16-10921

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

v.

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

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

APPELLANTS' REPLY BRIEF

Terrence P Collingsworth
INTERNATIONAL RIGHTS ADVOCATES
621 Maryland Ave. NE
Washington, DC 20002
Phone: 202-543-5811
Email: tc@iradvocates.org

Counsel for Plaintiffs-Appellants,
Penaloza et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTORY AUTHORITIES

RULES AND REGULATIONS

**Indicates citations upon which the party primarily relies.*

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs-Appellants Marisol Melo Penaloza *et al.* ("Plaintiffs") hereby reply to the Drummond Defendants' Answering Brief ("DAB"). Plaintiffs are wrongful death claimants of 34 decedents executed during the Colombian civil conflict by the paramilitary group, Autodefensas Unidas de Colombia (AUC). They brought claims under the Alien Tort Statute (ATS) and Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350, and Colombia's wrongful death law against the Drummond Defendants based on allegations they collaborated with the AUC in the murders of Plaintiffs' decedents.

Drummond's arguments to affirm the District Court's *pro forma* dismissal of all of Plaintiffs' claims would require this Court to ignore at least four well-established rules of procedure:

First, this Court's rulings are overwhelming that in dismissing all of the claims without any dismissal motion by Drummond pending, the District Court was required to provide a ruling with clear reasoning, rather than a general reference to prior *Drummond* decisions addressing different issues in different cases at different stages of litigation. The sole reasoning provided was: "[b]ased on the decisions entered by this court and the Eleventh Circuit in 2:09-cv-1041-RDP ("*Balcero*") and 7:09-cv-557-RDP ("*Baloco*") . . ." APP. 7, ECF No. 59 at 2. In *Danley v. Allen*, 480 F.3d 1090, 1091-1092 (11th Cir. 2007) (per curiam), this

Court reversed the trial court's "one-sentence orders perfunctorily stated" that were "devoid of any facts and any legal analysis." *Id*. at 1091. Drummond's reliance on Fed. R. Civ. P. 52(a)(3) is objectively wrong. *See* DAB at 14-15. Rule 52(a)(3) allows a district court to forgo extensive findings only in ruling "on a ***motion***." Fed. R. Civ. P. 52(a)(3) (emphasis added). There was no pending motion in this case as the District Court had previously denied Drummond's motion to dismiss in issuing a stay. APP. 3, ECF No. 45 at 1.

Second, Drummond ignores clear precedent in urging this Court to simply decide on appeal the complex, factually-laden issues that were not decided by the District Court. This is particularly evident with respect to the statute of limitations issue relating to Plaintiffs' claims under Colombian wrongful death law. *See* DAB at 45-47. This Court's case law is clear that, with limited exceptions not applicable here, an issue not ruled upon by the trial court must be remanded and should not be addressed in the first instance on appeal. *See, e.g.*, *Danley*, 480 F.3d 1090, 1092 ("While this Court certainly could review the record and applicable case law and render a reasoned decision . . . this is the responsibility of the district court in the first instance."). If the Court were to reach the limitations issue, based on the current record, Plaintiffs' wrongful death claims were timely based on the applicable Colombian statute of limitations, and the fact-based equitable tolling issues cannot be addressed in the context of a dismissal motion.

Third, with respect to Plaintiffs' TVPA claims against individual Defendants Garry Drummond and Mike Tracy, Drummond urges the Court, again in the absence of a pending motion and without any specific ruling below by the District Court on the TVPA claims, to act as if there is a motion to dismiss now pending before ***this Court***, and dismiss the TVPA claims. DAB at 31-45. Further, in considering this non-existent motion to dismiss, Drummond urges this Court to improperly weigh evidence and ignore the well-established requirement that, assuming there was a proper motion to dismiss pending under Fed. R. Civ. P. 12(b)(6) (which there was not), Plaintiffs are entitled to the benefit of all reasonable inferences to be drawn from the factual allegations, which must be taken as true.[1] DAB at 34-45 If this Court were to consider the merits, Plaintiffs have stated viable TVPA claims.

Fourth, in requesting that this Court dismiss Plaintiffs' ATS claims based on *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), Drummond likewise seeks a ruling before this Court on a non-existent motion to dismiss and asks this Court to make a ruling in the first instance. DAB at 18-31. Drummond's

[1] On a motion to dismiss under Rule 12(b)(6), a Court must treat plaintiffs' factual allegations as true and must grant plaintiffs the benefit of all reasonable inferences from the facts alleged. *Secretary of Labor v. Labbe*, 319 Fed.Appx. 761 (11th Cir. 2008). Such allegations must raise a right to relief above a speculative level. *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Whether the court believes the claim will ultimately succeed is not a permissible factor in determining whether plaintiff has stated a claim. *In re Se. Banking Corp.*, 69 F.3d 1539, 1550 (11th Cir. 1995).

position requires that the rules of *res judicata* and due process be suspended to allow the Plaintiffs ***in this case*** to be denied the right to amend their complaint in a case that has been stayed most of the time since it was filed, in which there has been no discovery, including on the jurisdictional issues raised by *Kiobel*, and in which there has been no consideration of their claims under the proper standards of Fed. R. Civ. P. 12(b)(6), apparently because other, unrelated plaintiffs in different cases at much different stages of progression under different legal standards had their ATS claims against Drummond dismissed. There is no legal basis for the extraordinary legal immunity that Drummond seeks.

Plaintiffs seek the most basic relief – a chance for their claims to be fully considered by the District Court so that there can be a proper record to review on appeal should that be necessary following full consideration of the issues. The dismissal should be reversed and the District Court directed to allow Plaintiffs to amend their complaint to reflect the developments in the law that occurred during the nearly two years that the case was stayed while awaiting decisions in this Court and the Supreme Court that would impact the issues. Plaintiffs also seek limited jurisdictional discovery on the *Kiobel* issue for their ATS claims.

II. ARGUMENT

A. The District Court's Failure to Issue Any Reasoning to Support the Dismissal of Plaintiffs' Complaint Requires Remand for Full Consideration.

The sole reasoning provided by the District Court in dismissing Plaintiffs' complaint was: "[b]ased on the decisions entered by this court and the Eleventh Circuit in 2:09-cv-1041-RDP ("*Balcero*") and 7:09-cv-557-RDP ("*Baloco*") . . ." APP. 7, ECF No. 59 at 2. Further, there was no pending motion in this case as the District Court had previously denied Drummond's motion to dismiss without prejudice when it issued a stay in the case. APP. 3, ECF No. 45 at 1. Plaintiffs-Appellants established in their Opening Brief ("AOB") that it was an abuse of discretion for the District Court to dismiss Plaintiffs' claims without issuing a decision that provided the specific reasons for the dismissal. *See* AOB at 9, 16-19, 22-23, and 29-30.

Drummond argues that Fed. R. Civ. P. 52(a)(3) permitted the District Court to dismiss the case without providing any reasoning. DAB at 14-15. This is objectively wrong because that rule only allows a district court to forgo extensive findings in ruling "on a ***motion*** . . ." Fed. R. Civ. P. 52(a)(3) (emphasis added). Thus, Rule 52(a)(3) is simply inapplicable because there was no pending motion to dismiss as the District Court had previously denied Drummond's motion in issuing a stay. APP. 3, ECF No. 45 at 1.

More fundamentally, regardless of whether Rule 52(a)(3) applies, as the Supreme Court succinctly put it, a dismissal order should be reversed and remanded when the district court's order was "opaque and unilluminating as to

either the relevant facts or the law. . . .” *Carter v. Stanton*, 405 U.S. 669, 671-672 (1972) (per curiam). The decision at issue in this case was silent on both the relevant facts and applicable law.

This Court has likewise been adamant that a district court must create a reviewable record of a dismissal decision, regardless of whether Rule 52(a)(3) applies. The most widely-cited case is *Danley*, 480 F.3d at 1092, where this Court stated, “[w]hile this Court certainly could review the record and applicable case law and render a reasoned decision …, this is the responsibility of the district court in the first instance.” Numerous other decisions by this Court agree. *See, e.g.*, *Broadwater v. United States*, 292 F.3d 1302, 1304 (11th Cir. 2002) (“Where … there may potentially be some merit to the allegations if supported by the record, and the record consists of voluminous files and transcripts, an adequate appellate review of the basis for the district court's decision requires something more than a mere summary denial … by the district court.”); *Gilbert v. Daniels*, 624 Fed.Appx. 716, 718 (11th Cir. 2015) (per curiam) (citing *Danley* and vacating and remanding dismissal order that “did not address any of the allegations or explain how they failed to meet Rule 8(a)(2)’s pleading standard.”); *Milbauer v. United States*, 587 Fed.Appx. 587, 592 (11th Cir. 2014) (per curiam) (citing *Danley* and remanding because lack of factual findings left Court “unable to engage in meaningful appellate review”); *Ruffino v. City of Hoover, Ala.*, 467 Fed.Appx. 834, 834-835

(11th Cir. 2012) (per curiam) (citing *Danley* and remanding, stating "[w]e disapprove of such unexplained orders"); *Wetherbee v. Southern Co.*, 423 Fed.Appx. 933, 935 (11th Cir. 2011) (per curiam) (citing *Danley* and remanding for District Court to issue a "reasoned order" addressing the specific claim).

These additional decisions reinforce the Eleventh Circuit cases Plaintiffs previously cited showing it was an abuse of discretion for the District Court to dismiss their claims without specific reasoning. AOB at 9, 16-19.[2]

Other Circuits agree that a District Court must provide specific reasoning in ruling on a dismissal motion even if Rule 52(a)(3) applies. *See, e.g., Jot-Em-Down Store, Inc. v. Cotter & Co.*, 651 F.2d 245, 247 (5th Cir. Unit A July 1981) (citations omitted) (emphasis added) ("While the Federal Rules of Civil Procedure do not require a statement of reasons by a trial judge granting a motion to dismiss, … [i]n all but the simplest case, such a statement usually proves not only helpful, but ***essential***."); *Hanson v. Aetna Life & Cas.*, 625 F.2d 573, 575 (5th Cir. 1980) (citations omitted) (emphasis added) ("Although our prior admonitions have been precatory in character, we have ***in practice insisted*** that district courts record however informally their reasons for entering summary judgment [despite

[2] Drummond's simplistic effort to limit these cases to the specific legal issues that were on appeal in them, DAB at 16-17 and n. 11, ignores the obvious application by this Court of the general rule, fully supported by the numerous additional cases cited above, that it is reversible error for a District Court not to have supplied a specific and reviewable reason for a dismissal.

Fed.R.Civ.P. 52(a)], at least where their underlying holdings would otherwise be ambiguous or inascertainable."); *Francis v. Goodman*, 81 F.3d 5, 8 (1st Cir. 1996) (citations omitted) ("When a contested issue as sensitive and dispositive as the subject matter jurisdiction of the federal forum in a removed action is at stake, it will be the unusual case in which findings of fact and conclusions of law are unnecessary to enable effective appellate review."); *Couveau v. American Airlines, Inc.*, 218 F.3d 1078, 1081 (9th Cir. 2000) (citation omitted) ("Appellate review is a particularly difficult process when there is nothing to review. A[n] … order that fails to disclose the district court's reasons runs contrary to the interest of judicial efficiency by compelling 'the appellate court to scour the record in order to find evidence in support of [the] decision.' It also increases the danger that litigants, whether they win or lose, will perceive the judicial process to be arbitrary and capricious."); *United States v. Apperson*, No. 14-3069, 2016 WL 898885, at *6 (10th Cir. Mar. 9, 2016) (citing numerous cases, the Court stated "in a variety of different contexts, we have found reversible error where courts have failed to provide a record of their decisional process that was adequate to support and facilitate meaningful appellate review); *see also* Arthur C. Miller, 9C Fed. Prac. & Proc. Civ. § 2575 (3d ed.) ("Indeed, regardless of what the rule in terms requires, whenever the decision of a matter requires the court to resolve conflicting versions of the facts, findings are desirable and ought to be made.").

Based on this unwavering and overwhelming precedent,[3] the District Court abused its discretion in dismissing this case with no discernable reasoning. Drummond's incorrect reliance on Rule 52(a)(3) when there was no pending motion, and its failure to even discuss *Danley v. Allen* and its considerable progeny, leaves this Court with a simple option: reverse and remand this case for proper consideration of the issues.

Plaintiffs will demonstrate in the remaining sections that there is no plausible argument that the District Court's reasoning could be discerned through reference to the prior Drummond-related decisions referenced in the *pro forma* dismissal order (APP. 7, ECF No. 59 at 2) and that the complex and fact-laden issues awaiting initial resolution are not appropriate for resolution in the first instance on appeal, as Drummond urges. *See* DAB at 15-18. On the latter point, a well-established rule of appellate practice is that appellate courts should not reach the merits of issues that the trial court did not address. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (case was remanded with Supreme Court stating "[i]t is the

[3] The sole exception Plaintiffs identified to this Court applying *Danley v. Allen* when a District Court's order failed to provide reasoning sufficient to review, is *Anderson v. Florida Dept. of Envtl. Protection*, 567 Fed.Appx. 679, 680 (11th Cir. 2014) (per curiam), where the Court found it was appropriate to apply Rule 52(a)(3) and allow a non-specific ruling below because the motion at issue "bordered on being frivolous." As previously established, Rule 52(a)(3) does not apply here as there was no pending motion to dismiss, and the issues relating to the viability of Plaintiffs' complaint cannot by any stretch be considered frivolous.

general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Strickland v. Alexander*, 772 F.3d 876, 889 (11th Cir. 2014) (same). Should the Court decide to reach the merits on any of Plaintiffs' three distinct claims, Plaintiffs demonstrate that none of them should have been dismissed on the current record.

B. The District Court Abused its Discretion in Dismissing Plaintiffs' Wrongful Death Claims.

1. This Court should not decide the fact-laden statute of limitations issue in the first instance on appeal.

Drummond's general assertion that the District Court's *pro forma* dismissal of Plaintiffs' claims is supported by the order referencing the prior Drummond decisions in *Balcero* and *Baloco* (*see* APP. 7, ECF No. 59 at 2) is proven false by examining the dismissal of Plaintiffs' wrongful death claims based on diversity jurisdiction. As Plaintiffs demonstrated in their Opening Brief, neither *Balcero* nor *Baloco* had diversity claims based on Colombian wrongful death law, so no ruling in either of those cases could possibly support the dismissal of those claims in this case. *See* AOB at 14-16. As established in the preceding section A, the District Court's failure to provide any reasoning to support the dismissal, by reference or otherwise, requires reversal.

The Drummond Defendants simply gloss over this problem and argue that this Court should just rule in their favor on the merits. DAB at 45-57. As the

District Court did not provide a basis for dismissing the wrongful death claims, Drummond's argument is that this Appellate Court should rule in the first instance on Drummond's fact-laden argument that the statute of limitations has run on the claims. While Plaintiffs demonstrate below that the existing record supports their position that their claims are timely, the law is clear that Courts of Appeal generally should not decide complex fact-laden issues in the first instance. *See, e.g.*, *Singleton*, 428 U.S. at 120 (case was remanded with Supreme Court stating "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Strickland*, 772 F.3d at 889 (same); *Stewart v. Dept. of Health & Human Services*, 26 F.3d 115, 115-116 (11th Cir. 1994) (citations omitted) ("As a general principle, this court will not address an argument that has not been raised in the district court. … Although this court may hear an issue not raised in the lower court when the proper resolution is beyond any doubt, issues involving the resolution of factual questions can never be beyond doubt.").[4]

[4] Drummond's assertion that the purpose of this rule is to "ensur[e] that an appellate court does not reverse on a ground that an appellee was never given an opportunity to address" and thus only "protects *appellees* – not appellants", DAB at 16 n.10, is clearly incorrect. *See Mazzoni Farms, Inc. v. E.I. DuPont de Nemours and Co.*, 223 F.3d 1275, 1276 n.2 (11th Cir. 2000) (appellate court would not consider **appellee's** alternative argument in favor of dismissal that was not addressed by district court). The cases are clear that "the reason for this [rule] is to ensure that **all parties have had an opportunity to offer all evidence** they believe relevant to the issues so that they will not be surprised when the issues are decided by final decision on appeal without first having had an opportunity to be heard."

This principle is strongly applicable in the present case because there is a dispute between the parties' respective experts as to the nature of the Colombian statute of limitations that was not addressed by the District Court's *pro forma* dismissal. *Compare* Drummond's Supplemental Appendix ("Supp.") Vol. II at 51-54; ECF No. 36 at 43-46 (Plaintiffs' Opposition to Motion to Dismiss relying on expert Declaration of Professor Nelson Camilo Sánchez-León [ECF No. 36-1] that the 10 or 20 year statute of limitations period of Colombian law applies to Plaintiffs' claims for wrongful death) *with* ECF No. 33 at 53-54 (citing declaration of Alejandro Linares Cantillo to argue that the two-year Alabama statute of limitations applies).

As this case was stayed for most of its history, Plaintiffs have not had the opportunity for any discovery. Normal practice would permit Plaintiffs the opportunity to cross examine Defendants' expert at an evidentiary hearing. *See Osorio v. Dole Food Co.*, 665 F.Supp.2d 1307, 1321-1322 (S.D. Fla. 2009) (court granted plaintiffs' request for evidentiary hearing at which "[b]oth sides submitted substantial expert testimony and documentary evidence" concerning interpretation and application of a foreign law, and on foreign judicial system); *Cravens v. Wilbros Butler Engineers, Inc.*, 51 F.3d 285 (10th Cir. 1995) (holding "that it was an abuse of discretion for the district court to accept one affidavit over another

---

Strickland, 772 F.3d at 889 (emphasis added) (citing *Singleton*, 428 U.S. at 119-121).

without an evidentiary hearing where the parties could cross-examine the witnesses and the district court could measure their credibility."). While Plaintiffs establish in subsection (2) below that, based on the current record, their position is correct that the Colombian statute of limitations applies and their claims are timely, having a complete record before resolving the issue is consistent with proper procedure.

Similarly, this Court should not decide in the first instance the fact-laden issue of equitable tolling. Plaintiffs raised in their complaint the dangers of violent retaliation that prevented many of them from filing their claims until the Colombian civil conflict began to wind down. *See, e.g.*, APP. 2, ECF No. 20, ¶ 18. When Drummond moved to dismiss based on the statute of limitations, Plaintiffs demonstrated that their claims were equitably tolled and that such a fact-laden issue could not be decided in the context of a motion to dismiss. *See* Supp. Vol. II 36 at 51-54; ECF No. 36 at 40-41. As this Court has recognized, at the motion to dismiss stage, dismissal on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time-barred. *See, e.g.*, *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1288 (11th Cir. 2005); *La Grasta v. First Union Secs., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). Statute of limitations motions, therefore, cannot be granted at the dismissal stage if a factual inquiry is required. *Id.* at 848.

As the District Court previously recognized in the *Balcero* case when addressing the issue of equitable tolling, to survive a motion to dismiss on statute of limitations grounds, Plaintiffs' allegations need only raise an issue of fact as to timeliness. *See Balcero v. Drummond Co., Inc*., No. 2:09-cv-1041-RDP (N.D. Ala. filed May 27, 2009), Doc. 275, at 6 ("The court cannot say that the thirty-six Plaintiffs at issue cannot prove a set of facts that would show their claims are subject to equitable tolling."); *see also Tello*, 410 F.3d at 1288; *Doe v. Unocal Corp.*, 963 F. Supp. 880, 897 (C.D. Cal. 1997) (denying motion to dismiss ATS and TVPA claims on statute of limitations grounds because "plaintiffs have raised an issue of fact regarding equitable tolling"); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549-51 (N.D. Cal. 1987) (same).

Equitable tolling is an individualized inquiry requiring a factual conclusion as to when each Plaintiff could have filed her claims and whether that would then be timely. Such a finding could not be made in the first instance on appeal. [5]

[5] This Court has recognized that it has discretion to decide certain limited issues on appeal in the first instance: "While an appellate court enjoys discretion to address issues not ruled on by the district court, an appellate court should exercise that discretion only where the circumstances warrant such review. The Supreme Court has … identified [only] two such situations: 'where the proper resolution is beyond any doubt' and 'where injustice might otherwise result.' Here, neither applies." *Travelers Property Cas. Co. of America v. Kansas City Landsmen, LLC*, 592 Fed.Appx. 876, 884 (11th Cir. 2015) (citing *Singleton*, 428 U.S. at 121). Plaintiffs have shown that the disputed and fact-laden issues are far from "beyond any doubt" and, since their claims were dealt with in such a *pro forma* fashion,

Appellees' citations to *In re Mroz*, 65 F.3d 1567 (11th Cir. 1995) and *U.S. v. Chitwood*, 676 F.3d 971 (11th Cir. 2012) do not undermine the fundamental principle that appellate courts generally should not decide issues in the first instance. In *Mroz*, the Eleventh Circuit remanded for an evidentiary hearing to determine whether proper grounds existed for the imposition of sanctions and to give the appellant an opportunity to respond. There, the lower court improperly imposed sanctions under statute. However, the appellate court held the decision could still be affirmed if it was shown that there were grounds for imposing sanctions under the court's inherent power, i.e. bad faith. Even though it was arguable that the appellee had asserted bad faith in the lower court, the case had to be remanded because it was not clear that the court had found the requisite bad faith to justify the imposition of sanctions under its inherent power. *Id*. at 1575-1576. Thus, although the Eleventh Circuit did cite the 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," *id*. at 1574, it clarified that the correct grounds must actually have been addressed below for the appellate court to affirm. If not, remand is necessary.

The Drummond Defendants' reliance on *Chitwood*, 676 F.3d at 975, for the proposition that affirmance may be based on any ground supported by the record is

---

injustice [is] more likely to be caused than avoided by deciding the issue without [Appellants'] having had an opportunity to be heard." *Singleton*, 428 U.S. at 121.

also misplaced because they neglected a key aspect of that holding. The Court went on to say "[t]hat is true where … the alternative route for affirming does not require facts that remain to be found by the district court." *Id*. at 976. As demonstrated, there are fact-laden issues in this case that have yet to be resolved.

2. If the Court does reach the merits of the statute of limitations issue, the limited record supports Plaintiffs' position that their claims are timely based on the Colombian statute of limitations.

The parties agree on the legal framework for assessing whether the statute of limitations for Colombia or Alabama should apply. Federal courts apply the choice-of-law rule of Alabama, which mandates applying the substantive law of the place where the tort occurred and the procedural law of the forum state. *See Murphy v. McGriff Transp., Inc.*, No. 2:11-CV-02754-RDP, 2012, at *1 (N.D. Ala. filed Aug. 15, 2012). In Alabama, while statutes of limitations are generally considered to be "procedural," and thus governed by the forum's rules, there are two exceptions to this rule, which Defendants do not dispute. DAB at 50. The first exception applies when the cause of action arose in a jurisdiction that has a limitation statute "bound up" in the statute creating the right. *See Murphy*, 2012 WL 3542296, at *1. In that instance, the statute of limitations is determined to be part of the substantive right itself and governed by the law of the place where the injury occurred, in this case Colombia. *Id.* at *1-2. The second exception applies

when the foreign state's statute of limitations is part of the "public policy" of the foreign state. *Id.* In that situation, the foreign state's limitation period is considered substantive rather than procedural, and is thus applied. *Id.*; *see also Bodnar v. Piper Aircraft Corp.*, 392 So.2d 1161, 1163-64 (Ala. 1980) (applying the foreign state's two-year statute of limitations, rather than Alabama's statute of limitations, because it was a matter of "public policy" in the foreign state).

Here, the ***sole*** expert testimony in the record as to the applicability of both of these recognized exceptions is provided by Plaintiffs' expert, Professor Nelson Camilo Sánchez-León. *See* ECF No. 36-1. As to whether the Colombian statute of limitations is "bound up" with the substantive law, Plaintiffs' expert specifically considers this issue and concludes with extensive reasoning and citations to Colombian statutory law as well as secondary sources that the limitations period is "bound up" with the substantive law. *Id.* ¶¶ 4-8. In sharp contrast, Drummond's expert provides a general description of the possible limitations periods that could be applied to wrongful death claims but at no point does he opine whether the limitations period is "bound up" with the substantive law. *See* ECF No. 33-1 ¶¶ 5-11.

Drummond attempts to cobble together an argument based on the different locations of the statute of limitations and the wrongful death law within the Colombian Civil Code, *see* DAB at 48-55, but Plaintiffs' expert specifically rebuts

this argument: "it is a misunderstanding of Colombian law to infer on this basis [the statutory limitations] are not 'bound up' with those substantive rights." *See* Professor Sánchez-León Declaration, ECF No. 36-1, ¶ 5. He then gives a detailed, and unrebutted in this record, explanation as to why, under Colombian law, the limitations period is considered part of the substantive law. *Id*. ¶¶ 5-8.

As to the second exception, only Plaintiffs' expert considered and specifically concluded that Colombia's statute of limitations provisions are a matter of public policy. *Id.* ¶¶ 9-10. Drummond merely argues, based on U.S. law, that the Colombians do not consider their statute of limitations part of their public policy. DAB at 52-55. Tellingly, Drummond's expert does not address the issue at all, *see* ECF No. 33-1, nor do the Drummond Defendants cite to their expert on this issue. Plaintiffs' expert is thus unrebutted in stating that, as a matter of Colombian law, Colombia considers the statute of limitations for wrongful death law to be part of public policy.

Based on Colombian law, whether the possible 10 or 20 year limitations period applies, Plaintiffs' claims are timely. *See* ECF No. 36 at 46-47. Further, as demonstrated in the preceding subsection, any issues of equitable tolling cannot be addressed in the context of a dismissal motion so that issue could not be decided against Plaintiffs in this Court or the District Court until summary judgment at the earliest.

C. The District Court Abused its Discretion in Dismissing Plaintiffs' TVPA Claims.

Once again, Drummond's assertion that the District Court's *pro forma* dismissal of Plaintiffs' TVPA claims by reference to the *Balcero* and *Baloco* decisions was not legal error, DAB at 31-32, is facially impossible, particularly given that Defendant Garry Drummond was not a party to either of those cases so there could not have been a ruling on the allegations against him to apply in this case. *See* AOB at 22-25. Likewise, there was no assessment in either case under Fed. R. Civ. P. 12(b)(6) as to whether Plaintiffs there had properly alleged a claim against Defendant Tracy. *See* AOB at 25-28. As Plaintiffs established in section II.A., *supra*, the fact that this Court, and the parties, are left to speculate as to the possible basis for the District Court to have dismissed the TVPA claims in the absence of any prior consideration of those claims requires reversal and remand for full consideration of the issues because the District Court's *pro forma* order "did not address any of the allegations or explain how they failed to meet Rule 8(a)(2)'s pleading standard." *Gilbert*, 624 Fed.Appx. at 718.

Likewise, the clear legal rule previously discussed should prevent this Court from accepting Drummond's invitation to imagine that a proper motion to dismiss is pending and that this Court make an initial determination as to the sufficiency of the pleadings. *See, e.g.*, *Singleton*, 428 U.S. at 120 ("[i]t is the general rule, of

course, that a federal appellate court does not consider an issue not passed upon below."); *Strickland*, 772 F.3d at 889 (same). As this Court stated, "[w]hile this Court certainly could review the record and applicable case law and render a reasoned decision …, this is the responsibility of the district court in the first instance." *Danley*, 480 F.3d at 1092.

If the Court were to reach the merits, Plaintiffs demonstrated in their Opening Brief that the allegations against Garry Drummond (AOB at 24-25) and Mike Tracy (AOB at 27-28) are more than sufficient to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), if one had been pending and the claims were properly assessed against that standard. The applicable rules remain clear – Plaintiffs' allegations must be taken as true and Plaintiffs must be granted the benefit of all reasonable inferences from the facts alleged. *See, e.g., Secretary of Labor*, 319 Fed.Appx. 761. Drummond's request for the Court to weigh or disregard evidence[6] and to accept inferences in Drummond's favor, should be denied. *See* DAB at 37-44.

[6] Drummond urges the Court to disregard declarations made by two key witnesses, Samario and El Tigre, who directly implicated Drummond in the murders of Plaintiffs' decedents. DAB at 37, n.20. There is no question that issues of witness credibility must be resolved by the trier of fact. *U.S. v. Peters*, 403 F.3d 1263, 1270 (11th Cir. 2005). Drummond's suggestion that Plaintiffs' counsel was not candid with the Court in discussing the issues in a related defamation case, DAB at 6-7, ns. 6 and 7, is remarkable in that Drummond misleadingly asserts as fact that Plaintiffs' counsel "paid hundreds of thousands of dollars" to the paramilitary

That Plaintiffs' TVPA allegations are more than sufficient is well-illustrated by the recent decision involving similar claims in *In re Chiquita Brands International, Inc.*, No. 08-MD-01916-KAM, 2016 WL 3247913 (S.D. Fla. June 1, 2016), Doc. 267. Drummond's misleading description of the case omits that the TVPA claims against seven of the nine Chiquita executives were ***upheld*** based on allegations that, as Drummond admits, closely mirror those in this case. *See* DAB at 41, n.22. For example, considering the *mens rea* requirement for aiding and abetting, the Court found the "allegations of the Amended Complaints [as to seven of the nine defendants], read in the light most favorable to Plaintiffs, support a reasonable inference that the Individual Defendants approved and continued to approve Chiquita's support of the AUC . . . . Plaintiffs allege specific facts providing a reasonable basis for inferring their knowledge of the fact of Chiquita's payments to the AUC, as well as their knowledge of the status of the AUC as a violent terrorist organization engaged in rampant human rights abuses in the

---

witnesses. *Id*. at 7, n.7. As Drummond well knows, Plaintiffs' counsel's position is that any funds involved in the testimony of paramilitary witnesses were to relocate family members of those witnesses so they would not be killed for testifying against Drummond. As the trial court noted in that case, Plaintiffs introduced expert testimony of a former DEA agent, the former head of the Justice Department's witness protection program and a top legal ethics expert to demonstrate that such security payments could be necessary, morally-required and ethical. *See* 11th Cir. Appeal No. 16-11090. Appellant's Appendix, Vol. III, Doc. 417 at 44. The District Court specifically reserved ruling on whether the security payments were "lawful, appropriate, or warranted." *Id*. Those and other issues should be resolved in that case, not this one.

banana-growing regions controlled by Chiquita's Colombian subsidiary." *Id.* at *13-*14. Plaintiffs here likewise allege Garry Drummond approved the plan to fund the AUC. FAC ¶¶ 5, 6, 57-58, 88, 91. Plaintiffs also specifically alleged that Defendant Tracy approved and ratified the AUC payments. *Id*. ¶¶ 59,120. Both Defendants had specific knowledge of the brutal tactics of the AUC. *Id*. ¶¶ 1-2, 7-8, 63, 98-127.

The *Chiquita* Court then found that Plaintiffs' aiding and abetting allegations met the *actus reus* requirement because "the[] alleged acts of decision-making by these Individual Defendants, acting from within the United States, caused substantial amounts of money and material support to be supplied to the AUC from 1995 to 2004, putting the AUC in a position to continue and intensify its terror campaign in the banana-growing regions long after it was formally designated a foreign terrorist organization by the United States." *In re Chiquita Brands International*, 2016 WL 3247913 at *14. Plaintiffs here similarly alleged that Drummond provided substantial assistance to the AUC, and this funding allowed the AUC to expand and continue its terror campaign on innocent civilians. *See, e.g.*, FAC ¶¶ 5-8, 87,91 (noting that Drummond provided support to the AUC "well beyond what Chiquita provided"), and 133-36. Applying the *Chiquita* ruling to this case requires denial of any dismissal motion with respect to the TVPA claims.

If the Court decides to reverse and remand, rather than uphold Plaintiffs' TVPA claims, they request the remand order include leave to amend their TVPA claims. While already sufficient, out of an abundance of caution, Plaintiffs would amend the TVPA claims to reflect new legal and factual developments that have occurred since the case was stayed. The very purpose of the stay was to allow the District Court and the parties to have the benefit of the clarification of various legal standards, including the command responsibility doctrine for TVPA claims as clarified by this Court's decision in *Balcero*. *See* APP. 5, ECF No. 53 at 3. When there are significant new legal developments, leave to amend should be granted to allow Plaintiffs to address them. *See* AOB at 34-36 (citing cases).

D. The District Court Abused its Discretion in Dismissing Plaintiffs' ATS Claims.

There is no question that the Plaintiffs ***in this case*** are unrelated to the Plaintiffs in any prior *Drummond* case, and Drummond concedes here that it is not raising any argument based on issue or claim preclusion. DAB at 32. The issue is whether the Plaintiffs ***in this case*** can have their ATS claims dismissed without any court having specifically considered whether the claims properly allege a cause of action. Again, there was no valid and pending motion under Fed. R. Civ. P. 12(b)(6), and the District Court's *pro forma* dismissal of Plaintiffs' ATS claims "did not address any of the allegations or explain how they failed to meet Rule

8(a)(2)'s pleading standard." *Gilbert*, 624 Fed.Appx. at 718. This alone is a sufficient basis to reverse and remand.

The Drummond Defendants devote much of their ATS argument to showing that the ATS allegations in this case are similar to the claims that were dismissed in *Balcero* and *Baloco* based on *Kiobel*, 133 S. Ct. 1659. *See* DAB at 18-26. Plaintiffs can hardly dispute that assertion, but it does not permit the *pro forma* dismissal of Plaintiffs' claims in this case for three additional reasons beyond the lack of a reasoned dismissal order.

First, the very purpose of the nearly two-year stay in this case was to give the Court, and the parties, the benefit of this Court's rulings in three cases presenting the *Kiobel* issue. Once the stay was lifted, Plaintiffs should have had the opportunity to address the newly-developed law through a renewed and properly-briefed dismissal motion, as they requested. *See* APP. 5, ECF No. 53 at 4-5. In neither *Balcero* nor *Baloco* were the ATS claims assessed under the well-established standard for a Fed. R. Civ. P. 12(b)(6) motion in which Plaintiffs' allegations must be taken as true and they must be given the benefit of all reasonable inferences from the facts alleged. *See, e.g.*, *Secretary of Labor,* 319 Fed.Appx. 761. And, of course, that was not done below in this case. Plaintiffs should, at a minimum, have the opportunity to address what reasonable inferences could be drawn to meet *Kiobel*'s "touch and concern" test. 133 S.Ct. at 1669.

Plaintiffs' allegations in this case of the direct and regular involvement from the U.S. of Defendants Garry Drummond and Mike Tracy, along with Security Director, James Adkins, *see, e.g.*, FAC ¶¶ 5, 6, 57-59, 120, allow the ***inference*** that the ATS claims alleging that Drummond aided and abetted or conspired with the AUC to commit extrajudicial killings and war crimes occurred almost entirely in the U.S. These allegations are certainly not "conclusory" as Drummond must show to obtain dismissal in any court. While Plaintiffs might not prevail on summary judgment, a reasonable inference could be that the conspiracy occurred in the U.S. because Drummond "joined the conspiracy [in the U.S.] knowing of at least one of the goals of the conspiracy and intending to help accomplish it." *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1159 (11th Cir. 2005). This was precisely the holding in *Mwani v. Bin Laden*, where, the court found the *Kiobel* presumption was displaced in an ATS case "between foreign nationals and a foreign group for events that occurred in Nairobi, Kenya," because "overt acts in furtherance of that conspiracy took place within the United States." 947 F.Supp.2d 1, 3-5 (D.D.C. 2013). Whether the District Court merely thought the claims will not ultimately succeed is not a permissible factor in determining whether Plaintiffs have stated a claim. *In re Se. Banking Corp.*, 69 F.3d at 1550.

Second, this case, unlike *Balcero* and *Baloco*, had hardly begun when it was dismissed. It was stayed for nearly two years to assess this Court's decisions in

those cases. No discovery was taken. The *Baloco* Court's reasoning in refusing to allow an amendment there because it would "needlessly extend this litigation, which began over eleven years ago" has no application here. 767 F.3d at 1239. Plaintiffs here specifically requested the District Court to allow them to have discovery to address the new issues raised by *Kiobel* and noted the procedural distinction between this case and the much more advanced records in *Balcero* and *Baloco*. *See* APP. 5, ECF No. 53 at 4-5. Drummond's assertion that whether Plaintiffs have satisfied the new *Kiobel* requirement of the ATS is not a jurisdictional question, and thus requiring pre-dismissal discovery, is wrong. DAB 27 at 16. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 730-31 (2004), squarely held that the ATS is a "jurisdictional" statute. The Supreme Court confirmed this in adding the extraterritorial "touch and concern" test to the prerequisites for finding that the elements of the jurisdictional statute had been satisfied. *See Kiobel*, 133 S. Ct. at 1664; *see also, Mastafa v. Chevron Corp.*, 770 F.3d 170, 179 (2d Cir. 2014) (*Kiobel*'s extraterritorial standard is but one jurisdictional predicate for the ATS).

Plaintiffs' request for limited discovery on the *Kiobel* issue for purposes of adding additional facts to an amended complaint is thus a request for jurisdictional discovery, which, as this Court has recognized, should normally be permitted before any dismissal based on lack of jurisdiction. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997); *Majd-Pour v. Georgiana Community*

Hosp., Inc., 724 F.2d 901, 903 (11th Cir. 1984); *Henriquez v. El Pais Q'Hubocali.com*, 500 F.App'x 824, 830 (11th Cir. 2012). *See also* AOB at 30-31.

At a minimum, Plaintiffs should be given leave to amend their complaint to address the new *Kiobel* issues. *See* AOB at 34-37 (discussing cases). There are few more compelling situations for allowing an amendment than this case, which will allow Plaintiffs to address a major change in the law that occurred while the case was stayed to await and address that anticipated change.

III. CONCLUSION

Plaintiffs respectfully request this Court reverse the *pro forma* dismissal of their claims by the District Court without any reasoned opinion. At a minimum, the case should be reversed and remanded for full consideration of the issues. Plaintiffs further request that they be granted leave to amend their TVPA and ATS claims in light of major changes in the law that occurred while the case was stayed to await those changes, and that they be granted limited jurisdictional discovery on the *Kiobel* issue.

Dated: July 22, 2016

Respectfully submitted,

s/ Terrence P. Collingsworth

Terrence P. Collingsworth
INTERNATIONAL RIGHTS ADVOCATES
621 Maryland Ave. NE
Washington, DC 20002

Phone: 202-543-5811
Email: tc@iradvocates.org
Counsel for Appellants, Penaloza et al.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(C), I certify that Plaintiffs/Appellants Reply Brief complies with Rule 32 (a)(7)(B)(i) in that it has a text typeface of 14 points and contains 6,944 words.

Respectfully submitted this 22nd day of July, 2016,

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

CERTIFICATE OF SERVICE

I hereby certify that, on July 22, 2016, I caused the foregoing to be electronically filed with the Clerk of the U.S. Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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

Clerk of the Court
Elbert P. Tuttle Courthouse
56 Forsyth Street, N.W.
Atlanta, GA 30303

Additional copies were sent to counsel of record for Defendants-Appellees in this case via U.S. First-Class Mail:

William H. Jeffress, Jr.
Noah R. Mink
Baker Botts LLP
1299 Pennsylvania Avenue NW
Washington, D.C. 20004

William Anthony Davis, III
H. Thomas Wells, III
Benjamin T. Presley
Starnes Davis Florie LLP
100 Brookwood Place, 7th Floor
Birmingham, AL 35259

Signed,

s/ Shannon Gough
Shannon Gough