IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

Plaintiffs,

v.

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

Defendants

Civil Action No. 17-1315-GAM.

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS ON THE GROUNDS OF *FORUM NON CONVENIENS*

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NATURE AND STAGE OF THE PROCEEDING

This case returns on remand from the Third Circuit. The question is whether Defendants meet their burden to prove Peru is an adequate alternative forum for Plaintiffs' claims despite the Peruvian government's own declaration of a national judicial emergency and dissolution of critical judicial institutions due to rampant corruption, and despite Plaintiffs' evidence that Defendants have corrupted Peruvian proceedings against these Plaintiffs.

As the Court will recall, Plaintiffs, members of the Chaupe family, are subsistence farmers in Cajamarca, Peru, whose small plot sits atop a gold deposit coveted by Defendants, four Delaware corporations. Defendants are trying to force the Chaupes from their farm to pave the way for a massive open-pit mine. Defendants have dug up the Chaupes' crops, destroyed their property, killed their animals, detained them against their will, filed false criminal complaints against them, threatened their lives and beaten them—one into unconsciousness. Plaintiffs sued Defendants for the personal injuries, distress and property destruction they have suffered.

Defendants moved to dismiss the case to Cajamarca on *forum non conveniens* (FNC) grounds, claiming it is inconvenient for them to litigate in their home state. D.I. 14-15. Noting that Defendants must prove Peru is an adequate alternative forum, Plaintiffs provided evidence that corruption is endemic in Peru's courts, including in Cajamarca; that those who oppose Defendants, including Plaintiffs, have been subjected to false criminal charges; and that these Defendants have improper influence over local courts, which they have exercised in cases against Plaintiffs, including by bribing a prosecutor to bring criminal charges against Plaintiffs. D.I. 43 at 4, 7-8.

This Court recognized that Plaintiffs' evidence provided "reasons to be concerned about the Peruvian judicial system." D.I. 92 at 2, 20 ("prior opinion"). But it granted Defendants' motion, holding *Plaintiffs* had not proven Peru was a "clearly inadequate" forum. *Id.* at 2. Plaintiffs appealed, arguing *inter alia* that the prior opinion did not require Defendants to bear their burden of proof.

Plaintiffs also argued for a remand, because, after this Court ruled, new revelations of widespread corruption throughout the Peruvian courts came to light. These revelations led the government to declare a judicial state of emergency and dissolve the National Magistrates Council (NMC), which appoints and dismisses judges and prosecutors, and prompted the Peruvian President to observe that the country's justice system had "collapsed." The Third Circuit vacated this Court's prior opinion, remanding for this Court to "reconsider its prior determination that Peru is an adequate forum," "taking account of the recent developments in Peru." *Acuna-Atalaya v. Newmont Mining Corp.*, No. 18-2042 (3rd Cir. Mar. 20, 2019), D.I. 96-2 at 3, 8. The Third Circuit emphasized the importance of this Court being "mindful [on remand] of the proper allocation of the burden of proof and the standards that must be satisfied, including that the burden of persuasion on a *forum non conveniens* motion lies with the defendant." *Id.* at 6-7; *accord id.* at 8.

SUMMARY OF ARGUMENT

Given Peru's own recent recognition that judicial corruption is at emergency levels, Defendants cannot show that Peru is an adequate forum. Defendants' motion must be denied.

I. Since the "burden of persuasion . . . lies with the defendant," D.I. 96-2 at 7, *Defendants* must overcome Plaintiffs' substantial evidence of both general and specific corruption, including evidence of the ongoing judicial corruption crisis, and show Peru is an adequate forum for this case. Plaintiffs need not prove Peru is a "clearly unsatisfactory" forum. *Cf.* D.I. 92 at 20. Thus, denying Defendants' motion does *not* require this Court to *find* that Peru is an *in*adequate forum. The question is whether Defendants, *on this record*, have affirmatively proven that Peru is a generally adequate forum *and* that the Peruvian courts will give *these* Plaintiffs a fair shake.

II.A. In these unusual circumstances, in which Peru's judicial system has "collapsed," corruption reaches even its highest appellate courts, and the full scope of the crisis is still unknown, the answer is clear: they have not. Defendants cannot prove that Peru is an adequate forum despite

its self-declared judicial corruption emergency. This Court cannot dismiss to a legal system so suffused with corruption that its own officials recognize its inadequacy.

II.B. While the exceptional nature of recent events and the widespread judicial corruption alone defeat Defendants' motion, the Court has other bases for denying the motion. Defendants cannot prove that Cajamarca courts will treat these Plaintiffs impartially in a case against these Defendants. Even before the recent revelations of systemic judicial corruption, this Court recognized that Plaintiffs' "troubling" evidence of Defendants' corruption of the local courts where they propose to send Plaintiffs – in cases against Plaintiffs – provides good reason to be concerned. Defendants failed to rebut that evidence. And the recent revelations have made Defendants' task that much harder. As the Third Circuit instructed, this Court must view Plaintiffs' evidence of Newmont's corruption and the Cajamarca courts' bias through the lens of the systemic corruption. D.I. 96-2 at 5. "[A] factfinder could conclude that [Plaintiffs'] case-specific evidence [of corruption] carries greater weight in the context of a judicial system permeated by corruption problems." *Id.* This Court should so conclude.

III. The FNC doctrine does not permit dismissal to a forum where Plaintiffs' cannot present critical evidence. Here, Plaintiffs' own eyewitness testimony to the abuses they suffered is central to their case. But Peru sharply limits the ability of parties and family members to testify. The prior opinion recognized Peruvian courts might exclude that key evidence. Because Defendants cannot prove otherwise, they cannot show the forum is adequate.

In sum, there are ample grounds to question whether Plaintiffs will get a fair hearing in Defendants' preferred forum. The FNC doctrine does not require the Chaupes to bear that risk. The Court may not oust the Chaupes' claims from Newmont's home forum, where both sides would get an impartial hearing, to one that provides the Chaupes no such assurance.

SUPPLEMENTAL STATEMENT OF FACTS

While this case was on appeal, new revelations of widespread and high-level judicial corruption emerged based on recordings of phone calls. A Supreme Court Justice, the Chief Justice of an appeals court, and three members of the National Magistrates Council were implicated; later other judicial officials were implicated too. Declaration of Ursula Indacochea, ¶¶ 4, 9, 21-23; Declaration of Wyatt Gjullin Ex. 2, 3, 6, 12. Officials declared an "unprecedented" three-month "state of emergency for the country's judicial system." Indacochea Decl. ¶¶ 9, 23; Gjullin Ex. 1.[1] The declaration responded to "reprehensible actions that affect the image and autonomy of the Judicial Branch" and that created a "critical situation . . . in the judicial system." Gjullin Ex. 1. Peru's President stated: "The system for administering justice has collapsed." Gjullin Ex. 5.

Following this declaration of a judicial emergency, all members of the National Magistrates Council were impeached for gross misconduct, and Peru's Congress declared a nine-month state of emergency for the Council. Indacochea Decl. ¶ 23; Gjullin Ex. 4. The next domino to fall was the Executive Judicial Council (EJC), the judiciary's governing body, which had declared the judicial emergency. The EJC was itself declared in emergency after some of its members were brought down by the scandal. Indacochea Decl. ¶¶ 21-23. Under the EJC and NMC, corruption networks "exercise[d] influence over the entire justice system and over judges and prosecutors at all levels," *id.* ¶ 30, creating a systemic crisis, which according to Peru's Congress and Plaintiffs' experts, cannot be remedied in short order. *Id.* ¶¶ 6, 29-32; Declaration of Jan-Michael Simon and César Bazán Seminario at ¶¶ at 19, 23, 84, 112; Declaration of Richard Messick ¶¶ 11, 16-20.

Two more sitting Supreme Court justices were then implicated, leading to ethics investigations that remain open. Indacochea Decl. ¶ 13. Most recently, the acting Attorney General,

[1] In addition to the official declaration, the Gjullin Declaration also attaches newspaper articles and press releases describing the situation. Exs. 1-20. *E.g.*, Rebecca Tan, *Leaked calls reveal systemic corruption in Peru's judiciary, sparking flurry of resignations*, Washington Post, July 20, 2018.

upon replacing her corrupt predecessor, declared the Prosecutor's Office in a state of emergency. Indacochea Decl. ¶ 23; Gjullin Ex. 17; Simon Decl. ¶ 92. This is the fourth national judicial institution to be declared in emergency. Indacochea Decl. ¶ 23.

While the recent revelations implicate Peru's highest appellate courts and judicial organs, the crisis is not limited to those institutions. *Id.* ¶¶ 4, 6, 30-31. The "scandal" simply exposed some of the corrupt actors. Audio recordings continue to surface, and while several regional court systems have been implicated already, comprehensive investigations at the regional level have not yet been carried out. *Id.* ¶¶ 6, 11, 31; Simon Decl. ¶¶ 86-87. The recent revelations are likely just the tip of the iceberg. Indacochea Decl. ¶¶ 6-7, 31; Simon Decl. ¶¶ 19, 57-66, 84. The full extent of corruption at all levels is still unknown.

Since January 2019, the Office of Judicial Oversight has sanctioned ninety-three judicial officials at various levels of the justice system, including in Cajamarca, for extreme misconduct that "contradicts the principle of working honestly in the judiciary," including corruption offenses. Gjullin Ex. 7, 8. In one recent example, a judicial assistant in Cajamarca was found to have unlawfully provided legal advice and drafted documents for litigants. Gjullin Ex. 8. In Cajamarca, as of August 2018, there were at least nine disciplinary proceedings for dismissal and four others for suspension, against judges accused of grave misconduct. Indacochea Decl. ¶ 6.

None of the judges recommended for dismissal by the Office of Judicial Oversight has been removed because the entity that can do so is not staffed. Gjullin Ex. 7; Indacochea Decl. ¶ 17. The principal reform to address the crisis was to replace the NMC with a new body, the National Board of Justice (NBJ). Indacochea Decl. ¶¶ 16-17, 24; Gjullin Ex. 13, 14. But as of this month, only three out of seven officeholders have been selected, leaving the NBJ inoperative. Gjullin Ex. 9; Indacochea Decl. ¶¶ 17, 26. As a result, corrupt judges remain at their post and the NBJ has yet to review judicial appointments carried out since 2015 by the disgraced NMC. Indacochea Decl. ¶ 16.

Even if the NBJ were functioning (and itself free of corruption), a new institution could not address the judicial crisis in a matter of months. Rooting out corrupt judicial officers, and instilling new norms of behavior – particularly given Peru's relatively unique situation of both high-level and quotidian judicial corruption – will take years. Messick Decl. ¶¶ 11, 16-20; Simon Decl. ¶¶ 19, 52-53, 71, 74-75, 81-84; The "structural problems" that "made [the corruption] possible, remain unresolved." Indacochea Decl. ¶ 6. And the reform efforts implemented by the Peruvian government so far are insufficient. Simon Decl. ¶¶ 85-88; Indacochea Decl. ¶ 32.

In addition to the limited nature of reforms and implementation delays, efforts to address judicial corruption face grave threats from powerful public officials and legislative opposition. Simon Decl. ¶¶ 90-94. In late 2018, Peru's then-Attorney General Chavarry attempted to fire the two lead prosecutors investigating high-level corruption. Gjullin Ex. 15-17; *see* Simon Decl. ¶ 91. The prosecutors were reinstated only after widespread unrest. Gjullin Ex. 15-17. Congress has acted to protect corrupt officials. Simon Decl. ¶¶ 90-94. And its resistance to certain anti-corruption measures is so strong, the President has had to resort to procedures that would dissolve the body in order to force lawmakers to commit to approving reforms. Gjullin Ex. 18; Simon Decl. ¶¶ 91-94.

Transparency International's Peru chapter attributes the recent drop in Peru's corruption ranking to grave corruption in the judicial system and high-level attempts to impede corruption investigations. Gjullin Ex. 11; *see also* Simon Decl. ¶¶ 97-98. But they warned the problem was much deeper, with 100 public officials suspended and over 9,000 corruption cases in 2018. Gjullin Ex. 11.

Peru's courts were known to be rife with corruption even before the recent revelations.[2] But the ongoing crisis has revealed the situation to be worse than feared. The emergency declarations are

[2] The U.S. State Department noted that reports of judicial corruption were common. D.I. 43-1 at 182-83, 190; *see also* D.I. 43-1 at 215 (study concluding Peru's courts carry a very high risk of corruption and that bribes are "very commonly exchanged to obtain favorable court decisions."). Plaintiffs' legal expert emphasized "the prevalence of corruption as a determining factor in the final ruling in many cases." D.I. 43-1 at 259-62 ¶ 48.

"unprecedented," and the scandal has drawn international concern, with the U.N. Special Rapporteur on the Independence of Judges and Lawyers stating that it "greatly surpasses" any other recent Latin American corruption scandal. Indacochea Decl. ¶¶ 23, 27-28, 33.

Corruption is prevalent in the Cajamarca courts that would hear this case. D.I. 43-1 at 308-310 ¶¶ 18-22 (Ruiz Decl.); Indacochea Decl. ¶ 6. And Defendants corrupted those courts in cases against these Plaintiffs. D.I. 43 at 4, 7-8. A judge sentenced the Chaupes to prison, with an order written by Defendants, after admitting that she knew Defendants' agents had bribed the prosecutor, D.I. 27-1 at 51-52 ¶¶ 7-8 (Ysidora Chaupe Decl.); and Defendants used their influence to obtain privileged access to court documents and to prevent Plaintiffs from presenting evidence. D.I. 43-1 at 339-40, 343-45 ¶¶ 12, 14, 28-33 (Vásquez Decl.). Defendants also hired relatives of local judicial officials that give Defendants an advantage in cases involving the Chaupes, *id.* at 343, 345 ¶¶ 27, 33; and Defendants' agents plied Peruvian prosecutors with money, gifts, and favors to procure favorable outcomes. *Id.* at 342-43 ¶ 25. Such conduct is par for the course: a former member of the Special Prosecutor's team investigating judicial corruption noted that Newmont has been corrupting the judiciary for as long as it has operated in Peru. D.I. 79-1 at 10-13, ¶¶ 2-8 (Arbizu Decl.).

The implication of Newmont's subsidiary's lawyer in corruption raises further concerns about the risk of unfairness in litigation against Defendants. Aresnio Ore Guardia, who represented Minera Yanacocha in a criminal case against Plaintiffs, is under investigation for obstructing justice in connection with a money-laundering case against a prominent politician. Gjullin Ex. 10, 19.

The State Department has emphasized the danger to indigenous leaders and activists opposing large mining projects, and the "[c]orruption . . . around extractive projects." D.I. 43-1 at 192, 224. A case "filed by a rural community or family . . . against a multimillion-dollar mining company has absolutely no chance of justice." D.I. 79-1 at 13, ¶ 8 (Arbizu Decl.); *see also* D.I. 43-1 at 308, ¶ 15 (Ruiz Decl.); Simon Decl. ¶¶ 18, 34, 56; Messick Decl. ¶ 12.

ARGUMENT

I. Defendants bear the burden to prove their proposed forum is adequate.

A. Defendants bear the ultimate burden of persuasion.

As the Third Circuit reiterated in this case, "the burden of persuasion on a *forum non conveniens* motion lies with the defendant." D.I. 96-2 at 7. Where, as here, "the plaintiff produces significant evidence documenting the partiality . . . typically associated with the adjudication of similar claims and these conditions are so severe as to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the District Court that the facts are otherwise." *Id.* at 7-8 (internal quotation omitted). That is, defendants must "counter effectively" Plaintiffs' evidence "with evidence of [their] own demonstrating" that their proposed forum is adequate. *Bhatnagar by Bhatnagar v. Surrendra Overseas*, 52 F.3d 1220, 1229 (3d Cir. 1995).

Plaintiffs' account of corruption need only be "plausible." *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1086-87 (S.D. Fla. 1997). If defendants provide evidence, but "the Court cannot draw a conclusive judgment" that the forum is fair, "defendants have not met their burden." *Id.*[3]

Denying Defendants' motion would not require a *finding* that Peru's courts are generally inadequate, or that local courts are inadequate for these claims. The only question is whether Defendants have *proven* Plaintiffs will have an *adequate* forum based on *this* record. *Bhatnagar*, 52 F.3d at 1230; *Eastman Kodak*, 978 F. Supp. at 1087.

B. The Court must hold Defendants to their burden of proof.

"[T]he proper allocation of the burden of proof," emphasized by the Third Circuit, D.I. 96-2 at 6-7, requires a different approach from that reflected in the prior opinion, in two respects. *First*, if

[3] The Third Circuit has repeatedly reversed FNC dismissals that did not hold defendants to their burden of proof. *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 174 (3d Cir. 1991); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 640 (3d Cir. 1989); *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 39 (3d Cir. 1988); *Tech. Dev. Co. v. Onischenko*, 174 F. App'x 117, 118–20 (3d Cir. 2006).

a court "look[s] to the *Plaintiff* to show that the alternative forum was *not adequate*, rather than looking to the *Defendant* to show that it was *adequate*," its determination is "inappropriate as a matter of law." *Lony*, 886 F.2d at 633, 640 (emphasis added). The prior opinion concluded *Plaintiffs* had not shown the forum to be *inadequate*, rather than requiring Defendants to prove its adequacy. It held that while "there are reasons to be concerned about the Peruvian judicial system," it could not "say that it is clearly inadequate," and reiterated that "although Plaintiffs have shown cause for concern over Peruvian courts, [it] cannot say that they are 'clearly unsatisfactory.'" D.I. 92 at 2, 20.[4] Defendants' motion must be assessed bearing in mind that Plaintiffs need not prove that Peruvian courts are a clearly *unsatisfactory* forum.[5] *Defendants* must establish that Peru is an *adequate* forum.

Second, Plaintiffs argue both specific and general corruption. As the prior opinion noted, FNC dismissal is improper if the foreign forum is inadequate for *these* Plaintiffs due to corruption pertaining to *them*. D.I. 92 at 13-14. This is a separate theory from "one alleging widespread corruption render[s] the entire Peruvian judicial system inadequate." *Id.* at 13. While the ongoing corruption epidemic alone precludes dismissal to Peru, Section II.A, even if it did not, Defendants still must show *these* Plaintiffs will get a fair hearing against *these* Defendants. *See Bhatnagar*, 52 F.3d at 1230. These two separate bases for questioning the foreign forum's adequacy cannot be conflated.

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[4] The opinion also discounted Plaintiffs' evidence that Newmont improperly influenced the Peruvian Supreme Court in 1998 as insufficient to "find the Peruvian court system inadequate." *Id.* at 16. It noted that the Chaupes' evidence that they were convicted of crimes after Defendants bribed the prosecutor and gave the judge the decision she issued was "troubling," but "does not support a global *finding* that Peru is an *inadequate* forum for Plaintiffs." *Id.* at 17 (emphasis added). And it was "not prepared . . . to conclude" that the Peruvian rule barring Plaintiffs from presenting key evidence, the Chaupes' testimony, "renders an entire court system inadequate." *Id.* at 24-25.

[5] In requiring Plaintiffs to prove the forum is "clearly unsatisfactory," the prior opinion quoted *Piper Aircraft Co. v. Reyno*, D.I. 92 at 11, 20 (quoting 454 U.S. 235, 254 n.22 (1981)), but *Piper* did not place the burden on plaintiffs. It provided an example of when the adequate forum requirement may not be met – "where the remedy offered by the other forum is clearly unsatisfactory. . . . Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Piper* was not discussing who bears the burden when there is a factual dispute about adequacy. *Id.* at 254. *Lony* and the Third Circuit's decision in this case control.

The prior opinion, however, analyzed evidence of Newmont's corruption, and other inadequacies in Cajamarca's courts affecting *these* Plaintiffs, by reference to whether it proved the general inadequacy of entire Peruvian court system.[6] The Court must assess specific corruption in terms of whether Defendants have proven Cajamarca's courts are an adequate forum for *these* claims.

II. Given the corruption crisis, Defendants cannot show Peru is an adequate forum.

The rot infecting the Peruvian judiciary, which prompted Peru's President to lament the "collapse" of the country's justice system, and Peruvian officials to declare states of emergency in four separate judicial bodies, precludes a finding that Peru's courts are *generally* adequate. That disposes of Defendants' motion. Even if it did not, the crisis and the "troubling" evidence of Newmont's own corruption preclude a finding that the local courts will fairly hear *these* Plaintiffs' claims against *these* Defendants. Defendants' motion must be denied.

A. Peru has essentially declared itself to be an inadequate forum.

Plaintiffs cannot be sent to litigate in a court system in shambles. As the Third Circuit has recognized, a "legal system" can be "so corrupt that it cannot serve as an adequate forum." *Doe v. Ritz Carlton Hotel Co.*, 666 F. App'x 180, 185 n.2 (3d Cir. 2016). "In a particular case, the evidence may well support the conclusion that a legal system is so fraught with corruption" as to preclude FNC dismissal. *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006). This may be rare, but the present crisis in Peru is the exceptional case.

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[6] *See also* D.I. 92 at 16 (finding evidence that Newmont previously corrupted Peru's Supreme Court insufficient to "find the Peruvian court system inadequate"); *id.* at 17 (characterizing the Chaupes' evidence that they were convicted of crimes after Defendants bribed the prosecutor and gave the judge the decision she issued as "troubling," but holding that it "does not support a *global finding* that Peru is an inadequate forum for Plaintiffs" (emphasis added); *id.* at 25 (finding Plaintiffs' showing that *they* are unlikely to be allowed to present key testimony does not "render[] an entire court system inadequate."). The opinion also cited cases finding Peru to be an adequate forum, D.I. 92 at 16, which could only go to the forum's general adequacy; none involved Newmont. Even if "[e]very other court . . . has found [Peruvian] courts do provide an adequate alternative forum . . . it would be irrelevant to the issue of whether [Defendants] met its burden of proof on the issue here." *Bhatnagar*, 52 F.3d at 1229. Regardless, those cases pre-date the judicial corruption crisis.

The revelations of ubiquitous judicial corruption have laid bare systemic problems affecting the impartiality of judges at all levels that will take years to rectify. Supp. Statement of Facts, *supra*; Indacochea Decl. ¶¶ 6, 30, 32; Simon Decl. ¶¶ 19, 23, 71, 74-75, 81-83, 85-88, 112; Messick Decl. ¶¶ 11, 16-20. The body responsible for rooting out corrupt judges is inoperative, and obstacles in other branches of the Peruvian government impede reform. Supp. Statement of Facts, *supra*; Simon Decl. ¶¶ 90-94; Indacochea Decl. ¶¶ 17, 26; *see also* Messick Decl. ¶ 13 (discussing political interference with past efforts to eradicate judicial corruption).

In *Eastman Kodak*, the court found the Bolivian Justice Minister's criticism of corruption was "compelling evidence" that the justice system was too corrupt to permit fair adjudication of plaintiffs' claims. 978 F. Supp. at 1085. Here, the Peruvian President's recognition that the justice system "has collapsed," the declarations of emergency in the Peruvian courts, the Executive Judiciary Council, the National Magistrates Council, and the Prosecutor's Office, provide equally – if not more – "compelling evidence" that Peru is an inadequate forum. The Court cannot reasonably deem a foreign legal system "adequate" when the country's own government recognizes it is not.

In time, Peru may fix its corruption problem and become a perfectly adequate forum. But today, it is not. Since Defendants cannot refute Plaintiffs' showing that judicial corruption has run amok, they have not met their burden of proof. D.I. 96-2 at 7-8.

B. In light of the judicial crisis, Defendants cannot meet their burden to prove Cajamarca is an adequate forum.

As the Third Circuit held, the recent revelations of widespread judicial corruption require this Court to re-evaluate the evidence of Newmont's corruption and problems in Cajamarca courts. D.I. 96-2 at 5-6. Plaintiffs submitted evidence that Newmont hand-delivered a guilty verdict against Plaintiffs to a Peruvian judge, who later admitted that Newmont had given an "economic benefit" to the prosecutor. *Id.* at 6 (quoting D.I. 92 at 17). Plaintiffs also "offered other particularized evidence regarding [Newmont's] influence in those courts," such as "multiple examples of suspicious court

behavior in the criminal proceedings discussed above, including the court's refusal to accept [certain] evidence." *Id.* at 5 (citing D.I. 92 at 16-17). The recent crisis bolsters this evidence.

First, "[w]hile the publicity around the recent scandal has not centered on Cajamarca trial courts, a factfinder could conclude that [Plaintiffs'] case-specific evidence [of corruption] carries greater weight in the context of a judicial system permeated by corruption problems than it would in the absence of such problems." D.I. 96-2 at 6. That is what the *Eastman Kodak* court concluded. *See* 978 F. Supp. at 1086-87 (noting plaintiffs' claims appear plausible in light of evidence of general corruption). And this Court should too.[7]

Second, as the Third Circuit noted, Plaintiffs submitted evidence of "Newmont successfully pressuring a Peruvian Supreme Court judge to rule favorably in its case." D.I. 96-2 at 5. The prior opinion "discounted" that evidence, "reasoning that 'the events in question occurred some 18 years ago. . . and noted improvements since' mitigate concerns about similar events recurring." *Id.* (quoting D.I. 92 at 16). But as the Third Circuit concluded, "[t]he recent exposure of corruption among the judicial system's top ranks and the two [now, four] resulting state-of-emergency declarations call into question these 'noted improvements.'" *Id.* at 5-6 (quoting D.I. 92 at 16). Defendants have already corrupted the Supreme Court, and the recent judicial crisis proves that judges at every level still can be had.

Third, while this Court found Plaintiffs' evidence of Newmont's improper influence in cases involving the Chaupes to be "'troubling,'" its "concerns were mitigated in part by the fact that

[7] The parallels to *Eastman Kodak*, which this Court called the "model case," D.I. 92 at 14, are striking. There, plaintiff presented evidence that defendants brought criminal charges against plaintiff to extort an advantageous financial arrangement, and used their attorney's connections to secure favorable judges, all against a back drop of systemic corruption. Despite defendants' strenuous denial of the risks of litigating in Bolivia, the court found defendants failed to carry their burden. 978 F. Supp. at 1080-81, 1085-1087. Similarly, here, Defendants used prison to intimidate Plaintiffs, and improperly influenced proceedings involving these Plaintiffs; and there is systemic corruption. Moreover, Plaintiffs have submitted evidence of the intimidation and surveillance of those who oppose Defendants in the region. D.I. 43-1 at 311, ¶ 24; 345-46 ¶¶ 35-40.

Appellants had achieved some 'success . . . in [Peru's] appellate courts.'" *Id.* (quoting D.I. 92 at 17). But as the Third Circuit found, "the recent disclosures raise the specter of corruption in the appellate courts of Peru and undermine confidence that they can serve as a protection against Newmont's alleged capture of the lower courts." *Id.* Indeed, two sitting Supreme Court justices are the subjects of ethics investigations linked to the recordings. Supp. Statement of Facts, *supra. See also* Indacochea Decl. ¶ 13.[8]

Other recent revelations further support Plaintiffs' evidence that Defendants corrupted Cajamarca courts in proceedings against the Chaupes. Defendant's lawyer in those proceedings has been implicated in corruption; the Prosecutor's Office employing the paid-off prosecutor was recently in a state of emergency; a judicial assistant for the Cajamarca courts was found to be providing the same kind of special treatment Newmont received; and there have been disciplinary proceedings against numerous Cajamarca judges accused of misconduct. Supp. Statement of Facts.

Defendants' track record of corrupting proceedings, in combination with the revelations of systemic corruption, surely "call the adequacy of the forum into doubt." D.I. 96-2 at 7-8. Indeed, even before the current crisis, the Court considered Plaintiffs' evidence "troubling" and grounds "to be concerned about the Peruvian judicial system" D.I. 92 at 2, 17, 20. Thus, Newmont must prove "the facts are otherwise" and that Plaintiffs will get a fair hearing in Cajamarca. D.I. 96-2 at 7-8.

They come nowhere close. Defendants present no evidence refuting Plaintiffs' evidence that corruption is prevalent in Cajamarca courts. And they have not "counter[ed] effectively" Plaintiffs' evidence of Defendants' corruption, including in those courts. Their main argument, that Plaintiffs

[8] Because the trial courts are compromised, Defendants could not meet their burden even if appellate courts were fair. A forum must be able to provide an adequate *remedy*. *Piper*, 454 U.S. at 254 n.22. *Trial* courts fashion relief. While appellate courts spared the Chaupes long prison sentences after they spent years defending themselves against false charges, that is not a *remedy* for the abuses at issue here. No Peruvian court has *ever* granted the Chaupes affirmative relief. And corruption is not often obvious. A decision may *look* proper to an appellate court even if it was bought and paid for. A forum cannot be adequate if, to prevail, Plaintiffs must overcome lower court corruption.

had some success on appeal, D.I. 16 at 5-6, ¶¶ 13-18; D.I. 38-1 at 8-10, ¶¶ 17-26 (Velarde Decls.), is addressed above. Their declarant's conclusory suggestion that Peruvian courts are not corrupt, D.I. 18 at 6-9 ¶¶ 15-20; D.I. 54 at 11, ¶ 38 (Freyre Decls.), has no credibility coming from a lawyer whose firm is being investigated for corruption, D.I. 91-1 at 7-9, and given recent events, is absurd.[9]

In short, while Plaintiffs "produce[d] significant evidence documenting the partiality . . . typically associated with the adjudication of similar claims," Defendants did not refute this evidence. D.I. 96-2 at 7. Even if the Court cannot "draw conclusive judgment" as to which side is "telling the true story," Plaintiffs' evidence is "plausible at least" – as this Court's own concerns confirm. *See Eastman Kodak*, 978 F. Supp. at 1087. That precludes dismissal, because "defendants have not met their burden of proving the existence of an adequate alternative forum." *Id.*

III. Defendants cannot meet their burden to show Plaintiffs will have key evidence in Peru.

Under "the proper allocation of the burden of proof," D.I. 96-2 at 6-7, this Court must "reasonably assure itself that [Plaintiffs] would have access to *essential* sources of proof in [Peru]." *Lacey*, 932 F.2d at 184, 189 (emphasis in original). If they "cannot access [such] evidence," the "forum is inadequate." *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 161 n.14 (3d Cir. 2010). A failure to "require[e] an affirmative demonstration" that Plaintiff can present key testimony would "mistakenly relieve the moving Defendant of its burden." *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 426 (1st Cir. 1991).[10]

[9] Mr. Velarde also submitted a declaration with Defendants' motion for a protective order denying they provided economic benefits to judicial officers in cases involving the Chaupes. D.I. 74 at 2, ¶ 2. The denial does not disclaim bribing the prosecutor or public ministry, as Ms. Vásquez and Plaintiff Ysidora allege, nor did it address the irregularities Ms. Vásquez observed in proceedings involving Defendants. The prior opinion did not suggest this refuted Plaintiffs' evidence, and it does not.

[10] Plaintiffs' access to key evidence is part of the adequate forum analysis. *Eurofins Pharma US Holdings*, 623 F.3d at 161 & n.14; *Lacey*, 932 F.2d at 190-91 (Pollak, J., concurring). Prior to *Eurofins*, *Lacey* analyzed the issue as a private interest factor, but noted it might be "more logical" to address as an adequacy question. 932 F.2d at 186 and n.13. This Court discussed it as a private interest

This Court recognized that Plaintiffs identified "potential obstacles to proving their case, because the testimony of family members is uniformly deemed unreliable under Peruvian law." D.I. 92 at 24-25. Plaintiffs have been abused and harassed at their isolated farm; eyewitness testimony is necessary for most if not all of the Chaupes' claims, and the primary eyewitnesses, other than the perpetrators, are the Plaintiffs and their family members. D.I. 27-1 at 2-76 (Plaintiffs' Decls.). But family member testimony is viewed with extreme suspicion, and a judge can refuse to receive it "based on the understanding that it is biased." D.I. 43-1 at 258, ¶¶ 42-44; D.I. 86 at 3-4. Under Article 229 of the Peruvian Civil Procedure Code, "unless the opposing party proposes it," a party's spouse and relatives up to first cousins may not serve as a witness. D.I. 43-1 at 258 ¶¶ 42-44 and n.5; D.I. 86 at 3-4. And *parties* cannot testify in person in their own cases, unless called by their opponent for cross-examination. Article 221, D.I. 43-1 at 259, ¶¶ 46-47; D.I. 86 at 3-4.

Because the critical witnesses to many events are Plaintiffs or other close family members, they could only testify if Newmont chooses to call them. And their testimony could still be excluded under Article 229. Thus, FNC dismissal would likely deny Plaintiffs their main source of evidence: eyewitness testimony to their ordeal. Since the Court cannot "assure itself" that Plaintiffs have access to essential proof, dismissal would be improper. *Lacey*, 932 F.2d at 174, 186, 189.

CONCLUSION

Defendants cannot prove Peru is a generally adequate forum given the judicial crisis, cannot overcome Plaintiffs' "troubling" evidence of Defendants' own corruption, and cannot show that their chosen forum will consider critical evidence. Defendants' motion should be denied.

Dated: June 21, 2019

Respectfully submitted,

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factor, but noted that it goes to adequacy. Dkt. No. 92 at 24-25. Even under the interest factor rubric, failure to show access to key evidence alone forecloses dismissal. *Lacey*, 932 F.2d at 184, 189.

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CERTIFICATE OF SERVICE

I, Misty A. Seemans, hereby certify that on June 21, 2019, 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:

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