UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-MD-01916-MARRA

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC.
ALIEN TORTS STATUTE AND
SHAREHOLDER DERIVATIVE LITIGATION
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This Document Relates To:

ATS ACTIONS:

07-60821-CIV-MARRA (*Carrizosa*)
08-80508-CIV-MARRA (*Valencia*)
10-60573-CIV-MARRA (*Montes*)
08-80465-CIV-MARRA (D.C. Action) (Does 1-144/Pérezes 1-795)
10-80652-CIV-MARRA (D.C. Action) (Does 1-976)
11-80404-CIV-MARRA (D.C. Action) (Does 1-677)
11-80405-CIV-MARRA (D.C. Action) (Does 1-254)
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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT IN THE SEVENTEEN REMAINING CASES FROM the INITIAL BELLWETHER CASE SELECTIONS [DE 2773, 2775]
and
ORDER DENYING PLAINTIFFS' CROSS MOTIONS FOR SUMMARY JUDGMENT ON NEGLIENCE *PER SE* AND THE DURESS DEFENSE [DE 2766, 2767, 2769]

THIS CAUSE is before the Court upon Defendants' Joint Motion for Summary Judgment in the seventeen remaining cases drawn from the parties' initial bellwether case selections [DE 2773; 2775]. Having considered the Motion, the Wolf Plaintiffs' Opposition [DE 2878], the non-Wolf Plaintiffs' Opposition [DE 2829] and the Defendants' Replies [DE 2878, 2899], together with the evidentiary record and oral arguments of counsel, the Court grants the motion in part and denies the motion in part for the reasons which follow.

I. BACKGROUND

The procedural history of this Multi-District Litigation ("MDL") and factual background on the evolution of Chiquita Brand International, Inc.'s ("Chiquita") farming operations in Colombia, and its financial entanglements with various Colombian terrorist organizations, including the *Autodefensas Unidas de Colombia* (United Self-Defense Groups of Colombia or "AUC"), has been detailed in prior orders of this Court and is not repeated here except to recap as relevant to the instant motion.[1]

A. September 2019 Summary Judgment Ruling [DE 2551]

On September 5, 2019, the Court granted Defendants' motion for summary judgment in twelve of the fifty initial bellwether cases randomly selected by the parties for full discovery and summary judgment procedures. *In Re: Chiquita Brands International, Inc.*, 2019 WL 11497632 (S.D. Fla. 2019) [DE 2551]. That ruling was premised on Plaintiffs' inability to adduce admissible evidence, or evidence reducible to admissible form at trial, showing a genuine issue of material fact on the issue of AUC involvement in the disappearance or killings of their decedents. Based on this evidentiary deficiency on the link between Chiquita's alleged misconduct in financing the AUC and the murders of Plaintiffs' decedents, the Court entered a final partial summary judgment in favor of Defendants in that initial bellwether set without reaching the Defendants' alternative challenges to the sufficiency of proofs on the other elements of their claims.

The Court *sua sponte* certified its summary judgment ruling for interlocutory appeal under Fed. R. Civ. P. 54(b) [DE 2552], and on September 6, 2022, the Eleventh Circuit reversed various

[1] A comprehensive case history was most recently outlined in the Court's August 23, 2022, Order Granting in Part and Denying in Part Defendants' Motions to Dismiss the Second Amended Complaints in a series of Ohio and Florida cases filed by New Jersey counsel [DE 3135].

evidentiary rulings underpinning the Order and remanded the cases for further proceedings before this Court. *Carrizosa v. Chiquita Brands International, Inc*., 47 F.4th 1278 (11th Cir. 2022). The Eleventh Circuit's ruling in *Carrizosa* informs the Court's current analysis of the summary judgment challenges to the remaining seventeen cases drawn from the parties' initial bellwether case selection. Since the Court ultimately finds many of these claims survive summary judgment on the threshold AUC-link causation issue, based on the teachings of *Carrizosa*, it must now proceed to address Defendants' alternative challenges to the adequacy of proofs on other elements of the claims and to the legal viability of the punitive damage and miscellaneous tort claims.

B. Current Summary Judgment Motions[2]

Defendant Chiquita and the Individual Defendants (Cyrus Freidheim, Carla Hills, as Personal Representative of the Estate of Roderick Hills, Sr., Charles Keiser, Robert Kistinger, Keith Lindner, Robert Olson, and William Tsacalis) move for summary judgment on the Colombian law claims asserted in the seventeen remaining bellwether cases (drawn from an initial bellwether set of fifty), six of which are presented through Attorney Paul Wolf ("Wolf Plaintiffs") and eleven of which are presented through Attorney John Scarola, appearing as liaison counsel for all other Plaintiffs' groups ("Non-Wolf Plaintiffs") [DE 2773]. The Individual Defendants -- save Mr. Lindner – further move for summary judgment on the claims lodged against them under the Torture Victims Protection Act, 28 U.S.C. §1350 ("TVPA").[3]

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[2] Many of the filings in this summary judgment proceeding are redacted versions of documents that were also filed unredacted and under seal. The Court cites to the redacted filings where possible for consistency and clarity. To the extent references to portions of unredacted documents involving non-parties to the litigation are made in this Order, the Court has removed references to the identity of the declarants and has inserted pseudonym placeholders in their stead.

[3] The TVPA claims against Chiquita were previously dismissed, as were the TVPA claims against Mr. Lindner (DE 1110).

Defendants advance the following arguments in support of their current motions:

(1) Plaintiffs have not presented sufficient evidence to raise a genuine issue of material fact on the issue of AUC responsibility for the death or disappearance of each decedent. In all cases, Defendants argue Plaintiffs' testimonial and documentary evidence is largely inadmissible hearsay that fails to create a triable issue of fact linking the AUC to their decedents' killers, thereby defeating the causation element underlying all Colombian law claims against all Defendants. In eight of the seventeen cases under consideration,[4] Defendants further argue that the forced disappearances or killings at issue occurred before Chiquita's first documented payment to the AUC (June 1997), and in some cases even before Chiquita executives first met with AUC leader Carlos Castanos to broker the AUC payment agreement - a chronology they say defeats any possible causal link between Chiquita's alleged misconduct in financing AUC paramilitaries and the harm which befell Plaintiffs' decedents.

(2) Plaintiffs have not presented sufficient evidence to raise a genuine issue of fact on "but for" causation as that element is interpreted and applied under Article 2341 of the Colombian Code, which governs all genre of non-contractual civil liability under Colombian law. On this point, Defendants argue that Plaintiffs have not presented evidence which would allow a reasonable jury to conclude that the deaths or abductions of their family members would

[4] The following abductions or killings of Plaintiffs' decedents occurred before June 23, 1997, the date Chiquita identifies as Banadex's first documented payment to the AUC: (1) Plaintiff Rosamaria Pino/ Decedent Narciso Reales Pina (August 1987); (2) Plaintiff Rubiela Caicedo Guerrero/ Decedent Carlos Enrique Hembra Cordova (April 1995); (3) Plaintiff Maria Delores Roldan Echeverria/ Decedent Javier Jesus Echevarria (March 1995); (4) Plaintiff Luz Celeny Quejada Bejarano/ Decedent Alvaro Uribe Jimenez (September 1996); (5) Plaintiff Elba Tamayo Vahos/ Decedent Miguel Angel Hoyos Garcia (November 1996); (6) Plaintiff Jose Emilio Lizardad Murillo/ Decedent Aureliano Lizardad Mosquera (February 1997); (7) Plaintiff Ana Elg Brand Aguirre/Decedent Milton Percy Santero Brand (March1997); (8) Plaintiffs Alberto Manuel Martinez Herrera and Clorinda Ester Rodriguez Galaraga/Decedent Alberto Martinez Cardenas Decedent (May 1997).

not have occurred "but for" the financial support which Chiquita extended to the AUC (i.e., that the AUC would not otherwise have had the ability to carry out the murders of Plaintiffs' decedents without Chiquita's infusion of capital). As an illustration, Defendants point to evidence of the AUC's enormous financial assets, fueled by its narcotics trade, and the nominal fractional proportion of Chiquita's contribution to that overall income stream.

(3) Plaintiffs have not presented sufficient evidence of "fault" as that element is interpreted and applied under Article 2341 of the Colombian Civil Code. First, Defendants say "fault' in this context requires proof of voluntary action – an element they say is negated by the uncontradicted testimony of Chiquita executives claiming they were pressured to capitulate to the demands of the AUC under extortionate threats of violence to employees and property. Second, they say Article 2341 civil liability, when derived from criminal activity, requires proof of an underlying criminal conviction related to the harm for which civil damages are sought, proof lacking here where no Individual Defendant has been convicted of a crime in connection with the Banadex-AUC payment scheme and where Chiquita pled guilty, in a federal criminal action filed in the District of Colombia, to what is essentially a licensing violation (unauthorized payments to a foreign terrorist organization).

(4) With regard to the Colombian law claims alleged against the Individual Defendants, Defendants argue Plaintiffs have not presented sufficient evidence showing each Defendant's participation in the alleged wrongful conduct, by way of authority to approve or stop the AUC payments, and hence cannot show a triable issue on causation in fact. Further, some of the Individual Defendants assert they cannot be liable for AUC crimes which occurred before or after their tenure at Chiquita. Finally, all Individual Defendants

argue there is insufficient evidence to support imposition of secondary liability either under aiding and abetting or conspiracy theories.[5]

(5) With regard to the TVPA liability alleged against the Individual Defendants, Plaintiffs failed to present sufficient evidence to show that (i) the killings were "deliberate" and "purposeful;" (ii) the killings were "extrajudicial;" or (iii) the killers acted "under actual or apparent color of law" within the meaning of the Act.

Plaintiffs, in turn, seek partial summary judgment on the issue of negligence *per se* [Wolf Plaintiffs - DE 2769] and the affirmative defense of duress [All Plaintiffs - DE 2766, 2767].

II. FACTUAL BACKGROUND [6]

The relevant facts, viewed in the light most favorable to Plaintiffs as nonmoving parties, are set forth below. The volatile political landscape against which Chiquita operated in Colombia is first discussed, followed by a timeline of Chiquita's shifting financial relationships with left-wing guerillas and right-wing paramilitaries over the course of Colombia's long-running civil war;

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[5] Defendants argue Plaintiffs' theories of secondary liability fail as a matter of law because: (i) as to aiding and abetting, there is no evidence any Individual Defendant knowingly aided the natural persons who committed the murders; no evidence that any Individual Defendant and any perpetrator shared a common illegal goal (such as driving the FARC and left-wing sympathizers out of the banana-growing regions), and no evidence any Individual Defendant "substantially assisted" the assailants who killed Plaintiffs' decedents; (ii) as to conspiracy theories of liability, there is no evidence that any Individual Defendant voluntarily agreed with the AUC to achieve a mutually agreed upon illegal goal (e.g. elimination of labor unrest by violent force).

[6] The recited facts are drawn from the affidavits, depositions and documentary evidence submitted by the parties in support of or in opposition to the motion. Although discovery in the initial bellwether case pool has long been closed, the Court granted leave for the parties to submit further evidence generated outside of formal discovery procedures, in support of or in opposition to the instant summary judgment motions, provided that advance notice of an intent to use new evidence was provided timely along with the disclosure of any new evidentiary materials [DE 2681 at 3-4].

Plaintiffs have since filed new third-party affidavits in select cases, and Defendants have objected to the submission of the new evidence from various of these witnesses on the ground their identities were not disclosed timely under Rule 26 requirements, in addition to other substantive objections to the admissibility of the testimony. The admissibility of these declarations and other supplemental documentary evidence is addressed in the individual case summaries outlined below.

a summary of criminal proceedings brought against Chiquita in the United States; and a summary of war crime reparation proceedings involving certain AUC commanders conducted before Colombia's Justice and Peace Commission. Finally, the individual circumstances attending the disappearance or murder of each decedent are separately described in the Analysis section (IV.A.) as context for Chiquita's threshold challenge to the sufficiency of the evidence of an AUC link to each attack.

A. Colombian Civil War - Emergence of Guerillas and Anti-Guerilla Paramilitaries

Colombia has long suffered under the burden of civil war, erupting in the 1960s with the emergence of various left-wing guerilla groups who professed to believe they could bring about social justice through destruction of the capitalist economic structure and elimination of private landowning classes. In the mid-1980s, the notorious Fuerzas Armadas Revoulcionarias de Colombia (Revolutionary Armed Forces of Colombia or "FARC") emerged as the dominant guerrilla group, along with other insurgencies. The FARC rapidly expanded its operations into the rural banana-growing regions of Colombia where it terrorized the countryside with ransom kidnappings, torture, killings, bombings, and mass executions. By the late 1990s, the FARC controlled the Uraba and Magdalena regions, where Chiquita's wholly owned Colombian subsidiary, Banadex, operated. The FARC fueled its operations with enormous amounts of money generated from narcotics trafficking, and to a lesser extent, from extortion and ransom kidnappings. According to Defendants, at its height, the FARC generated an annual income of about $1.2 billion, of which approximately $630 million was derived from the drug trade.[7]

[7][DE 2282-33 at 22-23] [Report of Major General Gustavo Rincon Rivera and Brigadier General Diego Yesid Sanchez Ruiz]. Plaintiffs dispute these numbers and challenge the admissibility of these expert reports.

Opposing the guerillas, self-defense paramilitary groups began organizing,[8] initially with encouragement from the Colombian government[9] which embraced the "*Autodefensas*" as allies in its fight against far-left guerrillas such as the FARC, the Ejercito Liberacion de Nacional (National Liberation Army or "ELN") and the Ejercito Popular de Liberacion (Peoples Liberation Army or "EPL"). The Colombian government also assisted a group of former EPL leftist guerillas who demobilized in the early 1990s, under a peace agreement with the government, and became *Esperanza Paz y Libertad* (Hope Peace and Liberty) or "*Esperanza*," a group which participated in politics. After demobilizing, *Esperanza* members faced attacks from leftist guerillas -- such as the FARC, ELN and EPL-Caraballo -- and rearmed to fight these groups.

Esperanza's armed wing was known as the "*Comandos Populares"* ("CP"), which by 1992 had come to be treated favorably by the National Army and was allowed to move freely throughout

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[8] According to AUC leader Salvatore Mancuso, the Colombian government began training civilians in the use of weapons usually restricted to military use in 1965 and at one point formally authorized the Colombian military to organize and recruit paramilitary personnel to participate in campaigns against guerrilla insurgents [Mancuso Deposition, DE 2346-3 at 18-19].

[9] After paramilitarism was banned in 1991, the Colombian government encouraged the formation and support of private citizen security groups through which financial support to paramilitaries could be channeled. To this end, it enacted Decree 356 of 1994 to create and fund private security groups known as "convivirs" to help fight the guerillas. [Salvatore Mancuso Deposition, DE 2346-3 at 20]. The government encouraged the banana industry to make contributions to convivirs, and Chiquita contributed. [Roderick Hills Deposition, DE 2348-17 at 76] ("All I knew is that – all we knew is that the government urged payments to support self-defense, organize the planters and others to provide funds to support self - to get rid of the FARC.").

Hills learned on or about April 2002 that cash payments were being made to the "self-defenses" through at least two convivirs, but testified he was not alarmed by this because "this began at the request of the Colombian government, and the purpose was to support self-defense forces to keep the AUC out … I don't recall that it was spelled out at [the April 23, 2002, meeting] but if I could cast myself back there, the CONVIVIR was created to support the self-defense force, and whatever was told us at the time, this was part of the self-defense effort requested by the Colombian government." *Id.* at 71-72. Hills acknowledged he was not told the payments were "extortion payments" at that time and does not recall that characterization of payments being used at Chiquita's April 23, 2002 Audit Committee meeting. *Id.* at 72.

Colombia. CP rearmed "legally with the assistance of the National Army and with the sponsorship of the banana plantation owners for the purpose of controlling and protecting the banana plantations, and to defend themselves from the EPL that … were wiping them out." [DE 2346-10 at 21; Ever Veloza Garcia ("H.H.") Deposition]. CP members often served as foremen on banana plantations to protect against guerilla attacks [DE 2346-19 at 23], and Chiquita itself gave "security payments" to *Esperanza* – which by this time had become a legal political group - to guard its farms, appreciating that *Esperanza was* "willing to ensure peace in the farms in which they have the most influence." [DE 2884 -80 at 9; Banadex (1993) Security Report] [DE 2885-13 at 90-93; Charles Keiser Deposition].

By late 1994 or early 1995, a powerful paramilitary group known as the *Autodefensas Campesinas de Cordoba y Uraba* ("ACCU") emerged, founded by Vicente and Carlos Castano (the "Castano Brothers") and rancher Salvatore Mancuso.[10] When the ACCU took over Uraba, it absorbed several paramilitary groups, including the CP (armed branch of "*Esperanza*"). [Deposition of Ever Veloza Garcia; DE 2834-10 at 21-22]. The ACCU seized on the use of convivirs to raise money to finance its military operations under an appearance of legality, and Chiquita, among other banana industry members, started paying the ACCU either directly or through AUGURA [DE 2346-3 at 58-60; Mancuso deposition]; [DE 2346-10 at 40-41; "HH" deposition].

[10] The ACCU placed field commanders in charge of different ACCU "bloques," i.e. military blocs, in the Uraba banana region. Ever Veloza Garcia (a/k/a "HH") commanded the Turbo group, later called the "Banana Bloc," and Raul Hasbun, a banana plantation owner, commanded the Alex Furtado Front of the Banana Bloc [Hasbun Deposition, DE 2346-9 at 15-16; Garcia Deposition, DE 2834-10 at p 37].

The record is unclear as to the point at which Chiquita started paying the ACCU. There is evidence that it was contributing as early as 1995, either directly or indirectly through AUGURA [DE 2346-9 at 29-30; Hasbun Deposition (testifying he met with Banadex or Chiquita representatives regularly between 1995 and 2004)]; [DE 2346-10 at 23; H.H. Deposition].[11] There is also evidence from which it might reasonably be inferred that unrecorded cash payments began flowing before that time: According to AUC leaders Raul Hasbun and Ever Veloza Garcia (a/k/a "HH"), the ACCU solicited and received financial support from all banana industry companies from the moment it first arrived in Uraba in 1994 [DE 2834-10 at 41-42] [HH Deposition] ("[W]hen we arrived, banana growers would pay directly to the Castano brothers … they all paid it") to the time the ACCU was absorbed by the AUC in 1997.

This inference is consistent with testimony given by "HH," who said he regularly met to discuss security issues with Banadex bosses Juan Manuel Alvarado and Victor Buitrago, from the end of 1995 and continuing up through 2004. This again suggests that Banadex's financial ties to

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[11] The parties also dispute the point at which the connection between convivirs and paramilitaries was understood by the banana industry executives authorizing the payments. For the purpose of this motion, with all the record evidence viewed in the light most favorable to Plaintiffs, it can be plausibly inferred that Chiquita executives had actual or constructive knowledge of the connection between the paramilitaries and the convivirs from the outset, and that Chiquita's decision to pay the convivirs was made with appreciation of that connection.

Chiquita's corporate representatives acknowledged that Chiquita started paying the convivirs in 1994, and "[o]ver the next few years" learned that "the monies that were being paid to the convivirs were also being routed to the paramilitary groups." [Deposition of Barbara Howland, Chiquita's Rule 30(b)(6) designee; DE 2838-5 at 168]. And from 1997 forward, payments to the convivirs were recorded on Chiquita's Foreign Corrupt Practices Act summary reports presented to the Audit Committee, which Tsacalis and others received [Tsacalis Deposition at 39, 106].

By the time the AUC organized and absorbed the ACCU in 1997, it was "common knowledge in the region" that the convivirs were AUC [Kaplan Report at 58; HH Deposition at 41-42]. AUC leader HH announced publicly "all the convivirs were ours." In 2000, Chiquita's Audit Committee referred to Castano as a "convivir leader." [Audit Committee Notes, at ATS0002227784]. And Chiquita paid the AUC in Santa Marta through a convivir located in Turbo, as there were no convivirs in Santa Marta because of "political pressure" related to their known affiliation with paramilitaries [Hasbun Deposition at 34]; [Thomas Deposition at 135-37].

the Castano-led paramilitaries well preceded the Castano-Keiser Medellin meeting (early 1997) and the first recorded payment to the AUC in June 1997 [DE 2834-9 at 29-30]. For summary judgment purposes, the Court finds this testimony susceptible to a plausible inference that Chiquita was financially contributing to the ACCU as early as 1994 and proceeds with its summary judgment analysis upon this premise.

In 1997, the ACCU merged with an umbrella organization formed by Carlos Castano called the *Autodefensas Unidas de Colombia* (United Self-Defense Groups of Colombia or "AUC"), a consolidation and national federation of right-wing paramilitary groups. In Uraba, banana grower Raul Hasbun led the "Alex Hurtado Front" of the AUC's "Banana Bloc," while Jose Gregorio Lugo Mangones led the William Rivas Front of the Northern Block. Like the FARC, the AUC generated the bulk of its operational funding from narcotics trafficking,[12] although there were regional variations; the Banana Bloc, for example, purportedly generated 60% of its funding from banana growers. [DE 2884-10, at 8, 20-21].

The AUC grew rapidly, with the support of banana industry money channeled through convivirs. Eventually, the AUC sought to ratify its power in the regions which the FARC controlled, leading to a bloody power struggle in the banana-growing regions of Uraba (Turbo)

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[12] The parties dispute the degree to which AUC funding was generated through narcotics trafficking. Defendants contend the AUC generated an estimated annual income ranging between $286 million and $928 million, between 1997 and 2004, citing to testimony of AUC leader Carlos Castano who admitted that 70 percent of the financing of paramilitary units was derived from narcotics [DE 2772 at 21] [citing expert reports of Rincon and Sanchez, [DE 2282-33, at 23-28; Hasbun Deposition, DE 2282-37 at 5-9; Oliver Kaplan (Plaintiff Expert) Deposition, DE 2282-38 at 146-149].

Plaintiffs dispute the foundation for these numbers, and object to the admissibility of the Rincon-Sanchez expert report. They argue that different AUC fronts generated money in different ways, with some more reliant on banana industry support. They also note that the AUC unit in Uraba (controlled by Hasbun), for example, was funded principally by banana growers.

and Magdalena (Santa Marta) as the AUC moved into these areas between 1995-1997. Whether and to what degree the AUC ultimately succeeded in taking control of the rural areas in the banana-growing zones where Plaintiffs' decedents were abducted and killed is a disputed question of fact.[13]

The AUC was dedicated to elimination of the guerillas, but most of its victims were civilians which it terrorized with routine death threats, extrajudicial killings, torture, rape, kidnapping, forced disappearances and village looting -- tactics intended to deter community support for the guerillas by "*quitarle agua al pez*," i.e., "draining the sea to catch the fish." Between 1994 and 2004, the AUC and its constituent groups carried out hundreds of mass killings of civilians in furtherance of this strategy. It typically targeted persons perceived to share the guerrillas' leftist ideology, such as teachers, community leaders and activists, trade unionists, human rights defenders, religious workers, and leftist politicians, along with anyone else it considered socially undesirable, including indigenous persons, persons with disabilities, persons with psychological problems, drug addicts, prostitutes, and suspected petty criminals.

According to Plaintiffs, Chiquita embraced the AUC's political ideology because the two organizations shared a common enemy in the FARC, which threatened the integrity of the capitalist class structure and the economic interests of Chiquita as a private corporation operating within the

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[13] While Plaintiffs' experts contend the AUC dominated in Uraba and Magdalena at the time of the murders of their decedents, there is testimony from AUC leaders who expressed the belief that the AUC never achieved control of the rural areas dominated by the FARC.

Raul Hasbun, AUC leader of the "Banana Bloc," denied that the AUC had control of the entire Uraba and Magdalena regions between 1997 and 2004, explaining "There were some sectors in the Uraba region whereby the date 1997 we did not have absolute control in the entire region. … in some areas of the region we did have control by 1997, yes. And then, by 2008, we had more military presence, and we almost had the – the general control of the regions in the urban portion. In the rural areas we never managed to have total control of that sector." [DE 2436-9 at 17].

purview and protection of that structure. Defendants deny that the AUC and FARC were driven by conflicts in political ideology and posit instead that the antagonism between these organizations was, at heart, a turf war between competing drug cartels: "[T]here was no ideology there. The ideology was the cocaine. There are no left or right ideologies. They're bandits, terrorists, drug dealers." [DE 2282-34 at 15; Deposition of Brigadier General Diego Yesid Sanchez Ruiz]. Chiquita denies that its relationship with the AUC was profit driven, and maintains that it paid the AUC involuntarily, under extortionate threats of violence, solely for purpose of protecting its employees and infrastructure in Colombia.

B. Interface between the AUC and Colombian State

Although the AUC was banned in Colombia by 1991,[14] and the Colombian Army was under orders to fight and kill outlawed paramilitaries, Plaintiffs adduce some evidence that high-ranking members of the Colombian Army continued to interface and share resources with the AUC, including intelligence, supplies, access to military bases and manpower. As Plaintiffs view it, despite the Government's official ban on paramilitarism, cooperation between the Army and AUC persisted and openly flourished in some areas because the Colombian government relied on the AUC to help push back the FARC, crush social movements, defend the rights of the land-owning capitalist class, and create a politically homogenous population critical to the

[14] The AUC, like all paramilitary organizations in Colombia, was outlawed by the Colombian government. The Colombian Army fought against it from the time it formally organized in 1997 up through the time it demobilized in approximately 2006. The Colombian military was under orders to capture and kill AUC operatives and other paramilitaries and used "maximum combat power" to do so throughout the 1990s [Rincon and Sanchez Report, DE 2282-33 at 36; Restrepo Report, DE 2282-36].

government's own maintenance. [DE 2884-8; Kaplan Report at ¶¶ 19-21] [DE 2884-228; Villaraga Statement at ¶¶ 20, 27, 29].[15]

In return for the AUC's assistance in pushing back the guerillas, the Colombian government allegedly turned a blind eye toward the AUC's criminal activities and allowed it to move freely throughout the country. Army soldiers sometimes moonlighted as AUC operatives, and cooperation between the AUC and Army became so familiar that paramilitaries were often referred to as the "Sixth Division," suggesting the AUC's close integration with the five official divisions of the Colombian Army [Kaplan Report; DE 2884-9 at 15-27]. AUC leader Carlos Castano admitted that paramilitary members and Colombian military officers actively coordinated their efforts.[16] And in Uraba the AUC received logistical support and transportation aid from the 17th Brigade, led by General Rito Alejo del Rio Rojas (1995 to 1997), who notoriously openly collaborated with paramilitary commanders.[17]

Against this backdrop, Plaintiffs claim the AUC and Colombian Army enjoyed a symbiotic relationship well into the late 1990s which was exercised in the regions where Plaintiffs' decedents

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[15] Former AUC member Jesus Ignacio Roldan Perez explained that AUC growth was "done with the support of the Colombian government," because the Colombian state "needed armed groups to fight the guerrillas" and relied on the AUC for back up [Roldan Deposition; DE 2884-223 at 28-29]. Chiquita's security contractor, the Arkin Group, issued an intelligence report dated February 2004 finding, "many elements of the Colombian government officially supported the paramilitaries" until a recent U.S. policy change, and commenting "[t]hat support is now very much unofficial." [DE 2838-71 at 13].

[16] *See also* Alvaro Villaraga Sarmiento Affidavit (political science professor and member of Colombia's National Center for Historical Memory) [DE 2884-93 at ¶¶17- 18] [The "self-defense groups (were) co-opted by the army ... received training and weapons from the army. They also participated in intelligence operations, acts of assassination of community leaders, and acts of violence with the army …. In many regions. the army used the paramilitaries as a vanguard troop, which was first jointed by the paramilitaries and then the army. They looked the same, both in uniform and on the same trucks."].

[17] General Rito Alejo del Rio Rojas was convicted in 2012 for homicides related to his collaboration with the paramilitaries.

were abducted or killed, and that the involvement of that relationship in the killings of Plaintiffs' decedents may be inferred from that geographical overlay.[18] Defendants deny that such a symbiotic relationship existed, and deny that random or rogue instances of collaboration between the AUC and Colombian Army were involved in the civilian attacks which claimed the lives of Plaintiffs' decedents.

Since the alleged AUC-Army interdependence is central to the "state action" element of Plaintiffs' TVPA claims, the Court has attempted a closer examination of the evidence identified by Plaintiffs as probative of this alleged relationship and its connection to the attacks on Plaintiffs' decedents. On this point, in their current Opposition Memorandum, the (non-Wolf) Plaintiffs contend that it is enough for them to show that such symbiotic relationship was involved in the AUC's campaign of killing civilians in the banana growing regions, without a specific connection to attacks on Plaintiff's decedents, since this allegation was held sufficient to withstand a motion to dismiss on the issue [DE 2838-1 at 48]. They say, "all significant allegations" of their Complaint that addressed that issue "are now supported by record evidence," with a simple citation back to their earlier filed Opposition Brief from the first bellwether summary judgment round [DE 2345 at 35-36] (pertaining to a different set of decedent attacks), a document they describe as "cataloging" the evidence of the AUC's "well-known collaboration with the Colombian military." That document, in turn, refers back to Plaintiffs' Amended Statement and Counterstatement of Facts from the first bellwether summary judgment round as source material [DE 2365-1 at ¶¶ 429-

[18] Defendants dispute that a symbiotic relationship existed between the AUC and Colombian government, contending that any instances of collaboration were "rogue" events harshly punished by the Colombian government. With nothing more than allegations of "outlier" collaboration, Defendants contend that Plaintiffs fail to identify a triable issue of fact on the "color of law" element of their TVPA claims.

450], which Statement in turn refers back to various evidentiary exhibits filed under separate indices in the Court file [DE 2838-1 through 2838-136] [DE 2834-1 through 2834-91].

As a threshold matter, the Court disapproves of this "incorporation by reference" approach in the presentation of Plaintiffs' opposition briefing, finding it at odds with Plaintiffs' burden of identifying specific pieces of evidence at specific locations in the record showing the existence of a triable issue on the "state action" element of claim, or put another way, evidence from which AUC action tinged with the "color of law" taken against Plaintiffs' decedents might reasonably be inferred. This circuitous briefing mechanism effectively circumvents the briefing page limitations in place in the current summary judgment proceeding (effectively expanding page limitations unilaterally). It also inappropriately tasks the Court with the misplaced administrative burden of sifting through the massive record to patch together source materials sewn together in multiple docket entries filed nearly four years ago (March -April 2019) in a burgeoning Court docket now exceeding 3,000 docket entries.

Plaintiffs' failure to include argument and evidence addressing Defendants' "state action" challenge to the TVPA claims in their current briefing essentially leaves this challenge unmet, arguably warranting adverse summary judgment on the TVPA claims due to Plaintiffs' failure to meet their burden of production on the issue. However, in the interest of rendering a comprehensive disposition on the merits of all sub-parts of Defendants' current motion, and in light of the reemergence of almost identical issues raised in Defendants' earlier filed motion for summary judgment in the first bellwether set [now back before the Court on remand from the

Eleventh Circuit in *Carrizosa*], the Court elects to address Defendants' evidentiary challenge to the Plaintiffs' "state action" proofs on the merits.[19]

In their prior opposition briefing [DE 2345 at 35-36], Plaintiffs stated they "have plenty of evidence of a symbiotic relationship between the AUC and the government regarding the AUC," and that the allegations of the complaint pertaining to this relationship are now supported by evidence developed in discovery. They catalogued a series of bullet point evidentiary propositions, from which they claim a plausible inference of "state action" involved in AUC attacks on civilians in the banana-growing zones of Colombia generally may be drawn:

(1) That paramilitaries were organized and armed by the Colombian military and participated in (military) campaigns against guerilla insurgents in the 1980.

(2) That Alvaro Uribe, governor of Antioquia, where Uraba is located, authorized the funding, arming, and sharing of information with the convivirs (and hence with the AUC).

(3) That cooperation with paramilitaries "has been demonstrated" in half of Columbian's 18 brigade-level Army units, spread across all the Army's regional divisions.

(4) That members of the Colombian military and police who collaborated with the AUC were rarely prosecuted despite official criminalization of collaboration.

(5) That Senior Colombian military officers, including Commanders Major General Manuel Bonett; Victor Admiral Rodrigo Quinones; Gen. Jaime Uscategui; Gen. Rito Alejo Del Rio, General Mario Montoya, and Captain Carvajal, collaborated with, facilitated, and

[19] In their Reply [DE 2901 at 35], the Chiquita Defendants generally object to the "catalog" of argument and evidence Plaintiff's purport to incorporate in their current briefing [i.e., DE 2345 at 35-36] describing it as a repository of "inadmissible hearsay and unreliable sources" which were "thoroughly discussed and dispelled" in Defendants' earlier filed summary judgment papers on the first bellwether set [DE 2434 at 5-11].

aided and abetted the AUC in committing attacks on civilian populations, extrajudicial killings, and other atrocities [DE 2365-1 at ¶ 442, citing KIRK000009, 32, 37-39, 81, 99]:

(6) That the AUC in Uraba regularly received logistical support and intelligence from the 17th Brigade and other units of Army and conducted joint operations with 17th Brigade.

(7) That General Del Rio was convicted in 2012 for homicide arising out of his collaboration with paramilitaries. That Del Rio purportedly designed and carried out operation "Genesis" in 1997, an instance where the 17th Brigade allied itself with the AUC, and specifically the Elmer Cardenas Bloc, to combat the FARC in Uraba, pursuant to a joint strategy with AUC leaders Castano, Mancuso, "HH" and El Aleman.

(8) That "senior officials" in the Colombian civilian government and Colombian security forces collaborated with the AUC and assisted paramilitaries in orchestrating attacks on civilian populations, extra juridical killings, murders, disappearances, forced displacements threats and intimation. [KIRK 000484, DE 2365-1 at ¶447].

(9) That Colombian security forces in Uraba, with knowledge of high level officials in national government, willfully failed to preempt or interrupt AUC crimes and indeed actively conspired and coordinated activities with AUC; that the Colombian state failed to execute arrest warrants for collaborating military leaders; failed to intervene to stop attacks on civilian populations over a period of days; shared intelligence, including the names of suspected guerilla collaborators; shared vehicles, weapons and munitions; provided medical aid and shared communications and soldiers with AUC;

(10) That the Colombian military delegated tasks to the AUC in instances where the government was unable to arrest or attack civilians legally.

(11) That Castano collaborated with and retained *La Terraza*, a hit squad which tracked and killed intended victims using intelligence gathered by the military.

[DE 2345 at 35-36]. The source materials cited in this earlier briefing included the expert rebuttal report of Plaintiffs' political science expert, Oliver Kaplan, Ph.D.; deposition testimony of Robin Kirk, a former Human Rights Watch researcher; deposition testimony of AUC leaders H.H., Mancuso and Hasbun; and affidavit testimony of an alleged eyewitness to one AUC civilian attack (unrelated to the attacks on Plaintiffs' decedents).

As to the testimony of the referenced AUC leaders, the remarks cited generally went to whether and under what circumstances the Army and AUC cooperated with each other – through sharing resources or conducting joint operations – in their mutual resistance of FARC guerillas. This testimony at best tends to suggest that the Colombian state tolerated AUC aggressions in exchange for the benefit of receiving AUC manpower to buttress an overwhelmed military; it does not explicitly or impliedly suggest the government's involvement in planning or executing joint operations involving attacks against civilians.

As to Plaintiffs' designated "human rights" expert Robin Kirk, a self-described "journalist by trade," this witness acknowledged at deposition she has no personal knowledge of the matters she investigated. She will, however, identify a "great deal of evidence" that she collected as a researcher for Human Rights Watch, drawing from interviews she conducted with AUC operatives (including Carlos Castano); military leaders (including Gen. Rito Alejo del Rio); "priests and mayors;" victims; human rights advocates; other journalists; former guerillas; and "lawyers who know how the system worked" and described the coordination to her, and from data gathered through government agency reports and prosecutorial investigative files. [DE 2348-6 at 88-89, 91]. She testified that she expects to offer expert testimony to "sustain [the] assertion" that the

AUC and ACCU operated in "direct coordination with the security forces" in Colombia through the identification of "facts [she] collected as a researcher," as documented in a Human Rights Watch report appended as an exhibit to her deposition. *Id*. at 86-87.

As to the rebuttal expert report of Oliver Kaplan, Ph.D., it appears Plaintiffs likewise intend to offer Kaplan testimony to confirm the existence of paramilitary and Colombian state cooperation and coordination of military activities, which allegedly sometimes involved civilian attacks, based on research data he has collected including articles published by newspaper publishers in the United States.

Defendants challenged Plaintiffs' opposition proofs on this point as inadmissible hearsay and speculation, and in connection with earlier briefing submitted in the first bellwether summary judgment round (from which Plaintiffs extrapolate to frame their current opposition) the Defendants submitted companion *Daubert* motions challenging the admissibility of the Kirk testimony and Kaplan rebuttal report [DE 2521-5, 2521-6, 2521-7; Chiquita Omnibus Motion in *Limine*]. The Court did not resolve those *Daubert* motions on the merits at that earlier juncture, however, as the issues to which they were directed were largely mooted by the Court's first summary judgment order entered roughly two weeks after the *Daubert* motions were filed. [DE 2551].[20]

The testimony of Kirk and rebuttal report of Kaplan are the central opposition proofs identified by Plaintiffs on the "state action" element of their TVPA claims -- particularly as

[20] Shortly before the entry of the Court's September 2019 summary judgment order, the parties jointly moved for an extension of time to complete briefing on the Daubert motions in light of the then pending Hurricane Dorian [DE 2549]. That motion and the *Daubert* motions were later held moot in light of the Court's disposition of the summary judgment motion on the basis of Defendants' threshold challenge to the sufficiency of proofs on an AUC connection to each attack there at issue.

relevant to the allegation that the AUC and Army coordinated joint attacks against civilians. The *Daubert* motions directed to the proffered testimony of those individuals raise significant and potentially claim dispositive evidentiary challenges which are appropriately resolved as a preliminary matter here, as related to the TVPA claims challenged by the instant summary judgment motions. *See e.g.*, *Barrueto v. Fernandez Larios*, 2003 WL 25782075 (S.D. Fla. 2003) (excluding proffered expert testimony on extrajudicial killings in Copiapo Chile as part of "Caravan of Death" under Pinochet regime from an investigative journalist and from international human rights lawyer under Rule 702); *Glowczenski v. Taser International Inc.*, 928 F. Supp. 2d 564 (E.D.N.Y. 2013) (excluding formal reports of Amnesty International and American Civil Liberties Union offered as "learned treatises" under Rule 803(18) and under Rule 703, noting Rule 703 does not allow an expert to disclose otherwise inadmissible evidence or allow the revelation of inadmissible hearsay).

Because the parties have not addressed the "state action" evidentiary predicate to the TVPA claims in their current briefing, with Plaintiffs instead (improperly) relying on incorporated briefing from a prior summary judgment proceeding involving different attacks, and because the first-filed summary judgment proceeding did not reach these issues and the companion *Daubert* motions relating to them, the Court has determined it will reserve ruling on the threshold TVPA "state action" evidence challenge pending the parties' completion of *Daubert* briefing directed to the experts referenced above. Once the *Daubert* issues are resolved, the Court shall proceed to evaluate whether the totality of evidence on file is sufficient to raise a triable issue of fact on the "state action" element of TVPA claim as related to the attacks at issue in the instant bellwether

cases.[21] As this issue is potentially dispositive of the TVPA claims, the Court will also reserve ruling on Defendants' ancillary challenges to the sufficiency of proofs on other elements of the TVPA claims asserted against the Individual Defendants.

C. Evolution of Chiquita's Farming Operations in Colombia

Chiquita and its corporate predecessors have done business in Colombia for over one hundred years. At times, the company operated under a "purchased fruit" model in Colombia, securing product from third-party growers. In later times, it operated under an "owned fruit" model, harvesting bananas grown from its own farmlands. At other times, it operated under a combination of both methods. Chiquita's transition into an owned fruit production model began in the late 1980s in response to the formation of the European Union and its anticipation of dramatically increased demand from the newly opened European markets. Chiquita purchased financially distressed farms in politically unstable areas, at a discount, on notice of the danger to its infrastructure and employees posed by the escalating civil war and "anti-American" sentiment of the guerilla insurgents who opposed its presence in Colombia.

In approximately 1995, Chiquita consolidated its Colombian operations under a fully owned subsidiary, C.I. Bananos de Exportacion, S.A. ("Banadex") and by the late 1990s, Chiquita, through Banadex, owned 35-40 farms in Colombia and employed over 4,000 employees in Turbo

[21] Chiquita generally argues that Plaintiffs fail to present competent admissible evidence from which the existence of systematic collaboration or "symbiotic relationship" between the AUC and Army may be inferred in the first instance. Defendants also assert that Plaintiffs fail to adduce evidence from which the involvement of any AUC-Army relationship or interface – isolated or otherwise -- in the attacks on Plaintiff's decedents may be drawn under any scenario. They argue any rogue instances of AUC-Army collaborations were aggressively prosecuted and punished by the Colombian government, and that the record reveals no evidence from which the government's knowledge of, much less participation in, AUC attacks against civilians could plausibly be inferred.

(Uraba) and Santa Marta (Magdalena). Chiquita continued to purchase farmland in the Uraba and Magdalena regions of Colombia up through 2002, knowing of the presence of the FARC and other violent guerilla groups, such as the Ejercito Liberacion de Nacional ("ELN") ("National Liberation Army") and Ejercito Popular de Liberacion ("EPL"), and of the guerillas' hostility toward Americans. Given the volatile political environment in which it operated, Chiquita often took title to its farms under the names of third parties because, as Chiquita Vice-President John Ordman put it, leftist guerilla groups were seen as "anti-American" and Chiquita management "assume[d], that to the extent that Chiquita openly owned farms that [it] would become a more likely target of extortion demands." [John Ordman (ATA) Deposition, DE 2348- 27 at 71].

Charles "Buck" Keiser was the Banadex General Manager and a direct Chiquita employee from the 1980s to 2001. Keiser was followed by Jose Luis Valverde from 2001 to 2002, and Alvarado Acevedo from 2002 to 2004. Keiser reported to John Ordman, who had "uninterrupted" "bottom line" operational responsibility for all of Chiquita's operations in Colombia. Ordman, in turn, reported directly to Chiquita Fresh Group President Robert Kistinger, who oversaw Chiquita's global banana operations.

Shortly after Chiquita began purchasing farms in Uraba, in approximately 1988 or 1989, a FARC operative approached a Banadex farm manager demanding a $10,000 payment. This demand was relayed to Banadex General Manager Keiser, who together with John Ordman, relayed it to management at Chiquita's corporate headquarters in Cincinnati. An executive decision to pay the demand was made at the corporate headquarters. This decision was made jointly by Kistinger, Chiquita Controller William Tsacalis and the head of Chiquita's Internal Audit Committee, Wilfred "Bud" White. These individuals understood the payment would not be a one-time transaction and that additional demands would likely follow.

The FARC's demand for money did continue and Banadex did continue to pay. In total, Banadex made at least 57 payments to the FARC between 1989-1999, averaging $32,000 per year for a cumulative total of $220,959.16.[22] Chiquita did not seek intervention from the United States or the Colombian government, nor did it consider leaving Colombia as an alternative to paying the FARC guerillas. According to Ordman and Keiser, the guerilla payments were viewed as the "cost of doing business" in Colombia. For several years the company employed a color-coded system for paying FARC guerillas under a "sensitive payments" schedule which drew from the Banadex general manager's fund [Ordman Deposition; DE 2348-27 at 136-137, 141-142].[23] Chiquita's financial support of the FARC continued into the late 1990s, although the payments ultimately did not buy peace, and guerilla violence – destruction of shipments and burning of packing plants – continued to disrupt its operations.

At some time in early 1997, AUC co-founder Carlos Castano arranged a meeting with Chiquita executives and other local businessmen at a private home in Medellin.[24] Attendees

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[22] According to Chiquita's military experts, Major General Gustavo Rincon Rivera, and Brigadier General Diego Yesid Sanchez Ruiz, by the late 1990s the FARC generated annual income of approximately $1.2 billion, with $630 million of that sum derived from the drug trade [DE 2282-33 at 22-23].

[23] On April 19, 1990, Wilfred "Bud" White memorialized a "sensitive payments" procedure for recording "Managers Fund Expenses" where there was "the need of maintaining an appropriate level of confidentiality about the recipients of the payments." This system applied to company-wide operations and covered a variety of payments. [Deposition of Wilfred White, DE 2282-63 at 32-33, 35]. On December 7, 1999, Controller William Tsacalis approved the opening of a Managers Fund in Colombia to "report sensitive payments beginning in year 2000" in a similar manner. According to Tsacalis, all payments to convivirs were accurately recorded in the company's books and records and held in confidence by the General Manager.

[24]Plaintiffs dispute whether this was the first meeting between Chiquita executives and AUC leaders, and dispute whether this was when Chiquita's financial support of the AUC or its predecessor organization first began [DE 2829 at 4]. Besides the testimony of Hasbun and Garcia, discussed *supra*, they cite to the deposition of Colombian businessman Irving Bernal, who testified on the manner he was summoned to the meeting and the general tenor of the discussion [DE 2282-41, pp. 48-49]. Bernal, however, did not mention the date of the meeting. At a later point in his deposition, when asked when this meeting took place, Bernal responded "[t]hat was somewhere between the years of '97 and '98," [DE 2282-41 at 60] and stated he could not remember the month. *Id.* at 61.

included Banadex's then General Manager, Charles Keiser; its consulting Colombian attorney, Renaldo Escobar; its director of security, Juan Manuel Alvarado; and Colombian businessman Irving Bernal. The AUC's "Banana Bloc" commander, Raul Hasbun, also joined the meeting.

Castano told the attendees that the AUC was preparing to move into the banana-growing region of Uraba, with the intent of pushing out the FARC. He relayed that he "looked forward" to receiving Chiquita's financial support through convivirs, explaining "we are not demanding payments in the way the guerillas were demanding payments, but if you don't pay, no one will protect you." [DE 2838-5 at 145]. It is undisputed that Castano made no explicit threats of violence in delivering this message, although Keiser testified that he interpreted Castano's remarks to mean the AUC would use violence if payments were not forthcoming and that the decision to pay was motivated by fear of retaliatory violence.

Charles Keiser is credited with brokering the agreement under which Banadex paid a flat rate per box of bananas exported in exchange for the AUC's protection against guerilla attacks on its infrastructure and farming operations. Keiser's proposal was approved by Chiquita

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Plaintiffs also cite the deposition testimony of Barbara Howland, Chiquita's Rule 30(b)(6) designee [DE 2838-5 at p. 142-144]. However, in the cited passage Howland makes no mention of the timing of the meeting, but instead simply described the content of Castano's message from the meeting as it was relayed to and understood by management.

Finally, Plaintiffs cite to an internal Chiquita document described as the "Thomas Memo" [DE 2846-22], an unsigned "Memo to File" dated Sept. 2000, bearing a "Colombia Security" subject line, which sets out (at page two) a summary of information purportedly exchanged at the Medellin meeting with Carlos Castano. This memo does not include a source attribution and describes the Medellin meeting simply as an event occurring "about 3 ½ to 4 years ago" – which would have placed it sometime between September 1996 and March 1997.

The Wolf Plaintiffs likewise claim the financial ties between Chiquita and the AUC or ACCU predated the 1997 Medellin meeting. As support for this proposition, they cite to unauthenticated internet articles authored by Michael Evans of the "National Security Archives," a non-governmental organization which purportedly collects and analyzes documents obtained through Freedom of Information Act ("FOIA") requests [DE 2828-8 (Ex. 8) and 2828-9 (Ex. 9)]. Even if this document was deemed reducible to admissible form at trial, it contains no substantive information relating to the date on which Chiquita's financial support of paramilitary groups, including the AUC, began and thus does not inform the instant controversy.

management in Cincinnati, Ohio [Ordman Deposition; DE 2348-27 at 61-62], and Chiquita's first documented payment to the AUC was recorded on June 23, 1997.[25] [Chiquita's Rule 36(b)(6) Designee Deposition, DE 2838-5 at 205.] Chiquita initially made four cash payments directly to the AUC, and then paid through convivirs in Uraba from 1997 through 2004.

The parties dispute the underpinning motivation for Chiquita's decision to pay. Plaintiffs argue Chiquita paid for protection against guerilla attacks, which were proving disruptive to its farming operations and deleterious to its profit margins, and that it paid to quell costly labor unrest which management feared was fomented by the FARC's ties to "Sinaltrainal," a left-leaning agricultural union which was active on Chiquita farms. Defendants, on the other hand, say Chiquita capitulated to the AUC's demands under an extortionate threat of violence and that the payments were made "for the sole purpose of protecting Chiquita's personnel and property from violence and threats of violence by the AUC." [Kistinger Deposition. DE 2282-58 at 222-223]; [Olson Deposition; DE 2282-59 at 187-88]; [Tsacalis Deposition; DE 2282-62 at 179-180]; [Freidhiem Deposition; DE 2282-66 at 47, 71]; [Factual Proffer DE 2282-44 at ¶21]. Defendants deny the AUC payments were motivated by anti-union animus and offer evidence suggesting Chiquita was on good terms with the banana industry union and was generally viewed as a strong leader in good environmental and equitable business governance.

For a time, Chiquita simultaneously paid both the FARC and the AUC. Shortly after Chiquita began paying the AUC, however, FARC attacks on Chiquita's infrastructure escalated prompting Chiquita to slow and eventually cease all payments by 1999. Chiquita continuously

[25] Chiquita draws this date from the "KPMG Sensitive Payment Schedule" [DE 2423-5], an internal ledger purporting to chart all "security" payments made by Banadex to the AUC in Colombia.

paid the AUC, primarily through convivirs, between 1997 to February 4, 2004, making a series of at least 50 payments totaling over $1.7 million, or an average of $242,000 per year [D.C. Criminal Action, Factual Proffer; DE 2282-44 at ¶19]. More than $825,000 was paid after the United States designated the AUC as a foreign terrorist organization ("FTO") on September 10, 2001.

The payments finally stopped in February 2004, approximately a year after Chiquita was advised by outside counsel that its AUC payments were illegal and must stop. In 2003, Chiquita began selling off its Colombian farms to "Banacol." Chiquita sold its last Colombian farm to this company in early 2004, while retaining long term rights to buy banana product from it. This arrangement enabled Chiquita to acquire roughly the same number of bananas previously generated through its owned-fruit operations. [Fact Proffer DE 2282-44 at 19]; [DE 2884-62 at 57-60; Aguirre Deposition]; [DE 2838-5 at 360; Rule 30(b)(6) Designee Deposition]. By May 2004, Chiquita no longer owned any farms in Colombia.

D. Criminal Proceedings Against Chiquita in the United States

On September 10, 2001, the United States State Department added the AUC to its list of foreign terrorist organizations.[26] In early February 2003, a Chiquita employee relayed this information to a high-ranking Chiquita officer. On February 21, 2003, Chiquita's outside counsel advised its Board of Directors that the Banadex payments to the AUC were illegal and should stop immediately [D.C. Factual Proffer] [DE 1405-62 at 12]. In April 2003, Chiquita's Board agreed to self-report Banadex's AUC payments to the U.S. Department of Justice. A federal criminal

[26] The U.S. government had earlier designated the FARC as a foreign terrorist organization in 1997.

investigation followed, leading to the indictment of Chiquita in the United States District Court for the District of Columbia.

In March 2007, Chiquita pled guilty to one count of engaging in transactions with a designated global terrorist organization (the AUC) and paid a $25 million criminal fine. In conjunction with this plea, the government filed a Factual Proffer, signed by Chiquita's counsel, identifying numerous Chiquita executives involved in the decision to authorize payments to the AUC and other terrorist groups in Colombia over the span of more than a decade. Plaintiffs contend this is the first time Chiquita's financial support of the AUC and other Colombian terrorist groups became public and served as their first notice of Chiquita's role in funding terrorist organizations responsible for the murders of their family members.

E. Colombian Justice and Peace Commission Proceedings: AUC Commanders Mangones and Hasbun

By 2004, the Colombian government had begun the disarmament of paramilitary groups, with particular focus on the AUC. To expedite the process, the Colombian Justice and Peace Process, formalized by a law enacted in 2005 [Law 975 of 2005],[27] was established as an alternative to the ordinary Colombian criminal justice system for demobilized AUC members. The process reduced criminal sentences for war criminals who acknowledged their crimes, gave reparations to their victims, and laid down their arms [Affidavit of Emilio Restrepo Villegas, Defense Colombian Law Expert (explaining Justice and Peace Law process and specific proceedings as to Roldan, Rendon, and Mangones); DE 696-4, ¶¶ 3-4].

[27] This law applied to "perpetrators or participants in criminal acts during and in relation with membership in [illegal armed] groups." [DE 696-4, Restrepo Decl. at Ex. 1, quoting Art II of Law 975 of 2005].

AUC leader Jose Gregorio Lugo Mangones participated in that process and was sentenced as a war criminal under the auspices of the Justice and Peace Commission. Three Plaintiffs involved in this proceeding rely on the Mangones "*Sentencia*" as proof of AUC responsibility for the deaths of their decedents - Jose Antonio Olivares Salazar (decedent Pablo Perez 9); Ovidio Alfonso Palma Blanquist (decedent Pablo Perez 72) and Myriam Ramirez (decedent Simon Efran Gonzalez Ramirez).

In earlier summary judgment proceedings, the first set of bellwether Plaintiffs unsuccessfully sought to introduce a portion of the Mangones *Sentencia* under the hearsay exception for a judgment of conviction, Fed. R. Evid. 803(22). On appeal, the exclusion of the limited excerpt from the *Sentencia* was upheld by the Court of Appeals which noted the proffered document "surprisingly" did not include the adjudicative terms, thereby defeating its admission under Rule 803(22).

In the instant summary judgment proceeding, Plaintiffs attempt to reintroduce the Sentencia, supported by a newly filed Apostille [DE 2884-89, at 52-58] for authentication, and a an expanded 50-page excerpt of the 1,000-page *Sentencia*, with English and Spanish translations [DE 2884-89 at 1-51]. Plaintiffs also submit new information from their political science expert, Oliver Kaplan, Ph.D. – proffered as a Rule 1006 Summary Report – which interprets and expounds on the import of the *Sentencia* [DE 2885-131]. In this Report, Kaplan represents he has read the 2015 "Judgment" entered against Jose Gregorio Mangones Lugo (alias 'Carlos Tijeras' (Carlos Scissors) and Omar Enrique Martinez Ossias in the Justice and Peace Law proceedings [DE 2885-131, ¶8] and identifies Section IV of this document, spanning over 200 pages, as a list of the acts and crimes charged against Mangones and Martinez, respectively. As relevant to the instant proceeding, this includes charges relative to the forced disappearance of Simon Efrain Gonzalez

Ramirez (DE 2884-89 at 52-53); the murder of Jose Antonio Olivares Salazar (*id.* at 22); and the murder of Ovidio Alfonso Palma Blanquist (*id.* at 57).[28]

AUC commander Raul Hasbun also participated in the Justice and Peace Commission reparation processes. In an effort to connect him to the deaths of three other decedents -- Miguel Santero Brand, Silvio de Jesus Henao and Daladier Arieza Duarte -- Plaintiffs proffer "Acta 138" or "Record 138" (Ex 178), a charging document generated by the Colombian Prosecutor's Office which lists these individuals, among others, as victims of homicides charged to Hasbun. Plaintiffs proffer this document as evidence of the Colombian Prosecutor's conclusion that Hasbun either directed or participated in the commission of these murders, advancing it is admissible under the public record hearsay exception, Fed. R. Evid. 803(8)(A), either as a document prepared by a government officer under a duty to report, pursuant to Rule 803(8)(A)(ii), or as a document incorporating the factual findings of a legally authorized investigation conducted by the Colombian Prosecutor's Office, pursuant to Rule 803(8)(A)(iii). As a third alternative, Plaintiffs proffer Record 138 under the "business record" hearsay exception, Fed. R. Evid. 803(6), relying

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[28] In the Rule 1006 Summary, Kaplan asserts these crimes were confessed to by the defendants through the "free versions" public audience aspect of the Justice and Peace Process.

Kaplan describes the remainder of the document as consisting of "mainly legal and factual arguments" related to the charges, including a discussion of the historical socio-political context of Colombia's armed conflict, a discussion of "responsibility attributed to the accused" and a recitation of the "range of penalties" assigned for each crime. Kaplan describes 37 rulings of a three-judge panel found at the end of the document, including a panel ruling that the defendants are eligible for benefits under the Justice and Peace Law; a finding that Bloque Norte of the AUC is responsible for criminal acts for which the defendants are charged; a computation of Mangones' criminal sentence at 40 years, and a ruling authorizing the imposition of an alternative reduced sentence of 8 years against Mangones under the Justice and Peace Law.

Kaplan's Rule 1006 Summary also includes Kaplan's summation of what is described as a "Banadex Charging Document" issued in 2018 by Colombian prosecutors, and "Acta 138," described as a transcript of the "Preliminary hearing for the filing of partial and additional indictment and imposition of measure to ensure appearance at trial issued against Raul Hasbun and other paramilitaries" [DE 2884-94 (redacted); 2885-131(unredacted)].

on Professor Sanchez's earlier declaration to establish the authenticity of the document based on his familiarity with the practice of creating charging documents such as Record 138. [Sanchez Dec at Ex 1].[29] As *Carrizosa* held Hasbun Record 138 admissible, under either the business record or public record hearsay exception, it is accepted and considered here, under a totality of evidence approach, in assessing the sufficiency of proofs on an AUC link to the three homicides charged to Hasbun under this document.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, the discovery, affidavits, and evidentiary materials on file show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To discharge this burden, the movant must demonstrate a lack of evidence supporting the nonmoving party's case. *Id.* at 325.

Once the movant has met its burden under Rule 56, the burden of production shifts to the nonmoving party who "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party may not rely merely on allegations or denials in its own pleading, but instead must come forward with specific facts showing a genuine issue for trial. *Id.* at 587.

[29] Plaintiffs alternatively assert all categories of Justice and Peace-related documents are admissible under the residual hearsay exception, Fed. R. Evid. 807(a).

Provided the nonmoving party has had ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. *Anderson v. Liberty Lobby Inc.* 477 U.S. 242, 257 (1986). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the non-moving party is merely colorable, or is not significantly probative, summary judgment may be granted. *Anderson*, 477 U.S. at 249-50.

Under Rule 56(c)(2), a party opposing summary judgment must either produce evidence in a form that would be admissible at trial, or evidence which could be reduced to admissible form at trial. *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012); *Gleklen v. Democratic Congressional Campaign Committee Inc.*, 199 F.3d 1365 (D.C. Cir. 2000). Thus, as a general proposition, inadmissible hearsay is not properly considered in ruling on a motion for summary judgment. *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007) (absent an applicable exception to the hearsay rule, hearsay "counts for nothing" on summary judgment).

A party may proffer hearsay evidence in opposing summary judgment, but only where the proponent can identify a specific witness with personal knowledge of the substantive content of the matter who is available to testify at trial. The possibility that an unknown witness will emerge to provide testimony is deemed insufficient to establish that hearsay statement could be reduced to admissible evidence at trial. *Jones*, 683 F.3d at 1294; *Garside v. Osco Drug Inc*., 895 F.2d 46, 50 (1st Cir. 1990); *Benjamin v. Thomas*, 766 F. Appx 834 (11th Cir. 2019) (rejecting reliance on hearsay account of shooting where proponent did not identify eyewitness regarding events who could corroborate plaintiffs' accounts of event proffered by affidavit).

A court need not permit a case to go to a jury when the inferences drawn from the evidence, upon which the non-movant relies, are "implausible." *Cuesta v. School Board of Miami-Dade County, Fla.,* 285 F.3d 962, 970 (11th Cir. 2002). Nor may the non-movant rely on conclusory allegations based on subjective beliefs to create a genuine issue of material fact. *Leigh v Warner Bros., Inc.,* 212 F.3d 1210, 1217 (11th Cir. 2000). Rather, the nonmovant must present competent evidence on which a reasonable juror could rule in its favor on each element of its claim. Ultimately, the standard for summary judgment is "whether reasonable jurors could find by a preponderance of the evidence that the [nonmoving] party is entitled to a verdict." *Anderson,* 477 U.S. at 252.

IV. THRESHOLD EVIDENTIARY ISSUES

A. Mangones *Sentencia*

In effort to show a triable issue on an AUC link to three of the murders presented,[30] drawing from war crime reparation proceedings conducted before the Colombian Justice and Peace Commission, the non-Wolf Plaintiffs introduce an Apostille and an expanded excerpt of the *Sentencia* issued against AUC leader Lugo Mangones, this time including adjudicative provisions pertaining to the homicides of these victims [DE 2838-126]. At Section "VIII.," captioned "The Court Rules," the *Sentencia* recites that Mangones is a commander of the William Rivas Front of the Northern Block of the AUC; that the William Rivas Front was responsible for the crimes for which Jose Mangones Lugo and his co-defendant, Omar Enrique Martinez Ossias, "are now

[30] The Mangones Sentencia is proffered as evidence of AUC responsibility for the murders of Pablo Perez 9 (Claimant Jose Antonio Olivero Salazar); Pablo Perez 72 (Claimant Ovidio Alfonso Palma Blanquist), and Simon Efrain Gonzalez Ramirez (Claimant Myriam Ramirez), which homicides are included in those charged to Mangones and his co-defendant, Omar Enrique Martinez Ossias as recited in this document [DE 2838-126 at 12-16, 19-20].

convicted;" and that the cases upon which the charges against Mangones and Ossias are based and "for which they are now convicted" were committed "during and because of their membership in the so-called "William Rivas Front" of the Northern Block of the AUC.

Section VIII prescribes a prison term of 480 months for Mangones "upon having been found guilty of the crimes of: illegal use of uniforms and insignias; aggravated homicide; homicide of a protected person; attempted homicide of a protected person; forced disappearance; torture of a protected person; simple kidnapping; forced displacement of a civilian population; extortion or receipt of arbitrary contributions; acts of terrorism; threats; damage to third-party property; obstruction of health and humanitarian tasks, and arson, some of these acts constituting grave infractions of International Humanitarian Law, as well as grave violations of Human Rights, as detailed in the substance of this judgment." [DE 2838-126 at 19-20].

Defendants object to admission of the Apostille and expanded *Sentencia* as untimely filed (contemporaneously with Plaintiff's Opposition Brief). Defendants also object that Plaintiffs' failure to supply the entire document in its original Spanish formulation is fatal to the Court's consideration of its contents as evidence in this summary judgment proceeding, citing *Legacy Entertainment Group v. Endemol USA*, 2015 WL 12838795, at *4 (M.D. Fla. 2015) (a party "must attach the entirety of the document, not just excerpts or summaries, because it is not possible to determine a document's authenticity or accuracy without a complete picture") (citing *Horsely v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002)). They do not, however, challenge the trustworthiness of the document or accuracy of the translation provided.

Since Plaintiffs' reliance on the Mangones *Sentencia* and Apostille in this proceeding was reasonably anticipated, and since these documentary proofs are not "new" to the case but rather are directed at curing deficiencies identified in earlier-filed summary judgment procedures, the

Court overrules the timeliness objection. It also overrules the objection to the filing of a partial excerpt, as Defendants do not claim or show that the excerpted provisions cannot properly be understood outside the full context of the entire *Sentencia*.

As to its substantive terms, Defendants complain the expanded excerpt is not properly admitted as a "judgment of final conviction," under Fed. R. Evid. 803(22), because AUC involvement in each victim's death is not a "fact essential" to the "judgment" given the absence of adjudicative findings pertaining to Mangones' liability for each specific homicide charged. The Court rejects this objection, finding it at odds with language in the decretal provisions of the *Sentencia* reciting that Mangones stands "now convicted" of the homicides charges based on his commission of the charged offenses during and as a result his membership in the Northern Bloc of the William Rivas Front, the AUC division which was assigned responsibility for the crimes.

The Court interprets this language to represent an adjudication of Mangones' guilt for the charged crimes based on his leadership role in the AUC, and particularly, his command over the William Rivas Front, under the equivalent of "command responsibility" secondary liability, and without regard to his personal participation in, direction of, or even knowledge of the fact of the executions. This adjudicatory provision is enough, for summary judgment purposes, to establish a triable issue on Mangones' responsibility for (and hence AUC involvement in) the murders of these three decedents.

Defendants protest that war criminals like Mangones had every motive to accept responsibility for crimes committed within the broad geographical areas under their command – to maximize leniency in sentencing under the Justice and Peace Law – regardless of their actual involvement in the crimes (even at a command responsibility level), suggesting that the *Sentencia* is not necessarily proof of Mangones responsibility for these murders under primary or secondary

liability theories. That Mangones may have offered up a plea, as a matter of expediency and without regard to actual responsibility or criminal liability, is simply another plausible inference from the evidence that Defendants remain free to advance at time of trial.[31] For summary judgment purposes, Mangones' acceptance of responsibility for these murders permits, as a reasonable inference, that he was involved at a primary or secondary liability level of engagement and this is enough, standing alone, to establish a triable issue on AUC involvement in these murders.

B. Prosecutor Letters

Some Plaintiffs also proffer letters generated by the Colombian National Prosecutor's Office, under the public record exception to the hearsay rule, as further evidence of an AUC link to the deaths of their decedents. The Wolf Plaintiffs rely on correspondence appearing on letterhead of the Colombian Prosecutor Office or "Fiscalia" addressed to claimants in five cases: Rubella Caicedeo Guerrero [Ex 14]; Maria Delores Echevarria [Ex 15]; Luz Bejarano [Ex 16]; Elbo Vahos [Ex 18]; and Rosamaria Pino [Ex 26]. As to "Fiscalia" letters proffered by the Wolf Plaintiffs, the authors of the letters do not purport to identify any individual or group claiming responsibility for the murder, but simply acknowledge that the matter is under investigation as a homicide.[32] Thus, the substantive content of the documents is not probative as to identity of victims' killers and does not serve to generate a triable issue of fact on AUC involvement,

[31] *See e.g.*, *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414,449 (E.D. N.Y. 2013) (terrorist organization statement taking responsibility for death not reliable as statement against interest because there was ulterior incentive to take responsibility); *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 542 (E.D.N.Y. 2012).

[32] In one case, the referenced prosecutorial correspondence was apparently illegible to the translator – resulting in a blank page. *See* DE 2828-30, at 2; page marked "Not Translated" "Not Readable" - Document WOLF 000941 (re: Javier De Jesus/claimant Maria Delores Roldan Echavarria).

rendering it unnecessary for Court to determine the admissibility of the documents under any hearsay exception.

In the Non-Wolf Plaintiff group, the Claimants for decedent Pablo Perez 9 submit "Exhibit 59," correspondence on letterhead of the National General Prosecutor's Office, or "Fiscalia," which recites that Jose Mangones "accepted his involvement" in the homicide of Jose Antonio Olivares Silgado in "testimony hearing" of June 9, 2001 [DE 2838-49 at 2]. Plaintiffs contend the letter is admissible under the public record hearsay exception, either because it reflects a matter personally observed by the reporter (prosecutor) while under a legal duty to report pursuant to Rule 803(8)(A)(ii), *or* alternatively, because it sets forth "factual findings" of a "legally authorized investigation" conducted by the prosecutor for purposes of admission under R. 803(8)(A)(iii). As to "Exhibit 59," a question presents as to whether the reference to Mangones' purported acknowledgment of responsibility in testimony before some unidentified body is inadmissible "hearsay within hearsay." The Court, however, ultimately need not resolve this question because it has concluded, as discussed above, that the Mangones *Sentencia* standing alone is sufficient to create a triable issue of fact on AUC involvement in this homicide.[33]

C. ***Modus Operandi* Circumstantial Evidence – Expert Opinions**

In *Carrizosa,* the Court of Appeals considered the admissibility of the opinions proffered by the Non-Wolf Plaintiffs "soft science" political science expert, Oliver Kaplan, Ph.D., *Carrizosa*, 47 F.4th 1278, 1319-1321 (11th Cir. 2022) The Court of Appeals summarized the

[33] This document is addressed to Plaintiff as the surviving spouse and recites "We noticed the homicide of XXXXX (name of decedent) event occurred on 2001-06-09," and states: "In a testimony hearing, Jose Gregorio Mangones Lugo, alias Carlos Tijeras, a member of the northern block of the AUC, accepted his involvement in such crime." Defendants object to admission of this document on grounds of authenticity and hearsay.

primary branches of information on which Dr. Kaplan relied in forming his opinion that the AUC was "probably" involved in the murders of Plaintiffs' decedents,[34] and concluded that this evidence, viewed in conjunction with Kaplan's review of the history of the AUC and its rise to power in the banana-growing zones, his study of the *modus operandi* of the AUC, and his confirmation of the claimed manner of death of Plaintiffs' decedents (by reference to armed conflict databases, paramilitary testimonies and news sources) was sufficient to establish a triable issue on AUC involvement in the attacks on most of the Plaintiffs' decedents from the first bellwether Plaintiff set (finding a triable fact issue in eight of the twelve cases in that set).

As to the testimony of the Wolf Plaintiffs' expert, Daniel Ortega, a former special agent with the FBI previously involved in the FBI's investigation of Chiquita's payments to the AUC [DE 2325-4], the *Carrizosa* court reached a different conclusion. Although Ortega had likewise examined temporal and geographic evidence to conclude that the violent crimes committed against six specified victims were "probably all committed by paramilitaries," given the circumstances of the murders he reviewed, and government statistical data on murders committed in the Uraba region, the Court of Appeals upheld exclusion of Ortega's ultimate opinion on responsibility for the homicides.[35]

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[34] The three general categories of information on which Dr. Kaplan relied in forming his opinions, included "temporal overlap" of the violence against bellwether victims and general patterns of AUC violence; the consistency of geographic patterns of bellwether victims' cases compared with the geographic spread of crimes committed by paramilitary groups; statistical data regarding killings and massacres in the bellwether victims' municipalities during the relevant time period.

[35] The Court of Appeals found Ortega's statement attributing a "vast majority of murders in Uraba" committed between 1995 to 1997 to the AUC to be impermissibly based, in part, on "hearsay statements of counsel [which] absent independent investigation or verification, is not the type of evidence which an expert like Mr. Ortega would reasonably rely on to form an opinion." It also found an "analytical gap" between the data on which Ortega relied and his ultimate opinion on identity of the killers of six victims, observing Ortega did not adequately explain how a 38% attribution of paramilitary-sourced murders allowed him, based on his expertise, to opine that the decedents were probably murdered by the AUC. Third, it noted that the record on appeal did not contain a complete copy of Ortega's

In the current proceeding, the Wolf and Non-Wolf Plaintiffs again draw on the opinions of their respective experts as evidence of AUC involvement in the deaths of their decedents, asking that these opinions be considered together with the circumstantial evidence (testimonial) attending the manner of death, and documentary evidence generated in Justice and Peace Commission proceedings in assessing whether evidence as a whole establishes a triable issue on an AUC link to the attacks.

V. ANALYSIS

The Court's examination now turns to the circumstances of the individual bellwether cases at issue, beginning with the threshold question of whether Plaintiffs can show a triable issue of fact on AUC involvement in the death or disappearance of each decedent. Finding multiple cases which meet this threshold evidentiary burden, the Court next assesses Defendants' alternative challenges to the sufficiency of evidence on: (1) the causation and fault elements of Colombian law governing negligence-style claims; (2) the Individual Defendants' personal involvement in decision-making regarding Chiquita's funding of the AUC, for purposes of establishing a causal link between each individual's alleged misconduct and the financial fueling of the AUC; (3) the existence of a symbiotic relationship between the AUC and Colombian state, and the involvement of that relationship, if any, to the disappearances and homicides at issue, for purposes of satisfying the TVPA "state action" element of claim. Finally, the Court assesses Defendants' legal challenges to the viability of the punitive damage claims and miscellaneous tort claims asserted under Colombian law.

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expert report, rendering it difficult to assess the availability of any other information which may have related to the sufficiency of his opinions. *Carrizosa*, 47 F.4th *a*t 1321-1324.

A. CAUSATION-IN-FACT: SUFFICIENCY OF EVIDENCE OF AUC INVOVLEMENT IN THE DEATHS OR DISAPPEARANCES OF PLAINTIFFS' DECEDENTS

In their threshold causation challenge, Defendants contend Plaintiffs do not identify admissible evidence, or evidence which may be reduced to admissible form at trial, from which a jury could reasonably find that Plaintiffs' decedents were abducted or killed by AUC operatives – as opposed to FARC guerillas, some other guerilla group, organized crime operatives, the Colombian Army, or random killers. To assess this contention, the circumstances attending the disappearance or death of each decedent are summarized below, followed by an analysis of the sufficiency of proofs offered on the issue of AUC involvement in each abduction or killing.

1. Plaintiff Rosamari Mechuca Pino: Decedent Narciso Reales Pena

(Jane Doe 135/Peter Doe 135) (D.C. Action – Does 1-144/Pérezes 1-795)

Bellwether Plaintiff Rosamari Mechuca Pino (Jane Doe 135) brings claims for the death of her free union partner, Narciso Reales Pena (Peter Doe 135), who was killed in Turbo on **August 2, 1987,** while walking home from work with his friend, Carlos. Plaintiff testified at deposition that Carlos visited her home later that evening and reported that "paramilitaries" traveling on foot accosted the two men on the street and opened fire. Her husband was killed instantly, while Carlos escaped [DE 2828-25 at 31-37]. Carlos told her the attackers "had a uniform, a police uniform, [but] they weren't police officers." Carlos himself was killed a month later. As to how Carlos might have known that the assailants were "paras," Plaintiff explained, "[e]verybody knows when somebody is a para and when they are not [because] over there you know the paras." [2828-25, p. 33].

Defendants challenge the entirety of Plaintiff's secondhand account of the event as inadmissible hearsay; and, even assuming its admission under a hearsay exception, they

alternatively object to that portion of Carlos' recounting of the military dress of the assailants, and his opinion they were not military but were "paras," as incompetent speculation since there is no evidence that the killers identified themselves or that Carlos had some other objective basis for drawing this conclusion.

As to the general hearsay challenge, the Court finds that Plaintiff's relay of Carlos' account of the shooting is admissible under the excited utterance hearsay exception. To qualify as excited utterance, an out-of-court statement must be: (1) responsive to a startling occasion; (2) related to circumstances of the startling occasion; (3) made by a declarant who appears to have had an opportunity to personally observe the events; and (4) made by the declarant before there has been time to reflect and fabricate. *United States v. Brown*, 254 F.3d 454, 458 (3rd Cir. 2001). The statement need not be "contemporaneous with the startling event," but it need be contemporaneous with "the excitement caused by the event." *Id*. at 460.

It is not clear how many hours passed between the time Carlos witnessed the killing and reported it to the Plaintiff, but it is undisputed that the message was conveyed later the same day. Given the intense emotional reaction predictably triggered by the witnessing of a murder and near-death experience of the narrator, the Court is satisfied that a contemporaneous psychological reaction to the event overwhelmed Carlos' capacity to reflect upon what he had witnessed and that his accounting of the event to Plaintiff offers the indicia of reliability recognized by this hearsay exception. *See e.g.*, *Brunsting v. Lutsen Mountains Corp*., 601 F.3d 813, 818 (8th Cir. 2010) (permitting "excited utterance" testimony of witness to near-fatal skiing accident who rushed to scene where injured party was unconscious, bleeding from the mouth, turning blue and believed to be near death); *Fischer v United States*, 2022 WL 2287922 at *6 (E.D. Mich. 2022*)* (noting that excited utterance exception does not contain specific time limitation; relevant inquiry is whether

the statements are within the traumatic range of startling event and whether the declarant had opportunity to fabricate). The Court also accepts Carlos' testimony about the military-style clothing of the assailants as part of his description, in an agitated emotional state, of his perceptions at the scene of the murder.[36]

The Court finds the substance of Carlos' statement as to the manner of execution and military-garb dress of the assailants, which matches the AUC's *modus operandi*, and location of the attack in Uraba, a location dominated by the AUC sufficient to show a triable issue on paramilitary involvement in the murder of this decedent. The more difficult question, given the timing of this murder, is whether the evidence raises a triable issue on the assailants' association with *a paramilitary group funded by Chiquita*. As Defendants note, the AUC was not formed until 1997, and its predecessor organization, the ACCU, was not formed until 1994. There is some evidence suggesting the banana industry made payments directly to the ACCU (or routed payments through AUGURA) as far back as 1994, from which it may be inferred that Chiquita was a contributor as far back as 1994. But this particular death occurred in 1987-- well before the emergence of the ACCU or AUC. Thus, the key question on the causation cut-off date is whether the summary judgment evidence is sufficient to create a triable issue of fact on Chiquita's financial ties to paramilitary groups *before* 1994.

[36] On the other hand, the Court finds Carlos' reference to the assailants as "paras" to be inadmissible lay opinion, in the nature of a lay opinion on a criminal "gang" affiliation. Rule 701 permits lay opinion testimony only to the extent those opinions or inferences are (a) rationally based on the perception of the witness; (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011). Plaintiff does not establish such a foundation as she does not show how Carlos' impression or opinion on the attackers' "para" status is one "rationally based" on his physical observations of the assailants.

In a general response to Defendants' temporal causation challenge, the Wolf Plaintiffs simply state that Chiquita was paying both the AUC "and guerilla groups" before 1997, without identifying which groups were allegedly paid and when [DE 2828-1 at ¶ 169], implying Chiquita's history of financial ties to terrorist groups in general preceded 1997. As evidentiary support, Plaintiffs cite to a Chiquita internal document recording payments to various guerilla groups in the 1990s, showing an entry for payments made between 1991 to 1993 to "Hope Peace and Freedom" (a/k/a *Esperanza)*, a demobilized guerilla group which, as discussed in history above, included a branch which rearmed to fight the guerillas with support of the Colombian state.

This evidence at best, liberally read with all remotely plausible inferences favoring Plaintiff, suggests Chiquita had financial ties to paramilitaries (or groups which appeared to function in similar fashion to state-sponsored private military groups) dating back to 1991; this is not enough to support an inference that Chiquita payments to paramilitaries dated back to the 1980s and not enough to plausibly link this 1987 assassination to a paramilitary group on Chiquita's payroll. Accordingly, the Court shall grant summary judgment on this claim due to Plaintiff's failure to establish a triable issue on a Chiquita-funded paramilitary link to the death of this decedent.

As to all other Plaintiffs in this current bellwether set whose decedents were killed between 1994 and 1997 - after formation of the ACCU but before its merger with AUC and Chiquita's first recorded payment to the AUC – there is evidence from which Chiquita's financial support of the AUC's predecessor (ACCU) dating back this far may be inferred. Accordingly, the Court rejects Defendants' temporal causation challenge in these cases, discussed bellowed, and continues with an evaluation of the evidence attending the circumstances of each attack and plausibility of an inference of AUC involvement on the basis of that evidence.

2. Rubella Caicedo Guerrero (Doe 1764): Decedent Carlos Enrique Himba Cordova (*Does 1-2146*)

Rubiela Caicedeo Guerrero brings claims for the death of her free union partner, Carlos Enrique Himba Cordova, whose bullet-ridden body was found on the side of a road near her home on or about **April 24, 1995.**[37] The decedent, a street fruit vendor, previously worked for a banana company on a farm known as Bodega.

Plaintiff testified that three days before the discovery of her husband's body, seven armed men came to her home asking for her husband by name. She could not recall anything else imparted by the men and did not recognize them [DE 2828-19 at 12-13] [DE 2774-3]. She said her husband left with the men and that she heard nothing further about his whereabouts until a relative (an unidentified now-deceased cousin) told her a few days later that his body had been found on the side of the road. She said she personally saw the body on the road as she travelled by bus to report the crime to the authorities. Plaintiff testified she does not know who the abductors were,[38] but believes they were AUC members because of "comments" made by unidentified persons in her area [DE 2828-19 at 14-16]. Plaintiff has since been recognized as a war crime victim eligible for compensation by Accion Social.

Chiquita's threshold causation challenge on this claim – based on the timing of the murder as one pre-dating the Medellin AUC-Banadex meeting and first recorded AUC payment- is

[37] Plaintiff's opposition brief identifies a December 1996 date of death (citing to the Ortega report), but the source for that date is not clear. At deposition, Plaintiff said the death occurred April 21, 1993 [DE 2774-3 at 23], while her Complaint identifies April 25, 1995, as the date of death. The death certificate, which is part of the summary judgment record, recites an April 24, 1995, date, and this is the date of death assumed for purposes of this motion.

[38] Plaintiff's Opposition Brief states that the armed abductors "identified themselves as AUC in the presence of his family" [DE 2828-14], citing to the Ortega Report [2828-14 at p. 11], but there is no record support for this assertion. To the contrary, Plaintiff testified at deposition that she did not recognize the men, who simply asked for her husband by name. She did not claim that the men identified themselves.

rejected. As noted, there is record evidence that Chiquita indirectly funded the ACCU, the AUC's predecessor, through its participation in AUGURA as early as 1994 and this death occurred after that time. When the AUC leader testimony on timing of the formation and funding of the ACCU is viewed in conjunction with undisputed evidence that Chiquita was a member of AUGURA and had employees sitting on its board, a jury could reasonably infer that Chiquita indirectly supported the ACCU through monetary contributions made by AUGURA, with knowledge and intent that the money reach the ACCU and at least constructive knowledge of the heightened risk of terrorism against innocent civilians posed by the contributions.

This leaves, as the relevant causation issue in this and all remaining bellwether cases here presented (all involving deaths post 1995), the question of whether Plaintiffs can show a triable issue of fact on the assassin's association with the AUC or another paramilitary group enjoying financial ties to Chiquita. In this particular case, Plaintiff has identified admissible evidence showing that the assailants visited the victim's home three days before his death and asked for him by name – evidence one might reasonably infer this was not a random killing but a targeted one (perpetrated with use of ACCU/AUC kill lists). The gruesome public staging of the corpse on a public highway is also consistent with what Plaintiffs' terror experts have identified as a unique paramilitary terror strategy designed to deter to other would-be guerilla sympathizers. Viewed together, the Court finds these pieces of circumstantial evidence sufficient to create a triable issue of fact on AUC involvement in this murder. The Court accordingly denies Defendants' threshold summary judgment challenge on causation.

3. Plaintiff Maria Delores Roldan Echevarria: Decedent Javier Jesus Echevarria Roldan (Does 1-2146)

Plaintiff Maria Roldan Echevarria brings claims for the disappearance of her seventeen-year-old son, Javier Jesus Echevarria Roldan. Mr. Roldan was abducted from Plaintiff's home in Apartado (Uraba) on **March 14, 1995,** by two unknown individuals traveling on motorcycles wearing full face-mask helmets. Her son's body was never recovered, although family members found remnants of the shirt he was wearing at the time of his disappearance, garments they described as showing "signs of torture."

Plaintiff testified at deposition [DE 2828-20] that she did not recognize the abductors but believed them to be a man and woman. She believes they were AUC representatives, based on her understanding that the AUC "was around there" and "doing a lot of damage in that location," and based on a "a rumor among the people" that the AUC was responsible for the disappearances of other people in the neighborhood around the same time [DE 2772-4 at 38].

Plaintiff's repetition of neighborhood rumors about AUC paramilitaries in the area is sheer hearsay. However, her testimony that the abductors wore full mask motorcycle helmets and traveled by motorcycle -- a mode of transportation purportedly favored by the AUC – is admissible as *modus operandi* evidence. In addition, her testimony describing how the men removed her son from the home implies that her son was targeted by his killers– negating idea of a random killing. This circumstantial evidence, viewed in context of location of the abduction in area dominated by AUC, is sufficient to raise a triable issue on an AUC link to the abduction.

The Court does not view the testimony relaying other family members' description of the son's clothing as admissible, where there is no indication that the persons allegedly viewing the garment will be available to testify at trial. It likewise excludes from consideration the proffered

letter from the Apartado Prosecutor, where the referenced packet of supporting documents in which the letter was supposedly included does not contain the correspondence. Instead, it reveals a blank document bearing the notation that WOLF Document #941 is "not translatable" and "not readable." Finally, Plaintiff includes a copy of her application for benefits to Accion Social (WOLF000944), reciting, in the box for "description of event," "An unknown man and a woman arrived at my house and took him against his will 15 years ago. We do not know anything about him since then." [DE 2828-30 at 5]. That this claimant applied for war crime reparations is not viewed as probative of an AUC connection to this attack, an inference plaintiff apparently attempts seeks to draw as implicit in the agency's processing of the request.

However, the Court finds the circumstantial evidence of AUC *modus operandi* linked to the murder and the location and targeted nature of the murder sufficient to support a reasonable inference of an AUC or other Chiquita-funded paramilitary link to this attack and hence finds a triable issue on causation. Accordingly, Defendants' threshold challenge to the sufficiency of proofs on the element of causation is denied.[39]

4. Plaintiff Luz Celeny Quejada Bejarano (Doe 1512): Decedent Alvaro Uribe Jimenez (Does 1-2146)

Luz Celeny Quejada Bejarano brings claims for the death of her husband, Alvaro Uribe Jimenez (Decedent 1512), a political office worker who held a leadership role in the Union

[39] In this case, and all others where *modus operandi* evidence is proffered and accepted as circumstantial evidence of an AUC link to the subject attack, the Court, following *Carrizosa*, assumes the admissibility of the *modus operandi* evidence for summary judgment purposes. However, this ruling is without prejudice for Defendants to renew their objections to the admissibility of *modus operandi* evidence under a Rule 403 balancing test at time of trial, an exercise which the Court deems premature at this juncture. *See e.g. Crye Precision LLC v. Bennettsville Printing*, 2017 WL 10978562 (E.D.N.Y. 2017)("[W]hile it is not unheard of to exclude evidence under Rule 403 at the summary judgment stage … normally the balancing process contemplated by that rule is best undertaken at the trial itself.")(citing *Adams v Ameritech Serv. Inc.*, 231 F.3d 414, 428 (7th Cir. 2000); *S.E.C. v. McGinnis* 2015 WL 5643186 at *15 n. 12 (D. Vt. 2015)("[T]he reason for excluding evidence that is unfairly prejudicial (because it may inflame the jury) is simply not present at the summary judgment phase.").

Patriotica ("UP") – a leftist political party co-created by the FARC. He was shot and killed in Apartado on **September 26, 1996**.

Plaintiff, a pediatric nurse, did not witness the killing. She was working at a hospital when coworkers came to tell her that her husband had been killed. She testified that a co-worker had warned her and her husband, three days earlier, that two men on motorcycles had come to the area looking for him. Her husband told her they must have been "the paras," who he also suspected were responsible for threatening him a few weeks before when he brought food to homeless people sheltered at a nearby coliseum. As he left, "some men" allegedly taunted him, "Is it hurting you a lot? Because it's going to be your turn soon" [DE 2828-21, at. 13-14, 39-45]. Shaken by this exchange, he told his wife later that day, "If they kill me, it's the paras."

Plaintiff testified that her husband worked as a UP labor advocate and educator who routinely visited the farms to talk to workers about their rights and the labor laws. She said the AUC was committed to eliminating members of the UP, something she learned from her patients, including guerillas, Colombian Army members, and AUC operatives, who freely identified themselves to her and discussed their objectives. She further testified that her employer allowed her to hold a wake for her husband at the hospital, as a security measure, and that one of her husband's colleagues was stopped on his way out by men who warned him he would be next.

After the murder, Luz was fearful that she was being followed by the AUC and might be the next person targeted. She asked a local priest, Father Isaias Duarte, whom she understood to have AUC contacts, to approach the AUC on her behalf and disclaim any involvement on her part in her husband's political activities. Five days later, Father Duarte told her he had talked to AUC leaders and that she should not worry, as they knew all about her – including the fact she was a

mother of two small children and worked as a hospital nurse -- and assured him that she was not viewed as a UP member or an AUC target.

The Court disregards Plaintiff's description of her conversations with Father Duarte as hearsay finding no path for admission under any hearsay exception. However, Luz's relay of her conversations with co-workers – who advised that men had come looking for her husband by name a few days before his disappearance – is potentially admissible as an excited utterance, as is her relay of comments made by her husband describing the taunting from men he encountered while assisting at a homeless shelter.

The Court therefore considers, as circumstantial evidence of an AUC link, that the victim was targeted before his death; that he belonged to a union group favored by the FARC and a natural target of the AUC; that the victim was threatened by people he believed to be "paras" while offering aid to homeless people, a social underclass also targeted by the AUC. Viewed cumulatively, this is sufficient circumstantial evidence to raise a triable issue of fact on AUC involvement in this death and the Defendants' motion for summary judgment on the element of causation is accordingly denied.

5. Plaintiff Elba Tamayo Vahos (Doe 1848): Decedent Miguel Angel Hoyos Garcia (Does 1-2146)

Plaintiff Elba Tamayo Vahos brings claims for death of her companion, Miguel Angel Hoyos Garcia, who was killed on **November 1, 1996,** when he was ambushed at the butcher shop where he worked in Apartado. Owners of nearby businesses heard shots at about 6 a.m. and saw the attackers flee. Plaintiff was not a witness to the killing. The victim's brother, Leonardo, later told her about the killing, relaying information he had obtained from the victim's co-workers.

Plaintiff testified she believed the "banana group" was responsible for the killing because they were the ones "pillaging the country" at that time and because the "Justice and Peace told us that they had signed those cases." [2828-22, at 4- 5]. She does not know if the police investigated this murder, and she never received compensation from any government agency for the death. In effort to establish an AUC connection, Plaintiff points to evidence that the butcher shop was located near a banana farm and that the victim had worked on three banana farms in the past. In addition, Plaintiff notes that the attackers took the victim's identification card, allegedly a signature mark of the AUC used to document an assassination.[40]

This case does not match the AUC's *modus operandi*, as described by Plaintiffs' experts, and no AUC-driven motive for the killing is suggested. Nor does Plaintiff adduce evidence showing how the removal of an identification card from the body of a murder victim is a *modus operandi* uniquely associated with the AUC. Killers often take steps to obscure the identity of their victims, as a means of slowing or impeding an investigation into the identity of the killer, and the Court does not view this item as circumstantial proof of AUC involvement. As this case presents as a random attack on a tradesman having no apparent affiliation to any group targeted by the AUC, it does not match the AUC *modus operandi*, and it does not appear to implicate a homicide charged to any AUC leader in proceedings under the Colombian Justice and Peace Law

[40] As noted above, this Plaintiff also relies on correspondence from Colombian prosecutor's office, but this document does not attribute killing to any person or group: It simply states the case was under investigation as a homicide, with accused "not known" and case assigned to the national prosecutor's office. [DE 2828-31 at 4, 10]. Even assuming without deciding whether the document is admissible under the public record hearsay exception, the contents do not support an inference of AUC involvement in the murder.

processes, summary judgment is properly entered in favor of Defendants due to Plaintiffs' failure to come forward with adequate causation proofs linking the homicide to the AUC.

6. Plaintiff Gladys Nomery Munoz Correa: Decedent Ruben Dario Munoz Correa

Gladys Munoz Correa is the sister of the victim, Ruben Dario Munoz Correa. Mr. Correa's body was found shot on the road three days after a group of men in civilian dress approached the family farm, Finca La Popala, on or about December 22, 1998, and asked for her brother by name [DE 2828- 27]. An unidentified neighbor later told Plaintiff he witnessed a man in a white pickup truck tie and blindfold the victim and put him in his truck, but this person did not disclose his name and admonished Plaintiff not to say where she learned this information. *Id.* at 17, 23. Plaintiff said another gentleman came the following day and told her the body of her brother was dumped near a school, *id*. at 23, while a third gentleman later came to her home and said the FARC killed her brother. *Id.* at 24. The Colombian Army retrieved the body, but there was no government investigation into the death.

Plaintiff testified she believed Chiquita was involved in the death because it "paid armed groups outside of the law in Colombia," a fact she learned from the news. *Id*. at 27. In her opposition brief, she attempts to link the AUC to the murders with citations to Exhibits 8 and 9, unauthenticated internet articles from a non-governmental website which do not link any terrorist group to this specific homicide.

There is competent evidence that the victim was targeted by name ahead of the killing, and that his body was displayed in a public place after the killing. However, there is no evidence of AUC *modus operandi* in play, no evidence that the victim belonged to a group especially targeted by the AUC, and no evidence that the Colombian government charged any AUC operative with

this homicide. The limited circumstantial evidence of predeath targeting and public display of the corpse is deemed insufficient to create a triable issue on AUC involvement in this homicide.

7. Plaintiff Jose Emilio Lizardad Murillo: Decedent Aureliano Lizardad Mosquera (*Montes*)

Plaintiff Jose Emilio Lizardad Murillo brings claims for the disappearance of his son, Aureliano Lizardad Mosquera. Mr. Mosquera was abducted from his home on **February 11, 1997,** by men dressed in civilian clothing with no visible weapons. Plaintiff testified that the men drove a truck, marked with the "Chiquita Brand" logo, and that his son left without a struggle or argument when the men commanded "let's go." [Depo 2772-8, at 30-31]. Plaintiff never saw his son again and his body was never recovered. [DE 2772-8, at 53-54].

The next day, two friends of his son told him they saw the van after it left his home and asked his boy where he was going. Plaintiff said the truck was known as "a butcher of people" and "caused a lot of disasters in Turbo." He added "[t]he idea that I have is that that truck of that company took him away in that truck in Uraba, had great fame of, of let's say taking people away and killing them." *Id.* at 53. He acknowledged that he did not have a good view of the truck from his vantage point inside the house and could not recall the color or any details of the markings other than the words "Chiquita Brand." Plaintiff did not know the men who took his son away and testified he would not be able to recognize them now. However, local authorities advised him that the disappearance would be investigated, and he offers an unauthenticated photocopy of a document in Spanish in support of this assertion.

Chiquita contends Plaintiffs' observations about the disappearance of his son could not reasonably be construed to infer an AUC link to the abduction, nor an inference that Chiquita had any involvement in the episode. The Court agrees that this testimony is insufficient to support a

plausible inference of AUC involvement in the event. In reaching this conclusion, the Court observes, first, that the circumstances of the disappearance do not match the *modus operandi* described by Plaintiffs' expert. Second, no AUC motive for the abduction related to the victim's occupational or social status is apparent.

Finally, the fact that the vehicle used to transport the victim was described as bearing a "Chiquita" logo does not raise an inference of AUC involvement. Plaintiff does not allege or offer proofs that Chiquita directed or was behind the abduction, or that it indirectly facilitated the disappearance by knowingly and voluntarily lending part of its transportation fleet to AUC operatives. The circumstances of the abduction, as relayed by the father, simply do not match the Plaintiffs' theory of the case, as alleged in the Complaint, even if the testimony regarding the labelling of the truck is accepted as true for purposes of the instant motion. The Court accordingly grants Defendants' motion for summary judgment in this case due to Plaintiffs' inability to come forward with proofs from which an AUC connection to the abductors might reasonably be inferred.

8. Plaintiff Ana Elcy Brand Aguirre: Decedent Milton Percy Santero Brand

Plaintiff Ana Elcy Brand Aguirre brings claims for the death of her son, Milton Percy Santero Brand. Mr. Brand was a farm worker who was killed on or about **March 3, 1997,** near Finca Kativos, a farm near Turbo. Plaintiff did not witness the murder but learned of its circumstances from her daughter-in-law, who relayed information she received through unidentified co-workers of Plaintiff's son. The co-workers reported seeing five unknown men calling the son out by name, throwing him to the ground, tying him and carrying him off [DE 2772-9 at 7, 16, 32]. One of the assailants, a man nicknamed "Che," was described by the coworkers as a "paramilitary" *Id.* at 37. Plaintiff testified she believed him to be an AUC operative because

"they are the ones who operated around there," and her daughter-in-law also believed this to be the case. *Id.* at 38. Her son's body was later discovered nearby by unknown persons. *Id*. at 35.

Plaintiff's testimonial description of this incident is based on double hearsay, derived from secondhand accounts of unidentified witnesses to the abduction and murder, without any indication as when the witnesses relayed the information. Without data on the timing, the excited utterance hearsay exception is not available to meet the first hearsay level; and no hearsay exception is identified to overcome the second layer attending the daughter in law's transmission of the information to Plaintiff.

However, there is evidence that this episode occurred in Turbo, which, according to Plaintiff's expert, was then a site of heightened AUC activity. Additionally, the homicide of this victim is one charged against Raul Hasbun, as reflected in Hasbun Record 138, a document which has been held admissible under either the public record exception or business record exception to hearsay rule. The Court concludes that Acta 138, with its attribution of this homicide to Raul Hasbun, viewed in conjunction with Dr. Kaplan's Rule 1006 report, is sufficient to create a triable issue of fact on AUC involvement in this death.

9. Plaintiffs Alberto Manuel Martinez Herrera (Juan Perez 11A) and Clorinda Ester Rodriguez Galaraga (Juana Perez 11B): Decedent Alberto Martinez Cardenas

Plaintiffs bring claims for the death of their father and free union partner, who was killed by a shot to the head on **May 30, 1997,** at the La Juliana farm. The son was 9 years old at the time of the death, and the wife was living in Barranquilla at the time her partner was killed. The wife did not witness the death of her partner and testified at deposition that there were no witnesses to the shooting [DE 2772-12 at 35]. The wife also testified she believed the AUC was involved based

on reports from her brother-in-law, who relayed information learned from a cousin who worked on the farm where the killing occurred. *Id*. at 53.

Plaintiff wife now supplements her earlier deposition testimony with the proffer of two new third-party affidavits from witnesses who state they were present at the La Juliana farm in 1997 when Alberto Martinez Cardenas was taken out of the building and shot [DE 2743]. Witness 1 ("I.M.J.") [Affidavit dated 11-10-20; DE 2774-14], says he saw Cardenas being taken away from the banana farm packinghouse by heavily armed men in military clothing, some wearing ski masks and others using scarves or clothes to cover their faces. One of the men asked the workers for identification documents, and then took away two people, Alberto Martinez Cardenas and a man named Jesus. Five minutes later, Witness 1 heard gunshots. He waited a moment and then went to the scene of the shooting where he saw Cardenas' body and observed the victim's head "was totally destroyed by rifle shots." [DE 2774-14 at 2-3.] He testified the attackers did not say they were paramilitaries but commented that paramilitaries "dominated that sector."

Plaintiffs also offer the affidavit of Witness #2 ["W.A.M.P."] [Affidavit dated 11-20-20; DE 2774-15], who attests that he was also present at the Finca La Juliana packinghouse at the time of the killing. Witness 2 testified he saw armed men wearing military camouflage enter the building with a list in hand, which they used to check against worker identifications. Witness 2 saw the assailants take two men away, including Cardenas, after which he heard gunshots. He ran out to the road in fear and later identified the body of the victim in the morgue in Cienega. He likewise averred that paramilitary were "in control" of the Cienega area at the time [DE 2774-15 at 3-4].

Defendants object to the introduction of the two new witness affidavits, first on the ground that Plaintiffs did not disclose these witnesses in earlier, now-closed discovery proceedings, depriving Defendants of an opportunity to test the witnesses' recollections through normal

discovery avenues. Plaintiffs argue that the use of voluntarily-secured affidavits in opposition to the instant summary judgment motion is authorized by the prescriptions of the Court's Second Amended Global Scheduling Order [DE 2681 at 3-4], which denied Plaintiffs' request to reopen discovery in this bellwether group, while recognizing that any party obtaining evidence "outside of the formal discovery process" which they wished to use in support of or in opposing to summary judgment remained free to do so, provided that a copy of the material was timely provided to all other parties within three days of receipt and in any event by no later than November 16, 2020.

By this order, the Court did not intend to limit the use of evidence generated outside of formal discovery to documentary – as opposed to testimonial - evidence, as advanced by Defendants. The Court thus overrules Defendants' objections to use of the newly acquired affidavits as being violative of prescribed discovery deadlines.

This does not, however, resolve the issue of the admissibility of this testimonial evidence. The descriptions of the attack offered by Witness 1 and Witness 2 do constitute out-of-court hearsay accounts. The witnesses may be competent to testify about their firsthand observations, but their descriptions of the packinghouse attack are inadmissible hearsay unless Plaintiffs show how the testimony might be reduced to admissible form at trial. This the Plaintiffs fail to do. Witnesses 1 and 2 state only that they "can testify under oath to the facts described herein."[41] They do not testify they are willing *and able* to testify at trial.

Declarations used to oppose motions for summary judgment must "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). This means a party proffering hearsay

[41] The affidavit of Witness 1 [DE 2772-14] states in relevant part: "I provide this declaration based on my personal knowledge and I can testify under oath to the facts described herein." The affidavit of Witness 2 [DE 2772-15] contains this same statement.

evidence via affidavit must show the substantive content of the affidavit could be presented through direct testimony at trial, i.e., that the affiant is available to testify at trial. *Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012); *Murphy v. County of Yavapai*, 2006 WL 2460916 at *5 (D. Ariz. 2006) (striking affidavit and reports of witnesses as hearsay where witnesses would be unavailable at trial); *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 465 n. 12 (3d Cir. 1989).

In this case, were Witness 1 and Witness 2 available to testify at trial, their affidavits would meet the requirements of Rule 56(e). Facially, at least, their affidavits are based on personal knowledge and relate to admissible evidence. However, these witnesses are both identified as Colombian nationals and neither claims an immigration status which would allow them to travel to the United States to give trial testimony. Given the recent assertions of other bellwether Plaintiffs regarding extraordinary delays in the processing of travel visa applications facing new applicants occasioned by backlogs created by the Covid-19 pandemic, it appears highly unlikely these witnesses would be in a position to obtain the necessary visas to legally enter the United States to testify at trial even if they were otherwise willing to do so. [42]

Thus, Plaintiff has not shown that the affiants are "competent to testify to the matters contained" in their affidavits. Without the availability of either witness to testify and undergo cross-examination either at trial or in pretrial deposition, the Court cannot credit the substantive

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[42] Notably, in a series of recently filed motions seeking protective relief against Florida depositions now pending before the Court, a different set of bellwether Plaintiffs contend they are unable to secure visas for entry into the United States for at least two to three years due to application processing delays occasioned by the Covid-19 pandemic [DE 3170, 3176, 3186, 3213].

Unless Witness 1 and Witness 2 already hold valid visas for travel- and there is no indication this is the case- the Court would expect that these witnesses face the same travel impediments. If Plaintiffs contend witnesses are currently able to legally enter the United States to give trial testimony, the Court is open to reconsidering this point upon submission of supplemental proofs on their immigration status.

content of the affidavits as anything other than hearsay and must exclude it from consideration in this proceeding. *See Bortell v. Eli Lilly & Co*., 406 F. Supp. 2d 1, 8-9 (D.D.C. 2005) (without affiant's availability to testify and undergo cross-examination either at trial or pretrial deposition, affidavits necessarily excluded as hearsay); *Metro Enterprise Corp. v. United Technologies International*, 2005 WL 2300382, at *7 (D. Conn. 2005) ("[T]he parties agree that Wei is unavailable to testify because he resides and works in Taiwan and will not voluntarily appear at the trial. His letter therefore remains inadmissible hearsay unless plaintiff can show that it meets an exception to the hearsay rule."). *Cf. Coffman v. Battle*, 614 F. Appx 445, 448 (11th Cir. 2015) (allowing consideration of hearsay statement where declarant is presumably available to testify at trial and has made no other contradictory statements on subject) *with Santos v. Murdock*, 243 F.3d 681, 682 (2d Cir. 2001) (disallowing consideration of affidavit of nonparty witness at summary judgment stage where proponent did not show that witness would testify in support of plaintiff's case at trial).

This leaves only a newspaper article concerning the attack as the only other evidence proffered by Plaintiffs to illustrate the circumstances of the murder. On this item, Plaintiffs supply a copy of what appears to be an excerpt from a newspaper captioned "Sucesos" – "El Informador" marked "31 de Mayo de 19997," along with an English translation prepared by a member of Plaintiffs' law firm. Neither the name of the newspaper or date of the publication is provided, but it supplies a narrative translation stating in material part that a group of thirty "strongly armed men" responsible for the attack had called off the names of Jose Perez, Francisca Bolonos and Alberto Martinez from a list, separated them from the group of other employees and then killed them by gunshot. Albert Martinez is identified as "a worker who was victim of the violence at the

Zone" and who suffered "several gunshots in different parts of his body." [DE 2838-45 at 2 (Ex 55)].

Plaintiffs contend this document is self-authenticating as a news article under Fed R. Evid. 902(6), and that its substantive content may be considered under the ancient document exception to the hearsay rule. Fed. R. Evid. 803(16). The Court disagrees. Newspaper articles are "classic, inadmissible hearsay" and are "unusable to defeat summary judgment" as a general proposition. *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005). Although the document may be self-authenticating, under Fed. R. Evid. 902(6), the substantive contents of the article otherwise remain inadmissible hearsay when offered to prove the truth of the matter asserted because the contents are not sworn or certified and the author is not subject to cross examination. *United States v. Habteyes*, 356 F. Supp. 3d 573, 586 (E.D. Va. 2018) (statement in ancient document that quotes another declarant or was made on basis of another declarant's statement is attributable to outside declarant and constitutes hearsay within hearsay).

Nevertheless, Plaintiffs invoke the ancient documents hearsay exception as foundation for the admission of the article. Federal Rule of Evidence 803(16) recognizes, as an exception to the rule against hearsay, regardless of the availability of the declarant, "[a] statement in a document that was prepared before January 1, 1988, and whose authenticity is established." Rule 803(16) does not, however, inoculate all assertive statements contained within an ancient document against application of the general prohibition against hearsay within hearsay contained in Rule 805. *Hicks v. Charles Pfizer & Co.*, 466 F. Supp. 2d 799 (E.D. Tex. 2005). For example, "[t]he rationale of Rule 803(16) in permitting the admission of statements in ancient documents where the author is the declarant does not justify the admission of double hearsay merely because of its presence in an ancient document. The danger of faulty perception persists unabated because a narrator, such as a

reporter, may not properly record the remarks of the speaker." *Hicks*, 466 F. Supp. at 806 (citing *United States v. Stelmokas*, 1995 WL 464264 at *6 (E.D. Pa. 1995) and Greg Kettles, *Ancient Documents & the Rule Against Multiple Hearsay*, 39 Santa Clara L. Rev. 719, 735 (1999)).

Given this tension, some courts take the position that a separate hearsay exception must apply to each layer of hearsay contained within an ancient document to warrant admission of the specific statement into evidence, *United States* v. *Hajda*, 135 F.3d 439, 444 (7th Cir. 1998); *United States v. Ismoila*, 100 F. 3d 380, 392 (5th Cir. 1996), while a few district courts have implied that multiple levels of otherwise inadmissible hearsay may be admitted under Rule 803(16), *see e.g. Murray v. Sevier*, 50 F. Supp. 2d 1257, 1265 n. 6 (M.D. Ala. 1999)(allowing statement made in interview in news article over thirty years old to be used under Rule 803(16)), *vacated on other grounds*, *Murray v. Scott*, 253 F.3d 1308 (11th Cir. 2001); *Gonzales v. North Township of Lake County*, 800 F. Supp. 676 (N.D. Ind. 1992), *rev'd on other grounds*, 4 F.3d 1412 (7th Cir. 1993).

This Court agrees that the better reasoned authority finds Rule 803(16) applicable only where the author of the ancient document had personal knowledge of the substance underlying the relevant assertive statements. *Hicks*, 466 F. Supp. 2d at 806. The Rule does not justify admission of double hearsay simply because of its presence in an ancient document. "This interpretation best reconciles the underlying justifications of Rule 803(16) with the limitations of Rule 805." *Id.* at 807 ("Rule 805 would be superfluous if the explicit hearsay exceptions excused double hearsay"); *see also People v. McCullough*, 38 N.E.3d 1, 28 (Ill. App. 2d 2015) (agreeing with *Hicks* that each layer of hearsay contained in an ancient document must be excused by its own hearsay exception), citing *United States v. Hajda*, 135 F.3d 439 (7th Cir. 1998); *Rehm v. Ford Motor Co.*, 365 S.W. 3d 570, 583 (Ky. App. 2011) (Caperton, J., concurring) (agreeing with *Hicks* that ancient document hearsay exception permits introduction of a statement only where declarant is the author of the

document; if multiple levels of hearsay exist, each must meet a hearsay exception in order to reconcile Rule 803(16) with Rule 805).

In this case, the substance of the matter sought to be proved by the news article – a description of the packinghouse attack and summary execution of Plaintiffs' decedent following his identification off a "kill list" -- relies on reports from bystanders and does not include personal observations of the reporter. There is no indication from the face of news article translation provided that the reporter/author was at the scene of the packinghouse attack. As such, the article is susceptible to the pitfalls of double hearsay evidence, and its admission is not secured under the ancient document exception to the hearsay rule.

This leaves only the Plaintiff (decedent's wife)'s deposition testimony regarding the circumstances of the event – testimony patched together by hearsay accounts relayed by third persons. Without any admissible evidence describing the circumstances of the homicide, or evidence showing the perpetrators of the attack were prosecuted or adjudicated as AUC operatives, Plaintiffs fail to demonstrate a triable issue of fact on an AUC link to this death and summary judgment on the threshold causation issue is warranted.

10. Luz Mila de Jesus Velazquez Manco: Decedent Silvio de Jesus Henao Aguilar (*Montes*)

Plaintiff Luz Mila de Jesus Velazquez Manco brings claims for the death of her free union partner, Silvio de Jesus Hernao Aguilar. Mr. Aguiliar was killed by unknown assailants on **August 11, 1997,** in Mutata, department of Antioquia, Columbia. On the day of the murder, Plaintiff was approached at her home by a young man on a motorcycle asking for her husband [DE 2772-26 at 9; Deposition of Plaintiff]. The man left after learning her husband was not home, but he returned later in the day during dinner. The young man asked to be taken to Barandosito, and the husband

left with the man in a truck. Three neighbors later saw three other people get in the truck and told Plaintiff that her husband was killed on a bridge over the river on the way to Barnadosito. The unidentified reporters told Plaintiff her husband was shot in the head, the arm and stomach, and suffered a broken arm.

Six months after the death, Plaintiff received a telephone call from an unidentified man inviting her to a meeting at which he could make a personal apology for the murder. Plaintiff went with two other people from the town for security. When they arrived, there were 10-15 men present, some of whom she claims were AUC members. One man stood up and made an apology. Plaintiff believes some of the other people were members of the AUC also, but "not all of them." She testified that "[t]he other ones had been, like, called by them." [2772-16 at 7]. Plaintiff said that the speaker addressed her and told her they were given the wrong information about her husband and apologized for the mistake.

Plaintiff believed the speaker was a leader of the AUC because "they were around there … going up and down." *Id.* at 8. She concededly does not know the identity of the man who apologized and indicates that the only other witness to the meeting is now dead. *Id.* at 62-66. Plaintiff advances this testimonial account of her confrontation with these men as a "confession" or statement against interest admissible under Rule 804(b)(3). Without a competent factual basis for assuming an AUC connection to the men -- beyond the speculative assertion that the AUC "was around there" at the time -- the Court does not find this testimony competent to create a triable issue of fact on AUC involvement in the death.

However, Plaintiff was competent to testify about the circumstances of the disappearance, and those circumstances are consistent with AUC modus operandi described by Kaplan– abduction by a man traveling by motorcycle who asked for her husband by name– and this testimony,

combined with the attribution of this homicide victim to AUC leader Raul Hasbun under Record 138, is deemed sufficient to create a triable issue on an AUC link to this murder.

11. Plaintiff Miriam Duarte Puerta: Decedent Daladier Areiza Duarte (*Montes*)

Plaintiff Miriam Duarte Puerta brings claims for the loss of her son, Daladier Arieza Duarte, who disappeared on **April 30, 1998**, near Carepa, department to Antioquia, Colombia. The body was never recovered, and Daladier has not been declared deceased. Plaintiff testified that her son walked to work that morning with two other employees from the *El Altguad* farm, and that the two other employees (Ramon and another unidentified (now deceased) man) came back later in the day to say her son had been tied up by a group of armed people and taken away [DE 2772-17 at 7-8]. The co-workers said the abductors were "wearing the emblem of the AUC" and were dressed in Army clothing. *Id.* at 7, 9.

Plaintiff also testified that a FARC commander came to her home a few days prior to the disappearance looking for Daladier's father, and spoke to her son, Wilmer, asking to be given an animal as a favor. Wilmer refused and the commander left. She testified that "quite a few" FARC soldiers surrounded her home with weapons aimed at it during this exchange. [Depo 2772-17 at 11-12]. Wilmer told her the men were in uniform and wore the symbol of the FARC. Plaintiff acknowledged that the FARC was feared in the area, "the same" as the AUC. *Id.* at 12.

Eight years after the disappearance, Plaintiff asked an unidentified gentleman to inquire with the AUC (after its demobilization) on what happened to her son. This individual reportedly relayed that he spoke to an AUC "patrolling commander" known as "Escalera" who instructed him to "tell the lady her son is dead." *Id.* at 9. This testimony, delivered through an unidentified third person, describing comments made by an alleged AUC commander is plainly inadmissible hearsay and is excluded as such from the Court's summary judgment review.

On the other hand, the information relayed by the son's coworkers, within hours of the abduction, is potentially admissible under the excited utterance hearsay exception as it is implied (although not completely clear) that the co-workers were reporting what they personally witnessed. This evidence, casting the assailants in military garb with AUC emblems, is sufficient to create a triable issue of fact on an AUC link to this disappearance. Defendants' motion for summary judgment on the threshold AUC-link causation issue is accordingly denied.

12. Plaintiff Elizabeth Gissell Carbal Diaz: Decedent Miguel Santiago Carbal Conrado (Does 1-144/Pérezes 1-795)

Plaintiff Elizabeth Gissell Carbal Diaz brings claims for the death of her father, Miguel Santiago Carbal Conrado. Mr. Conrado was killed on **October 30, 1998,** by a gunshot to the head at a banana farm in Cienega where he worked as a general foreman. Plaintiff was four years old at the time of the murder [DE 2772-18 at 7]. At deposition, Ms. Diaz testified that she learned of the circumstances of the death seven years later through conversations with her mother and a cousin and learned more information eleven years later from a secretary who worked at the farm where her father was killed. [DE 2772-18 at 62]. The secretary told her two people arrived at the farm where her father worked and asked for her father by name. The cousin told her that her father spoke to the men, leading to a heated argument and an exchange of blows. *Id.* at 11. One of the men shot her father in the hand, and when he fell to the ground, he was shot twice in the rear of his head. Plaintiff's mother (now deceased) further told her that the victim received a death threat two days before his death. *Id.* at 14. This information –all relayed years after the death -- is hearsay and Plaintiff identifies no path for its admission under any cognizable hearsay exception.

In an effort to cure this evidentiary lapse, Plaintiff proffers a newly authored affidavit from her cousin ["E.J.R."]. This witness states he was at the farm on the day of the murder and was told

by other farm workers that they saw his uncle being taken away "by some guys," following which shots were heard [DE 2772-19, ¶¶ 3-6]. He ran to where his uncle had been taken and found him on the ground unconscious with blood sputtering from his mouth. He helped lift the body into a truck for transport to a hospital in Cienega where his uncle died. [43] E.J.R. further testified that at the time of this murder, "it was public knowledge that the Cienega area was controlled by the paramilitaries," and when they came to town, they dressed in civilian clothes, but "everyone in town knew who they were." *Id.* at ¶6.

The testimony of this witness is not admissible unless Plaintiff can show a path for reduction of the testimony to admissible form at trial, e.g., by showing that Rodriguez is able and willing to testify at trial. This is not apparent from the text of his affidavit: He states simply that he has personal knowledge of the events and that "I can testify under oath to the facts described herein" [DE 2772-19 at ¶1]. He does not indicate that he holds immigration status which would allow him to legally travel to the United States to testify or that he could realistically obtain a travel visa in advance of trial. Without affirmation of his willingness *and ability* to testify at trial, this newly proffered affidavit is inadmissible hearsay which is properly excluded from the Court's consideration.[44]

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[43] Plaintiffs cite the excited utterance and present sense impression exceptions to the hearsay rule as basis for permitting this witness to relay information given to him about the attack from bystanders at the scene. The Court finds this aspect of E.J.R.'s testimony admissible as an excited utterance. *See e.g., United States v. Alarcon-Simi*, 300 F.3d 1172, 1175 (9th Cir. 2002). A "present sense impression" is a "statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid 803(1). The theory for its admissibility – like an excited utterance -- is that the contemporaneity of the event and the statement negate the likelihood of a deliberate or conscious misrepresentation. *United States v. Scrima*, 819 F.2d 996, 1000 (11th Cir. 1987).

[44] Unless Witness E.J.R. already holds a valid visa for travel- and there is no indication this is the case- the Court would expect that this witness to face the same travel impediments as those which the Bellwether 2 Plaintiffs impair their ability to obtain travel visas due to Covid related processing backlogs. If Plaintiff contends this witness is

With no other documentary evidence suggesting an AUC leader's connection to this crime, or circumstantial evidence from which an AUC link might otherwise be plausibly inferred, Plaintiffs fail to show a triable issue on AUC responsibility and adverse summary judgment is appropriately entered for failure to adduce evidence on this threshold causation issue.

13. Plaintiffs Gilma Rosa Ibarra Florez (wife); Maria Georgina Florez Florez (daughter); Antonio Florez Ibarra (son)/ Decedent Misael Antonio Florez (Jose Lopez 66) (*Valencia*)

Plaintiffs are the surviving wife and two children of Misael Antonio Florez who was killed in the town of Carepa Tierra Alta, in the Cordoba region, on **July 13, 1999** [DE 2772-23]. The wife testified that her husband's body was found on the road the next day and brought back to her residence where they buried the body. She described her husband's face as bloated from the rain and said that "[t]hey tore his eyes out, his tongue, his heart, and they let him bleed out," removed his intestines and cut up his hands and face. *Id.* at 9. The wife believes the AUC was responsible "[b]ecause they were on that path that same day, they murdered him." [DE 2772-23 at 6]. She does not, however, claim to have personally witnessed AUC paramilitaries marching on the path where the body was found.

The children testified that the AUC, FARC, and Colombian military were all present in the area [DE 2772-23, 2772-22]. Plaintiff's expert, Oliver Kaplan, stated that the AUC had an active presence near Teirralata, Cordoba, where the body was found, and that the brutality of the torture and public staging of the corpse in this case is consistent with AUC terror tactics (Opposition at 27, citing Kaplan Report at 22-3, 46, 48). Kaplan's opinions, viewed in conjunction with

currently able to legally enter the United States to give trial testimony, the Court is open to reconsidering this point upon submission of supplemental proofs on his immigration status.

testimonial evidence from the wife regarding the condition of her husband's body and the public staging of the corpse, are sufficient to create a triable issue on AUC involvement in this death. Defendants' motion for summary judgment on threshold causation is accordingly denied.[45]

14. Plaintiff Marta Rose Olivares Selgado: Decedent Jose Antonio Olivares Salazar (Juana Perez 9A: Decedent Pablo Perez 9 (*Does 1-144/Pérezes 1-795*)

Plaintiff Marta Rose Olivares Selgado brings claims for the death of her brother, Jose Antonio Olivares Salazar, who was abducted as he headed home from work at the *El Tempo* farm on June 9, 2001. At deposition, Plaintiff testified she later learned from two eyewitnesses (Gustavo Mendoza and Juan Carlos Varon) that some men picked her brother up in an SUV that day and took him to Sevillana where he was shot and killed. Her brother's body was later found shot, but Plaintiff identifies no witnesses to the shooting.

Plaintiff does not know the identity of the men who abducted her brother, but she testified at deposition she believed they were AUC agents because, according to others, "they were concentrated, or they were headquartered in the town." [DE 2772-24 at 53, 84, 87; DE 2774-24

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[45] In determining the instant motion, the Court does not consider the testimony of the daughter, Claimant 2, which consists of multiple layers of inadmissible hearsay. The daughter stated she found out about the death when she received a call from one of her sisters about a massacre in Carepa, Tierra Alta, an event which the sister attributed to the AUC. Claimant 2 could not distinguish members of the different political groups [DE 2772-22 at 5]. She testified that an unnamed individual who came into town months later told her he knew who killed her father because he was in the same group of paramilitaries responsible for the death [DE 2772-23 at p 53]. She also said she saw a man in a black shirt at her father's funeral, a man her sister identified as a "paramilitary," a fact the sister allegedly learned in her job as a hairdresser for the local townspeople. *Id.* at 10.

Similarly, the Court does not consider the testimony of the son, Claimant 3, who said he believes the paramilitary, and specifically the AUC, were responsible because "they were operating in that region already." [DE 2772-23 at 6]. Claimant 3 acknowledged that the FARC was also operating in the area, and that the Colombian military also had a presence. *Id*. He believes his father was murdered by paramilitaries because he had heard they killed someone else in the area just before they killed his father *Id*. He also claims he saw an AUC platoon on the path near his home in Saiza Cordoba, about six hours away from the area in Cordoba where his father was killed and said that the platoon was moving in the direction of Carepa. [DE 2772-23 at 38-39]. Claimant 3 testified he is "sure" it was the AUC because his father left for work that day and "didn't come back" and "that day, the ones who passed by there, it was them." However, he concedes he did not witness the attackers passing by. *Id.* at 53.

(sealed)]. In a newly authored affidavit offered in opposition to the current motion [DE 2772-25; 2774-25 (sealed)], Plaintiff elaborates that the paramilitary had a presence in her small town and wore green armbands labelled "AUC." Before her brother was killed, Plaintiff said paramilitaries came to her home asking for water. They asked if she knew who they were and they told her they belonged to the AUC [DE 2774-25 at ¶6].

In the new affidavit, Plaintiff adds that an unidentified worker spoke to her eight days after the abduction, telling her three people that he recognized as paramilitaries took her brother away in a white truck, and that he hid because he was afraid, he too would be killed. *Id.* at ¶ 11. Finally, Plaintiff says she met AUC leader Carlos Lugo Mangones, a/k/a Carlos Tijeras, at a Justice and Peace conciliation hearing which she attended in Santa Marta. She said she confronted Mangones and asked him what happened to her brother. Mangones allegedly glanced at the computer in front of him and then said he had killed her brother in 2001 because of bad information received from "Jorge 40," and asked her for forgiveness. *Id.* at ¶3.

Defendants challenge the admission of Plaintiff's new affidavit as contrary to her deposition testimony (e.g., the new elaboration about seeing AUC armbands on paramilitaries in town). Defendants also complain the account of the abduction which she learned from Varon is hearsay. The Court concludes that the report of the abduction and killing relayed by Varon does not fall within the excited utterance hearsay exception where there is no indication as to when Varon relayed the information and whether he was in proximity of the abduction and killing or simply heard about it and passed the information along. Similarly, the information relayed from the unidentified worker is inadmissible hearsay. This person's statements to Plaintiff do not qualify as an excited utterance since the comments were relayed to her 8 days after the abduction by a person who was not himself the victim of the attack. *See generally United States v. Belfast,* 611 F.3d 783,

817 (11th Cir. 2010) (totality of circumstances, not simply the length of time which has passed, determines whether statement qualifies as an excited utterance). The Court also concludes that Plaintiff's testimony regarding her personal informal conversation with Mangones in a hearing room is inadmissible as a statement against interest, as Mangones unavailability for deposition has not been established.

However, this homicide is one charged to Mangones in the *Sentencia*, and one for which he accepted responsibility and was adjudicated responsible based on his leadership role in the William Rivas Front of the AUC. The Court accepts the Mangones *Sentencia*, in the expanded version presented, as adequate to generate a triable issue on an AUC link to this death. Defendants remain free to suggest other plausible deductions from Mangones' acceptance of responsibility for the crime, as documented by the *Sentencia,* but this document is sufficient to create a fact issue on AUC involvement for summary judgment purposes.

15. **Myriam Ramirez: Decedent Simon Frangal Gonzalez Ramirez (*Carrizosa*)**

Plaintiff Miriam Ramirez brings claims for the death of her twenty-two-year-old son, Simon Frangal Gonzalez Ramirez. Mr. Ramirez disappeared in May 2002 while hitch-hiking in Santa Marta. Plaintiff and her son were dual citizens of France and Colombia and were visiting in Colombia at the time of her son's disappearance and death. Plaintiff testified at deposition that on May 17 or 18, 2002, her son boarded a flight to Santa Marta, where he intended to study philosophy at a Krishna farm. [DE 2772-26; 2774-26 (sealed)]. Plaintiff's son left the farm a few days later, sooner than planned, and was assaulted and robbed of his phone and identification papers as he left the area on foot. He then hitchhiked to Cienega, where he was able to borrow a phone and attempted to call his mother on May 21, 2002, the last time she had any contact from the victim. The son went missing for a month.

With the help of the French Embassy and the Colombian police, Plaintiff was able to recover the body of her son at a hospital near Cienaga. She testified that a man at the hospital told her the boy was picked up by a van and taken to a nearby farm where workers heard gunshots. The son was found dead of three gunshot wounds, two to the head and one to the heart. Plaintiff testified she believed Chiquita was indirectly responsible for the death because of its financial support of paramilitary groups in the region, something she learned in the press. She also testified that her son's father also went to public hearings, where he heard paramilitary figures admit to taking money from Chiquita. [DE 2772-26 at 60-61].

There is adequate circumstantial evidence in this case to create a triable issue on an AUC link to the crime: The homicide of this victim is charged to Mangones in the *Sentencia*, which is sufficient, by itself, to create a triable issue of fact on AUC involvement in this death. The Defendants' motion for summary judgment based on threshold causation proof deficiencies is accordingly denied. This ruling is without prejudice to Defendants to seek to exclude the statements made to her about her son's abduction and death from third parties as inadmissible hearsay at trial.

16. Plaintiff Nurys Isabel Ferreira Sanchez / Decedent Ovidio Alfonso Palma Blanquiset Juana Perez 72: Decedent Pablo Perez 72 (*Does1-144/Pérezes 1-795*)

Plaintiff brings claims for the death of her husband who was shot to death on March 31, 2003, at 5:30 A.M. after he arrived at work at the *Finca Juliana* farm in Cienaga. Plaintiff did not witness the death and knows of no witnesses. She learned about the attack from her niece, who in turn heard about it from an unidentified "young lady" [DE 2774-27 at 68-69]. The unidentified lady relayed that Plaintiff's husband was taken off a bus by armed men who were holding a list. Plaintiff did not know who the men were and had no information as to whether they were affiliated

with any groups. The testimonial account of this killing is double or triple hearsay, with no hearsay exception proffered for its admission.

The Court therefore excludes Plaintiff's hearsay account of the attack from its consideration. However, the homicide of Plaintiff's husband is one charged to Mangones in the S*entencia* and one for which he was adjudicated responsible, based on his leadership role in the William Rivas Front. As this document has been found admissible in this proceeding, on the basis of the newly proffered Apostille and expanded adjudicatory terms of the document now on file, it is here viewed, in conjunction with the Rule 1006 report of Dr. Kaplan, as evidence sufficient to create a triable issue on AUC responsibility for this death.

17. Plaintiffs Adriana Barrasa Acosta (daughter) and Carmen Acosta Constante (wife): Decedent Manuel Santiago Barrasa Martinez/ (Minor Doe 6a and Juana Doe 6/Decedent Juan Doe 6) (*Carrizosa*)

Plaintiffs Adriana Barrasa Acosta and Carmen Acosta Constante (Minor Doe 6a and Juana Doe 6) bring claims for the death of Manuel Santiago Barrasa Martinez (Juan Doe 6). Mr. Martinez was shot and killed while working as a taxi driver in Cienega on April 27, 2004. Plaintiffs did not witness the shooting and they have no personal knowledge of the circumstances surrounding the attack. Minor Doe 6a says her family learned of the death from her uncle, who called the family home in the early hours of the morning to relay a news report about a taxi driver who was just killed, and to inquire if her father was out to work yet [DE 2772-29 at 57].

Plaintiffs allege that this victim was critical of the AUC, suggesting a possible motive for the crime, but there is no indication that Juan Doe 6 publicly voiced such views. Minor Doe 6A testified that her father complained about the AUC demanding protection money from various small businesses, but she said her father himself was never the subject of such demands. *Id*. at 59-60; Juana Doe 6, in turn, testified she did not believe her husband ever expressed any negative

feelings about the AUC or any other paramilitary or guerilla groups [DE 2772-30 at 79-80], and she had no views on the identity of her husband's killer.

Minor Doe 6a, further testified at deposition that her family was approached two years after the death by the state attorney and asked to make a statement about the death. The state attorney allegedly verbally advised her that his office had a statement from Tijeras (Mangones), who had acknowledged that paramilitary groups had murdered her father [DE 2772-29 at 53], but her relay of this conversation is inadmissible hearsay. There is no document in the file relating to any prosecutor's findings or charges relative to this homicide proffered under any hearsay exception.

Minor Doe 6A gave somewhat confusing testimony on the identity of the perpetrator; she stated no one was ever charged in connection with her father's death, but then stated Tijeras (Mangones) "acknowledged the fact" and was also prosecuted for her father's death. *Id.* at 54. In the latter regard, she claimed she later attended a hearing at which Tijeras was in attendance and observed: "[T]he dates – the day that I went to court they were – he just gave the names. I mean, they gave him a list. There's a list. And he was saying 'Yes, yes we killed them. We Killed them.'" *Id*. at 56. [DE 2772-30].

This homicide is not listed as a crime attributed to Mangones in the excerpted portion of the *Sentencia* currently on record. This leaves the verbal acknowledgment of the homicide Mangones allegedly made in the presence of Minor Doe 6a at a hearing as the only evidence of an AUC link to this crime proffered by Plaintiff. This testimony is hearsay and is not admissible as a statement against interest under Rule 804(b)(3), because Plaintiff has not shown Mr. Mangones was unavailable under Rule 804(a). *See Carrizosa v. Chiquita Brands International, Inc*., 47 F.4th 1278, 1310-1311 (11th Cir. 2022) (upholding exclusion of testimony of Juana Doe 11 regarding a

personal confession to murder of her husband made by Mangones at a hearing given Plaintiff's failure to establish unavailability of Mangones under Rule 804(a)). Accordingly, Plaintiffs fail to establish a triable issue on an AUC link to this attack and its motion for summary judgment on the issue of causation is granted.

B. COLOMBIAN LAW "NEGLIGENCE"- STYLE CLAIMS

1. But-For Causation

Plaintiffs bring what they describe as "negligence-style" and "wrongful death-style" claims under the Colombian Civil Code against all Defendants. At the heart of these claims is the contention that Defendants acted imprudently, and at variance with the good businessperson standard of care imposed under Article 2341 of the Code, by paying money to the AUC with knowledge or deliberate indifference to the fact that the AUC was a violent terrorist organization which frequently targeted innocent civilians and the likelihood that these cash infusions would enhance the AUC's capacity to terrorize the Colombian countryside.

Defendants' threshold causation challenge to these claims is presented in two parts: They argue that there is insufficient evidence to plausibly suggest an AUC link to each death, and thus to create a triable issue on how Chiquita's financial support of the AUC is causally connected to the harm which befell Plaintiffs' decedents. This attack has been previously discussed. In addition, or in the alternative, Defendants argue that the negligence-style claims fail because Plaintiffs do not identify evidence raising a genuine issue of material fact on "but for" causation as that element is defined and applied under the Colombian Civil Code.[46] Defendants assert that Plaintiffs present

[46] Defendants also argue that Article 2341 requires proof of an underlying conviction of a crime when a civil action is brought seeking reparation for criminal conduct. Finally, they argue that the concept of "fault" under Article 2341 presupposes action taken by one with freedom to choose between prudent or imprudent conduct and argue that Plaintiffs cannot make this showing here because the evidence that Chiquita acted under duress and under extortionate

no evidence plausibly suggesting that the AUC's capacity to perpetrate civilian murders was dependent on Chiquita financing (i.e. no evidence suggesting the murders would not have occurred "but for" Defendants' alleged misconduct). As Defendants see it, the amount of money which Chiquita paid to the AUC over time was but a negligible proportion of the AUC's income stream, which it derived primarily from narcotics trafficking,[47] and that the subtraction or "suppression" of Chiquita's financial contribution would not have had any impact on the AUC's terror capacity or prevented the deaths of Plaintiffs' decedents.

Under Article 2341 of the Colombian Civil Code, "[h]e who has committed a crime or fault, which has caused damage to another, is liable to reparation, without prejudice to the principal penalty that the law imposes due to fault, or the crime committed." [DE 2283-1 at 4; Professor Jorge Santos Ballesteros Expert Report]. This provision imposes liability based on "*culpa*," which translates as "fault" or "negligence," measured by comparing the conduct of the defendant with that of a diligent and prudent person under the same circumstances. To impose liability under Article 2341, a plaintiff must prove (1) fault or affirmative intent to cause damage on the part of the defendant; (2) damages suffered by the plaintiff; and (3) a causal nexus between the fault and the damages. *Id.* at 4-5.

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threats from the AUC, is "ample and substantial," and no reasonable interpretation of the evidence supports a contrary conclusion.

[47] Chiquita says its payments to the AUC, which averaged out to $242,000 per year, were but a "negligible portion" (between .0003 or 3/100 of one percent) of the AUC's estimated $286 million annual income stream derived primarily from narcotics trafficking (citing the Rincon and Sanchez defense expert reports; as well as the Kaplan Plaintiff expert report acknowledging that by year 2000, drug money made up 70% of AUC's revenue). Accepting Mancuso's testimony that he trafficked cocaine worth 6.5 billion alone, this would average $928 million per year over a seven-year period.

The parties disagree on the standard for establishing the element of causation under Article 2341. Defendants claim Plaintiffs must show that the harm which befell their decedents would not have occurred "but for" Chiquita's contributions to the AUC. As support for this theory, Defendants rely on the expert testimony of Professor Jorge Santos Ballesteros (a former Justice and Chief Magistrate of the Civil Cassation Chamber of the Colombian Supreme Court (1996-2003)) who states, citing a 1935 decision of the Colombian Supreme Court, that the requisite causal link generally required in civil actions is missing if it is found that "the damage would have been caused even if such fault had not taken place." [DE 2283-1 at 10]. When a third party is involved, he opines there must yet be an "immediate causal link" with the damage caused by the primary tortfeasor and the third party to establish liability. [DE 2283-1, 2431-5].

While concurrent fault concepts are recognized under Colombian law, Professor Santos asserts that only activity which "has had a dominant and transcendent role in the occurrence can be considered the legal cause." *Id.* at 11. Further, under the criterion of "adequate causation," as explained by Professor Santos, "only the effects that according to the rules of the common sense and experience usually are their normal results, can be estimated as effects of a cause. Then, the rules of nature are remembered." *Id.* at 11. This exposition appears to essentially mirror causation-in-fact and proximate causation concepts common to primary tortfeasor liability under traditional tort jurisprudence in the United States.

Opposing this point, Plaintiffs argue where the misconduct of multiple tortfeasors converges to produce a single harm, the theory of "concurrent causation" applies as a variant of the "adequate cause" doctrine, and notions of "but for" causation are inapplicable [DE 2838-1; Opposition at 33-34]. For this point, they proffer the affidavit of Colombian law expert Dr. Jaime Arrubla-Pacar, who explains that in the concurrent cause situation, each tortfeasor shoulders full

liability for the damages inflicted regardless of his or her degree of participation in causing the injury.[48] [Arrubla Declaration at ¶ ¶59-63].

Defendants counter with the reply to the expert report of Professor Santos [DE 2431-5] who acknowledges "it is valid to assert that the joint and several liability provided in Article 2344 of the (Colombian Code), in the sense that 'when a crime or fault has been committed by two or more people, each one will be jointly responsible for all the damages resulting of such crime or fault….,' implies a legal based joint and several liability which takes place when several individuals must respond for the damages caused to a victim, but each of their conducts must be analyzed independently." *Id.* at 6. Professor Santos maintains "this independent analysis" still requires a hypothetical inquiry into whether the harm or injury would have happened even "if an allegedly concurrent conduct is hypothetically suppressed or removed." If the harm would have happened anyway, he opines the allegedly concurrent conduct could not be an "adequate" cause because it has not caused harm. If the concurrent cause or conduct is hypothetically suppressed or removed and the harm *would not have* happened anyway, he states the concurrent cause or conduct would then be considered an "adequate cause." [DE 2431-5 at 7].

The Court does not find the expression of either expert on the operation of "but for" causation and "concurrent causation" precepts, in the primary tortfeasor context, to be on point in

[48] While Professor Aruba's comments seem to suggest there is no apportionment of fault among multiple tortfeasors, Plaintiffs themselves seem to acknowledge that apportionment is called for under Colombian law, although they suggest it is considered a judicial rather than jury function. Non-Wolf Plaintiffs state that "Colombian courts may examine the relative participation of each joint and severally liable tortfeasor in apportioning damages between them." (Opposition at p. 34, n. 47). This does not bear on the threshold question of how causation precepts are defined in the secondary liability context, but the inconsistency in position on the separate issue of apportionment is simply noted here.

resolving the precise issue here presented, namely, how does the element of "causation" express in the *secondary liability* context under Colombian law? Defendants are accused of aiding and abetting or conspiring to commit extrajudicial killings which were perpetrated by a third party – a terrorist paramilitary organization - a form of secondary liability where "but for" causation concepts logically have no play. The pertinent question is not whether the tortious conduct of a third party (the AUC) would have materialized with or without the Defendants' aid – the question is whether Defendants knowingly contributed to and assisted the misconduct, *to a degree sufficient* to create a foreseeable risk of harm to others.

Under federal and state common law doctrine under United States jurisprudence, causation is defined differently in the secondary liability context; here, the causal connection requires a showing of "knowing substantial assistance" to the primary malefactor. If this standard is met, it is no defense to point to the ability of the primary tortfeasor to exert its will without that aid. *Doe v. Drummond*, 782 F.3d 576, 608 (11th Cir. 2015) (affirming knowing substantial assistance as proper standard for measuring aiding and abetting liability under federal common law and TVPA); *El Camino Resources Ltd. v. Huntington National Bank*, 722 F. Supp. 2d 875 (W.D. Mich. 2010) ("substantial assistance" requirement for aiding and abetting fraud and conversion requires showing that secondary party "proximately caused" violation, i.e., that its encouragement or assistance was a "substantial factor" in causing the tort).

As explained by the Seventh Circuit, discussing causation precepts under the Anti-Terrorism Act ("ATA"), when the only defendants are the primary violators, ordinary tort requirements relating to fault, state of mind, causation and foreseeability must be satisfied to succeed on a claim. "But when the primary liability is that of someone who aids someone else, so *that functionally the primary violator is an aider and abettor or other secondary actor*, a different

set of principles comes into play." *Boim v. Holy Land Foundation* for *Relief and Development*, 549 F.3d 685, 692 (7th Cir. 2008). Addressing cases involving monetary contributions to a terrorist organization, the *Boim* court held it is enough, under a statue requiring proof of intentional or reckless misconduct, to show that the contributor understood the mission of the organization because this amounts to knowingly contributing to the organization's terrorist activities; and liability is justified where the combined resources pooled by knowing contributors "as a whole" would have "substantially enhanced the risk of terrorist acts" and the probability that the plaintiff's decedent would be a victim. *Id.* at 698.[49] *See also Atchley v AstraZeneca UK Limited*, 22 F.4th 204 (D.C. Cir. 2022) (to establish aiding and abetting liability under the ATA, the plaintiff must show defendants aided or abetted an act of international terrorism by knowingly providing substantial assistance).

Whether Colombian law recognizes this exception to "but for" causation rules in the secondary liability context and would measure causation by reference to a "substantial assistance" yardstick in this context is not addressed in the parties' submissions. As neither side has illuminated the substantive contours of Colombian law on this precise issue, the Court will assume, for purposes of this motion, that Colombian law is in accord with Florida law on the point, and hence requires a showing that a defendant has rendered "substantial assistance" to another in the

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[49] *Compare Sokolow v. Palestine Liberation Organization*, 60 F. Supp. 3d 509 (S.D.N.Y. 2014) (in ATA claim, rejecting contention that any reckless contribution to a terrorist organization or its affiliate, no matter how attenuated, will result in civil liability, without showing proximate causal relationship to plaintiff's injury; plaintiffs must show it was reasonably foreseeable that defendants' actions would cause the resulting injuries; the more inferential leaps the jury would have to make to find a connection, the less likely it is plaintiff can meet the causation burden), citing *In Re Terrorist Attacks on Sept. 11 2001*, 714 F.3d 118, 124 (2d Cir. 2013)(allegations that defendants "provided funding to purported charity organization known to support terrorism that, in turn, provided funding to Al Qaeda" held insufficient to allege causation and survive a Rule 12(b)(6) motion to dismiss).

commission of an intentional tort as a prerequisite to the imposition of aiding and abetting liability. *Dar El-Bina Engineering & Contracting Co. Ltd. v. Republic of Iraq*, 79 F. Supp. 2d 374 (S.D.N.Y. 2000) (parties' failure to plead and provide foreign law permitted court to proceed on assumption that law of foreign jurisdiction accords with that of New York on the subject at hand); *A.O.A. v. Rennert*, 350 F. Supp. 3d 818, 847 (E.D. Miss. 2018) (court is not a under duty to make further inquiries of a party who fails to prove content of applicable foreign law; where parties do not adequately prove foreign law so as to enable the court to apply it in a particular case, the law of the forum applies) (*citing Bel-Ray Co v. Chemrite Ltd*., 181 F.3d 435, 440 (3d Cir. 1999)). *See also Loebig v. Larucci*, 572 F. 2d 81 (2d Cir. 1978) (while there is no presumption that state law is the same as in civil law country, if no evidence is presented as to the substance of the foreign law, the court will generally decide case in accord with forum law).

Florida law follows the well-established view that aiding and abetting tortious activity requires a showing that the aider and abettor rendered "substantial assistance" in the commission of the wrongdoing. *Lesti v. Wells Fargo Bank N.A.*, 960 F. Supp. 2d 1311 (M.D. Fla. 2013) (under Florida law, elements needed to sustain claim for aiding and abetting tortious conduct are (1) underlying violation on the part of the primary wrongdoers; (2) knowledge of the underlying violation by the alleged aider and abettor, and (3) the rendering of substantial assistance in committing the wrongdoing by the alleged aider and abettor). This is also the standard under the federal common law. *Doe v. Drummond*, 782 F.3d 576, 608 (11th Cir. 2015). *See also Chang v. J.P. Morgan*, 845 F. 3d 1087 (11th Cir. 2017) (discussing substantial assistance as an element of aiding and abetting fraud).

Applying these precepts here, the Court assumes for purpose of the instant motion that a showing of "substantial assistance" is needed to support aiding and abetting secondary liability

under Colombian law, and that this element essentially operates in a proximate causation requirement. It further finds the record evidence adequate to support a plausible inference that Defendants alleged financial misconduct "substantially assisted" the AUC in carrying out its bloody rampage across the Colombian countryside resulting in the deaths of Plaintiffs' decedents.

Such an inference may be drawn from the timing of the payments – beginning at a critical stage in the nascency of the group and serving as well- timed "seed" money for explosive growth; from the length of payment stream – over a seven-year course—offering a reliable consistent income stream for projected operations; and from the evidence of other material support offered by way of valuable port access (notwithstanding Chiquita's dispute of its knowledge of AUC usurpation of port privileges at Turbo, the conflicting evidence on the point raises a triable issue). This evidence raises at least a triable issue on whether Chiquita's contributions to the AUC in cash and in kind over time served to "substantially assist" the AUC by enhancing its terror capacity and facilitating the widescale civilian attacks which were the hall mark of its "draining the sea" policy. Accordingly, Defendants' motion for summary judgment challenging sufficiency of proofs on "but for" causation is denied.

2. Fault: Underlying Criminal Conviction

Defendants further argue that imposition of civil liability based on criminal conduct under Article 2341 of the Colombian Civil Code requires proof of an underlying criminal conviction, evidence which is lacking where no Individual Defendant was ever convicted of a crime based on the misconduct alleged, and where Chiquita was convicted of a licensing violation as opposed to a material support charge. The expert testimony on which Defendants rely for this proposition, proffered by Professor Santos, references only one prong of Article 2341 liability – that premised on criminal misconduct involving *intentional* fault. Plaintiffs recognize intentional misconduct as

a separate basis for imposition of liability under Article 2341, essentially providing an avenue for imposition of civil liability arising "*per se*" from the commission of an intentional criminal offense.

However, Plaintiffs proceed here on a separate liability theory -- what Professor Santos himself describes as "quasi-criminal" liability, derived from unintentional fault, similar to common law "negligence" liability standards under United States jurisprudence. Like common law negligence precepts in the United States, Article 2341 of the Colombian Civil Code similarly recognizes imposition of fault based on deviation from the "good family man" or "good businessperson" objective standard of care [DE 2341-5 at 4]. Plaintiffs' expert, Professor Arrubla, expounds on this prong of civil liability, derived from unintentional fault, agreeing it is properly measured by deviation from an objective "good family man" or "good businessman" standard of care under Article 2341. This formulation of civil liability does not require proof of an underlying criminal conviction.

As to this distinct strand of unintentional liability, the Court finds the record evidence adequate to show a triable issue on whether Chiquita's decision to pay the AUC represented a deviation from an objective "good businessperson" standard of care.[50] A jury could plausibly interpret the evidence to find a departure from that standard, given the notoriety of the AUC's civilian attacks; evidence suggesting Chiquita executives' knowledge of the AUC terror tactics and civilian atrocities; evidence of Chiquita's continued support of the AUC notwithstanding its acquisition of that knowledge; Chiquita's knowledge of the AUC's designation as a foreign terrorist organization, and the illegality of its payments under both Colombian and United States

[50] Certainly Keiser, who was indicted in 2018 by the Colombian Attorney General for crimes against humanity for his role in funding AUC operations, implicates a triable issue on the breach of the "good businessperson" standard of care.

law.[51] Accordingly, both prongs of Defendants' motion for summary judgment directed to the adequacy of proofs on "fault," as that concept is understood under the Colombian Civil Code, are rejected.

3. Fault: Voluntary Conduct

Finally, Defendants challenge the sufficiency of Plaintiffs' "fault" proofs. Defendants assert that Article 2341 presupposes voluntary conduct as a predicate of liability, contending the evidence in this case indisputably shows the payments were extorted from Chiquita, under threats of violence to persons and property, which precludes any plausible inference of "voluntary" action.

Here, Defendants point to testimony from Chiquita executives who claim the payments were made under perceived threats of violence against Chiquita personnel and property, in fear of imminent reprisals from AUC in event of nonpayment, but their claimed subjective perceptions in this regard are not dispositive on this issue. There is competing evidence from which a jury could reasonably conclude that Chiquita's primary motivation for paying the AUC was to quell labor unrest and disruptions to Banadex operations caused by FARC guerilla attacks on its infrastructure and the fomenting of labor unrest among union workers. In other words, there is evidence that the decision to pay the AUC was driven by profit, not self-preservation.

There is also evidence from which a jury could plausibly infer that the decision to pay the AUC was voluntary, not coerced. Chiquita does not adduce evidence of an express threat of violence, nor does it adduce evidence that its employees or infrastructure suffered any violent attacks from the AUC. That its executives "knew what it (the AUC) was capable of" is probative

[51]Since the Court finds sufficient evidence to raise a triable issue of fact for unintentional fault liability under Article 2341, it is unnecessary to reach Plaintiffs' alternative theory of no-fault civil liability under the Colombian Civil Code, premised upon Chiquita's alleged commission of "hazardous activity" (funding an illegal notorious terrorist group).

of their *mens rea* and goes to the issue of whether Chiquita's decision to continue paying the AUC was voluntary, negligent, reckless, or grossly reckless. Hence, Chiquita's employees' claimed fear of the AUC's retaliatory intentions is for the trier of fact to access relative to the question of the voluntary nature of its decision to stay in Colombia and continue to pay the AUC as the price for protection against guerilla attacks. As a result, Defendants' motion for summary judgment, challenging the adequacy of evidence on the commission of "voluntary" action, is denied.

C. **Punitive Damage Liability**

Defendants seek summary judgment on Plaintiffs' claim for punitive damages, contending that Colombian law does not authorize recovery of punitive damages in an action premised on non-contractual civil liability. Plaintiffs argue that Colombian law does not control the punitive damage issue. First, they correctly note that when a case originating in one district is transferred to another solely for purpose of consolidation into an MDL proceeding, the choice of law rules of the originating jurisdiction travel with the case and must be followed by the MDL Court. Second, they note that conflict of laws analysis must distinctly treat each specific issue in the case on which there is a true conflict -- a precept sometimes referred as "doctrine of depecage."

Plaintiffs say all transferor courts involved in the pending member MDL cases follow the general rule that the law of the state with the most significant relationship with the occurrence and the parties governs. On the issue of punitive damages, they argue Ohio is the state with the most significant relationship because Chiquita's decisions to approve the AUC payments were made in Cincinnati, Ohio, where all but two of Individual Defendants were located, and where Chiquita then had its principal place of business [Opposition, DE 2829 at 49 (citing *Krichman v. Novartis Pharmaceuticals Corp.*, 2014 WL 2722483 *5 (S.D. Fla. 2014)]. Because Ohio recognizes punitive damages for negligence claims and intentional torts, they contend that their punitive

claims are properly pled and withstand summary judgment. *Rebar v. Laboratory Corp. of America*, 2015 WL 7076608 at *3 (S.D. Ohio 2015); *Premix, Inc. v. Zappitelli*, 561 F. Supp. 269 (N.D. Ohio 1983).

As a threshold item, the Court agrees that a "true conflict" exists between the place where the injuries occurred and where Plaintiffs' decedents were domiciled (Colombia) and the place in which some aspects of Chiquita's alleged misconduct occurred (Ohio). The Court also recognizes that under a Restatement Conflict of Laws §175 approach, the law of the place of injury is presumed to govern in an injury case, "unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in Sec. 6." *In re Disaster at Detroit Metropolitan Airport on Aug 16, 1987*, 750 F. Supp. 793, 798 (E. D. Mich. 1989) (quoting Rest. (Second) of Conflict of Laws § 175). In this case, the Court does not find Ohio has a more significant relationship to the issue than Colombia, the injury forum.

While the place of injury is not necessarily the controlling factor in determining the forum with the most significant interest in the application of its own punitive damages law, the injury forum typically takes precedent over the place where a defendant happens to be headquartered or where allegedly poor business or manufacturing decisions were made. *See In re FCA US LLC Monostable Electronic Gearshift Litigation*, ___ F. Supp. 3d ____, 2022 WL 1207833 at **8-10 (E.D. Mich. April 13, 2022) (collecting cases).

Here, the Court concludes that the interests of Colombia, as the injury forum, are greater than that of Ohio in determining the application of punitive damage liability. This is apparent where the specific misconduct alleged is claimed to have posed a collective risk to thousands of Colombian civilians who were terrorized by the AUC on Colombian soil in the wake of the AUC's scorched earth policy for routing out guerillas and leftist sympathizers. Colombia has a strong

economic interest in governing and regulating the conduct of foreign corporations doing business on its soil, and in punishing corporations that place its populace at risk. This interest is particularly strong here, where the location of the murders and forced disappearances of Plaintiffs' decedents is not fortuitous: Chiquita's Colombia subsidiary, Banadex, brokered the AUC payment deal in Medellin, and paid the AUC to repel guerrillas in Uraba and Magdalena directly and indirectly through its participation in AUGURA. AUGURA then financially contributed to paramilitary organizations moving into the banana growing zones from the outset.

The Court believes Ohio courts would find, under these circumstances, that the law of the place of the injury controls and governs the adjudication of punitive damages. That place is Colombia, which does not allow recovery of punitive damages in noncontractual tort cases. As Plaintiffs' punitive damage claim is unauthorized under the governing law of Colombia, summary judgment in favor of Defendants is granted upon this issue. *See e.g. Johnson v. Occidental Fire & Cas. of North Carolina*, 954 F.2d 1581, 1585 (11th Cir. 1992) (summary judgment on issue of punitive damages was appropriate after determining which state's substantive law applied to the question); *Borochov v. Islamic Republic of Iran*, 589 F. Supp. 3d 15 (D.D.C. 2022) (under the District of Columbia's most significant relation test used to determine choice of law, the law of Israel – rather than United States tort law – governed tort based claims brought by Israeli family members of victims of terrorist attacks where the attacks occurred in Israel; the conduct causing injury occurred in Israel, and other foreign territories and the plaintiffs' decedents were Israeli citizens). *See also Gorji v. C.R. Bard, Inc*., 2022 WL 597334 (D. Neb. 2022), citing *O'Brien v. Cessna Aircraft*, 93 N.W. 2d 432 (Neb. 2017) (Nebraska rather than Kansas law governed punitive damage recovery, where the crash occurred in Nebraska, despite fact that significant decisions and the product manufacture took place at defendant's headquarters in Kansas*); Bramberger v. Toledo*

Hospital, 897 F. Supp. 2d 587 (N.D. Ohio 2012) (Ohio choice of law would direct application of Michigan law to wrongful death action against a physician and hospital where Michigan was place of injury before the death); *In re Air crash Disaster Near Monroe, Michigan on January 9, 1997*, 20 F. Supp. 2d 1110 (E.D. Mich. 1998); *Stringer v. National Football League*, 2007 WL 520618 (S.D. Ohio 2007).

D. Individual Defendants' Liability - Colombian Law Claims

The Individual Defendants assert the same threshold "but for" causation challenge raised by Chiquita, and the Court makes the same ruling on this element of the claims. The Individual Defendants next argue that Plaintiffs fail to show a triable issue on "but for" causation due to failures of proof linking the role and decision-making authority of each Defendant to the creation and implementation of the AUC payment scheme. On this latter point, the Court's inquiry now turns to whether Plaintiffs have adduced sufficient evidence from which a jury might reasonably infer that: (1) the Defendant either participated in the decision to fund the AUC or had the authority to stop the funding but failed to intervene; and (2) the Defendant's conduct, by act of commission or omission, was inconsistent with the objective "good business person" standard of care applicable under Article 2341 of the Colombian Civil Code.

Having reviewed the evidentiary record, with a focus on the sufficiency of proofs linking each Defendant's role within the corporate hierarchy to the creation and implementation of the AUC payment system, the Court concludes that triable issues of fact on each Defendant's involvement preclude the entry of summary judgment on the claims against all Individual Defendants, save Defendant Keith Lindner. The role each Individual Defendant played within the organization, and interface with the AUC payment scheme, is described in the evidence summaries which follow, with the evidence and all inferences available therefrom taken in the light most

favorable to Plaintiffs as nonmovants. The Court has also considered and rejected Defendants' challenges to the sufficiency of the evidence on secondary liability (aiding and abetting, conspiracy) charged to each Individual Defendant.

1. Cyrus Freidhiem

Cyrus Freidhiem served as Chiquita's President and Chief Executive Officer ("CEO") from March 19, 2002, to January 2004. He also served as Chairman of the Board of Directors of Chiquita from March 19, 2002, to May 2004. Mr. Freidhiem testified that he first learned of Chiquita's payments to paramilitaries in March 2002 when he became CEO, and at that time he understood the payments were necessary to avoid "serious jeopardy" to Chiquita employees whom he feared would be targeted and killed if the payments stopped. He believed the AUC provided "rural security" at a cost less than other alternatives. He continued authorizing the AUC payments, even after the AUC's role as a foreign terrorist organization was revealed and Chiquita reported its financial relationship with the AUC to the U.S. Justice Department.

The Court finds a triable issue of fact on the credibility of Freidheim alleged motivation in authorizing payments, and it likewise finds a triable issue of fact on the objective reasonableness of his decision to authorize the payments under a "good businessperson" standard of care: This follows in view of the fact that the record reveals no evidence of an express threat of violence waged by the AUC against any employee or infrastructure (Charles Keiser admitted Carlos Castanos did not expressly threaten violence when he first requested financial support from Banadex), and there is no evidence of violence inflicted by the AUC against Chiquita personnel or property, either before payments began or after payments stopped and Chiquita withdrew from Colombia. Accordingly, the causal relationship between the alleged misconduct, in approving

payments, and the harm which befell Plaintiffs' decedents, implicates a triable issue of fact for a jury's determination.

As to Freidheim's responsibility for deaths occurring before 2002, when he joined Chiquita, or deaths occurring after May 2004, the Court agrees, as advanced by Defendants, that there is no exposure for deaths occurring before he joined Chiquita. As to deaths occurring after May 2004, the Court agrees, as advanced by Plaintiffs, that funding decisions made during his tenure potentially supported AUC activities throughout the remainder of that calendar year. Thus, summary judgment is appropriately granted in part and denied in part on the window of Freidheim's liability accordingly.

2. **The Estate of Roderick Hills**[52]

Roderick Hills served on Chiquita's Board of Directors and as Chair of Chiquita's Audit Committee from 2002 to 2007. In early 2002, at his first Audit Committee meeting, Chiquita's General Counsel, Bob Olson, briefed the members on payments the company had made to the FARC and "convivirs," which Olson described as self-defense forces sanctioned by the Colombian government. In April 2003, Olson informed Hills that Chiquita's payments to convivirs were being redirected to the AUC, which was a designated foreign terrorist organization.

Hills testified he "never had authority to halt or continue payments," but instead was authorized only to "investigate" the payments as an Audit Committee member, an obligation he claims to have discharged in cooperation with the Department of Justice. Plaintiffs counter that Chiquita's Board of Directors played an active part in decision-making on AUC funding; that the

[52] Roderick Hills passed away after initiation of this MDL, and his Estate has been substituted as a party Defendant.

Board had authority to stop payments; and that Hills, as a member of that Board, was among those in favor of continuing the payments. [Chiquita Corporate Designee Deposition at 275-277; Roderick Hills Deposition at 176].

The participation of Hills in the AUC funding decision-making presents a closer call; the Court does not agree that his position on the Board is sufficient, in and of itself, to infer his involvement in that process. However, it is not clear whether he ever participated in voting on AUC funding decisions and/or what role his alleged favoring of the AUC system played within the decision-making hierarchy. At this juncture, the Court finds a triable issue of fact on his involvement, recognizing the evidence in the summary judgment record is slim. Thus, the motion for summary judgment submitted on behalf of the Estate of Hills is denied as to decedents killed during his tenure on the Board (Pablo Perez 72, Juan Doe 6, Simon Ramirez), while the motion is granted as to the five deaths which preceded Hills' induction into Chiquita's Board of Directors in 2002.

3. Charles Keiser

Charles Keiser was the Banadex General Manager stationed in Colombia from October 1987 to March 2000, at which point he was transferred to Costa Rica as Vice-President of Chiquita's North American production. Keiser understood that the AUC was committing violent crimes against innocent civilians and acknowledged that he played an integral role in brokering the AUC payment scheme and implementing it on the ground in Colombia. [Keiser Deposition at 180; Fact Proffer at ¶21]. For that role, Keiser was charged by Colombian prosecutors in 2018 with crimes against humanity. [DE 2346-104 at 1, 459-60 (Ex 230) (Banadex Charging Document)].

Keiser does not challenge the sufficiency of evidence linking his role within the organization to the corporate misconduct alleged. Instead, he moves for partial summary judgment excluding any liability for those murders committed after March 2000, when he left Colombia and was transferred to Costa Rica. This motion is denied in light of evidence suggesting Keiser remained involved in Colombian operations up through the time Banadex was sold in 2004, and suggesting he was frequently consulted on security issues relating to armed groups operating in Colombia up through the time of the sale. [DE 2348-110; Ex. 186; DE 2348-109; Ex 185; Valverde Deposition; DE 2348-69; Keiser email 12-22-03 discussing ransom kidnaping of Banadex employee; DE 2348-9; Keiser Deposition at 21.] This evidence, linking Keiser to Banadex security protocols after his departure from Colombia, is sufficient to create a triable issue of fact on his exposure to liability for AUC-triggered deaths which occurred in Colombia up through the end of 2004.

4. Robert Kistinger

As Chiquita Fresh Group President overseeing the company's global banana operations, Robert Kistinger held decision-making authority over the entire Banadex operations. Although he disclaims having knowledge of the link between convivirs and the AUC until after 2000, and he disclaims having any decision-making authority respecting the AUC payments, there is evidence showing he did authorize payments to convivirs between 1997 and 2000 and participated in the senior executives' review and approval of AUC payments from 1997 through 2004.

While he disclaims understanding the connection between convivirs and AUC before 2000, there is testimony from AUC leaders – to the effect that meetings with banana industry leaders encouraging support of convivirs began at the inception of ACCU/AUC -- from which a contrary

inference might be drawn. Kistinger's motion for summary judgment based on the sufficiency of evidence linking him to the implementation of the AUC payment system is denied.

5. Keith Lindner

Keith Lindner joined Chiquita's Board of Directors in 1984 (when the company was known as United Brands Co.) and became Chiquita's Senior Vice-President in 1986. He remained in that role until June 1989, when he became President and Chief Operating Officer ("COO") of Chiquita. In March 1997, he became Vice Chairman of the Board and continued to serve only on the Board (not as an officer) up through March 2002 when he resigned and left Chiquita. As an officer of Chiquita, he was not involved in Colombian operations or security concerns attending those operations [DE 2343-19]. Rather, he focused on the strategic direction of the corporation and development of capital sources and other market-related efforts designed to fund capital investments worldwide.[53]

Plaintiffs do not counter with evidence suggesting Lindner's involvement in the approval or implementation of payments to armed guerilla or paramilitary terrorist groups operating in Colombia. Instead, opposing the instant motion, Plaintiffs simply contend that Lindner worked together with the Board in making "fundamental decisions as to how to conduct business in Colombia," and say that a jury could "infer" from his position on the Board that he participated in the decisions to fund the AUC. Plaintiffs cursorily (and improperly) incorporate by reference materials filed in prior summary judgment proceedings (the first bellwether set) on this point,

[53] At his deposition, Mr. Lindner testified he was unaware that Chiquita was paying guerilla groups during his tenure [DE 2343-19 at 177-178] and specifically disclaimed involvement in approving any payments made to groups in Colombia. He explained that as director and officer, he was "typically not involved in implementing operationally a strategic decision, which (sic) the board made one…." Rather, he was "[i]nvolved in strategic direction, capital markets and other market related activities." and not "operations." *Id*. at 128.

referencing DE 2339, which in turn references DE 2440 ¶¶ 4, 19 (Plaintiff's counterstatement of facts opposing Lindner's first-filed motion for summary judgment).

These proofs include citation to the deposition testimony of Chiquita's Rule 30(b)(6) representative, Barbara Howland, to the effect that to her knowledge no Board member at Chiquita (save Steve Stanbrook and Morton Aronson) ever opposed making the paramilitary payments [DE 2440 ¶4] and the report of the Special Litigation Committee for the general proposition that Lindner should have been on notice of the payment issue (i.e. that he "knew or should have known about Chiquita's involvement with the AUC or any other armed groups in Colombia") [DE 2440 ¶19].

Lindner's status as an officer or as a Board member of Chiquita does not, standing alone, operate to support an inference that he participated in the relevant AUC decision-making, and it does not create a triable issue on his liability for any torts committed by or for the corporation in which he did not participate. *Ben-Yishay v. Mastercraft Development LLC*, 553 F.3d 1360 (S.D. Fla. 2008) (under Florida law, director or officer of corporation does not incur personal liability for its torts merely be reason of his official position and is not liable for torts committed by or for corporation unless he has participated in the wrong). Plaintiffs do not offer any authority suggesting Colombian law would treat officer and director liability differently, nor do they offer any authority supporting their broad contention that Lindner's position within the corporate hierarchy is enough to justify imputing knowledge of the payment scheme or to justify inferring his participation in the scheme. Likewise, the oblique reference to Chiquita's Special Litigation Committee report implying a finding of constructive knowledge as to Lindner (for which no evidentiary foundation has been laid) is inadequate to create a triable issue on Linder's liability. With this dearth of evidence on Lindner's role in creating, executing, or controlling the AUC

payment plan, the Court finds no triable issue on Lindner's alleged participation in the corporate misconduct alleged in this case and enters summary judgment in his favor accordingly on the Colombian law claims.

6. John Ordman

John Ordman is a now retired Vice President of Chiquita who joined the company in May 1975 and remained with the company for over thirty years [DE 2774-34 at 10] He testified he initially understood that convivirs were intended to provide information on guerrilla movements, and that payments made to the convivirs were legitimate [DE 2774-34 at 173]. He claims he did not understand otherwise until a "light bulb [went] off" in 2002 when the AUC in Santa Marta demanded that the payments be routed through the convivir in Uraba. *Id*. at 174.

With this, Ordman seeks summary judgment contending he cannot be liable for any AUC-related deaths which occurred before 2002 on theory he had no knowledge of the AUC-convivir connection prior to that time. However, as with the other Chiquita executives disclaiming knowledge of this connection, the Court finds the evidence presents a triable issue of fact on the date by which each Individual Defendants had knowledge of the relationship between the convivirs and paramilitaries and/or on the issue of their deliberate ignorance of that connection. Ordman's motion for summary judgment challenging the sufficiency of evidence linking his conduct to the tortious corporate misconduct alleged is accordingly denied.

7. William Tsacalis

As Chiquita's Controller since 1987, William Tsacalis was responsible for financial reporting and overseeing a system of procedures and controls to assure fair reporting of the company's financial position. Although he did not participate in the decision to make the payments, he did initially authorize the use of existing accounting procedures to be followed for reporting "sensitive

payments" in the company's books and records after the decision to make payments was made. [Tsacalis Deposition, DE 2282-62 at 75]; [Kistinger Deposition, DE 2282-58 at 291, 294].

Tsacalis also seeks summary judgment due to his alleged absence from the relevant decision making, contending he had no authority to determine what types of expenses or payments were appropriate and exercised no discretion as to whether a payment should be classified as "sensitive." Rather, he was responsible simply to ensure payments were properly recorded in the corporate books. He also claims he was unaware of the connection between Chiquita's convivir payments and the AUC until September 2000, so that at a minimum his role cannot causally be connected to deaths occurring prior to that date.

These claimed limitations of Tsacalis' accounting responsibilities, even assumed to be true, do not necessarily insulate him from potential liability. The record reveals that he was instrumental in inventing an accounting machination designed to disguise or suppress the fact of AUC payments by issuance of pseudo-bonus checks to Banadex managers with the expectation that the checks would be converted to cash and delivered to AUC operatives in Colombia. His role in that book-keeping system, to the extent it furthered and perpetuated the AUC payment plan, suffices to trigger a triable issue of fact on his involvement in the scheme and the relationship of that conduct as the cause of harm which befell Plaintiffs' decedents. Tsacalis' individual motion for summary judgment, challenging the sufficiency of evidence of his involvement in the alleged tortious decision-making activity, is therefore denied.

8. Robert Olson

Robert Olson joined Chiquita as General Counsel in August 1995. He claims to have first learned of the connection between the convivirs and the AUC in September 2000, when he received an investigative report from Robert Thomas, then an attorney in Chiquita's inhouse legal

department ("Thomas Report.") [Olson Deposition DE 2282-59 at 53, 64, 87; Thomas Deposition, DE 2282-70 at 175 – 176.] Because he was allegedly unaware of the connection before that time, he claims, at a minimum, he cannot be liable for deaths which occurred prior to September 2000. He also claims he believed the failure to pay the AUC would jeopardize the lives of Chiquita employees, and that Plaintiffs cannot show his conduct departed from the good businessperson standard of care.

The record reveals, however, that Olson met with Tsacalis, Thomas, Kistinger and Bud White in May 1997 to discuss the payments, and that Ordman alerted him to the AUC payments shortly after the 1997 Medellin meeting between Keiser and Castano [DE 2829-37 at 186-187]. Whether he understood the connection between the convivirs and the AUC/ACCU at that point in time is a triable question of fact, given evidence on file showing ACCU leaders promptly sought out banana industry support as early as 1994 when the paramilitaries began moving into Uraba.

The record also shows that Olson approved and monitored the AUC payments after Keiser brokered the deal [Kistinger Deposition, DE 2829-24 at 170] and continued approving the payments even after learning of the AUC's designation as an FTO [Factual Proffer ¶ 56] and after Chiquita's outside counsel, Kirkland & Ellis, told Chiquita that the payments were illegal and must stop. Against this background, there is sufficient evidence from which a jury might reasonably infer Olson's knowing involvement in the payment scheme and a triable issue of fact on whether his conduct represent a departure from the diligent or prudent businessperson standard of care.

E. Multiple, Individual Specific Tort Claims – Colombian Law

Defendants also seek summary judgment resolving the individual, specific tort claims asserted by Plaintiffs, contending that Colombian law recognizes only the concept of fault-based

liability, under which only the "negligence" and related "wrongful death" style claims asserted are actionable. The Non-Wolf Plaintiffs' Opposition Memorandum does not address the point.

The Wolf Plaintiffs do not address the point either, as relevant to the Colombian law claims. However, they generally reiterate a conflicts of law argument favoring application of Ohio law, as the place with "most significant relationship" with Defendants' conduct, in support of an extraterritorial application of Ohio law [DE 2828 at 9-10]. Finding no reason to alter its earlier state law extraterritoriality analysis, the Court reaffirms its prior rulings on applicability of Colombian law to all non-federal tort claims [DE 412; 513; 516; 1110; DE 2603; DE 2342]. Accordingly, the case will go forward on the negligence style (and subsumed wrongful death style) Colombian law claims only.

F. Individual Defendants Liability -Torture Victims Protection Act ("TVPA") Claims

The Torture Victim Protection Act provides in relevant part:

> [a]n individual who, under actual or apparent authority, or color of law, of any foreign nation … (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a clamant in an action for wrongful death.

28 U.S.C. §1350 note.

To obtain relief for an extrajudicial killing pursuant to the TVPA, a plaintiff must be (1) a legal representative or any person who may be a claimant in an action for wrongful death; (2) of a victim of an extrajudicial killing; (3) committed by an individual acting "under actual or apparent authority, or color of law, of any foreign nation." To obtain relief for torture, the plaintiff must be

a person subjected to torture[54] by an individual acting under color of law. A plaintiff who satisfies these elements has a cause of action under the TVPA. *Balcoco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 11346 (1st Cir. 2011).

To withstand summary judgment on their TVPA claims against the Individual Defendants, Plaintiffs must present sufficient evidence from which it may reasonably be inferred that: (1) each decedent's death was a deliberate, extrajudicial killing (2) committed by a person acting under color of law (or the decedent was subjected to torture by a person acting under color of law)[55] and (3) each Individual Defendant is linked to that killing and/or torture based on a theory of secondary liability, such as aiding and abetting or conspiracy liability. *Mamani v. Sanchez Bustamante*, 968 F.3d 1216 (11th Cir. 2020) ("*Mamani II*") (citing *Mamani I*, 654 F.3d at 1154)). Defendants argue Plaintiffs have not produced evidence which could reasonably be interpreted to establish: (1) the identity of the individual killers as AUC operatives in the first instance (discussed above under the threshold causation in fact challenge); (2) a "deliberate" intent to kill on part of the perpetrators; (3) the "extrajudicial" nature of the killings, and (4) tortious conduct committed by the AUC under "color of law."[56]

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[54] The TVPA defines torture as an act: (1) "directed against an individual in the officer's custody or physical control [;] (2) that inflicts "severe pain or suffering [,] … whether physical or mental [;]; (3) for the purpose of obtaining information, intimidation, punishment, or discrimination. 28 U.S.C. 1350 note §3(b)(1).

[55] Strict attention to the color of law requirement serves two purposes: it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power," *Lugar v. Edmondson Oil Co*., 457 U.S. 922 (1982) and it avoids imposing on a state responsibility for conduct which was not under its control. *Brentwood Academy* v. *Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001).

[56] In the 42 U.S.C. § 1983 context, the Supreme Court has recognized several circumstances in which a private party may be characterized as a state actor, such as where the state has delegated to a private party a power "traditionally exclusively reserved to the State," *see Jackson v. Metro. Edison Co*.,419 U.S. 345, 352 (1974); where a private actor is a "willful participant in joint activity with the State or its agents," *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 151(1970); and where there is "pervasive entwinement" between the private entity and the state, *Brentwood,* 531 U.S.

On the "color of law" element, Defendants contend Plaintiffs have failed to produce evidence establishing a triable issue on the existence of a symbiotic relationship between the AUC and Colombian state which was involved in the specific deaths of Plaintiffs' decedents. Defendants say there is no evidence that the Colombian state was even aware of, much less involved in, the deaths of Plaintiffs' decedents, an evidentiary lapse which defeats an essential element of the TVPA claims.

Opposing the motion, Plaintiffs contend their burden is simply to produce evidence of an AUC-Army interdependence involved in joint operations resulting in civilian attacks taking place in the banana-growing zones of Uraba and Magdalena, as alleged in their complaints. Plaintiffs note this Court previously allowed the complaints to go forward on the basis of those allegations at the motion to dismiss stage on the theory that such a geographical nexus was adequate to support the inference of AUC-state involvement in the deaths of Plaintiffs decedents in these regions. They claim they now have "plenty of evidence" to support those allegations.

As discussed above, Plaintiffs have not properly briefed the "color of law" issue on the TVPA claims, and to the extent they seek to incorporate by reference earlier filed briefing and proofs from the first summary judgment round, their proofs on this element hinge in large part on the proffered expert testimony of Robin Kirk and Oliver Kaplan, whose testimony was the subject of *Daubert* motions earlier lodged but not resolved. As noted, the Court will reserve ruling on the

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at 291. The latter category, invoked here, is known as the "symbiotic relationship" test and requires a "close nexus" not merely between the state and the private party, but between the state and the challenged conduct itself. *Brentwood*, 531 U.S. at 295.

No such nexus exists where a private party acts with the mere approval or acquiesce of the state, *Blum v. Yaretsky*, 457 U.S. 991 (1982), *Sinaltrainal*, but a private entity may be considered a state actor if it "has acted together with or has obtained significant aid from the state officials' in furtherance of the challenged action. *Lugar*,457 U.S. at 937.

portion of Defendants' summary judgment motion directed to the TVPA claims against Individual Defendants pending completion of the relevant *Daubert* briefing and, if necessary, hearing on the relevant *Daubert* motions.

In addition to the expert testimony of Oliver and Kirk, on which ruling on admissibility is reserved, Plaintiffs also seek to buttress the alleged AUC-Army alliance with testimony from an alleged eyewitness to a coordinated attack and testimony of a former AUC commander. The Court addresses this evidence here, in the interest of streamlining the issues remaining on the "state action" element of claim, independent of the cited expert testimony, and finds both categories of proffered evidence lacking.

First, as to the alleged eyewitness, Plaintiffs point to the sealed affidavit of Witness 3 ["R.J.S."] [DE 2346-107], a refugee from Uraba and a former La Finca farm worker and union leader. Witness 3 testified that he once saw "B2," an AUC intelligence unit under the command of Colombian Army Gen. Del Rio, appear at the La Finca Farm (owned by Banadex). This witness further testified that he was present in Chigorodo on August 2, 1995, at which time he saw paramilitaries in town, wearing the military uniforms of soldiers; and he observed graffiti warning "paramilitaries are here," and "get out guerillas." He says on this date he saw Raul Hasbun, a "very famous" AUC leader that he recognized, as well as General Rito Alejo del Rio, whom he observed go into a store and order the shop owner to close. Later that night, he heard shots fired for about 25 minutes, and when it ended, he ventured out into the street where he saw "soldiers walking around," and at the El Aracatazo cantina saw 11 dead bodies, including the body of the owner of the café as well as a colleague who was an inspector from Sintrainagro.

Presumably, Plaintiffs seek to draw the inference that this was an AUC attack – since AUC leaders were observed in the neighborhood earlier in the day and graffiti in the town warned of

their presence – and seek to draw the inference that the attack was the product of a joint operation between the AUC and Colombian military since General del Rio had been observed walking in the town earlier that day. The latter is not a reasonable inference drawn from the evidence, and the Court does not find this affidavit adequate to establish a triable issue of fact on AUC-Army coordination of civilian attacks generally in the banana growing zones. And, even if accepted as such, it would not be an adequate premise from which to draw the inference that attacks on Plaintiffs' decedents were also the product of joint operations simply because the attacks occurred in the banana growing zones.

Plaintiffs also point to the deposition testimony of former AUC commander Veloza Garcia (aka "HH"), who testified he arrived in Uraba in 1995 when the FARC dominated the area. HH also testified that the paramilitaries assisted the police in forcing out the guerillas at that time in exchange for having the police "look the other way when it came to us." He testified that the AUC operated freely throughout Uraba, sometimes "with the Army" in patrolling rural areas. He said, "we coordinated, we supported each other," [HH Deposition at 55] and confirmed that AUC operatives wore camouflage uniforms, purchased from the Army, when operating in rural areas. HH did not, however, testify about any civilian attacks jointly planned or executed by AUC and Colombian military personnel, and hence offers no testimony relevant to the lynchpin of the "state action" element of the TVPA claims.

G. Duress Defense - Plaintiffs' Motions for Summary Judgment

The Wolf Plaintiffs move separately for partial summary judgment on Defendants' affirmative defense of duress [DE 2766] contending: (1) the Court's ruling in *Pescatores*, holding that duress, as a matter of law, is a nonviable defense to the ATA claims of American citizens [DE 1733], should be given collateral estoppel effect and (2) Chiquita is estopped from arguing the

duress defense by its guilty plea in the District of Columbia criminal case under the offensive nonmutual issue prelusion doctrine. *See e.g., Kowalski v. Gagne,* 914 F.2d 299 (1st Cir. 1990); *Brown v. City of Hialeah*, 30 F.3d 1433, 1437 (11th Cir. 1994). Plaintiffs alternatively argue that the same policy rationale underpinning the ruling in *Pescatore* supports rejection of "duress" as a defense to the Colombian law negligence-style claims.

The Non-Wolf Plaintiffs also move for partial summary judgment on the affirmative defense of duress arguing that the same legal standards for a duress defense under the ATA apply here, and that Chiquita's capitulation to the demands of the AUC could not reasonably be viewed as an involuntary act of duress or coercion under the most generous interpretation of the evidence favoring Defendants. On this point, they argue: (1) there is no evidence Chiquita was responding to an imminent threat of harm as opposed to generalized fear (and no evidence the AUC retaliated with violence after Chiquita ultimately stopped paying); (2) Defendants had reasonable alternatives to paying the AUC - options they ultimately exercised by selling their owned fruit operations and returning to the purchased fruit operation model, and Defendants did not report the alleged extortion to the United States or Colombian authorities; (3) Chiquita voluntarily placed itself in harms' way by persisting in the profitable operation of its owned fruit operations in Colombia, knowing that this production model increased its vulnerability to armed groups. Alternatively, Plaintiffs argue there is no duress defense to aiding and abetting murder, and that Chiquita is estopped from asserting a duress defense here by virtue of the guilty plea it entered in the District of Columbia criminal action.

The Court has carefully reviewed the parties respective briefing on these points and concludes that genuine issues of material fact exist respecting the exigency of the circumstances

under which Chiquita capitulated to the demands of the AUC[57] and the availability of other reasonable and realistic options to that capitulation.

The Court has also reviewed the Wolf Plaintiffs motion for partial summary judgment on liability, based on negligence per se, along with the relevant opposition briefing and concludes that genuine issues of material fact on Defendants' alleged departure from the "prudent and good businessperson" standard of care preclude summary judgment on all claims.

. V. CONCLUSION

Based on the foregoing**,** it is **ORDERED AND ADJUDGED:**

1. Defendants' Joint Motion for Summary Judgment [DE 2773, 2775] as to the sufficiency of proofs on the causation-in-fact element of the Colombian law claims is **DENIED IN PART AND GRANTED IN PART** as follows:

a. As to the following Plaintiffs' bellwether cases: (1) Rosemarie Pino/Narciso Pino; (2) Elba Tamayo Vahos; (3) Gladys Correa; (4) Jose Emilio Lizardad /Auereliano Lizardad Mosquera; (5) Alberto Manuel Martinez Herrera

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[57] For example, there is some evidence that the AUC threatened Banadex on occasion to impress the importance of uninterrupted payments: Hasbun claimed that Castano threatened the banana growers from the outset that they would become military targets of the AUC if they did not switch payments to the AUC; that the AUC had the capacity to force individuals and companies to pay it, or suffer the consequences, and that the reprisal for failure to pay would include violence to persons and property [DE 2343-1, Hasbun Deposition at 58-59; 63].

Businessman Irving Bernal said Castano "made clear" to Keiser that continued payments to guerillas would be prohibited, and that failing a switch of payments to the AUC "paramilitaries would begin to take the same sort of reprisals that the guerrillas had been taking up to that time." [DE 2343-29, at 68].

Former head of security for Banadex Uraba, Hermes Segundo Hernandez Aguirre, testified at deposition that the AUC threatened violence when Banadex was late with payment. He said AUC operatives were observed visibly armed in the fields, with armbands and camouflage, and that workers feared the AUC because they would arrive at farms with kill lists and summarily execute targeted employees. He also Carlos Tijeras called him on one occasion at a farm in Pino, demanding that he give him his "fucking money in the Magdalena area," and directly threatening him with violence if the money wasn't paid [DE 2343-5 at 26-27].

/Clorinda Ester Rodriguez Galanga; (6) Elizabeth Gissell Carbal Diaz; and (7) Adriana Acosta/Manuel Barrasa Martinez, Defendants' motion for summary judgment is **GRANTED** due to Plaintiffs' failure to identify a triable issue of fact on an AUC link to the disappearance or murder of the decedents at issue. Pursuant to Rule 58, final summary judgment in favor of Defendants and against the Plaintiffs shall enter in these cases.

b. As to the following Plaintiffs' bellwether cases: (1) Rubella Guerrero /Carlos Himba Cordoba; (2) Maria Delores Roldan Echevarria; (3) Luz Celeny Bejarano; (4) Ana Brand Aguirre/Milton Percy Santero Brand (5) Luz Mila Velasquez Manco; (6) Miriam Duarte Puerta; (7) Gilma Rosa Iberra Florez/Maria Florez/Antonio Florez Iberra; (8) Marta Rose Olivares Selgado; (9) Miriam Ramirez; (10) Nurys Isabel Ferreira Sanchez, Defendants' motion for summary judgment on causation is **DENIED** as Plaintiffs have identified admissible competent evidence establishing a triable issue on the existence of an AUC link to each of the disappearances or killings at issue.

c. As to Individual Defendant Lindner, the motion for summary judgment on the Colombian law claims -- based on failure to adduce evidence showing a causal relationship between Lindner's corporate role and the corporate misconduct alleged -- is **GRANTED**. Final Summary Judgment in favor of Lindner shall enter by separate order of the Court pursuant to Rule 58.

2. As to those Colombian law claims on which summary judgment has been **DENIED**, as identified in the foregoing paragraph at ¶1b., Defendants' further and alternative challenges to the sufficiency of proofs on the remaining elements claim are found lacking and

Defendants' motion for summary judgment on each of these alternative grounds is **DENIED.**

3. As to the TVPA claims lodged against the Individual Defendants, ruling on the motion for summary pertinent to the "state action" element of claim is **RESERVED** pending completion of the parties' briefing on the relevant *Daubert* motions as previously discussed. The parties are directed to submit a proposed briefing agenda on those motions within **FIFTEEN (15) DAYS** from the entry of this Order. In the interest of judicial economies, the Court shall also reserve ruling on Defendants' alternative challenges to the sufficiency of proofs on the other elements of the TVPA claims pending completion of this briefing on the threshold "state action" element.

4. Defendants' motion for summary judgment on punitive damages [DE 2773, 2775] is **GRANTED**.

5. The Non-Wolf Plaintiffs' and Wolf Plaintiffs' motions for partial summary judgment on the defense of duress [DE 2766, 2767], as to the Colombian law claims against Chiquita and the Individual Defendants, is **DENIED**.

6. The Wolf Plaintiffs motion for partial summary judgment on liability based on the doctrine of negligence *per se*, as to the Colombian law clams against Chiquita and Individual Defendants [DE 2769], is **DENIED.**

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 15th day of December, 2022.

KENNETH A. MARRA
United States District Judge

cc. all counsel