No. 16-10921

IN THE

United States Court of Appeals for the Eleventh Circuit

MARISOL MELO PENAZOLA, 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)

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Appellees certify that, to the best of counsel's knowledge, and in addition to persons identified in the Appellants' Certificate, the following persons and entities have an interest in the outcome of this case:

Conrad & Scherer, LLP

Cuellar, Francisco Ramirez

Scherer, Jr., William R.

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellees certify that Drummond Company, Inc. is the parent company of Defendants Drummond Ltd. and Drummond USA; that Defendant Drummond Company, Inc. has no parent company; and that Itochu Corporation (ITOCY) owns 20% of the Drummond entities' Colombian operations through a subsidiary, Itochu Coal Americas Inc., which is based in Birmingham, Alabama.

s/ H. Thomas Wells, III
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STATEMENT REGARDING ORAL ARGUMENT

Appellees do not believe that oral argument is necessary in this matter. However, should the Court believe oral argument would assist the Court in its decision, Appellees would welcome the opportunity to present the same.

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JURISDICTIONAL STATEMENT

Although Drummond[1] does not agree with Plaintiffs' contention that jurisdiction exists over their ATS and TVPA claims, Drummond does agree that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the District Court err in dismissing Plaintiffs' ATS and TVPA claims in light of this Court's decisions in *Baloco v. Drummond Company, Inc.*, 767 F.3d 1229 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 410 (2015) and *Doe, et al. v. Drummond Company, Inc., et al.*, 782 F.3d 576 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016)?
2. Did the District Court abuse its discretion by declining to provide Plaintiffs with the opportunity to conduct jurisdictional discovery or amend their complaint for a second time where Drummond challenged the existence of subject matter jurisdiction and where the First Amended Complaint failed to plead facts sufficient to establish a *prima facie* case of jurisdiction?
3. Did the District Court err in dismissing the Plaintiffs' Colombian law wrongful death claims?

[1] Appellees are referred to collectively herein as "Drummond." Additionally, for ease of reference, the term "Drummond" is used to describe the defendants in prior cases filed by Mr. Collingsworth against Drummond Company, Inc., and its subsidiaries and executives.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal of the dismissal of the last of four[2] separate lawsuits filed against Drummond under the ATS, beginning in 2002. In each of those lawsuits, Colombian plaintiffs represented by Mr. Collingsworth accused Drummond of aiding and abetting Colombian paramilitaries in killing Colombian citizens who either worked at Drummond's coal mine in Colombia or lived along the railroad that carries coal from its mine to port for shipment overseas.

None of these cases have met any success. In the first case, after certain claims and defendants were dismissed on summary judgment, a jury in 2007 conclusively found in favor of the remaining defendants on all claims. *Romero v. Drummond Company, Inc.*, No. 7:02-cv-0575-KOB (N.D. Ala.). This Court affirmed that judgment on appeal. *Romero v. Drummond Company, Inc.*, 552 F.3d 1303 (11th Cir. 2008) ("*Romero*"). In the second case, filed in 2009, the district court dismissed all claims against Drummond and its executives, and that dismissal was affirmed by this Court. *Baloco v. Drummond Company, Inc.*, 767 F.3d 1229 (11th Cir. 2014), *cert. denied*, 136 S. Ct. 410 (2015) ("*Baloco II*"). The third case,

[2] The actual number is eight, but the first five cases were all consolidated under the case file *Romero v. Drummond Company, Inc.*, No. 7:03-cv-0575-KOB (N.D. Ala.).

also filed in 2009, resulted in complete summary judgment in favor of Drummond and its executives. *Balcero v. Drummond Company, Inc.*, No. 2:09-cv-01041-RDP (N.D. Ala.). This Court also affirmed that dismissal. *Doe, et al. v. Drummond Company, Inc., et al.*, 782 F.3d 576 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016) ("*Doe*").

The instant case, *Melo v. Drummond Company, Inc.*, No. 2:13-cv-00393-RDP (N.D. Ala.), was filed on February 26, 2013. Doc. 1.[3] The original complaint, *id.*, and the First Amended Complaint ("FAC"), Doc. 20, are largely word-for-word copies of the operative complaint in *Doe*. *Compare* Doc. 20 *with Doe* Doc. 233 (3rd Am. Compl.)[4]; *also compare* Doc. 20 *with Doe*, 782 F.3d at

[3] "Doc. __" refers to the electronic docket maintained by the Northern District of Alabama in *Melo v. Drummond Company, Inc.*, No. 2:13-cv-00393-RDP (N.D. Ala.).

[4] This Court can take judicial notice of the complaint in *Doe*. *See Baloco II*, 767 F.3d at 1241 n.13 ("We take judicial notice of the proceedings in *Drummond I*.") (citations omitted). As explained by the Supreme Court,

> "We take judicial notice of our own records, and, if not *res judicata*, we may, on the principle of *stare decisis*, rightfully examine and consider the decision in the former case as affecting the consideration of this;" and again, as further declared in *Dimmick v. Tompkins*, 194 U. S. 540, 548, 48 L. Ed. 1110, 1113, 24 Sup. Ct. Rep. 780: "The court has the right to examine its own records and take judicial notice thereof in regard to proceedings formerly had therein by one of the parties to the proceedings now before it." Availing of this power and making reference to the records of this court, it appears that the controversy as to the validity of the attachments with which the appeal

593-601 (analyzing the allegations of the 3rd Amended Complaint). Not coincidentally, the instant case was filed shortly after the District Court declined to allow a fourth amended complaint in *Doe* (which would have added Mr. Drummond as a defendant and dismissed Augusto Jimenez – a former Drummond Colombian executive – to create diversity jurisdiction).

In both *Doe* and the instant case, Colombian plaintiffs represented by Mr. Collingsworth alleged that Drummond engaged an illegal group of paramilitaries in Colombia (the Autodefensas Unidas de Colombia or "AUC") "to eliminate suspected guerilla groups from around the company's mining operations in Colombia," and that the Plaintiffs' "innocent decedents were incidental casualties of Defendants' arrangements with the AUC." *Doe*, 782 F.3d at 579. *See also* App. Br. at 7 ("Plaintiffs' fundamental allegation is that Drummond, along with most other multinational businesses 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.") (citing Doc. 20 at ¶¶ 2-8).[5]

> before us is concerned has, on three different occasions, been here considered.

De Galard de Brassac de Bearn v. Safe Deposit & Trust Co. of Baltimore, 233 U.S. 24, 32, 34 S. Ct. 584, 586 (1914).

[5] "App. Br." refers to the Appellants' Opening Brief, filed on May 11, 2016.

B. Course of Proceedings and Dispositions Below.

Plaintiffs filed this case on February 26, 2013. Doc. 1. On April 17, 2013, the Supreme Court issued its opinion in *Kiobel v. Royal Dutch Petroleum Co., et al.*, 133 S. Ct. 1659 (2013) ("*Kiobel*"). That same day, the District Court ordered the parties to brief *Kiobel*'s effect on this case. Doc. 19. Nine days later, on April 26, 2013, Appellants filed their FAC, which is the operative complaint. Doc. 20. The District Court subsequently received extensive briefing relating to the dismissal of the claims in the FAC. *See* Docs. 33, 33-1, 34, 35, 36, 36-1, 37, 38, 43 & 44. On February 4, 2014, the District Court administratively terminated the motions to dismiss and stayed the case pending this Court's decisions in *Baloco II* and *Doe*. Doc. 45 at 1.

Shortly after this Court issued its opinion in *Doe*, the District Court issued a show-cause order, stating that "[t]he Eleventh Circuit has recently issued opinions in *Doe et al. v. Drummond Company, Inc .et al.*, 2:09cv1041-RDP and *Baloco et al. v. Drummond Company, Inc. et al*, 7:09cv557-RDP. In light of those decisions, the court believes that this case is due to be dismissed. The parties are **DIRECTED** to **SHOW CAUSE**, if any there be, **on or before May 11, 2015**, why dismissal is not appropriate in this case." Doc. 51.

On May 11, 2015, both parties responded to the District Court's show cause order. Docs. 52 & 53. Drummond's response addressed not just the Plaintiffs'

ATS claims, but also their TVPA and Colombian wrongful death claims, and explained why all claims were due to be dismissed. *See* Doc. 52 at Section I (arguing for dismissal of the ATS claims on the authority of *Kiobel*, *Balcero*, *Baloco II*, and *Cardona*); at Section II (arguing for dismissal of the TVPA claims, citing *Doe* and Mr. Drummond and Mr. Tracy's Motion to Dismiss (Doc. 34)); and at Section III (arguing for dismissal of the Colombian law wrongful death claims and citing Defendants' motions to dismiss (Docs. 33 & 34) and reply brief in support thereof (Doc. 37)). The Plaintiffs' response to the show-cause order also addressed all claims. *See* Doc. 53 at Section I-A (Colombian wrongful death claims); at Section I-B (TVPA claims); and at Section I-C (ATS claims).

On January 26, 2016, the District Court dismissed all claims, with prejudice. Doc. 59 at 2.[6] This appeal followed.

[6] As the dismissal order reflects, the District Court retained jurisdiction over the parties and their counsel with respect to sanctions, due to the fact that "two other cases filed in this court (2:11-cv-3695-RDP and 2:15-cv-506-RDP) implicate the behavior of attorneys in this case." *Id.* at 1. On December 7, 2015, the district court entered a 50-page memorandum opinion in Case No. 2:11-cv-3695-RDP, finding that the crime-fraud exception to the attorney-client and work product privileges applied to both Mr. Collingsworth and his former law firm, Conrad & Scherer, LLP, based on evidence of witness bribery and suborning perjury, as well as fraud on the court. *See* 11th Cir. Appeal No. 16-11090. As stated by the district court, "This ongoing fraud operated not only at the relevant time in this case, but continued in this court in *Melo*, 2:13cv393-RDP and before both the Eleventh Circuit and the Supreme Court of the United States in *Balcero*, 2:09cv1041-RDP. . . . [T]he fact remains that the record presented to these various courts is devoid of evidence of the payments made to witnesses." *Id.* at Appellant's Appendix, Vol.

C. Statement of the Facts.

Drummond vehemently disputes the allegations of FAC.[7] As Drummond has repeatedly proved in court, those allegations are malicious and demonstrably false. In fact, in 13 years of litigation, Mr. Collingsworth and his clients have yet to find a single piece of documentary evidence to support their allegations. Nevertheless, Drummond recognizes that non-conclusory, factual allegations of the FAC must be assumed true for purposes of this appeal.

That said, the pertinent allegations of the FAC are indistinguishable from the allegations in *Doe*, where this Court found that, even accepting those allegations as true, they were insufficient to establish jurisdiction under the ATS pursuant to *Kiobel*, *Baloco II*, and *Cardona*. 782 F.3d at 593-601.

III, Doc. 417 at 18 n.13. A parallel interlocutory appeal is pending before this Court in which Conrad & Scherer, LLP, has argued that the district court improperly applied the crime-fraud exception to the firm. *See* 11th Cir. Appeal No. 16-11090.

[7] As explained in footnote 6, *supra*, it has come to light that the "evidence" upon which these allegations are purportedly based was procured through bribery, perjury and fraud. Incredibly, Mr. Collingsworth continues to act as though neither the witness payments nor the district court's crime-fraud ruling have any importance whatsoever. *See* App. Br. at 6 (characterizing the crime-fraud ruling and witness payments as a "distracting side show"). As an officer of the court, Mr. Collingsworth owes this Court a duty of candor, and should have disclosed that the allegations of the FAC are premised on statements of incarcerated Colombian paramilitaries who were paid hundreds of thousands of dollars.

With respect to the TVPA claims against the individual defendants, the limited allegations of the FAC are as follow. There are two relevant factual allegations against Garry Drummond in the 110-page FAC (Doc. 20). Paragraph 57 alleges that Mr. Drummond "approved" a plan to "have Drummond provide material support to the AUC so that the AUC would drive the FARC and other guerilla groups out of the areas of Drummond's operation in Colombia." And paragraph 91 alleges that Jim Adkins brought to Mr. Drummond the "idea" of making payments to the AUC through Drummond contractor Jaime Blanco, and he "agreed."

As to Mr. Tracy, the FAC baldly alleges that he "approved and ratified the Drummond contractors' payments to the AUC." *Id.* at ¶ 59. The FAC does not even identify the contractors involved, much less any of the payments he supposedly approved or the manner in which he "approved" or "ratified" them. *See* Doc. 20 *generally*. Similarly, paragraph 120 alleges without more that Tracy "approved the decision to formally engage the AUC." *Id.* at ¶ 120.

SUMMARY OF THE ARGUMENT

One recurrent theme of Plaintiffs' brief is that the District Court should be reversed for failure to provide more detail as to the reasoning behind dismissal of Plaintiffs' claims. But the District Court was not required to state such reasoning. *See* Fed. R. Civ. P. 52(a)(3) ("[t]he court is not required to state findings or

conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion"). Furthermore, the record below—including the arguments made by Drummond in support of dismissal—amply supports the District Court's decision, and it is well settled that an appellate court "may affirm 'for any reason supported by the record, even if not relied upon by the district court.'" *United States v. Chitwood*, 676 F.3d 971, 975 (11th Cir. 2012) (citations omitted).

Here, the dismissal of Plaintiffs' ATS claims was mandated by this Court's prior decisions in *Baloco II* and *Doe*, wherein this Court analyzed virtually identical allegations to those here and found them insufficient to overcome the presumption against extraterritoriality as defined by *Kiobel*. The District Court should not be held in error for following this binding precedent. And given that this is the last in a series of similar lawsuits brought by Plaintiffs' counsel against Drummond, in which Plaintiffs' counsel have been conducting discovery for well over a decade, the District Court acted well within its discretion in not permitting Plaintiffs to conduct additional discovery to amend the complaint yet again to attempt to plead around this Court's precedent. *See Baloco II*, 767 F.3d at 1239 ("While there has been no discovery in the instant case, there has been a very large amount of discovery over a period of more than ten years in preceding related cases. . . . We decline to remand this case so that the district court may consider

Plaintiffs' request to amend their complaint. . . . A remand would also needlessly extend this litigation, which began over eleven years ago.").

With respect to the TVPA claims against the individual defendants Garry Drummond and Mike Tracy,[8] Plaintiffs' allegations fall far short of the standards this Court set forth in *Doe* for adequately pleading such claims. Plaintiffs rely on the secondary liability theories of command responsibility and aiding and abetting. Under *Doe*, a theory of command responsibility requires factual allegations that Mr. Drummond and Mr. Tracy had "'effective control' over the perpetrators" of the murders at issue here, *Doe*, 782 F.3d at 610 n.48, which allegations are found nowhere in the FAC. For aiding and abetting, *Doe* requires that Plaintiffs allege facts showing that Mr. Drummond and Mr. Tracy "actively participated" in the killings by providing "knowing substantial assistance" to the AUC members who killed the Plaintiffs' decedents. 782 F.3d at 604. The allegations of the FAC do not come close to the level of specificity this Court requires to plausibly plead such a theory. *Compare Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (finding allegations of "active participation" sufficient to establish aiding and abetting liability) *with Mamani v. Berzain*, 654 F. 3d 1148 (11th Cir. 2011)

[8] Plaintiffs have not asserted any error in the dismissal of the TVPA claims against any of the other Defendants, and have therefore waived this issue.

(finding allegations much more detailed than those at issue here to be insufficient to plausibly plead aiding and abetting).

Finally, the District Court's dismissal of Plaintiffs' Colombian law wrongful death claims is fully supported by the record. Drummond argued below that these claims were barred by the statute of limitations, and that this defect was apparent from the face of the FAC. Whether the District Court enunciated this as the basis of its decision is not the question on appeal; the question is whether the District Court's dismissal of these claims can be justified on this ground. *In re Mroz*, 65 F.3d 1567, 1574 (11th Cir. 1995) (citation omitted) ("'if the decision below is correct, it must be affirmed," even if "the lower court relied upon a wrong ground or gave a wrong reason.'").

Drummond respectfully submits that the dismissal of Plaintiffs' claims should be affirmed.

STATEMENT OF THE STANDARD OF REVIEW

Drummond agrees that the District Court's dismissal of the FAC is reviewed for an abuse of discretion. In performing that review, this Court accepts the non-conclusory allegations in the FAC as true and construes them in favor of the plaintiffs. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003) (per curiam).

In evaluating the sufficiency of the FAC, this Court must "make reasonable inferences in Plaintiff[s'] favor," but it is "not required to draw [P]laintiff[s']

inference." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005)), *abrogated on other grounds by Mohamad v. Palestinian Authority*, 132 S. Ct. 1702, 1706 n.2 (2012). The FAC must not only allege but also show that Plaintiffs are entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009); *see also Mamani v. Berzain*, 654 F. 3d 1148, 1153 (11th Cir. 2011).

Plaintiffs are held to a "heightened pleading standard" for their ATS claims:

> [J]urisdictional concerns are not satisfied by merely alleging a colorable violation of the law of nations. "[T]his court *must thoroughly examine the merits of the plaintiff's complaint to determine whether it has [ATS] jurisdiction*." . . . Moreover, the "paucity of suits successfully maintained under [the ATS] is readily attributable to the statute's requirement of alleging a violation of the law of nations at the jurisdictional threshold."

Villeda Aldana v. Fresh Del Monte Produce, Inc., 305 F. Supp. 2d 1285, 1292 (S.D. Fla. 2003), *aff'd in part, vacated in part*, 416 F.3d 1242 (11th Cir. 2005) (citations omitted) (emphasis added). Thus, to survive a motion to dismiss for want of jurisdiction under the ATS, the FAC must meet a "higher standard of pleading than traditionally required." *Id.* (citing *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995)).

In determining whether a complaint states a claim under the ATS, a court must undertake "a more searching review of the merits" than under "the more

flexible 'arising under' formula of [28 U.S.C. § 1331]." *Aldana*, 305 F. Supp. 2d at 1292; *see also Aldana*, 416 F.3d at 1248 (affirming district court opinion and holding that in an ATS case, "'[p]leadings must be something more than an ingenious academic exercise in the conceivable'") (citation omitted).

The District Court's denial of the Plaintiffs' request for jurisdictional discovery and for leave to amend their complaint is reviewed for an abuse of discretion. *Culverhouse v. Paulson & Co. Inc.*, 813 F.3d 991, 993 (11th Cir. 2016). Equitable tolling decisions are likewise reviewed for an abuse of discretion. *Arce v. Garcia*, 434 F.3d 1254, 1260 (11th Cir. 2006).[9] This standard

> recognizes the range of possible conclusions the trial judge may reach. By definition ... under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. . . . [T]he abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.

United States v. Frazier, 387 F.3d 1244, 1259 (11th Cir. 2004) (*en banc*) (internal quotation marks and citations omitted).

A conflict-of-laws issue is reviewed *de novo*. *American Family Life Assurance Co. v. United States Fire Co.*, 885 F.2d 826, 830 (11th Cir. 1989).

[9] Drummond notes that the standard of review applicable to equitable tolling determinations appears to be unsettled in this circuit. *See Jackson v. Astrue*, 506 F.3d 1349, 1352 (11th Cir. 2007) (quoting *Cabello v. Fernandez–Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005)) ("'The question of whether equitable tolling applies is a legal one subject to de novo review.'").

ARGUMENT AND CITATIONS TO AUTHORITY

I. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' ATS CLAIMS.

Plaintiffs present two arguments for reversal of the dismissal of their ATS claims. The first, which is a theme throughout their brief, is that the District Court should be reversed for failing to provide sufficient detail in its dismissal order. Second, Plaintiffs argue they should be granted "jurisdictional" discovery and an opportunity to amend their complaint (again) in order to attempt to plead around *Kiobel* and the precedent of this Court. Neither argument has merit.

A. Plaintiffs' contention that the District Court abused its discretion by failing to explain its dismissal of the ATS claims is unavailing.

Plaintiffs argue that the District Court erred by dismissing their ATS "without any analysis of the pleadings." App. Br. at 28. This argument fails in multiple respects.

First, the District Court was not required to explain the reasoning behind its dismissal. Fed. R. Civ. P. 52(a)(3) provides that "[t]he court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion." Citing Rule 52, circuit courts of appeal – including this Court – have refused to find error where a district court does not set forth its reasoning in an order. For example, in *Anderson v. Florida Dep't of Environmental Protection*, 567 F. App'x 679, 680 (11th Cir.), *cert. denied*

sub nom. Anderson v. Creech, 135 S. Ct. 727 (2014), this Court held that "the Federal Rules of Civil Procedure do not require courts to state findings of fact or conclusions of law when ruling on Rule 59(e) motions. *See* Fed. R. Civ. P. 52(a)(3)." *See also Richards v. Dickens*, 411 F. App'x 276, 279 (11th Cir. 2011).

Other circuit courts agree. *See, e.g.*, *Gutierrez v. Hiatt*, 308 F. App'x 836, 838 (5th Cir. 2009) ("Gutierrez's argument that the district court's dismissal orders in the instant case were improper for lack of findings and conclusions is without merit. *See* Fed. R. Civ. P. 52(a)(3). Moreover, in stating that the defendants' Rule 12(b)(6) motions were 'meritorious and well-taken,' the district court accepted the grounds for dismissal advanced by the defendants and thus implicitly found that Gutierrez had failed to state a claim under RICO and that her claims were alternatively barred by res judicata. Such a statement provides this court with sufficient reasons to conduct effective review."); *Barry v. Moran*, 661 F.3d 696, 702 n.9 (1st Cir. 2011) ("Appellants argue that it was legal error for the district court to fail to explain its summary judgment order. They ask us to remand for that explanation. We may quickly dispose of this argument. Federal Rule of Civil Procedure 52(a) explicitly states that district courts are 'not required to state findings or conclusions when ruling on a motion under Rule 12 or 56.'").

The above authority is consistent with the settled rule that "'if the decision below is correct, it ***must*** be affirmed, although the lower court relied upon a wrong

ground or gave a wrong reason.'" *In re Mroz*, 65 F.3d at 1574 (quoting *Brown v. Allen*, 344 U.S. 443, 459, 73 S. Ct. 397, 408 (1953)) (emphasis added). And, an appellate court "may affirm 'for any reason supported by the record, even if not relied upon by the district court.'" *Chitwood*, 676 F.3d at 975 (citations omitted).[10]

The cases cited by Plaintiffs, App. Br. at 29-30, are not to the contrary. In *Edwards v. Okaloosa County*, 5 F.3d 1431, 1434 (11th Cir. 1993), *opinion modified on denial of reh'g*, 23 F.3d 358 (11th Cir. 1994), the district court erred when it "simply concluded it had no jurisdiction. This is incorrect, for even after it granted Gilbert summary judgment on the federal claim, the district court retained the discretionary power to exercise pendent jurisdiction." No other reason justifying dismissal of the state law claims was "apparent from the record." *Id.* at 1435.

[10] Plaintiffs repeatedly cite *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868 (1976), for the proposition that this Court cannot consider arguments for the first time on appeal. *See* App. Br. at 19, 24 & 27. *Singleton* held that the Eighth Circuit erred by addressing and reversing on an issue that the circuit court appellee (and Supreme Court petitioner) had not been afforded an opportunity to argue in the lower court. 428 U.S. at 120, 96 S. Ct. at 2877. That plainly differs from this case, as the parties extensively briefed the dismissal arguments in the District Court. More generally, *Singleton* protects *appellees* – not appellants – by ensuring that an appellate court does not reverse on a ground that an appellee was never given an opportunity to address. Notably, *Singleton* also recognized that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." 428 U.S. at 121, 96 S. Ct. at 2877.

Similarly, in *Wright v. Newsome*, 795 F.2d 964, 967-68 (11th Cir. 1986), this Court reversed the dismissal of pendent state law claims after it determined that the district court erred in dismissing the appellant's federal due process claim. This Court held that because the federal claim should not have been dismissed, "there was no apparent reason to dismiss the pendent claims," *id.* at 968, and it could not identify "[a]ny other reason that the court may have had for dismissing the state claims." *Id.*

Both *Edwards* and *Wright*, therefore, hold that where a district court's sole stated reason for declining to exercise its discretionary jurisdiction over pendent state law claims is patently erroneous, and no other ground for dismissal is apparent from the record, dismissal of pendent state law claims without any explanation constitutes an abuse of discretion.[11]

These cases are inapposite here for two reasons. First, as Plaintiffs adamantly proclaim, App. Br. at 14-16, this case presents no issue of supplemental jurisdiction. Second (and more importantly), the record in this case, as well as this

[11] *United States v. Pickering*, 178 F.3d 1168 (11th Cir. 1999), the other case cited by Plaintiffs in support of their argument that the District Court erred by purportedly not providing any reasons for its dismissal, is even further afield. *Pickering* involved an appeal of a criminal sentencing order in which the district court failed to analyze required factors in making a downward departure from federal sentencing guidelines. *Id.* at 1173. Simply put, the District Court here was under no such affirmative, statutory obligation.

Court's binding precedent, fully supports the dismissal of the Plaintiffs' claims. *See* Section I-B *infra*.

For all of these reasons, Plaintiffs' contention that the District Court erred by failing to explain its dismissal of the claims in this case is unavailing.

B. *Baloco II* and *Doe* foreclose Plaintiffs' ATS claims in this case.

Contrary to Plaintiffs' argument, the District Court did not "dismiss the ATS claims without any specific analysis." App. Br. at 29. Rather, the District Court cited its prior opinions, as well as the published decisions of this Court in *Baloco II* and *Doe*, as supporting its dismissal. Doc. 59 at 2. As this Court is well aware, both *Baloco II* and *Doe* were filed by Colombian plaintiffs represented by Mr. Collingsworth against Drummond. Those cases decisively foreclose Plaintiffs' ATS claims here and provide this Court "with sufficient reasons to conduct effective review." *Gutierrez*, 308 F. App'x at 838.[12]

In *Doe*, another group of Colombian plaintiffs represented by Mr. Collingsworth alleged that Drummond "engaged the paramilitaries . . . to eliminate suspected guerilla groups from around the company's mining operations in Colombia," and that their "innocent decedents were incidental casualties of Defendants' arrangements with the AUC." 782 F.3d at 579. The *Doe* court

[12] Plaintiffs' contention that "this case is very different from [*Doe*]", App. Br. at 37, is disingenuous. As explained on pages 20-26, the allegations of the FAC are indistinguishable from those in *Doe*.

undertook an extensive review of ATS case law where the defendants were U.S. citizens or companies, including *Baloco II*. *Id.* at 583-93. In that analysis, this Court reaffirmed that the allegations in *Baloco II* – which it described as "nearly identical" to those in *Doe*, *id.* at 599 – were insufficient to overcome the presumption against extraterritoriality:

> This factual predicate was not met in *Baloco II*; the plaintiffs' allegations of the defendants' 'mere consent' from within the United States to support a terrorist organization did not suffice. *See id.* at 1236. Nor were there allegations of "a purported express agreement" between the defendants and the perpetrators to commit the underlying law of nations violations on the defendants' behalf. *Id.* (finding no allegations that defendants "would finance AUC operations in exchange for the AUC carrying out the killings").

Id. at 591. [13]

The *Doe* court also discussed *Cardona v. Chiquita Brands Intern., Inc.*, 760 F.3d 1185 (11th Cir. 2014) ("*Cardona*"). 782 F.3d at 589-90. In *Cardona*, the plaintiffs alleged that a U.S. company, from within the United States, made decisions to collaborate with and fund Colombian paramilitaries that committed extrajudicial killings and war crimes. Significantly, the allegations in *Cardona* –

[13] In *Baloco II*, this Court affirmed the dismissal of ATS claims against Drummond that were asserted by another group of Colombian plaintiffs who were represented by Mr. Collingsworth, stating "[t]he foregoing evidence, assuming it is true and that it is admissible, is not enough even in conjunction with the allegations of the First Amended Complaint to establish that, assuming Plaintiffs' claims 'touch and concern the territory of the United States,' they do so with sufficient force to displace the presumption against extraterritorial application." 767 F.3d at 1238-39.

which are not described in the majority opinion, but are described in the dissent – are much more particularized than those at issue here (or in *Doe*). *See Cardona*, 760 F.3d at 1194 (Martin, J. dissenting) (plaintiffs "have alleged that Chiquita's corporate officers reviewed, approved, and concealed payments and weapon transfers to Colombian terrorist organizations *from their offices in the United States* with the purpose that the terrorists would use them to commit extrajudicial killings and other war crimes."). Moreover, Chiquita admitted to making "over 100 payments to the AUC totaling over $1.7 million." Doc. 20-1 at ¶ 19. Nevertheless, this Court held that "'[a]ll the relevant conduct in [*Cardona*] took place outside the United States,' and the plaintiffs could not 'anchor ATS jurisdiction in the nature of the defendants as United States corporations' to make the statute apply extraterritorially." *Doe*, 782 F.3d at 589 (quoting *Cardona*, 760 F.3d at 1189).

This Court then turned to the allegations at issue in *Doe*, explaining that its analysis starts with a presumption that there is no jurisdiction: "Since Plaintiffs' claims as alleged involve both domestic and extraterritorial conduct, the presumption against extraterritoriality applies and will prevent jurisdiction unless it is displaced." *Id.* at 593. This Court methodically examined the allegations in *Doe*, repeatedly noting their similarity to those in *Baloco II*: "[t]he claims of the plaintiffs in *Baloco II* and those of Plaintiffs before us now are premised on similar

allegations – that the defendants made decisions within the United States to fund, aid and abet, and otherwise support the perpetrators of extrajudicial killings in Colombia." *Id.* at 590; *see also id.* at 596-97.

Citing *Cardona* and *Baloco II*, this Court explained why the *Doe* plaintiffs' allegations were insufficient under *Kiobel*:

> In *Cardona* and *Baloco II*, the plaintiffs proffered similar domestic conduct. Those opinions concluded, either implicitly or explicitly, that general allegations involving U.S. defendants' domestic decision-making with regard to supporting and funding terrorist organizations were insufficient to warrant displacement and permit jurisdiction.
>
> [. . .]
>
> Plaintiffs' claims do not allege sufficient domestic conduct to displace the presumption. Plaintiffs allege that generally, Defendants made funding and policy decisions in the United States; but Plaintiffs specifically allege that the agreements between Defendants and the perpetrators of the killings, the planning and execution of the extrajudicial killings and war crimes, the collaboration by Defendants' employees with the AUC, and the actual funding of the AUC all took place in Colombia. In light of our precedent, the domestic location of the decision-making alleged in general terms here does not outweigh the extraterritorial location of the rest of Plaintiffs' claims.
>
> [. . .]
>
> The circumstances underlying the ATS claims in this case—including the Defendants, paramilitary perpetrators, general factual background, and allegations of Defendants' involvement—are nearly identical to those in *Baloco II*, even though these Plaintiffs have had the added benefit of discovery. Plaintiffs here continue to allege that an employee obtained consent within the United States to provide substantial financial and material support to the AUC. These are the same allegations and evidence we explicitly considered and rejected in *Baloco II*.

> In that case, the plaintiffs alleged in their complaint that the employee, Jim Adkins, "obtained consent in Alabama from Garry Drummond [Drummond Company's President] and other Drummond officials to provide substantial support to the AUC." *Baloco II*, 767 F.3d at 1236 (internal quotation marks omitted). The court then considered the evidence in support of this assertion, which was derived from the discovery in *this* case. *See id.* at 1236, 1238 (noting that "[t]hese materials were obtained from discovery in a related case" and citing to the proceedings below). Specifically, *Baloco II* noted witness depositions and declarations stating, "Adkins frequently traveled to the United States"; "Adkins told [the witness] he would bring up the issue of collaboration with the AUC with Garry Drummond"; "subsequently, Drummond agreed to fund the AUC"; and "the murders ... were 'agreed to' by Garry Drummond." *Id.* at 1238.
>
> *Baloco II* held that, regardless of the veracity of the above allegations and admissibility of the evidence, this was "not enough ... to establish that, assuming [p]laintiffs' claims 'touch and concern the territory of the United States,' they do so with sufficient force to displace the presumption against extraterritorial application." *See id.* at 1238. Here, there are no distinguishable allegations or evidence of conduct in the United States "directed at" the extrajudicial killings and war crimes, and "mere consent" is not enough. *See id.* at 1236, 1238–39. Consequently, in this closely connected case, we must find that Plaintiffs' allegations regarding Defendants' domestic conduct do not meet the requisite factual predicate or act with the forcefulness envisioned by *Baloco II* to warrant displacement. *See id.* at 1238–39.

Id. at 598-600.

The allegations of the FAC are indistinguishable from the allegations in *Doe*. *Id.* In fact, the allegations are so similar on the jurisdictional issue that the Plaintiffs' opposition to the motion to dismiss in the District Court did nothing more than "incorporate by reference the entirety of their post-*Kiobel* briefing

submitted for consideration in [*Doe*]." Doc. 36 at 4.[14] The district court rejected plaintiffs' arguments in *Doe*, and that decision was affirmed by this Court. 782 F.3d at 601. The District Court rejected the same arguments in this case, and there is no reason this Court should come to a different conclusion than it did in *Doe*.

Plaintiffs nevertheless argue on appeal that the FAC establishes subject matter jurisdiction for their ATS claims because the allegations "support an inference . . . that the major decisions and funding for the Drummond scheme to support the AUC occurred in Alabama" and that "[t]hese acts of providing knowing and substantial support ***from Alabama*** would satisfy this Court's definition of aiding and abetting." App. Br. at 32-33.[15] The only factual allegations Plaintiffs cite in support of this argument relate to the purported

[14] Plaintiffs suggest that *Doe* examined only the "evidence." App. Br. at 32. As the *Doe* court made clear, it considered both the "evidence" ***and*** the "allegations" of the complaint. *See, e.g.*, *Doe*, 782 F.3d at 600 ("Consequently, in this closely connected case, we must find that Plaintiffs' ***allegations*** regarding Defendants' domestic conduct do not meet the requisite factual predicate or act with the forcefulness envisioned by *Baloco II* to warrant displacement.") (emphasis added). In fact, *Doe* noted that the district court's exclusion of the plaintiffs' evidence was "irrelevant given that, in *Baloco II*, we considered this same evidence, explicitly addressing these witnesses' testimony, and found that even 'assuming it is true and admissible, [it] is not enough' to permit jurisdiction." *Id.* at 599 n.33.

[15] Drummond notes that the Plaintiffs conclude not by requesting a reinstatement of their ATS claims, but rather by asking for jurisdictional discovery and another opportunity to amend their complaint. App. Br. at 38. In other words, Plaintiffs tacitly admit that the FAC fails to meet the *Kiobel* standard.

"approval" by Mr. Drummond of a "scheme to provide the AUC with substantial assistance" and his alleged "consent to Adkins to the AUC funding plan." *Id.* at 31-32. Specifically, Plaintiffs argue 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. . . . Plaintiffs' allegations were already sufficient to withstand a motion to dismiss.

Id. at 31-32.

Simply put, these allegations are identical to allegations that this Court held were insufficient in *Doe*:

> Plaintiffs here continue to allege that an employee obtained consent within the United States to provide substantial financial and material support to the AUC. These are the same allegations and evidence we explicitly considered and rejected in *Baloco II.*
>
> In that case, the plaintiffs alleged in their complaint that the employee, Jim Adkins, "obtained consent in Alabama from Garry Drummond [Drummond Company's President] and other Drummond officials to provide substantial support to the AUC." *Baloco II*, 767 F.3d at 1236 (internal quotation marks omitted). The court then considered the evidence in support of this assertion, which was derived from the discovery in *this* case. *See id.* at 1236, 1238 (noting that "[t]hese materials were obtained from discovery in a related case" and citing to the proceedings below). Specifically, *Baloco II* noted witness depositions and declarations stating, "Adkins frequently traveled to

> the United States"; "Adkins told [the witness] he would bring up the issue of collaboration with the AUC with Garry Drummond"; "subsequently, Drummond agreed to fund the AUC"; and "the murders ... were 'agreed to' by Garry Drummond." *Id.* at 1238.
>
> *Baloco II* held that, regardless of the veracity of the above allegations and admissibility of the evidence, this was "not enough ... to establish that, assuming [p]laintiffs' claims 'touch and concern the territory of the United States,' they do so with sufficient force to displace the presumption against extraterritorial application." *See id.* at 1238. Here, there are no distinguishable allegations or evidence of conduct in the United States "directed at" the extrajudicial killings and war crimes, and "mere consent" is not enough.

782 F.3d at 599; *see also id.* at 590 ("The claims of the plaintiffs in *Baloco II* and those of the Plaintiffs before us now are premised on similar allegations – that the defendants made decisions from within the United States to fund, aid and abet and otherwise support the perpetrators of extrajudicial killings in Colombia"). Accordingly, even if the FAC's categorically false allegations are assumed true, they are insufficient to displace the "presumption against extraterritoriality." *Id.* at 593.

* * *

In *Cardona*, *Baloco II*, and *Doe*, this Court made clear that allegations such as those in this case were not sufficient to establish jurisdiction under the ATS. The *Doe* plaintiffs argued that *Kiobel* did not bar their ATS claims because the defendants included U.S. corporations and a U.S. citizen, because alleged support of the AUC violated U.S. law, and because some of the conduct claimed to give

rise to secondary liability allegedly occurred in the United States. But this Court disagreed, holding that "Plaintiffs' allegations regarding Defendants' domestic conduct do not meet the requisite factual predicate" that would permit jurisdiction after *Kiobel*. 782 F.3d at 600. The same arguments were made and rejected in *Cardona*, where the allegations of domestic conduct were far more extensive and particularized than in this case.

Citing *Doe* and *Baloco II*, the District Court correctly found that the allegations of the FAC provide no basis to reach a different conclusion. Its dismissal of the ATS claims should be affirmed.

C. The District Court did not abuse its discretion by declining to allow the Plaintiffs to conduct "jurisdictional" discovery or amend their complaint for a second time.

At the outset, it must be noted that Plaintiffs *were* permitted to amend their Complaint shortly after the Supreme Court released *Kiobel*. *See* page 5 *supra*. Despite the guidance of *Kiobel*, and even with the benefit of plenary discovery in *Doe*, that amended complaint (the FAC) still fails to allege facts sufficient to establish subject matter jurisdiction over the ATS claims. The District Court acted well within its discretion in disallowing yet another amendment to the complaint or additional discovery to support such an amendment.

Moreover, Drummond mounted a "facial attack" on subject matter jurisdiction. "A 'facial attack' on the complaint 'require[s] the court merely to

look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion.'" *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007) (citations omitted). Where there is a facial attack to subject matter jurisdiction, the District Court need not decide any issues of disputed fact, and therefore is under no obligation to allow jurisdictional discovery. *Id.* ("[d]iscovery was not necessary" for a District Court to resolve a facial attack to subject matter jurisdiction).

In fact, because the FAC fails to establish a *prima facie* case of subject matter jurisdiction, *see* Section I-B *supra*, it would have been error for the District Court to allow jurisdictional discovery. *Butler v. Sukhoi Co.*, 579 F.3d 1307, 1314 (11th Cir. 2009) ("Inasmuch as the complaint was insufficient as a matter of law to establish a *prima facie* case that the district court had jurisdiction, the district court abused its discretion in allowing the case to proceed and granting discovery on the jurisdictional issue.") (citations omitted). Plaintiffs' contention that the District Court erred by refusing to allow "jurisdictional" discovery fails for this reason alone.[16]

[16] Drummond notes that Plaintiffs do not cite (and Drummond was unable to locate) a single reported case construing ATS discovery of the type Plaintiffs request to be "jurisdictional discovery" as that term is used in the case law Plaintiffs *did* cite. The ATS is a jurisdictional statute only, and therefore taking

Furthermore, additional discovery would be futile. The allegations of the FAC are indistinguishable from the allegations of the operative complaint in *Doe*, which were "nearly identical" to those in *Baloco II*. 782 F.3d at 599. As a result, there has already been extensive discovery on these claims, yet Plaintiffs could not allege proper subject-matter jurisdiction in the FAC. Indeed, in refusing to remand *Baloco II* for jurisdictional discovery, this Court emphasized this point:

> While there has been no discovery in the instant case, there has been a very large amount of discovery over a period of more than ten years in preceding related cases. These cases include not only *In re Juan Aquas Romero v. Drummond Co., Inc.*, No. CV–03–BE–575–W (N.D.Ala.) (hereinafter "*Drummond I* "), which is a near mirror image of the instant case, but also the *Balcero* case which is highly similar. ***Even with all of this discovery, Plaintiffs have not found evidence of conduct actionable under the ATS because it is focused in the United States***.
>
> We decline to remand this case so that the district court may consider Plaintiffs' request to amend their complaint. The new evidence described in the briefs which have been filed recently provide sufficient information upon which to base our ruling. ***Further 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).

Plaintiffs' argument to its logical conclusion would mean any ATS plaintiff is entitled to full discovery on the merits of his ATS claims before they can be dismissed for lack of jurisdiction. No court has come to this conclusion.

In *Doe*, Colombian plaintiffs represented by Mr. Collingsworth conducted extensive discovery on allegations that are virtually identical to those in the instant matter. Despite the production of hundreds of thousands of documents by Drummond in response to 264 separate document requests covering a period of eleven years (1996-2006), there was not a single document that even remotely supports the Plaintiffs' theories. During the course of *Romero* and *Doe*, Mr. Collingsworth deposed approximately 20 Drummond executives and employees – most of them twice. Every witness with personal knowledge squarely denied any approval by the company of payments to paramilitaries. In affirming the dismissal of the ATS claims in *Doe*, this Court held that

> [t]he circumstances underlying the ATS claims in this case – including the Defendants, paramilitary perpetrators, general factual background, and allegations of Defendants' involvement – are nearly identical to those in *Baloco II*, ***even though these Plaintiffs have had the added benefit of discovery***. Plaintiffs here continue to allege that an employee obtained consent within the United States to provide substantial financial and material support to the AUC. These are the same allegations and evidence we explicitly considered and rejected in *Baloco II*.

782 F.3d at 599 (emphasis added). *See also id.* at 599 n.33 ("Plaintiffs have pointed us to no evidence of U.S. conduct—admissible or otherwise—that is additional to or distinguishable from the evidence considered and rejected by this court in *Baloco II*.").

In light of these clear holdings, and the fact that Plaintiffs' counsel has been conducting discovery on the allegations of the FAC for well over a decade, the District Court did not abuse its discretion in refusing to allow the Plaintiffs the opportunity to conduct jurisdictional discovery or amend their complaint for a second time. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 593 n.8 (9th Cir. 2014), *cert. denied sub nom. Mujica v. Occidental Petroleum Corp.*, 136 S. Ct. 690 (2015) (affirming the dismissal of ATS claims while citing *Baloco II* and holding that "[j]udicial economy and common sense both counsel that we ought not prolong this case still further by remanding to the district court for a futility analysis when it is obvious to us that leave to amend is unwarranted"); *RMS Titanic, Inc. v. Kingsmen Creatives, Ltd.*, 579 F. App'x 779, 790-91 (11th Cir. 2014) (affirming the denial of jurisdictional discovery, explaining "[w]hile Premier did identify certain areas in which it wanted more discovery—namely, the dealings between AES and Kingsmen—it had already received information from AES, and Kingsmen itself admitted that it had given AES the specifications it received from Zaller in connection with the iceberg transaction. More importantly, there is no indication that the receipt of additional information about this one transaction would demonstrate the existence of jurisdiction.").

In light of the extensive history of these cases against Drummond—and the lack of evidence of jurisdiction uncovered by discovery in the past—the District Court did not abuse its discretion by refusing to allow additional discovery.

II. THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO STATE A CLAIM UNDER ANY THEORY OF LIABILITY UNDER THE TVPA.

Plaintiffs contend that the District Court erred in dismissing the TVPA claims against Mr. Drummond and Mr. Tracy for three reasons. First, they argue that the District Court was required to provide "specific analysis or written findings" in support of its ruling.[17] Second, they contend that *Doe* and *Baloco II* have no preclusive effect here, and therefore the District Court improperly relied on them. Third, they argue that the allegations of the FAC state a claim under the TVPA against Mr. Drummond and Mr. Tracy through either an aiding or abetting or command responsibility theory of liability. Each of these arguments should be rejected.

A. The District Court Correctly Relied on This Court's Decision in *Doe* to Dismiss the TVPA Claims.

Plaintiffs argue that the district court erred by citing this Court's *Doe* and *Baloco II* decisions in support of its dismissal of the claims against Mr. Drummond and Mr. Tracy because those decisions have no preclusive effect. App. Br. at 23 ("there can be no issue or claim preclusion applied against these Plaintiffs"); *see*

[17] As explained above in Section I-A, this argument is unavailing.

generally id. at 23-26. This argument is a straw man. Mr. Drummond and Mr. Tracy did not argue below that *Doe* or *Baloco II* implicated issue or claim preclusion, Doc. 52 at 3-8, and the District Court did not hold that either preclusion theory applied.[18]

The District Court correctly cited and relied upon the *Doe* decision in its order dismissing the complaint against Mr. Drummond and Mr. Tracy because it was ***controlling precedent***. In their briefing below, Plaintiffs primarily relied on two theories of secondary liability against Mr. Drummond and Mr. Tracy: aiding and abetting and command responsibility. *See generally* Doc. 35. In response, Defendants argued in the District Court that (1) *Doe* "squarely rejects plaintiffs' reliance on the doctrine of command responsibility as a theory of liability [against] Garry Drummond and Mike Tracy" under the TVPA, Doc. 52 at 3, and (2) the FAC's allegations "do not satisfy [*Doe*'s] 'active participation' requirement" for aiding and abetting, *id*. at 4.

The issue before the District Court, then, was whether the Plaintiffs alleged facts sufficient to state a claim under either theory. Because the *Doe* decision defined the elements of these secondary liability theories under the TVPA, the District Court properly applied its holding to evaluate Plaintiffs' claims. The

[18] Drummond reserves the right to raise issue and/or claim preclusion should this Court reverse the dismissal of any of the claims in this case.

District Court's citation to *Doe* is nothing more than evidence of the District Court's appropriate deference to binding precedent. This deference, of course, is not error. *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004) ("A circuit court's decision binds the district courts sitting within its jurisdiction").

In *Doe*, this Court established that aiding and abetting a TVPA violation requires "active participation," which means that the "defendants gave knowing substantial assistance to the person or persons who committed the wrongful act." 782 F.3d at 608. As explained below, the record supports the District Court's dismissal under this theory of liability, because the allegations in the FAC do not establish that Mr. Drummond or Mr. Tracy gave any "knowing substantial assistance" to the persons alleged to have murdered Plaintiffs' decedents.

Doe also defined the elements of the command responsibility doctrine for a TVPA claim. This Court held that a civilian corporate officer "could *feasibly* be held liable under the doctrine" only if "the plaintiffs demonstrated a superior-subordinate relationship between the civilian and the perpetrator." *Id*. at 610.[19] In *Doe*, this Court concluded that the plaintiffs were unable to demonstrate that two of Drummond's executives had the requisite control over the persons who killed the plaintiffs' decedents. *Id*. at 610 n.48 ("In these circumstances, the command

[19] Drummond notes that Plaintiffs have not cited a single reported decision in which a U.S. court imposed liability on managers of a private company based on the command responsibility doctrine.

responsibility doctrine could not sustain Plaintiffs' claims. Specifically, Plaintiffs failed to produce any evidence that plausibly supports the first element of the doctrine, the superior-subordinate relationship, which requires that the defendants have 'effective control' over the perpetrators."). As explained below, the District Court rightly concluded that the allegations in the FAC against Mr. Drummond and Mr. Tracy did not meet this exacting standard. As a result, the District Court did not err by citing and relying upon *Doe* to dismiss the TVPA claims against these two individual defendants.

i. The FAC Does Not Offer Any Factual Allegations that Mr. Drummond or Mr. Tracy Had "Effective Control" Over the AUC Under the Command Responsibility Doctrine.

The *Doe* opinion conclusively demonstrates why Plaintiffs' reliance on the doctrine of command responsibility as a theory of TVPA liability against Mr. Drummond and Mr. Tracy is misplaced. Although this Court did not "foreclose the possibility" that this doctrine might apply to officers of a private corporation, it expressly held that the doctrine requires that a defendant have "'effective control' over the perpetrators." 782 F.3d at 610 n.48. Thus, the FAC must allege facts demonstrating that these two corporate officers had "effective control" over the AUC members who allegedly murdered Plaintiffs' decedents.

On appeal, Plaintiffs argue that Mr. Drummond had "command responsibility over the key direct actors in Drummond's relationship with the

AUC," citing paragraph 64 of the FAC. App. Br. at 25. They also argue that "Drummond managers under Mr. Drummond had sufficient control to direct and re-prioritize the violent activities of the AUC units Drummond supported," citing paragraphs 105-107 of the FAC. *Id*. Plaintiffs repeat these arguments as to Mr. Tracy. *Id*. at 28 (also citing paragraphs 64 and 105-107). These arguments fail for two independently sufficient reasons.

First, Plaintiffs do not allege facts showing that these Drummond executives had "'effective control' over the perpetrators" of the murders at issue here. *Doe*, 782 F.3d at 610 n.48. Importantly, the alleged "perpetrators" are the AUC members who committed these murders, not anyone at Drummond. Doc. 20 at ¶ 19 ("All of the decedents described herein are among the hundreds, or even thousands, of persons murdered by the AUC's Northern Bloc[]"). To state a claim, Plaintiffs must allege that Mr. Drummond or Mr. Tracy had "effective control" over the AUC Northern Bloc members who killed Plaintiffs' family members.

Paragraph 64 of the FAC, however, alleges only that Mr. Drummond and Mr. Tracy had control over certain Drummond employees, and not over any AUC members. Even assuming this allegation were true, it does not properly state a claim under *Doe*'s definition of the command responsibility doctrine.

Indeed, the type of control alleged in the FAC falls well short of the type of effective control required by other cases applying this doctrine. For example, in

Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002), this Court refused to reverse the jury's verdict against the El Salvadoran Director of the National Guard and Minister of Defense under the command responsibility doctrine. The plaintiffs there alleged that these two defendants had control over the Salvadoran National Guard members responsible for the abduction, torture and murder of four people. *Id*. at 1286. The *Ford* court held—consistent with *Doe*—that plaintiffs must prove "the existence of a superior-subordinate relationship between the commander *and the perpetrator of the crime*." *Id*. at 1288 (emphasis added); *see also Xuncax v. Gramajo*, 886 F. Supp. 162, 172-73 (D. Mass. 1995) (concluding that "plaintiffs have convincingly demonstrated that, at a minimum, Gramajo was aware of and supported widespread acts of brutality *committed by personnel under his command* resulting in thousands of civilian deaths," where Gramajo was former Vice Chief of Staff and director of Army General Staff, army commander and Minister of Defense) (emphasis added).

Doe v. Qui, 349 F. Supp. 2d 1258 (N.D. Cal. 2004), is also instructive as to the level of "effective control" required for this theory of liability. *Id.* at 1331 ("The Liu Plaintiffs clearly allege a superior-subordinate relationship between Defendant Liu and the police and other security forces which allegedly committed the human rights violations claimed herein. . . . According to the Liu Complaint, the Beijing police and jail security forces acted under [the defendant Mayor's]

management, command, and supervisory authority."). Nowhere does the FAC allege that Mr. Drummond or Mr. Tracy had any similar, direct control over the AUC members who committed these murders. Simply alleging that these two Drummond executives had control over Drummond employees who allegedly provided financial assistance to the AUC is not sufficient under *Doe* and *Ford.*

Second, the allegations in Paragraphs 105-107 of the FAC do not state a claim against Mr. Drummond or Mr. Tracy. These paragraphs merely restate the false allegations of two paramilitaries, El Tigre and Samario[20], about Drummond's supposed financial assistance to the AUC. The paragraphs nowhere mention Mr. Drummond or Mr. Tracy by name or title or suggest that they personally had any control over AUC members or any decision-making authority at all with respect to the activities of the AUC.

For these reasons, this Court should affirm the District Court's dismissal of the TVPA claims against Mr. Drummond and Mr. Tracy under the command responsibility doctrine.

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[20] These allegations are premised on declarations obtained by Mr. Collingsworth from Samario and El Tigre. These inadmissible statements are irreconcilable with their prior sworn testimony to Colombian authorities in which they denied any knowledge of Drummond's involvement with the AUC. Moreover, as noted above in footnote 6, it has also come to light that Mr. Collingsworth and Conrad & Scherer, LLP paid Samario and El Tigre in excess of $100,000. *See* 11th Cir. Appeal No. 16-11090, Appellant's Appendix, Vol. III, Doc. 417 at 24-26.

ii. The FAC Does Not Offer Any Factual Allegations that Mr. Drummond or Mr. Tracy "Aided and Abetted" any TVPA Violation as Defined by *Doe*.

Plaintiffs' second argument is that Mr. Drummond and Mr. Tracy "provided 'knowing substantial assistance'" to the AUC for these killings, under "the [*Doe*] Court's definition of aiding and abetting." App. Br. at 25. The allegations of the FAC fail to state a claim under this secondary theory of liability because (1) they are conclusory and therefore not entitled to be assumed true, (2) they do not satisfy the Eleventh Circuit's "active participation" requirement, and (3) under the circumstances of this case, they fail to satisfy the "plausibility" test established by Supreme Court precedent.

The allegations upon which Plaintiffs rely are wholly conclusory, rather than factual. For example, as to Mr. Drummond, the FAC alleges that "Defendant Garry Drummond approved plans to support and fund the AUC and gave the approval to Drummond's Security Advisor, Adkins." Doc. 20 at ¶ 5; *see also id*. ¶ 57 ("While residing in Alabama, [Mr. Drummond] personally approved the plan proposed by Adkins and others to have Drummond provide material support to the AUC so that the AUC would drive the FARC and other guerilla groups out of the areas of Drummond's operations in Colombia."); *id*. ¶ 91 ("When Adkins brought the idea, Garry Drummond agreed to make payments to the AUC.").

The two paragraphs with allegations as to Mr. Tracy's supposed "active participation" are no more factual in nature. *See id.* at ¶ 59 ("Defendant Tracy was briefed by Adkins about Drummond contractors who were paying the AUC . . . . Tracy approved and ratified the contractors' payments to the AUC"); *id.* at ¶ 120 ("Defendant Mike Tracy approved and ratified Drummond's decision to engage the AUC.").

These conclusory allegations—completely devoid of any facts whatsoever—are insufficient under the pleading standards established by *Twombly* and *Iqbal*. In fact, they are virtually identical to the allegations at issue in *Iqbal*, which the Supreme Court found were "conclusory and not entitled to be assumed true." 556 U.S. at 680-81, 129 S. Ct. at 1951 (addressing allegations that defendant Ashcroft "knew of, condoned, and willfully and maliciously agreed" to harsh confinement of the plaintiff based on his religion, race, and national origin); *see also id.* at 678, 129 S. Ct. at 1949 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' . . . Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'") (citations omitted).

This Court has rigorously applied these standards. In *Mamani v. Berzain*, for example, the complaint alleged that the defendants "order[ed] Bolivian security forces . . . to attack and kill scores of unarmed civilians," "exercised command

responsibility over, conspired with, ratified, and/or aided and abetted subordinates in the Armed Forces . . . to commit acts of extrajudicial killing, crimes against humanity, and the other wrongful acts," and "met with military leaders, [and] other ministers in the Lozada government to plan widespread attacks involving the use of high-caliber weapons against protesters." 654 F.3d 1148, 1153 (11th Cir. 2011). The complaint also alleged that one of the individual defendants "directed military personnel . . . and, at times, accompanied military personnel in a helicopter from which shots were fired and directed them where to fire their weapons." *Id.* at 1154. This Court found these allegations lacking "adequate factual support of more specific acts by these defendants" which would support a plausible claim that the individual defendants were responsible for extrajudicial killings as that term is defined by the TVPA. *Id.*[21] *See also American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1293-94 (11th Cir. 2010) ("*Iqbal* instructs us that our first task is to eliminate any allegations in Plaintiffs' complaint that are merely legal conclusions. Plaintiffs offer conclusory statements such as '[d]efendants have not undertaken

[21] Although this Court in *Mamani* was dealing with claims under the ATS, rather than the TVPA, the crux of the Court's holding was that the allegations did not plausibly allege "extrajudicial killings" as defined by the TVPA, in that the allegations were insufficient to show "that plaintiffs' decedents' deaths were 'deliberate' in the sense of being undertaken with studied consideration and purpose." *Id.* at 1154-55. Accordingly, this Court's *Mamani* decision is squarely applicable to Plaintiffs' claims here, premised on alleged extrajudicial killings as defined by the TVPA.

the above practices and activities in isolation, but instead have done so as part of a common scheme and conspiracy,' and '[e]ach Defendant and member of the conspiracy, with knowledge and intent, agreed to the overall objective of the conspiracy, agreed to commit acts of fraud to relieve Class Plaintiffs of their rightful compensation, and actually committed such acts.'") (citations omitted).[22]

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[22] A Florida district court recently addressed this issue. *See In re Chiquita Brands International, Inc.*, No. 08-MD-01916-KAM, 2016 WL 3247913 (S.D. Fla. June 1, 2016). The *Chiquita* court refused to dismiss TVPA claims against some corporate executives under an aiding and abetting theory because the complaint alleged detailed facts showing that each individual executive had direct and specific involvement in the payments. *Id.* at *14. In contrast, the *Chiquita* court dismissed the TVPA claims against two of the corporate executive defendants that were premised on allegations similar to those against Mr. Drummond and Mr. Tracy here, which the court found to be wholly conclusory:

> As to Individual Defendants Warshaw and Linder, the amended complaints contain no allegations from which their alleged knowledge and approval of AUC payments, or concealment of payments, may reasonably be inferred. The conclusory allegations that these Defendants approved the payments, with knowledge of AUC's status as a violent terrorist organization are entirely lacking in any foundational support—for example, there is no information suggesting their presence at meetings at which the subject was discussed or participation in activity specifically designed to continue or conceal the payments from which such knowledge might be inferred. The conclusory allegations of knowledge and approval are insufficient, under *Iqbal*, to plausibly establish the requisite "*mens rea*" element or "*actus reus*" element of aiding and abetting liability. *Id*. at 28.

Id.; *see also id.* at *7 ("Plaintiffs allege that Warshaw [Chiquita's former CEO, CFO and COO] knew about payments made to convivirs by at least 1997, and learned of the connection between convivirs and the AUC by no later than 2000. Warshaw allegedly approved the AUC payments."). The allegations against Mr. Drummond and Mr. Tracy, like those against Mr. Warshaw and Mr. Linder, are

In short, nothing in the allegations specific to Mr. Drummond or Mr. Tracy supplies any more definite statement of what either of them is claimed to have done than did the allegations in *Twombly*, *Iqbal*, or *Mamani*.

Moreover, even if these conclusory allegations were accepted as true, they fall well short of *Doe*'s requirement that Plaintiffs allege facts that Mr. Drummond and Mr. Tracy "actively participated" in these killings by providing "knowing substantial assistance" to the AUC members who killed the innocent civilians at issue. 782 F.3d at 604. General allegations that Mr. Drummond or Mr. Tracy approved proposals by subordinates to provide money to the AUC to "drive the FARC and other guerilla groups out of the areas of Drummond's operations," Doc. 20 at ¶ 57, or "approved and ratified" payments by contractors to the AUC, *id.* at ¶ 59, do not meet *Doe*'s standard. The FAC alleges no facts suggesting that Mr. Drummond or Mr. Tracy personally knew that Drummond's alleged financial assistance would "substantially assist" the AUC's killings. *See Baloco II*, 767 F.3d at 1236 ("Moreover, mere consent to support the AUC does not necessarily suggest any conduct in the United States directed at the murders [at issue], nor is it

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wholly conclusory. The FAC contains no specific factual averments of Mr. Drummond or Mr. Tracy's personal participation in the payments at issue, but rather relies on general allegations of "knowledge" and "approval" unsupported by foundational facts which would make these allegations plausible.

indicative of an express quid pro quo understanding that Drummond would finance AUC operations in exchange for the AUC carrying out the killings.").

The conclusory allegations here stand in stark contrast to the type of specific evidence of knowing substantial assistance held by this Court to support a TVPA aiding and abetting claim. For example, in *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), this Court concluded that the evidence supported the jury's verdict in favor of the family of a Chilean economist who had been tortured and killed by the Chilean military during a *coup d'état* headed by General Arellano:

> [Defendant] Fernández's substantial assistance in Cabello's killing, torture, or mistreatment is adequately supported by the evidence. The jury could reasonably conclude that Fernández was indirectly liable based on Fernández's admission that he served as [General] Arellano's bodyguard. According to the deposition of Enrique Vidal Aller ("Vidal"), an aide to the garrison's commander, Fernández bragged that he was Arellano's right hand man and that his spiked weapon would be used to "caress the little pigeons," which Vidal understood as a threat to the prisoners. Vidal also saw Fernández enter the office in which prisoner's files were kept. Dr. Ivan Murua Chevesich ("Murua"), a prisoner who was being interrogated in that office, testified that he saw Fernández with Arellano when Arellano selected files of prisoners and said that they would be "eliminated." Murua also testified that those files were marked with red circles. Another witness saw Fernández himself selecting and reviewing prisoners' files.

Id. at 1158-59.[23]

[23] *Doe* cited almost exclusively to *Cabello* when discussing the standard for aiding and abetting liability, describing it as "form[ing] the basis for aiding and abetting liability in this circuit." 782 F.3d at 608-09.

Nowhere does the FAC allege the kind of "active participation" affirmed in *Cabello*. Even if the conclusory allegations of Mr. Drummond and Mr. Tracy's purported knowledge and approval of payments to the AUC by Drummond were true (and they most assuredly are not), these general allegations do not rise to the close relationship between the defendant's acts and the wrongdoing perpetrated that was required in *Cabello*. No allegation even remotely links Mr. Drummond or Mr. Tracy to the killings here the way the *Cabello* court requires. Indeed, the allegations against Mr. Drummond and Mr. Tracy do not even approach the level of personal participation alleged against the individual defendants in *Mamani*, which this Court held were still insufficient to establish aiding and abetting liability for extrajudicial killings as defined by the TVPA.

If adopted, Plaintiffs' theory would vastly expand the doctrine of aiding and abetting, making corporate executives liable for *any* wrongdoing committed by their subordinates in the organization. No precedent in this—or any other court—supports such an expansion.[24]

[24] In fact, such an expansion contradicts the well-settled doctrine of *respondeat superior*, which imposes liability on an employer—not an employer's corporate officers—for the wrongdoing of an employee. *See Meyer v. Holley*, 537 U.S. 280, 285-86, 123 S. Ct. 824, 829 (2003); *Ware v. Timmons*, 954 So. 2d 545, 555 (Ala. 2006).

For these reasons, the Court should affirm the District Court's dismissal of the TVPA claims against Mr. Drummond and Mr. Tracy under an aiding and abetting theory.

III. PLAINTIFFS' COLOMBIAN WRONGFUL DEATH CLAIMS ARE TIME-BARRED.

Plaintiffs argue that the District Court was required to exercise diversity jurisdiction over their Colombian law wrongful death claims and therefore abused its discretion by dismissing them. *See* App. Br. at 13-19. That argument is a straw man. As explained *infra*, these claims were properly dismissed because they were time-barred. Plaintiffs' contention that the District Court failed to exercise diversity jurisdiction over these claims is therefore a *non-sequitur*, and does not serve as grounds for reversal.

A. The District Court did not abuse its discretion in failing to state findings or conclusions underlying its dismissal the Colombian law wrongful death claims.

In *Baloco II* and *Doe*, the plaintiffs' Colombian wrongful death claims were dismissed by the District Court on the exercise of its authority pursuant 28 U.S.C. § 1367. In this case, however, Drummond argued that the Colombian wrongful death claims are barred by the statute of limitations. The parties extensively briefed this issue below, Doc. 33 at 50-54; Doc. 36 at 41-47; Doc. 37 at 14-17; *see also* Doc. 33-1 & Doc. 36-1, including in response to the District Court's show cause order that precipitated the dismissal of these claims. *See* Doc. 52 at 8-9;

Doc. 53 at 2-3. Plaintiffs nevertheless contend that the District Court abused its discretion by failing to set forth its reasoning for dismissing these claims.

First, the District Court was not required to make specific findings or explain its reasons for dismissing these claims. *See* Section I-A, *supra*. Plaintiffs' argument to the contrary is without merit.

Moreover, under the circumstances presented here, this Court can infer that the District Court adopted the reasoning and arguments set forth by Drummond related to the dismissal of these claims. *See Malloy v. WM Specialty Mortgage LLC*, 512 F.3d 23, 27 (1st Cir. 2008) ("[T]he court's implicit reasons for choosing dismissal with prejudice can be inferred from defendants' arguments in opposition to plaintiffs' motion to vacate, which the district court implicitly adopted."); *Smith v. Insley's Inc.*, 499 F.3d 875, 879 (8th Cir. 2007) ("Our review of the district court's electronic document report reflects that these arguments were made to the district court, but the district court did not reference them in its order granting summary judgment on the merits, implicitly rejecting these arguments."). *See also Arizona v. Washington*, 434 U.S. 497, 517, 98 S. Ct. 824, 836 (1978) ("The basis for the trial judge's mistrial order is adequately disclosed by the record, which includes the extensive argument of counsel prior to the judge's ruling.").

This principle is consistent with the settled rule that "'[t]rial judges are presumed to know the law and to apply it in making their decisions'", as well as

the assumption that "all courts base rulings upon a review of the entire record." *United States v. $242,484.00*, 389 F.3d 1149, 1155 (11th Cir. 2004) (citations omitted).

Finally, even if Plaintiffs' contention that the District Court wrongly relied on *Doe* and *Baloco II* to dismiss their Colombian law wrongful death claims is taken at face value, the record nevertheless reflects that these claims are time barred, *see* Section III-B, *infra*, and therefore must be dismissed. Indeed, "the rule is settled 'that if the decision below is correct, it ***must*** be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason,'" *In re Mroz*, 65 F.3d at 1574 (citations omitted) (emphasis added), and that affirmance may be based on any ground supported by the record. *Chitwood*, 676 F.3d at 975.

For all of these reasons, this Court should reject Plaintiffs' invitation to reverse the District Court for its purported failure to explain the basis for the dismissal of the Colombian wrongful death claims.

B. Plaintiffs' Colombian wrongful death claims are time-barred.

Plaintiffs argue that dismissal of these claims was improper because they "rais[ed] the factually-intensive issue of equitable tolling . . . [and] also asserted . . . fraudulent concealment." App. Br. at 20. Plaintiffs also contend that there is a dispute "over the choice of law issue of whether the statute of limitations of Colombia or Alabama applied", *id.*, and therefore dismissal was inappropriate.

i. The two-year limitations period under Alabama law applies to the Plaintiffs' wrongful death claims.

The statute of limitations applicable to Plaintiffs' wrongful death claims is the two-year limitations period covering unspecified torts under Alabama law. *See* Ala. Code § 6-2-38(*l*).[25] There is no basis to apply the ten-year statute of limitations under Colombian law that is applicable to civil claims generally, including wrongful death. Because Plaintiffs' wrongful death claims were filed *six to sixteen* years after the alleged wrongful conduct at issue, those claims are time-barred under the Alabama two-year statute of limitations.

The FAC alleges that the Court has diversity jurisdiction over the wrongful death claims pursuant to 28 U.S.C. § 1332(a)(2). Doc. 20 at ¶ 11. "A federal court sitting in diversity applies the choice of law rules of the state in which it sits." *Murphy v. McGriff Transp., Inc.*, No. 2:11-cv-02754-RDP, 2012 WL 3542296, *1 (N.D. Ala. Aug. 15, 2012) (citing *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020 (1941)). In *Murphy*, a diversity action, the court considered whether the one-year Tennessee statute of limitations or the two-year Alabama statute of limitations applied to a wrongful death claim based on a trucking accident in Tennessee. 2012 WL 3542296, *1. The Court noted that,

[25] The statute of limitations for unspecified torts applies because the statute of limitations specific to wrongful death claims (Ala. Code § 6-2-38(a)), applies only to wrongful death claims under Alabama law. *See Thomas v. FMC Corp.*, 610 F. Supp. 912, 914 (M.D. Ala. 1985).

"[i]n Alabama, the traditional choice of law rule of *lex loci delicti* governs tort causes of action and requires that the substantive law of the place where the tort occurred must be employed, while procedural law of the forum state is to be applied." *Id.* (citing *Alabama Great So. R.R. v. Carroll*, 11 So. 803 (Ala. 1892)); *see also Baloco v. Drummond Co., Inc.*, 640 F.3d 1338, 1349 n.12 (11th Cir. 2011); *Bodnar v. Piper Aircraft Corp.*, 392 So. 2d 1161, 1163 (Ala. 1980).

Here, although the Court may apply the substantive law of Colombia, it must apply the procedural rules of Alabama. *Murphy*, 2012 WL 3542296, *1. As stated in *Murphy*, "the question becomes how Alabama regards [Colombia's] particular statute of limitations—*i.e.*, is it procedural or substantive." *Id.* That analysis begins with the settled rule that "[i]t is generally recognized in Alabama that statutes of limitations are procedural." *Id.*; *see also Randolph v. Tennessee Valley Authority*, 792 F. Supp. 1221, 1222 (N.D. Ala. 1992) (same). As stated by the Alabama Supreme Court:

> The general rule, long accepted by most of the courts of this country for determining the statute of limitations to be applied in such cases as the Mullins case and the case at bar is to the effect that where a wrongful death occurs outside of the state in which the action is brought, the statute of limitations of the state where the action is brought controls unless the homicide or wrongful death statute where the accident occurred has a built-in statute of limitations.

Battles v. Pierson Chevrolet, Inc., 274 So. 2d 281, 285 (Ala. 1973) (collecting cases).

Alabama courts recognize limited exceptions to the rule that a statute of limitations is procedural, but those exceptions do not apply here. First, an exception applies where the tort occurred in a jurisdiction that has a so-called "built-in" statute of limitations—*i.e.*, the statute of limitations is part of the statute creating the cause of action. *Id.*; *see also Thomas*, 610 F. Supp. at 915 ("[T]he Alabama Supreme Court has consistently hewn to the rule that, to be considered substantive, the foreign limitation statute must be so inextricably bound up in the statute creating the right that it is deemed a portion of the substantive right itself.").

Second, the foreign statute of limitations may apply if "the foreign state has a 'public policy' against allowing a plaintiff to bring suit after a certain period of time has elapsed," in which case "the limitations period of the foreign state is considered to be substantive rather than procedural." *Murphy*, 2012 WL 3542296, at *2 (citing *Sanders v. Liberty Nat'l Life Ins. Co.*, 443 So. 2d 909, 912 (Ala. 1983)).

To the extent Plaintiffs raise either of these arguments on reply, they should be rejected.

The "Built In" Exception

The Colombian statute of limitations is not "built-in" to the Colombian statute creating the cause of action for wrongful death. Indeed, Plaintiffs did not dispute that the Colombian statute that permits a civil claim for wrongful death,

Article 2341 of the Colombian Civil Code, does not contain any statute of limitations. *See* Doc. 33-1 (Linares Cantillo Decl.) at ¶¶ 5-6; Doc. 36 at 43 (acknowledging that "Colombia's statute of limitations provisions are defined in a different part of the Civil Code from the provision creating a wrongful death action").[26] Rather, the statute of limitations applicable to wrongful death claims under Colombian law is the *general* statute of limitations that is applicable to *any* ordinary civil claim, including both tort and contract, under Colombian law, and it is in no way specific to claims for wrongful death. *Id.* at ¶ 7.

Accordingly, it was undisputed that Article 2536 does not specifically address wrongful death claims, let alone contain "express language to the effect that it is to be construed as part of the substantive right itself." *Thomas*, 610 F. Supp. at 916; *id.* at 915 ("Alabama law requires that a limitations statute *by its own terms* qualify a substantive right to be considered substantive law."). Thus, the applicable Colombian statute of limitations is generic and is plainly not "so inextricably bound up in the statute creating the right that it is deemed a portion of the substantive right itself." *Id.* In other words, there is no "express language to the effect that it is to be construed as part of the substantive right itself." *Id.* at 916.

[26] The testimony of Mr. Linares Cantillo was properly before the District Court under Federal Rule of Civil Procedure 44.1, which permits courts, in determining relevant foreign law, to "consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *See also Baloco*, 640 F.3d at 1349 n.13.

Because there is no such language in the Colombian statute of limitations, it is clearly procedural under Alabama choice of law principles.

As a result, the general choice-of-law rule in Alabama—*i.e.*, that statutes of limitation are procedural—applies in this case, and mandates that the two-year statute of limitations under Alabama law applies to Plaintiffs' wrongful death claims. *See Battles* and *Thomas*, *supra*.

The "Public Policy" Exception

Any belated argument by Plaintiffs on reply that the "public policy" exception applies should also be rejected. Plaintiffs never identified a purported public policy concerning any limitations period applicable to wrongful death claims under Colombian law. That is because no such policy exists. Plaintiffs' entire argument below – that the purpose of the generic Colombian statute of limitations is a matter of "public policy" – simply reflects the purpose of *any* statute of limitations: to maintain certainty and order by requiring claims to be brought within a specified time. *See* Doc. 36 at 45 ("the reason why statutes of limitations exist is the necessity of certainty, clarity and security in legal relations that necessarily contribute to social order and peace, since a right that is not exercised timely undermines the public order") (citation omitted). Such an argument does not satisfy the "public policy" exception:

> If Alabama courts were to regard the general statutes of limitations of sister states as matters of public policy such that the courts of Alabama should treat those general limitations periods as substantive rather than procedural law, then the exception would quickly swallow the general rule that "most statutes of limitation are deemed procedural rather than substantive" and that "Alabama courts will only apply another state's statute of limitations when it is demonstrated that 'the limitation is so inextricably bound up in the statute creating the right that it is deemed a portion of the substantive right itself.'" *Etheredge*, 632 So. 2d at 1326, and *Sanders*, 443 So. 2d at 912. The Court does not believe that the Alabama Supreme Court intended such a result when it mentioned public policy in the *Bodnar* decision.

Reece v. Intuitive Surgical, Inc., 63 F. Supp. 3d 1337, 1345 (N.D. Ala. 2014).[27]

Furthermore, Plaintiffs have not identified any specific pronouncement by either the Colombian legislature or Colombian courts providing that the statute of limitations applicable to wrongful death claims constitutes a "public policy." *See Randolph*, 792 F. Supp. at 1223 ("[T]he court will not find, with no help from the Tennessee Supreme Court, that the Tennessee one-year statute of limitations [applicable to negligence actions] is such an important or crucial 'public policy' of Tennessee as to be elevated to the status of the 'substantive' law of that state to the north of us. The pertinent Tennessee statute is no more and no less than a general limitations statute applicable to all actions arising out of 'injury to the person'.

[27] Plaintiffs argued below that Colombia includes the generic statute of limitations in its civil rather than procedural code, but this is not determinative. Plaintiffs' argument would mean that such a classification would trump Alabama law as to all claims of any type occurring in Colombia, and falls well short of a statement of "public policy" by the foreign state that is required by Alabama law.

Accordingly, this court will tentatively treat the Tennessee limitations period as procedural"). *Cf. Murphy*, 2012 WL 3542296, at *2 (finding the Tennessee wrongful death statute of limitations to be substantive because "[i]n *McDaniel v. Mulvihill*, 263 S.W.2d 759, 762 (Tenn. 1953), the Tennessee Supreme Court stated that 'the Tennessee General Assembly has declared its public policy to be that an action for such a death be instituted within one year.'"). In the absence of any such specific pronouncement, the general rule applies and provides that Alabama's two-year statute of limitations controls.

Plaintiffs argued below that *Bodnar v. Piper Aircraft Corp.*, 392 So. 2d 1161 (Ala. 1980) stands for the proposition that public policy can support applying Colombia's much longer statute of limitations. Doc. 36 at 46. It is true that, in *Bodnar*, the Alabama court applied the Georgia two-year limitations period for wrongful death instead of Alabama's one-year limitations period because the Supreme Court of Georgia had previously found that the two-year period was Georgia's "public policy." 392 So. 2d at 1163. But the Georgia case that did so—*Taylor v. Murray*, 204 S.E.2d 747 (Ga. 1974)—fully supports applying the *shorter* limitations period in situations like this case. In *Taylor*, a wrongful death action, the court considered whether to apply South Carolina's six-year limitations period or Georgia's two-year period. 204 S.E.2d at 748. Finding that the shorter, two-year limitations period was Georgia's "public policy," the court explained that the

limitations period "bars the institution of such litigation after a lapse of this period and *the period can not be extended by legislatures of foreign states*." *Id.* at 749 (emphasis added). Thus, the Georgia public policy underlying the discussion in *Bodnar* was to ensure application of the forum's *shorter* limitations period.

Because neither exception applies, Alabama's general rule governs, and the two-year statute of limitations under Alabama law controls.

ii. Plaintiffs' claims are untimely under the two-year limitations period.

The killings alleged in the FAC all occurred between 1997 and 2007 (Doc. 20 at ¶¶ 20-53), with the *most recent* alleged killing occurring on February 20, 2007. *Id.* at ¶ 38. Under the applicable two-year limitations period, to be timely, the *most recent* of Plaintiffs' wrongful death claims had to be filed by February 20, 2009, which was over four years prior to the filing of this lawsuit. The other Plaintiffs' wrongful death claims are even further outside the limitations period. Because Plaintiffs' wrongful death claims were all filed long after the limitations period expired, those claims are time-barred and must be dismissed. *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845–46 (11th Cir. 2004) (dismissal on statute of limitations grounds is appropriate if it is apparent from the face of the complaint that the claim is time-barred).

iii. Plaintiffs' fraudulent concealment and equitable tolling arguments are palpably wrong.

Plaintiffs suggest that equitable tolling or fraudulent concealment could operate to save their Colombian wrongful death claims from dismissal. App. Br. at 20. This argument fails for (at least) two reasons.

First, Plaintiffs conceded that if Alabama's two-year statute of limitations applies, their claims are untimely, even with the benefit of equitable tolling. *See* Doc. 36 at 47 n.21 ("If this Court applies Alabama's statute of limitations law, Plaintiffs' claims should be tolled until at least 2007. *See supra*, Section IV.A. If the Court applies Alabama's two-year statute of limitations beginning in 2007, their wrongful death claims will have run in 2009."). As explained above on pages 47-55, Alabama's statute of limitations unquestionably applies, and therefore Plaintiffs' equitable tolling and fraudulent concealment arguments are non-starters.

Second, Plaintiffs did not allege facts establishing the elements required to apply equitable tolling, which "requires the party invoking it to show both extraordinary circumstances and diligence in pursuing her rights." *Wilson v. Standard Ins. Co.*, 613 F. App'x 841, 844 (11th Cir. 2015) (citations omitted). Indeed, Plaintiffs' equitable tolling and fraudulent concealment arguments are decisively foreclosed by the filing of the *Doe* case. As explained in Section I-B, the allegations of the FAC are indistinguishable from the allegations in *Doe*, which

was filed in May of *2009*. 782 F.3d at 580. Assuming for the sake of argument that the FAC adequately alleged equitable tolling or fraudulent concealment, the latest possible date that Plaintiffs could conceivably argue the statute of limitations started to run on their Colombian wrongful death claims is May of 2009, when another group of Colombian plaintiffs – represented by the same lawyer – filed Colombian wrongful death claims in *Doe* against many of the same defendants in the same court based on virtually identical allegations.

The instant action, however, was not filed until February of *2013*, nearly *four years later*. Doc. 1. The FAC does not allege facts showing how the circumstances that purportedly precluded Plaintiffs in the instant matter from timely filing suit differ from the circumstances allegedly faced by the plaintiffs in *Doe* (or *Baloco II* for that matter). *See* Doc. 20 *generally*. Stated differently, the FAC offers no explanation of why Plaintiffs in the instant matter were unable to file their claims until nearly four years after the *Doe* plaintiffs did so. *Id.* Accordingly, because the FAC "failed to plausibly allege any facts showing that [Plaintiffs are] entitled to equitable tolling" beyond the date that *Doe* was filed, *Henderson v. Reid*, 371 F. App'x 51, 54 (11th Cir. 2010) (citing *Iqbal*, 129 S. Ct. at 1950), all of the Colombian wrongful death claims are time-barred.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, according to the word count function of Microsoft Word, this brief contains 1,288 lines, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4. I further certify that this brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 14-point Times New Roman type.

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CERTIFICATE OF SERVICE

I hereby certify that on **June 20, 2016**, the Appellees' Brief was served on the following counsel of record utilizing the Court's ECF system pursuant to 11th Cir. R. 25-3:

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