Nos. 08-56187 & 08-56270

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOMAS MAYNAS CARIJANO; ROXANA GARCIA DAHUA; ROSARIO DAHUA HUALINGA; NILDA GARCIA SANDI; ROSALBINA HUALINGA SANDI; ELENA MAYNAS MOZAMBITE; GERARDO MAYNAS HUALINGA; ALAN CARIAJANO SANDI; PEDRO SANDI WASHINGTON; ELISA HUALINGA MAYNAS; DANIEL HUALINGA SANDI; ANDREA MAYNAS CARIAJANO; CERILO HUALINGA HUALINGA; ROMAN HUALINGA SANDI; ROSA HUALINGA; RODOLFO MAYNAS SUAREZ; HORACIO MAYNAS CARIAJANO; DELMENCIA SUAREZ DIAZ; KATIA HUALINGA SALAS; ALEJANDRO HUALINGA CHUJE; LINDA SALAS PISONGO; FRANCISCO PANAIFO PAIMA; MILTON PANAIFO DIAZ; ANITA PAIMA CARIAJANO; ADOLFINA GARCIA SANDI; AND AMAZON WATCH INC.,

Plaintiffs/Appellants/Cross-Appellees,

v.

OCCIDENTAL PETROLEUM CORPORATION AND OCCIDENTAL PERUANA, INC.,

Defendants/Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Central District of California, Case No. CV-07-5068-PSG(PJWx)
The Honorable Philip S. Gutierrez, United States District Judge

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DEFENDANTS/APPELLEES/CROSS-APPELLANTS' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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CORPORATE DISCLOSURE STATEMENT

Occidental Petroleum Corporation is a publicly traded corporation. It has no parent corporations and no publicly traded corporation owns more than 10% of its stock. Occidental Peruana, Inc. is a wholly owned subsidiary of Occidental Petroleum Corporation.

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INTRODUCTION

In this action, 25 individual Peruvian citizens and a public interest group ("Plaintiffs") assert claims arising from environmental contamination that allegedly resulted from oil exploration activities conducted years ago by Occidental Peruana, Inc., an indirect subsidiary of Occidental Petroleum Corporation (collectively "Defendants"), in a "quite remote and relatively inaccessible" portion of Peru. (ER 27.)[1] Plaintiffs sought, *inter alia*, to have the district court oversee environmental remediation and medical monitoring programs in the Peruvian jungle (ER 49-50)—even though the relevant oil exploration facilities are now run by an Argentine oil company (Pluspetrol Peru Corp. ("Pluspetrol")) and even though the Peruvian government is already working with Pluspetrol (which has allegedly polluted the site for seven years) to address environmental conditions in the area. *See infra* at 7-8, 37-38. Defendants moved to dismiss the action under the doctrine of *forum non coveniens*, and the district court (Gutierrez, J.) granted that motion, concluding that "Peru stands out as the more convenient forum for this litigation." (ER 14.)

The district court did not abuse its discretion in concluding that (1) Peru was "an adequate alternative forum" and (2) the balance of "private interest" and

[1] "ER" refers to Plaintiffs' Excerpts of Record, "SER" refers to Defendants' Supplemental Excerpts of Record, and "POB" refers to Plaintiffs' Opening Brief. "CR" refers to the Clerk's Record of the proceedings below and is followed by the relevant docket number.

"public interest" factors strongly weighed in favor of a Peruvian forum. *Lueck v. Sunstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001) (describing these two elements of the *forum non conveniens* analysis). On the first point, the district court carefully analyzed the parties' arguments and evidence and concluded that Peru was an adequate forum that provided sufficient remedies for Plaintiffs' claims. (ER 6-11.) In particular, the court rejected Plaintiffs' argument that Peru was too corrupt, holding that Plaintiffs had failed to make the "'powerful showing'" required to sustain that claim. (ER 10, quoting *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006).)

In addressing which forum was more convenient, the district court properly concluded that the "private interest factors weigh *overwhelmingly* in favor of dismissal." (ER 13, emphasis added.) Specifically, the court held that "[m]any of the witnesses are located in Peru and thus are beyond the reach of compulsory process"; the "facts of this case indicate that it centers primarily on Peruvian lands and Peruvian people"; and the costs of litigation (including witness travel and translation expenses) were likely to be higher in the U.S. (ER 11-13.) With respect to the "public interest" factors, the court held that they either favored a Peruvian forum or were neutral. (ER 13-14.) In particular, Peru had a far greater interest than California in adjudicating a dispute concerning "environmental regulation of Peruvian territory." (ER 13.)

Plaintiffs' opening brief on appeal fails to show any abuse of discretion. Instead, Plaintiffs largely repeat their arguments below, asking this Court to weigh the evidence and the facts differently than the district court did. But a district court's *forum non conveniens* determination "may be reversed only when there has been a *clear abuse of discretion*." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (emphasis added). Here, the district court properly concluded that the considerable difficulties of attempting to try this action in the U.S. made this a clear case for *forum non conveniens*.

Plaintiffs make much of the fact that the district court denied their request to obtain discovery from Defendants, but that too was not an abuse of discretion. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983) (holding that this Court "'will not interfere with the trial court's refusal to grant [*forum non conveniens*] discovery except on the clearest showing ... [of] actual and substantial prejudice to the litigant'") (citation omitted). The *forum non conveniens* analysis in this case was not particularly close. There is no precedent for finding Peru to be an inadequate forum, and the balance of factors "overwhelmingly" favored a Peruvian forum. (ER13.) Where, as here, the district court already had "'enough information to enable [it] to balance the parties' interests,'" discovery is properly denied. *Cheng*, 708 F.2d at 1412 (citation omitted).

Plaintiffs also place great weight on the presence of a U.S.-based public

interest group (Amazon Watch) as an additional 26th Plaintiff, but the presence of Amazon Watch does not defeat the propriety of a Peruvian forum. As the complaint alleges, Amazon Watch has engaged in substantial activity in Peru, including coordinating an investigation concerning the environmental harms alleged here. (ER 37.) Moreover, Amazon Watch abandoned its monetary claims below and instead asserted only a claim for Peruvian-centered injunctive relief, together with the other 25 Plaintiffs, under California's Unfair Competition law, Cal. Bus. & Prof. Code § 17200, *et seq*. ("UCL"). The district court did not abuse its discretion in concluding that Amazon Watch's peripheral and redundant injunctive relief claim did not warrant retaining this action in the U.S.

The district court's only error in this regard is that it should have granted Defendants' motion to dismiss Amazon Watch outright with prejudice. Amazon Watch conceded below that it could *not* satisfy the standing requirements of the UCL, as set forth in recent California appellate decisions. Instead, Amazon Watch argued that those cases were wrongly decided and would not be followed by the California Supreme Court, an argument that is without merit. *See infra* at 57-64.

STATEMENT OF JURISDICTION

Because Amazon Watch lacks Article III standing, the district court lacked jurisdiction over its claims. The district court otherwise had jurisdiction under 28 U.S.C. §§ 1332(d)(2), 1367. This Court has jurisdiction under 28 U.S.C. § 1291.

The judgment dismissing the action was entered on June 25, 2008. (ER 1.) Plaintiffs filed a timely notice of appeal on July 22, 2008. (ER 428.) *See* Fed. R. App. P. 4(a)(1)(A). Defendants timely filed their notice of cross-appeal on August 1, 2008. (SER 1.) *See* Fed. R. App. P. 4(a)(3).

STATEMENT OF THE ISSUES

I. Issues on Appeal

A. Whether the district court abused its discretion in dismissing this action under the doctrine of *forum non conveniens*.

B. Whether the district court abused its discretion in concluding that discovery was unnecessary in order to determine that the action should be dismissed under *forum non conveniens*.

II. Issues on Cross-Appeal

A. Whether the district court should have dismissed the claims of Amazon Watch for lack of statutory standing, for lack of Article III jurisdiction, or for failure to state a claim on which relief may be granted.

STATEMENT OF THE CASE

I. Nature of the Case

These appeals arise from the district court's dismissal of Plaintiffs' complaint under the doctrine of *forum non conveniens*.

II. Course of the Proceedings and Disposition in the Court Below

The Peruvian Plaintiffs filed their original complaint in Los Angeles

Superior Court on May 10, 2007. (CR 1.) On August 3, 2007, Defendants timely removed the action to the district court under 28 U.S.C. § 1332(d)(2). (*Id.*) On September 10, 2007, a First Amended Complaint ("FAC") was filed that, *inter alia*, added Amazon Watch as a plaintiff. (ER 16.)

On November 8, 2007, Defendants moved to dismiss the FAC on the grounds of *forum non conveniens* and international comity. (CR 18.) Defendants simultaneously filed a motion to dismiss Amazon Watch with prejudice. (CR 17.) Plaintiffs filed their oppositions to the motions on December 20, 2007. (CR 26, 28.) Plaintiffs thereafter filed a motion for discovery regarding *forum non conveniens* on January 4, 2008. (CR 30.)

After briefing was completed, the district court on April 15, 2008 issued an order granting the motion to dismiss on the ground of *forum non conveniens*; denying Plaintiffs' motion for discovery; and denying as moot Defendants' motion to dismiss Amazon Watch. (ER 3-15.) Defendants lodged a proposed judgment on May 2, 2008 (CR 53), and Plaintiffs lodged a competing proposed judgment on May 21, 2008 (CR 57). After further briefing, the district court adopted Defendants' proposed judgment as its final judgment. (ER 1.)

STATEMENT OF FACTS

I. Allegations of the First Amended Complaint

The Peruvian Plaintiffs are 25 members of the Achuar indigenous group who

reside in a remote region of northeastern Peru, along the border with Ecuador. (ER 19-24, 27-28, 30-31.) They allege that they have been injured, and run an increased risk of future illness, as a result of their exposure to pollutants allegedly discharged in connection with the operation of certain oil exploration facilities previously operated by Occidental Peruana, Inc. ("Oxy Peruana") in a nearby area known as Block 1-AB. (ER 27-28.) The FAC acknowledges that Oxy Peruana ceased operating the facilities when it sold its stake in Block 1-AB to "Pluspetrol, an Argentine oil company" nearly nine years ago, in 2000. (ER 28, 35; SER 200.)

Plaintiffs maintain that Oxy Peruana failed to take reasonable measures to prevent contamination to the environment during the time in which it extracted oil from Block 1-AB. (ER 30.)[2] Specifically, Plaintiffs allege that Oxy Peruana released "produced water" (*i.e.*, water that is extracted along with oil in the drilling process), which allegedly contained heavy metals in quantities harmful to human health, into the tributaries of nearby rivers. (ER 29.) Plaintiffs also claim that Oxy Peruana allowed chemical wastes, including heavy metals, to seep into the ground from improperly lined earthen pits. (ER 30.) Plaintiffs contend that "[c]ontact with these compounds, directly and indirectly, has led to health problems among

[2] Based on a conclusory allegation that Defendants Occidental Petroleum Corp. ("OPC") and Oxy Peruana were agents, co-conspirators, and alter egos of one another, the FAC alleges that OPC, as Oxy Peruana's parent, is liable for all of Oxy Peruana's conduct. (ER 25-26.) The FAC, however, contains no allegations of any specific conduct by OPC.

the Achuar people," including the individual Plaintiffs. (ER 31.)

Plaintiffs allege that the current operator, Pluspetrol, which is not named as a defendant, thereafter failed to remedy the alleged pre-2000 pollution (ER 34) and "continues to discharge produced water in the same manner as Oxy, continues to store toxic chemicals and wastes improperly, and continues to spill crude oil and other contaminants." (ER 35.) Plaintiffs nonetheless assert that their injuries were caused by the pre-2000 contamination allegedly committed by Oxy Peruana, rather than the post-2000 conduct of Pluspetrol. (ER 41.) Although the FAC alleges that Amazon Watch visited the area in 2001 "to hear community concerns about the impacts of Oxy" (ER 36-37) and that Amazon Watch obtained video footage of the affected areas in 2001 and 2002 and produced a documentary in 2003 (*id*.), Plaintiffs contend that Oxy Peruana somehow fraudulently concealed its "harmful operations," thereby tolling the statute of limitations. (ER 36.)

Plaintiffs purport to represent two overlapping putative classes, one composed of "all children and young adults" in five Peruvian villages (Antioquia, José Olaya, Nueva Jerusalén, Pampa Hermosa, and Saukí) who "have suffered or will suffer harmful health … impacts from exposure to lead" (ER 42), and the other composed of "all residents" of the same five villages "who have suffered or will suffer harmful health impacts from exposure to cadmium …" (ER 42-43). On behalf of these classes, Plaintiffs assert claims under theories of negligence, strict

liability, battery, intentional infliction of emotional distress, and fraud, as well as claims for medical monitoring and for injunctive relief. (ER 44-52, 54-57.) Plaintiffs also assert individual, non-class claims for nuisance and trespass (ER 53-54), and Plaintiff Adolfina Sandi asserts a claim for wrongful death (ER 50-51). Amazon Watch joins in Plaintiffs' UCL claim, asserting standing based on the amounts it spent investigating Defendants' alleged misconduct. (ER 25, 55-56.)

II. The District Court's Dismissal of the Action

Defendants moved to dismiss the action under *forum non conveniens*, arguing that Peru was a more appropriate forum. (CR 18.) In support of that motion, Defendants submitted, *inter alia*, an extensive declaration from a Peruvian law expert. (SER 218-59.)

After briefing was completed, the district court issued a thorough opinion dismissing the action under the doctrine of *forum non conveniens*. (ER 3-15.) The court held that the threshold requirement of an adequate alternative forum was satisfied, because Defendants were amenable to process in Peru, Defendants' evidence amply demonstrated that Peru provides sufficient remedies for Plaintiffs' asserted injuries, and Plaintiffs failed to show otherwise. (ER 6-10.) In particular, the court held that Plaintiffs had not substantiated their claim that Peru was too corrupt to be deemed an adequate forum. (ER 10.)

In assessing the relative convenience of the fora, the court considered the relevant "private interest" and "public interest" factors, and concluded that they favored Peru. (ER 11-14.) The court found that, "[a]lthough witnesses and documents are located in both fora, the facts of this case indicate that it centers primarily on Peruvian lands and Peruvian people, thus weighing in favor of dismissal." (ER 12.) Moreover, Plaintiffs conceded that the many witnesses in Peru "are beyond the reach of compulsory process in the United States." (*Id*.) The court also held that Peru had a substantially greater interest in the suit, because it "involves Peruvian lands and Peruvian citizens" and "environmental regulation of Peruvian territory." (ER 13.) Even affording a measure of deference to Plaintiffs' choice of a U.S. forum, the court concluded that "Peru stands out as the more convenient forum for this litigation." (ER 14.)

Because it was already sufficiently clear on this record that the suit belonged in Peru, the court denied Plaintiffs' motion to allow *forum non conveniens* discovery. (ER 5.) And having concluded that *forum non conveniens* dismissal was proper, the court denied as moot Defendants' separate motion to dismiss Amazon Watch's UCL claim with prejudice. (ER 15.)

SUMMARY OF ARGUMENT

1. The district court did not abuse its discretion in dismissing this action under the doctrine of *forum non conveniens*.

a. The district court correctly held that Defendants had met their initial burden to show (1) that Defendants were "amenable to service of process" in Peru and (2) that "the forum provides 'some remedy' for the wrong at issue." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006); *see also id*. ("[t]his test is easy to pass"). Defendants stipulated to service of process and jurisdiction in Peru, and they submitted "an extensive affidavit" by a Peruvian law expert, "detailing background about [the foreign forum] and its court system, the availability of … tort relief, the discovery process, and procedural formalities." *Id*. "Under [this Court's] precedent, this showing is sufficient." *Id*. The burden then shifted to Plaintiffs to make the requisite "powerful showing," *Tuazon*, 433 F.3d at 1179, that this is one of the "rare circumstances" in which an available foreign forum will be deemed inadequate. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981). The district court did not abuse its discretion in concluding that Plaintiffs had fallen far short of making such a showing. *See supra* at 14-25.

b. The district court did not abuse its discretion in finding that, regardless of any deference that may be due to Plaintiffs' choice of a U.S. forum, the balance of private interest and public interest factors strongly favored Peru. As the district court found, "[m]any of the witnesses are located in Peru and thus are beyond the reach of compulsory process"; the facts of this environmental-contamination case "indicate that it centers primarily on Peruvian lands and

Peruvian people"; and the costs of litigation were likely to be higher in the U.S. (ER 11-13.) Moreover, Peru—whose government is already working on a remediation program for the site, which was allegedly polluted by an Argentine company for many years *after* Oxy Peruana ceased operations in Peru—has a far greater interest than California in adjudicating a dispute concerning "environmental regulation of Peruvian territory." (ER 13.) Courts addressing comparable suits have consistently reached similar conclusions. *See*, *e.g.*, *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997); *Flores v. Southern 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). And the district court did not abuse its discretion in concluding that Amazon Watch's peripheral, duplicative, and meritless injunctive relief claim did not warrant retaining this entire action in the U.S. *See infra* at 26-47.

2. The district court did not abuse its discretion in denying Plaintiffs' request for discovery concerning the *forum non conveniens* issue. Here, the record "overwhelmingly" favored a Peruvian forum (ER 13), and Plaintiffs failed to show that discovery was warranted and would have made a difference to the analysis. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983) (discovery properly denied where the district court already had "'enough information to enable [it] to balance the parties' interests'") (citation omitted). *See infra* at 47-57.

3. Although the district court's *forum non conveniens* analysis was correct, the court nonetheless should have dismissed Amazon Watch outright and with prejudice. Under applicable California case law, Amazon Watch has UCL standing only if (1) it is eligible for *restitution* under the UCL, *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 817 (2007), and (2) its monetary injuries were *proximately caused* by the challenged conduct, *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 & n.2 (2008). Amazon Watch conceded below that it could not satisfy these requirements, arguing instead that these California authorities were wrongly decided. But under this Court's case law, these decisions must be followed. For related reasons, Amazon Watch's standing is so deficient that it does not meet the requirements of Article III. And Amazon Watch's claim plainly fails on the merits as a matter of law. *See infra* at 57-64.

STANDARD OF REVIEW

"The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a *clear abuse of discretion*; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (emphasis added). The district court's determination that discovery was unnecessary to determine the *forum non conveniens* issue is reviewed only for

abuse of discretion and will not be reversed "'except on the clearest showing ... [of] actual and substantial prejudice to the litigant.'" *Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983) (citation omitted).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Dismissing This Action Under the Doctrine of *Forum Non Conveniens*

A dismissal on *forum non conveniens* grounds is proper if (1) there is "an adequate alternative forum" and (2) "the balance of private and public interest factors favors dismissal." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). Plaintiffs' brief fails to show that the district court committed a "clear abuse of discretion" in determining that Peru was the more convenient forum under these standards. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

A. The District Court Properly Concluded That Peru Is An Adequate Alternative Forum

1. Where, as Here, Defendants Showed the Availability of Remedies in a Foreign Forum, *Plaintiffs* Bear the Heavy Burden of Establishing the Inadequacy of Those Remedies

As Plaintiffs correctly note (POB 27), "the burden of showing the *existence* of an adequate alternative forum is the defendant's." *Lueck*, 236 F.3d at 1143 (emphasis added). Plaintiffs wrongly contend, however, that this imposes a "heavy burden." (POB 27-28.) Rather, "[*t*]*his test is easy to pass*": A defendant need only show that (1) "the defendant is amenable to service of process" and (2) "the forum provides 'some remedy' for the wrong at issue." *Tuazon v. R.J. Reynolds*

Tobacco Co., 433 F.3d 1163, 1178 (9th Cir. 2006) (emphasis added). Once a defendant makes this showing, the burden shifts to the *plaintiff* to show that the remedies available in the alternative forum are nonetheless inadequate. This latter burden is a heavy one: a "litigant asserting inadequacy or delay must make a powerful showing." *Tuazon*, 433 F.3d at 1179.

2. Defendants Met Their Burden to Show That Peru Provides an Available Remedy for Plaintiffs' Alleged Injuries

As noted above, a defendant seeking a *forum non conveniens* dismissal must show that (1) it is "amenable to service of process" in the alternative forum and (2) the forum provides "some" remedy for the asserted injuries. *Tuazon*, 433 F.3d at 1178. The district court did not abuse its discretion in concluding that Defendants satisfied these requirements. (ER 6-7.)

First, a defendant's "voluntary submission to service of process" is sufficient to satisfy the amenability-to-service requirement. *Tuazon*, 433 F.3d at 1178 (reversing district court's contrary holding on this point). Here, the district court noted that Oxy Peruana had conceded that it was "unquestionably subject to jurisdiction in Peru based on its past activities there" and that, for purposes of this case, OPC had affirmatively stipulated to service of process and jurisdiction in Peru. (ER 6; *see also* CR 8 at 5-6.) Under *Tuazon*, this was sufficient to establish amenability to service of process in Peru. 433 F.3d at 1178. Plaintiffs' opening brief does not dispute this point. (POB 28 n.4.)

Second, the district court correctly held that Defendants had demonstrated that Peru provides an alternative remedy for Plaintiffs' asserted injuries. (ER 6-7.) Here, as in *Tuazon*, Defendants submitted "an extensive affidavit" by a foreign law expert, "detailing background about [the foreign forum] and its court system, the availability of … tort relief, the discovery process, and procedural formalities." 433 F.3d at 1178. Specifically, Defendants submitted a lengthy declaration from Dr. Felipe Osterling Parodi, who has been a Peruvian law professor for more than 50 years and who has served as a law school dean, as Peruvian Justice Minister, and as President of the Peruvian Academy of Law. (SER 220, 258.) Dr. Osterling explained at length the nature of the Peruvian court system, the elements of Peruvian civil procedure, and the substantive claims and remedies available under Peruvian law with respect to Plaintiffs' claims. (SER 218-57.) As this Court held in *Tuazon*, "[u]nder our precedent, this showing is sufficient." 433 F.3d at 1178.

Plaintiffs nonetheless contend that Defendants failed to carry their burden because Defendants assertedly did not show that Peru would provide a specific remedy for Plaintiffs' UCL claims. (POB 28-29.) This argument misconceives the relevant legal standard. The question is *not* whether the foreign forum provides the same remedies for the same specific causes of action; rather, the question is whether "the forum provides 'some remedy' for the wrong at issue." *Tuazon*, 433 F.3d at 1178. "[T]ypically, a forum will be inadequate only where the remedy

provided is 'so clearly inadequate or unsatisfactory, that it is no remedy at all.'" *Id.*; *see also Capital Currency Exch., N.V. v. National Westminster Bank PLC*, 155 F.3d 603, 610 (2d Cir. 1998) ("'[t]he availability of an adequate alternate forum does not depend on the existence of an identical cause of action in the other forum'") (citation omitted). Thus, in *Lueck*, this Court held that New Zealand was an adequate alternative forum even though that country had adopted an administrative accident compensation system that barred any civil suit for damages. 236 F.3d at 1143. It was irrelevant that "New Zealand law [did] not permit Plaintiffs to maintain [the] exact suit" they could in a U.S. court; New Zealand provided an adequate alternative forum because its "no-fault accident compensation scheme" provided "a remedy for Plaintiffs' losses." *Id.* at 1144. Here, Dr. Osterling's declaration establishes that Peru provides adequate remedies for Plaintiffs' injuries. *Tuazon*, 433 F.3d at 1178. Dr. Osterling specifically explained that "Peruvian law has analogies for all of the substantive legal theories on which the lawsuit filed in the Los Angeles jurisdiction is based." (SER 246.)

Plaintiffs also argue that Defendants failed to show that Plaintiff *Amazon Watch* could pursue its UCL claim in Peru. (POB 28-29.) This argument has no merit. In the proceedings below, Amazon Watch abandoned its claims to *monetary* relief under the UCL by failing to defend them in response to Defendants' separate motion to dismiss Amazon Watch. (CR 42 at 2, 12.) *See infra* at 58-59.

Accordingly, the only claim Amazon Watch asserts is a claim for unspecified injunctive and declaratory relief concerning Oxy Peruana's alleged environmental practices in Peru. (ER 54-56.) Dr. Osterling's declaration amply establishes that plaintiffs, including "non-profit associations," who have the requisite standing to complain of environmental-law violations may bring suit in Peru for "the protection of the damaged environment, its restoration, renovation, or repair, and the ceasing of the polluting activity, among other points." (SER 234-35.) That is sufficient to establish that Peru is an adequate alternative forum for any claim for injunctive or declaratory relief that Amazon Watch may have.[3]

3. Plaintiffs Failed to Make the Requisite "Powerful Showing" That Peru Should Be Deemed an Inadequate Forum

As the Supreme Court explained in *Piper*, only in "rare circumstances" will an alternative forum in which the defendants are amenable to process be deemed

[3] Plaintiffs appear to suggest that Defendants also needed to show that Peru would *in fact* afford relief to Amazon Watch. (POB 29.) This argument has a Catch-22 flavor, because Defendants' position was and is that Amazon Watch's claims fail as a matter of California law, *see infra at* 57-64; viewed in this light, Plaintiffs' argument is essentially that Defendants may not obtain a *forum non conveniens* dismissal without showing that Peru would recognize a claim *that even U.S. courts will not recognize*. There is no authority for this audacious argument. *See, e.g.*, *Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390, 395 (D.C. Cir. 2003) (question is whether foreign forum provides remedies for a "meritorious claim" or a "valid claim"); *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 533 n.25 (S.D.N.Y. 2002) (question is whether plaintiffs can sue "in the Peruvian courts and obtain a remedy *if their claims are proven to be meritorious*") (emphasis added), *aff'd on other grounds*, 414 F.3d 233, 266 (2nd Cir. 2003).

inadequate. 454 U.S. at 254 n.22. As a result, a "litigant asserting inadequacy or delay must make a powerful showing." *Tuazon*, 433 F.3d at 1179. Plaintiffs' burden is a particularly heavy one here, given that U.S. courts have regularly found Peru to be an adequate forum. *See, e.g.*, *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997); *Flores*, 253 F. Supp. 2d at 539-40; *Sudduth v. Occidental Peruana, Inc.*, 70 F. Supp. 2d 691, 697 (E.D. Tex. 1999); *Vargas v. M/V MINI LAMA*, 709 F. Supp. 117, 118 (E.D. La. 1989); *see also Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987). The district court did not abuse its discretion in concluding that Plaintiffs failed to carry their burden.

a. Peru's Civil Law System, in Which Precedents Are Not Binding, Does Not Render It Inadequate

Peru's status as a civil law country means that, in contrast to a common law judicial system, its courts are generally not bound by principles of *stare decisis*. (ER 9; SER 32.) Of course, the fact that a country adheres to the civil law tradition, and thus does not treat precedent as formally binding, does not make it inadequate for purposes of *forum non conveniens*. *See, e.g.*, *Do Rosario Veiga v. World Meteorological Org.*, 486 F. Supp. 2d 297, 304 (S.D.N.Y. 2007).

Plaintiffs nonetheless assert that Peru is an inadequate forum because there is supposedly a "fundamental unpredictability" in the legal system. (POB 30.) In the proceedings below, Plaintiffs' support for this sweeping assertion was sketchy and anecdotal. Plaintiffs relied largely on the opinion of their Peruvian expert,

who gave five examples of allegedly contradictory holdings by the Peruvian Supreme Court over a seven-year period and who also noted that the Peruvian Public Defender's Office had complained about inconsistencies in decisions. (ER 10-11.) In response, Defendants submitted the declaration of Dr. Osterling, who described various measures adopted in Peru to ensure greater consistency among judicial decisions (SER 32-37), and who explained that, as a result, "in the overwhelming majority of cases, precedent has been and continues to be respected." (SER 32.) In particular, as to Plaintiffs' claims of conflicting Supreme Court decisions, Dr. Osterling explained that decisions by the full 18-member Court (as opposed to the smaller divisions that ordinarily hear cases) *are* binding precedent and that, coincidentally, the first such full-Court proceeding was underway in an environmental-law case that could provide controlling guidance on questions of Peruvian law pertinent to this case. (SER 36-37.)

After reviewing the declarations of the parties' competing experts, the district court found Dr. Osterling's analysis, and his critique of Plaintiffs' expert, to be persuasive. (ER 9.) The district court's weighing of the competing views of the parties' experts concerning the adequacy of Peru's legal system was not an abuse of discretion. *See Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir. 1983) (district court properly found Taiwan to be an adequate forum where the "court

considered the affidavits" of the competing experts and "decided that the views of [the defendant's] expert were more persuasive").

b. Plaintiffs Failed to Show That Peru Is Too Corrupt to Be Considered an Adequate Forum

As this Court has noted, "the argument that the alternative forum is too corrupt to be adequate does not enjoy a particularly impressive track record." *Tuazon*, 433 F.3d at 1179 (citations and quotation and alteration marks omitted). That is not surprising. As the district court correctly observed, comity concerns suggest considerable caution before making "'unnecessary indictments by our judges condemning the sufficiency of the courts and legal methods of other nations.'" (ER 11, citation omitted.) With respect to Peru specifically, the track record for this argument is particularly unimpressive. In contrast to the numerous courts that have found Peru to be an adequate forum, *see supra* at 19, Plaintiffs were unable to cite a single decision in which Peru was found to be too corrupt.

Plaintiffs contend that their evidence concerning Peru is comparable to that concerning Bolivia, which was found to be an inadequate forum in *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997). The district court acted within its discretion in rejecting this argument. (ER 9-11.) As this Court explained in rejecting a comparable analogy to *Eastman Kodak* in connection with the Philippine courts in *Tuazon*, "[t]he proof offered [in *Eastman Kodak*] was both specific and sordid, unlike the evidence here":

> The plaintiff [in *Eastman Kodak*] offered statements by the Minister of Justice that Bolivian courts were instruments of extortion, detailed affidavits by two experts in Bolivian legal and political affairs, and an affidavit by a former legal counsel to the Bolivian legislature observing that "corruption is endemic to the judicial system of Bolivia."

Tuazon, 433 F.3d at 1179 (quoting *Eastman Kodak*, 978 F. Supp. at 1085). *Tuazon* is controlling. The record overwhelmingly shows that, unlike Bolivia in *Eastman Kodak*, Peru is not the rare case in which a forum is so corrupt as to be inadequate.

Plaintiffs below relied on a report by Transparency International (a non-governmental organization) which showed that a large majority of Peruvian survey respondents *perceived* corruption in the legal system. (ER 112, 273-81; POB 17.) But as the district court properly noted, survey responses about perceptions of corruption are "not indicative of *actual* corruption." (ER 11, emphasis added.) Indeed, the same report showed that approximately 55% of U.S. survey respondents considered *U.S. courts* to be corrupt. (SER 77.) Moreover, competing reports submitted by Defendants below—such as the 2006 Corruption Perceptions Index (also published by Transparency International)—showed that Peruvians perceived less overall corruption in their country than did respondents in many other Latin American nations. (SER 82-84; *see also* SER 38.) The district court's assessment of these competing evidentiary submissions was not clearly erroneous.

Plaintiffs' other evidence was no more convincing. The district court properly discounted Plaintiffs' reliance on evidence of corruption that occurred

during the regime of former President Alberto Fujimori (1992-2000). (ER 10-11; *see also* SER 37-38 (Supp. Osterling Declaration) (describing incidents of corruption during Fujimori regime and the ongoing efforts to prosecute and punish the offenders).) The district court also correctly held that Plaintiffs had failed to present any evidence to support their "sweeping" allegation—made only "on information and belief"—that Defendants had bribed unnamed Peruvian officials at unspecified times. (ER 11; *see also* ER 41.) Indeed, the allegation is frivolous. (SER 107 (noting Defendants' contention below that the allegation violated Fed. R. Civ. P. 11).) Despite Plaintiffs' excess of rhetoric on appeal—in which they claim that "Defendants were the target of several investigations" for corruption in Peru (POB 19)—Plaintiffs had no factual basis for this serious (and slanderous) allegation. The only "evidence" Plaintiffs offered for it consisted of excerpts from a 585-page spreadsheet suggesting that—included among the literally *tens of thousands of documents* assembled by a Peruvian legislative commission that investigated corruption during the Fujimori regime—there were 18 irrelevant documents that merely *mentioned* an Occidental entity. (CR 43 at 6 n.9; SER 107.) Moreover, Plaintiffs' reliance upon the legislative committee's document inventory overlooks the fact that *the commission's substantive report does not mention Defendants anywhere.* (CR 35 at 10 n.5.) The district court properly rejected this non-evidence.

c. None of Plaintiffs' Other Arguments Is Sufficient to Render Peru an Inadequate Forum

The district court also properly rejected Plaintiffs' argument that Peru's "history of discrimination against indigenous people" demonstrated that the Peruvian courts would be unfair. (ER 7.) Contrary to Plaintiffs' strawman reading of the district court's order, the court did not hold that claims of discrimination can *never* render a forum inadequate. (POB 35, 37.) On the contrary, the district court simply held that Plaintiffs' sweeping claims of intractable systemic discrimination were unpersuasive. (ER 7-8.) The district court specifically relied upon Defendants' evidence showing that "Peru has taken substantial measures to protect indigenous rights." (ER 7; *see also* SER 51-54.) And in noting that the few cases that had examined comparable discrimination claims had rejected them (ER 8), the court did not suggest that such claims can never succeed, but only that the showing required to make such a claim is, as a practical matter, a high one. *Cf. Tuazon*, 433 F.3d at 1179 (analogously noting how rare it was for a court to find that a foreign forum was too corrupt to be adequate).

Plaintiffs' claims that they are unable to afford Peruvian court filing fees, and that they lack the identity papers necessary to bring suit there, were properly rejected. (ER 7-8.) Defendants below presented uncontradicted evidence that national identity cards are available without charge (SER 25-30); that Peruvian judges are authorized to admit complaints filed by individuals lacking a national

identity card, if the individuals can demonstrate their inability to obtain it (SER 27; ER 7); that Peru permits contingency fee arrangements (*see Flores*, 253 F. Supp. 2d at 542); and that, unlike in the U.S., state-provided counsel may be available in Peru for civil cases at no cost (SER 31). Likewise, Peruvian tribunals may waive fees for indigents (SER 31), thereby negating any argument that Peru's fees render it inadequate. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 479 (2d Cir. 2002) (rejecting comparable argument where Ecuador had reduced "filing fees for indigent persons"). In any event, the "mere existence of filing fees, which are required in many civil law countries, does not render a forum inadequate as a matter of law." *Altmann v. Austria*, 317 F.3d 954, 972-73 (9th Cir. 2002), *aff'd on other grounds*, 541 U.S. 677 (2004).

Finally, Plaintiffs contend that Defendants' use of *arbitration* clauses in its contracts with the Peruvian government demonstrates a lack of confidence in the Peruvian courts. (ER 80; POB 38.) The argument is a *non sequitur*, because the use of arbitration clauses could just as easily (and just as illogically) be construed as establishing that *the U.S. courts* should be deemed inadequate. This argument also overlooks the fact that Oxy Peruana has been sued many times in the Peruvian courts. (SER 198-200.) The district court properly gave no weight to this plainly meritless argument. *See Banco de Seguros del Estado v. J.P. Morgan Chase & Co.*, 500 F. Supp. 2d 251, 265 (S.D.N.Y. 2007).

B. The Private And Public Interest Factors Favored Dismissal

1. In Weighing These Factors, the District Court Gave Plaintiffs' Choice of Forum the Proper Degree of Deference

"[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient." *Piper*, 454 U.S. at 256. When a *domestic* plaintiff brings suit in its home forum, "it is reasonable to assume that this choice is convenient," and the Supreme Court has therefore held that there is "ordinarily" a "strong presumption" in favor of a domestic plaintiff's choice of forum, "which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Id*. at 255-56. By contrast, "[w]hen the plaintiff is foreign," the assumption of convenience "is much less reasonable" and the presumption in favor of the plaintiff's chosen forum "applies with less force." *Id*.

The district court's order properly acknowledged the "strong presumption" in favor of a domestic plaintiff's choice of forum and the reduced deference afforded to foreign plaintiffs. (ER 14.) In applying these various presumptions, the district court noted that 25 of the Plaintiffs were Peruvian residents who, collectively, are Plaintiffs in every cause of action, while the 26th Plaintiff (Amazon Watch) was a plaintiff only in the UCL claim. (ER 14.) Because the case, viewed as a whole, was overwhelmingly a Peruvian-plaintiff case, the court held that it would be inappropriate to apply the sort of "strong presumption" that would apply to a case brought exclusively by U.S. plaintiffs. (*Id*.) Accordingly,

the court held that only a lesser degree of deference would apply. (*Id.*)

Plaintiffs contend that the presence of a single U.S. corporation as a co-plaintiff in a single claim for equitable relief required the district court to apply a "strong presumption" in favor of a U.S. forum for this entire 26-Plaintiff, 12-count case. (POB 25-26, 39-40.) For multiple reasons, this argument is unavailing.

First, Plaintiffs' argument overlooks the fact that *Piper*'s various presumptions "are not 'abrupt or arbitrary' rules"; rather, "they illustrate 'a broader principle under which the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale' depending on the degree of convenience reflected by the choice in a given case." *Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146, 154 (2d Cir. 2005) (citation omitted). Because the *Piper* presumptions are based on assumptions about the extent to which a plaintiff's choice of forum reflects the *convenience* of that forum, *Piper*, 454 U.S. at 255-56, these presumptions "may not apply, either at all or with full force, to forum choices in particular cases," depending upon whether the circumstances of the case indicate that "a forum choice was likely motivated by genuine convenience" rather than by tactical concerns such as "forum-shopping." *Norex Petroleum*, 416 F.3d at 154-55.

Here, *Amazon Watch*'s presence as the 26th Plaintiff (and the only U.S. Plaintiff) appears to reflect, not a judgment about the convenience of the forum, but rather a tactical effort to keep the other 25 foreign Plaintiffs in a U.S. forum.

When this suit was first filed in California state court, *Amazon Watch was not a plaintiff* (CR 1); rather, Amazon Watch was added as an additional plaintiff in the First Amended Complaint only *after* Plaintiffs were expressly informed that Defendants intended to move for dismissal based on *forum non conveniens*. (SER 359.) Thereafter, Plaintiffs vigorously argued (as they do in this Court) that Amazon Watch's presence as an additional plaintiff in the UCL claim required a strong presumption in favor of a U.S. forum for the entire case. (ER 72, 82-83.)

These factors confirm that the rationale for *Piper*'s "strong presumption" in favor of a U.S. forum does not apply here. Because the circumstances of this case strongly indicate that Amazon Watch's presence as an additional plaintiff does *not* reflect "a forum choice [that] was likely motivated by genuine convenience," there is no reason to start with a strong presumption that the choice is in fact convenient. *Norex Petroleum*, 416 F.3d at 154-55; *see also Pain v. United Techs. Corp.*, 637 F.2d 775, 797-98 (D.C. Cir. 1980) (fact that "one of the plaintiffs here is an American resident" was entitled to no special weight where "[t]here is some suggestion in the record that that plaintiff may have been made a party precisely to defeat dismissal on *forum non conveniens* grounds"), *overruled on other grounds as stated in Nemariam*, 315 F.3d at 393. To apply such a presumption in this case—especially where, as explained below, Amazon Watch's claim is meritless—would create inappropriate incentives for foreign plaintiffs to attempt to defeat an

otherwise manifestly warranted *forum non conveniens* motion through the artifice of adding a single nominal domestic plaintiff.

Second, whether to apply a "strong presumption" here is academic, because any such presumption was overwhelmingly rebutted and makes no difference to the outcome. The district court held that the "private interest factors weigh *overwhelmingly* in favor of dismissal," and that the various public interest factors were *all* either neutral or favored dismissal. (ER 13-14, emphasis added.) That is especially true given that Amazon Watch abandoned its monetary claims under the UCL and asserted only a duplicative request, together with the 25 Peruvian Plaintiffs, for injunctive and declaratory relief. *See infra* at 58-59. Under these circumstances, whether *Piper*'s "strong presumption" applies in the first instance is irrelevant. *Piper* itself instructs that even a "citizen's forum choice should not be given dispositive weight" and that "[a]s always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." 454 U.S. at 256 n.23. That is the case here, and Plaintiffs' arguments about the appropriate starting presumption are ultimately moot.[4]

[4] Plaintiffs erroneously contend that the district court was required to give deference to "Plaintiff's *evidence*" concerning the public and private interest factors, as opposed to the evidence offered by Defendants. (POB 27, emphasis added.) Plaintiffs cite no authority for this remarkable proposition, which misconstrues a starting presumption against which the competing evidence must be

Third, the question whether Amazon Watch's presence requires a "strong presumption" in favor of a U.S. forum is academic for a further and more fundamental reason. As explained below in connection with Defendants' cross-appeal, the district court erred in not dismissing Amazon Watch's UCL claim, at the outset, for lack of statutory standing, lack of Article III standing, and failure to state a claim. *See infra* at 57-64. Once Amazon Watch's patently meritless UCL claim is set aside, only foreign plaintiffs are left and there is no basis whatsoever for applying a strong presumption in favor of a U.S. forum. *Piper*, 454 U.S. at 256; *see also Grodinsky v. Fairchild Industries, Inc.*, 507 F. Supp. 1245, 1253 n.5 (D. Md. 1981) (a *forum non conveniens* motion "may not be avoided by the assertion of baseless claims" under state law); *Fosen v. United Technologies Corp.*, 484 F. Supp. 490, 504 (S.D.N.Y. 1980) (*forum non conveniens* motion "cannot be resisted on the basis of specious or unfounded claims"); *Dahl v. United Technologies Corp.*, 472 F. Supp. 696, 701 (D. Del. 1979) (a *forum non conveniens* dismissal "may not be avoided, however, by the assertion of palpably specious and legally baseless claims"), *aff'd*, 632 F.2d 1027 (3d Cir. 1980).[5]

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evaluated (in order to determine whether the presumption has been rebutted) as if it were instead an instruction to apply an affirmative bias against the defendant's evidence and in favor of the plaintiff's.

[5] Even if Plaintiffs were otherwise correct, at most that would suggest that the district court should have severed and retained Amazon Watch's UCL claim, while dismissing the 25 Peruvian Plaintiffs' claims under *forum non conveniens*. *See*,

2. The District Court Did Not Abuse Its Discretion in Concluding That the Private Interest Factors Overwhelmingly Favor Dismissal

a. Peru Offers Easier Access to Witnesses and Documentary Evidence

The district court correctly concluded that access to sources of proof weighs in favor of Peru. (ER 11-12.) Specifically, the court noted that (1) although there were witnesses and documents in both Peru and the U.S., "the facts of this case indicate that it centers primarily on Peruvian lands and Peruvian people"; and (2) Plaintiffs did not dispute that the "[m]any" witnesses who are located in Peru "are beyond the reach of compulsory process in the United States." (ER 12.) The court acted well within its discretion in concluding that these considerations favor Peru. *See, e.g., Creative Tech., Ltd. v. Aztech System PTE, Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995) (dismissal affirmed where "the majority of witnesses" were in Singapore); *Paper Operations Consultants Int'l, Ltd. v. S.S. Hong Kong Amber*, 513 F.2d 667, 669 (9th Cir. 1975) (dismissal affirmed where Canada was "the place where any witnesses except … one … would be located"); *First Union Nat.*

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e.g., Blum v. General Elec. Co., 547 F. Supp. 2d 717, 724, 736-38 (W.D. Tex. 2008) (severing and retaining claims of some plaintiffs while dismissing the others under *forum non conveniens*); *see also Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968) (affirming authority to sever and transfer a portion of a case to a more convenient forum); *Warter v. Boston Securities, S.A.*, 380 F. Supp. 2d 1299, 1307 (S.D. Fla. 2004) (same). But severing Amazon Watch's claim would not assist it, because the claim would then have to be dismissed on the merits for lack of standing and failure to state a claim. *See infra* at 57-64.

Bank v. Paribas, 135 F. Supp. 2d 443, 450 (S.D.N.Y. 2001) (noting the "focus on the availability of compulsory process for unwilling witnesses" in the *forum non conveniens* analysis).

Plaintiffs assert that the district court nonetheless abused its discretion because the court did not "specifically identif[y]" any witnesses who were outside the compulsory process of the court and "not under the control of the parties." (POB 41-42.) This argument ignores the record. Defendants submitted below a detailed declaration from trial counsel outlining the various categories of Peruvian witnesses whose testimony would be critical to a fair resolution of this case. (SER 339-40.) Based on this (and other) evidence in the record, the district court's order identifies several categories of important non-party Peruvian witnesses, including "employees and consultants of Pluspetrol"—the Argentine company that currently operates in Block 1-AB and has done so for more than eight years[6]; the "physicians who treated Plaintiffs"; and "Peruvian civil servants and consultants responsible for monitoring the environmental conditions in Block 1-AB." (ER 12.) Likewise, the order specifically notes that important documents—including the underlying research behind the Peruvian governmental "epidemiological reports referenced in

[6] Although the district court's order does not mention it, an additional significant factor in favor of a Peruvian forum is that Pluspetrol can be added as an additional defendant in Peru. (SER 236-37; CR 18 at 19.) By contrast, the U.S. courts generally appear to lack personal jurisdiction over Pluspetrol, which has insufficient contacts with the U.S. (SER 206-08.)

the FAC" and documents concerning the condition of the relevant "Peruvian lands"—are undoubtedly located in Peru. (*Id.*)

To the extent Plaintiffs contend that the district court was required to specifically recite in its order the names of particular individuals, their position is directly contrary to *Piper*. There, the Supreme Court rejected the view that defendants seeking *forum non conveniens* dismissal are required to "submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum." *Piper*, 454 U.S. at 258. Indeed, the Court noted that the very fact that categories of witnesses "are located beyond the reach of compulsory process" makes it "difficult to identify" specific individuals who are unavailable. *Id.*

The correctness of the district court's analysis is confirmed by *Lueck*. There, this Court found that the U.S. and New Zealand both housed "evidence … crucial to [the] dispute," which involved the crash of an airline operated by a non-party, Ansett New Zealand. 236 F.3d at 1146. The Court held that this factor was "not in equipoise" in the *forum non conveniens* analysis, precisely because of the inability to obtain critical evidence in the possession of non-parties:

> The documents and witnesses in the United States are all under the control of Plaintiffs and Defendants, so they can be brought to court, no matter the forum. The documents and witnesses in New Zealand, however, are not so easily summoned to the United States. Though some of the New Zealand evidence is under Plaintiffs' control, … many of the New Zealand documents and witnesses are under the

> control of the New Zealand government or Ansett. *The district court does not have the power to order the production or appearance of such evidence and witnesses.*

Id. at 1146-47 (emphasis added). This Court held that, because "the district court cannot compel production of much of the New Zealand evidence, whereas the parties control, and therefore can bring, all the United States evidence to New Zealand, the private interest factors *weigh in favor of dismissal*." *Id.* at 1147 (emphasis added). This analysis is controlling here.[7] The location of *Defendants'* documents (POB 43) does not weigh in favor of a U.S. forum, given that these party documents "can be brought to court, no matter the forum." *Id.* at 1146.[8]

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[7] Despite this Court's emphasis on the lack of compulsory process in *Lueck*, Plaintiffs rely on a Sixth Circuit case in asserting that this factor should be given less weight "'when it has not been alleged or shown that any witness would be unwilling to testify.'" (POB 41, quoting *Duha v. Agruim, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006).) But *Duha* acknowledges that the lack of compulsory process *is* a crucial factor when "circumstantial evidence" indicates that non-parties have disincentives to testify voluntarily. 448 F.3d at 877. That is the case here. As Defendants noted below, many important witnesses have strong incentives not to appear voluntarily in a U.S. court—including employees of Pluspetrol, which may have been responsible for the relevant contamination, and Peruvian government workers, whose environmental reports are likely to be questioned. (CR 43 at 8.)

[8] Nor is this conclusion altered by Plaintiffs' proffer of five potential witnesses who, in identically drafted declarations, stated that they are willing to "provide testimony" in this action. (POB 42; ER 216-20.) Not surprisingly, all of these witnesses indicated their willingness to give testimony harmful to Defendants. (ER 216-20.) Plaintiffs' cherry-picking of third-party witness testimony illustrates exactly why this Court in *Lueck*, and the district court here, correctly refused to assume that the defendants could obtain a fair hearing by relying exclusively on volunteered evidence. Moreover, nothing in these five declarations suggests these witnesses will not also be available to Plaintiffs in Peru.

b. Litigation in Peru Would Have Substantial Advantages in Cost and Convenience

Plaintiffs' remaining arguments—which rely on the relative costs and convenience of litigating in Peru versus California—ignore the standard of review. Plaintiffs complain that the district court did not weigh these factors the way they wanted, but without showing that the court abused its discretion. (POB 41-42.)

Thus, for example, Plaintiffs contend that the district court "improperly discounted" their evidence and argument that travel from the remote Achuar region of Peru to the nearest Peruvian city (Iquitos) is "only marginally more convenient than travel from Achuar territory to Los Angeles." (POB 44.) There was no abuse of discretion. By definition, a trip from the Achuar territory to Iquitos is shorter and less costly than a trip from the Achuar territory to Iquitos that is then followed by a two-leg airplane flight to Los Angeles. The district court therefore properly noted that the cost of each round-trip flight from Iquitos to Los Angeles was an additional *marginal* cost that could apply to every Peruvian witness, making the total expense of bringing them to the U.S. "prohibitive." (ER 13.)[9] *See*, *e.g.*,

[9] Plaintiffs contend that the district court erred in relying on Defendants' evidence concerning the costs of such flights, as opposed to that of Plaintiffs. (POB 44 n.6.) The objection is difficult to fathom, because Plaintiffs' brief flatly misdescribes their own evidence. Although Plaintiffs fault the district court for relying on Defendants' evidence that round-trip flights between Los Angeles and Iquitos can cost over $1,000 (ER 13, citing SER 114 & SER 186), Plaintiffs evidence likewise placed the cost over $1,000. (ER 234-35 (listing fares from $1,163 to $1,498).) Plaintiffs' reference to fares of "under $700" (POB 44 n.6) relates to fares between

Schertenleib v. Traum, 589 F.2d 1156, 1165 (2d Cir. 1978) (dismissal affirmed where the court found it "difficult to understand why plaintiff would prefer to litigate here when it is obviously cheaper for him, as well as for defendant, to litigate" in the foreign forum).

The district court similarly did not abuse its discretion in concluding that translation costs were a factor that weighed in favor of dismissal. (ER 13.) Plaintiffs complain that there was no evidence in the record that specifically quantified how many witnesses spoke English versus Spanish or other languages (POB 45), but the lack of such precise quantification is insufficient to establish an abuse of discretion. As Plaintiffs conceded below, there would be a need for translators for some testimony and documents regardless of the forum in which this case is tried (ER 86 n.11), and so the relevant question concerning translation costs is which forum is likely, at the margin, to entail greater translation costs than the other. In view of the district court's not-clearly-erroneous finding that this suit "centers primarily on Peruvian lands and Peruvian people" (ER 12), it was likewise not clearly erroneous for the district court to conclude that the majority of the oral testimony would probably be in Spanish and that translation costs in a U.S. forum would therefore likely be greater. *See Flores*, 253 F. Supp. 2d at 541 (dismissing for *forum non conveniens* where "many of the witnesses, … including plaintiffs,

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Los Angeles and *Lima*, not Los Angeles and Iquitos. (ER 98-99.)

speak only Spanish" because "the translation requirements alone, of testimony and documents, would double the length of the trial"); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 546 (S.D.N.Y. 2001); *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 510 (S.D.N.Y. 1982).[10]

3. The District Court Did Not Abuse Its Discretion in Concluding That, on Balance, the Public Interest Factors Favored a Peruvian Forum

As Plaintiffs note, the district court concluded that the public interest factors were either neutral or favored a Peruvian forum. (POB 46; ER 13.) The district court's conclusion on this score was not an abuse of discretion.

The one public interest factor that the district court concluded weighed in favor of a Peruvian forum was Peru's substantially greater interest in resolving the controversy. (ER 13.) The district court did not abuse its discretion in concluding that Peru had a much greater interest than California in resolving a dispute concerning alleged discharges of pollutants in Peruvian soil and waters, resulting in environmental damage to "Peruvian territory" and physical injuries to "Peruvian citizens." (*Id.*) Indeed, the evidence below showed that the Peruvian government is actively exercising its interests by overseeing an ongoing remediation program at Block 1-AB. (SER 255-56 (noting the substantial fines levied against Pluspetrol

[10] Plaintiffs suggest that the district court's order failed to consider some of the applicable private interest factors (POB 40-41), but that is wrong. The order expressly discusses all of the relevant private interest factors. *Compare Tuazon*, 433 F.3d at 1180 (listing factors) *with* ER 12-14 (discussing each such factor).

for its pollution at Block 1-AB); *see also* SER 266, 271-304.)

Plaintiffs quibble that the district court should have weighed the jurisdictions' competing interests more to Plaintiffs' liking (POB 48-49), but they fail to establish an abuse of discretion. In particular, contrary to what Plaintiffs suggest (POB 48), the district court did not deny that California has some interest in this lawsuit; it merely recognized that Peru's interest was substantially greater. On this score, the decision in *Aguinda* is instructive. There, as here, the plaintiffs claimed "they 'have or will suffer property damage, personal injuries, and increased risk of disease,' … as a result of negligent or otherwise improper oil piping and waste disposal practices." 142 F. Supp. 2d at 537. In granting the defendant's *forum non conveniens* motion, the district court pointed out that "Ecuador's interests in this case vastly outweigh those of New York" and that this factor favored dismissal. *Id.* at 552. The Second Circuit, in affirming, held that the district court had properly considered "the interest in having localized controversies decided at home." 303 F.3d at 480.[11]

[11] Plaintiffs' reliance on Amazon Watch's presence as the 26th (and sole U.S.) Plaintiff (POB 48) is once again unavailing. Unlike the California plaintiff in *Weisel Partners LLC v. BNP Paribas*, 2008 WL 3977887 (N.D. Cal. Aug. 26, 2008), Amazon Watch suffered no cognizable injury (which is why, as Defendants explain below, it lacks standing and has no UCL claim). *See infra* at 57-64. And even if Amazon Watch had been injured, its only non-waived UCL claim is one for Peruvian-centered injunctive relief. *See infra* at 58-59. Amazon Watch's peripheral role as a duplicative injunctive-relief plaintiff does not remotely show that the district court erred in finding that Peru has the greater interest in this case.

Plaintiffs wrongly contend that California should be held to have the greater interest in this litigation because Peruvian law does not recognize punitive damages. (POB 49.) Plaintiffs have cited no authority for the illogical proposition that a forum's lack of a particular remedy (here, punitive damages) somehow lessens its interest in the underlying subject matter. Plaintiffs' argument is hard to reconcile with settled law holding (in the context of assessing the adequacy of a forum) that a jurisdiction's comparatively less generous range of remedies is generally not a sufficient basis for denying a *forum non conveniens* motion. *See Piper*, 454 U.S. at 254; *de Melo v. Lederle Labs., Div. of Am. Cyanamid Corp.*, 801 F.2d 1058, 1061 (8th Cir. 1986) (affirming *forum non conveniens* dismissal, despite unavailability of punitive damages under Brazilian law); *Dtex, LLC v. BBVA Bancomer, S.A.*, 512 F. Supp. 2d 1012, 1022-23 (S.D. Tex. 2007) (same, Mexican law); *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, 58 F. Supp. 2d 925, 928-29 (N.D. Ill. 1999) (same, German law).

Plaintiffs' remaining arguments concerning the public interest factors are all without merit. Contrary to what Plaintiffs contend (POB 49-50), the district court properly treated choice-of-law considerations as a neutral factor. (ER 13-14.) Plaintiffs assert that the district court was "obligated to presume that California law would apply" because (according to Plaintiffs), there was an insufficient showing of a conflict between Peruvian and California law. (POB 50.) Plaintiffs' position

is ironic, inasmuch as Plaintiffs themselves have highlighted conflicts between the laws of the two jurisdictions, including Peru's lack of a cause of action directly comparable to California's UCL and Peru's prohibition on punitive damages. (POB 28-29, 49.) The district court reasonably concluded that it did not need to resolve this issue, because even assuming that there were no material differences in Peruvian and California law, that fact would itself neutralize the significance of choice-of-law as a factor in the public interest analysis. (ER 13-14.) As this Court held in *Lueck*, a "choice of law analysis is only determinative when the case involves a United States statute requiring venue in the United States," and in the absence of such a statute, the district court need *not* make a formal choice-of-law determination in ruling on *forum non conveniens*. 236 F.3d at 1148.[12]

Plaintiffs wrongly contend that the district court should have specifically discussed in its order several additional considerations, such as whether a Peruvian judgment would be enforceable. (POB 46-47.) As an initial matter, Plaintiffs'

[12] Plaintiffs' argument that California law should have been found applicable also overlooks Defendants' contention that extraterritorial application of California law to regulate effluent levels and environmental remediation on Peruvian lands would be plainly unconstitutional under the foreign affairs doctrine. (CR 43 at 11, citing *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419-25 (2003); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1187-88 (C.D. Cal. 2005).) *See also Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 919 n.7 (2001) (acknowledging the obvious point that California choice-of-law analysis cannot override federal constitutional limits). Thus, had the district court undertaken a full-blown choice-of-law analysis, the result would have been *less* favorable to Plaintiffs than the district court's "neutral" evaluation of this factor.

argument on this score is somewhat confusing, because it improperly labels as a "public" interest factor what Plaintiffs below correctly identified as a "private" interest factor. (ER 88.) In any event, Plaintiffs cite no authority for the view that the district court—whose detailed order already exceeded 12 single-spaced pages—was required to explicitly mention and reject every argument raised by a party, no matter how insubstantial. And Plaintiffs' argument on this score was plainly insubstantial. Plaintiffs' sole evidence of lack of enforceability of a Peruvian judgment was the failure of the *Peruvian government*, within one year after a judgment was rendered in one case, to have yet satisfied it. (ER 88, 119.) This flimsy evidence says nothing about the enforceability of judgments against *private* parties and overlooks the fact that foreign monetary judgments, including those from Peru, are generally enforceable in the U.S., where Defendants reside. *See* Cal. Code Civ. P. §§ 1715, 1716(a) (foreign-country money judgments are generally enforceable in California); *see also In re B-E Holdings, Inc.*, 228 B.R. 414, 419 (Bankr. E.D. Wis. 1999) (enforcing Peruvian money judgment).[13]

C. The District Court Did Not Abuse Its Discretion in Determining that Plaintiffs Had Failed to Show the Need for Additional Conditions, Beyond Those Imposed in the Judgment

As this Court has made clear, "conditions are not necessary" in a *forum non*

[13] Plaintiffs likewise cite no authority that the district court, having exhaustively considered the adequacy of Peru as a forum and Plaintiffs' failure of proof of inadequacy, was somehow required to re-state that analysis in its discussion of the private (or public) interest factors. (POB 47.)

conveniens dismissal. *Leetsch v. Freidman* 260 F.3d 1100, 1104 (9th Cir. 2001). Rather, "'each case turns on its facts.'" *Piper*, 454 U.S. at 249 (citation omitted). The question in each case is whether "there is a justifiable reason to doubt that a party will cooperate with the foreign forum," so that conditions are necessary to ensure that the defendant does not obstruct the proceedings or otherwise defeat the adequacy of the forum. *Leetsch*, 260 F.3d at 1104. Accordingly, many courts have granted *forum non conveniens* dismissals without imposing any express conditions beyond acquiescence in personal jurisdiction.[14] *See, e.g., Miskow v. Boeing Co.*, 664 F.2d 205, 208 (9th Cir. 1981); *Gund v. Philbrook's Boatyard*, 374 F. Supp. 2d 909, 914 (W.D. Wash. 2005); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 65 (S.D. Tex. 1994). In this case, the district court did not abuse its discretion in concluding that four additional conditions requested by Plaintiffs were not necessary to ensure the adequacy of a Peruvian forum.[15]

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[14] Consistent with its order of dismissal, the district court's final judgment in this case required Defendants to consent to personal jurisdiction in Peru and also stated that the suit could be re-filed in the U.S. if the Peruvian courts failed to accept personal jurisdiction over Defendants. (ER 2.)

[15] In opposing Defendants' *forum non conveniens* motion below, Plaintiffs made only the most cursory arguments in favor of the requested conditions, apparently on the view that Plaintiffs' request for further briefing on the issue was somehow sufficient to obligate the district court to give them another bite at the apple. (ER 93.) As a result, most of Plaintiffs' arguments in support of these conditions were raised for the first time in briefing over the form of the judgment—*i.e.*, after the district court had already issued its order dismissing the case without imposing the requested additional conditions. As such, these belated arguments constituted an

1. Plaintiffs Failed to Show Any Basis for Requiring an Advance and Unconditional Agreement to the Enforceability of Any Peruvian Judgment

Plaintiffs below failed to show any basis to justify requiring Defendants to guarantee, in advance, that any judgment will be automatically enforceable in the U.S., regardless of the actual course of litigation in Peru. The only argument Plaintiffs made on this score before the case was dismissed was that such a condition was required under *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446 (9th Cir. 1990). (ER 93.) That argument, which Plaintiffs conspicuously do *not* renew on appeal, is plainly wrong. This Court in *Leetsch* expressly rejected the argument that *Contract Lumber* stands for the proposition that such a condition is properly imposed in every case: "*Contract Lumber* held that conditions were sufficient to establish an adequate alternative forum," but it did "not hold that conditions must always be established." 260 F.3d at 1104.

The arguments that Plaintiffs do make on appeal were waived below, *see* note 15 *supra*, but they are meritless in any event. Plaintiffs make much of the fact that Defendants no longer have substantial operations in Peru (POB 51), but the point is of no moment. There is no need for there to be assets in Peru to satisfy any judgment for the simple reason that foreign money judgments, including those

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improper motion for reconsideration in violation of the district court's local rules and were waived. *See* C.D. Cal. Local R. 7-18; *see also Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir. 1995).

from the courts in Peru, are generally enforceable in the U.S, *see supra* at 41, and Plaintiffs failed to provide any basis for concluding that any of the very narrow ground for declining enforcement in the U.S. would apply here. *See* Cal. Code of Civ. P. § 1716(b), (c) (specifying grounds); RESTATEMENT (THIRD) OF THE FOR. RELATIONS LAW OF THE U.S. § 482 (1987) (listing nearly identical grounds).

Moreover, in the unlikely event that one of the grounds for non-enforcement did later apply (*e.g.*, fraud by Plaintiffs or their agents during the proceedings in Peru), requiring Defendants to give, in advance, full absolution for any such misconduct would not have been justified. *See, e.g.*, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December 1984*, 809 F.2d 195, 204 (2d Cir. 1987) (*reversing* condition of advance consent to enforceability, noting that it would grant immunity to fraud); *Banco de Seguros*, 500 F. Supp. 2d at 263-64 (rejecting guarantee condition for the same reason).

2. Because All Parties Agree That the Peruvian Statute of Limitations Has Been Tolled, Requiring a "Waiver" of the Statute Would Be Unnecessary and Confusing

The parties below all agreed that the Peruvian statute of limitations (to the extent it had not already run) was tolled by the filing of this litigation and that the tolling continues during the pendency of this appeal. (SER 17-18, 252.) Plaintiffs nevertheless contend that the district court abused its discretion by failing to require Defendants to "waive" the statute of limitations. (POB 52.) That such a

condition may have been appropriate or necessary in order to ensure the adequacy of other fora in other cases (POB 52-54) does not mean that the district court abused its discretion in declining to impose such a requirement here. The condition is concededly unnecessary, and requiring Defendants nonetheless to "waive" the statute could create confusion, and opportunities for later mischief, about the scope of any such "waiver." Indeed, Plaintiffs' quixotic persistence in seeking to impose this superfluous condition only heightens such concerns. The district court acted well within its discretion in refusing to impose it.

3. The District Court Properly Declined to Require the Peruvian Courts to Apply the Discovery Provisions of the Federal Rules of Civil Procedure

The district court did not abuse its discretion in declining Plaintiffs' request that Defendants be required to provide discovery pursuant to the U.S. Federal Rules of Civil Procedure and that the court "retain[] jurisdiction for the purpose of determining whether" this (and other) conditions are met. (POB 56.)

In the briefing prior to the dismissal order, Plaintiffs' only argument on this score was to rely on a single, unpublished out-of-circuit district court case in which the basis for imposing such a condition was that the defendant *voluntarily agreed* that the Federal Rules of Civil Procedure would apply to discovery in Jamaica. (ER 93, citing *Guimond v. Wyndham Hotels*, 1996 U.S. Dist. LEXIS 7255 at *16, 1996 WL 281959 at *5 (S.D.N.Y. 1996).) This argument provides no basis for

imposing such a condition where, as here, the defendants have objected to such a condition. Although Plaintiffs waived any other arguments on this score, *see* note 15 *supra*, Plaintiffs' belated, post-dismissal arguments were equally without merit. Plaintiffs' position is effectively that the Peruvian discovery system is inadequate, and that the district court was therefore required to supervise, according to the Federal Rules, the entire pretrial discovery process in Peru. The district court, however, properly held that the Peruvian system provides an adequate forum without the forced importation of the Federal Rules; indeed, virtually every country in the world would be inadequate if compliance with American-style discovery were required.[16] Moreover, the district court properly declined to adopt Plaintiffs' unworkable suggestion that the district court retain jurisdiction to resolve every discovery dispute and thereby to serve, in effect, as discovery master for any Peruvian action. Such jurisdiction-sharing arrangements are both "illusory and unrealistic" and have been properly rejected by courts. *In re Union Carbide*

[16] Plaintiffs' belated, post-dismissal submission of an additional Peruvian law declaration (ER 385-91) provided no basis for reconsideration. *See Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (motion for reconsideration may not be used to present evidence for the first time). Moreover, the declaration was riddled with misstatements about the Peruvian system. Thus, while Plaintiffs suggested that Peruvian discovery requires that each document requested by a party must be "specifically known" (ER 374), Dr. Osterling demonstrated that the suggestion is flatly incorrect (SER 10). Dr. Osterling likewise rebutted Plaintiffs' suggestion (POB 56; ER 388) that Peruvian law lacks mechanisms to enforce compliance with discovery. (SER 12-14.)

Corp., 809 F.2d at 205 (eliminating condition that defendant consent to discovery under the Federal Rules); *see also Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1132-33 (S.D.N.Y. 1992) (declining to impose discovery condition).

4. The District Court Properly Declined to Adopt Plaintiffs' Unfair Suggestion That Defendants Pay for All Translations

The district court did not abuse its discretion in declining to shift the costs of all translations to Defendants. Plaintiffs themselves acknowledged below that "[r]egardless of where this case is tried, the use of translators will be necessary." (ER 86 n.11.) When they filed in a U.S. court, Plaintiffs were prepared to accept the substantial translation costs that would have been incurred for *Spanish* documents, and the district court properly declined to grant them the windfall of having Defendants bear *all* the costs of translation in Peru. The lone case cited by Plaintiffs (POB 55) is inapposite, because the defendants there voluntarily agreed to bear the costs of translating documents. *Duha*, 448 F.3d at 876.

II. The District Court Did Not Abuse Its Discretion in Deciding the Issue of *Forum Non Conveniens* Without First Requiring Discovery

A party seeking discovery in advance of the conference of parties under Fed. R. Civ. P. 26(f) must show "good cause." *See, e.g.*, *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273, 275 (N.D. Cal. 2002); *see generally* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 2046.1 (2d ed. 1998). Plaintiffs had a

significant burden in attempting to show "good cause" here, because conducting discovery in connection with a *forum non conveniens* motion is at odds with the purpose of that doctrine, and the courts have routinely denied such discovery.

In *Piper*, the Supreme Court stated that "[r]equiring extensive investigation" as a prerequisite to determining a *forum non conveniens* motion "would defeat the purpose" of the doctrine. 454 U.S. at 258; *see also Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (a *forum non* "inquiry does not necessarily require extensive investigation, and may be resolved on affidavits presented by the parties"). Because the *forum non conveniens* doctrine is grounded in concern for the costs of litigation and the convenience of the parties, it is well settled that "[m]otions to dismiss based on *forum non conveniens* usually should be decided at an early stage in the litigation, so that the parties will not waste resources on discovery and trial preparation in a forum that will later decline to exercise its jurisdiction over the case." *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 614 (3d Cir. 1991). "[I]n resolving a *forum non conveniens* motion, the district court must do no more than delineate the likely contours of the case by ascertaining, among other things, the nature of the plaintiff's action, the existence of any potential defenses, and the essential sources of proof." *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 181 (3rd Cir. 1991).

Consistent with these principles, courts routinely resolve *forum non*

conveniens motions without any discovery having been conducted. *See, e.g.*, *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 120 (2d Cir. 1998) (affirming *forum non conveniens* dismissal "prior to any discovery"); *Marra v. Papandreou*, 33 F. Supp. 2d 17, 19 (D.D.C. 1999) (concluding that "*forum non conveniens* issue does not require preliminary discovery" and granting defendants' motion to dismiss). And courts have frequently denied formal requests for discovery prior to dismissing suits on the basis of *forum non conveniens*. *See, e.g.*, *Nolan v. Boeing Co.*, 919 F.2d 1058, 1067 (5th Cir. 1990) (rejecting as "frivolous" appellants' contention that the district court erred in dismissing actions on *forum non conveniens* grounds without first allowing them to conduct discovery); *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987) (upholding district court's protective order preventing further discovery pending its decision to dismiss on the grounds of *forum non conveniens*); *Beekmans v. J.P. Morgan & Co.*, 945 F. Supp. 90, 95 (S.D.N.Y. 1996) (in dismissing action, "[t]he fact that this [*forum non conveniens*] motion is based on affidavits does not compel the conclusion that discovery should be granted"); *Sequihua*, 847 F. Supp. at 64 (denying "Plaintiffs[']attempt to delay the Court's ruling on the motions to dismiss [by] arguing that they need time for discovery on the *forum non conveniens* issues").[17]

[17] *See also Sibrian v. Chapel Navigation, Ltd.*, 1997 WL 767651 at *3 (E.D.La.

As set forth below, Plaintiffs simply failed to carry their burden to show that discovery was warranted and would have made a difference to the *forum non conveniens* analysis. *Cheng*, 708 F.2d at 1412 (noting that, although discovery may often be warranted, there is no abuse of discretion in denying it absent the "'clearest showing'" that discovery would have made a difference to the outcome) (citation omitted). Where, as here, the district court already had "'enough information to enable [it] to balance the parties' interests,'" discovery is properly denied. *Id*. (quoting *Piper*, 454 U.S. at 258).

A. The Evidence in the Record Was Sufficient to Determine the Adequacy of the Peruvian Forum

Plaintiffs had an especially heavy burden in attempting to show that discovery was warranted with respect to the adequacy of the Peruvian forum, because only in "rare" circumstances is a forum deemed "clearly unsatisfactory." *Piper*, 454 U.S. at 255 n.22. As noted earlier, "[t]he effect of *Piper Aircraft* is that a foreign forum will be deemed adequate *unless it offers no practical remedy for the plaintiff's complained of wrong*." *Lueck*, 236 F.3d at 1144 (emphasis added). Likewise, only in very rare cases will a forum be found to be inadequate on the ground that its courts are too corrupt. *See Tuazon*, 433 F.3d at 1179 (noting the heavy burden that would be required to support such a "dramatic holding").

1997); *Oxley v. Wyeth Lab., Inc.*, 1992 WL 116308, at *1-*2 (E.D.Pa. 1992); *Varnelo v. Eastwind Transp., Ltd.*, 2003 WL 230741, at *4 n.10 (S.D.N.Y. 2003).

Plaintiffs failed to show good cause why discovery was needed to evaluate the overall adequacy of a Peruvian forum under these standards.

As the district court recognized, the adequacy of the Peruvian courts as an alternative forum is judged largely based on publicly available information about the cognizable claims in Peru and the structure and integrity of its courts. (ER 7-11.) Here, Defendants' Peruvian law expert, Dr. Osterling, canvassed the publicly available materials in order to show that (1) Peruvian law specifically recognizes, and provides remedies for, claims of personal injury and property damage caused by environmental contamination; (2) significant reform measures have been implemented in the Peruvian judicial system since the end of the Fujimori regime in 2000; and (3) there are other structural mechanisms designed to preserve the impartiality and independence of the Peruvian judiciary. (SER 222-29, 245-50.) Plaintiffs did not show why they needed discovery from Defendants to challenge these points. If they disagreed with Dr. Osterling's assessment of Peruvian law and the integrity of the Peruvian system, then the response was to present (as they did) their own declarations of Peruvian law and their own assessment of the system's integrity. *See, e.g.*, *Flores*, 253 F. Supp. 2d at 532-33 (relying on declarations of Peruvian law to conclude that Peru was an adequate alternative forum for plaintiffs' environmental claims).

Indeed, the notion that depositions of the competing experts were required to

resolve, for example, disagreements over whether Peruvian law affords remedies for the harms at issue is inconsistent with the fact that such questions about the content of Peruvian law are treated "as a ruling o*n a question of law*." Fed. R. Civ. P. 44.1 (emphasis added); *Daehan Inv. Trust Mgmt. Co., Ltd. v. J.P. Morgan Chase Bank*, 2003 WL 21297304, at *2 (S.D.N.Y. 2003) (noting that "Defendant has sufficient time to submit an affidavit or declaration from an expert in Argentine law" in lieu of deposing plaintiffs' foreign law expert).

The record is also more than sufficient to make clear—as the federal courts have consistently held—that the Peruvian courts do not present the sort of rare case in which *forum non conveniens* can be denied based on a supposed total lack of integrity in the foreign judicial forum. *See supra* at 19 (collecting cases). Plaintiffs' own brief, which spends nearly three pages summarizing the various items of evidence they submitted on the issue of corruption in the Peruvian judicial system, amply confirms the lack of any need for discovery on this issue. (POB 17-19.) Indeed, the cases cited by Plaintiffs do not justify allowing *forum non conveniens* discovery in connection with the *adequacy* of a foreign forum. *See, e.g.*, *Duha*, 448 F.3d at 873 n.4 (noting that the plaintiffs had never contested the adequacy of the Argentine forum below); *Alfadda v. Fenn*, 159 F.3d 41, 46 (2d Cir. 1998) (affirming *forum non conveniens* dismissal and noting that France's *adequacy* as an alternative forum was not in dispute).

The nature of the discovery requests that Plaintiffs proposed to serve also confirms that there is no need for *forum non conveniens* discovery as to adequacy and that allowing such discovery would be burdensome and unwarranted. *See, e.g.*, *OMG Fidelity, Inc. v. Sirius Technologies, Inc.*, 239 F.R.D. 300, 304-05 (N.D.N.Y. 2006) (burden of proposed discovery is a factor in assessing whether "good cause" has been shown). In an effort to show that Peru is an inadequate forum, Plaintiffs proposed to review decades' worth of contracts relating to Defendants' Peruvian operations. (POB 19.) Plaintiffs' theory is apparently that this review will show that Defendants use arbitration clauses that reflect a lack of "confidence in the Peruvian legal system." (*Id*.) But as explained earlier, *supra* at 25, it is simply irrelevant to a determination of the *adequacy* of a forum whether Defendants use forum selection clauses. *See, e.g.*, *Banco de Seguros del Estado*, 500 F. Supp. 2d at 265.

Plaintiffs likewise fell far short of showing "good cause" for using a *forum non conveniens* motion as a fishing expedition into Defendants' worldwide corporate ethics. (ER 327 (proposing to inspect any documents relating to "evidence that Oxy has been involved in corruption or bribery at any level in Peru, or judicial corruption *in any country*") (emphasis added).) Plaintiffs cite not a single case in which a court has granted such an extraordinary request in connection with a *forum non conveniens* motion. Moreover, as explained above,

Plaintiffs lack any good-faith basis for their information-and-belief allegation that Defendants have engaged in bribery in Peru. *See supra* at 23. Indeed, Plaintiffs' fanciful theory that Defendants somehow have undue influence in the Peruvian courts cannot be squared with the undisputed fact that Defendants do not even have active operations in Peru at the present time. (SER 198.)

Given the "powerful showing" that would be required to show that the Peruvian courts are too corrupt to be adequate, *Tuazon*, 433 F.3d at 1179, Plaintiffs must come forward with more than speculation to establish "good cause" for the sort of purely harassing discovery they seek here. *Cf. Terracom v. Valley National Bank*, 49 F.3d 555, 562 (9th Cir. 1995) ("'[W]here a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants, the Court need not permit even limited discovery….'") (citation omitted). The denial of Plaintiffs' request for discovery concerning the adequacy of a Peruvian forum was not an abuse of discretion.

B. The Evidence in the Record Was Sufficient to Weigh the Private and Public Interest Factors

As explained earlier, the record before the district court demonstrated that the overwhelming majority of witnesses and physical evidence, including (most importantly) Block 1-AB itself, was located in Peru, and that "[m]any of the witnesses … are beyond the reach of compulsory process in the United States." (ER 12.) The record also contained the parties' competing evidence concerning

such factors as the relevant costs of transportation and the relative court congestion in Peru and the United States. (ER 12-13.) The district court properly concluded that discovery was not warranted here because the evidence in the record was more than sufficient for the court to find that the "private interest factors weigh overwhelmingly in favor of dismissal" and that the public interest factors were either neutral or favor dismissal. (ER 13-14.)

The discovery Plaintiffs sought on these points—*e.g.*, the precise location of Defendants' witnesses and documents, and the degree of corporate control exercised from California over Oxy Peruana's Peruvian activities—was ultimately immaterial to the district court's *forum non conveniens* determination. Even if all of Defendants' documents and witnesses are in the U.S., it would make no difference. Documents and witnesses in the U.S. that are under Defendants' "control … can be brought to court, no matter the forum." *Lueck*, 236 F.3d at 1146; *see supra* at 33-34. Similarly, the precise geographic allocation of decision-making within Oxy Peruana between Peru and the U.S. cannot alter the fact that the alleged contamination occurred in Peru, Plaintiffs are in Peru, and critical third-party witnesses and documents are in Peru. Indeed, Plaintiffs' contention that discovery was necessary in order to identify all relevant witnesses (POB 21) is inconsistent with *Piper*, which rejects any such requirement. *See supra* at 33.

None of the cases cited by Plaintiffs supports a different result. *Duha* and

Alfadda are inapposite because the courts there had ordered discovery into both *personal jurisdiction* issues (which typically require some preliminary discovery to resolve) and *forum non conveniens*. *See Alfadda v. Fenn*, 1994 WL 714254 at *1, (S.D.N.Y. 1994); *Duha v. Agrium, Inc.*, 340 F. Supp. 2d 787, 790 (E.D. Mich. 2004). In such dual-issue cases, the possibility of entirely avoiding the burdens and delay of discovery has already been lost, and it is not surprising that courts in such circumstances have chosen to allow additional discovery on other points at the same time.[18] And Plaintiffs' reliance on *Aguinda* (POB 16) is the proverbial exception that proves the rule. Looking back on the lengthy discovery that had been authorized in that case, the district court questioned whether, in hindsight, that indulgence had been warranted:

> [T]he late Judge Broderick accorded plaintiffs unusual leeway, through discovery and otherwise, to try to prove that this seemingly Ecuadoran-centered lawsuit properly belonged here…. In hindsight, such solicitude may have been improvident, for the overwhelming obstacles to the Court's jurisdiction that were already apparent to the court in *Sequihua* have become increasingly obvious to this Court as well.

945 F. Supp. 625, 627 (S.D.N.Y. 1996), *vacated on other grounds sub nom. Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). The district court did not abuse its

[18] Plaintiffs cite two other unpublished cases that do not provide any context about the nature of the discovery permitted and that therefore cannot establish that the district court here abused its discretion on the record of this case. *See Vivendi, S.A. v. T-Mobile USA, Inc.*, 2007 WL 1168819, at *2 (W.D. Wash. 2007); *Herkemij & Partners Knowledge, B.V. v. Ross Sys. Inc.*, 2005 Dist. LEXIS 4128, at *1 (N.D. Cal. 2005).

discretion in concluding that it was already apparent that this case belongs in Peru and that discovery would be a waste of the parties' and the court's resources.

III. Amazon Watch's UCL Claim Should Have Been Dismissed With Prejudice

Although the district court's *forum non conveniens* analysis was unassailable, the court erred in failing to dismiss Amazon Watch's UCL claim outright and with prejudice. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (noting that, although courts have discretion to decide *forum non conveniens* ahead of jurisdictional issues such as standing, they should ordinarily decide jurisdictional issues first if they can be "readily determine[d]"); *see also id*. at 430-31 (noting that only jurisdictional issues generally *must* be decided before merits issues).

A. Amazon Watch Lacks Statutory Standing to Assert a Claim Under California's Unfair Competition Law

The FAC makes clear that, as a matter of law, Amazon Watch cannot satisfy the UCL standing requirements imposed by Proposition 64 in 2004.[19] That initiative repealed the language that had previously allowed *any* private person or organization (even uninjured ones) to bring suits for violations of the UCL. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553 (1998). Instead, Proposition 64 amended the UCL to limit private actions to those by plaintiffs who

[19] It is settled that questions of statutory standing may be decided before questions of Article III standing. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

have "suffered injury in fact and … lost money or property as a result of" the alleged unfair competition. Cal. Bus. & Prof. Code § 17204. For two independent reasons, Amazon Watch cannot satisfy this standing requirement.

1. Amazon Watch Has Not "Lost Money or Property" That Is Remediable Under the UCL

Because the UCL's only monetary remedy is equitable restitution, *see Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1146-52 (2003); *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal. App. 4th 997, 1015-20 (2005), the "import" of Proposition 64's requirement that the plaintiff must have lost money or property "is to limit standing to individuals who suffer losses of money or property *that are eligible for restitution*." *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 817 (2007) (emphasis added); *see also Kwikset Corp. v. Superior Court*, 171 Cal. App. 4th 645, 654 (2009); *Citizens of Humanity, LLC v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1, 22 (2009).

In the proceedings below, Amazon Watch did *not* contest that it could not satisfy *Buckland*'s requirement that a plaintiff must show a loss of money or property that is eligible for restitution under the UCL (CR 42 at 2), and it has therefore waived any such claim. *Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033, 1037 (9th Cir. 2006).[20] Rather, Amazon Watch contended that

[20] The concession was wise. Amazon Watch's assertion that it "lost money or property" was based on the allegation that its efforts "to investigate and expose"

Buckland was wrongly decided and should not be followed. (CR 28 at 8 & n.4.) This argument fails. *Buckland* is binding on this Court absent "convincing evidence" that the California Supreme Court would not follow it. *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007). The lack of such convincing evidence is confirmed by the fact that the California Supreme Court denied review in *Buckland* and refused to depublish the decision. (CR 42 at 3.) *See Tenneco West, Inc. v. Marathon Oil Co.*, 756 F.2d 769, 771 (9th Cir. 1985) (rule that intermediate state appellate decisions are binding is especially true when the supreme court "has refused to review the lower court's decision"). And since *Buckland* was decided, two other California appellate decisions have followed its holding on this point. *Kwikset Corp.*, 171 Cal. App. 4th at 654; *Citizens of Humanity*, 171 Cal. App. 4th at 22.

2. Defendants Did Not Proximately Cause Amazon Watch's Voluntary Expenditure of Funds

Proposition 64 also requires a private UCL plaintiff to plead and prove that it "has suffered injury in fact and has lost money or property *as a result of* [the alleged] unfair competition." Cal. Bus. & Prof. Code § 17204 (emphasis added).

Defendants' UCL violations consumed "financial resources" and caused a "diversion of its staff time." (ER 41, 55; *see also* ER 36-40.) Because the funds Amazon Watch spent on these activities were given to third parties, and not to Defendants, they are not recoverable as restitution under the UCL. *Alch v. Superior Court*, 122 Cal. App. 4th 339, 404 (2004) ("[I]t is settled that restitution [under the UCL] is available only if a defendant has wrongfully acquired funds or property in which a plaintiff has an ownership or vested interest").

This use of the phrase "as a result of" in Proposition 64 "imports a *reliance or causation* element" into the UCL, *Medina v. Safe-Guard Products, Intl., Inc.* (2008) 164 Cal. App. 4th 105, 115 (2008) (emphasis in original), so that a plaintiff must now show that the challenged conduct *proximately caused* it to suffer a loss of money or property. *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 855 & n.2 (2008) (holding that the causation required is the same as in a negligence action). Amazon Watch did *not* contend in the district court that it could satisfy this standard,[21] instead arguing only that *Hall* was wrongly decided and that Proposition 64 does not require proximate causation. (CR 42 at 5-7.) The question whether Proposition 64 requires proximate causation is currently before the California Supreme Court, whose resolution of that issue will be binding on this Court. *See In re Tobacco II Cases*, 47 Cal. Rptr. 3d 917, 925-26 (Cal. App.), *review granted*, 146 P.3d 1250 (Cal. 2006).

B. Amazon Watch Lacks Article III Standing to Assert a UCL Claim

The Supreme Court has held that Article III's "irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*,

[21] Again, the concession was appropriate. As the FAC makes clear, Amazon Watch's alleged monetary injuries were the result of its own voluntary decision "to investigate and expose" Defendants activities. (ER 36-37, 55.) That is insufficient to satisfy the requirements of Proposition 64. *See Buckland*, 155 Cal. App. 4th at 816-19 (plaintiff failed to satisfy Proposition 64's standing requirements when, after "supect[ing] the deceptive practice," she voluntarily bought the defendant's product as part of investigation leading up to litigation).

504 U.S. 555, 560 (1992). First, "the plaintiff must have suffered an *injury in fact*—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id*. (emphasis added; citations and internal quotation marks omitted). Second, "there must be a causal connection between the injury and the conduct complained of—the injury has to be '*fairly* ... *trace*[*able*] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" *Id*. (emphasis added; citation omitted). Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be '*redressed* by a favorable decision.'" *Id*. at 561 (emphasis added; citation omitted). Amazon Watch's UCL claim fails to satisfy any of these elements.

As the D.C. Circuit correctly held in *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp*., 28 F.3d 1268 (D.C. Cir. 1994), an organization's voluntary expenditure of resources to investigate a defendant's conduct is a "self-inflicted" harm; as such, it "is not really a harm at all" and is not fairly traceable to the defendant's conduct. *Id*. at 1276-77. The court contrasted such "self-referential injury" with the quite different situation in which "the defendant's actions *themselves*" interfered with an organization's activities, *e.g.*, by harming individuals who then use the organization's counseling services. *Id*. at 1277 (emphasis added) (distinguishing *Havens Realty Corp. v. Coleman*, 455 U.S. 363,

379 (1982), on that basis). Here, all of Amazon Watch's asserted injuries consist of the expenses incurred in connection with its investigation of Defendants' conduct; it does not allege any loss of money or property in connection with the provision of *other* services, *i.e.*, services that are unrelated to its choice to investigate Defendants. (ER 36-40.) *See also Project Sentinel v. Evergreen Ridge Apts.*, 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999) (no Article III standing when only injuries alleged were "nothing more than the monitoring and investigating of housing providers" and subsequent litigation).

Amazon Watch also lacks Article III standing because it is clear that its asserted injuries would not be "'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (citation omitted). As explained above, Amazon Watch did not contest below that the UCL provides no basis whatsoever for recovering the funds that Amazon Watch expended on its investigative efforts. *See supra* at 58-59 & n.20. Although Amazon Watch would undoubtedly feel vindicated by a ruling that Defendants violated the UCL, such "psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998). Accordingly, Article III requires that the relief requested must redress the *particular* injury that assertedly constitutes the "injury in fact" that is "fairly traceable" to the defendant's conduct: "Relief that does not remedy the injury

suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id*. Because the UCL provides no redress for Amazon Watch's past investigatory expenditures, Article III's redressability requirement cannot be satisfied here.[22]

C. Alternatively, Amazon Watch's UCL Claim Fails on the Merits as a Matter of Law

Alternatively, Amazon Watch's UCL claim should have been dismissed with prejudice for failure to state a claim on which relief may be granted.

As explained earlier, Amazon Watch is not entitled to any monetary remedy under the UCL. *See supra* at 58-59. Amazon Watch's request for injunctive relief fares no better. (ER 56.) The FAC is quite vague as to either the basis for, or scope of, any injunctive relief requested. Amazon Watch's past expenditures of funds on investigative activities cannot be remedied by an injunction, because it would run afoul of the strict limitations on the UCL's monetary remedies. *Korea Supply*, 29 Cal. 4th at 1148 ("A court cannot, under the equitable powers of [the UCL], award whatever form of monetary relief it believes might deter unfair

[22] To the extent that Amazon Watch seeks injunctive relief to avoid *future* investigative expenditures, its UCL claim would still fail. Any such *post-filing* expenditures would be "entirely of [its] own making since any future reallocation of resources would be initiated at [Amazon Watch's] sole and voluntary discretion," and "[s]uch an optional programming decision does not confer Article III standing on a plaintiff." *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 816 (S.D. Ind. 2006), *aff'd on other grounds*, 472 F.3d 949, 951 (7th Cir. 2007) (declining to decide standing of organizations, because political party had sufficient standing to allow court to reach merits), *aff'd*, 128 S. Ct. 1610 (2008).

practices."). Moreover, the only ongoing injury that Amazon Watch alleges is that it will "continue to lose money or property" in the form of ongoing expenses "to investigate and expose defendants' unlawful and unfair practices." (ER 55.) But having filed this litigation as the *means* to continue its investigation, Amazon Watch's request for injunctive relief falls squarely within *Buckland*'s holding that expenses incurred in connection with the litigation itself cannot form the basis of a UCL claim. 155 Cal. App. 4th at 817-19. Moreover, a request for declaratory relief, standing alone, cannot state a UCL claim where none otherwise exists. *City of Colati v. Cashman*, 29 Cal. 4th 69, 80 (2002).

CONCLUSION

To the extent that the district court's judgment dismissed the claims of Amazon Watch based on *forum non conveniens*, the judgment should be vacated and remanded with instructions to dismiss the claims of Amazon Watch with prejudice. In all other respects, the judgment should be affirmed. Alternatively, the judgment should be affirmed in its entirety.

DATE: April 6, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASES

Defendants/Appellees/Cross-Appellants Occidental Petroleum Corporation and Occidental Peruana, Inc. are not aware of any related cases that are currently pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 28.1(e)(2)(B)(*i*) and 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 16,318 words, which is less than the 16,500 words permitted by Fed. R. App. P. 28.1(e)(2)(B)(*i*).

Dated: April 6, 2009

/s/ Daniel P. Collins
Daniel P. Collins

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2009, I electronically filed the foregoing **DEFENDANTS/APPELLEES/CROSS-APPELLANTS' ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL** with the Clerk of the Court for the United States Court of Appeals by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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