NO. S-144726
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Adolfo Agustín García, Luis Fernando García Monroy, Erick Fernando Castillo Pérez, Artemio Humberto Castillo Herrera, Wilmer Francisco Pérez Martínez, Noé Aguilar Castillo, and Misael Eberto Martínez Sasvin

PLAINTIFFS

AND:

Tahoe Resources Inc.

DEFENDANT

SUBMISSIONS OF THE DEFENDANT TAHOE RESOURCES INC.

A. OVERVIEW

1. The question on this application is whether this Court should adjudicate claims:

   (a) belonging to residents of Guatemala;

   (b) based on injuries suffered in Guatemala;

   (c) arising from events occurring in Guatemala;

   (d) involving the alleged actions or omissions of Guatemalan or American residents;

   (e) to be determined in accordance with Guatemalan law; and

   (f) related to ongoing legal proceedings in Guatemala.

2. The answer to this question must be no. Otherwise, the parties and this Court will be faced with the burden of sifting through voluminous Spanish documents located in Guatemala, hearing many Spanish speaking witnesses travelling from Guatemala, attempting to appreciate a complex factual matrix of events occurring in a foreign country and deciding issues of foreign law. The exercise of jurisdiction in such circumstances would also open the

floodgates to innumerable claims that will be brought in Canadian courts merely because an indirect parent company of a relevant foreign corporation sought financing on Canadian capital markets.

3. Accordingly, the Defendant Tahoe Resources Inc. ("**Tahoe**") applies for an order pursuant to Rule 21-8 of the *Supreme Court Civil Rules* that this proceeding be stayed on the ground that this Court should decline to exercise its jurisdiction over the claims (the "**Claims**") of Adolfo Agustin Garcia, Luis Fernando Garcia Monroy, Erick Fernando Castillo Pérez, Artemio Humberto Castillo Herrera, Wilmer Francisco Pérez Martinez, Noé Aguilar Castillo, and Misael Eberto Martinez Sasvin (the "**Plaintiffs**" or the "**Guatemalan Plaintiffs**") against Tahoe.

4. This case centres around an altercation that allegedly occurred on April 27, 2013 at the gate of the Escobal Mine, which is owned by a Guatemalan company called Minera San Rafael S.A. ("**MSR**") and which is located in the Department of San Rafael Las Flores near the town of San Rafael Las Flores in Guatemala. The Guatemalan Plaintiffs were allegedly injured on that date by a Guatemalan resident (Alberto Rotondo) who was at the time engaged by MSR, and by other security personnel who worked for a Guatemala based international security services provider called Grupo Golan. Grupo Golan provided services to MSR under a Guatemalan contract.

5. For reasons one could only speculate about, the Guatemalan Plaintiffs have not named MSR as a party to this action.

6. Guatemala is clearly the more appropriate forum for determining the Guatemalan Plaintiffs' Claims given that:

(a) the alleged tort of battery could only have occurred in the place where the Guatemalan Plaintiffs were allegedly battered, which is Guatemala;

(b) the alleged vicarious liability of Tahoe for the acts of MSR's contractor (Rotondo) is based entirely on relationships between and among entities and/or individuals in Guatemala and Nevada;

(c) Tahoe's alleged liability is also based entirely on events that took place in Guatemala;

(d) the alleged negligence of Tahoe is in respect of security activities and operations that take place in Guatemala through Guatemalan legal entities;

(e) the alleged negligence is in respect of alleged duties owed by a company whose board members are mostly non residents of British Columbia or Canada; and

(f) are in respect of damages suffered by Guatemalan nationals in Guatemala.

7. Almost all of the dozens of witnesses that would have to testify to the relevant events and issues in this case are Guatemalan residents, many of whom do not speak English, expatriates from other countries, or residents of Nevada. Many legal and other relationships will need to be evaluated and understood based on documents in Spanish and in accordance with Guatemalan law.

8. However, the Guatemalan Plaintiffs have already brought proceedings before the Guatemalan courts in respect of a claim for damages for their alleged injuries. Having done so, they cannot deny that the Guatemalan courts are not competent to adjudicate their claims.

9. Finally, the claims advanced by the Guatemalan Plaintiffs will not be determined under Canadian law, as Canadian conflict of laws principles dictate that even if a British Columbia court takes jurisdiction, the claims advanced will be decided under Guatemalan law.

10. While this Court may have jurisdiction simpliciter based on the incorporation of Tahoe in British Columbia, this is the weakest basis for jurisdiction set out in section 3 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 ("***CJPTA***"). All of the *forum non conveniens* factors set out in section 11 of the *CJPTA*, should lead this Court to decline jurisdiction in this case.

11. Given the weakness of the factors connecting the claims to this jurisdiction, the Guatemalan Plaintiffs have asked this Court to condemn the entire Guatemalan civil justice system. They have done so based on speculation and conjecture. This Court should decline to embark on such an enquiry.

B. FACTS

Tahoe, Tahoe USA & Minera San Rafael

12. Tahoe is a silver mining company with its business headquarters in Reno, Nevada.

Aff. #1 of D. Gray at para.4.

13. Tahoe has no business address, officers, or employees in British Columbia. During the relevant period and to date, only three of Tahoe's eight directors reside in British Columbia and two others reside in Ontario. All other directors and all of the officers of Tahoe reside in Reno, Nevada.

Aff. #1 of D. Gray at paras. 5, 6, 8, 9 and 16.

14. Tahoe was founded and incorporated in British Columbia on November 10, 2009. Its shares are listed for trading on the Toronto Stock Exchange ("**TSX**") and on the New York Stock Exchange. Tahoe's only activities in Canada are those related to its obligations as a reporting issuer, which include making proper filings and meeting its continuous disclosure requirements.

Aff. #1 of D. Gray at paras.6-7.

15. The TSX and the TSX Venture Exchange list the most mining companies in the world, accounting for 63% of the equity capital raised by mining companies globally from January to November 2014. Of the 244 TSX mining companies that are incorporated in a Canadian jurisdiction, approximately 58% of those have mining projects located outside of North America. There are many more TSXV mining companies with projects located outside of North America.

Aff. #1 of L. Rocca at paras. 3-5.

16. As with many other mining companies, Tahoe raised money on the TSX in 2010 to pursue its acquisition of an interest in MSR. MSR owned mining assets known as the Escobal Project. MSR still owns the Escobal Project, which is now a producing mine (the "**Escobal Mine**"). MSR is owned by Tahoe Swiss A.G. and Escobal Resources Holdings Limited (Barbados). Tahoe owns each of those companies.

Aff. #1 of D. Gray at paras.11-14.

17. Tahoe Resources USA Inc. ("**Tahoe USA**") was incorporated under the laws of Nevada on February 2, 2010, and is based in Reno, Nevada. Reno Nevada is the head office for all Tahoe operations. Tahoe USA employs all of Tahoe's officers as well as 26 employees. Those officers and employees provide various functions relating to investor relations and sales of silver concentrate. Those officers and employees also provide MSR with technical support for mine operations, including mine engineering, development and long-term mine planning.

Aff. #1 of D. Gray at para. 16.

The Operation of the Guatemalan Mine

18. From 2010 until late 2013, the Escobal Mine was under construction. In January 2014, the Escobal Mine went into commercial production.

Aff. #1 of D. Gray at para. 32.

19. In April 2013, MSR had 693 employees who were all Guatemalan nationals, as well as 28 expatriates residing in Guatemala who provided services and held various management positions with MSR, through what is known in Guatemalan law as a "Contrato". A Contrato is a Guatemalan form of agreement through which a legal representative and/or manager of a contract agrees to distribute profits and losses of a particular enterprise with the Contrato participants. MSR currently employs 894 Guatemalan residents, while the Contrato is currently comprised of 29 expatriate partners who provide services to MSR.

Aff. #1 of D. Gray at para. 21-22.

20. MSR has two business locations in Guatemala: one in Guatemala City and at the other Escobal Mine, located near the town of San Rafael Las Flores, in the Department of San Rafael Las Flores. In April 2013, the Guatemala City office had 10 employees, all Guatemalan residents, who provided high level supervision of the Escobal Mine, including mine operations, security, legal compliance, public relations and human resources. Some of these employees oversaw corporate social responsibility ("**CSR**") activities at national and local levels in Guatemala. The balance of several hundred MSR employees, all Guatemalan residents, were responsible for management and administration of daily mine operations, including security operations or interactions with contract security personnel and execution of local CSR programs.

Aff. #1 of D. Gray at para. 24-25.

21. At material times, Mr. Don Gray was the head of MSR and resided in Guatemala. He has significant experience managing mine operations in foreign countries.

Aff. #1 of D. Gray at para. 2 and 3.

22. In his role with MSR, Gray had responsibility for all matters relating to the operation of the Escobal Mine and MSR in Guatemala, including security and CSR initiatives.

Aff. #1 of P. Joliffe, Exh. C, p.10, Lines 34-45

Aff. #1 of D. Gray at paras. 41-43.

MSR's Security Measures in Guatemala

23. Since 2010, MSR's security activities and decisions have been carried out by Gray, other MSR employees or its contractors working in Guatemala. All contracts for security between MSR and security providers were made in Guatemala and are in Spanish.

Aff. #1 of D. Gray at para. 51.

24. In 2011, MSR engaged International Security and Defense Management LLC ("**ISDM**") to assess the security requirements for the Escobal Mine and to solicit proposals for security services. This process resulted in MSR contracting with Grupo Golan, formally called Alfa Uno, Sociedad Anonima ("**Grupo Golan**"), to develop and implement MSR's security plan. Grupo Golan has offices and operations in Guatemala.

Aff. #1 of D. Gray at paras. 53-54.

25. Alberto Rotondo initially provided services to MSR through ISDM. In 2012, after completing some due diligence with ISDM's assistance, MSR engaged Rotondo as its security manager at the Escobal Mine through the Contrato.

Aff. #1 of D. Gray at para. 56.

26. As Security Manager, Rotondo was required to manage MSR's third party security contracts for the Escobal Mine, including MSR's contract with Grupo Golan. At various times, Grupo Golan provided approximately 80 to 125 security guards for the Escobal Project, all of whom were Spanish-speaking Guatemalan nationals. MSR also employed two or three other Guatemalan nationals to support Rotondo.

Aff. #1 of D. Gray at paras. 58-59.

27. In about early 2013, MSR retained Peter Snell, who later formed the Guatemalan security company Centurion Security S.A. ("**Centurion**") to advise MSR on security matters. In about June 2013, Centurion was retained by MSR to manage the Grupo Golan contract and in about April 2014, MSR terminated its contract with Grupo Golan and retained Centurion to provide all security services for the Escobal Mine.

Aff. #1 of D. Gray at paras. 60, 62-63.

28. During the relevant period, Rotondo kept Gray regularly informed on security matters. During the relevant period, Gray kept Ron Clayton, President and Chief Operating Officer of Tahoe, based in Reno, generally informed on security engagements and developments.

Aff. #1 of D. Gray at para. 58.

29. Aside from technical mine operation matters, Clayton had limited involvement in the day-to-day decisions and operations of MSR, including security activities. Rather, Clayton's role and the role of other officers and employees in the Reno office was to ensure that the Escobal Mine was developed, designed and constructed on time and on budget.

Aff. #1 of D. Gray at para.17.

Tahoe's CSR Policies

30. During the relevant period, Tahoe's role in CSR was to set polices, which guided MSR's CSR programs. In April 2010, in connection with its incorporation, Tahoe's Board of Directors formed a Health, Safety, Environment and Community Committee. At the same time, Tahoe adopted a Code of Conduct. In February 2011, Tahoe developed a CSR Policy for implementation by Tahoe and MSR.

Aff. #1 of D. Gray at paras. 44-45.

31. On April 3, 2013, the Ministry of Energy and Mines in Guatemala had granted Tahoe an exploitation license for the Escobal Project. Soon after, in about mid-April 2013, Tahoe established a CSR Steering Committee. The CSR Steering Committee was comprised of Gray and MSR's General Director, and executive officers of Tahoe, who are based in Reno. The establishment of the CSR Steering Committee was part of a transition as Tahoe moved from a junior exploration company without an exploitation license, to a silver company preparing to

begin commercial production. Just as this transition was occurring, the events of April 27, 2013 occurred.

Aff. # 1 of D. Gray at paras. 45-46.

32. During the relevant period, Gray oversaw all national and local CSR policies and initiatives in Guatemala and he was the direct report for personnel in Guatemala who were responsible for implementing those policies and initiatives.

Aff. #1 of D. Gray at para. 48.

The April 27, 2013 Incident in Guatemala

33. Beginning in or about September 2012, there were a series of protests and incidents, some violent, near the Escobal Project in Guatemala. In one incident, on or about January 12, 2013, armed individuals ambushed a Grupo Golan security patrol at the Escobal Project, killing two Grupo Golan security guards and injuring approximately seven others.

Aff. #1 of D. Gray at paras. 64-67.

34. After the exploitation license for the Escobal Mine was issued in early April 2013, several more protests occurred in the area.

Aff. #1 of D. Gray at para. 68.

35. The defining activity in this case is an incident that occurred in Guatemala on April 27, 2013, when protestors impeded traffic near the Escobal Mine entrance and an altercation between the protestors and security ensued.

Aff. #1 of D. Gray at paras. 68-70.

The Guatemalan Plaintiffs Seek Damages in Guatemalan Proceedings

36. Following the incident, Guatemalan prosecuting authorities known as the Ministerio Publico charged Rotondo with assault, aggravated assault and obstruction of justice. These charges remain unproven.

Aff. #1 of D. Gray at paras. 72 and 75.

37. Under Guatemalan law, a person can be added as a claimant seeking civil reparation/damages from an accused in a criminal proceeding. That type of claimant is referred

to as "***querellante adhesivo***". Other parties who might be held responsible for the actions of the accused can also be added as parties to the civil claim.

Aff. #1 of F. Chavez, Exh. C, pgs. 19-22.

Aff. #1 of M. Melgar, Exh. C; translation contained in Aff #2 of R. Barany, Exh. A, p. 3-4.

38. The Guatemalan Plaintiffs first appeared in the criminal proceedings against Rotondo in May, 2013, very shortly after the events of April 27, 2013. They were and continue to be represented by counsel in those proceedings. In particular, Mr. Rafael Moldonado is Guatemalan counsel for four of the Guatemalan Plaintiffs and is providing his services to Garcia and three of the other Plaintiffs, free of charge, through an entity called CALAS (El Centro de Accion Legal Ambiental y Social de Guatemala).

Aff. #1 of J. Paz, para. 5

Aff. #1 of J. Chumil, para. 3.

39. In June, 2013, the Guatemalan Plaintiffs sought a hearing in the Rotondo proceedings. At that hearing, their counsel requested they be added as joint plaintiffs in the civil proceeding seeking compensation for the alleged civil wrongdoing of Rotondo. They were admitted as civil claimants seeking civil reparation.

Aff. #1 of J. Paz, paras. 3-7.

40. Garcia testified on cross examination that he and the other Plaintiffs have attended at least 6 hearings in the Rotondo proceedings to date.

Aff. #1 of P. Joliffe, Exh B,
pg. 5, Lines 1-11.

41. Garcia knows it is possible for him to add parties, such as MSR, to the Guatemalan Plaintiffs' claim in the criminal proceedings and obtain damages from such parties. He also admits, albeit reluctantly, that he sought and obtained status as a claimant in the Rotondo proceedings in order to obtain compensation for his injuries.

Aff. #1 of P. Joliffe, Exh B,
pg. 10, Lines 20-46; pg. 11, Lines 1-3 and Lines 22-26; pg. 14, Lines 22-26

42. The Plaintiffs could also have brought a civil claim for battery or negligence in Guatemala against any parties, including Tahoe, which they would like to hold responsible for their alleged injuries and damages.

Aff. #1 of F. Chavez, Exh. C. at pgs. 8-18

43. Garcia says he does not know if he ever considered bringing a civil claim of any kind against Tahoe or MSR or any other party (ie. Grupo Golan) in the courts in Guatemala. He is also unaware that Tahoe's head office is located in Reno Nevada.

Aff. #1 of P. Joliffe, Exh B, pg. 27, Lines 15-24; pg. 16, Lines 10-14.

44. The Guatemalan court has made numerous decisions in the Rotondo proceedings, including relating to the Plaintiff's legal status as *querellante adhesivos*, regarding the evidence of their injuries and losses and regarding their evidence about the events of April 27, 2013. The court has already ordered that Rotondo stand trial for two counts of aggravated assault, three counts of assault and for obstruction of justice. The allegations of assault against two of the Plaintiffs were reduced to an administrative charge which will be determined by a "Peace Judge". The Guatemalan court has also made a decision in favour of the Guatemalan Plaintiffs, who objected to the initial judge appointed to adjudicate the proceedings.

Aff. #1 of J. Queseda, Exh. B; translation contained at Aff. #1 of M. Campos, Exh. B, pgs 44-45, 63-68, 85-86.

Aff. #2 of J. Toledo, paras. 8, 9, 10, 11.

The Current Proceedings in British Columbia

45. The Guatemalan Plaintiffs sought status as *querellante adhesivos* in the Rotondo criminal proceedings immediately following the incident of April 27, 2013. They commenced this proceeding in British Columbia more than one year later on June 18, 2014.

46. This proceeding was commenced by the Guatemalan Plaintiffs with the support of the Canadian Centre for International Justice ("**CCIJ**"). Garcia is not aware of the CCIJ.

Aff. #1 of P. Joliffe, Exh. F.

Aff. #1 of P. Joliffe, Exh B, pg. 6, Lines 34-37.

47. In the Notice of Civil Claim, the Guatemalan Plaintiffs allege that Tahoe is liable, either directly or vicariously, for battery and directly for negligence as a result of the events on April 27, 2013.

Notice of Civil Claim at paras. 37-50 and 57-64.

48. The Guatemalan Plaintiffs' alleged injuries and any damages they allegedly suffered all occurred entirely in Guatemala.

Notice of Civil Claim at paras. 54-56.

49. Each of the Guatemalan Plaintiffs have been treated or evaluated, or both, by multiple Guatemalan doctors who practice medicine in Guatemala. Initially Garcia was being seen by multiple doctors in hospital, and then multiple doctors outside of hospital. He has also been evaluated by Guatemalan medical and forensic specialists who work for INACIF, the Guatemalan Institute of Forensic Science (*Instituto Nacional de Ciencias Forenses de Guatemala*), who have prepared technical reports, in Spanish. Those reports have been tendered to the court in Guatemala.

Aff. #1 P. Joliffe, Exh B, pg. 4, Lines 3-8, 11-18, 26-35.

Aff. #1 of J. Queseda, Exh. B; translation contained at Aff. #1 of M. Campos, Exh. B, pgs 63-68.

Aff. #1 of D. Gray, para. 75.

50. All of the Guatemalan Plaintiffs are farmers in Guatemala. They claim loss of income, which is a function of local weather, pests, different seasons for varying crops, and local supply and demand variables in any given year.

Aff. #1 of P. Joliffe, Exh. B, pg. 2, all Lines; pg. 3, Lines 1-27.

51. All of the Guatemalan Plaintiffs are residents of, and located in, Guatemala. None speak English. Mr. Garcia does not have a passport and has never travelled outside of Guatemala. He believes that to be the same for the others, except for one plaintiff who has travelled to Canada one in relation to this litigation. Garcia and likely other Guatemalan

Plaintiffs cannot afford to pay for the airfare and accommodations necessary for any trip to Canada.

Notice of Civil Claim at paras. 10-16.

Aff. #1 of P. Joliffe, Exh. B, pg. 17, Lines 25-47, pg. 18, Lines 1-16, pg. 19, Lines 6-23.

52. The events and relationships at the heart of this litigation all occurred in Guatemala or in Reno leading up to the central event, which took place in Guatemala on April 27, 2013. That event related to a protest by a group in Guatemala with which all of the Guatemalan Plaintiffs are associated called Resistencia Pacifica el Escobal. CALAS representatives are also part of Resistencia Pacifica el Escobal.

Aff. #1 P. Joliffe, Exh. B, pg. 8, Lines 2-42.

53. Almost all of the dozens of fact and expert witnesses, such as security personnel, principals and employees of security companies, various MSR employees (security, CSR, mine operations), MSR contractors, other witnesses to prior events, altercations, protests leading to April 27, 2013, CSR consultants, and officers and directors of Tahoe from Reno who would be called to testify by the parties in this proceeding will be from Guatemala or Reno and will have to travel to British Columbia to testify. Most of those from Guatemala will be unable to testify in English.

The Guatemalan Courts Can Provide a Just and Fair Result

54. There is plenty of evidence before the Court that the Guatemalan court system is capable of achieving a just and fair result in this case.

55. MSR has substantial experience with the Guatemalan legal system and has litigated a variety of cases in various Guatemalan courts and cases.

Aff. #1 of D. Gray, paras. 41-43.

56. The Plaintiffs' witness, Carol Zardetto, works with a law firm in Guatemala, which conducts various litigation for clients, with success.

Aff. #1 of P. Joliffe, Exh. A, pg. 21-22, Lines 46-47 and 1-8.

57. Garcia gave evidence that Moldonado of CALAS is an effective lawyer and has had success in the Guatemalan courts.

Aff. #1 of P. Joliffe, Exh. B, pg. 15, Lines 7-47.

58. Garcia gave evidence that in his limited experience in the criminal proceedings against Rotondo to date, he and the other Plaintiffs have obtained various fair and successful results in that proceeding with the assistance of their counsel. He also testified that his father obtained a fair disposition from the court shortly after being arrested after a protest in April, 2013.

Aff. #1 of P. Joliffe, Exh. B, pg. 16, Lines 1-9.

59. More importantly perhaps, Garcia admitted that he has no other experience in the Guatemalan court system (and is not aware of whether any of the other Plaintiffs have other experience) to support the view he expresses in his Affidavit #1 that he cannot get justice in Guatemalan courts from parties that might be responsible for the events on April 27, 2013.

Aff. #1 of L. Garcia, para 5.

Aff. #1 of P. Joliffe, Exh. B, pg. 16, Lines 15-47; pg. 17, Lines 1-14.

60. Mr. Jose Pablo Chumil Arevalo of CALAS swore an affidavit in this proceeding, which was filed by the Plaintiffs. The Plaintiffs refused Tahoe's request that they produce Chumil for cross examination on his affidavit. In lieu, Tahoe has filed evidence of statements posted on Facebook by CALAS's Moldonado and Chumil. Those postings represent examples of proclamations by CALAS of its legal successes and accomplishments of achieving justice in the Guatemalan courts on behalf of various clients in court proceedings against various parties (including MSR).

Aff. #1 of P. Joliffe, Exhibits A and B.

61. Guatemala has a Civil Code, which reflects the influence of the French Civil Code and Roman law and many of the rules of civil law in Guatemala are similar to other Latin American and European nations. As in other civil law countries, Guatemalan procedures intend to elicit the truth through evidence.

Aff. #1 of F. Chavez, page 2.

Aff. #2 of F. Chavez, page 12(Q.11) and 13(Q.12).

62. In their Application Response, the Guatemalan Plaintiffs contend that the court system in Guatemala is corrupt and incapable of adjudicating the Plaintiffs' claims. They rely mainly on the affidavits of Zardetto, Mirte Postema and Mynor Alberto Melgar Valenzuela in support of that serious accusation.

Application Response, para 5, 22, 23 and 18 (numbered in error).

63. Those affidavits contain opinion of alleged corruption that is based on cases of civil war crimes such as genocide perpetrated during the 37 year Guatemalan civil war (Zardetto) or concerns about effective public prosecution of organized crime (Melgar and Postema). Those types of cases are not analogous to this case. To the extent that any of those affiants' opinions on those matters can be considered expert opinion, as opposed to lay witness testimony, those opinions do not address or impugn the current-day functioning of the Guatemalan legal system to adjudicate civil claims between private parties.

64. Further, the Guatemalan Plaintiffs' reliance on these opinions is based on speculation and conjecture. There is no allegation or evidence that Tahoe or MSR would engage in any corrupt activity. There is no allegation or evidence that Tahoe or MSR would seek to involve any government officials in the proceedings or that the specific judge assigned to hear such a case would be vulnerable to any improper pressure.

65. Tahoe's expert witness, Francisco Chavez, on the other hand, has extensive experience working in the courts in Guatemala, particularly as compared to Ms. Zardetto.

Aff. #1 of O. Ardon
Aff. #1 of A. Reyes
Aff. #1 of A. Rivera

66. Chavez's opinion is that the Plaintiffs can be assured a fair and impartial proceeding against Tahoe or any other defendant in the Guatemalan courts.

Aff. #2 of F. Chavez, page 1.

C. PRELMINARY ISSUES OF ADMISSIBILITY AND WEIGHT OF EXPERT EVIDENCE

67. There are three preliminary issues of evidence that Tahoe submits should be determined by this Court:

(a) Should the evidence of Zardetto in her Affidavit #1 be accepted as expert evidence on the issues of:

(i) alleged corruption in the Guatemalan legal system and

(ii) Guatemalan civil procedure generally and interpretation of Guatemalan law relating to *forum non conveniens*?

(b) What is the value of the evidence tendered by the Plaintiffs in the Affidavit #1 of Postema and the Affidavit #1 of Melgar?

(c) Should the transcript of wiretap evidence attached to the Affidavit #1 of Chumil, the translation of which is attached to the Affidavit #1 of Roger Barany, be accepted and considered by this Court on this application?

Zardetto Does Not Qualify As an Expert

68. In order to be admissible, expert evidence must be: relevant; necessary to assist the trier of fact; given by a properly qualified expert; and there must be no exclusionary rule otherwise prohibiting the receipt of the evidence.

R. v. Mohan, [1994] 2 SCR 9, 114 DLR (4th) 419 at paras. 17-21.

69. A properly qualified expert is a witness who "is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify". The court must be satisfied that the expert has expertise with respect to the opinions advanced and not a mere familiarity or involvement with the subject matter. An expert's opinion must be within his or her stated qualifications or uniquely within his or her special skill. Thus, where expertise is required in a specialized area, an expert with knowledge on the general subject will not be permitted to his or her opinion.

R v. Mohan, supra at para. 31; *Dhaliwal v. Bassi,* 2007 BCSC 547 at para. 7; *Hughes v. Haberlin* (1997), 49 B.C.L.R. (3d) 366 (S.C.) at para. 14; *Johnson v. Goldsmid,* [1987] B.C.J. No. 2530 (QL) (S.C.).

70. There is a two step process for determining admissibility of expert evidence based on the *Mohan* criteria: (i) the party proffering the evidence must establish that the proposed witness is qualified to give the relevant opinion; and (ii) the judge as gatekeeper must decide if the evidence is beneficial to the proceeding.

R. v. Abbey, 2009 ONCA 624 at para. 71, leave to appeal refused [2010] S.C.C.A. No. 125 (QL).

71. The Supreme Court of Canada in *R. v. J. (J.-L.),* [2000] SCR 600, cautioned trial judges to not allow expert evidence too easily (at para. 28):

> [T]he Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

72. In the alternative, an expert's evidence may be afforded less weight if there are deficiencies in his or her expertise, including the method by which the expert's experience was gained.

R. v. Ballony-Reeder, 2001 BCCA 293 at para. 10 citing *R. v. Marquard,* [1993] 4 SCR 223 at para. 35.

(i) Zardetto is not an expert on alleged corruption in the Guatemalan court system

73. The Plaintiffs have filed the Affidavit of Carol Zardetto, presumably tendering her as an expert witness in respect of alleged corruption in the court system and the resulting alleged inability of the Plaintiffs to obtain a fair adjudication of their civil claims in Guatemala.

74. Zardetto does not qualify as an expert on this topic as:

(a) Zardetto has not done any work in the field of anti-corruption since 2006. Her knowledge of whether there is corruption in the Guatemalan court system and about the existence, success or failure of anti-corruption efforts since that time is based on her casual review of her subjective selection of publically available reports.

Aff. #1 of P. Joliffe, Exh A, p.11, Line 47; p. 12, Line 1-3.

(b) Zardetto confirmed that she is not an expert on what transpires in the Ministerio Publico in Guatemala or in criminal law in respect of corruption. A large portion of her anti-corruption experience came from work she did from 2000 to about 2003 with the Ministerio Publico.

Aff. #1 of P. Joliffe, Exh A, p. 7-8, Lines 34-47 and 1-7.

(c) Zardetto was not aware of recent publications or projects that were put to her and that relate to enhancement and investments made in improvement of Guatemala's legal system, including a report of World Bank from June 2010, reporting on the success of its $49.7 million investment to improve the court system in Guatemala between 1998 and 2007.

Aff. #1 of P. Joliffe, Exh A, pg. 12, Lines 16-47, Exhibit 2 for Identification.

(d) She also clearly stated that she has no expertise in respect of the work of CICIG, even though she relied on CICIG publications in her report (at Exhibit C to Zardetto Affidavit #1, page 2).

Aff. #1 of P. Joliffe, Exh A, pg. 4, Lines 19-38.

(e) Zardetto admitted that what she knows about corruption in the Guatemalan legal system, if any, and progress, if any, since her last work in the area in 2006, is what any "interested citizen" of Guatemala might know, based on readings of personal interest to her.

Aff. #1 of P. Joliffe, Exh A, pg. 10, Lines 2-37, pg.14, Lines 1-41.

75. Based on the foregoing, Tahoe respectfully submits that the Court should either disqualify Zardetto as an expert on the question of whether the court system in Guatemala is

corrupt and whether that alleged corruption affects the Plaintiffs' ability to get a fair and impartial trial of their claims. Her opinion on the same is set out in the introduction to her opinion and in her answer to Question 1 (at Exhibit C to Zardetto Affidavit #1).

76. Alternatively, for the same reasons, this Court should give her opinion on those matters very little weight.

77. Another reason to give her expert opinion little weight on these points (if it is accepted as expert opinion) is that much of her opinion in these sections is based on cases from arising from events during the civil war and based on commentary from others about the use of appeal, reconsideration and constitutional (*amparo*) remedies in Guatemala. Zardetto acknowledged the importance of the rights of appeal, reconsideration and constitutional applications to a functioning court system, despite potential misuse of same.

Aff. #1 of P. Joliffe, Exh A, pg. 25, Lines 28-41.

(ii) Zardetto's expertise about civil litigation procedure is constrained by her very limited recent experience

78. Zardetto practiced actively as a litigator from 1984 to 1996. From 1996 to 2006, she worked on various other projects, including writing a novel and a children's book. Zardetto has very limited experience, and significantly less experience than Chavez working as a litigator in the Guatemalan courts, particularly over the last 20 years.

Aff. #1 of O. Ardon
Aff. #1 of A. Reyes
Aff. #1 of A. Rivera

79. Zardetto agreed that she was not surprised that research would have revealed that she has been counsel on less than 10 cases since returning to practice in 2006.

Aff. #1 of P. Joliffe, Exh A, pg. 19, Lines 15-23.

80. Zardetto admitted that in recent years she has had very limited dealings with Guatemalan court officers and judges.

Aff. #1 of P. Joliffe, Exh A, pg. 20, Lines 20-24 and 31-34.

81. Zardetto only recalled working on one case involving civil claimants in a criminal proceeding in Guatemala.

Aff. #1 of P. Joliffe, Exh A, pg. 20, Lines 9-15.

82. Zardetto has never been an expert witness in a court proceeding, other than in the *Hudbay* case in Ontario, where the parties did not proceed with a jurisdictional or *forum non conveniens* challenge.

83. Based on all of the foregoing, Zardetto does not qualify as an expert on the current state of Guatemalan civil practice. In contrast, Chavez's opinion on matters relating to the conduct of litigation in Guatemala and matters relating to the interpretation of Guatemalan laws should be favoured over Zardetto's opinion on same.

(b) The Affidavits in respect of civil war crimes and organized crime are irrelevant

84. As outlined above, a large portion the Melgar and Postema affidavits principally address concerns about effective public prosecution of organized crime in Guatemala (Melgar and Postema). To the extent that those affiants' opinions on those matters can be considered expert opinion, as opposed to lay witness testimony, those opinions do not address or impugn at all the functioning of the Guatemalan legal system to deal with civil claims between private litigants. Those opinions are therefore not relevant or of very little assistance to this Court in respect of the Plaintiffs' allegation that they cannot get justice in the courts in Guatemala.

(c) The transcript of wiretap evidence should not be accepted and considered by this Court.

85. The Guatemalan Plaintiffs have filed Affidavit #1 of Chumil, a law student employed at CALAS. Chumil attaches to his affidavit evidence allegedly submitted by the Ministerio Publico in the ongoing Guatemalan Rotondo criminal proceedings, including a transcript of recordings of telephone intercepts of phone calls on which it is alleged but not proved that Rotondo is speaking, in and around the events on April 27, 2013. The affiant suggests that it should be accepted that Rotondo is the speaker on the intercepts.

86. Tahoe respectfully submits that the content of the wiretap evidence and the affiant's suggestion of who is speaking on the wiretap are not reliable and in any event not

relevant to the issue of whether this Court should decline jurisdiction in this case. It matters not on this application who might have said these things to someone else, if they were said at some point in time around the April 27, 2013 incident. That will only be relevant to a court that determines the merits of what allegedly occurred on or around April 27, 2013. Notwithstanding the foregoing, the Guatemalan Plaintiffs have given the content of the wiretap prominence covering three out of the eleven pages of their Application Response. It is respectfully submitted that in tendering the content of the wiretap as evidence in this application and in giving it such prominence, the Guatemalan Plaintiffs are attempting to sensationalize this matter. On the foregoing grounds, Tahoe submits that the content of the wiretap should be excluded from the evidence on this application and should not be considered by this Court.

87. The existence of this wiretap evidence is an example of the danger of multiplicity of proceedings and potential inconsistent decisions if this Court does not decline jurisdiction.

88. There is a pending issue in the Rotondo proceedings as to whether the wiretap intercepts are admissible in the Rotondo proceedings and if they are admissible, what they establish. That question is presently before the Guatemalan court in the Rotondo proceedings. The basis for the admissibility question in the Rotondo proceeding relates to the phone tapping authorizations that have now been disclosed by the Guatemalan prosecutor to Rotondo's counsel. That counsel thinks that the wiretaps might have been illegal or cannot be relied upon in the case against Rotondo because of defects in the way they were obtained.

Aff. #2 of J. Toledo, para. 13.

89. Finally, it is a notable exaggeration for the Guatemalan Plaintiffs to contend that this Court already has access to the key evidence by virtue of having access to wiretap evidence and a video of the events. Rather, this is only a very small piece of the puzzle.

D. SUBMISSIONS

Overview of Forum Non Conveniens

90. Section 3 of the *CJPTA* codifies the grounds on which British Columbia Courts have jurisdiction over matters. One of those grounds is where the defendant is incorporated in British Columbia. Tahoe submits that this is the weakest ground for establishing jurisdiction.

91. At common law, Tahoe's incorporation in British Columbia would only create a rebuttal presumption of jurisdiction *simpliciter*. The presumption of jurisdiction could be rebutted if the subject matter of the litigation is unrelated to the defendant's activities in the province. Tahoe's activities in British Columbia are limited to accessing Canadian capital markets, which has nothing to do with the Guatemalan Plaintiffs' claims.

Club Resorts Ltd. Van Breda, 2012 SCC 17, [2012] 1 SCR 572 at paras. 90, 96.

92. While this Court may have jurisdiction *simpliciter* under the *CJPTA*, Tahoe submits that this proceeding should be stayed pursuant to Rule 21-8(2), as the courts of Guatemala are a more appropriate forum to determine the issues raised by the Guatemalan Plaintiffs than the courts of British Columbia. Rule 21-8(2) provides that a party may apply to court for a stay of the proceeding on the ground that the court ought to decline jurisdiction over that party in respect of the claim made against the party in the proceeding.

Supreme Court Civil Rules, B.C. Reg. 168/2009.

93. In British Columbia, section 11 of the *CJPTA* codifies the *forum non conveniens* test and creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (*forum non conveniens*).

94. Section 11(1) indicates that after considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding. Section 11(2) then provides a non-exhaustive list of factors that the court

must consider in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding. These factors include:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses in litigating in the court or in any alternative forum,
>
> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.
>
> *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 SCR 321 at paras. 21-22.

95. The factors set out in section 11(2) of the *CJPTA* are not exhaustive and other factors may also be considered. Additional factors (many of which overlap with the factors in section 11(2)) that the court may consider include: the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

> *Laxton v. Anstalt*, 2011 BCCA 212 at para. 44.
>
> *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at para. 110.
>
> *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2014 BCSC 715 at paras. 63, 67.
>
> *BNSF Railway Co. v. North American Reload Inc.*, 2007 BCSC 1184 at para. 7.

96. The weight to be attributed to the various factors is a matter of discretion. The analysis does not require that all the factors point to a single forum or involve a simple numerical tallying up of the relevant factors. It only requires that one forum ultimately emerge

as *clearly* more appropriate. The objective of the court in deciding a *forum non conveniens* application is to ensure fairness to the parties and the efficient resolution of the dispute.

> *The Original Cakerie Ltd. v. Renaud*, 2013 BCSC 755 at para. 51.
>
> *180 University Residential Limited Partnership v. Yours Asia Corporation*, 2015 BCSC 289 at paras. 20-21.
>
> *Right Business Limited v. Affluent Public Limited*, 2011 BCSC 783 at para. 75, aff'd 2012 BCCA 375.
>
> *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated,* 2014 BCSC 752 at paras. 24-26.
>
> *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at paras. 108-109.

97. The purpose of the *forum non conveniens* analysis, and therefore of section 11 of the *CJPTA*, is to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties. Tahoe says that in the circumstances of this case, it would be fairer and more efficient for the Guatemalan Plaintiffs to proceed in Guatemala. The Court should not hesitate in this case to find that a Guatemalan court is the appropriate forum in which to apply Guatemalan law to events that occurred wholly in Guatemala and where any damages claimed by the Guatemalan Plaintiffs were incurred solely in Guatemala.

> *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated*, 2014 BCSC 752 at para. 23
>
> *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572 at para. 109.

98. The Guatemalan Plaintiffs are only able to establish the territorial competence of the British Columbia Court because of the minimal connection of Tahoe having its registered office in British Columbia. But for this presumption of territorial competence, the Guatemalan Plaintiffs would be unable to establish a real and substantial connection between the proceeding and British Columbia and this Court would be without jurisdiction. For that reason, this case is of the type that the Supreme Court of Canada warns of in *Club Resorts Ltd. v. Van Breda* where the court must be mindful that jurisdiction may sometimes be established on a rather low

threshold. In such an instance, *forum non conveniens* plays an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 SCR 572 at para. 109.

Jurisdiction Should be Declined in Favour of Guatemala

99. In the circumstances of this case, the following factors set out in section 11(2) of the *CJPTA* and other factors clearly favour the determination of this dispute by the courts of Guatemala.

(a) Proceeding in British Columbia is Inconvenient and Will Cause Unnecessary Expense

100. The inconvenience and expense of this litigation proceeding in British Columbia as opposed to Guatemala overwhelmingly favours the courts of Guatemala.

101. Previous decisions of this Court have recognized that language barriers and the nature of the allegations in a proceeding that may require witnesses to attend in person in order to ensure a fair trial can weigh against the court favouring jurisdiction.

Right Business Limited v. Affluent Public Limited, 2011 BCSC 783 at paras. 79-84, aff'd 2012 BCCA 375.

102. For example, in *Formula Contractors Ltd. v. Lafarge Canada Inc.,* the court held that all of the key witnesses resided in Alberta, the events at issue all occurred in Alberta and Alberta law applied to the claim. These factors clearly made Alberta the more appropriate forum. Trying this action in British Columbia will result in considerably greater inconvenience and expenses for the parties and dozens of witnesses.

Formula Contractors Ltd. v. Lafarge Canada Inc., 2009 BCSC 105 at para. 19.

103. Similarly, in *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated*, the presence of eight defence witnesses in Ontario was compared to the plaintiff company's presence in British Columbia. The court found that on this factor, the balance of convenience favoured trying the action in Ontario given the costs involved in witnesses attending the trial from Ontario.

Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated, 2014 BCSC 752 at paras. 31-36.

104. In *Sky Harvest Energy Corp. v. Ireland*, the court held that the balance of convenience favoured Manitoba over British Columbia as Manitoba was more convenient for the majority of the witnesses and a trial there would involve less expense.

Sky Harvest Energy Corp. v. Ireland, 2014 BCSC 472 at para. 31.

105. All the evidence relating to the events alleged in the Guatemalan Plaintiffs' Notice of Civil Claim is similarly located outside of British Columbia, mainly in Guatemala or Reno.

106. As in *Kvaerner U.S. Inc. v. AMEC E&C Services Limited*, there is no indication in this case that there are witnesses or substantial evidence of any kind located in British Columbia. Rather, the evidence shows that Tahoe has no officers or employees or business office whatsoever in British Columbia. While three independent directors reside in British Columbia, the other five directors and all officers are ordinarily resident outside of British Columbia. Although Tahoe makes required filings in British Columbia, has a registered office and a bank account in Canada, none of the work of Tahoe or its subsidiaries relating to the matters in issue is conducted in British Columbia or Canada.

Kvaerner U.S. Inc. v. AMEC E&C Services Limited, 2004 BCSC 635 at para. 30.

Aff. #1 of D. Gray at paras. 7-9.

107. While Tahoe is incorporated in British Columbia and listed on the TSX (as well as the New York Stock Exchange), such ties are financial and not operational. The TSX and the TSX Venture Exchange list the most mining companies in the world and between January and November 2014, 63% of the equity capital raised by mining companies globally was raised on those exchanges. Being incorporated in a Canadian jurisdiction and having mining projects located outside of North America places Tahoe squarely in the majority of mining issuers listed on the TSX. This case therefore raises the prospect that innumerable plaintiffs from around the world will litigate in British Columbia simply because an indirect parent corporation of a local

company obtains its financing in Canada. This could not have been the intention of the legislature in drafting section 3 of the *CJPTA*.

Aff. #1 of D. Gray at para. 6.
Aff. #1 of L. Rocca at paras. 3-5.
Aff. #1 of D. Gray at paras. 16-17.

108. Gray was at all material times a Guatemalan resident. All of MSR's employees were and are residents of Guatemala and MSR's two business locations are in Guatemala. MSR's Guatemala City office employees provided supervision and direction for the mine and related operations and the balance of its employees are at the mine site near the town of San Rafael Las Flores. As of April 2013, MSR also had 28 expatriates (including Rotondo) who were partners of what is known in Guatemalan law as a Contrato, a uniquely Guatemalan legal instrument, and provided services to MSR.

Aff. #1 of D. Gray at paras. 2, 21-24, and 26.

109. None of these potential witnesses are located in British Columbia or have any connection to British Columbia. Moreover, none of the Guatemalan Plaintiffs are located in British Columbia and the Guatemalan Plaintiffs' testimony will need to be interpreted into English from Spanish. While the Guatemalan Plaintiffs have indicated a willingness to travel to Canada for trial, Tahoe will still need to conduct examinations for discovery in Guatemala. There will no doubt be significant challenges in obtaining (and translating) evidence such as medical records, income information, and schooling records held by third parties located in Guatemala that will be needed to assess the damages claimed by the Guatemalan Plaintiffs.

110. Proceeding in British Columbia will further be mired in evidentiary issues arising from the fact that substantially all of the relevant evidence regarding the events at issue is located in Guatemala. This includes the results of investigations conducted (with the cooperation of MSR) by the Guatemalan Ministerio Publico and the Guatemalan National Institute of Forensic Science. This includes security contract engagements, which were made among Guatemalan companies, in Spanish. Various contractual and other relationships and responsibilities may have to be determined based on Guatemalan law and custom. The socio-political circumstances that relate to various facts and evidence will not be understood by this Court. As outlined above, the Guatemalan Plaintiffs have put forward evidence that they say was obtained in the

Guatemalan criminal proceedings that they will presumably argue is relevant to and admissible in the British Columbia proceedings.

Aff. #1 of D. Gray at para. 75.

Aff. #1 of J. Chumil at paras. 5-11

111. In a similar context, the comments of this Court in relation to the advantages of proceeding before a court in Mexico support Tahoe's submission here that Guatemala is clearly the more appropriate forum in which to try the Guatemalan's Plaintiffs' claim to avoid inconvenience and unnecessary expense:

> [72] For this reason, in my view it would be considerably more convenient and, on the whole, much less expensive to the parties, their witnesses and to the discovery process (both documents and witnesses) to have the proceedings conducted in Mexico, in Spanish and tried by a Mexican court. One shudders to think of the expense arising from the numerous inquiries and searches which would be made from this jurisdiction for documents related to title, transfers of title, banking documents all going back a number of years and the interpretations which would be required for a court in this jurisdiction to understand those documents.
>
> *Mendez v. Demos*, 2014 BCSC 2047 at para. 72.

(b) The Substantive Law of Guatemala Will Be Applied to the Plaintiffs' Claims

112. The proper law to be applied to the Guatemalan Plaintiffs' claims is the law of Guatemala. Where the substantive law of another jurisdiction will be applied, this can be a factor that weighs heavily in favour of the other jurisdiction as the *forum conveniens*.

Kvaerner U.S. Inc. v. AMEC E&C Services Limited, 2004 BCSC 635 at para. 26.

113. The Guatemalan Plaintiffs allege that Tahoe is liable, either directly or vicariously, for battery and directly for negligence. The law applicable to both of these tort claims is the *lex loci delicti*, that is, the law of the place where the activity occurred. Vicarious liability is also determined by the law of the place of the tort.

Schwarzinger v. Bramwell, 2011 BCSC 283 at para. 89.

Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon, [1994] 3 SCR 1022.

Yeung (Guardian ad litem of) v. Au, 2006 BCCA 217 at para. 16, aff'd (2007), 286 DLR (4th) 193 (S.C.C.).

114. In *Tolofson v. Jensen*, the Supreme Court of Canada defended the application of the *lex loci delicti* on the basis that, amongst other things, ordinarily people expect their activities to be governed by the law of the place where they happen to be. If other states routinely applied their laws to activities taking place elsewhere, confusion would result. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon, [1994] 3 SCR 1022 at para. 44.

115. A tort is regarded to have occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties.

Moran v. Pyle National (Canada) Ltd., [1975] SCR 393.

i. Guatemalan Law Will Apply to the Claim of Battery

116. The Guatemalan Plaintiffs' first allegation is that certain conduct of Rotondo and MSR or other security personnel toward the Guatemalan Plaintiffs on April 27, 2013 constitutes battery by Tahoe. All of the facts pleaded in relation to the events of April 27, 2013 are said to have occurred in Guatemala and all of the particulars pleaded in support of the allegation that certain acts were intentional also are said to have occurred in Guatemala. Tahoe is said to have expressly or implicitly authorized that conduct such that it is directly liable for the battery, or alternatively, Tahoe's Guatemalan subsidiary MSR is said to have expressly or implicitly authorized the conduct such that Tahoe is vicariously liable for the battery. In the further alternative, it is pleaded that Tahoe is simply vicariously liable for the battery committed by Rotondo and the security personnel.

Notice of Civil Claim at paras. 37-50, 57-60.

117. Battery is the intentional infliction of unlawful force on another person. A plaintiff must prove direct interference with his or her person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant.

> *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 SCR 551, 2000 SCC 24 at paras. 6, 8.

118. There is no doubt that Guatemala is the place where the alleged battery, that is the intentional infliction of force, is pleaded to have occurred. The Guatemalan Plaintiffs sustained injuries and suffered the alleged damages in the same place where the alleged wrongful acts or omissions constituting the alleged battery occurred. Applying the *lex loci delicti* rule, it is therefore the law of Guatemala that will be applied to the Guatemalan Plaintiffs' claim in battery and any claim that Tahoe is vicariously liable for battery.

ii. Guatemalan Law will Apply to the Negligence Claim

119. The law of Guatemala is also to be applied to the Guatemalan Plaintiffs' claim in negligence as both the alleged wrongful act and the alleged consequences of those acts are all alleged to have occurred in Guatemala.

120. In *Roed v. Scheffler*, the court considered the place where a tort occurred in the context of a claim for negligence arising out of a motor vehicle accident that occurred in Washington State involving British Columbia plaintiffs. In that case, the court held that the test set out in *Moran* is that a tort occurs in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. In applying that test, the court found that the location of the tort in that case was Washington State:

> It is the foreign jurisdiction that was most substantially affected by the defendants' acts of negligence: the accident occurred in Washington State, the plaintiff's vehicle suffered damage in that state, and the injuries to the plaintiff originated in that state. These circumstances also lead to a conclusion that Washington State law would likely have been in the reasonable contemplation of the parties. Although the plaintiff continued to suffer from her injuries when she returned home to British Columbia, this fact does not alter the location of the tort.
>
> *Roed v. Scheffler*, 2009 BCSC 731 at paras. 20, 23.

121. In order to succeed on their negligence claim, the Guatemalan Plaintiffs must prove: (1) that Tahoe owed them a duty of care; (2) that Tahoe's behavior breached the standard

of care; (3) that the Guatemalan Plaintiffs suffered damage; and (4) that the damage was caused, in fact and in law, by Tahoe's breach.

Mustapha v. Culligan of Canada Ltd., 2008 SCC 27, [2008] 2 SCR 114 at para. 3.

122. The Guatemalan Plaintiffs allege that Tahoe owed a duty of care on various grounds. Tahoe is said to control the security policies, practices and community relations at the Escobal Mine in Guatemala. The Guatemalan Plaintiffs further allege that Tahoe knew the Guatemalan Plaintiffs were members of the local community (in Guatemala); knew that its mine operations had the potential to negatively impact members of the local community (in Guatemala); made representations regarding its responsibility to the local community (in Guatemala); and knew that there was a high risk of harm to the local community (in Guatemala) if its security personnel (which was MSR's security personnel in Guatemala) failed to adhere (in Guatemala) to certain standards and policies.

Notice of Civil Claim at paras. 22-26, 61.

123. It is alleged that Tahoe breached the duty of care by failing to conduct adequate background checks; failing to institute procedures and safeguards to ensure that Rotondo and private security personnel would comply with international and *local* guidelines pertaining to the use of force; failing to establish and enforce clear rules regarding engagement and the use of force; failing to monitor activities; failing to require adherence to certain standards and policies; failing to monitor security personnel under Rotondo's command; failing to detect or properly act upon the fact that Rotondo did not view his role as Guatemala Security Manager as being strictly defensive in nature; and failing to detect or properly act upon the fact that Rotondo had an openly hostile attitude towards local community members.

Notice of Civil Claim at para. 64.

124. Almost all of these alleged failures are pleaded to have occurred in Guatemala. While arguably a few of the acts could have been performed from Tahoe's headquarters in Reno, Nevada, the Plaintiffs have not pleaded that any of these acts were carried out in British Columbia (and in fact, Tahoe has no place of business in British Columbia and no officers or employees in British Columbia).

125. A duty can only exist if it is owed to someone. In this case, the duty is allegedly owed by Tahoe to nationals of Guatemala. The alleged duty is inextricably tied to Guatemala. Any breach that is alleged to have occurred outside of Guatemala is not sufficient as the tort of negligence is not complete until damage is suffered by the Guatemalan Plaintiffs in Guatemala. The mere alleged failure to, for example, monitor or require adherence to standards, including non binding international standards (assuming that such failure to monitor or require could be established as having occurred in British Columbia), does not constitute an actionable wrong until Tahoe's alleged negligence *causes* the Guatemalan Plaintiffs to *suffer* injuries in Guatemala.

126. In terms of the damages suffered, the Guatemalan Plaintiffs say that the harms they have suffered include pain, suffering, and loss of enjoyment of life; loss of income and earning capacity; loss of opportunity; loss of capacity to perform household work; past and future medical rehabilitation costs; and costs of care provided by family members. There is no suggestion that these damages arise in any location other than Guatemala.

Notice of Civil Claim at para. 55.

127. Many negligence cases have focused on where damages are suffered to determine the *situs* of the tort. In *Moran v. Pyle National (Canada) Ltd.*, [1975] SCR 393, the Supreme Court of Canada held that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus the predominating element is damage suffered. In this instance, all of the Guatemalan Plaintiffs' alleged damages have been suffered in Guatemala.

128. An Ontario court recently used an example from an earlier Ontario Court of Appeal decision of a police chase that started in Ontario but resulted in a car accident in Quebec. The court quoted the Ontario Court of Appeal, as follows:

> It seems clear to me that the wrong occurred in the Province of Quebec because the injury occurred there. The plaintiffs are not suing because the Ottawa police breached their duty when they commenced a chase while they were in the Province of Ontario, nor are they suing because the Ottawa police failed to adequately warn the Quebec police authorities of the ongoing chase. They are suing because Leonard was injured in the resulting car accident in the Province of Quebec. *The activity which took place in the Province of Ontario, even if found to constitute a breach of duty on the part of the Ottawa police, does not amount to an actionable wrong. There is no actionable wrong without the injury. The place*

> *where "the activity took place" which gives rise to the action is in the Province of Quebec.*
>
> *Lilydale Cooperative Ltd. v. Meyn Canada Inc.*, 2013 ONSC 5313 at para. 11 [emphasis in original].

129. In *Lilydale Cooperative Ltd. v. Meyn Canada Inc.*, the court was asked to determine whether Alberta or Ontario law applied to a claim in negligence for failures to notify, warn, or provide sufficient information to the plaintiff in assembling, testing, inspecting, shipping, and supplying a defective fryer and oven system that was alleged to have caused a fire in Alberta. It was argued that all of these actions occurred in Ontario. Following the Ontario Court of Appeal decision described above, the court refused to find that Ontario law applied to the tort claim, instead holding that the law of Alberta applied to the tort claims as that is the place where all of the damage occurred.

> *Lilydale Cooperative Ltd. v. Meyn Canada Inc.*, 2013 ONSC 5313 at paras. 9-23.

130. By analogy, even if Tahoe owed a duty and the alleged breaches of duty by Tahoe were proven to have occurred in Nevada or in some small part in British Columbia by virtue of participation of three British Columbia directors, there is no actionable wrong until the Guatemalan Plaintiffs suffered injury in Guatemala. The *lex loci delicti* of the tort of negligence is thus Guatemala and it is the substantive law of Guatemala that applies to the negligence claim.

iii. Guatemalan Law Should Be Determined by Guatemalan Courts

131. It will be both costly and difficult to have Guatemalan law proved as a fact by having experts appear before the courts in British Columbia. While it is sometimes noted that British Columbian Courts are adept at applying the laws of other jurisdictions based upon expert evidence, these cases usually arise where the law of another Canadian jurisdiction is at issue. Here, the court will be asked to apply a civil code written in Spanish, and interpret documents, business arrangements and contracts that may be subject to Guatemalan law or standards or customs. Even the few affidavits and evidence already advanced demonstrate that much of the evidence will be in Spanish and will need to be interpreted or translated before being applied by the court. In addition, virtually none of those documents, business arrangements or contracts

will have anything to do with Tahoe, but will be MSR documents and Guatemalan contracts to which MSR is a party.

Aff. #1 of F. Bosque at Exh C, p. 8.

Aff. #1 of M. Melgar at para. 4, Exh C.

Aff. #1 of R. Barany at Exh A-H.

132. The substantive law to be applied is of importance in this matter because of the novel claims advanced by the Guatemalan Plaintiffs. It is the courts of Guatemala that should determine whether, under Guatemalan law, a foreign entity with subsidiary operations on its soil, is liable either directly in battery and/or negligence for actions taken by contractors retained a foreign subsidiary. Under Guatemalan law, a plaintiff needs to establish that he has suffered damage or injury and a defendant's liability will be presumed.

Aff. #1 of D. Gray at para. 22.

Aff. #1 of F. Chavez, Exh. C, pg. 9.

(c) The Guatemalan Plaintiffs Are or Could Be Seeking Compensation in Guatemala

133. The Guatemalan Plaintiffs could have filed a civil suit in Guatemala. For the time being, they have been admitted as civil claimants in a criminal case. The evidence establishes that Guatemalan Plaintiffs are claimants in an existing proceeding in Guatemala where they are entitled to claim compensation. While there is no common defendant in the proceedings, the proceedings arise from the same events and the British Columbia courts will have to make factual findings about the same events in order to adjudicate Tahoe's liability. There is accordingly the risk that the courts of Guatemala may reach different factual conclusions than the courts of British Columbia. Where possible, the courts should use their discretion to decline jurisdiction to avoid a situation where the same cause of action or *set of facts* gives rise to related legal proceedings and (potentially) conflicting judgments.

Aff. #1 of F. Bosque at Exh C, pgs. 13, 19.

Aff. #1 of J. Paz at paras. 3-7.

Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated, 2014 BCSC 752 at para. 54 [emphasis added].

134. The Guatemalan Plaintiffs who are participating in the criminal proceedings in Guatemala could obtain civil damages against other parties in that proceeding, if they requested

other parties to be summoned as alleged civilly liable persons for the acts of Rotondo. The Guatemalan Plaintiffs have not explained their failure to join MSR for example in those proceedings, other than vague assertions that they believe the criminal proceedings will not result in all parties who were responsible for the events of April 27, 2013 being held accountable. If their concern arises from the fact that Tahoe might not be capable of being held vicariously responsible for the acts of Rotondo under Guatemalan law, the same concern arises under British Columbia law.

Aff. #1 of F. Bosque at Exh C, pgs. 20-21.
Aff. #1 of L. Monroy at para. 3.
Aff. #2 of F. Bosque at Exh B, pg. 14.

135. The Guatemalan Plaintiffs should not be permitted to seek damages in Guatemala against Rotondo and then subsequently "switch horses" by pursuing Tahoe in British Columbia, as this tactic undermines the objective of avoiding a multiplicity of proceedings and potentially conflicting decisions.

80 University Residential Limited Partnership v. Yours Asia Corporation, 2015 BCSC 289 at para. 35.

(d) No Loss of Juridical Advantage

136. While a loss of juridical advantage may be considered as one factor on this application, Canadian courts should avoid focusing on juridical advantage as this may put too strong an emphasis on issues that may reflect only differences in legal tradition which are deserving of respect, or courts may be drawn too instinctively to view disadvantage as a sign of inferiority and favour their home jurisdiction.

Breeden v. Black, 2012 SCC 19, [2012] 1 SCR 666

137. In any event, the Guatemalan Plaintiffs would not suffer any loss of juridical advantage, either substantively or procedurally. As a matter of substance, if this case were to be tried in British Columbia, Guatemalan law would likely apply. Therefore, there can be no loss of juridical advantage from a different substantive law. As the Supreme Court of Canada has

warned, a court should not assume that the proper law naturally flows from the assumption of jurisdiction.

Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 SCR 572 at para. 109.

138. The Guatemalan courts would take jurisdiction over the claims because Guatemala is where the alleged damages occurred. While the Guatemalan courts may not accept a *transfer* of a case, a new lawsuit can be filed in Guatemala if it is determined that the British Columbia courts will decline jurisdiction on the basis of *forum non conveniens.* Similar causes of action to the ones pleaded in this case are available under Guatemalan law and there is the possibility of a company being found vicariously liable (although as in British Columbia, there may be an issue in Guatemala as to piercing the corporate veil). The Guatemalan Plaintiffs would be free to claim damages for suffering, lost income, lost profit and medical expenses.

Aff. #1 of F. Bosque at Exh C, pgs. 22-24.

Aff. #2 of F. Bosque at Exh B, pg. 13.

Aff. #1 of F. Bosque at Exh C, pgs. 8-13.
Aff. #1 of F. Bosque at Exh C, pgs. 17-18.

139. To the extent that the Guatemalan Plaintiffs may suggest that there may be a statue of limitation problem in Guatemala, this disregards that limitations law is substantive in nature. Any expiry of a limitation period under Guatemalan law will equally be a barrier to proceeding in British Columbia because, as detailed above, it is the substantive law of Guatemala that is to be applied to the torts alleged here. Notwithstanding this, it is not clear that the Guatemalan Plaintiffs are barred by a limitation period. A statute of limitations must be raised as a defence and it may be waived.

Castillo v. Castillo, 2005 SCC 83, [2005] 3 SCR 870 at para. 7.

Ngo v. Luong, 2014 BCSC 516.

Aff. #1 of F. Bosque at Exh C, pg. 18.

140. Despite the fact that the Guatemalan Plaintiffs' complain about the Guatemalan judicial system, they ironically rely in this proceeding on evidence that they have obtained through the proceedings in Guatemala, and CALAS indicates that the Plaintiffs have a right to obtain copies of all of the evidence in that case. The hearing transcripts from the Guatemalan

proceedings available to this Court show that the Guatemalan Plaintiffs have legal representation and are actively participating and making submissions in the ongoing criminal proceedings. Further, their participation in the Guatemalan criminal proceedings is free and the Guatemalan Plaintiffs are represented by competent counsel with experience litigating against MSR in that jurisdiction.

Aff. #1 of J. Queseda, Exh. B; translation contained at Aff. #1 of M. Campos, Exh. B,

Aff. #1 of J. Chumil at paras. 3-5, 7, 9.

Aff. #1 of L. Monroy at para. 3.

Aff. #1 of J. Paz, paras. 3, 5.

141. Guatemalan courts follow the civil law procedural tradition. This is true of most countries around the world. There is no reason to find that these differences mean that Guatemala cannot fairly hear and determine this proceeding. As the Ontario Superior Court held in *Kornhaber v. Starwood Hotels*, it is not enough to show that a country is not a western democratic country to conclude that a plaintiff cannot obtain justice.

Aff. #1 of F. Bosque, Exh C, pgs. 8-17, 25-27.

Aff. #2 of J. Paz at paras. 4-6, 11-12.

Kornhaber v. Starwood Hotels, 2014 ONSC 6182 at para. 17.

(e) Enforcement of a Guatemalan Judgment Is Possible

142. The Guatemalan Plaintiffs seek a monetary judgment against Tahoe. There is no reason to believe that if the courts of Guatemala determine the Guatemalan Plaintiffs' claims, there will be any difficulty in enforcing any such judgment in British Columbia. After establishing that Guatemala has properly taken jurisdiction (which should pose no problem given the facts pleaded), the courts of British Columbia would recognize and enforce judgment of a Guatemalan court unless Tahoe can establish that a defence (based on fraud, natural justice, or public policy) bars its enforcement.

Beals v. Saldanha, 2003 SCC 72, [2003] 3 SCR 416 at para. 79.

Aff. #1 of F. Bosque at Exh C, pgs. 22-25.

(e) Frailties of Guatemalan Plaintiffs' Claim

143. This Court should not ignore the forum shopping evident in naming Tahoe as defendant, which is the parent company of a foreign company (Tahoe USA) whose Guatemalan subsidiary (MSR) retained contract security personnel, who are alleged to have committed the acts that resulted in alleged injury on April 27, 2013 in Guatemala. The Guatemalan Plaintiffs have pursued a similar path to the one that the Ontario Court of Appeal described in *Piedra v. Copper Mesa Mining Corporation* as underscoring the weakness of the connection between the harms alleged and the named defendant.

144. While it would not be a determinative factor, Tahoe submits that this Court also should not ignore the frailties in the claims advanced by the Guatemalan Plaintiffs in British Columbia against Tahoe. To succeed against Tahoe, whose registered office is the only connection to British Columbia under section 3 of the *CJPTA*, the Guatemalan Plaintiffs must successfully pierce the corporate veil and/or establish a new range of foreseeability in tort law. The Ontario Court of Appeal's decision in *Piedra v. Copper Mesa Mining Corporation* demonstrates the difficulties that the Guatemalan Plaintiffs will have in establishing that Tahoe had either the necessary foreseeability or proximity to the Guatemalan Plaintiffs to owe a duty of care in negligence. A claim in battery against Tahoe is even more precarious.

145. The Guatemalan Plaintiffs' theory of their case is likely derived from the Ontario Superior Court of Justice decision in *Choc v. Hudbay Minerals*. The pleadings in that case are not identical to the present one and that decision has not yet been followed outside of Ontario. Given the stringent test on a motion to strike a claim, the Ontario Court accepted for the sake of argument the agency theory pleaded in that case and was willing to entertain the possibility of the existence of a "novel duty of care". The fact that this Court will be faced with having to decide such novel issues of law demonstrates that there is no loss of juridical advantage to the Plaintiffs of proceeding in Guatemala.

Piedra v. Copper Mesa Mining Corporation, 2010 ONSC 2421 at para. 53, aff'd 2011 ONCA 191.

Choc v. Hudbay Minerals Inc., 2013 ONSC 1414.

(f) The Fair and Efficient Working of the Canadian Legal System as a Whole

146. While the final factor enumerated in section 11 of the *CJPTA* is often applied to comparisons between provinces within Canada, it is also described as the factor that engages the "public interest component". This factor looks beyond considering the purely private interests of the parties to the litigation and recognizes that the public has an interest in seeing that the justice system work as efficiently as possible throughout the country.

Right Business Limited v. Affluent Public Limited, 2011 BCSC 783 at para. 89, aff'd 2012 BCCA 375.

Fujitsu Consulting (Canada) Inc. v. Themis Program Management & Consulting Limited, 2007 BCSC 1376 at paras. 16, 30.

147. The modern conflicts system rests on the principle of comity and its goal is to facilitate exchanges and communications among people in different jurisdictions subject to various legal systems. In the *forum non conveniens* analysis, comity and an attitude of respect for the courts and legal systems of other countries is appropriate. Courts must refrain from leaning too instinctively in favour of their own jurisdiction.

Club Resorts Ltd. v. Van Breda, 2012 SCC 17, [2012] 1 SCR 572 at paras. 74, 112.

148. The Guatemalan Plaintiffs urge this Court to disregard the principle of comity and find that the courts of Guatemala are insufficient and incapable of fairly determining this dispute. While it does not appear that Canadian courts have grappled with the transfer of jurisdiction to Guatemala, this question has arisen in the United States and those courts have consistently found that the legal system of Guatemala is entitled to deference and respect.

149. In *Aldana v Del Monte Fresh Produce N.A., Inc.*, the United States Court of Appeals for the Eleventh Circuit upheld a finding that Guatemala was an adequate alternative forum. In doing so, the appellate court held that it was not persuaded by arguments that Guatemala was not an adequate forum because it was unsafe for the plaintiffs (banana plantation workers) and because Guatemalan courts were beset by corruption and were ill-equipped to adjudicate a case that implicated political conditions and officials. The appellate court confirmed

that despite substantial evidence from the plaintiffs, the lower court did not err in finding that the Guatemalan courts were adequate.

Aldana v Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283 (2009).

150. This case recently came again before the United States Court of Appeals for the Eleventh Circuit to determine whether the Guatemalan forum that it had been returned to after the earlier *forum non conveniens* determination was unavailable such that the United States court should reassume jurisdiction. The appellate court upheld a lower court's refusal to reopen the case because the plaintiffs had failed to take all available steps in Guatemala to have their case tried.

Aldana v Del Monte Fresh Produce N.A., Inc., 741 F. 3d 1349 (2014).

151. In another example, in *Palacios, et al. v. The Coca-Cola Company, et al.*, the United States District Court (Southern District of New York) addressed a *forum non conveniens* argument in the context of claims advanced in New York by Guatemalan nationals employed by a Coca-Cola manufacturer in Guatemala. The Guatemalan plaintiffs in that case argued that Guatemala lacked an independent and functioning legal system as it was characterized by "backlog, ineffective discovery, and systemic corruption". The New York court rejected these arguments, holding that while Guatemalan discovery was limited in comparison to the American system, that did not render the alternative forum inadequate. The court further noted that every American court to have considered the issue has found the Guatemalan courts to be an adequate alternative and that recent events cited by the plaintiffs did not alter this opinion despite the provocative headlines. The New York court concluded that to pretend that anything less than the full plethora of United States constitutional rights renders an alternative forum inadequate would disqualify most civil law systems and gut the doctrine of *forum non conveniens*.

Palacios, et al. v. The Coca-Cola Company, et al., No. 10 Civ. 3120 (S.D.N.Y. 19 Nov. 2010).

See also:
Acapolon Corp v Ralston Purina Co, 827 SW 2d 189 (1992);

Polanco v Hb Fuller Co, 941 F. Supp. 1512 (1996);

Lisa S.A. v Juan Jose Gutierrez Moyorga et al, Chancery Court of Delaware (2009); 240 Fed. App'x 822, 824 (11th Cir. 2007); and

Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1361 (S.D. Tex. 1995).

152. Tahoe has advanced expert and other evidence confirming that Guatemala has a functioning justice system and has provided specific evidence regarding MSR's experience in the Guatemalan judicial system. By contrast, the Guatemalan Plaintiffs ask this Court to find that Guatemalan courts are unjust on the basis of hyperbole and non-specific examples of, amongst other things, "Kafkaesque" procedures. Tahoe submits that the public interest requires that Canadian courts proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its own citizens. To hold otherwise is to ignore the principle of comity and risk that other jurisdictions will treat the Canadian judicial system with similar disregard.

Affs. #1 and 2 of F. Bosque.

Aff. #1 of D. Gray at paras. 41-43.

Aff. #1 of C. Zardetto at Exh C.

153. To the extent that the Guatemalan Plaintiffs argue that this case is about the larger question of whether Canadian companies should be liable under Canadian law for activities abroad, the Ontario Superior Court of Justice in *Piedra* rightly said that policy considerations that would extend liability are appropriately a matter for the legislatures and not the courts.

Piedra v. Copper Mesa Mining Corporation, 2010 ONSC 2421 at para. 53, aff'd 2011 ONCA 191.

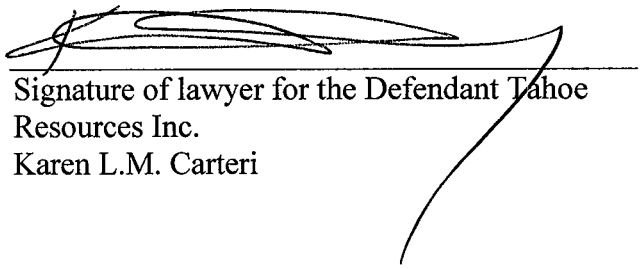
154. It is submitted that if this Court does not decline jurisdiction in this case, where the connection to British Columbia is extremely tenuous and where the connection to Guatemala is clear and strong, that would open the floodgates to innumerable claims that will be brought in Canadian courts merely because an indirect parent company of a relevant foreign corporation sought financing on Canadian capital markets.

E. RELIEF SOUGHT

155. Tahoe seeks an order staying this proceeding on the basis that this Court declines to exercise its jurisdiction over Tahoe in respect of the claims made by the Guatemalan Plaintiffs in this proceeding. Tahoe further seeks costs of the application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: March 13, 2015



Signature of lawyer for the Defendant Tahoe Resources Inc.
Karen L.M. Carteri