No. 2020-1765

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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July 29, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Rule 26.1, Appellees Newmont Corporation (f/k/a Newmont Mining Corp.), Newmont Second Capital Corporation, Newmont USA Limited, and Newmont Peru Limited make the following disclosure:

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

2) The Vanguard Group Inc. holds 10% or more of Newmont Corporation's stock.

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

4) 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 case is back before the Court after a limited remand. The district court previously held that Peru was an adequate forum and dismissed on forum non conveniens (FNC) grounds. This Court recognized that the district court had "carefully reviewed the record" and issued a "thorough and thoughtful opinion," and that the adequacy inquiry is "'committed to the [district court's] sound discretion,'" but remanded because of a supervening corruption scandal. *Acuna-Atalaya v. Newmont Mining Corp.*, No. 18-2042, 765 F. App'x 811 (3d Cir. 2019), slip op. 6-8 ("CA3" Op.) (citation omitted). The question on remand was whether the district court's assessment of the adequacy of the Peruvian judiciary had changed. After another careful review of the record, and a similarly thorough and thoughtful opinion, the district court unequivocally held that it had not.

As the district court found, the Peruvian government uncovered the corruption, is prosecuting the corrupt actors, and has implemented extensive reforms. The recent events have nothing to do with Plaintiffs' case. And there is still no reason to think Defendants would illegally influence the Peruvian courts. The judicial system in Peru—as in many Latin American and other countries—is flawed. That is an unfortunate reality. But it is still more than adequate to fairly adjudicate Plaintiffs' claims. The district court correctly declined to become one of the very few courts to ever declare a foreign forum too corrupt to be adequate.

Plaintiffs' arguments on appeal misstate the law, the district court's decision, and the record evidence. At bottom, Plaintiffs just disagree with the district court's conclusions. But the district court applied the burden and standards set forth by this Court and its decision is amply supported by the evidence. This Court should affirm.

STATEMENT OF RELATED CASES

This case was previously before this Court. *Acuna-Atalaya*, 765 F. App'x. 811. There are no cases related to this proceeding in any United States federal court or state court.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Parties Are In A Land Dispute In Cajamarca, Peru

This case arises out of a property dispute in the Northern Andes of Peru, in the Cajamarca region. In 2001, Minera Yanacocha S.R.L. (Yanacocha), a mining company in Peru and Defendants' subsidiary, acquired two adjacent parcels of land historically possessed and farmed by local *campesinos* (Disputed Land). JA165-66 ¶¶ 2, 5 (Velarde Decl.). Ten years later, Plaintiffs—seven members of the Chaupe family—began living on the Disputed Land. JA483-84 ¶¶ 7-9 (Velarde Decl.); *see* JA491 (map of Disputed Land).

Peruvian law provides certain remedies for trespass. JA599 ¶ 9 (Freyre Aff.). One such remedy is an out-of-court possession defense known as a "possess[ory]

defense," where the owner must take action within 15 days of learning of the trespass. JA600 ¶ 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. JA601 ¶¶ 15-16. If a possessory defense is used, and the trespasser remains on or returns to the property, the owner must exercise another possessory defense within 15 days. *Id.* ¶ 17. Failure to do so effectively gives the trespasser the right to remain on the property until there is a judicial resolution of property rights. JA602 ¶ 20.

In August 2011, Plaintiffs trespassed onto the Northern Parcel and refused to leave. JA483-84 ¶¶ 7-9 (Velarde Decl.). Yanacocha tried to exercise its possessory defense to evict Plaintiffs. *Id.* ¶¶ 9-10. After that attempt failed, Yanacocha decided not to interfere with Plaintiffs' activities on the Northern Parcel, pending a final judicial resolution of the parties' rights. JA484 ¶ 10.

In 2015, Plaintiffs extended their occupation to the Southern Parcel. *Id.* ¶ 12. Yanacocha employed its possessory defense, but Plaintiffs continued to encroach—requiring Yanacocha to regularly exercise that defense. JA485 ¶ 14. When Yanacocha learned of an incursion, it promptly met with the trespassers, directed them to leave, and returned the property to its previous condition (*e.g.*, pulling out crops, removing improvements). JA484-85 ¶¶ 13-14. Since 2018, with limited exceptions, incidents of Plaintiffs' encroachment and Yanacocha's possessory

defenses have largely ceased. Dkt. 126 at 5:3-6:7 (Oct. 28, 2019 Tr.) (Plaintiffs' counsel stating "it's been relatively quiet at the family's homestead").

Yanacocha never engaged in violent or harassing conduct against Plaintiffs. JA167 ¶ 10 (Velarde Decl.). No force has been exerted against any of the Plaintiffs. JA585-86 ¶ 5 (Farfan Decl.); JA594-95 ¶¶ 10, 12 (Herran Decl.). Plaintiffs and their family members, on the other hand, have wielded machetes and attacked Yanacocha representatives with rocks. JA594 ¶ 10, Exs. B-G (videos lodged with court).

B. The Land Dispute Has Spawned Multiple Lawsuits In Peru

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

Beginning in May 2011, after their first trespass, Plaintiffs have attempted to bring criminal charges against Yanacocha employees. JA168 ¶ 14 (Velarde Decl.). After thoroughly investigating each complaint, Cajamarca officials declined to prosecute. *See, e.g.*, JA495-537 (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. JA488 ¶ 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. JA563-69 (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. JA571-82 (Cajamarca Appeals May 2016 Decision).

Yanacocha initiated legal proceedings in the Peruvian courts too. 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. JA179-90 (Appeals Chamber August 2013 Decision). In 2014, Plaintiffs were again found guilty. JA168 ¶ 17 (Velarde Decl.). The appellate court again reversed. *Id.* Yanacocha appealed to the Supreme Court, which upheld the appellate court's decision after finding the evidence insufficient to determine which individual had engaged in the violent act. JA432-55 (Supreme Court 2017 Decision).

In 2011, Yanacocha also sought an injunction to prevent Plaintiffs from using the Northern Parcel. JA168 ¶ 15 (Velarde Decl.). Although the Peruvian court granted the injunction, Yanacocha declined to enforce it to avoid further conflict. JA173-78 (Superior Court December 2011 Decision).

Finally, Yanacocha filed two civil lawsuits in Peru to recover possession and ownership of the Disputed Land. JA192-253 (Yanacocha Civil Complaints). In 2015, Yanacocha obtained a preliminary injunction against Plaintiffs' trespass of the Southern Parcel, but the trial court later withdrew the injunction and the appellate court affirmed. JA457-67 (Superior Court March 2016 Decision). Both lawsuits remain pending. JA169 ¶ 18 (Velarde Decl.).

C. The Peruvian Government And Defendants Have Taken Steps To Protect Plaintiffs

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 near the Disputed Land. JA32 (2018 Decision); *see* JA367 (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." JA151-52 ¶¶ 350-51 (Complaint).

Defendants, meanwhile, have taken steps to investigate Plaintiffs' claims. In 2015, Newmont funded an independent factfinding mission to examine "the allegations of human rights violations perpetrated against the Chaupe family." JA365 (Resolve Report). After reviewing reports by key actors (including the Chaupes), 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." JA406, 403.

II. PROCEDURAL HISTORY

A. Plaintiffs File Suit In Delaware

In September 2017, Plaintiffs filed suit in the District Court of Delaware asserting state law tort claims against Defendants (JA152-63)—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. JA74, 79 ¶¶ 3, 31.

Defendants filed a motion to dismiss on FNC grounds, and Plaintiffs moved for a preliminary injunction. Dkt. 14, 26. By December 2017, the parties completed briefing on both motions after having compiled a record of over 100 exhibits. Dkt. 50, 51 (Reply Brs.). On the eve of the scheduled FNC hearing, Plaintiffs introduced additional exhibits through a notice of supplemental evidence. Dkt. 79.

At the hearing, the district court explained that it had "thoroughly read the briefing" and "the underlying materials which are voluminous" (Dkt. 90 at 5:6-9 (Tr.)), and that it had "spent a fair amount of time trying to immerse [itself] in the nuances of the case" (*id.* at 26:3-6). The court also overruled Defendants' objections to Plaintiffs' evidence (*id.* at 5:9-20), and invited Plaintiffs to submit "any other evidence [they had] of the violence directed against [Plaintiffs] that … should move

[it] to find a Peruvian court[] inadequate" (*id.* at 35:5-9). Plaintiffs then filed two additional notices of supplemental evidence. Dkt. 86, 91.

B. The District Court Grants A Conditional Dismissal

On April 11, 2018, the district court dismissed Plaintiffs' complaint in a 28-page decision. JA28-55. The dismissal was 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"; and (3) that Defendants "not directly, or indirectly … raise objection to any of Defendants' officers or employees testifying or providing evidence relevant to the claims asserted by Plaintiffs." JA56.

The district court recognized 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." JA36 (citation omitted). And 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," and because "Plaintiffs conceded that Peruvian law recognizes a cause of action and offers a remedy." JA38.

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." JA38-39. "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." JA40. The court noted that theories of "generalized corruption" have "'not enjoyed a particularly impressive track record.'" *Id.* (citation omitted). And the court then addressed Plaintiffs' specific allegations, walking through the record evidence and explaining why none justified finding the Peruvian court system inadequate. JA42-47.

The district court found ample reasons to "question whether Yanacocha's influence over the Peruvian government is as strong as Plaintiffs assert." JA45. 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 contravened the "core premise of Plaintiffs' argument … that Defendants will go to any means to expand their mining operation." *Id.* The court further found it "far from clear … that Defendants are ruthlessly determined to exploit weaknesses in the Peruvian judiciary to trample Plaintiffs' rights." *Id.* In the end, 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. JA47.

As for balancing, 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." JA55. The court considered Plaintiffs' argument that "testimony of family members is uniformly deemed unreliable under Peruvian law," but 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." JA51-52.

C. Plaintiffs Appeal To This Court

On appeal, Plaintiffs focused primarily on whether the Peruvian courts were too corrupt to qualify as an adequate forum in this case. Pls.' CA3 Br. 32-38. And Plaintiffs asked this Court to take judicial notice of recently uncovered corruption within the Peruvian judiciary. Pls.' CA3 Mot. Judicial Notice 1 (Aug. 2018 CA3 Judicial Notice).

Specifically, in early 2018, local prosecutors—who were conducting a judicially approved wiretap investigation of drug trafficking and organized crime in the Port of Callao, Peru (hundreds of miles from Cajamarca)—recorded five members of the judicial sector engaged in influence peddling. Pls.' CA3 Borochoff-Porte Decl., Ex. 4 (news article). The scandal was dubbed the "White Collars of the Port." In response, the Executive Council of the Judiciary declared a 90-day judicial "state of emergency" (*id.*, Ex. 1 (administrative resolution)); Congress declared a

nine-month state of emergency for the National Magistrates Council (CNM), the entity charged with appointing judges and prosecutors (Pls.' CA3 Reply Br. 27 n.10); and the President proposed reforms (*id.* at 26 (citation omitted)). The limited record before this Court did not extend beyond July 2018 and provided few details.

D. This Court Remands To The District Court

On March 20, 2019, this Court issued an unpublished decision remanding to the district court based on "changed factual circumstances." CA3 Op. 3. This Court noted that the district court had "meticulously reviewed the then-existing record," "engaged in a rigorous analysis," and set forth "its reasoning in a thorough and thoughtful opinion." *Id.* at 3, 4, 8. The Court remanded for the district court "to reevaluate whether Peru is an adequate alternative forum in light of [the] supervening corruption scandal that has prompted the Peruvian judiciary and Peru's Congress to declare a state of emergency." *Id.* at 2.

Because the FNC "inquiry is generally 'committed to the sound discretion of the trial court,'" this Court left it to the district court "to assess in the first instance whether and to what extent these developments affect its conclusions here." *Id.* at 6 (citation omitted). The Court noted that, in "'rare circumstance[s],'" a foreign forum may not be adequate if the plaintiff would "'be … treated unfairly'"; "trust[ed]" that the district court would be "mindful of the proper allocation of the burden of proof and the standards"; and embraced the Eleventh Circuit's articulation of those

"burdens" and "standards" amidst allegations of "corruption." *Id.* at 6-8 (omission in original) (citations omitted). This Court then ordered the district court "to consider the record as supplemented and to rule on the adequacy of the proposed alternative forum." *Id.* at 8.

E. The District Court Again Grants A Conditional Dismissal

On remand, the parties agreed to a supplemental briefing schedule and submitted dozens of additional declarations and exhibits. JA68-70 (docket). The district court held another hearing and, shortly before the hearing, Plaintiffs submitted more exhibits. JA2101-14 (newspaper articles).

The new evidence on remand focused primarily on the recent developments in Peru—which did not involve Defendants—and fell roughly into two categories. First, the parties presented evidence of the corruption uncovered through the White Collars of the Port scandal and the Peruvian government's response, including the states of emergency, the resulting sanctions, and the extensive reforms. JA9-11 (2018 Decision). Second, the parties presented evidence on more recent events regarding Peru's political branches and the subsequent legislative elections. JA11-13. Specifically, after supplemental briefing was complete, the executive clashed with the legislative branch over corruption reforms; the President who was pushing additional reforms (successfully) dissolved Congress; Congress (unsuccessfully)

attempted to impeach the President; the Constitutional Court confirmed that the President's actions were lawful; and Peruvians elected a new Congress. JA13.

On March 10, 2020, after considering this voluminous record as supplemented, the district court dismissed again—in a 25-page decision. The district court explained that this Court's remand was "based upon events affecting the judiciary in Peru that occurred after" its initial decision, and asked it to "evaluate whether these new developments changed [its] conclusion that Peru is an adequate forum." JA6-7. And, as the court noted, "[t]he parties agree[d] that [its] analysis on remand is so limited." JA16.

The district court also recognized that this Court had specified that it "reassess adequacy" under the standards set forth in *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311-12 (11th Cir. 2001). As relevant here, the court explained that, under *Leon*, a plaintiff must first produce "significant evidence" that "[t]he alternative forum is partial to defendants or will treat the plaintiff unfairly" and, if the plaintiff does so, then "'the defendant has the burden to persuade the district court that the facts are otherwise.'" JA8 (emphasis and citation omitted). The court "reopen[ed] the inquiry into the adequacy of the Peruvian courts," applied the *Leon* framework to "the record as a whole," found that Plaintiffs had produced "enough" evidence "to satisf[y] their [initial] burden of production," and then found that "Newmont has satisfied its ultimate burden to show that Peru is an adequate alternative forum." JA9, 14-15.

Because Defendants had "satisfied" the court "that the entire judiciary of Peru cannot be deemed inadequate, and further satisfied" it that "Plaintiffs … can be treated fairly by Peruvian courts" in this dispute, the court again granted the motion to dismiss without prejudice subject to the three conditions initially imposed. JA25.

SUMMARY OF ARGUMENT

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

First, Plaintiffs argue that the district court failed to apply the correct burden of proof on remand because it did not reach a "conclusive" judgment, and because it resolved factual conflicts in Defendants' favor. They are wrong. The district court irrefutably applied the precise burden framework adopted by this Court in the first appeal. And Plaintiffs' attempts to further ratchet up the standard find no support in the case law and make no practical sense. Plaintiffs' "heads we win, tails you lose" approach to adequacy would be a drastic change in the law that would have U.S. courts declaring foreign forums corrupt far more often than they do—or should.

Second, Plaintiffs argue that the district court abused its discretion in finding that the Peruvian forum was adequate. Plaintiffs disagree with the district court's assessment of the evidentiary record, but that provides no basis to reverse under the

deferential standard of review applicable here. In finely parsing the district court's findings, Plaintiffs also misstate what the district court said and what the evidence showed. The real dispute was less about historical facts and more about conclusions to be drawn from those facts regarding the ultimate question of adequacy. And on that, the district court's judgments were correct and well within its sound discretion.

Third, Plaintiffs assert that the district court abused its discretion in failing to address certain evidence. The suggestion that the district court did not thoroughly consider the evidence is belied by the record. And the court was not required to cite every single piece of evidence in its decision.

Fourth, Plaintiffs' remaining arguments are also without merit. The new evidence submitted by Plaintiffs on appeal adds little, and what it does add supports the decision below. There are no grounds to remand, let alone reverse. And Plaintiffs just misunderstand Peruvian law when it comes to familial witnesses. Every Plaintiff will submit written declarations. That they will not also be able to testify live (in most cases) is neither unique nor disqualifying. Finally, Defendants already stipulated to a waiver of limitations condition; it is Plaintiffs that failed to take that issue up with the district court on remand.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE CORRECT BURDEN OF PROOF AND LEGAL STANDARDS

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), including "if it does not hold the defendants to their proper burden," *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988).

B. The District Court Applied The Precise Burden And Standards Ordered By This Court

This Court "trust[ed]" that the district court would be "mindful of the proper allocation of the burden of proof and the standards" on remand, CA3 Op. 6-7, and embraced the Eleventh Circuit's approach as set forth in *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001). Under that framework, "defendants have the ultimate burden of persuasion, but only where [Plaintiffs have] substantiated [their] allegations of serious corruption." CA3 Op. 7-8 (citation omitted). If Plaintiffs "produce[] 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 [Defendants have] the burden to persuade the [court] that the facts are otherwise." *Id.* (citation omitted).

This Court's "trust" was warranted. The district court adopted and applied the *Leon* framework on remand. The court first placed the burden of production on Plaintiffs to "produce 'significant evidence' demonstrating that 'the remedy offered by the other forum is clearly unsatisfactory.'" JA7-8 (citation omitted). And the court found that Plaintiffs had met that burden through the "submission of evidence of general and specific corruption, plus the supervening instances of significant corruption." JA15. The court recognized that Defendants "no doubt disagree[] with the conclusions Plaintiffs draw from these facts," but explained that such "disagreement" goes to Defendants' "burden of persuasion, not Plaintiffs' burden of production." JA16.

Which the district court turned to next. Per *Leon*, the court required Defendants to "persuade" it "that the facts are otherwise." JA8 (citation omitted). The court found that Defendants did just that and, thus, carried their "ultimate burden to establish Peru as an adequate alternative forum." JA16; *see* JA24. Plaintiffs no doubt disagree with the district court's conclusions. *See* Part II, *infra*. But this was a textbook application of the precise burden of proof and standards adopted by this Court in the first appeal.

C. Plaintiffs' Arguments To the Contrary Are Without Merit

Plaintiffs concede that this Court "endorsed" the Eleventh Circuit's approach and that the district court "acknowledged this Court's burden-shifting framework." Pls. Opening Br. (Br.) 26-27. But Plaintiffs argue that the district court committed legal error in *how* it held Defendants to their burden because it was required but failed (i) to reach a "conclusive" or "definitive" judgment (Br. 27-31), and (ii) to resolve all factual conflicts in Plaintiffs' favor (Br. 31-33). So, in Plaintiffs' view, Defendants could only have persuaded the district court that the "facts are otherwise" by producing undisputed evidence sufficient for the district court to reach an irrefutable judgment that the Peruvian forum was not too corrupt to be adequate. That ratcheted-up standard is legally unsupported and practically impossible, and it would make nonsense of the *Leon* framework already adopted by this Court.

1. *Plaintiffs' cases provide no support for heightened standards*

Plaintiffs first argue that, "[t]o meet its burden of persuasion, a defendant must produce sufficient evidence to allow the district court to reach a 'definitive' or 'conclusive' judgment, free of uncertainty, that the alternative forum is adequate." Br. 26. But there is no "conclusive" or "definitive" judgment requirement. To argue otherwise, Plaintiffs cherrypick language from two cases. Neither provides support.

Plaintiffs get the word "definitive" from *Bank of Credit & Commerce International (Overseas) Ltd. v. State Bank of Pakistan (BCCI)*, 273 F.3d 241 (2d

Cir. 2001). "The Second Circuit," Plaintiffs say, has "required defendants to produce sufficient evidence whereby the district court can reach a '*definitive* finding as to the adequacy of the foreign forum.'" Br. 28 (emphasis added) (quoting *BCCI*, 273 F.3d at 247). *BCCI* held no such thing. The issue there was whether a district court could condition dismissal on a foreign court exercising jurisdiction without first examining whether jurisdiction might be an issue. 273 F.3d at 247-48. And the Second Circuit held that a district court need only have a "justifiable belief" that there will not be a jurisdictional issue before granting a conditional dismissal. *Id.* at 248. The word "definitive" appears once: "the district court may dismiss on [FNC] grounds, despite its inability to make a *definitive* finding as to the adequacy of the foreign forum, if the court can protect the non-moving party by making the dismissal conditional." *Id.* at 247 (emphasis added). This case thus provides no support for a "definitive" judgment standard even in the more traditional adequacy context—let alone when the question is whether the foreign forum is too corrupt to be adequate.

Plaintiffs' support for the "conclusive" judgment standard fares no better. Plaintiffs get that word—which they repeat more than a dozen times throughout their brief—from the district court's decision in *Eastman Kodak Co. v. Kavlin,* 978 F. Supp. 1078, 1087 (S.D. Fla. 1997). And from that decision alone, Plaintiffs assert that "*if* 'the Court cannot draw a conclusive judgement' that the forum is fair, 'defendants have not met their burden.'" Br. 28 (quoting *Eastman Kodak Co.,* 978

F. Supp. at 1086-87 (emphasis added)). But the critical word "if" has been added by Plaintiffs. The word "conclusive" appears once, not as an articulation of any overarching legal standard, but as a statement of the district court's inability—based on the facts of that case—to "draw a *conclusive* judgment as to which side (if either) is telling the true story." 978 F. Supp. at 1087. The "burden" language comes later and, similarly, states only the district court's conclusion that (on the facts there) "defendants have not met their burden." *Id.*[1]

Plaintiffs also argue that the district court was required to "draw[] all reasonable inferences … and resolve[] any factual conflicts" in Plaintiffs' favor. Br. 31 (first and third alteration in original) (quoting *Constr. Specialties, Inc. v. Ed Flume Bldg. Specialties, Ltd.*, No. 4:05cv1863, 2006 WL 42181, at *5 (M.D. Pa. Jan. 6, 2006)). Plaintiffs acknowledge that this Court has adopted no such standard. Br. 31. But, they claim, "district courts have held that FNC motions follow the general rule in the venue context.'" *Id*. For this proposition, they cite three cases.

But as Plaintiffs' own parentheticals for the two appellate cases make clear, none were FNC decisions. *See Hancock v. AT&T Co.*, 701 F.3d 1248, 1260-61 (10th

[1] The other two district court cases cited by Plaintiffs are similar in kind. Neither articulated any heightened legal standard; they simply examined the specific evidence and stated their respective conclusions. *See Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982); *McLellan v. Am. Eurocopter, Inc.*, 26 F. Supp. 2d 947, 951 (S.D. Tex. 1998).

Cir. 2012) (forum selection clause); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2003) (same); *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1352, at 324 (2004) (improper venue). The same is true of *Construction Specialties*. The only mention of FNC there was the court's footnote explanation that the defendants' motion to transfer venue was *not* an FNC motion. 2006 WL 42181, at *3 n.1. And the quote Plaintiffs excerpt regarding the resolution of factual conflicts was in the context of a "Fed.R.Civ.P. 12(b)(3) motion." *Id.* at *2. In short, Plaintiffs have not identified (and Defendants are not aware of) *any* district court—let alone appellate court—that has applied this standard to an FNC motion.

Then, relying on *Eastman Kodak*, Plaintiffs suggest their "story" need only be "plausible." Br. 31 (quoting 978 F. Supp. at 1087). But *Eastman Kodak* never adopted a "plausibility" standard any more than it adopted a "conclusive" judgment standard. The court simply stated, "in light of the expert declarations," that "plaintiffs' story is plausible at least." 978 F. Supp. at 1087.

Finally, Plaintiffs fault the district court for "taking as its starting point its original decision" because, they argue, that decision "impermissibly placed the burden of proof on Plaintiffs." Br. 30. As an initial matter, Plaintiffs' premise is flawed. The district court got the burden right the first time. JA38-39. And, in "trust[ing]" that the district court would be "mindful" of the proper burden on

remand, this Court did not hold that the district court had been anything less in its initial decision. CA3 Op. 6-7.

But in any case, Plaintiffs are wrong to suggest that the district court should have started from scratch. The remand in this case was a limited one: to "reevaluate whether Peru is an adequate forum in light of [the] supervening corruption scandal." *Id.* at 2. This Court recognized that the district court had already "meticulously reviewed the then-existing record and engaged in a rigorous analysis," but believed that the "significant factual developments" that "post-dat[ed] its dismissal" might "cast its ruling in a different light." *Id.* at 4. The Court left it to the district court to determine "whether and to what extent these developments affect its conclusions here." *Id.* at 6. That is exactly what the district court did.

2. *Other FNC cases reject Plaintiffs' heightened standards*

Not only do Plaintiffs' heightened standards find no support in the case law cited, they are rejected—either explicitly or implicitly—by a wealth of cases going the other way.

First, although Plaintiffs frame their argument in terms of the "burden of proof," what they really seem to be asking for is something akin to a beyond-a-reasonable-doubt standard of proof. But that standard has generally been reserved for criminal proceedings. *See Cal. ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 93 (1981) ("[T]he Court has never required the 'beyond a

reasonable doubt' standard to be applied in a civil case."). There is no basis to apply it to an FNC motion.

Second, on an FNC motion to dismiss, a district court "is free to weigh the evidence." *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 452 (D. Del. 1978) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). In *Mortensen*, which involved a Rule 12(b)(1) motion, this Court held that "the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." 549 F.2d at 891. Then, in *Phoenix Canada Oil Co.*, the district court held that the same was true of a motion to dismiss on FNC grounds. 78 F.R.D. at 452; *see also Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 249-50 (4th Cir. 2011) (rejecting argument that district court misapplied *Leon* burden by resolving "conflicting affidavits" in favor of defendants). And beyond those cases that have said so explicitly, courts routinely weigh evidence and resolve disputed facts when granting FNC motions amid corruption allegations.[2]

What Plaintiffs' Rule 12(b)(3) cases recognize is really a process point. A district court should not resolve factual disputes without giving the parties notice and an opportunity to be heard. That is the takeaway from the Ninth Circuit's

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[2] The cases are legion. Here are a few: *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1226 (9th Cir. 2011); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 531-41 (S.D.N.Y. 2002), *aff'd*, 414 F.3d 233 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002).

decision in *Murphy*. 362 F.3d at 1139-40 (when "genuine factual issues are raised," district court may "hold[] an evidentiary hearing" at which it "may weigh evidence, assess credibility, and make findings of fact"). That is also what this Court held (in the Rule 12(b)(1) context) in *McCann v. George W. Newman Irrevocable Trust,* 458 F.3d 281 (3d Cir. 2006). *See id.* at 290-91 ("A court can evaluate its jurisdiction without an evidentiary hearing 'so long as the court has afforded [the parties] notice and a fair opportunity to be heard.'" (alteration in original) (citation omitted)). This case law makes clear that a district court is not forever powerless to resolve factual disputes against the plaintiff—even outside the FNC context.[3]

Third, a district court *has* to be able to weigh the evidence under the *Leon* framework that everyone agrees applies here. Remember that for the burden to shift back to Defendants, Plaintiffs must have already come forward with "significant evidence documenting the partiality … typically associated with the adjudication of similar claims and these conditions [must be] so severe as to call the adequacy of the forum into doubt." *Leon*, 251 F.3d at 1312. With that evidence in the record, Defendants must then persuade the district court that the "facts are otherwise." *Id.*

[3] Plaintiffs stipulated to the process on remand. Dkt. 97 (Joint Stipulation). And the fact that there were going to be factual disputes in this case was no surprise. Yet Plaintiffs never asked for an evidentiary hearing. *See McCann,* 458 F.3d at 290 ("A key consideration in determining whether a[n] [evidentiary] hearing is required is whether either party requested one").

Resolving factual disputes and weighing competing evidence is what the final step of the *Leon* framework is all about.

Finally, Plaintiffs conflate genuine disputes of historical facts with disagreements as to ultimate facts. The gravamen of Plaintiffs' complaint has to do with the latter category of "facts"—*i.e.*, the ultimate judgments to be drawn from undisputed historical facts. For example, with respect to the supervening acts of corruption in Peru, the real dispute between the parties was not about the underlying facts (*e.g.*, details of the White Collars of the Port scandal, the states of emergency, the government reforms), it was about whether the government reforms were (or would be) sufficient, whether more revelations of corruption were still to come, whether the corruption uncovered rendered the Peruvian forum inadequate, and so forth. *E.g.*, Br. 31-33. As to those "facts," the district court was well-positioned and required to make the necessary judgments. *See Washington Post Co. v. U.S. Dep't of Health & Human Servs.*, 865 F.2d 320, 326 (D.C. Cir. 1989) ("[F]actual issues that involve predictive facts almost always require a court to survey the available evidence, to credit certain pieces of evidence above others, and to draw cumulative inferences until it reaches a judgmental conclusion.").

3. *Plaintiffs' heightened standards would turn FNC law on its head*

Putting this all together, in Plaintiffs' view, a district court is *required* to find a foreign forum too corrupt to be adequate if (a) there is any factual dispute; (b) it

has any doubt about the forum's adequacy; *or* (c) Plaintiffs have a "plausible" story. That describes virtually every case where adequacy is disputed because of alleged corruption. If that were the law, one would expect to see countless cases denying FNC motions on corruption grounds. But that is not the reality—nor should it be.

As the district court (and this Court) recognized, "deeming an alternative forum inadequate" still "remains the 'rare circumstance,'" and the theory that foreign courts are too corrupt to be adequate has "'not enjoyed a particularly impressive track record.'" JA16-17 (citations omitted); *see* CA3 Op. 7. There is a reason why Plaintiffs rely so heavily on *Eastman Kodak*—it is one of a very small handful of decisions where a district court has *ever* deemed an alternative forum too corrupt to be adequate. And there is a good reason for that: U.S. courts should not be in the business of declaring a foreign forum corrupt based on the mere existence of a factual dispute, any doubt about the forum's adequacy, or evidence that is just plausible. *See Leon*, 251 F.3d at 1312 ("The reluctance to hold an alternative forum inadequate on [corruption] grounds has manifested itself not only in the degree of corruption … that must be shown, but also in the allocation of the burdens of proof."); *cf. In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002); *Gonzales v. P.T. Pelangi Niagra Mitra Int'l*, 196 F. Supp. 2d 482, 488 (S.D. Tex. 2002). The standards Plaintiffs seek to impose would not only change the law, it would threaten the

international comity interests that explain why a 20-year-old case like *Eastman Kodak* remains an outlier.

4. *Plaintiffs mistake the district court's candor for uncertainty*

Plaintiffs are also wrong to suggest that the district court did not reach a definitive judgment as to adequacy. Plaintiffs repeatedly quote the district court's statement that it "remain[ed] concerned that Plaintiffs' ability to be fairly heard in Peru is compromised" (Br. 2, 4, 22, 23, 29, 30 (quoting JA2)), and they infer that its "concern" was about corruption. The remainder of that sentence shows otherwise. As the court explains, "because" of this "concern," it imposed "various conditions"—in its original order and on remand. JA2. Those conditions address whether Peruvian courts would exercise jurisdiction, whether certain evidence would be admissible, and whether any resulting judgment could be enforced in the United States. JA26-27, JA56 (Order). As Plaintiffs concede (Br. 30-31), those conditions do not address (or attempt to address) Plaintiffs' corruption allegations. JA56. Which makes it implausible the court imposed them "because" of lingering concerns that Plaintiffs would not be "fairly heard in Peru" due to corruption.

More fundamentally, Plaintiffs mistake the district court's candor for uncertainty. Of course the supervening events in Peru were "concerning." JA2. But the question is whether they were sufficient, along with other evidence, to conclude that the Peruvian courts are not an adequate forum to resolve the parties' dispute.

And on that question the district court did not equivocate: "Newmont has satisfied me that the entire judiciary of Peru cannot be deemed inadequate, and further satisfied me that Plaintiffs here, citizens and natives of Peru, can be treated fairly by Peruvian courts in a dispute involving a United States corporation." JA25.

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. v. Lemster*, 737 F.3d 869, 872 (3d Cir. 2013) (citation omitted). Rather, as this Court explained in the first appeal, the FNC inquiry is "committed to the sound discretion of the trial court." CA3 Op. 6 (quoting *Piper*, 454 U.S. at 257). And the district court's decision "may be reversed only when there has been a clear abuse of discretion." *Piper*, 454 U.S. at 257. "[A]buse of discretion review acknowledges that there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment," an appellate court "will not reverse even if [it] would have gone the other way had the choice been [its] to make." *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1288 (11th Cir. 2009) (citation omitted).

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

Because federal courts are 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 v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006) (citation omitted). There are dozens of decisions finding adequacy despite allegations of corruption.[4] And while each case must be decided on its own facts, this is not the rare case.

As this Court recognized, even before the remand, the district court had "carefully reviewed" the voluminous record and set forth its reasoning "in a thorough and thoughtful opinion." CA3 Op. 8. On remand, the district court again carefully reviewed the even more voluminous "record as supplemented," held another hearing, took judicial notice of events in Peru that occurred after the hearing, and issued another "thorough and thoughtful" opinion. *Id.*

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[4] *See, e.g.*, *Jones v. IPX Int'l Equatorial Guinea, S.A.*, 920 F.3d 1085, 1091 (6th Cir. 2019) (Equatorial Guinea); *Jiangsu Hongyuan Pharm. Co. v. DI Glob. Logistics Inc.*, 159 F. Supp. 3d 1316, 1329-32 (S.D. Fla. 2016) (China); *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 337-38 (S.D.N.Y. 2008) (Egypt), *aff'd*, 358 F. App'x 282 (2d Cir. 2009); *Gonzales*, 196 F. Supp. 2d at 487-89 (Indonesia); *Stalinski v. Bakoczy*, 41 F. Supp. 2d 755, 762 (S.D. Ohio 1998) (Honduras); *Banco Mercantil, S.A. v. Hernandez Arencibia*, 927 F. Supp. 565, 567-68 (D.P.R. 1996) (Dominican Republic); *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 981-82 (2d Cir. 1993) (Venezuela).

After "carefully consider[ing]" the supervening "revelations, and, more importantly, Peru's response to them," the district court found that "Peru remains generally an adequate forum." JA16-17. Among other things, the court acknowledged the "exceptional" nature of declaring a foreign forum too corrupt to be adequate. JA16. Looking to the supervening corruption scandal, the court found that "the Peruvian government appears to have taken appropriate steps to address the scandals," and that "those steps suggest that corruption is not a feature of the judiciary or the current political regime." JA19. The court further determined that while the "few instances of corrupt actors who have manipulated or otherwise influenced the outcome of pending cases" is "no doubt serious," "such limited instances of corruption do not speak to whether these Plaintiffs can obtain a fair hearing in Peruvian courts, or suggest that the entire Peruvian judiciary is compromised." JA20. And with respect to the parties in particular, the court noted that Plaintiffs "have received favorable decisions from every level of the Peruvian court system, including during the pendency of the White Collars of the Port scandal," and that Defendants' "serious corporate reforms" make it "unlikely" they would engage in any corrupt acts. JA21-23. The court was correct to find the Peruvian forum adequate—and it certainly did not abuse its discretion in so holding.

C. Plaintiffs Simply Disagree With The District Court's Assessment Of The Evidence

Plaintiffs simply disagree with the district court's assessment of the evidence. As an initial matter, Plaintiffs argue only that "the record" does not "support a *conclusive* judgment that the forum is fair." Br. 34; *see also* Br. 45, 48. Since that is not the correct standard (*see* Part I, *supra*), and Plaintiffs do not claim the record is otherwise insufficient, the Court could reject Plaintiffs' record-based arguments out of hand. Regardless, Plaintiffs' critique of the district court's findings fails on its own terms.

1. *The State Department reports*

Plaintiffs first take issue with the district court's mention of the State Department's annual reports because they were "not part of the record." Br. 36. Plaintiffs' procedural objection is both surprising and misplaced. Plaintiffs have repeatedly requested judicial notice of far less reliable materials. *E.g.*, JA1089 (news article); Dkt. 79, Ex. 4 (LinkedIn profile page); JA2100-14 (news articles); Aug. 2018 CA3 Judicial Notice, Exs. 3-4 (same); Pls.' Mot. Judicial Notice, Exs. 2-7, 9-10, ECF 17-2, 17-3 (Pls.' MJN) (same). The district court (and this Court) have taken judicial notice of other material *sua sponte*. JA12-13 (judicially noticing articles); CA3 Op. 4 (same). And Plaintiffs previously submitted and relied on an earlier version of the same report. JA711-46 (2016 State Department Report on Human Rights Practices for Peru). For whatever reason, Plaintiffs chose not to

update the record to include the latest report. There was nothing improper about the district court comparing the 2016 report (that Plaintiffs submitted) to the most up-to-date report (that Plaintiffs did not). *See* Fed. R. Evid. 201(c).[5]

Plaintiffs also claim the district court "mistakenly asserted" that the State Department had not "downgraded" the Peruvian judiciary. Br. 36. For starters, the district court's discussion of the State Department report amounts to two sentences. JA16-17. And those sentences state only that "the Department of State has not declared Peru's legal system dysfunctional," and "[t]he State Department periodically evaluates the legal systems of foreign nations, and has not downgraded Peru's judiciary since my earlier ruling or issued any advisory contradicting conclusions it drew before the White Collars of the Port case emerged." *Id.* These are both accurate statements. Plaintiffs quibble with the word "downgraded," but the point remains: while the 2018 report describes the new scandal, the State Department drew no different conclusions about the Peruvian judiciary. *Compare* JA711, 724 (2016 Report) ("The most serious human rights problems were …

[5] Plaintiffs remarkably complain they were given no "opportunity to respond" to the latest State Department report. Br. 36. At the hearing, the district court asked whether there was "anything new from the Department of State, from either side." JA2119:11-17 (Oct. 28, 2019 Tr.). After defense counsel noted that the most recent report "specifically mention[s] the recent corruption scandal in Peru," but is not "terribly different from the 2016 report in terms of the ultimate conclusions," the court asked Plaintiffs whether there was "anything" they "want[ed] to say on that." JA2120:2-9. Plaintiffs' answer: "No, your Honor." *Id.*

corruption and impunity that undermined the rule of law"; "[t]here were allegations of widespread corruption in the judicial system during the year."), *with* Pls.' MJN, Ex. 11 at 1, 11 (2018 Report) ("Human rights issues included … government corruption, including in the judiciary"; "[t]here were allegations of widespread corruption in the judicial system.").[6]

2. *The Peruvian government's response to corruption*

Plaintiffs next argue that the district court erred in its assessment of the reforms adopted by the Peruvian government. Br. 37-41.

First, Plaintiffs argue that while the district court found that the "'principal actors involved'" had been sanctioned, "many actors have *not* been sanctioned." Br. 38 (citation omitted). But the "principal actors" the district court was referring to were those "involved in the White Collars of the Port case" (JA17)—the precise "supervening corruption scandal" this Court asked the district court to consider (CA3 Op. 2). And there is no dispute that *those* actors were sanctioned. As the district court recounted, "[t]he Callao appeals court judge was suspended" and "then arrested"; "[a]ll members of the National Magistrates Council were impeached and dismissed," and "the Council was disbanded and replaced"; and "Cesar Hinostroza, the Supreme Court judge … was suspended from his post and ordered to remain in

[6] The date confusion is explained by the fact that the 2018 report was published in 2019. Since the 2018 report was the only one available at the time, defense counsel and the court were plainly referring to that report.

Peru."[7] JA17-18 (citing JA1206-07, 1208 ¶¶ 8, 18 (Indacochea Decl.); JA1318-23 ¶ IV.8 (Quiroga-Leon Decl.)); *see also* JA1307, 1316, 1318-23, 1327 ¶¶ II.3.d, IV.5, IV.8, VII.4 (Quiroga-Leon Decl.).

Plaintiffs point to allegations of judicial corruption outside the White Collars of the Port case and argue that "many" of those actors have not been sanctioned. Br. 38-39. Apart from the fact that this does not refute the district court's actual finding, Plaintiffs identify precious little record evidence in support of their claim that "many" have escaped with impunity, and ignore record evidence to the contrary. *See* JA1316, 1328-32 (¶¶ IV.5, VIII.1-18) (Quiroga-Leon Decl.).

Plaintiffs instead turn to evidence that was not before the district court—a report by Peru's Public Attorney General's Office Specialized in Crimes of Corruption (Anti-Corruption Prosecutors Office report) and a news article—to argue that the corruption is still "widespread" and that the culpable actors remain in office. Br. 38-39 (citing Pls.' MJN, Ex. 1, 8). But even a cursory review of the evidence shows the opposite. Of the 3321 judges in Peru, 26 (or 0.8%) have been convicted

[7] Hinostroza fled to Spain and, in July 2020, Spain granted Peru's extradition request. *See* Defs.' Mot. Judicial Notice (Defs.' MJN), Ex. 1 (filed concurrently). As for the former Attorneys General (Br. 39), Pedro Chavarry was forced to resign, is undergoing impeachment proceedings, and may be suspended from his current position as Supreme Prosecutor (JA1323 ¶ IV.9 (Quiroga-Leon Decl.); Defs.' MJN Ex. 6), and Tomas Galvez has already been suspended from that position (Defs.' MJN, Ex. 5).

of some type of malfeasance, and 128 (or 3.8%) are subject to ongoing investigations. Pls.' MJN, Ex. 1 at 37-38. The numbers for public prosecutors are similar, with 16 (or 0.2%) convictions and 168 (or 2.4%) charges still pending. *Id.* at 37. If anything, the report shows that Peruvian prosecutors have the commitment, authority and resources to root out the corruption that remains. And as for Plaintiffs' claim that "*hundreds* of … corrupt judges remain in their posts" (Br. 39; *see also* Br. 14), the unidentified "sources" reported that those judges have all been "suspended," Pls.' MJN, Ex. 8 at 1.

Second, Plaintiffs contend that while the district court "pointed to reforms," the "current reforms do not *guarantee* a fair judiciary" and that, "[e]ven if ultimately sufficient, they do not ensure a fair hearing *now*." Br. 39-40 (final emphasis in original). What is most notable is what Plaintiffs do not say. They do not dispute that the Peruvian government adopted extensive reforms in the wake of the scandal. Nor could they. Among other things, "[t]he National Magistrates Council was abolished and replaced with … the National Board of Justice [(NBJ)]," which will "appoint judges and prosecutors, among other positions." JA18. And "[a]s of January 2020, the Board is fully staffed and has begun work" and will be "reviewing thousands of cases … concerning appointments, ratifications and disciplinary processes of judges and prosecutors." *Id.*; *see* JA1317-18 ¶ IV.7 (Quiroga-Leon Decl.) (detailing additional reforms).

Plaintiffs claim (Br. 39-40) that the district court did not address their critique of the current reforms, but that is not true. As the court explained, "Plaintiffs' evidence center[ed] on the corruption infecting the National Magistrates Council and the difficulty the [NBJ] had in becoming fully staffed," but "[b]oth problems have since been rectified." JA18 & n.7.[8]

Third, Plaintiffs challenge the district court's assessment of the current "political climate" in Peru. Br. 40. In their view, the events that preceded the legislative elections only "show[] how deeply embedded judicial corruption is in Peru." *Id.* But while Plaintiffs point to "judicial corruption reforms" as the "trigger[]" of the "political instability" in Peru (Br. 41), they ignore the fact that those *supporting* such reforms won. As the district court explained, "the political party targeted by the government for its ongoing role in corruption lost badly." JA18. In the end, Plaintiffs just disagree with the district court's conclusions. They don't point to anything evidencing an abuse of discretion.

3. *The location and type of corruption uncovered*

Plaintiffs also claim that the district court's findings that "Peru's judicial corruption crisis did not involve Cajamarca," is "mostly" about favor trading, and is

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[8] Plaintiffs note that the Anti-Corruption Prosecutors Office report says the creation of the NBJ is "insufficient" *by itself* to fix the justice system. No doubt. But the report also states that it represents, "without a doubt, the emergence of a unique opportunity to solve the pending problems that the former entity left behind and an opportunity to start a new phase." Pls.' MJN, Ex. 1 at 6.

unlikely to lead to further revelations were unsupported by the record. Br. 41-43 (citation omitted). Plaintiffs misrepresent what the district court found.

As for Cajamarca, the district court said only that "the White Collars of the Port case did not involve Cajamarca." JA16. That is absolutely true. *See* JA1324 ¶ IV.12 (Quiroga-Leon Decl.). The evidence Plaintiffs rely on has nothing to do with the White Collars of the Port case,[9] was very much refuted, and has no probative value—which explains why the district court did not address it. *See* Dkt. 126 at 22:5-25:15, 80:21-82:14 (Oct. 28, 2019 Tr.).

For example, Plaintiffs rely on an article (in Spanish and with very few details) for their claim that the Higher Court of Cajamarca requested that 13 judges be "suspended or dismissed." Br. 41. But these were accusations (not adjudications) that may have had nothing to do with corruption and range widely in seriousness from delays in processing cases to seeking benefits (such as airfare to Lima) from a defendant. Similarly, Plaintiffs say Cajamarca had the third highest rate of requests for judge dismissals in 2018. Br. 41. But Plaintiffs' support gives no indication of raw numbers or percentages and Cajamarca did not even make the list (*i.e.*, was not within the top nine regions) in 2015, 2016, or 2017. JA2078-79 ¶ 12 (Indacochea

[9] The only evidence even arguably relevant states that "according to the media," two brothers "who worked" as attorneys in Cajamarca were the subject of a conversation on one audio file. Br. 42; JA2005 ¶ 7b (Silva Decl.).

Supp. Decl.). The record evidence thus demonstrates that the normal process for monitoring and disciplining wrongdoing within Cajamarca is operating effectively. JA1326 ¶ V.7 (Quiroga-Leon Decl.).

Plaintiffs' new evidence further confirms the degree to which Cajamarca remains a minor player in Peru's corruption problems. According to the Anti-Corruption Prosecutors Office report, four prosecutors or judges in Cajamarca have been convicted of some level of corruption; another four are under investigation. Pls.' MJN, Ex. 1 at 46. This represents 2.4% of all judicial corruption cases in Peru, compared to Lima, Junin, and Piura which collectively represent 56%. *Id.* at 45. The district court got it right: Cajamarca is not a significant source of the corruption.

Plaintiffs take a similar tact with respect to the district court's discussion of the type of corruption uncovered. Neither the court nor Defendants ever said "the crisis does not involve manipulating cases." Br. 42. What the district court found was that (i) the investigations uncovered only a "*few instances* of corrupt actors who have manipulated or otherwise influenced the outcome of pending cases" (JA20 (emphasis added) (citation omitted)), and (ii) the corruption "*mostly* involved efforts by officials to trade their powers for certain personal benefits" (JA19-20 (emphasis added)). Again, that is true. JA1307 ¶ II.3.b. (Quiroga-Leon Decl.). And while the court recognized that "[a]ny … instance of case manipulation is no doubt serious,"

"such limited instances" do not "suggest that the entire Peruvian judiciary is compromised." JA20. Plaintiffs offer no evidence to the contrary.[10]

The same is true of Plaintiffs' continued speculation that the uncovered corruption is "likely just the tip of the iceberg." Br. 43. The district court found that "unlikely" given the passage of time and the reforms adopted by the Peruvian government. JA20. Such a predictive judgment was squarely within the district court's discretion. *See supra* at 25 (citing cases). And although the district court did not have to be "proven right" (Br. 43), so far it has been. Plaintiffs claim that "nearly five times as many judges and prosecutors are being investigated and sanctioned for corruption than were initially exposed." Br. 43 (citing Pls.' MJN, Ex. 1 at 2). But all the report says is that of the 334 judges and prosecutors involved in alleged corruption cases of all types, 70 are linked to the White Collars of the Port scandal. Pls.' MJN, Ex. 1 at 2. There is no indication that review of the audio tapes is continuing to reveal evidence of corruption, or that there have been additional revelations (beyond what Plaintiffs submitted to the district court).

[10] Plaintiffs cite a conclusory statement by their expert declaring that benefits and favors were exchanged "in order to influence the outcome of judicial proceedings," without any quantification or specifics. Br. 42 (quoting JA2075 ¶ 1). Similarly, the 2019 State Department report simply acknowledges the undisputed fact that some of the corruption involved "political interference in judicial decisions." Br. 42 (quoting Pls.' MJN, Ex. 12 at 5).

4. *The likelihood that Defendants would engage in corruption*

Plaintiffs finally argue that the district court erred in finding that Defendants would not attempt to corrupt the Peruvian courts in this case. Br. 43-48. They premise this argument on allegations of "specific" corruption. The district court reached the right conclusion, twice now, and (at the risk of repetition) Plaintiffs identify nothing approaching an abuse of discretion.

In its initial decision, the district court found that Defendants had "shown" that "Plaintiffs' allegations of specific corruption did not render the Peruvian forum unsatisfactory." JA17 (citing JA40). After the corruption scandal broke, this Court remanded for the district court to reconsider such "case-specific evidence" in light of recent events to decide whether those "developments affect its conclusions." CA3 Op. 6. In so ordering, the Court recognized that this was a question for the "factfinder"; that the supervening developments "could" (or could not) affect those conclusions; and that the answer was "'committed to the sound discretion of the trial court.'" *Id.* (citation omitted). On remand, the district court did what this Court ordered. It reexamined the "specific" allegations—none of which was new on remand—in light of the supervening corruption scandal, and reached the same conclusion. JA24-25.

Plaintiffs rely on two categories of "specific" corruption evidence. The first consists primarily of Defendants' purported corruption of the Cajamarca judiciary

in a criminal case brought against Plaintiffs. Specifically, Plaintiffs claim that Defendants' "lawyer hand-delivered the guilty sentence to the Peruvian judge who, after issuing the sentence, admitted that Newmont had given an 'economic benefit' to the prosecutor to bring the case against Plaintiffs." JA5 (citation omitted). The only evidentiary support was the testimony of two declarants—Plaintiffs' Peruvian counsel and one of the Plaintiffs. Defendants submitted their "own declarations, declaring Plaintiffs' assertions false." JA21. Defendants also argued that Plaintiffs' declarations were internally inconsistent, refuted by objective evidence, and not corroborated by other eyewitness Plaintiffs (several of whom had submitted sworn testimony). Dkt. 126 at 25:7-38:22 (Oct. 28, 2019 Tr.). That would have been reason enough to conclude that Defendants had met their burden to prove that the "facts are otherwise."

But the district court did not stop there. Giving Plaintiffs every benefit of the doubt, the court said that if there had been only "competing declarations," it "might" have concluded that Defendants did not carry their burden.[11] JA21. The court never had to answer that closer question because there *was* more: "Plaintiffs have

[11] Plaintiffs say the district court "credited" their evidence of "specific" corruption. Br. 29, 42-43. That depends what Plaintiffs mean by "credited." The court was not "willing" to "discount the veracity" of Plaintiffs' evidence simply because it was limited to sworn declarations by interested parties, deeming it "plausible" there might not be other evidence available. JA20 n.9. But the court never found that any of the "suspicious court behavior" (JA20) actually happened.

succeeded within the very judicial system they ask[ed the district court] to deem inadequate." *Id.* The district court had reached the same conclusion in its original decision, but reexamined it in light of this Court's instruction to "determine whether 'corruption in the appellate courts of Peru' could 'undermine confidence that they can serve as protection against Newmont's alleged capture of the lower courts.'" *Id.* (quoting CA3 Op. 6). The district court found: "[i]t should not." JA21. The reason, the court explained, was because Plaintiffs had "received favorable decisions from *every* level of the Peruvian court system, *including* during the pendency of the White Collars of the Port scandal." *Id.* (emphases added).

Plaintiffs do not dispute that critical reality. Instead, they nitpick just how favorable or successful they have truly been. For example, they don't dispute that their criminal convictions were overturned on appeal (twice), and by the Peruvian Supreme Court *during the events that led to the White Collars of the Port scandal*, but argue that the mere fact that prosecutors brought the case and the trial court convicted proves they are "unlikely to get a fair hearing." Br. 44. What Plaintiffs fail to acknowledge is the reason *why* their convictions were overturned. There was sufficient evidence that the charged offense of aggravated usurpation (*i.e.*, violent trespass) had been committed; the appellate courts deemed the evidence insufficient only to establish *which* of the Plaintiffs had engaged in the violent act. JA486-87 ¶ 19 (Velarde Decl.). And as to Defendants' "alleged capture of the lower courts,"

Plaintiffs do not dispute that they obtained an injunction from the Cajamarca trial court—they just say it was overturned on appeal. Br. 44-45 (citation omitted). Whether Plaintiffs choose to count these as "successes," they surely prove that Defendants do not have anything close to the power to corrupt the Peruvian judiciary that Plaintiffs like to claim.[12]

The second category of "specific" evidence was historical in nature: allegations that Defendants corrupted the Peruvian Supreme Court in an ownership dispute 19 years ago, during the infamous Fujimori regime. Dkt. 43 at 7 (Pls.' Opp. MTD); Dkt. 99 at 12 (Pls.' Suppl. Opp. MTD). The district court previously recognized that the "interim regime change and noted improvements" in the ensuing decades made it implausible to infer that the Peruvian court system is inadequate today. JA43. And while this Court in the first appeal noted that "[t]he recent exposure of corruption … call into question these 'noted improvements'" (CA3 Op. 5-6), the district court found that Plaintiffs' inference is no more plausible than it was before.

[12] Plaintiffs also point to criminal complaints brought by Plaintiffs against Yanachocha employees. Br. 44. But the detailed and well-documented investigations confirm that Plaintiffs' charges were by no means ignored. JA494-537; *see* JA46 n.11 (district court noting video evidence showed *Plaintiffs* attacking Yanacocha representatives).

As the district court observed, the more recent incidents of corruption have nothing to do with Defendants and are nothing like what happened during the authoritarian Fujimori regime. JA22-23. The corruption there involved the intelligence agencies of the executive using their powers to undermine other branches of government to secure the regime's power. JA1307-08 ¶¶ II.3.a, III.1 (Quiroga-Leon Decl.). After the fall of Fujimori, wide-ranging and significant anti-corruption reform was undertaken under intense public pressure, which indisputably improved the judiciary. JA1307 ¶ II.3.a. Moreover, "Fujimori … has spent much of the last decade in prison, and recent national elections decimated whatever control his legacy political party may have had." JA22. And in "marked[]" contrast to the Fujimori situation, the Peruvian government has offered support to Plaintiffs in their dispute with Defendants. JA22-23. Plaintiffs belittle these efforts as "meager and belated," but the district court was clearly correct in discerning a stark difference between Peru today and the Peru of the 1990s.

So Plaintiffs try to paint the Fujimori incident as probative evidence of Defendants "capacity" and "willingness" to corrupt. Br. 45-46. But the district court addressed that too. As the court explained, "Newmont, to its credit, appears to have engaged in serious corporate reform in its own right." JA23. Defendants now have a "robust and rigorously enforced ethics and compliance program," which specifically "prohibits the kind of corrupt conduct" alleged in the Fujimori matter

and that "Plaintiffs allege will happen if these cases are heard in Peru." *Id.* (citing JA1339-40 ¶¶ 2-4 (Lipson Decl.)). They have "endorsed and adopted established human rights frameworks such as the United Nations Guiding Principles on Business and Human Rights and the Voluntary Principles on Security and Human Rights, in addition to a series of internal policies and standards." JA23. And "beyond good intentions, [Newmont] has made some efforts to investigate alleged abuses by their subsidiary," including those charged by Plaintiffs here. JA45.

Plaintiffs' only real response: it isn't enough. Just because Defendants have policies prohibiting exactly this kind of conduct does not mean that corruption "will not happen." Br. 46.[13] Just because Defendants hired an independent party to investigate and produce a public report about the abuses Plaintiffs allege does not mean they won't "corrupt Peruvian court proceedings." Br. 47. And so forth. Such contorted arguments are unpersuasive in their own right; under an abuse of discretion standard, they fall especially flat.

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[13] Plaintiffs note (Br. 47) that, in 2018, approximately 40 of Newmont's ethics investigations involved "concerns about corruption (including conflicts of interest, commercial and government issues)." JA1442. But Newmont initiated these investigations and publicly report them, and in each instance it took remedial action. *Id.* And Plaintiffs claim Defendants have hired two lawyers tied to corruption, but fail to note that the allegations have nothing to do with Defendants; that neither has been charged; and that the only lawyer to represent Yanacocha *lost* the case he argued *against Plaintiffs*—in the Peruvian appellate courts, JA168 ¶¶ 16-17 (Velarde Decl.).

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO CITE EVERY PIECE OF EVIDENCE

A. Standard Of Review

"The [FNC] determination … may be reversed only when there has been a clear abuse of discretion" (*Piper*, 454 U.S. at 257), including "when [the district court] summarily grant or denies [an FNC] motion" (*Lacey*, 862 F.2d at 39). But "the district court's inquiry does not necessarily require extensive investigation," and the court will be "accorded substantial flexibility in evaluating [an FNC] motion." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).

B. The District Court Properly Considered All Of The Evidence

Plaintiffs contend that the district court abused its discretion by failing to consider some of Plaintiffs' evidence and failing to "explain" how Defendants met their burden. Br. 48. Plaintiffs then point to "six instances" where, they say, the district court failed to consider relevant evidence. Br. 48-50. Plaintiffs misstate what the district court was required to do—and what it in fact did. In all six instances, the district court properly considered the relevant evidence and simply reached a different conclusion. That is not an abuse of discretion.

Plaintiffs have not identified a single case reversing a district court for failing to discuss some evidence in its decision, and the three cases they do cite are readily distinguishable. In *Lacey*, this Court held that the district court abused its discretion because it "summarily granted [the] motion to dismiss" when the defendants had not

submitted any evidence and without addressing the plaintiff's evidence. 862 F.2d at 49. In *El-Fadl v. Central Bank of Jordan*, the D.C. Circuit held that the district court abused its discretion when it completely failed to consider the adequacy factor. 75 F.3d 668, 677 (D.C. Cir. 1996). And in *Purchasing Power, LLC v. Bluestem Brands, Inc.*, the Eleventh Circuit held that the district court abused its discretion in granting sanctions (outside the FNC context) without considering evidence relevant to whether the party should be sanctioned. 851 F.3d 1218, 1225 (11th Cir. 2017). These cases stand for the unobjectionable propositions that a district court abuses its discretion by failing to consider adequacy altogether (*El-Fadl*), by summarily granting an FNC motion without considering one-sided evidence (*Lacey*), or by ignoring material considerations that bear on the legal analysis (*Purchasing Power*). They do not require district courts to write a tome discussing each and every piece of evidence.

The district court more than satisfied its obligation to consider the relevant evidence and arguments raised by the parties. On this, the record speaks for itself. The district court allowed extensive supplemental briefing on remand; it held a hearing; it afforded Plaintiffs an opportunity to submit additional evidence; and it carefully considered post-hearing developments. The court then issued a 25-page decision, focusing exclusively on adequacy, that articulated "specific reasons for its conclusion." *Lacey*, 862 F.2d at 39.

None of the "six instances" Plaintiffs rely on prove otherwise. Specifically, Plaintiffs focus on their belief that (i) the "judicial corruption crisis" is "widespread"; (ii) the government reforms are "insufficient or will take years to work"; (iii) "the corruption crisis implicated Cajamarca courts"; (iv) some involved the "manipulation of case outcomes"; (v) the revelations were was just the "tip of the iceberg"; and (iv) Defendants are likely to engage in corrupt acts. Br. 49-50. These assertions are the same ones Plaintiffs made in Part II, *supra*. All Plaintiffs do here is point to expert testimony that, they say, support their assessment—and argue the district court ignored that evidence.

Defendants have already explained why Plaintiffs' expert declarations either do not say what Plaintiffs claim they do, provide no support for their conclusory statements, rely on evidence that contradicts the opinion asserted, or simply make predictive judgments about what the future may hold for the Peruvian judicial system—months before more recent developments that the district court took into account. *See* Part II, *supra*. But to the extent this separate argument is about the district court's purported failure to even consider Plaintiffs' evidence, the record again proves otherwise. In fact, the district court decision cites Plaintiffs' Indacochea declaration *nineteen* times, more than any other piece of evidence. JA9-11, 15, 17-19. That the court did not also cite every other piece of evidence does not mean that it was not considered. *See FMC Corp. v. Hennessy Indus., Inc.*, 836 F.2d

521, 524 (Fed. Cir. 1987) ("[F]ailure to mention does not mean failure to consider when the evidence supplies support for the district court's determination."); *Newport News Holdings Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 434 n.7 (4th Cir. 2011) ("Courts are not required to identify every piece of evidence they consider in making a decision.").

IV. PLAINTIFFS' REMAINING ARGUMENTS FAIL TOO

In the final pages of their brief, Plaintiffs raise three additional arguments for reversal. Br. 50-56. None withstand scrutiny.

A. Plaintiffs' New Evidence Is No Reason To Remand, Let Alone Reverse

Plaintiffs yet again seek to supplement the record with new evidence. Even if the Court is inclined to grant Plaintiffs' motion for judicial notice, the new evidence does nothing to undermine the district court's findings. If anything, that evidence—and other recent events in Peru—confirms the district court's conclusion.

Plaintiffs rely primarily on the Anti-Corruption Prosecutors Office report. Pls.' MJN, Ex. 1. It is unclear why. As discussed, that report makes clear that the Peruvian government has implemented reforms "demonstrating [its] commitment to ensuring that such corruption does not repeat." JA16.

The other evidence consists primarily of nine newspaper articles that add nothing:

- Three identify three individuals, in *pre-trial* custody, who successfully argued for house arrest because of COVID-19 (Pls.' MJN, Exs. 5-6), or because the necessary showing for pre-trial detention had not been made (*id.*, Ex. 7). Disputes over bail (particularly during the pandemic) hardly suggest a corrupt system.
- Three others report on communications between two selected NBJ members and the President of the Judicial Branch and some involved in the White Collars of the Port scandal, and explain that the revelations (which did not suggest any impropriety) "suspend[ed] the appointment" of the NBJ members and prompted a "preliminary investigation" into the President of the Judicial Branch. *Id.*, Exs. 2-4.
- One article reports, in December 2019, that 260 judicial officials could not be dismissed for misconduct because the NBJ was not yet constituted; a month later (now six months ago), that changed. *Id.*, Ex. 8.
- Another quotes the Ministry of Energy and Mines as supporting the Conga project because of the current economic crisis (*id.*, Ex. 9), and the final one says Yanacocha and the police visited the Disputed Land to look at a border incursion (*id.*, Ex. 10). Neither speaks to adequacy.

Plaintiffs had every incentive to submit the most probative evidence to show that the conditions in Peru have become so dire post-judgment as to call the district court's findings into doubt. That these exhibits are the best they have speaks volumes.

What also speaks volumes are the articles Plaintiffs declined to submit. The reality is that the Peruvian government continues to take significant steps in its fight against corruption. The recently-sworn-in Minister of Interior affirmed that the current government is intolerant towards any acts of corruption. Defs.' MJN, Ex. 4. President Vizcarra recently announced general elections in April 2021. *Id.*, Ex. 2. At that general election, there will be a referendum to eliminate parliamentary immunity. *Id.*, Ex. 3. And, contrary to Plaintiffs' assertion that challenges to the newly created NBJ "continue to haunt its potential" (Br. 13), recent events show that the NBJ has made significant progress. Defs.' MJN, Exs. 5-7.

In the end, the critical point is that nothing post-judgment does anything to undermine the district court's decision. Defendants agree that a remand is not necessary and that, after three years of litigation, it is time to try this case on the merits in the appropriate forum. But that calls for this Court to affirm. There is no basis on which this Court could or should act as factfinder and reverse based on this new evidence. *Cf. Landy v. FDIC*, 486 F.2d 139, 150-52 (3d Cir. 1973) (taking judicial notice but declining to consider new developments on appeal).

B. The District Court Did Not Abuse Its Discretion In Finding That A Peruvian Evidentiary Rule Does Not Make The Forum Inadequate

In their first appeal, Plaintiffs argued that the district court abused its discretion in not declaring the Peruvian forum inadequate based on an evidentiary rule allegedly prohibiting their testimony. Pls.' CA3 Br. 50. This Court did not address that argument, and remanded only for the district court to reevaluate adequacy "in light of [the] supervening corruption scandal" (CA3 Op. 2)—which had no impact on Peruvian evidentiary rules. And while Plaintiffs sought to raise this issue again on remand, the district court chose not to reconsider its prior decision. The district court got it right the first time.

Plaintiffs continue to misunderstand both Peruvian and FNC law. Plaintiffs assert that "Peruvian law may bar Plaintiffs from presenting their own testimony or that of their relatives." Br. 52-54. But what Plaintiffs carefully obscured in this Court and on remand 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." JA898 ¶ 28 (Freyre Suppl. Aff.). In other words, the "primary eyewitness" testimony of *all* Plaintiffs—seven members of the Chaupe family—will be provided to the Peruvian court. Given the number of Plaintiffs (and the fact that other family members could join), what "relatives" are missing?

For the first time on (this second) appeal, Plaintiffs respond to this fatal flaw. They argue that the issue is not just a matter of "written versus live testimony"

because the only "declarations" a party can submit is the complaint and answer, "which are *not* evidence." Br. 54. But Plaintiffs provide no support for this belated assertion. Their own legal expert says only that because the parties have already provided a "declaration" in "their respective written documents (lawsuit and answer) … it is not possible for each party to offer their own declaration before the Judge." JA793 ¶ 47 (Fernandez Decl). Article 221 of the Peruvian Civil Procedural Code provides that "assertions included in the evidence or written documents submitted by the parties are considered to be their declarations." JA793 ¶ 46 (citing PCPC Article 221). And the Peruvian courts have considered similar testimony from Plaintiffs in related cases. *E.g.*, JA1688 (Cajamarca Superior Court May 29, 2017 Resolution) (quoting complaint for purposes of determining size of Disputed Land).

Plaintiffs are really arguing 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). 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).

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

Plaintiffs finally argue that the district court erred by not requiring Defendants to waive their statute of limitations defenses as a condition of dismissal. Br. 55-56. Although Plaintiffs make no mention of this, they made this same argument in the first appeal and Defendants *agreed* that such a condition was warranted. Specifically, Defendants "stipulate[d] that they will 'waive … any statute of limitations defense that would not have been available had the court retained jurisdiction,' and that Plaintiffs could seek relief before the district court if they fail to fulfill that assurance." Defs.' CA3 Br. 50-51 (quoting Pls.' CA3 Br. 50-51). And Defendants explained that the Court could either find such a waiver "implicit" or "modify the order on appeal to include the stipulated condition." *Id.* (citing *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 712 F. App'x 200, 204-05 (3d Cir. 2017); *Trotter v. 7R Holdings, LLC*, 873 F.3d 435, 443 (3d Cir. 2017); *Leon*, 251 F.3d at 1316). Remarkably, on remand, Plaintiffs never asked the district court to impose this (then, undisputed) condition. Although Plaintiffs may well have waived this issue, Defendants stand by their original position.

CONCLUSION

This Court should affirm the judgment of the district court.

Dated: July 29, 2020

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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 28.3(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) and Local Rule 32.1, I hereby certify that the foregoing brief contains 12,969 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 July 29, 2020, and according to that program no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2020, I caused a copy of the foregoing Brief for 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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