UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(Ft. Lauderdale Division)

Case Nos. 07-22459 & 08-21063 (COHN)

ELOY ROJAS MAMANI, et al.,

Plaintiffs,

v.

GONZALO DANIEL SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,

Defendant,

JOSÉ CARLOS SÁNCHEZ BERZAÍN,

Defendant.

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR A NEW TRIAL

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Plaintiffs contend that Rule 50 requires the Court to accept everything they say, no matter how incredible their conclusions are from the evidence. In fact, Rule 50 does not suspend reality or supply evidence that does not exist. Nor does Rule 50 preserve inferences "'at war with uncontradicted or unimpeached facts.'" *Fenner v. Gen. Motors Corp.*, 657 F.2d 647, 650-51 (5th Cir. 1981) (quoting *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841, 851 (5th Cir. 1967)).

The Opposition provides no evidence of any link between Defendants and any extrajudicial killings. Instead, Plaintiffs manipulate the evidence and distort the standard for command responsibility. They omit key language from their lead case and misstate the holdings of others. Their manipulation amounts to a tacit admission that their arguments fail when reviewed under the correct standard. Indeed, they persist with their principal argument that Defendants are "high-level" leaders "at the top of the chain of command," and that a "functioning chain of command" is sufficient to establish liability even when there is no link between Defendants and any wrongdoing. *See* Pls.' Opposition, DE 530 ("Opp.") at 2, 4, 33-34. But the Eleventh Circuit has rejected that very argument twice in this case. *See Mamani v. Berzaín*, 654 F.3d 1148, 1154 & 1155 n.8 (11th Cir. 2011) (*Mamani I*) (rejecting "strict liability akin to respondeat superior for national leaders at the top of the long chain of command" and requiring "facts connecting what these defendants *personally* did to the particular alleged wrongs"); *Mamani v. Sánchez de Lozada*, 968 F.3d 1216, 1239 (11th Cir. 2020) (*Mamani III*) (Plaintiffs must "connect Defendants to th[e] wrongdoing.").

Rule 50 also requires no deference when a jury verdict is based on "testimony as to facts that the witness could not have possibly observed or events that could not have occurred under the laws of nature." *United States v. Green*, 818 F.3d 1258, 1274 (11th Cir. 2016) (internal quotation marks omitted). Disputing the violent uprising, Plaintiffs argue, in essence, that the Court must

infer that "dinosaurs did not exist" simply because one or more witnesses "never saw any." They continue to insist, for example, that no armed civilians were present in the areas where the deaths occurred, notwithstanding the overwhelming evidence to the contrary, including the armed ambush in Warisata, soldiers who were shot through the head in Río Seco and the Ánimas Valley, and armed attacks by civilians on tanker trucks in Senkata. Plaintiffs also insist that soldiers on the ground unlawfully shot some decedents who were on the upper floors of their homes—a theory that violates the laws of nature because the bullets entered their bodies on a *downward* trajectory, as proven by uncontradicted expert and documentary evidence. Plaintiffs' impossible theory cannot stand because "the trier of fact would not be at liberty to disregard arbitrarily the unequivocal, uncontradicted and unimpeached testimony of an expert witness" that "bears on technical questions . . . beyond the competence of lay determination." *Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113, 1127 (11th Cir. 2016) (internal quotation marks omitted).

Faced with a lack of evidence, Plaintiffs argue that Defendants cannot "re-litigate" "settled finding[s]" on remand. Opp. at 26. But they do not explain how "re-litigation" occurs when (i) this Court expressly declined to rule on the command responsibility issue when it was raised, and (ii) the Eleventh Circuit remanded for this Court "to *consider in the first instance* whether, *for each decedent*, Plaintiffs produced sufficient evidence to demonstrate that *each death* was not lawful under international law and thus extrajudicial and, if so, whether Plaintiffs produced sufficient evidence to link Defendants to that wrongdoing via the command-responsibility doctrine." *Mamani III*, 968 F.3d at 1240 & n.26 (emphases added).

In short, the Opposition fails to identify an evidentiary basis to support the jury verdict. Plaintiffs offer nothing to "link Defendants" to any "wrongdoing via the command-responsibility doctrine." *Id.* They rely on unsupported characterizations and unreasonable inferences while

failing to prove that "each death was not lawful under international law and thus extrajudicial." *Id.* For these reasons, the Court should grant Defendants' Rule 50 Motion. In the alternative, the Court should grant a new trial under Rule 59 of the Federal Rules of Civil Procedure.

I. THERE IS NO BASIS FOR LIABILITY UNDER THE COMMAND-RESPONSIBILITY DOCTRINE.

A. Plaintiffs Manipulate the Legal Standard.

The Opposition provides no evidence of a link between Defendants and any unlawful killings by soldiers. Plaintiffs attempt to skirt this failure by arguing that command responsibility applies to Defendants "who 'neither ordered nor participated in' the predicate crimes." Opp. at 34, 45 (citing *Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006) and *Ford ex. Rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288-94 (11th Cir. 2002)). Plaintiffs misrepresent the holding of *Arce* and omit key language from a quote in *Ford*, which actually affirmed a jury verdict *for the defendants*.[1]

The Court in *Arce* expressly addressed only one issue: "Whether the district court abused its discretion in equitably tolling the statute of limitations." 434 F.3d at 1260. The Court went on to hold, "We therefore find that the district court did not abuse its discretion in holding the plaintiffs' claims to be timely under the doctrine of equitable tolling." *Id.* at 1265. Nowhere does *Arce* state that it is "affirming TVPA liability for former officials who 'neither ordered *** nor participated in' underlying crimes," as Plaintiffs represent. Opp. at 45.

Plaintiffs offer a more subtle manipulation of *Ford*. They quote *Ford* as holding "a commander liable for acts of his subordinates, *even where the commander did not order those*

[1] Such misleading omissions have been a hallmark of Plaintiffs' Rule 50 briefing in attempting to salvage an indefensible jury verdict. *See* Rule 50 Order, DE 488, at 20 ("Critically, Plaintiffs omit the remainder of this sentence from the Court's Summary Judgment Order, which discusses Defendants' alleged plan 'to use military force *to kill unarmed civilians*.'").

acts." Opp. at 45 (quoting *Ford*, 289 F.3d at 1286) (emphasis added by Plaintiffs). But without using ellipses or providing any other signal, Plaintiffs simply omit the critical phrase that completes the quoted sentence. The full quote, with the omitted phrase now emphasized, reads, "a commander liable for acts of his subordinates, even where the commander did not order those acts, *when certain elements are met*." *Ford*, 289 F.3d at 1286. Those "certain elements" that Plaintiffs attempt to elide are an integral part of the test for command responsibility. They require Plaintiffs to prove "the defendant's *actual ability* to control the guilty troops." *Id.* at 1291 (emphasis added). Sitting at the top of a chain of command is not enough. The commander must have "effective control," *id.* at 1290-93, which is "defined as the *legal authority and the practical ability* of the [Defendants] to control the guilty troops," *id.* at 1287 (emphasis added). As shown below, Plaintiffs offer no evidence whatsoever to make that showing.

Plaintiffs also rely on two cases from the Sixth and Ninth Circuits for the proposition that "[t]he law of command responsibility does not require proof that a commander's behavior proximately caused the victim's injuries." Opp. at 45 (citing *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009) and *Hilao v. Estate of Marcos*, 103 F.3d 767, 779 (9th Cir. 1996)). Neither case rejects the requirement of a causal link.

Hilao upheld a jury instruction that did not include proximate cause language because it "came directly after the district court's main instruction on liability, which required the jury to find either that [Defendant] had 'directed, ordered, conspired with, or aided' in torture, summary execution, and disappearance, or that he had knowledge of that conduct and failed to use his power to prevent it." 103 F.3d at 779. *Hilao* thus required the jury to "find not merely that the plaintiffs were taken into custody under [Defendant's] authority, but that once in custody the plaintiffs were tortured, executed, or disappeared on [Defendant's] orders or with his knowledge." *Id.* None of

the evidence offered by Plaintiffs here comes close to proving such a causal link.

Chavez similarly recognizes that "whether an injury was caused by a commander's act or omission can be resolved by a finding of liability under the elements of command responsibility." 559 F.3d at 499. Thus, as the Eleventh Circuit has emphasized multiple times in this case, to meet the test for command responsibility, Plaintiffs must provide "facts connecting what these defendants *personally* did to the particular alleged wrongs." *Mamani I*, 654 F.3d at 1155 n.8 (emphasis added); *see Mamani III*, 968 F.3d at 1239-40 (Plaintiffs must identify evidence that "Defendants were either personally involved in" "orders to indiscriminately shoot at civilians . . . or otherwise failed to prevent or punish such conduct within their chain of command").

Defendants correctly state the legal standard in their opening Brief. DE 528 ("Br.") at 4-5, 15-16. The Opposition provides no basis for concluding otherwise.

B. Plaintiffs Misrepresent the Evidence.

Plaintiffs assert numerous "facts" to support their command responsibility argument. The record shows many of those assertions to be misleading at best and, in some cases, downright false.

First, Plaintiffs attempt to walk back their admission that Defendants had no *de jure* authority over the troops. Opp. at 35. Their admission was unequivocal, however. *See* DE 458 (Trial Tr. 3/19/18) at 20:12-14 ("So while there might not be *de jure* authority, there is certainly *de facto* authority . . ."); *id.* at 26:14-27:25 (responding to the Court's "concern" about a "strict liability scheme . . . because of their positions in government," Plaintiffs' counsel admitted, "If all we were saying was the fact that they were the President and the Minister of Defense means they're responsible, we wouldn't be here."). In other words, they admit there is no *de jure* authority.

Second, Plaintiffs assert that Sánchez Berzaín "made the decision to deploy the military . . . for the deadly Senkata operation." Opp. at 36. But Plaintiffs' witness, German Loza Aguirre, said the opposite. Loza Aguirre testified, "*it was a general who told the Minister of Defense* . . .

we are going to send military drivers in order for them to drive the gasoline trucks, and so be able to get out of the plant." DE 456 (Trial Tr. 3/14/18) at 35:2-8 (emphasis added). Plaintiffs further assert that Sánchez Berzaín knew the "use of military force to respond to civil demonstrations would result in civilian deaths" based on this quote: "'Well, there have to be deaths, but also gasoline.'" Opp. at 38. Loza Aguirre also puts that assertion to rest. He testified that the concern being expressed about deaths "related to possible explosions at gas stations," DE 456 at 40:15-18, not to concerns about soldiers killing innocent civilians. Unrebutted evidence confirms that violent protestors caused civilian fatalities by blowing up gas stations on October 12, 2003. Br. at 31, 35.

Third, Plaintiffs selectively misquote the Three Prosecutors' Report (Trial Ex. 1002) as evidence that "'the Army acted based on specific orders from their natural hierarchical superiors,' including 'written orders from the former President.'" Opp. at 33-34. They delete—without using any ellipses—language and punctuation showing that the President did nothing more than issue a general order to "safeguard peace and the public order." Trial Ex. 1002 at 1002.28. The full quote, with the deleted language emphasized in italics below, states, "the Police and Army acted based on specific orders from their natural hierarchical superiors. In the case of the Armed Forces, the Prosecutorial Commission determined the existence of written orders from the former President in which he instructs the forces ***to be mobilized to safeguard peace and the public order***." *Id.* No reasonable jury could conclude that an order "to safeguard peace and the public order" provides the requisite link between Defendants and any wrongdoing by unidentified individual soldiers.[2]

[2] Additionally, the evidence is undisputed that Marlene Nancy Rojas Ramos died at 4:00 p.m. on September 20, 2003, before any orders relating to Warisata had been issued. *See* Br. at 16 n.6. Plaintiffs attempt to dispute Marlene's time of death, citing language in Exhibit 9 that the "event occurred" at "6:00 p.m." Opp. at 35 n.9. Plaintiffs are mistaken. Exhibit 9 shows that the time of death was 4:00 p.m. ("A horas 16:00"). Trial Ex. 9 at 0009-0001, 0009-0020. The 6:00 p.m. "event" to which Plaintiffs refer appears in connection with a "visit[]" by the prosecutor and investigators to the "home of Mr. Eloy Rojas." *Id*. at 0009-0002, 0009-0021. Moreover, Plaintiffs

Fourth, Plaintiffs argue that "Lozada's government . . . directed troops to 'apply the Principles of Mass and Shock' to control civil disturbances." Opp. at 40 (citing Trial Exs. 38 & 39). Plaintiffs' argument once again misrepresents the trial record. Plaintiffs offer no evidence linking Defendants to Exhibit 38 (Manual for the Use of Force). The Manual was "prepared by Department III EMO" of the General Army Command. Trial Ex. 38 at 38-0002. It was issued by the General Commander of the Army, General Juan Veliz Herrera. *Id.* There is no evidence that Defendants had anything to do with the Manual. Indeed, Plaintiffs never asked either Defendant about the Manual even though both testified. The only witness they did ask was Colonel Nelson Flores. Without rebuttal, Colonel Flores explained that the accurate translation of *masa y sorpresa* is "mass and surprise," which signifies just the opposite of using force against unarmed civilians. *See* DE 474-6 at 63:21-64:19 ("'Sorpresa' means to look ahead and to take provisions so—so the attack doesn't take place. . . . [T]he concept of mass in that period was not used in the Bolivian Army because these agitators were very large in number, much larger than the soldiers. In terms of surprise, yes . . . taking provisions in order to try and see that the problem doesn't escalate anymore or using a strategy to dissuade them . . .").

Similarly, Plaintiffs misrepresent Exhibit 39 (Republic Plan) by attributing it to Defendants. Opp. at 40. There is no evidence that Defendants launched, knew about, or played any role in developing the Republic Plan. None. To the contrary, the evidence shows that General Juan Veliz Herrera—not Defendants—implemented the Republic Plan after receiving an order from the Commander in Chief of the Armed Forces, General Roberto Claros Flores. DE 459

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contradict their own witnesses (Marlene's parents), both of whom corroborate the 4:00 p.m. time of death. *See* DE 450 (Trial Tr. 3/6/18) at 62:20-22 (Eloy: "It was 2:00 p.m., 3:00 p.m., 4:00 or 4:30 p.m., [the military] came by my house."); 54:16-24 (Etelvina: Marlene was shot in the "afternoon.").

(General Veliz Herrera Testimony) at 25:4-14. General Veliz Herrera launched the Republic Plan "to help the police unblock the roads and keep them clear, and to protect some facilities of public utilities." *Id.* at 19:8-11. He planned operations under the Republic Plan, "not to kill or to hurt, but to impose order and to uphold the Constitution, and to guarantee the legally constituted government." *Id.* at 19:14-17. What makes Plaintiffs' deception so brazen is that the testimony exposing their misrepresentations comes from their own witnesses.

C. The Opposition Fails to Show Any Evidence Supporting Liability Under the Command-Responsibility Doctrine.

The Opposition fails to establish any of the "three indispensable elements" for command responsibility. *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 609 (11th Cir. 2015). Perhaps that explains why, as noted above, the Opposition persists with the already-rejected theory that Defendants are liable because they were "high-level" leaders "at the top of the chain of command," and there was a "functioning chain of command." Opp. at 2, 4, 33-34.

1. No Superior-Subordinate Relationship with Any Wrongdoer.

Plaintiffs failed to produce any evidence that links Defendants to any wrongdoing by any soldiers. The Opposition has no answer to the uncontested fact that Defendants had no legal authority, let alone the practical ability, to order soldiers to open fire. Plaintiffs do not even address that "[t]he decision to open fire is the exclusive responsibility of the Unit Commander and will always be under his control[.]" Trial Ex. 38, at 38-0012. Instead, Plaintiffs identify several items of evidence purporting to show that Defendants had "a superior-subordinate relationship with the wrongdoer." Opp. at 32-35. None of the items proves that point.

- **Bolivian Constitution** (Trial Ex. 40) (Opp. at 33). Article 97 states in its entirety, "The rank of Captain General of the Armed Forces is inherent in the office of the President of the Republic." Article 210 provides, "The Armed Forces are subordinate to the President

of the Republic and receive their orders from him on administrative matters, through the Minister of Defense; and on technical matters, through the Commander in Chief." Notably, the "Commander in Chief" of the Armed Forces is a military general, and is defined by the Organic Law of the Armed Forces as "the highest Command and Decision-making body" for "technical/operating" matters. Trial Ex. 13 (Organic Law, art. 36) at 13-0007. The Constitution thus shows that the Commander in Chief, not Defendants, had the legal authority and practical ability to control the individual troops.

- **Organic Law** (Trial Ex. 13) (Opp. at 33-34).
    - Article 18 simply tracks Article 210 of the Constitution. It provides that the Armed Forces are subordinate to the President, but confirms that they receive their orders on technical matters from the Commander in Chief, not Defendants. Trial Ex. 13 at 13-0004.
    - Article 19 states that the President and Minister of Defense are part of the "Military High Command." *Id.* It does not give Defendants the legal authority and practical ability to control individual troops or military operations. *Id.*
    - Article 22 states, "The Ministry of National Defense is the Political and Administrative Body of the Armed Forces." *Id.* at 13-0005. None of the enumerated "powers and responsibilities" includes the legal authority and practical ability to control individual troops or military operations. *Id.*
    - Article 25 describes the "administrative" responsibilities of the Ministry of National Defense. *Id.* at 13-0006. It does not confer on Defendants any legal authority or practical ability to control individual troops or military operations. *Id.*
    - Article 28 provides that the Minister of Defense is one of many "authorities who

order the final investigatory phase in military matters." *Id.* Sánchez Berzaín explained, without contradiction or impeachment, that his role was to see that the process worked as an institution, not to intervene in the work of the independent tribunals. DE 455 (Trial Tr. 3/13/18) at 93:12-94:6. Plaintiffs' witness, Vice Minister Harb, further explained that the investigation of deaths is "a duty of the federal prosecution." DE 474-7 at 64:23-65:2. That investigation actually happened, as evidenced by the Three Prosecutors' Report (Trial Ex. 1002).

- **Colonel Flores and General Antezana** (Opp. at 33). Plaintiffs cite testimony by Colonel Flores that the President is the "general captain of the armed forces." Opp. at 33. But they ignore his testimony that the President's responsibilities do not include "operational issues," DE 474-6 at 101:10-16, and that the Defense Minister had "no authority to command forces in the field," *id.* at 82:24-83:17. Plaintiffs also cite the testimony of General Antezana, but use asterisk symbols to distort and manipulate his testimony. *See* Opp. at 33, line 14. They omit entirely this critical part of General Antezana's testimony: that "the President as head—as political leader and political head gives the initial concept *and those who plan it are the commanders of the armed forces*." DE 474-2 at 46:14-23 (emphasis added). *See also id.* at 154:04-14 (the Commander in Chief (not the President) gives the orders to the commanders of the armed forces on technical and operative matters).
- "**Tactical Orders"** (Opp. at 35-36). Plaintiffs contend that Defendants gave "tactical orders" that demonstrate their control over the armed forces. Opp. at 35-36. But using the words "tactical" and "directives" does not change the nature of the orders. The so-called tactical orders are just the President's general orders to the Commander in Chief to mobilize and use the necessary force to restore order, public safety, and respect for the rule

of law in two different regions. Opp. at 35-36 (citing Trial Exs. 3 and 45).[3] Nothing in these orders lays out any tactical strategy or plan. As the actual directives make clear on their faces, it was General Gonzalo Rocabado Mercado and General Roberto Claros Flores, not Defendants, who issued the specific directives that established the operational plans and strategies. *See* Br. at 11-14 (discussing Trial Exs. 1004, 17, and 18).

- **"Sorata operation"** (Opp. at 36). Testimony about the "Sorata operation" does not show any control over soldiers, much less control during the subsequent Warisata ambush or the military operations in El Alto and La Paz a month later. The President's comment that "the state never retreats" related to the rescue of hostages in Sorata, not to any wrongdoing by soldiers outside of Sorata. DE 459 (Trial Tr. 3/20/18) at 80:4-22.[4] Similarly, the comments attributed to Sánchez Berzaín addressed the use of buses to rescue hostages, not military operations. As Colonel Flores put it, the Defense Minister provided "logistics support." DE 474-6 at 83:12-17. He testified that Colonel Guido Castro coordinated and led the convoy out of Sorata. *Id.* at 23:16-22. Most importantly, *not a single death occurred in Sorata*. One of the rescued tourists agreed that, "everything was peaceful in Sorata" when he left, and testified that the military did not attack anyone there. DE 451 (Trial Tr. 3/7/18) at 50:3-10. The evidence concerning Sorata, like all the other evidence cited above, fails to link Defendants to any wrongdoing that caused the death of any of the decedents.

[3] Plaintiffs also cite testimony from Sánchez Berzaín that the President ordered the military to be deployed, and that the Commander in Chief would follow those orders. Opp. at 35-36 (citing Trial Tr. 3/13/18 at 79:18-80:9, 98:5-19). That testimony proves nothing relevant. *See Mamani I*, 654 F.3d at 1155 (rejecting argument that "order[ing] the mobilization of a joint police and military operation" was a sufficient basis for imposing liability under the TVPA).

[4] The Opposition includes a blatant misstatement that the President "directed Berzain to go to Sorata with military force . . . ." *See* Opp. at 36 (citing DE 450 (Trial Tr. 3/6/18) at 90:16-24). The transcript says no such thing.

Finally, Plaintiffs contend that Defendants "have doubly forfeited" their argument that Plaintiffs failed to present expert testimony. Opp. at 24 n.4. To the contrary, Defendants argued from the outset that Plaintiffs needed Borrelli's expert testimony to "fill the gap." DE 458 (Trial Tr. 3/19/18) at 16:9-14 ("I think it bears reminding that plaintiffs have never pointed to evidence of any de facto control between defendants [and] the military. They needed someone to fill that gap, and I think that's where the expert Allen Borrelli was going to come in. And he's not here. He's not testified. So I think the analysis stops there as well."). *See also* DE 462 (Trial Tr. 3/23/18) at 161:7-9 ("The plaintiffs' expert on this command and control issue, Allen Borrelli, as we said, he is AWOL. Plaintiffs have nothing on this point.").[5]

2. No Knowledge of Unlawful Acts by Soldiers.

The Opposition rests on yet another flawed premise. Plaintiffs argue that they satisfy the "knowledge" element because Defendants learned about civilian *deaths*—or got "warnings" that deaths might occur—in the midst of a violent civil uprising. Opp. at 38-39. The law demands more. Hearing about deaths in those circumstances—whether from the media, government officials, police reports, or the Catholic Church—falls well short of proving that Defendants "knew or should have known, owing to the circumstances at the time, that [their] subordinates had committed, were committing, or planned to commit *acts violative of the law of war*." *Ford*, 289 F.3d at 1288 (emphasis added). This Court already concluded as much in its Order granting

[5] Plaintiffs argue that Borrelli's absence is irrelevant because the questions of command responsibility and proportionate force were "question[s] for a jury." Opp. at 24 n.4. Plaintiffs miss the point. Whether an issue is a "question for the jury" is a separate question from whether expert testimony is required *before* something can be submitted to a jury. Certain complex questions—like military command and control in Bolivia, and "proportionate force" under international law during an armed uprising—require expert testimony before they can be submitted to a jury. Reliance on *Gomez v. Lozano*, 839 F. Supp. 2d 1309 (S.D. Fla. 2012), is misplaced because *Gomez* does not address this separate question about expert testimony. *Id.* at 1323-24.

Defendants' original Rule 50 motion: "At most, the evidence in these cases supports an inference that Defendants responded to civil unrest in their country with a heavy hand, and that some unidentified members of the Bolivian military fired upon civilians for unknown reasons. But that is insufficient to impose TVPA liability on these Defendants." DE 488 at 25; *id.* at 20 ("Evidence that approximately fifty individuals were killed, without more, is not evidence that those individuals were killed deliberately."); *see also Mamani III*, 968 F.3d at 1240 (noting "agree[ment] with the District Court" that a "pattern of innocent deaths does not suffice").

In effect, Plaintiffs argue that the President had two choices: (i) roll over and let the insurgents overthrow the government (contrary to his duties under the Constitution and the Organic Law of the Armed Forces), or (ii) mobilize the military to use the necessary force to restore order and respect for the rule of law, but face TVPA liability in the event that a civilian dies in the conflict. That is not the law. As Vice Minister Harb explained, the President had "a legal obligation" to "maintain restored order" because "[c]ertain sectors of society had been radicalized" and "there was a widespread crisis in the country." DE 474-7 at 61:17-24, 133:19-134:2.[6]

The Opposition tries to impute knowledge of wrongdoing based on statements by Sánchez Berzaín having nothing to do with events in September and October 2003. Opp. at 38. One of them occurred three years before the events at issue. The statement addressed the hypothetical use

[6] Resignations of government officials, *see* Opp. at 2, 39, prove nothing. As Harb admitted, "the President was trapped between the need to apply the law and the emergency to negotiate politically." DE 474-7 at 165:4-10. Thus, "[a]s mandated by Article 208 of the National Constitution," Defendants and fourteen other members of the Cabinet "declare[d] a national emergency" and issued Supreme Decree No. 27209 ordering the Armed Forces "to assume control of shipments in tanker trucks" for liquid fuel. DE 479-1 (Trial Ex. 1) at 0001-03. This Supreme Decree came in response to a request by hydrocarbons suppliers for "police and/or military protection for their businesses and transport vehicles." *Id.* at 0002. Some government officials expressed disagreement with the military deployment and advocated for a political solution, DE 474-7 at 81:2-7, but that disagreement does not support an inference that Defendants knew that soldiers would commit acts violative of the law of war.

of troops to avoid another "Water War," and said nothing about using troops to kill unarmed civilians. DE 456 (Trial Tr. 3/14/18) at 91:12-93:9; *see also* Rule 50 Order, DE 488, at 22 ("Mr. Canelas' testimony regarding Defendant Berzaín's comment in 2000 does not" support knowledge of extrajudicial killings). The other alleged statement—to the La Paz Mayor—occurred in the midst of an armed attack on the Presidential Palace in which sharpshooters killed two soldiers while attempting to kill both Defendants. Trial Ex. 1001 at 1001.8. That incident took place in February 2003, more than six months before the events at issue here.

Plaintiffs thus reveal that their theory depends on drawing unreasonable inferences from stray comments that are unrelated in time or place to any of decedents' deaths. They have no answer to this critical point: If the Three Prosecutors found no evidence of extrajudicial killings following an independent, ten-month investigation that included witness interviews, ballistics evaluations, and forensic analysis, there can be no reasonable basis for inferring that Defendants had *contemporaneous knowledge* that soldiers "had committed, were committing, or planned to commit acts violative of the law of war." *Ford*, 289 F.3d at 1288.

3. No Authority or Failure to Prevent Crimes or Punish Wrongdoing.

The Opposition does not dispute the Three Prosecutors' finding that Defendants were "not capable of preventing the conflicts" because their "calls for peacemaking dialogue went unheard by the social groups, which gradually became more radical in their demands and approach." Trial Ex. 1002 at 1002.27. Instead, Plaintiffs argue, without citing any evidence or authority, that Defendants had "available measures like recalling military units responsible for civilian deaths or suspending commanders of those units." Opp. at 42. In effect, Plaintiffs argue that Defendants should have chosen not to deploy the military at all. But this Court and *Mamani I* already have rejected that argument. *See* Br. at 20-21. The Opposition fails to address these prior rejections.

Plaintiffs have no response to the undisputed evidence that the President had a "legal obligation" to deploy the military. *See id.* at 17. Plaintiffs' disagreement with that legally-required decision cannot form the basis for imposing liability based on command responsibility.

Having no evidence or legal authority, the Opposition again resorts to inventing and misrepresenting trial testimony. For example, the Opposition claims that Sánchez Berzaín "announced that he had been *commanded to use force to dismantle the demonstrations* and transport the tourists." Opp. at 41 (emphasis added). The actual testimony says no such thing. According to the cited transcript, Sánchez Berzaín said he was in Sorata "on the orders of the President of the Republic in order to comply with that mission of extracting the tourists." DE 450 (Trial Tr. 3/6/18) at 90:16-22. Similarly, the Opposition provides a misleading account of Colonel Flores's testimony about who commanded the elite Special Forces in Warisata. Opp. at 41. The cited testimony actually says that the Chachapumas were deployed in Sorata and Warisata "under the command of Colonel Guido Castro." DE 474-6 at 46:6-10.[7]

The Opposition likewise fails to address that Defendants had no legal authority to investigate the deaths or punish anyone found to be a wrongdoer. *See* Br. at 19-20. Plaintiffs fail to rebut Harb's testimony that the investigation of deaths is "a duty of the federal prosecution," not of the President or Defense Minister. DE 474-7 at 64:23-65:2. They do not dispute that automatic investigations by federal prosecutors take place whenever civilians are harmed by the Bolivian military. Br. at 19. And they do not rebut the fact that these investigations actually occurred, not only by the federal prosecutors, but also by the Human Rights Assembly and the committees of congress. *Id.* *See* Trial Ex. 1002 (Three Prosecutors' Report).

[7] Plaintiffs still have no answer to the undisputed fact that the Chachapumas, the soldiers present in Warisata, carry only M-16 rifles with 5.56 mm caliber bullets, making it impossible for those soldiers to have fired the 7.62 mm shot that killed Marlene. Br. at 29. *See also infra* at 22-23.

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No reasonable jury could find on this record that *these* Defendants are responsible for the deaths at issue under a theory of command responsibility. Plaintiffs failed to prove any, let alone all, of the three indispensable elements. Finding command responsibility liability under these circumstances would be tantamount to strict liability based solely on Defendants' high-level positions in the chain of command. The Rule 50 Motion should be granted.

II. NO DEATH OF ANY DECEDENT WAS AN EXTRAJUDICIAL KILLING.

A. Defendants Did Not Forfeit Their Arguments on Extrajudicial Killing.

Plaintiffs argue that Defendants "forfeited" the ability to challenge the sufficiency of the evidence on whether each death was an extrajudicial killing. Opp. at 23-25. Plaintiffs' argument makes no sense because the Eleventh Circuit remanded for the Court to make an initial determination on this very issue. *Mamani III*, 968 F.3d at 1240 ("We remand for the District Court to consider in the first instance whether, for each decedent, Plaintiffs produced sufficient evidence to demonstrate that each death was not lawful under international law and thus extrajudicial . . .").

Defendants have argued since Day 1 that there is no evidence of extrajudicial killing under the applicable law, making Plaintiff's forfeiture argument a nonstarter. *See* DE 421.1 at 2 (Rule 50(a) Motion) ("There is no evidentiary basis from which a reasonable jury could find an extrajudicial killing under the TVPA, or that Defendants are secondarily liable."); *id.* at 13 ("There Is No Evidence that Defendants Acted Unlawfully."). The Court also questioned the sufficiency of Plaintiffs' evidence at the hearings on Defendants' Rule 50 arguments. DE 462 at 169:7-15. Under these circumstances, it is frivolous to claim that Defendants have waived any arguments on this subject. *See Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1109 n.12 (11th Cir. 2020) ("Since these issues are closely related to the arguments the defendants made in their Rule 50(a) motion, the [plaintiff] cannot argue she has been ambushed. Further, the district court criticized the

sufficiency of evidence as to materiality during the proceeding."); *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("As the Supreme Court has made clear, it is *claims* that are deemed waived or forfeited, not *arguments*." (emphases added) (citing *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 378-79 (1995)); *Yee v. Escondido*, 503 U.S. 519, 534 (1992).

B. Rule 50 Is Not a Rubber Stamp.

Plaintiffs rely heavily on Rule 50, asserting that Defendants "never acknowledge" that Rule 50 requires the evidence and inferences to be drawn in Plaintiffs' favor. Opp. at 6. That accusation is both unwarranted and false. *See* DE 421.1 at 2 (filed March 18, 2018) (In original Rule 50 filing, Defendants state, "Under Rule 50, a court considers the evidence in the light most favorable to the non-movant and grants all reasonable inferences in its favor.").

Courts recognize that there are limits to Rule 50 deference. *See supra* at 1-2; *see also*, *Ralston Purina Co. v. Hobson*, 554 F.2d 725, 728-29 (5th Cir. 1977) ("In the face of . . . uncontradicted expert testimony, . . . completely self-serving testimony, unsupported by other evidence and in the teeth of universal experience, will not support a jury verdict."); *AcryliCon USA, LLC v. Silikal GmbH*, No. 17-15737, 2021 WL 248273, at *10 (11th Cir. Jan. 26, 2021) (error to deny defendant's Rule 50 motion where evidence showed it was "factually impossible for [plaintiff] to prove" an element of its claim); *Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 483 (5th Cir. 1976) ("A careful examination of both the trial transcript and the documentary evidence . . . compels the conclusion that a significant portion of the testimony given by the Plaintiff's witnesses was incredible as a matter of law.").

Rejecting unreasonable inferences does not require the Court improperly to "weigh the evidence" or "judge a witness's credibility." Here, for example, the fact that certain witnesses "did not see" armed civilians from their limited vantage points does not require the Court to conclude that "no armed civilians" were present. Plaintiffs cite testimony from witnesses who

"could not have possibly observed" everything that was happening, *Green*, 818 F.3d at 1274, and offer it in the face of evidence so "overwhelmingly in favor of [Defendants] . . . that reasonable people, in the exercise of impartial judgment, could not arrive at a contrary verdict . . . ." *Bailey v. Bd. of Cty. Comm'rs of Alachua Cty., Fla.*, 956 F.2d 1112, 1119 (11th Cir. 1992).

C. The Forensic Evidence Is Uncontradicted and Unimpeached; the "Eyewitness" Testimony Does Not Show the Deaths Were Unlawful.

When forced to engage with the evidence of "military reaction to just provocation, which is lawful under international law," *Mamani III*, 968 F.3d at 1240, it is Plaintiffs who resort to "re-litigating" an issue that this Court has already decided: "there were specific crises at each of the locations where decedents were shot." Rule 50 Order at 18 (citing "unrebutted evidence" of "protestors armed with rifles and dynamite"); *Mamani III*, 968 F.3d at 1240 & n.13 (same). Plaintiffs argue, without evidentiary support, that "the 'specific crises' Defendants cite as justification for the extreme military response were in fact distant—in time, space, and circumstances" from each decedent. Opp. at 1. But the Court rejected that conclusory argument the first time for good reason. The unrebutted evidence is entirely to the contrary and came from Plaintiffs' own witnesses—*e.g.*, Harb, Aguilar Vargas, Colonel Flores, Flores Limachi, and Gen. Veliz Herrera—and unimpeached exhibits, such as the Three Prosecutors' Report and police reports. *See* Br. at 26-28, 30-32, 39-42.

Plaintiffs exclusively rely on the refrain that some witnesses testified that, from their limited vantage points, they saw no armed protestors. *Id.* at 1, 3, 5, 12, 14, 15, 17, 19, 20, 21, 28, 31. As an initial matter, witnesses Plaintiffs rely on—such as Ela Trinidad and Father Soria Paz—did not claim to be near any decedent and said nothing about any of the deaths at issue. But more importantly, and as this Court has already found, non-exclusive evidence that some witnesses saw no armed protestors cannot support a reasonable inference that there *were no armed protestors*.

Rule 50 Order at 18. This is especially true when considered alongside the "unrebutted evidence" from numerous other sources of "protestors armed with rifles and dynamite," *id.*, and the indisputable fact that soldiers and police officers were shot and killed, Br. at 26-28, 30-32, 39-42. In other words, testimony that some witnesses felt no rain when standing under an overhang does not create a factual dispute as to whether it rained when others in the same area saw rain and got wet, and the streets were flooded.

Nor is the Court required to accept the unreasonable inferences proffered by Plaintiffs that "could not have occurred under the laws of nature," *Green*, 818 F.3d at 1274, such as decedents being shot by soldiers directly below them when the bullets entered their bodies from above at a top-down trajectory, or decedents being targeted by soldiers through walls that prevented them from even being seen, much less shot, *Hobson*, 554 F.2d at 729-30 (rejecting inferences "at variance with the laws of nature and the physical facts," "as described by the undisputed testimony of the experts").

Uncontradicted expert opinions show that many of Plaintiffs' theories are physically impossible. Plaintiffs argue that Rule 50 requires the Court to reject these opinions, Opp. at 29, but that is not the law. *See, e.g.*, *Hobson*, 554 F.2d at 729-30; *Cadle*, 838 F.3d at 1127 ("'[T]he trier of fact would not be at liberty to disregard arbitrarily the unequivocal, uncontradicted and unimpeached testimony of an expert witness, where, as here, the testimony bears on technical questions of medical causation beyond the competence of lay determination. Indeed, such opinion testimony may form the basis for a directed verdict.'" (quoting *Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970)); *Wingster v. Head*, 318 F. App'x 809, 815 (11th Cir. 2009) (same, affirming summary judgment). For example, in *Hobson*, the court affirmed judgment as a matter of law where the plaintiff's testimony as to what caused the loss of his chickens was

"thoroughly discredited by the testimony of both expert poultry nutritionists[:] What Hobson says his chickens did, chickens do not do." 554 F.2d at 729-730. So too, here, what Plaintiffs argue bullets did, the "undisputed testimony of the experts" shows that bullets "do not do." *Id*.

Plaintiffs' fallback argument is that, absent evidence and faced with physical impossibilities foreclosing their unsupported inferences, the Court should nonetheless find some deaths to be extrajudicial killings as a matter of law simply because they occurred "in the [decedents'] homes." Opp. at 1, 3, 4, 8, 13, 16. But this would render every civilian struck by a stray bullet through a wall during an armed conflict to be considered an extrajudicial killing, regardless of the circumstances—a scenario the Eleventh Circuit has already (and repeatedly) rejected. *See Mamani I*, 654 F.3d at 1155 ("precipitate shootings during an ongoing civil uprising" and "accidental or negligent shooting[s]" are not extrajudicial killings); *Mamani III*, 968 F.3d at 1237 ("the use of military force (and the resulting precipitate shootings) during an ongoing civil uprising may be lawful if the circumstances support such action").

The Court should reject Plaintiffs' plea to ignore both the laws of physics and unrebutted evidence of armed protestors at the location of each death. The Rule 50 Motion should be granted for the independent reason that there is no evidence of extrajudicial killings as to any decedent.

1. Marlene Nancy Rojas Ramos

Plaintiffs rely on three witnesses—Marlene's parents Eloy Rojas and Etelvina Ramos, and American tourist Benjamin Smith—to dispute that there was an ambush in Warisata. Opp. at 11-13. But none of those witnesses creates a factual dispute with the overwhelming evidence—including from Plaintiff's own witness Aguilar Vargas—that armed insurgents opened fire on the police and military in Warisata just before Marlene's death. Br. at 26-29.

Plaintiffs concede that no witness saw who fired the shot that killed Marlene. Br. at 26-

30; Opp. at 11-13. Eloy Rojas was hiding behind a rock on the hill behind his house when he learned his daughter was shot and did not have a vantage point on the armed protestors near the Warisata Plaza. DE 450 (Trial Tr. 3/6/18) at 62:22-63:2. Etelvina Ramos had not left her home that day because she was ill, and was not looking out the window at the time her daughter was shot. *Id.* at 53:12-55:15. While lying in bed, she heard multiple shots ("boom boom"), then heard her daughter cry out. *Id.* After getting out of bed and tending to her daughter, she looked out the window and saw soldiers below, but did not see them shooting. *Id.* Plaintiffs offer no response to the uncontradicted forensic evidence that the bullet that struck Marlene through the second-story window could not have come from the nearby soldiers on the ground because it struck her from a top-down trajectory, and could only have done so after travelling on a parabolic arc from a long distance (such as a stray bullet from the Warisata Plaza, where armed protestors were attacking police and soldiers). Br. at 28-29 (citing testimony of experts Dr. Joye Carter and David Katz).

Benjamin Smith offered no testimony as to what was happening in Warisata at the time of Marlene's death at 4:00 p.m.—he testified that in the "late afternoon," he was stopped in a bus on the outskirts of Warisata for "a couple of hours" while he heard gunshots ahead in the town. DE 451 (Trial Tr. 3/7/18) at 53:19-54:11. He could not say whether civilians were armed in Warisata. *Id.* He only passed through Warisata later that night after the violence subsided. *Id.* As Aguilar Vargas confirmed, the buses "full of civilian and foreign tourists" were only able to pass through Warisata "towards the end of the evening when everything had ended." DE 474-1 at 80:5-19.

This non-exclusive evidence does nothing to call into question the Three Prosecutors' Report, police reports, and the testimony of Plaintiff's own witness Aguilar Vargas as to the armed attack on the police and military in Warisata that day at the time of Marlene's death. Br. at 26-29. Unable to account for that evidence, Plaintiffs resort to distorting Aguilar Vargas's testimony,

asserting that he testified that "soldiers entered the area prepared to fire lethal 'war munitions' and were ordered 'from the moment [they] entered the village' to 'shoot at anything that moved.'" Opp. at 12. As Plaintiffs well know, when Aguilar Vargas was impeached with his prior sworn testimony and forced to unpack the timeline of that day on cross-examination, he testified in no uncertain terms that soldiers entered the town armed with *non-lethal ammunition* and only switched to lethal ammunition after police and soldiers had been shot and killed. Br. at 27-28. Plaintiffs also claim that Aguilar Vargas testified that he "never saw armed civilians," Opp. at 12, but in the testimony Plaintiffs cite he was only asked if he saw "any civilians shooting" at certain points in time. DE 471-1 at 36:23-37:10. Elsewhere in his testimony he affirmed that "the peasants had weapons, they shot at us. My lieutenant threw himself. He threw himself, and we saw why. Bullets were flying. . . . When the peasants wanted to surround us, they took my comrade who was already wounded with a bullet bleeding all over." *Id.* at 112:11-113:21.

Nor do Plaintiffs address Aguilar Vargas's testimony that the orders he received to shoot "above the belt for people armed with dynamite and guns, below the belt for anyone who moves, were designed to minimize the risk that unarmed people would be killed." *Id.* at 78:9-15. To the contrary, Plaintiffs acknowledge that orders to shoot "'given as a measure of very last resort to protect lives'" are consistent with international law, as noted in *Mamani III*. Opp. at 13.

Finally, Plaintiffs entirely ignore the factual impossibility of Marlene being shot by the "special forces" they repeatedly claim are responsible for her death, *id*. at 13, 36, 41, given the undisputed evidence that Marlene was struck by a 7.62 mm caliber bullet and the Special Forces in Warisata that day carried only 5.56 caliber ammunition. Br. at 29. This evidence cannot be dismissed as an irrelevant technicality. It precludes Plaintiffs from meeting their burden of establishing that Marlene was "killed by soldiers indiscriminately shooting . . . in the absence of

just provocation." *Mamani III*, 968 F.3d at 1240. Plaintiffs' failure to respond to this fact amounts to a tacit concession that Marlene's death cannot have been an extrajudicial killing by a soldier.

2. Teodosia Morales Mamani

Plaintiffs concede that no witness saw who fired the shot that killed Teodosia. Br. at 30-33; Opp. at 16-18. Plaintiffs rely heavily on the testimony of Ela Trinidad Ortega, Father Zabala, and Father Soria Paz, but, as the Eleventh Circuit confirmed, "evidence about widespread casualties and a pattern of innocent deaths does not suffice to demonstrate that in any particular instance a death was an extrajudicial killing." *Mamani III*, 968 F.3d at 1240. As explained above, all of those witnesses had limited, non-exclusive vantage points and none claimed to have witnessed the circumstances of any decedent's death. Opp. at 16-18.[8] For example, Plaintiffs cite to a map used by Ms. Trinidad to illustrate what she saw, but conspicuously do not argue that the map encompasses any of the locations of any decedent's death or that Ms. Trinidad's testimony coincides with the time of any death. *Id.* at 18. The only witness to Teodosia's death that Plaintiffs identify is her niece Beatriz Apaza. *Id.* at 16. But Beatriz did not see any soldiers shooting, much less at innocent civilians. Br. at 32. The only soldiers she saw were below her house on the street that day. Rather than shooting, the soldiers urged her to "'get inside'" when she looked out. *Id.*

Plaintiffs do not even attempt to address the factual impossibility that Teodosia was extrajudicially killed by these soldiers. *See* Br. at 30-32. It is beyond dispute that Teodosia was struck by a bullet through a wall that entered both the wall and Teodosia's body from above, at a top-down trajectory. *Id*. (citing the uncontradicted expert testimony of Dr. David Fowler and David Katz). This is dispositive of Plaintiffs' extrajudicial killing argument, as it is physically

[8] Additionally, both Zabala and Soria Paz acknowledged that they never saw any soldiers shooting, much less harming, civilians. DE 453 at 47:3-15, 49:1-3 (Zabala); DE 454 at 114:7-11 (Soria Paz).

impossible that the bullet that struck Teodosia could have come from a soldier firing from the street below, the only location where any witnesses saw soldiers that day. *Id.* The jury heard no evidence of any soldiers positioned above Teodosia's house, but they did hear evidence of armed protestors shooting from rooftops in the Río Seco area that day that resulted in a young soldier being shot through the head. *Id.*

On these indisputable facts—armed protestors in the location where Teodosia was shot combined with the impossibility that she was shot by any soldier seen by any witness—there is simply no evidence from which a jury could draw a reasonable inference that Teodosia was extrajudicially killed by a soldier under international law.

3. Roxana Apaza Cutipa

Plaintiffs concede that no witness saw who fired the shot that killed Roxana. Br. at 33-35; Opp. at 16-18. The only witnesses they identify are her brothers Hernan and Guzman Apaza Cutipa. Opp. at 16-17. Neither saw any soldiers, much less soldiers shooting, much less at unarmed civilians. DE 453 (Trial Tr. 3/9/18) at 74:4-75:3, 101:1-102:18. Guzman only saw military vehicles passing by on the street 400 meters away. *Id.* at 74:4-75:3 ("Q. Did you see the military at all? A. Not exactly. But we could see tanks and trucks that were driving on the avenue."). He later saw "people running" in the street and "saw [his] sister falling to the ground." *Id.*

Hernan was inside the house watching television on the first floor when his sister was shot on the fourth-story rooftop, over a brick wall that almost completely obscured her. *Id.* at 101:1-102:18, 111:23-112:6. He heard "firecracker noises" and noises that "seemed like shots" coming from outside the house. *Id.* at 101:1-102:18. Then he heard his brother Guzman scream, ran to the rooftop, and saw that his sister had been struck by a bullet. *Id.* He admitted he "did not see

what happened to [his] sister." *Id.* at 111:23-112:6. That is the extent of Plaintiffs' evidence of Roxana's death, none of which supports a finding of extrajudicial killing.

Plaintiffs make no attempt to address the physical impossibility that Roxana was shot by a solider from the street below. As with Marlene and Teodosia, the evidence is undisputed that Roxana was struck from above by a bullet travelling at a top-down trajectory. Br. at 34-35 (citing the uncontradicted expert testimony of Dr. David Fowler and David Katz). The evidence is similarly undisputed that a shot fired from the street below could not have struck her at that angle. *Id.* The jury heard no evidence of any soldiers positioned above Roxana's rooftop, but they did hear evidence of armed protestors shooting from rooftops in the Río Seco area that day that resulted in a young soldier being shot through the head. *Id.*

On these indisputable facts—armed protestors in the location where Roxana was shot combined with the impossibility that she was shot by any soldier seen by any witness—there is simply no evidence from which a jury could draw a reasonable inference that Roxana was extrajudicially killed by a soldier under international law.

4. Marcelino Carvajal Lucero

Plaintiffs concede that no witness saw who fired the shot that killed Marcelino. Br. at 35-37; Opp. at 16-18. The only witness Plaintiffs identify is his wife Juana Valencia Carvajal. Opp. at 16. But she admits that she did not witness the shooting. DE 452 (Trial Tr. 3/8/18) at 74:12-25. Nor did she witness any soldiers shooting that day: "I can't lie, I didn't see them shooting." *Id.* at 74:17. To the contrary, as with Beatriz, the only soldiers Juana saw that day in the street below her home were non-violent. *Id.* at 74:2-9. When she looked out her window they had their weapons raised and could have fired at her if they were shooting indiscriminately, as opposed to scanning for threats, but did not do so. *Id.* That is the extent of Plaintiffs' evidence of Marcelino's

death, which cannot support a finding of extrajudicial killing.

Plaintiffs also do not attempt to address the physical impossibility that Marcelino was shot by a solider from the street below. As with Marlene, Teodosia, and Roxana, the evidence is undisputed that Marcelino was struck from above by a bullet travelling at a top-down trajectory. Br. at 35-37 (citing the uncontradicted expert testimony of Dr. David Fowler and David Katz). The evidence is similarly undisputed that a shot fired from the street below could not have struck Marcelino at that angle. *Id.* The jury heard no evidence of any soldiers positioned above Marcelino's home, but they did hear evidence of armed protestors shooting from rooftops in the Río Seco area that day that resulted in a young soldier being shot through the head. *Id.*

On these indisputable facts—armed protestors in the location where Marcelino was shot combined with the impossibility that he was shot by any soldier seen by any witness—there is simply no evidence from which a jury could draw a reasonable inference that Marcelino was extrajudicially killed by a soldier under international law.

5. Lucio Santos Gandarrillas Ayala

Plaintiffs concede that no witness saw who fired the shot that killed Lucio. Br. at 37-38; Opp. at 14-15. The only witness Plaintiffs identify that can attest to the circumstances of Lucio's death is Luis Castaño. Opp. at 14-15. But Castaño repeatedly emphasized the limited vantage point he had that day. Critically, he admitted he "couldn't tell whether it had been any of the military . . . that gave the shot [that struck Lucio] . . . because all I did was hear the shot." DE 474-4 at 40:3-10. The soldiers Castaño saw facing him and Lucio either "sho[t] up in the air," or were "positioned to fire," without shooting. *Id.* at 26:22-27:04, 34:7-25.

Plaintiffs claim that Castaño saw "soldiers g[i]ve chase to the fleeing civilians, firing 'a whole shower or rain of bullets.'" Opp. at 14 (citing DE 474-4 at 29:23-32:14). But that is not his testimony.

Castaño said that he saw one soldier run to the corner of an alleyway and start shooting. DE 474-4 at 29:23-32:14. Castaño could not see what was happening in the alleyway. *Id.* ("I didn't see anything more because, from the fear, I ran, and I escaped over here. . . . [F]rom there I didn't see anything more because I was already at another place."). He testified that he *heard* a "shower or rain of bullets," and he could not say whether whoever was in the alleyway was firing at the solider: "Q. And did you see anyone shooting from the alleyway back at the officer? *A. No. I didn't see anything, anything at all, because I already was away, far away*." *Id.* at 31:5-12 (emphasis added). He certainly did not testify that the soldier was firing on "fleeing civilians." Opp. at 14.

That is the extent of Plaintiffs' evidence of Lucio's death, which cannot support a finding of extrajudicial killing when considered alongside the unrebutted evidence that a "'mobilized civilian population . . . armed with Mauser rifles and dynamite'" launched "'attacks on the tanker trucks transporting gasoline'" that day in Senkata, the exact location where Lucio was struck by a bullet. Br. at 37 (quoting Trial Ex. 1002 at 1002.27); *see also* DE 474-7 (Harb Testimony) at 140:03-142:23 (confirming that he received a report on October 12 that "the gas convoy had been shot at" and "a soldier who was with the convoy actually was hit in the head by a bullet"); Rule 50 Order at 18.

6. Arturo Mamani Mamani and Jacinto Bernabé Roque

Plaintiffs acknowledge that on the morning of October 13 there was a blockade on the Ánimas Valley road below the hills/mountains were Arturo and Jacinto were positioned. Br. at 39-42; Opp. at 19-21. Plaintiffs concede that, while the military was stopped at that blockade, a soldier was shot in the head from the hills. Br. at 39-42; Opp. at 19-21. Plaintiffs further concede that, *before* that soldier was shot, the military was not firing, and that they did not switch to lethal ammunition until after the armed ambush. Br. at 39-42; Opp. at 19-21. Plaintiffs primarily rely on an argument of temporal disproportionality, arguing that the military's return of fire into the hills was unlawful as it relates to Arturo and Jacinto because their deaths occurred "over two hours

after the soldier had been shot far below." Opp. at 21 (asserting that the soldier Lecona was shot at "8 o'clock"). But that is a telling mischaracterization of the record.

As noted in Defendants' Brief, Lecona's death certificate and the testimony of General Antezana objectively confirm he was shot between 10:00 a.m. and 11:00 a.m. Br. at 41. Plaintiffs rely exclusively on the testimony of Flores Limachi, who initially said that Lecona was shot at "approximately 8 o'clock," but then acknowledged it was "10:00 a.m." when confronted with the sworn declaration that Plaintiffs' own counsel had him sign to submit in support of their summary judgment opposition. DE 454 (Trial Tr. 3/12/18) at 148:4-17. Flores Limachi testified that the "clash" between civilians and soldiers triggered by Lecona's death lasted "45 minutes." *Id.* at 131:24-132:1. It is undisputed that both Arturo and Jacinto were struck by bullets only minutes after the time Flores Limachi testified that Lecona was shot. Opp. at 21 ("Jacinto [was] shot sometime around '10:00, 10:15 or 10:20,' and Arturo after"); Br. at 39-42.

Plaintiffs resort to this mischaracterization, and also focus at length on what happened *after* Jacinto's and Arturo's deaths, because the evidence is entirely one-sided that their deaths were the result of precipitate shootings immediately following an armed attack. These facts cannot support a finding of extrajudicial killing as a matter of law. *Mamani III*, 968 F.3d at 1237 ("precipitate shootings[] during an ongoing civil uprising may be lawful"). This is reinforced by Defendants' unrebutted expert testimony that neither Arturo nor Jacinto would have been visible to any soldiers on the road below and that it was impossible to see them, much less know that they were unarmed civilians, much less target them as such. Br. at 39-42.

7. Raul Ramón Huanca Márquez

Plaintiffs concede that no witness saw who fired the shot that killed Raul. Br. at 42-45; Opp. at 21-23. They cite the testimony of Raul's daughter Felicidad, Opp. at 22, but she admitted

she was in her home at the time her father was shot and did not witness any of the circumstances of his death. DE 453 (Trial Tr. 3/9/18) at 117:12-119:22. Plaintiffs also rely on the testimony of Juan Carlos Pari, but Mr. Pari conceded he had a limited vantage point and could not see what happened in the surrounding Ánimas Valley hills that resulted in "chaos" and "confusion" and caused soldiers to start shooting in Ovejuyo that day. Br. at 42-45. Plaintiffs cite the testimony of Flores Limachi, but his testimony does not establish unlawful shootings by any soldiers. When asked to describe the shooting he saw in Ovejuyo that day, Flores Limachi testified that in "Ovejuyo, there was a crowd, a multitude of civilians. They wanted to prevent us from retreating into the military college." DE 454 at 132:24-133:17. He never testified that the civilians in Ovejuyo were unarmed, or that they did not open fire on the soldiers first. *Id.*

Moreover, Pari did not see soldiers shoot Raul—he only saw soldiers on a bridge positioned to shoot, heard a shot, and saw Raul fall. Br. at 44. Plaintiffs argue that this should be sufficient to permit a reasonable inference of extrajudicial killing by the soldiers on the bridge. But they ignore the physical impossibility of such an inference given the undisputed evidence of an obstructing wall between the soldiers' position and Raul's location. *Id.* The laws of physics and Defendants' uncontradicted expert testimony that there was no line of sight from the bridge to Raul's location given the intervening structure—and thus that it would have been impossible for those soldiers to see him, much less shoot him—preclude a finding that Raul was extrajudicially killed by those soldiers. *See, e.g.*, *Reid v. Sec'y, FL Dept of Corr.*, 486 F. App'x 848, 851-52 (11th Cir. 2012) (rejecting inference that "contradicts the laws of nature"); *Hobson*, 554 F.2d at 729 (same, as "described by the undisputed testimony of the experts").

III. At a Minimum, the Court Should Order a New Trial Under Rule 59.

Plaintiffs do not dispute that the Court may "'weigh the evidence'" when considering whether to grant a new trial, and must do so where "'the verdict [is] contrary to the great, and not

merely the greater, weight of the evidence.'" Opp. at 48 (quoting *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982)). Plaintiffs suggest that "'legal error, prejudicial conduct, or pernicious behavior'" is also necessary "to justify a new trial." *Id.* at 49. But that is conflating two distinct standards. *See, e.g.*, *Deas v. PACCAR, Inc.*, 775 F.2d 1498, 1504 (11th Cir. 1985) ("[T]here is a distinction between a new trial awarded because the verdict was against the weight of the evidence and one awarded for other reasons.").

If the Rule 50 Motion is not granted, this case cries out for a new trial. There is absolutely no evidence linking either Defendant to any death. No witness saw any soldier shoot any decedent. Armed protestors were shooting in each location. And the unrebutted expert forensic evidence renders it physically impossible, or extremely unlikely, that each decedent's death occurred in the manner in which Plaintiffs contend, let alone in circumstances that amount to extrajudicial killing. The one-sided nature of that evidence permits the Court to order a new trial under Rule 59.

CONCLUSION

For these reasons and those set forth in Defendants' opening Brief, judgment should be entered in favor of Defendants on all TVPA claims or, alternatively, the Court should grant Defendants' motion for a new trial under Rule 59.

Dated: February 19, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 19, 2021, I electronically filed the foregoing documents with the Clerk of the Court using CM/ECF. I also certify that the foregoing documents are being served this day on all counsel of record or parties of record on the Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ James E. Gillenwater
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