**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

| | | |
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| JOAN JARA, etc., et al. | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. 6:13-cv-01426-RBD-GJK |
| PEDRO PABLO BARRIENTOS NÚÑEZ, | ) | |
| Defendant. | ) | |

**PLAINTIFFS' APPLICATION FOR DEFAULT JUDGMENT ON THE SECOND AMENDED COMPLAINT**

Plaintiffs Joan Jara, Amanda Jara Turner, and Manuela Bunster in their personal capacities and Plaintiff Joan Jara on behalf of the estate of Víctor Jara ("Plaintiffs") apply, pursuant to Rule 55(b) of the Federal Rules of Civil Procedure for a default judgment on the Second Amended Complaint (Doc. No. 63; the "Amended Complaint") against Defendant Pedro Pablo Barrientos Nuñez ("Defendant"), and in support say:

1. Defendant was served with summons and the Initial Complaint on September 4, 2013. Affidavit of James A. Bolling, Doc. No. 53, ¶ 2 ("Bolling Aff."). Defendant's response to the Initial Complaint was due to be served by September 25, 2013, pursuant to Rules 12(a) and (b), Federal Rules of Civil Procedure. *Id.* On September 30, 2013, Plaintiffs applied for an entry of default

against Defendant because he had failed to plead or otherwise defend himself against this action. See Doc. No. 35; Bolling Aff. ¶ 2. On October 1, 2013, the Clerk of Court entered a default against Defendant. *See* Doc. No. 36.

2. On November 18, 2013, Plaintiffs filed a Motion for Default Judgment on the Initial Complaint against Defendant. *See* Doc. No. 41. Plaintiffs refer the Court to their November 18, 2013 Motion for Default Judgment (Doc. No. 41) for a discussion of the background facts of this case and applicable legal standards of the causes of action in the Initial Complaint.

3. On November 20, 2013, this Court set a status conference for January 16, 2014, to address, with regard to the liability portion of the Motion for Default Judgment on the Initial Complaint, the issues of (1) exhaustion of remedies under the Torture Victim Protection Act; (2) statute of limitations; and (3) *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). *See* Doc. No. 43; Doc. No. 45.

4. After the January 16, 2014 status conference, this Court ordered Plaintiffs to submit additional briefing on the Motion for Default Judgment on the Initial Complaint. *See* Doc. No. 47. Plaintiffs did so, and also filed an Amended Complaint to address issues the Court raised during the status conference. *See* Doc. No. 50; Doc. No. 52.

5. On February 19, 2014, Plaintiffs served Defendant with their Amended Complaint by mail pursuant to Federal Rule of Civil Procedure 5(b).

*See* Bolling Aff. ¶ 3; Doc. No. 52. The Amended Complaint's first five claims are identical to the first five claims of the Initial Complaint.[1] *See* Doc. No. 52. The Amended Complaint removed four claims brought in the Initial Complaint,[2] and did not add any new claims. *Id.*

6. Defendant's response to the Amended Complaint was due to be served by March 17, 2014, pursuant to Rules 15(a)(3), 6(d), and 5(b)(2)(C) of the Federal Rules of Civil Procedure. On April 22, 2014, Plaintiffs filed a Motion for Entry of Default against Defendant pursuant to Rule 55(a) of the Federal Rules of Civil Procedure after Defendant failed to respond. *See* Doc. No. 53. On April 23, 2014, the Clerk of the Court filed an entry of default. *See* Doc. No. 54.

7. On June 30, 2014, this Court issued an order denying Plaintiffs' Application for Default Judgment without prejudice. Doc. No. 62. In its order, the Court found that the First Amended Complaint sufficiently established the Defendant's liability for torture and extrajudicial killing under the Torture Victim Protection Act. Doc. No. 62 at 5-6.

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[1] (1) Claim for torture under the Alien Tort Statute ("ATS") and the Torture Victim Protection Act ("TVPA"); (2) claim for extrajudicial killing under the ATS and the TVPA; (3) claim for cruel, inhuman, or degrading treatment or punishment under the ATS; (4) claim for arbitrary detention under the ATS; and (5) claim for crimes against humanity under the ATS.

[2] Claims for wrongful death, intentional infliction of emotional distress, false imprisonment, and battery under Florida State law.

8. The Court further found that *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) foreclosed Plaintiffs' claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, mainly, extrajudicial killing, torture, cruel treatment, arbitrary detention, and crimes against humanity, because the tortious conduct took place outside the United States. Doc. No. 62 at 4 n.4. While the Court accepted that the Defendant is a U.S. citizen, resides in the U.S., and has businesses in the U.S. – and while Plaintiffs demonstrated that they have no other jurisdiction in which to bring their claim (*see* the "Additional Briefing in Support of Motion for Default Judgment Following Status Conference," Doc. No. 50 at 13-14) – the Court concluded that it was compelled to rule that Plaintiffs' claims do not "touch and concern" the United States sufficiently to overcome the presumption against extraterritoriality. *Id.* at 12-13.

9. Although the Court found that the Amended Complaint established the entitlement of Plaintiff Joan Jara to relief for the extrajudicial killing of Víctor Jara under the TVPA, the Court questioned the sufficiency of the allegations with respect to the standing of Víctor Jara's daughters to seek redress for the same claim under Chilean law. *Id.* at 6-8. The Court gave leave to Plaintiffs to replead and clarify whether the children are proper claimants under Chilean wrongful death law. *Id.* at 9.

10. Pursuant to the Court's Order (Doc. No. 62), on June 30, 2014 Plaintiffs filed and served a Second Amended Complaint. *See* Doc. No. 63. The Second Amended Complaint specifically alleged that Amanda Jara Turner and Manuela Bunster have standing under Chilean law and did not add any new claims. *Id.* On that date, Plaintiffs also filed a supplemental brief regarding standing under the laws of the Republic of Chile and an accompanying declaration of Chilean law expert Professor Rodrigo Gil, providing that Amanda Jara Turner and Manuela Bunster are entitled to relief for the wrongful death of their father under Chilean law, and therefore have standing under the TVPA. *See* Doc. No. 64.

11. On July 30, 2014, Plaintiffs served Defendant with the Second Amended Complaint by mail pursuant to Federal Rule of Civil Procedure 5(b). See Affidavit of James A. Bolling, Doc. No. 66, ¶ 2. Defendant's response to the Second Amended Complaint was due to be served by August 18, 2014, pursuant to Rules 15(a)(3), 6(d), 6(a)(1)(C), and 5(b)(2)(C) of the Federal Rules of Civil Procedure.

12. On August 21, 2014, Plaintiffs filed a Motion for Entry of Default against Defendant pursuant to Rule 55(a) of the Federal Rules of Civil Procedure after Defendant failed to plead or otherwise defend himself against this action. *See* Doc. No. 66; Affidavit of James A. Bolling, Doc. No. 66, ¶ 4.

On August 22, 2014, the Clerk of the Court filed an entry of default. *See* Doc. No. 67.

13. In support of this motion, Plaintiffs refer to and reincorporate the arguments in their previous briefing:

| **Description** | **Doc. No.** | **Pages** |
|---|---|---|
| Motion for Default Judgment on the Initial Complaint | 41 | 2-9 |
| Motion for Leave to File First Amended Complaint | 49 | 1 |
| Additional Briefing in Support of Motion for Default Judgment Following Status Conference | 50 | 6-22 |
| *Supplemental Brief on Chilean Law Regarding Standing* by Manuela Bunster, Joan Jara, and Amanda Jara Turner. | 64 | 3-6 |

14. As Plaintiffs previously argued in their Additional Briefing in Support of Motion for Default Judgment, the Supreme Court's *Kiobel* decision does not foreclose the availability of jurisdiction under the ATS. *See* Doc. No. 50 at 9-12. Instead, the Supreme Court was careful to provide an exception for those extraterritorial claims that touch and concern the United States with sufficient force to displace the presumption against extraterritoriality. *Kiobel*, 133 S. Ct. at 1669. However, the Supreme Court declined to decide what factors meet this exception and confined its holding to the specific facts of *Kiob*el, in which the defendant was a foreign multinational corporation whose only connection to the U.S. was a listing in the New York Stock Exchange and an affiliation with a public relations office in New York City, holding that these

connections were insufficient to displace the presumption. *Id.* at 1669 ("Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."); *id.* at 1670 (Breyer, J., concurring in the judgment) (citing facts relating to defendant Royal Dutch Petroleum's limited affiliation with the U.S.).

15. Since Plaintiffs' initial briefing in this matter and following the Court's decision on June 30, 2014 (Doc. No. 62), two courts of appeals have issued opinions (one released on the same day as this Court's decision) grappling with the question of what claims satisfy the *Kiobel* standard. Plaintiffs hereby provide the Court with these decisions as supplemental authority and address their impact on the case at bar.

16. While these cases do not take a uniform approach, Plaintiffs reassert their argument that claims alleging violations of the law of nations against an individual who resides in the U.S. and is a U.S. citizen "touch and concern" the United States sufficiently to overcome the *Kiobel* presumption to warrant jurisdiction, a result that is not inconsistent with either of these cases.

### A. *Eleventh Circuit Opinion in Cardona v. Chiquita Does Not Foreclose Plaintiffs' ATS claims in this Case bBecause it is Limited to Claims Against a Corporate Defendant and Fails to Apply the Majority Opinion in Kiobel.*

17. In the recent decision *Cardona v. Chiquita Brands Int'l Inc.*, No. 12–14898, 2014 WL 3638854 (11th Cir. July 24, 2014) (*en banc* petition

pending), the Eleventh Circuit held that it lacked jurisdiction over the plaintiffs' ATS claims asserted against a corporate defendant. As an initial matter, Plaintiffs note that this fact alone distinguishes the claims here. The claims in Chiquita were not made against an individual U.S. citizen, against whom claims could only be brought in U.S. courts, as is the case with Defendant Barrientos.

18. The Court of Appeals reasoned that the facts in *Chiquita*, involving claims asserted against a U.S. corporation, present in several countries, were not sufficiently distinguishable from the facts in *Kiobel*, which involved claims against a foreign multinational present in multiple jurisdictions. *Id.* at *2-*3. It observed that the *Kiobel* Court's finding that corporations are present in many jurisdictions made the question of whether the defendant was a U.S. or foreign corporation a distinction without a difference. *Id.* at* 3. ("Plaintiff-appellants attempt to anchor ATS jurisdiction in the nature of the defendants as United States corporations. Corporate defendants in *Kiobel* were not United States corporations, but were present in the United States. The Supreme Court declared that '[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.' The distinction between the corporations does not lead us to any indication of a congressional intent to make the statute apply to extraterritorial torts.") (citations omitted).

19. Yet even the *Chiquita* court recognized that the *Kiobel* presumption is displaced where ATS claims touch and concern the U.S. with sufficient force. *Chiquita*, 2014 WL 3638854, at *3-4. While it did not hazard an opinion on when that exception might be satisfied, it is of interest that following its decision, in an order on the petition for rehearing, the Court of Appeals took pains to emphasize that its decision was limited to the corporate defendants before it. *Cardona v. Chiquita*, No. 12-14898, Order: Petition for Panel Rehearing Denied (Sept. 4, 2014) ("Insofar as the petitions before us see clarification of the effect of our decision on claims beyond those against the corporate defendants, we make plain that we decided only those questions presented affecting the parties to the appeal. Only the corporate defendants appealed, and our judgment disposes only of the claims against them.")(Copy attached).

20. At the very least, this keeps the door open to the question of whether a case against a natural person, who is present in the U.S., and who is, moreover, a U.S. citizen, and who cannot be brought before any other court, touches and concerns the U.S. with sufficient force to overcome the presumption against territoriality.

21. In any event, and as this Court is likely aware, a petition for *en banc* review of the Court of Appeals for the Eleventh Circuit's decision in Chiquita is currently pending on the grounds that it conflicts both with Supreme

Court precedent (*see Kiobel*, 133 S. Ct. at 1669; *Sosa v. Alvarez Machain*, 542 U.S. 692, 725 (2004)), and with every other Circuit decision interpreting *Kiobel*. *See Al-Shimari v. CACI Premier Tech. Inc.*, 758 F.3d 516 (4th Cir. 2014); *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013) (*en banc* petition pending); *Balintulo v. Daimler AG*, 727 F.3d 174, 189-92 (2d Cir. 2013); *Chowdury v. World Bangladesh Holding Ltd.*, 746 F.3d 42, 49 (2d Cir. 2013); *see also* Petition for Rehearing En Banc, *Cardona v. Chiquita Brands Int'l, Inc.*, No. 12-14898 (11th Cir. Aug. 4, 2014) (petition pending).

22. Significantly, the *Chiquita* Court bypassed the *Kiobel* majority opinion and instead adopted the view Justice Alito proposed in his concurrence, that the *Kiobel* presumption prohibits *all* extraterritorial claims under the ATS. *Cardona v. Chiquita Brands Int'l Inc.*, No. 12–14898, 2014 WL 3638854 at *7-9 (11th Cir. July 24, 2014); *see also In re: Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, No. 08-01916-MD-MARRA, (S.D. Fla.) at 10; Petition for rehearing and rehearing *en banc* at 8-9, *Cardona v. Chiquita Brands Int'l, Inc.*, No. 12-14898 (11th Cir. Aug. 14, 2014). As plaintiffs in *Chiquita* argued in Supplemental Briefing, only two out of nine Justices adopted this position and instead, the majority articulated a broader view permitting jurisdiction for some extraterritorial claims that "touch and concern" the territory of the U.S. Petition for rehearing and rehearing *en banc*

at 2-3, 8-9, *Cardona v. Chiquita Brands Int'l, Inc.*, No. 12-14898 (11th Cir. Aug. 14, 2014).

23. In contrast, in a decision that came down the same day as this Court's order, the Court of Appeals for the Fourth Circuit recognized, like all of the other courts of appeal reaching this issue other than the Court of Appeals for the Eleventh Circuit, that the *Kiobel* majority embraced a broader view of ATS jurisdiction than Justices Alito and Thomas, even for corporate defendants. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d at 528-531 (4th Cir. 2014).[3]

24. In *Al Shimari*, the Fourth Circuit found that a defendant's U.S. corporate citizenship and other connections to U.S. territory satisfied the "touch and concern" test. 758 F.3d at 530-531. The Ninth Circuit also rejected a blanket extraterritoriality rule for corporate defendants in *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013) (*en banc* petition pending), and remanded the decision to allow the Plaintiffs to amend their complaint to show how their ATS claims met the "touch and concern" test. Also contrary to the holding of

[3] Moreover, the court in *Chiquita* wrongly reasoned that torture committed by a private, non-State actor does not violate the law of nations and questioned whether the plaintiffs' claims would survive the cautionary analysis in *Sosa v. Alvarez Machain. See Sosa v. Alvarez Machain*, 542 U.S. 692, 725 (2004) (cautioning that claims of present-day violations of the law of nations should be widely "accepted by the civilized world and defined with a specificity"). The court thus concluded that "[t]here is no allegation that any torture occurred on U.S. territory, or that any other act constituting a tort in terms of the ATS touched or concerned the territory of the United States with any force." *Chiquita*, 2014 WL 3638854, at *4.

the Court of Appeals for the Eleventh Circuit in *Chiquita*, the Court of Appeals for the Second Circuit also held that *Kiobel* left "questions regarding the permissible reach of causes of action under the ATS." *Balintulo v. Daimler AG*, 727 F.3d 174, 191, n.26 (internal quotation omitted).

25. Therefore, even if the Chiquita decision is affirmed through *en banc* review, it is readily distinguishable from the facts of this case. Unlike in *Chiquita*, Plaintiffs' claims here are against an individual U.S. citizen who is a State-actor and who has sought and found safe haven in the United States and over whom jurisdiction cannot be obtained in any foreign country. *See Kiobel*, 133 S. Ct. at 1669.[4] As stated in paragraph 8, above, Defendant has significant connections to the U.S. and the claims touch and concern the U.S. with sufficient force to displace the presumption against extraterritoriality.

### B. *Plaintiffs' Claims Are More Closely Analogous to Those in Al-Shimari v. Caci, Upon Which the Fourth Circuit Found Jurisdiction Over Extraterritorial ATS Claims With a Substantial Tie to the U.S.*

26. *Chiquita* declined to define the "touch and concern" test, while the Court of Appeals for the Fourth Circuit did so in *Al-Shimari v. Caci Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014). Unlike the Court of Appeals for the Eleventh Circuit, the Court of Appeals for the Fourth Circuit

[4] To the extent Plaintiffs' ATS claims might be barred by *Chiquita*, Plaintiffs assert a nonfrivolous argument for extending, modifying, or reversing *Chiquita*, in the event the Eleventh Circuit does not do so *en banc*.

hewed closely to the language of the rule pronounced by the Supreme Court in *Kiobel*, finding that where the *claims*, not necessarily the underlying *conduct*, have a substantial connection to the United States, the presumption is displaced. *See id.*; *Al-Shimari v. Caci Premier Technology, Inc.*, 758 F.3d at 528 (4th Cir. 2014) ("[T]he clear implication of the Court's 'touch and concern' language is that courts should not assume that the presumption categorically bars cases that manifest a close connection to United States territory."). With this, the court relied on the limited guidance provided by the majority in *Kiobel* to determine whether the extraterritorial ATS claims in that case might proceed.

27. The Court of Appeals for the Fourth Circuit explained "that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Al-Shimari*, 758 F.3d at 527 (*quoting Kiobel*, 133 S.Ct. at 1669) (*citing, e.g.*, Black's Law Dictionary 281 (9th ed. 2009) (defining "claim" as the "aggregate of operative facts giving rise to a right enforceable by a court")). Therefore, the tortious conduct does not necessarily need to take place on U.S. territory to displace the *Kiobel* presumption against extraterritoriality.

28. Based on a close reading of the Supreme Court opinion, the Court of Appeals for the Fourth Circuit looked to the principles underlying the presumption against extraterritoriality, namely: (1) whether application of the

ATS to the overseas tortious conduct would create international discord resulting from "unintended clashes between our laws and those of other nations," and (2) whether ATS claims will not require "unwarranted judicial interference in the conduct of foreign policy." *Al-Shimari*, 758 F.3d at 530 (quoting *Kiobel*, 133 S. Ct. at 1664).

29. The court reasoned that enforcement of claims under the ATS cannot cause an unintended clash with the law of other nations because the ATS, by its nature, is simply enforcing universal and obligatory customary international law, law which is recognized by other nations. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 529-530 (4th Cir. 2014). Moreover, the court did not risk problems associated with bringing a foreign national to court for foreign crimes because the claims were against a U.S. citizen defendant. *Id.* (citing *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 322-24 (D. Mass. 2013) (holding that *Kiobel* did not bar ATS claims against an American citizen, in part because "this is not a case where a foreign national is being hailed into an unfamiliar court to defend himself"). Finally, given that all three branches of government have proscribed acts of torture, the Court of Appeals for the Fourth Circuit concluded that litigation for allegations of torture under the ATS would not create any unwarranted judicial interference with foreign policy. Therefore, Plaintiffs' ATS claims were found to touch and concern the

territory of the United States with sufficient force to displace the *Kiobel* presumption. *Id.*

30. The claims at bar are closely analogous to those alleged in *Al-Shimari*. In keeping with the Supreme Court's decision in *Kiobel*, those claims should proceed. Plaintiffs here seek to bring to bring a U.S. citizen, who is a long-standing resident of the state of Florida, before a U.S. Court; Defendant Barrientos is a natural person, subject only to the jurisdiction of the United States. In doing so, Plaintiffs seek to enforce universal and obligatory norms of customary international law against a U.S. citizen defendant, who is a long-standing resident of the state of Florida. An action against him here will not result in international discord or conflict with the laws of a foreign nation. As for judicial interference with foreign policy, Congress has made clear a "distinct interest in preventing the U.S. from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Id.* (Breyer, J., concurring in judgment) (quoting *Kiobel*, 133 S. Ct. at 1671 ).

31. This Court has already found that Plaintiffs' allegations of torture and extrajudicial killing are sufficient (*see* Order denying Motion for Default Judgment, Doc. No. 62, 5-6), making Defendant Barrientos, as a matter of law, an enemy of all mankind. See Sosa, 542 U.S. at 732 (citing *Filártiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the

torturer has become—like the pirate and slave trader before him— *hostis humani generis*, an enemy of all mankind.")). Providing civil accountability in U.S. court for such egregious violations of the law of nations is what Congress intended by enacting the Alien Tort Statute and, more recently, the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note. Accordingly, Plaintiffs' claims against U.S. defendant Barrientos touch and concern the U.S. substantially, and litigation in federal court does not run the risk of international discord or conflict with foreign policy. Thus, Plaintiffs claims here satisfy the cautionary analysis of both *Sosa* and *Kiobel*. These claims touch and concern the U.S. sufficiently to displace the *Kiobel* presumption. *See Kiobel* at 1669.

32. In the event this court nevertheless dismisses Plaintiffs' claims under the ATS, Plaintiffs request permission to present evidence for damages on all claims at the February 23, 2015 hearing and request that at the end of such hearing, that this Court issue a provisional order on damages for Plaintiffs' ATS claims. Thus, should Plaintiffs' ATS claims be reinstated on appeal, they may seek entry of the provisional order, rather than presenting evidence on damages a second time. A second hearing would be financially and emotionally taxing for the Plaintiffs and witnesses, as well as repetitive and unduly burdensome on the Court's resources and, accordingly, in the interest of justice and judicial economy. Evidence on damages relating to the ATS claims

will largely overlap with evidence on the TVPA claims, and Plaintiffs estimate that they will require no more than one hour of additional testimony in total to address the ATS claims.

33. Accordingly, Plaintiffs hereby move for a default judgment on the Second Amended Complaint and seek a hearing on damages for all claims. In the alternative, Plaintiffs seek a hearing on damages for the TVPA claims, with permission to present evidence on harms resulting from violations under the ATS in support of a provisional order on damages for those claims. For the same reasons, Plaintiffs submit that this approach is in the interests of justice and judicial economy.

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**Certificate of Service**

I certify that on September 22, 2014, I electronically filed a copy of the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of the electronic filing to the following: none. I further certify that I mailed the foregoing document and notice of electronic filing by first-class mail to the following non-CM/ECF participant: Pedro Pablo Barrientos Núñez, 1584 Brady Dr., Deltona, Florida 32725 and P.O. Box 5462, Deltona, FL 32728-5462.

*/s/ James A. Bolling*
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 12-14898

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LILIANA MARIA CARDONA,
JOHN DOE,
ANGELA MARIA HENAO MONTES, et al.,

Plaintiffs – Appellees - Cross Appellants,

ADANOLIS PARDO LORA,
AIDEE MORENO VALENCIA,
ALBINIA DELGADO, et al.,

Plaintiffs – Appellees,

versus

CHIQUITA BRANDS INTERNATIONAL, INC.,
an Ohio corporation,
CHIQUITA FRESH NORTH AMERICA LLC,
a Delaware corporation,

Defendants – Appellants - Cross Appellees.

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Appeal from the United States District Court
for the Southern District of Florida

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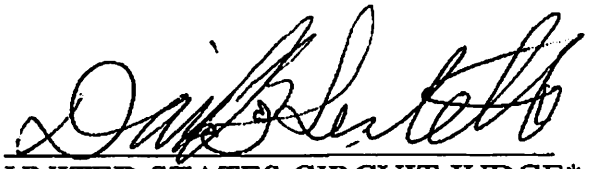
ORDER:

The petitions for panel rehearing filed by the parties are DENIED.

Insofar as the petitions before us seek clarification of the effect of our decision on claims beyond those against the corporate defendants, we make plain that we decided only those questions presented affecting the parties to the appeal. Only the corporate defendants appealed, and our judgment disposes only of the claims against them. We do not offer, nor would it be appropriate for us to offer, any opinion as to matters not encompassed in the appeal.



UNITED STATES CIRCUIT JUDGE*

*Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia, sitting by designation.

Martin, Circuit Judge, dissenting from the denial of the petition for rehearing by the panel.

I agree with the clarification issued by the panel today. With that said, I would grant the petition for panel rehearing for the reasons I set forth in my dissenting opinion.