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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Claudia Balcero Giraldo, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 2:09-cv-1041-RDP**
	)	
Drummond Company, Inc., *et al.*,	)	
	)	
Defendants.	)	

DRUMMOND COMPANY, INC.'S
MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As outlined in the motion for summary judgment filed by Drummond Ltd. ("DLTD"), the claims asserted in Plaintiffs' Third Amended Complaint ("TAC") should be dismissed in their entirety, and Drummond Company, Inc. ("DCI") adopts and incorporates by reference the arguments presented in that motion. DCI separately moves for summary judgment on the additional ground there is no evidence, substantial or otherwise, that DCI is the alter ego of DLTD. TAC, Dkt. 233, ¶167. Moreover, there is no admissible evidence that DCI directly participated in any way in the alleged wrongdoing here.

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). In this case, the Plaintiffs' allegations and former paramilitaries' testimony, to the extent they are relevant at all, pertain to DLTD and/or DLTD employees and their purported dealings with paramilitaries. Discovery produced no admissible evidence that either DCI or any DCI employee made any arrangements to make payments to paramilitaries.[1] Thus, in order to hold DCI liable for the alleged acts of DLTD,

[1] The only testimony that any DCI employee had any knowledge of alleged payments to the AUC is in the form of inadmissible hearsay. In Section III, *infra*, DCI addresses this

Plaintiffs must pierce the corporate veil between DCI and DLTD.

Courts hold a parent corporation liable for the acts of a subsidiary only in exceptional cases. To disregard corporate form in the instant matter, Plaintiffs must demonstrate that DCI so dominated the operation and decisions of DLTD that DLTD had no mind or existence of its own and was a mere instrumentality of DCI. The undisputed facts, however, preclude any such finding because they show that DLTD is a substantial, legitimate, self-sustaining business entity with its own departments, employees, customers, tax returns, financial statements and contracts. DLTD is entirely responsible for its daily operations in Colombia, including the selection and payment of security contractors and other vendors. In fact, the only factors relevant to a piercing analysis that Plaintiffs have any evidence of are present in virtually every parent-subsidiary corporate relationship: common stock ownership, some overlap of officers and directors, and the parent caused the incorporation of the subsidiary. There is no basis in this case to disregard the corporate form and hold DCI liable for any wrongful acts of DLTD that have yet to be proven.

Furthermore, there is simply no evidence that DCI was directly involved in any wrongdoing as alleged in the Complaint. All of the alleged wrongdoing took place in Colombia, far from DCI offices and personnel. There is no admissible

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testimony in anticipation of Plaintiffs' reliance on inadmissible evidence in an attempt to avoid summary judgment.

evidence that DCI or any of its representatives collaborated with the AUC to kill civilians in the area near DLTD's rail line. Accordingly, DCI should be granted summary judgment on all claims.[2]

STATEMENT OF UNDISPUTED MATERIAL FACTS

DCI adopts the Statement of Undisputed Material Facts set forth in DLTD's Memorandum of Law in Support of its Motion for Summary Judgment as if set forth fully herein.

1. DCI is an Alabama corporation headquartered in Birmingham, Alabama. Defendants' Answer to the TAC, Dkt. 238, ¶ 162.

2. DLTD is a limited partnership organized under the laws of Alabama and headquartered in Birmingham, Alabama. DLTD Exh. B, Agreement of Ltd. P'ship of DLTD[3]; Exh. 2, Webster Dep. 48:1-8.

3. Drummond USA, Inc. – a second tier subsidiary of DCI – is the general partner of DLTD. *Id.* at 38:14-39:14; 48:9-12.

[2] This would represent the second time a court in this District has held that DLTD is not the alter ego of DCI. Exh. 1, *Romero v. Drummond*, 7:03-cv-00575-KOB ("*Drummond I*"), 3/5/2007 Mem. Op., Dkt. 329 at 4 ("Plaintiffs also have not convinced the court that it should pierce the corporate veil, or that any other theory of corporate liability exists for asserting these claims against Drummond Company, Inc. Therefore, the court GRANTS summary judgment as to all claims against Drummond Company, Inc.").

[3] To avoid duplicative filings and to keep this Court's file size to a minimum, DCI is not re-filing identical copies of exhibits that have already been submitted in support of DLTD's previously-filed motion for summary judgment. Where those previously-filed exhibits are cited in DCI's motion, the citation will correspond with the designation given to those exhibits in DLTD's motion with the form "DLTD Exh. [letter]". Exhibits attached to this motion will be designated numerically.

4. Drummond Projects, LLP is DLTD's limited partner, and DCI is, in turn, the limited partner of Drummond Projects. *Id.* at 38:14-39:14; 48:15-18.

5. DLTD was founded in 1987 and is responsible for the mining, extraction, selling and shipping of all coal it mines in Colombia, South America. *Id.* at 40:11-41:11; DLTD Exh. B, Agreement of Ltd. P'ship of DLTD.

6. Since approximately 1989 DLTD has owned, and since 1995 has operated, a coal mine and related facilities near the town of La Loma, in the Department of Cesar, Colombia. Exh. 3, Webster Decl. ¶ 2; DLTD Exh. C, Tracy Dep. 35:11-17; DLTD Exh. D, G. Drummond Dep. 73:20-21; DLTD Exh. E, Jiménez Dep. 24:19-25:1.

7. Since approximately 1990, DLTD has owned a port for the loading and shipping of coal in Santa Marta, Department of Magdalena, Colombia. Exh. 3, Webster Decl. ¶ 3; DLTD Exh. C, Tracy Dep. 35:11-17; DLTD Exh. D, G. Drummond Dep. 73:20-21; DLTD Exh. E, Jiménez Dep. 24:19-25:1.

8. Between 1996 and 2006, DLTD held all contracts for the exportation and sale of coal from Colombian operations and was entirely responsible for the mining, selling and shipping that coal. Exh. 2, Webster Dep. 40:11-41:3.

9. DCI has never held any contracts for the shipment or sale of coal from Colombia and has never been a signatory on any of DLTD's contracts for the sale or supply of coal. *Id.* at 40:23-41:7.

10. Between 1996 and 2006, DCI did not have any contracts with any Colombian company. *Id.* at 189:9-20.

11. While DLTD does not have a Board of Directors, its general partner Drummond USA does, and from 1996 to 2006 the Board consisted of between four and five individuals. At any one time, only three of those individuals also served as members of DCI's Board. DCI's Board from 1996 to 2006 included between 13 and 18 members. Exh. 3, Webster Decl. ¶ 4.

12. From 1996 to 2006, Drummond USA had four officers, who were also officers of DCI. However, during that time period DCI had 20 to 25 officers, only four of whom at any one time were also officers of Drummond USA. *Id.* at ¶ 5.

13. DLTD's management is responsible for the day-to-day operations of DLTD. *Id.* at ¶ 6.

14. Augusto Jiménez, the President of DLTD, does not report to DCI. Exh. 2, Webster Dep. 49:8-50:11.

15. DLTD has always had its own Human Resources, Tax, Finance, Risk Management, Legal, Payroll, Shipping, Accounting, Purchasing, Operations, Security, and Sales Departments, and DCI does not participate in the operation or administration of these departments or the day-to-day operations of DLTD. Exh. 3, Webster Decl. ¶ 7; Exh. 4, Dortch Dep. 20:16-22; 107:2-14; Exh. 2, Webster Dep. 85:23-86:1; 98:14-21; 102:16-103:18; 123:7-8.

16. During the relevant time period, DLTD's home office set the policies for operations in Colombia. DLTD Exh. S, Linares Dep. 27:20-28:1.

17. DLTD is, and always has been, entirely responsible for selecting the contractors it uses and for coordinating security efforts at all of the DLTD facilities in Colombia, including at the mine, at the port, and on the rail line. Exh. 2, Webster Dep. 85:21-86:1; 102:16-103:18.

18. DCI never requested that any changes be made, never directed any changes be made, and did not have approval power over the security procedures used at DLTD's Colombian operations. *Id.* at 98:4-99:8.

19. DCI was never a signatory on any contract with any security contractor which DLTD used in Colombia. *Id.* at 103:5-10.

20. DCI did not recommend, select or train any of DLTD's security contractors. *Id.* at 103:11-15; 126:2-7.

21. DLTD's security policy and plan was created by General Rafael Peña, a DLTD employee. DLTD Exh. S, Linares Dep. 24:21-25:7; 191:13-192:9.

22. During the relevant time period, DCI's Board of Directors received periodic security reports and updates from DLTD President Augusto Jiménez, who gave these reports to the DCI Board for informational purposes only and in its capacity as the majority investor in DLTD. Exh. 2, Webster Dep. 78:21-79:4. DCI never took any action in response to these reports. *Id.* at 79:7-18; 93:8-15.

23. DCI did not approve or recommend the hiring of Jim Adkins by DLTD. *Id.* at 105:13-18.

24. Adkins was, at all times, an employee of DLTD, not DCI. *Id.* at 104:11-16.

25. Adkins was hired and paid by DLTD, not DCI. Exh. 3, Webster Decl. ¶ 8; DLTD Exh. S, Linares Dep. 130:23-132:4.

26. Adkins reported to Mike Tracy, and later Mike Zervos, in their capacities as either an officer or board member of Drummond USA, and Adkins did not report to anyone at DCI. DLTD Exh. K, Adkins Dep. 56:9-15; 66:1-6; DLTD Exh. S, Linares Dep. 137:7-20.

27. DCI had no role in the selection or payment of Jaime Blanco or his company, Industrial de Servicios y Alimentos Ltda. ("ISA"), which provided food services for DLTD's workers. Exh. 2, Webster Dep. 170:17-171:4; DLTD Exh. S, Linares Dep. 245:8-246:3.

28. Jose Miguel Linares, DLTD's Vice President of Corporate Affairs, drafted the contract between DLTD and ISA, and DCI was not a signatory on DLTD's contract with Blanco's company. DLTD Exh. S, Linares Dep. 250:12-19; Exh. 2, Webster Dep. 170:17-20.

29. DLTD paid Blanco's company directly via check. DLTD Exh. O, Peel Dep. 68:1-7.

30. DLTD has its own internal auditing department composed entirely of DLTD employees. *Id.* at 125:17-22.

31. DLTD processes its own payroll, *id.* at 134:12-16, and DLTD's purchasing department is responsible for the procurement of supplies, goods and services for DLTD's Colombian operations. Exh. 4, Dortch Dep. 20:11-22.

32. During the relevant time period, payments to vendors who provided services inside of Colombia were handled by DLTD accounting personnel, and DLTD's Special Services Department in Botoga was responsible for checking to ensure that the vendors were not on the OFAC list[4] and for performing all background and licensing checks on the vendors. Exh. 4, Dortch Dep. 25:1-26:1; DLTD Exh. O, Peel Dep. 29:1-7; 115:17-116:15.

33. DCI had no role in selecting DLTD's vendors and did not perform any background check with respect to those vendors. Exh. 4, Dortch Dep. 24:11-26:1.

34. DLTD is not required to obtain approval from DCI for any purchase orders. DLTD Exh. O, Peel Dep. 91:2-13; Exh. 4, Dortch Dep. 107:11-14.

35. DLTD promulgated its own hiring policy ("HR recruitment policy") which was in place from 1996 to 2006 and was created by Juan Fernando Serrano, the manager of DLTD's HR Department. DLTD Exh. S, Linares Dep. 31:5-32:4.

[4] The OFAC list is published by the U.S. Office of Foreign Assets Control and lists persons and entities with whom U.S. companies are prohibited from doing business due to suspected links to terrorism, narcotics trafficking, or other criminal activity. *See* http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx.

36. During the relevant time period, DLTD either performed its own background checks (including checking them against the OFAC list) on its prospective employees or hired a Colombian contractor to do so. *Id.* at 65:11-68:19.

37. Since DLTD's founding in 1987, DCI and DLTD have always prepared separate financial statements and filed separate tax returns. Exh. 3, Webster Decl. ¶ 9.

38. DLTD has been self-sustaining since at least 1996, and during the entire relevant time period DLTD was extracting enough coal in Colombia to sustain its operations and did not require DCI for financing. *Id.* at ¶¶ 10 & 11; DLTD Exh. C, Tracy Dep. 60:10-16.

39. During the entire relevant time period (1996 to 2006), DCI was extracting enough coal in the State of Alabama to sustain its operations. Exh. 2, Webster Dep. 45:4-46:21.

40. Between 1996 and 2006, DLTD was adequately capitalized and able to pay its debts without any assistance from DCI. Exh. 3, Webster Decl. ¶ 12.

41. DCI is not now, and was not during the relevant time period, a guarantor on any debt held by DLTD. *Id.* at ¶ 13.

42. DCI has never bought any coal from, or sold any coal to, DLTD. *Id.* at ¶ 14.

43. DCI has never entered into any contract with DLTD to buy, sell, ship or store any coal. Exh. 2, Webster Dep. 40:11-41:7.

44. DCI did not have any contract with DLTD to buy or sell any type of good or service between 1996 and 2006. Exh. 3, Webster Decl. ¶ 15.

45. DCI does not own any of the property or facilities that DLTD utilizes in Colombia, and DLTD, not DCI, owns the mining permits which allow it to mine coal in Colombia. *Id.* at ¶ 16.

46. DLTD owns all of DLTD's equipment utilized in its Colombian operations and does not utilize any of DCI's equipment. *Id.* at ¶ 17.

47. DCI has never appropriated or otherwise used any of DLTD's equipment and uses its own mining equipment to conduct its own operations in the United States. *Id.* at ¶ 18.

48. DLTD and DCI have separate bank accounts and keep separate books. *Id.* at ¶ 19.

49. DCI and Drummond USA hold their own respective shareholder and board of director meetings on a regular basis. *Id.* at ¶ 20.

50. DCI and DLTD have always had an unequivocal policy prohibiting any dealings whatsoever with any illegal groups in Colombia. DLTD Exh. C, Tracy Dep. 76:2-10; Exh. 2, Webster Dep. 201:21-22; DLTD Exh. S, Linares Dep. 194:1-195:8; DLTD Exh. K, Adkins Dep. 144:9-145:6.

STANDARD OF REVIEW

DCI adopts and incorporates herein by reference the summary judgment standard included in DLTD's motion. Dkt. 396 at 9-10. Specifically with respect to the issues raised by this motion, where there is a lack of sufficient evidence to place the alter ego issue in dispute, a corporate defendant is entitled to summary judgment. *See, e.g., Willard v. Fairfield Southern Co., Inc.*, 472 F.3d 817, 823 (11th Cir. 2006); *Local Union No. 59, Intern. Broth. of Elec. Workers, AFL-CIO v. Namco Elec., Inc.*, 653 F.2d 143, 146 (5th Cir. 1981).

LEGAL ARGUMENT

"Corporations are legal entities by fiction of law. Their purpose is generally to limit liability and serve a business convenience. Courts are reluctant to pierce the corporate veil and only in exceptional cases will they do so. Such instances are for fraud as where creditors are misled and defrauded or where the corporation is created for some illegal purpose or to commit an illegal act." *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1320 (11th Cir. 1998). Because the legitimate reason for the creation of a subsidiary is often to limit liability or serve a business convenience, a parent corporation generally is not liable for the acts of its subsidiary, even if its subsidiary is wholly owned. *Bestfoods*, 524 U.S. at 61. Thus, "[l]imited liability is the rule, not the exception." *Anderson v. Abbott*, 321 U.S. 349, 362 (1944). Only in extraordinary cases, where

the corporate form is being used for wrongful purposes, will courts pierce the corporate veil and disregard the corporate entity, treating the parent corporation and its subsidiary as a single entity. *Bestfoods*, 524 U.S. at 62.

Both Alabama state courts and the Eleventh Circuit require plaintiffs to satisfy the following three-prong test before a court may disregard corporate structure and impose liability on a shareholder or controlling corporation:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practices in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
> (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights; and
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499, 1507 (11th Cir. 1988), *cert. denied* 489 U.S. 1096 (1989); *Messick v. Moring*, 514 So. 2d 892, 894-95 (Ala. 1987). *See also Heisz v. Galt Industries, Inc.*, -- So. 3d --, 2012 WL 29190, at *11 (Ala. 2012).

Domination alone is insufficient to pierce the corporate veil. *Duff v. Southern Ry. Co.*, 496 So. 2d 760, 762 (Ala. 1986); *Thrift Drug, Inc. v. Universal Prescription Adm'rs*, 131 F.3d 95, 97 (2d Cir. 1997). A plaintiff must also prove that the misuse of the control or domination by the parent proximately caused the

harm or loss. *Id.*; *Connors Steel*, 855 F.2d at 1507. In this case, Plaintiffs cannot present evidence establishing any of the three prongs.

I. PLAINTIFFS CANNOT SHOW THE REQUISITE DOMINATION OF DLTD BY DCI.

To satisfy the first prong of the piercing test, Plaintiffs must establish that DCI so completely controlled DLTD's finances, policy and business practices that at the time of the alleged acts DLTD had no separate mind, will, or existence of its own. *Connors Steel*, 855 F.2d at 1506-07; *Heisz*, -- So. 3d --, 2012 WL 29190, at *11. Plaintiffs cannot do so. With respect to the "domination" or "alter ego" prong, Alabama courts and the Eleventh Circuit both examine the following non-exhaustive list of factors:

> (1) the parent and the subsidiary have common stock ownership;
> (2) the parent and the subsidiary have common directors or officers;
> (3) the parent and the subsidiary have common business departments;
> (4) the parent and the subsidiary file consolidated financial statements and tax returns;
> (5) the parent finances the subsidiary;
> (6) the parent caused the incorporation of the subsidiary;
> (7) the subsidiary operates with grossly inadequate capital;
> (8) the parent pays the salaries and other expenses of the subsidiary;
> (9) the subsidiary receives no business except that given to it by the parent;
> (10) the parent uses the subsidiary's property as its own;
> (11) the daily operations of the two corporations are not kept separate; and
> (12) the subsidiary does not observe the basic corporate formalities, such as keeping separate books and records and holding shareholder and board meetings.

Connors Steel, 855 F.2d at 1505; *Duff*, 496 So. 2d at 763 (citing *Taylor v. Standard*

Gas & Elec. Co., 96 F.2d 693, 704-05 (10th Cir. 1938) and listing the identical factors). Plaintiffs can only present evidence of three of these twelve factors.

The fact that DCI indirectly owns DLTD and that there is a partial overlap of directors is utterly insufficient to establish the requisite domination. *Bestfoods*, 524 U.S. at 61. Moreover, an application of the above factors to the undisputed facts reveals that DLTD was not a mere puppet or dummy corporation, but rather a substantial, legitimate, self-sustaining and independent business entity that retained control over its entire operation in Colombia.

A. Analysis of the *Connors Steel* Factors.

(1) Common Stock Ownership

DCI does not dispute that DLTD is an indirect majority-owned subsidiary of DCI. Statement of Facts ("SOF") ¶¶ 2-4. However, while this factor is met, it is of nominal probative value in this inquiry. *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1162 (5th Cir. 1983) (the "well-settled rule" is that "the parent's ownership of 100 percent of the subsidiary's stock" does not "defeat their corporate existence").

(2) Common Directors or Officers

While some overlap exists between the officers and directors of Drummond USA (DLTD's general partner) and DCI, *see* SOF ¶¶ 11 & 12, the United States Supreme Court has "expressly held that overlapping officers and directors is not

sufficient to expose a parent to liability for its subsidiary's actions." *Atlanta Gas Light Co. v. UGI Utilities, Inc.*, 463 F.3d 1201, 1204 (11th Cir. 2006) (citing *Bestfoods*, 524 U.S. at 69). Additionally, the Supreme Court has "established a presumption that the 'officers and directors [of the subsidiary] were acting in the capacities as . . . officers and directors [of the subsidiary]' and not of the parent." *Id.* Plaintiffs can present no evidence to rebut the presumption that Drummond USA officers and directors were acting in their capacity as Drummond USA officers and directors.

Moreover, even if DCI and DLTD did have complete identity of directors (which they do not), it would not create a genuine issue of material fact. *Bestfoods*, 524 U.S. at 69. *See also FMC Finance Corp. v. Murphree*, 632 F.2d 413, 422-23 (5th Cir. 1980)[5] ("neither ownership of all of the stock of a subsidiary nor identity of officers and directors, nor both combined, are sufficient to justify piercing the corporate veil absent additional factors") (citations omitted).

(3) Common Business Departments

DLTD operates as a distinctive corporate entity, with its own Human Resources, Tax, Finance, Risk Management, Legal, Payroll, Shipping, Accounting, Purchasing, Operations, Security, and Sales Departments, and is entirely

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

responsible for the mining, shipping and selling of the coal it extracts in Colombia. SOF ¶¶ 5 & 15. DLTD also has its own internal auditing department, processes its own payroll and has its own employees. *Id.* at ¶¶ 30 & 31. DLTD and DCI do not have common business departments and the third factor is not satisfied.

(4) Consolidated Financial Statements and Tax Returns

DCI and DLTD prepare separate financial statements, keep separate books, maintain separate bank accounts and file separate tax returns. SOF ¶ 37. In fact, DLTD has filed its own tax returns and prepared its own financial statements since its inception in 1987. *Id.* Plaintiffs do not establish this factor either. *See Estate of Thomson ex rel. Estate of Rakestraw v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 363 (6th Cir. 2008) (refusing to find that TMS, a wholly owned subsidiary of Toyota Motor Corp., was the alter ego of TMC where "[t]hey have separate books, financial records, bank accounts, and file their own taxes").

(5) DCI Does Not Finance DLTD

DLTD has been self-sustaining during the entire relevant time period of 1996 to 2006. SOF ¶ 38. During this time, DLTD was extracting and selling enough coal in Colombia to sustain its operations and did not require DCI for financing. *Id.*. The uncontroverted evidence also shows that DCI was able to sustain its operations without DLTD from 1996 to 2006. *Id.* at ¶ 39. Accordingly, this factor weighs heavily against piercing the corporate veil. *In re Beck*

Industries, 479 F.2d 410, 417 (2d Cir. 1973), *cert. denied*, 414 U.S. 858 (1973) (refusing to pierce the veil to exercise personal jurisdiction over a parent where "the proof is clear and undisputed that ever since the merger [the subsidiary] has functioned as a self-sustaining enterprise" and there was no evidence the subsidiary "had grossly inadequate capital, that the debtor-parent pays its debts, or that its sources of business is dependent in any way upon that of its parent"). *Cf. U.S. v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 694-695 (5th Cir. 1985) (piercing the corporate veil where "[t]he underlying question is whether [the subsidiary] was an economically viable, independent entity" and the subsidiary "continually had net operating losses and survived due to massive and ongoing transfusions from [the parent]").

(6) Incorporation of DLTD

DCI does not dispute that it caused the formation of DLTD. However, this statement is true in most all parent-subsidiary relationships, and thus this factor should be accorded limited weight in the context of a parent and subsidiary veil-piercing analysis.

(7) DLTD Is Adequately Capitalized

DLTD has been, and continues to be, adequately capitalized. SOF ¶¶ 38 & 40. "A court will find a corporation to be undercapitalized only when it 'has so little money that it could not and did not actually operate its nominal business as its

own.'" *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 379 (7th Cir. 2008) (citation omitted). DLTD pays its own employees and vendors, and the company makes more than enough money to cover its debts, pay its employees and sustain its Colombian operations. *Id.* DLTD's sustained economic viability and its corresponding lack of the need to rely on DCI for capital infusions constitute strong evidence that DLTD was not the alter ego of DCI. *Cf. U.S. v. Jon-T Chemicals, Inc.*, 768 F.2d at 694-695.

(8) DLTD Pays Its Own Expenses And Salaries

DLTD processes its own payroll, and DLTD's purchasing department is responsible for the procurement of supplies, goods and services for its Colombian operations. SOF ¶ 31. DCI does not oversee the day-to-day purchasing or payroll functions of DLTD. *Id.*; *see also* SOF ¶¶ 13 & 15. Moreover, DLTD has been a self-sustaining corporate entity since at least 1996 and has been able to pay its own expenses, operating costs, debts and salaries since that time. *Id.* at ¶¶ 38 & 40.

(9) DLTD Does Not Receive All of Its Business From DCI

DLTD is entirely responsible for the mining, shipping and selling of the coal it extracts in Colombia. SOF ¶ 8. DCI does not buy any of this coal from DLTD. *Id.* at ¶¶ 9, 42 & 43. Likewise, DCI does not sell DLTD any coal. *Id.* In fact, DCI did not have any contract with DLTD to buy or sell any type of good or service between 1996 and 2006, and does not have one now. *Id.* at ¶ 44. *Cf. Avco Delta*

Corp. Canada Ltd. v. United States, 540 F.2d 258, 265 (7th Cir. 1976) (piercing the corporate veil because, in addition to numerous other reasons, "the only business of [the subsidiaries] was leasing equipment to [the parent], and neither [subsidiary] produced revenues from third parties").

(10) DCI Does Not Own or Utilize DLTD's Property or Equipment

DLTD, not DCI, owns its property and facilities in Colombia. *Id.* at ¶¶ 45 & 46. DLTD also owns all of the mining equipment used in Colombia. *Id.* Moreover, DLTD, not DCI, owns the mining permits which allow it to mine coal in Colombia. *Id.* Finally, DCI has never appropriated or otherwise used any of DLTD's equipment and uses its own mining equipment to conduct its own mining operations in the United States. *Id.* at ¶ 47.

(11) DLTD's Daily Operations Are Separate

DLTD has separate and distinct business departments which are responsible for the day-to-day operations of the company, including human resources, mining operations, payroll, accounting, security, purchasing and sales. *Id.* at ¶ 15. DLTD is responsible for the mine, railroad and port security. *Id.* at ¶¶ 17-21. Further, DLTD is responsible for all of its own personnel decisions, and chooses what contractors and vendors it uses in Colombia. *Id.* at ¶¶ 13, 15 & 17. DCI is not responsible for any of these functions. *Id.* Accordingly, "the daily operations of the two corporations are separate," and this factor also weights heavily against

piercing the corporate veil. *Miles v. Am. Tel. & Tel. Co.*, 703 F.2d 193, 195 (5th Cir. 1983); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990) (declining to pierce the corporate veil where the parent corporation "observes corporate formalities" and "makes its subsidiaries responsible for daily operations including all personnel decisions").

(12) DLTD and DCI Follow Basic Corporate Formalities

DLTD operates as an entirely separate corporate entity and keeps its own books and records. SOF ¶¶ 48 & 49. Drummond USA, the general partner of DLTD, holds its own board of director meetings, separate and apart from the meetings held by DCI's Board. *Id.* Thus, DLTD and DCI observe basic corporate formalities, and this factor also counsels against piercing the corporate veil.

In sum, the first and sixth *Connors Steel* factors ("common stock ownership" and that "parent caused the incorporation of the subsidiary") are met in the instant matter. The second factor ("common directors and officers") is met in part because there is overlap between DCI's officers and directors and Drummond USA's officers and directors. However, these factors are present in nearly every parent and wholly-owned-subsidiary relationship. As the United States Supreme Court has held, this relationship is utterly insufficient to warrant piercing the corporate veil to hold the parent liable for the subsidiary's alleged acts. *See Bestfoods*, 524 U.S. at 69. Indeed, "[t]o hold otherwise would render virtually

every subsidiary the alter ego of its parent." *Logal v. Inland Steel Indus., Inc.*, 568 N.E.2d 152, 157 (Ill. 1991). Significantly, none of the other *Connors Steel* factors—upon which courts typically rely as proof of true domination and control—are met. As explained below, the evidence here is wholly insufficient to merit disregarding the corporate forms of DLTD and DCI.

B. Analysis of the *Connors Steel* Factors Together Does Not Warrant Piercing The Corporate Veil.

Courts are universally reluctant to impose liability on parent corporations absent a clear and compelling reason to do so. *Bestfoods*, 524 U.S. at 61; *Anderson v. Abbott*, 321 U.S. at 362. As outlined in Section I.A above, there is simply insufficient evidence of domination to warrant holding DCI liable for the alleged acts of DLTD. Indeed, courts that have pierced the corporate veil have required vastly more indicia of domination and complete control than what is present here.

For example, in *U.S. v. Fidelity Capital Corp.*, 920 F.2d 827 (11th Cir. 1991), the Eleventh Circuit was presented with significant evidence of domination by the parent, yet it reversed the district court's ruling which allowed the plaintiff to pierce the corporate veil. In that case, there was evidence that the parent had an established practice of acting as a "private lender" to its subsidiaries with very few formalities observed. *Id.* at 838. It was also established that the parent and subsidiary shared offices, shared the same telephone number, filed consolidated tax returns, and used the same business stationary. *Id.* at 839. Additionally, the

subsidiary had no employees of its own. *Id.* Nevertheless, the Eleventh Circuit concluded that "without other evidence that [the parent] abused [the subsidiary's] corporate form" there was insufficient evidence to warrant the conclusion that the parent and subsidiary were "one and the same." *Id.* at 840-41.

The former Fifth Circuit also recognized that "the dual personality of parent and subsidiary is not lightly disregarded, since application of the instrumentality rule operates to defeat one of the principal purposes for which the law has created the corporation." *Berger v. Columbia Broadcasting System, Inc.*, 453 F.2d 991, 994 (5th Cir. 1972), *cert. denied*, 409 U.S. 848 (1972). In *Berger*, the court acknowledged that the subsidiary's board was composed entirely of the parent's employees, and that the corporate organization chart of the parent (CBS) included the subsidiary. *Id.* at 995. The court also noted "all lines of employee authority from [the subsidiary] passed through employees of the defendant and other subsidiaries to the chairman of the board of CBS, Inc." *Id.* Finally, the subsidiary's comptroller testified that the subsidiary was a "division" of CBS. *Id.* Despite this evidence, the former Fifth Circuit reversed the district court's piercing of the corporate veil, reasoning that "the evidence adduced below concerning the relationship between the defendant and [the subsidiary] could not sustain any finding that the defendant completely dominated not only the finances, but the policy and business practices of [the subsidiary]." *Id.* The *Berger* court

emphasized that "complete stock ownership, common officers and directors, and the use of organizational charts illustrating lines of authority are all business practices common to most parent-subsidiary relationships" and are insufficient to show domination. *Id.*

The evidence of domination by DCI in the instant matter is clearly less than that present in *Fidelity Capital* and *Berger*. If piercing the corporate veil was not justified in those cases, it certainly is not justified here. Plaintiffs, therefore, have failed to meet their "notoriously difficult" burden of presenting substantial evidence "that in all aspects of business" DCI and DLTD "actually functioned as a single entity and should be treated as such," and DCI should be granted complete summary judgment. *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 485 (3d Cir. 2001).

II. PLAINTIFFS CANNOT SHOW EITHER MISUSE OR PROXIMATE CAUSE.

Even if Plaintiffs could show domination or total control by DCI (they cannot), they nevertheless cannot demonstrate that DCI either misused this control or that DCI's purported misuse of its domination or control proximately caused their injuries. *In re Birmingham Asbestos Litig.*, 619 So. 2d 1360, 1362 (Ala. 1993) ("mere domination or control of a corporation by its stockholder cannot be enough to allow a piercing of the corporate veil; rather, there must be the added elements of misuse and harm or loss resulting from the misuse."). Plaintiffs'

theory of liability in this case is that the Defendants provided material support to the AUC either directly or by knowingly employing vendors in Colombia who were providing payments to the AUC. Plaintiffs do not present any evidence that DCI either formed or used DLTD for this purpose.

As an initial matter, both DCI and DLTD have always had an unequivocal policy prohibiting any dealings whatsoever with any illegal groups in Colombia. In addition to this unequivocal policy, the timing of DLTD's founding and the subsequent events make it literally impossible for the Plaintiffs to show that this is one of the "exceptional cases" in which the court should pierce the corporate veil. *Johnson Enterprises of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d at 1320. Specifically, "such instances are for fraud as where creditors are misled and defrauded or where the corporation is created for some illegal purpose or to commit an illegal act." *Id.* Stated differently,

> Limiting one's personal liability is a traditional reason for a corporation. Unless done deliberately, with specific intent to escape liability for a specific tort or class of torts, the cause of justice does not require disregarding the corporate entity. The corporate form itself works no fraud on a [tort victim] who has never elected to deal with the corporation.

Zubik v. Zubik, 384 F.2d 267, 273 (3d Cir. 1967), *cert. denied*, 390 U.S. 988 (1968). DLTD was founded in 1987 for the legitimate business purpose of conducting coal mining operations in Colombia. The AUC, the right-wing paramilitary group to whom the Plaintiffs allege DLTD provided material support,

was not even founded until late 1996 or 1997. Therefore, it is temporally impossible for Plaintiffs to show that DLTD was "created for [the] illegal purpose" of providing material support to the AUC.

Likewise, DCI had no role in the selection or payment of Jaime Blanco's company, ISA, which provided food services for DLTD at the mine and which Plaintiffs allege served as a conduit through which DLTD provided material support to the AUC. As with all of its Colombian vendors, it was DLTD's sole decision to contract with ISA and the decision was not subject to DCI's review or approval.

Thus, even if there were sufficient evidence of complete domination by DCI, Plaintiffs have failed to present any evidence showing that DCI either misused its alleged domination of DLTD or that any such misuse proximately caused their injuries, and DCI is entitled to summary judgment. *See Electronic Switching Industries, Inc. v. Faradyne Electronics Corp.*, 833 F.2d 418, 424 (2d Cir. 1987) (refusing to pierce the corporate veil where the "plaintiff failed to allege or prove that this control and domination was used to commit wrong, fraud, or the breach of a legal duty, or a dishonest and unjust act in contravention of plaintiff's legal rights, and that the control and breach of duty proximately caused the injury complained of"); *First Health, Inc. v. Blanton*, 585 So. 2d 1331, 1335 (Ala. 1991) ("In the absence of any evidence that First Health misused its control, if any, of

First Health Courtland, or that Dr. Blanton's loss resulted from a misuse of that control, the trial court, sitting without a jury, erred in disregarding the corporate entity of First Health Courtland.").

III. THERE IS NO ADMISSIBLE EVIDENCE WHICH COULD SUPPORT THE CONCLUSION THAT DCI DIRECTLY PARTICIPATED IN ANY OF THE ALLEGED WRONGFUL CONDUCT.

Plaintiffs may argue that DCI can be held liable for these killings because it somehow directly participated in DLTD's alleged collaboration with the AUC. There are, however, only two pieces of inadmissible evidence in the record to support this argument. First, Jaime Blanco, one of the Colombian prisoners on whose testimony Plaintiffs rely, testified that Jim Adkins (a member of DLTD's security department) supposedly told him that Adkins needed to obtain Garry Drummond's approval to make payments to the AUC. DLTD Exh. N, Blanco Dep., 72:4-17; 105:19-106:1. Second, Jairo de Jesus Charris Castro, an imprisoned former paramilitary, testified that Adkins told him that Garry Drummond and other DCI executives agreed to the murder of certain union leaders by the AUC. Exh. 5, Charris Dep. 22:14-19; 24-26. Both of these statements are inadmissible hearsay and cannot be considered here. *Macuba v. Deboer*, 193 F.3d 1316, 1324-25 (11th Cir. 1999); *Rowell v. Bellsouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005).

As an initial matter, Charris' statement is irrelevant to the claims at issue here. Dkt. 30 at 11 n.8 ("[t]he murders at issue here are not alleged to involve

union leaders or members.").

Moreover, Adkins' supposed statements to either Blanco or Charris do not fit an established hearsay exception. Any argument that these statements by Adkins are admissible against DCI as authorized statements of an agent would be futile.[6] Plaintiffs may point to Adkins' testimony that he occasionally provided security information about DLTD's operations to Garry Drummond, that he met with representatives of the DCI security and legal department on his "six or seven" visits to Alabama, or that he believed Garry Drummond could have terminated his employment. DLTD Exh. K, Adkins Dep. 57:4-13; 58:8-59:21; 63:16-20. None of this makes Adkins DCI's agent.

Adkins was, at all times, an employee of DLTD, not DCI. DCI had no role in hiring Adkins. SOF ¶¶ 23-25. Indeed, Adkins was hired and paid by DLTD, not DCI. *Id. See, e.g.*, *Johnson v. Flowers Industries, Inc.*, 814 F.2d 978, 980 (4th Cir. 1987) ("when a subsidiary hires employees, there is a strong presumption that the subsidiary, not the parent company, is the employer"). Additionally, Adkins reported to Mike Tracy, and later Mike Zervos, in their capacities as either a board member or as an officer of Drummond USA. *Id.* at ¶ 26. Adkins did not report to anyone in DCI. *Id.*

[6] *Fed. R. Evid.* 801(d)(2)(D) provides that non-hearsay includes a statement offered against an opposing party that "was made by the party's agent or employee on a matter within the scope of that relationship and while it existed."

That Adkins occasionally provided security information to Garry Drummond—the CEO of Adkins' employer's parent company—is wholly insufficient to make Adkins the agent of DCI for purposes of Rule 801(d)(2)(D). *See Lippay v. Christos*, 996 F.2d 1490, 1498–99 (3d Cir. 1993) (for statements to be attributable, party must have "continuous supervisory control" over declarant); *Boren v. Sable*, 887 F.2d 1032, 1039 (10th Cir. 1989) (statement of foreman not attributable to "absentee owner"). Additionally, Adkins' subjective belief that Mr. Drummond could have terminated his employment does not make Adkins DCI's agent. *Griffin v. U.S.*, 588 F.2d 521, 528 (5th Cir. 1979) (power of termination does not establish agency); *see also Carlisle v. Deere & Co.*, 576 F.3d 649, 656-57 (7th Cir. 2009) ("the existence of an agency relationship depends on a number of facts, including the manner of hiring, the right to discharge, the manner and direction of the work of the parties, the right to terminate the relationship, and the character of the supervision of the work done") (citations omitted).

Rather, for Adkins to be considered DCI's agent, Plaintiffs must offer substantial evidence that DCI controlled Adkins in the daily functions of his job. 4 Federal Rules of Evidence Manual § 801.02[6][f][iii] ("most courts require that the party-opponent must control the daily tasks of the declarant") (citing among others *Boren v. Sable*, 887 F.2d 1032 (10th Cir. 1989)). The lack of such evidence is dispositive:

> For one to be an agent, the other party must retain the right to direct the manner in which the business shall be done, as well as the results to be accomplished, or, in other words, not only what shall be done, but how it shall be done. 'Control must be proven; and proof of control requires more than proof of mere right to determine if the person claimed to be an agent is conforming to the requirements of a contract.'

Glenn Const. Co., LLC v. Bell Aerospace Services, Inc., 785 F. Supp. 2d 1258, 1289 (M.D. Ala. 2011) (citing *Malmberg v. American Honda Motor Co., Inc.*, 644 So. 2d 888 (Ala. 1994)).

Furthermore, even if Plaintiffs could present sufficient evidence of an agency relationship (which they cannot), the hearsay statements attributed to Adkins are not admissible against DCI because if they were made, they were made outside the scope of Adkins' authority. *See Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1589 fn.5 (11th Cir. 1987) ("conduct of a servant is not within the scope of employment if it is different in kind from that authorized") (quoting Restatement (Second) of Agency, § 228(2)). In order to establish that statements of Adkins were authorized by DCI, or within the scope of Adkins' authority, Plaintiffs must present evidence of this authority other than the statements themselves. *U.S. v. Docampo*, 573 F.3d 1091, 1097 (11th Cir. 2009) (the hearsay statements at issue "'are not alone sufficient to establish the declarant's authority under [Rule 801] subdivision (C) . . . [or] (D).' Fed.R.Evid. 801(d)(2).").

There is no evidence—other than the hearsay testimony of Charris and

Blanco as to what Adkins supposedly said in their presence—to support the contention that Adkins was authorized by DCI to collaborate with the AUC to kill innocent civilians. In fact, Adkins' alleged acts are completely contrary to DCI's unequivocal policy prohibiting dealings of any kind with illegal groups in Colombia. SOF ¶ 50. *See Lloyd v. Van Tassell*, 318 F. App'x 755, 761 (11th Cir. 2009) (affirming summary judgment where the primary evidence in opposition was that a subordinate "supposedly said that [defendant] had told him to kill [plaintiff]," and holding that any argument that such statement constitutes non-hearsay under Rule 801(d)(2)(D) "fails because a directive to kill a suspect is not properly 'within the scope of the agency or employment' of a deputy sheriff").

Accordingly, Plaintiffs cannot rely on hearsay statements attributed to Jim Adkins by Colombian prisoners to defeat summary judgment in favor of DCI.

CONCLUSION

The record evidence fails to support any contention that DLTD is the alter ego of DCI, or that DLTD is so completely dominated and controlled by DCI in its day to day operations that it ceased to have an existence of its own. There is simply no justification for imposing liability against DCI based on a theory of piercing the corporate veil. Nor is there any admissible evidence linking DCI directly to the alleged wrongdoing. Accordingly, Defendant DCI requests that this Court enter summary judgment in its favor.

Dated: September 19, 2012

Respectfully submitted,

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I hereby certify that on **September 19, 2012**, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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