

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-01916-MD-MARRA

IN RE: CHIQUITA BRANDS  
INTERNATIONAL INC. ALIEN TORT  
STATUTE AND SHAREHOLDERS  
DERIVATIVE LITIGATION

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This Document Relates To:

ATS ACTIONS

08-80421-CIV-MARRA (N.J. Action) (*Does 1-11*)  
18-80248-CIV-MARRA (Ohio Action)

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ORDER AND OPINION  
DENYING NEW JERSEY PLAINTIFFS' MOTION  
FOR CLASS CERTIFICATION [DE 2290]

I. INTRODUCTION

This case involves the claims of thousands of Colombian nationals who allege that they or their family members were victims of kidnapping, torture, extrajudicial killings or other human rights abuses during the Colombian civil war at the hands of a violent right-wing paramilitary group with financial ties to a United States-based corporation. More specifically, Plaintiffs contend that Chiquita Brands International, Inc. ("Chiquita") funneled approximately 1.7 million dollars to the *Autodefensas Unidas de Colombia* (United Self-Defense Groups of Colombia, or the "AUC"). The AUC is a Colombian terrorist organization believed to have massacred over 100,000 persons in Colombia between 1995 and 2006, including over 10,000 civilians living in the fertile Uraba and Magdalena regions where Chiquita operated. The funds provided by Chiquita allegedly

enhanced the AUC's terror capabilities and facilitated its killing campaign in the regions where Plaintiffs and their families lived.

After Chiquita's financial relationship to the AUC and other Colombian terror groups gained significant media attention in March of 2007, when Chiquita pled guilty to making payments to a designated terrorist organization and agreed to pay a \$25 million fine in criminal proceedings filed in the District of Columbia, thousands of persons whose family members were allegedly brutalized by the AUC filed suit in the United States seeking to hold Chiquita and various of its executive officers accountable for their alleged role in strengthening the AUC killing machinery.<sup>1</sup>

On February 20, 2008, the Judicial Panel on Multidistrict Litigation centralized six cases in this district and assigned the case to the undersigned. The Panel has since continued to transfer cases from around the country. In addition, a number of cases were filed in this District, and the Court combined those cases with the multidistrict cases. At this time, there are approximately nineteen cases left in this MDL litigation, comprised of Colombian common law tort claims against all Defendants and statutory claims under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note,<sup>2</sup> against various Individual Defendants. Cumulatively, roughly 7500 individuals appear as plaintiffs in these remaining cases. Of these, the New Jersey plaintiffs, *Does I-11*, have filed their claims in a representative capacity, pleading a putative class action on behalf of thousands of other unnamed Colombian citizens victimized by the AUC in the Uraba and

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<sup>1</sup> Several American families who lost family members to the FARC, a left-wing guerilla group similarly alleged to have received payments from Chiquita, also filed lawsuits in the United States under the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333(a). The ATA cases, originally a subset of cases subsumed within this MDL proceeding, were dismissed based on settlement in early 2018. Case Nos. 08-20641 (*Julin*); 09-80683 (*Pescatore*) and 11-80402 (*Sparrow*).

<sup>2</sup> The TVPA authorizes a civil cause of action against "[a]n individual" for acts of torture and extrajudicial killing committed under authority or color of law of any foreign nation. 28 U.S.C. § 1350 note. For purposes of the TVPA, an individual acts under color of law "when he acts together with state officials or with significant state aid." *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 260 (2d Cir. 2007) (*per curiam*).

Magdalena regions between 1995 and 2004, the time period over which Chiquita allegedly paid the AUC and its predecessor.<sup>3</sup>

## II. FACT AND PROCEDURAL BACKGROUND

The factual and early procedural history of this case is described in prior rulings of the Court and will not be repeated here [DE 1110] [DE 1194] [DE 1733].<sup>4</sup> The more recent procedural chronology of the case, as relevant to the instant motion, is highlighted as follows.

In November 2016, after the conclusion of an initial dispositive motion round, the Court dissolved its previously-entered discovery stay [DE 1197]. It next solicited a proposed scheduling order from the parties governing pretrial procedures and trial dates for the Florida-filed cases, along with a proposed scheduling order governing pretrial procedures in all other cases subsumed within this MDL proceeding [DE 1246]. Following submission of proposed scheduling orders outlining pretrial and trial procedures for the parties' bellwether case selections, on April 11, 2017, the Court entered its original Global Scheduling Order which largely tracked and incorporated the parties' stipulated terms while resolving a few areas of disagreement [DE 1361].<sup>5</sup> Also in early 2017, the New Jersey Plaintiffs sought leave to file a third amended complaint for the stated purpose of

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<sup>3</sup> On July 7, 2007, Plaintiffs filed their original complaint in New Jersey, Case No. 07-3406 (JAG) naming Chiquita as well as various fictitious "Moe" corporations and "Moe" individuals as defendants. The New Jersey Plaintiffs' now operative Second Amended Complaint filed in November 16, 2012 [DE 589] names six specific current or former employees of Chiquita allegedly involved in the AUC decision-making processes.

<sup>4</sup> *In re Chiquita Brands International, Inc. Alien Tort Statute and Shareholder Derivative Litigation*, 190 F. Supp. 3d 1100 (S.D. Fla. June 1, 2016) (dismissing in part and sustaining in part various state law, federal law and foreign law claims against Chiquita and various Individual Defendants); *In re: Chiquita Brands International Inc. Alien Tort Statute and Shareholder Derivative Litigation*, Case 08-MD-1916-MARRA (S.D. Fla. Nov. 29, 2016) (denying motion to dismiss based on *forum non conveniens*); *In re: Chiquita Brands International Inc. Alien Tort Statute and Shareholder Derivative Litigation*, 284 F. Supp. 3d 1284 (S.D. Fla. Jan. 3, 2018) (denying motion for summary judgment on Anti-Terrorism Act claims arising out of Chiquita's alleged support of the Fuerzas Armadas Revolucionarias de Colombia ("FARC")).

<sup>5</sup> On September 20, 2018, the Court entered an Amended Global Scheduling Order [DE 2122], pursuant to the parties' joint requests [DE 1877, 2116], altering various of these deadlines which, again, did not include a provision governing class certification motions.

adding, as named plaintiffs, a sizable group of additional claimants originally travelling as unnamed members of the putative class, in addition to other unspecified “minor clerical changes.” On March 27, 2017, the Court denied that motion, citing the advanced stage of the proceeding and imminent scheduling of the matter for trial [DE 1315].

In November 2017, the New Jersey Plaintiffs propounded limited fund class discovery on the Defendant Chiquita, and, failing a satisfactory response, moved to compel the production of that material. The motion to compel was denied as untimely in an Omnibus Order entered March 2018 [DE 1856]. Five months later, on August 17, 2018, the New Jersey Plaintiffs first sought leave to file a class certification motion and moved to amend the global scheduling order to incorporate a corresponding briefing schedule [DE 2054] – an item neither side addressed in the originally-proposed scheduling orders. The Court granted this motion, over Defendants’ objection to its timeliness, and imposed a briefing schedule which tracked that governing the dispositive motion briefing agenda then in place for selected bellwether cases on track for trial [DE 2246].

Accordingly, on February 15, 2019, the New Jersey Plaintiffs filed the instant motion seeking certification of a “predominance” class under Rule 23(b)(3), or alternatively, an “issue” class under Rule 23(c)(4), against the Defendant Chiquita and various Individual Defendants.<sup>6</sup> In support of the motion, Plaintiffs have filed: (1) the affidavit of counsel Melissa Vahsling, purporting to establish the proposed class representatives’ status as AUC-victims, based on Attorney Vahsling’s asserted “personal knowledge” and review of “highly confidential documents” regarding the proposed class representatives. This affidavit, however, does not explain the basis for any personal knowledge of the facts recited, nor does it specifically identify the

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<sup>6</sup> Plaintiffs also purport to reserve the right to seek certification of a limited fund class under Rule 23(b)(1)(B) at “some later date” if they are ultimately successful in obtaining information regarding Chiquita’s assets and the sufficiency of funds available to pay a judgment in this case [DE 2290, at pp.18-19, f.n. 11].

secondary sources on which the statements are presumably based. It does refer to a review of “highly confidential documents,” described by Bates-stamp number, which purportedly show that Jane Doe 7 and John Doe 7, the proposed class representatives, have “registered” as victims of the AUC with the Colombian authorities under its Justice and Peace Law program, and that the Colombian authorities “have opened an investigation” into the murders of their respective family members. In the case of John Doe 7, the affidavit recites that “an AUC paramilitary has taken responsibility for [his son’s] murder during the Justice and Peace process.”<sup>7</sup> Both representatives are alleged to have received administrative payments from the Colombian government as a result of their claims and the apparently still “open investigation[s]” into the murders of their family members [DE 2290-2]; (2) the affidavit of counsel Sean Powers, purporting to authenticate and introduce the following evidentiary matters in support of the class certification motion: (a) the

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<sup>7</sup> The affidavit does not identify the paramilitary who allegedly took responsibility, nor reference the secondary source or sources from which the assertion is drawn. It is therefore not possible to decipher from this cryptic reference whether a person with personal involvement accepted responsibility for this particular murder, or if this is a reference to command responsibility accepted by an AUC leader during the Justice and Peace processes. As described at the deposition of AUC leader Salvatore Mancuso, at the commander level, this process involved a general acceptance of responsibility for acts of subordinate combatants and was not necessarily based on direct participation or even knowledge of the specific underlying crimes. As Mancuso testified, “There are events in which I did not directly participate and of which I do not have knowledge. I have to assume responsibility when I’m in the chain of command. If some one of those were combatants under my command, we’re responsible for that... [S]pecify for me the time and the place and that way I would be able to certify whether or not someone from the Autodefensas under my command gave a deposition, declared whether or not he was there at that time ... [d]eclare whether or not he was responsible.” [Deposition of Salvatore Mancuso, June 15, 2018] [DE 2399-2, pp. 109-110]

Plaintiffs’ motion, citing the unsworn allegations of their underlying complaint, amplifies the circumstances attending the murder of John Doe 7’s son, contending that “John Doe 7 confronted the AUC about the killing of his son, and was told by the AUC that “the AUC were guarding the farm and were responsible for preventing thefts.” [DE 2290, p. 6, citing Complaint DE 589 ¶ 204]. Setting aside the hearsay issues with this statement, for purposes of the present relaxed evidentiary setting, this statement is not reasonably interpreted as an acknowledgment of AUC responsibility for this specific death and is of limited probative value on the issues presented by the current motion.

Similarly, with regard to Jane Doe 7, the motion cites to allegations of the underlying complaint for the proposition that “the AUC arrived at the home [the victim] shared with Jane Doe 7, dragged him from the house, and killed him with a knife.” [Motion DE 2290, p. 5, citing Complaint DE 589 ¶215]. It does not explain how this crime was attributed to the AUC or cite any secondary source material implicating its involvement.

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