

07-14090-D

**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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JUAN AQUAS ROMERO, *et. al.*,  
Plaintiffs / Appellants,

v.

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

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On Appeal from the United States District Court for the Northern District of  
Alabama; Case Nos.: 7:03-cv-00575-KOB; 7:04-cv-00242-KOB;  
7:02-cv-00665-KOB; 7:03-cv-01788-KOB; and 7:04-cv-00241-KOB  
The Honorable Karon O. Bowdre

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**APPELLANTS' OPENING BRIEF**

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Pursuant to Circuit Rule 26.1-1, Plaintiff-Appellants Romero, *et.*

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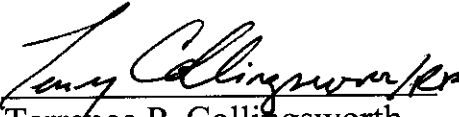
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## REQUEST FOR ORAL ARGUMENT

Appellants request oral argument. This appeal raises issues of legal significance. This is the first case against a corporation for human rights violations under the Alien Tort Statute (“ATS”) and the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350, to reach trial. Oral argument could well facilitate a better understanding of the unusual proceedings that resulted in the legal errors and instances of abuse of discretion in the trial court.

Dated: December 11, 2007      Respectfully submitted,

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## **I. INTRODUCTION**

This case was brought under the Alien Tort Statute (“ATS”) and the Torture Victim Protection Act (“TVPA”), 28 U.S.C. § 1350, by family members of three union leaders who were executed by paramilitaries while representing workers at Defendant Drummond’s coal mine in Colombia. Four other union leaders who survived assassination attempts by paramilitaries joined and brought claims for torture, as well as state law claims. This is the first case against a corporation under the ATS and TVPA to reach trial.

The backdrop of the case is Colombia, where the ongoing civil conflict allows trade union leaders and other human rights activists to be murdered with impunity, and the constant threat of deadly violence keeps most witnesses quiet. Further, like a mafia case, it was difficult to find inside witnesses, and those who were willing to testify were less than savory characters. The Colombian Plaintiffs thus faced many unique challenges. One they didn’t expect was that the District Court would be extremely hostile to their efforts to bring Drummond to trial in Alabama using the ATS and TVPA, two federal laws this Circuit has repeatedly confirmed are available to foreign victims of human rights violations.

The key issue in the case was whether Drummond had directed the United Self Defense Forces of Colombia (“AUC”), a paramilitary group that was

designated a terrorist organization by the U.S. State Department,<sup>1</sup> to murder the union leaders and dismantle the union. Before filing their case, Plaintiffs had a witness, Jimmy Rubio, a union official who had evidence that Drummond made cash payments to the AUC, and that the AUC murdered the three union leaders as part of a “package” with Drummond. Close members of Rubio’s family had already been murdered, and his name was on an AUC hit list. On the eve of the second effort to depose Rubio, his father-in-law was murdered by paramilitaries. Rubio, understandably, disappeared. Plaintiffs were left with circumstantial evidence, such as Drummond providing supplies and a safe haven to the AUC terrorists, but, without Rubio, there was no direct “smoking gun” evidence.

Plaintiffs then learned of a new witness, Rafael Garcia, who was in prison in Bogota, Colombia. He told a reporter that he was present when Defendant Drummond Ltd.’s President, Augusto Jimenez, paid the AUC to murder the union leaders. Plaintiffs immediately took Garcia’s Declaration and filed it with the Court. Rather than work with Plaintiffs to preserve this breakthrough testimony, the Court found that the filing violated her gag order, and held Plaintiffs’ counsel in criminal contempt. This Court, using strong language, reversed. *See Romero v. Drummond Company, Inc.*, 430 F.3d 1234,1243 (11<sup>th</sup> Cir. 2007).

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<sup>1</sup> See 66 Fed. Reg. 47,054 (September 5, 2001).

The reversal of the contempt finding cleared the names of counsel, but the District Court's subsequent rulings prevented the jury from ever hearing Mr. Garcia's name, and also denied Plaintiffs other direct evidence that linked Drummond to the AUC. The Court initially ruled that Garcia's testimony could not be used at all because Plaintiffs did not learn of him until after the discovery cutoff date. The Court also ruled that Rubio's Declaration could not be used because he disappeared. Then, applying erroneous legal standards, and without evidence from Garcia or Rubio, the Court dismissed all but one of Plaintiffs' claims at summary judgment.

After the summary judgement hearing, and seven months after the Garcia Declaration was submitted, the Court reluctantly agreed that Garcia met the newly-discovered witness standard, and permitted Plaintiffs to attempt to depose him for trial. As Garcia was in prison, his testimony had to be obtained using Letters Rogatory. However, knowing that this process takes at least six months, the Court gave Plaintiffs less than four months. REII502 at 6:10-15; 18:14-19.<sup>2</sup> When it was clear Plaintiffs could not meet this impossible deadline, they moved for a

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<sup>2</sup> "R\_\_" is a record document not provided in the Record Excerpts. "REI\_\_" or "REII\_\_" refer to Record Excerpts volumes I and II respectively, and the specific document number in the record. "SRE" is the Sealed Record Excerpts. All record cites are to the lead case, CV-03-BE-0575-W.

continuance. The District Court denied the motion, and when Plaintiffs moved for reconsideration, the Court asked Drummond's lawyers whether they would be confident "in defending my discretion" on appeal. She was assured that Drummond would "vigorously" defend her discretion, and that they would be "successful." REII509 at 6:8-7:6. Their pact intact, the Court ordered the trial to begin as scheduled on July 9, 2007, without Garcia, and without four other witnesses with evidence of the Drummond-AUC connection who were discovered as part of a tide-turning truth commission process in Colombia. After calling these new witnesses "terrorists" and openly disparaging their credibility, the Court categorically stated that no new witnesses would be permitted, even if they "arise from the dead." REII504 at 19:10-11. As it turned out, the Colombian government responded positively to the Garcia Letters Rogatory on December 4, 2007, REII514, indicating that a reasonable continuance would have yielded this crucial testimony.

Plaintiffs were forced to go to trial without any of the witnesses who could have provided testimony directly linking Drummond to the AUC. Thus limited, the trial on the sole issue remaining, whether the murders of the trade union leaders were in furtherance of "war crimes" that were aided and abetted by Drummond, resulted in a defense verdict.

Plaintiffs are appealing the legally-erroneous dismissal of most of their claims at summary judgment, as well as the numerous decisions before and during trial that denied Plaintiffs crucial eye witness and expert testimony. A new trial of all of Plaintiffs' claims, supported by all of the excluded evidence, is warranted.

## **II. STATEMENT OF JURISDICTION**

This appeal is taken from a jury verdict and final judgment in favor of Defendants entered on July 30, 2007. R487. Plaintiffs also appeal the dismissal of their claims in the March 5, 2007 Order granting summary judgment on most of the claims. REII329. The District Court had jurisdiction over Appellants' claims pursuant to 28 U.S.C. §§ 1331 and 1350. This Court has jurisdiction under 28 U.S.C. § 1291.

## **III. STATEMENT OF ISSUES ON APPEAL**

A. Did the District Court err in first excluding the Declarations of Garcia and Rubio that included direct evidence that Drummond had paid the AUC to murder the three union leaders, and then finding on summary judgment that there was no evidence of conspiracy or agency, and dismissing these claims?

B. Did the District Court err in finding on summary judgment that, despite the evidence of "state action," the Court did not believe that state officials acted in

concert with paramilitaries, and then, applying an erroneous legal standard, dismissed all of Plaintiffs' claims that required state action?

C. Did the District Court err in dismissing Plaintiffs' claims under Colombian law for wrongful death based on the Court's position that the law of Colombia was unclear?

D. Did the District Court err in dismissing Plaintiffs' claims under Alabama law for assault, intentional infliction of emotional distress and negligence, on the basis that the law of Alabama does not apply extraterritorially, and then denying Plaintiffs leave to amend their claims to plead Colombian law?

E. Did the District Court abuse its discretion in denying Plaintiffs' pre-trial motion for a continuance to allow Plaintiffs necessary time to complete a Letters Rogatory process to take the trial deposition of newly-discovered witness Rafael Garcia, as well as to take the depositions of other newly-discovered witnesses who were available to testify at trial?

F. Did the District Court abuse its discretion in striking all of Plaintiffs' experts before the trial, based on the form of the expert reports, including the experts on state action and war crimes, two key issues in the case?

#### IV. STATEMENT OF THE CASE

##### A. **Procedural History**

Plaintiffs-Appellants are heirs of the three murdered trade union leaders, Valmore Locarno Rodriquez (“Locarno”), Victor Hugo Orcasita Amaya (“Orcasita”), and Gustavo Soler Mora (“Soler”). Four additional union leaders who survived assassination attempts – Juan Aguas Romero (“Aguas”), Jimmy Rubio Suarez (“Rubio”), Francisco Ruiz Daza (“Ruiz”), and John Doe II later joined the case. Their union, SINTRAMIENERGETICA (the “Union”), is also a Plaintiff. The first Complaint was filed on March 14, 2002. The remaining Plaintiffs filed their Complaints during 2003, and the cases were consolidated for trial.<sup>3</sup> The Complaints made claims under the ATS and TVPA for extrajudicial killing and torture, as well as state law claims for wrongful death, assault, intentional infliction of emotional distress and negligence. The essence of the claims is that Drummond directed the AUC to terrorize and dismantle the Union.

Defendants made two dismissal motions, and both were substantially denied. *Estate of Rodriguez v. Drummond Co.*, 256 F. Supp.2d 1250 (N.D. Ala. 2003), and *Romero v. Drummond Co.*, REI34.

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<sup>3</sup> The cases consolidated were Nos. 7:02-cv-00665-KOB, 7:03-cv-01788, 7:04-cv-00241-KOB, 7:04-cv-00242-KOB, and 7:03-cv-00575-KOB.

After the December 1, 2005 close of discovery, Plaintiffs learned that Garcia, a former government official imprisoned on corruption charges, stated that he saw Drummond's President, Augusto Jimenez, pay a representative of Jorge 40, an AUC commander, to murder Locarno and Orcasita. Plaintiffs' counsel immediately visited Garcia in his prison in Bogota, and he produced a sworn declaration to that effect. *See Romero*, 480 F.3d at 1240. The District Court decided that filing the Garcia Declaration violated a gag order she had imposed, and she found counsel for Plaintiffs in criminal contempt. This Court reversed. *Id.* at 1242-43.

While the contempt appeal was pending, the District Court denied Plaintiffs' motion to depose Garcia. R276. The Court also denied Plaintiffs' request to issue a Letters Rogatory to depose Jorge 40 himself. He had been arrested in September 2006. SRE306. In both cases, the Court reasoned that the December 1, 2005 discovery cutoff date had passed.

Defendants moved for summary judgment, and the Court held a hearing on February 27, 2007. The Court refused to consider the Declarations of Garcia and Rubio, the only witnesses at that point to Drummond's payments to the AUC. REII339 at 8:19-22; 15:12-16:5. At the hearing, the Court dismissed all but one of Plaintiffs' claims. *Id.* at 64:18-65:24. The Court issued an Order confirming these

dismissals on March 5, 2007. REII329. These dismissals terminated all claims brought by the living union leaders for torture and for state law claims of assault, intentional infliction of emotional distress and negligence, and resulted in the dismissal of their cases. This left for trial only the claims based on the murder of the three union leaders as war crimes under the ATS.

Following the summary judgment hearing, the Court ordered the parties on March 5, 2007 to brief whether Garcia was a newly-discovered witness. REII330. On March 20, 2007, the Court ruled that Garcia was a newly-discovered witness and could be deposed. REII337. Two days later, at a March 22, 2007 status conference, the Court set July 9, 2007 as the trial date, giving Plaintiffs less than four months to obtain the deposition. The Court did this even though Drummond acknowledged that it takes at least six months to obtain a deposition via Letters Rogatory. REII502 at 6:10-15; 18:14-19.

On May 24, 2007, Plaintiffs moved for a continuance to allow adequate time to take the Garcia Declaration, and to allow for other newly-discovered witnesses to be deposed. The Court denied this motion, finding that “going forward with the trial in July will not unduly harm Plaintiffs.” REII382 at 3.

On July 2, 2007, Plaintiffs made a renewed motion for a continuance because the Colombian government had yet to respond to the Letters Rogatory.

After receiving Drummond's assurance that the company would vigorously defend her discretion on appeal, the Court denied the motion. REII509 at 6:8-7:6. On December 4, 2007, within the initial extension sought by Plaintiffs, the Colombian government responded to the Letters Rogatory and also provided substantial documentary evidence relating to Garcia's expected testimony. REII514.

Plaintiffs filed a Writ of Mandamus with this Court after the second denial of the continuance motion. This Court denied the Writ, *citing In Re BellSouth Corp.*, 334 F. 3d 941, 953 (11<sup>th</sup> Cir. 2003) ("Significantly, a party is not entitled to mandamus merely because it shows evidence that, on appeal, would warrant reversal of the district court."). REII ("C.A. Decision").

The trial began on July 9, 2007 and concluded with a defense verdict on the war crimes claim. During the trial, Plaintiffs requested that they be permitted to depose and offer as evidence the testimony of two other newly-discovered witnesses, Alberto Visbal and "Alcon", both of whom were in hiding in Panama, but were unable to obtain visas to the U.S. for trial. Both of these witnesses had direct evidence that Drummond ordered the murders of the Union leaders. Plaintiffs also offered the testimony of Rubio, who they finally located in Venezuela. The Court denied all of these requests. R506Vol10 at 2062-65. The Court had previously ruled that she would not entertain any new witnesses, "even

if they arise from the dead.” REII504 at 19:10-11.

The Court entered a final judgment on July 30, 2007. REII487. Plaintiffs filed a timely notice of appeal on August 27, 2007. REII490.

## **B. Statement of Facts**

Most of the background facts were agreed to in the Pretrial Order. *See* REII418. Defendant Drummond, Ltd., an Alabama company, has since 1995, owned and operated a large coal mine in La Loma, in the Department of Cesar, Colombia. *Id.* at 3. During all relevant periods, Defendant Augusto Jimenez was President of Drummond Ltd. *Id.* at 4. From 1996 on, the Union represented the Drummond workers in Colombia. *Id.*

There is no question that Colombia is widely-known as a country that is torn by a long-standing civil conflict involving armed leftist groups on the one side, and the Colombian military, as well as right-wing paramilitaries, on the other. *See* REII323-ExsA&B. In this context, trade union leaders are often branded as “subversives,” and are considered legitimate targets for violence by the right-wing paramilitaries and their collaborators within the Colombian military. *Id.*

Drummond had a record of problems with the leftist rebels attacking and destroying its facilities. As one measure of protection, Drummond directly

supported military troops that were stationed on Drummond property. R506Vol9 at 1613-1614. Plaintiffs contend that Drummond also used the terrorist AUC paramilitaries as a security force, one that collaborated with the regular military, and could go well beyond what the regular military could or would do in using violence to terrorize Drummond's union leadership. There was absolutely no evidence that the Union ever had any relationship with the armed rebel groups. R506Vol2 at 400.

The three murdered union leaders, Locarno, Orcasita and Soler, were all officials of the Union. At the time of their deaths, Locarno and Orcasita were the President and Vice President, respectively. The company had previously tried on numerous occasions to fire these leaders, but the union managed to prevent this. R506Vol2 at 363-365,367,371-2. Prior to the murders, Drummond President Jimenez, in the midst of heated negotiations with the union leaders, openly threatened that "the fish dies from opening his mouth." R506Vol2 at 290. Drummond was particularly hostile towards Locarno, a charismatic leader who publicly criticized the company on its labor policies, pollution of the environment, and failure to adequately contribute to the social development of the region. R506Vol2 at 419,554-56.

On March 12, 2001, Orcasita and Locarno were taken off a Drummond

company bus and murdered by members the AUC. REII418 at 3. The Union had no top leadership for several months because the members were too terrified to assume leadership positions. In September, 2001, Soler agreed to become the new President. On October 5, 2001, he was taken off a bus by AUC paramilitaries and murdered. *Id.* at 3; R506Vol12 at 399.

At summary judgment and at trial, Plaintiffs produced evidence that Drummond provided substantial assistance to the AUC paramilitaries operating on and around Drummond's vast property in Colombia. This included making the Drummond property a safe haven for the terrorist organization, R506Vol18 at 1464-1465; R506Vol17 at 1213-1215, and providing fuel and other supplies. R506Vol15 at 854, 1485. There was evidence that Drummond officials met with AUC leaders. *See, e.g.*, R506Vol17 at 1180-1182,1186. However, as noted, due to the Court's rulings, Plaintiffs were forced to trial with none of the witnesses to establish that Drummond actually directed the AUC to murder the Union leaders, which was the key fact in contention.

In late 2006, the government of Colombia began a process to demobilize the paramilitaries and the guerillas. Under the Justice and Peace Law, even the most violent of the former combatants could receive a maximum sentence of eight years if he confessed to all of his crimes. As part of this process, former AUC members

who participated in or knew about the murders of the Drummond Union leaders were coming forward. Plaintiffs presented evidence of the peace process to the District Court to explain why new witnesses were coming forward at this unique moment in Colombian history. R371(Declaration of Terry Collingsworth and Exhibits A-P). Details of the evidence excluded by the Court's refusal to allow these newly-discovered witnesses to testify are discussed in § VII(E), *infra*.

## V. STANDARD OF REVIEW

The questions of law raised on this appeal relating to the District Court's dismissal of claims at summary judgment are reviewed *de novo*. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844, 846 (11th Cir. 1996). The District Court's decisions to deny Plaintiffs a continuance of the trial and to exclude testimony of newly-discovered witnesses, and their experts, are reviewed for abuse of discretion. *See, e.g., R.M.R. v. Muscogee County Sch. Distr.*, 165 F.3d 812 (11<sup>th</sup> Cir. 1999)(fact witness); *U.S. v. 0.161 Acres of Land in Birmingham, Ala.*, 837 F.2d 1036, 1039-1042 (11<sup>th</sup> Cir. 1988)(expert witness).

## **VI. SUMMARY OF ARGUMENT**

The District Court first erred in dismissing all but one of Plaintiffs' claims at summary judgement. The Court dismissed the conspiracy and agency claims based on a lack of evidence, although Plaintiffs submitted the Garcia and Rubio Declarations, which were direct evidence of Drummond's payments to the AUC terrorists to murder the Union leaders. The Court improperly declined to consider this evidence because she did not think these witnesses could testify at trial. The Court's subsequent rulings then ensured they would not testify.

The Court further erred in dismissing all claims based on "state action." The Court first disagreed with Plaintiffs' evidence of the overall complicity of state actors with the paramilitary terrorists who murdered the Union leaders. This was itself reversible error for the Court to weigh or disagree with evidence at a summary judgment hearing. Further, the Court applied an erroneous legal standard in assessing the level of state participation necessary to establish "under color of law."

The Court again erred when she dismissed Plaintiffs' claims for wrongful death under the law of Colombia because she found the law unclear. This crucial claim would have allowed the jury to assess Drummond's conduct in relation to the murders under a negligence standard. There was agreement between the

parties as to the elements, but the Court abdicated her judicial duty and refused to rule on what the law was, resulting in the extreme prejudice of dismissal of Plaintiffs' claims.

The Court also erred in dismissing Plaintiffs' other state law claims, finding Alabama law could not apply, and then refusing to allow Plaintiffs to amend their claims for negligence, emotional distress and assault to plead Colombian law. There was absolutely no prejudice to Defendants as the elements for these claims are the same under both laws, and discovery was complete.

With only one claim remaining, whether the murders were war crimes under the ATS, Plaintiffs were forced to go to trial with *none* of the five witnesses who had direct evidence that Drummond paid the AUC terrorists to murder the Union leaders. While Plaintiffs had some circumstantial evidence of Drummond's link to the AUC, there is no question that exclusion of all of the smoking gun evidence was reversible error. The Court abused its discretion in not granting Plaintiffs a continuance to depose Garcia, who the Court found was a newly-discovered witness. The Court further abused its discretion in not allowing newly-discovered witnesses Visbal and Alcon to testify even though they were available. In addition, the Court should have issued a Letters Rogatory for Jorge 40, the AUC commander of the operation to murder the Union leaders, and should have allowed

former Plaintiff Jimmy Rubio to testify once he was found hiding in Venezuela.

Finally, the Court erred in striking all of Plaintiffs' experts, including Nagle and Gaitan, both of whom had relevant testimony on the war crimes and state action issues.

Individually, any of these errors would be grounds for reversal. Collectively they illustrate an unusual denial of justice and fairness.

## VII. ARGUMENT

### A. **The District Court Erred in Excluding Direct Evidence of Conspiracy and Agency, and then Granting Summary Judgement on these Claims.**

Plaintiffs advanced three theories of liability to hold Drummond responsible for the murders and other violence carried out by the AUC against the Union: aiding and abetting, conspiracy, and agency. The District Court allowed the case to proceed on an aiding and abetting theory, and granted summary judgment on conspiracy and agency. REII329 at 4. In this Circuit, the issue is settled that aiding and abetting is a basis for liability in ATS and TVPA cases. *See, e.g., Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-48 (11th Cir. 2005), *cert. denied*, No. 06-426, 2006 WL 2783671, at \*1 (2006); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005).

In granting summary judgment on conspiracy and agency, the Court did so after ruling that she would not consider the declarations of Garcia and Rubio. REII339 at 8:19-22;15:12-16:5. Garcia stated he was present when Drummond's President, Jimenez, paid a "suitcase full of money" to a representative of AUC commander, Jorge 40, to murder the leaders of the Union. REII219 (Garcia Declaration ¶ 4). Rubio stated under oath that another AUC leader showed him checks from Drummond, and AUC thugs boasted to him that they murdered Locarno, Orcasita and Soler as part of a "package" with Drummond. REII323-Ex 62 (Rubio Declaration ¶¶ 8-9).

Clearly, if *either* of these had been considered, there was sufficient evidence to find conspiracy and agency. As to conspiracy, payment to a terrorist group to murder union leaders would certainly qualify. *See Cabello*, 402 F.3d at 1159. Likewise, with respect to agency, the testimony that Drummond paid the AUC to murder the three union leaders meets the standard. *See, e.g., Castleberry v. Goldome Credit Corp.*, 408 F.3d 773, 787 (11th Cir. 2005); *Jackson v. Searcy*, 628 So.2d 887, 889 (Ala. Civ. App. 1993).

The District Court excluded both declarations based on her self-fulfilling projection that, since these witnesses would not testify at trial, the declarations would not be converted to admissible evidence. With respect to Rubio, the Court

stated, “I’m not going to consider Mr. Rubio’s declaration in evaluating the motion for summary judgment because I do not believe that he will be found and able to present testimony at trial.” REII339 at 8:19-25. Later, when he *was* available at trial, the Court refused to allow him to testify. R506Vol10 at 2063:2-2064:3. Likewise, the Court prevented Garcia from testifying by knowingly providing insufficient time for the Letters Rogatory process. *See* REII502 at 6:10-15; 18:14-19. However, as the Colombian government responded positively to the Letters Rogatory, it is clear that Garcia could have testified with a reasonable continuance. REII514.

The Court’s abuse of discretion with respect to these decisions is discussed in § VII(E), *infra*. However, as a matter of law, the District Court should have considered the Garcia and Rubio declarations.<sup>4</sup> The Supreme Court has spoken on this: “We do not mean that the nonmoving party must produce evidence in a form

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<sup>4</sup>While Plaintiffs dispute that the evidence must be admissible to be considered at a summary judgment hearing, there is no question that if Plaintiffs prevail in establishing that either Garcia or Rubio should have been permitted to testify, the Court’s reasoning collapses, and the declarations should have been considered at summary judgment. This would require a reversal of the grant of summary judgment on conspiracy and agency. Further, as a practical matter, if any of the other “smoking gun” witnesses who, along with Garcia and Rubio, were not permitted to testify at trial, are able to testify on remand, then this would also require the summary judgment on conspiracy and agency to be reversed.

that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses.”

*Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Plaintiffs did not have to establish that Garcia and Rubio would have testified at trial with certainty. *See Wright and Miller*, 10B *Federal Practice and Procedure* § 2738 (citing *Banco de Espana v. Federal Reserve Bank of New York*, 114 F.2d 438, 445 (2d Cir. 1940)).

That Rubio *was* available to testify at trial, and Garcia could have testified, either by trial deposition or live by video conference, with a reasonable continuance, illustrate precisely why speculation at summary judgment about whether a witness will be able to testify is error. For the District Court to have refused to consider the Garcia and Rubio Declarations because they might not be able to testify, and then made erroneous rulings that prevented them from testifying, placed Plaintiffs in a circular trap that was manifestly unfair.<sup>5</sup>

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<sup>5</sup> With the December 4, 2007 Colombian Government’s response to the Letters Rogatory, it clear that Garcia’s testimony will be available if there is a new trial. However, as Plaintiffs asserted to the District Court in their Emergency Motion to Continue the July 9 Trial Date, if the parties were in fact unable to obtain Garcia’s trial testimony, for any reason, this would establish his “unavailability” under Fed. R. Evid. 804 (a)(5). His Declaration is a “statement against interest” under Rule 804 (b)(3) as it is both a confession to being present at a crime and it places him in grave danger to report on AUC activity. Thus, it should have been treated as admissible evidence. *See* R455 at 9-11.

**B. The District Court Erred in Disagreeing With the Evidence on State Action, and Then in Applying an Erroneous Legal Standard and Dismissing All Claims that Required a Showing of State Action.**

Plaintiffs had ample evidence at summary judgment to show that the AUC paramilitaries were acting under “color of state law” when they murdered the Union leaders. While the Court’s Order states that there was “insufficient evidence” of state action, REII329 at 3, at the hearing the Court indicated that she in fact simply disagreed that government actors could possibly share a goal with Drummond and the AUC of “eradication of the union.” REII339 at 64:23-65:16. The Court questioned the evidence: the AUC “is a terrorist organization that’s been outlawed by Colombia officially and all this kind of stuff; yet, you’re asking me to find that there is a relationship with the government sufficient to establish state action . . . . [T]hose are contradictory positions.” *Id.* at 37:25-38:5.

In so ruling, the Court made two legal errors. First, for the Court to disagree with the evidence, here that the Government of Colombia could outlaw the AUC, but still maintain a cooperative relationship with it, is itself error. A trial court is not permitted to weigh evidence on summary judgment. *Barron v. FRB*, 129 Fed. Appx. 512, 515-17 (11<sup>th</sup> Cir. 2005); *Holifield v. Reno*, 115 F.3d 1555, 1561 (11<sup>th</sup> Cir. 1997); *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1444 (11<sup>th</sup> Cir. 1998).

“Likewise, if reasonable minds could differ on the inferences arising from undisputed facts, then the court should deny summary judgment.” *Holifield*, 115 F.3d at 1561.

Here, as is discussed immediately below, Plaintiffs introduced evidence that the Colombian government was complicit in anti-union violence, particularly the State Department and United Nations (“UN”) reports. It was error for the District Court to disagree with this evidence.

Second, the Court applied an erroneous test of participation by state actors. The Court’s requirement that Plaintiffs show that “eradication of the union” was a goal of the Government of Colombia is not the law. “State action” does not require government-wide participation or official policy. A single state actor cloaked with “color of law,” can establish state action. For example, in *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247-1248 (11<sup>th</sup> Cir. 2005), this Court held that a banana company operating in Guatemala could be liable for acts of a private mob of vigilantes where the private actors carried out the challenged acts “under color of state law” by virtue of the alleged participation of the local mayor. *See also Smith v. Brookshire Brothers, Inc.*, 519 F.2d 93, 94-95 (5<sup>th</sup> Cir. 1975)(upholding court’s conclusion that store acted under “color of state law” and was liable for wrongful arrests committed by police officers where the

store had a pre-arranged plan with the officers to assist them when they needed help); *Groom v. Safeway*, 973 F. Supp. 987, 991-92 (W.D. Wash. 1997)(grocery store could be liable under the “color of state law” theory where the store hired an off-duty police officer for security and where the conduct of that officer while acting in his role as security guard was at issue in the case).

Applying the proper test here and conducting a *de novo* review, this Court should find that there was sufficient evidence of “state action” to withstand summary judgment because Plaintiffs had voluminous evidence that one or more state actors participated in the murders of the Union leaders. Colombia’s own *Fiscalia*, or prosecutor’s office, concluded that some of the individuals who murdered Locarno and Orcasita were wearing military uniforms at the time. REII323-Ex62. If military officials participated in the murders, there is “state action.” *See Aldana*, 416 F.3d at 1249.

Plaintiffs also presented evidence that the AUC paramilitaries who killed the trade unionists had a symbiotic relationship with the military, and thus should themselves be treated as state actors. For example, the U.S. State Department, in its 2001 Colombia Country Report, covering the year of the murders at Drummond, found that the paramilitaries had a symbiotic relationship with the military. As the State Department concluded, “[m]embers of the security forces

collaborated with paramilitary groups that committed abuses,” by “allowing such groups to pass through roadblocks, sharing information, or providing them with supplies or ammunition”. REII323-Ex1 at 1, 3-5. Consistent with the Colombian *Fiscalia*’s report, the State Department found military officers were “even joining their [the paramilitaries’] ranks while off duty” *Id.* at 5.

Similarly, the UN concluded its human rights report that “[d]uring 2001 . . . paramilitary activity was strengthening and spreading throughout much of the country’s territory. . . . Toleration, support and complicity on the part of public servants, as well as non-fulfillment of their duty to safeguard rights . . . means that the State continues to bear responsibility. REII323-Ex2 at 40.

The District Court properly held that the State Department and UN Reports are admissible based on *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 143-144 (2d Cir. 2000). REII339 at 17-18.<sup>6</sup> This evidence alone is sufficient to allow an inference of the AUC’s symbiotic relationship with state actors. However, in this case, Drummond’s own internal security reports admit that the paramilitaries are supported by sectors of the Colombian military, including those working for Drummond. SRE294-Ex4 at DX 1468, 1520, 1609. Moreover, Defendants have

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<sup>6</sup> This conclusion was required by the consistent rulings of other courts on this issue. *See* Plaintiffs’ SJ Opposition, R314 at 22, n.8.

also admitted that there are some public officials who are active members of paramilitary groups. *Id.* at DX 1638.

Further, if either the Garcia or Rubio testimony is considered, both provide direct evidence of official participation in AUC operations. Garcia himself aided the AUC as a government official. REII219 ¶ 4. Rubio was able to forestall his own execution by the AUC by going to the military commander at the Drummond base, who intervened with the AUC and saved him. REII323-Ex62 ¶¶ 4-5.

Subsequent to the Court's initial decision on summary judgment, and prior to trial, Plaintiffs discovered and then presented further compelling evidence on the state action issue.<sup>7</sup> This was the testimony of a newly-discovered witness, former Colombian Army Sergeant, Edwin Guzman. He personally experienced the strong links between the Colombian military – in particular, the Popa Battalion responsible for guarding the Drummond mining property – and the AUC paramilitaries responsible for the murder of the three union leaders. He testified that the very military which protected Drummond's mining property knowingly permitted the paramilitaries to maintain a base on and to patrol Drummond property in Drummond vehicles. *See, e.g.*, REII461–ExA at 87-88,135-138,167.

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<sup>7</sup> Plaintiffs made a motion to reconsider the state action issue prior to trial, which Judge Bowdre never ruled upon. R461.

Guzman further stated that his military superiors prevented him from leading an assault he was planning upon AUC paramilitaries operating on Drummond property. REII356 (Guzman Declaration ¶5).

This additional evidence adds concrete detail to the symbiotic relationship that the State Department and the UN Reports described. All of this evidence compels the inference that the AUC was sufficiently “entwined” with state actors to be operating under “color of state law.” *See, e.g., Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 298-299 (2001) (private athletic association was sufficiently "entwined" with the public school system as evidenced by the fact that the association, which provided "an integral element of secondary public schooling," was composed of public officials and financially supported by the public schools); *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995)(finding that unofficial and unrecognized state could carry out acts “under color of state law”, and therefore be treated as a state actor, the court held that “[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid.”); *Mehinovic v. Vuckovic*, 198 F. Supp.2d 1322, 1331, 1346-1347 (N.D. Ga. 2002) (Bosnian-Serb paramilitary group, which received material support from official military acted under “color of state law” in carrying out gross abuses of human

rights); *Chavez v. Carranza*, 413 F. Supp.2d 891, 899 (W.D. Tenn. 2005)(“When persons who are not government officials 'act[] together with state officials' or act with 'significant state aid[,]’ they are deemed governmental actors for the purposes of the state action requirement under the TVPA and the ATCA.”).<sup>8</sup>

As a result of erroneously concluding there was no “state action,” the Court dismissed all claims based on the TVPA, and all ATS claims requiring state action, and allowed only the remaining ATS claim based on “war crimes” to proceed to trial. REII329 at 3. The jury should have been permitted to consider whether Drummond aided and abetted state actors, including the AUC, which were responsible for the murders.

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<sup>8</sup> While Judge Bowdre necessarily did not reach this question, once the AUC is found to have acted under “color of state law,” then Drummond can be liable under the state action claims based on its participation in the AUC’s wrongful acts. Here, Plaintiffs had substantial evidence that Drummond aided and abetted the AUC, which is sufficient for liability. *See, e.g., Aldana*, 416 F.3d at 1249. Further, if any of the excluded witnesses discussed in § VII(E), *infra*, are permitted to testify, there will be evidence that Drummond directly contracted with the AUC to murder the union leaders. This direct relationship would establish that Drummond engaged in “joint action” with the AUC. *See NCGUB v. Unocal, Inc.*, 176 F.R.D. 329, 336-337, 348 (C.D. Cal. 1997)(allegations that Unocal hired and/or contracted military units establish joint action).

**C. The District Court Erred in Dismissing Plaintiffs’ Wrongful Death Claims Because the Court Found Colombian Law Unclear.**

At the very outset of this case, *Defendants* submitted the expert opinion of Alejandro Linares-Cantillo, which supported Plaintiffs’ Colombian wrongful death claims. R359-ExB. Of course, Defendants submitted it to argue that the claims should be *heard* in Colombia, but, regardless, their expert stated that Colombia allows for a wrongful death claim: “Civil relief is available for the acts alleged in the complaint,” and Plaintiffs have a cognizable claim for “wrongful death” under the Colombian Civil Code. *Id.* ¶¶7,10. Linares listed the elements as: “(I) a negligent act (or crime); (ii) damages; and (iii) a direct link between said act and the damages caused.” *Id.* at ¶10. Plaintiffs’ expert, Nester Alfonso Gutierrez Romero, concurred in Defendants’ expert opinion. R359-ExA at ¶¶22-26. In other words, in a rare occurrence, opposing experts agreed.

Adding to the chorus, in 2003, the District Court, relying upon Defendants’ expert, found that “the individual plaintiffs would have standing under Columbian [sic.] law to bring individual claims for wrongful death so long as they are family members or relatives of the deceased, or to bring representative claims if they are legal heirs of the deceased . . . .” *Estate of Rodriquez*, 256 F. Supp.2d at 1258.

Yet, when the issue resurfaced at summary judgment, Defendants’ posture

was much different. Rather than arguing that the claims should be heard in Colombia, Defendants shifted to arguing that Colombian wrongful death claims could not be asserted in the Alabama trial. Despite everyone's prior agreement, and even though the parties briefed the issue again at summary judgment, the Court gave Defendants still another opportunity to brief it, and reserved ruling. REII329 at 3. Both parties provided more briefing.R338,344,358.

After years of clarity on this issue and extensive discovery, on the eve of trial, the District Court ultimately decided that she was incapable of making a decision on this matter. In a June 15, 2007 Order, Judge Bowdre first correctly noted that it was proper to exercise supplemental jurisdiction over the Colombian wrongful death claim under 28 U.S.C. §1367. REII408 at 3. Yet, in spite of her concession that she **could** exercise such jurisdiction, Judge Bowdre decided that she **would not** do so: “the court – despite repeated requests for assistance from the parties – has been unable to discern what the Colombian law requisites for a wrongful death claim [sic.]” *Id.* She added, “the court remains unable to navigate the complexities of the parties’ submissions on Colombian law.” *Id.*

By refusing to resolve a critical issue, Judge Bowdre abdicated her role as a judge and abused her discretion. *James v. Jacobson*, 6 F.3d 233, 239 (4<sup>th</sup> Cir. 1993)(abuse of discretion occur when a court fails or refuses, either expressly or

implicitly, to actually exercise discretion, “deciding instead as if by general rule, or even arbitrarily, as if neither by rule nor discretion”)(citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978)); *Armstrong v. Virgin Records*, 91 F. Supp. 628, 637, 638 (S.D. N.Y. 2000)(a federal court may be called upon to enter “thorny legal thickets on a routine basis” and there is no reason it cannot apply a certain foreign law).

If the Court was legitimately confused about the law, she had the power under Fed. R. Evid. 706 to appoint her own expert. The Court also could have directed the parties to work out any differences as to the elements of Colombian wrongful death law in finalizing jury instructions, as they did with many other areas of law. Instead, the Court’s complete abdication resulted in severe prejudice to Plaintiffs, who had their wrongful death claims dismissed as a result. *See* R408. These were fundamental claims in a case based on murder, not tangential issues to be tossed out as an inconvenience.

**D. As There Was No Prejudice to Defendants, the District Court Erred in Not Giving Plaintiffs Leave to Amend and Plead Their State Law Claims Under Colombian Law.**

At the summary judgment hearing, the Court, in considering Defendants' motion as to the state law claims for assault, intentional infliction of emotional distress, and negligence,<sup>9</sup> asked counsel for Plaintiffs whether the claims were based on Colombian law or Alabama law. REII339 at 71:20-72:3. Counsel responded that the actual elements as to the claims were identical under the law of Colombia and Alabama, and therefore it didn't matter, and it was Defendants' burden to show that the law of the forum did not apply.<sup>10</sup> *Id.* 72:4-9. Forced to choose, counsel indicated that the claims were briefed based on the law of Alabama. *Id.* 72:17-20. The Court then dismissed all of the claims stating that Alabama law does not apply extra-territorially. *Id.* 74:20-25. Plaintiffs filed a

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<sup>9</sup> These claims were properly before the Court as pendant claims. *See* 28 U.S.C. § 1367.

<sup>10</sup> Defendants did have the burden on this issue. In *Pound v. Gaulding*, 237 Ala. 387 (Ala. 1939), where the complaint alleged a tort committed in a foreign jurisdiction, the defendants failed to meet their burden of showing that the law of the forum did not apply. According to the court, "[i]f, therefore, upon any theory of conflict of laws or otherwise, plaintiff is not entitled to recover, we think this was defensive matter to be set up and established by defendant." *Id.* at 389.

motion to amend to plead their state law claims under the law of Colombia,<sup>11</sup> and in doing so, demonstrated that the elements of these torts were identical under the law of Alabama and Colombia. *See* R359. The District Court denied the motion “due to the reasons explicitly stated on the record at the hearing.” REII364 at 2. However, the issue of **amending** the Complaints was never discussed at the hearing, so the Court denied the motion without applying a legal standard.

While the denial of Plaintiffs’ motion to amend should be reviewed under an abuse-of-discretion standard, the District Court’s failure to apply a discernable legal standard in denying the motion is itself an abuse of discretion. *See James v. Jacobson*, 6 F.3d at 239, citing *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978)); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 19 (1983); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-02 (1990).

To be sure, if the Court had properly evaluated the standards to amend, Plaintiffs should have been permitted to amend their claims. Plaintiffs moved to amend following the Court’s dismissal of their Alabama law claims. Fed. R. Civ.

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<sup>11</sup> It is now clear that an Alabama court would apply Colombian law, not because of the non-extraterritorial application of Alabama law, but because Alabama is one of the few jurisdictions that continues to recognize the *lex loci delicti* rule and applies the law of where the injury occurred, in this case Colombia. *Fitts v. Minnesota Mining & Mfg. Co.*, 581 So.2d 819, 823-24 (Ala. 1991).

P. 15(a) makes clear that leave to amend should be granted when justice so requires. Indeed, leave to amend should be freely given so long as there are no indications that the amending party engaged in undue delay, bad faith, or the repeated failure to cure deficiencies by previous amendments, and no undue prejudice would inure to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Warner v. Alexander*, 828 F.2d 1528, 1531 (11<sup>th</sup> Cir. 1987).

Plaintiffs meet the Rule 15 factors. They did not engage in undue delay in seeking leave to amend following the dismissal of their state law claims. Furthermore, the amendment was not being presented for dilatory purposes, as Plaintiffs did not request a delay of the trial date as a result. Nor were there any indications of bad faith or any prior failure to cure deficiencies. It would not have been futile to amend to assert these claims; as the declaration of Nestor Gutierrez-Romero, a Colombian lawyer, made clear, Plaintiffs' claims are fully cognizable under Colombian law. *See* R359-ExA.

Finally, no prejudice would have resulted from the amendments, and it is Defendants' burden to show they would be prejudiced. *Beeck v. Aqua slide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977). Here, Defendants were on notice since the filing of the Plaintiffs' respective Complaints of the factual and legal bases asserted for their claims of negligence, assault, and intentional infliction of

emotional distress. Discovery was conducted on these issues. Further, at the time of the summary judgment hearing, neither the parties, nor the Court, were clear on what law was to be applied, and since the elements were nearly identical under the law of Colombia and Alabama, there could be no prejudice to the Defendants to clarify which specific law would be applied. The amendment only raised legal, rather than factual, questions, thereby requiring no additional discovery. Thus, Plaintiffs' amendment "would [not] require the gathering and analysis of [additional] facts..., only those "already considered by the opposing party. [Plaintiff's] request [therefore] hardly merit[s] the description as prejudicial." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4<sup>th</sup> Cir. 1986). *See also McKinley v. Kaplan*, 177 F.3d 1253, 1258 (11<sup>th</sup> Cir. 1999)(finding no prejudice when the amendment [sought to substitute money damages for injunctive and declaratory relief], did not allege new facts or additional grounds for relief, and did not necessitate additional discovery or reformulation of the opposing party's legal strategy).

Finally, while there clearly would have been no prejudice to the Defendants, leave to amend should have been granted even if there was prejudice, because the need for allowing the amendment outweighed the prejudice that would have resulted. *See Crescent Tool Co. v. Fruehauf Corp.*, 306 F. Supp. 884, 886, 887

(N.D. Ga. 1969). Here, the result of the denial of amendment was severe prejudice of the dismissal of all of the Plaintiffs' state law claims.

The jury should have been permitted to hear evidence, taken in discovery but excluded by the Court, on Plaintiffs' claims for negligence, assault, and emotional distress, and to decide whether Plaintiffs had satisfied the elements of these claims under Colombian law.

**E. The District Court Abused its Discretion in a Series of Decisions Denying Plaintiffs Several Witnesses that Would have Provided “Smoking Gun” Evidence that Drummond Hired the AUC to Murder Locarno, Orcasita, and Soler.**

A detailed examination of the saga of the Garcia testimony, and the related instances of other newly-discovered witnesses who were not permitted to testify, provides a clear window on the extent of the abuse of discretion directed at Plaintiffs by the District Court. It began with a major breakthrough in the case – Garcia provided Plaintiffs with a sworn declaration stating unequivocally that he was present when Drummond's President, Jimenez, paid a representative of the AUC leader, Jorge 40, a “suitcase full of money” to execute Locarno and Orcasita. REII219(Garcia Declaration ¶ 4). Garcia's testimony was later corroborated by Visbal, who stated that he, as a member of the AUC, saw Jimenez meeting with

Garcia and an AUC commander. REII392-ExA at ¶¶ 4-5. In addition, “Alcon,” another AUC member, came forward to say that he delivered a package from Jimenez to Jorge 40, and he was the messenger to Jorge 40 of the names of the targeted Union leaders. He also participated in the operation to murder the Union leaders. R506vol9 at 1701:12-1704:24.

Further, Jorge 40 himself was arrested in late 2006 under the Colombian Justice and Peace process, and could have provided testimony of his direct link to Jimenez. Under the Justice and Peace law, to get the benefit of a substantially reduced sentence requires that all crimes must be confessed. Finally, Jimmy Rubio, a Plaintiff who had his claims dismissed at summary judgment and who had been living in hiding because the AUC had murdered several of his family members and had tried to kill him, was ready to testify that he was present when AUC assassins boasted of killing the three union leaders as part of a “package” for Drummond. REII323-Ex62 (Rubio Declaration ¶¶ 4-9). ***However, the jury heard none of this evidence due to a series of decisions by the District Court that were, in each instance, an abuse of discretion.***

Any one of the District Court’s decisions discussed below would be reversible error because each of them deprived Plaintiffs of a “smoking gun” witness that connected Drummond to the terrorist AUC. Collectively, the

decisions show that the Court had a fundamental hostility to the case. This was verbalized often. As detailed below, among other things, the Court called Plaintiffs' witnesses "terrorists," and said they lacked credibility. Most relevant to the issues relating to the newly-discovered witnesses, the Court refused to consider the unique circumstances of a case based on the murder and torture of trade union leaders by a brutal terrorist group, the AUC, in one of the most dangerous countries on earth, Colombia, a place this Court acknowledged, "where the awful is ordinary." *Romero*, 480 F.3d at 1238 (quoting *Silvia v. U.S. AG*, 448 F.3d 1229,1242 (11<sup>th</sup> Cir. 2006)).

Further, the Court viewed the assertion of newly-discovered witnesses as an affront to the discovery cutoff date without any consideration that the situation in Colombia dramatically changed with the implementation of the Justice and Peace process, and this, unfortunately, occurred after the discovery cutoff date. Plaintiffs submitted evidence of this phenomenon to the District Court. *See, e.g.*, R371 (Collingsworth Declaration and Exhibits A-P).

As this Court has recognized in taking a leading role in the development of the law under the ATS and TVPA, these cases must be conducted in light of the reality that they are often the sole mechanism for addressing human rights violations in foreign countries. Evidence and witnesses regarding egregious

human rights violations in foreign countries do not easily come to light, which may explain the generous ten-year statute of limitations and equitable tolling principles accorded for cases brought under the ATS and the TVPA. *See Cabello*, 402 F.3d at 1153.

It is usually due to a major change in conditions within the foreign country – as has occurred here with the Justice and Peace process in Colombia – that allows witnesses to human rights violations to step forward to tell their stories. *See Arce v. Garcia*, 434 F.3d 1254,1262 (11<sup>th</sup> Cir. 2006); *Jean v. Dorelien*, 431 F.3d 776, 780 (11<sup>th</sup> Cir. 2005).

The numerous abuses of discretion in this case display the District Court’s fundamental lack of understanding about, or hostility towards, cases brought under the ATS and TVPA. These errors must be corrected to allow the brave people who endured very concrete threats to their lives, as well as to their families, to testify and speak the truth about Drummond’s partnership with AUC terrorists in Colombia. Yet, even if this case involved a more routine domestic issue, applying this Court’s standards for newly-discovered witnesses and grounds for continuance, it is clear that the District Court abused its discretion with respect to the five issues discussed below.

Reversing any one of these decisions would require a new trial as Plaintiffs

were forced to go to trial with *none* of the witnesses linking Drummond to the AUC, and the murders of the Union leaders. Denying Plaintiffs evidence of this link was reversible error as it “struck at the heart of” their case. *Murphy v. Magnolia Electric Power Assoc.*, 639 F.2d 232, 235 (5<sup>th</sup> Cir. 1981).

Indeed, as this Court noted in *Borden, Inc. v. Florida East Coast Ry. Co.*, 772 F.2d 750, 756 (11th Cir. 1985), “[T]he trial court's failure to admit the evidence substantially prejudiced [plaintiff] because it resulted in the exclusion of evidence that was essential to its case. . . . a litigant is unduly prejudiced when his opponent is successful in preventing the admission of evidence on a particularly crucial issue in dispute, and then points to the absence of such evidence in closing argument.”

Here, the District Court lambasted Plaintiffs in chambers for not having the very evidence of a direct AUC-Drummond link that she excluded. R506Vol10 at 1804-07.<sup>12</sup> She came close to directing a verdict based on Drummond’s insistence

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<sup>12</sup> This conclusively precludes any argument that the excluded testimony was cumulative. The Court did allow two newly-discovered witnesses to testify, Edwin Guzman and Isnardo Ropero Gonzalez. Both of these witnesses were former military officers who testified about the relationship between the military and the AUC. *See, e.g.*, REII365, REII461-ExA (Guzman) and R371-ExI to Collingsworth Declaration (Ropero). Certainly the Court did not consider their testimony relevant to whether Drummond orchestrated the AUC’s murder of the Union leaders.

that Plaintiffs lacked evidence linking Drummond to the AUC, but she ultimately decided to let Drummond “defend itself publicly,” *id.* 1806:23-24, a task made much easier by the exclusion of all evidence showing that Drummond paid the AUC to murder the union leaders.

1. **The District Court knowingly gave Plaintiffs insufficient time to depose Rafael Garcia and then abused its discretion in denying Plaintiffs’ motion for a continuance to depose Garcia and the other newly-discovered witnesses.**

The Garcia Declaration was filed with the District Court on May 16, 2006. REII219. Rather than work with the Plaintiffs to preserve this newly-discovered evidence, the Court found counsel for Plaintiffs in criminal contempt for violating her gag order, a decision that this Court reversed. *Romero*, 430 F.3d at 1243. Reasoning that Plaintiffs did not discover the Garcia testimony until after the December 1, 2005 discovery cutoff date, the Court denied Plaintiffs request to depose him. R276.

At the February 27, 2007 summary judgment hearing, the Court refused to consider the Garcia Declaration, which would have established both the agency, conspiracy, and state action claims, reasoning that Garcia would not be permitted to testify at trial. REII339 at 15:12-16:5.

Likely because of the looming and glaring error this circular trap placed the

Plaintiffs in, the Court ordered the parties on March 5, 2007 to brief the issue of whether Garcia met the newly-discovered witness standard. REII330. On March 20, 2007, the Court ruled that the parties could depose Garcia as a newly-discovered witness. REII337. The Court found it would result in “manifest injustice” to deny Plaintiffs the Garcia testimony because of “the importance of that testimony to the Plaintiffs’ case.” *Id.* at 3.

At a March 22, 2007 status conference, the Court stated to Drummond’s counsel that its March 20 Order to allow the Garcia deposition, “was one of those things where I really felt, Mr. Jeffress, that was the best thing to do so that we would only have to try this case one time.” REII502 at 2:10-13 (emphasis added). Thus, the Court acknowledged that it would have been reversible error to deny Plaintiffs the Garcia testimony.

The District Court then committed this reversible error by knowingly providing Plaintiffs with insufficient time to complete the Letters Rogatory process. At the same March 22, 2007 status conference, the Court set July 9 as the trial date. *Id.* 18:14-17. The Court was on notice that it takes at least six months for obtaining a deposition via letters rogatory, *id.* 6:10-15, yet gave Plaintiffs less than four months to do it.

After making unprecedented, but unsuccessful, efforts to expedite the

Letters Rogatory process, Plaintiffs moved for a continuance on May 24, 2007 to allow adequate time to take Garcia's deposition, and to allow other newly-discovered witnesses to be deposed. Plaintiffs also were seeking to avoid prejudice to Defendants or the Court by clarifying the schedule well before the eve of trial. The Court denied this motion in a June 4, 2007 Order, finding that "going forward with the trial in July will not unduly harm Plaintiffs." REII382 at 3.

Under any standard of review, it is an abuse of discretion for the Court to initially acknowledge that "manifest injustice" would result in denying Plaintiffs the Garcia testimony, "because of the importance of that testimony to the Plaintiffs' case," and two months later to say that loss of this testimony would not prejudice Plaintiffs. The abuse of discretion, and harm to the Plaintiffs, is compounded by the fact that Plaintiffs first offered Mr. Garcia's declaration on May 16, 2006, and on August 10, 2006, the Court denied Plaintiffs' request to depose him. Plaintiffs then lost over seven months, until March 20, 2007, for the Court to decide that Mr. Garcia should be deposed.

Plaintiffs made a renewed motion for a continuance of the trial on July 2, 2007 because the Colombian government had yet to respond to the Letters Rogatory. The District Court specifically asked Drummond's counsel if they would be confident "in defending my discretion" on appeal. Having been assured

by Drummond that they would “vigorously” defend her discretion in denying a continuance, she did so. REII509 at 6:8-7:6. At this hearing, the Court never assessed the legal standard for granting a continuance.

On December 4, 2007, the Colombian government responded to the Letters Rogatory, and provided substantial documents relating to the Garcia testimony. REII514.

The Eleventh Circuit considers four factors in determining whether a district court's denial of a request for a continuance constitutes an abuse of discretion: “(1) the moving party's diligence in its efforts to ready its case prior to the date set for hearing; (2) the likelihood that the need for a continuance would have been remedied had the continuance been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the extent to which the moving party might have suffered harm as a result of the district court's denial.” *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1296 (11th Cir. 2005), *cert. denied*, 546 U.S. 935 (2005). These factors are substantially similar to those used in assessing whether a newly-discovered witness should be permitted to testify,<sup>3</sup> making it clear error for the District Court to first find on March 22, 2007

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<sup>3</sup> The standard for using a new witness is based on the following factors: (1) bad faith on part of the parties seeking to call the witnesses not listed in his pretrial memorandum, (2) ability of the party to have discovered the witnesses

that the Garcia testimony was newly-discovered, but then refuse on June 4, 2007, based on the same factors, to give Plaintiffs a brief continuance to obtain Mr. Garcia's crucial testimony. As Judge Tjoflat held, once it is clear that there is newly-discovered evidence, a trial continuance is the appropriate remedy to permit the movant to introduce newly discovered evidence while minimizing any prejudice to the nonmoving party. *R.M.R. v Muscogee County Sch. Dist.*, 165 F.3d 812, 818-19 (11<sup>th</sup> Cir. 1999). There, the newly-discovered evidence surfaced during the trial, but still this Court held that the proper remedy would have been a continuance. *Id.*

Plaintiffs easily meet the *Rink* factors. There is not even a suggestion that Plaintiffs engaged in dilatory tactics as the District Court agreed ultimately that Garcia legitimately was a newly-discovered witness. The delay that occurred after the filing of the Garcia Declaration on May 16, 2006 was attributable solely to the District Court holding counsel in criminal contempt for filing the declaration, and then erroneously ruling that Garcia could not testify because he became known to Plaintiffs after the discovery cutoff date. Further, Plaintiffs were able to learn of

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early, (3) validity of the excuse offered by the party, (4) willfulness of the party's failure to comply with the court's order, (5) party's intent to mislead/confuse his adversary, and (6) importance of the excluded testimony. *United States v. Koziy*, 728 F.2d 1314, 1320-21 (11th Cir. 1984).

the other subsequent newly-discovered witnesses because the political climate had substantially changed in Colombia, and testimony gathered in Colombia as part of the Justice and Peace process was yielding significant new information highly relevant to the Drummond murders. *See* R371 (Collingsworth Declaration and Exhibits A-P).

Thus, there is no basis to question Plaintiffs' conduct in the discovery of Garcia's testimony. This Circuit recognizes that it is an abuse of discretion to deny a continuance where the moving party is free of negligence, such as is the case here. *Arabian American Oil Co. v. Scarfone*, 939 F.2d 1472, 1479 (11<sup>th</sup> Cir. 1991)(“The exercise of discretion by the trial court will be disturbed . . . in . . . cases in which it clearly appears that the moving party was free of negligence.”) (citing *Grunewald v. Missouri Pacific R.R.*, 331 F.2d 983, 986 (8th Cir. 1964)). *See also Bearint v. Dorell Juvenile*, 389 F.3d 1339, 1353 (11<sup>th</sup> Cir. 2004).

As to the second factor, the December 4, 2007 response by the Colombian government indicates that the parties could have taken testimony from Garcia with a reasonable continuance. At its essence, this factor seeks to determine whether Plaintiffs have “suffered prejudice as a result of the denial of [their] request.” *United States v. Flynt*, 756 F.2d 1352, 1359 (9<sup>th</sup> Cir. 1984). There is hardly a greater prejudicial effect in a trial setting than the denial of a key witness.

Moreover, the Court's denial of a continuance also prevented Visbal, Alcon and Rubio from testifying at trial. These witnesses are discussed further below. All were available to testify at trial about their knowledge of Drummond's arrangement with the AUC to murder the Union leaders. Plaintiffs noted in their first motion for continuance that, while waiting for the response to the Garcia Letters Rogatory, they could depose Visbal and allow Defendants adequate time to investigate his assertions. They further asserted that, with a continuance, and the ongoing Justice and Peace process in Colombia, they were certain that other important witnesses would come forward as part of the paramilitary demobilization. R371at 10-15. In fact, it is an abuse of discretion to deny a continuance when sought for the purpose of obtaining more time to access a material witness. *Flynt*, 756 F.2d at 1360 (the trial court clearly abused its discretion in failing to grant the requested continuance where the defendant probably could have obtained an expert to assist him if he had been given more time)(citing *United States v. Barrett*, 703 F.2d 1076, 1081 (9<sup>th</sup> Cir. 1983)).

At the trial, Plaintiffs again offered Visbal, and also offered Rubio and Alcon. R506Vol10 at 2062-65. As in *R.M.R.*, 165 F.3d at 818-19, Plaintiffs properly sought a continuance to take their testimony. The District Court denied this as well, but even a continuance of a few days would have allowed this

testimony to be admitted at trial. R506Vol110 at 2062-65. In the end, Plaintiffs tried the case without a single “smoking gun” witness, and this caused severe prejudice. Plaintiffs had only circumstantial evidence of Drummond’s relationship to the AUC, and Drummond’s witnesses, particularly its President, Jimenez, were able to deny, without rebuttal, that they ever even met with leaders of the AUC.

The third factor likewise shows Plaintiffs should have been given a continuance because their request would have placed very little burden, if any, upon the District Court or Drummond. Indeed, the Court did not articulate a specific burden in denying Plaintiffs’ motion. Moreover, with respect to Garcia, the need for the continuance was at least in significant part attributable to the District Court’s prior refusal to allow his deposition.

Even if there was some normal scheduling burden to the Court, judicial efficiency is not a dispositive factor, and discretion to deny a continuance should not effectively deny a party’s right to try their case on the merits. “[A] trial court should not adhere blindly to the letter of a [pre trial] order for timely compliance with witness disclosures ‘*no matter what the reason*’ for a party’s non-compliance.” *Dabney v. Montgomery Ward & Co.*, 692 F.2d 49, 52 (8<sup>th</sup> Cir. 1982)(emphasis added)(citing *De Marines v. KLM Royal Dutch Airlines*, 580 F.2d 1193 (3<sup>rd</sup> Cir. 1978)). Indeed, in declining to allow Visbal to be considered a

newly-discovered witness, the Court announced that her mind was closed on the subject; she would not consider any new witnesses, even if they “arise from the dead.” REII504 at 19:10-11.

Plaintiffs note that they made their first motion for continuance on May 24, 2007, six weeks before the July 9 trial date, in order to minimize any prejudice to the Court, and to the Defendants. *See Charles v. Wade*, 665 F.2d 661, 664-65 (5th Cir. 1982)(plaintiff’s motion filed six weeks before trial to take a prison witness’ deposition had provided “ample time to select a convenient date and prepare for the deposition,” and that “permitting the deposition to be taken would not prejudice [defendants] in any way,” and even if so, proper result was a continuance of trial). *See also E.E.O.C. v. General Dynamics Corp*, 999 F.2d 113, 116 (5<sup>th</sup> Cir. 1993); *Daniel J. Hartwig Associates, Inc. v. Kanner*, 913 F.2d 1213, 1222-23 (7<sup>th</sup> Cir. 1990).

As to the final factor, Plaintiffs suffered grave harm due to the District Court’s denial of their request for a continuance. In the March 20, 2007 Order finding that Garcia was a newly-discovered witness, the Court stated that “manifest injustice” would result in denying Plaintiffs the Garcia testimony because of “the importance of that testimony to the Plaintiffs’ case.” Plaintiffs could not agree more, and in preventing Garcia’s testimony, and excluding Visbal,

Alcon and Rubio, as well as declining to provide a Letters Rogatory for Jorge 40, the Court forced Plaintiffs to try their case with none of their witnesses on the key issue – whether Drummond arranged for the AUC terrorists to murder Locarno, Orcasita, and Soler. *See United States v. Rio Grande Dam & Irrigation Co.*, 184 U.S. 416, 422-25 (1902); *United States v. Ramos*, 179 F.3d 1333, 1336-37 (11<sup>th</sup> Cir. 1999)(reversible error to exclude testimony on a determinative issue).

**2. The District Court abused its discretion in refusing to consider Alberto Visbal a newly-discovered witness.**

Alberto Visbal is a former member of the AUC. He demobilized, and was not charged by the Colombian government with any crimes. On June 12, 2007, Plaintiffs filed a motion to depose Visbal. R392. Plaintiffs indicated that they had first met with Visbal on June 8, 2007, and that they had learned recently of him from Colombian law enforcement officials. Visbal submitted a sworn declaration stating that, in his capacity as a member of the AUC, he was present when Drummond’s President, Jimenez, met with a representative of AUC Commander Jorge 40, and he also saw Garcia present at the meeting. REII392-ExA. This testimony would have been extremely significant at trial because Jimenez, knowing that Garcia and Visbal would not be testifying, denied that he ever met

with any AUC member. *See* R506Vol9 at 1662-1665.

The District Court denied Plaintiffs' motion to depose Visbal, and when Plaintiffs offered him again at trial, she denied that too. R506Vol10 at 2062-65. The exclusion was based upon her announced policy that no new witnesses could testify "even if they arise from the dead." REII504 at 19:10-11. She also questioned the value of his testimony, and collectively labeled Plaintiffs' proposed new witnesses "terrorists." REII505 at 30:21-31:20. It is an abuse of discretion for a trial court to apply a rule that, regardless of circumstances, no new witnesses would be considered. *See Dabney*, 692 F.2d at 52.

Based on this Court's standard for newly-discovered witnesses in *Koziy*, 728 F.2d at 1320-21, there is nothing to suggest that Plaintiffs should have been denied Visbal's crucial testimony. The key cases on the use of newly-discovered witnesses and abuse of discretion focus on whether the party offering the witness engaged in unnecessary delay and whether the new evidence is critical. For example, in *Murphy*, 639 F.2d at 235, the Court held that the district court abused its discretion in striking a newly-discovered expert because the expert had been disclosed to the appellees in another case and the appellants offered to exchange expert reports ten days before trial resulting in no surprise and unfair prejudice to the appellees; and "exclusion of the testimony struck at the heart of appellants'

case.” *See also Meyers v. Pennypack Home Ownership Assoc.*, 559 F.2d 894, 904 (3d Cir. 1977); *Price v. Seydel*, 961 F.2d 1470, 1474 (9th Cir. 1992).

Usually, when “the district court is held not to have abused its discretion in excluding the testimony of a witness who was not listed or otherwise timely identified,” it is only “because the witness was neither newly discovered, nor was the nature of his testimony first disclosed after the pre-trial order.” *Dabney*, 692 F.2d at 51. Plaintiffs here provided immediate notice to the Court and Defendants when they learned of Visbal’s testimony, and they offered him for a deposition during the same time that the parties were in Panama deposing two other witnesses. R371 at 10-15. There is simply no defensible basis for the Court to have excluded this testimony of an available witness.

**3. The District Court abused its discretion in refusing to allow “Alcon” to offer testimony at the trial.**

Near the end of their case, Plaintiffs moved for a brief continuance to allow the parties to take the testimony of a new witness, “Alcon,” who Plaintiffs had just learned about. Plaintiffs made an offer of proof that Alcon was a former AUC member who observed meetings between Drummond’s President, Jimenez, and the leader of the AUC, Jorge 40. He delivered a package from Jimenez to Jorge 40, he

was the messenger to Jorge 40 of the names of the Union leaders to be killed, and he, as an AUC official, participated in the operation to murder Locarno and Orcasita. R506Vol9 at 1701:12-1704:24. This testimony was offered after Jimenez testified that he never had met with AUC members. R506Vol9 at 1662-1665.

Plaintiffs offered to put the testimony on by video conference, or by video deposition. REII506Vol10 at 2058:25-2059:4. Alcon was ready to testify during the time of the trial, but Plaintiffs offered to give Defendants whatever time they needed to investigate him. *Id.* 2061:14-2062:2. The District Court denied Plaintiffs' motion to add Alcon as a witness, and to take his testimony. *Id.* 2062:10-14. In doing so, the Court first said that since none of Plaintiffs other witnesses were credible, she assumed Plaintiffs did not care about the credibility of the witnesses. *Id.* 2050:18-22. After an initial apology, *id.* 2050:25-2051:1, she repeated that she didn't think the witnesses Plaintiffs had presented were credible, *id.* 2057:24-2058:4, and she used this as the basis for denying Plaintiffs' motion: "So Alcon may be the most credible witness in the world, but I'm not going to continue the case on the possibility that perhaps the plaintiffs have finally found a credible witness." *Id.* 2062:10-14.<sup>4</sup> No doubt the Court was also applying the

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<sup>4</sup> The sole fact the Court cited in attacking the credibility of Plaintiffs' witnesses was that they were given funds by Plaintiffs to testify in Panama, rather than Colombia. The Court mocked Plaintiffs' witnesses: "I think I could have a

“arise from the dead rule,” which she reminded Plaintiffs previously, would apply to all offers of new witnesses. REII504 at 19:10-11.

Except for the undisguised hostility of the trial court, the Alcon facts are precisely the same as those in *R.M.R.*, where Judge Tjoflat held that the proper procedure for a witness newly-discovered during trial is a continuance. *R.M.R.*, 165 F.3d at 818-19. There was no finding that Alcon was not newly-discovered. The sole reason given for denying the testimony was that the Court believed Alcon was not a credible witness. However, the Court had no right to be opining about Alcon’s credibility in the midst of a jury trial; this task was for the jury.

*Washington v. Texas*, 388 U.S. 14, 22 (1967). *See also United States v. Mills*, 760 F.2d 1116, 1120-21 (11th Cir. 1985)(reversing denial of deposition of fugitive residing in Bermuda as abuse of discretion; credibility of testimony was issue of fact for the jury).

It was an abuse of discretion to bar the testimony of a highly-significant new witness based on an arbitrary standard that had nothing to do with the proper legal test for assessing whether a witness is newly-discovered, such as was

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pretty good time in Panama on four thousand dollars.” REII506Vol10 at 2072:1-4. This comment reveals much because ***the Court ordered Plaintiffs to produce all the witnesses in Panama.*** She felt that Colombia was too dangerous for Drummond’s lawyers. *Id.* 2073:19-24. *See also* R504 at 20:24-21:18.

articulated by this Court in *Koziy*, 728 F.2d at 1320-21. To fail to apply any recognized legal standard is itself an abuse of discretion. *See James*, 6 F.3d at 239. To deny Plaintiffs a witness who admitted to being a participant in both the arrangements with Drummond to retain the AUC to murder the Union leaders, and in the implementation of the murders, makes the abuse of discretion extreme.

**4. The District Court abused its discretion in refusing to issue a Letters Rogatory to obtain the testimony of Jorge 40, the AUC commander charged by the Government of Colombia for the murders of Locarno, Orcasita and Soler.**

In the midst of the tensions between the Plaintiffs and the Court over the Garcia issues, the Colombian government arrested Jorge 40. By all accounts, Jorge 40 was the leader of the Northern Block of the AUC, and at this time in the proceedings, Plaintiffs had Garcia's Declaration that Jorge 40 was paid by Drummond to murder the Union leaders. Plaintiffs moved on September 21, 2006 for the Court to issue a Letters Rogatory to depose the suddenly-available Jorge 40 and preserve his testimony for trial. R278. The Court denied Plaintiffs' motion on December 12, 2006. SRE 306. The Court's position was the same as that taken in the Garcia motion – discovery cutoff was past, so no new witnesses, even newly-captured paramilitary leaders who directed the murders at issue in the case, would

be permitted. *Id.* 1-2.

Under any test for newly-discovered witnesses, Jorge 40 would qualify. One of the most dangerous terrorists in Colombia was finally in custody, and it occurred in September 2006, about ten months before the ultimate trial date. Based on the recent experience with the Garcia Letters Rogatory, the testimony could have been secured even without a continuance. Jorge 40 was ultimately charged by the Colombian government for the murders of Locarno, Orcasita and Soler. *See* R 423 (Defendants' motion in limine, **granted** by the Court, to prevent the jury from learning that Jorge 40 was charged with the murders).

Jorge 40 would have much to say about Drummond, and the District Court's refusal to issue the order necessary to begin gathering that testimony for trial must be reversed as an abuse of discretion.

**5. The District Court abused its discretion in not allowing Jimmy Rubio to testify.**

The substance of Mr. Rubio's Declaration has been discussed. He had direct evidence that Drummond was paying the AUC, that the AUC had a cooperative relationship with the Colombian military stationed on Drummond's property, and that the AUC executioners of the three union leaders told him it was part of a "package with Drummond." REII323-Ex62 (Rubio Declaration ¶¶ 4-9). The

District Court refused to consider his declaration at summary judgment because she did not think he would be available to testify. REII339 at 8:19-25. When he ultimately was available to testify at trial, the Court refused to allow it.

R506Vol110 at 2063:2-2064:3.

Mr. Rubio's story as a prospective witness is particularly unusual. He started the case as a Plaintiff. After filing the case, he fled Colombia and went to Venezuela. His sister had already been executed by the AUC, and he himself was on the AUC hit list. REII323-Ex62 at ¶ 3-4.

There is no dispute that Plaintiffs twice arranged for him to be deposed in Venezuela as he could not get a visa to the United States. On both of these occasions Defendants unilaterally cancelled. They raised issues about Rubio's visa application and whether he had been charged with a crime in Colombia.

On the eve of the second scheduled deposition, Rubio's father-in-law was murdered in Colombia. He was found with his tongue cut out and then inserted in his mouth, a known paramilitary warning in Colombia to keep quiet. *See* R320 at J17(a). This caused Rubio to go into deep hiding, and Plaintiffs' counsel lost contact with him for quite a while. A third effort to depose Rubio was scheduled, and it was cancelled because Plaintiffs could not find him. Plaintiffs kept the Court advised of the ongoing effort to locate Rubio. REII502 at 6:4-8:12. At

summary judgment, the Court dismissed all of his claims, along with those of the other living Union officials. REII329 at 1-2.

At the trial, in the context of discussing newly-discovered witnesses, Plaintiffs notified the Court that Rubio had been found and was willing to testify. The Court ruled that he could not testify. R506Vol10 at 2063:2-2064:3.

Putting aside whether the violence visited upon Rubio and his family excused his failure to stay in contact with the Plaintiffs after his second deposition was cancelled unilaterally by Defendants, once his claims were dismissed, he should have been treated as a third party witness willing to testify, at great risk, for the remaining Plaintiffs, since he was no longer a Plaintiff himself. The Court acknowledged this distinction in saying that “I have more authority in terms of prohibiting a party from testifying when that party has not cooperated previously in discovery, than in denying plaintiffs a factual witness who has just shown up, sort of at the last minute.” REII502 at 8:2-7. Yet, this is what the Court did. It was an abuse of discretion to exclude Rubio, as Plaintiffs not only were not negligent in failing to produce him, they miraculously found him after his understandable desire to go into hiding.

#### **F. The District Court Erred in Striking All of Plaintiffs' Experts.**

On July 18, 2005 – almost two years prior to the commencement of the July 9, 2007 trial – Plaintiffs presented Defendants with reports of three expert witnesses pursuant to Fed.R.Civ.P. 26(a)(2)(B). While one of these reports (that of Dr. Sonja Binkhorst on the psychological damages suffered by Plaintiffs) was albeit incomplete because of her inability to examine the Colombian Plaintiffs by that point, the other two reports were very detailed.

Thus, Plaintiffs presented Defendants with the expert reports of former Colombian Judge and current law professor, Luz Nagle, and Colombian human rights expert, Tito Gaitan. *See* REI190-ExsA and B. Their reports included a statement of their opinions with all the information specifically required by Rule 26(a)(2)(B), the copies of exhibits they relied upon, and a *curriculum vitae*. In addition, Professor Nagle's report included a comprehensive list of her publications and a sampling of them.

As clearly demonstrated in these materials, both Nagle and Gaitan could opine about key issues in this case, including, *inter alia*, the close relationship and collaboration between the Colombian military and the right-wing paramilitaries in

human rights abuses, and the scope and nature of the civil conflict in Colombia.<sup>5</sup>

This expert information would have supported both the state action and war crimes issues.

Notwithstanding that these reports were complete, and the critical nature of these two experts to Plaintiffs' case, Judge Bowdre not only struck them, but ordered that "the Plaintiffs are precluded from offering *any* expert at trial."

REI199 (emphasis added). While Judge Bowdre gave scant opinion as to why Plaintiffs' expert reports were insufficient, she gave absolutely no reason for the extraordinary decision to exclude all experts. Judge Bowdre thus stated that Plaintiffs' expert reports were insufficient because "the disclosures of Plaintiffs' experts fail to state any actual opinions about which they will testify, but instead merely recite the general subject matter of their expected testimony." *Id.*

However, Judge Bowdre focused almost her entire opinion on how Dr. Binkhorst's report was, admittedly, inadequate, but she then lumped the other, comprehensive reports of the other experts together and stated only that "[t]he other reports similarly lack any of the substance required by Rule 26(a)(2)(B)." *Id.* Indeed, Judge Bowdre spent more verbiage on her chastisement of Plaintiffs'

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<sup>5</sup> Professor Nagle attached a Monograph to her expert report, which emerged from a conference sponsored by the U.S. Army War College, and focuses on the history and development of the Colombian civil war. *See* REI190-ExA.

counsel for raising the argument that Defendants had failed to meet and confer before moving to strike all of Plaintiffs' experts, and that the meet and confer process should have clarified what further information Defendants needed, than she did on the actual shortcomings she perceived in Plaintiffs' expert reports for Nagle and Gaitan *See id.*

The expert reports speak for themselves in terms of their thoroughness. The signed reports also included their qualifications, the compensation to be paid and a listing of other cases in which they provided expert opinions. In short, Plaintiffs' expert reports for Nagle and Gaitan complied with all of the enumerated requirements of Fed. R. Civ. P. 28(a)(2)(B).

The District's Court's failure to apply a discernable standard to her evaluation of the expert reports, and to indicate how or why the reports did not meet that standard, is itself an abuse of discretion. *See James v. Jacobson*, 6 F.3d at 239. In addition, it was an abuse of discretion to not even purport to say why the Court believed, well over a year before trial, that the circumstances compelled her extraordinary decision of excluding *all* of Plaintiffs' experts. There was plenty of time in advance of trial to allow Plaintiffs to supplement their reports, if told what was lacking, and to allow Defendants to seek more evidence/information about the expert witnesses, their opinions and the bases for these opinions prior to deposing

them before trial. Indeed, Fed. R.Civ. P 26(a)(2)(C) provides that the required expert witness reports must be provided “at least 90 days before the trial date.”

In this case, Plaintiffs’ expert reports were provided **almost two years before the trial**, and, even at the time the Court considered this issue, over one year remained before trial. In such circumstances, there were much less extreme remedies available to cure any perceived deficiencies in the reports. The extreme action of altogether disqualifying Plaintiffs’ crucial expert witnesses was an abuse of discretion. *See, e.g., Commonwealth Ins. Co. v. Titan Tire Corp.*, 398 F.3d 879, 888 (7<sup>th</sup> Cir. 2004)(failure to submit **any** expert report was harmless where there was still sufficient time before trial); *Sherrod v. Lingle*, 223 F.3d 605 (7<sup>th</sup> Cir. 2000)(reversing district court and holding that non-disclosure was harmless when defendant had sufficient time to prepare examination of plaintiff’s expert); *Dickenson v. Cardiac and Thoracic Surgery of Eastern Tenn.*, 388 F.3d 976, 982 (6<sup>th</sup> Cir. 2004)(reversing district court and allowing testimony, despite disclosure, when trial date was not set).


The lack of expert opinion on the state action and war crimes issues severely prejudiced Plaintiffs. As was discussed previously, the Court dismissed the state action claims for want of evidence, and perhaps, understanding. As to war crimes, this is a very complex issue, and it was an issue that the jury submitted a

question on to the District Court regarding the instruction. R484. It was an abuse of discretion to exclude this crucial expert testimony. See *U.S. v. 0.161 Acres of Land in Birmingham, Ala.*, 837 F.2d at 1039-1042.

### **VIII. CONCLUSION**

For the foregoing reasons, and considering the entire record in this case, Plaintiffs-Appellants respectfully request that this Court reverse the District Court's rulings dismissing their claims at summary judgment and denying their fact and expert witnesses at trial, and order a new trial.

Dated: December 11, 2007      Respectfully submitted,

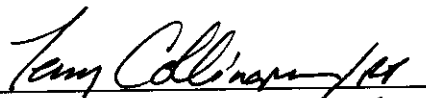
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**CERTIFICATION OF BRIEF FORMAT**

Pursuant to Fed. R. App. P. 32 (a)(7)(C), I certify that this Opening Brief for Plaintiffs/Appellants complies with Rule 32 (a)(7)(B) in that it has a typeface of 14 points and contains 13,993 words.

Dated: December 11, 2007      Respectfully submitted,

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I hereby certify that a true and correct copy of Plaintiffs-Appellants' Appeal Brief was served via Federal Express Overnight on this 11th day of December, 2007, on the following:

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