Case No. 19-13926-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

On Appeal from the United States District Court
for the Southern District of Florida, The Honorable Kenneth A. Marra
No. 08-md-1916
(Nos. 07-60821, 08-80421, 08-80465, 08-80480, 08-80508, 10-60573, 10-80652, 17-81285, 18-80248)

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APPELLEES/CROSS-APPELLANTS' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE

Pursuant to Rule 26.1-1(a) of the Eleventh Circuit Rules, counsel for Appellee-Cross-Appellant Chiquita Brands International, Inc. ("Chiquita") on behalf of all Appellees/Cross-Appellants, hereby certifies that no publicly held corporation owns 10% or more of Chiquita's stock. Counsel also certifies that the following is a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations (none of which is publicly listed) known to Chiquita that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party:

Abrams, Louis D.

Agrícola Bananera Santa Rita, S. de R. L.

Agroindustria Santa Rosa de Lima, S.A.

Alamo Land Company

Alexander, Lauren

Alsama, Ltd.

American Produce Company

Americana de Exportación S.A.

Arnold & Porter Kaye Scholer LLP

ASD de Venezuela, S.A.

B C Systems, Inc.

Bandy, Kevin M.

Blalack II, K. Lee

Blank Rome LLP

Blue Fish Holdings Establishment

Boies Schiller Flexner LLP

Borja, Ludy Rivas

Borja Hernandez, Genoveva Isabel

Brackman, Liza J.

Bronson, Ardith M.

Brown, Benjamin D.

Buckley LLP

Burman, John Michael

Carrillo, Arturo

Carter, Melanie

Charagres, Inc., S.A.

Chiquita (Canada) Inc.

Chiquita Brands Costa Rica Sociedad de Responsabilidad Limitada

Chiquita Banana Ecuador CB Brands S.A.

Chiquita Brands International Sàrl

Chiquita Brands International, Inc.

Chiquita Brands L.L.C.

Chiquita Compagnie des Bananes

Chiquita Europe B.V.

Chiquita Finance Company Limited

Chiquita For Charities

Chiquita Fresh North America L.L.C.

Chiquita Guatemala, S.A.

Chiquita Holding SA

Chiquita Holdings Limited

Chiquita Honduras Company Ltd.

Chiquita Logistic Services El Salvador Ltda.

Chiquita Logistic Services Guatemala, Limitada

Chiquita Logistic Services Honduras, S. de R.L.

Chiquita Mexico, S. de R.L. de C.V.

Chiquita Nature and Community Foundation

Chiquita Panama L.L.C.

Chiquita Relief Fund - We Care

Chiquita Tropical Fruit Company B.V.

Chiquita Tropical Ingredients, Sociedad Anónima

Chiquita US Corporation

Chiriqui Land Company

Chomsky, Judith Brown

Cioffi, Michael L.

CILPAC Establishment

Cohen Millstein Sellers & Toll PLLC

Collingsworth, Terrence Patrick

Colombian Institute of International Law

Compañía Agrícola de Nipe, S.A.

Compañía Agrícola e Industrial Ecuaplantation, S.A.

Compañía Agrícola Sancti-Spiritus, S.A.

Compañía Bananera La Ensenada, S. de R.L.

Compañía Caronas, S.A.

Compañía Cubana de Navegación Costanera

Compañía Frutera América S.A.

Compañía La Cruz, S.A.

Compañía Productos Agrícolas de Chiapas, S.A. de C.V.

Compañía Tropical de Seguros, S.A.

Conrad & Scherer, LLP

Dante, Frank A.

Davenport, Jonathan

De Leon, John

Desarrollos Agroindustriales del Istmo, S.de R.L.

DLA Piper LLP (US)

Doe 7, Jane*[1]

Doe 7, John*

Doe 11, Juana*

Doe 11A, Minor*

Doe 46, Jane*

Durango, Pastora

EarthRights International

Exportadora de Frutas Frescas Ltda.

Fontalvo Camargo, Juvenal Enrique

Freidheim, Cyrus

[1] Jane Doe 7, John Doe 7, Juana Doe 11, Minor Doe 11A, Jane Doe 46, the unnamed children of Jose Lopez 339, and Juana Perez 43A were proceeding in the district court under pseudonym until the district court order that required each to proceed under his or her actual name. On July 16, 2020, this Court affirmed that decision. Because the pseudonymous Plaintiffs' time to publicly identify themselves has not yet expired, they are identified by pseudonym herein and denoted by asterisk, but Chiquita intends to use the true names of any formerly pseudonymous Plaintiff in filings moving forward.

Fresh Express Incorporated

Fresh Express Vegetable LLC

Fresh Holding C.V.

Fresh International Corp.

Fryszman, Agnieszka M.

Frutas Elegantes, S. de R.L. de C.V.

G W F Management Services Ltd.

Golembe, Stephen

Graziano, MacKennan

Great White Fleet Corp.

Great White Fleet Liner Services Ltd.

Great White Fleet Ltd.

Green, James Kellogg

Halliday, Katherine

Heaton Holdings Ltd.

Herz, Richard

Hills, Carla as personal representative of the Estate of Roderick M. Hills, Sr.

Hoffman, Paul L.

Hughes, Jonathan

International Rights Advocates

Istmo Holding LLC One

Istmo Holding LLC Two

James K. Green, P.A.

Jones, R. Stanton

Jost-Creegan, Kelsey

Keiser, Charles

Kenny Nachwalter, P.A.

Kistinger, Robert

Konkel, Kaitlin

Krakoff, David S.

Krezalek, Martin S.

Kroeger, Leslie M.

La Ensenada Holding LLC One

La Ensenada Holding LLC Two

Landon III, Robert D.W.

Law Firm of Jonathan C. Reiter

Law Offices of Chavez & De Leon, P.A.

Law Offices of Judith Chomsky

Leopold, Theodore J.

Lindner, Keith

Lopez 339, Jose (unnamed children of)*

Marcus, Bradley A.

Marcus Neiman & Rashbaum

Marra, Kenneth A.

McCawley, Sigrid

Melitsky, Anton

Mitchell, Douglass

Mora Lemus, Nancy

Mrachek, Lorin Louis

Mrachek, Fitzgerald, Rose, Konopa, Thomas & Weiss, P.A.

Munoz, Gloria Eugenia

Murphy, Melissa F.

Murray, Jr., John Brian T.

Neiman, Jeffrey A.

Olson, Robert

O'Melveny & Myers LLP

Orlacchio, Adam V.

Perez 43A, Juana*

Portnoi, Dimitri D.

Powers, Sean

Preheim, Elissa J.

Procesados IQF, S.A. de C.V.

Reiter, Jonathan

Ronald Guralnick, P.A.

Santa Rita Holding LLC One

Santa Rita Holding LLC Two

Scarola, John

Scherer III, William R.

Schonbrun, Seplow, Harris & Hoffman LLP

Searcy Denny Scarola Barnhart & Shipley, PA

Servicios Chiquita Chile Limitada

Servicios de Logistica Chiquita, S.A.

Servicios Logisticos Chiquita, S.R.L

Silbert, Earl

Simons, Marco Benjamin

St. James Investments, Inc.

Soto, Edward

Stephen J. Golembe & Associates, P.A.

Stewart, Thomas H.

Three Sisters Holding LLC

Torres, Ana Ofelia

Tsacalis, William

TransFRESH Corporation

UNIPO G.V., S.A.

United Fruit Transports S.A.

United Reefer Services S.A.

Vahlsing, Marissa

Villegas Echavarria, Maria Emilse

Wayne, Charles B.

Weil, Gotshal & Manges LLP

Wichmann, William J.

William J. Wichmann, P.A.

Wolf, Paul

Wolosky, Lee

Yanez, Anthony

Dated: July 31, 2020

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The district court was well within its broad discretion when it painstakingly applied the Federal Rules of Evidence to exclude Plaintiffs-Appellants/Cross-Appellees' proffers of hearsay, speculation, rumors and innuendo and properly granted summary judgment on the evidence of record. But Defendants-Appellees/Cross-Appellants believe that oral argument will assist the Court to sort through Plaintiffs-Appellants/Cross-Appellees' multi-faceted but futile attempts to manufacture abuse of discretion and triable issues of fact in their brief.

Defendants-Appellees/Cross-Appellants take no position as to how oral argument time should be allocated among Plaintiffs-Appellants/Cross-Appellants in Case Nos. 19-13926 (the Wolf Appellants) and 19-13928, 19-13929, 19-13930, 19-13931, 19-13932, and 19-14692 (the Non-Wolf Appellants) so long as Defendants-Appellees /Cross-Appellants are allocated the same total amount of time for oral argument.[2]

[2] *See* Order entered April 1, 2020, distinguishing between Wolf Appellants and Non-Wolf Appellants and allowing separate briefs to each.

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I. INTRODUCTION

As the district court explained in the summary judgment decision now on review, Plaintiffs-Appellees ("Plaintiffs") are "family members of Colombian nationals who were killed in separate attacks in the Uraba or Magdalena regions of Colombia between 1997 and 2004, at the pitch of a prolonged civil war which displaced hundreds of thousands of Colombian civilians from their homes and claimed the lives of thousands." (Appx. at 7510-11.) The horrendous violence, death and destruction of Colombia's prolonged civil war is well documented in federal court jurisprudence and the undisputed facts of this case. *Escobar v. Holder*, 657 F.3d 537, 540-41 (7th Cir. 2011) ("The battle that rages [in Colombia] has many different actors: the government's security troops, paramilitary groups, revolutionary guerilla groups, and drug traffickers"); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1348 (S.D. Fla. 2003) ("The events giving rise to these claims occurred against a backdrop of civil war that plagued Colombia with violence and terror for over forty years. The civil unrest involves so-called left-wing guerilla groups, right wing paramilitary units, and the Colombian government, including its military and police forces.").

It was "complete chaos" in Colombia, a country ravaged by internal political and criminal warfare. (Appx. at 3639, 99:5-17.) As one former AUC commander testified, narco-terrorist guerilla groups and paramilitary groups waged war against

each other, the Colombian government, civilians, and businesses that operated in Colombia, causing violence and terror to reign over the country. (*Id.*) A former brigadier general in the Colombian Army testified that the "narco-terrorists of FARC [*Fuerzas Armadas Revolucionarias de Colombia*] and the narco-terrorists of ELN [*Ejército de Liberación Nacional*], and the narco-terrorists of the paramilitary [AUC, *Autodefensas Unidas de Colombia*]" attacked each other and the Colombian military attacked all three "because there was no ideology there. The ideology was cocaine. There was no left or right ideologies. They're bandits, terrorists, drug dealers. We needed to attack them." (DE 2282-34, 15:6-18.)[3]

Plaintiffs' decedents were killed in this horrible fog of war in Colombia. No Plaintiff knows who killed their decedent and cannot identify even one perpetrator. There are no witnesses of any kind who can identify even one perpetrator. The record contains no police reports or any other documents that identify even one perpetrator who killed a decedent in this case. There is no direct evidence whatsoever as to the identity of any perpetrator.

Plaintiffs speculate, however, that the unknown perpetrators were members of one of the warring factions known as the AUC. But Plaintiffs have never sued the AUC or any of its members nor could they without knowing the identities of the

[3] Unless otherwise noted, docket entry numbers refer to those in the underlying MDL, Case No. 08-md-1916 (S.D. Fla.), which will be included in Defendants' supplemental appendix.

actual perpetrators. Instead, Plaintiffs rely on a sweeping theory of secondary liability to ask the Court to transfer the liability of these unknown perpetrators to an American company that operated in Colombia at the time—Chiquita Brands International, Inc. ("Chiquita")—and its former executives (the "Individual Defendants").

Like thousands of other businesses and individuals in Colombia during the prolonged civil war, Chiquita itself was a victim of extortion by the narco-terrorist AUC. The second in command of the AUC, Salvatore Mancuso,[4] testified that the "AUC had a very powerful army with weapons." (DE 2343-36, 42:14-16.) Mancuso further testified:

> Q. It's true, is it not, that anyone who did not pay taxes imposed by the AUC would face enormous consequences, correct?
>
> A. Yes.
>
> Q. Those consequences would include violence to people and to property, correct?
>
> A. Yes.

(*Id.* at 43:1-7).

[4] Mancuso was deposed in the United States Penitentiary, Atlanta where he served a 15-year sentence as a drug king pin pursuant to 21 U.S.C. § 21 U.S.C. § 848.

Another AUC commander, Otoniél Hoyos Perez, testified that the AUC used violence and threats of violence to force businesses to pay the AUC. (DE 2343-33, 50:19-23 Over a seven-year period between 1997-2004, Chiquita was forced to pay $20,000 per month to save the lives of its employees.[5]

Plaintiffs assert various theories that these extorted payments make Defendants legally liable for the wrongful acts of the AUC. Defendants moved for summary judgment as to these assertions and theories. The district court reserved ruling on this part of Defendants' summary judgment motions given that Plaintiffs could not adduce evidence that created a triable issue as to the threshold question of causation – whether one or more of the unknown perpetrators was a member of the AUC.

[5] Contrary to Plaintiffs' argument, Chiquita did not plead guilty to illegally financing the AUC. (Appellants' Opening Brief ("Brief") at 1.) Rather, Chiquita entered into a plea agreement with the United States District Court for the District of Columbia to a single-count violation of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1705(b) and 31 C.F.R. § 594.204, for engaging in transactions with the AUC, a Specially Designated Global Terrorist ("SDGT") organization, without a license. In the factual proffer supporting the plea agreement, the Government acknowledged that the payments by Chiquita were the result of extortion by the AUC, agreeing that the following fact would be proven "beyond a reasonable doubt": "Castano [AUC top leader] sent an unspoken but clear message that failure to make the payments could result in physical harm to Banadex [Chiquita's Colombian subsidiary] personnel and property." (Appx. at 3572, 3576 ¶ 21.)

From 2007 to 2010, Plaintiffs filed a series of virtually identical cases alleging more than a dozen causes of action in various district courts around the country that were transferred to the multidistrict litigation below.[6] Each of their claims were premised upon the "foundational allegation that the AUC killed their decedents." (Appx. at 7580.) Plaintiffs' theory of causation has never changed and is set forth on the very first page of their brief: "There is no doubt that the AUC murdered thousands in the relevant areas of Colombia during the relevant time. The entire world knows this." (Brief at 1.) This proclamation begs the question. Other warring factions of armed groups, narco-terrorists and criminals also murdered thousands of Colombians during the bloody civil war.

Twelve years after filing the first action and after two years of discovery, Plaintiffs were unable to proffer any admissible evidence that a member of the AUC, as opposed to a member of some other group, killed any Plaintiffs' decedent.

After analyzing Plaintiffs' proffered testimonial and documentary evidence in a comprehensive 73-page opinion, the district court exercised its discretion to exclude it as only hearsay, speculation, or rumor and innuendo. (Appx. at 7560,

[6] Two of the Plaintiffs included a purported class action claim allegedly on behalf of thousands of similarly situated Colombian claimants that the district court refused to certify, a ruling they chose not to appeal. Between 2010-2017, Plaintiffs' lawyers followed with more lawsuits. There are now 17 lawsuits consolidated in the MDL, with over 7,500 plaintiffs.

7569.) Without any admissible evidence on the foundational question of AUC responsibility for killing Plaintiffs' decedents, the district court entered summary judgment against Plaintiffs.

II. STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court below had jurisdiction over Plaintiffs' Colombian law claims pursuant to diversity jurisdiction (28 U.S.C. § 1332) and over Plaintiffs' TVPA claims pursuant to federal question jurisdiction (28 U.S.C. § 1331). The Court has jurisdiction over the district court's decision granting summary judgment against Plaintiffs and in favor of Defendants. (Appx. at 7510.) The district court's decision disposed of all claims of fewer than all the parties but the district court *sua sponte* certified the decision for appeal under Rule 54(b) of the Federal Rules of Civil Procedure. (Appx. at 7584-85.)

The Court therefore has jurisdiction over the Individual Defendants' contingent[7] cross-appeal pursuant to the district court's Rule 54(b) certification of its summary judgment decision. When a Rule 54(b) judgment is appealed, all interlocutory orders of the district court leading up to the judgment merge into the

[7] This cross-appeal is filed out of an abundance of caution. The Court should affirm the district court's grant of summary judgment for the reasons set forth in Defendants' response briefing. However, should the Court reverse any part of the district court's decision, it should proceed to consider the issues and arguments addressed in the cross-appeal.

partial final judgment and become appealable. *See Meadaa v. K.A.P. Enters., L.L.C.*, 756 F.3d 875, 879 (5th Cir. 2014); *Bowdry v. United Airlines*, 58 F.3d 1483, 1489 (10th Cir. 1995). Thus, the Court has jurisdiction over the district court's denial of the Individual Defendants' motion to dismiss Plaintiffs' TVPA claims (DE 1110)[8] and denial of the Estate of Roderick Hills' motion to dismiss for lack of personal jurisdiction (DE 1493) because they were merged into the district court's grant of summary judgment on those same claims.

III. STATEMENT OF THE ISSUES

RESPONSE BRIEF

1. Whether the district court abused its discretion in excluding from consideration at summary judgment hearsay evidence, where Plaintiffs did not present the evidence in admissible form and failed to explain how the evidence could be reduced to admissible form at trial.

2. Whether the district court committed manifest error in excluding Plaintiffs' expert's opinion, where the expert conceded at his deposition that he did not engage in a reliable methodology and did not apply reliable principles and methods to the facts.

[8] The district court granted the Individual Defendants' motion to dismiss Plaintiffs' TVPA claims as to Mr. Lindner, against whom such claims were dismissed for failure to state a claim. (DE 1110 at 38.) Accordingly, while Mr. Lindner joins in Defendants' Response Brief, he is not a party to the Individual Defendants' Principal Brief of the Cross-Appeal.

3. Whether the district court properly granted summary judgment based on evidence remaining in the record after conducting an extensive and comprehensive analysis of the admissibility of each piece of evidence proffered by Plaintiffs in opposition to summary judgment.

CROSS-APPEAL

1. Whether a district court must dismiss a plaintiff's claims for torture and extrajudicial killing under the TVPA where the plaintiff fails to plead specific facts establishing direct government involvement in the specific alleged act of violence against the plaintiff's decedent.

2. Whether a district court must dismiss a plaintiff's claim for secondary liability under the TVPA, where the plaintiff fails to allege a primary violation of the TVPA by a natural person.

3. Whether a district court errs by dismissing based solely upon waiver a joinder by a defendant to a motion to dismiss for lack of personal jurisdiction without conducting a personal jurisdiction analysis as to that defendant.

IV. STATEMENT OF FACTS AND PROCEEDINGS BELOW

I. STATEMENT OF FACTS

Plaintiffs' decedents were killed by unknown persons for unknown reasons in the middle of a decades-long internal war in Colombia in an area that was ravaged

by numerous warring factions of narco-terrorists, most notably the AUC and FARC, and other extensive criminal activity that rendered human life expendable and cheap.

Desperate to establish **any** fact to avoid summary judgment, Plaintiffs inundated the district court and now this Court with a tsunami of circumstantial evidence based exclusively on hearsay, innuendo, rumor and speculation. Their circumstantial evidence was properly excluded by the district court and the Court should affirm that exercise of discretion. As they do through much of their Brief, Plaintiffs assume the admissibility of their proffered evidence and claim the contents as fact, ignoring that almost all of it is not properly considered under the Federal Rules of Evidence. For example, Plaintiffs attempt to establish "facts" by relying on unsworn expert reports that themselves rely on double and triple hearsay, and not the personal knowledge of the expert.[9] This is improper, and neither the "facts" nor the evidence in these unsworn reports can be considered at summary judgment.

[9] The very first footnote reflects the deficiencies of Plaintiffs' evidence. (Brief at 5 n.4.) Appx. at 5019 and 5047 are excerpts from the deposition of a non-retained expert who, as explained below, lacks personal knowledge of any "facts" to which she testifies, but is instead reiterating multiple levels of hearsay. The same is true of Appx. at 3656, albeit with a different expert who is simply regurgitating more hearsay. Appx. at 8528 and 8530-31 are excerpts from the deposition of Chiquita's corporate representative, who testified that the AUC targeted and threatened Chiquita employees in Colombia—a far cry from Plaintiffs' claim that the AUC killed persons they believed to stand in opposition to Chiquita. This strategy—either reliance on wholly inadmissible evidence or gross mischaracterizations of the record—is present throughout Plaintiffs' Brief and is not limited to their "Statement of Facts."

Plaintiffs suggest that the AUC "targeted persons like the bellwether decedents" (Brief at 5-9), but they again rely exclusively on rank hearsay or mischaracterizations of the record to support such a contention. The Court should disregard these so-called "facts" proffered by Plaintiffs to support this claim. Nor is there any admissible evidence to support Plaintiffs' claim that the AUC "controlled"—to the exclusion of all other armed groups—the banana-growing regions of Colombia where their decedents were allegedly killed. (*See, e.g.*, Brief at 10 (citing Appx. at 4664, which implicitly concedes the AUC's "opponents" remained in the areas); at 9 (citing Appx. at 4385 (testimony of witness who was not in charge of any combat groups that, at unspecified times in unspecified areas, the AUC provided protection to the civilian population against guerillas).) To the contrary, as the district court found, Plaintiffs' own evidence demonstrated that "the geographic areas where Plaintiffs' decedents resided were brutalized by numerous warring factions over the course of a long and bloody civil war" with that area undergoing transition between multiple armed groups. (Appx. at 7576.)

V. PROCEEDINGS BELOW

The original five cases were consolidated in multidistrict litigation before the Honorable Judge Kenneth A. Marra in the United States District Court for the Southern District of Florida. (DE 1.) The initial complaints included claims against only Chiquita under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, the TVPA,

Colombian tort law, and United States domestic tort law. (DE 72; DE 77; DE 2 in No. 9:08-cv-80421; DE 283; DE 284; DE 285; DE 287; DE 84 in No. 08-cv-20641).) Chiquita moved to dismiss all of Plaintiffs' claims for lack of subject matter jurisdiction and for failure to state a claim. (DE 92; DE 93; DE 295.) The district court ultimately granted in part and denied in part Chiquita's motion. (DE 412.)

As relevant here, the district court denied Chiquita's motion to dismiss certain ATS and TVPA claims because it concluded that Plaintiffs adequately alleged the state action requirement for ATS and TVPA claims, despite no allegations by any Plaintiff of direct Colombian government involvement in the deaths of their decedents.[10] Chiquita filed a motion with the district court to certify its decision for immediate appeal (DE 454), which the district court granted (DE 518.)[11] Among four questions certified by the district court was the following:

> Whether the "state action" element of claims for extrajudicial killing and torture brought under the ATS and TVPA requires plaintiffs to plead facts establishing government involvement in the **specific** torture and killings alleged in Plaintiffs' complaints.

[10] (DE 412 at 36-45.) After initially dismissing Plaintiffs' Colombian law tort claims, the district court later re-instated them. (*See* DE 516.) The district court's conclusion that Plaintiffs adequately alleged state action under the ATS and TVPA was later adopted without further analysis and is the decision being appealed here. (DE 1110.)

[11] The Individual Defendants who bring this cross-appeal were not parties to the prior appeal.

(DE 518 at 11 (emphasis in original).) This Court granted Chiquita's timely petition for permission to appeal. *See Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1188 (11th Cir. 2014). Ultimately, however, the Court did not consider the "state action" question certified by the district court because it ordered dismissal of the ATS and TVPA claims against Chiquita on different grounds. *See id.* at 1188-89.

During pendency of *Cardona* in this Court, the district court stayed all proceedings. (DE 66; DE 141.) Following remand of *Cardona* to the district court, some Plaintiffs filed amended complaints asserting, for the first time, Colombian law and TVPA claims against former executives of Chiquita. (Appx. at 1260; 1001; 2351; DE 186 in *Carrizosa v. Chiquita Brands Int'l, Inc., et al.*, No. 07-60821-CIV-MARRA (S.D. Fla.).[12]) Subsequently, the Individual Defendants filed additional motions to dismiss the Colombian law and TVPA claims against them. (DE 735.)

The district court granted in part and denied in part the Individual Defendants' motions to dismiss. (DE 1110.) The district court summarily denied the Individual Defendants' arguments that Plaintiffs failed to adequately allege the state action requirement of their TVPA claims. (DE 1110 at 24 (citing DE 412 at 36-45).) The district court further concluded that Plaintiffs sufficiently alleged aiding and abetting and conspiracy liability under the TVPA against all Individual Defendants except

[12] This iteration of the amended complaint in *Carrizosa* has never been filed in the MDL.

two: Steven Warshaw and Keith Lindner. (*Id.* at 24-31.) The district court granted the Individual Defendants' motion to dismiss Plaintiffs' ATS claims and state law tort claims. (*Id.* at 15-17.)

Subsequently, the district court dissolved the discovery stay in Plaintiffs' cases (DE 1197.) In January 2017, the district court solicited from the parties a proposed scheduling order governing pretrial procedures and trial settings. (DE 1246.) In April 2017, the district court largely adopted the parties' proposal and established an orderly bellwether process. (Appx. at 3074.)

Pursuant to that process, the parties were required to randomly select 56 individual cases[13] from each of the seven Plaintiffs' counsel's groups. From those 56 cases, eight were selected from each of the seven plaintiffs' counsel groups—four by plaintiffs' counsel, and four by Defendants—for full discovery. (Appx. at 3076, § II.1; DE 1459 at 1.) Fact discovery on Plaintiffs' Colombian law claims[14] and TVPA claims[15] began in earnest on May 30, 2017. (Appx. at 3076, § II.2.)

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[13] A "case" was defined "as the claims arising from an alleged injury to one alleged victim, even though there may be more than one Plaintiff seeking recovery for that alleged victim's injury." (DE 1361 at 2, § I.5.a.)

[14] Colombian law tort claims remained pending against Chiquita, and Messrs. Freidheim, Keiser, Kistinger, Olson, Lindner, and Tsacalis, and Mrs. Hills as personal representative of the Estate of Roderick Hills.

[15] TVPA claims remained pending against Messrs. Freidheim, Keiser, Kistinger, Olson, and Tsacalis, and Mrs. Hills as personal representative of the Estate of

Nearly a year later, at Plaintiffs' request, the district court extended fact discovery six months and entered an amended scheduling order. (Appx. at 3209.) Fact discovery concluded on October 18, 2018. (*Id.*) From the 56 cases selected for full discovery, the parties selected cases[16] for dispositive motion briefing and, if necessary, trial. (DE 2241; DE 2244.) Following expert discovery, on February 15, 2019, Defendants filed two dispositive motions: one by all Defendants addressing Plaintiffs' Colombian law claims and one by the Individual Defendants addressing the TVPA claims of Plaintiffs. (Appx. at 3293, 3385.) The motions set forth numerous factual and legal arguments, any one of which would have been sufficient to grant summary judgment on each Plaintiff's claims.

After meticulously parsing though an avalanche of inadmissible evidence, rumor, hyperbole and innuendo, the district court granted both motions for summary judgment. (Appx. at 7510.)

Roderick Hills. The TVPA claims against Mr. Lindner had previously been dismissed. (DE 1110 at 38.)

[16] Following voluntary dismissal of one claim, severance of another, and the district court's decision not to consider the merits of another plaintiff's claims, there are now ten Plaintiffs who have appealed the district court's summary judgment decision to this Court. However, as discussed in Chiquita's separate brief addressing the Wolf Plaintiffs, the Court should dismiss the purported appeal of Ludy Rivas Borja.

VI. SUMMARY OF THE ARGUMENT

Twelve years after the complaints were filed and almost two years after merits discovery, Plaintiffs could not proffer any direct evidence of who killed their decedents, let alone that a member of the AUC did. Instead, Plaintiffs proffered mounds of purported circumstantial evidence to try to overwhelm the district court to abstain from its duty to review and simply conclude there must be a genuine issue of material fact to preclude summary judgment. Instead, the district court thoroughly reviewed—and exercised its sound discretion to exclude—the proffered evidence as hearsay, innuendo, rumors and speculation.

The district court did not abuse its discretion in finding that Plaintiffs' proffered *modus operandi* evidence was not admissible nor could it be reduced to admissible form at trial. The proffered evidence was not probative of the identity of their decedents' killers because the evidence was not unique to the AUC but merely general criminal traits common to all the warring factions.

Plaintiffs had full opportunity to and did brief their arguments for purported exceptions to the hearsay rule. The snippets of the Justice and Peace documents that Plaintiffs proffered years after their dates were properly excluded under Evidence Rules 803(6), 803(8) and 803(22).

The district court properly exercised its discretion to exclude Oliver Kaplan's purported expert report as unreliable and a regurgitation of hearsay facts. While in

his unverified report Kaplan opined that it was more likely than not that an AUC member killed a decedent, under oath in his deposition Kaplan would only say that it may have been *possible* that an AUC member killed a decedent.

VII. STANDARD OF REVIEW

This Court reviews a district court's evidentiary rulings at the summary judgment stage for abuse of discretion. *Calvert v. Doe*, 648 F. App'x 925, 927 (11th Cir. 2016) (citing *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548, 556 (11th Cir. 1998)). Under the abuse of discretion standard, "there is a range of choice for the district court and so long as its decision does not amount to clear error of judgment [this Court] will not reverse even if [the Court] would have gone the other way had the choice been [the Court's] to make." *Id.* (quoting *McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001)) (internal quotations omitted). This Court "'must affirm [a district court's evidentiary or expert witness decision] unless [the Court] find[s] that the district court has made a clear error in judgment, or has applied the wrong legal standard.'" *United States v. Barton*, 909 F.3d 1323, 1330 (11th Cir. 2018) (quoting *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (*en banc*)).

A district court's decision to exclude expert testimony or opinions is likewise reviewed for abuse of discretion. *Phillips v. Am. Honda Motor Co.*, 238 F. App'x 537, 539 (11th Cir. 2007) (citing *GE v. Joiner*, 522 U.S. 136 (1997)). "Under this

standard, this Court defers to the district court's ruling unless it is manifestly erroneous." *Id.* (citing *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1340 (11th Cir. 2003)).

The threshold question of admissibility of evidence relied upon in opposition to summary judgment must be resolved before determining whether questions of fact exist in the admissible evidence. *United States v. Hangar One, Inc.*, 563 F.2d 1155, 1157 (5th Cir. 1977). Thus, following an abuse of discretion review on evidentiary decisions, this Court reviews a grant of summary judgment *de novo* considering the admissible evidence, if any, that remains in the summary judgment record. *Phillips*, 238 F. App'x at 539.

DEFENDANTS' ARGUMENT IN RESPONSE BRIEF

I. THE DISTRICT COURT CONSIDERED PLAINTIFFS' EVIDENCE IN ITS TOTALITY, NOT IN ISOLATION. THAT EVIDENCE, AS EXPLAINED IN PAINSTAKING DETAIL BY THE DISTRICT COURT, WAS INADMISSIBLE OR SO SPECULATIVE THAT IT DID NOT CREATE A TRIABLE ISSUE OF FACT AS TO THE AUC'S RESPONSIBILITY FOR THE DEATH OF ANY PLAINTIFFS' DECEDENT.

In section I of their Opening Brief ("Brief"), Plaintiffs make two arguments. First, they argue that the district court reviewed individual pieces of evidence only in isolation and not in totality. Second, they argue that there was certain circumstantial evidence ("motive, means and opportunity") that was not excluded and that created a genuine dispute about whether the AUC killed any of their decedents.

The clear and undisputed record proves that both arguments are wrong and unavailing. With respect to the first argument, Plaintiffs' citation to *Kyles v. Whitley*, 514 U.S. 419 (1995), for the proposition that "evidence is to be considered collectively, not item by item" is belied by what the Supreme Court actually did there: "We evaluate the tendency and force of the undisclosed evidence item by item; there is no other way" and then consider the undisclosed evidence collectively. *Id.* at 436 n.10.

The district court here painstakingly followed this protocol, evaluating the evidence item by item, piece by piece. Per this Court's instruction, once evidence

was excluded, it was no longer part of "the totality of the evidence adduced in [the] summary judgment record." *Lippert v. Community Bank, Inc*., 438 F.3d 1275, 1278 (11th Cir. 2006). The district court then collectively considered the totality of evidence and appropriately found that it did not create a genuine issue of material fact from which a reasonable jury could conclude that the AUC had killed any Plaintiffs' decedent.

In a Herculean effort, the district court comprehensively considered the totality of the evidence, clearly explained what evidence was inadmissible and why, and further explained why the remaining evidence did not create a triable issue of fact. The fact that the district court carefully considered all of the evidence in its totality is beyond cavil: "Having carefully considered the parties' submissions, the [district court] now turns to a review of the summary judgment record to determine, as a threshold matter, whether a triable issue of fact is presented on the issue of AUC responsibility for the death of each Bellwether Plaintiff's decedent." (Appx. at 7516.)

With respect to the second argument in section I, the district court again comprehensively considered all of Plaintiffs' "circumstantial evidence." Contrary to Plaintiffs' contention, much of this evidence was excluded as based on inadmissible expert testimony (Appx. at 7576-78), inadmissible *modus operandi* evidence and

inadmissible habit evidence (Appx. at 7575.) These evidentiary rulings are discussed in more detail below, *infra* at § IV.

The district court found the remainder of the circumstantial evidence to be far too speculative absent evidence "distinguishing AUC methodologies from brutalities committed by other terror organizations, military operatives, narcotrafficking criminals, or common criminals operating across Colombia during the time frames in question." (Appx. at 7575.)

Tacitly conceding that the record overwhelmingly supports affirmance, Plaintiffs invent new facts in Section I of their Brief that appear nowhere in the record to try to embellish their arguments. For example, Plaintiffs speciously proclaim that the "AUC had a motive to kill the decedents; each decedent was killed in a locale tightly controlled by the AUC, from which other belligerents and common criminals had been driven out; and the AUC was responsible for at least 90 percent of the murders of civilians . . . ." (Brief at 21-22.) Plaintiffs repeatedly invoke the 90% figure throughout their brief, but no admissible evidence was presented to the district court supporting that figure and none exists in the record. It is simply not a fact in the record.

Rather, Plaintiffs' 90% assertion is based entirely upon hearsay statements in expert reports that the district court excluded for simply regurgitating hearsay as purported facts—without applying any methodology, let alone a reliable

methodology—from third-party sources including other Plaintiffs' counsel solely to "circumvent the rules prohibiting hearsay." *United States v. Mejia,* 545 F.3d 179, 197 (2d Cir. 2008) (quoting *United States v. Dukagjini*, 326 F.3d 45, 58-59 (2d Cir. 2002)).

Plaintiffs cite Appx. 4823 and Appx. 4832 for the 90% figure (Brief at 10-11 n.21), which is the expert report of Oliver Kaplan, who in the finding of the district court, was "simply repeating statistical evidence, and drawing inferences from it, based on temporal and geographical overlays [without] applying specialized knowledge or 'reliable' methodologies." (Appx. 7577.) Further, Plaintiffs cite Appx. at 3491-93, for their "90%" assertion. This leads to a page from the excluded expert report of Manuel Ortega that regurgitates hearsay from one of Plaintiffs' lawyers (Paul Wolf) that Wolf told Ortega that "90% of the 2000 cases he [Paul Wolf] investigated were [murders] committed by the paramilitaries." (Appx. 3492-93.) Statements of counsel are no basis to create a triable issue of fact to preclude summary judgment. *Nieves v. University of Puerto Rico,* 7 F.3d 270, 276 n.9 (1st Cir. 1993). *See Skyline Corp. v. NLRB*, 613 F.2d 1328, 1337 (5th Cir. 1980) (statements of counsel are not evidence).

Plaintiffs attempt to avoid the district court's exclusion of their hearsay assertions about "90%" and "control" by bootstrapping a legal argument regarding the use of statistical evidence in other, dissimilar cases. (*See* Brief at 26-27 & 27

n.31 (citing cases involving aviation accidents, vaccines, statistics relating to sudden cardiac deaths, and a medical opinion based on statistical correlations and relationships of probability).) Plaintiffs rely, for example, on this Court's products liability decision in *Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1517-20 (11th Cir. 1988), which they inaccurately describe as "finding sufficient evidence to link [plaintiffs'] son's injury to defendant's vaccine, given that most or all of the vaccines in the doctor's office when and where plaintiffs' son was given a shot were defendant's." (Brief at 27.) In fact, however, that case turned on circumstantial evidence establishing that *no* doses of other manufacturers' vaccines were present in the office at the time plaintiffs' son received his immunization. *See Chapman*, 861 F.2d at 1520.

The district court explained that it "is unaware of any application as an alternative causation theory outside the products liability arena, and Plaintiffs offer no precedent in law or logic for its extension to the war crimes context, as urged here, due to difficulties in proving assailant identity in a period of prolonged and bloody civil unrest involving multiple warring political factions." (Appx. 7740-41.) But even if products liability principles had some application, Plaintiffs would have had to provide evidence that *no* potential killers other than AUC members were present in the geographic area at the time of their decedents' deaths. *See Chapman*, 861 F.2d at 1519-20 (relying on circumstantial evidence that "no DTP vaccine was

purchased from [other manufacturers] by Dr. Murray's new office" and that a supply of the vaccine taken from Dr. Murray's prior practice had run out). The district court properly declined to accept Plaintiffs' "novel theory" of a "market share-reminiscent theory of causation." (Appx. at 7575.)

The TVPA requires Plaintiffs to show that a member of the AUC committed a "deliberated killing"—that is, a killing that was "undertaken with studied consideration and purpose," *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011)—and Colombian law requires Plaintiffs to show that Defendants caused a member of the AUC to kill Plaintiffs' decedents. Plaintiffs have failed to adduce admissible evidence of record to make a triable question of fact as to either showing because the perpetrators are unknown.

Similarly, Plaintiffs cite criminal case law where the court considered whether a *known* person (the criminal defendant) was a member of the gang or other criminal conspiracy based, in part, on location evidence. (*See* Brief at 24-25.) Here, by contrast, the issue is whether the acts of an *unknown* killer, his motive and membership can be attributed to the AUC because it was one of the warring factions of narco-terrorists in Colombia. As the district court correctly recognized, a jury could only speculate that Plaintiffs' decedents were killed by an unidentified member of the AUC and not the FARC, a drug cartel, some other criminal or criminal organization, a personal feud, or any number of other possibilities.

II. THE DISTRICT COURT PROPERLY EXCLUDED PLAINTIFFS' CAUSATION EXPERT OPINION FOR UNRELIABLE METHODOLOGY AND AS AN IMPROPER ATTEMPT TO INTRODUCE HEARSAY FACTS INTO EVIDENCE AND THIS COURT SHOULD DECLINE TO RECOGNIZE THE SAME INADMISSIBLE EVIDENCE UNDER THE HEADING OF MOTIVE, MEANS OR OPPORTUNITY.

Plaintiffs attempt to satisfy their burden on causation by shoehorning rejected evidence into new arguments based on criminal law principles. But the district court properly exercised its discretion to exclude the evidence as inadmissible and too speculative to establish that a member of the AUC, rather than some other person, killed each Plaintiff's decedent. In the proceedings below, Plaintiff proffered an expert witness who sought to opine that it was more likely than not that some unidentified member of the AUC killed Plaintiffs' decedents. As discussed more fully *infra* at § V, the district court exercised its discretion to exclude that expert based upon his unreliable methodology and his attempt to introduce hearsay facts into the evidentiary record by simply regurgitating them from third party sources instead of applying a reliable methodology to develop opinions based upon them.

Plaintiffs now argue the district court committed reversible error by not finding that the same underlying facts permit a reasonable inference of the exact same opinion. This time, Plaintiffs have recast their position to argue, as they did not argue below, principles of criminal law (motive, unique means and opportunity,

and similar acts by the AUC) and to cite, to which they did not cite below, other portions of the record in support.

"As a general rule, an issue not raised in the district court and raised for the first time in an appeal will not be considered by [this court]." *Blue Martin Kendall, LLC v. Miami Dade Cty.*, 816 F.3d 1343, 1349 (11th Cir. 2016). The rule is discretionary, and this Court has set specific exceptions that allow consideration of arguments not made in the district court. *Georgia Power Co. v. ABB, Inc.*, No. 19-11148, 2020 U.S. App. LEXIS 13032, *12 (11th Cir. Apr. 23, 2020) (citing pure questions of law that if not considered would result in miscarriage of justice). Although the Court is "more willing to consider unpreserved arguments on an appeal from summary judgment, that fact alone is not a permissible basis for exercising our discretion." *Id.* at *13 (citing *Blue Martin Kendall*, 816 F.3d at 1350). In such case, the Court will deem the argument waived. *Id.*

Here, Plaintiff did not argue the criminal law principles of motive, opportunity, and similar acts to the district court. (*See* Appx. at 6893-94, 7369-83.) Indeed, the word "motive" does not appear in either Plaintiffs' summary judgment brief or its supplemental brief and, therefore, not in the district court's summary judgment opinion. (Appx. at 7510-82.) The cases to which Plaintiffs now cite were not cited in their district court briefs. (Brief at 22-29.) The Court should not consider

this reformulated criminal law argument that Plaintiffs never made to the district court and the district court never considered.

Even if the Court were to entertain Plaintiffs' new criminal law argument, the result would not change. The evidence on which Plaintiffs base their motive, unique means and opportunity, and similar acts evidence is itself inadmissible and does not create a question of fact. This evidence is discussed below.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING PLAINTIFFS' SO-CALLED *MODUS OPERANDI* EVIDENCE.

Plaintiffs concede there is no direct evidence of the specific person(s) they believe killed any Plaintiff's decedent and that there is no evidence that the unknown perpetrator was a member of the AUC. Plaintiffs, therefore, attempt to prove AUC involvement through inferential chains which they attempt to cast as *modus operandi* or habit evidence. (Brief at 34, 71, 83, 88-89, 92-93, 95-96, 99, 101-02.)

The district court correctly ruled this purported evidence to prove identity was inadmissible because Plaintiffs adduced no threshold, foundational evidence that would allow the court to consider the proffered methodologies[17] or *modus operandi*

[17] Plaintiffs claim that the alleged unique AUC "methodologies" were: (1) to kill "subversives" is gruesome ways; (2) kidnapping of victims, sometimes on motorcycles while wearing helmets, and sometimes not; (3) killing while hooded or masked; (4) taking people from their homes at night; (5) leaving victims' bodies in public; and (6) stopping buses at roadblocks to kill people. (Brief at 30-31.) Plaintiffs had argued to the district court that the AUC *modus operandi* also included targeting union leaders or guerilla sympathizers and creating lists of peoples' names. (DE

or habit evidence in the first place. (DE 2551 at 66-67.) In other words, what Plaintiffs claim to be *modus operandi* or habit evidence simply is not. As the district court correctly noted, for facts to be considered *modus operandi* evidence that is probative of identity requires a showing of peculiar, unique, or bizarre similarities as to mark them as handiwork of a particular individual.

In other words, evidence of an alleged *modus operandi* is only probative of identity when the proffered evidence of prior acts possesses a common feature or features that make it likely that an unknown perpetrator is the same person as a known perpetrator who committed a different crime. *United States v. Pearson*, 308 F. App'x 375, 377 (11th Cir. 2009). *Modus operandi* evidence is not probative of identity merely because the prior act and subsequent act bear some, or even many, similarities; the *modus operandi* evidence must be so unique to constitute a signature act of the perpetrator. *United States v. Myers*, 550 F.2d 1036, 1045-46 (5th Cir. 1977).

Plaintiffs' proffered *modus operandi* evidence is not probative of AUC identity because it consists only of generic criminal traits that are not unique or idiosyncratic and falls far short of bearing a "singular strong resemblance" to permit

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2510 at 7.) In essence, Plaintiffs argue a different AUC *modus operandi* that is ever-expanding to include any of the ways in which their decedents were allegedly killed.

an inference of an AUC pattern. *United States v. Thomas*, 321 F.3d 627, 634-35 (7th Cir. 2003).

Plaintiffs' Rule 404(b) analysis and argument is unavailing because it is irrelevant. Courts often consider *modus operandi* evidence to prove identity under Rule 404(b) because the Rule permits evidence of prior acts (*modus operandi*) as an exception to the prohibition against character evidence, but **only** if the *modus operandi* evidence is actually probative of identity. *See, e.g.*, *United States v. Brown*, 344 F. App'x 555, 557 (11th Cir. 2009) (finding an abuse of discretion where the district court admitted evidence under Rule 404(b) but the proponent of the *modus operandi* evidence did not demonstrate how it was relevant to proving identity); *United States v. Beechum*, 582 F.2d 898, 911-13 (5th Cir. 1978) (*modus operandi* evidence admissible under 404(b) only when the proponent demonstrates the evidence is relevant to identity); *Myers*, 550 F.2d at 1045 (*modus operandi* evidence admissible to establish identity under Rule 404(b) only where the proponent demonstrates that the proffered evidence establishes the uniqueness of the *modus operandi* and a high degree of similarity between the prior act and the act of the charged individual).

This core requirement—probative value of identity—defeats Plaintiffs' arguments here. Plaintiffs' proffered evidence of alleged killing methodologies is not admissible because there is no unique aspect, handiwork, or feature that identities

those methodologies as AUC methodologies. Brutal killings or other conduct—for example, sometimes by persons wearing helmets on motorcycles, but sometimes not; sometimes wearing hoods or masks, but other times not; sometimes taking people from their homes, but other times killing people in public, etc.—are the manner in which different criminals and criminal organizations in Colombia and around the world murder their victims, and they apply on their fact to the activities of members of the FARC and the AUC, narcotraffickers, the Mafia, or a Miami drug lord.

The same conclusion is true if the proffered evidence of "methodologies" is analyzed under Rule 404. The evidence would not be admissible because there is nothing sufficiently unique about the "methodologies" that would tend to prove they were the work of an AUC member, as opposed to a member of some other criminal, narco-terrorist organization. Thus, these methodologies are irrelevant to the issue of whether a member of the AUC killed any Plaintiff's decedent.

It is, therefore, unnecessary to engage in a Rule 404(b) analysis of whether the evidence is being offered against a criminal defendant or a third party. This argument is a red herring. Plaintiffs' evidence is inadmissible not because of the heightened prejudicial effect of such evidence against a criminal defendant versus a third-party. Plaintiffs' proffered evidence of "killing methodologies" is inadmissible for a much more basic reason—it is not *modus operandi* evidence in the first place

because it is not probative of identity given that it lacks any unique or idiosyncratic feature.

There is a second, separate reason that Plaintiffs' proffered *modus operandi* or methodologies evidence is inadmissible. Even if the claimed methodologies were distinctive, they are not supported by any admissible record evidence. Instead, Plaintiffs rely exclusively on inadmissible evidence or gross distortions of the record. (Brief at 30-31; *see also id.* at 34-35.)

None of the testimony or documents cited by Plaintiffs constitutes admissible evidence to establish that the AUC, to the exclusion of all other armed groups or violent individuals in Colombia: (1) "killed alleged 'subversives;'"[18] (2) "kidnapped victims as a means of terror" sometimes on motorcycles, but sometimes not, and sometimes wearing helmets, but other times not wearing helmets;[19] (3) "killed while

[18] Appx. at 5049 (excerpt of Robin Kirk deposition); 3802 (testimony of AUC commander claiming the purpose of the AUC was to kill communist guerillas); 7589 (certificate of service on notice of appeal filed by some Plaintiffs); 4804 (excerpt of Oliver Kaplan report).

[19] Appx. at 5059 (excerpt of Terry Karl report summarizing her opinion); 5094 (excerpt of Terry Karl report that does not mention kidnappings, and does not cite any support for contentions that the AUC targeted unarmed civilians); 8530-31 (confirming that Chiquita was extorted by the AUC); 7817 (discussing the witness's experience in Colombia in 1987 (before the AUC)); 7859-61 (excerpts of Human Rights Watch reports); 6592 (statement not made on personal knowledge of the declarant); 3482 (report of Manuel Ortega, who was not retained by Plaintiffs, that fails to substantiate any claim that only AUC members rode motorcycles); 3492 (same); 6060 (index page of a deposition); 3229 (declaration of a person with no personal knowledge of the facts therein (*see* Appx. at 3222-23), based on additional

hooded or masked;"[20] (4) "took people from their homes at night, to murder them;"[21] (5) "purposefully left their victims' bodies in public;"[22] and (6) "stopped buses at roadblocks to murder people."[23]

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layers of hearsay, and relating only to alleged AUC successor groups); 6020-21 (excerpt of deposition that is not based on witness's personal knowledge and is unrelated to the AUC's alleged tendency to kidnap persons as a means of terror); 4156 (witness has no personal knowledge whether those men he saw on motorcycles were members of the AUC).

[20] Appx. at 6661 (declaration of person that "sometimes" persons alleged to be AUC members wear hoods, uniforms, civilian clothes, and sometimes they did not); 4661 (non-sensical statement that "[t]he collaboration with civilian actors, known by wearing a hoodie, in the counterinsurgency actions of the army" provides no support for any substantive statements).

[21] Appx. at 4386 (members of the AUC took guerillas from their home).

[22] Appx. at 3633 (testimony of an AUC commander, who was not present in the banana-growing regions (*see* Appx. at 3641), that AUC members would remove bodies from public areas and that unknown members of the AUC would leave the bodies of guerilla combatants in public following combat); 7817 (testimony of AUC member that they would work with community members to remove bodies from public areas).

[23] Appx. at 3933 (notes of hearsay statements that are not based on the personal knowledge of the note taker); 4808 (excerpt of Terry Karl's report); 3393 (table of contents of the Individual Defendants' motion for summary judgment on Plaintiffs' TVPA claims).

As Defendants argued below (Appx. at 4247-48; 7210-12), the "facts" set forth in the reports of Kaplan[24] and Karl,[25] and all "facts" described in the Human Rights Watch reports purportedly authored by Robin Kirk,[26] are inadmissible hearsay that themselves contain at least two, and oftentimes more, layers of hearsay.

Expert reports that are not attested to under penalties of perjury and that do not otherwise meet the criteria of Rule 56(c) (including the requirement that all facts contained therein are based on the personal knowledge of the affiant or declarant) cannot be considered on summary judgment. *Carr v. Tataneglo*, 338 F.3d 1259, 1273 n.26 (11th Cir. 2003); *Henderson v. Black Elk Energy Offshore Operations, L.L.C.*, 783 F. App'x 380 (5th Cir. 2019); *Scott v. Edinburg*, 346 F.3d 752, 759 (7th Cir. 2003); *O'Dell v. United States*, No. 8:17-cv-733-T-27JSS, 2019 U.S. Dist. LEXIS 15686, at *10 n.5 (M.D. Fla. Jan. 31, 2019) (excluding from consideration at summary judgment purported facts stated in an unsworn expert report).

[24] Appx. at 4899. Kaplan admitted at his deposition that all the "facts" stated in his report were based on information collected by other persons and were not based on his personal knowledge. Appx. at 4926, 102:3-24, 103:13-20, 104:10-14.

[25] Appx at 5055. Karl admitted at her deposition that all the "facts" stated in her report were based on information collected by and from other persons. DE 2432-2, 71:10-20, 73:6-12, 88:3-8, 92:5-8, 120:23-121:1, 121:3-5, 128:25-129:3, 141:10-21.

[26] Appx. at 7853-8375.

By Plaintiffs' experts' own admissions, the reports of Karl and Kaplan cannot be considered for the "facts" contained therein because they lack personal knowledge of the facts. Accordingly, Plaintiffs cannot rely on those reports to establish any AUC *modus operandi*.[27]

Likewise, the district court did not err in refusing to consider the Human Rights Watch reports purportedly authored by Kirk as a basis to establish AUC "methodologies." (Appx. at 7575.) As Defendants argued below, Human Rights Watch reports, when offered for the truth of the matter asserted as here, are inadmissible hearsay not subject to any exception. (Appx. at 7212 (citing *Weinheimer v. Lower Brule Cmty. Dev. Enter.*, LLC, No. 162379/2014, 2015 N.Y. Misc. LEXIS 4140, at *12 n.2 (N.Y. Cty. Sup. Ct. Nov. 16, 2015) as the only case to squarely address the inadmissibility of Human Rights Watch reports).) This Court regularly concludes that a district court does not abuse its discretion by excluding similar documents. *See, e.g.*, *United States v. Baker*, 432 F.3d 1189, 1211 (11th Cir. 2005). Furthermore, Kirk—the purported author of the articles—conceded that she

[27] Plaintiffs argued to the district court below, and will likely do so again on appeal, that Defendants objected to Kaplan's expert conclusions because they were not based on personal knowledge. (Appx. at 7373 n.12.) That is a gross misstatement of Defendants' argument below. The **facts** that Kaplan purports to set forth in his report clearly cannot be considered by the district court in ruling on summary judgment because they were not based on his personal knowledge and Plaintiffs have not ever argued to the contrary.

has no personal knowledge of any of the facts contained within the Human Rights Watch report.[28] Thus, Defendants affirmatively established the inadmissibility of much of the proffered evidence in the district court, and it was properly not considered.

IV. THE DISTRICT COURT DID NOT IMPROPERLY EXCLUDE EVIDENCE THAT MEMBERS OF THE AUC MURDERED PLAINTIFFS' DECEDENTS.

As discussed above, the district court categorized all of Plaintiffs' proffered testimonial, documentary, and circumstantial evidence and thoroughly analyzed it before excluding it as inadmissible hearsay not subject to any exception, speculation, "rumors and innuendo." (Appx. at 7560, 7569, 7571, 7575, 7580.) In an attempt to avoid proving that the district court abused its discretion in these evidentiary rulings, Plaintiffs instead raise procedural arguments that the district court denied them a "meaningful" opportunity to respond and improperly shifted the burden of proof.

A. THE DISTRICT COURT GAVE PLAINTIFFS AN OPPORTUNITY TO RESPOND INCLUDING BY PERMITTING SUPPLEMENTAL BRIEFING ON THE VERY CAUSATION ISSUE ON WHICH THEY FAILED TO PROFFER ADMISSIBLE EVIDENCE.

Plaintiffs argue that they never had an opportunity to respond to Defendants' objections to the admissibility of their proffered evidence and that the district court

[28] *See, e.g.*, Appx. at 5027-28, 89:25-93:18; Appx. at 5030, 101:16-23; Appx. at 5032, 106:2-6, 107:21-25, 109:14-16.

"reversed the summary judgment burden." (Brief at 37-42.) Such argument is belied by the record. Defendants moved for summary judgment on the basis that Plaintiffs lack admissible evidence on an element of their claims for which Plaintiffs bear the burden of proof at trial. In so moving, Defendants' burden was to inform the district court of the basis of its motion and identify the areas of the record that "[Defendants' believe[] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991).

This is exactly what happened. Defendants raised the issue in their summary judgment motion: "Not one [Plaintiff] has personal knowledge of who killed his or her family member. There is no other admissible evidence of record that any member of the AUC was involved in any way in killing any Plaintiff's decedent. Instead, each Plaintiff's understanding is based upon the hearsay statement of others, often double and triple hearsay with no one having personal knowledge of what happened." (Appx. at 3307.) Defendants then reviewed each Plaintiff's testimony demonstrating lack of personal knowledge. (Appx. at 3308-16.)[29]

[29] In accordance with S.D. Fla. L. R. 56.1, Defendants also filed their statement of material facts in which they demonstrated each Plaintiff's lack of personal knowledge as to who killed that Plaintiff's decedent. (Appx. at 3254-66.) *See also* DE 2282-1 to 2282-73, DE 2298-2301, DE (supporting exhibits to Defendants' statement of material facts, improperly omitted from Plaintiffs' Appendix).)

In their opposition to summary judgment, attempting to comply with their burden under *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), Plaintiffs pointed to various proffered evidence in their proposed statement of material facts including specifically the same proffered evidence that they rely upon in their appellate brief that they argued showed an issue of fact that the AUC killed their decedents (Appx. at 6903-06.) In their summary judgment reply, Defendants examined each piece of proffered evidence that Plaintiffs had identified in their opposition and explained why it was not admissible and could not be reduced to admissible form for trial. (Appx. at 7239-49, 7267-68, 8380 (under seal).) This briefing—motion, opposition, reply—is exactly what is required under the Federal Rules of Civil Procedure and would have been a sufficient basis for the district court to decide the summary judgment motions. Neither party was entitled to anything more.

Yet the district court afforded Plaintiffs the opportunity to make a supplemental filing in order to "*submit a line-by-line response to each objection lodged by Defendants . . . [and] provide a citation to a specific location in the record where the source evidence on a specific point may be found . . . .*" (*Id.* at 7365-66 (italics in original).)

Plaintiffs did file a supplemental brief addressing the foregoing evidence (Appx. at 7368) but Plaintiffs went further and improperly submitted a new

declaration where the declarant stated his purpose was to "provide evidence for this case." (Appx. 7389, ¶ 1.)[30] Defendants were then given the opportunity to respond to Plaintiffs' arguments (Appx. at 7367) and did (Appx. at 7435).

Thus, the record plainly belies Plaintiffs' arguments that they were denied a "meaningful opportunity to respond" and had "*no* opportunity to respond" to Defendants' objections (Brief at 38-39) and that the district court "reversed the summary judgment burden." (*Id.* at 40-42.) To the contrary, Plaintiffs had ample opportunity to address these objections in both their 50-page opposition brief (Appx. at 7092) and 15-page supplemental brief (Appx. at 7368) that Plaintiffs filed on summary judgment. Defendants did not present "new arguments or theories" in their summary judgment reply (Brief at 41 (quoting *WBY, Inc. v. Dekalb Cty.*, 695 Fed. App'x 486 (11th Cir. 2017)) but merely responded to the evidentiary materials that Plaintiffs proffered with their summary judgment opposition.

[30] The district court found that this declaration was "untimely, and is properly excluded from the summary judgment record in the Court's assessment of the sufficiency of Plaintiffs' proofs on causation." (Appx. at 7540.) *See Burgest v. United States*, 316 F. App'x 955, 957 (11th Cir. 2009) ("we review whether summary judgment was appropriate based only on the evidence in the record."); *Butchkosky v. Enstrom Helicopter Corp.*, 855 F. Supp. 1251, 1257 (S.D. Fla. 1993) ("[T]he Court must consider only the evidence in the record"). Even if considered, the district court ruled the declaration "does not supply a foundation for admission of the proffered Colombian government records under the hearsay exceptions advanced by Plaintiffs . . . ." (Appx. at 7540.)

Finally, Plaintiffs citation to this Court's decision in *Burns v. Gadsden State Cmty. College*, 908 F.2d 1512 (11th Cir. 1990) is inapposite. This Court in *Burns* held that the deadlines of former Fed. R. Civ. P. 56(c) (requiring to serve a summary judgment motion at least 10 days before the hearing and allowing the nonmoving party to serve opposing affidavits at least one day before the hearing) were to "permit the nonmoving party a reasonable and meaningful opportunity to respond." *Id.* at 1516. Likewise, Plaintiffs' citation to *Burns* for the proposition that the "opportunity must include the ability to submit additional evidence once the moving party makes its arguments" (Brief at 38) mischaracterizes what this Court held. The *Burns* Court held that when a defendant has "offered evidence of a legitimate, nondiscriminatory reason for its employment decision, the plaintiff should not be denied the opportunity to submit additional evidence of pretext after seeing the defendant's *evidence* of justification." 908 F.2d at 1516 (quoting *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 594 (11th Cir. 1987) (emphasis added)). Here, Defendants did not offer evidence but merely refuted the admissibility of Plaintiffs' proffered evidence on which Plaintiffs purported to rely.

Likewise, Plaintiffs' citation to Fed. R. Civ. P. 56(f) (Brief at 38) is unavailing because that Rule states that "a district court may 'grant [summary judgment] on grounds not raised by a party' *only* '[a]fter giving notice and a reasonable time to

respond.'" *Amy v. Carnival Corp.*, 961 F.3d 1303, 1310 (11th Cir. 2020) (emphasis in original). Here, Plaintiffs had not one but two opportunities to respond.

B. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION TO EXCLUDE THE PROFFERED JUSTICE AND PEACE DOCUMENTS AS INADMISSIBLE.

"Plaintiffs recognize that they must identify admissible evidence showing that the AUC killed their family members in order to survive summary judgment." (Appx. at 7537.) Plaintiffs filed their cases between 9 and 12 years before the deadline for summary judgment motions and should have known since that time that such proof was necessary for their claims against Defendants to reach a jury. The district court expressly found that "everyone involved in this litigation was on notice by the Fall of 2017, at the very latest, that the question of AUC involvement in the deaths of the bellwether victims was very much at issue in this case." (Appx. at 7551, citing a motion for letters of request under the Hague Evidence Convention for testimony of AUC operatives "necessary to provide evidence for the [] basic elements of Plaintiffs' claims"). The deadline for summary judgment motions was almost two years later, on February 15, 2019. There was no excuse for the "delay in pinning down these documentary proofs on AUC involvement . . . ." (Appx. at 7550.)

1. THE DISTRICT COURT WAS WITHIN ITS DISCRETION TO FIND THAT THE RENDÓN FIRST INSTANCE JUDGMENT AND THE MANGONES *SENTENCIA* DID NOT MEET THE REQUIREMENTS OF

RULE 803(22) FOR JUDGMENTS OF A PREVIOUS CONVICTION.

Plaintiffs contend that the district court abused its discretion by finding that Plaintiffs had not sustained their burden of showing that the Rendón First Instance Judgment and the Mangones *sentencia* qualified for the hearsay exception in Fed. R. Evid. 803(22).

Plaintiffs attempt to excuse their failure to proffer—on summary judgment—a complete copy, in English, of the Rendón First Instance Judgment and the Mangones *sentencia*. They argue that, on *forum non conveniens* briefing, the parties had presented "without challenge" excerpts of *sentencias* to support or oppose that Colombia was an available and adequate alternate forum. Citing no authority, Plaintiffs argue that they should be permitted to do the same in opposing Defendants' motions for summary judgment. (Brief at 43 (citing Appx. at 2864-69).) But briefing on the motion for dismissal under *forum non conveniens* was submitted—and then ruled upon—before, not after, completion of discovery. Indeed, the *sentencia* that Plaintiffs reference in *forum non conveniens* briefing was filed **two years before** the commencement of merits discovery. Further, whether a document was considered for *forum non conveniens* purposes is irrelevant to its admissibility on summary judgment where Defendants have properly asserted objections. *See Carrizosa, v. Chiquita Brands International, Inc.*, ___ F.3d ___, 2020 U.S. App. LEXIS 22441, **18-19, No. 19-11494, Opinion at 20-21 (11th Cir. July 16, 2020).

Plaintiffs cannot satisfy Rule 803(22)(C) with respect to either the First Instance Judgment or the Mangones *sentencia* because they are attempting to admit the evidence herein to prove that an operative of the AUC killed a Plaintiff's decedent, which is not a "fact essential to the judgment." To the contrary, Plaintiffs again incorrectly assume the fact that they must prove. Nothing in the First Instance Judgment states that Rendón committed the murder. (Appx. at 4369.) Likewise, the Mangones *sentencia* does not state that Mangones committed the murder. (Appx. at 4292.) As the Advisory Committee Note to Rule 803(22) states, a judgment is "admissible in evidence for what it is worth." Even if admitted, neither judgment has any worth to proving that an operative of the AUC killed any Plaintiff's decedent.

The district court examined Hasbún's deposition and correctly concluded that Hasbún did not testify that he ordered or was responsible for or the AUC was involved in the killing of any specific decedent. As a war criminal he accepted responsibility in the Justice and Peace process for crimes recorded in the geographical territory under his command even though he had no personal knowledge of the identity of the victims or of the perpetrators. He did so in order to maximize his benefits under the Justice and Peace process. War criminals like Hasbún faced a maximum sentence of five to eight years in prison, regardless of the number of killings for which they accepted responsibility. (Appx. at 7542.) Conversely, if a war criminal failed to take responsibility for crimes in his territory,

he could be prosecuted separately for those crimes, with no reduction in sentence. (Appx. at 7393.)

The district court found that, "[b]ecause Plaintiffs only offer an excerpted version of the [Rendón First Instance Judgment], which does not set forth any adjudicative findings (or sentencing terms) -- final, interim or otherwise -- the Court is unable to make an informed assessment of this document as a 'final' judgment within the meaning of Fed. R. Evid. 803(22) on the record presented, and for this threshold reason finds this hearsay exception inapplicable to the First Instance Judgment." (Appx. at 7545.) This finding was well within the district court's zone of choice and no abuse of discretion because "[i]n the limited excerpts provided, neither judgment identified the victims' killers by name, and it is impossible to determine whether the charges hinged on the geographical situs of the crimes or specific subordinate activity." (Appx. at 7547.)

Nor is there a basis in the record before the district court that Plaintiffs proffered these documents to prove a "fact essential" in them as required by Rule 803(22)(C). As the district court found: "Because Plaintiffs do not clearly show how command responsibility was assessed in the context of Colombian Justice and Peace Law proceedings, it is not possible to determine whether an AUC-based killing was a 'fact essential' to either the Herrera 'First Instance Judgment' or the Mangones '*Sentencia*' from the face of either document." (Appx. at 7547.) Indeed, "even if

Plaintiffs were able to overcome the hearsay problem with the '*Sentencia*' or 'First Instance Judgment,' and the Court were to consider the excerpted portions of these documents as substantive evidence, at best these documents show that Herrera (aka El Aleman) was **charged** with the homicide of Jose Lopez 339, and that Mangones was **charged** with the homicide of John Doe 11; neither excerpt includes adjudicative findings by the relevant tribunal on the liability of the named defendants for any specific homicide." (Appx. at 7547-48 (emphasis added).)

Most importantly, the Mangones *sentencia* does not provide any "fact essential" because, as the district court found, it cannot "reasonably be inferred from the face of either document, or other source evidence in the summary judgment record, that . . . Mangones confessed to responsibility for the homicides charged in these documents." (Appx. at 7547-48) internal footnote omitted).) "Notably, the translated portion of the Mangones *Sentencia* on file includes a lengthy "Index," showing a Section captioned "About the responsibility ascribed to the postulados," at VII.E., and a Section captioned "Ruling," at VII. (*sic*). Plaintiffs did not include English (or Spanish) translations of either of these portions of the excerpted *Sentencia* in their summary judgment opposition papers." (Appx. at 7548, n.28.)

2. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE EXCERPTS OF RECORD 138 AS INADMISSIBLE HEARSAY NOT CONSTITUTING A PUBLIC OR BUSINESS RECORD.

Plaintiffs filed short excerpts in English of a document titled Record 138 dated September 5, 2016, the subject of which is "Preliminary hearing for partial and additional indictment and imposition of measure to ensure appearance at trial." (Appx. at 4319.)[31] Plaintiffs proffered this document because, as the district court found, "Hasbun did not testify at deposition that he ordered or assumed responsibility for the death of any specific person, nor did he testify that the AUC was involved in the killing of any specific decedent." (Appx. at 7542.) After carefully considering Record 138 and Plaintiffs' arguments (Appx 7538-42), the district court found that the excerpted document was hearsay not exempt as public records under Fed. R. Evid. 803(8) or business records under Fed. R. Evid. 803(6), which Plaintiffs now argue was an abuse of discretion. (Brief at 47-55.) Plaintiffs are wrong for several reasons.

First, the controlling precedent in this Circuit is that "indictments cannot be considered as evidence[.]" *United States v. Cox*, 536 F.2d 65, 72 (5th Cir. 1976).[32] That precedent ends the inquiry.

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[31] The Court should reject Plaintiffs' attempt to augment the summary judgment record via a link to allegedly full versions (in Spanish) of documents on the internet. *See also* Defendants' Opposition to Plaintiffs' Motion to Take Judicial Notice filed July 6, 2020.

[32] *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981). The out-of-circuit and unreported cases cited by Plaintiffs (Brief at 48) are neither controlling nor persuasive.

But even out-of-circuit precedent demonstrates that indictments are not proper evidence. "The Rule 803(22) exception does not apply here either. That exception addresses judgments of conviction, not indictments or charging documents." *In re WorldCom, Inc.*, No. 02-Civ-3288, 2005 U.S. Dist. LEXIS 2214, *27 (S.D.N.Y. Feb. 18, 2005). *Cf. Levinson v. Westport Nat'l Bank*, Nos. 3:09cv269(VLB), 3:09-cv-1955(VLB), 3:10cv261(VLB), 2013 U.S. Dist. 71208, *10 (D. Conn. May 20, 2013) ("criminal information is not evidence admitted to prove any fact essential to the judgment but again merely the charging instruments" and therefore not admissible under Rule 803(22)). There is no evidence in the record that Record 138 is a **conviction** of Hasbún.

Second, as the district court found, "it does not appear that [Record 138] sets out factual findings based on a legally authorized investigation." (Appx. at 7541.) Government records that do not set forth factual findings as to an interviewee's allegations or statements are inadmissible. *Williams v. Asplundh Tree Expert Co.*, 2006 U.S. Dist. LEXIS 73238, at *10 (M.D. Fla. Oct. 6, 2006). Indeed, Plaintiffs proffered only limited excerpts in English of Record 138 which they now seek to piece together into "factual findings." In fact, however, the translated excerpts do not contain any factual findings as Plaintiffs implicitly concede by morphing their argument.

Plaintiffs now argue Record 138 shows that murder charges were brought against Hasbún, which is supposedly "enough" because that implicitly means that prosecutors made a finding that he was responsible for the murders. (Brief at 47-48.) But there is no admissible evidence of record to support that deduction. Certainly, nothing in Record 138 says that. (*See* Appx. at 4319, with subject line referring to "**preliminary hearing** for filing of partial and additional indictment" and imposition of bail; Appx. at 4325-28, with columns for "**suspects** and culprits" of the acts and "date of **accusation**") emphasis added).) An indictment is not a confession or an admission; an indictment is "only an accusation" that acts as "the physical means by which a defendant is brought to trial and its sole purpose is to identify the defendant's *alleged* offense." *United States v. Glaziou*, 402 F.2d 8, 15 (2d Cir. 1968). "[A]n indictment is not evidence of the charges contained in it, any more than a complaint is" and cannot be considered to overcome summary judgment. *Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995). Finally, to satisfy the public records exception, the record or report must be "based upon the knowledge or observations of the preparer of the report," and the record or report cannot be "a mere collection of statements." *Mamani*, 309 F. Supp. 3d at 1297.

This lack of any factual finding distinguishes the cases cited by Plaintiffs. *See, e.g., Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp.2d 414, 447-49 (E.D.N.Y. 2013) (Israeli government indictment as well as a yearly public report **expressly**

"**concluded** that Hamas was responsible for carrying out the April 30 Attack.") (emphasis added); *Mamani v. Berzaín*, 309 F. Supp.3d 1274, 1296 (S.D. Fla. 2018) (Bolivian prosecutor's report explained evidentiary basis for its conclusions as "inter alia, field work performed over 17 locations, witness interviews, the collection of physical evidence and written statements, and ballistics analyses.") (emphasis added); *In re Ethylene Propylene Diene Monomer Antitrust Litig.*, 681 F. Supp.2d 141, 159 (D. Conn. 2009) (report set forth factual findings "based on a record of ascertainable and verifiable facts").

Third, the district court did not abuse its discretion when it excluded the declaration of Nelson Camilo Sánchez León—who was "delivering [his] statement to provide evidence for this case" (Appx. at 7389)—filed well beyond the summary judgment deadlines. (Appx. at 7539-40.)[33] Plaintiffs attempted to use Professor Sánchez to try to correct the deficiencies of Record 138 by having him opine to fill in the gaps in the document and in Plaintiffs' evidence. Indeed, while Record 138

[33] Indeed, Plaintiffs filed Professor Sanchez's declaration on July 15, 2019 (Appx. at 7399), almost **three years** after the September 5, 2016 date of Record 138 and almost **three months** after Defendants filed their summary judgment reply on April 22, 2019 (Appx. at 7237.) The three years is especially telling given that, according to Professor Sanchez, the "State also has a duty to guarantee victims' access to Justice and Peace archives" (Appx. at 7396, ¶ 28), but Plaintiffs failed to proffer any such documents on the summary judgment record. That Plaintiffs themselves, as purported victims, did not obtain Justice and Peace documents belies the purported prejudice of the district court's denial (Appx. at 3104) of separate Appellants' motion for letters of request for such documents in discovery (Appx. at 3080), even assuming these Plaintiffs could rely upon that request. *See infra* at § IV.C.

contains the signature of Hasbún (Appx. at 4322, 4339), when asked by Plaintiffs' counsel if it was "a true and correct copy of the documents that you remember signing," he testified: "We were not given the entire document. We simply sign the record concerning the appearance at the procedure." (Appx. at 3749, 40:18-22.)

As the district court also found, even Professor Sánchez had to guess or "deduce[]" what Record 138 meant. This deduction on the import of Record 138 was "not a proper subject of expert testimony and [] not admissible evidence which support the inference urged." (Appx. at 7539-40.) Indeed, a cursory review of Professor Sánchez's proffered testimony shows that, even had it not been excluded, it was phrased in terms of what *should* happen, not what *did* happen. (*See, e.g.*, Appx. at 7393, ¶ 15 – "Individuals participating in the Justice and Peace Process **may be required** to participate in as many Free Versions audiences as are necessary;" Appx. at 7394, ¶ 19 – "A paramilitary **may be subject to penalties** for failing to tell the truth;" Appx. at 7395, ¶ 24 – "The Office of the Prosecutor must therefore undertake investigatory activities [that] **may include**, but are not limited to . . .") (emphasis added).)

As the district court phrased it: "From this general exposition on the procedural ideals embodied in the Colombian Justice and Peace Law war-crime reparation processes, Plaintiffs urge the inference that the Hasbun indictment was issued in conformity with these procedures . . . ." (Appx. at 7539.) These general and

equivocal statements about the Justice and Peace procedure, therefore, did not constitute probative foundational evidence for Record 138. In sum, as the district court found within its broad discretion: "[E]ven if Plaintiffs were able to overcome the hearsay problem with this document . . . [i]t does not establish, nor can it reasonably be inferred from the face of [the excerpts of] the document or other source evidence on file, that Hasbun confessed to the responsibility for the homicides charged." (Appx. at 7542.)

Fourth, Plaintiffs' argument that the district court's citation of the previous version of Fed. R. Evid. R. 803(8) is a *per se* abuse of discretion for "applying the wrong rule" is a red herring. (Brief at 52, citing *United States v. Henderson*, 409 F.3d 1293, 1297 (11th Cir. 2005)). This Court ruled in *Henderson* that "**basing** an evidentiary ruling on an erroneous view of the law constitutes an abuse of discretion per se." *Id.* (emphasis added). Plaintiffs complain that the district court cited the earlier version of Rule 803(8) in a footnote. The district court did so only as background. The difference between the two versions is that the earlier version said "neither the source of information nor other circumstances indicate a lack of trustworthiness" as opposed to the current version that says "the opponent does not show the source of the information or other circumstances does not indicate a lack of trustworthiness." This mis-cite was of no consequence and does not "alone require[] remand to apply the correct rule" because the district court did not base its

evidentiary ruling excluding Record 138 on the absence of trustworthiness. (*See* Appx. at 7541.)[34]

Fifth, the district court was within its discretion to find that Record 138 was not admissible as a business record under Fed. R. Evid. 803(6). In proffering the indictment, Plaintiffs rely exclusively on the declaration of Professor Sánchez. (Brief at 53-55). As discussed above, however, the district court found that the "Sanchez Declaration is filed untimely, and is properly excluded from the summary judgment record in the Court's assessment of the sufficiency of Plaintiffs' proofs on causation." (Appx. at 7540.) The district court's decision to exclude a declaration is reviewed for abuse of discretion. *Flamingo South Beach I Condo. Ass'n v. Selective Ins. Co.*, 492 Fed. App'x 16 (11th Cir. 2012). As this Court has ruled, a district court "does not abuse its discretion in refusing to accept out-of-time affidavits." *Useden v. Acker*, 947 F.2d 1563, 1572 (11th Cir. 1991) (quoting *Clinkscales v. Chevron U.S.A., Inc.*, 831 F.2d 1565, 1568 (11th Cir. 1987)).

Moreover, as the district court found, Record 138 fails the standard of Rule 803(6)(D) because "the record does not contain testimony by a custodian of the document (or 'other qualified witness' familiar with the organization's

[34] Furthermore, the mis-cite is of no consequence because there is no substantive difference between the old and new version. The amendment merely "clarified" what had been the practice of "most courts" as to the burden for lack of trustworthiness. FED. R. EVID. 803(8) advisory committee's note to 2014 amendment.

recordkeeping practices), nor does it contain a certification showing that the document was 'signed in manner that, if falsely made, would subject the maker to criminal liability in [Colombia].' Fed. R. Evid. 902(12)." (Appx. at 7541.)

The snippets of Record 138 that Plaintiffs proffered also do not state the source of the little information therein. "To satisfy the Rule 803(6), however, the proponent must establish it was the business practice of the recording entity to obtain such information from persons with personal knowledge . . ." *United States v. Bueno-Sierra*, 99 F.3d 375, 379 (11th Cir. 1996). Here, there is no evidence of record that anyone with personal knowledge supplied information to the Colombian prosecutor's office that Hasbún (or any AUC member) killed (or ordered the death of) any Plaintiffs' decedent. Likewise, "Rule 803(6) does not eliminate double hearsay problems. Rather, it commands that each link in the chain of possession must satisfy the requirements of the business records exception or some exception to hearsay." *Bueno-Sierra*, 99 F.3d at 379 n.10. Nothing in the record on appeal shows that.

3. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING "PROSECUTORS' LETTERS" AS INADMISSIBLE HEARSAY NOT CONSTITUTING A PUBLIC RECORD.

The district court found that "proffered letters [that] purport to relay information gathered by Colombian prosecutors, but no information is given as to

how the prosecutors gathered the information, or from what sources that information was derived" did not meet the Fed. R. Evid. 803(8) exception for public records (Appx. at 7543.) Plaintiffs argue that the district court abused its discretion by excluding the letters because the letters report "'a matter observed' by the Colombian government: paramilitary confessions." (Brief at 55-56 (citing Rule 803(8)(A)(ii)).) Plaintiffs also argue that the prosecutor was "'legally authorized' to investigate murder" and the letters "summarize the 'factual findings' of their investigations." (Brief at 56 (citing Rule 803(8)(A)(iii)).)

But, as the district court found, Plaintiffs do not explain "where or how" the prosecutors obtained the information in the letters nor the sources of the information. (Appx. at 7543.) Indeed, for Rule 803(8) to apply, the factual findings must be "based upon the knowledge or observations of the preparer of the report, as opposed to a mere collection of statement from a witness." *United Technologies Corp. v. Mazer*, 556 F.2d 1260, 1278 (11th Cir. 2009); *Mamani*, 309 F. Supp.3d at 1297. As the district court found: "Without knowing where or how the prosecutors obtained the information recited in this correspondence, or anything about the procedures and methods *actually used* to reach the stated conclusions in the specific investigations at hand, the Court is unable to conclude that the letters set out matters personally observed by any Colombian official, or factual findings from any legally authorized investigations." (Appx. at 7543 (italics in original).)

Plaintiffs' citation to *JVC American, Inc. v. Guardsmark, L.L.C.*, 2006 U.S. Dist. LEXIS 59270 at *41 (N.D. Ga. Aug. 22, 2006)—decided three years **before** *Mazer*—as collecting cases that personal knowledge of the preparer of the report is not required is inapposite. The *JVC American* court noted that some courts had so ruled, that this Court had not decided the issue, and then held that only the opinions and conclusions of the police officer conducting the criminal investigation who prepared the subject report were admissible. *Id.* at **41-43. And this Court subsequently decided *Mazer* ruling the same way – that Rule 803(8) reports had to be based on the personal knowledge/observations of the declarant/preparer.

In sum, as the district court found: "[Because] Plaintiffs do not show a path for admissibility of the correspondence under Fed. R. Evid. 803(6) or Fed. R. Evid. 803(8), this correspondence does not create a triable issue on the question of AUC involvement in the murders of the Plaintiffs' decedents." (Appx. at 7544.)

4. THE DISTRICT COURT'S RULING AS TO LACK OF AUTHENTICATION OF PROFFERED DOCUMENTS WAS NOT AN ABUSE OF DISCRETION.

In addition to the reasons above, the district court also ruled that the Mangones *sentencia*, the Record 138 report, and the prosecutor letters were not admissible because they were not properly authenticated. (Appx. at 7548-51.) The district court found Plaintiffs' failure to pin down their documentary proofs to be "mystifying, given the extraordinary length of this litigation – now ten years running – and the

imposition of the current summary judgment schedule agenda which dates back to April 11, 2017." (Appx. at 7551-52.) Plaintiffs argue that the district court abused its discretion because they could submit supporting evidence to make the documents admissible at trial. (Brief at 58 (citing to Fed. R. Civ. P. 56(c)(2)).)

Plaintiffs argument is unavailing. In response to Defendants' evidentiary objections to the documents, the district court ordered Plaintiffs "to identify specific source material in the summary judgment record that supports their claim of AUC responsibility for each death, and to explain how that evidence is either admissible as presented, or to describe the admissible form anticipated at trial (by explaining either how they would satisfy a hearsay exception, or how they would introduce admissible evidence through a specific witness who is both available and competent to testify to the facts at trial and whose identity is disclosed in the existing record)." (Appx. at 7516, 7363.) Despite this order, the district court found that Plaintiffs did not "identify the person or persons from whom they expect to obtain the threshold certified copies (as to Colombian prosecutors' correspondence), nor do they identify the United States or Colombian consulate official or officials from whom they expect to obtain apostilles (as to all documents, including the purported indictment and judgments) in lieu of conventional authentication procedures." (Appx. at 7549.) Rather, Plaintiffs just offered a "future intent" to obtain apostilles for the documents "all of which concededly are unauthenticated as supplied in the summary judgment

record." (*Id.*) It was not an abuse of discretion for the district court to exclude documents based upon Plaintiffs' failure to comply with its supplemental briefing order.

5. THE DISTRICT COURT'S RULING THAT "THE JUSTICE AND PEACE" DOCUMENTS WERE NOT SUBJECT TO THE RESIDUAL EXCEPTION OF RULE 807 WAS NOT AN ABUSE OF DISCRETION.

Desperate to find an applicable hearsay exception, Plaintiffs make an implausible argument based upon the December 1, 2019 amendment to Fed. R. Evid. 807. (Brief at 60.) Noting that one of the two trials was scheduled before the amendment date and one after, Plaintiffs argue that the Court should apply the amended standard (or remand to the district court for it to do so). Plaintiffs' argument about the lessened standard of "trustworth[iness]" is unavailing as demonstrated by the fact that Plaintiffs' can make only conclusory assertions that they do not flesh out. Indeed, the residual hearsay exception is to be used only "very rarely" and in "exceptional circumstances." *Mazer*, 556 F.3d at 1279. Plaintiffs do not demonstrate that the inadmissibility of "the [unspecified] Justice and Peace documents" would have been different under the new rule and, therefore, have not borne their burden of demonstrating applicability of the Rule 807 exception. *United States v. Kennard*, 472 F.3d 851, 855-56 (11th Cir. 2006) (burden of proof on party seeking to rely on hearsay exception).

C. THE DISTRICT COURT'S DISCOVERY ORDER WAS WELL WITHIN ITS DISCRETION.

Plaintiffs never filed a motion to issue letters of request to obtain the Justice and Peace documents. Nevertheless, Plaintiffs argue that the district court's denial of the Hague Evidence Convention request by different Plaintiffs represented by different counsel who are briefing their separate appeal constitutes reversible error and that this Court should order the district court to issue them letters of request for "evidence from the Justice and Peace Process." (Brief at 62-65.)

As an initial matter, Plaintiffs did not "designate" the other Plaintiffs' discovery order (Appx. at 3104) in their notices of appeal[35] as required by Fed. R. App. P. 3(c)(1)(B). Neither did the other Plaintiffs who obtained the order. (*See* DE 2568.) The Court should, therefore, refuse to consider this issue.

But even if the Court considers the merits of Plaintiffs' arguments, they are unavailing. As the district court found, the predicate "central issue" on summary judgment was whether Plaintiffs had identified in the record any "admissible evidence showing that the AUC killed their family members . . . ." (Appx. at 7537.) Plaintiffs fault the district court for noting that Plaintiffs "[did] not come forward with any such underlying investigative records from Colombian prosecutors, making it unreasonable, on this record, to infer that such confessions [made by Hasbún] were

[35] Appx. at 7586, 7588, 7590, 7592, 7624, 7627, 7631, 7668.

actually made and verified by Colombian prosecutors before issuance of the charging document proffered here, 'Record 138.'" (Brief at 62 (citing Appx. at 7540-41).) The error, Plaintiffs contend, was that the district court had earlier refused to issue letters of request under the Hague Evidence Convention from other Plaintiffs' counsel. (*See* Appx. at 3108 – "The Court finds . . . the overbreadth of the requests – which encompass entire investigatory files relating to allegedly ongoing criminal prosecutions before a foreign tribunal – and the questionable importance of the requested information to disputed issue in this MDL proceeding . . . .").)

But, as the district court noted, Plaintiffs' own untimely expert, Professor Sánchez, stated that the Justice and Peace files are available to the victims of crimes. (Appx. at 7540.) The documents that Plaintiffs proffered are years old and Plaintiffs never sought, nor did their counsel, to obtain the documents themselves by invoking this availability to later proffer as evidence to the district court. Similarly, Plaintiffs took no action to correct the overbreadth problem by narrowing the request from the "entire investigatory files" to the documents at issue in this appeal. There was no denial of "essential evidence" to Plaintiffs. They are responsible for any lack of evidence in the record, not the district court.

Finally, Plaintiffs' citation to caselaw that "courts should exercise caution in too quickly deciding summary judgment motions when the factual record may be better developed" (Brief at 64) only underscores their desperation and attempt to

ameliorate the effects of their own delay. *See* Appx. at 7550-51 (deeming Plaintiffs' failure to pin down their proofs as "mystifying, given the extraordinary length of this litigation – now ten years running – and the imposition of the current summary judgment schedule agenda which dates back to April 11, 2017.").) The factual record here is fully developed, the district court has considered that record, and this Court will now consider that record considering the parties' arguments and applicable law. Plaintiffs' suggestion that the Court remand this appeal to the district court with instructions to obtain all the Justice and Peace documents via a letter of request under the Hague Evidence Convention should be denied out of hand.

V. THE DISTRICT COURT DID NOT COMMIT MANIFEST ERROR IN EXCLUDING OLIVER KAPLAN'S "EXPERT OPINION" PROFFERED IN OPPOSITION TO SUMMARY JUDGMENT.

Plaintiffs proffered Professor Kaplan for the opinion that the AUC was "more likely than not" responsible for the deaths of Plaintiffs' decedents. (Brief at 67.) But, at deposition, Kaplan testified it was merely **"possible"** that the unknown and unidentified perpetrators were members of the AUC:

> Q: . . . [A]re you saying that because in the period of time between 1995 and 2007 . . . it's been documented that the AUC affected killings, that because they affected killings in the time frame, the unknown killers of the Bellwether plaintiffs could also possibly be the AUC? Is that what you're saying?
>
> A: Yes, possibly.
>
> . . .

> Q: . . . Could you explain it to me, the geographical correlation?
>
> A: Yes. So I mapped the locations, to the best that I was aware, of the incidents by Bellwether victims, and juxtaposed it with a map of active presence or paramilitary activity in the part of the country that includes the banana regions.
>
> Q: . . . [S]imilar to your temporal correlation, is the correlation here because it's known and established that the AUC effected certain killings in this geographical region and because it's known that the relatives were killed in this geographical region, that because of that correlations it's possible that the AUC killed the relatives?
>
> A: It's possible.

(Appx. at 4951-52, 204:15-24, 205:16-23, 205:25-206:8.)

Even if it were not excluded, Kaplan's opinion does not create a triable issue of material fact as to whether any victim was killed by an AUC member. Under oath, Kaplan admitted that he could opine to no more than a mere possibility that "the AUC" killed Plaintiffs' decedents.[36] A mere possibility of causation is insufficient

[36] Plaintiffs may argue in their Reply that Kaplan says "more likely than not" in his unsworn and unverified report. However, an unverified expert report generally may not be considered at summary judgment, *Carr*, 338 F.3d at 1273 n.27, and in any event, unsworn statements (i.e., statements like those in Kaplan's report that the AUC "more likely than not" killed Plaintiffs' decedents) that contradict sworn deposition testimony (i.e., Kaplan's sworn testimony that he could only opine on AUC responsibility to a possibility) cannot create a question of fact. *Stroud v. Bank of Am.*, 886 F. Supp. 2d 1308, 1324 (S.D. Fla. 2012).

to defeat summary judgment. *See, e.g.*, *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1326 (11th Cir. 1982) (jury not permitted to engage in speculation and conjecture that would render its findings "a guess or mere possibility"); *Hinkle Oil & Gas, Inc. v. Bowles Rice McDavid Graff & Love*, 360 F. App'x 400, 404 (4th Cir. 2010) ("[A] mere possibility of causation is not sufficient to defeat summary judgment.") (internal citation and quotations omitted).[37]

The district court did properly exclude Kaplan's "opinion" because he did not apply a reliable methodology to form the opinion he tried to proffer about the "likelihood" of AUC involvement in the death of Plaintiffs' decedents. (Appx. at 7743 ("Both experts [including Kaplan] are simply repeating statistical evidence and drawing inferences from it, based on temporal and geographical overlays; neither [including Kaplan] is applying specialized knowledge or 'reliable' methodologies.").) Plaintiffs raise three purported errors by the district court in excluding Kaplan's opinion, each of which lack merit and none of which amount to an abuse of discretion.

First, Plaintiffs argue that the district court did not consider "any" of the *Daubert* factors. (Brief at 66.) This argument is frivolous. These factors have, of

[37] Although the district court did not expressly rely on Kaplan's admission that there is not sufficient evidence of causation, this Court may do so because it may affirm a district court's decision for any reason in the record. *DeMartini*, 942 F.3d at 1288 n.7.

course, been codified in Rule 702 of the Federal Rules of Evidence. *See, e.g.*, *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1217 (10th Cir. 2016) (noting that the district court's reliability determinations under *Daubert*, which calls for an assessment of whether the methodology underlying an opinion is valid and of whether that methodology properly can be applied to the facts at issue in a reliable way, have been codified in Rules 702(c) and 702(d)). The district court cited Rule 702 verbatim and then focused on and considered the penultimate *Daubert*/Rule 702 factor that the expert's opinion must be the product of reliable principles and methods, which the expert must reliably apply. (Appx. at 7576 (citing Fed. R. Evid. 702).) The test of "reliability" is flexible and a district court is granted broad latitude when it decides **how** to determine reliability. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999); *Cook v. Sheriff of Monroe Cty.*, 402 F.3d 1092, 1113-14 (11th Cir. 2005).

The district court correctly found that Kaplan failed both parts of this test. Kaplan simply repeated facts and data from unverified and often unidentified third-parties, verbatim, without subjecting those facts and data to any analysis.[38] His

[38] *See, e.g.*, Appx. at 4926, 102:3-105:6 (Kaplan collected articles, press sources, and media, that likewise collected statements of other persons, and did not conduct an independent investigation into the matters on which he claims to rely); Appx. at 4936, 144:4-20 (Kaplan relying on hearsay statement of anonymous source as quoted in a diplomatic cable); Appx. at 4941, 163:8-164:5 (relaying unverified hearsay statements of former AUC commanders); Appx. at 4950-51, 200:6-202:2 (Kaplan quoted from unsworn and unverified databases compiled by unknown

regurgitation of facts stated by third parties, simply collected without a methodology or analysis, is not admissible. As a district court in this Circuit stated in excluding an expert markedly similar to Kaplan here:

> Although an expert may rely upon inadmissible materials and hearsay to form his opinion, the expert must also carry out some independent analysis of the material issues in the case. Plaintiffs have simply failed to establish that [the expert's] testimony is relevant and reliable, or that it would be helpful to the jury in deciding the material facts of the case. Plaintiffs could not show any methodology applied by [the expert] to the investigation of this case; indeed, he indicated he has not investigated . . . the facts of this case.

Barrueto v. Larius, No. 99-0528-CIV-LENARD/SIMONTON, 2003 U.S. Dist. LEXIS 28086, at **24-25 (S.D. Fla. Sept. 18, 2003) (citing *United States v. Corey*, 207 F.3d 84, 89 (1st Cir. 2000)). Kaplan testified that he is merely "relying on what other people reported" and "statements, historical facts that have been recorded and reported by other people" without any independent analysis or verification. (Appx. at 4926, 103:13-20; 4936, 144:16-20.)

At his deposition, Kaplan admitted that his opinion about AUC involvement in the deaths of Plaintiffs' decedents was based entirely on: (1) visually examining a graph looking at statistical data about when the AUC is accused of killing persons in Colombia generally; and (2) mapping the locations of each Plaintiff's decedent's

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persons and conducted no independent investigation or corroboration of any statements therein).

alleged death and juxtaposing that map with a map of paramilitary presence in Colombia during a 12-year span. (Appx. at 4951.)

In other words, Kaplan's opinion that the AUC **possibly** killed Plaintiffs' decedents rests solely on his visual examination of a graph concerning deaths attributed to paramilitaries in a certain time period, literally overlaying a map of locations where each Plaintiff's decedent died with a map of AUC presence in Colombia over a 12-year period, and deducing from those examinations that the AUC may have killed Plaintiffs' decedents. (Appx. at 4951, 204:15-24; Appx. at 4951-52, 205:25-206:8.) Kaplan conceded under oath that he did not undertake any independent analysis of the facts upon which he relied, instead blindly accepting hearsay statements of others with no independent investigation of the facts of this litigation. (*See, e.g.*, Appx. at 4950-51.)

Kaplan's own testimony refutes Plaintiffs' second argument that Kaplan employed a "general comparative method" and "triangulation" method to reach his conclusion (Brief at 67). As discussed above, in Kaplan's own words, his "methodology" involved visually inspecting and comparing a graph and two maps against each other. Plaintiffs' belated and self-serving arguments that Kaplan applied a reliable methodology are unavailing. *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004). That is especially the case here, where Kaplan's own words directly contradict Plaintiffs' arguments. Furthermore, Kaplan himself admitted in his

deposition that he did not apply his own self-proclaimed methodology because he did not have sufficient data:

> Q: So what I'm looking for, then, is what methodology do you use to make the association that caused known AUC killings happened—that the plaintiffs' relatives were victims of those—of the AUC? What connects the two?
>
> A: Well, this is a background graphic that show that temporally in that region the paramilitary general victims and the Bellwether victims, those patterns seem to occur in similar—the changes seen to follow each other **to an extent**.
> . . .
> So it's a correlation, as I say in the text.
>
> Q: That's my question. What is the correlation? The correlation is what? Explain it.
>
> A: Well, I didn't—a correlation is a measure of an association between two indicators. **I didn't run a Pearson test or something like that to get a correlation coefficient in this case, in part, because there aren't really enough cases, either yours or Bellwether victim cases, to do that.** And so this is more examining visually the graph and seeing how the trends, you know, either go up or down in similar ways.

(Appx. at 4951, 203:12-204:14 (emphasis added).)

With respect to Plaintiffs' third argument, it is simply not true that Kaplan relied on what Plaintiffs now claim to be five categories of evidence in rendering his opinion that the AUC was involved in the killings. As noted above, Kaplan admitted that his opinion was based only on his visual examination and comparison of a graph

and two maps related to the time and place each Plaintiffs' decedent allegedly died. (Appx. at 4951, 204:15-24; Appx. at 4951-52, 205:25-206:8.)

With respect to other categories of information Kaplan allegedly relied upon, Plaintiffs proclaim: "He has conducted hundreds of interviews with Colombian guerillas, AUC paramilitary, military officers, the police intelligence directorate, and Ministry of Defense staff." (Brief at 69.) But that is not what Kaplan testified to under oath:

> Q. All right. I see no reference to interview notes for any kind of independent investigation, and consistent with our—your earlier testimony, am I correct to assume that you conducted no independent investigation as to this particular statement?
>
> A. For this particular statement, no, I did not conduct any interviews.
>
> Q. For any statement in your report, did you conduct any interviews?
>
> A. No.

(Appx. at 4950, 201:16-202:2.)

An expert may not simply assemble masses of hearsay from reports, newspapers, books and other sources, then regurgitate them as facts to a jury. *See, e.g.*, *United States v. Meija*, 545 F.3d 179, 197 (2d Cir. 2008) (expert not permitted to simply collect and repeat hearsay evidence to a jury without applying any expertise or methodology in reaching a conclusion based on the hearsay); *Gilmore*

v. Palestinian Interim Self-Government Auth., 843 F.3d 958, 972-73 (D.C. Cir. 2016) (no abuse of discretion in district court's exclusion of expert who relied on hearsay materials in forming an opinion, but did not explain how he applied a reliable methodology to the hearsay that was different from what a layperson could do); *Barrueto*, 2003 U.S. Dist. LEXIS 28086, at *23-25 (excluding expert opinion where expert did not independently research the facts of the case, but simply collected and repeated hearsay without applying a methodology to reach an opinion).

But this collection and recitation of facts, gathered from an assortment of third-party sources with no independent verification or analysis, is the entirety of Kaplan's report and opinion. There are many examples. (*See* Appx. 4936, 144:4-20; Appx. 4950, 199:23-201:15; Appx. at 4950, 201:16-202:2.) An opinion based on such unverified evidence from unknown sources does not rest on a reliable methodology. *Barrueto*, 2003 U.S. Dist. LEXIS 28086, at *23-25.

VI. THE PLAINTIFF-SPECIFIC EVIDENCE PROFFERED TO THE DISTRICT COURT, TO THE EXTENT IT WAS ADMISSIBLE AT ALL, WAS INSUFFICIENT TO CREATE A QUESTION OF FACT ON THE THRESHOLD ISSUE OF WHETHER AN AUC OPERATIVE KILLED EACH PLAINTIFF'S DECEDENT.

A. PLAINTIFF JOHN DOE 7 AND DECEDENT JOHN DOE 8

The district court properly granted summary judgment on John Doe 7's claim for the alleged death of John Doe 8. In opposition to summary judgment, John Doe 7 submitted rank hearsay and speculative evidence that, as the district court properly

found, was either inadmissible or was insufficient to create a question of fact as to whether the alleged killers of John Doe 8 were AUC operatives.

1. THE DISTRICT COURT DID NOT ERR IN FINDING INSUFFICIENT ADMISSIBLE EVIDENCE TO LINK CAMACHO TO THE AUC.

The district court properly concluded that there was no admissible evidence in the record establishing a connection between Camacho and the AUC. (Appx. at 7568.) John Doe 7 did not "confirm" that Camacho was an AUC operative.[39] To the contrary, as the district court found, John Doe 7 fails entirely to set forth any personal knowledge as the basis for his belief that Camacho was an AUC operative. None of the testimony cited by John Doe 7 alters that conclusion – John Doe 7 asserts his belief that Camacho was an AUC operative but he does not explain why he believes that or how he learned of Camacho's alleged affiliation. (*Cf.* Brief at 74.) The same holds true for John Doe 7's declaration.

Contrary to John Doe 7's argument (Brief at 75), a blanket statement that an affidavit is based on personal knowledge is insufficient to satisfy Rule 56(c) where the affiant fails to explain the basis for his personal knowledge. *See Ellis v. England*,

[39] John Doe 7's argument that "[d]efense counsel never asked him for his [alleged] basis of knowledge [that Camacho belonged to the AUC] nor objected that his answer lacked foundation" is somehow grounds to admit otherwise inadmissible evidence is wrong. (Brief at 75.) John Doe 7 cites no case to support that contention. Nor does he cite any cases in which a defendant has waived the right to object to introduction of deposition testimony at summary judgment where additional questions were not asked.

432 F.3d 1321, 1326 (11th Cir. 2005) (stating that unsupported and conclusory statements in an affidavit are insufficient to withstand summary judgment).

If an affiant fails to explain how he gained personal knowledge of the subject matter of statements in his affidavit, there is no abuse of discretion in excluding those statements. *See, e.g.*, *Alliant Tax Credit Fund XVI, Ltd. v. Thomasville Cmty. Hous., LLC*, 713 F. App'x 821, 825 (11th Cir. 2017) (no abuse of discretion where magistrate judge excluded portions of affidavits where the affiant failed to explain how he came into personal knowledge of the information in the affidavit).

John Doe 7 does not even attempt to argue that his declaration sets forth specific and concrete facts establishing personal knowledge of his assertion that Camacho was a member of the AUC. As Defendants argued below, John Doe 7's only basis for believing a person was an operative of the AUC was if "they had both short and long weapons." (Appx. at 7455 (citing Appx. 6699 at ¶ 13).) John Doe 8 does not explain the basis for this belief. Nor does he explain how he came into the improbable personal knowledge that only AUC operatives carried long and short weapons.

Implicitly conceding that John Doe 7's declaration fails to establish personal knowledge, John Doe 7 argues, in the face of all contrary case law, that he need not establish any foundation of personal knowledge. (Brief at 75-76.) But none of the non-binding cases relied upon by John Doe 7 excuse a proponent of an affidavit from

establishing that the affiant has personal knowledge of the facts in the affidavit. *See Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1045 (9th Cir. 2013) (plaintiff established personal knowledge of events described in his declaration where he personally observed measurements being taken); *United States v. Gerard*, 507 F. App'x 218, 222 (3d Cir. 2012) (Rule 602 satisfied where the declarant provided "a detailed, first-person account" of a murder that demonstrated she personally observed the incident and providing specific, concrete facts to support claims of personal knowledge). In comparison, John Doe 7's declaration contains no facts even purporting to establish specific and concrete facts demonstrating John Doe 7's purported personal knowledge that only AUC operatives carried "long and short" weapons or that Camacho was an AUC operative.

Nor was the district court required to accept John Doe 7's inadmissible statements as true. (*Cf.* Brief at 75.) Again, John Doe 8's claim that Camacho was an AUC member is not based on his personal knowledge. John Doe 8's argument to the contrary assumes in the first instance that his claim that Camacho was an AUC leader was admissible. But a district court may not consider statements in an affidavit when the affiant fails to establish personal knowledge of the statements. Fed. R. Civ. P. 56(c). Thus, there was no admissible fact for the district court to consider.

The portions of John Doe 7's declaration concerning his alleged attendance at "community meetings" where Camacho was present and armed likewise is insufficient to link Camacho to the AUC, because, as explained above, he has no personal knowledge to support the assertion that persons carrying weapons were AUC operatives. (*Cf.* Brief at 75 (citing Appx. at 6699-6701.) John Doe 7 cites no evidence in the record supporting his contention that "community meetings convened by AUC paramilitaries" were "common objects or events" such that his belief that Camacho was an AUC member qualifies as based on personal knowledge.

Finally, John Doe 7 is wrong that the district court "did not account for" statements his declaration concerning Camacho's attendance at these community meetings. (*Compare* Appx. at 7528-29, *with* Brief at 76.) The district court clearly did so but concluded that it was insufficient to "establish[] an affiliation between Camacho and the AUC." (Appx. at 7568.)

2. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING CAMACHO'S ALLEGED STATEMENTS AS INADMISSIBLE HEARSAY NOT SUBJECT TO ANY EXCEPTION.

John Doe 7 testified at his deposition that he confronted Camacho after the death of John Doe 8. (Appx. at 7568.) Notably, John Doe 7 did not testify that Camacho took responsibility for the death of John Doe 11, or that he even attributed the death to an AUC operative. (*Id.*) John Doe 7 does not dispute this on appeal and the testimony he cites only confirms that Camacho made no such statement. (See

Brief at 72-73.) Indeed, as Defendants argued below and as the district court agreed, there is no place in the record where Camacho "confessed" to the death of John Doe 11. Absent such a "confession" or actual statement against interest, there is no applicable hearsay exception.

John Doe 7 nonetheless argues that hearsay statements allegedly made by Camacho are admissible under the "statement against interest" hearsay exception. (Brief at 73.) But John Doe 7 misapprehends Rule 804(b)(3) of the Federal Rules of Evidence. The district court did not abuse its discretion in finding that hearsay exception inapplicable.

Rule 804(b)(3) permits admission of a hearsay statement only when: (1) the declarant is unavailable; and (2) the statement so far tends to subject the declarant to criminal liability that a reasonable person would not have made the statement unless the declarant believed it to be true. Fed. R. Evid. 804(b)(3); *see also United States v. Hardy*, 389 F. App'x 924, 925 (11th Cir. 2010).[40] This Rule must be narrowly construed, and application of Rule 804(b)(3) should be limited "to **specific statements** or remarks that are individually self-inculpatory . . . ." *United States v. Bowe*, 426 F. App'x 793, 797 n.5 (11th Cir. 2011) (emphasis added).

[40] The third prong of Rule 804(b)(3) only applies to hearsay offered in criminal cases and need not be considered.

As an initial matter, "courts are not required to view evidence presented at summary judgment in the light most favorable to the nonmoving party on the question of admissibility." *Garcia v. U Pull It Auto & Truck Salvage, Inc.*, 657 F. App'x 293, 297 (5th Cir. 2016). Thus, John Doe 7's argument that Camacho's alleged hearsay statements are admissible as statements against interest after "making all inferences in the light most favorable to Plaintiffs" (Brief at 73) is misplaced. The district court was not required to draw any such inferences.

John Doe 7 cites nothing in the record demonstrating that Camacho made any statements that he was directly and personally involved in criminal conduct. Accordingly, the district court did not err in finding the statement against interest exception was inapplicable to Camacho's alleged statements to John Doe 7. *See, e.g.*, *United States v. Funt*, 896 F.2d 1288, 1298 (11th Cir. 1990) (no abuse of discretion in finding Rule 804(b)(3) inapplicable to declaration that contained no information related to criminal knowledge or intent and did not describe any criminal acts).

Unable to cite any such evidence in the record, John Doe 7 argues that Camacho's purported "silence" should be construed as a statement against interest. (Brief at 73.) The only case relied upon by John Doe 7 for this contention did not even purport to analyze admission of a hearsay statement under Rule 804(b)(3) and is thus easily distinguishable. *See United States v. Carter*, 760 F.2d 1568, 1579 (11th

Cir. 1985) (considering whether a declarant's silence constituted an adoptive admission under Rule 801(d)(2)(B)).

Indeed, John Doe 7 would have this Court flip Rule 804(b)(3) on its head: while Rule 804(b)(3) requires that a declarant's affirmative statement be so clearly contrary to his penal interests that the declarant would not have made the statement unless believing it to be true, John Doe 7 seeks to have this Court rule that an **absence** of affirmative statements can also be contrary to the declarant's penal interests. John Doe 7 cites no case law to support this novel application of Rule 804(b)(3) which, by its very terms, does not apply to any statements made in John Doe 7's alleged conversation with Camacho. The district court did not abuse its discretion.

3. THERE IS NO OTHER ADMISSIBLE EVIDENCE THAT JOHN DOE 8 WAS KILLED BY AN AUC OPERATIVE.

There is no admissible evidence that supports John Doe 7's claim that John Doe 8 "was kidnapped in public by a local AUC commander" or that "his body was dumped at a known AUC killing field." (Brief at 71 (citing Appx. at 6581-82).) The only witness to John Doe 8's alleged abduction submitted a declaration on both these points (*see* Appx. at 6581-82), and the district court excluded both statements as hearsay because the declarant did not establish any personal knowledge for either. (Appx. at 7568-69.) Indeed, the declarant admits this. (Appx. at 6582, ¶ 8

(declarant's belief that Camacho was a "local AUC commander" based solely on "rumors" from unspecified persons); *id.* at 6582-83, ¶ 14 (declarant told by unidentified "friend" that John Doe 8 was found at a farm that had a "reputation" for being a place where paramilitaries killed people).)[41] John Doe 7 does not dispute these evidentiary findings.

Thus, John Doe 7 is left with only purported evidence that John Doe 8 was killed at a time and in an area with allegedly heavy AUC presence. The district court found that "evidence is simply far too speculative, standing alone, to permit a reasonable juror to conclude, more likely than not, that the death of any decedent was linked to an AUC operation." (Appx. at 7575.) Indeed, the district court found that the fundamental flaws in John Doe 8's claim are "difficulties in proving assailant identity in a period of prolonged and bloody civil unrest involving multiple warring political factions" and "summarily rejected" any argument that Plaintiffs could prove AUC responsibility based solely on geographical and temporal evidence. (*Id.*)

B. PLAINTIFF JUVENAL FONTALVO CAMARGO AND DECEDENT FRANKLIN FONTALVO SALAS

[41] Indeed, there is not even evidence that John Doe 8 was kidnapped: according to the confidential declaration relied upon by John Doe 7, John Doe 8 voluntarily got on a motorcycle with Camacho. (Appx. at 6582 at ¶¶ 9-10.) No reasonable juror could conclude from this voluntary action that John Doe 8 was "kidnapped" or taken away against his will.

At the outset, Mr. Camargo conflates the district court's grant of summary judgment against him, and subsequent denial of a motion for relief from judgment, by relying on evidence submitted in support of that subsequent motion to argue that the district court should not have granted summary judgment. (Brief at 78-79 (citing Appx. at 7601-04, 7610, 7613, 7616, 7619, 7622, 7647-67).) This is an improper attempt to avoid the deferential abuse-of-discretion standard of review afforded to a district court's denial of a motion for reconsideration. *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 746 (11th Cir. 2014) ("We review denials of Rule 59(e) motions for an abuse of discretion."); *Lugo v. Sec'y of Fla. Dep't of Corr.*, 750 F.3d 1198, 1207 (11th Cir. 2014) (same standard for Rule 60(b) motions).

Mr. Camargo moved the district court for relief from summary judgment on the basis of what he now characterizes as "newly obtained evidence including . . . documents, fingerprints, a photograph, and a declaration from a Colombian prosecutor" purporting to verify "El Ruso's" affiliation with the AUC, the supplemental declarations submitted by Mr. Camargo and Castro, and excerpts of the Mangones *sentencia*.[42] (Brief at 78-79; Appx. at 7594-98.) Mr. Camargo

[42] As discussed above, the Mangones *sentencia* is hearsay that is not subject to any exceptions and which cannot be reduced to admissible form at trial. Furthermore, the *sentencia* was properly disregarded in conjunction with Mr. Camargo's motion for relief from judgment: Mr. Camargo readily admits that he was in possession of the *sentencia* but failed to submit it in opposition to summary judgment and did not bother submitting the document to the district court until **after** the district court

purported to seek this relief 27 days after the district court's summary judgment decision and pursuant to Rule 60(b) but, as Defendants explained below and as the district court agreed, Mr. Camargo's motion was governed by Rule 59(e) and not Rule 60(b). (DE 2581 at 2; DE 2608 at 2-3.)

In opposition, Defendants demonstrated that none of the untimely-submitted evidence could provide relief from judgment. (DE 2581.) In summary, Mr. Camargo did not show he was duly diligent in seeking to obtain the "new" evidence (evidence that has been publicly available for many years) submitted with his motion for relief from judgment and, in any event, the untimely-submitted documents consisted of unauthenticated, rank hearsay. (*See generally id.*) The district court agreed and denied the motion for relief from judgment, ruling that the evidence proffered by Mr. Camargo was not "newly-discovered" evidence; even if the evidence were new, Mr. Camargo was not diligent in pursuing it; and even if the evidence were considered, the district court still would have granted summary judgment. (DE 2608 at 7-11.)

Tellingly, Mr. Camargo fails to inform this Court that the district court denied his motion for relief from judgment. Instead, Mr. Camargo simply assumes the untimely-submitted evidence filed in support of that motion should have been

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granted summary judgment. (Brief at 78 n.46.) Thus, the *sentencia* is not "newly-discovered evidence."

considered as a basis to deny summary judgment (Brief at 79 (arguing that "[t]hese matters" filed in support of Mr. Camargo's motion for reconsideration "should have led the district court to deny summary judgment"). Mr. Camargo has conceded that the district court did not abuse its discretion in denying his motion for relief by not arguing to the contrary.

For these reasons, Mr. Camargo cannot rely on appeal on any of the evidence proffered with his motion for relief from judgment (identified in Plaintiffs' Brief at Appx., 7601-04, 7610, 7613, 7616, 7619, 7622, 7647-67).

Mr. Camargo also relies on the declaration of Sergio Contreras for his contention that four paramilitaries were seen with the decedent, including a man purportedly known as "El Ruso." (Brief at 77 (Appx. at 4156-57).) But, the district court explained, Contreras "does not establish any personal knowledge or experience to support his claimed belief that [El Ruso or any of] the alleged abductors" were AUC leaders or operatives. (Appx. at 7567.)

Likewise, the district court did not err in excluding statements in Ever Fontalvo's declaration that were not supported by his personal knowledge of the facts contained therein. Mr. Fontalvo simply assumes the admissibility of the proffered declaration and argues that the evidence created a question of fact. (Brief at 77-78 (citing Appx. at 4162-63).) Mr. Camargo does not even attempt to argue that the district court abused its discretion in finding that Ever Fontalvo's declaration

"does not establish any personal knowledge for the claimed belief that persons who [allegedly] admonished him for moving the [decedent's] body were AUC affiliates or commanders." (Appx. at 7567-68.) Nor could he—nothing in Ever's declaration even purports to lay such a foundation.

Instead of addressing the district court's actual ruling, Mr. Camargo makes several factually unsupported or otherwise irrelevant arguments to contend that Ever's declaration should have been considered. (Brief at 80.)

Mr. Camargo first claims that Ever has personal knowledge that he was "detained" by AUC members because he was "detained near an AUC barracks." (Brief at 80 (citing Appx. at 4163).) Nothing in Ever's declaration, however, establishes personal knowledge for his claim that he was "near an AUC barracks" when allegedly detained by unidentified men. That claim was therefore properly excluded. And, even if his statement were somehow found to be based on personal knowledge, there is no evidence in the record or cited by Mr. Camargo linking the unidentified persons who allegedly "detained" Ever with the alleged abductors of the decedent.

The Court should accept Mr. Camargo's implicit concession that there is no record evidence to support these statements. Indeed, it is undisputed that, according to Plaintiffs and their own experts, the areas in which Plaintiffs and their decedents lived "were brutalized by numerous warring factions over the course of a long and

bloody civil war (with some areas undergoing transition from guerilla-based control to paramilitary-based control during the timeframes in question).” (Appx. at 7576.) In any event, Ever’s claims that members of the AUC sometimes wore uniforms and other times wore civilian clothes (Appx. at 4163) does nothing to support Mr. Camargo’s claim that Ever had personal knowledge he was detained by AUC operatives. (*Cf.* Brief at 80.)

Mr. Camargo also implicitly concedes that Ever had no personal knowledge that “El Tijeras” was an AUC member (Brief at 81) and nothing in his declaration (*see* Appx. at 4163) could support such an argument.

Finally, the district court did not abuse its discretion in largely excluding the proffered deposition testimony of Mr. Camargo himself. Mr. Camargo conceded in the district court that he has no personal knowledge of the identities of the persons alleged to have taken his decedent, but that his belief that “El Ruso” was an AUC operative and was involved in the abduction of his decedent was instead based solely on hearsay relayed by Mr. Camargo’s cousin. (Appx. at 7567; Appx. at 7451-52.) Because he did not witness the alleged abduction of his decedent, Mr. Camargo has no personal knowledge as to whether the men he now claims, for the first time, he saw in town wearing armbands were the same men alleged to have abducted his decedent.

C. PLAINTIFF JANE DOE 7 AND DECEDENT JOHN DOE 11

1. CIRCUMSTANTIAL EVIDENCE PRESENTED BY JANE DOE 7 IS EITHER INADMISSIBLE OR INSUFFICIENT TO CREATE A TRIABLE ISSUE.

Jane Doe 7 argues that the mere presence of alleged paramilitaries in the place and at the time when John Doe 11 died is sufficient to create a question of fact. Jane Doe 7 is wrong. For the reasons discussed above, none of the purported *modus operandi* evidence cited by Jane Doe 7 (Brief at 83) is admissible and, therefore, cannot create a triable question of fact. There is also no admissible evidence relied upon by Jane Doe 7 to support her claim that the AUC "regularly targeted" labor union members.[43]

The proffered evidence relied upon to support the contention that the AUC "targeted" labor union members is either rank hearsay or utterly irrelevant. *See* Appx. 5050-51 (deposition of purported expert witness Robin Kirk in which Ms. Kirk admits she has no personal knowledge of whether the AUC targeted labor unions), 4804 (excerpt of Oliver Kaplan report, which was not attested to under penalties of perjury and of which Professor Kaplan had no personal knowledge, that makes no mention of the AUC's alleged targeting of union members), 4828 (excerpt of Kaplan report, which was not attested to under penalties of perjury and of which Professor Kaplan had no personal knowledge), 5126-27 (excerpt of the report of

[43] (*See Brief* at 83.) Similarly, none of the evidence cited by Jane Doe 7 to support her claim that the AUC had a "motive" to kill John Doe 11 supports that claim.

Terry Karl, which was not attested to under penalties of perjury and on which Ms. Karl has no personal knowledge of the contents), 6592 (no mention of the AUC's targeting of labor union members).)

Jane Doe 7's attempt to launder factual testimony through expert witnesses is improper. Ms. Kirk admitted numerous times throughout her deposition that the only basis she had for the purported "facts" is hearsay. (*See, e.g.*, Appx. at 5032-34, 5043-44.) Professor Karl did not attest to her report under penalties of perjury and did not claim that the "facts" stated therein were based on her personal knowledge. (Appx. at 5156.) Likewise, Professor Kaplan did not attest to his report under penalties of perjury and did not claim that the "facts" stated therein were based on his personal knowledge. (Appx. at 4835.)

As discussed above, *e.g.*, *supra* at § III, expert reports that are not attested to under penalties of perjury and which contain "facts" that are not based on the expert's personal knowledge cannot be considered at summary judgment because the "facts" are inadmissible and cannot be reduced to admissible form. *Carr*, 338 F.3d at 1273 n.26; *Scott*, 346 F.3d at 759. *See also O'Dell*, 2019 U.S. Dist. LEXIS 15686, at *10 n.5; *Smith*, 864 F. Supp. 2d at 658-59. Put another way, a party cannot avoid summary judgment by relying on "facts" in an expert report, when the expert lacks personal knowledge of those facts and the report does not otherwise comply with the strict requirements of Rule 56(c).

2. JANE DOE 7'S TESTIMONY AND DECLARATION PURPORTING TO ESTABLISH AN AUC CONNECTION TO JOHN DOE 11'S ALLEGED KILLERS WAS PROPERLY EXCLUDED.

Jane Doe 7's declaration sets forth her unsupported belief that AUC operatives killed John Doe 11. Specifically, Jane Doe 7 claims that she was told by John Doe 11, who was told by two unidentified co-workers, that they had heard John Doe 11's name read from a "kill list" by alleged AUC operatives. (Appx. at 6791-92.) Jane Doe 7's belief that AUC operatives killed her decedent rests on multiple levels of hearsay. (Appx. at 7554.) Hearsay within hearsay is only admissible if the proponent of the evidence demonstrates that each layer of hearsay is subject to an exception to the rule against hearsay. Fed. R. Evid. 805; *United Techs Corp. v. Mazer*, 556 F.3d 1260, 1280 (11th Cir. 2009).

Thus, for this part of Jane Doe 7's declaration to be admissible, she must demonstrate the admissibility of two levels of hearsay: (1) the hearsay statements of John Doe 11's coworkers to John Doe 11; and (2) the hearsay statements of John Doe 11 to Jane Doe 7. Jane Doe 7 only addresses the latter layer, conceding that the former layer did not satisfy any hearsay exceptions and was properly excluded. Jane Doe 7 argues only that her conversation with John Doe 11 is admissible as an excited utterance. Fed. R. Evid. 803(2). This argument lacks merit.

As to the hearsay statements of John Doe 11's coworkers to John Doe 11, the district court noted that Jane Doe 7 conceded that the unidentified coworkers did not make the hearsay statements at the time of the allegedly startling event (i.e., the purported reading of the "kill list"). (Appx. at 7554-55.) Recognizing that the coworkers' statements to John Doe 11 could theoretically constitute "excited utterances," but without making any finding on the admissibility of those statements, the district court focused instead on the admissibility of John Doe 11's statements to Jane Doe 7. (*Id.* at 46.)

The district court correctly found that Jane Doe 7 did not present foundational evidence relating to John Doe 11's statements to Jane Doe 7 that could satisfy the excited utterance exception. (*Id.*) On appeal, Jane Doe 7 again fails to point to any evidence in the record concerning when John Doe 11 made his statement to Jane Doe 7 or whether he was under the stress of excitement of his conversation with his coworkers.

Without such evidence in the record to support application of the excited utterance exception, the district court could not have abused its discretion. *See, e.g.*, *Howard-Bunch v. Carnival Corp.*, No. 1:18-cv-21867-KMM, 2019 U.S. Dist. LEXIS 35024, at *9 n.3 (S.D. Fla. Mar. 3, 2019) (finding the excited utterance inapplicable where "no evidence [in the summary judgment record] suggests that

[the declarant] was 'under the stress of excitement' caused by the incident at issue" when he gave his hearsay statement).

Mistakenly, Jane Doe 7 relies on events that allegedly occurred many days or weeks **after** her conversation with John Doe 11 as reason to apply the excited utterance exception. (Brief at 84 (citing Appx. at 6791-92 for hearsay statements concerning funeral arrangements); 85 (arguing that the district court should have considered subsequent alleged actions taken by John Doe 11 in its hearsay analysis).) None of this evidence is related to John Doe 11's mindset at the undetermined time he made his statements to Jane Doe 7. Thus, it cannot satisfy the excited utterance hearsay exception.

Because there is no evidence that could support application of the excited utterances exception here, the cases relied upon by Jane Doe 7 are easily distinguished. *See United States v. Belfast*, 611 F.3d 783, 817-18 (11th Cir. 2010) (excited utterance exception applicable to hearsay statement where evidence existed that the hearsay declarant was still distressed from the excitable event); *United States v. Smith*, 606 F.3d 1270, 1279-80 (passage of time did not make excited utterance exception inapplicable where there was testimony that the declarant's demeanor and tone at the time of making the statement "were consistent with ongoing stress arising" from the event); *United States v. Arnold*, 486 F.3d 177, 184-87 (6th Cir. 2007) (excited utterance exception applicable where there was evidence that the

hearsay declarant was "frantic," "crying," "hysterical," and "visibly shaken and upset" at the time of the statements).

After exercising its discretion to exclude the hearsay statements discussed above, the district court properly concluded that the Jane Doe 7-specific evidence and admissible circumstantial evidence remaining in the record did not create a triable question of fact as to whether John Doe 11 was killed by an AUC operative.

D. PLAINTIFF NANCY MORA LEMUS AND DECEDENT MIGUEL RODRIGUEZ DUARTE

The district court properly found that there was no question of fact as to whether an AUC operative killed Ms. Lemus's decedent.[44] Ms. Lemus testified at her deposition that her husband was killed by two men dressed in sweatshirts and green shirts, and that their clothing had a wheel symbol on it. (Appx. at 5766-67, 65:21-66:11.) Ms. Mora did not recognize the symbol, and no evidence in the record connects the AUC to a wheel symbol. (*Id.* at 5767, 66:8-14.) Ms. Mora likewise testified that she did not know whether the two alleged attackers belonged to the AUC or any armed group in Colombia. Ms. Lemus conceded below that no person has ever confessed to the killing. (Appx. at 6905.) Considering the totality of this

[44] Ms. Lemus alleged below that she and her family had suffered attacks in 2018 by "an AUC offshoot" operating in Magdalena and implied that these separate alleged incidents created a question of fact as to the identity of her husband's alleged killers in 2003. The district court soundly rejected that argument. (Appx. at 7565.) Ms. Lemus does not challenge that finding on appeal.

evidence, the district court concluded that no reasonable juror could infer—let alone find—that an AUC operative killed Ms. Lemus's decedent.

The testimony identified by Ms. Lemus on appeal, which she baselessly contends was "ignored" by the district court (Brief at 87), does not alter this conclusion. In the first instance, the district court did consider Ms. Lemus's proffered evidence of a general AUC presence in the area where Ms. Lemus lived. (Appx. at 7523.) In any event, the evidence does not create a question of fact. Even assuming *arguendo* the admissibility of Ms. Lemus's proffered testimony, Ms. Lemus's general experiences with the AUC cannot support a reasonable inference that the specific two men who allegedly killed her decedent were AUC operatives.

Indeed, Ms. Lemus herself admitted she did not know whether the men alleged to have killed her husband belonged to any armed group in Colombia. (Appx. at 5769, 77:24-78:6.) There is no evidence in the record linking these two men to the AUC. No reasonable juror could conclude from the cited testimony—Ms. Lemus had interacted with the AUC, she did not see other armed groups operating in the area, and persons she believed to be members of the AUC had previously taken food from her—that the two unidentified men who allegedly killed Ms. Mora's decedent were AUC operatives.

Unable to identify any evidence that could create a triable question of fact as to whether an AUC operative killed her decedent, Ms. Lemus egregiously misstates

the contents of her own sworn testimony and attempting to change it on appeal. (Brief at 87.) Ms. Lemus never testified that the alleged killers wore a "band" or an armband. (*Cf.* Brief at 87.) Ms. Lemus did not provide an errata sheet to her deposition. Nor did Ms. Lemus ever allege to the district court that her deposition testimony had been inaccurately transcribed. The Court should disregard Ms. Lemus's improper attempt to alter her testimony on appeal.

E. PLAINTIFFS JUANA DOE 11 AND MINOR DOE 11A, AND (CARRIZOSA) DECEDENT JOHN DOE 11

1. MINOR DOE 11A'S TESTIMONY IS INSUFFICIENT TO CREATE A QUESTION OF FACT.

Plaintiffs conceded to the district court that Minor Doe 11A's testimony did not establish personal knowledge that her decedent was killed by an AUC operative and that her testimony was ultimately irrelevant to the question of whether an AUC operative killed her decedent. (Appx. at 7380; Appx. at 7451.) Plaintiffs make no challenge to that conclusion on appeal. Accordingly, even if admissible Minor Doe 11A's testimony is irrelevant to the question of whether her decedent was killed by an AUC operative.

2. THE DISTRICT COURT PROPERLY EXCLUDED THE PROFFERED DOCUMENTARY EVIDENCE FROM COLOMBIA.

The district court excluded as rank hearsay, not subject to any exceptions, documentary evidence proffered by Juana Doe 11 and Minor Doe 11A in opposition

to summary judgment. (Appx. at 7542-48.) Plaintiffs rely once again on these same documents (Brief at 89-90) to argue that the district court erred in granting summary judgment. But Plaintiffs make no specific arguments that these documents are in admissible form or could be reduced to admissible at trial. As explained above, letters from the Justice & Peace process and the Colombian Attorney General's Office are inadmissible hearsay not subject to any exceptions. Similarly, the Mangones *sentencia* is inadmissible hearsay not subject to any exceptions.

3. JUANA DOE 11'S PROFFERED TESTIMONY WAS PROPERLY EXCLUDED AS HEARSAY.

In opposition to summary judgment, Juana Doe 11 proffered hearsay statements from her own deposition purporting to relay statements from alleged AUC member Jose Mangones, arguing that these hearsay statements were admissible under the "statement against interest" hearsay exception of Rule 804(b). The district court concluded, however, that the "statement against interest" exception was inapplicable because Plaintiffs had failed to carry their burden of showing that Mangones was an unavailable witness under Rule 804(a)(5) of the Federal Rules of Evidence. (Appx. at 7561-65.)

There was no error in the district court's conclusion. As the district court recognized, the mere fact that a witness is a foreign national does not *per se* make the witness unavailable as defined in Rule 804(a)(5). A witness is only unavailable under that Rule if, as relevant here, the proponent of the hearsay statement

demonstrates that she has been unable to procure the testimony of the hearsay declarant. The cases cited by Plaintiffs do not hold otherwise. *United States v. Samaniego*, 345 F.3d 1280, 1283-84 (11th Cir. 2003) (recognizing that the proponent of a hearsay statement by a foreign national must still demonstrate that the proponent undertook reasonable means to obtain the declarant's testimony); *United States v. Drogoul*, 1 F.3d 1546, 1553-54 (11th Cir. 1993) (applying the standard of Fed. R. Crim. P. 15(a) for depositions of witnesses in pretrial criminal proceedings); *French American Banking Corp. v. Flota Mercante Grancolombia, S.A.*, 693 F. Supp. 1421, 1425 (S.D.N.Y. 1987) (misapplying Rule 804(a)(5) by not requiring the proponent of a hearsay statement to even attempt to obtain the declarant's testimony).

As the district court noted, even when hearsay declarants are foreign nationals, the proponent of a hearsay statement must still demonstrate that the proponent was unable to obtain the testimony of the hearsay declarant through ordinary process or other reasonable means before a hearsay statement may be admitted under Rule 804. (Appx. at 7561-62 (collecting cases).) Plaintiffs do not challenge this correct statement of law, but instead misstate, distort, or otherwise ignore the relevant parts of the record supporting the district court's conclusion that Plaintiffs did not meet their burden of demonstrating that Mangones was an unavailable witness. (Brief at 91.)

Indeed, Plaintiffs simply ignore the six years of litigation—including an almost two-year fact discovery period that was extended at Plaintiffs' request—that followed their initial request to depose Mangones. Indeed, the record (or lack thereof) speaks for itself regarding Plaintiffs' lack of diligence in obtaining the testimony of Mangones.

In 2015, Plaintiffs sought, on an emergency basis, a partial lift of the then-existing discovery stay for purposes of deposing Mangones and other alleged AUC commanders. (Appx. at 2684.) The district court granted that request, but Plaintiffs failed to take the deposition for reasons that remain, to this day, unexplained. Notably, Plaintiffs do not cite to any evidentiary support for their claim that "authorities declined to schedule [Mangones's] deposition" (Brief at 91) and provided none of the district court.

Furthermore, Plaintiffs' claim that they "informed" the district court that they had "done everything possible to ensure that the Colombian government would expeditiously act upon their Letters Rogatory requests" (Brief at 91) for Mangones is not supported by the facts. This statement was made in the context of Plaintiffs' request for a six-month extension of the discovery deadline and was limited solely to the two sets of requests for Letter Rogatory that had been made during the fact discovery period. (*See* Appx. at 3139, 3141-42, 3145-48.) Neither of those requests included Mangones. Thus, Plaintiffs are incorrect that they explained to the district

court their failure to depose Mangones on an emergency basis—at Plaintiffs' request—in 2015.

Plaintiffs would have this Court believe that their failure to diligently pursue the testimony of Mangones ends there. But Mangones was subsequently released from prison and, after Plaintiffs failed to coordinate the deposition of Mangones in 2015, fact discovery began in earnest on Plaintiffs' claims in April 2017. (Appx. at 3074.) At Plaintiffs' request, the district court extended the discovery deadline for six months to October 18, 2018.

In June 2018—more than 14 months after the district court entered its initial scheduling, three months after the district court—at Plaintiffs' request—extended the fact discovery period, and less than four months before the close of fact discovery—Juana Perez 43 alone applied for and was granted a second letter rogatory for Mangones. (*See* DE 2309 at 6, DE 2313.) The deposition was not noticed until many months after the close of fact discovery and the district court appropriately quashed the noticed deposition of Mangones as violative of the fact discovery deadline.[45] Once again, Plaintiffs provided no evidence or explanation to

[45] (Appx. at 3441.) Plaintiffs chose not to appeal this order, but nonetheless complain about their belief that "the district court reversed its scheduling order" with respect to deposition taken pursuant to Letters Rogatory. (Brief at 92 n.49.) That is incorrect—Plaintiffs well aware of the existing discovery deadline of October 18, 2018. The district court acted well within its discretion to cancel the untimely deposition—especially because the untimeliness resulted from Plaintiffs' own delay

the district court explaining why the Mangones deposition was not timely scheduled or what efforts they undertook to coordinate the deposition within the fact discovery period, and they do not provide any such explanation to the Court here based on evidence in the record. Indeed, the only evidence in the record suggests that Juana Perez 43 undertook no efforts to schedule the deposition of Mangones in a timely manner.

Thus, Plaintiffs' contention that they could not depose Mangones without "official cooperation" from the Colombian government (Brief at 92) is incorrect and ignores the facts. Even assuming that such "official cooperation" was necessary **before** Mangones left prison, Plaintiffs have provided no evidence that it was required **after** he had been released—and they certainly do not cite to any evidence that Plaintiffs' failure to depose Mangones in the fact discovery period was the fault of anyone but themselves.

Plaintiffs' citation to *Barber v. Page*, 390 U.S. 719, 724-25 (1968), is misplaced. There, the Supreme Court held that, for Confrontation Clause purposes in criminal cases, a hearsay declarant's out of court statements can only be admitted if the prosecutor made a good faith effort to obtain the declarant's presence at trial. *Barber*, 390 U.S. at 724-25. Plaintiffs do not cite to a single case—from this Court

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in seeking the deposition in the first place. *Chrysler Int'l Corp. v. Chemaly*, 280 F.3d 1358 (11th Cir. 2002).

or any other—in which this Confrontation Clause "good faith" exception has been applied in the context of Rule 804(a)(5) unavailability.

Finally, Plaintiffs do not even address the district court's observation that Plaintiffs made a strategic decision to not pursue testimony from Mangones because of unrebutted evidence that Attorney Terrence Collingsworth (who represents Juana Perez 43 in this appeal) paid substantial sums of money, directly or indirectly, to Mangones in exchange for testimony. (Appx. at 7564.) That Plaintiffs made a tactical decision to not pursue the deposition of Mangones is underscored by the fact that only Juana Perez 43—and no other Plaintiff, including Juana Perez 11 or Minor Doe 11A—subsequently sought a letter rogatory from the district court to obtain the deposition testimony of Mangones. (Appx. at 3179; DE 1977; DE 1953.) Similarly, other Plaintiffs in this appeal actively sought to dissociate themselves from Attorney Collingsworth and the law firm of Conrad & Scherer (both representing Juana Perez 43 in this appeal) during the fact discovery period (DE 1953) shortly after this Court affirmed a district court's finding of a *prima facie* showing that Attorney Collingsworth and Conrad & Scherer engaged in witness tampering, suborning perjury, and bribery. *Drummond Co. v. Conrad & Scherer*, 885 F.3d 1324 (11th Cir. 2018). Whatever the merit of Plaintiffs' strategic decision to not pursue a deposition of Mangones, that decision cannot serve as the basis for a finding of unavailability under Rule 804(a)(5).

4. THE CIRCUMSTANTIAL EVIDENCE PROFFERED BY JUANA DOE 11 AND MINOR DOE 11A IS EITHER INADMISSIBLE OR INSUFFICIENT TO CREATE A QUESTION OF FACT.

As explained above, the district court did not abuse its discretion in excluding purported *modus operandi* evidence—accordingly, any claim that "John Doe 11 was murdered [in a way] consistent with the way the AUC were conducting their crimes in the Magdalena region" or that the AUC "had motive to kill him" cannot create a question of fact as to whether an AUC operative killed John Doe 11. (*Cf.* Brief at 92-93.) Plaintiffs' claim that John Doe 11 was killed because he "refused to sell land that could benefit Chiquita and the interests with which the AUC aligned" is wholly unsupported by any facts or admissible evidence and likewise cannot create a triable question of fact.

Nor can Juana Doe 11 and Minor Doe 11A rely on rank hearsay proffered in the form of "[d]atasets such as CINEP" in their attempt to create a question of fact. (Brief at 93.) Plaintiffs do not even argue that these records are in or could be reduced to admissible form for trial. Instead, Plaintiffs attempt to make much of the fact that one of Defendants' experts relied on these "datasets" in forming an expert opinion. (Brief at 93 (citing Appx. at 3858).) But whether one of Defendants' experts relied on these datasets in forming his expert opinion is irrelevant to the question whether Plaintiffs may launder these "datasets" for the truth of the matters asserted through

the "expert" report of Oliver Kaplan. (*See* Brief at 93 (citing Appx. at 4789).) As discussed above, Kaplan has no personal knowledge of any of the "facts" alleged in his report, including the "datasets" now relied upon by Juana Doe 11 and Minor Doe 11A, and those materials could not be considered at summary judgment.

F. DECEDENT JOSE LOPEZ NO. 339 AND THE SEVEN SURVIVING CHILDREN AS PLAINTIFFS

The district court did not error in granting summary judgment on the claims of the seven surviving children of Jose Lopez No. 339. There was no admissible evidence, or evidence that could be reduced to admissible form, in the summary judgment record creating a triable question of fact as to whether an AUC operative killed Plaintiffs' decedent.

Plaintiffs claim that Defendants did not challenge the proffered evidence purporting to describe the circumstances surrounding the death of Jose Lopez No. 339 (Brief at 93), but that is wrong. (Appx. at 3309; Appx. at 7454.) The only testimony relied upon by Plaintiffs on this subject comes from one son of the decedent, who testified that he heard about what happened to his father from his brother, who heard what happened from an unidentified woman. (Appx. at 7454 (citing Appx. at 6472, 56:9-23).) Defendants challenged that testimony as rank hearsay and Plaintiffs did not dispute Defendants' arguments. In any event, the testimony is irrelevant to whether Plaintiffs' decedent was killed by an AUC operative.

Rather, Plaintiffs rely exclusively on an alleged conversation some family members had with Fredy Rendón and what they contend is a judgment against the Elmer Cárdenas Bloc that, notably, is not a judgment against Rendón. As explained above, *supra* at § IV.B, the "judgment" against the Elmer Cárdenas Bloc is inadmissible hearsay not subject to any exceptions and cannot be considered at summary judgment. Thus, the only remaining evidence in the record Plaintiffs contend could defeat summary judgment involves certain family members' accounts of hearsay statements purportedly made to them by Rendón.

After Defendants objected to this evidence as inadmissible hearsay in the district court, Plaintiffs argued below that Rendón's statements at this meeting were admissible as statements against interest pursuant to Rule 804(b)(3) of the Federal Rules of Evidence.

The district court found that Plaintiffs did not carry their burden of showing that Rendón was an "unavailable witness." (Appx. at 7566-67.) Specifically, the district court found that Plaintiffs failed to show that Rendón was unavailable pursuant to Rule 804(a)(5) "because they do not show that they attempted, but were unable, to secure his pretrial deposition testimony due to factors **outside their control**." (*Id.* at 7566 (emphasis added).) The district court did not error in reaching this conclusion. Indeed, similar to Mangones, all evidence is to the contrary: Plaintiffs were given multiple opportunities to depose Rendón and simply chose not

to. The only reason Rendón was not deposed by Plaintiffs in the litigation below is that Plaintiffs delayed in doing so, despite cooperation from both the district court and Colombian authorities.

Plaintiffs in 2015 received from the district court, on an emergency basis, a partial lifting of the then-existing discovery stay to take the deposition of Rendón, who at that time was imprisoned in Colombia. (DE 788.) Plaintiffs did not take Rendón's deposition and did not explain the reasons for this failure to the district court. (Appx. at 7566.) Four years later, after Rendón was released from prison, Plaintiffs were given another opportunity to depose him, but once again failed to do so—and, again, did not explain the reasons for this failure to the district court. (Appx. 7564 n.35, 7566-67.) The district court acknowledged Plaintiffs' previous attempts to depose Rendón but noted that Plaintiffs did not explain why neither deposition was taken. As such, the district court concluded that Plaintiffs' failed to show Rendón was unavailable pursuant to Rule 804(a)(5) of the Federal Rules of Evidence. This was not an abuse of discretion.

Plaintiffs argue for the first time on appeal that the reason Rendón did not appear for his first deposition is because "he sent his attorney to the wrong court and did not appear." (Brief at 95 (citing Appx. at 3134, 4394.) As an initial matter, that explanation was never provided to the district court and Plaintiffs cannot raise that argument for the first time on appeal. And, in any event, one of the documents cited

by Plaintiffs does not support their belated explanations as to why Rendón did not appear for either of his noticed depositions (Appx. at 3134 (a renewed motion for issuance of a letter of request for Rendón merely noting that he did not appear at his prior deposition)), while the other only highlights that Plaintiffs were not diligent in obtaining the testimony of Rendón (Appx. at 4394, 61:2-17 (statement of a Colombian judge that Rendón was "prepared to provide testimony" and imploring Plaintiffs' counsel to schedule a time because, in the words of Plaintiffs' counsel, they wished to take Rendón's testimony). (*See also* Appx. at 4395, 65:8-66:3 (statement of a Colombian judge that it would be incumbent upon the parties to schedule Rendón's deposition).)

Plaintiffs were given every opportunity to obtain Rendón's deposition but failed to do so through their own fault, delay, and failure to coordinate with Colombian authorities. The district court did not commit error, where Plaintiffs provided no explanation for failing to take advantage of the multiple opportunities provided by the district court and Colombian authorities to depose Rendón. *See Acosta*, 769 F.2d at 723 (no error in exclusion of prior testimony of a witness, where the proponent of the evidence did not show that the witness refused to testify or that the proponent tried, but was unable to, obtain testimony of the witness).

G. PLAINTIFF JUANA PEREZ 43A AND DECEDENT PABLO PEREZ 43A

1. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING JUANA PEREZ 43A'S TESTIMONY AS INADMISSIBLE.

The district court found that Juana Perez 43A's testimony purporting to claim that Mangones confessed to the murder of her decedent was inadmissible hearsay that could not be reduced to admissible form at trial. (Appx. at 7564-65.) After exercising its broad discretion to exclude this testimony and other documentary evidence proffered by Juana Perez 43A, the district court granted summary judgment. This was not error.

To support her argument to the contrary, Juana Perez 43A misstates the law, grossly distorts the record, and misrepresents the contents of her own sworn testimony. (*See* Brief at 96-97.) As the district court found, Juana Perez 43A testified that she attended two separate "Justice and Peace hearings." (Appx. at 7564.) At one, Juana Perez 43A was allegedly informed by government officials that Mangones had accepted responsibility for the death of her decedent, but it is undisputed that Mangones was **not** in attendance at that hearing and that Juana Perez 43A did not personally hear or observe Mangones make an alleged confession. (*Id.*; *see also* Appx. at 5661.) Juana Perez 43A testified that at another, separate hearing, she saw Mangones, but that at that hearing she did not speak to Mangones and did not recall anything that Mangones said. (Appx. at 7564-65; Appx. at 5661-62.) Thus, there is no evidence supporting a contention that Juana Perez 43A has personal knowledge

of a "confession" made by Mangones, and the district court did not abuse its discretion in finding her incompetent to testify on the matter. Juana Perez 43A's argument that Mangones took responsibility is a gross misrepresentation of the record. There is no record evidence that Juana Perez 43A ever spoke to Mangones, let alone that he "took responsibility" for the death of her decedent in a conversation with Juana Perez 43A.

2. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING "JUSTICE AND PEACE" RECORDS PROFFERED BY JUANA PEREZ 43A.

The district court excluded as hearsay letters from the Justice and Peace process that were proffered by Juana Doe 43A in opposition to summary judgment. (Appx. at 7565 n.36.) As explained above, the district court did not abuse its discretion in so doing.

3. AFTER EXCLUDING THE PROFFERED TESTIMONIAL AND DOCUMENTARY EVIDENCE, THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AFTER EXAMINING THE ADMISSIBLE CIRCUMSTANTIAL EVIDENCE.

Left with no admissible testimonial or documentary evidence in the record, Juana Perez 43A argues only that the district court should have denied summary judgment because of proffered speculative and circumstantial evidence such as a

claim that her decedent was killed in a manner and place where the AUC and other armed groups were present.

Because the district court did not abuse its discretion in excluding all of this evidence, Juana Perez 43A concedes that summary judgment was proper on her claim.

H. PLAINTIFF ANA OFELIA TORRES TORRES AND DECEDENT CEFERINO ANTONIO RESTREPO TANGARIFE

The district court correctly found that there was no triable issue of fact as to whether Ms. Torres's decedent was killed by an AUC operative. Defendants directly challenged the admissibility of documents, declarations, and testimony proffered by Ms. Torres in the district court. (Appx. at 7445.) Ms. Torres is wrong to argue otherwise. (*Cf.* Brief at 99.) Defendants likewise argued that the substance of the proffered evidence did not create a question of fact as to whether an AUC operative killed Ms. Torres's decedent. (*Id.*) Ms. Torres fails to make any meaningful argument to this Court that the district court erred in finding no question of fact after conducting its evidentiary analysis.

As explained above, the district court properly held that the indictment of Raúl Hasbún was not in admissible form and cannot be reduced to admissible form at trial. (*See also* Appx. at 7538-42.) Thus, that document cannot create a question of fact as to whether an AUC operative killed Ms. Torres's decedent.

None of the other evidence cited by Ms. Torres supports an inference that an AUC operative killed her decedent. (Brief at 99-100.) Ms. Torres conceded that neither she nor her son, who witnessed the killing, know whether the person who killed Ms. Torres's decedent was a member of the AUC. (Appx. at 7446 (citing Appx. at 6425, 35:2-5; Appx. at 6426, 41:22-42:1); Appx. at 7554.) Ms. Torres also conceded that a statement in her son's declaration that his "sister said [the assailants] were paramilitaries" is hearsay that could not be reduced to admissible form at trial. (Appx. at 7377.) Thus, the district court did not error in granting summary judgment on Ms. Torres's claim.

I. PLAINTIFF PASTORA DURANGO AND DECEDENT WAYNESTY MACHADO DURANGO

The district court properly granted summary judgment on Ms. Durango's claims. As discussed above, the Hasbún indictment is inadmissible hearsay that cannot be reduced to admissible form at trial, and in any event does not support Ms. Durango's unsubstantiated contention that her decedent was killed "under Hasbún's directive." It therefore cannot be a basis for reversing summary judgment.[46] As Defendants argued to the district court, the remaining evidence in the record does nothing to link the alleged assailants of Ms. Durango's to the AUC, and Ms. Durango does not argue otherwise.

[46] Defendants challenged the admissibility of this piece of evidence in the district court. (*See* Appx. at 7445.)

Remarkably, Ms. Durango cites to the testimony of **another** Plaintiff with a different claim to support her arguments. (Brief at 100.) But, even if this were proper, testimony that the AUC was active in a geographic area when Ms. Durango's decedent died is insufficient to support a reasonable inference that the specific persons alleged to have killed her decedent were AUC operatives. Indeed, Ms. Durango admitted that she has no personal knowledge of who allegedly killed her son, and nothing else in the record links the alleged wrongdoers to the AUC.

J. PLAINTIFF GLORIA EUGENIA MUÑOZ AND DECEDENT MIGUEL ANGEL CARDONA

The district court properly granted summary judgment on Ms. Muñoz's claims. As discussed above, the Hasbún indictment is inadmissible and cannot be used to defeat summary judgment. Moreover, the proffered circumstantial *modus operandi* evidence is inadmissible.

The deposition testimony upon which Ms. Muñoz relies in her attempt to create a question of fact is full of rank hearsay not subject to any hearsay exceptions. Ms. Muñoz testified at her deposition that her daughter in law, Onelsi Meija, saw two men take the decedent away from Onelsi's house. (Appx. at 9079-80, 48-50.) Ms. Muñoz also testified that Onelsi told her the two men were known as "El Muelon" and "El Tripilla." (*Id.* at Appx. 9080, 51:14-19.) Plaintiffs argue that this hearsay statement is subject to the excited utterances hearsay exception.

Olnesi did not have personal knowledge of the alleged AUC affiliation of the decedent's abductors. It is undisputed that such purported knowledge "was derived from unidentified 'people in the community.'" (Appx. at 7559; Appx. at 4754-55.) Ms. Muñoz does not argue otherwise.

Rather, Ms. Muñoz argues that she "could testify at trial that her daughter-in-law's statements were excited utterances." (Brief at 101.) This argument fails for at least two reasons. First, as discussed above, even if Ms. Muñoz could establish that Onelsi's statements were made "under stress of excitement," Ms. Muñoz identifies no record evidence that Onelsi had personal knowledge that the two abductors were AUC operatives. Indeed, Ms. Muñoz's own evidence shows the contrary. Second, Ms. Muñoz cannot rely on unsworn statements of counsel regarding her anticipated trial testimony to make Onelsi's hearsay statements reducible to admissible form. *See, e.g.*, *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (observing that summary judgment is "not a dress rehearsal or practice run; it is **the put up or shut up moment in a lawsuit**" and a plaintiff cannot avoid summary judgment merely by claiming that evidence not in the summary judgment record could be developed at trial).

It was also not error to exclude the hearsay accounts of the alleged abduction of the decedent. The district court concluded that these statements were not subject to the "excited utterance" hearsay exception because Ms. Muñoz failed to cite any

place in the record revealing "when [Onelsi's statements] were allegedly made to Roberto, or [Ms. Muñoz], and without this temporal link the [district court found] no predicate for admission of the statement as one made while [Onelsi] was 'under the stress of excitement' caused by the kidnapping." (Appx. at 7559.) This was not error—there was no evidence in the summary judgment that Onelsi's statements were made under the stress of excitement of witnessing the alleged kidnapping. *Howard-Bunch*, 2019 U.S. Dist. LEXIS 35024, at *9 n.3; *Wallace v. Wiley Sanders Truck Lines, Inc.*, No. 4:14-CV-142 (CDL), 2016 U.S. Dist. LEXIS 8026, at *4-5 (M.D. Ga. Jan. 25, 2016)).

As a final fallback, Ms. Muñoz argues that the declaration of Roberto, one of her sons, creates a question of fact as to whether an AUC operative killed the decedent. (Brief at 101-102.) The district court did not err in refusing to consider hearsay or claims not based on personal knowledge in its summary judgment decision.

At best, even assuming the admissibility of the hearsay account of Roberto's confrontation with the two alleged abductors, the only inference that can be drawn is that the two identified men were involved in the abduction. (*See* Appx. at 7559.) But no admissible evidence in the record links these two men to the AUC, as the district court correctly found. (*Id.*)

As Ms. Muñoz concedes, and as the district court found, the only basis for Roberto's purported knowledge that the two alleged attackers were members of the AUC is that he was told by Onelsi that "they were recognized by inhabitants of the area" as members of the AUC. (Brief at 101; Appx. at 7560; Appx. at 4755.) Thus, Roberto's statement in his declaration that the two men were AUC operatives was not based on his personal knowledge or observation, his blanket statement to the contrary and Ms. Munoz's argument (Brief at 101-102) notwithstanding. The district court did not error in excluding that portion of Roberto's declaration as hearsay. *Pace v. Capobianco*, 283 F.3d 1275, 1278-79 (11th Cir. 2002).

Ms. Muñoz also argues that Roberto stated in his declaration that "when they committed crimes identified themselves as AUC or paras"[47] and that from this statement a jury could infer that the two alleged abductors of the decedent belonged to the AUC. (Brief at 102.) As the district court noted, this statement is "incomprehensible, and in any event does [not] connect the AUC to this specific crime." (Appx. at 7560.) Indeed, there is no evidence cited by Ms. Muñoz or in the record that the two alleged abductors identified themselves as members of the AUC.

[47] Like Ms. Lemus above, Ms. Muñoz attempts to alter the evidence on appeal, changing the contents of Roberto's declaration by inserting brackets in a quote to attempt to fix an otherwise incomprehensible sentence in order to fit their arguments. The Court should not condone such behavior.

For the reasons above, the district court did not error in excluding large portions of Roberto's declaration and concluding that the remaining statements did not create a triable issue of fact whether an AUC operative killed Ms. Muñoz's decedent.

INDIVIDUAL DEFENDANTS' PRINCIPAL CROSS-APPEAL BRIEF

I. INTRODUCTION

The Individual Defendants[48] filed this contingent cross-appeal out of an abundance of caution. For the reasons explained above in Defendants' Response Brief to Plaintiffs' Opening Brief, this Court should affirm the district court's decision granting summary judgment on Plaintiffs' Colombian law claims against all Defendants, and their TVPA claims remaining against certain Individual Defendants. However, should the Court reverse that decision, it should proceed to consider Defendants' arguments herein.

II. STANDARD OF REVIEW

This Court reviews a district court's denial of a motion to dismiss *de novo*. *W. Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App'x 81, 85 n.3 (11th Cir. 2008). The Court applies the same legal standards in its review of a complaint as the district court. *Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm.*

[48] As used hereafter in this cross-appeal, "Individual Defendants" collectively refers to Cyrus Freidheim, Charles Keiser, Robert Kistinger, Robert Olson, William Tsacalis, and Carla Hills as personal representative of the Estate of Roderick Hills. Chiquita and Keith Lindner are not involved in this cross-appeal, because there are no pending TVPA claims against either party. Similarly, neither Plaintiffs, Maria Emilse Villegas Echavarria nor Genoveva Isabel Borja Hernandez, has any pending TVPA claims that are the subject of this cross-appeal.

of Adjustment CSX Transp. N. Lines v. CSX Transp., Inc., 522 F.3d 1190, 1193-94 (11th Cir. 2008).

III. SUMMARY OF THE ARGUMENT

To state a claim for torture or extrajudicial killing under the TVPA, a plaintiff must allege specific facts of direct government involvement in each specific alleged act of violence in order to satisfy the "state action" element. This requires a plaintiff to allege a symbiotic relationship between a private actor and the government that involves the specific torture or killing of each plaintiff. Allegations of a general relationship between the state and private actor are insufficient to state a claim under the TVPA. The district court erred in holding that Plaintiffs adequately alleged the state action element of their TVPA claims because of the absence of allegations of direct governmental involvement in each specific death alleged.

The district court also erred in finding that Plaintiffs stated a claim under the TVPA under secondary liability theories. Because the TVPA imposes liability against only natural persons, Plaintiffs must first allege a primary violation of the TVPA by a natural person before they can state a claim for deliberated killing or under secondary liability theories. Plaintiffs fail to identify any natural person who allegedly committed a violation of the TVPA. Without any such allegations, each Plaintiff fails to state a TVPA claim.

Finally, the district court erred in refusing to dismiss claims filed in New Jersey against the Estate of Roderick Hills for lack of personal jurisdiction. The Estate did not waive its personal jurisdiction defense. To the contrary, the Estate expressly argued that there was no personal jurisdiction over the Estate in New Jersey, cited the inadequate factual allegations in the operative complaint, and otherwise joined a motion to dismiss and the law cited therein by co-defendants. The district court committed reversible error by refusing even to consider the merits of the Estate's personal jurisdiction defense.

INDIVIDUAL DEFENDANTS' CROSS APPEAL – ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT REQUIRING PLAINTIFFS TO PLEAD SPECIFIC FACTS OF DIRECT GOVERNMENT INVOLVEMENT IN EACH SPECIFIC CLAIM FOR TORTURE AND EXTRAJUDICIAL KILLINGS UNDER THE TVPA.

A. THE TVPA "STATE ACTION" ELEMENT REQUIRES PROOF OR ALLEGATIONS OF A SPECIFIC FACTUAL NEXUS BETWEEN THE ALLEGED STATE ACTION AND THE ALLEGED PARTICULAR ACTS OF VIOLENCE THAT HARMED PLAINTIFFS' DECEDENTS.

To state a claim under the TVPA, a plaintiff must allege, *inter alia*, that an individual alleged to have committed torture or extrajudicial killing was, at the time of his or her actions, acting "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350, note; *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012). In determining the standards for "actual or apparent authority" and "color of law," this Court looks to jurisprudence interpreting 42 U.S.C. § 1983. *Sinaltrainal*, 578 F.3d at 1264. Under this jurisprudence, a private actor may be considered a state actor only if the private actor was an "integral, and indeed, indispensable part of the State's plan[s] . . . ." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723-24 (1961).

"[S]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Academy v. Tenn. Secondary*

Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (internal quotations omitted). Indeed, only in "rare circumstances" will a private party be deemed a state actor. *Rayburn v. Hogue*, 241 F.3d 1341, 1347 (11th Cir. 2001).

This Court has repeatedly held, in the TVPA context, that allegations of a general relationship between the AUC and Colombian government are insufficient to plead state action in connection with a particular act of violence. In *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008), the Court read its prior "state action" decisions as standing for two propositions:

> First, there must be proof of a **symbiotic relationship** between a private actor and the government that **involves the torture or killing alleged in the complaint** to satisfy the requirement of state action under the [TVPA]. Second, a plaintiff may prove that relationship . . . by presenting evidence of the active participation of a single official.

Id. at 1317 (emphasis added). Thus, under the "symbiotic relationship test" as set forth in *Romero*, the alleged relationship must relate to the "conduct at issue" in the complaint, which were the specific killings alleged in the complaint. *Id.* (stating that the "district court did not err" in inquiring "whether the plaintiffs had presented evidence 'that the symbiotic relationship between the paramilitaries and the Colombian military had anything to do **with the conduct at issue** [in the complaint], **which is the killing of the union officers**") (emphasis added).

Moreover, even though the *Romero* plaintiffs contended that they had presented evidence of a close and regular relationship between the AUC and

Colombian government, this Court found that such evidence was merely that of a "general relationship" which was insufficient to establish state action under the TVPA. *Id.* at 1317-18. Despite this evidence of a "general relationship" between the AUC and Colombian government, such evidence did not satisfy the state action element of a TVPA claims because it did not establish "either that state actors were actively involved **in the assassination of the union leaders** or that paramilitary assassins enjoyed a symbiotic relationship with the military **for the purpose of those assassinations**." *Id.* (emphasis added). Because the *Romero* plaintiffs did not present evidence of a symbiotic relationship between the Colombian government and the AUC for the purpose of the particular acts of violence alleged in their complaint, the Court affirmed summary judgment in favor of the defendants. *Id.*

In *Sinaltrainal*, the Court applied the standard articulated in *Romero* to affirm dismissal of the plaintiffs' TVPA claims for failure to allege facts establishing a symbiotic relationship between the Colombian government and the AUC for purposes of the specific incidents of torture and extrajudicial killings alleged in the complaint. 578 F.3d at 1266. The plaintiffs there, like Plaintiffs here, alleged that the Colombian government tolerated and permitted the AUC to exist, and that the Colombian government cooperated with, assisted, protected, and worked in concert with the AUC. *Id.* The Court concluded there that these allegations were insufficient to plead state action because there was no suggestion or allegation that the

Colombian government was involved in, much less aware of, the specific acts of violence against plaintiffs or their decedents as alleged in the complaints. *Id.* at 1259, 1266. The Court should conclude the same thing here.

Thus, this Court has required proof or allegations of **direct** government involvement in **each specific act** of alleged violence in a plaintiff's TVPA claim. In both *Romero* and *Sinaltrainal*, the Court held that "the conduct at issue" or the "subject of the complaint" was the specific alleged injuries and acts of violence against the plaintiffs' relatives—not some sort of general collaboration, campaign, or shared objective between the state actor and private actor. Indeed, not once has the Court found it sufficient to state a claim under the TVPA to allege a generalized relationship between the Colombian government and the AUC untethered from a plaintiff's specific and individualized injuries.[49]

In comparison, this Court reversed a district court's dismissal of Guatemalan plaintiffs' TVPA claims because those plaintiffs adequately alleged state action in *Aldana v. Del Monte Fresh Product, N.A., Inc.*, 416 F.3d 1242, 1249-50 (11th Cir. 2005). In contrast to the evidence in *Romero* and the allegations in *Sinaltrainal* and here, however, the *Aldana* complaint specifically alleged that a state actor—the

[49] Even today, nearly nine years after the district court's initial ruling on state action, Plaintiffs have never cited a single case supporting the district court's conclusion that allegations of generalized collaboration between the AUC and Colombian government, untethered from the Plaintiffs' specific alleged injuries, is sufficient to state a claim under the state action element of the TVPA.

mayor of a town—was an active participant in a private group's acts of violence against the specific plaintiffs' decedents. *Aldana*, 416 F.3d at 1249-50. Because allegations of a state actor's mere presence with or tolerance of a violent private group do **not** establish state action, the Court required and found allegations of direct participation by the state actor in the specific alleged act of violence. *Id.*

The Court's interpretation of the "state action" requirement in the TVPA—that a plaintiff must allege or prove specific government involvement in each specific death or act of violence—is consistent with other Courts of Appeals and district courts that have considered the state action issue in the ATS or TVPA context. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (to establish state action under the TVPA, a plaintiff must establish government involvement in the specific torture or killing); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007); *Estate of Manook v. Research Triangle Inst.*, 759 F. Supp. 2d 674, 680 (E.D.N.C. 2010) (dismissing a TVPA claim for lack of state action where a private security force was alleged to have shot and killed plaintiff's decedent because there were no allegations of state involvement in the specific killing alleged in the complaint); *Jaramillo v. Naranjo*, No. 10-21951-CIV-TORRES, 2014 U.S. Dist. LEXIS 138887, at *25-27 (S.D. Fla. Sept. 30, 2014) (dismissing a TVPA claim where plaintiff failed to allege state actor participation in the specific alleged death of the plaintiffs' decedent).

B. THE DISTRICT COURT HERE ERRED IN NOT REQUIRING ALLEGATIONS OF STATE ACTION WITH RESPECT TO EACH ALLEGED ACT OF VIOLENCE AGAINST EACH OF PLAINTIFFS' DECEDENTS.

The district court here erred by not holding Plaintiffs to this standard. (DE 412 at 45; DE 1110 at 24 ("summarily" disposing of the Individual Defendants' challenge to the sufficiency of Plaintiffs' "state action" allegations and adopting its analysis from DE 412 at 36-45).) The district court deemed sufficient Plaintiffs' allegations of a general relationship between the AUC and Colombian government, without requiring any allegations linking direct government involvement to any of the specific alleged acts of violence against any of Plaintiffs' decedents. As discussed above, this Court has consistently found such generalized allegations—without connecting the alleged state involvement to the specific alleged acts of violence—do not state a TVPA claim. Yet, the district court below found those generalized allegations sufficient to plead state action and concluded that Plaintiffs needed to allege only facts showing a "symbiotic relationship between the paramilitaries and the Colombian military [that] had anything to do with the conduct at issue." (DE 412 at 38.) None of those allegations of a general relationship between the AUC and the Colombian government are tethered to the specific alleged acts of violence against each of Plaintiffs' decedents. (*See id.*) That is not the law.

Had the district court required of Plaintiffs what this Court has consistently required—allegations of direct governmental involvement in the specific alleged

deaths—every Plaintiff's TVPA claim would fail. Not a single Plaintiff alleges a specific factual connection between the purported state action and the specific acts of violence against each of Plaintiffs' decedents.[50] (*See* Appx. at 991, ¶ 274; 1013, ¶ 426; at 1033, ¶ 567; at 1362-63, ¶ 281; at 2563, DE 576, ¶¶ 1239-42; at 2644, ¶¶ 202-05; at 2645 ¶¶ 214-16; DE 167-1 at ¶ 87, No. 07-60821-CIV-MARRA (S.D. Fla.). The district erred in allowing Plaintiffs to circumvent this Court's precedent.

And, despite this Court's clear precedent to the contrary, the district court characterized the "conduct at issue" extraordinarily broadly as the "AUC's campaign of torturing and killing civilians in the banana-growing regions" of Colombia. (*Id.*) The district court was satisfied that Plaintiffs alleged a general symbiotic relationship with respect to this broad "conduct at issue" and concluded that no

[50] Indeed, the few allegations in any of the complaints that do refer to state actors committing acts of violence are wholly unrelated to any of the particular Plaintiffs' claims. By way of example, the district court in its state action analysis credited allegations that members of the Colombian military participated with the AUC in the assassination of five banana workers on February 19, 2000 (DE 412 at 42), but no Plaintiff is bringing a claim on behalf of one of those five workers. Yet other allegations, considered relevant by the district court in concluding that Plaintiffs alleged state action, allege that the Colombian military did not intervene to stop AUC attacks on civilians, shared intelligence, vehicles, and supplies with the AUC, and planned and carried out joint operations. Once again, however, none of these allegations are tied in any way to the specific acts of violence alleged to have been committed against Plaintiffs' decedents. Accordingly, they provide no support for the district court's conclusion that Plaintiffs sufficiently pled state action.

Plaintiff was required to allege "specific government involvement with each individual act of torture and killing of Plaintiffs' relatives." (*Id.*)

The district court erred in so holding.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS STATED A CLAIM FOR AIDING AND ABETTING AND CONSPIRACY LIABILITY UNDER THE TVPA, DESPITE THEIR FAILURE TO IDENTIFY ANY UNDERLYING VIOLATION BY A PRIMARY TORTFEASOR.

Because Plaintiffs allege no *principal* violation of the TVPA, they likewise allege no *secondary* claim that any defendant aided and abetted or conspired in the violation.[51] "[I]t is axiomatic that one cannot aid and abet a crime unless a crime was actually committed." *United States v. Freed*, 921 F.3d 716, 721 (7th Cir. 2019); *see also United States v. Hernandez-Orellana*, 539 F.3d 994, 1007 (9th Cir. 2008) ("In

[51] In 2015, a panel of this Court held in *Drummond* that theories of secondary liability are available for claims brought under the TVPA. Respectfully, several factors warrant reconsideration of this holding. First and foremost, the TVPA's text does not provide for secondary liability, and "an implicit congressional intent to impose . . . aiding and abetting liability" cannot be inferred from "statutory silence." *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185 (1994). Thus, the United States, in a brief to the Supreme Court in May 2020, determined that "[t]he TVPA does not provide for aiding-and-abetting liability." Brief for the United States as Amicus Curiae, *Nestle USA, Inc. v. Doe 1*, Nos. 19-416 and 19-453, 2020 WL 2749081 (May 2020). The Court's holding in *Drummond* further is in tension with the Supreme Court's admonition in *Mohamad* that the TVPA's scope of liability does not extend beyond its text. If the Court finds that Plaintiffs have met their burden to prove secondary liability under the TVPA, the Individual Defendants respectfully submit that the Court should grant *en banc* review to decide whether the TVPA provides a cause of action for secondary liability, as well as what standards should apply.

an aiding and abetting case, . . . the underlying substantive offense [must] actually be completed by someone . . . ."). The same is true of civil tort liability under either an aiding and abetting or conspiracy theory. *See Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1047 n.8 (11th Cir. 1986) ("Of course, for Andersen to be liable for aiding and abetting there must have been a Rule 10b-5 violation for Andersen to aid and abet."); *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (aiding and abetting requires assistance of "the principal violation"); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005) (requiring the plaintiff in a TVPA conspiracy case to prove, among other things, that "one or more of the [underlying] violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy" (emphasis added)).

Because the TVPA imposes liability **"solely against natural persons"** and "does not impose liability against organizations," *Mohamad v. PLO*, 566 U.S. 449, 451, 456 (2012), Plaintiffs must allege a primary violation by a natural person, and they have not. Liability under the TVPA is available for a defined category of wrongdoers, as provided by Congress: "individual[s] who, under actual or apparent authority or color of law . . . subject[] an individual to extrajudicial killing." 106 Stat. 73 § 2. The Act defines an "extrajudicial killing" as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court" that provides indispensable judicial guarantees. *Id.* § 3(a). But as the Supreme Court

implicitly recognized in *Mohamad*, an organization does not commit a "deliberated killing"—only people do.

Plaintiffs' allegations that the Individual Defendants generally assisted or conspired with the AUC **as an organization** therefore fail to state an underlying TVPA violation because "the AUC" cannot be liable under the TVPA. *See Mohamad*, 566 U.S. at 456 ("[T]he Act authorizes suit against natural persons alone."); *see also King v. United States*, 364 F.2d 235, 238 (5th Cir. 1996) ("The principle that one cannot be guilty of aiding and abetting the commission of an offense unless another person has committed a criminal violation seems well-reasoned."). Here, the operative complaints fail to identify any natural person who allegedly committed a deliberated killing. Without alleging a natural person's identity, it is impossible to plead that the natural person had the *mens rea* to commit a *deliberated* killing, that is, one that is "undertaken with studied consideration and purpose." *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011).

All of Plaintiffs' TVPA claims suffer from this basic deficiency. There is no allegation in any of the operative complaints that, if proven, would establish that a natural person committed a killing "undertaken with studied consideration and purpose." *Id.* Indeed, no Plaintiff alleges any facts related to the identity of the specific person who committed the wrongful act under the TVPA. (*See* Appx. at 991, ¶ 274; 1013, ¶ 426; at 1033, ¶ 567; at 1362-63, ¶ 281; at 2563, DE 576, ¶¶ 1239-

42; at 2644, ¶¶ 202-05; at 2645 ¶¶ 214-16; DE 167-1 at ¶ 87, No. 07-60821-CIV-MARRA (S.D. Fla.). In many instances, Plaintiffs' allegations of TVPA violations amount to little more than assertions that the AUC, an entity not subject to liability under the TVPA, killed the decedents. *E.g.*, Appx. at 1306, ¶ 188 ("Peter Doe 139 was killed by the AUC."); Appx. at 2641, ¶ 188 ("John Doe 2 was traveling by bus from his home to the banana farm. The bus was stopped by AUC paramilitaries. The paramilitaries removed John Doe 2 from the bus and executed him."); *id.* at 2642, ¶ 194 ("AUC paramilitaries approached John Doe 4, identified him by name, and executed him.").

These generalized allegations are not enough. In *Mamani*, this Court held that a plaintiff failed to allege a deliberated killing by a natural person even where a complaint narrowed the potential principal violators to a specific group of military sharpshooters and also alleged "sufficient facts to plausibly suggest that the killings were targeted." *Mamani*, 654 F.3d at 1154-55. The Court found the allegations insufficient because "some targeting [is] not enough to state a claim of extrajudicial killing under already established and specifically defined international law." *Id.* at 1155. Those facts are at most "consistent with a deliberated killing," but not a plausible allegation that the killings were "undertaken with studied consideration and purpose." *Id.* Plaintiffs' claims here, which allege only general targeting by the AUC, are even further afield than the deficient allegations in *Mamani*.

Because Plaintiffs fail even to identify the primary tortfeasors, let alone allege facts giving rise to a plausible inference that those persons killed Plaintiffs' decedents with studied consideration and purpose, each and every Plaintiff failed to state a TVPA violation and their claims should have been dismissed. This result comports with this Court's observation five years ago that "TVPA claimants may face significant hurdles in bringing suit" under the TVPA after *Mohamad*, because "'[v]ictims may be unable to identify the men and woman who subjected them to the [the violation], all the while knowing the organization for whom they work.'" *Doe v. Drummond Co.*, 782 F.3d 576, 611 (11th Cir. 2015) (quoting *Mohamad*, 566 U.S. at 460). "Nonetheless," this Court stated, "this is the legislative scheme in which TVPA plaintiffs must operate." *Id.*

The history of this litigation shows the consequences of permitting TVPA claims to proceed to discovery based on conclusory allegations of extrajudicial killings by unidentified primary tortfeasors. After years of costly litigation, Plaintiffs remain unable to establish the most basic elements of a primary TVPA violation, including identifying their decedents' killers and establishing that those persons undertook the killings in a manner that would satisfy the TVPA's "deliberated killing" requirement. Even today, after 12 years of litigation, Plaintiffs can neither prove, as discussed in Defendants' Response Brief, nor even allege the identity of

any specific person alleged to have committed an act of violence against their decedents.

III. THE DISTRICT COURT'S RULING ON THE ESTATE'S PERSONAL JURISDICTION DEFENSE IN THE NEW JERSEY ACTION WAS CLEARLY ERRONEOUS.

Following the passing of Defendant Hills, and substitution of party, his Estate filed a joinder to an earlier-filed motion by other individual defendants, which described the law of personal jurisdiction and stated that "a New Jersey court cannot exercise personal jurisdiction over an estate constituted in the District of Columbia." (DE 912 at 1-2.) That statement addressed the only allegation in the Complaint concerning personal jurisdiction and shifted the burden to Plaintiffs to establish it. Plaintiffs did not respond to that argument, but the district court *sua sponte* found the joinder improper and then announced that this improper joinder constituted waiver of the Estate's personal jurisdiction defense. (DE 1493 at 7, 18.) This ruling satisfied no waiver standard, which requires some intentional and deliberate action. That did not occur below, and the Estate did not waive its objection to personal jurisdiction. The Estate's personal jurisdiction argument must be addressed on the merits.

"[W]aiver of a right . . . must be knowingly and voluntarily made." *United States v. Bushert*, 997 F.2d 1343, 1351 n.20 (11th Cir. 1993); *see also United States v. Olano*, 507 U.S. 725, 733 (1993) (waiver is the "intentional relinquishment or

abandonment of a known right"). A consensus of district courts in this circuit apply this standard to personal jurisdiction. *E.g., Catalyst Pharms., Inc. v. Fullerton*, 2017 U.S. Dist. LEXIS 221258, at *11 (S.D. Fla. Aug. 8, 2017) (defendant did not waive objection to personal jurisdiction where there was "[n]o such voluntary or intentional relinquishment" of that objection); *Thoroughbred Legends, LLC v. Walt Disney Co.*, 2007 WL 9702282, at *4 (N.D. Ga. Dec. 4, 2007) (rejecting argument that defendant had waived its right to contest personal jurisdiction due to administrative error that "was inadvertent, not the result of a change in legal strategy"). Those courts correctly hold that a defendant's waiver of its objection to personal jurisdiction must "arise[] to the level of overt conduct," and recognize that "[s]uch a waiver is not readily found." *Pizarro v. Vida Café, LLC*, 2012 U.S. Dist. LEXIS 198943, at *11 (S.D. Fla. May 10, 2012).

The district court neither cited nor applied any standard of waiver, much less the correct one. Instead, while acknowledging that joinder by one party in another party's motion "enjoys some informal use in" the Southern District of Florida, it relied on a footnote in an unpublished, out-of-circuit district court decision generally criticizing the practice of joinder, and then held that the "the Estate has waived its objection to personal jurisdiction in the New Jersey [forum]." (DE 1493 at 7-8.) Failure to state, much less apply, any legal standard, much less the correct one, constitutes clear error.

In finding waiver, the district court faulted the Estate for not presenting "specific evidence and argument," (*id.*), thus ignoring clear precedent that "[t]he plaintiff has the burden of establishing a prima facie case of personal jurisdiction over a nonresident defendant." *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1268–69 (11th Cir. 2002) (emphasis added). The only allegation in the New Jersey Complaint concerning the Estate was that Mr. Hills was a D.C. resident. The Estate thus cited the inadequacy of this factual allegation, while pointing to law cited by co-defendants, and challenged Plaintiffs to make a *prima facie* showing of personal jurisdiction. This, too, is not waiver and is also a second basis to find that the district court committed clear legal error.

The district court's frustration is understandable. Plaintiffs' failure to sue the Individual Defendants in their states of domicile had caused substantial delay in resolving this decade-old MDL. The death of Mr. Hills and Plaintiffs' decision to sue him in New Jersey rather than in the District of Columbia only introduced more delay. "But the law governs an MDL court's decisions just as it does a court's decisions in any other case." *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020). The Estate presented and did not waive its objection to personal jurisdiction in the New Jersey Action, and the district court's refusal to rule on the merits of that objection was clear, reversible error.

CONCLUSION

For the reasons explained in Defendants' Response Brief, the Court should affirm the district court's grant of summary judgment in favor of Defendants on Plaintiffs' Colombian law and TVPA claims. Should the Court be inclined to reverse that decision, however, it should proceed to consider the merits of the Individual Defendants' conditional cross-appeal. In so doing, the Court should reverse the district court's decision in DE 1110 with respect to Plaintiffs on appeal and dismiss their TVPA claims and reverse the district court's denial of dismissal for lack of jurisdiction over the Estate in DE 1493.

Dated: July 31, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this document complies with the type-volume limit as set forth by the Court because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 30,110 words according to a word count using Microsoft Word, the word-processing software used to prepare the document.

Dated: July 31, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this document with the Clerk of the Court using the DE system on July 31, 2020, which will automatically generate and serve by e-mail a Notice of Docket Activity on Attorney Filers under Fed. R. App. P. 25(c)(2).

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