

# REJOINDER

**Of Defendant II, Richard Bruce Ness as an individual  
To the Reply of the Public Prosecutor  
of 23<sup>rd</sup> February 2007**

**Manado, 16 March 2007**

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## **I. GENERAL RESPONSE**

Honorable Panel of Judges

The Defense Team

The Public Prosecutor

The District Court of Manado,

On 23rd February 2007, in this Court, the Public Prosecutor read and submitted to the Panel of Judges, the Defense teams and myself (as Defendant II) their REPLY to the Defense submitted by the Defense Team of Defendant I (PT Newmont Minahasa Raya), the Defense Team of Defendant II Richard Bruce Ness and individually by Defendant II Richard Bruce Ness, which hereafter shall be referred to as the “Replic”.

To ensure consistency between what the Defense I have read and submitted to this Court in this Criminal Case and the Rejoinder, all the terms I shall use in the Rejoinder shall have the same meaning as the terms I have used in my Defense.

With the submission of my Pledoi entitled: “VERITAS – The Pursuit of Truth and Justice in BUYAT BAY”, I provided the Prosecution an opportunity to mend their ways and right the wrongs they have inflicted upon me and Defendant I, leading up to and during these legal proceedings. However, it now seems clear from the Prosecution’s presentation and subsequently their Replic, that they have no shame or remorse for their actions. Their Replic is consistent with their original motives that they had made apparent through their original arguments at the stage of prosecution – their goal is to prove that a crime has been committed at Buyat Bay, no matter what the truth may be!

The Replic was supposed to be a reply to the three Pledois submitted by the Defense but it turned out to be a replica of the same old factual errors, the same old use of discredited Police samples and a reiteration of the wrong science of the Integrated Team’s report. This Replic is no more than a contrived empty formality lacking the substance and spirit to uphold law and justice. In fact, the Public Prosecution Team’s position shows that all it wants to do is to be over and done with this painful task that

they have been toiling at for almost two years. The Prosecution is perfectly aware that there is no basis for this criminal case because pollution and environmental degradation of Buyat Bay that was allegedly caused by NMR did not actually occur. The Replic does not present any new issue, evidence or argument not already contained in the Charges.

Your Honor, this trial is clearly NOT about the environmental conditions in Buyat Bay. But this case has put the integrity of the rule of law on trial. It has put the dreams of the forefathers of Indonesia on trial. It has put the public trust of the scientific community on trial. By reading the Replic it has become clear that the Prosecution has chosen to be on the side of rumors and lies.

I was enlightened by the Defense team that the essence of criminal law in Indonesia is that a defendant can be convicted of a crime only if there is evidence to prove each and every element of the crime beyond a reasonable doubt. The objective of the criminal process is to find the truth as to whether or not a crime has been committed. And this can only be found if legal and convincing credible evidence is presented during the criminal trial. THEREFORE, THE EVIDENCE MAY NOT REST ON A PIECE OF PAPER SUCH AS THE ANALYSES AND RESULTS PROVIDED BY THE POLICE HEADQUARTER FORENSIC LABORATORY WHEN IT HAS BEEN PROVEN IN THIS COURT THAT THEIR METHODOLOGY AND PROCESS, HAVE BEEN TAMPERED WITH IN SUCH A MANNER SO AS TO BE A SOURCE OF EMBARRASSMENT TO THE ENTIRE POLICE INSTITUTION. TO ADD TO THAT THE VERACITY AND VALIDITY OF THIS EVIDENCE HAS BEEN FIRMLY REFUTED BY A LARGE NUMBER OF NATIONAL AND INTERNATIONAL ACADEMIC INSTITUTIONS AND ACCREDITED LABORATORIES.

THE PUBLIC PROSECUTION TEAM HAS FAILED TO PROVE ITS CASE BEYOND REASONABLE DOUBT – AN ELEMENT THAT IS ABSOLUTELY ESSENTIAL FOR CONVICTION, AS PER THE LAW IN INDONESIA!

Commenting on the Defenses, the Public Prosecution Team stated in its Reply (page 1) that, “However as Public Prosecutor we appeal to this Court not to be dazzled by the physical appearance only but to consider the substance contained in it. As the proverb says, “Don’t judge the book by its cover...!!!”, Their meaning was that the

Defense documents only looked beautiful because of their packaging, but that there are no facts, evidence, substance or arguments that merit any examination. On the one hand, considering how packed the Defenses are with facts, graphs, charts, quotes from the testimony and actual figures and numbers, this is a preposterous statement; which, if they pondered over for even a minute, might even seem funny to the Public Prosecution Team. On the other hand, it is extremely ironic because, either the Public Prosecution Team did not read the analysis of the facts, evidence, substance and arguments contained in the Defenses or they stubbornly refused to understand what they had read. Except for the Introductions and a few headings, the Replic did not offer any replies to the Defenses. The Replic did not explain and/or further prove the Indictment and the Charges of the Public Prosecution Team in this criminal case.

The only new information in the Replic is the rather amusing attempt by the Prosecutors to link Adam Air black box to the thermocline issue of Buyat Bay. At each and every opportunity the Prosecution's proposition has been a source of bogus science on many occasions but their attempt to use a speculative comment about Adam Air's black box from a newspaper as a definitive scientific argument has clearly set a new low. The sad fact is that the only similarity between Prosecution's Replic and the Adam Air issue is that both are attempting to whitewash the truth.

I have become very concerned that this criminal case because I am convinced that this case was intentionally created by some NGOs and politicians and was subsequently used by the Public Prosecution Team to indict and charge NMR and myself; and now this may become a bad precedent for upholding law and justice in Indonesia. This precedent has already taken a costly toll on this country and has caused considerable losses to tax-payers, and the regional economy; and at a time when Indonesia needs to attract investment, this case has created a climate not conducive to foreign investment; and in terms of money, effort and time, it has cost the police, the Prosecution, public officers at the regional as well as the national level; and of course the cost to NMR and myself has been very high indeed. It has cast aspersions on my good name, that of my family and the good name of NMR employees and their families who were even put through the public shame of being interrogated and detained without reason!

In order to maintain the consistency of the facts, evidence, substance and arguments I have submitted in my Defense, I have included in my own Rejoinder each and every section of the Defense of Defendants I and II and of my own Defense, and also the Rejoinder of Defendants I and II, as an integral and inseparable part of my own Rejoinder without exception.

If I count correctly, this is the 52<sup>nd</sup> time I have appeared before this court. I have to say I am getting sick and tired and extremely frustrated by the Prosecution's presentation of baseless allegations and their insistence on using the same unsubstantiated facts and untruths in order to mislead this court. Some of the content of the Replic presented by the Prosecutors is so outlandish that it defies logic and it does not reflect the testimony and evidence presented before this very court, over the past year and a half.

Of course, while it is not within my authority to present final judgment, I would like to point out to this court and this Honorable Panel of Judges of a series of untruths and deceptions that are at the very foundation of the Prosecution's Replic.

## II. RESPONSE TO THE REPLIC

### *Replic - Item 1*

The Public Prosecution Team in its Replic stated that: (a) the assertion of the Defendants, that the Charges had considered 21 witnesses, 9 experts and 7 items of documentary evidence, meant that Defendants I and II and myself as Defendant II recognized that the Charges were in compliance with the criminal evidence stipulated under Article 184 KUHAP, (b) the Charges met the formal criteria of the KUHAP, and (c) the statement of the Defense Teams and myself, as Defendant II, were contradictory because on the one hand it stated that the Public Prosecution Team only referred to the testimonies of witnesses Dra. Masnelyarti Hilman MSc, Ir. Sulistyowati, MM and IR Isa Karmisa while, on the other hand, [it admitted] that the Prosecution had already submitted 21 witnesses, 9 experts and 7 items of documentary evidence in its Charges.

The above response from the Public Prosecution Team clearly shows its arrogance or ignorance that justice can only be upheld on the basis of its own witnesses (no matter how biased) with their own opinions (no matter how flawed). This is a remarkable admission. The Public Prosecution Team is saying that it can prove a criminal charge simply by ignoring all the evidence disproving it. Such narrow thinking shows that this criminal case was orchestrated based solely on the "evidence" presented by the Public Prosecution Team, ignoring the fact that this evidence has been scientifically destroyed by the facts, expert conclusions and documentary evidence submitted by the Defendants. This way of thinking shows that the Public Prosecution Team places the Office of the General Attorney not as an upholder of the law carrying out its noble mandate pursuant to the Kekuasaan Kejaksaan Law but as the instrument of an abusing power, a form of tyranny in denying the Defendants' rights and a manifestation of a despotic disposition in clear violation of the 1945 Constitution.

In Chapter 5 of my Pledoi, I have described in detail the comparisons between testimonies from witnesses and experts submitted by the Public Prosecution Team and by Defendants I and II which clearly demonstrate the biases that are at play in this case. On the one hand, the material truth that the witnesses and experts for the Prosecution attempted to show was very weak, flimsy and unable to prove or support either the Indictment or the Charges. On the other hand, both in terms of institutional

and expert credibility, the level of accuracy of the scientific analysis, independence and objectivity, national and international recognition and the massive amount of evidence, it is obvious that the material truth proven by the witnesses, experts and documentary evidence submitted by the Defendants completely rebutted the Indictment, Charges and witnesses and expert testimonies submitted by the Prosecution.

Further we present the list of all the witnesses (see Table-1) who appeared in the court during the hearings and I have highlighted in yellow the names of those witnesses that the Prosecution has cited in the Charges and the Replik. It becomes clear that the Prosecution has used only 1/3<sup>rd</sup> of the total witnesses. They have not even attempted to refute the conclusions of the rest of the witnesses who repeatedly told the court that Buyat Bay is clean, the fish are fine, the people are healthy and PTNMR had all the valid permits. From the Prosecution's perspective it appears that the rest of the witnesses are simply redundant. Such a selective use of witnesses who only favor the prosecution's case is a continuation of the bias observed during the investigation and the pre-trial phases when the POLRI denied me my right to present my witnesses. Your Honor, this is the most obvious example of the unfair regulatory process that has forced me to appear in this court today.

The response of the Public Prosecution Team which stated in its Replic that the Charges already met the formal criteria stipulated in the KUHAP reinforced my strong suspicion that the Public Prosecution Team only looked at the superficial aspects of the charges and that is how they could easily neglect the intrinsic objective or reasoning that is at the very foundation of any criminal trial, namely, to find the truth in a quest to uphold the law and the ideals of justice. By only looking at the formal side, not only did the Public Prosecution Team neglect the legal objectives, that is the certainty of the stipulations of criminal law which enshrine the norms of individual behavior towards the law, but they have also ignored or completely denied the other, deeper aspect of the law, that is, justice. I strongly feel that throughout this process, from investigation, to examination, to indictment, to the charges bring filed and to this very moment, as I read my Rejoinder, the Prosecution has denied me my right to Justice!

**Table 1: list of Witnesses Cited by Prosecution is yellow highlighted**

<b>Prosecutor's Witnesses</b>	<b>Defense Witnesses</b>
<b>1. Testimonies of Villagers</b>	
Rasit Rahmat; Juhria Ratonbahe; Ahyani Lombonaung; Masna Stirman; Marjan Ismail; Mansur Lombonaung; Surtini Paputungan; Nurbaya Pateda; Juhra Lombonaung; Sul Manoppo; Herson Bawole	Madjid Essing; Robert Sasuhane; Rahima Jumaidi; Hj. Dahlan Ibrahim; Jantje Aring; Madjid Andaria; Salam Ani
<b>2. Regulatory Compliance and Enforcement</b>	
Witiro Soelarno; Sigit Reliantoro; Isa Karnisa; Dibyo Kuntjoro, Sofyan Simangunsong	Washington Tambunan; Ngaja Ginting Soeka
<b>3. Sampling Issue</b>	
Ricky Telleng; Steven Kaunang; Yahya Lombonaung; Yogie Chrisswasono; Dolfi Nicolaas	Jerry Kojansow
<b>4. AMDAL Issue</b>	
Sigfried Lesiasel; Witiro Soelarno Masnellyarti Hilman	David Sompie
<b>5. Permit</b>	
Sonny Keraf; Masnellyarti Hilman; Asep Warlan Yusuf	Nabiel Makarim; Safri Nugraha
<b>6. Perjury by Masnellyarti Hilman</b>	
Masnellyarti Hilman	James Paulus; Inneke Rumengan
<b>7. B-3 Waste</b>	
Sulistiowati	James Paulus
<b>8. Fish Issue</b>	
Rachmansyah	L.T.X. Lalamentik; James Paulus
<b>9. Surface Water</b>	
Yudi Prabangkara	Rudy Sagoya

<b>10. Thermocline</b>	
Abdul Ganie Ilahude	Andojo Wurjanto (ITB)
<b>11. Marine Ecology</b>	
Rignolda Djamaludin	L.T.X. Lalamentik ; James Paulus
<b>12. Legal Experts</b>	
Muladi; Asep Warlan Yusuf	Daud Silalahi; Andi Hamzah
<b>13. Metals in Blood</b>	
Dr. Budiawan	Keith Bentley
<b>14. Errors in Police Data</b>	
Munawardin	Sri Bimo Andi Putro; Dr. Mun'im Idris; Shakeb Afsah
<b>15. Health Issues</b>	
Dr. Jane Pangemanan	Dr. Sandra Rotty; Dr. Joy Rattu Dr. Winsy Warouw

The Public Prosecution Team has forgotten or has completely rejected the principles of a criminal trial process, where not only the judges but the Prosecution too must be convinced that a crime has been committed, based on strong and conclusive evidence. NMR and I, are clearly innocent because according to the body of legal and conclusive evidence disclosed throughout this criminal trial, NMR placed its tailings – which were not B3 waste – on the seabed of Buyat Bay; NMR held a valid permit to place tailings on the seabed of Buyat Bay based on the NMR AMDAL and the Permit from the Ministry of Environment and that no pollution and/or environmental degradation took place in Buyat Bay as is defined by the Environmental law and that there never was any negative health impact on the residents of Buyat Bay as a result of the placement of NMR tailings on the seabed of Buyat Bay.

There is no contradiction in the Defense statements of Defendants I and II and in my own Defense regarding the statement that the Public Prosecution Team only considered the testimonies of Dra. Masnelyarti Hilman MSc, Ir. Sulistyowati, MM and Ir. Isa Karmisa, while on the other hand stating that the Prosecution had already referred to the testimonies of 21 witnesses, 9 experts and 7 items of documentary

evidence in its Charges because the Public Prosecution Team only focused on the testimonies of those three witnesses.

If based on the evidence submitted by the Prosecution, the Public Prosecution Team wishes to conclude in its Reply that a crime had taken place, then once more I must reiterate that the Public Prosecution Team did not act in its capacity to uphold the law but has instead become an instrument of abusive power and authority.

### ***Reply - Item 2***

Under point 2 of the Reply, the Public Prosecution Team basically questioned two main issues in the Defenses of Defendants I and II and of my own Defense regarding external intervention and the non-application of the Subsidiary Principle. The Public Prosecution Team responded: (a) external intervention is a right guaranteed in the 1945 Constitution, the Human Right legislation and the Environmental legislation and (b) the Subsidiary Principle is an alternative so that if any element of exception is fulfilled then the Subsidiary Principle does not apply and what applies instead are sanctions under the Environmental law.

It seems the Public Prosecution Team had accepted the reports and allegations of dr. Jane Pangemanan, the Kompas articles and the reports in the mass media of allegations of heavy pollution in Buyat Bay which were started by a bunch of NGOs, politicians, and a small number of Buyat Bay residents (instigated by NGOs and politicians) without any comprehension or verification. It is the duty of the Police and of the Attorney General's office at the investigative stage to conduct in-depth investigations and examinations, while taking into account the negative and sensitive impacts stirred up by such a case. Simple logic shows that if the Police and the Attorney General's office had been aware that the reports and allegations were based on nonexistent facts and evidence then there should not be a basis or legal reasons to charge the Defendants.

But since they chose to prosecute based on such obvious lies, I am forced to conclude that the Police and the General Attorney's office had been used by certain groups or individuals to achieve their own specific objectives.

I fully support the idea or objective of community participation in ensuring that Environmental law is upheld. I support the role of responsible NGOs in their function to empower the community to become an important player in this nation's

development. I have already clearly stated this in my Pledoi. However, what I find unacceptable are the statements made by some NGOs and politicians which clearly intended to manipulate the community to achieve their own devious objectives, using half truths and turning them into scientific sounding nonsense. This was not what is meant in the Environmental law as “Community Unrest”. If every piece of news appearing in the mass media is “community unrest” then one could say that the government of this country does not work and that the wheels of the bureaucracy have stopped turning because the government must constantly quell the unrest raised by any party getting media coverage of every non-issue. It is the duty of the mass media to present what is happening in the society in public interest, to act as a watchdog for governmental actions and to ensure that public accountability is always at the forefront of all governmental practices. I am sure that a system of *checks and balances* like this must be present in a society intent on democracy-building. I am also certain that the role of the mass media is vital in a system of national integrity which was one of the basic ideals of the founders of this Nation. However, it is also public knowledge that some of the national and even international media have neglected the principle of “*covering both sides*”, have not conducted “*investigative reporting*” for issues that should require in-depth investigation forming the subject of their news. The allegations of Pollution and Environmental Degradation in Buyat Bay are damaging, dangerous and serious allegations, for which the mass media must shoulder its responsibilities as mentioned above. The negligence of some of the mass media, the NGOs with a clear anti-mining agenda, and the maneuvers of politicians with personal interests allied to become one main strength pushing and moving the Police and Attorney General office to make this a criminal case – something that should never have happened – because the Police and the Attorney General office should uphold the law only on the basis of convincing and conclusive evidence. This has been submitted in the Defenses and the Public Prosecution Team has failed to understand it, or even worse, simply ignored the fact that legal evidence cannot be based on mere media generated sensationalism.

The section of the Replic responding to the Defense regarding the Subsidiary Principle really shows that the Public Prosecution Team did not understand the meaning of the Subsidiary Principle. Once more I wish to draw the attention of the Panel of Judges to the various sections of the Defenses regarding what I believe constitutes a common understanding of the Subsidiary Principle. To understand the legal criteria, one must first understand its moral and physical dimension; understand the problem it wished to avoid, to prohibit or to regulate as well as understand the moral, ethical, business,

cultural context and the interests that the legislation seeks to protect. It has already been stated in the Defenses, and also explained by the expert witnesses in this trial, that the Environmental law is part of the State Administrative Law system. The Environmental law is closely related to economic and development activities. Should it be proven with strong and conclusive evidence that Pollution and/or Environmental Degradation have taken place then resolution mechanisms of an administrative nature should be put in motion to find a solution that creates a balance between development and sustainable maintenance of the ecosystem. There is not one valid piece of evidence to show in this criminal trial that Pollution and/or Environmental Degradation have occurred. To-date Buyat Bay continues to be a source of livelihood for the people of that area. Even currently, investors are in the process of building storage and processing facilities of marine produce from Buyat Bay. All this proves that the waters of Buyat Bay continue to fulfill their function, that is, to become a source of sustainable livelihood for the community of the Buyat Bay area. There is not one shred of evidence submitted by the Public Prosecution Team to prove that Pollution and/or Environmental Degradation have occurred in Buyat Bay as a result of PT Newmont Minahasa Raya's tailing placement, - not in the past, not in the present and not in the future! With this simple fact it is evident that the Subsidiary Principle must be applied in line with the intent, the spirit and the objectives of the Environmental law through an Alternative Environmental Dispute Resolution, starting with an administrative solution, followed by a mediated environmental dispute resolution, event in the subsidiary principle written in the general elucidation in paragraph two and last of the Law No.23/1997 it is required that an administrative sanction should have been implemented, the words "administrative sanction" clearly indicate that never ever has there been an administrative verdict, and just only administrative procedures as was meant by the Prosecutor in his charges that do not distinguish between administrative sanctions and administrative, and ONLY if these steps do not succeed, a solution is to be sought in a court of law. Even though it was correct that there are exceptions to the Subsidiary Principle as alleged by the Public Prosecution Team, none of these exceptions were ever proven by the Public Prosecutor..

There were never any administrative sanctions that were allowed under Article 33 up to Article 25 of Law No. 13/1997, let alone warnings from the Indonesian government. NMR is not guilty because the placing of its tailings was done pursuant to Indonesian laws and regulations by obtaining an AMDAL and the permits from various government agencies. The Public Prosecution Team claims that NMR's actions caused unrest. Which actions? Operating a mine that has significantly improved the community's

economy and protected the environment? The environmental law expert brought here to the court, Prof. Dr. Daud Silalahi, SH stated at the court that the criteria for citing unrest should not be based on newspaper news, but should be based on the existence of physical evidence that the environment on physical facts that the environment has been polluted or damaged. What the Prosecution calls “unrest” was not as a result of NMR’s actions, but instead it was started by a bunch of NGOs and politicians and later inflamed by sections of the mass media; where all three of these players were manipulating facts and the members of the community in pursuance of their own selfish interests and hidden agenda.

Even if we were to say that civil sanctions or alternative environmental dispute resolution were applied, the government of Indonesia had filed a civil suit against NMR in the South Jakarta District Court and NMR had won the suit; subsequently the Indonesian government had appealed the decision which was later withdrawn following the signing of the Goodwill Agreement. By resolving the civil suit and signing the Goodwill Agreement, all controversies regarding Buyat Bay should have ended. Consequently in pursuance of the Goodwill Agreement’s criteria and stipulations what should have remained for the Indonesian government and NMR to do was to monitor the condition of Buyat Bay waters in order to promote sustainable environmental management.

Even the Chief of the Supreme Court, Bagir Manan admitted that there has been differential treatment or discrimination by the Indonesian government through the Police and the Attorney General office by their actions of continuing to accuse NMR and myself in the criminal case. The Public Prosecution team should have had no need for concern that the statement of the Chief of the Supreme Court could influence the decision of the Panel of Judges because I believe that it was not the intention of the Chief of the Supreme Court to influence the Panel of Judges presiding in this criminal case and I am fully convinced of the independence of the Panel of Judges in this case to rule according to the strong and conclusive body of evidence disclosed throughout this trial.

### ***Replic – Item 3***

The defense stated that the Goodwill Agreement was an administrative resolution while the Prosecution contends that: “the existence of such an agreement does not invalidate the criminal element and therefore it may not be used as an argument for apology or justification by the Defendant to be released of criminal charges.” The

Goodwill Agreement is an acknowledgement by the Government of Indonesia that there is doubt that Buyat Bay is polluted and that it will take 10 years of monitoring by experts to prove whether or not pollution has occurred. It is not logical to pursue a criminal case when the Government itself already stated its view, that there were events of environmental pollution occurred, in other words that the contents of the agreement was a proof that the government itself rejected the evidence submitted by the Prosecutor. Careful and objective scientific principles should have been used to determine the validity of the claims before this case was filed.

The Public Prosecution Team stubbornly denied that the Goodwill Agreement was a form of administrative and civil solution to the Buyat Bay controversy. It is clear that the Indonesian government withdrew the civil lawsuit upon signature of the Goodwill Agreement. Their doing so, should have been seen as a resolution of the environmental dispute as intended under the Environmental law. That the Goodwill Agreement stated that its execution did not preclude the criminal case taking place in the Manado District Court from continuing, was simply to show the respect of the executive to the judicial authority. That does not mean that this court must close its eyes to the clear fact: THE BUYAT BAY CONTROVERSY WAS OVER. If at a later stage independent expert team were to establish on the basis of the Goodwill Agreement or conclude that Pollution and/or Environmental Degradation had occurred in Buyat Bay, then, based on the Agreement, mechanisms would have been placed to resolve the issue.

Why has this criminal trial been allowed to continue till now when the Goodwill Agreement already resolved the Buyat Bay controversy? The Goodwill Agreement was signed by the Minister for Social Welfare representing the Indonesian government and witnessed and/or known by the Coordinating Minister for the Economy, The State Minister for Environment and the Attorney General as well as a number of high ranking officials from the Indonesian government. So when various branches of the Indonesian Government were parties to this agreement, where they took part in stating that no evidence was obtained regarding pollution of the Buyat Bay, then why should other branches of the government continued to pursue this criminal case, defies all logic. Is the Indonesian government's executive branch not one unified organ of the state? If the Attorney General's office and the Public Prosecution Team had rationally thought through the Goodwill Agreement and the effects of continuing this criminal

trial, then the Public Prosecution team should have demanded that Defendants I and II be allowed to be cleared of all charges. The truth, however, is that both I and NMR are still here in this court today to read our Rejoinders, to fight to defend our future, our good names, NMR's honor, NMR's employees' honor, my honor and that of my family. It is indeed really difficult to understand what motivates the Public Prosecution Team to stubbornly continue with this criminal case!

#### ***Replic - Item 4***

Under Point 4 of the Replic, the Prosecutors are responding to our challenge to demonstrate any wrong doing on my part and so to show that I was not named as a defendant simply because of my position. After all the evidence produced in this court over the last two years, all they could come up with were five letters. In all of them, I am asking the Indonesian Government for regulatory clarity and providing answers to Bapedal's questions. They are all truthful, honest and accurate. If that is a crime, then every right-acting company official in Indonesia needs to go to prison.

The Public Prosecution Team insists on accusing me solely because of my position as the leader of the company quoting from the expert opinion of Prof. Muladi. His testimony clearly should have been disregarded as he did not testify as a legal expert in this criminal trial nor was I given the opportunity to cross examination him. He must have known that what he said in court was wrong and indefensible, otherwise he would have come back to defend his stand and also give me the opportunity to cross-examine him.

#### ***Replic - Item 5***

The Public Prosecution Team lectures the Defense Teams on the Indonesian legal system and its stipulations. I am not a lawyer and I do not claim to understand Indonesian law, although I have started to learn something about it from this criminal case. Unfortunately, what I have learnt from this case shows that on paper Indonesian laws and regulations might be good, might include legal certainty and might be just, but the reality in this particular case is that in the application of the law by the Police, the Attorney General's office and the Public Prosecution Team, the law has become most uncertain and definitely unfair towards NMR, myself, my family and a number of NMR employees. From my understanding of the Indictment, Charges and Replic and

as a person with limited knowledge of the law, I can only conclude that the Public Prosecution Team knows nothing about Indonesian Law, or worse yet, simply ignores what it knows. My lawyers have shown that the Public Prosecution Team has failed to follow the letter of the law in this case. But understanding law is not simply a matter of reading the text, it also requires an understanding of the background of the law, its spirit, its objectives and economic, social and cultural factors, its effects and, of course, its impacts and its implementation. The Public Prosecution Team has utterly failed to uphold the “spirit” of the law in this case.

Regarding whether or not NMR has complied with its social and community development obligations to improve the welfare of the community around the NMR mining area, this is an undisputable fact. Regarding the fact that the communities of Buyat and Ratatotok have the right to sue should Pollution and/or Environmental Degradation occur, I was informed by my Defense team that these are the stipulations of Indonesian laws and regulations. That the Attorney General office has the right to press criminal charges, I have not disputed it because these are legal issues, however what I need to respond to and to dispute is how the Attorney General Office can press criminal charges against NMR and myself if there has never been even a shred of real evidence that Pollution and/or Environmental Degradation have occurred in Buyat Bay waters as a result of NMR Tailing placement. And it is significant to point out that not one resident of the Buyat Bay area has pressed charges against NMR or myself that the health complaints they might have been suffering from were caused by NMR placement of its tailings on the seabed of Buyat Bay!

The Public Prosecution Team says that they are the ones who represent the “legal feelings of the injured community” and so can ignore the fact that the community has not pursued a suit claiming pollution. It is obvious from the testimony of the witnesses in this court that the Public Prosecution Team is acting directly against the feelings and desires of the local community, who know that they have benefited from the mine, have not been the victims of fictional “strange diseases” and that the pollution claim is a hoax.

### ***Replic - Item 6***

Under Section 6 of the Replic, the Public Prosecution Team continues to assert, as a matter of legal procedure, that the POLRI water sample results constitute valid legal evidence, despite the fact that they contradict every other study ever conducted. I must defer to the lawyers and the Honorable Judges on the legal nature of the

evidence, but as a mining professional who bases decisions on scientific results all the time, I must say that the POLRI results are wrong. They have been proven to be wrong in so many different ways that no reasonable person would rely on them, and even the guidance provided by the Prosecution to the Police, using the term of P-19, one of which mentioned that the Police Forensic Laboratory should not make any conclusions, as this was outside their authority, and this was also stated by the Expert witness Dr. Munim Idris – forensic expert – who stated that the Puslabfor conclusion was transgression of authority. As a matter of reality, the POLRI results are not evidence of anything but persistent bungling and erroneous conclusions.

### ***Replic - Item 7***

Under this item, the Public Prosecution Team only extracted parts of the Defense to provide a selective response in its Reply without considering the substance of the issue. In the Defenses, the principles, substance, context and application of the Subsidiary Principle are explained in detail. Written warnings are a key ingredient in the application of the Subsidiary Principle and this is an official requirement in the company's Contract of Work, and in the State Administrative law.

Here again, the Public Prosecution Team wants to ignore the point that the Government of Indonesia never gave us any kind of a warning that we were doing something wrong. This may not be important to the Prosecutors, but as someone trying to run a business in Indonesia, it is crucial. We were being regulated *before* we acted and *while* we were acting. We had inspections and permits and massive AMDAL committees. We were being watched and studied by every part of the government. We never had any objection to their visits and welcomed their supervision. We wanted to do right deeds and correct wrong actions. After all that watching and despite no hint being provided that anything was wrong, particularly not one note about pollution was entered in the mining log-book, we are now being told that we were committing criminal acts while all the regulators were watching and were completely cognizant of each of our activities at the mine site! If you do not know, and cannot know, what the law is, how can you follow it? What is more basic than that? How can you call it a "rule of law" if you are put in prison because the government refuses to tell you what is legal and what is not?

### **Replic – Item 8**

In this part the Public Prosecutor stated that: “the Defense team for Defendant I argued that the claim of Minamata disease was “fictitious” while the Prosecution argues that “.... *this argument is completely irrelevant for submission in this criminal case because the Minamata disease was never mentioned or discussed in the Indictment, evidence presented in this court or in the Charges of the Public Prosecutor.*” This is not correct, and it would be silly for NMR and I to intentionally make up the Minamata disease allegations. One needs to keep in mind that the origin of this case was the allegation of Minamata disease or mercury poisoning. We have to keep in mind that to pursue the truth we can not only look at certain instances, to disclose the reality, we need to view the background of a case, to comprehend whether there are certain objectives or motivations. It can not be denied that the origin of this case started with the claim of the Minamata disease or mercury poisoning, as was mentioned in the testimony of the witness as well as expert witness Nabel Makarim and the news that surfaced at the same time as the police report made by dr. Jane Pangemanan. The made-up Minamata disease issue was raised by dr Jane Pangemanan in her report to the Police. This police report (although subsequently withdrawn by dr. Jane Pangemanan herself because she could not support the allegations she had made and spread) became the basis for the Police investigation and were included in the Police BAP.

Is the Prosecutor now stating in the Replic that people are not contaminated with unusual levels of mercury? If so, I would wholeheartedly agree as that is what all the evidence points towards.

### **Replic –Item 9**

The Defense stated “*The Defense teams for Defendants I and II stated that no pollution or environmental degradation had taken place in Buyat Bay based on public knowledge*” and the Prosecution argues that “*In an environmental case it is not possible to just base claims on perfunctory observations unsupported by legal and valid laboratory analysis*”. I fully agree with this statement. But the Prosecution departs from common sense - in giving any credibility whatsoever to the analysis conducted by the Police Headquarters Forensic laboratory and the report generated by some members of the team for the Handling of Alleged Case of Pollution and/or Environmental Degradation in the Villages of Buyat Pantai and Ratatotok. The key

word here is “VALID” – all the evidence shows that the results of these two analyses are not credible and therefore are “NOT VALID”.

First the Police sample results are very much in question as they do not agree with results from split samples nor do they match any other samples collected by neither a third party nor by NMR, nor could they be replicated in the court ordered re-sampling in 2006. The chain of custody of the police samples is questionable because there were 24 water samples taken and 34 were received at the police laboratory. No one has ever explained where those 10 extra samples came from, so how can the Prosecution assert that the sample results are valid and reflect the actual conditions of Buyat Bay while all the evidence before this court demonstrates that the samples are invalid.

In the same sentence of the Replic, the Prosecution refers to what they perceived as valid evidence extracted from the study undertaken by the team for the Handling of Alleged Case of Pollution and or Environmental Degradation in the Villages of Buyat Pantai and Ratatotok established by the State Minister for the Environment. If the Prosecution would open and actually read that report they would realize that the report totally contradicts the Police Laboratory results. That report correctly states that the mercury and arsenic content in the sea water in Buyat Bay and the Buyat River are well within applicable Indonesian regulatory limits. So although the two reports contradict each other, the Prosecution claims that both are legal and valid laboratory analysis supporting their case. This is simply wrong. How can two contradictory and opposing reports support the same claim of pollution in Buyat Bay?

Since pollution of this sort is always long-term, so is its impact measurable at the location over a long period (often decades and centuries). So the Honorable Panel of Judges ordered the Prosecution to resample Buyat Bay which would prove once and for all the true condition of the Buyat Bay waters. The Public Prosecution Team’s refusal to follow the order of the Panel of Judges (a very appropriate ruling in the quest to find the truth of this case) publicly demonstrated the Prosecution’s fear that the re-sampling would disprove the Indictment and the Charges. It is reasonable to assume that the refusal was an act of insubordination against the Panel of Judges’ ruling and should be viewed as a violation of Indonesian laws and regulations.

Again following the Prosecution’s own statement in the Replic *“In an environmental case it is not possible to just base claims on perfunctory observations unsupported by legal and valid laboratory analysis”*. Consequently applying their own logic to their witnesses one can easily invalidate the testimony of all the Prosecution’s fact witnesses in which they stated that their lumps, bumps and skin rashes are caused by

tailings as again, the Prosecution failed to support any of those allegations with legal and valid laboratory or medical analysis.

***Replic –Item 10***

In regards to the Defense statement: *“If the PROPER methodology from the Ministry of the Environment had been applied [to PTNMR] then PT Newmont Minahasa Raya would have obtained a green rating, meaning that its activities were in compliance with environmental law. (Pled I, page 7, Pled II, Pled III)”* while the Prosecution contends that *“the Defendants attempted to create an unsubstantiated opinion by relating the activities of PT Newmont Minahasa Raya to the PROPER method because to this point in time PT Newmont Minahasa Raya has never been involved in the PROPER program.”*

The Prosecution once again is trying to deflect the attention from the core issue of the quality of compliance performance of the effluent in tailings. PROPER methodology is the nationally mandated methodology for assessing the level of environmental compliance of any operation in Indonesia irrespective of whether or not they participate in the PROPER program or not. The core criterion for PROPER rating is based on the quantitative assessment of how good or bad the value of an environmental parameter is relative to the applicable standard. This aspect of the PROPER methodology for measuring compliance using the five color codes is well documented as shown in the Evidence T.I-18A. When this methodology is applied to the effluent quality data of PTNMR, it becomes clear that PTNMR’s level of performance is at the GREEN level, which implies that the effluent quality is more than 50% better than the standard. This reality stands irrespective of the fact whether PTNMR participated in the PROPER program or not.

The issue of PTNMR’s participation in PROPER was well explained in the court. And Mr. Nabel Makarim, former Minister of Environment and founder of the PROPER program confirmed to the court that PTNMR was not included in the list of PROPER companies because their operation was scheduled for closure in 2004, and that there were many other sources that were more important than PTNMR for inclusion in the PROPER program.

The Defense was very clear on this point. We never stated NMR was formally enrolled in the PROPER program. The Defense arguments stated: *“IF [NMR] WERE INVOLVED”* they would have received a GREEN rating. NMR’s RKL-RPL data was put into the PROPER computer system and the computer rated NMR’s environmental

performance as GREEN as defined by the PROPER color coded system. This was testified to in court by the Expert Witness Shakeb Afsah who developed and programmed the PROPER computer evaluation system.

However, based on the comment in the Replic it is clear that the Prosecution admits that PTNMR's compliance level was good enough for a GREEN rating in PROPER program even if they didn't participate in it—and this indeed is the most relevant fact for this case.

### **Replic – Item 11**

In regards to the Defense statement: *“the General Prosecutor’s refusal to look at and observe the exhibit in Teluk Buyat shows that Teluk Buyat is not polluted. That particular statement is supported by the article in the National Geographic magazine, August 2006 edition as well as the daily newspaper, Kompas dated 18 December 2006. (Pled. I page 7-10, Pled. II page 7-8, Pled III)”* however the Prosecution argues that *“This statement is inconsistent with the previous statement where forwarding an argument has to be accompanied with solid evidence and not merely based on assumptions.”* The Prosecution further goes on to state that *“The refusal by the General Prosecutor for not inspecting the location and not taking samples from the location at Teluk Buyat is in fact a form of consistent effort by the General Prosecutor to follow the court’s procedures.....”* The Prosecutions further states that *“The reacquiring of samples is no longer necessary keeping in mind the disposal of tailing into the sea and PTNMR activities was completed in 2004”* As I pointed out in my Pledoi, this is not logical. First, is it not odd that when this five Judge Panel issued a direct and written order to resample and the Prosecution at that time did not raise any objection in court but later they refused to comply with the order? Though I am not a lawyer, in my mind this action or inaction is nothing short of “Contempt of Court”. Second, the tailings which the Prosecution contends are the source of pollution are still in Buyat Bay (by definition Pollution is said to have occurred when there is a long term impact) and still could be measured if indeed the allegations were true. An analogy to this would be if the Prosecution was charging me with arson or the burning down a building and in my defense I told the court that the allegations are false because the building is still standing and has never been burnt down. The panel of judges would logically request that we all go out and see if the building is standing there or not, but the Prosecution objects that this act of examination is irrelevant because the act of

arson was committed earlier and if the building is still there or not is irrelevant to the case at hand.

The Prosecution further states that: *“It would be impossible to use the magazine, National Geographic Indonesia and the newspaper, as exhibits to prove the non-occurrence of contamination and/or destruction of the environment in Teluk Buyat this is so because the two mentioned tools of evidence are not valid and legal as stipulated in the Indonesia Supreme Court Jurisdiction Number: 1479/Pid/1969 date 18 December 2006.”*

The Prosecution contends in the Replic that the “General Prosecutor continues to be consistent in using the exhibit which is legal and valid in the form of “Criminal Examination Event Laboratory Report by the Centre for Forensic Laboratories POLRI Headquarters, Number: 4171/KTF/2004 date: 27 September 2004” and the report: Suspected Contamination and/or Destruction of the Environment in Buyat and Ratatotok Villages conducted by research teams which was formed by Ministry of Environment” This could be paraphrased another way and state that the Prosecution continues to rely solely on the Police laboratory results that are inconsistent with all other samples ever taken in Buyat Bay with known errors in the quantity of samples taken in the field with those evaluated by the Police Laboratory in which no one has explained to the court where those 10 extra samples came from, and where do the sampling location points come from, such as “Jembatan Belang” that was never mentioned in the official sampling report, and this location according to witness Majid Andaria, is in “Belang” which is very far located from the Buyat area. As well as other sampling location points of which the coordinates occur mysteriously without anyone being able to explain why and how, including the Witness from the Police Investigator and the Puslabfor staff that took part in taking the samples in the field, although being asked by the Defense Team. This alone makes the police sampling illegal and invalid. The Prosecution also bases its case on what is a fabricated report by some team members which references non-existent regulations, transposes formulae and miscalculates a hazard index with errors of over 4,500 percent and the Prosecution still insists on using the word VALID. Given these circumstances, I would insist on using the word PREPOSTEROUS!

### ***Replic –Item 12 and 13***

Under this item of the Reply, the Public Prosecution Team responded that: (a) the Defenses of Defendants I and II regarding the Police illegal investigation are not relevant to the issue of Supreme Court ruling in the Habeas Corpus case and that (b) the Contract of Work demands that NMR comply with the Environmental law.

With this response the Public Prosecution Team showed its lack of understanding of the context presented by the Defense Team and myself. My defense raises the issue that there have clearly been anomalies in the investigation process against NMR and myself and that violations of NMR's rights, my own and those of a number of NMR employees took place and that for that reason we filed the Habeas Corpus action. It is important to note that the Habeas Corpus claim was granted by the South Jakarta District Court. It is also clear that the Supreme Court legislation itself precludes appeals and cassation in a Habeas Corpus ruling by a District Court. This rule was violated by the Police who submitted a cassation on the Habeas Corpus ruling. Subsequently the Supreme Court violated the Supreme Court Law and its own Gazette by issuing a cassation ruling on a case of Habeas Corpus. The anomalies in the treatment of NMR, I and some NMR employees did take place; this can never be erased from our lives and remains as yet another incident of unfairness in the shameful history of Indonesia's legal practices relating to the Buyat case.

I truly do not understand in which context the Public Prosecution Team in its Replic states that NMR must comply with the Contract of Work which states that NMR shall comply with environmental laws and regulations. Because NMR did not violate even a single stipulation of the Contract of Work and NMR did not violate any Environmental law stipulations or regulations.

### ***Replic –Items 14***

Under this item of the Replic, basically the Public Prosecution Team wants to state that the NMR's AMDAL and the Minister of the Environment Permit did not constitute a permit to place NMR tailings on the seabed of Buyat Bay. They do so by repeating time and time again that this has been proven by the NMR letter applying for a permanent waste disposal permit.

The Defense Team exhaustively addressed and proved this by referring to undeniable witness and expert testimonies that NMR's AMDAL and the permit by the Minister of the Environment constituted a permit to dispose of NMR tailings on the seabed of Buyat Bay in accordance with Indonesian laws and regulations. Once again, the Public Prosecution Team thought and unsubstantially played with words by only referring to the term "permanent permit" mentioned by NMR in its letter. Whatever be the wording used in correspondence between NMR and the Indonesian government, the facts remain that the NMR's AMDAL and the permit of the Minister of the Environment are to all effect a permit or an approval based on extensive and time consuming detailed technical and scientific studies by NMR and the Indonesian government that in the end allowed NMR to place its tailings on the seabed of Buyat Bay. ***This permit has never been revoked.***

Based on NMR's routine reports to the Ministry of the Environment, the Department of Energy and Mineral Resources, the Provincial government of North Sulawesi and other government agencies all parties KNEW FOR CERTAIN that NMR had become operative in 1996 and concluded its operations in 2004, and that the results were reported every quarterly in the form of an RKL/RPL, that supervision was performed as proven by the notes entered into the mining log-book that never mentioned of any pollution, that the supervision activities were executed, and that at the begin of each year PT Newmont Minahasa Raya submitted its workplan to the ESDM Department and the monitoring/ management of environment (RTKPL) which after being approved by the ESDM, the project could continue to run in the ongoing year, and that throughout this period it had always placed its tailings on the seabed of Buyat Bay. Had this not been permitted, then CERTAINLY in accordance with the Environmental law the Minister for Energy and Mineral Resources based on the Contract of Work and other government agencies in authority would have stopped NMR operations. With its response, the Public Prosecution Team is stating that throughout NMR's mining operations from 1996 to 2004 the government of Indonesia, including the Minister for the Environment and the Minister for Energy and Mineral Resources, the North Sulawesi provincial government and other government agencies were either fast asleep or were taking time off from work. Even if the term "permanent permit" was used in correspondence between NMR and the government of Indonesia, this only occurred because NMR as an investor wanted certainty for its activities in Indonesia and those words do not obliterate the fact that the Indonesian government had granted NMR a permit to place its tailings on the seabed of Buyat Bay.

Regulation exists to protect the environment. Here we know, absolutely know, based on all these months of testimony by eminent scientists, that the Buyat Bay environment is healthy and not polluted. Therefore, we know the regulators did their job. These false claims are insulting towards the regulators because they imply that the regulators were not doing their job, even when they had acted conscientiously while conducting their duty and thereby protected the environment.

The Prosecutor's claim that we did not have legal permission to operate the Mesel Mine and mill. I have always found this claim simply amazing. Was the Mine a secret? The Mesel Mine took years of planning. We went through a lengthy and intensive process of environmental study, much of which concerned submarine tailings. The AMDAL approved submarine tailings placement as the most environmentally sound method. We took extensive data on the location of the tailings. We tested hundreds of samples of the quality of the water in the ocean near the tailings over a decade. We conducted bathymetry studies to confirm that the tailings were stable and did not move. We did transmissivity tests showing that the tailings were not mixing with the ocean water. We had complex peeper studies performed to show that metal compounds in the tailings were stable and not entering the sea water. We did many hundreds of sea water quality metal tests to monitor and make sure that the tailings were not mixing with the sea water. We reported all of that data and findings in our quarterly RKL/RPLs. The conclusions of the AMDAL were correct: submarine tailing placement did not harm the environment.

The Mine Inspectors and the Ministry of Environment reviewed the performance of the operation. The Minister of Mines himself inspected the mine. The mine had hundreds of employees and it operated for eight years. After originally approving the operation, monitoring the operation and subsequently when Indonesia and Minahasa had received the benefits of the operation, and after the mine, mill and submarine tailings closed down, only then was the issue raised for the first time that there was no valid permit. Clearly, this allegation was concocted to try to come up with claims in this case.

Of all of the imaginary claims that we have had to respond to in the case, the “no permit” claim is the silliest.

***Replic –Item 15***

In regards to the statement: *“General Prosecutor has proven in a convincing and lawful manner based on the information given by the Expert Witness Sulistyowati which basically firmly asserts that PT Newmont Minahasa Raya has disposed 33 (thirty-three) tons of Mercury in the time span of 4.5 years. Of the 33 tons of Mercury mentioned, 17 (seventeen) tons expelled to the air in gas form and the other remaining 16 (sixteen) tons are disposed through the pipe to the bottom of the Buyat Bay”,* if one looks at the transcripts of Sulistiowati’s testimony of February 17, 2006 you will find that she stated no such thing. The Prosecution has falsely attributed this quote to Sulistiowati.

In regards to the statement: *“With the categorization of tailing waste produced by PT Newmont Minahasa Raya as B-3 due its chemical metal contents and hence classified as heavy metals and is listed in the Government Regulation Number 19 Year 1994 as attached and in connection with Government Regulation Number 12 Year 1995 also stated in the mining activity’s B-3 waste material list, therefore PT Newmont Minahasa Raya has conducted transgressions against the laws in effect,.....”,* the Prosecution has once again employed the means of falsehood. Tailings can ONLY be classified as a B-3 material under classification code D-222 after undergoing toxicity testing and if the results are above prescribed standards. Since the tailings were tested and proved not to be a B-3 material as testified to in this court, the Prosecution has misrepresented the facts once again.

***Replic – Item 16***

Quote Replic: *That the argument by the Defendant maintains that no rejection has been made against ERA and is absolutely at odds with the courts’ facts (fakta persidangan) where the General Prosecutor lawfully and convincingly proven that ERA PT Newmont Minahasa Raya has never been approved by the Ministry of Environment based on elucidations by the witnesses Sonny A. Keraf, Isa Karmisa Ardiputra and Masnelyati Hilman. As I stated in my Pledoi, the ERA is an evaluation tool allow regulators to make informed decisions. Governments do not “approve” ERA’s. No*

one was expecting approval, the Government's options upon receipt of the ERA would be to increase or decrease discharge requirements or to revoke the permit, not to "approve" the ERA. They did none of those things showing that there was no problem with the tailings disposal by NMR. With regards to sampling, I need to remind the Prosecution that the bathymetry survey was conducted in 2001 and KLH conducted sampling of the Buyat Bay in 2003.

Every witness and expert witness concluded that the ERA is not a part of Indonesian law. It is a super careful study of the environment to determine not only if there is any damage currently, but also to determine if there is any risk of damage in the future. It is a very expensive, scientifically conclusive and very careful analysis. When the Indonesian law on ocean discharge, changed in 2000, no Ministry approached us and told us that in addition to the many permits we already had, we now needed a new one. No. We approached the Minister of Environment, and asked what the Ministry of Environment wanted us to do to comply with the law. And then we did what they asked us to do. NMR commissioned a world-class Scientific Group to perform a complete environmental risk assessment on Buyat Bay. It was done on time. It was thorough. And it conclusively determined that not only was Buyat Bay clean and unpolluted, but that there is no risk of harm to any living thing in the future. There were conversations that went back and forth with Bapedal, and their every question was answered by NMR. At that time, there was reorganization within the Indonesian government, and Bapedal was reorganized. We never heard anything again from the regulators, we never heard a complaint, we never heard of a lack of any ERA process. Not until this case was brought to court!

There is no wrongdoing here by NMR or the government. The government asked for scientific assurances over and above those normally given, and it got them. The government was extra careful in their environmental analysis and we were extra careful in our environmental analysis. That is not a crime.

The ERA claim is another claim in this case which was wholly concocted after the fact. It has been conclusively rebutted by the evidence presented, by the testimony and legal expert witnesses in this case.

Based on the evidence presented to this honorable Court, it is no secret as to who made up these claims of no permit and ERA: Ibu Masnellyarti Hillman. As the documents and testimony show, she was an official with Bapedal at the time of the STP permit and ERA communications in 2000 and 2001. She admitted in this Courtroom that she had complained to the Ex-Minister of Environment and the head of Bapedal, but her complaint was disregarded by him as being invalid. She reentered the scene in 2004, precisely at the time the Buyat hoax was being created by the activists and being played up in the media. Ibu Masnellyarti Hillman rode with that current and, as Chairman of the Integrated Team, steered that team away from science. Its negative findings, as have been presented to this Court, have been so discredited as to make it the laughing stock in the international scientific community.

### ***Replic – Item 17***

The General Prosecutor's response to the fact of a thermocline being present in Buyat Bay was the most entertaining, if not the most absurd item contained in the Replic. This particular segment is very straightforward. A thermocline has been measured in Buyat Bay before, during and after NMR's mining operations. There are twelve years of measurements that prove this point.

The Prosecution's witness never measured for a thermocline in Buyat Bay but merely did an extrapolation from some of his measurements out in the Maluku Sea in 1972 or 24 years prior to the start of the NMR mine operation. His opinions were point by point examined and then destroyed by the Defense witness who had examined about 10,000 measurements in Buyat Bay which indicated the presence of a thermocline at an average depth of 43 meters. Real data means real conclusions, and this means that the thermocline is around 43 meters.

The tailings that were placed in Buyat Bay have been on the seabed from the time of placement until today. The exact location of the tailings mound has been repeatedly measured and reported to the government and to this court. NMR and the government know exactly where the tailings are. No one has ever contested the fact that tailings were placed and they remain at the bottom of Buyat Bay in a stable condition. However in the Replic, new irrational information was brought to light, with the Prosecution's statement: *"we would like to invite this court read again the actual news*

*article on the black box of the Adam Air plane in the waters of Majene, West Sulawesi detected by the USNS Mary Sears at a depth of 2000 (two thousand) meters under the sea surface. This black box itself has a weight of about 6 (six) kilograms and all experts, whether Indonesian as well as those experts from the Mary Sears vessel suggested to have the black box immediately taken out of the water, since there are worries that it might move due to sea water currents".* What has the Adam Air crash and the aircraft's flight recorder have to do with tailings in Buyat Bay? Maybe the experts are correct and that there are sea currents in the area of the crash, but how does this relate to the confines of Buyat Bay. The simple answer is that there is no relationship. It seems that with the passage of time, the Prosecution has forgotten that the Prosecution, the Defense and the Honorable Panel of Judges actually conducted a court session in the field, and a grab sample was taken at the point where the tailings were placed. And if the Prosecution will recall what came up from the seabed was tailings. Not a flight recorder or black box – just tailings. Just where NMR said they were placed and where they remain today under the thermocline that exists in that location.

Of equal absurdity to that of the black box comparison was the Prosecution's conclusive scientific facts that the tailings deteriorated the sea water quality. To quote the Replic "*.... the facts disclosed at the court which validly and convincingly showed that a degradation in the quality of the Buyat Bay waters occurred due to the placement of tailings, as was mentioned by Witnesses Masna Stirman, Ahyani Lombonaung, Herson Bawole, Sul Manoppo, Nurbaya Pateda, Marjan Ismail, Surtini Paputungan who all stated that due to the impact of tailings that were place in the Buyat Bay, the Buyat Bay waters became turbid, the fishes moved farther away, and even died in large numbers.*" The Replic further goes on to state that "*and they stated that they often caught fishes with lumps, as well as that they suffered health problems such as lumps, itchiness and cramps*" The testimonies of the Prosecution's fact witnesses from Buyat were concocted and not credible. For instance all these witnesses stated they went out exactly five miles to sea to catch fish; all of them knew that the tailings pipeline was 82 meters below the sea; all of them had experienced the so-called "symptoms" that were similar, and all their "symptoms" coincided with the time NMR started operations. The full extent of these witnesses' deception became obvious through the testimonies of respected village elders like Hadji Dahlan, Robert Sasuhane, Jante Aring and others. It is clear that the Prosecutors' witnesses were

coached, their answers were well-orchestrated, and to even rely and reflect upon such testimony in a Replic is in my opinion an act of desperation by the Prosecution.

It is also noteworthy that the Replic states that *“Expert Witness Munawardin who essentially was of the opinion that the heavy metal content in the Buyat Bay waters exceeded the standards, and facts were encountered that fishes died and migrated since their environment were disturbed and also the fact that coral reefs as well as sea-weeds were damaged”* . This statement does not reflect the facts and testimony before the court, If one checks the court transcripts, the Head of the Police Laboratory, Munawardin who also testified that he was also a member of the Integrated Team that took samples between 6<sup>th</sup> and 12<sup>th</sup> September and that the results of the water samples were low in metals and below the regulatory limit. He also could not explain why the Police water samples taken in July were high for Buyat and EVEN HIGHER FOR TOTOK BAY yet the fish samples taken were well below the WHO guidelines for metals.

### ***Replic – Item 19***

The Defense Counsel argued that it was proven that *sludge* and the *sediment pond* did not degrade the quality of the Buyat River water (*Pled. I*). While the Prosecution stated in the Replic that: *“This argument is not relevant to be considered because it is very contradictory to the facts disclosed at the court”* The Replic goes on to state that *“This opinion is also supported by the Exhibit Letter of the Mabes Polri Criminology Laboratory Report Number: 4171/KTF/2004 dated 27 September 2004. Hence, based on these facts it was validly and convincingly proven that the quality of the Buyat River water has been degraded and that this was caused by sludge and the sediment pond.”* First, Dr. Ir. Rudy Sayoga of ITB testified that arsenic and mercury in the Buyat River were below applicable standards. Second, Ministry of Environment’s report stated that mercury and arsenic in Buyat River were below applicable standards. CSIRO’s report came to the same conclusion. The dubious nature of the police’s water quality results has been extensively discussed in this court. These are the people that shipped 24 water samples from Buyat and received 34 at the Police Laboratory and then produced 29 samples before this court. The police water results are obviously wrong. As explained before this court, the sediment pond is not connected to the process plant. All that has been proven is that the police investigators could not keep track of samples which understandably produced dubious and unreliable results.

### **Replic – Item 20**

The Prosecution stated that the *“Defense Counsel for Defendants and Defendant II argued that the marine biota samples and the Buyat Pante Village inhabitants were not contaminated by heavy metals originating from PT Newmont Minahasa Raya’s tailings. (Pled. I, Pled. II 4.3, Pled. III).”*, while the Prosecution contends that the court was provided with proof that many fishes died, had lumps, and migrated due to environmental disturbance, that damages occurred at the coral reefs and sea-weed, that a high concentration of arsenic and mercury existed in fish organs and marine biota that exceeded the international/ WHO standards, as well as there was a high concentration of heavy metals in human bodies.

Let us review what the Prosecution stated – fish had died. The fact that many fish were and continue to be caught, eaten, sold and even exported was testified to by numerous witnesses. No evidence was presented that fish had died as a result of NMR’s tailings placement. Now, as to fish with lumps, no one produced them, long term fisherman who testified before the court had never seen one, none was ever placed before the court as evidence. The number of species of fish never decreased and in fact a private investor is constructing a large cold storage and fish processing plant right on Lakban/ Buyat beach, so this clearly point to the fact that the investor and the fisherman do not perceive that there is a problem. All the evidence shows is that the marine ecological system in Buyat Bay is vibrant and thriving. A Prosecution’s witness testified that there were plenty of fish in Buyat Bay at the time of the Police sampling. No one produced any evidence that the coral reefs were damaged by mine tailings, but the Defense through several witnesses provided video testimony and other documentary evidence that the coral reefs are healthy and support a vibrant ecosystem. I went diving in the Bay myself (the day after the Prosecution read the Replic) and am happy to report that the coral is still beautiful and pristine.

The Prosecution continued on to incorrectly state that a high concentration of arsenic and mercury existed in fish and marine biota that exceeded the international/ WHO standards, as well as a high concentration of heavy metals in human bodies. Let us look at the facts - even the police results showed low levels of metals in fish and humans which matched all the other studies. As the following table demonstrates, no

one produced any evidence that metals were high in fish or humans when compared to guidelines or standards

Study	SeaWater		Fish		Human		
	Hg 1 ug/L	As 12 ug/L	Hg 0.5 mg/kg	Inorganic Arsenic 2 mg/kg	Hg-Blood 50 ug/g	As-Blood 100 ug/g	Hg- Hair 50 ug/g
1. KLH 03	ND	0.975	0.05				
2. POLRI 04	4.89	16.62	0.007	0.04	6.329	6.026	1.097
3. POLRI (SPLIT- ALS)	ND	2.47					
4.UNSRAT	ND	2.52	0.117	0.053			
5.WHO	ND		0.243				3.071
6. DEPKES					13.14		4.006
7. CSIRO	ND	2.33	0.103	0.0176			
8. KLH 04	ND	1.51	0.169	0.176			
9. ALS 06	ND	1.33					

**Replic – Item 21**

The Defense argued that tailings are what in scientific and legal terms can be called solid waste, but in the indictment the Public Prosecutor erroneously used the Decree of the Minister of Environment No.51/1995 regarding quality standards for liquid waste for industrial activities. (Pledoi I pp. 29-30) In the Replic the Prosecution argues that basically tailings are solids liquefied by water, so its form is no longer solid waste but liquid waste. This is a scientific impossibility because tailings are insoluble in water. The Prosecutor’s attempt to equate the characteristics of tailings to the solubility of salt or sugar only confirms the Prosecution’s ignorance and incompetence in basic science. This is one of the silliest arguments I have heard before this court, on par with the relevance of the Adam Air “black box”. The Prosecution was on board the boat on Buyat Bay along with the defense lawyers, the defendant and the Honorable Panel of Judges. A grab sample of the tailings was collected from the seabed and placed on the deck of the boat. The tailings were solid particles, repeat solid particles, not a liquid. Everyone before this court has stated that the tailings are at the bottom of Buyat Bay. Is the Prosecution contending that the tailings are resting at the bottom of

the seabed in a liquid state? It is true that some solid particles such as sugar or salt can dissolve or liquefy in water, but rock particles or tailings are not one of them. Tailings are in a non-soluble solid state – for the Prosecution to allude to tailings being liquefied defies not just scientific principles but basic logic and even common sense.

### ***Replic – Item 22***

The Prosecution contended that the Defense, argued that the Requisitor did not clearly and convincingly elaborate the elements of the articles being indicted. The elements of Article 41 did not have the legal foundation to explain several elements, such as “... did not function according to its designation”. However, the Prosecution contends that if a region has not been specifically designated vis-à-vis its allocation, then the general designation shall apply. Let us think about this for a moment. First, NMR conducted and received an approval on an AMDAL as well as annual work plans submitted to the Government. In these meetings and in the approval process, representatives from the Regional, Provincial and National levels of the Government participated and all the approvals were granted including the disposal of mine tailings to be placed at the bottom of Buyat Bay. This being the case, logic dictates that the function of Buyat Bay was mentioned in this context because it was designated as a place where mine tailings could be placed. Second, sea water is not classified as surface water. The government has defined “Surface Water” in Government Regulation 20 – 1990 Concerning the Control of Water Pollution. To quote the definitions adopted in Article 1.1, which states: “Water means all the water that is present in or is derived from water sources, and is found on the surface of the ground, **not including water that is present below the surface of the soil, or sea water**” It seems that the Prosecution did not conduct appropriate research for the regulation when drafting their Replic, because under this regulation, sea water is NOT surface water. If sea water and surface water were one and the same, why would the government write separate regulations for sea water and surface water?

In addition, the Prosecution did not prove Pollution or any change in the function of Buyat Bay. The water remains clean, the fish are still abundant and contain low levels of metals, the coral reefs are vibrant, and a thriving ecological system continues to function within the confines of Buyat Bay. And as the Prosecution themselves witnessed when marine sediments and tailings were placed on the deck of the boat

when the court visited Buyat Bay, the sediments/tailings that were taken at the time, and being directly observed by the Panel of Judges, the Public Prosecutor, the Defense Counsel and I myself, the tailing which is obviously solid contained living marine organisms – so which function of Buyat Bay has changed? The answer is, of course – none! Besides, if the Prosecutors really wanted to know if Buyat Bay had lost its function, why didn't they agree to resample? Instead, they did everything they could to prevent it. The answer is clear: they know what we all know, and what has been proven over and over again in this Court: Buyat Bay is clean and unpolluted. What I would like to ask the Prosecution is this – when clearly there has been no proof provided of any pollution and no change in the function of Buyat Bay has been observed or proven, why are they insisting on continuing with this case?

### ***Replic – Item 23***

The Prosecution argues that based on the testimony of Isa Karmisa, KLH has not received any reports from NMR since 2002. It seems the Prosecution was sleeping or did not take the time to read my Pledoi; as both the Pledoi and its attachments contain delivery receipts signed by KLH that they did then and continue to receive RKL/RPL reports on a quarterly basis. I have also checked the court transcripts and I cannot find when and where Isa Karmisa ever stated before the court that KLH never received RKL reports after 2002.

### ***Replic – Item 24***

My Legal Counsel argued that the court reject the testimonies of witnesses from the community because: 1) the witnesses went to Jakarta to seek “treatment” but then went on a demonstration at the Hotel Indonesia roundabout and were interviewed by members of the mass media; 2) witness testimonies were suspiciously uniform; 3) witnesses had filed a civil suit and then retracted their suit; 4) all witnesses are related by family ties, as such their objectivity is questionable; 5) there is a witness who is not related to others (Salim Modeong) listed in the BAP but he was never presented in court; 6) witnesses had been talking about pollution in Buyat Bay from PTNMR tailings [even] before PTNMR carried out tailings placement or STP in Buyat Bay (Pledoi I page 42-44, Pledoi II page 16, Pledoi III), while the Prosecution contends that even if the arguments expressed by the Defense regarding witnesses were accurate, the arguments cannot legally disqualify the legitimacy of the witnesses. As I said before, I am not a lawyer, but, common sense observations dictate that the members of the

witness group were so well rehearsed and coached for their Buyat Bay theatrical performance that obvious red-flags are waved regarding the reliability of their testimony. It is obvious that they were motivated by something other than the search for truth.

### ***Replic – Item 25***

The Defense Legal Counsel argued that the testimony of witness Masnellyarti shall be rejected because the witness never reappeared [in court] to be confirmed/ confronted about the accuracy of her statements even though [she] had been officially summoned (Pledoi I page 44), while the Prosecution contends that the authority to reject and grant requests to bring witnesses is the authority of the Panel of Judges. As a non-legal person, this may be true, however her perjury before the court with her sworn testimony that she had never seen the October 2004, report of Minister of the Environment as well as dropping-off the controversial Technical Team's Report (that references non-existent standards for sediments and through a series of errors or manipulations, taking perfectly safe fish and drawing the conclusion that a village needs to be relocated because of imaginary pollution) has denied me the right to cross-examine her on relevant matters and evidence before this court. That is why in my Pledoi's request to the court, I respectfully asked the Honorable Panel of Judges to order a full investigation into her actions and the actions of some other members of the Technical Team.

### ***Replic - Item 26***

The Defense requested that Prosecution Experts' testimonies be rejected because they do not reflect specific expertise necessary to clarify this case. 1) Expert Sulistyowati who was declared an expert in permits/licenses apparently did not have any legal education background; 2) Till the conclusion of the hearing, the expert named Muladi never finished his testimony so the legal counsel, including the Defendants, did not get a chance to ask questions and respond to the expert's testimony; 3) Rignolda talked about many things, while his academic background was in mangrove forestry, as stated by the Dean of Fisheries and Oceanography Faculty of Sam Ratulangi University (Pledoi I pages 44-46). The Prosecution contends that the statement of the Defense Counsel is contrary to the fact the court expressly accepted Sulistyowati, Muladi, and Rignolda as experts to be examined before the court. First, these witnesses were accepted as experts before they were examined. What they

said in court proved that they were not experts appropriate for this case. Sulistyowati was clearly not an expert in chemistry or B3 materials, both in the BAP and in court she talked about how acidic sea water could release metals from tailings. It is an undisputable scientific fact that sea water by its very nature is basic, not acidic. This alone indicates she did not have a clue of what she was talking about during her testimony. Professor Muladi entered in grand style but left before I was given the chance to examine him. He told the court (while still under oath) that he would return – and he did not. Should I have had the opportunity to examine him, I would have asked him many things, such as his legal opinion of the police not allowing me to have witnesses and evidence at the investigative stages of the case and how can a Prosecution accept a one-sided investigation report to be used to indict someone for a crime that was never committed and I would also ask, how a real form of the legal term “performing an action” or the term “to lead an action” in accordance with Article 46 of Law No. 23 of 1999 and distinguish this with a “CEO”. With regard to Rignolda, I will only quote my first comment in my summary to the court at the conclusion of Rignolda’s testimony [Quote Court Transcript of 3 March 2006] “In my opinion this expert witness has represented himself as a medical expert, a toxicologist, a marine fishery and coral expert, a geo chemist, a bio chemist and a oceanographer and a sociologist. I reject this witness’ testimony in its entirety and I believe the only expertise this witness has is to make up anecdotal information, misrepresent science and confuse the general public.”

### ***Replic – Item 27***

The Prosecution stated that the Defense request that the Forensic Report of the Criminal Laboratory of National Police Headquarters must be disqualified because: 1) there is a discrepancy in the number of seawater and river water samples as written in the dossier of sampling and dossier of results of Puslabfor analysis; the Dossier of Sampling stated 24 samples but the Dossier of Puslabfor analysis results stated 34 samples; 2) the retrieval of evidence samples from Buyat Bay was carried out on 28-30 July 2004, whereas the sealing was carried out on 31 July 2004. Before being sealed the evidence samples were placed in a room in the Sectoral Police office without protection; 3) the person accepting the samples from the divers was Rignolda who had stated all long before the hearings that there is Minamata disease in Buyat Bay and his testimony was at the same time [used as] evidence in court; 4) the report of Puslabfor examination results had gone beyond its authority because it concluded who the “perpetrator” was and there is a statement of “have degraded the quality of the

seawater/river water” whereas the seawater quality is not determined only by the amount of chemicals contained in the tailings but also other factors, such as specific gravity, pH, etc; 5) apparently what was elaborated in the letter contrasted with the results of the split sampling [analysis] conducted by an accredited laboratory, ALS, in Bogor; 6) Mabes Polri forensic laboratory that issued the letter was apparently not accredited as required by P-19 and pursuant to KepMenLH No.113/2000, Explanation to Article 16-17 of PP 82/2000; 7). The Investigator did not obtain a confiscation order from Tondano District Court, that has jurisdiction over the location of where the samples were taken, such as the evidence of water and sediment around the area of Buyat River tributaries; 8) pursuant with the ruling of Tondano District Court 334/Pen.Pid/2004/PN.TDO on page 2 where it is stated that the ruling pertained to water of the tributaries and sediment. But when the case files are examined, the dossier of confiscation dated 28 July 2004 only pertained to hair and nails, and nothing about water from tributaries and the sediment. Moreover, when examined further, the dossier of confiscation of tributary water and sediment, the dossier dated 30 July 2004, which is the same as number 7 page 4 of the Dossier of Puslabfor results which states that the sampling of the tributary water and sediment around the tributary area and PTNMR’s sediment pond was conducted on 30 July 2004, contrary to the court ruling stating that the confiscation was conducted on 28 July 2004; 9) every evidence (sample) according to criminal procedure law can be considered valid if it meets one basic requirement, and that being, that the suspect or those suspected to be the perpetrators of the pollution must be present during the process of sample retrieval. Sampling of the water of Buyat River tributary and sediment as mentioned in the dossier of confiscation on 30 July 2004, was apparently not requested or escorted by the suspect(s). This is not in conformance with the Annex to the Letter of Deputy Attorney General for Generic Crimes Regarding the Technical Judicial Guidelines for the Handling of Environmental Criminal Cases No. B-60/E/Ejp/01/2002. (Pledoi I page 49, Pledoi II pages 7-8, Pledoi III) The Prosecution contends that Dossier of Criminal Laboratory Examination, Forensic Laboratory Center of Mabes POLRI Number: 4171/KTF/2004 dated 27 September 2004 was made based on scientific methods as well as applicable Standard Operating Procedures. This is a strange line of argument and thus raises the following questions: Do the police standard operating procedures include adding samples along the way? Do the Police not need to promptly seal samples? Are the Police allowed to let the accuser (a clearly partisan player in the issue at hand) collect the evidence? Does the Police procedure allow for a mere laboratory technician to draw complex scientific conclusions? Is the Police free to use

non-accredited laboratories for environmental case evaluations? And finally do the Police not have to follow any rules?

***Replic - Item 28***

The Prosecution contends that the Defense Legal Counsel argued that the list of evidence in the BAP listed 129 items of evidence. But in the dossier of file handover from the Public Prosecutor to Manado District Court dated 11 July 2005 the listing was apparently not the same. Therefore, the evidence presented by the Public Prosecutor does not guarantee the accuracy and the authenticity of the evidence (Pledoi I page 51, Pledoi II), while the Prosecution in the Replic states that the argument about the dissimilarity in the number of evidence items is very vague because it does not explain what the legal counsel refers to as “dissimilarity,” as such this has to be disqualified. Even though I may qualify only as a lay man in the field of law (but one who gained considerable experience as a defendant in this case), I would just like the Prosecution to explain where the 10 extra sea water samples that arrived at the police laboratory come from and what happened to the five that got lost between the police laboratory and the court. That alone would be an interesting story. Clearly, it doesn't take a legal expert to realize that this irregularity itself places the evidence as being highly questionable in a criminal proceeding.

***Replic – Item 29***

The Prosecution stated in the Replic that the Legal Counsel for the Defendants and Defendant II argued that PT Newmont Minahasa Raya did not commit any act of pollution in Buyat Bay based on the report of the KLH Integrated Team published by Nabel Makarim. The Prosecution stated that the argument regarding this statement must be disqualified based on the testimony of Nabel Makarim (the then State Minister for Environment) because he had published the Integrated Team report when the Team had not yet concluded the study and the analysis. I think that the Prosecution has it backwards, the Technical Team worked for the Minister to assist him in the evaluation; it was not the Minister who worked for the Technical Team. As the Minister of the Environment he had the right to accept or reject any work product the Technical Team came up with. The final KLH report on the study was issued by the Ministry on October 14, 2004, declaring that Buyat Bay was not polluted. A subgroup of the Technical Team, comprised of NGOs and some of the Prosecution's witnesses, clearly horrified that the truth had come out, continued to work to twist facts and reverse as

many conclusions as it could. They came up with the scientifically embarrassing conclusions which were printed in a subsequent report dated November 8. This latter report has no legitimacy. That is why many of the members of the original team wrote dissenting opinions on the revised November report. The individuals responsible for the revised report then continued to use what they called the Technical Team Report as a means to justify their misleading testimony to the police.

The original Report has been verified by every legitimate study on Buyat Bay; the revised Report was a political stunt that has been completely discredited.

### ***Replic – Item 30***

The Prosecution states that the Defense Legal Counsel argued that Buyat Pantai community members have changed their position and dr. Jane Pangemanan retracted her grievance (Pledoi I, Pledoi II, pages 11, 14, 16, Pledoi III), however the Prosecution contends that this statement is irrelevant and must be disqualified because pollution and/or destruction of the environment is not a grievance and so the legal process is not dependent upon a report or filing of a complaint. As a non-lawyer, I can not argue this from a legal stand-point but common sense would dictate that their retraction of prior testimony is very relevant if the goal is to try to find out what is really going on. When someone goes to the media, causes a national sensation that people are suffering from Minamata Disease and then later changes her story because she suddenly realizes that she had not even conducted a single laboratory test and had no basis for such a claim, that is indeed a relevant fact. Dr Jane Pangemanan was the only medical doctor who testified for the Prosecution. Her retraction of testimony is a crucial turn of events. The only other witness for the Prosecution who called himself a medical doctor was Super Expert Rignolda Djammaludin, who, as we all know, was only qualified to talk about Mangroves.

### ***Replic – Item 31***

The Prosecution contends that the Defense Legal Counsel for the Defendants argued that PTNMR did not commit pollution in Buyat Bay based on the results of studies by Minamata Institute, CSIRO, and WHO (Pledoi I, Pledoi II, Pledoi III), while the Prosecution stubbornly stands by the only two items of flimsy evidence that they have - the pseudo-science of the revised Report of the Integrated Team and the Dossier of Criminal Laboratory. First, the Prosecution forgot to mention that the defense is based

on over 30 scientific studies and supported by expert testimony, not just two questionable reports. Second, they derived a relatively meaningless comparative table comparing the Integrated Teams report with that of WHO and CSIRO, and I have taken the liberty to add one more column for comments for clarification to the court (see attachment "a"), But more interestingly by choosing to base their prosecution and efforts to put me in prison on those two pieces of evidence, they have actually aided my defense. First, they contradict each other on a key point: The Police Laboratory Report finds that the sea water in Buyat Bay is unusually high in mercury and arsenic content but that the fish are very low in both mercury and arsenic, the Integrated Team report concludes that the sea water in Buyat Bay is well within regulatory limits for arsenic and mercury, (matching all other studies) and completely discrediting the Police Laboratory results. However, in other points they agree with each other and with all other legitimate studies. The metals found in fish in both the Integrated Teams report and the Police Lab reports are normal. But because of their bias, some members of the technical team then used some formulae that they got wrong by 4,500% and refer to non-existent ASEAN Marine Water Guidelines for sediments as their baseline. Therefore, in their final arguments, the Prosecution has just destroyed the credibility of the only two pieces of so-called evidence that it has. Thank you, Prosecutors, for aiding me in my defense.

The Replic goes on to state: *"report by Kompas daily on 24 December 2004 stating that PTNMR has disposed 33 (thirty-three) tons of Mercury in the time span of 4.5 years. Of the 33 tons of Mercury mentioned, 17 (seventeen) tons expelled to the air in gas form and the other remaining 16 (sixteen) tons are disposed through the pipe to the bottom of the Buyat Bay."* The irony or double standard set forth by the Prosecution would be amusing if I were not the Defendant, because in the same Replic they state that *"It would be impossible to use the magazine, National Geographic Indonesia and the newspaper, as a form of exhibit to prove the non-occurrence of contamination and/or destruction of the environment in Teluk Buyat this is because the two mentioned tools of evidence are not valid and legal as stipulated in the Indonesia Supreme Court Jurisdiction Number: 1479/Pid/1969 date 18 December 2006"*. So the Prosecution can use the printed media as evidence against me but I can not use it in my defense? Is this the Prosecution's interpretation of the law? Do the rules only apply to the Defense and not the Prosecution?

### III. CONCLUSIONS

Honorable Panel of Judges

The Defense Team

The Public Prosecutor

The District Court of Manado,

**1. *The Rule of Law.*** This Rejoinder is my last opportunity to defend myself against the unfounded and bizarre Indictment and Charges. I am at a loss to understand how and why those with political, economic, personal and other agendas want to use this criminal trial. Will those that perpetrated the Buyat Bay hoax be investigated, brought to justice and be held accountable for their despicable actions, or will a blind eye be turned to the real guilty parties in this case? Only time will tell, as neither the facts nor the law so far has stood in the way of the Prosecution's pursuit of this case. The only thing that can prevent the misuse of these claims and this forum is the wisdom of this honorable Panel of Judges. Therefore I ask for only one thing: that you render a fair ruling based on the evidence presented to this court.

This criminal trial is perhaps the first time so much highly technical evidence has been presented in a criminal court, including mathematical calculations, graphs, charts and videos. I was told by many that the courtroom “almost became a classroom for a post-graduate or even a PhD-level course in environmental sciences”. This was necessary because charges based on pseudo-science had to be countered by real science. Environmental and mining issues are necessarily scientific in nature. I have used science during my entire career and, for me the answers are really very simple. The evidence proves that the waters of Buyat Bay are not and have never been polluted. The evidence proves that NMR's operation never caused harm to people or their surrounding environment.

Your ruling is important. It will become a *benchmark*, a standard, a point of reference for future environmental cases; it will show that judicial power is free and independent of all interference in deciding a case that has so many political and economic ramifications. It will have an impact on the investment climate as many investors view this case as a litmus test for future investment. Finally, if the criminal justice system

takes the next step and goes on to investigate, prosecute and fairly try the individuals who perpetrated this hoax, then the people of Indonesia and the world will know that **“the State of Indonesia is a state based on law”** as defined by your constitution.

**2. The origins of the indictment.** As I have already submitted in my Defense, this case started with the anti-mining efforts of some NGOs and, as their anti-mining attacks continued, politicians seized the opportunity to join in for their own personal interests. Both were then aided by a segment of the mass media permanently on the prowl for sensational news. These groups fed off of each other’s efforts to create a controversy, which caused a transitional government at the time of the national elections to waver in using the facts to put an end to the matter once and for all. Instead, a few officials within the Ministry of the Environment, in conjunction with adversarial NGO’s, took advantage of the situation by rewriting NMR’s permit-history, as well as the laws of physics, chemistry and statistics, by pretending to conduct a study, while actually concocting conclusions to further the controversy. Due to negligence or reckless or intentional tampering, the Police Headquarter Forensic Laboratory produced test results that were wildly and obviously inaccurate. In spite of glaring flaws, both the Technical Team Report and the Police lab results were accepted without question by the Prosecutor’s office. I consider the report written by some members of the Technical Team and the results of the Police Headquarter Forensic Laboratory as the biggest scientific/ legal scandal in Indonesian history. Both studies are so outlandish that their results, along with the Prosecutor’s addition in the Replic of their scientific evidence of Adam Air’s “black box” have alternately been a source of humor, scorn and outrage in the scientific community and among investors here and around the world.

**3. The Subsidiary Principle.** The Defense Team and I have already explained in great detail why the Subsidiary Principle is the appropriate, prudent and fundamental principle in the application of the Environmental law. The Government’s signing of the Goodwill Agreement showed its respect for resolving disputes in accordance with the Subsidiary Principle. Any environmental issues found based on the opinion of a panel of independent experts established by the Goodwill Agreement will be resolved in accordance with the mechanisms set forth in that Agreement. The central and regional governments, NMR, the residents of Buyat Bay and all stakeholders have become a part of the implementation of the Goodwill Agreement. Therefore it is

inadvisable to ignore the significance of the Goodwill Agreement as the first basis for resolving all issues arising from the Buyat Bay controversy. All people involved in this criminal case, including the Public Prosecution Team, Defendants I and II and the Panel of Judges should share that same vision. The question for us now is: How should we finally resolve this case in accordance with the the Subsidiary Principle? It is clear to me that an application of the Subsidiary Principle would discharge NMR and I of all charges.

**4. Violation of Defendants' Rights.** As explained in my Defense, the Police, the Attorney General's office and other members of the Indonesian government committed numerous violations and improprieties in handling this Buyat Bay controversy. These are serious violations of the 1945 Constitution, the KUHAP, the Environmental law, Human Rights law and a host of other Indonesian laws and regulations, starting from illegal detention and examination, a travel ban being imposed on me, manipulation of reports and BAP, limiting the defendants' rights to call witnesses, experts and evidence during the investigation, manipulating study results, and other misdeeds. The concept of Justice is all encompassing and dictate that transparency, and legal clarity must be upheld at every opportunity. Therefore I respectfully request to this court to order that these violations of Human Rights be investigated and addressed.

The Prosecution has been consistent in its attitude throughout these proceedings. Any evidence, whether provided by the prosecution witnesses or the defense witnesses, which did not support their case was summarily dismissed and ignored as if it did not exist. They cling, like a drowning man to two sticks, to two pieces of flimsy pieces evidence that have been destroyed/ refuted by a mountain of undisputable facts. They are so blinded by their zeal to find NMR and me guilty that they have lost the noblest aspect of humanity: FAIRNESS.

**5. Indictment and Charges.** In their Replic, the Public Prosecution team responded to their failure in proving a single element of the Indictment by repeating over and over again that every claim had been proven beyond a doubt. This empty repeating displayed their cavalier arrogance and blind stubbornness. All the evidence submitted by the Public Prosecution team was completely and convincingly refuted by the witnesses, experts and documentary evidence presented by the Defendants. Throughout this case, the weakness of the Prosecution's evidence has been in stark contrast to the strength/ solidity of the evidence submitted by the Defense. The

evidence submitted by the Public Prosecution team was derived from the biggest scientific scandal I have ever seen in my life. The witnesses and experts for the Prosecution showed their lack of integrity, competence or both. On the other hand, the defense witnesses and experts personified honesty and confidence along with sound knowledge of relevant science and the existing facts. Take a moment to compare Budiawan's screaming or Rignolda's shouting with well-respected professionals like Prof Andoyo, Prof Rudi Sayoga or Shakeb Afsah. The defense experts were people you could trust.

As has been proved, I am not the one who broke the law, but that there were violations of the law by those that investigated, testified and vigorously prosecuted this case. I wrote my own Pledoi and this Duplic because I wanted to tell the "**Truth**" and to be perfectly clear what has been proved here in this courtroom: **Buyat Bay is not polluted.**

In conclusion, all the elements in the Indictment and the Charges are untrue, and the Public Prosecutor's team has failed to establish the truthfulness and validity of the primary elements of the Indictment and the Charges, namely:

- (a) "**the existence of an unlawful act**", is untrue and incorrect. I believe that I have proven beyond reasonable doubt that I have adhered to and have performed in conformance with each and every applicable Indonesian Law and Regulation. Consequently Buyat Bay never was, currently is not and never will be polluted by mine tailings from NMR's mining operations;
- (b) "**that there is negligence on my part in performing my duties**" is untrue and has never been proven. This one is little more than an empty insult. It has been clearly established that NMR and I have fulfilled all obligations under Indonesian Laws and Regulations, AMDAL, RKL and RPL. Far from being negligent, I submit that our dealings with the Indonesian regulators have been exemplary.
- (c) "**that NMR does not possess any license or permit to dispose NMR Tailings to the Buyat Bay Seabed**" is obviously untrue and unproved. NMR has obtained an AMDAL and a Permit from the Minister of Environment which clearly allow the placement of NMR's tailings at the Buyat Bay seabed as the most environmentally safe method of disposal. The choice of placing tailings in the sea as a method of avoiding disasters, since the placement on land would be various times more dangerous, keeping in mind that North

Sulawesi is a volcanic area, often disturbed by earthquakes, nature apparently is part of the evidence that on the basis of earthquake, the placing of tailings on the seabed becomes an issue that can not be disagreed upon.

- (d) ***“the act of not preventing toxic tailing disposal”*** is also completely untrue and unproved. It has been established during the proceedings of this criminal case that tailings from NMR are comprised of an inert substance which will not release heavy metals into the environment and all testing conducted by both the Government of North Sulawesi and NMR confirm that the tailings are not a B-3 waste;
- (e) ***“I already knew NMR did not have a permit to dispose tailing to the sea, however I did allow/ did not give any instruction to stop the disposal of tailings to the sea by NMR”***.Is untrue, unproven and ridiculous. I always knew that NMR had obtained the permit or license to dispose of NMR tailings to the Buyat Bay seabed from the fact that NMR obtained the AMDAL, Operating License from the Department of Mines, and was in receipt of a valid Permit issued by the Ministry of Environment, and as such the disposal of NMR Tailings to the Buyat Bay Seabed had always been authorized and/or permitted by the Indonesian Government. Moreover, if such disposal was conducted without permit, the Indonesian Government based on the Contract of Work, the Mining Law, and the Environmental Law would have issued a warning to NMR to obtain the permit, or even stop operations pending the process to obtain the required permit. The Indonesian Government, until today, has never issued such a warning, and has never instructed me or NMR to stop its mining operations or to stop placing tailings to the Buyat Bay seabed. The Charge ***“even that I already knew NMR did not have a permit to dispose tailing to the sea”*** is preposterous. I knew of no such issue and was never apprised of it by anyone in the Government; to the contrary I was aware of every valid permit and authorization being in order.

**BUYAT BAY IS NOT POLLUTED.** Without pollution there is no crime, I have followed the law; NMR helped make the area prosperous and carefully protected the environment. Buyat Bay is beautiful and clean. There is no disgrace in that. However, the Prosecution’s request that I be sent to prison for 3 years is a disgrace.

#### **IV. DEFENDANT II'S PERSONAL SUBMISSION**

Based on matters I have already disclosed in my Defense in the trial process of this criminal case and in my Rejoinder here, I respectfully re-submit my request to the Panel of Judges to render a verdict to:

- A. To declare me free from the indictment and charges
- B. Clear my name of all the charges brought against me by the Public Prosecution team; or at least
- C. Include in the court's ruling a request to investigate, and if sufficient evidence is established, to prosecute those suspected of misleading the public and breaching the public's trust in perpetrating false allegations relating to the environmental and health conditions surrounding Buyat Bay. Those individuals include but are not limited to:
  - 1. Rignolda Djamaludin, Jane Pangemanan and Raja Siregar for the perpetration of the Buyat Hoax.
  - 2. Those members of the Ministry of Environment's Technical Team, (especially including Ibu Masnellyarti Hillman), who willfully and knowingly manipulated data and referenced non existing regulations to deceive the public by creating the illusion that a village needed to be relocated because of pollution when in fact no pollution existed.

Finally I wish to extend my deepest gratitude to the Panel of Judges who have made it possible for this trial to be conducted independently, with fairness and objectivity so that through this trial process I have been extended the very valuable opportunity to present strong, legal and convincing evidence that should clear me of all charges, and to convey my opinion in this trial.

I also wish to thank the Defense Team which has expended so much energy, thought and expertise in disclosing the truth of all aspects of this case.

Finally I wish to express my sincere gratitude and appreciation to my wife and family, my friends, the mass media, the academic community, national and international organizations, government officials and officials from the Embassy of the United States that always attended these court sessions, as well as colleagues from the private sector, in particularly those involved in mining, and everyone else who has expressed their sympathy and concern for me as I have endured these attacks and this long criminal trial.

I have had my chance to speak. I now respectfully the verdict of the Honorable Panel of Judges

Manado, 16 March 2007

Richard Bruce Ness

## ATTACHMENT

Aspect	CSIRO Report	WHO/ Minamata	Integrated Team Report	Comment
<p>Chemical (levels of heavy metals in the water and sediment, pH, DO)</p>	<p>Levels of arsenic and mercury in the seawater in Buyat Bay and Rata Totok Bay are still below the quality standards.</p> <p>High levels of arsenic in the sediment in Buyat Bay are affected by the accumulation of Newmont tailings.</p>	<p>Levels of mercury in the seawater in the mouth of Buyat River and Ratatotok River (4 samples) are still below the quality standards.</p>	<p>Levels of arsenic and mercury in the seawater in Buyat Bay and Ratatotok Bay are still below quality standard.</p> <p>Levels of arsenic in the sediment around Newmont tailings mound in Buyat Bay is very high and is higher than the highest range for “polluted sediment” according to ASEAN Marine Water Quality Guideline (2004)</p> <p>At depth of 110 meters (deeper than Newmont’s pipe end) there is still DO (Dissolved Oxygen) indicating that at that depth there are still marine organisms.</p>	<p>Note that the levels of seawater in Buyat Bay and Ratatotok Bay are within standards as in all other studies except the police. This totally contradicts the Police Laboratory results and proves that Buyat Bay is not polluted. This is a regulated item.</p> <p>There is no standard for sediments and as proven in court, the ASEAN Marine Water Quality Guidelines does not have a sediment standard nor does it even mention Arsenic in seawater.</p> <p>No one is arguing there is still</p>

Aspect	CSIRO Report	WHO/ Minamata	Integrated Team Report	Comment
				dissolved oxygen at a depth of 110 meters, and the court witnessed marine organisms alive and well and living above the tailings during their field visit.
Physical (current patterns, thermocline, bathymetry, etc)	Was not conducted	Was not conducted	<p>Current pattern data indicate that in Buyat Bay there is dynamist seawater movement which can cause the seawater to contain heavy metals.</p> <p>No thermocline layer was found above 82 meters of depth (the location of tailings pipe) as claimed by Newmont in the AMDAL (1994). PTNMR assumed that this layer will prevent tailings from spreading to the surface.</p>	There is no standard and this evaluation is completely meaningless to draw conclusions from. Impact by heavy metals in water is measured in the water itself. That is why professional organizations such as CSIRO and WHO did not conduct these tests as they are not something to derive conclusions on.
Calculation of	Was not conducted	Was not conducted	Risk assessment on the	Organizations such as CSIRO

Aspect	CSIRO Report	WHO/ Minamata	Integrated Team Report	Comment
risk on humans consuming the fish containing heavy metals (mercury and arsenic)			community who continuously consume fish containing heavy metals was conducted using a Tolerable Daily Intake (TDI) for mercury and Acceptable Daily Intake (ADI) for arsenic. The total Hazard Index (HI) exceeded 1, which means that it falls under the category of having high risk to human health.	and WHO would not conduct a risk assessment such as Average Daily Intake or Hazard Index as conducted by the Integrated team as all the fish and water were below the regulatory standards or recommended guidelines.  In the case of the Integrated Team who conducted such test when fish well within the recommended guidelines and came up with bad results, then there is something wrong with the calculation as it is those very formulas from which the guidelines are derived.
Test on human biomarkers (heavy metal)	Was not conducted	Test for methyl mercury in hair  [The WHO report	It was recommended to the Department of Health to conduct further studies on the	The comment by the Integrated Team is incorrect, WHO/ Minamata tested for 17

Aspect	CSIRO Report	WHO/ Minamata	Integrated Team Report	Comment
content measured in blood, hair, nails and urine) depending on the metal being measured		measured mercury and methyl mercury and 17 other metals among the residents of Buyat Bay area. From these tests WHO concluded that there was no metal poisoning in Buyat. Thereby implying that the seawater is clean and fish are fine]. See attached Figure -1.	nails and urine to see arsenic exposure in the community. This was a recommendation based on findings of mercury pollution and symptoms that resemble arsenic contamination according to literature.	different heavy metals. All levels of heavy metals were well within the safe range. Other health studies, including the Department of Health confirmed the same as WHO. That there was no finding of heavy metal exposure or unusual level of metals within the population.
Drinking water	It is said that quality of drinking water in Buyat Village was still below the quality standards. (in reality: two out of 3 samples of well water in Buyat Village contained arsenic exceeding the quality standard of 0.01	Was not conducted	The water supplied in Buyat Pante Hamlet since January 2004 was stated to contain Manganese in exceeding the PERMENKES quality standard. Four of six wells in Buyat Village had arsenic levels higher than the quality standards for drinking water	Again, the Integrated Team is playing with standards. The Integrated Team wrongly applied drinking water standards which are applicable to bottled water, when they should have applied class II water standards. Virtually very few water

Aspect	CSIRO Report	WHO/ Minamata	Integrated Team Report	Comment
	mg/L (PERMENKES quality standard for drinking water)		prescribed by the PERMENKES	sources anywhere in Indonesia would meet drinking water quality and it would be safe to bet that none of the Integrated Team member's homes would pass the drinking water test.  Nor does this water source have anything to do with mine operations.
Test on tailings	Was not conducted	Was not conducted	Samples of tailings before being discharged in the sea (after detoxification) show levels of As, Cu, Fe, Mn and CN that are relatively high.	Useless information. There is no regulatory standard for sediments, mine tailings come from a mineralized area and this would be expected. The important issue is that these elements are in the form of stable compounds and not readily available to be released into the water

Aspect	CSIRO Report	WHO/ Minamata	Integrated Team Report	Comment
				column. NMR's tailings were in a stable form before discharge.

Figure 1 - List of metals tested by WHO

MERCURY POLLUTION-Buyat & Totok Bay-North Sulawesi-Indonesia, FINAL REPORT  
 Prepared By: Mineshi Sakamoto, PhD, Institute for Minamata Disease, Ministry of Environment, Japan  
 For: World Health Organization, Indonesia  
 Date: 08 September 2004

**\*\* Please note that including total mercury and methymercury, the WHO report analyzed a total of 19 metals in the Buyat Bay community**

	No.	As	Cd	Cr	Ga	Mo	Sb	Se	Tl	V	Al	Cu	Mn	Ni	Pb	Sr	Ti	Zn
Buyat	1	0.572	0.086	2.124	0.240	0.057	0.046	1.243	0.003	0.474	-	7.773	17.01	1.255	8.701	11.78	15.75	775.1
	2	0.279	0.036	2.358	0.280	0.064	0.017	1.283	0.001	0.527	-	7.893	15.73	3.524	1.900	14.70	17.77	182.8
	3	0.551	0.114	1.933	0.138	0.054	0.049	0.967	0.005	0.462	-	9.696	16.13	2.583	5.025	9.304	14.02	133.7
	4	0.432	0.034	5.113	0.098	0.043	0.025	0.925	0.001	0.295	40.02	1.721	1.837	1.121	1.886	4.081	7.607	264.3
	5	0.793	0.041	14.53	0.068	0.078	0.036	1.416	0.007	0.726	96.22	11.32	9.687	3.104	3.200	5.041	14.61	179.1
	6	0.335	0.042	2.523	0.177	0.044	0.031	0.960	0.002	0.180	35.35	12.55	10.25	1.233	3.410	6.037	13.25	264.6
	7	0.434	0.019	3.459	0.055	0.042	0.022	1.353	0.002	0.273	27.01	6.604	10.68	1.215	1.056	8.321	14.97	129.0
	8	0.446	0.123	2.055	0.142	0.047	0.095	0.834	0.003	0.570	59.05	14.24	8.273	1.500	14.67	6.153	13.58	179.3
	9	0.587	0.054	3.463	0.174	0.033	0.046	1.400	0.004	0.453	26.01	11.41	5.557	1.520	6.213	4.905	12.15	227.2
	10	0.823	0.113	2.491	0.213	0.074	0.135	1.035	0.010	0.482	33.36	19.43	16.21	1.615	12.40	10.83	14.00	160.2
	11	0.487	0.128	1.520	0.112	0.076	0.073	0.897	0.005	0.299	42.70	15.24	24.53	1.767	7.035	11.97	14.61	176.5
	12	0.235	0.074	1.398	0.106	0.046	0.044	0.907	0.002	0.273	32.68	6.149	14.06	8.255	6.736	17.18	23.35	736.7
	13	0.518	0.049	2.280	0.240	0.047	0.026	1.483	0.003	0.474	34.23	9.547	6.579	0.489	6.022	4.947	13.36	150.9
	14	0.401	0.011	13.04	0.175	0.064	0.031	1.075	0.004	0.319	32.04	7.933	3.214	1.865	1.845	2.720	11.50	160.9
	15	0.394	0.046	2.572	0.247	0.045	0.035	1.021	0.005	0.331	52.21	9.963	6.685	1.246	6.286	8.394	16.34	157.0
	16	0.725	0.083	3.267	0.115	0.046	0.053	0.979	0.004	0.354	17.01	6.742	22.94	0.632	6.499	14.35	17.17	240.9
	17	0.297	0.046	3.181	0.086	0.022	0.026	1.331	0.002	0.376	30.66	10.40	22.18	1.133	3.135	15.90	18.93	177.7
	18	0.345	0.061	20.53	0.166	0.075	0.029	0.910	0.002	0.336	13.61	8.706	8.977	3.248	2.428	9.403	14.09	214.9
	19	0.357	0.028	1.564	0.207	0.037	0.015	1.386	0.003	0.095	9.096	8.647	2.604	1.485	1.831	5.520	12.05	150.0
	20	1.017	0.165	7.831	0.178	0.098	0.071	1.086	0.012	0.721	57.34	10.31	11.24	1.685	6.929	6.165	12.93	174.5
	21	0.272	0.050	3.280	0.156	0.032	0.022	1.201	0.002	0.239	18.89	11.24	12.74	0.377	3.880	6.799	13.41	173.7
	22	0.406	0.046	3.055	0.232	0.046	0.021	1.673	0.005	0.435	39.54	10.63	5.674	0.549	1.257	5.976	13.09	167.3