No. 09-15641

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY BOWOTO, et al.,

Plaintiff-Appellants,

v.

CHEVRON CORP., et al.,

Defendant-Appellees.

On Appeal from the United States District Court
for the Northern District of California
Susan Y. Illston, District Judge, No. 99-02506 SI

APPELLEES' ANSWERING BRIEF

Robert A. Mittelstaedt
Craig E. Stewart
Caroline N. Mitchell
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700

Attorneys for Defendant-Appellees
CHEVRON CORP., CHEVRON
INVESTMENTS INC. AND CHEVRON
U.S.A. INC.

CORPORATE DISCLOSURE STATEMENT

Appellee Chevron Corporation has no parent company and no publicly traded company owns 10% or more of its stock. Appellee Chevron Investments Inc. is a wholly owned subsidiary of Chevron Corporation. Appellee Chevron U.S.A. Inc. is an indirectly wholly owned subsidiary of Chevron Corporation.

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INTRODUCTION

This personal injury trial was a credibility contest in which the evidence in defendants' favor—most of which plaintiffs omit from their brief—was overwhelming. Plaintiffs were given wide latitude to tell their story. In the process, they put at issue the very evidence to which they now object.

In May 1998, some 150 members of the Concerned Ilaje Citizens (CIC) stormed a construction barge, a tugboat and an oil platform nine miles off the Nigerian coast. They claimed to represent 42 onshore Ilaje communities. For over three days, they used violence, the threat of violence and the strength of their numbers to hold the barge workers and tug crew for ransom. Chevron Nigeria Ltd. (CNL), which operated the oil platform, attempted to negotiate for three days. The invaders not only refused to vacate the facilities or release the hostages, they threatened to kill the CNL negotiator and took him hostage.

On the fourth day of the occupation, the Nigerian Navy intervened at CNL's request. The Navy-led force was attacked by CIC members, three of whom were shot, two fatally. The barge workers were rescued unharmed, and several CIC members were arrested. Other CIC members, however, forced the tugboat crew to shore and held them for another three days.

This lawsuit was brought by four CIC members or their relatives against Chevron Corporation and two subsidiaries, none of which had anything to do with CNL's decision to request the hostage rescue. Plaintiffs advanced a three-tiered theory: first, that the Nigerian Navy rescue team unlawfully injured them; second, that non-defendant CNL should not have requested the hostage rescue and was

responsible for the rescue team's conduct; and third, that Chevron Corporation and two subsidiaries were in turn liable. Failure at any tier defeats plaintiffs' case.

After a five-week trial, the jury found in defendants' favor on all counts. The general verdict form, on which plaintiffs insisted, did not reveal whether the jury found for defendants on the underlying claims (*e.g.*, wrongful death, battery, negligence), the secondary or tertiary liability theories, or all of them. On appeal, plaintiffs do not dispute that the verdict was amply supported by the evidence. Instead, they challenge the admissibility of certain evidence, and the wording of certain instructions.

The challenged evidence was properly admitted and, indeed, invited by plaintiffs. It directly refuted their testimony that their communities were "peace-loving" and "would never take hostages" and that their group which seized the tug, barge and oil platform for those communities was "peaceful" and without weapons. The jury instructions, including those addressing CNL's privilege to report the invasion to law enforcement officials, properly stated the law.

Moreover, the challenged evidence and instructions bear on only the first tier of plaintiffs' three-tiered liability theory. Thus, even if plaintiffs' challenge had any basis, this appeal would still fail, with plaintiffs having insisted on a general verdict.

Plaintiffs' challenge to the dismissal of two claims is wrong as a matter of law. DOHSA provides the exclusive remedy for deaths on the high seas. The TVPA expressly provides remedies only against individuals. In any event, the jury

found against plaintiffs on identical claims under different laws, thus eliminating any possible prejudice from the dismissals.

STATEMENT OF THE CASE

At trial, plaintiffs presented 56 witnesses. Defendants presented 17 witnesses, including hostages and eyewitnesses to the attacks by the CIC that led to the shootings. After deliberating for one and a half days, the jury returned a unanimous verdict for defendants using plaintiffs' general verdict form.

The district court denied a motion for new trial, because the "jury heard evidence that could have made them doubt the credibility of plaintiffs' witnesses" and the jury may not have been "persuaded by plaintiffs' evidence of secondary and tertiary liability." ER:78.

STATEMENT OF FACTS

Far from presenting the evidence "in the light most favorable to the verdict" (*Lassiter v. City of Bremerton*, 556 F.3d 1049, 1053 (9th Cir. 2009)), plaintiffs omit nearly all the evidence supporting the verdict and showing the relevancy of the evidence they challenge.

Plaintiffs' themes at trial were that their group, the CIC, represented 42 Ilaje communities that were peaceful and "would never hold hostage[s] to advance" their interests (ER:625-26, 683-84, 3108; SER:457 ("We the Ilajes believe in dialogue and hate sea piracy . . . .")); CNL had no need for armed protection by the Nigerian Navy or other government security forces (GSF), at least not from "'anything that the communities might try to do'" (AOB:7); CNL neglected those communities, was unwilling to meet with them despite their "peace-loving" nature

and favored rival ethnic groups (ER:552, 706, 1453, 1559-60, 1563); and the Parabe takeover was in keeping with those peaceful traditions (ER:1563).

Against that backdrop, plaintiffs asserted that in May 1998 their communities sought only to "discuss" grievances with CNL's managing director (who worked hundreds of miles away in Lagos, not on the facilities they seized) (ER:998-1000, 901-02, 1325, 1560-61); they were weaponless (ER:1453-54) and "did nothing but sing and pray and hang out" while occupying those facilities (ER:563); CNL, its barge and tug workers and its negotiator had nothing to fear (ER:706, 1562-63); CNL should have been willing to continue negotiations instead of asking the Navy to rescue the hostages (ER:1184); and they were prepared to leave on the fourth day when they were unjustifiably attacked by the Nigerian authorities (ER:945-48, 1570).

Defendants' evidence told a different story.

A. CIC Threatens Violence in Advance of Takeover.

Onshore from the Parabe oil platform are the 42 communities of the Ilaje ethnic group. ER:625-26. To maintain good relations, CNL provided jobs, training, education and other assistance, and built schools and other facilities for the communities. ER:2397-98. CNL suspended meetings with the communities because of the communities' hostage taking and "other forms of threat." ER:2404-13; SER:448-49, 444.

In early 1998, CNL began upgrading the Parabe platform. ER:3559. The work required a construction barge (the CBL-101) with some 150 workers and the Cheryl Anne tugboat with a crew of nine. ER:2593, 3393, 3446-47.

In April 1998, the CIC began sending threatening letters to CNL. ER:2420-21; SER:435-40, 454-60. They threatened "sea piracy" if CNL did not "immediately" meet their demands for money and jobs. SER:457. Failure to comply "would not be tolerated," would "trigger [an] unpredictable re-action" and "could lead to mass riot the result of which nobody could predict." SER:437. They threatened, "[w]hich language do you understand? Is it violence or sea piracy, war or peace?" SER:439.[1]

These threats were signed by plaintiff Larry Bowoto and other CIC members. At trial, Bowoto denied understanding or agreeing with the letter threatening sea piracy, only to be impeached by his deposition where he had read the letter aloud in English and admitted that he had signed and agreed with it. ER:1075-76, 1083; SER:434. Plaintiffs' witness Ebiesuwa, a CIC founder, claimed that "mass riot" meant "peaceful protest." ER:681-84. But he admitted that the "sea piracy" letter was the CIC's way of telling CNL "[i]f you don't do this, I'm going to hit you." ER:661; *see also* ER:685-86.

B. Violent Takeover of Parabe Facilities.

1. Tugboat.

On May 25, the CIC launched its threatened attack with a flotilla of motorized boats. Plaintiffs Bowoto, Jeje and Oyinbo and their trial witness Aiyenumelo were "leaders" in the lead boat. ER:903, 1560. Their first target was

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[1] At trial, plaintiffs stressed that their group, the CIC, spoke for the Ilaje communities and was responsible for the invasion. *E.g.*, ER:463, 553, 625-26, 898. On appeal, however, they refer only to "plaintiffs and others" (*e.g.*, AOB:8) without ever mentioning the CIC or their threatening letters.

the tugboat moored to the barge connected to the platform. *Id.* Aiyenumelo and others seized the tugboat. ER:909, 3449-51. In Captain Schools' words, "in a heartbeat they were just there," "scrambling up the ladders," "shouting and carrying on." ER:3449. About 14 pirates, as Schools viewed them, "materialized on the bridge and completely surrounded me." ER:3449-50. They forced him against the bulkhead and "slammed the throttles forward." ER:3449. They seized "fire axes" and "sharp objects" from the galley. ER:3452. They had a large machete knife known as a "lamb splitter." ER:3453, 3653-56. They placed Molotov cocktails around the tug. ER:3452. They threatened to "run the Cheryl Anne aground and burn it, set it afire." ER:3453, 3464. They had no peace placards and did not ask permission to board. ER:3451, 1635 (no permission for ten pirates to board tug and stay there).

2. Barge and Platform.

Next, Bowoto and the other CIC boats assaulted the adjacent barge. As the barge workers testified, a "swarm of canoes" with 120 people approached. ER:2679. "They got on as quick as they could and from any point of entry they could." ER:2682. "They were running up the stairs," "going to the radio room," and "coming across the . . . gangway to the platform." ER:3509. They hit a worker in "the head with a bolt" and with their fists, and struck other barge workers, one "hard enough on the back of the head to knock his hard hat off and knock his glasses off his face." ER:2683-85, 2599-2600.

The invaders did not "want anybody working," prevented the workers from escaping on the bridge to the platform, pushing and shoving them and yelling at

them to go to the barge. ER:3403-05, 3510. Workers complied, because that was "safest." ER:3511. Workers gathered on the barge's top floor because it "was more easily defensible, and everyone was together for communication purposes." ER:2600-01.

The workers saw no placards and heard no songs. ER:3410, 3516, 2589-90. The invaders warned that "they were there to quench," would "stay until they got what they came for" and were ready to die for their cause. ER:3409-10, 3564.

Over the next three days, the invaders maintained control with violence, threats of further violence and, as their hostage expert testified, "with the strength of their numbers." ER:1169-70. They wounded a worker, causing him to fear for his life. ER:2685. They threatened to kill workers, "cut [one of them] up in little pieces," or take them to shore. ER:3367, 3371-72, 3564, 3578. "[T]hey threw bottles and broke bottles all over the helideck." ER:3407. "There was a lot of pushing and shoving. They kicked in the door to the radio room, . . . jerked radios off the wall, . . . cornered the captain in his office." *Id.* They poured diesel fuel on the barge deck, causing fear they would set it ablaze. ER:2686-89, 3519-20.

Some invaders had machetes with foot-long blades and tools like wrenches that could be used as weapons. ER:2690-92, 3520-21, 3534. As on the tug, they made bombs out of bottles and placed Molotov cocktails around the barge. ER:3369, 3568. They broke bottoms off Coke bottles as if "to use them as a weapon." ER:3569. They drank alcohol and became intoxicated, "stumbling" and "yelling," and smoked marijuana. ER:3521-22, 3580, 3534.

Understandably, the barge workers were "[v]ery tense," "worried," and "agitated." ER:2608. The invaders blocked the helidecks on the barge and platform (ER:3536-37, 3414-15), so the "[o]nly way to leave would have been to swim. And you would have died swimming." ER:2686. The workers were not allowed to leave. ER:3518. They were hostages "every second of every day." ER:2697, 3519, 1426-28, 3368. As one worker put it, "[i]f I had been free, I would have left." ER:3413-14, 3420. A worker reached his father by phone, crying that he "had been taken hostage" and the call might be the last time they ever spoke. ER:2694-95, ER:3572 ("There was a lot of talk of being scared of dying or not making it home to see their families . . . .").

This testimony was so powerful that, in his closing, plaintiffs' counsel abandoned the claim that the invaders did nothing but "sing and pray and hang out" (ER:563), stating instead that "I do not deny that these [workers] were scared" and that he was not trying to "excuse bad conduct." ER:3124.

C. Hostage Negotiations.

Scott Davis, CNL's operations manager in the Niger Delta, headed its crisis management team (CMT). ER:1323, 1355. The CMT received information from the barge, including that the invaders had spread diesel over the barge and threatened to blow it up (ER:3499-500) and were armed with broken bottles, blades and clubs (ER:2149-50, 2752), and that hostages were worried they would be killed (ER:3500-01).

On May 26, at the CIC's insistence, CNL's Deji Haastrup went to the barge to negotiate. ER:2440-43. Refusing to negotiate, however, the CIC threatened to

kill him and to "burn this whole thing down." ER:2451, 2752. Although fearful of being kidnapped, Haastrup agreed to go to an onshore village to negotiate—in exchange for the invaders' promise to vacate the barge. ER:2451-52. But when Haastrup arrived at the village the next day, the CIC reneged on its promise to vacate. ER:2455-56. The CIC promised, however, to vacate if negotiations progressed. ER:2457. Haastrup agreed to some CIC demands but they still refused to vacate. ER:2457, 2459-63.

The CIC demanded that CNL pay 10 million Naira (more than $100,000). ER:2464, 2936. Haastrup refused to pay that "ransom." ER:2464-65. Infuriated, the CIC told Haastrup that "you're going to pay this or else" and took him hostage. ER:2465-66. Two captors later accompanied him to a CNL facility so he could radio Davis and the CMT. ER:2466-67. Davis refused the ransom demand. ER:2761-63. When Haastrup relayed that response to the Ilaje, "they stormed out very angrily" threatening that CNL "would regret this." ER:2324-25, 2468.[2] Haastrup informed the CMT that negotiations had broken down. ER:2324, 2167, 2467-68, 2762-63, 1410-11.

D. Decision to Request Law Enforcement Intervention.

After receiving Haastrup's report, the CMT discussed its options. ER:2763-64. Returning Haastrup to the village for further negotiations was "off the table" because he had just been held hostage. ER:2763. Relocating negotiations to a safer spot would take time, increasing the risk of further violence that could

[2] Contrary to plaintiffs' claim (AOB:8-9), they did not agree to release the hostages or to vacate the facilities on the fourth morning. ER:2325, 2467.

"escalate out of control" (ER:2757, 2764) or cause a "major explosion" on the platform. ER:2750. The barge supervisor advised Davis that the workers were "ready" to be rescued. ER:2755. It was "a real tinderbox," a "very volatile situation" with tension "clearly increasing." ER:2753, 2757, 2764.

The CMT believed a peaceful rescue could be accomplished. When the same barge was invaded a few months earlier, the Nigerian mobile police had intervened, without being attacked or firing shots. ER:2734-35. A year earlier, the Nigerian Navy had intervened in a hostage situation, again without any injuries. ER:2765. And, when a helicopter made a test flight over the barge on May 27, the invaders headed to their boats as if they intended to leave rather than attack. ER:2765-66. For these reasons, the CMT expected that the invaders "would move away from the living quarters" and permit the Navy to rescue the hostages. ER:2765. The CMT was concerned, however, that the invaders would force the tugboat to shore and thus tried, unsuccessfully, to advise the tug to disable its engines. ER:2769-70.

Late on May 27, with the approval of CNL management in Lagos, the CMT asked the Navy to rescue the hostages. ER:1325, 1389, 2769.

E. Hostage Rescue.

On May 28, the law enforcement team led by the Navy and accompanied by CNL security coordinator, Neku, flew to the barge on CNL-leased helicopters. *See* ER: 2156-58, 2764. When they landed, Neku showed them the stairs down to the deck of the barge. ER:1422-24, 2159. The rescue team went down to the deck without Neku. ER:1422-23, 2160-61.

Although most invaders moved away from the Navy team and toward the platform or their boats, a small group including some with heavy pipes advanced on the Navy team. ER:2639-40. As eyewitnesses recounted, two invaders were shot as they attacked the rescue team with pipes. ER: 3528-29, 3575-76. Irowarinun was one of them.

Plaintiff Bassey Jeje was the only purported witness to his alleged shooting. He claimed that he was moving from the platform to the barge, against the tide of fleeing invaders, directly towards soldiers supposedly shooting in his direction with a hail of bullets whizzing by his ears. ER:2926, 3266-69. He claimed that a bullet hit him and that, after it was removed from his body, he showed it to his family "every day" for six years as evidence of his suffering. ER:2926-27. But he failed to produce the bullet despite court order. ER:2928-32. Jeje chose not to testify live at trial. His counsel did not argue the truth of his testimony other than the alleged injuries. ER:2591, 2603.

Like Jeje, Bowoto also admitted running at the rescue team, waving his hands and shouting after two invaders had already attacked and been shot. ER:947-48. Bowoto was the only witness to his shooting, with Jeje giving inconsistent testimony on whether he witnessed it. *Compare* ER:3270-71 *with* ER:3280.

The hostages were evacuated by boat. ER:2642. The rescue team arrested eleven invaders, including Oyinbo, who were held in the Ondo State Prison. ER:1593, 1596-97. Oyinbo later died of an unrelated cause, and his wife and children substituted in his place. ER:358. Their witnesses claimed that Oyinbo

had told them that he was tortured[3] and that they saw marks on his body. No witness, however, testified that anyone from CNL was aware of or participated in the alleged torture. *See* ER:2774, 2470-71, 1933.[4]

F. Continued Detention of Tugboat.

Davis' concern that the tug was "[o]ur most vulnerable spot" (ER:3611) and would be forced to shore (ER:2766) proved prophetic. When the rescue team arrived, some CIC members forced the tug's captain and crew to shore. ER:1581-82, 1586, 3469-70. The community "elders" who had organized the invasion held the captain and his crew against their will for three more days, purportedly to exchange for their arrested group members. ER:1658-60, 3480-82, 1458-61, 1655-56, 2233, 990, 1683.

G. CNL's Relationship With GSF.

Although plaintiffs criticized CNL for relying on the Navy and other parts of the Nigerian government security forces (GSF) for armed protection, CNL needed such protection because of "looting," "vandalism," "numerous instances of people

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[3] The trial court permitted this testimony, over defendants' objection, under the "excited utterance" exception to the hearsay rule. ER:12.

[4] To tie CNL to Oyinbo's alleged torture, plaintiffs' witnesses claimed that a CNL employee paid cash to soldiers at a place where the arrestees were briefly held. ER:1909-10, 2057-58. The jury had ample basis to reject that testimony. Plaintiffs' witnesses testified that the supposed employee wore a Chevron logo and his car had a Chevron logo. ER:2066-68, 1928-31. But CNL vehicles never had Chevron logos on them because that would be like "putting a big bulls-eye on you." ER:2734. The same witnesses were unable to recall basic matters such as the height and weight of the employee (ER:1929), and the color or make of the vehicle (ER:1930), and gave conflicting answers (*compare* ER:3325-26 *with* ER:3328-31).

being attacked," death threats and takeovers. ER:2730-31. In Nigeria, only the GSF is authorized to bear arms. ER:2731. The Nigerian government paid the GSF salaries and CNL supplemented the salaries of GSF assigned to protect CNL facilities. ER:1338, 2024-25. The mobile police, to which plaintiffs refer (AOB:7) and which were part of the Navy-led rescue team, were armed only with tear gas at Parabe. ER:1898-99, 2158-59. No evidence was offered, and no claim was made, that the Navy had a reputation for excessive force or that the mobile police shot any plaintiff.

ARGUMENT

I. PLAINTIFFS' FAILURE TO REQUEST A SPECIAL VERDICT DEFEATS THEIR APPEAL.

When a party requests a general verdict form making it impossible to know the basis for the verdict, that party may not challenge the verdict for alleged errors not affecting all potential bases for the verdict. *McCord v. Maguire*, 873 F.2d 1271, 1274, *as amended by* 885 F.2d 650 (9th Cir. 1989). Litigants who wish to challenge rulings as to less than all theories of liability must "present an appropriate record for review by asking the jury to make separate factual determinations as to each" theory. *Id.*

> Any other rule would unnecessarily jeopardize jury verdicts that are otherwise fully supported by the record on the mere theoretical possibility that the jury based its decision on unsupported specifications. We will not allow litigants to play procedural brinksmanship with the jury system and take advantage of uncertainties they could well have avoided.

Id.[5]

This rule bars plaintiffs' arguments. Over defendants' objection, plaintiffs insisted on a general verdict form that left no trace of the jury's footprints. SER:81, 142-44, 353, 407. Plaintiffs therefore cannot now seek to overturn the jury's verdict unless error infected all three levels of liability plaintiffs were required to establish. *See* ER:25-42 (GSF liability), 52-59 (CNL liability), 44-50 (defendants' liability).

The alleged errors go only to the first level. The challenged evidence related to plaintiffs' conduct, motive, plan and intentions, not to the relationship or interactions between the GSF and CNL, or between CNL and defendants. The alleged instructional errors likewise relate only to the underlying claims and are irrelevant to secondary liability of CNL or tertiary liability of defendants. Liability on the DOHSA-preempted ATS and the TVPA claims would also have separately required establishing secondary and tertiary responsibility.[6]

Plaintiff must live with the opaqueness that their verdict form created. Their "failure to request a special verdict as to each factual theory in the case prevents [them] from pressing [their] argument on appeal" and engaging in "procedural brinksmanship." *McCord*, 873 F.2d at 1274. They did not just fail to request a

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[5] *See also, e.g.*, *E. Trading Co. v. Refco, Inc.*, 229 F.3d 617, 622 (7th Cir. 2000) (barring challenge to jury instruction where appellant did not request a special verdict); *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987); *Union Pac. R.R. Co. v. Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968).

[6] As discussed below (at 34-36), the jury also had ample basis to find against plaintiffs on the secondary and tertiary levels.

special verdict form; they affirmatively opposed defendants' request for that form. SER:136, 154.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT DIRECTLY REBUTTED PLAINTIFFS' TESTIMONY.

The four pieces of evidence plaintiffs challenge were properly admitted because they directly refuted testimony offered by plaintiffs. And given the overwhelming evidence refuting plaintiffs' claims, admission of these four pieces of evidence in a five-week trial could not possibly have prejudiced plaintiffs even if improperly admitted. *United States v. Hankey*, 203 F.3d 1160, 1166 (9th Cir. 2000) (decision to admit evidence under Rule 403 is "reviewed with considerable deference"); *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000) (abuse of discretion requires that "the reviewed decision lies beyond the pale of reasonable justification").

A. Evidence That the CIC Continued to Hold the Tug and Its Crew Was Properly Admitted.

Plaintiffs do not dispute the relevancy of the CIC's occupation of the tug and detention of its crew during the first three days of the invasion. *See supra*, pp. 5-6. Yet they assert that it was error for the jury to learn that the CIC continued to do so for another three days, with the tug crew being taken to shore and held there. Their argument is groundless.

1. The evidence was properly admitted.

Plaintiffs argue (AOB:19-25) that the continued detention of the tug supposedly had "no connection" to the events on the barge. In fact, the events on the tug were part and parcel of the same CIC invasion, as plaintiffs conceded by

not challenging evidence about the first three days of the tug occupation. ER:499; SER:56-63. The initial seizure of the tug was planned and carried out as part of the invasion of the barge. *Supra,* pp. 5-6. Three plaintiffs delivered Aiyenumelo to the tug on May 25. ER:903-04, 907-09, 1138-39, 1560. He remained in communication with the CIC leaders on the barge during the invasion. *E.g.*, ER:1142-43, 1635-36, 3459. Just before taking the tug crew to shore, Aiyenumelo communicated via radio with Oyinbo on the barge. ER:1582-84. The CIC negotiator Ajidibo assisted Aiyenumelo. ER:2218. Plaintiffs never suggested that their group's occupation of the barge and platform was unrelated to their occupation of the tug. *E.g.*, ER:1140-43. And the "elders" who organized the assault on the tug, barge and platforms are the ones who held the crew on shore. *Supra,* p. 12.

Indeed, occupying the tug was important to the CIC not only to control radio communications (ER:1636) but to increase its leverage over CNL. As CNL acknowledged, "[o]ur most vulnerable spot is the tug." ER:3611. Although the CIC could not move the barge or platform, they could easily take the tug to shore with its crew if a rescue mission was attempted. And the CIC expected CNL to be concerned for the safety of the tug workers, adding to the CIC's leverage. ER:1624.

Thus, the taking of the tug bore directly on the conduct, motive, intent and state of mind of the invaders, and it rebutted plaintiffs' contention that the invaders, as a group, harbored only peaceful intentions and would never engage in violence or a hostage-taking invasion, and were not in control of the tug for the

first three days. *Supra*, pp. 3-4; ER:1562-63, 1636. The jury was entitled to hear about the entire episode, not just about the portion that plaintiffs wanted them to hear. "The picture of a kidnapping is not complete unless all of the relationships of the [perpetrator] to the victims, from the beginning of the illegal detention to the end of it, are shown." *United States v. Bradshaw*, 690 F.2d 704, 708-09 (9th Cir. 1982).

Plaintiffs were free to argue to the jury their implausible theory that the barge rescue was "an intervening act" that "severed" the taking of the tug from the rest of the invasion. AOB:24-25. But, as the trial court recognized, it was for the jury to decide whether that assertion was factual. Moreover, even where (unlike here) the challenged evidence is of a subsequent event rather than the same episode, this Court has repeatedly permitted use of subsequent misconduct as evidence of prior intent.[7] As this Court has held in finding admissible "conduct and statements subsequent to the criminal acts" at issue, the "timing of the statements and conduct" goes to weight, not admissibility. *United States v. McDonald*, 576 F.2d 1350, 1356 n.10 (9th Cir. 1978).

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[7] *E.g.*, *United States v. Hinostroza*, 297 F.3d 924, 928 (9th Cir. 2002) (admitting evidence of subsequent acts showing "intent, perhaps a common plan to gather more firearms, and an absence of mistake or accident"); *United States v. Ayers*, 924 F.2d 1468, 1473-74 (9th Cir. 1991) (evidence of three subsequent acts of concealment admitted to show defendant's purpose for concealing cash from government); *United States v. Hearst*, 563 F.2d 1331, 1335-36 (9th Cir. 1977) (evidence of defendant's participation in a crime occurring one month after the crime charged admitted to prove defendant's intent to rebut the defense of duress).

Nor are plaintiffs correct (AOB:26) that the tug detention was irrelevant because it supposedly did not go to whether the GSF's shooting of plaintiffs was justified or whether CNL acted negligently in seeking a rescue. It was plaintiffs who sought to prevail on these issues by testifying about the supposed peacefulness of their group and, in particular, their purpose and intent in invading the barge and tug. *Supra*, pp. 3-4. Defendants were entitled to introduce evidence rebutting that sanitized account.

The cases on which plaintiffs rely confirm the relevance of the evidence here. In *United States v. Haywood*, 280 F.3d 715, 722 (6th Cir. 2002), the challenged evidence was of "dissimilar" separate conduct that occurred five months after the transaction at issue. In *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1013 (9th Cir. 1995), the Court held that possession of a small, personal-use amount of an illegal drug did not show that the defendant conspired to possess chemicals necessary to manufacture the drug. Here, the taking of the tug was neither separate nor dissimilar. It was an integral part of the same invasion, and a continuation of the illegal detention of the tug that plaintiffs admit was properly in evidence.[8]

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[8] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), does not help plaintiffs. It involved a seven-year-long, city-wide political boycott involving only isolated incidents of violent behavior—not a single episode characterized by violence throughout. Even more fundamentally, the Court did not suggest that the evidence of violence was inadmissible, but only that (unlike here) it had not been connected to the group as a whole. *Id.* at 920.

Plaintiffs argue (AOB:22-23) that the district court should have at least excluded some of the details of Captain Schools' testimony about "events onshore." But plaintiffs never asked the district court to exclude those details if their overall objection to the event's relevance was overruled. *See* ER 3929-39; SER:270-310. Moreover, Schools' testimony of how he was treated onshore, the bulk of which plaintiffs designated,[9] was necessary to rebut plaintiffs' assertion that he was well treated. *E.g.*, ER:562 (asserting that Schools was merely taken "to the village where he stay[ed] in one of the chief's houses for three days"); *see also* ER:1460.

Finally, plaintiffs' argument (AOB:27-28) that defense counsel improperly used the tugboat kidnapping in closing argument is incorrect. Counsel properly referred to the tug's detention, not for propensity purposes, but to show that the Ilaje's intent, or "mind set," in launching the invasion was not peaceful but was to hold the workers hostage as leverage. *See* ER:999-1001 (Bowoto admitting that he thought CNL would meet the CIC demands out of concern for its workers), 1624. Moreover, Rule 404 does not apply when the party is relying on an act that is part of the same underlying transaction. *See United States v. Beckman*, 298 F.3d 788, 794 (9th Cir. 2002). Here, the tug kidnapping was not evidence of violence in ***other*** circumstances, but was proof of kidnapping in ***these*** circumstances.

Betraying their current assertion that the argument was objectionable, plaintiffs did not object at the time or file a motion before the jury retired. Thus,

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[9] ER:3929-34; SER:270-310 (deposition pages relating to onshore events are 109-146).

they may raise only plain error, which exists only in "extraordinary cases" where the error was so prejudicial that a miscarriage of justice resulted. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1192-93 (9th Cir. 2002); *Bird v. Glacier Elec. Coop. Inc.*, 255 F.3d 1136, 1148 (9th Cir. 2001). Here, there was no error at all, let alone plain error. Given all the other evidence of plaintiffs' violent behavior, including that they had seized and held the tug for three days even before May 28, defendants' argument could not possibly have resulted in a miscarriage of justice. *See supra*, pp. 4-11.

2. Plaintiffs waived any error by introducing the evidence first.

Plaintiffs' challenge to the tug detention evidence also fails because plaintiffs were the first to introduce the evidence. *See* ER:562-63 (opening statement), 1458-61 (plaintiff witness testifying that the captain did not object to going to the shore and that villagers brought them gin and food and assured them that "we will take good care of them").[10]

Having presented their story first, plaintiffs are barred from complaining that defendants told their side of the same story. *Ohler v. United States*, 529 U.S. 753, 755 (2000) ("a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted"); *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1063 n.6 (9th Cir. 2002) (same), *as amended by* 319 F.3d 1073 (9th Cir. 2003); *United States v. Chavez*, 229 F.3d 946, 952 (10th Cir. 2000) ("It is widely

[10] Although plaintiffs designated this testimony as "[r]ebuttal," they presented it before defendants introduced any evidence of the tugboat incident. SER:243-46, 231-40; ER:1458-59.

recognized that a party who raises a subject in an opening statement 'opens the door' to admission of evidence on that same subject by the opposing party."); *accord United States v. Kerr*, 981 F.2d 1050, 1052 (9th Cir. 1992); *United States v. Croft*, 124 F.3d 1109, 1120 (9th Cir. 1997).

Plaintiffs assert (AOB:23 n.2) that they introduced the evidence only because the court denied their motion *in limine*. But the court denied the motion only conditionally, stating that it would "listen to objections as they come in." ER:11, 512. Moreover, even when the denial is unconditional, a party who proceeds to introduce the evidence first is barred from challenging the denial on appeal. *Ohler*, 529 U.S. at 755. Nor does it matter that plaintiffs may have offered the evidence only to "remov[e] the sting" in anticipation of defendants doing so. *Id.* at 758. When a party makes "the strategic decision to take the sting out of the . . . evidence by mentioning it during his opening statement and introducing it later," he waives his right to appeal the issue. *Spencer v. Young*, 495 F.3d 945, 950 (8th Cir. 2007).

3. The district court conducted a proper Rule 403 analysis.

Contrary to plaintiffs' argument (AOB:25-26), "[a] trial judge allowing evidence under Rule 403 does not need to recite his balancing analysis, if we can see from the record that balancing was done." *Blind-Doan v. Sanders*, 291 F.3d 1079, 1083 (9th Cir. 2002); *accord United States v. Verduzco*, 373 F.3d 1022, 1029 n.2 (9th Cir. 2004); *Bradshaw*, 690 F.2d at 709.

Here, after the district court considered and conditionally ruled on a motion in limine on this subject (SER:56, 71; ER:11), the court entertained further

argument—for 14 pages of transcript (ER:498-508, 511-13)—over the admissibility of the tugboat evidence, including whether the evidence was "relevant" (ER:511) and "prejudic[ial]" (ER:500). The court's extensive consideration of this issue, together with the court's other Rule 403 rulings, confirm that the district judge was aware of and applied Rule 403's balancing requirement. *Verduzco*, 373 F.3d at 1029 n.2 (citing *United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978)).

B. The District Court Properly Admitted the Machete Photographs.

Plaintiffs' objection to photographs of CIC members with a machete was another attempt to sanitize the record on an issue plaintiffs raised. In their case-in-chief, plaintiffs put at issue whether their group had access to weapons. They asserted that the invaders had "no weapons" (ER:557), and Bowoto testified that he was unarmed and never saw a CIC member with a weapon or doing something hostile. ER:950-51; *see also* ER:797, 806-07, 1877. Plaintiffs and their witnesses did not limit their testimony to the barge. *See* ER:903, 1453-54.

In response, defendants offered testimony of barge and tug workers that the invaders had machetes and other weapons (*supra*, pp. 6-7)—the admission of which plaintiffs do not challenge—and corroborating photographs by Captain Schools, taken on the first day of the invasion, showing a CIC member with a machete or "lamb-splitter." ER:3453-56, 3653-56. The photographs were directly probative of the CIC's claim that they had no weapons, or access to weapons, and that the workers had nothing to fear. It was irrelevant that the photographs were taken on the tug rather than the barge. Plaintiffs never claimed that their "no

weapons" testimony pertained only to the CIC members on the barge, or that they had different instructions and *modi operandi* on the tug. CIC members freely moved among the barge, tug and platform. ER:1569-70, 2598, 3464-66.

Nor is it relevant whether a CNL decision maker was aware of the machete. The evidence was admissible because it disproved plaintiffs' story that no invader had any weapon, and it undermined the credibility of their witnesses who claimed otherwise. *United States v. Terry*, 760 F.2d 939, 943-44 (9th Cir. 1985) (evidence is probative if it indicates "possible lack of credibility"). Plaintiffs concede as much by not challenging on appeal the admissibility of testimony that the barge invaders had machetes even if Davis did not know about it. The photographs were relevant on the same basis. *Cf. Boyd v. City & County of San Francisco*, 576 F.3d 938, 944 (9th Cir. 2009) (upholding admissibility of evidence of plans and conduct of a shooting victim even though it was unknown at the time to the police officer who shot him).

Plaintiffs' crabbed view of relevancy further ignores that a main tertiary liability theory was that Chevron Corporation's post-incident press statements constituted "ratification." This theory put at issue statements that invaders were armed with weapons. ER:563-64, 2131-32, 2144-45.

For all these reasons, the district court was well within its discretion in admitting these photographs. *Borunda v. Richmond*, 885 F.2d 1384, 1388 (9th Cir. 1988) ("trial courts have very broad discretion in applying Rule 403") (internal quotation omitted).

Contrary to plaintiffs' suggestion (AOB:28-30), defendants did not use the photographs because they included a dead sea turtle. This was not a heavily photographed invasion, and the photographs taken by Captain Schools were the only available photographs proving that the invaders had weapons or access to them. This case is thus far afield from *United States v. Hitt*, 981 F.2d 422 (9th Cir. 1992), a criminal case in which the government gratuitously used a photograph, displaying the exterior of a dozen weapons owned by the defendant's housemate, with little if any relevance to whether defendant had modified the interior of a gun. *Id.* at 423-24. Here, by contrast, whether CIC members had access to weapons was directly relevant to disprove plaintiffs' contentions. And, contrary to plaintiffs' assertion, there is no reason to assume that a San Francisco jury cannot appreciate that other people use animals such as sea turtles for food.

Finally, the trial court engaged in Rule 403 balancing. In their written and oral motions, plaintiffs argued Rule 403. *See* SER:69, 65-66; ER:578-79, 1664-65. Although the court denied those motions, it granted other motions for plaintiffs on Rule 403 grounds. *E.g.*, ER:10-11, 280-83. This experienced trial court was well aware of Rule 403's balancing requirement. *See Bradshaw*, 690 F.2d 709.

C. The District Court Properly Admitted the Testimony of Stapleton and Hervey.

Plaintiffs' challenge (AOB:31-36) to the Stapleton and Hervey testimony about reports they received from the barge is likewise groundless. Plaintiffs do not dispute that reports relayed to the CMT were relevant for the non-hearsay purpose of showing the reasonableness of the CMT's decision to request law enforcement intervention. Plaintiffs argue only (1) that the reports were not conveyed to the

CMT and (2) that the evidence was unfairly prejudicial even if relevant. Neither assertion is correct.

Plaintiffs concede (AOB:34) that Stapleton relayed the reports he received from the barge to Hervey, who was his supervisor and a member of the CMT. ER:3493, 3495-3501, 2883-84, 2892-95. The one time Stapleton could not reach Hervey, he called Davis directly. ER:3501.

In turn, Hervey passed along to the rest of the CMT the reports he was receiving from Stapleton. ER:2883-84, 2894. Contrary to plaintiffs' assertion (AOB:34), Hervey's reports were not limited to relaying that the barge workers were "scared." He spoke with Stapleton on nearly an hourly basis and reported to the CMT, in six CMT meetings over the first two days of the invasion, what he had learned from Stapleton and others, without limiting it to any specific incident. ER:2888, 2892, 2893-94 ("Each of us would report on what we had heard . . ."). Having relayed the challenged information to Davis and the CMT, it matters not that (as plaintiffs note (AOB:34)) Hervey was off work after the first two full days of the invasion.

Contrary to plaintiffs' assertion (AOB:34), Parkin was not Davis' "sole source" of information about events on the barge. In testimony plaintiffs ignore, Davis confirmed that a principal source of information was Stapleton, via Hervey. ER:2747-48.

Nor are plaintiffs correct that the testimony was unfairly prejudicial under Rule 403. It was plaintiffs themselves who put such reports at issue by asserting that the CMT thought everything was calm and peaceful and that Chevron's

witnesses were lying when they testified to the contrary. ER:559-61, 3109-10. Defendants were entitled to rebut that assertion, and the challenged testimony went directly to that disputed issue. Moreover, the district court instructed the jury that the testimony could only be used to demonstrate what information was given to the CNL decision makers. ER:2876-2877. There is a "strong presumption" that the jury followed this instruction. *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1270 (9th Cir. 2000).[11]

Any claim of unfair prejudice also fails because, even if the jury took the reports for the truth of what was reported, first-hand testimony from witnesses on the barge supported the same reported facts. *See* ER:2683-85 (invaders beat and injured hostages); ER:2685, 2694 (hostages feared for their lives); ER:3519-20 (invaders poured diesel on the barge and threatened to burn it); ER:3566 (invaders drank alcohol); ER:3580 (invaders smoked marijuana); ER:2694-95 (hostage made distress call to family). That direct testimony, which plaintiffs do not challenge, attested more powerfully to the invaders' behavior than the Stapleton/Hervey testimony.

Davis and the CMT also heard much the same information directly from barge workers, again in testimony plaintiffs do not challenge. *E.g.*, ER:2754, 2448 (invaders used hostages as human shields to block helidecks); ER:2750-52

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[11] *United States v. Bland*, 908 F.2d 471, 473 (9th Cir. 1990) (AOB:36) is not to the contrary. The problem there was that the district court permitted evidence that was irrelevant to the asserted non-hearsay purpose. The events on the barge, however, went directly to the disputed issue of the reasonableness of the CMT's decision to request law enforcement intervention.

(invaders threatened to kill Haastrup and burn down barge); ER:2752 (invaders had broken bottles and clubs as weapons); ER:2749 (two workers beat up the first day); ER:2756 (invaders called villages for "more men and with arms"). With this powerful, more direct evidence, the challenged Stapleton/Hervey testimony could not have prejudiced the jury.

Plaintiffs' *Blind-Doan* argument is also meritless in this context. The district court received lengthy bench briefs on the issue (SER:252, 264), considered plaintiffs' written objections (SER:312-39, 340-52), heard argument at trial (ER:2859-62) and considered the issue again post-trial (ER:79-80). The court properly found the testimony was "relevant to a central issue in the case" and that any risk of unfair prejudice was addressed by the court's limiting instruction. ER:80, 2861-62. That was sufficient. *See Sangrey*, 586 F.2d at 1315.

D. The District Court Properly Admitted Evidence of Prior Kidnappings by CIC Communities.

As summarized (*supra*, pp. 3-4), plaintiffs claimed that their group represented the Ilaje communities; those communities "would never hold hostage[s] to advance" their interests; and CNL provoked the invasion by refusing to meet with those communities despite their "peace-loving" nature. In response, the district court permitted defendants to tell their side, including Haastrup's testimony that the same communities had kidnapped CNL employees on four prior occasions which, among other things, explained CNL's reluctance to meet with those communities. As defendants contended, this testimony was relevant

> not just to show that Mr. Haastrup was frightened. [Plaintiffs have] put into evidence the whole relationship between these Ilaje communities and Chevron Nigeria. They've put in evidence that the

> company had frustrated the Ilaje communities over the years, had marginalized them, and I think we're entitled to tell our side of the story.

ER:2359. The court responded, "Well, I actually agree with that," and permitted Haastrup to "testify about things that he has personal knowledge of previous to 1998." ER:2359-2360. At plaintiffs' request, however, the court precluded defendants under Rule 403 from proving that Bowoto and his trial witnesses participated in those kidnappings. ER:11, 2354-60.[12]

Plaintiffs have no basis to complain about this resolution under Rule 403—and, having succeeded in excluding evidence linking them to the prior kidnappings, they cannot complain that defendants did not link them to the kidnappings. The kidnapping evidence was relevant for multiple purposes, including motive, intent, credibility and Haastrup's state of mind. *See United States v. Diggs*, 649 F.2d 731, 737 (9th Cir. 1981) (evidence of prior bad acts should be excluded "only when it proves nothing but the defendant's criminal propensities").

Plaintiffs put their motive and intent at issue by arguing (as they repeat in their opening sentence (AOB:1)) that their purpose was not to hold hostages for

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[12] Defendants' offer of proof showed that Bowoto, the elder whom he claimed masterminded the Parabe invasion, and other plaintiffs' trial witnesses participated in the earlier kidnappings, one where Bowoto was trying to force CNL to deal with another group representing Ilaje communities. SER:247.

ransom but only to peacefully protest environmental harm. ER:552-57, 3106-08.[13] In response, Chevron was entitled to prove "a pattern of operation" that "tend[ed] to undermine the [plaintiffs'] innocent explanation." *United States v. Long*, 328 F.3d 655, 661 (D.C. Cir. 2003). The evidence showed that the CIC communities had previously used hostage-taking to obtain their ends, making it more likely this invasion by those same communities was intended to be more of the same and refuting their claim that they were peaceful. *See Boyd*, 576 F.3d at 944 (evidence of police shooting victim's earlier encounters with police and criminal behavior admissible to show his intent was to provoke an encounter with police rather be cooperative). "The evidence concerning the four other hostage taking events is clearly probative of [the plaintiffs'] motive and intent, and thus is relevant to an issue other than character." *United States v. Straker*, 567 F. Supp. 2d 174, 178 (D.D.C. 2008).[14]

This evidence also bore on the credibility of plaintiffs and their witnesses. It refuted their contention that the communities they represented "would never talk of holding people hostage to advance the interests of the Ilaje people." ER:684. *See*

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[13] Over defendants' objection, plaintiffs were permitted to introduce evidence of alleged environmental harm to "illuminate [plaintiffs'] motives for going to the Parabe operation." SER:3.

[14] Contrary to plaintiffs' innuendo (AOB:2, 27), referring to plaintiffs or their communities as Ilaje was not ethnic stereotyping. From their opening statement to their closing argument and in their testimony and exhibits, plaintiffs referred to themselves as Ilaje. *E.g.*, ER:549 (opening statement); 3613-31 (plaintiffs' trial exhibit); 896-97 (Bowoto testimony); 3106-08 (closing argument). Indeed, the name of their group included their ethnic group. Plaintiffs have no basis to complain that defendants used the same term.

United States v. Castillo, 181 F.3d 1129, 1132 (9th Cir. 1999) (admitting evidence of prior drug charge when defendant "portrayed himself as a 'paragon of virtue' and 'quintessential model citizen' who would never have anything to do with drugs").

This evidence was also highly relevant to Haastrup's state of mind during the Parabe takeover. It helped explain why he thought the invasion was not a peaceful protest (ER:2442), why he was reluctant to negotiate in the village (ER:2451 ("[m]y first thought was that this was a plan to kidnap me")), why he thought negotiations had broken down on the third day (ER:2323-25), and why returning to the village for further negotiations was not a realistic option. ER:2325. Contrary to plaintiffs' argument (AOB:38), Haastrup's state of mind on these issues was directly relevant because it gave context to his conduct and because Davis and the CMT relied in part on his reports in deciding to seek law enforcement intervention. *Supra*, p. 9.

The evidence was also relevant to explain why CNL stopped meeting with the communities, and thus to rebut plaintiffs' assertions that their invasion was necessary because CNL had "marginaliz[ed]" the Ilaje by "making dialogue impossible" and "total neglect." ER:658, 3613, 3625-26, 3629-30, 1170. As recorded in a document written by plaintiffs' group two weeks before the invasion, CNL had been "holding meetings with us in Ilaje[land] before, but it got to a point when there were [sic] hostage of their staffs and other forms of threat. This led to their withdrawal." SER:444; ER:1952-53, 1961-62. Another contemporaneous document recorded that Haastrup had expressed "in strong terms his surprise at the

act of kidnapping to express grievances by communities, particularly where there are open channels of dialogue all the time." SER:448; ER 2403-04 (Haastrup testifying that the Ilaje group was "the most problematic" because "[t]hey were the ones that would stop our work [and] cause violence and intimidate our staff").

When Haastrup testified about the four kidnappings (ER:2406, 2409-13), plaintiffs did not request a limiting instruction that the evidence be used only for state of mind. Indeed, at one point, plaintiffs stated: "I don't need the instruction." ER:2409. Thus, plaintiffs waived any objection as to how the testimony was used. *See Stevens v. United States*, 256 F.2d 619, 623 (9th Cir. 1958); 12 Fed. Proc., L. Ed. § 33:51 (2008) ("[A] party may waive any objection as to a trial court's failure to give a limiting instruction under FRE 105 so as to restrict the way in which the jury should consider certain evidence, where such party does not object to the omission of the limiting instruction nor ask for any others.").[15] Although plaintiffs object to Haastrup's brief testimony about the condition of a kidnap victim, plaintiffs did not object on that basis below and thereby waived that objection. ER:2410-11.

Nor is there any merit to plaintiffs' challenge to defendants' reference to this evidence in closing. Defense counsel properly argued that the kidnapping evidence had several implications, including that it showed Haastrup's reticence to

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[15] In denying a new trial, the district court interpreted its prior ruling as precluding defendants from using the kidnapping testimony for its truth. ER:80. Defendants were entitled to rely, however, on the court's earlier ruling that the evidence was relevant for the truth of the relations between CNL and the communities—a correct ruling for the reasons stated here.

return to the village for additional negotiations and that his concern over his safety "was realistic." ER:3163. Defense counsel also argued that the tug kidnapping showed "hostage-taking, kidnapping, was part of their mind set. It's something that they would do. It's something they, these Ilaje communities, some people in the Ilaje communities, had done at least four times before. It's what they were doing at Parabe and it's what they did on the tug afterwards." ER:3162-63. Plaintiffs did not object to that statement at the time, and have no basis to do so now. Contrary to their assertion (AOB:37), this was not a propensity argument; it refuted their claim that they would never take hostages and responded to their closing argument that the "42 villages" of the Ilaje "came up with a plan" for a peaceful protest. ER:3108. Defendants' point was that their plan or "mind set" was to take hostages.

Even if, contrary to the record, the kidnappings were relevant only to Haastrup's state of mind, plaintiffs could not establish that the closing was plainly erroneous, as they must because they did not object. *See supra*, p. 20. Plaintiffs have merely identified "an isolated, short comment during a closing statement that covered [58] pages when transcribed"—in the context of a case filled with other, unchallenged evidence of their conduct. *Hemmings*, 285 F.3d at 1194. No miscarriage of justice could possibly have occurred.

E. The Challenged Evidence Did Not Prejudice Plaintiffs.

Plaintiffs assert that prejudice occurred because defendants used the four pieces of challenged evidence to demonstrate that the Parabe invasion was violent, that the invaders took hostages, that the invaders had weapons and that workers on

the barge were afraid. AOB:39-41. As noted, however, even aside from the challenged evidence, the other evidence against plaintiffs on each point was overwhelming—most of it much more harmful to plaintiffs than the few items plaintiffs challenge on appeal. Witness after witness testified about the hostile take-over of the tug and the barge, the invaders' knives and other weapons, their violence and threats of violence against the workers, the invaders' ransom demands, their holding the CNL negotiator hostage and the hostile actions of those shot by the rescue team. *Supra*, pp. 4-11. No reason exists to believe that, with all of this unchallenged evidence properly before the jury, the few items on which plaintiffs now focus had any effect at all—let alone a decisive effect—on the jury's deliberations. *See United States v. Frederick*, 78 F.3d 1370, 1375 (9th Cir. 1996) (considering the nature of the evidence challenged and the weight of other, properly admitted evidence).[16]

Plaintiffs suggest (AOB:41) that prejudice must have occurred because it was supposedly "undisputed" that Bowoto and Jeje were unjustifiably shot and that Jeje and Oyinbo were tortured. Far from being undisputed in plaintiffs' favor, however, the jury had more than enough evidence to find that Bowoto and Jeje (assuming Jeje was shot at all) were rushing toward the rescue team in a threatening manner when they were shot—and to disbelieve their testimony to the contrary. *Supra*, p. 11. Indeed, given the denials by Bowoto and his witnesses that

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[16] This showing of no prejudice given the strength of the other, unchallenged evidence against them is in addition to the threshold barrier to plaintiffs' appeal created by their three-tiered liability theory and their failure to request a special verdict. *Supra*, pp. 13-15.

they did anything other than "sing and play and hang out" and given their attempts to disown their threatening letters, the jury was justified in disregarding all of their testimony. *See Grotemeyer v. Hickman*, 393 F.3d 871, 879 (9th Cir. 2004) (when a witness provides an implausible account, "the jury is entitled to reject the testimony in its entirety, disbelieving both the reasonable and the unreasonable aspects"). The jury also had ample basis to reject the self-serving, hearsay accounts of the alleged torture—and to conclude that CNL and defendants had no role in any event in whatever actually occurred. *Supra*, pp. 11-12.

Plaintiffs try to bolster their claim of prejudice by asserting (AOB:41) that "undisputed" evidence supported their secondary and tertiary liability theories—and thus that the jury must have ruled against them on the basis of the challenged evidence rather than for their failure to prove these other required elements of their claims. As the district court properly found, however, the jury easily could have rejected these theories of liability. ER:78. On secondary liability, plaintiffs point to their agency and joint enterprise theories. Among other things, however, the agency theory required the jury to find that CNL controlled the manner in which the Navy performed the rescue operation. ER:53-54. That requirement was not satisfied here, because it was the Navy, not CNL, that controlled the manner of the rescue, including the decision to shoot and detain certain of the invaders. ER:2160-62 (describing how the Navy led the GSF at Parabe). Requesting that law enforcement authorities intervene to stop criminal behavior, or directing them to the wrongdoers, does not create an agency relationship. *See McGeorge v. Cont'l Airlines, Inc.*, 871 F.2d 952, 954-55 (10th Cir. 1989) (police officer who removed

passenger from plane was not "agent" of airline, given airline's lack of control over officer's actions). Nor is agency created by providing material support such as housing, food, and supplemental *per diem* payments. *See, e.g.*, *Mahon v. City of Bethlehem*, 898 F. Supp. 310, 312-13 (E.D. Pa. 1995) (no agency between the defendant and police officers who provided security at defendant's music festival, even though defendant paid the city for the police officers' services and negotiated with the city as to when and where security would be necessary).

Plaintiffs' "joint enterprise" theory was likewise unfounded. That theory required proof that CNL "engaged in concerted action with the Nigerian security forces with a common end or joint purpose." ER:57. Given the evidence that CNL's role was limited to requesting law enforcement intervention, allowing use of CNL's helicopters, and giving logistical directions on the platform (*see supra*, pp. 10-12), the jury could readily find the concerted action element unmet. The jury likewise could have found that CNL and the Navy did not share a relevant common purpose that could support liability. To hold, as plaintiffs suggest, that the jury was required to find a joint enterprise here would mean private citizens would be liable every time they request police intervention and assist the police in any fashion. No authority supports that result.

The jury also had ample basis to reject plaintiffs' tertiary liability theories. On appeal, plaintiffs assert only their agency theory, relying on their expert's testimony that defendants exercised "unusually tight" control over CNL. But cross-examination revealed that the expert had no basis to compare the degree of defendants' control over CNL with any other company's control over its

subsidiaries. ER:1774-77. Nor did the expert address the relevant issue, which was "the relationship between CNL and the defendants as it relates to this case, rather than whether any sort of agency relationship generally existed between CNL and the defendants." ER:46; *see also id.* ("The arrangement must be relevant to the plaintiff's claim of wrongdoing."). He offered little testimony about defendants' control over security at CNL and nothing about control over CNL's response to the invasion. By his own admission, he "didn't say much about security." ER:1773. Corporate security guidelines set forth advisory policies and procedures that subsidiaries could disregard. ER:2196-97. They did not dictate how CNL was to respond to events like this invasion. ER:2202-03. Testimony by Chevron witnesses likewise refuted plaintiffs' claim that defendants "shaped and managed CNL's security operations." That testimony showed that Chevron's corporate security department never communicated with CNL about how to handle this or similar invasions. ER:2185, 2188, 2199-2200, 2202-03. This failure to prove tertiary liability dooms plaintiffs' case, because they sued Chevron Corporation and two of its subsidiaries, not CNL.[17]

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[17] Plaintiffs refer to a "high volume of communications" between CNL and defendants during the invasion, but they provided no evidence about the content of those telephone calls, or even that the calls were completed. ER:2376-82.

Likewise unfounded is plaintiffs' assertion (AOB:14) that defendants approved CNL's payments to the Nigerian military. The purported "approval" was simply a determination that payments did not violate the Foreign Corrupt Practices Act. *E.g.*, ER:2179; *see also* ER:47-48 (instructing jury that "adoption of internal accounting controls governing payments to foreign officials" should not be considered as evidence of agency).

(continued)

III. PLAINTIFFS FAILED TO PRESERVE VIRTUALLY ANY OF THEIR OBJECTIONS TO THE JURY INSTRUCTIONS, WHICH WERE PROPER IN ANY EVENT.

A. The Battery Instruction Was Proper.

1. Plaintiffs' English law argument is waived and without merit.

The district court instructed that, for their Nigeria law battery claims, plaintiffs had the burden to show "[t]hat the Nigerian security forces used unreasonable force." AOB:45-46; ER:32. Plaintiffs argue this instruction is contrary to an English case that puts the burden on the defendant to show that force was reasonable.

Plaintiffs waived this argument by objecting below only on other grounds and not invoking English law on this issue. ER:4315-17. *See* Fed. R. Civ. P. 51(c)(1) (party must state "distinctly the matter objected to and the grounds for the objection"); *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 714 (9th Cir. 2001) (objection must bring into focus the "precise nature of the alleged error"; finding insufficient an objection that referred to comparative fault but did not specifically invoke the constitutional standard that the instruction allegedly violated); Fed. R. Civ. P. 44.1 ("A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing.").

Other interactions between CNL and defendants are irrelevant because they do not relate to this invasion. CNL's oil was shipped to third parties, not to Chevron refineries. ER:1820-21. Only one person served as an officer, director or high level manager of CNL while holding a similar position with defendants. ER:1055, 3741. CNL, not defendants, made the ultimate decision to approve prospective expatriate employees. ER:1851.

Even if not waived, the argument is meritless. English law is not binding in Nigeria, and Nigerian courts do not follow it when it is contrary to Nigeria's decisions. SER:6-7, 11-55. That is the case here.

Plaintiffs' English law case, *Ashley v. The Chief Constable of Sussex Police*, [2006] EWCA Cal. 1085 (July 27, 2006), recognized that in criminal cases the prosecution has the burden to prove unreasonable force. *Id.* ¶ 20. But it held that tort law has "diverged" from this criminal standard and puts burden on the defendant. *Id.* ¶ 32. Nigerian courts, however, hold that the tort and the crime of battery must be governed by the same standard. "Otherwise a person who alleges that he was assaulted might fail to prove the assault in a criminal prosecution and yet obtain judgment in civil proceedings." *Okuarume v. Obabokor* (1965) NSCC 286 ¶¶ 35-40. Thus, to ensure that the outcome does not differ between criminal and tort cases, Nigeria law requires tort plaintiffs to prove assault and battery under the same reasonable doubt standard as in criminal cases. *Id*. This same principle dictates that, as in criminal cases, plaintiffs' burden in tort cases includes proving that the force used was excessive.[18]

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[18] Other jurisdictions also put the burden on the plaintiff to show that force used by a police officer is excessive. *E.g., Peraza v. Delameter*, 722 F.2d 1455, 1457 (9th Cir. 1984) (§ 1983 action).

If Nigeria law were unclear on this issue, plaintiffs would still lose, because in that circumstance the district court may presume that Nigeria law is the same as California law. *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 n.1 (9th Cir. 1981). As discussed in the following section, California law puts the burden on the plaintiff.

2. The California law battery instruction was correct.

Plaintiffs take a slightly different tack in arguing that the California-law battery instruction improperly placed the burden on plaintiffs regarding reasonableness. They do not contest that California law, which governs Oyinbo's land-based battery claim,[19] places the burden on the plaintiff to prove that force used by a peace officer was excessive. But they argue (AOB:47) that this California burden rule did not apply here—and that the burden should have been on defendants—because the alleged battery occurred when Oyinbo was in custody.

Plaintiffs, however, cite no authority suggesting that the burden shifts back to the defendant once the plaintiff is in police custody. Nor would such a shift make sense. California law places the burden on the plaintiff in peace officer cases because peace officers are "charged with acting affirmatively and using force as part of their duties." *Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1273 (1998). That rationale continues to apply even when the suspect is in custody, because police officers are often required to use reasonable force even after the initial arrest is made. *See, e.g.*, *Irvine v. City & County of San Francisco*, 2001 WL 967524, at *9 (N.D. Cal. July 12, 2001) (plaintiff alleging police officers

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[19] In a ruling plaintiffs do not challenge on appeal, the district court held that, while Nigeria law governs the tort claims arising from events on the offshore barge, California law applies to Oyinbo's claim that he was tortured after he was taken back onshore. ER:92-98. The court reached this result by applying maritime choice of law analysis to the offshore events, while following the forum state's choice of law rules to the non-maritime events onshore.

assaulted and battered him during overnight stay in jail bore burden of proving unreasonable force).[20]

Nor is there any merit to plaintiffs' assertion (AOB:49) that the instruction was erroneous because it did not require the jury to first decide whether the police who allegedly tortured Oyinbo were actually police officers. Plaintiffs waived this argument by not requesting any such instruction. Indeed, the district court used plaintiffs' alternative instruction on this point, which said nothing about asking the jury to find whether the police who held Oyinbo were police officers. *See* ER:32-33, 4319.

In any event, plaintiffs do not cite any authority suggesting that it was for the jury to decide the police's status. In the two cases they cite, the issue was resolved by the court. *See Cervantez v. J.C. Penney Co., Inc.*, 24 Cal. 3d 579, 588 (1979); *Traver v. Meshriy*, 627 F.2d 934, 940 (9th Cir. 1980). Moreover, the evidence here showed that the police who held Oyinbo and allegedly tortured him were on-duty law enforcement personnel, not off-duty police officers moonlighting as private security guards as in plaintiffs' cited cases. ER:1912, 1927, 1933, 3298.

Finally, any alleged error would be harmless. Defendants did not assert that the torture of Oyinbo, if it occurred, was reasonable—and thus the burden of proof instruction could not have caused the jury to find against plaintiffs on that issue. Instead, the question was whether the torture occurred at all, and if so, whether

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[20] Plaintiffs rely on California Civil Jury Instruction 1305 as supposedly placing the burden on the plaintiff only when the police use force related to "arrests, escapes, and acts of resistance." But that instruction expressly states that "other applicable action" by the police would also fall within the rule.

defendants were secondarily or tertiarily liable for it. *See* ER:3181 (arguing only that defendants were not involved in and knew nothing about the alleged torture). Plaintiffs do not dispute that the jury was properly instructed that plaintiffs had the burden on those issues.

B. The Absence of an Affirmative Defense Instruction Makes No Difference.

Plaintiffs next assert (AOB:49-50) that it was confusing to instruct that defendants bore the burden of proving "any affirmative defense" to battery when no affirmative defense instruction was given for that claim. But the absence of an affirmative defense to battery simply meant that the burden instruction was superfluous, and the jury is presumed to have ignored it. *See United States v. Washington*, 106 F.3d 983, 1007-08 (D.C. Cir. 1997). Moreover, plaintiffs did not ask the court to delete the reference, despite recognizing that the court did not intend to instruct on an affirmative defense. *See* ER:3041-44.

Likewise groundless is plaintiffs' argument (AOB:50) that the "Privileges, Duties and Defenses" portion of the instructions—in which the court described Nigerian criminal statutes related to riot, trespass and the like—was improper because it did not make clear that defendants had the burden to show that the invaders committed those crimes. Defendants were not required to prove that crimes were committed. This section of the instructions was expressly limited to plaintiffs' claim that CNL negligently called in law enforcement. ER:61. For that claim, the issue was not whether crimes actually occurred, but only whether it was a breach of duty for CNL to seek law enforcement intervention against possible criminal conduct. To provide context for that determination, the Court properly

instructed the jury on Nigeria law relevant to the invaders' conduct, with which the jury may not have been familiar.

Finally, plaintiffs' argument (AOB:51) that the district court should have put the burden on defendants to prove that the GSF's force was reasonable is simply plaintiffs' burden of proof argument dressed in slightly different garb, and fails for the same reason: both Nigeria and California law required that plaintiffs show that the GSF used an unreasonable level of force. *See supra*, pp. 37-40. Contrary to plaintiffs' assertion (AOB:50-51), this is a matter not of "self-defense" but of the right of law enforcement authorities to use reasonable force to enforce the law.

C. The Court's Crime Reporting Duties and Privileges Instructions Were Legally Correct.

Similarly meritless are plaintiffs' challenges to the "duty to report crime" and "law enforcement reporting privilege" instructions. AOB:52-53. Plaintiffs argue that the "law enforcement reporting privilege" derives solely from California law and is not recognized in Nigeria. But the case on which plaintiffs rely makes clear that Nigeria law, like California law, precludes liability for "indicating to the police a person whom one suspects of having committed an offence." ER:4265 (*Ezeadukwa v. Maduka*, (1997) 8 NWLR 635, 643 (citing *Gbajor v. Ogunburegui*, (1961) All NLR 882)).

Contrary to plaintiffs' argument (AOB:52), the jury was not instructed that a private actor is immunized when it "plays a direct role" in criminal or tortious conduct. It was instructed only that liability cannot be imposed "merely for . . . reporting [criminal] activity" or based on a communication reporting a crime. ER:61. These instructions are consistent with plaintiffs' theory that the jury could

find liability if CNL did something more than "merely" report or communicate suspected criminal behavior. ER:4367-72; *see Nye & Nissen v. United States*, 168 F.2d 846, 857 (9th Cir. 1948) (finding no error or prejudice when "the substance of the offered instructions . . . was adequately presented in the charge as given").

Plaintiffs are mistaken in suggesting (AOB:53) that the law enforcement reporting privilege instruction erroneously failed to put the burden of proof on defendants. At plaintiffs' insistence (ER:3040-44; SER:395), the law enforcement reporting privilege instruction was limited to solely to plaintiffs' negligence claim. ER:61. On that claim, plaintiffs always retained the burden of proving that CNL breached its duty of due care because it did more than merely report a crime to Nigerian officials. Moreover, to extent defendants had any burden on this issue, the instruction stated that "[d]efendants contend that CNL was not negligent because it had a duty and/or a privilege to call law enforcement or the Nigerian security forces to seek assistance," and it further expressly instructed that, for such a privilege to apply, "defendants have the burden of showing that their report would trigger proceedings governed by adequate procedural safeguards." *Id.* Absent such safeguards, "defendants [must] prove that they made their report to the police in good faith and without malice." *Id.* Because the jury was thus told that defendants had the burden on the key elements of the privilege, the instruction was correct even under plaintiffs' theory. And there is no reason to believe the instruction caused any prejudice, even if it were erroneous.

IV. THE RULING THAT DOHSA PRECLUDES IROWARINUN'S EXECUTION AND SURVIVAL CLAIMS WAS INCONSEQUENTIAL AND CORRECT.

A. The Unchallenged Rejection of the Irowarinun's Nigeria Law Wrongful Death and Survival Claims Renders Inconsequential Any Error in Dismissing Those Same Claims under the Alien Tort Statute.

Plaintiffs assert (AOB:54-58) that the district court erred in holding that DOHSA precludes the Irowarinun's extrajudicial killing and survival claims under the Alien Tort Statute. But the district court permitted the Irowarinuns to assert equivalent wrongful death and survival claims under Nigerian law, which DOHSA expressly saves. 46 U.S.C. § 30306. The jury found against the Irowarinuns on the wrongful death claim (SER:429), and the district court granted judgment as a matter of law on the survival claim after defendants showed that Irowarinun did not survive the shooting and thus had no viable survival claims. ER:3132-34; SER:403-04. Plaintiffs do not challenge on appeal either the jury's verdict or the district court's grant of judgment.

This unchallenged rejection of the wrongful death and survival claim defeats the challenge to the DOHSA preemption ruling. Where the jury's finding or a court ruling on a related claim shows that it is "highly unlikely" that the plaintiff would have prevailed on the dismissed claim, dismissal of that claim is not prejudicial and thus not reversible. *Tennison v. Circus Circus Enter., Inc.*, 244 F.3d 684, 691 (9th Cir. 2001) (jury's rejection of harassment claim eliminated the need for the court to decide the correctness of trial court's dismissal of intentional infliction of emotional distress claim, which relied on same facts and

similar legal inquiries); *Cavataio v. City of Bella Villa*, 570 F.3d 1015, 1024 (8th Cir. 2009) (summary judgment was harmless error where jury ruling on other claims showed they would not have found for plaintiffs on dismissed claim).

That is the situation here. Proving summary execution under the ATS requires showing that a wrongful death occurred. *Cf. Wiwa v. Royal Dutch Shell Petroleum Corp.*, 2009 WL 464946, at *9 (S.D.N.Y. Feb. 25, 2009) (recognizing that summary execution claim is the ATS equivalent of a wrongful death claim). The jury's adverse verdict on the wrongful death claim thus shows it would have also rejected any summary execution claim.[21]

Similarly, like a survival claim under Nigeria law, any survival claim under the ATS would require proof that the decedent survived for an appreciable time period after the injury. *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1060-61 (9th Cir. 1997). Thus, the district court's unchallenged ruling that Irowarinun did not so survive also means that his ATS survival claims were not viable and renders harmless any error in finding that claim preempted on DOHSA grounds.

B. The Preemption Ruling Was in any Event Correct.

Plaintiffs do not dispute that, because Irowarinun died on a barge beyond a marine league (three nautical miles) from the United States (ER:90-91 n.9), DOHSA applies. 46 U.S.C. §§ 30301-30308. DOHSA provides the exclusive

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[21] Under international law, "summary execution" includes the element of custody of the victim. *See, e.g., Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542-43 (N.D. Cal. 1987). Here, there was no evidence that Irowarinun was in custody when he attacked the rescuers and was killed. ER:3528-29, 3574-76. This is an additional ground for rejecting the summary execution claim.

remedy for deaths on the high seas. *See Dooley v. Korean Air Lines Co., Ltd.*, 524 U.S. 116, 117, 123 (1998); *Mobil Oil Corp. v Higgenbotham*, 436 U.S. 618, 624-25 (1978); *Offshore Logistics v. Tallentire*, 477 U.S. 207, 233 (1986).[22]

Plaintiffs argue that DOHSA preempts only "nonstatutory" claims. But federal common law, not a statute, provides the substantive law under the ATS, which is only a jurisdictional statute. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 694, 729, 724 (2004). Thus, just like the common law maritime remedies in *Higgenbotham*, the claim for summary execution is a common law remedy and cannot be added where DOHSA defines the scope of available relief. *See also Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 564 (E.D. Va. 2007) (rejecting a terrorism exception to DOHSA that would have allowed a claim under the Foreign Sovereign Immunities Act, because an allegation of terrorism "does not overcome the fact that DOHSA is an exclusive remedy"). That all federal common law claims are preempted is confirmed by DOHSA's savings clause, which preserves other remedies—such as those arising under the law of other countries—but not federal common law claims. *See, e.g., Albright v. U.S.*, 10 F.3d 790, 793 (Fed. Cir. 1993) ("by inference, that which is not excluded in the Savings Provision, is included within the Act").[23]

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[22] In a ruling plaintiffs do not challenge, the district court denied their request to amend their complaint to add a DOHSA claim. ER:204-06.

[23] Even if common law claims under the ATS were "statutory," DOHSA would still govern because "a precisely drawn, detailed statute pre-empts more general remedies." *Hinck v. United States*, 550 U.S. 501, 506 (2007) (internal quotation marks omitted). DOHSA is a specific remedy for deaths from wrongful acts or omissions "occurring on the high seas." 46 U.S.C. § 761. It prevails over (continued)

The same is true of survival claims. *Dooley* held that DOHSA preempts survival claims on the same basis that it preempts non-DOHSA wrongful death claims. 524 U.S. at 123. Contrary to plaintiffs' assertion, *Dooley*'s rationale is not limited to general maritime law. *See Jacobs v. S. Shipping Co.*, 180 F.3d 713, 717 (5th Cir. 1999) (following *Dooley* to hold that state law survival claims are precluded).[24] Nor is there any basis to apply any different rule for ATS survival claims. The common law claims under the ATS's general grant of jurisdiction must give way to DOHSA's specific remedial scheme.

V. THE TRIAL COURT'S TVPA RULING WAS ALSO INCONSEQUENTIAL AND CORRECT.

A. The Jury's Rejection of the Irowarinuns' Wrongful Death Claim Makes Dismissal of the TVPA Claims Inconsequential.

Plaintiffs challenge the dismissal of the Irowarinun family's TVPA claim for extrajudicial killing. As noted, however, the jury rejected their wrongful death

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the general language of the ATS. Contrary to plaintiffs' assertion, *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), did not hold that the Jones Act applies to deaths on the high seas. But, even if it did, the specific substantive remedy provided for seamen under the Jones Act is much different from the general grant of jurisdiction of the ATS, which "remained largely in shadow for much of the . . . two centuries" after it was enacted and which is to be exercised only with "caution." *Sosa*, 542 U.S. at 725, 726.

[24] *Dugas v. Nat'l Aircraft Corp.*, 438 F.2d 1386 (3d Cir. 1971), cited by plaintiffs, is no longer good law after *Dooley*. Likewise, *Dooley* has superseded the *dicta* plaintiffs cite from *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). *Compare Gray v. Lockheed Aeronautical Sys. Co.*, 125 F.3d 1371, 1382, 1385 (11th Cir. 1997) (relying on *Dugas* and *Kernan* to allow a survival claim), with *Gray v. Lockheed Aeronautical Sys. Co.*, 155 F.3d 1343, 1343 (11th Cir. 1998) (after remand to reconsider in light of *Dooley*, concluding that DOHSA precludes survival claim).

claim, which required a finding that Irowarinun's death was "caused by a battery or negligent act" of CNL or the GSF. ER:39. The standard for TVPA extrajudicial killing is much higher, requiring among other things a "deliberated killing." 28 U.S.C. § 1350 Note, § 3(a). By finding against the Irowarinuns under a lower standard, the jury necessarily rejected any factual basis for the higher TVPA standard.[25] Thus, because any TVPA claim would also have failed, the Court need not resolve whether the TVPA applies to corporations.

B. Claims Under the TVPA Can be Stated Only Against Individuals.

The trial court's ruling that a corporation cannot be sued under the TVPA was in any event correct. The TVPA imposes liability only on "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual" to torture or extrajudicial killing. 28 U.S.C. § 1350 Note, § 2(a). In statutes, as in common parlance, "'individual' means individual, not a corporation or other artificial entity." *In re Goodman*, 991 F.2d 613, 619 (9th Cir. 1993). The Dictionary Act expressly distinguishes "individuals" from "corporations," and uses "person" to compass the latter. 1 U.S.C. § 1. Thus, use of "individual" in a statute "dictate[s]" that only natural persons, not corporations, are covered, unless that reading "would produce an absurd and unjust result which Congress could not have intended." *Clinton v. City of New York*, 524 U.S. 417,

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[25] The jury instructions also required that the Irowarinun plaintiffs have suffered economic loss. ER:39. That element, however, was uncontested. Defendants did not challenge the Irowarinun's evidence that they suffered such losses. ER:1443-44, 1467, 1983-84, 1987, 2021.

429 & n.14 (1998) (internal quotation marks omitted); *United States v. Middleton*, 231 F.3d 1207, 1211 (9th Cir. 2000) (same).

Here, the result dictated by the use of "individual" is not "absurd" or "unjust," but rather implements Congress' plain intent. The bill that became the TVPA was introduced in 1987. *See* H.R. Rep. No. 102-367(I) at *5-6 (1991), *reprinted in* 1992 U.S.C.A.A.N. 84. As introduced, it imposed liability on "[e]very person who, under actual or apparent authority of any foreign nation, subjects any person to torture or extrajudicial killing." *The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417*, 100th Cong. 82 (1988). However, the bill was amended in committee to change "person" to "individual" explicitly to make "it clear that we are applying it to individuals and not to corporations." *Id.* at 87-88. The bill retained "individual" when reintroduced in 1991. The TVPA was ultimately passed without further discussion of substituting "individual" for "person." Pub. L. No. 102-2561, 106 Stat. 73 (1992).

The Senate Judiciary Committee's statement that the TVPA "uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued" (S. Rep. 102-249 at *7 (1991)) does not mean that "individual" excludes only foreign governments. If that had been the Senate's intent, it could have suggested a specific exclusion of governments, instead of adopting a term normally used to exclude all artificial entities. *Cf.* 7 U.S.C. § 3508(3)(B).

Contrary to plaintiffs' contention (AOB:59), the context confirms that the TVPA uses "individual" to refer only to humans. It is a "normal rule of statutory

construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks omitted). The TVPA uses the term "individual" for both the perpetrator and victim of torture and extrajudicial killing. *See* 28 U.S.C. § 1350, Note, §§ 2(a), 3(b)(1). Because corporations cannot be "torture[d]," "kille[d] or feel "pain and suffering," "individual" as used in the TVPA must refer only to humans.

Plaintiffs argue that it would be anomalous to impose liability on corporations under the ATS while excluding them under the TVPA. However, the Ninth Circuit has never held that corporations can be liable for torture under the ATS. *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 n.12 (2d Cir. 2009) (declining to resolve issue). Nor has it addressed whether torture claims can even be brought under the ATS—an issue on which the circuits have split. *Compare Enahoro v. Abubakar*, 408 F.3d 877, 884-86 (7th Cir. 2005) (TVPA occupies the field, precluding ATS claims for torture) *with Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F. 3d 1242, 1250-51 (11th Cir. 2005) (TVPA does not preempt ATS claims for torture). In any event, no court considered whether ATS claims could be brought against corporations until more than a decade after Congress enacted the TVPA. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 308 (S.D.N.Y. 2003). Thus, these cases are not probative of Congress' intent in limiting liability under the TVPA to "individual[s]."

Plaintiffs' argument (AOB:60) that, even if corporations cannot commit torture, they can be held indirectly liable for the conduct of others misreads the TVPA. The TVPA does not state that only an "individual" can ***commit*** torture. Rather, it limits "liability" for torture to "individuals." 28 U.S.C. § 1350 Note § 2(a). It makes no difference whether the theory of liability is direct or vicarious.

Thus, like the overwhelming majority of courts to consider the issue,[26] the trial court correctly held that corporations cannot be sued under the TVPA. Plaintiffs and their amici assert that the Eleventh Circuit held otherwise in *Aldana*, 416 F.3d at 1253. But that court did not expressly address whether the TVPA covers corporations, and there is no indication that the issue was even raised. *Cf. Morales-Garcia v. Holder*, 567 F.3d 1058, 1064 (9th Cir. 2009) ("Unstated assumptions on non-litigated issues are not precedential holdings binding future decisions.") (internal quotation marks omitted). Later Eleventh Circuit decisions simply followed *Aldana* without analyzing the issue either and thus are likewise not authoritative.

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[26] *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004); *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765, 828 (S.D.N.Y. 2005), *aff'd on other grounds*, 538 F.3d 71 (2d Cir. 2008); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175-76 (C.D. Cal. 2005), *remanded on other grounds*, 564 F.3d 1190 (9th Cir. 2009); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007); *Doe v. ExxonMobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 55-56 (E.D.N.Y. 2005), *aff'd on other grounds*, 517 F.3d 104 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009); *Friedman v. Bayer Corp.*, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 366 (E.D. La. 1997), *aff'd on other grounds*, 197 F.3d 161 (5th Cir. 1999).

In sum, the weight of authority, plain meaning, context and legislative history establish that the TVPA imposes liability only on individuals, not corporations.

CONCLUSION

The judgment should be affirmed.

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Respectfully submitted,

JONES DAY

By:/s/ Craig E. Stewart

Craig E. Stewart
Attorneys for Defendants-Appellees
CHEVRON CORP., CHEVRON INVESTMENTS, INC. AND CHEVRON U.S.A. INC.

STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending before this Court.

No. 09-15641

CERTIFICATE OF COMPLIANCE PURSUANT TO

CIRCUIT RULE 32-1

I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 13,941 words.

/s/ Craig E. Stewart

Craig E. Stewart

Attorneys for Appellees

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