Case No. 19-13926-RR

In the United States Court of Appeals for the Eleventh Circuit

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DOE, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., *et al.*,
Defendants-Appellees-Cross-Appellants.

(IN RE: CHIQUITA BRANDS INTERNATIONAL, INC., ALIEN TORT STATUTE & SHAREHOLDER DERIVATIVE LITIGATION)

On Appeal from the United States District Court
for the Southern District of Florida
No. 08-md-01916
(Nos. 07-cv-60821, 08-cv-80421, 08-cv-80465, 08-cv-80480, 08-cv-80508, 10-cv-60573, 17-cv-81285, & 18-cv-80248)
(The Honorable Kenneth A. Marra)

PLAINTIFFS-APPELLANTS' REPLY BRIEF AND CROSS-APPELLEES' RESPONSE TO CROSS-APPEAL

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Caption continued on next page

ANTONIO GONZALEZ CARRIZOSA, *et al.*,
Plaintiffs,

JUANA DOE 11 and MINOR DOE 11A,
Plaintiffs-Appellants-Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., KEITH E. LINDNER, CYRUS F. FRIEDHEIM, JR., ROBERT W. OLSON, ROBERT F. KISTINGER, and WILLIAM A. TSACALIS,
Defendants-Appellees-Cross-Appellants.

District Court No. 07-cv-60821

JOHN DOE 1, *et al.*,
Plaintiffs,

JOHN DOE 7, individually and as representative of his deceased son JOHN DOE 8, and JANE DOE 7, individually and as representative of her deceased husband JOHN DOE 11,
Plaintiffs-Appellants-Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee-Cross-Appellant,

MOE CORPORATIONS 1-10,
Defendants,

CHARLES KEISER, CYRUS FRIEDHEIM, ROBERT KISTINGER, ROBERT OLSON, WILLIAM TSACALIS, and CARLA A. HILLS, as personal representative of the Estate of RODERICK M. HILLS, SR,
Defendants-Appellees-Cross-Appellants.

District Court No. 08-cv-80421

JANE/JOHN DOES (1-144),
Plaintiffs,

JUANA PEREZ 43A,
Plaintiff-Appellant-Cross-Appellee,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee-Cross-Appellant,

DAVID DOES 1-10, et al.,
Defendants,

CYRUS F. FRIEDHEIM, JR., ROBERT W. OLSON, ROBERT F. KISTINGER, and WILLIAM A. TSACALIS,
Defendants-Appellees-Cross-Appellants.

District Court No. 08-cv-80465

JUAN DOES, 1-377, *et al.*,
Plaintiffs,

JUVENAL ENRIQUE FONTALVO CAMARGO and NANCY MORA LEMUS,
Plaintiffs-Appellants Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC.,
Defendant-Appellee-Cross-Appellant,

INDIVIDUALS "A THROUGH J" et al., (whose identities are presently unknown),
Defendants.

District Court No. 08-cv-80480

JOSE LEONARDO LOPEZ VALENCIA, *et al.*,
Plaintiffs,

JOSE LOPEZ 339,
Plaintiff-Appellant-Cross-Appellee,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., ROBERT F. KISTINGER, WILLIAM A. TSACALIS, and KEITH E. LINDNER,
Defendants-Appellees-Cross-Appellants.

District Court No. 08-cv-80508

ANGELA MARIA HENAO MONTES, *et al.*,
Plaintiffs,

ANA OFELIA TORRES TORRES, PASTORA DURANGO, and GLORIA EUGENIA MUÑOZ,
Plaintiffs-Appellants Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., and KEITH E. LINDNER,
Defendants-Appellees Cross-Appellants.

District Court No. 10-cv-60573

JOHN DOE 1, *et al.*,
Plaintiffs,

JOHN DOE 7, individually and as representative of his deceased son JOHN DOE 8, and JANE DOE 7, individually and as representative of her deceased husband JOHN DOE 11,
Plaintiffs-Appellants-Cross-Appellees,

v.

CARLA A. HILLS, as personal representative of the Estate of RODERICK M. HILLS, SR,
Defendant-Appellee-Cross-Appellant.

District Court No. 17-cv-81285

JOHN DOE 1, *et al.*,
Plaintiffs,

JOHN DOE 7, individually and as representative of his deceased son JOHN DOE 8, and JANE DOE 7, individually and as representative of her deceased husband JOHN DOE 11,
Plaintiffs-Appellants-Cross-Appellees,

v.

CHIQUITA BRANDS INTERNATIONAL, INC., CHARLES KEISER, CYRUS FRIEDHEIM, ROBERT KISTINGER, ROBERT OLSON, and WILLIAM TSACALIS,
Defendants-Appellees Cross-Appellants.

District Court No. 18-cv-80248

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 27-1(a)(9), counsel for Plaintiffs-Appellants certifies that a list of interested persons, trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations (noted with stock symbol if publicly listed), that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party, known to Plaintiffs-Appellants, are as follows:

1. The individual plaintiffs are listed in the Complaints as filed in the Southern District of Florida in Case Nos. 07-60821-CIV-MARRA (*Carrizosa*); 08-80421-CIV-MARRA (N.J. Action); 08-80465 CIV-MARRA (D.C. Action, Does 1-144); 08-80508-CIV-MARRA (*Valencia*); 08-80408-CIV-MARRA (*Manjarres*, NY Action); 10-60573-CIV-MARRA (*Montes*); and in 10-80652-CIV-MARRA (D.C. Action, Does 1-976); 11-80404-CIV-MARRA (D.C. Action, Does 1-677); 17-81285-CIV-MARRA (D.C. Action, *Does v. Hills*); 18-80248-CIV-MARRRA (Ohio Action, *John Doe 1*) .
2. The thousands of other individual Plaintiffs whose complaints have been consolidated in the instant multidistrict litigation, Case No. 0:08-md-1916-KAM.

3. Additional interested parties are:

Plaintiffs-Appellants have included persons previously identified by Chiquita Brands International as having a financial interest in this litigation. Plaintiffs do not have direct information as to whether these persons continue to have such an interest.

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PLAINTIFFS'-APPELLANTS' REPLY BRIEF

INTRODUCTION

Plaintiff-Appellants' Opening Brief ("AOB") established that there is far more than enough admissible evidence to allow a jury to find that the AUC murdered the bellwether Plaintiffs' loved ones. This includes evidence that the AUC had motive to kill them; that the AUC had the means and opportunity to do so, including dominating the area and driving out other groups; that the AUC committed the overwhelming majority of murders where these murders occurred; and that the bellwether Plaintiffs died in the same ways the AUC killed its victims. Further, AUC members were convicted for these murders and accepted AUC responsibility for them. There was also eyewitness testimony to many of the murders. Highly qualified experts also opined that these were AUC hits. A jury should have been allowed to reach the obvious conclusion that Plaintiffs' decedents were killed by the AUC.

Defendants point to nothing in the record that would support summary judgment, largely avoiding the record of disputed facts. For the district court's decision to be upheld, Defendants would have to show that all of Plaintiffs' evidence is inadmissible or should be discounted. They fail to do so. Defendants ignore arguments they cannot refute. They ask this Court to exclude evidence on baseless grounds the district court did not accept. And they misstate the record and the law.

The district court did not exclude the evidence that these murders were

committed in AUC dominated areas, against perceived AUC opponents. Nor should this Court. This evidence is enough to survive summary judgment. But there is much more.

In excluding Plaintiffs' evidence that their loved ones' killers used AUC methods, the district court applied the wrong legal standard. It required the perpetrator's handiwork to be unique, even though such a bar only applies when the perpetrator is a criminal defendant. Defendants suggest that the fact that these murders were committed in the same way the AUC traditionally killed its victims has no probative value whatsoever, but that is clearly wrong. The district court should have weighed any prejudice here, which is concededly absent.

The district court afforded Plaintiffs no opportunity to respond to many of Defendants' evidentiary objections, and to objections Defendants did not raise at all. Summary judgment based on such objections is not proper.

The district court also erred in excluding Justice & Peace documents that demonstrate the AUC committed these murders. Defendants ignore key showings of this that Plaintiffs made in their Opening Brief. Defendants do not disprove that the court erred.

The Rendón and Mangones convictions establish that four of the decedents were murdered by the AUC. Defendants do not respond to most of Plaintiffs' arguments showing they are admissible. Likewise, Record 138, the Hasbún

indictment, shows the same about four more decedents. It is admissible since it reflects factual findings that Hasbún committed these murders, and, contrary to Defendants' claim, indictments may be admitted "in a civil case." Fed. R. Evid. 803(8)(A)(iii).

Similarly, Defendants try to support the district court's exclusion of the Prosecutors' Letters showing the AUC accepted responsibility by suggesting that Plaintiffs must prove Colombian prosecutors diligently performed their duties, but that reverses the burden of proof. Officials are assumed to do their job and Chiquita has failed to establish that they did not.

The district court also erred in requiring Plaintiffs to produce the prosecutors' files it previously denied them the opportunity to pursue in discovery. Defendants' argument that the district court's discovery order was not an abuse of discretion fails to address that the court could not deny Plaintiffs evidence and then grant summary judgment because Plaintiffs do not have that evidence.

Plaintiffs' expert, Professor Oliver Kaplan, concluded, based on well-established social science methods, that the AUC likely committed these murders. Defendants misstate his testimony. He did not assert that it was merely "possible" that the killers were AUC members. He did not admit that his conclusion that the AUC murdered decedents was based entirely on the timing and location of AUC murders. Nor did he admit that he did not employ the "comparative" and

"triangulation" methods. As to each, he specifically testified otherwise. The district court erred as a matter of law in finding Professor Kaplan did not apply a proper methodology without applying the analysis required by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993). Defendants' assertion that it is enough that the district court merely cited Rule 702 would read *Daubert* out of the law.

The above-noted errors, and others made with respect to individual Plaintiffs' cases, require reversal.

ARGUMENT

I. THE PLAINLY ADMISSIBLE EVIDENCE CREATED A GENUINE DISPUTE OF FACT AS TO WHETHER THE AUC WAS MORE LIKELY THAN NOT TO HAVE KILLED THE PLAINTIFFS' FAMILY MEMBERS.

Evidence the district court did not exclude of the AUC's motive, means, and opportunity would allow a jury to find that it was more likely than not that the AUC rather than anyone else killed Plaintiffs' family members. AOB 20–28. Defendants barely address the sufficiency of this evidence. Their suggestion that that the district court found much of this evidence inadmissible is wrong. Defendants' Response Brief and Cross-Opening Brief ("RB") 19–20. Section I of Plaintiff-Appellants' Opening Brief relies on evidence the district court did not exclude.

To the extent Defendants suggest the district court considered the totality of the unexcluded circumstantial evidence, this is incorrect. AOB 21–22. The record speaks for itself, and Defendants largely ignore it. As the district court itself stated, it

repeatedly viewed and rejected evidence as "standing alone." *E.g.,* App7517 n.5, 7558, 7575–76. Defendants' contrary argument is based only on the district court's statement that it looked at the submissions and "now turns to a review of the summary judgment record." RB 19 (quoting App7516). This statement does not overcome the fact that the district court did not view the evidence in its totality. The non-excluded evidence considered in its totality would permit a reasonable jury to conclude it was more likely than not that the AUC murdered Plaintiffs' family members. Defendants offer no real argument or citation to the record to the contrary. Their contention that the evidence of the AUC's means, motive, and opportunity must be excluded, or that Plaintiffs waived these arguments, fails for reasons addressed below.

A. Evidence of the AUC's Motive Was Not Excluded. In Combination with Other Unexcluded Evidence, Such Evidence Permits a Reasonable Jury to Conclude the AUC Killed the Bellwether Decedents.

The AUC had a motive to kill the Plaintiffs' family members and no other groups or individuals in the record did. AOB 22–24; *see also* AOB 6 & nn.3–10, 22–23 (collecting evidence). Thus, the evidence of motive – and certainly in combination with evidence suggesting AUC had dominance and unique opportunity to carry out the murders the area – would allow a reasonable jury to find that it was more likely that the AUC killed Plaintiffs' family members than any other persons. AOB 22–24. Defendants argue that the district court *could not* reach the evidentiary significance of

the AUC's unique motive as a matter of law because it excluded such evidence as "*modus operandi*" evidence, and this was proper; or else Plaintiffs waived the argument. RB 19–20, 24–34. These arguments fail.

There was ample evidence that the AUC was ideologically opposed to persons like Plaintiffs' family members – *e.g.* union or other social activists, perceived guerrilla sympathizers, or suspected criminals. AOB 5–7.[1] Other groups had no reasons to kill Plaintiffs' loved ones and Defendants point to no contrary evidence. *See* App6612 (Chiquita's own notes reflecting guerrillas provided "support . . . . for union activities with the aim of strengthening them"); *see also, e.g.*, Plaintiffs-Appellants' Supplemental Appendix (PSApp) 13692 (stated platform of guerrillas was workers' rights, contrary to paramilitaries). The district court did not exclude this motive evidence – the court ignored it. *See* App7572–78 (addressing "geographical and temporal" evidence and specific "killing methodologies"). Defendants did not object to this evidence below, and thus have waived any objection. App7443–45; AOB 41–42 (excluding evidence on summary judgment as inadmissible is only appropriate if parties opposing evidence raise and support the objection). In any event, such evidence is admissible.

[1] Defendants cite two pieces of testimony, one from a Colombian military member for the proposition that the AUC had no ideology or connection to the military and the AUC aimlessly attacked based solely on cocaine. RB 1–2. That is belied by ample evidence. *E.g.*, AOB 5–9 & nn. 4–18. In any case Defendants' selection of evidence cannot support summary judgment when it is contradicted by the record, which Defendants ignore.

First, there was ample evidence of the AUC's motive to kill Plaintiffs' decedents from the AUC's ideology and stated intent, rather than its acts. *E.g.*, AOB 5–7 & nn.4–9 (AUC aligned itself with the military and farming interests and opposed those such as union members, subversives, or criminals and others it perceived to be guerrilla sympathizers). Thus, Rule 404(b) and its concerns about past "acts" would be irrelevant, as would be any requirement to prove that "acts" bore a particular handiwork, given acts were not necessary to establish motive. Second, though the AUC's acts also underscored the same motive, even such acts would not be excludable for failure to show a unique handiwork. There is no requirement for acts to show such handiwork when they establish *motive*. *E.g. United States v. Beechum*, 582 F.2d 898, 912 n.15 (5th Cir. 1978) ("[S]imilarity is not required when the [other] offense is introduced to show motive."); *United States v. Frye*, 193 F. App'x 948, 951 (11th Cir. 2006).

The unique handiwork requirement only applies where a past act is introduced to show "physical similarity" reflecting a person's handiwork. *Id.* This Rule does not apply to *non-parties'* acts. AOB 29–36; § II, *infra*.

Evidence of the AUC's motive in the context of these killings was sufficient for a jury to determine the AUC's responsibility. AOB 23–24. This evidence was also joined with evidence of the AUC's control over the territory at issue and its having committed the majority of murders there. AOB 9–12, 24–29. Combined, it is more

than sufficient to permit a reasonable jury to conclude that the AUC killed Plaintiffs' family members, and the district court erred by refusing to allow a jury to decide the matter. AOB 23–25, 26–27. There was no waiver of Plaintiffs' argument. *See* § I(B), *infra*.

B. Evidence that the AUC Dominated the Areas where Plaintiffs' Family Members were Killed, and that it Committed the Majority of Murders There Was Not Excluded. It Permits an Inference that the AUC Killed the Bellwether Decedents, Particularly in Combination with the AUC's Motive.

Defendants also largely ignore the significance of the AUC's control of the regions at issue, that it displaced other violent actors and that it was responsible for the vast majority of the murders there, none of which the district court excluded. AOB 9–13, 24–29. This establishes material disputes of fact as to whether the AUC was more likely than not responsible for these deaths, particularly in combination with the AUC's undisputed motive to kill the Plaintiffs' family members. AOB 24–29. Defendants do not contest this evidence with contrary evidence. For example, they offer no evidence that these murders were more likely committed by anyone other than the AUC. Defendants argue that Plaintiffs' evidence was excluded, but there is no basis in the record for this and it would have been error for the district court to have excluded this evidence.

Defendants do not seriously refute the evidence showing that the AUC dominated the areas at issue and displaced other violent groups. RB 19–23; *see generally*

AOB 9–12, 24–25.[2] Substantial record evidence also shows that the AUC committed the majority of murders in the relevant areas. *E.g.* AOB 24–26 & nn.27–29; *see also, e.g.*, App3856 (Defendants' own expert opinion that paramilitaries committed more targeted killings of civilians than guerrillas did); App4385 (testimony of AUC member that the AUC had "100% control over areas in which it operated"); App3806 (testimony from AUC commander that by 1996, the AUC had Urabá fully under control); App4163 (at the time of death, the paramilitaries "were in charge; they were the ones who made the law to be followed"); App4656–57 (testimony, from Alvaro Sarmiento whose team interviewed more than 28,300 paramilitaries, that Urabá was the most complete and powerful expression of paramilitarism). Chiquita's former head of security himself testified that by 1997, Urabá was "under the control of the paramilitary" and there was "no longer guerrilla" there, that the area was "clean of guerrilla." App6172. The district court did not exclude such evidence. App7571–78.

[2] Defendants suggest that there was evidence that at some points other groups existed in areas where Plaintiffs' family members were killed and "some areas were undergoing transition from guerilla-based control to paramilitary-based control during the timeframes in question," citing the district court. RB 78–79, 10. It is unclear what evidence the district court was referring to and Defendants cite none. *Id.*; App7576. The district court may have been referring to Ortega's opinion that, "prior to about 1995, Urabá was primarily controlled by the FARC, which the AUC took from them over the next two years or so." App3491–92. But that opinion states the AUC *did* control Urabá by 1995. App3491. Other record evidence also confirms that the AUC took control of Urabá by 1995 and dominated it by 1996. *E.g.*, App3806 (the AUC retook Urabá in 1995, and by 1996 the region was "literally under [its] control.") The Plaintiffs' family members were all killed from 1997 to 2004. In any event, even if evidence was disputed it would be up to a jury to resolve the dispute, not a judge.

Defendants ignore all of it. RB 20–23.

Instead, Defendants' primary argument is that Professor Kaplan's opinion that the AUC was responsible for 90 percent of the killings was excluded. RB 20–21. The argument fails for several reasons. First, other record evidence including that identified above shows that the AUC committed the majority of murders in the relevant areas. Prof. Kaplan's opinion is not necessary to establish this. Such other evidence creates a material issue of fact for a jury to resolve. Second, Prof. Kaplan's testimony about the 90% figure was not excluded. The district court excluded only his testimony that these murders were likely committed by the AUC, and did not exclude the reports on which Prof. Kaplan relied. App7576–78.[3] Third, even if the district court's decision could be read as broadly as Defendants claim, the court's analysis regarding Prof. Kaplan erred as a matter of law. *See* § IV, *infra.*

Defendants' other arguments are also unavailing. Defendants contend that Plaintiffs must establish "that no [other] potential killers . . . were present in the geographic area," RB 22, a standard beyond that required to convict a murderer under a criminal law standard. The well-established civil standard is whether plaintiffs can prove their case merely by a preponderance – that the AUC was more likely than not to be responsible. *Blossom v. CSX Transp., Inc.,* 13 F.3d 1477, 1479 (11th Cir. 1994).

[3] Indeed, the district court relied on the data collected and presented by the experts, as a basis to support summary judgment. App7576.

Plaintiffs were not required to eliminate all other potential suspects, especially when Defendants did not introduce evidence of alternative perpetrators.

Defendants cite *Chapman v. American Cyanamid Co.*, 861 F.2d 1515 (11th Cir. 1998), for the proposition that Plaintiffs must eliminate all other potential suspects, RB 22–23, but *Chapman* does not hold this. It made no suggestion that in order for acts to be ascribed to a defendant or even for statistical evidence to have evidentiary significance, the party must affirmatively disprove the possibility that any other person could have been responsible for the act, and it *denied* summary judgment for the defendant. 861 F.2d at 1519–20. The rule of burdens and evidence is clear – a fact is taken as established in a civil case if it is more likely than not to have occurred. *Blossom,* 13 F.3d at 1479. Plaintiffs certainly need not prove more to get before a jury. Nothing in *Chapman* limits the use of statistical evidence, or any other evidence, let alone in combination, which indicates that one party is more likely than any other to be responsible. Defendants offer no authority for the proposition that evidence is inadequate unless it disproves the possibility that any other person could be responsible. It is up to the jury to decide whether it was more likely than not that the AUC was responsible. Furthermore, Defendants refer to *Chapman's* holding as reflecting "products liability principles." RB 22. This is not a products liability action.

Additionally, Defendants ignore the other contextual facts (*e.g.*, the AUC's motive, means, and opportunity, etc.) in addressing the evidence that the AUC was

responsible for the majority of the killings in the areas where Plaintiffs' decedents were murdered. Defendants rely on the district court's "market share liability" analysis, but this case does not concern "market share liability," and the district court committed reversible error by viewing Plaintiffs' evidence through an irrelevant lens. AOB 27–29. Defendants cite no caselaw supporting the district court's analysis.

Defendants also fail to distinguish Plaintiffs' cases concerning evidence of a criminal group's territorial control as powerful circumstantial evidence that a criminal act was linked to that group. Defendants claim that these cases apply only if the person is *known*, but that is not what these cases stand for. RB 23. The legal question in these cases was whether actions could be attributed to a particular criminal group. That is precisely the question posed here. The fact that a crime occurred in a gang territory, especially where it would have furthered the group's ends, indicates it was likely – indeed highly likely – linked to this particular group rather than actions taken independent of it. *E.g.*, *United States v. Rodriguez-Torres*, 939 F.3d 16, 28 (1st Cir. 2019); *United States v. Gregory Thomas*, 114 F.3d 228, 241 (D.C. Cir. 1997); *see also, e.g.*, *United States v. Fields*, 138 F. App'x 622, 626 (5th Cir. 2005) (gang's control over territory combined with fact that drugs were sold on gang's turf could allow a jury to infer acts were committed as part of a conspiracy with the gang). The same kind of evidence here enables a jury to conclude that Plaintiffs' family members were killed by the AUC.

Defendants falsely contend that Plaintiffs "waived" arguments that the AUC targeted persons like Plaintiffs' decedents, dominated the areas where they died and excluded other groups, committed the overwhelming majority of the murders there, and killed in the manners in which these decedents were killed. RB 24–26. But Plaintiffs expressly addressed these issues in the district court where the same evidence was before the court. *See, e.g.*, App7375 (arguing summary judgment was inappropriate given evidence "that the AUC targeted certain types of people" including unionists, social leaders, banana workers, suspected guerrilla sympathizers, and social undesirables); App7374–75 (arguing a material dispute of fact as to AUC responsibility because the AUC dominated the area and was responsible for the majority of murders there). Plaintiffs cannot "waive" the same issue of sufficiency of the evidence or a description of it as "motive, means, and opportunity." Appellants' Opening Brief makes the same arguments with additional support. There is no waiver in such circumstances. *E.g. Eleison Composites, LLC v. Wachovia Bank, N.A.*, 267 F. App'x 918, 923 n.9 (11th Cir. 2008) (providing additional authority in support of an argument is not waiver); *United States v. Rapone*, 131 F.3d 188, 196 (D.C. Cir. 1997).

Last, Defendants' argument that Plaintiffs could not show a "deliberated killing" under the Torture Victim Protection Act (TVPA), or that Defendants' actions contributed to the Plaintiffs' deaths under Colombian law "because the perpetrators

are unknown" fails.[4] The district court expressly declined to rule in Defendants' favor on these arguments, and it makes little sense to resolve such evidentiary matters for the first time on appeal.[5] App7580. Regardless, there was ample evidence that the brutal murders here were "deliberated," meaning "purposeful killings" rather than acts of negligence or provoked homicide. *Mamani v. Sánchez Bustamante*, 968 F.3d 1216, 1232–36 (11th Cir. 2020) ("*Mamani III*") (outlining standard); *see also, e.g.*, AOB § V(A)–(J) (describing murders of Plaintiffs' family members).[6] There was also extensive evidence that would allow a jury to find Chiquita responsible for the AUC's murders here by funding and abetting them. *See* PSApp13519 (Colombian law expert describing standard for causation); PSApp13667 (same).[7] Neither the TVPA nor Colombian law requires that on top of this, the individual identity of the killer must be

[4] Colombian law does not have a "deliberated" killing element. *See generally, e.g.*, PSApp13504–06, 13516–25, 13529–32, 13534, 13537.

[5] The district court did rule on the TVPA issue at the motion to dismiss stage; the Individual Defendants cross-appeal that ruling. RB 111–123. But the Court did not apply the law to the record evidence as is required on summary judgment.

[6] Indeed, this is reflected in Defendants' own expert testimony that the AUC typically killed with intentionality, App3859, and substantial other evidence confirming the AUC targeted perceived guerrilla sympathizers – like the decedents here – as "missions" "military objectives," and targets. *E.g.* App3632–33, 3634–35, 3637, 3633, 3804, 3810; *see also generally* AOB 5–9.

[7] *E.g.*, App3744 (AUC Commander Hasbún testifying that sixty percent of the banana bloc's budget came from the banana growers); App3804 (AUC Commander HH testifying that the banana growers "were the people who [were] financing" the ACCU "throughout the zone" of Urabá); App3806 (AUC Commander HH testifying that "when we go to the Urabá, the objective was to protect the banana plantations").

known. *See infra* Cross-Appellees' Response § I(C) (addressing issue in more detail); *see also, e.g.*, PSApp13529–31 (outlining standard for liability under Colombian law, which does not require the individual perpetrator's identity).

In sum, evidence that the AUC had the motive to kill Plaintiff's family members, dominated the areas where they were murdered, and were responsible for the majority of the murders in these areas would permit a reasonable jury to conclude the AUC was responsible for the deaths, and therefore summary judgment was inappropriate.

II. THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE THAT THE KILLINGS OF PLAINTIFFS' FAMILY MEMBERS WERE CONSISTENT WITH THE AUC'S PAST KILLINGS.

A. The District Court Erred in Concluding that the AUC's Killing Methodologies Could not be Admitted Absent Signature Handiwork, and that there Was No Signature Handiwork Here.

The evidence establishes that Plaintiffs' family members were killed in manners consistent with the AUC's typical method of killings. The district court's decision to exclude such evidence under Rule 404(b) was reversible legal error. AOB 29–36.

Under Rule 404(b), introducing similarities between *criminal defendants'* past acts and ones at issue to establish a common handiwork is barred unless the proponent shows the acts were unusually or peculiarly similar, amounting to "signature" actions. *United States v. Myers*, 550 F.2d 1036, 1045–46 & n.17 (5th Cir. 1977). This protection for criminal Defendants does not apply in civil cases in the same way. For non-defendants, even in criminal cases, their past acts' similarities are only excluded if

introducing them would be more prejudicial than probative. *See* AOB 30–33. There was no such prejudice here, the district court found none, and Defendants tacitly concede this by not contending otherwise.

Defendants try to construct an alternate reality to avoid the trial court's legal error, ignoring the cases Plaintiffs cite. Without legal support, Defendants say that under Rule 404(b), criminal defendants and others are treated the same. Thus, they claim that unless past acts are so similar and unique that they represent the "signature" handiwork that *Myers* required for criminal defendants, they are immaterial and can *never* be introduced to indicate identity with respect to any person, whether a criminal defendant or not. This is so, they maintain, because acts that do not meet the *Myers* standard have *zero* probative value. RB 26–29. But *Myers* was about prejudice to criminal defendants; Defendants' effort to expand *Myers* beyond criminal defendants by falsely claiming such acts necessarily lack probative value fails, as case law plainly shows. AOB 31–33.

Past acts have probative value if they are similar to current acts, but fall short of "unique handiwork." Evidence is relevant, and probative and admissible, "if it has any tendency to make a fact more or less probable than it would be without the evidence," and no other rule requires its exclusion. FRE 401(a), 402. There is little question that evidence of similar but not wholly "unique" handiwork meets this minimal relevance threshold. The fact that an individual or a group frequently

committed acts similar to the one at issue has *some* tendency to make the individual or group's connection to the act more probable than if no such evidence existed. This is true even where such similarities fall short of bearing a unique signature that *Myers* required to protect criminal defendants under Rule 404(b). *Myers*, 550 F.2d at 1045–46 & n.17.

This Court has held that the reason similar past acts, but not "signature handiwork" ones, of a criminal defendant are excluded is because of the *prejudice* evidence with fewer similarities might have on that defendant. *Id.* at 1044 (announcing the rule in *Myers* "[b]ecause the risk of prejudice is so great."); *id.* (noting "the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes."). Thus, probative value is concededly present, but for a criminal defendant given possible prejudices to him, the probative value and "inference of identity" must be strong. *Id.* at 1045. The concern when admitting past bad acts of *criminal defendants* is that "[t]he probative value of this evidence does not outweigh its substantial prejudicial effect" unless there was unique handiwork involved. *Id.*

Concerns about prejudice to criminal defendants do not apply with the same force to the past acts of others, especially in a civil case. Accordingly, for non-criminal defendants there is no categorical bar to admitting non-signature past acts. Instead, Courts must consider prejudice in its totality, and may or may not admit past acts of a

non-party regardless of whether they show the unique handiwork *Myers* required. AOB 31–32; *see also, e.g.*, *United States v. Ellis*, 593 F. App'x 852, 857 (11th Cir. 2014) (admitting evidence of non-defendant's acts with no indicators of unique handiwork because it tended to show "what he might have been up to that day," and there was no argument of prejudice).

Moreover, past acts are probative and admissible where they are intertwined with the act at issue or are an integral and natural part of the complete story of that act, as is the case here. AOB 33–34. Such evidence, as opposed to "extrinsic evidence,"[8] does *not* require a showing that each past act exhibited unique handiwork. *E.g. United States v. Miller*, 959 F.2d 1535, 1539 (11th Cir. 1992) (Unique handiwork is required "[w]hen extrinsic offense evidence is introduced to prove identity . . . ."); *id.* at 1540 (Kravitch, J., concurring). ("The *extrinsic act* must be a 'signature' crime . . . .") (emphases added); *see also, e.g.*, *United States v. Chappell*, 307 F. App'x 275, 282–83 (11th Cir. 2009) (admitting prior acts without requiring signature evidence); *United States v. Estrada*, 969 F.3d 1245, 2020 WL 4690063, at *19 (11th Cir. 2020). Defendants do not dispute that the evidence here was intertwined and intrinsic.[9] Their position that there

[8] The Court refers to "intertwined" evidence as "intrinsic" evidence, and other evidence, to which Rule 404(b) principles apply as "extrinsic" evidence. *See, e.g.*, *United States v. Sanders*, 663 F. App'x 781, 782–83 (11th Cir. 2016); *United States v. Figueroa*, No. 09-20610-CR, 2010 WL 11506679, at *3 (S.D. Fla. June 29, 2010).

[9] Matters in the opening brief that Appellees do not dispute are waived. *E.g. Hamilton v. Southland Christian Sch., Inc.* 680 F.3d 1316, 1318–19 (11th Cir. 2012).

is no probative value or admissibility here absent "signature" past acts would eviscerate established law concerning intrinsic evidence and admitting past bad acts. RB 26–34.

The district court committed legal error by imposing a "unique handiwork" requirement barring the past acts of the AUC here. There is concededly no prejudice, and at minimum the district court should have addressed the matter. *See, e.g. United States v. Phillips*, 401 F.2d 301, 305 (7th Cir. 1968) ("A trial court, in exercising its discretion to admit or exclude evidence of a prior crime, is required to balance its tendency to unduly prejudice the accused against its tendency to prove a material fact."); *Blind-Doan v. Sanders*, 291 F.3d 1079, 1083 (9th Cir. 2002) (trial court must balance prejudice and probative value).

Regardless, these murders did in fact bear the unique hallmarks of AUC murders, and the district court erred in ignoring evidence of this. AOB 34–35; §§ II(B)–(C), *infra*.

B. Sufficient Non Expert Evidence of the AUC's Killing Methodologies Was Otherwise Admissible.

Defendants' fallback argument is that even if the district court erred in refusing to consider evidence that Plaintiffs' decedents were killed in manners the AUC often used, all of it could still be excluded on appeal. RB 30–34. The argument fails for several reasons.

The district court did not exclude the evidence for any purported

inadmissibility apart from the 404(b) issue discussed above. App7571–76. The evidence is admissible. Plaintiffs introduced admissible evidence of the AUC's *modus operandi* including not only expert evidence, but also non-expert evidence. Defendants mischaracterize the latter evidence, ignore it, or construe it in the light most favorable to them rather than in the light most favorable to Plaintiffs as is required.[10]

For example, Plaintiffs introduced evidence showing that the AUC:

- killed alleged subversives[11] including union leaders,[12] banana workers,

[10] For example, Defendants ignore and restate their own deponent's testimony that the AUC acted in retribution against farmers and others and to control "territory by terror," App8530–31, as "Chiquita was extorted by the AUC." RB 30 n.19.

[11] *E.g.*, App3804, 3810 (former AUC commander testifying that targeting "subversives" for violence "was the objective" of the AUC, and that any people who were considered "against the companies" were considered "military objectives"); App3623 (former AUC Commander testifying that anyone who opposed "free investment" was considered the "common enemy" of the AUC and the army). *See also* App3838–39.

[12] App3806, 3810 (former AUC commander testifying that the AUC would threaten those who called for strikes with death and that the AUC killed a large number of union members); App6648 (former banana union leader testifying that their status as union leaders made them military targets); App4661 (testimony from a former official of the Colombian National Center for Historical Memory that the AUC targeted "workers, trade union leaders, leaders of peasant associations, leftist political leaders"); App6662 (percipient witness' testimony that "[b]eginning in 1995, many union leaders died at the hands of the paramilitary members"); App6679 (percipient witness's testimony that the AUC distributed signed pamphlets threatening union workers and others); App6172, 6182, 6184 (testimony from Chiquita employee).

[13]and others perceived to be sympathetic to guerrillas;[14]

- targeted common criminals as a measure to deter recidivism;[15]
- committed atrocities in a manner to instill terror in the civilian population, consistent with its motive to terrify its targets;[16]

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[13] App4348–4354 (former Presidential Advisor for Urabá recounting that he attended the burial of banana plantation workers killed by the AUC); App6676, 6679 (former union leader from Urabá testifying that he had knowledge of massacres of banana workers where the AUC recognized responsibility); App6647 (a second union leader from Urabá testifying that in his position he "often received news of many deaths of workers and union members" and that "most" of those murders "were committed by paramilitaries.")

[14] App3810 (former AUC commander testifying that union members were killed because the AUC considered them "sympathizers or members of the guerilla groups"); App3748 (former AUC commander testifying that he issued orders to kill individuals "merely for having the connections and collaboration or direct connections with the guerrillas"); App3622–23 (former AUC commander testifying that the AUC targeted civilians presumed to be associated with the guerrillas); App3828 (former AUC Commander testifying that the AUC targeted unarmed individuals considered to be guerrilla sympathizers); App3651–52, 3659 (former Colombian Colonel corroborating that the paramilitaries targeted those considered "guerrilla helpers" or "guerrillas in civilian clothes" and targeted the "civilian population" that it considered the "social base of the guerrillas"); App3636–68 (former AUC Commander testifying that the AUC considered "farmers", "campesinos", "peasants", and union members to be targets, "whether they were armed or not", if they were considered to have guerrilla sympathies).

[15] *E.g.*, App3638.

[16] *E.g.*, App8629 (testimony from Chiquita's corporate representative acknowledging the AUC's "objective was to control territory" and to do so they "threatened people and terrorized people); App8530–31; 9172–75 (report Chiquita commissioned showing that the AUC, and not the guerrilla groups, killed in brutal ways to spread terror through the civilian population); AOB 6 n.8.

- committed murders in front of family members[17] and purposefully left victims' bodies in public;[18]
- abducted people from their homes at night to murder them elsewhere; [19]committed killings while hooded or masked; [20]
- and kidnapped victims, often on motorcycle while wearing helmets, which was uncommon in Colombia.[21]

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[17] *E.g.* App9712–15 (security report Chiquita commissioned showing that the AUC, and not guerrilla groups, intentionally committed killings "in front of the victim's family and community").

[18] *E.g.*, App3633 (former AUC Commander Mancuso testifying that the AUC killed suspected guerrillas and left their bodies out as examples to others unless the military demanded otherwise). Defendants state Mancuso was not in the banana zones, but Mancuso testified that in his role as a high-ranking commander he participated in meetings and actions in Urabá, App3629–31, and as a commander he was familiar with the AUC practices he discussed, controlling four blocs with 1,000 or more men each. App3622.

[19] *E.g.*, App4386 (former AUC leader Roldán testifying that the paramilitaries were specifically set up to "go into homes at night and take out" perceived guerrillas "and murder them."); App4163 ("[T]he paramilitaries . . . started knocking on doors and taking people and killing them.").

[20] *E.g.*, App4661 ("wearing a hoodie" was one of the ways that paramilitaries acting with the army in undertaking "counterinsurgency actions" (including against trade unionists) were identifiable); App6117 (testimony that witness was able to identify persons as AUC members rather than members of another group or individual assailants "[b]ecause [the AUC] were the ones who would come in like that with their faces covered to kill people"); App6661 ("Sometimes when the paramilitary members entered the farms to kill people, they wore hoods. I never heard of or saw a guerrilla in the region wear a hood to commit a crime."); App6674–75 (paramilitary precursor groups used hoods when killing union members).

[21] *E.g.*, App6592.

Defendants do not even say how most of Plaintiffs' evidence could be excluded. RB 30–31. The evidence cited in the previous paragraph came from AUC commanders and numerous others (including Defendants' own witnesses) with personal knowledge that the AUC targeted civilians – particularly persons deemed sympathetic to guerrillas, *e.g.*, union leaders, banana workers and farmers – and did so in gruesome ways designed to instill terror among such persons and the civilian population that might otherwise support guerrillas. Indeed Chiquita's former head of security in Colombia testified that the AUC killed banana workers who they believed "sympathized with the guerrilla." App6172, 6182, 6184; *see also* App8629 (Chiquita's 30(b)(6) witness testifying that the AUC threatened and terrorized people in the regions they operated in order to maintain control); App8530–31 (similar testimony from other Chiquita witness); App3933–34 (Chiquita's own notes indicating that the AUC's tactics involved going into parking structures and announcing there is no neutrality and those who supported the guerrillas would be executed). There is no reasonable basis to exclude such evidence and the district court did not.

To the extent Defendants address any non-expert evidence, Defendants raised none of their objections below and the district court did not exclude evidence on this basis, App7443–45, nor did Plaintiffs have an opportunity to respond to and address them. *See* § III(A), *infra*. In addition to the fact that the evidence is admissible, it makes little sense to address factually intensive matters for the first time on appeal

where the district court did not, and such objections were not even raised below.

C. Evidence of the AUC's Killing Methodologies from Plaintiffs' Experts Was Also Admissible.

The expert evidence reflects the same *modus operandi* that the admissible non-expert evidence does. Thus, the expert reports were not required to create disputes for the jury as to whether the AUC evinced this *modus operandi*. However, Defendants' argument that such expert reports and opinion are inadmissible for lack of personal knowledge or foundation is also incorrect. The expert opinion is admissible and creates material disputes of fact as to the AUC's *modus operandi*. *E.g.*, *Moore v. GEICO Gen. Ins. Co.,* 633 F. App'x 924, 931 (11th Cir. 2016) (expert opinions create material disputes of fact).

Defendants contend that the *facts* contained in Plaintiffs' experts' reports are inadmissible because the experts lack personal knowledge and therefore, they claim, Plaintiffs cannot rely on the *reports* themselves to establish the AUC's *modus operandi*. RB 33. The district court made no such finding. Neither the experts' *opinions* concerning the AUC's *modus operandi*, nor the facts they relied on, were excluded other than to the extent they were purportedly barred by Rule 404(b). App7576–7578. Regardless, Plaintiffs can certainly rely on the experts' *opinions*, even if they are based on underlying facts about which the expert lacks personal knowledge.

Fed. R. Evid. 703 states that an expert may base an opinion "on facts or data" that the expert "has been made aware of *or* personally observed." (emphasis added).

Experts need not have personal knowledge of the underlying facts, and "they need not be admissible for the opinion to be admitted," if experts would reasonably rely on them. *Id.* The reason is "that the expert, because of his professional knowledge and ability, is competent to judge for himself the reliability of the records and statements on which he bases his expert opinion." *United States v. Williams*, 447 F.2d 1285, 1290 (5th Cir. 1971). There is "abundant authority that an expert witness who is available for cross-examination at the trial may use such records as the basis for an opinion without the proponent having to call every person who made a recorded observation." *Id.* at 1290.

Combined with other evidence here the expert *modus operandi* evidence, like the non-expert *modus operandi* evidence, also allowed a reasonable jury to conclude the AUC was most likely responsible for the Plaintiffs' family members' deaths. *See, e.g.*, App5049, 4804, 5059, 5094–95; AOB 5–9. Defendants respond that they object to the introduction of "facts," not *opinions* concerning *modus operandi*. RB 33 & n.27. But the experts clearly expressed expert *opinions* about what constituted the AUC's *modus operandi*, and there is therefore no argument that the opinions are inadmissible. Prof. Kaplan's opinion was that, *inter alia*, the AUC engaged in brutal war strategies consisting of the *modus operandi* he identified. App4785, 4801–10. Prof. Kaplan's opinion is based in part on his expertise in the Colombian conflict and extensive fieldwork in Colombia. App4786, 4914 (Prof. Kaplan published on AUC's violence

and war strategy); App4953.[22] Prof. Karl's report includes a similar opinion, informed by her expertise in the Colombian conflict and own fieldwork in Colombia. App5061. These opinions are admissible. And, to the extent those opinions are informed by facts and data, such facts and data can be admitted since they are the sort reasonably relied on by experts in the field. *E.g.*, *Williams*, 447 F.2d at 1290–91.

Defendants do not object to Prof. Kirk's expert opinion as to the AUC's methods, only to admitting the Human Rights Watch reports she authored. RB 32–34. There is no basis to object to her expert opinion. Prof. Kirk travelled to Colombia for weeks of fieldwork twice a year from 1995 to 2004. App5011. She interviewed participants in Colombia's civil war, including the leader of the AUC, and victims and survivors of AUC killings. App5028–29. Prof. Kirk's testimony, based on extensive fieldwork, concerned her opinion as to the AUC's *modus operandi*. *E.g.*, App5049 (AUC was committed to sending a message in killing victims, including dismemberment, making a "tableau," and committing "Colombian necktie[s]," and that the "brutality of the killings would often be a tell" of AUC responsibility).

The admission of Professors Kaplan, Karl and Kirk's opinions is proper and there is no "foundation" or "hearsay" bar to the testimony. *Williams*, 447 F.2d at

[22] It is not true that Prof. Kaplan "admitted at his deposition that all facts in his report were collected by other persons and not based on his personal knowledge," RB 32 n.24. Prof. Kaplan testified that he did not conduct *new* interviews *in 2018*, but he applied his past interviews, which were a basis for his opinions. App4926; 4914.

1290–91. For example, experts on other terrorist groups or gangs need not personally observe the group's crimes to testify about its *modus operandi*. *See, e.g.*, *United States v. Locascio*, 6 F.3d 924, 936–38 (2d Cir. 1993) (finding it well established that experts can testify as to inner workings of crime families by virtue of their expertise, even if they are basing opinions on information from others and hearsay recordings); *United States v. Augustin,* 661 F.3d 1105, 1125 (11th Cir. 2011) (where knowledge of particular group was derived from reports, but expert had conducted some interviews – there, from a different gang – the expert testimony was admissible); *United States v. Gastiaburo*, 16 F.3d 582, 589 (4th Cir. 1994) ("[E]xpert testimony on the *modus operandi* of criminals 'is commonly admitted.'"). There is no contention that the sources relied on by Professors Kaplan, Karl and Kirk are not reasonably relied on by experts in their field.[23]

Defendants' fallback argument that the expert reports must be excluded because they were not sworn, which the district court did not adopt, similarly fails. First, it ignores that the experts made similar statements in their sworn depositions, rendering the point moot. *See* App5049; App4936 (AUC's enemies were perceived guerrilla sympathizers). Second, the fact that reports were signed but not made under oath does not preclude the documents' admission, because they ratified the reports in

[23] Indeed Prof. Kaplan's report and its conclusion was peer-reviewed and approved by other experts. App4786.

depositions, and in any case, thenhc contents of the reports could be presented in a form admissible at trial. *See* § IV n.33 , *infra*; PSApp13688, PSApp13697.

Finally, Defendants' argument that the Human Rights Watch reports should be excluded as an independent document fails.[24] The reports were part of Prof. Kirk's work and expert opinion, and she ratified them under oath and expressly stated they were the basis for her opinion. App5024–25.

III. THE DISTRICT COURT'S EXCLUSION OF DIRECT EVIDENCE THAT THE AUC MURDERED PLAINTIFFS' DECEDENTS WAS ERROR.

A. Plaintiffs Had No Adequate Opportunity to Respond to Objections to Evidence, Including by Submitting Foundational Evidence.

Defendants do not rebut Plaintiffs' showing that they were denied a meaningful (and, often, any) opportunity to respond to objections that led to the preclusion of evidence and summary judgment – because they were raised in Defendants' Reply brief, or in their last supplemental filing, or by the district court *sua sponte* in its Order. Summary judgment based on such objections was error, as was the district court's decision to exclude foundational evidence that could address the objections made, such as Professor Sánchez's testimony. AOB 37–42, 59–61.

Without analyzing any of the specifics of which objections were raised when,

[24] Prof. Kirk's expert opinion was admissible and thus to the extent the reports indicate findings she adopted in her expert opinion, they should not be excluded.

Defendants simply assert that because Plaintiffs had an opposition brief and a supplemental response, this was sufficient. RB 36–39. Their brief effectively concedes the issue, however, in multiple ways.

First, they admit that their summary judgment motion attacked *only* the Plaintiffs' own testimony: it did not object to *any* of the supporting evidence, including any Justice & Peace documents, even though these were known to Defendants. *Id.* at 35 & n.29. Failing to address known evidence does not discharge their initial burden on summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) ("Only when [the movant's] burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment."); *see* AOB 40–41. Indeed, to the extent it mentioned Justice & Peace, it made no evidentiary objections. *See* App3310 (arguing that "[n]o member of the AUC confessed during the Justice and Peace process to killing [John Doe 8]"). And, as noted below, Plaintiffs had no expectation that Defendants would object to documents that they themselves had previously relied on.

Second, "[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986) (J. White, concurring). But Defendants concede that they made only conclusory hearsay and

foundation objections, generally asserting that no Plaintiff "has personal knowledge of who killed his or her family member;" that their testimony was based on hearsay, and that "[t]here is no other admissible evidence of record" that the AUC was responsible for the bellwether deaths. RB 35. These conclusory and non-specific objections do not carry the movant's burden; "the objecting party must plead the objection with specificity." *Guijosa-Silva v. Wendell Roberson Farms, Inc.*, Civil Action No. 7:10-CV-17 (HL), 2012 U.S. Dist. LEXIS 33358, at *15–16 (M.D. Ga. Mar. 13, 2012) (citing 10B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2738); *see also First-Citizens Bank & Trust Company v. Curtis L. Whitaker*, No. 1:16-cv-3463-SCJ, 2018 WL 6362630 at *2 (N.D. Ga. Sep. 4, 2018) ("General objections such as 'not supported by competent evidence' fail to provide FCB's rationale for why the evidence cited could not be presented in an admissible form and leave the Court guessing as to the substance behind the objection.").

Third, they suggest that the district court did not actually have to give Plaintiffs an opportunity to respond to Defendants' objections, because Plaintiffs are only entitled to an opposition brief. RB 36. But they do not dispute the case law that Plaintiffs were not required "to anticipate and rebut possible objections to the offered evidence." *Dowling v. United States*, 493 U.S. 342, 351 n.3 (1990); *see also Smith v. Bray*, 681 F.3d 888, 902 (7th Cir. 2012). This is especially true with respect to the Justice & Peace documents, which both sides had previously relied on. Defendants claim that

such documents were considered in prior stages because discovery had not been completed, and because "Defendants [had not] properly asserted objections." RB 40. The discovery argument is a red herring, because *sentencias* are publicly-available court documents; Defendants do not explain how discovery should have changed the parties' presentation of these documents. And of course Defendants did not previously object – because *they submitted the sentencias*. *See* App2864–69.

Defendants essentially argue that it was okay for them to rely on Colombian *sentencias*, because they did not object to their own evidence, but that they were entitled to object when Plaintiffs did the same thing, even if Plaintiffs had no notice that Defendants would raise these objections or opportunity to respond. Not so. And Defendants' claim that Plaintiffs should have responded in their opposition to summary judgment to objections Defendants had not yet raised rings hollow when Defendants themselves had previously relied on the same documents.

Fourth, they do not dispute that despite the number of briefs, Defendants only raised many objections in their last brief – to which Plaintiffs had no opportunity to respond – or were only raised by the district court itself. This Court can easily see for itself that Defendants' supplemental brief did not merely "respond to Plaintiffs' arguments," RB 37; it raised new objections, including challenges to the *sentencias*, AOB 44, 46; and authenticity objections to Record 138 and the prosecutors' letters, AOB 57. "[W]hen a moving party advances in a reply new reasons . . . in support of

its motion for summary judgment, the nonmoving party should be granted an opportunity to respond." *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998). Last, they concede that Professor Sánchez's declaration was submitted in response to evidentiary objections they made on reply, but they complain that the declaration was submitted "almost three months after Defendants filed their summary judgment reply." RB 47 n.33. But Defendants only raised their objections on reply; the district court denied Plaintiffs' request to respond to the reply brief, App7360–62; and Plaintiffs submitted the declaration according to the district court's supplemental briefing order, App7363–67. Defendants suggest that although this declaration was foundational testimony in response to objections they did not raise in their opening brief, Plaintiffs were required to submit it with their opposition. That is not true but even it were, summary judgment "is not a game of 'Gotcha!' in which missteps by the non-movant's counsel, rather the merits of the case, can dictate the outcome." *Burch v. Regents of the Univ. of Cal.*, 433 F. Supp. 2d 1110, 1120 (E.D. Cal. 2006). Defendants contend that the district court was justified in excluding the testimony because it was submitted "beyond the summary judgment deadlines," arguing that Plaintiffs had "three years" to establish the admissibility of the documents that Professor Sánchez addressed. RB 47 & n.33. As noted, however, Plaintiffs are not required to anticipate every objection that may be raised.

Defendants' position is that Plaintiffs were not entitled to respond to their

belated evidentiary objections with foundational evidence. They claim that *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1516 (11th Cir. 1990), requires only an opportunity to submit evidence when the movant introduces new *evidence*, not when it makes new objections. Nothing in *Burns* suggests such a distinction; instead, it recognized the importance of giving the non-movant "proper notice . . . to insure opportunity to present *every* factual and legal argument." *Id.* (emphasis added, internal quotation marks omitted). Even if the reasoning of *Burns* could be cabined, other cases similarly establish the right to respond to belated evidentiary objections – including with foundational evidence. *E.g.*, AOB 39 n.35; *see also Jerden v. Amstutz*, 430 F.3d 1231, 1237 (9th Cir. 2005)[25] ("[T]he exclusion of testimony for lack of foundation is improper following an untimely objection if such objection unfairly deprives the proponents of the testimony of an opportunity to cure the objection."); *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 46–47 (2d Cir. 2015) (error to grant summary judgment and preclude evidence based on authenticity challenge in a reply brief where plaintiffs could have provided complete, certified copies).

Plaintiffs should not be in a worse position because the Defendants failed to properly discharge their burden or timely lodge evidentiary objections. But that is the type of gamesmanship that Defendants' rule would invite. If, for example, Defendants challenged the authenticity, or made their hearsay objections to the Justice & Peace

[25] *As amended,* 2006 U.S. App. LEXIS 686 (9th Cir. Jan. 12, 2006).

documents when they moved for summary judgment, Plaintiffs would have been able to submit authenticated documents and responsive foundation evidence to meet those objections along with their opposition. To afford a meaningful opportunity to respond to Defendants' belated objections, the district court should have given Plaintiffs that same opportunity to meet the objections once they were raised.

Defendants try to paint a picture of Plaintiffs sitting on their hands and failing to develop the evidence, over the course of "ten years" of litigation. RB 58. But the reality is that, due to Defendants' multiple motions to dismiss and interlocutory appeal, discovery began less than two years before summary judgment briefing. And the focus of discovery – as the district court recognized – was on Chiquita's liability. Four months into discovery, the district court noted that "AUC involvement in the murders at issue is but one layer of the causation analysis, with a second, more difficult inquiry revolving around the Defendants' contributory role, if any, in facilitating the criminal conduct of the AUC." App3110. Thus the district court questioned "the potential importance" of obtaining documents from Justice & Peace prosecutors and denied letters of request. *Id.* And while Plaintiffs did continue to obtain these documents as best they could, *see infra* § III(B)(4), the prior practice in the case indicated that foundational testimony regarding the Colombian Justice & Peace process would not be necessary.

In sum, the district court erred by providing no opportunity to respond to

objections to the Justice & Peace documents, and no opportunity to provide foundational evidence that could address Defendants objections. This error affected its rulings not only concerning the admissibility of the Justice & Peace evidence, but also rulings on the admissibility of the individual Plaintiffs' evidence. *See, e.g.*, *infra* §§ V(A)(4); V(F)(1).

B. Defendants Fail to Rebut Plaintiffs' Showing that the Justice & Peace Documents were Admissible.

In response to Plaintiffs' showing that the Justice & Peace documents should have been admitted, Defendants largely rehash the district court's opinion. They fail to respond to Plaintiffs' argument in several important respects. And they overlook or misstate key aspects of the relevant evidentiary rules and caselaw.

1. The *Sentencias* Should Have Been Admitted.

Both the Rendón and the Mangones *sentencias* should have been admitted as prior convictions. Defendants fail even to respond to most of Plaintiffs' arguments.

Unable to contradict their own expert testimony, recognizing that *sentencias* are "convictions," Defendants abandon their argument – relied on by the district court – that the Rendón *sentencia* is inadmissible because its status as a "First Instance Judgment" is somehow different from a final judgment. RB 40–43. They appear to concede that this document is a *sentencia* – a Colombian court judgment – of the same character as the Mangones *sentencia*, and that the district court erred in holding

otherwise. RB 40–43.[26]

Similarly, Defendants offer no meaningful rebuttal to Plaintiffs' showing that additional excerpts of the Mangones *sentencia*, submitted in connection with Plaintiffs' Motion for Judicial Notice, should be considered. Mot. for Judicial Notice Ex. E at 1170 (May 29, 2020). As noted above, *supra* § III (A), Plaintiffs should have been given an opportunity to respond to Defendants' objections, and would have submitted these additional excerpts.

Defendants argue that the *sentencias* do not establish that Rendón or Mangones "committed the murder[s]." RB 41. But they do not rebut Plaintiffs' showing that each *sentencia* establishes that the decedents at issue – Jose Lopez 339, Franklin Fabio Fontalvo Salas, John Doe 11 (Carrizosa), and Pablo Perez 43 – were victims of the AUC. *See* AOB 45, 78, 89, 94, 97–98. Indeed, the Mangones *sentencia* states that all of the crimes at issue "were committed during and as a result of [the defendants'] membership in the so-called 'William Rivas Front' of the Northern Block of the AUC." Mot. for Judicial Notice Ex. E at 1170 (May 29, 2020). That is enough.

Defendants' argument that AUC involvement in these killings was not a "fact essential to the judgment" under Rule 803(22)(C) ignores Plaintiffs' showing that, as a

[26] In a different section of their brief, Defendants note that – as Plaintiffs previously noted, AOB 43-44 – this *sentencia* is a judgment against the leaders of the Elmer Cardenas Block, not Rendón alone. RB 96. This distinction does not matter, because either way the *sentencia* establishes AUC responsibility.

matter of law, Justice & Peace proceedings against AUC commanders could *only* address AUC crimes. AOB 44. Nor do they rebut the conclusion that traditional elements of command responsibility would limit these commanders' responsibility only to killings under their command. AOB 44–45.

Defendants' argument that the *sentencias* only establish that Mangones and Rendón were charged with these murders, not convicted of them, is obviously untrue. The Mangones *sentencia*, for example, states that "the cases on which the charges against [the defendants] are based," are also the ones "for which they are now convicted." Mot. for Judicial Notice Ex. E at 1170 (May 29, 2020).

Mystifyingly, Defendants discuss Raúl Hasbún's testimony in relation to the discussion on *sentencias*, RB 41–42, even though there is (as yet) no Hasbún *sentencia*. Defendants appear to argue that Hasbún's testimony establishes that AUC commanders had an incentive to plead guilty to crimes regardless of whether they had committed them. RB 41–42. But Defendants cite no evidence for this conjecture, *id.,* and these proceedings are not plea bargains; they are thousand-page court judgments convicting AUC commanders. AOB 43–45; App7398–99; Mot. for Judicial Notice Ex. E at 1170 (May 29, 2020). Regardless, this argument is irrelevant to admissibility under Rule 803(22), which expressly includes judgments entered "upon a plea of guilty"; there is no second-guessing whether the conviction is *correct* or not. Such an argument goes to the conviction's weight, not admissibility; Defendants are free to

argue to the jury that Justice & Peace convictions should be discounted.

2. Record 138, the Hasbún Indictment, Was Admissible to Show the Colombian Prosecutors' Factual Findings.

"The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14–15 (1926); *see also Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123, 128–29 (1919). Because public officials are presumed to do so, *see Wong Wing Foo v. McGrath*, 196 F.2d 120, 123 (9th Cir. 1952), the admissibility of public records is assumed in the first instance. *Kehm v. Procter & Gamble*, 724 F.2d 613, 618–19 (8th Cir. 1983); *see also Robbins v. Whelan*, 653 F. 2d 47, 50 (1st Cir. 1981) (holding that government reports created in line with procedures determined by agency rule have strong indicia of trustworthiness); *Ellis v. Int'l Playtex,* 745 F.2d 292, 304 (4th Cir. 1984) (same). With respect to Record 138, the district court undermined this presumption at every turn.

Defendants do not dispute that Record 138 reflects that Hasbún was indicted by prosecutors for the murders of John Doe 8, Ceferino Antonio Restrepo Tangarife, Waynesty Machado Durango, and Miguel Angel Cardona, pursuant to a legally-authorized investigation. *See* RB 42–51. Instead – and in response to the multiple cases that have admitted indictments under Rule 803(8)(A)(iii) – Defendants claim that Record 138 does not reflect factual findings that Hasbún committed these

murders. *See* RB 45–47. But that is impossible to square with the required presumption that the Colombian prosecutors performed their duties properly. *See* AOB 48. The burden is not on Plaintiffs to show that prosecutors only brought charges for murders they believed the defendants had committed; the burden is on Defendants to show that this ordinary prosecution practice was not followed.[27]

The district court did not adopt Defendants' argument. It held that Record 138 did not show that Hasbún had *confessed* to these murders, but accepted that the document showed that Hasbún had been *charged* with them – in other words, that prosecutors had found he was *responsible* for them. App7540–41. Defendants essentially argue that if the document does not reflect Hasbún's confessions, then prosecutors' conclusions that he committed these murders are untrustworthy. But if that was the basis for exclusion, reversal is warranted because the district court applied the wrong version of Rule 803(8), AOB 47, and failed to hold Defendants to their burden of showing untrustworthiness. *Cf.* RB 49–50.[28]

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[27] If this is a question of Colombian law – i.e., what is the legal import of a Colombian indictment – then the district court was obligated to make an inquiry into Colombian law under Federal Rule of Civil Procedure 44.1, and should have considered Professor Sánchez's declaration, which explained that such indictments are based on the defendant's confessions corroborated by prosecutors' investigations. App7390-98.

[28] In a footnote, Defendants suggest that the district court's reliance on the wrong rule "is of no consequence" even if the court found a lack of trustworthiness, because the new rule merely clarified what most courts had already done. RB 50 n.34. But neither the opinion below nor the record show that *this* district court placed the burden on *these* Defendants to show lack of trustworthiness; application of the wrong rule was not harmless.

Without any evidentiary basis to question that the indictment reflects prosecutors' conclusion that Hasbún committed these murders, Defendants advance an obviously misleading argument: that "indictments cannot be considered as evidence." RB 44 (quoting *United States v. Cox*, 536 F.2d 65, 72 (5th Cir. 1976)). That is *only* correct in a criminal case such as *Cox*. But such documents may be admitted "in a civil case." Fed. R. Evid. 803(8)(A)(iii).[29] *Cox* is inapposite, as are Defendants' cases concerning Rule 803(22), on which Plaintiffs do not rely. Defendants also cite *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), in which the Seventh Circuit opined in passing *dicta* that "an indictment is not evidence," but *Scholes* does not reference or analyze any rules of evidence; nothing turned on this characterization, because its holding was that admitting the indictment was "harmless error." *Id.* at 762.

Defendants also argue that personal knowledge is required for factual findings under Rule 803(8), relying on *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1278 (11th Cir. 2009). But *Mazer* was not about whether factual findings made by government officials required personal knowledge; it was about whether the statements of a witness were admissible simply because they *appeared* in a government report, *id.*; indeed, the Court accepted that the report itself "might be hearsay subject to an exception." *Id.* at 1280. Defendants also rely on *Mamani v. Sánchez Berzaín*, 309 F. Supp. 3d 1274, 1297 (S.D. Fla. 2018) (*"Mamani II"*), which has recently been

[29] *Cox* also was not applying the Federal Rules of Evidence. *See* 536 F.2d at 69.

superseded by this Court's opinion in *Mamani III*. In *Mamani III*, the Court concluded that several State Department cables were inadmissible because "there [was] no indication . . . who drew the conclusions within the reports"; they merely collected information from "third parties with no duty to report": "One cable describes an opinion poll, one cable repeats 'unconfirmed rumors,' and one cable lists the four themes observed by 'influential Bolivian media leaders.'" 968 F.3d at 1243. As in *Mazer*, these reports collected the hearsay statements of third parties, without indicating whether governmental officials under a legal duty drew any conclusions or made factual findings. That is not the case here, where it is clear that Colombian prosecutors concluded that Hasbún committed these crimes.

Moreover, this Court in *Mazer* relied principally on caselaw from the Sixth Circuit, which has since held unequivocally that "lack of personal knowledge is not a proper basis for exclusion of a report otherwise admissible under Rule 803(8)." *Alexander v. CareSource*, 576 F.3d 551, 562 (6th Cir. 2009). This is because government officials' "findings may be assumed to be trustworthy." *King v. Cessna Aircraft Co.*, No. 03-20482-CIV, 2010 U.S. Dist. LEXIS 53585, *27–28 (S.D. Fla, May 6, 2010) (collecting cases).

Defendants' interpretation of *Mazer* conflicts with the Supreme Court's ruling that Rule 803(8)(A)(iii) encompasses "conclusion[s]" that are "based on a factual investigation." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 170 (1988). "A factual

finding, unless it is a simple report of something observed, is an opinion as to what more basic facts imply." *Id.* at 168 (internal quotation omitted). Thus, the Rule plainly admits more than simple reports of things observed. Documents like the indictment here "embody the results of investigation and accordingly are often not the product of the declarant's firsthand knowledge, required under most hearsay exceptions." 2 McCormick on Evid. § 296 (7th ed.). Indeed, it is "unlikely that the report's author(s) will have any personal knowledge of the incidents investigated." *Alexander*, 576 F.3d at 562.

These conclusions necessarily flow from the Supreme Court's observation that "public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because – having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial – they are not testimonial." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). This precludes grafting a double-hearsay bar onto such records where, as here, they were not prepared for the purpose of this proceeding.

3. Record 138 Was Admissible to Show Hasbún's Confessions and as a Business Record.

With Prof. Sánchez's declaration, Record 138 was also admissible to show Hasbún's confessions and as a business record. AOB 49–55. The district court should have considered this foundational evidence submitted in response to Defendants' unanticipated objections. *Supra* § III(A). Defendants also do not dispute that courts

are "not bound by evidence rules" when considering material that bears on admissibility, Fed. R. Evid. 104(a), or contest that the declaration should have been considered as evidence of foreign law under Federal Rule of Civil Procedure 44.1. AOB 50–51. Indeed, Defendants try to have it both ways, relying on Prof. Sánchez's declaration when it suits them, RB 57, and otherwise arguing that it was properly excluded.

Defendants repeat the district court's conclusion that Plaintiffs failed to show what *actually* happened with the investigation behind Record 138, as opposed to what *should* happen in the ordinary practice, but offer no support for the claim that this showing is required. RB 48–49. This approach is inconsistent with the Supreme Court's decision in *Beech*:

> First, [Rule 803(8)(a)(iii)] assumes admissibility in the first instance. Second, it provides ample provision for escape if sufficient negative factors are present. That provision for escape is contained in the final clause of the Rule: evaluative reports are admissible unless the sources of information or other circumstances indicate lack of trustworthiness.

488 U.S. at 167 (internal ellipses and quotation marks omitted). The district court did not "assume admissibility." And while its question about whether all the proper procedures been followed in the process that led to this public record is a paradigmatic trustworthiness inquiry, Rule 803(8) now places the burden in that inquiry squarely on the *opponent* of admission; Defendants made no such showing. *See also Jones v. Ford Motor Co.*, 204 Fed. Appx. 280, 285 (4th

Cir. 2006); *Montiel v. City of Los Angeles*, 2 F.3d 335, 341 (9th Cir. 1993).

The decision below also conflicts with the presumption of regularity of public records. *Supra* § III(B)(2). The district court did not find "clear evidence," *Chemical Foundation*, 272 U.S. at 15, that prosecutors did not follow the usual procedures in preparing Record 138, *see* App7538–42, and Defendants submitted no such evidence. *See* RB 43–51. To require affirmative evidence that standard procedures were followed in order to credit public records would eviscerate Rule 803(8). And if the court had accepted that Record 138 was the product of such standard procedures, it would have had to accept that it reflected Hasbún's confessions to these murders.

Defendants' objection to admission as a business record, RB 50–51, is based entirely on the propriety of excluding Prof. Sánchez's declaration as untimely, which was error. *See supra* § III(A). Prof. Sánchez was also a "qualified witness" under Rule 803(6)(D), whose testimony established that the information came from Hasbún's own confessions. Prof. Sánchez, as "the proponent of [the] document," need not have "first-hand knowledge"; he only needs to establish that it was the prosecutors' practice to "obtain such information from persons with personal knowledge." *United States v. Bueno-Sierra*, 99 F.3d 375, 379 (11th Cir. 1996). Hasbún certainly has personal knowledge of what he confessed to, and such confessions – which Defendants do not dispute are admissible under Rule 804(b)(3) – satisfy any "double hearsay" issues. *Id.* at 379 n.10.

4. Plaintiffs *Did* Seek Records from the Justice and Peace Process – and Submitted Them.

The district court excluded Record 138 in part because it believed that, if it reflected Hasbún's confessions, "those confessions should have been preserved by Colombian prosecutors, made part of the relevant Justice and Peace Law files, and available to the victims of the crimes" – and therefore submitted by Plaintiffs. App7540. Although Defendants now latch onto this argument, RB 57, they never argued this previously; the district court came up with this *sua sponte* without affording Plaintiffs any response. This in itself was error, because courts cannot grant summary judgment on a ground not raised by the movant without "giving notice and a reasonable time to respond." Fed. R. Civ. P. 56(f); *see also, e.g.*, *Amy v. Carnival Corp.*, 961 F.3d 1303, 1310–11 (11th Cir. 2020).

If the district court had allowed Plaintiffs to respond, they would have demonstrated that they *did* request such records. The Prosecutors' Letters, *infra* § III(B)(5), constitute the response of Justice & Peace officials to these requests. For example, John Doe 7, whose son's murder is confirmed in Record 138, specifically requested all "confessions" as well as the complete file about John Doe 8's death. He requested this first in August 2017, and again in October 2018. *See* Plaintiffs-Appellants' Motion to Supplement the Appellate Record at 3 & Ex. A (Sept. 11, 2020). His declaration confirms that he exercised his "right to petition" to obtain documents both from the Victims' Unit and the Justice & Peace prosecutor's office.

App6699.

The Prosecutors' Letters, App6722–35, are the responses to those requests. Indeed, these responses indicate that each is a "Response to Right to Petition." App6731; *see also* App3978 ("Answer to Petition"). But Plaintiffs were denied any further documentation: "[T]he documents requested by you are reserved," one response reads, and would only be "delivered to the judicial authority that requests them." App6729. Thus, it was improper for the district court to rely on the absence of any "underlying" Justice & Peace documents as a basis for excluding the documents that were submitted.

5. The Prosecutors' Letters Were Admissible to Show the Colombian Prosecutors' Factual Findings and Records Attributing Plaintiffs' Deaths to the AUC.

As with the other Justice & Peace documents, Defendants fail to respond to Plaintiffs' showing that the district court's exclusion of the Prosecutors' Letters was improper. Instead, they try to cast doubt on the idea that Colombian prosecutors performed their duties properly and diligently; and suggest the burden is on plaintiffs to show otherwise. RB 51–53. As noted above, *supra* § III(B)(3), this is not how Rule 803(8) works.

Defendants' own argument establishes that these documents constitute matters observed by Colombian prosecutors "while under a legal duty to report." Fed. R. Evid. 803(8)(A)(ii). Defendants argue that victims have a right to access information

in Justice & Peace files, RB 57, entailing the conclusion that Justice & Peace prosecutors are legally obligated to provide that information. Thus, in responding to Plaintiffs' information requests and providing these letters, prosecutors were providing their observations while under a legal duty to report. Defendants also do not dispute that these prosecutors were entitled to make factual findings regarding the murders they were investigating, such that these documents likewise qualify under Rule 803(8)(A)(iii). *See* RB 51–53.

As with Record 138, Defendants ignore the required assumption that public officials will perform their duty properly, instead arguing that the district court's exclusion of the Prosecutors' Letters was proper because *Plaintiffs* failed to explain the methods the Colombian prosecutors "actually used" or show "where or how" they gathered their evidence when preparing the Letters. RB 52. But the burden of proving untrustworthiness falls on the party opposing admission, *supra* § III(B)(3); Defendants made no such showing.

Again, Defendants suggest that the district court's application of the wrong Rule 803(8) is harmless because the court never found the Colombian documents untrustworthy. RB 49–50. They know that if the court *had* found the documents to be untrustworthy without placing the burden on Defendants, reversal would be required. But this cannot save the ruling; if Defendants are correct that the district court did not find these documents untrustworthy, then none of the district court's innuendo

casting doubt on the methods and procedures "actually used" by the Colombian authorities matters.

Defendants therefore recast their attack on the reliability of the Prosecutors' Letters by arguing that they fail to meet the requirements of Rule 803(8) because "factual findings must be 'based upon the knowledge or observations of the preparer of the report as opposed to a mere collection of statements from a witness.'" RB 52 (quoting *Mazer*, 556 F.3d at 1278). As noted above, however, these letters are not collections of witness statements; they reflect the knowledge of the officials under a legal duty to report and their factual findings from their investigations.[30]

As with the other documents, Defendants merely cast doubt on the assumption that the Colombian authorities followed their own procedures (which are clearly regulated by Colombia's Justice & Peace law as provided in full in English to the district court. App7401–15; *see also* Motion for Judicial Notice) and second-guess whether the Colombian officials' conclusions are justified. This runs afoul of bedrock principles of our federal evidence rules; it also raises potentially serious comity concerns and undermines the respect the U.S. Government has accorded to the Colombian transitional justice system.

[30] *Supra* § III(B)(2); *see also* App7414 (text of Articles 57 and 58 of the Colombian Justice & Peace Law requiring the Office of the Prosecutor to ensure the preservation of files and to make sure files accessible to victims); AOB 55-56; App7391-7396.

6. The District Court's Authentication Ruling Cannot Stand.

Defendants offer no authority supporting the district court's ruling that Record 138 and the Prosecutors' Letters lacked authentication. RB 53–55. They do not dispute that Plaintiffs explained that they would obtain apostilles for the documents, nor that this is sufficient for authentication, *id.*, nor that Plaintiffs actually *have* now obtained apostilles as they said they would.[31] They offer no argument for the position that a court may exclude evidence on summary judgment even where the proponent has explained how they will authenticate that evidence at trial. *Id.*

Instead, Defendants argue that the district court properly excluded documents because Plaintiffs "fail[ed] to comply with its supplemental briefing order." RB 55. But if the district court meant to require Plaintiffs to authenticate all documents at that time, rather than to "explain the admissible form that is anticipated," Fed. R. Civ. P. 56 advisory committee's note, the court violated Rule 56(c)(2) and the authorities previously cited. AOB 58–59.

[31] *See* Plaintiffs' Mot. for Judicial Notice of May 29, 2020 and accompanying exhibits. Defendants' authenticity objections were never raised in good faith. *E.g.*, *Fenje v. Feld*, 301 F. Supp. 2d 781, 789 (N.D. Ill. 2003) ("Even if a party fails to authenticate a document properly or to lay a proper foundation, the opposing party is not acting in good faith in raising such an objection if the party nevertheless knows that the document is authentic.").

7. The Justice & Peace Documents Would be Admissible Under the Current Version of the Residual Exception, Which Applies Here.

Defendants do not dispute that the current version of Rule 807 should apply, instead arguing that Plaintiffs' argument under this rule is "implausible." RB 55. Although the new rule explicitly relaxes the "trustworthiness" prong, Defendants argue that would not matter here; but this rings hollow in the face of the district court's repeated innuendo doubting whether the Colombian authorities "actually" followed the "procedural ideals" embedded in the Justice & Peace process, App.7539, or issued their records "in conformity" with those procedures, *id.*, as well as Defendants' repeated attempts to second-guess the reliability of the Colombian authorities' documents altogether. *See, e.g.*, RB 48, 51–52. Clearly, trustworthiness was a central issue for the court, even though it was not properly raised by Defendants. Had the court actually held Defendants to their burden, the court should have found these documents trustworthy under Rule 807, regardless of whether they met the technical requirements of Rule 803(8). *E.g.*, *United States v. El-Mezain*, 664 F.3d 467, 499 n.8 (5th Cir. 2011) (admitting public records under Rule 807 where they did not qualify under Rule 803(8)). Indeed, long before the adoption of the Federal Rules of Evidence, the Supreme Court explained that public records are "unusually trustworthy sources of evidence," due to the "the official character of their contents entered under the sanction of public duty, the obvious necessity for regular contemporaneous entries

in them and the reduction to a minimum of motive on the part of public officials and employees to either make false entries or to omit proper ones." *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123, 128–29 (1919).

8. The District Court's Grant of Summary Judgment was Improper Because Plaintiffs were Denied Access to Discovery the Court Later Required.

Defendants argue that the district court's discovery order, App3104, "was within its discretion," but that misses the point. The issue is whether summary judgment was improperly granted, not whether discovery was improperly denied. The district court's denial of the Hague Requests would not have been erroneous if the district court did not later require Plaintiffs to submit those same documents in order to defeat summary judgment. But it did, and it was.

Relying on Plaintiffs' foreign law expert, Prof. Sánchez, whose testimony Defendants otherwise reject as improper, Defendants state that if Plaintiffs were truly interested in securing these documents, then they would have exercised their "right" under Colombian law to access their Justice & Peace files in the hands of the Colombian Prosecutors. RB 57. But Plaintiffs *did* just that; they requested all of the files available, and in response received the Prosecutors' Letters that the district court excluded. *Supra* § III(B)(4).

The district court failed to allow Plaintiffs to request the full Justice & Peace files here. AOB 62–65; App3104–12. It was thus improper for the court to grant

summary judgment against Plaintiffs for failing to proffer those files. *See XRT, Inc. v. Krellenstein*, 448 F.2d 772, 772–73 (5th Cir. 1971) (per curiam) (reversing summary judgment as premature where district court failed to require production of key evidence).

IV. THE DISTRICT COURT ERRED IN EXCLUDING PROFESSOR KAPLAN'S EXPERT CONCLUSION THAT THE AUC MURDERED PLAINTIFFS' LOVED ONES.

The district court excluded Prof. Kaplan's expert testimony that the AUC was more likely than not responsible for Plaintiffs' family members' deaths. App7576–58. It did not exclude his opinion as to the AUC's *modus operandi*, or that 90 percent of the murders in the relevant areas were committed by the AUC. *Id.*

Prof. Kaplan rigorously applied a variety of well-established social science methods and determined that the AUC was likely responsible for these murders. Defendants' repeatedly misstate Prof. Kaplan's testimony, and do not refute Plaintiffs' showing that the district court erred in failing to consider the methods Prof. Kaplan employed and the evidence he relied on.

First, Defendants pluck out bits of Prof. Kaplan's testimony to argue that he asserted only that it was "possible" that the killers were AUC members. RB 58–60. Chiquita misconstrues his testimony. Prof. Kaplan actually found that "the evidence supports the conclusion" that Plaintiffs' loved ones were murdered by the AUC, App4822, that the decedents were "more than likely harmed by the AUC paramiltiaries," App4832, and that in his opinion "there is a clear causal link between

the support Chiquita provided to the AUC and its later harm of the bellwether victims." App4834–35. And he testified that he formed these opinions with "a high degree of certainty."App4917. The district court understood that Prof. Kaplan found that the AUC more likely than not was responsible for these deaths. App7576. [32]

In the exchange Defendants distort, Prof. Kaplan agreed that the fact that the AUC committed most of the murders at the time and places decedents were killed made it "possible" that these were AUC murders. App4951–52. But he was *only* talking about which conclusions could be drawn from the fact that the killings occurred where and when the AUC was dominant alone. *Id.* (discussing "this first part of your analysis on page 40," and "[t]he second paragraph on [page] 41"). In forming the opinions in his report, his analysis did not stop with time and place alone; his conclusion that the AUC committed these murders was also based on case details, like that the killings fit the AUC's *modus operandi*, and "direct verification of bellwether victim cases and their details via human rights violation and conflict databases and paramilitary testimonies that confess to the murders." App4822–30, 4832, 4834; AOB 68–70.[33]

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[32] The strength of the causal link goes to the testimony's weight, not its admissibility. *In re Chantix (Varenicline) Prod. Liab. Litig.*, 889 F. Supp. 2d 1272, 1286 (N.D. Ala. 2012). Whether there is sufficient evidence is an issue reviewed *de novo*.

[33] Defendants would exclude Prof. Kaplan's reports because they were not sworn even though they were signed, RB 59, n.36, grounds the district court did not accept. A statement is "considered on summary judgment [][if] it can be reduced to an

Second, the district court erred as a matter of law in finding Prof. Kaplan did not apply a proper methodology, because it failed to conduct the analysis *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993), requires. AOB 65–66. Defendants argue, RB 61, that it is enough that the district court cited Rule 702's requirement that "the testimony is the product of reliable principles and methods." App7576 (quoting Rule 702). But Rule 702 states the *question* that the *Daubert* factors *answer*; the factors are *how* a court determines whether the methods are reliable, and *Daubert* cannot simply be ignored. 509 U.S. at 592–93. Thus, courts "must" consider whether the

admissible form at trial," including through the declarant's testimony. *Brannon v. Finkelstein*, 754 F.3d 1269, 1277 n.2 (11th Cir. 2014); *accord* Fed. R. Civ. P. 56(c)(2) (party may object that cited material "cannot be presented in a form that would be admissible in evidence"). This applies to unsworn expert reports. *Patel v. Tex. Tech Univ.*, 941 F.3d 743, 746-47 (5th Cir. 2019); *Jones v. Coty Inc.*, 362 F. Supp. 3d 1182, 1194 and n.4. (S.D. Ala. 2018) (collecting cases). As in *Jones*, Defendants rely on "dicta" from *Carr v. Tatangelo*, 338 F.3d 1259, 1273 n.26 (11th Cir. 2003), that was based on the now-superseded version of Fed.R.Civ.P. 56(c), which required a witness statement to be in an affidavit. 362 F. Supp. 3d at 1195 n.5 (citing *Carr*, 338 F.3d at 1273 n.26.) Rule 56(c) now lets parties dispute summary judgment through unsworn expert reports, provided their contents can be presented in admissible form at trial. *Id.*; *Patel*, 941 F.3d at 746-47. Since Prof. Kaplan's opinions can be made admissible at trial through his testimony, the reports must be considered. So finding "avoids the elevation of form over substance." *Jones*, at 1194 n.5. Regardless, Prof. Kaplan's report can be used at summary judgment because he adopted it in his deposition. *E.g.*, *Medtronic Xomed, Inc. v. Gyrus ENT LLC*, 440 F. Supp. 2d 1300, 1310 n.6 (M.D. Fla. 2006) (holding "report is properly before [the court] in considering the motions for summary judgment" where unsworn report was identified by expert at deposition)*; Claussen v. PowerSecure, Inc.*, NO. 3:18-CV-00607-ALB-SMD, 2019 U.S. Dist. LEXIS 173429, at *21 n.3 (M.D. Ala. Oct. 7, 2019); App4948–52 (adopting part of report concluding AUC was responsible for decedents' murders); App4917 (stating he formed opinions in his report with "a high degree of certainty").

expert's methodology "is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*." *Quiet Tech. DC-8 v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1340–41 (11th Cir. 2003) (internal quotation omitted). While district courts have some discretion in deciding how to assess reliability, they still must "determine" "whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152–53 (1999). And no authority suggests that a trial court can ignore them all. *See United States v. Frazier*, 387 F.3d 1244, 1276 n.14 (11th Cir. 2004) (Tjoflat, J., concurring).

Here, the district court erred as a matter of law; it applied none of the *Daubert* factors, nor did it explain why those factors were not probative of reliability. The factors show Prof. Kaplan's methods are reliable. They look, for example, to the degree of acceptance of a given method within the scientific community, and whether the analysis has been tested or peer reviewed. *Daubert*, 509 U.S. at 593–94. Prof. Kaplan applied well-accepted "social science methodologies," App4915–17, tested his hypotheses against the evidence, *id.*, and his report was peer reviewed. App4786. By not applying these factors, the district court substituted its own judgment as to what constitutes good science for that of Prof. Kaplan (who teaches social scientific methods, App4850), and of the social science community.

Third, regardless of whether the court had to apply the *Daubert* factors, it had to assess Prof. Kaplan's actual methods. Here too it erred by ignoring some of those

methods and much of the evidence he relied on. AOB 67–71.

Defendants' assertion that Prof. Kaplan merely repeated facts from third parties without conducting his own analysis, RB 61–63, 65–66, is wrong. AOB 67. Prof. Kaplan conducted his own extensive analyses. He applied a "general comparative method," which involved "postulating" a hypothesis, "testing" that hypothesis against the evidence, and creating "alternative hypotheses" to consider multiple possible explanations. App4915–17. He also used "triangulation," evaluating "how well [multiple sources of information] fit together." *Id.*; *see also* App4822–30. This is independent social science analysis, App4915–17, not regurgitation.

To be sure, he relied on reports and academic articles, *e.g.* App4926, as experts do. FRE 703; *Daubert*, 509 U.S. at 592 (experts have "wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation."); AOB 70. But Prof. Kaplan used the data to conduct his own analysis.

Prof. Kaplan also did not "admit[]" that his conclusion that the AUC murdered decedents was based "entirely" on his consideration of his graph of the timing of AUC murders and his mapping of the each decedent's murder in comparison to AUC activity. DB 62–63. He relied on this in *part*, App4951–52, which further shows that he conducted his *own* analysis. But here again, Defendants cite Prof. Kaplan's description of his *geographic and temporal* analysis, failing to acknowledge that this was only part of the analysis upon which Prof. Kaplan based his conclusion.

Defendants deny that Prof. Kaplan employed the "comparative method" and "triangulation," RB 63–64, but he testified that "that's the method[s] I applied." App4917. Defendants misstate Prof. Kaplan's testimony, claiming he "admitted" he did not apply these methods. He testified only that there were not enough cases to calculate a "correlation coefficient" for the correlation between the timing of these murders and AUC violence. App4951. But "courts frequently permit expert testimony on causation based on evidence other than statistical significance" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 40–41 (2011). Regardless, he based his conclusion on numerous other lines of evidence.

Last, Chiquita cherry-picks again in suggesting Prof. Kaplan did not conduct any relevant interviews. RB 65. He testified that he did not conduct interviews "for" his report, *id.* (quoting App4950), but Defendants ignore his testimony that he conducted interviews for his prior research that informed his knowledge of the case. App4914, 4953.[34]

Defendants are free to launch their attacks on Prof. Kaplan's methods on cross-examination at trial, but they are not a basis for excluding his conclusion. *See Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001). Because the district court failed to analyze the well-accepted methods Prof. Kaplan actually employed and the data upon

[34] Prof. Kaplan interviewed more than 200 people in Colombia, many of whom are referenced in his book "Resisting War: How Communities Protect Themselves," 2017. Cambridge University Press.

which he actually relied, the district court erred in excluding his conclusions.

V. EACH PLAINTIFF PRESENTED SUFFICIENT EVIDENCE THAT THE AUC MURDERED THEIR FAMILY MEMBERS.

The arguments above apply to each of the bellwether Plaintiffs and require reversal. The individual Plaintiffs also each provided evidence unique to their cases showing that the AUC killed their family members, which requires reversal in its own right, and particularly in combination with the errors identified above.

A. Plaintiff John Doe 7 and Decedent John Doe 8.

Defendants ask this Court to ignore ample admissible evidence that the AUC killed John Doe 8, including the fact that two AUC members accepted responsibility, eyewitness testimony to John Doe 8's kidnapping, and evidence that the murder both occurred in a municipality the AUC controlled and fit the AUC's modus operandi. AOB §V.A.

1. Camacho's AUC Membership and Camacho's Confession to John Doe 7 are Well Established and Admissible Facts.

The district court erred in concluding that there was no admissible evidence establishing a connection between Camacho and the AUC. App7568–69. John Doe 7 did not make a "blanket statement" that his affidavit was based on personal knowledge, RB 67, but rather explained how he acquired his knowledge: he knew some paramilitaries from Nueva Colonia "by sight, because he lived there" and because they patrolled in the town, including with police. App6026, 6699–6700. He and his son John Doe 8 knew Camacho personally because they were neighbors in the

same '*vereda*' or neighborhood, and Camacho was a "known figure in the area." App6020–23. John Doe 7 did not claim to know who every paramilitary in Urabá was based on their weapons – he said he knew the identity of a notorious paramilitary leader *in his community*, who also happened to be his neighbor. App6699–6700. And his identification is corroborated by another eyewitness from the area. App6581–82.

John Doe 7 also knew who Camacho was because he saw Camacho at community meetings that the paramilitaries "controlled," where the "paramilitaries were already calling themselves the AUC." App6699–6701. He identified specific tasks that the paramilitaries undertook at those meetings: they told the population "how [they] should behave," "gave out the rules," and "receive[d] monetary assistance." App 6700. John Doe 7's affidavit makes it clear that AUC members played a distinguishable role at these meetings that they ran and that he saw Camacho there in his capacity as a "paramilitary area commander." App6701. The district court acknowledged that John Doe 7 testified to the meetings, App7528–29, but the court's opinion, App7568–69, did not explain why an attendee at an AUC meeting, run by AUC commanders, completing AUC functions, could not identify one of those AUC commanders.

Furthermore, John Doe 7 lived in a municipality the AUC controlled, when the AUC was in control. App6020–23. John Doe 7 was living in the midst of a "civil war that plagued Colombia with violence and terror," *Sinaltrainal v. Coca-Cola Co.*, 256 F.

Supp. 2d 1345, 1348 (S.D. Fla. 2003). It would be a matter of life or death for him to know who the local AUC commanders were, and it belies the evidence to suggest he did not. His ability to testify as to the identity of local paramilitaries is consistent with the testimony of numerous other witnesses from the region.[35]

Defendants' cases are not analogous. *Ellis* considered an affidavit where the Plaintiff included information alleged "upon information and belief, rather than personal knowledge." *Ellis v. England,* 432 F. 3d 1321, 1326–27 (11th Cir. 2005); neither affiant claimed to have personal knowledge of the key issue. In *Alliant Tax Credit*, the witness did not explain how he acquired his knowledge. *Alliant Tax Credit Fund XVI, Ltd. v. Thomasville Cmty. Hous., LLC*, 713 F. App'x 821, 825 (11th Cir. 2017). Those cases are vastly different from that at hand, where John Doe 7 demonstrated personal knowledge of Camacho's involvement as a paramilitary commander and laid the foundation for having that knowledge in his deposition and declaration.

Regarding Camacho's statement against interest, a determination of whether a statement is against the declarant's penal interest is a question of law subject to de novo review. *United States v. Westry*, 524 F.3d 1198, 1215 (11th Cir. 2008). Defendants ask this court to disregard the plain meaning of Camacho's words; he did not deny the

[35] *See* App4353-54 (the paramilitaries patrolled openly and engaged in "social control"); App4766 (explicitly referencing Nueva Colonia); App6647, 6659-60, 6675-76.

killing and instead told John Doe 7 *why* John Doe 8 was murdered. AOB 72–73. John Doe 7 testified that he went to Camacho and "he confessed to me." App6020. Defendants seem to insist on a standard that would require the words, "I confess," but Rule 804(b)(3) does not require a "direct confession[] of guilt." *United States v. Rowland Chester Thomas*, 571 F.2d 285, 288 (11th Cir. 1978). Rather, the standard is whether "the statement so far tends to subject the declarant to criminal liability that a reasonable person . . . would not have made the statement unless the declarant believed it to be true." *Westry,* 524 F.3d at 1214 (11th Cir. 2010) (internal quotation marks omitted). Any prosecutor would consider as a suspect an individual who, when a murder victim's father asked him why he murdered his son, did not deny involvement but instead answered the question and explained why the victim was murdered. Therefore, any reasonable person, making a statement like Camacho's, would assume that statement could subject them to criminal liability. Here, we know Camacho was concerned about being held responsible, because he sent someone to threaten John Doe 7 that "if [he] opened [his] mouth they would bury [him] right there." App6026–27. Plaintiff John Doe 7 also presented an eyewitness declaration from the last person who saw John Doe 8 alive, who saw Camacho take him away. App6580–83. *See also* App6021.

Here again, Defendants' cases are inapposite. *Bowe* concerned a declarant's statement about the guilt of a third party – not a self-inculpatory statement. *United*

States v. Bowe, 426 F. App'x 793, 797 n.5 (11th Cir. 2011) ("[S]aying that another was not involved is not the same as saying oneself was involved"). And in *United States v. Hardy*, the statement was not clearly against the declarant's interest. 389 F. App'x 924, 926 (11th Cir. 2010). Here, Camacho's statement was *self-inculpatory*, and clearly fits into this Court's description of statements against interest in *Bowe*: "specific statements or remarks that are individually self-inculpatory in the context of broader self-inculpatory narrative." 426 F. App'x at 797 n.5.

While courts make admissibility determinations at summary judgment, "the court must not lose touch with a basic principle of summary judgment: to view the evidence strictly against the movant and favorably toward the party opposing the motion." *Prudential Ins. Co. v. Curt Bullock Builders, Inc.*, 626 F. Supp. 159, 164 (N.D. Ill. 1995) (*citing Miller v. Solem*, 728 F. 2d 1020 (8th Cir.), *cert. denied*, 469 U.S. 841 (1984)). *See also, Richardson v. Oldham*, 12 F.3d 1373, 1378 (5th Cir. 1994).

Camacho's statements explaining the reasons John Doe 7 was murdered demonstrate that he was directly involved in criminal conduct. App6020, 6023. This is wholly distinct from the knowledge in question in *Funt*, where the court found that a statement was not admissible because it was not sufficiently inculpatory and implied only "knowledge of the internal operations of [Intercontinental Coin Exchange]," not "criminal knowledge or intent" or involvement in "apparently illegal acts." *United States v. Funt*, 896 F.2d 1288, 1298 (11th Cir. 1990). The AUC was an illegal criminal

organization, and implicit in Camacho's statements is knowledge of a murder and the motivations behind it.

2. Hasbún Accepted Responsibility for John Doe 8's Murder.

AUC commander Raúl Hasbún accepted responsibility for the murder of John Doe 8, carried out under his orders. AOB 71–72. John Doe 7's evidence as to Hasbún's acceptance of responsibility for the murder that was carried out under his orders is sufficient to establish AUC causation. AOB 51–53; *see also* § III(B)(2)–(3), *supra*.

3. Circumstantial Evidence and Justice and Peace Documents Establish AUC Responsibility for John Doe 8's Murder.

Extensive circumstantial evidence and Justice & Peace documents also establish the AUC's responsibility for John Doe 8's murder. AOB 71–72; §§ I–II & III(B)(2)–(5), *supra*.

4. The District Court Provided No Adequate Opportunity to Respond to the Objections that John Doe 7 Lacked Foundation.

As addressed above, the district court erred in denying a reasonable opportunity to respond to objections to the Justice & Peace documents. It made the same procedural error here. Defendants' summary judgment motion raised no particular objection. Defendants' suggestion that they made individualized showings "demonstrating lack of personal knowledge," RB 35, is not supported by the record. The record amply established John Doe 7's personal knowledge that the person who killed his son belonged to the AUC, but Plaintiffs also had no reason to provide

additional foundation when they opposed summary judgment because Defendants never raised this issue. Even though John Doe 7 gave this testimony in his deposition, Defendants did not question the basis for his knowledge then or develop any facts suggesting he lacked such basis; nor did they challenge the basis for his testimony when they moved for summary judgment. They ignored it, and instead argued only that he "did not witness the death of his son," "[n]o member of the AUC confessed during the Justice and Peace process to killing his son," and that there was "no admissible evidence of who was personally responsible for the death of his son." App3264.

B. Plaintiff Juvenal Fontalvo Camargo and Decedent Franklin Fontalvo Salas.

Defendants' claim that there are no witnesses "who can identify even one perpetrator," RB 2, is also wrong with respect to the murder of Franklin Fontalvo Salas. There is eyewitness testimony of his abduction and transport by motorcycle with his hands bound behind him by armed men, App4156–57; eyewitness evidence of the identity of one of the abductors, a notorious AUC executioner nicknamed "El Ruso" who was known to the eyewitnesses Sergio Castro and Ever Fontalvo, as well as plaintiff Camargo, *Id.*, App4162–63, App5532; direct evidence of a threatening telephone call by "El Tijeras" (Mangones) to Fontalvo who found Franklin's body and moved it to plaintiff's home the day of the murder, App4163; direct evidence that "El Ruso" and three others Plaintiff Camargo knew to be AUC came to his home at 6

p.m. the night of the murder to intimidate his family to enforce the "law of silence," App5523–24; and other evidence detailed in Plaintiff's main brief. AOB 76–79. Defendants' claim that Franklin's killer was never identified is patently false.

Contrary to Defendants' claims, plaintiff did not make any "implicit" concession regarding the district court's erroneous denial of its motion for reconsideration; indeed, plaintiff filed an amended notice of appeal specifically bringing that ruling up for review. App7668. The district court's refusal to accept the certified and apostilled statement of the Designated Special Prosecutor in Santa Marta, Colombia, identifying "El Ruso" as an AUC operative, supported by fingerprints and photographs, was an abuse of discretion. App7600–08, PSApp13673–81. As prosecutor stated, *see id.*, "El Ruso" was an AUC paramilitary, who committed murders in the Banana Zone with squads of three or more people that typically patrolled on motorcycles – precisely the method used in the decedent's murder. The district court's statement that even if it had credited this evidence, it still would have granted summary judgment because, in its view, the prosecutor's declaration was allegedly not the product of an official government investigation, App7760, is also patently erroneous. The document states that the Prosecutor's Office carried out a chronological presentation of the structure of the AUC's William Rivas Front from its founding until its demobilization, and based upon that found that Edwin Alberto Ferrer Gonzalez, *alias* "El Ruso," was an AUC murderer in the Banana Zone.

App7602. This was a governmental investigatory finding.

The district court's view that Plaintiffs should have been able to obtain this evidence earlier, App7759, ignores the realities of obtaining certified government documents in Colombia detailed in Plaintiff's investigators' affidavits and those of other Plaintiffs. App7634. The Court's rejection of this evidence was plain error and an abuse of discretion. Defendants' suggestion that "El Ruso" and/or "El Tijeras" were members of some other group, not the AUC, is baseless.

Even apart from the identification of "El Ruso" and his status as an AUC paramilitary, "El Tijeras's" threatening phone call to Fontalvo is highly probative of AUC responsibility. App4163. Acts by a known leader of a conspiracy to intimidate witnesses or family members of a murder victim to conceal a crime or the conspiracy, is a circumstantial evidence that the murder was committed in furtherance of the conspiracy. *United States v. Taylor*, 972 F.2d 1247, 1252 (11th Cir. 1992). There is a reasonable basis for concluding that these statements furthered the conspiracy *i.e.* the AUC and its enforcement of a code of silence. *See e.g. United States v. Mejia-Duarte*, 780 Fed. App'x 730 (11th Cir. 2019) (threat to kill family members in furtherance of drug conspiracy); *United States v. Harris*, 886 F.3d 1120, 1126 (11th Cir. 2018) (threat to kill witness' family); *United States v. Matthews*, 431 F.3d 1296 (11th Cir. 2005) (conspiracy and witness intimidation).

The dismissal of this claim was error warranting reversal.

C. Plaintiff Jane Doe 7 and Decedent John Doe 11.

There is ample, admissible, and unchallenged evidence that the AUC killed John Doe 11. Evidence the district court did not exclude shows that the AUC targeted banana union leaders, and that the AUC often killed its victims by kidnapping them from their homes during the night and killing them in a gruesome manner in the street. John Doe 11 was a banana union leader who was kidnapped from his home during the night and killed in a gruesome manner in the street. App7379. A rational jury could reasonably infer from this evidence that the AUC killed John Doe 11. This conclusion becomes inescapable when considering additional evidence, which the district court improperly excluded, that John Doe 11's name was on an AUC kill list. Plaintiff Jane Doe 7 does not argue that "the mere presence of alleged paramilitaries in the place and at the time when John Doe 11 died is sufficient to create a question of fact." RB 80. Instead, extensive circumstantial evidence – which Defendants do not address – also establishes the AUC's responsibility for John Doe 11's murder. AOB 71–72; *see supra* §§ I–II.

1. Defendants Ignore the Fact that John Doe 11 was Killed in a Way Characteristic of the AUC.

John Doe 11 was taken from his home in the night by masked men, App6090–92, 6095–96, 6790, beaten with sticks, stabbed "around the heart," App6790, and left to stagger home where his wife, seven-year-old son, and other family members watched him "drown[] in his own blood." App6090–91, 6098, 6590–93, 6600–03,

6790.

The district court ruled that the manner of John Doe 11's killing was not evidence of the AUC's involvement because, it stated, Plaintiffs "do not adduce any specific evidence distinguishing AUC methodologies." App7741. But the court applied the wrong standard. AOB 30–34; *supra* § II(A). And there was explicit record evidence that John Doe 11 *was* killed in a manner characteristic of the AUC. John Doe 11's murder involved multiple distinguishing AUC methodologies. The AUC would commonly (1) take victims of selective killings from their homes at night; (2) murder them in brutal ways in front of their families; and (3) do so while masked. *See supra* § II(B) nn.16–17, nn.19–20. Defendants proffered no contrary evidence.

The district court did not explain why it ignored this evidence, which showed precisely what the court said was missing: "specific evidence distinguishing AUC methodologies from brutalities committed" by other armed actors. App7741. Applying the standard from *Myers*, cited by the district court, the details of this murder are sufficiently "unique" as to "mark them the handiwork" of the AUC. 550 F.2d at 1045–46; *see also supra* § II. The district court simply guessed that because Colombia had areas of conflict, perhaps other "warring factions" also committed violence in this manner. App7742. But there was not record evidence to support this leap, no suggestion that guerrillas or any others committed killings in the same way as the AUC.

2. There is Overwhelming Admissible Record Evidence that the AUC Targeted Union Members.

Defendants also ignore multiple strands of admissible evidence that show that the AUC targeted labor union members like John Doe 11. *See supra* § II(B) & nn.11–12. Defendants do not mention any of this evidence in their brief, and make no arguments that it is inadmissible. The evidence Defendants do reference – the deposition of Robin Kirk, the reports and depositions of Oliver Kaplan, and the Report of Terry Karl – are admissible for the reasons explained above. *Supra* § II(C).

3. Jane Doe 7's Testimony and Declaration were Improperly Excluded, and Provide Further Evidence That the AUC Killed John Doe 11.

Jane Doe 7's testimony that John Doe 11's name appeared on an AUC "kill list" is admissible because both layers of hearsay are admissible.

Defendants claim that Plaintiffs "concede" that the statements of John Doe 11's coworkers "did not satisfy any hearsay exceptions and [were] properly excluded," RB 82, but this is entirely false. Plaintiffs did not address this layer because the district court recognized that the coworkers' statements "might qualify for admission under the excited utterance hearsay exception." App7721. Thus, this was not the basis for exclusion. And the district court was correct; Jane Doe 7 stated that workers describing the AUC practice of setting up checkpoints to check names against their lists were "fearful[]," App6790, and the co-workers who came to tell John Doe 11 that his name appeared on the list obviously did so because they were concerned about

this startling incident and wanted to warn him, App6791 – and thus that they were still motivated by the stress of the incident. Fed. R. Evid. 803(2).

The district court erred in ruling that the "hearsay statement of John Doe 11 to Jane Doe 7" was inadmissible, App7721; it also qualifies under Rule 803(2) for the same reasons. The district court concluded that because Jane Doe 7 stated that John Doe 11 told her he was on a kill list "afterwards," his statement "does not qualify as an 'excited utterance." App7721. But the district court acknowledged that "several hours or more" may pass and a statement may still qualify as an excited utterance. App7721. Nonetheless, the court apparently believed that because John Doe 11's conversation with his partner occurred "at some indeterminate point" after his coworkers warned him, it could not be an excited utterance. *Id.* In so holding, the district court failed to draw inferences in Plaintiffs' favor, because the word "afterwards" could easily mean "immediately afterwards" – indeed this is the clear meaning of the word in context, because this entire paragraph of her declaration is about a single night, followed by the events of subsequent days. App6791. And while Defendants claim that Plaintiffs do not point to evidence that John Doe 11 was "under the stress of excitement of his conversation with his coworkers," RB 83, this is again untrue, because Jane Doe 7 said that her partner remained "very worried for a few days" after he told her about this. App6791. Indeed, during this period Jane Doe 7 herself was "terrified" and "began to think about where he could hide in the house

if they came round to do anything to him." *Id.* For Jane Doe 7 to have been terrified in the days following the co-workers' visit, the only logical inference is that John Doe 11 told her "afterwards" that same night. Otherwise, she would not have been able to know why John Doe 7 was worried, or to be terrified herself.

At summary judgment, the district court was required to credit Plaintiffs' "inferences that are drawn from the evidence" unless they are "implausible."' *Cuesta v. School Bd. Of Miami-Dade County, Fla.*, 285 F.3d 962, 970 (11th Cir. 2002). It is not implausible to read Jane Doe 7's declaration as stating that John Doe 11 told her that his name was on a kill list later that same night, while he was very worried about this apparent threat to his life; indeed it is the most natural reading of her statement. Contrary to Defendants' suggestion, evidentiary standards at summary judgment do not exist divorced from this standard.[36]

The relevant question is whether John Doe 11's behavior was "consistent with ongoing stress arising" from being told he was marked for death. *United States v. Smith*,

[36] *Prudential Ins. Co.*, 626 F. Supp. at 164 (*citing Miller*, 728 F. 2d 1020) ("It is true that affidavits submitted in conjunction with summary judgment proceedings must generally comply with the rules of evidence. However, in applying these rules the court must not lose touch with a basic principle of summary judgment: to view the evidence strictly against the movant and favorably toward the party opposing the motion."). *See also Richardson*, 12 F.3d at 1378; *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985) (referring to the "rule of liberal construction of a counter affiant's papers"). *See generally* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2738 at 484 (1983)) ("[A]s a general principle we treat the opposing party's papers more indulgently than the moving party's papers.")).

606 F. 3d 1270, 1280 (10th Cir. 2010). John Doe 11 remained "very worried" after his co-workers' visit, and understandably so. App6791. Indeed it is far less plausible to conclude, as Defendants argue, that John Doe 11 would not "still be distressed" from the "excitable event," *United States v. Belfast*, 611 F.3d 783, 817–18 (11th Cir. 2010), when he told his wife that terrorists were planning to kill him, especially when she indicated that he was "very worried." App6791.

Furthermore, the trustworthiness of both layers of hearsay are corroborated by other factors. Jane Doe 7 explains, "I believe that his co-workers told him this to warn him; they had no reason to lie. He wouldn't have had any reason to lie to me about this either, because this news worried me." App6791. John Doe 11's subsequent actions in the time following his co-workers' revelation – telling his wife that if he was killed "it would be because of his involvement in SINTRAINAGRO," giving her "the undertaker's card, his band card, and insurance card" and asking her to "take care of the funeral arrangements" – all indicate that he believed the trustworthiness of his co-workers' news and that he impressed the real nature of the threat upon Jane Doe 7. App6791–92. Defendants do not suggest otherwise, or suggest he would have any reason to lie.

D. Plaintiff Nancy Mora Lemus and Decedent Miguel Rodriguez Duarte.

Defendants mischaracterize Plaintiff Mora Lemus' deposition testimony, RB 85–87, in which she unequivocally testified, for well-articulated reasons, that the

perpetrators were AUC. Defense counsel's questions as to whether her husband's murderers were affiliated with any "groups" or "organizations" were vague, App5769; by contrast she testified that the perpetrators were "affiliated with the Autodefensas . . . because they were there, all of them . . . there was a large group . . . . I'm sure because they were the only ones who were there in that area…and because everybody else was withdrawn, because they were the only ones that had the power there." App5769. She further testified that the ELN was far away and there were no other gangs, just the AUC. *Id.* She knew "for sure" that they were AUC because whenever she went into town, they would take her food. *Id.* Moreover, whether the transcription of "brand" was accurate, or was actually "band," the witness clearly recognized this "wheel" mark on the perpetrators' clothing as an identifying feature of the AUC "paracos." App5767. Such identifying marks on clothing may be probative of affiliation with an illegal group. *See e.g. United States v. Gaines*, 859 F.3d 1128, 1132 (8th Cir. 2017) (gang related clothing); *United States v. Ledbetter*, 929 F.3d 338 (6th Cir. 2019) (same); *Lee v Frauenheim*, No. 1:15-cv-01774, 2017 U.S. Dist. LEXIS 71510, at *90, 115–17 (E.D. Cal. May 9, 2017) (blue clothing indicative of Crips gang). Under these circumstances, there was an issue of fact for the jury to decide.

E. Plaintiffs Juana Doe 11 and Minor Doe 11A, and Carrizosa Decedent John Doe 11.

Admissible evidence shows that the AUC commander Jose Gregorio Mangones, alias Carlos Tijeras, ordered the killing of John Doe 11. In fact, Mangones

confessed to John Doe 11's wife, Juana Doe 11. She testified that she attended the Justice & Peace hearing and confronted Mangones, who admitted "Yes, I killed him." App5502. Such evidence alone creates a material dispute of fact. It was admissible and Mangones was unavailable for the same reasons argued below. *Infra* § V(F); *see also* AOB 90–92. This is coordinated litigation and had Letters been granted for Mangones, counsel for Carrizosa would have attended the deposition, in Colombia, on behalf of his clients, just as he did for the Hasbún deposition.

This evidence was also not alone. Juana Doe 11 testified that her husband had been threatened by the AUC when he refused to sell the family farm. App5493–94, 5501–02. The AUC had motive to kill John Doe 11. *Id.*, AOB 92–93. Minor Doe 11A provided eyewitness testimony of the circumstances of her father's killing and they were consistent with AUC killings. AOB 89. John Doe 11 was killed in an area controlled by the AUC. AOB 88–89.

This evidence – establishing an AUC motive to kill John Doe 11, the AUC's control over the area where he died, and the similarities John Doe 11's death shared with AUC killings – was admissible, and also requires a jury to decide whether the AUC was responsible. *See* AOB 20–36; *supra* §§ I–II. Official Colombian records, including the Mangones *sentencia*, also show the AUC was responsible for John Doe 11's murder, and were admissible. AOB 89–90, 43–46; *supra* § III(B)(1), (5).

F. Decedent Jose Lopez 339 and Plaintiffs Seven Surviving Children.

There is ample, admissible, and unchallenged evidence that the AUC killed Jose

Lopez 339. AOB 93–94. This evidence includes the Rendón *sentencia*, *supra* § III(B)(1), as well as Rendón's confessions to Jose Lopez 339's family. *See* AOB 94; *see also* App5705. Defendants do not dispute that if either the *sentencia* or the testimony about confessions is admitted then summary judgment was error. The confessions, proffered as statements against interest under Rule 804(b)(3), were excluded solely because the district court found that Rendón was not "unavailable." App7564 n.35.

1. Defendants Did Not Object to Rendón's Unavailability, and Plaintiffs Had no Opportunity to Respond to This Ground for Exclusion.

Defendants claim they objected to Plaintiffs' evidence, RB 95, but their moving papers stated only "[t]here is no admissible evidence . . . that the killer was a member of the AUC." App3309. As noted above, these kinds of general objections are insufficient to raise the issue. *Supra* § III(A). Even in the appendix to their reply brief, where Defendants made additional objections to Plaintiffs' evidence, they did not challenge *any* evidence relating to Jose Lopez 339. App7267–68. In Plaintiffs' supplemental brief, Plaintiffs specifically noted that Rendón's confession to the family was admissible as "a statement against interest by an unavailable witness under FRE 804(b)." App7383. Defendants never argued otherwise; even in their supplemental response, they stated only that the confession was "inadmissible hearsay that should be excluded" but they did not dispute Rendón's unavailability. App7454. While Defendants charge that "Plaintiffs did not dispute" their objections, Plaintiffs had no

opportunity to respond to this filing and, in any event, it did not challenge Rendón's unavailability.

Defendants complain that Plaintiffs are now explaining Rendón's unavailability "for the first time on appeal." RB 97. This is bold, because it is *Defendants* who are offering arguments against Rendón's unavailability for the first time on appeal; they never argued this below. It is also false, because all of the documentation of Rendón's failure to appear was already in the district court record. *See* AOB 94–95. But to the extent that Plaintiffs are offering new explanations, it is only because the district court invented the argument about Rendón's availability *sua sponte* without giving Plaintiffs an opportunity to respond. App7564 n.35. Reversal is warranted for this reason alone. *Supra* § III(A).

2. The District Court's Ruling as to Rendón's Unavailability was Error.

Defendants suggest that the district court did not abuse its discretion in determining that "Plaintiffs did not explain why neither deposition was taken." RB 97. However, this issue is reviewed *de novo*, AOB 20, and the district court actually acknowledged that Rendón "failed to appear." App7564 n.35. Defendants fail to address Plaintiffs' ample showing as to why Rendón was unavailable, having failed to appear for two depositions. AOB 94–95.

Defendants claim that Rendón's failure to appear was somehow Plaintiffs' fault because "Plaintiffs delayed in" seeking his deposition, RB 97, but that is nonsense.

Plaintiffs not only sought an emergency order to take Rendón's deposition, months before he was released from prison – despite the fact that there was a discovery stay in place – but the deposition itself was scheduled by the Colombian authorities. AOB 95. The district court's statement that Plaintiffs only sought his deposition "after his release from prison," App7564 n.35, is therefore incorrect. Nonetheless, Plaintiffs tried again, and again Rendón failed to appear. AOB 20. This plainly satisfied the requirement of good faith effort under Fed. R. Evid. 804(a)(5)(B).

Defendants cite no case law suggesting that where a witness fails to appear, he can nonetheless be considered "available." Their only case is *United States v. Acosta*, 769 F.2d 721 (11th Cir. 1985). But *Acosta* found only that a witness was not unavailable where the party "offered no evidence that he had requested the witness to testify or that she had refused to do so." *Id.* at 723. Here, Plaintiffs *twice* obtained orders to depose Rendón, and he *twice* failed to do so.

Indeed, as to both Mangones and Rendón, neither Defendants nor the district court's order offer any support for the proposition that Plaintiffs were required to seek letters of request for their testimony at all. They cite no cases in which witnesses in foreign countries, beyond the court's process, who are not U.S. citizens subject to subpoena under 29 U.S.C. § 1783, can be considered anything but "unavailable." *See Bailey v. S. Pac. Transp. Co.*, 613 F.2d 1385, 1390 (5th Cir. 1980) (witness "beyond the court's process" was unavailable); *Trade Dev. Bank v. Cont'l Ins. Co.*, 469 F.2d 35, 42 (2d

Cir. 1972) (since the declarant "was outside the jurisdiction, his unavailability to testify at trial was not disputed").

G. Plaintiff Juana Perez 43A and Decedent Pablo Perez 43A.

Without citing a single case or addressing the high standard of review on summary judgment – that all reasonable inferences should have been drawn in Plaintiff's favor, *see, e.g.*, *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (*en banc*), with respect to Juana Perez 43A – Chiquita merely pronounces itself correct on the disputed evidentiary issues. *See* RB 99–100. Indeed, Chiquita falsely proclaims that "Juana Perez 43A concedes that summary judgment was proper on her claim." *Id.* at 101. That is absurd, and Chiquita's failure to engage the issues and merely declare victory based on false pronouncements should not be taken seriously.

Juana Perez 43A, an elderly woman who was extremely intimidated while being deposed by Chiquita's lawyers on her first trip outside Colombia, conceded only that her testimony was ambiguous on whether she was present when AUC Commander took responsibility for killing her son, Pablo Perez 43. *See* AOB 97. She testified that she was present at a Justice & Peace hearing, at which Mangones "made himself responsible" for the killing. App5657, 5660–62. When pressed for details by Chiquita, she stated she could not remember anything more about the hearing. *Id.* That testimony would certainly allow for the reasonable inference that she was present when Mangones took responsibility for killing her son, and she can clarify this at trial. Chiquita does not address this testimony or the proper standard and instead states

falsely that "it is undisputed that . . . Juana Perez 43A did not personally hear or observe Mangones make an alleged confession." RB 99. It certainly ***is*** disputed, and this dispute must be resolved by the jury at trial.

As to Chiquita's other arguments, the district court erred in excluding all of the Justice & Peace documents, including those in which Mangones was found to be responsible for murdering Pablo Perez 43. *See* AOB 42–62; § III(B)(2)–(3), *supra*. Finally, Chiquita mischaracterizes the circumstantial evidence presented by Juana Perez 43A; there was substantial circumstantial evidence that would have allowed a jury to find it was more likely than not that the AUC executed Pablo Perez 43 and did so consistent with the AUC's well-established *modus operandi*. *See* AOB 20–36; §§ I-II, *supra*.

H. Plaintiff Ana Ofelia Torres and Decedent Ceferino Antonio Restrepo Tangarife

AUC commander Raúl Hasbún accepted responsibility for Restrepo Tangarife's murder, carried out under his orders. AOB 98–99. Plaintiff Ana Ofelia Torres' evidence as to Hasbún's acceptance of responsibility is sufficient to establish AUC causation. AOB 51–53; *see also* § III(B)(2)–(3), *supra*. Defendants claim they "directly challenged the admissibility of documents, declarations, and testimony proffered by Ms. Torres in the district court. App7445. Ms. Torres is wrong to argue otherwise." RB 101. Defendants' assertion is disingenuous. Their Motion for Summary Judgment merely argued "[t]here is no admissible evidence of who" killed her son or whether the killer

was an AUC member. App3308. Defendants' motion contained no "direct[] challenge" to the admissibility of the documents, declarations, and testimony Ms. Torres presented. The only time Defendants "directly" challenged some of that evidence was after Plaintiffs filed their supplemental brief, leaving Plaintiffs no opportunity to respond. App7471.

Defendants never challenged that Torres' son was shot in July 1997 in the municipality of Apartadó in Urabá. *Id.*

As to the remaining evidence, which Defendants also only challenged for the first time after Plaintiffs filed their Supplemental Brief, Plaintiffs had no opportunity to respond and therefore to argue that the murder occurred in an area that was controlled by the AUC; that in the years leading up to the decedent's murder, the paramilitaries also committed massacres in Apartadó; that "back then and over there, those [paramilitaries] were the ones who were doing all the killing . . . . [the paramilitaries] were carrying out the massacres"; that Torres was scared of them, "very scared, because in Apartado, [dead people] was an everyday thing," and the paramilitaries "would kill everyday." App6425, 6434.

Moreover, Restrepo Tangarife's murder occurred in 1997 in Apartadó, Urabá. App6419–20, an area with heavy AUC activity at the time. *See* AOB 9–12, 99; App4824–25; § I(B), *supra*. Restrepo Tangarife was a banana worker, App6427–28, a group targeted by the AUC. *See* AOB 9–12; § II(B) n.13, *supra*.

I. Plaintiff Pastora Durango and Decedent Waynesty Machado Durango.

AUC commander Raúl Hasbún accepted responsibility for Waynesty Machado Durango's murder, carried out under his orders. AOB 100. Plaintiff Pastora Durango's evidence as to Hasbún's acceptance of responsibility is sufficient to present a jury question on AUC causation. *See* AOB 51–53; § III(B)(2)–(3), *supra*.

Defendants made no specific objections to the evidence presented by this Plaintiff, *see generally* App7237–63, and the evidence supports the AUC's responsibility. Waynesty was murdered in Apartadó, Urabá in 1997. App9124, 9132, 4325. Defendants have not challenged that fact. The AUC had control of the municipality at this time. *See* AOB 9–12; § I(B), *supra*. Defendants have not challenged that fact, either. As Plaintiff Torres testified, at that time, the "paramilitaries were the ones who were doing all the killing" in Apartadó. App6425.[37] Defendants have also not challenged Plaintiff Durango's statement that the paramilitaries "were the ones who were killing the people." App9128.

J. Plaintiff Gloria Eugenia Muñoz and Decedent Miguel Angel Cardona.

AUC commander Raúl Hasbún accepted responsibility for Miguel Angel

[37] Defendants suggest that sworn testimony cannot be considered at summary judgment if the witnesses are Plaintiffs. RB 103. There is no basis for this, and Defendants cite none. *Id.* Nor is Torres' testimony the only evidence for the fact that the AUC dominated the area and committed most of the murders. *E.g.*, AOB 9–12.

Cardona's murder, carried out under his orders. AOB 100–01. Plaintiff Gloria Eugenia Muñoz's evidence as to Hasbún's acceptance of responsibility is sufficient to present a jury question on AUC causation. *See* AOB 51–53; *see also* § III(B)(2)–(3), *supra*.

Miguel Angel Cardona was killed on January 15, 2001, in the municipality of Turbó in Urabá. App9079, 9087, 4326. Defendants have not challenged that. The AUC controlled Turbó at that time. *See* AOB 9–12, § I(B), *supra*. Defendants have not challenged that. Miguel was abducted from his home by two men on motorcycles, App9079–80, 9090, consistent with AUC practice, *see* § II(B) n.21, *supra*, at a place and time with heavy AUC activity. *See* App4824–25; AOB 9–12; § I(B), *supra*.

Defendants do challenge, RB 103, Ms. Muñoz's testimony that her daughter in law, Onelsi Mejia, said she saw two men take the decedent away from Onelsi's house, App9079–80, that Onelsi told her the two men were known as "El Muelon" and "El Tripilla," App9080, and that Ms. Muñoz could testify at trial that her daughter-in-law's statements were excited utterances. AOB 101. Her testimony at trial that they were excited utterances would constitute a form in which these statements would be admissible.

Defendants argue that "Ms. Muñoz cannot rely on unsworn statements of counsel regarding her anticipated trial testimony to make Onelsi's hearsay statements reducible to admissible form." RB 104 (citing *Steen v. Myers*, 486 F.3d 1017, 1022 (7th

Cir. 2007)). *Steen* predates the 2010 amendments to Fed. R. Civ. P. 56(c)(2), which allow "the proponent to show that the material is admissible as presented *or to explain the admissible form that is anticipated*." Fed. R. Civ. P. 56(c)(2) advisory committee's note (2010 amendments) (emphasis added).

Further, Ms. Muñoz's other son, Roberto Cardona Muñoz, submitted a declaration, App4755, that he tracked down El Muelon and El Tripilla: "At first they denied that they knew what I was talking about but after admitting they had left Miguel at the entrance of a [banana] farm called La Represa. I was able to find my brother at the entrance to the farm and he was dead. They had shot him four times in the head and he was beaten with the stock of a firearm." App4755.

CROSS-APPELLEES' RESPONSE TO INDIVIDUAL DEFENDANTS' CROSS-APPEAL

INTRODUCTION AND SUMMARY OF ARGUMENT

The Individual Defendants seek to use the district court's summary judgment decision to bootstrap an appeal of entirely different issues: the district court's ruling that all of the Plaintiffs had adequately alleged state participation in the murders at the pleading stage and primary violations under the TVPA, and its ruling that Defendant Carla Hills, Administrator of the Estate of Roderick Hills, waived any personal jurisdiction argument.

As to the TVPA issues, the case is now on summary judgment, and the district court should determine them based on the factual record. Regardless, Plaintiffs have

adequately alleged that these murders involved state action. The AUC committed its widespread campaign of terror hand-in-glove with the Colombian military, implementing the state's war strategy, engaging in joint operations and sharing intelligence with the military, and using arms the military provided. In short, the military delegated to the AUC the job of murdering civilians. Defendants' position, that the military needed to specifically participate in each individual murder, has no basis in law or logic. It is enough that the AUC was engaged in a "symbiotic relationship" and conspiracy with the military to commit murder wholesale. The government need not participate at the retail level. But even if this Court were to adopt Defendants' position, the result would not be dismissal; the district court would still have to apply the law to the facts in the record.

Defendants' assertion that Plaintiffs did not allege a TVPA violation by a natural person is wrong; the Complaints allege that Plaintiffs' loved ones were murdered by members of the AUC. Defendants also claim that Plaintiffs must allege a murderer's identity in order to plead a *deliberated* killing, but the facts of the murders alleged here show they were premeditated assassinations.

Ms. Hills's claim that the district court erred in finding that she waived objections to personal jurisdiction is both immaterial and wrong. It is immaterial because the New Jersey Plaintiffs separately sued Ms. Hills in the District of Columbia where she does not contest jurisdiction, and that case was transferred to the MDL.

And it is wrong because her passing reference to personal jurisdiction was insufficient to raise the issue.

STANDARD OF REVIEW

This Court reviews a district court's denial of a motion to dismiss *de novo*, accepting the allegations as true and construing them in the light most favorable to the Plaintiffs. *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016). The Court assesses whether Plaintiffs' alleged non-conclusory facts plausibly state a claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. PLAINTIFFS STATED A CLAIM FOR "STATE ACTION" UNDER THE TVPA.

The district court correctly held that Plaintiffs adequately alleged state action because the AUC had a symbiotic relationship with Colombian state actors regarding the abuses at issue. Defendants-Appellees' Supplemental Appendix (DSApp) 10223–32, 10272–73.

In so finding, the district court faithfully applied this Court's holding in *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008), requiring that Plaintiffs "must allege a close relationship between the government and the AUC that 'involves the torture or killing alleged in the complaint.'" DSApp10224–25 (quoting *Romero*, 552 F.3d at 1317). The district court reaffirmed that "allegations of general, joint-relationship" were not enough, but held Plaintiffs had satisfied this Circuit's test based on a careful

review of the Complaints. *Id.*

The district court evaluated Plaintiffs' detailed allegations, including that: AUC violence was central to the government's war strategy; paramilitaries included active-duty and retired military personnel; the AUC ran joint operations with the military; State forces provided arms, munitions, and vehicles to the AUC; the military and AUC shared intelligence, including about the identities of suspected guerrilla supporters; and unable to defeat the guerrillas alone, the military delegated to the AUC the role of attacking civilians, targeting suspected guerrilla sympathizers, including teachers, trade unionists, community leaders, religious workers, and human rights defenders. DSApp10226–30 (citing Plaintiffs' complaints).

Plaintiffs also pled "detailed facts of the government's role in creating, financing, promoting, and collaborating with the AUC in the common objective of fighting the leftist guerillas." DSApp10230. The complaints thus link the close relationship between the state and the AUC "to the campaign of torture and killing in the banana-growing regions – *i.e.*, the subject of the complaints." *Id.*

As the district court concluded, this is sufficient to establish a "symbiotic relationship" between the Colombian government and the AUC for the purposes of the violence alleged. DSApp10230–31.

A. Plaintiffs do not Need to Show a Symbiotic Relationship to Prove State Action.

As an initial matter, there are several tests to show "state action,"[38] not just the symbiotic relationship test Individual Defendants discuss. Courts look to agency law and the jurisprudence surrounding 42 U.S.C. §1983. *See, e.g.*, *Aldana v. Del Monte Fresh Product, N.A. Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005); *accord Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995). Plaintiffs alleged state action under a number of theories. *See* DE 111 at 56–65. For example, the "public function" test is met where a private entity exercises power delegated by the State that is traditionally exclusively reserved to the State. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352–53 (1974). Here, Colombian officials delegated the power to suppress an insurgency, a quintessential public function. Similarly, conspiracy suffices for state action. *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). To be a co-conspirator, Colombian officials need not have been involved in each specific murder, so long as these killings were committed "in furtherance of the conspiracy." *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005) (citing *Halberstam v. Welch,* 705 F.2d 472, 481 (D.C. Cir. 1983)). The district court considered only Plaintiffs' symbiotic relationship argument. Thus, even if Individual Defendants were correct – and they are not – on the symbiotic relationship test, remand would be necessary to consider Plaintiffs' other theories.

B. As Defendants' Own Authority Demonstrates, Plaintiffs' Detailed Allegations More than Sufficiently Show a Symbiotic Relationship Between the Colombian Government and the AUC

In *Romero*, this Court held that a party may show state action by "***either***" showing that state actors were actively involved in assassinations ***or*** "that the paramilitary assassins enjoyed a symbiotic relationship with the military for the purpose of those assassinations." *Romero*, 552 F.3d at 1318. When the Individual Defendants argue that Plaintiffs must allege "direct government involvement in each specific act of alleged violence," RB 114, they omit half the test. Defendants' proposed test is not the law in this Circuit, and the district court correctly rejected Defendants' argument. DSApp10225.

Nor would Defendants' rule make sense. Faced with allegations that state actors developed a joint strategy with, and supported, the direct perpetrators of a mass crime encompassing the killings at issue, courts should not pretend there was no state action just because state officials delegated the actual killing to their partners.

Furthermore, as the district court found, Plaintiffs' allegations "do more than assert generalized allegations of collusion" but rather "link this close relationship to the campaign of torture and killing in the banana-growing regions – i.e., the subject of

[38] The TVPA provides a cause of action against "any individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to extrajudicial killing." 28 U.S.C. § 1350, note. The question of whether a private individual acted under "actual or apparent authority" or "color of law" of the foreign nation constitutes the "state action" element of the TVPA.

the complaints." DSApp10230. Plaintiffs did not allege general collaboration, but, as described above, provided "detailed allegations of the government's close cooperation with the AUC regarding the torture and killing alleged in the complaint." DSApp10232.

Indeed, the district court specifically noted that "[t]hese detailed facts distinguish the allegations here from those found insufficient in *Sinaltrainal*, upon which Chiquita principally relies." DSApp10231 (citing *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012)). The *Sinaltrainal* plaintiffs offered only a "conclusory allegation" of state action; that the Colombian government merely "tolerated and permitted the paramilitary forces to exist." 578 F.3d at 1266.

Plaintiffs' detailed allegations likewise distinguish this case from *Romero*. In that case, this Court affirmed summary judgment because the plaintiffs' only admissible evidence of symbiotic relationship with was a United Nations report stating the paramilitaries and the Colombian military had a general relationship and the Defendant's security reports stating the paramilitaries were "sometimes supported by the Colombian military." *Romero*, 552 F.3d at 1317–18. Unlike Plaintiffs' allegations here, the summary-judgment evidence in *Romero* and the "naked allegations" in *Sinaltrainal* failed to provide any link between the government and the abuses at issue. *Sinaltrainal*, 578 F.3d at 1266; *see also Romero*, 552 F.3d at 1317–18.

In *Aldana v. Del Monte Fresh Product, N.A. Inc.*, this Court held that the alleged participation by a state official in a single part of a broader violent incident was sufficient. 416 F.3d 1242, 1250–51 (11th Cir. 2005). Individual Defendants mistake a sufficient condition for a necessary one. RB 114–15. Indeed, this Court appeared to accept that state action would exist if the police made a knowing choice to ignore the ongoing commission of abuses. 416 F.3d at 1248–49.

Defendants' cited authority supports, not undercuts, the district court's holding. For example, in *Kadic,* victims of Bosnian-Serb atrocities sued Radovan Karadžić for ordering "a campaign" of such atrocities, committed by troops under his command. 70 F.3d at 242, 244. The Second Circuit held that the plaintiffs sufficiently alleged that Karadžić acted under color of law since he acted in concert with the former Yugoslavia. *Id.* at 245 ("[A]ppellants are entitled to prove their allegations that Karadžić acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid."). There was no allegation that Karadžić directly participated in every atrocity of the Bosnian war. Similarly, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the seminal "symbiotic relationship" case, contradicts Defendants' view of the symbiotic relationship test. There was no allegation in that case that any government employee participated in the restaurant's discrimination. *Id.* at 720, 725. Instead, state action was based on the mutually beneficial and interdependent relationship between the restaurant and the state. The

connection between the government and the challenged activity is far closer here. In *Burton*, there was no claim that the government even wanted the restaurant to discriminate, whereas AUC violence against civilians was substantially the *point* of Colombian officials' cooperation.

C. Defendants' Misplaced Arguments Against Aiding-and-Abetting and Conspiracy Liability Contradicts Settled Precedent and Ignores Plaintiffs' Allegations

This Circuit holds that "[t]he TVPA contemplates liability against those who did not "personally execute the torture or extrajudicial killing" including aiders, abettors and co-conspirators. *Doe v. Drummond Co.*, 782 F.3d 576, 607 (11th Cir. 2015) (quoting *Mohamad,* 566 U.S. at 458).[39]

Individual Defendants do not challenge the district court's decision recognizing that Plaintiffs adequately alleged that Chiquita abetted and conspired with the AUC. Instead, they argue that Plaintiffs did not adequately allege a principal violation of the TVPA because Plaintiffs did not "allege a primary violation by a natural person." RB 119. They also argue that Plaintiffs did not allege the names of the AUC triggermen who murdered their loved ones, and that "[w]ithout alleging a natural person's identity, it is impossible to plead that the natural person had the *mens rea* to commit a *deliberated* killing," RB 120. They are wrong on both counts.

[39] Defendants assert in a footnote that this Court erred in *Drummond*, but this Court is bound by prior panel decisions. *E.g.*, *United States v. Kaley*, 579 F.3d 1246, 1255–56 (11th Cir. 2009).

First, Defendants misstate the Complaints, which plainly allege that decedents were murdered by *members* of the AUC. *E.g.*, DSApp10017 ("The killings alleged herein . . . were committed by members of the AUC in furtherance of the conspiracy."). These are natural persons. Regardless, Defendants are playing word games. An allegation that the AUC committed a murder *is* an allegation that its members or agents did so.

Those individual AUC members need not be identified by name to establish that there was a violation of the TVPA. Indeed, Defendants' argument is at odds with the law of conspiracy and abetting generally. It is well established under federal criminal law that an aiding-and-abetting conviction does not require "that the principal be convicted or even that the identity of the principal be established." *Hendrix v. United States*, 327 F.2d 971, 975 (5th Cir. 1964) (collecting cases); *see also, e.g.*, *United States v. Mullins*, 613 F.3d 1273, 1290 (10th Cir. 2010). Likewise, "a defendant may be convicted of conspiring with persons whose names are unknown." *United States v. Wenxia Man*, 891 F.3d 1253, 1272 (11th Cir. 2018).

Defendants' position would make it practically impossible to hold anyone responsible for abetting or conspiring in a mass atrocity. For example, top officials at a chemical company were convicted at Nuremberg for supplying poison gas to the death chambers of Auschwitz. *The Zyklon B Case, Trial of Bruno Tesch and Two Others*, 1 Law Reports of Trials of War Criminals 93 (1947) (British Military Ct., Hamburg,

Mar. 1–8, 1946), *available at*: https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-1.pdf. There was no requirement that they knew the executioners' names. Similar examples abound. *See, e.g., The Flick Case*, 9 Law Reports of Trials of War Criminals (1949) (U.S. Military Tribunal, Nuremberg Apr. 20 –22, 1947, *available at* https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol9.pdf (industrialist convicted for contributing money to an organization committing widespread abuses).

Defendants argue that Plaintiffs must identify the specific perpetrators because the TVPA only imposes *liability* on natural persons, RB 119–20 (citing *Mohamad*, 566 U.S. 449), but that is a *non sequitur*. Plaintiffs do not sue the AUC or suggest it, as an organization, bears TVPA liability. Regardless, specific members of the AUC murdered Plaintiffs' decedents; this establishes the tort in which Individual Defendants aided and/or conspired.

Second, Defendant's assertion that without alleging a murderer's identity, it is impossible to plead that the murderer had the *mens rea* to commit a *deliberated* killing, RB 120 (emphasis in original), is nonsense. The facts of the crime, not the killer's name, tell you whether the killing was deliberated. And the killings here were nothing if not deliberated. The examples Defendants highlight, RB 121, prove the point: (1) paramilitaries removed John Doe 2 from a bus and executed him and (2)

paramilitaries identified John Doe 4 by name and executed him.[40] These are deliberated killings. *Mamani III*, 968 F.3d 1216, 1230 (11th Cir. 2020) (finding liability notwithstanding there was no "evidence regarding the identity of the individual shooters who killed the decedents nor evidence about the shooters' states of mind."); *id.* at 1235 (holding that plaintiffs must show the "deaths were the result of a purposeful act to take another's life and that the deaths were not caused by 'accidental or negligent' behavior or other external circumstances and were not a result of just provocation or sudden passion.").[41] Finally, Defendants quote this Court's observation that "'[v]ictims may be unable to identify the men and woman who subjected them to the [the violation], all the while knowing the organization for whom they work.'" *Doe v. Drummond Co.*, 782 F.3d at 611 (quoting *Mohamad*, 566 U.S. at 460). But this court was referring to the difficulty in naming individual corporate executives, rather than the corporate entity itself in TVPA cases. *Id.* This Court was not suggesting that the primary tortfeasor must be named in the suit.

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[40] *See also, e.g.*, App1362–63 (alleging a paramilitary shot Pablo Perez 43 five times in the head and an AUC commander later took responsibility); App2644 (alleging the AUC killed John Doe 7 because he stole from a banana farm).

[41] Individual Defendants cite to an earlier decision, *Mamani v. Berzain*, 654 F.3d 1148, 1155 (11th Cir. 2011) ("*Mamani I*"), but that decision simply found the plaintiffs' allegations inadequate because, unlike here, the allegations were "compatible with accidental or negligent shooting" or "individual motivations"; it never held that plaintiffs needed to identify the shooters by name. The allegations here are not similarly deficient.

Plaintiffs' TVPA claims are properly pled, as the district court held.

II. THE DISTRICT COURT'S RULING ON THE ADMINISTRATOR'S PERSONAL JURISDICTION DEFENSE IN THE NEW JERSEY ACTION WAS NOT CLEARLY ERRONEOUS.

When she moved to dismiss the New Jersey Plaintiffs' claims, Administrator Carla Hills *did not* argue that jurisdiction in New Jersey was improper over Roderick Hills prior to his death; instead, she argued (at length) that jurisdiction was improper as to her – after substitution – because of service of process defects. DSApp10640–42; PSApp13447–48. The district court properly rejected those arguments; Ms. Hills does not appeal that ruling. DSApp10703–07. Instead, Ms. Hills argues that the district court erred by finding that she waived objections to personal jurisdiction beyond the service of process issues. RB 123–25. The waiver ruling does not matter because the same Plaintiffs also brought the same claims against Ms. Hills in the District of Columbia; in any event, the ruling was not error.

The personal jurisdiction ruling does not matter for this appeal. Ms. Hills only challenges John Doe 7 and Jane Doe 7's claims in No. 08-80421, but these Plaintiffs filed the same claims against her in the District of Columbia where personal jurisdiction is uncontested; that suit was transferred to the MDL as No. 17-81285 and is also part of this appeal. *See* PSApp13908–14000 (D.D.C. complaint); PSApp13464 (transfer to MDL); App443 (assigned Case No. 17-cv-81285). Regardless, dismissal would not be warranted even if the waiver ruling were erroneous. The district court did not dismiss the New Jersey Plaintiffs' claims against Individual Defendants where

it found personal jurisdiction lacking. Instead those claims were remanded to the originating New Jersey court. *See* DSApp10689 (suggesting remand); PSApp13457–61 (remand order). That court then transferred to districts where jurisdiction over each Defendant was proper, PSApp14015; ultimately, those cases were returned to the MDL. PSApp13465–66. The same would have happened for the claims against Ms. Hills; if this Court does address the issue, the most it should do is remand for a similar jurisdictional transfer.

But the district court was also right to find waiver. Below, Ms. Hills "ma[de] a single passing reference to the issue of personal jurisdiction" in the introduction of her motion to dismiss brief, DSApp10702 n.4, a conclusory statement that "a New Jersey court cannot exercise personal jurisdiction over an estate constituted in the District of Columbia." DSApp10636–37. The only authority cited was another motion to dismiss,[42] but that motion did not make any argument with respect to Ms. Hills or to an estate. *See* DSApp10592–94. Ms. Hills did not argue the issue in her reply brief. PSApp13441–55.

The district court correctly held that Ms. Hills could not incorporate an entirely separate argument by different parties that did not reference her situation as

[42] Actually, mis-cited. Ms. Hills cited Defendant Keith Lindner's separate brief, DE 732, which makes no personal jurisdiction argument, PSApp13431-39, but presumably intended to cite DE 735, the Individual Defendants' Joint Motion. DSApp10575-10623. This error underscores the reasons that incorporation by reference does not preserve an argument.

administrator of the Hills Estate, and that her failure to make any specific argument for *why* jurisdiction was improper constituted waiver. DSApp10702–03. Indeed, "[i]ncorporating by reference to earlier filings" results in waiver. *Weatherly v. Ala. State Univ.*, 728 F.3d 1263, 1273 (11th Cir. 2013). Although Ms. Hills claims that the district court failed to apply the right standard for assessing waiver, she does not actually articulate one; she merely states that the waiver must be voluntary as opposed to inadvertent or unintentional. RB 124. But her decision not to devote even a paragraph – in a brief with pages on service of process issues – was clearly voluntary; she does not claim inadvertence or oversight.

This Court has found waiver under similar circumstances. For example, in *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357 (11th Cir. 2006), this Court *reversed* a dismissal for lack of personal jurisdiction, because the district court should have found waiver where personal jurisdiction was only "a mention in a reply memorandum." *Id.* at 1364 & n.8. Ms. Hills cites unpublished lower court decisions, but they involved wildly different facts and do not suggest error here. *See, e.g.*, *Catalyst Pharm. v. Fullerton*, No. 16-25365-CIV, 2017 U.S. Dist. LEXIS 221258, at *6–8 (S.D. Fla. Aug. 8, 2017) (stating that defendant raised personal jurisdiction in three timely motions to dismiss, but fourth motion was four days late); *Pizarro v. Café*, No. 10-22112-CIV, 2012 U.S Dist. LEXIS 198943, at *10–12 (S.D. Fla. May 10, 2012) (finding no waiver where a defendant – subject to a default judgment –

contested jurisdiction in its first responsive filing).

The district court rightly rejected the incorporation of arguments made by other Defendants because Ms. Hills did "not propose how the Court should analyze this inherently fact-sensitive defense as it pertains to the Estate, without individualized, separate briefing on the subject . . . directed to the relationship between Roderick Hills – or the Estate of Roderick Hills – and the relevant fora." DSApp10702. Her single sentence failed to explain how the arguments that the Individual Defendants made with respect to personal jurisdiction were relevant to her. The other Individual Defendants had argued against jurisdiction because they had no suit-related contacts with New Jersey beyond their roles as officers and directors of Chiquita, a New Jersey company, DSApp10594; they did not mention Ms. Hills or argue issues of personal jurisdiction over estate administrators. Indeed, it remains unclear whether Ms. Hills's assertion that "a New Jersey court cannot exercise personal jurisdiction over an estate constituted in the District of Columbia," DSApp10636–37, is an argument about D.C. estates as a matter of law, or about Ms. Hills's (or Mr. Hills's) specific forum contacts. And Ms. Hills's argument that Plaintiffs bore the burden of establishing personal jurisdiction, RB 125, is only relevant if Ms. Hills made a proper personal jurisdiction objection – which she did not, waiving the issue.

CONCLUSION

For the foregoing reasons and those in Plaintiffs'-Appellants' Opening Brief the judgment below should be reversed and all of these bellwether cases remanded to the district court for trial.

September 11, 2020

Respectfully submitted,

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Dated: September 11, 2020

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