13-15503

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE, *et. al.*,
Plaintiffs / Appellants,

v.

DRUMMOND COMPANY, INC., *et. al.*,
Defendants / Appellees.

On Appeal from the United States District Court for the
Northern District of Alabama; Case No.: 09-cv-01041-RDP
The Honorable R. David Proctor

APPELLANTS' OPENING BRIEF

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Jane Doe, et al.

AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Counsel for Appellants hereby certify, to the best of their knowledge, that of the corporate parties in this action, Drummond Company, Inc. is the parent company of Appellee Drummond Ltd.; Appellee Drummond Company, Inc. has no parent company; and Itochu Corporation (ITOCY) owns 20% of the Drummond entities' Colombian operations through a new subsidiary, Itochu Coal Americas Inc., which is based in Birmingham, Alabama.

Counsel for Appellants hereby amend their Certificate of Interested Persons filed on January 3, 2014 to include additional parties of interest listed in Appellees' Certificate:

District Court Trial Judge
Honorable R David Proctor
United States District Court
Northern District of Alabama

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Otero, Ivan (Colombian counsel in Plaintiffs–Appellants' legal team)
Ramirez, Francisco (Colombian counsel in Plaintiffs–Appellants' legal team)

STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Circuit Rule 28-1(c), Plaintiffs-Appellants hereby request oral argument before this Court. This case arises under the Alien Tort Statute (ATS) and Torture Victim Protection Act (TVPA), 28 U.S.C. §1350, and includes important public policy questions, including the proper scope of the Supreme Court's ruling in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) on the extraterritorial application of the ATS. The case also raises important questions relating to grounds for liability under the ATS and TVPA. Resolution of these issues would be facilitated if the Court had the opportunity to question the parties and hear elaboration on the briefing.

Respectfully submitted this 14th day of March, 2014

/s/ Terrence Collingsworth
By: _____
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Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTORY AUTHORITIES

RULES AND REGULATIONS

ADDITIONAL AUTHORITIES

I. STATEMENT OF JURISDICTION

Plaintiffs alleged violations of the Alien Tort Statute (ATS) and Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, creating federal question jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES ON APPEAL

A. Whether the District Court erred in not considering all the grounds Plaintiffs advanced to overcome the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), which established a presumption against extraterritoriality applicable to the ATS, and finding *Kiobel* is only overcome by an assessment of U.S. conduct, and also erred in finding there was insufficient admissible evidence of U.S. conduct to overcome the presumption.

B. Whether the District Court erred in finding Plaintiffs had not satisfied the elements of crimes against humanity and dismissing those ATS claims.

C. Whether the District Court erred in finding the doctrine of superior responsibility cannot apply to officers of private corporations, and finding the doctrine was not properly alleged against Defendant Tracy.

D. Whether the District Court erred in finding ratification and the responsible corporate officer doctrines cannot support liability under the TVPA.

E. Whether the District Court erred in granting summary Judgment to Defendants Tracy and Jimenez on Plaintiffs' aiding and abetting and conspiracy theories of liability under the TVPA by applying an erroneous standard of intent and improperly excluding evidence of their unlawful conduct.

F. Whether the District Court erred in declining supplemental jurisdiction over Plaintiffs' wrongful death claims based on Colombian law.

G. Whether the District Court erred in denying Plaintiffs' motion, under Federal Rule of Civil Procedure 60, to amend the complaint to perfect diversity and pursue Colombian law claims.

III. STATEMENT OF THE CASE

A. Procedural History

Plaintiffs-Appellants are wrongful death claimants of 144 decedents executed during the Colombian civil conflict by the umbrella paramilitary group, Autodefensas Unidas de Colombia (AUC). Plaintiffs filed their complaint on May 27, 2009, alleging the Drummond Defendants[1] aided and abetted, conspired with, and entered into an agency relationship with the AUC to commit extrajudicial killings, war crimes, and crimes against humanity in violation of the ATS.

[1] The four Defendants are Drummond Ltd. (DLTD), Drummond Company, Inc. (DCI), DLTD President Augusto Jiménez, and Mike Tracy, who held top positions at DCI and DLTD.

Plaintiffs also alleged extrajudicial killings under the TVPA, and wrongful death claims under Colombian law. APP. (Vol. I) 1.

After considering Defendants' motion to dismiss, the District Court granted Plaintiffs leave to amend, but dismissed Plaintiffs' wrongful death claims under Colombian law, declining to exercise supplemental jurisdiction under 28 U.S.C. § 1367 (a), regardless of whether Plaintiffs properly alleged federal claims. APP. (Vol. I) 30 at 34-35.

Plaintiffs filed their First Amended Complaint (APP. (Vol. II) 35) making the same allegations with greater specificity in light of the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). On April 30, 2010 the District Court largely denied Defendants' renewed dismissal motion, finding Plaintiffs had stated claims for extrajudicial killing and war crimes, but dismissing the crimes against humanity claim. APP. (Vol. II) 43 at 16-19, 28-29.

On the District Court's order, Plaintiffs filed a Second Amended Complaint (SAC), which removed Plaintiffs' pseudonyms and disclosed their identities. APP. (Vol. III) 55. On June 28, 2010, Drummond sought to dismiss all Plaintiffs not suing as legal representatives of the decedents. Docket No. ("Dkt.") 62. The District Court granted the motion, dismissing 357 Plaintiffs not acting as legal representatives, and directing Plaintiffs to amend their complaint to reflect this ruling. Dkt. 112. Shortly thereafter, this Court ruled in *Baloco v. Drummond Co.*

Inc., 640 F.3d 1338 (11th Cir. 2011), non-legal representatives who suffered personal damages have standing under the ATS and TVPA. The District Court granted Plaintiffs' motion to file their Third Amended Complaint (TAC) -- the operative complaint -- to comply with *Baloco.* Dkt. 232.

The parties engaged in extensive discovery, including taking Letters Rogatory testimony from demobilized AUC commanders in Colombia. This testimony provided substantial evidence Drummond collaborated with the AUC during Colombia's civil war, resulting in the murders of Plaintiffs' decedents. APP. (Vol. V) 407 at 2-22.

When discovery closed, Defendants filed four separate motions for summary judgment (Dkts. 396, 400, 404, 405), which Plaintiffs opposed. APP. (Vol. V-VI) at 407,411,414,417. While these motions were pending, the Supreme Court decided *Kiobel* and, providing an early interpretation of *Kiobel*, the District Court dismissed the ATS claims against all Defendants, which were the sole pending claims against DLTD and DCI. APP. (Vol. VI) 455; APP. (Vol. VI) 457 at 7; APP. (Vol. VI) 459 at 6. The District Court also dismissed the TVPA claims against Defendants Jimenez and Tracy. APP. (Vol. VI) 457 at 8-13; 459 at 9-14.

The District Court denied Plaintiffs' Rule 60 motion to dismiss Defendant Jimenez, which would have established complete diversity and allowed the case to

proceed under Colombian wrongful death law. APP. (Vol. VI) 468; APP. (Vol. VI) 477. Plaintiffs filed a timely Notice of Appeal. APP. (Vol. VI) 479.

B. Statement of Facts

Plaintiffs amassed substantial evidence to support all elements of their claims regarding Drummond's collaboration with the AUC to commit war crimes and extrajudicial killings. The evidence was based largely on testimony of former AUC combatants participating in Colombia's Justice and Peace process, which requires them to testify truthfully about their participation in war crimes. The process, which began in 2007, revealed the role of business interests siding with the AUC in Colombia's civil conflict and ultimately funding war crimes and other violations of international law. APP. (Vol. IV) 233, ¶ 8. For example, in 2007, Chiquita Brands International pled guilty to funding the AUC, a violation of U.S. law because the AUC was designated a terrorist organization by the U.S. State Department in 2001. *Id*. ¶ 194 and Exhibit A thereto.

Drummond provided substantial support to the AUC from 1996 until the AUC demobilized in 2006. APP. (Vol. V) 407, Plaintiffs' Statement of Disputed Material Facts (PSDMF) at 11 ¶ 1. The lynchpin for Drummond's initial collaboration with the AUC was its Security Director, James Adkins, who was forced to resign from the CIA due to his role in the Iran-contra scandal. *Id*. at 16-17 ¶¶ 5-6; Plaintiffs' Statement of Undisputed Material Facts (PSUMF) at 4 ¶ 1.

Independent Counsel Walsh found Adkins violated the law, lied to investigators, and falsified CIA financial accounts to hide his crime. *Id*. at 5 ¶ 2. Drummond was aware of this history when it hired Adkins to oversee security operations in Colombia. *Id*. at 4 ¶ 1.

Shortly after being hired, Adkins informed Drummond the Colombian military was organizing "paramilitary groups in the region into one umbrella group controlled by the army." *Id*. at 5 ¶ 3 (citing 1995 Adkins memo). Adkins further reported the military requested funds from Drummond to support this effort. *Id*. at 5 ¶ 4.

Explicitly acknowledging ***the military's plan to organize and fund paramilitary groups "will bring with it egregious human rights violations,"*** *id*. at 7 ¶ 8 (citing 1995 Adkins memo) (emphasis added), Drummond nonetheless began providing enormous amounts of unrestricted money to the Colombian military, including "war taxes." *Id*. at 6-7 ¶ 7. Various Alabama-based Drummond executives admitted they had no control over funds provided to the military and claimed to have "no idea" what the military did with those funds. *E.g., id*. (citing Deposition of James Adkins at 206:16-21).

In addition to funneling millions to the AUC through the military, Drummond also began its own direct collaboration with the AUC, again with Adkins coordinating. In 1996, Adkins returned to Alabama and obtained Garry

Drummond's agreement to fund the AUC directly. *Id.* at PSDMF, 11-12 ¶ 1. Initially, Adkins brought cash back to Colombia from Alabama, but then developed a scheme with Drummond's food service provider, Jaime Blanco Maya, to use inflated invoices with the overage going to the AUC. *Id*. This use of false invoices was exactly the scheme Adkins utilized and lied about in the Iran-contra scandal. *Id.* at PSUMF, 5 ¶ 2. Drummond provided this funding to focus the AUC on driving guerillas out of the areas of Drummond's operations. *Id.* at PSDMF, 13-15 ¶ 3. Drummond's collaboration with the AUC brought a surge of AUC combatants and hundreds were killed as the AUC conducted cleansing operations in these areas. *Id*. at 15-17 ¶¶ 4-5.

The Drummond-supported AUC coordinated with the Drummond-supported Colombian military to bring a reign of terror to the areas around Drummond's operations. *Id*. at 19-21 ¶ 9. Further, Drummond directed its private security forces to coordinate with the AUC. *Id*. at 17-18 ¶ 6.

From the AUC's inception, the U.S. State Department and credible human rights organizations reported the AUC was slaughtering innocent civilians. *Id*. at PSUMF, 7-8 ¶ 9. In 2001, after years of Drummond support, the AUC's brutal methods and scorched earth tactics resulted in the U.S. designating it a terrorist organization. *Id*. at 8 ¶ 11. Key Drummond officials were aware of this

designation. *Id*. at 8 n.4. Among the civilian non-combatants killed by the AUC acting on behalf of Drummond were Plaintiffs' decedents. *Id*. at 10-11 ¶ 19.

IV. STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Hulsey v. Pride Rests., LLC*, 367 F.3d 1238, 1243 (11th Cir. 2004). The Court "view[s] the evidence the way the district court ***should have viewed it***, which means" construing "all the evidence, and mak[ing] all reasonable factual inferences, in the light most favorable to the nonmoving party." *Id.* at 1240, 1243 (emphasis added) (citation omitted).

"Rulings on the admissibility of evidence are reviewed for abuse of discretion." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 556 (11th Cir. 1998). "[W]hen the district court misinterprets the Federal Rules of Evidence or controlling case law, [this Court's] review is plenary." *Id.*

"The factual findings of the district court that underlie its decisions regarding the admissibility of the purported hearsay evidence -- such as its findings regarding whether a statement was made in furtherance of a conspiracy . . . are reviewed for clear error." *Id.* (citations omitted). *See id.* at 557 (concluding the court abused its discretion by excluding testimony as hearsay, which was admissible under Federal Rule of Evidence 801(d)(2)(D)).

V. SUMMARY OF ARGUMENT

Plaintiffs brought ATS and TVPA claims against Defendants based on evidence Drummond collaborated with AUC paramilitaries. Plaintiffs all had close family members murdered by the AUC while it was acting on Drummond's behalf, conducting a scorched earth campaign to cleanse the areas around Drummond's operations of suspected guerilla groups. In doing so, the AUC murdered hundreds of innocent civilians, including Plaintiffs' decedents.

Plaintiffs' evidence of Drummond's collaboration with the AUC was before the District Court in response to Drummond's motions for summary judgment when the Supreme Court decided *Kiobel*, which concluded the "principles underlying" the presumption-against-extraterritoriality constrain courts considering ATS cases. 133 S. Ct. at 1664. But *Kiobel* recognized ATS cases that "touch and concern" the U.S. with "sufficient force" may "displace" the presumption even when the claims involve extraterritorial conduct. *Id.* at 1669. The Supreme Court held the new presumption was not displaced in *Kiobel* because the "mere corporate presence" of the foreign, non-resident defendant, without more, was insufficient, and all relevant conduct took place outside the U.S. *Id*. at 1667, 1669.

Plaintiffs identified three distinct ways this case overcame *Kiobel*'s "touch and concern" standard: (1) there was a strong U.S. interest because Drummond was providing material support to a U.S. designated terrorist organization; (2) the

Drummond Defendants, unlike the *Kiobel* defendant, are U.S. nationals and residents; and (3) key conduct, including Drummond's decision to fund the AUC, occurred in the U.S. *See generally*, APP. (Vol. VI) 449. Without explanation, the District Court considered only the third factor, dismissing Plaintiffs' ATS claims against Defendants because there was not sufficient U.S. conduct to satisfy *Kiobel*. APP. (Vol. VI) 455 at 8-9, 16-17. The District Court erred in not assessing two significant grounds demonstrating a strong U.S. interest and because there was sufficient evidence of U.S. conduct to meet even the District Court's limited *Kiobel* standard. Moreover, the District Court erroneously excluded testimony that Garry Drummond in Alabama made the major decisions to fund and collaborate with the AUC.

The District Court also erred in dismissing Plaintiffs' crimes against humanity claims after applying an overly narrow legal standard.

The District Court erroneously held the doctrine of superior or command responsibility could not be applied to Plaintiffs' TVPA claims against Defendants Jimenez and Tracy, finding the doctrine cannot reach civilians unless they had control over military or other public forces. The legislative history of the TVPA requires that international law define the contours of the superior responsibility doctrine. International law clearly applies the doctrine to civilians, including

officers of private corporations. The District Court also erred in finding the doctrines of ratification and responsible corporate officer did not apply here.

The District Court erred in determining the required *mens rea* under the TVPA is more than knowledge, again in conflict with explicit TVPA legislative history, and, after improperly excluding evidence as inadmissible, finding there was insufficient evidence to find Tracy and Jimenez aided and abetted or conspired with the AUC in committing extrajudicial killings.

Finally, the District Court erred in denying Plaintiffs two different avenues for applying Colombian wrongful death law. First, the District Court abused its discretion in declining to exercise supplemental jurisdiction based on an unsupported assertion Colombian law would be "impossible" to apply. APP. (Vol. I) 30 at 35. Second, after dismissing all of Plaintiffs' federal claims, the District Court should have granted Plaintiffs' Rule 60 motion to perfect diversity jurisdiction and proceed on Colombia law claims. APP. (Vol. VI) 468.

VI. ARGUMENT

A. *Kiobel* does not Bar Extraterritorial Application of the ATS in this Case.

Providing an early interpretation of the Supreme Court's *Kiobel* decision, the District Court dismissed Plaintiffs' ATS claims for not meeting the new standard for extraterritorial application of the ATS. *Kiobel* did not involve U.S. citizens or unique national interests: foreign nationals sued a foreign corporation and all

relevant conduct took place outside the U.S. 133 S. Ct. at 1667, 1669. The decision was purposefully narrow, barring claims where the ***only*** connection to the U.S. was the "mere presence" of a foreign corporate defendant. *Id*. at 1669. The *Kiobel* majority dispatched the "foreign-cubed" case before it, and post-*Kiobel* foreign-cubed cases have been dismissed as a routine matter.[2] But those cases have no bearing on this one, which is at the other end of the spectrum of U.S. connection and does not require this Court to explore the dividing line between cases that do and do not overcome the *Kiobel* presumption.

The Supreme Court did not shut the door on ATS cases arising outside the U.S. Because of the facts there, the *Kiobel* majority had no need to address how other cases may "touch and concern" the U.S. with "sufficient force" to overcome the presumption against extraterritorial application. *Id.* Justice Kennedy noted other cases "may arise with allegations of serious violations of international law principles," which are not covered "by the reasoning and holding of today's case." *Id.* (Kennedy, J., concurring). Seven Justices agreed the majority was "careful to leave open a number of significant questions." *Id*.; *accord id*. at 1669-70 (Alito, J.,

[2] *See, e.g., Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. 2013); *Tymoshenko v. Firtash*, 11-CV-2794 KMW, 2013 WL 4564646, at *4 (S.D.N.Y. Aug. 28, 2013); *Kaplan v. Cent. Bank of Republic of Iran*, CIV. 10-483 RCL, 2013 WL 4427943, at *16 (D.D.C. Aug. 20, 2013); *Ezekiel v. B.S.S. Steel Rolling Mills*, 3:13CV167/MCR/CJK, 2013 WL 3339161, at *2 (N.D. Fla. July 2, 2013); *Fotso v. Republic of Cameroon*, 6:12 CV 1415-TC, 2013 WL 3006338, at *7 (D. Or. June 11, 2013); *Murillo v. Bain*, CIV.A. H-11-2373, 2013 WL 1718915, at *3 (S.D. Tex. Apr. 19, 2013).

concurring); *id*. at 1673 (Breyer, J., concurring).

Here, there are three distinct grounds establishing the necessary connection to the U.S. beyond Defendants' "mere corporate presence": (1) Drummond provided substantial support to a designated terrorist organization, and by making it a federal crime to provide the AUC with financial support, the U.S. Government already concluded the conduct at issue directly touches and concerns the U.S.; (2) Defendants are U.S. citizens or residents; and (3) Drummond significantly participated in the unlawful acts from Alabama, providing sufficient U.S. conduct.

The District Court acknowledged Plaintiffs raised these three grounds, but without reasoning, ignored the first two and assessed only the last factor, the extent of U.S. conduct. APP. (Vol. VI) 455 at 8-9, 16-17. The District Court's failure to apply a discernable legal standard in focusing exclusively on U.S. conduct constitutes legal error. *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993).

More fundamentally, this erroneous limitation is not supported by *Kiobel*, which never held U.S. conduct is the sole avenue for a case to "touch and concern" the U.S. This position was advanced by Justice Alito, but it was ***not*** adopted by the majority. *See* 133 S. Ct. at 1669-70 (Alito, J., concurring). Indeed, Justice Alito recognized the majority's approach as "narrow," and "wr[o]te separately to set out [a] broader standard." *Id*. at 1670. Nothing in the *Kiobel* majority even hinted it created a test turning exclusively on whether all, or even most, of the

conduct occurred in the U.S. As one court noted, "the [*Kiobel*] Court appeared to leave room for cases in which the conduct took place outside the United States, but where 'the claims touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Kaplan*, 2013 WL 4427943, at *16.

In the sole post-*Kiobel* case to weigh the impact of U.S. interests going beyond U.S. conduct, a U.S. national engaged in some U.S. conduct, and the court found the case "fits comfortably within the limits described in *Kiobel*." *Sexual Minorities Uganda v. Lively*, 12-CV-30051-MAP, 2013 WL 4130756, at *14 (D. Mass. Aug. 14, 2013). Here, in addition to those two factors, there is the unique fact Drummond provided material support to a U.S.-designated terrorist organization, which itself establishes a strong U.S. interest. With all three factors present and properly considered, this case easily satisfies the *Kiobel* standard.

1. Drummond's Support of a Designated Terrorist Organization Touches and Concerns the U.S.

In this case, the Court can avoid a lengthy analysis of the *Kiobel* presumption because the U.S. Government has explicitly recognized supporting the AUC, a designated terrorist organization, touches and concerns the U.S. In 2001, the U.S. Secretary of State designated the AUC a terrorist organization. *See* Designation of a Foreign Terrorist Organization, 66 Fed. Reg. 47,054-03 9 (Sep. 10, 2001). Such a designation can only be made upon finding the AUC's terrorist

activity "***threatens the . . . national security of the United States.***" 8 U.S.C. § 1189 (a)(1)(c) (emphasis added).

President George W. Bush then further designated the AUC a "Specially-Designated Global Terrorist" based on the finding the AUC's acts of terrorism threatened the "national security, foreign policy or economy of the United States." Exec. Order No. 13,224, 3 C.F.R. 786 (2002). This made it a violation of U.S. law for anyone to provide support to the AUC.

Based on these designations, the U.S. government prosecuted Chiquita Brands International for acts identical to those at issue here -- providing material support to the AUC. *See, e.g.*, Press Release, Dep't of Justice, Chiquita Brands Int'l Pleads Guilty to Making Payments to a Designated Terrorist Org. and Agrees to Pay $25 *Million Fine* (Mar. 19, 2007), *available at* http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html ("The message to industry from this guilty plea today is that the U.S. Government will bring its full power to bear in the investigation of those who conduct business with designated terrorist organizations, ***even when those acts occur outside of the United States***.") (emphasis added). Here, there is evidence Drummond provided substantial support to the AUC, conduct identical to Chiquita's. APP. (Vol. V) 407, PSDMF at 11-13

¶¶ 1-2. This makes this ATS case exceptional[3] and well outside the narrow concerns of *Kiobel*. Drummond's support for a designated terrorist organization should be dispositive on whether this case touches and concerns U.S. interests.

2. Defendants are U.S. Nationals and the U.S. has an Obligation to Hold Them Accountable for Violations of the Law of Nations Wherever They Occur.

Defendants are U.S. corporations and U.S. citizens or residents. APP. (Vol. VI) 449 at 3. Plaintiffs allege all Defendants violated the law of nations. *See, e.g.*, APP. (Vol. IV) 233, ¶¶ 282-293. Such violations give rise to U.S. responsibility under international law to hold its nationals accountable, one of the central functions for which Congress enacted the ATS. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 717 (2004).

Whether the ATS extends extraterritorially to U.S. nationals was not addressed in *Kiobel* because the defendant there, Royal Dutch Shell, was a foreign corporation with dual British and Dutch nationality. *Kiobel*'s rationale in distinguishing Attorney General Bradford's 1795 Opinion, an early interpretation of the ATS' extraterritorial reach, reinforces the Supreme Court's understanding the ATS extends to U.S. nationals extraterritorially. 133 S. Ct. at 1668. *Kiobel* distinguished the Bradford Opinion, which applied the ATS extraterritorially to an

[3] The only other ATS case raising this issue is against Chiquita, *In re Chiquita Brands Int'l, Inc. Alien Tort Statute Litig.*, Case No. 12-14898-B, and is pending in this Court.

attack on the British colony of Sierra Leone, because it involved U.S. citizens. *Id*. Although, the Bradford Opinion did not support the extraterritorial application of the ATS to a foreign national in *Kiobel*, it "provides support for the extraterritorial application of the ATS to the conduct of U.S. citizens." Curtis Bradley, *Agora: Kiobel, Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 Am. J. Int'l L. 509, 510 (2012).

Kiobel appeared to accept the United States' recommendation on extraterritorial jurisdiction. The Government argued *Kiobel* should be dismissed for insufficient connection to the U.S., but opposed an absolute bar on extraterritorial claims, particularly where the defendant is found within its territory. Supplemental Brief for the United States as *Amicus Curiae* in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 2161290, at *4-5 (U.S. 2012) ("U.S. Supp. Br."). As an example of claims that should not be barred, the Government identified *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which "involved a suit by Paraguayan plaintiffs against a Paraguayan defendant based on alleged torture committed in Paraguay." U.S. Supp. Br. at 4. The Government emphasized the defendant "was found residing in the U.S., circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator." *Id.* The Government affirmed applying the ATS to conduct arising abroad in circumstances like those in

Filártiga supports U.S. foreign policy, including the promotion of respect for human rights. *Id.* at 13. These concerns apply with even more force here because Defendants are U.S. nationals.

Indeed, unlike here, *Kiobel* involved a conflict over the appropriate reach of U.S. law consistent with international law. The Dutch and British governments argued the assertion of ATS jurisdiction over their corporations for acts taking place in Nigeria would violate international law, but they agreed "the extraterritorial application of the ATS to acts committed by American individuals, corporations, and other U.S. entities in foreign sovereign territory, would be consistent with international law." Brief of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co*., No. 10-1491, 2012 WL 2312825, at *15 (U.S. 2012) ("U.K/Dutch Br.").

When Congress passed the ATS, it understood when U.S. citizens violate international law extraterritorially, such acts engage U.S. responsibility or risk provoking hostile action by foreign sovereigns. *See* Bradley, *supra*, at 526 ("when the ATS was enacted, the [U.S.] would have had a duty to ensure that certain torts in violation of international law, especially those committed by its citizens, were punished and redressed"); *id.* at 526 n.112 (collecting authorities).

Two post-*Kiobel* cases assessed the significance of a defendant's U.S. residency. In *Sexual Minorities*, the court held

> This is not a case where a foreign national is being hailed into an unfamiliar court to defend himself. Defendant is an American citizen located in the same city as this court . . . An exercise of jurisdiction under the ATS over claims against an American citizen who has allegedly violated the law of nations in large part through actions committed within this country fits comfortably within the limits described in *Kiobel.*

2013 WL 4130756, at *14.

Likewise, in *Ahmed v. Magan*, 2:10-CV-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013), the court found the presumption against extraterritoriality was overcome where a Somali citizen sued a Somali military official for crimes that occurred in Somalia solely because the military official was a legal permanent resident of the U.S.

The Second Circuit, however, rejected the significance of U.S. residency, stating nothing in *Kiobel* "suggests the rule of law it applied somehow depends on a defendant's citizenship." *Balintulo v. Daimler AG*, 727 F.3d 174, 190 n.24 (2d Cir. 2013). *Kiobel* never assessed this factor because Royal Dutch Shell was a foreign national, so the significance of U.S. residency was not relevant. Further, *Kiobel*'s flexible "touch and concern" standard is the antithesis of *Balintulo*'s "bright-line" rule focused only on U.S. conduct, the same error made by the District Court below. Whether ATS claims may be brought against U.S. citizens

for international law violations committed abroad is one of the "significant questions" *Kiobel* left open. *Id*. at 1669-70 (Kennedy, J. concurring).[4]

In a subsequent case, the Second Circuit again dismissed ATS claims involving foreign nationals when all the conduct at issue occurred outside the U.S. *See Chowdhury v. Worldtel Bangladesh Holding, Ltd*., 09-4483-CV, 2014 WL 503037 (2d Cir. Feb. 10, 2014). One judge noted the Court had:

> no cause in this case to focus on the nationality of the defendant, as he is a Bangladeshi citizen. The *Kiobel* Court at least implied that nationality could be relevant for determining whether a claim brought under the ATS would "touch and concern" the territory of the United States, as the *Kiobel* Court determined that "it would reach too far" for "mere corporate presence" to suffice to make out a claim under the circumstances in *Kiobel*.

Id. at *12, n.4 (Pooler, J. concurring).

Defendants' U.S. nationality removes the rationale for the *Kiobel* majority's concern in declining to extend the ATS to foreign defendants, which was "'to protect against unintended clashes between our laws and those of other nations

[4] Regardless, *Balintulo* is inapplicable here for three other reasons. First, it expressly did *not* address "how much conduct must occur in the United States" because it found "all of the relevant conduct" occurred outside the U.S. 727 F3d at 191, n.26. Thus, *Balintulo* has no bearing on whether the conduct alleged here is sufficient. Second, *Balintulo* also did not address the extraordinary situation, present here, where Defendants' conduct is a federal crime the U.S. government expressly found threatens the security of the nation. Third, *Balintulo*'s discussion of *Kiobel* is *dicta*, because it occurred in *denying* mandamus. The panel lacked jurisdiction to interpret *Kiobel*; indeed, it recognized "a decision denying mandamus relief is usually, if not always, an inappropriate occasion to address novel questions of law, since the authority to issue mandamus is narrowly circumscribed." *Id.* at 188 n.21.

which could result in international discord.'" 133 S. Ct. at 1664 (quoting *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991)). As *Aramco* noted, "application of United States law to United States nationals abroad ordinarily raises considerably less serious questions of international comity than does the application of United States law to foreign nationals abroad." 499 U.S. at 274.

International law permits, if not requires, the ATS to extend to U.S. citizens wherever their misconduct occurs. *See, e.g.*, *Kiobel*, 133 S. Ct. at 1673-76 (Breyer, J., concurring); Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 2165345, at *11 (U.S. 2012); U.K./Dutch Br., 2012 WL 2312825, at *15 ("extraterritorial application of the ATS to acts committed by American individuals [and] corporations . . . in sovereign territory, would be consistent with international law.").

The First Congress passed the ATS to fulfill U.S. responsibility to vindicate the law of nations, including ensuring the U.S. would provide redress when U.S. persons committed violations of international law. *Sosa*, 542 U.S. at 722 n.15. Here, the U.S. Defendants are subject to U.S. law in their home jurisdiction. Nothing in the *Kiobel* majority suggests otherwise.

3. Drummond's U.S. Conduct is Sufficient to "Touch and Concern" the U.S.

Kiobel squarely found "***all of the relevant conduct took place outside the United States***" and thus did not "touch and concern the territory of the United States with sufficient force to displace the presumption against extraterritorial application." 133 S. Ct. at 1669 (emphasis added). This case, with substantial conduct occurring at Drummond's headquarters in Alabama, is in sharp contrast to the complete lack of U.S. conduct in *Kiobel*.

The District Court erred in finding there was ***no*** evidence of relevant U.S. conduct. In reaching this conclusion, the Court excluded evidence of Drummond's Alabama conduct. APP. (Vol. VI) 455 at 11-16. As demonstrated below, although it was error to exclude this evidence, Plaintiffs' non-excluded evidence sufficiently demonstrated Drummond controlled the AUC scheme from Alabama.

a. The uncontested evidence demonstrates sufficient U.S. conduct.

There is no dispute Defendant DCI owns and controls Drummond's operations in Colombia from their headquarters in Alabama, which includes day-to-day control over security matters and the security contractors who paid the AUC. *See, e.g.,* APP. (Vol. V) 411 at 21-28, 33-34. U.S.-based Drummond officials, including "Mr. Tracy and Mr. D.L. Lobb . . . and Mr. Drummond . . . were making decisions about what Drummond was going to do in . . . Colombia." *Id.* at PSUMF at 7 ¶7 (citing Adkins Dep.); PSDMF at 19-20 ¶ 3. U.S.-based

officers, including Bill Phillips, the head of security for DCI, Bud Long, Curt Jones, Mike Zervos, Mike Tracy, Garry Drummond, and Don Baxter, among others, regularly received specific security information from the Colombia operations. *Id.* at PSUMF at 6-7, 9 ¶¶ 6, 17.

Garry Drummond met regularly with Defendant Tracy, DLTD's President between 1992-1998, in Alabama regarding security for Drummond's Colombian operations. *Id.* at 8 ¶ 15. Tracy worked with DLTD's security team to form and implement DLTD's security policies, and Garry Drummond approved security issues for the Colombia operations. APP. (Vol. VI) 449 at 20. Garry Drummond and other U.S.-based executives attended meetings with Colombian and U.S. government officials regarding security and the "whole scope of . . . company operations," including those in Colombia. APP. (Vol. V) 411, PSUMF at 7 ¶ 10 (citing Adkins Dep. 85:10-86:3). Garry Drummond often discussed Colombian security issues with Adkins. *Id.* at 8 ¶ 12.

Drummond's Alabama-based officers, including Garry Drummond and Defendant Tracy, made the decision to provide funds to the Colombian military without restrictions, allowing the military to use the funds to contribute to the AUC. *See, e.g.*, APP. (Vol. V) 407, PSUMF at 6-7 ¶ 7 (Garry Drummond approved $1.1 million payment to military); ("[w]hen the money went into the military fund the . . . military could do with it what it wanted.").

Drummond's Alabama-based officers knew of the Colombian military's connections to paramilitary groups when they approved Drummond's payments to the military. *See, e.g.*, APP. (Vol. V) 407 at PSUMF, 5 ¶¶ 3-4 (1995 Adkins memo). Indeed, the Colombian military requested funds from Drummond to support paramilitary groups. *Id.* at 7 ¶ 8. Drummond acknowledged it was illegal to make such payments and that the military's plan to organize and fund paramilitary groups "will bring with it egregious human rights violations." *Id.*

On summary judgment, the court '"view[s] all the evidence, and make[s] all reasonable factual inferences, in the light most favorable to the nonmoving party.'" *Hulsey*, 367 F.3d at 1243 (citation omitted). Based on Plaintiffs' evidence of Drummond's control of Colombian operations from Alabama, it is reasonable to infer Drummond also controlled from Alabama an issue of extreme importance with major implications: Drummond's collaboration with the AUC. Additionally, Drummond's decision, made by U.S. officers in Alabama, to provide massive and unrestricted funding to the Colombian military after it solicited funds for paramilitary groups, allows the reasonable inference Drummond knew at least some funds would go to support the AUC.

In *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, the court held that plaintiff presented evidence showing the defendants hired the "Rapid Action Battalion," a group "known for committing torture," which then tortured the

plaintiff. This was "more than sufficient to permit the jury to infer that defendant had a deal with the torturers . . . ." 08 CIV. 1659 BMC, 2009 WL 9053203, at *1 (E.D.N.Y. Sept. 16, 2009), *aff'd in relevant part, rev'd in part on unrelated grounds,* 09-4483-CV, 2014 WL 503037 (2d Cir. Feb. 10, 2014). The court rejected defendants' arguments, which were "based on their assumption that the jury cannot be permitted to draw inferences from the evidence that [are] not only logical, but compelled." *Id.* The court found "[t]here is nothing speculative about plaintiff's case . . . The strongly compelled inference from the evidence was . . . defendants filed their complaint against plaintiff with the RAB, they did it because they knew torture could achieve their goal." *Id.* The court noted "Defendants' crabbed view of the evidence would apparently require plaintiff to show that defendants met with the torturers in a hotel room and committed their plan to writing" but "the law recognizes that such agreements are rarely provable by direct evidence and must frequently be established by inferences based on known facts." *Id.*

While presumably Drummond could otherwise provide support to the Colombian military, Drummond knew it would be illegal to fund the AUC. *See, e.g.*, APP. (Vol. VI) 449 at 19. It is reasonable to infer when Drummond provided substantial unrestricted funds to the military, ***after*** the military requested AUC funding, Drummond was hiding payments intended for the AUC. It would strain

credulity, and the law, to require Plaintiffs to produce a written contract of Drummond's unlawful plan with the Colombian military or a receipt from the AUC.

Drummond's overall control of the scheme from the U.S. was central to implementing the AUC's commission of war crimes and extrajudicial killings. *See, e.g., United States v. Mandell,* S1 09 CR. 0662 PAC, 2011 WL 924891, at *4-5 (S.D.N.Y. Mar. 16, 2011) (holding presumption against extraterritoriality was overcome where scheme was "orchestrated from" the U.S. and "the transactions which occurred abroad [we]re the last step to give effect to the crime charged."). If Drummond made the decision from Alabama to collaborate with the AUC, the conspiracy occurred in the U.S. because Drummond "joined the conspiracy [in the U.S.] knowing of at least one of the goals of the conspiracy and intending to help accomplish it." *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005). This was precisely the holding in *Mwani v. Bin Laden*, where, the court found the *Kiobel* presumption was displaced in an ATS case "between foreign nationals and a foreign group for events that occurred in Nairobi, Kenya," because "overt acts in furtherance of that conspiracy took place within the United States." CIV.A. 99-125 JMF, 2013 WL 2325166, at *2-4 (D.D.C. May 29, 2013).

b. The District Court improperly excluded evidence key decisions to directly fund the AUC were made in Alabama.

Plaintiffs demonstrated Drummond controlled its Colombian operations from Alabama, including security and military funding, which is sufficient to satisfy *Kiobel*. If more evidence of U.S. conduct is required, however, the District Court erroneously excluded specific evidence Drummond approved and funded the AUC collaboration from Alabama. Two key witnesses, Jairo Charris Castro and Jaime Blanco Maya, testified Drummond's Security Director, Adkins, told them he needed return to Alabama to obtain Garry Drummond's approval to fund the AUC. APP. (Vol. V) 407, PSDMF at 11 ¶ 1 (citing Deposition of James Blanco at 70:5-73:11); *id.* at 13 ¶ 3 (citing Deposition of Jairo Charris at 25:5-10).

Charris testified Adkins told him Garry Drummond ordered the AUC scheme because "they were going through a crisis, a collapse, due to the guerilla attacks to the . . . railroad." *Id*. at 25:5-10. Adkins traveled frequently, every 25 days, to Alabama and "would meet directly with Garry Drummond to agree on everything that Adkins had to do. These were direct communications at the Drummond office in Alabama." APP. (Vol. VI) 449 at 17 (citing Charris Dep. 27:1-11). Garry Drummond directed Adkins' coordination with the AUC "to neutralize the activity and presence of the guerilla." APP. (Vol. V) 407, PSDMF at 17 ¶ 6 (citing Charris Dep. 18:2-20:21).

Adkins' statements to Charris regarding Garry Drummond's approval of the AUC scheme were admissible under Federal Rule of Evidence 801(d)(2)(D) because Adkins was Defendants' employee and agent. And as Drummond's Security Advisory, when Adkins spoke of arranging for the AUC to provide security it was within the scope of that relationship while it existed. Additionally, Adkins' statements are admissible because they were made "during and in furtherance of the conspiracy" between Defendants and the AUC and establish the existence of the conspiracy and Adkins' participation in it. *See* Fed. R. Evid. 801 advisory committee's note (Rule 801(d)(2) "codifies the holding in *Bourjaily* [*v. United States*, 483 U.S. 171 (1987)] by stating expressly that a court shall consider the contents of a coconspirator's statement in determining 'the existence of the conspiracy and the participation therein'"). Moreover, "Rule 801(d) is to be construed broadly in favor of admissibility," *United States v. McMurray*, 34 F.3d 1405, 1412 (8th Cir. 1994), and this Circuit "applies a liberal standard in determining whether a statement was in furtherance of a conspiracy." *United States v. Siegelman*, 640 F.3d 1159, 1181 (11th Cir. 2011). Plaintiffs demonstrated the admissibility of Adkins' statements as Defendants' agent and coconspirator. *See, e.g.*, *Chowdhury*, 2014 WL 503037, at *9 (affirming testimony in TVPA case regarding statements made by agents of a paramilitary unit were admissible under hearsay exception for statements of an agent or coconspirator).

The District Court excluded Charris' testimony with exactly one sentence: "[t]hese statements, presented for the truth of the matter asserted, cannot be reduced to admissible form for trial purposes in this case." APP. (Vol. VI) 455 at 14. With this, the District Court summarily abrogated its responsibility to examine and rule as to each alleged hearsay statement. *See Mack v. ST Mobile Aerospace Eng'g, Inc.*, 195 F. App'x 829, 842-43 (11th Cir. 2006) ("The court should have analyzed and ruled on each particularized objection as to each statement.").

The District Court's complete lack of reasoning leaves this Court with an inadequate basis to evaluate the court's evidentiary rulings. *Id.; see also Wright v. Farouk Sys., Inc.*, 701 F.3d 907, 911 (11th Cir. 2012) ("In exercising its discretion on [determining admissibility], the district court should make findings of fact and explain its ruling, which will enable us to review the ruling for an abuse of discretion"); *Hulsey*, 367 F.3d at 1240 ("We cannot tell how the district court viewed the evidence, or much else about its reasoning, because of the cursory nature of its order granting summary judgment.").

Plaintiffs extensively briefed the admissibility of Adkins' statements, but the District Court did not even consider their arguments. APP. (Vol. V) 411 at 39-45, 21-23; APP. (Vol. V) 407 at 29 n.16. The "district court's blanket declaration that 'the statements at issue are inadmissible hearsay . . .' was an abuse of discretion." *Mack*, 195 F. App'x at 843. The District Court's failure to properly assess and

apply Rule 801(d) is precisely the type of legal error that requires reversal of the exclusion of key evidence. *City of Tuscaloosa*, 158 F.3d at 556.

Blanco, Drummond's food service contractor in Colombia, similarly testified Adkins went to Alabama and obtained Garry Drummond's agreement in 1996 to start paying AUC commander "El Tigre," and this was first done by Adkins bringing $10,000 cash payments from Alabama to evade the law and Drummond's accounting system. APP. (Vol. V) 407, PSDMF at 11¶ 1(citing Blanco. Dep 70:5-73:11). "Adkins told [him] that [Garry Drummond] had authorized these payments himself in order to support the AUC . . . ." *Id.* at 14 ¶ 3 (citing Blanco Dep. 105:19-106:10). Adkins later developed schemes to hide the payments in inflated invoices to Blanco. *Id.* at 12 ¶ 1 (citing Blanco Dep. 73:12-75:9, 80:14-92:3). This is the exact scheme Drummond knew Adkins used in his illegal Iran-contra participation when Drummond hired Adkins in the U.S. APP. (Vol. V) 407, PSUMF at 4-5 ¶¶ 1-2.

The District Court excluded the entirety of Blanco's otherwise admissible testimony because he declined to answer some questions on cross examination, despite Defendants' failure to show any resulting prejudice. APP. (Vol. VI) 455 at 12-13. Contrary to the District Court's assertion, *id*. at 13, Plaintiffs ***did*** argue the admissibility of Blanco's testimony below. APP. (Vol. V) 407 at 3, n.2.

The District Court abused its discretion in excluding the entirety of Blanco's testimony because he abstained from answering a handful of questions on collateral issues implicating his right against self-incrimination. When Blanco's testimony was taken in May 2012, Blanco was imprisoned and facing criminal charges. The Colombian judge overseeing the Letters Rogatory hearing instructed him not to answer questions implicating his criminal activity. APP. (Vol. V) 396-15, Blanco Dep. 10:5-15, 141:16-19. Blanco invoked this right predominantly to abstain from answering questions regarding his role in the murders of Drummond's union leaders and previous statements he made to Colombian authorities. *Id.* at 125:14-126:5, 141:1-19, 172:1-173:2, 174:4-7, 176:13-17, 202:4-205:7, 225:20-226:2, 229:3-9.

The District Court excluded Blanco's testimony based on its conclusion that "[t]he right to cross examination is a basic due process protection that is guaranteed by the Fourteenth Amendment." APP. (Vol. VI) 455 at 13. Neither of the two cases the District Court relied on, however, supports the Fourteenth Amendment guaranteeing a ***tort*** litigant the right to cross examination under all circumstances. *See In re Oliver*, 333 U.S. 257, 273 (1948) (holding due process is denied where individual is *charged and held* for contempt of court without "right to examine the witnesses against him."); *Al Najjar v. Reno*, 97 F. Supp.2d 1329, 1355 (S.D. Fla. 2000). Neither the Supreme Court nor this Circuit recognize a

general right to cross examination applicable in all judicial proceedings. *See, e.g.*, *Greene v. McElroy*, 360 U.S. 474, 497 (1959) (holding rights of confrontation and cross examination apply "where *governmental action* seriously injures an individual") (emphasis added); *Wolff v. McDonnell*, 418 U.S. 539, 567 (1974) (holding "[c]onfrontation and cross-examination . . . ***are not rights universally applicable to all hearings.***") (emphasis added); *U.S. Steel, LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1287 n.13 (11th Cir. 2001) (noting "the Confrontation Clause is not applicable to civil cases"). Unsurprisingly, the District Court cited no ***tort*** case which found the right to cross examination implicated due process concerns.

The District Court next noted courts may exclude testimony where "the inability to cross examine a witness 'created substantial danger of prejudice by depriving [the defendant] of the ability to test the truth of the witness' direct testimony.'" APP. (Vol. VI) 455 at 13 (quoting *United States v. Monaco*, 702 F.2d 860, 871 (11th Cir. 1983)). Again, the District Court cited only a single *criminal* case, which provides no support for excluding Blanco's testimony in this *tort* litigation. Regardless, the District Court failed to impose on Drummond ***its burden*** of demonstrating Blanco's invocation of the right against self-incrimination "substantially prejudiced" Drummond. *See United States v. Darwin*, 757 F.2d 1193, 1203 (11th Cir. 1985) ("Appellant does not demonstrate how Dunn's refusal to respond 'substantially prejudiced' his ability to disprove Dunn's

direct testimony."), *abrogated on other grounds by United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990).

Nor could Drummond satisfy its burden, as *Monaco* recognized "the general rule that the testimony of a witness is admissible, even though the witness invoked the privilege against self-incrimination on cross-examination . . . so long as 'the cross-examination went only to collateral matters . . . .'" 702 F.2d at 871 (quoting *Coil v. United States*, 343 F.2d 573 (8th Cir. 1965)). *See also United States v. Diecidue*, 603 F.2d 535, 552 (5th Cir. 1979) (holding "generally only where the witness refuses to answer on 'direct' as opposed to 'collateral' matters that his direct testimony must be excised."); *Fountain v. United States*, 384 F.2d 624, 628 (5th Cir. 1967) (noting a "distinction is generally drawn between invoking the privilege as to 'collateral matters,' not requiring the striking of direct testimony, and invoking it as to 'direct' matters").[5] Thus, even in *criminal* cases, the right to cross examination is not absolute and testimony may be admitted, despite the witness' invocation of the right against self-incrimination regarding "collateral matters."

Here, Blanco primarily abstained from answering questions concerning his role in the murders of Drummond's union leaders. But, while Plaintiffs disagree, the District Court repeatedly held the union leader murders are not directly at issue

[5] *Diecidue* and *Fountain* are binding precedent in this Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

in this case and declined to consider that evidence from all sources. *See, e.g.*, APP. (Vol. I) 30 at 11 n.8; APP. (Vol. VI) 455 at 15; APP. (Vol. VI) 459 at 10. Accordingly, the District Court exceeded its discretion in excluding Blanco's testimony on a topic it had found to be collateral, despite Drummond's inability to show that Blanco's abstention from answering questions concerning "collateral matters," in any way created a "substantial danger of prejudice."[6] *Cf. United States v. Rodger*, CR 1:09-040, 2010 WL 2643268, at *9 (S.D. Ga. June 30, 2010) (striking testimony where witness refused to submit to ***any*** cross examination) *report and recommendation adopted*, CR 1:09-040, 2010 WL 2643267 (S.D. Ga. June 30, 2010) *aff'd*, 521 F. App'x 824 (11th Cir. 2013).

Finally, the District Court exceeded its discretion in excluding the entirety of Blanco's testimony when even Drummond did not seek this extreme relief. *See, e.g.*, *Southland Health Servs., Inc. v. Bank of Vernon*, 887 F. Supp. 2d 1158, 1172-73 (N.D. Ala. 2012) (excluding only "contested portions" found inadmissible); *U.S. Aviation Underwriters, Inc. v. Yellow Freight Sys., Inc.*, 296 F. Supp. 2d 1322, 1330-33 (S.D. Ala. 2003) (same). Here, Drummond only sought to exclude two lines of questioning from Blanco's testimony. *See, e.g.*, APP. (Vol. V) 396 at 34 ("The Court should strike from the record Blanco's testimony regarding his

[6] Even if Drummond could satisfy its burden of demonstrating Blanco's invocation of his right against self-incrimination created substantial prejudice, this does not necessitate excluding Blanco's testimony if there is an opportunity to re-depose him before trial.

agreement with El Tigre to funnel money from DLTD to the AUC."); APP. (Vol. V) 405 at 13 (union leader murders); Dkt. 430 at 6 (union leader murders). The District Court further erred in failing to explain its decision to exclude the entirety of Blanco's testimony instead of only those sections Drummond sought to strike.

The District Court also erroneously excluded other evidence of U.S. conduct, APP. (Vol. VI) 455 at 13-15, but consideration of either Charris or Blanco's testimony, added to the evidence of Drummond's control of the Colombian operations from Alabama, sets this case apart from *Kiobel* where ***all*** relevant conduct occurred outside the U.S.

Plaintiffs demonstrated there are three independent grounds to satisfy *Kiobel*'s standard for extraterritorial application of the ATS. The District Court erred in only assessing U.S. conduct, and in doing so excluding and ignoring evidence of significant U.S. conduct. Combining this with Defendants' support for a terrorist group and being U.S. nationals, no other case has approached this level of U.S. interest.

B. The District Court Erred as a Matter of Law in Holding Plaintiffs Failed to State a Claim for Crimes Against Humanity.

Assuming Plaintiffs' ATS claims satisfy *Kiobel*, the District Court erred in dismissing their crimes against humanity claims, which can be shown through systematic or widespread attacks against civilian populations. *Cabello,* 402 F.3d at 1161. The District Court found Plaintiffs properly alleged systematic and

widespread attacks, APP. (Vol. II) 43 at 18, but erroneously found because the AUC targeted perceived guerrilla sympathizers, the victims somehow lost their status as civilians. *Id.* at 18-19. The AUC strategically attacked and terrorized in a widespread and systematic manner civilian populations perceived to be sympathetic to guerrillas. APP. (Vol. II) 35, FAC, ¶¶ 127,132,133,141,142,229. "Perceived 'collaborators' [with rebel groups] are accorded civilian status under international law," *Prosecutor v. Fofana & Kondewa*, Case No. SCSL-04-14-A. Judgment, at 260 (May 28, 2008), and because Plaintiffs have alleged more than "sporadic episodes of violence against communities," their claims are sufficient. *Bowoto v. Chevron Corp.*, C 99-02506 SI, 2007 WL 2349343, at *11 (N.D. Cal. Aug. 14, 2007). There is no legal basis for finding the AUC's strategy, which resulted in widespread and systematic attacks on civilians, is a defense to crimes against humanity.

C. The District Court Erred in Granting Summary Judgment on Plaintiffs' TVPA Claims Against Defendants Jimenez and Tracy.

The District Court dismissed Plaintiffs' TVPA claims against Defendants Jimenez and Tracy for both legal and factual reasons. The District Court rejected superior responsibility based on its erroneous legal interpretation of the doctrine. Likewise, the District Court applied an erroneous legal standard to ratification and the responsible corporate officer doctrine. For Plaintiffs' aiding and abetting and conspiracy theories, the District Court both erred in its interpretation of the *mens*

rea element and in its conclusions regarding the evidence satisfying that element

1. Tracy and Jimenez can be Held Liable Under the Doctrine of Superior Responsibility.

a. The District Court erred in holding the doctrine of superior responsibility never applies to corporate officers.

The doctrine of command responsibility (also known as superior responsibility)[7] imposes liability on superiors who knew or should have known of their subordinates' international law violations but failed to prevent such acts or punish the wrongdoers. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002). International law defines its contours. *See id.* at 1289 (holding "legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA]"); *id.* at 1289 n.6 ("Congress adopted the doctrine from international law"). The District Court ignored *Ford*'s instruction to look to international law in superior responsibility cases and erred as a matter of law in finding the doctrine applies only to those with authority over military or other state personnel. APP. (Vol. VI) 459 at 8.

International law is clear civilians, including corporate officers, may be subject to superior responsibility. The International Criminal Tribunal for the

[7] *See Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶¶ 182-197 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), excerpt available at Dkt. 414-25, Ex. 24 (using superior and command responsibility interchangeably).

former Yugoslavia (ICTY) held superior responsibility "encompasses political leaders ***and other civilian superiors*** in positions of authority." *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶ 195 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), excerpt available at Dkt. 414-25, Ex. 24 (emphasis added). This Court has relied heavily on *Delalic*. *See Ford*, 289 F.3d at 1290-92; *id.* at 1291 n.8 ("We quote from *Delalic* because it states the matter with great clarity.").

Consistent with *Delalic*, contemporary tribunals apply superior responsibility in trials of civilians, including corporate officers and other non-political civilians. *See, e.g. Prosecutor v. Nsengimana*, Case No. ICTR-01-69-T, Judgment, ¶¶ 813, 829 & 840 (Nov. 17, 2009), excerpt available at Dkt. 414-30, Ex. 29 (holding it "is well established that civilians can be held accountable as superiors"); *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-T & ICTR-96-17-T, Judgment *and Sentence*, ¶¶ 434 & 437 (Feb. 21, 2003), excerpt available at Dkt. 414-29, Ex. 28 (holding it "is established case law that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their 'effective control'").

The Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) affirmed the conviction of a key figure at a private radio station which broadcast speeches inciting genocide. *Prosecutor v. Nahimana*, Case No. ICTR–

99–52–A, Judgment (Nov. 28, 2007), excerpt available at Dkt. 414-26, Ex. 25. Nahimana was "the boss who gave orders" at the radio station. *Id.* ¶ 808.[8] Because Nahimana failed to prevent and punish the radio staff's broadcasts inciting ethnic murders, the Appeals Chamber affirmed his conviction for inciting genocide under a superior responsibility theory. *Id.* ¶¶ 856-57.

Similarly, the ICTR convicted the director of the Gisovu Tea Factory of genocide for the criminal acts of factory employees. *See Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, ¶¶ 895, 900 & 906 (Jan. 27, 2000), excerpt available at Dkt. 414-28, Ex. 27. The dispositive finding was "Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory." *Id.* ¶ 880. Musema was thus convicted as the head of a business who failed to prevent or punish criminal acts by his employees, thus reaffirming superior responsibility "applies not only to the military but also to persons exercising civilian authority as superiors." *Id.* ¶ 148. The District Court erred in using *Musema* to hold the doctrine is limited to military situations because the "theory [was] used against director of a public factory."

[8] The radio station in *Nahimana* was a private entity. *See Prosecutor v. Nahimana*, Case No. ICTR–99–52–T, Judgment and Sentence, ¶ 1099 (Dec. 3, 2003), excerpt available at Dkt. 414-27, Ex. 26.

APP. (Vol. VI) 459 at 8. Musema's failure to prevent his employees' crimes was decisive, not the factory's government ownership.

Modern war crimes tribunals' undisturbed recognition that civilian superiors can be prosecuted for their employees' acts is well-grounded in historical practice. Following World War II, Hermann Roechling, a German steel executive, was convicted by a French military tribunal for allowing use of prisoners of war and deportees in his steel plants under deplorable conditions. *See Judgment Rendered on 30 June 1948 in the Case* versus *Hermann Roechling and Others Charged with Crimes Against Peace, War Crimes, and Crimes Against Humanity*, in *14 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, 1096 (1951) (convicting Roechling for "having tolerated or encouraged punishments meted out in inhuman fashion"), excerpt available at Dkt. 414-31, Ex. 30; *id.* at 1088 (Roechling was "not accused of having ordered this abominable treatment but of having tolerated it and of not having done anything in order to have it modified").

Similarly, the owner of a group of industrial enterprises, Flick, was convicted for war crimes relating to the use of slave labor. U.N. War Crimes Comm'n, *The Flick Trial*, 9 *Law Reports of Trials of War Criminals* 1-2 (1949), excerpt available at Dkt. 414-32, Ex. 31. Flick did not "exert[] any influence or [take] any part in the formation, administration or furtherance of the slave-labour

programme," but he knew of the "active participation" of his subordinate. *Id.* at 8. Flick's conviction "was an application of the responsibility of a superior for the acts of his inferiors which he has a duty to prevent." *Id.* at 54.

Thus, the District Court erred in holding "command responsibility is a military doctrine" or only applies to civilians with "control over state-run military or public forces." APP. (Vol. VI) 459 at 8. Aside from the District Court's opinion, no domestic or international decision categorically exempts corporate officers from the doctrine's reach. Indeed, in passing the TVPA, the Senate indicated no class of person is exempt: "Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts–***anyone*** with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." S. Rep. No. 102-249 at 9 (1991) (emphasis added). International law indisputably allows holding corporate officers liable for the acts of subordinate employees.

b. The District Court also erred in finding Plaintiffs did not properly plead superior responsibility against Tracy.[9]

Defendant Tracy has been on notice Plaintiffs intended to pursue a theory of superior responsibility since October 2010, when Plaintiffs first briefed the issue in relation to Defendant Jimenez's motion to dismiss. APP. (Vol. III) 91 at 25-28.

[9] The District Court declined to decide whether Plaintiffs properly pled the doctrine against Jimenez so there is no ruling to appeal with respect to him. APP. (Vol. VI) 459 at 7-8.

The District Court chose not to rule on the issue at that time. APP. (Vol. VI) 459 at 7-8. It also declined to rule on it when Tracy adopted Jimenez's dismissal arguments. APP. (Vol. IV) 257 at 2 & n.1. Nonetheless, as the District Court acknowledged, neither Tracy nor Jimenez challenged Plaintiffs' superior responsibility theory in their motions for summary judgment. APP. (Vol. VI) 457 at 3 n.3; 459 at 3 n.3, 7. Accordingly, they waived their challenges, and that alone justifies reversal. *Bryant v. Jones*, 575 F.3d 1281, 1308 (11th Cir. 2009).

Despite this, the District Court found Plaintiffs did not "put Tracy on notice of the claim being alleged against him." APP. (Vol. VI) 457 at 3 n.3. Additionally, the District Court held "a new theory of liability cannot, of course, be asserted at the summary judgment stage." *Id.* Both rulings are incorrect and fundamentally unfair and are conclusively rebutted by Plaintiffs' October 2010 briefing on the Jimenez motion to dismiss and Tracy's adoption of Jimenez's superior responsibility arguments in a November 2011 filing. APP. (Vol. IV) 257 at 2 & n.1.

c. Plaintiffs submitted ample evidence of superior responsibility for a jury to consider.

The superior responsibility standard is whether Jimenez and Tracy knew or should have known of their subordinates' international law violations but failed to prevent such acts or punish the wrongdoers. *Ford*, 289 F.3d at 1288. Plaintiffs submitted ample evidence supporting both Defendants' liability under this

standard. APP. (Vol. VI) 414 at 20-25 (Tracy); APP. (Vol. VI) 417 at 15-24 (Jimenez). As the District dismissed this issue as a matter of law, it should be remanded for jury consideration of Plaintiff's evidence.

2. The District Court Erred in Finding Ratification and the Responsible Corporate Officer Doctrine Cannot Support TVPA Liability.

a. Defendants may be held liable for ratification under the TVPA.

The District Court, despite noting both the court and parties cited exclusively to domestic law to govern Plaintiffs' ratification theory at the motion to dismiss stage, abruptly changed course at summary judgment, holding "international law should apply to the secondary theory of ratification" and "a ratification theory of liability is not accepted in international law." APP. (Vol. VI) 457 at 13. This holding was erroneous because the TVPA generally is ***not*** interpreted with reference to the ATS or international law.[10]

The Supreme Court has indicated courts should interpret the TVPA based on its text, legislative history, and federal common law. *See Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1708, 1709 n.4, 1710 (2012). The Court rejected international law as an interpretive source and decoupled the TVPA from the ATS.

[10] Plaintiffs' reliance on international law for the contours of superior responsibility, *see*, *supra*, Section VI.C.1.a, stems from the TVPA's legislative history. *Ford*, 289 F.3d at 1289 (holding "legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA]").

See id. at 1709 n.4 (rejecting "contention that the TVPA must be construed in light of international agreements"); *id.* at 1709 (declining "to construe the TVPA's scope of liability to conform with" ATS). Accordingly, the theories of liability cognizable under the ATS (whether drawn from international law or otherwise) do not determine the theories of liability available under the TVPA.

But even prior to the Supreme Court's opinion in *Mohamad*, this Court correctly found domestic law, not international, governs the theories of liability available under the TVPA. *See, e.g., Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005) (looking "to the principles of agency law and to jurisprudence under 42 U.S.C. § 1983" for TVPA claim); *Cabello*, 402 F.3d at 1159 (applying common law of conspiracy to TVPA and ATS claims).

The District Court therefore erred in relying heavily on *In re Chiquita Brands Int'l., Inc. Alien Tort Statute and Shareholder Derivative Litig.*, 792 F. Supp. 2d 1301, 1353 (S.D. Fla. 2011), which "found that a ratification standard of liability was not cognizable under international law for purposes of an ***ATS*** claim." *Id.* (emphasis added). This ignores the Supreme Court and this Court's clear holdings that liability issues for ***TVPA*** claims are governed by its statutory language, legislative history, as well as federal common law.

Properly interpreting the TVPA with reference to its own legislative history, the Second Circuit recently held ratification is available under the TVPA.

Chowdhury, 2014 WL 503037, at *8. The Second Circuit recognized "[t]he weight of authority makes clear that agency theories of liability are available in the context of a TVPA claim" and agency law "provide[s] a theory of tort liability if a defendant did not personally torture the victim." *See id.* (citing *Mohamad*, 132 S. Ct. at 1709 ("Congress is understood to legislate against a background of common-law adjudicatory principles")). *Chowdhury* found "Congress has not, in other words, 'specified' any 'intent' that traditional agency principles should not apply under the TVPA." *Id.* (quoting *Meyer v. Holley*, 537 U.S. 280, 287 (2003)). Therefore, the Second Circuit held "the District Court did not err in permitting agency theories of liability to be submitted to the jury," specifically a "ratification theory of agency." *Id.*, n.11.

Plaintiffs submitted ample evidence demonstrating Defendants Jimenez's and Tracy's liability under a ratification theory. APP. (Vol. VI) 414 at 20-25 (Tracy); APP. (Vol. VI) 417 at 15-24 (Jimenez). As the District dismissed this issue as a matter of law, it should be remanded for jury consideration of Plaintiffs' evidence.

b. Jimenez[11] may be held liable under the responsible corporate officer doctrine.

Like its erroneous holding regarding ratification, the District Court held it "must consider whether there is a consensus for the [responsible corporate officer doctrine] in international law" before recognizing it under the TVPA. APP. (Vol. VI) 459 at 14. As discussed above, the Supreme Court in *Mohamad* rejected international law as an interpretive source for the TVPA, instead looking to its text, legislative history, and federal common law. Furthermore, in *Aldana* and *Cabello*, this Court correctly applied common law to theories of liability under the TVPA. And in common law it is well established, "if a corporate officer participates in the wrongful conduct, or knowingly approves the conduct, the officer, as well as the corporation, is liable for the penalties." 3A *Fletcher Cyclopedia of the Law of Corporations* § 1135 (2012); *see also id.* (corporate officers "cannot avoid personal liability for wrongs committed . . . with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval."). This rule has been adopted both in Alabama and by this Circuit. *See Crigler v. Salac*, 438 So. 2d 1375, 1380 (Ala. 1983); *Shingleton v.*

[11] Despite being extensively briefed, the District Court simply ignored this liability theory against Defendant Tracy, requiring remand for proper application of this theory to the evidence against Tracy.

Armor Velvet Corp., 621 F.2d 180, 183 (5th Cir. 1980) (affirming officers' liability for corporation's torts based on officers' approval of misrepresentations).[12]

The District Court also held Plaintiffs presented no "evidence that Jimenez approved of the murders along Drummond's rail lines, much less that he actively participated in the killings." APP. (Vol. VI) 459 at 14. First, there is no active participation requirement under the responsible corporate officer doctrine. While, "more than mere knowledge may be required in order to hold an officer liable," Plaintiffs need only show Jimenez "directed, controlled, approved, or ratified the decision that led to the plaintiff's injury." Fletcher § 1135.

Second, the evidence of Jimenez' approval of Drummond's collaboration with the AUC the Court found inadmissible was Blanco and Charris' recounting of Adkins' statements. As addressed in section VI.A.3, *supra*, these exclusions were in error. The District Court exceeded its discretion in excluding the entirety of Blanco's testimony because he abstained from answering a handful of questions, which directly implicated his right against self-incrimination and were collateral to the matters directly at issue here. Similarly, the District Court exceeded its discretion in excluding Akins' admissions as they were made by Defendants' agent and co-conspirator.

[12] *Shingleton* is binding Eleventh Circuit precedent under *Bonner*, 661 F.2d at 1209.

3. Plaintiffs Submitted Sufficient Evidence of Tracy and Jimenez's Knowledge and Intent for Aiding and Abetting and Conspiracy Liability under the TVPA.

The District Court held intent, not knowledge, is required for secondary liability claims under the TVPA. APP. (Vol. VI) 457 at 8-12; 459 at 9-12. This was error because the District Court again ignored the TVPA's legislative history and improperly applied ATS law to the TVPA. *Mohamad*, 132 S. Ct. at 1709-10; *Baloco,* 640 F.3d at 1345. The *mens rea* applicable to the ATS is ***not*** determinative of the one applicable to the TVPA, and the Senate Report for the TVPA demonstrates only knowledge is required for secondary liability. *Compare* S. Rep. No. 102-249, at 9 (1991) (stating "anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them"); *with id.* (suggesting one who "should have known" may also be held liable).

The District Court further erred in finding intent cannot be established by showing the AUC's murders of Plaintiffs' decedents were the "natural and probable consequences" of Tracy's and Jimenez's conduct. *See, e.g., United States v. Myers*, 972 F.2d 1566, 1573 (11th Cir. 1992) (approving jury instruction stating "you may infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done"); *Lancaster v. Newsome*, 880 F.2d 362, 370 (11th Cir. 1989) ("juries are free to infer intent from conduct."). The District Court ***should have*** drawn all reasonable inferences in Plaintiffs' favor. *Hulsey*,

367 F.3d at 1243. Instead it held the natural and probable consequences doctrine is not "the standard employed by the court on the intent inquiry in an aiding and abetting action." APP. (Vol. VI) 457 at 10 n.10. The Supreme Court, however, expressly recognized the practice of inferring intent in the aiding and abetting context. *See, e.g.*, *Rosemond v. United States*, 12-895, 2014 WL 839184, at *8, n.9 (U.S. Mar. 5, 2014) (holding "intent needed to aid and abet" violation was "advance knowledge" and "the factfinder can draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission."); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 191 (2007) (recognizing "many States and the Federal Government apply some form or variation of [the "natural and probable consequences"] doctrine, or permit jury inferences of intent" in aiding and abetting cases).

The Eleventh Circuit also routinely infers intent for aiding and abetting from defendants' conduct. *See, e.g., United States v. Gonzalez*, 501 F. App'x. 851, 853 (11th Cir. 2012); *United States v. Pareja*, 876 F.2d 1567, 1570 (11th Cir. 1989); *United States v. Cotton*, 770 F.2d 940, 941 (11th Cir. 1985); *United States v. Brantley*, 733 F.2d 1429, 1434-35 (11th Cir. 1984). Accordingly, the District Court's categorical statement "no case" has applied the natural and probable consequences doctrine in the aiding and abetting context is legal error.

a. Plaintiffs submitted sufficient evidence of Tracy's knowledge and intent.

The District Court's holding that Plaintiffs presented insufficient evidence of Tracy's intent stemmed from two erroneous findings. First, the District Court found there was not even "evidence that Tracy knew that noncombatants were being murdered along the rail lines." App. (Vol. VI) 457 at 10-11. Yet the evidence demonstrated Tracy knew of the paramilitary presence near Drummond's operations and was aware of the paramilitary's murder of five people in Chiriguana, where many of Plaintiffs' decedents were also murdered. APP. (Vol. VI) 414 at PSUMF, 8-9 ¶ 14; *see also* APP. (Vol. IV) 233, ¶¶ 22, 28, 31, 39 & 46 (allegations concerning various murders in Chiriguana). Similarly, Tracy admitted violent paramilitaries were active around the rail line. APP. (Vol. VI) 414 at PSUMF, 9 ¶ 14 (citing Deposition of James Michael Tracy at 40:13-41:4). Additionally, Tracy knew and approved of Drummond's coordination with the AUC to murder Drummond union leaders. APP. (Vol. VI) 414 at PSDMF, 13 ¶ 4 (citing Charris Dep. 92:2-94:5; 97:16-98:19). Second, the District Court relied on the supposed "absence of any evidence of Tracy's knowledge that the AUC was allegedly being paid by Drummond." APP. (Vol. VI) 457 at 11. Yet Tracy approved Drummond's payments to the Colombian military after he was notified the military was controlling and supporting paramilitaries in the area of Drummond's operations *and* knew three Drummond contractors paid, collaborated

with, or otherwise had connections to the AUC. APP. (Vol. VI) 414 at PSUMF, 9 ¶ 15 & 11 ¶¶ 18-20.

b. Plaintiffs submitted sufficient evidence of Jimenez's knowledge and intent.

As with Tracy, Plaintiffs submitted evidence Jimenez knew of the noncombatant murders and Drummond's support for the AUC. Regarding the murders, in addition to receiving the same Chiriguana killings email, Jimenez received a security memorandum referencing the paramilitary tactic of engaging in "sweeps that empty out nearly entire villages." APP. (Vol. VI) 417 at PSUMF, 7 ¶ 8. Jimenez also knew and approved of Drummond's coordination with the AUC to murder the Drummond union leaders. *Id.* at PSDMF, 13 ¶ 8.

Similarly, evidence of Jimenez's knowledge of Drummond's AUC support includes Charris' and Blanco's testimony Jimenez was aware of Drummond's relationship with the AUC and Jorge 40's statement that Jimenez "was handling . . . directly" Secolda's payments to the AUC. *Id.* at 10-13 ¶¶ 3-8[13]; *see also id.* at PSUMF, 8 ¶ 9 (Jimenez knew of Drummond contractor Viginorte's AUC connections). Notably, Jimenez refused multiple times to deny the Drummond-AUC link when the issue arose, including in a meeting with a U.S. government official. *Id.* at 8-9 ¶ 12.

[13] The admissibility of Charris' and Blanco's testimony is discussed in section VII.A.3.b, *supra*.

Thus, Plaintiffs submitted sufficient evidence of Tracy's and Jimenez' knowledge and intent to defeat summary judgment.

D. The District Court Abused Its Discretion in Declining Supplemental Jurisdiction Over Plaintiffs' Colombian Law Claims.

The District Court abused its discretion in declining supplemental jurisdiction, finding without reason "it would be impossible for this court to navigate the Colombian law requisites for a wrongful death claim." APP. (Vol. I) 30 at 35. "This conclusory statement, which cannot truly be called analysis, is grossly insufficient and easily rises to the level of an abuse of discretion." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1278 (11th Cir. 2009).

The District Court's citation to *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1318 (11th Cir. 2008) highlights its abuse of discretion. APP. (Vol. I) 30 at 35. *Romero* affirmed the refusal to assert supplemental jurisdiction because the district court had "extensive briefing" on the Colombian law issue and its finding of complexity was "supported by the record." *Id.* By contrast, because the issue was raised prematurely in Defendants' motion to dismiss, the parties' dismissal briefs barely touched on the issue, APP. (Vol. I) 13 at 51-52, and the record contains no substantive discussion of Colombian wrongful death law. *Cf. Romero*, 552 F.3d at 1318 (noting "the district court was unable to reconcile conflicting translations of Colombian legal precedents"). Had the District Court not improperly dismissed Plaintiffs' Colombia law claim prior to discovery and any

expert submissions, Plaintiffs would have demonstrated Colombian wrongful death law is not unduly complex. Indeed, in *Baloco*, after giving "thorough consideration" to submissions on Colombian law, this Court found plaintiffs there "properly alleged their entitlement to proceed as wrongful death claimants under Colombian law." 640 F.3d at 1349.

The sparse record and conclusory findings here are nothing like *Romero*, and *Baloco* demonstrates Colombian wrongful death law is far from "impossible" to apply. Accordingly, the District Court abused its discretion in declining supplemental jurisdiction without proper justification.

E. The District Court Erred in Denying Plaintiffs' Rule 60 Motion to Vacate the Judgment to Allow for Amending the Complaint to Perfect Diversity and Pursue Colombian Law Claims.

If this Court affirms the dismissal of Plaintiffs' ATS claims and does not direct the District Court to assert supplemental jurisdiction over Plaintiffs' Colombian wrongful death claims, Plaintiffs should be permitted to proceed with diversity-based Colombian law claims. The District Court denied Plaintiffs' request to drop the single remaining non-diverse defendant, Jimenez, and amend to plead diversity jurisdiction. Plaintiffs, however, demonstrated extraordinary circumstances meriting relief under Rule 60(b)(6) because, if the District Court was correct, *Kiobel* was a "seismic shift" in ATS law, APP. (Vol. VI) 455 at 2, this was unforeseeable and Plaintiffs are left without a remedy against the corporate

Defendants if they are not allowed to go forward on their diversity-based Colombian law claims. *LeBlanc v. Cleveland*, 248 F.3d 95, 100-01 (2d Cir. 2001); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1357 (11th Cir. 2014).

If the underlying facts or circumstances Plaintiffs rely upon are a proper subject of relief, they should be afforded an opportunity to test their claim on the merits. *Foman v. Davis*, 371 U.S. 178, 182 (1962) (finding abuse of discretion in denying plaintiff's motion to vacate judgment and amend pleading when "the amendment would have done no more than state an alternative theory for recovery."). '"In the absence of any apparent or declared reason,'" the leave sought should be '"freely given."' *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1319 (11th Cir. 1999) (quoting *Foman*, 371 U.S. at 182). The District Court's refusal to allow Plaintiffs to proceed with Colombian law claims is squarely at odds with federal law and the Second Circuit's holding in *LeBlanc*, which involved similar facts.

In *LeBlanc*, the district court dismissed a complaint based on admiralty jurisdiction, and refused plaintiff's motion to vacate the judgment, drop a non-diverse party, and reinstate the action based on diversity jurisdiction. 248 F.3d at 97-98. The Second Circuit held "it was an abuse of discretion to deny [the

plaintiff's] Rule 60(b) motion to vacate the judgment and to reinstate her complaint." *Id.* at 100.

In rejecting the same request here, the District Court misread *LeBlanc* and the procedural rules and statutes underlying it. The District Court found *LeBlanc* "distinguishable" because the district court there "failed to consider" the motion and "failed to assess prejudice." APP. (Vol. VI) 477 at 9 n.8. This suggests the Second Circuit remanded for the district court's consideration, but the Second Circuit directed the district court to grant the plaintiff's request. *LeBlanc*, 248 F.3d at 100-01. The mere fact the District Court here considered Plaintiffs' request before denying it does not change its conflict with *LeBlanc* to mandate the same relief.[14]

The District Court's opinion also reflected a misunderstanding of the governing rules and statutes. It first suggested Plaintiffs acted too late, APP. (Vol. VI) 477 at 9 n.8, ignoring that Federal Rule of Civil Procedure 21 allows parties to be dropped "at any time." Fed. R. Civ. P. 21; *see also Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989) ("[I]t is well settled that Rule 21 invests

[14] The District Court further asserted that this case and *LeBlanc* are "on different footing" because jurisdiction over "the wrongful death claims has long been settled," whereas the issue of admiralty jurisdiction in *LeBlanc* was not resolved early in the proceeding. APP. (Vol. VI) 477 at 8 n.5. The proper comparison, however, is the admiralty ruling in *LeBlanc* and the ATS and TVPA rulings here--rulings on federal issues well into the litigation, which precipitated a request to proceed on diversity-based claims. When drawing the correct comparison, the cases are on the same footing.

district courts with authority to allow a dispensable nondiverse party to be dropped at any time."). Parties may be dropped even at the appellate stage. *Newman-Green*, 490 U.S. at 827. Under these circumstances, the District Court abused its discretion in not allowing Plaintiffs to drop Jimenez. *LeBlanc*, 248 F.3d at 100; *Shows v. Harber*, 575 F.2d 1253, 1254-55 (8th Cir. 1978) (holding plaintiff should be allowed to drop non-diverse defendant so as to be able to invoke diversity jurisdiction).

Next, the District Court's discussion of 28 U.S.C. § 1653, which permits the amendment of jurisdictional allegations, reflects a misunderstanding of the retroactive effect of Rule 21 dismissals. The District Court labeled diversity jurisdiction "improper" because Jimenez (a Colombian citizen) was a defendant. APP. (Vol. VI) 477 at 9 n.7. Yet if Jimenez is dropped, the District Court would have to view the complaint as if Jimenez was never a defendant, so complete diversity would be achieved. *See, e.g.*, *Newman-Green*, 490 U.S. at 830 (holding application of Rule 21 is an exception to rule that the "existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed"); *LeBlanc*, 248 F.3d at 99 ("Once a party has been dropped under Rule 21, we read the complaint as if he had never been included."). It would then be entirely proper to allow Plaintiffs to formally plead diversity jurisdiction.

Unlike the District Court's interpretation, Plaintiffs' reliance on Section 1653 was consistent with its longstanding application. *See, e.g.*, *Miller v. Stanmore*, 636 F.2d 986, 990 (5th Cir. 1981) (holding district court abused its discretion by not allowing plaintiffs to amend to add an alternative basis for jurisdiction);[15] *Mobil Oil Corp. v. Kelley*, 493 F.2d 784, 788 (5th Cir. 1974) (stating Section 1653 was "originally designed to permit belated amendment to allege diversity of citizenship").

The District Court also invoked the specter of delay and prejudice to deny Plaintiffs' request, but its conclusions in that regard are factually and legally incorrect. First, there was no delay because Plaintiffs sought to proceed on their Colombian law claims immediately upon dismissal of Plaintiffs' ATS claims under *Kiobel*. APP. (Vol. VI) 468; *see also In re Lorazepam & Clorazepate Antitrust Litig.*, 631 F.3d 537, 542 (D.C. Cir. 2011) (dismissing a party in order to maintain diversity jurisdiction *after* the case had already gone to trial and remanding for district court to proceed under Rule 21). "[T]here is no such rule" that Plaintiffs were "under obligation to seek leave to replead . . . immediately upon receipt of the court's ruling granting the motion" to dismiss Colombian law claims. *Williams v. Citigroup Inc.*, 659 F.3d 208, 214 (2d Cir. 2011).

[15] *Miller*, decided on February 9, 1981, is binding precedent. *Bonner*, 661 F.2d at 1209; *see also Majd-Pour v. Georgiana Cmty. Hosp., Inc.*, 724 F.2d 901, 903 n.1 (11th Cir. 1984) (citing *Miller* for proposition that "leave to amend should be freely granted when necessary to cure a failure to allege jurisdiction properly").

Second, the District Court incorrectly asserted "Defendants . . . have not had notice of potential Colombian wrongful death claims since 2009." APP. (Vol. VI) 477 at 9. Yet Plaintiffs preserved and asserted their Colombian law claim in subsequent years. *See, e.g.*, APP. (Vol. III), SAC, 55 ¶ 10 (asserting in 2010 jurisdiction exists over Plaintiffs' wrongful death claim under Colombian law but noting the Court declined to exercise jurisdiction); APP. (Vol. IV) TAC, 233 ¶ 10 (same, in 2011). Finally, the District Court's position Defendants would be prejudiced by "substantial additional expense, preparation, and discovery," APP. (Vol. VI) 477 at 9, cannot be reconciled with the record or governing law. Plaintiffs proffered they would need no additional discovery to proceed on their Colombian law claims. APP. (Vol. VI) 468 at 13. Moreover, the District Court's summary judgment findings demonstrate Plaintiffs' Colombian law claim, which is essentially a negligence claim, could go quickly to trial, even if this Court affirms all challenged evidentiary rulings. APP. (Vol. VI) 455 at 16 (finding admissible evidence of Drummond-AUC meeting, increased AUC presence around Drummond's rail line after meeting, and Drummond's knowledge AUC would commit human rights violations); *see also LeBlanc*, 248 F.3d at 100 (finding defendant would not suffer prejudice where it "had notice of the complaint from the date it was filed" and where "trial preparations and discovery have already been substantially completed").

Regardless, the District Court misunderstood the meaning of prejudice in this context, which turns on "whether the non-diverse party is indispensable under Rule 19" and "whether the presence of the non-diverse party provided the other side with a tactical advantage in the litigation." *Molinos Valle del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1343-44 (11th Cir. 2011). Plaintiffs did not gain the tactical advantage of "access to otherwise unavailable discovery materials only because of the presence of the improper party." *Id.* at 1345. And any claim the non-diverse joint tortfeasor, Jimenez, is indispensable would be specious. *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990).

The District Court's critique of Plaintiffs' so-called "tactical choice" to request reinstatement of their Colombian law claims following summary judgment is simply not "unlike the situation in *LeBlanc*." APP. (Vol. VI) 477 at 9 n.8. Rather, like here, the plaintiff in *LeBlanc* waited for a ruling on a major federal law issue before seeking to proceed on diversity grounds. 248 F.3d at 100. The District Court abused its discretion in denying Plaintiffs the opportunity to go forward on their diversity-based Colombian law claims after the Court dismissed Plaintiffs' ATS claims against the corporate Defendants post-*Kiobel.*

VII. CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request this Court reverse the grant of summary judgment on their ATS and TVPA claims,

dismissal of their crimes against humanity ATS claims, and denial of Plaintiffs' requests to permit their Colombia law claims to proceed. The case should be remanded for trial on the merits.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32 (a)(7)(C), I certify that Plaintiffs/Appellants Opening Brief complies with Rule 32 (a)(7)(B)(i) in that it has a text typeface of 14 points and contains 13,718 words.

Respectfully submitted this 14th day of March 2014,

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I hereby certify that I caused a true and correct copy of Appellants' Opening Brief to be served via FedEx overnight on this 14th day of March, 2014, on the following:

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