

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

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

ELOY ROJAS MAMANI, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
GONZALO DANIEL SÁNCHEZ DE	)
LOZADA SÁNCHEZ BUSTAMANTE,	)
	)
Defendant,	)
	)
JOSÉ CARLOS SÁNCHEZ BERZAÍN,	)
	)
Defendant.	)
_____	)

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR  
MOTION FOR SUMMARY JUDGMENT**

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<b>PLAINTIFFS</b>	
<b>Name</b>	<b>Description</b>
Gonzalo Mamani Aguilar	Sues on behalf of Arturo Mamani Mamani
Hermógenes Bernabé Callizaya	Sues on behalf of Jacinto Bernabé Roque
Juana Valencia de Carvajal	Sues on behalf of Marcelino Carvajal Lucero
Teófilo Baltazar Cerro	Sues on behalf of Teodosia Morales Mamani
Hernán Apaza Cutipa	Sues on behalf of Roxana Apaza Cutipa
Eloy Rojas Mamani	Sues on behalf of Marlene Nancy Rojas Ramos
Etelvina Ramos Mamani	Sues on behalf of Marlene Nancy Rojas Ramos
Felicidad Rosa Huanca Quispe	Sues on behalf of Raúl Ramón Huanca Márquez
Sonia Espejo Villalobos	Sues on behalf of Lucio Santos Gandarillas Ayala

<b>DEFENDANTS</b>	
<b>Name</b>	<b>Description</b>
Gonzalo Sánchez de Lozada	President of the Republic of Bolivia (August 1993-August 1997, August 2002 to October 2003)
Carlos Sánchez Berzaín	Minister of Defense of the Republic of Bolivia (August to October 2003)

<b>DECEDENTS</b>	
<b>Name</b>	<b>Description</b>
Marlene Nancy Rojas Ramos	Deceased on September 20, 2003, approximately 900 meters away from Warisata
Lucio Santos Gandarillas Ayala	Deceased on October 12, 2003, in El Alto
Roxana Apaza Cutipa	Deceased on October 12, 2003, in El Alto
Teodosia Morales Mamani	Deceased on October 14, 2003, as a result of gunshot wound suffered October 12, 2003, in El Alto
Marcelino Carvajal Lucero	Deceased on October 12, 2003, in El Alto
Jacinto Bernabé Roque	Deceased on October 13, 2003, in La Paz
Arturo Mamani Mamani	Deceased on October 13, 2003, in La Paz
Raúl Ramón Huanca Márquez	Deceased on October 13, 2003, in La Paz

<b>THIRD PARTIES</b>	
<b>Name</b>	<b>Description or Title in Fall 2003</b>
Jorge Berindoague Alcocer	Minister of Hydrocarbons, Bolivia
Jaime Aparicio	Ambassador of Bolivia to the United States
Beatriz Bedoya	Private Secretary to President Sánchez de Lozada
Javier Comboni	Minister of Finance, Bolivia
Jorge Mario Eastman	Special Advisor, Organization of American States
Roberto Claros Flores	Commander in Chief of the Armed Forces, Bolivia
Guido Romulo Meruvia Gutierrez	Vice Minister of Labor, Bolivia
José Elias Harb	Vice Minister of Government, Bolivia
Gonzalo Rocabado Mercado	Acting Commander in Chief of the Armed Forces, Bolivia (September 20-26, 2003)
Evo Morales	Leader of the Cocaleros President of Bolivia (2005 to present)
[REDACTED]	[REDACTED]
Felipe Quispe	Leader of Confederación Sindical Única de Trabajadores Campesinos de Bolivia, Trade Union Confederation of Bolivian Workers.
Luis Eduardo Siles Perez	Member of Congress, Bolivia
Marcelo Eulogio Antezana Ruiz	Commander of the Military Academy in the Southern Zone of La Paz
[REDACTED]	[REDACTED]
Simon Rolando Ramirez Ustariz	Bolivian citizen in Warisata

<b>PLAINTIFFS' PROFFERED EXPERTS</b>	
<b>Name</b>	<b>Description</b>
Carwil Bjork-James	Assistant Professor of Anthropology at Vanderbilt University
Al Borrelli	Intelligence Analyst
Daniel M. Goldstein	Professor of Anthropology at Rutgers, the State University of New Jersey
Philip P. Hayden	Law Enforcement Consultant



## INTRODUCTION

Plaintiffs began this case with sensational allegations: that the democratically elected President of Bolivia and his Minister of Defense ordered the military to kill Plaintiffs' relatives—just so the government could sell natural gas to the United States. Plaintiffs withstood a motion to dismiss based on a legal standard that required the Court to accept the truth of their allegations. But the Eleventh Circuit warned that Plaintiffs faced a high burden in proving their claims on the merits: Plaintiffs must establish not only that the decedents were shot by members of the military, but also that the “decedents’ deaths were ‘deliberate’ in the sense of being undertaken with studied consideration and purpose.” *Mamani v. Berzaín*, 654 F.3d 1148, 1152, 1155 (11th Cir. 2011). “Facts suggesting some targeting are not enough.” *Id.* Plaintiffs must prove that the shootings were “linked to defendants” based on “what these defendants personally did,” and not based on “individual motivations (personal decisions)” of individual shooters. *Id.* Moreover, Plaintiffs cannot prevail if the deaths were “compatible with accidental or negligent shooting.” *Id.*

With discovery completed, it is now clear that Plaintiffs do not have any evidence that would meet the standard set out by the Eleventh Circuit. To the contrary, discovery has shown Plaintiffs’ allegations to be as far-fetched as they sound. It is tragic that fellow Bolivians died in September and October 2003, but neither the facts nor the law support the idea that Defendants bear legal responsibility for those tragedies.

*First*, there is no evidence that any decedent in this case was shot by a member of the military, let alone intentionally. All Plaintiffs concede that they do not know the identity of the person who shot their relative. Plaintiffs have not identified a single eyewitness who saw the person who shot any decedent. Plaintiffs proffer one witness, Philip P. Hayden, who purported to analyze the circumstances of each death. And he was forced to admit that (i) it was not possible to confirm whether the shots were intentional or accidental, and (ii) he does not know what any

shooters intended, including whether they believed they were shooting at an armed protestor. The basis for summary judgment then is straightforward. A jury cannot make a state-of-mind assessment of intent or motivation without knowing whose state-of-mind is being assessed.

*Second*, there was no order by Defendants to kill civilians. Plaintiffs identify only two orders at issue, neither of which came from Mr. Sánchez Berzaín, the Defense Minister. Both were lawful written orders, given by President Sánchez de Lozada to the Commander in Chief of the Armed Forces, who made the determination of how to implement them. The President gave the first order after armed “campesinos” ambushed a police and military convoy as it passed through the town of Warisata during a mission to rescue hundreds of tourists who had been held hostage in a nearby town. Police and soldiers were killed and wounded by rifle shots from gunmen hidden in nearby homes and the surrounding hills. The President’s order thus instructed the Commander in Chief to “use the necessary force to restore public order and the respect for the Rule of Law in the region.” The President gave the second order weeks later after the city of La Paz had been choked off by blockades that left the city without critical supplies. With the signed approval of his Cabinet, the President ordered the Armed Forces to assume control of tanker trucks and other vehicles to ensure the delivery of liquid fuels to the people of La Paz. Neither order called for direct confrontation with civilians, let alone killing civilians.

Without any evidence showing who shot their relatives, or that Defendants ordered the killing of civilians, it is impossible for Plaintiffs to show that (i) the unknown shooters had the required intent, (ii) the unknown shooters were linked to Defendants, or (iii) the unknown shooters were acting on orders from Defendants or under their “effective control.” As the Eleventh Circuit recognized, it simply is not enough for Plaintiffs to show that “their relatives were killed by the Bolivian armed forces and that . . . the armed forces acted under the authority of” Defendants.

*Mamani*, 654 F.3d at 1155 n.8. Plaintiffs can only speculate about the material facts: that is not enough to withstand summary judgment. Defendants respectfully request that their motion for summary judgment be granted in its entirety.

**I. STATEMENT OF MATERIAL FACTS<sup>1</sup>**

**A. Plaintiffs Have Not Identified Who Shot Any Decedent**

Plaintiffs sue on behalf of eight decedents who died during civil unrest and violent clashes in Bolivia in September and October 2003. SMF ¶¶ 3-11, 53, 86, 92, 101, 107, 125, 133, 140. Plaintiffs have each conceded that they cannot identify the gunmen who shot their decedents: They do not know themselves, and no one has provided them with any information sufficient to identify the gunmen after the fact. SMF ¶¶ 28-30, 57-59, 88-91, 97-100, 104-06, 109-11, 128-32, 136-39, 148-53. Plaintiffs cannot identify any of the particular circumstances under which any gunman shot. SMF ¶¶ 28-30, 57-59, 88-91, 97-100, 104-06, 109-11, 128-32, 136-39, 148-53. No physical evidence related to any death is available for inspection. SMF ¶ 31. There is no evidence in the record as to what type of bullet any decedent was shot with, and therefore no possible determination based on ballistics as to what firearm was used for each shot.<sup>2</sup> SMF ¶¶ 32, 60.

**B. The Events of 2003**

Gonzalo Sánchez de Lozada served as the democratically elected President of the Republic of Bolivia from August 1993 to August 1997 and again from August 2002 to October 2003. SMF ¶ 1. Carlos Sánchez Berzaín served as Defense Minister during Sánchez de Lozada's second term. SMF ¶ 2. In December 2002, President Sánchez de Lozada announced that his Administration

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<sup>1</sup> All facts cited herein refer to Defendants' Statement of Material Facts in Support of their Motion for Summary Judgment (SMF).

<sup>2</sup> Although a Bolivian prosecutor tested a bullet provided by Ms. Mamani in 2006, Mr. Hayden acknowledged that no determination was ever made that the bullet tested was the bullet that struck Marlene Nancy Rojas Ramos in 2003. SMF ¶ 32.

would continue enforcement of a previously implemented U.S.-funded coca eradication program to curb Bolivia's massive exportation of illegal cocaine. SMF ¶ 13. In response, the leader of the "cocaleros" (coca growers), and current president of Bolivia, Evo Morales, issued a public threat in response: "[I]f the government maintains its intransigent position" on the cocaine eradication program, "we'll paralyze this nation until the government is forced from office." SMF ¶ 13.

In February 2003, amid protests, armed rebel police units fired hand guns and assault rifles at military personnel stationed in front of the Presidential Palace. SMF ¶ 14. Shots were fired at the Presidential Palace while Sánchez de Lozada was inside at places he was known to work. SMF ¶ 14. After a lengthy investigation, the Organization of American States (OAS) found that "[t]he life of the President of Bolivia was indeed in danger, as was the stability of Bolivian institutions and democracy in this country." SMF ¶ 15. The OAS also found that the Bolivian "armed forces acted to defend democracy and the rule of law against an attack by police, and their response was controlled and proportional, the large number of victims notwithstanding." SMF ¶ 15.

This opposition escalated throughout 2003. The opposition grew in part because of a plan to export and sell gas to raise domestic revenue and finance public spending. SMF ¶ 16. As Bolivia is a landlocked country, the gas would have needed to be exported through a pipeline that ran through either Chile or Peru. SMF ¶ 16. The previous Administration had initiated the plan, and no final decision was made during President Sánchez de Lozada's tenure about where the pipeline would run. SMF ¶ 16. Many erroneously believed a decision had been made to sell the gas through Chile, though a final port was never in fact chosen. SMF ¶ 16. Sánchez de Lozada had regular meetings with members of his government looking for dialogue with protesters, with increased frequency in October 2003, and often used the church as a mediator in negotiations. SMF ¶¶ 17-18, 39, 48.

### 1. The Events of September 2003 in Warisata

In September 2003, civilians blocked major roads and held hundreds of tourists, both foreign and Bolivian, in the town of Sorata, which was hosting a popular religious festival. SMF ¶¶ 36-37. The road-blockade was organized by Felipe Quispe, the head of the Single Trade Union Confederation of Peasant Workers of Bolivia. SMF ¶¶ 35-36. The government attempted to negotiate the end of the blockade with Mr. Quispe over several days. SMF ¶¶ 17, 39, 48. But many of Mr. Quispe's demands—which by September 20 numbered more than one hundred—could not be redressed by the Government. SMF ¶ 39.

With the blockade lasting more than a week, the trapped people were running low on food and money, and some who had tried to escape had been threatened with physical violence. SMF ¶¶ 37-38. The Bolivian government also received requests from foreign governments to rescue the individuals in Sorata. SMF ¶ 40. Ultimately, the Bolivian government sent in a police convoy to retrieve the Bolivians and the foreign individuals on September 20, 2003. SMF ¶ 41. Members of the military police accompanied the convoy, escorting and protecting a fleet of buses that traveled out of Sorata. SMF ¶ 42.

Soon after the convoy left Sorata, civilians armed with rifles ambushed the security forces and convoy as it passed through Warisata. SMF ¶¶ 43-52. Security forces in Warisata were fired upon from the hills and from some local homes. SMF ¶ 44. Police and soldiers received small arms fire from the surrounding hills from an estimated 150 people, some of them armed with 7.62 mm FN FALS, .30 caliber Mauser rifles and .22 caliber rifles. SMF ¶ 44. [REDACTED]

[REDACTED] received reports that members of the military unit “were shot [at] . . . from the hills where there were armed civilians.” SMF ¶ 49.

Having received reports of the attack, Sánchez de Lozada issued an order to the acting Commander in Chief of the Armed Forces, General Gonzalo Rocabado Mercado, to “mobilize and use the necessary force to restore public order and respect for the rule of law in the region.” SMF ¶ 160. Consistent with the limitations on his military authority under the Bolivian constitution, he gave no order as to how to implement this general command. SMF ¶¶ 154, 157-60, 162-65. On September 20, 2003, General Rocabado issued Directive No. 27/03 to put into operation the general command in the order. SMF ¶ 167. The Directive created a Joint Task Force consisting of members of the Armed Forces, whose mission was to carry out operations to “restore public order and the Rule of Law, in order to guarantee that the population may carry out its normal activities.” SMF ¶ 168. Sánchez de Lozada’s order and General Rocabado’s directive were authorized under Bolivian law. SMF ¶¶ 154, 156-60, 162-63, 167-69, 175. Sánchez de Lozada had the order reviewed by legal counsel before issuing it. SMF ¶ 160.

While Plaintiffs might dispute who shot first—the military or the armed civilians—there can be no dispute that there were armed civilians in the Warisata area. Indeed, each of Plaintiffs’ four proffered experts who were deposed conceded that fact. SMF ¶ 52. Soldiers and policemen were killed and wounded as a result of this civilian fire; three civilians also died. SMF ¶ 46.

**a. Marlene Nancy Rojas Ramos**

During the afternoon of September 20, Marlene Nancy Rojas Ramos was struck by a bullet that passed through a second-floor glass window in her home. SMF ¶¶ 53-54. Her house was located approximately 900 to 1000 meters away from Warisata, in front of the surrounding hills. SMF ¶ 55. Her father, Plaintiff Eloy Rojas Mamani, had left the house that afternoon for the hills. SMF ¶ 54. The situation around her house when she was shot was, according to her father’s sworn testimony, “chaos,” with people running around and shots being fired. SMF ¶ 59. In fact, just

minutes before Marlene was shot, there were reports of crossfire from both hills, from the Rural School of Warisata building, and from people positioned in trees near the school. SMF ¶ 45.

In light of the chaos, Mr. Rojas Mamani conceded that it was “possible that [his daughter] was shot by mistake.” SMF ¶ 59. Indeed, a State Department Cable dated September 22, 2003, concluded that she was shot “by [a] stray bullet,” and one of Plaintiffs’ proffered experts relied on evidence that she had been shot “by a stray bullet.” SMF ¶ 59. Mr. Rojas Mamani testified that he only saw military shooting in the area, but conceded he would not have been able to see if there were individuals firing from the hills. SMF ¶ 57.<sup>3</sup> Mr. and Ms. Mamani, who sue on Marlene’s behalf, cannot identify the gunman, name any eyewitness who saw the gunman, or present any facts concerning what the gunman was doing at the time of the shooting. SMF ¶¶ 57-58.

The following day, September 21, 2003, the media published numerous photographs of campesinos in Warisata brandishing Mauser rifles and calling for civil war. SMF ¶ 50. Felipe Quispe publicly took credit for the violence, admitting that he gave the order to fire rifles at soldiers escorting the convoy that was rescuing the tourists. SMF ¶ 47. A government Minister who was negotiating with Mr. Quispe that day testified that he feared for his life after Mr. Quispe learned that the trapped tourists were being rescued, and that he and other government officials were forced to escape by jumping through a bathroom window. SMF ¶ 48.

## **2. The Events of October 2003 in El Alto**

In September and October 2003, there was growing civil unrest in and around the area of the capital city of Bolivia, La Paz, and neighboring El Alto. Opposition forces implemented blockades in the area in October 2003. These blockades led to a shutdown of the city of La Paz,

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<sup>3</sup> Plaintiff Etelvina Ramos Mamani states she only saw military individuals with firearms—but she was on bedrest in the afternoon and could not see all that was occurring outside. SMF ¶¶ 54-57.

which sits in a crater and at the time was accessible by two main roads: one through El Alto—a high plateau area surrounding La Paz—and the other through the southern part of the city. SMF ¶¶ 61-64. State Department cables from the U.S. Embassy in La Paz reported how the opposition had laid siege to La Paz. SMF ¶ 65. The opposition called it “Plan Tourniquet,” which was “designed to starve the capital city into submission.” SMF ¶ 65. Numerous individuals, including a number of Plaintiffs, have testified that these blockades led to food and fuel shortages, which reached critical levels, paralyzing public and private transit in the city and causing immense economic damage to production and business activity in the cities of La Paz and El Alto. SMF ¶¶ 66-74. Ambulances were prevented from transporting patients in need of critical care to hospitals. SMF ¶¶ 73-74.

With the capital city having been subject to the roadblocks for more than ten days, on October 11, 2003, Sánchez de Lozada issued, with the signed approval of his Cabinet and after review by legal counsel, Supreme Decree 27209, an order to the Commander in Chief of the Armed Forces. SMF ¶¶ 72, 75. The Supreme Decree declared “a national emergency . . . in order to ensure a regular supply of liquid fuel to the people by protecting storage facilities and ensuring fuel shipments.” SMF ¶ 161. It ordered “the Armed Forces of the Nation . . . to assume control of shipments in tanker trucks and other [vehicles] and to secure storage facilities, pipelines, service stations, and all types of infrastructure needed to ensure regular distribution and supply of liquid fuels” and that “the Ministry of Defense shall establish the mechanisms necessary for its execution.” SMF ¶ 161.

On October 12, 2003, General Roberto Claros Flores, the Commander in Chief of the Armed Forces, issued Directives Nos. 33/03 and 34/03. SMF ¶¶ 170-71. These Directives instructed the National Armed Forces in part “to restore public order and the rule of law.” SMF



¶¶ 172-73. Supreme Decree 27209 and Directives Nos. 33/03 and 34/03 were authorized by Bolivian law. SMF ¶¶ 171-175.

That day, the government organized security forces to transport fuel tanks from the Senkata plant, a storage facility for gasoline in El Alto, to the city of La Paz. SMF ¶¶ 74-76. Violent confrontations and most of the casualties took place when security forces tried to bring fuel supplies into the surrounded city. SMF ¶ 78. During the October 12 operation in the Senkata area, there were “attacks on the tanker trucks—the mobilized civilian population was armed with Mauser rifles and dynamite.” SMF ¶ 80. While the attacks were directed at the members of the joint forces, in Senkata, the attacks on the tanker trucks endangered the lives of civilians who did not take part in the clashes. SMF ¶ 81.

There were violent clashes throughout El Alto during the day, with at least one soldier killed. SMF ¶ 82. Four of Plaintiffs decedents died as a result of the violence on this day in El Alto. SMF ¶¶ 86, 92, 101, 107.

**a. Lucio Gandarillas Ayala**

Mr. Gandarillas Ayala left his home the morning of October 12. SMF ¶ 87. He left the house to get fuel as there was no gasoline in the stores due to the blockades. SMF ¶ 87. He was shot in the Senkata area of El Alto. SMF ¶ 87. There is no evidence of any witness who was with Mr. Ayala when he was shot, and no one has testified as to what he was doing at that time. SMF ¶¶ 88-91. Sonia Espejo Villalobos, who sues on his behalf, was not with him when he was shot. SMF ¶ 88. She cannot identify the shooter, name any eyewitness who saw the shooter, or present any facts concerning what the gunman was doing at the time of the shooting. SMF ¶¶ 88-89.

**b. Roxana Apaza Cutipa**

Roxana Apaza Cutipa was hit by a bullet behind her left ear while she looked over the wall of a fourth-floor rooftop in El Alto. SMF ¶¶ 93-94. There were no soldiers on the street outside

the building where Ms. Apaza Cutipa was shot. SMF ¶ 98. Plaintiff's proffered expert Hayden testified he saw evidence of armed protestors on the roofs of buildings in the area. SMF ¶ 95. Plaintiff Hernán Apaza Cutipa testified that "there were lots of people on the street that could have been hit instead" at the time his sister was shot. SMF ¶ 100. He explicitly acknowledged that it was possible that his sister was hit by a stray bullet. SMF ¶ 100. He cannot identify the shooter, name any eyewitness who saw the shooter, or present any facts concerning what the gunman was doing at the time of the shooting. SMF ¶¶ 96-99.

**c. Teodosia Morales Mamani**

Teodosia Morales Mamani was shot while at her sister's house on Juan Pablo II Avenue No. 35 in the Río Seco zone of El Alto. SMF ¶ 101. This is the same general area in which Plaintiff's proffered expert Hayden saw evidence of armed protestors on the roofs of buildings. SMF ¶ 95. The house is only a couple of blocks from the Río Seco bridge, where there were clashes between protestors and the military and near where a Bolivian soldier was shot and killed. SMF ¶¶ 83-85, 101. The bullet that hit Ms. Morales Mamani came through a brick wall. SMF ¶ 102. Plaintiff Teófilo Baltazar Cerro, who sues on her behalf, was not in the room with her when she was shot, cannot identify the shooter, name any eyewitness who saw the shooter, or present any facts concerning what the gunman was doing at the time of the shooting. SMF ¶¶ 103-06.

**d. Marcelino Carvajal Lucero**

Marcelino Carvajal Lucero was shot through the window of his bedroom in El Alto. SMF ¶ 108. Minutes before her husband was killed, Plaintiff Juana Valencia de Carvajal "did not hear at that point noise from the military, but [she] did hear the noise from the protestors." SMF ¶ 109. It sounded like "chaos outside [her] home in the minutes before" he was killed—people were "running around . . . shouting" and there were "loud noises" that made her afraid. SMF ¶ 109. Mr. Carvajal Lucero was by himself in the room when he was shot, and no one can testify as to

what he was doing at that time. SMF ¶ 109. Ms. Valencia de Carvajal, who sues on his behalf, cannot identify the shooter, name any eyewitness who saw the shooter, or present any facts concerning what the gunman was doing at the time of the shooting. SMF ¶¶ 109-11.

### **3. The Events of October 13, 2003 in Southern La Paz**

Palca is an important rural region, southeast of La Paz, from which agricultural goods are transported to the capital city. SMF ¶ 114. There is only one road from Palca to La Paz, and it passes from east to west through Uni, Apaña, Ovejuyo, and Chasquipampa, in that order. SMF ¶¶ 114-15. For about a week leading up to October 13, 2003, a small unit of military troops were deployed in Uni during each day to keep the road unobstructed. SMF ¶ 113.

During the morning of October 13, the troops were instructed to move from Uni to Chasquipampa due to a “great protest growing” there. SMF ¶ 118. Protestors had threatened to come down into the southern suburbs of La Paz to ransack the city. SMF ¶ 118. As the troops left Uni, a military unit was ambushed on the Palca road. SMF ¶¶ 119-21. At “a place that was planned by the people from the zone” in Uni, a troop transport truck had to stop due to a ditch that had been dug in the road. SMF ¶ 119. The troops set up a secure perimeter around the truck so that “officials could analyze the situation and could find a way to go through this obstacle.” SMF ¶ 119. At that point, they were attacked from above with firearms. SMF ¶ 119. The unit was ambushed and attacked by a mob of people who shot and threw dynamite at the military contingent. SMF ¶ 120. During the ambush, a young soldier was hit through the eye with a “precise shot” and killed. SMF ¶ 121. The unit commander called General Antezana, the then commander of the military academy in the southern zone of La Paz, to report the ambush, at which point General Antezana ordered the troops to withdraw, defending themselves as they withdrew. SMF ¶ 122. General Antezana

ordered helicopter FAB-730 to be “sent to rescue the fallen soldier and provide supplies.” SMF ¶ 123. It was near this exchange of gunfire that two of Plaintiffs’ decedents died.

In Chasquipampa, just to the west of Ovejuyo (where another decedent died that day), “about 4,000 to 5,000” protestors surrounded a military truck and soldiers. SMF ¶ 123. The protestors “ask[ed] them to surrender” and “to leave their weapons on the floor.” SMF ¶ 123. The soldiers retreated to avoid casualties, leaving the truck behind, at which point the protestors flipped it over and burned it. SMF ¶ 124.

**a. Arturo Mamani Mamani**

Arturo Mamani Mamani’s son, Plaintiff Gonzalo Mamani Aguilar, testified that on the morning of October 13, he and his father left their home around 7:30 a.m., each travelling separately. SMF ¶ 126. While Mr. Mamani Aguilar positioned himself atop a steep hill called Huaichichuni near decedent Jacinto Bernabé Roque, decedent Mamani Mamani positioned himself on a different cliff, Huaichichuro, approximately 250 meters away. SMF ¶ 125. Huaichichuro is a steep cliff face overlooking the Palca road. SMF ¶¶ 125, 127. Below is a still frame from a drone camera video—looking from the direction of the Palca road—taken by Plaintiffs’ proffered expert Hayden of individuals in the spot where decedent Mamani Mamani was positioned atop Huaichichuro:



SMF ¶ 127. Plaintiff Mamani Aguilar was on a hilltop to the left, out of the view of the above picture. The Palca road, also out of view, winds along the bottom of the cliff face.

Mr. Mamani Aguilar did not “actually see” his father get shot, or who shot him. SMF ¶ 128. He sues on his father’s behalf, and cannot identify the shooter, name any eyewitness who saw the shooter, or present any facts concerning what the gunman was doing at the time of the shooting. SMF ¶¶ 129-32.

**b. Jacinto Bernabé Roque**

Plaintiff Mamani Aguilar testified that he arrived at Huaichichuni, around 8:00 a.m. on October 13. SMF ¶ 135. Huaichichuni, like Huaichichuro, also overlooks the Palca road. SMF ¶ 134. Mr. Bernabé Roque was already positioned on the hilltop, “laying down behind [a] bale of hay,” and at some point was shot. SMF ¶ 135. Mr. Mamani Aguilar did not see Mr. Bernabé Roque get shot, nor did he see who shot him. SMF ¶ 136. Neither Plaintiff Mamani Aguilar nor Plaintiff Hermógenes Bernabé Callizaya, who sues on behalf of Jacinto Bernabé Roque, can identify the shooter, name any eyewitness who saw the shooter, or present any facts concerning what the gunman was doing at the time of the shooting. SMF ¶¶ 136-39.

**c. Raúl Ramón Huanca Márquez**

Also on October 13, Mr. Huanca Márquez was struck by a bullet in Ovejuyo, just west of where the military was ambushed on the Palca road. SMF ¶¶ 140, 149. Plaintiff Rosa Felicidad Huanca Quispe, Mr. Huanca Márquez’s daughter, heard sounds in Ovejuyo that morning like gunfire or dynamite exploding. SMF ¶ 142. This was the same morning when—just to the west of Ovejuyo in Chasquipampa—“about 4,000 to 5,000” protestors surrounded a military truck and soldiers, “asking them to surrender, to leave their weapons on the floor,” and burned the truck as the soldiers retreated. SMF ¶¶ 123-24.

That day, the two stores on the main road were closed due to looting by campesinos. SMF ¶ 143. Ms. Huanca Quispe attempted to buy food that morning, but there was “nothing for [her] to buy,” and she returned home to cook lunch for her family, including her father. SMF ¶ 144. They continued to hear what she thought sounded like gunfire while they had lunch. SMF ¶ 145. After they finished lunch, Mr. Huanca Márquez left the house by himself. SMF ¶ 146. According to Ms. Huanca Quispe, he said he was leaving to buy a Coca-Cola, despite hearing gunfire and despite the stores being closed. SMF ¶ 146. A neighbor later told Ms. Huanca Quispe that her father had been shot and had died. SMF ¶ 147. Ms. Huanca Quispe, who sues on his behalf, cannot identify the shooter, name any eyewitness who saw the shooter, or present any facts concerning what the gunman was doing at the time of the shooting. SMF ¶¶ 148-53.<sup>4</sup> In a police interview, Ms. Huanca Quispe was told that “versions” of what occurred reported her father as being armed and antagonizing the soldiers when he was shot. SMF ¶ 150.

**C. There Was No Order by Defendants to Shoot or Harm Innocent Civilians**

There is no evidence in the record of any order given by either Defendant to shoot or harm innocent civilians. Indeed there is no evidence of any direct control of military operations. Rather, Sánchez de Lozada, guided by Bolivian legal principles, provided general orders to restore public order, which were directed at his then-Commander in Chief who would execute the orders through a series of directives.

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<sup>4</sup> In her response to Defendants’ interrogatories, Ms. Huanca Quispe asserted that “[t]he soldier who shot Raúl was from the Colegio Militar. A neighbor, Germán, worked in the Colegio Militar and stated that it was a captain from the Colegio Militar who killed Raúl.” SMF ¶ 151 n.3. But that answer does not identify any individual shooter or state that Germán had any firsthand knowledge of this assertion. There is no evidence in the case to support her second-hand assertion. Not surprisingly, Plaintiffs never included this person in their Initial Disclosures. SMF ¶ 151 n.3.

Sánchez de Lozada, as the President of the Republic, was the Captain General of the Armed Forces. SMF ¶ 154. Between early August 2003 and October 17, 2003, Sánchez Berzaín was the Minister of National Defense. SMF ¶ 155. The Bolivian Constitution in effect in 2003 provided: “The Armed Forces are subordinate to the President of the Republic and receive their orders administratively through the Minister of Defense, and in technical matters, from the Commander in Chief [who is not the President].” SMF ¶ 157. Neither Sánchez de Lozada nor Sánchez Berzaín had the authority to give, or ever gave, operational orders to the Armed Forces. To the contrary, the Organic Law of the Armed Forces in effect in Bolivia in 2003 (Organic Law) provided at the time that: “The Commander in Chief of the National Armed Forces is *the highest Command and Decision-making body of a technical/operating nature*, for the permanent coordination and direction of the Armed Forces.” SMF ¶ 159.<sup>5</sup>

The Organic Law also provided: “The President of the Republic and Captain General of the Armed Forces . . . *shall* order the use of the military forces [] Domestically, for maintaining public order when the institutions legitimately constituted for this purpose prove insufficient.” SMF ¶ 158. The President was therefore required by Bolivian law to mobilize the military if police were insufficient to restore public order.

\* \* \*

On October 17, 2003, President Sánchez de Lozada resigned under protest, and his cabinet, including Minister Berzaín, was dissolved. SMF ¶ 21. At that time, the President’s life was in danger. SMF ¶ 21. Following acceptance by the Congress of the resignation of the Sánchez de Lozada government, both men subsequently left Bolivia for the United States. SMF ¶ 21. The

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<sup>5</sup> It bears emphasis that, unlike in the United States, the President of Bolivia is *not* the “Commander in Chief” of the Armed Forces.

man behind the violence, Evo Morales, was elected president on December 18, 2005, after two successors to Sánchez de Lozada also were forced to resign. SMF ¶¶ 22-23. Since Morales’s election, his government has attempted to bring formal criminal charges against the five former presidents “for reasons that appear to be politically motivated.” SMF ¶ 24. Morales remains in office today, notwithstanding a provision in the Bolivian constitution that had previously limited a President’s term to five years. SMF ¶ 23.

## **II. PROCEDURAL HISTORY**

In 2008, Plaintiffs filed their First Amended Consolidated Complaint asserting claims under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, and Torture Victims Protection Act (TVPA), Pub. L. No. 102–256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note), as well as state-law claims. This Court granted in part and denied in part Defendants’ motion to dismiss. The Eleventh Circuit unanimously reversed and remanded with instructions to dismiss, holding that Plaintiffs had failed to plead sufficient facts to state a plausible claim for relief under the ATS. 654 F.3d 1148 (11th Cir. 2011).

Following an agreed stay of the proceedings, Plaintiffs filed their Second Amended Consolidated Complaint in 2013, and this Court granted in part and denied in part Defendants’ Motion to Dismiss. On interlocutory appeal, the Court of Appeals affirmed the Court’s decision concerning the TVPA. 825 F.3d 1304 (11th Cir. 2016). Two counts remain in Plaintiffs’ Complaint: the TVPA claim and a claim for “Intentional Wrongful Death.”

## **III. STANDARD OF REVIEW**

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Once the moving party demonstrates the absence of a genuine issue of material fact, “the nonmoving party must come forward with ‘specific facts showing that there is a *genuine issue*



for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Only a disputed fact “that might affect the outcome of the suit” can preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And the dispute must be “such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

In deciding summary judgment, the Court views the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party’s favor. *See Black v. Wigington*, 811 F.3d 1259, 1265 (11th Cir. 2016). But, “an inference is not ‘reasonable’ and a dispute is not ‘genuine’ if it is based on conclusory allegations and speculation.” *Id.*

#### **IV. ARGUMENT**

##### **A. The Undisputed Facts Show that Plaintiffs Cannot Support a TVPA Claim**

The bar for establishing an extrajudicial killing under the TVPA is a high one. Each Plaintiff must establish, “a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court.” TVPA § 3(a), 28 U.S.C. § 1350. The Eleventh Circuit, in this case, has held that to meet that standard, it is “not enough” to allege “facts suggesting some targeting,” and cautioned that “not all deliberated killings are extrajudicial killings.” *Mamani*, 654 F.3d at 1155. The Eleventh Circuit held it would also be insufficient for Plaintiffs to establish only that “their relatives were killed by the Bolivian armed forces and that at all relevant times the armed forces acted under the authority of [defendants].” *Id.* at n.8 (alteration in original).

Instead, the Eleventh Circuit held that Plaintiffs must establish that their “decedents’ deaths were ‘deliberate’ in the sense of being undertaken with studied consideration and purpose.” *Mamani*, 654 F.3d at 1155. Further, if decedents’ deaths were “precipitate shootings during an ongoing civil uprising,” or if they were “compatible with accidental or negligent shooting (including mistakenly identifying a target as a person who did pose a threat to others),” or “individual motivations (personal decisions) not linked to defendants,” or something similar, those

would not constitute extrajudicial killings. *Id.* Thus, not only must the deaths have been intentional, but the motivations for the deaths must be linked specifically to the Defendants.

**1. There Is No Evidence as to Who Shot Each Decedent, Much Less Evidence Concerning Intent or Motivation**

Plaintiffs have not adduced any facts to establish that their decedents died as the result of extrajudicial killings. No Plaintiff could identify by name or description the person who shot their relative or any witness who saw the person who pulled the trigger. Plaintiffs have no evidence as to what any shooter was doing, seeing, hearing, or processing, much less thinking, at the time of the shooting. *A fortiori*, there is no evidence that any soldier intentionally targeted any decedent, and no evidence linking any shooter to an order given by any military official. In fact, Plaintiffs' expert conceded this point repeatedly. *See, e.g.*, SMF ¶¶ 30, 32-33, 52, 59-60, 90-91, 94-95, 100, 103, 106, 111, 131-32, 137, 139, 152-53.

Plaintiffs' case, therefore, relies purely on speculation. According to Plaintiffs, only members of the Bolivian military were armed and shooting in the areas where their decedents were hit by bullets, and therefore their decedents must have been shot by the military and the military could not have believed they were armed protestors. But that speculation cannot create a genuine dispute when the evidence is one-sided—and Plaintiffs' own proffered experts concede—that there was violent, armed conflict between protestors and the military in the areas where the decedents were killed. Given the Eleventh Circuit's prior ruling in this matter, Plaintiffs' inability to produce sufficient evidence to show that only military in the area were shooting should end the inquiry. Indeed, Plaintiffs' counsel have conceded that to succeed, they must establish that there were no armed protestors in the area of the decedents' deaths. *Mamani v. Berzaín*, Nos. 07-22459-CIV et al., 2009 WL 10664387, at \*16-17 (S.D. Fla. Nov. 25, 2009). Plaintiffs cannot make that showing.

Even ignoring the unassailable evidence of armed conflict between protestors and the military in the areas where decedents were struck by bullets, and assuming that only the military was armed, Plaintiffs still cannot withstand summary judgment. That is so because without any identification of the shooter or what he was doing at the time, it is impossible to establish that the shot was intentional as opposed to negligent or accidental, that the gunman believed he was intentionally shooting at an unarmed civilian as opposed to an individual who posed a threat, *and, inter alia*, that the gunman was acting on orders from superiors as opposed to personal motivations or in the heat of the moment. Yet, the Eleventh Circuit has held that to succeed Plaintiffs would have to establish each of these elements. *See Mamani*, 654 F.3d at 1155. Put differently, it is impossible to reach the jury on a “state-of-mind” analysis if the Plaintiffs cannot even identify whose state-of-mind the parties are to be assessing.

## **2. The Shootings Are Compatible with Accidental or Negligent Shooting**

At the motion to dismiss stage, Plaintiffs “conceded in oral argument that there must be allegations to show intentional targeting of civilians in an area where there were *no* violent demonstrators or attacks against the armed forces,” rather than “an accidental or negligent killing (e.g., a stray bullet that penetrated the wall).” *Mamani v. Berzaín*, Nos. 07-22459-CIV et al., 2009 WL 10664387, at \*16–17 (S.D. Fla. Nov. 25, 2009) (emphasis added).

Discovery has established not only that Plaintiffs are unable to show intentional targeting by any member of the Bolivian military, they cannot factually dispute that the death of each decedent occurred “in an area where there *were* . . . violent demonstrators or attacks against the armed forces” in a manner that is compatible with “an accidental or negligent” shooting. *Id.*

For Marlene Nancy Rojas Ramos, it is undisputed that on the day she was killed in Warisata there was a violent attack by protestors with rifles firing the same caliber bullet Plaintiffs claim struck Marlene—a 7.62 mm. A September 22, 2003 U.S. State Department cable concluded that,

beginning at 3:40 p.m. on September 20, 2003 (Marlene died at “approximately 4 pm”), police and soldiers “received small arms fire from the surrounding hills” from an estimated “150 people, some . . . armed with 7.62 mm FN FALs, .30 caliber Mauser[] rifles and .22 caliber rifles.” SMF ¶ 44. A military intelligence report documents a crossfire initiated at 3:39 p.m. that day by armed protestors in the Warisata plaza and the hills and trees around the town. SMF ¶ 45. Similarly, a report issued by the Bolivian Public Prosecutor’s Office on July 28, 2004, found that, on the day Marlene died, security forces in Warisata were fired upon from the hills and from some local homes. SMF ¶ 44. [REDACTED]

[REDACTED] received reports that members of the unit “were shot [at] . . . from the hills where there were armed civilians.” SMF ¶ 49. Soldiers and policemen were killed and wounded as a result of this civilian fire, including with the exact same caliber bullet, 7.62 mm, with which Plaintiffs claim Marlene was hit. SMF ¶¶ 44-46, 51, 60. Plaintiffs have no evidence to rebut these findings.

Plaintiffs assert that the attack did not happen near Marlene’s house and that Mr. Rojas Mamani did not see anyone other than the military carrying or firing weapons that day. But Mr. Rojas Mamani acknowledged that he could not see areas where the armed protestors were, such as the hills. SMF ¶ 57. A party’s testimony regarding his own admittedly limited observations does not create a genuine issue of material fact as to whether armed protestors were shooting firearms in Warisata on September 20, as evidenced by the State Department Cables, military intelligence, the Prosecutor’s Report, [REDACTED] and members of the police and military being shot. Plaintiffs are unable to point to any evidence that the bullet that hit Marlene did not come from an armed protestor, was not intended for an armed protestor, or was not a stray bullet as the result of a protestor-instigated crossfire. All the evidence is to the contrary: a

contemporaneous State Department cable found that Marlene was hit “by [a] stray bullet as she looked out a window,” and Plaintiffs own proffered expert Carwil Bjork-James likewise noted that Marlene “was killed by a stray bullet.” SMF ¶ 59. Moreover, Mr. Hayden testified that a 7.62 caliber bullet can travel 1000 meters. SMF ¶ 56. Marlene’s house was approximately 900 to 1000 meters from the main road in Warisata—and stood in front of the surrounding hills. SMF ¶ 55. Indeed, Mr. Rojas Mamani agreed that the bullet that hit his daughter could have been a stray bullet. When asked, “[I]s it possible that she was shot by mistake?,” he agreed, “By mistake, it could have been.” SMF ¶ 59.

Roxana Apaza Cutipa, Marcelino Carvajal Lucero, and Teodosia Morales Mamani were all hit by bullets near the Juan Pablo II area of El Alto on October 12, 2003. That day, an “angry mob” was using dynamite, Molotov cocktails, and shots from firearms from buildings bordering the main avenue, Juan Pablo II. SMF ¶ 83. A military report produced by Plaintiffs states that armed protestors that day were firing rifles and carbines at the military from the tops of buildings and church bell towers in the Río Seco area, blocks away from the decedents’ homes. SMF ¶ 83. Plaintiffs’ proffered expert Mr. Hayden conceded that there were armed protestors on the roofs in the Juan Pablo II area “shooting down at” the military. SMF ¶ 95.

Plaintiffs can point to no evidence contradicting these facts. Both Plaintiffs Juana Valencia de Carvajal (suing on behalf of Marcelino Carvajal Lucero) and Hernán Apaza Cutipa (suing on behalf of Roxana Apaza Cutipa) acknowledged at deposition that the deaths of their family members could have been the result of stray bullets. SMF ¶¶ 100, 111. As for Teodosia Morales Mamani, the circumstances of her death—being hit by a bullet through a brick wall while invisible to any member of the Bolivian military in the street below—is the paradigm of an accidental

shooting. *See Mamani*, 2009 WL 10664387, at \*17 (“[A]n accidental or negligent killing (e.g., a stray bullet that penetrated [a] wall)”).

Lucio Gandarillas Ayala was hit by a bullet on October 12 in the Senkata area of El Alto, where a joint military and police force was escorting a convoy of gasoline tankers through protestors’ blockades. SMF ¶¶ 80, 87. Around the Senkata area that day, the July 2004 Prosecutors’ Report found that protestors attacked the tanker trucks with Mauser rifles and dynamite and endangered the lives of the hundreds of civilians who did not take part in the clashes. SMF ¶¶ 80-81. Plaintiffs cannot factually dispute that Mr. Gandarillas Ayala was shot by an armed protestor attacking the gas convoy near Senkata, hit by a bullet meant for an armed protestor, hit by a stray bullet resulting from the armed confrontation in that area, or hit accidentally.

Arturo Mamani Mamani and Jacinto Bernabé Roque were both hit by bullets on the morning of October 13 while positioned on steep cliffs with vantage points overlooking the Palca road below. SMF ¶¶ 125, 133-34. That morning, according to the sworn deposition testimony of General Marcelo Antezana and military and police reports, the military was ambushed by protestors armed with firearms and dynamite on the road below Mr. Mamani Mamani and Mr. Bernabé Roque, and a young soldier was killed with a “precise shot.” SMF ¶¶ 119-21. Later that day, Mr. Huanca Márquez was hit by a bullet in Ovejuyo (just west of where the military was ambushed on the Palca road), following thousands of protestors setting a military truck on fire in the nearby town of Chasquipampa and taking soldiers’ weapons while the soldiers walked away to avoid a confrontation. SMF ¶¶ 123-24, 149. Plaintiffs cannot factually dispute that any of these individuals was shot by an armed protestor, hit by a bullet meant for an armed protestor, hit by a stray bullet resulting from the armed confrontation, or hit accidentally.

Because Plaintiffs can point to no evidence establishing that any Plaintiff was shot “in an area where there were no violent demonstrators,” much less intentionally shot by a member of the Bolivian military, by their own concession they do “not have a claim” that can go to a jury. Oct. 24, 2008 Hr’g Tr., Dkt. No. 94, at 51-55.

### **3. Plaintiffs Cannot Rely on Expert Opinion To Establish Intent**

Having no admissible evidence that a member of the Bolivian military shot any decedent, much less intentionally, Plaintiffs would have to rely on proffered expert testimony from Philip Hayden. He opines that the military shot decedents intentionally. But Mr. Hayden could not support this position in his sworn deposition testimony. He conceded that he did not know of any eyewitnesses to the shootings; that the shots could have been accidental; that there were armed protestors; and that he could not testify as to whether any shots taken were intended in response to shots from armed protestors. SMF ¶¶ 30, 32-33, 52, 59-60, 90-91, 94-95, 100, 103, 106, 111, 131-32, 137, 139, 152-53. Moreover, Mr. Hayden did not apply any discernible expertise or methodology, and Defendants have concurrently moved to exclude his opinions under Federal Rule of Evidence 702. *See* Mot. To Exclude Pls.’ Expert P. Hayden, Dkt. 314. Because Mr. Hayden’s testimony should be excluded in its entirety, Plaintiffs may not rely on it to avoid summary judgment. *Chapman v. Procter & Gamble Distrib., LLC*, 766 F.3d 1296, 1313 (11th Cir. 2014) (“Evidence inadmissible at trial cannot be used to avoid summary judgment.” (quoting *Corwin v. Walt Disney, Co.*, 475 F.3d 1239, 1249 (11th Cir. 2007))).

Mr. Hayden’s testimony, even if it were admissible, cannot alone suffice to defeat summary judgment. “[A] party may not avoid summary judgment solely on the basis of an expert’s opinion that fails to provide specific facts from the record to support its conclusory allegations.” *Buckler v. Israel*, 680 F. App’x 831, 836 (11th Cir. 2017) (per curiam) (quoting *Evers v. Gen. Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985)). Even where an expert opinion “purports to be based

upon a review of the evidence,” summary judgment is appropriate where the expert “fails to provide specific facts to back [it] up.” *Evers*, 770 F.2d at 986. “An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process,” *Martinez v. Weyerhaeuser Mortg. Co.*, 959 F. Supp. 1511, 1515 (S.D. Fla. 1996), and a party’s arguments, “‘dressed up and sanctified as the opinion of an expert,’” are insufficient to create an issue of material fact, *Weiss v. Standard Ins. Co.*, 672 F. Supp. 2d 1313, 1320 (S.D. Fla. 2009) (quoting *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 424 (5th Cir. 1987)); *see also Am. Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985) (“An expert’s opinion that lacks any credible support does not create an issue of fact.”).

Mr. Hayden’s opinions do nothing to create an issue of material fact regarding any shooters’ identity or intent because he fails to identify specific facts from the record to support his opinion. As noted above, there are none. Mr. Hayden cannot identify any individual who saw a member of the Bolivian military shoot any decedent. And although he interviewed multiple sources hand-picked by Plaintiffs’ counsel, none of them claims to have seen a member of the Bolivian military shoot any decedent. He cannot link the bullet that hit any decedent with a weapon fired by a Bolivian soldier, nor even with a specific location at which independent facts confirm a soldier’s presence. He fails to rule out the possibility that any decedent’s death could have resulted from a stray bullet or a shot fired by an armed protestor.

Mr. Hayden’s opinions on intent cannot be credited for a more basic reason. Putting aside that Mr. Hayden does not know who shot the decedents, much less what they were thinking or doing at the time, an expert’s opinions regarding an actor’s “knowledge, motive, intent, and state of mind” are not admissible “under Rule 702 and *Daubert* because they have no basis in any relevant body of knowledge or expertise and lie outside the proper bounds of expert testimony.”



*In re Trasyol Prod. Liab. Litig.*, No. 08-MD-01928, 2010 WL 4052141, at \*8 (S.D. Fla. May 12, 2010); *see also Taylor v. Novartis Pharm. Corp.*, No. 06-61337-CIV, 2013 WL 5118945, at \*4 (S.D. Fla. Apr. 22, 2013) (“[M]otivation or intent is not a proper subject of expert testimony. . . . [as] opinions related to ‘the intent, motives or states of mind of . . . others have no basis in any relevant body of knowledge or expertise. . . .” (quoting *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004))). “[T]here is nothing ‘scientific’ in speculating about [another’s] state of mind,” *King v. Cessna Aircraft Co.*, No. 03-20482-CIV, 2010 WL 1980861, at \*6 (S.D. Fla. May 18, 2010), and experts are simply “not qualified to . . . put [themselves] in the minds of [others],” *Habersham Plantation Corp. v. Art & Frame Direct, Inc.*, No. 10-61532-CIV, 2011 WL 4055376, at \*3 (S.D. Fla. Sept. 13, 2011). Mr. Hayden freely admitted he could not put himself in the minds of the shooters. *See, e.g.*, SMF ¶ 30.

## **B. There Is No Evidence To Support an Indirect Liability Claim**

Even if there were evidence that members of the military intentionally targeted and killed the decedents, there is no evidence supporting Defendants’ liability for those deaths. Plaintiffs do not allege that Defendants actually killed the decedents, but rather that Defendants are secondarily liable under various theories of indirect liability under the TVPA: (1) command responsibility, Compl. ¶¶ 180-88; (2) agency, Compl. ¶¶ 189-96; and (3) conspiracy, Compl. ¶¶ 197-200. Plaintiffs have failed to adduce evidence that creates a genuine issue of material fact as to Defendants’ indirect liability.

### **1. There Is No Command Responsibility Liability**

The doctrine of command responsibility makes a commander secondarily liable for acts of his subordinates where three essential elements are met:

(1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were

committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.

*Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1288 (11th Cir. 2002).<sup>6</sup> The complete absence of evidence as to the first element is dispositive here.<sup>7</sup>

Here, the Eleventh Circuit “d[id] not accept that, even if some soldiers or policemen committed wrongful acts, present international law embraces strict liability akin to respondeat superior for national leaders at the top of the long chain of command in a case like this one.” 654 F.3d at 1154. As this Court explained, “[t]o establish the ‘superior-subordinate relationship’ element, Plaintiffs must [establish] . . . that Defendants had ‘effective control’ over the Bolivian soldiers who killed Plaintiffs’ relatives.” *Mamani v. Berzaín*, 21 F. Supp. 3d 1353, 1376 (S.D. Fla. 2014). Defendants had no effective control over the soldiers on the ground during these events and thus cannot be held liable, even if a soldier acted intentionally.<sup>8</sup>

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<sup>6</sup> Defendants maintain that the command responsibility doctrine does not apply to a civilian leader outside of armed conflict as defined under international law. Gunael Mettraux, *The Law of Command Responsibility* 97 (2012). Even when the command responsibility doctrine is applied to a civilian leader, different standards apply. For example, as to the element of effective control, Article 28(b)(ii) of the Rome Statute requires proof that the perpetrator’s illegal “activities”—not just the perpetrators themselves—were within the civilian superior’s “effective responsibility and control.” As to the knowledge element, the Rome Statute imposes liability on military commanders if they “should have known” of their subordinates’ crimes, but only allows liability for civil commanders who “consciously disregarded information which clearly indicated” information that would have led to knowledge. Compare Rome Statute of the International Criminal Court art. 28(a)(i), July 17, 1998, 2187 U.N.T.S. 90, with *id.* art. 28(b)(i). But see *Doe v. Drummond Co.*, 782 F.3d 576 (11th Cir. 2015). Regardless of the standard applied, however, there is insufficient evidence supporting liability in this case.

<sup>7</sup> Defendants also dispute that the evidence in the record would satisfy the second and third elements but do not address those elements herein.

<sup>8</sup> The evidence does not establish that Bolivian soldiers killed decedents. The absence of evidentiary support for this foundational point negates any liability under the theory of command responsibility.

The Eleventh Circuit has explained that “[t]he concept of effective *control* over a subordinate [is] in the sense of a material ability to prevent or punish criminal conduct.” *Ford*, 289 F.3d at 1290 (quoting *Prosecutor v. Delalic* (Appeals Chamber ICTY, Feb. 20, 2001) ¶ 256). A defendant’s “*de jure* authority . . . over the troops who perpetrated the crime” may be prima facie evidence of effective control, but can be rebutted with evidence that the defendant lacked such effective control. 289 F.3d at 1291. In other words, “a showing of the defendant’s *actual ability to control the guilty troops* is required as part of the plaintiff’s burden under the superior-subordinate prong of command responsibility.” *Id.* (emphasis added). There is no evidence here to establish that defendants possessed the requisite effective control over the alleged perpetrators.

**a. Sánchez de Lozada Did Not Have Effective Control over Bolivian Soldiers**

As President of Bolivia, Sánchez de Lozada was the Captain General of the Armed Forces. SMF ¶ 154. The Armed Forces are subordinate to the President and receive their orders “administratively” through the Minister of Defense. Orders for operational matters, however, come from the Commander in Chief. SMF ¶ 157. Unlike in the United States, the President in Bolivia is not the Commander in Chief. In Bolivia, that role is occupied by the highest military officer (not a civilian) and that individual is the highest-level command and decision-making body of a technical-operational nature. SMF ¶ 159. Thus, the President provides general orders to the Commander in Chief, who then issues operational orders as the highest decision-making operational commander.

Plaintiffs’ characterization of Sánchez de Lozada’s role as Captain General of the Armed Forces may have been sufficient to suggest the requisite effective control at the motion to dismiss phase, but the undisputed evidence now shows that in fact he had no such effective control. As President, Sánchez de Lozada only had the ability to issue high-level general orders,

operationalized by the Commander in Chief. *See* SMF ¶¶ 154, 157-59, 177-78. There is no evidence that he had the requisite “actual ability to control the [alleged] guilty troops” on the ground. *Ford*, 289 F.3d at 1291. Indeed, before this litigation, Sánchez de Lozada had not even seen the two operational military documents cited in Plaintiffs’ Complaint—the Manual for the Use of Force, and the Republic Plan. SMF ¶¶ 181-82.

There also is no evidence that Sánchez de Lozada, as Captain General, had the ability to punish troops or prevent them from following the operational orders given by the Commander in Chief. As to punishment, any investigation or prosecution of guilty troops would have occurred through the military justice process, or in civilian courts, at the request of the Office of the Chief Prosecutor, *i.e.* the Attorney General, which is independent from the executive branch of government. SMF ¶ 184. Indeed, the initial investigation and report of the events of September and October 2003 was performed by three prosecutors by order of the Chief Prosecutor. SMF ¶ 27. As to preventing the conduct alleged, the Bolivian military structure does not contemplate any orders from the Captain General that would affect troops on the ground other than the general orders to be operationalized by the Command in Chief. The ability to give such general orders does not suffice to show Sánchez de Lozada’s “actual ability to control the guilty troops.” Indeed, the only evidence of any orders given by Sánchez de Lozada are two general, high-level orders he gave to the Commander in Chief to have the military mobilize to achieve the lawful objective of restoring public order in September and October 2003. SMF ¶¶ 160-61. Neither order authorized extrajudicial killings, nor did they direct the military to conduct particular operations. Similarly, none of the more specific orders from the Commander in Chief—Directives 27/03, 33/03, or 34/03—authorized extrajudicial killings. SMF ¶ 175. In short, none of the evidence demonstrates that Sánchez de Lozada had the actual ability to control the troops on the ground.

**b. Sánchez Berzaín Did Not Have Any Non-Administrative Military Authority or Control Over Bolivian Soldiers on the Ground**

As the Minister of Defense, Sánchez Berzaín did not have any authority to command the military. It is undisputed that Sánchez Berzaín's role as Minister of Defense was legally limited to administrative responsibilities for the Armed Forces. SMF ¶ 157. There is no evidence that Sánchez Berzaín had the material ability to punish troops or prevent them from following the operational orders given by the Commander in Chief. Indeed, there is no evidence that Sánchez Berzaín had any non-administrative control over troops at all. There is no evidence to suggest that Sánchez Berzaín made any operational decisions, gave any orders to the Armed Forces, or took any other acts suggesting he exercised effective control over troops on the ground. Plaintiffs' "command and control" expert concedes that he cannot identify a single order or instruction by Sánchez Berzaín that was unauthorized under Bolivian law. SMF ¶ 176.<sup>9</sup>

**2. There Is No Agency Liability**

Plaintiffs' theory of agency liability fails. "A court determining the existence of vicarious liability must first assess whether the principal had the necessary agency relationship with the direct wrongdoer to support such liability." *Legg v. Voice Media Grp., Inc.*, 20 F. Supp. 3d 1370, 1377 (S.D. Fla. 2014) (Cohn, J.). To establish an agency relationship a plaintiff must show: (1)

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<sup>9</sup> Plaintiffs proffer an expert, Al Borrelli, to opine, based on his review of the evidence, that the Defendants had "command and control" of Bolivian soldiers. That testimony is improper. "An expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *Tillman v. C.R. Bard, Inc.*, 96 F. Supp. 3d 1307, 1330 (M.D. Fla. 2015) (alteration omitted) (quoting *In re Fosamax Prods. Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009)). Moreover, Mr. Borrelli does not opine that they had effective control, as defined by the Eleventh Circuit, of Bolivian soldiers generally, much less of the unknown individuals who shot the decedents. SMF ¶ 185. Notably, Mr. Borrelli freely admitted that he had no experience whatsoever with the Bolivian military prior to this case and that he is not an expert in the structure of the Bolivian military. SMF ¶ 185.

consent to agency by both principal and agent, and (2) control of agent by principal. *Commodity Futures Trading Comm'n v. Gibraltar Monetary Corp.*, 575 F.3d 1180 (11th Cir. 2009) (per curiam). Neither element is satisfied here.

There is no evidence of consent to agency by any purported principals or agents. Plaintiffs allege, in a brief and conclusory manner, that Defendants are liable for the deaths of decedents because the unidentified members of the Bolivian Armed Forces who allegedly killed decedents were agents of the Defendants. Compl. ¶ 189.<sup>10</sup> The Court cannot find the necessary consent by both the perpetrators and the Defendants where, as here, the perpetrators of the underlying acts have not even been identified.

Nor does the evidence establish the Defendants' requisite control of such agents. "A court may find a sufficient agency relationship where the principal exercised *substantial control* over the agent's actions." *Legg*, 20 F. Supp. 3d at 1377 (emphasis added). Even assuming that members of the Bolivian Armed Forces killed the decedents, there is no evidence that either Defendant had any operational control, let alone "substantial control," over the actions of members of the Armed Forces.<sup>11</sup> Absent such evidence, Defendants are entitled to summary judgment. *See Strauss v. CBE Grp., Inc.*, 173 F. Supp. 3d 1302, 1310, 1313 (S.D. Fla. 2016) (Cohn, J.) (granting summary judgment in favor of defendants based on absence of evidence establishing that a "clear and unequivocal" agency relationship existed).

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<sup>10</sup> Plaintiffs also allege that Sánchez Berzaín was an agent of Sánchez de Lozada. Compl. ¶ 194. There is simply no evidence of such a relationship between the Defendants, nor any indication how such a relationship would result in vicarious liability since there is no evidence of any operational authority or orders given by Sánchez Berzaín.

<sup>11</sup> Defendants incorporate herein the discussion in the command responsibility section regarding the lack of evidence of effective control. *See supra* Part IV.B.

Unsupported allegations of ratification do not save Plaintiffs' agency theory. "A principal's ratification of the agent's conduct, or representations that the agent acts with authority, may also create an agency relationship supporting vicarious liability." *Legg*, 20 F. Supp. 3d at 1377. However, "[n]o rule of law is better settled than this: [t]hat the ratification of the act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts." *Nationmotor Club Inc. v. Stonebridge Cas. Ins.*, Civ. No. 10-CV-81157, 2013 WL 6729664, at \*15 (S.D. Fla. Oct. 29, 2013) (quoting *Banford State Bank v. Howell Co.*, 88 Fla. 493, 495 (1924) (per curiam)). "Constructive knowledge does not apply to bring about ratification." *Id.* There is simply no evidence that either Defendant knew about the details of the deaths of the decedents, let alone that those deaths were the result of any unlawful conduct by the Armed Forces.

### **3. There Is No Conspiracy Liability**

Plaintiffs' conspiracy theory of liability fails too. To find Defendants indirectly liable for conspiracy, Plaintiffs need to prove by a preponderance of the evidence that (1) two or more persons agreed to commit a wrongful act, (2) Defendants joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy. As outlined above, there is insufficient evidence regarding the wrongful act itself. *See supra* Part IV.A. And there is no evidence of an agreement to commit the alleged wrongful acts, or that Defendants joined a conspiracy with knowledge of at least one of the goals and intent to help accomplish it. *Cf. Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1156-57 (11th Cir. 2005) (per curiam) (finding conspiracy liability where defendant knew of plan to kill prisoners and foresaw victim's torture and killing by co-conspirators based on evidence of defendants' clear involvement in killings (before and afterwards), of the squad's objective to kill

the prisoners as selected by the squad General, and of defendant's bragging he was the General's right-hand man).

**C. The Undisputed Facts Establish as a Matter of Law that Plaintiffs Cannot Support State Law Claims**

Plaintiffs' state law claim also fails as a matter of law. In their Second Amended Complaint, Plaintiffs assert a claim for "intentional wrongful death" and proceed to repeat the same allegations. *See* Compl. ¶¶ 215-224. They do not indicate under which law their claim arises or provide any statutory citation—they allege only that Defendants' actions occurred "[i]n violation of the laws of the State of Florida and Bolivia." Compl. ¶ 216.

While a choice-of-law analysis would confirm that Bolivian law applies,<sup>12</sup> the claims fail under either Bolivian or Florida law. Primarily, Plaintiffs make no allegations in the state law claim that are any different from the allegations made to support their TVPA claim. They allege, as they must, that their claim is one for intentional wrongful death. Thus, if their TVPA claim of extrajudicial killing fails, so too does their state law claim. Moreover, Bolivian law does not recognize vicarious liability for intentional wrongful death, and the claim is precluded by the criminal actions brought there. Under Florida law, the claim fails because it is preempted by the TVPA under the doctrines of both field preemption and the foreign affairs doctrine.

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<sup>12</sup> "To resolve choice-of-law issues in tort cases, Florida courts apply the flexible significant relationships test from the Restatement (Second) of Conflicts of Laws §§ 145-46 (1971)." *Mamani v. Berzain*, Nos. 07-22459-CIV et al., 2009 WL 10664387, at \*23 (S.D. Fla. Nov. 25, 2009). Here, the alleged tort would indisputably concern Bolivian decedents who died in Bolivia, Bolivian Plaintiffs, decedents' relatives who live in Bolivia, Bolivian Defendants, only one of whom lives in Florida, and underlying conduct by the Bolivian government and military. Thus, under Florida choice-of-law principles, Bolivian law provides the substantive law here. *See id.* at \*23 n.13.



**1. Plaintiffs' Claim Fails Under Bolivian Law**

**a. Bolivian Law Does Not Recognize Indirect Liability**

Bolivian law does not recognize the sort of indirect liability sought by Plaintiffs. Under Bolivian law any criminally liable person is also potentially civilly liable and may be obligated to make reparations for any damages caused by the crime. *See* SMF ¶ 190 (Bol. Penal Code art. 87 (Civil Liability)). As such, the criminal code informs civil liability under Bolivian law.

In general, the Bolivian Penal Code identifies four kinds of criminal participation: (1) “perpetrator,” the person who perpetrates the act on his own or those who wrongfully provide their cooperation, without which the crime could not have been committed; (2) “mediate perpetrator,” a person who uses another as an instrument, *i.e.*, a person who uses an agent to commit an aspect of the crime; (3) “instigator,” the person who intentionally urged another person to perpetrate the wrongful illegal act; and (4) “accomplice,” the person who intentionally facilitates or cooperates in the execution of the intentional illegal act, even if without such help the crime would have still been committed; and that by virtue of previous promises provides assistance subsequent to the fact. SMF ¶¶ 187-89 (Bol. Penal Code arts. 20-23). “Mediate perpetrator” liability is the closest Bolivian criminal law gets to the concept of vicarious liability—but it is not available for Bolivian civil liability. SMF ¶ 191. Bol. Penal Code art. 273 (specifying “perpetrator” liability only).<sup>13</sup>

**b. Bolivian Law Precludes Plaintiffs' Bolivian Law Claims**

In general, in Bolivia, criminal and civil claims cannot be pursued simultaneously. Under Article 37 of Bolivia’s Code of Criminal Procedure, “[a] civil action can be pursued in the criminal

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<sup>13</sup> “Instigator” liability is likewise unavailable under this civil liability provision. Regardless, that still does not amount to a claim for intentional wrongful death as alleged by Plaintiffs. It only describes the act of intentionally urging another to act. In any event, there is no proof anywhere in the record that either Defendant intentionally urged anyone to kill anyone else, much less urged any unknown shooters to do so.

proceedings under special rules . . . or may be filed with the civil courts, but cannot be pursued simultaneously in both [civil and criminal] jurisdictions.” SMF ¶ 192. In October 2004, the Bolivian Congress authorized the Trial of Responsibilities proceedings and, in December 2006, the prosecutor filed charges against Defendants. Article 38 of the Code of Criminal Procedure grants the injured party the right to proceed in both a criminal and civil action if, and only after, the criminal proceedings have been suspended. SMF ¶ 193. Here, the criminal proceedings against the Defendants were suspended on May 18, 2009. Therefore, Plaintiffs could have potentially asserted a civil claim under Bolivian law after May 18, 2009, but not before.<sup>14</sup> The cases here were filed before that date, on September 19, 2007. Plaintiffs cannot use United States courts to circumvent established Bolivian legal principles.

## **2. The TVPA Preempts Plaintiffs’ State Law Causes of Action**

### **a. Field Preemption Applies**

The doctrine of field preemption applies where state law “regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.” *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). Field preemption, as a matter of principle, seeks to keep state laws from “frustrat[ing] the federal scheme.” *Allis-Chalmers, Corp. v. Lueck*, 471 U.S. 202, 209 (1985). To that end, “courts discern from the totality of the circumstances” whether “Congress sought to occupy the field to the exclusion of the States.” *Id.*

Courts have acknowledged that “[p]reemption can apply to all forms of state law, including civil actions based on state law.” *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010). The question whether the TVPA preempts the “intentional wrongful death” claim at issue here would

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<sup>14</sup> Claimants would have had access to the civil court in Bolivia for their claim after May 18, 2009, as civil claims in Bolivia would proceed normally even in the absence of a party. SMF ¶ 194 (Bol. Code Civ. Proc. art. 69).

be an issue of first impression: no court has yet considered whether the TVPA occupies the field of providing civil remedies for foreign state-sponsored torture and extrajudicial killings<sup>15</sup> such that it would preempt an action for remedies arising from the same alleged conduct. Here, the text, structure, and legislative history of the TVPA leave no room for the states to provide a local remedy, especially where such an undefined remedy would undermine the federal scheme.

With the TVPA, Congress created a federal cause of action to provide limited civil remedies for allegations of state-sponsored extrajudicial killings and torture. The action created a federal scheme for specific human rights violations abroad. This was a field already in the purview of the federal government—and has been for more than two centuries. *See* Alien Tort Statute, 28 U.S.C. § 1350. It is the type of scheme for which courts have, in other contexts, previously found that preemption is warranted. *See, e.g., Local 926, IUOE v. Jones*, 460 U.S. 669 (1983); *Garner v. Teamsters Union*, 346 U.S. 486 (1953).

Indeed, Congress not only intended for the TVPA to have a limited reach, but also expressed great hesitancy about courts generally opening their doors to these sorts of suits. By allowing a state common law tort action to cover the same conduct as the field occupied by the TVPA—that is, torture and extrajudicial killings that take place outside the United States—this Court would be frustrating the cohesive and limited federal scheme that Congress sought to create for this very specific, complex, and sensitive claim.<sup>16</sup> Indeed, even at the final legislative step,

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<sup>15</sup> Here Defendants understand the TVPA to be working with the Alien Tort Statute as part of the same federal scheme. *See, e.g., Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-51 (11th Cir. 2005) (per curiam) (holding that claims under the ATS were not preempted by Congress' passage of the TVPA).

<sup>16</sup> *See, e.g.,* 138 Cong. Rec. 4177 (1992) (statement of Sen. Alan Simpson) (noting that “as a practical matter, this legislation will result in a very small number of cases”); 137 Cong. Rec. 2671 (1991) (statement of Sen. Arlen Specter) (emphasizing that “the bill is a limited measure”); 133 Cong. Rec. 6909-6910 (1987) (statement of Sen. Patrick Leahy) (noting that the bill “contains important limitations to prevent a flood of lawsuits based on any violent crime overseas”).

when the president signed the bill into law, the signing statement explicitly noted that “the expansion of litigation by aliens against aliens is a matter that must be approached with prudence and restraint” and expressed “hope[] that U.S. courts will be able to avoid these dangers by sound construction of the statute and wise application of relevant legal procedures and principles.” Presidential Statement on Signing H.R. 2092, 28 Weekly Comp. Pres. Doc. 465 (Mar. 12, 1992), 1992 U.S.C.C.A.N. 91, 91 (Mar. 16, 1992). The legislative history of the TVPA, then, confirms that Congress intended to create a limited remedy for potential human rights abuses abroad—and expressly noted its concern about widespread litigation of such claims.

Although courts do acknowledge a general presumption against preemption of state law, that presumption is not absolute. The “presumption applies with particular force in fields within the police power of the state,” but does not apply where state regulation has traditionally been absent. *Farina*, 625 F.3d at 116. Here, Florida has no identifiable interest that would justify the presumption against preemption in this context. After all, Florida’s wrongful death statute is intended to aid Florida residents and protect Florida’s interests within its borders. None of those interests are implicated in a TVPA-type claim brought by Bolivian Plaintiffs based on events that occurred in Bolivia, against Bolivian government officials.

**b. The Foreign Affairs Doctrine Applies**

It has been long understood that “[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively.” *United States v. Pink*, 315 U.S. 203, 233 (1942); *see* Federalist No. 42 (James Madison) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”). The foreign affairs doctrine of preemption provides that state laws may not trespass into the area of “foreign affairs which the Constitution entrusts to the President and the Congress.” *Zschernig v. Miller*, 389 U.S. 429, 432 (1968). “[E]ven in [the] absence of a treaty,” state laws must yield if they “may disturb foreign relations.” *Id.* at 441.

When Congress legislates in the area of foreign relations, there is a strong presumption that Congress intended to preempt the field, in particular where the federal legislation does not touch on a traditional area of state concern. The fact that foreign policy and national security are areas “of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can.” *Boyle v. United Techs. Corp.*, 487 U.S. 500, 508 (1988); *see also* Lawrence H. Tribe, *American Constitutional Law* §§ 4-5, at 656 (3d ed. 2000).

To consider whether the foreign affairs implication of a state law claim has a preemptive effect, courts weigh the interests at issue. Courts consider the “strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted.” *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2008). To plead successfully a Florida state law claim, then, Plaintiffs must show that the wrongful death claim not only falls within an area of traditional state responsibility, but also that the conduct has such substantial ties to Florida that it would be more appropriate to litigate the issue under Florida law. There are no such ties to Florida here.

In this unusual case, any state law interests held by Florida are far outweighed by the foreign policy implications. On the one hand, Florida has a weak interest in providing a wrongful death remedy for foreign litigants based on conduct in a foreign country. On the other hand, the foreign policy implications of this case are self-evident. Even today, the State Department denied Defendants’ *Touhy* request for deposition and testimony of the former U.S. Ambassador to Bolivia because “[t]he current President of Bolivia was a principal opposition figure during the events at issue in the lawsuit, and testimony by the former U.S. Ambassador could be used by opponents and supporters of the President to entangle the United States in the controversial matters addressed in the case, with substantial detrimental impact on U.S. foreign policy interests.” SMF ¶ 25.

Florida's weak interest in this case is easily outweighed by the foreign policy implications this case carries. Those foreign policy concerns provide an independent basis for dismissing Plaintiffs' intentional wrongful death claim.

**D. Three Plaintiffs' Claims Cannot Proceed Based on Individual Deficiencies**

In addition, individual deficiencies preclude the claims of Plaintiffs Sonia Espejo Villalobos, Gonzalo Mamani Mamani, and Hermógenes Bernabé Callizaya.

**1. Plaintiff Sonia Espejo Villalobos Is Not a Proper Plaintiff**

The claims of Plaintiff Sonia Espejo Villalobos also fail because she is not a proper wrongful death claimant or legal representative. Florida law governs who may bring a TVPA wrongful death claim: a plaintiff must be (1) a legal representative (or any person who may be a claimant in an action for wrongful death) (2) of a victim of an extrajudicial killing (3) that was committed by an individual acting "under actual or apparent authority, or color of law, of any foreign nation." *Baloco ex rel. Tapia v. Drummond, Inc.*, 640 F.3d 1338, 1346 (11th Cir. 2011). State law governs whether a claimant is a proper wrongful death plaintiff. *Id.* at 1349.<sup>17</sup>

Ms. Villalobos brings her claims as the wife or personal representative of Lucio Gandarillas Ayala. Compl. ¶¶ 19, 218. The inquiry for both is the same, as the only applicable basis on which Ms. Villalobos may be the decedent's personal representative is as his spouse. Fla. Stat. Ann. § 733.304. The statutory term "spouse" means "a person who has entered into a marital relationship with another," and Florida only recognizes marriages of citizens of a foreign country

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<sup>17</sup> The Eleventh Circuit relies on the TVPA's legislative history for its conclusion that state law determines whether a particular individual could act as a beneficiary for a TVPA action. *Baloco*, 640 F.3d at 1346; *see also* S. Rep. No. 102-249, at 7 n.10 (1991), 1991 WL 258662 (1991) (citing *In re Air Crash Disaster Near New Orleans, Louisiana*, 789 F.2d 1092, 1097-98 (5th Cir. 1986).).

if the marriage is recognized under foreign law. *Cohen v. Shushan*, 212 So. 3d 1113, 1118-19 (Fla. Dist. Ct. App. 2017).

Ms. Villalobos has testified that she and the decedent did not have a wedding ceremony and were not “officially married” under Bolivian law; they had a common law union. SMF ¶¶ 5, 195-96. For this reason she could not (and did not) obtain any benefits as the decedent’s beneficiary under the 2008 Humanitarian Assistance law, which provided benefits only to the “children, spouses, and parents” of those killed in the events of 2003. SMF ¶ 5. Her inability to obtain benefits that would have been available to the decedent’s spouse is consistent with Bolivian law’s differentiation between such unions from civil marriages. *See* SMF ¶ 195 (specifying, in the Bolivian constitution, that certain unions that meet certain criteria “produce effects *similar to those of marriage*”).<sup>18</sup> Regardless of whether one self-identifies as a decedent’s spouse, if the country’s laws do not recognize that relationship as marriage, that self-identified spouse cannot be a wrongful death claimant, nor serve as a personal representative of the estate. *See Cohen*, 212 So. 3d at 1118-19; *Am. Airlines v. Mejia*, 766 So. 2d 305, 306 (Fla. Dist. Ct. App. 2000).<sup>19</sup>

Ms. Villalobos’ claims are barred no matter how her relationship is defined. If she is not the legal spouse, her claims must be dismissed for the reasons explained above. But if she asserts that she *is* the legal spouse, her claims must be dismissed for failure to exhaust her legal remedies

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<sup>18</sup> *See also* SMF ¶ 196 (stating, on the website for the U.S. Embassy in Bolivia, that in Bolivia “[o]nly civil marriages are recognized as legal” and are “performed by a civil registry official, either before or after a religious ceremony”).

<sup>19</sup> Defendants have alerted Plaintiffs’ counsel to the fact that Ms. Villalobos appears to have been appointed personal representative of decedent’s estate in error based on the inaccurate representation that she and the decedent were married. Florida law makes clear that “[a] personal representative **shall resign immediately** if the personal representative knows that he or she was not qualified to act at the time of appointment.” Fla. Stat. Ann. § 733.3101(1) (emphasis added). Accordingly, her counsel must correct the record with the Florida court and resign Ms. Villalobos immediately. Notwithstanding her sworn testimony that she was not married and did not have the same benefits as a legally married spouse, her counsel has refused to do so.

in Bolivia. This Court previously dismissed Plaintiffs' TVPA claims based on their failure to exhaust the remedies available under the 2008 Humanitarian Assistance law in Bolivia. *Mamani v. Berzain*, 636 F. Supp. 2d 1326 (S.D. Fla. 2009). Plaintiffs subsequently filed the Second Amended Complaint, alleging that Plaintiffs had "exhausted all adequate and available remedies in Bolivia." Compl. ¶ 179. Yet Ms. Villalobos has conceded that while her son collected money as a beneficiary under that law, she herself did not apply for or obtain such benefits. SMF ¶ 5. This failure to exhaust remedies, if they were available to her as a "married" claimant, "prevents a court from reaching the merits of a TVPA claim." 636 F. Supp. 2d at 1328.

**2. Plaintiffs Gonzalo Mamani Mamani and Hermógenes Bernabé Callizaya Failed to Exhaust Local Remedies As Ordered by the Court**

Plaintiffs Gonzalo Mamani Mamani and Hermógenes Bernabé Callizaya failed to exhaust the remedies available to them under the 2008 Humanitarian Assistance law in Bolivia, as this Court required them to do before proceeding with their TVPA claims. *See Mamani*, 636 F. Supp. 2d at 1326. As children of decedents, Plaintiffs were eligible to receive money under the law. SMF ¶ 5. Plaintiffs alleged that all Plaintiffs "received the monies from the Bolivian Government to which they were entitled under the Humanitarian Assistance Agreement." Compl. ¶ 176. Not so. While other eligible members of their families obtained compensation under the law, Mr. Mamani Mamani and Mr. Bernabé Callizaya have conceded that they did not do so. SMF ¶¶ 9-10. There is no evidence that either tried to obtain these benefits to which they were entitled. This is an independent, mandatory ground for dismissal.

**CONCLUSION**

For the foregoing reasons, the Court should grant Defendants' motion for summary judgment.



Dated: November 20, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on November 20, 2017, 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/ Evan Berger  
Evan Berger