IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANAJAI CALCAÑO PALLANO, et. al.,	)	CONSOLIDATED
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	C.A. No. N09C-11-021 JRJ
THE AES CORPORATION, et. al.,	)	
	)	
Defendants.	)	

SHERIANA ESTHER DE LA CRUZ MONEGRO, et. al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	C.A. No. N10C-04-054 JRJ
THE AES CORPORATION, et. al.,	)	
	)	
Defendants.	)	

UPON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINTS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

GRANTED IN PART/DENIED IN PART

Submitted: April 13, 2011
Decided: July 15, 2011

Ian Connor Bifferato, David W. deBruin, Kevin G. Collins, and J. Zachary Haupt of Bifferator LLC; OF COUNSEL: Steven J. Phillips (Argued), Diane Paolicelli, and Philip Monier III of Levy Phillips & Konigsberg, LLP, New York, New York; Robert T. Vance, Jr., Giovanni O. Campbell of Law Offices of Robert T. Vance, Jr., Philadelphia, Pennsylvania, Attorney for Plaintiffs.

Timothy Jay Houseal and William E. Gamgort of Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware; OF COUNSEL: Dane H. Butswinkas (Argued), R. Hackney Wiegmann, John M. McNichols, and Christopher R. Hart of Williams & Connolly, LLP, Washington, D.C., Attorneys for Defendants.

JURDEN, J.

INTRODUCTION

This litigation arises out of the alleged unlawful dumping of toxic waste in the Dominican Republic by The AES Corporation ("AES") and four of its wholly owned subsidiaries, AES Atlantis, Inc.; AES Puerto Rico, LP; AES Puerto Rico, Inc.; and AES Puerto Rico Services, Inc. (collectively "Defendants"). On November 4, 2009, several residents of the Dominican Republic initiated an action (the "Pallano Action") against Defendants, alleging that their conduct caused, and continues to cause, severe personal injuries, including death.[1] On April 8, 2010, a second action (the "Monegro Action") was filed.[2] Plaintiffs[3] assert ten causes of action: Negligence, Negligence *per se*, Nuisance, Fraud and Fraudulent Misrepresentation, Abnormally Dangerous and/or Ultra Hazardous Activities, Battery, Intentional Infliction of Emotional Distress, Violation of International Law and Human Rights, Willful and Wanton Misconduct; and Wrongful Death.

On May 17, 2010, the Court, pursuant to Superior Court Civil Rule 42(a), consolidated the Pallano and Monegro Actions. Defendants filed Partial Motions to Dismiss the Pallano and Monegro Complaints (collectively "Complaints"), contending that: (1) many of the claims were barred by the statute of limitations; (2) several claims

[1] Named plaintiffs are: Anajai Calcaño, individually, and as parent and natural guardian of Maximiliano Calcaño; Maribel Mercedes, Individually, and as personal representative of the estate of "Baby Mercedes;" Maribel Andujar Medina, individually, and as parent and natural guardian of Isael Altagracia Andujar; Rosa Maria Andujar, individually, and as personal representative of the estate of "Baby Olmos;" Maria Virgen Deogracia, individually, and as parent and natural guardian of Estanlyn Garcia Deogracia; and Amparo Andujar. Pallano Pl.'s Compl. (hereinafter "P. Pl.'s Compl.")

[2] Plaintiffs in the Monegro Action are: Sheriana Esther de la Cruz Monegro and Elvi Aquile Hidalgo Calcano, each individually, and as parents and natural guardians of Ezequiel Hidalgo de la Cruz; Esperanza Jones Metivier, individually, and as personal representative of the Estate of "Baby Metivier;" Yordeli Salome Suarez, individually, and as mother and natural guardian of "Joandry Calcano Salome;" Santa Fermin de Leon, individually, and as personal representative of the Estate of "Baby de Leon;" and Lidia Carolina Espino de la Cruz, individually, and as personal representative of the Estate of "Baby de la Cruz." All Monegro Plaintiffs are residents of the Samaná province. Monegro Pl.'s Compl. ¶¶ 17-21 (hereinafter "M. Pl.'s Compl.").

[3] Unless otherwise indicated, "Plaintiffs" refers to all claimants in both the Pallano and Monegro Actions.

brought by all of the Plaintiffs failed to state a claim under Dominican and international law, and (3) Plaintiffs could not recover punitive damages. After oral argument, this Court held that Plaintiffs failed to sufficiently plead: (1) a claim for fraud, and (2) a fraudulent concealment defense to Defendants' statute of limitations affirmative defense. Thereafter, Plaintiffs filed their First Amended Complaints, which were followed by Defendants' Partial Motions to Dismiss the First Amended Complaints.

Upon review of the pleadings and briefs, and for the reasons set forth in this Opinion, Defendants' Motions to Dismiss are **GRANTED IN PART AND DENIED IN PART.**

FACTUAL BACKGROUND

Defendants are power companies which operate fossil fuel burning plants[4] that produce "vast quantities of solid waste known as coal ash and fly ash," ("Coal Ash Waste").[5] Prior to October 2003, Defendants constructed a coal-fired power plant in Guayama, Puerto Rico.[6] According to Plaintiffs, Puerto Rican officials required Defendants to transport and dispose of the Coal Ash Waste outside of Puerto Rico "due to the serious health hazards associated with its presence...."[7] As a result, from October 2003 until March 2004, Defendants dumped thousands of tons of Coal Ash Waste at the Arroyo Barril port in the Samaná Province, which is located near the Plaintiffs' homes, workplaces, and recreational sites.[8]

[4] P. Pl.'s Compl. ¶ 4.
[5] *Id*. at ¶ 5.
[6] *Id*. at ¶ 7.
[7] *Id*. at ¶ 39. Plaintiffs allege that "this off-site disposal mandate was included as a material provision in the Power Purchase Agreement entered into between AES Puerto Rico, L.P. and the Puerto Rico Electric Power Authority." *Id*. at ¶ 40.
[8] *Id*. at ¶ 11.

Coal Ash Waste is comprised of arsenic, cadmium, nickel, beryllium, chromium, lead, mercury and vanadium."[9] Plaintiffs allege that it is "well known" that these substances cause birth defects and "other adverse reproductive outcomes, including cancer of the lung, kidney, bladder and skin, as well as respiratory illnesses and other disorders."[10] However, according to Plaintiffs, Defendants represented to residents and Dominican government officials that Coal Ash Waste was not a harmful substance, and that it could even be considered a "beneficial product that might be profitably utilized by the residents of Samaná as construction material."[11] Plaintiffs claim that Defendants' misrepresentations were intended to lull the citizens of Samaná, including Plaintiffs, "into the belief that they were not at risk, thereby discouraging them from attempting any preventative measures when in fact, they were and continue to be at grave risk."[12] In addition, Plaintiffs claim Defendants bribed local Dominican officials so that they could dispose of their Coal Ash Waste.[13] Specifically, Plaintiffs claim that in the fall of 2003, Roger Fina, an agent of Defendants, met with Rafael Emilio Betances, deputy in the Dominican Republic Congress for the Monte Cristi district, several times,[14] and that Fina offered to pay Betances "One Million Pesos in exchange for his support of the transport and dumping plans of the Coal Ash Waste at sites within the Dominican Republic, and his pledge not to interrupt the barges unloading the Coal Ash Waste."[15]

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[9] *Id*. at ¶ 6.
[10] *Id*.
[11] *Id*. at ¶14. Despite these representations, Plaintiffs contend Defendants "were well aware, or alternatively should have been aware, that this Coal Ash Waste was extremely harmful to human beings, was particularly harmful to children, and was even more harmful to pregnant women and their unborn children." *Id*. at ¶ 8
[12] *Id*. at ¶ 15.
[13] *Id*. at ¶ 13.
[14] Plaintiffs claim Fina met Betances at the airport, at the law offices of Aristides Lopez, in a car, and at Mr. Betance's home. *Id*. ¶ 13.
[15] *Id*. at ¶13.

Plaintiffs allege that Defendants' misconduct exposed Plaintiffs "to reproductive, carcinogenic and other toxins in the Coal Ash Waste, either directly or *in utero*, and as a result [they] suffered catastrophic injuries, including grotesque malformations and death."[16] In addition, Plaintiffs allege that their exposure to these harmful substances has created an elevated risk for the contraction of any of the following diseases: lung cancer, bladder cancer, kidney cancer, skin cancer, respiratory ailments and other disorders, which may occur in the future.[17] As a result, Plaintiffs will require "periodic medical examinations" so that these illnesses can be detected at an early stage to improve the chances of curing them.[18]

Plaintiffs seek compensatory damages and equitable relief for "physical pain and suffering; permanent disability and disfigurement; mental, psychological and emotional injury; fear of contracting cancer or other disease; risk of contracting cancer or other disease; loss of the enjoyment of life's pleasures; inability to participate in usual activities; lost income and earning opportunities; past, present and future medical

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[16] *Id*. at ¶16. Specifically, the Pallano Plaintiffs alleged the following physical injuries Plaintiff, Maximiliano Calcaño, was born on or about November 24, 2007, with multiple birth defects, including missing limbs, and died shortly on May 21, 2009 as a result of a failed "Siamese twinning." *Id*. at ¶18. It is alleged that Plaintiff Isael Altagracia Andujar was born on December 18, 2005 with "severe gastrointestinal anomalies, among other injuries." *Id*. at ¶ 19. Isael's claim was brought by Maribel Andujar Medina, mother and natural guardian. Id. "Baby Olmos," was "born on…with severe gastrointestinal deformities and other birth defects, and died shortly thereafter." *Id*. at ¶ 20. Plaintiff Estanlyn Garcia Deogracia was born "with birth defects, including bony anomalies and an absent kidney." *Id*. at ¶ 21. Finally, Plaintiff Amparo Andujar, claims to have become pregnant in early 2008, and after approximately four months of pregnancy, she underwent a therapeautic abortion because her physician believed that the "fetus exhibited several cranial and/or other anomalies and was no longer viable." *Id*. at ¶ 22.
The Mongero Plaintiffs alleged the following physical injuries: Plaintiff Ezequiel Hidalgo de la Cruz with "his intestines outside of his body." M. Compl. ¶ 17. Baby Metivier was born with amencephalia and died shortly after his birth. *Id*. at ¶18. Joandry Calcano Salome was born "with cranial deformities and severe cleft palate, among other injuries." *Id*. at ¶ 19. "Baby de Leon was born with amencephalia and died shortly after birth on October 15, 2009." *Id*. at ¶ 20. "Baby de la Cruz was born with myelomeningocele and died shortly thereafter on November 14, 2007." *Id*. at ¶ 21.
[17] Pl.'s Compl. ¶ 61.
[18] *Id*.

expenses; other pecuniary loss; moral damages; and other damages as allowed by law."[19] In addition, Plaintiffs seek punitive damages "in order to punish Defendants for their willful, wanton, intentional and/or reckless misconduct and to deter Defendants and others similarly situated from engaging in like misconduct in the future."[20]

Based on Defendants' disposal of Coal Ash Waste and Plaintiffs' alleged resulting injuries, Plaintiffs assert claims of negligence, negligence *per se*, nuisance, abnormally dangerous and/or ultra hazardous activities, battery, intentional infliction of emotional distress, violation of international law and human rights, willful and wanton misconduct; and wrongful death. Plaintiffs further allege that Defendants knowingly made false misrepresentations to citizens, including Plaintiffs, and those misrepresentations constitute fraud and fraudulent misrepresentation.[21]

ISSUES PRESENTED

Defendants' Motions require the Court to consider whether: (1) Plaintiffs' claims are barred by the applicable statute of limitations; (2) Counts I-VII and IX-X state claims upon which relief can be granted under the governing law; (3) Plaintiffs' Complaints state a viable claim for violations of international law and human rights; and (4) Plaintiffs may recover punitive damages.

STANDARD OF REVIEW

When deciding a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(6), the Court must accept all well-pleaded factual allegations in the complaint as

[19] *Id*. at ¶ 63.
[20] *Id*. at ¶66.
[21] *Id.* at ¶ 93.

true, and draw all reasonable inferences in favor of the non-moving party.[22] An allegation is considered well pled "if it puts the opposing party on notice of the claim being brought against it."[23] The complaint may only be dismissed if "it appears to a certainty that the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible to proof."[24]

DISCUSSION

I. WHETHER PLAINTIFFS' CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

In their Motions to Dismiss, Defendants argue that the Pallano Plaintiffs' claims, except for those of Baby Mercedes and her mother, Maribel Mercedes, are barred by the statute of limitations, and therefore, should be dismissed.[25] In addition, with respect to the Monegro Plaintiffs, Defendants contend that all claims asserted by Baby de la Cruz and Lidia Carolina Espino de la Cruz are untimely,[26] and the claims based in negligence and negligence *per se* (Counts I and II) brought by Eziquiel Hidalgo de la Cruz, his mother Sheriana Esther de la Cruz Monegro, and his father Elvi Aquile Hidalgo Calcano, are untimely.[27]

The parties dispute which statute of limitations applies. Defendants assert that the limitations period applicable to Plaintiffs' claims is governed by the Dominican Civil

[22] *See, e.g., Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[23] *Precision Air, Inc. v. Standard Chlorine of Del., Inc*., 654 A.2d 403, 406 (Del. 1995).
[24] *Klein v. Sunbeam Corp*., 47 Del. 536, 538 (Del. 1952).
[25] Pallano Def.'s Op. Br., at 6-7 (Feb. 8, 2010).
[26] Monegro Def.'s Op. Br., at 7 (Jun. 21, 2010). Defendants also assert that Plaintiffs' claims would be untimely under Delaware's two-year statute of limitations period. *Id*. at 8, n. 7.
[27] Monegro Def.'s Op. Br., at 8 (Jun. 21, 2010).

Code.[28] Plaintiffs contend that this case is governed by the limitations period provided in the Dominican Criminal Code, or alternatively, by the Delaware Code.[29]

a. Choice-of-Law Analysis

Defendants contend that pursuant to Delaware's borrowing statute, 10 *Del. C.* § 8121, the Court is required to apply the applicable statute of limitations under the laws of the Dominican Republic, because that is the jurisdiction where Plaintiffs' causes of action arose. Delaware's borrowing statute, 10 *Del. C.* § 8121, provides:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration *of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose*…

Delaware's borrowing statute is designed to prevent plaintiffs from forum shopping.[30] The statute's purpose is to prevent a non-resident from bringing a foreign cause of action, which is precluded by that jurisdiction's statute of limitations, in Delaware where the statute of limitations period is longer.[31] In essence, one who brings a cause of action that occurred in a foreign jurisdiction must also bring the foreign statute of limitations period if it is shorter than Delaware's.[32]

Delaware's borrowing statute is implicated in this case because Plaintiffs' injuries and Defendants' alleged misconduct occurred in the Dominican Republic, thus, this cause of action arose in the Dominican Republic.[33] Therefore, the Court will apply "whichever

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[28] Pallano Def.'s Op. Br., at 5 (Feb. 8, 2010).
[29] P. Pl.'s Ans. Br., at 13 (Mar. 17, 2010).
[30] *Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Company, Inc*., 866 A.2d 1, 16 (Del. 2005) (citing, *Pack v. Beech Aircraft Corp*., 132 A.2d 54, 58 (Del. 1957)).
[31] *Id*.
[32] *Id*. at 17.
[33] *May v. Remington Arms Co., Inc*., 2005 WL 2155229 (Del. Super. Ct. Aug. 31, 2005) (holding that Plaintiff's cause of action arose either where the defective product was manufactured-New York, where Plaintiff bought it-North Carolina, or where he was injured-again, North Carolina. Plaintiff's cause of action

is shorter, the time limited by the law of this State, or the time limited by the law of" the Dominican Republic.

In Delaware, the statute of limitations for personal injury and wrongful death actions is two years.[34] The applicable Dominican statute of limitations period is disputed by the parties' Dominican law experts.

Due to the experts' conflicting opinions regarding several key aspects of Dominican law, the Court determined that it was necessary to appoint an independent expert,[35] Professor Keith S. Rosenn from the University of Miami School of law, to assist the Court in resolving pending legal issues in this action.[36]

Defendants' Dominican law experts, Reynaldo Ramos Morel ("Ramos") and Marcos Peña Rodriguez ("Peña"), opine that the Dominican Civil Code required Plaintiffs to file their claims alleging intentional wrongdoing, (Counts II through X) within one year, and their negligence claim (Count I) within six months.[37]

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did not arise here. Delaware's only tie to what happened is the fact that Defendants are incorporated, and Plaintiffs filed suit here).

[34] 10 *Del. C*. §§ 8107 and 8119.

[35] Pallano, D.I. 56, Letter November 5, 2010. Pursuant to Delaware Uniform Rule of Evidence 706, the Court ordered "the parties to show cause why it should not appoint a Dominican law expert to assist the Court in interpreting the relevant Dominican law…." *Id*. Neither party objected to the Court appointing an expert. Furthermore, although Professor Rosenn's opinion significantly limits Plaintiffs' case, they have waived their right to challenge Professor Rosenn's opinion. Office Conf. May 26, 2011, Tr. 5: 1-5.

[36] *See* Order Jan. 24, 2011. Plaintiffs argue that Defendants' Motions should be denied "outright" because of their failure to satisfy their burden under Superior Court Civil Rule 44.1 of demonstrating that Dominican law applies, and of proving the law of the Dominican Republic. However, the Court's decision to obtain an independent expert has rendered this issue moot.

[37] Pallano Def.'s Op. Br. (Feb. 8, 2010), Ex. A, Affidavit of Jeffrey Schmidt ("Schmidt Aff.") translating Ex. A, tab 1 (Affidavit of Ramos ("Ramos Aff.") ¶¶ 9-16, Ex. A, tab 2 (Dom. Civ. Code Arts. 1382 & 1383); Affidavit of Peña ("Peña Aff.") ¶¶ 9-12. The Dominican Civil Code provides for only two causes of action for personal injuries: (1) a claim based on intentional wrongdoing pursuant to Article 1382 of the Code; and (2) a claim for negligent or imprudent conduct under Article 1383 of the Code. Id. Claims arising under Article 1382 are subject to a one-year statute of limitations, while claims brought pursuant to Article 1383 must be filed within six-months. *Id*. Defendants' assert that Counts II through X of The Complaints are analogous to a claim under Article 1382 of the Dominican Code, which are subject to a one-year statute of limitations, and Count I, Plaintiffs' negligence claim, is analogous to a claim under 1383 of the Code, which is subject to a six months statute of limitations. *Id*.

Plaintiffs' expert, Ricardo Estevez Lavandier, opines that Plaintiffs' claims, which "are…viable under [Dominican] Environmental Law 64-00, a statute enacted to provide damages for injuries caused by environmental harms, and various provisions under the Dominican Penal Code," are subject to the limitations periods contained in these provisions.[38] Plaintiffs' experts conclude that the Complaints allege civil claims based upon several provisions of the Dominican Penal Code.[39] According to Plaintiffs' experts, "[s]ome of these Articles provide for statute of limitations for civil actions based thereon, ranging from 2 years to as many as ten years."[40] Plaintiffs assert that the longer statute of limitations periods contained in the Dominican Penal Code may be used even without an accompanying criminal action.[41] Defendants' Dominican law experts disagree, and opine that Plaintiffs cannot "borrow" the Penal Code's longer statute of limitations without a parallel pending criminal case, regardless of whether Defendants' conduct constitutes a crime under Dominican law. [42]

According to the court appointed expert, Professor Rosenn, all of Plaintiffs' claims are subject to the limitations period contained in the Dominican *Civil* Code. Professor Rosenn rejects Plaintiffs' Dominican law experts' conclusion that the

[38] Pallano Pl.'s Ans. Br., at 16 (Mar. 17, 2010), Declaration of Ricardo Estevez Lavandier ("Lavandier Decl."), ¶¶ V(j) and X(A.3), Ex. 10. Alternatively, Plaintiffs take the position that "this Court need not determine which of the available limitations periods under Dominican law applies to each of Plaintiffs' claim, since none of the applicable limitations periods begins to run until discovery of the cause and the source of the injury." This contention is addressed below in the Court's analysis of Plaintiffs' contention that the statute of limitations was tolled.

[39] Specifically, Article 301, which deals with poisoning; Articles 295 and 304, which deals with voluntary homicide; and Article 209, which covers assault and battery. P. Pl.'s Ans. Br., at 16 (Mar. 17, 2010), Castillo Decl. § IV(b), Ex. 11.

[40] Pallano. Pl.'s Ans., at 16 (Mar. 17, 2010) Castillo Decl. § IV(b), Ex. 11.; Lavandier Decl., ¶ V, Ex. 10.

[41] Pallano. Pl.'s Ans., at 16 (Mar. 17, 2010). Plaintiffs rely upon statements made by the Attorney General of the Dominican Republic in connection with an action brought by the Dominican government in the United States District Court for the Eastern District of Virginia. ("Virginia Action"). *Id.*

[42] Pallano Def.'s Rep. Br. at 10 (April 6, 2010). citing, Ramos Supp. Aff. at ¶¶ 15-18 & Ex. 2 (Pena Supp. Aff.) at ¶9.

Dominican Code of Criminal Procedure's limitations period applies in this case.[43] According to Professor Rosenn, the fact that Defendants' agents could conceivably be charged with a criminal offense is not a basis to "borrow" the criminal statutory period.[44] Professor Rosenn explains that "[w]hen the civil action is either brought jointly with a criminal action or filed separately from the criminal action in a civil court," the Criminal Code provides the statute of limitations because the "civil action is either tried jointly with the criminal action, or, if filed separately, stayed pending the outcome of the criminal action."[45] Professor Rosenn opines that:

> [w]here there is no criminal action, as in this case, it is wholly illogical to adopt the limitations period for any crime that might conceivably have been charged if the factual allegations in the civil complaint can be proven with lawfully obtained evidence and the Dominican Republic could have obtained jurisdiction over the persons who might have been accused.[46]

Professor Rosenn also rejects Plaintiffs' experts' conclusion that Environmental Law 64-00, which does not provide a limitations period for civil claims, has a longer limitations period than that contained in the Civil Code. Professor Rosenn opines that Articles 2271 and 2272 of the Code apply.[47] Article 2271 of the Code provides for a six month statute of limitations period for a quasi-delictual action, which is an unintentional tort.[48] Article 2272 of the Code provides for a one year statute of limitations period for intentional torts.[49]

Therefore, Professor Rosenn concludes, Defendants' experts, Pena and Ramos are correct that Articles 2271 and 2272 provide the statute of limitations for Plaintiffs'

[43] Professor Rosenn's Report ("R. Report"), ¶ 28 (April 15, 2011).
[44] *Id*.
[45] *Id*. at ¶ 31.
[46] *Id*.
[47] *Id*. at 27.
[48] *Id*.
[49] *Id*.

negligence and intentional wrongdoing claims, respectively.[50] Consequently, the Court finds that all of Plaintiffs' claims based upon Article 1383, negligent or imprudent conduct, are subject to a limitations period of six months, and those claims based upon Article 1382, intentional wrongdoing, are subject to a limitations period of one year. Because the applicable limitations periods are shorter under the Dominican Civil Code than the Delaware Code, the Delaware "borrowing" statute requires this Court to apply the statute of limitations found in Articles 2271 and 2272 of the Dominican Civil Code.[51]

b. Accrual of Plaintiffs' Claims

When Delaware's borrowing statute mandates the application of another jurisdiction's limitations period, "the borrowed statute is accepted with all its accoutrements," including the rules governing when a claim accrues and triggers the limitations period. [52]

The parties' experts offer conflicting opinions with respect to when civil claims for personal injuries accrue under Dominican law. Defendants maintain that a plaintiff's claim accrues on the date of the alleged injury. Plaintiffs' experts opine that a plaintiff's claim does not accrue, and the statute of limitations does not begin to run, until the plaintiff discovers an injury, its cause, and the party responsible.[53]

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[50] *Id*. at ¶ 31.

[51] Plaintiffs also argued that even if the limitations period under Dominican law is longer than that under Delaware law, the Dominican period may apply because the purpose behind Delaware's borrowing statute is to prevent forum shopping, which would not be a problem because, according to Plaintiffs, their claims are timely under Delaware law. However, having found the applicable statute of limitations periods under Dominican law to be shorter than under the Delaware Code, this argument is now irrelevant.

[52] *Plumb v. Cottle*, 492 F. Supp. 1330, 1336 (D. Del. 1980) (citing, *Frombach v. Gilbert Assoc*., 236 A.2d 363 (Del. 1967)), *cert. denied*, 391 U.S. 906, 88 S.Ct. 1655, 20 L.Ed.2d 419 (1968). Plaintiffs make several arguments regarding accrual rules under Delaware law, however, it is clear that accrual is determined by Dominican law.

[53] Pallano. Pl.'s Ans. Br.., at 13-14 (Mar. 17, 2010), Lavandier Decl. ¶¶ V and X (A.3), Ex. 10.

While the parties agree that Articles 2271 and 2272 of the Dominican Civil Code allow for the limitations period to be tolled "in those cases where some circumstances makes it *legally or judicially impossible* to exercise said action",[54] their experts offer differing interpretations of what constitutes "legally or judicially impossible."

Plaintiffs' experts opine that Defendants' "fraudulent concealment from Plaintiffs and the Samaná community that its coal ash waste contained toxic substances, and its false statements that this material was in fact safe and beneficial, are also a basis for tolling the statute of limitations," because it delayed Plaintiffs' ability to learn that they had legal recourse against Defendants.[55] According to Plaintiffs' expert, George A. Bermann,[56] under the French Civil Code, upon which the Dominican Code is based, the statute of limitations is tolled until "the essential circumstances under which the injury occurred were known or should have been known" to the plaintiff.[57]

In response, Defendants contend that it was not "legally or judicially impossible" for Plaintiffs to file their suit within the limitations period.[58] Defendants' expert on this issue offers a different interpretation of "legally or judicially impossible:"

> As it has been interpreted by Dominican courts, the circumstances referred to in Articles 2271 and 2272, are *force majeure* events, generally defined as unforeseeable and unavoidable events, which directly affect the individual the right to initiate the action…and not the lack of education or general knowledge.[59]

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[54] (emphasis added).
[55] *Id*. at 14.
[56] Bermann is a professor at Columbia University School of Law. Pallano. Pl.'s Ans. Br., at 14 (Mar. 17, 2010).
[57] Pallano. Pl.'s Ans. Br., at 14-15 (Mar. 17, 2010); Bermann Decl., ¶13, Ex. 12.
[58] Pallano Def.'s Rep. Br., at 6 (April 6, 2010).
[59] *Id*. at Ex. 2 (Pena Supp. Aff.) at ¶ 6. Defendants also take issue with the opinions of Plaintiffs' proffered experts. *Id*. at 6. First, Defendants assail Lavandier's opinion that the statute of limitations does not run until a plaintiff knows that his injury was caused by the defendant. *Id*. Defendants contend that Lavandier's conclusion is based upon his recitation of French precedent which stands for the proposition that a statute of limitations does not being to run until "the day that all of the elements of the civil crime have been completed," which is not consistent with his conclusion. *Id*. at 6, citing, Opp. Ex. 10 (Lavandier Aff.) at V. In addition, Defendants argue that, "as a matter of simple logic, Mr. Lavandier's assertion

According to Defendants, Plaintiffs have not alleged any "unforeseeable" or "unavoidable" event that would allow them to file outside of the limitations period.

Because of the experts' conflicting opinions on the Dominican law on this issue, the Court relies upon the court appointed independent expert, Professor Rosenn, to provide an opinion regarding the rules governing accrual of personal injury claims under Dominican law.

According to Professor Rosenn, under the tolling provisions in Articles 2271 and 2272 of the Dominican Civil Code "[i]t seems obvious that it was impossible for any of the adult Plaintiffs in this case to bring their actions until they knew that their children or unborn children had been damaged, and this conclusion is supported by Dominican law case [sic] and doctrine."[60] However,

> [t]he more difficult question is whether the limitations period is tolled under the concept of legal or factual impossibility until the Plaintiffs in this case actually knew that the coal ash that had been dumped in their neighborhood was the likely cause of the injuries to their children, or until the Plaintiffs should have known that the coal ash was the likely cause of these injuries.[61]

Professor Rosenn explains that while the Dominican Supreme Court has not addressed this precise issue, based on the Court's precedent, and recent reforms to the French Civil Code, which is highly influential in the Dominican Republic, it is unlikely

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cannot be correct, as the 'generating cause' of a sued-upon injury can never be determined 'with certainty' until trial, and thus in any case where causation is disputed - as it is here - the statute of limitations never would run. That cannot be the law." *Id*. at 6. Next, Defendants note that Plaintiffs' other proffered experts are not in agreement with Mr. Lavandier on this issue. Defendants contend that Claudio Stephen Castillo's opinion is that under Dominican law, the statute of limitations must be complied with unless the defendant "has hidden the true cause of the damages to the victim, in which case the period starts to be calculated from the date of discovery." *Id*. at 7, citing, Opp. Ex. 11 (Castillo Aff.) at IV(b). Defendants then claim that Bermann's opinion is also inconsistent because he opined that under French law, a plaintiff's statute of limitations begins to run when he knew or should have known the cause of his injuries (inquiry-notice). *Id*.

[60] R. Report, ¶ 35.

[61] *Id*. at 36.

that Dominican law would require a plaintiff to demonstrate "absolute impossibility" in order to toll the statute of limitations. [62] Rather, it is likely that the limitations period would be tolled if the vital facts supporting a claim were reasonably undiscoverable.[63] Essentially, a cause of action would accrue, and the limitations period begins to run, "from the date on which the holder of a right knew or should have known of the facts to enable him to exercise it."[64]

In addition, Professor Rosenn points out that, under Dominican law, there is no specific fraudulent concealment doctrine which would operate to toll the limitations period. However, he opines that if Defendants did conceal Plaintiffs' cause of action, "it would bolster the Plaintiffs' position as to when they knew or should have known of the cause of their injuries."[65]

The Pallano Action was filed on November 4, 2009. All of the Plaintiffs in that action, except for the Estate of Baby Mercedes and Maribel Mercedes, filed their claims more than a year after their injuries manifested, and thus, absent a basis to toll the statute of limitations, their claims are barred.[66]

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[62] *Id*. at 37.
[63] *Id*.
[64] *Id*. at 36, Citing, French Civil Code 2008, Article 2224.
[65] *Id*. at 37. Rosenn warns that he does not know "[p]recisely how the Dominican courts would resolve this question…because I have no precedents or Dominican doctrine directly on point." *Id*. However, Rosenn concludes that considering the short limitations periods and "strong influence of French law on Dominican law, I think it likely that the Dominican courts will interpret the requirement of legal, judicial or factual impossibility to mean that the limitations periods…begin to run from the time when the Plaintiffs knew or should have known that the coal ash was a likely cause of their complained of injuries." *Id*. Rosenn also concludes that the limitations period is the same for all minor plaintiffs. *Id*. at 38.
[66] According to their Complaint, the Pallano Plaintiffs' became aware of their alleged injuries on the following dates:

12/18/05	Isael Altagracia Andujar was born with "severe gastrointestinal anomalies." Thus, Isael Altagracia Andujar and Maribel Andujar Medina were also aware of the Isael's injuries.
11/24/07	Maximiliano Calcaño was born with "multiple severe birth defects, including missing limbs." Thus, Maximiliano Calcaño

The Monegro Action was filed on April 8, 2010. Baby de la Cruz and Lidia Carolina Espino de la Cruz's claims are based upon an alleged injury that occurred on November 14, 2007, and thus, their claims are time-barred absent a finding that the limitations period was tolled.[67] In addition, the negligence and negligence *per se* claims brought by Eziquiel Hidalgo de la Cruz, his mother Sheriana Esther de la Cruz Monegro, and his father, Elvi Aquile Hidalgo Calcano, arose out of an injury that occured on May 19, 2009.[68] Thus, those claims are untimely unless the limitations period is tolled.[69]

It is important to keep in mind the procedural posture of these proceedings, and that the Court cannot dismiss Plaintiffs' claims "unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the [Plaintiffs]

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	and Anajai Calcaño were aware of the alleged injuries that constitute the basis of their claims.
3/8/08	Estanlyn Garcia Deogracia was born with "severe birth defects," including "bony anomalies and an absent kidney." Thus, Estanlyn Garcia Deogracia and Maria Virgen Deogracia became aware of the alleged injuries that constitute the basis of their claims.
July 2008	Amparo Andujar was "required to undergo a therapeutic abortion" because her fetus "exhibited severe cranial and/or other anomalies and was no longer viable." Thus, Amparo Andujar became aware of the alleged injuries that constitute the basis of his claims.
7/23/08	Baby Olmos was born "with severe gastrointestinal deformities and other birth defects" and died shortly thereafter. Thus, the Estate of Baby Olmos and Rosa Maria Andujar became aware of the injuries that constitute the basis of their claims.
5/21/09	Baby Mercedes dies shortly after birth. Thus, the Estate of Baby Mercedes and Maribel Mercedes became aware of the injuries that constitute the basis of their claims.

[67] Monegro Def.'s Op. Br. at 7 (Jun. 21, 2010). Defendants also assert that their claims would be untimely under Delaware's two-year statute of limitations period. *Id*. at 8, n. 7. The Monegro Complaint alleges that Plaintiff Baby de la Cruz was born on November 14, 2007 with myelomeningocele and died shortly thereafter.

[68] The Monegro Complaint asserts that Plaintiff Eziquiel Hidalgo de la Cruz was born on May 19, 2009, with his intestines outside of his body.

[69] Monegro Def.'s Op. Br., at 8 (Jun. 21, 2010).

be entitled to relief.[70] Upon review of the Complaints, Plaintiffs have demonstrated that there may be a basis to toll the statute of limitations pursuant to the standard enunciated by Professor Rosenn.

The Pallano Plaintiffs assert that notice of the potential connection between the Coal Ash Waste and their injuries occured no earlier than June 16-17, 2009, less than six months prior to the filing of the Pallano action.[71] The Monegro Plaintiffs allege that notice of the potential association between the Coal Ash Waste and their injuries occurred no earlier than six months prior to the filing of the Monegro Action.[72] In addition, all Plaintiffs allege that they had no reason to conclude that there was a connection between Coal Ash Waste and any of their injuries prior to receiving actual notice.[73] According to Plaintiffs, they were all "blamelessly ignorant" of any claims against Defendants because "they are each poor, uneducated, have little access to all but the most rudimentary medical care, and virtually no access to scientific, technological or medical libraries or databases."[74]

Plaintiffs further allege that Defendants affirmatively concealed the hazardous nature of Coal Ash Waste and facts that would have put Plaintiffs on notice of the dangers of Coal Ash Waste from the people of Samaná, including Plaintiffs.[75] Moreover,

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[70] *See Klein v. Sunbeam Corp*., 94 A.2d 385 (Del. 1952).
[71] P. Pl.'s Amend. Compl. ¶ 23.
[72] M. Pl.'s Amend. Compl. ¶22. Specifically, they allege that Plaintiff Yordeli Salmone Suarez was first put on notice of the potential association on approximately December 2, 2009; Plaintiff Lidia Carolina Espino de la Cruz on approximately February 11, 2010; Santa Fermin de Leon on approximately January 21, 2010; Esperanza Jones Metivier on approximately November 20, 2009; Sheriana Esther de la Cruz Monegra and Elvi Aquile Hidalgo Calcano on approximately December 1, 2009. The Monegro Plaintiffs allege, as did the Pallano Plaintiffs, that prior to the preceding dates, there was no reason for them to believe that the injuries were caused by Coal Ash Waste. *Id*. at ¶¶ 60-65.
[73] P. Pl.'s Amend. Compl. ¶ 24. Plaintiffs claim that "[t]o the extent that they sought an explanation from a treating physican regarding the cause of their child's birth defects, Plaintiffs were told or otherwise led to believe that the cause was not known." *Id*.
[74] *Id*. at ¶ 25.
[75] *Id*. at ¶ 26.

Plaintiffs assert that Defendants engaged in "widespread dissemination of false assurances" regarding the safety of Coal Ash Waste "to the press, the public and the Government of the Dominican Republic," which caused the community, including Plaintiffs, to believe that Coal Ash Waste did "not pose a serious reproductive hazards."[76] For example, Plaintiffs claim that as a consequence of Defendants' misrepresentations, a news article was published in 2007 in the Dominican Republic "that touted allegedly successful treatment, transportation and disposal of the Coal Ash Waste."[77] In February 2007, the Government of the Dominican Republic and Defendants settled a lawsuit, and the Settlement Agreement, which was "signed by the Secretary of State of the Environment and Natural Resources of the Dominican Republic, states that the Coal Ash Waste dumped in Samaná 'is not toxic or hazardous to humans, the environment or otherwise."[78] Plaintiffs maintain that this information was reported in the press and became common knowledge within the community.[79]

The foregoing factual assertions are sufficient to conclude that Plaintiffs' claims might not be barred by the statute of limitations due to the tolling provisions contained in the Dominican Civil Code. Plaintiffs have pled facts that suggest they did not know, nor should they have known, about the connection between Coal Ash Waste and their injuries until approximately six months before their respective actions were filed. Therefore, with respect to their statute of limitations defense, Defendants' Motions to dismiss are denied.[80]

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[76] *Id*. at ¶ 27.
[77] *Id*. at ¶ 28. Plaintiffs claim that this information became public knowledge in the community. *Id*.
[78] *Id*. at ¶ 29.
[79] *Id*.
[80] The Court's holding also addresses Plaintiffs' contention that Defendants' Motions to Dismiss are procedurally defective with respect to their statute of limitations defenses. Pallano. Pl.'s Op. Br., at 2-3 (Feb. 8, 2010). Plaintiffs note that the statute of limitations is not "one of the specified bases" for dismissal

II. WHETHER PLAINTIFFS HAVE STATED CLAIMS UPON WHICH RELIEF CAN BE GRANTED IN COUNTS I-VII AND IX-X

Defendants' Motion seeks to dismiss Counts I-VII and IX-X as to all Plaintiffs for failure to state a claim upon which relief can be granted. The parties disagree whether Plaintiffs' claims are governed by Dominican or Delaware substantive law.[81]

a. Choice-of-Law

Under general conflict of laws principles, the forum court will apply its own conflict of laws rules to determine the governing law in a case.[82] In Delaware, courts follow the conflict of laws principles set forth in the *RESTATEMENT (SECOND) CONFLICT OF LAWS* § 145,[83] which provides:

> The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the *most significant relationship to the occurrence and the parties* under the principles stated in § 6.
>
> The Court examines: (1) the place where the injury occurred, (2) the place where the conduct causing the injury occurred, (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any between the parties is centered. [84]

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pursuant to Rule 12(b)(6). Monegro. Pl.'s Ans. Br., at 11 (Aug. 2, 2010). Plaintiffs contend that in this case, a more complete record must be developed in order to address Defendants' statute of limitations defense, and accordingly, the defense should be rejected as procedurally defective. *Id*. at 11-12. Generally, a statute of limitations is an affirmative defense, "[b]ut it is equally well settled that where the complaint itself alleges facts that show that the complaint is filed too late, the matter may be raised by defendants' motion to dismiss." *Kahn v. Seaboard Corp*., 625 A.2d 269, 277 (Del. Ch. 1993). In some cases, courts have denied a motion to dismiss grounded in a statute of limitations defense predicated upon a complex set of facts, and deferred decision until discovery further developed the record. *See*, *Boyce Thompson Institute For Plant Research v. Medimmune, Inc*., 2009 Del. Super. LEXIS 185, at *54 (Del. Super. Ct. May 19, 2009).

[81] In their briefs, Plaintiffs argue that the Court need not engage in a choice-of-law analysis because there is no "appreciable difference" between Dominican and Delaware law with respect to the claims alleged in this case. Pallano. Pl's Ans. Br., at 20 (March 17, 2010). However, as illustrated by Professor Rosenn's Report, it is clear that Delaware and Dominican law differ drastically with respect to civil claims for personal injury.

[82] *Lumb v. Cooper*, 266 A.2d 196, 197 (Del. Super. Ct. Apr. 20, 1970).

[83] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991).

[84] *RESTATEMENT (SECOND) CONFLICT OF LAWS § 145* at p. 414 (1971). In addition to considering the factors in Section 145, the Court must also consider public policy and fundamental fairness. *Travelers*

Applying the criteria set forth in Sections 145 and 6 of the Second Restatement, the Court is compelled to apply the substantive law of the Dominican Republic.

The "place of injury" factor in Section 145 is "often determinative of the most significant relationship," unless the place of injury is fortuitous.[85] "The place of injury is considered 'fortuitous' when there is no other significant contact with the site other than the injury itself."[86] That is not the situation presently before the Court. Not only did Plaintiffs' alleged injuries occur in the Dominican Republic, there are several additional significant contacts with that forum. Plaintiffs allege that Defendants' unlawful dumping of Coal Ash Waste and fraudulent misrepresentations regarding the dangers posed by the waste occurred in the Dominican Republic. All of the Plaintiffs are residents and citizens of the Dominican Republic. The relationship between the parties is centered in the

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Indem. Co. v. Lake, 594 A.2d 38, 47-48; See also, *Cervantes v. Bridgestone/Firestone North American Tire Company, LLC*, 2008 Del. Super. LEXIS 283, at *11 (Del. Super. Aug. 14, 2008). The RESTATEMENT (SECOND) CONFLICT OF LAWS § 6, provides several policy factors for the court to consider:

> (1) the need of the interstate and international systems,
> (2) relevant policies of the forum,
> (3) the relevant policies of the other interested states and the relative interests of those states in the determination of the particular issue,
> (4) the protection of justified expectations,
> (5) the basic policies underlying the particular field of law,
> (6) certainty, predictability and uniformity of result, and
> (7) ease in the determination and application of the law to be applied.

Rest. (2d) Confl. § 6. Plaintiffs make the policy argument that the Dominican Republic "would not have an interest in applying its own laws if to do so would deprive its citizens of a remedy against a foreign corporation." Pallano Def.'s Rep. Br. at 15, n.7 (April 6, 2010). Defendants argue that this assumes the Dominican Republic's only interest is to enrich its citizens. *Id*. at 15-16, n. 7. However, Defendants contend that the Dominican Republic has other interests, such as preventing untimely and illegitimate lawsuits against foreign corporations, which "might discourage foreign investment in the country."[84] Defendants also argue that the purpose of the Dominican statute of limitations is to assure defendants that they will not be vulnerable to litigation indefinitely. *Id*. at 16, n. 7. Finally, Defendants contend that the Dominican Republic has an interest in even-handed application of its laws to disputes arising within the country. *Id*. The Court agrees with Defendants that public policy considerations weigh in favor of application of Dominican law.

[85] *Cervantes v. Bridgestone/Firestone North American Tire Company, LLC*, 2008 Del. Super. LEXIS 283, at *6; citing, Rest. (2d) Confl. § 145, cmt. e at p. 419 (1971)

[86] *Cervantes v. Bridgestone/Firestone* 2008 Del. Super. LEXIS 283, at *7; citing, *Thompson v. Reinco, Inc*., 2004 WL 1426971 at *1 (Del. Super. Ct. 2004).

Dominican Republic, and it is the jurisdiction "whose interests are most deeply affected."[87] Delaware's only connection to this dispute is that Defendants are incorporated in this state.

Consequently, the Court will apply Dominican law to Counts I-VII and IX-X in Plaintiffs' Complaints.

b. Whether Counts I-VII and IX-X Are Cognizable Under Dominican Law

Defendants contend that Plaintiffs can assert only two claims under the Dominican Civil Code: (1) a negligence-based claim under Article 1383, and (2) a claim for intentional-wrongdoing under Article 1382.[88] Thus, Defendants argue, only Counts I (Negligence) and VI (Battery) of Plaintiffs' Complaints state a claim upon which relief can be granted, and the remaining claims must be dismissed.[89]

Plaintiffs maintain that all of their claims are viable under Dominican law, and that Defendants' presentation to the contrary "ignores binding precedent" established by the United States District Court for the Eastern District of Virginia in an action brought by the Dominican government against Defendants.[90] The court in *Gov't of the Dominican Republic v. AES, Corp, et. al*., held that "the law of the Dominican Republic encompasses actions for nuisance, civil conspiracy, and aiding and abetting claims…."[91]

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[87] *Cervantes v. Bridgestone/Firestone North American Tire Company, LLC*, 2008 Del. Super. LEXIS 283, at *7; quoting, Rest. (2d) § 6, cmt. f. at p. 14 (1971).
[88] Pallano Def.'s Op. Br., at 10 (Feb. 8, 2010).
[89] *Id*. Defendants also contend that Dominican law does not recognize claims of fraud or fraudulent misrepresentation unless it relates to a written contract, and thus, Plaintiffs' Count IV should be dismissed. Pallano Def.'s Rep. Br. at 16, n.8 (April 6, 2010). Plaintiffs disagree. However, the Court, as discussed below, adopts Professor Rosenn's interpretation of Dominican law.
[90] P. Pl.'s Ans. Br., at 19 (Mar. 17, 2010).
[91] 466 F. Supp.2d 680, 683. In so concluding, the court relied upon the sworn statements made by the Attorney General for Defense of the Environment and Natural Resources for the Dominican Republic, Andrés M. Chalas Velázquez. *Id*. at 693. According to Mr. Velázquez, Articles 1382 and 1383 of the Dominican Civil Code permits common law nuisance claims. *Id*. at 693-694. The court also adopted Mr. Velázquez's opinion that "criminal proceedings do not need to take place before a plaintiff can bring a civil suit for conspiracy and aiding and abetting-civil actions of this type…." *Id*. at 694. In addition, the court

Plaintiffs argue that the doctrine of issue preclusion bars Defendants from re-litigating these issues.[92]

The Court disagrees. The doctrine of collateral estoppel precludes a party from relitigating issues of fact, not issues of law.[93] The determination of whether the Dominican Civil Code recognizes certain causes of action is clearly an issue of law, and therefore, collateral estoppel does not preclude Defendants from litigating an interpretation of the Dominican Civil Code that is inconsistent with the Eastern District of Virginia's holding. Furthermore, the district court's interpretation of Dominican law does not create precedent that this Court is required to follow.[94]

The Court adopts Professor Rosenn's interpretation of Dominican law. Dr. Rosenn opines that Plaintiffs' Complaints sufficiently plead four causes of action under Dominican law.

According to Professor Rosenn, the Dominican Code, like the French Civil Code does not create specific torts, rather, it establishes general principles of tort liability.[95] As a result, the Dominican Code does not codify many of the tort claims asserted in Plaintiffs' Complaints. Instead, tort actions are provided for by statute in Articles 1382-1384 of the Dominican Civil Code.[96] Article 1382 recognizes a cause of action for intentional wrongdoing, and provides that, "any act of a person that causes injury to

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relied upon a statement from Péréz Gómez, a Dominican attorney, who opined that Article 167 of the General Law of the Environmental and Natural Resources, Law 64-00. *Id*.

[92] P. Pl.'s Ans. Br. at 19 (Mar. 17, 2010).

[93] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999).

[94] *NACCO Industries, Inc. v. Applica Inc*., 997 A.2d 1, 25 (Del. Ch. 2009) (explaining that federal case law is merely persuasive authority).

[95] R. Report, at ¶ 11.

[96] *Id*. at ¶ 12.

another obligates the person by whose fault it occurred to compensate it."[97] Article 1383 of the Code imposes liability for unintentional acts or omissions, i.e. negligence.[98]

Professor Rosenn concludes that Plaintiffs have stated causes of action under both Articles 1382 and 1383.[99] The Court agrees. In fact, Defendants do not appear to dispute Professor Rosenn's conclusion. Defendants' Motions seek to dismiss all Plaintiffs' claims for failure to state a claim under Dominican law, except for negligence and battery, which appear analogous to claims brought under Articles 1382 and 1383 of the Dominican Civil Code.

Professor Rosenn opines that Plaintiffs have a viable claim under Article 1384 of the Dominican Civil Code. That Articles provides that "[o]ne is liable not only for the damage he causes by his own act, but also for that caused by the acts of persons for whom he is responsible *or of things that he has under his care*."[100] Professor Rosenn further opines that the Supreme Court of the Dominican Republic has interpreted Article 1384 as imposing strict liability, and explains that,

> [o]nce the plaintiff proves that the damages suffered were caused by a thing or inanimate object under the defendant's care, the only way in which the owner or custodian of the inanimate object that has caused damage to another can escape or reduce liability is by proving one of these three defense: (1) that the damage was caused by the fault of the victim, (2) that the damage was caused by the act of a third party, or (3) that the damage was caused by a fortuitous event or *force majeure*.[101]

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[97] *Id*., Citing translation of Articles, Appendix B.
[98] *Id*., Citing Jorge A. Subero Isa, Tratado Practico de Responsabilidad Civil Dominicana [Practical Treatise on Dominican Civil Liability] 72-73 (Unibe, 1992).
[99] *Id*. at ¶ 13.
[100] *Id*. at ¶ 14. Professor Rosenn opines that liability under "Article 1384 is not limited to things that are defective or inherently dangerous, but includes any inanimate object that causes injury to others." *Id*. at ¶ 17.
[101] *Id*. at ¶ 16, Citing Decision of the Dominican Supreme Court of Mar. 9, 1934, B.J. 284, p. 10.

Professor Rosenn concludes that Plaintiffs have alleged sufficient facts to find that Defendants could be considered the guardian or custodian of the Coal Ash Waste that allegedly caused Plaintiffs' injuries.[102]

According to Professor Rosenn, Law 64-00 provides Plaintiffs with a fourth cause of action.[103] Article 169 of Law 64-00 provides:

> Reparation of damages consists of restoration of the situation prior to the act, where possible, economic compensation of the damage and prejudice caused to the environment or natural resources, to the communities or individuals.[104]

Professor Rosenn concludes that Article 178 of Law 64-00 permits "every person or association of citizens" to bring an action pursuant to Law 64-00,[105] and it is not necessary for there to be a related criminal action pending in order for Plaintiffs to bring a civil claim under Law 64-00.[106] Professor Rosenn concludes that Plaintiffs have sufficiently pled a claim for strict liability under Law 64-00.[107]

In sum, the Court finds that Plaintiffs have sufficiently pled allegations in their Complaints to support four causes of action: (i) a claim for intentional wrongdoing under Dominican Civil Code Article 1382; (ii) a negligence-based claim under Article 1383; (iii) a no-fault claim under Article 1384; and (iv) a strict liability claim for damages under Law 64-00. Accordingly, Plaintiffs' Complaints must be amended to conform to this Court's interpretation of what claims are available under Dominican law.

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[102] *Id*. at ¶ 17. According to Professor Rosenn, under Dominican law, Defendants can still be considered the custodian or guardian of the Coal Ash Waste regardless of the fact that it was dumped.
[103] *Id*. at ¶ 20.
[104] *Id*., citing Article 169 of Law 64-00.
[105] *Id*. at ¶ 21.
[106] *Id*. at ¶ 22.
[107] *Id*. at ¶ 39.

III. WHETHER PLAINTIFFS HAVE STATED A VALID CLAIM UNDER INTERNATIONAL LAW

Defendants seek to dismiss Count VIII of Plaintiffs' Complaints (Violations of International Law and Human Rights) for failure to state a claim upon which relief can be granted. Defendants argue that the authorities Plaintiffs rely upon have no force under international law, and that the environmental and human rights injuries that Plaintiffs complain of do not constitute actionable violations of international law.[108] Rather, according to Defendants, each of the sources Plaintiffs rely upon are examples of an "international pronouncement[] that promote[s] amorphous, general principles" that cannot substantiate a claim for violations of international law.[109]

Plaintiffs' Complaints allege violations of four sources of international law that have been violated.[110] Plaintiffs allege violations of international law under three additional sources in their Answering Briefs.[111]

First, Plaintiffs allege that Defendants violated The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal ("Basel Convention"). The Basel Convention is a comprehensive global environmental agreement on hazardous and other wastes that aims to protect human health and the environment against the adverse effects resulting from the disposal of hazardous wastes.[112]

Second, Plaintiffs assert that Defendants violated The Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes ("Cairo

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[108] *See, e.g., Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 255, 266 (2d. Cir. 2003); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991).
[109] *Flores*, 414 F.3d at 252.
[110] P. Pl.'s Compl. ¶¶ 126-135.
[111] See, P. Pl.'s Ans. Br., at 25-33 (Mar. 17, 2010).
[112] P. Pl.'s Compl. ¶ 127.

Guidelines"). The Cairo Guidelines provide guidelines and principles for the environmentally sound transport, handling, and disposal of toxic and dangerous substances.[113]

Third, Plaintiffs claim that Defendants violated the United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights ("Human Rights Norms").[114] Plaintiffs contend that the Human Rights Norms require transnational corporations and other business enterprises to respect and contribute to the realization of the right to the highest attainable standard of physical and mental health and to refrain from actions which obstruct or impede the realization of those rights.[115] Plaintiffs argue that international human rights law recognizes that transnational corporations and other business enterprises have the obligation to respect, ensure respect of, promote, secure the fulfillment of, and protect human rights.[116]

Fourth, Plaintiffs contend that Defendants violated customary international human rights law. Plaintiffs state that international law recognizes a generalized human right to the highest attainable standard of physical and mental health.[117] Plaintiffs argue that international human rights law also recognizes that "the illegal disposal of toxic and dangerous substances can result in violation of traditional human rights such as the right to life, personal security, health, and well-being, physical security and integrity, property, freedom from discrimination, and inviolability of the home and privacy."[118]

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[113] *Id*. at ¶ 128.
[114] *Id*. at ¶131.
[115] *Id.*
[116] *Id.*
[117] *Id*. at ¶ 129.
[118] *Id*. at ¶ 130.

In their Answering Briefs, Plaintiffs claim violations of international law under the: (1) United Nations Convention on the Law of the Sea ("UNCLOS"), (2) the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter ("the Dumping Convention"), and (3) the international law against bribery.[119]

Plaintiffs maintain that their claims for violation of international law are viable because the authorities expressly relied upon, other relevant international treaties, and precedent, support the proposition that environmental injuries and human rights injuries, similar to those alleged by the Plaintiffs, constitute actionable violations of international law.[120]

The threshold question for a claim for violation of international law is whether the claim "rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms," i.e., the common-law prohibitions against piracy and assaults on ambassadors.[121] To succeed on a claim for violation of international law, a plaintiff must show that the rule that he claims was violated is "'a settled rule of international law' by 'the general assent of civilized nations.'"[122] This threshold requirement "is a stringent one," as the court "must proceed with extraordinary care and restraint" when attempting to discern a rule binding on international actors.[123] To determine whether a rule meets this standard, the court looks primarily to international treaties and the customs and practices of states,[124] mindful that "international pronouncements that promote amorphous, general principles"

[119] P. Pl.'s Ans. Br., at 26, n. 14 (Mar. 17, 2010).
[120] *See, e.g., Sarei v. Rio Tinto, PLC*, 221 F.Supp. 2d 1160, 1160-62 (C.D. Cal. 2002).
[121] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).
[122] *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d. Cir. 1980) (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).
[123] *Flores*, 414 F.3d at 248; *accord Sosa v. Alvarez-Machain*, 542 U.S. 692, 728-29 (2004)(holding courts must exercise "great caution in adapting the law of nations to private rights").
[124] *Flores*, 414 F.3d at 251.

do not suffice, and that only "clear and unambiguous rules by which States universally abide . . . constitute the body of customary international law."[125]

a. Violation of the Basel Convention

Plaintiffs argue that Defendants violated the Basel Convention. While the Basel Convention is an international treaty, it has not been ratified by the United States ("U.S."), and thus it has no force in its own right under U.S. law.[126] The Basel Convention also fails as evidence of a rule of customary international law. As one court has observed:

> The Basel Convention has no implementing legislation and is not self-executing. This court has no standards or procedures to judicially enforce the treaty and therefore, plaintiffs' claims under the Basel Convention must fail.[127]

A treaty without judicially-enforceable "standards or procedures" is rendered meaningless as evidence of a rule of customary international law.[128]

b. Violation of the Cairo Guidelines and the Human Rights Norms

Plaintiffs assert that Defendants violated the Cairo Guidelines and the Human Rights Norms. The Cairo Guidelines and the Human Rights Norms are, respectively, materials promulgated by the United Nations ("U.N.") Environmental Programme and

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[125] *Id.* at 252.
[126] *See Flores*, 414 F.3d at 256 (explaining "[O]nly States that have ratified a treaty are legally obligated to uphold the principles embodied in that treaty.").
[127] *Greenpeace USA v. Stone*, 748 F. Supp. 749, 767 (D. HI. 1990).
[128] *See Flores*, 414 F.3d at 252 (stating "[n]otably absent from … the sources of international law are conventions that set forth broad principles without … specific rules."); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (rejecting, as evidence of international law, "sources … [that] refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards); *Amlon Metals*, 775 F. Supp. at 671 (stating "[p]laintiffs' reliance on the Stockcholm Principles is misplaced, since those Principles do not set forth an specific proscrpitons.").

the U.N. High Commissioner for Human Rights. U.S. courts have held that U.N. publications have no force as international law.[129]

In *Flores v. S. Peru Copper Corp.*, Peruvian residents, and representatives of deceased residents, brought personal injury claims against an American mining company, alleging that pollution from the mining company's Peruvian operations had caused severe lung disease.[130] Plaintiffs relied on the U.N. Convention on the Rights of the Child as a basis for their claim. The United States Court of Appeals for the Second Circuit found the U.N. treaty was "extremely vague, clearly aspirational in nature, and does not even purport to reflect the actual customs and practices of States."[131] Similarly, in *Sosa v. Alvarez-Machain*, the United States Supreme Court held that the U.N. Declaration of Humans Rights "does not of its own force impose obligations as a matter of international law."[132]

c. Violation of Customary International Human Rights Law

Plaintiffs also contend that Defendants violated unspecified provisions of international human rights law recognizing rights to life, health, and well-being, and the responsibilities of corporations to ensure the same.[133] Plaintiffs argue that courts which have considered the content of customary international law have universally accepted a variety of sources as evidence of custom, including: international and regional treaties, widely accepted declarations and U.N. resolutions declaring principles as international law, decisions of international tribunals, opinions of international organizations and of

[129] *Flores*, 414 F.3d at 259.
[130] *Id.* at 237.
[131] *Id.* at 259.
[132] *Sosa*, 542 U.S. at 734
[133] P. Pl.'s Compl. ¶¶ 130-131.

regional human rights bodies such as the Inter-American Commission on Human Rights, states' uniform domestic practice, and the works of leading jurists and commentators.[134]

In order to establish a violation of customary international law, "a plaintiff must demonstrate that a defendant's alleged conduct violated 'well-established, universally recognized norms of international law.'"[135] Here, Plaintiffs have not demonstrated that Defendants' conduct violated a well-established, universally recognized norm of international law. Instead, they allege violations of unspecified provisions of customary international law. Although Plaintiffs argue that the international community has universally recognized that obligatory rights to life and health encompass a right to be free from massive environment degradation causing widespread injury, courts have rejected the idea that a "right to life" or a "right to health" are sufficiently definite to constitute rules of customary international law.[136]

d. Violation of UNCLOS

Plaintiffs contend that part of their claim is based on a violation of UNCLOS, which prohibits certain acts of pollution in the marine environment.[137] UNCLOS has been ratified by 166 nations, including the Dominican Republic, but not the U.S.[138] Plaintiffs contends that Defendants' actions violated treaty provisions aimed at preventing pollution of the marine environment that implicate hazards to human health.[139] Plaintiffs also argue that the district court in *Sarei v. Rio Tinto*[140] found that UNCLOS reflects customary international law.[141]

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[134] Pallano Pl.'s. Ans. Br., at 25-26 (Mar. 17, 2010).
[135] *Flores v. Southern Peru Copper Corp.*, 253 F.Supp.2d 510, 514 (S.D.N.Y. 2002) (quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir.1980), citing *Kadic v Karadzic*, 70 F.3d 232, 239 (2d Cir.1995)).
[136] *Flores*, 414 F.3d at 254 (quotation marks omitted).
[137] Pallano Pl.'s. Ans. Br., at 31 (Mar. 17, 2010).
[138] *Id.*
[139] *Id.*

Defendants further argue that Plaintiffs fail to set forth the actual text of UNCLOS and fail to identify any specific treaty provisions allegedly violated by Defendants.[142] Defendants contend that although UNCLOS obligates signatory states to "adopt laws . . . to prevent, reduce, and control pollution of the marine environment,"[143] it does not contain any outright prohibition on maritime pollution. Instead, UNCLOS expressly recognizes the sovereign right of states to exploit their marine resources pursuant to their own environmental policies.[144]

Defendants argue that because Plaintiffs make no allegation of (a) dumping in Samaná Bay itself, (b) exposure to toxic runoff in the bay, or (c) coal ash waste "leaching into Samaná Bay," the Complaints fail to allege any pollution of the marine environment or any causal link between such pollution and the alleged injuries to make UNCLOS relevant.[145]

Finally, Defendants argue that even if UNCLOS applied to the factual allegations in Plaintiffs' Complaints, it does not provide a basis for Plaintiffs to pursue an international law claim.[146]

In *Sarei v. Rio Tinto*, the court concluded that while UNCLOS may reflect customary international law that is specific and obligatory, it is not a matter of universal concern in the same manner that *jus cogens* norms such as genocide, torture, or crimes against humanity are.[147] In that case, the court found that plaintiffs' international claims, including those premised on UNCLOS, involved norms where "aspiration has not yet

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[140] 221 F. Supp. 2d 1116, 1162 (C.D. Cal. 2002).
[141] *Id*.
[142] Pallano Def.'s Rep. Br. at 21 (Apr. 6, 2010).
[143] *See* UNCLOS Pt. XII § 5 art. 207.
[144] *Id.* art. 193.
[145] Pallano Def.'s Rep. Br., at 21-22 (Apr. 6, 2010).
[146] *Id*. at 22.
[147] 650 F. Supp. 2d at 1026 n.60 (C.D. Cal. 2009).

ripened into obligation."[148] The court also found that plaintiffs were required to prove that they had exhausted their local and intra-national remedies before proceeding with any UNCLOS-based claim under international law.[149] Accordingly, even if Plaintiffs had pled a valid UNCLOS-based claim, they would first be required to exhaust all remedies within the Dominican Republic and under UNCLOS itself.[150]

e. Violation of the Dumping Convention

Plaintiffs next argue that they have stated a claim based on the violation of international law as reflected in the Dumping Convention because they allege that Defendants' dumping of toxic coal ash waste from barges onto the beach resulted in that waste "leaching into Samaná Bay."[151]

Defendants maintain that Plaintiffs' argument is flawed in terms of its applicability to the facts alleged because the Dumping Convention defines "dumping" as "the deliberate disposal at *sea* of wastes or other matter."[152] Defendants contend there is no allegation in this case of any maritime disposal of coal ash waste; rather, the Complaints instead assert that coal ash waste was deposited "in [Plaintiffs'] home town," and "on pristine beaches."[153]

Regardless of the parties' factual dispute, Plaintiffs cite no authority for the contention that the Dumping Convention establishes a binding norm of customary

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[148] *Id*.
[149] *Id.* at 1031 & n.69.
[150] Plaintiffs do not contend that they have attempted to exhaust their remedies in any way other than the current litigation.
[151] Pallano Def.'s Rep. Br., at 32 (Apr. 6, 2010).
[152] Dumping Convention art. III.1.a. (emphasis added).
[153] P. Pl.'s Compl. ¶¶ 3, 10.

international law.[154] Both state and federal courts have uniformly held that environmental harms are not actionable under international law.[155]

f. Violation of the International Law Against Bribery

Plaintiffs argue that they state a claim for violation of the international law against bribery. Plaintiffs assert that the international consensus against bribery is reflected in international instruments, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the U.N. Declaration Against Corruption and Bribery in International Commercial Transactions, the U.N. Convention Against Corruption, the European Union Convention on the Fight Against Corruption, and the International Chamber of Commerce Rules of Conduct.[156] Plaintiffs allege that Defendants bribed Dominican officials to permit the dumping of the toxic coal ash waste in violation of local, national, and international law.[157]

Defendants argue that the treaties Plaintiffs cite, other than the 1999 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction ("the OECD Convention"), are without force under international law because only the OECD Convention is an actual treaty ratified by the U.S.[158] And, although the OECD Convention was ratified by the U.S., Defendants argue that it "hardly reflects" a well-established, universally recognized norm, as fewer than 40 countries have ratified

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[154] Plaintiffs do cite two cases, neither of which addresses a cause of action brought under the Dumping Convention.

[155] *Id.* (stating Plaintiffs here have failed to demonstrate that Rio Tinto's alleged environmental torts violated a specific, universal, and obligatory norm of international law.); *Flores*, 414 F.3d at 255, 266 (same); *Beanal v. Freeport-McMoran, Inc.*, 197 F. 3d 161, 167 (5th Cir. 1999) (same); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (same).

[156] Pallano Def.'s Rep. Br., at 32-33. (Apr. 6, 2010).

[157] *Id.* at 33.

[158] *See Flores*, 414 F.3d at 259 (stating resolutions "are not proper sources of customary international law"); *Sosa*, 542 U.S. at 734 (stating a U.N. declaration "does not of its own force impose obligations as a matter of international law").

it.[159] Defendants also point out that Plaintiffs cite no authority holding that the OECD Convention provides a basis for a private right of action and note that courts have rejected the OECD Convention as a basis on which to bring a claim for violation of international law.[160] The Court agrees with Defendants that Plaintiffs have failed to state a claim for violation of international law and human rights, and thus, Count VIII of Plaintiffs' Complaints is **DISMISSED**.[161]

IV. WHETHER PLAINTIFFS MAY PURSUE A CLAIM FOR PUNITIVE DAMAGES

Defendants seek to dismiss Plaintiffs' request for punitive damages. Since Defendants' alleged misconduct occurred in the Dominican Republic, this issue is governed by Dominican law.[162] Defendants argue that punitive damages are not recoverable under Dominican law.[163] Plaintiffs contend otherwise.[164] Once again, the Court resolves the parties' dispute regarding Dominican law by adopting the expert opinions of Professor Rosenn.

According to Professor Rosenn, under Dominican law, punitive damages are not recoverable in civil proceedings.[165] Therefore, Plaintiffs' request for punitive damages is

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[159] Pallano Def.'s Rep. Br., at 25 (Apr. 6, 2010).
[160] *Id*.
[161] *See Maugein v. Newmont Mining Corp.*, 298 F. Supp. 2d 1124, 1130 (D. Colo. 2004); *Mendonca v. Tidewater, Inc.*, 159 F. Supp. 2d 299 (E.D. La. 2001).
[162] *See* Restatement (Second) of Conflict of Laws § 171 ("The law selected by application of the rule of §145 determines the right to exemplary damages.") *Id*. § 145 cmt. c. ("If the primary purpose of the tort rule involved is to deter or punish misconduct…the state where the conduct took place may be the state of the dominant interest and thus that of the most significant relationship.") *See also*, *In re Train Derailment near Amite, La*., 2003 U.S. Dist. LEXIS 18589, at *12 (E.D. La. Oct. 15, 2003).
[163] Pallano Def.'s Rep. Br., at 19 (April 6, 2010).
[164] In addition, Plaintiffs contend that violations of international law permit recovery of punitive damages. P. Pl.'s Ans., at 34 (Feb. 8, 2010). However, since those claims have been dismissed, the Court need not address this issue.
[165] R. Report, at ¶ 23.

DISMISSED. Plaintiffs may only recover damages to the extent permitted by Articles 1149 and 1150 of the Dominican Civil Code.[166] Professor Rosenn opines that Plaintiffs would be entitled to recover compensatory damages, which include damages related to pain, grief, and injury to one's reputation.[167] If it is determined that Defendants' conduct resulted from "simple fault or negligence," rather than bad faith, then Plaintiffs' recovery is limited to foreseeable damages.[168] However, if Defendants' conduct constitutes "grave fault or intentional misconduct," then Plaintiffs can recover all damages that were an immediate and direct consequence of the Defendants' conduct, regardless of whether they were foreseeable.[169]

CONCLUSION

For the reasons stated above, the Court finds that: (1) Plaintiffs have pled sufficient facts to deny Defendants' Motions on the basis that Plaintiffs' claims are barred by the statute of limitations; (2) Plaintiffs have failed to state a claim for violations of international law and human rights; (3) Plaintiffs cannot recover punitive damages; and (4) Plaintiffs' Complaints sufficiently plead four causes of action under Dominican law, however, Plaintiffs must amend their Complaints to specifically state those four claims.

IT IS SO ORDERED.

Jan R. Jurden, Judge

[166] *Id*. at ¶¶ 24-25.
[167] *Id*. ¶ 26.
[168] *Id*. at ¶ 25.
[169] *Id*. (citing Article 1151 of Dominican Code).