No. 08-56187

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMAS MAYNAS CARIJANO et al.,
Plaintiffs-Appellants,
v.
OCCIDENTAL PETROLEUM CORPORATION; OCCIDENTAL PERUANA, INC.,
Defendants-Appellees.

On Appeal From a Judgment of the
United States District Court for the Central District of California
Case No. cv 07-5068 PSG (PJWx)

PLAINTIFFS'-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 26.1, Amazon Watch states that it is a nonprofit corporation organized under the laws of Montana. Amazon Watch has no parent corporation and no stock owned by any publicly owned corporation.

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I. INTRODUCTION

This case arises out of the massive pollution that Defendants Occidental Petroleum Corp. and Occidental Peruana, Inc. (Defendants-Appellees, hereinafter "Defendants") needlessly inflicted upon indigenous Achuar communities in a pristine corner of the Peruvian Amazon. Despite the fact that the Achuar came to Defendants' home jurisdiction, filing suit where Defendants have their headquarters, and despite the fact that this case could not be litigated in Peru, and without allowing any discovery or even requiring that Defendants satisfy any judgment issued by the Peruvian courts, the District Court dismissed this case on the basis of *forum non conveniens*.

For thirty years, Defendants operated an oil concession in and around the ancestral territory of the Achuar people. Defendants' reckless design, construction, and operation of those facilities has caused egregious toxic contamination over the course of decades, which continues today. Recently, Achuar residents discovered that contamination from Defendants' operations has caused severe health problems for themselves and their children, including widespread lead poisoning.

In the last few years, the Achuar began to seek assistance in investigating and exposing Defendants' actions, especially from Plaintiff

Amazon Watch.[1] Amazon Watch has been working on behalf of the Achuar people to monitor Defendants' action and their effects, and has lobbied Defendants to take corrective actions to clean up the pollution they have caused and to provide compensation to the injured Achuar. ER 25 (First Amended Complaint ("FAC") ¶30).

In an attempt to seek redress for the massive pollution Defendants have caused, the Achuar indigenous residents of the Peruvian Amazon and the California-based organization Amazon Watch (Plaintiffs-Appellants, hereinafter "Plaintiffs"), filed suit against Defendants in their own home forum of Los Angeles. Plaintiffs believed this was the only forum open to them because Defendants no longer have operations in Peru.

Defendants sought *forum non conveniens* dismissal. In response, Plaintiffs provided the District Court with evidence that corruption and discrimination are endemic in the Peruvian legal system, as well as evidence of practical problems and inadequate remedies under Peruvian law. Plaintiffs noted that Defendants failed to meet their burden of proving that Plaintiff Amazon Watch has any remedies available under Peruvian law. Plaintiffs also submitted evidence that private and public interest factors weigh in favor of

[1] Plaintiffs' Excerpt of Records (*hereinafter* "ER __") 36-40 (FAC ¶¶ 89–103).

retention of the case in California, which is Defendants' home forum, and home forum of Plaintiff Amazon Watch.

In light of factual disagreement about key issues underlying the adequacy of Peru as an alternate forum and the weight of private and public interest factors, Plaintiffs urged the court to permit limited *forum non conveniens*-related discovery prior to ruling on Defendants' motion to dismiss. Plaintiffs also urged the court to allow briefing on conditions of dismissal should the court be inclined to grant Defendants' motion. ER 93.

On April 15, 2008, the District Court ruled on Defendants' motion to dismiss, abusing its discretion in three ways. First, although there were clear factual disputes between the parties and Defendants had made assertions regarding the location of witnesses and documents without submitting evidence, the District Court denied Plaintiffs' request to take limited discovery prior to the ruling on the motion.

Second, the court below took the extraordinary measure of granting Defendants' motion to dismiss for *forum non conveniens*, even though this case involves a local Plaintiff (Amazon Watch) suing local Defendants and bringing a claim that Defendants failed to show is cognizable in Peru, and even though the Achuar Plaintiffs' claims could not practically be litigated in Peru. Moreover, the District Court erred in its analysis of the public and private

interest factors, concluding without evidence that witnesses and documents were more conveniently located in Peru and failing to conclude that California law presumptively applied.

Third, the District Court ignored Plaintiffs' request for briefing on conditions of dismissal, and dismissed the case without even requiring that a foreign judgment would be satisfied or that the statute of limitations must be waived, despite compelling facts and law requiring such conditions in this case. ER 3-15. The judgment below must be reversed.

II. REQUEST FOR ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a), Plaintiffs respectfully request oral argument. Plaintiffs submit that oral argument will assist this Court with decision of the issues presented on appeal.

III. STATEMENT OF JURISDICTION

This case was originally filed in California Superior Court, which had jurisdiction pursuant to the California Constitution, Article VI § 10, because this case is a cause not given by statute to other trial courts.[2] Defendants removed Plaintiffs' case to the United States District Court for the Central District of

[2] This action is brought by Plaintiffs pursuant to, *inter alia*, the California Business and Professions Code §§ 17200 et seq. Plaintiffs and Defendants are "persons" within the meaning of California Business and Professions Code § 17201.

California, asserting federal jurisdiction pursuant to 28 U.S.C. § 1332(d)(2). ER 446-47 (Nos. 1, 8).

On June 25, 2008, the District Court entered Judgment in this case, constituting a final order. ER 1-2. Pursuant to FRAP 4(a)(1)(a), Plaintiffs timely filed their Notice of Appeal on July 22, 2008. ER 428-434. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

IV. ISSUES PRESENTED

1. Did the District Court abuse its discretion in refusing to allow Plaintiffs to take discovery prior to ruling on the motion to dismiss for *forum non conveniens* where key facts pertaining to the motion were in dispute?
2. Did the District Court abuse its discretion by improperly taking the extraordinary measure of dismissing Plaintiffs' case on the basis of *forum non conveniens* where a local Plaintiff sued local Defendants, where some of Plaintiffs' claims undisputedly could not be litigated in the foreign jurisdiction, and where evidence showing inadequacy of the alternate forum and pertaining to the weighing of factors was ignored or afforded improper consideration?
3. Did the District Court abuse its discretion in failing to impose conditions on its *forum non conveniens* dismissal in the final judgment?

V. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs brought this case against Defendants Occidental Petroleum Corp. and Occidental Peruana, Inc., for the harm Defendants knowingly caused to the health, land and water of members of the Achuar community resulting from thirty years of contamination from Defendants' oil production. This contamination has caused lead and cadmium poisoning, cancer, and health problems such as skin rashes, vomiting blood, kidney damage and death. ER 26-34 (FAC ¶¶ 39-77). Defendants fraudulently misled the Achuar as to the cause of their injuries and launched a public campaign of misinformation that Plaintiff Amazon Watch has been working on behalf of the Achuar to counteract. ER 34-35, 84-88, 314-318.

Plaintiffs bring claims for negligence, strict liability, battery, medical monitoring, injunctive relief, wrongful death, fraud and misrepresentation, public and private nuisance, trespass, intentional infliction of emotional distress and unfair business practices in violation of California's Unfair Competition Law (UCL), Business and Professions Code §§ 17200 et seq.

B. Course of Proceedings

Plaintiffs filed their case in Los Angeles Superior Court in May of 2007. Defendants removed the case to United States District Court for the Central

District of California where it was assigned to the Honorable Philip S. Gutierrez. ER 446-47 (Nos. 1, 8).

On November 8, 2007, Defendants filed a motion to dismiss on grounds of *forum non conveniens* and international comity. ER 447 (No. 18). On December 19, 2007, Plaintiffs opposed Defendants' motion to dismiss (ER 61-94), arguing that dismissal was not warranted and that, even if it were, Plaintiffs should be given the opportunity to brief the conditions of dismissal.

Because of discrepancies in evidence presented by the parties to the District Court in the *forum non conveniens* briefing, on January 4, 2008, Plaintiffs moved the District Court for leave to conduct limited discovery prior to the court's ruling on the motion to dismiss. ER 320-338. Defendants opposed Plaintiffs' discovery motion on January 18, 2008.

C. Disposition Below

Without hearing oral argument, the District Court issued an order on April 15, 2008, denying Plaintiffs' motion for discovery and granting Defendants' motion to dismiss for *forum non conveniens* without prejudice. ER 3-15. The court held that it need not reach Defendants' arguments concerning international comity. ER 14.

On May 2, 2008, Defendants lodged a proposed judgment. ER 451 (No. 53). Plaintiffs objected to the proposed judgment, arguing that conditions of

dismissal were required. ER 362-377, 452 (No. 57). Defendants objected to Plaintiffs' objection. ER 452 (No. 61). The court, accepting Defendants' proposed Judgment, entered Judgment on June 25, 2008. ER 1-2, 453 (No. 64). The District Court's Judgment was conditioned only upon Defendants' consent to jurisdiction in Peruvian courts or Peruvian assertion of personal jurisdiction over Defendants. *Id*. Plaintiffs now appeal.

VI. STATEMENT OF FACTS

Plaintiffs-Appellants in this case are indigenous Achuar residents of the remote northern Amazonian basin along the Corrientes River in Peru, and the California-based non-profit organization Amazon Watch ("Plaintiffs"). ER 25, 27 (FAC ¶¶ 30, 39). On September 10, 2007, Plaintiffs filed their First Amended Complaint against Defendants Occidental Petroleum Corporation and Occidental Peruana, Inc. ("Defendants") alleging that Defendants knowingly contaminated Achuar water and land through their oil operations over a thirty-year period. ER 28-30 (FAC ¶¶ 42-55).

Plaintiffs allege that Defendants have knowingly caused the Achuar severe health problems and other injuries. ER 30-34 (FAC ¶¶ 56-78). Specifically, the Achuar Plaintiffs, who live immediately downstream from Defendants' operations in Peru, are dependent on the local river water for their drinking, bathing, washing, fishing and other services. ER 31 (FAC ¶ 58).

Defendants' release of harmful compounds into these rivers has exposed the Achuar Plaintiffs to a number of health problems including skin rashes, aches and pains, gastrointestinal problems including vomiting blood, harm to their kidneys, and deaths. The exposure to contaminants has also caused cancer and increased the risk of cancer. Lead poisoning, which is known to cause harmful developmental effects, is widespread among the Achuar children (all minor Plaintiffs have levels higher than 10 ug/dL), and cadmium poisoning, which can cause a range of negative health impacts, is widespread among the entire population. ER 31, 32 (FAC ¶¶ 58-59, 65-66). The Achuar Plaintiffs have also suffered from severe emotional distress as a result of the contamination. ER 31 (FAC ¶ 60).

The harm from Defendants' contaminating practices was so severe that in the case of Plaintiff Adolfina Garcia Sandi's son Olivio Salas Garcia, the six-year-old boy developed a fever, stomach pains, passed blood and vomited after drinking contaminated river water. ER 31-32 (FAC ¶¶ 61-63). Olivio's mother took him to see a doctor who worked for Defendants who told Adolfina to take her son Olivio home to die. Two days later, Olivio passed away. ER 32 (FAC ¶¶ 63-64).

Plaintiffs allege that Defendants' practices have contaminated waterways to such a degree that fish yields – upon which the Achuar depend – have

drastically decreased (to the point of disappearing in some areas), ER 32 (FAC ¶ 68), while oil spills and acid rain from Defendants' activities have damaged or destroyed the Achuar land and its plant and animal life. ER 32-33 (FAC ¶¶ 68-69). The harm also extends to contamination of Achuar land, which includes contaminated crops and the inability to grow crops at all where the oil and chemical contamination is most severe. ER 33 (FAC ¶¶ 70-73).

When Defendants began operating in their concession in the early 1970s, they created an extensive system of wells and other facilities that caused severe contamination with heavy metals and other toxins. ER 28-29 (FAC ¶¶ 42–48). Two of the worst practices that Defendants willfully engaged in, on a daily basis, were discharging hazardous produced waters into the environment and burying toxic waste in earthen pits. ER 29, 30 (FAC ¶¶ 49, 52). Both of these practices were prohibited by U.S. standards and oil industry best practices at the time, and were known to cause environmental and human health harm in violation of Peruvian law. ER 29, 30 (FAC ¶¶ 50, 53). Defendants' operations also caused frequent, hazardous oil spills. ER 30 (FAC ¶ 54).

Over the ensuing decades, the Achuar began to get sick and suffer other problems from the oil contamination. Defendants, however, failed to disclose the dangers from their operations and deliberately concealed the cause of the Achuar's illnesses. ER 30-31, 32-34 (FAC ¶¶ 56–60, 68–79). Defendants never

admitted to the Achuar that their operations could be harmful, and have since generally denied any responsibility for the Achuars' problems. ER 39 (FAC ¶¶ 98, 100).

Plaintiffs alleged that Defendants knew their operations in Peru were harmful to human health and Achuar land, but fraudulently concealed facts regarding the harm. ER 34-36 (FAC ¶¶ 78-80, 86-87). Plaintiff Amazon Watch has dedicated substantial time and resources to investigating and exposing Defendants' misconduct. ER 36-40 (FAC ¶ 88-107).

VII. SUMMARY OF THE ARGUMENT

The District Court abused its discretion in three respects. First, the District Court improperly denied Plaintiffs' request for discovery prior to the court's ruling on the motion to dismiss based on *forum non conveniens*. A conflict in the evidence regarding the adequacy and availability of Peru as a forum and the weighing of public and private interest factors necessitated further information through discovery. For example, the District Court assumed that documents and witnesses were more conveniently available in Peru than in California, in the absence of any discovery demonstrating that this was the case. Accordingly, the proper course in this circumstance was to grant discovery; the court erred in assessing *forum non conveniens* based upon an incomplete and inadequate record.

Second, the District Court abused its discretion by actually dismissing the case based on *forum non conveniens*. The District Court's reasoning was erroneous throughout in that it failed to afford adequate deference to Plaintiffs' choice of forum. This is particularly problematic in light of the high degree of deference owed the forum choice of California Plaintiff Amazon Watch and the hesitancy the court should have shown in overturning the Plaintiffs' choice of forum because California is Defendants' home forum, which is presumptively convenient. The District Court also erred by ignoring or improperly discounting Plaintiffs' evidence that Peru is an inadequate forum due to corruption, discrimination, and a number of practical barriers to an adequate remedy for Plaintiffs' claims. Indeed, with respect to Amazon Watch, the court failed to even consider whether Peruvian courts would hear the subject matter of the only claim Amazon Watch brought: its unfair business practices claim. The District Court further failed to address the fact that even Defendants abjure the use of Peruvian courts in their own contracts.

The District Court compounded these errors by improperly weighing the relevant private and public interest factors. Specifically, the court identified *not one witness* who would be unwilling or unavailable to testify in California, cited inapposite case law, and then held that availability of witnesses weighed in favor of dismissal. Furthermore, the court ignored significant issues with respect to

the convenience of the parties, the enforceability of a judgment in Peru and the risk of an unfair trial in Peru, thereby abandoning its duty of deference to the Plaintiffs' choice of forum. The District Court's final error in its *forum non conveniens* dismissal was its failure to acknowledge that California law would apply, resulting in an improper weighing of choice-of-law.

Third, even assuming the dismissal was proper, the District Court failed to attach necessary conditions to the final judgment. It was an abuse of discretion for the court to dismiss the case without: (i) ensuring that any judgment Plaintiffs may obtain in Peru would be satisfied, based on substantial evidence of the risk it would not; (ii) requiring Defendants to waive any statute of limitations arguments that would not have been available if the case had remained in the District Court; and (iii), requiring that Defendants comply with discovery in accordance with the Federal Rules of Civil Procedure and the translation of English documents into Spanish. Finally, the court improperly failed to retain jurisdiction to supervise adherence to these conditions.

VIII. ARGUMENT

A. Standard of Review

Discovery decisions pertaining to *forum non conveniens* are reviewed for abuse of discretion. *Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983). The standard of review for dismissals for *forum non conveniens* is abuse of

discretion. *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006). Decisions regarding imposition of conditions in a *forum non conveniens* dismissal are reviewed for abuse of discretion. *Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001).

"A district court abuses its discretion when it makes an error of law, when it rests its decision on clearly erroneous findings of fact, or when we are left with a definite and firm conviction that the district court committed a clear error of judgment." *United States v. 4.85 Acres of Land*, 546 F.3d 613, 617 (9th Cir. 2008) (quoting *United States v. Hinkson*, 526 F.3d 1262, 1277 (9th Cir. 2008)) (internal quotation marks omitted).

B. The District Court Abused its Discretion in Refusing to Grant *Forum Non Conveniens* Discovery

A defendant moving to dismiss a case for *forum non conveniens* has the burden of demonstrating that there is an adequate alternative forum and that a balancing of private and public interest factors favors dismissal. *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991). *Forum non conveniens* is a fact-intensive inquiry. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249 (1981) (noting that each *forum non conveniens* "case turns on its facts") (internal quotation marks omitted).

Defendants' motion to dismiss for *forum non conveniens* relied upon expert declarations that raised issues regarding whether Peru is an adequate

alternate forum and whether public and private interest factors weigh in favor of granting the motion. In response, Plaintiffs submitted expert declarations containing conflicting evidence on the same subjects. ER 61-282. Specifically, the parties' experts disagreed as to whether corruption pervades the Peruvian legal system so as to render it an inadequate forum, *see infra* sections VIII(B)(1) and (C)(2)(b); whether Peruvian law affords remedies for the harms at issue in Plaintiffs' Complaint, *see infra* section VIII(C)(2)(a); and whether the location of witnesses and evidence weigh in favor of Peru or California as a forum, *see infra* section VIII(C)(3)(a).

Due to the disagreement about these factual issues central to the *forum non conveniens* analysis, Plaintiffs sought limited discovery related to the location of witnesses and documents regarding Defendants' Peruvian operations, Defendants' awareness of corruption within the Peruvian judicial system, Defendants' history of litigation in Peruvian and American courts, as well as the depositions of the parties' experts on the Peruvian legal system. ER 320-338.

Where, as here, Plaintiffs have shown "an arguable basis for concluding … that a *forum non conveniens* dismissal may not be appropriate, the proper course is to allow discovery prior to considering dismissal." *Alfadda v. Fenn*, Case Nos. 89 Civ. 6217 (LMM), 90 Civ. 4470 (LMM), 1994 U.S. Dist. LEXIS 18267, *1 (S.D.N.Y., Dec. 22, 1994); *see also Duha v. Agruim*, 448 F.3d 867,

873 n.4 (6th Cir. 2006) (finding *forum non conveniens* discovery prior to ruling on motion to dismiss useful in evaluating of need to reverse the dismissal). Courts grant limited discovery where such discovery would aid the court in a determination of *forum non conveniens* issues. *Aguinda v. Texaco*, 303 F. 3d 470 (2d Cir. 2002) (trial court ordered two and a half years of discovery prior to ruling on *forum non conveniens* motion); *see also Vivendi, S.A. v. T-Mobile USA, Inc*., Case No. CV6-1524 JLR, 2007 U.S. Dist. LEXIS 28710, *6 (W.D. Wash. April 18, 2007); *Herkemij & Partners v. Ross Systems, Inc*., Case No. C 04-01674 CRB, 2005 U.S. Dist. LEXIS 4128, *1 (N.D. Cal. Feb. 18, 2005). Here, as detailed below, Plaintiffs made a showing of good cause as to why the limited discovery requested would aid the court.

Information about each of the *forum non conveniens* issues in dispute should therefore have been made available to the District Court through the discovery process prior to the court's ruling. However, the court abused its discretion by denying Plaintiffs' request for limited discovery and then ruling without the benefit of any discovery.

1. Discovery is warranted because key facts concerning corruption in the Peruvian legal system are in dispute.

Plaintiffs sought discovery regarding disputed facts related to endemic corruption that undermines the adequacy of the Peruvian legal system, and to investigate allegations that Defendants themselves were involved in such

corruption. ER 326-28. The District Court's failure to permit discovery precluded Plaintiffs from showing that Defendants' own knowledge of corruption was at odds with its argument, and that corruption was likely in this case were it to proceed in Peru. Moreover, it prevented the court from adequate evaluation of disputed facts regarding judicial corruption in Peru.

Plaintiffs presented considerable evidence that corruption pervades the Peruvian judicial system. *See generally,* ER 76-79. In particular, Plaintiffs provided the court with the testimony of experts who attested to the fact that, according to the congressionally-created Peruvian National Plan for Integral Reform of the Administration of Justice, "[p]ractically all social indicators affirm that the Peruvian judicial system is in crisis[,]" ER 110, and that judicial corruption includes "illegal lobbying, party intermediaries that 'network' with magistrate judges, and agreements within the judiciary to rule in predetermined ways for certain cases." ER 111-112.

Plaintiffs also supplied the court with evidence from a 2007 Transparency International report finding that "over eighty percent of Peruvian respondents viewed their judicial system as corrupt, the second-highest such result for any country surveyed." ER 112; *see also* ER 272-281. Indeed, the U.S. Government's own State Department Report on Human Rights Practices from 2006, states that "'press reports, NGO sources and others' indicated that 'judges

were frequently subject to corruption and/or influence by powerful outside actors.'" ER 77. The State Department's February 2007 statement on the issue notes that "'allegations of corruption and outside interference in the judicial system are common,' and that even after corrupt judges were identified after the downfall of the Fujimori regime, 'progress has been slow' in combating corruption." ER 77; *see also* ER 109-110.

Plaintiffs also provided evidence that "a climate of intimidation exists in Peru whereby those who challenge corporate environmental contamination are subject to threats of violence" which has a "chilling effect on would-be Peruvian plaintiffs and lawyers who are too afraid to bring cases." ER 156-57.

Plaintiffs further submitted evidence that several official Peruvian government entities have identified problems of corruption that cripple the Peruvian judicial system. ER 110-112. Corruption in the Peruvian judicial system is undeniable. In 2000, recordings captured high-level Peruvian officials successfully bribing a Peruvian Supreme Court judge to rule in favor of Newmont Mining Corporation, a U.S. company. ER 148, 150-155; *see also* ER 254-256.

Finally, Plaintiffs presented evidence that Defendants themselves may have engaged in corrupt practices in Peru. Occidental Petroleum Corporation's long-time CEO Armand Hammer had a "well-known" history of "bribery and

corrupt influence[.]" ER 78 (n.5, citing Edward Jay Epstein, *Dossier: The Secret History of Armand Hammer* (1996)); *see also* ER 251-253. One piece of evidence in particular cried out for further discovery and investigation prior to ruling on *forum non conveniens*: Plaintiffs submitted documents from an official Peruvian government commission investigating corruption during the period of 1990–2000, which indicated that Defendants were the target of several investigations. While the results of the inquiry are unclear, the commission's published list of documents that it solicited include a number of documents relating to Defendants, including financial statements and records. ER 78 (n.5); ER 236-47.

As a result of these opposing views of the competence of the Peruvian legal system with regard to its susceptibility to bribery and corruption, the Plaintiffs sought discovery regarding Defendants' confidence in the Peruvian legal system, such as documents, interrogatories and limited depositions related to: (1) Defendants' contracts related to their Peruvian operations regarding choice of law and/or choice of forum clauses; (2) Defendants' involvement in corruption or bribery at any level in Peru (or other countries), including government documents with accusations or charges of Defendants' corruption, records of internal or external investigations into alleged corruption, and records of corrupt transactions with Peruvian officials; (3) corruption or bribery in the

Peruvian courts or legal system; (4) the competence of the Peruvian courts or legal system; (5) Defendants' history of litigation in Peru for the previous 20 years; and (6) Defendants' current or former employees who have been charged, accused of, or investigated for bribery or other corrupt transactions in Peru. ER 326-328, 330-331, 351.

Despite the trove of evidence of corruption in the Peruvian legal system, including specific evidence suggesting the involvement of Defendants, the District Court denied Plaintiffs' requests for discovery, determining that "it ha[d] enough information to sufficiently weigh the parties' interests and determine the adequacy of the foreign forum." ER 5.

The court committed a clear error of judgment when it precluded Plaintiffs from testing the veracity of Defendants' arguments through discovery into Defendants' own knowledge of corruption, and from fully determining the risk of such corruption *in this case* through discovery into allegations of Defendants' own participation in corruption.

2. Discovery is warranted because the location of witnesses and evidence is in dispute.

Defendants argue that the majority of the witnesses whose testimony would be needed to adjudicate this case are in Peru. Defendants failed to identify a single such witness, and Plaintiffs disputed this conclusory assertion, because Defendants no longer have operations in Peru. ER 41 (FAC ¶ 113); ER

71, 248-250. Therefore, although certain witnesses and evidence are located in Peru, Plaintiffs expect that a substantial amount of the evidence and documentation of key decisions regarding Defendants' operations in Peru are located in Los Angeles. ER 84. Plaintiffs, however, could not verify this because the court denied discovery.

These contentious issues are properly the subject of discovery. Specifically, Plaintiffs requested production of documents and interrogatory responses which: (1) reflect the extent to which Defendants' operations in Peru were directed or managed from the United States; (2) identify Defendants' current and former employees who reside outside Peru and who participated in Defendants' Peruvian operations from 1970 to 2001; and (3) identify which relevant witnesses would be unwilling to testify voluntarily who are not subject to subpoena and the basis for that determination.

Without this discovery, it is impossible to say whether the non-party witnesses likely to testify in the case are located predominantly in California or in Peru, and whether witnesses in either jurisdiction would be willing to testify in the other jurisdiction in the absence of compulsory process, as well as whether the documentary evidence in the case is likely to be found. At the very least, Plaintiffs provided an arguable basis for concluding that the witnesses and evidence would be found in California. Because the location of witnesses and

evidence is an important consideration in the *forum non conveniens* analysis, this discovery would have aided the court, and it was an abuse of discretion to rule in its absence.

C. The District Court Abused Its Discretion in Granting *Forum Non Conveniens* Dismissal

As "the Ninth Circuit has cautioned[,] […] '*forum non conveniens* is an exceptional tool to be employed sparingly.'" *Deirmenjian v. Deutsche Bank, A.G.*, Case No. CV 06-00774 MMM (CWx), 2006 WL 4749756, *12 (C.D. Cal. Sep. 25, 2006) (quoting *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000)). The moving party has the burden of demonstrating that there is an adequate alternative forum and that a balancing of private and public interest factors favors dismissal. *Lockman Found.*, 930 F.2d at 767. The plaintiff's choice of forum is entitled to substantial deference and should rarely be disturbed. *Gulf Oil v. Gilbert*, 330 U.S. 501, 508 (1947); *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002); *see also Creative Tech. Ltd. v. Aztech Sys. PTE*, 61 F.3d 696, 703 (9th Cir. 1995) (ordinarily, there is a "strong presumption in favor of honoring the plaintiff's choice of forum."). This is particularly the case where a local plaintiff has sued a local defendant, as is the case here. *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991).

The District Court committed three key errors in dismissing Plaintiffs' case on *forum non conveniens*. First, the District Court failed to afford the

proper deference to Plaintiffs' choice of forum. Second, the court erred in its determination that Peru is an adequate alternate forum. Third, the court erred in its analysis of the private and public interest factors. The latter two errors were compounded by the court's refusal to allow discovery regarding the adequacy of the forum and the location of witnesses and evidence, as discussed above.

In addition to these discrete errors, the District Court also erred in the overall balancing of factors. Because *forum non conveniens* analysis involves multiple factors, this Court may reverse the District Court's ruling not only when analysis of an individual factor is erroneous, but also "when a district court fails to consider all the relevant factors or unreasonably balances those factors . . . [b]ecause much of the doctrine's strength derives from its flexibility and each case turns on its own facts, a single factor is rarely dispositive." *DiRenzo v. Philip Services Corp.*, 294 F.3d 21, 28 (2d Cir. 2002) (citing *Piper Aircraft*, 454 U.S. at 257, 249-50). Looking at the Order as a whole demonstrates that the District Court "committed a clear error of judgment." *4.85 Acres of Land*, 546 F.3d at 617.

1. The District Court Failed To Afford Adequate Deference To Plaintiffs' Choice of Forum

There is a strong presumption in favor of the plaintiff's choice of forum. *See Piper Aircraft Co.*, 454 U.S. at 255. Even where a plaintiff is foreign, the choice of forum is entitled to some deference. *See Ravelo Monegro*, 211 F.3d at

514; *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1134, 1141 (C.D. Cal. 2005) ("'Less deference' is not 'no deference.'").

Here, Plaintiffs are both local (California-based Amazon Watch) and foreign (indigenous Achuar residents of Peru). ER 19-25 (FAC ¶¶ 3-30). When, as here, a local plaintiff sues a local defendant in the defendant's home forum, it would be an "unusual situation" in which the "forum resident seeks dismissal," and in such a case "this fact should weigh strongly against dismissal." *Reid-Walen*, 933 F.2d at 1395. Defendants' efforts to move this case should be viewed with some suspicion because litigating in Los Angeles, at a courthouse a stone's throw from their headquarters, is undoubtedly convenient for Defendants.

Furthermore, where a plaintiff's choice of forum is dictated by where the defendants are subject to jurisdiction, such a decision merits "substantial deference" because jurisdictional convenience is a valid basis for choosing a forum. *Norex Petroleum, Ltd. v. Access Indus.*, 416 F.3d 146, 156 (2d Cir. 2005); *see also Mujica*, 381 F. Supp. 2d at 1141 (dismissal denied where deference was given to plaintiffs' choice of forum for jurisdictional convenience). That is the case here, since Defendants no longer have operations in Peru, and Plaintiffs chose this forum in order to be assured of proper jurisdiction. ER 41 (FAC ¶ 113); ER 71, 248-250.

The District Court plainly erred in its analysis of the degree of deference to be shown. First, while the court acknowledged that Amazon Watch, as a local plaintiff, would ordinarily be entitled to "a strong presumption in favor" of its choice of forum, ER 14, it then diminished this presumption because the Achuar Plaintiffs are Peruvian, ultimately only granting "some deference to Plaintiffs' choice of forum." *Id.* This conclusion is unsupported by any case law -- Plaintiffs are not aware of any authority that allows this kind of "averaging" of degrees of deference in order to lessen the deference ordinarily given to a local plaintiff. The court's analysis fails to consider that Defendants are forum residents, or the fact that this forum was chosen in order to obtain jurisdiction over them. Finally, its conclusion – "some deference" – is so vague that it provided little insight into the degree of deference actually afforded. The District Court should have preserved the strong presumption in favor of Plaintiffs' choice of forum, and afforded substantial deference to this choice.

In order to rebut this strong presumption, Defendants bear the burden of making a "clear showing of facts which … establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent." *Dole Food Co.*, 303 F.3d at 1119 (internal quotation marks omitted, omission in original); *Cheng*, 708 F.2d at 1410; *Deirmenjian*, 2006 WL 4749756 at *19 ("exceptional" circumstance of

dismissal not warranted because the oppression and vexation of defendants was not out of proportion to plaintiff's convenience). Defendants failed to make a clear showing of oppression or vexation, or that any such oppression was disproportionate to Plaintiffs' convenience. Defendants are both citizens of California – which is both their home forum and place they have been sued. A defendant's home forum is a presumptively convenient forum. *See, e.g.*, *Piper Aircraft Co.*, 454 U.S. at 255-56 (holding that "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 303 (1980). Despite Defendants' contention that they are "residents" of Peru (a contention that was unsupported and has yet to be tested in discovery) and their irrelevant contention that they are still "registered" in Peru, litigation in Defendants' home forum – indeed, in Los Angeles, the same city where they are physically based – cannot be said to be more oppressive or vexatious than litigation in Peru where Defendants no longer have physical operations. ER 41 (FAC ¶ 113); ER 71; ER 248-250.

As discussed below, the District Court repeatedly presented both parties' arguments – and sometimes only Defendants' arguments[3] – as to adequacy of the alternate forum and the weighing of private and public interest factors, but

[3] *See e.g.* ER 7 (determining Peru's laws to be adequate based on Defendants' expert and ignoring Plaintiffs' argument that Defendants' failed to prove availability of remedies for Plaintiffs' unfair competition law claims).

then summarily ruled in favor of Defendants on each issue without full, or at times any, consideration of Plaintiffs' arguments. *See e.g.*, ER 11-13 (failing to give equal weight, let alone deference, to Plaintiffs' evidence in discussion of convenience of the parties). Therefore, the District Court both articulated the wrong level of deference to apply and actually failed to afford appropriate deference in practice, abusing its discretion by accepting Defendants' assertions and ousting Plaintiffs' choice of forum.

2. The District Court Erred in Determining That Peru is An Adequate Forum

It is a defendant's burden to show the existence of an adequate alternate forum. *Dole Food Co.*, 303 F.3d at 1118; *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001) (holding that "[a]s with the other requirements of a forum non conveniens dismissal, the burden of showing the existence of an adequate alternative forum is the defendant's."); *see also Local Billing, LLC v. Webbilling*, 2008 WL 5210667, *11-12 (C.D. Cal. Dec. 10, 2008) (court denied motion to dismiss on *forum non conveniens* where defendants made the "fatal" flaw of failing to demonstrate that the alternate forum in that "particular case" was adequate). Adequacy is a factual inquiry that depends on the specifics of each case. *Piper Aircraft Co.*, 454 U.S. at 249. Here, the District Court abused its discretion in finding that Defendants had carried their heavy burden to show

that Peru is an adequate and available[4] alternate forum in five main respects.

a. The District Court failed to conclude that Peruvian law provides an adequate remedy for Plaintiffs' claims

A foreign court should be found inadequate if it offers a "clearly unsatisfactory" remedy for the wrong at issue in the complaint. *Piper Aircraft Co.*, 454 U.S. at 255 n.22. The remedy must be "practical[,]" *Lueck*, 236 F.3d at 1144, not merely "hypothetical." *Mujica*, 381 F. Supp. 2d at 1141. Dismissal is inappropriate unless the Defendant can show that the alternative forum "permit[s] litigation of the subject matter" at issue in the case. *Piper Aircraft Co.*, 454 U.S. at 255 n.22; *see also Abdullahi v. Pfizer, Inc.*, Nos. 05-4863-cv (L), 05-6768-cv (CON), 2009 WL 214649, *19 (2d Cir. Jan. 30, 2009) ("Dismissal is not appropriate if an adequate and presently available alternative forum does not exist.") (citing *Norex Petroleum Ltd.*, 416 F.3d at 153).

i. The District Court failed to conclude that all of Plaintiffs' claims could be litigated in Peru

Here, all Plaintiffs (including Amazon Watch) have brought an unfair business practices claim pursuant to California's Unfair Competition Law ("UCL"). The District Court abused its discretion when it failed to address,

[4] The District Court found that Peruvian courts are available due to Defendants' agreement to consent to their jurisdiction. ER 3-15. Even if Peruvian courts were available, this would not alter the fact that Plaintiffs' choice of forum is entitled to "substantial deference." *Norex Petroleum, Ltd.*, 416 F.3d at 156.

indeed overlooked, Plaintiffs' argument that Defendants failed to meet their burden to show a remedy for Plaintiffs' unfair business practices claims in Peru. ER 81. Significantly, this was the only claim brought by Amazon Watch; if it could not be pursued in Peru, Amazon Watch's entire case would be unable to be litigated in the alternate forum. Since Amazon Watch has no other claim, this is a case in which the alternate forum would not be able to hear the subject matter of the dispute, not merely one in which the law in the alternate forum is less favorable. If Peru provide no remedy at all to Amazon Watch, this precludes its qualification as an adequate forum. *E.g., Mujica*, 381 F. Supp. 2d at 1141.

The District Court further abused its discretion by failing to address this question at all. While the Order initially acknowledges that Plaintiffs brought claims for "violation of California's Unfair Competition Law ('UCL'), Bus. & Prof. Code §§ 17200 *et seq.*," ER 3-15, that is the last mention of these claims. A District Court is required to explain the basis for its decision. *Crawford v. Astrue*, 545 F.3d 854, 866 (9th Cir. 2008) (where basis for decision was required in an attorneys fees calculation case, the Ninth Circuit remanded the case for reassessment where it could not "determine the basis for the district court's decision"); *see also Bank of Credit and Commerce Int'l (OVERSEAS) Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 248 (2d Cir. 2001) ("If, in the end, the

court asserts its 'justifiable belief' in the existence of an adequate alternative forum, it should cite to evidence in the record that supports that belief."); *Beckford v. Portuondo*, 234 F.3d 128, 130 (2d Cir. 2000). Furthermore, as is the case here, where the District Court has given no basis for its decision, there is no record upon which this Court may affirm the District Court's decision. *Dependable Highway Express, Inc. v. Navigators Ins. Co*., 498 F.3d 1059, 1067 (9th Cir. 2007) (dismissal based on international comity reversed and remanded where district court failed to make required determinations underlying reason for dismissal). Here, the District Court utterly failed to explain why Peru was an adequate forum for Plaintiffs' unfair business practices claims, and for Amazon Watch's entire case.

Even if the court had considered this issue, dismissal would have been an abuse of discretion, since any conclusion that Peru would hear the subject matter of the UCL claims would have been an error of law.

ii. The District Court erred in failing to weigh Plaintiffs' argument that the Peruvian legal system's unpredictability renders it inadequate

Plaintiffs provided the court with evidence that the fundamental unpredictability of the Peruvian legal system, including numerous contradictory decisions and apparent disregard for statutes, renders Peru an inadequate alternate forum. ER 76. This unpredictability means that neither the parties nor

the District Court can predict whether remedies that are believed to exist under Peruvian law will be afforded Plaintiffs in any one case. ER 110-111. When presented with this evidence, the District Court described the issue of unpredictability, ER 9, but then provided only Defendants' counter-argument based on the declaration of their expert. *Id*. The court *failed to reach a conclusion* as to the weight that should be afforded to this factor in determining the adequacy of Peru's legal system based on this fundamental unpredictability. ER 9-10. Because it did not discuss its opinion on this issue, the District Court failed to provide this Court with a basis for affirming its finding that Peru is an adequate alternate forum. *Dependable Highway Express, Inc.*, 498 F.3d at 1067.

b. Evidence of corruption in Peru is substantial and cannot be discounted in the absence of discovery

Plaintiffs offered the court substantial evidence of corruption in the Peruvian legal system, *see infra* Section VIII(B)(1), that renders Peru inadequate as an alternate forum because, *inter alia*, Peruvian government entities have identified problems of corruption that cripple the Peruvian judicial system, ER 110-12, and have investigated Defendants for possible corruption. ER 236-247.

Corruption in Peru is analogous to that in *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997), where the district court held the Bolivian court too corrupt to be an adequate alternative forum based on admissions to that effect by Bolivian government officials. However, the

District Court distinguished *Eastman Kodak*, holding that "Plaintiffs' record falls short of the 'extensive record' described in *Eastman Kodak*," ER 8, and that Plaintiffs were required to make a "powerful showing[.]" ER 10 (citing *Tuazon*, 433 F.3d at 1178). The District Court held that Plaintiffs' case is more similar to *Tuazon*, where the plaintiff had offered only "'anecdotal evidence of corruption and delay,' and State Department Country Reports focused on the criminal justice system and referencing corruption, judicial bias and inefficiency [which] provided an insufficient basis for finding the Philippine courts were an inadequate forum for the civil case." ER 10 (citing *Tuazon*, 433 F.3d at 1178). However, in *Tuazon*, "no personal testimony on corruption" was offered, as it was here, *see infra* Section VIII(B)(1), and while country reports related to criminal justice corruption in the Philippines may have been inapposite in that case to Tuazon's civil claims in the Philippines, here, Plaintiffs presented evidence of corruption in Peru's civil justice system related to Plaintiffs' civil law claims. *Id*.

The District Court's reasoning also fails to account for the fact that the courts in both *Eastman Kodak* and *Tuazon* allowed discovery so that a factual record could be developed before the district court ruled. *Tuazon*, 433 F.3d at 1179 (discussing plaintiff's deposition); *Eastman Kodak*, 978 F.Supp. at 1082 ("Defendants' motions to dismiss have been pending … to allow the parties

discovery on the … *forum non conveniens* issues."). Here, it belies reason that the District Court could find Plaintiffs' substantial offering of evidence of corruption insufficient – indeed, not constituting an "extensive record" and making the "powerful showing" that the court says is required – without allowing *any* discovery on the matter[5] and that the court could base the insufficiency on comparison with cases where the factual record was allowed development through discovery. ER 11. As noted above, the Court disallowed discovery despite the fact that Peruvian government documents indicated that Defendants had been the target of corruption investigations. ER 236-247.

On this record, the District Court abused its discretion in determining that the Peruvian judicial system was adequate and not corrupt. Even if Plaintiffs' evidence did not have the same weight as that submitted in *Eastman Kodak*, the District Court should not have required such a substantial showing in the

[5] Plaintiffs requested discovery related to Defendants' confidence in the Peruvian legal system as seen through the choice of law and/ or choice of forum clauses in Defendants' contracts; Defendants' involvement in corruption or bribery in Peru, including government documents with accusations or charges of Defendants' corruption; Defendants' records of internal or external investigations into alleged corruption, and records of corrupt transactions with Peruvian officials; Defendants' knowledge of corruption or bribery in the Peruvian courts or legal system; Defendants' history of litigation in Peru; and Defendants' employees who have been charged, accused of, or investigated for bribery or other corrupt transactions in Peru. ER 326-28, 330-31; ER 351. Information obtained through this discovery would have been useful to the court prior to its ruling to determine whether Plaintiffs have made the "powerful showing" of corruption in the Peruvian legal system that the court requires.

absence of discovery. In this posture, Plaintiffs' showing was more than sufficient to preclude the conclusion that Peru is an adequate forum.

c. The District Court failed to adequately address Plaintiffs' arguments about discrimination in the Peruvian legal system

Discrimination against the poor and indigenous communities in the Peruvian legal system would render the Peruvian courts inadequate because it would result in "unfair treatment" of indigenous Achuar Plaintiffs sufficient to deprive them of substantive remedy under the law. *See Tuazon*, 433 F.3d at 1178 (citing *Piper Aircraft*, 454 U.S. at 255 and *Creative Tech., Ltd.*, 61 F.3d at 701-02). Plaintiffs' evidence included the declarations of two Peruvian legal experts as well as the U.S. State Department's Peru Country Report on Human Rights Practices, which describes discrimination throughout all levels of the Peruvian judicial system. ER 75 (citing Peru Country Report on Human Rights Practices), 79, 108-122, 146-158.

The District Court both committed an error of law and rested its decision on clearly erroneous findings of fact in finding the Peruvian legal system adequate despite this evidence of discrimination. The court dismissed the entire issue with the conclusory statement, "[a]s for the discrimination claim, the few cases that have examined comparable claims have rejected them." ER 8 (citing *Parex Bank v. Russian Sav. Bank*, 116 F. Supp. 2d 415, 425 (S.D.N.Y. 2000)

(regarding Russia) and *Shields v. Mi Ryung Const. Co.*, 508 F. Supp. 891, 894 (S.D.N.Y 1981) (regarding Saudi Arabia)).

The District Court committed an error of law by assuming that discrimination could not be a basis for inadequacy of a foreign forum, simply because the facts of other cases did not substantiate this basis in those cases. Neither of the cases the District Court cited dealt with Peru and the specific allegations of discrimination at issue in this case. If the District Court meant to suggest that undue influence by one interest group against another is never a basis to deny a *forum non conveniens* motion, that holding is error. *See e.g.*, *Eastman Kodak*, 978 F. Supp. at 1084-87. As determinations of alternate forum adequacy on a motion to dismiss are necessarily fact-specific (*Piper Aircraft Co.*, 454 U.S. at 249 (citing *Williams v. Green Bay & Western R. Co.,* 326 U.S. 549, 557 (1946))), simply stating that other courts have rejected discrimination arguments is insufficient to address *Plaintiffs'* allegations of discrimination bearing on adequacy of Peru as an alternate forum in *this* case.

Even if the court had actually undertaken the required analysis of the evidence of discrimination Plaintiffs provided, any conclusion that there was no such discrimination would have been a clearly erroneous finding of fact. Plaintiffs presented ample evidence of such discrimination, which was both more specific and more substantial than the evidence in the cases relied upon by

the District Court.

In *Parex*, the plaintiff provided evidence of general bias in Russia relative to the "*political* climate[,]" *Parex Bank*, 116 F.Supp.2d at 425 (emphasis original), as distinguished from bias in the judiciary, which is specifically alleged here. ER 79; ER 117-119 ("discrimination is particularly pronounced and institutionalized in the judicial system" where unequal treatment of indigenous groups in the judicial system plays out in endemic ways – with systematic poor treatment by every player in the system from court clerks to judges). Furthermore, the plaintiff in *Parex* had not raised the issue of bias in Russian courts when bringing the initial complaint in Russia about the same matter at issue in the U.S. court. *Id*. Here, Plaintiffs chose to file their initial complaint in the United States precisely because they were aware that discrimination against the Achuar, *inter alia*, would prohibit a fair opportunity for redress in Peru. ER 79; ER 117-119.

In *Shields*, the court dismissed the plaintiff's claim of discrimination in Saudi courts as a reason for the inadequacy of the forum only because the plaintiff provided the court with no evidence of discrimination -- "none[.]" *Shields*, 508 F. Supp. at 896. Furthermore, the plaintiff's claim was described as "unsubstantiated speculation," not even supported "by his expert." *Id*. Here, Plaintiffs provided the court with the testimony of two legal experts as well as

the 2006 U.S. State Department Peru Country Report on Human Rights Practices. ER 79; ER 109-123; ER 147-158. Citation to *Parex* and *Shields* was no substitute for assessing the evidence in the record.

The District Court thus abused its discretion by suggesting that discrimination in the judicial system is not a basis for questioning the adequacy of a forum, and by failing to recognize that Plaintiffs had submitted far more extensive and substantial evidence of such discrimination than was present in the cases it cited.

d. The District Court erred in concluding that this case could practically be brought in Peru

Plaintiffs provided the District Court with further evidence that Peru is not an adequate alternate forum because all of the minor Achuar Plaintiffs and five of their adult guardians have no identity papers, called "DNI", needed to bring suit in Peru. ER 61-94; ER 98 (¶ 16); ER 108-123; ER 75 (citing the U.S. State Department's Peru Country Report on Human Rights Practices – 2006 pt 5 (2007), which recognized that indigenous peoples who lack identity documents "could not exercise basic rights," and that obtaining a DNI "requires a birth certificate," which many do not have). Furthermore, the Achuar cannot afford the filing fees in Peru which total more than an indigenous Amazonian family would earn in a year. ER 61-94; ER 114; ER 98 (¶ 16). As a result of these practical barriers, Peru is not an adequate alternate forum because it fails to

provide Plaintiffs a "practical" remedy. *Piper Aircraft Co.*, 454 U.S. at 255 n.22; *see also Lueck,* 236 F.3d at 1144 (merely hypothetical remedies render a forum inadequate).

The District Court again dismissed these concerns by relying on the untested declaration of Defendants' expert, who disputed Plaintiffs' evidence. ER 7-8. As noted above, however, the court did not allow a deposition of Defendants' expert. The court's decision was predicated on arbitrary rejection of Plaintiffs' evidence in favor of Defendants' evidence, without allowing any discovery to test the evidence. This was an abuse of discretion.

e. The District Court failed to consider that Defendants' own contracts avoid the Peruvian courts

The fact that Defendants, in their own contracts, explicitly avoid Peruvian courts further shows that Peru is an inadequate forum. ER 80-81. Although the District Court did not allow discovery on this issue, the available evidence demonstrated that Defendants themselves did not trust the Peruvian courts sufficiently to allow their contracts to be litigated there.

The District Court failed to address this in its Order, despite citing a case in another portion of the Order that supports Plaintiffs' argument. The court cited *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993), and described the case as "refusing, despite charges of corruption, to find Venezuelan courts an inadequate alternative forum where parties' contract

contained a forum selection clause naming Venezuela as parties' forum of choice[.]" ER 9. If, in *Blanco*, the court determined that Venezuelan courts were adequate based on consideration of parties' contracts selecting Venezuela as the forum for their disputes, 997 F.2d at 981, so too should Defendants' decision to *decline* to use Peruvian courts weigh in this Court's determination of adequacy.

3. The District Court Erred In Weighing The Public And Private Interest Factors

The District Court abused its discretion by discounting Plaintiffs' choice of forum when it held 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. As discussed above, *see infra* Section VIII(C), Plaintiffs' choice of forum is entitled to substantial deference. *Gulf Oil Corp.*, 330 U.S. at 510 (holding that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed"); *Altmann v. Republic of Aus.*, 317 F.3d 954, 974 (9th Cir. 2002) (same); *Lajouj v. Kwajalein Range Servs.*, 2008 U.S. Dist. LEXIS 56219, *15 (D. Haw. July 23, 2008) (same, but with emphasis on "*strongly*").

The fact that both the Defendants and Plaintiff Amazon Watch are California corporations also weighs heavily in favor of retention of California as

a forum. *See Dole Food Co.*, 303 F.3d at 1119; *Ravelo Monegro*, 211 F.3d at 514; *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 107 (2d Cir. 2000); *Mercier v. Sheraton Int'l, Inc.,* 935 F.2d 419, 429-30 (1st Cir. 1991). Indeed, for the same reasons, U.S.-based multinationals acting abroad are routinely sued in U.S. courts regarding their foreign actions. *See e.g*, *Mujica*, 381 F. Supp. 2d at 1154 (Colombia); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004) (Nigeria); *Doe v. Unocal Corp*., 403 F.3d 708 (9th Cir. 2005) (Burma). The District Court therefore abused its discretion by conducting analysis of private and public interest factors without starting from the presumption that Plaintiffs' choice of Defendants' home forum is reasonable.

a. The District Court erred in weighing the private interest factors

The District Court concluded that "the private interest factors weigh overwhelmingly in favor of dismissal" in this case. ER 13. But the court's discussion of these factors identified only three issues. First, the court held that despite the fact that no witnesses or evidence had been identified that were available only in Peru (and despite prohibiting discovery on this issue), the location of witnesses and documents nonetheless "weigh[ed] in favor of dismissal." ER 12. Second, the court determined that travel costs could be "prohibitive," ER 13, even though such costs are usually only a small fraction of

the overall cost of major litigation. Third, the court speculated that witnesses probably did not speak English, thus raising considerable translation costs, ER 13, but the court ignored the fact that Defendants' employees almost certainly do speak English, and that most of the Achuar do not speak Spanish. Concluding that this amounted to overwhelming evidence in favor of dismissal was an abuse of discretion.

i. The District Court failed to identify any specific witnesses or evidence that would only be available in Peru

The District Court abused its discretion in determining that private interest factors weigh in favor of Peru where not a single witness or piece of evidence was identified as being more readily available in Peru than in California. ER 12. Rather than any actual evidence of where witnesses and documents are located, the District Court improperly relied upon Defendants' speculation as to access to witnesses and evidence. *Duha*, 448 F.3d at 877 ("although the availability of compulsory process is properly considered when witnesses are unwilling, it is less weighty when it has not been alleged or shown that any witness would be unwilling to testify."). As *Duha* held, "[w]hen no witness' unwillingness has been alleged or shown, a district court should not attach much weight to the compulsory process factor." *Id.* at 877.

The District Court also referenced *Lueck*, 236 F.3d at 1146–47, but that

case is distinguishable because the *Lueck* Court specifically identified foreign witnesses that were not under the control of the parties.

Here, the only foreign non-party witnesses who were identified in this case were five of Defendants' former workers identified by Plaintiffs, all of whom indicated that they would be willing to testify voluntarily as witnesses in this case. ER 85; ER 215-220. The District Court ignored this evidence, and the assumption to which it was entitled that, absent evidence to the contrary, other of Defendants' former workers would be willing to voluntarily testify as well. *See Critikon, Inc. v. Becton Dickinson Vascular Access*, 821 F. Supp. 962, 967 (D. Del. 1993); *Manela v. Garantia Banking*, 940 F. Supp. 584, 592 n.14 (S.D.N.Y. 1996); *Duha*, 448 F.3d at 877 n.7. This error is compounded by the District Court's denial of discovery which sought further evidence about the location and availability of Defendants' witnesses and evidence. The District Court abused its discretion by first refusing to allow discovery into the location and identity of witnesses and evidence, and then concluding that this factor "weigh[ed] in favor of dismissal." ER 13.

The District Court further abused its discretion by not crediting Plaintiffs' evidence that witnesses and documents are likely to only be available in California. This includes evidence regarding decisions made in California regarding Defendants' Peruvian operations, including their decision to sell their

facilities, and witnesses with knowledge of these decisions who reside in California – especially former employees of Defendants, who would not be subject to party discovery. Furthermore, Plaintiff Amazon Watch has its headquarters in California, where most of its evidence and witnesses are located. ER 317.

Because Plaintiffs believe that Defendants have retreated from Peru, ER 251-53, Defendants' evidence and witnesses are more likely to be located in California. However, even if they were not, it is more convenient to transfer select documents and witnesses than it would be to transfer the entire lawsuit, now two years in, to Peru. *See Local Billing, LLC*, 2008 WL 5210667 at *13 (private interest factors weighed against *forum non conveniens* dismissal where "the economics of bringing a few witnesses from [the foreign forum] to California" were "less costly than moving a trial"); *see also Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring) ("It will often be quicker and less expensive to transfer a witness or a document than to transfer a lawsuit.").

ii. The District Court erred in weighing the convenience of the Parties

The District Court improperly abandoned its duty to afford deference to Plaintiffs' choice of forum by discounting Plaintiffs' evidence that litigation in Lima is of no greater convenience to the parties than litigation in Los Angeles.

ER 13 (holding that "it is clear the cost and convenience of travel between Peru and Los Angeles supports dismissal on forum no [sic] conveniens grounds.").

Specifically, the court determined that the cost of bringing witnesses to Los Angeles and the cost and time required for translation of oral and written evidence into to English would be "prohibitive." ER 13. However, Plaintiffs offered evidence, improperly discounted by the District Court, that travel from Achuar territory to Lima or Iquitos is only marginally more convenient than travel from Achuar territory to Los Angeles. ER 83-84.[6] The court also failed to contend with Plaintiffs' cite to the analagous situation in *Mujica*, 381 F. Supp. 2d at 1152, where the court noted that while flight costs between Los Angeles and Bogota "are higher than most domestic flights, the court does not consider this to be an important private interest factor given that the other costs of this action would certainly dwarf this slight difference." ER 83-84; *see also* ER 100-101 (Declaration of Marco Simons, noting that counsel has litigated cases in California with much greater foreign travel distances and costs); *Thomas Weisel Partners LLC v. BNP Paribas*, 2008 U.S. Dist. LEXIS 65936, *31 (N.D. Cal. Aug. 26, 2008) (balance weighed in favor of California where "relevant […]

[6] For example, while Plaintiffs pointed out that Defendants' estimates of the costs flights to Peru are overstated, ER 83 n.8; ER 98-99 (under $700, not over $1000), the court ruled based on factoring in the Defendants' more expensive estimate, not Plaintiffs'.

employees […] are based in Hong Kong, so flying these witnesses from Hong Kong to Mumbai would only be marginally more convenient than flying them from Hong Kong to San Francisco."). In the context of the likely overall costs of this case, the travel costs are minimal.

The District Court's ruling regarding translation was also erroneous, because it ignored that Defendants' English language documents and Plaintiffs' Achuar-Shiwar language testimony would be required to be translated into Spanish for ligitation in Peru, which is no greater convenience than translating Achuar or Spanish into English for litigation in Los Angeles. As noted below, this error was compounded by the court's failure to require translation of Defendants' documents into Spanish as a condition of dismissal. *See Duha*, 448 F.3d at 876 (as condition of dismissal, defendant was required to "translate needed English-language documents into Spanish."). And, as noted above, there was no evidence demonstrating that there would be a greater number of Spanish-language documents in this case than English-language documents, or that there would be a greater number of Spanish-fluent witnesses (as opposed to English- and Achuar-fluent witnesses). In the absence of such evidence, it was an abuse of discretion for the District Court to assume that translation needs weighed in favor of dismissal.

b. The District Court erred in its analysis of the public interest factors

Unlike with the private interest factors, the court below apparently determined that the public interest factors only weakly favored dismissal. Of the three issues considered – forum interest in the case, court congestion, and applicable law – the District Court found that the latter two were neutral, and that only the first favored Defendants. ER 13-14. This was error, because the District Court failed to consider other factors noted by Plaintiffs and misconstrued the interests of California and the applicability of California law. Nonetheless, even if the District Court's analysis were correct, the public interest factors would not weigh so strongly in favor of Peru so as to justify ousting Plaintiffs' choice of forum.

i. The District Court failed to consider that the enforceability of a judgment and likelihood of a fair trial weigh in favor of California

The District Court's analysis of the public interest factors was erroneous in part because it failed even to consider some of the relevant factors. Although Plaintiffs argued that factors weighing heavily in favor of California as a forum include the enforceability of a judgment and the ability to obtain a fair trial, ER 87-88 (citing *Gulf Oil Corp.*, 330 U.S. at 510), the District Court made no mention of these factors in its analysis. These factors are particularly crucial given Defendants' failure to provide any evidence that a judgment against them

would be enforceable in Peru. ER 88. On the contrary, Plaintiffs provided the court with evidence – again, evidence that the court did not cite – that there have been no known judgments against multinational corporations successfully enforced in Peru. *Id*. (citing ER 119, pt. 4.6). Defendants plainly did not meet their burden, and the court's decision was clearly erroneous in light of Plaintiffs' undisputed evidence.

Plaintiffs' argument that they are less likely to obtain a fair trial in Peru was similarly ignored by the District Court. Due to issues such as corruption and discrimination in the Peruvian judicial system, *see infra* Sections VIII(B)(1) and (C)(2)(b-c), significant barriers to justice exist and should have been weighed by the District Court as a factor favoring the U.S. forum. Even if the District Court correctly determined that corruption and discrimination were not so substantial as to make Peru an inadequate forum, the court still should have considered these issues among the public interest factors to be weighed. The court's failure to address these issues was an abuse of discretion.

ii. The District Court improperly discounted California's interest in deciding this action pertaining to misconduct of its corporate citizens

The only public interest factor that the District Court found to favor dismissal was the forums' interest in the case. Although the District Court mentioned California's "interest in ensuring that businesses incorporated or

operating within its borders abide by the law," the court erred as a matter of law by failing to give this interest proper weight. ER 13. The District Court ignored cases that establish that a state has a strong interest in "ensuring that businesses incorporated . . . within its borders abide by the law." *Lony v. Dupont*, 886 F.2d 628, 641 (3d Cir. 1989); *see also McLennon v. Am. Eurocopter Corp., Inc.*, 245 F.3d 403, 425 (5th Cir. 2001) (district court did not abuse its discretion in deciding that Texas had a strong interest in enforcing its laws against and monitoring the activities of the defendant, a Texas-based manufacturer).

Furthermore, the District Court ignored the fact that California's interest in this case is not limited to its supervision of Defendants, but also its vindication of Plaintiff Amazon Watch, a nonprofit corporation headquartered in California. In a recent district court decision denying a motion to dismiss for *forum non conveniens*, the court held that "[t]here is a strong local interest in the lawsuit since one of the plaintiffs is a California corporation allegedly injured while in the course of conducting business in the state." *Thomas Weisel Partners LLC*, 2008 WL 3977887 at *11. The court concluded, "[g]iven the strong interest that California has in this suit, the public interest factors favor plaintiffs." *Id*. Similarly, many of Amazon Watch's activities on behalf of the Achuar – about which its unfair competition law claims are based – were conducted in California. ER 314, 317. Here too, this factor weighs in favor of

Plaintiffs' choice of forum.

The court also failed to address Plaintiffs' argument that this case promotes "California's interest in deciding actions against resident corporations whose conduct in this state causes injury to persons in other jurisdictions" because this is apparently the only legal action seeking to hold Defendants responsible for the damages caused by its Peruvian activities. *Stangvik v. Shiley*, 54 Cal.3d 744, 756 n.10 (1991).

Furthermore, the court failed to weigh Plaintiffs' evidence that civil liability in Peru is designed only to compensate and not to punish. It does not provide for punitive damages. ER 179 ("Peruvian law establishes that responsibility for damages fulfills a compensatory function, but not a punitive one."). Therefore, the court ignored the important fact that California is the only forum where its corporate citizens can be held properly responsible for the harm Defendants have caused and where Plaintiffs' may obtain punitive damages. California's interests will not be served by dismissal to Peru.

iii. The District Court failed to consider that California law is presumed to apply

The District Court abused its discretion by incorrectly determining that the analysis of which law applies in this case is a factor that "remains neutral." ER 14. The District Court erred as a matter of law in determining that it was "reasonable" for Defendants to conclude that Peruvian law would apply to the

case. *Id*. Instead, the District Court was obligated to presume that California law would apply because Defendants failed to show a facial conflict with material difference between Peruvian and U.S. law. *See Wash. Mutual Bank v. Superior Court*, 24 Cal. 4th 906, 919 (2001) (holding that the first step in any California choice-of-law analysis is to determine whether the laws of jurisdictions are *materially* different and, where there is no facial conflict shown, the analysis ends). The District Court improperly gave Defendants the benefit of a presumption that, if this case were litigated here, Defendants would be able to identify a material conflict between California and Peruvian law, and that Peru's interests in applying its law would prevail – none of which Defendants have actually done.

D. The District Court Abused Its Discretion In Failing To Make The Dismissal Appropriately Conditional

The District Court's April 15, 2008, Order failed to place any conditions on the *forum non conveniens* dismissal, despite holding that dismissal is warranted only where the defendant agrees to waive jurisdiction in the alternate forum and the court retains jurisdiction so that it may "reinstate the case if the foreign forum refuses to accept jurisdiction." ER 6 (citing *Leon v. Million Air, Inc*., 251 F.3d 1305, 1313 (11th Cir. 2001)). This triggered a round of briefing

by the parties[7] prior to the court's entry of Judgment on June 25, 2008. The final entry of Judgment conditioned dismissal only upon Defendants' submission to Peruvian jurisdiction, or Peruvian acceptance of jurisdiction over Defendants. ER 1-2. Missing, however, were at least four additional conditions required by the circumstances of this case: (1) that any Peruvian judgment will be satisfied; (2) that Defendants waive any statute of limitations defense in Peru that would not have been available in California; (3) that Defendants agree to comply with discovery in the United States under the Federal Rules of Civil Procedure and agree to translate English-language documents into Spanish; and (4) that the court retain jurisdiction to supervise these conditions.

1. The District Court Should Require Guarantees That Any Peruvian Judgment Will Be Satisfied

The District Court's Judgment of June 25, 2008, failed to require satisfaction of any judgment obtained by Plaintiffs in Peru. This condition is necessary here where Defendants have sold their Peruvian operations, making it more difficult for a Peruvian court to enforce a judgment. ER 371-72. Indeed, Plaintiffs provided the District Court with specific evidence that Defendants have sold off their assets. *Id.*; ER 414 (where the L.A. Business Journal notes

[7] Briefing on the issue of conditions was originally requested by Plaintiffs in their Opposition to the Motion to Dismiss for *Forum Non Conveniens*, ER 93, prior to issuance of the court's Order.

that "even if substantial damages were awarded to the plaintiffs by the Peruvian court, Occidental has no assets remaining in Peru that the government can use to force Occidental to pay up.").

A similar case cited in briefs by both parties demonstrates the real risk of dismissal without this condition. In *Aguinda v. Texaco*, the court, at Texaco's request, dismissed the toxic tort case to Ecuador where Chevron (successor to Texaco) now faces the risk of a multi-billion dollar award. *See* 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F. 3d 470 (2d Cir. 2002)). Chevron's response has been a denigration of the Ecuadorian legal system and a stated commitment to fight any award rather than honoring it. ER 372, 416-17. Given the risk of a similar occurrence here, and Defendants' refusal to agree that any Peruvian judgment would be honored, the District Court abused its discretion in failing to condition dismissal on this requirement.

2. The District Court Should Require Defendants To Waive The Statute Of Limitations

The District Court abused its discretion in failing to condition dismissal on the Defendants' waiver of any statute of limitations defenses in Peru that it would not have been able to assert in the District Court. As with this case, justice has required a statute of limitations waiver condition in similar cases. *See e.g.*, *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1450 (9th Cir. 1990) (requiring waiver of "any statute of limitations defense that

would not have been available had the court retained jurisdiction"); *Paper Operations Consultants Int'l, Ltd. v. SS Hong Kong Amber*, 513 F.2d 667, 672 (9th Cir. 1975) ("The danger that the statute of limitations might serve to bar an action is one of the primary reasons for the limitation on the court's discretion with respect to the application of the doctrine of *forum non conveniens*"); *Indopac Perdana Fin. v. Msangung*, 2001 WL 182382, *1 (N.D. Cal. Feb. 15, 2001) (conditioning *forum non conveniens* dismissal in part on waiver of statute of limitations defenses); *Henderson v. Metro Bank & Trust Co*., 470 F. Supp. 2d 294, 311-312 (S.D.N.Y. 2006) (conditioning dismissal on waiver of statute of limitations defenses to prevent prejudice to plaintiffs).

Indeed, *even Defendant Occidental Petroleum Corporation* has previously consented to waiving its statute of limitations defense in past cases where a conditional *forum non conveniens* dismissal was ordered. *Kinney v. Occidental Oil & Gas Corp*., 109 Fed. Appx. 135, 136 (9th Cir. 2004) (unpublished)[8] ("We conclude that the district court did not abuse its discretion when it determined that an adequate forum for the adjudication of Kinney's action is available in Qatar, where Occidental stipulated to the jurisdiction of the Qatari Labor Court, agreed to toll the statute of limitations applicable to Kinney's claims from the

[8] Pursuant to 9th Cir. R. 36-3, this pre-2007 unpublished opinion is cited for factual purposes only, not as binding precedent.

date on which she filed her action in the district court, and presented evidence that Kinney would have a remedy in a Qatari court.").

Although Defendants argued that the statute of limitations on Plaintiffs' claims in Peru has been tolled due to the filing of this action in the United States, in this case, the court should have had no reason not to impose such a condition. *See Guimond v. Wyndham Hotels*, 1996 WL 281959 at *5 (S.D.N.Y. May 29, 1996) (conditioning dismissal on "Defendant's adherence to its counsel's representations concerning ... the statute of limitations").

3. The District Court Should Require Defendants To Cooperate With Discovery In The U.S. And Translate English-Language Documents

The District Court erred in failing to condition its *forum non conveniens* dismissal on Defendants' agreement to cooperate with discovery in the United States pursuant to the Federal Rules of Civil Procedure ("F.R.C.P.") and to translate English-language documents into Spanish.

As noted above, Plaintiffs dispute that translation would be more of a problem in California than in Peru. Nonetheless, given the District Court's holding that translation militated in favor of dismissal, the court and Defendants should have been willing to guarantee that translation would not become a problem for Plaintiffs. If, as Plaintiffs suspect, there are hundreds of thousands of pages of English-language documents relevant to these claims and dozens of

English-speaking witnesses, the burden of this translation should not fall on Plaintiffs. *See Duha*, 448 F.3d at 876.

Defendants also should have been required to cooperate with Plaintiffs' discovery requests pursuant to the F.R.C.P. and to make their employees, agents, documents, and other materials reasonably available for discovery in connection with any action Plaintiffs may file against them in Peru. These measures were necessary to ensure that Plaintiffs' access to information is not compromised by the grant of dismissal. *See Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (dismissing with the condition that the defendants "agree[] to conduct all discovery in accordance with the Federal Rules of Civil Procedure"); *Stewart v. Dow Chemical Co.*, 865 F.2d 103, 104-105 (6th Cir. 1989) (dismissing with the condition that the defendants "allow discovery ... of any materials which would be available under the Federal Rules of Civil Procedure in a United States Court"); *Guimond*, 1996 WL 281959 at *2, *5 (conditioning dismissal in part on the defendant's representation that it would follow the U.S. Federal Rules of Civil Procedure if the case were refiled in Jamaica); *see also Piper Aircraft Co.*, 454 U.S. at 257 n.25 (suggesting that district courts can condition dismissal upon a defendant's agreeing to provide all relevant records).

Again, such a condition is particularly appropriate here because the

District Court accepted Defendants' assertion, over Plaintiffs' objections, that the majority of witnesses and evidence would be located in Peru. If this turns out not to be the case, Plaintiffs should not be handicapped by attempting to use Peruvian procedures to obtain discovery over evidence in the United States. There is no mandatory exchange of information in Peru as there is in the United States. ER 374, 387. Furthermore, parties may only request specific, known documents, *id*., and there is no penalty for refusal to provide documents requested or for destruction of documents requested. *Id*. Because Peruvian discovery rules and protections are insufficient, ER 374, 387, the District Court abused its discretion in failing to impose this condition on its dismissal.

4. The District Court Should Supervise These Conditions And Allow Re-Filing If They Are Not Met

With respect to personal jurisdiction in Peru, the District Court already recognized the need to retain jurisdiction and allow Plaintiffs to refile if necessary. ER 1-2. However, the District Court should not have limited retention of jurisdiction to Defendants' agreement to personal jurisdiction in Peru.

Instead, in addition to imposing the above noted conditions, the District Court should have retained jurisdiction for the purpose of determining whether all conditions have been met, and should have permitted Plaintiffs to refile their action in the District Court in the event they are not. *See Leon*, 251 F.3d at 1316

(where court expressly adopted a condition allowing plaintiffs to refile if jurisdiction was not accepted by the Ecuadorian courts); *Henderson*, 470 F. Supp. at 294, 311-312 (where court included a condition permitting plaintiffs to refile the action if the defendants did not meet any of the numerous conditions, including waiver of any statute of limitations defense and disclosure of certain information); *Bank of Credit and Commerce Int'l.*, 273 F.3d at 247 (requiring the district court to include the condition permitting plaintiff to refile action if it were on remand to dismiss the case based on *forum non conveniens*).

IX. CONCLUSION

For the foregoing reasons, the Order of the District Court denying Plaintiffs'-Appellants' request for discovery and granting Defendants'-Appellees' motion to dismiss for *forum non conveniens* should be reversed and remanded.

Dated: February 4, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C), I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 12,652 words, as calculated by the word processing program employed to prepare this brief.

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PROOF OF SERVICE

I, Natalie L. Bridgeman, hereby certify that on February 4, 2009, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit 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, for delivery within 3 calendar days to the following non-CM/ECF participants:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on February 4, 2009.

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