Case No. 12-14898-B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC. ALIEN TORT STATUTE LITIGATION

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
THE HONORABLE KENNETH A. MARRA
Case No. 08-md-01916
(Nos. 07-60821, 08-80421, 08-80465, 08-80480, 08-80508,
10-60573, 10-80652, 11-80404, 11-80405)

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CORPORATE DISCLOSURE STATEMENT AND AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Plaintiffs-Appellees-Cross-Appellants ("Plaintiffs") certifies that no party represented by counsel has a parent corporation, nor is there a publicly held corporation that owns 10% or more of any party's stock.

Pursuant to Eleventh Circuit Rule 26-1.1, counsel for Plaintiffs certify and adopt the lists of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case on appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party, listed in Plaintiffs-Appellees-Cross-Appellants' initial Certificate of Interested Persons filed with this Court on December 21, 2012, in addition to those listed in Defendants-Appellants-Cross-Appellees' Certificate of Interested Persons filed on May 28, 2013, Plaintiffs-Appellees-Cross-Appellants' Brief filed by Attorney Paul Wolf on July 22, 2013, Plaintiffs-Appellees-Cross-Appellants' Response Brief and Cross-Appeal Opening Brief filed by Attorney Marco Simons on July 31, 2013, and Plaintiffs-Appellees-Cross-Appellants' Motion for a 21-Day Extension of Time filed by Paul Hoffman on August 5, 2014.

STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

> *Kiobel v. Royal Dutch Petroleum Co*, 133 S. Ct. 1659 (2013).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

> In determining whether an ATS claim "touch[es] and concern[s]" the United States with sufficient force to displace the presumption against extraterritoriality under *Kiobel v. Royal Dutch Petroleum Co*, 133 S. Ct. 1659 (2013), is the location of the harm dispositive or must the Court also consider other factors, such as the defendant's United States citizenship, its tortious actions in the United States, and that the support provided was a federal crime implicating U.S. national security?

Dated: August 14, 2014

By: /s/Paul L. Hoffman
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Counsel for the Plaintiffs

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STATEMENT OF ISSUES

Defendant-Appellant-Cross-Appellee Chiquita is a U.S. company that paid and supported a Colombian terrorist group, the *Autodefensas Unidas de Colombia* ("AUC"), in order to benefit from its crimes against humanity. Chiquita devised, approved, and supervised that support from its headquarters in the United States. Because aiding the AUC was so harmful to U.S. national security, the U.S. officially designated it a terrorist organization. Thus, Chiquita's payments to the AUC were federal crimes. Indeed, Chiquita was prosecuted by our government and pled guilty, based on the same allegations at the heart of these civil claims.

Relatives of victims of the violence Chiquita funded sued under, *inter alia*, the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, which permits aliens to sue for international law violations. The panel dismissed the ATS claims, finding they did not concern the U.S. because the murders occurred in Colombia. The issue is:

In determining whether an ATS claim "touch[es] and concern[s]" the United States with sufficient force to displace the presumption against extraterritoriality under Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), is the location of the harm dispositive or must the Court also consider other factors, such as the defendant's United States citizenship, its actions (including tortious conduct) in the United States, and that the support provided was a federal crime implicating U.S. national security?*

Plaintiffs also brought non-federal claims under diversity jurisdiction. Plaintiffs do not believe the panel meant to dismiss these claims, since it did not address them. If, however, it did intend to do so, the issue is:

Does the Court have the power to dismiss non-federal claims over which it indisputably has diversity jurisdiction without mentioning them, even though under Meredith v. Winter Haven*, 320 U.S. 228, 234-37 (1943), courts lack discretion to decline such jurisdiction?*

Last, Plaintiffs brought Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350, note, claims against corporate officers. The Court dismissed TVPA claims against Chiquita itself, because *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012), bars such claims against corporations. Plaintiffs thus do not believe the panel meant to dismiss the claims against natural persons, but if it did, the issue is:

Could the Court dismiss TVPA claims against natural persons based on Mohamad *even though* Mohamad *expressly allows such claims?*

INTRODUCTION AND SUMMARY OF ARGUMENT

The divided panel's decision should be reheard *en banc* because it conflicts with the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co*, 133 S. Ct. 1659 (2013), and every other Circuit decision interpreting *Kiobel*. As the Fourth Circuit recently noted, only Justices Alito and Thomas asserted that the ATS only reaches domestic tortious conduct; the *Kiobel* majority held a broader

view of ATS jurisdiction. *Al Shimari v. CACI Premier Tech., Inc.*, No. 13-1937, 2014 U.S. App. LEXIS 12268, *23-26 (4th Cir. June 30, 2014). Indeed, although Justices Alito and Thomas acknowledged that their approach was more restrictive than *Kiobel*'s holding, the panel majority's ban on the extraterritorial application of the ATS was even *more* restrictive than their concurrence.

As the dissent correctly observed, the panel majority's radically restrictive approach misread *Kiobel* and ignored extensive factual allegations of Chiquita's U.S.-based conduct and the United States's interest in Chiquita's unlawful acts. Chiquita pled guilty to a federal crime for its payments to a U.S.-designated terrorist organization, which were authorized by high-level company officials in the United States. These payments and other support to the AUC directly contributed to the mass murder of Plaintiffs' relatives in furtherance of Chiquita's goal of pacifying Colombia's banana-growing region and ensuring its profits. The majority opinion contains not one word about these allegations, which are supported by Chiquita's own factual admissions in the criminal proceedings.[1]

[1] The majority also questioned, based on D.C. Circuit case law, whether torture (or any norm not recognized by Blackstone in 1789) is actionable. Slip Op. at 8. This is not an open issue. ATS claims are not limited to the Blackstone norms. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009). Indeed, *Sosa* cited with approval cases finding liability for torture, 542 U.S at 732, and this Court later held that the ATS permits claims for torture and the other abuses that Plaintiffs allege. *E.g.* *Sinaltrainal*, 578 F.3d at 1262-63, 1267 (torture, war crimes, summary execution); *Cabello v. Fernandez Larios*, 402 F.3d 1148, 1154 (11th Cir. 2005) (torture,

Ambiguous language in the decision suggests that the district court should order "judgments of dismissal," but the panel presumably did not mean to dismiss Plaintiffs' non-federal claims, or their TVPA claims against individual defendants, without even mentioning them.

The panel could not dismiss the non-federal claims because there is undisputed federal diversity jurisdiction over them and Chiquita raised no argument about them on appeal. If the panel did intend to dismiss these claims, its decision would conflict with Supreme Court precedent holding that courts lack discretion to decline diversity jurisdiction. The panel or this Court *en banc* should clarify that these claims survive.

The dismissal of Plaintiffs' TVPA claims was based on the absence of TVPA liability for corporations. Slip Op. at 4-5. But Plaintiffs have brought TVPA claims against corporate officials; claims against natural persons are clearly permitted. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012). It was uncontested that these claims would proceed regardless of how the Court ruled on the ATS. The panel or this Court *en banc* should correct this apparent oversight.

The circumstances in which the ATS applies to U.S. citizens complicit in human rights violations occurring abroad through misconduct that ocurred in the

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crimes against humanity, extrajudicial killing); *Romero v. Drummond Co.*, 552 F.3d 1303, 1316-17 (11th Cir. 2008) (torture, extrajudicial killing, war crimes).

United States is, after *Kiobel*, the most important ATS question. Plaintiffs' ATS claims are a paradigm of claims that "touch and concern" the United States with "sufficient force" to overcome the presumption against extraterritoriality *Kiobel* created. Judge Martin's dissent and *Al Shimari* are faithful to *Kiobel* and the ATS's purpose and history. The majority's opinion is not. The Petition should be granted.

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

The operative amended complaints in these consolidated cases allege that Chiquita and its high-ranking executives in the United States intentionally supported and abetted the AUC's brutal strategy, which included the killing of Plaintiffs' family members. Plaintiffs assert – against the company and its officials – claims under the ATS and the TVPA, and ordinary tort claims for assault and battery, negligence, and wrongful death based on state and Colombian law.

Chiquita moved to dismiss. The district court denied the motion as to the TVPA and most of the ATS claims, based on Plaintiffs' detailed allegations that Chiquita intended to assist the AUC. Opinion and Order, District Ct. Dkt. 412 at 73, 76, 77 (S.D. Fla. June 3, 2011).[2] The issue of the extraterritorial application of the ATS was not raised by Chiquita or discussed by the district court. For the non-federal claims, the district court held that it would not apply state law, but that it

[2] Citations to "District Ct. Dkt." refer to the multi-district litigation docket in the district court below, *In re: Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, No. 08-019160-MD-MARRA (S.D. Fla.).

was bound to consider them under Colombian law based on diversity jurisdiction.

The district court certified an interlocutory appeal on ATS issues concerning the pleading requirements for state action, crimes against humanity, and war crimes. Plaintiffs conditionally cross-appealed the issue of whether state law could apply to the non-federal diversity claims. This Court granted permission to appeal, including Plaintiffs' conditional cross-appeal.

The panel majority held, as Plaintiffs conceded, that TVPA claims could not proceed against a corporation based on *Mohamad*, 132 S.Ct. 1702. Slip Op. at 5. The panel did not address Plaintiffs' TVPA claims against individual defendants.

The panel also held that under *Kiobel*, the court had no jurisdiction based on the ATS because the abuses occurred outside the United States. *Id*. at 6. It did not address Plaintiffs' allegations that significant acts of support for the AUC took place on U.S. territory, or the fact that Chiquita's acts were federal crimes.

Nor did the panel address Plaintiffs' cross-appeal regarding whether state law, rather than Colombian law, may apply to their non-federal claims.

The panel remanded "for the entry of judgments of dismissal." *Id*. at 12.

Judge Martin dissented. She noted that Chief Justice Roberts's majority opinion in *Kiobel* allows extraterritorial claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." *Id*. at 12 (Martin, J., dissenting) (quoting *Kiobel*, 133 S. Ct. at 1669). Judge Martin

analyzed the factors pertinent to whether particular ATS claims "touch and concern" the United States, including the U.S.-based conduct and whether the acts were committed by U.S. citizens. She found that Plaintiffs met the *Kiobel* standard.

STATEMENT OF FACTS

U.S. banana producer Chiquita Brands International, Inc., its subsidiaries, and its affiliates (collectively, "Chiquita") funded, armed, and otherwise supported a foreign terrorist group, the AUC, that targeted civilians. Chiquita did this to maintain its control and lower production costs in the banana regions. Chiquita's aid substantially assisted the AUC to perpetrate murders, forced disappearances, torture, rapes, crimes against humanity, and war crimes against trade unionists, banana workers, political organizers, social activists and their relatives, and other local residents. *See, e.g.*, Second Amended Complaint ¶¶ 2, 230, *John Doe I v. Chiquita Brands Int'l, Inc.*, District Ct. Dkt. 589 (S.D Fla. Nov. 16, 2012).

Chiquita's actions were conceived and directed from the United States. Top Chiquita executives – CEOs, directors and other high-ranking officers based in Ohio – some of whom are co-defendants in this case, approved over 100 payments to the AUC over at least seven years and devised a plan to hide them in their books, labeling them "security payments." Chiquita sought legal advice in the United States and continued approving the payments despite counsel's advice that the payments were illegal. *See* Order, District Ct. Dkt. 412 at 9 (Mar. 6, 2011).

Chiquita pled guilty in federal court to supporting a group designated by the U.S. government as a Foreign Terrorist Organization and Specially-Designated Global Terrorist. In so doing, it agreed to detailed factual findings about these activities. Thus, the connection between U.S.-based conduct and the mass murder of Plaintiffs' relatives is supported by Chiquita's own admissions.

REASONS FOR GRANTING THE PETITION

I. The panel's ATS ruling conflicts with the Supreme Court's decision in *Kiobel* and with every post-*Kiobel* Circuit decision on this issue.

A. The panel's ruling conflicts with *Kiobel.*

The panel adopted the approach espoused by Justices Alito and Thomas in their *Kiobel* concurrence, even though these Justices recognized their approach restricted the ATS more than the majority holding. Justices Alito and Thomas stated that the *Kiobel* holding was "narrow" and that they would have preferred a broader holding requiring conduct on U.S. soil that constitutes an international law violation in itself. *Kiobel,* 133 S. Ct. at 1669-70 (Alito, J., concurring). Yet, the panel inexplicably accepted this minority view as *Kiobel*'s holding. Slip Op. at 10. In fact, the panel went further than the Alito concurrence by failing to consider whether Chiquita's conduct on U.S. soil was itself a violation of international law.

Chief Justice Roberts's majority opinion permitted ATS claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption" against extraterritoriality. *Kiobel*, 133 S. Ct. at 1669. In cases

involving foreign corporate defendants, foreign plaintiffs, and acts occurring entirely abroad, the "mere corporate presence" of the defendant in the United States is insufficient. *Id.* But nothing in *Kiobel* bars ATS claims where the connection between the claims and the United States is as extensive as here.

To the contrary, the Supreme Court "broadly stated that the 'claims,' rather than the alleged tortious conduct, must touch and concern United States territory." *Al Shimari*, 2014 2014 U.S. App. LEXIS 12268, at *23. This "suggest[s] that courts must consider all the facts that give rise to ATS claims, including the parties' identities and their relationship to the causes of action." *Id.* The "clear implication" of the "touch and concern" language is that courts must conduct a fact-based inquiry into all of the ways in which particular claims affect the United States and may not mechanically focus on the location of the harm. *Id.* at *26.

The panel erred in adopting Justice Alito's view as *Kiobel*'s holding, and in assuming that the ATS precluded extraterritorial claims altogether without conducting the fact-specific analysis that Section IV of Chief Justice Roberts's majority opinion requires. *See Kiobel*, 133 S. Ct. at 1669.

The panel compounded these errors by failing to apply even the Alito test. Chiquita's acts of aiding and abetting extrajudicial killings, war crimes and crimes against humanity, which originated in the United States, are themselves torts in violation of the law of nations. *See* AOB 10-13 & Section II.B. The panel did not

address the factual allegations that critical conduct took place on U.S. territory.

Judge Martin's dissent found the "touch and concern" test satisfied here for two reasons. First, Chiquita is a U.S. corporation. This makes it appropriate for U.S. courts to exercise jurisdiction over extraterritorial torts and distinguishes this case from *Kiobel*, in which foreign sovereigns objected to U.S. jurisdiction over foreign corporations while recognizing the propriety of U.S. jurisdiction over U.S. citizen violations. Slip Op. at 14-18 (Martin, J., dissenting). Indeed, the ATS was enacted to address unlawful conduct by U.S. nationals, even if it occurred abroad. *Id.* at 15-18. The U.S. may incur responsibility under international law for its nationals' acts, *id.* at 15-16, an element absent in *Kiobel*.[3]

Second, Chiquita's acts *in the United States* contributed directly to the massive human rights violations at issue. *Id*. at 18. Chiquita directed the financing of the AUC from the United States, its top executives devised a plan to hide the payments and monitored them from the company's headquarters in Ohio, and they

[3] Thus, the United States argued in *Kiobel* that while the claims there lacked sufficient U.S. connection, an absolute bar on claims involving abuses abroad is unwarranted. Supp. Br. for the United States as *Amicus Curiae* in Partial Support of Affirmance, at 4-5, *Kiobel*, 133 S.Ct. 1659 (2013) (No. 10-1491). The Government cited with approval *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) – "a suit by Paraguayan plaintiffs against a Paraguayan defendant based on alleged torture committed in Paraguay" – emphasizing that because the defendant resided here, U.S. responsibility under international law was engaged. U.S. Supp. Br. at 4. This concern about providing perpetrators of serious international crimes with safe harbor applies with even more force here, since Chiquita is a U.S. *citizen*.

intended to benefit here. *See id*. The majority ignored these allegations.

Moreover, Chiquita pled guilty to a federal crime based on the acts Plaintiffs allege. These acts were illegal because Congress and the Executive determined that supporting the AUC harmed the national interest and threatened U.S. nationals. *See* Exec. Order No. 13,224, 31 C.F.R. 595-97 (2001) (blocking transactions with terrorists deemed to "threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States"). The panel did not explain how Chiquita's support for terrorists could violate U.S. criminal law and undermine our security but not "touch and concern" the United States.

Rehearing *en banc* is necessary because the panel's opinion conflicts with the holding in *Kiobel* allowing ATS claims that "touch and concern" U.S. territory with sufficient force. The allegations here meet any possible definition of the "touch and concern" standard for the reasons Judge Martin noted.

B. The panel's decision conflicts with all other Circuit decisions.

Three other Circuits have applied *Kiobel* to ATS claims involving abuses committed abroad. None has suggested that claims do not "touch and concern" the United States where U.S. nationals assist abuses *from the United States*. None has adopted Justice Alito's concurrence as the *Kiobel* holding.

Most recently, the Fourth Circuit found that the defendant's U.S. corporate citizenship and other connections to U.S. territory satisfied the "touch and

concern" test. *Al Shimari*, U.S. App. LEXIS 12268. The Court adopted an analysis very similar to Judge Martin's and explicitly rejected the approach favored by the panel majority here. *Id.* at *23-27.

The Ninth Circuit also rejected the blanket extraterritoriality rule accepted by the panel. *Doe v. Nestle*, 738 F.3d 1048 (9th Cir. 2013) (*en banc* petition pending). The *Nestle* court remanded to allow the Plaintiffs to amend their complaint to show how their ATS claims met the "touch and concern" test.

The Second Circuit held that *Kiobel* bars claims where defendants committed *no* acts on U.S. territory. *Balintulo v. Daimler AG*, 727 F.3d 174, 189-92 (2d Cir. 2013); *Chowdury v. World Bangladesh Holding Ltd*, 746 F.3d 42, 49 (2d Cir. 2013). But, contrary to the panel's holding here, it held that *Kiobel* "left open any questions regarding the permissible reach of causes of action under the ATS when *some* domestic activity is involved." *Balintulo*, 727 F.3d at 191, n.26 (internal quotation omitted, italics in original).

In short, one Circuit has not ruled on the issue presented here, but has rejected the panel's suggestion that its approach is compelled by *Kiobel*, while two have flatly rejected the panel's approach.

II. If the panel meant to dismiss Plaintiffs' non-federal claims and TVPA claims against individual defendants, such dismissal would conflict with Supreme Court precedent.

The panel did not mention Plaintiffs' non-federal claims based on diversity

jurisdiction or Plaintiffs' TVPA claims against individual defendants. Though the opinion used language that could be read to require dismissal of all claims, it seems unlikely that the panel would dismiss claims unaffected by its reasoning without explaining why. Regardless, Supreme Court precedent precludes such dismissal. The Court should clarify that Plaintiffs' non-federal claims and TVPA claims against individual may not be dismissed based on the panel's opinion.

A. Dismissal of the non-federal claims would conflict with Supreme Court precedent.

Plaintiffs assert ordinary tort claims – assault and battery, wrongful death and negligence – based on state or Colombian tort law. There is plainly jurisdiction over these claims under 28 U.S.C. § 1332. Federal courts lack discretion to decline diversity jurisdiction. *See, e.g., Meredith v. Winter Haven*, 320 U.S. 228, 234-37 (1943).

Whether the ATS provides jurisdiction over Plaintiffs' international law claims has no bearing on the non-federal claims. No party contends that *Kiobel* limits diversity jurisdiction. There is disagreement as to whether state law (as opposed to Colombian law) may ever apply to Plaintiffs' non-federal claims, which is the subject of the cross-appeal the panel ignored. But Chiquita itself noted that it "does not dispute . . . that plaintiffs could adequately plead diversity jurisdiction," District Ct. Dkt. 470 at 3, 11-12 (S.D. Fla. Aug. 19, 2011), and that Plaintiffs can therefore "litigate claims under Colombian law . . . regardless of the

fate of their ATS claims." *Id.* And the district court held "that it did not have the discretion to dismiss the Colombia-law claims" that were properly pled under diversity jurisdiction. District Ct. Dkt. 516 at 5 (S.D. Fla. Mar. 27, 2012).

B. Dismissal of Plaintiffs' TVPA claims against individual defendants would conflict with Supreme Court precedent.

The panel's sole basis for dismissing the TVPA claims was the Supreme Court's recent holding that the TVPA "authorizes liability solely against natural persons," not corporations. Slip Op. at 4-5 (quoting *Mohamad*, 132 S. Ct. at 1708). Plaintiffs conceded that TVPA claims against Chiquita cannot proceed, but noted that such claims against the individual defendants are allowed. AOB at 67. Indeed, *Mohamad* affirmed that the law's purpose was to authorize suits against natural persons for torture and extrajudicial killing abroad. 132 S. Ct. at 1709-10. After *Mohamad*, this Circuit and others have recognized that the TVPA authorizes such suits.[4] If the panel meant to suggest that the TVPA claims against individual defendants should be dismissed, its decision would conflict with *Mohamad.*

CONCLUSION

The panel's decision conflicts with *Kiobel* and all post-*Kiobel* circuit decisions. Moreover, the majority ignored factual allegations concerning

[4] *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1352 n.1 (11th Cir. 2014); *Al Shimari*, 2014 2014 U.S. App. LEXIS 12268, at *35 (finding TVPA evinces Congressional intent "to hold citizens of the United States accountable for acts of torture committed abroad"); *Chowdhury*, 746 F.3d at 51.

Chiquita's actions in the United States that are crucial under even the *Kiobel* minority's preferred approach. Plaintiffs' claims, involving U.S. citizens and U.S. actions that violate U.S. criminal law, are precisely the type of claims that "touch and concern" the United States. This Court should rehear the case *en banc* to ensure that the law of this Circuit is faithful to Supreme Court precedent.

The panel's ambiguous order that the district court "dismiss" these actions cannot apply to Plaintiffs' diversity claims or their TVPA claims against natural persons. The opinion did not mention these claims, its rationale provides no basis to dismiss them, and Chiquita did not challenge them on appeal. This Court should clarify the order to avoid confusion on remand.

Dated: August 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Paul Hoffman, certify that, on August 14, 2014, a copy of this PLAINTIFFS-APPELLEES-CROSS-APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC was electronically filed with the Court and served on all other parties using CM / ECF.

By: /s/ Paul L. Hoffman

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ADDENDUM: PANEL OPINION