No. 2018-2042

United States Court of Appeals for the Third Circuit

MAXIMA ACUNA-ATALAYA; DANIEL CHAUPE-ACUNA; JILDA CHAUPE-ACUNA; CARLOS CHAUPE-ACUNA; YSIDORA CHAUPE-ACUNA, personally and on behalf of her minor child M.S.C.C.; MARIBEL HIL-BRIONES; ELIAS CHAVEZ-RODRIGUEZ, personally and on behalf of his minor child M.S.C.C.,

Appellants,

v.

NEWMONT MINING CORPORATION; NEWMONT SECOND CAPITAL CORPORATION; NEWMONT USA LIMITED; NEWMONT PERU LIMITED,

Appellees.

Appeal from the United States District Court for the District of Delaware
No. 17-1315, Hon. Gerald Austin McHugh, District Judge

BRIEF FOR APPELLEES

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September 21, 2018

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Rule 26.1, Appellees Newmont Mining Corporation, Newmont Second Capital Corporation, Newmont USA Limited, and Newmont Peru Limited make the following disclosure:

1) BlackRock, Inc. holds 10% or more of Newmont Mining Corporation's stock.

2) Newmont Mining Corporation is the parent corporation of Newmont USA Limited and holds 10% or more of Newmont Mining Corporation's stock.

3) Newmont USA Limited is the parent corporation of Newmont Peru Limited and Newmont Second Capital Corporation, and no company holds 10% or more of Newmont Peru Limited or Newmont Second Capital Corporation's stock.

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INTRODUCTION

This lawsuit was brought by Peruvian Plaintiffs based on torts allegedly committed by Peruvian subsidiaries and security forces on disputed land in Peru that will be governed by Peruvian law and for which parallel proceedings are currently pending in Peruvian courts. After briefing and a hearing, and after examining an extensive record, the district court issued a detailed decision granting Defendants' *forum non conveniens* (FNC) motion without prejudice and contingent on the satisfaction of three conditions.

On appeal, Plaintiffs do not dispute that the private and public factors "tilt decidedly" in favor of a Peruvian forum. JA25. They do not dispute that a Peruvian court would have jurisdiction to adjudicate their claims which are cognizable under Peruvian law. And they do not ask this Court to find that "Peru's courts are inherently inadequate." Br. 30. Plaintiffs instead focus their appeal on whether the trial courts in Cajamarca are too corrupt to qualify as an adequate forum in this case. The district court correctly answered that question in the negative and its decision is entitled to substantial deference.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Parties Are Engaged In A Land Dispute In The Cajamarca Region of Peru

This case arises out of a property dispute in the Northern Andes of Peru, in the region of Cajamarca. In 2001, Minera Yanacocha S.R.L. (Yanacocha)—a mining company in Peru and the direct or indirect subsidiary of Defendants—acquired ownership and possessory rights to a plot of land historically possessed and farmed by local *campesinos* (Disputed Land). JA129-30 ¶¶ 2, 5 (Velarde Decl.). Ten years later, Plaintiffs—seven members of the Chaupe family—began living on the Disputed Land, claiming rights of possession which they purportedly obtained in the early 1990s and which they allege were never transferred to Yanacocha. JA448 ¶¶ 7-8 (Velarde Decl.). Specifically, since August 2011, Plaintiffs have illegally occupied the Northern Parcel of the Disputed Land, building a house and farming the land. JA448-49 ¶ 9; *see also* JA456 (map of Disputed Land).

Peruvian law provides certain remedies when a property owner discovers that an individual is trespassing on the property. JA567 ¶ 9 (Freyre Aff.). One such remedy is an out-of-court possession defense known as a "possessory defense," where the owner must take action within 15 days of learning of the trespass. JA568 ¶ 12. The possessory defense authorizes the owner to take reasonable, proportionate action to remove the trespasser from the property, including removing any crops or

structures. JA569 ¶¶ 15-16. If a possessory defense is used, and the trespasser remains on or returns to the property, replants crops, or rebuilds structures, the owner must exercise another possessory defense within 15 days of learning of the new trespass. *Id.* ¶ 17. Failure to exercise a timely possessory defense effectively gives the trespasser the right to remain on the property until there is a judicial resolution of property rights. *See* JA570 ¶ 20.

In May 2011, upon learning of Plaintiffs' initial trespass onto the Northern Parcel, Yanacocha representatives engaged in a peaceful dialogue with Plaintiffs and Plaintiffs left the property. JA558 ¶ 3 (Herran Decl.); JA448 ¶ 7 (Velarde Decl.). Then, in August 2011, Plaintiffs returned and refused to leave. JA448-49 ¶ 9. Consistent with Peruvian law, Yanacocha tried to exercise its possessory defense to evict Plaintiffs. *Id.* ¶¶ 9-10. After that attempt failed, and due to pressures from the Peruvian government and the local community, Yanacocha decided that it would not interfere with Plaintiffs' activities on the Northern Parcel—pending a final judicial resolution of the parties' rights. JA449 ¶ 10.

In 2015, Plaintiffs extended their occupation to the Southern Parcel of the Disputed Land by, among other things, planting crops and building animal huts on the property. *Id.* ¶ 12. In order to protect its possessory interests under Peruvian law, Yanacocha employed its possessory defense to evict Plaintiffs from the Southern Parcel. JA450 ¶ 14. But Plaintiffs have continued to encroach. As a result,

Yanacocha has been forced to regularly exercise its possessory defense ever since. *Id*. When Yanacocha learns of an incursion by Plaintiffs, it promptly meets with the trespassers, directs them to leave Yanacocha property, and returns the property to its previous condition (*e.g.*, pulling out crops, removing or erasing improvements). JA449-50 ¶¶ 13-14.

Yanacocha has never engaged in violent or harassing conduct against Plaintiffs—whether during a possessory defense or in any other circumstances. JA131 ¶ 10 (Velarde Decl.). No force has been exerted against any of the Plaintiffs, and no animals have been killed or injured. JA551-52 ¶ 5 (Farfan Decl.); JA561 ¶ 10 (Herran Decl.); JA562 ¶ 12. Plaintiffs and their family members, on the other hand, have wielded machetes and attacked Yanacocha representatives with rocks, as evidenced in video recordings submitted to the district court. *See* JA561 ¶ 10, Ex. B-G (videos lodged with district court).

B. The Land Dispute Has Spawned Multiple Lawsuits In Peruvian Courts

The dispute between the parties has also spawned multiple lawsuits in the Peruvian courts—several of which remain pending.

Beginning in May 2011, Plaintiffs attempted to bring criminal charges against employees of Yanacocha on multiple occasions. JA132 ¶ 14 (Velarde Decl.). After investigating each of Plaintiffs' complaints, Cajamarca officials declined to prosecute. *See, e.g.*, JA460-502 (Resolutions of Preparatory Investigation Court).

In 2015 and 2016, Plaintiffs filed two habeas corpus lawsuits challenging some of the same actions at issue in this case. JA453 ¶ 25 (Velarde Decl.). In one, Plaintiffs prevailed before the Cajamarca trial court. *Id*. ¶ 26. The appellate court reversed, and Plaintiffs' appeal is currently pending before the Constitutional Court. JA528-534 (Cajamarca Appeals June 2016 Decision). In the other, Plaintiffs lost before the trial court and on appeal, and that claim is also now pending before the Constitutional Court. JA536-47 (Cajamarca Appeals May 2016 Decision).

As part of its efforts to resolve the land dispute, Yanacocha also initiated legal proceedings in the Peruvian courts. In 2011, a Cajamarca trial court found some of the Plaintiffs guilty of aggravated usurpation, but the appellate court reversed and granted a new trial. JA144-54 (Appeals Chamber August 2013 Decision). In 2014, a new trial was held and Plaintiffs were again found guilty. JA 132 ¶ 17 (Velarde Decl.). The appellate court again reversed. *Id.* Yanacocha appealed to the Supreme Court of Peru, which upheld the appellate court's decision on the ground that the evidence was insufficient to determine which individual had engaged in the charged violent act. JA396-419 (Supreme Court 2017 Decision).

In 2011, Yanacocha also sought an injunction to prevent Plaintiffs from using the Northern Parcel. JA132 ¶ 15 (Velarde Decl.). Although the Peruvian court granted the injunction, Yanacocha declined to enforce it to avoid further conflict. JA137-42 (Superior Court December 2011 Decision).

Finally, Yanacocha filed two civil lawsuits in Peru to recover possession and ownership of both parcels of the Disputed Land. JA156-217 (Yanacocha Civil Complaints). In 2015, Yanacocha sought and obtained a preliminary injunction against Plaintiffs' trespass of the Southern Parcel, but the trial court later withdrew the injunction and the appellate court affirmed (albeit on other grounds). JA421-31 (Superior Court March 2016 Decision). Both lawsuits remain pending. JA133 ¶ 18 (Velarde Decl.).

C. The Peruvian Government And Defendants Have Taken Steps To Protect Plaintiffs Pending Resolution Of The Land Dispute

In November 2011, due to widespread community opposition and public demonstrations, the Peruvian government ordered Defendants to suspend work on the Conga project—Defendants' planned mining operation that sits beneath the Disputed Land. JA6; *see* JA331 (Resolve Report). Since April 2016, the Peruvian government has "travel[ed] to [the Disputed Land] twice a month . . . to verify [Plaintiffs'] safety," "pa[id] for [their] phone bills," and "coordinat[ed] with the police on a protection plan." JA115-16 ¶¶ 350-51 (Complaint).

Defendants, meanwhile, have taken steps to investigate Plaintiffs' claims. In 2015, Newmont funded an independent fact-finding mission to examine "the allegations of human rights violations perpetrated against the Chaupe family, and [Yanacocha's] conformance to Newmont's own policies and international standards." JA329 (Resolve Report). After reviewing reports by key actors

(including the Chaupe family, Yanacocha, and its security personnel), in addition to videos and photographic records, the mission team recommended a "precautionary approach" based on the "risk" of human rights violations, but "did not discover conclusive evidence that [Yanacocha] violated the human rights of members of the Chaupe family. Specifically, [it found] no conclusive evidence relating to the use of force by Police on 11 August 2011." JA370, 367.

II. PROCEDURAL HISTORY

A. Plaintiffs File Suit In Delaware District Court

In September 2017, while the civil lawsuits in Peru were still pending, Plaintiffs filed a complaint in the Delaware District Court asserting state law tort claims against Defendants (JA116-27)—all Delaware corporations with their principal place of business in Colorado, Dkt. 17 ¶¶ 2-5 (Hudgens Decl.). Plaintiffs alleged that Defendants directed Yanacocha and its security personnel to engage in a campaign of harassment and violence against them. JA38, 43 ¶¶ 3, 31. Plaintiffs did not name Yanacocha as a party.

On October 16, 2017, Defendants filed a motion to dismiss on FNC grounds and, on November 1, 2017, Plaintiffs filed a motion for preliminary injunction. *See* Dkt. 14, 26. On December 11, 2017, the parties completed briefing on both motions after having compiled a record of over 100 exhibits. Dkt. 50, 51 (Reply Brs.). On

December 15, 2017, the district court informed the parties that it would address the FNC motion first. JA952-53 (email).

On December 22, 2017, Plaintiffs filed a "Notice of Discovery," to "inform the Court that they will be seeking narrowly targeted discovery for the limited purpose of more fully responding to Defendants' FNC motion and their Reply Brief." Dkt. 62 at 1. On January 10, 2018, the Court scheduled a hearing on the FNC motion to take place on February 8, 2018. Dkt. 64. Approximately three weeks before the hearing, on January 16, 2018, Plaintiffs served discovery on Defendants for the first time (JA933-43)—consisting of four sets of Rule 30(b)(6) notices of deposition, each with 16 topics; four sets of document requests, each with 11 requests; and four sets of interrogatories, each with 14 interrogatories having numerous subparts. In response, Defendants filed a motion for protective order. Dkt. 71. Plaintiffs' opposition argued that discovery was necessary because Defendants had objected to Plaintiffs' evidence. Dkt. 80 (Opp. to PO Mot.).

On the eve of the scheduled hearing, Plaintiffs filed a notice of supplemental evidence. Dkt. 79. At the hearing, the district court explained that it had "thoroughly read the briefing," "[m]any of the cases if not most or all," and "the underlying materials which are voluminous" (Dkt. 90 at 5 (Tr.)), and that it had "spent a fair amount of time trying to immerse [itself] in the nuances of the case" (*id.* at 26). The court also indicated that it was going to overrule Defendants' objections to Plaintiffs'

evidence (*id.* at 5), and even invited Plaintiffs to submit "any other evidence [it had] of some of the violence directed against [Plaintiffs] that [they argued] should move [the court] to find a Peruvian court[] inadequate" (*id.* at 35). After that hearing, the district court issued an order staying discovery and deferring resolution of Defendants' motion for protective order until it ruled on the FNC motion. Dkt. 85. Plaintiffs then filed two additional notices of supplemental evidence with the district court. Dkt. 86, 91.

B. The District Court Granted A Conditional Dismissal Without Prejudice On FNC Grounds

On April 11, 2018, after considering the voluminous record including Plaintiffs' multiple supplemental submissions, the district court dismissed Plaintiffs' complaint in a 28-page decision. JA3-30. The dismissal was without prejudice and subject to three conditions: (1) that Defendants "submit to the jurisdiction of the appropriate court in Peru, and that [the] Court . . . accept jurisdiction"; (2) that Defendants "stipulate that any judgment entered in Peru qualifies as legally adequate under Delaware law, including 10 Del. Code. § 4803(b)"; and (3) that Defendants "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." JA31.

In granting the motion, the district court applied the "three-step analysis" set forth by this Court in *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 160 (3d Cir. 2010). JA11. First, the court determined "'whether an adequate alternate forum' exists to entertain the case." *Id.* (citation omitted). Second, it determined "the appropriate amount of deference to be given to the plaintiff's choice of forum." *Id.* (citation omitted). And, third, the court weighed "'the relevant public and private interest factors'. . . 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.* (citation omitted). The court explained that Defendants "bear the burden of persuasion at every stage of this analysis, against the backdrop of a generally 'strong presumption' in favor of the plaintiff's choice of forum." *Id.* (citation omitted). The court also noted that the parties had submitted "competing accounts" and "extensive documentation"; that the court had "availed" itself of the "full scope of these submissions"; and that it considered "evidence from the broader record," including "affidavits submitted specifically for the FNC motion," as well as "all evidence pertaining to the motion for preliminary injunction." JA12-13.

On the first step, the district court explained that "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." JA13. The court concluded that

"Defendants have met their burden to demonstrate that an adequate alternative forum exists" because "Defendants have stipulated to service of process, consented to jurisdiction in Peru, and agreed to have those be conditions of dismissal." *Id.* And, the court continued, "Plaintiffs conceded that Peruvian law recognizes a cause of action and offers a remedy for the property damage and personal injuries alleged here." *Id.*

The district court then considered Plaintiffs' argument that "Defendants have not met their burden" because "Defendants' improper influence over the Peruvian judiciary renders the forum inadequate."[1] JA13-14. "That contention," the court explained, "can be broken down 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." JA15. The court addressed both theories. On the first, the court noted that theories of "generalized corruption" have "'not enjoyed a particularly impressive track record.'" *Id.* (citation omitted). As a result, the court specifically examined the "general evidence" that "Plaintiffs have submitted, but only as background for the more particularized

[1] Plaintiffs made other arguments in the district court regarding the Peruvian forum's adequacy (*see* JA12 n.7, 13, 14-15), but abandon those arguments on appeal.

allegations that Plaintiffs present to support [their] second theory." JA16 (footnote omitted).

The district court then addressed Plaintiffs' specific allegations which focused on "three discrete episodes," and spent multiple pages walking through the record evidence. JA17-22. With respect to the first "episode"—"an incident" in 2000 during the "Fujimori regime"—the court explained that the "events in question occurred some 18 years ago," around the time the Fujimori regime "imploded," and that there has been "interim regime change and noted improvements since." JA17-18. The court further noted that, "both before and after Fujimori's regime, every federal court to consider the issue has found Peru to be an adequate forum." JA18 (citing cases).

The second "episode" was documented in a declaration from Plaintiffs' own Peruvian attorney which asserted, among other things, that the "Peruvian legal system has been unresponsive to Plaintiffs' claims, but solicitous of Yanacocha's claims." *Id.* The court explained that while some of the "irregularities" noticed during Plaintiffs' criminal trial were "concerning," "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. In short, "Plaintiffs were ultimately protected by the very judicial system they ask [the court] to deem inadequate." *Id.*

Finally, the district court addressed the account of one of the Plaintiffs that, during the same criminal trial, the judge "apologized" and told her that "'the company gave an 'economic benefit' to the prosecutor'." *Id.* (citation omitted). "Even taking these facts at face value," the court found it "noteworthy that it was the court that brought this instance of apparent corruption to Plaintiffs' attention." *Id.* And the court found it insufficient to support a finding that "Peru is an inadequate forum for Plaintiffs, particularly in light of the success Plaintiffs experienced in the appellate courts." *Id.*

Taking a step back, the district court found ample reasons to "question whether Yanacocha's influence over the Peruvian government is as strong as Plaintiffs assert." JA20. The court explained that Yanacocha had been "stymied" in its efforts to "expand their mining operation" based on the Peruvian government's "responsiveness to local opposition" to the Conga operation, which directly contravenes the "core premise of Plaintiffs' argument . . . that Defendants will go to any means to expand their mining operation." *Id.* The court also noted that Plaintiffs' own complaint "acknowledges other ways in which the Peruvian government has been responsive to their situation." *Id.* The court further found it "far from clear on the record before [it] that Defendants are ruthlessly determined to exploit weaknesses in the Peruvian judiciary to trample Plaintiffs' rights." *Id.* And the court noted that the "continued spotlight" on this dispute "makes it less likely

that judicial proceeding in Peru will be subject to untoward influences." JA22. For all of these reasons, the court held that the record did not support a finding that the Peruvian courts are "'clearly unsatisfactory' under *Piper* [*Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)]" to adjudicate Plaintiffs' case. *Id.*

On the second step of the FNC analysis, the district court held that Plaintiffs' choice of forum warranted "less than full deference" because they are "foreign citizens." JA23-24.

And, on the third step, the district court held that Defendants had "met their burden of showing that the private and public interest factors weigh heavily in favor of this case being tried in Peru." JA30. On the private interest factors, the court concluded that they "tilt decidedly in favor of Peru." JA25. As for Plaintiffs' argument that "testimony of family members is uniformly deemed unreliable under Peruvian law," the court refused to conclude that a "single [testimonial] rule" is sufficient to render the forum inadequate, and declined to "attach a condition presumptuously imposing American evidentiary rules on a foreign court." JA26-27. Finally, on the public interest factors, the court found that they likewise "weigh heavily in favor of trial in Peru." JA27.[2]

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[2] Aside from the district court's treatment of the "testimony of family members" (JA26), Plaintiffs do not appeal the district court's resolution of the second and third steps of the FNC analysis.

In the accompanying order, the district court granted the FNC motion subject to the conditions set forth above, denied Defendants' motion for protective order as "*moot*," and denied Plaintiffs' motion for preliminary injunction. JA31-32 (Order).

SUMMARY OF ARGUMENT

The primary focus of Plaintiffs' appeal is whether the trial courts in Cajamarca are simply too corrupt to qualify as an adequate forum in this case. The district court correctly answered that question in the negative and its decision is entitled to substantial deference.

First, Plaintiffs argue that the district court reversed the burden of proof and applied an erroneous legal standard. They are wrong in both respects. The district court said it was placing the burden on Defendants, and Defendants readily satisfied their threshold burden to prove adequacy. Defendants were not required to prove the absence of corruption unless Plaintiffs first made a "powerful showing" of corruption rising to the level of "no remedy at all." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006); *see Doe v. Ritz Carlton Hotel Co.*, 666 F. App'x 180, 183-85 & n.2 (3d Cir. 2016). And even if Plaintiffs made that showing, Defendants could (and did) establish that the "facts [were] otherwise." *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001). The district court properly applied that approach and found the evidence in the record insufficient to deem the Peruvian forum inadequate (*i.e.*, not adequate). Plaintiffs also badly mischaracterize

the legal standard applied by the district court. The court looked to generalized allegations of corruption only to provide context for Plaintiffs' more particularized allegations, and expressly found that Peru was an adequate forum *for Plaintiffs*.

Second, Plaintiffs argue that the district court erred in finding that the Peruvian forum was adequate. But Plaintiffs' disagreement with the district court's assessment of the evidentiary record provides no basis to reverse under the deferential standard of review applicable here. Moreover, Plaintiffs significantly overstate the quality of their evidence (as opposed to rhetoric) and understate the strength and volume of contrary evidence in the record. The actual evidence—including the fact that the Peruvian judiciary, at every level, has at times sided with Plaintiffs against Defendants about the very events at issue in this case—makes clear that this is not the "rare" case where a U.S. court should declare a foreign court too corrupt to be adequate. *Piper*, 454 U.S. at 254 n.22. The district court did not err in so holding—let alone clearly abuse its discretion.

Third, Plaintiffs assert that the district court abused its discretion in denying discovery and in doing so without explanation. But the district court's decision, *after* reviewing the briefs and hearing argument, to defer Plaintiffs' last-minute request to engage in a fishing expedition in the hopes of uncovering "corruption" was entirely reasonable. There was already ample evidence in the record to guide the district court's discretion, and discovery into allegations of corruption is

something courts rarely need. Plaintiffs had not filed any discovery motion; the district court was not required to explain why it chose to defer resolution of Defendants' motion; and its decision is fully supported by the record.

Fourth, Plaintiffs argue that the district court erred in not giving evidentiary rules governing the testimony of familial witnesses dispositive weight. Contrary to Plaintiffs' intimations, as parties, they *would* be able to submit statements in support of their claims to a Peruvian court. That *oral* testimony is not permitted is neither unique nor disqualifying. And it is well-settled that a foreign forum need not conform to U.S. evidentiary standards to qualify as adequate.

Fifth, Plaintiffs contend that the district court should have conditioned dismissal on Defendants' waiver of any limitations defense that would not have been available had the court retained jurisdiction. Defendants now stipulate that they will waive any such defense and that the district court can enforce any noncompliance. This Court can either read that implicit condition into the district court's order or modify the order on appeal to make it explicit. No remand is necessary.

And, finally, Plaintiffs ask this Court to take judicial notice of the fact that Peru recently declared a 90-day judicial state of emergency after uncovering certain instances of corruption within the Peruvian judiciary, and to remand for the district court to consider the same. But this new "evidence" is nothing more than the sort of generalized allegations of corruption that courts have routinely rejected. Plaintiffs

fail to identify any link to Defendants, to the Cajamarca trial courts, or to the facts of this case. If anything, the Administrative Resolution shows a government intent on investigating and punishing judicial corruption.

ARGUMENT

I. THE DISTRICT COURT DID NOT IMPROPERLY "REVERSE" THE BURDEN OF PROOF OR APPLY AN INCORRECT LEGAL STANDARD

A. Standard Of Review

"The *forum non conveniens* determination is committed to the sound discretion of the trial court," *Doe v. Ritz Carlton Hotel Co.*, 666 F. App'x 180, 182 (3d Cir. 2016) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)), and "[t]he district court's determination 'may be reversed only when there has been a clear abuse of discretion,'" *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 189 (3d Cir. 2008) (citation omitted). Although a district court may "abuse[] 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), an "erroneous statement" of the law "does not amount to reversible error" if the error was harmless, *Ritz Carlton*, 666 F. App'x at 183.

B. The District Court Applied The Correct Burden Of Proof

Plaintiffs argue that the district court "reversed" the burden of proof by requiring them to prove that Peru is a "'clearly inadequate'" forum, rather than

requiring Defendants to prove it is an "adequate" one. Br. 22-26 (citation omitted). Plaintiffs further argue that the district court erred by asking whether a "specific body of Plaintiffs' evidence" established that Peru was clearly unsatisfactory, rather than requiring Defendants to overcome Plaintiffs' evidence with evidence of their own. Br. 19, 26-27. Plaintiffs misstate the law and mischaracterize the district court's decision.

1. *Defendants Need Not Always Show That A Forum Is Not Corrupt To Establish That It Is Adequate*

Defendants have never disputed that they bear the burden of persuasion at all three steps of the FNC analysis, including availability and adequacy of the alternative forum. Dkt. 51 at 1 (FNC Reply). "An alternative forum is available if all defendants are amenable to process there," and it "is generally adequate if the plaintiff's claim is cognizable in the forum's courts." *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 712 F. App'x 200, 203 (3d Cir. 2017); *see also Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 873 (3d Cir. 2013) (describing adequate alternative forum as one where "defendants are amenable to process and plaintiffs' claims are cognizable"); *Pollux Holding, Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 75 (2d Cir. 2003) ("An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute."); *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 12 (1st Cir. 2000) ("Courts generally deem [the adequacy] requirement satisfied if the defendant demonstrates

that the alternative forum addresses the types of claims that the plaintiff has brought and that the defendant is amenable to service of process there."). Accordingly, a defendant must establish that it is amenable to process in the forum's courts (*i.e.*, that the foreign forum will have jurisdiction), and that the plaintiff's claims are cognizable in those courts (*i.e.*, that the plaintiff will have a remedy).

Once those threshold requirements are satisfied, a forum will only be deemed inadequate in the "rare circumstances" (*Piper Aircraft*, 454 U.S. at 254 n.22) in which "'the remedy provided . . . is so clearly inadequate or unsatisfactory that it is *no remedy* at all,'" including when the "legal system is 'so corrupt that it can[not] serve as an adequate forum.'" *Ritz Carlton Hotel*, 666 F. App'x at 185 n.2 (second alteration in original) (citations omitted); *Tuazon*, 433 F.3d at 1179-80 (explaining that foreign forum may be inadequate if evidence "support[s] the conclusion that a legal system is so fraught with corruption, delay and bias as to provide 'no remedy at all'").

Courts do not require defendants in every case to come forward with evidence to demonstrate the *absence* of corruption sufficient to deem the foreign forum inadequate. Rather, they presume impartiality and place the onus on the plaintiff to both make and substantiate any allegations of corruption. *See, e.g.*, *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001) (citing cases and explaining that "[s]ome courts have said that an alternative forum is presumptively impartial and

efficient, and have put at least the burden of production on the plaintiff to show that this is not so"). Only then does the defendant have *any* obligation to counter those allegations. *See id.* at 1311 ("[C]ourts have not always required that defendants do much to refute allegations of partiality and inefficiency in the alternative forum."). And, at that point, courts generally hold that a defendant has no obligation to refute the plaintiff's evidence absent a "powerful showing" of pervasive corruption. *Tuazon*, 433 F.3d at 1179.

As the Eleventh Circuit explained in *Leon*, "defendants have the ultimate burden of persuasion, but only where the plaintiff has substantiated his allegations of serious corruption." 251 F.3d at 1312. When "the allegations are insubstantially supported, . . . a District Court may reject them without considering any evidence from the defendant." *Id*. Only when "the plaintiff produces significant evidence documenting" allegations of corruption that "are so severe as to call the adequacy of the forum into doubt," does the defendant have the "burden to persuade the District Court that the facts are otherwise." *Id.*

That standard makes perfect sense. For one thing, it appropriately reflects the "reluctance" of U.S. courts "to hold" a foreign forum inadequate on grounds of corruption. *Id.*; *see also In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002) ("We have been reluctant to find foreign courts 'corrupt' or 'biased.'" (citation omitted));

Gonzales v. P.T. Pelangi Niagra Mitra Int'l, 196 F. Supp. 2d 482, 488 (S.D. Tex. 2002) ("Making a generalized pronouncement condemning the [foreign] court system as 'inadequate' is not the right nor the duty of this Court."). For another, it is consistent with the general rule that parties should rarely shoulder the burden of proving a negative (*i.e.*, the *absence* of corruption). *See Evankavitch v. Green Tree Servicing, LLC*, 793 F.3d 355, 367 (3d Cir. 2015) ("[A]ll else . . . being equal, courts should avoid requiring a party to shoulder the more difficult task of proving a negative." (second alteration in original) (citation omitted)); *Lupyan v. Corinthian Colleges Inc.*, 761 F.3d 314, 322 (3d Cir. 2014) ("The law has long recognized that [proving a negative] is next to impossible.").

2. *The District Court Correctly Applied That Burden Of Proof*

The district court correctly applied that burden of proof. As Plaintiffs acknowledge (at 24-25), the court expressly stated that "Defendants seeking dismissal on the basis of FNC bear the burden of persuasion at every stage of this analysis." JA11. The district court then held that "Defendants have met their burden to demonstrate that an adequate alternative forum exists in Peru because . . . Defendants have stipulated to service of process, consented to jurisdiction in Peru, and agreed to have those be conditions of dismissal," and because "Plaintiffs conceded that Peruvian law recognizes a cause of action and offers a remedy for the property damage and personal injuries alleged here." JA13.

Having found that Defendants met that threshold burden, the district court continued on to address Plaintiffs' argument that "Defendants have not met their burden" because "Defendants' improper influence over the Peruvian judiciary renders the forum inadequate." JA13-14. In addressing that argument, the court spent eight pages walking through the evidence. The court found some of Plaintiffs' evidence to be insignificant. *See, e.g.*, JA15-16 & n.8 (discounting evidence of generalized corruption); JA17-18 (discounting evidence of alleged corruption based on events "some 18 years ago" during the "infamous[]" Fujimori regime). And the court relied on, and found persuasive, evidence contradicting Plaintiffs' account. For example, the court found good "reason to question whether Yanacocha's influence over the Peruvian government is as strong as Plaintiffs assert," and deemed it "far from clear . . . that Defendants are ruthlessly determined to exploit weaknesses in the Peruvian judiciary to trample Plaintiffs' rights." JA20.

Among the many reasons to question Plaintiffs' account, the court pointed to evidence showing that:

- Plaintiffs had prevailed on multiple occasions before "the very judicial system" they "deem inadequate" (JA19);
- the Peruvian court "brought th[e] instance of apparent corruption [reported by one of the Plaintiffs] to Plaintiffs' attention" (*id.*);

- "many of the instances [of generalized corruption] were cases brought to light by the Peruvian government's own investigation and prosecution of the officials involved" (JA16 n.8);
- the Peruvian government had itself "stymied" Defendants' efforts to expand mining operations in response to local opposition (JA20);
- the Peruvian government had otherwise been "responsive" to Plaintiffs' situation (*id.*); and
- "Defendants ha[d] endorsed and adopted established human rights frameworks" and made "efforts to investigate alleged abuses by their subsidiary," including funding "an independent fact-finding mission" (*id*).

In short, the court simply did not believe that Peruvian courts would "be subject to untoward influences" in this case, or that Defendants would try to "gain an *unlawful* advantage in [the] Peruvian courts." JA21-22; *see also* JA1071 ¶ 2 (declaring that Defendants never "provided any benefits to any members of the Peruvian judiciary or government officials employed by the Peruvian court, or their family members, in connection with any litigations . . . [involving] the Chaupe family"). That is why the court concluded that it could not "say" that the Peruvian courts are "'clearly unsatisfactory' under *Piper*." JA22.

The district court's analysis thus makes clear that Plaintiffs failed to produce "significant evidence" establishing corruption "so severe as to call the adequacy of

the forum into doubt" or, alternatively, that Defendants had successfully persuaded the court "that the facts are otherwise." *Leon*, 251 F.3d at 1312. Either way, the district court properly applied the burden of proof. *See Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 249-50 (4th Cir. 2011) (rejecting argument that district court "misallocated the burden of proof" where "district court considered the parties' conflicting affidavits and concluded that '[u]nder the low threshold established by . . . *Piper* . . . *Defendants* have met their burden of showing that China is an adequate forum'" (citation omitted)).

3. *Plaintiffs' Arguments To The Contrary Are Without Merit*

Plaintiffs never clearly articulate what burden they think the district court should have—but did not—apply. At times, they speak broadly of Defendants' overarching burden to prove "adequacy." But Plaintiffs also rely on cases—including *Leon*—that apply the same burden-shifting standard set forth above. *See* Br. 26 n.3, 36 (citing *Leon* standard favorably); Br. 23 (relying on standard in *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085-86 (S.D. Fla. 1997), which the Eleventh Circuit adopted in *Leon*, 251 F.3d at 1312-13). And the only other cases Plaintiffs cite involving allegations of corruption or delay are entirely consistent with the *Leon* approach. In *Bhatnagar ex rel. Bhatnagar v. Surrendra Overseas Ltd.*, the plaintiff had come forward with substantial evidence of an extraordinary 25-year delay, the district court found that defendant had failed to

refute that evidence, and this Court deferred to the district court "under our lenient standard[] of review"—even though the facts could have also supported the opposite conclusion. 52 F.3d 1220, 1230 (3d Cir. 1995). In *Daventree Ltd. v. Republic of Azerbaijan*, the plaintiffs had come forward with substantial evidence that the executive branch of the Bolivian government (which was a party in the case) yielded significant influence over the judiciary, which the defendant not only failed to refute—its own expert had written an article saying the same. 349 F. Supp. 2d 736, 756 (S.D.N.Y. 2004), *modified by* 2005 WL 2585227 (S.D.N.Y. Oct. 13, 2005).

Plaintiffs' objection to the district court's analysis seems to rest in large part on its use of words like "inadequate" and "unsatisfactory," as opposed to "adequate" and "satisfactory." *See, e.g.*, Br. 24-25, 27. And they infer from this word choice that the district court must have placed the burden on Plaintiffs. But the court *never* said it was placing the burden on Plaintiffs; rather, as Plaintiffs acknowledge, the court said precisely the opposite. *Id.* (citing JA11). More fundamentally, Plaintiffs are confusing the applicable legal standard with the burden of proof. As Plaintiffs also acknowledge, the "clearly unsatisfactory" language comes directly from the Supreme Court's decision in *Piper*. Br. 25. Faced with that fact, the most Plaintiffs can say is that *Piper* was not "discussing who bears the burden." *Id.*[3] That is

[3] Plaintiffs also note that this language from *Piper* was in the context of discussing "unfavorable change[s] in law," but the accompanying footnote makes

precisely our point: neither was the district court. And courts routinely frame the inquiry in "inadequacy" terms when the plaintiff alleges that a foreign court is corrupt. *See, e.g.*, *Carijano v. Occidental Petroleum Corp*., 643 F.3d 1216, 1226 (9th Cir. 2011); *In re Arbitration between Monegasque De Reassurances S.A.M.*, 311 F.3d at 499; *Stroitelstvo Bulgaria Ltd. v. Bulgarian-Am. Enter. Fund*, 589 F.3d 417, 424 (7th Cir. 2009); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1291 (11th Cir. 2009); *Geier v. Omniglow Corp.*, 357 F. App'x 377, 380 (2d Cir. 2009); *Tuazon*, 433 F.3d at 1179; *Aguinda v. Texaco, Inc*., 303 F.3d 470, 478 (2d Cir. 2002).[4] There is nothing surprising about that: a forum is either "adequate" or *not* "adequate" (*i.e.*, *in*adequate). In short, Plaintiffs' word games prove nothing.

Finally, Plaintiffs appear to suggest that the district court must have applied an improper burden because it did not rely on "evidence" submitted by Defendants. As an initial matter, to the extent Plaintiffs failed to "produce[] significant evidence" of corruption "so severe as to call the adequacy of the forum into doubt," Defendants were not required to produce any contrary evidence. *Leon*, 251 F.3d at 1312. But

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clear that the Court was applying the adequate forum requirement to that particular circumstance. *See* 454 U.S. at 254 n.22 ("In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative.").

[4] Tellingly, Plaintiffs do the same. *See, e.g.*, Br. 22 (district court should have asked "whether Peru is an inadequate forum for these Plaintiffs"); Br. 35 ("A forum is inadequate if, to prevail, Plaintiffs must swim against a tide of lower court corruption.").

even if Plaintiffs made the necessary showing, Defendants were only required to persuade the court that the "facts were otherwise." *Id.* Through evidence and some common sense, that is exactly what Defendants did. For example, Plaintiffs' "evidence" of Defendants' alleged corruption of the Peruvian judiciary in a case brought against Plaintiffs (*i.e.*, declarations from one of the Plaintiffs and their Peruvian lawyer), was countered by evidence that Plaintiffs had prevailed on appeal. JA18-19. Plaintiffs' allegations (*i.e., not* evidence) that Defendants "will go to any means to expand their mining operations," was countered by evidence (*i.e.*, not allegations) that the Peruvian government had suspended the Conga mine project and had otherwise assisted Plaintiffs. JA20. And Plaintiffs' evidence regarding alleged corruption of the Peruvian Supreme Court nearly two decades ago simply was not probative of whether the Peruvian judiciary is "so corrupt that it can[not] serve as an adequate forum" (*Ritz Carlton Hotel*, 666 F. App'x at 185 n.2 (alteration in original) (citation omitted)) for Plaintiffs today. JA15-16.

C. The District Court Applied The Correct Legal Standard

Plaintiffs briefly argue (at 28-29) that the district court also applied an "erroneous legal standard" because it purportedly asked "whether Peru's 'entire court system' is inadequate rather than whether the Cajamarca's courts would treat these Plaintiffs fairly." That characterization of the district court decision is remarkably inaccurate.

The district court explained that Plaintiffs' "contention . . . that corruption in the Peruvian judiciary renders Peru an inadequate forum . . . 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." JA15. The court reasoned that because a "theory of generalized corruption has 'not enjoyed a particularly impressive track record in our courts,'" it would "consider the general evidence Plaintiffs have submitted . . . *only as background for the more particularized allegations that Plaintiffs present to support the second theory*." JA15-16 (emphasis added) (citations omitted). And the court then spent several pages focused on these "more particularized allegations" to determine whether "Peru is an inadequate forum *for Plaintiffs*" and whether *Defendants* seek "to gain an *unlawful* advantage in Peruvian courts." JA16-21 (first emphasis added). The only reason the court even addressed generalized allegations of corruption is because *Plaintiffs* made them a centerpiece of their briefing. *See* Dkt. 43 at 7-9, 12-13 (FNC Opp.).[5] Accordingly, Plaintiffs' argument that the district court applied the wrong legal standard is specious. *See Tang*, 656 F.3d at 250-51 (rejecting argument

[5] Despite criticizing the district court, Plaintiffs rely on the same generalized allegations on appeal. *See, e.g.*, Br. 31 (relying on "Plaintiffs' sworn affidavits from multiple experts describ[ing] recent and continuing corruption at high levels of the government" that have nothing to do with Defendants).

that district court "elevated" "general" evidence of corruption over "specific" evidence).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT DEFENDANTS SATISFIED THEIR BURDEN

A. Standard Of Review

Once Plaintiffs' attempts to position this appeal as presenting a legal issue are cast aside, they are left asking this Court to second-guess the district court's determination that the Peruvian forum is adequate to adjudicate Plaintiffs' case. But this Court "do[es] not perform a *de novo* resolution of forum non conveniens issues." *Kisano Trade & Invest Ltd.*, 737 F.3d at 872 (citation omitted).[6] Rather, "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court." *Wilmot,* 712 F. App'x at 202-03 (citation omitted). The district court's decision "may be reversed only when there has been a clear abuse of discretion." *Id*. Particularly given the "lenient standard[] of review" (*Bhatnagar*, 52 F.3d at 1230), there is no basis to reverse the decision below.

B. The District Court Did Not Abuse Its Discretion In Finding Peruvian Courts To Be An Adequate Forum

As the district court recognized, the theory that foreign courts are too corrupt to be adequate has "not enjoyed a particularly impressive track record." JA15

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[6] To the extent Plaintiffs suggest that a de novo standard would apply to their "Section II" argument (*see* Br. 29 n.4), they are mistaken.

(quoting *Wilmot v. Marriott Hurghada Mgmt., Inc.*, No. 15-618-RGA-MPT, 2016 WL 2599092, at *5 (D. Del. May 5, 2016)). Because federal courts are quite understandably reluctant to declare a foreign judiciary inadequate on corruption grounds, they require a "powerful" and particularized showing that the corruption is so extreme that adjudication in the foreign forum would effectively equate to "'no remedy at all.'" *Tuazon*, 433 F.3d at 1179 (citation omitted). Indeed, Plaintiffs cite only two decisions where a district court has deemed an alternative forum too corrupt to be adequate. Br. 23, 38 (citing *Eastman Kodak* and *Daventree*).[7]

In contrast, there are dozens and dozens of decisions finding adequacy despite allegations of corruption. *See, e.g.*, *Jiangsu Hongyuan Pharm. Co. v. DI Glob. Logistics Inc.*, 159 F. Supp. 3d 1316, 1332 (S.D. Fla. 2016) (China); *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1073 (C.D. Cal. 2012) (Pakistan); *Palacios v. The Coca-Cola Co.,* 757 F. Supp. 2d 347, 358 (S.D.N.Y. 2010) (Guatemala); *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 338 (S.D.N.Y. 2008) (Egypt); *MBI Grp., Inc. v.*

[7] Both cases are readily distinguishable. In *Daventree*, the defendant was the sovereign itself, Azerbaijan had no independent judiciary (and the defendant's own expert had published an article saying as much), and the underlying lawsuit was about fraud and corruption of that government. 349 F. Supp. 2d at 756. In *Eastman Kodak*, the plaintiffs had presented credible evidence of corruption in Bolivia with respect to the same matter, which had resulted in the plaintiffs being imprisoned under "nightmarish" conditions and tried in abstentia, and the lawsuit was itself about the extortionate settlement plaintiffs were forced to enter into to secure their eventual release from prison. 978 F. Supp. at 1081,1086.

Credit Foncier du Cameroun, 558 F. Supp. 2d 21, 28-32 (D.D.C. 2008) (Cameroon); *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493, 500 (S.D.N.Y. 2007) (Russia); *Gonzales*,196 F. Supp. at 489 (Indonesia); *Stalinski v. Bakoczy*, 41 F. Supp. 2d 755, 762 (S.D. Ohio 1998) (Honduras); *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 983 (2d Cir. 1993) (Venezuela); *Banco Mercantil, S.A. v. Hernandez Arencibia*, 927 F. Supp. 565, 570 (D.P.R. 1996) (Dominican Republic). Most notably, courts have routinely rejected the argument that the Peruvian judiciary is inadequate on similar grounds. *See* JA18 (citing cases, including *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 (S.D.N.Y. 2002), *aff'd*, 414 F.3d 233 (2d Cir. 2003)); *see also Carijano*, 643 F.3d at 1226-27; *STM Grp., Inc. v. Gilat Satellite Networks Ltd.*, No. SACV 11-0093 DOC RZX, 2011 WL 2940992, at *5 (C.D. Cal. July 18, 2011).

Of course, each case must be decided on its own facts. But the record here does not support a finding that this is the "rare" case and, more importantly, it does not support the conclusion that the district court clearly abused its discretion in finding otherwise. Plaintiffs simply disagree with the district court's assessment of the evidence. Specifically, Plaintiffs focus on (i) the purported "history" of corruption in Peru (Br. 30-32); (ii) party-specific "evidence" regarding corruption in recent years (Br. 32-38); and (iii) the district court's reliance on other evidence regarding the Peruvian government and Defendants (Br. 38-42). As they did in the

district court, Plaintiffs overstate the significance of any actual "evidence" of corruption and understate the evidence and arguments that gravely undermine their allegations.

1. *The District Court Did Not Abuse Its Discretion In Declining To Rely On Old Corruption Allegations*

The bulk of Plaintiffs' "evidence" involved Defendants' alleged corruption of the Peruvian Supreme Court regarding an ownership dispute 18 years ago, during the infamous Fujimori regime. JA587 ¶¶ 9-11 (Vahlsing Decl.); JA598-620 (news articles); JA819-22 ¶¶ 25-33 (Vasquez Decl.); JA1075-77 ¶¶ 2-4 (Arbizu Decl.). But, as the district court explained, the "interim regime change and noted improvements" in the intervening decades make it implausible to infer from this evidence that the Peruvian court system is inadequate today. JA18.

Plaintiffs take issue with that finding because there were sworn affidavits "describing recent and continuing corruption at high levels of the government," and because multiple Peruvian Presidents were implicated in some sort of corruption scandal. Br. 31. Plaintiffs also argue that the evidence says something about Defendants' "willingness and ability to corrupt" and that, even though "the Fujimori era may be over, . . . Newmont's pattern of misconduct is not." Br. 30-31. But Plaintiffs' sworn affidavits described only the sort of generalized corruption (*i.e.*, having nothing to do with Defendants) that courts routinely reject and on which Plaintiffs claim not to rely. *See* JA804-06 ¶¶ 15-22 (Molleda Decl.); JA785-89

¶¶ 48-55 (Cruz Decl.). Moreover, as the district court found, "many of the instances [Plaintiffs' witnesses] cited were cases brought to light by the Peruvian government's own investigation and prosecution of the officials involved." JA16 n.8. As for Plaintiffs' allegations of corruption by former (or current) Peruvian Presidents, that says nothing about the adequacy of an independent Peruvian judiciary. JA887 ¶ 16 (Freyre Suppl. Aff.) ("the Judiciary is independent of the Legislative Power"). And, finally, Plaintiffs' incendiary *argument* about a "pattern" of misconduct by Defendants has no *evidentiary* support.

2. *The District Court Did Not Abuse Its Discretion In Finding Plaintiffs' "Evidence" Of Present-Day Corruption By Defendants To Be Rebutted And Unpersuasive*

Although it is difficult to tell from Plaintiffs' laundry list, the only "evidence" in the record of *Defendants*' purported "corruption of the Cajamarca judiciary" *today* consists of two declarations: one from Plaintiffs' Peruvian counsel (Vasquez) and the other from one of the Plaintiffs (Ysidora Chaupe).[8] *See* Br. 32-33; *see* JA813-23 (Vasquez Decl.); JA296-303 (Ysidora Chaupe Decl.). Although the district court was willing to take the "facts" alleged "at face value" (JA18-19), the source and veracity of the purported evidence is questionable at best.

[8] Contrary to Plaintiffs' intimation (at 33), the Molleda declaration includes no corruption allegations about Defendants at all. *See* JA799-811.

In any event, the only assertion of any "corruption" or "irregularities" involving the parties relates to (i) Plaintiffs' attempts to criminally charge individuals employed by Yanacocha, and (ii) Plaintiffs' criminal trial. On the first, the record includes translated versions of the Peruvian government's investigation of two of Plaintiffs' many attempts to bring unfounded criminal charges. *See* JA460-502. These detailed and well-documented investigations make clear that Plaintiffs' charges were by no means ignored; to the contrary, the failure to pursue charges "represents nothing more than local officials exercising prosecutorial and judicial discretion on how to expend resources." JA18-19.[9] As for Plaintiffs' criminal trial, the district court found any concerns "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. As the district court explained, "Plaintiffs were ultimately protected by the very judicial system they ask[ed the court] to deem inadequate." *Id.*

Plaintiffs try to minimize this inconvenient fact by distinguishing between Peruvian trial and appellate courts—seemingly suggesting that the concern here is

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[9] Other evidence in the record lends further support to that decision. As the district court noted, the extensive video evidence did not corroborate Plaintiffs' claims of violence *against* them; to the contrary, it showed *Plaintiffs*, "armed with machetes and clubs," attacking Yanacocha representatives. JA21 n.11. And the independent fact-finding mission found "no conclusive evidence relating to the use of force by police" against Plaintiffs "on August 11, 2011." JA21 (citation omitted).

limited to "Cajamarca trial courts." Br. 34-35, 37.[10] But, as Plaintiffs begrudgingly acknowledge (at 9 n.1), they have also prevailed against Defendants before the Cajamarca *trial* court. *See, e.g.*, JA528-34 (July 1, 2016 Crim. Div. of Appeals Judgment).[11] The reality is that, in the multiple lawsuits between the parties previously or now-pending in Peru, Plaintiffs have received favorable decisions from every level of the Peruvian court system. *See supra* at 4-6. Which leaves Plaintiffs arguing that they have not obtained any "affirmative" relief. Br. 9. Needless to say, the district court did not abuse its discretion in finding this virtually non-existent data set insufficient to counter the ample, objective evidence that Defendants do not have anything close to the power to corrupt the Peruvian judiciary that Plaintiffs like to claim.

A closer look at the actual "evidence" further undermines Plaintiffs' argument. Plaintiffs' Peruvian attorney focuses primarily on allegations of "irregularities" during the criminal trial, such as "insulting remarks" made by

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[10] Plaintiffs alternate between the different Peruvian courts when convenient. Because Plaintiffs' success before the Peruvian appellate courts and Supreme Court strongly undermines their assertion that those courts have been corrupted (or would be corrupted) by Defendants, they deem them irrelevant and ask this Court to focus solely on the trial courts. At the same time, Plaintiffs fault the district court for failing to give more credence to allegations of corruption by the Peruvian Supreme Court. *See* Br. 30-32. They cannot have it both ways.

[11] To explain this win, Plaintiffs told the district court that there just "happened to be one judge that rotated through [the trial court] that wasn't corrupt." Dkt. 90 at 30 (Tr.).

prosecutors, the judge's decision not to accept certain evidence or allow oral argument, the court's purported delay in providing Plaintiffs a copy of one of its judgments, and the judge canceling an inspection of the Disputed Land without notifying Plaintiffs' counsel. *See* JA816-17, JA819-22 ¶¶ 11-14, 25-33 (Vasquez Decl.). These assertions, even if true, provide no specific evidence of *corruption*. Indeed, the only firsthand observation of (even arguable) corruption is the attorney's assertion that, when she "worked in the Public Ministry of Cajamarca" in the 1990s, she "observed that [Yanacocha] gave gifts and financed initiatives for the benefit of the employees in the Public Ministry." JA819-20 ¶ 25. That the district court did not credit such a vague reference to conduct allegedly occurring nearly 20 years ago is hardly surprising and certainly not an abuse of discretion.[12]

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[12] The attorney's remaining allegations of corruption are assumptions or "word of mouth" type claims that can hardly constitute "evidence," let alone probative evidence. *See, e.g.*, JA819 ¶ 25 ("Apart from the central government, *it is known* that [Yanacocha] has great influence over the judiciary, especially with prosecutors and judges in Cajamarca." (emphasis added)); JA820 ¶ 26 ("*We believe* that [Yanacocha] *might* be influencing the judicial branch with its campaigns, to persecute defendants." (emphasis added)); JA822 ¶ 33 ("During both hearings, [Yanacocha] was represented by an attorney who is the son of an employee of the appeals division in Cajamarca. With this, *we can assume* that Yanacocha had privileged knowledge of the details of the process." (emphasis added)). And her unsubstantiated claims regarding "intimidation" and "surveillance" make the declaration even less credible. *See, e.g.*, JA822 ¶ 37 ("*I believe* that Forza, with the support of [Yanacocha], hired people to perform surveillance operations against persons who were critical of [Yanacocha]." (emphasis added)); JA823 ¶ 40 ("I also received anonymous threats. Since I started working with Grufides, I have even received death threats. Also, unknown people have sometimes entered my house

The same is true of Plaintiff Ysidora's claim that the trial judge in the criminal case "told [her] that the company gave an 'economic benefit' to the prosecutor to bring the case against [them]." JA298-99 ¶¶ 7-8. The district court found it "noteworthy" that the court itself "brought this instance of apparent corruption to Plaintiffs' attention." JA19. And, again, the court found its significance mitigated by "the success Plaintiffs experienced in the appellate courts." *Id.* Moreover, Defendants submitted a counter-declaration attesting that "neither [Yanacocha] nor Newmont Peru S.R.L. has provided any benefits to any member of the Peruvian judiciary or government official employed by the Peruvian court, or their family members, in connection with the litigations between [Yanacocha] and the Chaupe family." JA1071 ¶ 2 (Velarde Decl.).

In the end, it is important to distinguish Plaintiffs' rhetoric from actual evidence. There was simply no credible *evidence* in the record to substantiate Plaintiffs' *arguments* that Defendants have a "long track record of corrupting Peruvian courts" (Br. 35); that "Defendants have gone to significant lengths to corrupt Peruvian court proceedings" (Br. 36); or that they have a "long history of corrupting Peru's courts" (*id.*).

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when no one was there. *I also believe* that these aggressions are retaliation as a consequence of my work for Grufides." (emphasis added)).

3. *The District Court Did Not Abuse Its Discretion In Relying On Non-Judicial Evidence That Cast Further Doubt On Plaintiffs' Claims*

Plaintiffs also criticize the district court for considering evidence "unrelated to judicial corruption." Br. 38. Specifically, Plaintiffs challenge the district court's assessment that (i) the international awareness surrounding Plaintiffs' dispute with Yanacocha, (ii) the investigation commissioned by Defendants into the alleged abuses committed against Plaintiffs, (iii) the Peruvian government's suspension of Defendants' operations in the Conga mine, and (iv) the Peruvian government's various means of support to Plaintiffs, call into question the amount of influence Defendants actually have over the Peruvian government. *See* JA20-22. That argument has no merit.

The district court did not evaluate Defendants' purported influence over the Peruvian government in place of its analysis of Plaintiffs' particularized claims of corruption. Rather, the court considered this additional evidence after walking through the (limited) particularized evidence—taking a step back to consider, "[m]ore broadly," the gravamen of Plaintiffs' claim. JA20 ("The core premise of Plaintiffs' argument is that Defendants will go to any means to expand their mining operation . . . ."). Notably, it was *Plaintiffs* who argued that Defendants' alleged influence over the Peruvian government rendered Peru an inadequate forum. *See, e.g.*, Dkt. 43 at 7 (FNC Opp.) ("Since at least the commencement of the Yanacocha

mine operation in 1993, [Yanacocha] has exerted substantial influence over Peruvian officials."); *id.* at 7-8 ("Defendants' influence over the Peruvian government has also prevented Plaintiffs from obtaining adequate protection."); JA819 ¶ 23 ("the lack of action by the state shows the influence that [Yanacocha] has with very powerful people in the government"). This is yet another example of Plaintiffs relying on a broader range of evidence when it benefits them, but arguing that the district court grievously erred in doing the same to rule against them. The district court committed no error in looking to this additional evidence.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANTS' MOTION FOR PROTECTIVE ORDER AS MOOT

A. Standard Of Review

As Plaintiffs recognize (at 42), this Court's "standard of review of questions concerning the scope or opportunity for discovery is for abuse of discretion." *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 264 F.3d 344, 365 (3d Cir. 2001).

B. The District Court Did Not Abuse Its Discretion In Dismissing On FNC Grounds Without Discovery

Plaintiffs argue (at 42-46) that the district court abused its discretion both in "denying discovery," and in doing so without "any explanation." That argument is without merit.

As an initial matter, it is important to clarify the procedural history and what motion was actually pending before the district court for decision. The district court

did not "deny[] discovery" (Br. 43) in any formal sense because Plaintiffs never filed any discovery motion with the district court. Instead, over two months after Defendants filed the FNC motion, and after the motion had been fully briefed by the parties, Plaintiffs for the first time indicated that they intended to seek discovery for the purpose of exploring the adequacy of the Peruvian forum. JA955 (Dec. 2017 email). But Plaintiffs did not actually serve any discovery requests until January 16, 2018—three weeks before the scheduled hearing date. JA947-48 ¶ 6 (Romey Decl.). Defendants filed a motion for protective order. Dkt. 71. And, in response, Plaintiffs argued that discovery was necessary because Defendants had objected to their evidence. Dkt. 80. Only after reviewing all of the briefing and evidence, after holding the FNC hearing, and after indicating that it was going to reject Defendants' objections and consider all the record evidence, did the district court stay discovery and defer resolution of the pending motion. Dkt. 85. When the district court dismissed the case on FNC grounds, it denied Defendants' motion for protective order as "moot." JA31 (Order).

The district court's ultimate resolution of the discovery dispute falls comfortably within its broad discretion. Plaintiffs claim they sought to discover (i) communications between Defendants (or their Peruvian subsidiary) and "members of the Peruvian judiciary," and (ii) "prior allegations of and investigations into corruption and improper conduct by Defendants in Peru, including the *Castillo*

record." Br. 45. In fact, their discovery requests were vastly broader in subject matter (*e.g.*, seeking discovery regarding any employees of any Newmont entities who are relatives of any employees of the Peruvian judiciary), in time (*e.g.*, dating back to 1998), and in scope (*e.g.*, seeking information on Newmont-related entities and attorneys involved in litigation against Plaintiffs). Dkt. 67, Exs. A-D (Rule 30(b)(6) Dep. Notices).

As for the two requests Plaintiffs single out, Defendants directly addressed their concerns. Plaintiffs requested "[d]ocuments relating to any benefits, in kind or in cash, furnished directly or indirectly to members of the Peruvian Government and/or their family members." JA941. In response, Defendants submitted a declaration testifying, unequivocally, that they never "provided any benefits to any member of the Peruvian judiciary or government officials employed by the Peruvian court, or their family members in connection with any litigations . . . [involving] the Chaupe family." JA1071 ¶ 2 (Velarde Decl.). Plaintiffs also requested information relating to "all ex-parte communications" with "any Peruvian prosecutors, judges of the courts in Cajamarca, or any other members of the Peruvian judicial system." JA925. And Defendants responded with an expert declaration explaining that such *ex parte* communications are routine and "not prohibited or viewed in any way as improper in Peru." Dkt. 71 at 6 (PO Mot.) (quoting JA1065-66 ¶ 16). Finally, discovery regarding prior allegations of corruption—including the *Castillo* record (a

case that was closed in *2003*)—focused on the same decade-old allegations regarding corruption of the Peruvian Supreme Court that the district court found irrelevant to the question whether the Peruvian courts are an adequate forum today. JA18. In sum, the district court was well within its discretion in deciding that he could grant the FNC motion based on the existing voluminous record.

Plaintiffs argue that "[c]ourts in this Circuit frequently permit targeted FNC discovery." Br. 43 & n.9. Notably, however, only one of the cases cited even arguably involved discovery targeted at the question whether a foreign forum is so plagued by corruption that it cannot be considered an adequate forum. Given how easy it is to allege corruption, how rare it is for a foreign forum to be deemed inadequate on this basis, and how sensitive the inquiry, it makes sense that courts rarely need discovery on this topic. In any event, district courts do deny requests for discovery before granting FNC motions,[13] such decisions are squarely within the district court's discretion, and we are aware of no decision from this Court reversing

[13] *See, e.g., Transunion Corp. v. PepsiCo, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (upholding district court's protective order preventing further discovery pending its decision to dismiss on the grounds of FNC); *Beekmans v. J.P. Morgan & Co.*, 945 F. Supp. 90, 95 (S.D.N.Y. 1996) (denying discovery, dismissing action, and noting that "[t]he fact that this [FNC] motion is based on affidavits does not compel the conclusion that discovery should be granted"); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 64-65 (S.D. Tex. 1994) (denying "Plaintiffs[']attempt to delay the Court's ruling on the motions to dismiss [by] arguing that they need time for discovery on the *forum non conveniens* issue").

a district court on this basis. *Cf. Moskovits v. Moskovits*, 150 F. App'x 101, 102 (2d Cir. 2005) (rejecting argument "that the district court erred in ruling on the defendants' motion to dismiss on the basis of *forum non conveniens* without allowing limited discovery" and holding that "it was not an abuse of discretion for the district court to decide the defendants' [FNC motion] on the basis of affidavits").

Plaintiffs thus rely on *Castillo v. Newmont*, No. 02-CA-1772, 2003 WL 22677806 (Colo. App. Nov. 13, 2003), *as modified on denial of rehearing* (Dec. 24, 2003) (JA664-96)—a decision by an intermediate appellate court in Colorado. That case is readily distinguishable. In *Castillo*, the Colorado trial court had decided the FNC motion without giving the plaintiffs *any* opportunity to respond and without considering *any* of the relevant factors. JA695. Also, the "doctrine of forum non conveniens ha[d] only the most limited application in Colorado courts," JA693 (citation omitted), given the State's "constitutional guarantee of access to the courts for 'every person,'" *id.* (quoting Colo. Const. art. II, § 6). In the words of the *Castillo* court, there was simply "no indication that the trial court considered pertinent forum non conveniens considerations." JA694. The same certainly cannot be said of the multiple rounds of briefing, extensive hearing, considerable record, and 28-page decision here.

Plaintiffs' further contention that the district court abused its discretion by failing to provide an "explanation" for "denying discovery" is equally without merit.

Br. 43. For one thing, the district court did provide an explanation for denying the only pending motion (*i.e.*, Defendants' motion for protective order): it was "moot" because the case had been dismissed on FNC grounds. JA31 (Order). More fundamentally, though, a district court is not required to provide a written explanation when ruling on a discovery motion. Federal Rule of Civil Procedure 52(a)(3) makes this explicit: "[T]he court is not required to state findings or conclusions when ruling on [any] motion, unless these rules provide otherwise." *See Ambrose v. Krause Publ'ns, Inc.,* 354 F. App'x 711, 713 (3d Cir. 2009). Plaintiffs identify no such rule. Nor do they cite a single decision from this Court reversing a district court's discovery ruling merely because it lacked an explanation.[14] And, for all the reasons set forth above, the record makes it abundantly clear that discovery was not needed.

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[14] They instead rely on two Fifth Circuit cases that do not announce the broad rule Plaintiffs seek. *Bravo Express Corp. v. Total Petrochemicals & Ref. USA*, explains that "our precedent" (*i.e.*, Fifth Circuit precedent) "requires district courts to provide reasoning when they decline to issue a subpoena or when they quash a subpoena." 613 F. App'x 319, 324 (5th Cir. 2015). The district court did neither here. *Wiwa v. Royal Dutch Petroleum Co.*, in turn, says only that denial of a motion without explanation "*may* constitute an abuse of discretion." 392 F.3d 812, 818-19, 822 (5th Cir. 2004) (emphasis added). And the Fifth Circuit itself has declined to find an abuse of discretion on this basis. *See, e.g.*, *Shelton v. Fox*, No. 09-40264, 2010 U.S. App. LEXIS 11016, at *11 (5th Cir. May 28, 2010) (affirming district court's denial of plaintiff's discovery motion even though "the magistrate judge[] fail[ed] to provide reasons").

IV. PLAINTIFFS' REMAINING ARGUMENTS DO NOT WITHSTAND SCRUTINY

In the final pages of their brief, Plaintiffs raise three additional arguments for reversal or remand. First, Plaintiffs argue that Peru is not an adequate alternative forum as a matter of law because Peruvian courts will purportedly be skeptical of some of Plaintiffs' evidence and "may" reject that evidence. Br. 47-50. Second, Plaintiffs contend the district court "erred" in not deciding whether Plaintiffs' claims would be barred by a Peruvian statute of limitations nor did it condition dismissal on a limitations waiver. Br. 50-51. And, third, Plaintiffs ask this Court to remand in light of "later events" that, they claim, should change the district court's adequacy determination. Br. 51-52. None of these arguments withstand scrutiny.

A. The District Court Did Not Abuse Its Discretion In Finding That Peruvian Evidentiary Rules Do Not Render The Forum Inadequate

In the district court, Plaintiffs included two sentences—in a section of their opposition addressing "practical obstacles" under the private interest factors—arguing that "Peruvian courts do not allow immediate family members to testify regarding another family member's claims" and that this "would substantially prejudice Plaintiffs—who are all members of the same family—were they forced to litigate this action in Peru." Dkt. 43 at 16 (FNC Opp.). On appeal, Plaintiffs argue that the district court abused its discretion in not declaring the Peruvian forum *inadequate* based solely on that singular "practical obstacle" which "*may* bar

Plaintiffs from relying" on that evidence. Br. 50 (emphasis added). Plaintiffs misstate both Peruvian law and the law that governs the FNC analysis.

Plaintiffs assert that "Peruvian courts may not accept the testimony of victims or their relatives"; that "*parties* [generally] cannot testify in person in their own cases"; and that their "main source of evidence" is "primary eyewitness testimony" from Plaintiffs themselves and other "closely related" family members. Br. 48-49. But what Plaintiffs carefully obscure is the fact that "every person included as Plaintiff . . . is able to give their declaration as part of exercising their defense right, even if some of those persons are related to each other." JA890 ¶ 28 (Freyre Suppl. Aff.). In other words, the "primary eyewitness testimony" of *all of the Plaintiffs*—consisting of seven members of the Chaupe family—will be provided to the Peruvian court. Plaintiffs' argument thus comes down to the fact that there will be no *live* testimony from Plaintiffs, or written testimony of other familial witnesses, and that a Peruvian court *may* discount Plaintiffs' testimony as self-serving.[15]

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[15] The absence of live testimony hardly distinguishes Peru from any other civil law country. *See GreenEarth Cleaning, L.L.C. v. Collidoue Invest France*, No. 09-0329-CV-W-GAF, 2009 WL 1766716, at *4 (W.D. Mo. June 23, 2009) (finding that private factors favor dismissal even though "the Tribunal in France rarely hears live testimony from witnesses"). Nor does a law codifying the common sense reality that a fact-finder may question the credibility of familial testimony render Peruvian courts unique.

At bottom, Plaintiffs are arguing that the Peruvian forum is inadequate because its evidentiary rules are not as favorable as those in the United States. But it is well-settled that "[a]n adequate forum need not be a perfect forum," *Ritz Carlton Hotel*, 666 F. App'x at 185 n.2 (quoting *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001)), and that the parties need not "enjoy . . . all the benefits of an American court," *DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 796 (5th Cir. 2007) (quoting district court decision adopted in full). Specifically, the fact that a foreign country's "evidence-gathering tools may be different in timing and scope from those available here does not make [it] an inadequate forum." *Hidrovia v. Great Lakes Dredge & Dock Corp.*, No. 02 C 5408, 2003 U.S. Dist. LEXIS 7098, at *5 (N.D. Ill. Apr. 25, 2003); *see also Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 383 (S.D.N.Y. 2006) ("[T]he fact that German courts may utilize different procedures regarding evidence does not mean that *forum non conveniens* is inappropriate."); *Howden N. Am. Inc. v. ACE Prop. & Cas. Ins. Co.*, 875 F. Supp. 2d 478, 489-91 (W.D. Pa. 2012) (holding that the "United Kingdom qualifies as an adequate alternative forum" despite the plaintiff's argument that "English courts do not have a procedure for [defendant] to obtain" the "documentary or testimonial evidence from . . . underlying [asbestos] claimants"). Indeed, "[i]t would be inappropriate—even patronizing" for an American court to "denounce . . . legitimate

policy choice[s]" reflected in foreign evidentiary rules "by holding that" a foreign forum is "inadequate" for that reason. *DTEX*, 508 F.3d at 797 (citation omitted).

Nor do the evidentiary rules at issue here come anywhere close to presenting the "rare circumstances . . . *where the remedy offered by the other forum is clearly unsatisfactory*." *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 (3d Cir. 2010) (alteration in original) (quoting *Piper Aircraft*, 454 U.S. at 254 n.22).[16] Plaintiffs argue that this is the rare case because "the only witnesses to the many events are likely to be Plaintiffs and their family members." Br. 50. But they ignore the fact that Plaintiffs *can* present their written testimony. JA890 ¶ 28 (Freyre Suppl. Aff.). They ignore the extensive video footage of the incidents in question. JA21 n.11 ("Video submitted by the parties or otherwise accessible within the public domain does not show instances of violence against Plaintiffs."). They ignore the international observers, media coverage, and other reports that have covered the challenged acts, as well as the neutral third party witnesses in Peru

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[16] Plaintiffs' reliance on the purported "express holding[]" (Br. 50) in *Eurofins* is misplaced. This Court affirmed the district court's dismissal on FNC grounds and found the adequacy issue—involving whether evidence from non-parties would be accessible—"moot" because the relevant witnesses were in fact parties. 623 F.3d at 161. *Lacey v. Cessna Aircraft Co.*, in turn, remanded for the district court to consider whether "essential" evidence would be inaccessible because it was in the possession of non-parties *in the United States* and because foreign law would provide no means to access such evidence. 932 F.2d 170, 189 (3d Cir. 1991). Here, the allegedly "essential" evidence is Plaintiffs' own testimony, which is located in Peru, and which can be submitted to a Peruvian court.

whose testimony would be critical to establishing Plaintiffs' claims. JA20-21. And they ignore the fact that Plaintiffs have already filed multiple lawsuits in Peruvian courts seeking to adjudicate claims based on the same events. *supra* at 4-6. In short, the district court did not abuse its discretion in concluding that these evidentiary rules did not render the Peruvian court system "inadequate" to adjudicate Plaintiffs' claims. JA27.

B. The Absence Of An Explicit Statute Of Limitations Waiver Condition Does Not Require A Remand

Plaintiffs argue (at 50-51) that the district court erred by not requiring Defendants to waive their statute of limitations defenses as a condition of dismissal. In the district court, Defendants did not oppose the imposition of reasonable conditions. Dkt. 51 at 10 (FNC Reply). And the district court imposed three conditions, including conditioning dismissal on the Peruvian court accepting jurisdiction. JA31. To the extent there is any ambiguity regarding Defendants' position or the district court's order, Defendants now stipulate that they will "waive . . . any statute of limitations defense that would not have been available had the court retained jurisdiction" (Br. 50-51), and that Plaintiffs could seek relief before the district court if they fail to fulfill that assurance.

This Court recently found such a waiver implicit in a district court's order under similar circumstances. *See Wilmot*, 712 F. App'x at 204-05 (finding waiver of statute of limitations condition implicit in district court order where the defendant

"view[ed] such conditions as implicit" and asserted that the plaintiff "could seek relief before the District Court if [it] failed to fulfill its aforementioned assurances"); *see also Trotter v. 7R Holdings*, LLC, 873 F.3d 435, 443 (3d Cir. 2017) ("[A] reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel." (citation omitted)). The Court should do the same here. Alternatively, the Court should modify the order on appeal to include the stipulated condition. *See Leon*, 251 F.3d at 1316 (modifying dismissal order on appeal to attach certain conditions). Either way, no remand is required.

C. The Recent Administrative Resolution Does Not Warrant A Remand Either

Plaintiffs have requested judicial notice of an Administrative Resolution issued by the Peruvian government on July 16, 2018, which is aimed at "improv[ing] the administration of justice" in Peru, by instituting a 90-day "state of emergency" for the judicial branch. Appellants' RJN, Ex. 1 (filed Aug. 15, 2018). Plaintiffs argue (at 51-52) that a remand is required for the district court to consider this new evidence. Plaintiffs' argument is unfounded for several reasons.

First, and most importantly, the district court already considered and rejected generalized allegations of corruption with respect to the Peruvian judiciary. *See* JA16 n.8. Like other courts, the district court found such generalized allegations insufficient. *See* JA16; *see also Wilmot*, 2016 WL 2599092, at *5 ("The alternative forum is too corrupt to be adequate does not enjoy a particularly impressive track

record." (quoting *Eastman Kodak*, 978 F. Supp. at 1084)). And, notably, Plaintiffs insist on appeal that they are not questioning the adequacy of the Peruvian judiciary as a whole. Br. 28-29. Yet, that is precisely the sort of evidence they seek to introduce with the Administrative Resolution—and the result should be the same.

Second, Plaintiffs have presented *no* new evidence more specific to Defendants or to Plaintiffs' case. The Administrative Resolution says nothing about the Cajamarca trial court (which is now Plaintiffs' primary focus). Nor does it say anything about Defendants or Yanacocha. And the fact that Plaintiffs obtained favorable rulings at the appellate and Supreme Court level—during the same time the alleged corruption prompting the resolution took place—suggests that it had (and would have) no adverse impact on Plaintiffs.

Third, the Administrative Resolution is, if anything, further evidence that the Peruvian government is focused on weeding out corruption. *See* JA16 n.8 (finding it "noteworthy" that many instances of corruption "were cases brought to light by the Peruvian government's own investigation and prosecution of the officials involved"); Appellants' RJN, Ex. 5 at 1 ("It is imperative to adopt urgent and immediate measures to restore the normal, efficient, effective, and transparent development of judicial activities . . . ." (quoting the Administrative Resolution)). And the existence of corrupt actors within a country's judicial system is, unfortunately, not uncommon. *See Stalinski*, 41 F. Supp. 2d at 761 ("The American

justice system has not been wholly free from bribery either . . . ."); *Eastman Kodak*, 978 F. Supp. at 1086 ("[C]orruption can and does manifest itself in every court system, including our own."); *cf. Leon*, 251 F.3d at 1313 n.3 (declining to find Ecuador to be an inadequate forum despite "military coup" that had recently "overthrown the democratically elected president").

Finally, the "state of emergency" is set to last for "90 days" (*i.e.*, until October 14, 2018) and will end well before this Court issues a decision on Plaintiffs' appeal. Appellants' RJN, Ex. 1. As such, the Peruvian judiciary will no longer be subject to the Administrative Resolution by the time Plaintiffs file their claims in Peru. Moreover, Plaintiffs present no evidence that the declared state of emergency would have any impact on the regular course of judicial proceedings.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Dated: September 21, 2018

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COMBINED CERTIFICATIONS

1. CERTIFICATE OF BAR MEMBERSHIP

I, Melissa Arbus Sherry, counsel for Appellees Newmont Mining Corporation, Newmont Second Capital Corporation, Newmont USA Limited, and Newmont Peru Limited, hereby certify pursuant to Rule 23.3(d) that I am a member in good standing of the bar of the Court of Appeals for the Third Circuit.

2. CERTIFICATE OF WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), Local Rule 32.1, I hereby certify that the foregoing brief contains 12,787 words as counted using the word-count feature in Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 and a 14-point Times New Roman font.

3. CERTIFICATE OF IDENTICAL BRIEFS

Pursuant to Local Rule 31.1(c), I certify that the text of the electronic and hard copy forms of this brief are identical.

4. CERTIFICATE OF VIRUS CHECK

Pursuant to Local Rule 31.1(c), I certify that a virus check of the electronic PDF version of this brief was performed using McAfee Endpoint Security, which was updated August 22, 2018, and according to that program no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I caused a copy of the foregoing Principal Brief of Appellees to be served by electronic means, via the Court's CM/ECF system, on all counsel registered to receive electronic notices.

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