16-10921

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARISOL MELO PENALOZA, *et al.*,
Plaintiffs / Appellants,

v.

DRUMMOND COMPANY, INC., *et al.*,
Defendants / Appellees.

On Appeal from the United States District Court for the
Northern District of Alabama, Case No. 2:13-cv-00393-RDP
The Honorable R. David Proctor

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Plaintiffs-Appellants Marisol Melo Penaloza, *et al.* hereby submit their Certificate of Interested Persons:

District Court Trial Judge

Honorable R David Proctor
United States District Court
Northern District of Alabama

Plaintiffs-Appellants[1]

Adelaida Isabel de la Rosa Rodriguez

Adriana Cristina Padilla Daza

Alba Luz Caballero Gomez

Alfredo Campo Medina

Aminta Domitila Lazcano Junco

Amparo De Jesus Florez Torres

Ana Cecilia Pastor Barrios

Ana Cristina Campo Medina

Ana Gregoria Palomino Romero

Ana Virginia Ochoa Navarro

[1]Plaintiffs are listed in alphabetical order by first name for ease of reference. Minor plaintiffs are identified by their initials only.

Armando Rafael Candanoza Guzman

C.N.G.R.

Carlos Enrique Carbono Azuaga

Carmen Inelma

Claudina Rosa Orozco

Dominga Gutierrez Caballero

Edilma Isabel Torres Ozuna

Edys Correa Cervantes

Everely Palomino Vanegas

Fatiniza Isabel Gutierrez Buelvas

Francia Coll de Tovar

Gicela Margarita Padilla Daza

Gina Paola Santana Gutierrez

Hermelinda Sarmiento de la Cruz

Hildemaro Melgarejo Molina

Isabel Maria Lazcano de Calderon

J.A.G.F.

Jhon Alfer Padilla Daza

Juana Maria Contreras de Lopez

Luz Marina Anaya Royero

Luz Marina Castillo Manjarres

Luz Marina Pacheco Cantillo

Luzlenid Silva Munoz

Manuel Gregorio Tapia Vega

Marcos Jose Padilla Daza

Maria Felicia Meza Garcia

Maria Otilia Aguirre Ballesteros

Maria Sureya Suescun Botello

Marisol Melo Peñaloza

Martha Josefa Hernandez Martinez

Merilsa Francisca Daza Amaya

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Other Persons of Interest

ITOCHU Coal Americas Inc.

ITOCHU Corporation (ITOCY)

Otero, Ivan (Colombian counsel in Plaintiffs–Appellants' legal team)

STATEMENT REQUESTING ORAL ARGUMENT

Pursuant to Circuit Rule 28-1(c), Plaintiffs-Appellants hereby request oral argument before this Court. This case arises under the Alien Tort Statute (ATS) and Torture Victim Protection Act (TVPA), 28 U.S.C. §1350, as well as wrongful death law of Colombia, and includes important legal and public policy questions relating to the scope of corporate legal accountability in the global economy. Resolution of these issues would be facilitated if the Court had the opportunity to question the parties and hear elaboration on the briefing.

Respectfully submitted this 11th day of May, 2016

/s/ Terrence P. Collingsworth
By: _____
Terrence P. Collingsworth
INTERNATIONAL RIGHTS ADVOCATES
Counsel for Plaintiffs-Appellants

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I. STATEMENT OF JURISDICTION

Plaintiffs alleged violations of the Alien Tort Statute (ATS) and Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, creating federal question jurisdiction under 28 U.S.C. § 1331. Plaintiffs further alleged wrongful death claims based on diversity jurisdiction under 28 U.S.C. § 1332(a)(2). All of the claims were dismissed with prejudice and a final decision was entered. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES ON APPEAL

A. Whether the District Court erred in dismissing Plaintiffs' wrongful death claims based on Colombian law without providing any analysis or written findings when these claims were based on the Court's mandatory diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).

B. Whether the District Court erred in dismissing Plaintiffs' claims against individual defendants Garry Drummond and Mike Tracy under the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, note, prior to any discovery and without providing any analysis or written findings.

C. Whether the District Court erred in dismissing Plaintiffs' claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, without providing any analysis or written findings, and without any discovery and an opportunity to amend the complaint to overcome the new presumption against extraterritoriality or

the ATS established by *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

III. STATEMENT OF THE CASE

A. Procedural History

Plaintiffs-Appellants are wrongful death claimants of 34 decedents executed during the Colombian civil conflict by the umbrella paramilitary group, Autodefensas Unidas de Colombia ("AUC"). Plaintiffs filed their initial complaint on February 26, 2013 alleging the Drummond Defendants[1] aided and abetted, conspired with, and entered into an agency relationship with the AUC to commit extrajudicial killings, war crimes, and crimes against humanity in violation of the ATS. Plaintiffs also alleged extrajudicial killings under the TVPA, and wrongful death claims under Colombian law. Appendix ("APP.") 1 (refers to Tab No.) ("Docket"), ECF No. 1.

Plaintiffs filed their First Amended Complaint ("FAC") on April 26, 2013, APP. 2, ECF No. 20, First Am. Compl. This is the operative complaint, and is referred to throughout as "FAC."

On May 30, 2013, the Drummond corporate Defendants and the individual Defendants filed separate motions to dismiss. Docket, ECF Nos. 33 and 34,

[1] The five Defendants are Drummond Ltd. ("DLTD"), Drummond Company, Inc. ("DCI"), Drummond U.S.A., Inc. ("DUSA"), DCI CEO Garry Drummond, and Mike Tracy, who held top positions at DCI, DUSA, and DLTD.

respectively. Plaintiffs filed briefs in opposition to both motions. Docket, ECF Nos. 35 (individual Defendants) and 36 (corporate Defendants). The Drummond corporate Defendants (Docket, ECF No. 37) and individual Defendants (Docket, ECF No. 38) filed reply briefs in support of their motions to dismiss.

While the dismissal motions were pending, the U.S. Supreme Court decided *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). In response to this, on January 15, 2014, the District Court issued an order directing the parties to show cause why a stay is not appropriate in light of the *Daimler AG* opinion. Docket, ECF No. 42.

Plaintiffs responded by first noting that, because they had wrongful death claims based on diversity jurisdiction, their case would go forward regardless of any rulings, positive or negative, on their ATS and TVPA claims by the Supreme Court or the Eleventh Circuit. Docket, ECF No. 44, Pls.' Statement at 1. Plaintiffs further stated that while the issues of the *Daimler* case were irrelevant to their claims, *id*. at 3-4, there were three cases pending in the Eleventh Circuit[2] that could have a significant impact on their federal claims. *Id*. at 2-3. All of these cases included an issue of the scope of the Supreme Court's ruling in *Kiobel v. Royal*

[2] The three cases that were pending in the Eleventh Circuit were ultimately decided by this Court. *See Doe v. Drummond Co., Inc*., 782 F.3d 576 (11th Cir. 2015), *cert. denied* 136 S.Ct. 1168 (2016) ("*Balcero*"); *Baloco v. Drummond Co., Inc*., 767 F.3d 1229 (11th Cir. 2014), *cert. denied* 136 S.Ct. 410 (2015); *Cardona v. Chiquita Brands International*, 760 F.3d 1185 (11th Cir. 2014), *cert. denied* 135 S.Ct. 1842 (2015).

Dutch Petroleum Co., 133 S.Ct. 1659, 1669 (2013), that the ATS only extends extraterritorially to cases that "touch and concern" the United States. Accordingly, Plaintiffs concluded that in the interests of judicial economy the parties would benefit from this Court's assessment of the impact of *Kiobel* on ATS claims, similar to theirs, and they would not oppose a stay. Docket, ECF No. 44 at 3. Defendants agreed that a stay was appropriate. Docket, ECF No. 43, Defs.' Resp. at 4-5.

Following the parties' filings, on February 4, 2014, the District Court stayed the case and "administratively terminated without prejudice" Defendants' Motions to Dismiss the First Amended Complaint. APP. 3, ECF No. 45, Order at 1. Over a year later, once the pending Eleventh Circuit cases had been decided, the District Court issued an April 20, 2015 show cause order on whether this case should be dismissed in light of those decisions. APP. 4, ECF No. 51, Order. Plaintiffs filed a timely response, APP. 5, ECF No. 53, Pls.' Statement; as did Drummond. APP. 6, ECF No. 52, Defs.' Resp.

Plaintiffs asserted, once again, that their wrongful death claims based on diversity jurisdiction were not impacted by this Court's ATS and TVPA decisions in the two recently decided *Drummond* cases because neither of those were based on diversity jurisdiction. APP. 5, ECF No. 53 at 2-3. Further, with respect to the TVPA claims against individual Defendants Drummond and Tracy, Plaintiffs

asserted this Court had clarified various secondary liability standards and this case should now be assessed with respect to those standards following discovery. *Id*. at 3 (citing *Balcero*, 782 F.3d at 605-11). Plaintiffs also noted that with respect to their ATS claims, they should be permitted to obtain discovery to satisfy the new jurisdictional standard set by the Supreme Court in *Kiobel*,133 S.Ct. 1659 (2013). APP. 5, ECF No. 53 at 4. Plaintiffs concluded by noting that there was no pending motion to dismiss as the Court had denied Defendants' motion without prejudice, and if the Court was going to lift the stay, it should allow Defendants to refile any motion to dismiss and set a briefing schedule to resolve the never-addressed issues raised in the original, dismissed motion. *Id*. at 5.

With no motion pending under Fed. R. Civ. P. 12(b), the District Court dismissed all of Plaintiffs' claims, "[b]ased on the decisions entered by this court and the Eleventh Circuit in 2:09-cv-1041-RDP ("*Balcero*") and 7:09-cv-557-RDP ("*Baloco*") . . . ." APP. 7, ECF No. 59, Order at 2.

Plaintiffs filed a timely Notice of Appeal. APP. 8, ECF No. 61, Notice of Appeal.

This case was stayed for most of the time it was on file. These 45 Plaintiffs are not associated with any of the prior Drummond litigation, and have yet to have

discovery of their allegations.[3] Facts are still developing as the testimony from Colombia's Justice and Peace process is ongoing. *See* FAC ¶¶ 9, 111.

The individual Plaintiffs in this case have no involvement with any of the issues Drummond has raised in its retaliatory claim for defamation against counsel for Plaintiffs. Those issues will be resolved in that case in due course,[4] and Drummond should not be permitted to create a distracting side show to the straight forward issues presented in this appeal.

B. Statement of Facts

The AUC was known in Colombia and the world as a brutal right-wing paramilitary organization that massacred thousands of innocent civilians in its effort to drive leftist guerillas from Colombia. From the AUC's inception, highly regarded human rights organizations, such as Amnesty International and Human Rights Watch, documented in horrifying detail the extent of the AUC's war crimes. *See*, *e.g.*, FAC ¶¶ 15-16, 81-82. The U.S. State Department regularly reported on the AUC's atrocities, *id*. ¶¶ 97, 100-02, 114-15, and in 2001, after years of building its brutal track record, the AUC was designated a terrorist organization by the U.S.

[3] There is an unresolved issue in this case as to whether three of the Plaintiffs have a claim that duplicates a claim filed in the *Balcero* case. See note 10, *infra*.
[4] Some of the issues raised in Drummond's libel case have been accepted for review by this Court following a petition filed under 28 U.S.C. § 1292(b). *See* Briefing Notice, *Drummond Co., Inc. v. Conrad & Scherer, LLP*, No. 16-11090 (11th Cir. Mar. 24, 2016).

State Department. *Id*. ¶ 85.

Plaintiffs' fundamental allegation is that Drummond, along with most other multinational businesses[5] operating in areas of Colombia where the AUC was fighting the leftist groups, ultimately sided with the AUC and began providing substantial financial and logistical support to the terror group. *Id*. ¶¶ 2-8.

The specific allegations of Plaintiffs' FAC come from many sources, but mainly from testimony of former AUC combatants participating since 2007 in Colombia's Justice and Peace process, which requires them to testify truthfully about their participation in war crimes and extrajudicial killings. FAC ¶¶ 9, 10, 108-111. These include Salvatore Mancuso, the former head of the AUC; Rodrigo Tovar Pupo, alias "Jorge 40," the leader of the AUC's Northern Block; Jhon Jairo Esquivel Cuadrado, alias "El Tigre," a former commander of the AUC's Juan Andres Alvarez Front assigned to Drummond; Alcides Manuel Mattos Tabares, alias "Samario," a former subcommander of Juan Andres Alvarez Front; Jairo Jesus Charris Castro, a former AUC member who was sentenced to 30 years in prison for his role in murdering the union leaders at Drummond; and Rafael Garcia, a high official of the Colombian Administrative Department of Security

[5] For example, in 2007, Chiquita Brands International pled guilty to funding the AUC, a violation of U.S. law because the AUC was designated a terrorist organization by the U.S. Department of State. FAC ¶ 90 and Ex. A thereto.

(Spanish acronym: DAS; similar to the FBI), who was also a political advisor to the top leaders of the AUC. *Id*. ¶ 10. Others have come forward to give evidence, including a close business associate of the Drummond Defendants, Jaime Blanco Maya, who served as a liaison and payment conduit between Drummond and the AUC. *See*, *e.g.*, *id*. ¶¶ 60, 88, 91, 127.

Plaintiffs allege that Drummond provided substantial support to the AUC from 1996 until the AUC demobilized in 2006. *Id*. ¶ 5. The lynchpin for Drummond's initial collaboration with the AUC was its Security Director, James Adkins, *id*. ¶¶ 117-26, who was a former CIA agent hired by Drummond to handle security for Drummond's Colombian operations. *Id*. ¶ 58.

Adkins had specific knowledge of the brutality of the AUC and informed Drummond that the Colombian military was helping to organize and fund the paramilitary group. Adkins explicitly acknowledged to Drummond that ***the military's plan to organize and fund paramilitary groups "will bring with it egregious human rights violations."*** *Id*. ¶ 120 (emphasis added).

Adkins developed a scheme for Drummond to fund the AUC and hide the payments. *Id*. ¶¶ 5, 57-60, 91. Defendant Garry Drummond specifically approved the scheme. *Id*. ¶¶ 5, 57, 91. Drummond's collaboration with the AUC brought a surge of AUC combatants in and around the Drummond facilities, and hundreds of innocent civilians were killed as the AUC conducted cleansing operations in these

areas. *See*, *e.g.*, *id*. ¶¶ 145-46, 154. Among the civilian non-combatants killed by the AUC acting on behalf of Drummond were Plaintiffs' decedents. *Id*. ¶ 145.

IV. STANDARD OF REVIEW

The propriety of the District Court dismissing all claims in this case with a *pro forma* order that did not provide analysis or any written findings as to the basis for the decision, *see* APP. 7, ECF No. 59 at 2, is reviewed for abuse of discretion. *See*, *e.g.*, *U.S. v. Pickering*, 178 F.3d 1168, 1173 (11th Cir. 1999) (citing *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) (noting that a court may abuse its discretion by "a failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule, or even arbitrarily, as if neither by rule nor discretion")); *Edwards v. Okaloosa County*, 5 F.3d 1431, 1434-35 (11th Cir. 1993) (court abused discretion in dismissing pendant state law claims without analysis of legal factors).

While there were no specific findings in this case, and there was no pending motion for failure to state a claim under Fed. R. Civ. P. 12(b)(6), *see* APP. 3, ECF No. 45 at 1 (dismissing pending motion to dismiss without prejudice), Plaintiffs' allegations in the complaint should have been taken as true and all reasonable inferences therefrom drawn in favor of the Plaintiffs. *Long v. Slaton*, 508 F.3d 576, 579 (11th Cir. 2007). Dismissal would be appropriate only where Plaintiffs fail to provide "enough facts to state a claim to relief that is plausible on its face." *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007). A complaint "does not need detailed factual allegations," but must merely "be enough to raise a right to relief above the speculative level." *Id.* at 555.

Any pure questions of law raised on this appeal are reviewed *de novo*. *See*, *e.g.*, *Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005); *Tennyson v. ASCAP*, 477 Fed.Appx. 608, 609 (11th Cir. 2012).

V. SUMMARY OF ARGUMENT

Plaintiffs filed a detailed complaint alleging the Drummond Defendants aided and abetted, conspired with, and entered into an agency relationship with the AUC to commit extrajudicial killings, war crimes, and crimes against humanity in violation of the ATS. Plaintiffs also alleged extrajudicial killings under the TVPA, and wrongful death claims under Colombian law. Shortly after the complaint was filed and before there was any discovery undertaken in this case, the District Court stayed the case so that this Court could resolve three other cases[6] that all included application of the Supreme Court's new "touch and concern" standard for extraterritorial jurisdiction of cases brought under the ATS. *See Kiobel*, 133 S.Ct. at 1669. In issuing the stay, the District Court dismissed Drummond's pending and fully-briefed motion to dismiss without prejudice. APP. 3, ECF No. 45 at 1.

[6] These cases are listed in note 2, *supra*.

Over a year later, after the pending Eleventh Circuit cases had been decided, the District Court issued a show cause order on whether this case should be dismissed in light of those decisions. The parties responded to the show cause, with Plaintiffs asserting, among other things, that the ATS-related decisions from this Court did not impact their wrongful death claims brought under diversity jurisdiction or their TVPA claims. APP. 5, ECF No. 53 at 2-4. Plaintiffs also noted that with respect to their ATS claims, they should be permitted to obtain discovery to satisfy the new jurisdictional standard created in *Kiobel*, and since there was no motion to dismiss pending, the Court should set a briefing schedule to allow Defendants to refile any motion to dismiss and allow the parties to address the impact of the newly-decided cases from this Court on this case. *Id*. at 4-5.

With no motion pending under Fed. R. Civ. P. 12(b), nor any additional briefing, the District Court dismissed all of Plaintiffs' claims. The sole reasoning provided in the way of a written order dismissing the claims was: "[b]ased on the decisions entered by this court and the Eleventh Circuit in 2:09-cv-1041-RDP ("*Balcero*") and 7:09-cv-557-RDP ("*Baloco*") . . ." APP. 7, ECF No. 59 at 2.

The District Court's *pro forma* dismissal of all of Plaintiffs' claims should be reversed and remanded. The District Court's failure to analyze each of Plaintiffs' three claims and provide written findings to justify the dismissal of each claim was an abuse of discretion. Further, with respect to Plaintiffs' claims based

on wrongful death under Colombia law, the decisions referenced by the District Court's dismissal order, *Balcero and Baloco,* did ***not*** include any claims brought based on diversity jurisdiction. The Plaintiffs in this case pled their wrongful death claims exclusively under diversity jurisdiction. Thus, the prior decisions referenced by the District Court could not possibly provide a reasoned basis for dismissing Plaintiffs' diversity claims.

Likewise, with respect to the claims brought against individual Defendants Drummond and Tracy under the TVPA, the referenced *Balcero* and *Baloco* decisions could not serve as a basis to dismiss these claims. Putting aside that there is no ground to apply issue or claim preclusion to Plaintiffs' claims in this case, more fundamentally, Mr. Drummond was not a party to either of those cases so there was no finding of any sort made regarding the quality of the allegations of any TVPA claims against him. Similarly, while Mr. Tracy was a party in *Balcero* and *Baloco*, in *Baloco* there was no analysis at all of the substance of any TVPA claims because they were dismissed based on issue and claim preclusion. With respect to *Balcero,* the District Court found the TVPA claims brought against the corporate Defendants there to have been adequately alleged and denied Defendants' motion to dismiss these claims. Mr. Tracy himself did not challenge the adequacy of the TVPA claim against him on any motion to dismiss so there is no finding that could be applied in this case even if it was legally proper to do so.

Thus, the TVPA claims in this case against Mr. Drummond and Mr. Tracy are issues of first impression and could not be dismissed for failure to state a claim merely by reference to the prior decisions in *Balcero* and *Baloco*.

Finally, Plaintiffs' ATS claims should not have been dismissed without first giving them the opportunity for jurisdictional discovery and then to amend their complaint to attempt to satisfy the new *Kiobel* standard for extraterritorial jurisdiction announced by the Supreme Court, and interpreted by this Court in three different cases, during the time this case was stayed. The very purpose of the stay was to get the benefit of this Court's reasoning regarding the *Kiobel* standard and then allow the parties to apply the new decisions to this case. These Plaintiffs should be given a full and fair opportunity to litigate their specific claims. At a minimum, the ATS claims should be remanded for full consideration of whether Plaintiffs' current allegations state a claim that satisfies the new *Kiobel* test.

VI. ARGUMENT

A. The District Court Erred in Dismissing Plaintiffs' Wrongful Death Claims Based on Diversity Jurisdiction.

Plaintiffs brought claims for wrongful death based on Colombian law and invoked diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(2). *See* FAC ¶¶ 11, 206-209. There is no question, and Defendants have never disputed, that Plaintiffs are all resident nationals of Colombia and all of the Defendants are U.S. nationals,

and Plaintiffs alleged damages in excess of $75,000, satisfying the elements of diversity jurisdiction under section 1332(a)(2).

The District Court dismissed Plaintiffs' wrongful death claims (and their federal claims) "[b]ased on the decisions entered by this court and the Eleventh Circuit in 2:09-cv-1041-RDP ("*Balcero*") and 7:09-cv-557-RDP ("*Baloco*") . . ." APP. 7, ECF No. 59 at 2.

1. The District Court erred as a matter of law in dismissing Plaintiffs' wrongful death claims over which the Court had mandatory diversity jurisdiction.

The District Court's dismissal was error with respect to the diversity claims because the Plaintiffs in neither *Baloco* nor *Balcero* had claims based on diversity jurisdiction. In *Baloco*, there was not complete diversity of the parties, and the Colombian wrongful death claims were asserted based on supplemental jurisdiction under 28 U.S.C. §1367. *See Baloco v. Drummond Co., Inc.*, No. 7:09-cv-0557-RDP, ECF No. 60, First Am. Compl. ¶ 13. In that case, all of the claims, including the pendant state law claims, were found to be barred by claim preclusion. *See Baloco*, 767 F.3d at 1248. There was absolutely no issue of diversity jurisdiction in that case.

Likewise, in *Balcero*, this Court affirmed the discretionary dismissal of Plaintiffs' Colombian wrongful death claims brought invoking supplemental jurisdiction under 28 U.S.C. §1367. *See* 782 F.3d at 611-612. There was no

analysis of diversity jurisdiction in that case either.[7] Therefore, neither of these decisions provides a reasoned basis for dismissing Plaintiffs' claims based on diversity jurisdiction.

In this case, Plaintiffs specifically pled ***diversity*** jurisdiction for their Colombian-law wrongful death claims pursuant to 28 U.S.C. § 1332(a)(2). *See* FAC ¶¶ 11, 206-209. Unlike the discretionary supplemental jurisdiction,[8] diversity jurisdiction is mandatory. The language of section 1332(a) is clear that, with respect to claims brought under diversity jurisdiction, "district courts ***shall have*** original jurisdiction." 28 U.S.C. § 1332(a) (emphasis added). It is black letter law that "[w]hen parties do meet the requirements for federal jurisdiction based on diversity of citizenship, absent other justifications for abstention, federal courts have an obligation to exercise that jurisdiction." Wright & Miller, 13E Fed. Prac. & Proc. Juris. § 3602.1 & n.33 (3d ed.). Courts that have faced this seemingly obvious question have agreed that diversity jurisdiction is mandatory. *See*, *e.g.*, *Davis v. OneBeacon Ins. Group*, 721 F.Supp.2d 329, 335-336 (D.N.J. 2010) ("if

[7] Plaintiffs did seek review of the District Court's refusal to vacate the judgment under Fed. R. Civ. P. 60(b) to allow Plaintiffs to dismiss the sole non-diverse party to establish diversity jurisdiction, and this Court affirmed the District Court's discretion in declining to do so. *Balcero,* 782 F.3d at 612-13.

[8] As this Court confirmed, 28 U.S.C. §1367 is discretionary, and as per the terms of the statute, a "district court may decline supplemental jurisdiction when 'the claim raises a novel or complex issue of State law.'" *Balcero*, 782 F.3d at 611 (quoting 28 U.S.C. §1367; other citation omitted).

diversity jurisdiction . . . empowers [a federal] Court to hear [a] dispute, the Court shall do so. . . . [T]he Court is duty-bound to perform its judicial function and to adjudicate a case that is properly before it."); *see also Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976) (federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them.").

Since diversity jurisdiction was established and undisputed here, the District Court had an obligation to exercise it and hear Plaintiffs' Colombian wrongful death claims. The District Court's erroneous and general reliance on the decisions in *Baloco* and *Balcero*, APP. 7, ECF No. 59 at 2, neither of which had anything to do with the application of diversity jurisdiction, cannot justify dismissal of these claims which were properly before the Court.

2. The District Court abused its discretion in dismissing Plaintiffs' claims based on diversity jurisdiction without providing any reasoned analysis.

The District Court's dismissal of Plaintiffs' diversity claims, despite having mandatory jurisdiction over them, without even providing a reviewable basis for doing so, was an abuse of discretion requiring reversal. In *Edwards*, 5 F.3d 1431, this Court reversed the district court for dismissing "[plaintiff's] pendent state claim without weighing the *Gibbs* factors [for determining whether to exercise pendent jurisdiction over state law claims]—judicial economy, convenience, fairness, and comity. The court simply concluded that it no longer had jurisdiction.

This is incorrect, for even after it granted . . . summary judgment on the federal claim, the district court retained the discretionary power to exercise pendent jurisdiction." *Id.* at 1434.

This Court concluded: "Here, the balance of factors to be considered under *Gibbs* points toward retaining jurisdiction. ***The district court's order articulates no reason justifying dismissal, and none is apparent from the record. We hold that it was an abuse of discretion to dismiss the pendent wrongful death claim under these circumstances***." *Id.* at 1435 (emphasis added).

The Eleventh Circuit has held on numerous occasions that it is an abuse of discretion for a district court not to provide a reasoned basis for dismissing a pending claim. *See, e.g.*, *Wright v. Newsome*, 795 F.2d 964, 967-968 (11th Cir. 1986) ("The district court also dismissed Wright's pendent state law claims at the same time it [erroneously] dismissed the due process claim on the basis of *Parratt.* The court did not explain this decision and, given that the access to courts federal claim remained in the case, there was no apparent reason to dismiss the pendent claims. . . . [W]e reverse the dismissal of the pendent state claims."); *U.S. v. Pickering*, 178 F.3d at 1173 (finding an abuse of discretion in dismissing claim in failing to provide specific reasoning and quoting *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993) that "a court may abuse its discretion by 'a failure or refusal,

either express or implicit, actually to exercise discretion, deciding instead as if by general rule, or even arbitrarily, as if neither by rule nor discretion.'").

In this case, not only did the District Court dismiss Plaintiffs' diversity claims without any assessment of the application of diversity jurisdiction, it did so when there was no motion to dismiss pending. Defendants' motion was dismissed without prejudice on February 4, 2014. APP. 3, ECF No. 45 at 1. Almost two years later, on January 26, 2016, the District Court dismissed all of Plaintiffs' claims. APP. 7, ECF No. 59 at 2. In response to the District Court's show cause order, Plaintiffs did assert there was no motion to dismiss pending, and in the lengthy period of the stay, the ground had shifted on several of the key issues. Plaintiffs requested that the District Court set a new briefing schedule, assuming Defendants sought to refile their motion to dismiss. APP. 5; ECF No. 53 at 4-5. The District Court instead dismissed all of the claims, including Plaintiffs' diversity claim, without any specific reasons and without even acknowledging that, unlike the prior *Drummond* cases, this case included diversity claims. APP. 7, ECF No. 59 at 2.

This truncated process resulting in a *pro forma* dismissal lacking in reasoning was itself an abuse of discretion. "It is within a district court's reserve of power to *sua sponte* dismiss a lawsuit for failure to state a claim upon which relief can be granted . . . 'as long as the procedure employed is fair.' Such fair procedure includes allowing service of the complaint on the defendants, notice to all parties

of the court's intention to dismiss, ***a statement of the reasons for the dismissal***, and providing the plaintiff with an opportunity to either amend her complaint or respond to the basis for dismissal." *Helton v. Hawkins*, 12 F.Supp.2d 1276, 1283 (M.D. Ala. 1998) (citations omitted) (emphasis added); *see also Lee v. City of Los Angeles*, 250 F.3d 668, 683 n.7 (9th Cir. 2001) (same).

Both because Plaintiffs' diversity claims should not have been dismissed on the merits because they were properly pled, and because the District Court erred in not providing any reasoning as to why the diversity claims were dismissed and thus abused its discretion, the dismissal of these claims should be reversed.

3. This Court should remand to allow the District Court to address fact-intensive issues relating to Plaintiffs' wrongful death claims.

To the extent Defendants argue that this Court should further short circuit the process and address their substantive arguments as to Plaintiffs' wrongful death claims, it would violate a cardinal rule of appellate practice for this Court to reach the merits of a major issue that the District Court did not address. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (case was remanded with Supreme Court stating "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Strickland v. Alexander*, 772 F.3d 876, 889 (11th Cir. 2014) (same).

The need for a remand is particularly clear here since the *sole* argument made by Defendants in their dismissal motion regarding the Colombian wrongful

death claims based on diversity, which was dismissed without prejudice, APP. 3, ECF No. 45 at 1, was that the statute of limitations had expired on them. *See* Docket, ECF No. 33 at 50-54. Plaintiffs responded that there was a major factual issue of equitable tolling based in large part on the reasoning of this Court's decisions in *Arce v. Garcia*, 400 F.3d 1340, 1346 (11th Cir. 2005) and *Jean v. Dorelien*, 431 F.3d at 780. *See* Docket, ECF No. 36 at 31-38. Indeed, in *Balcero*, the District Court held that the similar factual allegations made there of threats of violent reprisal and the dangers of the Colombian civil conflict, prevented application of the statute of limitations in the context of a motion to dismiss. *Balcero v. Drummond Co., Inc*., No. 2:09-cv-1041-RDP (N.D. Ala.), ECF No. 275, Mem. Op. and Order at 6.

In addition to raising the factually-intensive issue of equitable tolling, Plaintiffs in this case also asserted that factual allegations of fraudulent concealment and the overall factual nature of the application of the statute of limitations to numerous plaintiffs based on different facts prevented application of the statute of limitations on a dismissal motion. *See* Docket, ECF No. 36 at 38-47. In addition, the battle of the parties' experts over the choice of law issue of whether the statute of limitations of Colombia or Alabama applied was just getting under way, with Plaintiffs demonstrating that Colombian law applied, *see* Docket,

ECF No. 36 at 41-47, but noting that resolution on a dismissal motion without discovery and expert testimony was premature, *id*. at 47.

These factually-intensive issues relating to the application of the statute of limitations must first be addressed in the district court so that there is a complete record and clear findings. *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1294 (11th Cir. 2005) ("Accordingly, at this preliminary stage of the proceedings with an undeveloped record, we remand this case to the district court to determine the essential, preliminary factual issues that we need to proceed with a legal determination of the applicable statute of limitations."); *Omar ex rel. Cannon v. Lindsey*, 334 F.3d 1246, 1251-1252 (11th Cir. 2003) (Mem.) (holding it would be premature to dismiss on statute of limitations grounds where "[b]oth parties set forth fact-intensive reasons why the motion to dismiss on the basis of the statute of limitations should be granted or denied" and as such, resolution of this issue at this stage of the litigation "would depend either on facts not yet in evidence or on construing factual ambiguities in the complaint in Defendants' favor, which would be inappropriate"); *American Home Assur. Co. v. Weaver Aggregate Transport, Inc.*, 773 F.Supp.2d 1317 (M.D. Fla. 2011) (denying motion to dismiss on statute of limitations grounds because the record was insufficient at this stage of the litigation to properly conduct a conflict-of-laws analysis to determine which state's statute of limitations applied, and, regardless of which limitations period applied,

the court would have to conduct a fact-intensive inquiry into when the limitations period began to run).

For these reasons this Court should reverse the District Court's dismissal of Plaintiffs' wrongful death claims based on Colombian law and remand the case for further proceedings.

B. The District Court Erred in Dismissing Plaintiffs' TVPA Claims Against Individual Defendants Drummond and Tracy.

Plaintiffs brought TVPA claims against individual Defendants Garry Drummond and Mike Tracy for extrajudicial killing and properly pled all of the elements of this claim. *See* FAC ¶¶ 11, 196-205. The District Court likewise dismissed Plaintiffs' TVPA claims with its *pro forma* dismissal of the entire case "[b]ased on the decisions entered by this court and the Eleventh Circuit in 2:09-cv-1041-RDP ("*Balcero*") and 7:09-cv-557-RDP ("*Baloco*") . . . ." APP. 7, ECF No. 59 at 2.

As with the diversity claims, based on the law of this Circuit, it was an abuse of discretion for the District Court to dismiss the TVPA claims without any specific analysis or written findings. *See, e.g.*, *Edwards*, 5 F.3d at 1434-35; *Wright*, 795 F.2d at 967-968; *U.S. v. Pickering*, 178 F.3d at 1173. The need for specific analysis as to the TVPA claims brought in this case was particularly apparent because, as Plaintiffs asserted in the response to the District Court's show cause order, while this case was stayed, the *Balcero* decision by this Court significantly

clarified the law of secondary liability with respect to TVPA claims. APP. 4, ECF No. 53 at 3. Specifically, that decision addressed the aiding and abetting standard and application of the command responsibility doctrine as applied to TVPA claims against individuals. *See Balcero*, 782 F.3d at 605-11. The District Court should have applied the clarified legal standards to the allegations in this case, something that has yet to be done.[9]

With respect to individual Defendant Garry Drummond, there is an additional clear error in dismissing the TVPA claim against him by merely referencing prior decisions in *Balcero* and *Baloco*, APP. 7, ECF No. 59 at 2—Mr. Drummond was ***not*** named as a Defendant in either of those cases. *See Balcero,* No. 2:09-cv-1041-RDP (N.D. Ala.), ECF No. 233, Third Am. Compl.; *Baloco,* No. 7:09-cv-0557-RDP (N.D. Ala.), ECF No. 60, First Am. Compl. Thus, in addition to the fact that there can be no claim or issue preclusion applied against these Plaintiffs based on any prior *Drummond* case because these Plaintiffs have no relationship to any of the prior claimants in any *Drummond* case nor are they

[9] In *Balcero*, the District Court and this Court were not reviewing *allegations* for purposes of a motion for failure to state a claim under Fed. R. Civ. P. 12(b)(6); that case was dismissed under the more stringent standard for summary judgement, 782 F.3d at 582, 604, after the District Court had previously found the *allegations* were sufficient to state a claim and denied Defendants' motion to dismiss the TVPA claims. *See Balcero,* No. 2:09-cv-1041-RDP (N.D. Ala.), ECF No. 43, Mem. Op. at 19-32.

seeking to share damages from a common decedent,[10] there are no prior findings to apply to Mr. Drummond because he was not a party in these prior cases.

While this Court should not make the initial determination on appeal as to the adequacy of the allegations in the FAC supporting TVPA liability for Mr. Drummond, *see, e.g., Singleton,* 428 U.S. at 120; *Strickland*, 772 F.3d at 889, the allegations are more than sufficient to deny any future motion to dismiss brought by Drummond. Based on this Court's decision in *Balcero*, 782 F.3d at 605-11, the allegations support both an aiding and abetting and command responsibility theory of liability against Mr. Drummond. The key allegation is "Defendant Garry Drummond approved plans to support and fund the AUC, and gave the approval to Drummond's Security Advisor, Adkins." FAC ¶ 5. *See also id*. ¶¶ 6, 57-58, 88, 91 (Mr. Drummond was advised of and approved payments to the AUC from Drummond). The Drummond organization, of which Mr. Drummond was fully in

[10] In *Baloco*, this Court applied an expansive definition of claim and issue preclusion, but both still require a substantive legal relationship between the parties. *See* 767 F.3d at 1249-52. There is no basis in this case to suggest that any of the Plaintiffs participated directly or through a legal relationship in any prior *Drummond* case. There is an issue in this case as to three of the 45 Plaintiffs, Alba Luz Caballero Gomez, Amparo De Jesus Florez Torres, and J.A.G.F., have a claim that duplicates a claim filed in the *Balcero* case, but this issue was not resolved below and should be when the case is remanded. *See* Docket, ECF No. 33, Defs.' Mot. to Dismiss at 49 and ECF No. 36, Pls.' Opp. to Mot. to Dismiss at 47-40. Further, as Plaintiffs demonstrate herein, there was no finding in either case regarding the adequacy of the pleadings against either Mr. Drummond or Mr. Tracy.

charge, had specific knowledge of the brutal tactics of the AUC. *Id*. ¶¶ 1-2, 7-8, 63, 98-127.

Moreover, Plaintiffs have ample allegations showing that Mr. Drummond, as well as all of the other Drummond Defendants, provided "knowing substantial assistance," the *Balcero* Court's definition of aiding and abetting, *see* 782 F.3d at 608-09, to the AUC. *See*, *e.g.*, FAC ¶¶ 113-63.

Plaintiffs specifically alleged Mr. Drummond's liability based on command responsibility over the key direct actors in Drummond's relationship with the AUC. *Id*. ¶ 64. Plaintiffs further alleged that these Drummond managers under Mr. Drummond's direct command had sufficient control to direct and re-prioritize the violent activities of the AUC units Drummond supported. *See*, *e.g.*, FAC ¶¶ 105-107. These allegations, taken in the light most favorable to Plaintiffs, are sufficient to state a claim for Mr. Drummond's command responsibility based on the standard of *Balcero*. *See* 782 F.3d at 609-610.

As no prior ruling in *Balcero* or *Baloco* precludes or otherwise forecloses Plaintiffs' TVPA claims in this case against Mr. Drummond, it was error to dismiss these claims merely by reference to those prior decisions.

While individual Defendant Mike Tracy was a Defendant in *Balcero* and *Baloco,* those decisions do not preclude Plaintiffs' TVPA claims against him as neither of those decisions included any finding that Plaintiffs' allegations against

Mr. Tracy were not adequate to state a claim.[11] Indeed, there was no evaluation whatsoever in those decisions regarding whether the claims against Mr. Tracy could be dismissed under Fed. R. Civ. P. 12(b)(6). In *Balcero*,[12] the District Court found the allegations sufficient to state a claim for aiding and abetting, conspiracy and agency liability under the ATS and TVPA against the Drummond Defendants. *See Balcero*, No. 2:09-cv-1041-RDP (N.D. Ala.), ECF No. 43 at 19-32.

Defendant Tracy was not a party at that time and thus did not challenge the pleadings. When the *Balcero* Plaintiffs filed their Third Amended Complaint, they added Mr. Tracy as a Defendant. *Id*., ECF No. 233 at ¶ 166.

When Mr. Tracy filed his sole motion to dismiss, he did not challenge the allegations as to his personal liability under the ATS and TVPA; instead, he raised statute of limitations issues. *See id*., ECF No. 257, Tracy Mot. to Dismiss. Thus, as with Mr. Drummond, there is no prior ruling on the adequacy of the pleadings for Plaintiffs' TVPA claims against Mike Tracy in either the *Balcero* or *Baloco* decisions, and the District Court erred in dismissing those claims by mere reference to the prior *Drummond* decisions.

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[11] As with Mr. Drummond, there is no basis to apply issue or claim preclusion to Plaintiffs' claims against Mr. Tracy. See note 10, *supra*.

[12] *Baloco* was dismissed based on claim and issue preclusion and no determination was made there as the adequacy of the factual allegations holding Mr. Tracy liable for the TVPA claims. *See* 767 F.3d at 1246-52.

As with Mr. Drummond, Plaintiffs note that this Court should not make the initial determination on appeal as to the adequacy of the allegations in the FAC supporting TVPA liability for Mr. Tracy. *See*, *e.g., Singleton,* 428 U.S. at 120; *Strickland*, 772 F.3d at 889. A remand is appropriate, but to be clear, based on the current record, the allegations are more than sufficient to deny any future motion to dismiss brought by Mr. Tracy. Based on this Court's decision in *Balcero*, 782 F.3d at 605-11, the allegations support both an aiding and abetting and command responsibility theory of liability against him.

Among the main allegations is that Defendant Tracy was informed by his Director of Security, Adkins, that requests were made to Drummond by the Colombian military to support the paramilitary groups in the area. "Tracy approved and ratified the Drummond contractors' payments to the AUC. Tracy also approved payments to the Colombian military after he was notified that the military was controlling and supporting paramilitary groups in the area. Additionally, as one of Adkins' supervisors, Tracy knew or should have known about Adkins' central role in Drummond's payment schemes to the AUC on behalf of Drummond. Tracy socialized with known paramilitaries when he was in Colombia." FAC ¶ 59. *See also id*. ¶ 120 (Tracy approved AUC payments).

The Drummond organization, in which Mr. Tracy held numerous high management positions and had wide authority, had specific knowledge of the brutal tactics of the AUC. *Id*. ¶¶ 1-2, 7-8, 63, 98-127.

Moreover, Plaintiffs allege that the Drummond organization, in which Mr. Tracy was a major participant, *id*. ¶ 1, provided "knowing substantial assistance" to the AUC. *See*, *e.g.*, *id.* ¶¶ 113-63. This is the *Balcero* Court's definition of aiding and abetting. 782 F.3d at 608-09.

Plaintiffs specifically alleged Mr. Tracy's liability based on command responsibility over the key direct actors in Drummond's relationship with the AUC. FAC ¶ 64. Plaintiffs further alleged that Drummond managers under Mr. Tracy's and Mr. Drummond's direct command had sufficient control to direct and re-prioritize the violent activities of the AUC units Drummond supported. *See*, *e.g.*, *id.* ¶¶ 105-107. These allegations, taken in the light most favorable to Plaintiffs, are sufficient to state a claim for Mr. Tracy's command responsibility based on the standard of *Balcero*. *See* 782 F.3d at 609-610.

As no prior ruling in *Balcero* or *Baloco* precludes or otherwise forecloses Plaintiffs' TVPA claims in this case against Mr. Tracy, it was error to dismiss these claims merely by reference to those prior decisions.

C. The District Court Erred in Dismissing Plaintiffs' ATS Claims Without Any Analysis of the Pleadings and Without Allowing Any Discovery or an Opportunity to Amend the Complaint to Address the New Presumption Against Extraterritoriality Established by *Kiobel*.

Plaintiffs' case was stayed for most of the time after it was filed precisely to allow the District Court and the parties to have the benefit of this Court's rulings on three pending cases raising the issue of the scope of the Supreme Court's ruling in *Kiobel*, 133 S.Ct. at 1669, and how the "touch and concern" test for extraterritorial jurisdiction impacted Plaintiffs' ATS claims in this case.[13] APP. 3, ECF No. 45 at 1. There was no discovery on any issue in this case, and Plaintiffs were not afforded the opportunity to amend their complaint to address the new *Kiobel* standard. In responding to the District Court's show cause order, Plaintiffs specifically noted that this Court's decisions interpreting *Kiobel* came down while their case was stayed, and once those standards were clarified by any further final decisions, they should have the benefit of discovery to explore additional facts to satisfy the newly-minted *Kiobel* standard. APP. 5, ECF No. 53 at 4-5.

Once again, the District Court's failure to provide any written findings deprives Plaintiffs of the ability to address any reasoning supporting the dismissal. *See* APP. 7, ECF No. 59 at 2. As with the other claims dismissed in this *pro forma* fashion, it was an abuse of discretion for the District Court to dismiss the ATS claims without any specific analysis. *See, e.g.*, *Edwards*, 5 F.3d at 1434-35; *Wright*, 795 F.2d at 967-968; *U.S. v. Pickering*, 178 F.3d at 1173. Plaintiffs' ATS

[13] See note 2, *supra*, for specific citations to the three cases.

claims were never evaluated under the proper standard for assessing a dismissal motion under Fed. R. Civ. P. 12(b)(6). The District Court should have provided a reasoned opinion in which Plaintiffs' allegations were taken as true and all reasonable inferences were drawn in their favor. *Long*, 508 F.3d at 579.

The dismissal of the ATS claims should also be remanded so the District Court can properly apply the law to rule specifically on Plaintiffs' request for jurisdictional discovery and for leave to amend their complaint to address the new *Kiobel* standard. At a minimum, the case should be remanded so that the District Court can apply the proper legal standard under Fed. R. Civ. P. 12(b)(6) to Plaintiffs' current allegations, which are sufficient to state a claim that meets the *Kiobel* test.

Plaintiffs' specific request for jurisdictional discovery should have been granted before there was any consideration of dismissing Plaintiffs' ATS claims following the creation of a new jurisdictional standard in *Kiobel*.[14] The Eleventh Circuit allows jurisdictional discovery when "[r]esolution of a pretrial motion . . .

[14] The landmark decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713-14 (2004), squarely held that the ATS is a "jurisdictional" statute, and the Court upheld that decision in *Kiobel*, 133 S.Ct. at 1664. *See also Mastafa v. Chevron Corp.*, 770 F.3d 170, 179 (2d Cir. 2014) (explaining that *Kiobel*'s extraterritorial standard is but one jurisdictional predicate for the ATS). Plaintiffs' request for limited discovery on the *Kiobel* issue, for purposes of adding facts to their First Amended Complaint, is thus a request for jurisdictional discovery.

turns on findings of fact – for example, a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) – may require some limited discovery before a meaningful ruling can be made." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997); *see also Majd-Pour v. Georgiana Community Hosp., Inc.*, 724 F.2d 901, 903 (11th Cir. 1984) (citations omitted) ("plaintiff should be given the opportunity to discover facts that would support his allegations of jurisdiction. We recognize that the district court has discretion to determine the scope of discovery. Nonetheless . . . dismissal without affording the plaintiff any opportunity to proceed with reasonable discovery [i]s premature and an abuse of the court's discretion"); *Henriquez v. El Pais Q'Hubocali.com*, 500 F.App'x 824, 830 (11th Cir. 2012) ("[P]laintiff should be given the opportunity to discover facts that would support his allegations of jurisdiction.").

In this case, there has been no discovery at all, and the case was stayed shortly after filing. During that time, this Court elaborated on the *Kiobel* standard and clarified that the ATS now requires detailed allegations of U.S.-based participation in the law of nations violations. *See Balcero*, 782 F.3d at 598-99. Thus, before having any idea that *Kiobel* would place the emphasis on ***where*** Defendants' conduct took place, as opposed to ***whether*** Defendants participated in the torts regardless of location, Plaintiffs, for example, alleged that Defendant Garry Drummond, based in Alabama, approved the scheme to provide the AUC

with substantial assistance. FAC ¶¶ 5-6, 54, 57. Plaintiffs specifically alleged that, following regular, sometimes monthly, briefings in Alabama from James Adkins, his head of security in Colombia, Mr. Drummond gave his consent to Adkins to the AUC funding plan in Alabama. *Id*. ¶¶ 57, 58. In doing so, Mr. Drummond had full knowledge of the brutal practices of the AUC and the likely war crimes that would occur as the AUC drove rebel groups out of the areas of Drummond's operations for Drummond's benefit. *Id*. ¶¶ 1-2, 7-8, 63, 98-127.

Balcero was dismissed following discovery and summary judgement motions were filed. 782 F.3d at 582. The *Balcero* Court found that the evidence Plaintiffs there had fell short of the level of detail needed to show U.S.-based participation in the wrongful acts. *Id*. at 598-99. Here, Plaintiffs have not had any discovery, but prior to discovery, Plaintiffs' allegations were already sufficient to withstand a motion to dismiss. As noted, the District Court dismissed Defendants' pending motions to dismiss without ruling on them, APP. 3, ECF No. 45 at 1, and then ultimately dismissed Plaintiffs' claims without reference to any legal standard, APP. 7, ECF No. 59 at 2, so Plaintiffs' allegations were never tested against the proper standard for ruling on a motion to dismiss.

Plaintiffs' allegations in this case, viewed in the light most favorable to Plaintiffs, certainly support an inference, that must be drawn in Plaintiffs' favor, that the major decisions and funding for the Drummond scheme to support the

AUC occurred in Alabama. These acts of providing knowing and substantial support ***from Alabama*** would satisfy this Court's definition of aiding and abetting. *Balcero*, 782 F.3d at 608-09.

Plaintiffs' allegations constitute a plausible basis for satisfying the *Kiobel* "touch and concern" standard that goes well beyond mere "conclusory allegations" that the Supreme Court has held would justify denying discovery and dismissing the claim. *See*, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp.*, 550 U.S. at 555. A conclusory allegation in this case would be that Plaintiffs merely asserted that Drummond's conduct "touched and concerned the United States." Instead, without any basis for knowing there would be a new standard set in *Kiobel* for extraterritorial jurisdiction for ATS claims, Plaintiffs have alleged a plausible theory that should be sufficient to withstand a dismissal motion and certainly are sufficient to get discovery to obtain facts exclusively under the control of Drummond as to the extent of the acts in furtherance of the ATS claims that occurred in the U.S.

With knowledge of the *Kiobel* test as clarified by this Court, and with additional evidence gathered in the four years since *Kiobel* was decided, and other evidence available in the discovery process, Plaintiffs in this case should have been given the opportunity to show the U.S.-based participation in the wrongful acts in greater detail. It was an abuse of discretion for the District Court to deny

jurisdictional discovery to allow Plaintiffs access to additional facts under the exclusive control of the Defendants. *See Intercont'l Indus. Corp. v. Wuhan State Owned Indus. Holdings Co.*, 619 F. App'x 592, 594-595 (9th Cir. 2015), *as amended on clarification* (Aug. 19, 2015); *Amerifactors Financial Group, LLC v. Enbridge, Inc.*, No. 6:13–cv–1446–Orl–22TBS, 2013 WL 5954777, at *5 (M.D. Fla. Nov. 7, 2013) (citations omitted) ("When the question of jurisdiction is genuinely in dispute and the movant has access to facts relevant to the motion, refusing to allow jurisdictional discovery is an abuse of discretion. A plaintiff 'must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction.'").

Even if Plaintiffs were not entitled to discovery prior to the dismissal of their ATS claims, they should have been given leave to amend their complaint to address the *Kiobel* issue of extraterritorial jurisdiction prior to any ruling on a properly filed motion to dismiss. This is a textbook situation in which a new issue of law arose while this case was stayed, and Plaintiffs should be given leave to amend their complaint to address this new development. *See*, *e.g.*, *McGuire v. Warren*, 207 Fed.Appx. 34, 36-37 (2d Cir. 2006) (remanding matter to district court to allow plaintiff to move for leave to file amended complaint in light of new case, decided after complaint was filed, changing the applicable law, because plaintiff "should be given the opportunity to replead the facts as she believes them

to be in order to attempt to meet the change in applicable law since she filed her complaint"); *Marrero v. City of Hialeah*, 625 F.2d 499, 512 (5th Cir. 1980) (citing *Bryan v. Austin*, 354 U.S. 933 (1951)) ("Since appellant certainly had no reason to anticipate the holding of *Monell* [which changed the law] and the appellees would not be unduly prejudiced if appellants were allowed leave to amend, 'justice requires' that appellants be given the opportunity to amend their complaint to state a cause of action . . . in conformity with the requirements of *Monell*."); *Balgowan v. State of N.J.*, 115 F.3d 214, 216-217 (3d Cir. 1997) (granting motion to amend complaint at appellate level after Supreme Court issued "opinion that abruptly changed the law" because, "given the change in the law effected by *Seminole,* we would be hard-pressed to fault the engineers for not having moved to amend the complaint sooner . . . [and] the State has not identified any prejudice to it resulting from the delay"); *Moss* v. *U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009) ("Having initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint . . . .").

Specific to the *Kiobel* issue, in *Doe v. Exxon Mobil Corp.*, the D.C. Circuit remanded the dismissal of plaintiffs' ATS claims to the District Court for further consideration in light of *Kiobel*. 527 Fed.Appx. 7 (D.C. Cir. 2013). The District Court then held "that plaintiffs should have the opportunity to file for leave to

amend their complaint in light of the intervening change in the law created by *Kiobel*." *Doe v. Exxon Mobil Corp.*, 69 F.Supp.3d 75, 97 (D.D.C. 2014); *see also*, *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) (granting plaintiffs' request to amend their dismissed complaint alleging ATS violations in light of *Kiobel* because "[i]t is common practice to allow plaintiffs to amend their pleadings to accommodate changes in the law, unless it is clear that amendment would be futile," and concluding that, because plaintiffs contended that some actionable conduct occurred in the United States, the case was distinguishable from *Kiobel* and amendment was not necessarily futile).

These cases overwhelmingly support Plaintiffs' position that they should have been given leave to amend their complaint to address the *Kiobel* issue that arose while their case was stayed. The Plaintiffs in this case have not had the opportunity to attempt to satisfy the new *Kiobel* standard.

This case is far different than *Baloco*, where the Eleventh Circuit upheld the district court's grant of summary judgment and, noting there had been no discovery, the Court nonetheless declined plaintiffs' request for remand to amend the complaint because it believed "[f]urther amendment of the complaint would be futile because it would not allege conduct focused in the United States to a degree necessary to overcome the presumption against extraterritoriality. ***A remand would also needlessly extend this litigation, which began over eleven years ago***." 767

F.3d at 1239 (emphasis added). Because the Court affirmed the finding that the *Baloco* Plaintiffs were parties to the original *Drummond I* litigation, filed in 2002, the Court was not willing to further extend the litigation. *Id*. at 1239-40, 1247-48.

Likewise, as noted, this case is very different from *Balcero*. There had been discovery in that case, unlike here, and the evidence was found to be lacking sufficient details about U.S.-based conduct. *Balcero*, 782 F.3d at 598-99. Discovery in *Balcero* closed in 2012, *id*. at 582, and the Plaintiffs in this case have gathered additional evidence of U.S.-based conduct during the past four years. Plaintiffs have specifically stated in their current complaint that the Justice and Peace process is ongoing, *see*, *e.g*., FAC ¶¶ 9, 111, and they have learned new facts from that process. Thus, amendment would not be futile, and they should be permitted to amend to add any new information they have and can obtain regarding the *Kiobel* standard. It would be fundamentally unfair, and contrary to overwhelming case law, to prevent Plaintiffs from attempting to satisfy a new standard that did not exist when they filed their complaint.

Plaintiffs have demonstrated both that they should get jurisdictional discovery and the opportunity to amend their complaint to satisfy the new *Kiobel* test. At a minimum, the case should be remanded so that the District Court can apply the proper legal standard under Fed. R. Civ. P. 12(b)(6) to Plaintiffs' current

allegations and make specific findings as to whether Plaintiffs have stated a claim that meets the *Kiobel* test.

VII. CONCLUSION

The District Court's *pro forma* dismissal of all of Plaintiffs' claims should be reversed and remanded. The District Court's failure to analyze each of the three claims and provide written findings to justify the dismissal of each claim was an abuse of discretion. Further, with respect to Plaintiffs' claims based on wrongful death under Colombia law, and extrajudicial killing under the TVPA, the claims were properly pled and should not have been dismissed based on applicable law if the District Court had properly reviewed the claims. Plaintiffs' ATS claims should not have been dismissed without first giving them the opportunity for jurisdictional discovery and then to amend their complaint to attempt to satisfy the new *Kiobel* standard for extraterritorial jurisdiction announced by the Supreme Court, and interpreted by this Court in three different cases while this case was stayed. These Plaintiffs have yet to have an opportunity to fairly litigate their specific claims.

Dated: May 11, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(C), I certify that Plaintiffs/Appellants Opening Brief complies with Rule 32 (a)(7)(B)(i) in that it has a text typeface of 14 points and contains 9,292 words.

Respectfully submitted this 11th day of May 2016,

/s/ Terrence P. Collingsworth
By: _____
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CERTIFICATE OF SERVICE

I hereby certify that, on May 11, 2016, I caused the foregoing to be electronically filed with the Clerk of the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I also certify that on this same date, I sent via Federal Express delivery a package containing the original and six (6) copies of Plaintiffs-Appellants' Opening Brief to the Clerk of the U.S. Court of Appeals for the Eleventh Circuit at the following address:

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