IN THE UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF PENNSYLVANIA

JANE W, in her individual capacity, and in her capacity as the personal representative of the estates of her relatives, James W, Julie W and Jen W;

JOHN X, in his individual capacity, and in his capacity as the personal representative of the estates of his relatives, Jane X, Julie X, James X and Joseph X;

JOHN Y, in his individual capacity;

AND JOHN Z, in his individual capacity,

Plaintiffs,

v.

MOSES W. THOMAS,

Defendant.

Case No. 2:18-CV-00569-PBT

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. Introduction

In opposing Plaintiffs Jane W, John X, John Y, and John Z ("**Plaintiffs**")'s Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 (the "**Motion**") (Dkt. 60), Defendant Moses W. Thomas ("**Defendant**") points to alleged "hearsay" and "inconsistencies" in the record. His submission misses the mark; Defendant has failed to introduce any evidence to refute Plaintiffs' evidence that he is responsible for the July 1990 massacre of approximately 600 unarmed civilians who had taken refuge at St. Peter's Lutheran Church in Monrovia, Liberia (the "**Lutheran Church Massacre**" or the "**Massacre**").

Defendant has resurfaced after over a year to file his Opposition to the Plaintiffs' Motion (the "**Opposition**"). Dkt. 63. Prior to filing the Opposition, Defendant fled this Court's jurisdiction for Liberia (*see* Mem. Law Supp. Pls.' Mot. Suppl. Protective Order and Leave to File under Seal, Dkt. 59-1 at 4) and repeatedly evaded his discovery obligations: he failed to respond to Plaintiffs' document requests, interrogatories, and requests for admission (*see* Pls.' Req. Disc. Extension, Dkt. 49), ignored the Court's warning of sanctions (Order Granting Pls.' Mot. Compel Resp. Pls.' First Set Doc. Reqs. and First Set Interrogs., Dkt. 48), and showed no interest in taking testimony from the witnesses and experts disclosed by Plaintiffs' counsel (*see e.g.*, Mem. Law Supp. Pls.' Mot. Suppl. Protective Order and Leave to File under Seal, Dkt. 59-1 at 12). As a result, Defendant has left Plaintiffs' evidence of his liability unrefuted—he produced no evidence during discovery and did not submit any evidence in support of his Opposition.

Defendant's Opposition fundamentally fails to identify any genuine issue of material fact precluding summary judgment. Instead, Defendant attempts to make picayune criticisms of certain witness declarations and a single expert report filed in support of Plaintiffs' Motion.

Defendant's identification of alleged hearsay and minor factual inconsistences is not only incorrect, but entirely inconsequential. Defendant incorrectly argues that the entire case rests on a single declaration or expert report considered in isolation—ignoring the totality of approximately 2,000 pages of declarations, uncontested expert reports, third-party reports, and pleadings Plaintiffs have adduced in support of their case, as well as Defendant's own admissions.

Defendant cannot even come close to demonstrating that his litany of alleged issues actually creates any genuine issue of material fact that warrants denial of Plaintiffs' Motion for Summary Judgment. Plaintiffs thus respectfully request that the Court grant summary judgment.

II. The Evidence, including Defendant's Own Admissions, Warrants Summary Judgment.

Defendant concedes that in order to avoid summary judgment, he must "come forward with specific facts showing that there is a genuine issue for trial." Opp., Dkt. 63 at 7 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citations omitted)); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("[A] party opposing a properly supported motion for summary judgment 'may not rest upon mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'") (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). "The mere existence of a scintilla of evidence in support of the non-moving party's position will not suffice." Opp., Dkt. 63 at 7; *see also Phillips v. Serv.Emps. Int'l Union Local 36 AFL-CIO and ISS Inc.*, No. 88–7220, 1989 WL 88999, *2 (E.D. Pa. Aug. 2, 1989) ("[I]f the evidence is merely 'colorable' or is not significantly probative, summary judgment may be appropriate.") (citing *Liberty Lobby Inc.*, 477 U.S. at 249–51).

Defendant also does not dispute that the Court must consider the "record taken as a whole"—including the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits"—when determining whether there is a genuine issue of material fact for trial. Mem. Law Supp. Mot. Summ. J. (hereinafter "MoL"), Dkt. 60-1 at 25 (quoting *Matsushita Elec*., 475 U.S. at 587) (internal citation omitted); *Id.* at 24 (quoting *Celotex Corp*. *v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)).

Nor does Defendant dispute that the "admissions on file" include "[m]atters deemed admitted" and "conclusively established" "due to a party's failure to respond to request for admission"—*i.e*., Defendant's admissions in Plaintiffs' First Set of Requests for Admission conclusively establish the facts therein. MoL at 25 (quoting *Sec'y U.S. Dep't of Labor v. Kwasny*, 853 F.3d 87, 91 (3d Cir. 2017)); Nielsen Decl., Ex. A, Reqs. for Admis. (hereinafter "RFA Ex. A"), Dkt. 59-6. Accordingly, Defendant has admitted that he was present at St. Peter's Lutheran Church (the "**Lutheran Church**") on July 29, 1990, that he ordered soldiers under his command to kill the civilians sheltering in the Lutheran Church, that he himself fired his weapon while there, and that he called a ceasefire only after approximately 600 civilians were killed. RFA Ex. A, Dkt. 59-6 ¶¶ 21–35. Indeed, Defendant has failed to provide a single piece of evidence showing otherwise. Rather than swear in an affidavit that he did not commit the acts he is accused of, Defendant is silent regarding his own culpability.

Despite this, Defendant tries to avoid summary judgment by artificially and improperly treating each witness declaration and expert report in isolation. As discussed in Parts III and IV below, none of Defendant's hearsay objections and purported factual inconsistencies withstands scrutiny. And even if Defendant's purported hearsay objections were to prevail or his asserted factual discrepancies credited, they do not present any genuine dispute of material fact for trial

and the record as a whole, including Defendant's own admissions, readily supports summary judgment. Accordingly, this Court should reject Defendant's "attempt to obfuscate the appropriateness of summary judgment . . . [i]n light of the overwhelming, unrebutted evidence produced during discovery." *A.M. by and through Forgione v. Landscape Structures, Inc*., No. 1:14-CV-1376, 2017 WL 2215276 (M.D. Pa. May 19, 2017); *see also Diaz v. City of Phila.*, No. 11–671, 2013 WL 3213333, *2 (E.D. Pa. June 25, 2013) (denying a motion to reconsider summary judgment where the non-moving party "pick[ed] at many factual inconsistency [*sic*] in the record, and attempt[ed] to magnify these inconsistencies to justify proceeding to trial"); *Phillips*, 1989 WL 88999 at *5 (quoting *Anderson*, 477 U.S. at 248) ("Plaintiff's attempt to establish the existence of a genuine issue of material fact by pointing out minor inconsistencies between [witness statements] is unavailing. '[O]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment.'").

III. Defendant Wrongly Objects to Plaintiffs' and Witnesses' Statements as Hearsay and, In Any Event, Plaintiffs Have Met Their Burden Even Apart from the Challenged Evidence.

In an attempt to refute the Plaintiffs' evidence supporting summary judgment, Defendant has cherry picked a handful of statements in order to make hearsay or other inadmissibility objections due to the lack of personal knowledge, and on that basis, argues that summary judgment must be denied. This strategy must fail. As an initial matter, many of the statements identified by Defendant are either not hearsay or are subject to a hearsay exception that makes them admissible. But in addition, even the exclusion of these statements, as well as the remaining statements identified, does not create a material dispute of fact.

As a preliminary matter, some of the statements that Defendant calls hearsay are offered not "to prove the truth of the matter asserted," but for the permissible purpose of showing the effect on Plaintiffs and witnesses. Fed. R. Evid. 801(c); *see Kreider v. Breault*, No. CIV.A. 10-

3205, 2012 WL 118326, at *1 n.2 (E.D. Pa. Jan. 13, 2012) (admitting statements of an agent incorporated into a report because they "are not offered for their truth but rather for their effect on the listener"). Accordingly, Jane W's statement that someone told her that the "big man" at the Lutheran Church days before the Massacre was "Moses Thomas," the head of the SATU, is not introduced to identify Defendant, but simply to explain why Jane W took notice and "committed that man's face to [] memory." Decl. Jane W (hereinafter "Jane W"), Dkt. 60-5 ¶ 16. Indeed, Jane W separately identified Defendant through a photo line-up. *See* Jane W, Dkt. 60-5 ¶¶ 16, 17. Similarly, Jane W's account that her father feared she would be killed is not offered to prove that she would in fact be killed, but rather to describe the effect her father's fear had on her own assessment of the danger to herself and her resulting decision not to engage in the Truth and Reconciliation Commission process. *See* Opp., Dkt. 63 at 9; Jane W, Dkt. 60-5 ¶ 28.

Other statements to which Defendant objects fall under a well-established exception to hearsay. Defendant concedes, as he must, that hearsay statements may be factored into the summary judgment analysis if they fall within an exception. Opp., Dkt. 63 at 9. One such exception is for statements relating to a startling event made while a declarant is still under the stress of the excitement caused by the event. Fed. R. Evid. 803(2); *see also United States v. Brown*, 254 F.3d 454, 460 (3d Cir. 2001) (citing *United States v. Tocco*, 135 F.3d 116 (2d Cir. 1998) (admitting a statement made three hours after the startling event, where the declarant realized he had set fire to a building that might have contained people)) (noting that a statement need not be contemporaneous with the startling event, "but rather only with the excitement caused by the event"); *Bornstad ex rel. estate of Bornstad v. Honey Brook Tp.*, No. 03-CV-3822, 2005 WL 2212359, at * 8. (E.D. Pa. Sept. 9, 2005) (citing *Tocco*, 135 F.3d at 127–28; *United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (admitting a statement made five to six hours

after a startling event while the declarant "was still under the stress of excitement")) (holding that a statement made over an hour after the startling event was "made before [the declarant] had time to reflect and prevaricate" and was therefore admissible); *see also Gross v. Greer*, 773 F.2d 116, 119–20 (7th Cir.1985) (finding that the trial court properly admitted a statement made twelve hours after startling event).

Any reasonable observer would conclude that surviving the Lutheran Church Massacre or the AFL attack on the United Nations compound would create a great stress of excitement in the traumatic aftermath, during which time the survivor would have no reason—and likely no ability—to recast the facts out of self-interest. *See Brown*, 254 F.3d at 458 (finding that excitement "suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that the utterance will be influenced by self interest and therefore rendered unreliable"). Thus, the portion of William X's declaration describing statements made by a woman who fled the Lutheran Church Massacre and arrived at William X's home that same morning, exclaiming that the AFL had attacked the Lutheran Church, is covered by this exception, and therefore, admissible. *See* Opp., Dkt. 63 at 14; Decl. William X (hereinafter "William X"), Dkt. 61-6 ¶ 19. Similarly, John Y encountered women who informed him of the attack on the United Nations compound at most within days of the attack, while they were actively seeking refuge in another location and expressed fear that the war was escalating. *See* Opp., Dkt. 63 at 11; Decl. John Y (hereinafter "John Y"), Dkt. 60-7 ¶ 6 (encountering the women one day in May); MoL, Dkt. 60-1 at 9 (describing the attack on the United Nations Development Program compound on May 29).

Likewise, John Y's statement that his father said in January 1990 that the "AFL was targeting anyone in Monrovia that was originally from Nimba" falls under the excited utterance

exception, and is therefore admissible. John Y, Dkt. 60-7, ¶ 4. When John Y's father made this statement, he also explained "soldiers were patrolling mostly Mano neighborhoods like ours and could attack at any moment." Opp., Dkt. 63 at 11; John Y, Dkt. 60-7 ¶ 4. The statement was therefore made contemporaneously with his father's fear of imminent attack, and reflected the stress of excitement that it caused.

The individuals who told Jane W about the death of her relatives at the Lutheran Church Massacre similarly made the disputed statements while under the stress of the devastating news. Opp., Dkt. 63 at 9. Jane W was informed by a relative that her aunt had been killed, and someone who had returned to the Church and witnessed the horrific aftermath of the Massacre told Jane W that the bodies of her children and husband were among the corpses. Jane W, Dkt. 60-5 ¶ 26. Moreover, these statements are sufficiently trustworthy and probative under the totality of the circumstances, including Jane W's direct testimony that her family members were present with her during the Massacre, her description (undisputed by Defendant) of the carnage and mass casualties at the Lutheran Church, and her testimony that she has not seen or heard from her family in the thirty years since the Massacre. *See* Fed. R. Evid. 807; *see also* MoL, Dkt. 60-1 at 14–16, 18–20. These statements are more probative than any other evidence that Jane W could obtain through reasonable efforts, particularly when the bodies of those slaughtered during the Massacre were interred in six mass graves or buried at a beach, and identifying her role in the present action would place Jane W's life at risk. *See* Fed. R. Evid. 807; *see also* MoL, Dkt. 60-1 at 18, Mem. Law Supp. Pls.' Mot. Suppl. Protective Order and Leave to File under Seal, Dkt. 59-1, at 3–4 (describing Plaintiffs' reasonable fear of violent retaliation).

In any event, even if the Court were to strike these statements, and the remaining statement to which Defendant objects,[1] it would not affect Plaintiffs' strong case in favor of summary judgment. Other evidence in the record—including the ample non-declarant evidence that remains unrefuted and Defendant's own admissions—demonstrates the facts underlying the purported hearsay statements for four reasons that, taken together, support summary judgment in favor of Plaintiffs.

First, independent of the challenged testimony, the record establishes Defendant's physical presence at the Lutheran Church during reconnaissance missions and on the night of the Massacre. So although Defendant objects to Jane W's identification of Defendant at the Lutheran Church days prior to the Massacre on the basis of hearsay, he ignores that Jane W separately recognized Defendant in a photo line-up. Opp., Dkt. 63 at 9–11; Jane W, Ex. A, Dkt. 60-5 ¶ 17. Moreover, regardless of Jane W's testimony, two eyewitnesses identified Defendant at the Lutheran Church compound on the night of the Massacre. *See* Decl. William Y (hereinafter "William Y"), Dkt. 60-9 ¶ 14; Decl. John Z (hereinafter "John Z"), Dkt. 60-8 ¶¶ 17–20. And most importantly, Defendant himself admitted that he was there and ordered soldiers under his command to carry out the massacre. RFA Ex. A, Dkt. 59-6 ¶¶ 24, 27, 34–35.

Second, independent of the challenged testimony, the unrefuted evidence establishes that all international observers, including from the U.S. Embassy and the United Nations, and journalists reporting on the Lutheran Church Massacre have attributed the attack to AFL forces. MoL, Dkt. 60-1 at 18–19; Expert Report Amb. Dennis C. Jett (hereinafter "Jett"), Dkt. 61-8 at 38–39; Decl. Elizabeth Blunt (hereinafter "Blunt"), Dkt. 61-2 ¶ 25; Decl. Mark Huband

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[1] *See* Opp., Dkt. 63 at 15 (objecting to William Z's statement regarding when he heard a BBC report attributing the Lutheran Church Massacre to the AFL) (Decl. William Z (hereinafter "William Z"), Dkt. 61-7 ¶ 36)).

(hereinafter "Huband"), Dkt. 60-10 ¶ 20; Decl. Patrick Robert (hereinafter "Robert"), Dkt. 61-3 ¶ 14. Notwithstanding Defendant's insinuations, nothing in the record indicates that rebel forces could have accessed the Church and carried out such an organized attack on July 29, 1990. William Z's description of the BBC news report attributing the Massacre to the AFL was presented to show how he first learned of and reacted to the reported attack, and even if omitted, the remainder of his declaration and the rest of the record still undisputedly establish that the AFL was responsible. *Id.*; *see also* William Z, Dkt. 61-7 ¶ 37 (independently concluding that the AFL was responsible for the Massacre on the basis of the proximity of the Lutheran Church to the Executive Mansion in addition to the AFL's control of Sinkor in September 1990).

Third, notwithstanding Defendant's objections, the unrefuted evidence demonstrates how the AFL perpetrated multiple civilian attacks during the summer of 1990, including an attack on the United Nations compound nearly two months before the Lutheran Church Massacre. *Compare* Opp., Dkt. 63 at 11 (objecting to John Y's description of his encounter with women recounting the United Nations compound attack), *with* MoL at 9; Jett, Dkt. 61-8 at 32; Jett Ex. WWW, Dkt. 61-12 at 4, lines 1–8; Jett Ex. M, Dkt. 61-8 at 28, lines 7–9; Blunt, Dkt. 61-2 ¶¶ 12–13. Further, it is well-documented that these attacks were ethnically motivated, and Defendant's objection to three lines in a declaration does not address, much less refute, that overwhelming body of evidence. *Compare* Opp., Dkt. 63 at 11 (objecting to John Y learning from his father that the AFL attacks were ethnically motivated), *with* MoL, Dkt. 60-1 at 3–5, 6–10, 28–29 (citing Jett, Dkt. 61-8 at 29–39); Jett Ex. NN, Dkt. 61-10 at 8, lines 5–7, 11–12; Jett Ex. K, Dkt. 61-8 at 6, lines 46–54; RFA Ex. A, Dkt. 59-6 ¶¶ 21–26.

Finally, the exclusion of Jane W's statements that she learned from third parties that her aunt had been killed in the massacre and that her husband and children's bodies were found have

no impact on Defendant's liability for the attempted extrajudicial killing and torture of Jane W herself. *See* MoL, Dkt. 60-1 at 30–33. Nor would the exclusion of Jane W's statement that her father feared she would be killed affect the unrefuted evidence establishing Plaintiffs' fears of reprisals justifying equitable tolling of their claims. *See* MoL, Dkt. 60-1 at 19–23, 56–60; Mem. Law Supp. Pls.' Mot. Suppl. Protective Order and Leave to File under Seal, Dkt. 59-1 at 3–8.

Based on the foregoing, Defendant's hearsay objections should be overruled, but even in the event they are not, they neither cast doubt on the veracity of the declarants' statements nor identify any material dispute of fact that would preclude summary judgment here.

IV. Defendant Fails to Present Any Genuine Issue of Material Fact Precluding Summary Judgment.

As Defendant concedes, to avoid summary judgment on the basis of a genuine issue of material fact, he "must do more than simply show that there is some metaphysical doubt as to material facts." Opp., Dkt. 63 at 8 (citing *Matsushita Elec.*, 475 U.S. at 586). He must establish the existence of genuine disputes of material facts, where the disputed facts "have the potential to alter the outcome of the case." *United States v. Weiss*, No. CV 19-502, 2021 WL 352014, at *3 (E.D. Pa. Feb. 2, 2021) (quoting *Favata v. Seidel*, 511 F. App'x 155, 158 (3d Cir. 2013)). "Factual disputes that are irrelevant or unnecessary [to the outcome of the suit] will not be counted" for these purposes. *Phillips*, 1989 WL 88999 at *5 (citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)).

Far from meeting this standard, Defendant has failed to make *any* showing that rebuts Plaintiffs' case as to the physical presence of Defendant at the Lutheran Church Massacre and the AFL's territorial control of the Lutheran Church compound at the time of the Massacre. Even if the purported factual discrepancies cited by Defendant in his Opposition were colorable, their exclusion from the record still fails to establish a genuine dispute of material fact.

A. There Is No Genuine Issue of Material Fact as to Defendant's and SATU's Presence at the Lutheran Church Massacre.

None of Defendant's attempts to create a genuine issue of material fact as to his presence at the Lutheran Church Massacre withstands even cursory scrutiny.

First, Defendant has admitted that he was present at the Lutheran Church on July 29, 1990, and that he ordered SATU soldiers under his command to commit the Lutheran Church Massacre killing approximately 600 civilians seeking shelter there. RFA Ex. A, Dkt. 59-6 ¶ 21–35. These facts are conclusively established. *See supra* at 3; MoL, Dkt. 60-1 at 25 (citing *Sec'y U.S. Dep't of Labor v. Kwasny*, 853 F.3d 87, 91 (3d Cir. 2017)).

Second, Defendant cannot deflect blame by pointing fingers at other AFL soldiers who may have also been present at the Massacre. Specifically, Defendant seeks to place blame on Colonel Gay and Michael Tilley of the Death Squad on the basis of incidents not even contemporaneous to the Massacre. *See* Opp., Dkt. 63 at 10 (citing Decl. John X (hereinafter "John X," Dkt. 60-6 ¶ 22) (describing Colonel Gay sending a group of AFL soldiers to the Lutheran Church in June 1990, over one month prior to the Massacre)); Opp., Dkt. 63 at 11 (citing Huband, Dkt. 60-10 ¶ 27) (describing Tilley as an individual "thought to be involved with the massacre" and then describing that Tilley and his men were present at the Lutheran Church in October 1990). In any case, Death Squad members' presence at the Massacre cannot preclude summary judgment. Indeed, the presence of the Death Squad and other AFL soldiers is consistent with Defendant's presence and direction of the Massacre, as well as documents in the record. As Plaintiffs articulated in the Memorandum of Law in Support of the Motion for Summary Judgment, "Defendant led SATU and other AFL forces in a convoy to the Lutheran Church" and they were "supported by members of Tilley's Death Squad." MoL, Dkt. 60-1 at 13 (citing Robert, Dkt. 61-3 ¶ 14; Jett Ex. ZZZ, Dkt. 61-12).

Third, Defendant cannot overcome the force of the testimony of multiple witnesses who identified him as being present at the Massacre by relying on the lack of electricity in Monrovia in July 1990. *See* Opp., Dkt. 63 at 12–13. To the contrary, these witnesses have already explained how they were able to see and recognize Defendant during the Massacre. In John Z's own words, for instance, he was positioned outside in the courtyard, not inside the church, when soldiers entered the compound at night and although "[i]t was dark out," he was able to identify Defendant at the Lutheran Church compound because "car headlights made it light in the compound." John Z, Dkt. 60-8 ¶¶ 13, 17, 21. Similarly, John Y was able to identify SATU uniforms despite it being "pitch black" since "one [soldier] was holding a gas lamp." John Y, Dkt. 60-7 ¶ 21. These sources of light—which Defendant conveniently fails even to acknowledge—also explain how William Y was able to identify Defendant and see his name tag while they were standing just two feet apart. William Y, Dkt. 60-9 ¶ 14; *cf.* Opp., Dkt. 63 at 15. Thus, the fact that there was no electricity in Monrovia in July 1990 does not to refute the identification of Defendant and SATU soldiers under his command on the night of the Massacre.

Fourth, Defendant cannot negate his and his subordinates' physical presence at the Massacre by creating alleged factual inconsistencies regarding the uniforms of SATU and AFL soldiers. The fact that *some* AFL soldiers at the Lutheran Church Massacre wore masks or helmets with netting does not undermine the witnesses' identification of Defendant, who at the time was smoking a cigarette and was not wearing anything on his face. Opp., Dkt. 63 at 11–13; John Z, Dkt. 60-8 ¶ 17 ("Unlike the other soldiers, Moses Thomas did not wear a combat helmet or a mask"); MoL, Dkt. 60-1 at 5 ("Sometimes SATU soldiers wore combat helmets with netting[.]"). Indeed, Defendant does not allege or otherwise present evidence that he wore or was known to wear such masks or netting. Further, William Y's description of the uniforms of

the soldiers at the Lutheran Church Massacre—namely, "the signature SATU red on the[] uniforms" (William Y, Dkt. 60-9 ¶ 12)— fully comports with the SATU uniforms described by Plaintiffs and admitted to by Defendant: green camouflage fatigues with red t-shirts underneath and red tabs on their collars. MoL, Dkt. 60-1 at 5 (citing William Z, Dkt. 61-7 ¶¶ 15, 29; William Y, Dkt. 60-9 ¶ 5; John Z, Dkt. 60-8 ¶ 9; RFA Ex. A, Dkt. 59-6 ¶ 8); *cf.* Opp., Dkt. 63 at 15.

Similarly, that some senior figures of the NPFL wore olive green fatigues and Jane W saw a man wearing an olive-green hat at the Lutheran Church days before the Massacre does not affect the identification of Defendant and SATU as being present at the Massacre, nor does it suggest that rebel forces were somehow responsible for the Massacre. *See* Opp., Dkt. 63 at 9–10 (citing Huband, Dkt. 60-10 ¶ 9; Jane W, Dkt. 60-5 ¶ 15). Jane W explicitly describes seeing "*government* soldiers" wearing "*government* camouflage fatigue and combat helmets" with official AFL insignia. Jane W, Dkt. 60-5 ¶ 13 (emphases added); *id.* ("They wore what I recognized as the government camouflage fatigues and combat helmets. They had insignia on their uniforms, including bird and palm tree symbols, the Liberian flag, and stars that showed their rank."). Indeed, it is telling that Defendant is unable to point to *any* evidence in the record of soldiers at the Lutheran Church Massacre wearing civilian clothing, which as the record undisputedly establishes, all non-senior rebel forces wore at the time. Blunt, Dkt. 61-2 ¶ 25; RFA Ex. A, Dkt. 59-6 ¶ 8, Huband, Dkt. 60-10 ¶ 9; William Z, Dkt. 61-7 ¶¶ 15–16, 29; John Z, Dkt. 60-8 ¶ 9; William Y, Dkt. 60-9 ¶¶ 5, 14; John X, Dkt. 60-6 ¶¶ 22, 24; John Y, Dkt. 60-7 ¶ 11; Decl. Andrew Voros (hereinafter "Voros"), Dkt. 61-4 ¶ 14; Decl. William W (hereinafter "William W"), Dkt.61-5 ¶ 18; William X, Dkt. 61-6 ¶ 16. Moreover, because members of the AFL wore olive green at times, the sight of an olive green hat does not create a genuine issue of

material fact as to the AFL's presence. *See* MoL, Dkt. 60-1 at 5; *see also* Robert, Ex. I, Dkt. 61-3 (depicting General Nimley of the AFL wearing an olive green hat).

Fifth, although Defendant attempts to dismiss William Z's statement about the AFL command structure on the basis of lack of personal knowledge, William Z did have personal knowledge: he was an AFL soldier at the time of the Massacre and shared his understanding that it is unlikely that the SATU would have taken orders from anyone other than Defendant on the basis of his intimate personal knowledge of the military hierarchy as an AFL soldier at the time of the Massacre. *See* Opp., Dkt. 63 at 15; William Z, Dkt. 61-7 ¶ 6 (describing his observations of the "inner workings of the AFL . . . gaining significant knowledge about the structure and operations of the AFL."). William Z's statements are the admissible lay opinion testimony of a trained and skilled witness based on his "years of service in the AFL as an active duty soldier and officer." William Z, Dkt. 61-7 ¶ 3. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175-76 (3d Cir. 1993) (lay opinion testimony of plaintiff's owner based on his position, knowledge and participation in the operation of the business was admissible); *Acosta v. Cent. Laundry,* Inc., 273 F. Supp. 3d 553, 556 (E.D. Pa. 2017) (citing *Donlin v. Philips Lighting N. Am. Corp.*, 581 F.3d 73, 81–82 (3d Cir. 2009)) (lay witness's opinion is admissible where it "is the reasonable product of a witness's particularized knowledge," and that knowledge is "achieved through either personal experience or specialized training" and "provide[s] a truly rational basis for his or her opinion"). Given his experience and particularized knowledge of the AFL in 1990 and throughout the civil wars, William Z's statements go well beyond mere speculation.

Lastly, Defendant's attempts to undermine the credibility of William Y, who saw Defendant at the Lutheran Church compound on the night of the Massacre, also fail to create a genuine issue of material fact precluding summary judgment. Defendant disputes the facts of

William Y's declaration on the basis that it is "undisputed that there is no beach near to Lutheran church from which William [Y][2] could have heard shoots [*sic*]." Opp., Dkt. 63 at 15. But undisputed evidence establishes the existence of a long stretch of beach four blocks south of the Lutheran Church, which is located on Tubman Boulevard and 14th Street in the Sinkor neighborhood. *See* Jett, Dkt. 61-8 at 19; Jett, Ex. X, Dkt. 61-9 (showing map of Monrovia).

Accordingly, each of Defendant's purported discrepancies is unavailing in light of the record as a whole. *See* RFA Ex. A, Dkt. 59-6 ¶¶ 27–35; Jane W, Dkt. 60-5 ¶¶ 13–17; John X, Dkt. 60-6 ¶ 22; John Z, Dkt. 60-8 ¶¶ 17–20; William Y, Dkt. 60-9 ¶¶ 11–14. In any event, Defendant's physical presence at the Massacre is not a prerequisite to a finding of liability. As Plaintiffs articulate in the Motion for Summary Judgment, even if Defendant did not directly perpetrate the Massacre, the undisputed record establishes Defendant's liability for all of Plaintiffs' claims under the doctrines of command responsibility[3] or joint criminal enterprise.[4]

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[2] Defendant refers to "William X" but it is clearly a typographical error based on the contents of the cited declaration, which describes an AFL soldier who was stationed at the beach on July 29, 1990, heard gunshots coming from the Lutheran Church compound, and ran to the church, where he saw SATU soldiers and Defendant, who ordered him to return to his post. The witness returned to the Church the next day and discovered the dead body of his sister. *Compare* Opp., Dkt. 63 at 14–15, *with* William Y, Dkt. 60-9 ¶¶ 10–18.

[3] The undisputed record establishes Defendant's liability under command responsibility even if he was not present at the Massacre because he failed to prevent SATU forces under his command from committing the Lutheran Church Massacre and then failed to take any steps to punish them thereafter. Defendant has admitted and the record shows that he was the *de jure* commander of SATU at the time that SATU forces committed the Lutheran Church Massacre. MoL, Dkt. 60-1 at 4–5, 13–17, 20–21; RFA Ex. A, Dkt. 59-6 ¶¶ 2–3, 24–33. Moreover, Defendant maintained effective control over his forces. *See, e.g.*, MoL, Dkt. 60-1 at 18, 50. Even if he was not at the Massacre himself, Defendant knew or at the very least, should have known that SATU soldiers perpetrated the attack and others like it. He commanded previous atrocities and SATU's abuses were notorious and widely reported. *Id*. at 7–10; *see also id*. at 8 (describing how the U.S. Department of State reported that SATU forces were among those in the AFL "primarily responsible" for the targeted killings of

MoL, Dkt. 60-1 at 49–54. Accordingly, as a matter of law, Defendant's presence at the Massacre cannot "properly preclude the entry of summary judgment." *Phillips*, 1989 WL 88999 at *5 (citing *Anderson*, 477 U.S. at 248).

B. There Is No Genuine Issue of Material Fact as to the AFL's Territorial Control of the Lutheran Church Area at the Time of the Massacre.

Defendant also asserts without basis that "[t]here are material issues of fact as to whether [the Executive Mansion and Sinkor] area was under AFL control on July 29, 1990." Opp., Dkt. 63 at 16. But Defendant fails to offer any evidence to support the existence of a material dispute of fact and refute Plaintiffs' evidence. At most, Defendant observes—as Plaintiffs previously explained—that the rebel forces were closing in on Monrovia at the time of the Massacre and that fighting in the region was escalating. Opp., Dkt. 63 at 13–14, 16–18. But

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Mano and Gio civilians). Finally, the record shows that Defendant failed to take any steps to punish his men for their abuses, including the Lutheran Church Massacre. *Id*. at 51–52.

[4] The elements of joint criminal enterprise are also readily met even if Defendant was not himself present at the Massacre. MoL, Dkt. 60-1 at 52–54. The Massacre was part the AFL's common plan to target Mano and Gio civilians they believed to be rebel sympathizers before rebel forces reached Monrovia. *Id.* at 4, 6–10; *see also Prosecutor v. Babić,* Case No. ICTY-03-72-S, Trial Chamber Sentencing Judgment, ¶¶ 24, 37–40 (June 29, 2004) (finding a senior government official liable under joint criminal enterprise because he provided support, despite not being present for the commission of the crimes themselves). That plan was being carried out by the AFL soldiers, including Defendant and the SATU forces under his command. MoL, Dkt. 60-1at 6–10, 12, 16–19. Even without being present at the Massacre, Defendant acted in furtherance of the AFL's plan to target Mano and Gio civilians. He directed another attack of Mano and Gio civilians—the massacre of 27 Mano and Gio AFL soldiers' family members—and went to the church in the days before to conduct a reconnaissance mission to prepare for the Massacre. *Id*. at 7, 12, 54. Defendant also never disciplined his men for the Massacre. *Id.* at 20–21, 53. Defendant's reconnaissance of the Lutheran Church, as well as his own participation in and command over SATU forces responsible for attacking Mano and Gio civilians also establish his intention to further the AFL's attack against these ethnic groups.

these facts do not address, much less undermine the fact of the AFL's exclusive control of the Sinkor neighborhood where the Lutheran Church is located at the time of the Massacre.

As an initial matter, Defendant misconstrues witnesses' statements to improperly suggest that on the night of July 29, 1990, the area around the Lutheran Church was contested territory. *Compare* Opp., Dkt. 63 at 4, 13 ("During the night of July 23, 1990 and the days, that followed, INPFEL [*sic*] advanced to the lower end of Crown Hill, the vicinity of St. Peter's Lutheran Church (the Lutheran Church)." (citing Huband, Dkt. 60-10 ¶¶ 12–13)), *with* Huband, Dkt. 60-10 ¶¶ 12–13 ("As the INPFL and NPFL closed in on Monrovia, the AFL concentrated its forces in the city center, in the areas close to President Doe's Executive Mansion, and in the Crown Hill area, including the vicinity of St. Peter's Lutheran Church."). The witness clearly stated that on the morning of July 30, 1990, he was unable to travel to the Lutheran Church because it was "a mile or more into AFL territory." Huband, Dkt.60-10 ¶ 17. It is also clear from the map of Monrovia that Crown Hill is not "the vicinity of the Lutheran Church." *See* Jett Ex. X, Dkt. 61-9.

Unable to make any showing negating the AFL's territorial control, Defendant resorts to mischaracterizing Ambassador Dennis Jett's testimony. Defendant first misleadingly claims that Ambassador Jett "opinioned solely on the issue as to who was responsible for the July 29, 1990 Lutheran Church massacre" (Opp., Dkt. 63 at 16) when in fact he opined on the historical context and events of the first Liberian civil war, including the U.S. Embassy in Liberia's assessment of the AFL's activities, human rights record, and command structure—all drawing from his personal experience as the Deputy Chief of Mission in the U.S. Embassy in Liberia at the time of the Massacre. Jett, Dkt. 61-8 at 3. Defendant then characterizes Ambassador Jett's testimony attributing the Massacre to the AFL as "speculation" and "inconclusive" as his own "expert conclusion," even though Ambassador Jett's report articulates the *U.S. Government's*

official assessment of AFL responsibility in the days and months following the Massacre, including "after there had been some time for investigation." Jett, Dkt. 61-8 at 38 (citing Jett, Exs. K, G, Dkt. 61-9; Ex. RR, Dkt. 61-10; Exs. XX, OOO, Dkt. 61-11; Exs. PPP, QQQ, RRR, SSS, TTT, Dkt. 61-12). Defendant also misleadingly describes Ambassador Jett's report as "conclud[ing] that no one else could have attacked the Lutheran Church but the AFL because AFL was in control." Opp., Dkt. 63 at 17. But the AFL's zone of territorial control was only one of two stated reasons for the U.S. Embassy's attribution of the Massacre to the AFL. Defendant conveniently omits Ambassador Jett's explanation that the U.S. Embassy's attribution to the AFL *was also* based on the nature of the Massacre and its likeness to other contemporaneous attacks by the AFL on Mano and Gio civilians, including at IDP shelters like the Lutheran Church. Jett, Dkt. 61-8 at 39; *see also* Huband, Dkt. 60-10 ¶ 20 ("The size and coordination of the operation leaves little doubt that it was carried out by AFL forces.").

At summary judgment, an expert report can serve to establish undisputed material facts. *See United States v. Donovan*, 661 F.3d 174, 185 (3d Cir. 2011) (finding that the district court properly relied on two expert reports at summary judgment to find that movant met its burden at summary judgment, where non-movant did not present any expert evidence but instead relied on their own affidavit). In any event, even if Ambassador Jett's conclusion as to the AFL's control of the Lutheran Church area is credited as "inconclusive" as Defendant urges (Opp., Dkt. 63 at 16; *see also* Opp., Dkt. 63 at 13), the record taken as a whole—including declarations of witnesses living in the area around the Lutheran Church on the night it was attacked, declarations of journalists reporting on the Liberian Civil War from Liberia and neighboring countries, and U.S. government cables and reports monitoring the conflict—undisputedly demonstrates that the Sinkor area was under the AFL's exclusive control, and only AFL forces could have operated

freely in that area. *See* MoL, Dkt. 60-1 at 10; *see also* Jett Ex. GG, Dkt. 61-10 ¶ 3; Jett Ex. X, Dkt. 61-9; Huband, Dkt. 60-10 ¶¶ 13, 16 ("I understand that on the night of July 29, 1990—the night of the attack on the Lutheran Church—the area in which the church is located was under AFL control."); Blunt, Dkt. 61-2 ¶ 18 ("Although the NPFL were approaching Monrovia, through late July 1990, the AFL was based around the Executive Mansion and maintained control of the Sinkor area of Monrovia, which included St. Peter's Lutheran Church."); Voros, Dkt. 61-4 ¶¶ 9, 14, 20 (noting that despite the shifting frontlines, "the AFL still controlled central Monrovia"); William W, Dkt. 61-5 ¶ 31; William Z, Dkt. 61-7 ¶ 11; William Y, Dkt. 60-9 ¶¶ 10–17.

Because the totality of the record, including unrefuted evidence, establishes AFL territorial control over Sinkor and the Lutheran Church, there is no genuine issue of material fact here. *See Hoffman v. J.M.B. Retail Props., Co.*, 817 F. Supp. 448, 451-53 (D. Del. 1993) (granting defendant's motion for summary judgment where plaintiff "offered no evidence to refute the evidence offered" to show that defendant did not control the property where plaintiff's injury occurred); *see also Humphreys & Partners Architects, L.P. v. Lessard Design, Inc*., 43 F. Supp. 3d 644, 671 (E.D. Va. 2014) (finding expert reports, combined with documents in the record, established undisputed material facts).

V. Conclusion

For the reasons set forth above and in Plaintiffs' Motion and its supporting documents, Plaintiffs respectfully request that the Court enter an order granting Plaintiffs' Motion for Summary Judgment.

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