

No. 07-15471-B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ANGEL ENRIQUE VILLEDA ALDANA, *et. al.*
Plaintiffs / Appellants,

v.

DEL MONTE FRESH PRODUCE CO., *et. al.*
Defendants / Appellees.

On Appeal from United States District Court for the Southern District of Florida
Case No.: 1-CV-3399 Moreno/ Simmonton

PLAINTIFFS / APPELLANTS' OPENING BRIEF

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STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Circuit Rule 28-1©, Plaintiffs hereby request oral argument before this Court. Plaintiffs believe that the Alien Tort Statute and Torture Victim Protection Act, 28 U.S.C. §1350, issues raised by this Appeal as they relate to the issue of *forum non conveniens* present important public policy questions. The resolution of these issues would be facilitated if the Court had the opportunity to question the parties and hear elaboration on the numerous issues presented.

Respectfully resubmitted this 14th day of February, 2008,

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I. INTRODUCTION

Plaintiffs are U.S. residents who formerly served as trade union leaders at Defendants' banana plantation in Guatemala, known as Bandegua (Compania De Desarrollo De Guatemala, S.A.). In 2005, this Court reversed the District Court's dismissal of Plaintiffs' torture claims under the Torture Victims Protection Act (TVPA) and Alien Tort Statute (ATS), 28 U.S.C. § 1350, finding that Plaintiffs' confinement for over eight hours at gun point under the constant threat of impending death constituted torture, and accordingly a violation of a specific, universal, and obligatory norm of international law. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1252-53 (11th Cir. 2005), rehearing en banc denied *Aldana v. Fresh Del Monte Produce Co.*, 452 F.3d 1284 (11th Cir. 2006), cert. denied *Fresh Del Monte Produce Inc. v. Aldana*, 127 S. Ct. 596 (2006). Accordingly, this Court remanded the case to the District Court for adjudication consistent with its holding.

In an effort to stall discovery, Defendants then renewed their *forum non conveniens* ("FNC") motion, already twice-denied by the District Court, and the District Court referred it to a magistrate. Following a lengthy hearing, the magistrate issued a written order finding that the U.S. was the appropriate forum for Plaintiffs' torture case. The District Court disregarded the magistrate's finding, and *six years* after the case was filed dismissed Plaintiffs' case for the

second time. Rather than rely upon the magistrate's analysis, which properly balanced the federal interests, the District Court relied upon a prior state court's *FNC* dismissal of Plaintiffs' state law claims.

This case therefore again presents important issues regarding the right of torture victims to seek redress in U.S. courts pursuant to the TVPA and ATS. By dismissing this case, as precluded by a Florida state court's *FNC* dismissal of Plaintiffs' state law claims, the District Court abrogated its duty to conduct its own independent *FNC* analysis with respect to Plaintiffs' torture claims, and in doing so contravened the Supreme Court's holding in *Parsons v. Chesapeake & O.R. Co.*, 375 U.S. 71 (1963). In *Chesapeake*, the Court expressly held that a prior state court dismissal on *FNC* grounds in a case between the same parties in a subsequent federal action "can never serve to divest a federal district court judge" of the ability to rule on an *FNC* motion under federal law. *Id.* at 73-74. This is because, although a state and federal court may rely on the same legal framework in assessing *FNC* issues, federal courts are concerned with the United States' interest in hearing the claim, and with Plaintiffs' choice of a U.S. forum as U.S. residents. Here, given the unequivocal U.S. interest in adjudicating ATS and TVPA claims, firmly recognized by this Court, combined with the presumptive weight of Plaintiffs' choice of forum as U.S. residents, the District Court erred as a

matter of law by giving preclusive effect to the state court's *FNC* dismissal.

This error is compounded significantly by the extreme prejudice to Plaintiffs in having their federal case dismissed six years after the filing of their initial complaint in 2001. There is simply no way after the tremendous expenditure of time and resources by Plaintiffs' public interest counsel in litigating this case for over six years, and the judicial resources of this Court, can Guatemala be a more convenient forum. Incredibly, the District Court did not even consider this significant prejudice to Plaintiffs, who were in merits discovery on their torture claims when this case was dismissed.

It is equally implausible that Guatemala is now a safe forum for Plaintiffs, as the former trade union leaders were granted political asylum to the U.S. precisely because of the danger they would face in Guatemala after speaking out about the violence they experienced at Bandegua. Indeed, only a few weeks prior to the District Court's Order dismissing Plaintiffs' case in favor of Guatemala, a trade union leader working at Defendants' banana plantation was gunned down, execution style, while in the midst of a labor dispute. The District Court did not even so much as acknowledge this recent tragedy and the potential danger to Plaintiffs in choosing simply rely on the state court's finding from 2005 that Plaintiffs would not need to travel to Guatemala to pursue their case. Even if this

assumption was true, which it is not, it was an abuse of discretion to take such an unnecessary gamble with Plaintiffs' lives.

II. STATEMENT OF JURISDICTION

This appeal is taken from the District Court's final Order, entered on October 16, 2007, granting Defendants' *FNC* Motion to Dismiss. ER-212.¹ The District Court had jurisdiction over Plaintiffs' claims pursuant to 28 U.S.C. §§ 1331 and 1350. This Court has jurisdiction under 28 U.S.C. § 1291.²

III. STATEMENT OF ISSUES

1. Did the District Court abuse its discretion in failing to adhere to its initial decision denying *FNC* dismissal as the law of the case?
2. Did the District Court err in giving preclusive effect to a Florida state court's *FNC* dismissal of Plaintiffs' state law claims in the context of Plaintiffs'

¹The referenced numbers are to the District Court docket numbers as used in Appellants' Excerpts of Record ("ER"). Pursuant to Circuit Rule 30-1, Plaintiffs have only included those portions of the record specified by the Court. Accordingly, where reference is made to a document not contained in the Excerpts of Record, Plaintiffs use the designation Record ("R") and the appropriate District Court docket number.

²See Plaintiffs Statement of Jurisdiction, filed with this Court on December 14, 2007, and this Court's Notice of Probable Jurisdiction issued on January 30, 2008. As the jurisdictional issue has been previously briefed, Plaintiffs will not restate their jurisdictional arguments herein, but instead refer the Court to their aforementioned Statement of Jurisdiction.

federal torture claims, and in doing so erroneously hold that the application of *FNC* in a state case is identical to a federal torture case under the ATS and TVPA?

3. Did the District Court abuse its discretion by failing to conduct its own, independent *FNC* analysis in determining whether Guatemala is an adequate, alternative forum, instead relying on state court's *FNC* ruling, which is inconsistent with the federal record in this case.

4. Did the District Court abuse its discretion by failing to adequately consider the risk to Plaintiffs' lives in dismissing Plaintiffs' case, given new and recent evidence of violence against union leaders in Guatemala's banana sector?

5. Did the District Court abuse its discretion by failing to give sufficient weight to the United States' interest in adjudicating torture claims under the ATS and TVPA, and to Plaintiffs' choice of forum, as U.S. residents?

6. Did the District Court abuse its discretion in conducting its *FNC* analysis by completely failing to consider the extreme prejudice to Plaintiffs in having their federal torture claims dismissed six years after the filing of their initial complaint in 2001, and while in the midst of discovery?

IV. STATEMENT OF CASE

A. Factual Background

The following factual background is taken directly from this Court's

previous decision in this case, *Aldana*, 416 F.3d at 1245-46, unless otherwise specified.³ The same allegations can be found in Plaintiffs' Fourth Amended Complaint ("FAC"). ER-156.

Plaintiffs are seven Guatemalan citizens currently residing in the United States. Del Monte is a Delaware company with its principal place of business in Coral Gables, Florida. In Guatemala, Plaintiffs were officers in SITRABI, a national trade union of plantation workers. At the time in question, they represented workers on a Bandegua banana plantation in the municipality of Morales, Izabal. Bandegua is a wholly-owned subsidiary of Del Monte.

SITRABI and Bandegua were negotiating a new collective bargaining agreement for workers at the plantation. While those negotiations were ongoing, Bandegua terminated 918 workers. SITRABI responded by filing a complaint in the Labor Court of Guatemala. Negotiations continued.

Plaintiffs allege that on or before 13 October 1999, Bandegua hired or established an agency relationship with a private, armed security force. Private security forces are permitted and regulated in Guatemala. According to Plaintiffs, on 13 October 1999, Del Monte agents met with the security force "to plan violent

³The quoted references are to Plaintiffs' Third Amended Complaint and based on the District Court's factual record at the time.

action against the Plaintiffs and other SITRABI leaders.”⁴

According to Plaintiffs, at 5:45 p.m. the security force, which is described as “a gang of over 200 heavily armed men,” arrived at SITRABI's headquarters in Morales, Izabal. There, the security force held two Plaintiffs hostage, threatened to kill them, and shoved them with guns. Throughout the evening, other SITRABI leaders were lured, abducted or otherwise forced to the headquarters and similarly detained. The SITRABI headquarters is one hundred meters from the National Police office. Based on this spacial proximity, Plaintiffs conclude that “it was an absolute certainty that the National Police were aware of all events of the night.”

Once the seven SITRABI leaders were in the headquarters, “a leader of the security force ... who claimed to be the President of the [municipal] Chamber of Commerce,” blamed Plaintiffs for the area's economic decline. The official also explained that Plaintiffs' union activity could cause Del Monte to abandon the plantation. Later, a mayoral candidate appeared. While the candidate was at SITRABI headquarters, the security force “reached a consensus that the two main leaders of SITRABI [both of whom are Plaintiffs in this case] would be taken to a radio station ... where they would be forced to denounce the union.” Plaintiffs also

⁴Plaintiffs allege that governmental officials were present during the violence, and thereafter worked to shield the perpetrators from full prosecution. ER-156, FAC, at ¶¶ 64, 68.

allege that the actual Mayor of Morales participated. He, along with “several other armed aggressors,” allegedly accompanied Plaintiffs to a radio station. There, Plaintiffs, at gunpoint, announced the labor dispute was over and that they were resigning from the union, and from their jobs.

Members of the security force then took the two Plaintiffs back to the headquarters. There, they received a facsimile of a “model resignation form,” purportedly sent from Del Monte or Bandegua. The Plaintiffs then signed the letters at gunpoint and were released at 2:00 a.m. on 14 October 1999 after being detained for more than eight hours. The leader of the security force allegedly threatened to kill Plaintiffs if they failed to leave Guatemala.

To avoid this direct threat of harm, Plaintiffs left the area of Morales and fled to Guatemala City. ER-156, FAC, at ¶ 60. *See also* ER-172-2 (Exhibit A-Second Declaration of Angel Enrique Villeda Aldana), at ¶ 5. Once in Guatemala City, the danger to Plaintiffs was increased due to their participation in the criminal prosecution of the key gang members who tortured them. Ultimately, five of the Plaintiffs testified against their attackers, but did so only after the Public Minister of Guatemala provided them with a secret place to live up until the trial, and after the U.S. embassy promised to relocate them to the U.S. following the trial. ER-172-2 (Exhibit A) at ¶¶ 7-9. The threat of death was so significant that

the U.S. embassy arranged for the five Plaintiffs who testified to immediately flee to Los Angeles after they testified, and this is the only reason Plaintiff Aldana believes that he and the other Plaintiffs are still alive. *Id.* ¶¶ 8-9, 14. The two other Plaintiffs, Gumerzindo Loyo Martinez and Rigoberto Alvayero Hernandez, came out of hiding in rural Guatemala, and with the assistance of the U.S. embassy, also fled to the U.S. *Id.* ¶ 14. All of the Plaintiffs have since been granted political asylum by the United States, and are now either permanent residents or in the final stages of obtaining permanent residency status. *Id.* Plaintiffs have also resided in the U.S. continuously upon fleeing Guatemala, and nothing has changed to make a return to Guatemala safe. *Id.* ¶ 17.

B. Procedural History

Plaintiffs filed their initial complaint in 2001 before the U.S. District Court for the Southern District of Florida, where the Defendant parent corporations are headquartered. Their Complaint alleged torture under the TVPA and ATS; arbitrary detention, crimes against humanity, and cruel, degrading, inhumane treatment under the ATS; as well as various Florida state law claims.

In 2003, the District Court denied Defendants' initial *FNC* motion to dismiss, finding that Guatemala was not an adequate, alternative forum given the risk to Plaintiffs' lives as U.S. political asylees, should they return to any part of

Guatemala. *See* R-92. The Court also denied Defendants' motion to reconsider their *FNC* motion. R-96. However, the Court then dismissed Plaintiffs' Complaint finding, *inter alia*, that Plaintiffs' confinement under threat of death was insufficient to constitute torture. R-140.

Plaintiffs appealed the District Court's ruling on subject matter jurisdiction to this Court. While a decision was pending, Plaintiffs filed their state law claims in Florida state court. The state court dismissed Plaintiffs' state law claims on *FNC* grounds, refusing to adhere to the District Court's previous denial of *FNC* dismissal and finding no *Florida* state interest in adjudicating the case.

Following the dismissal of Plaintiffs' state case, this Court reversed the District Court's decision on torture and remanded.⁵ *Aldana*, 416 F.3d at 1252-53. Upon remand, the District Court directed Plaintiffs to update their federal complaint consistent with this Court's appellate decision and without the state claims. R-155. In the interim, the District Court permitted Plaintiffs to proceed

⁵The Court dismissed Plaintiffs' arbitrary detention claims following the Supreme Court's decision in *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), finding that Plaintiffs' arbitrary detention and crimes against humanity claims in this case were insufficient to constitute a specific, universal, and obligatory norm of international law. *Aldana*, 416 F.3d at 1247. This Court also found that Plaintiffs CIDT claim was also not sufficiently defined to meet the *Sosa* standard of actionable norms under the ATS. *Id. But see Aldana*, 452 F.3d at 1284 (J. Barrket, dissenting).

with merits discovery, over Defendants' objection. R-170. Defendants then used the opportunity of Plaintiffs filing their Fourth Amended Complaint, as directed by the Court, to reassert their motion for *FNC* dismissal in the federal case based on the state court's *FNC* dismissal of Plaintiffs' state law claims. ER-163.

The District Court referred Defendants' renewed *FNC* motion to Magistrate Simmanton for ruling. R-193. After a lengthy hearing, Magistrate Simmanton issued a Report and Recommendation correctly denying Defendants' *FNC* motion, due to the significant difference in application of the *FNC* analysis under federal law based on the strong U.S. interest in adjudicating TVPA / ATS cases, and Plaintiffs' choice of a U.S. forum as U.S. residents. ER-198. Importantly, Magistrate Simmanton also took the prudent and commendable step of refusing to place Plaintiffs' lives in danger, no matter how remote or how small the chance that a case in Guatemala would require Plaintiffs to go there. *Id.* at 17. The District Court, however, in an unusual move, refused to adopt the Magistrate's decision, and instead relied upon the state court decision in granting Defendants' *FNC* motion, which Plaintiffs currently appeal. ER-212; R-213.

V. SUMMARY OF ARGUMENT

The District Court's decision to give preclusive effect to a Florida state court's *FNC* dismissal of state law claims with respect to Plaintiffs federal torture

case is erroneous as a matter of law. Plaintiffs' torture claims under the TVPA / ATS involves a different cause of action and a broader *FNC* analysis, which requires consideration of the strong U.S. interest in adjudicating TVPA / ATS claims and Plaintiffs' choice of forum as U.S. residents. Accordingly, a state court can never divest a federal court of its ability to rule on an *FNC* motion.

In making this erroneous legal finding, the District Court also abused its discretion on multiple grounds. First, by failing to adhere to its initial denial of *FNC*, which Plaintiffs' reasonably relied on, and by essentially reconsidering the issue *six years* after Plaintiffs' initial complaint and the start of merits discovery. This significant prejudice to Plaintiffs alone is an abuse of discretion. Second, it was an abuse of discretion for the District Court not to conduct its own, independent analysis of whether Guatemala is an adequate, alternative forum, and to instead rely on the state court's *FNC* findings, which are inconsistent with the current record. Third, the District Court abused its discretion by failing to give substantive weight to the strong U.S. interest in this case or Plaintiffs' choice of forum, and instead rely on Guatemala's alleged sovereign interests, despite the established record in this case showing that Guatemala has no serious interest in adjudicating trade union violence cases. Indeed, here, Guatemala would have an interest an interest impeding the resolution of the case because of the implicit state

action issue. Fourth, and most importantly, the District Court abused its discretion by failing to give paramount importance to the potential danger Plaintiffs would face if forced to return to any part of Guatemala as U.S. political asylees, no matter how small or how remote the chance that the case would require their return. This is particularly true given the recent murder of a trade union leader working at Defendants' banana plantation during the course of a labor dispute. The law in this and every other Circuit is clear that a forum which places a plaintiff's life at risk cannot be an adequate, alternative forum. This is particularly compelling here where Plaintiffs are U.S. residents precisely because they were given asylum following a determination by the U.S. government that their lives would be in danger if they returned to Guatemala.

VI. STANDARD OF REVIEW

The District Court's decision to give the Florida state court's *FNC* dismissal preclusive effect is a conclusion of law, which this Court reviews *de novo*. See, e.g., *American Iron and Steel Institute v. O.S.H.A.*, 182 F.3d 1261 (11th Cir. 1999). The District Court's failure to adhere to the law of case doctrine with respect to its own initial ruling denying *FNC* dismissal, and its rulings as to the merits of the *FNC* issue are reviewed under an abuse of discretion standard. See e.g., *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir.

1996)(as to *FNC*); *Continental Ins. Co. v. Federal Express Corp.*, 454 F.3d 951, 954 (9th Cir. 2006)(as to law of the case).⁶

VII. ARGUMENT

A. **The District Court Abused its Discretion By Failing to Adhere to its Initial Ruling Denying *FNC* Dismissal as Law of the Case.**

In 2003, after substantial briefing, the District Court denied Defendants' initial *FNC* motion finding that, "[Plaintiffs] were granted asylum in the United States precisely because of the threat of death in Guatemala" and holding that "a forum that puts Plaintiffs' lives at risk cannot be an adequate alternative under the doctrine of *forum non conveniens*". See R-92 at 4. The Court based this ruling on an extensive record including Plaintiffs' Declarations, their asylum documents, numerous human rights reports (from the U.S. State Department, Human Rights Watch and Amnesty International), as well as review of Defendants' expert declaration, which attached 37 pages of exhibits including numerous excerpts of Guatemalan law. Following the Court's decision, Defendants filed a Motion for Reconsideration, again engaging in a factual discussion of the adequacy of Guatemala as a forum, which the District Court also rejected. R-96.

⁶This is distinct from review of the application of law of the case following an appellate court ruling which this Court reviews as a matter of law *de novo*. See *Alphamed, Inc. v. B. Braun Med., Inc.*, 367 F.3d 1280, 1285-86 (11th Cir.2004).

While the state court improperly disregarded the District Court’s ruling as a non-final judgment, it is a far different question from whether the District Court should have treated its *own* initial denial of *FNC* as the law of the case. Contrary to the District Court’s position, law of the case does not require a “final” judgment for the same court to exercise its discretion in adhering to its *own* earlier ruling. Because of Plaintiffs’ reasonable reliance on the District Court’s initial *FNC* decision, and the significant prejudice to Plaintiffs in having their case dismissed six years after ongoing litigation in the U.S., this Court should find that the District Court abused its discretion in failing to apply the law of the case doctrine to its initial *FNC* decision.⁷

The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988). *See also Scottish Air Intern., Inc. v. British Caledonian Group, PLC.*, 152 F.R.D. 18, 25 (S.D.N.Y. 1993) (holding “[t]he law of the case doctrine is also applied where a court is asked to reconsider its own prior rulings”).

The doctrine “is a rule based on sound public policy that litigation should

⁷The substantial prejudice to Plaintiffs is discussed in greater detail in Section VIII (E), *infra*, as this is also a significant consideration in assessing the public and private interest factors in an *FNC* analysis.

come to an end, and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided.” *U.S. v. Monsisvais*, 946 F.2d 114, 116 (10th Cir. 1991). *See also* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE (“Wright & Miller”) § 4478 (1981). Thus, while “[i]t is generally accepted that the law of the case doctrine does not limit the power of a court, but ‘merely expresses the practice of courts generally to refuse to reopen what has been decided,’” *see Christianson*, 486 U.S. at 817, there is a strong policy favoring finality which cautions that courts review earlier rulings sparingly. *McClain v. United States*, 676 F.2d 915, 917 (2d Cir. 1982).

The District Court’s failure to apply law of the case to its initial *FNC* decision is based on its erroneous belief that the doctrine is *only* applicable when there is a final judgment. *See* ER-212 at 4 (citing *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1949)). In *Smelting Refining*, however, appellants were asking the Supreme Court to adhere to a *District Court’s* earlier decision as law of the case, and in this context held that such a determination was not binding because nothing had been “finally decided”. *Id.* at 198-99. In this case, Plaintiffs were asking the District Court to abide by its *own* previous ruling as law of the case, not another federal, state, or even appellate court, which may have required a final judgment, and been more akin to *res*

judicata. In essence, the District Court’s failure to abide by its own decision unfairly provided Defendants with yet a third motion for reconsideration, without meeting any of the legally permissible grounds. Here, Plaintiffs are not challenging whether the District Court had the ability to revisit an earlier ruling, but that it was an abuse of discretion given that Plaintiffs’ case has been pending for six years, that Plaintiffs had reasonably relied on the Court’s decision, and given the recent evidence that it would still be unsafe for them to return to any part of Guatemala.

In the Matter of Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1991), the Seventh Circuit summarized the aforementioned distinction and rejected the notion that a final judgment is required for a court to abide by its own previous rulings, stating: “this language [in *Smelting Refining*] is not relevant to this case where the issue is whether law of the case applies in a court that has already decided the issue Similarly, we think the Supreme Court's further statement that law of the case, like *res judicata*, requires ‘a final judgment,’ . . . was meant to apply only when a party is arguing that law of the case precludes a court that has not yet considered the issue from reaching the merits of the issue on appeal.” *Id.* at 1291-92.

The Seventh Circuit’s position is consistent with that of other Circuits. *See*,

e.g., *Hull v. Freeman*, 991 F.2d 86, 90 (3rd Cir. 1993)(holding “[r]elitigation of issues previously determined in the same litigation is controlled by principles of the law of the case doctrine rather than collateral estoppel”); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir. 1999); *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 880 (5th Cir. 1993). *See also* Wright & Miller, *supra*, § 4478 (explaining that “[l]aw-of-the-case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. They do not apply between separate actions. As rules that govern within a single action, they do not involve preclusion by final judgment; instead, they regulate judicial affairs *before* final judgment”)(emphasis added). All that is required for purposes of finality is that the decision not be a tentative ruling. *See id.* at §4478.5 (stating “[a]lthough at times it is said that only a "final" ruling will support law of the case, it is clear that this concept cannot refer to the technical concepts of finality applied to preclusion by judgment or appeal jurisdiction. Instead, the concept is a functional one that seeks to identify a determination intended to put a matter at rest. Preliminary or tentative rulings do not establish law of the case”).

Accordingly, after six years of litigation in the District Court and this Circuit, Plaintiffs should not have had merits discovery abruptly interrupted by

Defendants' third effort to have the *FNC* issue reconsidered by the District Court.

B. The District Court Erred By Giving Preclusive Effect to the Florida State Court's *FNC* Dismissal.

Even assuming that the District Court's initial denial of *FNC* dismissal cannot be considered the law of the case, the District Court erred as a matter of law by holding that the state court's *FNC* dismissal dictated the dismissal of this federal, statutory case on *FNC* grounds.

1. A state court's *FNC* decision cannot divest a federal court of its ability to rule on an *FNC* motion in a federal case.

In *Parsons v. Chesapeake & O.R. Co.*, 375 U.S. 71, 73-74 (1963), the Supreme Court held that a prior state court dismissal on *FNC* grounds in a case between the same parties in a subsequent federal action cannot divest a federal judge of his or her ability to rule on an *FNC* motion under federal law. There, the plaintiff had previously filed a state court action in Chicago, which had been dismissed on state *FNC* grounds. The plaintiff then filed an identical action against the same defendant in a federal district court also sitting in Chicago. The defendant then moved to transfer the federal case to a different state under federal *FNC* principles. The district court denied the motion. The defendant then petitioned the Seventh Circuit for a writ of mandamus to direct the district court to transfer the case, contending that the state court's decision on the issue of *FNC*

was binding on the district court. The Seventh Circuit granted the petition, holding that the prior state court order precluded the district court from considering the *FNC* issue and required the district court to transfer the case. The Supreme Court reversed, holding that “since different factual considerations may be involved in each court's determination, we hold that a prior state court dismissal on the ground of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404(a).” *Id.* at 73-74.⁸

In Esfeld v. Costa Crociere, S.P.A. 289 F.3d 1300 (11th Cir. 2002), this

⁸While a transfer of venue is governed by 28 U.S.C. §1404, and is not identical to *FNC*, it is well recognized that it implicates the same substantive concerns as *FNC*, and is therefore treated generally as the same legal concept. *See, e.g., Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 127 S. Ct. 1184, 1190-91 (2007) (“We have characterized *forum non conveniens* as, essentially, a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined. . . . The common-law doctrine of *forum non conveniens* has continuing application in federal courts only in cases where the alternative forum is abroad For the federal-court system, Congress has codified the doctrine and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action.”)(Citations omitted). Indeed, given the far greater prejudice in transferring the case to a foreign forum, it is even more prudent for a federal court to exercise its own independent judgment. Here, transfer to Guatemala effectively ended the case as Plaintiffs would not risk their lives again to pursue Defendants in Guatemala’s courts, when Guatemalan Courts have not been able to effectively address trade union torture cases.

Court, citing *Chesapeake*, concurred that collateral estoppel did not apply in an *FNC* context because the considerations in an *FNC* analysis under state law is distinct from that of federal law. *See id.* at 1305-06. In doing so, this Court stated “we have reached this decision based on our analysis showing that several federal interests . . . are at stake in the *forum non conveniens* context. Such interests include the federal goal of ensuring that United States citizens generally have access to the courts of this country for resolution of their disputes . . . [and] trump outcome-determinative state law on *forum non conveniens*”. *Id.* at 1313-14.

Accordingly, both the Supreme Court’s decision in *Chesapeake* and this Court’s holding in *Esfeld* should be controlling here. These decisions make clear that the District Court erred as a matter of law by giving a state court decision preclusive effect in a federal *FNC* analysis.

2. Even if the District Court could consider the preclusive effect of the state court’s *FNC* dismissal, preclusion is unwarranted given the different state and federal interests in this case.

The District Court’s primary basis for finding that the state court’s *FNC* ruling must be given preclusive effect is its reliance on *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525-26 (1986). ER-212 at 3, 8. However, the *Parsons Steel* decision did not involve an *FNC* issue, and in any event makes clear that the Full Faith & Credit Act, 17 U.S.C. § 1738, does not require *automatic* adherence

to a previous state court judgement by a federal court; only that the federal court apply the state court's rules of issue preclusion to determine *if* collateral estoppel is warranted. *See Parsons Steel*, 474 U.S. at 525-26.

In this case, the divergence between the factors at issue in the state and federal cases is significant so as to preclude collateral estoppel.⁹ First, they involved fundamentally different causes of action. The state law claims of assault, false imprisonment, and emotional distress are distinct from torture, which implicates a *jus cogen* norm of international law that is specifically protected via U.S. statutes. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 337 (S.D.N.Y. 2003) (“Assuming, however, that a Canadian court . . . would apply domestic law, another problem remains . . . neither affidavit makes any mention of a cause of action for violations of the law of nations, and in particular, for *jus cogens* violations thereof The concern is that the causes of action available do not reflect the gravity of the alleged offenses, and in particular, the universally-condemned nature of these acts. The offenses alleged in the Amended Complaint are considered international crimes entailing individual

⁹*See, e.g., Christo v. Padgett*, 223 F.3d 1324, 1339 (11th Cir. 2000)(holding that the Florida state law standard for preclusion is identical to the Eleventh Circuit's federal standard holding that for preclusion to apply, the issues presented in the two cases must, among other things, be identical).

responsibility and subject to universal jurisdiction precisely because they constitute a fundamental affront to the international order. Such crimes are more than the sum of their parts.”).

Accordingly, while Plaintiffs’ torture may arise from the same core set of facts, the legal and factual elements necessary to establish torture are significantly different. For instance, an essential element of Plaintiffs’ torture claims, not present in the state law claims, is evidence of “state action”. *See Aldana*, 416 F.3d at 1248-49 (noting the necessity of state action and finding that Plaintiffs’ allegations can be reasonably read to support a finding of such).¹⁰ *See also Harley v. Health Center of Coconut Creek*, 518 F. Supp.2d 1364, 1368-69 (S.D. Fla. 2007)(explaining that Florida law requires identity of the cause of action for issue or claim preclusion to apply and holding that the plaintiff’s claim for retaliation under the Family Medical Leave Act was not identical to a cause of action under Florida’s Civil Rights Act although arising from the same set of facts). *See also Santini v. Cleveland Clinic Florida*, 843 So.2d 1029,1033 (Fla. 4th DCA

¹⁰The fact that certain witnesses regarding state action may reside in Guatemala is insufficient to render Guatemala an adequate, alternative forum. *See, e.g., Lehman v. Cayman, Ltd.*, 713 F.2d 339, 343 (8th Cir. 1983)(holding “the time and expense of obtaining the presence or the testimony of a foreign witness in a local forum are significantly lessened by modes of communication and travel that are commonplace today”).

2003)(holding that “a claim made under one of the civil rights statutes is not the same cause of action as a claim made under another. The claims arise from separate rights recognized and protected by different sovereigns”)(citing *Andujar v. Nat’l Prop. and Cas. Underwriters*, 659 So.2d 1214, 1216 (Fla. 4th DCA 1995)).

Second, the *FNC* analysis between the two forums is different, which is well-recognized. *See, e.g., Callasso v. Morton & Co.*, 324 F. Supp.2d 1320, 1325 (S.D. Fla. 2004)(“The *forum non conveniens* analysis used in the State Court Order is not identical to the analysis a federal court must undertake when deciding whether to dismiss an action under the doctrine of *forum non conveniens*.”); *Chazen v Deloitte & Touche*, 2003 WL 24892029 at *2 (11th Cir. 2003)(“In federal court, . . . a *forum non conveniens* analysis requires consideration of the connections between [the lawsuit] and the United States as a whole. . . . Because the *forum non conveniens* criteria are different in [state and federal court], the issues decided in . . . state court is not identical to that decided in the federal court. Thus, the district court erred in applying collateral estoppel.”).¹¹

¹¹*See also Villar v Crowley Maritime Corp.*, 780 F. Supp. 1467, 1482 (S.D. Tex. 1992)(holding an *FNC* dismissal in one forum does not necessarily preclude the maintenance of an identical suit in another forum)(citing *Mizokami Bros. v. Mobay Chem. Corp.*, 660 F.2d 712, 716-17 (8th Cir.1981)).

The state court necessarily did not consider the United States’ significant interest in adjudicating TVPA / ATS claims or consider Plaintiffs’ choice of a U.S. forum as U.S. residents, both of which are discussed below.¹² These important distinctions altered the *FNC* analysis and required the District Court to deny full faith and credit to the state court’s *FNC* dismissal. Its failure to do so, particularly given the existence of a distinct federal cause of action, was erroneous as a matter of law.

C. The District Court Abused its Discretion by Failing to Conduct its Own, Independent *FNC* Analysis, and by Instead Relying on the State Court’s Findings, Which Are Inconsistent with the Current Record.

It is well-established that a “court abuses its discretion when it fails to balance the relevant [*FNC*] factors”. *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1100 (11th Cir. 2004). *See also Ambrosia Coal and Const. Co. v. Pages Morales*, 368 F.3d 1320, 1332 (11th Cir. 2004)(“A district court abuses its discretion if it misapplies the law . . . or makes findings of fact that are clearly erroneous.”)(citations omitted); *U.S. v. Frazier*, 387 F.3d 1244, 1276 (11th Cir. 2004)(“An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.”).

¹²See Sections VII(D)(1) and (2), *infra*.

Here, the District Court completely abrogated its duty and failed to conduct an independent analysis regarding the existence of Guatemala as an adequate, alternative forum, stating instead that “this Court is following the Florida state court’s decision on this matter, in finding that Guatemala provides an adequate and available alternative forum for the Plaintiffs to litigate their claims.” ER-212 at 6. This failure to conduct a thorough and independent analysis with regards to the adequacy of an alternative forum is alone sufficient grounds to warrant reversal. *See Chesapeake* 375 U.S. at 73-74 (holding a prior state court dismissal on *FNC* grounds in a case between the same parties in a subsequent federal action “can never serve to divest a federal district court judge” of the ability to rule on an *FNC* motion under federal law). This error is greatly magnified because the District Court declined to apply the new and independent analysis conducted by the Magistrate.

Had the District Court conducted such an independent analysis based on the current record, which evidences continued violence against trade union leaders, there is simply no legal basis on which to find that Guatemala is an adequate alternative forum.¹³ Specifically, Plaintiffs explained to the Court that the

¹³The framework for an *FNC* analysis involves a two step process: 1) determining the availability of an adequate alternative forum and, if that is found; 2) a balancing of private and public interests. *Piper Aircraft Co. v. Reyno*, 454

Secretary of Plaintiffs' former SITRABI union, Marco Tulio Ramirez Portela, was recently murdered, execution-style, by masked assailants, believed to be connected to the military, while leaving home for work at Defendant's banana plantation.

R-203 at 2. In support, Plaintiffs submitted to the District Court a copy of a press release from The Center for Labor Solidarity in Guatemala, R-203-2 (Exhibit A), which stated that: "Ramirez's murder is the most recent in a series of threats and attacks against SITRABI and its leaders". . . . The assassination of Ramirez came just three days after SITRABI learned that military officers had been disciplined by the Ministry of Defense in response to SITRABI complaints about the unlawful entry. *Id.*

The recent murder of Marco Ramirez confirms Plaintiffs' continued fears of retaliation, which were also explained to the Court in Plaintiff Aldana's

Declaration. In his Declaration, Plaintiff Aldana explains how he and the other

U.S. 235, 236-56 (1981). Defendants bear the burden of proof in both steps. *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001). First and foremost, they must prove that an adequate alternative forum exists for litigating the claims. *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676-77 (D.C. Cir. 1996). Only then can the court proceed to the second step of balancing the private and public factors. *Id.* at 677. Defendants then bear the burden of showing that the relevant factors tilt strongly in favor of trial in the foreign forum. *R. Maganlal & Co. v. M.G. Chemical Co., Inc.*, 942 F.2d 164, 167 (2d Cir. 1991); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Finally, the court must ensure that plaintiffs could reinstate the suit in the alternative forum without encountering undue inconvenience or prejudice. *El-Fadl*, 75 F.3d at 679.

four original Plaintiffs lived in constant fear that they would be killed, and that this fear was only relieved through the grant of political asylum by the U.S. government. *See* ER-172-2 (Exhibit A) at ¶¶ 4, 7-9, 14. As Plaintiff Aldana indicates, “[n]othing has changed in Guatemala. If I return, the same people who attacked us and forced us to flee are still there and they will find us We would not be safe anywhere in Guatemala if we returned”. *Id.* ¶ 17.¹⁴

The District Court ignored Aldana’s Declaration and did not even mention, let alone, discuss, the implications of Ramirez’s murder, apparently relying on the state court’s finding that Plaintiffs would not need to travel to Guatemala to pursue their case, but could do so upon written submissions. *See* ER-212 at 5, 8. Apart from the fact that the District Court is not bound by this finding in a federal *FNC* analysis, and that this point was directly contradicted by Plaintiffs’ expert,¹⁵ the

¹⁴Indeed, this is the very basis underlying a grant of asylum. *See, e.g.,* Immigration and Nationality Act § 208(a), 8 U.S.C. §110 *et. seq.* (1952)(noting that to be granted asylum, a refugee must necessarily establish that he or she is unable to return to any part of the country at issue “because of persecution or a well-founded fear of persecution on account of . . . membership in a particular social group”).

¹⁵*See* Section VII (B), *supra* (explaining that the District Court was not bound by the state court’s *FNC* ruling). *See also* Supplemental Declaration of Alejandro Garro, ER-172-5 (Exhibit D) at ¶ 2. Plaintiffs’ expert, Alejandro Garro, is a professor of law at Columbia University who has studied Latin American legal systems for over 20 years. In his Supplemental Declaration, Professor Garro concluded that “[t]hird party witnesses are required to appear in court to provide

risk to Plaintiffs' lives cannot be reduced to an abstract legal exercise.¹⁶

Rather, the District Court was bound by the consistent and explicit federal case law, which holds that a forum which places a plaintiff's life in danger, no matter how remote, is not an adequate, alternative forum. *See, e.g., Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996)(denying motion to dismiss under doctrine of *FNC* because the plaintiff would be "putting himself in grave danger" were he to return to Ghana, where he was allegedly tortured); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983)(finding Iran to be an inappropriate forum where the plaintiffs alleged they would be executed if they were to return); *Talisman*, 244 F. Supp. 2d at 335 (holding that Sudan would not be an appropriate forum "in light of the almost self evident fact that, if plaintiffs' allegations are true, plaintiffs would be unable to obtain justice in Sudan and might well expose themselves to great danger in trying to do so"). *See also Iraborri v. United Technologies Corp.*, 274 F.3d 65, 75 (2d Cir. 2001)(reversing the District Court's *FNC* dismissal, and holding that plaintiffs'

live testimony, and failure to do so will subject such witnesses to civil and criminal penalties if they fail to appear".

¹⁶Indeed, even Magistrate's Simminton's Report and Recommendation on this issue had to, in good conscience, consider the potential danger to Plaintiffs' lives. *See* ER-198 at 17.

claim regarding their safety in Colombia was highly relevant to the balanced inquiry that the district court must conduct); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp.2d 1134, 1143 (C.D. Cal. 2005)(holding “an alternative forum is inadequate if the claimants cannot pursue their case without fearing retaliation. Under those conditions, the foreign alternative forum, in reality, would provide no available remedies for Plaintiffs' claims. In addition, the Court does not believe that there has to be an absolute certainty that Plaintiffs would be harmed if they returned: a significant possibility would be sufficient.”)(citations omitted).

More than an abuse of discretion, it was unconscionable for the District Court to simply ignore evidence of any potential danger to Plaintiffs' lives, and risk their safety based solely on the position of a state court which had no new evidence of recent violence against Guatemalan trade unionists. This is particularly true given the position of Plaintiffs' expert that there is absolutely no guarantee that Plaintiffs would not be called to provide live testimony in Guatemala.¹⁷ Indeed, when this issue was first presented to the District Court, before this new murder, the District Court agreed with Plaintiffs in twice denying Defendants' *FNC* motion. The changes since then can only further compel keeping the case in the U.S.

¹⁷See note 15, *supra*.

Even assuming that Plaintiffs would not need to return to Guatemala, the District Court ignored evidence that the level of impunity in Guatemala also renders it an inadequate forum. Plaintiffs presented the District Court with substantial evidence that Guatemala is ill-equipped to adjudicate a case challenging the use of clandestine security forces to torture trade unionists in a country where trade unionists are routinely murdered, and judges turn a blind eye to such violence.¹⁸ While mere corruption in a foreign judicial system may be insufficient to render a forum insufficient, if the level of impunity renders the remedy offered by the alternative forum “so clearly inadequate or unsatisfactory that it is no remedy at all,” the forum cannot be considered an adequate, alternative

¹⁸ See ER-172-1 at 10, n.3 (referring the Court to the U.S. Department of State, Country Reports on Human Rights Practices 2005: Guatemala, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61729.htm>, Section 1(e)(stating “the judicial system often failed to provide fair or timely trials due to inefficiency, corruption, . . . and intimidation of judges, prosecutors, and witnesses During the year there were numerous reports of corruption and manipulation of the judiciary. Judges, prosecutors, plaintiffs, and witnesses also continued to report threats, intimidation, and surveillance.”); *Id.* at Section 6(a) (noting “[a]n ineffective legal system and inadequate penalties for violations continued to undermine enforcement of the right to form unions and participate in trade union activities There were credible reports of retaliation by employers against workers who tried to exercise internationally recognized labor rights Labor leaders reported receiving death threats and other acts of intimidation”). The 2005 State Department Report is consistent with Plaintiffs’ earlier human rights reports also submitted to the District Court. See R-88, Plaintiffs’ Consolidated Memorandum of Points and Authorities in Opposition to Defendants’ Motions to Dismiss, Exhibits G, H, I, filed in 2003.

forum. *See Piper Aircraft*, 454 U.S. at 254. *See also Eastman Kodak v. Kavlin*, 978 F. Supp. 1078, 1082-87 (S.D. Fla. 1997)(holding “[t]he degree, extent, and apparent lack of redressability for individual litigants, . . . makes the allegations about Bolivia particularly troubling. But most important . . . the system is easily manipulable by the well-connected and that extortionate use of the criminal justice system is routine”).

Here, the District Court was required to credit Plaintiffs’ evidence on this point as Defendants provided no evidence to the contrary, and it could not consider the declaration of Defendants’ expert submitted in the state court proceeding as it necessarily did not pertain to whether Plaintiffs could pursue their federal torture claims in Guatemala. *See, e.g., Lisa, S.A. v. Gutierrez Mayorga*, 441 F. Supp. 2d 1233, 1236 (S.D. Fla. 2006)(“A defendant has the burden of persuasion as to all elements of a *forum non conveniens* motion, including the burden of demonstrating that an adequate alternative forum is available”); *Canales Martinez v. Dow Chemical Co.*, 219 F. Supp. 2d 719, 740-41 (E.D. La. 2002) (holding “[t]he content of the State Department's report on the Philippines [indicating corruption and impunity] convinces the Court that defendants cannot carry their burden of demonstrating that the Philippines provides an adequate forum in which the parties will not be deprived of all remedies or treated unfairly.

To the contrary, given the situation in the Philippine court system, it appears that there is a very real risk that plaintiffs will be denied basic fairness in the prosecution of their claims”).

By failing to consider both the current danger to Plaintiffs’ lives and the inability of Guatemalan courts to adjudicate Plaintiffs’ torture case, and instead relying on the outdated findings of the state court, this Court should find that the District Court abused its discretion and reverse.

D. Even Assuming That Guatemala Could Constitute an Adequate, Alternative Forum, the District Court Abused its Discretion in Weighing the Private and Public Interests.

1. The District Court abused its discretion in failing to give sufficient weight to Plaintiffs’ choice of forum.

Among the private interests in an *FNC* analysis is the significant deference to Plaintiffs’ choice of forum. In *SME Racks*, this Circuit held that “‘positive evidence of unusually extreme circumstances’ must be present and that the court must be ‘thoroughly convinced that material injustice is manifest’ before ousting a domestic plaintiff from this country's courts,” and that “[t]his presumption in favor of the plaintiffs' initial forum choice in balancing the private interests is at its strongest when the plaintiffs are citizens, residents, or corporations of this

country”. *SME Racks*, 382 F.3d at 1101-02(citations omitted).¹⁹ Although the District Court cited this Court’s holding in *SME Racks*, it failed to actually adhere to *SME Racks* and disregarded completely Plaintiffs’ choice of forum.

Here, all of the Plaintiffs are political asylees who were granted asylum because so severe was the threat of death that they could not return to any part of Guatemala. *See* ER-172-2 (Exhibit A) at ¶¶ 4, 7-9, 14. They have accordingly been residing in the U.S. for the past six years, and either have permanent residency status or are in the final stages of obtaining such status.²⁰ They, like so many immigrants, have now made the U.S. their home, and have a right like all U.S. residents to pursue their legal claims in the U.S. The District Court’s belief that this case is inherently Guatemalan, *see* ER-212 at 7-8, is therefore simply no longer accurate, and this changed circumstance must be afforded significant weight in the *FNC* analysis.

¹⁹*See also* *Byrne v. British Broadcasting Corp.*, 132 F. Supp.2d 229, 237-38 (S.D.N.Y. 2001)(holding foreign plaintiffs who reside in the U.S. are entitled to the same deference as U.S. citizens)(citing *Wiwa*, 226 F.3d at 103).

²⁰Copies of Plaintiffs’ permanent resident cards can be found at ER-172-2, Exhibit A (Attachment 1). *See also* ER-172-2, Exhibit A, ¶¶ 15-16 (explaining that he and the other Plaintiffs have made their home in the U.S.). For informational purposes only, Plaintiffs note that Plaintiff Jorge Palma Romero has since obtained his permanent residency card, and that Plaintiff Gumerzindo Loyo Martinez is still in the final stages of also obtaining his permanent residency card.

The sole reason that the District Court did not afford Plaintiffs' choice of a U.S. forum the substantial deference required is its mistaken belief that the other private interest factors outweighed Plaintiffs' choice of forum. Specifically, the District Court, again relying inappropriately on the state court's ruling, believed that "the entirety of the witnesses except for the Plaintiffs are located in Guatemala, that the vast majority of documentary evidence is in Spanish and thus would require translation for admission in this Court, and that the vast majority of witnesses do not speak English." ER-212 at 7. This is simply not the record in this case.

The District Court ignored that Plaintiffs' primary theory of liability based on agency and aiding and abetting will necessarily require sources of proof in the U.S. *See* ER-198 at 17-18 (Magistrate Simmonton's Report finding that "evidence relevant to the Plaintiffs' ATCA and TVPA claims is found in the United States, not the least of which is the live, eyewitness testimony of the Plaintiff-victims, and testimony regarding the control by the Del Monte defendants in the United States over the actions of Bandegua. Plaintiffs theory of liability with respect to these defendants rests upon proof of common law agency, as well as aiding and abetting,

proof of which may lie with the companies and persons present in Florida”).²¹

The District Court also ignored that many witnesses actually reside outside of Guatemala. *See* R-45, Exhibit A (Attachment 1-Defendants’ Initial Disclosures) at 2 (demonstrating that the majority of witnesses, particularly those employed by Defendants, currently reside outside of Guatemala, with many residing in Miami, and others even residing in Europe).²² It is well-established that a Court abuses its discretion when its decision is unsupported by the record. *See, e.g., Ambrosia*

²¹This observation based on the actual review of the record before the District Court, and not simply reliance on the outdated state court decision, led the Magistrate to correctly apply this Court’s holding in *SME Racks*, stating “[i]n balancing these private factors, the undersigned concludes that despite the presence of most of the evidence and witnesses in Guatemala, when these facts are viewed in light of the strong interest of Plaintiffs in pursuing this action in the country which granted them political asylum and permanent residency status, the undersigned concludes that the private interest factors weigh in favor of Plaintiffs’ choice of forum”. ER-198 at 18.

²²This again highlights the dangers of the District Court relying on the state court’s finding issued nearly two years ago and ignoring the evidence actually before it in this federal case. Moreover, even assuming that some language translation is required, this alone would be insufficient for *FNC* dismissal. *See Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 136 F. Supp. 2d 1271 (S.D. Fla. 2001)(rejecting the notion that the residence of foreign witnesses abroad is sufficient basis for *FNC* dismissal and holding that technical difficulties such as language barriers be evaluated “in light of the increased speed of travel and communication which makes no forum as inconvenient today”). *See also Doe v. Sun Int’l Hotels, Ltd.*, 20 F. Supp. 2d 1328, 1330 (S.D. Fla. 1998) (holding that witnesses and evidence within a defendant's control and located abroad were not a basis for *FNC* dismissal).

Coal, 368 F.3d at 1332.

Finally, the Court made no mention of the fact that Plaintiffs chose to sue Defendants in Miami, where the Del Monte parent companies are headquartered and from where Plaintiffs allege that they maintained significant control over Bandegua. *See* ER-198 at 17-18. Here, not only are the parent Defendants headquartered in Miami, but they have fought to litigate in Florida as a matter of convenience. *See Dole Food*, 136 F. Supp. 2d at 1279. There, Del Monte Fresh Produce Company brought a case against its competitor, Dole Foods, and successfully resisted an *FNC* motion seeking to transfer the case to Costa Rica, a forum far superior to Guatemala. Notably, Del Monte was correct “citizenship and residence are proxies for convenience.” *Piper Aircraft*, 454 U.S. at 249. For example, in *Lony v. Dupont*, 886 F.2d 628, 634 (3rd Cir. 1989), the Court reversed the district court’s decision to dismiss on *FNC* grounds, where the district court failed to grant deference to a foreign plaintiff’s choice of a U.S. forum, which was the home forum of the defendant, stating: “[t]he foreign plaintiff is suing the defendant in the latter’s home forum where the latter’s corporate headquarters, headquarters of the division in question, and research laboratories are located. That in itself has considerable weight in showing that the plaintiff’s choice of forum was based on convenience.” Accordingly, courts have held

“where the forum resident seeks dismissal, this fact should weigh strongly against dismissal.” *Reid-Walen v. Hansen*, 933 F.2d 1390, 1395, 196 (8th Cir. 1991). *See also LG Electronics, Inc. v. Fritz Transp. Intern.*, 2001 WL 1843715 at *6 (N.D. Cal. Oct. 2, 2001)(noting that the local connection to the forum is enhanced where the defendant is headquartered in the city where the suit was filed). Thus, it is exceedingly difficult for defendants to win the balancing of private interests where “plaintiff has ceded defendants the ‘home turf’ advantage and... in light of the relative economic capabilities of the parties, plaintiff can hardly be said to ‘vex,’ ‘harass,’ or ‘oppress’ defendants by the bringing of this suit.” *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.*, 78 F.R.D. 445, 453 (D.C. Del. 1978)(emphasis in original).

In short, the location of some evidence and other witnesses in Guatemala is far from the “unusually extreme circumstances” and “material injustice” required by this Circuit to displace a U.S. resident’s choice of a U.S. forum in a TVPA case, particularly where significant evidence can also be found in the U.S., and Plaintiffs have chosen a forum in which Defendants’ are headquartered and have litigated in before.

2. The District Court abused its discretion in failing to give sufficient weight to the United States’ interest in adjudicating TVPA and ATS cases.

The District Court also abused its discretion in assessing the public interest factors of the *FNC* analysis by subverting the strong U.S. interest in providing torture victims access to U.S. Courts via the TVPA and ATS. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000). In *Wiwa*, the Second Circuit held that “in passing the Torture Victim Prevention Act, Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts”, and that more importantly, “[i]f in cases of torture in violation of international law our courts exercise their jurisdiction conferred by the 1789 Act only for as long as it takes to dismiss the case for *forum non conveniens*, we will have done little to enforce the standards of the law of nations.” *Id.* at 105-106. In *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006), this Circuit agreed with the *Wiwa* Court, stating: “Congress enacted the TVPA “to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights Absent a cause of action in the United States courts, some of the most egregious cases of human rights violations might go unheard.” *Id.* at 1261-62(citations omitted). *See also Talisman*, 244 F. Supp.2d at 339 (holding “the United States has a strong interest in seeing violations of

international law vindicated”).²³

Plaintiffs are not suggesting that ATS and TVPA cases are never subject to an *FNC* analysis, but that it was an abuse of discretion for the District Court in this case to subvert the U.S.’s substantial interest in favor of Guatemala’s interest, *see* ER-212 at 9, when the established record is that Guatemala has little interest in bringing Plaintiffs’ violators to justice or prosecuting trade union violence cases.²⁴ Specifically, the U.S. State Department has for years reported the notorious level of violence against Guatemalan trade unionists, and the level of impunity which prevents the Courts from bringing the perpetrators of trade union violence to justice.²⁵ The criminal trial in which Plaintiffs testified about the torture they

²³*See also* Senate Report No. 102-249, 102nd Cong., 1st Sess., 1991 WL 258662, at * 3-4 (stating that the TVPA provides “[j]udicial protections against flagrant human rights violations [committed]. . . in those countries where such abuses are most prevalent”); H.R. Rep. 102-367, 1992 U.S.C.C.A.N. 84, 85-86 (stating that the TVPA was passed specifically to provide a right of action that “can be used by victims of torture committed in foreign nations”).

²⁴The District Court also relied on an inaccurate factual record in weighing the public interests, stating “all of the evidence involved, except for Plaintiffs’ testimony is located in Guatemala or the surrounding area, outside of this Court’s reach, and thus a material injustice would result were Defendants forced to litigate in the United States”. ER-212 at 9 (emphasis in original). As Plaintiffs have indicated this is inconsistent with the record which was actually before the District Court. *See* Section VII (D)(1), *supra*.

²⁵*See* note 18, *supra*.

experienced, and that ultimately led to their political asylum, is further evidence of Guatemala's lack of any serious interest in this case. *See* ER-172-2 (Exhibit A) at ¶¶ 8-14 (explaining to the District Court that many of the Del Monte managers involved in Plaintiffs' torture were permitted to flee the country to avoid prosecution, and that those gang members who were tried were charged only with minor crimes and ultimately given minimal fines in lieu of jail time). It was a clear abuse of discretion not to credit, or even discuss, this evidence which negates any serious governmental interest on the part of Guatemala. *See, e.g., Ambrosia Coal*, 368 F.3d at 1332 ("A district court abuses its discretion if it misapplies the law . . . or makes findings of fact that are clearly erroneous"). At minimum, Guatemala's interest under such circumstances cannot be said to override that of the U.S., which provides a specific venue for torture cases.

E. The District Court Abused its Discretion in Failing to Consider the Significant Prejudice to Plaintiffs in Having Their Case Dismissed After Six Years of Active Litigation in the U.S.

Important among both the public and private interest factors in an *FNC* analysis is the prejudice to Plaintiffs at having their case dismissed. *See La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310 (11th Cir. 1983)(holding that a district court must consider the prejudice and inconvenience to the plaintiff in having his or her case relegated to a foreign forum).

In *Genpharm Inc. v. Pliva-Lachema*, 361 F. Supp. 2d 49 (E.D.N.Y. 2005), the court considered it extremely prejudicial to Plaintiffs to have their case dismissed given the start of discovery, stating “[t]he private interest factors favor the Plaintiffs. This case has been pending since June 6, 2003. Although the parties have not engaged in extensive discovery, the Defendants have sought to stay and delay discovery at every step of the case. In addition, as noted above, the Court can consider the fact that the Defendants have moved for dismissal based on *forum non conveniens* more than a year after the case was filed.” *Id.* at 60. In *Genpharm*, like this case, Defendants also attempted to stay discovery, *see* R-170, which obviously also limited the time for extensive discovery in this case. However, as noted, the *Genpharm* court found it significant that the parties had proceeded to discovery, and that it would have been unfair to simply thwart the expense and time of such discovery in favor of a foreign forum. *See id.* at 60. *See also Lony*, 935 F.2d at 614 (“Motions to dismiss based on *forum non conveniens* usually should be decided at an early state in the litigation, so that the parties will not waste resources on discovery and trial preparation in a forum that will later decline to exercise its jurisdiction over the case.”); *Schexnider v. McDermott Int’l, Inc.*, 817 F.2d 1159, 1163 (5th Cir. 1987); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1335 (9th Cir. 1984).

Here, the District Court did not even consider this factor, which is compelling as Plaintiffs have been litigating their case in the U.S. for six years via public interest counsel, and were in merits discovery at the time of dismissal. Plaintiffs raised this in argument before the Magistrate, but the District Court ignored this point in summarily dismissing Plaintiffs' case. Ironically, it was this very District Court that allowed Plaintiffs to proceed with merits discovery, over Defendants' objection. R-170. It would be manifestly unfair to now require Plaintiffs, who are low income persons dependent on public interest counsel, to lose the product of all that effort, time, and resources.

VIII. CONCLUSION

This Court should reverse the District Court's *FNC* dismissal of Plaintiffs' torture case, and find that the District Court erred as a matter of law by giving preclusive effect to a state court's *FNC* dismissal, and by failing to conduct its own independent *FNC* analysis based on the current federal record. This Court should also find that the District Court further abused its discretion by failing to adhere to its initial denial of *FNC* dismissal as law of the case to the extreme prejudice of Plaintiffs; and by misapplying the federal *FNC* analysis. The District Court was required to give sufficient weight to the U.S. interest in hearing TVPA/ATS cases, and to Plaintiffs' choice of the U.S. forum as U.S. residents.

Finally and most importantly, this Court should find that the District Court abused its discretion by finding that Guatemala constitutes an adequate, alternative forum despite the potential risk to Plaintiffs' lives.

Respectfully submitted on this 14th day of February, 2008 by:



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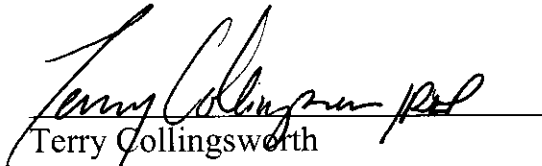
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CERTIFICATION OF BRIEF FORMAT

Pursuant to F.R.A.P. 32 (a)(7)©, I certify that this Opening Brief for Plaintiffs/Appellants complies with Rule 32 (a)(7)(B) (ii) in that it has a text typeface of 14 points and contains 10,703 words.

Respectfully resubmitted on this 14th day of February, 2008 by:

A handwritten signature in black ink, appearing to read "Terry Collingsworth", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs/ Appellants'

OPENING BRIEF together with Plaintiffs/Appellants' EXCERPTS OF RECORD

were served via overnight, express mail on this 14th day of February, 2008 to:

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