NO. 20-1765

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

v.

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

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

REPLY BRIEF FOR PLAINTIFFS/APPELLANTS

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INTRODUCTION

Plaintiffs' claims cannot be dismissed from Defendants' home jurisdiction in favor of their preferred forum, Peru, because – as Peru itself recognizes – given its massive, unfolding corruption scandal, corruption "thrive[s] within the Judicial Branch." Plaintiffs' Motion for Judicial Notice ("PMJN"), Ex. 1 at 134.

This Court's carefully calibrated *forum non conveniens* (FNC) test does not permit dismissal in such extreme circumstances unless the Defendants can convince the court that Plaintiffs will be afforded a fair hearing. But the district court here dismissed this case despite its own concerns about Plaintiffs' ability to have their claims fairly heard in Peru, given extensive evidence of both general and specific corruption. In so doing, the court failed to hold Defendants to their burden of persuasion, neglected to draw reasonable inferences in Plaintiffs' favor, and ignored key evidence undermining the adequacy of Peru's judiciary. Indeed, after the district court ruled, the Peruvian government confirmed that, due to widespread corruption and limited reforms, its courts are not adequate to administer justice.

Defendants object to the legal standard Plaintiffs describe, but it is the standard this Court previously endorsed in this case, and is consistent with cases both Plaintiffs *and Defendants* cite. Defendants also defend the district court's assessment of the evidence, erroneously dismissing objective errors as harmless and drawing sweeping conclusions from a few select facts taken out of context. None of these efforts overcomes the record evidence of widespread corruption throughout the Peruvian

judiciary, including in the courts where Plaintiffs' claims would be heard, and even involving the same parties. And none of their evidence of "reforms" undermines the Peruvian government's own conclusion that its courts are far from adequate.

The district court's dismissal should be overturned. The FNC doctrine does not allow Defendants to force Plaintiffs to bear the huge risk of corruption litigating in Peru's courts poses.

Peru's courts are also inadequate because Plaintiffs would be unable to present essential evidence – their own testimony. Defendants cannot show otherwise, and that is another risk they cannot force Plaintiffs to bear.

ARGUMENT

I. By failing to hold Defendants to the proper burden of proof and by failing to draw reasonable inferences in Plaintiffs' favor, the district court committed legal error.

A. *Leon* requires Defendants to persuade the district court that the adequacy of the foreign forum is not in doubt.

Defendants are incorrect that the district court held Defendants to the burden of persuasion required in *Acuna-Atalaya v. Newmont Mining Corp.*, 765 F. App'x. 811, 815(3d Cir. 2019) (citing *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001)). Opp. 17.

There is no dispute that Plaintiffs met their threshold burden to produce "significant evidence documenting the partiality" such that "conditions are so severe as to call the adequacy of the forum into doubt." *Id.* (internal quotation marks

omitted). Thus, Defendants bear the "burden to persuade the District Court that the facts are otherwise" – namely, that the adequacy of the forum is *not* in doubt. *Id.* Far from an attempt to "ratchet up the standard," Opp. 14, Plaintiffs ask this Court to apply the standard it already endorsed. If the adequacy of the foreign forum is still in doubt, Defendants have not met their burden.

Other courts apply another formulation of this same standard, finding defendants' burden unmet when the court is left with "significant" doubt or cannot reach a "definitive" judgment about the foreign forum's adequacy. Plaintiffs' Opening Brief (POB) 26-29. Defendants deny that these cases apply this requirement, Opp. 18-20 & n.1, but they permit only one reading: where the court "cannot draw a conclusive judgment" about the adequacy of the foreign forum – as where despite defendants' evidence, "plaintiffs' story is plausible at least" – "defendants have not met their burden." *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1087 (S.D. Fla. 1997). The courts in *Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982), and *McLellan v. Am. Eurocopter*, 26 F. Supp. 2d 947, 950 (S.D. Tex. 1998), applied the same burden. POB 28-29; *accord Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 455-456 (D. Del. 1978) (denying dismissal where there was "[s]ufficient doubt" regarding forum's adequacy).

As does the Second Circuit; the adequacy of the foreign forum "should [not] be left uncertain." *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pak.*, 273 F.3d 241, 247-48 (2d Cir. 2001). Defendants' lax "justifiable belief" standard finds no

support in *BCCI*; a "justifiable belief" in, rather than a "definitive finding" as to the forum's adequacy, is sufficient *only if* the court can protect plaintiffs by imposing conditions on dismissal. *Id.* Where it cannot, "the court should . . . be more sure of its finding . . . as to the adequacy of the alternative foreign forum." *Id.* at 248. The D.C. Circuit likewise held that "[i]f doubts about the availability of an alternative forum remain," dismissal is proper only if conditions would remove the risk to plaintiffs. *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 679 (D.C. Cir. 1996). Since Plaintiffs' evidence calls the adequacy of the foreign forum into doubt, and conditions on dismissal could not protect Plaintiffs, the matter should not be left uncertain; only a "definitive finding" as to the forum's adequacy is sufficient.

The standard these cases apply is nothing like the "beyond-a-reasonable-doubt standard" in criminal cases. Opp. 22. A criminal defendant has no initial burden whatsoever, unlike Plaintiffs' burden here. While some reasonable doubt need not always bar dismissal, courts have consistently found that "significant" doubts do so. POB 28. This standard approximates the clear and convincing evidence standard, which is applied in civil cases under similar, though less consequential, circumstances, such as venue transfers. *E.g., Headrick v. Atchison, T. & S.F.R. Co.*, 182 F.2d 305, 310 (10th Cir. 1950); *Vassallo v. Niedermeyer*, 495 F. Supp. 757, 759 (S.D.N.Y. 1980).

B. The district court must draw reasonable inferences in Plaintiffs' favor.

Defendants provide no meaningful response to Plaintiffs' showing that the

district court also erred by not drawing reasonable inferences in Plaintiffs' favor. POB 31-33. Many courts apply this standard, and Defendants point to no cases rejecting it. *See, e.g., Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1336 (11th Cir. 2020); *Shi v. New Mighty U.S. Tr.*, 918 F.3d 944, 948 (D.C. Cir. 2019); *Halcyon Syndicate Ltd., LLC v. Graham Beck Enters.* (PTY), No. 19-cv-04278-JCS, 2020 U.S. Dist. LEXIS 127500, *56-57 (N.D. Cal. July 20, 2020).[1] These decisions are consistent with how courts treat venue motions, POB 31, and many courts acknowledge that FNC and venue motions are treated similarly.[2]

Defendants attack a straw man, arguing that district courts are free to weigh the evidence. Opp. 23-25. No one disputes that. But where, *after* weighing the evidence, the district court is faced with uncertainty about an issue that can only be resolved through inference (*e.g.* the likelihood that Peru has fully uncovered its corruption crisis or that reforms have solved it), the court must draw reasonable inferences in Plaintiffs' favor. The standard is particularly warranted at the motion to dismiss stage where, as here, the FNC analysis is entangled in the merits of Plaintiffs' malicious prosecution and abuse of process claims. *See* JA159-61 (Complaint).

It is unsurprising that Defendants cite cases weighing evidence or ruling against

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[1] *See also, e.g., OOO-RM Invest v. Net Element Int'l, Inc.*, No. 14-20903-CIV-ALTONAGA/O'Sullivan, 2014 U.S. Dist. LEXIS 197010, at *8 (S.D. Fla. Nov. 3, 2014); *Melgares v. Sikorsky Aircraft Corp.,* 613 F. Supp. 2d 231, 235-36 (D. Conn. 2019).

[2] *See American Dredging Co. v. Miller,* 510 U.S. 443, 453 (1994); *Halcyon Syndicate*, 2020 U.S. Dist. LEXIS 127500, at *56.

Plaintiffs. Opp. 23 n.2. But their cases are inapposite. None applied the *Leon* framework, let alone involved a finding that Plaintiffs *met* their substantial initial burden. And in none did courts face the sort of uncertainty at issue here, prompting consideration of competing inferences; either, as in most, plaintiffs' evidence was insufficient to call the adequacy of the forum into doubt (and thus to satisfy what under *Leon* would be plaintiffs' initial burden),[3] or the evidence decisively weighed in defendants favor.[4]

C. The district court failed to apply the correct standard.

The district court erred both by failing to require Defendants to remove the doubt about Plaintiffs' ability to be fairly heard in Peru, POB 29-31, and failing to

[3] *See Jiali Tang v. Synutra Int'l, Inc.*, No. DKC 09-0088, 2010 U.S. Dist. LEXIS 29868, at *32-33 (D. Md. Mar. 29, 2010) (finding "on the basis of the limited evidence presented" that Plaintiffs' "argument that due process is completely lacking is not persuasive."); *Monegasque De Reassurances S.A.M. (monde Re) v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 499 (2d Cir. 2002) (finding plaintiffs' "meager and conclusory submissions" to be insufficient to doubt adequacy of the foreign forum).

[4] Even in cases that seemed to weigh evidence, it was far from clear that Plaintiffs met what would be their initial *Leon* burden. *See Carijano v. Occidental Petroleum Corp.,* 643 F.3d 1216, 1226-27 (9th Cir. 2011) (agreeing that Plaintiffs' expert affidavits were "too generalized and anecdotal") (internal quotation marks omitted); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 539-40 (S.D.N.Y. 2002) ("It would be entirely inappropriate for this Court to hold, on the basis of this record, that these Peruvian citizens cannot obtain justice in the courts of their own country"); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002) (noting district court's "detailed findings" including "no evidence of impropriety" by defendant in prior judicial proceedings, and "numerous cases against multinational corporations without any evidence of corruption"). Defendants also cite *Gonzales v. P.T. Pelangi Niagra Mitra, Int'l*, Opp. 26, but it applied a different legal standard and "refuse[d]" to weigh the evidence of corruption. 196 F. Supp. 2d 482, 487-88 (S.D. Tex. 2002).

draw reasonable inferences in Plaintiffs' favor. POB 31-33. Defendants do not show otherwise.

Defendants claim, inconsistently, that the court did not express doubt, and that its doubt was not about corruption, Opp. 27-28. Nonsense. In initially dismissing, the court "assessed the allegations of corruption offered by Plaintiffs, and concluded that '. . . Plaintiffs have shown cause for concern . . . .'" JA4 (quoting *Acuña-Atalaya v. Newmont Mining Corp.*, 308 F. Supp. 3d 812, 826 (D. Del. 2018)). The court noted that Plaintiffs' evidence of Defendants' corruption involving the same parties was "concerning" and "troubling." JA5 (internal quotation marks omitted). On remand, the district court found that, given the briefing on recently-revealed judicial corruption scandals, "the events described are again concerning," and it "remain[ed] concerned that Plaintiffs' ability to be fairly heard in Peru is compromised." JA2.

Defendants' claim that the district court did not equivocate when it found that Plaintiffs will be treated fairly in Peru is wrong. Opp. 28 (citing JA25). Throughout the opinion, the court couched its language in terms of probability, not certainty, given its concerns regarding corruption. For example, the court hedged on reforms, saying only that it "appears" that the Peruvian government and Newmont have taken steps to address corruption, and speculated that future instances are "unlikely to recur." *See* JA19, 20, 23. The court was only unequivocal in its uncertainty.

Defendants' point that many of the real disputes are over predictive or "ultimate" facts, not "historical" facts, Opp. 25, only highlights that the district court

needed to draw inferences against Plaintiffs to find the Peruvian forum adequate.[5] Much of the dispute below centered on whether corruption has been fully uncovered and the sufficiency of reforms. Opp. 25. The court could not resolve these issues by merely weighing the evidence, but rather than drawing well-supported inferences in Plaintiffs' favor, it drew inferences *against* them. And this case is unique in that the Peruvian government has now confirmed that the court's inferences were *wrong*. POB 31-33. Had the district court properly drawn these inferences in Plaintiffs' favor, it could not have found that Defendants met their burden to remove the significant doubt Plaintiffs raised about the forum's adequacy.

D. Applying this Court's standard promotes the purposes of the FNC doctrine.

"[A] plaintiff's choice of forum should rarely be disturbed." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). Thus, FNC dismissal is an exceptional remedy. *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 609 (3d Cir. 1991). The adequacy inquiry ensures that plaintiffs do not bear the risk that defendants' preferred forum is inadequate. *Eastman Kodak*, 978 F. Supp. at 1087.

A "legal system" can be "so corrupt that it cannot serve as an adequate forum." *Doe v. Ritz Carlton Hotel Co. LLC*, 666 F. App'x 180, 185 n.2 (3d Cir. 2016) (internal

[5] *Washington Post Co. v. U.S. Dep't of Health & Human Servs.* 865 F.2d 320 (D.C. Cir. 1989), Opp. 25 – a case analyzing the treatment of factual conflicts under a summary judgment standard – is inapposite. It does not question that circuit's requirement that district courts draw reasonable inferences in Plaintiffs' favor when assessing FNC. *See Azima v. RAK Inv. Auth.,* 926 F.3d 870, 872 n.1 (D.C. Cir. 2019).

quotation marks omitted); *accord Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006). Defendants erroneously suggest the above described standards would regularly preclude dismissal on corruption grounds, Opp. 25-26, but they misstate the standards and ignore Plaintiffs' substantial initial burden. While courts do not often deny FNC motions on these grounds, Opp. 26, that is because plaintiffs rarely meet what is in this Circuit their burden to produce "significant evidence" that "conditions are so severe as to call the adequacy of the forum into doubt." *See Acuna-Atalaya,* 765 F. App'x. at 815; *see, e.g., supra* at 6 nn.3 & 4; *Rivas v. Ford Motor Co.*, No. 8:02 CV-676-T-17 EAJ, 2004 U.S. Dist. LEXIS 7535, at *18-21 (M.D. Fla. Apr. 19, 2004). Indeed, courts' reluctance to rule on these grounds is why plaintiffs' initial burden is so heavy. *Leon*, 251 F.3d at 1312.

Plaintiffs here surmounted this high hurdle, establishing a real risk that the forum is unfair. Since Plaintiffs are not required to bear that risk, Defendants must meet their burden to show the facts are otherwise. This burden reflects the fact that, while Defendants merely stand to be inconvenienced, Plaintiffs face dismissal; at best they risk losing their ability to be fairly heard. Defendants' assertion that they can meet their burden even though real risks remain conflicts with the purpose of their burden. *See Eastman Kodak*, 978 F. Supp. at 1087 ("[T]his case comes down to the deference to be given the plaintiffs' choice of forum."). *Eastman Kodak* applied the "correct approach." *Leon*, 251 F.3d at 1312.

II. The district court abused its discretion in finding Defendants met their burden to demonstrate that Peru is a fair forum.

A. Defendants' comity concerns are misplaced; even if they were not, this is the rare case in which the forum is inadequate.

Few cases have involved the evidence of both widespread and party-specific corruption Plaintiffs present here. Defendants emphasize that courts are reluctant to find forums inadequate, Opp. 29, but that is largely irrelevant since Plaintiffs met their initial burden to call the forum's adequacy into doubt. JA15.

Defendants cite cases with corruption "allegations," Opp. 29 & n.4, not *evidence* of extraordinary systemic and particularized corruption.[6] Many are driven by concerns about blithely judging another sovereign's judiciary.[7] Those concerns are absent here. Plaintiffs satisfied their burden under *Leon*, which was crafted to avoid "crediting cursory attacks on [other] legal systems." 251 F.3d at 1312-13. And Peru's own government recognizes its judicial emergency. *See Eastman Kodak*, 978 F. Supp. at 1085 (finding Bolivian Justice Minister's statements criticizing judicial corruption to be "compelling evidence" undermining forum's adequacy).

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[6] *See, e.g., Jiangsu Hongyuan Pharm. Co., Ltd. v. DI Global Logistics Inc.*, 159 F. Supp. 3d 1316, 1330-1331 (S.D. Fla. Feb. 5, 2016) (rejecting "anecdotal[] and unsubstantiated allegations"); *Niv v. Hilton Hotels Corp.*, 710 F. Supp. 2d 328, 337 (S.D.N.Y. 2008) (arguments rested on "general biases and dangers"); *Jones v. IPX Int'l Eq. Guinea, S.A.*, 920 F.3d 1085, 1091 (6th Cir. 2019) ("general allegations" that did "not address nuances") (internal quotation marks omitted).

[7] *See, e.g.*, *Gonzales*, 196 F. Supp. 2d at 488; *Banco Mercantil, S.A. v. Arencibia*, 927 F. Supp. 565, 567-568 (D.P.R. 1996); *Stalinski v. Bakoczy*, 41 F. Supp. 2d 755, 760 (S.D. Ohio 1998); *Jones*, 920 F.3d at 1091 (6th Cir. 2019).

Courts *do* find foreign forums inadequate, including for reasons, such as the judiciary being controlled by the military, that, if anything, raise even more comity concerns than corruption.[8] Defendants' cases expressing skepticism of commercial plaintiffs who complain about corruption in a forum in which they chose to contract are inapposite;[9] Plaintiffs here did not "opt in" to Peru's corrupt system. Plaintiffs' showing of emergency levels of corruption in Peru coupled with particularized evidence of these Defendants' corrupt track record *is* the rare case.

Given this extraordinary record evidence, the district court's insistence that Defendants carried their burden is an abuse of discretion. Defendants assert that Plaintiffs only argue that the record does not support a *conclusive* judgment about Peru's adequacy. Opp. 31. That is the standard, but even if it were not, the judgment rested on four unsustainable assertions, each involving a clearly erroneous assessment

[8] *See, e.g.*, *Phoenix Canada Oil Co.*, 78 F.R.D. at 455-456 (finding "[s]ufficient doubt" regarding forum since "Ecuador is presently controlled by a military government" and the "powers of the judiciary are thus allegedly 'uncertain'"); *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3rd Cir. 1966) (suggesting Venezuela is inadequate forum because its "procedural remedies" do not "comport with our concepts of fairness"); *Sablic v. Armada Shipping Aps*, 973 F. Supp. 745, 748 (S.D. Tex. 1997) (finding political and military instability, coupled with case backlog, rendered Croatian courts inadequate); *Canadian Overseas Ores*, 528 F. Supp. at 1342-43 (concluding that "serious questions" about Chilean judiciary's independence from military junta rendered Chile inadequate); *see also Bridgeway Corp. v. Citibank*, 201 F.3d 134, 137 (2d Cir. 2000) (affirming Liberian judicial system did not "provide[] impartial tribunals or procedures compatible with the requirements of due process").

[9] *See Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 981(2d Cir. 1993); *Banco Mercantil, S.A.*, 927 F. Supp. at 567; *Stalinski*, 41 F. Supp. at 762.

of the evidence. POB 35; Section II.B. *infra*. This requires reversal under any standard.

B. The district court abused its discretion in finding Defendants produced evidence to show Peru is a fair forum.

The district court's assessment was objectively erroneous. It was unsupported by the record and has since been proven wrong by Peru's own findings.

1. The district court erred by misconstruing a State Department report it had not read.

State Department reports carry substantial weight. It is concerning that the district court led with a finding it attributed to a 2019 report that it did *not* consider: the report was issued after the court ruled. POB 36-37; JA17. The court apparently believed it was relying on current information; it was not.

Contrary to Defendants' claim, the district court's assertion that the State Department has "not downgraded Peru's judiciary" or "contradict[ed] conclusions it drew before" the crisis emerged was inaccurate. Opp. 32; JA17. The Department's description of Peru's judiciary grew bleaker between 2016 and 2019 alongside evidence of the crisis. POB 37. And the Department's "downgrading" progressed from not even specifying judicial corruption to calling out judicial corruption at all levels. *See id.*

2. The district court abused its discretion by finding that "corruption is not a feature of the judiciary" because of reforms.

The district court's finding that government reform efforts "suggest that corruption is not a feature of the judiciary," JA18-19, is clearly wrong. This would

mean that, in a matter of months, Peru fixed the once-in-a-generation judicial corruption crisis that Plaintiffs' experts said could not be fixed with the reforms proposed, or fixed at all for years. POB 39. The day after the court's decision, the State Department acknowledged "evidence of widespread corruption in the Peruvian judiciary." POB 33 (citing PMJN Ex 12).

Defendants do not defend this ruling. Opp. 30, 33-36. Instead, they argue the court was correct that the "principal actors" in the White Collars of the Port Case were "sanctioned," Opp. 33; but that does not fix systemic corruption. The court pointed only to sanctions for nine judicial officials. JA17. But the corrupt National Council of the Judiciary (NCJ) installed corrupt judges and prosecutors throughout Peru for years and corruption networks operate at every judicial level. POB 10-11, 38. There is no record evidence that these corruption networks have been rooted out.

Defendants erroneously claim that there is little evidence that "many [judicial officials] have escaped with impunity." Opp. 34. Plaintiffs presented evidence of multiple judicial corruption networks, and of officials failing to act on dozens of judge dismissal requests from the Judicial Oversight Office for extreme misconduct "contradicting an honest judiciary." POB 11-12; JA1150 ¶ 17 (Judicial Oversight Office press release). As the 2016 State Department report noted, "officials often engage in corrupt acts with impunity." JA0724. By 2018, the Anti-Corruption Prosecutor's Office had a backlog of 40,229 cases. JA2022. Defendants' only response is to cite actions against past corrupt *presidents*. Opp. 34 (citing JA1328-32 (¶¶ VIII.1-

18) (Quiroga-Leon Decl.)). By relying on a limited number of high-profile sanctions, where systemic corruption remains, the court abused its discretion.

The Peruvian government confirms that error, acknowledging that initial revelations were only the tip of the iceberg. PMJN, Ex. 1, 1-2. Indeed, *at least* 60 judges and 13 prosecutors were involved in the White Collars of the Port Case*, id.* at 135, and only one has been convicted over two years later. Gjullin Declaration, Ex. 1 at 111 (filed herewith).

The majority of judicial actors involved in the White Collars of the Port case *have not been* sanctioned. While some additional corrupt judges may be "suspended," Opp. 33, they "continue to participate in the Public Ministry and Judicial Branch." PMJN, Ex. 8 at 1.

Defendants downplay the Peruvian Government's finding of at least 334 corrupt judges and prosecutors by dividing 334 by the total number in Peru. Opp. 34-35. But the Anti-Corruption Prosecutor's Office warns that 334 is "only a fraction of the total number of corruption cases," and estimates that over 80% of crimes go unreported and "will never see justice," underscoring the weakness of sanctions. PMJN, Ex. 1 at 35-36, 133-34.

Defendants point to the court's reliance on the National Board of Justice (NBJ), and its statement that the NBJ "*will* be 'reviewing thousands of cases . . . concerning appointments, ratifications and disciplinary processes of judges and prosecutors,'" as the reform that supposedly renders Peru adequate. Opp. 35 (citing

JA18) (emphasis added). But saying the NBJ *will* review *thousands* of potentially corrupt NCJ decisions only shows that it has not done so – not even close. PMJN, Ex. 1 at 133. Finding that Peru is trying to fix the problem sometime in the future is not a finding of adequacy *now*.

Defendants' evidence on appeal highlights the NBJ's insufficiency. For most of the NBJ's 8-month existence, it held no proceedings, Defendants-Appellees' Motion for Judicial Notice ("DMJN"), Ex. 7 at 2, and it has yet to act on even the most prominent cases. DMJN, Ex. 6 at 3-4. The NBJ has not "rectified" the problems the NCJ left behind. JA18. Defendants concede the NBJ alone is "no doubt" *insufficient* to render Peru an adequate forum. Opp. 36 n.8. They say the NBJ is an "opportunity to solve [all] pending problems," *id.* (quoting PMJN, Ex. 1 at 6), but that means little *now*.

Regardless, as Plaintiffs' experts explained, the reforms fail to target key structural problems. POB 13-14, 39. The Anti-Corruption Prosecutor's Office confirms that "agencies of formal control of crime . . . have been failing every day," and reform must "*begin* with the full renovation of supreme justices and prosecutors and with the selection of new presidents of higher courts. . . in all judicial and fiscal districts." PMJN, Ex. 1 at 133 (emphasis added). This has not happened.

Last, an easing of political instability following the full-blown constitutional crisis does not address the corrupt *judiciary*. No matter who won the most recent election, the constitutional crisis demonstrates that, far from assuring that the political branches can fix judicial corruption, the judicial corruption crisis may rupture the

political order.

3. The district court abused its discretion by finding that the judicial corruption crisis did not involve Cajamarca or the types of claims Plaintiffs raised.

The district court did not support its conclusion that the crisis does not extend to Cajamarca. POB 41; JA19. Defendants fail to show otherwise. Instead, they downplay and misstate evidence tying the "White Collars of the Port Case" to attorneys that "worked in the High Court of Cajamarca." Opp. 37 n.9; JA2005 ¶ 7b (Silva Decl.). The court did not address this evidence.

Defendants erroneously claim that Cajamarca has few corruption cases and that Plaintiffs provided no numbers or percentages of judicial corruption in Cajamarca. Opp. 37-39; *contra* POB 11-12. By August 2019, authorities had issued nine judge dismissal requests for Cajamarca based on "evidence" of "serious offenses" including corruption, and four suspensions, misconduct that took place during the pendency of the crisis – an effective 8% dismissal request rate. POB 11-12, 41-42; JA2078-79 ¶ 10-13 and n.5; JA1206 ¶ 6; JA2005 ¶ 7c, n.7; JA2006 ¶ 7d, n.8 (expert declarations). What matters is not Cajamarca's size, but rather its sky-high *rate* of judicial corruption. Plus, corruption convictions in Cajamarca all involve specific bribery, exactly the misconduct in which Defendants have engaged. *See* PMJN, Ex. 1 at 71. As Plaintiffs' expert concluded, "the judicial corruption networks recently revealed are widespread, and may reach the Cajamarca Judicial district." JA2075-77 ¶¶ 1-8. The court did not dedicate a single sentence to support the opposite conclusion.

Defendants themselves discuss the evidence indicating that corruption networks were designed to influence case outcomes. Opp. 39 n.10; JA2075 ¶ 1, 8. Yet they still claim there is "no evidence," Opp. 39, contradicting the district court's finding that the crisis "mostly involved efforts by officials to trade their powers for certain personal benefits" and only a "few instances" of manipulating case outcomes, JA19-20. In March, the State Department confirmed "a widespread network of corrupt practices and political interference *in judicial decisions*." PMJN, Ex. 12 at 5 (emphasis added).

Anti-Corruption Prosecutors have further refuted the district court's finding, reporting 48 instances of bribery among their "White Collars of the Port" cases—30% of the total. Gjullin Decl., Ex. 1 at 109-10. Indeed, 57% of known judicial corruption cases nationally involve accepting bribes, including to "influence . . . a matter under [the officials'] knowledge and competence." PMJN, Ex. 1 at 48. Only 15% of known cases involve the influence peddling the district court discussed, and these too can affect "judicial or administrative case[s]." *Id.* The Anti-Corruption Prosecutor's Office is clear: Peru's judicial corruption is "fundamentally characterized by acts of illegal favoring of the parties being tried, selling justice to the highest bidder," *id.* at 134, in line with Defendants' past corruption. POB 16-17.

This new information confirms that the district court's speculation that more revelations were unlikely was wrong. JA20. At the time, Plaintiffs warned that thousands of recordings had not been reviewed, JA2076 ¶ 5; JA2001 ¶ 2 (expert

declarations), which the Anti-Corruption Prosecutor's Office confirmed. PMJN, Ex.1 at 123. And the court recognized there are thousands of corrupt NCJ decisions to review. JA18. The court apparently assumed that these reviews would find no wrongdoing. This was error.

4. The district court abused its discretion in finding that Defendants are unlikely to engage in more corruption.

Finding inadequacy *does not* require finding that Defendants will corrupt a foreign court. Regardless, the court's finding that the corruption crisis does not make it more likely that Defendants will again bribe court officials and exert improper influence in cases with Plaintiffs remains deeply flawed.

First, Defendants argue that the district court had only "competing declarations" on suspicious court behavior and bias, and that Plaintiffs' declarations were uncorroborated. Opp. 41 (quoting JA21). Not so. *See* D.I. 126 (Tr. 67:14-73:10). Hundreds of pages of court documents showed that in proceedings against the Chaupes, prosecutors rejected Plaintiffs' evidence, JA1801; JA1962-63, and failed to recognize Plaintiffs' videos and property documents when considering Plaintiffs' complaints, JA1663-65; JA1703. And they show a double standard: prosecutors pursued Defendants' *criminal* complaints against Plaintiffs for years, but consistently argued Plaintiffs' identical claims must "be heard through a non-criminal procedure." JA1681; *see also* JA1660, 1671, 1689, 1701-02, 1709. The district court addressed none of this. Defendants only response is that at least the documents show Plaintiffs were

not ignored. Opp. 43 n.12.

Second, the court erred in relying principally on the criminal proceedings against the Chaupes not merely because "[p]rosecutors brought the case and the trial court convicted," Opp. 42-43, but because the six-year prosecution was riddled with irregularities and corruption. POB 16-18. Betting on the *possibility* that Plaintiffs will prevail *despite* corruption hardly assures that Plaintiffs will get a fair hearing.

Third, Plaintiffs have not won at all levels of the court system during the judicial crisis. Opp. 42. The Cajamarca appellate court proceedings acquitting the Chaupes occurred *prior* to 2015 and the recent scandal. *See* JA434. Defendants quibble that they do not have as much power to corrupt the judiciary as Plaintiffs claim, noting an "injunction" requiring them to stop surveilling Plaintiffs for five weeks in 2016, Opp. 43, POB 45, but any such power is too much.[10]

Indeed, Defendants have previously corrupted the Supreme Court. Defendants argue that judicial corruption is different now. Opp. 44. But it does not matter whether Defendants may use corruption networks instead of intelligence agencies to influence court proceedings. Defendants argue that Peru implemented judicial reforms after Fujimori, *id.*, but the crisis shows they failed. *See* JA1280-82 (expert declarations).

[10] Defendants mischaracterize why Plaintiffs were ultimately spared prison. Opp. 42-43. "No acts of violence were attributed to the four accused." JA452. The court did not suggest other Chaupe family members acted violently.

Defendants cite the district court's reliance on corporate reforms to find that Defendants are unlikely to corrupt again. Opp. 45. But the court was betting that the policies are "likely" to work this time, when Defendants' track record tells us otherwise. The alleged reforms were in place, *see* JA1339-44 ¶¶ 1, 5-12 (Lipson Decl.), when Defendants: violently attacked Plaintiffs in 2011; corrupted criminal proceedings in 2012; failed to screen their Peruvian lawyers for ties to corruption; and continued to use national police as private security. POB 6-7, 16-20; JA1100 (police contract). The evidence belies Defendants' denial of corrupt practices.

III. The district court abused its discretion by failing to address material evidence of the Peruvian forum's inadequacy.

Defendants erroneously argue that the district court did not need to address key evidence. While some FNC cases do not "*necessarily* require extensive investigation," Opp. 46 (quoting *Van Cauwenberghe v. Biard* 486 U.S. 517, 529 (1988) (emphasis added)), the Supreme Court made clear that "in the main," they do. *See* 486 U.S. at 528-29. And the detailed record here requires an analysis commensurate with the "facts of the individual case." *See El-Fadl*, 75 F.3d at 677. The "district court['s] fail[ure] to afford due consideration to evidence relevant to [its] inquiry" before dismissing is an abuse of discretion. *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1225 (11th Cir. 2017). The court could not ignore key evidence in determining whether Defendants met their burden.

Contrary to Defendants' claim, Opp. 46, Plaintiffs cite cases reversing district

courts for failing to discuss evidence. In *Purchasing Power*, the district court abused its discretion by issuing sanctions without considering several pieces of evidence. 851 F.3d at 1225. In *El-Fadl,* the district court did not adequately address an affidavit stating that the lawsuit would be barred in the alternative forum, thereby failing to "consider a material matter in dispute." 75 F.3d at 678-679. And in reversing in *Lacey v. Cessna Aircraft Co.*, this Court focused on the fact that the district court "ignored" a report that had implications for the FNC analysis. 862 F.2d 38, 40-41, 45-48 (3d Cir. 1988).

Here too, the court failed to consider evidence that created material disputes. For example, the court did not address multiple expert declarations finding reforms insufficient to render Peru adequate. POB 48-49; JA18. And it asserted in a sentence that the corruption crisis "did not involve Cajamarca," without addressing direct and expert evidence to the contrary. JA19; POB 49. These errors are compounded because it was Defendants' burden to refute the evidence the court ignored.

Defendants argue that this does not matter because Plaintiffs' expert declarations do not support Plaintiffs' position. Opp. 48. They are wrong on the merits, POB 49-50, but the point here is that this is the district court's job. Defendants cannot argue that this Court should defer to an analysis the district court did not undertake. *See Ray v. Robinson*, 640 F.2d 474, 478 (3rd Cir. 1980) (failure to exercise discretion is an abuse of discretion).

It makes no difference that Plaintiffs *submitted* evidence, Opp. 47; the court did

not address it. And while Plaintiffs' Indacochea declaration was cited 19 times, Opp. 48, that was almost exclusively to support undisputed facts. *See* JA9-13 (citing ECF 101). The court did not cite or discuss four expert declarations from Silva, Bazan and Simon, Messick, and Indacochea (supplemental). JA1-25.

Defendants invite this Court to speculate that the district court considered evidence it did not discuss, Op. 48-49; but a district court abuses its discretion when it does not consider relevant evidence, in part because, if it does not specifically explain its decision, this Court cannot adequately review it. *Lacey*, 862 F.2d at 39, 43.

The ignored evidence created material disputes on the crisis's scope, geography and reforms. Beyond failing to mention exhibits, the court failed to discuss these disputes, let alone explain why it was resolving them against Plaintiffs. Even if the evidence supported the court's findings, which it does not, *FMC Corp. v. Hennessy Indus., Inc.*, 836 F.2d 521, 524 (Fed. Cir. 1987) merely excuses the district court from addressing a "kitchen sink" of unsupported "assertions" that were "not relevant." This Court should not simply *assume* the district court gave due consideration to material evidence on a dispositive motion.

IV. This Court should reverse because Peru has recognized the ongoing judicial crisis's gravity, including in Cajamarca.

Defendants argue that the Anti-Corruption Prosecutor's Office's report demonstrates Peru's "commitment to ensuring" that "corruption does not repeat." Opp. 49 (quoting JA16). But the report found that reforms have *not* ensured a fair

forum, POB 12; instead the crisis has "deeply damaged the justice system and allowed for corrupt practices to thrive within the Judicial Branch," including multiple cases of judicial bribery in Cajamarca, and investigations are still in their infancy. PMJN, Ex. 1 at 71, 123, 133-34. Commitment aside, the Peruvian government's own conclusions about the present adequacy of its judiciary refute the district court's.

Plaintiffs' articles further show the corruption's scope and how any such "commitment" has not resulted in a fair forum. They highlight the difficulties of even finding seven honest judges for the NBJ, PMJN, Exs. 2-4, and the continuing impunity corrupt judges and prosecutors enjoy, with "more than 260 judicial officials" sanctioned with dismissal still active in the judicial system. PMJN, Ex. 8.[11]

Defendants claim that the new NBJ has made "significant progress," Opp. 51, but the NBJ's suspension of four judicial officials out of at least "53 disciplinary proceedings for dismissal [and] 109 preliminary investigations" is not "significant." DMJN, Ex. 7. And while Peru is holding elections, DMJN, Exs. 2, 3, and its ministers say they oppose corruption, DMJN, Ex. 4, this is the bare minimum for any nation.[12] That Defendants' best recent evidence of judicial adequacy is the existence of presidential elections speaks volumes.

[11] Defendants also ignore that the President of the Judicial Branch and Supreme Court remains in his post despite lying about his interactions with known heads of the corruption scandal. PMJN, Ex. 3.

[12] Defendants' additional article discusses a judicial decision in *Spain*, not Peru. DMJN, Ex. 1.

Both parties' submissions show that the judicial corruption crisis is in its early stages and that the "deeply damaged" justice system is unrepaired. PMJN, Ex. 1 at 133-34. Peru's courts are inadequate, and will remain so indefinitely. Thus, "[r]etention of jurisdiction by the district court would best serve the convenience of the parties and the ends of justice." *Mobil Tankers Co.*, 363 F.2d at 613. This Court should reverse based on Peru's acknowledgement that judicial corruption is rampant and extant reforms are insufficient.

V. The district court erred as a matter of law by failing to account for Plaintiffs' inability to access essential witness testimony in Peru.

Defendants do not deny either that, if Plaintiffs are unable to present "essential evidence" in Peru, dismissal is impermissible as a "matter of law," *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 189 (3d Cir. 1991); POB 52-53, or that Plaintiffs' eyewitness testimony is essential. Opp. 52. Nor do they dispute that Plaintiffs could testify live only *if Defendants call them*. *Id.* They cite their expert's opinion that Plaintiffs can submit a declaration, *id.* (citing JA898 ¶ 28), but Plaintiffs showed otherwise, POB 54, and Defendants' expert cited nothing.

As Plaintiffs' expert noted: "the 'declaration' of each party is already made in their respective written documents (lawsuit and answer) *and, unless the respective opposing parties need to ask them specific questions,* it is not possible for each party to offer their own declaration before the Judge." JA793 ¶ 47 (Fernandez Decl.) (describing PCPC Art. 221). Defendants omitted the emphasized language, Opp. 53, and provide no

evidence that a "lawsuit and answer" is a substitute for oral testimony or a declaration.

The fact that Peru's courts preclude Plaintiffs from presenting essential testimony renders the forum inadequate. POB 52-54. Defendants' cases on adequate, but imperfect forums involve procedural differences like judge versus jury trials, *Doe*, 666 F. App'x at 184-85, and limits on money damages, *Dtex, LLC v. BBVA Bancomer, S.A.,* 512 F. Supp. 2d 1012, 1022 (S.D. Tex. 2007). Plaintiffs' concerns are not so mundane.

Defendants offer no assurances that they would allow Plaintiffs to testify to the violence Defendants inflicted, and have every incentive not to. At *best* for Defendants, it is uncertain whether Plaintiffs could submit declarations if Defendants do not call them. But Defendants bear the burden to prove a Peruvian court *would* consider them. They failed to do so.

CONCLUSION

Peru recognizes its courts are so corrupt that they cannot "ensure the guarantees of a correct administration of justice." PMJN Ex. 1 at 133. It is not an adequate forum. For the foregoing reasons, the court's dismissal must be reversed.

Dated: September 2, 2020 Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

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

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CERTIFICATE OF SERVICE

I, Richard Herz, hereby certify that on September 2, 2020, I caused the foregoing Reply Brief for Plaintiffs-Appellants to be filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF electronic filing system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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