No. 08-56187
No. 08-56270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

PLAINTIFFS'-APPELLANTS'-CROSS-APPELLEES' REPLY BRIEF ON APPEAL AND ANSWERING BRIEF ON CROSS-APPEAL

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Defendants-Appellees-Cross-Appellants' ("Defendants") Answering Brief on Appeal and Opening Brief on Cross-Appeal ("DACAB") fails to rebut Plaintiffs-Appellants' ("Plaintiffs") Opening Brief ("PAOB") and ignores the longstanding legal principles under which Plaintiff Amazon Watch ("AW") has standing to pursue its claim.

Defendants argue that the district court appropriately determined that Peru was an adequate forum, but their arguments frequently ignore the actual stated reasoning of the district court's order—which must be the touchstone for any abuse of discretion review. The district court did not articulate what degree of deference it was affording to Plaintiffs' choice of forum. More importantly, the district court failed to find that AW's claim could be litigated in Peru, which is an essential requirement for an adequate forum. The district court did not make findings relating to Plaintiffs' arguments about discrimination, the unpredictability of Peruvian courts, or Defendants' contractual clauses. And the district court ignored Plaintiffs' allegations of corruption without allowing any discovery.

Defendants argue that the public and private interest factors support dismissal, but here again, the district court failed to make key findings. With respect to the private factors, the only factor which the district court found favored Peru was the access to evidence and witnesses, but the court's decision was

unsupported by anything more than the conclusory declaration of counsel. Defendants do not dispute that the district court failed to address the critical factor of enforceability of the judgment in Peru. As to the public factors, only one factor—local interest—was found to favor Peru. Because Peru's interest at most only weakly outweighs California's, and choice of law should have favored California, the public factors should have balanced neutrally if not in Plaintiffs' favor. Overall the balance of these factors was not sufficiently in favor of Peru so as to oust Plaintiffs' choice of forum.

While Defendants argue that the district court was right to reject conditions on the dismissal of this case, none of their arguments are supported by the district court's order and judgment, which fail to address the requested conditions entirely. Moreover, given the concerns about enforceability of the judgment and access to discovery in Peru, it was error for the district court to fail to require that a Peruvian judgment be enforceable in California or to require that Defendants submit to discovery.

Defendants' argument that the district court properly ruled without allowing discovery is unsupported by the case law. Furthermore, Defendants' arguments ignore the circumstances in this case, which are distinguishable from the cases they cite. The district court here was presented with conflicting information; limited discovery would have assisted the court in its determination of the motion, and,

indeed, would likely have changed the outcome of the determination. Refusal to permit such discovery was an abuse of discretion.

Defendants' assertions in their cross-appeal that Amazon Watch lacks standing and has not stated a claim upon which relief can be granted are meritless. Case law applying the Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200, et seq. (2004), and longstanding Article III principles (which the UCL incorporates), recognize the "organizational drain" theory of standing that AW asserts here. The injuries to Amazon Watch's mission and programs by the harms Defendants have caused, and the drain on its resources in combating these harms, provide standing under both the UCL and Article III.

Defendants' argument that Plaintiff's injury must be redressable through restitution cannot be squared with the UCL's plain language or the stated intent of the California voters to adopt Article III's "injury in fact" standard. Defendants' position is also inconsistent with a host of UCL cases, including a California Supreme Court case issued after Defendants filed their brief.

Defendants further err in claiming that Proposition 64 adopted a tort "proximate cause" requirement. UCL cases make clear that Article III standards apply. Indeed, the UCL uses the same "as a result of" language as Article III jurisprudence. Under California, U.S. Supreme Court and Ninth Circuit precedent, Amazon Watch has standing.

Moreover, AW's claim also meets the Article III requirement of redressability, which is not part of the UCL. The district court can issue a number of remedies that are likely to redress AW's injuries, including a declaration that Defendants' actions violate § 17200, an order requiring Defendants to inform the Achuar of the potential dangers of Defendants' pollution and ways to avoid those dangers, an order requiring Defendants to investigate pollution levels and health effects to better inform the Achuar of the dangers posed by Defendants' acts, and/or an injunction ordering Defendants to clean up the grave pollution they have caused. Defendants' argument—that AW has failed to state a claim upon which relief can be granted because no relief is available—fails for the same reasons.

In the alternative, if this Court were to conclude that Plaintiffs have not adequately alleged standing or stated a claim, Plaintiffs seek remand to the district court to request leave to amend their complaint.

COUNTER-STATEMENT OF JURISDICTION ON CROSS-APPEAL

Defendants argue that Plaintiff Amazon Watch lacks Article III standing; for the reasons noted herein, Plaintiffs disagree.

COUNTER-STATEMENT OF THE CASE AND FACTS ON CROSS-APPEAL

In the last few years, the Achuar began to seek assistance in investigating and exposing Defendants' actions from Plaintiff Amazon Watch. ER 36-40.

Amazon Watch is a non-profit organization whose mission is to defend the environment and rights of indigenous peoples of the Amazon. Pursuant to this mission, Amazon Watch has been working on behalf of the Achuar people to monitor Defendants' actions and their effects, and has lobbied Defendants to clean up their pollution and provide compensation. ER 25. Thus, AW has, among other things, undertaken intensive research to document the damage, sought to educate the American public and Defendants' shareholders and officials about the harms Defendants have caused to the Achuar, and attempted to counter Defendants' false denials. ER 25, 37-39.

Amazon Watch brings a Cal. Bus. & Prof. Code § 17200 claim against Defendants, alleging that Oxy's discharge of pollutants and concealment thereof constitute unfair business practices. ER 54-56. Amazon Watch has lost and will continue to lose money or property due to the frustration of its mission, its expenditure of financial resources, and the diversion of its staff time to investigate, expose and seek redress for Defendants' unlawful practices. ER 41. AW asserts standing on that basis under traditional Article III organizational standing principles. The district court did not reach the merits of Defendants' motion to dismiss Amazon Watch's claims. ER 15.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING THIS ACTION UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*

A. Under An Abuse of Discretion Standard, This Court Must Look at the Actual Stated Reasoning of the District Court

At various points, Defendants seem to suggest that the Court should look beyond the district court's actual stated reasons for its decision, and should consider Defendants' additional arguments as to why the decision was correct. But, in reviewing for abuse of discretion, this Court "must examine the adequacy of the rationale behind the district court's decision rather than simply reach the conclusion that seems best." *Blue Cross & Blue Shield v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 724 (9th Cir. 2007). The Court cannot look to reasons that were not articulated by the district court; "[a]n order that fails to articulate its reasoning must be vacated and remanded because meaningful appellate review is impossible when the appellate panel has no way of knowing whether relevant factors were considered and given appropriate weight. *Pintos v. Pac. Creditors Ass'n*, ___ F.3d ___, 2009 U.S. App. LEXIS 9104, *21 (9th Cir. Apr. 30, 2009). Thus the only proper subject of review for abuse of discretion is what the district court actually did, and if the district court did not explain its decision, remand is required.

B. The District Court Did Not Afford The Proper Degree of Deference to Plaintiffs' Choice of Forum

Defendants do not dispute that the district court vaguely stated that it was applying "some deference" to Plaintiffs' forum choice. ER 6. Defendants suggest that deference should be lessened because the inclusion of Amazon Watch as a Plaintiff was "tactical," DACAB 27, but this argument is irrelevant because it was not the stated basis for the district court's decision.[1] The district court only mentioned that most of the plaintiffs were Peruvian and that AW had only a single cause of action. ER 14. The lack of deference to AW's choice of forum demonstrates an abuse of discretion on the part of the district court. *See, e.g., Adelson v. Hananel*, 510 F.3d 43, 54 (1st Cir. 2007) (failure to give proper deference to plaintiff's choice of home forum constitutes abuse of discretion). The district court should have recognized that AW's choice of *its* home forum to litigate claims against California defendants in *their* home forum was entitled to a

[1] Nonetheless, Defendants' reliance on *Pain v. United Techs. Corp.* 637 F.2d 775, 797-98 (D.C. Cir. 1980), for the proposition that Amazon Watch's claim is made only to defeat dismissal on grounds of *forum non conveniens*, is clearly misplaced. In that case, the court noted that numerous plaintiffs were actually residents of Norway who held dual American citizenship and that the sole U.S. resident plaintiff was an American attorney who was only suing in a representative capacity of one of the decedents. *See id.* In this case, Amazon Watch is not simply a representative plaintiff. It is suing in its own capacity for injuries caused to it by the Defendants' actions.

high degree of deference.[2] Although Defendants suggest that AW's claims could be severed, DACAB 30-31 n.5, this would not be permissible here, because that claim was inextricably intertwined with the Achuar Plaintiffs' claims and litigating both claims in separate courts would be highly inefficient.

As previously discussed, PAOB 25, there is no authority for averaging levels of deference among local and foreign plaintiffs. Furthermore, the district court overlooked, and Defendants fail to address, the fact that even foreign plaintiffs' choice of forum should be given *substantial* deference where, as here, they have sued a defendant in its home forum because that defendant is not amenable to suit in the plaintiffs' home forum. *See, e.g., Norex Petroleum, Ltd. v. Access Indus.,* 416 F.3d 146, 156 (2d Cir. 2005). Foreign plaintiffs routinely sue American companies in American courts because they are best able to obtain justice and jurisdiction in U.S. courts. Accordingly, the plaintiffs' "decision to litigate . . . where all defendants were amenable to suit (and where some reside or are incorporated) is properly viewed as a strong indicator that convenience, and not tactical harassment of an adversary, informed [their] decision to sue outside [their]

[2] Defendants' argument that AW's claims are "patently meritless" is completely unfounded. Amazon Watch did suffer economic harm as a result of Defendants' conduct, and its claims under California law are clearly viable. *See infra* Part IV(A)(1). Therefore, because AW, a California plaintiff, has legitimate and viable claims, its choice of forum should not be completely discounted.

home forum." *Id.* at 155. Nonetheless, while the district court paid lip service to this principle, an analysis of the opinion below reveals that these presumptions were ignored. The district court erred in failing to afford substantial deference.

C. The District Court Erred In Concluding That Peru Was An Adequate Forum

Defendants argue that they are amenable to suit in Peru, which is not disputed, and that Peru provides an adequate remedy. But they do not, and cannot, dispute that the district court did not actually conclude that Peru provided an adequate remedy for each plaintiff's claims; the district court never addressed the unfair competition law ("UCL") claims at all, including AW's entire claim. Moreover, many of their arguments are based not on what the district court actually decided, but on their own arguments before the court below, which were not expressly adopted by the district court and cannot save any abuse of discretion.

Defendants correctly note that a forum will be deemed inadequate if "it offers no practical remedy for the plaintiff's complained of wrong." *Lueck v. Sunstrand Corp.*, 236 F.3d 1137, 1144 (9th Cir. 2001). As Plaintiffs have demonstrated, there is *no dispute* (and no contrary finding from the district court) that Peru provides no remedy *at all* to Amazon Watch or for the UCL claims of the Achuar Plaintiffs. Moreover, even for claims for which Peru theoretically provides a legal remedy, other barriers to filing and recovery are likely to deprive the

Achuar Plaintiffs of any practical remedy in that forum.

1. Defendants effectively concede that if Amazon Watch's claim is colorable, reversal is warranted.

Defendants do not dispute that, as Plaintiffs argued, the district court failed to explain why Peru was an adequate forum for Plaintiffs' UCL claims, including AW's entire case. Instead, Defendants improperly go beyond what the district court did, and argue that the court below *could have* concluded that Peru provides an adequate remedy because their expert, Dr. Osterling, "establishes that plaintiffs . . . who have the requisite standing to complain of environmental-law violations may bring suit in Peru" for injunctive relief. DACAB 18. The district court did not rely on this argument, not did it discuss the UCL claims or AW at all. ER 7.

Defendants undermine their own argument, however, when they suggest that AW actually could *not* bring a claim in Peru, because it would not actually have the requisite standing. DACAB 18 n.3. While it stands to reason that a party without standing to pursue a claim in the United States is not harmed by a dismissal to a forum where it also lacks standing, the district court did *not* conclude that Amazon Watch lacked standing. Dismissing the case on *forum non conveniens* grounds, without deciding whether AW had standing, was therefore error.

The relevant question should be whether, if AW has standing in the United

States, Peruvian courts would recognize the same basis for standing and allow a claim valid under U.S. law to proceed. Defendants effectively concede that if this Court denies their cross-appeal, and finds that Amazon Watch does have standing to proceed, the district court's *forum non conveniens* order must be reversed. AW has a valid claim under U.S. law, and the district court made no conclusions that it could press this claim in the Peruvian courts, despite Plaintiffs' specific showing that it could not do so. *See, e.g.*, ER 81. Even if this Court could look beyond the district court's decision and consider the opinions of Defendants' expert, Dr. Osterling did not assert that AW would have standing to pursue its claims in Peru. Plaintiffs are not suggesting that Peru must provide a remedy for nonmeritorious claims, but if Peru does not provide *any* remedy to AW—a plaintiff who has standing to pursue its claims in the United States—dismissal was certainly error.

2. Other cases finding Peruvian courts adequate are not controlling.

Defendants suggest that, because several other courts have found the Peruvian courts to be adequate, this Court should too. But, as this Court held in *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir. 2006), other cases finding an adequate forum are merely "illustrative"; they "are not dispositive as to the evidence here." *Id.* at 1179 n.7. For example, the other cases cited by Defendants were not examining whether there was any comparable remedy for

UCL claims brought by nongovernmental organizations such as AW, nor did they have the same record as here on the allegations of corruption, discrimination, and other barriers.

3. The district court did not reach any conclusions about the unpredictability of Peru's courts.

In suggesting that the district court properly rejected Plaintiffs' claim that Peruvian law was too unpredictable to provide an adequate remedy, Defendants again confuse their own arguments with the district court's actual ruling. They claim that "the district court found Dr. Osterling's analysis . . . to be persuasive," DACAB 20, but the district court made no such findings. It simply repeated what "Dr. Osterling avers," ER 9, without adopting this analysis, and in so doing failed to explain its decision. Thus, at the very least, remand is required. *Pintos*, 2009 U.S. App. LEXIS 9104 at *21.

4. The district court erroneously rejected evidence of corruption and practical barriers to remedies without allowing discovery.

Defendants argue that Plaintiffs did not meet the showing in *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997), that the foreign court is corrupt. But they do not dispute that the *Kavlin* court allowed discovery before making this decision, as did the district court in *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d *at* 1179.

Plaintiffs provided sufficient evidence to raise substantial questions of

corruption that should not have been dismissed lightly. As but one example, Defendants do not dispute that Occidental Petroleum entities were named in documents in official government corruption investigations. ER 236-247. Defendants argue that this evidence was properly ignored because "among the literally *tens of thousands of documents* assembled by a Peruvian legislative commission that investigated corruption . . . there were 18 irrelevant documents that merely *mentioned* an Occidental entity." DACAB 23. Yet the source for this statement is none other than *defense counsel's own letter*. SER 107. Defense counsel's interpretation of the corruption documents is not competent evidence of any kind, and certainly not sufficient to provide either the district court or this Court a basis for discounting the evidence of corruption submitted.[3]

Defendants also suggest that the district court properly rejected evidence of widespread perceptions of judicial corruption in Peru, based on Defendants' submissions showing that "Peruvians perceived less *overall* corruption in their country than did respondents in many other Latin American nations." DACAB 22 (emphasis added). But this reinforces Plaintiffs' argument—Peru ranks only around the middle of the world's countries for perception of corruption *overall*,

[3] Defendants also cite to "CR 35," a document that they have not included in their excerpts and that therefore need not be considered. *Cf.* 9th Cir. R. 30-1.1(a) (requiring that parties submit all "portions of the record necessary to reach a decision" as excerpts).

SER 82, but was one of the five worst countries for *judicial* corruption, ER 279. Thus, Peruvians are not exaggerating corruption in general—they are singling out judicial corruption as a particular problem.

Similarly, the district court was presented with evidence of substantial barriers to practical remedies, including punishing filing fees and difficulties in obtaining required papers.[4] Defendants repeat the district court's analysis, crediting Dr. Osterling's declaration, but they fail to provide any basis for crediting Defendants' evidence over Plaintiffs', especially in light of the complete lack of discovery. Indeed, on this point Dr. Osterling's declaration is similar to the testimony rejected by this Court in *Tuazon*—it failed "to mention a single episode that he directly observed or of which he has personal knowledge." 433 F.3d at 1179.

5. The district court did not analyze Plaintiffs' discrimination claims.

Defendants argue that "the district court . . . held that Plaintiffs' sweeping claims of intractable systemic discrimination were unpersuasive," similar to this Court's ruling in *Tuazon*. DACAB 24. Again, nothing in the district court's actual

[4] Contrary to Defendants' suggestion, Plaintiffs do not claim that "the mere existence of filing fees" is the problem, *Altmann v. Austria*, 317 F.3d 954, 972 (9th Cir. 2002). Rather, Plaintiffs argue that filing fees that would be more than the annual income of the Achuar Plaintiffs are a practical barrier to an effective remedy.

order suggests this. The court simply stated, "The few cases that have examined comparable claims have rejected them." ER 8. Defendants read much into this statement, suggesting that the district court *meant* to say, "the showing required to make such a claim is, as a practical matter, a high one." DACAB 24. Nothing in the district court's language suggests this reading. The district court did not discuss any legal standard for evaluating a claim of systemic discrimination. Defendants do not dispute Plaintiffs' showing, PAOB 36-37, that the cases cited by the district court are *not* comparable, because the evidence presented was considerably different—or, in one case, *Shields v. Mi Ryung Construction Co.*, 508 F. Supp. 891, 896 (S.D.N.Y. 1981), no evidence at all. The district court erred in failing to consider the evidence presented in *this* case rather than in simply adopting the conclusion of other courts considering different evidence.

6. The district court failed to consider Defendants' contractual clauses.

Defendants argue that the district court "properly gave no weight" to Plaintiffs' argument that arbitration or choice of forum clauses in Defendants' contracts demonstrated a lack of faith in the Peruvian courts, both by Defendants and their governmental contract partners. DACAB 25. That is a mischaracterization of the district court's decision. The court below did not find that this argument was not entitled to weight; it did not consider the argument at

all. Defendants suggest that this failure was harmless because such contractual clauses are irrelevant, citing *Banco de Seguros del Estado v. J.P. Morgan Chase & Co.*, 500 F. Supp. 2d 261 (S.D.N.Y. 2007). That case, however, concluded that the use of choice of forum and arbitration clauses did not qualify as *private interest factors* weighing in favor of the forum, not that they were irrelevant to the question of the defendant's belief in the adequacy of the court system. *Id.* at 265. Indeed, there did not appear to be any argument in *Banco de Seguros* that the foreign forum was inadequate. *Id.* at 260. As Plaintiffs noted, if such clauses in favor of a forum can help establish its adequacy, *Blanco v. Blanco. Indus. de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993), such clauses that eschew the forum can help demonstrate the opposite.

D. The District Court Abused Its Discretion In Disregarding Plaintiffs' Choice of Forum Where The Public And Private Interests Do Not Clearly Point To Peru As The Alternative Forum

The district court's failure to afford adequate deference to Plaintiffs' choice of forum, discussed above, is especially glaring in the context of the public and private interest factors. Although the district court's order states that it gave "some deference" to Plaintiffs' choice of forum, ER 14, an analysis of the factors in this case shows that, in reality, there was virtually no consideration paid to Plaintiffs' choice of forum. At most, the private and public interest factors here should have resulted in a neutral balance; thus, any degree of deference to Plaintiffs' chosen

forum should have resulted in denial of Defendants' motion.

It is well-established that a defendant's home forum is presumed to be convenient. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 303 (1980) (defendant's home forum is presumptively convenient); *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608 (3d Cir. 1991) (rejecting defendant's challenge to its home state as an appropriate forum). Indeed, when a local plaintiff sues a local defendant in the defendant's home forum, it is "unusual" for the defendant to seek dismissal based on *forum non conveniens* and therefore, "this fact should weigh strongly against dismissal." *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395 (8th Cir. 1991). The Defendants' "home" forum is California, as both Occidental Petroleum and Occidental Peruana are California citizens. Therefore, California is a presumptively convenient forum for this action. Nonetheless, the district court failed to address the argument that a defendant seeking *forum non conveniens* dismissal of its home forum bears a substantial burden, thereby demonstrating the district court's abuse of discretion.

There has simply been no "strong" showing that the private and public interests favor Peru as an alternative forum that would outweigh the presumption that Plaintiffs' decision to sue Defendants in their home forum should be disturbed. A balanced analysis of these factors reveals that, at most, the public and private factors are neutral, which means that Plaintiffs' choice of forum should not be

disturbed. *See Lueck v. Sundstrand Corp.*, 236 F.3d *at* 1145-46 (noting that all of these factors should be considered together to arrive at "a balanced conclusion").

1. The private factors do not justify departing from Plaintiffs' choice of Defendants' home forum.

The district court found that "the private interest factors weigh overwhelmingly in favor of dismissal." ER 13. But this finding is not supported by the court's analysis or the evidence before it. Notably, the district court only addressed issues relating to the parties' access to witnesses and documents, and ignored the critical private factor of the enforceability of any judgment in a Peruvian forum. The district court's failure to consider this factor when it dismissed Plaintiffs' action demonstrates a clear abuse of discretion. *See Adelson*, 510 F.3d at 52 (noting among reasons for finding abuse of discretion that the district court "failed to consider a material factor").

If this case were to be litigated in a Los Angeles federal court, Plaintiffs would certainly be able to enforce a judgment against Defendants because they are California companies. In contrast, Plaintiffs are likely to face substantial hurdles in enforcing a judgment against the Defendants in Peru.[5] The U.S. government itself acknowledges that "enforcement" of judgments even in commercial cases is

[5] Plaintiffs are aware of only one successful environmental case involving (but not against) a multinational corporation in Peru; even in that case, the court's judgment has not been enforced a year after it was rendered. ER 119.

"difficult to predict." U.S. Dep't of State, 2006 Investment Climate Statement – Peru (2007), *available at* http://164.109.48.103/e/eeb/ifd/2007/80730.htm; *see also* 2008 Investment Climate Statement – Peru, *available at* http://www.state.gov/e/eeb/ifd/2008/100999.htm. In this case, it is even more likely that Plaintiffs would face substantial obstacles in enforcing a judgment against defendants in Peru, because Defendants claim to have ceased operations there and therefore may not have any assets to secure in order to satisfy any judgment.[6]

Events in other cases involving oil pollution in the Amazon demonstrate that this concern is not academic. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470 (2d Cir. 2002), was re-filed in Ecuador after dismissal due to *forum non conveniens*, and is currently proceeding against Texaco's successor, Chevron Corporation. Chevron is now challenging the competency of the Ecuadorian forum it had requested while defending the case in the United States. Specifically, now that Chevron faces the possibility of a multi-

[6] Defendants cite to a decision from a federal bankruptcy court, *In Re B-E Holdings, Inc.*, 228 B.R. 414 (E.D. Wisc. 1999), to argue that a Peruvian judgment can be enforced in American courts. However, the *B-E Holdings* case actually demonstrates that the creditor had a difficult time enforcing his Peruvian judgment in the United States and that it took over seven years from the time in which the judgment was entered in Peru before he was able to have the Peruvian judgment enforced.

billion dollar liability in Ecuador, it is rejecting enforceability of any Ecuadorian judgment. *See* ER 416-417.

With respect to the one factor that the district court did consider—access to witnesses and evidence—the district court's analysis was flawed. On one hand, the district court noted that "witnesses and documents are located in both fora." ER 12. For example, Amazon Watch witnesses are located in California, as are witnesses associated with the Defendants, and Defendants' former employees. On the other hand, the district court went on to presume, without any evidence, that there are critical witnesses who cannot be compelled to testify in California, even though none of these witnesses were identified and there is no evidence that these witnesses are unwilling to submit to the jurisdiction of this Court.[7] *See Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2005) (holding that "although the availability of compulsory process is properly considered when witnesses are unwilling, it is less weighty when it has not been alleged or shown that any witness

[7] The district court's presumption that critical witnesses would be unavailable if this case were to be litigated in California federal court, despite the lack of any evidence to support this presumption, serves to highlight the district court's abuse of discretion in failing to allow for limited discovery concerning the identity and location of witnesses. *See infra* Part III.

would be unwilling to testify").[8]

Defendants argue, DACAB 33, that *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), requires no evidentiary showing of what witnesses and evidence are located in the foreign forum. But *Piper* specifically held that "defendants must provide enough information to enable the District Court to balance the parties' interests." *Id.* at 258. The same is true of *Lueck*, on which Defendants rely; there, it was apparent that far more evidence was presented to the district court than here. *See* 236 F.3d at 1146 (describing in detail the submissions of witnesses and evidence available in the foreign forum). Defendants, by contrast, submitted only the conclusory declaration of their own counsel, who demonstrated no personal knowledge of any of the purported witnesses or evidence at issue.[9]

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[8] In their submissions to the district court, Plaintiffs demonstrated that numerous Peruvian witnesses would consent to be available for testimony in the district court action. ER 209-220.

[9] Defendants contend that PlusPetrol, the Argentine company which took over lot 1AB after Defendants ceased their operations in Peru, is an indispensible party and that PlusPetrol witnesses will need to testify in this litigation. DACAB 32. Defendants admit that the district court did not consider this argument, and therefore it has no place in abuse of discretion review. Nonetheless, the argument lacks merit. Indeed, "it has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp. Ltd.*, 498 U.S. 5, 7 (1990); *see also Blecker v. Wolbart*, 167 Cal. App. 3d 1195, 1203 (1985) (holding that contributory wrong-doers, whether labeled joint, successive or concurrent tort-feasors, are jointly and severally liable for the damages suffered by the plaintiffs). Moreover, in this case, Plaintiffs allege that Defendants negligently designed and built the facilities that PlusPetrol operates.

More importantly, the same access problems may exist if this case were litigated in Peru. Many of Defendants' U.S.-based witnesses may no longer be employed by the company, and there is no assurance that Plaintiffs would be able to compel their critical testimony in this action. Furthermore, even though many of the documents and witnesses are controlled by Defendants and *could* be made available in either forum, Plaintiffs demonstrated that Peruvian discovery methods would be insufficient to allow this. For precisely this reason, the *Piper* Court suggested that *forum non conveniens* dismissals might be "subject to the condition that defendant corporations agree to provide the records relevant to the plaintiff's claims." 454 U.S. at 257 n.25. As noted below, the court below failed to do so.

Additionally, as noted previously, the district court clearly overstated the cost of access to witnesses and documents. While Defendants argue that there was no abuse of discretion here, they do not dispute that there was no evidentiary basis for the district court's conclusion that more translation would be required in the

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See ER 29-30, 35. Accordingly, any contamination subsequent to Defendants' sale of Lot 1AB to PlusPetrol is still Defendants' legal responsibility. *See Angeles Chem. Co. v. Spencer & Jones*, 44 Cal. App. 4th 112, 118-20 (1996) (noting that a claim that a contractor negligently caused a condition that led to contamination does not even accrue until the condition is discovered by the plaintiff, and can be brought well after the contractor's negligent act). Therefore, Defendants' contentions that PlusPetrol is an indispensible party and that PlusPetrol witnesses will be needed to testify in this action must be rejected.

United States than in Peru. Nor do they dispute that, in a case such as this, the difference in the cost or ease of traveling to Lima or Iquitos versus Los Angeles would be a marginal amount in the context of the overall costs of litigation.

The factor of enforceability of judgments, which was not even considered by the district court, clearly favors the local forum. Even if access to witnesses and documents favors the foreign forum, at most the balance of private factors is neutral.

2. The public factors do not support ousting Plaintiffs' choice of forum.

In analyzing the public interest factors, the district court determined that two of the factors—choice of law and court congestion—were neutral, while the local interest in the case favored Peru. But, as Plaintiffs noted previously, choice of law favors California, and California also has a strong interest in the case.

As Defendants acknowledge, the district court recognized that California has a significant interest in this case, but still concluded that the local interest factor favored Peru. Plaintiffs believe that, given California's interest, the local interest factor should have been neutral. Nonetheless, even if the district court was correct to weigh this factor in favor of Peru, the admittedly significant California interest in the case means that this factor is only weakly in Peru's favor. Thus, even under the district court's own analysis, this factor did not weigh strongly enough to

displace Plaintiffs' choice of forum.

Furthermore, because the district court should have given more weight to California law in the choice of law factor, any weight given to Peru in the local interest factor should have been balanced out, if not outweighed. Defendants do not disagree that the district court failed to conduct a choice of law analysis. As explained previously, the choice of law analysis favors California. While Defendants now argue that there must be conflicts between Peruvian and California law, they ignore the rule that *they* had the burden of establishing that this factor favored the alternative forum. *See Liquidation Com'n of Banco Intercontinental, S.A. v. Renta*, 530 F.3d 1339, 1356 (11th Cir. 2008). Defendants do not dispute that, before the district court, they failed to make a case that Peruvian law would apply. Thus, as previously argued, the district court should have presumed that California law would apply. Balancing this against a showing that Peru had a slightly stronger local interest in the case, the public factors should have been considered neutral overall. But even if they weighed slightly in favor of the foreign forum, deference to Plaintiffs' choice should have resulted in retention of the case in California.

II. THE DISTRICT COURT ERRED IN FAILING TO IMPOSE CONDITIONS ON ITS DISMISSAL OF PLAINTIFFS' ACTION

The district court's error in dismissing Plaintiffs' action based on *forum non conveniens* is compounded by its refusal to impose certain conditions on the dismissal even though such conditions were clearly required under the circumstances.[10] Indeed, although there is no general rule requiring a district court to impose conditions on a *forum non conveniens* dismissal, under appropriate circumstances, a district court will be required to impose conditions. *See Leetsch v. Freedman*, 260 F.3d 1100, 1104 (9th Cir. 2001) ("A district court can be required to impose conditions if there is a justifiable reason to doubt that a party will cooperate with the foreign forum.").[11] In this case, Plaintiffs presented

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[10] Plaintiffs have not waived this argument; contrary to Defendants' contention, in their opposition papers filed in the district court, Plaintiffs clearly requested that the district court impose various conditions on any dismissal. ER 92-93. Moreover, as Defendants acknowledged, the parties briefed the issue of conditions prior to the entry of the final judgment, CR 54, 57, 61; ER 362-423, and nothing in the district court's judgment indicates that it refused to impose such conditions because they had not been properly raised. The district court entered its judgment without imposing any conditions (apart from Defendants' consent to personal jurisdiction in Peru), and without any explanation of its reasoning. The failure to explain this decision alone requires remand. *See, e.g., Pintos*, 2009 U.S. App. LEXIS 9104 at *21.

[11] Defendants misstate the holding of *Leetsch*. In *Leetsch*, the Ninth Circuit found that conditions were not necessary in that particular case, noting that the plaintiff "has not alleged, nor have appellees indicated . . . that they will evade or obstruct the action" in the foreign forum. 260 F.3d at 1104. This Court declined to adopt an "inflexible test requiring conditional dismissals," *id.*; the plaintiffs there

compelling reasons for the district court to impose four conditions on the dismissal based on *forum non conveniens*.

Here again, Defendants confuse their own arguments with what the district court actually held. Notably, the district court utterly failed to address any of Plaintiffs' proposed conditions other than submission to personal jurisdiction. This alone is abuse of discretion, which would at least require remand to allow the district court to consider these questions. *Pintos*, 2009 U.S. App. LEXIS 9104 at *21.

The most glaring error is the district court's failure to require Defendants to agree that any judgment in Peru be enforceable in California on the same terms as a domestic judgment, even though Plaintiffs presented evidence that Defendants had ceased operations in Peru and had no assets there to satisfy a judgment. ER 401-02. *See Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001) (conditioning dismissal in part on the defendant "consenting to any Argentine judgment against it"); *Stewart v. Dow Chemical Co.*, 865 F.2d 103, 104-

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had urged the adoption of the Fifth Circuit's test that would have required the Court to determine that "failure to impose a return jurisdiction clause was a per se abuse of discretion." *Id.* Although the Ninth Circuit declined to adopt a bright line rule, it cited with approval the Circuit's "willingness" in other cases "to impose conditions." *Id.* The Court also noted that a "district court *can be required* to impose conditions" if there is a reason to doubt a party's cooperation. *Id.* (emphasis added). But it in no way held, as Defendants suggest, that there *must* be such a showing in order for a court to impose conditions. *Id.*

05 (6th Cir. 1989) (dismissing with a condition that the defendant "pay any judgment rendered by a Canadian court, subject to its right to appeal under Canadian law").

Defendants' sole argument against a condition requiring the enforcement of a Peruvian judgment is that California law provides for the enforcement of judgments obtained in foreign countries. Defendants ignore, however, the fact that California law treats foreign judgments very differently from domestic judgments, and provides a host of reasons for refusing to enforce a foreign judgment that are not ordinarily available for a domestic judgment. *Compare* Cal. Code Civ. Proc. § 1710.35 (providing that, generally, any domestic judgment has "the same effect" as a California judgment) *with id.* § 1716 (providing three mandatory and eight discretionary bases on which to refuse recognition of a foreign-country judgment).[12] Defendants suggest that a Peruvian judgment would ordinarily be enforceable unless "fraud by Plaintiffs or their agents" or other "misconduct" occurred, DACAB 44, but this is simply misdirection. Even if enforceability conditions were imposed, fraud by the Plaintiffs would still be a basis for refusing to enforce such a judgment. But, without such conditions, nothing prevents Defendants from arguing that a California court is precluded from enforcing a

[12] Furthermore, these provisions only allow for enforcement of money judgments, not the injunctive relief sought here. *See id.* § 1715(a)(1).

Peruvian judgment because that "judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." *Id.* § 1716(b)(1).

Plaintiffs alerted the district court to the likely problems that the plaintiffs in the Chevron litigation will face in having an Ecuadorian judgment enforced. *See supra* Part I(D)(1); ER 416-417. Plaintiffs in this case could be placed in the same "Catch-22" as the plaintiffs in the *Aguinda* case are facing, where the defendants are now trying to avoid enforcement of a foreign judgment after they were able to have their case dismissed in favor of the foreign forum. There is no reason to let Defendants have it both ways; any Peruvian judgment should be enforced on the same basis as if it were a domestic judgment.

Defendants argue that no waiver of the statute of limitations should be required because they agreed that the statute had been tolled, DACAB 44-45, but actual waiver should still be required because at the moment nothing prevents Defendants from changing their views on tolling (without recourse by Plaintiffs).

The remaining proposed conditions, concerning discovery and translation costs, are necessary to avoid unfair prejudice to Plaintiffs by the shift to a foreign forum. Here, the district court provided no reasoning for rejecting Plaintiffs'

expert's opinion that discovery methods in Peru were inadequate.[13] Given this undisputed evidence and Defendants' refusal to make discovery available in Peru, the real reason for Defendants' insistence on a Peruvian forum may not be convenience but to avoid substantial discovery over their operations.

As for translation, Defendants stretch the record when they suggest that Plaintiffs have conceded that translation would be required in either forum. DACAB 47. Plaintiffs acknowledge that translation of *testimony* will be necessary regardless of the forum, but they sought to have Defendants' *documents* translated from English into Spanish. Without discovery, Plaintiffs have no reason to believe (and Defendants have provided no evidence) that the U.S.-based Defendants have substantial relevant documents in Spanish (which would require translation for use in the U.S.), rather than the vast majority of these documents existing only in English (which will require expensive translation in Peru), as Plaintiffs suspect.

III. PLAINTIFFS SHOWED GOOD CAUSE FOR THEIR REQUEST FOR DISCOVERY PRIOR TO THE COURT'S RULING ON *FORUM NON CONVENIENS*

Plaintiffs demonstrated good cause for the discovery sought prior to the district court's ruling on the *forum non conveniens* motion. ER 325-331. Defendants themselves accept that the district court was presented with conflicting

[13] Defendants' argument that this declaration was submitted in an untimely manner, DACAB 46 n.16, is mystifying and not supported by the district court's orders below.

information pertaining to the adequacy of Peru as an alternate forum and the weight of public and private interest factors. DACAB at 51. In some cases, a district court may rule on a *forum non conveniens* motion without discovery. But in a case such as this, where the court is presented with conflicting information, and where limited discovery would assist the court in its determination of the motion and, indeed, would change the outcome of the determination, refusal to permit such discovery is an abuse of discretion. *See Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983) (affirming that "*forum non conveniens* questions are often an appropriate subject for directed discovery, that a plaintiff ordinarily should not be required to rely on a movant's affidavits on a motion to dismiss, and that a plaintiff should be able to conduct directed discovery on the issues raised by the motion" (citation omitted)).[14]

Cases Defendants cite where discovery was denied prior to a ruling on *forum non conveniens* either fail to stand for the proposition for which they are cited or

[14] While Defendants cite this case for the abuse of discretion standard relevant to a denial of discovery on a *forum non conveniens* motion, it actually supports Plaintiffs' position. *Cheng* suggests that denial of discovery would be an abuse of discretion where there is controverted evidence presented and the information sought could make a difference to the outcome. In *Cheng*, potentially dispositive information was gleaned during oral argument and no other discovery was needed. 708 F.2d at 1412. Here, the district court ruled without the benefit of oral argument, there was controverted information, and information gained through discovery would have made a difference in the outcome.

are not instructive here. In *Nolan v. Boeing Co.*, 919 F.2d 1058, 1067 (5th Cir. 1990), the court denied discovery prior to ruling on *forum non conveniens* as it was sought for the limited purpose of determining collusive joinder. There was no conflicting evidence presented to the court in need of explanation through discovery. *Id.* at 1068 ("Because the appellants offered no evidence that [defendants] manufactured the jurisdictional facts necessary to remove this case to federal court[,] the district court's denial of discovery was proper.").

In *Transunion Corp. v. Pepsico, Inc.*, 811 F.2d 127, 130 (2d Cir. 1987), although the court did prevent *further* discovery, it had *already allowed discovery* when it stayed additional discovery and issued its ruling on *forum non conveniens*.

In *Beekmans v. J.P. Morgan & Co.*, 945 F. Supp. 90, 95 (S.D.N.Y. 1996), the case concerned the narrow issue of publication and circulation of one alleged defamatory memo. The court held that "[d]iscovery on peripheral facts regarding transmission would not change the central facts of this case, and would not alter the convenience of litigating this matter in the Netherlands." *Id.* Here, the conflicting issues presented to the court are numerous, complex, central to the disposition of the motion, and cannot be resolved through affidavits alone.

In *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 64 (S.D. Tex. 1994), the court noted that the goal of the proposed discovery was delay, as evinced from proposed discovery regarding an already known set of facts. There is no such allegation here

where, unlike in *Sequihua*, there are genuine conflicts that require factual development.

In *Sibrian v. Chapel Navigation, Ltd.*, No. Civ.A. 97-1862, 1997 WL 767651 (E.D. La. Dec. 9, 1997), the sole contested issue was the location of a shipping company's base of operations. The court pointed out that plaintiff was using an incorrect definition of "base of operations" such that discovery

> would not change the decision as to whether defendants have . . . a base of operations in the United States. The discovery sought would be futile insofar as the Court's decisions on personal jurisdiction and the *forum non conveniens* issues are concerned.

Id. at *3. Here, the issues for which discovery is requested are more complex and would have bearing on the determination of the *forum non conveniens* issue.

In *Oxley v. Wyeth Lab., Inc.*, No. Civ. A. No. 91-1285, 1992 WL 116308 (E.D. Pa. May 20, 1992), the court noted that the plaintiffs' motion for reconsideration was really an unsupported guise for plaintiffs' desire to conduct *additional* discovery, *id.* at *1-2, a different circumstance from the one posed here where limited discovery—not *additional* discovery—was sought prior to the court's ruling and supported by full and timely briefing.

In *Varnelo v. Eastwind Transp., Ltd.*, No. 02 Civ. 2084, 2003 U.S. Dist. LEXIS 1424 (S.D.N.Y. Feb. 3, 2003), the plaintiff was a Russian national who lived in Russia. The court noted that, regarding "the death of a Russian seaman,

hired in Russia, on board a Liberian ship in Chinese territorial waters, one is hard put to argue the 'lawsuit's bona fide connection to the United States.'" *Id.* at *36. Here, on the contrary, Plaintiffs—including one U.S.-based plaintiff—have sued a U.S.-based company for actions alleged to have been directed from the United States. The basis for dismissal on *forum non conveniens* and related denial of discovery in *Varnelo* is therefore a poor comparison.

A. Contradictory Evidence In The Record As To Adequacy That Necessitates Discovery Is Unchanged With Defendants' Misleading Analysis

As Defendants note, the parties provided the district court with contradictory information regarding the adequacy of Peru as a forum. DACAB 51. Disagreements in the record remain regarding: (1) corruption in the Peruvian legal system, and (2) whether Peruvian law affords remedies for the harms at issue in Plaintiffs' Complaint. *See* PAOB 14-22. Ruling absent discovery in light of these contradictions was a clear abuse of the district court's discretion.

Regarding Plaintiffs' corruption allegations, Defendants point to Plaintiffs' three-page summary of such allegations in Plaintiffs' Opening Brief, but perplexingly argue that this shows a "clear" record that corruption allegations *cannot* render Peru an inadequate forum. DACAB 52. Like Defendants, the district court ignored the need to assess the corruption allegations in light of information that should be obtained through discovery into Defendants' own

knowledge of and participation in corruption in the Peruvian legal system.[15] The court's ruling was an abuse of discretion because discovery was required in order for the court to make an informed evaluation of the adequacy of the Peruvian forum. Faced with contradictory information, it was the district court's duty to allow Plaintiffs the opportunity to take discovery and present this information to the court.

As to discovery requested regarding whether Peruvian law affords remedies for the harms at issue in Plaintiffs' Complaint, it was an abuse of discretion to deny Plaintiffs the opportunity to depose Defendants' Peruvian law expert. Defendants' citation to *Daehan Investment Trust Management Co., Ltd. v. J.P. Morgan Chase Bank*, No. 02 Civ.1379, 2003 WL 21297304, *2 (S.D.N.Y. June 4, 2003), is a mischaracterization of the case and is unhelpful on this point. In *Daehan*, an opinion regarding summary judgment, discovery had proceeded and the court held that "litigants frequently depose expert witnesses, and sometimes those who are

[15] As to Defendants' arguments challenging the good faith of Plaintiffs' corruption allegations, the allegations are specific to Defendants' corporate practice and relate to a corruption investigation of Defendants' operations in Peru. Having reached as far into public records as possible, Plaintiffs made good faith allegations and requested discovery into Defendants' own information regarding these allegations of their corrupt practices in Peru. Plaintiffs contend that not only are their corruption allegations made in good faith, but that their considerable volume amounts to a "powerful showing" of corruption. The district court's dismissal on *forum non conveniens* while refusing to allow discovery on this issue was an abuse of discretion.

giving an opinion concerning foreign law." *Id.* The fact that in this particular case a deposition of this particular expert was unnecessary—*because the moving party no longer requested a deposition*—has no bearing on this case where such a deposition was requested and would have been useful.

Defendants' general statement that Plaintiffs' cases "do not justify allowing *forum non conveniens* discovery in connection with the *adequacy* of a foreign forum" is incorrect. DACAB 52 (emphasis in original) For example, Plaintiffs cited the district court opinion in *Alfadda v. Fenn*, Nos. 89 Civ. 6217, 90 Civ. 4470, 1994 U.S. Dist. LEXIS 18267, *1 (S.D.N.Y. Dec. 22, 1994) *(Alfadda I)*, which held that discovery prior to a ruling on *forum non conveniens* is appropriate without distinction as to whether that discovery related to adequacy or private and public interest factors. Defendants, however, cite the Second Circuit's opinion, four years later, *Alfadda v. Fenn*, 159 F.3d 41, 46 (2d Cir. 1998)*(Alfadda II)*, which notes that "[n]either side challenges Judge McKenna's conclusion that France is an adequate alternative forum." This does not mean that no discovery took place as to adequacy of France as an alternate forum, only that after the district court's ruling on the matter, the issue was no longer in dispute.

In *Herkemij & Partners v. Ross Systems, Inc.*, No. C 04-01674, 2005 U.S. Dist. LEXIS 4128, *1 (N.D. Cal. Feb. 18, 2005), the court granted discovery and, after reviewing the products of discovery, denied the motion to dismiss for *forum*

non conveniens on the basis of the inadequacy of the alternate forum. *Id.* at *2. A safe inference may be drawn that when the defendant "raised doubts as to whether a court in The Netherlands would have jurisdiction over this matter," these doubts were raised through discovery. *Id.* at *1-2.

Defendants' discussion of *Duha v. Agruim*, 448 F.3d *at* 873 n.4, is similarly unpersuasive. In *Duha*, the Sixth Circuit focused on private interest factors and Plaintiffs cite this case as an example of where discovery prior to a ruling on *forum non conveniens* was warranted. This does not translate into a Sixth Circuit holding against *forum non conveniens* discovery as to adequacy.

Finally, Plaintiffs' discovery requests as to adequacy are minimally burdensome; those regarding Defendants' contracts are tailored to discover Defendants' own confidence in the Peruvian legal system. ER 326-328. As noted above, *see supra* Part I(C)(6), Defendants' reliance on *Banco de Seguros del Estado*, 500 F. Supp. 2d at 265, is misplaced. There, the plaintiff argued that there was "a private interest in adjudicating these matters here in light of forum selection clauses in certain prior agreements," *id.*—the plaintiff's argument, and thus the court's opinion, was not related to whether forum selection clauses are relevant to *forum non conveniens* adequacy determinations.

B. Defendants' Analysis Of Case Law Discussing Discovery As To Private And Public Interest Factors Is Incorrect

Defendants argue that dual personal jurisdiction and *forum non conveniens* cases, where discovery has proceeded prior to a ruling, are inapposite. This is not only an incorrect summary of cases cited by Plaintiffs, but Defendants cite no authority supporting their position. First, Defendants offer *Alfadda I at* 1, as such a "dual-issue" case. While there is discussion in the opinion of discovery that would assist resolution of motions "pending seeking dismissal on grounds of lack of *in personam* jurisdiction and *forum non conveniens*," the Second Circuit's description of the case history—in the opinion cited by Defendants—shows that prior to this 1994 opinion, discovery had been granted apparently in relation to the *forum non conveniens* issue alone. *Alfadda II* 159 F.3d *at* 45 ("In 1992, after the Alfadda action was remanded to Judge McKenna, the defendants moved for dismissal of the consolidated actions on the ground of forum non conveniens."); *see* DACAB 52.

With regard to *Aguinda v. Texaco*, 303 F. 3d 470 (2d Cir. 2002), Defendants' argument about a later judge's criticism of the leeway with which Judge Broderick managed the case may relate to the length of time permitted for discovery, but does not lessen *Aguinda* as one of many cases where discovery was appropriate prior to the court's ruling on *forum non conveniens*.

Defendants' characterization of *Vivendi, S.A. v. T-Mobile USA, Inc.*, No. CV6-1524 JLR, 2007 U.S. Dist. LEXIS 28710, *6 (W.D. Wash. April 18, 2007), is also incorrect. At a minimum, the *Vivendi* court allowed discovery prior to ruling on *forum non conveniens* as to the "events and evidence in the United States implicated by this dispute." *Id.* The court further described that it would "consider, inter alia, the physical location of evidence and witnesses, and local interest in the controversy." *Id.* at n.3. Far from providing no "context about the nature of the discovery permitted", DACAB 56 n.18, *Vivendi* supports the precise type of discovery that Plaintiffs seek in this case.

Finally, in *Herkemij & Partners*, the court held that:

> plaintiff's discovery revealed that, to the extent there are any witnesses or documents in the United States related to this action, they are located at defendant's headquarters in Georgia. Neither plaintiff nor defendant are California corporations and plaintiff failed to turn up anything in discovery that would indicate that any material evidence or witnesses are located here.

2005 U.S. Dist. LEXIS 4128 at *2. Again, this is precisely the type of information that Plaintiffs seek—the location of witnesses and documents. Defendants are incorrect that *Herkemij & Partners* cannot "provide any context about the nature of the discovery permitted," in this case. DACAB 56 n.18.

IV. PLAINTIFF AMAZON WATCH HAS STANDING TO ASSERT UNFAIR COMPETITION LAW CLAIMS

Defendants' Federal Rule of Civil Procedure 12(b)(1) motion challenged AW's standing based on the pleadings. Accordingly, the court should accept as true all material allegations of the complaint, and construe the complaint in Plaintiff's favor. *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1189 (9th Cir. 2008). Similarly, in assessing Defendants' motion for failure to state a claim under Rule 12(b)(6), the district court must "accept the plaintiffs' allegations as true and construe them in the light most favorable to plaintiffs." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009) (quoting *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002)).

A. Amazon Watch Has Standing Under the UCL

Proposition 64 requires only that a plaintiff "has suffered injury in fact and has lost money or property as a result of" unfair competition. Cal. Bus. & Prof. Code § 17204 (2004). AW easily meets the UCL's standing requirements. Defendants, however, seek to read into this provision two requirements that conflict with the text and the voters' stated intent: that money lost must be eligible for restitution and that defendants must "proximately cause" the loss. DACAB 58-60. The UCL requires neither.

1. AW suffered injury in fact and lost money or property.

Defendants err in claiming that the UCL requires that lost money or property be eligible for restitution. Proposition 64 did not eliminate claims for injunctive relief by plaintiffs who have suffered the "wrong" kind of monetary loss.

This Court's task is "to construe, not to amend, the statute"; it is "not to insert what has been omitted." *Cal. Fed. Savings & Loan Assn. v. City of Los Angeles*, 11 Cal. 4th 342, 349 (1995). As several courts have held, the words "suffered injury in fact and has lost money or property as a result of" unfair competition simply do not require that the lost property be subject to restitution. *Anderson v. Riverside Chrysler Jeep*, No. E039507, 2007 WL 3317819, *2-4 (Cal. Ct. App. Nov. 8, 2007) (unpublished); *Freeman v. Mattress Gallery*, Nos. E039614, E039615, 2007 WL 3300717, *6-7 (Cal. Ct. App. Nov. 8, 2007) (unpublished). This ends the inquiry. *See In re Tobacco II Cases*, No. S147345, 2009 Cal. LEXIS 4365, *26 (Cal. Sup. Ct. May 18, 2009) (if statutory "language is unambiguous, there is no need for further construction").

Defendants' suggestion that a plaintiff must have a restitution claim in order to have standing also conflicts with the plain language of the UCL's provision that a court may make orders necessary "to prevent . . . unfair competition . . . *or* . . . to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition." Cal. Bus. & Profs. Code § 17203

(emphasis added); *Anderson,* 2007 WL 3317819 at *2 (noting the conflict); *see also Tobacco II*, 2009 Cal. LEXIS 4365 at *22 (noting that UCL plaintiff "may obtain restitution and/*or* injunctive relief" (emphasis added)). In *Tobacco II*, the California Supreme Court explicitly held that "Proposition 64 did not amend the remedies provision of section 17203." 2009 Cal. LEXIS 4365 at *37. That provision has never required a loss redressable through restitution in order to obtain an injunction; prior to Proposition 64, there was no standing requirement at all. Indeed, Defendants' argument turns section 17203 on its head, since injunctive relief is the "primary" remedy, whereas restitution is only "ancillary." *Id.* Defendants thus propose an interpretation under which a plaintiff could only seek the primary remedy intended by the statute if that plaintiff qualified for the ancillary remedy.[16]

Even if, however, the Court were to find it necessary to look beyond the plain meaning of the statute, the Findings and Declarations of Purpose of Proposition 64 further refutes Defendants' position. This Court may not interpret Proposition 64 "in a way that the electorate did not contemplate." *Hodges v.*

[16] More generally, Defendants' argument ignores "the UCL's focus on the defendant's conduct, rather than the plaintiff's damages, in the service of the statute's larger purpose of protecting the general public," 2009 Cal. LEXIS 4365 at *20, and that "Proposition 64 did not propose to curb th[at] broad remedial purpose," *id.* at *30.

Superior Court, 21 Cal. 4th 109, 114 (1999). The voters were told that Proposition 64 looks to Article III principles; section 1(e) states that it was the voters' intent to prohibit lawsuits where no plaintiff "has been injured in fact *under the standing requirements of the United States Constitution*." *Tobacco II*, 2009 Cal. LEXIS 4365 at *52 n.16 (quoting Prop. 64 § 1(e)) (emphasis added); *accord Troyk v. Farmers Group, Inc.*, 171 Cal. App. 4th 1305, 1346 (2009); *Anunziato v. eMachines Inc.*, 402 F. Supp. 2d 1135, 1138-39 (C.D. Cal. 2005) (Proposition 64's purposes met without requirements beyond actual injury).

Article III "injury in fact" does not require injury redressable through restitution. *See* DACAB 61 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Indeed, under Article III, "injury in fact" and the requirement that it must be likely that the injury will be redressed by a favorable decision are wholly separate. *Id.* (quoting *Lujan*, 504 U.S. at 560-61). The UCL does not incorporate the latter. *Troyk*, 171 Cal. App. 4th at 1346. Defendants seek not merely to conflate the two, but to create a more stringent redressability requirement than Article III, precluding standing even where the injury is redressable through means other than restitution. Defendants' position cannot be reconciled with what California voters were told.

Defendants' argument also conflicts with voluminous caselaw. For example, *Southern California Housing Rights Center v. Los Feliz Towers*

Homeowners Association, 426 F. Supp. 2d 1061 (C.D. Cal. 2005), held that a non-profit had standing based on the same kind of allegations AW raises: loss of financial resources and diversion of staff time in investigating the events at issue. *Id.* at 1069. Other cases have explicitly rejected Defendants' position. *See, e.g.*, *G&C Auto Body Inc. v. Geico Gen. Ins. Co.*, No. C06-04898, 2007 WL 4350907, *4 (N.D. Cal. Dec. 12, 2007) (nothing in Proposition 64 suggests that new standing requirements in section 17204 should track requirements for obtaining restitution under section 17203); *White v. Trans Union LLC*, 462 F. Supp. 2d 1079, 1084 (C.D. Cal. 2006) (noting that the UCL statute does not require that losses were product of defendant's wrongful acquisition of plaintiff's property).

Similarly, additional post-Proposition 64 UCL cases have found standing based on losses that did not pass into the defendant's hands and thus did not qualify for restitution. *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.*, 129 Cal. App. 4th 1228, 1240, 1262 (2005) (protestors vandalized plaintiff's home); *Witriol v. LexisNexis Group*, No. C05-02392, 2006 U.S. Dist. Lexis 26670, *18-19 (N.D. Cal. Feb. 10, 2006) (plaintiff incurred costs to repair damage to credit caused by defendants' unauthorized release of private information); *Overstock.com, Inc. v. Gradient Analytics, Inc.*, 151 Cal. App. 4th 688, 716 (2007) (defendant's conduct resulted in decline in value of plaintiff's assets and market capitalization).

Defendants rely on the statement in *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798 (2007), that standing is limited "to individuals who suffer losses of money or property that are eligible for restitution." *Id.* at 817; *see* DACAB 58. This Court has cited *Buckland* with approval. *Walker v. Geico Gen. Ins. Co. ("Walker II")*, 558 F.3d 1025, 1027 (9th Cir. March 10, 2009). Neither case, however, assists Defendants.

Both *Buckland* and *Walker II* were decided before the California Supreme Court held in *Tobacco II* that Proposition 64 did not affect the remedies available under Section 17203. 2009 Cal. LEXIS 4365 at *37. Moreover, as the Court recognized in *Fulford v. Logitech, Inc.*, No. C-08-2041, 2009 WL 1299088, *1 (N.D. Cal. May 8, 2009), "neither *Walker* nor *Buckland* was suggesting that the only type of action that may be brought under the UCL is one for restitution, nor would such a holding be consistent with the language of the UCL." Instead, those decisions used the phrase "eligible for restitution," "to distinguish between the losses claimed in the respective cases before them and the type of loss cognizable under the UCL, specifically, a loss of 'money or property' in which the plaintiff has 'either prior possession or a vested legal interest.'" *Id.* (citing *Walker v. USAA Cas. Ins. Co. ("Walker I")*, 474 F. Supp. 2d 1168, 1172 (E.D. Cal. 2007)); *Walker II*, 558 F.3d at 1027. Indeed, "in both *Walker* and *Buckland*, neither of the respective plaintiffs therein had actually 'lost money or property' of any sort." *Id.*

(citing *Walker I*, 474 F. Supp. 2d at 1173); *Buckland*, 155 Cal. App. 4th at 818 n.11. Under Defendants' interpretation of *Buckland*, the cited proposition is *dicta*.

Given all of this, *Fulford* emphasized that where a plaintiff alleged loss of financial resources or economic loss, courts subsequent to Proposition 64 have found standing, irrespective of the plaintiff's inability to seek restitution. *Id.* (citing *White*, 462 F. Supp. 2d at 1084); *So. Cal. Housing Rights Ctr.*, 426 F. Supp. 2d at 1069. Indeed, if *Buckland* actually meant to require that a plaintiff have a claim for restitution, it is predicated on a non-sequitur. The Court stated that because UCL remedies "are restricted to injunctive relief and restitution," Proposition 64 limits standing to individuals who suffer losses "eligible for restitution." 155 Cal. App. 4th 798, 817 (2007). But that logic would allow standing where a claim was redressable by injunctive relief.[17]

Fulford provides a more persuasive reading of *Buckland* (and *Walker II*) than Defendants do. Regardless, Defendants' interpretation does not survive *Tobacco II*. Given *Tobacco II* and the state appellate authority rejecting *Buckland*'s approach, Defendants' claim that *Buckland* controls under *Ryman v.*

[17] *Kwikset Corp. v. Superior Court*, 171 Cal. App. 4th 645, 654 (2009), and *Citizens of Humanity, LLC v. Costco Wholesale Corp.*, 171 Cal. App. 4th 1, 22 (2009), cite *Buckland* without analysis. The relevant statement in *Kwikset* is *dicta*, since there was no loss at all, 171 Cal. App. 4th at 654, and the court cited *Southern Cal. Housing* with approval, *id.* at 656.

Sears, Roebuck and Co., 505 F.3d 993, 994 (9th Cir. 2007), is mistaken. *See* DACAB 59. In addition, even assuming *Tobacco II* does not resolve the issue, Defendants' interpretation of *Buckland* conflicts with the statute's plain language, which is "convincing evidence" that California's Supreme Court would not follow it. *See Ryman*, 505 F.3d at 995.[18]

2. Plaintiff's injury occurred "as a result of" Defendants' conduct.

The UCL, like Article III, requires only that the injury occur "as a result of" a defendant's illegal acts. Thus, contrary to Defendants' claim, the UCL does not require proximate cause. DACAB 59-60. Under both UCL and Article III caselaw, Plaintiffs have adequately alleged they were injured as a result of Defendants' acts.

a. UCL precedent establishes that Plaintiff's injury occurred "as a result of" Defendants' conduct.

UCL cases have clearly held that the statute recognizes the "organizational drain" standing AW asserts. For example, in *Southern California Housing Rights Center*, an advocacy group for disabled individuals sued a condominium

[18] Denial of review in *Buckland* does not afford it privileged stature. DACAB 59. The California Supreme Court's refusal to change the status of an opinion does not suggest anything about the merits. *See* Cal. Rules of Court 8.1120(d), 8.1125(d); *Bd. of Supervisors v. Local Agency Formation Com'n*, 3 Cal. 4th 903, 925 (1992). The same is true of the Court's denial of a request to publish the *Anderson* and *Freeman* decisions. *Bd. of Supervisors*, 3 Cal. 4th at 925.

association for its failure to provide parking for a disabled owner. 426 F. Supp. 2d at 1063. As noted above, the court found standing based upon allegations indistinguishable from those here. *Id.* at 1069.

Similarly, *Buckland* noted that an organization sufficiently alleges injury in fact where it asserts that "defendants' misconduct compelled it to divert resources from its other programs to helping [persons] affected by the defendants." 155 Cal. App. 4th at 816. That is, "funds expended independently of the litigation to investigate or combat the defendant's misconduct may establish an injury in fact." *Id.* at 816.

Amazon Watch has alleged exactly that. It has specifically alleged that it expended financial resources and staff time to investigate, expose and seek redress for Defendants' unlawful practices. ER 36-40. Accordingly, AW has adequately alleged it has lost and will continue to lose money as a result of Defendants' acts. This has hindered AW's ability to carry out its mission of protecting the indigenous peoples of the Amazon. ER 41, 55. There is no allegation in the complaint that AW undertook any of these activities for the purposes of this litigation. ER 25, 36-41, 55. Instead, AW's actions were part of its longstanding mission. ER 25, 36-41.[19]

[19] Defendants misconstrue *Buckland*. DACAB 60 n.21. There, the plaintiff lacked standing because she expended costs specifically in an attempt to establish

b. The UCL "as a result of" language adopts Article III standards.

The UCL on its face incorporates Article III standards. The term "as a result of" is identical to that used in Article III cases. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (plaintiff must show "injury *as a result of* the putatively illegal conduct.") (emphasis added); *accord Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *United States v. Ensign*, 491 F.3d 1109, 1116-17 (9th Cir. 2007).[20]

Thus, *Southern California Housing Rights Center* and *Buckland* held that Article III standards, in particular, *Havens* and it progeny, control under the UCL. *So. Cal. Housing Rts. Ctr.*, 426 F. Supp. 2d at 1069; *Buckland*, 155 Cal. App. 4th at 814-16. Indeed, in a passage *Buckland* quotes, *Havens* held that the "as a result of" requirement is part of the "injury in fact" test. 455 U.S. at 372; *accord Ensign*, 491 F.3d at 1116-17; *So. Cal. Housing Rts. Ctr.*, 426 F. Supp. 2d at 1069.

Moreover, the California voters stated their intent to incorporate Article III

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standing. 155 Cal. App. 4th at 815-17. Defendants erroneously suggest that plaintiff lacks standing because its decision to help the Achuar was "voluntary." DACAB 60 n.21, 63 n.22. The notion that, when an organization spends money or diverts staff time to combat injuries to its mission, it has merely made a voluntary choice insufficient to confer standing is utterly inconsistent with the UCL and Article III precedent recognizing organizational drain standing.

[20] Although Article III cases sometimes use the words "fairly traceable", *e.g. Lujan*, 504 U.S. at 560, the above cited cases demonstrate these terms are interchangeable.

injury in fact standards. Prop. 64 §1(e). This clearly indicates that they meant the "as a result of" language to adopt Article III standards, not some stricter requirement.[21] As the California Supreme Court recently held, "if the proponents of the initiative had intended some other standard of causation to apply, they would have said so directly instead of using an elliptical reference to federal standing." *Tobacco II*, 2009 Cal. LEXIS 4365 at *52 n.16.[22]

Defendants assume that "as a result of" in the UCL has a different meaning than in Article III, and argue it requires *proximate* cause. DACAB 59-60. That claim ignores not only the above-noted authority, but also other directly inconsistent appellate case law. In *Overstock.com*, the plaintiff's claim that the defendant published falsehoods was actionable under the UCL since the materials were "likely to deceive" potential investors in the plaintiff's stock. 151 Cal. App. 4th at 714. In assessing standing, the Court rejected reliance on proximate cause requirements in cases applying other states' consumer protection laws. *Id.* at 716. The plaintiff had standing since it alleged the publications resulted in diminution in the value of its assets. *Id.* Since the Court found sufficient a showing that investors

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[21] The Supreme Court has elsewhere characterized "injury in fact" and "fairly traceable" as two separate prongs. *See, e.g.*, *Lujan*, 504 U.S. at 560. But the *Havens* and *Lujan* formulations do not differ in any substantive respect.

[22] The court, however, cautioned that its discussion of causation was limited to cases in which a UCL action is based on a fraud theory involving false advertising. *Tobacco II*, 2009 Cal. LEXIS 4365 at *53-54 n.17.

were *likely to be*, not *actually* deceived, the Court was not applying a proximate cause standard.

Defendants cite *Medina v. Safeguard Products, Intl.*, 164 Cal. App. 4th 105, 115 (2008). DACAB 60. But *Medina* refers to "causation"; it does not mention proximate cause. *Id.* That is consistent with Article III; the Supreme Court equates the term "causal connection" with "fairly traceable." DACAB 61 (*quoting Lujan*, 504 U.S. at 560).

Defendants also rely on the statement in a footnote in *Hall v. Time, Inc.*, that "causation" refers to the causation element of negligence. 158 Cal. App. 4th 847, 855 n.2 (2008). But *Hall* provided no basis for that usage. Proposition 64 is not a tort provision. The UCL does not require plaintiffs to meet tort standards. *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266-67 (1992).

Even if "as a result of" refers to tort causation, it does not mean "proximate cause." That analysis has two parts. *Jackson v. Ryder Truck Rental Inc.,* 16 Cal. App. 4th 1830, 1847 (1993). The first asks whether conduct was an *actual* cause, *i.e.* a "substantial factor" in the harm. *Id.* The second asks whether policy considerations limit responsibility. *Id.* "[A]s a result of" does not include the latter. *See Troyk*, 171 Cal. App. 4th at 1349 n.33 (no legislative intent in Proposition 64 that requires cause standard more stringent than "substantial factor"); *see also Tobacco II*, 2009 Cal. LEXIS 4365 at *56 ("substantial factor"

sufficient in context of UCL fraud theory).[23] "But-for" causation meets the substantial factor test. *See Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 969 (1997). Defendants' actions are a but-for cause of AW's injury. Regardless, plaintiffs can meet a proximate cause test; defendants suggest no policy concerns that could limit liability.[24]

c. Amazon Watch has standing under Article III standards.

Amazon Watch's expenditure of funds and staff time satisfies the Article III requirement that a plaintiff suffer an injury in fact as a result of the defendant's acts. Amazon Watch therefore meets both the UCL standing requirement and the first requirement of Article III. Defendants' argument is fundamentally inconsistent with Supreme Court and Ninth Circuit precedent, involving facts indistinguishable from those here. DACAB 61-62.

In *Havens*, a nonprofit fair housing organization challenged "racial steering" at two apartment complexes. 455 U.S. at 366-69. The organization had Article III standing, because it alleged it had diverted resources from providing counseling and referral services to identifying and counteracting the defendant's actions. *Id.*

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[23] The Court did not require proximate cause even though Defendants, (represented by the same counsel as represent Defendants here), argued for that standard. *Tobacco II*, Respondents' Answer Brief on the Merits at 23-24, *available at* http://www.17200blog.com/briefs/Tobacco/AnswerBriefMerits.pdf.

[24] Contrary to Defendants' claim, DACAB 60, Plaintiff made this same argument below. ER 361.

at 379.

Applying *Havens*, this Court has held that an organization suffered Article III injury in fact if a defendant's actions frustrate its mission and it made non-litigation related diversions of resources to counter these actions. *Smith v. Pacific Properties & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004); *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002). In *Smith*, this Court noted that because the organization's purpose was to eliminate discrimination by ensuring compliance with laws designed to provide access to housing, *any* violation of the Fair Housing Amendments Act would frustrate its mission. 358 F.3d at 1105. Moreover, allegations that the organization, in order to monitor and educate the public concerning the defendant's violations, had and would continue to divert resources from other efforts to promote compliance with accessibility laws and to benefit the disabled community are sufficient to meet the diversion of resources requirement. *Id.* at 1105-06.

Similarly, *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, held that several organizations had standing to challenge the defendant's failure to fully translate immigration hearings as violative of the rights of non-English speaking immigrants. 959 F.2d 742, 748 (9th Cir. 1991). This Court noted that the organizations' mission was to assist refugees in obtaining asylum, and held that "[t]he allegation that the EOIR's policy frustrates these goals and

requires the organizations to expend resources in representing clients they otherwise would spend in other ways is enough to establish standing." *Id.* at 748.

In short, the organizational drain of non-litigation costs provides standing, while that of litigation costs does not. *See Smith*, 358 F.3d at 1105; *Walker v. City of Lakewood*, 272 F.3d 1114, 1124 n.3 (9th Cir. 2001). This, of course, is the same distinction *Buckland* drew under the UCL, citing *Walker* and *Fair Housing of Marin*. 155 Cal. App. 4th at 815. AW's efforts specifically directed to redressing the injuries of particular victims of the Defendants' actions cannot be distinguished from those found sufficient in these cases. *See* ER 36-37, 40.

Defendants ignore these cases and urge this Court to look to other jurisdictions. DACAB 61-62. But even those cases do not support Defendants' position. *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268 (D.C. Cir. 1994), held that the plaintiff *had* standing, based upon the same organizational drain principles upon which AW relies. *Id.* at 1276-77. There, the plaintiff alleged that the defendant's discrimination made the plaintiff's task more difficult, since it *might* increase the number of people in need of the kind of counseling the plaintiff provided, or *may* have reduced the effectiveness of the plaintiff's outreach. *Id.* Here, the allegations are far stronger. AW has alleged that Defendants' acts have *actually* hampered its efforts to protect the environment and rights of Amazon residents, and that it *actually* expended costs to help the

Achuar fight Defendants. ER 25, 39, 41.

Indeed, Defendants concede that standing exists under *Fair Employment Council* where a defendant's acts injure individuals who then use the organization's counseling services. DACAB 61. Defendants posit no meaningful distinction between such services and the advocacy services Amazon Watch provides to affected residents of the Amazon in general and to the Achuar. Instead, Defendants claim that all of AW's injuries involve expenses incurred in investigating Defendants' conduct. That is demonstrably untrue. ER 36-40. Regardless, this Court has held that non-litigation investigation can confer standing. *Fair Housing of Marin*, 285 F.3d at 905 (finding standing where plaintiff's "resources were diverted to *investigating* and other efforts to counteract [defendant's] discrimination above and beyond litigation.") (emphasis added); *accord Buckland*, 155 Cal. App. 4th at 815 (collecting cases from various circuits).[25]

B. Amazon Watch Meets the Redressability Requirement of Article III

Defendants' argument that Plaintiff has not alleged an injury in fact that is fairly traceable to Defendants' conduct fails for the reasons noted above.

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[25] *Project Sentinel v. Evergreen Ridge Apartments* noted that an organization establishes Article III injury where it has devoted additional resources to some area of its effort in order to counteract illegal action, independent of the lawsuit. 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999). Plaintiffs have alleged that here.

Defendants fare no better when they assert that AW lacks Article III standing because its injury is not redressable. DACAB 62. Plaintiffs need only show that it is "likely" that the injury will be redressed. *Lujan*, 504 U.S. at 560. The UCL provides for a variety of injunctive and other relief likely to redress AW's harms. *See generally* Cal. Bus. & Profs. Code § 17203.

Defendants may be required to inform the Achuar of the dangers of its pollution and ways to avoid them. *See Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 970-73 (1992). Such relief would remedy AW's injuries because defendants concealed their illegal acts and their effects from the Achuar, and AW spent resources to expose them. ER 34, 36.

Defendants may also be required to investigate pollution levels and health effects. This would relieve AW's burden of investigating the problem.

Additionally, a court may require Defendants to remedy the underlying violations. In *El Rescate Legal Services*, the organization had standing where the relief sought was an injunction requiring interpretation of the immigration hearings. 959 F.2d at 748; *accord Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 901 (2d Cir. 1993) (organization's standing based on expenditures to counteract advertisements; court upheld injunction prohibiting defendants from using advertising indicating racial preference). Thus, AW has standing to seek an injunction compelling Defendants to clean up the grave pollution they have caused.

This would redress AW's injuries; indeed it is a primary focus of Plaintiff's efforts. *See, e.g.*, ER 25.

Likewise, AW is entitled to a declaration that Defendants violated the legal rights of the Achuar.[26] This would remedy AW's injuries, since it expended resources to prove to the public what Defendants did, and a declaratory judgment would have precisely that effect. Last, a court can order medical monitoring.

Defendants claim that because damages are not available under the UCL, no relief would redress AW's past expenditures. DACAB 62-63. But as *El Rescate Legal Services* demonstrates, Defendants err in suggesting that the only way to redress organizational drain is to restore spent money. Moreover, because the above noted remedies would provide exactly the results AW sought in expending resources, they would not provide mere "psychic satisfaction." DACAB 62 (quoting *Steel Co. v. Citizens for a Better Environment*, 533 U.S. 83, 107 (1998)). Under Defendants' approach, a UCL case based on organizational drain standing could never be heard in federal court, contrary to *Southern California Housing Rights Center.*

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[26] The UCL provides for declaratory relief. *See, e.g., Bell v. Blue Cross of California*, 131 Cal. App. 4th 211, 214, 221 (2005); *AICCO, Inc. v. Ins. Co. of N. Am.*, 90 Cal. App. 4th 579, 584-98 (2001); *see generally City of Cotati v. Cashman*, 29 Cal. 4th 69, 79 (2002) (declaratory relief available where parties fundamentally disagree over meaning of legislation).

Moreover, since a harm to an organization's non-economic interests, such as an interest in promoting open housing, (or the rights of Amazon residents), is cognizable for Article III purposes, *Havens*, 455 U.S. at 379 n.20, AW need only show that its non-economic injuries are likely to be redressed.[27]

Regardless, the above-noted relief would avoid imminent future injury. Like the plaintiff in *Smith*, 358 F.3d at 1105, AW will continue to divert resources to educate the public, Defendants' shareholders, and the Achuar about Defendants' pollution. *See e.g.* ER 55; *see also* ER 317-18. AW has standing to seek remedies that would mitigate the need to do so.[28]

C. Amazon Watch Has Stated A Claim Upon Which Relief May Be Granted

Defendants largely repeat their erroneous assertion that AW is not entitled to any remedy. DACAB 63-64. That argument fails for the reasons noted above, *supra* Parts IV(A)-(B).

Defendants also suggest that AW's ongoing expenditures cannot support

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[27] The UCL requires a loss of money or property, but as noted above, the UCL standing provision has no redressability requirement. Accordingly, the lost money or property itself need not be redressed.

[28] Defendants suggest that such future injury cannot provide standing because any expenditures would be voluntary. DACAB 63, n.22, *citing Indiana Democratic Party v. Rokita,* 458 F. Supp. 2d 775, 816 (S.D. Ind. 2006). But this passage in *Rokita* relies entirely on the discussion in *Fair Employment Council of Greater Wash.*, 28 F.3d at 1276, that Defendants cite. DACAB 61. It is inapposite for the reasons noted above.

relief because, they assert, AW has filed this lawsuit as the means to continue its investigation, and litigation expenses cannot form the basis of a claim. DACAB 64. This erroneously presumes that AW has ceased non-litigation efforts on the Achuars' behalf. Nothing in the complaint supports that assumption, *e.g.* ER 55, and nothing could be further from the truth. ER 317-318.

D. If Plaintiff Has Not Adequately Alleged Standing, Plaintiff Seeks Leave to Amend the Complaint

Plaintiff has adequately alleged facts sufficient to confer UCL and Article III standing. If, however, this Court were to conclude otherwise, AW should be granted leave to amend the complaint. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Smith*, 358 F.3d at 1106.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' appeal and deny Defendants' cross-appeal.

Dated: June 5, 2009

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 13, 932 words, as calculated by the word processing program employed to prepare this brief.

Dated: June 5, 2009

Respectfully submitted,

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PROOF OF SERVICE

I, Liz Gonzalez, hereby certify that on June 5, 2009, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, for delivery within 3 calendar days to the following non-CM/ECF participants:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Venice, California on June 5, 2009.

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