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)

OPENING BRIEF FOR PLAINTIFFS/APPELLANTS AND JOINT APPENDIX VOL. I

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INTRODUCTION

The district court erred in dismissing Plaintiffs' claims on *forum non conveniens* (FNC) grounds, because it did not hold Defendants, four Delaware mining corporations, to their burden to prove Peru is an adequate forum to hear Plaintiffs' claims. This Court should reverse.

Plaintiffs, members of the Chaupe family, are subsistence farmers in Cajamarca, Peru, whose small plot sits atop a gold deposit Defendants covet. For the past eight years, Defendants have intimidated and physically attacked Plaintiffs, killed their animals, and destroyed their property, all to force them from their land and pave the way for a massive open pit mine. Plaintiffs sued Defendants in Delaware, Defendants' home forum. Asserting that it would inconvenience them to litigate at home, Defendants sought FNC dismissal in favor of Peru, whose courts are in the throes of the worst judicial corruption crisis in recent Latin American history and where Defendants have improperly influenced courts, including in cases against Plaintiffs.

Despite Defendants' "heavy" burden to show that their proposed forum is adequate, *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 613 (3d Cir. 1991), and the district court's concern about Plaintiffs' ability to get a fair hearing there, the court has twice found Peru to be an adequate forum and dismissed Plaintiffs' claims. This Court vacated the first dismissal with instructions to consider Peru's unfolding judicial

corruption crisis and resulting states of emergency. *Acuna-Atalaya v. Newmont Mining Corp.*, 765 F. App'x. 811, 813-14 (3d Cir. 2019).

Since then, the breadth of the crisis has expanded. Peru's government declared multiple additional judicial states of emergency, and opposition to judicial reform sparked a political and constitutional crisis in which the President dissolved Congress and Congress purported to suspend the President. While the political crisis has calmed, at least for now, with the election of an interim Congress, judicial corruption remains widespread, its scope still not fully understood, and reform efforts nascent and insufficient. The district court on remand acknowledged that Plaintiffs produced "'significant evidence'" of partiality "'so severe as to call the adequacy of the forum into doubt.'" JA0007, JA0015 (quoting *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001). Indeed, this included evidence that Defendants themselves have participated in corruption, including in cases against Plaintiffs. But the district court nonetheless dismissed, ruling that Peru is an adequate forum.

The district court made several legal errors and abused its discretion in assessing the record evidence. Far from requiring Defendants to prove that the forum is adequate, it acknowledged that it "remain[s] concerned that Plaintiffs' ability to be fairly heard in Peru is compromised." JA0002. And it impermissibly resolved numerous factual conflicts in Defendants' favor. Indeed, it did so against the clear weight of the evidence. It found, for example – contrary to Plaintiffs' experts'

evidence that judicial corruption remains endemic and will, at best, take years to fix – that the government's reform efforts "suggest that *corruption is not a feature of the judiciary* or the current political regime." JA0019, (emphasis added).

The Peruvian government disagrees. After the court ruled, the government concluded "without a doubt" that the reforms are "insufficient to recover and ensure the guarantees of a correct administration of justice at a national level"; real change requires a "deep restructuring." Plaintiffs-Appellants' Motion for Judicial Notice (MJN), Ex. 1 at 133.[1]

The district court also erred by failing to ensure that Plaintiffs will be able to present critical evidence in Peru. It recognized that Peruvian law could prohibit the Chaupes from presenting their own eyewitness testimony, but dismissed anyway, contrary to this Court's repeated holding that where a plaintiff cannot access critical evidence in the alternative forum, that forum is inadequate.

The FNC doctrine does not allow Defendants to force the Chaupe family to bear the high risk that their claims will not be fully or fairly heard. This Court should reverse.

JURISDICTIONAL STATEMENT

The district court had diversity jurisdiction under 28 U.S.C. § 1332(a)(2).

[1] The government's report, as well as newspaper articles describing the situation, are attached to Plaintiffs-Appellants' motion, submitted herewith.

Plaintiffs are citizens of a foreign state, Defendants are United States citizens and the amount in controversy exceeds $75,000. On March 10, 2020, the district court entered a final order. Plaintiffs timely filed their Notice of Appeal on April 8, 2020. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. After considering the evidence, the district court "remain[ed] concerned that Plaintiffs' ability to be fairly heard in Peru is compromised." Did the district court err as a matter of law by failing to require Defendants to prove that the Peruvian forum is fair? Dkt. No. 99 at 8-14 (Pls' Supp. Br.); Dkt. No. 114 at 1-2 (Pls' Supp. Reply); Dkt. No. 107, at 3-6 (Defs' Supp. Br.); Dkt. No. 121, at 1-2 (Defs' Surreply); JA0002, 8-9, 24.

2. Assuming the district court applied the correct burden of proof, was its finding that the Peruvian forum is adequate an abuse of discretion, given the unrefuted evidence of widespread judicial corruption and Defendants' own involvement? Dkt. No. 99 at 10-14 (Pls' Supp.); Dkt. No. 114 at 2-7 (Pls' Supp. Reply); Dkt. No. 107, at 6-14 (Defs' Supp. Br.); Dkt. No. 121, at 2-7 (Defs' Surreply); JA0016-24.

3. Did the district court abuse its discretion by failing to address material evidence contrary to its finding that the Peruvian forum is adequate? Dkt. No. 99 at 4-7, 10-14 (Pls' Supp. Br.); Dkt. No. 114 at 2-7 (Pls' Supp. Reply); JA0016-24.

4. Did the district court err as a matter of law by failing to assure itself that

Plaintiffs would have access to key proof and their claims would not be time-barred in Peru? Dkt. No. 43, at 20 (Pls' Opp); Dkt. No. 99 at 14-15 (Pls' Supp. Br.); Dkt. No. 114 at 7 (Pls' Supp. Reply); Dkt. No. 107, at 14-15 (Defs' Supp. Br.); Dkt. No. 121, at 7 (Defs' Surreply); JA0051-52.

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. Statement of Facts.

A. Defendants are using harassment, intimidation, and false criminal charges to force Plaintiffs off their farm on a gold deposit Defendants covet.

Defendants Newmont Mining Corporation and its subsidiaries, Newmont USA Ltd., Newmont Peru Ltd., and Newmont Second Capital Corp. (together, "Newmont") are trying to force Plaintiffs, the Chaupe family, from their remote farm at Tragadero Grande to build a $5 billion gold mine – the Conga project. JA0074-77, JA0084-85 ¶ 56 (Complaint). The Chaupes hold possession rights, and have lived on and farmed the land since 1994. JA0285 (Máxima Acuña-Atalaya Declaration). Defendants' agents have threatened, beaten, and terrorized Plaintiffs with the admitted goal to forcibly evict them. JA0284-JA0359 (Plaintiffs' Declarations); JA0404 (RESOLVE Report).

Defendants have hired the Peruvian police and private security, who have invaded Plaintiffs' farm at least nineteen times – with swarms of men armed with batons – destroying property, entering the Chaupes' house, digging up crops, and killing or maiming their livestock and dogs. JA0420-29; JA1097-1113 (Police Contracts); Dkt. No. 27, Ex. 35 (Securitas Contract); JA0287-95; JA300-08; JA0317-18; JA0326-28; JA0334-38; JA344-45; JA0351-57; JA0305, JA0856; JA0291-92 (Plaintiffs' Declarations); JA0311-14 (Photos of dog). Defendants have threatened,

filed false criminal complaints against, and attempted to extort Plaintiffs. JA0284-359 (Plaintiffs' Declarations). Plaintiffs constantly fear for their lives and livelihoods. JA0284-539. The Inter-American Commission on Human Rights has recognized that Plaintiffs "have been the object of continuous acts of harassment and threats, with the intent to allegedly dislodge them from the land where they live." JA0477.

Plaintiffs' local attorney's and her colleagues' communications have been intercepted by security firms tied to Defendants, and she has received anonymous death threats. JA0830-35 ¶ 35-40 (Vasquez Declaration). Two lawyers from a local organization that helps represent the Chaupes were beaten by Cajamarca police. JA0815 ¶ 24 (Molleda Declaration). The State Department emphasizes the danger to those resisting large-scale extractive projects in Cajamarca. JA0617-18; JA0726.

B. Plaintiffs presented unrefuted evidence of systemic judicial corruption in Peru.

Corruption was endemic even before recent revelations resulted in multiple national judicial institutions declaring states of emergency. The 2016 State Department human rights report for Peru reported "widespread corruption in the judicial system" that "undermined the rule of law," and that "officials often engaged in corrupt acts with impunity." JA0724. A corruption monitor found a very high risk of judicial corruption and that bribes are "very commonly exchanged to obtain favorable court decisions." JA0618, JA0749. Plaintiffs' legal expert, Gaston Fernando Cruz, emphasized "the prevalence of corruption as a determining factor in the final

ruling in many cases." JA0793-97 ¶ 48. Defendants' only contrary evidence were declarations from a single lawyer – whose firm was slated to be investigated for links to corruption – asserting that the judiciary rules based on facts and law. Dkt. No. 15 at 8-9; Dkt. No. 51 at 3-4 (Defendants' FNC briefing); JA259-61 ¶¶ 15-20; JA0900 ¶ 38 (Declarations).

While this case was first on appeal, new revelations of widespread judicial corruption emerged based on recorded phone conversations captured by a criminal investigation, known as the White Collars of the Port scandal. As Plaintiffs explained on remand, a Supreme Court Justice, the Chief Justice of an appeals court, and three members of the National Council of the Judiciary (NCJ), the body responsible for selecting and appointing judges and prosecutors at all levels of the judiciary, were the initial focus of an unprecedented crisis. JA1205-10, ¶¶ 4, 9, 21-23; JA2077 ¶¶ 6-7 (Indacochea Declarations); JA1133-38, JA1145-48, JA1170-72 (Newspaper Articles). Officials declared an "unprecedented" three-month "state of emergency for the country's judicial system." JA1207-10 ¶¶ 9, 23 (Indacochea Declaration); JA1129 (Emergency Declaration). Peru's President stated: "The system for administering justice has collapsed." JA1143.

All members of the NCJ were impeached for gross misconduct, and Peru's Congress declared a nine-month state of emergency for the Council. JA1209 ¶ 23 (Indacochea Declaration); JA1139-41(News Article). The Executive Judicial Council

(EJC), the judiciary's governing body which had declared the judicial emergency, was itself declared in emergency after some of its members were linked to the scandal. JA1209-10 ¶¶ 21-23 (Indacochea Declaration). Under the EJC and NCJ, corruption networks "exercise[d] influence over the entire justice system and over judges and prosecutors at all levels." JA1213 ¶ 30.

Two more sitting Supreme Court justices were then implicated, leading to ethics investigations that remain open. JA1207 ¶ 13 (Indacochea Declaration). Then, the acting Attorney General, upon replacing her corrupt predecessor, declared the Prosecutor's Office in a state of emergency, the fourth national judicial institution to be so classified. JA1209-10 ¶ 23 (Indacochea Declaration); JA1191-92 (Newspaper Article).

Plaintiffs submitted five expert declarations and over 20 articles describing the extent of judicial corruption. JA1123-1301; JA2075-81; JA2000-23. Plaintiffs' experts include specialists in, and contributors to, judicial reform throughout Latin America, including Peru; an expert on judicial independence in Latin America; and a Peruvian judicial sector expert and legal coordinator of the organization whose reporting brought about the revelations of Peru's unprecedented judicial corruption. JA1204; JA1226-33; JA1215-17; JA2000-01.

According to Plaintiffs' experts – and Peru's Congress – Peru's judiciary is in the midst of a systemic corruption crisis, which cannot be remedied in short order.

JA2076-77 ¶¶ 1, 5-9; JA1205 ¶¶ 4, 7, 30 (Indacochea Declarations); JA2002-03 ¶¶ 4-5 (Silva Declaration); JA1219 ¶ 11, JA1222-23 ¶¶ 16-20 (Messick Declaration); JA1234 ¶ 19, JA1267 ¶ 84, JA1283 ¶¶ 112-115 (Simon/Bazan Declaration).

Just last month, after the district court ruled, Peru's Anti-Corruption Prosecutor's Office concluded that the corruption pervading the Peruvian judiciary is even *more* widespread and intractable than earlier reports suggested, including in Cajamarca. *See* MJN, Ex. 1 at 45-47.

1. Judicial corruption is widespread, the corruption networks involved aim to benefit litigants in individual cases, and its full dimensions are still unknown.

Recent revelations implicate the entire judiciary. According to organized crime prosecutors, the recordings revealed multiple corruption networks made up of businessmen, lawyers, and judicial officials at all levels. These corruption networks have affected the make-up of regional courts throughout the country. JA1205 ¶¶ 4, 7, 30; JA2076-77 ¶¶ 6-9 (Indacochea Declarations); JA2002-03 ¶¶ 4-5 (Silva Declaration).

These networks manipulate cases. "[P]owerful actors both within and outside the judicial system" were "exchanging benefits and favors in order to influence the outcome of judicial proceedings." JA2075 ¶ 1. The networks are designed to provide their services to politicians and private actors, including powerful commercial actors, regardless of the local court they appear before. JA2077 ¶ 8; JA1205 ¶ 4 (Indacochea

Declarations); JA2006 ¶ 8 (Silva Declaration).

These revelations are likely just the beginning. Years of NCJ's decisions are being evaluated, JA2001 ¶¶ 2-3 (Silva Declaration); JA0018 (Dt. Ct. Op.), and tens of thousands of recordings are yet to be investigated. JA2076 ¶ 5 (Indacochea Declaration); JA2001 ¶ 2 (Silva Declaration); MJN, Ex. 1 at 123. Special prosecutors recognize that the recordings revealed so far are "just the tip of the thread of a larger and more complex skein." JA2076 ¶ 5; *accord* JA1206 ¶¶ 6-7, 31 (Indacochea Declarations); JA2001, JA2007-08 ¶¶ 2, 10-11 (Silva Declaration).

The Peruvian government recently confirmed the corruption's scale. There are 334 judicial officials across the country under investigation for corruption, including 183 prosecutors and 151 judges. MJN, Ex. 1 at 37. The former Peruvian Judicial Branch president recognized that corruption is a national problem. *Id.* at 137.

2. There is judicial corruption in Cajamarca.

Cajamarca had the country's third highest rate of requests for judge dismissals in 2018, stemming from serious offenses. JA2078-79 ¶¶ 10-13 (Indacochea Declaration); JA2006 ¶ 7d (Silva Declaration). In August 2018, the Higher Court of Cajamarca requested *13 judges* out of approximately 100 be suspended or dismissed. JA1206 ¶ 6 (Indacochea Declaration); JA2005 ¶ 7c (Silva Declaration). Since January 2019, the Office of Judicial Oversight has sanctioned 93 judicial officials at various levels, including in Cajamarca, for extreme misconduct contradicting "the principle of

working honestly in the judiciary," including corruption. JA1149-1154 (Press Releases). And leaked recordings linked "two attorneys who worked in the High Court of Cajamarca" to key actors in the corruption scandal. JA2005 ¶ 6b (Silva Declaration).

The recent Anti-Corruption Prosecutor's Office report documents eight cases implicating prosecutors and judges in the Cajamarca region—four convictions and four under investigation. MJN, Ex. 1 at 47, 73-74. Given the slow pace of prosecution and the high number of unrecorded crimes, MJN Ex. 1 at 35, 134, these cases reflect only a fraction of the total corruption.

3. The Peruvian government's efforts to address the crisis are insufficient or will take years to work.

The government's principal reform attempt was to replace the NCJ with the new National Board of Justice (NBJ). JA1208-10 ¶¶ 16-17, 24; JA2079-80 ¶¶ 14-18 (Indacochea Declarations); JA1174-83 (Newspaper Articles). The NBJ was only belatedly staffed because the process failed to exclude corrupt officials. JA1155-57 (Press Release); JA2079-80 ¶¶ 14-18 (Indacochea Declaration). Regardless, the Peruvian government concluded last month that the rampant corruption cannot be fixed quickly: "[B]eyond the actions [the NBJ] could take in upcoming months, it is without a doubt insufficient to recover and ensure the guarantees of a correct administration of justice at a national level. . . . The so called agencies of formal control of crime have failed and have been failing every day." MJN, Ex. 1 at 133.

Further, the challenges in its creation continue to haunt its potential. *Id.* at 86-7. One sitting NBJ member had more than 16 calls with the some of the scandal's highest profile culprits. *Id.*

The Prosecutor's Office has documented significant difficulties that continue to prevent substantial progress, including high levels of fragmentation across cases, lack of coordination among district attorney offices, and a broader failure to eliminate conflicts of interest. *Id.* at 123, 136. Moreover, three key suspects have left prison, are likely to "hinder the investigations," MJN, Ex. 5 at 1, and could put whistleblowers at risk. MJN, Ex. 6.

The government's findings confirm Plaintiffs' experts' submissions that rooting out corrupt judicial officers, and instilling new norms of behavior against high-level and quotidian judicial corruption would take *years*. JA1219 ¶ 11, JA1222-23 ¶¶ 16-20 (Messick Declaration); JA1234 ¶ 19, JA1267 ¶ 84, JA1283 ¶¶ 112-115 (Simon/Bazan Declaration). And that is if the reforms were sufficient; they are not. JA1234 ¶ 19, JA1283 ¶ 115 (Simon/Bazan Declaration); JA1206 ¶ 6, JA1213-14; JA2079-80 ¶¶ 14-18 (Indacochea Declarations); JA2002-03 (Silva Declaration). The "structural problems" that "made [the corruption] possible, remain unresolved." JA1206 ¶ 6 (Indacochea Declaration). The adopted reforms "fail to target key stakeholders and address the critical components of judicial corruption." JA1234-35 ¶ 19. Indeed, "there has been no attempt at an ambitious and integral reform . . . [and] the

expectations for in-depth and long-lasting changes are limited." JA1283-84 ¶ 115.

Further, the limited reform efforts face grave threats from powerful public officials. JA1270-73 ¶¶ 90-94 (Simon/Bazan Declaration); JA2008-10 ¶¶ 13, 17d, 18 (Silva Declaration); JA2076 ¶ 4 (Indacochea Declaration). In late 2018, Peru's then-Attorney General Pedro Chavarry fired the lead prosecutors investigating high-level corruption, and they were only reinstated after widespread unrest. JA1184-92 (Newspaper Articles); *see* JA1272 ¶ 91 (Simon/Bazan Declaration). He then resigned after being implicated in the corruption crisis, but is still a Supreme District Attorney. JA1184-92; JA1272 ¶ 91; JA2076-8 ¶ 4, 9 (Indacochea Declaration). In late 2019, Congressional resistance to anti-corruption measures triggered a constitutional crisis and the body's temporary dissolution. *See* Section C, *infra*.

Hundreds of corrupt judicial officials remain at their posts, including more than 260 judges and prosecutors sanctioned for serious offenses; 15 justices, one sitting on the Supreme Court; and the President of the Peruvian Judicial Branch, who was investigated after failing to report requests for favors from members of the now-defunct NCJ. *See* MJN, Ex. 2-4, Ex. 8 at 1; *accord* JA1279-80; JA1213-14 (Indacochea Declarations).

4. Corruption watchdogs, the United Nations, and the State Department recognize the extraordinary and widespread nature of the judicial corruption crisis.

The scandal has drawn international condemnation. The U.N. Special

Rapporteur on the Independence of Judges and Lawyers stated that it "greatly surpasses" any corruption scandal in recent Latin American history. JA1211-14 ¶¶ 27-28, 33 (Indacochea Declaration).

Transparency International dropped Peru's corruption ranking in 2018 due to the crisis and high-level attempts to impede corruption investigations. JA1166-69; JA2018-23; *see also* JA1274-75 ¶¶ 97-98. And they warned the problem was much deeper than the scandal, noting the over 40,000 case backlog at the Anti-Corruption Prosecutor's Office. JA2018-23.

While the State Department's 2018 and 2019 Country Reports for Peru were not in the record, the court cited Newmont's counsel's oral representation regarding the former. JA0017; JA2119-20 41:11-42:9. The Reports found widespread judicial corruption in the Peruvian judiciary and made clear the corruption networks revealed by the scandal involve judges at all levels and interference in judicial decisions. MJN, Ex. 11-12. The Department also continued to report danger to activists opposing mining projects, singling out "areas where officials faced corruption charges." MJN, Ex. 12 at 13.

Defendants admit that "for the most part, [they] do not take issue with" Plaintiffs' description of the crisis. JA0015. Their single expert, however, attempted to characterize this unprecedented crisis as a few instances of corruption that is well under control. JA1307.

C. Conflict over corruption reforms sparked a constitutional crisis.

During the proceedings on remand, Peru's President dissolved Congress after it sidestepped his reform attempt by electing judges to the Constitutional Court who were accused of corruption. JA2096-114 (Newspaper Articles). The Constitutional Court adjudicates disputes between Congress and the Executive, including over corruption reforms. JA2105-14. It was also set to decide whether to release the congressional majority's leader, Keiko Fujimori – who was in jail on corruption charges – which it later did. JA2100-04; JA1196-98; MJN, Ex. 12 at 12. When the President dissolved Congress, it suspended him, creating the "deepest political crisis in at least three decades." JA2105-10.

After the briefing on remand, the Constitutional Court declared the dissolution constitutional. Elections in January produced a fractured congress that will serve just one year. JA0013 (Dt. Ct. Op).

D. Defendants corrupted cases in Cajamarca against these Plaintiffs.

After Defendants filed a criminal complaint against the Chaupes for criminal trespass on Tragadero Grande, local trial courts twice convicted the Chaupes and sentenced them to prison. JA0821-22 (Vasquez Declaration); JA0168 (Velarde Declaration); JA0431-55 (2017 Supreme Court Decision). Plaintiff Ysidora Chaupe submitted an affidavit declaring that she saw Defendants' lawyers deliver the guilty sentence before the judge issued it. JA0334-35 ¶¶ 7-8. And when Máxima Chaupe

fainted upon learning that she, her daughter Ysidora, son Elias, and husband Jaime had been sentenced to prison, the same judge apologized, explaining that Defendants had given an "economic benefit" to the prosecutor to bring the case. JA0334-35 ¶¶ 7-8; JA0342-43.

These proceedings were tainted. The court refused to accept the family's evidence. JA0828-29 ¶ 29 (Vasquez Declaration); JA1962-63 (Appellate Criminal Proceedings). The prosecutor did not include critical property documents in its accusation, and rejected Plaintiffs' request to do so. JA2082 ¶ 2 (Vasquez Declaration); JA1801 (Oral Hearing Minutes); JA1962-63. Defendants obtained prior knowledge of court documents through their influence with judicial staff. JA0828-30 ¶¶ 28-33 (Vasquez Declaration). After six years of litigation, only the Supreme Court saved the Chaupes from prison. JA0431 (2017 Supreme Court Decision); JA821-22 ¶ 3 (Vasquez Declaration).

Meanwhile, local trial courts and prosecutors failed to move forward with any of the Chaupe family's ten criminal complaints against Defendants' local subsidiary, Minera Yanacocha, stemming from the same conflict, arguing that the land dispute did not belong in criminal court. *See* JA1681; JA0494-JA0538; JA1654-JA1717 (court resolutions); JA0824 ¶ 11(Vasquez Declaration). The prosecutor's office failed to meaningfully investigate the company's destruction of the family's property, rejected Plaintiffs' evidence, and dismissed complaints for lack of evidence without giving

Plaintiffs the promised opportunity to amend. JA2082-83 ¶¶ 3, 4; JA0824 ¶¶ 11-13 (Vasquez Declaration); Dkt. No. 43-1, Ex. 19A (Prosecutor Complaint); *see also* JA1665 (Court Resolution).

Instead, prosecutors encouraged Plaintiffs to allow the company onto their land or risk missing "a great opportunity." JA1843 (Oral Hearing Minutes). The family's constitutional claims have been blocked by trial and appellate courts alike. JA0564-69; JA0572-82; JA1922-1930.[2]

"Minera Yanacocha gave gifts and financed initiatives for the benefit of [Cajamarca judiciary] employees." JA0828 ¶ 25; JA2083 ¶ 5 (Vasquez Declarations). Defendants also gave jobs to relatives of the judiciary, including hiring as legal counsel an influential Cajamarca appeals court jurist's son who participated in cases against Plaintiffs. JA0828-30 ¶¶ 27-33; JA2084 ¶ 8 (Vasquez Declarations); JA1590, JA1598 (Prosecutors' Reports). Plaintiffs' experts cited extensive corruption in Cajamarca courts predating the judicial corruption crisis, JA0812-14 ¶ 15, 18-22, and "categorically" stated that "a legal process filed by a rural community or family . . . against a multimillion-dollar mining company has absolutely no chance of justice." JA1086 ¶ 8.

E. Defendants corrupted the Peruvian Supreme Court.

[2] The only favorable judgment Plaintiffs ever obtained from a trial court related to this dispute was on a constitutional claim against Minera Yanacocha for surveillance by camera and drone. The order was reversed five weeks later on appeal. JA1922-1930; JA0564-69.

Since the 1990s, Defendants "have used their power and money to ensure that the justice system would favor them." JA1086 ¶ 8 (Arbizu Declaration). Newmont paid a more than half-million dollar bribe through a notorious secret police chief, Vladimiro Montesinos, in 1998 to swing a Peruvian Supreme Court opinion, which decided Newmont owns the gold mines it now operates. When corruption charges were later filed, "only some judges who were suspected to have received bribes were summoned" and "justice has never been sought against the Newmont officials involved." JA1083-85 ¶¶ 2-4 (Arbizu Declaration); *see also* JA0621-49 (Publications); Dkt. 79-1, Ex. 2 (video of a top-level Newmont executive and Montesinos discussing the scheme).

F. Newmont's Peruvian lawyers are tied to corruption.

To assist with the criminal prosecution against the Chaupe family and defend this case, Defendants have hired lawyers tied to corruption.

Aresnio Ore Guardia, who represented Minera Yanacocha in Defendants' criminal case against Plaintiffs, is under investigation for obstructing justice in connection with a money-laundering case against Keiko Fujimori. JA1158-65; JA1196-98 (Newspaper Articles).

A Peruvian congressional commission investigating another major corruption scandal involving the multinational corporation Odebrecht, planned to seek information regarding links to the scandal from the law firm led by Mario Castillo

Freyre, Defendants' Peruvian law expert here. JA1119-22 (Peruvian Newspaper Article).

G. Defendants' harassment has continued even after the initiation of these proceedings.

Less than a month after Plaintiffs filed this case, Defendants again invaded Tragadero Grande and destroyed the Chaupes' crops. Dkt. No. 27-3, Ex. 60 (Prosecutor's Report). And less than two months after the district court dismissed this case the second time, Defendants and the Peruvian National Police invaded the family's plot at Tragadero Grande. They refused to identify themselves, announced they were there under a private security agreement between the police and Defendants' subsidiary, and attempted to force Daniel Chaupe to sign a document attesting to his invasion of company land. MJN, Ex. 10. The minister of Mines and Energy said less than a month ago that the Conga project's reactivation "has to happen." MJN, Ex. 9.

II. Procedural History.

In September 2017, Plaintiffs filed this suit in the District of Delaware, Defendants' place of incorporation. JA0001; JA0071. Defendants moved to dismiss on FNC grounds in favor of Peru. Dkt. No. 14-15. Plaintiffs opposed, providing evidence of substantial corruption in Peru's courts, including improper influence by these Defendants. Dkt. No. 43 at 4, 7-8. Plaintiffs also submitted evidence that Peruvian courts would not allow critical eyewitnesses – Plaintiffs and their family

members – to testify unless *Defendants* called them. JA0792-93 ¶¶ 41-47.

The district court granted Defendants' motion, even though it recognized that Plaintiffs' evidence provided "reasons to be concerned about the Peruvian judicial system." JA0029, JA0047 (Prior Opinion). Plaintiffs appealed, arguing *inter alia* that the court did not require Defendants to bear their burden of proof. Plaintiffs also explained that, after the district court ruled, new revelations of corruption throughout the Peruvian courts led the government to declare a judicial state of emergency and prompted the President to observe that the country's justice system had "collapsed." JA1143.

This Court vacated the district court's prior opinion, instructing the district court to "reconsider its prior determination that Peru is an adequate forum," "taking account of the recent developments in Peru." *Acuna-Atalaya*, 765 F. App'x. at 813, 815. The Court emphasized that the district court should be "mindful [on remand] of the proper allocation of the burden of proof and the standards that must be satisfied, including that the burden of persuasion on a *forum non conveniens* motion lies with the defendant." *Id.* at 6-7; *accord id.* at 8.

On remand, Plaintiffs submitted detailed evidence of the judicial corruption crises, as detailed above. The district court again dismissed, holding that "[t]hough the events described are again concerning, they do not suffice to supplant my previous conclusion that Peru is an adequate alternative forum." JA0002; *accord* JA0024. The

court recognized that Plaintiffs produced "significant" evidence that the forum is inadequate, including evidence of both general corruption and specific corruption by these Defendants. JA0014-16. And it "remains concerned that Plaintiff's ability to be fairly heard in Peru is compromised." JA0002. Nonetheless, the court found the judicial crisis did not render the forum inadequate. JA0016-25.

Plaintiffs timely appealed. Concurrently with this brief, Plaintiffs filed a motion for judicial notice providing additional evidence of the inadequacy of the forum that came to light after the district court's opinion.

SUMMARY OF ARGUMENT

The district court erred as a matter of law by failing to hold Defendants to their burden to prove Peru is an adequate forum. The court correctly recognized that Plaintiffs produced significant evidence of corruption that calls the adequacy of the forum into doubt. Thus, Defendants bear the burden to prove "'that the facts are otherwise.'" *Acuna-Atalaya,* 765 F. App'x. at 815 (quoting *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001)). If a district court cannot conclusively determine that the forum is adequate – resolving factual conflicts in favor of the non-movant – then dismissal must be denied. The district court failed to hold Defendants to their burden.

The district court did not require Defendants to produce sufficient evidence by which it could reach a conclusive judgment that the forum is fair. Indeed, the Court's

finding that it "remained concerned that Plaintiff's ability to be fairly heard in Peru is compromised," JA0002, is the antithesis of a conclusive judgment.

The district court further erred as a matter of law by resolving factual conflicts in Defendants' favor. For example, the court found that that the corruption crisis was limited and under control, and that reforms "suggest that corruption is not a feature of the judiciary," JA00019, despite voluminous credible evidence to the contrary. Certainly, that evidence precluded a conclusive judgment that the forum is fair.

Even if the district court had held Defendants to the proper burden, it abused its discretion in finding that Defendants met that burden, because the record simply does not support a judgment that the forum is fair and because the court ignored material evidence, such as expert declarations, that undermined its conclusions.

The district court did not dispute Plaintiffs' evidence that Peru has suffered an unprecedented judicial corruption crisis or their evidence that Newmont corrupted Peruvian proceedings, including involving these Plaintiffs. Instead, the court based its holding on four clearly erroneous findings, any one of which warrants reversal. *First*, the district court mistakenly asserted that the U.S. State Department has not "downgraded" Peru's judiciary since the revelations of the corruption crisis. In fact, the State Department's recent reports have described the widespread corruption in increasingly grave terms. *Second*, the court incorrectly concluded that Peru has the corruption crisis under control. But Plaintiffs' evidence and expert opinions

demonstrate both that the crisis is much more widespread than credited, and that government sanctions and reform were inadequate. *Third*, the court erroneously concluded that the corruption crisis in Peru did not extend to Cajamarca or involve manipulation of case outcomes. In fact, clear record evidence shows that corruption is rife in Cajamarca courts, and that the recently exposed corruption networks are *designed* to influence case outcomes. *Fourth*, the court thought that Defendants' acts of corruption are unlikely to recur due to changes in Defendants' policies and the existence of cases in which Plaintiffs were said to have prevailed against Defendants. But the record shows a judicial system that favors these Defendants over these Plaintiffs, and the fact that Defendants have hired Peruvian lawyers with their own ties to corruption shows there is little reason to believe Defendants (or their lawyers) would not again avail themselves of the opportunities for illicit advantage.

The court's failure to consider material evidence that contradicts its conclusions represents an independent abuse of discretion. And, since the district court's opinion, the Peruvian government has confirmed that Peru is not an adequate forum by recognizing, contrary to the district court's findings, that corruption remains rampant, including in Cajamarca, and that reforms have been "insufficient to recover and ensure the guarantees of a correct administration of justice." MJN, Ex. 1 at 133.

The district court's conclusion that Peru is an adequate forum is also erroneous for two reasons unrelated to corruption. Although the district court previously

recognized that Peru's evidence rules might exclude Plaintiffs' and their relatives' critical eyewitness testimony, it held – contrary to this Court's caselaw – that this inability to access critical evidence did not render the forum inadequate. And although a forum is inadequate if Plaintiffs' claims are time-barred, the district court failed to ensure that Peruvian statutes of limitations will not preclude Plaintiffs' claims.

ARGUMENT

I. The district court erred as a matter of law by failing to hold Defendants to their burden to conclusively prove that the Peruvian forum is adequate.

A. Standard of review.

While *forum non conveniens* dismissal is reviewed for abuse of discretion, "the district court abuses its discretion if it does not hold the defendants to their proper burden." *Lacey v. Cessna Aircraft Co. (Lacey I)*, 862 F.2d 38, 43 (3d Cir. 1988). The court's discretion "may not serve the Defendants as a burden-shifting device on appeal." *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 160 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981).

The application of the proper burden of proof is a matter of law. *In re Dobrowsky*, 735 F.2d 90, 92 (3d Cir. 1984). This court "review[s] the allocation of the burdens of persuasion and production de novo." *Sikara v. Wettach (In re Wettach)*, 811 F.3d 99, 105 (3d Cir. 2016); *see also United States v. Washington*, 869 F.3d 193, 213 & n.81 (3d Cir. 2017).

This Court does not hesitate to reverse FNC dismissals where the district court does not properly apply, or hold defendants to, their burden of proof. *Lacey v. Cessna Aircraft Co. (Lacey II)*, 932 F.2d 170, 174 (3d Cir. 1991); *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 640 (3d Cir. 1989); *Lacey I*, 862 F.2d at 39; *Tech. Dev. Co. v. Onischenko*, 174 F. App'x 117, 118–20 (3d Cir. 2006).

B. The district court erred by failing to hold Defendants to the proper burden of persuasion that the Peruvian forum is fair.

"[A] district court must first determine whether an adequate alternate forum can entertain the case." *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 160 (3d Cir. 2010) (internal quotation marks omitted). This Court has endorsed the Eleventh Circuit's approach: once "'plaintiff produces significant evidence documenting the partiality . . . typically associated with the adjudication of similar claims and these conditions are so severe as to call the adequacy of the forum into doubt,'" then the burden shifts to defendant to "'persuade the District Court that the facts are otherwise.'" *Acuna-Atalaya*, 765 F. App'x at 815 (quoting *Leon*, 251 F.3d at 1312); *accord Bhatnagar by Bhatnagar v. Surrendra Overseas*, 52 F.3d 1220, 1229 (3d Cir. 1995) (defendants must "counter effectively" Plaintiffs' evidence "with evidence of [their] own demonstrating" that their proposed forum is adequate).

To 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. *See Bank of Credit &*

Commerce Int'l (Overseas) Ltd. ("BCCI") v. State Bank of Pak., 273 F.3d 241, 247 (2d Cir. 2001); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1086-87 (S.D. Fla. 1997). District courts must "draw all reasonable inferences . . . and resolve all factual conflicts in favor of the non-moving party." *See Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir. 2003).

The district court held that "it cannot be questioned that Plaintiffs have satisfied their burden" in producing significant evidence calling the adequacy of the Peruvian forum into doubt. JA0014-15. But while the district court acknowledged this Court's burden-shifting framework, JA007-08, it failed to hold Defendants to the correct burden. It did not require Defendants to prove that the "facts are otherwise" by presenting sufficient evidence by which it could reach a conclusive judgment. And the court impermissibly resolved key factual conflicts in Defendants' favor.

1. The district court did not require Defendants to produce sufficient evidence by which it could reach a conclusive judgment.

The clearest statement of Defendants' burden of proof when faced with "significant evidence" of corruption is in *Eastman Kodak*, 978 F. Supp. 1078, a case the Eleventh Circuit in *Leon* endorsed as applying the "correct approach." 251 F.3d at 1312; *accord* JA0041 (district court noting *Eastman Kodak* is the "model case for evaluating [corruption] allegations"). The *Eastman Kodak* plaintiffs provided evidence that Bolivian courts were corrupt and that defendants' "special influence" heightened

the risk that plaintiffs would not get a fair hearing. *See* 978 F. Supp. at 1084-86. That shifted the burden of persuasion to the defendant; if "the Court cannot draw a conclusive judgment" that the forum is fair, "defendants have not met their burden." *Id.* at 1086-87. Defendant "den[ied] manipulating the Bolivian justice system," and argued that the problems that had plagued the justice system "do not reflect the changes effected" by reforms. *Id.* at 1086. But since the court was left with "serious doubts" about the adequacy of the forum, *id.* at 1087, defendants "failed to meet their burden of persuading the Court that [plaintiffs'] evidence was incorrect, and that the forum was in fact adequate." *Leon*, 251 F.3d at 1312 (citing *Eastman Kodak*, 978 F. Supp. at 1087).

The Second Circuit has likewise required defendants to produce sufficient evidence whereby the district court can reach a "definitive finding as to the adequacy of the foreign forum" as "[w]e do not believe . . . that the matter should be left uncertain." *BCCI*, 273 F.3d at 247. Other courts have also found that defendants failed to meet their burden when doubt remained about the alternative forum's adequacy. *See, e.g., Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982) ("[A] significant doubt remains . . . . Since we are unable to conclude from the differing views expressed by the experts that Chile would be an adequate forum, CAP has failed to carry its burden of persuasion."); *McLellan v. Am. Eurocopter*, 26 F. Supp. 2d 947, 950 (S.D. Tex. 1998) (Given "the

conflicting testimony from Canadian experts, the Court remains unconvinced that Canada offers an available and adequate forum on the facts of this case."). Thus, Defendants must produce sufficient evidence that the "facts are otherwise" than argued by Plaintiffs, such that the district court can reach a "conclusive judgment," free of doubt, that Plaintiffs can get a fair hearing in the alternative forum.

The district court did not require Defendants to produce sufficient evidence to support a conclusive judgment that the foreign forum is fair. To the contrary, the district court expressed doubt as to the adequacy of the Peruvian forum. That precludes any conclusive judgment that Plaintiffs will be treated fairly, demonstrating that the court failed to hold Defendants to this standard of proof.

The district court recognized that Plaintiffs presented evidence, largely unrefuted, of "an expansive network of corruption involving high-level Peruvian judges and judicial officials" reaching all the way to the Supreme Court as well as "the body responsible for selecting and appointing judges and prosecutors at all levels of the judiciary," that led to a "'state of emergency' for the entire judicial branch," and ongoing investigations. JA0009-11, JA0015. Plaintiffs also presented ample evidence, credited by the district court, of corruption in Cajamarca, including in cases involving these Plaintiffs and Defendants. JA0014-15. And after weighing all the evidence offered by Defendants, the Court found that it "remain[ed] concerned that Plaintiff's ability to be fairly heard in Peru is compromised." JA0002. This is precisely the sort of

doubt that courts have found precludes a "conclusive judgment" that the alternative forum is adequate, and shows that the district court held Defendants to a less demanding standard. This was error.

Indeed, the district court compounded that error by taking as its starting point its original decision: "Though the events described are again concerning, they do not suffice to supplant my previous conclusion that Peru is an adequate alternative forum." JA0002. That opinion was vacated with an admonition to be "mindful of the proper allocation of the burden of proof and the standards that must be satisfied," *Acuna-Atalaya,* 765 F. App'x. at 815; Plaintiffs bore no burden to rebut it. And that opinion impermissibly placed the burden of proof on Plaintiffs. The court found "reasons to be concerned about the Peruvian judicial system," JA0029, JA0044, JA0047, but required *Plaintiffs* to prove that the forum "is clearly inadequate." JA0029.

The conditions the district court imposed on dismissal do not warrant a lesser burden of proof than a "conclusive judgment" that Plaintiffs will get a fair hearing. If a district court is unable "to make a definitive finding as to the adequacy of the foreign forum," it can only dismiss with sufficient conditions that protect the non-movant. *BCCI*, 273 F.3d at 247-48. Here, the district court attached conditions precisely "because I remain concerned that Plaintiffs' ability to be fairly heard in Peru is compromised." JA0002. But the conditions – submitting to a Peruvian court's jurisdiction, allowing employees to provide evidence, and recognizing a Peruvian

judgment's validity – do nothing to address the serious corruption concerns. JA0026-27. Thus, nothing short of a "conclusive judgment" that the forum is adequate is sufficient for dismissal. The court erred by not applying this standard.

2. The district court erred as a matter of law by failing to draw all reasonable inferences in Plaintiffs' favor when presented with factual conflicts.

The district court also erred in resolving factual conflicts and drawing inferences in Defendants' favor. While this Court does not appear to have considered the resolution of factual conflicts on an FNC motion, district courts have held that FNC motions follow the general rule in the venue context that the court must "draw[] all reasonable inferences . . . in the plaintiff's favor, and resolve[] any factual conflicts in the plaintiff's favor." *Constr. Specialties, Inc. v. Ed Flume Bldg. Specialties, Ltd.*, No. 4:05cv1863, 2006 U.S. Dist. LEXIS 1907, at *5 (M.D. Pa. Jan. 6, 2006); *see also Murphy*, 362 F.3d at 1138 (same rule for improper venue motion); *Hancock v. AT&T Co.*, 701 F.3d 1248, 1260 (10th Cir. 2012) (same); 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1352, at 324 (2004) (same). Put another way, where "plaintiffs' story is plausible at least," factual conflicts preclude a "conclusive" judgment. *Eastman Kodak*, 978 F. Supp. at 1087.

While there are numerous examples of the district court improperly resolving key factual conflicts in Defendants' favor, Argument, Section II, *infra*, two are illustrative. First, there was a clear factual conflict as to whether the corruption

exposed was "only a few instances of corrupt actors" as Defendants argued, or a widespread crisis that was merely the tip of the iceberg with "surely more revelations to come" as Plaintiffs showed. JA0020. The district court found the crisis amounted to "supervening instances of corruption" largely among "senior members" of the judiciary, and with little analysis, that the possibility of new revelations of corruption emerging "seems unlikely now." JA009, JA0016, JA0020. The district court was not allowed to draw this inference in Defendants' favor.

Indeed, we now know definitively that the court was wrong. A new report by the Anti-Corruption Prosecutor's Office found that 334 judges and prosecutors are being investigated and sanctioned for corruption around the country, MJN, Ex. 1 at 2, far more than "only a few instances of corrupt actors" exposed in the aftermath of the White Collars of the Port scandal. JA0020.

Second, there was a factual conflict as to whether government reform efforts to address the corruption crisis were sufficient. JA0017-19. The court resolved that conflict in Defendant's favor, finding that the "appropriate steps" taken by Peru "suggest that corruption is not a feature of the judiciary," JA0019, without addressing Plaintiffs' evidence and expert declarations demonstrating that the reforms were inadequate given their failure to target key components of judicial corruption, the widespread and structural nature of the corruption problem, and that the problems would take years to fix.

Again, we now know definitively that the court was wrong. Shortly after the district court's opinion, the U.S. State Department confirmed the existence of "evidence of widespread corruption in the judicial system," MJN, Ex. 12 at 12, and Peru's own Anti-Corruption Prosecutor's Office concluded that the reforms implemented by the government are "without a doubt insufficient to recover and ensure the guarantees of correct administration of justice at a national level." MJN, Ex. 1 at 133.

The court drew additional impermissible inferences in light of *at best* conflicting evidence in concluding that the crisis does not reach Cajamarca, does not involve the manipulation of case outcomes, and that Defendants' own corrupt acts are unlikely to recur. *See* Argument, Section II.B.3&4, *infra*.

The district court reached these conclusions by improperly resolving factual disputes in Defendants' favor. Doing so was legal error. Since, "[v]iewed in light of the expert declarations, plaintiffs' story is plausible at least," these factual conflicts preclude a "conclusive" judgment. *Eastman Kodak*, 978 F. Supp. at 1087. "[T]he Court can only rule that defendants have not met their burden." *Id.*

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

A. Standard of review.

A court's *forum non conveniens* holding must be "supported by the record." *Lacey I,* 862 F.2d at 39. A district court "necessarily abuses its discretion if it based its ruling

on . . . a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). "The abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal or factual error." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014).

B. The district court abused its discretion in finding Defendants produced sufficient evidence to support a judgment that Peru is a fair forum.

Even if this Court were to find that the district court held Defendants to the proper burden as a matter of law, it was an abuse of discretion to find that Defendants met that burden. Given the unprecedented judicial corruption crisis and credible evidence of Newmont's own corruption of Peruvian proceedings, the record simply does not support a *conclusive* judgment that the forum is fair.

Plaintiffs' evidence – including declarations from five experts on Peruvian judicial corruption and reform efforts, and U.S. State Department reports – established the existence of multiple, widespread corruption networks intended to affect the outcome of cases at all levels of the Peruvian judiciary, including in Cajamarca. Statement of Facts ("SOF"), Section B, *supra*. Plaintiffs' evidence further shows that the government's response has been insufficient to resolve this crisis. SOF, Section B.3-4, *supra*. Plaintiffs also provided evidence of Defendants' own corruption of proceedings in Peru involving these Plaintiffs, Defendants' corruption of Peruvian Supreme Court proceedings, and evidence that Defendants continue to enlist

Peruvian counsel linked to corruption. SOF, Sections D-F, *supra*.

These facts demonstrated Peru is an inadequate forum, JA0015, and Defendants have failed to show that the facts are "otherwise." Indeed, their declarations on remand – from two of their lawyers and a Newmont officer – simply issue denials or reveal high levels of corruption-related ethical violations within the company. *See* JA1442 (Newmont report); JA1580-87; JA1576-77 (Declarations). Their single expert on the crisis mischaracterizes the worst judicial corruption crisis in Latin American in recent memory as "instances of corruption" that are well-in hand. JA1307.

Nevertheless, faced with Plaintiffs' evidence of extraordinary, widespread judicial corruption in Peru and by Defendants in proceedings against these Plaintiffs, the district court found that Defendants carried their burden to demonstrate the forum is fair. JA0024. The court relied on four unsustainable assertions: 1) the State Department has not downgraded the Peruvian judiciary; 2) sanctions of high-level judicial officials and government reforms show corruption is not a feature of the Peruvian judiciary; 3) the corruption crisis involved only a "few instances" of manipulating case outcomes and did not involve Cajamarca, and 4) Defendants' own corrupt acts are unlikely to recur. JA0016. Each assertion is based on "a clearly erroneous assessment of the evidence," *Cooter & Gell* 496 U.S. at 405, and is not "supported by the record," *Lacey I,* 862 F.2d at 39. Plaintiffs address each below.

1. The district court abused its discretion by relying on evidence outside the record to mistakenly determine that the U.S. State Department had not downgraded the Peruvian judiciary, without providing Plaintiffs an opportunity to respond.

The district court mistakenly asserted that the State Department has not "downgraded" Peru's judiciary or contradicted conclusions the court drew before the judicial crisis emerged. JA0016-17. But the district court failed to consider the Reports' actual content. The crisis surfaced in mid-2018, so it was only addressed in the State Department's 2018 and 2019 Country Reports. The 2018 Report was not in the record or ever cited by the court, and the 2019 Report was not issued until after the district court ruled. The court's opinion relies solely on Defendants' counsel's three-sentence representation at oral argument, that what counsel mistakenly believed was the 2019 report "says what you would expect it to say" and its conclusions are not "terribly different" than the State Department's 2016 report. JA0017; JA2119-20 (oral argument transcript). This was not evidence, and the court's reliance on a report mentioned at oral argument, but not part of the record, denied Plaintiffs an opportunity to respond. This was error. *See Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994) (court must provide notice and an opportunity to respond before entering judgment).

Moreover, the Reports do not support the district court's conclusion. State Department Reports do not use any metrics other than narrative description and thus do not "downgrade" judiciaries. But the State Department *has increased* its criticism of

Peruvian judicial corruption in the wake of the judicial corruption crisis. The most significant human rights issues listed in the beginning of the report escalated from "corruption" in 2016, JA0711, to "government corruption, including in the judiciary" in 2018, MJN, Ex. 11 at 1, and "government corruption at all levels, including the judiciary," in 2019. MJN, Ex. 12, at 1. The 2018 Report noted "allegations of widespread corruption in the judicial system," citing "July media reports of a judicial scandal involving allegations of influence peddling and graft by various judges at all levels" which "included court decisions." MJN, Ex. 11 at 5, 11. And the 2019 Report, issued the day after the district court's opinion, described the ongoing revelations as "evidence of widespread corruption in the judicial system," and explained that the conversations "uncovered a widespread network of corrupt practices and political interference in judicial decisions." MJN, Ex. 12 at 5, 12. Thus, the 2018 and 2019 Reports reflect an escalation of concern about Peru's judiciary, and as discussed below, they directly contradict two of the court's principal findings – that the crisis is limited to senior officials and that it largely does not affect judicial decisions.

2. The district court abused its discretion by finding that "corruption is not a feature of the judiciary or current political regime" given reform efforts, despite record evidence that judicial corruption is widespread and unresolved.

The district court erroneously concluded that the "Peruvian government appears to have taken appropriate steps to address the scandals that have plagued the judiciary, and those steps suggest that *corruption is not a feature of the judiciary* or the

current political regime." JA0018-19 (emphasis added). That conclusion contradicted those of Plaintiffs' five experts, the Peruvian government, and the U.S. State Department, which reported "evidence of widespread corruption in the judicial system" a day after the district court's decision. MJN, Ex. 12 at 12. The district court offered three reasons for its conclusion; each is mistaken.

First, the district court noted that "principal actors involved," which the court described as "senior members" of the judiciary, have been sanctioned. JA0009, JA0017. But Plaintiffs' experts, the U.S. State Department, and the Peruvian government itself found that corruption exists throughout the judiciary, and that many actors have *not* been sanctioned. SOF, Section B, *supra*.

Investigations revealed multiple corruption networks made up of judicial officials at all levels, businessmen, and lawyers aiming to provide services to actors before any local court. JA2076-77 ¶¶ 1, 5-9 (Indacochea Declaration). The corrupt NCJ exercised influence over judges and the make-up of regional courts *throughout the country*. JA1205 ¶¶ 4, 7, 30; JA2076-77 ¶¶ 6-9 (Indacochea Declarations); JA2002-03 ¶¶ 4-5 (Silva Declaration). The State Department agrees. Argument, Section II.B.1, *supra*. And after the district court's ruling, Peru's Anti-Corruption Prosecutor's Office confirmed that at least 334 judicial officials, excluding court staff and assistants, were implicated in the widespread judicial corruption. MJN, Ex. 1 at 2, 35. The former

president of the Peruvian Judiciary also recognized that judicial corruption is a national problem. *Id.* at 133.

The initial sanctions have not addressed this widespread judicial corruption. SOF, Section B.3, *supra*. Even high-level officials implicated in the crisis, like former Attorney General Pedro Chavarry and Tomas Galvez, (both currently Supreme District Attorneys), remain in office. JA2076 ¶ 4 (Indacochea Declaration); JA2010 ¶ 14e (Silva Declaration); JA1271-72 (Simon/Bazan Declaration). And the Anti-Corruption Prosecutor's Office report made clear that *hundreds* of these corrupt judges remain in their posts. MJN, Ex. 8 at 1.

Second, the district court pointed to reforms, noting that the National Board of Justice (NBJ) is now fully staffed and plans to review the disgraced NCJ's past appointments. JA0018. But current reforms do not guarantee a fair judiciary because they "fail to target key stakeholders," JA1234 ¶ 19, JA1283 ¶ 115 (Simon/Bazan Declaration), fail to resolve the structural problems at the root of the crisis, JA1206 ¶ 6 (Indacochea Declaration); JA2002-03 (Silva Declaration), and would take *years* to root out corrupt judges and instill new norms of behavior. JA1219 ¶ 11, JA1222-23 ¶¶ 16-20 (Messick Declaration); JA1234 ¶ 19, JA1267 ¶ 84, JA1283 ¶¶ 112-115 (Simon/Bazan Declaration). Even if ultimately sufficient, they do not ensure a fair hearing *now*. *See Sarhan v. Holder*, 658 F.3d 649, 660 (7th Cir. 2011) (noting in refugee context that while attempts at reform "are welcome steps," they "are not evidence

that the government . . . has the power . . . to protect" applicant). The court addressed none of this. *See* JA0018.

Peru's own government recently confirmed that Peru's judiciary is still not functioning and the NBJ is "without a doubt insufficient to recover and ensure the guarantees of correct administration of justice at a national level" as the "so called agencies of formal control of crime have failed and have been failing every day." MJN, Ex. 1 at 133.

Third, the district court believed that "political instability resulting from the scandals seems to have calmed," in light of January's legislative elections. JA0018. But the fact that resistance to judicial corruption reform threw the country into a full-blown constitutional crisis, including a dispute over who was the rightful President, shows how deeply embedded judicial corruption is in Peru. *See* JA2096-2114 (Newspaper Articles). And the political climate is hardly stable. As the articles the district court cited demonstrate, "Peruvians elected a fractured Congress with no clear leadership" that "will be in place for just over a year." JA0013. The ousted congressional majority party is not the only political party in Peru associated with corruption – indeed, five of Peru's previous six Presidents, from multiple political parties, are tied to corruption. JA1089-1091; JA1199-1203. Regardless, an easing of acute political instability does not suggest that Peru's unprecedented *judicial* corruption crisis will be resolved any time soon.

The district court's comparison of the recent political crisis to the Ecuadorian coup in *Leon* is inapposite. JA0018-19 (citing 251 F.3d at 1313 n.3). There, the coup was of little relevance because the case involved only private parties and therefore adequacy of the courts was not implicated by an undemocratic or partial executive. *Id.* But the Peruvian forum is inadequate because of a systemic *judicial* corruption crisis; unlike in *Leon*, the political instability at issue was itself triggered by a fight over judicial corruption reforms.

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

The district court found that Peru's judicial corruption crisis did not involve Cajamarca, is "mostly" about favor trading (with "only a few instances" of manipulating case outcomes), and is unlikely to lead to further revelations. JA0019-20. These findings were unsupported by the record, and thus were an abuse of discretion.

The district court offered no support for its conclusion that the crisis does not extend to Cajamarca, and failed to address Plaintiffs' unrefuted evidence of corruption in Cajamarca courts. *See, e.g.*, JA0812-14 ¶¶ 15, 18-22 (Molleda Declaration). Cajamarca had the third highest rate of requests for judge dismissals in the country in 2018; the Higher Court of Cajamarca requested *13 judges* out of approximately 100 be suspended or dismissed. JA1206 ¶ 6; JA2078-79 ¶¶ 10-13 (Indacochea Declarations); JA2005-06 ¶ 7c-d (Silva Declaration). Evidence tied the corruption scandal to

Cajamarca, with indications that more would surface. A "new audio file" linked key culprits to "two attorneys who worked in the High Court of Cajamarca." JA2005 ¶ 7b (Silva Declaration).

The Anti-Corruption Prosecutors' recent report confirms that the corruption crisis extends to Cajamarca, noting that four judicial corruption cases in Cajamarca have been prosecuted and four remain under investigation, numbers likely to expand as many more audios are investigated. MJN, Ex. 1 at 47, 71, 123.

The court's conclusion that the crisis does not involve manipulating cases likewise cannot be sustained. Ms. Indacochea explained that "powerful actors both within and outside the judicial system" exchanged favors "*in order to influence the outcome of judicial proceedings*." JA2075 ¶ 1 (emphasis added). "Specialized Prosecutors have . . . stated that the judicial corruption network sought to [build] a network of influencers that could offer its services to politicians or businessmen in any local court." Id. ¶ 8. The State Department recently confirmed that the scandal reached all levels of the judiciary, and revealed a "widespread network of corrupt practices and political interference in judicial decisions." MJN, Ex. 12 at 5. The entities that benefited include powerful commercial actors like Defendants. *See* JA1205 ¶ 4 (Indacochea Declaration); JA2006 ¶ 8 (Silva Declaration.) This manipulation of case outcomes through unlawful influence is precisely Plaintiffs' concern, and mirrors Plaintiffs'

specific evidence of Defendants' own corrupt acts, including in Cajamarca courts, which the district court credited. *See* SOF, Sections D-F, *supra*.

Last, in determining that future revelations "seem unlikely," JA0020, the district court discounted Plaintiffs' experts' declarations that the recent revelations are likely just the tip of the iceberg as there are tens of thousands of recordings yet to be investigated and three years of NCJ decisions to be evaluated. JA2076 ¶ 5; JA1206-13 ¶¶ 6-7, 16, 31 (Indacochea Declarations); JA2001-08 ¶¶ 2, 10-11(Silva Declaration) Here again, Plaintiffs' experts were proven right, as Peru's Anti-Corruption Prosecutor's Office recently reported that nearly five times as many judges and prosecutors are being investigated and sanctioned for corruption than were initially exposed, and the investigations are ongoing. MJN, Ex. 1 at 2.

These clear errors led the district court to the indefensible conclusion that the current crisis does not pose a risk to Plaintiffs' ability to be fairly heard in Peru. This was an abuse of discretion.

4. The district court abused its discretion by finding that the acts of corruption engaged in by Defendants are unlikely to recur.

The district court did not dispute Plaintiffs' evidence that Defendants have corrupted a Supreme Court case, and it correctly credited Plaintiffs' evidence of irregularities, improper bias, and a bribe paid by Defendants in proceedings involving Plaintiffs. As this Court observed, "a factfinder could conclude that this case-specific evidence carries greater weight in the context of a judicial system permeated by

corruption problems." *Acuna-Atalaya*, 765 F. App'x. at 814. Nonetheless, the district court found that this corruption "does not make the historic allegations of corruption perpetuated by Newmont likely to occur again." JA0020-24. This was an abuse of discretion.

The court relied on Defendants' assertion that the Plaintiffs have "prevailed" against Newmont at every level of the court system. JA0021. But Defendants need not *always* unduly influence the courts for a forum to be unfair. And as this Court noted, "the recent disclosures raise the specter of corruption in the appellate courts of Peru and undermine confidence that they can serve as a protection against Newmont's alleged capture of the lower courts." *Acuna-Atalaya*, 765 F. App'x. at 814.

Plaintiffs' "successes" actually show that Plaintiffs are unlikely to get a fair hearing. The most glaring example is Defendants' six-year pursuit of false criminal trespass charges against Plaintiffs – using bribes and enlisting lawyers with ties to corruption – after *the company* attacked the Chaupes. SOF, Sections D-F *supra*. While Plaintiffs' convictions were ultimately overturned in the Supreme Court, the Chaupes won only a reprieve from prison and an end to their wrongful prosecution. *Id.* That does not change the fact that prosecutors pursued and Cajamarca trial courts twice affirmed these meritless convictions. *Id.* Indeed, these same officials simultaneously and repeatedly declined to pursue or dismissed Plaintiffs' complaints, indicating that this conflict had no business in criminal courts. *Id.*

Similarly, Plaintiffs' other "success," an injunction against the company's drone and camera surveillance of Plaintiffs, was quickly overturned by the Cajamarca appellate court in 2016. JA1922-1930; JA0564-69. Further, since 2015, the Cajamarca trial court ruled against Plaintiffs on their constitutional restriction of movement claim, as did the Cajamarca appellate court, JA0572-82, and the trial court and prosecutors have dismissed every criminal complaint Plaintiffs have filed. *See* JA0494-JA0538; JA1654-JA1717 (court resolutions); JA0824 ¶ 11 (Vasquez Declaration). Newmont has yet to experience a meaningful loss. The instances in which Plaintiffs "prevailed" do not "conclusively" neutralize the doubt this raises about Plaintiffs' ability to be treated fairly in Peru, before the trial courts *or* the appellate courts.

At bottom, the district court found the forum is fair based on the *possibility* that Plaintiffs will prevail. But a forum is inadequate if, to prevail, Plaintiffs likely must overcome corruption. Defendants must do more to carry their burden than merely show they do not win every time.

Newmont also corrupted the Peruvian Supreme Court to control the mine it now operates. SOF, Section E, *supra*. The court asserted that, because Newmont relied on "intelligence agencies" under the Fujimori government, and that regime no longer exists, Newmont is unlikely to "try to corrupt a court official again." JA0022. But the currently-existing judicial corruption networks provide alternative means to

corrupt courts, and the fall of Fujimori does not reflect at all on *Newmont's* capacity or recently demonstrated willingness to corrupt.

Similarly, despite the court's suggestion, JA0023, it would not matter if the Peruvian executive branch opposed Defendants' mining project, as the relevant inquiry is whether Peruvian *courts* are vulnerable to corruption. Nonetheless, the court misconstrued the executive's positions. First, police hired by Defendants have participated – and, contrary to the district court's finding, continue to participate – in intimidating Plaintiffs. SOF, Sections A & G, *supra*. Second, the executive only imposed barriers to the project in response to widespread protests in which several demonstrators were killed, JA0818 ¶ 34 (Molleda Declaration); JA0129-30 ¶¶ 237-39 (Complaint), and its meager and belated steps to protect the Chaupes were only in response to protection measures ordered by the Inter-American Commission on Human Rights and are ineffective. JA0151-52 ¶ 350-51 (Complaint); JA0469-0479 (Inter-American Decision); JA0292-0294 ¶¶ 32-35 (Máxima Acuña-Atalaya Declaration). These actions do not suggest the executive opposes the mine. Just three weeks ago, the Ministry of Energy and Mines declared that the project must go through eventually. MJN, Ex. 9.

The district court's reliance on Newmont's claim that it has reformed itself is similarly unavailing. JA0023-24. As the court itself recognized, it is "a tautology" to argue that criminality will not happen because it is not allowed. JA20023-24 n.11.

Indeed, 2018 saw the highest number of substantiated reports of ethical issues – 215 – at the company in the last four years, with corruption concerns being the second highest type of matter investigated at 19%. JA1442 (Newmont report). These complaints surface *after* the corruption has occurred, which will not save Plaintiffs. And as Plaintiffs have shown, Defendants continue to enlist Peruvian counsel with ties to corruption. SOF, Section F, *supra*.

The district court briefly noted that Defendants commissioned an investigation into the abuses committed against the Chaupes. JA0023. But a report does not make Newmont less likely to corrupt Peruvian court proceedings, is irrelevant to the receptivity of Peru's courts to Newmont's misconduct or Plaintiffs' claims, and had nothing to do with judicial corruption. The report found that "the human rights of members of the family have been at risk since the first Tragadero Grande eviction attempt." JA0406.

Lastly, the district court noted that Plaintiffs have "generated intense public interest in their cause, with all the salutary effects such public attention brings," apparently speculating that the company and Peruvian courts would be less likely to misbehave with the eyes of the world upon them. JA0024. But Defendants' corruption of Peruvian proceedings involving Plaintiffs has *already* taken place against a backdrop of international awareness and support for Plaintiffs' plight. And despite press headlines, Peru's corruption crisis continues.

In short, Defendants did not rebut, and the district court did not question, Plaintiffs' evidence of Defendants' own corrupt acts in Peruvian proceedings, including in cases involving these Plaintiffs, and the record does not support a conclusive judgment that Defendants' corruption is unlikely to recur. Recent revelations of extraordinary judicial corruption in Peru have only made the import of this evidence clearer: the Peruvian forum is not adequate, and Defendants failed to show otherwise.

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

A. Standard of review.

A district court abuses its discretion when it does "not adequately consider the contentions raised by plaintiff." *Lacey I*, 862 F.2d at 39. Similarly, "[t]he district court abuses its discretion when it fails to consider a material factor," *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996), or "ignores or misunderstands the relevant evidence." *Purchasing Power, LLC v. Bluestem Brands, Inc.,* 851 F.3d 1218, 1222 (11th Cir. 2017) (internal quotations omitted).

B. The district court abused its discretion by ignoring material evidence.

As Argument, Section II, *supra* shows, the district court failed to consider much of Plaintiffs' evidence that the Peruvian forum is unsatisfactory, much less explain how Defendants carried their burden in light of this evidence. There are at least six

instances in which the court abused its discretion by failing to consider relevant evidence.

First, in determining that sanctions of "senior members" of the judiciary suggest corruption is not a feature of the Peruvian judiciary, JA0009, JA0017, the district court ignored Ms. Indacochea and Ms. Silva's expert declarations describing the widespread nature of the judicial corruption crisis. Argument, Section II.B.2, *supra.*

Second, in deciding that government sanctions and reforms suggest corruption is no longer "a feature of the Peruvian judiciary," JA0018-19, the district court ignored Plaintiffs' experts Mr. Simon, Mr. Bazan, Mr. Messick, and Ms. Indacochea's explanation that such steps are insufficient or will take years to work. Argument, Section II.B.2, *supra.*

Third, in analyzing whether the corruption crisis implicated Cajamarca courts, JA0019-20, the district court ignored Ms. Indacochea and Ms. Silva's evidence that the crisis had affected Cajamarca, as well as unrefuted evidence of judicial corruption in Cajamarca generally from Ms. Indacochea, Ms. Silva, and Mr. Molleda. Argument, Section II.B.3, *supra.*

Fourth, in holding that the scandal involved only limited instances of the manipulation of case outcomes, JA0020, the district court ignored Ms. Indacochea's showing that the corruption networks were designed to benefit litigants in local courts

and that benefits were exchanged in order to influence the outcome of judicial proceedings. Argument, Section II.B.3, *supra*.

Fifth, in concluding that future revelations "seemed unlikely" and that information on the crisis's effect on case outcomes and Cajamarca was unlikely to change, JA0020, the district court ignored evidence from Ms. Indacochea and Ms. Silva demonstrating that recent revelations are likely just the tip of the iceberg. Argument, Section II.B.3, *supra*.

Sixth, in finding Defendants' corruption unlikely to recur, JA0020-24, the district court ignored Plaintiffs' showing that Defendants continue to enlist questionable Peruvian counsel, SOF, Section F, *supra*. Lawyers frequently serve as corruption intermediaries in Peru. JA0277 ¶ 7; JA1255 ¶ 61.

This information was material to the adequacy of the Peruvian forum. The court's failure to consider it warrants reversal, independent of the fact that the record does not support a judgment that the forum is fair. *See* Argument, Section II, *supra*.

IV. This Court should reverse the district court's decision in light of recent findings by the Peruvian government documenting the ongoing judicial crisis, including in Cajamarca.

Even if the district court's conclusions would be upheld on the record below, subsequent findings by the Peruvian government on the ongoing institutional crisis and widespread judicial corruption make clear that Peru is not an adequate forum for Plaintiffs to litigate their claims. The Peruvian government has now drawn its own

conclusions about the adequacy of its judiciary; and it disagrees with the district court. *See* MJN, Ex. 1.

A trial court ruling, though correct when made, may be reversed due to later events that cast a different light on the decision. *United States v. Wilson*, 601 F.2d 95, 98-99 (3d Cir. 1979). The district court could not have considered these Peruvian government findings as the Anti-Corruption Prosecutor's Office report on the White Collars investigation only became public in early May 2020. MJN, Ex. 1. These recent findings corroborate Plaintiffs' evidence that widespread corruption has infected courts and prosecutors at all levels of the judiciary and across all regions of Peru, including Cajamarca, and has yet to be remedied. *Id.* Hundreds of judges and prosecutors continue to hold office despite having been sanctioned for misconduct. MJN, Ex. 8. And the current President of the Judicial Branch has come under scrutiny for his ties to members of the White Collars organization. MJN, Ex. 2-4. Four Cajamarca judges have already been convicted for their connection to the White Collars scandal – two receiving some of the longest sentences in the country – and four others are under investigation. MJN Ex 1 at 47, 71.

The Peruvian government recognizes the reforms have made limited progress and are far from having the transformative effect that the district court asserts. Leading prosecutors have acknowledged that the investigation and prosecution of key suspects faces significant challenges. MJN, Ex. 1 at 123, 136; Ex. 5-6. And there have

been serious irregularities in the formation of the NBJ tasked with reform. MJN, Ex 1 at 86.

The need for finality dictates that this Court should reverse rather than remand. The district court's last two decisions were quickly rendered obsolete by events, and there is no reason to think history will treat a third decision any better. The record shows that Peru is an inadequate forum that will, at best, take years to fix. This case has already been languishing for nearly three years on Defendants' initial, non-merits dismissal motion, and Plaintiffs are entitled to proceed on their claims.

V. The district court erred as a matter of law by failing to account for Plaintiffs' inability to access key witness testimony in Peru and to ensure statutes of limitations do not bar Plaintiffs' claims.

A. Standard of review.

Dismissal without ensuring that Plaintiffs have access to essential proof in the foreign forum is "fundamentally unfair," and warrants reversal "as a matter of law." *Lacey II*, 932 F.2d at 174, 186, 189. Likewise, failing to ensure that plaintiffs' claims will not be time-barred warrants reversal. *See BCCI*, 273 F.3d at 246.

B. The district court erred as a matter of law by failing to assure itself that Plaintiffs will be allowed to present critical evidence.

The Chaupes need eyewitness testimony to prove their claims that they have been abused and harassed at their isolated farm, and the primary eyewitnesses, other than the perpetrators, are the Chaupes and their family members. JA0284-0359 (Plaintiffs' Declarations). There is no dispute that their eyewitness testimony is critical

to their case. But, as the district court recognized, Peruvian law may bar Plaintiffs from presenting their own testimony or that of their relatives. JA0051. That would leave Plaintiffs without essential sources of proof, and thus without an adequate forum.

"Where a plaintiff cannot access evidence essential to prove a claim in an alternative forum, that forum is inadequate." *Eurofins Pharma US Holdings*, 623 F.3d at 161 n.14. A forum need not be perfect, and evidentiary rules need not be identical to ours. But it must allow plaintiffs to prove their case. A district court's failure to "require[e] an affirmative demonstration" that Plaintiff would be allowed to present key testimony "mistakenly relieve[s] the moving Defendant of its burden of assuring the district court that all conditions essential to establishing an adequate alternative forum exist." *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 426 (1st Cir. 1991).[3] In *Lacey II*, this Court reversed because the district court failed to ascertain whether the foreign forum afforded access to critical evidence. 932 F.2d at 184, 189. Here too, the district court's dismissal to a forum that may exclude the evidence

[3] Plaintiffs' access to key evidence is part of the adequate forum analysis. *Eurofins Pharma US Holdings*, 623 F.3d at 161 and n.14; *accord Lacey II*, 932 F.2d at 190-91 (Pollak, J., concurring). Prior to *Eurofins*, *Lacey II* analyzed the issue as a private interest factor, but noted it might be "more logical" to address as an adequate forum question, because it goes to adequacy, not convenience. 932 F.2d at 186 and n.13. The court below discussed key witness availability as a private interest factor, but noted that it goes to Peru's adequacy. JA0051-52. The rubric does not matter. *Lacey II* makes clear that even under the interest factor rubric, a failure to show access to key evidence alone forecloses dismissal. 932 F.2d at 184, 189.

Plaintiffs need to prosecute their claims was "fundamentally unfair" and warrants reversal "as a matter of law." *Id.* at 174, 186, 189.

Peruvian law strictly limits witness testimony in ways that will hamstring these Plaintiffs' ability to present their case. Specifically, Article 229 of the Peruvian Civil Procedure Code prohibits a party's spouse and relatives up to first cousins "from being called as a witness . . . unless the opposing party proposes it." JA0792 ¶¶ 42-44; D.I. 86 at 3-4. And under Article 221, *parties* cannot testify in person in their own cases, unless called by their opponent for cross-examination. Article 221, JA0793 ¶¶ 46-47; D.I. 86 at 3-4. Plaintiffs could thus only present their own or their family members' critical witnesses' testimony if Newmont chooses to call them. Plaintiffs' ability to present critical evidence cannot depend on Newmont's litigation strategy.

Defendants have argued that parties may offer testimony by written declaration, but that is wrong. The only "declarations" a party can submit are the complaint and answer—which are *not* evidence—*unless* the opposing party calls them to be cross examined. JA0793 ¶¶ 46-47(citing PCPC Article 221). The issue is thus not a question of written versus live testimony; it is whether the Chaupes can testify *at all*. JA0792-93 ¶¶ 42-46.

In its original opinion, the district court acknowledged that Peruvian law might preclude Plaintiffs' key witness testimony. It recognized that Plaintiffs identified "potential obstacles to proving their case, because the testimony of family members is

uniformly deemed unreliable under Peruvian law." JA0051-52. Yet it dismissed without "reasonably assur[ing] itself" that Plaintiffs would be able to present this essential evidence in Peru, as this Court requires. *Lacey II*, 932 F.2d at 189. That was error. *Id.*

Instead, the district court stated without analysis that it was "not prepared . . . to conclude that a single such rule renders an entire court system inadequate," JA0052, a holding that contains two errors of law. First, the question is not whether the "entire court system [is] inadequate"; it is whether *Defendants* have shown Peruvian courts would afford *these* Plaintiffs a fair opportunity to present *these* claims. Second, in cases like this one, a single rule *does* render a forum inadequate; this Court held in *Eurofins* and *Lacey II* that lack of access to critical evidence, *in and of itself*, disqualifies the forum.

On remand, Plaintiffs noted that the district court's original decision conflicted with *Eurofins* and *Lacey II*, *See* D.I. 99 at 14-15, but the court never assessed whether Newmont met its burden on this issue. Because there is no assurance Plaintiffs can submit key evidence, dismissal must be reversed.

C. The district court failed to assure that Peru would be an adequate forum because it did not require waiver of any statute of limitations defenses.

The district court also erred in holding Peru to be an adequate forum because it did not find Plaintiffs' claims are timely in Peru or require Defendants to waive any

statute of limitations defense that would not have been available had the court retained jurisdiction.

A forum is not adequate if a statute of limitations bars the case in that forum. *BCCI*, 273 F.3d at 246; *Yao-Wen Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 736 (7th Cir. 2010). Accordingly, this Court regularly requires a statute of limitations waiver. *See, e.g.*, *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 872 (3d Cir. 2013); *In re Chevron Corp.*, 633 F.3d 153, 157 (3d Cir. 2011); *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 712 F. App'x 200, 204-05 (3d Cir. 2017).

Here, although the district court held that the Peruvian court must accept jurisdiction, JA0026, it did not require a limitations waiver. But statutes of limitations are not necessarily jurisdictional, so that condition does not obviate Defendants' burden to show Plaintiffs' claims will be heard, or meet the court's obligation to assure itself of the existence of an adequate alternative forum.

CONCLUSION

Because the district court erred by not holding Defendants to the correct burden to prove Peru is a fair and adequate forum for these Plaintiffs' claims, and abused its discretion in assessing the record evidence, the decision dismissing Plaintiffs' claims should be reversed.

Dated: June 15, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because this brief contains 12,938 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word (2013) in 14-point Garamond font.

3. This brief complies with Local Appellate Rule 31.1(c) because the text of this electronic brief is identical to the paper copies, and a virus check was performed on the file of this electronic brief using Webroot SecureAnywhere Endpoint Protection v.90.28.48™ and no virus was detected.

Date: June 15, 2020

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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 June 15, 2020, I caused the foregoing Opening Brief for Plaintiffs-Appellants and the Joint Appendix 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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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 20-01765

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)

JOINT APPENDIX VOLUME I (JA0001-JA0061)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA; DANIEL CHAUPE-ACUÑA; JILDA CHAUPE-ACUÑA; CARLOS CHAUPE-ACUÑA; YSIDORA CHAUPE-ACUÑA, personally and on behalf of her minor child; ELIAS CHAVEZ-RODRIGUEZ, personally and on behalf of her minor child; and MARIBEL HIL-BRIONES,	:	**CIVIL ACTION**
Plaintiffs,	:	**No. 17-1315**
v.	:	
NEWMONT MINING CORPORATION, NEWMONT SECOND CAPITAL CORPORATION; NEWMONT USA LIMITED; and NEWMONT PERU LIMITED,	:	
Defendants.	:	

McHUGH, J. **MARCH 10, 2020**

MEMORANDUM OPINION

This case concerns a conflict over a tract of land in northern Peru between a family of indigenous *campesinos* residing on the land (Plaintiffs) and several Delaware-incorporated mining entities, collectively referred to as Newmont. Newmont owns a gold mining company operating in the region, and land on which Plaintiffs live and farm sits atop a gold deposit.

In 2017, Plaintiffs brought suit in the District of Delaware. In their Complaint, they contended that Newmont's agents had used violence and other illegal tactics to evict them from their land. Plaintiffs opted to proceed in these federal courts and not the courts of Peru because they believed the Peruvian courts were corrupt and would not fairly adjudicate their claims. After Plaintiffs filed suit, Newmont moved to dismiss on *forum non conveniens* grounds, arguing, among other things, that the sources of proof and the key witnesses were in Peru. I

granted Newmont's motion, with conditions, and Plaintiffs appealed. While the appeal was pending, a further political crisis arose in Peru, leading both its judiciary and Congress to declare states of emergency. As a result, the Court of Appeals vacated my Order dismissing Plaintiffs' Complaint and remanded for me to reevaluate whether Peru remained an adequate alternative forum in light of the instances of corruption identified following my dismissal.

The parties have submitted supplementary materials concerning those scandals for my consideration. Though the events described are again concerning, they do not suffice to supplant my previous conclusion that Peru is an adequate alternative forum under the appropriate *forum non conveniens* legal framework. Newmont's motion to dismiss therefore will be granted. However, because I remain concerned that Plaintiffs' ability to be fairly heard in Peru is compromised, I grant Newmont's motion subject to various conditions attached to the accompanying Order.

I. Nature and stage of the proceedings

A. The District of Delaware lawsuit

The facts relevant to Plaintiffs' decision to bring suit were detailed in my previous opinion. *See* ECF 92, at 2-5. I will restate them here, but only briefly. This case arises from a conflict over a tract of land in Cajamarca, Peru, a rural region in the northern Andes. Plaintiffs are *campesinos*—indigenous subsistence farmers residing on that land, which they refer to as "Tragadero Grande." Plaintiffs claim they purchased possessory rights to Tragadero Grande in 1994. ECF 1, ¶ 65. In the years following Plaintiffs' alleged purchase, Minas Conga, a Peruvian mining company, began negotiating with members of the community to acquire the land for a mining project. Minas Conga achieved some success in its negotiations with members of the community. But Plaintiffs insist they never sold or transferred the possessory rights they had in Tragadero Grande to Minas Conga or any other entity. Newmont, for its part, claims that Minas

Conga entered legitimate land-sale contracts for hundreds of acres in the region, including Tragadero Grande. Reconciling the parties' positions seems to turn on decades-old Spanish language real estate documents, the oral histories of the parties to the negotiations, and complex property law governing land held by *campesinos*. In any case, in 2001, Minas Conga transferred the property rights it alleges it acquired to Minera Yanacocha, a subsidiary of Newmont.

Conflict between the parties began in earnest in 2010. According to Plaintiffs, in late 2010, Newmont or its agents entered Tragadero Grande and destroyed Plaintiffs' property and crops. Then, the next year, Yanacocha staff, accompanied by members of the Peruvian National Police and a private security firm, sought to evict Plaintiffs from the land. In doing so, Plaintiffs allege that the entities attacked them and again destroyed their property. Plaintiffs further allege that the purpose of these attacks was to dispossess them of their portion of the land to facilitate the development of a gold mine operated by Newmont and its Peruvian subsidiary. Newmont concedes that it or its agents worked with the Peruvian National Police and other security officials to evict Plaintiffs from the land. But, according to Newmont, such measures were necessary "to protect [their] possessory interests under Peruvian law." ECF 15, at 3.

B. The District Court opinion

Plaintiffs brought suit against Newmont in the federal district court in Delaware. Plaintiffs filed in Delaware and not Peru because they were convinced that the Peruvian courts, including the trial courts in Cajamarca, were corrupt and would not fairly adjudicate their case. After suit was filed, Newmont moved to dismiss the Complaint on *forum non conveniens* grounds. I granted Newmont's motion on April 11, 2018, concluding that Peru was an adequate alternative forum and that the relevant *forum non conveniens* criteria otherwise favored dismissal. *See Acuña-Atalaya v Newmont Mining Corp.*, 308 F. Supp. 3d 812, 819-20 (E.D. Pa. 2018) (all citations will be to the slip opinion, available at ECF 92).

In deciding whether *forum non conveniens* dismissal was appropriate, I employed the standard three-step analytical framework that the Court of Appeals prescribed in *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147 (3d Cir. 2010):

- "First, the court must determine 'whether an adequate alternate forum' exists to entertain the case." ECF 92, at 9 (quoting *Eurofins Pharma*, 623 F.3d at 160).
- "If so, the court must next determine 'the appropriate amount of deference to be given the plaintiff's choice of forum.'" *Id.* (quoting *Eurofins Pharma*, 623 F.3d at 160).
- "Finally, the court must weigh 'the relevant public and private interest factors' . . . to determine whether, on balance, 'trial in the chosen forum would result in oppression or vexation to the defendant out of all proportion to the plaintiff's convenience.'" *Id.* (quoting *Eurofins Pharma*, 623 F.3d at 160).

In applying the *Eurofins* factors, I noted that defendants seeking dismissal on the basis of *forum non conveniens* bear the burden of persuasion at every stage of the analysis. *Id.* (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981), and *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43-44 (3d Cir. 1988)).

As to the first *Eurofins* factor, I concluded that Peru was an adequate alternative forum because Newmont stipulated to service of process, consented to the jurisdiction of the Peruvian courts, and agreed to have that stipulation and consent be conditions of dismissal. *Id.* at 11. In addition, Plaintiffs conceded that Peruvian law recognized a cause of action for their claims and offered a remedy for the property damage and personal injuries alleged. *Id.*

In arguing that Peru was not an adequate forum, Plaintiffs alleged that corruption pervaded the Peruvian judiciary, compromising their ability to be fairly heard. I assessed the allegations of corruption offered by Plaintiffs, and concluded that "as to the first element of the [*Eurofins*] test, although Plaintiffs have shown cause for concern over Peruvian courts, I cannot say that they are 'clearly unsatisfactory' under *Piper*." *Id.* at 20. In particular, I assessed three

main arguments advanced by Plaintiffs, and found none sufficiently persuasive to conclude that Peru was an inadequate forum.

As to Plaintiffs' first argument, I discounted an older well-publicized story about a Newmont executive successfully pressuring a Peruvian Supreme Court judge to rule favorably in a case involving Newmont. *See id.* at 15-16. My conclusion was based on the fact that the event "occurred some 18 years ago, around the time when the regime of an infamously corrupt president . . . imploded," but that "the interim regime change and noted improvements since," both in the Peruvian judiciary and at Newmont, mitigated concerns about similar events recurring. *Id.*

Second, I analyzed evidence offered by Plaintiffs regarding Newmont's influence in the Peruvian lower courts. Plaintiffs' attorney in Peru testified to multiple examples of suspicious behavior in criminal proceedings involving Plaintiffs, including a trial court's refusal to accept some of Plaintiffs' evidence and the prosecutors receiving a copy of a judgment before the attorney did. *Id.* at 16-17. While I found the account "concerning," I noted that "such concern is mitigated by the fact that the judgment was overturned by the court of appeals on two occasions, and the Peruvian Supreme Court subsequently upheld that ruling." *Id.* at 17. Ultimately, I concluded that "Plaintiffs were ultimately protected by the very judicial system they ask me to deem inadequate." *Id.*

Finally, I investigated a particular episode evidencing Newmont's capture of the Peruvian lower courts. Plaintiffs asserted that, in criminal proceedings against them in Peru, Newmont's 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. *Id.* at 17-18. Though I found this account "troubling," my concerns were

mitigated in part by the fact that Plaintiffs had achieved "success . . . in the appellate courts [of Peru]" in those same criminal proceedings. *Id.*

As to the second and third *Eurofins* factors, I concluded that, on balance, Newmont had met its burden of showing that the private and public interest factors weighed heavily in favor of the case being tried in Peru, and outweighed the reduced deference owed to Plaintiffs' choice of forum. ECF 92, at 22-28 (relying on the factors established in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)). I acknowledged that the federal courts often defer to a plaintiff's choice of forum, but noted that these Plaintiffs' choice of forum was not due significant deference because the federal courts generally do not entitle foreign plaintiffs the same deference as to choice of forum as domestic citizens. And because the sources of proof and the key witnesses were largely located in and around Cajamarca, and Delaware had no particular stake in the litigation, the public and private factors favored dismissal.

I therefore granted Newmont's *forum non conveniens* motion and dismissed Plaintiffs' Complaint, allowing Plaintiffs to reinvoke the jurisdiction of this Court if the conditions of dismissal were not met.

C. The Court of Appeals opinion

The Court of Appeals has issued a limited remand for this Court "to reconsider its prior determination that Peru is an adequate forum." *Acuña-Atalaya v Newmont Mining Corp.*, 765 Fed. App'x 811, 812 (3d Cir. 2019) (all citations will be to the slip opinion, available at ECF 96).[1] The remand is based upon events affecting the judiciary in Peru that occurred after I first ruled in April 2018. The Court of Appeals has requested that I evaluate whether these new

[1] I do not read the Court of Appeals' opinion to question my conclusions that, on balance, Newmont has met its burden of showing that the private and public interest factors outweigh any deference owed to Plaintiffs' choice of forum. *See* ECF 92, at 21-28.

developments change my conclusion that Peru is an adequate alternative forum. In doing so, the Court of Appeals has further specified that I reassess adequacy (the first *Eurofins* factor) by applying the following standard established by the Eleventh Circuit in *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001):

> While the Supreme Court has not yet spoken to particular burdens or standards associated with a plaintiff's assertion of unfair treatment in [the proposed alternative forum], the Eleventh Circuit has done so, offering a logical and persuasive approach: "defendants have the ultimate burden of persuasion, but only where the plaintiff has substantiated his allegations of serious corruption or delay. . . . [W]here the allegations are insubstantially supported, . . . a District Court may reject them without considering any evidence from the defendant. But where the plaintiff produces significant evidence documenting the partiality or delay (in years) typically associated with the adjudication of similar claims and these conditions are so severe as to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the District Court that the facts are otherwise."

ECF 96, at 7-8 (first bracketed text added).[2]

In practical terms, *Leon* endorses a three-step analysis when a district court is evaluating whether a proposed alternative forum is adequate under the first *Eurofins* factor:

1. Defendant's Initial Burden. At the outset, the defendant must show that "there exists an alternative forum," a requirement "[o]rdinarily . . . satisfied when the defendant is 'amenable to process' in the other jurisdiction." *Id.* at 7 (citing *Piper Aircraft*, 454 U.S. at 254 n.22). To satisfy this step, a court can require a defendant to stipulate to service of process and consent to jurisdiction in the alternative forum, as I did in my initial dismissal. ECF 92, at 22.

2. Plaintiff's Burden of Production. If there exists an "alternative forum," then the burden shifts to the plaintiff to produce "significant evidence" demonstrating that "the remedy

[2] *Leon* offers a workable template for addressing the adequacy of the alternative forum. As such, it can be understood as a refinement of the step-one analysis articulated in *Eurofins*. In any event, because the Court of Appeals has requested that I employ *Leon*'s methodology on remand, it represents the law of the case. *See Christianson v. Cold Indus. Operating Corp.*, 486 U.S. 800, 816 (1988); *Minard Run Oil Co. v. U.S. Forest Service*, 549 Fed. App'x 93, 98 (3d Cir. 2013).

offered by the other forum is clearly unsatisfactory." ECF 96, at 7 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)). To demonstrate a clearly unsatisfactory forum, the plaintiff must do more than simply show that "the law applicable in the alternative forum is less favorable to the plaintiff's chance of recovery." *Id.* (citing *Piper Aircraft*, 454 U.S. at 250). Indeed, "an adequate forum need not be a perfect forum," and "some inconvenience to litigants does not indicate that a forum is inadequate." *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311-12 (11th Cir. 2001) (internal quotations omitted). Instead, the plaintiff must produce "significant evidence" that one or more of the following factors (or related factors) is the case:

- **The alternative forum is incapable in fact or in law of producing a remedy**. ECF 96, at 7 (noting that "the other forum may not be an adequate alternative . . . where the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all" (citing *Piper Aircraft*, 454 U.S. at 254)).

- **The alternative forum is partial to defendants or will treat the plaintiff unfairly**. *Id.* (noting that "the other forum may not be an adequate alternative . . . where the plaintiff 'will be . . . treated unfairly'" (citing *Piper Aircraft*, 454 U.S. at 254-55)).

- **The alternative forum is slow or inefficient in adjudicating similar claims**. *Id.* (noting that the alternative forum may be inadequate when "delay (in years) typically associated with the adjudication of similar claims" (citing *Leon*, 251 F.3d at 1312)).

3. Defendant's Burden of Persuasion. If the plaintiff produces significant evidence that the alternative forum is "clearly unsatisfactory," then "the defendant has the burden to persuade the District Court that the facts are otherwise." *Id.* at 7-8; ECF 92, at 9 ("Defendants seeking dismissal on the basis of [*forum non conveniens*] bear the burden of persuasion at every stage of this analysis."). But "where [plaintiffs'] allegations are insubstantially supported, . . . a District Court may reject them without considering any evidence from the defendant." *Id.*

As to the changed situation in Peru, the Court of Appeals observed that "there have been significant factual developments post-dating [the District Court's] dismissal that cast its ruling in a different light." ECF 96, at 4. The panel aptly observed that those later scandals, discussed in

detail below, could call into question various judicial reforms I relied upon in my initial opinion.[3] It is thus necessary to reopen the inquiry into the adequacy of the Peruvian courts.

D. The significant factual developments post-dating this Court's dismissal

The significant factual developments post-dating my dismissal collect in two categories: first, the discovery, through wiretapped recordings of phone conversations, of significant corruption among senior members of the Peruvian judiciary; and, second, the political clash between Peru's legislative and executive branches, followed by subsequent legislative elections. I discuss each in turn.

1. The White Collars of the Port case and the resulting states of emergency. In December 2017, local authorities were investigating drug trafficking and organized crime in the Port of Callao, Peru's main commercial seaport, located just outside Lima. ECF 101, ¶ 4. As part of the investigation, the authorities wiretapped and recorded conversations among various suspects. ECF 101, ¶ 4. Among other things, the recorded phone conversations revealed an expansive network of corruption involving high-level Peruvian judges and judicial officials, including the President of the Superior Court of Justice of Callao, the President of the Second Transitory Criminal Chamber of the Supreme Court, and three members of the National Magistrates Council, the body responsible for selecting and appointing judges and prosecutors at all levels of the judiciary. ECF 101, ¶ 4; ECF 108, ¶ III.8.[4]

[3] The Court of Appeals noted that the recent disclosures of corruption could "undermine confidence that [the appellate courts of Peru] can serve as a protection against Newmont's alleged capture of the lower courts." ECF 96, at 6. The panel also suggested that "while the publicity around the recent scandal has not centered on Cajamarca trial courts," historic allegations of corruption perpetuated by Newmont may be more likely to recur "in the context of a judicial system permeated by corruption problems than it would in the absence of such problems." *Id.*

[4] *See* Rebecca Tan, *Leaked calls reveal systemic corruption in Peru's judiciary, sparking flurry of resignations*, Washington Post (July 20, 2018), https://www.washingtonpost.com/news/worldviews/wp/2018/07/20/leaked-calls-revealsystemic-corruption-in-perus-judiciary-sparking-flurry-of-resignations.

The audio files were released to the public on July 7, 2018, and the fallout was dramatic. The Executive Judicial Council—the governing body of the judicial branch—declared the Court of Appeals of Callao to be in a state of emergency, which by the terms of the decree lasted for sixty days. ECF 101, ¶ 8. The judiciary's internal disciplinary body, known as OCMA, suspended the President of the Callao appeals court, together with four other judges linked to the scandal, and deactivated the Second Provisional Criminal Chamber of the Supreme Court, the arm of the Supreme Court whose president was implicated in the audio files. ECF 101, ¶ 8. The following week, the Executive Judicial Council declared a "state of emergency" for the entire judicial branch, which lasted for 90 days. The National Council of the Judiciary suspended its selection processes for judges and prosecutors and, on July 16, 2018, provisionally suspended César Hinostroza from his position as a Supreme Court judge while investigations against him continued. ECF 101, ¶ 10. A fortnight after the audio records were released, the head of Peru's Supreme Court stepped down, even though he was not personally accused of any wrongdoing. ECF 101, ¶ 9.

The reactions from the executive and legislative branches were likewise swift. Martín Vizcarra, the President of Peru, convened a special session of Congress where he presented a slate of proposed reforms. ECF 101, ¶ 14-15. Congress investigated possible offenses committed by the members of the National Magistrates Council, and recommended that all members be impeached for having committed major offenses to the Constitution, which the Congress unanimously approved. Peru's Congress declared a nine-month state of emergency for the Council and, thereafter, replaced it with a new entity called the National Board of Justice. ECF 101, ¶ 14-17. The Congress then impeached Hinostroza (the Supreme Court judge) and banned him from holding public office for ten years. Soon after he was impeached, Hinostroza

fled to Spain to avoid prosecution. Finally, Congress approved the proposal presented by the President to create a Council on Reforming the Justice System, which aimed to "promote and follow up on the reform of the justice system." ECF 101, ¶ 19-20.

The scandal and its aftermath did not stop there. The Executive Judicial Council, the judiciary's governing body, which had declared the judicial emergency, was itself declared in emergency after some of its members were implicated by the scandal. ECF 101, ¶¶ 21-23. Two more sitting Supreme Court judges were found to be involved, leading to ethics investigations that remain open. ECF 101, ¶ 13. The acting Attorney General, upon replacing her corrupted predecessor, declared the Prosecutor's Office to be in a state of emergency. ECF 101, ¶ 23; ECF 100, Ex. 17.

In all, as a direct result of the publications of the wiretapped phone conversations, various Peruvian governmental entities declared five times that various other Peruvian governmental entities were in states of emergency.

2. The political clash between Peru's legislative and executive branches, and the subsequent legislative elections. In addition to White Collars of the Port case and its aftermath, Plaintiffs filed three supplemental exhibits that "provide an update about events unfolding in Peru in response to attempted judicial corruption reforms," which, they argue, "confirm that Defendants cannot meet their burden to prove Peru is an adequate alternative forum for this case." Plaintiffs' Notice of Supplemental Evidence, ECF 124. Those exhibits include:

- October 2, 2019 (Washington Post)—**"Peru Shuts Congress, Triggers a Constitutional Crisis."**
- October 1, 2019 (Washington Post)—**"Peru's president dissolved Congress. Then Congress suspended the president."**
- October 1, 2019 (New York Times)—**"Who Leads Peru? Power Struggle Creates Worst Political Crisis in Decades."**

Broadly, each supplemental exhibit discusses events that occurred in Peru in late September involving a clash between Peru's executive and legislative branches. At bottom, the President of Peru (Martín Vizcarra) ordered the dissolution of Congress and, in response, Congress suspended Vizcarra and nominated his vice president, Mercedes Aráoz, as the new acting head of state. Those events have been reported widely in the American press. In addition to the articles offered by Plaintiffs, I have taken notice of various other articles describing the events:

- October 3, 2019 (New York Times)—**How a Political Crisis Seized Peru: Boom Times, Corruption and Chaos at the Top**—noting that the "turmoil that has roiled Peru for more than a year reached a turning point this week, when the president dissolved Congress and a rival briefly claimed to lead the nation. One Peruvian ex-president shot himself dead as the police arrived at his door. . . . The head of the opposition sits in jail, under investigation herself. And for about a day this week, the president and vice president both claimed to rightfully lead Peru."

- October 9, 2019 (Wall Street Journal)—**'God and Money': Graft in Peru Sparks Political Reckoning—**noting that President Vizcarra's dissolution of the opposition-controlled Congress was viewed by many "angry lawmakers" as a coup, but "many Peruvians saw it as a righteous act, like closing a rowdy red-light district."

- October 10, 2019 (New York Times)—**Peru Opposition Leader Keiko Fujimori Is Arrested in Corruption Inquiry**—noting that "Fujimori, a powerful Peruvian politician whose father ruled the country in the 1990s, was arrested in a money laundering investigation on Wednesday, calling into question the future of the political family and their right-wing populist movement" and that the "arrest came just days after the country's Supreme Court ordered her father, former President Alberto Fujimori, back to prison on a human rights abuse conviction, overruling the presidential pardon that had freed him in December."

- October 14, 2019 (Reuters)—**Peru Lawmaker Files Last-Ditch Legal Appeal Over Congress Closure**—noting that the "head of Peru's dissolved Congress presented a legal appeal to the country's top court . . . to suspend the closure of parliament on the grounds that President Martín Vizcarra had exceeded his constitutional powers."

Like the evidence submitted by Plaintiffs, the representative articles listed above describe years of corruption that have dogged all branches of the Peruvian government, culminating in the confrontation between Peru's executive and legislative branches.

I also have taken notice of two developments out of Peru that could pertain to the indices of corruption identified by Plaintiffs. Late January, Peru held legislative elections after its Constitutional Court ruled that the President's dissolution of the Congress in September 2019 was legal. The *New York Times*, for example, covered the election as follows:

- January 25, 2020—**Peruvians to Vote for New Congress as Country Seeks to Turn Page on Crisis**—"Peruvians will head to the polls on Sunday to choose a new Congress that will be in place for just over a year."

- January 26, 2020—**Peru Elects Deeply Split Congress With Right-Of-Center Tilt**—"Peruvians elected a fractured Congress with no clear leadership on Sunday, split among 10 parties with a center-right party grabbing the most seats."

- January 27, 2020—**'Stunning Defeat': Fujimori's Ghost Fades in Peru After Legislative Gamble**—"Peruvian President Martin Vizcarra took a gamble last year when he shuttered Congress after a bruising battle over a corruption crackdown."

I consider all these events in reevaluating the adequacy of Peru as an alternative judicial forum.[5]

[5] As I noted in my previous opinion, the Federal Rules of Civil Procedure provide that in assessing the adequacy of a foreign forum, "the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1; *see also* ECF 92, at 10 n.6. My consideration of the reporting published in various newspapers but not exhibited by either party falls within that general allowance and, as before, I have availed myself of the full scope of the parties' submissions and material publicly available. Further, the general allowance detailed in Rule 44.1 accords with my ability to "take judicial notice at any stage of the proceeding of a fact not subject to reasonable dispute that is capable of accurate and ready determination by resort to a source whose accuracy cannot be reasonably questioned." *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 600 n.3 (3d Cir. 2000). To those ends, I have identified articles from major United States newspapers reporting the events in Peru and attempted to distill from them a common nucleus of facts. I should note, though, that at least in the case of one newspaper, the difference in content between the newsroom and the editorial page is stark. The editorial board at the *Wall Street Journal* published a piece last October in which the author opined that "Hugo Chávez['s] [coming] to power in 1999 on a pledge to root out corruption" and "Fidel Castro's Cuban revolution [that] derived much of its popular support from widespread disgust with the corruption of the Batista regime . . . . help[] [to] explain why the unconstitutional dissolution of the Peruvian Congress by President Martín Vizcarra last week has the region's democrats on edge." Mary Anastasia O'Grady, Opinion, *The President of Peru Stages a Coup*, Wall Street Journal, Oct. 6, 2019 (accessed online). The Journal's newsroom, for its part, took a different perspective. It acknowledged that President Vizcarra's dissolution of the opposition-controlled Congress was viewed by many "angry lawmakers" as a coup, but further observed that "many Peruvians saw it as a righteous act, like closing a rowdy red-light district." John Otis & Juan Montes, *'God and Money': Graft in Peru Sparks Political Reckoning*, Wall Street Journal, Oct. 9, 2019 (accessed online). Newsrooms and editorial pages are, of course, held to different standards, and I have given the news reports greater weight. Further, the *New York Times*, *Washington Post*, and *Wall Street Journal* are not the only news outlets covering the scandals in Peru and their aftermath. *See, e.g.*, *Peru in turmoil after President Vizcarra dissolves Congress*, BBC News, Oct. 1, 2019 (accessed online); Mariana Sanchez, *Peru voters demand corruption-free gov't*, Al-Jazeera, Oct. 16, 2019 (accessed online). Finally, various Peruvian newspapers, including *El Comercio*, *El Peruano*, and *La República*, along with myriad other Latin American publications, have covered the scandals and their aftermath relentlessly.

II. Discussion

Taking the record as a whole, for the reasons that follow, I conclude that Newmont has satisfied its ultimate burden to show that Peru is an adequate alternative forum.

A. Newmont has shown that Peru is an alternative forum

Newmont has shown that Peru "exists [as] an alternative forum." ECF 96, at 7 (quoting *Piper Aircraft*, 454 U.S. at 254 n.22). In my previous order, I imposed on Newmont various conditions of dismissal. ECF 93. I required that Newmont submit to the jurisdiction of the appropriate court in Peru and for that court to accept jurisdiction; to stipulate that any judgment entered in Peru qualifies as legally adequate under Delaware law; and to agree not to directly or indirectly raise objections to any of its agents testifying or providing evidence relevant to the claims asserted by Plaintiffs, whether such evidence is sought here or in Peru. Newmont did not lodge objections to any of those conditions before, nor did it seek to litigate the imposition of those conditions on appeal. ECF 126, at 3:1-14. I will reimpose those conditions on Newmont now. Because the existence of an alternative forum ordinarily is satisfied by defendant's agreement to submit to the jurisdiction of the foreign forum, *see Trotter v. 7R Holdings*, 873 F.3d 435, 442-43 (3d Cir. 2017), Newmont has demonstrated that Peru exists as an alternative forum.

B. Plaintiffs have produced enough evidence to credibly question whether Peru is a satisfactory forum

Because Newmont has demonstrated that Peru exists as an alternative forum, Plaintiffs must now produce "significant evidence" to demonstrate that "the remedy offered by the other forum is clearly unsatisfactory." ECF 96, at 7 (citing *Piper*, 454 U.S. at 254 n.22). To do so, Plaintiffs must demonstrate that Newmont's proposed alternative forum either cannot provide a remedy, is biased against them or for Newmont, or would be severely slow or inefficient in adjudicating their claims. Given the posture of the case, it cannot be questioned that Plaintiffs

have satisfied their burden of production here. The Court of Appeals described the White Collars of the Port scandal and how evidence related to that scandal could "cast a different light" on my initial determination that Peru was an adequate forum. The Court of Appeals then supplemented the record with that evidence, ECF 96, at 8, and Plaintiffs have submitted detailed materials concerning those scandals. ECFs 100, 101. Further, evidence related to that scandal and related scandals has been made widely available in the public domain.

Plaintiffs highlight the White Collars of the Port case and its aftermath to question the *general* adequacy of the Peruvian courts. In their supplemental filing opposing Newmont's motion to dismiss, Plaintiffs contend that "[t]he rot infecting the Peruvian judiciary, which prompted Peru's President to lament the 'collapse' of the country's justice system, and Peruvian officials to declare states of emergency in four separate judicial bodies, precludes a finding that Peru's courts are *generally* adequate." ECF 99, at 10. Even Newmont, "for the most part, do[es] not take issue with [Plaintiffs'] general descriptions" of corruption. *See* Defs. Supp. Reply, at 6, ECF 107.

Plaintiffs also reassert the *specific* evidence of corruption perpetrated by Newmont that was before me in advance of my initial opinion. ECF 92, at 11-20 (detailing the alleged corruption in the Peruvian judiciary). Plaintiffs argue that even if this Court found the Peruvian courts to be generally adequate, "the crisis and the 'troubling' evidence of Newmont's own corruption preclude a finding that the local courts will fairly hear *these* Plaintiffs' claims against *these* Defendants." *Id.*

In total, Plaintiffs' submission of evidence of general and specific corruption, plus the supervening instances of significant corruption, is enough to satisfy Plaintiffs' burden to produce "significant evidence" that the alternative forum is "clearly unsatisfactory." *See* ECF 96, at 7.

Newmont no doubt disagrees with the conclusions Plaintiffs draw from these facts, but that disagreement goes to Newmont's burden of persuasion, not Plaintiffs' burden of production, which I discuss next.

C. Defendants have satisfied their burden of persuasion to show that Peru can fairly adjudicate Plaintiffs' legal claims

Having carefully considered these revelations, and, more importantly, Peru's response to them, I conclude that Newmont has carried its ultimate burden to establish Peru as an adequate alternative forum. In concluding that it has, my analysis proceeds in four parts. First, deeming an alternative forum inadequate remains the "rare circumstance," *see* ECF 96, at 7, and even with these recent developments, the Department of State has not declared Peru's legal system dysfunctional. Second, the Peruvian government swiftly prosecuted the main actors of the White Collars of the Port case and instigated further reforms in the wake of the scandal, demonstrating commitment to ensuring that such corruption does not repeat. Third, the White Collars of the Port case did not involve Cajamarca or the types of claims raised by Plaintiffs, and is geographically distant, thus discounting the probability that the scandals would cause Plaintiffs to receive an impartial hearing. Fourth, the specific instances of historic corruption perpetrated by Newmont are unlikely to recur.

1. Deeming an alternative forum inadequate is an exceptional conclusion. In ordering remand, the Court of Appeals has asked me to review newly available evidence only as it might affect my analysis at *Eurofins* step one, that is, whether Newmont has shown Peru to be an adequate alternative forum in light of supervening instances of corruption that came after my dismissal, none of which involved Newmont. ECF 96, at 8. The parties agree that my analysis on remand is so limited. ECF 99, at 8; ECF 107, at 3-4.

While the burden of satisfying that factor remains with Newmont, the Supreme Court has long held that it is the "rare circumstance[]" in which the alternative forum is deemed inadequate. *See Piper Aircraft*, 454 U.S. at 254 n.22; *see also* ECF 96, at 7 (noting that "in the rare circumstance . . . the other forum may not be an adequate alternative" (cleaned up)[6]). Moreover, as I observed in my initial opinion, theories of "generalized corruption" have "not enjoyed a particularly impressive track record," and Newmont had previously shown that Plaintiffs' allegations of specific corruption did not render the Peruvian forum unsatisfactory. ECF 92, at 13. The 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. *See* ECF 126, at 41:11-42:9 (discussing 2016 and 2019 State Department Human Rights Reports).

2. Newmont has shown the Peruvian forum to be generally adequate notwithstanding the serious scandals that have plagued the judiciary for the past two years. Newmont has shown that Peru remains generally an adequate forum for several reasons. First, the Peruvian government aggressively pursued administrative, civil, and criminal sanctions for the principal actors involved in the White Collars of the Port case. The Callao appeals court judge was suspended, *see* ECF 101, ¶ 8, then arrested, *see* ECF 108, ¶ IV.8. All members of the National Magistrates Council were impeached and dismissed, ECF 101, ¶ 18, the Council was disbanded and replaced, *id.*, and at least one of the three members implicated in the phone recordings has been prohibited from leaving the country. ECF 108, ¶ IV.8. César Hinostroza, the Supreme Court judge caught on the recordings, was suspended from his post and ordered to remain in

[6] This opinion uses (cleaned up) to indicate that extraneous, nonsubstantive information—like brackets, internal quotation marks, alterations, and citations—has been omitted from quotations. *See, e.g.*, *United States v. Steward*, 880 F.3d 983, 986 n.3 (8th Cir. 2018); *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017).

Peru. He thereafter left Peru but was captured in Spain, and awaits extradition. ECF 101, ¶ 12; ECF 108, ¶ IV.8.

Second, the Peruvian government has instituted a series of reforms to ensure similar instances of corruption do not recur. The National Magistrates Council was abolished and replaced with a new organization, the National Board of Justice. ECF 101, ¶ 14-17. Peru's Congress constituted the Board last year after President Vizcarra proposed it in his package of judicial reforms. Like the Council it replaced, the Board will appoint judges and prosecutors, among other positions. As of January 2020, the Board is fully staffed and has begun work.[7] According to its new president, the justice board will spend most of the next few months reviewing thousands of cases ruled on by the Magistrates Council concerning appointments, ratifications and disciplinary processes of judges and prosecutors. Plaintiffs argue that the "reform efforts implemented by the Peruvian government" to address the "structural problems" that made the corruption possible "are insufficient." ECF 99, at 6. But much of Plaintiffs' evidence centers on the corruption infecting the National Magistrates Council and the difficulty the National Board of Justice had in becoming fully staffed. *See, e.g.*, ECF 126, at 10:7-13:16. Both problems have since been rectified.

Third, the political instability resulting from the scandals seems to have calmed. Peru held legislative elections in late January and the political party targeted by the government for its ongoing role in corruption lost badly.[8] In *Leon*, the Eleventh Circuit case on which the Court of Appeals relied in ordering remand, the court declined to find Ecuador inadequate despite a

[7] *See National Board of Justice begins its task, reviewing court appointments*, Peruvian Times (Jan. 22, 2020) (accessed online).

[8] Marcelo Rochabrum, *'Stunning Defeat': Fujimori's Ghost Fades in Peru After Legislative Gamble*, Reuters (Jan. 27, 2020) (accessed online).

"military coup" that had occurred just months before the district court's opinion and that had "overthrown the democratically elected president." 251 F.3d at 1313 n.3. The *Leon* Court reasoned that the coup was of little relevance to the forum-adequacy analysis because the litigants "were private parties only" and the case "implicate[d] no sovereign interests." *Id.* The court further noted that there was "some reason to believe that the Ecuadorian government has stabilized in the past year," and cited to a news report that "describe[ed] peaceful protests on [the] anniversary of [the] coup, without backing from the armed forces." *Id.* The circumstances in Peru seem more placid than the circumstances at play in *Leon*.

In all, the Peruvian government appears to have taken appropriate steps to address the scandals that have plagued the judiciary, and those steps suggest that corruption is not a feature of the judiciary or the current political regime. None of the declared states of emergency halted the normal adjudication of cases. All states of emergencies have since expired by their own terms, and the most relevant one (the judicial state of emergency) expired last year. As in *Leon*, the parties to this case and the subject matter involved "implicate no sovereign interests." Peru held legislative elections, and no major entity is challenging the results. As it stands, the Peruvian government appears imperfect, but functional.

3. The White Collars of the Port case did not involve Cajamarca or the types of claims raised by Plaintiffs. In *Leon*, the Court focused its forum-adequacy analysis on whether the defendants had persuaded the Court that the alleged corruption was the type "typically associated with the adjudication of similar claims [to plaintiffs' claims]" and "so severe as to call the adequacy of the forum into doubt." *Id.* at 1312. Here, most corruption constituting the White Collars of the Port case had nothing to do with the adjudication of cases. As Newmont demonstrates, the corruption mostly involved efforts by officials to trade their powers for certain

personal benefits. ECF 108, ¶¶ II.3.b, III.11. Newmont points out that the investigations resulting from the scandals have "uncovered only a few instances of corrupt actors who have manipulated or otherwise influenced the outcome of pending cases." ECF 107, at 8. Any such instance of case manipulation is no doubt serious, as Newmont concedes. *Id.* But such limited instances of corruption do not speak directly to whether these Plaintiffs can obtain a fair hearing in Peruvian courts, or suggest that the entire Peruvian judiciary is compromised. Plaintiffs argue that "[t]he scandal implicated the whole of Peru's judiciary, and there are surely more revelations to come." ECF 113, at 3. That may have been true when the scandal was fresh, but given the reforms instigated by the government that eventuality seems unlikely now.

4. Newmont also has shown that the specific instances of corruption highlighted by Plaintiffs are unlikely to recur. Finally, Newmont demonstrates that the corruption comprising the White Collars of the Port case does not make the historic allegations of corruption perpetuated by Newmont likely to occur again. Take, for instance, Newmont's alleged corruption of the Cajamarca judiciary in cases involving Plaintiffs. Plaintiffs have identified various instances of suspicious court behavior in criminal proceedings that they have participated in. Plaintiffs claim that a trial court refused to accept some of Plaintiffs' evidence. Plaintiffs also assert that, in criminal proceedings against them in Peru, Newmont's 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. To support these allegations, Plaintiffs rely on sworn declarations. *See* ECF 99, at 7; Vasquez Decl., Ex. 19, ECF No. 43-1; Ysidora Chaupe Decl., Ex. 6, ECF No. 27-1.[9]

[9] Newmont seems to discount the veracity of sworn testimony, noting that Plaintiffs' "only 'evidence' consists of declarations from Plaintiffs' Peruvian counsel and one of the Plaintiffs." ECF 107, at 12. I am not as willing to do so. Testimony under oath, to which we attach the penalty of perjury, must be accorded substantial weight. In cases alleging fraud, testimony of this sort could form the bulk of the evidence. If Newmont or its agent had given the

To combat Plaintiffs' allegations, Newmont offers two forms of evidence. First, Newmont submits its own declarations, declaring Plaintiffs' assertions false. ECF 107, at 12-13. If all I had before me were competing declarations, then Newmont might not be able to carry its burden of persuasion on this issue. But Newmont offers additional evidence. Newmont demonstrates that, notwithstanding the supervening corruption scandals, Plaintiffs have succeeded within the very judicial system they ask me to deem inadequate. Plaintiffs have prevailed against Newmont before the Cajamarca trial court, the regional appeals court, and the Peruvian Supreme Court. ECF 107, at 13 (citing dockets). The Court of Appeals instructed this Court 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." ECF 96, at 6. It should not. As Newmont observes, 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. ECF 108, ¶ II.3.c.

Plaintiffs also reassert as evidence Newmont's corruption of a Peruvian Supreme Court judge. In 2000, Newmont Second Capital Corporation and several other entities were seeking control of Yanacocha. The fight for control became tied up in the Peruvian courts. Lawrence Kurlander, a Cornell-trained lawyer who was then a Newmont executive, allegedly asked Vladimiro Montesinos, then head of Peru's secret police, to intervene with the Peruvian courts to ensure that Newmont's interests would be protected. *See* ECF 43-1, Ex. 1, ¶ 9. Montesinos subsequently pressured a Supreme Court judge to protect Newmont's interests and that judge

prosecutor an economic benefit to rule in its favor, which was thereafter disclosed by the judge, it is plausible that the only evidence would be a witness's testimony recounting the disclosure.

cast the decisive vote in Newmont's favor. ECF 92, at 11. Kurlander has conceded that he visited Montesinos on Newmont's behalf, but denies doing anything untoward.[10]

In my initial opinion, I concluded that such an episode was unlikely to recur. For one, the original corrupting happened two decades ago under the infamously corrupt Fujimori regime. *See id.* at 16. I recognized that the "interim regime change and noted improvements" in the ensuing decades made it unlikely that Newmont would try again to corrupt a court official. The Court of Appeals questioned whether the recent instances of corruption "call[ed] into question these 'noted improvements.'" ECF 96, at 5-6. It is true that some corruption can make other corruption more likely, but Newmont shows how Plaintiffs' evidence is lacking here. The corruption allegedly perpetuated by Kurlander and other Newmont executives involved the intelligence agencies of the executive branch. Since then, the dictatorial regime led by Fujimori ended, Fujimori himself has spent much of the last decade in prison, and recent national elections decimated whatever control his legacy political party may have had.

Moreover, the circumstances here differ markedly from the actual corruption perpetrated by Kurlander and other executives in the late 1990s. After Kurlander visited Montesinos, Newmont *succeeded* in its attempt to acquire Yanacocha. Now, by contrast, action by *the Peruvian government* has led to Yanacocha *suspending* its mining operations in the region in

[10] A recording of Kurlander's conversation with Montesinos has been published, and Kurlander has conceded its authenticity. According to Kurlander, he first went to the United States government for assistance with Newmont's bid to acquire Yanacocha, but officials declined to intervene. Instead, according to Kurlander, the United States government encouraged him to visit Montesinos. Kurlander admits that he went to Montesinos to help Newmont "level the playing field," but denies ever paying him a bribe. According to Kurland, Newmont was "very confident that we would win on the merits, but that if there was inappropriate behavior, we couldn't win." Kurlander and Newmont were worried that the French government—their main adversary in their attempt to acquire Yanacocha—was acting improperly. Kurlander claims he "was not asking for anybody to intervene on our behalf," only "asking [the Peruvian government] to stop the French from doing what they were doing. Period." *See* Interview with Larry Kurlander, https://www.pbs.org/frontlineworld/stories/peru404/kurlander.html (transcript of interview that took place in May and September of 2005). For additional in-depth reporting, *see* Jane Perlez and Lowell Bergman, *Tangled Strands in Fight Over Peru Gold Mine*, N.Y. Times (June 14, 2010) (accessed online).

which Plaintiffs reside. Moreover, Plaintiffs have acknowledged various ways the Peruvian government has been responsive to their concerns. Plaintiffs state that the government "will travel to Tragadero Grande twice a month . . . to verify [their safety]," and that it "will also pay for [their] phone bills." ECF 1, ¶ 350. Plaintiffs also have acknowledged that the Peruvian Minister of Justice and Human Rights affirmed that the "government was coordinating with the police on a protection plan" for Plaintiffs. *Id.* ¶ 351. And since at least 2015, the Peruvian National Police have not been involved with Yanacocha's exercises of its possessory defense against Plaintiffs. *See* ECF 37, at 6 n.4. At argument, counsel for Plaintiffs acknowledged that Newmont was honoring its commitment to allow Plaintiffs access to the disputed land. ECF 126, at 6:8-7:5.

Newmont, to its credit, appears to have engaged in serious corporate reforms in its own right. Kurlander retired from the company in 2002, and Newmont has since developed a robust and rigorously enforced ethics and compliance program. Declaration of Nancy Lipson ¶¶ 2-4, ECF 109. That program prohibits the kind of corrupt conduct Kurlander and other Newmont executives allegedly engaged in twenty years ago, as well as the kind of conduct Plaintiffs allege will happen if these cases are heard in Peru. As I recognized in my initial opinion, Newmont has 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. Newmont also has made efforts to investigate alleged abuses by their subsidiaries. *See* ECF 92, at 18-20. Further, if the kind of conduct Plaintiffs allege will happen if these cases are heard in Peru *does happen*, Newmont

executives could easily run afoul of certain United States laws, including the Foreign Corrupt Practices Act.[11]

For these reasons, I conclude that the recent developments in Peru do not disturb my initial conclusion that, under the appropriate *forum non conveniens* framework, Newmont has carried its burden to demonstrate that Peru is an adequate alternative judicial forum. Because the other *forum non conveniens* remain in favor of dismissing this case, I will grant Newmont's motion, subject to the various conditions attached to the Order.

III. Conclusion

On June 20, 2014, Judge Thomy Paul Padilla Mantilla held an oral hearing involving various of the Plaintiffs here for their alleged crime of "usurpation" against Yanacocha. According to a record of that hearing, upon its completion, a French national, apparently not affiliated with either party, approached the Judge as an outside observer with an admonition: "A fin de indicarme que sobre este proceso se encuentran los ojos del mundo," she said—the eyes of the world are watching how these proceedings unfold. *See* ECF 111, Ex. C, at 165, 192. As noted in my earlier opinion, Plaintiffs have generated intense interest in their cause, with all the salutary effects such public attention brings.

Corruption of courts by private actors is pernicious. But attempts to corrupt need not disable independent judiciaries from delivering equal justice under law. What is most pertinent here is the *response* in Peru from the public and other governmental institutions when the

[11] This is not simply hypothetical. Mr. Kurlander identified the Foreign Corrupt Practices Act as a piece of evidence in his favor for why he could not have bribed Peruvian officials. But Kurlander's argument is a tautology. Every criminal act is committed against the backdrop of some law prohibiting that act. It is thus no defense to an accusation of criminality that criminality was impossible because the law made it so. Nevertheless, Kurlander's awareness that the law *could* apply to the bribing of a foreign official—the same kind of bribery Plaintiffs are predicting could happen here—suggests that the Newmont executives were undoubtedly aware of various legal limits on their behavior. *See* Interview with Kurlander, *supra* note 10.

integrity of its judiciary was compromised. That response has shown a determination to restore the credibility of the courts, and there has been objectively observable progress in doing so. 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.

I will therefore grant Newmont's motion to dismiss, subject to the same conditions set forth in my earlier Order.

/s/ Gerald Austin McHugh
Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA; DANIEL CHAUPE-ACUÑA; JILDA CHAUPE-ACUÑA; CARLOS CHAUPE-ACUÑA; YSIDORA CHAUPE-ACUÑA, personally and on behalf of her minor child; ELIAS CHAVEZ-RODRIGUEZ, personally and on behalf of her minor child; and MARIBEL HIL-BRIONES,	:	**CIVIL ACTION**
Plaintiffs,	:	**No. 17-1315**
v.	:	
NEWMONT MINING CORPORATION, NEWMONT SECOND CAPITAL CORPORATION; NEWMONT USA LIMITED; and NEWMONT PERU LIMITED,	:	
Defendants.	:	

ORDER

This 10th day of March, 2020, upon consideration of the Court of Appeals' instructions ordering remand (ECF 96), and the parties' supplemental briefing and submissions of evidence (ECF 99 *et seq.*), it is hereby **ORDERED** that Defendants' Motion to Dismiss on the basis of *forum non conveniens* (ECF 14) is **GRANTED**, subject to the following conditions:

1. Defendants in this action must submit to the jurisdiction of the appropriate court in Peru, and that Court must accept jurisdiction.
2. Defendants must stipulate that any judgment entered in Peru qualifies as legally adequate under Delaware law, including 10 Del. Code § 4803(b).
3. Defendants may not directly, or indirectly through their subsidiaries and affiliates in Peru, raise objection to any of Defendants' officers or employees testifying or

providing evidence relevant to the claims asserted by Plaintiffs, whether such evidence is sought here or in Peru.

This dismissal is without prejudice.

/s/ Gerald Austin McHugh
Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, *et al.*	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action**
	:	**No. 17-1315**
	:	
NEWMONT MINING	:	
CORPORATION, *et al.*,	:	
Defendants.	:	

McHUGH, J. **April 11, 2018**

MEMORANDUM

This case arises out of a land dispute between indigenous subsistence farmers in Peru and the Peruvian subsidiary of a multi-national gold mining company headquartered in the United States. At the forefront is a rancorous struggle over the right to occupy the land in question, amid years-long litigation in Peruvian courts. Plaintiffs Máxima Acuña-Atalaya de Chaupe and her family complain of repeated invasions of their farm, alleging threats on their lives, assaults, and destruction of livestock and crops. They have brought this action in Delaware, seeking to hold the American parent companies responsible for actions taken by their subsidiary on the ground in Peru, contending that Peruvian courts are inadequate to protect them. Defendant Newmont Mining Corporation and its affiliates strongly contest the facts, and have moved to dismiss invoking *forum non conveniens* (FNC).

The ultimate question in the underlying dispute—how American corporations conduct their affairs in less developed nations—has profound moral implications. But the issues before me are legal and practical. On the record here, I conclude that this case is centered in Peru.

There are intense disputes over baseline facts for which the evidence is in Peru. There is ongoing litigation there, governed exclusively by Peruvian law, and some of the conduct Plaintiffs challenge here would appear to be permissible under that law. And though there are reasons to be concerned about the Peruvian judicial system, I cannot say that it is clearly inadequate as a forum. I will therefore grant Defendants' Motion, but mindful of some of the concerns Plaintiffs raise, address them by attaching conditions to dismissal.

I. Relevant Facts

This is an unusual case brought by Peruvian citizens living in a remote, mountainous area against the U.S.-based Newmont Mining Corporation and affiliated entities, which are engaged in the business of mining gold around the world. The area in question was long thought to harbor gold, a suspicion that was confirmed by developmental drilling in the 1980s. In 1993, with the support of the Peruvian government, the International Finance Corporation, an affiliate of the World Bank, made a substantial loan to Newmont and a French-based partner for development of a mine. That mine opened and substantial amounts of gold were recovered, although the venture was affected by disputes between the companies forming the partnership and by environmental damage, resulting in litigation in both the United States and Peru. Local protests erupted, sometimes ending in violence, both as a reaction to the environmental toll exacted by the project and to a proposal to further expand the mining operation. It is that proposed expansion that gives rise to this case.

Plaintiffs Máxima Acuña-Atalaya de Chaupe and her family are indigenous campesinos residing in the Northern Andes region of Peru on a parcel of land in an area they refer to as

"Tragadero Grande."[1] Máxima and her husband Jaime Chaupe Lozano represent that they purchased possessory rights to that parcel from a family member in 1994. At the time they made that purchase, Tragadero Grande was part of communal land that belonged to the Campesino Community of Sorochuco. Over the next five years, a Peruvian mining company known as Minas Conga underwent an extensive two-part process to acquire that communal land, which it then sold to Defendants' subsidiary, Minera Yanacocha [hereinafter "Yanacocha"] in 2001.[2] Step one involved acquiring the communal land, and Step two purchasing the possessory rights of each individual member of the community. After acquiring the communal land, Minas Conga divided it into two units, and re-named these units to correspond with the two separate land titles, which for our purposes will be referred to as the "Southern Parcel" and the "Northern Parcel." It then continued with the two-part process by negotiating with individual possessors, like the Chaupes, to purchase their possessory rights. There is a dispute over whether the Chaupes were parties to Minas Conga's negotiations and ultimately sold their possessory rights to Tragadero Grande, which now straddles both the Northern and Southern Parcels. That issue is being litigated in another case in Peru.

Meanwhile, the Chaupe family has a cottage on the Northern Parcel. Defendants contend that Plaintiffs illegally occupied the land in 2011. *See* Defs.' P.I. Resp. Ex. 1A, ECF No. 38-1. Plaintiffs counter that they have lived and farmed on that parcel since they purchased their possessory rights in 1994. But, according to Plaintiffs, beginning in 2011, security personnel consisting of Yanacocha staff, the contracted Peruvian National Police (PNP), and the private security company Securitas threatened, and continued their assault on various other family

[1] "Tragadero" means "throat" or "gullet" in Spanish. Hence, the name "Tragadero Grande" derives from the fact that the point where rainwater infiltrates the land is relatively large. *See* Defs.' P.I. Resp. Ex. 1A, ECF No. 38-1.
[2] Minas Conga ceased to exist sometime after that transfer. Pls.' P.I. Mot. Ex. 16 at v., ECF No. 27-16.

members. *Id.* at 4–5. Plaintiffs allege that some combination of these entities physically attacked, destroyed the property of, and terrorized Plaintiffs. Pls.' P.I. Mot. 4, ECF No. 28. For example, Plaintiffs contend that in August 2011, Yanacocha security personnel destroyed their huts, removed crops they had planted, struck Plaintiff Máxima on her arms and legs with sticks, and knocked Plaintiff Jilda unconscious with the same sticks. Plaintiffs further allege that the purpose of these attacks was to dispossess them of their portion of the land in order to facilitate the development of the proposed new gold mine, referred to as the Conga Project, operated by Defendants and their Peruvian subsidiary.

That project would represent a $4.8 billion expansion to Yanacocha's operations. As proposed, the expansion would eradicate four mountain lakes, raising concerns that it would threaten the water supply serving over 200 communities in the region, particularly in light of earlier problems. The Peruvian government initially approved the project over "broad community opposition" in 2010. Compl. ¶¶ 55–56, ECF No. 1. But about a year later, that widespread community opposition, coupled with public demonstrations, resulted in the government doubling back and suspending the operation. In part as a result, Defendant Newmont Mining Corporation told the SEC in 2016 that "it does not anticipate being able to develop Conga for at least the next five years." *Id.* ¶ 62. But Plaintiffs allege that none of that has stopped the abuses and efforts to dispossess them.

They have therefore brought this action in Delaware against Newmont Mining Corporation and three of its subsidiaries: Newmont Second Capital Corporation, Newmont USA Limited, and Newmont Peru Limited. They contend that Defendants are aware of such abuses, and exercise sufficient control over Yanacocha and its operations in Peru to be able to stop them. All of the Defendants are incorporated in Delaware and headquartered in Denver, Colorado.

Plaintiffs aver that they chose to sue in the United States because justice cannot be had for them in Peru, given Yanacocha's influence over the government and judiciary.

Defendants contend that Plaintiffs overstate the extent of Defendants' direct involvement with and control over Yanacocha and its security personnel overseas. They strongly dispute Plaintiffs' factual account, alleging that Plaintiffs "omitted key facts and created or exaggerated others." Defs.' P.I. Resp. 2, ECF No. 37. Specifically, Defendants dispute that Plaintiffs occupied any portion of Tragadero Grande at any point between 2001 and 2011. According to Defendants, Yanacocha has been engaged in preliminary mining activities on the land since 2001, including by placing checkpoints to control access, but did not encounter Plaintiffs until May 2011. Defendants stress that the most prominent incident occurred in August 2011, and reject Plaintiffs' factual account. Defendants also assert that Yanacocha's actions are legally necessary to protect their possessory rights to the portion they occupy while the years-long litigation over who has legal right continues.[3] Nonetheless, Yanacocha decided to not interfere with Plaintiffs' activities in the portion of the Northern Parcel Plaintiffs now occupy. Defendants contend that they did not attempt to dislodge Plaintiffs until Plaintiffs sought to expand their occupancy. In addition, Yanacocha has purportedly established a procedure to allow Plaintiffs access through Yanacocha's checkpoints, and has provided Plaintiffs the direct phone number of high-ranking Yanacocha executives whom they can call for immediate authorization of entry.

[3] Under Peruvian law, one avenue to prevent loss of title in an ownership dispute where "adverse possession" is the issue is to engage in "self-help" activities such as ejectment of those occupying the land. The parties, through their competing legal experts, dispute whether such action is *required* for the party seeking to preserve ownership, but agree that such a legal right exists. Needless to say, the possibility for physical confrontation looms large.

II. Procedural Posture

Plaintiffs seek both injunctive relief and damages. Defendants move to dismiss, arguing that Delaware is an inconvenient forum because the relevant evidence, witnesses, and actors essential to adjudicating this case are in Peru. In their response to this Motion, Plaintiffs urge that I first address their motion for preliminary injunction, which, in part, asks that I order Defendants and their agents to cease the alleged harassment of Plaintiffs, bar Defendants and their subsidiaries from entering Tragadero Grande[4] without Plaintiffs' permission, and bar them from attempts to communicate with Plaintiffs except through counsel.

As an initial matter, I note that a district court has the power to address FNC at the outset of the case. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). I hesitate to address the petition for injunctive relief before resolving venue, because the injunction requested is one that might alter the status quo, rather than merely preserve it. That is so because I cannot definitively determine whether prohibiting Defendants' subsidiary from engaging in what they contend are lawful self-help remedies would prejudice their rights under Peruvian law. Furthermore, because there is litigation currently pending in Peru, any order I enter will necessarily impact that litigation.

The leading case where an injunction was issued despite a pending FNC motion is *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988). There, Ferdinand Marcos, the former President of the Republic of the Philippines, left the Philippines when he realized his regime was nearing its end. *Republic of Philippines v. Marcos*, 818 F.2d 1473, 1475 (9th Cir. 1987), *on reh'g*, 862 F.2d 1355. The United States government immediately recognized his successor, and when the Marcoses arrived in Hawaii with numerous crates of currency, jewels,

[4] On its face, Plaintiffs' prayer for relief would seem to seek to bar Defendants and affiliated entities from the entire area, including parcels over which Plaintiffs have asserted no claim.

precious metals and the like, the United States Customs Service impounded them. *Id.* At the same time, other assets allegedly belonging to the Marcos family were turning up around the world. *Id.* The Republic of the Philippines launched civil suits in several countries to recover or freeze specific assets it regarded as property of the Philippines. *Id.* In the United States action, the district judge granted the Republic's motion for preliminarily injunction, despite the pending FNC motion, in order to prevent the assets from being transferred. The Ninth Circuit affirmed, because "it was imperative for the district court to preserve the status quo lest the defendants prevent resolution of the case by putting their property beyond the reach of the court." *Republic of Philippines*, 862 F.2d at 1364. It also bears mention that the party seeking the injunction was the newly recognized government of the Philippines.

The situation here is different. Indeed, if Defendants' version is true and Yanacocha has to engage in these possessory defenses in order to continue its activities on the portion of the land it now occupies, a preliminary injunction risks altering the merits of the underlying land dispute before the court in Peru. *See* Defs.' P.I. Resp. 4, ECF No. 37 (stating that "the owner must take action, known as a 'possessory defense,' within 15 days of learning of the trespass"). According to the defense, uprooting crops and displacing newly erected structures is something that they must do or risk their legal rights. Although Plaintiffs argue that Yanacocha need not exercise this defense and suggest that Defendants would be able to recover any lost land regardless, the competing experts make that issue a difficult one. In either case, the injunction sought would by definition change, not preserve, the situation on the ground in Peru, and thereby potentially impact the legal proceedings there.

Further, there are practical concerns about the requested relief that are also relevant to the discussion of whether Delaware is a convenient forum. Even assuming that neither party would

willfully act in contravention of an order from this court, I remain skeptical of the practical impact of an injunction from a federal judge in Delaware over the actions of third parties in Peru. That skepticism is especially warranted where, as here, Defendants represent that they have taken affirmative steps to protect the rights of the Plaintiffs, and had limited success. Indeed, Defendants have presented evidence that security personnel have been instructed to exercise the utmost restraint in carrying out these possessory defenses. In fact, nothing in the video evidence provided by either side shows the type of abuse asserted by Plaintiffs. Plaintiffs insist otherwise, contending that abuses similar to those alleged in their Complaint have continued even during this case. But if these additional abuses have continued to occur contrary to Yanacocha's instruction, and despite cameras placed by both parties and journalists documenting the various encounters, it underscores the limited ability of an American judge to influence local behavior. And, as discussed below, part of Plaintiffs' argument is that local courts have not implemented Peruvian appellate court rulings that were in their favor. To the extent that is true, an American court's order entered against Yanacocha's parent company here is unlikely to have greater effect.

Similar concerns exist with respect to another aspect of Plaintiffs' proposed injunction: Plaintiffs' allegations that they have faced significant difficulties when attempting to access their cottage as a result of Yanacocha's security checkpoints. Those allegations persist despite the fact that Defendants presented to the court established procedures for admitting Plaintiffs through those checkpoints, and a means of recourse if Yanacocha's instructions regarding access are being violated by the contracted security personnel on the ground.

For these reasons, I will not decide the pending motion for an injunction before first considering whether Delaware is an appropriate forum, which requires further consideration of many of the same practical considerations reviewed above.

III. Analysis

FNC is a discretionary tool that empowers a district court "to dismiss an action on the ground that a court abroad is the more appropriate and convenient forum for adjudicating the controversy." *Sinochem*, 549 U.S. at 425. To decide whether FNC dismissal is appropriate, district courts engage in a three-step analysis. First, the court must determine "whether an adequate alternate forum" exists to entertain the case. *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 160 (3d Cir. 2010). If so, the court must next determine "the appropriate amount of deference to be given the plaintiff's choice of forum." *Id.* Finally, the court must weigh "the relevant public and private interest factors"—discussed below—to determine whether, on balance, "trial in the chosen forum would result in oppression or vexation to the defendant out of all proportion to the plaintiff's convenience." *Id.* If so, or if the chosen forum is "inappropriate" in light of the court's own "administrative and legal problems," the court "may, in its discretion," dismiss the case. *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 189 (3d Cir. 2008) (citing *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). Defendants seeking dismissal on the basis of FNC bear the burden of persuasion at every stage of this analysis, *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43–44 (3d Cir. 1988) (*Lacey I*), against the backdrop of a generally "strong presumption" in favor of the plaintiff's choice of forum, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).[5]

[5] Plaintiffs argue that, under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), Delaware FNC law, which describes Defendants' burden as "heavy," should govern, as opposed to the federal standard I am applying. Both parties requested that I allow supplemental briefing on this issue if it is material. I did not grant that request because I am not convinced that the Delaware standard would warrant a different result, especially given the Delaware Supreme Court's recent ruling in *Martinez v. E.I. DuPont de Nemours & Company*, 86 A.3d 1102, 1104 (Del. 2014), which specifically held that "where [. . .] the plaintiff in the case is a citizen of a foreign state whose law is at issue, and where [. . .] the injury in the case occurred in that foreign state, and the case turns on unsettled issues of foreign law, a trial court may permissibly exercise its discretion under *Cryo–Maid* to weigh appropriately the defendant's interest in obtaining an

As an initial matter, it must be noted that what is at issue here is not the ultimate legal question of the parties' rights with respect to Tragadero Grande. Indeed, the case before me is ancillary to that fundamental underlying dispute. Unlike some other cases filed in American courts seeking damages for past unlawful acts of American corporations overseas, Plaintiffs here seek detailed injunctive relief affecting an ongoing dispute, even as Peruvian courts attempt to resolve that dispute. Moreover, this action does not focus on the broader impact of Newmont's mining activities in Peru, such as pollution of the watershed or treatment of workers; it focuses on multiple discrete encounters replete with complex factual disputes, many of which involve third parties, including local authorities. And, as noted above, some of the challenged conduct—clearing crops, destroying structures—is characterized as a permissible remedy under Peruvian law. Thus, the specialized nature of this case has unique implications for whether Delaware is a convenient forum.

As to these highly specific issues, the parties present competing accounts and, in support of both this Motion and Plaintiffs' Preliminary Injunction motion, have submitted extensive documentation. I am therefore "thrust into the merits of the underlying dispute," *Van Cauwenberghe v. Biard*, 486 U.S. 517, 528 (1988), and have necessarily availed myself of the full scope of all of these submissions, from affidavits submitted specifically for the FNC motion to all evidence pertaining to the motion for preliminary injunction. [6] Because it is necessary to

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authoritative ruling from the relevant foreign courts on the legal issue on which its liability hinges, as distinguished from a predictive, non-authoritative ruling by our courts."

[6] Defendants objected to evidence submitted by Plaintiffs in support of their opposition to Defendants' FNC Motion on the basis that such evidence was inadmissible under the Federal Rules of Evidence. *See* Defs.' Ev. Obj., ECF No. 55. But in considering an FNC motion, I am not aware of any precedent that limits my scope of review to evidence admissible under the Federal Rules, nor have Defendants cited any. In fact, several courts in the Third and other Circuits have reached the opposite conclusion. *See, e.g.*, *Kisano Trade & Invest Ltd. v. Lemster*, 2013 WL 594017, at *3 (W.D. Pa. 2013), *aff'd*, 737 F.3d 869 (3d Cir. 2013); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1144 n.4 (C.D. Cal. 2005), *aff'd*

"'generally become[ ] entangled in the merits' to the extent required to 'scrutinize the substance of the dispute'" on an FNC motion, *Path to Riches, LLC ex rel. M.M.T. Diagnostics (2014), Ltd. v. CardioLync, Inc.*, 2018 WL 993752, at *3 (D. Del. 2018) (quoting *Van Cauwenberghe*, 486 U.S. at 528), I consider evidence from that broader record.

A. Adequacy of the Peruvian Court System

In many respects, this is the critical issue. The adequacy of an alternative forum is determined by a defendant's amenability to process in that forum and a plaintiff's opportunity for redress there. The Supreme Court has observed that it is the "rare circumstance[] . . . where the remedy offered by the other forum is clearly unsatisfactory." *See Piper*, 454 U.S. at 254 n.22. Defendants have met their burden to demonstrate that an adequate alternative forum exists in Peru because, for the purposes of this action only, Defendants have stipulated to service of process, consented to jurisdiction in Peru, and agreed to have those be conditions of dismissal. In addition, Plaintiffs conceded that Peruvian law recognizes a cause of action and offers a remedy for the property damage and personal injuries alleged here.

For their part, Plaintiffs argue that Defendants have not met their burden because first, they have not demonstrated that Peruvian courts have jurisdiction over all Defendants, and second, Defendants' improper influence over the Peruvian judiciary renders the forum

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sub nom. Mujica v. AirScan Inc., 771 F.3d 580 (9th Cir. 2014). Moreover, the Federal Rules of Civil Procedure expressly preclude the application of the Federal Rules of Evidence to one pivotal aspect of the FNC analysis: the adequacy of the alternative forum. *See* Fed. R. Civ. P. 44.1; *see also Wilmot v. Marriott Hurghada Mgmt., Inc.*, 2016 WL 2599092, at *4 (D. Del. 2016), *report and recommendation adopted*, 2016 WL 3457007 (D. Del. 2016) (citing Fed. R. Civ. P. 44.1 and stating, "In determining whether foreign law provides adequate relief, as an element of determining whether the [FNC] doctrine applies, a court may consider any relevant material or source, including testimony, whether submitted by a party or admissible under the Federal Rules of Evidence, and such determination shall be treated as a ruling on a question of law"), *aff'd*, 2017 WL 4570664 (3d Cir. 2017); *Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681, 699 (S.D.N.Y. 2003) (taking the same approach and reaching the same conclusion), *aff'd*, 98 F. App'x 47 (2d Cir. 2004).

inadequate, relying primarily on *Eastman Kodak Company v. Kavlin*, 978 F. Supp. 1078, 1085–86 (S.D. Fla. 1997).[7]

1) The Potential for Jurisdiction over Defendants in Peru

Plaintiffs base their first contention on the declaration of Juan Carlos Ruiz Molleda, a Peruvian attorney specializing in, *inter alia*, human rights and access to justice and the law governing indigenous peoples. Pls.' FNC Resp. Ex. 17, ¶ 1, ECF No. 43-1. Ruiz is also the author of numerous publications and specialized legal articles in Peru and abroad. *Id.* Based on Article 2058 of the Peruvian Civil Code, Ruiz attests that "there is no guarantee" that a Peruvian civil court would exercise its jurisdiction" over this case, even if Defendants consent or stipulate to jurisdiction. *Id.* ¶¶ 4–14.

Defendants counter with their own expert declaration by Mario Castillo Freyre. Castillo is another Peruvian lawyer in the areas of civil law and arbitration who graduated from the same law school as Ruiz. Castillo Decl. Ex. 1, at 1–4, ECF No. 54-1. In addition to his private practice, Castillo is a professor and well-published scholar. *Id.* at 4. Castillo's analysis principally relies on language in the same article of the Peruvian Civil Code, the translation of which he includes in his affidavit:

> The Peruvian courts have competence to hear complaints arising from the exercise of patrimonial content actions even against persons domiciled in a foreign country, in the following cases:
> [. . .]

[7] Plaintiffs also argue that excessive delay in the Peruvian courts warrants denying this Motion, citing *Bhatnagar v. Surrendra Overseas Limited*, 52 F.3d 1220, 1227 (3d Cir. 1995). But the *Bhatnagar* Court did not conclude that a delay of any length rendered a forum inadequate. Rather, it recognized that delay "is an unfortunate but ubiquitous aspect of the legal process," and "our own courts" suffer from it. *Id.* at 1227. *Bhatnagar* merely stated that "at some point, . . . the prospect of judicial remedy becomes so temporally remote that it is no remedy at all." *Id.* Applying that standard, it had no difficulty finding delay intolerable when it approached 25 years. Here, although Plaintiffs point to a number of factors that might contribute to delay in any system, they fail to provide a benchmark for how much delay can be expected in this case. Without that, I cannot even begin to determine how to apply the *Bhatanagar* standard.

> 2. When actions related to obligations that must be executed in the territory of the Republic or that arise from executed contracts or of facts carried out in said territory are dealt. In the case of civil actions arisen from crimes or faults perpetrated or whose results have occurred in the Republic, this competence is considered exclusive.

Castillo Decl. 2 n.1, ECF No. 54. Castillo interprets that language to indicate that jurisdiction can be had if there is reasonable proximity—that is, if the alleged tortious acts and the results of the alleged harm occur in Peru. *Id.* ¶¶ 2–9. Castillo asserts that is the case here, since Yanacocha's actions in Peru form the basis of this suit. *Id.* In addition, Castillo points out that Molleda is wrong about the effect of consent or stipulation, because another aspect of Article 2058, referred to as "numeral 3[,]" allows jurisdiction to be asserted over foreign parties if they "expressly or tacitly submit to [the court's] jurisdiction." *Id.* ¶ 10.

Although Castillo's text-based argument is admittedly appealing, it does not account for how the statute might actually be applied. But there is no need to attempt to resolve this issue of Peruvian law, because Plaintiffs' concerns are unquestionably within my power to address, by making dismissal of this action not only contingent upon Defendants' consent to jurisdiction in Peru, but further upon on a Peruvian court actually ***accepting*** it.

2) Alleged Corruption in the Peruvian Judiciary

Plaintiffs' second contention is that corruption in the Peruvian judiciary renders Peru an inadequate forum. That contention can be broken into two theories, one alleging widespread corruption rendering the entire Peruvian judicial system inadequate, and another more narrow theory arguing that Peru is inadequate only as to these parties based upon specific evidence of judicial corruption pertaining to them.

A theory of generalized corruption has "not enjoyed a particularly impressive track record in our courts." *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 2016 WL 2599092, at *5 (D. Del. 2016) (citing *Eastman Kodak*, 978 F. Supp. at 1084), *report and recommendation adopted*,

2016 WL 3457007 (D. Del. 2016), *aff'd*, 2017 WL 4570664 (3d Cir. 2017). Indeed, "absent at least some particularized showing of wrongdoing, courts are hesitant" to deem an entire foreign court system so corrupt that it cannot be considered an adequate forum. *Id.* Thus, I will consider the general evidence Plaintiffs have submitted,[8] but only as background for the more particularized allegations that Plaintiffs present to support the second theory.

The model case for evaluating such allegations is *Eastman Kodak*. The allegation there was that Casa Kavlin, the former exclusive distributor for Kodak in Bolivia, brought criminal charges against Carballo, who became Kodak's new distributor, in order to extort an advantageous financial arrangement with Kodak. *Eastman Kodak*, 978 F. Supp. at 1080–81. Specifically, Kodak presented several instances of Kavlin's attorney, Juan Carlos Zegarra, using his judicial connections for this purpose. *Id.* First, Zegarra used his connections to have the case assigned to favorable judges: in one case, Zegarra was the godfather of the judge's son, who was conceived out of wedlock by way of an affair with Zegarra's sister; and in another, Zegarra was once the judge's brother-in-law. *Id.* In each of those instances, it was alleged that Zegarra was able to subject Carballo, other Kodak employees, and even a Chilean lawyer whose only act in Peru was to help Carballo be released from prison lawfully, to significant abuses at the hands of the Bolivian judicial system. *Id.* Most notably, Zegarra secured Carballo's pre-trial imprisonment without bail in an infamous prison, where it is rumored that one would have to pay for even the right to live in a jail cell. *Id.* Kodak supplemented these specific instances of

[8] The U.S. State Department has not deemed the Peruvian judiciary to be dysfunctional, but cautioned in its 2016 Human Rights Report that there are allegations in the press and by non-governmental organizations that judges have been corrupted and influenced by outsiders. A 2016 report from GAN Integrity, a consulting and software firm that advises businesses on compliance issues, stated that Peru's judicial system "carries a very high risk of corruption," based upon its review of various private and public sources. Mr. Ruiz, one of Plaintiffs' attorney experts, describes systemic corruption, although it is noteworthy that many of the instances cited were cases brought to light by the Peruvian government's own investigation and prosecution of the officials involved.

corruption with general evidence about the state of the Bolivian judicial system, most notably statements by the Bolivian Minister of Justice's that the judicial system he supervised was "a collection agency and the penal system was an agent of [extortion]." *Id.* at 1085. Combined, these allegations led the court to have "serious doubts about Kodak's ability to operate in Bolivia free from the threat of prosecution, and even immediate imprisonment." *Id.* at 1087.

Here, Plaintiffs allege that Defendants similarly influenced the Peruvian judiciary, including in cases against Plaintiffs. Those allegations focus on three discrete episodes, documented by affidavits and news articles.

The first pertains to an incident that took place in 2000, when Defendant Newmont Second Capital Corporation was seeking control of Yanacocha during the Fujimori regime. In one well-publicized account, an audio recording surfaced of a then-Newmont executive reaching out to the ranking Peruvian National Intelligence Agency officer, Vladimoro Montesinos, for Montesinos's aid in ensuring that the Peruvian Supreme Court would rule in favor of Newmont. *See* Pls.' FNC Resp. Ex. 1, ¶ 9, ECF No. 43-1. The New York Times reported that Montesinos then tacitly pressured the judge who went on to break the Supreme Court's tie in favor of Newmont and company. *See* Jane Perlez and Lowell Bergman, *Tangled Strands in Fight Over Peru Gold Mine*, N.Y. Times (June 14, 2010), http://www.nytimes.com/2005/10/25/world/americas/tangled-strands-in-fight-over-peru-gold-mine.html. Newmont's attempts to influence the decision of Peru's Supreme Court appear to be well-documented, but according to the Newmont executive accused, he was reacting defensively to similar attempts by Newmont's French partners to influence the decision. *Peru – The Curse of Inca Gold*, Frontline/World (Oct. 2005), https://tinyurl.com/frontlineworld-thestory.

Regardless, the events in question occurred some 18 years ago, around the time when the regime of an infamously corrupt president, Alberto Fujimori, imploded. The interim regime change and noted improvements since render this a case where Plaintiffs cannot plausibly allege that the national government itself or high governmental officials are directly involved in the alleged misconduct and can dictate the outcome. *Compare HSBC USA, Inc. v. Prosegur Paraguay, S.A.*, 2004 WL 2210283 (S.D.N.Y. 2004); *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736 (S.D.N.Y. 2004); *Araya v. Nevsun Res. Ltd.*, 2017 BCCA 401 (CanLII). Further, both before and after Fujimori's regime, every federal court to consider the issue has found Peru to be an adequate forum. *See, e.g.*, *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 904 (S.D. Tex. 1996), *aff'd* 113 F.2d 540 (5th Cir. 1997); *Sudduth v. Occidental Peruana, Inc.*, 70 F. Supp. 2d 691, 697 (E.D. Tex. 1999); *Flores v. S. Peru Copper Corp*., 253 F. Supp. 2d 510 (S.D.N.Y. 2002), *aff'd on other grounds*, 414 F.3d 233, 266 (2nd Cir. 2003); *Maxima International, S.A. v. Interocean Lines, Inc.*, 2017 WL 346826, *2 (S.D. Fla. 2017). Thus, an act of corruption involving a high official during that regime is not enough to now find the Peruvian court system inadequate.[9]

Second, Plaintiffs' attorney in Peru, Mirtha Esther Vásquez Chuquilín, asserts that the Peruvian legal system has been unresponsive to Plaintiffs' claims, but solicitous of Yanacocha's complaints. Ms. Vásquez submits that the prosecutor's office has not investigated their numerous complaints, and that one judge, who agreed to conduct an on-site inspection of Tragadero Grande, later cancelled the visit without notifying Plaintiffs. Pls.' FNC Resp. Ex. 19, ¶ 11–14, ECF No. 43-1. The defense counters that what Plaintiffs describe as unresponsiveness

[9] Fujimori was later sentenced to 25 years in prison for graft and human rights violations. It should be noted, however, that Fujimori's children remain moving forces in Peruvian politics, and he was recently the beneficiary of a controversial pardon. Mitra Taj, *Fujimora Family Pulls Peru back into Political Turmoil*, Reuters (Dec. 25, 2017), https://www.reuters.com/article/us-peru-fujimori-family/fujimori-family-pulls-peru-back-into-political-turmoil-idUSKBN1EJ0VX.

represents nothing more than local officials exercising prosecutorial and judicial discretion in deciding how to expend resources. Ms. Vasquez further alleges that, in August 2011, the prosecutor's office brought an aggravated usurpation claim against three of the Chaupes without any evidence. *Id.* ¶ 28. She then points to several irregularities she noticed during the proceeding, such as the prosecution insulting her and not focusing on strictly legal arguments, the court not accepting evidence she wanted to present, and, in the end, the prosecutors receiving a copy of the judgment before she did. *Id.* ¶¶ 28–32. This is concerning, but such concern is mitigated by the fact that the judgment was overturned by the court of appeals on two occasions, and the Peruvian Supreme Court subsequently upheld that ruling. *Id.* ¶ 3. In short, Plaintiffs were ultimately protected by the very judicial system they ask me to deem inadequate.

The third is an account from Plaintiff Ysidora Chaupe-Acuña, pertaining to a trial in 2013. There, she alleges that,

> right before [the Judge] issued the sentence, the lawyer for [Yanacocha] arrived and gave the judge a document. Afterwards, the [Judge] gave us the same document and it was the guilty sentence. Shortly after being given [that] document, . . . [the Judge] apologized for the outcome of the trial, . . . [and told me] that the company gave an 'economic benefit' to the prosecutor to bring the case against us.

Pls.' P.I. Mot. Ex. 6, ¶ 7–8, ECF No. 27-1.

Even taking these facts at face value, it is noteworthy that it was the court that brought this instance of apparent corruption to Plaintiffs' attention. Thus, although the situation is troubling, it does not support a global finding that Peru is an inadequate forum for Plaintiffs, particularly in light of the success Plaintiffs experienced in the appellate courts.[10]

[10] As supplemental evidence, Plaintiffs submitted an article concerning corruption within the Peruvian government. That article reports an investigation into allegations that certain officials accepted bribes from Brazilian companies in exchange for public construction jobs. *See* Notice of Supp. Ev. Ex. 1, ECF No. 91. The implications for the Peruvian judiciary are not apparent.

More broadly, there is reason to question whether Yanacocha's influence over the Peruvian government is as strong as Plaintiffs assert. Action by the Peruvian government has led to Yanacocha suspending its Conga operation. The core premise of Plaintiffs' argument is that Defendants will go to any means to expand their mining operation, but in fact they have been stymied by the government's responsiveness to local opposition to such expansion. Further, Plaintiffs' Complaint acknowledges other ways in which the Peruvian government has been responsive to their situation. Plaintiffs state that the government "will travel to Tragadero Grande twice a month . . . to verify [their safety]," and that it "will also pay for [their] phone bills." Compl. ¶ 350, ECF No. 1. The Complaint also alleges that the Peruvian Minister of Justice and Human Rights publically affirmed that the "government was coordinating with the police on a protection plan" for the Plaintiffs. *Id.* ¶ 351. Finally, since at least 2015, the Peruvian National Police have not been involved with Yanacocha's exercises of its possessory defense against the Chaupes. *See* Defs.' P.I. Resp. 6, n. 4, ECF No. 37.

In addition to the fact that Defendants' influence was not enough to force through expansion of the mine over local opposition, it is far from clear on the record before me that Defendants are ruthlessly determined to exploit weaknesses in the Peruvian judiciary to trample Plaintiffs' rights. At the corporate level, Defendants 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. And beyond good intentions, Defendant Newmont has made some efforts to investigate alleged abuses by their subsidiary. Newmont funded an independent fact-finding mission in 2015 by Resolve, a non-profit, Washington-based dispute resolution organization with a 40-year history. Resolve reviewed earlier public inquiries dating back to

2009, which found in part that the growth and persistence of conflicts in Tragadero Grande was attributable to Yanacocha's inadequate grievance systems and over-reliance on state institutions and legal processes to resolve disputes. Further, the mission examined "the allegations of human rights violations perpetrated against the Chaupe family, and [Yanacocha's] conformance to Newmont's own policies and international standards." Pls.' P.I. Mot. Ex. 16, at v., ECF No. 27-2. Consistent with the findings in earlier studies, the Chaupes and Yanacocha both agreed that attempts to evict the Chaupes occurred without an opportunity for dialogue, and that there was no such opportunity until 2015. This led the mission team to conclude that the Chaupe family's human rights were at risk from the first encounter, and that a precautionary approach should have been taken prior to eviction. *Id.* at 36. After reviewing reports by key actors, including Yanacocha's security personnel, Yanacocha, and the Chaupe family, in addition to video footage and photographic records, the mission team "did not discover conclusive evidence that [Yanacocha] violated human rights of members of the Chaupe family. Specifically, [it found] no conclusive evidence relating to the use of force by police on August 11, 2011." *Id.* at 32.[11] Such private fact-finding is by no means controlling, and a court would be naïve not to consider the fact that such investigations can be self-serving. But given Resolve's apparent independence,[12] I find the effort itself somewhat relevant in determining whether the principal defendant here, Newmont, seeks to gain an *unlawful* advantage in Peruvian courts.

[11] Video submitted by the parties or otherwise accessible within the public domain does not show instances of violence against Plaintiffs. One video, however, appears to show local residents armed with machetes and clubs advancing toward a police line, and another shows what appears to be one of the Plaintiffs throwing a rock that strikes a Yanacocha representative on the head.

[12] It should be noted that a former executive of Newmont sits on the board of Resolve. But as a result of that, he took a leave of absence for the entire period of the Yanacocha fact finding mission. *Yanacocha Independent Fact Finding Mission*, Resolve.org, http://www.resolv.org/site-yiffm/faqs/ (last visited Apr. 10, 2016).

An additional factor bearing on whether Peruvian courts will function impartially is the admirable success Plaintiffs have had in focusing international public attention on this dispute, including now the attention of the federal judiciary in the United States. Among other things, the Inter-American Commission on Human Rights (IACHR) of the Organization of American States formally requested that the Peruvian government to adopt precautionary measures for numerous leaders of campesino communities, among them the Chaupe family. *PM 452 11 – Leaders of Campensino Communities and Campesino Patrols in Cajarmaca, Peru*, Organization of American States: Inter-American Commission on Human Rights (May 5, 2014), https://www.oas.org/en/iachr/decisions/precautionary.asp. Journalists and international human rights groups such as Amnesty International have visited the site of the dispute as observers, carrying letters of support. *Peru: Peruvian Authorities Put an End to the Criminalization of Defender Máxima Acuña*, Amnesty International (May 3, 2017), https://www.amnesty.org/en/latest/news/2017/05/peru-autoridades-peruanas-ponen-punto-final-a-la-criminalizacion-de-la-defensora-maxima-acuna/. In 2016, Plaintiff Máxima Acuña received the Goldman Environmental Prize from a United States foundation for her defense of her claim to the land. Major media outlets have praised her resilience. Anna Lekas Miller, *Meet the Badass Grandma Standing Up To Big Mining*, The Daily Beast Company LLC (Apr. 16, 2016), https://www.thedailybeast.com/meet-the-badass-grandma-standing-up-to-big-mining. This continued spotlight makes it less likely that judicial proceeding in Peru will be subject to untoward influences.

In summary, as to the first element of the test, although Plaintiffs have shown cause for concern over Peruvian courts, I cannot say that they are "clearly unsatisfactory" under *Piper*.

B. Level of Deference to Plaintiffs' Choice of Forum

I must now decide how much deference Plaintiffs' choice of forum is due. The importance of this factor was also highlighted in *Eastman Kodak*, where, despite the fact that Kodak's allegations of corruption raised "serious doubts" as to the adequacy of Bolivia as a forum, "[the] case [came] down to the [full] deference being given to [Kodak's] choice of forum" as a domestic plaintiff. *See* 978 F. Supp. at 1087. Indeed, ordinarily there is a "strong presumption in favor of the plaintiff's choice of forum" and plaintiff's choice "should rarely be disturbed." *Piper*, 454 U.S. at 241. That presumption, however, "applies with less force when the plaintiff or real parties in interest are foreign." *Id.* at 255. Courts give foreign plaintiffs less deference not because of "xenophobia, but merely [out of] a reluctance to assume that the choice is a convenient one." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 179 (3d Cir. 1991) (*Lacey II*)(citing *Lony v. E.I. Du Pont de Nemours & Co.*, 886 F.2d 628, 634 (3d Cir. 1989)). This reluctance "can readily be overcome by a strong showing of convenience" by the plaintiff. *Id.*

Despite being foreign citizens, Plaintiffs argue that their forum choice is due full deference because 1) a United States-Peru treaty provides for national access to U.S. courts for Peruvians, and 2) the convenience of the United States is established by the problems with Peru discussed above.

I am not persuaded. As to the first point, there is binding precedent to the contrary. In *Kisano Trade & Invest Limited v. Lemster*, the Third Circuit specifically rejected an argument that a treaty with Israel providing Israeli citizens access to United States courts required greater deference to an Israeli citizen's choice of forum. 737 F.3d at 875 (3d Cir. 2013) (citing 14D Charles Alan Wright et al., Federal Practice and Procedure § 3828.2 (3d ed. 2007) ("[I]n practice, federal courts generally hold that [treaties promising equal access to courts] do not

entitle foreign plaintiffs to the same deference as United States citizens.")). The treaty here is similar, and does not entitle Plaintiffs to full deference on their choice of forum.

As to Plaintiffs' remaining points, I address two of their three concerns by predicating dismissal on certain conditions. As to jurisdiction in Peru, dismissal here will be predicted upon a Peruvian court accepting it. As to enforceability, I will make dismissal here contingent upon Defendants' stipulation that the judicial system in Peru qualifies as legally adequate for purposes of applying Delaware's standards for the recognition of foreign-country judgments. *See* 10 Del. Code. § 4803(b). As to the likelihood of a fair trial in Peru, although concerns exist, as set forth above, under the totality of the circumstances, I am not persuaded that Plaintiffs' fears of unfair treatment entitle them to additional deference as foreign Plaintiffs. I therefore afford them less than full deference.

C. Balance of Private and Public Interests

Having concluded that Peru is an adequate alternative forum and assessed the level of deference to Plaintiffs' choice of forum, I move to the final step of the analysis, which requires that I examine the relevant private and public interests. Defendants' burden here is to show that the balance of these factors "tips decidedly in favor of trial in the foreign forum," outweighing the deference owed to Plaintiffs' chosen forum. *See Lacey II*, 932 F.2d at 180.

1) Private Interest Factors Weigh Heavily in Favor of Peru

The relevant private interest factors are set forth in *Gilbert*:

> [1] the relative ease of access to sources of proof; [2] availability of compulsory process for attendance of unwilling witnesses; [3] the cost obtaining attendance of willing witnesses; [4] the possibility of a view of the premises, if appropriate to the action; and [5] all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gilbert, 330 U.S. at 508.

I conclude that these factors tilt decidedly in favor of Peru. As to the first factor, Peru is where much of the alleged conduct and all of the injuries took place, where most of the relevant witnesses—the Chaupes, Yanacocha, PNP, and Securitas—are all located, and where most of the documentary and physical evidence is located. As to the second factor, compulsory process is not available for some of these witnesses, including Securitas and the PNP. As to the third, given how many witnesses are located in Peru and how few are in the United States, the costs of obtaining attendance would be significant in Delaware when compared to trial in Peru. Regarding the fourth factor, though not absolutely necessary given modern technology, viewing the premises might be appropriate in this action, given the many allegations about what was done to and around the land. As to the final, catch-all factor, Defendants identify three salient points: (i) they will not be able to implead other potentially responsible parties, such as Securitas or PNP, since those parties do not have sufficient contacts with Delaware, (ii) translators for all the witnesses and documents will be costly, and (iii) there will be challenges to enforcing a United States judgment in Peru, similar to the issues regarding the enforceability of a Peruvian judgment in the United States.

Plaintiffs contend otherwise, advancing eight separate arguments, six of which concern the practical advantages of trying this case in Delaware, and the final two concerning legal challenges that may arise if trial is in Peru. Overall, these arguments are predicated on the notion that this case is likely to center on the conduct of Newmont executives in the United States. By framing the issue in that manner, Plaintiffs invite me to make a determination now as to the ultimate focus of this case. But that invitation reflects a misapprehension of the extent of my inquiry at this stage of the litigation, where "no discovery has taken place," and no answer has been filed. *See Lacey II*, 932 F.2d at 181. Indeed, I can, at most, "delineate the likely contours

of the case," but "cannot . . . determine what the ultimate focus of the trial will be." *Id.* And even if I could, the extensive evidence provided on this Motion and, more importantly, on Plaintiffs' own Motion for Preliminary Injunction, has focused almost exclusively on the events that took place in Peru, undercutting their argument that trial or discovery will feature Defendants' corporate conduct in this country more prominently.

As to the arguments themselves, Plaintiffs contend that there are key corporate witnesses in the U.S., and that Defendants overstate the costs of obtaining witnesses and translators, and the need to see Tragadero Grande. But because an overwhelming majority of the evidence and relevant witnesses appear to be in Peru, along with potential parties, I remain convinced that the private interests weigh heavily in favor of trying this case in Peru. Again, that conviction is bolstered by the fact that, thus far, much of the parties' factual disputes have centered on events in Peru.

The result is the same for Plaintiffs' legal concern about the enforceability of a Peruvian judgment in Delaware. Here, in an effort to make Delaware the center of the case, Plaintiffs simply ignore the reality of the injunctive relief they seek, which is specific protection from the actions of entities in Peru. As discussed above, given this aspect of the case, local administration is preferable, and enforceability of any judgement here is a concern I can effectively address.

The Plaintiffs' other legal challenges warrant a different response. First, they raise the possibility that Peruvian evidentiary rules could limit the use of foreign evidence. Second, they identify potential obstacles to proving their case, because the testimony of family members is uniformly deemed unreliable under Peruvian law. The former concern can be addressed by including in my dismissal order the condition that, if Plaintiffs seek the testimony of Defendants' representatives, Defendants may not object even if grounds for objection exist under Peruvian

law. The latter concern, however, deals with the specific rules concerning testimony by Peruvian citizens. I am not prepared as a judge sitting in another nation to conclude that a single such rule renders an entire court system inadequate, or to attach a condition presumptuously imposing American evidentiary rules on a foreign court.

2) Public Interest Factors Weigh Heavily in Favor of Peru

As to the public interest factors, I am likewise persuaded that those weigh heavily in favor of trial in Peru. *Gilbert* identified the relevant factors here as:

> "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach . . . . There is a local interest in having localized controversies decided at home."

330 U.S. at 508–09. Here, Defendants point to the alleged torts occurring in Peru, the Peruvian government's efforts to address this dispute thus far, and the case before the Peruvian judiciary concerning the underlying land dispute, to argue that Peru has an overwhelming interest in this matter, and Delaware virtually none in comparison. Further, Defendants argue that jurors here should not be burdened, especially since Peruvian law will likely govern or at least play a significant role. Finally, they contend that the congestion existing in Peruvian courts should not weigh heavily here, both in light of controlling precedent and because as a result of vacant judgeships this court is not without its own challenges. I agree. This case would pose administrative difficulties,[13] not the least of which is the likelihood that Peruvian law would

[13] Plaintiffs' argument that the difficulties posed by the vacancies on this court "pale[] in comparison" to those affecting Peruvian courts may be well-founded, but short of implying a burden of the kind acknowledged in *Bhatnagar*, those difficulties do not carry dispositive weight.

govern many, if not all, of Plaintiffs' claims. And although I would not characterize Delaware's interest as "virtually none," it necessarily carries less weight than the interest of Peru.[14]

To determine this dispute's connection to Plaintiffs' preferred forum, I "consider the locus of the alleged culpable conduct, *often a disputed issue*, and the connection of that conduct" to Delaware. *See Lacey I*, 862 F.2d at 48 (citation omitted) (emphasis added). I emphasize "often a disputed issue" because that is precisely the case here: in Plaintiffs' view, the locus of the alleged culpable conduct is Delaware, where Defendants are incorporated, oversee the conduct of Yanacocha, knew of the alleged tortious conduct, and failed to put an end to it. Meanwhile, Defendants argue that the alleged culpable conduct took place in Peru, for the conduct at issue here is the alleged tortious conduct of Yanacocha's security personnel in Peru, more so than anything Defendants did or failed to do at the corporate level. As previously stated, Plaintiffs' own submissions underscore the degree to which Peru is at the center of this case. Further, Peru has demonstrated significant interest in this matter. *See* Compl. ¶¶ 60, 350–51. In contrast, Delaware's connection to this case is remote, especially since, even accepting that the alleged corporate conduct plays an equally prominent role, that conduct likely took place in Colorado, where Defendant is headquartered, as opposed to Delaware. *See* Hudgens Decl. ¶¶ 2–5 ("None of [Newmont's] operations, employees, or records are located in Delaware."). Thus, separated from both Peru and Colorado by at least a thousand miles, Delaware can hardly be considered the locus of the alleged culpable conduct. *See Eurofins*, 623 F.3d at 163 ("[T]hough

[14] The legislative findings that accompanied the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1, make clear that maintaining international confidence in the integrity of American business is in the national interest of the United States. The specter of disproportionate corporate influence raised by Plaintiffs here was also addressed by regulations promulgated by the Securities Exchange Commission under Section 1504 of the Dodd-Frank Wall Street Reform and Protection Act, 15 U.S.C. § 78m(q), requiring that companies that extract minerals disclose publicly any payments made to governments. But those reporting requirements were eliminated in the first legislation signed during the Trump Administration. Disclosure of Payments by Resource Extraction Issuers, Pub. L. No. 115-4, 131 Stat. 9 (Feb. 14, 2017). Suffice it to say that the absence of such a reporting requirement is felt in cases such as this.

Delaware has a significant interest in actively overseeing the conduct of those owing fiduciary duties to the shareholders of Delaware corporations, that interest is . . . insufficient to outweigh the locus of the alleged culpable conduct in this case.")

As to the difficulties posed by governing law in this case, *Piper* instructs that FNC "is designed in part to help courts avoid . . . complex exercises in comparative law." *See* 454 U.S. at 251. Thus, "where the court would be required to untangle problems in conflict of laws, and in law foreign to itself," the public interest factors point towards dismissal. *Id.* Here, both parties agree that, as a federal judge sitting in diversity in Delaware, I am to apply Delaware's choice of law rules to any dispute regarding applicable substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Delaware has adopted the Restatement (Second) of Conflicts, pursuant to which Defendants present a compelling case that Peruvian law would govern many of the claims here. *See* Defs.' FNC Mot. 20 (citing Restatement (Second) of Conflicts § 145(2) cmt. e ("When the injury occurred in a single, clearly ascertainable state and when the conduct which caused the injury also occurred there, that state will usually be the state of the applicable law with respect to most issues involving the tort.")). Their analysis is even more compelling in light of the Delaware Supreme Court's ruling in *Bell Helicopter Textron, Incorporated v. Arteaga*, 113 A.3d 1045, 1053 (Del. 2015), which held that in tort actions, the local law of the state of injury is presumed to apply if the plaintiff has "significant contact with the site other than the accident itself." There, the fact that a foreign Plaintiff resided in the forum where the injury occurred was held to meet the "significant contact" requirement, and the law of that forum, Mexico, was applied. *Id.* (citing § 145 cmt. f, which states that "when [the] conduct and injury occur in different states . . . the local law of the state where the injury occurred is most

likely to be applied when the decedent had a settled relationship to that state, either because he was domiciled or resided there or because he did business there").

Plaintiffs attempt to forestall such a conclusion by arguing that Defendants failed to identify a conflict between Peruvian and Delaware laws. But the possessory defense discussed above is one such conflict, and central to this case. Moreover, from a review of the submissions of the parties' legal experts, it is readily apparent that there will be multiple contested issues of Peruvian law.

On balance, Defendants have met their burden of showing that the private and public interest factors weigh heavily in favor of this case being tried in Peru, and outweigh the reduced deference owed to Plaintiffs' forum choice.

IV. Conclusion

Defendants' FNC motion will therefore be granted, subject to the conditions set forth throughout this Memorandum and included in the accompanying order. Such dismissal will be without prejudice, allowing Plaintiffs to re-invoke the jurisdiction of this Court if the conditions of dismissal are not met.

/s/ Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, *et al.*	:	
Plaintiffs,	:	
	:	
v.	:	**Civil Action**
	:	**No. 17-1315**
	:	
NEWMONT MINING	:	
CORPORATION, *et al.*,	:	
Defendants.	:	

ORDER

This 11th day of April, 2018, it is hereby **ORDERED** that Defendants' Motion to Dismiss on the basis of *forum non conveniens,* (ECF No. 14), is **GRANTED**, subject to the following conditions:

1) Defendants in this action must submit to the jurisdiction of the appropriate court in Peru, and that Court must accept jurisdiction;
2) Defendants must stipulate that any judgment entered in Peru qualifies as legally adequate under Delaware law, including 10 Del. Code. § 4803(b);
3) Defendants may not directly, or indirectly through their subsidiaries and affiliates in Peru, raise objection to any of Defendants' officers or employees testifying or providing evidence relevant to the claims asserted by Plaintiffs, whether such evidence is sought here or in Peru.

This dismissal is without prejudice.

Defendants' Motion for Protective Order, (ECF No. 70), is **DENIED** as **moot.**

Plaintiffs' Motion for Preliminary Injunction (ECF No. 26) is **DENIED,** based solely upon the Court's decision to transfer this action. Such denial is not, and should not be construed as, a substantive decision as to the merits of the Motion.

/s/ Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, *et al.*	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action
	:	No. 17-1315
	:	
NEWMONT MINING	:	
CORPORATION, *et al.*	:	
Defendants.	:	

ORDER

This 30th day of January 2018, upon consideration of Defendants' Motion for Protective Order (ECF No. 70), it is hereby **ORDERED** that Plaintiffs shall not seek discovery with respect to Defendants' Motion to Dismiss for Improper Venue (ECF Nos. 14, 15) prior to the February 8, 2018 oral argument (*See* ECF No. 64). The Court will determine the need for discovery, if any, at the time of argument on the Motion to Dismiss.

/s/ Gerald Austin McHugh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

MÁXIMA ACUÑA-ATALAYA, ET AL.	:	
	:	
v.	:	**CIVIL ACTION NO. 17-1315**
	:	
NEWMONT MINING CORPORATION, ET AL.	:	

ORDER

This 12th day of February, 2018, it is hereby **ORDERED** that resolution of Defendants' Motion for Protective Order, (ECF Doc. 70), shall be deferred until the Court rules upon Defendants' Motion to Dismiss. In the interim, discovery is **STAYED** pending a further ruling from the Court.

/s/ Gerald Austin McHugh
United States District Judge

NOTICE OF APPEAL
TO
U.S. COURT OF APPEALS, THIRD CIRCUIT

U.S. District Court for the District of Delaware

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

Plaintiffs,

v.

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

Defendants

CIRCUIT COURT DOCKET NUMBER: _____

DISTRICT COURT DOCKET NUMBER: 17-1315-GAM

DISTRICT COURT JUDGE: GERALD AUSTIN MCHUGH

Notice is hereby given that Plaintiffs Máxima Acuña-Atalaya, Daniel Chaupe-Acuña, Jilda Chaupe-Acuña, Carlos Chaupe-Acuña, Ysidora Chaupe-Acuña, Elias Chavez-Rodriguez, and Maribel Hil-Briones in the above named case, hereby appeal to the United States Court of Appeals for the Third Circuit from an order and an accompanying memorandum granting dismissal on the basis of *forum non conveniens*, D.I. 127 and 128, entered in this action on the 10th day of March, 2020, and from all prior decisions or orders from the district court in this case, including D.I. 92 and 93.

Dated: April 8, 2020

/*s*/Misty A. Seemans
Misty A. Seemans, DE Bar # 5975
O.P.D. (Pro Bono; cooperating attorney with EarthRights International)

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