Case No. 12-14898-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: CHIQUITA BRANDS INTERNATIONAL, INC.

ALIEN TORT STATUTE LITIGATION

On Appeal from the United States District Court
for the Southern District of Florida
No. 08-md-01916
(Nos. 07-60821, 08-80421, 08-80465, 08-80480, 08-80508,
10-60573, 10-80652, 11-80404, 11-80405)
(The Honorable Kenneth A. Marra)

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Case No. 12-14898-B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Antonio Carrizosa, et al., v. Chiquita Brands International, et al.

PLAINTIFFS-APPELLEES-CROSS-APPELLANTS' CORPORATE DISCLOSURE STATEMENT AND AMENDED CERTIFICATE OF INTERESTED PERSONS

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

Pursuant to Eleventh Circuit Rule 26-1.1, counsel for Appellees-Cross Appellants certify and adopt the lists of the trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case on appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party, listed in Appellees-Cross Appellants' initial Certificate of Interested Persons filed with this Court of December 21, 2012, in addition to those listed in Appellants-

Cross Appellees' Certificate of Interested Persons filed on May 28, 2013, and in Appellees-Cross Appellant's brief filed by Attorney Paul David Wolf on July 22, 2013.

1. Additional persons to be added to the above mentioned Certificates of Interested Persons are as follows:

Acevedo Caro, Gloria Patricia

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Aguirre Gomez, Elizabeth

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Altamiranda, Marleny

Alvarez Quintero, Omaira

Angel Gomez, Carmen Rosa

Aragon Borrero, Jaime

Areiza Jaramillo, Julia Stella

Argumedo Munoz, Teresa

Argumedo, Mabel Eugenia

Arias Perez, Luz Marina

Arrieta Lora, Gil De Jesus

Asprilla Blandon, Dora Amanda

Asprilla Caicedo, Ledys

Atencio Pajaro, Libia

Avendano Monsalve, Frank Giovanny

Ayala Tapias, Denis Antonio

Banquet Sanchez, Maria Cecilia

Barbosa Barrios, Jose

Batista Blanquicet, Juan

Batista Roquemes, Jose De Los Santos

Bedoya Serna, Maria Margarita

Bedoya Vargas, Adriana

Benitez Manco, Rosa Mirama

Bermudez Ospina, Adalgiza

Bertel De Osorio, Elsa Del Carmen

Betancor Uribe, Maria Del Carmen

Blanco San Martin, Natividad

Blandon Mosquera, Adelfa

Bolivar Garcia, Ana Dolia

Borja Gamboa, Rosa Eulalia

Borja Uribe, Ana Alicia

Buelvas Arriera, Leydis Alicia

Buenano Agualimpia, Efrain

Caicedo Bello, Yoni

Caicedo Valoyes, Dalia Maria

Campo Nunez, Flor

Cardenas Arteaga, Elis Margot

Carmona Correa, Elsy Alcira

Carmona Correa, Encarnacion

Carvajal Perez, Maria Belarmina

Casallas Rivera, Mario Ricardo

Castano De Valencia, Maria Marleny

Castrillon David, Orlin

Castro Beltran, Ayda

Castro Vargas, Rosa Mirama

Causil Nieto, Katia Maria

Cavadia Artriaga, Eneida Rosa

Chaverra Chaverra, Clotilde

Cogollo Alarcon, Glenis

Combatt Artheaga, Alexandra

Cordero Villalba, Teodora Maria

Cordoba Amagara, Yerlin

Cordoba Correa , Ana Teresa

Cordoba Florez, Luis Armando

Cordoba Martinez, Telma Maria

Cordoba Mosquera, Libardo

Cordoba Mosquera, Victoriana

Cordoba Tovar, Ana Milena

Correa Fuentes, Margelina

Correa Sanchez, Doralba

Correa Sepulveda, Marleny

Cortes Lopez , Carlos

Cortez Ruiz, Carlos

Cossio Martinez, Marta Nury

Cuesta Cuesta, Marleny

Cuesta, Edilberto

David De Torres, Ana Clarisa

Dias Perez, Yolis Filomena

Diaz Fuentes, Cecilia Del Carmen

Diaz Padilla, Aristides

Diaz Perez, Argemida

Diaz, Nohemi

Duarte Diaz, Luz Marina

Duarte Puerta, Amparo De Jesus

Emilse Torres, Maria

Ena Luna, Isabel

Enilza Vega, Yoaira

Espitia Zapata, Luz Mary

Falconery Perez Lopez, Maria

Fernandez Arrieta, Delis Isabel

Florez Jaramillo, Maria Dionis

Florez Loaiza, Maria Felicia

Florez Paz, Dalila

Franco Garcia, Maria Helda

Fuentes Cavadia, Yanidis

Galarcio Vega, Jose Luis

Galeano De Oquendo, Maria Nohelia

Gallego Sanchez, Patricia Isabel

Gamboa Vega, Clara Luz

Garces Isaza, Ana Cecilia

Garcia Calcedo, Ana Carolina

Garcia Chavarria, Maria Consuelo

Garcia Giraldo Jairo Leal, Ana Eva

Garcia Mena, Maria Osiris

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Garcia Pino, Dionne

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Giraldo Loaiza, Sol Marina

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Gomez Gomez, Rosa

Gomez Lenis, Veronica Isabel

Gomez, Ana Joaquina

Gomez, Luz Mary

Gonzalez, Miladis

Graciano Guisao, Romelia

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Hincapie Jaramillo, Alba Stella

Hinestroza Calderon, Sandra Judith

Holguin Bravo, Blanca Ines

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Julio Tapias, Erika

Lara Albarez, Tomasa Del Carmen

Ledesma Rodriguez, Dagoberto

Lemos Blandon, Toribio

Leon De La Hoz, Graciela

Leyes Morelos, Arellys

Linan Giraldo, Siria Rosa

Lizardad Murillo, Jose Emilio

Londono Madrigal, Ines Ofelia

Londono Pineda, Maria Nelly

Lopez Cardenas. Luz Mery

Lopez Pena, Sandra Isabel

Lopez Ubarne, Marcial De Jesus

Lucas Gomez, Neyla

Lucelli Zapata, Nubia

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Machado Perez, Jamel

Madera Robledo, Ayda Ruth

Madrigal Torres, Diana Beatriz

Maquilon Valencia, Maria Nayibe

Marin Bedoya, Carlos Andres

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Marquez Caravajal, Gerson Esteban

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Martinez Cordoba, Nohelia

Martinez Jaramillo, Delsi Maria

Martinez Miranda, Rosa Esther

Martinez Sierra, Francia Elena

Mejia Wilchens, Anais

Mena, Brunilda

Mendez Solera, Nadys

Mendoza Bornos, Ada Luz

Meneses Bustamante, Ana De Jesus

Mila Pantoja, Luz

Monsalve De Quintero, Magdalena

Montalvo Nino, Gilma

Montoya Garcia, Miriam

Moreno Gomez, Dario

Moreno Mena, Hayda Luz

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Moreno Pena, Marilexi

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Rojas Perea, Fredis

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Sabala Arcia, Ever Sofia

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Salas Cuesta, Cruz Marina

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Salgado Gonzales, Lucely Maria

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Sanchez Coronado, Abiut Amparo

Sanchez Coronado, Angela Judith

Sanchez De Mendoza, Maria Elvira

Sanchez Gutierrez, Ramiro

Santos Mosquer, Ruben Dario

Santos, Jesus Euliver

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Sotelo Sandoval, Libardo

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Suarez Barragan, Modesta Ines

Suarez Barragan, Neila Rosa

Suarez Florez, Turiano

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Tapias Cordoba, Bernardino

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Torres Sepulveda, Ana Edilma

Tuberquia Valle, Alicia

Urango Morelos, Luis

Usuga David, Rosa Elisa

Valencia Urrutia, Floralba

Valle Mendez, Katia Mercedes

Vargas Castillo, Francisco

Vargas Vargas, Carmen Cecilia

Vasquez Guerra , Miguel Mariano

Vasquez Toro, Robert Eduard

Vasquez Urrego, Luz Dione

Vayoles Murillo, Jose Mercedes

Vega Borja, Cielo Esther

Vellojin Marin, Lorena Patricia

Vergara, Nidiam Del Carmen

Vidal Morelo, Farides

Vidales Palacio, Rosangela

Viera Corrales, Venancio

Villadiego Mercado, Adelaida Rosa

Yanez Diaz, Guillermo Amancio

Yanez Tejada, Yadis Yaneth

Yanez Tejada, Yeinis Johanna

Yepes De Yerena, Nora Luz

Zapata Arrubla, Alicia

Zapata Bedoya, Maria

Zapata De Murillo, Ana Lucia

Zapata Quiceno, Lucia Del Carmen

Zapata Rojas, Luz Estrella

Zapata, Ana Ramona

Zuniga Cordoba, Alejandrina

2. Corrections to be made to the names in the above mentioned prior Certificates are as follows:

- "Ruth Nelly Estrada Moñoz" should be changed to "Ruth Nelly Estrada Munoz"
- "Virginia de Jesus Sanchez Sanchez" should be changed to "Virginia de Jesus Sanchez"
- "Gloria Nelly Tuberquia Osono" should be changed to "Gloria Nelly Tuberquia Osorio"
- "Celina de Jesus Otanaro Osoro" should be changed to "Celina de Jesus Otalvaro Osorio"

- “Oliva Arango Vda. De Andrade” should be changed to “Oliva Arango Andrade”
- “Natacha Piedrahita Valencio” should be changed to “Natacha Piedrahita Valencia”
- “Luz Dalida Montoya Moreno” should be changed to “Luz Dary Montoya Moreno”
- “Lydia Maria Moreno Montoya” should be changed to ” Lyda Naria Moreno Montoya”
- “Maria Elena AndradeCordoba” should be changed to ““Maria Elena Andrade Cordoba”
- “Ana Carmela llanez Alvarez” should be changed to “Ana Carmela Yanez Alvarez

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TABLE OF AUTHORITIES

Page(s)

CASES

*Authorities on which we chiefly rely are marked by asterisks

STATUTES

OTHER AUTHORITIES

GLOSSARY

Term	Definition
AOB	Appellants' Opening Brief
DC	Third Amended Complaint, *Does (1-144) Perezes (1-95), Perezes (96-795), and Carmen Tulia Cordoba Tuesta v. Chiquita Brands Int'l et al.* (S.D. Fla. Sept. 24, 2012), available at Doc. 575
Doc.	MDL docket of *In re: Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, No. 08-01916-MD-MARRA (S.D. Fla.)
NJC	Second Amended Complaint, *John Doe I et al. v. Chiquita Brands Int'l, Inc. et. al.* (S.D. Fla. Nov. 16, 2012), available at Doc. 589
NYC	Seventh Amended Complaint, *Sara Matilde Moreno Manjarres et al. v. Chiquita Brands International, Inc.* (S.D. Fla. Sept. 20, 2102), available at Doc. 557
Proffer	Factual Proffer, *United States v. Chiquita Brands Int'l, Inc.*, CR No. 07-055, (D.D.C. Mar. 19, 2013), available at Doc. 111, Exhibit 1
Order	Opinion and Order, *In re Chiquita Brands Int'l Inc. Alien Tort Statute and Shareholder Derivative Litig.*,No. 08-01916-MD (S.D. Fla. June 3, 2011), available at Doc. 412 or 792 F. Supp. 2d 1301

Reconsideration Order	Reconsideration Order, *In re: Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, No. 08-01916-MD-MARRA (S.D. Fla. Mar. 27, 2012), available at Doc. 516
Sentencing Hr'g Tr.	Transcript of Sentencing Hearing, *United States v. Chiquita Brands Int'l, Inc.*, CR No. 07-055 (D.D.C. Sept. 17, 2007) included in Addendum
Sentencing Mem.	Government Sentencing Memorandum, *United States v. Chiquita Brands Int'l, Inc.*, CR No. 07-055 (D.D.C. Jan. 15, 2007), available at Doc. 111, Exhibit 2
SOF	Statement of Facts Alleged
VC	Third Amended Complaint, *Jose & Josefa Lopez Nos. 1-342 v. Chiquita Brands Int'l, Inc. et al.* (S.D. Fla. Sept. 26, 2012), available at Doc. 576

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees-Cross-Appellants ("Plaintiffs") respectfully submit that oral argument would be appropriate because this case involves the application of a recent Supreme Court decision that has not been interpreted by any other Circuit, and that left open important relevant questions and addressed factual circumstances different from those at bar.

INTRODUCTION

In March 2007, Defendant-Appellant-Cross-Appellee Chiquita Brands International and Chiquita Fresh North America LLC (collectively "Chiquita") pled guilty to the federal felony of knowingly providing material support to the *Autodefensas Unidas de Colombia* ("AUC"), an illegal paramilitary organization notorious for its mass murder of Colombian civilians. Chiquita's assistance to the AUC was a federal crime because the U.S. Government had officially designated the AUC a "Foreign Terrorist Organization" and a "Specially Designated Global Terrorist," and thus, a threat to the security or foreign policy of the United States.

As the Government noted, Chiquita's support for the AUC was "prolonged, steady, and substantial"; over seven years – 1997 to 2004 – Chiquita, via its wholly-owned subsidiary, C.I. Bananos de Exportación, S.A. ("Banadex"), paid

the AUC $1.7 million. Sentencing Mem. at 13. The Government explained: "What makes this conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists." Sentencing Hr'g Tr. at 29. Chiquita not only provided financial assistance, but also assisted the AUC in smuggling arms and ammunition with full knowledge that the AUC was a violent organization responsible for crimes against humanity. "Chiquita's money helped buy weapons and ammunition used to kill innocent victims." Sentencing Mem. at 13.

Chiquita aided the AUC because it supported the AUC's goals and benefited from its actions, in particular, pacification of the banana growing regions and the suppression of labor and other social unrest that could have harmed Chiquita's operations. The more Chiquita could produce, the more they paid to the AUC. During this time, Colombia was Chiquita's most profitable banana-producer despite a bloody civil war.

The Plaintiffs are family members of the trade unionists, banana workers, political organizers, community activists and others killed by the AUC, with Chiquita's assistance. The district court held that Chiquita's alleged conduct constituted actionable claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 and Colombia law. Order; Reconsideration Order, Doc. 516 at 5 (Mar. 27,

2012). These allegations are sufficient to support claims for complicity in crimes against humanity, war crimes, torture and summary execution.

STATEMENT OF JURISDICTION

The district court has subject-matter jurisdiction over Plaintiffs' claims under the ATS for the reasons described herein; the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, under 28 U.S.C. § 1331; and state and Colombia law under 28 U.S.C. § 1332.

This Court has discretionary jurisdiction over this interlocutory appeal under 28 U.S.C. § 1292(b).

Plaintiffs timely filed their Notice of Appeal on October 12, 2012, fourteen days after this Court's order granting permission to appeal was entered on September 28, 2012. FRAP 4(a)(3) & 5(d)(2).

STATEMENT OF THE ISSUES

1. Do Plaintiffs' ATS claims against a U.S. company for its conduct originating within the United States, which the U.S. Government has criminalized due to its threat to U.S. security and foreign policy, sufficiently "touch and concern" the United States under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct 1659 (2013)? *See* Section I.

2. Did the district court act within an MDL court's discretion when it declined to dismiss these cases after finding that a sufficient number of claims, arising out of the same wrongful conduct by Defendants, were adequately pled? *See* Section II.A.

3. Did the district court correctly apply this Circuit's precedent when it held that Plaintiffs adequately pled state action by alleging that elements within the Colombian military financed, promoted and conspired with the AUC regarding the pattern of killings at issue? *See* Sections II.B.1 & B.2.

4. Did the district court correctly apply this Circuit's precedent when it found, for purposes of war crimes and crimes against humanity, that Plaintiffs adequately alleged that the abuses at issue were committed as part of the AUC's war strategy and as part of a widespread or systematic attack on a civilian population? *See* Section II.B.3.

5. Did the District Court properly find that Plaintiffs sufficiently alleged complicity through allegations that Chiquita intended to support the AUC's torture and killing of civilians in Colombia's banana regions, or must each Plaintiff further allege that Chiquita specifically intended to abet each particular act of violence? *See* Section II.C.

6. Did the district court err in holding that state tort law cannot apply to injuries that occurred abroad, where the relevant states have rejected *lex loci delicti* choice of law principles and no party has yet urged application of foreign law?

STATEMENT OF THE CASE

A. Procedural History.

The amended complaints allege that Chiquita and its high-ranking executives supported and abetted the AUC in implementing a war strategy that included the killing and torture of Plaintiffs' family members. Plaintiffs assert claims under the ATS and TVPA, and "ordinary tort claims for assault and battery, negligence [and] wrongful death" based on state law or, alternatively, Colombia law. Order 87. Plaintiffs originally filed suit in several federal districts. The Judicial Panel on Multi-District Litigation coordinated these complaints for pre-trial purposes in the Southern District of Florida. Transfer Order, Doc. 1 (Feb. 20, 2008).

Chiquita moved to dismiss. The district court denied the motion as to the TVPA claims and the majority of the ATS claims, crediting detailed allegations that the abuses alleged involved state action because of the AUC's symbiotic relationship with the Colombian military, Order 44-45; that the AUC committed crimes against humanity and war crimes, *id.* 49-50, 56; and that Chiquita intended

to assist and conspire with the AUC. *Id.* 73, 76, 77. The district court dismissed ATS claims relating to terrorism, concluding that they are not sufficiently defined or accepted. *Id.* 31. The court also dismissed Plaintiffs' non-federal tort claims, holding that state law cannot apply to injuries in Colombia, and declining to exercise jurisdiction over Colombia law claims. *Id.* 87-89, 90.

Plaintiffs moved to reconsider the dismissal of non-federal claims, and Chiquita petitioned to certify an interlocutory appeal. The court denied reconsideration of the state-law claims. Reconsideration Order 4. The district court reinstated the Colombia law claims, concluding that it lacked discretion to dismiss under diversity jurisdiction, and granted those Plaintiffs that had not alleged such claims leave to do so, *id.* 5-6, which they all subsequently did.

The district court also certified an interlocutory appeal, and this Court subsequently granted permission to appeal, including Plaintiffs' conditional cross-appeal.

B. Statement of Facts Alleged.

Chiquita is a New Jersey corporation, headquartered at the relevant time in Ohio (now in North Carolina). Chiquita operated in the Colombian banana-growing regions through its wholly-owned subsidiary, Banadex. Order 5, 8. Banadex was Chiquita's most profitable banana-producing operation, despite the

civil war between "FARC" guerillas and the AUC and military in Colombia's banana regions. *Id*.

Chiquita knew that the AUC was a violent, illegal paramilitary organization notorious for scorched-earth tactics and widespread atrocities, including summary executions, torture, rape, and massacres of civilians. *Id.* 70, 76; Proffer at ¶ 22; Sentencing Mem. at 5-6. Nevertheless, it began financing the AUC.

In September 2001, the Secretary of State designated the AUC a Foreign Terrorist Organization, *see* U.S. Dep't of State, *Designation of a Foreign Terrorist Organization*, 66 Fed. Reg. 47,054 (Sept. 10, 2001), and soon thereafter, a Specially Designated Global Terrorist. Sentencing Mem. at 6. In so doing, the Secretary found that the AUC's terrorist activity threatened "the security of U.S. nationals or the national security, foreign policy, or economy of the United States." Exec. Order 13,224 § 1(b) (Sept. 23, 2001); *accord* 8 U.S.C. § 1189(a)(1)(C). These designations made it a crime to knowingly provide the AUC material support. *See* Proffer at ¶5. Chiquita knew that the AUC had been so designated, through extensive coverage in United States and Colombian media and a subscription service Chiquita paid to receive. *Id.* at ¶¶27-28, Sentencing Mem. at 6-7. Yet Chiquita continued to finance the AUC. Order 9.

1. The AUC was inextricably intertwined with the Colombian military in the banana region.

The AUC enjoyed longstanding and pervasive ties to the Colombian Armed Forces. In the 1980s, the Colombian military helped organize and arm the paramilitaries. Paramilitarism was outlawed by presidential decree in 1989, and in 1991, Colombia's Congress outlawed membership in or providing support to the paramilitaries. Order 4.

Despite this, the AUC remained central to the military's war strategy. Unable to defeat the guerrillas alone, the military delegated to the AUC the role of attacking civilians. *Id*. at 40-41. The paramilitaries were commonly called the Colombian Army's "Sixth Division". *Id.* 39.

These close ties allowed the AUC to control the banana-growing region. State forces provided arms, munitions, and vehicles to the AUC; shared intelligence, including the identities of suspected guerilla collaborators; and planned and executed joint attacks on civilians with the AUC. *Id.* 39-43. High-level officials collaborated with and even directed AUC operations, including massacres, extra-judicial killings, disappearances, and forced displacements, in some cases positioning troops outside villages to prevent entry or exit while the AUC massacred civilians. *Id.* 40, 43.

The AUC-military relationship is confirmed by two recent Colombian court decisions regarding the AUC in the banana regions. Ruling in the case of former AUC commander "*El Alemán*," a Colombian court affirmed that the Colombian armed forces helped create, partnered with, financed, and directed joint strategies with the AUC.[1] The court concluded that the paramilitaries' campaign of violence was a state-sponsored mechanism to combat popular protest and suppress social mobilizations. Mot. for Judicial Notice Ex. C ¶319; Ex. D ¶319.

Another court reached similar conclusions in convicting ex-General Rito Alejo del Río Rojas, commander of the 17th Brigade of the Colombian Army, for an AUC murder.[2] The court emphasized that the killing was part of a campaign carried out through joint military-paramilitary groups in the banana region, Mot.

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[1] *See Sentencia de Fredy Rendon Herrera*, Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz [Superior Court of the Judicial District of Bogotá, Justice and Peace Chamber], Dec. 16, 2011 (Colom.) ("*El Alemán*"), relevant excerpts of which are attached to the Motion for Judicial Notice filed concurrently as Ex. C, at ¶¶263, 268, 250, 272, 274, 370, 371, 375, 378, 381, 385, 391, 443, 504 § 7 (English translation at *Id.* Ex. D.).

[2] *Sentencia de Rito Alejo del Río Rojas*, Juzgado Octavo Penal del Circuito Especializado de Bogotá (Juzg. Circ.) [Eighth Criminal Court of the Specialized Circuit of Bogotá], Aug. 23, 2012, (Colom.) ("*Del Río Rojas*"), attached to the Motion for Judicial Notice filed concurrently as Ex. A, with English translation of relevant portions at Ex. B.

For Judicial Notice Ex. A at 4, 20, 31; Ex. B at 2, 5, 9, and explained that the joint units operated "at the margin of the law" and were overseen and commanded by military leaders like del Río Rojas. *Id.* Ex. A at 4, 19, 20, 24; Ex. B at 2, 5, 6. Their objective was to "cause TERROR in order to evacuate [displace] the non-combatant a civilian population." *Id*. Ex A. at 20; Ex. B at 6. This was achieved through selective killings, massacres, kidnappings, and forced displacement, in a campaign that amounted to crimes against humanity. *Id. Ex*. A. at 14, 26, 28; Ex. B at 3, 7, 8.

2. Chiquita colluded with the AUC

Despite the AUC's notorious crimes and illegal status, and the fact that the United States outlawed support for the AUC, Chiquita's officers, directors, and high-ranking employees in the United States authorized years of payments and other assistance to the AUC.

Under the supervision and direction of high-level executives in the United States, Chiquita sought out paramilitaries for a meeting and formed an agreement with the AUC, paying them to pacify the banana plantations and suppress union activity. Order 8-9, 71. In 1997, Banadex's manager met with the AUC's Carlos Castaño to develop a plan wherein Chiquita would pay the AUC, contributing to the expansion of paramilitary operations in Urabá. Order 72. Chiquita's manager in

Colombia worked with AUC Commander Raúl Hasbún to establish organizations called "*convivir*" to receive Chiquita's payments. *Id.* 75. The *convivir* were first established in 1994 to enable the private sector to act as auxiliaries in the counter-insurgency. *Id.* 4-5. In Urabá, they functioned largely as legal fronts for AUC groups and were closely tied to General del Río Rojas's 17th Brigade. *Id.* 5, 42.

Chiquita funneled money to the AUC paramilitaries through the government-chartered and military-sponsored *Convivir Papagayo*, among others. NYC ¶¶1033-1039, 1075. Payments were calculated based on the number of boxes Chiquita shipped. Order 9. *Convivir Papagayo* was directed by AUC leaders, some of whom also served as public officials and are currently under arrest or investigation for facilitating Chiquita's illegal payments to the AUC. *Id.* ¶1039. In June 2002, Chiquita began paying the AUC directly, according to new procedures established by senior executives in the United States. *Id.* ¶1077; VC ¶75.

From 1997 until at least February 2004, on a nearly monthly basis, Chiquita made over 100 payments to the AUC, totaling over $1.7 million. Order 9. Top Chiquita executives, some of whom are co-defendants in this case – including CEOs, directors and other high-ranking officers – decided to finance the AUC and repeatedly reviewed and approved these payments, from the United States. *Id.* 9; NYC ¶¶1074-77, 2047, 2049; NJC ¶86. U.S.-based Chiquita officials also devised

a plan for hiding AUC payments, NJC ¶87, by cooking its books: recording them as security payments to the *convivir*, and later as income to Banadex executives with the intent that cash would be withdrawn and handed directly to the AUC. Order 9.

Well after outside counsel advised Chiquita that it "must stop payments" and "CANNOT MAKE THE PAYMENT," and even after the Justice Department informed Chiquita that the payments were illegal, Chiquita instructed its subsidiary to continue paying the AUC. *Id*.

Chiquita's support to the AUC was not limited to money; Chiquita helped the AUC acquire vast amounts of weapons and ammunition. NYC ¶1160-1173. The *El Alemán* court cited evidence of Chiquita's complicity in smuggling arms, Mot. for Judicial Notice Ex. C ¶¶317, 416; Ex. D ¶¶317, 416, and urged the Attorney General to prosecute Chiquita and its subsidiaries. *Id.* ¶864 § 8. In November 2001, Banadex employees unloaded more than 3,000 assault rifles and 5 million rounds of ammunition from the arms ship *Otterloo* at Chiquita's private port, where Banadex stored them in its warehouse before loading them onto trucks for transfer to the AUC. Order 10. Bills of lading and other shipping documents indicate that the recipient was Banadex. On at least one occasion, uniformed AUC members were seen offloading crates directly from a Chiquita ship. NJC ¶145.

Chiquita facilitated at least four other arms shipments to the AUC, *id.* ¶144. AUC leader Castaño boasted, "This is the greatest achievement by the AUC so far. . . five shipments, 13 thousand rifles." *Id.* ¶146. These arms and munitions were used by the AUC to commit killings in the region. *Id.* ¶147.

Both Chiquita and the AUC benefitted from their arrangement. Thanks in part to its support from Chiquita, the AUC, collaborating with the Colombian authorities, asserted control over the banana-growing regions and drove the guerrillas out, a goal Chiquita shared. In return, Chiquita operated uninterrupted in an environment in which labor and social opposition to the company was suppressed and competition destroyed. Through this strategic alliance, Chiquita was able to eliminate union organizers and others it perceived as hostile to its interests (and whom the AUC perceived as guerilla sympathizers), reduce operating costs, and eliminate disruptions and competition. NJC ¶¶183-84; Order 71. Chiquita was thus able to acquire monopolistic control over banana commerce. NYC at ¶1149. Chiquita intended to and did financially benefit in the United States from the AUC's systematic killings. Order 8, 70.

3. The AUC committed abuses as a matter of course.

As part of its war strategy, the AUC sought to eliminate any perceived guerrilla sympathizer. Its primary tactic was to sow terror among suspected guerrilla sympathizers. *Id.* 4, 71, 73.

The majority of the AUC's victims were innocent civilians. *Id.* 4. The AUC especially targeted social activists, teachers, community leaders, trade unionists, human rights defenders, religious workers and leftist politicians. It also targeted people it considered socially undesirable, such as indigenous persons, drug addicts and petty criminals. *Id.* All this took place with the support, acquiescence and, in some cases, active participation of Colombian authorities.

The Plaintiffs are survivors of members of the groups the AUC targeted with support from or as part of its deal with Chiquita. *See, e.g.*, NJC ¶¶197-216. Their killings were part of the mutually beneficial relationship between Chiquita and the AUC.

C. Standard of Review

The MDL court's decision regarding whether to rule on each individual claim is a case-management decision reviewed for abuse of discretion. *Ctr. for Bio. Diversity, Inc. v. BP Am. Prod. Co*, 704 F.3d 413, 432 (5th Cir. 2013); *see generally Pierce v. Underwood*, 487 U.S. 552, 558 n.1 (1988).

In other respects, both the denial in part and the grant in part of Defendants' motion to dismiss are reviewed *de novo.*

SUMMARY OF ARGUMENT

Kiobel held that the principles underlying the presumption against the extraterritorial application of federal statutes similarly limit the circumstances in which courts should enforce ATS causes of action. *Kiobel* 133 S. Ct. at 1669 (2013). However, claims arising abroad that "touch and concern the territory of the United States . . . with sufficient force" are actionable. *Id*. The claims here have substantial connections to the United States, thereby displacing the *Kiobel* presumption.

First, Chiquita has pled guilty to providing support to the AUC, despite the AUC's designation as a terrorist organization that threatens U.S. national security. Chiquita's acts, which were criminal under U.S. law, touch and concern the United States. Second, unlike in *Kiobel*, Chiquita is a U.S. corporation. The United States may regulate its own corporations' actions and bears responsibility for their acts under international law. Third, unlike in *Kiobel*, substantial relevant conduct took place in the United States. Chiquita made at least 100 separate payments to the AUC that it reviewed, approved and directed at the highest corporate levels from its U.S. headquarters. *Kiobel* does not bar Plaintiffs' claims.

The district court properly held that Plaintiffs adequately pled cognizable ATS claims. Chiquita challenges the court's management of this MDL. The district court carefully reviewed the complaints, but winnowing individual Plaintiffs' claims is not the appropriate function of an MDL court, and even less the function of this Court on an interlocutory appeal. The district court did not abuse its discretion in its handling of the cases here.

The district court also properly applied this Circuit's precedent on the requirements of state action, war crimes, and crimes against humanity. First, with respect to state action, the district court found that Plaintiffs adequately alleged that the military financed, supported and actively conspired with the AUC in the campaign of torture and killing in the banana regions. Although Chiquita claims that state action is only present where state actors directly participate in each murder, this Court's precedents recognize that state actors can sponsor mass atrocities. This Court need not turn a blind eye to the fact that state actors sponsored the pattern of killings that included the murders at issue, simply because state officials let their private partners decide who to kill. The district court's state action decision is also consistent with U.S. and Colombia policy, both of which publicly denounce and prosecute AUC-military collaboration.

Second, with regard to war crimes, the district court carefully applied Circuit precedent and found that Plaintiffs presented voluminous, detailed allegations that the killings and torture *at issue* occurred in the course of hostilities, to further the AUC's military objectives. And because these atrocities occurred as part of a widespread or systematic attack, the district court properly concluded that they are crimes against humanity.

With regard to complicity liability, this Court has held that the *mens rea* of conspiracy is purpose and that of aiding and abetting is knowledge. Although the district court erroneously required purpose for both, it properly found that Plaintiffs meet either standard. Mirroring its error with respect to state action, Chiquita claims that to be held complicit, Chiquita must have specifically intended that the AUC kill each individual victim. That is, Chiquita asserts that while those who abet or conspire in a single murder are liable, those complicit in widespread slaughter are immune. Chiquita's argument conflicts with both domestic and international law.

Chiquita's attempt to excuse its long-term support for the AUC also fails. It plucks particular allegations from isolated complaints, notably the fact that some Plaintiffs allege Chiquita supported murders committed by the AUC's enemy, the FARC, and claims that it is implausible that it supported the AUC. But no Plaintiff

is bound by the allegations in another's complaint. Regardless, there is nothing implausible about the claim that when the winds of war changed direction, Chiquita switched sides.

Although the district court correctly held – and Chiquita does not contest – that Plaintiffs' non-federal tort claims can proceed under Colombia law, it erred in holding that state tort law cannot apply. The court ignored the relevant choice-of-laws rules, which may ultimately point to forum law – particularly since no conflict has been shown. Prescriptive jurisdiction limits do not apply to tort suits, which employ jurisdiction to adjudicate. In any case, the United States may employ its prescriptive jurisdiction to bar abuses that give rise to universal jurisdiction, and to any acts of a U.S. company, particularly those that originate on U.S. soil.

Finally, Plaintiffs' TVPA claims against individual Chiquita executives may proceed.

ARGUMENT

I. The *Kiobel* Presumption is Displaced Here, If It Applies At All.

Kiobel does not bar claims against a U.S. corporation that acted in the United States to provide material support to an organization specifically found by the U.S. government to be a threat to U.S. national security and foreign policy, in

violation of a U.S. criminal law. This case sufficiently "touch[es] and concern" U.S. territory.[3]

A. *Kiobel* Is Narrow and Expressly Contemplates that Some Extraterritorial Cases May Proceed.

Kiobel determined that the "principles underlying" the presumption-against-extraterritoriality canon of statutory construction constrain courts considering ATS federal-common-law causes of action. *Kiobel*, 133 S. Ct. at 1664. But *Kiobel* recognized that ATS cases that "touch and concern" the territory of the United States with "sufficient force" may "displace" the presumption even when the claims involve extraterritorial conduct. *Id.* at 1669.

In *Kiobel*, the new presumption was not displaced because the only nexus to the United States was personal jurisdiction over the defendants. *Kiobel*'s holding is narrow: the "mere corporate presence" of a foreign multinational, without more, is insufficient. *Id*. at 1669; *see id.* at 1669-70 (Alito, J., concurring) (noting the Court's "narrow approach"). Justice Kennedy's noted that other cases "may arise

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[3] This is not, as Chiquita implies, AOB 22 n.4, a question of subject matter jurisdiction. The scope of a statute's reach, including whether it reaches extraterritorial conduct, is a merits issue. *See Morrison v. Nat'l Australia Bank Ltd*., 130 S. Ct. 2869, 2877 (2010); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89-92 (1998).

with allegations of serious violations of international law principles" that are not covered "by the reasoning and holding of today's case." *Id.* at 1669 (Kennedy, J., concurring). Indeed, seven Justices agreed that the majority was "careful to leave open a number of significant questions." *Id*.; *accord id*. at 1669-70 (Alito, J., concurring); *id*. at 1673 (Breyer, J., concurring). For the reasons set forth below, the Plaintiffs' ATS claims in this case overcome the presumption.

B. Plaintiffs' Claims Easily Overcome the *Kiobel* Presumption.

1. As the U.S. Government recognizes, supporting the AUC touches and concerns the United States.

This Court need not engage in a lengthy analysis of the *Kiobel* presumption, because the U.S. Government has concluded that providing support to the AUC directly concerns vital national interests.

In criminalizing support to the AUC as a Foreign Terrorist Organization and a Specially Designated Global Terrorist, the U.S. government determined that the AUC threatened U.S. citizens, national security or foreign policy. SOF 7.

Thus, the Government has already concluded that the conduct at issue here, for which Chiquita was convicted, directly touches and concerns the United States. The Court need look no further.

2. Extraterritorial claims against U.S. nationals may proceed.

Claims against U.S. nationals like Chiquita that are complicit in serious international law violations arising abroad displace the *Kiobel* presumption. Such violations give rise to U.S. responsibility under international law; thus, failure to remedy such violations would undermine a central purpose for which Congress enacted the ATS. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 717, 124 S. Ct. 2739, 2757 (2004).

In *Kiobel*, no one argued the U.S. was responsible under international law to hold foreign defendants accountable based on the actions of their Nigerian subsidiary. And the *Kiobel* plaintiffs conceded that they could have brought their claims in the defendants' home jurisdictions. Dismissal of this litigation, however, raises the specter of impunity for U.S. corporations that engage in egregious violations of U.S. and international law – an outcome that *Kiobel* nowhere countenances.

Kiobel appears to accept the United States' recommendation on extraterritoriality. The Government argued that *Kiobel* should be dismissed for insufficient U.S. connection, but opposed an absolute bar on claims of foreign abuses. Supp. Br. for the United States as *Amicus Curiae* in Partial Support of Affirmance, at 4-5, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (filed June

2012). As an example of an appropriate case, the Government cited *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which "involved a suit by Paraguayan plaintiffs against a Paraguayan defendant based on alleged torture committed in Paraguay." U.S. Supp. Br. at 4. The Government emphasized that the defendant "was found residing in the U.S.," and thus U.S. responsibility under international law was engaged. *Id*. at 4. The Government distinguished *Filártiga* from *Kiobel*, because with British and Dutch defendants who were present elsewhere, "the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, while the nations directly concerned could." *Id*. at 5. The Government affirmed that applying the ATS in *Filártiga* would support U.S. foreign policy, including the promotion of human rights. *Id*. at 13. These concerns apply with even more force to a suit against a U.S. citizen. The historical context of the ATS likewise supports applying it to U.S. corporations. *Kiobel* discussed two historical incidents in which ambassadors were unable to obtain relief for torts. *Kiobel*, 133 S. Ct. at 1666-67. Although these occurred on U.S. soil, attacks by U.S. citizens abroad would likewise engage U.S. responsibility under international law, for nations "ought not to suffer their citizens to do an injury to the subjects of another state." Emmerich de Vattel, *The Law of Nations* 162 (1797); *accord* 4 Blackstone's Commentaries

*67-68 (noting that if sovereign failed to provide redress for its citizen's acts, it would be considered an abettor). Even critics of the ATS recognize that, when it was passed, "the United States would have had a duty to ensure that certain torts in violation of international law, especially those committed by its citizens, were punished and redressed." Curtis Bradley, *Agora: Kiobel, Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 Am. J. Int'l L. 509, 526 & n.112 (2012) (collecting authorities). The ATS was enacted to address "the inadequate vindication of the law of nations," *Sosa*, 542 U.S. at 717; barring suits against U.S. nationals would present precisely that problem.

Kiobel's discussion of the "Bradford Opinion," Breach of Neutrality, 1 Op. Atty. Gen. 57 (1795), reinforces this point. The Opinion addressed an attack on a British colony and a formal protest by the British government.[4] The underlying events occurred in large part in Sierra Leone. *Kiobel* distinguished the Bradford Opinion by pointing out that these events involved U.S. citizens and a possible treaty violation. 133 S. Ct. at 1668. Thus the Bradford Opinion "provides support

[4] The diplomatic correspondence concerning the British claim is annexed to the Supplemental Brief of *Amici Curiae* Professors of Legal History in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 2165337 (2012), as Appendices B & C.

for the extraterritorial application of the ATS to the conduct of U.S. citizens." Bradley, 106 Am. J. Int'l L. at 510.

Furthermore, even *amici* in *Kiobel* supporting dismissal agreed that "the extraterritorial application of the ATS to acts committed by American individuals, corporations, and other U.S. entities in foreign sovereign territory, would be consistent with international law." Br. of the Kingdom of the Neth. and the U.K. of Gr. Brit. and N. Ir. as Amici Curiae in Support of Neither Party, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2312825 at *15; Restatement (Third) of the Foreign Relations Law of the United States, § 402(2) and cmt. e (1987) ("Foreign Relations Restatement") ("[A] state has jurisdiction to prescribe law with respect to . . . the activities, interests, status, or relations of its nationals outside as well as within its territory."). Indeed, Chiquita's status as a U.S. national allowed the government to prosecute it for the conduct at issue here.

Because Chiquita is a U.S. national, the *Kiobel* presumption is displaced by Plaintiffs' claims.

3. Chiquita acted in the United States.

Although U.S. conduct is unnecessary where – as here – the defendant is a U.S. national, the "touch and concern" test is also satisfied because Chiquita's

wrongful conduct originated in the United States. This distinguishes the case at bar from *Kiobel*, in which *all* relevant conduct took place abroad. 133 S. Ct at 1669.

Chiquita does not deny that its executives in the United States decided to finance the AUC. AOB 23. High-ranking U.S.-based officers and directors reviewed and approved the illegal payments and created a plan for hiding them, even after outside counsel and the Justice Department told Chiquita they were illegal. SOF 10-13. Chiquita's scheme was directed, overseen and managed in the United States, and was intended to benefit Chiquita financially in the United States. *Id*. This conduct on U.S. territory is sufficient to displace the *Kiobel* presumption.

Chiquita argues that because most other events occurred in Colombia, the Court should discount Chiquita's decision-making in the United States. AOB 23-26. But Chiquita's and Banadex's involvement with the AUC was directed from here, and the payments and other assistance contributed significantly to the AUC's crimes. SOF 10-13. This conduct, which was sufficient to support a U.S. criminal conviction, "touch[es] and concern[s]" the United States.

Chiquita argues the U.S. conduct should be disregarded because terrorism support is not cognizable under the ATS. AOB 23. But the same conduct supports Plaintiffs' claims for aiding and abetting violations that are without question

actionable. Changing the name of the tort does not change the underlying conduct or its U.S. connection.

4. Plaintiffs' claims fall within the "focus" of the ATS.

Relying on *Morrison v. Nat'l Australia Bank Ltd*., 130 S. Ct. 2869 (2010), Chiquita argues these claims do not meet the *Kiobel* "touch and concern" because the domestic conduct alleged does not fall within the "focus" of legislative concern. AOB 23. This argument fails for four reasons.

First, Chiquita seems to advance a view adopted only by Justices Alito and Thomas, *Kiobel*, 133 S. Ct. at 1669-70 (Alito, J., concurring), but rejected by the remaining seven Justices.[5] Moreover, the Alito view conflicts with *Sosa*, 542 U.S. at 754, 763, yet nothing in *Kiobel* purports to narrow *Sosa*. Nonetheless, Plaintiffs here could meet even Justice Alito's standard; Chiquita's acts of aiding and abetting extrajudicial killing, war crimes and crimes against humanity, which originated in the United States, are themselves torts in violation of international law norms and cannot be artificially separated from the harms Plaintiffs suffered in Colombia. *See* SOF 10-13 & Section II.B.

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[5] The court in *Al Shimari v. CACI Int'l, Inc*., No. 1:08-cv-827, 2013 WL 3229720, at *8-10 (E.D. Va. June 25, 2013), makes a similar mistake, declining to apply the "touch and concern" language of *Kiobel* and implicitly adopting Justice Alito's position.

Second, Chiquita's argument is based on an erroneous assumption that post-*Morrison* applications of the presumption against extraterritoriality are relevant to *Kiobel*. *Morrison* and its progeny consider Congressional intent; the presumption is used to determine whether a conduct-regulating statute applies abroad. *Kiobel*, 133 S. Ct. at 1664. The *Kiobel* presumption, however, concerns the circumstances in which federal courts will recognize federal common law causes of action based on international law.

Third, as discussed above, the "focus" of the First Congress in passing the ATS was to fulfill U.S. responsibility to vindicate the law of nations, including ensuring that the United States would provide redress when U.S. persons committed violations of international law. *Sosa,* 542 U.S. at 722 n.15. The conduct alleged here falls within that "focus," unlike the cases Chiquita cites. In *E.E.O.C. v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 499 U.S. 244 (1991), the focus of the conduct-regulating statute at issue (Title VII) was enforcement of domestic employment laws which were likely to conflict with those of other countries. Likewise, *Nieman* concerned regulations issued by the Federal Trade Commission with "a purely domestic focus." 178 F.3d at 1131. Neither case involved the universal norms at issue in ATS cases, nor a statute in which Congress's

acknowledged purpose was to fulfill U.S. responsibility to foreigners under international law.

Finally, Chiquita argues that the focus of the ATS is on the "tort," excluding secondary liability. AOB 26. But this Circuit has always recognized that secondary liability falls within the ambit of the ATS. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1248 (11th Cir. 2005).

Chiquita also ignores that when Congress creates a tort action, it legislates "in light of the background [principles] of tort liability." *Monterey v. Del Monte Dunes at Monterey, Ltd*., 119 S. Ct. 1624, 1638, 526 U.S. 687, 709 (1999) (citations omitted). Those background principles include secondary liability. *See Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd*., 125 S. Ct. 2764, 2776, 545 U.S. 913, 930 (2005). Indeed, U.S. courts have always placed aiding and abetting at the center of the civil liability regime for violations of customary international law. *See, e.g.*, *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 167-68 (1795); *Henfield's Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (Chief Justice Jay noting liability "under the law of nations, by committing, aiding or abetting hostilities").

The Framers understood that when persons inside the United States commit abet law of nations violations committed abroad, the ATS provides liability. For

example, Talbot "armed and equipped" Ballard's vessel "within the jurisdiction of the United States, and thus aided in making him an illegal cruizer." *Talbot*, 3 U.S. at 157. The district court recognized that Jansen could bring an ATS suit against Talbot for assisting Ballard to capture Jansen's ship near Cuba. *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356 (D.S.C. 1794) (No. 7,216). Based on his conduct in the U.S., the Supreme Court likewise held Talbot liable under international law.[6]

The fact that the AUC conducted its campaign of terror in Colombia, or that two of Plaintiffs' claims require state action, AOB 24, does not limit Chiquita's liability for its own conduct in the United States. Chiquita cites no authority for its conclusion that Congress meant to provide a safe haven in the U.S. by excluding from its "focus" those who aid and abet atrocities from our shores.[7]

5. Plaintiffs' claims are consistent with U.S. foreign policy.

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[6] *See also, e.g., Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgment ¶43 (Dec. 6, 1999) (assistance may be geographically unconnected to the commission of the offense).

[7] A recent decision in *Balcero, et al. v. Drummond Company, Inc.*, No. 2:09-cv-01041-RDP (N.D. Ala. July 25, 2013), determined on summary judgment that, based on the particular facts in that case, *Kiobel* barred the claims because there was no admissible evidence that decision-making occurred in the United States. In *dicta*, the court also concluded that *Kiobel* requires that the primary torts themselves take place in the United States. That is incorrect, for the reasons set forth above.

Kiobel reaffirmed that the primary basis for the presumption against extraterritoriality is protection against "unintended clashes between our laws and those of other nations which could result in international discord" that "should make courts particularly wary of impinging on the discretion of the Legislative and Executive branches in managing foreign affairs." *Kiobel*, 133 S. Ct. at 1664 (internal citation omitted). This concern is not present here.

Supporting the AUC is directly contrary to U.S. foreign policy and criminal law. *See, e.g.*, Press Release, Department of Justice, Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization And Agrees to Pay $25 Million Fine (Mar. 19, 2007), *available at* http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html ("The message to industry from this guilty plea today is that the U.S. Government will bring its full power to bear in the investigation of those who conduct business with designated terrorist organizations, even when those acts occur outside of the United States."). Plaintiffs' claims reinforce, not undermine, United States policy.

There is also no conflict with foreign policy because the defendant is a U.S. citizen. *See Kiobel* 133 S.Ct. at 1673-74 (Breyer, J., concurring) (where defendant is American national extraterritorial application of ATS would not conflict with "*Sosa*'s basic caution," "to avoid international friction."). Even if foreign nations

have grounds to object to ATS claims involving conduct abroad by foreign nationals, the opposite is true with respect to claims against U.S. nationals. In such cases, as the U.S. Government noted, *failure* to allow ATS claims would create the perception that the U.S. is a safe haven and open us to international censure.

Chiquita suggests the two claims that require state action raise foreign policy concerns. AOB 29. As to the other claims, this argument is irrelevant. Regardless, consideration of claims that require state action will not cause foreign policy problems or a clash of laws. Collaborating with the AUC was illegal in Colombia, and the U.S. Government and Colombian tribunals have concluded that state officials played an integral role in the paramilitary organizations and the offenses alleged here. SOF 10-13 & Section II.B.2.d. Courts have considered the foreign policy impact of cases involving state action allegations under the political question doctrine, and have declined to dismiss similar ATS cases on that basis. Order 32-33 (collecting cases); Section II.B.2.d.

II. Plaintiffs Plead Cognizable ATS Claims.

A. In Considering Common Allegations, the MDL Court Did Not Abuse its Discretion.

In a meticulous opinion of nearly 100 pages, the district court evaluated seven separate complaints, most over 200 pages long. Consistent with the traditional role of an MDL court, the district court evaluated the common

allegations against Chiquita and found them adequate. Order 39-43, 47-49, 53-55, 70-78. *See e.g.*, *In re Nuvaring Prods. Liab. Litig.*, No. 4:08-MD-1964-RWS, 2009 WL 4825170, at *2-3 (E.D. Mo. Dec. 11, 2009) (MDL promotes judicial economy and efficiency by resolving "matters common among all cases.").

The court observed that "to summarize each plaintiff's allegations would be impractical given the number of plaintiffs" and that for the purposes of the opinion, it would summarize only those of representative plaintiffs. Order 6. The district court demonstrated that representative plaintiffs' claims were sufficiently pled, *e.g.*, *id.* 6-8, 73, and concluded that at this stage of the litigation, the cases could proceed. *Id.* It emphasized, however, that each Plaintiff "must ultimately prove sufficient facts surrounding the deaths of each victim." *Id.* 6 n.4. In adopting this common-sense case management approach to the pleadings, the district court did not abuse its discretion.

Chiquita argues that the MDL court "was required to dismiss all claims that failed to allege facts sufficient to state a cause of action." AOB 31; *see also id.* 47. But it concedes that the district court was *not* actually required to individually review the claim of every Plaintiff. *Id.* 31 n.6. Chiquita's assertion that the court must "winnow the claims," *id.*, ignores the MDL court's role.

First, Chiquita was correct to concede that the court need not conduct a claim-by-claim review. That would defeat the point of coordination: to promote efficiency by resolving "common" issues. *Nuvaring*, 2009 WL 4825170, at *2-3. MDL courts therefore regularly refuse to issue "case-specific rulings" on the sufficiency of individual plaintiffs' allegations. *Id.* (collecting cases); *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, MDL 2272, 2012 WL 3582708 at *3-4 (N.D. Ill. Aug. 16, 2012). If dispositive motions concerning the sufficiency of plaintiff-specific allegations are to be heard, that is for the transferor court. *Id*. at *3-4.

Second, Chiquita's suggestion that the court could have directed Plaintiffs to drop claims that did not meet the court's criteria is unavailing. AOB 31, n.6. Chiquita never asked the court to do so, and it was not *required* to do so. MDL courts have broad discretion in managing pre-trial matters in coordinated complex litigation. *Ctr. for Bio. Diversity*, 704 F.3d at 432. There would be little reason to dismiss or add detail to individual claims at this point, since "clean[ing]-up the pleadings in the individual cases" is not the MDL court's role. *Nuvaring*, 2009 WL 4825170, at *3.[8]

[8] In criticizing the district court for considering representative plaintiffs, Chiquita also concedes that its argument does not apply to class actions, AOB 30; it is thus

Third, interlocutory appeal is not the place to resolve individual claims; it is reserved "for situations in which th[is Court] can rule on a pure, controlling question of law." *McFarlin v. Conseco Servs.*, 381 F.3d 1251, 1259 (11th Cir. 2004). This is especially true since, as Chiquita concedes, AOB 31, n.6, Plaintiffs can amend. *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 637, 644 (E.D. Pa. 2010).

In sum, the MDL court managed the case appropriately; the court certainly did not abuse its discretion. But even if the Court were to find otherwise, and further find individual pleadings insufficient, it should remand so plaintiffs may amend and allow adjudication of the merits of class certification – as Chiquita itself suggests. AOB 30-31 & n.6; *see In re South Africa Apartheid Litig.*, 617 F. Supp. 2d 228, 276 (S.D.N.Y. 2009) (allowing amendment where related case successfully pled claims).

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irrelevant to the class action complaint. *Smith v. GTE Corp.*, 236 F.3d 1292, 1304 n.12 (11th Cir. 2001) (holding class actions treated as such prior to certification).

B. Plaintiffs Sufficiently Allege that the AUC Violated International Law.

1. Crimes against humanity do not require state action.

Chiquita initially conceded that crimes against humanity (CAH), like war crimes, do not require state action, *see* Doc. 93 at 57, but has reversed itself. AOB 20. Chiquita was right the first time. *Kadic v. Karadzic*, 70 F.3d 232, 236, 239-40 (2d Cir. 1996); *Doe v. Drummond Co.*, No. 2:09-CV-01041, 2010 WL 9450019, *9-10 (N.D. Ala. Apr. 30, 2010) ("*Drummond II*") (noting contrary argument "can be quickly dismissed").

In this Circuit, CAH requires only "a widespread or systematic attack directed against any civilian population." *Cabello*, 402 F.3d at 1161. Chiquita argues that state action was assumed in *Cabello* because the defendant was an army officer, but *Cabello* does not indicate that such a requirement exists. As the Ninth Circuit recognized, CAH "include[s] non-State organizations," noting that this modern consensus in international law was "precipitated by the involvement of non-State militias and criminal syndicates" (like the AUC). *Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 741 (9th Cir. 2008). No court has held otherwise.

Chiquita claims that the Nuremberg CAH formulation applied only to state actors, but Plaintiffs easily meet the Nuremberg definition of CAH, which actually

makes no reference to state action.[9] Regardless, the international community has now uniformly rejected the notion that only state actors can commit CAH.

Instead, some authorities have included in CAH the element of a state or organizational policy, which does not require state action. *See*, *e.g.*, David Luban, *A Theory of Crimes Against Humanity*, 29 Yale J. Int'l L. 85, 97 (2004). As Luban notes, the International Criminal Court's (ICC) CAH definition requires an "attack" pursuant to "a State *or organizational* policy," but neither the International Criminal Tribunal for Yugoslavia (ICTY) nor the International Criminal Tribunal for Rwanda (ICTR) imposes this as an element of CAH. *Id.* at 96-97 (emphasis added). And the ICC's requirement can be satisfied by a non-spontaneous attack committed by "any organization with the capability to commit a widespread or systematic attack against a civilian population." *Situation in the Republic of Kenya*, Case No. ICC-01/09-19, Decision Pursuant to Article 15 ¶84-85 (Mar. 31, 2010). Thus, if any organizational policy requirement remains, it is minimal and easily satisfied here.

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[9] Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) art. 6, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 280. The Nuremberg CAH definition does include a war nexus that no longer applies, *see* M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 Transnat'l L. & Contemporary Problems 199, 211 (1998), but which Plaintiffs meet here in any event.

Against the weight of all of this authority, Chiquita cites statements by Professors Schabas and Bassiouni. Their position – which neither disrupts the uniformity of nor creates customary international law – is best understood as dissatisfaction with the direction international law has taken. In fact, Prof. Bassiouni signed an *amicus* brief during the Second Circuit hearing of *Kiobel* providing a list of elements for CAH that *excludes* state action, and expressly discounting state or organizational policy as a CAH element. Br. of *Amici Curiae* International Law Scholars Cherif Bassiouni, et al. in Support Of Plaintiffs-Appellants-Cross-Appellees and in Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co*., No. 06-4876, at 3 (2d Cir. July 17, 2007). Although they may wish state action were an element of CAH, it is not.

2. The district court correctly held that Plaintiffs have adequately alleged state action.

The district court correctly found that Plaintiffs adequately alleged state action because the AUC had a symbiotic relationship with Colombian state actors regarding the abuses at issue. Order 36-45, 85-86.

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 "allege a close relationship between the government and the AUC that 'involves the torture or killing alleged in the complaint.'" Order 37-38 (quoting

Romero, 552 F.3d at 1317). Plaintiffs alleged that AUC violence was part of the government's war strategy, *id.* 39, and 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." SOF 8-10.

As part of this strategic collaboration, "the government and the AUC jointly planned and carried out specific attacks against civilian villages in Urabá." Order 43. The complaints thus "link this close relationship to the campaign of torture and killing in the banana-growing regions – i.e., the subject of the complaints." *Id.* This is sufficient to establish a "symbiotic relationship" between the Colombian government and the AUC for the purposes of the violence alleged. *Id.* 43-44.

Chiquita proposes a new requirement: that there must be state involvement in each particular killing. AOB 32-33. According to Chiquita, faced with allegations that state actors developed a joint strategy with, and provided support to, the direct perpetrators of a mass crime encompassing the killings at issue, courts must pretend there was no state action just because state officials often, but not always, left the targeting of individual victims to their partners. *See* AOB 32-35. That is not the law in this Circuit, and the district court correctly rejected it. Order 38.

a. Defendants attempt to rewrite the symbiotic relationship test.

Defendants rely on three cases to support their proposed heightened standard. But *Romero* and *Sinaltrainal* apply the same standard as the district court; *Mamani* does not even mention the state action test.

Chiquita faults the district court for considering whether "the symbiotic relationship between the paramilitaries and the Colombian military had anything to do with the conduct at issue," AOB 33 (quoting Order 38), but this directly quotes *Romero*. 552 F.3d at 1317. Chiquita claims that because the "conduct at issue" in *Romero* was the killing of union leaders, the government must be specifically *involved* in each killing. AOB 33. But this Court found no symbiotic relationship for the purpose of the *Romero* killings because plaintiffs had alleged only a "general relationship" between the state and the paramilitaries, without allegations that it extended to violence against union leaders. *Romero*, 552 F.3d at 1317. Here, Plaintiffs allege far more than a "general relationship," Order 37-38; the relationship "involves the torture or killing alleged in the complaint," *Romero*, 552 F.3d at 1317, because the AUC campaign of terror that included the killings at issue here was joint military-AUC strategy.

Chiquita's reliance on *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009), fares no better. AOB 36. In *Sinaltrainal*, this Court quoted the same

standard from *Romero* discussed above and applied by the district court here. *See* 578 F.3d at 1266 (quoting *Romero*, 552 F.3d at 1317); Order 37-38. The *Sinaltrainal* plaintiffs' allegations amounted to no more than generalized claims that the state tolerated and cooperated with the paramilitaries; this Court merely found that a "formulaic recitation . . . that the paramilitary forces were in a symbiotic relationship and were assisted by the Colombian government, absent any factual allegations to support this legal conclusion, is insufficient." *Sinaltrainal*, 578 F.3d at 1266-67 (internal quotations omitted). The district court here expressly distinguished *Sinaltrainal*, finding Plaintiffs' "detailed allegations" to be adequate. Order 44-45.

In *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2008), state action was not even in question; the defendant was a government official and the killings were committed by government soldiers. *Id.* at 1154. The Court discussed the standard for holding the defendant liable for the soldiers' acts, not what is required to show state action. *Id*.

Defendants ignore *Burton v. Wilmington Parking Authority*, 81 S. Ct. 856, 365 U.S. 715 (1961), the seminal "symbiotic relationship" case. There, "[t]he State ha[d] so far insinuated itself into a position of interdependence with" a restaurant "that it must be recognized as a joint participant in the challenged activity." *Id.* at

725. There was no allegation 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 wanted the restaurant to discriminate, whereas AUC violence against civilians was substantially the *point* of Colombian officials' cooperation.

Thus, Chiquita cannot support its illogical claim that a symbiotic relationship directed towards committing the kinds of abuses at issue here is insufficient, nor that state officials must directly participate in each murder. Indeed, their proposal would eviscerate the symbiotic relationship test, which rests on the understanding that where the state and a private actor establish a mutually beneficial relationship, private conduct that is endorsed by the state or furthers that relationship constitutes state action. *See Burton*, 365 U.S. at 724-25.

Here, the AUC killed civilians, implementing the Colombian military's strategy in a symbiotic relationship with the state; the AUC's actions are inextricable from Colombian government involvement.

b. Defendants' proposed rule ignores the mechanisms of mass atrocity in Colombia.

Colombia court judgments confirm Plaintiffs' allegation that the AUC operated as a state actor. *See* SOF 9-10. Indeed, the court in *Del Río Rojas* found the military-AUC relationship to be so close that it convicted a banana region military commander of a homicide committed by the AUC under a command theory of responsibility. Mot. for Judicial Notice Ex. A at 4, 20, 31; Ex. B at 2, 6, 9.

Chiquita's proposed standard is carefully crafted to avoid recognizing the ways in which the military and AUC cooperated. The *Del Río Rojas* court noted that joint military-paramilitary groups were structured hierarchically, and that lower-tier paramilitary fighters were entrusted to carry out violent acts as a part of the general campaign without requiring specific authorization from the leaders. *Id.* Ex. A at 24, 25; Ex. B. at 6-7. Thus it was "absurd" to expect that the leaders would issue direct written orders for specific act of violence; "this kind of organization does not function in that way." *Id.*

Nothing in international law or the law of this Circuit prevents the Court from recognizing the realities of state involvement in AUC violence.

c. Defendants do not challenge Plaintiffs' other state action theories.

For state action, courts may look to agency principles and 42 U.S.C. § 1983 jurisprudence. *E.g. Kadic*, 70 F.3d at 245; *See* Pls.' Opp'n to Mot. to Dismiss, Doc. 111 (Aug. 19, 2008) at 56-65 (Plaintiffs alleged state action under a number of theories).

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*., 95 S. Ct. 449, 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*, 101 S. Ct. 183, 449 U.S. 24, 27-28 (1980); *Adickes v. S.H. Kress & Co.*, 90 S. Ct. 1598, 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*, 402 F.3d at 1159 (citing *Halberstam v. Welch*, 705 F.2d 472, 481 (D.C. Cir. 1983)).

The district court considered, and Chiquita challenges, only Plaintiffs' symbiotic relationship argument. Thus, even if this Court agrees with Chiquita, remand would be warranted to consider Plaintiffs' other theories.

d. Application of the symbiotic relationship test does not impinge on U.S. foreign policy.

Defendants argue that any state action claim not involving direct state participation in each abuse inherently impinges on the political branches' conduct of foreign affairs. AOB 37. Not so.

First, Chiquita's premise that the district court "allows a jury to sit in judgment of every aspect of the Colombian government's dealings with the AUC," *id.*, is wrong. State action is based on government officials' collaboration in the pattern of abuses at issue. Section II.B.2.

Second, the U.S. itself has repeatedly called attention to collusion between Colombian officials and paramilitaries.[10] Nor could the case conflict with official Colombian policy. Collaborating with the AUC was illegal in Colombia; the Colombian government has prosecuted officials for doing so. Colombian courts have found that the AUC served as an extension of state policy in Urabá during the relevant period and convicted paramilitary leaders and state officials. *See*, *e.g.* SOF 9-10. While president, Álvaro Uribe voiced support for extraditing Chiquita's

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[10] *See*, *e.g.*, U.S. State Dep't 2001 Colombia Country Report ("Members of the security forces collaborated with paramilitary groups that committed abuses . . ."); U.S. State Dep't 1999 Colombia Country Report ("Credible allegations of cooperation with paramilitary groups, including . . . direct collaboration by members of the armed forces, in particular the army, continued.") All Colombia Country Reports are available at http://www.state.gov/g/drl/rls/hrrpt/index.htm.

officers and directors, and the current President, Juan Manuel Santos, has publicly acknowledged government responsibility for paramilitary massacres.[11] Neither the United States nor Colombia has objected to this case. Chiquita fails to cite any country's policy that adjudicating this case could limit.

Third, this Court cannot dismiss under any recognized doctrine. Chiquita does not invoke the political question or act of state doctrines; tort suits rarely implicate them, even when they involve human rights claims that may touch on politically sensitive issues. *E.g. Mamani*, 654 F.3d at 1151 n.4 (rejecting political question objection to suit against former Bolivian head of state for actions while in office); *Kadic*, 70 F.3d at 249-50 (finding justiciable case by victims of Serb atrocities against President of the self-proclaimed "Republika Srpska," who was served while in the United States as a United Nations invitee); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1471-72 (9th Cir. 1994) (claims against a former head of state and U.S. ally were justiciable). As the district court

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[11] *See, e.g., Colombian leader favors extraditing Chiquita execs*, CNN.com, Mar. 17, 2007, *at* http://www.cnn.com/2007/WORLD/americas/03/17/colombia.chiquita/; Librardo Cardona, *Colombia's Santos apologizes for 2000 massacre*, AP, July 8, 2011, *at* http://www.utsandiego.com/news/2011/Jul/08/colombias-santos-apologizes-for-2000-massacre/.

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recognized, "[m]any courts have adjudicated ATS claims based on allegations involving significant foreign-relations issues, some involving allegations nearly identical to those here," even where, unlike here, the Government has raised foreign policy concerns. Order 31-33 (collecting cases).

Thus, Chiquita attempts to create another new rule by misconstruing language in *Sosa* and *Mamani* advising courts to exercise caution when deciding whether to *recognize new causes of action*. *Sosa*, 542 U.S. at 727; *Mamani*, 654 F.3d at 1152. But Chiquita's argument is not about whether the claims at issue (CAH, war crimes, etc.), "may give rise to a cause of action under the ATS." *Id*. They indisputably do.

The alleged past ties between Santos and Uribe and the AUC create no basis to dismiss. AOB 24, 37. Sitting heads of state may have immunity, but Chiquita does not. As *Mamani* and *Marcos* make clear, even suits *against* former heads of state are justiciable; here, neither Santos nor Uribe is a defendant. Moreover, "the avoidance of embarrassment" to the Executive Branch or a foreign government is not a basis to dismiss, absent any applicable doctrine. *W. S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 110 S. Ct. 701, 706, 493 U.S. 400, 408 (1990). Regardless, if evidence of Santos's and Uribe's actions is a concern, the proper course would be to exclude it, not to bar Plaintiffs' claims.

Chiquita's assertion that Plaintiffs might seek discovery from the Colombian President or other government officials, AOB 4, likewise fails; if particular discovery is problematic, the district court can preclude it. Indeed, an effort to obtain discovery from Uribe in another case was rejected. *Giraldo v. Drummond Co. Inc.*, 493 Fed.Appx. 106 (D.C. Cir. 2012). That is not a reason to dismiss.

In short, since the United States and Colombia have already recognized state involvement in AUC atrocities, there is no reason the district court cannot consider that issue with respect to the facts at bar.

3. War crimes and crimes against humanity are properly pled.

a. The district court correctly applied this Circuit's precedent to find that the AUC committed the abuses because of the civil war.

Abuses "perpetrated because of ongoing civil war or in the course of civil war clashes" are war crimes. *Sinaltrainal*, 578 F.3d at 1267. The district court recognized that "this requires more than merely alleging that the offenses occurred 'during' an armed conflict." Order 46 (quoting *Sinaltrainal*, 578 F.3d at 1267). Accordingly, it required Plaintiffs to "allege a nexus between the AUC's alleged violence and the Colombian civil war." *Id.*

After carefully reviewing the allegations, the district court found Plaintiffs "sufficiently alleged that the AUC committed the alleged violence because of, and

not merely during, the civil war." Order 47-50. This finding was based on a host of allegations that the AUC killed decedents "for the purpose of furthering its military objectives," *id.* 49, pursuant to a well-documented strategy of targeting civilians to discourage support for the guerrillas. *Id.* 49-55.

In claiming that Plaintiffs' "fundamental theory" is that the murders and torture were "carried out to further *Chiquita's* business interests – not the [AUC's] war aims," AOB 42 (emphasis in original), Chiquita simply ignores these allegations. The fact that Chiquita's business interests converged with the AUC's war strategy and objectives does not mean that the AUC did not commit war crimes.

Chiquita's reliance on *Sinaltrainal* is misplaced. *Id.* There, the Court found, based on the allegations in that case, that "there is *no suggestion* the plaintiffs' murder and torture was perpetrated because of the ongoing civil war or in the course of civil war clashes." *Sinaltrainal*, 578 F.2d at 1267 (emphasis added). The district court correctly held that the nexus missing in *Sinaltrainal* is present here. Order 47-50; *see also Drummond II*, 2010 WL 9450019 at *8 (finding war crimes adequately pled where company paid AUC for security because "[t]he AUC had intentions of fighting FARC" in that location).

Indeed, although Plaintiffs have adequately alleged that the AUC committed

these abuses in *furtherance* of war objectives, Order 49, this is not required. Accordingly, the court in *In re XE Services Alien Tort Litig.* – applying *Sinaltrainal* – rejected defendants' position that a war crime cannot be committed for economic or ideological reasons and must directly further a military objective. 665 F. Supp. 2d 569, 585-87 (E.D. Va. 2009). As the court noted, defendants' position is "so narrow" that it would exclude even the paradigmatic war crime: abuse lacking any legitimate military goal. *Id.*

b. Plaintiffs are not barred from asserting war crimes and crimes against humanity claims simply because there are many victims.

Defendants argue that Plaintiffs' war crimes and CAH claims should be barred because there are too many victims. AOB 44-5. But those complicit in mass crimes are ordinarily considered *especially* culpable. It is hardly a reason to find Chiquita immune. Order 33.

Chiquita cites *Sinaltrainal*, wherein this Court rejected the claim that an abuse is actionable if it "merely occur[ed] during an armed conflict" because that would open the courthouse doors too wide. *Sinaltrainal*, 578 F.3d at 1267. This was why the Court adopted the "in the course of" or "because of" standard. *Id.* The Court did not suggest that abuses meeting that standard could be dismissed simply because they were numerous. *See id.*

Chiquita wrongly suggests the district court's ruling permits all victims of the Colombian civil conflict to bring war crimes claims against Chiquita. AOB 44-5. In fact, while the AUC was present throughout the country, the order below was restricted to "torture and killing in the banana-growing region" during the period when Chiquita supported the AUC. *See e.g.* Order 6, 38-39, 73. And the court expressly noted that "any plaintiff whose relative was in fact killed solely for personal reasons" has no war crimes claim. Order 50, n.53.[12]

Defendants argue that Plaintiffs must allege something more than that the killings were committed as part of the AUC's war strategy. AOB 44. But such murders are the very definition of killings committed because of or in the course of hostilities.

Chiquita's claim that *Sinaltrainal* bars Plaintiffs' CAH claims is also wrong. AOB 44. That case did not mention CAH at all.[13] And Chiquita's complaint that the order below allows too many CAH claims is particularly misplaced; a "widespread" attack is an *element* of crimes against humanity. *Cabello*, 402 F.3d at

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[12] Chiquita's notion that the *Sinaltrainal* plaintiffs could also be plaintiffs here, AOB 45, is untrue. Counsel in the D.C. case represented those plaintiffs; none resided in the banana areas that are the subject of this case and none are participants in this litigation.

[13] CAH does not require any nexus to war. *See supra* n.9; *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1353 (N.D. Ga. 2002) (collecting authorities).

1161. Although *Mamani* noted that the limits of "widespread" may be uncertain, that case concerned fewer than 70 deaths and 400 injuries. 654 F.3d at 1156. There is no doubt CAH was adequately pled here; the complaints allege thousands of killings. Defendants cannot simultaneously suggest that the attack is not sufficiently widespread and that there are too many victims.

In sum, the district court applied this Court's standards; potential liability may be large only because Chiquita contributed to massive harms. Courts, especially MDL courts, are well-equipped to handle complex lawsuits, Order 33, and have successfully adjudicated human rights cases involving thousands of victims. *Kadic*, 70 F.3d 232; *Marcos*, 25 F.3d at 1469. If an American company had knowingly supplied Zyklon B, could it argue that liability standards should be changed because the Nazis gassed so many victims?

c. Plaintiffs pled facts sufficient to establish claims for war crimes and crimes against humanity.

Chiquita's argument as to the sufficiency of individual war crimes and CAH pleading rehashes their "representative plaintiff" argument. AOB 47. An MDL court is not required, and is not a suitable forum, to review the sufficiency of each individual claim. *See supra* Section II.A.

While Chiquita focuses on the plaintiff-specific allegations, which are brief in some cases owing to the number of victims, it ignores the voluminous factual

allegations linking *all* the killings at issue to the furtherance of the AUC's war strategy. *See, e.g.*, Order 47-48.

Drummond II applied *Sinaltrainal* to allegations very similar to those here and found that they sufficiently stated war crimes claims. 2010 WL 9450019, **7-8. There, as here, plaintiffs alleged that the murders were committed in the course of the AUC's attacks on areas where the guerrillas had a foothold, that the AUC pursued a policy of murdering perceived guerrilla sympathizers, and that the decedents were among those killed in the AUC's war strategy of murdering civilians to terrorize the population and discourage support for guerillas. *Id.*; SOF 13-14.

Chiquita challenges the sufficiency of certain representative plaintiffs' allegations, AOB 46-47, but omits key allegations relied upon by the district court, including, for example: Jane Doe 4 was a community activist and member of one of the groups targeted by the AUC in their war against perceived FARC sympathizers; the relevant municipal representative confirmed in writing that Pablo Perez 50 "was murdered in a massacre carried out in the context of the internal armed conflict"; and Pablo Perez 60 was kidnapped by paramilitaries who demanded to know where he had weapons hidden. Order 48-49.

Plaintiffs allege facts linking many other individual killings to the war. *E.g.*, NJC ¶¶196-98 (John Doe 5 killed to dry up FARC's funding); *id.* ¶¶206-09 (John Doe 9 killed because AUC eliminated labor leaders to weaken FARC); VC ¶¶347-51 (Jose Lopez 46 killed for selling supplies to FARC); *id*. ¶¶442-45 (Jose Lopez 66 killed because he was identified as a FARC collaborator); DC ¶322 (Pablo Perez 63 assassinated for political reasons in context of armed conflict).

Chiquita challenges certain claims that they say appear to involve killings for personal reasons. But the district court held that the complaints "overwhelmingly assert allegations of crimes carried out in furtherance of the war," while cautioning, as noted above, that victims killed for personal reasons do not have war crimes claims. Order 50 n.53. This Court is hardly the place to answer that question with respect to each Plaintiff.

Defendants' CAH argument makes little sense. In the context of more than 4,000 murders, they suggest that the plaintiffs have not shown a "link" between their claims and "particular acts of [AUC] violence." AOB 46. But the killing of thousands of civilians *is* a crime against humanity – no "link" to additional violence need be shown. The district court was justified in concluding that the very

claims pled demonstrate a widespread or systematic attack on a civilian population. Order 53-55.[14]

C. Plaintiffs Provide Sufficient Basis For Holding Chiquita Liable.

The district court correctly held that Plaintiffs adequately alleged Chiquita's liability for aiding and abetting and conspiring in AUC violence. Order 68-81. The court cited detailed allegations that Chiquita acted with the purpose to facilitate the abuses alleged. *Id.* 70-76.

1. Plaintiffs need not allege that Chiquita knew about or specifically intended to facilitate each individual murder.

Chiquita claims that it cannot be held liable unless it specifically intended its payments to facilitate each *particular* murder. AOB 51-52. Thus, it asserts that an ATS defendant can only abet or conspire in individual killings, not a pattern of killings. The district court properly rejected such immunity for those who abet the worst kinds of mass atrocities. Order 33.

As a threshold matter, secondary liability standards in ATS cases are a matter of federal common law. *Cabello*, 402 F.3d at 1158-59 (applying *Halberstam,* 705 F.2d at 481, 487). This Court's reliance on common-law liability

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[14] Allegations concerning killings by the FARC are presented in only one of the complaints addressed in this brief and are addressed in the brief filed by Attorney Paul Wolf at 48-50.

is consistent with *Sosa*, which held that ATS causes of action derive from federal common law, 542 U.S. at 724, 732, and *Kiobel*, which held that the question in ATS cases is "whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law." 133 S. Ct. at 1666. Application of federal common law has been a longstanding practice in cases where international law supplies the primary rule, dating back to the 18th Century. *See Talbot*, 3 U.S. (3 Dall.) at 156 (applying common law principles of aiding and abetting and conspiracy).

Ultimately, the question matters little here, because Chiquita's argument that complicity in the AUC's war strategies is insufficient to link Chiquita to the activities alleged in the complaint is wrong as a matter of both international and domestic law.

a. Conspiracy

As this Court has held, conspiracy requires that "(1) two or more persons agreed to commit a wrongful act, (2) [the defendant] joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy." *Cabello*, 402 F.3d at 1159 (citing *Halberstam*, 705 F.2d at 481, 487).

Thus, Chiquita need not have intended each specific murder, it need only have agreed with the AUC to perform at least one unlawful act, and the individual abuses must have arisen out of the AUC's actions in furtherance of the shared goal. *Halberstam*, 705 F.2d at 481. International law likewise does not require intent that the co-conspirator commit a specific murder. *See Prosecutor v. Tadić*, No. IT-94-1-A, ¶ 220 Appeal Judgment (July 15, 1999).

b. Aiding and abetting.

Aiding and abetting does not require that a defendant have had knowledge of the exact injuries that would result from its participation. *See, e.g.*, *Halberstam*, 705 F.2d at 488 (defendant who abetted burglar liable for murder committed during burglary even though defendant did not know about or intend to assist with murder and knew only that perpetrator was "involved in some type of personal property crime at night"); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 586 (E.D.N.Y. 2005) ("It is not necessary that [plaintiffs] allege that Arab Bank either planned, or intended, or even knew about the particular act which injured a plaintiff."). Thus, the district court was correct in determining that, to allege *mens rea* for aiding and abetting liability, "Plaintiffs need not allege that Chiquita specifically intended that the AUC torture or kill the specific individuals alleged in the complaint . . . ." Order 69.

Chiquita's argument also conflicts with international law, and makes no sense in the context of mass atrocity. International tribunals since Nuremburg have regularly held abettors of mass crimes liable without requiring them to know the identity of, let alone have any intent toward or contact with, individual victims. *See, e.g., United States v. Flick*, 6 Trials of War Criminals Before the Nuremburg Military Tribunals 1217 (1947) (industrialist convicted for contributing money to an organization committing widespread abuses); *In re Tesch*, 13 Int'l L. Rep. 250 (Br. Mil. Ct. 1946) (conviction for supplying poison gas to a concentration camp). The ICTY has also rejected Chiquita's approach. "The aider-and-abettor does not need to know either the precise crime that was intended or the one that was actually committed; it is sufficient that he or she be aware that one of a number of crimes will probably be committed, if one of those crimes is in fact committed." *Prosecutor v. Blaškić*, Case No. IT-95-14-A, ¶50 (July 29, 2004).

Indeed, Chiquita's claim that one cannot abet a pattern of atrocity is particularly unpersuasive with respect to crimes against humanity, which is *defined* as a pattern of atrocity.

Mamani did not address the *mens rea* for aiding and abetting or conspiracy and held only that plaintiffs had not sufficiently alleged an ATS tort. 654 F.3d at 1155. The *dicta* Chiquita cites is inapposite. *Mamani* noted that the plaintiffs did

not allege any connection between the Defense Minister telling soldiers in helicopters where to fire and the deaths of plaintiffs' decedents. AOB 51-52 (citing 654 F.3d at 1154). Critically, no plaintiff alleged their decedent was killed from a helicopter. *See* 654 F.3d at 1158-59. Thus, *Mamani* merely suggested that *Iqbal* would bar liability based on the allegations in that case. *Id.* at 1153. It did not imply, as Chiquita's argument would require, that for example, the poison gas supplier in *Tesch* would be immune because camp guards chose who would be sent to the gas chambers.

Plaintiffs allege that Chiquita paid the AUC in order to benefit from a war strategy that involved the killings and torture alleged. As the district court found, that is sufficient.

2. Plaintiffs adequately allege the *mens rea* for aiding and abetting and conspiracy.

a. The *mens rea* for aiding and abetting is knowledge.

Although the district court correctly found Plaintiffs alleged purpose, it erred in requiring Plaintiffs to meet the purpose standard for aiding and abetting. Under this Court's ruling in *Cabello*, the *mens rea* for aiding and abetting is determined by federal common-law, and is knowledge. 402 F.3d at 1158-59. The district court departed from *Cabello*, and instead followed the Second Circuit in applying a *mens rea* of purpose, purportedly "derived from international law." Order 65 (citing

Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 252 (2d Cir. 2009)). The district court's assumption that this approach was *consistent* with *Cabello*, Order 67, conflated aiding and abetting and conspiracy, which are "different theories." *Cabello*, 402 F.3d at 1158. While *Cabello* held that conspiracy liability – which does not require substantial assistance – requires agreement in the wrongful act, *id.* at 1159, aiding and abetting requires only that the defendant "knew his actions would assist in the . . . wrongful activity." *Id.* at 1158. Thus the district court erred in applying a purpose standard to aiding and abetting.

Even if the district court were correct in looking to international law, it adopted the wrong standard. International law since Nuremberg makes clear that knowingly facilitating abuses is sufficient for liability. *See, e.g.*, *Flick*, 6 Trials of War Criminals at 1222 ("One who *knowingly* by his influence and money contributes to the support [of a violation of the law of nations] thereof must, under settled legal principles, be deemed . . . an accessory . . . ."); *Tesch*, 13 Int'l L. Rep. 250 (1947) (defendant acted "with knowledge" that gas would be used to kill prisoners). In fact, in the very case *Talisman* cites to justify a purpose standard, Puhl was convicted because he "*knew* that what was to be received and disposed of was stolen property and loot taken from the inmates of concentration camps." *United States v. Von Weizsaecker (The Ministries Case)*, 14 Trials of War

Criminals at 620 (1949) (emphasis added). The Tribunal determined that Puhl's actions did constitute a crime:

> It would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim . . . he who *knowingly* took part in disposing of the loot must be exonerated. . . .

Id. (emphasis added).

Similarly, at the ICC, if a listed crime is committed by a group acting with a common purpose, anyone who contributes to the commission of that crime is responsible if they have "knowledge" of the group's intent. Rome Statute of the International Criminal Court art. 25(3)(d)(ii), July 17, 1998, 2187 U.N.T.S. 90.

The ad hoc international criminal tribunals agree. *See Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Judgement, ¶¶139-41 (Apr. 19, 2004); *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-13-I, Appeals Judgement, ¶501 (Dec. 13, 2004).[15] This Court should apply the established Eleventh Circuit and international law knowing, substantial assistance standard.

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[15] The ICTY's decision in *Prosecutor v. Perišić*, Case No. IT-94-1-A ¶26 (Feb. 28, 2013), which applies a "specifically directed" standard to the *actus reus* of aiding and abetting, cannot change the settled *mens rea* standard under customary international law for aiding and abetting and may soon be overturned. *See Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Transcript, 440-51 (Mar. 13, 2013) (prosecution challenging *Perišić* standard because, *inter alia*, it is a misinterpretation of the Appeals Chamber's jurisprudence and a "new . . . element .

b. The district court correctly found that Plaintiffs' "voluminous factual allegations" adequately alleged purpose.

The district court held Plaintiffs to a high standard for aiding and abetting and conspiracy liability, requiring Plaintiffs to allege "that Chiquita intended for the AUC to torture and kill civilians in Colombia's banana-growing regions." Order 69, 80-81. The district court found that all but one complaint contained "detailed and voluminous factual allegations [that] meet this demanding pleading standard." *Id.* 70. For example, the district court relied on allegations that Chiquita approached the AUC to initiate their relationship; the AUC informed Chiquita executives that the money it received would be used to finance violence; Chiquita made substantial payments to the AUC after the meeting between Chiquita executives and the AUC; Chiquita helped the AUC import weapons; a Chiquita manager worked with the AUC to establish the *convivir* system to hide the payments; a goal of the collaboration was to prevent work stoppages at the banana plantations (specific examples included that a Chiquita employee was present

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. . not found in customary international law"). Regardless, Plaintiffs here can meet *Perišić*; unlike in that case, Chiquita's agents were present when the deal to for Chiquita to support the AUC's war strategy was struck, *cf. Perišić* ¶39; Chiquita and its high-level executives had the final say in supporting the AUC, *cf. id.* ¶49-50; the AUC was an inherently criminal organization created to pursue war aims through illegal methods, *cf. id.* ¶53; and Chiquita deceitfully recorded its payments in order to conceal their illegal aims.

when paramilitaries arrived to summarily execute a troublemaker who slowed down the production line); and Chiquita utilized the AUC to quell labor unrest and notified the AUC of "security problems." *Id.* 69-76. After a thorough analysis, the district court concluded that the "allegations are neither 'vague' nor 'conclusory.'" *Id.* 73.

Plaintiffs need only plead enough facts to "nudge their claims across the line from conceivable to plausible," *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 550 U.S. 544, 552-55, 572-73 (2007); *i.e.* that permit a "reasonable inference" that defendant is liable. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 556 U.S. 662, 678 (2009). Plaintiffs easily meet this standard.

Chiquita wrongly asserts that Plaintiffs offered no well-pled facts in support of their allegation that Chiquita purposefully assisted the AUC with arms smuggling, AOB 55. In fact, Plaintiffs allege that Chiquita directly facilitated the illegal transfer of arms shipments to the AUC through the use of Banadex's port, equipment, storage facilities and employees. SOF 12-13.[16] These well-pled facts

[16] Since filing their amended complaints, Plaintiffs have obtained new documents and information regarding Chiquita/Banadex's complicity in providing weapons to the AUC and could amend their complaints to provide even greater detail based upon summaries of statements given to Colombia's Fiscalia from Banadex's former head of security and another Banadex security officer who participated in

further demonstrate that Chiquita assisted the AUC, Order 73, 74-75, with intent to further the AUC's violence.

Moreover, Chiquita's claim that it has been cleared of all wrongdoing in the transfer of munitions from the *Otterloo* through its private port, AOB 25, is false. The documents Chiquita submitted below describe the participation of several Banadex representatives, and one indicted defendant is described as working in the service of Banadex. *See* Doc. 93 Ex. C at 2. And the Colombian public prosecutor's investigation into the criminal responsibility of Chiquita's executives for supporting the AUC remains open.[17]

Chiquita asks this Court to ignore all of Plaintiffs' allegations showing purpose and to instead credit its claim of duress. AOB 55. Chiquita misconstrues the *Iqbal* standard. Although given the detailed facts alleged here, there is nothing "obvious" about Chiquita's "alternative explanation"; *Iqbal* does not require dismissal even when there is an "obvious alternative explanation," or even one that is "more likely" than that Plaintiffs allege. AOB 53-54. *Iqbal* explicitly held that

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the arms shipments, and confirmation from El Alemán. See Declaration of Jonathan C. Reiter dated July 26, 2013.

[17] Moreover, as the district court noted, the documents Chiquita cites are "not inconsistent" with Plaintiffs' allegations and would not preclude Plaintiffs from demonstrating Chiquita's involvement in AUC arms shipments. Order at 78 n.89.

"[t]he plausibility standard is not akin to a 'probability requirement' … when there are well-pleaded factual allegations, a court should assume their veracity." 556 U.S. at 678. Dismissal is warranted only where an "obvious alternative explanation" renders Plaintiffs' claim *implausible*. *Id.* 681-82. Here, duress is not an obvious or plausible alternative explanation, especially in light of Plaintiffs' allegation that *Chiquita* initiated the deal to support the AUC.

Regardless, Chiquita's arguments are inapposite. It relies on a statement in the Factual Proffer supporting its guilty plea, appended to a complaint. AOB 54. But even for that complaint, attaching a document authored by a defendant does not bind a plaintiff to the defendant's self-serving statements. *See, e.g.*, *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 455 (7th Cir. 1998); *Gant v. Wallingford Bd. of Educ*., 69 F.3d 669, 675 (2d Cir. 1995).

Chiquita's cite to an out of context excerpt from the Government's Sentencing Memorandum, which no Plaintiff attached to their complaint, is also untenable. Chiquita highlights the statement that Chiquita was not charged with supporting the goals of the AUC, AOB 9-10, 54 n.11, but that is unsurprising because Chiquita's motivation was not an element of the crime. Sentencing Mem. at 15-16. The Government went on to explain that Chiquita's "purported rationale for the payments begs serious questions" and that "although defendant Chiquita

would later claim that it was the victim of AUC extortion, the Company did not report the 'extortion' to any United States or Colombia authorities for several years." *Id*. at 14-16. The Sentencing Memorandum provides no support to Chiquita.

Chiquita points to the allegation that it previously aided the FARC as undermining the plausibility of its support for the AUC. AOB 54. Not all the complaints, however, contained that allegation. It is irrelevant to the others. Moreover, no complaint alleges that Chiquita actually supported both sides. At most, they allege Chiquita paid the FARC to use its power for Chiquita's benefit when the guerrillas held sway, and then joined forces with the AUC as the paramilitaries came to power. Chiquita simply switched sides.[18]

Chiquita cites isolated examples in a few complaints to argue that Plaintiffs fail to allege a nexus in time or place to Chiquita. That argument is misplaced.[19]

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[18] Regardless, plaintiffs may plead mutually inconsistent but separately plausible allegations. Fed. R. Civ. P. 8(d)(3); *e.g.*, *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1273-74 (11th Cir. 2009).

[19] Chiquita criticizes one plaintiff as asserting a claim occurring in 2011. AOB 56. That is a typo: the forced disappearance occurred in 2001. Similarly, Plaintiffs in Doc. 287 ¶¶39-41 erroneously listed the date of birth instead of the date of death for three decedents who were killed in 1999, 2003, and 2004, respectively. Chiquita first raised these issues on appeal and Plaintiffs will make these corrections when the case is remanded. Chiquita criticizes another complaint for

The majority of allegations demonstrate a clear nexus. Order 46-49. As noted above, MDL courts and interlocutory appeals are not the *fora* to resolve individual claims.

Finally, Chiquita's reliance on *Mamani* and *Talisman* is unavailing. The allegations in *Mamani* were precisely the kind of conclusory statements held to be deficient in *Iqbal*, 654 F.3d at 1153-55; they had nothing like the level of detail alleged here. Moreover, *Mamani* focused on the fact that the allegations never provided "more than a sheer possibility" of misconduct, because they were fully consistent with *lawful* behavior. *Id.* at 1153-54. Similarly, *Talisman*, which decided a motion for summary judgment after discovery, concluded that none of the conduct "was inherently criminal or wrongful." 582 F.3d at 261.[20] Here, unlike *Talisman* or *Mamani*, Plaintiffs allege inherently criminal acts: Chiquita made payments to the AUC that were illegal under both U.S. and Colombia law, and assisted the AUC in smuggling arms and ammunition into Colombia.

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failing to provide geographic information, Doc. 449 ¶¶31-956, but that information is provided elsewhere in the complaint. *Id.* ¶10.

[20] ATS liability could not be established by knowledge of the abuses "coupled only with such commercial activities as resource development." *Id*. The court concluded that most allegations besides the payment of royalties to Sudanese – which was not wrongful per se – had in fact been carried out by actors other than Talisman. *Id.* at 253.

III. Plaintiffs Have TVPA Claims Against the Individual Defendants.

Mohamad v. Palestinian Authority forecloses Plaintiffs' TVPA claims against the corporate defendants. 132 S. Ct. 1702, 1708 (2012). Plaintiffs' TVPA claims against individual defendants are unaffected.

CROSS APPEAL

IV. International Law Does Not Bar the Application of State Tort Law.

As detailed above, Chiquita is a U.S. company sued for its illegal payments to a Foreign Terrorist Organization; payments it approved from the United States. Courts hearing tort claims involving more than one jurisdiction apply a choice-of-law analysis and sometimes apply substantive forum law to harms occurring abroad.

The district court held that international law prohibits the application of state law because Plaintiffs did not allege that the AUC's killings had "a substantial effect within the [relevant] states" and the state law claims at issue are not "matters of universal concern." Order 87. Plaintiffs can actually show both of these things, but need not show either. Applying established choice-of-law principles to state-law claims does not violate international law.

Although it is premature to determine what law applies to each issue since no choice-of-law motion has been filed, it was error to hold categorically that the laws of the various states cannot apply.

A. International Prescriptive Jurisdiction Limits Do Not Apply.

The district court mistakenly relied on sections 402 and 404 of the Foreign Relations Restatement. *See* Order 86-7. But those sections do not apply to tort law; "prescriptive jurisdiction" limits apply *only* to "public law – tax, antitrust, securities regulation, labor law, and similar legislation." Foreign Relations Restatement pt. IV, ch. 1, subch. A, Intro. Note. There is a domestic nexus to the case sufficient to provide jurisdiction to adjudicate torts, so long as there is personal jurisdiction. *Id.* § 421.

This does not mean that the concerns underlying prescriptive jurisdiction are ignored when courts hear tort claims. Rather, "the question of jurisdiction to prescribe resembles questions traditionally explored under the heading of conflict of laws." Foreign Relations Restatement pt. IV, ch. 1, subch. A, Intro. note. Courts hearing a tort claim arising at least in part abroad apply ordinary choice-of-law principles to determine whether the law of the forum or the law of site of the injury applies. Restatement (Second) of Conflict of Laws ("Conflicts Restatement") § 10 & cmt. d & reporters' notes (1971) (noting that the Restatement's choice-of-law

rules "are generally applicable to cases with elements in one or more foreign nations"). Every U.S. state has established choice-of-law rules, and most, including those of all of the relevant jurisdictions, allow courts to apply their law to torts that occur outside their territorial jurisdiction. The district court erred by ignoring controlling choice-of-law rules.

B. If Needed, There Is Prescriptive Jurisdiction.

If prescriptive jurisdiction is necessary, there are four bases for it here: Chiquita's U.S. citizenship, substantial conduct in the United States, substantial effect within the United States and offenses that confer universal jurisdiction.

Although Chiquita's acts largely occurred in the United States, a nation may prescribe law for its nationals, even abroad. Section I.B.2. And as the district court correctly noted, states' right to prescribe is similar to the United States'. Order 87; *Skiriotes v. Florida,* 61 S. Ct. 924, 927, 929, 313 U.S. 69, 73, 77 (1941). At a minimum, this means that New Jersey or Ohio law may apply to any acts by Chiquita abroad.

A nation also has prescriptive jurisdiction with respect to conduct taking place "in substantial part" within its territory. Foreign Relations Restatement § 402(1)(a). Chiquita officials in the United States gave prior approval to and subsequently ratified illegal payments to paramilitary death squads.

Additionally, certain egregious conduct – including war crimes – triggers "universal jurisdiction" and may be adjudicated anywhere. Foreign Relations Restatement § 404. This reflects the international community's determination that some wrongs are so intolerable that *every* state has sufficient interest in their punishment to apply its own law. *Id.* cmt. a.

The district court acknowledged this, yet concluded that ordinary torts like battery are not of universal concern. Order 87. But what matters is that the underlying atrocities *are*, since international law leaves the means of its enforcement to domestic law. *E.g. Flomo v. Firestone Nat. Rubber Co., LLC,* 643 F.3d 1013, 1020 (7th Cir. 2011); *Kadic,* 70 F.3d at 246.

Last, Chiquita's conduct had substantial effects within the entire United States, and thus within the relevant states. Supporting the AUC was a federal crime precisely because of the harm it inflicted on national security, foreign policy or the economy.

C. International Law Permits Courts Hearing Tort Cases to Apply Forum Law.

Courts hearing tort cases arising abroad sometimes apply foreign law and sometimes forum law, but courts resolve this question under choice-of-law principles.

The forum nation has an interest in a case, even if it arises abroad. And, international law does not compel courts to always apply the law of the place of the tort. Conflicts Restatement § 2, cmt. d (noting that Restatement's rules accord with public international law).

As the Supreme Court has held:

> [i]f a transaction takes place in one jurisdiction and the forum is in another, the forum does not . . . by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely . . . makes applicable its own law to parties or property before it.

Banco Nacional de Cuba v. Sabbatino, 84 S. Ct. 923, 936-37, 376 U.S. 398, 421 (1964). Thus, *First Nat'l City Bank (FNCB) v. Banco Para El Comercio Exterior De Cuba* applied federal common law and international law to a claim for the expropriation of property by Cuba in Cuba, explicitly refusing to apply Cuban law. 103 S. Ct. 2591, 2597-98, 462 U.S. 611, 621-23 (1983). U.S. courts that apply U.S. law to foreign acts do not violate international law.

D. Under the Applicable Choice-of-law Rules, State Law May Apply, But that Determination Is Premature.

1. The relevant states have rejected *lex loci delecti.*

The district court essentially concluded that international law compels a *lex loci delicti* choice-of-law rule. But *most* states' choice-of-law doctrines under some circumstances direct courts hearing cases involving foreign conduct to apply forum

law. At least forty states and the District of Columbia – including all jurisdictions relevant here – have abandoned the *lex loci delicti* approach. *See* Lea Brilmayer & Jack Goldsmith, *Conflict of Laws: Cases and Materials* 12, 21 (5th ed. 2002); Conflicts Restatement, ch. 7, topic 1, Intro. note, n.2. The district court's holding that international law bars application of forum law conflicts with choice-of-law rules throughout the United States.

Federal courts apply the choice-of-law rules of the forum where the case was filed. *Klaxon Co. v. Stentor Electric Mfg. Co.*, 61 S. Ct. 1020, 1021-22, 313 U.S. 487, 496 (1941). This holds true when a case is transferred, *Ferens v. John Deere Co.*, 110 S. Ct. 1274, 1280-1281, 494 U.S. 516, 524-25 (1990), including by MDL. *In re Managed Care Litigation*, 185 F .Supp. 2d 1310, 1336 (S.D. Fla. 2002). Here, that means the choice-of-law rules of Florida, New York, New Jersey, and the District of Columbia.

Each of these jurisdictions looks, at least in part, to the Conflicts Restatement section 145, which incorporates Section 6. *Judge v. Am. Motors Corp.*, 908 F.2d 1565, 1567 (11th Cir. 1990); *Rymer v. Pool*, 574 A.2d 283, 285 (D.C. 1990); *P.V. ex rel T.V. v. Camp Jaycee*, 197 N.J. 132, 962 A.2d 453, 460 (2010); *Babcock v. Jackson*, 12 N.Y.2d 473, 482, 191 N.E.2d 279, 283-84 (1963).

Thus, courts consider numerous factors, including the relevant policies of

the forum and other interested states, the relative interests of those states in the determination of the particular issue, and ease in the determination of the law to be applied. Conflicts Restatement § 6(2). Relevant contacts include not only the place of the injury, but also where the conduct causing the injury occurred and the parties' nationality, or place of business or incorporation. *Id.* § 145(2). The court cannot undertake this analysis without knowing the particular issue for which applicable law is being determined or the particular circumstances.

The district court cited *Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1024 (S.D. Ind. 2007), and *Romero v. Drummond*, No. 03-0575, slip op. at 2 (N.D. Ala. Mar. 5, 2007). Order 87-8. But neither supports the court's holding. *Roe I* simply ruled that the plaintiffs "have not *yet* articulated a viable basis" for applying California law. 492 F. Supp. 2d at 1024 (emphasis added). Indeed, in a subsequent opinion in *Roe I* and in *Romero*, the courts did exactly what the district court failed to do here – apply the relevant state's choice-of-law rules. *Roe I v. Bridgestone Corp.*, No. 1:06-cv-0627, 2008 WL 2732192 (S.D. Ind. July 11, 2008); No. 03-0575, slip op. at 2.[21]

[21] Both courts ultimately found foreign law applied, but each decision is irrelevant because *Romero* applied Alabama's *lex loci delicti* rule, No. 03-0575, slip op. at 2, and *Roe* applied Indiana's rule, which, with very limited exceptions, is *lex loci*

The district court also cited its prior decision in *Basulto v. Republic of Cuba*, No. 02-21500, slip op. at 14 n.13 (S.D. Fla. Jan. 20, 2005), Order 88, which *allowed* state claims arising abroad, finding that because the plaintiff was a citizen, the tort had effects within the state. But that is no less true of in-state defendants – indeed, *Basulto* recognized nationality jurisdiction. Slip op. at 14, n.13.

2. A choice-of-law analysis at this juncture would have pointed to state law because no party alleged a conflict.

With the exception of statutes of limitations, there was no evidence before the district court that Colombia law differed from state law. Since no conflict has been presented, forum law would apply. *Int'l Ins. Co. v. Johns*, 874 F.2d 1447, 1458 n.19 (11th Cir. 1989); Conflicts Restatement § 136 cmt. h. This is so under each relevant states' choice-of-law regime. *Int'l Bus. Machs. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143-44 (2d Cir. 2004) (New York); *Clark v. Prudential Ins. Co. of Am.*, No. 08-6197, 2009 WL 2959801, at *7 (D.N.J. Sept. 15, 2009) (New Jersey); *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, No. 11-CV-1067, 2013 WL 1460503 at *10 (D.C. Apr. 11, 2013) (D.C.); *Cavic v. Grand Bahama Dev. Co.*, 701 F.2d 879, 882 (11th Cir. 1983) (Florida). There is no reason to determine and apply foreign law when no party urges its application or suggests

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delicti, 2008 WL 2732192 at **3-6. Indeed, *Roe* noted that Indiana rejects D.C.'s test. *Id.* at *6.

it differs from forum law.

3. Choice-of-law cannot be resolved at this juncture.

Choice-of-law is typically fact-dependent. Therefore, the district court should have considered whether it could conduct a choice-of-law analysis before the factual record has been developed. Many courts have determined such an analysis to be premature at the motion to dismiss stage. *See, e.g., Harper v. LG Elecs. USA, Inc*., 595 F. Supp. 2d 486, 490 (D.N.J. 2009); *Speedmark Transp., Inc. v. Mui*, No. 11 Civ. 0722 (AJP), 2011 WL 1533042, at *4 (S.D.N.Y. Apr. 21, 2011); *Am. Home Assur. Co. v. Weaver Aggregate Transp., Inc*., 773 F. Supp. 2d 1317, 1324 (M.D. Fla. 2011).

Moreover, choice-of-law is determined issue-by-issue. *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 397 n.1 (2d Cir. 2001); *Smith v. Merial Ltd.*, Civ. No. 10-439, 2011 WL 2119100, *3 (D.N.J. May 26, 2011); *Speedmark*, 2011 WL 1533042, at *4; *Estate of Miller ex rel. Miller v. Thrifty Rent-A-Car Sys., Inc.*, 609 F. Supp. 2d 1235, 1251 (M.D. Fla. 2009); *Beals v. Sicpa Securink Corp.*, No. CIV. A. 92-1512, 1994 WL 236018, at *2 (D.D.C. May 17, 1994). Here, no choice-of-law question was properly presented regarding *any* issue. Thus, there is no basis at this stage even to identify which issues foreign law might control, let alone which law properly controls those issues.

CONCLUSION

For the foregoing reasons this Court should affirm the district court's denial of the motion to dismiss Plaintiffs' non-terrorism based ATS claims and reverse the dismissal of Plaintiffs' state-law tort claims.

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Respectfully submitted,

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Form 6. Certificate of Compliance With Rule 32(a)

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1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because:

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(s): /s/ Marco Simons

Attorney for: Plaintiffs-Appellees-Cross-Appellants

Dated: July 31, 2013

CERTIFICATE OF SERVICE

I, Jonathan Kaufman, certify that, on July 31, 2013, a copy of this Plaintiffs-Appellees-Cross-Appellants' Response Brief And Cross-Appeal Opening Brief was electronically filed with the Court using CM / ECF.

I further certify that, on July 31, 2013, copies of this Plaintiffs-Appellees-Cross-Appellants' Response Brief And Cross-Appeal Opening Brief were sent, by Federal Express for overnight delivery, to the Clerk of the Court and to the following counsel:

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ADDENDUM

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TAB 1

FILED
2007 Mar-05 PM 01:17
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

IN RE: JUAN AGUAS ROMERO, *et al.*,	}	
Plaintiffs,	}	**CASE NO. CV-03-BE-0575-W**
v.	}	
DRUMMOND COMPANY, INC., *et al.*,	}	
Defendants.	}	

ORDER

This case is before the court on the Defendants' joint motion for summary judgment (Doc. 293). Following briefing by both sides, the court held a hearing on the motion on February 27, 2007. For the reasons explicitly stated on the record at that hearing, the court hereby GRANTS in part and DENIES in part Defendants' motion for summary judgment.

I. CLAIMS OF TORTURE PLAINTIFFS[1]

The First and Second Causes of Action in the complaints brought by each of the "Torture Plaintiffs" state claims for torture under the Alien Tort Claims ("ATCA") and the Torture Victims Protection Act ("TVPA"). The court finds that the Torture Plaintiffs have failed to put forward evidence sufficient to establish the elements of a claim for torture under either statute. Specifically, the court finds that a claim for torture under either act requires a showing of custody

[1] Juan Aquas Romero (Case No. 03-CV-575-KOB), Jimmy Jose Rubio Suarez (Case No. 03-CV-1788-KOB), Francisco Ruiz (Case No. 04-CV-241-KOB), John Doe II (Case No. 04-CV-242-KOB), and the union SINTRAMIENERGETICA (named plaintiff in each of the foregoing cases).

or physical control by the offender over the alleged torture victim. Because plaintiffs have not put forward evidence establishing custody or control over them, no genuine issue of material fact exists as to this element of their torture claims, and Defendants are entitled to summary judgment as a matter of law as to all claims for torture under the ATCA and the TVPA. As such, the First and Second Causes of Action are hereby DISMISSED with prejudice from each of the member cases named above.

The Torture Plaintiffs have also alleged various causes of action under state common law.[2] The court determined that, in view of Alabama's traditional refusal to apply its common law to torts where the injury occurred outside of the state, it would not apply Alabama common law to the tort claims alleged here, which occurred extraterritorially in Colombia. Because Plaintiffs pursued their claims for assault, intentional infliction of emotional distress, false imprisonment, and negligent supervision exclusively under Alabama law, the court hereby GRANTS Defendants' motion for summary judgment as to those claims. The state common law claims asserted by the Torture Plaintiffs, therefore, are hereby DISMISSED with prejudice.

The court notes that Plaintiffs have agreed to forego their claims for Denial of Fundamental Rights to Associate and Organize under the ATCA and the TVPA (Third Cause of Action in each of the cases brought by the Torture Plaintiffs, as well as in the case brought by the Wrongful Death Plaintiffs, discussed below). Thus, finding that no causes of action remain in any of the complaints brought by the Torture Plaintiffs, the court hereby DISMISSES with

[2] The state law tort claims are: (1) assault (Fourth Cause of Action in Romero, Suarez, Ruiz, and Doe II complaints); (2) intentional infliction of emotional distress (Fifth Cause of Action in Romero, Suarez, Ruiz, and Doe II); (3) negligent supervision (Sixth Cause of Action in Ruiz and Doe II complaints; Seventh Cause of Action in Romero and Suarez complaints); (4) false imprisonment (Sixth Cause of Action in Suarez complaint); and (5) negligent infliction of emotional distress (Sixth Cause of Action in Romero complaint, which this court has already dismissed on October 22, 2003).

prejudice the member cases *Romero v. Drummond* (03-575), *Suarez v. Drummond* (03-1788), *Ruiz v. Drummond* (04-241), and *Doe II v. Drummond* (04-242) in their entireties.

II. CLAIMS OF WRONGFUL DEATH PLAINTIFFS[3]

The Wrongful Death Plaintiffs in member case *Rodriquez v. Drummond* (02-665) have alleged in the Fourth Cause of Action a claim for wrongful death under the laws of Colombia, and have submitted an affidavit informing the court of what they contend are the relevant legal principles in Colombia. The court *reserves ruling* on Defendants' motion for summary judgment as to the wrongful death claims, until after Defendants have had an opportunity to brief Colombian law in response to the affidavit Plaintiffs submitted. A separate scheduling order will be entered as to Defendants' brief and Plaintiffs' reply on the issue of wrongful death under Colombian law.

The Wrongful Death Plaintiffs have alleged a claim for extrajudicial killing under both the ATCA and the TVPA (First and Second Causes of action in the *Rodriquez v. Drummond* complaint). The court finds that Plaintiffs have failed to put forward sufficient evidence to satisfy the state action requirement of the TVPA, and that Defendants are entitled to judgment on these claims. Accordingly, Defendants' motion for summary judgment is GRANTED as to all claims for extrajudicial killing under the TVPA. The Second Cause of Action in member case No. 02-CV-0665-KOB is hereby DISMISSED with prejudice.

On the other hand, the court finds that the Wrongful Death Plaintiffs have produced

---

[3] Several anonymously-identified Plaintiffs have filed a complaint alleging, among other things, a claim for wrongful death under the ATCA, the TVPA, and common law. That case is identified as Rodriquez, et al. v. Drummond et al. (02-CV-665-KOB). The anonymous Plaintiffs are the legal heirs and successors to Valmore Locarno Rodriquez ("Locarno"), Victor Hugo Orcasita Amaya ("Orcasita"), and Gustavo Soler Mora ("Soler"), all of whom were union leaders allegedly murdered by paramilitary forces at the orders of the Defendants.

enough evidence to create a genuine issue of material fact as to whether Defendants' alleged participation in the murders of the union leaders might fall within the war crimes exception to the state action requirement of the ATCA. *See Kadic v. Karadz*, 70 F.3d 232, 243 (2d Cir. 1996). Plaintiffs have put forward sufficient evidence to create a genuine issue of material fact as to Defendants' liability for violation of the Alien Tort Claims Act, under a theory of aiding and abetting liability, but *not* under either a conspiracy or an agency theory.[4] As such, Defendants have not established that no genuine issues of fact exist and that they are therefore entitled to judgment as a matter of law. The court, therefore, DENIES Defendants Drummond Ltd. and Augusto Jiménez's motion for summary judgment as to the ATCA claims of the deceased union leaders' anonymous heirs and successors for extrajudicial killing, under a theory of aiding and abetting liability. The Wrongful Death Plaintiffs' First Cause of Action, in member case No. 02-CV-0665-KOB, shall proceed.

The court found that Plaintiffs had failed to put forward sufficient evidence to establish direct liability of Defendant Drummond Company, Inc. on the claims for extrajudicial killing under the ATCA. Plaintiffs also have not convinced the court that it should pierce the corporate veil, or that any other theory of corporate liability exists for asserting these claims against Drummond Company, Inc. Therefore, the court GRANTS summary judgment as to all claims against Drummond Company, Inc.. Drummond Company, Inc., therefore, is hereby DISMISSED with prejudice from the remaining member case No. 02-CV-0665-KOB.

Finally, the court determined that the union, SINTRAMIENERGETICA, has put forward

[4] As stated on the record, however, should the court determine that Mr. Garcia may testify at trial, Plaintiffs are given leave to petition the court to reconsider whether Defendants may be held liable under either a conspiracy or an agency theory.

sufficient evidence of injury, causation, and redressability to establish that it has standing to assert claims for extrajudicial killing of its leaders under the ATCA. Defendants' motion for summary judgment as to the union's extrajudicial killing claims under the ATCA is therefore DENIED.

This case shall proceed only as to the claims of the Wrongful Death Plaintiffs (including the union, SINTRAMIENERGETICA) (1) for extrajudicial killing under the ATCA under a theory of aiding an abetting liability, and (2) for wrongful death under Colombian law (following briefing by both sides on Colombian wrongful death law, as set forth in the contemporaneously-filed scheduling order). All other claims and causes of action, including all claims against Drummond Company, Inc., have been dismissed with prejudice.

DONE and ORDERED this 5th day of March, 2007.

Karon O. Bowdre

KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

TAB 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
	:	
Government,	:	CR No. 07-55
	:	
v.	:	
	:	Washington, D.C.
CHIQUITA BRANDS	:	Monday, September 17, 2007
INTERNATIONAL, INC.,	:	10:02 a.m.
	:	
Defendant.	:	
	:	
- - - - - - - - - - - - - - - -	x	

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE DEPUTY CLERK: Criminal Case Number 07-55, United States of America versus Chiquita Brands International, Inc. Mr. Malis, Ms. Cheung, Mr. Ponticiello for the government. Mr. Holder, Mr. Garland, Mr. Rana, Ms. Mosier, Mr. Thompson for the defense. Ms. Panzer for the Probation Office.

THE COURT: Good morning, ladies and gentlemen. I take that there is no dispute over the presentence report, and we're ready to go forward to sentencing; is that correct.

MR. MALIS: That's correct, Your Honor.

MR. HOLDER: That's correct, Your Honor.

THE COURT: Okay. I raised one preliminary matter with counsel on Friday afternoon and discussed it with them this morning. As a result of my having raised the matter, counsel for some of the individuals have informed the Court through various means that they may wish to be heard on the question, but, first, let me just have a discussion of the matter with counsel.

The question I raised was whether, before the Court gives final approval and goes forward with sentencing, the names of the individuals should be made a matter of public record. The government had a footnote in their sentencing memorandum in which they indicated their position

to not make that public, citing a U.S. Attorney manual provision, and I wanted to give the government an opportunity to discuss that, and then I wanted to discuss it a little further as well.

Mr. Malis.

MR. MALIS: Thank you, Your Honor.

The government's position is that the U.S. Attorney's manual prohibits the government, absent exceptional circumstances not present here, prohibits the United States from disclosing the identities of uncharged individuals. That manual provision is grounded in case law, principally out of the Fifth Circuit, and the purpose for it is to protect the reputational and privacy interests of individuals who the government has decided not to charge. It's relying on that provision and the underlying authority. The government's position in this matter is that the individuals who are identified by letter in the criminal Information, as well as in the factual proffer, should not be -- their true identities should not be made public as part of this proceeding.

THE COURT: One reason the Court raised the question was that I was aware that in a proceeding with another component of the Department of Justice, but allegely the same Department of Justice, a few weeks ago before Judge Bates, the government insisted on naming the names of the --

I guess they were division and marketing directors of British Airways and Korean Airways, and the individuals actually appeared before Judge Bates to try to persuade him to not allow the government to name the names, and they even brought a separate civil action with a temporary restraining order which he denied. The Court of Appeals then stayed it for a couple of days, but ultimately the names were revealed. But it looked to me somewhat inconsistent with what the government was doing here.

I understand the manual has this thing about exceptional circumstances. I honestly don't know what exceptional circumstances were there that the government relied on, but I take it after I've raised the question you've reconferred and the government wants to adhere to its position, that the names would not be disclosed?

MR. MALIS: That's correct, Your Honor.

THE COURT: And I will say, then, to give some comfort to those individuals, I don't find it necessary to require disclosure in order for me to approve the plea agreement here. It seems to me the plea agreement is in the public interest. It's not a judicial function to try to go beyond approving a plea agreement that's in the public interest, and so I'm prepared to go forward, and everybody else can relax that's here to try to intervene this morning or take any other action about individual names.

Did the company want to say anything on that question?

MR. HOLDER: I could only mess it up, Your Honor, so I won't say anything.

THE COURT: Okay. I'll hear the allocution, then, from the government first.

MR. MALIS: Thank you, Your Honor.

On March 19th of this year, the parties tendered to the Court the plea agreement that was reached between the United States of America and Chiquita Brands International, Inc., in the context of a lengthy criminal investigation into payments that defendant Chiquita made to a federally-designated terrorist organization known as the AUC.

Pursuant to that agreement, defendant Chiquita agreed to plead guilty to a one-count criminal Information that charged the company with the felony of engaging in transactions with a specially-designed global terrorist. As a basis for its guilty plea, defendant Chiquita agreed to admit as true the facts set forth in the factual proffer subitted in support of the guilty plea. Defendant chiquita also agreed to cooperate in the on-going investigation. Pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), the United States and defendant Chiquita agreed that, with the Court's approval, the company should be sentenced to a

criminal fine of $25 million and corporate probation of five years.

At the plea hearing held on that day, defendant Chiquita admitted its guilt and pled guilty. The Court provisionally accepted the plea agreement at that time. The Court deferred final acceptance of the plea agreement until the date of the entencing hearing.

Pursuant to paragraph 8 of the plea agreement, the United States reserved its full right to allocute at sentencing. The United States wishes to allocute at this time about the conduct that defendant Chiquita has committed. The United States also wishes to address why the Court should accept the parties' plea agreement.

Turning first to the offense conduct. We are here today because defendant Chiquita, a major American multi-national corporation, has admitted to funding terrorists. This is not a corporate securities case or a corporate fraud case. This is a terrorist financing case.

For over six years, from sometime in 1997 through February 4, 2004, defendant Chiquita, through its wholly-owned Colombian subsidiary, paid money to a violent, right-wing terrorist organization in the Republic of Colombia, known as the "Autodefensas Unidas de Colombia" or "AUC." The AUC was formed around April 1997 to organize loosely-affiliated illegal paramilitary groups that had

emerged in Colombia to retaliate against left-wing guerillas fighting the Colombia government. Defendant Chiquita paid the AUC, directly or indirectly, nearly every month. From 1997 through February 4, 2004, defendant Chiquita made over 100 payments to the AUC, totaling over $1.7 million.

From around 1989 through 1997, defendant Chiquita paid money to two violent, left-wing terrorist organizations in Colombia, namely, the FARC and the ELN. The FARC and the ELN were federally-designated as foreign terrorist organizations in October 1997. There is no evidence that defendant Chiquita made any payments to the FARC or the ELN after those terrorist groups were designated as foreign terrorist organizations. Nevertheless, the FARC and the ELN were no less violent prior to their respective designations as foreign terrorist organizations. Indeed, it was their violent conduct that led to those designations.

In total, defendant --

THE COURT: But at the time of those payments, it would not have been illegal to make those payments to FARC or ELN?

MR. MALIS: It would not have been illegal under the material support statute or the International Emergency Economic Powers Act and the underlying regulations, that is correct, Your Honor.

In total, defendant Chiquita paid money to

Colombia terrorists - the FARC, the ELN, and the AUC - for approximately fifteen years. These terrorist groups are responsible for an astonishing loss of life in Colombia. While their victims have primarily been Colombians, they have also included Americans.

Defendant Chiquita began paying the AUC sometime in 1997. There were numerous points in time when the company made the decision to continue to pay the AUC. We highlight here some of the significant ones.

Defendant Chiquita admitted to paying -- excuse me -- continued to pay the AUC even after the payments were brought directly to the attention of its senior executives during a board meeting held in September 2000. Defendant Chiquita continued to pay the AUC after the United States designated the AUC as a foreign terrorist organization on September 10, 2001, and as a specially-designated global terrorist on October 30, 2001. The company, as a corporate entity, as distinct from any particular individual, had information about these federal designations in spades through the wide-spread reporting on it in the public media, both in the United States as well as in Colombia, which Chiquita had its substantial banana-producing operations.

Defendant Chiquita continued to pay the AUC even after an individual in its Cincinnati headquarters gained direct knowledge of the AUC's designation as a foreign

terrorist organization in September 2002 through an Internet-based security information service. The company had subscribed to this service in order to receive just this sort of information about important developments in Colombia.

Defendant Chiquita continued to pya the AUC even after its outside counsel told the company plainly and directly, beginning in late February 2003, to stop the payments. Defendant Chiquita continued to pay the AUC after Department of Justice officials admonished the company on April 24, 2003 that the payments were illegal and could not continue. Defendant Chiquita continued to pay the AUC after the same outside counsel advised the company on September 8, 2003, that the Department of Justice had given no assurances that the company would avoid criminal charges for making the payments. Defendant Chiquita continued to pay the AUC even after one of its directors acknowledged in an internal email, on December 22, 2003, that, quote, "we appear to be committing a felony," close quote.

By admitting to the facts in the factual proffer and pleading guilty to the crime charged in the criminal Information, Defendant Chiquita admits it committed a crime by continuing to pay the AUC after the AUC was federally designated as a terrorist organization in the fall of 2001. Defendant Chiquita has accepted criminal responsibility for

the decisions and actions of company officers, directors, and employees that led to these criminal payments. The conduct of these corporate actors is, of course, imputed to the company under the law.

It is important to note, however, that not all of Defendant Chiquita's executives agreed with the company's course of action. There was dissent at the highest levels of the company about the decision to continue to pay a federally-designated foreign terrorist organization, and the decision to risk the coming of this day, Chiquita's felony conviction for funding terrorism.

To begin with, on March 10, 2003, Chiquita's outside counsel advised the company, through one of its senior officers, that Defendant Chiquita, quote, "should leave Colombia," close quote. Upon first learning of the payments at a board meeting on April 3, 2003, one director echoed outside counsel's advice. That director objected to the payments and recommended that Defendant Chiquita consider taking immediate corrective action, to include withdrawing from Colombia. That same director later lodged an even stronger objection to the full board, saying, quote, "I reiterate my strong opinion - stronger now - to sell our operations in Colombia," close quote.

Moreover, within one month of his arrival as Defendant Chiquita's new chief executive officer, in January

2004, Fernando Aguirre decided that the payments had to stop. According to an internal e-mail, Mr. Aguirre stated, quote, "At the end of the day, if extortion is the modus operandi in Colombia or any other country, we will withdraw from doing business in such a country," close quote.

THE COURT: So that's the current management posture, consistent since 2004, it stopped, and nothing has happened since then?

MR. MALIS: That's the current chief executive officer, Your Honor.

THE COURT: That gives the Court some hope.

MR. MALIS: The United States filed a sentencing memorandum last week setting forth in greater detail the facts of this case. Defendant Chiquita filed a terse response to the government's sentencing memorandum. In it, Defendant Chiquita renewed its oft-repeated claim that the company was a victim here, a victim of extortion, and that the company only made these payments to protect its employees.

Defendant Chiquita fails to square its claimed victimhood with the facts. As a multi-national corporation, Defendant Chiquita was not forced to remain in Colombia for 15 years, all the while paying the three leading terrorist groups that were terrorizing the Colombian people. To quote the company's own outside counsel, and I quote, "You

voluntarily put yourself in this position. The duress defense can wear out through repetition. It's a business decision to stay in harm's way. Chiquita should leave Colombia," close quote.

And it was good business for the company. Defendant Chiquita turned a $49.4 million profit from its Colombia operations during the period while it was making the illegal payments to the AUC. To be clear, the time period I'm referring to is from the designation in September of 2001, through the end of January 2004. Defendant Chiquita's payments may have protected its workers while they were working on the company's profitable farms, but Defendant Chiquita's payments fueled the AUC's terrorist violence everywhere else.

We do not dispute that the company had no ideological affinity with these terrorists. Indeed, the fact that the company paid the left-wing groups, the FARC and the ELN first, and then later the right-wing group, the AUC, makes plain that this was not ideologically-driven support. But the law does not distinguish between malevolent donors and so-called benevolent donors, and that's because money is fungible.

Whatever Defendant Chiquita's claimed motivations, the company's money paid for the weapons and ammunition that the AUC used to kill innocent civilians, or it freed up

other AUC money to do the very same thing. It just doesn't matter. Terrorism depends on a funding stream. Defendant Chiquita was a substantial funding stream for the AUC. The AUC was able to purchase a lot of weapons and ammunition with the $1.7 million that the company paid it over the years.

Defendant Chiquita suggests in its pleading that its conduct should only be examined from the moment in late February 2003 when certain of its senior executives learned that the AUC was a federally-designated foreign terrorist organization. That ignores the company's admission that it obtained information about the AUC's designation directly in September 2002 from the security information service. Moreover, by late February 2003, when Defendant Chiquita's outside counsel advised the company to stop the payments immediately in light of the AUC's designation as a foreign terrorist organization, the payments had already been reviewed and approved at the highest levels of the company for years. The fact of the initial AUC demand in 1997 and any perceived risk to the company's employees from doing business in Colombia were not new topics to Chiquita. The payments had been discussed repeatedly in Defendant Chiquita's Cincinnati headquarters, including among the new management and the new board that took over the company after it emerged from bankruptcy in early 2002. The company

had long since made the business judgment to remain in Colombia, to keep pay the AUC, to record the payments in the company's books and records without ever identifying that these were payments to the AUC, and not to report the payments to the pertinent United States authorities. In short, the only new information that certain executives obtained in late February 2003, was the fact that Defendant Chiquita's well-established relationship with the AUC threatened the company with a possible U.S. prosecution.

Defendant Chiquita also claims in its pleading that it sought guidance from the Department of Justice that it never received. Here also, Defendant Chiquita's pleading ignores the admitted facts. The Department of Justice told the Company's representatives on April 24, 2003 -- and here I'm quoting from the factual proffer signed by Mr. Holder and by Mr. Aguirre -- that the payments were, quote "illegal and could not continue," close quote. Whether Defendant Chiquita could conform its conduct with the law and continue to do business in Colombia, or whether Defendant Chiquita had to withdraw from Colombia was a decision for the company to make, not a decision for the Department of Justice. Defendant Chiquita received guidance from the Department of Justice. The guidance was that the company was breaking the law. It chose to ignore that guidance and continue to break the law. That's one of the reasons we are here today.

Defendant Chiquita seriously misjudged what it means to self disclose criminal conduct. Self-disclosure does not, in and of itself, shield a company from prosecution. The appropriate resolution of a self-disclosure case will depend on many factors, including the nature and circumstances of the reported activity and the company's efforts to correct it. But there should be no mistake about it - self-disclosure does not give the disclosing party license to continue to commit the crime, and that's what happened here.

Defendant Chiquita well understood that. The company's outside counsel made sure of it. On September 8, 2003, outside counsel advised the company in writing that it was acting at its peril and risked criminal prosecution for the continued payments. In a memorandum sent to the company, outside counsel wrote that Department of Justice officials, quote, "have unwilling to give assurances or guarantees of non-prosecution," close quote.

One final point here about the offense conduct. The terrorism statutes do not distinguish among listed foreign terrorist organizations or specially-designated global terrorists as to their relative criminality or their relative threat to the national security interests of the United States. Our law criminalize payments to the ACU, just as they do payments to Hamas, Hizballah, and al-Qaeda.

And, of course, it is no comfort to the victims of the AUC's violence that Defendant Chiquita paid a terrorist organization that may be less well known that the others I've just named.

Turning to the plea agreement, Your Honor. Under the plea agreement, Defendant Chiquita is required to pay a $25 million criminal fine to the Court. The fine is to be paid in annual installments of $5 million plus post-judgment interest. It's our understanding that the company paid the first installment this morning.

The plea agreement also requires Defendant Chiquita to be placed on five years' probation. One of the required terms of probation is for the company to implement and maintain an effective compliance and ethics program to ensure that this criminal conduct never occurs again.

Defendant Chiquita was also required to provide cooperation to the United States in the on-going investigation into the criminal payments. The United States gave serious consideration to bringing additional charges in this case. Defendant Chiquita provided substantial cooperation post-plea in that regard. Indeed, the United States consider critical evidence and information that the company provided post-plea in making its determination not to bring additional charges in this matter. This substantial post-plea cooperation came on top of the

company's significant pre-plea efforts to assist this investigation.

THE COURT: And I take it the company waived attorney/client privilege and did other things that were helpful to the investigation of the individuals?

MR. MALIS: Let me answer the Court's question in this way, if I may.

THE COURT: Okay.

MR. MALIS: The plea agreement makes plain that the company waived attorney/client privilege and work product protection through the period March 2004, that is, covering the period while the company was making the payments.

THE COURT: Right.

MR. MALIS: I can address the Court and say that the company provided significant cooperation post-plea pursuant to that precise provision in the cooperation agreement.

THE COURT: And they get some credit for that.

MR. MALIS: Indeed, they do, and that's why we acknowledge that here today, and that's one of the factors that the government considered when ultimately striking this deal with the company.

Your Honor, the United States recommends that the Court accept the parties' plea agreement. Although

important differences obviously remain between the United States and Defendant Chiquita about how to view certain admitted facts, these differences should not deter the Court from approving the plea agreement. The company has admitted the facts in the factual proffer, and it has acknowledged that under those facts it has committed a very serious crime. We have a major American corporation admitting funding terrorism.

It is also important to note that many corporate cases end with a financial penalty, but without a criminal conviction. Many corporate cases are resolved with deferred prosecution agreements. The Court is not being asked to approve a deferred prosecution agreement. This agreement leaves the company with a criminal conviction, a very serious one, and with whatever collateral consequences that may case.

The $25 million criminal fine represents a substantial penalty here. If accepted, it would be the largest financial penalty ever imposed under the Global terrorism sanctions regulations, the regulations at issue here.

Finally, Your Honor, this plea agreement brings to a close a lengthy criminal investigation that has lasted several years, and thoroughly probed conduct here and in Colombia. For all these reasons, the United States

respectfully recommends that the Court approve the plea agreement and sentence Defendant Chiquita accordingly.

THE COURT: Thank you, Mr. Malis.

MR. MALIS: Thank you, Your Honor.

THE COURT: Mr. Holder.

MR. HOLDER: May it please the Court.

Let me just say that the company does not, through the remarks I'm about to make, try to minimize its role in the matter that brought us here today, or in any way give an indication to the Court that does anything other than accept responsibility for its actions.

I think, as the Court asked, and I think the response was not really an adequate one, the company has cooperated, I think, in an extraordinary way - waiving the attorney/client privilege, making its lawyers available. I sat through seven four-hour sessions with the lead lawyer for the company, at which time he was asked a variety of questions, every one of which I think he answered, except those that went beyond the privilege waiver time. If you think about that, 28 hours - 28 hours of our chief lawyer being questioned and answering those questions.

However, I think that certain things said by Mr. Malis are either unfair, incorrect, or draw inappropriate inferences. Frankly, I don't think they are worthy of the office that he represents.

The plea and the factual proffer were carefully worked out. The government's sentencing memorandum and Mr. Malis' comments this morning, I believe, are not in the spirit that led to that plea agreement, and as a result I believe we have to respond, not to everything with which we disagree, but just to those things that I think are most worthy of comment.

First and foremost, and I think this has to be made clear, Chiquita was extorted. That is why the payments began, that is why the payments continued. This was not a business decision. No one at Chiquita decided: "Do you know what, let's just try to come up with a way in which we can stay in this country, make these payments. This is a profitable center for us."

The payments were made because the company was extorted. The company faced real threats. Those threats were expressed by the leader of the AUC, and they were consistent with the actions that lead to the deaths of two company employees on two separate occasions before the AUC took over. The government, as you look through its sentencing memorandum, and even in the comments that Mr. Malis made today, I think almost concedes that in some way, that the company was a victim of extortion, but cannot bring itself to utter the "e" word, but extortion is really what this was all about.

The company had to pay, as Mr. Malis says, over 15 years a variety of terrorist groups because those were the groups that controlled the areas in which the company operated. The government of Colombia did not control those areas. The company had no choice. The notion that the company had, as Mr. Malis indicated, a well established relationship with the AUC, well, that's like saying that people in North Jersey had a well established relationship with Tony Soprano. It's all the same thing. It's all about extortion and force.

The government makes much of the fact, in both its statements today and in its sentencing memorandum, about the length of the payments, the time period. The government says that the payments were paid even after they were discussed at a board meeting in September of 2000. This is on page three. Well, one thing that is never -- that seems to kind of get lost here is that the payments at the time, at that time, were not illegal. The payment prior to 2001 were not illegal. The government skips over that fact, it seems to me, entirely too much. Everything that happened before September of 2001 did not violate the law of the United States. Everything that Mr. Malis talks about before that is interesting but ultimately not relevant to that which brought us here today, or the reason why Chiquita plead guilty.

On page six of the sentencing memoranda, the government says Chiquita never reported payments before the April '04 meeting. Well, the company only found out about the payments two months before, did a bit if research to find out what was going on, and as soon as they possibly could, got into the Justice Department and, in fact, did report the payments. Again, payments before September 1st were not illegal under U.S. or Colombian law.

Much is made about the fact that outside counsel said the payments have to stop, stop the payment. Well, what you have not heard, Your Honor, is what that same lawyer who went through those 28 hours of debriefing, what you have not heard is what he said in the grand jury. He said that he was not shocked that the company decided to continue the payments.

I think also I'm disturbed by the fact that the government selectively quotes from the memo prepared by outside counsel on September 8, 2003, where lawyers know the payments are continuing, the lawyers who prepared this memo, and they discussed legal defenses that are not raised, are not discussed by Mr. Malis here, and at no point in that memo is there an indicated that the lawyers say that the payments have to stop.

Now, let's talk about that April 24th meeting. The government would have you believe in its memorandum and

comments today that it was crystal clear that the company was told that the payments had to stop. Well, what you did not hear is that Mr. Chernoff (ph. sp.) said --

THE COURT: He didn't go that far. The government said the payments were illegal.

MR. HOLDER: Well, Your Honor --

THE COURT: He didn't make the extra step there, I don't think, from what I heard him say.

MR. HOLDER: Well, as I look at the memorandum --

THE COURT: Maybe he did in the memo.

MR. HOLDER: It seems to me that they said payments had to stop. Chernoff said, "This is a heavier meeting than I expected." Future payments were a complicated issue.

The government that it was going to get back to the company. No real conduct had been for a period of five months. An undercover operation was talked about between the parties up until December of 2003.

In August of 2003, the then Deputy Attorney General said that the company had done the right thing by coming forward and was not a target or subject of an investigation.

In September of 2003, a government prosecutor was asked by that same lead lawyer for the company, asked did the government want the payments to stop. They reply was

not "yes," but I'll stand on what Mr. Chernoff said. A simple "yes, stop the payments," could have been made at that point, could have been made on April 24th, was not.

We have refrained from saying this before, but, Your Honor, I will tell you why we believe this was so. The government did not want to say "stop" explicitly and then have blood on its hands if someone was, in fact, killed. It couldn't say "continue" because it did not want to hurt its case, and so it looked for what I considered to be a middle position.

In the sentencing memorandum, the government says that it's not in a position of providing advice. The government doesn't provide advice. This, to me, it seems, is worrisome. If a company came in and said that they were paying al-Qaeda, would the government not give advice or not take immediate action of some sort?

As I told these gentlemen in a meeting that we had, I think, early on in this process, if I as Deputy Attorney General, a post I was honored to hold, had heard that the government had the concerns that they expressed in this very important area, national security, and they decided not to say that this conduct had to stop, or took immediate action, heads would have rolled. It seems to me that the government, say it's not in the business of giving advice, but if this is as important as it says it was, it

needed to do something - either give the advice, tell the company to stop, or take immediate action to make those activities stop, and it did none of that.

When did Chiquita know of the designation? Here, I believe again, the government is being a little too cute, a little too crafty, and this is not what you would expect to hear from the United States. It's not what you would expect to hear from a good prosecutor.

If you look at the sentencing memorandum, there's an indication -- the quote is, "The Defendant Chiquita had information," and then it talks about the fact that public media -- it's on page seven of the sentencing memorandum -- the public media was out there. There's no proof that anybody that the company was aware of the fact of the designation. If the government had that proof, that fact certainly would have been something we would have heard today, and certainly something you would have seen in sentencing memoranda. The fact is that although that information did appear in the public media, there is no proof - there is no proof that anybody in the company ever had that information.

On page 13 of the sentencing memorandum -- I will call this the infamous page 13 -- it talks about financial support to the AUC. Again, Your Honor, that, it seems to me, is simply an unbelievable thing. This was simply

extortion.

A staggering loss of life is described. There was a staggering loss of life. What is not mentioned is that among the people who were killed as a result of terrorists who control that area were people who worked for the company. The company, quote, "funded terrorism." I would agree with that. Yes, in the same way that an extortion victim funds the mafia. The money that is extorted from the company and goes to the AUC is not something that was willingly given, it was given at the barrel of a gun and threats.

On page 13 again, that Chiquita's motive is irrelevant. That's just not legally true, and it's a prime reason why the government has substantial risk had this case gone to trial.

We've heard a lot today about $1.7 million going to the AUC. Well, that is true, but, again, that's a little -- that's almost -- that's a little deceptive. The reality is that $825,000 went to the AUC after the time period in which the money became illegal, after the designation. So the time -- the money that ought to be talked about is not $1.7, but $825,000. This, to me, seems a little too typical of a shading that has happened here, both in the sentencing memorandum and the comments that we heard today.

This motion of withdrawing from Colombia,

mentioned on page 16 and again today, would the 4,000 employees that Chiquita had in Colombia be better off -- are they better off now, in fact, that the company has withdrawn? Given the company's strong labor record around the world, and it's strong environmental record around the world, are the people now better off?

You know, in the end, Your Honor, it seems to me it's an easy thing to sit in the comfort of your office in Washington, D.C., and with the benefit of hindsight and tell the world how easy the choices were.

The company does not say that it was legally correct. That, among other reasons, is why it entered the plea of guilty here today. But Mr. Malis' inability to see that this was a difficult decision, a moral decision, concerns me. It concerns me a great deal. Great power is given to prosecutors, and the single-minded focus of some on the prosecution team to get this company, without consideration of what I believe are rather obvious nuances, is alarming.

In the end, we stand by our plea with these corrections as to the government's statements and ask the Court to impose the agreed upon sentence.

Thank you, Your Honor.

THE COURT: All right, I'll give you a chance, Mr. Malis, if you want to say anything further.

MR. MALIS: I am not going to respond to what I view as the ad hominine attacks on this prosecutor. I stand before the Court as a representative of the United States, and on behalf of the United States. The United States does not retract one word from its sentencing memorandum or the allocution that we provided to the Court this morning.

What I would like to simply remind counsel and the defendant, Chiquita, is that Chiquita did not make, one, or two, or three payments in response to a demand that was made in 1997. No doubt in 1977 this was a horrible situation for the company to face when the AUC said, "Pay this money or else." We don't shy away from that. That's part of the factual assertion, and the factual proffer, and in the criminal information.

What makes this conduct so morally repugnant is that the company went forward month after month, year after year, to pay the same terrorists. It did so knowing full well that while its farms may have been protected, and while its workers may have been protected while they literally were on those farms, Chiquita was paying money to buy the bullets that killed innocent Colombians off of those farms. A decision to engage in a course of conduct over years for an individual would fail to make out any duress claim or any extortion claim. For a multinational corporation with choices about where to do business in the world, which

markets to enter, which markets to exit, as Chiquita did throughout this time period -- it made business choices about withdrawing from Panama, for example, later purchasing farms in other countries, in other places in the world -- for this corporation to stand before the Court and say it had no choice but to be, quote, a "victim" of extortion for years while it reaped the profits of those Colombian operations, it does not stand any legitimate scrutiny. I understand that that's the company's position and it's the position the company has maintained from day one. It does not withstand any scrutiny.

Nevertheless, Your Honor, we believe that this plea agreement is in the best interest obviously of both parties or we wouldn't have a plea agreement, and we believe that the Court's acceptance of this plea agreement in entering judgment on Defendant Chiquita is the appropriate result here.

Thank you.

THE COURT: All right. Well, I will accept the parties' written plea agreement, and I will sentence Chiquita in accordance with the agreement. I agree with the parties, that the plea agreement is a fair resolution of the company's criminal culpability. It gives me some pause that no individuals are held accountable, but that's really beyond the matters that this Court can resolve. The Court

resolves the question before it, which is the company's culpability for the crime.

Whether or not the characterization given by Mr. Holder, that it started as extortion and remained extortion, is correct, the company admits and Mr. Holder admits it was criminal from the time that the statutes passed, and certainly the company acknowledges, once the terrorist organization went on the list in 2001 -- there's some dispute whether some people in the company knew in 2002, certainly they all knew by 2003, and they continued the payments. Clearly, the law makes the company liable criminally from that point.

I agree with Mr. Holder, that there is some risk associated with trial by jury to both sides. The risk to the company, obviously, is that I would impose, after the trial and conviction, a criminal fine of $98 million rather than $25 million. Obviously the risk to the United States is that a jury could decide that under these unique circumstances that a criminal conviction was not warranted. So as in all plea agreements, I suppose there is a compromise, and I find that the public interest supports settling this matter and putting it behind us with the company's admission that what it did was illegal. The company's cooperation in the investigation, which it clearly has done, and I have been impressed during the numerous

chambers' conferences we've had with both Mr. Malis and Mr. Holder, in the cooperative way that this matter has proceeded to this date.

Pursuant to the Sentencing Reform Act of 1984, it's the judgment of the Court that the defendant corporation Chiquita Brands International, Incorporated, is hereby placed on probation for a period of five years. The corporation shall abide by the general conditions of supervision adopted by the Probation Office and the following special conditions.

One, the corporation shall implement and maintain an effective compliance and ethics program that comports with the criteria set forth in U.S. Sentencing Guidelines, Section 8(b)(2.1), including but not limited to:

A. Maintaining a permanent compliance and ethics office, and a permanent educational training program relating to federal laws governing payments to, transactions involving, and other dealings with individuals, entities, or countries designated by the United States Government as foreign terrorist organizations, specially-designated global terrorists, specially-designated narcotics traffickers, and/or countries supporting international terrorism, and any other such federally designated individuals, entities or countries.

B. Ensuring that a specific individual remains

assigned with overall responsibility for the compliance and ethics program, and;

C. Ensuring that the specific individual reports directly to the chief executive officer and to the board of directors of Chiquita Brands International, Incorporated, no less frequently than on an annual basis on the effectiveness of the compliance and ethics program.

The second special condition is: The corporation shall provide the probation office with income tax returns, authorization for release of credit information, and any other business or financial information of which it has a control or interest.

It is ordered that the corporation pay a special assessment of $400, required to be imposed by statute, due immediately.

It is also ordered that the corporation pay a fine in the amount of $25 million on Count One. Payment of the fine shall be according to the following schedule: $5 million payable upon entry of judgment today; $5 million plus post-judgment interest computed pursuant to 18 U.S.C. Section 3612(F)(2), payable on the anniversary date of the entry and judgment until the full judgment is satisfied.

The Probation Office shall release the presentence investigation report to all appropriate agencies in order to execute the sentence of the Court.

The defendant has the right to appeal the sentence imposed by this Court. If the defendant chooses to appeal, the defendant must do so within 10 days after the Court enters judgment.

Anything further we need to do today, counsel?

MR. HOLDER: Nothing for the defense, Your Honor.

MR. MALIS: Nothing for the government. Thank you.

THE COURT: Thank you very much, counsel.

(Whereupon, the proceedings in the above-entitled matter were adjourned.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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Theresa M. Sorensen, CVR-CM

Official Court Reporter