IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 17-1315-GAM
v.	)	
	)	
NEWMONT MINING CORPORATION, *et al.*,	)	
	)	
Defendants.	)	

ANSWERING BRIEF OF DEFENDANTS NEWMONT MINING CORPORATION, NEWMONT SECOND CAPITAL CORPORATION, NEWMONT USA LIMITED, AND NEWMONT PERU LIMITED IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Of Counsel:

LATHAM & WATKINS LLP
Michael G. Romey
Monica R. Klosterman
Faraz R. Mohammadi
355 South Grand Avenue, Suite 100
Los Angeles, California 90071-1560
Telephone: (213) 891-7591
Facsimile: (213) 891-8763
michael.romey@lw.com
monica.klosterman@lw.com
faraz.mohammadi@lw.com

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Elena C. Norman (No. 4780)
Robert M. Vrana (No. 5666)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253
enorman@ycst.com
rvrana@ycst.com

Dated: November 22, 2017

Counsel for Defendants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

RULES

I. NATURE AND STAGE OF THE PROCEEDINGS

On September 15, 2017, Plaintiffs Máxima Acuña-Atalya, Daniel Chaupe-Acuña, Jilda Chaupe-Acuña, Ysidora Chaupe-Acuña, Elias Chavez-Rodriguez, M.S.C.C., and Maribel Hil-Briones ("Plaintiffs") filed their Complaint for Damages and Equitable Relief ("Complaint"). On October 16, 2017, Defendants Newmont Mining Corporation ("NMC"), Newmont Second Capital Corporation, Newmont USA Limited, and Newmont Peru Limited ("Defendants") filed a Motion to Dismiss the Complaint on the Grounds of *Forum Non Conveniens* ("*FNC* Motion") and a Motion to Dismiss the Complaint as to Plaintiff M.S.C.C. Pursuant to Federal Rule of Civil Procedure 12(b)(6). On November 1, 2017, Plaintiffs filed their Motion for Preliminary Injunction ("PI Motion").

II. SUMMARY OF ARGUMENT

This Court should first decide the pending *FNC* Motion. But, if the Court ultimately considers Plaintiffs' PI Motion, it should be denied. Plaintiffs have not met their high burden to obtain the extraordinary relief of a preliminary injunction. They have not established a likelihood of success on the merits. Many of the alleged wrongful acts are expressly permitted and, indeed, required by Peruvian law. And, the other purported wrongdoing is flatly refuted by Defendants' evidence, including video evidence demonstrating that it is only *Plaintiffs* who have resorted to violence. Plaintiffs are also unlikely to succeed because the named Defendants are not liable for the alleged wrongful acts of the Peruvian entities, and because many of the claims are the subject of multiple parallel proceedings in Peru. Duplicative adjudication in a U.S. court raises serious comity concerns. Nor have Plaintiffs come close to establishing irreparable injury. And, the balance of equities and public interest weigh strongly against injunctive relief. A preliminary injunction would gravely injure Defendants by prohibiting them from protecting their property from Plaintiffs' trespass in the manner required by Peruvian law and would allow Plaintiffs to expand their alleged claims over additional parcels of land. At bottom, all of Plaintiffs' claims arise out of a dispute about the ownership of land in Peru, between Peruvian citizens and entities, which are already the subject of multiple proceedings in Peruvian courts.

All the reasons that warrant dismissal of this case on *forum non conveniens* grounds counsel strongly in favor of denying the extraordinary relief Plaintiffs seek in the PI Motion.

III. INTRODUCTION

Plaintiffs have put this Court in the impossible position of adjudicating, at this very early stage, a highly fact-specific dispute where the relevant documents and witnesses are located in a foreign country. Many of the relevant documents are in Spanish, and some of the witnesses do not speak English. There is no indication that the witnesses will be able to travel to the Delaware court to provide testimony, particularly on an expedited schedule. Moreover, these issues are already the subject of several pending proceedings in the Peruvian courts. The Peruvian government, through its courts, should be given the opportunity to address the dispute that arose within its own borders between its citizens and Peruvian entities.

Plaintiffs submitted eight declarations setting forth alarming allegations of harassment and violence against Plaintiffs by alleged agents of Defendants. No doubt the Court is troubled by these serious allegations. But despite Plaintiffs' own say-so, there is simply no basis in fact for these allegations. Plaintiffs omitted key facts and created or exaggerated others. Defendants' evidence, including six declarations and six videos, demonstrate that no Newmont entity or agent engaged in any violence against any Plaintiff and that Minera Yanacocha S.R.L. ("MY") has only exercised the remedies legally required to preserve its rights under Peruvian law.

The Complaint and PI Motion seek to hold U.S. corporate parents liable for the acts of their foreign subsidiaries. Indeed, Plaintiffs spend the bulk of their motion on the issue of Defendants' "agency liability" for the alleged acts of Newmont's subsidiaries, MY and Newmont Peru S.R.L. Plaintiffs' arguments are laden with specific factual questions intersecting with complex legal issues that raise significant doubt as to Defendants' liability, and the PI Motion itself raises serious international comity concerns. Fortunately, the Court need not enter this minefield—even if it ultimately decides the PI Motion. Plaintiffs have failed to establish that the Peruvian entities have acted in any way that would merit injunctive relief, whether against themselves (if they were named Defendants) or against their parent corporations.

A full review of the evidence shows that Plaintiffs are unlikely to succeed on the merits and will not suffer irreparable harm if the PI Motion is denied. Defendants, in contrast, will be harmed by an injunction that would prevent Defendants from fully protecting their property interests. Further, granting the PI Motion is not in the public interest, which supports respecting ongoing proceedings in foreign countries. There is no reason to grant the PI Motion under these extraordinary circumstances. Rather than wade into a complex factual dispute, this Court should instead permit Peru to exercise its authority and grant Defendants' pending *FNC* Motion. At the least, this Court should deny the PI Motion.

IV. STATEMENT OF FACTS

A. Newmont's Corporate Structure

MY and Newmont Peru S.R.L. are foreign subsidiaries, with NMC as the ultimate parent corporation. (Ex. 1,[1] ¶ 2.) While NMC requires all of its subsidiaries to follow human rights standards, it does not exercise day-to-day control over how MY handles its security or MY's response to Plaintiffs' trespasses on MY property. (*Id.*, ¶ 15.) Certain strategic decisions relating to MY's responses are elevated to the regional leadership team, which is comprised of representatives of MY, as well as some Newmont employees. (*Id.*) While the regional leadership team offers collaborative, strategic advice, MY remains the final decision maker. (*Id.*) Further, MY itself hired and manages its contractor, Securitas, and entered into the MOU with the National Police ("PNP"). (D.I. 27, Exs. 36, 38.)

B. MY's Acquisition of the Peruvian Property in Dispute

In 2001, MY acquired two large, separate parcels of land near the MY mine. (Ex. 1, ¶ 3; Ex. 1A (showing boundaries of "Northern Parcel" and "Southern Parcel").) This land was historically farmed by local *campesinos* (or farmers) who, under Peruvian law, hold title to the land in common and, under *campesinos* custom, individually possess portions of the land. (*Id.* ¶ 3.) In 1995 and 1996, Minas Conga, SRL ("Minas Conga"), another Peruvian mining company,

[1] Citations to "Ex.", without any preceding docket number, are to exhibits to the Declaration of Faraz R. Mohammadi, filed contemporaneously with this brief.

purchased these two parcels from the Sorochuco *campesino* community and from the individual possessors in accordance with Peruvian law and *campesino* customs. (*Id.*) MY took title and possession of this land when it acquired the assets of Minas Conga. (*Id.*)

The land in dispute between the Chaupe family (the "Chaupes") and MY is located within the parameters of these two parcels, straddling both. (*See id.*; Ex. 1A). While the Chaupes treat the land as a single tract that they call "Tragadero Grande," it actually consists of portions of the two legally distinct parcels. Photographs of the area are included in Ex.1A .

After it acquired the two parcels, MY began preliminary mining activities (the "Conga Project"). (Ex. 1, ¶ 5.) It constructed roads and exploration sites, and in accordance with Peruvian Mine safety laws, placed checkpoints on its property to control access. (*Id.*) From at least 2001 until May 2011, Plaintiffs were not present on the property. (*Id.* ¶ 6; Ex. 10, ¶ 2.)

C. Plaintiffs' Attempts to Usurp the Property

1. Peruvian Law Regarding Trespass and Possessory Defense

Peruvian law provides certain remedies when the owner of a property discovers that an individual has trespassed upon the property. (Ex. 11, ¶ 9.) One such remedy is an out-of-court possession defense, where the owner must take action, known as a "possessory defense," within 15 days of learning of the trespass. (*Id.* ¶ 12.) The possessory defense requires the owner to take reasonable, proportionate action to remove the perpetrator from the property, including removing any crops or structures. (*Id.* ¶¶ 15-16.) Although the police and public prosecutor are notified and may seek to participate or observe, the owner of the land is not required to seek assistance from them. (*Id.* ¶ 23.) If a possessory defense is not used to remove the trespasser from the property within 15 days, the trespasser is permitted to remain on the property. (*Id.* ¶ 34.) 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 the new trespass. (*Id.* ¶ 17.) If the owner fails to exercise a possessory defense, its only remedy is to file suit in court to obtain a declaration that it owns the land and to evict the trespasser. (*Id.* ¶ 34.) Unlike the speedy remedy of unlawful detainer in the United States, this

process usually takes many years. (*Id.*)

MY has been forced to employ the procedure of possessory defense on a regular basis. (Ex. 1, ¶ 14.) MY owns large areas of land in and around its mine sites, many of which are remote and sparsely inhabited. (*Id.* ¶ 13.) It is common for individuals to enter these lands and attempt to occupy and use them for their own benefit to acquire possessor rights. (*Id.*) As Peruvian law allows and requires, when MY learns of an incursion, it promptly meets with the trespassers, directs them to leave MY property, and returns the property to its previous condition (*e.g.*, pulling out crops, removing or erasing improvements, etc.). (*Id.*) In almost all of the hundreds of such instances, the possessory defense was resolved peacefully, without confrontation or resistance on the part of the trespassers. (*Id.*)

2. Plaintiffs' Initial Trespass on MY's Northern Parcel

In May 2011, Jamie Chaupe, husband of Plaintiff Maxima, appeared on the northern portion of "Tragadero Grande." (Ex. 10, ¶ 3; Ex. 1, ¶ 7.) Jamie left after a peaceful dialogue with MY's representatives, but then returned along with other members of the family in August 2011. (Ex. 10, ¶ 3; Ex. 1, ¶ 9.) They occupied and built a small hut on the Northern Parcel. (Ex. 1, ¶ 9.) Over several days, MY attempted dialogue to get the family to leave; however, they refused, and attempts to evict them were unsuccessful.[2] (*Id.*)

Since August of 2011, the Chaupes have illegally occupied this part of the Northern Parcel, building a house and farming the land. (*Id.*) Because of the intense, but unrelated, controversy over the Conga Project during the same time-period, MY decided it would not interfere with the activities of the Chaupes on the Northern Parcel—pending a final judicial resolution of the parties' rights. (*Id.*, ¶ 10.) Consequently, despite the fact that the area occupied by the Chaupes in the Northern Parcel is located in the middle of MY's mining properties, MY

[2] The Chaupes have repeatedly claimed (including in their declarations in support of the PI Motion) that MY and the PNP treated them improperly during this August 2011 incident. But, testimony from MY security personnel who were present contradict these statements and assert that it was the Chaupes who acted violently. (*See* Ex. 13, ¶ 7.)

allows the Chaupes access to and from the entire approximately 12 hectares of the Northern Parcel that they claim is theirs and otherwise leaves them undisturbed.[3] (Ex. 1; ¶ 10; Ex. 10, ¶ 3.) MY has publicly stated this position and has repeatedly communicated it to the Chaupes. (Ex. 1, ¶ 10; Ex. 2; Ex. 8, ¶ 6.) Relations between the Chaupes and MY remained largely amicable between 2011 and 2015. (Ex. 1, ¶ 11; Ex. 10, ¶ 3.)

3. Plaintiffs Repeatedly Trespass onto MY's Southern Parcel

Not content to remain on the Northern Parcel pending judicial resolution of the parties' rights, beginning in 2015, the Chaupes attempted to extend their occupation of the Northern Parcel into the Southern Parcel. (Ex. 1, ¶ 12; Ex. 10, ¶ 4.) Most of these incursions have involved planting crops. (Ex. 1, ¶ 12.) In one instance, the Chaupes built a foundation for a new structure. (*Id.*) They have also built guinea pig huts on the Southern Parcel. (Ex. 1, ¶ 12; Ex. 1A (showing locations of Plaintiffs' incursions); Ex. 10, ¶ 12.)

To protect its interests, MY has exercised its right of possessory defense in each instance of Plaintiffs' trespass on the Southern Parcel. (Ex. 10, ¶¶ 4-5; Ex. 11, ¶ 12; Ex. 1, ¶ 14.) When Plaintiffs build a structure or plant crops on the Southern Parcel, MY notifies the police and prosecutor of the trespass and its intention to exercise a possessory defense.[4] (Ex. 10, ¶ 9.) MY also prepares a plan consistent with the Voluntary Principles on Security and Human Rights and holds a security briefing to ensure a peaceful defense. (Ex. 8, ¶ 5; Ex. 10, ¶ 6; Ex. 1, ¶ 16.) MY personnel enter the Southern Parcel to remove the crops or structures and otherwise to return the property to its original condition. (Ex. 1, ¶ 12-13.) Unarmed security personnel accompany these workers and must wear helmets and carry shields, as Plaintiffs have attacked the personnel

[3] Plaintiffs do not continuously occupy this land, with days or weeks passing with no one in residence. (Ex. 8, ¶ 2.) The family owns a house in the nearby town of Amarcucho, and they also frequently occupy a house in Cajamarca. (*Id.*) It is clear that the Chaupes do not rely on "Tragadero Grande" for their subsistence. (*Id.*)

[4] MY does not control the PNP or direct their activities. (Ex. 10, ¶ 6.) The MOU referenced in Plaintiffs' Exhibit 38 is not to the contrary. The MOU states only that the PNP will provide certain security services to MY; MY will provide logistical support; and the PNP will be paid for their services. (D.I. 27, Ex. 38.) In any event, since at least 2015, the PNP has not been involved with any MY interactions with the Chaupes. (Ex. 10, ¶ 6.)

with rocks, sticks, and even a machete. (Ex. 8, ¶ 5; Ex. 10, ¶ 8; Ex. 1, ¶ 16.) They form a human line to protect the workers while they remove the crops or structures, and promptly leave afterwards. (Ex. 10, ¶ 11; Ex. 1, ¶ 16.) When guinea pigs (treated as livestock in Peru) are present on the trespassed property, MY removes them prior to tearing down their habitat and transports them alive to the care of the public prosecutor. (Ex. 10, ¶ 12.) In the course of these possessory defenses, no latrine has ever been destroyed, no animals have been killed or injured, and no force has been exerted against any of the Plaintiffs. (Ex. 8, ¶ 5; Ex. 10, ¶ 10; Ex. 10B-G (videos[5] showing possessory defenses and aggression by Plaintiffs); Ex. 1, ¶ 14.)

Defendants have submitted five declarations from individuals present at the possessory defenses, including those described in Plaintiffs' declarations. (Exs. 8, 10, 13, 15, 17.) Each individual read the declarations that the Chaupes submitted with their PI Motion, in which the family claims they have been attacked and abused by MY or its contractors during these incidents. Each declarant denies the claims asserted by the Chaupes. Instead, the declarants uniformly testify that it is the Chaupes who have engaged in violence directed at MY personnel and contractors. (*Id.*)

D. Access to and Surveillance of the Disputed Property

As noted above, for safety and security reasons, and as required by Peruvian mine safety law, MY has installed simple one-armed security gates at locations along the roads it built in the area of the Conga Project. (Ex. 10, ¶ 14; Ex. 10H (pictures of typical gates); Ex. 8, ¶ 3; Ex. 1, ¶ 5.) MY has a procedure for the members of the surrounding community, including the Chaupes, to provide identification before passing through. (Ex. 8, ¶ 3; Ex. 10, ¶¶ 14-15.) MY has explained this procedure to the Chaupes and told them that they are free to come and go as long as they follow it. (Ex. 8, ¶ 3.)

---

[5] To guarantee transparency, MY videotaped most of these possessory defenses in their entirety and, in one instance, journalists were present. We have provided the Court with representative footage of six of the possessory defenses, with additional footage available to the Court upon request. (Ex. 10, ¶ 10.)

The only times that the Chaupes had difficulty proceeding through the checkpoint was when: (1) a new security guard did not recognize them and they refused to provide identification or (2) the Chaupes were accompanied by visitors who refused to provide identification. (Ex. 8, ¶ 3.) The Chaupes have the direct phone number of high-ranking MY executives who they can call for immediate authorization of entry if they do not have their identification with them. (Ex. 8, ¶ 3; Ex. 10, ¶ 15.) Further, there is no ability to arrest or "detain" anyone since there is only one security guard at the gate and he is unarmed. (Ex. 10, ¶ 14.) In short, if someone refuses to provide identification at the gate, the only action that is taken is that he is not permitted to enter through the road. (*Id.*)

Similarly, cameras were placed on a tower near the boundary with the Southern Parcel property after protestors demonstrating against the Conga Project burned down structures on an adjacent alpaca farm. (*Id.*, ¶ 13.) Tellingly, Plaintiffs have installed their own cameras on the property, and journalists are monitoring the situation, but there is no video evidence of any attacks on Plaintiffs. (Ex. 10, ¶ 7.)

E. Legal Proceedings Between the Parties in Peru

The dispute between MY and the Chaupes has spawned a multitude of criminal and civil lawsuits in the courts of Peru. (Ex. 1, ¶ 17.) There was a criminal action brought against the Chaupes for their original August 2011 trespass, which has been resolved. (*Id.*, ¶ 19.) There were also four civil lawsuits filed by both sides, all of which are still pending.[6] (*Id.*, ¶ 21.)

MY pressed charges against certain members of the Chaupe family for criminal trespass for their original August 2011 trespass. (*Id.*, ¶ 19.) MY requested a criminal prosecution because of the possibility, under Peruvian procedure, of obtaining a final decision and order of eviction more quickly than if the matter were pursued solely through a civil case. (*Id.*) The

[6] There have numerous requests by the Chaupes to public prosecutors to press charges against MY whenever it engages in a possessory defense of the Southern Parcel. (Ex. 1, ¶ 18.) All of these requests have been denied, including one that was recently upheld in a written decision by the supervising court. (*Id.*; Ex. 4.)

objective was to evict the Chaupes, not seek jail time. (*Id.*) The trial court found that certain members of the Chaupe family were guilty, but the Peruvian Supreme Court ultimately concluded that it could not identify which family members committed the violence required for a conviction.[7] (*Id.*)

Two of the pending Peruvian civil court proceedings were brought by MY in 2015 in the Civil Courts. (*Id.*, ¶ 22.) The first is a lawsuit seeking a judicial determination that MY owns and possesses the Northern Parcel and an order evicting the Chaupes from that parcel. (*Id.*) The second is a lawsuit seeking a restraining order to prevent the Chaupes from continuing their attempts to trespass on the Southern Parcel. (*Id.*) Both of the civil proceedings are currently in an evidentiary stage in the lower court. (*Id.*, ¶ 24.) On March 16, 2017, court-appointed experts issued a report finding that MY has been in possession of the land in dispute and that the Chaupes had performed actions that had disturbed that possession. (*Id.*; Ex. 5.) A final determination of the parties' rights and obligations related to the two parcels will be made when the civil court issues its final decision and any appeals are heard. (*Id.*, ¶ 24.)[8]

The other two pending civil proceedings were brought by the Chaupes in 2016 in the Constitutional Court. (*Id.*, ¶ 25.) The first is a habeas corpus claim concerning MY's alleged use of the surveillance camera and a drone to monitor the company's property, alleging that their use adversely impacts the Chaupes' privacy. (*Id.*) The second is a habeas corpus claim concerning MY's control of the entry and exit to the property at the checkpoints and the construction of the alpaca pen in the area of the Southern Parcel. (*Id.*, ¶ 26.) The Superior Court of Cajamarca has ruled in both proceedings that MY has the right to monitor and control access

---

[7] The Peruvian Supreme Court specifically noted that it was not ruling on the question of who rightfully has possession of the disputed property—which would be separately determined in the civil actions. (Ex. 1, ¶ 19.)

[8] As part of these proceedings, MY sought and obtained a preliminary injunction against the Chaupes' trespass pending the conclusion of the civil suit. (Ex. 1, ¶ 23.) In April 2016, the court lifted the preliminary injunction. (*Id.*) The Superior Court of Cajamarca confirmed the lifting of the injunction, but on different grounds. (*Id.*)

to its property and that the Chaupes' rights under the Peruvian Constitution have not been violated. (*Id*. ¶¶ 25-26; Exs. 6-7.) The Chaupes appealed both rulings, which are currently pending in the Constitutional Court of Peru. (*Id.* ¶¶ 25-26.)

F. MY's Efforts to Resolve the Dispute

MY's dispute with the Chaupes over the land they have occupied has become part of the larger dispute between MY and international and domestic NGOs concerning the Conga Project. (*Id.*, ¶ 28.) Mirtha Vasquez, who acts as the Chaupes' lawyer in Peru, is the Director of Grufides, one of the main NGOs that is opposed to the Conga Project. (*Id.*) Through the efforts of Grufides and other NGOs, including EarthRights, International—counsel for Plaintiffs in the present action—the dispute with the Chaupes has received substantial media coverage in Peru and internationally. (*Id.*)

MY has nevertheless continued to work with Plaintiffs in an attempt to resolve the land dispute, including through ongoing dialogues beginning in 2016 between the Chaupes and non-attorney company representatives. (Ex. 8, ¶ 7.) These discussions have been courteous and respectful. (*Id.*) MY has informed Plaintiffs that they could invite their attorneys to any discussion. (*Id.*, ¶ 8.) Plaintiffs have never told MY that they wished to end discussions or to hold discussions only through their attorneys. (*Id.*) Indeed, Plaintiffs have initiated meetings with MY personnel on numerous occasions, have invited them to Plaintiffs' home for meals, and have sought various favors. (*Id.*, ¶¶ 7, 10.) For example, the Chaupes have asked MY to donate money for religious festivities and community sporting events, as well as for medicine and funeral expenses for a family member—all of which MY provided. (*Id.*, ¶ 10.) Indeed, just eight days after signing her declaration in support of the PI Motion, Plaintiff Ysidora Chaupe sent her resume to MY and requested employment, and MY's representatives provided recommendations on how to improve her resume. (*Id.* ¶ 10: Ex. 10B.)

In August 2017, representatives from MY met with Plaintiffs and presented a proposal for settlement, including offering Plaintiffs scholarship money and a land exchange. (Ex. 8, ¶ 8; Ex. 9 at 6.) While MY was hopeful that these discussions would result in an amicable resolution

of the longstanding dispute, Plaintiffs and their NGO counsel filed this lawsuit two weeks later.

V. ARGUMENT

A. The Court Should First Resolve Defendants' *FNC* Motion

This Court need not wade into a factual dispute involving events, witnesses, and documents located in Peru, delve into the meaning of Peruvian law, or risk undermining proceedings already pending in Peru. On October 16, 2017, Defendants filed their *FNC* Motion, which will be fully briefed and ready for decision on December 11, 2017. Defendants have agreed to submit to the jurisdiction of the Peruvian courts and those courts should have the opportunity to address Plaintiffs' arguments. If this Court is inclined to grant the *FNC* Motion, it should do so expeditiously and not spend limited judicial resources deciding a motion for preliminary injunctive relief in a case that will ultimately be adjudicated in another forum. *See, e.g.*, *Broad. Rights Int'l Corp. v. Societe du Tour de France*, 675 F. Supp. 1439, 1440 (S.D.N.Y. 1987) ("[I]t is not appropriate to determine the issues raised by [a] motion for preliminary injunction" when case is subject to dismissal on *forum non conveniens* grounds.); *Koger, Inc. v. O'Donnell*, 2007 U.S. Dist. LEXIS 80551, at *15 (D.N.J. Oct. 31, 2007) (granting *forum non conveniens* dismissal and dismissing preliminary injunction motion as moot); *Flynn v. Nat'l Asset Mgmt. Agency*, 42 F. Supp. 3d 527, 540 (S.D.N.Y. 2014) (granting *forum non conveniens* dismissal and denying motion for preliminary injunction without prejudice); *GE Healthcare v. Orbotech, Ltd.*, 2009 U.S. Dist. LEXIS 72221, at *2 (E.D. Wis. July 2, 2009) (deferring resolution of preliminary injunction until after *forum non conveniens* motion).

B. Legal Standard for Preliminary Injunctions

"Preliminary injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances." *Ferring Pharm., Inc. v. Watson Pharm., Inc.*, 765 F.3d 205, 210 (3d Cir. 2014) (internal quotations omitted). Plaintiffs must establish: "[1] that [they are] likely to succeed on the merits, [2] that [they are] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [their] favor, and [4] that an injunction is in the public interest." *Id.* (internal quotations omitted). Plaintiffs indisputably bear the

burden of establishing the first two factors and a failure to demonstrate either likelihood of success or irreparable harm is fatal. *See id.*; *Reilly v. City of Harrisburg*, 858 F.3d 173, 176, 179 (3d Cir. 2017). As for the final two factors, there is confusion in Third Circuit case law about whether they must also be satisfied for injunctive relief to be granted, or whether a district court has discretion to balance all "four factors so long as the party seeking the injunction meets the threshold on the first two." *Reilly*, 858 F.3d at 176-79. The former approach is the better one. *Cf. eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (plaintiff "must" satisfy all four factors in context of permanent injunction). But, because Plaintiffs cannot even make their threshold showing, and because a balancing of the factors weighs against them, Plaintiffs are not entitled to preliminary injunctive relief regardless.

C. Plaintiffs Have Not Established a Likelihood of Success on the Merits

1. Plaintiffs Have Not Established the Existence of Wrongful Conduct

Plaintiffs argue they are likely to succeed on the merits of some of their claims, but they ignore two critical points of law that are ultimately fatal to their case and spend barely a page addressing only a handful of the dozen claims alleged in the Complaint. That showing falls far short of satisfying Plaintiffs' burden.[9]

a. Peruvian Law Applies

Because Plaintiffs invoke this Court's diversity jurisdiction, Delaware choice-of-law rules govern. *Naghiu v. Inter-Cont'l Hotels Grp., Inc.*, 165 F.R.D. 413, 421 (D. Del. 1996). For tort claims, Delaware applies the law of the jurisdiction that "has the most significant relationship to the occurrence and the parties." *Id.* Here, the alleged injury occurred in Peru; the

[9] The suggestion that this Court can infer anything from Defendants' decision not to file a more comprehensive motion to dismiss (PI Motion at 1) is frivolous. The standards applicable to a motion to dismiss are vastly different from those applicable to a motion for a preliminary injunction. On a motion to dismiss, Plaintiffs' "factual allegations" are accepted "as true" and the complaint is construed "in the light most favorable to" Plaintiffs; on a motion for preliminary injunction, Plaintiffs have the burden of proving they are likely to succeed on the merits with actual evidence. *Bruni v. City of Pittsburgh*, 824 F.3d 353, 361 & n.11 (3d Cir. 2016). Defendants intend to dispute Plaintiffs' claims at every appropriate stage—whether in this Court or a more suitable forum.

alleged conduct that purportedly caused the injury occurred in Peru; Plaintiffs are citizens of Peru; and the subsidiary entities allegedly responsible for the injuries are incorporated in Peru. *Id.* at 422 (for personal injury claims, the law of the place of injury generally applies). Peru has the "most significant relationship," and Peruvian law therefore governs. This is critical because many of the alleged wrongful acts are not actionable torts under Peruvian law because they are a possessory defense that is not only permitted but required.

b. Factual disputes preclude the grant of a preliminary injunction

"[A] district court cannot issue a preliminary injunction that depends upon the resolution of disputed issues of fact unless the court first holds an evidentiary hearing." *Elliott v. Kiesewetter*, 98 F.3d 47, 53 (3d Cir.1996); *see also Warner Chilcott Labs. Ireland Ltd. v. Mylan Pharm. Inc.*, 451 Fed. Appx 935, 939 (Fed. Cir. 2011). This is critical because, as detailed herein, many of the alleged wrongful acts relied on by Plaintiffs simply never happened. Plaintiffs cannot establish a likelihood of success unless that factual dispute is resolved in their favor. Because the witnesses are primarily located in the Andes of Peru and cannot all feasibly travel to this Court, an evidentiary hearing will not be possible. In similar circumstances, another district court in Delaware concluded that it could not "fairly . . . judge[]" the "likelihood of plaintiff's success on the merits" and declined to grant such "extraordinary" relief. *See Capriotti's Sandwich Shop, Inc. v. Taylor Family Holdings, Inc.*, 857 F. Supp. 2d 489, 502 (D. Del. 2012); *cf. Noorhasan v. De Jongh*, 2012 U.S. Dist. LEXIS 45368, at *11-12 (D.V.I. Mar. 31, 2012) (PI motion denied due to contradictory facts). The same result is warranted here.

c. Plaintiffs Have Not Established Any Wrongful Conduct

Plaintiffs argue that they are likely to succeed on the merits of (1) assault and battery (Counts I and II); (2) intrusion into solitude (Count IV); (3) conversion (Count XII); and (4) infliction of emotional distress (Count III).[10] Many of the alleged wrongful acts are not

[10] Courts in the Third Circuit are required to "exercise their discretion in weighing all the attendant factors . . . to assess whether, and to what extent, affidavits or other hearsay materials are appropriate given the character and objectives of the injunctive proceeding." *Kos Pharm.*,

actionable torts under Peruvian law because they are a possessory defense that is not only permitted but required, and Plaintiffs cannot prevail with respect to the other alleged wrongful acts because they never happened. Applying the law set forth above, Plaintiffs have failed to satisfy their burden to prove a likelihood of success on any of these claims.

First, Plaintiffs assert that they are likely to prevail on their assault and battery claims because they were exposed to "intentional, unpermitted contact[s] upon [Plaintiffs' persons] which [were] harmful or offensive" and which placed them "in apprehension of imminent harmful or offensive physical contact" through alleged "beatings, . . . attacks, and invasions." (PI Motion at 8.) As described above, despite the violent attacks by Plaintiffs against the security forces, no physical force was ever used *against* Plaintiffs. There was no unprovoked contact with Plaintiffs' persons—let alone contact that was "harmful or offensive." And to the extent the alleged "invasions" purportedly put Plaintiffs "in apprehension" of such offensive physical contact, they constituted MY's exercise of a possessory defense as required in order to prevent trespassers from remaining on its property for years. Such defenses were conducted in a nonviolent manner with the security forces taking defensive positions. Acts authorized (and required) by Peruvian law cannot give rise to a claim for assault, and no other acts of assault or battery were committed.

Inc. v. Andrx Corp., 369 F.3d 700, 718-19 (3d Cir. 2004) (internal quotations omitted). Thus, the Court must consider whether issues with the potential admissibility of evidence used by Plaintiffs weigh against granting the PI Motion. Plaintiffs rely on declarations that include numerous hearsay statements, and the Court should accordingly discount them. In particular, Plaintiffs rely on hearsay in an attempt to ascribe all manner of purported wrongdoing to Defendants. (D.I. 27, Ex. 6 at ¶ 8 (Peruvian judge informed Plaintiffs that MY "gave an 'economic benefit' to the prosecutor to bring [a criminal] case against us"); Ex. 5 at ¶ 7 (a public transportation driver "told me that [MY] threatened him about not providing transportation to anyone in my family"); *id.* at ¶ 5 ("I have spoken to a driver, Alan Mestanza, who told me someone from Securitas told him that he could not drive anyone in my family and if he did, he would lose work and would not be able to pass the security checkpoints").) As hearsay that does not fall within any exception, these and similar statements should be disregarded, or alternatively given very little weight in evaluating the PI Motion. (*See also* D.I. 27, Ex. 1 at ¶¶ 10, 16, 19, 24; Ex. 3 at ¶¶ 12, 15, 17, 32, 36, 38-39; Ex. 4 at ¶¶ 12, 22-23; Ex. 5 at ¶ 17; Ex. 6 at ¶¶ 7, 15-16; Ex. 7 at ¶¶ 9, 11, 20, 22-23; Ex. 8 at ¶¶ 12, 27, 33-34.)

Second, Plaintiffs assert that they are likely to prevail on their intrusion into solitude claim because the "intrusions [by security forces] into Plaintiffs' farm, including entering [their] house" constitutes the "intentional[] intru[sion] into a private place where the intrusion would be highly offensive to a reasonable person." (*Id.*) As described above, there were no "intrusions" into Plaintiffs' home. (Indeed, the only time MY representatives visited the home was when Plaintiffs invited them over for meals.) As for Plaintiffs' farm, the only "intrusions" occurred when MY lawfully exercised its possessory defense on its Southern Parcel. MY's property cannot be considered Plaintiffs' "private place," and exercising a possessory defense as required by law cannot be "highly offensive" to a "reasonable person."

Third, Plaintiffs claim that they are likely to succeed on their conversion claim because their crops, property, and livestock were purportedly destroyed which, they contend, qualifies as "an act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it." (*Id.* at 9.) As described above, no animals were injured or killed by MY or its agents. With respect to the destruction of crops and property, every such act was part of the lawful possessory defense that MY was required to exercise when Plaintiffs chose to trespass. Plaintiffs have no right to farm land that does not belong to them and, under Peruvian law, the crops and structures on MY's property must be removed.

Fourth, and finally, Plaintiffs claim they are likely to succeed on their intentional infliction of emotional distress ("IIED") claim because "Defendants' [alleged] agents intentionally or recklessly caused [Plaintiffs] severe emotional distress" through "extreme and outrageous conduct" in the form of alleged "attacks and threats" and an unspecified "pattern of harassment." (*Id.*) As described above, no alleged agent ever attacked, threatened, or harassed Plaintiffs—intentionally or otherwise. Any actions lawfully taken in furtherance of the possessory defense were conducted in a nonviolent manner and cannot give rise to a tort claim under Peruvian law.

2. Defendants Are Not Liable for Alleged Conduct of Their Subsidiaries

Plaintiffs are also unlikely to succeed on the merits because they did not sue any of the

Peruvian actors who allegedly committed the wrongful acts and Defendants are not liable for the alleged conduct of MY or Newmont Peru S.R.L. "[M]ere ownership of a subsidiary does not justify the imposition of liability on the parent." *Nespresso USA, Inc. v. Ethical Coffee Co. SA*, 2017 U.S. Dist. LEXIS 108311,*9-10 (D. Del. July 13, 2017). To hold a parent liable for the acts of its subsidiary, "there must be a 'close connection between the relationship of the corporations and the cause of action'" (*Garza v. Citigroup Inc.*, 192 F. Supp. 3d 508, 513-514 (D. Del. 2016)), where "the parent corporation dominates the activities of the subsidiary" that relate to the plaintiff's claims (*Japan Petroleum Co. (Nigeria), Ltd. v. Ashland Oil Co.*, 456 F. Supp. 831, 840-841 (D. Del. 1978)). Plaintiffs have failed to meet their burden to establish the necessary close relationship.

Plaintiffs claim that Defendants are liable for MY and Newmont Peru S.R.L.'s conduct because NMC is "the majority owner of MY," "NMC requires MY to follow NMC's global standards and policies," Defendants employ a security director that oversees operations in Peru, there is an "overlap of personnel," and Defendants discuss the Chaupes in "public materials." (PI Motion at 12-15.) But, "a subsidiary is not an agent of its parent merely because the parent: holds a majority of the subsidiary's shares, shares officers and directors with the subsidiary, or finances the operations of the subsidiary." *EBG Holdings LLC v. Vredezicht's Gravenhage 109 B.V.*, 2008 Del. Ch. LEXIS 127, 45-46 (Del. Ch. Sept. 2, 2008). Nor is a parent company's "implement[ation] and general[] overs[ight of] the compliance and risk management policies in its subsidiaries" sufficient to show that the parent has "direct control over" the subsidiary's conduct. *Garza*, 192 F. Supp. 3d at 514. Further, "[a]rrangements by a parent and subsidiary for economy of expense and convenience of administration," such as instituting a senior security director to oversee regional operations, "may be made without establishing the relationship of principal and agent" and public representations conflating operations of subsidiary with parent that may simply "result from public relations motives or an attempt at simplification" are insufficient to establish an agency relationship. *Japan Petroleum Co.*, 456 F. Supp. at 846.

The only connections Plaintiffs identify are insufficient to demonstrate agency liability.

Far from establishing the requisite "close connection" and "dominance of activities," the Peruvian subsidiaries' conduct shows that they operated autonomously from Defendants with respect to the matters at issue here. Plaintiffs' own evidence demonstrates that MY hired and managed the Securitas and PNP personnel that allegedly committed the torts against Plaintiffs. (D.I. 27, 36, 38; *see also* Ex. 10, ¶ 1.) MY also handled the day-to-day operations of its security team in the Conga area. (Ex. 10, ¶ 1; Ex. 1, ¶ 15.) Plaintiffs' inability to establish liability under this theory is another reason they are unlikely to prevail on the merits.

3. Rules of International Comity Warrant Dismissal of Plaintiffs' Claims

Plaintiffs are also unlikely to succeed on the merits of their claims because the Complaint should ultimately be dismissed on international comity grounds. "Principles of international comity permit a district court, in its discretion, to dismiss or stay a case over which it has subject matter jurisdiction in deference to the laws and interests of another foreign country." *Hay Acquisition Co., I, Inc. v. Schneider*, 2005 U.S. Dist. LEXIS 24490, at *34 (E.D. Pa. Apr. 27, 2005) (internal quotation omitted). In appropriate circumstances, courts also may require plaintiffs to "exhaust their local remedies in accordance with the principle of international comity." *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008).

Here, Plaintiffs' claims have virtually no connection to the U.S. The alleged conduct occurred in Peru, by Peruvian nationals and corporations, against Peruvian citizens. Further, under the Peruvian Civil Code, Peruvian courts maintain exclusive jurisdiction over property rights disputes for real property located in Peru—which, at bottom, is at the heart of this case. *See* Peruvian Civil Code, Art. 2058(1); Ex. 11, ¶ 34). Plaintiffs have already availed themselves of the Peruvian legal system to challenge the conduct alleged in this action, and the parties are engaged in multiple parallel proceedings pending in Peruvian courts that are either duplicative of or inextricably intertwined with the claims in this case. *See* Part IV.E, *supra*. In short, Plaintiffs claims should be adjudicated in Peru, as Peru has "legitimate interests in regulating conduct that occurs within [its] borders, involves [its] nationals [and] impacts [its] public and foreign policies." *Mujica v. AirScan Inc.*, 771 F.3d 580, 603, 607 (9th Cir. 2014) (dismissing state law

tort claims based on principles of international comity).

D. Plaintiffs Have Not Established Irreparable Injury

To establish irreparable injury, it is not enough to point to past injury or a risk of future injury. Plaintiffs must demonstrate that they will suffer harm that "cannot be redressed by a legal or an equitable remedy following a trial," and that a preliminary injunction is in fact "the *only* way of protecting [them] from harm." *Hynoski v. Columbia Cty. Redevelopment Auth.*, 485 Fed. Appx 559, 563 (3d Cir. 2012) (emphasis added). Plaintiffs must also demonstrate "that there exists some cognizable danger of recurrent violation" of its legal rights, *i.e.*, a "credible threat that [the violation] will recur in the future." *Anderson v. Davila*, 125 F.3d 148, 164 (3d Cir. 1997). For the reasons above, Plaintiffs have not established any cognizable past injury. Plaintiffs also have failed to prove the requisite *irreparable* injury for two independent reasons.

First, because any harm to real property can be adequately remedied through monetary compensation, it is not "irreparable" harm as a matter of law. *Hynoski*, 485 Fed. Appx at 563; *see also Frank's GMC Truck Ctr., Inc. v. GMC*, 847 F.2d 100, 102 (3d Cir. 1988) ("[P]urely economic injury, compensable in money, cannot satisfy the irreparable injury requirement").

Second, Plaintiffs have not established a "credible threat" that any of the other harms will happen in the future. (PI Motion at 18.) Plaintiffs offer no evidence in support of their claim that the alleged abuse will continue; indeed, there is no credible evidence of any past abuse. As described above, MY has not engaged with Plaintiffs on the Northern Parcel since 2011. Nor will MY exercise any possessory defense on the Southern Parcel as long as Plaintiffs do not trespass. To the extent Plaintiffs insist on trespassing on the Southern Parcel, the possessory defense will be performed only in accordance with Peruvian law. Thus, whether there will be any future "harm" is solely within Plaintiffs' control.

E. The Balance of Equities Weighs Against Plaintiffs

Contrary to Plaintiffs' contention (*id.* at 19), Defendants will be gravely harmed if this Court grants the requested injunction. Under Peruvian law, as described above, if MY does not continue to exercise its possessory defense, Plaintiffs will be permitted to further encroach on

MY's property and retain possession of portions of the Southern Parcel while MY spends years pursuing its rights in the courts. Plaintiffs' arguments to the contrary are without merit.

First, Plaintiffs claim that MY "does not need to invade Tragadero Grande to preserve its arguments." (*Id.*) But, under Peruvian law, a landowner is required to exercise its possessory defense—which includes the removal of structures and crops on its property—within 15 days of the discovery of each trespass. If the landowner fails to meet this deadline, the trespasser will be allowed to remain on the property while the landowner's claims proceed through the Peruvian legal system—which can take years. Granting the PI Motion will prevent MY from exercising its legal rights and will permit the Plaintiffs to trespass and illegally obtain the use of as much of MY's property as they wish.[11]

Second, Plaintiffs claim that the "Superior Court of Cajamarca found the Chaupes possess Tragadero Grande." (*Id.* (citing D.I. 27, Ex. 42 at 8-9).) But, this was at the preliminary injunction stage; the case remains pending and there has been no final judgment that the Chaupes possess the disputed land. (Ex. 1, ¶¶ 22-24.)

Third, Plaintiffs argue, "Newmont may not exercise a self-help remedy when that court has held Newmont is not entitled to a remedy." (PI Motion at 19.) It is not clear which entity Plaintiffs are referring to with the blanket term "Newmont," but no Peruvian court has made such a finding with respect to MY or any other Newmont entity.

Finally, Plaintiffs rely on *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996), to argue that Defendants "will not be irreparably harmed by an injunction narrowly tailored to preclude them from continuing their harassing conduct." (PI Motion at 19.) But, in *Wolfson*, the court found evidence that the defendant journalists were jeopardizing the health and safety of the plaintiffs and narrowly tailored the injunction to permit the defendants to continue to exercise their legal rights to gather and report on the news. *Wolfson*, 924 F. Supp. At 1435. Here, there is

---

[11] That "Newmont has suspended [its Conga operations] until at least 2021" is immaterial. (PI Motion at 19.) Given widespread attempts to adversely possess MY's land, MY cannot afford to set a precedent that it will not exercise its rights.

no evidence that Defendants are causing any harm to Plaintiffs and the injunctive relief sought *will* prevent MY from exercising its legal rights to protect its property from trespassers. In short, grant of the PI Motion will significantly harm Defendants.

F. The Public Interest Is Served by Denial of the PI Motion

Although the public interest factor may often favor plaintiffs who have established a likelihood of success and irreparable harm, that is not invariably the case, and courts may "award preliminary injunctive relief *only* upon weighing all four factors." *AT&T v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994) (emphasis added); *cf. Amgen, Inc. v. Sanofi*, 872 F.3d 1367, 1380-81 (Fed. Cir. 2017) (district court erred in granting permanent injunction after finding that injunction would not be in the public interest). Plaintiffs focus on Delaware's interest in ensuring that Delaware corporations abide by the law and state the unremarkable proposition that violence and intimidation are not in the public interest. (PI Motion at 20.) But, they ignore the compelling interests of the Peruvian government in adjudicating disputes that arise within its borders between its citizens and companies, and in avoiding the interference and entanglement of a U.S. court in a fundamentally local land dispute. Those interests counsel in favor of dismissal (either on *forum non conveniens* grounds per the *FNC* Motion, or on comity or exhaustion grounds as set forth above). At the very least, they counsel in favor of denying the extraordinary relief Plaintiffs seek. *See Capriotti's Sandwich Shop, Inc.*, 857 F. Supp. 2d at 502 (public interest supported denying preliminary injunction where it required "adjudicating [the] dispute in a forum without access to the best evidence").

VI. CONCLUSION

Defendants respectfully request that the Court dismiss or deny Plaintiffs' PI Motion.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Elena C. Norman

Elena C. Norman (No. 4780)
Robert M. Vrana (No. 5666)
Rodney Square
1000 North King Street
Wilmington, Delaware 19801
Telephone: (302) 571-6600
Facsimile: (302) 571-1253

Of Counsel:

Michael G. Romey
Monica R. Klosterman
Faraz R. Mohammadi
LATHAM & WATKINS LLP
355 South Grand Avenue, Suite 100
Los Angeles, California 90071
Telephone: (213) 485-1234
Facsimile: (213) 891-8763
michael.romey@lw.com
monica.klosterman@lw.com
faraz.mohammadi@lw.com

Counsel for Defendants

Dated: November 22, 2017

CERTIFICATE OF SERVICE

I, Elena C. Norman, hereby certify that on November 22, 2017, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

Misty A. Seemans, Esquire
Public Defender's Office
820 North French Street, 3rd Floor
Wilmington, DE 19801
misty@earthrights.org
mseemans@gmail.com

Attorney for Plaintiffs

I further certify that on November 22, 2017**,** I caused the foregoing document to be served via electronic mail upon the above-listed counsel and on the following:

Marco Simons, Esquire
Rick Herz, Esquire
Marissa Vahlsing, Esquire
Maryum Jordan, Esquire
Tamara Morgenthau, Esquire
EarthRights International
1612 K Street, NW, Suite 401
Washington, DC 20006
marco@earthrights.org
rick@earthrights.org
marissa@earthrights.org
maryum@earthrights.org
tamara@earthrights.org

Attorneys for Plaintiffs

.

Dated: November 22, 2017

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Elena C. Norman

Elena C. Norman (No. 4780)
Robert M. Vrana (No. 5666)
Rodney Square
1000 N. King Street
Wilmington, Delaware 19801
enorman@ycst.com
rvrana@ycst.com

Attorneys for Defendants