NO. 18-2042

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MÁXIMA ACUÑA-ATALAYA, DANIEL CHAUPE-ACUÑA, JILDA CHAUPE-ACUÑA, CARLOS CHAUPE-ACUÑA, YSIDORA CHAUPE-ACUÑA, ELIAS CHAVEZ-RODRIGUEZ, MARIBEL HIL-BRIONES,
Plaintiffs/Appellants,

v.

NEWMONT MINING CORPORATION, NEWMONT SECOND CAPITAL CORPORATION, NEWMONT USA LIMITED, AND NEWMONT PERU LIMITED,
Defendants/Appellees.

On Appeal from the United States District Court for
the District of Delaware
Civil Action No. 17-1315
(Honorable Gerald Austin McHugh, District Judge)

OPENING BRIEF FOR PLAINTIFFS/APPELLANTS AND JOINT APPENDIX VOL. I

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INTRODUCTION

"[A] plaintiff's choice of forum should rarely be disturbed." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). That is why *forum non conveniens* (FNC) dismissal is an exceptional remedy, warranted only where the Defendant meets a "heavy burden." *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 613 (3d Cir. 1991). To upend Plaintiffs' forum choice, Defendants must "establish" – even before showing that the alternative foreign forum is more convenient – "that an *adequate* alternative forum exists." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 180 (3d Cir. 1991) (emphasis added). The district court recognized that Defendants bear the burden of proof, but ultimately placed the burden regarding adequacy squarely and improperly on Plaintiffs.

Defendants, four Delaware corporations that head or are part of Newmont, a vast multinational mining enterprise, claim it is inconvenient for them to litigate in their own home forum. Plaintiffs Máxima Acuña-Atalaya, Daniel Chaupe-Acuña, Jilda Chaupe-Acuña, Carlos Chaupe-Acuña, Ysidora Chaupe-Acuña, Elias Chavez-Rodriguez, and Maribel Hil-Briones ("Plaintiffs") are all members of a family of subsistence farmers that has cultivated a small plot in the Peruvian Andes for over twenty years. But their farm sits atop a gold deposit that Defendants covet. Defendants are attempting – by harassing and intimidating Plaintiffs – to force them from their farm to pave the way for a massive open-pit gold mine.

Over the last six years, Defendants have repeatedly dug up Plaintiffs' crops,

destroyed Plaintiffs' property, killed Plaintiffs' livestock, detained Plaintiffs against their will as they tried to go to their farm, filed false criminal complaints against Plaintiffs, and threatened Plaintiffs' lives and beaten them—one into unconsciousness.

Plaintiffs sued Defendants in the District of Delaware, challenging the physical attacks, emotional distress, property destruction, and other harms inflicted on them by Defendants' agents.

Instead of litigating at home, Defendants asked the district court to dismiss on FNC grounds in favor of Cajamarca, Peru, where Defendants hold sway over the courts, where they recently bribed a prosecutor in a criminal case against Plaintiffs, where Plaintiffs were denied their right to present evidence, where the intimidation of and criminal charges against those who oppose Defendants' subsidiary in the region are commonplace, and where no court proceeding deriving from this dispute has ever led to affirmative relief for Plaintiffs. The district court recognized that Plaintiffs' evidence establishing these points "show[ed] cause for concern over Peruvian courts" and provided "reasons to be concerned about the Peruvian judicial system."

Nonetheless, the district court held that *Plaintiffs* had not proven that Peru was "clearly inadequate." The problem, of course, is that Defendants, not Plaintiffs, bear the burden of proof.

Regardless, Defendants' dearth of evidence to rebut Plaintiffs' makes it

abundantly clear that Defendants did not meet that burden.

The district court also denied Plaintiffs a fair chance to meet its improper burden by denying Plaintiffs any discovery seeking additional evidence of Defendants' corruption. And it did so without any analysis, which is itself an abuse of discretion.

The district court further failed to hold Defendants to their burden by failing to assure itself that Defendants' chosen forum will allow Plaintiffs to present critical evidence. Plaintiffs' claims depend on their testimony, but Peru sharply limits the ability of parties and family members to testify. The court recognized that Peruvian courts might exclude Plaintiffs' evidence, but did not recognize that this makes Peru an inadequate forum.

Plaintiffs do not need a finding of fact that Peru's entire judicial system is inadequate. The question is whether specific local courts will fairly and adequately hear these Plaintiffs' claims against these Defendants. And since the burden lies with Defendants, the court need not even find that those local courts are inadequate; the question is whether Defendants, on this record, have proven they are adequate.

Nonetheless, the corruption in Peru's courts is so extreme that, after the district court ruled, Peru declared a judicial state of emergency.

Defendants' inability to meet their threshold burden to prove the foreign forum is adequate ends the inquiry; there is no reason to consider whether Defendants could make the additional required showing that it would be oppressive

for Defendants to litigate in Delaware, their home forum. *See Piper*, 454 U.S. at 241.

The district court's decision to dismiss Plaintiffs' claims to Peru despite the corruption Plaintiffs will face and the real possibility that Plaintiffs will be foreclosed from proving their case should be reversed. At a minimum, the case should be remanded for consideration of whether courts in a state of emergency can provide Plaintiffs a fair forum.

JURISDICTIONAL STATEMENT

Plaintiffs filed this case in the United States District Court for the District of Delaware, which had subject matter jurisdiction under 28 U.S.C. § 1332(a)(2), as Plaintiffs are citizens of a foreign state while the Defendants are citizens of the United States, and the amount in controversy exceeds $75,000. The district court had personal jurisdiction over all Defendants because they are incorporated in Delaware. On April 11, 2018, the district court entered Judgment, constituting a final order. Pursuant to Fed. R. App. P. 4(a)(1)(a), Plaintiffs timely filed their Notice of Appeal on May 8, 2018. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Defendants bear the burden to establish the existence of an adequate alternative forum. Did the district court reverse that burden, and thus err as a matter of law, by requiring Plaintiffs to prove that Peru is a "clearly inadequate" forum? Dkt.

No. 43 at 5-6 (Pls' Opp.); Dkt. No. 51 at 1-2 (Defs' Reply); JA4, 11, 18-19, 22, 27 (D.Ct Memo).

2. The district court recognized that Plaintiffs produced "troubling" evidence that Defendants have recently corrupted the Peruvian courts that would hear this case in proceedings involving these same litigants, evidence of corruption in Cajamarca courts, and evidence that Defendants previously corrupted the Peruvian Supreme Court. Assuming the district court applied the correct burden, did it err in concluding that Defendants met it, given Plaintiffs' evidence of corruption and the dearth of evidence submitted by Defendants in response? Dkt. No. 43 at 4, 7-8 (Pls' Opp.); Dkt. No. 15 at 6-9 (Defs' Motion); Dkt. No. 51 at 3-4 (Defs' Reply); JA13-22 (D.Ct Memo).

3. Did the district court abuse its discretion by denying Plaintiffs any discovery into Defendants' improper influence over Peruvian courts despite recognizing concerning evidence of corruption of Peruvian courts by Defendants' agents, including in cases involving these Plaintiffs and without any analysis? Dkt. No. 62 (Pls' Not. of Discovery); Dkt. No. 67 (Pls' Not. of Service of Discovery); Dkt. No. 80 (Pls' Opp. to Defs' Mot. for Protective Order); Dkt. No. 71 (Defs' Mot. for Protective Order); JA31 (D.Ct Order).

4. The district court recognized that Peruvian courts may exclude testimony by members of the Chaupe family. And any claim in Peru would be filed

well after these claims. Did the district court err by failing to assure itself that critical witness and in-person testimony would be available to Plaintiffs in Peru, and that Plaintiffs claims would not be time-barred? Dkt. No. 43 at 16, 20 (Pls' Opp.); Dkt. No. 86 at 3-4 (Plaintiffs' Notice of Supp. Evidence); JA26-27 (D.Ct. Memo).

STATEMENT OF RELATED CASES

This case has never previously been before this Court. There are no cases related to this proceeding in any United States federal court or state court.

STATEMENT OF THE CASE

I. Statement of facts.

A. Defendants are using harassment, intimidation, and false criminal charges to try to force Plaintiffs off the site of a gold deposit they want to mine.

Defendants, Newmont Mining Corporation (NMC) and its subsidiaries, Newmont USA Ltd., Newmont Peru Ltd., and Newmont Second Capital Corp. (together, "Newmont"), are all Delaware corporations. JA235 (Newmont's 2016 SEC Filing). As Plaintiffs allege, Defendants, through their agents, are trying to force Plaintiffs from their farm at Tragadero Grande to build Conga, a $5 billion gold mine. JA38-41, JA48-49 ¶ 56 (Complaint).

Plaintiff Máxima Acuña-Atalaya, along with her husband, Jaime Chaupe Lozano, purchased the right to possess Tragadero Grande in 1994. JA249 (Máxima Acuña-Atalaya Declaration). Máxima, Jaime, and their family have lived and farmed

there ever since. *See, e.g.,* JA262, 280 (Daniel Chaupe-Acuña and Carlos Chaupe-Acuña Declarations). But since at least August 2011, Defendants' agents from Minera Yanacocha, Newmont's subsidiary in Peru, have threatened, beaten, and terrorized Plaintiffs. JA251-58; JA264-72; JA281-84; JA290-92; JA298-301; JA307-10; JA315-21 (Plaintiffs' Declarations).

Defendants have hired the Peruvian police and private security, who have invaded Plaintiffs' farm at least nineteen times – with swarms of men armed with batons – destroying property, entering the Chaupes' house, digging up crops, and killing their sheep and other animals. JA383-94 (2011 Police Contract); JA1091-1108 (2017 Police Contract); Dkt. No. 27, Ex. 35 (Securitas Contract); JA251-58; JA264-72; JA281-82; JA290-92; JA298-302; JA308-09; JA315-21(Plaintiffs' Declarations). They blinded one of Plaintiffs' pet dogs in one eye and stabbed another. JA269, 848 (Daniel Chaupe-Acuña Declarations); JA255-56 (Máxima Acuña-Atalaya Declaration); JA275-78 (Photos of dog). Defendants' agents have threatened, filed false criminal complaints against, spread false rumors about, and attempted to extort Plaintiffs. JA253-58; JA264-72; JA282-85; JA291-92; JA298-301; JA307-310; JA316, 321-22 (Plaintiffs' Declarations).

Plaintiffs constantly fear for their ability to make a living, and for their lives. JA251, JA259; JA262, JA273-73; JA281, JA285; JA290, JA292-93; JA297, JA301-02; JA306, JA310-11; JA317-22 (Plaintiffs' Declarations).

From the United States, Defendants oversee the agents responsible for these abuses. NMC is the majority owner of Minera Yanacocha, through NMC's subsidiary, Newmont Second Capital Corp. Dkt. No. 27-1, Ex. 9 at 21 (Newmont 2016 SEC Filing); Dkt. No. 27-1, Ex. 50 at 24 (Yanacocha Sustainability Report). Newmont USA Ltd. employs Newmont's Regional Security Director, who is responsible for security at Conga, Defendants' proposed mine. Dkt. No. 27-2, Ex. 26 at 18:10-22; 136:1-5 (2011 Newmont 30(b)(6) Deposition Transcript). And Newmont Peru Ltd. is effectively "responsible for managing, conducting and controlling the day-to-day operations of [Minera] Yanacocha." Dkt. No. 27-3, Ex. 33 at 49, 93 (Buenaventura 2016 SEC Filing).

Minera Yanacocha has admitted, in a report Newmont commissioned from the consulting group, RESOLVE, that it has attempted to forcibly evict the Chaupes and destroyed their crops and buildings. JA368. The report found that "the human rights of members of the family have been at risk since the first Tragadero Grande eviction attempt." JA370. The Inter-American Commission on Human Rights has recognized that Plaintiffs "have been the object of continuous acts of harassment and threats, with the intent to allegedly dislodge them from the land where they live." JA441.

In addition to this harassment and intimidation, Defendants bribed prosecutors to bring false criminal charges against the Chaupes. As described in the next section, several Plaintiffs were twice wrongfully convicted of "aggravated usurpation" and

sentenced to years in prison by local courts in Cajamarca as a result of these charges. JA298 (Ysidora Chaupe Declaration); JA397 (2017 Peruvian Supreme Court Decision); JA813-14 ¶ 3 (Vasquez Declaration). Ultimately, the Peruvian Supreme Court dismissed them. JA417-18.

When the Chaupes have sought affirmative relief, rather than seeking to overturn false criminal convictions or prevent being evicted, they have failed. The courts and prosecutors have uniformly refused to move forward with any of the numerous criminal complaints the Chaupes have brought against Minera Yanacocha. JA816 (Vasquez Declaration); JA459-503 (Trial court decisions). And the family's requests for constitutional relief have been blocked by trial and appellate courts alike. JA453 (Velarde Declaration); JA527-47 (Decisions addressing Plaintiffs' constitutional claims).[1]

B. Plaintiffs produced evidence that Defendants corrupted Cajamarca courts in cases against Plaintiffs and that corruption is pervasive in Cajamarca courts, as well as evidence of intimidation of Defendants' opponents in Cajamarca and of systemic corruption in Peru.

Plaintiffs presented voluminous evidence, including from the U.S. State Department, that corruption is widely reported in Peruvian courts. More importantly,

[1] The only favorable judgment Plaintiffs ever obtained from a trial court related to this dispute was on Máxima's constitutional claim against Minera Yanacocha for surveilling her by camera and drone. The order was reversed five weeks later on appeal. JA527-34.

Plaintiffs also presented specific evidence that these Defendants have corrupted Peruvian proceedings, including in the Peruvian Supreme Court, and including in cases against these Plaintiffs.

1. Evidence of corruption in Cajamarca courts, including by Defendants in recent cases against these Plaintiffs.

After Defendants filed a criminal complaint against the Chaupes for aggravated usurpation on Tragadero Grande, the local trial courts twice convicted the Chaupes and sentenced them to prison. JA298 (Ysidora Chaupe Declaration); JA813-14 (Vasquez Declaration); JA132 (Velarde Declaration); JA396-97 (2017 Peruvian Supreme Court Decision). Plaintiff Ysidora Chaupe submitted an affidavit declaring that she saw Defendants' lawyers deliver the guilty sentence in the second trial to the judge before the judge issued it. JA298-99 ¶¶ 7-8. And when Máxima Chaupe fainted upon learning that she, her daughter Ysidora, son Elias, and husband Jaime had been sentenced to prison, the same judge apologized, explaining in open court that Defendants had given an "economic benefit" to the prosecutor to bring the case against the Chaupes. *Id*; JA396-97.

These same criminal proceedings were unfair for additional reasons. As the Chaupes' lawyer in Peru, Mirtha Vasquez, explained, the court refused to accept the family's evidence. JA820-21 ¶ 29. Defendants were able to obtain prior knowledge of court documents through their influence with judicial staff, including a court opinion that the court had told Ms. Vasquez was not available to the Chaupes. JA820-22 ¶¶

28-33. And the prosecutor berated the Chaupes as ignorant and uneducated, and repeatedly attempted to humiliate Máxima, who is illiterate, by forcing her to attempt to read a document in open court. JA820-21 ¶29. After six years of litigation, only the Supreme Court saved the Chaupes from prison. JA396 (2017 Supreme Court Decision); JA813-14 ¶ 3 (Vasquez Declaration). But it did nothing to stop Defendants' harassment.

The Chaupes received the same hostile treatment in the lower courts for their own complaints seeking affirmative relief as they did regarding the complaints filed against them. The local trial courts failed to move forward with any of the ten criminal complaints the family filed against Minera Yanacocha. JA816 ¶ 11 (Vasquez Declaration). Court officials refused to go to Tragadero Grande to inspect the destruction of Plaintiffs' property. *Id.* A local judge canceled a judicial inspection without notifying Plaintiffs, and a prosecutor dropped a case filed by the Chaupes before the Chaupes' deadline to make submissions had passed. *Id.* ¶¶ 12-13.

Ms. Vasquez helped explain Defendants' influence over the Cajamarca judiciary by drawing on her time working in the public ministry in Cajamarca, observing that "Minera Yanacocha gave gifts and financed initiatives for the benefit of the employees" there. *Id.* at ¶ 25. She also pointed to jobs given by Defendants to relatives of the judiciary, including Defendants' attorney in litigation against the Chaupes, who was the son of an employee of the appeals division of the court in

Cajamarca. *Id.* at ¶¶ 27-33.

Plaintiffs' expert Juan Carlos Molleda, a specialist in human rights and access to justice in Peru, declared that the "judicial branch and the Public Ministry . . . are in cohorts with extraction companies" and cited extensive corruption in Cajamarca courts. JA804-06 ¶ 15, 18-22. He cited a bribe to a judge in Contumaza in 2011, *id.* at ¶ 20, a prosecutor found to be implicated in corruption in 2011, *id.* at ¶¶ 21-22, another bribe to the judicial secretary of Cajamarca exposed in 2016, *id.* at ¶ 19, and the launch of investigations into corruption in Cajamarca in 2017. *Id.* at ¶ 18.

2. Evidence of Defendants' corruption of the Peruvian Supreme Court and other proceedings.

Plaintiffs submitted the declaration of an expert on corruption in Peru – a former member of the Special Prosecutor's team investigating judicial corruption during the Fujimori era, Julio Cezar Arbizu Gonzalez – who explained that Newmont has been corrupting the judiciary for as long as it has operated in Peru. "Ever since the Yanacocha project began [], the businessmen behind the project have used their power and money to ensure that the justice system would favor them." JA1079 ¶ 8.

Doctor Arbizu described a more than half-million dollar bribe Newmont paid through a notorious secret police chief, Vladimiro Montesinos, in 1998 to swing a Peruvian Supreme Court opinion, which decided ownership of the gold mines Newmont now operates. Doctor Arbizu explained how, when corruption charges were later filed, "only some judges who were suspected to have received bribes were

summoned" and the investigation was closed and "justice has never been sought against the Newmont officials involved." JA1075-77 ¶¶ 2-4.

Plaintiffs also submitted three prominent newspaper articles discussing the bribe to Montesinos and a video, which includes a recording of a top-level Newmont executive and the secret police chief discussing the scheme. JA593-620; Dkt. No. 79; 79-1, Ex. 2.

Plaintiffs also submitted two court documents – an opening appellate brief and the decision that followed – from a 2003 case filed by Peruvian plaintiffs in Colorado state court for injuries suffered after being poisoned by mercury from a Newmont mine. The trial court dismissed on FNC grounds, but the Colorado Court of Appeals reversed because the lower court had not considered whether "[Newmont's] influence with Peruvian judicial officers was such that Plaintiffs could not expect to get a fair treatment by Peruvian courts." *Alberto Achas Castillo v. Newmont*, No. 02CA1772, 2003 WL 25485554 (Colo. App. Nov. 13, 2003); JA694-95.

According to the opening brief to the Colorado Court of Appeals, the plaintiffs presented "evidence of [Newmont's] payments to members of [the] Peruvian judiciary to benefit Newmont in . . . litigation," as well as "numerous other facts which demonstrate the corruption of the Peruvian judiciary, specifically in favor of Defendants . . . too lengthy to be" included in the brief. JA638. Plaintiffs here were unable to obtain the record, through their own efforts or from Newmont through

discovery, which the district court denied without analysis. JA942 (Plaintiffs' Request for Production); JA31 (D.Ct. Order).

3. Evidence of the intimidation and surveillance of those opposing Defendants in the Cajamarca region, including of Plaintiffs' attorneys.

Plaintiffs submitted evidence that the intimidation and surveillance of those opposing Defendants in the region is common. Attorneys are specifically targeted. Indeed, Plaintiffs' Peruvian attorney, Ms. Vasquez, and her colleagues noticed they were being monitored and photographed, and her colleagues' photographs and schedules were found on computers linked to the private security firm that Minera Yanacocha previously employed. JA822-23 ¶ 35-38. And Ms. Vasquez herself discovered her telephone and computer communications were intercepted by a subcontractor for this firm. *Id.* at ¶ 39. Ms. Vasquez has also received anonymous threats, including death threats, for working as a human rights attorney in the region. *Id.* at ¶ 40.

Mr. Molleda described how two human rights attorneys, one affiliated with the same organization that now helps represent the Chaupes in Peru and which Ms. Vasquez previously directed, were reportedly beaten by Cajamarca police. JA807 ¶ 24.

4. Evidence of systemic corruption.

Doctor Arbizu, the expert on Peruvian corruption, "categorically state[d] that a legal process filed by a rural community or family that is part of one against a

multimillion-dollar mining company has absolutely no chance of justice." JA1079 ¶ 8.

Plaintiffs' legal expert, Gaston Fernando Cruz, emphasized "the prevalence of corruption as a determining factor in the final ruling in many cases" in Peru. JA785-89 ¶ 48. He reported based on polls that 64% of the public does not trust the judiciary, 48% believe the judicial branch is the most corrupt branch in Peru, and 75% believe the government anti-corruption efforts are ineffectual. *Id.* at ¶¶ 48-55.

The U.S. State Department has noted the extensive corruption in Peru's judiciary. The 2016 State Department Country Report on Human Rights Practices for Peru observed that reports of corruption in the judicial system were common and emphasized the significant danger to indigenous leaders and activists resisting large-scale mining projects. JA588-89, 708, 718. And the State Department recently reiterated that conclusion in its Investment Climate Statements for 2017, detailing "[c]orruption and civil unrest around extractive projects." JA589-90, JA749. Likewise, the compliance consulting firm GAN Integrity concluded based upon its review of various private and public sources that Peru's courts carry a very high risk of corruption and that bribes are "very commonly exchanged to obtain favorable court decisions." JA589, 741.

Plaintiffs also submitted evidence showing that corruption is epidemic in other branches of the Peruvian government. Impeachment proceedings for corruption were initiated against now-former Peruvian President Pedro Pablo Kuczynski during the

pendency of this case. JA1083-85 (Washington Post article). And a Peruvian congressional commission tasked with investigating the same widespread corruption scandal planned to seek information from at least nineteen law firms in connection with their links to the scandal, including one led by Mario Castillo Freyre, Defendants' Peruvian law expert in this matter. JA1114-118 (Peruvian Newspaper Article).

Indeed, during the pendency of this appeal, revelations of widespread and high-level judicial corruption, including of a Supreme Court Justice, the Minister of Justice, and three members of the National Magistrates Council, prompted officials to declare a "three-month state of emergency for the country's judicial system."[2]

C. Defendants produced almost nothing to refute Plaintiffs' voluminous evidence of corruption.

The only evidence Defendants submitted in response to Plaintiffs' evidence were a handful of Peruvian court opinions and declarations from two affiants: the lawyer whose firm was slated to be investigated by congressional investigation for its links to corruption, and a Newmont officer. Dkt. No. 15 at 8-9; Dkt. No. 51 at 3-4 (Defendants' FNC briefing); JA223-25 ¶¶ 15-20; JA892 ¶ 38 (Freyre Declarations);

[2] The official declaration, as well as newspaper articles describing the situation, are attached to Plaintiffs-Appellants' Motion for Judicial Notice, submitted herewith. *E.g.*, Rebecca Tan, *Leaked calls reveal systemic corruption in Peru's judiciary, sparking flurry of resignations*, Washington Post, July 20, 2018, *available at* https://www.washingtonpost.com/news/worldviews/wp/2018/07/20/leaked-calls-reveal-systemic-corruption-in-perus-judiciary-sparking-flurry-of-resignations/?noredirect=on&utm_term=.67b529ff6ff9.

JA132-34 ¶¶ 13-18; JA451-53 ¶¶ 17-26 (Velarde Declarations). Defendants' submissions did not address much of Plaintiffs' evidence. The lawyer, Freyre, merely explained that under Peru's constitution, the judiciary is formally independent. JA223-25 ¶¶ 15-20. Mr. Freyre also summarily opined that in his experience, Peruvian courts rule based on the facts and the law, not the people before the court. JA892 ¶ 38. The declarations from Newmont Officer Javier Velarde simply described the various Peruvian court proceedings involving Defendants and the Chaupes and attached them. JA132-34 ¶¶ 13-18; JA451-53 ¶¶ 17-26.

D. Defendants' harassment has continued even after the initiation of these proceedings.

Although Defendants claim the Peruvian courts are adequate for Plaintiffs, Defendants simultaneously claim Peruvian courts are too slow for them. Dkt. No. 37 at 18-19. (Defendants' P.I. Opp.). That is how they try to justify their resort to a purported "possessory defense" – their continued incursions onto the farm to harass the Chaupes, *id.* – even while their own challenge to the Chaupes' ownership of Tragadero Grande is being litigated in Peru, a dispute that is not a part of this case. JA115-217 (Minera Yanacocha's lawsuits); JA133 ¶ 18 (Velarde Declaration). Less than a month after Plaintiffs filed their Complaint, Defendants' agents again invaded Tragadero Grande and destroyed the Chaupes' crops. Dkt. No. 27-3, Ex. 60 (Prosecutor's Report).

II. Procedural history.

In September 2017, Plaintiffs filed suit in the District of Delaware, Defendants' place of incorporation. JA35. Defendants moved to dismiss under the *forum non conveniens* doctrine, and send the case to Peru. Dkt. No. 14-15. Plaintiffs moved for a preliminary injunction halting Defendants' harassment, Dkt. No. 26-28, and opposed Defendants' FNC motion, attaching evidence in the form of sworn affidavits and publicly available documents on the inadequacy of a Peruvian forum. Dkt. No 43. Defendants sought to exclude Plaintiffs' evidence. Dkt. No. 51 at 9-10; Dkt. No. 55.

Although Plaintiffs believed their opposition and evidence provided ample basis to deny FNC dismissal, Plaintiffs served Defendants for discovery in January into whether Defendants have "sought to improperly influence Peruvian judges and prosecutors in Peru," JA1086-87 ¶ 2 (Declaration of Richard Herz); JA902-45 (Plaintiffs' Discovery Request), because such evidence is largely in Defendants' possession and they had objected to Plaintiffs' adequacy evidence. Dkt. No. 62 (Plaintiffs' Notice of Discovery). Defendants opposed all FNC discovery and moved for a protective order. Dkt. No. 70 (Motion for Protective Order); JA1048-54 (Declaration of Michael Romey). The court ordered Plaintiffs not to seek discovery prior to oral argument on Defendants' FNC motion. JA1. Four days after oral argument, the court deferred the resolution of Defendants' Motion for a Protective Order until ruling on the FNC Motion and stayed discovery. JA2.

On April 11, the court granted Defendants' motion to dismiss based on *forum non conveniens*, ruled without analysis that Defendants' motion for protection from discovery into the adequacy of a Peruvian forum was moot, and denied Plaintiffs' motion for a preliminary injunction based on its decision to dismiss the action. JA3-32. Plaintiffs appeal from the FNC order and memorandum. JA33-34.

SUMMARY OF ARGUMENT

Defendants bear the burden to prove that their proposed forum is adequate and will fairly consider Plaintiffs' claims. The district court recognized, based on Plaintiffs' evidence, that there is good reason to be concerned about Peruvian courts. But the district court reversed the burden of proof, explicitly requiring *Plaintiffs* to prove that Peru is a "clearly inadequate" forum, rather than requiring Defendants to prove it is an adequate one.

Indeed, Defendants' burden required them to refute Plaintiffs' evidence of corruption. That evidence showed not only that corruption is common in Peruvian courts, but that Defendants have corrupted the very courts where they propose sending Plaintiffs, in cases against the Chaupes. Yet at every step, the court asked whether a specific body of Plaintiffs' evidence established that Peru was a clearly unsatisfactory forum, rather than requiring Defendants to overcome Plaintiffs' evidence of corruption. Indeed, the district court cited very little evidence from Defendants. By failing to hold Defendants to their burden, the court erred as a matter

of law.

The court also applied the wrong standard. It considered whether the entire Peruvian legal system is inadequate, even though FNC dismissal is improper if Defendants do not prove Peru is an adequate forum *for these Plaintiffs*.

Regardless of whether the district court improperly placed the burden on Plaintiffs or applied the correct standard, Defendants simply did not meet their burden to prove Plaintiffs will be treated fairly in Peru. They utterly failed to refute the evidence of corruption that the district court found troubling.

Moreover, despite its concerns about Peruvian courts, the court dismissed Plaintiffs to Peru without allowing any discovery into Defendants' corruption – and without providing any explanation. This compounded the prejudice of the court's erroneous standard. Since the best evidence of Defendants' corruption is in Defendants' hands, the court deprived Plaintiffs of a fair opportunity to meet the burden it wrongly placed on them. And burden aside, the court deprived itself of a complete picture of the corruption Plaintiffs will face. The district court abused its discretion; courts may not deny discovery *without explanation*.

The court's analysis of the alleged adequacy of the Peruvian courts must be reversed for other reasons, as well. This Court has held that a district court's failure to assure itself that a defendant's proposed alternative forum will afford a plaintiff access to critical evidence warrants reversal. Here, Plaintiffs' case centers in large part on

their own eyewitness testimony to the abuses they suffered. But the district court failed to consider whether Peru's evidentiary rules limiting Plaintiffs' ability to put forth their own testimony and that of their family members would deny the Chaupes access to critical and necessary eyewitness evidence in Peru. It thus did not assure itself the forum is adequate. This was error.

And although a forum is inadequate if Plaintiffs' claims are time-barred, the district court failed to ensure that Peruvian statutes of limitations will not preclude Plaintiffs' claims.

After the district court ruled, revelations of corruption among high-level members of the Peruvian judiciary led officials to declare a judicial state of emergency. At a minimum, the Court should remand so that the district court can consider whether Defendants can show Peru is an adequate forum despite this newly discovered corruption and the turmoil it has engendered.

ARGUMENT

I. The district court reversed the burden of proof by requiring Plaintiffs to demonstrate that the entire Peruvian legal system is "clearly inadequate" rather than requiring Defendants to show that Peru was an adequate forum for these Plaintiffs.

A. Standard of review.

While *forum non conveniens* dismissal is reviewed for abuse of discretion, "the district court abuses its discretion if it does not hold the defendants to their proper burden." *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988). The court's

discretion "may not serve the Defendants as a burden-shifting device on appeal." *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 160 (3d Cir. 1980), *rev'd on other grounds*, *Piper*, 454 U.S. 235.

The application of the proper burden of proof is a matter of law. *In re Dobrowsky*, 735 F.2d 90, 92 (3d Cir. 1984). This court "review[s] the allocation of the burdens of persuasion and production de novo." *In re Wettach*, 811 F.3d 99, 105 (3d Cir. 2016).

Because a district court abuses its discretion when it makes an error of law, the standards the district court used in exercising its discretion are reviewed *de novo*. *United States v. Washington*, 869 F.3d 193, 213 and n.81 (3d Cir. 2017).

By reversing Defendants' burden of proof to show Peru is an adequate forum, and by erroneously considering whether the entire Peruvian legal system is inadequate rather than whether Peru is an inadequate forum for these Plaintiffs, the trial court abused its discretion – and erred as a matter of law.

B. The district court impermissibly required Plaintiffs to meet Defendants' burden.

This Court does not hesitate to reverse FNC dismissals where the district court does not properly apply, or hold defendants to, their burden of proof. *Lacey*, 932 F.2d at 174; *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 640 (3d Cir. 1989); *Lacey*, 862 F.2d at 39; *Tech. Dev. Co. v. Onischenko*, 174 F. App'x 117, 118–20 (3d Cir. 2006).

The district court's opinion cannot stand, because it reversed the burden of

proof on the adequacy of a Peruvian forum. It is "settled that the defendant bears the burden of persuasion as to all elements of the forum non conveniens analysis." *Lacey*, 862 F.2d at 43-44. Thus, a "moving Defendant must show that an adequate alternative forum exists as to all Plaintiffs." *Id.* at 44. It is the Defendant's burden to make this "threshold demonstration." *Bhatnagar by Bhatnagar v. Surrendra Overseas*, 52 F.3d 1220, 1226 (3d Cir. 1995).

As the district court recognized, corruption goes to the adequacy of an alternative forum. JA15-17; *see Daventree Ltd. v. Republic of Azer.*, 349 F. Supp. 2d 736, 756 (S.D.N.Y. 2004) (relying on evidence of corruption to find defendants did not meet their "burden of demonstrating that Azerbaijan is as an adequate alternative forum"). This is particularly true where there is evidence that *defendants* have manipulated the justice system and would likely continue to do so were the case sent there. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085-86 (S.D. Fla. 1997).

Accordingly, if a district court "look[s] to the Plaintiff to show that the alternative forum was not adequate, rather than looking to the Defendant to show that it was adequate," its determination is "inappropriate as a matter of law." *Lony*, 886 F.2d at 633, 640 (discussing court's burden reversal with regard to adequacy and private interest factors but finding no *reversible* error with regard to adequacy because Plaintiffs did not challenge the court's adequacy finding on appeal). That is precisely the district court's error here.

The district court concluded, "although Plaintiffs have shown cause for concern over Peruvian courts, I cannot say that they are 'clearly unsatisfactory' under *Piper*." JA22. And it reiterated that while "there are reasons to be concerned about the Peruvian judicial system," it could not "say that it is clearly inadequate." JA4.

Indeed, the court made clear – three more times – that it was considering whether *Plaintiffs* had shown the forum to be *inadequate*, rather than the other way around. It discounted Plaintiffs' evidence that Newmont improperly influenced the Peruvian Supreme Court in 1998 as "not enough to now find the Peruvian court system inadequate." JA18. It noted that Plaintiffs' evidence that Defendants gave a judge the decision she issued against the Chaupes and bribed a prosecutor was "troubling" but "does not support a global finding that Peru is an inadequate forum for Plaintiffs." JA19. And it held that it was "not prepared . . . to conclude" that the Peruvian evidentiary rule barring Plaintiffs from presenting key evidence, the Chaupes' testimony, "renders an entire court system inadequate." JA26-27.

But while the court found that *Plaintiffs* failed to show that a Peruvian forum is clearly *unsatisfactory*, that is not Plaintiffs' burden. To upend Plaintiffs' choice of forum and obtain the rare remedy of FNC dismissal, *Defendants* had to establish that Peru is an *adequate* forum. Because the court looked to Plaintiffs to make a required showing, it erred as matter of law. *Lony*, 886 F.2d at 633, 640.

To be sure, the district court acknowledged in reciting the *forum non conveniens*

standard that Defendants bear the burden on all FNC elements, JA11, but the court failed to hold Defendants to their burden. Indeed, the court's specific conclusion that Defendants met their burden to demonstrate an adequate alternative forum pointedly did *not* find that Defendants did so regarding corruption or the ability of the Chaupes to testify: The court found *only* that Defendants met their burden because they "stipulated to service of process [and] consented to jurisdiction in Peru." JA13. Those bases do not address corruption or the availability of key evidence; on those issues, the court put the burden on Plaintiffs.

The district court may have derived its erroneous requirement that Plaintiffs prove the forum is "clearly unsatisfactory" from *Piper*, *see* JA13 (quoting 454 U.S. at 254 n.22), but *Piper* established no such standard and did not place the burden on plaintiffs. Instead, the *Piper* court simply provided an example of when the adequate forum requirement may not be met – "where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Piper*, 454 U.S. at 254 n.22. Indeed, the *Piper* court was not even discussing who bears the burden when there is a factual dispute about adequacy. It was discussing when "an unfavorable change in law" might be a "relevant consideration." *Id.* at 254.

The district court therefore erred by requiring Plaintiffs to show that Peru was a "clearly unsatisfactory" forum, when it was Defendants' burden to establish the adequacy of a Peruvian forum in light of the significant evidence of corruption and other barriers to a fair trial presented by Plaintiffs.

C. The district court did not hold Defendants to their burden to refute Plaintiffs' "concerning" evidence of corruption in the Cajamarca courts.

Since the district court's holding that it could not "say that [Peru] is clearly inadequate as a forum" applied the wrong legal standard, that error, standing alone, requires reversal. JA22; Section I.B., *supra*. Regardless, the court's discussion of the evidence confirms that it reversed the burden of proof.

The district court recognized that Plaintiffs have produced "troubling" evidence and have "shown cause for concern" that Cajamarca is an inadequate forum. Accordingly, under this Court's caselaw, Defendants' burden requires it to "counter effectively" Plaintiffs' evidence "with evidence of its own demonstrating" that its proposed forum is actually adequate. *Bhatnagar*, 52 F.3d at 1229.[3] Indeed, even where

[3] *Accord Miller v. Boston Sci. Corp.*, 380 F. Supp. 2d 443, 449 (D.N.J. 2005) (where "there is a legitimate dispute concerning the adequacy of the foreign remedy," a defendant "must generally provide record evidence indicating that the Plaintiff could obtain proper redress in the alternative forum"); *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001) ("[W]here the Plaintiff produces significant evidence documenting the partiality . . . typically associated with the adjudication of similar claims . . . then the Defendant has the burden to persuade the District Court that the facts are otherwise.").

plaintiffs' evidence of corruption is "plausible," but defendants provide contrary evidence such that "the Court cannot draw a conclusive judgment" as to who is correct, the court "can only rule that defendants have not met their burden." *Eastman Kodak*, 978 F. Supp. at 1087.

But the court here looked to the Plaintiffs to provide definitive proof of inadequacy, rather than plausible evidence. Indeed, the district court found that Plaintiffs' evidence of corruption was more than plausible: It raised real concerns about the forum's adequacy. Yet the district court did not require Defendants "to counter effectively" Plaintiffs' evidence "with evidence of its own." *Bhatnagar*, 52 F.3d at 1229.

Instead, without relying on virtually any evidence Defendants provided, the district court tested some of *Plaintiffs*' evidence to see if it demonstrated that a Peruvian forum was *clearly unsatisfactory*. As described in Section I.B. *supra*, that is how the district court wrote off Plaintiffs' evidence that Newmont corrupted the Peruvian Supreme Court and a criminal proceeding against the Chaupes. That the court thus required little to nothing of Defendants makes clear it was looking to Plaintiffs to prove inadequacy, rather than holding Defendants to their burden to prove Peru is an adequate forum by overcoming Plaintiffs' evidence of corruption. The district court impermissibly reversed the burden of proof.

D. The district court applied the wrong legal standard, by requiring Plaintiffs to show the entire Peruvian legal system is inadequate, rather than asking whether Peru is an adequate forum for these particular claims.

Regardless of whether the district court misplaced the burden of proof, it applied an erroneous legal standard. The court repeatedly asked whether Peru's "entire court system" is inadequate. JA27; *accord* JA18 ("Peruvian court system"); *accord* JA4 ("Peruvian judicial system)." Systemic corruption is relevant – it shows courts are subject to improper influence, *Eastman Kodak*, 978 F. Supp. at 1086 – it can be sufficient, and it is at emergency levels in Peru. But it is not required.

The adequacy analysis does not ask the Court to determine whether, let alone find, Peru's courts are *always* inadequate. *Bhatnagar*, 52 F.3d at 1230. As the Supreme Court has recognized, "each [FNC] case turns on its facts." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, (1988). Courts must consider "the realities of the Plaintiff's position . . . and his or her ability as a practical matter to bring suit in the alternative forum." *Mercier v. Sheraton Int'l, Inc.*, 981 F.2d 1345, 1353 (1st Cir. 1992). Ultimately, a forum is only adequate if the Plaintiff will not be "treated unfairly." *In re Factor VIII or IX Concentrate Blood Prods.*, 484 F.3d 951, 957 (7th Cir. 2007).

The district court acknowledged that an argument that a forum is inadequate for the particular plaintiffs at bar due to corruption pertaining to them is a viable theory. JA15-16 (citing *Eastman Kodak*, 978 F. Supp. 1080-81). But it nonetheless considered whether the court system as a whole is inadequate.

Indeed, the court repeated that error by citing cases that found Peru to be an adequate forum, JA18, even though none of those cases involved Newmont and this Court has rejected such reliance. Even if "[e]very other court which has considered this issue has found that [Peruvian] courts do provide an adequate alternative forum . . . it would be irrelevant to the issue of whether [Defendants] met its burden of proof on the issue here." *Bhatnagar*, 52 F.3d at 1229. By asking whether Peru's "entire court system" is inadequate rather than whether the Cajamarca's courts would treat these Plaintiffs fairly, the district court committed an error of law.

II. Defendants failed to refute Plaintiffs' voluminous evidence of corruption and thus did not carry their burden.

Even if this Court were to disagree that the district court saddled Plaintiffs with the burden of proof, Defendants did not meet their burden to prove Plaintiffs will get a fair shake in Peru.[4] Defendants come nowhere close to "counter[ing] effectively" Plaintiffs' evidence of corruption "with evidence of [their] own." *See Bhatnagar*, 52 F.3d at 1229.

Indeed, if a defendant can simply submit a conclusory expert declaration and an employee's description of a few irrelevant cases to rebut varied evidence of specific, regional, and systemic corruption – including by the defendants themselves, in cases against plaintiffs – it is hard to see how any plaintiff could ever defeat an

[4] The standard of review for Section II is the same as that described in Section I.

FNC motion on these grounds.

A ruling for Plaintiffs here would not entail a finding that Peru's courts are inherently inadequate, or even that these Defendants actually corrupted those courts in cases against Plaintiffs. The only question is whether these Defendants have met their burden of proof based on the record in this case. *Bhatnagar*, 52 F.3d at 1230; *Eastman Kodak*, 978 F. Supp. at 1087. This record surely does not permit a "conclusive judgment" that Peru will provide an impartial forum. *Eastman Kodak*, 978 F. Supp. at 1087. Thus, had the district court held Defendants to their burden by refuting Plaintiffs' evidence, they would have failed to carry it.

A. Defendants failed to respond to Plaintiffs' evidence demonstrating Defendants' history of corrupting the Peruvian judiciary.

Defendants submitted nothing to counter Plaintiffs' evidence of their widely publicized and successful collaboration with a notorious secret police chief to corrupt the Peruvian Supreme Court and thus gain ownership of the gold mine it now operates. JA1075-77 ¶¶ 2-4 (Arbizu Declaration); JA593-620 (Newspaper articles). The district court attempted to explain away this evidence by stating that a high official's actions eighteen years ago do not render the entire Peruvian court system inadequate. JA18. But its decision does not respond to Plaintiffs' actual argument.

Plaintiffs need not show that the entire "court system" is corrupt, nor can this evidence be evaluated standing alone. Defendants' corruption of the Peruvian Supreme Court says something about Defendants: That they have both the

willingness and ability to corrupt even the highest court in Peru, and that they have been corrupting the Peruvian judiciary for as long as they have operated in Peru. This gives added weight to Plaintiffs' evidence of more recent misconduct in cases directly involving the Chaupes and increases the likelihood that Defendants will continue to do so if this case is sent to Peru. The Fujimori era may be over, but Newmont's pattern of misconduct is not.

Moreover, the court's statement that high-level misconduct can no longer be plausibly alleged is puzzling, given Plaintiffs' sworn affidavits from multiple experts describing recent and continuing corruption at high levels of the government, and that corruption-based impeachment proceedings were initiated against the President of Peru during these proceedings. Statement of Facts, I.B.4; JA1075-79 (Arbizu Declaration); JA804 (Molleda Declaration). Indeed, four of Peru's previous six Presidents either are convicted of corruption (Fujimori), arrested and awaiting trial for corruption (Humala), fugitive from an arrest warrant for corruption (Toledo), or resigned in a corruption scandal (Kuczynski). Of the remaining two, one is deceased (Paniagua) and the other, Alan Garcia, recently had five of his ex-ministers charged with corruption.[5]

In any event, more recent revelations of high-level corruption have resulted in a

[5] JA1083-1085; *Caso Odebrecht: Cinco ministros de Alan García son citados por la Fiscalía*, La Republica, July 5, 2017, *available at* https://larepublica.pe/politica/892438-caso-odebrecht-cinco-ministros-de-alan-garcia-son-citados-por-la-fiscalia.

"three-month state of emergency for the country's judicial system." Statement of Facts, I.B.4. While such high-level corruption is sufficient to preclude dismissal, corruption of the local courts in Cajamarca is even more relevant here.

The court's failure to cite any evidence from Defendants demonstrates that they did not overcome Plaintiffs evidence and thus did not meet their burden of proof on adequacy.

B. Defendants failed to respond to Plaintiffs' evidence of Defendants' corruption in cases involving the Chaupes, corruption in Cajamarca courts, and intimidation of those who oppose Defendants in the region.

Plaintiffs submitted declarations from Ms. Vasquez, Ms. Ysidora Chaupe, and Mr. Molleda, showing evidence of Newmont's corruption of the Cajamarca judiciary. In particular: a local judge recently sentenced the Chaupes to prison, with an order written by Defendants, after admitting that she knew Defendants' agents had bribed the prosecutor, JA298-99 ¶¶ 7-8 (Ysidora Chaupe Declaration); Defendants have used their influence to obtain privileged access to court documents during proceedings in Cajamarca against Plaintiffs and to prevent Plaintiffs from presenting evidence, JA820-22 ¶¶ 28-33 (Vazquez Declaration); court officials cancel hearings and expedite deadlines without notice to the Chaupes in their complaints against Defendants, JA816 ¶¶ 11-13; Defendants have hired relatives of local judicial officials and court workers that give Defendants an advantage in litigation involving the Chaupes, JA820-22 ¶¶ 27, 33; Defendants' agents have plied Peruvian prosecutors

with money and favors to procure favorable outcomes, JA819-20 ¶ 25; corruption is prevalent in the local Cajamarca courts that would hear this case, JA804-06 ¶¶ 15, 18-22 (Molleda Declaration); and intimidation and surveillance of those opposing Minera Yanacocha, including of Plaintiffs' attorneys, is commonplace. JA822-23 ¶ 35-40; JA807 ¶ 24.

In response, Defendants submitted only the declarations of Newmont officer Javier Velarde describing and attaching the various Peruvian court proceedings involving Defendants – only three of which the District Court found relevant – to show that appellate courts had overturned wrongful convictions against the Chaupes, and a conclusory statement the district court did not cite, stating that Peruvian courts are formally independent and are not corrupt, from a lawyer whose firm is being investigated for corruption.[6] JA132-34 ¶¶ 13-18; JA451-53 ¶¶ 17-26 (Velarde Declarations); Dkt. No. 15 at 8-9; Dkt. No. 51 at 3-4 (Defendants' FNC briefing); JA223-25 ¶¶ 15-20; JA892 ¶ 38 (Freyre Declarations); JA1114-118 (Newspaper article

[6] It is not surprising the district court did not rely on Mr. Freyre's declaration. His highly general and formalistic assertions about the structural independence of Peruvian courts did nothing to rebut Plaintiffs' specific evidence of Newmont's corruption of the Cajamarca judiciary in cases involving the Chaupes, and it directly contradicts the two State Department reports Plaintiffs submitted. Regardless, it would have been hard to credit Freyre's statement regarding a supposed lack of corruption when the law firm he leads was identified by a congressional corruption commission as the first firm for investigation.

reporting investigation); JA19 (D.Ct. Memo).[7]

The district court failed to address Ms. Vasquez's reports of corruption and irregularities related to complaints filed *by* the Chaupes. JA816 ¶¶ 11-13. And it relied solely on the three related criminal appellate decisions that spared the Chaupes from prison to explain away Ms. Vasquez's reports of corruption in the criminal proceedings *against* the Chaupes. The court did so by stating: "This is concerning, but such concern is mitigated by the fact that the judgment was overturned by the court of appeals on two occasions, and the Peruvian Supreme Court subsequently upheld that ruling." JA19.

The district court fundamentally overstated these appellate decisions' relevance. The question is whether Defendants have shown that the alternative forum is capable of providing an adequate *remedy*. *Piper*, 454 U.S. at 254 n.22. Only the trial courts can do that. Trial courts find facts and fashion relief. Appellate courts typically do not. So while appellate courts spared the Chaupes years in prison after they spent more than half a decade defending themselves against false charges, that is not an affirmative *remedy* for the harms at issue here, and suggests nothing about whether one would be

[7] Defendants submitted an additional declaration from Mr. Velarde in connection with their motion for a protective order denying that they provided economic benefits to judicial officers in cases involving the Chaupes. JA1070-71. The denial does not disclaim bribing the prosecutor or public ministry, as Ms. Vasquez and Plaintiff Ysidora allege, nor did it even attempt to address the myriad irregularities observed by Ms. Vasquez in proceedings involving Defendants. The district court did not suggest that this refuted Plaintiffs' evidence; it did not rely on this declaration.

forthcoming from the lower courts. JA396 (2017 Supreme Court Decision); JA813-14 ¶ 3 (Vaquez Declaration).

And corruption is not often discovered or obvious. A decision may *look* to an appellate court like the trial court did not commit reversible error, even if it was bought and paid for. If an American litigant somehow managed to bribe a trial judge, no one would say the forum was adequate because it did not also corrupt the court of appeals. A forum is inadequate if, to prevail, Plaintiffs must swim against a tide of lower court corruption.

Defendants, facing evidence of their long track record of corrupting Peruvian courts – including in cases with these very same litigants – must show Plaintiffs will get a fair trial on their claims. They must do more to carry their burden than merely show they do not win every time. *See* JA132-34 ¶¶ 13-18; JA451-53 ¶¶ 17-26 (Velarde Declarations). These appellate decisions do not come close to refuting Plaintiffs' voluminous evidence of Defendants' corruption.

No Peruvian court proceeding has *ever* resulted in affirmative relief for the Chaupes or followed up on their complaints against Defendants, as Defendants themselves admit. *See id.* When the Chaupes have sought affirmative relief, rather than simply trying to avoid prison or avoid being evicted from their land while ownership is determined by the courts, they have failed. The courts and prosecutors have uniformly refused to move forward with any of the criminal complaints they have

brought against Minera Yanacocha, JA816 (Vasquez Declaration), and the family's efforts at constitutional relief have been blocked by trial and appellate courts. JA527-47 (Decisions addressing Plaintiffs' constitutional claims); JA453 ¶¶ 25-26 (Velarde Declaration).

This is unsurprising, given that Defendants have gone to significant lengths to corrupt Peruvian court proceedings addressing disputes with the Chaupes and exert improper influence over the Cajamarca judiciary. Their actions in this regard are part of their long history of corrupting Peru's courts, which they will continue if this case is sent to Peru.

So while Plaintiffs "produce[d] significant evidence documenting the partiality . . . typically associated with the adjudication of similar claims" involving these exact same parties in Peru, Defendants did nothing to meet their burden to refute this evidence. *Leon*, 251 F.3d at 1312. The handful of cases they put forward do not disprove this corruption, and they do nothing to show that Plaintiffs have been able to obtain affirmative relief.

The district court's discounting of Plaintiff Ysidora's affidavit detailing that Newmont provided the judgment to the court and bribed a prosecutor in the criminal case against the Chaupes is equally problematic. The court suggested that the bribe does not "support" a finding that the forum is unfair because the judge informed Ysidora that the prosecutor in her case had been bribed, even though the court

convicted her anyway. JA19. But the fact that a court *informs* defendants that it is sentencing them to prison because of a bribe hardly makes the sentence fair or the court adequate. And that says nothing of the fact that Newmont gave the court the sentence it issued. JA298-99 ¶¶ 7, 8.

Last, neither the district court nor Defendants addressed Mr. Molleda's declaration detailing corruption in the Cajamarca courts where Plaintiffs would be forced to litigate. And neither the court nor Defendants addressed the alarming evidence presented by Ms.Vasquez and Mr. Molleda of the intimidation and surveillance of those who oppose Minera Yanacocha in the region, including the lawyers who help Minera Yanacocha's critics. Indeed, the district court categorized Mr. Molleda's declaration in a footnote as evidence of generalized corruption, despite its focus on Cajamarca. JA16 n.8.

In sum, the district court's reliance on three appellate opinions, with no other help from Defendants, was insufficient to overcome Plaintiffs' evidence of Defendants' corruption of Cajamarca trial courts. The court failed to account for the fact that Plaintiffs have never obtained affirmative relief, ignored reports of corruption and irregularities related to complaints filed *by* the Chaupes, ignored evidence on the prevalence of corruption in the Cajamarca judiciary, and neglected to address Plaintiffs' evidence regarding intimidation and surveillance.

Under the reasoning of *Eastman Kodak*, which the district court cited, JA16-17

(citing 978 F. Supp. at 1080-81, 1085, 1087), dismissal here was improper. There, plaintiff presented evidence that defendants brought criminal charges against plaintiff to extort an advantageous financial arrangement, and used its attorney's connections to secure favorable judges for their case, all against a back drop of systemic corruption. Despite defendants' strenuous denial of the significant and particularized risks of litigating in Bolivia the plaintiffs had raised, the court found that defendants failed to carry their burden. 978 F. Supp. at 1080-81, 1085-1087.

As in *Eastman Kodak*, Defendants here used prison to intimidate Plaintiffs, and improperly influenced the local court; and there is systemic corruption in Peru's courts. Indeed, there is "no chance for justice in Peru" in a case like this. JA1079 ¶ 8 (Arbizu Declaration). Moreover, Plaintiffs have submitted evidence of the intimidation and surveillance of those who oppose Defendants in the region; evidence both Defendants and the court failed to address. As in *Eastman Kodak*, the issue is whether Defendants have overcome Plaintiffs' evidence that calls into question the adequacy of the foreign forum for these claims. And as in *Eastman Kodak*, *Defendants* have not shown Plaintiffs will get a fair hearing in the alternate forum.

C. Attention from the international community, the Peruvian executive, or a non-profit fact-finding mission does not meet Defendants' burden to show the Cajamarca courts are adequate.

In the face of Defendants' failure to submit evidence demonstrating adequacy, the court invoked matters unrelated to judicial corruption to support its tenuous

finding that Plaintiffs have not shown that Cajamarca courts are clearly unsatisfactory. But those matters clearly do not suggest Defendants met their burden to show Cajamarca *courts* are fair or adequate.

First, the court noted Plaintiffs' "admirable success" in building international awareness of their dispute with Minera Yanacocha, speculating that the company and Peruvian courts would be less likely to misbehave with the eyes of the world upon them. JA22. But it ignored the fact that Defendants' corruption of Peruvian proceedings involving Plaintiffs has *already* taken place against a backdrop of international awareness and support for the Plaintiffs' plight.

International awareness has not stopped the harassment, which has continued even after the initiation of these proceedings, *see* Statement of Facts, Section I.D, *supra*; it is even less likely to deter Defendants from engaging in the backroom deals involved in pressuring Cajamarca courts. The district court recognized that the scandal that embroiled Newmont after it corrupted the Peruvian Supreme Court was "well-publicized," Dkt. No. 92 at 15, but that has not stopped Newmont's pattern of misconduct.

Second, the district court found that the fact that Newmont commissioned an investigation into the abuses committed against the Chaupes was "somewhat relevant in determining whether . . . Newmont[] seeks to gain an *unlawful* advantage in Peruvian

courts." JA21 (emphasis in original).[8] But commissioning a report does not make Newmont less likely to corrupt Peruvian court proceedings, and is entirely irrelevant to the receptivity of those courts to Newmont's misconduct or Plaintiffs' claims. Indeed, the report had nothing to do with the Peruvian judiciary in Cajamarca or Defendants' attempts to corrupt it. It focused on the conflict between the parties, and found that "the human rights of members of the family have been at risk since the first Tragadero Grande eviction attempt." JA370.

Third, the district court erred in concluding that the Peruvian *government*'s actions support a finding that the courts of Cajamarca represent an adequate forum. Specifically, the district court pointed to the Peruvian national government's successful request, in response to vociferous local opposition, that Defendants suspend their mining project and have an independent expert review its environmental impact assessment as evidence that Defendants' influence over the government is not as strong as Plaintiffs assert. JA20. But Defendants do not plan to walk away from the $5 billion Conga mine; they told the SEC in 2016 that the project would be on hold for "at least five years," but expressed no intention to pull the plug. JA50 (Complaint, citing Newmont's 2016 SEC filing).

More importantly, the Peruvian "government" is not the Peruvian judiciary; its

[8] The 2015 report was paid for by Newmont and conducted by a Washington-based non-profit organization with a former Newmont executive on its board. JA20-21 & n.12.

actions are irrelevant to Plaintiffs' evidence of specific corruption in the Cajamarca courts. Whether government agency regulators allow Defendants to force through a destructive mining project in the face of strong public opposition is a far different issue from whether Defendants can eliminate a tort suit brought by a family living on the site of the proposed gold mine – in local courts they have corrupted in the past. If an American litigant somehow managed to bribe a judge, no one would say the forum was adequate because it did not also corrupt the Environmental Protection Agency.

The court referenced meager actions the Peruvian executive belatedly undertook to protect Plaintiffs, JA20, but these do not suggest Peruvian courts are adequate, for the same reason: the government is not the courts.

In any event, the government's response has been entirely inadequate. It did not lift a finger to protect the Chaupes for five years after Defendants started abusing them in 2011. It took until two years after the Inter-American Commission on Human Rights found the family was entitled to protection in 2014 for Peru to do anything – and it merely promised to send police twice a month, pay the family's phone bill, and coordinate with the police on a protection plan, which has never been adopted. JA115-16 ¶ 350-51 (Complaint); JA432-443 (2014 Inter-American Commission Decision). Unsurprisingly, the government's measures have failed to protect the Chaupes. *See, e.g.,* JA256-58 ¶¶ 32-35 (Máxima Acuña-Atalaya Declaration).

The district court also ignored the fact that the Chaupes can hardly rely on the police; indeed, police hired by Minera Yanacocha participated in the intimidation campaign against the Chaupe family. *See, e.g.,* JA262 ¶ 3 (Daniel Chaupe-Acuña Declaration); JA250 ¶ 3 (Máxima Acuña-Atalaya Declaration). JA383-94 (2011 Police Contract). And the government recently authorized a new contract between the police and Minera Yanacocha. JA1091-1108. Defendants' representation that the police will no longer participate in invading the Chaupes' farm offers little comfort.

In short, Peru is not serious about ending the abuse. JA818-19 ¶¶ 18-24. Indeed, its failure to protect the Chaupes is the subject of a recent complaint before the Inter-American Commission. JA819 ¶ 24. And Newmont continues to harass the Chaupes.

None of this fills the void left by Defendants' failure to provide evidence that Peru is an adequate forum. Defendants would have failed to carry their burden had they been made to do so.

III. The district court abused its discretion by denying Plaintiffs any discovery into Defendants' improper influence over Peruvian courts despite recognizing troubling evidence of specific corruption and without any analysis.

A. Standard of review.

Discovery rulings are reviewed for an abuse of discretion. *Marroquin-Manriquez v. I.N.S.*, 699 F.2d 129, 134 (3d Cir.1983). Courts generally abuse their discretion if they deny discovery without providing any reason or explanation. *Wiwa v. Royal Dutch*

Petroleum Co., 392 F.3d 812, 819 (5th Cir. 2004) (collecting cases). The district court abused its discretion by failing to provide any reason for denying discovery here.

B. The district court's dismissal while denying discovery without explanation warrants reversal.

The court compounded its reversal of the burden of proof by barring Plaintiffs from conducting any discovery into the adequacy of the Peruvian forum, despite finding that Plaintiffs had produced "troubling" evidence of specific corruption. JA19. There is no way to review the district court's reasoning in denying discovery, because the court provided none. Indeed, the court did not even mention the issue in its Memorandum. JA3-30. Instead, it simply stated in its Order that *Defendants*' motion for a protective order was denied as moot. JA31. The court's denial of discovery without explanation cannot be sustained.

Forum non conveniens is a fact-intensive inquiry. *See Lacey*, 862 F.2d at 43; *see also Van Cauwenberghe*, 486 U.S. at 529. And, as the Supreme Court has recognized, "discovery is available to ascertain the facts bearing on [jurisdiction or venue]." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978). Courts in this Circuit frequently permit targeted FNC discovery.[9]

[9] *See, e.g.*, *In re Del. Bay Launch Serv.*, No. 06-595, 2010 U.S. Dist. LEXIS 72794, at *9 (D. Del. July 20, 2010); *Lony v. E.I. Du Pont De Nemours & Co.*, 793 F. Supp. 494, 495 (D. Del. 1992); *Dawson v. Compagnie Des Bauxites De Guinee*, 112 F.R.D. 82, 84 (D. Del. 1986); *Dahl v. United Techs. Corp.*, 472 F. Supp. 696, 698 n.6 (D. Del. 1979), *aff'd*, 632 F.2d 1027 (3d Cir. 1980); *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 376 (E.D. Pa. 1997); *Vidovic v. Losinjska Plovidba Oour Broadarstvo*, 868 F. Supp. 695, 697 & n.8

Plaintiffs do not suggest that FNC discovery is always appropriate or required. But the district court's discretion is "not without limit." *In re Orthopedic "Bone Screw" Products Liab. Litig.*, 132 F.3d 152, 156 (3d Cir. 1997). It has to provide its reasons. *Wiwa*, 392 F.3d at 819.

In *Wiwa*, the district court had quashed a subpoena and denied a motion to compel outright without providing reasons for doing so. The Court of Appeals held that this was an abuse of discretion. *Id.* at 18-19. And in *Bravo Express Corp. v. Total Petrochemicals & Ref. U.S.*, 613 F. App'x 319, 323–24 (5th Cir. 2015), the district court "abused its discretion by failing to explain the grounds on which it denied Bravo's [1782 discovery] application," because, as "a legal matter, '[a]n explanation must be generated by the court, not inferred by the appellate court from the submissions of the parties.'"

Here, discovery, or at least a reasoned explanation for its denial, is critical, since it relates to the threshold issue of whether Defendants' proposed forum will afford Plaintiffs a fair trial. Indeed, this Court has recognized that getting FNC issues wrong can be "fatal" to plaintiffs' claims, and remanded where information regarding whether Plaintiff would be able to litigate its case was inadequate. *Lacey*, 932 F.2d at

(E.D. Pa. 1994); *Lacey v. Cessna Aircraft Co.*, 785 F. Supp. 1201, 1204 (W.D. Pa. 1992) (on remand, permitting the case to proceed to discovery prior to deciding FNC motion so that it would be clear what evidence was critical and where it was available); *Cerda v. Eletson Mar. Corp.*, 515 F. Supp. 883, 886 (E.D. Pa. 1981).

189–90. On remand, the district court opted to conduct discovery rather than speculate and face a third appeal. *Lacey*, 785 F. Supp. at 1204, *supplemented* 849 F. Supp. 394 (W.D. Pa. 1994). This Court in *Lacey* did not tolerate a lack of factual clarity where getting the issue wrong could have been fatal to plaintiff's case, and it should not tolerate the same problem here.

In the analogous jurisdictional discovery context, also reviewed for abuse of discretion, this Court has held that if "the Plaintiff presents factual allegations that suggest 'with reasonable particularity' the possible existence of the requisite 'contacts between [the party] and the forum state,' the Plaintiff's right to conduct jurisdictional discovery should be sustained." *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 157 (3d Cir. 2010). Here, Plaintiffs presented specific evidence of corruption that the district court itself found "troubling" and "concerning." Given this, discovery "should [have] be[en] sustained," *id.*, not denied without analysis.

Discovery regarding communication between Defendants or Defendants' Peruvian subsidiary and members of the Peruvian judiciary, as well as prior allegations of and investigations into corruption and improper conduct by Defendants in Peru, including the *Castillo* record, goes directly to whether these particular Plaintiffs could receive an impartial trial against these Defendants in Peru. Absent discovery, however, that evidence remained outside of Plaintiffs' reach, and unavailable for the court's consideration on this critical issue. This Court should not allow the district court to

send Plaintiffs to an unfair forum without a complete and accurate picture of the corruption the Chaupes will face.

Castillo, which considered a similar FNC motion from Newmont that, as here, plaintiffs opposed on grounds that Newmont's improper influence with Peruvian courts meant plaintiffs could not expect fair treatment, JA694, is instructive. While Newmont would have had the Colorado Court of Appeals "believe that the undisputed facts . . . compel the conclusion" that FNC dismissal was warranted, the court was "not persuaded." JA691-92. In the absence of discovery, the court was "not able to adequately review the trial court's findings as a matter of law." JA695. Accordingly, it remanded for the trial court to resolve plaintiffs' pending discovery motion and conduct appropriate discovery. *Id.* This Court should do likewise.

Since the district court concededly had "cause for concern" over the fairness of the Peruvian courts, JA22, the facts presented by Plaintiffs warrant either denial of Defendants' motion, further investigation through limited discovery, or at the very least, an explanation of why limited discovery was not warranted. Sending Plaintiffs to an uncertain fate, without any explanation of why discovery was denied, was an abuse of discretion. *Wiwa*, 392 F.3d at 819.

IV. The district court erred as a matter of law in analyzing the adequacy of the Peruvian forum by declining to account for Plaintiffs' inability to access key witness testimony in Peru and failing to ensure statutes of limitations do not bar Plaintiffs' claims.

A. Standard of review.

A district court abuses its discretion if it fails to hold defendants to their FNC burden of proof, *Lacey*, 862 F.2d at 43, including if it dismisses without finding that the plaintiff will have access to key evidence in the foreign forum, *Lacey*, 932 F.2d at 174, or ensuring that plaintiffs' claims will not be time-barred. *See Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2nd Cir. 2001). The district court committed those errors here.

B. The district court erred by failing to assure itself that Plaintiffs will have access to key evidence in Peru.

The district court recognized that vital evidence and witness testimony for Plaintiffs will, by law, be viewed with skepticism and perhaps entirely rejected, in Peru. Its dismissal to a forum that may exclude the evidence Plaintiffs need to prosecute their claims requires reversal.

"Where a plaintiff cannot access evidence essential to prove a claim in an alternative forum, that forum is inadequate." *Eurofins Pharma US Holdings*, 623 F.3d at 161, n.14. Accordingly, a district court "must identify generically what sources of proof are likely to be critical to [Plaintiffs'] cause of action" and then "must reasonably assure itself that [Plaintiffs] would have access to *essential* sources of proof

in [the alternate forum]." *Lacey*, 932 F.2d at 184, 189 (emphasis in original).

A district court's failure to "require[e] an affirmative demonstration" that Plaintiff would be allowed to present key testimony "mistakenly relieve[s] the moving Defendant of its burden of assuring the district court that all conditions essential to establishing an adequate alternative forum exist." *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 426 (1st Cir. 1991). Dismissal without ensuring that Plaintiffs have access to essential proof is "fundamentally unfair," and warrants reversal "as a matter of law." *Lacey*, 932 F.2d at 174, 186, 189.[10]

Here, the text of the Peruvian code strictly limits witness testimony in ways that will hamstring these Plaintiffs' ability to present their case. Plaintiffs allege that they have been repeatedly abused and harassed at their isolated farm. Eyewitness testimony is necessary for most if not all of the Chaupes' claims, and the primary eyewitnesses, other than the perpetrators, are the Chaupe plaintiffs and their family members. JA248-323 (Plaintiffs' Declarations). But Peruvian courts may not accept the testimony of victims or their relatives, which would leave Plaintiffs without essential

[10] Plaintiffs' access to key evidence is part of the adequate alternative forum analysis. *Eurofins Pharma US Holdings*, 623 F.3d at 161 and n.14; *accord Lacey*, 932 F.2d at 190-91 (Pollak, J., concurring). Prior to *Eurofins*, *Lacey* analyzed the issue as a private interest factor, but noted it might be "more logical" to address as an adequate forum question, because it goes to adequacy, not convenience. 932 F.2d at 186 and n.13. The court below discussed key witness availability as a private interest factor, but rightly noted that it goes to Peru's adequacy. Dkt. No. 92 at 24-25. The rubric does not matter. *Lacey* makes clear that even under the private interest factor rubric, a failure to show access to key evidence alone forecloses FNC dismissal.

sources of proof.

Specifically, family member testimony is viewed with extreme suspicion in Peru, and a judge can entirely refuse to receive such testimony "based on the understanding that it is biased." JA784 ¶¶ 42-44; Dkt. No. 86 at 3-4. Article 229 of the Peruvian Civil Procedure Code prohibits "[r]elatives up to the fourth degree of consanguinity" (*i.e.* first cousins and great nieces, nephews, uncles and aunts), or a "spouse or domestic partner of one of the parties" from serving as witnesses, "unless the opposing party proposes it." JA784 ¶ 42 and n.5. And under Article 221, *parties* cannot testify in person in their own cases, unless called by the opposing party for cross-examination. JA785 ¶¶ 46-47; Dkt. No. 86 at 3-4.

Here, where all of the Plaintiffs – the Chaupe *family* – are closely related, and the critical witnesses to many events are the Plaintiffs or other close family members, they could only testify if Newmont chose to call them. And even then their testimony could still be excluded under Article 229. Thus, FNC dismissal would likely deny Plaintiffs their main source of evidence: primary eyewitness testimony to their ordeal.

The district court recognized that Plaintiffs identified "potential obstacles to proving their case, because the testimony of family members is uniformly deemed unreliable under Peruvian law." JA26-27. Thus, the court apparently agreed that Peruvian law might preclude Plaintiffs' key witness testimony. Yet it failed to require Defendants to prove, or to "assure itself," that Plaintiffs would have access to this

essential evidence, as this Court requires. *Lacey*, 932 F.2d at 189.

Instead, the court stated summarily that it was "not prepared . . . to conclude that a single such rule renders an entire court system inadequate." JA26-27. But as described above, the question is not whether the "entire court system [is] inadequate"; it is only whether Defendants have shown Peruvian courts would afford *these* Plaintiffs a fair opportunity to present *these* claims, where the only witnesses to many events are likely to be Plaintiffs and their family members.

More importantly, the district court's statement about a "single rule" directly contradicts this Court's express holdings in *Eurofins* and *Lacey* that lack of access to critical evidence, *in and of itself*, renders a forum inadequate.

In *Lacey*, the district court failed to ascertain whether the foreign forum afforded access to critical evidence, and this Court reversed and remanded. 932 F.2d at 184, 189. Since Peruvian procedure may bar Plaintiffs from relying on their most important source of evidence, testimony from Plaintiffs who are all one family, this Court should do likewise here.

C. The district court failed to assure that Peru would be an adequate forum because it did not require waiver of any statute of limitations defenses.

The district court also erred in holding Peru to be an adequate forum because it did not find Plaintiffs' claims are timely in Peru or require Defendants to waive of any statute of limitations defense that would not have been available had the court

retained jurisdiction.

A forum is not adequate if a statute of limitations bars the case in that forum. *Bank of Credit and Commerce Int'l (Overseas) Ltd.*, 273 F.3d at 246; *Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 736 (7th Cir. 2010). Accordingly, this Court regularly require a statute of limitations waiver. *See, e.g.*, *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 872 (3d Cir. 2013); *In re Chevron Corp.*, 633 F.3d 153, 157 (3d Cir. 2011); *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 712 F. App'x 200, 204–05 (3d Cir. 2017).

The district court's order cannot withstand such scrutiny, because it did not require a limitations waiver. It did hold that Defendants "must submit to the jurisdiction of the appropriate court in Peru, and that Court must accept jurisdiction." JA31. But statutes of limitations are not necessarily jurisdictional, so that condition does not obviate Defendants' burden to show Plaintiffs' claims will be heard, or meet the court's obligation to assure itself of the existence of an adequate alternative forum.

V. Even if the district court's decision would otherwise be upheld, this Court should remand for the district court to determine whether Peru is an adequate forum in light of the current judicial state of emergency.

Given that recent corruption scandals have forced officials to declare a "state of emergency for the country's judicial system," Statement of the Case, Section I.B.4., *supra*, Peru's court system cannot seriously be considered adequate. *E.g.*, *Eastman Kodak*, 978 F. Supp. at 1085 (finding Bolivian Justice Minister's statements criticizing judicial corruption "to be compelling evidence that Bolivian system may not be

suitable for the adjudication of plaintiffs' claims.").

Peru declared this state of emergency after the district court ruled, so the court could not have considered it. But that accident of timing should not foreclose Plaintiffs from raising the issue, or result in Plaintiffs being sent to litigate in a court system in shambles. A trial court ruling, though correct when made, may be reversed due to later events that cast a different light on the decision. *U.S. v. Wilson*, 601 F.2d 95, 98-99 (3d Cir. 1979). At a minimum, this Court should remand for the district court to address whether Peru is an adequate forum despite the recent crisis. *Nbaye v. Attorney Gen. of U.S.*, 665 F.3d 57, 60 (3d Cir. 2011) (taking judicial notice of a change in power in Guinea and remanding case to BIA to consider this new fact).

CONCLUSION

Because the district court did not hold Defendants to their burden to prove Peru is a fair and adequate forum for these Plaintiffs' claims, the decision dismissing Plaintiffs' claims should be reversed.

Dated: August 15, 2018 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 12,407 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word (2013) in 14-point Garamond font.

3. This brief complies with Local Appellate Rule 31.1(c) because the text of this electronic brief is identical to the paper copies, and a virus check was performed on the file of this electronic brief using Webroot SecureAnywhere™ and no virus was detected.

Date: August 15, 2018

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 46.1(e), the undersigned hereby certifies that he is counsel of record and is a member of the bar of the United States Court of Appeals for the Third Circuit.

Date: August 15, 2018

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CERTIFICATE OF SERVICE

I, Richard Herz, hereby certify that on August 15, 2018, I caused the foregoing Opening Brief for Plaintiffs-Appellants and the Joint Appendix to be filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF electronic filing system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: August 15, 2018

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 18-2042

MÁXIMA ACUÑA-ATALAYA, DANIEL CHAUPE-ACUÑA, JILDA CHAUPE-ACUÑA, CARLOS CHAUPE-ACUÑA, YSIDORA CHAUPE-ACUÑA, ELIAS CHAVEZ-RODRIGUEZ, MARIBEL HIL-BRIONES,
Plaintiffs/Appellants,

v.

NEWMONT MINING CORPORATION, NEWMONT SECOND CAPITAL CORPORATION, NEWMONT USA LIMITED, AND NEWMONT PERU LIMITED, Defendants/Appellees.

On Appeal from the United States District Court for
the District of Delaware
Civil Action No. 17-1315
(Honorable Gerald Austin McHugh, District Judge)

JOINT APPENDIX VOLUME I (JA0001-JA0034)

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August 15, 2018

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	:	
v.	:	Civil Action
	:	No. 17-1315
	:	
NEWMONT MINING	:	
CORPORATION, *et al.*	:	
Defendants.	:	

ORDER

This 30th day of January 2018, upon consideration of Defendants' Motion for Protective Order (ECF No. 70), it is hereby **ORDERED** that Plaintiffs shall not seek discovery with respect to Defendants' Motion to Dismiss for Improper Venue (ECF Nos. 14, 15) prior to the February 8, 2018 oral argument (*See* ECF No. 64). The Court will determine the need for discovery, if any, at the time of argument on the Motion to Dismiss.

/s/ Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, ET AL.	:	
	:	
v.	:	**CIVIL ACTION NO. 17-1315**
	:	
NEWMONT MINING CORPORATION, ET AL.	:	

ORDER

This 12th day of February, 2018, it is hereby **ORDERED** that resolution of Defendants' Motion for Protective Order, (ECF Doc. 70), shall be deferred until the Court rules upon Defendants' Motion to Dismiss. In the interim, discovery is **STAYED** pending a further ruling from the Court.

/s/ Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, *et al.*	:	
Plaintiffs,	:	
	:	
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	:	**No. 17-1315**
	:	
NEWMONT MINING	:	
CORPORATION, *et al.*,	:	
Defendants.	:	

McHUGH, J. **April 11, 2018**

MEMORANDUM

This case arises out of a land dispute between indigenous subsistence farmers in Peru and the Peruvian subsidiary of a multi-national gold mining company headquartered in the United States. At the forefront is a rancorous struggle over the right to occupy the land in question, amid years-long litigation in Peruvian courts. Plaintiffs Máxima Acuña-Atalaya de Chaupe and her family complain of repeated invasions of their farm, alleging threats on their lives, assaults, and destruction of livestock and crops. They have brought this action in Delaware, seeking to hold the American parent companies responsible for actions taken by their subsidiary on the ground in Peru, contending that Peruvian courts are inadequate to protect them. Defendant Newmont Mining Corporation and its affiliates strongly contest the facts, and have moved to dismiss invoking *forum non conveniens* (FNC).

The ultimate question in the underlying dispute—how American corporations conduct their affairs in less developed nations—has profound moral implications. But the issues before me are legal and practical. On the record here, I conclude that this case is centered in Peru.

There are intense disputes over baseline facts for which the evidence is in Peru. There is ongoing litigation there, governed exclusively by Peruvian law, and some of the conduct Plaintiffs challenge here would appear to be permissible under that law. And though there are reasons to be concerned about the Peruvian judicial system, I cannot say that it is clearly inadequate as a forum. I will therefore grant Defendants' Motion, but mindful of some of the concerns Plaintiffs raise, address them by attaching conditions to dismissal.

I. Relevant Facts

This is an unusual case brought by Peruvian citizens living in a remote, mountainous area against the U.S.-based Newmont Mining Corporation and affiliated entities, which are engaged in the business of mining gold around the world. The area in question was long thought to harbor gold, a suspicion that was confirmed by developmental drilling in the 1980s. In 1993, with the support of the Peruvian government, the International Finance Corporation, an affiliate of the World Bank, made a substantial loan to Newmont and a French-based partner for development of a mine. That mine opened and substantial amounts of gold were recovered, although the venture was affected by disputes between the companies forming the partnership and by environmental damage, resulting in litigation in both the United States and Peru. Local protests erupted, sometimes ending in violence, both as a reaction to the environmental toll exacted by the project and to a proposal to further expand the mining operation. It is that proposed expansion that gives rise to this case.

Plaintiffs Máxima Acuña-Atalaya de Chaupe and her family are indigenous campesinos residing in the Northern Andes region of Peru on a parcel of land in an area they refer to as

"Tragadero Grande."[1] Máxima and her husband Jaime Chaupe Lozano represent that they purchased possessory rights to that parcel from a family member in 1994. At the time they made that purchase, Tragadero Grande was part of communal land that belonged to the Campesino Community of Sorochuco. Over the next five years, a Peruvian mining company known as Minas Conga underwent an extensive two-part process to acquire that communal land, which it then sold to Defendants' subsidiary, Minera Yanacocha [hereinafter "Yanacocha"] in 2001.[2] Step one involved acquiring the communal land, and Step two purchasing the possessory rights of each individual member of the community. After acquiring the communal land, Minas Conga divided it into two units, and re-named these units to correspond with the two separate land titles, which for our purposes will be referred to as the "Southern Parcel" and the "Northern Parcel." It then continued with the two-part process by negotiating with individual possessors, like the Chaupes, to purchase their possessory rights. There is a dispute over whether the Chaupes were parties to Minas Conga's negotiations and ultimately sold their possessory rights to Tragadero Grande, which now straddles both the Northern and Southern Parcels. That issue is being litigated in another case in Peru.

Meanwhile, the Chaupe family has a cottage on the Northern Parcel. Defendants contend that Plaintiffs illegally occupied the land in 2011. *See* Defs.' P.I. Resp. Ex. 1A, ECF No. 38-1. Plaintiffs counter that they have lived and farmed on that parcel since they purchased their possessory rights in 1994. But, according to Plaintiffs, beginning in 2011, security personnel consisting of Yanacocha staff, the contracted Peruvian National Police (PNP), and the private security company Securitas threatened, and continued their assault on various other family

[1] "Tragadero" means "throat" or "gullet" in Spanish. Hence, the name "Tragadero Grande" derives from the fact that the point where rainwater infiltrates the land is relatively large. *See* Defs.' P.I. Resp. Ex. 1A, ECF No. 38-1.
[2] Minas Conga ceased to exist sometime after that transfer. Pls.' P.I. Mot. Ex. 16 at v., ECF No. 27-16.

members. *Id.* at 4–5. Plaintiffs allege that some combination of these entities physically attacked, destroyed the property of, and terrorized Plaintiffs. Pls.' P.I. Mot. 4, ECF No. 28. For example, Plaintiffs contend that in August 2011, Yanacocha security personnel destroyed their huts, removed crops they had planted, struck Plaintiff Máxima on her arms and legs with sticks, and knocked Plaintiff Jilda unconscious with the same sticks. Plaintiffs further allege that the purpose of these attacks was to dispossess them of their portion of the land in order to facilitate the development of the proposed new gold mine, referred to as the Conga Project, operated by Defendants and their Peruvian subsidiary.

That project would represent a $4.8 billion expansion to Yanacocha's operations. As proposed, the expansion would eradicate four mountain lakes, raising concerns that it would threaten the water supply serving over 200 communities in the region, particularly in light of earlier problems. The Peruvian government initially approved the project over "broad community opposition" in 2010. Compl. ¶¶ 55–56, ECF No. 1. But about a year later, that widespread community opposition, coupled with public demonstrations, resulted in the government doubling back and suspending the operation. In part as a result, Defendant Newmont Mining Corporation told the SEC in 2016 that "it does not anticipate being able to develop Conga for at least the next five years." *Id.* ¶ 62. But Plaintiffs allege that none of that has stopped the abuses and efforts to dispossess them.

They have therefore brought this action in Delaware against Newmont Mining Corporation and three of its subsidiaries: Newmont Second Capital Corporation, Newmont USA Limited, and Newmont Peru Limited. They contend that Defendants are aware of such abuses, and exercise sufficient control over Yanacocha and its operations in Peru to be able to stop them. All of the Defendants are incorporated in Delaware and headquartered in Denver, Colorado.

Plaintiffs aver that they chose to sue in the United States because justice cannot be had for them in Peru, given Yanacocha's influence over the government and judiciary.

Defendants contend that Plaintiffs overstate the extent of Defendants' direct involvement with and control over Yanacocha and its security personnel overseas. They strongly dispute Plaintiffs' factual account, alleging that Plaintiffs "omitted key facts and created or exaggerated others." Defs.' P.I. Resp. 2, ECF No. 37. Specifically, Defendants dispute that Plaintiffs occupied any portion of Tragadero Grande at any point between 2001 and 2011. According to Defendants, Yanacocha has been engaged in preliminary mining activities on the land since 2001, including by placing checkpoints to control access, but did not encounter Plaintiffs until May 2011. Defendants stress that the most prominent incident occurred in August 2011, and reject Plaintiffs' factual account. Defendants also assert that Yanacocha's actions are legally necessary to protect their possessory rights to the portion they occupy while the years-long litigation over who has legal right continues.[3] Nonetheless, Yanacocha decided to not interfere with Plaintiffs' activities in the portion of the Northern Parcel Plaintiffs now occupy. Defendants contend that they did not attempt to dislodge Plaintiffs until Plaintiffs sought to expand their occupancy. In addition, Yanacocha has purportedly established a procedure to allow Plaintiffs access through Yanacocha's checkpoints, and has provided Plaintiffs the direct phone number of high-ranking Yanacocha executives whom they can call for immediate authorization of entry.

[3] Under Peruvian law, one avenue to prevent loss of title in an ownership dispute where "adverse possession" is the issue is to engage in "self-help" activities such as ejectment of those occupying the land. The parties, through their competing legal experts, dispute whether such action is *required* for the party seeking to preserve ownership, but agree that such a legal right exists. Needless to say, the possibility for physical confrontation looms large.

II. Procedural Posture

Plaintiffs seek both injunctive relief and damages. Defendants move to dismiss, arguing that Delaware is an inconvenient forum because the relevant evidence, witnesses, and actors essential to adjudicating this case are in Peru. In their response to this Motion, Plaintiffs urge that I first address their motion for preliminary injunction, which, in part, asks that I order Defendants and their agents to cease the alleged harassment of Plaintiffs, bar Defendants and their subsidiaries from entering Tragadero Grande[4] without Plaintiffs' permission, and bar them from attempts to communicate with Plaintiffs except through counsel.

As an initial matter, I note that a district court has the power to address FNC at the outset of the case. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). I hesitate to address the petition for injunctive relief before resolving venue, because the injunction requested is one that might alter the status quo, rather than merely preserve it. That is so because I cannot definitively determine whether prohibiting Defendants' subsidiary from engaging in what they contend are lawful self-help remedies would prejudice their rights under Peruvian law. Furthermore, because there is litigation currently pending in Peru, any order I enter will necessarily impact that litigation.

The leading case where an injunction was issued despite a pending FNC motion is *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988). There, Ferdinand Marcos, the former President of the Republic of the Philippines, left the Philippines when he realized his regime was nearing its end. *Republic of Philippines v. Marcos*, 818 F.2d 1473, 1475 (9th Cir. 1987), *on reh'g*, 862 F.2d 1355. The United States government immediately recognized his successor, and when the Marcoses arrived in Hawaii with numerous crates of currency, jewels,

[4] On its face, Plaintiffs' prayer for relief would seem to seek to bar Defendants and affiliated entities from the entire area, including parcels over which Plaintiffs have asserted no claim.

precious metals and the like, the United States Customs Service impounded them. *Id.* At the same time, other assets allegedly belonging to the Marcos family were turning up around the world. *Id.* The Republic of the Philippines launched civil suits in several countries to recover or freeze specific assets it regarded as property of the Philippines. *Id.* In the United States action, the district judge granted the Republic's motion for preliminarily injunction, despite the pending FNC motion, in order to prevent the assets from being transferred. The Ninth Circuit affirmed, because "it was imperative for the district court to preserve the status quo lest the defendants prevent resolution of the case by putting their property beyond the reach of the court." *Republic of Philippines*, 862 F.2d at 1364. It also bears mention that the party seeking the injunction was the newly recognized government of the Philippines.

The situation here is different. Indeed, if Defendants' version is true and Yanacocha has to engage in these possessory defenses in order to continue its activities on the portion of the land it now occupies, a preliminary injunction risks altering the merits of the underlying land dispute before the court in Peru. *See* Defs.' P.I. Resp. 4, ECF No. 37 (stating that "the owner must take action, known as a 'possessory defense,' within 15 days of learning of the trespass"). According to the defense, uprooting crops and displacing newly erected structures is something that they must do or risk their legal rights. Although Plaintiffs argue that Yanacocha need not exercise this defense and suggest that Defendants would be able to recover any lost land regardless, the competing experts make that issue a difficult one. In either case, the injunction sought would by definition change, not preserve, the situation on the ground in Peru, and thereby potentially impact the legal proceedings there.

Further, there are practical concerns about the requested relief that are also relevant to the discussion of whether Delaware is a convenient forum. Even assuming that neither party would

willfully act in contravention of an order from this court, I remain skeptical of the practical impact of an injunction from a federal judge in Delaware over the actions of third parties in Peru. That skepticism is especially warranted where, as here, Defendants represent that they have taken affirmative steps to protect the rights of the Plaintiffs, and had limited success. Indeed, Defendants have presented evidence that security personnel have been instructed to exercise the utmost restraint in carrying out these possessory defenses. In fact, nothing in the video evidence provided by either side shows the type of abuse asserted by Plaintiffs. Plaintiffs insist otherwise, contending that abuses similar to those alleged in their Complaint have continued even during this case. But if these additional abuses have continued to occur contrary to Yanacocha's instruction, and despite cameras placed by both parties and journalists documenting the various encounters, it underscores the limited ability of an American judge to influence local behavior. And, as discussed below, part of Plaintiffs' argument is that local courts have not implemented Peruvian appellate court rulings that were in their favor. To the extent that is true, an American court's order entered against Yanacocha's parent company here is unlikely to have greater effect.

Similar concerns exist with respect to another aspect of Plaintiffs' proposed injunction: Plaintiffs' allegations that they have faced significant difficulties when attempting to access their cottage as a result of Yanacocha's security checkpoints. Those allegations persist despite the fact that Defendants presented to the court established procedures for admitting Plaintiffs through those checkpoints, and a means of recourse if Yanacocha's instructions regarding access are being violated by the contracted security personnel on the ground.

For these reasons, I will not decide the pending motion for an injunction before first considering whether Delaware is an appropriate forum, which requires further consideration of many of the same practical considerations reviewed above.

III. Analysis

FNC is a discretionary tool that empowers a district court "to dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem*, 549 U.S. at 425. To decide whether FNC dismissal is appropriate, district courts engage in a three-step analysis. First, the court must determine "whether an adequate alternate forum" exists to entertain the case. *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 160 (3d Cir. 2010). If so, the court must next determine "the appropriate amount of deference to be given the plaintiff's choice of forum." *Id.* Finally, the court must weigh "the relevant public and private interest factors"—discussed below—to determine whether, on balance, "trial in the chosen forum would result in oppression or vexation to the defendant out of all proportion to the plaintiff's convenience." *Id.* If so, or if the chosen forum is "inappropriate" in light of the court's own "administrative and legal problems," the court "may, in its discretion," dismiss the case. *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 189 (3d Cir. 2008) (citing *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). Defendants seeking dismissal on the basis of FNC bear the burden of persuasion at every stage of this analysis, *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43–44 (3d Cir. 1988) (*Lacey I*), against the backdrop of a generally "strong presumption" in favor of the plaintiff's choice of forum, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).[5]

[5] Plaintiffs argue that, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), Delaware FNC law, which describes Defendants' burden as "heavy," should govern, as opposed to the federal standard I am applying. Both parties requested that I allow supplemental briefing on this issue if it is material. I did not grant that request because I am not convinced that the Delaware standard would warrant a different result, especially given the Delaware Supreme Court's recent ruling in *Martinez v. E.I. DuPont de Nemours & Company*, 86 A.3d 1102, 1104 (Del. 2014), which specifically held that "where [. . .] the plaintiff in the case is a citizen of a foreign state whose law is at issue, and where [. . .] the injury in the case occurred in that foreign state, and the case turns on unsettled issues of foreign law, a trial court may permissibly exercise its discretion under *Cryo–Maid* to weigh appropriately the defendant's interest in obtaining an

As an initial matter, it must be noted that what is at issue here is not the ultimate legal question of the parties' rights with respect to Tragadero Grande. Indeed, the case before me is ancillary to that fundamental underlying dispute. Unlike some other cases filed in American courts seeking damages for past unlawful acts of American corporations overseas, Plaintiffs here seek detailed injunctive relief affecting an ongoing dispute, even as Peruvian courts attempt to resolve that dispute. Moreover, this action does not focus on the broader impact of Newmont's mining activities in Peru, such as pollution of the watershed or treatment of workers; it focuses on multiple discrete encounters replete with complex factual disputes, many of which involve third parties, including local authorities. And, as noted above, some of the challenged conduct—clearing crops, destroying structures—is characterized as a permissible remedy under Peruvian law. Thus, the specialized nature of this case has unique implications for whether Delaware is a convenient forum.

As to these highly specific issues, the parties present competing accounts and, in support of both this Motion and Plaintiffs' Preliminary Injunction motion, have submitted extensive documentation. I am therefore "thrust into the merits of the underlying dispute," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988), and have necessarily availed myself of the full scope of all of these submissions, from affidavits submitted specifically for the FNC motion to all evidence pertaining to the motion for preliminary injunction. [6] Because it is necessary to

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authoritative ruling from the relevant foreign courts on the legal issue on which its liability hinges, as distinguished from a predictive, non-authoritative ruling by our courts."

[6] Defendants objected to evidence submitted by Plaintiffs in support of their opposition to Defendants' FNC Motion on the basis that such evidence was inadmissible under the Federal Rules of Evidence. *See* Defs.' Ev. Obj., ECF No. 55. But in considering an FNC motion, I am not aware of any precedent that limits my scope of review to evidence admissible under the Federal Rules, nor have Defendants cited any. In fact, several courts in the Third and other Circuits have reached the opposite conclusion. *See, e.g.*, *Kisano Trade & Invest Ltd. v. Lemster*, 2013 WL 594017, at *3 (W.D. Pa. 2013), *aff'd*, 737 F.3d 869 (3d Cir. 2013); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1144 n.4 (C.D. Cal. 2005), *aff'd*

"'generally become[ ] entangled in the merits' to the extent required to 'scrutinize the substance of the dispute'" on an FNC motion, *Path to Riches, LLC ex rel. M.M.T. Diagnostics (2014), Ltd. v. CardioLync, Inc.*, 2018 WL 993752, at *3 (D. Del. 2018) (quoting *Van Cauwenberghe*, 486 U.S. at 528), I consider evidence from that broader record.

A. Adequacy of the Peruvian Court System

In many respects, this is the critical issue. The adequacy of an alternative forum is determined by a defendant's amenability to process in that forum and a plaintiff's opportunity for redress there. The Supreme Court has observed that it is the "rare circumstance[] . . . where the remedy offered by the other forum is clearly unsatisfactory." *See Piper*, 454 U.S. at 254 n.22. Defendants have met their burden to demonstrate that an adequate alternative forum exists in Peru because, for the purposes of this action only, Defendants have stipulated to service of process, consented to jurisdiction in Peru, and agreed to have those be conditions of dismissal. In addition, Plaintiffs conceded that Peruvian law recognizes a cause of action and offers a remedy for the property damage and personal injuries alleged here.

For their part, Plaintiffs argue that Defendants have not met their burden because first, they have not demonstrated that Peruvian courts have jurisdiction over all Defendants, and second, Defendants' improper influence over the Peruvian judiciary renders the forum

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sub nom. *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014). Moreover, the Federal Rules of Civil Procedure expressly preclude the application of the Federal Rules of Evidence to one pivotal aspect of the FNC analysis: the adequacy of the alternative forum. *See* Fed. R. Civ. P. 44.1; *see also Wilmot v. Marriott Hurghada Mgmt., Inc.*, 2016 WL 2599092, at *4 (D. Del. 2016), *report and recommendation adopted*, 2016 WL 3457007 (D. Del. 2016) (citing Fed. R. Civ. P. 44.1 and stating, "In determining whether foreign law provides adequate relief, as an element of determining whether the [FNC] doctrine applies, a court may consider any relevant material or source, including testimony, whether submitted by a party or admissible under the Federal Rules of Evidence, and such determination shall be treated as a ruling on a question of law"), *aff'd*, 2017 WL 4570664 (3d Cir. 2017); *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 699 (S.D.N.Y. 2003) (taking the same approach and reaching the same conclusion), *aff'd*, 98 F. App'x 47 (2d Cir. 2004).

inadequate, relying primarily on *Eastman Kodak Company v. Kavlin*, 978 F. Supp. 1078, 1085–86 (S.D. Fla. 1997).[7]

1) The Potential for Jurisdiction over Defendants in Peru

Plaintiffs base their first contention on the declaration of Juan Carlos Ruiz Molleda, a Peruvian attorney specializing in, *inter alia*, human rights and access to justice and the law governing indigenous peoples. Pls.' FNC Resp. Ex. 17, ¶ 1, ECF No. 43-1. Ruiz is also the author of numerous publications and specialized legal articles in Peru and abroad. *Id.* Based on Article 2058 of the Peruvian Civil Code, Ruiz attests that "there is no guarantee" that a Peruvian civil court would exercise its jurisdiction" over this case, even if Defendants consent or stipulate to jurisdiction. *Id.* ¶¶ 4–14.

Defendants counter with their own expert declaration by Mario Castillo Freyre. Castillo is another Peruvian lawyer in the areas of civil law and arbitration who graduated from the same law school as Ruiz. Castillo Decl. Ex. 1, at 1–4, ECF No. 54-1. In addition to his private practice, Castillo is a professor and well-published scholar. *Id.* at 4. Castillo's analysis principally relies on language in the same article of the Peruvian Civil Code, the translation of which he includes in his affidavit:

> The Peruvian courts have competence to hear complaints arising from the exercise of patrimonial content actions even against persons domiciled in a foreign country, in the following cases:
> [. . .]

[7] Plaintiffs also argue that excessive delay in the Peruvian courts warrants denying this Motion, citing *Bhatnagar v. Surrendra Overseas Limited*, 52 F.3d 1220, 1227 (3d Cir. 1995). But the *Bhatnagar* Court did not conclude that a delay of any length rendered a forum inadequate. Rather, it recognized that delay "is an unfortunate but ubiquitous aspect of the legal process," and "our own courts" suffer from it. *Id.* at 1227. *Bhatnagar* merely stated that "at some point, . . . the prospect of judicial remedy becomes so temporally remote that it is no remedy at all." *Id.* Applying that standard, it had no difficulty finding delay intolerable when it approached 25 years. Here, although Plaintiffs point to a number of factors that might contribute to delay in any system, they fail to provide a benchmark for how much delay can be expected in this case. Without that, I cannot even begin to determine how to apply the *Bhatanagar* standard.

> 2. When actions related to obligations that must be executed in the territory of the Republic or that arise from executed contracts or of facts carried out in said territory are dealt. In the case of civil actions arisen from crimes or faults perpetrated or whose results have occurred in the Republic, this competence is considered exclusive.

Castillo Decl. 2 n.1, ECF No. 54. Castillo interprets that language to indicate that jurisdiction can be had if there is reasonable proximity—that is, if the alleged tortious acts and the results of the alleged harm occur in Peru. *Id.* ¶¶ 2–9. Castillo asserts that is the case here, since Yanacocha's actions in Peru form the basis of this suit. *Id.* In addition, Castillo points out that Molleda is wrong about the effect of consent or stipulation, because another aspect of Article 2058, referred to as "numeral 3[,]" allows jurisdiction to be asserted over foreign parties if they "expressly or tacitly submit to [the court's] jurisdiction." *Id.* ¶ 10.

Although Castillo's text-based argument is admittedly appealing, it does not account for how the statute might actually be applied. But there is no need to attempt to resolve this issue of Peruvian law, because Plaintiffs' concerns are unquestionably within my power to address, by making dismissal of this action not only contingent upon Defendants' consent to jurisdiction in Peru, but further upon on a Peruvian court actually ***accepting*** it.

2) Alleged Corruption in the Peruvian Judiciary

Plaintiffs' second contention is that corruption in the Peruvian judiciary renders Peru an inadequate forum. That contention can be broken into two theories, one alleging widespread corruption rendering the entire Peruvian judicial system inadequate, and another more narrow theory arguing that Peru is inadequate only as to these parties based upon specific evidence of judicial corruption pertaining to them.

A theory of generalized corruption has "not enjoyed a particularly impressive track record in our courts." *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 2016 WL 2599092, at *5 (D. Del. 2016) (citing *Eastman Kodak*, 978 F. Supp. at 1084), *report and recommendation adopted*,

2016 WL 3457007 (D. Del. 2016), *aff'd*, 2017 WL 4570664 (3d Cir. 2017). Indeed, "absent at least some particularized showing of wrongdoing, courts are hesitant" to deem an entire foreign court system so corrupt that it cannot be considered an adequate forum. *Id.* Thus, I will consider the general evidence Plaintiffs have submitted,[8] but only as background for the more particularized allegations that Plaintiffs present to support the second theory.

The model case for evaluating such allegations is *Eastman Kodak*. The allegation there was that Casa Kavlin, the former exclusive distributor for Kodak in Bolivia, brought criminal charges against Carballo, who became Kodak's new distributor, in order to extort an advantageous financial arrangement with Kodak. *Eastman Kodak*, 978 F. Supp. at 1080–81. Specifically, Kodak presented several instances of Kavlin's attorney, Juan Carlos Zegarra, using his judicial connections for this purpose. *Id.* First, Zegarra used his connections to have the case assigned to favorable judges: in one case, Zegarra was the godfather of the judge's son, who was conceived out of wedlock by way of an affair with Zegarra's sister; and in another, Zegarra was once the judge's brother-in-law. *Id.* In each of those instances, it was alleged that Zegarra was able to subject Carballo, other Kodak employees, and even a Chilean lawyer whose only act in Peru was to help Carballo be released from prison lawfully, to significant abuses at the hands of the Bolivian judicial system. *Id.* Most notably, Zegarra secured Carballo's pre-trial imprisonment without bail in an infamous prison, where it is rumored that one would have to pay for even the right to live in a jail cell. *Id.* Kodak supplemented these specific instances of

[8] The U.S. State Department has not deemed the Peruvian judiciary to be dysfunctional, but cautioned in its 2016 Human Rights Report that there are allegations in the press and by non-governmental organizations that judges have been corrupted and influenced by outsiders. A 2016 report from GAN Integrity, a consulting and software firm that advises businesses on compliance issues, stated that Peru's judicial system "carries a very high risk of corruption," based upon its review of various private and public sources. Mr. Ruiz, one of Plaintiffs' attorney experts, describes systemic corruption, although it is noteworthy that many of the instances cited were cases brought to light by the Peruvian government's own investigation and prosecution of the officials involved.

corruption with general evidence about the state of the Bolivian judicial system, most notably statements by the Bolivian Minister of Justice's that the judicial system he supervised was "a collection agency and the penal system was an agent of [extortion]." *Id.* at 1085. Combined, these allegations led the court to have "serious doubts about Kodak's ability to operate in Bolivia free from the threat of prosecution, and even immediate imprisonment." *Id.* at 1087.

Here, Plaintiffs allege that Defendants similarly influenced the Peruvian judiciary, including in cases against Plaintiffs. Those allegations focus on three discrete episodes, documented by affidavits and news articles.

The first pertains to an incident that took place in 2000, when Defendant Newmont Second Capital Corporation was seeking control of Yanacocha during the Fujimori regime. In one well-publicized account, an audio recording surfaced of a then-Newmont executive reaching out to the ranking Peruvian National Intelligence Agency officer, Vladimoro Montesinos, for Montesinos's aid in ensuring that the Peruvian Supreme Court would rule in favor of Newmont. *See* Pls.' FNC Resp. Ex. 1, ¶ 9, ECF No. 43-1. The New York Times reported that Montesinos then tacitly pressured the judge who went on to break the Supreme Court's tie in favor of Newmont and company. *See* Jane Perlez and Lowell Bergman, *Tangled Strands in Fight Over Peru Gold Mine*, N.Y. Times (June 14, 2010), http://www.nytimes.com/2005/10/25/world/americas/tangled-strands-in-fight-over-peru-gold-mine.html. Newmont's attempts to influence the decision of Peru's Supreme Court appear to be well-documented, but according to the Newmont executive accused, he was reacting defensively to similar attempts by Newmont's French partners to influence the decision. *Peru – The Curse of Inca Gold*, Frontline/World (Oct. 2005), https://tinyurl.com/frontlineworld-thestory.

Regardless, the events in question occurred some 18 years ago, around the time when the regime of an infamously corrupt president, Alberto Fujimori, imploded. The interim regime change and noted improvements since render this a case where Plaintiffs cannot plausibly allege that the national government itself or high governmental officials are directly involved in the alleged misconduct and can dictate the outcome. *Compare HSBC USA, Inc. v. Prosegur Paraguay, S.A.*, 2004 WL 2210283 (S.D.N.Y. 2004); *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736 (S.D.N.Y. 2004); *Araya v. Nevsun Res. Ltd.*, 2017 BCCA 401 (CanLII). Further, both before and after Fujimori's regime, every federal court to consider the issue has found Peru to be an adequate forum. *See, e.g.*, *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 904 (S.D. Tex. 1996), *aff'd* 113 F.2d 540 (5th Cir. 1997); *Sudduth v. Occidental Peruana, Inc.*, 70 F. Supp. 2d 691, 697 (E.D. Tex. 1999); *Flores v. S. Peru Copper Corp*., 253 F. Supp. 2d 510 (S.D.N.Y. 2002), *aff'd on other grounds*, 414 F.3d 233, 266 (2nd Cir. 2003); *Maxima International, S.A. v. Interocean Lines, Inc.*, 2017 WL 346826, *2 (S.D. Fla. 2017). Thus, an act of corruption involving a high official during that regime is not enough to now find the Peruvian court system inadequate.[9]

Second, Plaintiffs' attorney in Peru, Mirtha Esther Vásquez Chuquilín, asserts that the Peruvian legal system has been unresponsive to Plaintiffs' claims, but solicitous of Yanacocha's complaints. Ms. Vásquez submits that the prosecutor's office has not investigated their numerous complaints, and that one judge, who agreed to conduct an on-site inspection of Tragadero Grande, later cancelled the visit without notifying Plaintiffs. Pls.' FNC Resp. Ex. 19, ¶ 11–14, ECF No. 43-1. The defense counters that what Plaintiffs describe as unresponsiveness

[9] Fujimori was later sentenced to 25 years in prison for graft and human rights violations. It should be noted, however, that Fujimori's children remain moving forces in Peruvian politics, and he was recently the beneficiary of a controversial pardon. Mitra Taj, *Fujimora Family Pulls Peru back into Political Turmoil*, Reuters (Dec. 25, 2017), https://www.reuters.com/article/us-peru-fujimori-family/fujimori-family-pulls-peru-back-into-political-turmoil-idUSKBN1EJ0VX.

represents nothing more than local officials exercising prosecutorial and judicial discretion in deciding how to expend resources. Ms. Vasquez further alleges that, in August 2011, the prosecutor's office brought an aggravated usurpation claim against three of the Chaupes without any evidence. *Id.* ¶ 28. She then points to several irregularities she noticed during the proceeding, such as the prosecution insulting her and not focusing on strictly legal arguments, the court not accepting evidence she wanted to present, and, in the end, the prosecutors receiving a copy of the judgment before she did. *Id.* ¶¶ 28–32. This is concerning, but such concern is mitigated by the fact that the judgment was overturned by the court of appeals on two occasions, and the Peruvian Supreme Court subsequently upheld that ruling. *Id.* ¶ 3. In short, Plaintiffs were ultimately protected by the very judicial system they ask me to deem inadequate.

The third is an account from Plaintiff Ysidora Chaupe-Acuña, pertaining to a trial in 2013. There, she alleges that,

> right before [the Judge] issued the sentence, the lawyer for [Yanacocha] arrived and gave the judge a document. Afterwards, the [Judge] gave us the same document and it was the guilty sentence. Shortly after being given [that] document, . . . [the Judge] apologized for the outcome of the trial, . . . [and told me] that the company gave an 'economic benefit' to the prosecutor to bring the case against us.

Pls.' P.I. Mot. Ex. 6, ¶ 7–8, ECF No. 27-1.

Even taking these facts at face value, it is noteworthy that it was the court that brought this instance of apparent corruption to Plaintiffs' attention. Thus, although the situation is troubling, it does not support a global finding that Peru is an inadequate forum for Plaintiffs, particularly in light of the success Plaintiffs experienced in the appellate courts.[10]

[10] As supplemental evidence, Plaintiffs submitted an article concerning corruption within the Peruvian government. That article reports an investigation into allegations that certain officials accepted bribes from Brazilian companies in exchange for public construction jobs. *See* Notice of Supp. Ev. Ex. 1, ECF No. 91. The implications for the Peruvian judiciary are not apparent.

More broadly, there is reason to question whether Yanacocha's influence over the Peruvian government is as strong as Plaintiffs assert. Action by the Peruvian government has led to Yanacocha suspending its Conga operation. The core premise of Plaintiffs' argument is that Defendants will go to any means to expand their mining operation, but in fact they have been stymied by the government's responsiveness to local opposition to such expansion. Further, Plaintiffs' Complaint acknowledges other ways in which the Peruvian government has been responsive to their situation. Plaintiffs state that the government "will travel to Tragadero Grande twice a month . . . to verify [their safety]," and that it "will also pay for [their] phone bills." Compl. ¶ 350, ECF No. 1. The Complaint also alleges that the Peruvian Minister of Justice and Human Rights publically affirmed that the "government was coordinating with the police on a protection plan" for the Plaintiffs. *Id.* ¶ 351. Finally, since at least 2015, the Peruvian National Police have not been involved with Yanacocha's exercises of its possessory defense against the Chaupes. *See* Defs.' P.I. Resp. 6, n. 4, ECF No. 37.

In addition to the fact that Defendants' influence was not enough to force through expansion of the mine over local opposition, it is far from clear on the record before me that Defendants are ruthlessly determined to exploit weaknesses in the Peruvian judiciary to trample Plaintiffs' rights. At the corporate level, Defendants have endorsed and adopted established human rights frameworks such as the United Nations Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights, in addition to a series of internal policies and standards. And beyond good intentions, Defendant Newmont has made some efforts to investigate alleged abuses by their subsidiary. Newmont funded an independent fact-finding mission in 2015 by Resolve, a non-profit, Washington-based dispute resolution organization with a 40-year history. Resolve reviewed earlier public inquiries dating back to

2009, which found in part that the growth and persistence of conflicts in Tragadero Grande was attributable to Yanacocha's inadequate grievance systems and over-reliance on state institutions and legal processes to resolve disputes. Further, the mission examined "the allegations of human rights violations perpetrated against the Chaupe family, and [Yanacocha's] conformance to Newmont's own policies and international standards." Pls.' P.I. Mot. Ex. 16, at v., ECF No. 27-2. Consistent with the findings in earlier studies, the Chaupes and Yanacocha both agreed that attempts to evict the Chaupes occurred without an opportunity for dialogue, and that there was no such opportunity until 2015. This led the mission team to conclude that the Chaupe family's human rights were at risk from the first encounter, and that a precautionary approach should have been taken prior to eviction. *Id.* at 36. After reviewing reports by key actors, including Yanacocha's security personnel, Yanacocha, and the Chaupe family, in addition to video footage and photographic records, the mission team "did not discover conclusive evidence that [Yanacocha] violated human rights of members of the Chaupe family. Specifically, [it found] no conclusive evidence relating to the use of force by police on August 11, 2011." *Id.* at 32.[11] Such private fact-finding is by no means controlling, and a court would be naïve not to consider the fact that such investigations can be self-serving. But given Resolve's apparent independence,[12] I find the effort itself somewhat relevant in determining whether the principal defendant here, Newmont, seeks to gain an *unlawful* advantage in Peruvian courts.

[11] Video submitted by the parties or otherwise accessible within the public domain does not show instances of violence against Plaintiffs. One video, however, appears to show local residents armed with machetes and clubs advancing toward a police line, and another shows what appears to be one of the Plaintiffs throwing a rock that strikes a Yanacocha representative on the head.

[12] It should be noted that a former executive of Newmont sits on the board of Resolve. But as a result of that, he took a leave of absence for the entire period of the Yanacocha fact finding mission. *Yanacocha Independent Fact Finding Mission*, Resolve.org, http://www.resolv.org/site-yiffm/faqs/ (last visited Apr. 10, 2016).

An additional factor bearing on whether Peruvian courts will function impartially is the admirable success Plaintiffs have had in focusing international public attention on this dispute, including now the attention of the federal judiciary in the United States. Among other things, the Inter-American Commission on Human Rights (IACHR) of the Organization of American States formally requested that the Peruvian government to adopt precautionary measures for numerous leaders of campesino communities, among them the Chaupe family. *PM 452 11 – Leaders of Campensino Communities and Campesino Patrols in Cajarmaca, Peru*, Organization of American States: Inter-American Commission on Human Rights (May 5, 2014), https://www.oas.org/en/iachr/decisions/precautionary.asp. Journalists and international human rights groups such as Amnesty International have visited the site of the dispute as observers, carrying letters of support. *Peru: Peruvian Authorities Put an End to the Criminalization of Defender Máxima Acuña*, Amnesty International (May 3, 2017), https://www.amnesty.org/en/latest/news/2017/05/peru-autoridades-peruanas-ponen-punto-final-a-la-criminalizacion-de-la-defensora-maxima-acuna/. In 2016, Plaintiff Máxima Acuña received the Goldman Environmental Prize from a United States foundation for her defense of her claim to the land. Major media outlets have praised her resilience. Anna Lekas Miller, *Meet the Badass Grandma Standing Up To Big Mining*, The Daily Beast Company LLC (Apr. 16, 2016), https://www.thedailybeast.com/meet-the-badass-grandma-standing-up-to-big-mining. This continued spotlight makes it less likely that judicial proceeding in Peru will be subject to untoward influences.

In summary, as to the first element of the test, although Plaintiffs have shown cause for concern over Peruvian courts, I cannot say that they are “clearly unsatisfactory” under *Piper*.

B. Level of Deference to Plaintiffs' Choice of Forum

I must now decide how much deference Plaintiffs' choice of forum is due. The importance of this factor was also highlighted in *Eastman Kodak*, where, despite the fact that Kodak's allegations of corruption raised "serious doubts" as to the adequacy of Bolivia as a forum, "[the] case [came] down to the [full] deference being given to [Kodak's] choice of forum" as a domestic plaintiff. *See* 978 F. Supp. at 1087. Indeed, ordinarily there is a "strong presumption in favor of the plaintiff's choice of forum" and plaintiff's choice "should rarely be disturbed." *Piper*, 454 U.S. at 241. That presumption, however, "applies with less force when the plaintiff or real parties in interest are foreign." *Id.* at 255. Courts give foreign plaintiffs less deference not because of "xenophobia, but merely [out of] a reluctance to assume that the choice is a convenient one." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 179 (3d Cir. 1991) (*Lacey II*)(citing *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989)). This reluctance "can readily be overcome by a strong showing of convenience" by the plaintiff. *Id.*

Despite being foreign citizens, Plaintiffs argue that their forum choice is due full deference because 1) a United States-Peru treaty provides for national access to U.S. courts for Peruvians, and 2) the convenience of the United States is established by the problems with Peru discussed above.

I am not persuaded. As to the first point, there is binding precedent to the contrary. In *Kisano Trade & Invest Limited v. Lemster*, the Third Circuit specifically rejected an argument that a treaty with Israel providing Israeli citizens access to United States courts required greater deference to an Israeli citizen's choice of forum. 737 F.3d at 875 (3d Cir. 2013) (citing 14D Charles Alan Wright et al., Federal Practice and Procedure § 3828.2 (3d ed. 2007) ("[I]n practice, federal courts generally hold that [treaties promising equal access to courts] do not

entitle foreign plaintiffs to the same deference as United States citizens.")). The treaty here is similar, and does not entitle Plaintiffs to full deference on their choice of forum.

As to Plaintiffs' remaining points, I address two of their three concerns by predicating dismissal on certain conditions. As to jurisdiction in Peru, dismissal here will be predicted upon a Peruvian court accepting it. As to enforceability, I will make dismissal here contingent upon Defendants' stipulation that the judicial system in Peru qualifies as legally adequate for purposes of applying Delaware's standards for the recognition of foreign-country judgments. *See* 10 Del. Code. § 4803(b). As to the likelihood of a fair trial in Peru, although concerns exist, as set forth above, under the totality of the circumstances, I am not persuaded that Plaintiffs' fears of unfair treatment entitle them to additional deference as foreign Plaintiffs. I therefore afford them less than full deference.

C. Balance of Private and Public Interests

Having concluded that Peru is an adequate alternative forum and assessed the level of deference to Plaintiffs' choice of forum, I move to the final step of the analysis, which requires that I examine the relevant private and public interests. Defendants' burden here is to show that the balance of these factors "tips decidedly in favor of trial in the foreign forum," outweighing the deference owed to Plaintiffs' chosen forum. *See Lacey II*, 932 F.2d at 180.

1) Private Interest Factors Weigh Heavily in Favor of Peru

The relevant private interest factors are set forth in *Gilbert*:

> [1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling witnesses; [3] the cost obtaining attendance of willing witnesses; [4] the possibility of a view of the premises, if appropriate to the action; and [5] all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gilbert, 330 U.S. at 508.

I conclude that these factors tilt decidedly in favor of Peru. As to the first factor, Peru is where much of the alleged conduct and all of the injuries took place, where most of the relevant witnesses—the Chaupes, Yanacocha, PNP, and Securitas—are all located, and where most of the documentary and physical evidence is located. As to the second factor, compulsory process is not available for some of these witnesses, including Securitas and the PNP. As to the third, given how many witnesses are located in Peru and how few are in the United States, the costs of obtaining attendance would be significant in Delaware when compared to trial in Peru. Regarding the fourth factor, though not absolutely necessary given modern technology, viewing the premises might be appropriate in this action, given the many allegations about what was done to and around the land. As to the final, catch-all factor, Defendants identify three salient points: (i) they will not be able to implead other potentially responsible parties, such as Securitas or PNP, since those parties do not have sufficient contacts with Delaware, (ii) translators for all the witnesses and documents will be costly, and (iii) there will be challenges to enforcing a United States judgment in Peru, similar to the issues regarding the enforceability of a Peruvian judgment in the United States.

Plaintiffs contend otherwise, advancing eight separate arguments, six of which concern the practical advantages of trying this case in Delaware, and the final two concerning legal challenges that may arise if trial is in Peru. Overall, these arguments are predicated on the notion that this case is likely to center on the conduct of Newmont executives in the United States. By framing the issue in that manner, Plaintiffs invite me to make a determination now as to the ultimate focus of this case. But that invitation reflects a misapprehension of the extent of my inquiry at this stage of the litigation, where "no discovery has taken place," and no answer has been filed. *See Lacey II*, 932 F.2d at 181. Indeed, I can, at most, "delineate the likely contours

of the case," but "cannot . . . determine what the ultimate focus of the trial will be." *Id.* And even if I could, the extensive evidence provided on this Motion and, more importantly, on Plaintiffs' own Motion for Preliminary Injunction, has focused almost exclusively on the events that took place in Peru, undercutting their argument that trial or discovery will feature Defendants' corporate conduct in this country more prominently.

As to the arguments themselves, Plaintiffs contend that there are key corporate witnesses in the U.S., and that Defendants overstate the costs of obtaining witnesses and translators, and the need to see Tragadero Grande. But because an overwhelming majority of the evidence and relevant witnesses appear to be in Peru, along with potential parties, I remain convinced that the private interests weigh heavily in favor of trying this case in Peru. Again, that conviction is bolstered by the fact that, thus far, much of the parties' factual disputes have centered on events in Peru.

The result is the same for Plaintiffs' legal concern about the enforceability of a Peruvian judgment in Delaware. Here, in an effort to make Delaware the center of the case, Plaintiffs simply ignore the reality of the injunctive relief they seek, which is specific protection from the actions of entities in Peru. As discussed above, given this aspect of the case, local administration is preferable, and enforceability of any judgement here is a concern I can effectively address.

The Plaintiffs' other legal challenges warrant a different response. First, they raise the possibility that Peruvian evidentiary rules could limit the use of foreign evidence. Second, they identify potential obstacles to proving their case, because the testimony of family members is uniformly deemed unreliable under Peruvian law. The former concern can be addressed by including in my dismissal order the condition that, if Plaintiffs seek the testimony of Defendants' representatives, Defendants may not object even if grounds for objection exist under Peruvian

law. The latter concern, however, deals with the specific rules concerning testimony by Peruvian citizens. I am not prepared as a judge sitting in another nation to conclude that a single such rule renders an entire court system inadequate, or to attach a condition presumptuously imposing American evidentiary rules on a foreign court.

2) Public Interest Factors Weigh Heavily in Favor of Peru

As to the public interest factors, I am likewise persuaded that those weigh heavily in favor of trial in Peru. *Gilbert* identified the relevant factors here as:

> "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach . . . . There is a local interest in having localized controversies decided at home."

330 U.S. at 508–09. Here, Defendants point to the alleged torts occurring in Peru, the Peruvian government's efforts to address this dispute thus far, and the case before the Peruvian judiciary concerning the underlying land dispute, to argue that Peru has an overwhelming interest in this matter, and Delaware virtually none in comparison. Further, Defendants argue that jurors here should not be burdened, especially since Peruvian law will likely govern or at least play a significant role. Finally, they contend that the congestion existing in Peruvian courts should not weigh heavily here, both in light of controlling precedent and because as a result of vacant judgeships this court is not without its own challenges. I agree. This case would pose administrative difficulties,[13] not the least of which is the likelihood that Peruvian law would

[13] Plaintiffs' argument that the difficulties posed by the vacancies on this court "pale[] in comparison" to those affecting Peruvian courts may be well-founded, but short of implying a burden of the kind acknowledged in *Bhatnagar*, those difficulties do not carry dispositive weight.

govern many, if not all, of Plaintiffs' claims. And although I would not characterize Delaware's interest as "virtually none," it necessarily carries less weight than the interest of Peru.[14]

To determine this dispute's connection to Plaintiffs' preferred forum, I "consider the locus of the alleged culpable conduct, *often a disputed issue*, and the connection of that conduct" to Delaware. *See Lacey I*, 862 F.2d at 48 (citation omitted) (emphasis added). I emphasize "often a disputed issue" because that is precisely the case here: in Plaintiffs' view, the locus of the alleged culpable conduct is Delaware, where Defendants are incorporated, oversee the conduct of Yanacocha, knew of the alleged tortious conduct, and failed to put an end to it. Meanwhile, Defendants argue that the alleged culpable conduct took place in Peru, for the conduct at issue here is the alleged tortious conduct of Yanacocha's security personnel in Peru, more so than anything Defendants did or failed to do at the corporate level. As previously stated, Plaintiffs' own submissions underscore the degree to which Peru is at the center of this case. Further, Peru has demonstrated significant interest in this matter. *See* Compl. ¶¶ 60, 350–51. In contrast, Delaware's connection to this case is remote, especially since, even accepting that the alleged corporate conduct plays an equally prominent role, that conduct likely took place in Colorado, where Defendant is headquartered, as opposed to Delaware. *See* Hudgens Decl. ¶¶ 2–5 ("None of [Newmont's] operations, employees, or records are located in Delaware."). Thus, separated from both Peru and Colorado by at least a thousand miles, Delaware can hardly be considered the locus of the alleged culpable conduct. *See Eurofins*, 623 F.3d at 163 ("[T]hough

[14] The legislative findings that accompanied the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, make clear that maintaining international confidence in the integrity of American business is in the national interest of the United States. The specter of disproportionate corporate influence raised by Plaintiffs here was also addressed by regulations promulgated by the Securities Exchange Commission under Section 1504 of the Dodd-Frank Wall Street Reform and Protection Act, 15 U.S.C. § 78m(q), requiring that companies that extract minerals disclose publicly any payments made to governments. But those reporting requirements were eliminated in the first legislation signed during the Trump Administration. Disclosure of Payments by Resource Extraction Issuers, Pub. L. No. 115-4, 131 Stat. 9 (Feb. 14, 2017). Suffice it to say that the absence of such a reporting requirement is felt in cases such as this.

Delaware has a significant interest in actively overseeing the conduct of those owing fiduciary duties to the shareholders of Delaware corporations, that interest is . . . insufficient to outweigh the locus of the alleged culpable conduct in this case.")

As to the difficulties posed by governing law in this case, *Piper* instructs that FNC "is designed in part to help courts avoid . . . complex exercises in comparative law." *See* 454 U.S. at 251. Thus, "where the court would be required to untangle problems in conflict of laws, and in law foreign to itself," the public interest factors point towards dismissal. *Id.* Here, both parties agree that, as a federal judge sitting in diversity in Delaware, I am to apply Delaware's choice of law rules to any dispute regarding applicable substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Delaware has adopted the Restatement (Second) of Conflicts, pursuant to which Defendants present a compelling case that Peruvian law would govern many of the claims here. *See* Defs.' FNC Mot. 20 (citing Restatement (Second) of Conflicts § 145(2) cmt. e ("When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort.")). Their analysis is even more compelling in light of the Delaware Supreme Court's ruling in *Bell Helicopter Textron, Incorporated v. Arteaga*, 113 A.3d 1045, 1053 (Del. 2015), which held that in tort actions, the local law of the state of injury is presumed to apply if the plaintiff has "significant contact with the site other than the accident itself." There, the fact that a foreign Plaintiff resided in the forum where the injury occurred was held to meet the "significant contact" requirement, and the law of that forum, Mexico, was applied. *Id.* (citing § 145 cmt. f, which states that "when [the] conduct and injury occur in different states . . . the local law of the state where the injury occurred is most

likely to be applied when the decedent had a settled relationship to that state, either because he was domiciled or resided there or because he did business there").

Plaintiffs attempt to forestall such a conclusion by arguing that Defendants failed to identify a conflict between Peruvian and Delaware laws. But the possessory defense discussed above is one such conflict, and central to this case. Moreover, from a review of the submissions of the parties' legal experts, it is readily apparent that there will be multiple contested issues of Peruvian law.

On balance, Defendants have met their burden of showing that the private and public interest factors weigh heavily in favor of this case being tried in Peru, and outweigh the reduced deference owed to Plaintiffs' forum choice.

IV. Conclusion

Defendants' FNC motion will therefore be granted, subject to the conditions set forth throughout this Memorandum and included in the accompanying order. Such dismissal will be without prejudice, allowing Plaintiffs to re-invoke the jurisdiction of this Court if the conditions of dismissal are not met.

/s/ Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, *et al.*	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action**
	:	**No. 17-1315**
	:	
NEWMONT MINING	:	
CORPORATION, *et al.*,	:	
Defendants.	:	

ORDER

This 11th day of April, 2018, it is hereby **ORDERED** that Defendants' Motion to Dismiss on the basis of *forum non conveniens,* (ECF No. 14), is **GRANTED**, subject to the following conditions:

1) Defendants in this action must submit to the jurisdiction of the appropriate court in Peru, and that Court must accept jurisdiction;
2) Defendants must stipulate that any judgment entered in Peru qualifies as legally adequate under Delaware law, including 10 Del. Code. § 4803(b);
3) Defendants may not directly, or indirectly through their subsidiaries and affiliates in Peru, raise objection to any of Defendants' officers or employees testifying or providing evidence relevant to the claims asserted by Plaintiffs, whether such evidence is sought here or in Peru.

This dismissal is without prejudice.

Defendants' Motion for Protective Order, (ECF No. 70), is **DENIED** as **moot.**

Plaintiffs' Motion for Preliminary Injunction (ECF No. 26) is **DENIED,** based solely upon the Court's decision to transfer this action. Such denial is not, and should not be construed as, a substantive decision as to the merits of the Motion.

/s/ Gerald Austin McHugh
United States District Judge

NOTICE OF APPEAL
TO
U.S. COURT OF APPEALS, THIRD CIRCUIT

U.S. District Court for the District of Delaware

MÁXIMA ACUÑA-ATALAYA;
DANIEL CHAUPE-ACUÑA;
JILDA CHAUPE-ACUÑA;
CARLOS CHAUPE-ACUÑA;
YSIDORA CHAUPE-ACUÑA.;
ELIAS CHAVEZ-RODRIGUEZ.;
MARIBEL HIL-BRIONES.

Plaintiffs,

v.

NEWMONT MINING CORPORATION;
NEWMONT SECOND CAPITAL CORPORATION;
NEWMONT USA LIMITED; and
NEWMONT PERU LIMITED.

Defendants

CIRCUIT COURT DOCKET NUMBER: _____

DISTRICT COURT DOCKET NUMBER: 17-1315-GAM

DISTRICT COURT JUDGE: GERALD AUSTIN MCHUGH

Notice is hereby given that Plaintiffs Máxima Acuña-Atalaya, Daniel Chaupe-Acuña, Jilda Chaupe-Acuña, Carlos Chaupe-Acuña, Ysidora Chaupe-Acuña, Elias Chavez-Rodriguez, and Maribel Hil-Briones in the above named case, hereby appeal to the United States Court of Appeals for the Third Circuit from an order and an accompanying memorandum granting dismissal on the basis of *forum non conveniens*, D.I. 92 and 93, entered in this action on the 11th day of April, 2018.

Dated: May 8, 2018

/*s*/Misty A. Seemans
Misty A. Seemans, DE Bar # 5975
O.P.D. (Pro Bono; cooperating attorney with EarthRights International)

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