

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**CLAUDIA BALCERO GIRALDO, *et al.*,** )

)

**Case No. 2:09-cv-1041-RDP**

)

**Plaintiffs,** )

)

**PUBLIC REDACTED**

**v.** )

)

**VERSION**

)

**DRUMMOND COMPANY, INC., *et al.*,** )

)

**Defendants.** )

)

**PLAINTIFFS' OPPOSITION TO DEFENDANT DRUMMOND LIMITED  
(DLTD)'S MOTION FOR SUMMARY JUDGMENT**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

In *Drummond I*, in which discovery was conducted prior to the availability of testimony from Autodefensas Unidas de Colombia (AUC) combatants now participating in Colombia's Justice and Peace process, the District Court largely denied Drummond's motion for summary judgment because the limited evidence still allowed for a reasonable inference that Drummond had aided and abetted war crimes. *See* Plaintiffs' Exhibit ("Pls' Ex") 1, Doc. 329 at 4, Case No. CV-03-BE-0575-W (Mar. 5, 2007). In the case now before this Court, with the new testimony from the key AUC paramilitaries who formed an alliance with the Drummond Defendants,<sup>1</sup> Plaintiffs have amassed evidence that will allow them to prove at trial that Drummond aided and abetted and conspired with the AUC to commit war crimes and extrajudicial killings. Drummond also ratified these international law violations by knowingly accepting the benefits of the AUC's violent acts.

DLTD represents to the Court in its summary judgment motion ("DLTD Mot") that there is "no evidence" on several key issues, including its intent to aid and abet war crimes. DLTD Mot at 29-37. Not only does Drummond omit key evidence of the witnesses it does discuss, it completely fails to mention the testimony of Jairo Charris Castro. He testified that, as the security coordinator for one of Drummond's private security firms, he served as "the intermediary between

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<sup>1</sup> The four Defendants are Drummond Ltd. (DLTD), Drummond Company, Inc. (DCI), DLTD President Augusto Jiménez, and Mike Tracy, who held top positions at DCI and DLTD.

Jim Adkins [Drummond's security coordinator] and [AUC Commander] El Tigre." Pls' Ex 2, Charris Dep 28:21-30:1. He also testified that "the commitment El Tigre, Jim Adkins, and myself had was to increase the forces of the AUC," *id.* at 30:1-2, and that "selective massacres" by the AUC took place once the AUC had Drummond's funds, *id.* at 31:5-8. There is much more material evidence DLTD did not disclose. Plaintiffs will demonstrate that, looking at *all* the evidence, they will prevail at trial on their claims. DLTD's Motion should be denied.

## **II. PLAINTIFFS' STATEMENT OF FACTS IN OPPOSITION**

### **A. Plaintiffs' Response to Drummond's Statement (PRDS).**

2. Disputed. Plaintiffs' evidence shows that DCI owns and controls the Drummond operations in Colombia. *See generally* Pls' Opposition to DCI Motion for Summary Judgment, to be filed November 5, 2012.

5. Disputed. There was cooperation between the Colombian military and the AUC. *See* Pls' Statement of Disputed Material Facts ("PSDMF") ¶¶ 9-10, *infra*.

6. Disputed. The fact that there may have been some arrests of AUC members is legally irrelevant when there was systematic cooperation between the military and the AUC. *See infra* § IV.B.1.

10. Disputed. The fact is misleading. Some members of Convivirs were also in the AUC, and Convivirs became part of the AUC. *See* Pls' Statement of

Undisputed Material Facts (“PSUMF”) ¶¶ 5, 6, 10, *infra*§.

11. Disputed. See *supra* response to ¶ 10.

12. Disputed. The decision to fund the AUC was made by DCI CEO Garry Drummond in Alabama. Defs’ Ex N, Blanco Dep 70:5-73:11.<sup>2</sup> The initial cash payments for AUC were brought from Alabama by Jim Adkins. *Id.*

13. Disputed. Blanco used inflated invoices that hid payments to the AUC. *Id.* at 73:12-75:9, 80:14-92:3. Drummond had no controls over funds paid to the army, which could have used the funds for the AUC. See *infra* PSUMF ¶ 7.

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<sup>2</sup> Drummond asserts that Jaime Blanco’s testimony should be stricken because he declined to answer a few of Drummond’s questions at his Letters Rogatory hearing. DLTD Mot 31-34. Drummond has no basis to strike Blanco’s highly relevant and probative testimony. As an initial matter, the Colombian judge advised Blanco, who is in the midst of defending criminal charges against him in Colombia, that he had a right against self-incrimination. Defs’ Ex N, Blanco Dep 10:5-15. Drummond neglects to mention that Blanco also refused to respond to questions from *Plaintiffs* that he considered sensitive. See, e.g., *id.* 115:13-116:3; Pls Ex 57, Blanco 5/25/12 Dep 231:21-232:7. Drummond seeks to punish Plaintiffs by excluding important evidence because a third party witness refused to answer a few questions from *both* sides in the course of a two-day hearing. More fundamental, Drummond fails to cite a single *tort* case in which the right to cross-examination implicated due process concerns. Drummond cites only criminal or quasi-criminal cases involving significant government action which triggered the Sixth Amendment. The Supreme Court stated that the Sixth Amendment protection only applies “where *governmental action* seriously injures an individual and the reasonableness of the action depends on fact findings...” See *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (emphasis added). The right is not implicated in this case. Additionally, even if the standard from criminal cases were to be applied here, Drummond falls far short of its burden of demonstrating that Blanco’s refusal to respond “substantially prejudiced” its ability to disprove his direct testimony. See *US. v. Darwin*, 757 F.2d 1193 (11th Cir. 1985), *abrogated on other grounds by U.S. v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990). Blanco’s failure to answer a few questions on both direct and cross-examination does not create a “substantial danger of prejudice.” Cf. *U.S. v. Rodger*, 2010 WL 2643268, at \*9 (S.D. Ga. 2010) (striking testimony where witness refused to submit to *any* cross-examination). Finally, Drummond seeks the most extreme remedy possible to deprive Plaintiffs of important testimony. Plaintiffs would cooperate in any effort to reopen Blanco’s testimony provided Drummond can first meet its burden of demonstrating substantial prejudice.

14. Disputed. *See infra* PSUMF ¶¶ 8, 9, 11; PSDMF ¶¶ 3, 5, 6, 7.

15. Disputed. *See infra* PSUMF ¶¶ 8, 9, 11; PSDMF ¶¶ 3, 5, 6, 7.

16. Disputed. *See infra* PSDMF ¶¶ 5, 6, 7.

17. Disputed. Drummond admits there is no written version of this so-called policy. *See, e.g.*, Defs' Ex D, Drummond Dep 62:3-63:6; Defs' Ex C, Tracy Dep 88:23-89:13; 91:18-92:23. In addition, Drummond did not investigate violations. *Id.* at 94:9-14. DLTD did not inform its contractors that supporting the AUC would not be tolerated because they did "not believe that should be needed." Defs' Ex S, Linares Dep 251:4-9.

18. Disputed. Drummond relied upon the AUC to fight the FARC guerillas. Drummond's private security forces provided support to and coordinated with the AUC. *See infra* PSUMF ¶¶ 5, 6, 13, 14, 18; PSDMF ¶¶ 2, 3, 5, 6.

19. Disputed. This fact is misleading as the military started, funded and controlled the AUC. *See infra* PSUMF ¶¶ 3-5. The military and Drummond also coordinated with the AUC. *See infra* PSDMF ¶¶ 9, 10.

**B. Plaintiffs' Statement of Undisputed Material Facts (PSUMF).**

1. James Adkins was hired by Drummond in 1995 as a security advisor after he was fired by the CIA due to his illegal conduct in assisting the contras in the Iran-Contra scandal, a fact that DCI and DLTD knew when he was hired. Defs'

Ex. K, Adkins Dep 19:21-21:17; 48:21-52:9.

2. Adkins was found by Independent Counsel Walsh to have violated the law in providing support to the contras, falsifying CIA financial accounts to hide his crime, and lying to investigators. Defs' Ex K, Adkins Dep 39:6-17; Pls' Ex 3 (Independent Counsel Walsh's final report to Congress).

3. Adkins reported to DCI and DLTD that the Colombian military had decided by September, 1995 to organize "paramilitary groups in the region into one umbrella group controlled by the army." Pls' Ex 4.

4. Adkins reported to DCI and DLTD that the Cordoba Battalion Commander requested funds from Drummond in September 1995 to support "Plan Convivir," the military's effort to form and fund paramilitaries. Pls' Ex 4.

5. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. Fidel Castano was a co-founder of the AUC. Pls' Ex 30, Duarte Dep 17:13-18:11. His brother, Vicente Castano, brought the AUC to Cesar Province where Drummond operated. Defs' Ex W, Gelvez Dep 38:14-39:20;41:4-42:3. The "Chepe Barrerra" group and the "Victor Carranza" group were illegal groups that were part of the AUC. Defs' Ex K, Adkins Dep 187:8-189:11.

7. Drummond provided substantial support to the Colombian military with no controls on the use of the funds and allowed the military to use the funds for any purpose, which could have included making contributions to the AUC. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Adkins admitted he had "no idea" what the military did with the war taxes collected. Defs' Ex K, Adkins Dep 206:16-21. He added that "[w]hen the money

went into the military fund the . . . military could do with it what it wanted.” *Id.*

211:18-212:2. [REDACTED]

[REDACTED]; Defs’ Ex. Q, Zervos Dep 200:6-201:25 (Garry Drummond approved a \$1.1 million payment to military). Defs’ Ex D, Drummond Dep 142:1-143:3 (did not verify what the military did with its funds).

8. DCI and DLTD knew as early as September 1995 from a report by Adkins that *the military’s plan to organize and fund paramilitary groups “will bring with it egregious human rights violations”* Pls’ Ex 4 at 2 (emphasis added).

9. The AUC was a brutal force that employed terrorist tactics, including slaughtering non-combatants in towns that had been under FARC control to terrorize the survivors and discourage them from allowing the guerillas access to their towns. The AUC’s record of conducting massacres and murdering civilians during the civil conflict with FARC was well known in Colombia and was documented beginning in 1996 by U.S. State Department Human Rights Reports (SDHRR) and Human Rights Watch Reports (HRWR). Pls’ Ex 31 at 2 (1997 SDHRR); Pls’ Ex 32 at 9 (HRWR, “War Without Quarter: Colombia and International Humanitarian Law,” October 1998) (The AUC repeatedly and unequivocally flouts international standards by committing massacres [and] killing civilians . . .”); *id.* at 86 (“AUC units...would enter a village, execute civilians

believed to support guerrillas, and leave”).<sup>3</sup>

10. The early paramilitary groups, including those formed under the Convivir process, ultimately united under the AUC structure. Defs’ Ex W, Gelvez Dep 27:19-28:15 (Convivir “Chamizos” became part of AUC); Pls’ Ex 34 at 14 (1998 SDHRR) (more than 200 members of 39 disbanded Convivirs announced they would join the AUC); Pls’ Ex 32 at 59 (HRWR)(Noting that “some Convivirs make no distinction between illegal paramilitary groups, which they embrace, and their own organizations,” and AUC leader Salvatore Mancuso led two Convivirs even after participating in massacres and the formation of paramilitary groups).

11. The AUC was designated a terrorist organization by the U.S. State Department on September 10, 2001. 66 Fed. Reg. 175, 47054 (Sept. 10, 2001). The designation was based on the AUC’s consistent record of brutality from the moment of its formation in 1996, including the massacres of civilians. *See, e.g.*, Pls’ Ex 31 at 2 (1997 SDHRR); Pls’ Ex 34 at 13 (1998 SDHRR); Pls’ Ex 35 at 10 (1999 SDHRR); Pls’ Ex 36 at 13 (2000 SDHRR).<sup>4</sup>

12. DCI and DLTD officials received reports from Adkins of allegations by

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<sup>3</sup>From 1996-2006 DCI and DLTD were aware of these SDHRR and HRWR documenting the AUC’s record of brutality. Pls’ Ex 33, Webster Dep 91:22-92:11.

<sup>4</sup>The key DCI and DLTD officials, including Garry Drummond, Mike Tracy and Augusto Jimenez, admit that they knew the U.S. had designated the AUC a terrorist organization. Pls’ Ex 37 (Defs’ Am. Resp. to Pls’ First Request for Admissions, Nos. 18-23, Mar. 22, 2011).



the Drummond union and FARC commander Guillermo that DLTD was sponsoring the AUC. No Drummond official investigated whether the allegation was true. Defs' Ex K, Adkins Dep 162:3-164:6.<sup>5</sup> Even after three Drummond union leaders were murdered by the AUC in 2001, and the union alleged that Drummond's food service contractor Blanco was involved with the AUC in the murders, DLTD took no action. It now admits that the union's accusations about Blanco were correct. Defs' Ex S, Lineros Dep 221:8-21.

13. DCI and DLTD officials did nothing to investigate allegations that one of DLTD's security contractors, Secolda, was collaborating with the AUC. Instead, after they were informed of these allegations, Drummond expanded Secolda's contract to include the provision of security along the rail line. Pls' Ex 23; Defs' Ex K, Adkins Dep 257:3-13; Defs' Ex S, Linares Dep 206:1-207:21.

14. Charris was security coordinator for Viginorte, DLTD's other private security firm, and while in that position, he coordinated security with the AUC. Pls' Ex 2, Charris Dep 18:2-20:21; 49:10-18.

15. Blanco, the former food service contractor for Drummond and close friend of Drummond manager Alfredo Araujo, pled guilty to conspiring with the AUC to murder three Drummond union leaders. Defs' Ex N, Blanco Dep 11:12-

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<sup>5</sup> Adkins *did* investigate when there were attacks on Drummond property. Defs' Ex K, Adkins Dep 155:10-156:13.

12:9, 135:13-136:13. Blanco and Araujo remain friends. Defs' Ex T, Araujo Dep 132:2-12. Araujo also grew up with AUC leader Jorge 40. *Id.* 33:2-8.

16. After learning that Blanco had links to the AUC, Drummond did not investigate how it maintained a long term contractual relationship with an AUC supporter, nor did Drummond change any policy to improve the monitoring of AUC links to contractors. Defs' Ex C, Tracy Dep 231:9-21 (no investigation); Defs' Ex D, Drummond Dep 190:13-21 (no change in policy).

17. After learning that Blanco and his former body guard, Charris, identified Drummond, Jimenez, Adkins, Tracy, Araujo, and other DCI and DLTD officials as being directly involved in the plan to provide the AUC with substantial resources, Drummond did nothing to investigate. Defs' Ex D, Drummond Dep 188:15-189:1 (did not even ask any Drummond officials about the allegations); Defs' Ex S, Linares Dep 239:19-23 (Drummond did nothing in response to allegations).

18. After the demobilization of the AUC in 2006, Drummond hired former AUC members as security guards. Pls' Ex 38 (2006 U.S. Embassy cable reporting that Drummond attributed security improvements to "ramped up private security operations" along the rail line, but noting that many of Drummond's security guards "are former paramilitary who had operated in the area.").

19. All of the Plaintiffs' decedents were noncombatant civilians residing in

the areas around Drummond's operations and were killed by the AUC during the course of the civil conflict in Colombia. *See* Pls' Ex 39 (Doc. 346, Ex. A).<sup>6</sup>

**C. Plaintiffs' Statement of Disputed Material Facts (PSDMF).**

1. DCI and DLTD provided substantial support to the AUC starting in 1996 and continuing until the AUC demobilized. *See, e.g.*, Defs' Ex W, Gelvez Dep 59:20-60:5 (Drummond and Prodeco agreed in 1996 to jointly support the AUC); *Id.* 52:12-53:15 (Adkins and General Pena were present when plans were made to fund AUC's Vicente Castano); Pls' Ex 42 ¶ 16 (Gelvez Decl.) (Drummond agreed to "give the AUC a monthly payment to cover the salaries, food, and costs of the AUC troops"); Pls' Ex 30, Duarte Dep 47:5-20 ("Drummond paid [AUC Commander] Omega between \$400 or \$500,000 a month..."). Adkins went to Alabama and obtained Garry Drummond's agreement in 1996 to start paying El Tigre, and this was done at first by Adkins bringing \$10,000 cash payments from Alabama to evade the law and Drummond's accounting system. Defs' Ex N, Blanco Dep 70:5-73:11. Thereafter, Adkins and Blanco developed a scheme to use

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<sup>6</sup> The individual facts of Plaintiffs' claims are not at issue in this first stage of the summary judgment process. *See* DLTD Mot 26, n.14. The spreadsheet summarizes the evidence for all of the Plaintiffs, including that they were all civilians killed by the paramilitaries. Many of the Plaintiffs have documentation that their decedents were officially declared to be victims of the civil conflict. *See, e.g.*, Pls' Ex 40 (municipal certification stating Candido Mendez, a Drummond union worker, was killed for ideological and political reasons in the context of the internal armed conflict). Others have witness testimony that their civilian decedent was killed by the AUC. *See, e.g.*, Pls' Ex 41, Latorre Dep 31:11-23 (describes public execution by AUC).

inflated invoices from Blanco, and he would provide the overage to El Tigre. *Id.* 73:12-75:9, 80:14-92:3; Pls' Ex 2, Charris Dep 30:8-17 (Blanco used fictitious invoices with Drummond to pay the AUC); Defs' Ex J, El Tigre Dep 148:19-149:10 (confirms that Blanco made the monthly payments to El Tigre). DLTD used security contractor Secolda to make payments to the AUC. Pls' Ex 2, Charris Dep 196:15-21; Defs' Ex N, Blanco Dep 103:18-104:14; 113:6-14. El Tigre was present in a 1999 meeting at which Araujo agreed to arrange for Drummond to provide funding to the AUC. Defs' Ex J, El Tigre Dep 34:13-37:9. Samario was present at a meeting in May 2001 with Jorge 40 and Araujo where Araujo agreed to increase DLTD's payments to the AUC. Defs' Ex I, Samario Dep 50:1-14, 53:2-54:4, 55:7-20. DLTD denies making the payments and disputes Plaintiffs' evidence, reinforcing there is a material fact in dispute. DLTD Mot 20-21.

2. As another form of substantial assistance, Drummond permitted the AUC to enter its facilities at will, where they took gasoline and food. Pls' Ex 2, Charris Dep 48:8-19; 52:2-15 (Charris entered Drummond mine with AUC forces); Pls' Ex 40 ¶18 (Gelvez Decl.) (Drummond agreed to provide AUC with access to Drummond mine); Pls' Ex 30, Duarte Dep 31:3-15; 51:19-54:19 (regularly visited Drummond mine); *id.* 39:12-14; *id.* 62:8-64:1 (got gas and food Drummond's facilities); Pls' Ex 43, Marengo Dep 180:18-181:15, 181:21-183:8 (Drummond

engineer saw paramilitaries on Drummond's roads and at Drummond's gas station many times); Pls' Ex 44, Quintero Dep 21:5-23:16 (Drummond employee was required to fill the gas tanks of paramilitaries upon the order of Drummond security). DLTD denies the AUC entered the mine area and used DLTD gasoline. *See, e.g.*, Defs' Ex K, Adkins Dep 252:6-253:3.

3. DCI and DLTD provided substantial assistance to the AUC *for the purpose of* siding with the AUC in Colombia's civil conflict and driving FARC guerillas out of Drummond's areas of operation, particularly its rail line. Pls' Ex 2, Charris Dep 19:9-20:21 (Drummond brought in AUC Commander El Tigre to "counteract or neutralize the activity and presence of the guerilla"); *id.* 25:5-10 (bringing in the AUC was a "direct order from Garry Drummond because they were going through a crisis, a collapse, due to the guerilla attacks . . . to the railroad."); *id.* 28:17-29:1. Charris testified that "[t]he commitment that El Tigre, Jim Adkins and myself had was to increase the forces of the AUC. It was -- the purpose was to increase the staff and to have a successful security of the mine, the railroad lines, and the purchase of weapons that El Tigre had so that he could fulfill or cover all commitments with Drummond." *Id.* 29:19-30:7. The "Northern Bloc . . . was strengthened, and the selective massacres took place when Drummond had already provided the funds to the Northern Bloc." *Id.*

31:5-8 (emphasis added). Blanco confirmed “Adkins told me that Garry Drummond had authorized these payments himself in order to support the AUC . . . and minimize these attacks by the guerillas.” Defs’ Ex N, Blanco Dep 105:19-106:10; Pls Ex 45 ¶ 26 (Blanco Decl.).

AUC Commander El Tigre was present at a 1999 meeting with Jorge 40 and Araujo at which Araujo agreed DLTD would fund the AUC so that El Tigre would “clean up the area of guerillas,” *which El Tigre understood meant “killing all of the guerillas or guerilla men that are armed in the area and civilians as well.”* Defs’ Ex J, El Tigre Dep 28:4-34:3 (emphasis added). Drummond’s support allowed El Tigre to pay and equip 200 AUC troops. *Id.* 44:2-48:19; Pls’ Ex 46 ¶ 2 (El Tigre Decl.) (Drummond’s “substantial payments allowed us to have more arms and men when we attacked [the FARC].”); *id.* ¶ 14 (“the Juan Andrés Álvarez Front . . . had an important presence . . . *all along the Drummond railroad line, where we carried out our work of security, intelligence, and massacres in order to clean the railroad corridor.*”) (emphasis added).

AUC Commander Samario testified that Drummond provided funds for 600 men to fight the guerillas in the area around Drummond’s rail line and increase the Juan Andres Alvarez Front from 70 to 250 men. Defs’ Ex I, Samario Dep 55:7-58:2. With Drummond funds, the AUC unit based at Silencio grew to 200 men and

then ultimately about 800 men in the area. Defs' Ex W, Gelvez Dep 63:17-65:3.

DLTD concedes that the evidence shows “*that DLTD intended the AUC to fight the FARC members who were bombing DLTD’s trains and impeding the company’s operations, not that DLTD intended the AUC to kill innocent people.*”

DLTD Mot at 29 (emphasis added). Drummond then argues there is no evidence that DLTD had specific intent to kill innocent civilians. *Id.* 29-37. The legal standard DLTD seeks to apply to intent is improper, *see infra* § IV.A.2.b, but there is nonetheless evidence showing Drummond’s intent. *Id.*

4. Drummond’s substantial support for the AUC caused a surge of AUC combatants to occupy the areas in and around the Drummond facilities and its rail line, bringing an AUC reign of terror to the area. Defs' Ex W, Gelvez Dep 70:15-72:5 (the arrival of the AUC to the area brought a wave of crime including “the daily murder of 30 to 40 people ... the amount of homicides that occurred between 1997, ‘98, and ‘99 was horrible.”); *id.* 69:16-70:9 (“most of the homicides . . . were done [by] the paramilitaries who arrived at El Silencio supported by the monies paid by Prodeco and Drummond.”). The AUC “continued to grow in size and strength, in large part due to the significant support provided by the Drummond company . . . The *Front engaged in regular and systematic cleansing campaigns to rid these areas of guerillas and their sympathizers . . . thousands of civilians*

*were killed.*” Pls’ Ex 47 ¶ 8 (Peinado Decl) (emphasis added). DLTD denies making the payments and disputes Plaintiffs’ evidence, reinforcing there is a material fact in dispute. DLTD Mot at 20-21; 28-37.

5. Once Drummond joined with the AUC in the civil conflict, *at Drummond’s direction, the AUC prioritized driving FARC guerillas out of the areas of Drummond’s operations* and escalated attacks on towns along Drummond’s rail line, including where Plaintiffs’ decedents and hundreds of other innocent civilians were killed. Pls’ Ex 2, Charris Dep 19:9-20:21 (once Drummond paid the AUC, it focused on defeating FARC in areas around Drummond’s rail line); Defs’ Ex J, El Tigre Dep 51:16-52:6 (was under orders from Jorge 40 to use his new arms to establish new bases near Drummond’s facilities and not allow any guerillas in the area). Pls’ Ex 46 (El Tigre Decl) ¶ 1 (naming towns where he set up operations); Defs’ Ex. I, Samario Dep 61:7-17 (Samario’s orders were to protect the railroad line and “we would just kill anyone who was said to be a guerilla around those parts.”); *id.* at 61:18-63:13 (AUC fought guerillas in Drummond’s area of operation because of importance to it of Drummond’s support). *Drummond security manager Lineros directed the AUC to focus “cleansing operations” in specific towns along the Drummond rail line. AUC member Peinado participated in these cleansing operations and “hundreds*



*of civilians were killed.*” Pls’ Ex 47 ¶¶ 13-14 (Peinado Decl). From 2001-06 the AUC continued to focus “cleansing operations” along Drummond’s rail corridor. *Id.* ¶ 25. DLTD denies making the payments and disputes Plaintiffs’ evidence, reinforcing there is a material fact in dispute. DLTD at Mot at 20-21; 28-37.

6. Under the orders of Adkins and Garry Drummond, Drummond’s private security contractors coordinated security of Drummond’s rail line with the AUC, and alerted the AUC if there were intruders along the rail line so that the AUC could respond and determine whether they were guerillas that required AUC engagement. Pls’ Ex 2, Charris Dep 18:2-20:21 (Charris, the coordinator for Viginorte, was ordered by Adkins and Drummond to coordinate security with the AUC, which was directed by Drummond “to neutralize the activity and presence of the guerilla.”); *id.* at 49:10-18 (Charris was directed by Drummond security managers “to control the presence of paramilitary forces in the area as well as the state security forces . . .”); Defs’ Ex N, Blanco Dep 23:5-10 (Charris handled the AUC relationship for Adkins); Defs’ Ex I, Samario Dep 63:14-64:13 (security staff for Drummond reported to AUC whenever there were strange people in the area and Samario responded: “If they could not justify their being there they were assassinated.”); Pls’ Ex 48 ¶ 5 (Decl. of Oscar Perez, alias “Yuca”) (AUC coordinated rail line security with Secolda). *Yuca stated that his AUC unit*

*coordinated with “Drummond’s security along the railroad line” and “carried out a cleansing campaign along the Drummond rail line.”* *Id.* ¶ 7 (emphasis added). DLTD does not address this fact but generally denies making payments to the AUC and disputes Plaintiffs’ evidence, reinforcing there is a material fact in dispute. DLTD Mot at 20-21; 28-37.

7. As part of its support for and coordination with the AUC, Drummond knew the AUC would kill innocent civilians. Pls’ Ex 2, Charris Dep 20:2-18 (coordinator for Viginorte testified that the AUC killed innocent civilians along Drummond’s rail line). Defs’ Ex J, El Tigre Dep 28:4-34:8 (AUC’s understanding with Drummond, through Araujo, was to clean out Drummond’s areas and killing guerillas and civilians). Adkins, carrying out orders from Garry Drummond, directed Charris to tell the AUC to execute the leaders of Drummond’s union. Pls’ Ex 2, Charris Dep 55:4-21; Pls’ Ex 49 (Jorge 40 Proffer) (Jorge 40 confirms Drummond paid him to kill the union leaders); Pls’ Ex 47 ¶¶ 15-18 (Peinado Decl) (Peinado attended meeting at which Adkins stated Garry Drummond approved the murder of the union leaders, and met with Drummond managers Araujo, Adkins and Lineros to plan the murders); Defs’ Ex I, Samario Dep 32:9-36:3 (Samario describes meetings he attended with Araujo, Blanco, Charris, and Tolemaida, regarding plans for AUC to kill civilians.); El Tigre killed five people at the

direction of Araujo. Pls' Ex 46 ¶ 12 (El Tigre Decl.).

DLTD does not address this fact but generally denies making payments to the AUC and disputes Plaintiffs' evidence, reinforcing there is a material fact in dispute. DLTD Mot at 20-21; 29-37.

8. Among the DCI and DLTD officials who devised the plan for Drummond to support the AUC's war effort in and around Drummond's facilities were Garry Drummond, Augusto Jimenez, Alfredo Araujo, and James Adkins. Pls' Ex 2, Charris Dep 19:9-20:18. Adkins assured Charris that the AUC plan was ordered by Garry Drummond because "they were going through a crisis, a collapse, due to the guerilla attacks to the . . . railroad." *Id.* 25:5-10; 22:14-19; 27:1-11. Araujo was in charge of relationship with Jorge 40. *Id.* 42:7-18; 45:2-20. DLTD does not address this fact but generally denies having an arrangement with the AUC and disputes Plaintiffs' evidence, reinforcing there is a material fact in dispute. DLTD Mot at 20-21; 29-37.

9. Members of the Colombian military based in and around Drummond's facilities systematically coordinated with and supported the AUC Commanders who were combating the FARC on behalf of Drummond. Pls' Ex 2, Charris Dep 18:9-19:2 (as Drummond's security contractor, he was involved in coordinating security with AUC and military); Defs' Ex I, Samario Dep 67:6-18 (the AUC

operated as the “left arm of the state. We would do what the public State forces would not do or could not do . . . we would coordinate in order not to have any type of clashes between the AUC and the military forces.”); *id.* 17:18-18:9 (AUC could assassinate while official military was “governed by international regulations and human rights and so on. We [AUC] were not governed by this.”); *id.* 18:16-19:4 (the AUC worked together with the military in several operations. “[A]s a matter of fact we would go into new areas or new zones and *they [the Colombian military] would lend us the arms with which we would kill people.*”) (emphasis added); *id.* 65:12-66:9 (“*So personally in my area I did a lot of coordination with the Army. And, you know, they even lent us arms. When I did not have the staff or the personnel or the weapons available I could use the arms of the public forces.*”) (emphasis added); *id.* 67:19-70:6 (Samario participated in the ‘false positive’ system in which the Colombian military coordinated with the AUC to receive the bodies of killed non-combatants in order to present them as combat kills and receive benefits from the Colombian government); *id.* 66:10-67:5 (AUC coordinated with two battalions, the Guajiros, which were charged with fighting the guerillas, and the Plan Especial Energetico, which had a training facility at the Drummond base); Defs’ Ex. J, El Tigre Dep 55:15-56:11 (El Tigre explained the army and the AUC cooperated “because we had a common enemy,” the guerillas.

He considered the army to be the AUC's strategic partner, "colleagues to fight against the guerilla."); Pls' Ex 46 ¶ 3 (El Tigre Decl.) ("In my capacity as retired military and as commander of the Juan Andrés Álvarez Front, I had encounters with active members of the army. On many occasions, they would let us act freely, since we were fighting the guerrilla, who was their enemy as well. During my operations with the AUC, I frequently found army officials who would allow us to continue our operations and who frequently collaborated with us."); Defs' Ex W, Gelvez Dep 63:17-65:3 (AUC Commander Melchor told Gelves the AUC needed to "coordinate with the Army so that they would know that they were already here, the AUC."); Pls' Ex 30, Duarte Dep 66:13-67:3 ("[The military] cooperated with us. . . they cooperated . . . because of the alliance that they have with the AUC . . . We would do joint operations . . ."). DLTD concedes that "[a]t best, however, the evidence is that there may have been incidents of unlawful cooperation between members of the Colombian military and the AUC," DLTD Mot 17, and argues for an improper legal standard that any cooperation must be government policy. *Id.* 13-14,17.

10. Drummond, along with the Colombian military, cooperated in the murder of civilians by passing information to the AUC about suspected "subversives," who were then executed by the AUC. Defs' Ex W, Gelvez Dep

66:1-67:18 (“[Colombian Military Intelligence Commander] Lino Sanchez told us that all the information that we had of that area should be passed on to . . . the paramilitary commander. . .”); *Id.* 69:16-70:9 (AUC supported by Drummond received information from military); Pls’ Ex 42 ¶¶ 9-10 (Gelvez Decl.) (Drummond security provided information to the Colombian military and the information was passed on to the AUC, so the AUC could kill any “subversives” in the region.); DLTD does not address this fact but generally disputes there was a symbiotic relationship between the military and AUC. DLTD Mot at 18-19.

### **III. STANDARD OF REVIEW.**

In the companion case *Locarno v. Drummond Company, Inc.*, No. 7:09-CV-00557, this Court provided the Fed. R. Civ. P. 56 standard for summary judgment. Plaintiffs adopt that standard here. *See* Doc. 95 at 3-6.

### **IV. ARGUMENT.**

As a preliminary matter, Drummond again raises issues of corporate liability and extraterritorial application of the ATS that are settled law in the Eleventh Circuit. Drummond seeks to preserve these issues in the event that the Supreme Court’s ruling in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F. 3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011), alters ATS law. *See* DLTD Mot 10-13. The Court need not address these issues until the Supreme Court rules,

and the parties will keep the Court advised.<sup>7</sup>

Plaintiffs will now demonstrate that there are issues of material fact that require their ATS claims for war crimes and extrajudicial killing go to a jury. This Court's prior opinion provides a comprehensive road map of the elements of these claims, *see* Doc. 43, and Plaintiffs' evidence satisfies these elements.

**A. There Is Sufficient Evidence for a Jury to Find DLTD Liable for the AUC's War Crimes.**

**1. The AUC Committed War Crimes.**

Drummond cites the three elements for war crimes this Court identified and does not contest that there is evidence to support them. DLTD Mot at 22 (citing Doc. 43 at 14). Drummond instead tries to invent a new element, arguing that because the AUC "*suspected*" Plaintiffs of being FARC supporters, they can be freely massacred. DLTD Mot at 26. Plaintiffs will first show that they satisfy the actual elements for war crimes, and then that Drummond's position has no basis.

**a. The evidence shows that the AUC's execution of Plaintiffs' decedents satisfies this Court's three requirements for a war crime.**

Drummond lists the three elements this Court required to establish "war crimes" but does not discuss the evidence. DLTD Mot at 22. Drummond's silence

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<sup>7</sup> Plaintiffs concede that *Mohamad v. Palestinian Authority*, 132 S. Ct. 1702 (2012), requires their claims under the TVPA against the corporate Defendants DLTD and DCI to be dismissed. The TVPA claims will proceed against individual Defendants Tracy and Jimenez.

is a concession that there is evidence to support these elements. Plaintiffs will briefly demonstrate that there is undisputed evidence supporting the three elements of war crimes: “(1) that there was an armed conflict,” *see, e.g.*, DLTD’s Statement of Undisputed Material Facts ¶ 3, DLTD Mot 5; “(2) that the AUC and the FARC were parties to the conflict,” *see, e.g., id.*, PSUMF ¶ 9; “and (3) that Plaintiffs were killed in the ‘course of hostilities,’” *see, e.g., Pls’ Ex 39.*<sup>8</sup> As this Court stated in the dismissal context when these facts were presented as allegations, the “unrest in Colombia did not merely provide the ‘background for the unfortunate events that unfolded’ but that the civil war precipitated the violence that befell Plaintiffs.” Doc. 43 at 15 (quoting *Sinaltrainal v. Coca-Cola, Inc.*, 578 F.3d 1252, 1267 (11th Cir. 2009)).

**b. DLTD’s invented war crimes element that the Plaintiffs can be massacred if the AUC “suspected” them of supporting the FARC has absolutely no support in the law.**

Drummond’s own words in describing its invented element for war crimes expose its legal absurdity: “[t]he AUC’s killing of a suspected FARC member or supporter is not a war crime.”<sup>9</sup> DLTD Mot at 26 (emphasis added). In denying

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<sup>8</sup> As Drummond points out, and per this Court’s direction, the facts of the individual Plaintiffs are not at issue in this round of summary judgment motions. *See* DLTD Mot at 26 n.14. Assuming Plaintiffs prevail at this stage, the Court will decide how the cases of the individual Plaintiffs will be grouped for final discovery and trial.

<sup>9</sup> DLTD falsely asserts that Plaintiffs agree with its position. DLTD Mot at 22. Whether a victim must be “innocent” or a “noncombatant,” *see id.* at 23, does not allow Drummond’s leap that a person “suspected” of being a FARC supporter is converted to a combatant.



Drummond’s dismissal motion on the issue of intent, this Court stated that Plaintiffs’ allegation—that their decedents were murdered precisely because of their suspected FARC connections in areas around Drummond facilities—reflects Drummond’s shared purpose with AUC of eliminating anyone even suspected of being a FARC supporter: “Those murdered are specifically alleged to have been murdered because of their suspected connection to the FARC – the suspected connection with the FARC now *coincides* with Drummond’s business motives.” Doc. 43 at 25 (emphasis in original).<sup>10</sup> Thus, this Court did not accept DLTD’s prior assertion that it is not a war crime to execute “suspected” FARC members.

There still is no legal support for Drummond’s position, and it cites none. The premise of a war crime is that a party to the conflict killed noncombatants. *See, e.g., Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement, ¶ 568 (May 18, 2012), excerpt attached as Pls’ Ex 50. (Geneva Conventions protect “those persons who take no active or direct part in the hostilities, and those who have ceased to take part therein...”).<sup>11</sup> Indeed, Charles Taylor’s recent war crimes conviction rested in part on allegations that his forces had killed civilians *because they were*

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<sup>10</sup> The Court goes on to state that Plaintiffs had properly alleged that Drummond “purposefully hired the AUC to defeat suspected members of the FARC in the areas in which it conducted business.” Doc. 43 at 26.

<sup>11</sup> U.S. federal courts in ATS cases have consistently cited international tribunals, beginning with Nuremberg, as important sources of international law. *See, e.g., Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 30 (D.C. Cir. 2011).

*“suspected of supporting or cooperating with”* the opposition forces. *Id.* ¶ 585 (emphasis added). Virtually every war criminal attempts to justify the massacre of civilians by claiming the victims “support” the opposition. Indeed, the AUC was notorious for this tactic, labeling entire towns FARC supporters and killing resident civilians. The 1997 SDHRR confirmed that the AUC massacred *“the guerrillas’ perceived or alleged civilian support base. . .”* Pls’ Ex 31 at 2 (emphasis added). DLTD’s effort to justify the war crimes of its former terrorist security force is contrary to the law and the realities of war crimes.

Rather than leave the issue of legitimate military targets to a war criminal’s subjective discretion, the law asks the objective question of whether a victim was a *combatant*. To classify someone as a combatant, the International Criminal Tribunal for Rwanda (ICTR) required he engaged in “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”<sup>12</sup> *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, ¶ 99 (Dec. 6, 1999), excerpt attached as Pls’ Ex 52.

There is absolutely no evidence presented by Drummond that *any* of the Plaintiffs’ decedents engaged in conduct that converted them to combatants.<sup>13</sup> In

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<sup>12</sup>The ICTR has found that civilians can be accompanying the military, or even mixed in with combatants, but so long as they do not participate in hostilities, they are protected by the Geneva Conventions. *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, ¶ 179-80 (May 21, 1999), excerpt attached as Pls’ Ex 51.

<sup>13</sup> Drummond also attempts to create a distinct issue of whether the AUC’s murders of the

any event, Drummond concedes, as it must, that any factual question as to the status of the individual Plaintiffs is premature at this stage. DLTD Mot at 26 n.14. When the inquiry is appropriate, the sole factual question is whether any of the Plaintiffs were combatants, not whether they were “suspected” by the AUC of being supporters of the FARC.

## **2. DLTD Aided and Abetted the AUC’s War Crimes.**

### **a. The evidence shows DLTD’s shared purpose with the AUC.**

Drummond provides the five factor standard for aiding and abetting that this Court applied at the dismissal stage. DLTD Mot at 26-27 (quoting Doc. 43 at 20-21). There, the Court noted that the “central dispute” was whether Drummond “intended to assist” the murders alleged, and determined that international law required Plaintiffs to show that “Drummond purposefully assisted” the murders. Doc. 43 at 21. Specific to war crimes, the Court explained that Drummond must have shared the AUC’s purpose “to advance the AUC’s interests over the interests of the FARC.” *Id.* at 24.<sup>14</sup> This remains the central dispute as DLTD contests only

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Plaintiffs’ decedents were “intentional,” DLTD Mot at 24-26, but Drummond does not dispute that every AUC victim in this case was intentionally killed. Instead, Drummond claims that if the AUC suspected a victim was a FARC supporter, they then were not intentionally killing an “innocent” victim. As established, a terrorist killer is not immune from war crimes based on a mere suspicion, and the sole question is whether any of the decedents were combatants.

<sup>14</sup> As the Court noted, at the dismissal stage Plaintiffs’ position was that the standard should be knowing assistance, not shared purpose. *See* Doc. 43 at 21 n.22. Plaintiffs’ evidence easily satisfies the shared purpose standard, but they reserve this issue for possible appeal. There is recent additional legal support that the knowledge standard is correct. Most significant, in

whether there is evidence of its shared purpose with the AUC. DLTD Mot at 27.<sup>15</sup>

In doing so, Drummond makes a dispositive concession: “*At best, they offer evidence that DLTD intended the AUC to fight the FARC members who were bombing DLTD’s trains and impeding the company’s operations, not that DLTD intended the AUC to kill innocent people.*” DLTD Mot at 29 (emphasis added).

This concession itself satisfies the Court’s standard that Drummond joined with the AUC to defeat the FARC. *See* Doc. 43 at 24.

Drummond’s concession was required by the overwhelming evidence of Drummond’s shared purpose. As an initial matter, Plaintiffs’ evidence shows Drummond used at least five major schemes to provide substantial support to the AUC. *See generally* PSDMF ¶¶ 1-2. First, starting in 1996 various DLTD

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*Exxon Mobil Corp.*, 654 F.3d at 33-39, the court rejected the purpose standard and found that knowledge was the appropriate standard. The *Exxon* court specifically cited *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-60 (11th Cir. 2005), as establishing a knowledge standard in the Eleventh Circuit. *Exxon Mobil*, 654 F.3d at 33. Two recent international tribunals likewise held that knowledge is sufficient. *See Taylor* ¶ 6904, Pls’ Ex 50; *Prosecutor v. Dordevic*, Case No. IT-05-87/1-T, ¶ 1876 (Feb. 23, 2011), excerpt attached as Pls’ Ex 53.

<sup>15</sup> The Court adopted the five-factor test for aiding and abetting from *Presbyterian Church of Sudan v. Talisman Energy Inc.*, 453 F.Supp. 2d 633, 668 (S.D.N.Y. 2006). *See* Doc. 43 at 20-21. The second (“the defendant knew of the specific violation”), third (“the defendant acted with the intent to assist that violation – that is, the defendant specifically directed his acts to assist in the specific violation”) and fifth (“the defendant was aware that his acts assisted the specific violation”) elements combine for the central question of whether “Drummond purposefully assisted” the AUC. *See* Doc. 43 at 21. The remaining two elements are not discussed by Drummond, and there is no question that there is ample evidence that “(1) the principal [the AUC] violated international law [by committing war crimes],” in this case murdering all of the Plaintiffs’ noncombatant decedents, *see* Pls’ Ex 39; and “(4) the defendant’s acts had a substantial effect upon the success of the criminal venture,” in this case providing substantial funding that was essential to the AUC’s surge in forces that allowed for a major escalation in the war against FARC. *See* PSDMF ¶¶ 1-4.

managers, including Adkins, General Pena, and Araujo, made arrangements with the top commanders of the AUC for DLTD to provide major funds to add hundreds of men to the AUC to allow it to expand its forces and drive the FARC out of the area of Drummond's rail line. AUC Commander Gelvez testified that Adkins and Pena agreed to 1996 to provide major funding to build up the AUC. Defs' Ex W, Gelvez Dep 52:12-53:15,59:20-60:5; Pls' Ex 42 ¶ 16 (Gelvez Decl). El Tigre was present in a 1999 meeting when Araujo agreed to arrange for Drummond to provide funding to the AUC. Defs' Ex. J, El Tigre Dep 34:13-37:9. Samario was present at a meeting in May, 2001 where Araujo agreed to increase DLTD's payments to the AUC. Defs' Ex I, Samario Dep 50:1-14, 53:2-54:4, 55:7-20.<sup>16</sup>

Second, Adkins made cash payments to Blanco, Drummond's food service contractor, to pass on to AUC commander El Tigre. Defs' Ex N, Blanco Dep 70:5-73:11. Thereafter, Adkins and Blanco developed a scheme to use inflated invoices from Blanco, and he provided the overage to El Tigre. *Id.* 73:12-75:9, 80:14-92:3; Pls' Ex 2, Charris Dep 30:8-17. Defs' Ex J, El Tigre Dep 148:19-149:10. This is the same scheme Adkins employed in the Iran contra scandal that got him fired

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<sup>16</sup> DLTD asserts in the abstract that there are examples of hearsay in the testimony of El Tigre and Samario. Def Mot at 20, n.10. However, the assertions made here and throughout Plaintiffs' opposition involve situations where a Drummond official, usually Adkins or Araujo, speaking in the course of his employment, admitted that Drummond had decided to back the AUC. Under Fed R. Evid. 801(d)(2), these admissions are not hearsay. *See, e.g., Zaben v. Air Products & Chemicals, Inc.*, 129 F.3d 1453, 1456 (11<sup>th</sup> Cir. 1997).

from the CIA, and the Special Counsel specifically found that Adkins lied about his illegal conduct when investigated. PSUMF ¶ 2.

Third, Drummond used one of its security contractors, Secolda, to make payments to the AUC. Pls' Ex 2, Charris Dep 196:15-21; Defs' Ex N, Blanco Dep 103:18-104:13; 113:6-14. Fourth, the Colombian military specifically asked Drummond for funds to support paramilitary groups. Pls' Ex 4. Drummond claims to have declined, but then began giving the military large amounts of unrestricted, untraceable cash. PSUMF ¶ 7. Drummond admits it does not know if any of the funds were used to support paramilitary groups. *Id.* A jury could easily draw the reasonable inference that Drummond knew that some of the funds would go to the paramilitaries the Colombian military specifically requested Drummond to fund, and Drummond accomplished this by making large unaccountable payments to the military. Finally, Drummond also gave the AUC access to Drummond's facilities and provided the AUC with gasoline and food. PSDMF ¶ 2.

The evidence also shows that Drummond provided substantial assistance to the AUC *for the purpose of* siding with the AUC in Colombia's civil conflict and driving the FARC guerillas out of Drummond's areas of operation, particularly its rail line. PSDMF ¶ 3. Further, the evidence shows that Drummond's substantial support for the AUC caused a surge of AUC combatants to occupy the areas in and

around the Drummond facilities and its rail line, bringing a reign of terror by the AUC to the area. PSDMF ¶ 4.

Drummond's collaboration with the AUC went beyond purposeful support, which is alone sufficient to show intent. *See* Doc. 43 at 26. *At Drummond's direction*, the AUC prioritized driving the FARC out of the areas of Drummond's operations and escalated attacks on towns along Drummond's rail line, where Plaintiffs' decedents and hundreds of other innocent civilians were killed. PSDMF ¶ 5. Drummond security manager Lineros directed the AUC to specific towns where the AUC conducted "cleansing operations." Pls' Ex 47 ¶¶ 13-14 (Peinado Decl.). Drummond manager Araujo told AUC commander El Tigre to "clean up the area of guerillas," which El Tigre understood to mean "killing all of the guerillas . . . in the area and civilians as well." Defs' Ex. J, El Tigre Dep 28:4-34:8.

Drummond's private security firm Secolda coordinated with the AUC and requested specific assistance when Drummond security observed intruders. PSDMF ¶ 6. Charris, while the security coordinator at Viginorte, also served as Adkins' intermediary to the AUC. PSUMF ¶ 14. AUC member Yuca *coordinated with "Drummond's security along the railroad line" and "carried out a cleansing campaign along the Drummond rail line."* Pls' Ex 48 ¶ 7. Drummond also coordinated with the Colombian military to give the AUC information about

subversives, who were then killed by the AUC. PSDMF ¶ 10. Drummond viewed the AUC as a reliable and effective partner in violence, using the AUC to murder Drummond's union leaders. Pls' Ex 2, Charris Dep 55:4-21; Pls' Ex 49 (Jorge 40 proffer); Pls' Ex 47 ¶¶ 15-18 (Peinado Decl.). El Tigre assassinated five people at the direction of Araujo. Pls' Ex 46 ¶ 12 (El Tigre Decl.).

Finally, Drummond's absolute and admitted failure to investigate reports that DCI and DLTD officers and contractors were aligned with the AUC, *see* PSUMF ¶¶ 12-17, demonstrates that Drummond saw no need to expose what it already knew: Drummond was entirely aligned with the AUC in its war against FARC. Indeed, as a final step towards the integration of Drummond and the AUC terrorists, after the AUC demobilized in 2006, the U.S. Embassy reported that Drummond *hired* former AUC killers as security guards. Pls Ex 38.

At the dismissal stage, this Court found Plaintiffs had properly alleged Drummond's shared purpose:

Plaintiffs have asserted that **Defendants hired the AUC to oust from around Drummond's rail lines suspected FARC members; therefore, they have sufficiently alleged that Drummond chose a side in the Colombian political unrest. . . . Plaintiffs have sufficiently alleged that Drummond purposefully and intentionally inserted itself in the civil unrest raging in Colombia.** The allegations of the First Amended Complaint clearly allege that the company could have hired and maintained a private security firm to maintain security along the its rail lines but, **instead, purposefully hired the AUC to defeat suspected members of the FARC in the areas in which it conducted business.**



Doc. 43 at 26 (italicized emphasis in original; bold emphasis added).<sup>17</sup>

Plaintiffs' evidence concisely tracks this Court's standard and goes well beyond it to establish that Drummond had the required intent.

**b. While not an element of aiding and abetting, the evidence also shows that Drummond intended that civilians would be killed by the AUC.**

Because of the overwhelming evidence of shared purpose and Drummond's forced concession that the evidence showed that it joined the AUC in the civil conflict, as at the dismissal stage, Drummond attempts to add a step that, in addition to sharing a purpose for the AUC to defeat the FARC, it needed to also intend "to kill innocent people." *See* DLTD Mot at 27-29. And, as at the dismissal stage, Drummond fails to provide a single legal authority to support its position, *see id.*, and this Court should reject Drummond's unsupported and radical position, as it did at the dismissal stage. Doc. 43 at 22 n.24.

Commission of war crimes is, by definition, the targeting of noncombatants to a civil conflict, whether the perpetrator knows their names or not. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 243 (2nd Cir. 1995) (quoting the Geneva

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<sup>17</sup> The District Court in *Chiquita*, based on nearly identical facts, reached exactly the same conclusion regarding the requirement of "shared purpose": "[t]he complaints' allegations that Chiquita assisted the AUC with the intent that the AUC's interests were furthered over the FARC's in the Colombian civil war sufficiently allege the *mens rea* for aiding and abetting the AUC's war crimes, irrespective of the fact that the company may have chosen the AUC's side for financial, as opposed to military, reasons." *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Deriv. Litig.*, 792 F. Supp. 2d 1301, 1349 (S.D. Fla. 2011).

Convention as identifying “[p]ersons taking not active part in the hostilities . . .” as target group). Every single authority to consider the issue agrees that war crimes does not require specific intent to kill innocent civilians.<sup>18</sup>

While there is no requirement that Drummond intended to kill innocent civilians when it made its alliance with the AUC war criminals against FARC, as discussed above, there is evidence that Drummond (1) directed the AUC to focus on areas around Drummond’s rail lines, resulting in massive civilian murders, PSDMF ¶ 5; (2) was present in the area and surely witnessed the dramatic daily violence that resulted from the AUC’s Drummond-supported surge, *id.* ¶ 4; (3) knew about and directed the AUC’s “cleansing operations” occurring in towns along the rail line, Pls’ Ex 47 ¶¶ 8, 13-14; (4) sought specific executions, PSDMF ¶ 7; and (5) and gave intelligence to the AUC that resulted in executions. *Id.* ¶ 10.

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<sup>18</sup> There is a consistent line of cases starting from Nuremberg and continuing to the 2012 conviction of former Liberian President Charles Taylor holding that specific intent to kill is not an element of war crimes. In the Zyklon B case, defendant businessmen were prosecuted for selling insecticide to the Nazis that was used for mass executions. Defendants argued they lacked specific intent. The prosecutors asserted the defendants knew what the buyer in fact intended to do with the product they were supplying. The defendants were found guilty over their “defense” that they were merely selling the gas to make a profit. *Trial of Bruno Tesch and Two Others*, British Military Court, Hamburg, 1-8 March 1946, Vol. I, Law Reports, p. 93, 100-01,103, excerpt attached as Pls’ Ex 54. Charles Taylor was convicted of, among other things, aiding and abetting war crimes based on indiscriminate, random violence involved in attacking villages, Pls’ Ex 50, *Taylor* ¶ 6994, and a “general policy of using terror against civilians.”*Id.* at ¶ 872. The International Criminal Tribunal for Yugoslavia (ICTY) has held unequivocally that a conviction for war crimes does not require intent to kill specific civilians: “[t]here is no requirement of the intent to attack *particular* civilians, rather it is prohibited to make the civilian populations as such, as well as individual civilians, the object of an attack.” *Prosecutor v. Strugar*, IT-01-42-A, ¶ 271 (July 17, 2008) (emphasis added), excerpt attached as Pls’ Ex 55.

More fundamental, the law does not allow Drummond to claim it lacked intent for the AUC to use its well-known, infamous tactic of terrorizing the local population to undermine local support for the FARC when Drummond unleashed the AUC on the towns along the rail line. The Eleventh Circuit specifically approved a jury instruction allowing a jury to infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done.” *U.S. v. Myers*, 972 F.2d 1566, 1573 (11th Cir. 1992).

Here, there is substantial evidence that Drummond knew *exactly* what the AUC would do. In light of Adkins’ initial advice that supporting the AUC “*will bring with it egregious human rights violations*,” Pls’ Ex 4, the regular security reports Adkins submitted to DCI and DLTD officers, PSUMF ¶ 5, 12, 13, Drummond’s knowledge of the exhaustive public record of the AUC’s atrocities, *see, e.g., id.* ¶ 9, Drummond’s knowledge of the designation of the AUC as a terrorist organization based on massacres committed against civilians, *id.* ¶ 11, and Drummond’s knowledge of the violence gained through its own coordination with the AUC, *see, e.g.* PSDMF ¶¶ 5-7, even if Drummond’s baseless intent standard is applied, it is for a jury to decide whether Drummond’s claim of ignorance of the consequences of funding the AUC is credible, or damning.

### **3. DLTD Conspired with the AUC to Commit War Crimes.**

As the Court noted at the dismissal phase, the intent requirement for conspiracy and aiding and abetting (based on the Court's heightened standard for intent to aid and abet, see *supra* note 14) is essentially identical. Doc. 43 at 29-30. Drummond treats them as the same. See DLTD Mot at 37-38. Accordingly, Plaintiffs submit that their evidence of DLTD's intent to aid and abet is sufficient to also demonstrate Drummond's intent to participate in a conspiracy with the AUC to commit war crimes. Indeed, wholly apart from the aiding and abetting evidence, Drummond's concession that the evidence is sufficient to show that "DLTD intended the AUC to fight the FARC members who were bombing DLTD's trains and impeding the company's operations," DLTD Mot at 29, conclusively establishes intent to conspire because this shows "defendants joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it." Doc. 43 at 29 (*citing Cabello*, 402 F.3d at 1159). The evidence plainly shows that part of the conspiracy was for Drummond to fund the AUC to defeat the FARC with the certain resulting massacres of civilians.

### **4. DLTD Ratified the AUC's War Crimes.**

#### **a. Federal common law governs DLTD's ratification liability.**

Challenging this Court's prior ruling that Plaintiffs have stated a claim for

ratification, Doc. 43 at 31-32, DLTD merely argues that international law must apply and would preclude recognition of a ratification theory. DLTD Mot at 39-40. First, this Court, along with many others, properly looked to federal common law for the contours of accessorial liability in ATS cases. Doc. 43 at 30-32. Drummond cites no binding authority for its assertion that this Court's initial decision on ratification was wrong. The Eleventh Circuit has, in fact, looked to federal common law for standards to determine accessorial liability for ATS and TVPA claims. *See Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005) (looking "to the principles of agency law and to jurisprudence under 42 U.S.C. § 1983"). Other federal courts have applied federal common law principles governing agency in ATS cases. *See, e.g., Exxon Mobil*, 654 F.3d at 51 (in ATS case, "agency law . . . [is to] be drawn from federal common law"); *In re South African Apartheid Litig.*, 617 F. Supp. 2d 228, 271 (S.D.N.Y. 2009) (applying "federal common law").

The one case DLTD cites that held that ratification is "not cognizable under international law" was *Chiquita*, 792 F. Supp. 2d at 1353, which does not bind this Court. Moreover, the *Chiquita* court ignored the Eleventh Circuit's precedent in *Aldana*. Further, the *Chiquita* court never addressed whether domestic or international law should apply; it rested its decision on the application of

international law without discussing whether such application was appropriate.<sup>19</sup>

For all of these reasons, federal common law determines whether Drummond ratified the AUC's misconduct here.<sup>20</sup>

**b. There are genuine issues of material fact in dispute on ratification.**

DLTD attempts to graft a control requirement onto the test for ratification, but this is a misstatement of the standard.<sup>21</sup> In *Pescia v. Auburn Ford-Lincoln Mercury Inc.*, 68 F. Supp. 2d 1269, 1282-84 (M.D. Ala. 1999), which this Court has cited with approval, *see* Doc. 43 at 31, the court expressly held that even where a plaintiff had failed to establish sufficient control to support a finding of agency, there was nonetheless sufficient evidence of ratification to survive a motion for summary judgment. Further, the Supreme Court of Alabama has held that a

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<sup>19</sup> The *Chiquita* court was concerned that application of agency law could result in a lower *mens rea* standard than purposeful intent. *See Chiquita*, 792 F. Supp. 2d at 1353. There is no prohibition to applying federal common law to accurately state the ratification standard as requiring less intent than aiding and abetting or conspiracy. However, even if an international law standard for ratification applies, such a conclusion still does not require, as DLTD assumes, application of a heightened standard based on the standards for aiding and abetting and conspiracy. In the TVPA context, the Eleventh Circuit has expressly recognized command responsibility as a theory of accessorial liability with a “knew or should have known” standard. *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288-89 (11th Cir. 2002).

<sup>20</sup> Warnings by the *Sosa* Court, which DLTD raises, to exercise “vigilant doorkeeping” in ATS cases, refers specifically to the restraint courts are cautioned to exercise in considering new *causes of action* under the ATS. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-28 (2004). The Eleventh Circuit has not interpreted such doorkeeping to apply to legal theories of liability for well-recognized “law of nations” violations.

<sup>21</sup> However, even if this Court deems control or an underlying agency relationship essential to the ratification inquiry, Plaintiffs have adduced sufficient evidence that Drummond controlled the AUC to survive summary judgment. *See* PSDMF ¶ 5 (at Drummond's direction, AUC prioritized its operations around Drummond's facilities); *id.* ¶ 6 (Drummond reported security issues to the AUC, which responded).

principal may ratify “unauthorized acts of one not an actual agent.” *Birmingham News Co. v. Birmingham Printing Co.*, 96 So. 336, 340 (Ala. 1923). Thus, Plaintiffs need not establish that the AUC was an agent of DLTD.

Instead, the test for ratification, as this Court has already defined it, requires that DLTD (1) had actual knowledge of the wrongful conduct; (2) knew or should have known that the conduct constituted a tort; and (3) armed with that knowledge, failed to take adequate steps to remedy the situation. Doc. 43 at 31. DLTD challenges only the first prong of this test, but all three are easily satisfied by the evidence. The “actual knowledge” requirement is satisfied if Drummond has “notice or knowledge, either actual or presumed,” of the misconduct. *Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889 (Ala. 1995). The evidence shows that Drummond knew that employing the AUC would result in civilian casualties due to the AUC’s brutal methods. *See* PSUMF ¶¶ 8, 9, 11; PSDMF ¶¶ 3, 7. There is also no question that Drummond knew or should have known that war crimes constituted a tort. Adkins warned that funding the paramilitaries would result in “egregious human rights violations,” Pls’ Ex 4, and DCI and DLTD officials were aware that the AUC was designated a terrorist organization in 2001. PSUMF ¶ 11. Regarding the last factor, Drummond took *no* steps to remedy the situation as Drummond chose to continue funding the AUC even after it was designated a

terrorist organization. PSDMF ¶¶ 1-2. Further, DLTD never even investigated following credible reports that senior staff and contractors were collaborating with the AUC. PSUMF ¶¶ 12, 16, 17.

**B. There Is Sufficient Evidence for a Jury to Find DLTD Liable for the AUC's Extrajudicial Killings.**

Drummond does not in any way challenge that Plaintiffs have sufficient evidence to show the murders of their decedents were extrajudicial killings, and Plaintiffs have demonstrated this undisputed fact. Pls' Ex 39. Likewise, Drummond does not even attempt to argue that any of the Plaintiffs were executed following proper judicial proceedings. All of them were summarily executed by the AUC. *Id.* Drummond argues only that the evidence does not show the required state action and that Drummond had the requisite intent to be held liable. The actual evidence proves Drummond wrong on both points.

**1. Plaintiffs Satisfy the “State Action” Requirement of Extrajudicial Killing as Articulated by This Court and the Eleventh Circuit.**

This Court's ruling at the dismissal stage stated the proper standard for the undisputed element that Plaintiffs' claims for extrajudicial killing against DLTD under the ATS includes an element of “state action.” *See* Doc. 43 at 7. The Court required Plaintiffs to show that the AUC was in a symbiotic relationship with some members of the Colombian military “that involves the torture or killing alleged.”



*Id.* at 8-9 (citations omitted). This link is sufficient if the “relationship between the paramilitaries and the Colombian military had anything to do with . . . the murders along Drummond’s rail lines.” *Id.* at 11. As long as the relationship exists “with respect to the AUC's campaign of torture and killing of civilians [in the relevant areas],” a symbiotic relationship between the Colombian military and the AUC is established, and Plaintiffs need “not [show] specific government involvement with each individual act of torture and killing of Plaintiffs' relatives.” *Chiquita*, 792 F. Supp. 2d at 1325-26. Furthermore, Plaintiffs “may prove that relationship by presenting evidence of the active participation of a single official.” Doc. 43 at 11-12 (quoting *Romero v. Drummond Co.*, 552 F.3d 1303, 1317 (11th Cir. 2008)); *see also Aldana*, 416 F.3d at 1249.

Because Drummond necessarily concedes that “***[a]t best, however, the evidence is that there may have been incidents of unlawful cooperation between members of the Colombian military and the AUC,***” *see* DLTD Mot at 17

(emphasis added), it can prevail on the state action issue only by advocating for a radical standard that would require all collaboration between the AUC and the Colombian military to be “official government policy.” *See id.* at 13-14, 17.<sup>22</sup> This

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<sup>22</sup> Drummond’s position is based on a misstatement of the sole case upon which they purport to support this argument. DLTD Mot at 17 (citing *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1346-47 (N.D. Ga. 2002)). The court in *Mehinovic* found persuasive in that case that the actions at issue *were* part of an official policy of the state, *id.* at 1346-47, but did not even hint that state action always requires “official policy.” No court has so held. Indeed, it would

unsupported and major deviation from settled law conflicts with this Court’s prior articulation of the proper standard for state action. In this Circuit, a single officer violating state policy still acts under color of law.<sup>23</sup> *See, e.g., Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1303-04 (11th Cir. 2001) (state action found when city manager raped city employee in her apartment, in clear violation of any official city policy); *U.S. v. Jones*, 207 F.2d 785, 786–87 (5th Cir.1953) (holding, “paradoxical as it may seem,” a state prison official whipping prisoners constituted state action, although doing it in violation of law.).

Looking at the proper question, whether there were instances of military collaboration with the AUC related to AUC operations around the Drummond facilities, the evidence goes well beyond the factual allegations this Court found sufficient to state a claim. *See* Doc. 43 at 12-13. As an initial matter, the U.S. State

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render all of the Eleventh Circuit case law on state action from *Aldana* to *Romero* irrelevant if the test was merely a bright line of whether victims were injured by an official policy. Moreover, the Supreme Court’s complex labyrinth of tests to determine “state action” would be unnecessary if all “state action” must be in furtherance of official policy. *See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298-299 (2001) (sufficient “entwinement” for private actor to be under color of law).

<sup>23</sup> Thus, there clearly is no requirement that Plaintiffs show that *all* members of the Colombian military violated the policy. This renders irrelevant Drummond’s defensive assertion that *some* members of “the military [were] arresting and imprisoning prominent AUC members.” DLTD Mot at 16. Further, it renders irrelevant Drummond’s heavy reliance on the fact that *one* Colombian military officer, Colonel Mejia, who is currently in prison under indictment in Colombia for war crimes and coordination with the paramilitaries, see Defs’ Ex. A, Mejia Dep 7:20-8:10, recanted his prior statement to the Plaintiffs that he served as a conduit for funds to the AUC. *See* DLTD Mot at 3,15. Plaintiffs’ evidence shows that there was extensive collaboration by other military officers.

Department officially reported that “despite the public pronouncements of the Government and the new armed forces high command that they intended to combat paramilitary violence . . . individual commanders and troops at local levels armed, coordinated actions with, or shared intelligence with paramilitary groups” Pls’ Ex 34 at 14.<sup>24</sup> Plaintiffs’ evidence establishes that this is exactly the sort of collaboration that occurred in this case. The cooperation began in 1995 when the Colombian government created a process to fund the formation of paramilitary groups using Convivirs. *See* PSUMF ¶ 3.

Drummond’s security coordinator, Adkins, reported to DCI and DLTD officers that the Colombian military approached him to seek Drummond’s support for the paramilitary groups. Pls’ Ex 4. [REDACTED]

[REDACTED] Drummond’s effort to distinguish these early paramilitary groups formed as Convivirs from the AUC is disputed by the evidence. The Convivirs became part of the AUC, *see* PSUMF ¶

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<sup>24</sup> The State Department regularly reported this systematic collaboration *despite* the official policy of the Colombian government: “Evidence suggests that there were tacit arrangements between local military commanders and paramilitary groups in some regions, and paramilitary forces operated freely in some areas that were under military control or despite a significant military presence. *Individual members of the security forces actively collaborated with members of paramilitary groups – passing them through roadblocks, sharing intelligence, providing them with ammunition, and allegedly even joining their ranks while off-duty.*” Pls’ Ex 56 at 2 (2001 SDHRR).

10, and Adkins, in reporting the success of the military-sponsored paramilitaries, specifically discussed paramilitary commanders who were founders of the AUC, *id.* ¶¶ 5,6. In fact, demonstrating the immediate impact of the AUC-military collaboration, [REDACTED]

The Colombian military was coordinating with Samario, El Tigre and other AUC leaders who were the very commanders Drummond supported and who killed civilians, including Plaintiffs' decedents, in the areas where Drummond was operating. This collaboration included intelligence sharing, the carrying out of joint operations, provision of arms and supplies, and coordinating with the AUC to pass off civilian victims of the AUC as Colombian military combat kills. PSDMF ¶¶ 9-10. Further, the military sought to support the paramilitaries in Drummond's area of operation, PSUMF ¶ 4, and Drummond gave the Colombian military substantial amounts of untraceable funds once the military requested support for the paramilitary groups. *Id.* ¶ 7. There is no question the military was providing financial support to the AUC in Drummond's area, and it is a reasonable inference that Drummond supplied some of the funds. Drummond admits it had "no idea" what the military did with its funds, and had no way to tell if it passed funds on the AUC. *Id.* This was not a mere general relationship between the two, but rather the

Colombian military supported and coordinated with the AUC in their joint fight against the guerrillas precisely because the AUC could operate in ways that the Colombian military was prohibited from under international law, *i.e.*, using terrorist methodology against the FARC and suspected supporters. PSDMF ¶ 9.

This evidence of the military's role in forming, supporting, protecting, supplying and coordinating with the AUC in the areas of Drummond's operations more than satisfies this Court's standard for a symbiotic relationship sufficient to establish state action. *See* Doc. 43 at 12-13.

**2. DLTD Had the Requisite Intent to Aid and Abet and Conspire with the AUC to Commit Extrajudicial Killings, and Also Ratified the Murders.**

Drummond's discussion of its intent to aid and abet or conspire with the AUC to commit extrajudicial killings merely references its arguments made on intent to commit war crimes. DLTD Mot at 19. Plaintiffs agree that, since the extrajudicial killings here were murders en masse, and the Court previously held that Plaintiffs need not show Drummond had intent to murder the specific victims as long as the evidence shows that Drummond "purposefully participated in murders along its rail lines," Doc. 43 at 22 n.24, the evidence of intent to commit war crimes would likewise apply to show intent to commit the numerous extrajudicial killings that collectively constituted war crimes. Accordingly, to

demonstrate Drummond aided and abetted extrajudicial killings, Plaintiffs rely on the evidence submitted for intent to aid and abet war crimes discussed in § IV.A.2, *supra*. Likewise, Plaintiffs rely on the evidence discussed in § IV.A.3, *supra* for conspiracy to commit war crimes, which itself overlaps with the aiding and abetting evidence, to establish conspiracy to commit extrajudicial killings. Finally, Plaintiffs adopt the ratification argument in § IV.A.4, *supra* to establish that DLTD ratified the AUC's extrajudicial killings.

Drummond's assertion within its intent section that there is no evidence that Drummond made payments to the AUC, *see* DLTD Mot at 20-21, is easily disputed. *See* PSDMF ¶¶ 1,2; § IV.A.2. *supra*.

### **C. Plaintiffs' ATS Claims Warrant Punitive Damages.**

Drummond attempts to avoid punitive damages for its purposeful participation in war crimes and extrajudicial killing by arguing that the Court must apply Colombian law, which does not allow for punitive damages. This argument fails for two reasons.<sup>25</sup> First, neither the ATS, nor the courts of this Circuit, require a federal court to apply a choice of law analysis to determine the substantive law governing ATS remedies. Instead, federal common law guides remedies and

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<sup>25</sup> Drummond's position is that whatever source of law is worse for Plaintiffs applies. Drummond seeks international law for the law of intent, DLTD Mot at 25, a hybrid of international law and federal law for war crimes, *id.* at 22-24, international law for agency, *id.* at 39, and Colombian law for punitive damages since it does not recognize them, *id.* at 46-50.

damages in ATS cases. Second, even if a choice of law analysis were appropriate, no ATS case has ever denied punitive damages because they are not provided for by the law of a foreign state. To the contrary, *every* case to consider the availability of punitive damages under the ATS has awarded them.

**1. A choice of law analysis is not required, nor is it appropriate.**

Drummond baldly claims that “a court must conduct a choice of law analysis to determine the applicable substantive law, including for damages.” DLTD Mot at 46. But Drummond fails to cite a single case for its position.<sup>26</sup> In fact, Drummond improperly fails to disclose to the Court cases from this very Circuit that consistently award punitive damages in ATS cases without conducting a choice of law analysis. *See, e.g., Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322, 1358-59 (N.D. Ga. 2002); *Paul v. Avril*, 901 F. Supp. 330, 335-6 (S.D. Fla. 1994). These cases are simply applying the general rule articulated by the Eleventh Circuit that

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<sup>26</sup> The cases Drummond cites are inapposite. *See e.g., Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 304 (2d Cir. 2007) (Korman, J., dissenting in part) (engaging in a “hypothetical choice-of-law analysis” to support his argument that the court should have refused to exercise jurisdiction over ATS claims out of prudential concerns, specifically deference to the political branches and the doctrine of international comity); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 442 (S.D.N.Y. 2002) (discussing limitations of choice of law analysis where law of foreign state fails to provide an adequate remedy and awarding punitive damages); *Mwani v. Bin Ladin*, 244 F.R.D. 20, 25 (D.D.C. 2007) (denying plaintiffs’ request for a jury trial because “a bench (rather than a jury) determination of damages is the norm in cases brought pursuant to the ATCA,” even “where the determination of damages is necessarily complicated by choice of law questions”); *Hilao v. Estate of Marcos*, 103 F.3d 767, 780 (9th Cir. 1996) (affirming the district court’s award of exemplary damages against an estate where no ruling was made expressly choosing a source of law but Philippine law appeared to allow for such damages).

the ATS “establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.” *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir. 1996). Further, most courts considering the source of law for ATS damages have found that federal common law, not the law of a foreign state, applies.<sup>27</sup> Given the weight of authority holding that federal common law governs ATS damages, this court should not accept Drummond’s invitation to reject Eleventh Circuit precedent and split from its sister courts in favor of an unwarranted choice of law analysis.

**2. Even if a choice of law analysis applies, punitive damages should still be awarded to effectuate the purpose of the ATS.**

Drummond argues that if this Court reverses itself and breaks with overwhelming authority and applies a choice of law analysis, doing so would compel the preclusion of punitive damages. But again, Drummond is unable to cite a single ATS case where the availability of punitive damages was denied because such damages were not provided for in the law of a foreign state. Once again, Drummond fails to disclose to the Court the numerous cases in which courts employed a choice of law analysis and then expressly abandoned application of

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<sup>27</sup> See e.g., *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 863 (E.D.N.Y. 1984), *aff’d*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995); *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1469 (D. Haw. 1995); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 256; *Tachiona*, 234 F. Supp. 2d at 413; *Xuncax v. Gramajo*, 886 F. Supp. 162, 182 (D. Mass. 1995).



foreign law where it did not allow for punitive damages. These courts uniformly reasoned that punitive damages are necessary to effectuate the purpose of the ATS and foreign law should not be applied to thwart that purpose. *See e.g. Filartiga*, 577 F. Supp. at 863-65; *Alvarez-Machain v. U.S.*, 331 F.3d 604, 635 (9th Cir. 2003), *rev'd on other grounds*, 542 U.S. 692 (2004); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1158 n.4 (E.D. Cal. 2004); *Tachiona*, 234 F. Supp. 2d at 417-19; *Kpadeh v. Emanuel*, Case No. 09-20050-CIV-JORDAN, at 7-8 (S.D. Fla. Feb. 5, 2010); *In re Xe Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 596 n.36 (E.D. Va. 2009); *Avril*, 901 F. Supp. at 336. All of these decisions squarely hold that, regardless of foreign law, punitive damages are necessary and important to redress the serious violations of international law cognizable under the ATS.

Based on all of the cases that have considered the very argument Drummond makes, *none* of which Drummond disclosed to the Court, “courts have consistently awarded punitive damages for ATS claims.”<sup>28</sup> *Xe Servs.*, 665 F. Supp. 2d at 595-

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<sup>28</sup> The following is a partial listing of such cases: *Abebe-Jira*, 72 F.3d at 846; *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009); *Arce v. Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006); *Cabello*, 402 F.3d at 1151; *Tachiona*, 234 F. Supp. 2d at 441, *overruled on other grounds*, 386 F. 3d 205 (2d Cir. 2004); *Hilao*, 103 F.3d at 772; *Yousuf v. Samantar*, Slip Copy, 2012 WL 3730617, \*16 (E.D. Va., 2012); *Kpadeh*, Case No. 09-20050-CIV-JORDAN, at 8-9. (2010); *Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355, 1366 (S.D. Fla. 2008); *Lizarbe v. Hurtado*, No. 07-21783, 2008 U.S. Dist. LEXIS 109517, 9-10 (S.D. Fla. 2008); *Rafael Saravia*, 348 F. Supp. 2d at 1159; *Mehinovic*, 198 F. Supp. 2d at 1360; *Doe v. Karadzic*, No. 93 CIV. 0878, 2001 WL 986545, at \*1 (S.D.N.Y. 2001); *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627, 1996 WL 164496, at \*3 (S.D.N.Y. 1996); *Xuncax*, 886 F. Supp. at 197-99; *Todd v. Panjaitan*, No. CV-92-12255, 1994 WL 827111 (D. Mass. 1994); *Avril*, 901 F. Supp. at 336; *Filartiga*, 577 F. Supp. at 867.

96. Plaintiffs respectfully request that this Court join all the others in allowing punitive damages should Plaintiffs prove at trial that Drummond intentionally released the violence of a terrorist organization on their relatives.

## V. CONCLUSION

Drummond's motion for summary judgment asks this Court to take the extreme step of dismissing Plaintiffs' claims and deprive them of a jury trial. In doing so, Drummond fails to disclose key evidence, fails to disclose applicable precedent, and tries to invent new legal standards that have no support in the law and conflict with this Court's prior rulings at the dismissal stage. Plaintiffs have shown that if *all* of the evidence is reviewed they have admissible evidence to satisfy the legal elements for their claims previously identified by this Court. Drummond's motion should be summarily denied.

Respectfully submitted this 1<sup>st</sup> day of November, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 1, 2012, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of the filing to the following:

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