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

REPLY SUBMISSIONS OF THE DEFENDANT TAHOE RESOURCES INC.

A. Introduction

1. The Plaintiffs' Submissions consist almost entirely of an attack on the Guatemalan justice system. In taking that approach, the Plaintiffs are implicitly admitting that Guatemala would otherwise be the more appropriate forum for adjudication of their claims. Where the ordinary factors point to a clearly more appropriate forum, the plaintiff must "take the forum as he finds it" unless he demonstrates that "substantial justice cannot be done" in that forum. This is a stringent test that has only been met in exceptional cases where there is concrete and specific evidence applicable to the particular facts at issue. The Plaintiffs' general accusations of corruption in the context of criminal prosecutions against state officials or organized crime syndicates come nowhere near meeting this test.

2. Guatemala became part of a peaceful democratic society only two decades ago. While its justice system may be imperfect, it functions in a meaningful way. It provides laws and procedures through which parties can, and do, pursue rights and remedies such as the ones raised by the Plaintiffs in their Notice of Civil Claim. Further, Guatemalan citizens who have lesser means to pursue their claims are supported by organizations like CALAS, which provide

free legal assistance to claimants. The Plaintiffs in this case have the benefit of such representation and are taking full advantage of it. It would be a real threat to the principle of comity, where the facts overwhelmingly point to Guatemala as the natural forum for this dispute, to refuse to refer this case to Guatemala on the basis of anecdotes of corruption in completely different circumstances.

3. Moreover, much of the Plaintiffs' attack on the Guatemalan justice system is based on the standard procedures and substantive laws of judicial systems based on the civil law tradition. This parochial approach is precisely what the Supreme Court of Canada has repeatedly cautioned courts to avoid.

4. Finally, the Plaintiffs' assertion that the case is "centred" on Canada is based on a game of smoke and mirrors. The Plaintiffs' laundry list of factors that purportedly connect the case to Canada have nothing to do with the specific breaches pleaded in the Notice of Civil Claim.

B. Guatemalan Courts Can Provide Judicial Scrutiny if this Court Declines Jurisdiction

5. At paragraphs 4 and 51 of their Submissions, the Plaintiffs argue that Tahoe will avoid all judicial scrutiny if this Court declines jurisdiction and that Guatemala is "not a fairer and more efficient forum".

6. The Plaintiffs distort the words of the Supreme Court of Canada in *Van Breda* to frame the main focus of the *forum non conveniens* analysis on whether Guatemala's legal system is fairer and more efficient than Canada's. The *forum non conveniens* analysis should not be manipulated in this way as it asks the Court to focus its analysis on evaluation of the foreign legal system as a whole, a factor which is not mentioned in either *Van Breda* or the *CJPTA*. Where the ordinary factors point to Guatemala as the more appropriate forum, the remaining question is not whether Guatemala's legal system is fairer and more efficient than Canada's. Instead, it is simply whether the foreign legal system is capable of providing justice.

Club Resorts Ltd. v. Van Breda, 2012 SCC 17 (JBA, Vol. I, Tab 16).

7. As highlighted in the English authorities cited by the Plaintiffs in their Submissions, where the *forum non conveniens* analysis points to a more appropriate forum, then the plaintiff must "take the forum as he finds it" unless he can prove that "substantial justice cannot be done" in that jurisdiction. Consequently, the burden of proof rests on the Plaintiffs to demonstrate that there would be no trial at all in Guatemala.

Connelly v. RTZ Corporation 157. Plc, [1997] UKHL 30 at page 13 (JBA, Vol. I, Tab 18).

8. In the cases referred to by the Plaintiffs, the plaintiffs met the stringent burden on them to establish that they would suffer a complete denial of justice in the foreign forum. Thus, in *89457 Alberta Inc. v. Katanga Mining Ltd.,* the English Court relied on the fact that there was "no functioning judicial system" and an "absence of a developed infrastructure within which the rule of law [could] be confidently and consistently upheld" in the Democratic Republic of Congo. By contrast, there is a functioning judicial system in Guatemala. Even if the judicial system is imperfect, its infrastructure is well funded and well developed. Its procedures and substantive laws are built on the civil law model that prevails throughout the world.

89457 Alberta Inc. v. Katanga Mining Ltd., [2008] E.W.H.C. 2679 (Comm.) (JBA, Vol. II, Tab 2).

9. In *AK Investment CJSC (Appellant) v Kyrgyz Mobil Tel* the Judicial Committee of the Privy Council considered a lengthy history of related proceedings between the parties in the courts of the Kyrgyz Republic. After a careful review of those decisions, it found that there was "substantial evidence of *specific* irregularities, breach of principles of natural justice, and irrational conclusions" which created more than a real risk that the plaintiffs would not obtain justice in Kyrgyzstan. Thus, the Privy Council concluded that if there was no trial outside of Kyrgyzstan, there would be no trial of the issues anywhere. By contrast, there is no evidence of any specific irregularities in the ongoing proceedings in Guatemala or that there would be no trial in Guatemala. On the contrary, the Plaintiffs have been successful in being accepted as civil complainants seeking compensation for the injuries at issue in this case.

AK Investment CJSC (Appellant) v Kyrgyz Mobil Tel, [2011] UKPC 7 at paras. 143 and 151 (JBA, Vol. I, Tab 4) [emphasis added].

10. In *Connelly v. RTZ Corporation Plc,* the House of Lords found that there could never be a trial of the issues in Namibia based on the unique circumstance that the plaintiff could not proceed to the trial without the financial assistance available in England. The Guatemalan Plaintiffs, however, have free legal representation in Guatemala through CALAS, an organization that is specifically set up to assist parties in Guatemala with human rights claims.

Connelly v. RTZ Corporation 157. Plc, [1997] UKHL 30, at para. 31 (JBA, Vol. I, Tab 18).

11. The two Canadian cases cited by the Plaintiffs, *Norex Petroleum Limited v. Chubb Insurance Company of Canada* and *Sistem Mühendislik v. Kyrgyz Republic* are also distinguishable because they involved concrete and specific evidence of whether the foreign courts could provide justice in the particular circumstances of each case.

12. In *Norex Petroleum Limited,* the Alberta Court examined the Russian Arbitrazh courts which hear commercial disputes involving oligarchs like the defendant in that case. It found that corruption was endemic in those specific circumstances. The Alberta Court did not look at the general human rights record of Russia, the impunity of government officials accused of political crimes, or the risk of political influence in cases involving the state or the difficulties in prosecuting organized crime.

Norex Petroleum Limited v. Chubb Insurance Company of Canada, 2008 ABQB 442 (JBA, Vol. II, Tab 44).

13. *Sistem Mühendislik* can be distinguished from the present case as it did not involve litigation between private parties but rather between a company and the Kyrgyz Republic itself. In its *obiter* comments, the Ontario Superior Court of Justice considered the specific circumstances of that case where the Kyrgyz Republic would be the defendant in its own courts.

Sistem Mühendislik v. Kyrgyz Republic, 2012 ONSC 4351, at paras. 61-71 (JBA, Vol. III, Tab 58).

14. Canadian courts have been very reluctant to condemn the legal systems of foreign countries as a whole. For example, they have declined jurisdiction in favour of Anguilla, Guyana, and China despite allegations of corruption or denial of justice in those countries, given that the other factors clearly pointed to those fora.

Edwards v. Bell, 2003 BCSC 1602 (Reply Book of Authorities ("RBA"), Tab 2); *Recherches Internationales Québec v. Cambior Inc.,* [1998] Q.J. No. 2554 (RBA, Tab 8); *Kornhaber v. Starwood Hotels and Restaurants Worldwide, Inc.,* 2014 ONSC 6182 (JBA, Vol. II, Tab 31).

15. Canadian courts have also repeatedly declined jurisdiction in favour of courts in the developing world or civil law jurisdictions. Thus, jurisdictions such as Grenada, Mexico, Nicaragua, Romania, Jamaica and Trinidad & Tobago have been found to be appropriate forums.

Lemmex v. Bernard, [2002] OJ No 2131 (CA) (RBA, Tab 4).

Genco Resources Ltd. v. MacInnis, 2010 BCSC 1342 (JBA, Vol. II, Tab 25).

Follwell v. Holmes, [2006] OJ No 4387 (SC) (RBA, Tab 3).

Prichici v. Prichici, [2005] OJ No 1979 (SC) (RBA, Tab 7).

Wilson v. RIU, 2012 ONSC 6840 (RBA, Tab 10).

Persaud v. Trinidad & Tobago National Petroleum Marketing Co., [1997] OJ No 161 (Gen Div) (RBA, Tab 6).

Nicholas v. Nicholas, [1995] OJ No 28 (SC) at paras. 26-30, aff'd [1996] OJ No 3543 (CA) (RBA, Tab 5).

16. The Ontario Court of Appeal has recognized Iran as an appropriate jurisdiction in which to try claims against a state-owned company. It declined to exercise its discretion to refuse enforcement of a forum selection clause despite extensive evidence of human rights abuses and concerns about the impartiality judicial system as a whole.

Crown Resources Corporation v. National Iranian Oil Company, 2006 CarswellOnt 5053 at para. 26.

17. Accordingly, Canadian law places a heavy burden on the Plaintiffs to demonstrate that they cannot obtain justice in Guatemala.

C. The US Cases Cited by Tahoe Ought to Be Considered by this Court

18. In its Original Submissions, Tahoe demonstrated that US Courts have repeatedly concluded that Guatemala is an appropriate forum despite accusations similar to those made by the Plaintiffs in this case. The Plaintiffs now contend at paragraphs 160 to 163 of their Submissions that these cases are distinguishable because US courts consider the burden placed on the judicial system as part of the *forum non conveniens* analysis.

19. The US courts consider various "public interest factors" as part of the *forum non conveniens* analysis. Those factors are very similar to the factors that apply in British Columbia under section 11 of the *CJPTA,* in particular, section 11(f): "the fair and efficient working of the Canadian legal system as a whole."

20. To the extent that US law on *forum non conveniens* may contain some element of concern for judicial economy beyond what Canadian courts have traditionally considered, that element was not determinative in the *Aldana* or the *Palacios* cases. In particular, the US Court in the *Aldana* case determined that "private interest" factors were decisive and that it was unnecessary to put any weight on "public interest" factors.

Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283 (2009) at pgs. 11-18 (JBA, Vol. I, Tab 5).

21. In paragraph 164 of their Submissions, the Plaintiffs further attack the usefulness of the US decisions where they say "[m]oreover, *Aldana* and *Palacios* both demonstrate that when the plaintiffs were forced to re-file in Guatemala, their cases were dismissed." This is an inaccurate description of what occurred. As Mr. Chavez demonstrated in his initial report: "...it has been an unfortunate practice for plaintiffs filing their case in Guatemalan courts after a *Forum Non Conveniens* ruling for a foreign court, to state their claim in a deliberately weak

manner so as to induce its rejection, and afterwards failing to take any steps to object or appeal to obtain any remedy against the order all with the purpose of restating their case in the foreign court".

Aff. #1 of F. Chavez, Exh. C, pg. 25 (AR, Vol. III, Tab 6).

22. The Court in *Aldana* scolded the plaintiffs for not trying hard enough to have their case heard in Guatemala. It referred to the plaintiffs' actions as "gamesmanship". Similarly, in the *Palacios* case, the US Court found that the Plaintiffs had voluntarily refused to avail themselves of their remedies in Guatemala.

Aldana v Del Monte Fresh Produce NA., Inc., 741 F. 3d 1349 (2014) at pgs. 5-9 (JBA, Vol. I, Tab 6).

Palacios, et al. v. The Coca-Cola Company et al., No. 10 Civ. 3120 (S.D.N.Y. 19 Nov. 2010) at pgs. 7-8 (JBA, Vol. II, Tab 45).

23. Contrary to paragraph 162 of the Plaintiffs' Submissions, the November 18, 2010 decision of the US District Court of the Southern District of New York in *Palacios* substantively addressed the allegations of the plaintiffs in that case and their evidence of corruption in the Guatemalan justice system. In doing so, the Court granted the defendant's motion to dismiss the matter for *forum non conveniens* as follows:

> … Plaintiffs allege that Guatemala is not an adequate forum because it lacks "an independent and functioning legal system." (Compl. ¶ 3.) Plaintiffs characterize the Guatemalan judiciary as plagued by backlog, ineffective discovery rules, and systemic corruption. (Pls.' Opp'n 16-21.) To attend trial in Guatemala, they argue, would expose Plaintiffs to "further physical and psychological harm" (id. at 17) due to ongoing labor violence in the country (id. at 19-20). To proceed in absentia, however, would "allow damaging statements to be incorporated as admissions" against them. (Id. at 18.) Thus, Plaintiffs assert that "[a] realistic view of the Guatemalan judicial system in practice demonstrates that it is not yet robust, transparent, or procedurally effective enough to handle this case." (Id. at 16.).
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> As a threshold matter, "considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards." PT United, 138 F.3d at 73; accord Monegasque, 311 F.3d at 499 ("We have been reluctant to find foreign courts 'corrupt' or 'biased.'"); Blanco, 997 F.2d at 982

("[I]t is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." (internal citation and quotation marks omitted)). American courts "should be wary of branding other nations' judicial forums as deficient" in substance or procedure, as "[s]uch denunciations not only run counter to principles of international comity . . . , but also risk imposing on our judicial system the burden of serving as courtroom to the world for the adjudication of essentially foreign disputes." Corporacion Tim, S.A. v. Schumacher, 418 F. Supp. 2d 529, 532-33 (S.D.N.Y. 2006).

In this case, Plaintiffs have made no "showing of inadequate procedural safeguards" sufficient to trigger an adverse judgment. PT United, 138 F.3d at 73. Although Guatemalan discovery is certainly limited in comparison to the American system, "it is well-established that 'the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate.'" In re Alcon S'holder Litig., 2010 WL 2076991, at *7 (quoting Blanco, 997 F.2d at 982). Indeed, "[w]ere a forum considered inadequate merely because it did not provide for federal style discovery, few foreign forums could be considered 'adequate' – and that is not the law." BlackRock, Inc. v. Schroders PLC, No 07 Civ. 3783 (PKL), 2007 WL 1573933, at *7 (S.D.N.Y. May 30, 2007) (citation omitted).

In addition, every American court to have considered the issue has found Guatemalan courts to be adequate alternatives. See, e.g., Aldana, 578 F.3d at 1291 (upholding state court finding that Guatemala was an adequate forum on collateral estoppel grounds); Lisa, S.A. v. Gutierrez Mayorga, 240 Fed. App'x 822, 824 (11th Cir. 2007) (per curiam) (upholding district court's determination that Guatemala was an adequate forum and noting that "every court to address the issue has reached the same conclusion"); Polanco v. H.B. Fuller Co., 941 F. Supp. 1512, 1527 (D. Minn. 1996) ("Guatemala provides an adequate remedy for plaintiff's claims."); Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1361 (S.D. Tex. 1995) ("[P]laintiffs will not be treated unfairly or deprived of all remedies in the courts of Guatemala.").

....To establish the inadequacy of a proposed alternative forum, "something more than bald assertion is required." Id. at 544.

Plaintiffs supply the "something more" in the form of various news articles on corruption and violent crime.... Despite the provocative headlines, however, these incidents differ in kind from the systemic judicial breakdowns that have prompted other courts to question forum adequacy.[..]. For that reason, the Court declines to brand the judicial system of Guatemala procedurally deficient or politically corrupt.

...To pretend that anything less than the full plethora of United States constitutional rights renders an alternate forum inadequate would disqualify most civil law systems and gut the doctrine of FNC. Such an expansive view of the common law tradition cannot govern the law of forum adequacy.

Palacios, et al. v. The Coca-Cola Company et al., No. 10 Civ. 3120 (S.D.N.Y. 19 Nov. 2010) at pgs. 10-12 (JBA, Vol. II, Tab 45).

24. Similarly, in the *Polanco* decision, the court relied on the *Delgado* decision and specifically mentioned the expert evidence provided in that case as follows:

> Plaintiff recites a litany of undesirable features of the Guatemalan legal system: the civil law tradition does not rely on reported cases as precedent; product liability under the negligence statute does not have a well-developed jurisprudence; Guatemalan courts are clogged with cases because they are inefficient and corrupt. The Court declines plaintiff's invitation to categorically denigrate legal systems which do not rely on written precedents as American courts do. Moreover, even in America, theories of "strict" products liability have only reached maturity in the past thirty to forty years; Guatemala's relative infancy in this regard does not make it an inadequate forum. Further, plaintiff estimates that the case will take years for Guatemalan courts to resolve yet court congestion is a fact of life even in this country. Finally, there is no evidence that Fuller–U.S. or its subsidiary would use their considerable resources in an attempt to "buy" the Guatemalan courts.
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> This Court entertains no illusions that justice in Guatemala is the same as justice in America, but it recognizes that "sometimes different laws are neither better or worse in an objective way, just different." Jepson v. General Casualty Co. of Wisconsin, 513 N.W.2d 467, 473 (Minn.1994) (describing choice of law analysis). The Court concludes that Guatemala provides an adequate remedy for plaintiff's claims. Adequacy alone, however, does not determine the propriety of dismissal. The public and private interest factors must be considered.

Polanco v. Hb Fuller Co, 941 F. Supp. 1512 at pgs. 19-20 (JBA, Vol. II, Tab 48).

25. In *Lisa S.A. v. Juan Jose Gutierrez Moyorga et al*, the Chancery Court of Delaware heard evidence of alleged corruption from a law professor. However, the Court rejected a general claim of corruption. Instead, the Court emphasized the fact that the plaintiff had filed lawsuits in Guatemala related to the incident and was represented by one of Guatemala's most prestigious law firms, demonstrating that it had confidence in the judicial system.

Lisa S.A. v. Juan Jose Gutierrez Moyorga et al, Chancery Court of Delaware (2009); 240 Fed.

App'x 822, 824 (11th Cir. 2007) (JBA, Vol. II, Tab 36).

D. The Forum Non Conveniens Analysis is Not Affected by Any Governance Gap

26. In paragraphs 4-5 and paragraphs 205-208 of the Plaintiffs' Submissions, they refer to three citations from two eminent Canadian jurists and other editorial material, each providing personal opinion about the role of Canadian courts in addressing an alleged "governance gap".

27. In reply to those submissions, Tahoe says there is no governance gap in this case. A Guatemalan judge can hear this case and Tahoe is not seeking to avoid a trial.

28. Furthermore, the Ontario Superior Court (affirmed by the Court of Appeal) expressly held in *Copper Mesa* that policy considerations in favour of extending the liability of Canadian companies conducting business abroad should be addressed by the legislatures and not the courts. In making that statement, the Court in *Copper Mesa* specifically referred to the various materials filed by the plaintiffs in that case containing a "number of statements of human rights principles, including remarks of an eminent Canadian jurist", before concluding that "[s]uch personal comments are not sufficient to found a policy duty…"

Piedra v. Copper Mesa Mining Corp., 2010 ONSC 2421, at paras. 52-53, aff'd 2011 ONCA 191 (JBA, Vol. II, Tab 47).

29. The Plaintiffs' related Submissions at paragraphs 209 to 214, that the forum of necessity doctrine informs the *forum non conveniens* analysis, are also incorrect. The authorities cited by the Plaintiffs in support of their submissions on this issue reach the opposite conclusion.

30. The Ontario Court of Appeal in *Van Breda* emphasized that "[t]he forum of necessity doctrine does not redefine the real and substantial connection to embrace 'forum of last resort' cases; it operates as an exception to the real and substantial connection test". Thus, any overriding concerns for access to justice "should be accommodated by explicit recognition of the forum of necessity exception rather than by distorting the real and substantial connection test". Further, the Court of Appeal in *Van Breda* held that "unfairness to the plaintiff in not assuming

jurisdiction does not amount to an independent factor capable of trumping the want of a real and substantial connection between the forum and the plaintiff's claim and/or the defendant".

Van Breda v. Village Resorts Limited, 2010 ONCA 84 at paras. 99-100 (JBA, Vol. III, Tab 65).

31. Based on the foregoing, the consideration of whether foreign plaintiffs should be provided with special access to the Canadian justice system, as described the Plaintiffs in their Submissions, is not an informing principle of the *forum non conveniens* analysis. Rather, the Court should only consider access to justice and forum of necessity considerations under section 6 of the *CJPTA* when that section is properly invoked.

32. Section 6 does not apply in this case. The Plaintiffs have failed to meet the requirements of the forum of necessity exception set out under section 6 of the *CJPTA* that:

> (a) there is no court outside British Columbia in which the plaintiff can commence the proceeding, or
>
> (b) the commencement of the proceeding in a court outside British Columbia cannot reasonably be required.

33. As explained in Tahoe's Original Submissions, the evidence establishes that the Plaintiffs are currently claimants in an existing proceeding in Guatemala where they are entitled to claim compensation. Moreover, 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. There is no issue of access to justice.

34. As a result, the Plaintiffs have not met the requirements under section 6 of the *CJPTA* and have failed to reach the "high bar" required for the court to assume jurisdiction under the forum of necessity doctrine.

West Van Inc. v. Daisley, 2014 ONCA 232 at para. 22 (JBA, Vol. III, Tab 67).

35. In fact, the British Columbia courts have assumed jurisdiction based on the doctrine of necessity on only one occasion: in the Loo J. decision in *Josephson (Litigation*

Guardian of) v. Balfour Recreation Commission. That case involved a unique set of facts and can clearly be distinguished from the present case. In *Josephson,* the plaintiff was injured in British Columbia while riding in a golf cart driven by the defendant in British Columbia. The British Columbia Supreme Court used the doctrine of necessity exception to assume jurisdiction over a third party claim for contribution and indemnity brought by the defendant against an Idaho hospital, which subsequently treated the plaintiff. Notably, the court found that the doctrine of necessity exception applied because defendant was otherwise unable to bring his claim under Idaho law, the defendant was sued in British Columbia and did not choose that forum, and practically speaking, it was best for the British Columbia courts to hear both claims together.

Josephson (Litigation Guardian of) v. Balfour Recreation Commission, 2010 BCSC 603 (JBA, Vol. II, Tab 28).

36. In this case, the Plaintiffs are not only able to bring their claims in Guatemala, they have already done so in a very active way. The Guatemalan courts present a ready option for the Plaintiffs and there is not already an ongoing action in British Columbia which is closely connected to this matter.

E. The Plaintiffs will be able to Obtain Evidence for a Claim in Guatemala

37. The Plaintiffs allege that they will have issues obtaining evidence to pursue their claims in Guatemala (see for example paragraphs 51 and 166). This allegation is directly contradicted by their assertions that they have the key evidence (video and wiretap) necessary to pursue their claims in British Columbia (see for example paragraphs 89 and 131 of their Submissions).

38. At paragraphs 131 and 178 of their Submissions, the Plaintiffs further allege that the wiretap and video evidence "reduces the need" for any other evidence in relation to the events of April 27, 2013. Paragraphs 74 to 82 of the Plaintiffs' Submissions are devoted to establishing that the key evidence of the events on April 27, 2013, is available to this Court. However, with respect to their claims in Guatemala, the Plaintiffs make a general assertion,

without any factual basis, that they will be unable to obtain sufficient evidence to pursue their case in Guatemala. These positions are clearly inconsistent.

39. Most of the other evidence relevant to the Plaintiffs' claims resides with MSR and its employees in Guatemala, with Grupo Golan and its employees in Guatemala, with doctors and investigators in Guatemala, and with Mr. Rotondo in Guatemala. Most of the evidence related to their claims would be available and accessible in Guatemala, including:

(a) investigators notes/files;

(b) forensic reports of ballistics, scene and injuries;

(c) contracts with security employees of MSR and security contractors of MSR and potential oral evidence of those witnesses;

(d) evidence of violent protests against MSR and other events necessary to establish the proper context;

(e) evidence of security protocols and communications in MSR, from various documents and witnesses;

(f) evidence of interactions between head office in Reno and MSR;

(g) evidence of nature and extent of injuries and lost income; and

(h) evidence of MSR CSR in Guatemala, from various documents and individuals.

40. Further, in both of his affidavits, Mr. Chavez specifically and objectively outlines the processes and procedures for obtaining and submitting evidence in civil proceedings in Guatemala, including obtaining declarations of material witnesses and conducting depositions. Ms. Zardetto's description of some challenges that might exist with respect to those procedures is exaggerated. As noted by Mr. Chavez, these procedures resemble those used in other civil law systems and are available to the Plaintiffs in this case.

Aff. #1 of F. Chavez, pg. 13-17 (Application Record ("AR"), Vol. I, Tab 6).

Aff #2 of F. Chavez, pg. 4-5 and 15-16 (AR, Vol. III, Tab 19).

F. There are No Prejudicial Differences in the Corporate Veil Principle in Guatemala

41. The Plaintiffs' allegation that the "inviolability of the corporate veil" under Guatemalan law precludes a claim against Tahoe in Guatemala is unfounded and untrue (see paragraphs 51 and 166).

42. There are three causes of action alleged against Tahoe in respect of which the Plaintiffs seek damages: (i) negligence; (ii) direct battery; and (ii) vicarious liability for battery. Mr. Chavez has opined that each of those civil causes of action can be brought against Tahoe in Guatemala. There are two types of procedures to obtain civil compensation in Guatemala: (i) through a regular civil claim on various causes of action; and (ii) through criminal proceedings (where both the accused and parties that are vicariously liable for the wrongful actions of the accused, can be ordered to pay compensation).

Aff. #1 of F. Chavez, Exh. C, pgs. 8-17 (AR, Vol. I, Tab 6).

43. Under Guatemalan tort law, in a regular personal injury civil claim for negligence, if the Plaintiffs establish that they suffered injuries and damages, the burden shifts to Tahoe (or any other defendant) to prove that it discharged its duties or obligations or that it did not cause the injuries. The concept of a corporate veil does not factor into the direct negligence claim or the direct battery claim under Guatemalan law. Mr. Chavez's evidence on that point is uncontested.

Aff. #1 of F. Chavez, Exh. C, pg. 9 (AR, Vol. I, Tab 6).

Aff #2 of F. Chavez, Exh. C, pg. 14 (AR, Vol. III, Tab 19).

44. Even if the corporate veil did create an impediment to the Plaintiffs' claims for direct battery and negligence in Guatemala, this impediment is no worse than the one they face in British Columbia.

45. In respect of the Plaintiffs' allegations that Tahoe is vicariously liable for battery, Mr. Chavez's description of the principle of vicarious liability under Guatemalan law is much the same as under British Columbia law.

Aff. #2 of F. Chavez, Exh. C, pg. 14 (AR, Vol. III, Tab 19).

Aff. #1 of F. Chavez, Exh. C, pg. 12 (AR, Vol. I, Tab 6).

46. The Plaintiffs' concern about the "inviolability of the corporate veil" under Guatemalan law is a smokescreen. The Plaintiffs' argument at paragraphs 168 to 172 of their Submissions, with respect to the corporate veil and in support of the alleged duty of care in this case, is developed in part by reference to *Hudbay*. In *Hudbay*, the defendant Hudbay argued that the plaintiffs' negligence claim was no claim at all, due to the corporate veil principle. The plaintiffs in *Hudbay* argued that a corporate parent company's alleged duty of care to foreign injured plaintiffs is based on the principles of foreseeability and proximity and not share ownership or vicarious liability. The Ontario court agreed that Hudbay's corporate veil argument had no bearing on the alleged duty of care. The Ontario court in *Hudbay* concluded that the plaintiffs had pled all the material facts required to establish a claim of direct negligence against the defendant Hudbay pursuant to the *Cooper-Anns* test. This claim was separate and distinct from the vicarious liability claims. As a result, the Ontario court found that it was not plain and obvious that the defendant Hudbay could not owe a novel duty of care to the plaintiffs and this matter is proceeding to trial.

Choc v. Hudbay Minerals Inc., 2013 ONSC 1414 at paras. 54-55 (Joint Book of Authorities ("JBA") Vol. I, Tab 14).

47. Oddly, the Plaintiffs in this case are making the same submissions based on the corporate veil principle as the defendant Hudbay, which were rejected by the Ontario court, presumably in an attempt to cast doubt on the availability of remedies in Guatemala. However, as set out above, that concern is misguided and is largely an illusion. Neither the principles of the corporate veil, nor foreseeability or proximity, would even appear to apply to the Plaintiffs' tort claims under Guatemalan law. As a result, it would likely be much easier for the Plaintiffs to satisfy their burden of proof in Guatemala and shift the burden to Tahoe to prove that it discharged its duties or obligations or that it did not cause the alleged injuries.

Choc v. Hudbay Minerals Inc., 2013 ONSC 1414 at paras. 24, 25 and 75 (JBA, Vol. I, Tab 14).

Aff. #1 of F. Chavez, Exh. C, pg 9 (AR, Vol. I, Tab 6).

G. Tahoe Did Not Need to Cross Examine Irrelevant Evidence

48. The Plaintiffs state several times in their Submissions that Mr. Melgar and Ms. Postema's evidence is unchallenged. However, Tahoe had no obligation to cross-examine on this evidence, as it is improper in several respects.

49. First, the evidence of Mr. Melgar and Ms. Postema does not address the functioning of the Guatemalan system in respect of civil claims between private parties. Their evidence is focused on the criminal justice system. That evidence is narrow and anecdotal. Tahoe cross examined the Plaintiffs' only witness with any knowledge or experience on Guatemala's civil justice system, Carol Zardetto.

50. Second, there is extensive evidence before this Court demonstrating that private parties regularly seek and obtain fair adjudication of their civil disputes in Guatemala, including human rights-related claims. Indeed, the evidence also demonstrates that the criminal justice system works fairly (as per Mr. Melgar's own successful prosecutions and the evidence of the Rotondo proceeding to date).

Aff. #1 of M. Melgar, Exh. A (AR, Vol. I, Tab 9); translation contained in Aff #2 of R. Barany, Exh. C (AR, Vol. I, Tab 13).

51. The third reason for not challenging the evidence of Mr. Melgar on cross examination is that his evidence is *prima facie* based on assumed facts that are not in the record.

52. In Mr. Melgar's answer to Question 1 posed by the Plaintiffs, he states that it would be "difficult to ensure a fair and impartial trial in a legal contest between <u>those who represent those common interests</u> and a group of seven farmers injured as a result of the actions in opposition to a mining project" [emphasis added]. The "common interests" referred to by Mr. Melgar are interests of various government officials.

Aff. #1 of M. Melgar, Exh. C (AR, Vol. I, Tab 9); translation contained in Aff #2 of R. Barany, Exh. A, p. 3 (AR, Vol. I, Tab 13).

53. The significant shortcoming of this conclusion is that it is based on Mr. Melgar's unfounded assumptions that various levels of government have particular interests in this matter and further, that those interests are aligned with Tahoe's interests and against the Plaintiffs' interest. This conclusion also contains an underlying assumption that some or all of those alleged "common interests" would influence the judge that hears the Plaintiffs' case and further, that this influence would be successfully exerted such that any trial of these issues would not be fair or impartial. There is simply no evidence of any of the assumptions on which the opinion is based.

Aff. #1 of M. Melgar, Exh. C (AR, Vol. I, Tab 9); translation contained in Aff #2 of R. Barany, Exh. A, p. 1-3 (AR, Vol. I, Tab 13).

H. The Plaintiffs Have No Legitimate Basis to Challenge Francisco Chavez's Opinion

54. Mr. Chavez's evidence is clearly relevant to the aspects of this application that relate to the adjudication of civil claims in the Guatemalan judicial system and to Guatemalan civil law and procedure. Mr. Chavez has previously testified as an expert on these very issues and his testimony on these issues has been tendered and accepted by other courts. None of the Plaintiffs' witnesses have those distinctions.

Aff. #1 of F. Chavez, Exh. A (AR, Vol. I, Tab 6).

Aldana v Del Monte Fresh Produce N.A., Inc., 741 F .3d 1349 (11th Cir. 2014) (JBA, Vol. I, Tab 6).

Palacios, et al. v. The Coca-Cola Company et al., No. 10 Civ. 3120 (S.D.N.Y. 19 Nov. 2010) (JBA, Vol. II, Tab 45).

55. Mr. Chavez was not cross examined. However, the Plaintiffs attack Mr. Chavez's opinion in four places in their Submissions.

56. In paragraph 67 of their Submissions, the Plaintiffs allege that Mr. Chavez's opinion is "wrong" and "convenient" where he says that Tahoe may be summoned to the Guatemalan criminal proceedings as an alleged responsible party for Mr. Rotondo's alleged acts, as long as the Plaintiffs can produce evidence of the relationship between Tahoe and Mr. Rotondo as a basis for vicarious liability. The Plaintiffs have provided no basis for alleging that Mr. Chavez's opinion was wrong or convenient. Further, Mr. Chavez's opinion on that point is aligned with the views of the Plaintiffs' witnesses, Mr. Melgar and Ms. Zardetto (see paragraphs 70 to 72 of the Plaintiffs' Submissions). Mr. Chavez acknowledges that the Plaintiffs must request the Guatemalan court to summon Tahoe in the Guatemalan criminal proceedings. He also confirms that summoning a third party for civil liability of a criminally liable person is based on the principle of vicarious liability, which appears to operate the same as in Canada. Thus, the Guatemalan Court would summon Tahoe if the Plaintiffs can establish that Mr. Rotondo was an agent or employee of Tahoe. If they cannot establish that connection, Tahoe will not be summoned. MSR could also be summoned by the Guatemalan Court if the Plaintiffs can establish a connection between Mr. Rotondo and MSR.

Aff. #2 of F. Chavez, Exh. C, pg 14 (AR, Vol. III, Tab 19).

Aff. #1 of F. Chavez, Exh. C, pg. 20 (AR, Vol. I, Tab 6).

57. At paragraphs 67 and 154 of the Plaintiffs' Submissions, they allege that Mr. Chavez oversteps his qualifications by describing the process for pursuing civil damages in criminal proceedings. Mr. Chavez has decades of experience in civil matters, which is the subject matter of his opinion. Further, his opinion on the civil reparation procedure in criminal proceedings is essentially the same as Mr. Melgar's. There is no valid basis for the Plaintiffs to challenge Mr. Chavez's opinion on these matters.

Aff. #1 of F. Chavez, Exh. A, pgs. 2-3 (AR, Vol. I, Tab 6).

Aff. #1 of F. Chavez, Exh. C, pgs. 19-20 (AR, Vol. I, Tab 6).

Aff. #1 of M. Melgar, Exh. C, pgs. 2-3 (AR, Vol. I, Tab 9); translation contained in Aff. #2

of R. Barany, Exh. A, pgs. 3-4 (AR, Vol. I, Tab 13).

58. Further, at paragraph 67 of their Submissions, the Plaintiffs allege that Mr. Chavez asserts without analysis or supporting evidence, that the Plaintiffs can receive a fair trial in Guatemala. This opinion is supported by Mr. Chavez's consistent and extensive experience representing multiple parties in dozens of reported cases in Guatemala over the past thirty five years.

59. Mr. Chavez's opinion that parties can receive fair trials is reinforced by Mr. Melgar's outline of his various successes in court (where he presumably did not engage in corrupt practices to obtain those results) and the successes of Ms. Zardetto's colleagues at her firm. Mr. Chavez's opinion is also reinforced by the various examples of CALAS' successes in human rights-related proceedings in Guatemala.

60. By all accounts, Mr. Chavez's opinion is supported by the actual everyday experiences of the parties and their witnesses in the Guatemalan courts. In comparison, the allegations made by Mr. Melgar, Ms. Postema, and Ms. Zardetto that Guatemalan courts cannot provide justice are based on anecdotes in exceptional cases of criminal prosecutions of state officials or members of organized crime syndicates.

Aff. #1 of F. Chavez, Exh. C, pgs. 25-27 (AR, Vol. I, Tab 6).

61. Finally, the Plaintiffs criticize Mr. Chavez in paragraph 154 of their Submissions for "not citing a single case where common citizens have prevailed over more powerful actors in a civil claim" in Guatemala. Tellingly, the Plaintiffs' experts also fail to cite any cases demonstrating that common citizens <u>do not</u> prevail over more powerful actors.

62. Mr. Chavez confirms that civil lawsuits against local companies are frequently filed in Guatemala. CALAS, the organization representing the Plaintiffs in the Guatemalan criminal proceedings, has made a business of bringing civil proceedings against "more powerful actors" in pursuit of the rights of Guatemalan citizens. Tahoe has provided examples of CALAS' own proclamations of its victories over what might be considered "powerful actors", including MSR. Further, the Guatemalan Court ordered that Mr. Rotondo stand trial on various criminal

charges in the Guatemalan criminal proceedings. Mr. Rotondo's prior relationship with MSR has apparently not deterred the Guatemalan Court in making that ruling.

> Aff. #2 of F. Chavez, Exh. B, pg. 15 (AR, Vol. III, Tab 19).
>
> Aff. #1 of P. Jolliffe, Exh. D and E (AR, Vol. III, Tab 23).
>
> Aff. #2 of M. Campos, Exh. B (AR, Vol. III, Tab 24).
>
> Aff. #1 of J. Quesada, Exh. A (AR, Vol. III, Tab 16).
>
> Aff. #1 of M. Campos, Exh. B (AR, Vol. III, Tab 17).

63. Mr. Chavez's opinion strongly supports Tahoe's submission that Tahoe can be pursued by the Plaintiffs in the Guatemalan courts and that the Plaintiffs can obtain civil relief in Guatemala, in both civil and criminal proceedings.

I. Tahoe's Description of the Purpose of the Forum Non Conveniens Doctrine is Current

64. In reply to paragraph 147 of the Plaintiffs' Submissions, Tahoe's description of the purpose of the *forum non conveniens* doctrine is not outdated. Subsequent to the Supreme Court of Canada's decision in *Van Breda,* this Court held in a 2014 decision with respect to the purpose of the *forum non conveniens* analysis as follows:

> [23] Section 11 of the CJPTA is a complete codification of the common law test for forum non conveniens: *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 (CanLII) at para. 22. The purpose of the forum non conveniens analysis, and therefore of s. 11, is "to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties" *(Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 912). The factors listed in s. 11(2) reflect a "comity-based approach", that is, an attitude of respect for and deference to the courts of other provinces and the principles of order and fairness (*Teck Cominco*, para. 23; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 74).
>
> *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated*, 2014 BCSC 752 at para. 23 [emphasis added] (JBA, Vol. I, Tab 17).

Club Resorts Ltd. v. Van Breda, 2012 SCC 17 (JBA, Vol. I, Tab 16).

65. The statement was originally made by the Supreme Court of Canada in *Amchem* and was repeated by that Court in *Teck Cominco* as follows:

> [38] Teck argues that a refusal to stay the B.C. Coverage Action places the parties in the difficult position of having legal proceedings on the issue of insurance coverage in two separate jurisdictions. While I am sympathetic to the difficulties presented by parallel proceedings, the desire to avoid them cannot overshadow the objective of the forum non conveniens analysis, which is "to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties" (*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at p. 912).

Amchem Products Incorporated v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897 at para. 26 (JBA, Vol. I, Tab 8).

Teck Cominco Metals Ltd. v. Lloyd's Underwriters, [2009] 1 SCR 321 at para. 38 [emphasis added] (JBA, Vol. III, Tab 62).

66. *Van Breda* did not override, but rather supplemented, the Supreme Court of Canada's prior description of the purpose of the *forum non conveniens* doctrine in *Amchem* and *Teck Cominco*. The British Columbia Supreme Court continued to rely on those decisions following *Van Breda* in 2014 in *Colonial Countertops Ltd. v. Maple Terrazzo Marble & Tile Incorporated.* The claims in this case are most closely connected to Guatemala.

J. The Threshold for Jurisdiction Simpliciter is "Weak" in this Case

67. In reply to paragraph 144 of the Plaintiffs' Submissions, the concept of a "weak" basis for jurisdiction *simpliciter* is taken from the Supreme Court of Canada's decision in *Van Breda*. *Van Breda* emphasizes the importance of certainty in respect of conflict rules generally. Thus, to advance predictability and certainty the Court set out a new list of presumptive factors for determining jurisdiction *simpliciter* modeled on the *CJPTA*. In the context of its focus on increased certainty, the Court then outlined the principles applicable to the *forum non conveniens* analysis. In addressing how those principles operate in relation to the presumptive connecting factors to establish jurisdiction, the Court stated that if jurisdiction is established on a "low

threshold" (i.e. a "weak" basis") with regard to the presumptive connecting factors that establish jurisdiction, *forum non conveniens* may play an important role in determining the more appropriate forum for adjudicating a dispute.

Club Resorts Ltd. v. Van Breda, 2012 SCC 17 at para. 109 (JBA, Vol. I, Tab 16).

K. The Question of Governing Law is Open and Shut: Guatemalan Law Will Govern the Torts in this Case

68. The law that governs the dispute between parties is an important factor in the *forum non conveniens* analysis.

Schwarzinger v. Bramwell, 2011 BCSC 283 at para. 70 (JBA, Vol. III, Tab 57).

69. The Plaintiffs are unable to argue more than that the question of governing law is an "open question". They do very little to address the fact that Canadian law leads to the inevitable conclusion that Guatemalan law will govern the torts alleged in this case.

70. In an effort to demonstrate that the question of governing law is open, at paragraph 185 of their Submissions the Plaintiffs rely on *Pan-Afric Holdings Ltd.* That is a professional negligence case and the Plaintiffs rely on it to argue that the law governing the alleged torts in this case may be determined according to the law of the place where "the professionals" conducted their work, rather than the place where the tort occurred and damage was suffered.

Pan-Afric Holdings Ltd. v. Ernst & Young LLP, 2007 BCSC 685 (JBA, Vol. II, Tab 46).

71. The present case is not a professional negligence case. Further, it does not involve a special type of tort that raises difficulties in determining where the tort occurred. On the contrary, it is a personal injury claim that is clearly governed by the rules set out in *Tolofson.*

Tolofson v. Jensen, [1994] 3 S.C.R. 1022 (JBA, Vol. III, Tab 64).

72. In reply to paragraph 184 of the Plaintiffs' Submissions, the rule in *Tolofson* was designed for both interprovincial and international application. The Ontario Court of Appeal has

in fact confirmed that "[t]he *lex loci delicti* rule applies in international litigation notwithstanding a high degree of connection between the litigants and the place of the forum".

Somers v. Fournier, 2002 CarswellOnt 2119 at para. 37 (RBA, Tab 9).

Tolofson v. Jensen, [1994] 3 S.C.R. 1022 (JBA, Vol. III, Tab 64).

73. The Plaintiffs also argue at paragraph 184 of their Submissions that Justice La Forest in *Tolofson* recognized that the court may not follow the *lex loci delicti* rule in certain cases where injustice arises. However, Justice La Forest stated that "[he] [could] imagine few cases where this would be necessary".

Tolofson v. Jensen, [1994] 3 S.C.R. 1022 at para. 50 (JBA, Vol. III, Tab 64).

74. The case cited by the Plaintiffs in support of this exception, *Wong v. Wei,* involved parties who were all Canadian citizens, who were ordinarily resident in British Columbia and who were involved in a motor vehicle accident while driving in California. The parties had no connection with the foreign jurisdiction, except that the accident occurred there.

Wong v. Wei, 1999 CanLII 6635 (BC SC) (JBA, Vol. III, Tab 68).

75. Subsequent decisions have criticized cases like *Wong v. Wei* for broadening what was intended to be a narrow exception to the general rule from *Tolofson.* This was explained by the Ontario Court of Appeal in *Wong v. Lee* as follows:

> 12 It appears that the trend of the case law is to broaden what was intended to be a very narrow exception to the general rule, and to apply the *lex fori* rather than the *lex loci delicti* generally in cases where the parties are resident in a province of Canada and have no connection with the state where the wrong occurred except to have been there in the accident. Although the exercise of the discretion must be available to address injustice in exceptional cases (such as Hanlan, supra; see para. 16 infra), it is my view that exercising the discretion whenever all the parties to the action are from the forum represents a misapplication of the *Tolofson* decision and a failure to recognize and give effect to the policy behind the enunciation of the rule, which emphasizes the importance of certainty in the choice of law rules as a means of achieving fairness in the application of private international law.

Wong v. Lee, (2002), 58 O.R. (3d) 398 at para. 12 (RBA, Tab 11).

76. *Van Breda* recently points to the decision in *Tolofson* as a good example of the Court's work toward assuring predictability and certainty in conflict rules. Predictability and certainty continues to be a focus of the Supreme Court of Canada in this area of the law. *Tolofson* supports Tahoe's submission that Guatemalan law governs the personal injury torts alleged in this case.

Club Resorts Ltd. v. Van Breda, 2012 SCC 17 at para. 37-38 (JBA, Vol. I, Tab 16).

Tolofson v. Jensen, [1994] 3 S.C.R. 1022 (JBA, Vol. III, Tab 64).

L. This Case is Not "Centered in Canada"

77. In response to paragraphs 83 and 88 of the Plaintiffs' Submissions, it is unclear what the Plaintiffs mean by the phrase "centre the liability case" and no authorities are cited in support of this term.

78. At paragraph 83 of their Submissions, the Plaintiffs allege that because two of three directors on Tahoe's HSEC Committee were resident in Canada during the relevant time period, this is enough to "centre the liability case in Canada and in the English language". However, paragraph 83 is incorrect to the extent that the term "centre the liability case" purports to refer to the proper law governing the alleged torts in this case. The fact that some of the directors on Tahoe's HSEC Committee were resident in Canada is not at all determinative of where the alleged torts in this case occurred.

79. Paragraph 88 in the Plaintiffs' Submissions, which sets out the particulars of negligence alleged in the Notice of Civil Claim, also does not "centre the liability case to Canada". Almost all of the alleged failures by Tahoe listed in the Notice of Civil Claim (summarized at paragraph 88 of the Plaintiffs' Submissions) are pleaded to have occurred in Guatemala. 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).

M. Tahoe's Internal Investigation

80. Starting at paragraph 79 and elsewhere in their Submissions, the Plaintiffs refer to an internal investigation conducted by Tahoe with respect to the events of April 27, 2013, which is referenced in a letter from Tahoe to a shareholder. The Plaintiffs allege that the fact that Tahoe conducted an internal investigation is "an important source of proof in this case" and they point to Tahoe's refusal to provide the content of the internal investigation to the Plaintiffs in respect of this application.

81. While the content of the internal investigation is not relevant to the question of *forum non conveniens*, the fact that an internal investigation was conducted and by whom, might be relevant. Tahoe provided that information to the Plaintiffs' counsel. Specifically, in response to a request by Plaintiffs' counsel for a copy of the internal investigation file, Tahoe confirmed that, at the request of Tahoe counsel in Reno, Nevada, a review of the events of April 27, 2013 was conducted by external MSR counsel in Guatemala. There has been no intention at any time to waive privilege to the content of the internal investigation. The fact that an internal investigation was conducted in Guatemala, at the request of counsel in Nevada, may be relevant to *forum non conveniens* analysis. Those facts create no connection to British Columbia.

Aff. #2 of P. Joliffe, Exh D (AR, Vol. III, Tab 26).

N. Conclusion

Guatemala has the closest connection to the Plaintiffs' claims and is clearly a more appropriate forum than British Columbia. The Plaintiffs cannot avoid this conclusion by a challenge to the entire Guatemalan justice system based on concerns arising in unrelated circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: April 7, 2015

Signature of lawyer for the
Defendant Tahoe Resources Inc.

Karen L.M. Carteri