IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

REPLY BRIEF OF DEFENDANTS NEWMONT MINING CORPORATION, NEWMONT SECOND CAPITAL CORPORATION, NEWMONT USA LIMITED, AND NEWMONT PERU LIMITED IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT ON THE GROUNDS OF *FORUM NON CONVENIENS*

Of Counsel:

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

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

Dated: December 11, 2017

Counsel for Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

I. INTRODUCTION

Defendants' Motion to Dismiss on the Grounds of *Forum Non Conveniens* ("*FNC* Motion") set forth the applicable standards and explained why Peru is a far more convenient and appropriate forum. Plaintiffs' Opposition fails to address Defendants' arguments; misstates the applicable law and standards; relies on inadmissible evidence;[1] and fails to come to terms with the fact that this case is about a dispute between Peruvians in Peru where multiple parallel cases are pending. Plaintiffs have not refuted that: (1) Peru is an adequate alternative forum, (2) Plaintiffs' forum choice deserves a low degree of deference, and (3) the private and public interest factors favor dismissal. Thus, the Complaint should be dismissed on *FNC* grounds.

II. ARGUMENT

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

Despite Plaintiffs' claims, there is no evidence of any "abuse" in this case (*see* D.I. 37 at 12-15), and it makes little sense to spend limited judicial resources deciding the PI Motion if the case will be tried in another forum (*see id.* at 11).[2] *Republic of Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988) (*en banc*), is not to the contrary. There, the court simply held that the district court did not "abuse its discretion" in granting a preliminary injunction before ruling on the *FNC* motion on "the present record," where an injunction was deemed necessary to prevent defendants "from dissipating assets in order to preserve the possibility of equitable remedies." *Id.* at 1364. Here, Plaintiffs' proposed injunction would not preserve the status quo; it would allow Plaintiffs to further expand their illegal trespasses. D.I. 37 at 19-20.

B. Plaintiffs Misstate the Applicable Burden

Plaintiffs seek to erect a far higher burden than what the law requires. While Defendants bear the burden "at each stage in the analysis," *Delta Air Lines, Inc. v. Chimet, S.p.A.*, 619 F.3d

---

[1] *See* Defendants' Objections to Evidence Submitted by Plaintiffs in Opposition to Defendants' *FNC* Motion ("Objections"), filed concurrently herewith.

[2] The Opposition's false allegations of alleged abuse are addressed in Defendants' Opposition to the PI Motion. *See* D.I. 37 at 2-10, 14-17.

288, 295 (3d Cir. 2010), none of the cases Plaintiffs cite characterize the overarching burden as "heavy." D.I. 43 at 2, 5. District courts in the Third Circuit have often granted *FNC* motions after finding that burden satisfied, and those decisions have been affirmed on appeal.[3]

Attempting to further increase the burden, Plaintiffs suggest that this Court should apply Delaware *FNC* law which, they argue, requires a showing of "overwhelming hardship." D.I. 43 at 11-12. Although the Third Circuit has yet to decide whether state or federal *FNC* law applies in a diversity case, the "vast majority of the other federal circuit courts of appeal" that have addressed the issue have correctly "concluded that federal law" applies. *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1305 & n.8 (11th Cir. 2002) (citing and agreeing with cases from the First, Fifth, Ninth, and Tenth Circuits). The only case Plaintiffs cite to the contrary is a Second Circuit decision from 1945, when the *FNC* doctrine "was not fully crystallized" (*Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 (1981)), and that is "unlikely [to] still [be] good law" (*Esfeld*, 289 F.3d at 1305, 1315 n.8).[4] Regardless, Defendants prevail under either standard.

C. An Adequate Alternative Forum Is Available in Peru

1. Defendants are Subject to Jurisdiction in Peru

Despite the offer to stipulate to jurisdiction, Plaintiffs claim that Defendants are not subject to jurisdiction in Peru. D.I. 43 at 6-7. They completely ignore the declaration of Defendants' expert on Peruvian law (Mr. Freyre) attesting that, under the Peruvian Civil Code, courts have authority to exercise subject matter jurisdiction over cases with foreign defendants and do so where, as here, there is a "reasonable factual proximity between the relationship and

---

[3] *See, e.g., Kisano Trade & Invest. Ltd. v. Lemster*, 737 F.3d 869, 872 (3d Cir. 2013); *Delta Air Lines*, 619 F.3d at 291; *Windt v. Qwest Communs. Int'l, Inc.*, 529 F.3d 183, 186 (3d Cir. 2008); *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1028 (3d Cir. 1980).

[4] If the Court is inclined to consider applying state law, Defendants would like to brief the issue further. Among other things, Plaintiffs' cursory discussion of Delaware law is incomplete. *See Martinez v. E.I. DuPont de Nemours and Co., Inc.*, 86 A.3d 1102, 1111 (2014) (clarifying Delaware *FNC* law and recognizing "the reality that plaintiffs who are not residents of Delaware, whose injuries did not take place in Delaware, and whose claims are not governed by Delaware law have a less substantial interest in having their claims adjudicated in Delaware").

the forum," such as where the alleged tortious acts and the results of the alleged harm occur in Peru. D.I. 18 at 3-4; *see also* Supplemental Affidavit of Mr. Freyre, filed concurrently herewith ("Supp. Freyre Aff."), ¶¶ 2-9. Instead, they rely on Mr. Ruiz's declaration, which refers to the same Article of the Civil Code but ignores its clear language: jurisdiction exists if alleged tortious actions *or* the *results* of those actions took place in Peru. D.I. 43-1 at 304-05, ¶¶ 5-7.

Mr. Ruiz's claim that a foreign defendant may not be able to submit to jurisdiction in Peruvian courts (*id.* at 305-08, ¶¶ 8-14) ignores the express provisions of Peruvian law. The *very same* Article of the Peruvian Civil Code provides that Peruvian courts can exercise jurisdiction "when the parties expressly or tacitly submit to their jurisdiction." Supp. Freyre Aff., ¶ 10. The clear language of Peruvian law establishes that Defendants can be subject to jurisdiction in Peru.

2. Peruvian Courts Provide Plaintiffs With a Fair and Impartial Forum

Plaintiffs do not deny that their claims are actionable in Peru, and they admit that Peruvian courts are generally adequate.[5] D.I. 43 at 7-9. Plaintiffs' claims of inadequacy turn almost entirely[6] on bare assertions, unsupported by any admissible evidence (*see* Objections) that

---

[5] Plaintiffs' grudging admission is correct. The Third Circuit has made clear that "[a]n alternative forum is generally adequate if the plaintiff's claim is cognizable in the forum's courts." *Wilmot v. Marriott Hurghada Mgmt.*, 2017 U.S. App. LEXIS 19990, at *6-*7 (3d Cir. Oct. 13, 2017)*; Dawson v. Compagnie Des Bauxites De Guinee*, 593 F. Supp. 20, 24-25 (D. Del. 1984) (foreign forum was adequate and "the fact that the civil legal system of Guinea is not a duplicate of that which exists in Delaware [was] no reason to find that dismissal [was] inappropriate"). As Plaintiffs' claims are cognizable in Peru (indeed, some are pending in Peru right now), the forum is adequate. Moreover, while corruption in Peruvian courts may occur, it is not prevalent or even common. Supp. Freyre Aff. ¶ 38 ("As a practicing lawyer who has 24 years of experience in litigating cases in Peru, cases in which the rulings have not taken into account who the parties are, but instead has focused on the facts and the law, I refuse to accept that insinuation [that Plaintiffs cannot obtain justice in Peru].") And, as explained in the *FNC* Motion, generalized claims of corruption against foreign judiciaries are not favored. D.I. 15 at 8.

[6] Plaintiffs' argument that "excessive delay" in the Peruvian courts counsels against granting the *FNC* Motion is easily dismissed. The case cited by Plaintiffs held that a delay of *a quarter of a century* to resolve an Indian legal dispute rendered that forum inadequate. *See Bhatnagar by Bhatnagar v. Surrendra Overseas*, 52 F.3d 1220, 1228 (3d Cir. 1995). Plaintiffs do not (and cannot) allege that the Peruvian courts experience anywhere near such delay. And, the *Bhatnagar* court noted that "[o]ur own courts suffer from delay, as does any other system that attempts to accord some modicum of process." *Id*. at 1227. Peru, like about half of the

Newmont's alleged agents purportedly engaged in "bribery" and "corrupt influence." D.I. 43 at 7-9. Plaintiffs' unsupported claims are not a basis for finding the Peruvian courts inadequate.[7]

Rather, the history of the proceedings in Peru illustrate that Plaintiffs have full and fair access to the legal system. Plaintiffs have had no difficulty bringing claims and have obtained favorable judgments against Minera Yanacocha ("MY") in Peru. D.I. 16 at ¶¶ 13-18; D.I. 38-1 at 8-10, ¶¶ 17-26; *see also* D.I. 15 at 18 (detailing government support provided to Plaintiffs). It is hard to see how a judiciary that recently ruled *in favor* of Plaintiffs on claims directly related to this case is somehow corruptly prejudiced *against* them. Such evidence illustrates that the alternate forum is adequate and dismissal is appropriate. *See Tresoro Mining Corp. v. Jivraj*, 2013 U.S. Dist. LEXIS 194285, at *4-*6 (W.D. Wa. July 29, 2013) (dismissal on *FNC* grounds where plaintiffs utilized Canada's courts, including for issues related to the pending litigation).[8]

D. The Foreign Plaintiffs' Choice of Forum Does Not Merit More Deference

A foreign plaintiff's choice to bring suit in the U.S. is afforded a low degree of deference. D.I. 15 at 10. Plaintiffs do not disagree as a general matter, but claim a different standard governs here because of (i) a U.S.-Peru treaty and (ii) the purported convenience of litigating in the U.S. D.I. 43 at 9-10. Both contentions are wrong.

---

world, is a civil law country. Supp. Freyre Aff. ¶ 38. While the procedures may seem foreign to common law practitioners, if the Court accepts Plaintiffs' position, it is hard to imagine a case that any civil law court could handle. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002) ("While Ecuador's judicial procedures may be less streamlined than ours, that does not make Ecuador's procedures ineffective or render Ecuador inadequate as an alternative forum.").

[7] Plaintiffs' cases are distinguishable. In *Daventree*, the foreign government, *which was itself a party to the litigation*, was found to exert too much control over the country's courts. *Daventree Ltd. v. Republic of Azer.*, 349 F. Supp. 2d 736, 756 (S.D.N.Y. Dec. 27, 2004). And in *Eastman Kodak*, the plaintiffs presented admissible evidence of actual corruption in the matter—extorting a commercial settlement from plaintiffs by causing one individual to be imprisoned in "nightmarish" conditions and four others to be convicted and sentenced in absentia. *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085-87 (S.D. Fla. 1997). Plaintiffs cannot reasonably allege (let alone offer admissible evidence of) anything close to these "rare" conditions here.

[8] The claim that the *Castillo v. Newmont* matter was settled to avoid answering questions about alleged corruption is baseless. The *Castillo* appellate court remanded because the trial court failed to fully evaluate certain *FNC* factors. D.I. 43-1 at 159-61. The parties' decision to settle indicates only that they wished to avoid further, costly litigation in either forum.

Plaintiffs' first argument (D.I. 43 at 9) is inconsistent with controlling Third Circuit law they neglect to cite. In *Kisano Trade & Invest. Ltd.*, the plaintiffs argued that a comparable "equal access" provision in a U.S.-Israel treaty required the court to give the foreign plaintiffs the same level of deference as domestic plaintiffs. 737 F.3d at 874-75. In no uncertain terms, the Third Circuit rejected that argument and held that "the equal access provision in the United States-Israel treaty does not change our analysis with respect to the degree of deference a district court must afford a foreign plaintiff's choice of forum." *Id.* at 875. The same is true here.[9]

Plaintiffs' second argument understates the showing required to increase the level of deference on convenience grounds. Only a "*strong* showing of convenience" warrants additional deference. *Windt v. Qwest Communs. Int'l, Inc.*, 529 F.3d 183, 190 (3d Cir. 2008). The *Windt* plaintiffs did not meet this standard because they had no connection to the U.S. forum, the evidence and conduct in question were not located there, and the parties were already engaged in proceedings in the foreign forum. *Id.* at 191. Similarly here, Plaintiffs have no connection to Delaware, Peru is the location of the evidence and conduct in question, and multiple parallel proceedings are pending in Peru. The *only* connection to the forum is Defendants' place of incorporation, which casts serious doubt on any claim that litigation in Delaware is "convenient"—let alone the "strong showing" required. *See* Section II.F.3 (discussing a state's minimal interest where a defendant's incorporation is the only tie to the forum).[10]

Further, Plaintiffs' serious and unsupported claims about Defendants' alleged motives should be disregarded. Multiple parallel proceedings are already pending in Peru, and

---

[9] *Windt v. Qwest Communs. Int'l, Inc.*, 544 F. Supp. 2d 409 (D.N.J. 2008), decided five years prior, is not to the contrary. The *Windt* court dismissed the case on *FNC* grounds, and when the foreign plaintiffs refiled in another U.S. district court, that case too was dismissed on *FNC* grounds. *Meijer v. Qwest Communs. Int'l, Inc.*, 2010 U.S. Dist. LEXIS 32122, at *33 (D. Colo. Mar. 31, 2010). Like the Third Circuit, the *Meijer* court refused to give more deference to the choice of forum based on a treaty providing for "national treatment." *Id.* at *16-*17.

[10] Plaintiffs' reliance on personal jurisdiction cases (D.I. 43 at 10) is misplaced. Defendants have not challenged the Court's jurisdiction, and the mere authority to hear a case does not counsel against a *FNC* dismissal. To the extent Plaintiffs suggest that a case cannot be dismissed on *FNC* grounds if personal jurisdiction exists, they are, of course, mistaken.

Defendants have requested a dismissal without prejudice. Defendants have not filed the *FNC* Motion to skirt responsibility. They are not seeking "unending litigation." Nor would they fail to comply with any entered judgment. The decision to refile these claims in a Peruvian court is fully within *Plaintiffs'* control.[11] Indeed, Plaintiffs have already brought claims against MY in Peru. D.I. 16 at ¶¶ 13-18; D.I. 38-1 at 8-10, ¶¶ 17-26.

E. The Balance of Private Interest Factors Favors Dismissal

The private interest factors support dismissal, and Plaintiffs' claims to the contrary fail.

1. The Relevant Evidence Is in Peru, Not Delaware. Plaintiffs' claim that evidence exists in the U.S. related to "Conga activities" and corporate structure/policy (D.I. 43 at 12-13) ignores the fact that any such evidence is in *Colorado*, not Delaware. D.I. 17 at ¶¶ 2-5. Plus, general evidence regarding "Conga activities" is irrelevant, and corporate structure/policy evidence is relevant only to the agency analysis. Plaintiffs ignore the most relevant evidence, which they need to establish tortious conduct and ownership of the disputed land—nearly all of which is in Peru and in Spanish. Indeed, many documents have already required translation, even at this very early stage. *See, e.g.*, D.I. 27; D.I. 38 (describing translated exhibits).

2. Critical Witnesses Cannot Be Compelled to Provide Testimony. Plaintiffs do not dispute the availability of witnesses in Peru. Nor do they address the fact that crucial witnesses will not be available to testify in the U.S., including employees of Securitas and PNP, doctors, and individuals with knowledge of the dispute between Plaintiffs and MY. *See* D.I. 15 at 13.[12]

---

[11] In arguing to the contrary, Plaintiffs rely on an article which refers to small, "informal" surveys from the early 1990s. E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals,* 13 Law & Bus. Rev. Am. 11, 25 (2007). And in *Chavez v. Dole Food Co.*, 836 F.3d 205 (3d Cir. 2016), the Texas court revived the case when plaintiffs were unable to bring their claims in the foreign forum. *Id.* at 212. The alleged delay was then caused by the case moving within various U.S. courts, as well as disputes over class certification, statute of limitations, and jurisdiction. *Id.* at 212-23.

[12] Plaintiffs claim that Peruvian law permits U.S. courts to compel witnesses and documents from Peru. D.I. 43 at 14. But, Plaintiffs' only citation describes a process by which *Peruvian* courts can request evidence located outside of Peru. D.I. 43-1 at 256-57, ¶ 38.

Contrary to Plaintiffs' claim (D.I. 43 at 12-14), parties to Peruvian proceedings must produce evidence in their custody or control, even if located in the U.S. Supp. Freyre Aff. ¶ 27. Thus, this factor turns on the availability of third party testimony and evidence, which is largely located in Peru. And, Plaintiffs' proposed alternatives—taking depositions in Peru and subpoenaing U.S. citizens abroad (D.I. 43 at 14-15)—are wholly insufficient. The relevant witnesses are not U.S. citizens, and a deposition is no substitute for live testimony. *See, e.g., Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1347 (Fed. Cir. 2000) (describing live testimony's "powerful advantage" in allowing one "to observe demeanor, to hear the witnesses rebut one another's testimony in response to questioning . . ., and thus to determine credibility").

Defendants also have met their burden by showing that Delaware cannot compel relevant witnesses (*see* D.I. 15 at 13-14), and they need not produce a witness list or identify specific unavailable evidence at this stage. *Miller v. Boston Sci. Corp.*, 380 F. Supp. 2d 443, 452 (D.N.J. 2005) (As "this litigation is at an early stage and Defendant has yet to even depose Plaintiffs . . . [i]t would be premature for this Court to require Defendant to establish through affidavits that its potential foreign witnesses are either unwilling or unable to appear here, and thus it is not Defendant's burden to do so.") The Supreme Court has also affirmed that "[s]uch detail is not necessary" and defendants need not "describe with specificity the evidence they would not be able to obtain if trial were held in the [U.S.]." *Piper Aircraft Co.*, 454 U.S. at 258.

3. Obtaining Testimony of Willing Witnesses Would Be Expensive. Plaintiffs do not dispute the costs of obtaining testimony in the U.S. from the many crucial Peruvian witnesses. Video/telephonic depositions are a poor substitute. *See* Section II.E.2. And, Plaintiffs' claim that it will be equally expensive to bring U.S. witnesses to Peru (D.I. 43 at 15) ignores the fact that the U.S. witnesses are relevant only to corporate structure/policy. If needed at all, document requests or depositions could be used, and it is far less costly to transport a few employees to Peru than to transport many rural Peruvians to the U.S.

4. Access to the Peru Property Would Be Appropriate. Plaintiffs do not dispute that the disputed land and the location of all of the alleged tortious conduct is in Peru. Rather,

Plaintiffs merely state that the Court does not need access to the site. *Id.* at 15. But, the question is whether a view of the premises would be "appropriate," not "necessary." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Here, viewing the location of the alleged tortious conduct and disputed land is at the very least "appropriate."

5. Other Practical Problems Exist in Delaware, Not Peru. Plaintiffs overstate the problems of litigating in Peru and ignore the fact that the difficulties are reciprocal. Plaintiffs claim that obtaining testimony from third party witnesses domiciled abroad is difficult in Peru (D.I. 43 at 16), but it is equally difficult in the U.S. And since most of the third party witnesses are in Peru, the practical problems are *greater* here. Plaintiffs' claim that English documents would need translation in Peru (*id.* at 15) ignores the fact that this only applies to evidence regarding corporate structure/policy and the bulk of the relevant evidence is primarily in Spanish.

Plaintiffs' arguments regarding impleading are also unconvincing. *Id.* at 16. Defendants provided sufficient evidence of their intent to implead. *See Delta Air Lines*, 619 F.3d at 300 (finding sufficient the "*stated desire* to pursue contribution claims against potentially responsible third parties" who could not be joined in the U.S.) (emphasis added). Nor is indemnification an adequate substitute. *See Piper Aircraft*, 454 U.S. at 259 ("forcing petitioners to rely on actions for indemnity or contributions would be 'burdensome'").

6. A Delaware Judgment May be Difficult to Enforce. Plaintiffs cite no evidence or law to support their claim that a Peruvian judgment would not be enforceable here. D.I. 43 at 16. And, Plaintiffs' claim that they seek only to enjoin the acts of U.S. entities or entities subject to their control is misleading.[13] D.I. 43 at 16-17. Plaintiffs are Peruvians seeking to alter the alleged activities of Peruvian entities in Peru. It is much harder to determine compliance with an injunction when distant activity is involved.

7. Obtaining a Fair Trial Will Be More Difficult in Delaware. Plaintiffs do not address Defendants' description of the obstacles to a fair trial in Delaware and, instead, simply

[13] Comity concerns are also triggered based on the parallel proceedings relating to the disputed land. *See* D.I. 37 at 17.

repeat their baseless and unfounded concerns about the ability to obtain a fair trial in Peru. As described above, these claims do not change the analysis, which favors dismissal.

F. The Public Interest Factors Weigh in Favor of Dismissal

The public factors support dismissal, and Plaintiffs' claims do not suggest otherwise.

1. Administrative Difficulties Favor a Peruvian Forum. Plaintiffs' claim that congestion is worse in Peru (D.I. 43 at 18) is not sufficient justification to keep a case more properly tried in Peru. *See* D.I. 15 at 17. And, while Plaintiffs complain that Defendants' source regarding the relatively less congested Peruvian courts is "dated," the support offered by Plaintiffs that Delaware has a "light docket" is older still. *See* D.I. 43 at 18-19.

2. Delaware Jurors Should Not Be Burdened With a Peruvian Matter. Plaintiffs' suggestion that this case concerns only "the conduct of [ ] Delaware corporations" (*id.* at 18) ignores reality. This case is about a land dispute in Peru between Peruvians. There is virtually no connection to Delaware, and Delaware citizens should not be burdened by a Peruvian matter.

3. Peru's Interest Is Overwhelmingly Greater Than Delaware's Interest. Peru's interest in resolving a dispute concerning land in Peru and alleged actions by Peruvians is obviously strong. And, Peru's response has been anything but "anemic." *Id.* at 17-18. Multiple cases are pending in Peruvian courts, prosecutors have reviewed and investigated numerous complaints, and the judiciary has ruled in Plaintiffs' favor more than once. D.I. 16 at ¶¶ 13-18; D.I. 38-1 at 8-10, ¶¶ 17-26. There is no admissible evidence of government harassment or complacency, and such claims are belied by Plaintiffs' *own allegations* regarding the government's active investment in protecting their rights. *See* D.I. 15 at 18. And, as this Court has held, Delaware's interest in ensuring that its corporations follow the law (D.I. 43 at 17) does not transform a local Peruvian controversy into a matter with a strong connection to Delaware.[14]

---

[14] *See, e.g., Dahl*, 632 F.2d at 1032 (finding "the commitment of Delaware judicial time and resources to this case [was] not justified by any nexus Delaware has with what [was] essentially a Norwegian case" where Delaware's only connection to the case was defendant's incorporation there); *Rudisill v. Sheraton Copenhagen Corp.*, 817 F. Supp. 443, 448 (D. Del. 1993) (finding the "nexus [was] not sufficient to impose jury duty upon [Delaware] citizens" where the case

4. Peruvian Law Governs and Should Be Decided by Peruvian Courts. Plaintiffs wrongly claim that no actual conflict has been shown between Delaware and Peruvian law. *See* D.I. 43 at 19. Not so. One major conflict concerns possessory defenses under Peruvian law—a conflict described in the PI Opposition and of which Plaintiffs are well aware.[15] *See id.* As this matter involves a dispute over land in Peru and alleged conduct by Peruvians in Peru, it is hard to see how any law other than Peruvian law would apply.[16] *See* D.I. 15 at 19-20.

G. Conditions Need Not Be Applied to Dismissal

Plaintiffs conclude by requesting a number of conditions if the action is dismissed. D.I. 43 at 19-20. Notably, if imposed, these conditions would address the issues that Plaintiffs claim prevent adjudication in Peru. Although, as explained above, there is no support for Plaintiffs' position, Defendants would not oppose reasonable conditions if the Court were so inclined.

III. CONCLUSION

For the reasons above and in the *FNC* Motion, the Court should dismiss the Complaint.

---

concerned events in Denmark and the only nexus to Delaware was defendant's incorporation); *but cf. Candlewood Timber Group, LLC v. Pan Am. Energy, LLC*, 859 A.2d 989 (Del. 2004) (denying *FNC* motion under state law in case between Delaware entities regarding a drilling program by one party on the other's land in Argentina).

[15] Plaintiffs' misstatement of the proceedings currently pending in Peru does not change this analysis. D.I. 43 at 19. No Peruvian court has made a final, binding determination that Plaintiffs own any of the disputed property. D.I. 38-1 at 9-10, ¶ 24. And, Mr. Fernandez's declaration supports Defendants' position that possessory defenses are permissible and required. His opinion differs only because he does not realize (or was not told) the difference between the northern parcel, which MY has allowed Plaintiffs to possess and where no possessory defenses are exercised, and the southern parcel, where it is permissible for MY to simultaneously exercise possessory defenses and seek a court order preventing further trespasses. Supp. Freyre Aff. ¶¶ 40-45.

[16] Plaintiffs' direction that this Court "follow the Peruvian courts on [the] issue" of ownership and the use of possessory defenses supports the need to apply Peruvian law. D.I. 43 at 19. And, a Delaware law citation in Defendants' Motion to Dismiss does not compel a different result. *Id.* Defendants' motion was based on Plaintiffs' utter failure to allege facts sufficient to support a claim on behalf of M.S.C.C. under *any* law. D.I. 13 at 3. In any event, any "uncertainty regarding the application of [foreign] law is itself a factor that weighs in favor of dismissal." *See Miller*, 380 F. Supp. 2d at 456.

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Elena C. Norman

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

Of Counsel:

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

Counsel for Defendants

Dated: December 11, 2017

01:22646030.1

CERTIFICATE OF SERVICE

I, Elena C. Norman, hereby certify that on December 11, 2017, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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

Attorney for Plaintiffs

I further certify that on December 11, 2017**,** I caused the foregoing document to be served via electronic mail upon the above-listed counsel and on the following:

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

Attorneys for Plaintiffs

.

Dated: December 11, 2017

YOUNG CONAWAY STARGATT & TAYLOR, LLP

/s/ Elena C. Norman

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

Attorneys for Defendants