Case No. 19-13926-RR

In the United States Court of Appeals for the Eleventh Circuit

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

v.

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

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

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

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Caption continued on next page

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

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

v.

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

District Court No. 07-cv-60821

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

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

v.

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

MOE CORPORATIONS 1-10,
Defendants,

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

District Court No. 08-cv-80421

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

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

v.

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

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

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

District Court No. 08-cv-80465

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

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

v.

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

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

District Court No. 08-cv-80480

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

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

v.

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

District Court No. 08-cv-80508

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

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

v.

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

District Court No. 10-cv-60573

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

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

v.

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

District Court No. 17-cv-81285

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

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

v.

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

District Court No. 17-cv-81285

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

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

3. Additional interested parties are:

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

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Agrícola Bananera Santa Rita, S. de R. L.

Agrícola Longaví Limitada

Agrícola Santa Marta Limitada

Agroindustria Santa Rosa de Lima, S.A.

Aguirre, Fernando

Alamo Land Company

Alexander, Lauren

Alsama, Ltd.

American Produce Company

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Centro Global de Procesamiento Chiquita, S.R.L.

Charagres, Inc., S.A.

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Chiquita (Shanghai) Enterprise Management Consulting Co., Ltd.

Chiquita Banana Company B.V.

Chiquita Banana Ecuador CB Brands S.A.

Chiquita Brands Costa Rica Sociedad de Responsabilidad Limitada

Chiquita Brands International Foundation

Chiquita Brands International Sàrl

Chiquita Brands International, Inc.

Chiquita Brands L.L.C.

Chiquita Central Europe, s.r.o.

Chiquita Compagnie des Bananes

Chiquita Deutschland GmbH

Chiquita Food Innovation B.V.

Chiquita for Charities

Chiquita Europe B.V.

Chiquita Finance Company Limited

Chiquita For Charities

Chiquita Fresh B.V.B.A.

Chiquita Fresh España, S.A.

Chiquita Fresh North America L.L.C.

Chiquita Fruit Bar (Belgium) BVBA

Chiquita Fruit Bar (Germany) GmbH

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Chiquita Frupac B.V.

Chiquita Guatemala, S.A.

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Chiquita Holdings Limited

Chiquita Honduras Company Ltd.

Chiquita Hong Kong Limited

Chiquita International Services Group N.V.

Chiquita Italia, S.p.A.

Chiquita Logistic Services El Salvador Ltda.

Chiquita Logistic Services Guatemala, Limitada

Chiquita Logistic Services Honduras, S.de RL

Chiquita Melon Packers, Inc.

Chiquita Mexico, S. de R.L. de C.V.

Chiquita Nature and Community Foundation

Chiquita Nordic Oy

Chiquita Norway As

Chiquita Panama L.L.C.

Chiquita Poland Spolka Z ograniczonaodpowiedzialnoscia

Chiquita Portugal Venda E Comercializaçao De Fruta, Unipessoal

Chiquita Relief Fund - We Care

Chiquita Shared Services

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ChiquitaStore.com L.L.C.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants-Cross-Appellees respectfully request oral argument because this case concerns numerous, common and distinct legal issues involving a voluminous factual record and many Plaintiffs.

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INTRODUCTION

Defendant Chiquita Brands International ("Chiquita") pleaded guilty in 2007 to the federal felony of illegally financing the *Autodefensas Unidas de Colombia* (United Self-Defense Forces of Colombia or "AUC"), a paramilitary group that the U.S. Secretary of State designated as a Foreign Terrorist Organization. Appendix ("App") 3590–3612.[1] The AUC was deemed a terrorist organization for the very reign of terror at the heart of this action and the cases of thousands of other plaintiffs awaiting their day in court.

Plaintiffs-Appellants ("Plaintiffs") are family members of AUC victims who sued Chiquita for aiding and abetting murders of their family members from 1997 to 2004.[2] They appeal the district court's grant of summary judgment in Defendants-Appellees' ("Defendants"") favor. Plaintiffs introduced substantial evidence that the AUC was responsible for their family members' deaths, but the district court discounted or excluded all of it, removing the decision about AUC responsibility from a jury. There is no doubt that the AUC murdered thousands in the relevant areas of Colombia during the relevant time. The entire world knows this. In Colombia, a U.S.-

[1] In its Sentencing Memorandum, the Department of Justice stated that "Chiquita's money helped buy weapons and ammunition used to kill innocent victims of terrorism." App3602.

[2] Appellants are the bellwether Plaintiffs listed on the caption of this consolidated appeal. There are several thousand other Plaintiffs, including two bellwether Plaintiffs who separately appeal in this case, Does 378 and 840.

supported "Justice and Peace" Process has documented the AUC's responsibility beyond cavil.

The district court nevertheless disregarded or excluded evidence that the AUC dominated the areas at the time and place the decedents were murdered and was responsible for the majority of deaths there; that Plaintiffs' family members were killed in accordance with the AUC's *modus operandi*; and that the murdered family members were members of groups the AUC targeted. That is, Plaintiffs showed that these killings were committed where, when, how and why the AUC murdered its victims. Such evidence is a traditional method of proving criminal responsibility and is sufficient to permit a jury to determine the AUC's responsibility for these killings in this civil action.

The district court also rejected testimony from witnesses confirming that AUC members admitted to kidnapping and killing their decedents or were observed doing so; documents from the Justice and Peace proceedings indicating that AUC members were responsible, including confessions, convictions, and investigations; and expert opinions further supporting the evidence pointing to AUC responsibility. The district court also frequently sustained evidentiary objections that had not been raised and to which Plaintiffs had no opportunity to respond.

This discrepancy between widely known facts tying the AUC to these murders in Colombia – which were the basis for the U.S.-backed Justice and Peace Process –

and the district court's finding that there was no evidence that the AUC was responsible for these murders underscores the district court's prejudicial errors. The rules of evidence were not designed to provide such a blanket immunity from a jury's decision in these circumstances.

This appeal also raises evidentiary issues that will be vitally important to the fair resolution of the remaining thousands of victims of AUC violence with cases pending in the district court. The district court's interpretation of the rules of evidence would hamstring future criminal prosecutions, particularly of gang members, and civil cases against terrorists and terrorist organizations. This Court should reverse the judgment and provide guidance to the district court on these critical issues for the pending cases.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1367. Plaintiffs appeal a final order granting summary judgment and dismissing all of their claims on September 5, 2019. App7510. Plaintiffs timely filed notices of appeal on October 3-4, 2019, App7588–89; App7590–91; App7592–93; App7624–26; App7627–30; App7631–32; App7668-70; and this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in finding that the admitted evidence – that the AUC had the motive to commit each of the murders and the means and opportunity to do so given its control of the region; the absence of any evidence of any proposed alternative perpetrators similarly situated; and evidence that the AUC committed the vast majority of violent deaths in the region during the relevant time – was insufficient to raise a genuine issue of material fact as to whether the AUC committed each murder. *See* § I, *infra*.

2. Whether the district court erred in refusing to admit evidence that Plaintiffs' family members were murdered in the unique manner that the AUC killed persons like them. *See* § II, *infra*.

3. Whether the district court erred in excluding documentary evidence from Colombian legal proceedings that the AUC committed these murders, including AUC members' confessions to the crimes and official investigations. *See* § III, *infra*.

4. Whether the district court erred in excluding expert conclusions as being based on an unreliable methodology, when the district court offered no indication why it was unreliable and did not consider the expert's actual methodology or the evidence on which the opinion was based. *See* § IV, *infra*.

5. Whether the district court erred in finding an absence of evidence of AUC responsibility for each of the murders involved in these bellwether cases. *See* § V, *infra*.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

A. The AUC Targeted Persons Like the Bellwether Decedents, Murdering Them in the Same Way the Decedents were Murdered. [3]

The AUC was formed in 1997 as an umbrella organization of violent paramilitary groups created to attack left-wing guerrillas such as the FARC, as well as those perceived to be in opposition to the government and to companies like Chiquita.[4] The AUC had strong ties to banana growers;[5] and its "major decisions . . . came almost directly from the board of directors of Augura," App3754, the banana industry association on which Chiquita had a member of the board of directors. App7837. The AUC aligned itself with the Colombian military,[6] and was dedicated to crushing any social movements it perceived to oppose the government and its allies,

[3] Plaintiffs-Appellants do not detail the evidence concerning Chiquita's liability for the AUC's conduct because the district court did not address it. Ample evidence demonstrates that Chiquita provided substantial support for the AUC's actions and killings, including feloniously providing at least $1.7 million. App3575.

[4] App5019, 5047; App3656; App8528, 8530-8531 (AUC saw "value in keeping the Colombian government" and "had a different ideology" than the FARC, the other major armed group in Colombia at the time); *see also* App4790, 4792; App7772.

[5] App3628–3629, 3632; App3654; App3575–3576; App4656–4657, 4660; App9175-9177 (Chiquita's own security company reported: "agricultural producers . . . had a strong hand in developing Colombia's right-wing paramilitary forces (AUC)."); App3804–3806; App7841.

[6] App5028; App3654–3656, 3660, 3662–3664, 3670–3671; App6676–6677, 6678–6679; App4656–4561; App7773, 7776, 7786, 7798.

including land and business owners in the banana growing regions.[7]

From 1997 to 2004, the AUC was the dominant armed group in Colombia's banana-growing regions. *See* § I(B). The AUC targeted unionists, social leaders, banana workers, suspected guerrilla sympathizers, criminals and social "undesirables."[8] As one AUC commander acknowledged, the open targeting of "subversives" was the AUC's "principal ideal."[9] The AUC committed its violence publicly, to terrorize the population.[10]

The AUC's leader, Carlos Castaño, also acknowledged the AUC followed a strategy intended to "neutralize" civilians who could offer civilian assistance to the

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[7] App3623; App3573; App3591; App4801–02; App4660–61.

[8] App3573; App3933–34; App5059, 5094; App6676–79; App6661-6662; App3800, 3810; App5059; App3638 (testimony from AUC member that the AUC acted pursuant to the military's instruction that, for suspected criminals who were not guerrillas, "we don't want to put that same person back in jail again, that person should go to the cemetery"); App3634 (precursor organization of AUC targeted union members as purported guerrilla sympathizers); App5094–95 (AUC targeted union activity and strikes by assassinating union members); App4661 (AUC adopted counterinsurgency tactics to target workers, trade union leaders); App6679 (paramilitaries made clear through graffiti their position was "Death to . . . union organizers"); App4353; App3806 (AUC commanders would patrol and announce that those who engaged in strikes would be killed); *see also* App4808, 4809.

[9] App3804; *see also* App7860; App4823–25, 4832.

[10] App5059, 5094; App8528, 8530, 8531 (Chiquita's corporate representative testified that the AUC "control[ed] territory by terror"); App7817 (it was "normal for anyone an everyday guy, to travel by car and come across even, many times, pigs eating [civilian] cadavers on the side of the road"); App3802 (AUC engaged in tactics to intimidate the community and perceived guerrilla collaborators); App7860–7861.

guerrillas. App3862. By 1998, the paramilitary threat to civilians was well-known. App3854. The AUC terrorized the local population through kidnappings, murder, and dismemberments and beheadings. App4082-4803; App5124; App8629.

AUC violence was different in character from the guerrillas'. The AUC targeted specific individuals, App3859, "assassinating suspected guerrilla supporters."[11] By contrast, civilian casualties of the guerrillas were generally collateral to their military objectives. Defendants' expert opined: "Most civilians killed by the paramilitaries are intentional killings, rather than collateral damage in operations, aimed at other objectives," App3859, and conceded "most paramilitary killings of civilians" were "selective measures," including exterminating civilians on a list of those allegedly supporting the guerrillas.[12] Defendants' expert conceded that paramilitaries committed many more acts of violence against civilians than the guerrillas did. App3856.

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[11] App3573; *see also* App3810, 3811 (the "majority" of perceived guerrilla "sympathizers" killed by the AUC were unarmed persons who were "declared military objectives" whether they were armed or not); App3622–23, 3634, 3637 (perceived sympathizers with guerrillas, considered their "civil rank," were treated as targets for "military acts" and violence of guerillas; this included "people from the union or the people who grew bananas"); App3748, 3746; App7781 (Kaplan Rebuttal Rep.) (the AUC targeted "left-wing guerrillas, their real or suspected supporters and unarmed civilians" as a "form of terrorism based on ideology"); App3830 (suspected guerrilla sympathizers were "considered to be a target" even if "they weren't armed"); App4658–59; App7859 (HRW Report) (the AUC repeatedly committed massacres, executing civilians, and torturing and mutilating corpses).

[12] App3853; App3933*; see also* App3651–52, 3664 (AUC targeted those civilians deemed "guerrilla helpers" in 1997; and the Office of the High Commissioner for Human Rights in Colombia reported that "acts committed by the paramilitaries

The AUC's violence had other distinctive features: The AUC killed alleged "subversives" by gruesome methods to send a message to others.[13] It kidnapped victims as a means of terror (often on motorcycle, and wearing helmets, often uncommon in the areas).[14] The AUC killed while hooded or masked.[15] It took people from their homes at night, to murder them,[16] and purposefully left the bodies of its victims in public.[17] The AUC took its victims off buses at roadblocks.[18] Plaintiffs' decedents were killed in these ways. *See* § V, *infra.*

There is no record evidence that shows that guerrillas targeted subversives; committed kidnappings on motorcycle; took people from their homes at night in these locations to murder them; or stopped buses at roadblocks during this time period to murder people. There is affirmative record evidence that other groups did not commit killings while masked or hooded. App6661.

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constituted the largest number of human rights violations reported in the country in 1997, including massacres, forced disappearances, and hostage-taking"); App7859 (HRW Report) (the AUC was responsible for the "vast majority of killings in violation of the laws of war in Colombia").

[13] App5049; App3804; App7859; App4804.

[14] App5059, 5094; App8528, 8530-8531; App7817; App7860–7861; App6592; App3482, 3492; App6060; App3229; App7859; App6020–21; App4156; App3492.

[15] App6661; App4661.

[16] App4386.

[17] App3633; App7817.

[18] App3933; *see also* App4808; 3393.

The distinct targets between the AUC and the guerrillas also reflect the differing institutional interests of the groups. As noted above, the AUC targeted union activists; the guerrillas were providing "support . . . . for union activities with the aim of strengthening them." App6612.

B. The AUC Had Displaced other Paramilitary Groups where Plaintiffs' Family Members were Murdered, and Was Responsible for Most of the Murders in These Areas.

The AUC was the dominant armed group in Colombia's banana-growing region, primarily Urabá and Magdalena, during 1997-2004. Plaintiffs' family members were killed in these regions during this time period, specifically in the municipalities of Turbó, Chigorodó, Carepa, Mutatá, and Apartadó in Urabá, and Zona Bananera and Ciénaga in Magdalena. *See* § V, *infra.*[19]

By 1997, when the first bellwether decedent was murdered, the AUC had seized control of these municipalities and pushed the guerrillas into mountainous rural areas. App3635. As AUC members and a commander recounted, by 1996, following the AUC's retaking of Urabá, the AUC had it "literally under control." App3806, 3802–03; *see also* App4385 (in the areas where the AUC operated, including Urabá, the AUC had them "100 percent under . . . control"). By the late 1990s, a "large part of their opponents had already been killed, or had already been displaced," and they had

[19] *See also, e.g.,* App4708; App4823 (locating municipalities in Urabá and Magdalena).

"gained control" of Urabá. App4664.[20] The Magdalena decedents were killed from 2002 to 2004. *See* § V(B), (D), (E), (G), *infra*. According to Chiquita's own head of security for the region during that time, App6158–59, by 2000 the paramilitaries had pushed out the guerillas from Magdalena. App6180.

When the AUC moved into an area as it did in Urabá and Magdalena, it displaced other armed groups and the AUC controlled the exercise of armed violence. Even Chiquita conceded it began to pay the AUC for operations in these regions beginning in 1997. App3575–76. During this time the AUC continued executing "counterinsurgency" operations, *id.*, targeting perceived "subversives" amongst the civilian population. *See* § I & n.13, *supra*.

The AUC was responsible for the vast majority of the violence where and when it dominated.[21] Defendants' own expert stated that the guerrillas' gains were

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[20] *See also, e.g.*, App4822–24, 4832; App3802; App5087 (paramilitaries were responsible for 102 forced displacements in Turbo, to guerrillas' six); App4422–23, 4425 (paramilitary groups, including AUC, became "a superstructure with a national scope, whose boom led to the worst violations of human rights"); App4353 ("When the AUC took control of an area, they would often express that control using graffiti writing on town walls and/or threatening pamphlets.").

[21] *See, e.g.*, App3856 (paramilitaries committed greater overall violence against civilians than guerrillas); App5047–48 (AUC committed the vast majority of political killings in Colombia from 1994–2004); App6425, 6434; App4163; App4656–57 ("From 1994 onwards, the epicenter of paramilitaries was always the south of Cordoba and Urabá, where the ACCU [a precursor to the AUC that was absorbed into it] originated . . . Urabá was the cradle of the most complete and powerful expression of this paramilitary in Colombia . . . ."); App4157 (in Magdalena in 2003, it was very common for paramilitaries to take people by force); *see also* App4823, 4832

reversed by 1998, at which time the paramilitaries' threat to civilians was dire. App3849, 3853–54. In Urabá alone, between 1995 and 2004, the AUC killed at least 4,335 people and disappeared 1,036 more. App4708.

Professor Oliver Kaplan, an expert on armed conflict in Colombia, App4914, 4786, 4836–50, testified that the general patterns of the bellwether murders were consistent with a wide variety of reports – from human rights organizations, the United Nations and the U.S. State Department – documenting AUC violence; in particular in Urabá and Magdalena. App4786–89. These reports indicate that the timing of violence against the bellwether victims and the patterns of AUC violence in those municipalities were closely correlated. App4822. Professor Kaplan also found "great overlap" between the sites of bellwether victim killings and the geographic pattern of AUC killing, App4823, and confirmed this with a variety of sources, including paramilitary commander testimonies. App4786–89, 4823–25. He also found the manner of the specific bellwether victims' murders fit the AUC's *modus operandi*. App4828. Another expert, Manuel Ortega, opined that the vast majority of killings were committed by the group in control of an area, and that this was true of the AUC in Urabá between 1995 and 1997. App3491–93. Professor Kaplan also concluded,

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(AUC was responsible for 90 percent of civilian murders in areas it controlled); App3492 (paramilitaries were responsible for the vast majority of the murders in Urabá from 1995–97); *see also* n. 13, *supra*.

with a high degree of certainty, that Plaintiffs' family members were murdered by the AUC. App4822, 4832, 4917. These conclusions were based on widely-available evidence about the way the AUC operated, and statistical analysis.

C. Colombia's Justice and Peace Process Connected the AUC to the Bellwether Murders.

The Justice and Peace Process ("Process") is a Colombian transitional justice legal mechanism created by Law 975 of 2005 to allow the demobilization of Colombian illegal armed groups, specifically the AUC. App3666–68. Through this process, AUC members commit to truthfully confessing their crimes, in exchange for certain legal benefits including leniency in their criminal sentences. App2820. Under this system participating AUC members must (1) tell the truth about their crimes; (2) refrain from committing further crimes; (3) deliver or identify property for reparations to their victims; and (4) carry out the acts of symbolic reparations or other conditions that the court may determine (e.g., ask their victims for forgiveness). *Id.* High-level AUC commanders, including Raul Hasbún Mendoza, José Mangones Lugo, and Fredy Rendón Herrera, participated in the process and admitted their responsibility for supervising the campaign of murder that engulfed Plaintiffs in these actions. The documentation of their admissions show that these AUC commanders were directly responsible for the deaths of several bellwether decedents and most likely all of them. *See* § III, *infra*. The documents produced in the Justice and Peace Process, including

these testimonies, were considered reliable by both parties and their respective experts.[22]

D. Evidence Specific to Each Bellwether Decedent.

In addition to these categories of evidence, Plaintiffs introduced additional decedent-specific evidence sufficient alone to defeat summary judgment on the issue of AUC responsibility for most decedents. The evidence is set forth in section V(A)-(J), *infra*.

II. PROCEDURAL HISTORY

Plaintiffs' respective complaints[23] alleged that Chiquita and individual Defendants[24] aided and abetted the AUC's torture and murder of their decedents. In all, the complaints included the claims of several thousand individual plaintiffs. The multi-district litigation panel centralized these actions in the Southern District of Florida in 2008. App7762–7764.

After motion practice the district court entered a "Global Scheduling Order," under which 56 bellwether cases were selected for full discovery, and from that group, twelve cases were selected for initial trials. App3076–77. The bellwether process was

[22] *E.g.* App2979–83, App2819–26; App3040–41; App7390-99.

[23] App537–2685.

[24] The individual Defendants are former Chiquita executives Keith Lindner, Cyrus Friedheim, Charles Keiser, Robert Kistinger, Robert Olson, William Tsacalis, and Carla Hills, representative of the estate of Roderick Hills.

designed to create a framework for the resolution of thousands of cases pending before the district court.

Early in discovery, one Plaintiff group sought leave to serve the Colombian authorities with letters of request to procure the Justice and Peace investigatory files that related to the AUC's murder of Plaintiffs' family members. App3080-84. The district court denied this request. App3104-12. It concluded that the issue of whether the AUC was responsible for Plaintiffs' murders was not likely to be a "critical issue" in the case, App3109, and that "investigatory files relating to allegedly ongoing criminal prosecutions before a foreign tribunal" were of "questionable importance . . . to disputed issues at stake in this MDL proceeding." App3108. It reasoned that Plaintiffs had not shown "that the identity of the murderers of Plaintiffs' decedents . . . is a disputed issue of fact in the first instance" or that "they could not establish the identities of the killers by other less burdensome discovery mechanisms." App3109. The district court cautioned plaintiffs that they "overestimate[d] the potential importance of the requested information" because the "larger critical issue of fact" was the issue of "the Defendants' alleged misconduct in financing the AUC." *Id.*

Following the district court's direction, all Plaintiffs attempted to use alternative means to obtain evidence of AUC responsibility for the murders. Plaintiffs gathered testimonial, circumstantial and expert evidence, as well as publicly-available Justice and Peace documents, showing that three high-level AUC commanders were

responsible for the murders of certain bellwether Plaintiffs' family members. These documents include court judgments of murder convictions, formal charging documents based on confessions, and letters from Colombian prosecutors officially recognizing that a particular AUC member confessed to, and/or was charged with or sentenced for the murder of Plaintiffs' family members. *Infra* § III(B)(5).

After this discovery period, Defendants moved for summary judgment on the first bellwether cases, arguing in part that Plaintiffs lacked admissible evidence that their family members were murdered by the AUC. App3293. In their Opposition, Plaintiffs presented the documents from the Process as well as testimonial, circumstantial and expert evidence showing AUC responsibility for the murders. App3445–75. Defendants only disputed the authenticity of one of these documents, and Plaintiffs could have authenticated any of them by trial, including by the discovery the district court denied Plaintiffs. *Infra* § III(B)(5). The first trial was not scheduled to begin until seven and a half months after Plaintiffs filed their summary judgment opposition, and for many bellwether plaintiffs – who had been transferred from other districts and never given up the right to remand for trial – their trials were many months or years in the future. *E.g.* App8386.

In an appendix to their reply brief Defendants made additional objections to Plaintiffs' evidence. App7232. The district court denied Plaintiffs' request to respond, App7360, but subsequently ordered Plaintiffs to identify the evidence showing AUC

responsibility for the murders and its admissibility. App7363–7367. After Plaintiffs' supplemental brief, App7368, Defendants were given a further supplemental response, App7435, where they made new evidentiary objections to which Plaintiffs had no opportunity to respond.

Defendants also filed a motion in limine to exclude Professor Kaplan's testimony based on *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *See generally* App7485.

The district court granted summary judgment without a hearing, and before the briefing was completed on the *Daubert* motion. It ruled the Justice and Peace documents were inadmissible and faulted Plaintiffs for failing to "come forward with any . . . underlying investigatory records from Colombian prosecutors," App7440–41, notwithstanding its prior ruling denying Plaintiffs access to these records. The district court also rejected Plaintiffs' other direct and circumstantial evidence and found other evidence inadmissible, finding that no reasonable jury could conclude the AUC was involved in killing the Plaintiffs' family members. App7571–78.

SUMMARY OF THE ARGUMENT

The evidence the district court did not exclude, viewed in the light most favorable to Plaintiffs, was sufficient for a jury to conclude that the AUC killed each of Plaintiffs' family members. The district court erroneously looked at evidence in isolation, viewing pieces of evidence individually as "standing alone," failing to consider the totality of the evidence before it in granting summary judgment.

First, Plaintiffs introduced substantial evidence, not excluded by the court, of the AUC's responsibility for the bellwether murders. This evidence demonstrated that the AUC had the unique means and opportunity to commit these murders. The AUC dominated the areas where the decedents were killed, and displaced other belligerents or criminals where they did so. The AUC committed 90 percent of the murders in these areas. The AUC also had a motive to kill these decedents that others lacked. From this and other evidence, a reasonable jury could have found that the AUC was responsible for each of the bellwether murders. § I, *infra.*

Second, Plaintiffs introduced evidence that these murders fit the AUC's *modus operandi*. The district court erroneously excluded evidence of the AUC's signatures in their killings, based on Federal Rule of Evidence 404(b)'s requirement that a *party's* past act may not be admitted as *modus operandi* evidence unless its handiwork was exceptional and unique. But this requirement does not apply to evidence of *non-parties*' *modus operandi*. *See* § II(A), *infra.* The applicable test is whether such evidence is substantially more prejudicial than probative. No such finding can be made here. *Id.* Even if Rule 404(b) *did* apply to non-parties in a civil case, acts that were "part of the same plan, and used the same *modus operandi*," may be used to establish a perpetrator's identity. *United States v. Horner*, 853 F.3d 1201, 1214-15 (11th Cir. 2017). The evidence here concerned the AUC's responsibility during the same campaign of violence in

which Plaintiffs' family members were murdered, and Plaintiffs produced evidence that the signatures of an AUC killing were unique. *See* § II(C), *infra.*

Third, Plaintiffs introduced numerous Justice and Peace Process documents showing the AUC's responsibility for the deaths of the Plaintiffs' family members. The district court excluded most of them based on mistaken objections to which Plaintiffs had no meaningful opportunity to respond. The court's refusal to allow any opportunity to respond or cure defects makes even less sense in the context of "bellwether" trials, where there was ample time to allow Plaintiffs to cure any purported defects. *See* § III(A), *infra.*

Each of the excluded documents falls within one or more hearsay exceptions. *See* § III(B), *infra.* The excluded judgments were government records of convictions. The indictment was admissible as a public record constituting the factual findings of prosecutors who determined that the evidence showed that the AUC leader was responsible for the killings. With foundational testimony from Plaintiffs' expert witness on the Justice and Peace Process, which was also improperly excluded, and Defendants' own expert testimony, the indictment also qualified as a business record. The prosecutors' letters also qualified as public records, reflecting confessions and prosecutors' factual findings..

The district court also erroneously excluded many of these documents as lacking authentication. Even if the documents were inadmissible as presented, it was

error for the district court to exclude them since the purported deficiencies could be cured by the time of trial.[25] *See* § III(A), (C), *infra.*

Fourth, the district court erred in excluding Professor Kaplan's statement that the AUC was "more likely than not" responsible for the deaths of Plaintiffs' decedents. The district court held that Kaplan's methodology was not reliable, without considering that methodology. *See* § IV, *infra.*

Finally, most of the bellwether Plaintiffs supplied additional decedent-specific evidence further creating material issues of fact about the AUC's responsibility that could only be resolved by a jury. *See* § V, *infra.*

STANDARD OF REVIEW

The district court's ruling as to whether admissible evidence creates a genuine issue of material fact is reviewed *de novo*. *Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1362 (11th Cir. 2018). The facts and inferences from all evidence are viewed in the light most favorable to Plaintiffs. *Id. See* § I, *infra.*

The district court's admissibility rulings are reviewed for an abuse of discretion. *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1068 (11th Cir. 2014). "A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a

[25] In fact, Plaintiffs have now obtained the required certifications. *See* Appellants' Request for Judicial Notice ("RJN") Exs. A-G.

determination, or makes findings of fact that are clearly erroneous. A court applies the wrong legal standard when it analyzes evidence under the wrong test or applies a test to evidence that the test should not apply to." *Id.* (internal quotation marks omitted). *See* § II-IV, *infra*.

Further, "[w]hether a declarant is unavailable as a witness under Rule 804(a) is a question of law that we review *de novo*." *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (11th Cir. 2013). *See* § V(E)-(F), (H), *infra*.

ARGUMENT

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

The evidence that the district court did not exclude was sufficient for a jury to find that the AUC murdered Plaintiffs' family members, particularly when considered, as it must be, in its totality and not in isolation.

First, Plaintiffs introduced evidence that the AUC had a motive to kill these decedents. Second, Plaintiffs introduced evidence that the AUC had the unique means and opportunity to kill Plaintiffs' decedents – the AUC dominated and controlled the areas in which the decedents were killed, at the time they were killed, and had displaced other belligerents or criminals. Third, Plaintiffs introduced evidence that the AUC was responsible for the vast majority – 90 percent – of civilian murders in the

relevant areas and time periods. This evidence supports the inference that Plaintiffs' family members were likely killed by the AUC.

A. The Totality of Plaintiffs' Evidence Creates a Genuine Dispute About Whether the AUC was Responsible for the Murders of Plaintiffs' Family Members.

The district court improperly considered Plaintiffs' individual pieces of evidence "standing alone" rather than considering Plaintiffs circumstantial case in its totality. *E.g.*, App7517 n.5, 7558, 7575-76. Courts must consider "the totality of the evidence adduced in [the] summary judgment record," *Lippert v. Cmty. Bank, Inc.*, 438 F.3d 1275, 1278 (11th Cir. 2006), and "the cumulative effect of [relevant] facts and the conclusion that rationally could be inferred from them." *Cox v. Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1400 (11th Cir. 1994); *see also, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (evidence is considered collectively, not item by item); *Bourjaily v. United States*, 483 U.S. 171, 180, (1987) ("The sum of an evidentiary presentation may well be greater than its constituent parts."); *Howley v. Town of Stratford*, 217 F.3d 141, 151 (2d Cir. 2000) ("In determining the appropriateness of summary judgment, the court should not consider the record solely in piecemeal fashion, giving credence to innocent explanations for individual strands of evidence, for a jury . . . would be entitled to view the evidence as a whole.").

The circumstantial evidence that the district court did not exclude alone showed that: the AUC had motive to kill the decedents; each decedent was killed in a locale tightly controlled by the AUC, from which other belligerents and common

criminals had been driven out; and the AUC was responsible for at least 90 percent of the murders of civilians, and in particular the kinds of civilians killed here. Taken together, the mutually-reinforcing evidence here permits a reasonable jury to find that it was more likely than not that the AUC murdered Plaintiffs' family members.

B. Plaintiffs Presented Evidence that the AUC had a Motive to Murder Most of the Bellwether Decedents.

Plaintiffs introduced evidence that the AUC's "objective" and "principal ideal" was to target perceived "subversives" and purported guerrilla sympathizers and that the AUC's persecution of its opponents was broad-ranging. *E.g.* App3804, 3811; *see also* App3660, App6792; App7774–7780. The AUC targeted unionists, social leaders, banana workers, suspected guerrilla sympathizers, criminals and similar social "undesirables." *See* n.7, *supra.* Almost all of Plaintiffs' family members fit at least one of these profiles. *See* § V(A)-(H), *infra.* All of Plaintiffs' decedents were also non-combatants, whom the paramilitaries targeted more frequently than guerrillas did as part of the AUC's campaign of terrorizing the civilian population. App3856.

Defendants' own expert testified to the distinctive, targeted nature of the AUC's violence. App3853, 3858-59. In contrast to the AUC, the FARC guerrillas – the other major armed group in Colombia at the time – had no institutional interest in killing such persons. App3859. Indeed, the guerrillas often supported union activities. *E.g.* App6612 (FARC supported union activities). Defendants introduced no evidence that anyone other than the AUC had a motive to kill Plaintiffs' family members. *See*

generally App3293–3330, App7237–62, App7435–58.

Even in the criminal context, motive is powerful circumstantial evidence of guilt. *See, e.g.*, *United States v. Covington*, 565 F.3d 1336, 1342 (11th Cir. 2009) ("[M]otive is an integral part of any crime."); *Boland v. Sec'y, Dept. of Corr.*, 278 F. App'x 876, 880 (11th Cir. 2008) (listing motive as part of the circumstantial evidence proving defendant's guilt). In fact, evidence proving motive is one of the specifically enumerated purposes for which evidence of a criminal defendant's prior bad acts may be introduced. Fed. R. Evid. 404(b)(2); *see also, e.g.*, *Covington*, 565 F.3d at 1341-42.

The district court erroneously discredited the evidence of the AUC's motive. *See, e.g.*, *Dugandzic v. Nike, Inc.*, No. 19-11793, 2020 WL 1510165, at *3 (11th Cir. Mar. 30, 2020) (reversal and remand required where district court did not consider all relevant evidence). The district court erred in finding that evidence of the AUC's unique means and opportunity were insufficient "standing alone." App7576.[26] The district court further erred in failing to consider motive as part of the totality of the evidence. *E.g. Lippert*, 438 F.3d at 1278. Motive to target Plaintiffs' family members – particularly combined with evidence of the AUC's near total control of the areas and

[26] If the district court excluded motive as *modus operandi* evidence this too would be legal error. The AUC's opposition to persons like the decedents does not require the introduction of prior murders, only their motive. There is also no "unique handiwork" requirement for the introduction past acts to establish motive. *E.g. United States v. Beechum*, 582 F.2d 898, 912 n.15 (5th Cir. 1978) ("[O]verall similarity is not required when the offense is introduced to show motive.").

its exclusion of other groups – permits a reasonable inference that the AUC likely killed Plaintiffs' family members.

C. Plaintiffs Presented Evidence that the AUC had Unique Means and Opportunity to Kill their Family Members and Total Control over the Areas in which the Murders Took Place.

Plaintiffs introduced evidence that the AUC was the dominant armed group in the regions (and in more specific localities relevant to these murders) and controlled the areas at the time of the bellwether murders.[27] Plaintiffs also introduced evidence that when the AUC moved into an area, it displaced other (and certainly oppositional) armed groups.[28] The evidence also shows that the AUC did not tolerate outside criminal activity in areas it controlled, and it was unlikely for common criminals to operate in those areas. *E.g.* App3638, App3491.

Even in criminal cases, though Plaintiffs need not meet their standard of proof, courts routinely consider evidence of a criminal group's territorial control as strong circumstantial evidence of the group's responsibility. *See, e.g.*, *United States v. Rodriguez-Torres*, 939 F.3d 16, 28 (1st Cir. 2019) (finding evidence that defendants each sold drugs in territory controlled by RICO conspiracy sufficient to show defendants were members of conspiracy); *United States v. Gregory Thomas*, 114 F.3d 228, 241 (D.C. Cir.

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[27] *E.g.* App3635 (guerillas driven out in 1997); App3806 (by 1996, the AUC had Urabá "literally under control"); App4385 ("100 percent" control); *see generally* Statement of Facts ("SoF") § I(B), *supra*.

[28] *E.g.* App3618, 3635 (AUC drove guerrillas into the mountainous area); App3575–76; App3635–36; *see generally* SOF § I(B), *supra.*

1997) (finding evidence that defendant sold drugs in gang's territory supported conclusion that defendant was involved with it in a conspiracy). Indeed, in *Rodriguez-Torres*, the fact that the crimes took place in the gang's territory, and could have served its ends, was the principal evidence supporting the sufficiency of the jury's finding – *beyond a reasonable doubt* – that the crimes involved the gang. 939 F.3d at 28. Here, a civil jury could reasonably find from this evidence that the AUC was responsible for the murders that took place within its territory, including the murders of Plaintiffs' family members.

There was also evidence that the AUC punished outside criminal activity within its territory, which further underscores the likelihood that the AUC committed the murders. *See, e.g.*, *Gregory Thomas*, 114 F.3d at 241 (noting connection to a gang evidenced by fact that defendant sold drugs on gang's turf without being targeted for retaliation as were gang's rivals).

D. Plaintiffs Presented Evidence that the AUC Committed the Vast Majority of Civilian Murders where and when the Bellwether Decedents were Killed.

Plaintiffs introduced evidence, including Defendants' own expert, showing that when the AUC dominated an area, it was responsible for the vast majority of the murders in that area – 90 percent of the murders, by one expert's estimate.[29] None of

[29] *See, e.g.*, App3856 (paramilitaries committed greater overall violence against civilians than guerrillas); App5047–48 (AUC committed vast majority of political killings in Colombia from 1994–2004); 6425, 6434; App4163; App4157 (in Magdalena

this evidence in the expert testimony was excluded except for the expert's ultimate conclusion as to the AUC's responsibility. *See* App7551–7576.[30]

This circumstantial evidence, along with the other evidence of AUC involvement outlined above, would allow a jury to find that the AUC was responsible for the murder of Plaintiffs' family members. The district court did not exclude any evidence concerning the AUC's dominance or responsibility for the vast majority of killings in the relevant time periods. Instead, it found the evidence was "speculative" because the district court erroneously believed that Plaintiffs were relying on "market-share liability," and apparently for this reason it "summarily rejected" the natural inference that this evidence supports Plaintiffs' claims. App7574–75.

The use of this kind of evidence is appropriate to support an inference that the AUC was responsible for these murders. *See Milam v. State Farm Mut. Auto. Ins. Co.*, 972 F.2d 166, 170 (7th Cir. 1992) ("[T]estimony and other forms of 'direct' evidence have no categorical epistemological claim to precedence over circumstantial or even explicitly statistical evidence."). For example, in determining an aviation accident's

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in 2003, it was very common for paramilitaries to take people by force); *see also* App4823, 4832 (AUC was responsible for 90 percent of civilian murders in areas it controlled); App3492.

[30] The district court did not dispute any of the experts' other testimony or conclusions, including testimony about the AUC's control over the areas in which Plaintiffs were killed and its responsibility for the majority of civilian murders within that territory – on which Defendants' own experts agreed. *Id.*; App3856, 3858. The other portions of the expert's report are plainly admissible.

cause, it was permissible to consider circumstantial evidence, such as statistics, suggesting the most frequent causes of such accidents. *Ashland v. Ling-Temco-Vought, Inc.*, 711 F.2d 1431, 1439-40 (9th Cir. 1983). The same is true in other contexts.[31]

Indeed, direct evidence will rarely be available concerning mass murder by terrorist groups like the AUC. *E.g. Owens v. Republic of Sudan*, 864 F.3d 751, 787 (D.C. Cir. 2017) ("Victims of terrorist attacks, if not dead, are often incapacitated and unable to testify about their experiences. . . . Eyewitnesses in a state that sponsors terrorism are similarly difficult to locate and may be unwilling to testify for fear of retaliation. . . . With a dearth of firsthand evidence, reliance upon secondary materials . . . is often critical."). Responsibility for atrocities of the kind at issue in this case will usually require circumstantial proof of responsibility, or the perpetrators will escape accountability.

Plaintiffs did not advance *any* argument based on market share liability. In any event, the market share liability doctrine does not preclude a jury from considering the

[31] *See, e.g. Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1517-20 (11th Cir. 1988) (finding plaintiff had sufficient evidence to link their son's injury to defendant's vaccine, given that most or all of the vaccines in the doctor's office when and where plaintiffs' son was given a shot were defendant's); *Mayfield v. Keeth Gas Co.*, 81 N.M. 313 (N.M. Ct. App. 1970) (finding that doctor's opinion as to cause of death, based on statistics that arteriosclerosis accounts for at least sixty to eighty percent of sudden cardiac deaths, "is not speculative but is substantial evidence"); *Skip Fordyce v. Workers' Comp. Appeals Bd.*, 149 Cal. App. 3d 915, 929 (Cal. Ct. App. 1983) (finding that medical opinion based on statistical correlations and relationships of probability is not speculative).

AUC's pervasive violence in the areas where the bellwether decedents were killed as circumstantial evidence of the AUC's responsibility for the deaths of Plaintiffs' family members. Plaintiffs' evidence that the AUC controlled a large share of the relevant territory is circumstantial evidence, along with circumstantial evidence of motive, that a defendant caused the Plaintiffs' harm. *See In re Methyl Tertiary Butyl Ether (MBTE) Prods. Liab. Litig.*, 725 F.3d 65, 115–17 (2d Cir. 2013). In *MBTE*, for example, New York City sought to hold a gasoline manufacturer liable for polluting its water supply. *Id.* at 82. The City's expert testified that the defendant manufactured 25 percent of the gasoline sold in the City, and the district court instructed the jury that it could consider the defendant's market share as circumstantial evidence of causation. *Id.* at 116. On appeal, the Second Circuit rejected the defendant's argument that the district court's instruction was an improper use of market-share liability, explaining instead that the district court "simply permitted the jury to draw upon market-share data as one piece of circumstantial evidence that [the defendant] caused the City's injury." *Id.* at 115-16; *cf. Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1517-20 (11th Cir. 1988). Similarly, Plaintiffs' evidence showing the near total degree to which the AUC dominated civilian murders in the areas and during the periods in which Plaintiffs' family members were murdered was circumstantial evidence of AUC responsibility. Defendants may dispute the inferences that such evidence raises, or introduce contrary evidence, but that "is a question of fact for trial – [the inference is] not

something to be rejected on summary judgment." *Milam*, 972 F.2d at 171.

II. THE DISTRICT COURT IMPROPERLY EXCLUDED EVIDENCE THAT THE KILLINGS OF PLAINTIFFS' FAMILY MEMBERS WERE CONSISTENT WITH THE AUC'S *MODUS OPERANDI*.

Plaintiffs presented substantial evidence that the AUC killed its victims in the same manner Plaintiffs' family members were killed. This has a "tendency" to make the fact that the AUC killed a bellwether decedent "more . . . probable than it would be without the evidence." Fed. R. Evid. 401. The district court, however, erroneously held that this was inadmissible "character" evidence under Rule 404(b), such that it was categorically barred absent peculiar, unique, or bizarre handiwork. App7575.[32]

First, the court applied the wrong legal standard. There is no requirement to show "unique handiwork" to introduce evidence of non-parties' *modus operandi*. The relevant test for admitting evidence of a crime committed by a third party is whether such evidence is not substantially more prejudicial than probative. *United States v. Ellis*, 593 F. App'x 852, 856 (11th Cir. 2014). Moreover, evidence of acts that were "part of the same plan, and used the same *modus operandi*" are not excluded under Rule 404(b)). *Horner*, 853 F.3d at 1215. The evidence here concerned the AUC's prior killings in the same campaign of violence and murders that claimed the lives of the bellwether decedents.

[32] Rule 404(b)(1) provides that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

Second, even if Rule 404(b) applied to AUC crimes, it is a "rule of inclusion" and the evidence, where essential, "should generally be admitted." *United States v. Floyd*, 522 F. App'x 463, 465 (11th Cir. 2013). Moreover, even if Plaintiffs were required to show "unique handiwork," the district court ignored evidence that these murders bore the unique hallmarks of an AUC murder.

While the district court suggested that Plaintiffs' *modus operandi* evidence is not enough, "standing alone," to defeat summary judgment, App7576, *modus operandi* was extremely probative of the issue of AUC responsibility, especially when viewed in the totality of evidence. In addition to being murdered in the *manner* in which the AUC killed, the victims were also murdered *where and when* the AUC was the dominant or only group committing political murders, and were the *types of victims* the AUC targeted.

A. The District Court Erred in Holding that Plaintiffs may not Introduce Evidence Indicating a Non-Party's *Modus Operandi* Absent "Signature" Handiwork.

Plaintiffs introduced voluminous, undisputed evidence that the AUC characteristically employed the same methods used in these murders. For example, the AUC (1) killed alleged "subversives" by gruesome methods to send a message to others, App5049; App3804; App7589; App4804; (2) kidnapped victims as a means of terror (often on motorcycle, and wearing helmets, which was uncommon in these

areas);[33] (3) killed while hooded or masked, App6661, 4661; (4) took people from their homes at night, to murder them, App4386; (5) purposefully left their victims' bodies in public, App3633, App7817; and (6) stopped buses at roadblocks to murder people, App3933; *see also* App4808; 3393. Plaintiffs' decedents were killed in this way, as discussed below. § V, *infra*.

The district court erroneously excluded the AUC "*modus operandi*" evidence under Rule 404(b), holding that this Rule requires a "showing of 'such peculiar, unique, or bizarre similarities as to mark them as handiwork' of [a] particular individual." App7575 (citing *United States v. Myers*, 550 F.2d 1036, 1045–46 (5th Cir. 1977)).

However, Rule 404(b) does not apply to AUC crimes. A showing of unique commonalities may be required for a *defendant*'s past acts in a criminal case. *See Myers*, 550 F.2d at 1045–46. But evidence of a crime committed by a *third party* – like the AUC – "is admissible if its relevance outweighs its prejudicial effect pursuant to Fed. R. Evid. 403." Rule 404(b) does not govern the analysis. *Ellis*, 593 F. App'x at 856; *see also United States v. Meester*, 762 F.2d 867, 877 (11th Cir. 1985) (Rule 404 only "deals with acts committed by the defendant himself." It does not apply to "crimes committed by other members of the conspiracy . . . ."); *United States v. Bailey*, 840 F.3d

[33] *E.g.* App5059, 5094; App8530-31 (AUC "debilitated to controlling territory by terror"); App7817; App7859–61; App6592; App3482, 3492; App6060; App3229; App6020–21; App4156; App3492; App6592.

99, 125 (3d Cir. 2016) ("Rule 404(b) only applies to evidence of a *defendant's* other bad acts or crimes, not those of third parties.").

Evidence of a "crime committed by someone other than" the party need not conform to the strictures of Rule 404(b), *Ellis*, 593 F. App'x at 856, in part because it does not taint the party with a criminal disposition. *United States v. Edwards*, 696 F.2d 1277, 1280-81 (11th Cir. 1983). *Myers* required unique similarities not because lesser evidence is not probative, but because of the risk that the defendant will be prejudiced by evidence that he committed other crimes. 550 F.2d at 1044–45. That concern is "inapplicable" when the crime is committed by a third party. *United States v. Krezdorn*, 639 F.2d 1327, 1333 (5th Cir. Unit A Mar. 1981) ("When the evidence will not impugn the defendant's character, the policies underlying Rule 404(b) are inapplicable.").[34]

Applying Rule 404(b) is also at odds with the Rule's text. It may apply to attempts to show that the same "person" committed other acts, but here, the question is whether *different* perpetrators were affiliated with the same *organization*. When rules

[34] *Ellis*, 593 F. Appx. at 856; *Edwards*, 696 F.2d at 1280-81, and similar cases admit a non-defendant's *modus operandi* evidence with no consideration of whether such evidence shares peculiar commonalities with the crime at issue. Other cases consider this in the totality of the circumstances in weighing prejudice. *E.g. United States v. Morano*, 697 F.2d 923, 926 (11th Cir. 1983). However, even in these cases, such commonalities are merely a factor in the totality of circumstances relevant to prejudice, and need not be shown for non-defendants, let alone for non-defendants in a civil case. *Id.*

of evidence apply to organizations *and* natural persons, they say so explicitly. *See* Fed. R. Evid. 406. Thus, the mis-application of Rule 404(b) was an abuse of discretion. *See Aycock*, 769 F.3d at 1068 (11th Cir. 2014) (district court abuses its discretion when it misapplies a legal rule).

Even if Rule 404(b) applied to the AUC's crimes, it does not bar evidence of acts "linked in time and circumstances" to the crime at issue, or that are an "integral and natural part of the complete story of the crime." *Horner*, 853 F.3d at 1213. Thus, Rule 404(b) does not exclude evidence that is "part of the same plan, and used the same modus operandi," as is the case here. *Id.* at 1215; *id.* at 1214 (same); *see also United States v. Chappell,* 307 F. App'x 275, 282–83 (11th Cir. 2009) (such evidence is admissible to prove identity). In *United States v. Palmer*, 759 F. App'x 854, 855-56 (11th Cir. 2019), this Court found that evidence is admissible as inextricably intertwined when it takes place within the time period relevant to the acts at issue and helps establish a defendant's methods. For example, an organization's *modus operandi* and bad acts may be admitted where such gang evidence helps explain the "context, motive, and set-up" of a crime. *United States v. Mills*, 704 F.2d 1553, 1559 (11th Cir. 1983) (admitting evidence of gang's history and activities in engaging in drug trade through violent means); *United States v. Rios*, 830 F.3d 403, 426 (6th Cir. 2016) (evidence that is part of a continuing pattern of illegal activity, such as prior gang violence, does not implicate Rule 404(b)). The AUC's campaign of violence against civilians like

Plaintiffs' family members is part of the context, motive, and set-up for these acts.

The evidence of prior murders by the AUC is both linked to and part of the same pattern and practice that killed the bellwether decedents. This case concerns Chiquita's assistance to the AUC as part of its campaign of violence and murders for which the various Plaintiffs seek to hold Defendants liable. Such evidence was accordingly admissible and Rule 404(b) is irrelevant. *E.g. Chappell,* 307 F. App'x at 282–83 (past acts linked to and part of an act at issue are admissible to prove identity.)

B. Plaintiffs Produced Substantial Evidence of the AUC's Signature Handiwork.

Even if litigants in a civil case need to show unique handiwork before the past acts of non-parties could be admitted, Plaintiffs made that showing here. *Myers* requires only that acts "possess a common feature or features" that make it very likely the perpetrator of the charged crime and the perpetrator of the prior crime "are the same person." 550 F.2d at 1045. Here, the Court ignored evidence of common features; for example, some of Plaintiffs' decedents were killed in uniquely brutal ways, such as cut around their hearts, were murdered with their bodies left in public, and abducted by men on motorcycles wearing masks as a method of terrorizing the civilian population. The record affirmatively established that other groups did not kill in these ways. For example, John Doe 11 was abducted from his home at night and killed by masked men, App6090, 6091–92, 6096; App6601; the record shows other groups did not kill in this way. App4386, App6117, App6661; *see* § V, *infra*. Moreover,

this Court has found other acts to be "sufficiently similar" to the acts at bar based on a "combination of similarities," even though individual similarities were common to many crimes. *United States v. Whatley*, 719 F.3d 1206, 1218 (11th Cir. 2013); *see also Myers*, 550 F.2d at 1045 (same). The district court erred in failing to consider that some of Plaintiffs' decedents' murders had multiple similarities to the AUC's killing methods. *See generally* § V, *infra.*

The AUC's methods were unique given the evidence in the record that the AUC had pushed other armed groups out of the regions where Plaintiffs' family members were murdered, and specifically targeted people like Plaintiffs' decedents. *See* § I, *supra*; *see also*, *e.g.*, *United States v. Stubbins*, 877 F.2d 42, 44 (11th Cir. 1989) (fact that drug deals happened at same location was sufficiently similar circumstances to warrant introduction of *modus operandi* evidence). Thus, other groups were not committing killings where and when these murders were committed, which further bolsters the uniqueness of these murders.

The district court's finding that the "evidence regarding the manner of the killings is not, standing alone, sufficient" was error. App7576. The AUC's methods were sufficiently unique to infer AUC responsibility, and Plaintiffs' *modus operandi* evidence does *not* stand alone. *See* § I, *infra*. Defendants pointed to no evidence that others acted in a similar way. *See* Fed. R. Civ. P. 56(c)(1)(B) (*movant* must "show . . . that an adverse party cannot produce admissible evidence to support the fact").

C. Any Potential Prejudice did not Substantially Outweigh the Probative Value of Evidence of the AUC's *Modus Operandi*.

The district court did not consider or weigh prejudice or probative value, given its conclusion that the evidence of non-parties' *modus operandi* was categorically barred absent unique handiwork. Had it done so, the balance plainly favors Plaintiffs.

The *modus operandi* evidence is highly probative. Where past acts involve the behavior of a person other than a criminal defendant, and the evidence is crucial, as it was here given the district court's other rulings, it is an abuse of discretion to exclude such evidence. *See United States v. Cohen*, 888 F.2d 770, 777 (11th Cir. 1989); *see also United States v. Smith*, No. 87-5507, 1987 U.S. App. LEXIS 19534, at *4 (4th Cir. Dec. 18, 1987), *reported at* 836 F.2d 548 (4th Cir. 1987) (evidence of *modus operandi* of a group, its past criminal acts, was admissible and the probative value outweighed any prejudice because it was "possibly critical to rounding out the other circumstantial evidence" to tie the defendant to the crime at issue).

III. THE DISTRICT COURT IMPROPERLY EXCLUDED DIRECT EVIDENCE THAT THE AUC MURDERED PLAINTIFFS' DECEDENTS.

While the circumstantial evidence here was sufficient, it by no means stood alone. Plaintiffs proffered documents from Colombia's Justice and Peace Process, including judgments of convictions ("*sentencias*") of two AUC commanders; letters from Colombian prosecutors to Plaintiffs confirming AUC responsibility; and the charging document ("Record 138") for AUC commander Raul Hasbún, prepared

from Hasbún's confessions and verified by prosecutors. Each document confirmed AUC responsibility for one or more decedents' murders; the district court erred in excluding them.

First, the district court reversed the summary judgment burden, and denied Plaintiffs a meaningful opportunity to respond to many of Defendants' objections.

Second, the court erred in applying the hearsay rule, because these documents are admissible as public records, business records, or records of convictions. This was true regardless of whether the court considered testimony from Professor Sánchez, Plaintiffs' foundational witness – but the court also erred in not considering that testimony. The court further erred in requiring Plaintiffs to produce investigatory documents to which it denied access in discovery. *See* App3104.

Third, the district court erred in excluding some of the documents as lacking authentication, because Plaintiffs could have authenticated them at trial, which is all that is required. Again, Plaintiffs had no meaningful opportunity to respond to many of Defendants' authenticity objections.

A. The District Court Erred in Excluding Evidence Without Affording an Opportunity to Respond, and in Reversing the Summary Judgment Burden.

Many of the district court's evidentiary decisions were colored by two procedural errors. First, Plaintiffs never had a meaningful opportunity to respond to many of the evidentiary objections that the district court upheld, some of which Defendants never raised. Second, the district court erred by essentially requiring

Plaintiffs to show that all of their evidence was admissible, rather than respond to objections.

Especially in the context of this bellwether proceeding – where there may be numerous subsequent trials – it makes no sense to exclude evidence without giving an opportunity to cure alleged defects.

1. Rule 56(f) Requires a Meaningful Opportunity to Respond.

It is error to grant summary judgment without "giving the nonmovant a meaningful opportunity to respond" to arguments and evidence. *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1516 (11th Cir. 1990). That opportunity must include the ability to submit additional evidence once the moving party makes its arguments. *Id.* at 1516-17. Here, the district court both upheld objections without giving Plaintiffs an opportunity to respond and excluded evidence submitted after objections were made.

The parties initially submitted the standard opening, opposition, and reply briefs. *See* App3293, 2325, 7237. Defendants, however, raised evidentiary objections in their reply, and yet more in "attachments" to their reply. App7237, 7270, 7267; App8381. Plaintiffs argued that these attachments should be excluded as exceeding the page limits or they should have an opportunity to respond, App7345; the court denied Plaintiffs' motion. App7630. A month later, the court directed Plaintiffs to affirmatively show admissibility and authenticity of each piece of evidence, but it specifically denied them the opportunity to submit any additional evidence. App7365

(limiting submissions to "the existing summary judgment record"). After Plaintiffs filed their supplemental brief, App7368, Defendants submitted a supplemental response, App7435 – to which Plaintiffs could not respond.

This procedure was faulty in at least two ways. First, as detailed below, the district court upheld multiple objections raised for the first time in Defendants' supplemental response. Plaintiffs had *no* opportunity to respond to these objections. Second, even as to objections raised in Defendants' reply brief, Plaintiffs had no opportunity to respond by submitting additional evidence (including foundational evidence). Both errors violate the rule of *Burns* and numerous other cases,[35] and require reversal.

This is especially so since these Plaintiffs are "bellwethers" for potentially hundreds or thousands of additional trials. *See* App3076–77. It does not advance this MDL to exclude evidence that could be made admissible without giving Plaintiffs a full opportunity to cure alleged defects.

[35] *See, e.g.*, *Smith v. Bray*, 681 F.3d 888, 903 (7th Cir. 2012) ("[D]istrict courts need to ensure that they do not base their decisions on issues raised in such a manner that the losing party never had a real chance to respond."); *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 46-47 (2d Cir. 2015) (error to grant summary judgment and preclude evidence based on authenticity challenge in a reply brief where plaintiffs could have provided complete, certified copies if given the opportunity); *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 410 (1st Cir. 1985).

2. The District Court Improperly Reversed the Summary Judgment Burden.

The district court's procedure also fundamentally undermined the purpose of Rule 56, by allowing Defendants to file their motion without attacking any of Plaintiffs' evidence, and then requiring Plaintiffs to affirmatively anticipate and respond to every conceivable objection. This is the opposite of the proper procedure, and also requires reversal.

The district court recognized that Defendants' motion only "generally contended that Plaintiffs failed to adduce admissible nonhearsay evidence"; Defendants did not identify specific "problems with various pieces of evidence adduced by Plaintiffs" until their reply brief. App7363 n.1. That should have led to denial of the motion. "It is not enough to move for summary judgment . . . with a conclusory assertion that the plaintiff has no evidence to prove his case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 328 (1986) (White, J., concurring). Where the movant does so, their "motion must be denied and the court need not consider what, if any, showing the non-movant has made." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993).

The documents Plaintiffs relied upon had previously been produced in discovery or were publicly available. Defendants should not have been permitted to sandbag their objections in their reply brief. "When a party has obtained knowledge through the course of discovery . . . that a material factual dispute exists and yet

proceeds to file a summary judgment motion, in hopes that the opposing party will fail or be unable to meet its burden in responding to the motion, he defeats [the] purpose" behind Rule 56. *Goka v. Bobbitt*, 862 F.2d 646, 650 (7th Cir. 1988). Moreover, reply briefs on summary judgment "are not a vehicle to present new arguments or theories." *WBY, Inc. v. Dekalb Cty.*, 695 F. App'x 486, 491-92 (11th Cir. 2017) (citing *Herring v. Sec'y, Dep't of Corr.*, 397 F. 3d 1338, 1342 (11th Cir. 2005)).

Additionally, the district court erred in requiring Plaintiffs to affirmatively show admissibility of their evidence, rather than responding to specific objections. Federal Rule of Civil Procedure 56(c)(2) puts the initial onus of the opponent of evidence offered on summary judgment to make an objection. Although when a proper objection is made the proponent bears the ultimate burden of showing admissibility, the opponent must first specifically explain its belief that the evidence could not be presented at trial in admissible form to trigger the proponents' burden. *See FTC v. Lanier Law, LLC*, 715 F. App'x 970, 979 (11th Cir. 2017) (finding opponent of evidence did not "raise a proper challenge" to the evidence on summary judgment because it failed to explain why evidence could not be presented in admissible form at trial); *see also, e.g.*, *SEC v. Ramirez*, No. 15-cv-2365, 2018 WL 2021464, at *6 (D.P.R. Apr. 30, 2018); *Dates v. Frank Norton LLC*, 190 F. Supp. 3d 1037, 1053 n.32 (N.D. Ala. 2016); *United States v. Estate of Mathewson*, No. 11-ca-18, 2016 WL 7409855, at *5 (W.D. Tex. Apr. 19, 2016). Similarly, the Tenth Circuit has cautioned against *sua sponte* Rule

56(c)(2) objections. *See Bird v. W. Valley City*, 832 F.3d 1188, 1194 n.1 (10th Cir. 2016). By ignoring these principles and the normal Rule 56(c)(2) procedure, the district court gave Plaintiffs the impossible task of justifying all the evidence they sought to introduce without any insight into the specific reasons Defendants sought the evidence to be excluded. This was unfair and improper. *See Smith v. Bray*, 681 F.3d 888, 902 (7th Cir. 2012) (explaining the "proponent of the evidence ordinarily need not make an argument in anticipation of an objection that may never be made").

The district court effectively reversed the burden on summary judgment, requiring Plaintiffs to prove their claims and demonstrate the admissibility of their evidence, rather than requiring Defendants to show that there was no triable issue and that any evidence in favor of Plaintiffs' case was inadmissible.

B. The District Court Erred in Finding that the Justice and Peace Documents were not Admissible at Summary Judgment.

The Justice and Peace Process was a legal process "praised" by the U.S. government, responsible for independently investigating murders by the AUC and procuring confessions and convictions. App3040–41. Defendants relied extensively on the Justice and Peace proceedings, App3047–48 (praising the Process and proceedings); *see also* App2819–26; App2959–60, 2951–52 (explaining and expressing confidence in the Process); App2979–82 (explaining the Process and praising its achievements and efficacy).

This Process was an alternative to the ordinary Colombian criminal system for

demobilized members of the AUC (and its precursor, the ACCU). App7514 n.4; App2820. Former paramilitaries who confessed to crimes they committed as AUC members and gave reparations to victims could qualify for reduced criminal sentences. *Id.* If they testified falsely, they would lose the reduced sentence and face full criminal penalties. App2820–2823. The criminal sentences or judgments issued in this process are known as *sentencias*. *See, e.g.*, App2821–22 nn.5–6 (Chiquita's expert declaration translating *sentencia* as "sentence" or "judgment"); App2864–69 (excerpts of a *sentencia* submitted by Chiquita).

All of the documents at issue here are highly probative, because they directly establish AUC responsibility for and participation in the killings of bellwether decedents. *See* § V, *infra.*

1. The *Sentencias* Were Admissible as Prior Convictions.

Under Fed. R. Evid. Rule 803(22) a final, foreign court judgment of conviction is admissible to prove any fact essential to the judgment. *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 412 (6th Cir. 2006); *see also Weiss v. Nat'l Westminster Bank PLC*, 278 F. Supp. 3d 636, 646-47 (E.D.N.Y. 2017) (admitting foreign convictions). Prior to summary judgment, the parties had presented excerpts of lengthy *sentencias*, cited to government websites, without challenge. *E.g.* App2864–69. At summary judgment, Plaintiffs did the same, submitting excerpts from two 1,180-page *sentencias* – the judgment of conviction of paramilitary leader José Mangones Lugo ("Mangones"), and the judgment against AUC leaders of the "Elmer Cardenas Block," including

Fredy Rendón Herrera ("Rendón") – which were similarly sourced to Colombian government websites. App4291–96, 2368–77; App7373 & n.11.[36] The district court excluded the *sentencias* as hearsay, adopting two arguments that Defendants raised only in their supplemental response: that AUC responsibility was not a fact "essential to the judgment," and that the AUC leaders were not actually found liable for the killings at issue. App7545–46. This was error.

AUC responsibility was essential to the *sentencias* because otherwise, these killings could not have been included in the proceedings. There was no dispute that the Justice and Peace law only applied to members of illegal armed groups "as perpetrators or participants in criminal acts during and in relation with membership in those groups." App2837. This forecloses the district court's supposition that perhaps a paramilitary leader could broadly accept responsibility for homicides based merely "on the geographical situs of the crimes," App7547; the court cited nothing for this speculation. Although the district court framed the question in terms of command responsibility, that doctrine is beside the point; by the terms of the Justice and Peace law, only AUC crimes could have been included in these proceedings against AUC commanders. In any event, the district court cited nothing to displace its recognition that, under traditional criminal law standards, a killing *by the AUC* "would be a fact

[36] The district court refers to Rendón as "Herrera," and also uses different labels for the two *sentencias*.

essential to judgment against an AUC leader based on command responsibility." App7546.

The *sentencias* actually did state that the killings at issue were committed by the AUC. Rendón and Mangones were undisputedly commanders of AUC units. *E.g.* App4370; App4294. The Rendón *sentencia* explicitly states that the bellwether decedent was "killed" during an incursion by an AUC "block" under Rendón's command. App4369–70. The Mangones *sentencia* does as well, *see* RJN Ex. E*,* but because Plaintiffs had no opportunity to respond to this objection, Plaintiffs did not submit that portion of the judgment; this could have been easily cured if the objection had been properly raised.

The district court also rejected the *sentencias* because it concluded that they did not contain "adjudicative findings by the relevant tribunal on the liability of the named defendants for any specific homicide." App7548. This appears to simply have been a misreading of the documents, which were not merely documents indicating what the AUC leaders were "charged with." *Id.* These were undisputedly judgments of criminal conviction, in which the Colombian court was stating the facts that it found; as Chiquita's expert noted, *sentencias* are rulings of criminal conviction. App2821–22 n.5 (citing to the Roldán *sentencia* as the "ruling" by which he was "convicted"). The Rendón *sentencia* clearly finds that Rendón commanded the AUC block that participated in the "incursion" that killed the bellwether decedent, App4370;

Defendants never argued that this was not a finding of liability for the killing. As to Mangones, Defendants only made this argument in their supplemental response. Had Plaintiffs been given an opportunity to respond, they could have demonstrated that the full *sentencia* unquestionably found the AUC commanders liable for these killings. *See* RJN Ex. E.

The district court also questioned whether the Rendón *sentencia* was a "final judgment of conviction" under Rule 803(22). App7545. This was apparently based on Defendants' argument about the meaning of "First Instance Judgment," which again was only raised in Defendants' supplemental response. App7441. Given the chance, Plaintiffs would have explained that "First Instance" simply means "trial court." *E.g.*, *Inbesa Am. v. M/V Anglia*, 134 F.3d 1035, 1038 (11th Cir. 1998) (noting that a district court is "a court of the first instance"); *Webb v. Webb*, 451 U.S. 493, 495 (1981). The district court gave no basis to question the document's status as a "judgment," App4369, nor any law for the notion that a judgment might not be a judgment. Indeed, the Rendón *sentencia* is the same type of document as the Mangones *sentencia*, whose finality was unquestioned. If more complete excerpts could have settled the issue, Plaintiffs should have had that opportunity. *See* RJN Ex. E.

2. Record 138 Was Admissible as a Public Record Without Foundational Testimony.

Record 138, including its Annex, App4319, officially records the Justice and Peace prosecutors' decision to "formulate and impose" charges against AUC commander Raul Hasbún for murders including those of several bellwether decedents, reflecting their conclusion that Hasbún was responsible for these murders. *Id.* It is affixed with a seal from the Justice and Peace chamber and was issued by a magistrate charged with carrying out the Justice and Peace procedures. *Id.* Annex 2 states that Hasbún was charged as part of prosecutors' investigation into crimes committed by the AUC's "Banana Block," which Hasbún oversaw. App4324.The district court recognized that this was an "indictment." App7538. As such, it should have been admitted under the public records exception to hearsay, Rule 803(8).

The district court also erred in applying the pre-2014 version of Rule 803(8), rather than the current version. App7541 n.21. This error alone requires remand to apply the correct rule. *See* § III(B)(6), *infra*.

The court erred by concluding, without analysis, that the indictment does not "set[] out factual findings based on a legally authorized investigation." App7541. But the court recognized that it "shows that charges were brought against Hasbún for the murders of some of the decedents." App7542. That is enough. Colombian prosecutors are obviously legally authorized to investigate murders, and to conclude that they indicted Hasbún without making a finding that he was responsible would

contravene "'the assumption that a public official will perform his duty properly.'" *Ellis v. Int'l Playtex, Inc.*, 745 F.2d 292, 300 (4th Cir. 1984) (quoting Fed. R. Evid. 803(8)(C) advisory committee's note).

While the district court focused on whether this document proved that Hasbún confessed to these murders, that does not affect its admissibility. Regardless of any confession, Record 138 reflects the prosecutors' findings that Hasbún was responsible. An "[i]ndictment . . . is a public record admissible under Federal Rule of Evidence 803(8)." *Washington-El v. Beard*, No. 08-1688, 2013 U.S. Dist. LEXIS 25676, at *9 (W.D. Pa. Feb. 26, 2013); *see also SEC v. Fehn*, No. CV-S-92-946, 1994 U.S. Dist. LEXIS 8204, at *54 (D. Nev. Apr. 1, 1994).

Courts regularly admit foreign documents under Rule 803(8). *United States v. Vidacak*, 553 F.3d 344, 351 (4th Cir. 2009); *see also United States v. Demjanjuk*, 367 F.3d 623, 631 (6th Cir. 2004). Indeed, foreign indictments have been introduced in terrorism cases as evidence of the prosecutor's conclusions. For example, in a case involving a challenge to Hamas's responsibility for an attack, the court admitted "an Israeli government indictment" as a public record. *Strauss v. Credit Lyonnais, S.A.,* 925 F. Supp. 2d 414, 447-49 (E.D.N.Y. 2013). This finding of a "public Israeli government report[]" constituted "admissible evidence indicating that Hamas is responsible." *Id.* at 448-49; *see also Mamani v. Berzaín*, 309 F. Supp. 3d 1274, 1297 (S.D. Fla. 2018) (admitting an "investigatory report" by Bolivian prosecutors); *In re Ethylene*

Propylene Diene Monomer (EPDM) Antitrust Litig., 681 F. Supp. 2d 141, 159 (D. Conn. 2009) (admitting conclusions of official foreign investigation).

Public records require no sponsoring witness to be admissible. *Vidacak*, 553 F.3d at 351; *see also United States v. Doyle*, 130 F.3d 523, 546 (2nd Cir. 1997). If the Rule's requirements are met, they are presumptively admissible unless the opponent proves they are untrustworthy. *Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991). The district court made no such findings; Record 138 thus should have been admitted as evidence that Colombian prosecutors had concluded that an AUC commander was responsible for these murders.

3. Record 138 Was Admissible as a Public Record or a Business Record with Foundational Testimony.

Plaintiffs also submitted testimony from a foundational witness – U.S. law professor and Colombian lawyer Nelson Camilo Sánchez León – who was intimately familiar with this type of document and its import. App7389. His testimony provided an additional basis for admitting the document as either a public record or business record. The district court erred in refusing to consider it.

a. Professor Sánchez's Testimony Should Have Been Considered.

The court erred in concluding that Professor Sánchez's declaration was untimely and inadmissible. Plaintiffs submitted Professor Sánchez's declaration in response to the court's order directing that they show the admissibility of any evidence, after Defendants raised objections in their reply brief. App7363 n.1; 7369.

As noted above, Plaintiffs were entitled to a meaningful opportunity to respond to objections with arguments *and evidence*; it was thus error to exclude Professor Sánchez's declaration as untimely. Because Defendants themselves had previously relied on the Justice and Peace Process and documents, Plaintiffs had no expectation that foundational testimony regarding these documents would be necessary. Excluding foundational testimony as untimely makes no sense where the question is whether the evidence can be made admissible at *trial. See, e.g. Brannon v. Finkelstein*, 754 F.3d 1269, 1277 n.2 (11th Cir. 2014).

The declaration was also largely a declaration about the Justice and Peace law and procedures, *i.e.*, foreign law. *See generally* App7389. As such, it falls under Rule 44.1 of the Federal Rules of Civil Procedure. As the court recognized, such testimony is not subject to ordinary time limits. App3217–18 (ordering that declarations under Rule 44.1 are not governed by discovery deadlines). Indeed, Rule 44.1 even allows this Court to consider foreign law materials submitted for the first time on appeal. *See* Notice of Submission of Foreign Law Materials Pursuant to Rules 28(f) of the Federal Rules of Civil Procedure & 44.1 of the Federal Rules of Civil Procedure, Exs. A-D.

It was also error to conclude, without analysis, that Professor Sánchez's testimony regarding Record 138 was "not a proper subject of expert testimony." App7540. The declaration need not be admissible to provide the foundation for Record 138; courts are "not bound by evidence rules" when considering material that

bears on admissibility. Fed. R. Evid. 104(a); *see, e.g.*, *Invest Almaz v. Temple-Inland Forest Prods. Corp.*, 243 F.3d 57, 69 (1st Cir. 2001); *United States v. Pierce*, 62 F.3d 818, 827 (6th Cir 1995). Similarly, admissibility rules do not apply to determinations of foreign law, and courts may consider "*any* relevant material." Fed. R. Civ. P. 44.1 (emphasis added). The Sánchez declaration should have been considered.

b. Professor Sánchez Established that Record 138 Reflects Hasbún's Confessions.

Professor Sánchez, who is "deeply familiar with the Justice and Peace Process," App7390, described the Justice and Peace Process and concluded that the list of murders in Record 138 was based on Hasbún's own confessions. As Professor Sánchez explained, the process depends on demobilized paramilitaries confessing their crimes, while state prosecutors undertake a complementary investigation to verify and corroborate the confessions. App7392–96. The Justice and Peace law states that the government "has a duty to undertake an effective investigation" of AUC crimes; the Colombian Constitutional Court has ruled that the prosecutor must "verify the facts confessed . . . before the . . . Formulation of Charges." App7394. Thus, Record 138 – as a Justice and Peace charging document – is necessarily based on confessions verified by the prosecutor's investigation. *Id.*

c. Record 138 is a Public Record of Hasbún's Confessions, Verified by Investigations.

In addition to reflecting the prosecutor's investigation, Record 138 is admissible because it reflects Hasbún's confessions. The district court did not dispute

that if it reflected confessions, it would be admissible (among other things, it would be a statement against interest under Rule 804(b)(3)). Indeed, Hasbún himself, in deposition, confirmed that he confessed to murders. App3749. The court's only analysis was the suggestion that, if Record 138 were based on confessions, those confessions should have been in Justice and Peace files. Because Plaintiffs did not have such files, the court concluded that it was "unreasonable, on this record, to infer that such confessions were actually made and verified by Colombian prosecutors before issuance of the charging document proffered here." App7541. This was error, for three reasons.

First, the district court applied the wrong version of Rule 803(8). The court applied the old rule, which required demonstrating that there was no "lack of trustworthiness." App7541 n.21 . The current rule, however, requires the "opponent" to show a "*lack* of trustworthiness." Fed. R. Evid. 803(8)(B) (emphasis added). Defendants made no such showing here, and applying the wrong legal rule is an abuse of discretion. *United States v. Henderson*, 409 F.3d 1293, 1297 (11th Cir. 2005).

Second, there was no dispute that Professor Sánchez accurately set forth Colombian law and procedure, so the district court was suggesting that the prosecutors on the Hasbún indictment did not follow those requirements. Again, this violates the requirement to assume that officials performed their duties properly. *Int'l Playtex*, 745 F.2d at 300.

Third, the court's suggestion that Plaintiffs should have obtained the underlying files for the prosecutors' conclusions was both ungrounded in law and ignored the course of discovery. There simply is no rule that proponents of a public record must obtain investigatory source documents; this contravenes the very text of Rule 803(8), which allows the admission of "factual findings" from an investigation – which are necessarily *not* primary source documents. Fed. R. Evid. 803(8)(A)(iii). Indeed, the underlying confessions would not have reflected the prosecutor's verification of the truth of the confessions. The court required the very documents that it had earlier denied discovery for – "the investigatory files maintained by the Commission of Justice and Peace." App3109. Plaintiffs then expressly formulated their Hague Convention requests to ensure that "the burden on the [Colombian] government is minimal," App3119, focusing on depositions of "central figure[s] in this case." App3114. Even if Plaintiffs could have obtained these files through other means, as the court suggested, App7540, they could not have predicted that the district court would determine that the documents it disallowed in discovery were essential to Plaintiffs' case. Requiring them was error.

d. Record 138 is Admissible as a Business Record.

Record 138 is also admissible as a business record under Fed. R. Evid. 803(6). The district court rejected this argument solely because it found that the documents lacked foundational testimony. App7541. But Professor Sánchez's testimony provided the necessary foundation.

"*Any person* in a position to attest to the authenticity of certain records is competent to lay the foundation for the admissibility of the records; he need not have been the preparer of the record, nor must he personally attest to the accuracy of the information contained in the records." *Rosenberg v. Collins*, 624 F.2d 659, 665 (5th Cir. 1980) (emphasis added). Professor Sánchez indicated his extensive familiarity with the practice of creating documents such as Record 138, App7397–98, which qualifies him under this rule. To the extent the court required personal knowledge of the document's preparation, it erred. A foundation witness need only establish the recording practices of the entity, *United States v. Bueno-Sierra*, 99 F.3d 375, 379 (11th Cir. 1996); the "'absence or extent of personal knowledge regarding preparation of a business record affects the weight rather than the admissibility of the evidence.'" *Chadwick v. Bank of Am., N.A.*, 616 F. App'x 944, 948 (11th Cir. 2015) (quoting *United States v. Page*, 544 F.2d 982, 987 (8th Cir. 1976)).

Indeed, the "touchstone of admissibility" under Rule 803(6) "is reliability," *Bueno-Sierra*, 99 F.3d at 378; and the court did not suggest that the documents were unreliable. To the contrary, "other circumstantial evidence and testimony suggest their trustworthiness." *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984) (internal quotation marks omitted). These records were produced by the Colombian prosecutor's office, whose investigatory and record-keeping activities are articulated and regulated by Colombian law and are not in dispute. *See* App7408–10. Records

prepared in compliance with government regulations (and used by a government agency) have sufficient trustworthiness to be admitted under Rule 803(6). *United States v. Veytia-Bravo*, 603 F.2d 1187, 1191 (5th Cir. 1979).

4. The Prosecutors' Letters Were Admissible as Public Records.

Plaintiffs submitted several letters from Colombian prosecutors confirming the AUC's responsibility for the decedents' murders. As with Record 138, the district court committed reversible error by applying the pre-2014 version of Rule 803(8). App7543. The court also erred in applying the standard and assessing the record evidence.

Public records are admissible where they contain either a matter observed while under a legal duty to report, or factual findings in a legally authorized investigation. Fed. R. Evid. 803(8). The court recognized that the letters "relay information gathered by Colombian prosecutors" that identify AUC paramilitaries as responsible for several decedents' murders. App7543. The letters indicate that the prosecutors' records show that the killings are attributable to the AUC, most often because AUC paramilitaries confessed to them and in some cases were charged and convicted of the killings. *E.g.*, App6731–32 (Hasbún confession); App4168 (Mangones confession); App8377-8378 (same); App4313 (same); App978–79 (same). The letters are on official letterhead, and state that they were prepared in response to requests for information about the Plaintiffs' cases. *Id.* The letters are thus admissible because they set out "a matter

observed" by the Colombian government: paramilitary confessions. Fed. R. Evid. 803(8)(A)(ii). They are similarly admissible because there was no dispute that the prosecutor was "legally authorized" to investigate murder, and these letters summarize the "factual findings" of their investigations. *Id.* R. 803(8)(A)(iii).

The district court, however, required Plaintiffs to provide more than what Rule 803(8) demands. It required additional foundation to establish "where [and] how the prosecutors obtained the information recited in this correspondence," and "the procedures and methods actually used to reach the stated conclusions in the specific investigations at hand." App7543. This was error, because Rule 803(8) "does not require a foundation. Instead, documents that fall under the public records exception 'are presumed trustworthy, placing the burden of establishing untrustworthiness on the opponent of the evidence.'" *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1318 (9th Cir. 1997) (internal quotation marks omitted). Defendants did not show untrustworthiness.[37]

The district court erred in requiring that the prosecutors have "personally observed" these matters. App7543. "[T]he personal knowledge requirement does not extend to official reports admissible under Rule 803(8)." *Alexander v. CareSource*, 576 F.3d 551, 562 (6th Cir. 2009); *see also* 2 McCormick on Evid. § 296 (7th ed. 2013); *JVC*

[37] Defendants themselves repeatedly suggested that the process was reliable in arguing for dismissal on the basis of *forum non-conveniens*. *See* n.6, *supra*.

Am., Inc. v. Guardsmark, L.L.C., No. 1:05-CV-0681, 2006 U.S. Dist. LEXIS 59270, at *41 (N.D. Ga. Aug. 22, 2006) (collecting cases). The district court further erred in requiring that Plaintiffs document the methods "*actually used*" in each investigation, App7543, because public officials are assumed to perform their duties properly. *E.g.*, *Int'l Playtex*, 745 F.2d at 300.

Although no additional evidence was necessary, Professor Sánchez's declaration also provided a foundation for these documents. As noted above, Professor Sánchez established that the Justice and Peace Process involves both confessions by paramilitaries and verification by prosecutors. App7392–96. This underscores the fact that these letters reflect the observations and factual findings, after investigations, by the prosecutors, relating to AUC responsibility for these specific crimes.

5. The District Court Erred in Ruling that Documents Were Not Authenticated.

In their briefs, Defendants only challenged the authenticity of the Mangones *sentencia*, which the district court found was subject to judicial notice. App7243–44; App7552. Defendants raised authenticity objections to Record 138 and the prosecutors' letters in their supplemental response, App7442–43, giving Plaintiffs no opportunity to respond. Nonetheless, the court upheld the objections. App7551. This was error, because Plaintiffs could have authenticated them for trial.

Under the 2010 amendments to Rule 56, courts should consider evidence on summary judgment that can be made admissible *at the time of trial*. Fed. R. Civ. P. 56(c)(2); *see Brannon*, 754 F.3d at 1277 n.2; *Bruno v. Greene Cty. Sch.*, 801 F. App'x 631, 684 n.2 (11th Cir. 2020). The 2010 amendments omitted any "requirement that a sworn or certified copy of a paper referred to in an affidavit or declaration be attached to the affidavit or declaration," *id.*; the proponent may simply "explain the admissible form that is *anticipated*." Fed. R. Civ. P. 56 advisory committee's note (emphasis added). This "eliminated the unequivocal requirement that documents submitted in support of a summary judgment motion must be authenticated." *Abbott v. Elwood Staffing Servs.*, 44 F. Supp. 3d 1125, 1134 (N.D. Ala. 2014). Defendants objected only that the documents were not authenticated, not that they "*cannot* be authenticated"; thus their objection should have been overruled. *Id.* at 1135.

Plaintiffs could have authenticated these documents at trial. Under Fed. R. Evid. 902(3), signed foreign public documents can be authenticated with the addition of a "final certification," typically by an apostille. *See, e.g.*, *United States v. Szehinskyj*, 104 F. Supp. 2d 480, 490-91 (E.D. Pa. 2000). The district court's holding that Plaintiffs had not identified any "process by which any . . . official might reasonably be expected to supply the requisite apostilles in advance of trial," App7551, was plainly wrong. Plaintiffs explained that they would obtain "official copies from the appropriate agency . . . and an apostille for all documents from the Colombian

consulate." App7373. That *is* the process for obtaining apostilles, and as Plaintiffs now demonstrate, they have been able to obtain these apostilles for numerous documents. *See* RJN Exs. A-G.

The district court also ruled that Record 138 was not subject to Rule 902(3) because it bore no signature. App7548. But the document was signed; the court recognized that the original document bears "signature marks," *id.*, and the English translation used "[signature]" to indicate this. App4322–23. This is consistent with industry practice;[38] indeed, Chiquita's translations left signature lines blank. *E.g.*, App2983, 2826.

Last, the district court ignored that some documents could be authenticated by other means – notably, the Plaintiffs who obtained letters from prosecutors could testify where they got them. *E.g.*, App6699, 6713–14; App7373. This is sufficient to show "that the proffered evidence is what it purports to be," which is all that is required. *United States v. Belfast*, 611 F.3d 783, 819 (11th Cir. 2010) (internal quotation marks omitted).

[38] *E.g.*, AUSIT, *Best Practices for the Translation of Official and Legal Documents* (2014), *available at* https://www.mediaelements.org/wp-content/uploads/2015/03/Best_Practices_2014.pdf ("Signatures should be represented by the insertion of [signature] or [signed] only . . . .").

6. The District Court Erred in Misapplying the Residual Exception to the Justice and Peace Documents.

The district court held that the Justice and Peace documents did not fall within the residual exception to the hearsay rule codified in Fed. R. Evid. 807. This was error in light of the significant amendments to Rule 807 that took effect on Dec. 1, 2019. The documents would satisfy the new Rule 807, and in any event remand would be appropriate to allow the district court to apply the operative law.

The new Rule 807 amendments would have applied at least to the second of the two bellwether trials, which was scheduled for February 3, 2020, App3214, and apply now to this appeal. *Thorpe v. Housing Authority of Durham*, 393 U.S. 268, 281 & n.38 (1969) ("The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision."); *see also Bailey v. Kawasaki-Kisen, K.K.*, 455 F.2d 392, 397 (5th Cir.1972) ("The admissibility of evidence in a federal court is a rule of procedure . . . ."), *superseded on other grounds as stated in Rutledge v. Harley-Davidson Motor Co.*, 364 F. Appx. 103, 105-106 (5th Cir. 2010). Although the first bellwether trial was to begin before the amendments took effect, the district court never decided which Plaintiffs would fall into which trial, and in any event it would make no sense to apply a rule that would only apply to the first of many trials.

The district court denied admission of these documents under the residual exception because it found: (1) they lacked "guarantees of trustworthiness," (2) were not "more probative on the point for which [they were] offered than any other

evidence that the proponent can obtain through reasonable efforts," and (3) "the interests of justice did not compel" their inclusion. App7553–7554. None of these grounds is sustainable.

First, the revised Rule 807(a)(1) loosens the standard for determining whether hearsay evidence is considered "trustworthy." Previously, a statement admitted under Rule 807 must have had "equivalent circumstantial guarantees of trustworthiness" as statements admitted under the enumerated hearsay exceptions found under Rules 803 and 804. Fed. R. Evid. 807(a)(1) (2011). But the new version requires only that the statement "is supported by *sufficient* guarantees of trustworthiness." Fed. R. Evid. 807(a)(1). Additionally, the amended version requires considering the totality of circumstances surrounding the document and corroborating evidence. The third basis for exclusion, that admission will "best serve" the rules and justice, has been stricken from the current rule.

Finally, the district court's second conclusion that equally or more probative documents, such as the full and formal Justice and Peace files, were reasonably available to Plaintiffs, was an abuse of discretion, given that the district court had refused to allow Plaintiffs to conduct discovery for those documents, App3108, as the next section details.

C. The District Court Erred in Requiring Plaintiffs to Produce Justice and Peace Documents that the Court Had Previously Denied Them.

The district court faulted Plaintiffs for failing to present evidence – Colombian prosecutors' "investigatory files" – that it had earlier denied them. During discovery, the court denied the Wolf Plaintiffs' request for Colombian prosecutors' "investigatory files," finding they were of "questionable importance." App3108. But then, on summary judgment, it erroneously excluded critical evidence because Plaintiffs failed to "come forward with [] underlying investigatory records from Colombian prosecutors" on this "central issue." App7537, 7540–41; *see also* App7543–44, 7553. Thereafter, Plaintiffs adopted the court's guidance and expressly formulated their Hague Convention requests to ensure that "the burden on the [Colombian] government is minimal," App3119, focusing on depositions of "central figure[s] in this case." App3114.

Although district courts have latitude in managing discovery, "a district court may not impose discovery restrictions that preclude a [litigant] from the legitimate pursuit of evidence supporting a claim." 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure ("Wright & Miller") § 2006 (3d ed. 2020) n.41 (citing *Danny B. ex rel. Elliott v. Raimondo*, 784 F.3d 825 (1st Cir. 2015) (abuse of discretion where protective order forced plaintiffs to attempt to prove their claims without essential evidence)); *see also Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1559-60

(11th Cir. 1985) (finding abuse of discretion where plaintiff had been denied discovery that related to the summary judgment motion).

The court's discovery order, App3104-3112, did just this: it precluded Plaintiffs from pursuing key evidence that the court later required of them on summary judgment. Indeed, the district court faulted Plaintiffs both for not coming forward with the complete Justice and Peace files, App7537, 7540–41, 7543–44, 7553, and for not having the limited, publicly available records they did possess in a final certified form. App7541–42, 7544, 7548–49. Permitting discovery of the official Justice and Peace documents, however, would have solved both of these purported problems: Plaintiffs would have obtained the complete files that the district court demanded and would have had them in the formal and certified format the court required.

Had the district court granted the moving Plaintiffs leave to request the Colombian government's investigatory files, all Plaintiffs' groups would have used the Hague Convention process to gather undisputed proof that the AUC was responsible for the deaths in question, and Plaintiffs would have obtained that evidence directly from the Colombian government in an admissible and authenticated form.[39] The requested files would have included *both* the private documents in the hands of the Colombian prosecutors as well as true and complete copies of the publicly available

[39] Under the Hague Convention, 28 U.S.C. § 1781, Plaintiffs could have obtained international judicial assistance to secure documents maintained by, *inter alia*, the Justice and Peace Commission.

Record 138 and *sentencias* upon which Plaintiffs rely, as well as any relevant underlying paramilitary confessions. App7537, 7542–43. Given all of this, either the district court's order precluding discovery to obtain these documents was error, *Shuman*, 762 F.2d at 1559-60, or the grant of summary judgment was; this Court cannot sustain *both* contradictory orders. *See XRT, Inc. v. Krellenstein*, 448 F.2d 772, 772-73 (5th Cir. 1971) (per curiam) (reversing summary judgment as premature where district court failed to require production of key evidence). Indeed, as the Supreme Court and this Court have held, courts should exercise caution in too quickly deciding summary judgment motions when the factual record may be better developed, particularly where a decision could address important matters. *E.g. Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948) (vacating and remanding summary judgment grant because good judicial administration required withholding a decision until allowing further factual development to provide "the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide"); *Askew v. Hargrave*, 401 U.S. 476, 479 (1971) (evidence that was critical to claim should not have been decided "without fully developing the factual record at the hearing"); *Bradbury v. Wainwright*, 718 F.2d 1538, 1546 (11th Cir. 1983) (summary judgment was inappropriate without further development of the factual record given prudential concerns, like complexity in the case). Summary judgment was premature here.

Obtaining evidence from the Justice and Peace Process was particularly essential in light of the district court's decision to ignore or exclude other evidence. *See* §§ I-II, *supra*. The Justice and Peace documents, and confessions and sentences, were fundamental to proving the AUC's responsibility for the mass murders they committed. All of these evidentiary issues relating to the Justice and Peace Process can easily be resolved before the trials in these cases if the district court allows the discovery permissible under the Hague Convention. The district court should be ordered to do so.

IV. THE DISTRICT COURT ERRED IN EXCLUDING SOME OF PROFESSOR KAPLAN'S EXPERT TESTIMONY.

Plaintiffs presented the expert testimony of Professor Oliver Kaplan, an expert on armed conflict in Colombia and social science methodology. App4914; App4786; App4836–50. The district court did not exclude Professor Kaplan's evidence and conclusions concerning the AUC's activities in Colombia, much of which is undisputed, App7576–78, and, as the *Daubert* briefing had not yet been completed, did not have occasion to rule on his testimony as a whole. [40]

However, the district court held that Professor Kaplan's statement that the AUC was "more likely than not" responsible for the deaths of Plaintiffs' decedents

[40] Defendants filed a motion *in limine* to exclude Professor Kaplan's testimony based on *Daubert* and the briefing was never completed. *See generally* App7485, App524–530.

was inadmissible. App7577. But courts permit such testimony, particularly where, as here, there is no contrary evidence.[41] The court found that Professor Kaplan was "simply repeating statistical evidence, and drawing inferences from it, based on temporal and geographical overlays," rather than applying "a reliable methodology." App7577. But the court failed to consider any of the *Daubert* factors for determining whether Professor Kaplan's methodology was reliable, *see, e.g.*, *United States v. Frazier*, 387 F.3d 1244, 1276 n.14 (11th Cir. 2004) (Tjoflat, J., concurring) – and it ignored the well-accepted scientific methods that Professor Kaplan actually employed.

Plaintiffs do not *need* Professor Kaplan's conclusion that these were AUC killings to defeat summary judgment, but this testimony alone does so. *See* § I-II, *supra*; *cf. Owens*, 864 F.3d at 787-88 (expert witnesses are often crucial in terrorism cases). However, because it was error to exclude his conclusion, and a jury could rely on it, it was error to grant summary judgment based in part on its exclusion.[42]

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[41] *E.g. Boim v. Holy Land Foundation for Relief and Dev.*, 549 F.3d 685, 704-05 (7th Cir. 2008) (admitting expert conclusion that murder was committed by Hamas); *Blais v. Islamic Republic of Iran*, 459 F.Supp.2d 40, 48-49 (D.D.C. 2006) (accepting expert opinion that Iran was responsible for attack on U.S. soldiers), *cert. denied*, 130 S. Ct. 458 (2009); *Acosta v. Islamic Republic of* Iran, 574 F. Supp. 2d 15, 23 (D.D.C. 2008) (accepting expert testimony that murderer acted for terrorist group).

[42] Even if the district court's decision is somehow read more broadly to exclude other portions of Professor Kaplan's opinion, it cannot be sustained given that the rest of his opinion contains matters routinely relied on.

A. The District Court Abused Its Discretion by Failing to Consider Professor Kaplan's Actual Methodology.

The district court abused its discretion when it held, *sua sponte*, that Professor Kaplan's conclusion that the murders were "more likely than not" committed by the AUC is not based on any reliable methodology. App7577. Professor Kaplan applied the well-accepted "social science methodologies," App4915; *see Daubert*, 509 U.S. at 593-94, that he was "trained" to, App4917, in his doctoral and post-doctoral education at Stanford and Princeton Universities. App4836; 4914. His report was peer-reviewed by other experts. App4786; *Daubert*, 509 U.S. at 593-94.

The district court could not properly conclude that Professor Kaplan's methods were unreliable, because it failed to consider the methods he actually applied. Professor Kaplan employed a "general comparative method," "used frequently within political science," testing his hypotheses by gathering evidence, including data that did not support his original hypotheses, and identifying alternative hypotheses to see if there is another explanation. App4915–16, 4917, 4952; *Daubert*, 509 U.S. at 593-94.

He also used "triangulation" – gathering multiple sources of information to see how well they fit together; this included "qualitative" methods like "interviews" and "participant observation," and quantitative methods, like the counting of cases, *i.e.* statistics and data sets. App4915–17. The district court did not identify any inadequacies in Professor Kaplan's well-accepted methods.

B. The District Court Abused Its Discretion in Excluding Professor Kaplan's Conclusion without Giving Sufficient Weight to the Evidence Supporting It.

A district court abuses its discretion if it excludes expert testimony without considering evidence supporting the expert's opinion. *Seamon v. Remington Arms Co., LLC*, 813 F.3d 983, 989-90 (11th Cir. 2016). The district court's finding that Professor Kaplan relied only on statistical evidence, and "temporal and geographical overlays," App7577, ignored the other evidence he cited.

Professor Kaplan relied upon a host of quantitative and qualitative sources. App4786–89, 4822–30. First, the "general patterns" of these murders "are consistent with" reports – from human rights organizations, the United Nations and the U.S. State Department – documenting AUC violence, particularly in Urabá and Magdalena. App4822. Additionally, the timing of the bellwether murders and the general patterns of AUC violence in their municipalities are "closely correlated." *Id.*

Second, Professor Kaplan documented the "great overlap" between the sites of bellwether victim killings and the geography of AUC killings. App4823. He confirmed this through paramilitary commander testimonies and data from a variety of sources, including the Colombia Attorney General and Colombia's National Center for Historical Memory, a research center with expertise in social science; this data shows that "almost all (90 percent) of the killings of civilians in the bellwether municipalities during the timeframe of this case were committed by paramilitaries." App4788, 4823,

4825.

Third, Professor Kaplan found that "the *modus operandi* of these specific bellwether victims' cases fits the general *modus operandi* of AUC paramilitary violence." App4828. He noted, based on numerous sources, that for example, the AUC killed based on lists of targets and it was the AUC's "*modus operandi*" to dump bodies in particular places, take victims off of public buses, murder banana workers and union members, commit politically-targeted killings of activists, local politicians, and community leaders, and kill for "social cleansing" motives, such as perceived criminality. App4808, 4828.

Fourth, news sources, NGO reports, paramilitary testimonies from the Justice and Peace Process, and human rights datasets "confirm and document" the circumstances of the crimes against these specific bellwether victims. App4829. Professor Kaplan compared these specific crimes against existing human rights databases, including that of the Jesuit think tank Center for Research and Grassroots Education ("CINEP"), *id.*, which Defendants' expert also used. App3858. To attribute acts to particular actors, CINEP and other analysts assess each case's facts. App4789, 4803, 4829. Professor Kaplan did not blindly rely on these data sets. He examined their methods. App4917.

Fifth, Professor Kaplan's conclusions were informed by his experience. He has conducted hundreds of interviews with Colombian guerrillas, AUC paramilitaries,

military officers, the police intelligence directorate, and Ministry of Defense staff. App4914, 4953.

Thus, Professor Kaplan's conclusion that the AUC was more likely than not to have murdered Plaintiffs' decedents, was *not* based *only* on the facts that the killings occurred where and when the AUC committed the vast majority of murders. It was *also* based on "similar *modus operandi*," "the general patterns of [AUC] violence," and "direct verification of bellwether victim cases and their details via human rights violation and conflict databases and paramilitary testimonies that confess to the murders." App4832, 4834; *see also* App4801-4807 (describing strategy behind and patterns of AUC killings).

The district court's belief that drawing inferences from statistics compiled by others is not "applying specialized knowledge or 'reliable' methodologies" was another error of law. An expert may base opinions on "data . . . that the expert has been made aware of." Fed. R. Evid. 703; *accord Daubert*, 509 U.S. at 592. "Trained experts commonly extrapolate from existing data." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The district court found "too great an analytical gap between the data and the opinion," App7577, but did not identify any "gap." It could not conclude that Professor Kaplan's opinion "is connected to existing data only by the *ipse dixit* of the expert," *Guinn v. AstraZeneca Pharm. LP*, 602 F.3d 1245, 1255-56 (11th Cir. 2010)

(quoting *Gen. Elec. Co.*, 522 U.S. at 146), since it did not consider his methods, or all of the evidence upon which he relied. Professor Kaplan's methodology was typical of expert testimony and supported by a wealth of sources. The erroneous exclusion of his conclusion is alone sufficient to require reversal.

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

The arguments above apply to each of the bellwether Plaintiffs and require reversal. In this section Plaintiffs address specific additional grounds for reversal unique to each bellwether Plaintiff's case.

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

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

Plaintiff John Doe 7's son, John Doe 8,[43] was killed in 2000 in Turbo, Urabá, an area controlled by the AUC. App6019, 6581-6583, 6705-6711, 6716, 6731-6735; Statement of Facts ("SoF") § I(A), *supra*. John Doe 8 was a banana farm worker, and had been falsely accused of theft at a farm controlled by the AUC. App6023, 6028, 6030-33. He was thus the type of person targeted by the AUC. § I(B), *supra*. John Doe 8's murder also fits the AUC's *modus operandi*. SoF § I(A), *supra*. He was kidnapped in public by a local AUC commander, taken away by motorcycle, and his body was dumped at a known AUC killing field. App6581-82. AUC commander Raúl Hasbún

[43] *See* App6019 (identifying John Doe 8's name).

also affirmed that John Doe 8's murder was carried out under his directive. A prosecutor's letter stated that Hasbún confessed to John Doe 8's killing. App6699, 6731-34. This is corroborated by Record 138, which also is evidence of Hasbún's responsibility for John Doe 8's murder. App4326–27, 4321. Both documents are admissible. *See* § III(B)(2)-(3), *supra.*

2. The District Court Erred in Excluding John Doe 7's Testimony that the AUC Killed His Son.

In addition to the evidence discussed above, John Doe 7 testified that an AUC commander, Gilberto Camacho, made incriminating statements about the AUC's responsibility for John Doe 8's murder. The district court abused its discretion by excluding this testimony as inadmissible hearsay, and in finding that John Doe 7 lacked personal knowledge that Camacho was an AUC member.

a. Camacho's Statements Against Interest.

John Doe 7 testified that he confronted Camacho two weeks after his son's murder questioning him about the murder:

> Q: What did you say to him?
> A: I told him, "***Why have you murdered my son***? Explain to me what happened."
> Q: And what did he say?
> A: He invented things.
> Q: What sort of things did he invent?
> A: Well, what he told me is not correct.
> Q: ***Did he deny the killing***?
> A: ***No, no.***
> Q: Did he know what you were talking about?
> A: Yes.

> Q: When you say he invented things, do you mean he invented reasons for ***why he would have done this***?
> A: ***Yes***.
> Q: Do you recall any of those reasons?
> A: Yes. That my son was full of vices and ***that's why he had to be killed*** because he was full of vices, but my son didn't even smoke cigarettes.

App6023 (emphasis added).

These statements are admissible as statements of an unavailable declarant made against the witness's penal interests. Fed. R. Evid. 804(b)(3).[44]

The district court found Camacho's statement inadmissible because Plaintiff "did not testify that Camacho took responsibility for the crime, or even attributed it to an AUC operative." App7568. The full exchange, making all inferences in the light most favorable to Plaintiffs, indicates that Camacho was admitting AUC responsibility; "whether a statement is self-inculpatory or not can only be determined by viewing it in context." *Williamson v. United States*, 512 U.S. 594, 603 (1994). Camacho was directly accused and did not deny responsibility; this constitutes an admission if the jury could conclude that "an innocent [party] would normally be induced to respond." *United States v. Carter*, 760 F.2d 1568, 1579 (11th Cir. 1985). But even if Camacho's statement was not a confession, Rule 804(b)(3) requires only that the statement "would have probative value in a trial against the

[44] Camacho was undisputedly unavailable because he was killed in 2002. App6024.

declarant." *United States v. Rowland Chester Thomas*, 571 F.2d 285, 288 (5th Cir. 1978); *accord, e.g.*, *United States v. Allen*, 416 F. App'x 875, 883 (11th Cir. 2011). The statement need not be a "direct confession[] of guilt," *Rowland Chester Thomas*, 751 F.2d at 288, or "establish the criminal liability of the speaker[]," *United States v. Hyde*, 574 F.2d 856, 863 (5th Cir. 1978). At a minimum, Camacho's statements demonstrated "an insider's knowledge of the crime[]" at issue. *United States v. Alvarez*, 584 F.2d 694, 700 (5th Cir. 1978) (internal quotation marks omitted). The district court's requirement of a direct confession, App7568, was an "erroneous view of the law" and thus an "abuse of discretion *per se*." *See United States v. Henderson*, 409 F.3d 1293, 1297 (11th Cir. 2005).

b. There was Adequate Foundation to Connect Camacho with the AUC.

During his deposition, John Doe 7 twice confirmed that Camacho was an AUC member:

> Q: Who is Gilberto Camacho?
> A: He was a commander there, around there, of them.
> Q: Who is "them"?
> A: Gilberto Camacho.
> Q: Who was the -- who was he the commander of?
> A: Of the AUC.
> . . .
> Q Was Mr. Camacho with the AUC?
> A Yes.

App6020, 6046. Defense counsel never asked him for his basis of knowledge nor objected that his answer lacked foundation. John Doe 7 later submitted a declaration, based on his personal knowledge, that "Camacho was a paramilitary area commander." App6701. With no contrary evidence, the district court was "was bound to accept [his] statements as true." *Martin v. Rumsfeld*, 137 F. App'x 324, 326 (11th Cir. 2005). "[A] clear statement that an affidavit is based on personal knowledge" suffices for Rule 56. *Davis v. Valley Hosp. Servs., LLC*, 372 F. Supp. 2d 641, 653 (M.D. Ga. 2005), *rev'd in part on other grounds*, 211 F. App'x. 841 (11th. Cir. 2006).

The declaration also stated that, at community meetings convened by self-identified AUC paramilitaries, Camacho – with whom John Doe 7 had previously worked – was present and armed. App6699–6701. This is easily sufficient to establish the personal knowledge requirement, which "imposes only a 'minimal' burden on a witness," *Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1045 (9th Cir. 2013), and "creates a low threshold for admissibility," *United States v. Gerard*, 507 F. App'x 218, 222 (3d Cir. 2012). Rule 602 "does not demand knowledge in an absolute or literal sense" and "there is usually no need to laboriously build a series of foundations establishing, for example, that the witness is familiar with common objects or events." 27 Wright & Miller § 6022 (2d ed. 2006, 2020 update). In the context of Colombia at the time, this would include community meetings convened by AUC paramilitaries.

"[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception." Fed. R. Evid. 602 advisory committee's note. This is because it is the jury's role to weigh the "testimony when there exist questions regarding the quantity or quality of perception." *United States v. Bush*, 405 F.3d 909, 916 (10th Cir. 2005). Thus, "testimony is excluded only if, as a matter of law, no juror could reasonably conclude that the witness perceived the facts to which she testifies." 27 Wright & Miller § 6023 (2d ed. 2006, 2020 update); *accord United States v. Hickey*, 917 F.2d 901, 904 (6th Cir. 1990); *Gerard*, 507 F. App'x at 222.

The district court failed even to discuss John Doe 7's testimony about Camacho's armed presence at AUC meetings. The district court "did not account for" this testimony and thus abused its discretion. *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1222, 1226 (11th Cir. 2017).

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

1. Factual Background.

Decedent Franklin Fabio Fontalvo Salas ("Franklin"), Plaintiff Camargo's son, was a banana worker who was abducted from a farm that sold to Chiquita, and murdered on July 3, 2003, in the municipality of Zona Bananera in the Magdalena region. App5518, 5523; App4156–57. He was a kidnapped in public from the banana farm where he worked, and his body was found at the entrance of a banana farm. App4156-4157; App4162-4163.

A witness, Sergio Contreras Castro, testified that the day Franklin was murdered he personally saw four paramilitaries riding motorcycles toward the farm where the decedent worked, and a short time later saw Franklin on one of the motorcycles between men, his hands bound, and the perpetrators' guns drawn. App4156-4157. He knew one of these abductors to be "El Ruso." *Id.*

After the murder, Plaintiff Carmago's brother, Ever Joel Fontalvo discovered Franklin's body covered with banana leaves near the entrance to another banana farm. App4162-4163; *see also* App5532. Fontalvo took Franklin's body to his father's house. *Id.*

Plaintiff Camargo testified that on the night of his son's murder, while his son's body was still in the house, the man he knew to be "El Ruso" and at least three other men came to the house to intimidate them and enforce a "law of silence." Camargo testified that he could identify these men as AUC. "El Ruso" was the head member of the group, and Camargo would see them in the town with "AUC" armbands. App5523-24.[45] Camargo also testified "they practically lived in the town by then and one would see them daily, and we would identify them by their nicknames." App5524.

Shortly after this murder, Ever Joel Fontalvo was threatened; on one occasion "the paracos" (slang for AUC paramilitaries) detained him and demanded to know

[45] *See also, e.g.*, App6162, 6185 (Testimony from one of Chiquita's heads of security that the AUC wore AUC armbands); App4763 (the AUC wore AUC armbands); App5766 (same, sic, should be "band").

why he had moved Franklin's body. App4163. On another occasion, the AUC detained him and demanded to know his connection with the decedent, stating that he should not have moved the body from where they had killed him. App4162-63. He stated that "El Tijeras" called him to ask why he had moved Franklin's body, which he took as threat. App4163. As a result of these threats, Mr. Fontalvo fled his home and moved to Bogota. *Id.* Fontalvo stated that the "paracos" sometimes wore normal clothes with an AUC bracelet and at other times they wore military uniforms. Plaintiff received a Prosecutor's letter advising that José Mangones Lugo, *aka* "El Tijeras" (The Scissors) had accepted responsibility for Franklin's murder. App4168; App5531 (letter stated that Mr. Carlos Tijeras "was the head and commander there. The head and the commander of the AUC accepted his participation or the participation of the AUC group in the dead [*sic*] of my son.")

Franklin's murder was also included in the Mangones *sentencia.* App7662-63, 7665; *see also* RJN Ex. E at 151-152, 403, 1075, 1170-1171, 1174.[46] After the district court dismissed the case stating that there was no "independent source evidence on record" of "El Ruso's" ties to the AUC, Plaintiff moved pursuant to Rule 60(b) for relief and submitted newly obtained evidence including Certified and Apostilled documents, fingerprints, a photograph, and a declaration from a Colombian

[46] The district court was advised that this Exhibit was left out of Plaintiffs' original submission due to clerical error. App7382 n. 17. The document was submitted with Plaintiff's Rule 60(b) motion. App7594.

prosecutor verifying "El Ruso's" identity and that he was an AUC hitman and death squad leader. Plaintiff also submitted supplemental declarations from witnesses Fontalvo and Castro further verifying that the "El Ruso" they previously identified as the killer was the person in the photograph on the fingerprint record. App7601-04, 7610, 7613, 7616, 7619, 7622, 7647-67. These matters should have led the district court to deny summary judgment.

2. The District Court Erred in Finding No Material Dispute of Fact as to the AUC's Involvement in Decedent Franklin Fontalvo Salas' Death.

Sergio Castro personally saw "El Ruso" riding with three others to the farm where the decedent was killed, and saw the men returning Franklin bound between two men on a motorcycle with their guns drawn. App4156-57. Similarly, "El Ruso" and other paramilitaries came to plaintiff Camargo's home the evening of the murder to intimidate him into silence about the murder of his son. App4163. Such evidence indicates AUC involvement in the murder, and the district court did not dispute it. App7567–7568.

However, the district court held there was no material dispute of fact as to whether "El Ruso" or the other three men were AUC members.[47] App7567–68. This was error. First, the district court ignored Camargo's testimony that he could identify "El Ruso" and the men who threatened him as AUC members because he saw them

[47] This is reviewed *de novo*. *Bowen*, 882 F.3d at 1362.

in town with "AUC" armbands. App5524. It was well-established that AUC operatives wore AUC armbands *Id.*; *see, e.g,* App6162, 6185 (testimony from one of Chiquita's heads of security that the AUC wore AUC armbands); App4763 (testimony that the AUC wore AUC armbands); App5766 (same, sic, should be "band")).The fact that "El Ruso" and the other three men expressly identified themselves as AUC members is more than adequate evidence to raise a material dispute of fact as to whether they were. Camargo was also familiar with the men: "they practically lived in the town by then and one would see them daily, and we would identify them by their nicknames." App5524. There was ample evidence "from which the alleged AUC affiliation of the abductor may reasonably be drawn." The district court erred in holding otherwise. App7568.

Moreover additional evidence connected the AUC with this murder, including the harassment and threats towards Ever Joel Fontalvo, the decedent's uncle. The district court's opinion that Fontalvo did not establish "any personal knowledge for the claimed belief that persons who admonished him for moving the body were AUC affiliates" ignores his testimony that he was detained near an AUC barracks. App7567; App4163. It also ignores the undisputed evidence that the AUC was an occupying paramilitary army with uniformed soldiers displaying weapons more or less permanently stationed in military bases throughout the banana region. The AUC was an open and notorious presence in these people's daily lives, as they testified.

App4156-57, 4162-63. People living in the midst of AUC occupation had an adequate basis for connecting notorious paramilitaries to the AUC. The district court erred in examining this issue in isolation rather than in the totality of the evidence Plaintiffs put before the Court.

Furthermore, Fontalvo testified that "El Tijeras," the AUC commander for the area, called Fontalvo and similarly asked why he had moved Franklin's body. App4163. This underscores the AUC's involvement in the murder, particularly in light of all the other record evidence. *See* § I-III, *supra*. To the extent the district court similarly disputed "El Tijeras's" connection to the AUC as unsupported by the record this too was in error. The Mangones *sentencia* and "Prosecutor's letter" were not only proof of AUC responsibility, but even apart from their admissibility for these purposes, they were further admissible evidence of "El Tijeras" status as an AUC commander. App5531. Other record evidence further establishes the same. *E.g.* App6179; *accord* App4162-4163, App4793.

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

1. Circumstantial Evidence Demonstrates AUC Responsibility for John Doe 11's Murder.

New Jersey Decedent John Doe 11 was killed in Chigorodó, Urabá. App6090. The AUC controlled Chigorodó, and it was responsible for 90 percent of civilian murders in the Urabá region, killing 4,335 persons and disappearing another 1,036 persons there. SoF § I (B), *supra*; App4823-4824, 4832; App6792; App6677, 6679;

App4708; App6601-6602 (testifying that while witness "would sometimes see paramilitaries dressed in civilian clothes" in Chigorodó, he "never saw any guerrillas in Chigorodó, nor did anyone tell [him] that any guerrillas were in the town."). Plaintiff Jane Doe 7 and witness "J" both testified that they saw AUC graffiti and pamphlets in Chigorodó in the period leading up to John Doe 11's death, including statements such as "the paramilitaries are here." App6677, 6679; App6792; *see generally* SoF § I(A)-(B), *supra*. Witness J testified that in the period leading up to John Doe 7's murder he saw the paramilitaries gathered in a hotel in the center of Chigorodó "almost every day, to plan their operations" and that from the mid-1990s forward the self-defense forces were "almost always present in Chigorodó's banana farms" and at guard posts along the side of the road. App6675-6676. Witness J indicated that he regularly saw paramilitaries in town and knew who they were because they wore military uniforms and armbands that said AUC, though when they committed murders they often dressed in civilian clothing. App6676. The ACCU, which formed part of the AUC, also committed multiple well-known massacres in Chigorodó in the time leading up to John Doe 11's death, including the massacres known as the Aracatazo and the Golazo. App3660-3661; App6676-6679 (witness statement describing the Aracatazo massacre, stating "[p]eople running past were screaming because the paramilitaries had arrived and were taking control of the neighborhood, that we should all run, that the self-defense forces were killing a lot of people").

The AUC had a motive to target John Doe 11 because he was a leader of SINTRAINAGRO, a banana workers' union, and a member of the owner–worker committee. App6591; App6601; App6788-6790; App6680; App6663. The AUC regularly targeted union members, specifically those of SINTRAINAGRO. App5050-5051; App4808, 4828; App5126-5127; App6592.

John Doe 11's murder also fits the AUC's *modus operandi* for killings in Urabá at that time, in multiple ways. John Doe 11 was pulled from his home in the middle of the night by masked men. App6090-6092, 6095; App6601. This was a tactic unique to the AUC. *E.g.* App6661. There was no record evidence that any other armed group in the region wore masks to commit murders. The brutality of John Doe 11's murder was another AUC signature. *See* SoF § I(A), *supra.* His assailants beat him with sticks, stabbed him in his chest, and cut around his heart. App6095; App6591; App6601-6602; App6788-6792; App6835; App6839. Masked men stormed his house, brought him outside, beat him, stabbed him, and left him in the street to "drown[] in his own blood." App6591; App6601-6603.

2. Jane Doe 7 Testified that John Doe 11's Name had been Placed on an AUC Kill List before His Abduction and Gruesome Murder.

In addition to the circumstantial evidence establishing AUC responsibility, direct evidence also established this link. Jane Doe 7 – John Doe 11's common-law spouse – testified that prior to his murder, the AUC had placed John Doe 11's name on a kill list. App6791. This was a known AUC tactic. App3933. One night two of

John Doe 11's coworkers came to their house; later, "very worried," John Doe 11 related to his spouse that his co-workers told him that, after their bus had been stopped by AUC militants, armed paramilitaries read names off a kill list – including John Doe 11. App6790-91. Two of John Doe 11's colleagues were also on the list, and the AUC executed them. *Id.* John Doe 11's worry was demonstrated by the fact that he gave Jane Doe 7 his undertaker's card and his insurance card, and said, "Don't leave me out in the sun" – a request that she take care of funeral arrangements. App6791-92.

The district court erroneously excluded Jane Doe 7's highly probative testimony as hearsay. The district court properly recognized that, despite the passage of time, John Doe 11's colleagues' statement to him that the AUC militants said his name was on a kill list could be admissible as an excited utterance under Fed. R. Evid. 803(2) because of the clear stress they experienced when the AUC militants boarded their bus, killed two of their coworkers, and threatened John Doe 11's life. App7554–55. But the district court inexplicably held that, John Doe 11's statement to Jane Doe 7 about what his colleagues said could *not* be an excited utterance because it was not necessarily made contemporaneously. App7555. This was a misinterpretation of the evidence and a misapplication of Rule 803(2).

The district court focused on the fact that Jane Doe 7's declaration states that John Doe 11 related his co-workers' warning "afterwards." App7554. Drawing

inferences in Plaintiffs' favor, however, the district court should have concluded that "afterwards" here meant *immediately* afterwards.

Even if it was not, however, Rule 803(2) requires only that retelling of a "startling event" occur "while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803(2). It need not be made contemporaneously or immediately afterwards. *United States v. Belfast*, 611 F.3d at 817; *see also, e.g.*, *United States v. Smith*, 606 F.3d 1270, 1280 (10th Cir. 2010) ("Nor does the passage of time suggest the stress had dissipated.").

Here, the district court properly recognized that, given the traumatic nature of such threats, the statements of John Doe 11's colleagues could fall within Rule 803(2) even though hours had passed between the time the militants read the kill list and the time they told John Doe 11. It was error not to apply the same principle to John Doe 11's statement to Jane Doe 7, especially where she made clear that he was worried and his acts demonstrated this.

Not surprisingly, courts have found credible threats of violence to be tremendously stressful. *E.g., Belfast*, 611 F.3d at 818 (finding excited utterance when declarant was threatened with death after being tortured by state forces); *United States v. Arnold*, 486 F.3d 177, 184-87 (6th Cir. 2007) (finding excited utterance when murderer threatened declarant with gun).

Had the district court applied the correct standard, it would have been compelled to draw the common-sense conclusion that John Doe 11 was under the enormous stress of learning of the credible threat to his life when he told his spouse about the threat. At the least, Jane Doe 7's testimony could be presented in an admissible form at trial with testimony elaborating on the stress John Doe 11 was under when he told Jane Doe 7 about the kill list. Fed. R. Civ. P. 56(c); *see also, e.g.*, *Brannon v. Finkelstein*, 754 F.3d 1269, 1276-77 & n.2 (11th Cir. 2014) (considering hearsay testimony at summary judgment that could "be reduced to an admissible form at trial"). This testimony alone was sufficient to create a material issue of fact about the AUC's responsibility for John Doe 11's murder.

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

1. Factual Background.

Plaintiff Nancy Mora Lemus's claim is for the death of her common-law spouse Miguel Antonio Rodriguez Duarte. Miguel was a day laborer and small-scale farmer. App5760-5761, 5779. Plaintiff and their three children witnessed Miguel's murder on December 7, 2003 at the family farm, Canta Gallo, in Magdalena. App5751-5752, 5759, 5764, 5765-5767, 5770. Miguel was killed by the "paracos," *i.e.* the AUC. App5764. By the time of his murder the AUC was the only armed group operating in the area. App5770. Plaintiff Lemus knows that the murderers were AUC because whenever she went into town they would take her food. *Id.*

On the day of Miguel's murder, Plaintiff Lemus observed two men come to their farm, take Miguel behind their house and tie his hands. App5765. They were going to take him away and she told them not to. App5766. They took Miguel down a path to the river and Ms. Lemus and her three daughters followed. *Id.* The two men grabbed her hair and threw her to the ground. *Id.* They wore sweatshirts and an armband, and had rifles. App5767. They took out a knife, tied Miguel to a pole, and cut his throat. *Id.*

2. The District Court Erred in Finding No Material Dispute of Fact as to the AUC's Involvement in Miguel Rodriguez Duarte's Death.

The Court highlighted what it considered the unpersuasive testimony concerning the "wheel" or "brand" (sic, should be "band") that Rodriguez Duarte's murderers wore, but ignored all of the other testimony clearly pointing to the AUC's responsibility. App5765. Plaintiff's testimony that she personally observed the AUC "paracos," that they were the only ones in the area because all other groups had withdrawn; and that the "paracos" would take her food when she went into town, demonstrated sufficient personal knowledge and familiarity with the AUC to make her testimony admissible to establish AUC responsibility for the murder. Her testimony, along with all of the other evidence of AUC responsibility, was enough to have this issue decided by a jury.

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

1. Factual Background.

Carrizosa Decedent John Doe 11 was murdered on August 13, 2003 in the town of Aracataca in Magdalena. App9117–18. Aracataca, the banana-growing municipality in Magdalena where John Doe 11 was killed, was controlled by the AUC's William Rivas front. App4793, 4802, 4832.

The AUC was responsible for the majority of all the violence in the Magdalena region, § I(B), *supra,* occupying the city centers of the municipalities and "cleaning" the countryside. App4802; *see also* SoF § I(A)-(B), *supra*.

Carrizosa Decedent John Doe 11 was a farmer who had received threats for refusing to sell his farm so that it could be used for banana farming. App5493–5494, 5501–02. He was shot in public. John Doe 11 had all the "qualities" that the AUC was looking for in a victim; he was a banana worker, and owned a farm. App5494–5496.

In addition, the way that John Doe 11 was murdered is consistent with the murders the AUC committed in the Magdalena region. AUC commander Mangones was responsible for the majority of the civilian assassinations from 2001 to 2005. App4822-4823. John Doe 11 was shot several times by men on motorcycle in a public area. App4296; *see* § I(A), *supra*. The circumstances of John Doe 11's murder were evidenced by eyewitness testimony from John Doe 11's daughter, Plaintiff Minor Doe 11A. App9116-18; App4296; App5501-02

Plaintiff Juana Doe 11 testified that she personally heard AUC commander Mangones confess to murdering her husband in a dialogue given to her by the state. App5501-5502. Plaintiffs also submitted public records that corroborate the fact that Mangones accepted responsibility for John Doe 11's murder. App8377-8378 (Justice and Peace Letter); App8380 (Letter from the Colombian Attorney General's Office). Mangones's confession is also corroborated by the Mangones *sentencia*. App7659-7667; *see also* RJN Ex. E.

2. Minor Doe 11A Witnessed John Doe 11's Murder, and Demonstrated Sufficient Personal Knowledge to Establish AUC Responsibility.

Minor Doe 11A testified that she went with her father to town to sell produce from their farm. On their way, a person asked her father his name, and when he responded, the person shot her father multiple times, killing him instantly. She hid in nearby bushes until the killer(s) left by motorcycle. App4296; App9116-18; App5501-02. The public nature of the assassination, and the use of motorcycles, are signatures of an AUC killing. § III(B), *supra*. Moreover, this murder took place after John Doe 11 had been threatened to sell their farm and for banana production, and had refused. App5493–94, 5501–02.

3. Colombian Official Records also Independently Create a Triable Issue of Fact as to the AUC's Responsibility for John Doe 11's Murder.

Minor Doe 11A submitted Justice and Peace documents establishing that AUC commander Mangones confessed to and was responsible for killing her father. These

documents included a prosecutor's letter stating that AUC commander Mangones confessed to the killing of John Doe 11, App8377-8378 (Justice and Peace Letter); App8380 (Letter from the Colombian Attorney General's Office); and a July 31, 2015 *sentencia* finding Mangones guilty of the murder of John Doe 11. RJN Ex. E.

These documents independently create a triable issue of fact as to the AUC's responsibility for John Doe 11's death.

4. Juana Doe 11's Testimony Establishes the AUC's Involvement in John Doe 11's Murder.

Juana Doe 11 testified that she attended the Justice and Peace hearing and spoke to Mangones, at which point he confessed to murdering her husband. App5501–02. The district court concluded that Mangones's confession was inadmissible as a statement against interest under Rule 804(b)(3) because Mangones was not unavailable. App7561. Under any standard this was error, and particularly so on *de novo* review. *See, e.g.*, *Lamonica,* 711 F.3d at 1317 (standard of review as to unavailability determination is *de novo*).

First, the district court failed to recognize that Mangones was unavailable because he resided in Colombia. App7562-64 n.35. *United States v. Samaniego*, 345 F.3d 1280, 1283–84 (11th Cir. 2003) (foreign nationals abroad are beyond district court's subpoena power); *United States v. Drogoul*, 1 F.3d 1546, 1553 (11th Cir. 1993); *French Am. Banking Corp. v. Flota Mercante Grancolombiana, S.A.*, 693 F. Supp. 1421, 1425

(S.D.N.Y. 1987) (Colombian national residing in Colombia is unavailable under Rule 804(a)(5)).

Second, the district court's conclusion that Plaintiffs "had an opportunity" to depose Mangones in 2015 while he was imprisoned in Colombia but "neglected to avail themselves of that opportunity timely," App7564, overlooked key portions of the record and is clearly mistaken. *See Broad. Music, Inc. v. Evie's Tavern Ellenton, Inc.*, 772 F.3d 1254, 1257 (11th Cir. 2014) ("It is an abuse of discretion for the district court to . . . base its decision on clearly erroneous findings of fact."). Plaintiffs need only make a good faith attempt to obtain the witness' testimony. *See Barber v. Page*, 390 U.S. 719, 724–25(1968); Fed. R. Evid. 804(a)(5)(B); 30B Wright & Miller § 6968 (3d ed. 2020); *see also Samaniego*, 345 F.3d at 1283–84 (asking relatives of witness is sufficient). They did so here.

Plaintiffs applied for and the district court granted a letter rogatory for Mangones's testimony in 2014, App2684-17, 3055-73, but the Colombian authorities declined to schedule his deposition. Plaintiffs notified the district court that "for reasons unclear, the Colombian authorities did not ultimately produce Mangones for a deposition, and the Letters Rogatory was returned." App3179-81, 7563. Plaintiffs further informed the court "that they had done everything possible to ensure that the Colombian government would expeditiously act upon their Letters Rogatory requests," App3145-48, 3435, but that setting dates for the Letters Rogatory hearings

was under the Colombian authorities' exclusive control. App3145-48, 3435.[48] The district court did not explain what more Plaintiffs should have done.[49]

Since the Colombian officials declined to produce Mangones, and Plaintiffs could not depose him in prison without official cooperation, the court's finding that Plaintiffs had an opportunity to depose Mangones is thus clearly erroneous, rendering its conclusion that Mangones was not unavailable an abuse of discretion.

5. Circumstantial evidence provides further proof of AUC involvement in John Doe 11's murder.

John Doe 11 was killed in Aracataca, a banana-growing municipality controlled by the AUC's William Rivas front, and the AUC had motive to kill him, as a banana farmer and farmowner who refused to sell land that could benefit Chiquita and the interests with which the AUC was aligned. *See* § V(E)(1), *supra.* The AUC were also indiscriminately killing civilians while declaring a war against the population. The AUC was responsible for the majority of all the violence in the Magdalena region. They were occupying the city centers of the municipalities and "cleaning" the countryside. *See* § V(E)(1), *supra.*

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[48] Thus, the district court's suggestion that Plaintiffs failed to coordinate with Colombian officials is unfounded. App7562 n.34.

[49] Indeed, Plaintiffs obtained a second letter rogatory and attempted to schedule the Mangones deposition, but when the Colombian government did order him to appear, the district court reversed its scheduling order permitting depositions pursuant to Letters Rogatory to take place after the discovery cut-off, App7770, and quashed the notices of deposition because it believed the Plaintiffs had unduly delayed. App7562 n.34.

In addition, the way that John Doe 11 was murdered is consistent with the way the AUC were conducting their crimes in the Magdalena region. The AUC was responsible for the majority of the civilian assassinations from 2001 to 2005. App4823-4822-4823.

Datasets such as CINEP – on which both Defendants and Plaintiffs' expert rely – have been created through the testimonies of paramilitaries, human rights groups, news agencies, etc., and have analysts assess the facts of individual cases and provide information about the presumed responsible actor. App3858; 4789. These databases, relied on and cited by both Defendants' expert and Professor Kaplan, App3858, App4789, analyze the facts of each of these bellwether cases and have confirmed that the paramilitaries are clearly the presumed "actor" responsible for John Doe 11's murder. App4829.

F. Decedent Jose Lopez 339/Plaintiff's Seven Surviving Children

There is ample, admissible, and unchallenged evidence that the AUC killed Jose Lopez 339. In particular, an AUC commander confessed to Jose Lopez 339's children. App6475, App5705–5706, App7525, App6551. On November 4, 1998, four armed men on motorcycles in the municipality of Necoclí, Urabá, shot Mr. Lopez and his nephew consistent with AUC practice. App6471-6472. The AUC had control of the area of Necoclí at the time of his murder. Jose was shot in the head and died instantly; his nephew was in a coma for 14 years until he passed. App6471-6472. The AUC also took the family's livestock. App6481-6482. Defendants did not challenge this

evidence or its admissibility.

Two months after the shootings, the AUC summoned Jose's family to a remote location. App6473-6475. AUC Commander Fredy Rendón presided over the meeting, escorted by heavily armed men wearing uniforms like the Colombian army's, with armbands that said "AUC." App6551. Rendón told the family he had ordered Jose's murder and declared the whole family a target based on misinformation he had received. App6474-6475. He apologized to the family for the murder. App5705, 6474-6475. Defendants did not challenge this testimony. The confession was also corroborated by the Rendón *sentencia*, discussed above. App4369-4370; *supra* § III(B)(1).

Chiquita did not specifically challenge Rendón's confession to Jose's family on evidentiary grounds, and Rendón's statement is a classic statement against interest by an unavailable witness under Fed. R. Evid. 804(b)(3). The district court concluded, for roughly the same reasons it found Mangones was an available witness, that Rendón was too. App7564 n. 55, 7566-7567. But as with Mangones, § V(E)(3), *supra*, the district court erred in finding Rendón was not "unavailable."

The district court concluded that Plaintiffs noticed his deposition "after his release from prison" and thus did not show they were unable to secure his testimony due to factors outside their control. App7564 n. 55, 7566. But Plaintiffs *did* try to depose Rendón while he was in prison: they filed an emergency motion for a letter

rogatory in December 2014, while Rendón was incarcerated, seeking to depose him before his release. App4394. The Court did not grant the emergency motion until April 2015. App3055-3073. The letters rogatory were transmitted to the Colombian government, which scheduled the deposition for August 12, 2015 at the prison. App4394. Plaintiffs' counsel traveled to Colombia to depose Rendón and other witnesses, but Rendón – who had been released two weeks before – sent his attorney to the wrong court and did not appear. App3134, 4394.

Plaintiffs tried again. They obtained a second amended letter of request, App3134, DE 1857, and scheduled another deposition, but Rendón again did not appear. App7564 n.55 (noting that Rendón was twice noticed for deposition but twice failed to appear). The district court erred by failing to acknowledge these facts, which plainly satisfy the requirement of good faith effort under Fed. R. Evid. 804(a)(5)(B). Given Rendón's unavailability, his statements against interest create a triable issue of fact as to the AUC's responsibility.

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

1. Factual Background.

Juana Perez 43A submitted sufficient evidence to allow a jury to find that her son, Pablo Perez 43, was murdered by the AUC. He was killed in September 2004 in Zona Bananera, Magdalena, App3978-3979, an area dominated by the AUC at the time. SoF § I(B), *supra*. Pablo Perez 43 was a Chiquita plantation worker; App5595, 5609-5610, 5618-5619; banana workers were specifically targeted by the AUC. SoF §

I(A), *supra*. He was publicly assassinated, a method of killing that was a signature of the AUC. § II(B), *supra*.

Pablo worked at a Chiquita farm and came home from work early one day to get some papers. App5595, 5609-5610, 5618-5620. Juana saw a man following her son and he walked past her. She heard gunshots and saw the man come back past her with a gun. App5618-5620. He told her "you haven't seen a thing." App5618-5620. She then found her murdered son. App5618-5620. Juana's stepdaughter also witnessed the killing. App5623-5624. Pablo's murder fits the AUC's *modus operandi* for killings in that region at that time. § III(B), *supra*.

Juana Perez 43A was present when AUC Commander Mangones took responsibility at a Justice and Peace hearing for killing Pablo. App5657, 5660-5662. Confirming that he confessed, he was found by the Justice and Peace Commission to have been responsible for the murder. App4294-4296. Juana also submitted two letters from the National Prosecutor of the Justice and Peace Commission finding that Mangones and his AUC associate Rolando René Garavito Zapata accepted responsibility for Pablo's murder. App3978-3979, 4313-4314; *see also* RJN Ex. E at 191, 480, 1149-1150, 1170-1171, 1174.

2. AUC Commander Mangones Took Responsibility for Killing Plaintiff Juana Perez 43A's Son when she Spoke with Mangones.

Juana Perez 43A testified that Mangones took responsibility for killing her son, Pablo Perez 43, at a Justice and Peace hearing she attended. App5657, 5660-5662.

While Juana's testimony on this point is ambiguous, *see* App5657, 5660-5662, the district court erred as a matter of law by simply rejecting it. The district court was required to view this testimony and all reasonable inferences that could be drawn from it in Plaintiff's favor. *See, e.g.*, *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (*en banc*). Juana's testimony certainly allowed the reasonable inference that she was present at a hearing in which Mangones confessed to killing Pablo. App5657, 5660-5662. That Mangones was found by the Justice and Peace Commission to have been responsible for Pablo Perez 43's murder is strong confirmation that he in fact did confess to the murder and is an independent basis of AUC responsibility. *See* App4294-4296. Juana should have been permitted to testify about this confession at trial, allowing the jury to make the ultimate factual determination. Mangones's confession was admissible as a statement against interest by an unavailable witness admissible under Fed. R. Evid. 804(b)(3). Mangones was "unavailable" as a witness and the district court erred in finding otherwise. § V(E)(4), *supra.*

3. Justice and Peace Records Confirm that the AUC Murdered Pablo Perez 43.

The Mangones *sentencia*, App4294-4296, and two official letters issued by the Justice and Peace Commission confirm that Mangones and his AUC associate Garavito accepted responsibility for Pablo's murder. App3978-3979, 4313-4314. These documents alone create a triable issue as to whether the AUC murdered Pablo.

The district court erred in finding the *sentencia* inadmissible. The court ignored it as a final, foreign court judgment of conviction. *See* § III(B)(1), *supra*. The court further erred in finding the letters inadmissible. The court failed to credit the fact that AUC leaders Mangones and Garavito officially accepted responsibility for killing Mr. Perez. App7523. Both exhibits specifically indicated that Mangones and Garavito accepted responsibility for Mr. Perez's murder. App3978-3979, 4313-4314. A February 2019 letter from the National Prosecutor states that "the accused person José Gregorio Mangones Lugo at the testimony hearings dated October 11, 2007 and November 11, 2008 confessed the event. Also, at the testimony hearing of April 15, 2004, the accused person Rolando René Garavito Zapata, accepted that he participated in the event." App3978. Likewise, a March 2019 letter from the National Prosecutor, confirms that Mangones and Garavito accepted responsibility for Perez 43's murder and transmitted the transcripts and video of the hearings. App4313-4314.

The district court abused its discretion in excluding these documents. App7565. They should have been admitted as public or business records. *See* § III(B)(1), (4).

Based on the location of the killing, the eyewitness testimony of the manner in which Pablo Perez 43 was murdered, the confession by Mangones, Mangones's *sentencia*, the Justice and Peace letters confirming that AUC members Mangones and Garavito took responsibility for murdering Pablo Perez 43, and the absence of any adequate alternate explanation, a jury could find the AUC responsible.

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

There is ample, admissible, and unchallenged evidence of AUC responsibility; even if the few challenged statements are excluded, there is sufficient evidence to withstand summary judgment.

Ceferino Antonio Restrepo Tangarife was shot in July 1997 in the municipality of Apartadó in the region of Urabá, App6419-6421, an area that was controlled by the AUC. App4824-4825; SoF § I(B), *supra.* In the years leading up to the decedent's murder, the paramilitaries also committed massacres in Apartadó. App4352-4353 (testifying about a massacre committed by the paramilitaries in Apartadó in 1995 that left 12 people dead). Ms. Torres testified at deposition that "back then and over there, those [paramilitaries] were the ones who were doing all the killing…. [the paramilitaries] were carrying out the massacres." App6425. She testified at deposition that: "people were scared of them," she was scared of them, "very scared, because in Apartado, [dead people] was an everyday thing," and the paramilitaries "would kill everyday." App6434. The district court excluded this testimony, App7267, but the context indicates theses statements concern the AUC.

Moreover, the decedent's murder occurred in 1997 in Apartadó, App6419-6421, an area with heavy AUC activity at the time. App4824-4825. Restrepo Tangarife was a banana worker, App6427-6428, a group targeted by the AUC. SoF § I(A), *supra.*

While neither Ms. Torres nor her son know specifically who killed Mr.

Restrepo, AUC commander Raúl Hasbún accepted responsibility for the murder, carried out under his orders. App4319-20, 4328; App3749.

I. Plaintiff Pastora Durango and Decedent Waynesty Machado Durango (Montes).

Plaintiff Pastora Durango brings a claim for the death of her son, Waynesty Machado Durango. Defendants made no specific objections to this victim, *see generally* App7237-7261, and the evidence supports the AUC's responsibility. Waynesty was murdered in Apartadó in 1997. App 9124, 9132. The AUC had control of the municipality of Apartadó at this time. *See* § V(H), *supra*; SoF § I(B), *supra.* As Plaintiff Torres, § V(H), *supra*, testified, at that time, the "paramilitaries were the ones who were doing all the killing" in Apartadó. App6425.

The paramilitaries "were the ones who were killing the people." App9128. Furthermore, AUC commander Raúl Hasbún accepted responsibility for the murder of Waynesty Machado Durango, carried out under Hasbún's directive. *See* § III(B)(2)-(3), *supra*; App4342.

J. Plaintiff Gloria Eugenia Muñoz and Decedent Miguel Angel Cardona (Montes).

Miguel Angel Cardona was killed on January 15, 2001, in the municipality of Turbó in Urabá. App9079, 9087; App4326. The AUC controlled Turbó at that time. *See* SoF § I(B), *supra*.

Miguel was abducted from his home by two men on motorcycles, App9079–80, 9087, 9090, consistent with AUC practice, at a place and time with heavy AUC

activity. App4824-4825; § I(B), *supra*. AUC commander Raúl Hasbún accepted responsibility for the murder, carried out under his directive. App3749, App4319-4320, App4326; § III(B)(2)-(3).

Gloria Muñoz's daughter-in-law, Onelsi Mejia, saw two men use a revolver and take Angel away without a shirt on and tie his hands behind him on one of two motorcycles. App9079–80. Onelsi knew their names, El Muelon and El Tripilla. App9080. Ms. Muñoz could testify at trial that her daughter-in-law's statements were excited utterances.

Ms. Muñoz's other son, Roberto Cardona Muñoz, submitted a declaration, App4755, that he tracked down El Muelon and El Tripilla: "At first they denied that they knew what I was talking about but after admitting they had left Miguel at the entrance of a [banana] farm called La Represa. I was able to find my brother at the entrance to the farm and he was dead. They had shot him four times in the head and he was beaten with the stock of a firearm." App4755. Roberto told Ms. Munoz "they" were paramilitary. App9082.

The district court's finding that the killers' AUC affiliation could not be inferred from Roberto's testimony was error. Roberto stated that the paramilitaries who killed his brother were "recognized by inhabitants of the area" and they appeared at Miguel's funeral. App4755. The district court found Roberto's identification to be inadmissible as based on rumor, App7650, but his affidavit is based on personal

observation. Given the evidence of pervasiveness of the AUC's reign of terror, a jury should have been permitted to decide whether the AUC was responsible.

Further, Roberto identified Miguel's abductors as paramilitaries, App9082, and stated that "when they committed crimes [they] identified themselves as AUC or paras." App4755. Drawing all inferences in Plaintiff's favor, a jury could find that the AUC killed Miguel, and resolve any ambiguity when Roberto testifies at trial.

CONCLUSION

For the foregoing reasons the judgment below should be reversed and all of these bellwether cases remanded to the district court for trial.

May 29, 2019

Respectfully submitted,

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Dated: May 29, 2020

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