

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
Miami Division

Case No. 01-3399-CIV-MORENO / DUBE

ANGEL ENRIQUE VILLEDA ALDANA, *et al.*

Plaintiffs,

v.

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

Defendants.

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

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Bandegua's renewed Motion to Dismiss for Lack of Personal jurisdiction is premised entirely on its strategic misrepresentation of key facts. What jurisdictional discovery actually demonstrates is that Bandegua is controlled entirely by its resident Defendant parents,<sup>1</sup> whose contacts can be imputed to Bandegua for purposes of alter ego jurisdiction. The level of operational and financial control extends to all aspects of Bandegua's day-to-day operations, including all aspects of Bandegua's banana production and its labor and employee relations. Even decisions as simple as whether to purchase a laptop computer or close the office early for Christmas is determined by Del Monte. Significantly, even Del Monte has admitted in its corporate filings that its "global business" is "conducted through subsidiaries" on "company controlled farms."<sup>2</sup> These facts, together with the other evidence detailed by Plaintiffs herein,

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<sup>1</sup>Fresh Del Monte Produce, Inc. ("Del Monte, Inc.") and Del Monte Fresh Produce Company ("Del Monte Company") (collectively referred to herein as "Del Monte").

<sup>2</sup>In response to Bandegua's declarations, Plaintiffs have submitted documents and deposition testimony obtained through jurisdictional discovery, permitted by this Court and conducted in 2003, to supplement the allegations in their Complaint. These materials have been organized into Appendix I ("App. I") which contains documents and/or relevant excerpts of documents as Exhibits 1-19, and Appendix II ("App. II") which contains excerpts of relevant deposition testimony as Exhibits A-D. *See* App. I: Exh. 1 at pp. 10, 12, 15, 20.

were obtained directly from Defendants' own corporate documents and deposition testimony, and they rebut any assertion in the declarations submitted by Bandegua that it is an independent entity. Not only must Plaintiffs' evidence be believed, but they are entitled to all reasonable inferences and to have any conflicting evidence submitted by Defendants construed in their favor. *Meir v. Sun Int'l Hotels*, 288 F.3d 1264, 1269 (11<sup>th</sup> Cir. 2002).

Recognizing that its declarations are likely to fall short, particularly in light of Del Monte's admission of control over Bandegua to its investors, Bandegua attempts to convince this Court that it is bound by a Florida state court's ruling denying personal jurisdiction based on considerations specific to Florida state law. While this Court may be bound to the state court's legal interpretation of Florida's long arm statute, it certainly is not bound by the state court's determination pertaining to alter ego jurisdiction, as this Court must apply different standards based on federal common law. Under this broader federal standard, there is no requirement of improper conduct with regards to the corporate form itself as required under Florida law. Rather, the corporate form can be disregarded in the interest of public convenience, fairness and equity, as the paramount interest is to promote the ends of the federal statute at issue.

Subjecting Bandegua to the jurisdiction of this Court is particularly appropriate in this case, which arises under the Alien Tort Claims Act (ATS) and Torture Victims Protection Act (TVPA), 28 U.S.C. §1350, for the torture inflicted upon Plaintiffs by Defendants' agents and employees to prevent them from organizing a work stoppage at Bandegua. There is now no question that Plaintiffs' federal torture claim is viable, and belongs in this Court, as indicated by the Supreme Court's recent decision to decline review of the Eleventh Circuit's remand of the case. *Fresh Del Monte Produce Inc. v. Aldana*, No. 06-426, 2006 WL 2783671, at \*1 (U.S. Nov. 13, 2006). Bandegua, along with its Defendant parent corporations,<sup>3</sup> should therefore be required to answer for its participation in the torture of Plaintiffs.

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<sup>3</sup> Regardless of a ruling on personal jurisdiction over Bandegua, the case would still go forward against the Del Monte parents, neither of which have raised a personal jurisdiction challenge, and both of which can be liable for their direct role in Plaintiffs' torture, as well as for any of their acts that aided and abetted those violations. *See* Section (E), *infra*.

## II. STATEMENT OF JURISDICTIONAL FACTS<sup>4</sup>

Defendant Bandegua is a wholly-owned subsidiary of Defendant Del Monte, Inc. App. I: Exh. 1 at p. 23.<sup>5</sup> Del Monte, Inc. is in turn a “holding company” controlled by the Abu-Ghazaleh family, and it exists solely to hold the interests of various Del Monte entities that operate its global business of producing and marketing fresh and packaged fruit. App. I: Exh.1 at pp.10-11. Del Monte, Inc. is a “global business” “conducted through subsidiaries” on “company-controlled farms.” App. I: Exh.1 at pp. 10, 12, 15, 20. In the case of Bandegua, Del Monte, Inc. holds its interest through three other subsidiaries, including Defendant Del Monte Company. *See* Deposition of Zoltan Pinter (“Pinter Dep.”), App. II: Exh. A at 15-16.

The role of Bandegua within the Del Monte enterprise is to produce Del Monte bananas for distribution and sale -- primarily to North America. App I: Exh.1 at pp. 13, 15. Bandegua does not sell its bananas to any other entity outside of the Del Monte enterprise. Deposition of Alfred Skinner-Klee (“Skinner Dep.”), App. II: Exh. C at 26-27. Bandegua’s production of the bananas is controlled by Del Monte through its common officers and/or directors with Bandegua. *See* Declaration of Phillip Brazlavsky (“Brazlavsky Decl.”), submitted by Bandegua, at ¶¶ 6, 16 (admitting the overlap of directors between Del Monte and Bandegua).

Del Monte’s control extends to many significant aspects of Bandegua’s operations, including production, labeling, and distribution of the bananas, as well as compliance with quality assurance and environmental standards. App. I: Exh. 2. Del Monte also directly controls Bandegua’s day-to-day labor and employment policies. *See* App. I: Exhs. 3-5. Both Mr. Skinner-Klee and Mr. Yock (two of Bandegua’s Directors) also confirmed that they do speak to

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<sup>4</sup> In addition to the facts presented herein obtain through jurisdictional discovery, Plaintiffs have also set forth the basis for alter ego jurisdiction in their Fourth Amended Complaint (“FAC”). *See* FAC at ¶¶ 12-18 (stating Bandegua is a wholly owned subsidiary of Del Monte; that Bandegua is under the direct supervision and control of Del Monte; that Bandegua shares common officers and directors; that Bandegua has been inadequately capitalized; and that Bandegua has failed to observe corporate formalities).

<sup>5</sup> A copy of Del Monte, Inc.’s most recent 20-F filing for year 2005, containing the same corporate information as that referenced by Plaintiffs herein, is available at: <http://www.sec.gov/Archives/edgar/data/1047340/000095014406001839/g99840e20vf.htm>.

*Del Monte's* representatives regarding *Bandegua's* labor and employment issues. Skinner Dep., App. II: Exh. C at 19-20; Yock Dep., App. II: Exh. B at 26-27. In addition, Mr. Yock, who is also *Del Monte's* Regional Officer of Latin America Operations, negotiated agreements on behalf of *Del Monte* to resolve the labor conflict giving rise to Plaintiffs' claims. App. I: Exhs. 6-7, 17. It was also Del Monte, not Bandegua, also arranged to pay for Plaintiffs' relocation to the United States as part of the agreement to remove them from ongoing threats of violence in Guatemala. App. I: Exh. 8.

Del Monte also requires that Bandegua seek approval from Del Monte prior to making *any* public statement. App. I: Exh. 9. Bandegua does not even carry its own risk and liability insurance policies, but instead is named under Del Monte's policy. App. I: Exh. 10. Indeed, due to the level of day-to-day control exercised by Del Monte, Bandegua is referred to as Del Monte's "Guatemala Division" by senior level Del Monte employees, including the former Finance manager for Bandegua. Skinner Dep., App II: Exh. C at 42; App. I: Exhs. 11-14. This characterization is further reinforced by Bandegua's use of the Del Monte seal on its letterhead, unmistakably holding itself out to the public as a unit of Del Monte. *See. e.g.*, App. I: Exh. 8.

In addition to operational control, Del Monte exercises significant financial control over Bandegua. Specifically, Bandegua has operated with inadequate capital during the time relevant to Plaintiffs' Complaint, from 1994-2003, and raised the necessary operating capital only by repeated infusions of cash from Del Monte. Skinner Dep. App. II: Exh. C at 65-67. Moreover, Bandegua cannot make any capital expenditure over \$1,000 without prior authorization by Del Monte's Chief Operating Officer, Hani El-Naffy, as this would be "in violation of company policy". *See* Deposition of Linda D. Conway ("Conway Dep."), App. II: Exh. D at 27-32; Yock Dep., App. II: Exh. B at 37-38. *See also* App. I: Exhs 15, 16 (requesting permission to purchase laptop computer and water tank).

It is not at all surprising that Del Monte maintains this level of day-to-day oversight of Bandegua's finances, as the bulk of the funds being used by Bandegua are Del Monte's. Indeed, Del Monte treats Bandegua's assets as its own, as evidenced by the fact that Del Monte leveraged *all* of Bandegua's assets to secure a Del Monte loan with no corporate formalities observed between the two entities in terms of consideration to Bandegua. *See* Conway Dep., App II: Exh. D at 44, 45; Skinner Dep., App II: Exh. C at 72-73. Considered collectively, along with

Del Monte's own admission of control over Bandegua, these foregoing facts are more than sufficient to support a finding of alter ego jurisdiction under federal common law.

### III. STANDARD OF REVIEW FOR PERSONAL JURISDICTION

The Eleventh Circuit has stated unequivocally that “a motion to dismiss . . . for lack of personal jurisdiction should . . . be treated with caution, and denied if the plaintiff alleges sufficient facts in his complaint to support a reasonable inference that the defendant can be subjected to jurisdiction within the state.” *Bracewell v. Nicholson Air Services, Inc.*, 680 F.2d 103, 104 (11th Cir. 1982). Moreover, when a Court does not conduct an evidentiary hearing, as is the case here, Plaintiffs need only establish a prima facie case of personal jurisdiction. *Coca-Cola Foods v. Empresa Commercial Internacional de Frutas*, 941 F. Supp. 1175, 1178 (M.D. Fla. 1996). This prima facie standard applies even when the parties have engaged in discovery. *Meir v. Sun Int'l Hotels*, 288 F.3d 1264, 1269; 1272, n.12 (11th Cir. 2002). Further, the court must construe all reasonable inferences in favor of plaintiffs, including any inference to be drawn from conflicting evidence submitted by defendants. *Id.* at 1269. *See also Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990).

### IV. LEGAL ARGUMENT

#### A. The Florida State Court's Personal Jurisdiction Ruling is Inapplicable to this Court's Jurisdictional Analysis Under Federal Common Law.

As an initial matter, this Court is not precluded from reaching its own decision with regards to personal jurisdiction over Bandegua, as an alter ego of its Del Monte parents.<sup>6</sup> Rather, this Court must apply its own federal common law, which calls for different legal standards and which must promote the purpose of the two federal statutes at issue in this case, the ATS and TVPA. Claim or issue preclusion is available only when the legal and factual issues in both

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<sup>6</sup> *See, e.g., Meterlogic, Inc. v. Copier Solutions, Inc.*, 126 F.Supp.2d 1346, 1357 (S.D. Fla. 2000) (holding that in lieu of a minimum contacts analysis, a party may establish personal jurisdiction over a foreign corporation by demonstrating that it is the alter ego of a defendant corporation which itself is subject to personal jurisdiction).

proceedings are identical. *See, e.g., Magluta v. U.S.*, 952 F. Supp. 798, 804 (S.D. Fla. 1996) (citing *Vazquez v. Metropolitan Dade County*, 968 F.2d 1101, 1107 (11th Cir.1992)); *Nwosun v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1257 (10th Cir.1997). It is well established that “issues are not identical “if the second action involves application of a different legal standard, even though the factual setting of both suits [are] the same.” *Chemi SpA v. GlaxoSmithKline* 385 F. Supp.2d 514, 517 (E.D. Pa. 2005)(citing18 Wright, Miller & Cooper, Federal Practice & Procedure § 4417 (2002)). *See also Pace v. Bogalusa City School Bd.* 403 F.3d 272, 290 (5th Cir. 2005)(“[i]ssues of fact are not ‘identical’ or ‘the same,’ and therefore not preclusive, if the legal standards governing their resolution are ‘significantly different’”); *Computer Associates Intern., Inc. v. Altai, Inc.*,126 F.3d 365, 371 (2d Cir. 1997) (“for collateral estoppel to apply, the issues in each action must be identical, and issues are not identical when the standards governing their resolution are significantly different”); *U.S. v. Powell* 494 F. Supp. 260, 263 (D.C. Ga. 1980)(“issue identity is insufficient to invoke collateral estoppel if the two actions involve different legal standards”).<sup>7</sup>

It is equally well recognized that federal courts are bound by federal common law, rather than state law, in cases that arise under federal statutes, and that under federal common law, the corporate form can be disregarded in the interest of public convenience, fairness and equity for purposes of a jurisdictional analysis. *See, e.g., United Elec. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1091-1092 (1st Cir. 1992) (stating that: [i]t would . . . serve no useful purpose to explore the interstices of the state-law standard. This is, after all, a federal question case -- and in federal question cases, courts are wary of allowing the corporate form to stymie legislative purposes . . . For this reason, a federal court, in deciding what veil-piercing test to apply, should 'look closely at the purpose of the federal statute . . .***an inquiry that usually gives less respect to***

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<sup>7</sup> *See also Dici v. Pennsylvania*, 91 F.3d 542, 547-551 (3<sup>rd</sup> Cir. 1996); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6<sup>th</sup> Cir. 1995); *Hillman v. Arkansas Highway & Transp. Dept.*, 39 F.3d 197, 199 (8<sup>th</sup> Cir 1994); *Peterson v. Clark Leasing Corp.*, 451 F.2d 1291, 1292 (9<sup>th</sup> Cir. 1971); *McCaw Personal Communications, Inc. v. Pacific Telesis Group*, 645 F. Supp. 1166, 1171-1172 (D.C. Cal.1986) (all refusing to give preclusive effect to a state court decision because federal law called for a different legal standard than that applied by the state court or the finding would have otherwise conflicted with the purpose of the statute at issue).

*the corporate form than does the strict common law alter ego doctrine.*”)(emphasis added). Accord, *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1506-07 (11<sup>th</sup> Cir. 1988) (applying federal common law to alter ego analysis because claim arose under the federal Labor Management Relations Act); *MCI Telecommunications Corp. v. O’Brien Marketing, Inc.*, 913 F. Supp. 1536, 1541 (S.D. Fla. 1995) (holding that the court was required to apply federal common law to determine alter ego because the case involved the federal Communications Act). See also *International Controls and Measurements Corp. v. Watsco, Inc.*, 853 F. Supp. 585, 590 (N.D.N.Y. 1994)(refusing to rely on Florida state alter ego principles and stating “while choice of law principles in cases arising under federal question jurisdiction have not always been applied with precision, invocation of those principles determines that federal common law, not Florida law, governs whether the veil should be pierced”); *United States v. Nicolet, Inc.*, 712 F. Supp. 1193, 1201 (E.D. Pa.1989) (“when a federal statute is silent as to the choice of law to be applied, but overriding federal interests exist courts should fashion uniform rules of decision”) (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943)).

Thus, the application of federal law to the jurisdictional alter ego issue in a case cannot be legitimately disputed.<sup>8</sup> Nor can Bandegua legitimately assert that Florida’s alter ego standard

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<sup>8</sup> Bandegua’s argument that Florida state law can be used to supplement federal common law with respect to alter ego unless Plaintiffs can show that Congress intended to preempt application of state law is wholly without merit. Bandegua Motion at 15, n. 4. First, Congress’ passage of the TVPA in 1992 suggests an intent to preempt application state law with respect to those international torts in violation of the law of nations. See S. Rep. 102-249, 102<sup>nd</sup> Cong., 1<sup>st</sup> Sess. 1991 WL 258662 at \* 3 (stating that “the purpose of this [TVPA] legislation is to provide a **Federal cause of action**”) (emphasis added). Second, courts cannot use state law when it conflicts with established federal common law or where state law would frustrate the legislative aims of the statute. See, e.g., *Nachwalter v. Christie*, 805 F.2d 956, 959-60 (11<sup>th</sup> Cir. 1986). As discussed herein, Florida courts require a higher standard to establish alter ego by requiring fraud or improper conduct with respect to the corporate form itself, and this higher standard would necessarily frustrate the aims of the TVPA and ATS. Finally, the *MCI Telecommunications v. O’Brien Mktg.*, 913 F. Supp. 1536 (S.D. Fla. 1995), case upon which Bandegua relies for this “preemption” argument is not supported by the Eleventh Circuit, which in *Connors Steel* made no mention of a preemption requirement with regards to applying federal common law. See *Connors Steel*, 855 F.2d at 1506-07. See also *Sheet Metal Workers v. Elite*, 212 F.3d 1031, 1038 (7<sup>th</sup> Cir. 2000); *Brotherhood of Locomotive Eng’rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 25-26 (1<sup>st</sup> Cir. 2000); *Maney v. Fischer*, 1998 Westlaw 151023 (S.D.N.Y. 1998); *Northern Tankers (Cyprus) LTD. v. Backstrom*, 967 F. Supp. 1391, 1398 (D. Conn. 1997).

is equivalent to the federal standard. *See* Bandegua Motion at 15. To determine whether an alter ego relationship exists under federal common law, courts consider three factors: (1) control, not only of finances but of business practices and policies; (2) such control must have been used to commit a wrong or violate plaintiff's legal rights; and (3) the control and violation of the plaintiff's rights must have proximately caused the injury complained of by the plaintiff. *See Connors Steel*, 855 F.2d at 1506-7; *MCI Telecommunications*, 913 F. Supp. at 1541. Thus, while requiring domination and control to pierce the corporate veil, the federal standard does not require fraud or other wrongful conduct with respect to the corporate form itself, and is therefore clearly distinct from Florida state law, which requires a showing of fraud. *See Connors Steel*, 855 F.2d at 1506-1507.<sup>9</sup>

Defendants attempt to dispute this distinction between Florida and federal law by citing to cases that suggest a court can consider fraud or other improper conduct in the federal analysis. *See* Bandegua Motion at 15 (citing *U.S. v. Bestfoods*, 524 U.S. 51, 62 (1998)). However, the ability to consider the existence of fraud is altogether different from **requiring** a showing of fraud as an essential element of an alter ego allegation.<sup>10</sup> Bandegua's position that there is no substantial difference between the Florida alter ego standard and federal common law is therefore objectively wrong. Indeed, the very case Bandegua relies upon for the proposition that Florida alter ego law is equivalent to federal law indicates that under federal common law, the corporate veil can be pierced in the interests of public convenience, fairness and equity

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<sup>9</sup> Compare *Connors Steel's* alter ego test, which requires only that the parent use its dominion and control over the subsidiary to commit a wrong against plaintiffs, with the Florida state standard articulated in *Dania Jai-Alai Palace, Inc. v. Sykes*, 450 So.2d 1114 (1984), which requires improper conduct with respect to the corporate form itself. After a review of several cases, the *Dania Jai-Alai* Court concluded that "the corporate veil will not be pierced, either at law or in equity, unless it be shown that the corporation was organized or used to mislead creditors or to perpetrate a fraud upon them." *Id.* at 1120-21.

<sup>10</sup> Defendants inexplicably cite to *MCI Telecommunications* case for the proposition that federal law also requires a showing of fraud. *See* Bandegua Motion at 15-16. However, a simple reading of *MCI Telecommunications* indicates that no showing of fraud or improper conduct is required with regards to the corporate form itself, only that the control over the subsidiary must have been used to commit a wrong against Plaintiffs. *See MCI Telecommunications*, 913 F. Supp. at 1541.

irrespective of improper conduct, which is certainly a far broader standard than any reading of Florida law. *See MCI Telecommunications*, 913 F. Supp. at 1541. *See also U.S. v. Lewis*, 1999 Westlaw 163053, \*3 ( N.D. Ill. 1999) (piercing corporate veil of a corporation because justice and the purpose of the statute required such, even though the corporation had complied with all corporate formalities and was adequately capitalized); *Locomotive Engineers*, 210 F.3d at 29 (emphasizing that the subsidiary need not be a “sham” corporation, and that even a “legitimate business” can be disregarded in promoting the legislative purpose of the statute). Indeed, the Supreme Court has explained that “when the notion of a legal entity is used to . . . justify wrong” or is necessary “to protect third persons,” the corporate veil will be pierced. *First National City Bank v. Banco Para El Comercio*, 462 U.S. 611, 628, ns 19, 20 (1983).

Here, there is no question that the purpose of Congress in passing the ATS and TVPA is to provide human rights victims, such as Plaintiffs, with access to U.S. federal courts. *See Senate Report No. 102-249*, 102<sup>nd</sup> Cong., 1<sup>st</sup> Sess., 1991 WL 258662 at \* 3-4 (noting that the TVPA and ATS were enacted specifically to fulfill the United States’ obligations under international law to enforce violations against the law of nations). The purpose behind these statutes therefore demands that federal courts exercise jurisdiction over alleged corporate human rights abusers, such as Bandegua. Anything less would allow the corporate form to be manipulated as a shield from liability for actions in direct contravention of policies underlying the ATS and TVPA. This Court should accordingly reach its own decision regarding personal jurisdiction over Bandegua pursuant to these principles of federal law.

**B. Application of an Alter Ego Analysis to the Issue of Personal Jurisdiction is Construed Less Stringently and is Premised on the Totality of Circumstances.**

In applying federal common law to the jurisdictional alter ego analysis, Courts have recognized that resolution of the alter ego issue is heavily fact-specific, and that consequently there is no litmus test for determining whether one entity is an alter ego of another. *Locomotive Engineers*, 210 F.3d at 26. Rather, courts look at the totality of circumstances based on a variety of factors, and application of these factors in the context of determining personal jurisdiction is to be construed less stringently. *See, e.g., Marine Midland Bank v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981) (recognizing a distinction between determining alter ego for purposes of jurisdiction versus liability, and utilizing a less stringent application of alter ego factors for purposes of

jurisdiction); *Carson v. Maersk*, 61 F. Supp.2d 607, 611, n. 2 (S.D. Tex.1999); *Stuart v. Spademan*, 772 F.2d 1185, 1198, n. 12 (5<sup>th</sup> Cir. 1985).

Affirming these principles, the Eleventh Circuit Court noted that the following factors may be used as indicia of control: (1) the parent and 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 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.<sup>11</sup> Further in assessing the foregoing factors, a Court need not assign relative weight to any particular factor or have a certain number of factors present before it can find domination by a parent corporation. *See Hollingshead v. Burford Equipment Company*, 828 F. Supp. 916, 919 (M.D. Ala. 1993).<sup>12</sup>

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<sup>11</sup> Notably, in the case of a holding company, such as Del Monte, Inc., a relationship of control based on the above factors is presumed. The Supreme Court has acknowledged this for decades: “[e]very holding company presupposes a relationship between it and a distinct corporate entity and its power to control the latter.” *United States v. Elgin, J & E Ry. Co.*, 298 U.S. 492, 506-507 (1936). *See also North Am. Co. v. SEC*, 327 U.S. 686, 701 (1946). In light of this presumed level of control of a holding company over its subsidiary, “courts will look through the [corporate] form to the realities of the relation between the companies as if the corporate agencies did not exist” in order to determine if the corporate veil should be pierced. *Elgin*, 298 U.S. at 507. These holdings are even more applicable here where Del Monte, Inc. presents itself as an integrated “global business” “conducted through subsidiaries” on “company controlled farms.” App. I: Exh. 1 at p. 23. *See, e.g., Cascade Steel Rolling Mills, Inc. v. C. Itoh and Co. Inc.*, 499 F. Supp. 829, 839 (D. Or. 1980) (finding an alter ego relationship where the parent corporations “strove to create an image of a single entity with numerous offices around the world to facilitate international operations,” and where the parents “impliedly represented that they were doing business through their overseas offices”).

<sup>12</sup> Thus, Bandegua’s argument that Del Monte, Inc. was formed 24 years after its formation, and Del Monte Company 13 years after, is meaningless outside of the context of the other factors. Bandegua Motion at 17. *See, e.g., Moran Pipe & Supply Co., Inc.*, 130 B.R. 588,

**C. Application of Federal Alter Ego Principles Firmly Establishes That This Court Has Personal Jurisdiction Over Bandegua.**

Applying the above factors to this case, and given the remedial nature of the ATS and TVPA, it is clear that Bandegua can be viewed as the alter ego of Del Monte, Inc. and /or Del Monte Company for purposes of jurisdiction. Plaintiffs need only establish that Bandegua is the alter ego of one of these two Miami-based corporations for a finding of jurisdiction. *See Meterlogic*, 126 F. Supp.2d at 1357. Here there is overwhelming evidence, as detailed in the Statement of Jurisdictional Facts, that 9 of the 12 factors used as indicia of control are present.

- Bandegua is a wholly-owned subsidiary of Del Monte (factor 1). App. I: Exh.1 at p. 23.
- Bandegua has shared at least four common directors / officers with Del Monte, including its Chief Operating Officer, Hani El-Naffy (factor 2).<sup>13</sup>
- Bandegua is commonly referred to as Del Monte’s “Guatemala Division,” and routinely uses the Del Monte trademark as its own (factor 3). App. I: Exhs. 11-14.<sup>14</sup>

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592 (E.D. Ok. 1991) (finding alter ego relationship although the affiliated corporation did not own any shares in its de facto subsidiary and did not cause its incorporation).

<sup>13</sup> Bandegua does not dispute this. *See* Brazlavsky Decl. at ¶¶ 6, 16 (admitting the overlap of directors between Del Monte and Bandegua). The overlap of corporate directors and officers itself raises a strong inference that these officers are acting as agents of the parent corporation or at the very least that there is a disregard of corporate lines with regard to Bandegua’s operations. *See Meir*, 288 F.3d at 1269 (holding that on a motion to dismiss for personal jurisdiction, the court must construe all reasonable inferences in favor of plaintiffs). *See also Bestfoods*, 524 U.S. at 67 (recognizing that although it may be appropriate for directors of a parent corporation to serve as directors of its subsidiary, where it appears that dual officers are acting as agents of the parent corporation in administering their duties to the subsidiary, this could subject the parent company to alter ego liability).

<sup>14</sup> Even Del Monte’s General Counsel, Zoltan Pinter, referred to transfers between Del Monte and Bandegua as “intracompany transfers” in a visa application to the U.S. Department of Justice. App. I: Exh. 17. This contradicts Yock’s statement that Bandegua does not share its employees with DMFPC or FDMPI. *See* Declaration of Jose Antonio Yock (“Yock Decl.”) at ¶ 4(l).

- Bandegua has been financed by Del Monte (factor 5). Skinner Dep., App. II: Exh. C at 65-67.<sup>15</sup>
- Bandegua operated with inadequate capital between 1994-2003 (the time period relevant to Plaintiffs’ complaint) and managed to pay its expenses only with infusions of cash from Del Monte as indicated above (factor 7). Skinner Dep., App. II: Exh. C at 65-67.<sup>16</sup>
- Del Monte has used Bandegua’s assets as collateral for its own loan with no observance of corporate formalities in terms of consideration to Bandegua (factors 10 and 12). Conway Dep., App. II: Exh. D at 44-45; Skinner Dep., App. II: Exh. C at 72-73.<sup>17</sup>
- Del Monte exercises control over Bandegua’s operational and financial policies, including labor and employee relations such that the daily operations of Bandegua and Del Monte are not kept separate (factor 11).<sup>18</sup>

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<sup>15</sup> In the Yock Declaration, Defendants attempt to explain their history of financing Bandegua by attributing a 4.8 million dollar contribution in 1998 to hurricane Mitch, which hit Guatemala in October 1998. *See* Yock Decl. at ¶16. However, this does not explain that Bandegua had operated with inadequate capital for the four year preceding the hurricane, between 1994-1998, or that Del Monte made repeated capital “contributions” to Bandegua prior to 1998 as indicated above by Skinner-Lee.

<sup>16</sup> This contradicts statements in the Declaration of Dana Kaufman (“Kaufman Decl.”) at ¶¶ 2-4 that Bandegua was allegedly adequately capitalized between 1999-2002, particularly as the Kaufman Decl does not deny that Bandegua obtained this “capital” through Del Monte. Thus, despite Bandegua’s assertion that it pays for its expenses with money from its own bank accounts, Yock Decl. at ¶¶ 4(k), 11, this is a gross misrepresentation, as Bandegua’s capital is derived from Del Monte and its other shareholders. And, while the Brazlvsy Declaration, *see* ¶ 8, states that Bandegua has paid all monies advanced to it by Del Monte, Bandegua has submitted no documents show repayment of such “loans” or “advances”.

<sup>17</sup> Del Monte has admitted that it used Bandegua as collateral to secure its loans, *see* Brazlvsy Decl. at ¶19, and one cannot leverage property as collateral unless you necessarily own and have control over it. The use of Bandegua assets as collateral with no consideration paid also contradicts statements in the Yock Declaration that Bandegua adheres to all corporate formalities. *See* Yock Decl. at ¶ 4.

<sup>18</sup> The level of day-to-day control extends to production, labeling, and distribution of the bananas, as well as compliance with quality assurance and environmental standards (*see* App. I: Exh. 2); control over Bandegua’s day-to-day labor and employment policies (*see* App. I: Exhs. 3-8, 17; Skinner Dep., App. II: Exh. C at 19-20; and Yock Dep., App. II: Exh. B at 26-27); control over all capital expenditures over \$1000 (*see* Conway Dep., App. II: Exh. D at 27-32; Yock Dep., App. II: Exh. B at 37-38); and even control over any public statement made by Banegua (*see* App. I: Exh. 9). This evidence directly contradicts the statements in the Yock and

- Del Monte also pays for Bandegua’s risk and liability insurance policies. App. I: Exh. 10.<sup>19</sup>

Although the above factors are only general indicators of control and are not to be used as a “litmus” test, it is dispositive that nine (9) factors are present. In the *Connors Steel* case, for example, only four of the twelve factors were present, and the Court relied solely on these four factors to find the necessary control. *See Connors Steel*, 855 F.2d at 1506. Even more significant here is that Del Monte, Inc. has already admitted that it “conducts its business on company controlled farms,” *see* App. I: Exh.1 at p. 23, which in addition to the presence of these 9 alter ego factors, should erase any doubt as to whether Del Monte possesses the necessary level of control or dominion over Bandegua.

**1. Plaintiffs’ Evidence of Control Rebutts Any Assertion in Bandegua’s Declarations That it is an Independent Entity.**

The declarations submitted by Bandegua do not negate Plaintiffs’ showing of control. As evident by foregoing facts, virtually every relevant contention in the declarations submitted by Bandegua is contradicted by Defendants’ own corporate documents and deposition testimony.<sup>20</sup> The law is clear that where plaintiff’s evidence conflicts with defendant’s affidavits, all

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Brazlavsky declarations that Del Monte is not involved in Bandegua’s day-to-day operations or that Bandegua’s employment and labor relations issues are handled by its own human resources department. *See, e.g.*, Yock Decl. at ¶¶ 4(e), 4(I), 4(l), 6, 7, 8 and Brazlavsky Decl. at ¶¶ 5, 20(f).

<sup>19</sup> Although not specified in the list of control factors, the provision of insurance by a parent for its subsidiary can be another factor weighing in favor of alter ego status. *See Hollingshead v. Buford Equipment Co.*, 828 F. Supp. 916, 921 (M.D. Ala. 1993).

<sup>20</sup> While Bandegua’s declarations state that Bandegua keeps its own records, has its own bank accounts, files its own taxes, and that it maintains its own office, these factors, even assuming they are accurate, are insufficient to rebut the evidence submitted by Plaintiffs herein showing, *inter alia*, that Del Monte maintains day-to-day operational and financial control of Bandegua; that Bandegua has been inadequately capitalized and financed by Del Monte; that Bandegua is viewed and held out to the public as a division of Del Monte; or that Del Monte simply uses Bandegua assets as collateral for its own loans. Again, as indicated in the above referenced cases, it is Plaintiffs who are entitled to have this evidence weighed in their favor.

reasonable inferences must be construed in Plaintiffs' favor. *See Meier*, 288 F.3d at 1269 (holding "where the plaintiff's complaint and supporting evidence conflict with the defendant's affidavits, the court must construe all reasonable inferences in favor of plaintiff"). *See also Rio Props, Inc. V. Rio Int'l Interlink*, 248 F.3d 1007, 1019 (9<sup>th</sup> Cir. 2002); *Crane v. New York Zoological Society*, 894 F.2d 454, 457 (D.C. Cir. 1990). This Circuit has also recognized that a defendant's affidavit must do more than offer conclusory denials. *See, e.g., Posner v. Essex Insurance Co.*, 178 F.3d 1209, 1215 (11<sup>th</sup> Cir. 1999)(refusing to credit the defendant's affidavit because the "affidavit primarily explains [defendant's] corporate structure and status; and denies in a conclusory way any other actions that would bring [the defendant] within the ambit of Florida's long-arm statute"). Plaintiffs have therefore sufficiently met their burden of establishing a prima facie basis for jurisdiction over Bandegua based on the control exercised by its resident Defendant parents.

**2. Bandegua's Reliance on Inapplicable Cases Also Does Not Refute Plaintiffs' Evidence of Control.**

While Bandegua correctly notes that courts have held that a parent's *general* oversight and involvement in a subsidiary's affairs is acceptable and expected behavior, Del Monte's high level of day-to-day control over Bandegua far exceeds any level of acceptable involvement. *See, e.g., In Re: Latex Gloves Product Liability Litigation*, 2001 WL 964105, \*4 n. 13 (E.D. Pa. 2001) (holding that where "all important financial decisions of the subsidiaries are subject to [the parent's] final approval . . . . This decisional activity goes beyond mere 'supervision of the subsidiary's finances and capital budget decisions'" and supports a finding of an alter ego relationship); *Hoffman v. United Telecommunications, Inc.*, 575 F. Supp. 1463, 1481-82 (D. Kan. 1983) (holding that where "the decision made by the subsidiary are made under the domination of the parent, as dictated by mandatory policies and procedures, such a showing is sufficient to establish an alter ego relationship"); *Flink Oil Co. v. Continental Oil Co.*, 277 F. Supp. 357, 360-61 (D. Colo. 1967) (finding alter ego relationship where subsidiaries financial reports and account procedures conformed to guidelines suggested by the parent in deciding that the parent exercised "effective and detailed control over [the subsidiary's] internal affairs"). *See also Milgo Electronic Corp. v. United Business Communications, Inc.*, 623 F.2d 645, 660 (10<sup>th</sup> Cir. 1980) (upholding District Court's finding of alter ego where although subsidiary paid its own

employees, parent provided subsidiary with operating capital to meet operating expenses, and all of subsidiary's products were sold to parent corporation).

Accordingly, all of the cases cited by Bandegua are distinguishable because they, unlike the facts presented herein or in the cases cited above, involved merely *general* oversight of a subsidiary affairs or general approval of *major* expenditures.<sup>21</sup> In none of the cases relied upon by Bandegua were the parent corporations deciding such intricate day-to-day matters as what time to close the office or the precise retirement age of the subsidiary's employees. *See, e.g.*, App. I: Exhs. 3-5. Here, Bandegua is *required* to adhere to Del Monte's Financial Procedures Manual and must submit authorization requests even for *minor* capital expenditures. *See* Conway Dep., App. II: Exh. D at 27-32. In other words, Bandegua does not maintain a sufficiently independent identity from Del Monte to deviate from any established policy. For example, in *Hillsborough Holdings*, approvals were required only for significant expenditures such as "acquisition and construction of plants, the sale or closing of plants, and the acquisition or transfer of assets." *See In re Hillsborough Holdings*, 166 B.R. at 466. *See also Akzona*, 607 F. Supp. at 237 (requiring approval for capital expenditures exceeding \$850,000). This contrasts sharply with Del Monte's requirement that Bandegua obtain permission for matters as routine as purchasing a laptop computer. *See* App. I: Exh. 15. Rather, in cases where the parent has mandated strict compliance with pre-established guidelines such that a subsidiary cannot deviate

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<sup>21</sup> *See, e.g., In re Hillsborough Holdings Corp. v. Celotex Corporation*, 166 B.R. 461, 466 (M.D. Fla. 1994) ("The JWC Board also monitored key events of subsidiaries and provided oversight functions, but there is no evidence in this record which warrants the finding that JWC was involved in the day-to-day operations of the business of the subsidiaries."); *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 152 (3<sup>rd</sup> Cir. 1988) ("In this case, there is no evidence that Charter's intrusion into Capes's affairs is even 'constant' or day-to-day."); *Quarles v. Fuqua Indus., Inc.* 504 F.2d 1358, 1364 (10<sup>th</sup> Cir. 1947) ("We also are convinced the total participation of Faqua in the affairs of Carrer . . . does not amount to a domination of the day to day business decisions of Carrer. . . . Although Fuqua probably had the opportunity to control Career, the exercise of, not the opportunity to exercise, control is determinative."); *Akzona Incorp. v. E.I. Du Pont De Nemours & Co.*, 607 F. Supp. 227, 238 (D. Del. 1984) ("DuPont has not established that Akzo interferes in the day-to-day operations of its subsidiaries."); *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 267 (D. Del. 1989) ("The Delaware corporation's board of directors allegedly approved . . . *major* expenditures and policies involving the subsidiary") (emphasis added).

from the protocol for even routine matters, as opposed to general approval of major expenditures, courts have found the necessary domination and control. *See, e.g., Hoffman*, 575 F. Supp. at 1481-82; *Flank Oil*, 277 F. Supp. at 360-61; *Milgo Electronic*, 623 F.2d at 660.

**D. The Evidence Presented by Plaintiffs Raises an Inference That the Defendant Parent Corporations Used Their Control to Cause Plaintiffs' Injuries.**

Not only did Del Monte exercise control over Bandegua, but it is reasonable to assume that such control effectively caused Plaintiffs' torture. *See Connors Steel*, 855 F.2d at 1506-7 (stating all that is required for a finding of alter ego under federal common law is control and a showing that the control exercised over the subsidiary caused the injury alleged). Here, Plaintiffs' evidence of Del Monte's operational and financial control over Bandegua, un-refuted by Bandegua's declarations, is more than sufficient at this stage of the proceeding to create an inference that Del Monte knew of, and/or had control over Bandegua's decision to initiate violence against Plaintiffs for their involvement in the labor dispute at the Bandegua plantation. This is highlighted by Del Monte's involvement, through Mr. Yock, one of Bandegua's Directors, in the negotiation of an agreement that sought to resolve the underlying labor dispute at Bandegua, and Yock's discussions with Hani El-Naffy, Del Monte's Chief Operating officer, regarding the agreement. App. I: Exh. 6-8; 17.

This Circuit's decision in *Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11<sup>th</sup> Cir 1986) is particularly instructive here. In *Jackam*, plaintiffs premised personal jurisdiction over the foreign defendant, HCA Mideast, Inc. ("HCA"), upon their allegation that this defendant "exercised dominion and control" over another resident defendant, HDAME, and HDAME's labor and personnel policies, and the fact that HCAME, acting as the agent of HCA, executed these policies. *Id.* at 1579-80. The Court denied HCA's motion to dismiss for lack of personal jurisdiction, stating that:

[t]he Jackams have alleged that HCA exercised dominion and control over Appellee HCAME, and as the parent corporation, controlled the activities and decisions of its subsidiary HCAME. This assertion is relevant in that the Jackams show that HCA exercised dominion and control in the very area in which they are now complaining -- employee relations.

*Id.* at 1581. The very same can be said of Bandegua here, which is dominated and controlled in the exercise of its daily employee and labor relations by Del Monte. Indeed, the level of Del

Monte's control over Bandegua far exceeds defendant's control over the subsidiary in *Jackman*, as evidenced by the fact that Bandegua had to consult Del Monte to decide something as routine as when to close the office on Christmas day. See App. I: Exhs. 3-5. It is therefore certainly reasonable to expect that Del Monte knew of and could exercise control over Bandegua's decision of how to deal with a major labor dispute involving Plaintiffs, and that their attempt to deal with the situation, or failure to do, resulted in Plaintiffs' torture. At minimum, Plaintiffs are entitled to this inference. See *Meir*, 288 F.3d at 1269 (holding that in ruling on a motion to dismiss for personal jurisdiction, the court must construe all reasonable inferences in favor of plaintiffs, even when plaintiffs' evidence conflicts with that submitted by defendants). Accordingly, this Court should find that Del Monte exercises the necessary level of control over Bandegua, and that such control over Bandegua's labor relations effectively caused Plaintiffs' injuries for purposes of alter ego jurisdiction.

**E. Even if Bandegua is Dismissed on Personal Jurisdiction Grounds, This Case Can Still Proceed Against the Del Monte Parent Corporations.**

Even if this Court finds that Bandegua is not the alter ego of its Defendant parents for purposes of personal jurisdiction, this case can still proceed directly against the Del Monte parent corporations through common law agency and direct liability principles of aiding and abetting. It is well recognized that a parent corporation can be liable for the acts of their subsidiaries either through a showing of alter ego liability or through an agency relationship, regardless of whether the subsidiary is a party to the case. See *John Doe I, et. v. Unocal Corp., et. al.*, Case Nos: BC 237980 and BC 237679 (Cal. Sup. Ct., September 14, 2004) (allowing the case to proceed against Unocal parent corporations under an agency theory without the presence of the subsidiaries after having dismissed plaintiffs' alter ego theories).<sup>22</sup> And while many courts continue to confuse and conflate the two theories of liability, several courts that have specifically considered the question have, like the *Unocal* case, recognized that alter ego and agency are two distinct theories. See, e.g., *Kissun v. Humana, Inc.*, 479 S.E.2d 751, 753 (Ga. 1997) (“[I]t cannot be held as a matter of law that evidence insufficient to pierce the corporate veil automatically

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<sup>22</sup>A copy of the Court's decision is attached hereto at App. I: Exh. 19.

serves to negate the existence of an agency relationship between the corporations.”); *Joiner v. Ryder Sys. Inc.*, 966 F. Supp. 1478, 1487 n.19 (C.D. Ill. 1996) (“Certainly, a corporation can be the agent of another corporation without being that corporation’s alter ego.”); *C.R. Bard Inc. v. Guidant Corp.*, 997 F. Supp. 556, 560 (D. Del. 1998) (“Under the agency theory, the court may attribute the actions of a subsidiary company to its parent where the subsidiary acts on the parent’s behalf or at the parent’s direction.”); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988) (looking at alter ego and agency as two different means of holding parent liable for conduct of subsidiary). *See also Mobil Oil Co. v. Linear Films, Inc.*, 718 F. Supp. 260, 271–72 (D. Del. 1989) (explaining that “[w]hen legal liability is predicated on [customary] principles of agency, the existence and entity of the agent are not ignored or set aside but affirmed, and the principal held [liable] precisely because the agent did act in the course of his employment and within the scope of his authority. The very opposite is true when the subsidiary’s corporate entity is set aside and ignored and the parent held liable.”).

Further, while some cases discuss the possibility of finding a general agency relationship through total domination and control, the common law of agency also recognizes a specific form of agency, where liability is premised on the principal’s *right to control the specific conduct giving rise to the cause of action*. *See Phoenix Canada Oil Co. v. Texaco, Inc.*, 842 F.2d 1466, 1477 (3d Cir. 1988) (holding “one corporation — completely independent of a second corporation may assume the role of the second corporation’s agent in the course of one or more specific transactions. This restricted agency relationship may develop whether the two separate corporations are parent and subsidiary or are completely unrelated outside the limited agency setting. Under this . . . theory, *total domination or general alter ego criteria need not be proven* . . . .Unlike the alter ego/piercing the corporate veil theory, *when customary agency is alleged the proponent must demonstrate a relationship between the corporations and the cause of action*”)(citations and footnotes omitted) (emphasis added). Here, Plaintiffs have presented more than sufficient evidence for a finding of specific agency, though at this early stage, agency is a question of fact that Plaintiffs need not prove. *See, e.g., Rodriguez v. Tombrink Enterprises, Inc.*, 870 So.2d 117, 120 (Fla. 2<sup>nd</sup> DCA 2003) (“The existence and scope of an agency relationship are questions of fact for the jury.”); *Robbins v. Hess*, 659 So.2d 424, 427 (Fla. 1<sup>st</sup> DCA 1995) (holding agency is a question of fact which must be determined by a jury).

As with common law agency principles, it is equally well recognized that a parent corporation can be held directly liable for wrongs that it aids and abets. *See In Re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1309 (S.D. Fla. 2003) (holding that in cases where the “‘alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management’ and ‘the parent is directly a participant in the wrong complained of [the parent] will, in such ‘instances be directly liable for its own actions’”)(quoting, *U.S. v. Bestfoods*, 524 U.S. 51, 64-65 (1998)); *Pearson v. Component Technology Corp.*, 247 F.3d 471,487- 488 (3<sup>rd</sup> Cir. 2001) (noting direct liability is imposed when the parent has forced the subsidiary to take the complained of action). *See also* Restatement (Second) of Torts § 876B (stating “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself”).

## V. CONCLUSION

In short, Plaintiffs have presented overwhelming evidence to support a finding of alter ego jurisdiction over Bandegua in this case, which conclusively rebuts its declarations. Further, there is the compelling justification that a finding of alter ego will promote the aims of the two federal statutes at issue in Plaintiffs’ case, the ATS and TVPA. Here, without a finding of alter ego jurisdiction, Plaintiffs would be left with no avenue to seek justice against Bandegua for the violations they suffered, given that Plaintiffs fled Guatemala in fear for their lives and do not have a forum there as already correctly determined by this Court. Thus, based on this critical factor and all the reasons discussed herein, Plaintiffs respectfully request that the Court deny Bandegua’s Motion to Dismiss Fourth Amended Complaint for Lack of Personal Jurisdiction in its entirety.

Respectfully submitted on this 7<sup>th</sup> day of December, 2006 by:

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### **CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2006, I electronically filed the foregoing Plaintiffs' Opposition to Defendant Bandegua's Motion to Dismiss Fourth Amended Complaint for Lack of Personal Jurisdiction with the Clerk of Court using CM/EF. I also certify that the foregoing document is being served this day to Defendants' counsel of record identified on the Service List below via transmission of Notice of Electronic Filing generated by CM/ECF.

By: s/ Marcus Braswell  
Marcus Braswell

### **SERVICE LIST**

#### **CASE NO. 01-3399**

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