

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 01-3399-CIV-MORENO/Dubé

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

vs.

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

**DEFENDANT BANDEGUA'S MOTION TO DISMISS FOURTH AMENDED
COMPLAINT FOR LACK OF PERSONAL JURISDICTION**

Defendant, COMPAÑÍA DE DESAROLLO BANANERO DE GUATEMALA, S.A.
("Bandegua"), moves to dismiss Plaintiffs' Fourth Amended Complaint for lack of personal jurisdiction.

I. INTRODUCTION

On March 30, 2005, in a lawsuit in the Florida circuit court in Miami-Dade County, Florida between these exact same parties and involving the same pendent tort claims that this Court dismissed in 2003, and that arise out of the same transactions and occurrences set forth in Plaintiffs' Fourth Amended Complaint, DE-156, the Florida circuit court entered a 17-page order, with detailed findings of fact and conclusions of law, dismissing Bandegua from the case because the Florida circuit court did not have personal jurisdiction over Bandegua under Florida's long-arm statute, § 48.193, Fla. Stat. (2005), or pursuant to an alter ego theory. The Florida circuit court's order was affirmed in all respects on appeal by the Florida Third District Court of Appeal, and is therefore res judicata as to the claims against Bandegua in this case.

Despite this, Plaintiffs inexplicably have named Bandegua as a defendant in their Fourth Amended Complaint in this action, failing to plead any basis for this Court's personal jurisdiction over Bandegua under Florida's long-arm statute, and presumably resting solely on an alter-ego theory of jurisdiction that was expressly rejected by the Florida circuit court.

For the reasons set forth in this motion and in the Florida circuit court's dismissal order,

this Court does not have personal jurisdiction over Bandegua, whether pursuant to Florida's long-arm statute or a strained alter-ego theory. Accordingly, the Fourth Amended Complaint as to Bandegua should be dismissed for lack of personal jurisdiction.

II. PROCEDURAL HISTORY

On or about April 30, 2003, Bandegua moved to dismiss Plaintiffs' Third Amended Complaint, DE-77, arguing that Plaintiffs had not alleged sufficient facts to establish personal jurisdiction pursuant to Florida's long-arm statute, the federal long-arm statute, Rule Fed. R. Civ. P. 4(k)(2), or an "alter ego" theory, and supporting its motion with sworn declarations. *See* DE-87, at 67-77.

Plaintiffs responded by arguing that "Bandegua's minimum contacts, or lack thereof, are irrelevant to a jurisdictional analysis based on an alter ego theory," and that Plaintiffs made a "prima facie showing of alter ego jurisdiction." DE-88, at 53-54. Plaintiffs sought leave to take discovery concerning the alter ego allegations. *Id.*

On or about June 5, 2003, the Court denied Bandegua's personal jurisdiction motion without prejudice, and granted Plaintiffs leave to take "discovery on [the] discrete issue" of whether Bandegua is the alter ego of co-defendants Fresh Del Monte Produce Inc. ("FDMPI") and Del Monte Fresh Produce Company ("DMFPC"). DE-92.

Specifically, the Court acknowledged Plaintiffs' contention that "the minimum contacts analysis for personal jurisdiction is inapplicable because [Plaintiffs] are proceeding on an alter ego theory of personal jurisdiction," *id.* at 5, and ordered the parties "to complete discovery on whether the non-resident Bandegua is the alter ego of the resident Defendants and thus subject to the jurisdiction of this court." *Id.* at 6.

Plaintiffs thereafter served requests for production of documents and interrogatories on each of the Defendants, and took the depositions of the Defendants' corporate representatives and other witnesses concerning whether Bandegua is the alter ego of either FDMPI or DMFPC.

On or about September 19, 2003, Bandegua renewed its motion to dismiss the Third Amended Complaint for lack of personal jurisdiction, DE-127, which was followed by Plaintiffs' memorandum in opposition, DE-129, and Bandegua's reply memorandum. DE-134.

On December 12, 2003, while Bandegua's personal jurisdiction motion was still pending, the Court entered an order dismissing all counts of the Third Amended Complaint for lack of subject matter jurisdiction without prejudice (except the RICO claim, which was dismissed with

prejudice), and granting Plaintiffs leave to “file an amended complaint no later than January 15, 2004.” DE-140.

On January 9, 2004, rather than amend their Third Amended Complaint, Plaintiffs elected to appeal the Court’s dismissal order. DE-143.

On January 12, 2004, Plaintiffs re-filed their pendent tort claims against all of the Defendants in Miami-Dade County circuit court, Case No. 04-00723 CA 20 (“State Court Action), based on the identical set of facts set forth in the dismissed Third Amended Complaint, DE-77, and recently filed Fourth Amended Complaint. DE-156. A copy of the Plaintiffs’ State Court complaint is attached as *Exhibit A*.

On January 14, 2004, the Court entered an order closing this case and terminating Bandegua’s renewed motion to dismiss for lack of personal jurisdiction as moot. *See* DE-144.

On May 17, 2004, Bandegua, in the State Court Action, filed a motion to dismiss the complaint for lack of personal jurisdiction with accompanying evidentiary authority, arguing that the State Court had no personal jurisdiction over Bandegua pursuant to Florida’s long-arm statute or an alter ego theory.

On December 22, 2004, in the State Court Action, Plaintiffs filed an opposition memorandum to Bandegua’s motion to dismiss for lack of personal jurisdiction with two appendices of alleged evidentiary support for their position, to which Bandegua replied on January 24, 2005.

On February 4, 2005, at a specially set two-hour hearing, the circuit court in the State Court Action heard oral argument of counsel and considered the evidence submitted by the parties.

On March 30, 2005, after evaluating the evidence, the parties’ memoranda of law and the arguments of counsel, the State Court entered a detailed 17-page order (“Florida Personal Jurisdiction Order”) granting Bandegua’s motion to dismiss for lack of personal jurisdiction. A copy of the Florida Personal Jurisdiction Order is attached as *Exhibit B*.

The Florida Personal Jurisdiction Order contains factual findings that Bandegua “has no meaningful connection to the State of Florida,” that “Bandegua is separate and independent from [co-defendants] FDMPI and DMFPC,” and that “at no time was Bandegua formed or used by any person or entity, including, without limitation, FDMPI or DMFPC, to mislead creditors or work a fraud upon them or for any other improper purpose.” *See id.* at 3-5. It also contains

conclusions of law that Plaintiffs failed to establish long-arm jurisdiction over Bandegua, that “Bandegua does not have sufficient ‘minimum contacts’ with Florida to satisfy procedural due process concerns,” and that Plaintiffs “failed to prove either prong of the veil piercing analysis sufficient to confer personal jurisdiction over Bandegua pursuant to an alter ego theory [of jurisdiction].” *See id.* at 5-16. Accordingly, the State Court held that “[b]ecause Plaintiffs have failed to allege or prove any legal theory under which Bandegua is subject to the personal jurisdiction of this Court in Florida, the Complaint and this action against Bandegua must be dismissed.” *Id.* at 17.

On April 26, 2005, Plaintiffs’ appealed the Florida Personal Jurisdiction Order to the Florida Third District Court of Appeal.

On July 8, 2005, the Eleventh Circuit Court of Appeals in this action issued an opinion affirming in part and reversing in part this Court’s order dismissing this case for lack of subject matter jurisdiction, and holding that Plaintiffs have alleged a legally sufficient claim for mental torture under the Alien Tort Statute, 28 U.S.C. § 1350 (“ATS”), and the Torture Victim Protection Act, 28 U.S.C. § 1350, note (“TVPA”). *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005).

On July 28, 2005, Defendants filed a Petition for Rehearing *En Banc* with the Eleventh Circuit.

On January 11, 2006, the Florida Third District Court of Appeal affirmed the Florida Personal Jurisdiction Order in the State Court Action. *See Aldana v. Fresh Del Monte Produce Inc.*, 922 So. 2d 212 (Fla. 3d DCA), *rev. disp.*, 928 So. 2d 334 (Fla. 2006).

Approximately five months later, on June 23, 2006, the Eleventh Circuit Court of Appeals denied Defendants’ Petition for Rehearing *En Banc*, *see Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 452 F.3d 1284 (11th Cir. 2006), and on September 21, 2006, Defendants filed a Petition for Writ of Certiorari with the United States Supreme Court. *Del Monte Fresh Produce, N.A., Inc. v. Aldana*, Case No. 06-426. (U.S. Sup. Ct. 2006), which is pending as of the date of this filing.

On or about September 8, 2006, Plaintiffs filed their Fourth Amended Complaint in this action. DE-156. Like the Third Amended Complaint, DE-77, Plaintiffs’ Fourth Amended Complaint fails to plead any basis for jurisdiction under Florida’s long-arm statute or pursuant Federal Rule of Civil Procedure 4(k).

III. FACTS

A. Bandegua Is an Independent Guatemalan Corporation.

As demonstrated by the sworn declarations of the Defendants' representatives attached hereto and the deposition testimony in this case,¹ Bandegua is an independent, self-sustaining Guatemalan corporation which makes all major operational and business decisions through its general manager, with input from various department heads and its separate board of directors. Bandegua observes and respects all of the corporate formalities necessary to support its independence.

1. Bandegua's history and business

Bandegua was organized as a corporation in 1972 under the laws of the country of Guatemala and has continuously maintained its principal place of business in Guatemala City since 1972. Bandegua owns, leases and/or operates banana farms exclusively in Guatemala. Bandegua also purchases bananas and other fruit from independent growers and farmers in Guatemala for resale to wholesale distributors in Guatemala and other Latin American countries. Bandegua does not engage in the importation, sale or distribution of fresh fruit or any other products into Florida or the United States. Bandegua Decl., at ¶¶ 2-3; Florida Personal Jurisdiction Order at 3-4.

2. Bandegua's business operations

To operate its business, Bandegua employs approximately 2,860 employees in Guatemala, and outsources work to another approximately 330 workers. Bandegua is one of the largest non-governmental employers in Guatemala. Bandegua Decl. at ¶ 5; Florida Personal Jurisdiction Order at 4.

Bandegua's current general manager, Marco Garcia, manages Bandegua on a day-to-day basis and is responsible for making and implementing all major operational and business decisions, with input from various departments heads, who report to the general manager about various aspects of Bandegua's business in Guatemala, including but not limited to operations,

¹ The sworn declarations of Bandegua, by and through José Antonio Yock ("Bandegua Decl."), and co-defendants FDMPI and DMFPC, by and through Phillip Brazlavsky, Esq. ("Brazlavsky Decl."), are attached herewith as *Exhibits C* and *D*, respectively. Further, excerpts of the deposition transcripts of Linda Conway ("Conway Dep."), Alfredo Skinner-Klée ("Skinner-Klée Dep."), Zoltan Pinter, Esq. ("Pinter Dep.") and José Antonio Yock ("Yock Dep."), taken in this action, are attached as *Exhibits E, F, G* and *H*, respectively.

agriculture, engineering, quality control, research and technical services, financial planning, information systems, internal audit, purchasing and materials, accounting, port organization, human resources, labor relations, and financial analysis. All of the heads of these departments report directly to the general manager, who is ultimately responsible for all major management decisions. Bandegua's Board of Directors also provides input on management and strategic direction. Bandegua Decl. at ¶¶ 4, 6; Skinner-Klée Dep. at 44; Florida Personal Jurisdiction Order at 4.

Employment issues are handled by the head of Bandegua's human resources department, who reports to Bandegua's general manager. Labor relations, including negotiations over collective bargaining agreements, are handled by Bandegua's general manager, head of labor relations, and other personnel. Bandegua does not share its employees with any other company or entity, including FDMPI or DMFPC. Bandegua Decl., at ¶¶ 4, 12-13.

Bandegua's general manager establishes, develops and implements policies that affect local issues and business in Guatemala and that are not inconsistent with global policies established by Bandegua's minority shareholder, DMFPC, *e.g.*, policies requiring adherence to international, environmental, taxation, or other standards. *Id.* at ¶ 7; Yock Dep. at 39-40, 43.

To operate its business, Bandegua owns various assets and equipment, including packing stations, heavy machinery, trucks, tractors, tools and related materials. Bandegua also leases approximately 3,500 hectares of land in Guatemala. Bandegua Decl., at ¶ 10.

All of Bandegua's management employees reside and work in Guatemala. Bandegua's assets are owned and controlled by Bandegua and are not commingled with any other entity. Bandegua maintains its own bank accounts in Guatemala and does not have any bank accounts in the United States. In addition, all operating expenses (including but not limited to employee salaries and wages) and capital expenditures incurred by Bandegua are paid by Bandegua with Bandegua's funds from its own bank accounts. Documents regarding Bandegua's payment of operating expenses and capital expenditures are maintained at Bandegua's corporate office in Guatemala. When Bandegua has financed or borrowed money from third persons to pay operating or capital expenditures, Bandegua repays such loans or advances with its own funds. Moreover, Bandegua enters into agreements on its own behalf and not on behalf of any other entity. *Id.* at ¶¶ 4, 8, 20; Yock Dep. at 39; Florida Personal Jurisdiction Order ¶ 4.

As to its finances, Bandegua is self-sustaining through income earned from the sale of its

fruit it grows or purchases in Guatemala. Bandegua earned an annual profit in 2002. However, for the four years prior to 2002 (including 1998, when Bandegua's plantations suffered significant damage as a result of Hurricane Mitch), Bandegua suffered operating losses. In 1998, to raise capital, DMFPC made a capital contribution to Bandegua in the amount of \$4.8 million in exchange for additional stock in Bandegua. At no time, however, has Bandegua's financial situation in any manner compromised its ability to operate independently from any affiliated company, including, without limitation, FDMPI or DMFPC, nor has it compromised Bandegua's ability to sustain itself. Bandegua Decl., at ¶¶ 15-16; Skinner-Klée Dep. at 67. When formed in 1972, Bandegua was formed and fully capitalized by United Brands Company, a corporation unrelated to the Del Monte group of companies. Moreover, Bandegua's financial statements show that it is solvent, and that its paid-in capital is in excess of \$70 million. Bandegua, therefore, is adequately capitalized. See Declaration of Dana Kaufman, C.P.A., J.D. ("Kaufman Decl.") at ¶¶ 3-4, attached as *Exhibit I*; Florida Personal Jurisdiction Order at 4.

3. Bandegua's adherence to requisite corporate formalities

Bandegua observes all of the corporate formalities necessary to support its independence as a company under Guatemalan law and U.S. law. Bandegua has its own Consejo de Administracion ("Board of Directors"), which is separate and apart from the Board of Directors of its corporate shareholders, DMFPC, Del Monte Fresh Produce B.V., and Del Monte B.V.I. Limited. DMFPC, Del Monte Fresh Produce B.V., and Del Monte B.V.I. Limited do not manage the day-to-day operations of Bandegua. Guatemala law does not require that Bandegua hold regular Board of Directors meetings. Nevertheless, Bandegua's Board of Directors holds annual meetings in Guatemala or executes written consents in lieu of meetings. Those directors who reside outside of Guatemala typically have granted their proxy to a representative in attendance in Guatemala. Further, Bandegua holds annual shareholders meetings in Guatemala or executes written consents in lieu of annual meetings. Bandegua Decl., at ¶ 4; Yock Dep. at 34-35; Florida Personal Jurisdiction Order at 4.

Bandegua maintains its books and records (including, without limitation, to incorporation documents, by-laws, tax returns, payroll information, corporate resolutions, etc.) at its principal corporate office in Guatemala City, Guatemala or at its other corporate offices located elsewhere in Guatemala. Further, it maintains its own financial records (including but not limited to balance sheets, income statements, and property plant and equipment reports) at its main

corporate office in Guatemala City, and annually files its own corporate tax returns in Guatemala in accordance with Guatemalan law. Bandegua Decl., at ¶ 4; Conway Dep. at 48; Florida Personal Jurisdiction Order at 4.

Finally, all of Bandegua's assets are owned or leased by Bandegua and controlled or managed by Bandegua. Bandegua does not own any assets, including equipment and real and/or personal property, on a joint basis with any other company or person, and does not commingle its assets with any other company or person. Bandegua Decl., at ¶ 4; Florida Personal Jurisdiction Order at 4.

B. Bandegua Lacks Any Significant Contacts with FDMPI or DMFPC

FDMPI is strictly a holding company whose stock is publicly traded on the New York Stock Exchange. FDMPI was formed in August 1996, approximately 24 years *after* the formation of Bandegua in December 1972. FDMPI is not a direct shareholder of Bandegua or DMFPC. Rather, FDMPI owns the shares of a subsidiary company, which owns the shares of another subsidiary company, which in turn owns the shares of DMFPC, one of Bandegua's minority shareholders. FDMPI has no employees. Brazlavsky Decl., at ¶¶ 12-13, 15, 17; Florida Personal Jurisdiction Order at 4.

DMFPC was formed in December 1985, 13 years *after* the formation of Bandegua in December 1972. DMFPC performs certain limited administrative functions on an arms' length basis for its subsidiaries. However, DMFPC is not involved in the management or day-to-day operations of any affiliated and/or subsidiary company, including Bandegua. DMFPC owns shares, directly or indirectly, in various corporations, including 13.84% of the outstanding shares of Bandegua. Del Monte Fresh Produce B.V. owns 84.41% of Bandegua's outstanding shares and Del Monte B.V.I. Limited owns the remaining 1.75%. Brazlavsky, at ¶¶ 2-5; Conway Dep. at 42; Pinter Dep. at 15-16; Florida Personal Jurisdiction Order at 3-4.

FDMPI and DMFPC lack any meaningful or significant business or management contacts with Bandegua:

- FDMPI and DMFPC do not own any assets jointly with Bandegua. FDMPI and DMFPC do not commingle any assets with Bandegua.
- FDMPI and DMFPC do not use or otherwise share Bandegua's property, office space, or assets.
- FDMPI and DMFPC do not have access to Bandegua's bank accounts, assets or

property; likewise, Bandegua cannot access FDMPI's and DMFPC's bank accounts, assets or property.

- FDMPI and DMFPC do not share employees or management personnel with Bandegua, and do not supervise Bandegua's employees.
- FDMPI and DMFPC do not engage in business with Bandegua and do not conduct any business in Guatemala. FDMPI and DMFPC are not involved with the daily operations and/or management of Bandegua.
- FDMPI and DMFPC do not lend money to Bandegua and do not pay the salaries, wages and/or other expenses associated with the operation of Bandegua's business.
- FDMPI and DMFPC do not act as Bandegua's agent in Florida, the United States, or anywhere else in the world.
- FDMPI and DMFPC do not share or have common business departments or divisions with Bandegua.
- FDMPI and DMFPC keep and maintain their own books and records, and have no involvement with the maintenance of Bandegua's books and records.
- FDMPI and DMFPC did not cause the incorporation of Bandegua, since Bandegua existed for approximately 24 years *before* FDMPI was incorporated and approximately 13 years *before* DMFPC was incorporated.
- FDMPI and DMFPC do not enter into agreements on behalf of Bandegua; likewise, Bandegua does not enter into agreements on behalf of FDMPI and DMFPC.

Brazlavsky Decl., at ¶¶ 5, 10, 20; Bandegua Decl., at ¶ 4; Conway Dep. at 44; Pinter Dep. at 31; Florida Personal Jurisdiction Order at 4.

FDMPI's limited, indirect connection to Bandegua is as follows:

- Four of FDMPI's officers and/or directors have been and/or are concurrently officers and/or directors of Bandegua.
- As part of FDMPI's reporting requirements to the U.S. Securities and Exchange Commission ("SEC"), FDMPI files each year, *inter alia*, a Form 20-F that adheres to generally accepted accounting principles and includes, *inter alia*, consolidated financial information for its various direct and indirect subsidiaries, including Bandegua.
- Coöperative Centrale Raiffeisen – Boerenleenbank B.A., New York Branch, a Dutch bank ("Rabobank"), issued a credit facility to FDMPI and certain other of its subsidiaries ("Rabobank Loan Parties") on May 19, 1998, which credit facility was

amended and restated on March 21, 2003. FDMPI executed the credit agreements, promissory notes, guaranties and other collateral agreements under the credit facility. Bandegua was requested by Rabobank to execute certain collateral documents concerning its Guatemalan business operations in connection with both credit facilities.

Brazlavsky Decl., at ¶¶ 16, 18, 19.

DMFPC takes steps to protect its investments in its subsidiaries as follows:

- Four of DMFPC's officers and/or directors have been and/or are concurrently officers and/or directors of Bandegua.
- DMFPC performs certain limited administrative functions, including the consolidation of financial results for reporting to the SEC or Internal Revenue Service by DMFPC, consistent with a normal parent-subsidiary corporate relationship. DMFPC charges Bandegua, as well as its other subsidiaries, for any administrative service performed on Bandegua's behalf, which charges are repaid, settled or satisfied by Bandegua.
- DMFPC has established a Financial Policies and Procedures Manual to which FDMPI's direct and indirect subsidiaries, including Bandegua, must adhere. The Financial Policies and Procedures Manual requires Bandegua to obtain the approval of DMFPC to make capital expenditures exceeding a certain dollar threshold. Bandegua pays for all capital expenditures from its own funds. Bandegua does not need approval from DMFPC or any other company to pay its operating expenses, such as employee salaries.
- On occasion, DMFPC has advanced funds to Bandegua, which advances have been repaid, settled or satisfied by Bandegua.
- In 1998, DMFPC made a capital contribution of \$4.8 million to Bandegua in exchange for additional stock in Bandegua.

Brazlavsky Decl., at ¶¶ 4, 6-9; Conway Dep. at 28-35, 42-43; Skinner-Klée Dep. at 67.

C. Bandegua Lacks Sufficient Contacts with Florida or the United States.

Bandegua's sworn declarations demonstrate that Bandegua is not "engaged in substantial and not isolated activity" in Florida or the United States, and does not maintain "continuous and systematic general business contacts" with the Florida or the United States.

- Bandegua is an independent corporation organized under the laws of the country of Guatemala and maintains its principal office in Guatemala City, Guatemala. Bandegua makes independent business decisions and controls its own operations.
- Bandegua does not operate, conduct, engage in, or carry on a business or business venture in Florida or anywhere else in the United States. Bandegua does not file any

U.S. federal or state income taxes returns in the United States. Bandegua does not maintain an office or agency in the State of Florida or anywhere else in the United States for the conduct of business. Bandegua does not have any employees, business agents, or registered agents in the State of Florida or anywhere else in the United States. Bandegua does not conduct meetings of shareholders or directors in Florida or elsewhere in the United States.

- Bandegua has no assets in the State of Florida. Bandegua neither owns nor leases any real or personal property in the State of Florida. Bandegua maintains no bank accounts in the United States.
- Bandegua owns, leases, or operates banana (and other fresh fruit) farms in Guatemala. Bandegua sells its fruit (or acquires fruit for sale) to distributors, who acquire such fruit from Bandegua in Guatemala or in other Central American countries.
- Bandegua does not engage in the importation, sale or distribution of fresh fruit or any other products into Florida or the United States.

Bandegua Decl., ¶¶ 2-10, 12-13, 18-21; Florida Personal Jurisdiction Order at 3-4.

IV. ARGUMENT

A. **Plaintiffs Bear the Burden of Proving This Court’s Personal Jurisdiction Over Bandegua.**

“Whether a federal court has personal jurisdiction over a defendant is a question of law” *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1291 (11th Cir. 2000). “Where a district court does not conduct an evidentiary hearing on the question [of personal jurisdiction], the burden is on the Plaintiff to establish a prima facie case of personal jurisdiction over a nonresident defendant.” *Consolidated Dev.*, 216 F.3d at 1291 (citing *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990)). “When a defendant raises through affidavits, documents or testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents.” *Sculptchair, Inc. v Century Arts, Ltd.*, 94 F.3d 623, 627 (11th Cir. 1996); accord *Polskie Oceaniczne v. Seasafe Transport A/S*, 795 F.2d 968, 972 (11th Cir. 1986) (“[T]he plaintiff is required to substantiate the jurisdictional allegations in the complaint by affidavits or other competent proof, *and not merely reiterate the factual allegations in the complaint.*”). Moreover, when jurisdiction is based on piercing the corporate veil, the “party seeking to pierce the corporate veil bears the burden of proof.” *In re Hillsborough Holdings Corp. v. Celotex Corp.*, 166 B.R. 461, 468 (Bankr. M.D. Fla. 1994).

B. The Florida Personal Jurisdiction Order Is Res Judicata.

“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) (relying on *Allen v. McCurry*, 449 U.S. 90 (1980)). “Defendants are entitled to rely on the earlier judgments by courts of competent jurisdiction, and should not be forced to submit to a retelling of the same claims under a technically different guise.” *Brennon v. Lyon*, 915 F. Supp. 324, 329 (M.D. Fla. 1996) (emphasis added).

“It is well settled that res judicata applies to jurisdictional questions.” *Rubaii v. Lakewood Pipe of Texas, Inc.*, 695 F.2d 541, 543 (11th Cir. 1983). Where, as here, “the Florida courts have determined that Florida lacks jurisdiction over [defendant] . . . , the doctrine of res judicata bars further litigation on this matter in any federal district court sitting in Florida.” *Rubaii*, 695 F.2d at 543 (emphasis added).

Specifically, the doctrine of res judicata in conjunction with 28 U.S.C. § 1738² precludes a plaintiff from pursuing in federal court a claim previously litigated in state court.” *Saboff v. St. John’s River Water Mgt. Dist.*, 200 F.3d 1356, 1359 (11th Cir. 2000); *Harbuck v. Marsh Block & Co.*, 896 F.2d 1327, 1328 (11th Cir. 1990) (citing, *inter alia*, 28 U.S.C.A. § 1738). “Where the question of personal jurisdiction has been fully and fairly litigated and finally decided in the state court, . . . that decision must be accorded full faith and credit in the federal court.” *Id.* at 1329. In addition, “state court personal jurisdiction determinations have res judicata effect even as to their federal due process aspects.” *Id.*

² Such Acts, records and judicial proceedings [of any court of any such State, Territory or Possession] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (“State and Territorial statutes and judicial proceedings; full faith and credit”). “Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.” *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984) (quotation and citations omitted).

When a federal court exercises federal question jurisdiction and is asked to give res judicata effect to a state court judgment, it must apply the res judicata principles of the law of the state whose decision is set up as a bar to further litigation. *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1509 (11th Cir. 1985); *Fields v. Sarasota-Manatee Airport Authority*, 755 F. Supp. 377, 379 (M.D. Fla. 1991) (quoting *Amey, Inc.*, 758 F.2d at 1509). Under Florida law, res judicata bars subsequent litigation where there is: “1) identity in the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the actions; and 4) identity of the quality or capacity of the person for or against whom the claim is made.” *Fields*, 755 F. Supp. at 379 (citations omitted).

All four requirements of res judicata are clearly met in this action. *First*, in both this action and the State Court Action, Plaintiffs sought compensation for their claims against Bandegua. *Second*, identity of the cause of action is found where there is a “similarity of the facts essential to the maintenance of both actions.” *Id.* (quoting *Amey, Inc.*, 758 F.2d at 1510). Plaintiffs’ claims in this action and the State Court Action are founded upon the exact same facts and circumstances. *Third*, the named plaintiffs and defendants to the State Court Action are identical to those named in this action. *Fourth*, in both this action and the State Court Action, the claims were made by and against identical parties in the same quality or capacity. Compare Fourth Amended Complaint, DE-156, with State Court complaint, attached as *Exhibit A*.

The Florida Personal Jurisdiction Order was affirmed by the Florida Third District Court of Appeal, and all requisites for applying res judicata have been satisfied.³ See *Harbuck*, 896

³ The findings of fact and law set forth in the Florida Personal Jurisdiction Order also have a preclusive effect on this Court under the doctrine of collateral estoppel. See *Brennon*, 915 F. Supp. at 328; *Callasso v. Morton & Co.*, 324 F. Supp. 1320, 1324-25 (S.D. Fla. 2004). “[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 action.” *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 170-71 (1984) (citations omitted). “[F]ederal courts considering whether to give preclusive effect to state court judgments must apply the State’s law of collateral estoppel.” *Vazquez v. Metro. Dade Co.*, 968 F.2d 1101 (11th Cir. 1992) (citing *Migra*, 465 U.S. at 81). Under Florida law, “collateral estoppel applies when the identical issue has been litigated between the same parties, and the particular matter was fully litigated and determined in a contest that results in a final decision of a court of competent jurisdiction.” *Paresky v. Miami-Dade County Bd. Of County Comm’rs.*, 893 So. 2d 664, 665-66 (Fla. 3d DCA 2005). See also *Callasso*, 324 F. Supp. 2d at 1325. In addition, the prior determination of the issue must have been a critical and necessary part of the judgment. *Gonzalez v. Florida Dep’t of Highway Safety & Motor Vehicles*, 237 F. Supp.1338, 1366 (S.D. Fla. 2002). All elements of the collateral

F.2d at 1329-30; *Rubaii*, 695 F.2d at 543. As a matter of law, therefore, Plaintiffs' claims against Bandegua in this Court are barred for lack of personal jurisdiction.

C. There Is No Personal Jurisdiction Under Rule 4(k) or Florida's Long-Arm Statute.

There is no allegation in the Fourth Amended Complaint or sufficient evidence to prove that Bandegua, on its own, has sufficient "'minimum contacts' with [Florida or the United States as a whole] such that the maintenance of the suit does not offend 'traditional notions of failure play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). There is no "specific jurisdiction" over Bandegua because there is no allegation or evidence that Plaintiffs' causes of action "arose out of or relate to" any contacts by Bandegua in Florida or the United States. *See* 48.189(1)(a); *see also Securities and Exchange Commission v. Carrillo*, 115 F.3d 1540, 1542 n.2 (11th Cir. 1997) (specific jurisdiction may be exercised over a defendant in a suit arising out of or related to defendant's contacts with the forum); *American Overseas Marine Corp. v. Patterson*, 632 So. 2d 1124, 1126 (Fla. 1st DCA 1994), *rev. denied*, 641 So. 2d 1346 (Fla. 1994) (specific jurisdiction "requires a causal connection between the defendant's activities in the forum state and the plaintiff's cause of action"); Florida Personal Jurisdiction Order at 5-10.

Likewise, there is no "general jurisdiction" over Bandegua under § 48.193(2), Fla. Stat., or Rule 4(k)(2), Fed. R. Civ. P., because there is no evidence that Bandegua has "continuous and systematic general business contacts" with Florida or the United States. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Consolidated Dev.*, 216 F.3d at 1292; *Meier v. Sun Int'l Hotels*, 288 F.3d 1264, 1269 n. 6 (11th Cir. 2002); *Woods v. Nova Cos. Belize, Ltd.*, 739 So. 2d 617, 620 (Fla. 4th DCA 1999). *Compare* Bandegua's lack of contacts with Florida and the United States, Bandegua Decl. at ¶¶ 18-22, *with Helicopteros*, 466 U.S. at 410-12 (travel by defendant's CEO to forum state for contract negotiations, defendant's purchase of \$4 million of helicopters, equipment and training services from company in forum state, acceptance of checks drawn on banks located in forum, and sending defendant's employees to forum state for training and consultation over seven year period was insufficient as a matter of law to confer general jurisdiction); *see also* Florida Personal Jurisdiction Order at 5-10.

estoppel analysis are present in this action and support its application against Plaintiffs.

D. Plaintiffs Cannot Pierce the Corporate Veil of Bandegua Under Any Applicable Law to Confer Personal Jurisdiction Over Bandegua.

As the United States Supreme Court has stated, “the doctrine of piercing the corporate veil . . . is the rare exception.” *Dole Food Company v. Patrickson*, 538 U.S. 468, 475 (2003). Indeed, “courts are reluctant to pierce the corporate veil and will do so only in exceptional cases where there has been *extreme abuse* of the corporate form.” *Government of Aruba v. Sanchez*, 216 F. Supp.2d 1320, 1362 (S.D. Fla. 2002) (emphasis added).

To pierce the corporate veil, under Florida or federal law,⁴ Plaintiffs must prove (1) that Bandegua is the “mere instrumentality” of FDMPI and/or DMFPC, and (2) that FDMPI and/or DMFPC engaged in “improper conduct” through the use of Bandegua.⁵ See *United States v. Bestfoods*, 524 U.S. 51, 62 (1998) (“[T]he corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.”); *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So. 2d 1114, 1120 (corporate veil will be pierced where the corporation is the alter ego of its stockholders *and* it was organized or employed to mislead creditors or work a fraud upon them); *MCI Telecommunications*, 913 F. Supp. at 1541 (under federal law, corporate veil will be pierced where subsidiary is the mere

⁴ As this Court noted in *General Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp.2d 1335 (S.D. Fla. 2002), “[g]enerally, a federal court with federal question jurisdiction looks to the state in which it sits” in determining whether personal jurisdiction exists. *Id.* at 1340. Except where Congress has totally preempted state law via legislation that serves as the basis for federal subject matter jurisdiction, see *MCI Telecommunications Corp. v. O’Brien Mktg., Inc.*, 913 F. Supp. 1536, 1540 (S.D. Fla. 1995), the forum state’s law governs whether a court may assert personal jurisdiction over, as opposed to determining liability of, a foreign corporation pursuant to an alter ego theory. Nevertheless, whether Florida law or federal law applies is not determinative of Bandegua’s personal jurisdiction motion, because both Florida and federal law are substantially similar, and Plaintiffs cannot satisfy any of the requisite elements.

⁵ Some federal courts have stated that, outside of the common law alter ego analysis, “a corporate entity may be disregarded in the interests of public convenience, fairness and equity. In applying this rule federal courts will look closely at the purpose of the federal statute [involved] to determine whether the statute places importance on the corporate form.” *MCI Telecommunications*, 913 F. Supp. at 1541. The ATS and the TVPA are federal statutes strictly conferring federal subject matter jurisdiction over certain limited claims arising under color of international law. These statutes do not suggest that the “corporate form” should be disregarded. Moreover, there are no public convenience, fairness, or equitable concerns that would mandate that this Court disregard the corporate form of Bandegua outside of the strict and narrow exceptions arising under common law.

instrumentality of its owner, and the control exercised by the parent was used to commit fraud or other improper conduct).

The record evidence shows that under Florida law or federal law, Plaintiffs cannot satisfy the stringent threshold to show that Bandegua is a mere alter ego.

1. Bandegua is not the “mere instrumentality” of FDMPI or DMFPC

“It is well established that as long as a parent and a subsidiary are separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other.” *Consolidated Dev.*, 216 F.3d at 1293; *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (jurisdiction over a parent corporation does not automatically establish jurisdiction over a wholly owned subsidiary; each defendant’s contacts with the forum state must be assessed individually).

An exception to this rule is if the subsidiary corporation is a “mere instrumentality” of the parent corporation. To be a “mere instrumentality,” the subsidiary must be *completely dominated* by the parent:

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.*

MCI Telecommunications, 913 F. Supp. at 1541 (emphasis added); *see also United Steel Works of Am., AFL-CIO-CLC v. Connors Steel Co.*, 855 F.2d 1499, 1507 (11th Cir. 1988) (same); 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 43, at 204-05 (“The control necessary to invoke what is sometimes call the ‘instrumentality rule’ is not mere majority or complete stock control but such domination of finances, policies and practices that the controlled corporation has, so to speak, no separate mind, will or existence of its own and is but a business conduit for its principal.”).

Moreover, “the line-of-business reporting and general oversight of the operations of a subsidiary by a parent is equally common and proper.” *In re Hillsborough Holdings*, 166 B.R. at 472. Indeed, “there is nothing inherently improper about corporations creating subsidiaries to perform specific functions. This is what holding companies do. A contrary finding would ‘ignore the historical justification for the corporate enterprise system.’” *Sun Trust Bank v. Sun Int’l Hotels, Ltd.*, 184 F. Supp.2d 1246, 1268-69 (S.D. Fla. 2001) (quoting *Advertects, Inc. v. Sawyer Indus., Inc.*, 84 So. 2d 21 (Fla. 1955)).

Under no circumstances can Plaintiffs sustain their burden of proving that FDMPI or DMFPC totally dominates Bandegua such that Bandegua has no separate mind, will or existence of its own. *First*, Plaintiffs' entire alter ego theory is based on the naked, but false, allegation in the Fourth Amended Complaint that Bandegua was created by FDMPI for "the sole purpose of achieving [FDMPI's] objectives with respect to the production, marketing, sale and distribution of its fruit products," and that Bandegua is "under the direct managerial and financial control of [FDMPI] to the extent that [Bandegua has] no or insignificant corporate identities or financial assets of [its] own." Fourth Amended Complaint, at ¶ 17. However, FDMPI, which was incorporated *24 years after* Bandegua, is nothing more than a holding company that has no employees and does not engage in business with Bandegua or in Guatemala. Brazlavsky Decl., at ¶¶ 12, 14-55, 20. FDMPI does not assert *any* control (much less "domination") over the day-to-day operations of Bandegua, its finances or its policies. *Id.* at 20.

The same holds true for DMFPC's relationship with Bandegua. DMFPC, which was incorporated *13 years after* Bandegua, does not engage in business in Guatemala and is not involved in the day-to-day operations and/or management of Bandegua. *Id.*, at ¶¶ 2, 5, 10. Further, DMFPC's limited oversight of its subsidiaries by, *inter alia*, requiring its subsidiaries, including Bandegua, to obtain approval for capital expenditures exceeding certain monetary thresholds is "not only proper but common and has been approved by the courts." *In re Hillsborough Holdings*, 166 B.R. at 472; *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 151-52 (3d Cir. 1988) (parent's "widespread involvement" in financial and management decisions of subsidiary, including "close scrutiny of new capital expenditure projects," did not rise to "high standard of domination necessary to pierce the corporate veil"); *Quarles v. Fuqua Indus., Inc.*, 504 F.2d 1358, 1363-64 (10th Cir. 1974) (Among other contacts, parent's financial control over subsidiary, including approval of budgets, monthly contact regarding financial issues, provision of adequate capital on open account basis, and purchasing insurance for subsidiary were not sufficient to confer personal jurisdiction pursuant to alter ego theory.); *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 267 (D. Del. 1989) (approval of "major expenditures and policies" merely demonstrated that parent and subsidiary were "closely connected" and did not warrant piercing the veil pursuant to an alter ego theory); *Akzona Inc. v. E.I. Du Pont De Nemours & Co.*, 607 F. Supp. 227, 237-40 (D. Del. 1984) (parent, among other contacts, requiring subsidiary to seek approval for capital expenditures exceeding a certain dollar

amount was insufficient to confer personal jurisdiction pursuant to an alter ego theory); *Fidenas AG v. Honeywell Inc.*, 501 F. Supp. 1029, 1034-37 & 1034 n.7 (S.D.N.Y. 1980) (fact that subsidiary was required to obtain parent's approval for expenditures over a certain level did not support piercing the corporate veil pursuant to an alter ego theory).

As the court in *In re Hillsborough Holdings* aptly stated:

Also, the [plaintiffs] contend that the requirement of approval by the parent of capital expenditures, acquisitions and sales of capital assets was improper. There is substantial authority to support the proposition that such involvement by a parent is not only proper but common and has been approved by the courts. * * * It would have been sheer, utter folly, and would defy common business sense to require the parent to stand aloof with its eyes closed to the subsidiary's activities concerning the acquisition and sale of capital assets. [The parent] owed, as a fiduciary, the duty to its stockholders to assure that nothing done by its wholly owned subsidiaries impaired or put in jeopardy the investment of its shareholders.

166 B.R. at 472.

Therefore, Plaintiffs' allegations that FDMPI or DMFPC created Bandegua "for the sole purpose of achieving [FDMPI's (or DMFPC's)] objective with respect to the production, marketing, sale and distribution of its fruit products," Fourth Amended Complaint, ¶ 17, and that Bandegua is "under the direct managerial and financial control of [FDMPI (or DMFPC)] to the extent that [Bandegua has] no or insignificant corporate identities or financial assets of [its] own," *id.*, are not only inaccurate factually, but also legally irrelevant. As the legal authorities above have acknowledged, shareholders such as DMFPC are permitted to exercise some control over the corporations that they own. However, without complete "domination," mere ownership, direction and control are not sufficient legal bases to pierce the subsidiary's corporate veil.

Second, the Eleventh Circuit considers 12 factors in determining whether a subsidiary is the "mere instrumentality" of its parent:

(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 filed 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.

United Steel Workers, 855 F.2d at 1505.

An analysis of these factors demonstrates that Bandegua is not the mere instrumentality or alter ego of FDMPI or DMFPC. Specifically, only factors (1) and (2), concerning stock ownership and common officers and directors, are remotely implicated in this case. However, it is hornbook law that “the exercise of the ‘control’ which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That “control” includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders. Nor will a duplication of some or all of the directors or executive officers be fatal.

Bestfoods, 524 U.S. at 61-62 (ellipses in original); *see also United States v. Jon-T Chem., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985) (“Nevertheless, our cases are clear that one-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying the alter ego theory to pierce the corporate veil.”); *Meterlogic, Inc. v. Copier Solutions, Inc.*, 126 F. Supp.2d 1346, 1358 (S.D. Fla. 2000) (“overlap of officers is insufficient to support a finding that the subsidiaries are the alter ego of their corporate parents”).

Therefore, there is no evidence to show an “extreme abuse” of Bandegua’s corporate form, and/or the total “domination” of Bandegua, by either FDMPI or DMFPC, such that Bandegua has no separate mind, will or existence of its own. *Compare* the lack of contact between Bandegua, on the one hand, and FDMPI and/or DMFPC, on the other, *supra* § III(B) of this motion, *with* the contacts between the parent and subsidiary in *Sun Trust Bank*, 184 F. Supp.2d at 1268-69 (defendant corporate entities sharing a business address and having overlapping officers and employees; authorizing subsidiary’s employees to sign checks on bank accounts held by the parent corporation; parent corporation making the final decisions regarding the subsidiary’s advertising content; and parent’s officers and employees frequently traveling to Florida “for the purposed of discussing various financial, administrative and marketing issues relating to operations” were not sufficient to confer personal jurisdiction pursuant to an alter ego theory).

Accordingly, Plaintiffs cannot pierce Bandegua’s corporate veil to confer jurisdiction pursuant to an alter ego theory as a matter of law.

2. Neither FDMPI nor DMFPC organized or used Bandegua for an improper purpose.

Both Florida law and federal law require Plaintiffs to prove that Bandegua was organized or used for an improper purpose, *e.g.*, fraud. *See Dole Food Co.*, 538 U.S. at 468 (“The doctrine of piercing the corporate veil, however, is the rare exception, applied in the case of fraud or certain other exceptional circumstances.”); *Bestfoods*, 524 U.S. at 62 (“[T]he corporate veil may be pierced and the shareholder held liable for the corporation’s conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.”); *Dania Jai-Alai*, 450 So. 2d at 1120 (corporate veil will be pierced where the corporation is the alter ego of its stockholders *and* it was organized or employed to mislead creditors or work a fraud upon them); *MCI Telecommunications*, 913 F. Supp. at 1541 (under federal law, corporate veil will be pierced where subsidiary is the mere instrumentality of its owner, and the control exercised by the parent was used to commit fraud or other improper conduct).

No detailed analysis is necessary. The record is undisputed that Bandegua was formed *before* FDMPI and DMFPC were created, *see* Bandegua Decl., at ¶ 2; Brazlavsky Decl., at ¶¶ 2, 12, and that FDMPI and DMFPC never used Bandegua’s “corporate structure fraudulently to commingle, convert or deplete property or assets, or for any other improper purpose.” Brazlavsky Decl., at ¶¶ 21-22; Bandegua Decl., at ¶ 23. Nor is there any allegation that Bandegua was used in this case to achieve an improper purpose. At worst, Plaintiffs allege that employees or agents of Bandegua committed a tort against Plaintiffs in Guatemala. Absent evidence that Bandegua or its employees were instructed by FDMPI or DMFPC to commit such torts, FDMPI or DMFPC are insulated from any resulting liability.

Accordingly, Plaintiffs cannot pierce Bandegua’s corporate veil to confer personal jurisdiction as a matter of law.

V. CONCLUSION

For the reasons set forth above, Bandegua respectfully requests the Court to dismiss the Fourth Amended Complaint and this action for lack of personal jurisdiction as to Bandegua.

Dated: October 18, 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18, 2006, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/Robert Harris

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