

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/ Simmanton

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I. INTRODUCTION

Defendants' Answering Brief is predicated on the erroneous position that a federal court's *forum non conveniens* (FNC) analysis is the same as a Florida state court's determination. However, a state court's determination that Florida is an inconvenient forum to litigate Plaintiffs' *state* law claims is a far different analysis from a determination of whether a federal court should hear Plaintiffs' torture claims under two federal statutes, the Torture Victims Protection Act (TVPA) and the Alien Tort Statute (ATS), 28 U.S.C. §1350. Here, the United States has a significant interest in adjudicating TVPA and ATS claims, and there is now no question that Plaintiffs' detention and repeated threats of death at gun point constitute torture, as previously determined by this Court. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1252-53 (11th Cir. 2005).

The District Court was also required to give substantial deference to Plaintiffs' choice of a U.S. forum as U.S. residents, and more importantly to fully consider new evidence of trade union violence, as evidenced by the recent murder of Marco Ramirez. Far from an isolated incident, Plaintiffs' counsel learned just days prior to submitting this brief that yet another member of Plaintiffs' SITRABI union, Carlos Enrique Hernandez, was murdered during lunch at Defendants' Bandegua plantation. While the District Court was not privy to the more recent Hernandez murder, it highlights the danger of the District Court relying on a state

court decision from 2005 in a federal torture case predicated on precisely such trade union violence. These critical distinctions altered the *FNC* analysis and precluded the District Court from giving full faith and credit to the state court's *FNC* dismissal, including its factual and legal conclusions.

Accordingly, Defendants' attempt to justify the District Court's *FNC* dismissal is unsupported by applicable law. The District Court was not precluded from adhering to its own prior decision refusing *FNC* dismissal as the Law of the Case doctrine in this context does not require a final judgment. Similarly, it was error for the District Court to simply accept the state court's holding that Guatemala is an adequate, alternative forum given new evidence of trade union violence and the federal record before it documenting Guatemala's known hostility to human right cases. Rather, the District Court was required to conduct its own independent analysis, free of the state court's legal and factual conclusions, based on state law and state interests. Its failure to do so, and the failure to give substantial deference to U.S. residents pursuing an ATS / TVPA case should be viewed by this Court as an abuse of discretion.

II. ARGUMENT

A. **The Law of the Case Does Not Require a Final Judgment in the Context of a District Court's Own Prior Rulings.**

Defendants misconstrue Plaintiffs' use of the Law of the Case doctrine. Specifically, Defendants continue to argue that the District Court was not required to adhere to its initial ruling denying *FNC* dismissal, and that even if applicable, a final, non-interlocutory decision was required. Plaintiffs do not dispute that the Law of the Case is a matter of judicial discretion, but instead assert that the District Court abused this discretion, as a matter of sound judicial policy, given Plaintiffs' reliance on its decision and litigation in this federal forum for the past six years. This is precisely the purpose behind the Law of the Case doctrine. *See, e.g., U.S. v. Monsisvais*, 946 F.2d 114, 116 (10th Cir. 1991)(explaining that the doctrine "is a rule based on sound public policy that litigation should come to an end, and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided"). 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 v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988), 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 cases cited by Plaintiffs in their Opening Brief address a court's adherence to its own prior rulings, and make clear that the doctrine does not require "finality" in this specific context, contrary to Defendants' position. *See, e.g., In Oil Spill by the Amoco Cadiz off the Coast of France on March*, 954 F.2d 1279, 1291-92 (7th Cir. 1991); *Hull v. Freeman*, 991 F.2d 86, 90 (3rd Cir. 1993); *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). Indeed, the application of Law of the Case in the context of a court's own prior decision without necessity of final judgment is well-established. *See* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 4478 (1981) (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.”).

Defendants argue that Plaintiffs’ authorities on this point are inconsistent with precedent from this Circuit. *See* Defs. Brief at 17, n. 13. However, this is simply untrue. The cases relied upon both by the District Court and Defendants, *see* Defs. Brief at 15-17, do not address the specific context of a court considering its own prior decision, but rather whether another court (specifically a reviewing appellate court) should abide by an earlier decision in the same case. Of the few cases cited by Defendants that concern a court adhering to its own previous decision, they simply reiterate the general principle that it is a matter of judicial discretion. Here, the District Court’s decision with respect to the Law of the Case did not at all consider the significant prejudice to Plaintiffs in having their case further delayed after six years of litigation in the U.S. This Court should accordingly find that its failure to do so constitutes an abuse of discretion. *See 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.”).

B. The District Court Was Not Bound by Any Portion of the State Court’s FNC Ruling.

Defendants acknowledge that the Full, Faith & Credit Act requires only that a federal court consider the preclusive effect of a state court ruling. Defs. Brief at 19. It does not require automatic adherence to the ruling. *See Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525-26 (1986). Under Florida’s preclusion rules, estoppel applies only where the legal issues are identical. *See, e.g., 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); *Santini v. Cleveland Clinic Florida*, 843 So.2d 1029,1033 (Fla. 4th DCA 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”).¹ Here, not only do Plaintiffs allege a *jus cogen* violation distinct from state law tort claims, but the District Court itself admits the *FNC* analysis under federal law is broader than under Florida law, which Defendants also concede. Defs. Brief at 25. *See also 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.”).

Accordingly, a federal court can never be bound by a state court’s *FNC*

¹Defendants attempt to distinguish these cases by arguing that Plaintiffs’ case arises from an “identical incident”. *See* Defs. Brief at 31, n. 18. However, this misreads the cases cited by Plaintiffs which also all arose from the same “incident”. As in the cases cited, Plaintiffs’ federal claims involve different facts and evidence than the state case, such as facts and evidence of state action and aiding and abetting by the U.S. corporate parents.

determination because each sovereign necessarily has its own concerns and relative burdens in allowing the action to proceed in its forum. The Supreme Court makes this abundantly clear in *Parsons v. Chesapeake & O.R. Co.*, 375 U.S. 71 (1963). There, the 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 the relative convenience of a federal forum under federal law. *Id.* at 73-74.

Defendants attempt to distinguish *Chesapeake* because it dealt with venue transfer, and assert that the reasoning applicable to venue transfer is inapplicable to an *FNC* analysis. *See* Defs. Brief at 27, n. 15 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-53 (1981)). However, *Piper Aircraft* holds only that the *FNC* analysis with respect to transfer between U.S. courts was superceded by statute via 28 U.S.C. §1404, and that *FNC* principles allow the court less discretion whereby it must use a more specific analysis which balances the public and private interests. *See Piper Aircraft*, 454 U.S. at 249-53. It certainly did not abrogate a federal court's duty to conduct its own analysis, or hold that the two doctrines are wholly unrelated as a conceptual matter. Such a reading of *Piper Aircraft*, as advanced by Defendants, is implausible because *FNC* and venue are inherently concerned with the same underlying principles regarding judicial

sovereignty over a case, and the relative balancing of inconvenience to the parties. The distinction lies only in that venue addresses transfer within the U.S., while *FNC* addresses transfer between the U.S. and a foreign forum, and, in this regard, requires a stricter balancing of interests pursuant to *Piper Aircraft*. 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). See also *Gross v. British Broadcasting Corp.*, 386 F.3d 224, 229 (2d.Cir. 2004) (“The “change of venue” statute, 28 U.S.C. § 1404(a), is ordinarily used as the vehicle to transfer a case when the preferred forum is another district court. But, if the preferred venue is a foreign court, a federal trial court may dismiss under the doctrine of *forum non conveniens*.”); *Flexicorps, Inc. v. Benjamin & Williams Debt Collectors, Inc.*, 2007 WL 1560212, *4 (N.D. Ill. May 29, 2007) (“Congress largely superceded the

forum non conveniens doctrine in 1948 when it enacted 28 U.S.C. § 1404(a). . . .

The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404 for transfer. As a consequence, the *forum non conveniens* doctrine has continuing application [in federal courts] only in cases where the alternative forum is abroad. Section 1404(a) gives district courts discretion to transfer cases upon a lesser showing of inconvenience than that required to dismiss on grounds of *forum non conveniens*.”(citations omitted).

In short, the core holding of *Chesapeake* that each sovereign must decide for itself whether to adjudicate the case in its forum based on its own specific interests applies with equal force whether to venue or its sister concept of *FNC*.

C. Defendants Admit That the District Court Failed to Conduct its Own, Independent *FNC* Analysis.

Defendants admit that the District Court did not conduct its own, independent analysis as to whether Guatemala is an adequate, alternative forum. Defs. Brief at 24. Rather, the Court adopted key factual and legal conclusions determined by the state court, which did not have new evidence of trade union violence; which is contrary to the federal record; and which did not take into account the difference between state and federal interests. Defendants justify the

District Court's failure to conduct a thorough and separate federal *FNC* analysis by asserting first that the Court would have found Guatemala to be an adequate, alternative forum because other courts have deemed Guatemala to be adequate, and second that recent evidence of trade union violence should simply be ignored because it is based on allegedly inadmissible evidence, namely the Solidarity Center Press Release. Neither argument is legally supportable.

1. The danger posed to Plaintiffs if forced to litigate in Guatemala cannot simply be ignored.

Defendants continue to argue that the District Court was justified in ignoring Plaintiffs' safety concerns based on a finding by the state court in 2005, which incidentally contradicted the District Court's own finding of danger in its 2003 decision. Even if this finding were applicable, it is negated by recent trade union violence against members of Plaintiffs' same union at Defendants' same banana plantation. *See* R-203 at 2 (Solidarity Center Press Release detailing the murder of SITRABI union secretary, Marco Ramirez). Defendants' response to this potential danger to Plaintiffs based on the Ramirez murder is that the evidence is inadmissible as hearsay. However, Defendants did not at any time move to strike the Solidarity Center Press Release. Accordingly, the Release is clearly part of the record below, regardless of Defendants' desires otherwise. Even assuming

that the District Court had excluded evidence of the Ramirez murder rather than having ignored it, it would still be part of the record for appeal purposes. *See, e.g., Waldorf v. Shuta*, 142 F.3d 601, 621 (3rd 1998)(“The Federal Rules of Appellate Procedure provide that the record on appeal should consist of: ‘The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court’ This definition not only includes items admitted into evidence, but also includes items presented to the district court and not admitted into evidence.”)(citing Fed. R. App. P. 10(a)).

Moreover, the Press Release falls clearly within the business records exception, under Federal Rule of Evidence 803(6), as it was issued by the Solidarity Center in the ordinary course of its business as a well-respected, non-governmental organization that frequently issues such releases.² *See, e.g., U.S. v. Bueno-Sierra*, 99 F.3d 375, 378-79 (11th Cir. 1996)(explaining “(t)he touchstone of admissibility under the business records exception to the hearsay rule is reliability” and holding that “the proponent of a document ordinarily need not be the entity whose first-hand knowledge was the basis of the facts sought to be

²*See* http://www.solidaritycenter.org/files/pressrelease_zamora_011807.pdf (showing another press release detailing yet another trade union murder in Guatemala).

proved. . . . [Rather], [t]o satisfy Rule 803(6) . . . the proponent must establish that it was the business practice of the recording entity to obtain such information from persons with personal knowledge and the business practice of the proponent to maintain the records produced by the recording entity”).

It was an abuse of discretion for the District Court to simply ignore evidence of recent trade union violence based solely on the state court’s erroneous determination that Plaintiffs would not need to travel to Guatemala.³ The state court based this determination on the opinion of a single expert who was not addressing federal torture claims, and who admitted that he had not even considered the human rights context of the litigation.

The District Court’s reliance on a single individual’s opinion, expert or otherwise, in the face of contradictory evidence by Plaintiffs’ expert and documented trade union persecution and violence in Guatemala is not only irresponsible, but legally unsupportable. The District Court had before it numerous

³Incredibly, Defendants also assert that it was correct for the District Court to ignore the declaration by lead Plaintiff, Aldana, because it is not based on any real danger, but allegedly on his subjective fears. *See* Defs. Brief at 36, n.23. While, this argument is completely misguided given the recent Ramirez murder, it highlights the District Court’s abuse of discretion in failing to balance the declaration, the Ramirez murder, or the human rights reports before it in its disjointed *FNC* analysis. *See SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1100 (11th Cir. 2004)(holding a court abuses its discretion when it fails to consider relevant evidence in its *FNC* analysis).

human rights reports, including those by the U.S. State Department indicating continued trade union violence.⁴ The recent murder of Ramirez undoubtedly confirmed these reports and required a thorough new analysis by the District Court, rather than simple reliance on the state court's now outdated findings. At minimum, Plaintiffs were entitled to further briefing on this significant issue, rather than simply being exposed to physical danger and possible death.

The District Court's order allowing Plaintiffs to reinstate suit in the U.S. should they be required to appear in Guatemala does not cure an inherently faulty legal analysis. More importantly, it ignores the significant prejudice to Plaintiffs in having to restart their case after six years of litigation in the U.S. While traditionally the ability to reinstate suit can offer a legitimate basis for *FNC* dismissal, it is unsuitable to the context of this case. The risk of violence is so well-documented that the exercise of initiating suit in the foreign forum is futile. *See, e.g. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983)(“[T]he trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.”). Here,

⁴*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>. *See also* R-88 (Plaintiffs' Consolidated Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss, Exhibits G, H, I, filed in 2003).

Plaintiffs would face the ultimate prejudice in having not only to restart the case and undergo further delay, but in potentially having to return to Guatemala. The cases cited by Defendants on this point are therefore distinguishable. In none of the cases were the plaintiffs already involved in years of litigation in the U.S.; in none were they political asylees with U.S. residency; and certainly in none was it disputed that suit in the foreign forum would be futile because of well-documented physical danger to the plaintiff. Rather, as the District Court agreed in 2003, it is well-recognized that a forum which places the lives of plaintiffs at risk can never serve as an adequate, alternative forum. *See, e.g., Iragorri v. United Technologies Corp.*, 274 F.3d 65, 75 (2d Cir. 2001); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp.2d 1134, 1143 (C.D. Cal. 2005); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1199 (S.D.N.Y. 1996); *Rasoulzadeh v. Associated Press*, 574 F. Supp. 854, 861 (S.D.N.Y. 1983).

2. Defendants' reliance on cases finding Guatemala an adequate forum is misguided.

Defendants cite a list of cases where courts have found Guatemala to be an adequate forum, *see* Defs. Brief at 33, n. 22, and argue that the District Court was correct in not passing judgment on Guatemala's judicial system. Defs. Brief at 37. In other words, Defendants' position is that the reality of whether these particular

Plaintiffs can obtain effective relief should simply be ignored, which is contrary to the very nature of an *FNC* analysis. Numerous human right reports, including those from the U.S. State Department, have repeatedly concurred that Guatemalan courts are not receptive to human rights cases, particularly those involving trade union violence. *See* note 4, *supra*. This is not a matter of opinion, but a matter of well-recognized fact.

Defendants did not offer any evidence to the contrary on this point, and admit that their expert did not consider the torture context of this case or even that the case dealt specifically with trade union violence. *See* Defs. Brief at 38, n. 24 (asserting only that some meaningful remedy is required). Defendants also cited no cases where a court found Guatemala an adequate forum to hear a human rights case. *See* Defs. Brief at 33, n. 22. *Cf. Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 337 (S.D.N.Y. 2003)(explaining that human rights torts are not to be treated as ordinary tort cases and that effective relief in a foreign forum must be cognizant of this distinction: “[t]he 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 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.”).

D. The District Court Abused its Discretion in Assessing Those *FNC* Factors it Did Consider.

1. Plaintiffs’ choice of a U.S. forum as U.S. residents was not outweighed by other private interest factors.

The District Court did not afford adequate weight to Plaintiffs’ choice of forum. Defendants argue that this factor was not entitled to dispositive weight because it was outweighed by other considerations. Specifically, the District Court 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. However this is unsupported by the record, and Defendants’ Answering Brief simply continues to rely on the District Court’s misreading of the relevant facts. Defs. Brief at 42. It is simply untrue that the majority of the evidence and witnesses are located in Guatemala. *See* Pls. Opening Brief at 35-37 (explaining that the majority of witnesses, particularly those employed by Defendants, currently reside outside of Guatemala, and that Plaintiffs’ primary theories of liability are based on agency and aiding & abetting by the U.S. parent company).

More importantly, even if this were true, these considerations would not outweigh Plaintiffs' choice of a U.S. forum to litigate their torture claim. Defendants make much of the fact that Plaintiffs' choice of forum is not a singularly "dispositive" factor. *See* Defs. Brief at 41. However, Plaintiffs have never asserted that it was, but Defendants' position ignores that while not dispositive, it is certainly entitled to significant presumptive weight in the *FNC* analysis. 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 [or] residents . . . of this country". *SME Racks*, 382 F.3d at 1101-02(citations omitted).

Based on *SME Racks*, there is simply no legal justification for the District Court's holding that other private interest factors, such as the location of witnesses and translation issues, could outweigh Plaintiffs' significant interest in litigating their ATS / TVPA claims in the U.S. *See also 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”); *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). At minimum, the procedural concerns cited by the District Court are far from the “positive evidence of *unusually extreme* circumstances,” which must be present before “ousting a domestic plaintiff from this country's courts”. *SME Racks*, 382 F.3d at 1101-02 (emphasis added).

2. Defendants’ attempt to minimize the relevance of Plaintiffs’ ATS / TVPA claims with respect to the District Court’s *FNC* analysis is contrary to established law.

There is no question that the U.S. has a responsibility to hear ATS / TVPA claims. This is established by the legislative history of the statute itself. *See* 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”). Numerous courts have

concluded with this reading of the ATS / TVPA. *See* Pls. Opening Brief at 38-39 (citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Talisman Energy, Inc.*, 244 F. Supp. 2d at 339).

Defendants attempt to subvert the clarity of the TVPA's legislative history and the case law cited by Plaintiffs by arguing that ATS / TVPA cases are still subject to an *FNC* analysis. However, Plaintiffs have never disputed this.⁵

Whether a case is subject to an *FNC* analysis and the balancing of factors in a particular case are two distinct issues. Here, Plaintiffs' position is that the District

⁵Defendants' cases on this point, *see* Defs. Brief at 46, simply reiterate the basic point that ATS / TVPA cases are subject to an *FNC* analysis, and are therefore wholly irrelevant. Moreover, each of the cases relied upon by Defendants are distinguishable. *Aguinda* involved environmental tort claims and was not an ATS or TVPA case. *See Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 n. 3 (2d Cir. 2002)(rejecting Plaintiffs argument to view their environmental tort claims as ATS claims and thereby refusing to find a strong U.S. interest in adjudicating the *Aguinda* case specifically based on the facts presented). At no time did the Second Circuit overrule *Wiwa* or otherwise express a departure from its decision. The unpublished *Coker* decision was also not an ATS / TVPA case, and any speculation about *FNC* in the context of ATS / TVPA jurisprudence was therefore pure dicta. *See United Bank for Africa PLC v. Coker*, 2003 WL 22741575, *6 (S.D.N.Y. 2003) ("Coker's amended counterclaim, as pleaded, does not invoke ATCA or the TVPA"). In *Pfizer*, the Plaintiffs were not U.S. residents and the court found no connection to the U.S. *See Pfizer*, 399 F. Supp.2d at 505 ("Plaintiffs have demonstrated no meaningful ties to this district, the District of Connecticut or the United States"). Finally, *Turedi* is currently on appeal and therefore does not constitute a final decision on this or any other point pending review by the Second Circuit.

Court in this particular case abused its discretion by not affording adequate weight to the fact that Plaintiffs are U.S. residents litigating ATS/TVPA claims, and that these two factors outweigh the procedural concerns relied upon by the District Court as a matter of law. This is particularly so when Guatemala has expressed no interest in this case as discussed below.

Specifically, the District Court cited the U.S. interest in preventing forum shopping, comity concerns with Guatemala, and the heavy burden which would be placed on the Court. *See* Defs. Brief at 47 (citing Order at 9-10). None of these factors are applicable here. First, Plaintiffs, as U.S. political asylees and now either current or pending U.S. residents, brought the case in their new home forum, and where they allege substantial business decisions were made by the U.S. Defendant parent companies. Plaintiffs therefore could not be “forum shopping”. Second, Guatemala has expressed no interest in this case so as to raise any comity concerns, and any comity concerns in terms of the state court decision is inapplicable because a federal court must consider its own federal interests. Incredibly, Defendants rely on the criminal trial conducted in Guatemala as support for Guatemala’s alleged interest in adjudicating Plaintiffs’ torture case. However, this trial could only take place because of special security and required that Plaintiffs be immediately flown out of Guatemala and given political asylum

because their participation in the criminal case, according to the U.S. Embassy there, put their lives at risk. Moreover, of those charged, which did not and could not have included Defendants as corporate entities, only minimal fines were assessed. *See* ER-172-2 (Exhibit A) at ¶¶ 8-14. Finally, as discussed previously, *see* Section D(1), *supra*, the District Court's belief that the majority of witnesses and evidence are in Guatemala is simply unsupported by the record in this case. In short, it is implausible that any of the cited public interest factors relied upon by the District Court were sufficient to outweigh the substantial U.S. interest in adjudicating ATS / TVPA claims in this case.

E. Plaintiffs Are Not Precluded from Asserting That They Were Significantly Prejudiced by Having Their Case Dismissed after Six Years of Litigation in the U.S.

Defendants assert that this Court cannot consider the significant prejudice to Plaintiffs in having their case dismissed after six years of litigation in the U.S. because it was not raised below. However, this is incorrect. As indicated in their Opening Brief, Plaintiffs did raise the prejudice they would face if the Court did not abide by its initial *FNC* denial during oral argument.⁶

⁶*See* August 27, 2007 Transcript of Hearing on Defendants' Motion to Dismiss, Supplemental ER-196, at 56:1-20, stating as follows:

1 The Eleventh Circuit, as you know, ruled
2 directly that we have the ability to bring forward

Defendants' remaining argument on this issue – that sufficient discovery had not occurred so as to preclude *FNC* dismissal – is equally disingenuous. *See* Defs. Brief at 52. First, there is no question that it was Defendants who sought a stay of discovery following remand by this Court, and that resolution of Defendants' motion necessarily limited the opportunity for discovery. *See* R-159; R-170. Second, there is no question that the parties were in the midst of merits discovery at the time of the District Court's *FNC* dismissal. Specifically, the parties had exchanged written discovery responses and documents, and were in the midst of supplementing such responses and preparing for depositions.

3 these torture claims and they remanded this case in a
4 2005 decision.

5 It took some time because the Defendants then
6 had an en banc review petition, which was denied. They
7 filed a cert. petition, which was denied.

8 And all of this matters because it's now 2007
9 and we've been litigating for six years in this court.
10 We have had discovery. We're in the midst of
11 exchanging documents.

12 I've always wanted to be able to use this
13 phrase I learned in law school. It's *res ipsa loquitur*
14 on whether this is a convenience forum. We are
15 litigating here for six years.

16 To make us start over anywhere else would be
17 the height of judicial un-economy and it would certainly
18 penalize my clients, who have been waiting six years to
19 get a trial date. That's all we want out of this
20 process, is a trial date.

Defendants' attempt to mis-characterize the procedural posture of this case is simply inconsistent with the record.

Moreover, the issue is not the extent of discovery, though sufficient discovery did occur, but that the District Court did not consider *at all* the prejudice to Plaintiffs who have been litigating in this forum for the past six years, or that their public interest counsel had expended a significant amount of time and resources. Nor, did the District Court consider the judicial resources expended by this Court. At minimum, the judicial resources expended and the undue delay and prejudice to Plaintiffs should have been among both the private and public interest factors weighed by the District Court in its *FNC* analysis, and its failure to do so was a clear abuse of discretion. *See, e.g., U.S. v. Frazier*, 387 F.3d at 1276 (“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”).

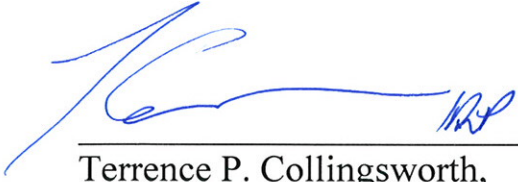
III. CONCLUSION

As demonstrated herein, Defendants have not offered any legally sound reasons to uphold the District Court's *FNC* ruling. This Court should accordingly reverse the District Court's *FNC* dismissal of Plaintiffs' torture case and remand for a continuation of merits discovery.

The U.S. is the only available forum to Plaintiffs, who as political asylees and U.S. residents, will not risk their lives to return to Guatemala, and who have already invested significant time and resources in this forum. As counsel for Plaintiffs indicated during hearing before the District Court, it would be the height of judicial inefficiency and prejudice to Plaintiffs to have them engage in the futile exercise of restarting the case in Guatemala, which has expressed no interest in this case, and is well known to be hostile to human rights cases involving trade union violence. Whereas, in contrast, the U.S., and this Circuit in particular, has expressed a significant interest in adjudicating human rights cases under the ATS / TVPA, and Plaintiffs' primary theory of ATS / TVPA liability, via aiding and abetting and agency, lies against the Defendant parent corporations based in Florida.

In failing to consider all these foregoing factors and the uniquely federal interests implicated in this case, and by instead relying on a state court's *FNC* determination, this Court should find that the District Court abused its discretion and reverse *FNC* dismissal.

Respectfully submitted on this 2nd day of May, 2008 by:

A handwritten signature in blue ink, consisting of a large, stylized initial 'T' followed by a long horizontal stroke and a smaller signature 'NHT' at the end.

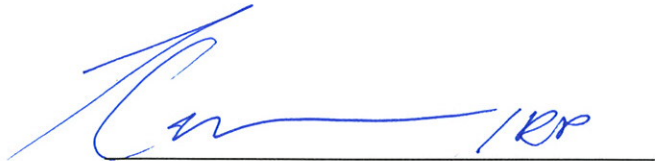
Terrence P. Collingsworth,
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CERTIFICATION OF BRIEF FORMAT

Pursuant to F.R.A.P. 32 (a)(7)(C)(i), I certify that this Reply Brief for Plaintiffs/Appellants complies with Rule 32 (a)(7)(B)(ii) in that it has a text typeface of 14 points and contains 1606 words.

Respectfully submitted on this 2nd day of May, 2008 by:



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CERTIFICATE OF SERVICE

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

Brief was served via overnight, express mail on this 2nd day of May, 2008 to:

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