restrictions would
2 not necessarily and as Mr. Bien pointed out, we conceded that
3 under the standards as currently applied for a forum non
4 conveniens situation for a transfer --

5 QUESTION: It wouldn't have been transferred.

6 MR. WARD: -- it may not have been. And Mayacamas
7 instead relied on the right provided by statute for it to
8 institute litigation in a Federal Court which had jurisdiction,
9 which had subject matter and in personam jurisdiction.

10 QUESTION: Well, was there an objection on your part
11 when the Georgia State Court action finally went to trial?

12 MR. WARD: Yes, Your Honor.

13 QUESTION: On what ground?

14 MR. WARD: That the Court lacked jurisdiction to
15 proceed in the action.

16 QUESTION: But you didn't argue that there was
17 another case pending in the Northern District of California
18 that should prevent it from going to trial?

19 MR. WARD: No, Your Honor. And in fact if I may
20 digress from the record just a little bit, Georgia has a
21 statute which requires its courts to set the matters earlier on
22 the calendar if there is another matter pending involving the
23 same issues in another court.

24 QUESTION: They've anticipated all this.

25 MR. WARD: So we found ourself kind of locked up
there. We had a trial date in the California case for October

1 5th. The Georgia Court set the trial for September 26th to
2 jump in front. We now no longer have a trial date in Federal
3 Court in California. Whether or not that is a stay which we
4 could appeal from the Judge's Order taking this matter off
5 calendar I suppose is something that Mr. Bien said.

6 QUESTION: If this judgment becomes final in Georgia,
7 do you agree that it would preclude the California case?

8 MR. WARD: Yes, Your Honor.

9 Mr. Bien indicates that the issue which is of all
10 encompassing importance here is the question of the Removal
11 Statute, and the important Federal policy restricting the forum
12 to the Federal Court in Georgia. And all of the cases he
13 cites, the Local 438 case, the Mercantile Bank case, the John
14 Mitchell case involving immunity -- excuse me, I shouldn't say
15 that -- except for the Mitchell case, they all involve the
16 question where the Federal Court had indicated that a
17 particular forum should be the forum in which this matter
18 should be handled.

19 And it was felt by this Court that a decision not to
20 permit the party to go forward in that particular forum
21 constituted a conclusive determination of an important issue
22 which was not effectively reviewable on appeal. In the
23 Mitchell case, you had an immunity situation where the Court
24 felt that the obligation was that the statute provided that
25 this individual did not have to subject himself to a trial in
the first instance, and therefore that was an important Federal

1 policy effectively unreviewable on appeal.

2 We do not have that situation here. We do not have
3 an important Federal policy which says that a case which is
4 filed in a State Court must be removed to the State Federal
5 Court, otherwise, we're going to have a lot of problems between
6 State and Federal relations. That's not found in any of the
7 federalist papers and in the anti-federalist papers, the
8 purpose for the Removal Statute was merely to help out of state
9 litigants get a fair trial by removing the case to Federal
10 Court.

11 QUESTION: That's going to the merits of the
12 argument, and for purposes of determining -- are you arguing
13 the finality point now? Is that?

14 MR. WARD: Yes, Your Honor.

15 QUESTION: For purposes of the finality point, don't
16 you have to take your opponent's argument at face value, that
17 his, assuming that there is such a Federal policy? Otherwise,
18 we'd have to decide the merits in order to decide finality.

19 MR. WARD: Well, if you assume that there is such a
20 policy, a Federal policy which favors that forum, then I think
21 that what Gulfstream is asking the Court to do is one of two
22 things: either create a new abstention doctrine which says that
23 in effect that an action brought outside of that forum, the
24 Court must be dismissed. And Gulfstream has indicated in its
25 papers that it's not asking the Court to do that.

What it is saying is that it wants this Court to make

1 the failure to remove a very significant factor to be
2 considered by the District Court in its Colorado River
3 analysis. In fact, I think they indicate that there should be
4 a presumption that there should be a stay or a dismissal taken
5 into effect by the District Court.

6 In that case, our position is that the District Court
7 was aware of this argument, took it into consideration, and
8 that is the only factor which could arguably be called
9 exceptional. And that is not sufficient to overrule the
10 District Court's ruling that he should proceed and exercise his
11 obligation to try the case.

12 QUESTION: May I ask you a question that I'm a little
13 puzzled by. Do you agree that you could have removed the
14 Georgia case to the Federal Court in Georgia and still preserve
15 your objection to personal jurisdiction?

16 MR. WARD: Well, Justice Scalia asked me that
17 question and I believe I had to confess that I didn't have any
18 cases to support my position on it, so I guess I would have to
19 say that I don't know the answer to that question, Your Honor.

20 QUESTION: Because the Removal Statute seems to
21 assume that there would be jurisdiction of the case in the
22 Federal Court. I'm just puzzled by it.

23 MR. WARD: Put me on the spot twice, Your Honor.

24 QUESTION: The principal question we're interested in
25 considering I guess is not so much who should have won in the
District Court, but whether the District Court's order denying

1 a stay was appealable?

2 MR. WARD: That's right. And under the three Cohen
3 factors which is the only reasonable basis on which argument
4 can be made that it is appealable, although I guess we need to
5 address the Enelow\Ettelson rule which was relied on by the
6 Seventh Circuit in permitting an appeal of these types of
7 issues. The order was not conclusive, it did not deal with an
8 important issue which was separate from the merits, and it is
9 reviewable on appeal. The question of whether or not this
10 Court should have stayed the action is reviewable on final
11 appeal. No significant rights are lost during the proceeding
12 of this litigation other than the fact that the parties have to
13 endure some expense and some irritation which has repeatedly
14 been stated to be an insufficient basis for concluding that an
15 action is unreviewable on appeal.

16 All of the points which are raised can be dealt with
17 after final judgment and the Cohen collateral order exception
18 is just not applicable.

19 Under the Enelow\Ettelson rule, which has been
20 criticized greatly recently, the simplest way to deal with that
21 is, other than just indicating that there's no longer any basis
22 for it now that we have the one forum of action rule, is that
23 Gulfstream is not attempting here to interpose an equitable
24 defense to a legal claim. It is merely raising an equitable
25 consideration which should be considered by the Court in
deciding whether or not to proceed with the action.

1 The difference is more than merely semantic. It's a
2 defense to an action, an equitable defense to an action is one
3 that has been recognized in the context of an injunction
4 situation. Merely raising the fact that this case should not
5 proceed because of wise judicial administration issues is
6 merely an equitable consideration to be taken into
7 consideration by the Court for purposes of this pretrial
8 matter, and has nothing to do with the adjudication on the
9 merits of the case.

10 With respect to very briefly on the issue of
11 mandamus, I think we're dealing here with a question of the
12 discretion of the District Court in deciding whether or not the
13 criteria of Colorado River have been met. Clearly, when you're
14 dealing with a matter of discretion, it's very difficult to say
15 that there is clear and indisputable evidence that this matter
16 should have been handled differently by the District Court.

17 Unless there are any questions from the Court, I have
18 nothing further.

19 QUESTION: I have one other question.

20 MR. WARD: Yes, sir.

21 QUESTION: Maybe it's sort of a trying to predict
22 what'll happen in this case. Does Georgia also have a statute
23 expediting the review of cases that are pending in another
24 forum? I'm just wondering if you have much chance of winning
25 the race no matter what we do here. They've already tried that
case gone to judgment and presumably they like to help their

1 courts decide things before other courts can decide them.

2 MR. WARD: Well, that's certainly problematic, Your
3 Honor, that at this point the battle has been lost. Certainly
4 if the District Court Judge decides to overturn the verdict --
5 and certainly there were some indications from the Court during
6 the course of the trial inviting --

7 QUESTION: Then you're back on square one.

8 MR. WARD: Then we're back on square one.

9 QUESTION: But if your motions in the trial court are
10 not successful, that may well be where the case will be
11 decided, I think.

12 MR. WARD: And it's certainly conceivable that the
13 District Court in California may choose to stay the proceedings
14 until the appeal in Georgia is resolved.

15 QUESTION: You can still win if you win on
16 jurisdiction.

17 MR. WARD: That's correct. If we win on
18 jurisdiction, then we're back to California without any doubt.

19 QUESTION: If you had removed to the Federal Court in
20 Georgia, and you had the separate suit pending in California,
21 you would have had the situation where you'd have two Federal
22 suits, one of which contains as a counterclaim and the other
23 one of which contains as the principal claim the very same
24 contention, right?

25 MR. WARD: Yes.

QUESTION: And you think even under those

1 circumstances, there wouldn't have been a transfer? I mean, it
2 isn't just -- it's only the convenience of the parties and not
3 the fact that you have exactly the same issue involved that the
4 Court could take into account?

5 It seems a very strange situation. You would have
6 two Federal suits, one counterclaim and the other one the claim
7 involving exactly the same contention. We don't have that all
8 the time.

9 MR. WARD: But we avoided that in this situation,
10 Your Honor, by having Gulfstream file in State Court and not
11 removing to Federal Court. Certainly we felt that the issues
12 that would be raised by removing to Federal Court and then
13 filing an action in State Court in California would increase
14 Mayacamas' difficulties in getting the case tried in California
15 rather than decrease them.

16 QUESTION: If it isn't the transfer for the
17 convenience of the party that gets rid of that situation, there
18 must be some other doctrine that gets rid of that situation
19 because you know, I'm just unaware of that proceeding with two
20 Federal courts adjudicating the very same thing.

21 MR. WARD: I agree, Your Honor.

22 QUESTION: Although, if there are two Federal courts,
23 one or the other of them's going to stay, isn't it?

24 MR. WARD: That certainly would be the presumption.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ward.

Mr. Bien, you have four minutes remaining.

1 ORAL ARGUMENT OF ELLIOT L. BIEN, ESQ.

2 ON BEHALF OF PETITIONER - REBUTTAL

3 MR. BIEN: Thank you.

4 Just to begin with the last point, I think it's the
5 Colorado River and the Kerotest decision on which it relied in
6 the two Federal court situation that would create the solid
7 case law basis for one or the other of those Federal courts
8 deferring to the other. There's a strong presumption in that
9 situation that you don't have two duplicative Federal court law
10 suits. And I think the law is very strong and certainly clear
11 on that.

12 The question arose by Justice Scalia and Stevens
13 about whether there might be a waiver of objection to personal
14 jurisdiction in this situation. The Removal Statute itself
15 says that the defendant in a State court can remove any time
16 the District Court would have had original jurisdiction,
17 whether diversity or federal question. And I think it's clear
18 that we're talking about subject matter jurisdiction then.

19 That there's no premise in the Removal Statute itself
20 that there must be in personam jurisdiction.

21 QUESTION: You say it's clear. Is that based on some
22 decision or do you just think it's clear on those words?

23 MR. BIEN: Well, the next comment that I was going to
24 make was that this Court had a decision called Polizzi v. Kels
25 Magazines, I can give you the cite now or subsequently, in
which there had been a removal.

1 QUESTION: Do it now.

2 MR. BIEN: Certainly. Polizzi v. Kels Magazines, 345
3 U.S. 663.

4 QUESTION: Thank you.

5 MR. BIEN: It's a 1953 decision in which this Court
6 ordered the District Court following removal to proceed to
7 examine the challenge to in personam jurisdiction to the
8 sufficiency of the service of process. That case, and also the
9 Morris Treatise also cites Section 1448 of Title 28 as
10 instructing the District Court following a removal, to look
11 into all questions of the adequacy of service of process.

12 And the Polizzi decision, I think, comes pretty close
13 to the question that you raised, that certainly there would be
14 no waiver by Mayacamas in that situation.

15 I think some of the colloquy about the trial setting,
16 one judge set its trail to effectuate the purposes of the
17 Georgia Priority Statute, and there was a certain lightness
18 about the colloquy, and Mr. Ward indicated that they were
19 trying to achieve a certain practical advantage in this
20 fashion. I'm simply motivated to cite the language that this
21 Court used just a few years ago in the San Carlos Apache case
22 which I had mentioned earlier, that when you've got a Federal
23 Court proceeding on a parallel track with a State Court lawsuit
24 over the same issue, now I'm quoting, "it's an unseemly and
25 destructive race." And I think it's that very spectacle even
though it can be, I think, made light of in some fashion, if

1 you look at it that way, that this Court held is something
2 that's very disfavored as a matter of federalism.

3 I think that that same concern was expressed by the
4 framers in the debates that I cited in my brief. I think that
5 same concern about avoiding Federal court\State court tensions
6 in litigation of this kind has been cited with concern over and
7 over again by this Court, most recently in the Pennzoil Texaco
8 case in a different context of younger abstention. But there
9 once again, you talk about the premise upon which basis our
10 federal system was established, that the Federal courts are not
11 to gratuitously intervene in situations where it would put
12 itself into a posture of this very kind of conflict and
13 potential tension with the State court.

14 With respect, my opponent belittles those concerns
15 about Federal and state relationships as something that, and
16 I'm quoting, "of dubious relevance" in today's world of modern
17 interstate commerce, as if this nation had no further reason to
18 be concerned about conflicts between the national courts and
19 the state courts. With respect, I think that's a striking
20 notion.

21 I think this case can be seen as just perhaps a
22 garden variety procedural dispute and so forth, but I think
23 with removal, it implicates a very fundamental Federal concern.

24 Thank you for your attention.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bien.

The case is submitted.

1 (Whereupon, at 1:47 p.m., the case in the above-
2 entitled matter was submitted.)
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REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-1329
CASE TITLE: Gulfstream Aerospace Corporation v.
Mayacamas Corporation
HEARING DATE: December 7, 1987
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
United States Supreme Court
and that this is a true and accurate transcript of the case.

Date: December 11, 1987

Margaret Daly
Official Reporter

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