

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

U.S.C.A. CASE NO. 07-15471-B
District Court No. 01-3399-CIV-MORENO

ANGEL ENRIQUE VILLEDA ALDANA, *et al.*

Appellants,

vs.

FRESH DEL MONTE PRODUCE INC., *et al.*

Appellees.

APPEAL FROM A FINAL ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ANSWER BRIEF OF APPELLEES

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APPELLEES' CERTIFICATE OF INTERESTED PERSONS

*Angel Enrique Villeda Aldana, et. al., Appellants v.
Fresh Del Monte Produce Inc., et. al., Appellees
Case No. 07-15471-B*

Defendants/Appellees, FRESH DEL MONTE PRODUCE INC.,
COMPAÑÍA DE DESARROLLO DE GUATEMALA, S.A., and DEL MONTE
FRESH PRODUCE COMPANY, pursuant to Rule 26.1 of the Federal Rules of
Appellate Procedure and 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, submit their
Amended Certificate of Interested Persons in this appeal:

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Del Monte Fresh Produce Company, Defendant/Appellee and shareholder
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STATEMENT REGARDING ORAL ARGUMENT

Appellees do not believe that oral argument is necessary. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

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II. STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal. *See* 28 U.S.C. § 1291 (“[T]he courts of appeal . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.”).¹

III. STATEMENT OF THE ISSUES

The primary issues presented by this appeal are:

1. Whether the District Court correctly afforded the Florida State Court *forum non conveniens* judgment full faith and credit pursuant to 28 U.S.C. § 1738.
2. Whether the District Court abused its discretion in reconsidering its June 2003 interlocutory denial of Appellants’ initial *forum non conveniens* motion.
3. Whether the District Court correctly determined the preclusive effect of the Florida State Court *forum non conveniens* judgment.
4. Whether the District Court abused its discretion in dismissing Appellants’ Fourth Amended Complaint pursuant to the doctrine of *forum non conveniens*.

IV. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a final order of the District Court dismissing

¹ *See also* Appellees’ Response to Jurisdictional Question Presented by the Court on November 30, 2007 (entered on this Court’s docket on December 17, 2007).

Appellants' Fourth Amended Complaint pursuant to the doctrine of *forum non conveniens*. R.212.

Appellants are Angel Enrique Villeda Aldana (“Aldana”), Jorge Agustin Palma Romero (“Romero”), Oscar Leonel Guerra Evans (“Evans”), Lyionhel McIntosch Rodriguez (“Rodriguez”), Marel Martinez (“Marel Martinez”); Gumerzindo Loyo Martinez (“Loyo Martinez”), and Rigoberto Alvayero Hernandez (“Hernandez”) (collectively herein as “Appellants”), all of whom were Plaintiffs in the underlying dismissed Fourth Amended Complaint. R.156.²

Appellees are Fresh Del Monte Produce Inc. (“FDMPI”), Compañía de Desarrollo Bananero de Guatemala, S.A. (“Bandegua”), and Del Monte Fresh Produce Company (“DMFPC”) (collectively herein as “Appellees”).

B. Course of Proceedings

On August 2, 2001, Appellants, Aldana, Romero, Evans, Rodriguez and Marel Martinez, all Guatemalan citizens now living in California or Nevada, filed a Complaint for Equitable Relief and Damages (“Complaint”) against FDMPI and an entity called “Bandegua, Ltd.” R.1. The twelve-count Complaint alleged claims under the Alien Tort Statute, 28 U.S.C. §1350 (the “ATS”), the Torture

² Items in the record will be cited as “R.____” (if the record item is referred to generally), “R.____.” (if a particular page number, paragraph and/or exhibit of the record item is cited), or “R.____.” (if a particular page number and/or paragraph of an exhibit to a record item is cited). The record citations refer to the District Court docket entries.

Victim Protection Act, 28 U.S.C. §1350, Note (the “TVPA”), and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et. seq.* (“RICO”), together with several pendent non-federal law claims, arising out of an armed altercation occurring in Guatemala on October 13-14, 1999. R.1.

After an initial amendment of their Complaint, Appellants, Aldana, Romero, Evans, Rodriguez, and Marel Martinez, filed a Second Amended Complaint for Equitable Relief and Damages (“Second Amended Complaint”) in March 2002, which raised additional factual allegations and joined DMFPC as a defendant. R.20. The Second Amended Complaint alleged the same twelve counts as the original Complaint.

In May 2002, Appellees filed four motions to dismiss the Second Amended Complaint: (1) Defendants’ Motion to Dismiss for *Forum Non Conveniens*, R.32; (2) Defendant Bandegua’s Motion to Dismiss for Lack of Personal Jurisdiction, R.31; (3) Defendants’ Motion to Dismiss for Failure to State Claims Upon Which Relief Can Be Granted, R.30; and (4) Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction, R.35.³

In October 2002, before the District Court ruled on Appellees’ motions to dismiss the Second Amended Complaint, Appellants, Loyo Martinez and

³ On March 19, 2003, the District Court entered an Order Denying Defendants’ Motions to Dismiss Without Prejudice for administrative purposes and directed Appellees to file a consolidated motion to dismiss the Second Amended Complaint. R.85.

Hernandez, filed a separate lawsuit in the United States District Court for the Southern District of Florida against Defendants (Case No. 02-23089-CIV-MORENO) arising out of the same facts alleged in the Second Amended Complaint. The District Court directed the Appellants to file a consolidated amended complaint, and in February 2003, all seven Appellants filed a Third Amended Complaint for Equitable Relief and Damage (“Third Amended Complaint”), alleging the same twelve counts against Appellees. R.77.

In April 2003, in response to the Third Amended Complaint, Appellees filed a Consolidated Motion to Dismiss Third Amended Complaint (1) for Lack of Subject Matter Jurisdiction, (2) for Failure to State Claims Upon Which Relief Can Be Granted, (3) for *Forum Non Conveniens*, and (4) for Lack of Personal Jurisdiction. R.87.

On June 4, 2003, the District Court denied Appellees’ *forum non conveniens* motion on the ground that “a credible threat of retaliatory violence against Plaintiffs renders the Guatemalan forum insufficient as an adequate alternative forum.” R.92.4. Appellees moved for reconsideration of the District Court’s interlocutory order, R.94, which was denied. R.96.⁴ Appellees filed a motion for leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), R.98, which

⁴ Appellees’ motion to dismiss for *forum non conveniens* was not “twice-denied” as Appellants suggest at page 1 of their Initial Brief. It was denied once, R.92, and Appellees’ motion for reconsideration was denied. R.96.

the District Court also denied. R.105.

On December 12, 2003, the District Court dismissed Appellants' Third Amended Complaint for lack of federal subject matter jurisdiction. R.140.⁵ With the exception of the RICO claim, all counts of the Third Amended Complaint were dismissed without prejudice, and the District Court expressly granted Appellants leave to "file an amended complaint no later than January 15, 2004." *Id.* at 38.

In lieu of amending their complaint, Appellants instead filed a notice of appeal of the District Court's subject matter jurisdiction order on January 9, 2004. R.143. Rather than wait for this Court's resolution of their appeal, Appellants, simultaneous with the filing of their appeal, elected to file their non-federal claims in the Circuit Court for the Eleventh Judicial Circuit in and for Miami-Dade County, Florida (hereinafter, the "State Court Action"). Appellants' State Court Action was based on the identical facts and circumstances alleged in their Third Amended Complaint. *See* R.162.A. In response, Appellees moved to dismiss Appellants' State Court Action pursuant to the doctrine of *forum non conveniens*.⁶

In opposition, Appellants argued that Appellees' *forum non conveniens* motion was barred by collateral estoppel, contending that the District Court's June

⁵ The District Court's order of dismissal for lack of subject matter jurisdiction, R.140. is published at *Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285 (S.D. Fla. 2003).

⁶ Appellee Bandegua also separately moved to dismiss the Appellants' State Court complaint for lack of personal jurisdiction. *See* R.162.B.

2003 interlocutory *forum non conveniens* order precluded any re-litigation of the issue in State Court. After jurisdictional and *forum non conveniens* discovery, and upon consideration of the legal memoranda and evidence submitted by the parties, including expert affidavits and depositions as to the adequacy of the Guatemalan forum, the State Court conducted a hearing. By order dated March 30, 2005, the State Court held that it was not precluded by collateral estoppel from considering Appellees' *forum non conveniens* motion or otherwise bound by the District Court's prior *forum non conveniens* ruling because "there is no prior final judgment to which both parties are bound." R.163.A.3-4. The State Court dismissed Appellants' State Court Action in favor of Guatemala pursuant to the doctrine of *forum non conveniens*. R.163.A.⁷ The State Court found, in relevant part:

An adequate alternate forum exists for these Plaintiffs in Guatemala and Guatemala possesses jurisdiction over the entire case, including all of the parties. . . . The private interest factors weigh heavily in favor of the Guatemalan forum [and] . . . the public interest factors also heavily favor the Guatemalan forum.

R.163.A.2.⁸ The State Court found that pursuant to Guatemala's rules of civil

⁷ The State Court also granted Bandegua's motion to dismiss for lack of personal jurisdiction. R.162.B. The personal jurisdiction order was affirmed on appeal by the Florida Third District Court of Appeal. *Aldana v. Fresh Del Monte Produce Inc.*, 922 So. 2d 212 (Fla. 3d DCA), *rev. disp.*, 928 So. 2d 334 (Fla. 2006).

⁸ The State Court's finding that Guatemala was an adequate alternative forum for Appellants' litigation was based, in part, on the expert testimony of Appellees'

procedure, Appellants were not required to be physically present in Guatemala to litigate their claims in a Guatemala judicial proceeding. R.163.A.6. Consequently, the State Court found that Appellants' safety would not be endangered if they were required to litigate their claims in Guatemala. Sensitive, nevertheless, to Appellants' claimed safety risk in Guatemala and cognizant of the fact "that the United States Department of State has seen fit to grant [Appellants] political asylum," the State Court conditioned its *forum non conveniens* dismissal on Appellants not having to appear in person in Guatemala to litigate their claims and granted Appellants leave to seek reconsideration if any of the Appellants were required to appear in person in Guatemala in order to litigate their claims. *Id.* at 5-6. The State Court's dismissal of Appellants' claims for *forum non conveniens* was affirmed on appeal by the Florida Third District Court of Appeal. *Aldana v. Fresh Del Monte Produce Inc.*, 922 So. 2d 212 (Fla. Dist. Ct. App.), *rev. disp.*, 928 So. 2d 334 (Fla. 2006), and the Florida Supreme Court dismissed Appellants' petition for discretionary review. *Id.*

On July 8, 2005, this Court rendered its opinion in the Appellants' initial appeal in Case No. 04-10234-HH concerning the District Court's subject matter jurisdiction dismissal order. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416

expert witness, Francisco Chavez Bosque, an attorney practicing in Guatemala since 1975, whom the State Court found "is more reliable, credible and persuasive" than Appellants' expert, Alejandro Miguel Garro, an adjunct professor of law at Columbia University Law School. R.163.A.2.

F.3d 1242 (11th Cir. 2005), *cert. denied*, ___ U.S. ___, 127 S. Ct. 596 (2006) (hereinafter, “*Aldana I*”). The Court affirmed the dismissal of all of Appellants’ claims alleged in Third Amended Complaint for lack of federal subject matter jurisdiction, with the exception of Appellants’ ATS and TVPA claims alleging torture based on intentionally inflicted mental pain and suffering. *Id.*⁹ After Appellees’ petition for rehearing was denied by this Court, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284 (11th Cir. 2006), the action was remanded to the District Court in June 2006. R.153.

On August 21, 2006, in accordance with this Court’s mandate, the District Court vacated its order dismissing the Third Amended Complaint for lack of subject matter jurisdiction and directed Appellants to file an amended complaint consistent with this Court’s Opinion. R.155. On September 8, 2006, Appellants filed their Fourth Amended Complaint. R.156.

In response, on October 18, 2006, Appellees filed their Renewed Motion to Dismiss Fourth Amended Complaint for *Forum Non Conveniens*. R.163. In large measure, Appellees contended that the District Court was required to afford full faith and credit to the State Court *forum non conveniens* judgment and that based

⁹ Contrary to Appellants’ statement at page 1 of their Initial Brief, this Court did not make any “finding” that Appellants’ allegations amounted to torture or a violation of international law as a matter of law. Rather, the Court held that some of Appellants’ claims were sufficient to *state a claim* for mental torture under the ATA and TVPA. *Aldana I*, 416 F.3d at 1252-53.

in part on Florida collateral estoppel principles, the Appellants' Fourth Amended Complaint should likewise be dismissed pursuant to *forum non conveniens*. *Id.* Following a referral of the motion to a Magistrate Judge, R.187, the Magistrate Judge issued a Report and Recommendation recommending denial of Appellees' Renewed Motion to Dismiss the Fourth Amended Complaint for *Forum Non Conveniens*. R.198. Appellees filed their Objections to the Report and Recommendation on September 17, 2007. R.200.

Shortly thereafter, on October 16, 2007, the District Court rejected the Magistrate Judge's Report and Recommendation and issued an Order Dismissing Complaint for *Forum Non Conveniens*. R.212 (the "Order of Dismissal").¹⁰ The District Court concluded that it was not precluded from reconsidering its earlier *forum non conveniens* order. Order of Dismissal, at 4. Furthermore, the District Court held that, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, it was "bound by the legal and factual conclusions of the Florida state court which were essential to [the State Court's] decision to grant a motion for *forum non conveniens*, including the fact that Plaintiffs would not be required to appear in person in Guatemala in order to litigate their claim," Order of Dismissal, at 5, thus "eliminat[ing] any concern over the Plaintiffs' safety" in Guatemala, *id.* at 8, the sole reason for the District Court's denial of Appellants' initial *forum non*

¹⁰ The Order of Dismissal, R.212, is published at *Aldana v. Fresh Del Monte Produce, Inc.*, 2007 WL 3054986 (S.D. Fla. Oct. 16, 2007).

conveniens motion in June 2003. Consequently, the District Court determined that Guatemala was an adequate alternative forum, *id.* at 6, that the “weight of the private interest factors lies heavily in favor” of Guatemala, *id.* at 8, that none of the “public interest factors” weighed in favor of Florida as a proper or convenient forum, *id.* at 10, and that the Appellants could reinstate their claims in Guatemala without undue inconvenience or hardship. *Id.* at 10. The District Court concluded that a “material injustice would result were Defendants forced to litigate [Appellants’ claims] in the United States,” *id.* at 9, and dismissed the Fourth Amended Complaint pursuant to *forum non conveniens*.

Appellants have appealed the District Court’s Order of Dismissal.

C. Statement of the Facts

FDMPI is a Cayman Islands holding corporation that owns the stock of other companies, including a minority interest in a non-party subsidiary company, which subsidiary company in turn indirectly owns the shares of DMFPC, a Delaware corporation. R.163.B.¶¶1,17. DMFPC in turn owns 13.84% of the shares of Bandegua, a Guatemalan corporation. *Id.* at ¶3.

Bandegua at one time operated the Bobos banana plantation in Morales, Izabal, Guatemala, where the incidents giving rise to the Appellants’ claims took place. *See* R.156.¶23. Bandegua owns, leases, and/or operates banana farms only in Guatemala. R.163.C.¶¶3,19. Bandegua also purchases bananas and other fruit

from independent growers and farmers in Guatemala for resale to wholesale distributors in Guatemala and in other Latin American countries. *Id.* Bandegua does not export, sell, or distribute fresh fruit or any other products into the United States and has no employees, business agents or contractors in Florida or the United States. *Id.*

Appellants were officers of a Guatemalan labor union, Sindicato de Trajadores del Banano de Izabal (“SITRABI”), which represented the workers at the Bobos plantation. R.156.¶¶5-11, 24. In September 1999, Bandegua announced it was closing its Bobos operations and laying off 918 plantation workers, all SITRABI members. *Id.* at ¶26. In response to the layoffs, SITRABI filed a complaint in the Labor Court of Guatemala. *Id.* at ¶27.

The Fourth Amended Complaint alleges that on October 13-14, 1999, during an eight-hour period, Appellants were rounded up at gunpoint by an unruly mob of townspeople in Morales, Izabal, Guatemala, and, after being threatened with bodily injury and death, were forced to resign their positions with Bandegua and SITRABI. *Id.* at ¶¶28-55. Appellants allege that Appellees coordinated the assault. Significantly, all of the Appellants were released and none was physically injured. The Guatemalan police made several arrests, and a criminal trial was conducted in Morales, Izabal. Appellants testified at the trial against the accused perpetrators. During the pendency of the criminal prosecution, the Guatemalan

government provided housing and around-the-clock police protection to the Appellants and their families in Guatemala City. R.172.A.¶9. Also, two presiding Judges, whose decisions were unpopular with the Appellants, were removed from the criminal case by the Guatemalan government. *Id.* at ¶12. At the conclusion of the criminal trial, the Appellants’ perpetrators were convicted of their crimes. *Id.* at ¶13. Approximately 17 months after the incident in Morales, Appellants, Aldana, Romero, Evans, Rodriguez, and Marel Martinez, were relocated (with Appellees’ financial and non-financial assistance) to the United States, where these Appellants now claim to reside. R.156.¶¶5-9, 59-60. More than two years after the incident, Appellants, Loyo Martinez and Hernandez, moved to the United States, where they now also claim to reside. *Id.* at ¶¶10-11, 60.

In 2001, Appellants filed this action based on the events that took place in Guatemala during that eight-hour period on October 13-14, 1999.

D. Standard of Review

1. Full Faith and Credit and Collateral Estoppel

A district court’s decision to afford full faith and credit to a state court judgment is reviewed *de novo*. *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 458 F.3d 733, 737 (8th Cir. 2006). A court of appeals also “review[s] *de novo* a district court’s decision about whether collateral estoppel applies,” while “a district court’s factual determinations underlying its legal

conclusion are upheld unless clearly erroneous.” *United States v. Weiss*, 467 F.3d 1300, 1308 (11th Cir. 2006).

2. *Forum Non Conveniens*

A court of appeals accords the district court “substantial deference” when reviewing a dismissal based on *forum non conveniens*, *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1310 (11th Cir. 2001), and the dismissal “may be reversed only if it constitutes a clear abuse of discretion.” *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1519 (11th Cir. 1985). A district court’s “decision to reconsider [a] prior determination is subject to review under an abuse of discretion standard.” *Pac. Employers Ins. Co. v. Sav-A-Lot of Winchester*, 291 F.3d 392, 398-99 (6th Cir. 2002).

V. SUMMARY OF THE ARGUMENT

Important principles of federalism and comity, embodied in the Full Faith and Credit Act, 28 U.S.C. § 1738, mandate affirmance of the District Court’s Order of Dismissal. The Florida State Court determined that Appellants’ claims should be dismissed pursuant to *forum non conveniens* and the State Court judgment was affirmed on appeal. Because the State Court *forum non conveniens* judgment was entitled to full faith and credit, the District Court properly held that the parties were precluded from re-litigating the factual and legal determinations essential to the State Court judgment, including finding “that Plaintiffs would not

be required to appear in person in Guatemala in order to litigate their claim.”
Order of Dismissal, at 5.

Even if the State Court dismissal were not entitled to full faith and credit, the District Court properly dismissed Appellants’ Fourth Amended Complaint for *forum non conveniens*. The District Court’s previous *forum non conveniens* ruling in June 2003 was plainly interlocutory and could be reconsidered and modified by the District Court in the exercise of its broad discretion. After a careful review of the record evidence, the District Court concluded that the litigation of Appellants’ claims in the United States would cause manifest injustice to Appellees. The District Court did not abuse its discretion in dismissing Appellants’ claims for *forum non conveniens*.

VI. ARGUMENT AND CITATIONS OF AUTHORITY

Appellants’ principal arguments for reversal are founded on fundamental misconceptions of federal law. First, Appellants assert that the District Court was *prohibited* from reconsidering its June 2003 interlocutory order on the *forum non conveniens* issue under the “law of the case” doctrine. Second, Appellants insist that the District Court could ignore the preclusive effect of the State Court’s legal and factual determinations essential to the State Court’s *forum non conveniens* dismissal. Neither argument is supported by any apposite legal authority.

A. The District Court Was Entitled, Indeed Even Required, to Revisit Its June 2003 *Forum Non Conveniens* Order

In the teeth of clear and controlling precedent from this Court and the United States Supreme Court, Appellants assert that the District Court was prohibited by the “law of the case” doctrine from reconsidering its June 2003 order denying Appellees’ motion to dismiss for *forum non conveniens*. There is simply no basis to support this frivolous argument. Not only was the District Court entitled to reconsider its own interlocutory order, but it was obligated to do so under the Full Faith and Credit Act.

The District Court correctly concluded that its prior order in June 2003 denying Appellees’ *forum non conveniens* motion was an interlocutory, nonbinding order that it could reconsider at any time prior to the entry of final judgment. *See* Order of Dismissal, at 5.¹¹ The cases cited by the District Court on this point, *Vintilla v. United States*, 931 F.2d 1444, 1447 (11th Cir. 1991), *Region 8 Forest Service Timber Purchasers Council v. Alcock*, 993 F.2d 800, 806 (11th Cir.

¹¹ There can be no question that the District Court’s June 2003 denial of Appellees’ *forum non conveniens* motion was a non-final, interlocutory order. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 529-30 (1988) (“[T]he denial of a motion to dismiss on the ground of *forum non conveniens* is not appealable under [28 U.S.C.] § 1291.”); *Ford v. Brown*, 319 F.3d 1302, 1304 n.2 (11th Cir. 2003) (denial of *forum non conveniens* motion is reviewable only with consent of district court and court of appeals pursuant to 28 U.S.C. § 1292). That is precisely why Appellees sought permission from the District Court to file a discretionary interlocutory appeal, R.98, but the District Court denied Appellees’ request for leave to appeal. R.105.

1993), and *United States v. United Smelting, Refining & Mining Co.*, 339 U.S. 186, 199 (1949), demonstrate the undeniable correctness of the District Court’s reasoning.

In the face of such incontrovertible legal authority, Appellants instead attempt to characterize the District Court’s June 2003 *forum non conveniens* order as “law of the case.” The “law of the case” doctrine, however, has no applicability whatsoever. This Court has repeatedly held that “[i]f a district court decision is interlocutory and subject to reconsideration, any constraints of the law of the case doctrine are inapplicable.” *United States v. Young*, 2008 WL 583810, at *3 (11th Cir. Mar. 5, 2008); *Lanier Constr., Inc. v. Carbone Prop. Of Mobile, LLC*, 2007 WL 3307384, at *1 (11th Cir. Nov. 8, 2007) (“We have held that if a district court decision is interlocutory and subject to reconsideration, any constraints of the law-of-the-case doctrine are inapplicable.”).

The “law of the case” doctrine is the rule under which the trial court and appellate courts are bound by any findings of fact or conclusions of law made by the appellate courts in a prior appeal of the case at issue. The purpose of the doctrine is to bring an end to litigation by foreclosing the possibility of repeatedly litigating an issue already conclusively decided. The issue normally arises in the context of a district court ignoring or contravening the ruling of a higher court in an earlier proceeding of the same case.¹² In the present case, the

¹² Nor did the District Court’s interlocutory *forum non conveniens* order in June 2003 somehow ripen into a final order when the Appellants filed their appeal in *Aldana I* challenging the District Court’s order of dismissal for lack of subject matter jurisdiction. Appellees had no legal right or ability to cross-appeal the District Court’s *forum non conveniens* order. “A party may *not* appeal from a

district judge's decision. . . was contrary to a ruling made . . . in the same litigation, but it did not contravene a ruling to which the . . . judge owed obedience or adherence. *To hold that a district court must rigidly adhere to its own rulings in an earlier stage of a case would actually thwart the purpose of the doctrine.* New developments or further research often will convince a district court that it erred in an earlier ruling, or the court may simply change its mind.

Robinson v. Parrish, 720 F.2d 1548, 1549-50 (11th Cir. 1983) (emphasis added).¹³

Even if the interlocutory denial of a *forum non conveniens* motion constituted “law of the case,” the District Court was not obligated to adhere to its original ruling:

The law of the case doctrine does not, however, require rigid adherence to rulings made at an earlier stage of a case in all circumstances. . . . Both the Supreme Court and this Circuit have made clear that reconsideration of a prior holding is not improper if the court is convinced that the prior decision is clearly erroneous and would work manifest injustice.

Murphy v. F.D.I.C., 208 F.3d 959, 966 (11th Cir. 2000) (holding that district court was not bound the “law of the case” doctrine). Significantly, and perhaps

judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous *which are not necessary to support the decree.*” *Elec. Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) (emphasis added). Because the June 2003 *forum non conveniens* ruling was immaterial to the judgment of dismissal for lack of subject matter jurisdiction, the District Court was free to enter an entirely new and/or modified order on *forum non conveniens*. See *United States v. Good Samaritan Church*, 29 F.3d 487, 489 (9th Cir. 1994) (holding that determinations which are immaterial to the judgment below have no preclusive effect on subsequent litigation).

¹³ Appellants instead rely on “law of the case” decisions from other Circuits that are inconsistent with the binding precedent of this Court. See Initial Brief, at 16-19.

dispositively, even Appellants concede that “the District Court had the ability to revisit [its] earlier ruling.” Initial Brief, at 17.

Moreover, for the reasons discussed *infra* in Section VI.B of this Answer Brief, the District Court was not only free to reconsider its June 2003 *forum non conveniens* ruling, but it was compelled to do so pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, in order to determine the preclusive effect of the Florida State Court judgment of dismissal on *forum non conveniens* grounds. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524-25, 106 S. Ct. 768, 772-73 (1986); *Swanson v. Faulkner*, 55 F.3d 956, 965-66 (4th Cir. 1995).

The United States Supreme Court has held that a federal district court is required under the Full Faith and Credit Act “to give the same preclusive effect to a state-court judgment as another court of that State would give.” *Parsons*, 474 U.S. at 523, 106 S. Ct. at 771 (recognizing the “important values of federalism and comity embodied in the Full Faith and Credit Act”). Affording full faith and credit to state court judgments in federal courts “promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system.” *Allen v. McCurry*, 449 U.S. 90, 96, 101 S. Ct. 411, 415 (1980). Consequently, the State Court’s judgment refusing to give collateral estoppel effect to the District Court’s June 2003 *forum non conveniens* ruling is entitled to full faith and credit, even if

the District Court believes the State Court's decision to have been wrongly decided. *Parsons*, 474 U.S. at 524, 106 S. Ct. 768, 772.

Even if the state court mistakenly rejected respondents' claim of res judicata . . . the Full Faith and Credit Act requires that federal courts give the state-court judgment, and particularly the state court's resolution of the res judicata issue, the same preclusive effect it would have had in another court of the same State. . . . Once the state court has finally rejected a claim of res judicata, the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision. Challenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court.

Parsons, 474 U.S. at 525, 106 S. Ct. at 772-73; *Swanson*, 55 F.3d at 965 n.8 (“*Parsons* requires that even an erroneous state court ruling concerning preclusion is entitled to full faith and credit.”).

Cognizant of its obligations under the Full Faith and Credit Act and the cases construing the Act, the District Court correctly understood that, notwithstanding its June 2003 *forum non conveniens* ruling, it was required to determine the preclusive effect of the State Court judgment and, in turn, to be “bound by the legal and factual conclusions of the Florida state court which were essential to its decision to grant a motion for *forum non conveniens*, including the fact that Appellants would not be required to appear in person in Guatemala in order to litigate their claim.” Order of Dismissal, at 5. The District Court could not have abused its discretion by revisiting its prior interlocutory *forum non*

conveniens decision, particularly because it was constrained to afford full faith and credit to the State Court judgment.

B. The District Court Correctly Gave Full Faith and Credit to the Florida State Court Judgment and Correctly Applied Florida Issue Preclusion Principles

The State Court's *forum non conveniens* judgment resulted as a direct consequence of Appellants' election to file the State Court Action rather than wait for this Court's decision in *Aldana I*. They cannot now complain that the State Court judgment is not binding upon them.

Rejecting Appellants' collateral estoppel argument, the State Court determined that it was not precluded by the District Court's June 2003 *forum non conveniens* order from addressing the merits of the Appellants' *forum non conveniens* motion because the District Court's order was not a "prior final judgment to which both parties are bound." R.163.A.3-4. The State Court then proceeded to follow the *forum non conveniens* "framework from *Kinney Sys., Inc. v. Continental Ins. Co.*, where the Florida Supreme Court explicitly 'adopted the federal doctrine of *forum non conveniens*.'" Order of Dismissal, at 4; accord R.163.A.2. The State Court then found that Guatemala was an adequate and available alternative forum for Appellants' claims because (a) the Guatemalan courts have jurisdiction over the Appellees, (b) the Guatemalan courts are adequate to adjudicate Appellants' claims, and (c) the Appellants' safety would not be at

risk because they have no need to be physically present in Guatemala to litigate their claims. The State Court also determined that the private interests factors weighed heavily in favor of dismissal to Guatemala because Guatemala is the site of the alleged misconduct, the vast majority of witnesses (who either do not speak English or Spanish is their native language) are in or near Guatemala, and the vast majority of the documentary evidence (which is in Spanish, requiring translation at great expense) is in Guatemala. The State Court also found that the public interest factors weighed heavily in favor of dismissal because, *inter alia*, the dispute involves one of Guatemala's largest private employers, one of Guatemala's most influential labor unions, one of Guatemala's most important economic sectors, and involves the application of Guatemalan law. Finally the State Court determined that Appellants could reinstate their claims in Guatemala without undue burden or inconvenience. R.163.A.4-6. The State Court therefore dismissed Appellants' State Court Action pursuant to *forum non conveniens*, but expressly conditioned its dismissal on Appellants not being required to physically appear in Guatemala. *Id.* at 5-6. The State Court judgment of dismissal was affirmed. *Aldana v. Fresh Del Monte Produce Inc.*, 922 So. 2d 212 (Fla. Dist. Ct. App.), *rev. disp.*, 928 So. 2d 334 (Fla. 2006).

Accordingly, when the District Court addressed Appellees' Renewed Motion to Dismiss Fourth Amended Complaint for *Forum Non Conveniens*, the *forum non*

conveniens issue had been fully and fairly litigated to final judgment in the trial and appellate courts of the State of Florida between the identical parties on the identical factual record. The District Court correctly held that the Full Faith and Credit Act obligated it to give the State Court judgment the same preclusive effect it would have in another Florida state court. *Parsons*, 474 U.S. at 525, 106 S. Ct. at 772-73.

The Full Faith and Credit Act is plainly central to this Court’s review of the District Court’s Order of Dismissal. The Full Faith and Credit Act mandates that state judicial proceedings be afforded “the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.” The United States Supreme Court has held that the “important values of federalism and comity embodied in the Full Faith and Credit Act” require a federal court to “give the same preclusive effect to state-court judgment as another court of that State would give.” *Parsons*, 474 U.S. at 523, 106 S. Ct. at 771. “It has long been established that § 1738 does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.” *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982). “It is now settled that a federal court must give to a state-court judgment the same preclusive effect as

would be given that judgment under the law of the State in which the judgment was rendered.” *Migra v. Warren City Sch. Dist. Bd. of Educ.* 465 U.S. 75, 81 (1984).

Florida law therefore determines the preclusive effect of a Florida state court judgment in federal district court. *Parsons*, 474 U.S. at 523, 106 S. Ct. at 771-72; *Vazquez v. Metro. Dade County*, 968 F.2d 1101, 1106 (11th Cir. 1992) (“[F]ederal courts considering whether to give preclusive effect to state court judgments must apply the State’s law of collateral estoppel.”). Under Florida law, collateral estoppel, also called “issue preclusion,” *Allen*, 449 U.S. at 94 n.5, requires that (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in the earlier action. *Callaso v. Morton & Co.*, 324 F. Supp. 2d 1320, 1325 (S.D. Fla. 2004) (same); *Carnival Corp. v. Middleton*, 941 So. 2d 421, 424 (Fla. Dist. Ct. App. 2006); *Paresky v. Miami-Dade County Bd. of County Comm’rs*, 893 So. 2d 664, 665-66 (Fla. Dist. Ct. App. 2005).¹⁴ “[T]he doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior

¹⁴ The federal standard for issue preclusion in this Circuit is identical. See, e.g., *Chazen v. Deloitte & Touche, LLP.*, 2003 WL 24892029, at *1 (11th Cir. Dec. 12, 2003).

action.” *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170-71, 104 S. Ct. 575, 578 (1984).

Consistent with its obligations under the Full Faith and Credit Act, the District Court properly addressed the preclusive effect of the State Court *forum non conveniens* judgment in accordance with Florida’s issue preclusion principles. The District Court correctly determined that the State Court dismissal precluded relitigation of those findings of fact and law that were essential to the State Court judgment. Order of Dismissal, at 5. Accordingly, the District Court held that the parties could not re-litigate, nor could the District Court re-examine, any discrete issues of fact or law essential to the State Court judgment of dismissal, even if the District Court believed that any such factual or legal issues were wrongly decided. *Id.*; see also *Parsons*, 474 U.S. 518, 106 S. Ct. 768; *Swanson*, 55 F.3d 956. The District Court’s ruling was eminently correct.

The District Court held, and the Appellants do not dispute, “that the current case involves the same litigants, and the same underlying facts as the state case.” Order of Dismissal, at 4-5. Thus, the District Court revisited its prior *forum non conveniens* decision and determined it was “bound by the legal and factual conclusions of the Florida state court which were essential to its decision to grant a motion for *forum non conveniens*, including the fact that Appellants would not be required to appear in person in Guatemala in order to litigate their claim.” *Id.* at 5.

In sharp contrast to Appellant's argument on appeal, *see* Initial Brief at 25, the Order of Dismissal clearly demonstrates that the District Court did not blindly accept the State Court's decision *in toto* or refuse to perform its independent *forum non conveniens* analysis pursuant to federal *forum non conveniens* law. Rather, the District Court recognized that even though this case involved the same litigants and the same underlying facts as the State Court Action, the federal *forum non conveniens* analysis "is broader than the state court's" analysis. Order of Dismissal, at 5.

In *Kinney Sys. Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 88 (Fla. 1996), the Florida Supreme Court adopted the federal *forum non conveniens* standard. Accordingly, a Florida court presented with a *forum non conveniens* motion must consider (1) whether an adequate alternative forum exists which has jurisdiction over the case; (2) all relevant private interests; (3) if the balance of private interests is in or near equipoise, whether relevant public interests tip the scale in favor of another forum; and, (4) if the balance favors an alternative forum, the court must ensure that plaintiffs can bring suit in the alternative forum. *Id.* at 90. A federal court conducting a *forum non conveniens* analysis considers *every issue* that a Florida state court considers when assessing a *forum non conveniens* motion, except that a federal court must also consider the lawsuit's connections to the entire United States in addition to the connections to the State of Florida.

Callasso, 324 F. Supp. 2d at 1325.

The District Court specifically acknowledged the differences between the federal and Florida law in its *forum non conveniens* analysis:

Although the overall analysis required in federal court is geographically broader than the one applied by the Florida courts . . . *the legal and factual issues essential to the forum non conveniens judgment of the Florida court are identical to the issues now before this [federal] Court.* Therefore, while the Plaintiff is not barred from challenging the ultimate judgment of the state court to dismiss the prior action for *forum non conveniens*, *the Plaintiff is barred from challenging the legal and factual issues resolved by the court.*

Order of Dismissal, at 5 (emphasis in original) (citing *Callasso*, 324 F. Supp. 2d at 1325). Consistent with Florida issue preclusion principles, the District Court held it was

bound by the legal and factual conclusions of the Florida state court which were essential to its decision to grant a motion for *forum non conveniens*. . . .

Order of Dismissal, at 5; *Callaso*, 324 F. Supp. 2d at 1324 (“while the Plaintiff is not barred from challenging the ultimate judgment of the state court to dismiss the prior action for *forum non conveniens*, the Plaintiff is barred from challenging the legal and factual issues resolved by the state court.”). The District Court then undertook its own federal *forum non conveniens* analysis concerning legal and factual issues not foreclosed or precluded by the State Court judgment. *See* Order of Dismissal, at 9.

The Appellants contend on appeal that the District Court erred by giving

preclusive effect to *any* of the State Court’s factual or legal findings. Initial Brief, at 19. Appellants’ flawed argument is based on a misplaced reliance on two cases, *Parsons v. Chesapeake & Ohio R.R. Co.*, 375 U.S. 71, 4 S. Ct. 185 (1963), and *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300 (11th Cir. 2002), both of which are inapposite.

In *Chesapeake & Ohio RR Co.*, the Supreme Court held only that “a prior state court dismissal on the grounds 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 [28 U.S.C.] § 1404(a).” *Id.* at 73. *Chesapeake & Ohio R.R. Co.* is not a *forum non conveniens* case.¹⁵ More importantly, the District Court did not hold that it was “divested” of its discretion to perform an appropriate *forum non conveniens* analysis or that it was bound *in toto* by the State Court’s *forum non conveniens* judgment. Rather, the District Court found, as it was required to do, that it was precluded from re-examining only those discrete “legal and factual matters determined by the state court which were essential to its final judgment.” Order of Dismissal, at 5. The District Court then weighed the appropriate *forum non conveniens* factors under federal law, *see* Order of Dismissal, at 4-10, and reached an independent decision to dismiss in favor of a

¹⁵ Of course, the Supreme Court has also taught that the reasoning in a 28 U.S.C. § 1404 transfer case “is simply inapplicable to dismissals on grounds of forum non conveniens.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 249-53 (1981).

Guatemalan forum pursuant to federal law. *Chesapeake & Ohio R.R. Co.* does not, therefore, lend any assistance to Appellants.

Appellants cite *Esfeld v. Costa Crociere, S.P.A.* for the proposition 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.” Initial Brief, at 22. The Court made no such holding in *Esfeld*. The sole issue in *Esfeld* was “whether, under the *Erie* doctrine, state or federal law on *forum non conveniens* should apply in diversity cases.” *Esfeld*, 289 F.3d at 1301. After undertaking a detailed *Erie* analysis, this Court held that federal *forum non conveniens* law applies in diversity cases. *Id.* at 1315. The Court then remanded to the district court for further proceedings consistent with its opinion. *Id.* Contrary to Appellant’s misstatement, the *Esfeld* Court did *not* decide or even consider whether collateral estoppel or issue preclusion applies in a *forum non conveniens* context. See Initial Brief, at 21.¹⁶ However, this precise issue has been decided contrary to Appellants’ position and consistent with the District Court’s decision. See, e.g., *Callaso*, 324 F. Supp. 2d at 1324-25 (collaterally estopping plaintiff from relitigating state court *forum non conveniens* dismissal).

¹⁶ The Appellants’ unreliable reading of *Esfeld* is taken from the Court’s discussion of the procedural history of the case, which noted only that the district court had not given collateral estoppel effect to the state court’s *forum non conveniens* order because it “was required to focus on the connections between the [plaintiffs’] suit and the whole United States.” *Esfeld*, 289 F.3d at 1304. This is the very analysis the District Court conducted here.

Appellants' position that "preclusion is unwarranted given the different state and federal interests in this case," *see* Initial Brief at 21, is a different spin on the same baseless assertion that the District Court blindly accepted the entirety of the State Court's judgment without undertaking any independent analysis of *forum non conveniens* pursuant to federal law. Contrary to Appellants' position, the District Court did not consider itself entirely precluded from examining Appellees' *forum non conveniens* motion under federal law. Accordingly the District Court did not apply res judicata or "claim preclusion," where identity of "causes of action" might theoretically be relevant to bar relitigation of the *forum non conveniens* doctrine in its entirety. Rather, the District Court applied collateral estoppel, or "issue preclusion," such that only those particular factual and legal issues actually decided and essential to the State Court's judgment were precluded from relitigation. *See* Order of Dismissal, at 5.

Moreover, Appellants' contention that the federal court could not give *any* part of the State Court's judgment full faith and credit because the State Court did not consider federal anti-torture law is flatly wrong. Here, the District Court was required to, and specifically did, consider the weight of the Plaintiff's federal ATS and TVPA claims in its independent federal analysis. Order of Dismissal, at 9. The District Court determined that under the facts of this case the public interest in receptivity of United States courts to such claims was far outweighed by the

countervailing interests regarding forum shopping, comity between nations, and the fact that “all of the evidence involved, except for the plaintiffs’ testimony, is located in Guatemala or the surrounding area, outside the reach of the Court’s reach, and that material injustice would result were Defendants forced to litigate in the United States.” Order of Dismissal, at 9.

Likewise without merit is Appellants’ contention that issue preclusion could not apply because of differences in how Appellants framed their state and federal claims arising out of the same factual predicate.¹⁷ See Initial Brief at 22-23. This Court has regularly applied issue preclusion to state court findings of fact and conclusions of law where the state and federal actions involved different legal claims but arose out of the same set of facts among the same parties. See, e.g., *Cnty. Bank of Homestead v. Torcise*, 162 F.3d at 1086-87 (holding the findings in a state court foreclosure judgment had collateral estoppel effect in a bankruptcy fraudulent transfer and preference proceeding); *Hoskins v. Yanks*, 931 F.2d at 42-43 (holding debtor in bankruptcy proceeding was collaterally stopped by findings in a state court defamation action); *Castro Convertible Corp. v. Castro*, 596 F.2d 123, 125 (11th Cir. 1979) (holding a party could not re-litigate in a federal constructive trust case issues previously resolved in a state court interpleader

¹⁷ Appellants admit that their state and federal actions “arise from the same core set of facts.” Initial Brief, at 23.

action).¹⁸ “It is well settled that a final judgment or decree on the merits in the courts of a state is conclusive in the federal courts, whether the question determined is one of federal, general, or local law.” *Jarrard v. Southeastern Shipbuilding Corp.*, 163 F.2d 960, 961 (5th Cir. 1947).

C. The District Court Correctly Dismissed the Fourth Amended Complaint Pursuant to *Forum Non Conveniens*

Contrary to Appellants’ assertions, the District Court conducted an independent *forum non conveniens* analysis, precluded only from reexamining those legal or factual issues essential to the State Court judgment. It did not abuse its discretion in the assessment of other factual or legal issues not precluded by the State Court judgment.¹⁹

1. The District Court Concluded that Guatemala Is an Adequate and Available Alternative Forum

¹⁸ In this case, Appellants brought claims for the identical incident in both state and federal court. The cases cited by Appellants for the proposition that the district court misapplied collateral estoppel to the state court *forum non conveniens* dismissal are therefore entirely inapposite. *Cf. Harley v. Health Ctr. of Coconut Creek*, 518 F. Supp. 2d 1364, 1369 (S.D. Fla. 2007) (the claims required the presentation of different facts and evidence); *Santini v. Cleveland Clinic Florida*, 843 So. 2d 1029 (Fla. Dist. Ct. App. 2003) (no analysis of the preclusive effect of conclusions of fact and law based upon claims arising from the same set of facts).

¹⁹ Contrary to Appellants’ assertions peppered throughout their Initial Brief, *see e.g.*, pages 2, 11, 26, 29 n.16, 36 n.21, 43, the District Court was not required to adopt the Magistrate Judge’s Report and Recommendation or any of the reasoning contained therein. Appellees objected to the Magistrate Judge’s Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(B) and Rule 4(b) of the Magistrate Rules of the Southern District of Florida, R.200, and the District Judge properly undertook a *de novo* examination of the issues raised by Appellees’ renewed *forum non conveniens* motion.

Florida's analysis for determining an adequate and available alternative forum is exactly the same as the federal analysis. *Compare Kinney System, Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 90-91 (Fla. 1996) with *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1946) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981).

Relying on *Kinney System, Inc.*, the State Court found: (a) “[a]n adequate alternate forum exists for [Appellants] in Guatemala and Guatemala possesses jurisdiction over the entire case, including all of the parties;” (b) “the testimony submitted by the [Appellees’] expert, Francisco Chavez Bosque,²⁰ is more reliable, credible and persuasive than that of the [Appellants’] expert;” (c) “the courts of Guatemala are not foreclosed to these [Appellants] and that the Guatemalan courts have jurisdiction over these [Appellees] for the matters alleged” by Appellants;²¹ and (d) “the courts of Guatemala are adequate to adjudicate the [Appellants’] claims.” R.163.A.2. Perhaps most importantly, the District Court was bound by

²⁰ See Amended Declaration of Francisco Chavez Bosque, R.163.D; Supplemental Declaration of Francisco Chavez Bosque, R.163.E.

²¹ “An alternative forum is ‘available’ to the plaintiff when the foreign court can assert jurisdiction over the litigation sought to be transferred.” *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001) (citing *Piper Aircraft*, 454 U.S. at 252 n.22). The alternate forum prong of the *forum non conveniens* analysis generally “will be satisfied when the defendant is amenable to process in the other jurisdiction.” *Piper Aircraft*, 454 U.S. at 255 n.22. Because Appellees have stipulated that they are amenable to service in Guatemala, Order of Dismissal, at 10, the availability of Guatemala as alternative forum is not an issue. *Accord Callasso*, 324 F.Supp.2d at 1330-31.

the State Court’s fundamental finding that Appellants’ attendance in Guatemala is not required to litigate their claims there, which eliminates any concern over their safety. R.163.A.5-6. *See also* Order of Dismissal, at 8. Accordingly, the State Court’s finding that Guatemala is an adequate and available alternative forum in which Appellants can litigate their claims was essential to its *forum non conveniens* dismissal and was therefore binding on the District Court. *See* Dismissal Order, at 5-6; *accord Callasso*, 324 F. Supp. 2d at 1330-31.

Even if the District Court had not followed the State Court on this determination, the determination that Guatemala is an adequate and available alternative forum is clearly correct. No court addressing the adequacy of the Guatemalan forum has ever found it to be inadequate. *See Lisa, S.A., v. Mayorga*, 2006 WL 2089817 (S.D. Fla. July 18, 2006) (“Indeed, every court that has addressed the adequacy of Guatemala as a forum, has determined that it is an adequate forum.”).²²

²² *See also Reyes v. Cruise Ship Catering & Servs. Int’l, N.V.*, 2006 WL 2389441 (S.D. Fla. May 25, 2006) (dismissing for *forum non conveniens* in favor of, among others, the courts of Guatemala); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1523 (D. Minn. 1996) (dismissing in favor of Guatemala under the doctrine of *forum non conveniens* where case was immutably Guatemalan); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1361 (S.D. Texas 1995) (finding that Guatemala provided an adequate alternative forum for tort claims and dismissing claims brought by Guatemalan nationals on *forum non conveniens*), *aff’d*, 231 F.3d 165 (5th Cir. 2000); *Banco Metropolitano, S.A. v. Desarrollo de Autopistas y Carreteras de Guatemala, S.A.*, 616 F. Supp. 301 (S.D.N.Y. 1985) (dismissing on *forum non conveniens* grounds because, among other reasons, there had already

a. Appellants Do Not Face Danger Litigating in Guatemala

In the face of the State Court's express factual finding to the contrary, Appellants continue to argue that Guatemala is not an adequate alternative forum because they would be in danger if required to litigate in a Guatemalan court. Initial Brief, at 26-30. Appellants' "danger" argument is completely eviscerated, however, by two critical facts: (1) Appellants do not have to personally appear in Guatemala in order to litigate there, and (2) a condition of the District Court's *forum non conveniens* dismissal is that Appellants not be required to appear in person in Guatemala to litigate their claims. Order of Dismissal, at 11.

As found by the State Court, Appellants are not required to physically appear before the Guatemalan court unless Appellees request their personal appearance, R.163.A., which Appellees have agreed not to do. R.184.4. Appellees' Guatemalan law expert explained why physical presence is unnecessary in a Guatemalan civil proceeding:

In the Guatemalan civil procedure, the parties have no right to unilaterally appear and testify before the judge. The only time a party

been litigation in Guatemala on the same subject events); *Bolanos v. Gulf Oil Corp.*, 502 F. Supp. 689, 692 (W. D. Pa. 1980) (dismissing in favor of jurisdiction in Guatemala because the pertinent events giving rise to the claims occurred in Guatemala and the only contact with the United States was the location of the defendant's corporate headquarters), *aff'd*, 681 F.2d 804 (3d Cir. 1982); *Acapolon Corp. v. Ralston Purina Co.*, 827 S.W. 2d 189, 195 (Mo. 1992) (dismissing products liability claims in favor of Guatemalan courts on basis of *forum non conveniens*).

may appear before a judge to testify occurs if the opposing party requests the party's personal appearance to answer written questions previously delivered to the Court in a sealed envelope. In that case the Judge will then set a date and hour for the sworn declaration or testimony and will decide which questions comply with the legal requirements and will be asked.

Supplemental Declaration of Francisco Chavez Bosque, R.163.E.¶21.

Appellants contend that their Guatemalan law expert, Alejandro Garro, “directly contradict[s]” Bosque’s expert opinion. Initial Brief, at 28-29 n.15. Even if this fact had not already been adjudicated adverse to Appellants, Garro concedes that Appellants, as *parties* to a Guatemalan suit, “need not appear personally before the court in order to present his or her case.” R.172.D.2. Garro further concedes that a party may *only* be summoned to appear before a Guatemalan court “upon request of the other party,” *id.* at 3-4, (which, as noted above, Appellees have agreed not to do). R.184.4.

The issue of Appellants’ need or right to appear personally in a Guatemalan court is now moot, having been resolved adverse to the Appellants by the State Court. The District Court was “precluded from disregarding the state court’s finding that Plaintiffs have no need to be in Guatemala, because this was an essential element in the state court’s decision. . . . *This fact eliminates any concern over the Plaintiffs’ safety*, because [of the State Court’s] consideration of whether Plaintiffs would be required to appear in person in Guatemala.” Order of Dismissal, at 8 (emphasis added); *accord* Order of Dismissal, at 5 (District Court

holding it was precluded from reexamining the State Court’s finding “that Plaintiffs would not be required to appear in person in Guatemala in order to litigate their claim”).

Appellants also rely on an unauthenticated and hearsay-laden “press release” which alleges that a former Guatemalan union member’s murder “confirms [Appellants’] continued fears of retaliation.” Initial Brief, at 17. The press release published by the “Center for Labor Solidarity in Guatemala” was attached to the last substantive filing by either party in the District Court. R.203. There is no competent admissible evidence in the record to authenticate or substantiate any of the contents of the press release. Moreover, Appellants failed to make any connection between the alleged murder and the instant case or the adequacy of the Guatemalan judicial system.

Finally, any alleged safety risk to Appellants completely vanishes given the express conditions imposed by the District Court and State Court in their respective dismissals. *See* Order of Dismissal, at 11; R.163.A.5-6. Because both courts retained jurisdiction to allow Appellants to seek reconsideration should they be required to appear in Guatemala, any claim of personal risk is nothing more than a red herring.²³

²³ Appellants highlight the self-serving declaration of Aldana in an effort to establish Appellants’ fear of returning to Guatemala. Initial Brief, at 27-28. Not only does Aldana’s declaration ignore the established fact that he faces no real risk,

b. Guatemala’s Judiciary Is Adequate to Adjudicate Appellant’s Claims

Finally, Appellants’ argument that “the level of impunity in Guatemala also renders it an inadequate forum” is meritless. *See* Initial Brief, at 31. First, as set forth above, no court has found Guatemala to be an inadequate forum. Second, as Appellants readily admit, even if corruption did exist, mere corruption in a foreign judicial system is insufficient to render a forum inadequate. *See Lisa, S.A.*, 2006 WL 2089817, at *4 (finding unpersuasive plaintiffs’ claims that the Guatemalan court system is inadequate because “its courts have been found by the United States State Department to be corrupt, inefficient, and subject to the intimidation of judgment and witnesses.”); *accord Gonzales v. P.T. Pelangi Niagra Mitra Int’l, P.T.*, 196 F. Supp. 2d 482, 487-491 (S.D. Tex. 2002); *Stalinski v. Bakoczy*, 41 F. Supp. 2d 755, 760-61 (S.D. Ohio 1998). “The ‘alternative forum is too corrupt to be adequate’ argument does not enjoy a particularly impressive track record. The Court has been unable to locate any published opinion fully accepting such an argument.” *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997). Third, Appellants again disingenuously summarize the record evidence by

as he does not need to be in Guatemala to pursue his claims there, the Order of Dismissal is expressly conditioned on that fact. The declaration merely sets forth Appellant’s subjective fears but does not evidence any actual danger to Appellants. The only competent and reliable evidence in the record shows that Appellants were not physically injured, much less killed, by their perpetrators on the night of October 13, 1999, no matter how harrowing the assault was.

claiming that Appellees did not adduce evidence that Appellants could fairly litigate their case in a Guatemalan court. Initial Brief, at 32. Appellees' expert, Francisco Chavez Bosque,²⁴ explains in his sworn statement:

Further to its enforcement of the 1996 peace accord that ended Guatemala's 36-year civil war, in the last few years, Guatemala has made enormous progress in preserving the civil liberties of its citizens, including the provision of a fair and independent legal system.

These efforts include the government's commitment to various human rights issues and the prosecution of past human rights violators, including, specifically, the conviction of those persons held responsible for the attacks claimed by Plaintiffs and the appointment of a Special Prosecutor for Crimes Against Unionists and Journalists to review cases involving violence against labor union members.

Amended Declaration of Francisco Chavez Bosque, R.163.D.¶¶51-52. *See also* Supplemental Declaration of Francisco Chavez Bosque, R.163.E.¶22.

There is ample record evidence demonstrating that Guatemala is an adequate and safe alternative forum; however, even if this issue were in doubt, Appellants

²⁴ Appellants attempt to discredit Chavez Bosque by arguing that he did not address whether Appellants could pursue their torture claims in Guatemala, *see* Initial Brief, at 32, which are ostensibly based on the violation of an internationally accepted norm prohibiting torture. First, "[t]here is a presumption that the substantive law of a foreign forum is adequate." *Torreblanca de Aguilar v. Boeing Co.*, 806 F. Supp. 139, 143 (E.D. Tex. 1992), *aff'd*, 11 F.3d 55 (5th Cir. 1993). Moreover, Chavez Bosque established that Guatemala offers sufficient remedies that can fairly compensate Appellants for psychological injuries allegedly suffered by them if Appellees are found to be liable. R.163.D.¶¶54-56. The relief provided need not be identical; indeed, the "possibility of Plaintiffs being deprived of some relief is not sufficient to find that the Guatemalan forum is inadequate." *Lisa, S.A., v. Mayorga*, 2006 WL 2089817, at *4 (S.D. Fla. July 18, 2006) (citing *Republic of Panama v. BCCI Holdings S.A.*, 119 F.3d 935, 952 (11th Cir. 1997)). Adequacy of the alternative forum requires only the existence of *some* meaningful remedy. *Id.*

have been afforded the ultimate safety net through the ability to reinstate their case in the District Court if they are required to appear in person in Guatemala in order to litigate their claims. Order of Dismissal, at 11.

2. The District Court Weighed Guatemala’s Substantial Private and Public Interests in this Litigation Against any Interests of the United States

After finding that Guatemala is an adequate and available alternative forum for Appellants’ claims, the District Court turned to weighing the private and public interests implicated by Appellees’ *forum non conveniens* motion. Order of Dismissal, at 6. In so doing, the District Court correctly accepted the findings of fact and law necessary to the state court’s *forum non conveniens* dismissal and re-weighed all other factors in the federal *forum non conveniens* balance. The District Court’s analysis included Appellants’ “connection to the United States as a whole (as opposed to just Florida), as well as whether it is relevant that the [Appellants] make their claim under federal anti-torture laws.” *Id.* at 5. The District Court also acknowledged that Appellants, although not residents of Florida, are residents of the United States, for which their venue choice is afforded a presumption of correctness, although not a *dispositive* presumption. *Id.* at 7.

Under this framework, the District Court analyzed the weight of all private and public interests to determine whether Appellants’ forum choice of the United States should be disturbed. *Id.* at 6-10. Further, the District Court was careful to

note, for example, that the “Florida state court did not consider the public interest factors, as it made its determination based on private interests.” *Id.* at 9. The District Court thus concluded that the “determinations in the state court regarding the weight of the public interest factors are not binding upon this Court due to not being essential to the state court’s decision.” *Id.* The District Court accordingly assessed the relevant public interest factors on its own without regard to the findings of the State Court. The District Court acted properly and deliberatively in parsing the State Court judgment to determine which factual or legal issues were to be given preclusive effect and which were not binding on the District Court.

a. The Private Interest Factors Weighed Heavily In Favor of Guatemala

In weighing the private interests, the District Court specifically held that in order to dismiss claims by Appellants, as U.S. residents, on *forum non conveniens*, the District Court must find “positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the court of this country.” Order of Dismissal, at 7 (quoting *SME Racks, Inc. v. Sistemas Macanicos Para Electronica, S.A.*, 382 F.3d 1097, 1101-02 (11th Cir. 2004)).

The District Court found, as it was compelled to do, that it could not deviate from the private interests already determined by the state court because the

analysis of private interest factors in *forum non conveniens* is identical in state and federal law.

Thus this Court considers that the alleged misconduct occurred in Guatemala, 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.

Order of Dismissal, at 7. The Court then considered the impact of the Appellants' U.S. residency, but held this fact "is *not* singularly dispositive." *Id.* (emphasis in original) (quoting *Piper*, 454 U.S. at 246); accord *J.C. Renfroe & Sons, Inc. v. Renfroe Japan Co., Ltd.*, 515 F. Supp. 2d 258 (M.D. Fla. 2007) (dismissing claims of United States residents for *forum non conveniens*). As the Supreme Court has instructed, the appropriate presumption is far from, and cannot be, dispositive:

A citizen's forum choice should not be given dispositive weight, however. Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. *As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.*

Piper, 454 U.S. at 256 n.23 (emphasis added). The *Piper* Court has explained that domestic plaintiffs receive a heightened presumption not for chauvinistic reasons but because "it is reasonable to assume that this choice is *convenient*." *Id.* at 255-56 (emphasis added). As the District Court concluded, however, there is nothing *convenient* about Appellants' choice of forum here.

In performing any *forum non conveniens* analysis, district courts must remain mindful that “since the touchstone of *forum non conveniens* analysis is convenience, controlling weight cannot be given to any one factor in the balancing process or the doctrine would lose much of the flexibility that is its essence.” *C.A. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983); *accord Piper*, 454 U.S. at 263 (“If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.”).

“Perhaps the most important ‘private interest’ of the litigants is access to evidence.” *Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003). In weighing the pertinent private interest factors, the District Court concluded that the vast majority of the evidence and witnesses are located in Guatemala or the surrounding area and are out of the reach of the District Court’s compulsory process. Order of Dismissal, at 8. The fact that an overwhelming amount of evidence is in Guatemala highlighted the manifest injustice to Appellees if forced to litigate in the United States and illustrates precisely why the doctrine of *forum non conveniens* exists.

The Appellants allege an eight hour ordeal at the hands of more than 200 townspeople in the remote Guatemalan town of Morales, Izabal -- an event that was allegedly planned and directed by the Appellees with the assistance and

participation of Guatemalan governmental authorities. R.156.¶¶33-35. The truth is in sharp contrast, but Appellees are materially prejudiced to prove the truth. Only those present in Morales can credibly and in the first person rebut the Appellants' self-serving testimony and recount any events prior to the incident, the reasons causing the incident, and who participated in the incident. None of these crucial defense witnesses is subject to the District Court's compulsory process. Appellants' claims also allege the complicity, and place squarely at issue the bona fides, of the Guatemalan National Police, the then sitting Mayor of Morales, the then incoming Mayor of Morales, and a host of other Morales residents. R.156.¶¶44, 55. All of these persons or entities are in Guatemala or otherwise outside of the Court's compulsory process.

Even if one could assume that any of these critical witnesses would be willing to voluntarily endure the enormous inconvenience of traveling thousands of miles from a remote Guatemalan town to testify in a United States District Court in Miami, Florida, the burden and expense on Appellees to obtain the testimony and attendance of any such witnesses is so daunting as to render the option worthless. Appellants cynically suggest Florida must be a fair and convenient forum because the executive offices of two Appellees, FDMPI and DMFPC, are located in Florida, Initial Brief, at 38, even though Appellants appreciate that none of the employees of these companies were knowledgeable, much less involved, in the

events of October 13-14, 1999. It is no surprise, then, that Appellants prefer to litigate this Guatemalan labor dispute away from Guatemala against an effectively emasculated defense. This only serves to highlight the manifest injustice of litigating in this forum and to illustrate precisely why the doctrine of *forum non conveniens* exists.²⁵

The District Court thus found that the weight of private interests lies “heavily in favor of the Defendants’ choice of Guatemala as a forum.” Order of Dismissal, at 8.²⁶ The District Court’s weighing of the private interests was neither

²⁵ Appellants’ claims also put the location and relative proximity and view of the National Police office directly into issue. R.156.¶55. An essential element of Appellants’ mental torture claims under the ATS and TVPA is the involvement of the foreign state in the alleged torture. To support this fundamental requirement, Appellants alleged that the National Police office was no more than 100 meters from the SITRABI office and it was “an absolute certainty” that the National Police were aware of all of the events but did nothing to intervene. *Id.* It would be, of course, exceedingly difficult, if not impossible, to adequately test Appellants’ allegation of “absolute certainty,” so crucial to their case, without the ability to view or at least be personally familiar with the relative locations of both the SITRABI office and the National Police office. This fact compounds the prejudice Appellees would suffer if forced to litigate in this forum.

²⁶ The State Court determined there was no personal jurisdiction over Bandegua in Florida, R.162.B, a matter that the District Court did not reach in light of its *forum non conveniens* dismissal. Where personal jurisdiction over one of the principal defendants is doubtful or does not exist, “a very heavy weight” is placed in favor of *forum non conveniens* dismissal to the foreign court.” *Carnival Cruise Lines, Inc. v. Oy Wartsila AB*, 159 BR 984, 999-1000 (S.D. Fla. 1993); *see also Campbell v. Bridgeview Marina, Ltd.*, 347 F. Supp. 2d 458, 466 (E.D. Mich. 2004) (fact that court dismissed one defendant for lack of personal jurisdiction weighed heavily in favor of dismissal to a forum having jurisdiction over all defendants). Given that all Defendants have consented to jurisdiction in the Guatemalan courts, this factor weighs heavily in favor of dismissal to Guatemala.

unreasonable nor an abuse of discretion. *See Ford v. Brown*, 319 F.3d at 1308-09; (finding dismissal for *forum non conveniens* appropriate where, as here, the subject incident, the witnesses, and the documentary evidence were located in the foreign forum); *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279 (11th Cir. 2001) (same).

b. The Public Interest Factors Weighed in Favor of the Dismissal to Guatemala

After finding that the private interest factors weighed heavily in favor of the Guatemalan forum, the District Court conducted its own analysis of the public interest factors. The District Court concluded that because the State Court's discussion of public interest factors was not essential to the State Court judgment, the District Court was not bound by any public interest findings. Order of Dismissal, at 9 (citing *Wingard v. Emerald Venture Fla. LLC*, 438 F.3d 1288, 1293 (11th Cir. 2006)). The District Court therefore undertook its own independent analysis of the relevant public interest factors under federal law.

The District Court's public interest analysis was not only reasonable, but it was the only correct decision it could have made on the facts of this case. Appellants, however, complain that the District Court abused its discretion because it did not afford dispositive weight to the federal interest in adjudicating TVPA and ATA claims. Initial Brief, at 39-40.

Contrary to Appellants' assertion, the District Court considered the United States' interest in adjudicating TVPA and ATS claims. However, the appropriate

weight to be afforded that federal interest is affected by the fact that the purpose underlying the ATS was to create a preference for a federal forum over a state forum, *not a U.S. forum over a foreign forum*. *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 553 (S.D.N.Y. 2001), *affirmed*, 303 F.3d 470 (2d Cir. 2002). “The United States therefore has no special public interest, under the [ATS] or otherwise, in providing a forum for plaintiffs pursuing an international law action against a United States entity that plaintiffs can adequately pursue in the place where the violation actually occurred.” *Id.*; *accord Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 522-23 (S.D. N.Y. 2006) (dismissing an ATS claim for *forum non conveniens*).

Moreover, the Second Circuit’s recognition of a so-called “policy” “favoring receptivity by [United States] courts,” *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 105 (2d Cir. 2000), has not met with much support, even in the Second Circuit. *See, e.g., Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 522 (S.D.N.Y. 2006) (quoting *Aguinda*, 142 F. Supp. 2d, at 553 (S.D.N.Y. 2001), *affirmed*, 303 F.3d 470 (2d Cir. 2002)); *Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495, 505 n.6 (S.D.N.Y. 2005) (plaintiffs’ choice of forum is not entitled to any greater deference because they have alleged ATS and TVPA claims); *United Bank for Africa PLC v. Coker*, 2003 WL 22741575, at *5 (S.D.N.Y. Nov. 18, 2003) (holding even if claims are made under the ATS and TVPA, a “balance of factors would still

militate in favor of dismissal of the false imprisonment claim on *forum non conveniens* grounds); *Robert v. Bell Helicopter Textron, Inc.*, 2002 WL 1268030, at *2 (N.D. Tex. May 31, 2002) (ATS does not preclude court from dismissing on *forum non conveniens* grounds). Indeed, the very Second Circuit case that gave birth to the notion of such a “policy” of receptivity noted that the “TVPA has not ‘nullified, or even significantly diminished, the doctrine of *forum non conveniens*.’” *Wiwa.*, 226 F.3d at 105.

The District Court concluded that any federal interest in adjudicating TVPA and ATS claims was far outweighed by other competing interests:

While there is a strong public interest in favoring the receptivity of United States courts to claims under 28 U.S.C. §1350, there is a greater policy interest in preventing forum shopping, as well as is in protecting comity between the United States and other nations and other such interests.

Order of Dismissal, at 9. Further, the District Court found as persuasive to its own weighing of the public interest factors the findings of the state court that

[t]his dispute, involving as it does one of Guatemala’s largest private employers in one of Guatemala’s most important economic sectors and one of Guatemala’s most influential labor unions, is a quintessentially Guatemalan dispute. Plaintiffs’ choice of a Florida forum imposes an inappropriately heavy burden on this Court and this community. . . . Guatemala, on the other hand, has a paramount interest in this dispute and its courts are more appropriate for adjudicating Plaintiffs’ claims.

Id. at 9-10 (quoting R.163.A.4-5). Guatemala’s paramount interest is underscored by the fact that it has already conducted a criminal trial in Guatemala based on the

identical events upon which Appellants' claims are based. *See* R.163.D.¶¶40-41. *See also Banco Latino v. Lopez*, 17 F. Supp. 2d 1327, 1332 (S.D. Fla. 1998) (“A Venezuelan court will be far more adept at applying the law of its own forum, particularly where it is already entertaining lawsuits involving the same subject matter.”). The District Court concluded that “[i]t is difficult to identify any public interest factors which would weigh in favor of the Plaintiffs.” Order of Dismissal, at 10.

The District Court's conclusion that the United States' interest in adjudicating ATS and TVPA claims is outweighed by other competing interests is perfectly consistent with how other federal courts have traditionally applied *forum non conveniens* to ATS and TVPA claims: “Striking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. Courts, *the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred.*” H.R. Rep. No. 102 - 367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87 (emphasis added). Clearly, the legislative intent of the TVPA was not to bar the dismissal of TVPA claims from U.S. courts, but rather to “avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries.” H.R. Rep. No. 102-367, at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88; *accord Turedi*, 460 F. Supp. 2d at 523 (concluding that

the TVPA has not nullified or diminished the doctrine of *forum non conveniens*).

3. The District Court Did Not Abuse Its Discretion by Not Addressing the Duration of the Litigation in Its *Forum Non Conveniens* Dismissal

a. Appellants Never Raised the Issue of Alleged Prejudice Caused by the Duration of the Litigation

Appellants assert, for the first time on appeal, that they will be unfairly prejudiced if the case is dismissed for *forum non conveniens* because of the length of time their case has been pending. Initial Brief, at 41-43. It is beyond peradventure that Appellants may not raise an issue for the first time on appeal. Indeed, this very Court has specifically rejected the Appellants' "delay" argument under similar circumstances.

[Plaintiff] contends that the district court should not have granted the dismissal because the defendants delayed filing their motion to dismiss on *forum non conveniens* grounds and that delay caused it severe prejudice. This contention is not properly before us because [Plaintiff] failed to raise it in the district court.

Lisa, S.A. v. Mayorga, 2007 WL 1667229, at *1 (11th Cir. June 11, 2007); *see also U.S. Equal Employment Opportunity Comm'n v. W & O, Inc.*, 213 F.3d 600, 620 (11th Cir. 2000) ("Failure to raise an issue, objection or theory of relief in the first instance to the trial court generally is fatal."); *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Because Plaintiff failed to make this argument in the district court, we decline to consider it here."); *Stewart v. Dep't of Health & Human Servs.*, 26 F.3d 115, 115 (11th Cir. 1994) ("Judicial economy is served and

prejudice avoided by binding the parties to the facts presented and the theories argued below.”). “Whenever a litigant has a meritorious proposition of law which he is seriously pressing upon the attention of the trial court, he should raise that point in such clear and simple language that the trial court may not misunderstand it,” which Appellants failed to do.²⁷ *United States v. Houston*, 456 F.3d 1328, 1338 (11th Cir. 2006) (citation and quotation omitted).

b. Appellants’ Assertion that the Duration of the Litigation Causes Undue Prejudice is Without Merit

Even if Appellants had timely or properly preserved this argument below, the argument is without merit, as there have been no unnecessary delays in this action, and Appellants were not prejudiced by any purported delay.²⁸

The general rule is that a “defendant must assert a motion to dismiss for

²⁷ Appellants make the naked assertion in their Initial Brief that they “raised this [delay issue] in argument before the Magistrate.” Initial Brief, at 43. An examination of Appellants’ record submissions, however, fails to reveal so much as a footnote on their newly minted delay argument. *See* R.172; R.203. Because Appellants failed to raise the issue of prejudice caused by the duration of the litigation, the issue is not properly before this Court.

²⁸ In addition to, and distinct from, their argument regarding the duration of the litigation, Appellants contend that the District Court abused its discretion by reconsidering the June 2003 *forum non conveniens* ruling because they somehow “relied” on the District Court’s original denial of the *forum non conveniens* motion. *See* Initial Brief, at 12. Having voluntarily elected to file their claims in state court and open the door to a *forum non conveniens* adjudication, Appellants’ complaint of “reliance” rings hollow. Moreover, there has been no “reliance” in a legal sense, i.e., Appellants have not changed their litigation position to their detriment as a result of the District Court’s June 2003 ruling. Having lost a motion that they thought they had won is not detrimental “reliance.”

forum non conveniens within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant. . . because a defendant's dilatoriness promotes and allows the very incurrance of costs and inconvenience the doctrine is meant to relieve." *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1165 (5th Cir. 1987), *vacated on other grounds by Pan Am. World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *reinstated by In re Air Crash Disaster Near New Orleans, La., on July 9, 1982*, 883 F.2d 17 (5th Cir. 1989).

In requiring defendants to make their motions in a timely manner, the *In re Air Crash* court sought to prevent eleventh-hour *forum non conveniens* motions. If a defendant raises a *forum non conveniens* objection for the first time after the defendant has answered, taken depositions, proceeded to pretrial and caused the plaintiff to incur expense in preparing for trial, such delay should weigh against granting the motion.

Lacey v. Cessna Aircraft Co., 932 F.2d 170, 177 (3d Cir. 1991).

First, Appellees were not dilatory at all in litigating this matter. Appellants quote *Genpharm v. Pliva-Lachema A.S.*, 361 F. Supp. 2d 49, 60 (E.D.N.Y. 2005), implying that Appellees moved for *forum non conveniens* dismissal "more than a year after the case was filed." Initial Brief, at 42. To the contrary, Appellees filed a motion for *forum non conveniens* dismissal shortly after each occasion that Appellants amended or re-filed their complaints against them in the District

Court.²⁹ Second, Appellants never answered the Fourth Amended Complaint, nor any of the other amended complaints. Third, Appellees did not take any depositions in this matter.³⁰ Fourth, this case did not go beyond the preliminary litigation stages, and Appellees did not cause Appellants or their counsel any unnecessary delay or expense.³¹ Finally, as Appellants openly admit, only very limited discovery, almost all related to jurisdiction, was taken in this case.³² Even if they could make this argument for the first time on appeal, Appellants are unable

²⁹ Appellees filed motions to dismiss for *forum non conveniens* in response to the Second, Third and Fourth Amended Complaints, R.20; 32; 77; 87; 156; 163, and Appellees were not required to respond to the original complaint or the First Amended Complaint. In addition, it is disingenuous for Appellants to now claim Appellees were dilatory after they agreed not to oppose Appellees' motions for extension of time throughout the litigation. *See, e.g.*, R.52, 54, 93, 125, 160.

³⁰ Appellants disingenuously claim that "Defendants have sought to stay and delay discovery at every step of the case." Initial Brief, at 42. Rather, at the beginning of the case, the District Court, *sua sponte*, stayed all discovery in the action pending its rulings on Appellees' motions to dismiss. R.47.¶6. The District Court then limited discovery to jurisdictional discovery, R.92, until dismissing the Third Amended Complaint for lack of federal subject matter jurisdiction in December 2003. R.140. Of course, no discovery was taken or should have been taken between December 2003 and August 2006 when the case was no longer pending. After this Court's partial reversal of the District Court's dismissal, and after the District Court vacated its order dismissing the Third Amended Complaint in August 2006, R.155, Appellees moved for stay of discovery, R.159, consistent with the District Court's prior *sua sponte* stay of discovery and in an effort to conserve resources pending the resolution of Appellees' motions to dismiss the Fourth Amended Complaint. Appellees' motion for stay was denied. R.170.

³¹ To the contrary, counsel for the parties cooperated throughout the litigation, as evidenced by Appellants' filing over half a dozen joint, agreed, or unopposed motions. *See, e.g.*, R.26, 38, 55, 99, 110, 121, 185.

³² Appellants admit that "the parties have not engaged in extensive discovery." Initial Brief, at 42.

to make a factual showing that they were unduly prejudiced by the duration of this litigation.

VII. CONCLUSION

For the reasons set forth above, Appellees respectfully request the Court to affirm the District Court's Order of Dismissal pursuant to *forum non conveniens*.

Respectfully submitted,

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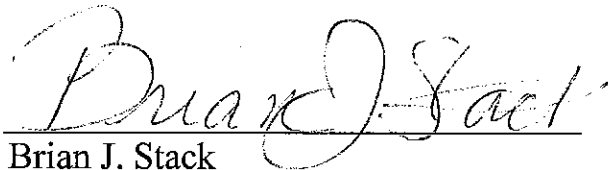
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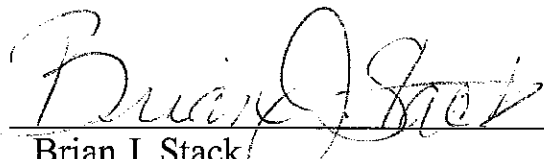
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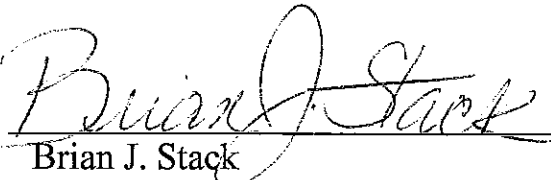
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I HEREBY CERTIFY that on this 15th day of April, 2008, a true and correct copy of the foregoing was delivered by U.S. mail to:

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