IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

Plaintiffs,

v.

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

Defendants

Civil Action No. 17-1315-GAM.

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

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INTRODUCTION

Defendants cannot meet their burden to prove that a court system facing a corruption crisis so severe that the nation's President recognized it has "collapsed" is an adequate forum. Their surprising suggestion that a forum can never be too corrupt to be adequate ignores their burden of proof and Third Circuit precedent. Defendants say that perhaps the biggest judicial corruption crisis in Latin America in recent memory is mostly about five bad apples in Lima, is irrelevant to this case, and is well in hand. But they cannot prove any of that; in fact, it is all nonsense.

Even if Defendants could prove Peru is a generally adequate forum, they fail to show these Plaintiffs will get a fair shake against these Defendants, given Defendants' history of improperly influencing the judiciary. As Defendants cannot meet their burden, their motion must be denied.

ARGUMENT

I. Defendants misstate the burden of proof articulated by the Third Circuit.

Plaintiffs' evidence "call[s] the adequacy of the forum into doubt." *See* CA3 Op. 7-8. Peru's courts are rife with systemic corruption, and, as this Court already recognized, Plaintiffs' evidence that they cannot receive a fair trial is "troubling" and provides "reasons to be concerned." Thus, Defendants must prove "the facts are otherwise." CA3 Op. 7-8.

Defendants try to rewrite this Court's prior opinion, claiming it held *sub silentio* either that Plaintiffs' evidence cast *no* doubt on the forum's adequacy or that Defendants showed the facts are otherwise. DSB 4. It did neither. Deeming Plaintiffs' evidence "troubling" *is* a finding that Plaintiffs raised doubt about the forum. And the prior opinion never held that Defendants proved the facts are otherwise. Instead, it asked whether *Plaintiffs* showed that a Peruvian forum was "inadequate" or "clearly unsatisfactory." DE 92 at 2, 20. Defendants say the words "inadequate" and "unsatisfactory" do not matter, DSB 4-5, but the *burden* does. On remand, *Plaintiffs* cannot be required to prove the forum's inadequacy; Defendants must prove it is adequate.

Thus, *Plaintiffs* need not convince the Court to "believe" their evidence, DSB 4; Defendants bear the burden of persuasion. CA3 Op. 7. If "the Court cannot draw a conclusive judgment" that the forum is fair, "defendants have not met their burden." *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1086-87 (S.D. Fla. 1997).[1]

Defendants cannot prove "the facts are otherwise" without proof. Courts may *only* reject allegations of "serious corruption" "without considering any evidence from the defendant" *if* they are unsubstantiated. CA3 Op. 7.[2] Even if Defendants "undermine[d] the credibility of Plaintiffs' evidence," DSB 5 – they do not – they must "also . . . counter [it] effectively with evidence of [their] own." *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1229 (3d Cir. 1995). "[D]iscredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984). Defendants "cannot establish a factual proposition upon which [they] bear[] the burden of proof by attacking the credibility of witnesses whose testimony negates the proposition." *SEC v. Amster & Co.*, 762 F. Supp. 604 (S.D.N.Y. 1991).

Last, a ruling for Plaintiffs would not "declar[e]" the forum corrupt. DSB 6. It would merely "declare" that these *Defendants* did not meet their burden to prove the forum is adequate. PSB 8; *Canadian Overseas Ores, Ltd.*, 528 F. Supp. at 1343 (denying motion because court could not *conclude* forum was adequate, without "hold[ing] as a matter of fact" forum was inadequate).

II. Defendants fail to show Peru is an adequate forum at this time.

[1] *Accord Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1343 (S.D.N.Y. 1982); *see also OOO-RM Invest v. Net Element Int'l, Inc.*, No. 14-20903-CIV, 2014 U.S. Dist. LEXIS 197010 at *8 (S.D. Fla. Nov. 3, 2014)(court hearing FNC motion must "must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff"). Defendants dispute *Eastman Kodak*'s holding that Plaintiffs' account need only be "plausible," 978 F. Supp. at 1086-87, but that is what the burden of persuasion means. Indeed, the Third Circuit's standard, CA3 Op. 7-8, comes from the holding in *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001), that *Eastman Kodak* adopted the "correct approach."

[2] *Accord Leon*, 251 F.3d at 1311 (defendants bear the "burden of *demonstrating*" there is an adequate forum; they must "*prov[e]* the 'adequacy'" of that forum.) (emphasis added).

Defendants admit that "for the most part, [they] do not take issue with" Plaintiffs' description of the corruption crisis. DSB 7; *see* PSB 4-7. Their attempts to minimize the crisis fail. This is the rare case where the risk that a litigant will not receive a fair hearing is too high to dismiss.

The crisis is far from resolved. Investigative journalists and other media, not the government, were principally responsible for exposing the corruption—despite retaliation from Congress and prosecutors. *See* Decl. of Cruz Silva del Carpio ¶¶ 1, 6, 14d, 15, 18; D.I. 108 nn.2-5; Gjullin Ex. 6. And while Defendants outline anti-corruption efforts, DSB 7, starting treatment is not proof the patient has improved. Defendants fail to refute key facts: the principal reforms are not operational, Supp. Decl. of Indacochea ¶¶ 4-18; Gjullin Ex. 7, 9; PSB 5; Silva Decl. ¶ 5, 16, reforms face strong resistance within government, Silva Decl. ¶¶ 13, 17d, 18; PSB 6; Indacochea Supp. Decl. ¶ 4, networks of corruption have metastasized throughout the judiciary, Simon Decl. ¶¶ 19, 57-66; Indacochea Supp. Decl. ¶¶ 6-9, and corruption will take years to fix. PSB 6.

Defendants argue that much of the corruption revealed is not about manipulating judicial decisions and thus does not "speak directly to whether litigants can obtain a fair hearing." DSB 8. But the revelations exposed networks of officials and powerful actors within and outside the judicial system, exchanging favors to influence judicial proceedings. Indacochea Supp. Decl. ¶ 1, 6-9.

The scandal implicated the whole of Peru's judiciary, and there are surely more revelations to come. DSB 5-6. Peru declared emergencies in four national judicial institutions, including the entire court system. PSB 4-5. Through its power to select and dismiss judges, the corrupt National Magistrates Council (NMC) exercised influence over judges and the make-up of regional courts. Indacochea Decl. ¶¶ 4, 7, 30; Indacochea Supp. Decl. ¶¶ 6-9; Silva Decl. ¶ 4. There is grave corruption in at least 14 of the 34 judicial districts. Indacochea Supp. Decl. ¶ 1, 8. And both parties' experts affirm that the list of corrupt actors is "not complete" and there are "other audios" that "involve judges, prosecutors, congressmen, [and] businessmen." D.I. 108 III.11; *see also* Indacochea

Decl. ¶¶ 4-7; Indacochea Supp. Decl. ¶¶ 4-9; Silva Decl. ¶¶ 2-5. The NMC's last five years of decisions are being evaluated, a review of unprecedented scale. Silva Decl. ¶¶ 2-3. And, there are tens of thousands of recordings yet to be investigated. Indacochea Supp. Decl. ¶ 5; Silva Decl. ¶ 2. The notion that the full scope of the corruption has been revealed is fantasy.[3] Silva Decl. ¶¶ 2, 10-11.

It is irrelevant whether the "White Collars of the Port Case" itself implicates Cajamarca judges, DSB 8; Plaintiffs provide unrefuted evidence of corruption and gross misconduct in Cajamarca courts. The Superior Court of Cajamarca requested that *13 judges* out of approximately 100 be suspended or dismissed. Indacochea Decl. ¶ 6; Silva Decl. ¶ 7c. Cajamarca had the third highest rate of requests for judge dismissals in the country in 2018, and such requests must be based on evidence of the most serious offenses. Indacochea Supp. Decl. ¶¶ 10-13; Silva Decl. ¶ 7d. In any event, the White Collars of the Port Case implicates Peru's highest court, which has already heard appeals in cases involving the parties. That the highest judicial organs are corrupt, the Peruvian judiciary has been staffed through favor-trading, and corruption networks extend to regional courts confirms the real risk that Plaintiffs will not get a fair hearing—a risk Defendants fail to neutralize.

Defendants suggest that courts can never exercise jurisdiction due solely to widespread corruption in the alternative forum, but they fail to mention that the Third Circuit indicated precisely the opposite. *See Doe v. Ritz Carlton Hotel Co.*, 666 F. App'x 180, 185 n.2 (3d Cir. 2016); PSB 10. Defendants exaggerate the rarity, and ignore the reasonableness, of a decision to exercise jurisdiction when there are substantial doubts regarding the general adequacy of an alternative forum. The relative dearth of cases addressing corruption is not surprising; many defendants do not

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[3]Although the Transparency International report in Ex. 11 does not mention "over 9,000 corruption cases," DSB n.2, a recent article Plaintiffs inadvertently omitted notes that in the last year "9,217 new cases have been filed" in the Attorney General's Anti-Corruption Office. *See* Second Gjullin Decl. Ex B. Defendants criticize reliance on newspaper articles, but their expert and the Third Circuit cite them, CA3 Op. 4 n.2; Quiroga Decl. nn. 34-5, and the evidence supports Plaintiffs' characterizations.

raise FNC where the alternative forum is clearly corrupt or otherwise inadequate.[4] Courts refuse to dismiss where foreign court systems are not generally adequate, including for reasons that if anything, reflect *more* poorly upon the foreign forum than corruption.[5] Regardless, concerns about comity do not require this Court to *disagree* with Peru's own declarations that its courts are in crisis.[6]

III. Defendants fail to show that Cajamarca courts will treat the Plaintiffs impartially in a case against these Defendants.

Faced with evidence of a pattern of irregularities, bias, and corruption in cases involving Minera Yanacocha (MY), Newmont simply denies wrongdoing. *See* DSB 12-13. But blanket denials do not overcome Plaintiffs' evidence – particularly in the context of the ongoing judicial corruption

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[4] *See, e.g.*, *Yousuf v. Samantar*, No. 1:04cv1360, 2007 U.S. Dist. LEXIS 56227, *2 (E.D. Va. Aug. 1, 2007) (Somalia); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D.Ca. 1997)(Burma).

[5] *See, e.g.*, *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 455-456 (D. Del. 1978) (finding "[s]ufficient doubt" regarding forum since "Ecuador is presently controlled by a military government" and the "powers of the judiciary are thus allegedly 'uncertain'"); *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3rd Cir. 1966) (suggesting Venezuela is an inadequate forum because its "procedural remedies" do not "comport with our concepts of fairness"); *Sablic v. Armada Shipping Aps*, 973 F. Supp. 745, 748 (S.D. Tex. 1997) (finding political and military instability, coupled with large backlog of cases, rendered Croatian courts inadequate); *Canadian Overseas Ores*, 528 F. Supp. at 1342-43 (concluding that "serious questions" about the Chilean judiciary's independence from a military junta rendered Chile inadequate); *see also Bridgeway Corp. v. Citibank*, 201 F.3d 134, 137 (2nd Cir. 2000) (affirming "Liberian judicial system was not 'a system that . . . provides impartial tribunals or procedures compatible with the requirements of due process'").

[6] None of Defendants' cases involved official statements by the foreign state that neutralize comity concerns as here, and most lacked detailed allegations of corruption like Plaintiffs'. *See, e.g., Jones v. IPX Int'l Equatorial Guinea, S.A.*, 920 F.3d 1085, 1091 (6th Cir. 2019) ("generalized allegations" did "not address nuances of [] case"); *Wilmot v. Marriott Hurghada Management, Inc.*, 712 F. App'x 200, 204 (3d Cir. 2017) ("instances of corruption" did not show "court system as a whole is corrupt"); *Harp v. Airblue Ltd.*, 879 F. Supp. 2d 1069, 1073 (C.D. Cal. 2012) (plaintiffs cited "generalized, anecdotal" evidence "not relevant to their specific claims"); *Palacios v. Coca-Cola Co.*, 757 F. Supp. 2d 347, 360 (S.D.N.Y. 2010)(no evidence of "systemic judicial breakdown"); *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 29-31 (D.D.C. 2008) (law review article and State Department report insufficient); *Esheva v. Siberia Airlines*, 499 F. Supp. 2d 493, 499-500 (S.D.N.Y. 2007) (no "detailed critique" of court system). Contrary to Defendants' claim, their cases include countries with higher Transparency International rankings than Peru (2010 Guatemala; 1998 Honduras), and one that predates the rankings (1993 Venezuela). Regardless, TI's ranking "does not deal specifically with judicial corruption." *Harp*, 879 F. Supp. 2d at 1073. Most importantly, other cases are "irrelevant" to "whether [Defendants] met its burden of proof on the issue here." *Bhatnagar*, 52 F.3d at 1224, 1229.

crisis. At best they create a dispute of fact, but that does not meet their burden. Section I. And we have seen such denials before: after Newmont conspired to improperly influence the Peruvian Supreme Court in a dispute about the Yanacocha mine, it denied wrongdoing, *see* D.I. 43-1 Ex. 6, even as tapes emerged of a Newmont representative offering to exchange favors with the head of Peru's intelligence service.[7] Now as then, its denials do not prove the facts are otherwise.

Newmont cannot square its claim that Peru's courts have improved, DSB 11, with recent revelations showing corruption is systemic and still reaches even the Supreme Court. Newmont also asks the Court to trust it does not engage in corruption anymore, because now it has policies against it. DSB 11-12. The existence of policies does not prove they are followed, nor overcome bad acts – the Foreign Corrupt Practices Act did not stop Newmont from fixing a Supreme Court case.

Indeed, Newmont does not deny evidence suggesting improper influence. It does not deny MY has provided gifts and sponsorship to Public Ministry employees, including local prosecutors, Supplemental Declaration of Mirtha Esther Vásquez ¶ 5 (filed herewith). Nor does it deny that MY contracted with companies run by the sons of prominent prosecutors. D.I. 43-1 ¶ 27. And Newmont admits MY hired as legal counsel an influential local jurist's son, who participated in cases against Plaintiffs. D.I. 111 at ¶ 10; Supp. Vásquez Decl. ¶ 8.

Defendants cannot refute that local prosecutors demonstrated bias in investigating both parties' complaints. *See* DSB 12-13.[8] Their declarant says prosecutors never rejected the Chaupes'

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[7] *See* D.I. 43-1 Ex. 5 ("the No. 3 Newmont executive at the time, Lawrence T. Kurlander, is heard offering to do a favor for Mr. Montesinos. 'Now you have a friend for life,' Mr. Kurlander tells the spy chief. 'You have a friend for life also,' Mr. Montesinos replies.")

[8] When the family complained that the company destroyed their property, the prosecutor's office failed to conduct a meaningful investigation, rescheduled inspections at the company's request without notifying the family or their counsel, and dismissed criminal complaints for lack of evidence without providing the promised opportunity to amend. Supp. Vásquez Decl. ¶¶ 3, 4. Yet the same office pursued unsubstantiated charges *against the Chaupes* that were overturned for lack of evidence, failed to include vital evidence supporting the family (such as documents establishing their interest in

evidence, D.I. 111 at ¶ 3, but his Exhibit C refutes his claim. Supp. Vásquez Decl. ¶ 2. And his denial that prosecutors denigrated the Chaupes' poverty and lack of education, D.I. 111 at ¶ 8, is belied by the hearing transcript. Supp. Vásquez Decl. ¶¶ 6, 7.

It is not enough for Newmont to show Plaintiffs have not lost *every* case in the lower courts. DSB 13. They must prove the forum is equally fair to both parties. That notion is risible.

IV. Defendants fail to show that Plaintiffs can access essential proof in Peru.

This Court must consider on remand the fact that severe limitations on Plaintiffs' ability to present essential eyewitness testimony render the forum inadequate. *Contra* DSB 14. The Third Circuit "vacated" the prior opinion. DE 96. And it asked this Court to consider the forum's adequacy, "bearing in mind the relevant burdens" of proof. CA3 Op. 8. Thus, the Court must assess whether Newmont meets its burden on this adequacy issue. PSB 14-15.[9] It does not.

The Court must "assure itself" that Plaintiffs may present essential proof. *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 174, 186, 189 (3d Cir. 1991). Plaintiffs' eyewitness testimony and their relatives' is critical. But Defendants do not dispute that Plaintiffs' family members can present evidence *only* if Defendants allow it. Nor do they dispute that, (unlike a case-by-case credibility assessment), a court can presume Plaintiffs' and their relatives' testimony is biased and reject it out of hand. PSB 15. There is thus no assurance Plaintiffs can submit key evidence.

CONCLUSION

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

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the land), and in court invoked MY's economic importance and argued the family had a propensity to commit crimes due to their socio-economic and ethnic background. Supp. Vásquez Decl. ¶¶ 6, 8.

[9] Unlike in *United States v. Smith*, 751 F.3d 107, 121-22. (3rd Cir. 2014), Plaintiffs appealed the issue.

Dated: September 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Misty A. Seemans, hereby certify that on September 6, 2019, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to

[10] Based in CT; admitted in NY; does not practice in DC's courts.

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