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' MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR A NEW TRIAL, AND SUPPORTING MEMORANDUM OF LAW

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INTRODUCTION

The Eleventh Circuit agrees that a fundamental defect has existed in Plaintiffs' case since Day 1: "We agree with the District Court that Plaintiffs' evidence about widespread casualties and a pattern of innocent deaths does not suffice to demonstrate that in any particular instance a death was an extrajudicial killing, as the same evidence is consistent with military reaction to just provocation, which is lawful under international law." *Mamani v. Sánchez de Lozada*, 968 F.3d 1216, 1240 (11th Cir. 2020) (*Mamani III*). The remand in *Mamani III* stems from the manner in which the test for TVPA liability from *Mamani I* should be applied. *Mamani III* clarifies that "the standard for an extrajudicial killing" and the "theory of liability tying Defendants to the decedents' deaths" should be determined separately. *Id.* at 1220. The Eleventh Circuit thus remanded for this Court "to consider in the first instance whether, for each decedent, Plaintiffs produced sufficient evidence to demonstrate that each death was not lawful under international law and thus extrajudicial and, if so, whether Plaintiffs produced sufficient evidence to link Defendants to that wrongdoing via the command-responsibility doctrine." *Mamani III*, 968 F.3d at 1240.

Judgment should be entered in favor of Defendants on the TVPA claims for two independent reasons. First, Plaintiffs produced no evidence to support liability under the command-responsibility doctrine. Indeed, the only evidence in the trial regarding command responsibility, which included testimony from high-ranking officers of the Bolivian army, was that Defendants did not have the ability to direct police or military operations. The absence of command responsibility applies uniformly to all decedents. Judgment can thus be entered for Defendants on this basis alone without analyzing whether each death was an extrajudicial killing. Second, however, analyzing the evidence for each death shows that there is no basis to conclude that any death was an "extrajudicial killing." Plaintiffs failed to produce evidence showing that

any of decedents' deaths was not the result of "precipitate shootings during an ongoing civil uprising," *Mamani III*, 968 F.3d at 1222, or was not "consistent with military reaction to just provocation, which is lawful under international law," *id.* at 1241. Without such evidence, there is no basis for finding that any "extrajudicial killing" occurred. *Id.* Plaintiffs' failure of proof on this issue thus provides a second and independent basis for entering judgment in Defendants' favor on the TVPA claims.

For these reasons, and as set forth below, the Court should grant Defendants' Motion for Judgment as a Matter of Law on the TVPA claims pursuant to Rule 50(a) of the Federal Rules of Civil Procedure ("Rule 50 Motion"). In the alternative, the Court should grant a new trial on the TVPA claims under Rule 59 of the Federal Rules of Civil Procedure because the jury verdict "is against the clear weight of the evidence." *McGinnis v. Am. Home Mortgage Serv., Inc.*, 817 F.3d 1241, 1254–55 (11th Cir. 2016).[1]

I. LEGAL STANDARD

A. Rule 50: Motion for Judgment as a Matter of Law.

Federal Rule of Civil Procedure 50 allows a district court to grant a motion for judgment as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the [nonmoving party]." Fed. R. Civ. P. 50(a). The standard is the same whether the motion is made before the case is submitted to the jury or renewed after the jury's verdict. *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 723–24 (11th Cir. 2012). "[T]o survive a defendant's motion for judgment as a matter of law . . . the plaintiff must present evidence that would permit a reasonable jury to find in the plaintiff's favor on each and every

[1] Defendants incorporate by reference their previous arguments and briefing in support of their Rule 50 motion, including Docket Entries ("DE") 421, 421-1, 475, and 487 (all docket citations are to Case No. 8-cv-21063).

element of the claim." *Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 659 (11th Cir. 1998); *U.S. Steel, LLC, v. Tieco, Inc.*, 261 F.3d 1275, 1288 (11th Cir. 2001). The ultimate question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997) ("If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the [Rule 50] motion was properly granted.").

B. Rule 59: Motion for a New Trial.

A court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). "[U]nder Rule 59(a), a district court may, in its discretion, grant a new trial 'if in [the court's] opinion, the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.'" *McGinnis*, 817 F.3d at 1254. Ultimately, "motions for a new trial are committed to the discretion of the trial court." *Montgomery v. Noga*, 168 F.3d 1282, 1295 (11th Cir. 1999).

"'[I]n a motion for a new trial the judge is free to weigh the evidence.'" *Rabun v. Kimberly–Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982) (citation omitted). "[W]hen independently weighing the evidence, the trial court is to view not only that evidence favoring the jury verdict but evidence in favor of the moving party as well." *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982); *Ore v. Tricam Indus., Inc.*, No. 14-cv-60269, 2017 WL 6597517, at *3 (S.D. Fla. Oct. 16, 2017) ("Under Rule 59, the standard is more flexible than the standard under Rule 50 and the court is free to independently weigh the evidence itself.").

II. THERE IS NO EVIDENCE TO SUPPORT COMMAND RESPONSIBILITY LIABILITY.

In *Mamani I*, the Eleventh Circuit rejected the concept of "strict liability akin to respondeat superior for national leaders at the top of the long chain of command." *Mamani v. Berzaín*, 654 F.3d 1148, 1154 (11th Cir. 2011) ("*Mamani I*"). As the Court explained, liability under the TVPA requires "facts connecting what these defendants *personally* did to the particular alleged wrongs." *Id.* at 1155 n.8; *Mamani III*, 968 F.3d at 1222. The Court in *Mamani III* reaffirmed those principles, holding that Plaintiffs must "produce[] sufficient evidence to link Defendants to [extrajudicial killings] via the command-responsibility doctrine." 968 F.3d at 1240. No reasonable jury could find on this record that *these* Defendants are responsible for the deaths at issue under a theory of command responsibility.[2]

The command-responsibility doctrine requires Plaintiffs to prove "three indispensable elements." *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 609 (11th Cir. 2015). Plaintiffs must show that Defendants "(1) had a superior-subordinate relationship with the wrongdoer, (2) knew or should have known of the wrongdoing, and (3) failed to prevent or punish the wrongdoing." *Mamani III*, 968 F.3d at 1239 n.24 (citing *Mamani v. Berzaín*, 825 F.3d 1304, 1312 (11th Cir. 2016) ("*Mamani II*")). The whole command-responsibility theory is premised on the "actual ability" of a superior to control his "guilty troops." *Ford ex rel Estate of Ford v. Garcia*, 289 F.3d 1283, 1291 (11th Cir. 2002). Thus, "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

[2] Plaintiffs' designated expert on command responsibility, Allen Borrelli, did not show up at trial after portions of his opinions were excluded under *Daubert*. *See* DE 400 (Order Granting in Part Mot. to Exclude Testimony of Allen Borrelli). They offered no other expert to address command responsibility. The military witnesses they offered—General Veliz Herrera, General Antezana, and Colonel Flores—each testified that Defendants did *not* have command responsibility.

command responsibility, whether the plaintiff attempts to assert liability under a theory of *de facto* or *de jure* authority." *Id.*

As the Eleventh Circuit explained in *Mamani I*, a mere recitation of the elements of command responsibility is insufficient. 654 F.3d at 1153 (dismissing case where Plaintiffs provided only conclusory allegations that Defendants, among other things, "met with military leaders [and] other ministers in the Lozada government to plan widespread attacks involving the use of high-caliber weapons against protesters"). Rather, to be held liable under the doctrine of command responsibility, a Plaintiff has the burden to come forward with "adequate factual support of more specific acts by . . . defendants." *Id.* at 1154.

After a three-week trial, Plaintiffs failed to produce any evidence to link Defendants to any "wrongdoer" or "guilty troops," or any of the deaths that occurred in this case. Despite having every opportunity to elicit such testimony at trial, they are on no better ground regarding these allegations than they were when the Eleventh Circuit remanded their case with instructions to dismiss in *Mamani I*. More specifically, Plaintiffs failed to prove *any* of the "three indispensable elements" required under the command responsibility theory. *Drummond*, 782 F.3d at 609.[3]

[3] Although the Eleventh Circuit has applied the command responsibility doctrine to defendants regardless of their military status, *see Drummond*, 782 F.3d at 576, Defendants maintain, consistent with their objections to the jury instructions on this issue, that the command responsibility doctrine does not apply to a civilian leader outside of times of armed conflict as defined under international law. DE 461 (Trial Tr. 3/22/18) 85:12-86:5, 90:1-7; *see also* Gunael Mettraux, *The Law of Command Responsibility* 97 (2012). Even when the command responsibility doctrine is applied to a civilian leader, different standards apply. DE 421-1 at 14 n.4 (Defs.' Mot. for Judgment as a Matter of Law); DE 389 (Defs.' Proposed Jury Instructions, Nos. 21, 21(a-c)); *see also* DE 389-1 (Expert Rebuttal Report of Professor Julian Ku submitted in support of jury instructions). Regardless of the standard applied, however, there is no evidence to support command responsibility as to any of the three elements, let alone all three that Plaintiffs are required to prove.

A. No Superior-Subordinate Relationship with Any Wrongdoer.

Command responsibility requires a "superior-subordinate relationship with *the wrongdoer*." *Mamani III*, 968 F.3d at 1239 n.24 (emphasis added). *See Ford*, 289 F.3d at 1291 (requiring relationship with "the guilty troops"); *Drummond*, 782 F.3d at 609 (requiring relationship with "the perpetrator of the crime"). Plaintiffs offered no evidence at all to show that either Defendant had such a relationship with any "wrongdoer," *Mamani III,* 968 F.3d at 1239 n.24, "guilty troops," *Ford*, 289 F.3d at 1291, or "perpetrator of the crime," *Drummond*, 782 F.3d at 609. In fact, Plaintiffs offered no evidence showing that either Defendant had *de jure* or *de facto* authority over Bolivian soldiers at all.

For these reasons alone, command responsibility does not exist because Plaintiffs failed to satisfy their burden on the first required element.

1. No Evidence of *De Jure* Authority.

As an initial matter, Plaintiffs *conceded* during the original Rule 50 argument that Defendants did not have *de jure* authority over the Bolivian troops. DE 458 (3/19/18 Trial Tr.) at 27:23-25 ("If all we were saying was the fact that they were the President and Minister of Defense means they're responsible, we wouldn't be here."); *id.* at 20:12-14 ("So while there may not be *de jure* authority . . ."). These concessions alone put an end to any claims about *de jure* authority. Plaintiffs made these concessions for good reason. They offered no evidence at all to support *de jure* authority. In fact, the evidence overwhelmingly shows that no *de jure* authority exists for either Defendant.

Sánchez de Lozada

Sánchez de Lozada, as the President of the Republic, was the Captain General of the Armed Forces. Trial Ex. 13 (Organic Law of the Armed Forces of Bolivia ("Organic Law"), art. 8) at 13-

0002.[4] In Bolivia, however, the President is not the Commander in Chief of the Armed Forces. DE 474-2 (Testimony of General Marcelo Antezana ("General Antezana Testimony"), played 3/13/18) at 155:12-17. The Commander in Chief of the Armed Forces is a military general, and "is *the highest Command and Decision-making body of a technical/operating nature*, for the permanent coordination and direction of the Armed Forces." Trial Ex. 13 (Organic Law, art. 36) at 13-0007 (emphasis added); DE 474-2 (General Antezana Testimony) at 154:4-155:3; DE 474-6 (Testimony of Col. Nelson Flores ("Col. Flores Testimony"), played 3/8/2018) at 83:12-17. Thus, the Bolivian Constitution provides: "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." Trial Ex. 40 (Bol. Const., art. 210) at 40-0042; DE 474-2 (General Antezana Testimony) at 154:4-14.

President Sánchez de Lozada thus did not "control the operational matters of the military." DE 455 (Trial Tr. 3/13/18, Testimony of Sánchez Berzaín) at 124:6-8. *See* DE 474-6 (Col. Flores Testimony) at 101:10-16 ("It's not part of [the President's] responsibilities to see operational issues."). For operational matters, the President gives "initial instruction[s] . . . [i]n a general manner" to the Commander in Chief of the Armed Forces who, in turn, gives the orders to the commanders of the forces according to the level of hierarchy and responsibility. DE 474-2, (General Antezana Testimony) at 154:21-155:3. The President cannot order anyone in the Armed Forces directly other than the Commander in Chief. *Id.* at 155:12-17. The President, "as political leader and political head gives the initial concept and those who plan it are the commanders of the Armed Forces." *Id.* at 46:19-23.

This undisputed evidence confirms Plaintiffs' concession that President Sánchez de Lozada

[4] All referenced "Trial Exhibits" were filed as attachments to DE 471 and DE 479.

did not have *de jure* authority over any troops involved in operational matters, let alone any troops engaged in any wrongdoing at the specific locations where the deaths occurred.

Carlos Sánchez Berzaín

Similarly, the undisputed evidence shows that Sánchez Berzaín did not have *de jure* authority over any troops in field operations. Between early August 2003 and October 17, 2003, Sánchez Berzaín served as the Minister of National Defense. DE 455 (Trial Tr. 3/13/18, Sánchez Berzaín Testimony) at 75:18-76:9. As the Defense Minister, Sánchez Berzaín had "no authority to command the armed forces in the field," and he played no role in field operations in September and October 2003. DE 474-6 (Col. Flores Testimony) at 82:24-83:17. Sánchez Berzaín never controlled "operational matters of the military as Minister of Defense." DE 455 (Trial Tr. 3/13/18, Sánchez Berzaín Testimony) at 124:3-5.

Rather, Sánchez Berzaín's authority was limited to administrative matters. DE 474-6 (Col. Nelson Flores Testimony) at 83:12-17; Trial Ex. 40 (Bol. Const., art. 210) at 40-0042. "Carlos Sánchez Berzaín as Minister of Defense only saw administrative issues and not operational issues." DE 474-6 (Col. Nelson Flores Testimony) at 180:15-20.

The Manual on the Use of Force introduced by Plaintiffs provides additional evidence that Defendants had no *de jure* authority over the troops. The Manual applies to all military personnel engaged in operations. Trial Ex. 38 at 38-0004. There is no evidence that Defendants played any role in developing the Manual. There is no evidence that Defendants even knew about the Manual or what it contained. Plaintiffs never asked Sánchez de Lozada or Sánchez Berzaín about the Manual even though both Defendants testified. Plaintiffs presumably did not ask because the Manual makes clear that Defendants had nothing to do with it. The Manual was "prepared by

Department III EMO" of the General Army Command. *Id.* at 38-0002. It was issued by the General Commander of the Army, General Juan Veliz Herrera. *Id.*

The Manual "regulates the use of Force and the Employment of Weapons" in order to "carry out the correct application of the laws, rules and international conventions in military operations against subversives (Social Conflicts)." *Id.* at 38-0004. According to the Manual, "The decision to open fire is the exclusive responsibility of the Unit Commander and will always be under his control[.]" *Id.* at 38-0012.

There is no evidence that Defendants had any authority to order any Bolivian soldiers to open fire against any individuals. And as demonstrated below, there is no evidence that Defendants ever gave such an order.

2. No Evidence of *De Facto* Authority.

Plaintiffs also failed to produce any evidence that Defendants exercised *de facto* control over the troops involved in the military operations. First, there is no evidence at all that Sánchez Berzaín gave any oral or written orders to the Armed Forces or any soldier. Similarly, there is no evidence that President Sánchez de Lozada gave any orders to any of the troops engaged in operations. It should come as no surprise, therefore, that Plaintiffs admit that Sánchez de Lozada did not issue any orders to shoot and kill unarmed civilians. DE 458 (Trial Tr. 3/19/18) at 25:9-11 ("we have not said that President [Sánchez] de Lozada issued an explicit order to shoot and kill unarmed civilians").

The unrebutted evidence shows that President Sánchez de Lozada gave only two general orders to the Commander in Chief, neither of which ordered any troops to use lethal force against civilians. *See* Trial Ex. 3; Trial Ex. 45. He issued the first order to the acting Commander in Chief of the Armed Forces on September 20, 2003, in response to the ambush of police forces in

Warisata. Trial Ex. 3. The Order instructed the acting Commander in Chief, 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." *Id.* This Order could not possibly have played any role in the deaths of any decedents in this case. The September 20 order was not created until after 5:00 p.m. DE 459 (Trial Tr. 3/20/18, Maria Paula Muñoz Testimony) at 87:20-88:14. Marlene Nancy Rojas Ramos died at 4:00 p.m. that day, at least an hour *before* the order was written. Trial Ex. 9 (Death Certificate) at 9-0001.

Sánchez de Lozada issued the second Order on October 11, 2003, to the Commander in Chief of the Armed Forces, Air Force General Roberto Claros Flores. Trial Ex. 45. The October 11 Order instructed General Flores "that for the purpose of restoring and ensuring the rule of law and public safety, you immediately arrange for the necessary security measures to restore order to the city of El Alto, ordering the military defense of strategic and public utility installations, as well as of military and police installations." *Id.*

President Sánchez de Lozada consulted the Constitution when preparing the September 20 and October 11, 2003 orders. DE 459 (Trial Tr. 3/20/18, Maria Paula Muñoz Testimony) at 99:8-10, 100:21-101:8. President Sánchez de Lozada also received legal advice from Fernando Giannini, the Vice Minister of the President, before signing both orders. *Id.* at 97:8-23.

There is no evidence of any other orders—written or oral—from Sánchez de Lozada to the Armed Forces in September or October 2003.

The September 20 and October 11 Orders did not authorize the killing of unarmed civilians or any other unlawful conduct. *See* Trial Ex. 3; Trial Ex. 45. President Sánchez de Lozada "was the first one who considered that the law had to be applied. . . . From [the] standpoint [of Plaintiff's witness Jose Elias Harb], the President was trapped between the need to apply the law and the

emergency to negotiate politically." DE 474-7 (Testimony of Jose Elias Harb ("Harb Testimony"), played 3/26/18) at 165:4-10.

In sum, there is no evidence of any order by Defendants for any Bolivian soldier to kill any of the decedents, or any other civilians. Plaintiffs introduced testimony from three high-ranking Bolivian military officers on the precise question of what orders, if any, Defendants gave. All three testified unequivocally—and that testimony is unrebutted—that Defendants never gave an order to kill anyone, much less unarmed civilians. General Veliz Herrera never received an order or gave an order to kill anyone. DE 459 (Testimony of General Juan Veliz Herrera ("General Veliz Testimony"), read into the record on 3/20/18) at 24:4-5. Colonel Nelson Flores never heard of any order from Sánchez de Lozada or Sánchez Berzaín to use lethal force against any Bolivian civilian in 2003. DE 474-6 (Col. Flores Testimony) at 180:11-20. General Marcelo Antezana testified that the President only gave the "initial concept" and explained that the commanders of the Armed Forces are the ones who actually plan the operations. DE 474-2 (General Antezana Testimony) at 46:19-47:4.

3. The Operational Directives and Orders Came from Military Commanders.

The unrebutted evidence establishes that President Sánchez de Lozada had no *de jure* or *de facto* authority over tactical and operational matters. In fact, the President had no authority to give an order to *anyone* in the military other than the Commander in Chief. DE 474-2 (General Antezana Testimony) at 155:12-17. Thus, "[t]he initial instruction by the President was on a general matter. As it goes down through the planning level it goes from the strategic level to a tactical and operational level and . . . every time it's more specific and more operational. *Id.* at 154:15-25. The unrebutted evidence proves that it was the military commanders, not Defendants,

who exercised *de facto* authority and control over the troops and their operations by issuing the Directives and Orders described below.

On September 20, 2003, General Gonzalo Rocabado Mercado issued Directive No. 27/03. Trial Ex. 1004 at 1004.1. Directive 27/03, whose purpose was to "[m]aintain public order and enforcement of the National Constitution in the north *altiplano* region of LA PAZ," cited the Presidential Decree of September 20, 2003 and the existence of "[a]rmed groups of campesinos and civilians from ACHACACHI, HUARINA, SORATA, WARISATA, and other towns in the *altiplano* region of La Paz," who "perpetrated a series of attacks over the last several days," including "an attack on a military column conducting a humanitarian rescue operation of a group of foreign and national tourists from the city of SORATA." *Id.* The Directive created a Joint Task Force consisting of members from the three branches of the Armed Forces, whose mission was "[t]o carry out DIT operations" in particular provinces "and restore public order and the Rule of Law, in order to guarantee that the population may carry out its normal activities." *Id.*

In Warisata, where Marlene was killed, the specific order for soldiers to switch to live ammunition came from Lieutenant Miranda after police and soldiers had been shot, injured, and killed. DE 474-1 (Testimony of Edwin Aguilar Vargas ("Aguilar Vargas Testimony"), played 3/7/18) at 76:18-25. As noted above, the Manual on the Use of Force exclusively vests the authority to "open fire" with the "Unit Commander." Trial Ex. 38 at 38-0012. Lieutenant Miranda gave the order consistent with his authority. There is thus no evidence that Defendants had anything to do with giving the order to open fire in Warisata. They could not have given such an order as a matter of law, and they could not have given such an order as a practical matter, as it resulted from an on-the-ground response to an armed attack. The sequence of events in Warisata simply precludes a finding that either Defendant had *de facto* control over any soldiers who opened

fire that day. Indeed, Plaintiffs conceded during the Rule 50 argument that, "if we were talking about Warisata . . . maybe that's a different case." DE 458 (Trial Tr. 3/19/18) at 21:16-17.

Likewise, on October 12, 2003, General Roberto Claros Flores, Commander in Chief of the Armed Forces, issued Directive Nos. 33/03 and 34/03. Trial Ex. 17; Trial Ex. 18. Directive Nos. 33/03 and 34/03, whose purpose was to "[m]aintain public order and enforcement of the Constitution of the State in the national territory," both cited the Supreme Decree dated October 11, 2003 and the existence of "[a]rmed groups of farmers and civilians" in towns in the "La Paz plateau [who] have been engaging in a series of attacks in recent days against people and property in the region," including that "the actions of these groups have worsened in the city of [EL] ALTO, leading to acts of violence." Trial Ex. 17 at 17-0001; Trial Ex. 18 at 18-0001.

Directive 33/03 created a Joint Task Force consisting of members from the three branches of the Armed Services, whose mission was to "perform [DIT] operations as of [the date of the order], throughout the entire national territory to restore public order and the rule of law with the purpose of ensuring that the population is able to carry out its normal activities." Trial Ex. 17 at 17-0002. Directive 33/03 ordered that the Joint Task Force be established in multiple areas of the country, including "LA PAZ, EL ALTO – ALTIPLANO NORTE." *Id.*

Directive No. 34/03 ordered that the Joint Task Force be established in "LA PAZ – EL ALTO – HIGHLANDS," and that its mission was to "[p]erform D[I]T [o]perations as of the date of the new order, in the city of [EL] ALTO, to restore public order and the rule of law to make sure the population is able to carry out its activities as normal, by carrying out the following tasks: Protect essential basic services[;] Protect military and police facilities and installations[;] Ensure operations at the Airport and hydrocarbon plant[;] Maintain a supply axle between El Alto – La Paz and . . . El Alto and the airport." Trial Ex. 18 at 18-0003.

Thus, in the Southern Zone on October 13, as in Warisata and consistent with the Manual on the Use of Force, Captain Belmonte gave the order to switch to live ammunition only after a soldier was shot in the head and killed by shooters from the top of the hills where decedents Arturo Mamani and Jacinto Bernabe were struck by bullets. DE 454 (Trial Tr. 3/12/18, Testimony of Jose Limber Flores Limachi) at 130:12-131:10, 151:2-6. Again, there is no evidence that Defendants played any role in giving this order or any order to open fire in October 2003. They could not have given such an order as a matter of law, and they had no practical ability to give such an order that was driven by emerging events on the ground.

Absent any operational orders from Defendants, Plaintiffs have argued in the past that the launching of the Republic Plan, Trial Ex. 39, shows that Defendants had actual control over the troops. But the evidence defeats that argument.

The evidence shows that General Juan Veliz Herrera—and not Defendants—implemented the Republic Plan on September 12, 2003 after receiving an order from the Commander in Chief of the Armed Forces, General Roberto Claros Flores. DE 459 (General Veliz Testimony) at 25:4-14. General Juan Veliz Herrera launched the Republic Plan "to help the police unblock the roads and keep them clear, and to protect some facilities of public utilities." *Id.* at 19:8-11. General Veliz Herrera planned operations under the Republic Plan, "not to kill or to hurt, but to impose order and uphold the Constitution, and to guarantee the legally constituted government." *Id.* at 19:14-17.

There is no evidence anywhere in the record—*anywhere*—that Defendants launched, knew about, or played any role in the development of the Republic Plan. Accordingly, the Republic Plan does not provide any link between Defendants and any wrongdoing by soldiers under the

command-responsibility doctrine.[5]

As set forth above, Plaintiffs failed to produce any evidence to satisfy the first "indispensable element" to support liability under the command-responsibility doctrine. *Drummond*, 782 F.3d at 609. For this reason alone, the Court should grant Defendants' Rule 50 Motion for failure to "produce[] sufficient evidence to link Defendants to th[e] wrongdoing via the command responsibility doctrine." *Mamani III*, 968 F.3d at 1240.

B. No Knowledge of Unlawful Acts.

The second "indispensable element" requires Plaintiffs to prove that Defendants "knew or should have known of the wrongdoing." *Mamani III*, 968 F.3d at 1239 n.24. But mere knowledge that deaths occurred in the midst of a violent uprising is not sufficient to satisfy this element. Plaintiffs must prove 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*." *Ford*, 289 F.3d at 1288 (emphasis added); *Drummond*, 782 F.3d at 609 (emphasis added). The dearth of evidence as to Defendants' actual or constructive knowledge of any extrajudicial killings is absolute.

Plaintiffs have argued from Day 1 that Defendants should have known about the alleged extrajudicial killings based on a "pervasive pattern, practice, or policy of extrajudicial killings."

[5] Plaintiffs' reliance on the Republic Plan is puzzling in any event. First, they admit that the Republic Plan does not expressly state that soldiers can indiscriminately shoot civilians, DE 458 (Trial Tr. 3/19/18) at 22:3-4, and was not tantamount to a plan to use lethal force against innocent civilians, DE 462 (Trial Tr. 3/23/18) at 165:17-23. Second, Plaintiffs cannot escape the fact that they introduced the Republic Plan ***only*** to show that soldiers received the (incomplete) document, not as proof of its contents. DE 452 (Trial Tr. 3/8/18) at 24:19-23 ("We are not offering it for the truth. We are simply offering it with respect to the fact that this was received. We're not saying it was a plan. We're not saying that it was implemented. We're saying that every single unit received this document, which is the testimony of Colonel Flores.").

See, e.g., DE 463 (Trial Tr. 3/26/18) at 179:18-23; *see* also DE 450 (Trial Tr. 3/6/2018) at 18:12-18. The Eleventh Circuit in *Mamani III* flatly rejected that core premise:

> We agree with the District Court that Plaintiffs' evidence about widespread casualties and a pattern of innocent deaths does not suffice to demonstrate that in any particular instance a death was an extrajudicial killing, as the same evidence is consistent with military reaction to just provocation, which is lawful under international law.

968 F.3d at 1240; *see also Mamani I*, 654 F.3d at 1155 (precipitate shootings during a civil uprising, or accidental or negligent shooting (including mistakenly identifying a target as a person who did not pose a threat to others), are *not* extrajudicial killings).

There is not a shred of evidence that either Defendant knew—"owing to the circumstances *at the time*"—about any extrajudicial killings committed by members of the military, as opposed to deaths that could have occurred for a variety of reasons. *Ford*, 289 F.3d at 1288 (emphasis added); *Drummond*, 782 F.3d at 609 (emphasis added). Significantly, the Three Prosecutors' Report *did not* conclude that any deaths resulted from extrajudicial (or even deliberated) killings by soldiers. Trial Ex. 1002 at 1002.3, .27-.32. If the Three Prosecutors did not find such evidence following an independent, ten-month investigation that included witness interviews, ballistics evaluations, and forensic analysis, there can be no evidentiary basis for inferring that Defendants had *contemporaneous knowledge* that the military was committing extrajudicial killings against unarmed civilians.[6]

[6] Plaintiffs concede that there was no notice of *any* civilian deaths—let alone extrajudicial killings—until after Marlene Nancy Rojas Ramos died on September 20, 2003. Thus, Plaintiffs conceded that "if we were talking about Warisata . . . maybe that's a different case," DE 458 (Trial Tr. 3/19/18) at 21:16-17, and even suggested in closing that Defendants be granted a "mulligan" for events that day, DE 463 (Trial Tr. 3/26/18 Tr.) at 179:24-180:6. Thus, by Plaintiffs' own admission, there was no basis to have any knowledge that soldiers might engage in extrajudicial killings with respect to Marlene. Moreover, the death of Marlene—by an unknown shooter under unknown circumstances after the military was ambushed nearby and which had not been fully investigated prior to October 12—cannot constitute sufficient notice to Defendants that each of the

Nothing about Sánchez de Lozada's deployment of the military suggests that Defendants knew that extrajudicial killings would occur. To the contrary, the Organic Law of the Armed Forces of Bolivia *requires* the President to call in the military when the police are insufficient to maintain public order: the President "*shall* order the use of the military forces: . . . Domestically, for maintaining public order when the institutions legitimately constituted for this purpose prove insufficient." Trial Ex. 13 (Organic Law, art. 8) at 13-0002; DE 459 (General Veliz Testimony) at 23:21-24:3; DE 455 (Trial Tr. 3/13/18, Sánchez Berzaín Testimony) at 125:4-12 ("[W]hen the police [are] overpowered and they don't have enough people or resources, the President must comply with this obligation."). The evidence is clear and undisputed that the police were, in fact, insufficient to handle the violent threat. As General Veliz testified, "[w]e went in support of the operations being carried out by the military police ***because they were insufficient***." DE 459 (General Veliz Testimony) at 24:10-11 (emphasis added); *see id.* at 24:13-14 ("I am saying that they were insufficient."). As this Court already has concluded,

> there is no evidence that the "military campaign" which Plaintiffs claim that Defendants "intended, supported, or . . . knew of" was a campaign to intentionally kill unarmed civilians. Thus, Defendants' intent to launch this "campaign," or their knowledge or support of it, is irrelevant to whether Plaintiffs have presented sufficient evidence of extrajudicial killings.

Rule 50 Order, DE 488 at 22.

Nothing in *Mamani III* reverses this Court's assessment of these facts.

Similarly, nothing about Sánchez de Lozada's September and October 2003 Orders gave either Defendant any reason to believe that soldiers would kill unarmed civilians or "commit acts violative of the law of war." *Ford*, 289 F.3d at 1288. *See* Trial Ex. 3; Trial Ex. 45; *see also* DE

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decedents in this case thereafter died as a result of extrajudicial killings. Nothing in the record suggests that these Defendants were ever on notice of any extrajudicial killings.

458 (Trial Tr. 3/19/18) at 25:9-11 (Plaintiffs concede: "we have not said that President [Sánchez] de Lozada issued an explicit order to shoot and kill unarmed civilians"). This Court determined, and the Eleventh Circuit did not disagree, that "[w]hile the evidence could of course support a reasonable inference that Defendants planned to use military force to, for example, restore order in Bolivia, it is not possible to infer—without resorting to speculation—that Defendants planned to use such force to kill unarmed civilians." Rule 50 Order, DE 488 at 20.

Finally, there is no evidence of any unlawful order from high-level commanders that could support an inference of Defendants' knowledge of extrajudicial killings. *See* Trial Ex. 1004 (Directive 27/03); Trial Ex. 17 (Directive 33/03); Trial Ex. 18 (Directive 34/03). The undisputed evidence shows that in 2003 all Bolivian soldiers were trained on the rules of engagement—which call for proportionate responses to aggression and prohibit lethal force against an unarmed civilian—and that military commanders and others believed that the rules of engagement were being followed. *See, e.g.*, DE 474-6 (Col. Nelson Flores Testimony) at 101:18-102:17, 106:10-14; DE 455 (Trial Tr. 3/13/18, Sánchez Berzaín Testimony) at 79:22-80:9 (agreeing there was an expectation that orders would be followed); DE 479-11 (General Antezana Testimony) at 142:16-142:25, 143:02-13 (explaining that when he instructed Captain Belmonte to respond to the ambush in the Southern Zone, he expected that soldiers would follow the rules of engagement, which included a mandate to respond only with necessary force, and that he never ordered anyone to kill civilians or heard about any such orders).

Plaintiffs failed to produce any evidence to satisfy the second required element for command responsibility. There is no evidentiary support—not a single document, not an utterance of witness testimony—that Defendants had knowledge "at the time" that soldiers were committing *extrajudicial killings*. *Ford*, 289 F.3d at 1288; *Drummond*, 782 F.3d at 609. Plaintiffs' failure to

prove this second indispensable element provides another independent basis for granting the Rule 50 Motion.

C. No Failure to Prevent Crimes or Punish the Wrongdoing.

The third indispensable element of command responsibility requires Plaintiffs to prove that Defendants "failed to prevent or punish the wrongdoing." *Mamani III*, 968 F.3d at 1239 n.24; *see Ford*, 289 F.3d at 1288, *Drummond*, 782 F.3d at 609 (Plaintiffs must prove "that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes").

Because there is no evidence that Defendants had knowledge of any extrajudicial killings, *a fortiori* Plaintiffs cannot establish the "failure to prevent or punish" element of command responsibility. There is no evidence that either Defendant failed to take all necessary and reasonable measures to prevent any purported extrajudicial killings or punish those who committed them. The undisputed evidence is that automatic investigations would take place whenever civilians were harmed by the Bolivian military. DE 455 (Trial Tr. 3/13/18, Sánchez Berzaín Testimony) at 88:21-89:1.

Nor is there any evidence that Defendants *could have* prevented or punished extrajudicial killings: they lacked the operational ability to prevent (or order) the deaths, and any investigation and punishment was governed by military rules and independent tribunals. DE 455 (Trial Tr. 3/13/18, Sánchez Berzaín Testimony) at 89:6-21, 93:12-94:6; DE 474-7 (Harb Testimony) at 63:17-65:02. As Vice Minister of Government Jose Elias Harb explained, "According to the legal order of Bolivia, . . . every death that was not natural must be investigated by the federal prosecutor." DE 474-7 (Harb Testimony) at 63:24-64:10. Here, the agency of the federal prosecutor gathered information and investigated every death. *Id.* at 64:7-16. "And that was also done by the Human Rights Assembly and also by the committees of congress." *Id.*

Vice Minister Harb made clear that federal prosecutors, *not* President Sánchez de Lozada, had the authority and ability to investigate the deaths: "it was not a direct duty of the President to investigate deaths, but it is rather a ***duty of the federal prosecution***." *Id.* at 64:23-65:2 (emphasis added); *see also* Trial Ex. 1001 (Report from the Organization of American States) at 1001.13 ("the Office of the Chief Prosecutor of the Republic must determine, based on the specifics of each case, which incidents should be tried."). Likewise, Sánchez Berzaín had no authority or ability to investigate. His only role as Minister of Defense was to see that this process worked as an institution, not to intervene in the work of the independent tribunals. DE 455 (Trial Tr. 3/13/18, Sánchez Berzaín Testimony) at 93:12-94:6. Plaintiffs offered no evidence to the contrary.

Nonetheless, Sánchez de Lozada did what he could under the circumstances. After arriving in the United States to escape death threats by Evo Morales, DE 456 (Trial Tr. 3/14/18, Sánchez Berzaín Testimony) at 20:10-14; DE 475-5 (Testimony of Jorge Mario Eastman) at 134:19-134:24, Sánchez de Lozada requested an independent investigation into the events that had occurred, DE 459 (Trial Tr. 3/20/18, Sánchez de Lozada Testimony) at 158:10-160:10. He wrote letters to the Inter-American Commission for Human Rights, Trial Ex. 1072, and the United Nations Human Rights Committee, Trial Ex. 1073. Both letters "advocate[d] for the need for this important investigation to be conducted" and offered his full cooperation. Trial Ex. 1072; Trial Ex. 1073.

Concerning efforts to prevent violence, Plaintiffs reluctantly conceded the ongoing dialogue efforts by the Sánchez de Lozada government after September 20, 2003, but fault the government because "they didn't even pull the troops back." DE 463 (Trial Tr. 3/26/18) at 180:11-19.[7] But this Court properly rejected Plaintiffs' argument: "Plaintiffs cite no authority supporting

[7] For additional examples of the undisputed evidence of Defendants' efforts to resolve conflict peacefully through dialogue, *see also* Ex. 1002 at 1002.1 ("the Sánchez de Lozada government attempted to reconcile the country through dialogue and negotiation."); DE 474-8 (Testimony of

their argument that Defendants' decision not to abandon military operations after there had been civilian casualties supports an inference that those casualties, and all subsequent casualties, were intentional." Rule 50 Order, DE 488 at 24 (quoting *Mamani I*, 654 F.3d at 1155 ("Plaintiffs point to no case where similar high-level decisions on military tactics and strategy during a modern military operation have been held to constitute extrajudicial killing under international law.")). As the Three Prosecutors' Report expressly found following their ten-month investigation, Defendants were "not capable of preventing the conflicts" because their "calls for peacemaking dialogue went unheard by the social groups, which gradually became more radical in their demands and approach." Trial Ex. 1002 at 1002.27.

The law requires only that Defendants employ *reasonable* measures to prevent extrajudicial killings. DE 429 (Jury Instructions) at 15. Removal of troops during an ongoing civil uprising when their presence is legally required does not constitute a reasonable measure that Sánchez de Lozada should have (or could have) taken to prevent extrajudicial killings. There is no evidence of any necessary and reasonable measure that Defendants could have, but failed, to employ to prevent extrajudicial killings. Plaintiffs thus failed to produce any evidence to support the third indispensable element required by the command-responsibility doctrine. That failure provides yet another independent basis for granting the Rule 50 Motion.

In the end, Plaintiffs cannot escape the Eleventh Circuit's rejection of "strict liability akin to respondeat superior for national leaders at the top of the long chain of command." *Mamani I*,

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Guido Meruvia, played 3/21/2018) at 69:23-70:9, 106:12-110:16; DE 474-3 (Testimony of Jaime Aparicio, played 3/22/18) at 198:14-200:4; DE 474-5 (Testimony of Jorge Mario Eastman, played 3/22/18) at 125:25-131:2; DE 455 (Trial Tr. 3/13/18, Sánchez Berzaín Testimony) at 116:9-119:9; Trial Ex. 1006 at 1006.1 (Supreme Decree 27210, "calling for the Bolivian people and civil society organizations to immediately engage in dialogue"); Trial Exs. 1009 through 1023 (dialogue letters and "Agreement to Bring Peace to the City of El Alto").

654 F.3d at 1154. The Court requires more:

> [T]o decide whether plaintiffs have stated a claim for extrajudicial killing against *these* defendants, we must look at the facts connecting what these defendants personally did to the particular alleged wrongs. For extrajudicial killings, we do not accept the following statement of the district court as correct as a matter of international law or of federal court pleading: "The plaintiffs here allege 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]. This is sufficient." D. Ct. Order 27 (citation omitted). We believe it is insufficient.

Id. at 1155 n.8.

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

III. THERE IS NO EVIDENCE TO DEMONSTRATE THAT THE DEATH OF ANY DECEDENT WAS AN EXTRAJUDICIAL KILLING.

In its Rule 50 Order, this Court held that evidence of "specific crises at each of the locations where decedents were shot" supported its conclusion that Plaintiffs failed to prove the killings were "premeditated" or "deliberated." DE 488 at 18-19. The Eleventh Circuit disagreed, but not entirely. The Court held that evidence "consistent with purposeful acts by Bolivian soldiers to take civilian lives" was "sufficient—even if not overwhelming—" to show "that each death was a 'deliberated killing.'" *Mamani III*, 968 F.3d at 1236. But the Court explained that Plaintiffs still were required to show that the deliberated killings were *extrajudicial*. *Id.* The Court expanded on the term and held that an extrajudicial killing is one that is both deliberate *and* that is not "lawfully carried out under the authority of a foreign nation." *Id.*

Critically, the Eleventh Circuit explained that the evidence of specific crises cited by this Court in its Rule 50 ruling can support a finding that the killings were *not extrajudicial*: "evidence

suggesting that there were specific crises in each general location goes to whether the killings were extrajudicial, rather than to whether they were deliberated." *Id.* Thus, "a killing can be *deliberate*, but if, under international law, it is 'lawfully carried out under the authority of a foreign nation,' it would not be deemed an *extrajudicial* killing." *Id.* For example, "[i]nternational law . . . generally recognizes the use of proportionate force as lawful." *Id.* at 1237.[8]

Against this backdrop, the Eleventh Circuit reaffirmed that "the use of military force (and the resulting precipitate shootings) during an ongoing civil uprising may be lawful if the circumstances support such action." *Id.* *See also Mamani I*, 654 F.3d at 1155 ("precipitate shootings during an ongoing civil uprising," are not extrajudicial killings). Indeed, the Eleventh Circuit "agree[d] with the District Court that Plaintiffs' evidence about widespread casualties and a pattern of innocent deaths does not suffice to demonstrate that in any particular instance a death was an extrajudicial killing, as the same evidence is consistent with military reaction to just provocation, which is lawful under international law." *Mamani III*, 968 F.3d at 1240. Similarly, deaths "are not in violation of [international law] . . . when the death results from 'force which is no more than absolutely necessary' 'in defence of any person from unlawful violence,' . . . or 'in action lawfully taken for the purpose of quelling a riot or insurrection.'" *Id.* at 1238 (quoting European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 2, §§

[8] Notably, Plaintiffs' expert on "proportionate force"—Allen Borrelli—failed to appear at trial. Therefore, Plaintiffs offered no expert testimony on whether the force used was "disproportionate" in the context of armed conflict during a violent civil uprising. This failure of proof is dispositive because whether Bolivian soldiers used "proportionate force" in the circumstances of this case under Bolivian law involves "technical issues beyond a juror's ordinary knowledge." *See, e.g., Mama Jo's, Inc. v. Sparta Ins. Co.*, No. 17-cv-23362, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) ("Here, without its experts, Plaintiff cannot show that the construction dust and debris from 2014 caused the alleged 'direct physical loss' to their awnings, retractable roof, HVAC system, railings, and audio and lighting system. Thus, summary judgment is appropriate."), *aff'd*, 823 F. App'x 868 (11th Cir. 2020).

1 & 2, 1950, 213 U.N.T.S. 221). Deaths occurring due to "sudden passion or just provocation" also do not support a TVPA claim for "extrajudicial killing." *Id.* at 1239.

The Court should grant the Rule 50 Motion because no extrajudicial killings occurred, for two independent reasons: (1) the use of the military under the circumstances of this case was lawful under international law; and (2) even if the Court disagrees, there was no evidence that any of the decedents' deaths was the result of an unlawful shooting under international law.

A. Use of Military Not Unlawful.

Plaintiffs produced no evidence that it was unlawful to use military force to "quell[] a riot or insurrection." *Mamani III*, 968 at 1238. To the contrary, the Organic Law of the Armed Forces of Bolivia requires the President to call in the military when the police are insufficient to maintain public order. Trial Ex. 13 (Organic Law, art. 8) at 13-0002; DE 459 (General Veliz Testimony) at 23:21-24:3. The evidence here shows conclusively that the police were, in fact, insufficient to handle the violent threat. *See* DE 459 at 24:10-11 ("[w]e went in support of the operations being carried out by the military police because they were insufficient."); *id.* at 24:13-14 ("I am saying that they were insufficient."); *see also* Trial Ex. 1110 at 1110.1-.2 (National Police Headquarters Declaration of "Police State of Emergency" for entire police force starting September 19, 2003, and mandating police officers to "coordinate actions with the Armed Forces of the Nation").

Plaintiffs' own witness, Vice Minister of Government Harb, agreed that deployment of the military was lawful. As Harb explained, "[e]very day the issue of restoring order was talked about . . . because that is the purpose of every state, to maintain restored order. ***It's a legal obligation***." DE 474-7 (Harb Testimony) at 61:17-24 (emphasis added). The legal obligation existed because "[c]ertain sectors of society had been radicalized" and "there was a widespread crisis in the country." *Id.* at 133:19–134:2. Harb thus confirmed what all the other evidence showed: that the military was deployed to restore order in response to a national crisis, not to kill innocent civilians.

Harb testified that "[t]he President of the Republic was the first one who considered ***that the law had to be applied***. . . . From my standpoint, ***the President was trapped between the need to apply the law and the emergency to negotiate politically***." *Id.* at 165:4-10 (emphases added).

B. No Evidence that Each Death Was the Result of an Unlawful Shooting.

As this Court noted, and as the Eleventh Circuit agreed, there is evidence of "specific crises at each of the locations where decedents were shot." Rule 50 Order, DE 488 at 18; *Mamani III*, 968 F.3d at 1236. The Eleventh Circuit reaffirmed, moreover, that "the use of military force (and the resulting precipitate shootings) during an ongoing civil uprising may be lawful if the circumstances support such action." *Mamani III*, 968 F.3d at 1237. Ultimately, the question for this Court is whether the actions of the soldiers were "lawfully carried out under the authority of a foreign nation," in this case, Bolivia. *Id.*

Here, the only evidence addressing this point showed that the actions of the military were lawful. By order of the Chief Prosecutor in Bolivia, three independent prosecutors conducted a 10-month investigation into the deaths that occurred in September and October 2003 and submitted an official report. Trial Ex. 1002. The prosecutors found that "the intervention was preventive and in defense of higher legal goods of the community, such as life and the enjoyment of fundamental rights." *Id.* at 1002.27. They also found that the Armed Forces and National Police "acted within the scope of their constitutional duties and in defense of the constitutional and legal order of the country." *Id*. The Armed Forces and National Police "had to respond to acts of aggression from the demonstrators, which in some cases endangered the lives of their forces." *Id.* As a result, the prosecutors "reject[ed] . . . the accusations and criminal complaints presented . . . against the members of the Military High Command . . . [and] the Police High Command for the deaths of civilians, policemen, and servicemen in the tragic events of September and October of the year 2003." *Id.* at 1002.34.

Plaintiffs did not produce evidence to show that any decedent's death was unlawful or contrary to what the Bolivian prosecutors found. Accordingly, Plaintiffs failed to show that any decedent's death was an extrajudicial killing.

1. Marlene Nancy Rojas Ramos

The death of Marlene Nancy Rojas Ramos in Warisata on September 20 occurred when she was struck by a bullet during an ambush of a police and military convoy as it drove through the town. Trial Ex. 1002 at 1002.3. The military was escorting a fleet of buses carrying hundreds of tourists who had been held hostage in the nearby mountain town of Sorata. *Id.* "Upon entering the [Warisata] town center . . . the rural inhabitants attacked us with dynamite, rocks, and blunt objects that they hurled with slingshots. Given the situation, it was resolved that chemical agents and rubber bullets would be used." Trial Ex. 1042 (National Police Report) at 1042.3. But the ambush escalated. Insurgents attacked the convoy, firing shots "*from the hills and from some local homes*." Trial Ex. 1002 at 1002.3, 1002.27 (emphasis added); DE 474-6 (Col. Flores Testimony) at 130 (the Chachapumas forces "were shot during that convoy from the hills where there were armed civilians.").

"Rural inhabitants began to open fire with long-range firearms of varying calibers on the police and military units." Trial Ex. 1042 at 1042.3; *see also* Trial Ex. 1061 (National Police Report) at 1061.1 ("They began to throw rocks and shoot firearms at the buses and at the police and soldiers who were getting out of them."). "[T]he mobilized civilian population was armed with Mauser rifles and dynamite." Trial Ex. 1002 at 1002.27; Trial Ex. 1056 (National Police Report) at 1056.6 ("[C]ampesinos armed with Mauser rifles and other weapons . . . were waiting for us to pass through the town with the intent of ambushing us."); DE 474-7 (Harb Testimony) at 105:10-107:21 ("Q. . . . [T]here were armed peasants in the area of Warisata when the hostages

were being transported to La Paz, correct? A. Correct."). They used dynamite "to produce explosions causing rocks and boulders to fall and hit the vehicles in the convoy. This led to an armed confrontation, causing the first casualty for the Armed Forces." Trial Ex. 1002 at 1002.3.

Plaintiffs' witness, Aguilar Vargas, described the harrowing circumstances that he and his military unit encountered when they entered Warisata that day. He saw "tear gas . . . coming towards us" and "heard dynamite blasts" and "the sound of bullets" when he arrived. DE 474-1 (Aguilar Vargas Testimony) at 65:2-25. At the entrance of Warisata, he saw "people from the town stationed in trees on sides of the road" and reported it to his commander. *Id.* at 67:5-13. "[T]he peasants had weapons, they shot at us. . . . Bullets were flying." *Id.* at 112:11-113:21. He saw "injured police who had been shot." *Id.* at 69:5-7. He saw the body of a soldier from of his unit who had been shot. *Id.* at 76:4-14. The police "were desperate for help because of the wounded people"—they asked him to shoot because they "did not have war weapons." *Id.* at 69:5-20. They "were asking [us] to shoot at the mountains." *Id*. at 69:22-24. We "were all very nervous because the police kept telling [us] to shoot." *Id.* at 69:25-70:4. Still, Aguilar Vargas did not shoot at that point because he "didn't have an order yet from [his] superiors to shoot." *Id.* at 70:5-8.

It was not until after police and soldiers had been shot, injured, and killed that Lt. Miranda ordered Aguilar Vargas to remove his nonlethal ammunition and switch to lethal ammunition. *Id.* at 76:18-25. At that point, after non-lethal means had been exhausted, Lt. Miranda ordered Aguilar Vargas to "shoot below the belt" at anything that moved, and above the belt for anyone with dynamite or guns. *Id.* at 77:17-21. Aguilar Vargas testified that this order was designed to minimize the risk that unarmed people would be killed. *Id*. at 78:9-15. This order, and the progression that led to it, complied with the Bolivian military's rules of engagement. *See* DE 474-6 (Col. Flores Testimony) at 162:19-163:25 (describing progression from verbal warning to use of

tear gas and nonlethal ammunition to firing of warning shots. "And if they continue and persist, . . . shots are fired but from the waist down.").

The undisputed evidence at trial was that *both* soldiers and civilians were harmed during the ambush in Warisata. Trial Ex. 1042 at 1042.3 ("It was then that we learned that a soldier had died . . . with bullet wounds."); Trial Ex. 1112 (death certificate of 19-year-old soldier Sergio Vargas Castro, shot on Sep. 20 in "Warisata Plaza"); Trial Ex. 1114 (Sergio Vargas Castro autopsy report, reporting death "due to bullet wound"). The violence included injuries to local police officers. Trial Ex. 1061 at 1061.1 ("[Police] Sergeant Antonio Venegas Flores was also hit by a bullet in the back. . . . The shooting continued and more police and soldiers were wounded.").

Marlene was struck by a bullet as she stood facing a window on the second floor of her home, which sits in front of a row of hills. Trial Ex. 309 (Stipulated Facts) at 309-0002; Trial Ex. 1151 (photograph of Mamani home); DE 450 (Trial Tr. 3/6/18, Testimony of Etelvina Ramos Mamani) at 53:12-54:24. Plaintiffs admit that no one saw anyone shoot Marlene. DE 463 (Trial Tr. 3/26/2018) at 36:13-14. Her father Eloy testified that he had left his home and was hiding behind a rock on a hill behind the home when someone told him Marlene had been killed. DE 450 (Trial Tr. 3/6/18, Testimony of Eloy Rojas Mamani) at 62:22-63:2; Trial Ex. 1163 (photograph of hill behind Mamani home).

While Plaintiffs failed to produce forensic evidence concerning Marlene's death,[9] Defendants presented forensic evidence that was unrebutted: the injury pathway "was front to back, and up to down." DE 461 (Trial Tr. 3/22/18, Testimony of Dr. Joye Carter ("Dr. Carter Testimony")) at 34:5-9. As a result, the bullet "could not have been fired from a position on the

[9] Plaintiffs did not call a single witness to testify about ballistics or forensic evidence concerning any of the decedents.

ground close to her home." DE 462 (Trial Tr. 3/23/18, Testimony of David Katz ("Katz Testimony")) at 97:11-22. And it is not possible that the bullet produced by Plaintiffs could have been fired from within 75 meters of the home. *Id.* at 99:14-100:10. Instead, the only conclusion supported by the evidence is "that Marlene was hit by misdirected fire coming from a rural inhabitant in Warisata that opened fire with long-range firearms." *Id.* 103:24-104:3.

It is further indisputable, based on the evidence, that the bullet that struck Marlene could not have been fired by the soldiers Plaintiffs claim were responsible for her death. *See* DE 484 (Pls.' Opp. to Defs.' Mot. for Judgment as a Matter of Law) at 4 ("Special Forces in Warisata shot 'back and forth' into peoples' homes."); *id.* at 20 ("the Chachapumas[] [were] the Special Forces unit present in Sorata and Warisata"). As attested by Col. Nelson Flores, the commander of the Chachapumas, those soldiers exclusively carried M-16 rifles that fired 5.56 mm caliber bullets. DE 474-6 (Col. Flores Testimony) at 46:3-10, 50:15-51:08. Marlene was struck by a 7.62 mm bullet. Trial Ex. 1002 at 1002.17; DE 462 (Katz Testimony) at 99:1-13; Trial Ex. 34 (Ballistics Report) at 34-0004. In contrast to the Chachapumas, the "campesinos armed with Mauser rifles" were firing 7.62 mm rounds on September 20 in Warisata. Trial Ex. 1056 at 1056.6; DE 462 (Katz Testimony) at 96:16-19 ("Q. Can Mauser rifles shoot 7.62 bullets? A. Many Mausers have [a] chamber for the exact same round, yes. Q. What about M-16s? Can they fire a 7.62 bullet? A. No, they can't."); *see also* Trial Ex. 1115 at 1115.3 (ballistics report finding that police officers were struck with 7.62 caliber bullets in Warisata on September 20). Based on this unrebutted forensic evidence, the jury's verdict cannot stand. *See* Rule 50 Order, DE 488 at 13 ("[A] jury verdict is not entitled to the benefit of unreasonable inferences, or those at war with the undisputed facts." (internal quotation marks omitted)).

The investigation by the three Bolivian prosecutors specifically examined the

circumstances of the death of Marlene Nancy Rojas Ramos in Warisata. Trial Ex. 1002 at 1002.3. The prosecutors concluded that "[t]he response of the security forces [in Warisata] was proportional and measured[.]" *Id*. And they rejected the accusations and criminal complaints presented "against the members of the Military High Command . . . [and] the Police High Command" for the deaths of civilians in Warisata. *Id*. at 1002.34.

The death of Marlene Nancy Rojas Ramos was tragic and never should have happened. Plaintiffs did not produce any evidence, however, to show that her death was unlawful under international law and thus extrajudicial. Accordingly, the Court should grant the Rule 50 Motion with respect to Plaintiffs Etelvina Ramos Mamani and Eloy Rojas Mamani.

2. Teodosia Morales Mamani

Teodosia Morales Mamani was shot when a bullet from an unknown shooter "came through a wall" of her second-story apartment in Rio Seco. DE 453 (Trial Tr. 3/9/18, Testimony of Beatriz Apaza Morales) at 85:5-22, 96:12-13; Trial Ex. 1002 at 1002.14. She died after her husband and others were delayed for hours trying to get her to the hospital because of protestors blocking the roads. DE 452 (Trial Tr. 3/8/18, Testimony of Teofilo Baltazar Cerro) at 85:23-89:13. Protestors blocked ambulances from going through because ambulances had provided the service of transporting gas. *Id.* at 86:25-87:2. Teofilo had to exit the ambulance and tell the protestors that his wife was inside; and only after the protestors inspected the ambulance were they allowed to leave. *Id.* at 87:1-9.

Teodosia's death occurred on October 12 in the midst of violent clashes between security forces and insurgents in the city of El Alto and the Rio Seco area near her home. Trial Ex. 1002 at 1002.14. "In the city of El Alto, the Federation of Neighborhood Associations ordered a general blockade of all roads, instituting night watches, burning tires, and destroying public thoroughfares

in order to prevent vehicles from passing, which led to several clashes between security forces and the social groups involved in the violence seen in the city of El Alto during that time." *Id.* at 1002.5. "In Rio Seco, groups of vandals dug into the ground in several places to find the gas lines so they could blow them up with dynamite; at mid-day the footbridge located near Rio Seco was blown up with dynamite . . . . That same day, several of the people involved in the blockades and vandalism, which included some antisocial elements masquerading as protesters, took advantage of the confusion to commit criminal offenses; while stealing gasoline from the Rio Seco gas station, they caused an explosion that resulted in deaths as well as injuries. . . ." *Id*. at 1002.5; *see also* DE 454 (Trial Tr. 3/12/18, Testimony of Wilson Soria Paz) at 116:3-17 ("They brought to the parish two wounded people that were dying, and they were hurt in the explosion."); DE 453 (Trial Tr. 3/9/18, Testimony of Enrique Zabala Velasquez) at 46:12-14 (sounds of explosions and shooting rocked the Rio Seco area on October 12).

The bullet that struck Teodosia came through the wall of her upstairs apartment on a downward trajectory. Trial Ex. 1172 (photograph of bullet hole in wall); Trial Ex. 1173 (same, showing downward trajectory); Trial Ex. 1174 (same); DE 462 (Katz Testimony) at 48:21-25. The wound path for the bullet also travelled "up to down." DE 461 (Trial Tr. 3/22/18, Testimony of Dr. David Fowler ("Dr. Fowler Testimony")) at 61:12-19. Defendants presented unrebutted evidence that based on the up-to-down trajectory of the bullet that struck Teodosia, *it is not possible* that the bullet came from the street level where the soldiers were located. DE 462 (Katz Testimony) at 60:12-21. Instead, the shooter would "have to be firing, in this case, from a higher position, a rooftop, a higher window, someplace elevated." *Id*. at 60:23-61:3. Here, Plaintiffs elicited unrebutted evidence that "insurgents on rooftops" fired down on the police and military from their "elevated positions" in El Alto that day. *Id.* at 130:21-131:4, 150:8-15; *see also* Trial

Ex. 1137 (autopsy report concluding that an 18 year-old soldier Nemesio Sianca Garcia died in the Rio Seco area of El Alto on October 12 of an "open traumatic brain injury due to bullet"); Trial Ex. 1136 (death certificate of soldier Nemesio Sianca Garcia reporting same).

By contrast, there is no evidence anywhere in the record that soldiers were firing shots from elevated positions, or that soldiers were even present on rooftops or higher positions. Not a single witness testified to seeing a single soldier on rooftops or higher positions. To the contrary, Beatriz Apaza Morales, Teodosia's niece, testified that the soldiers near Teodosia's apartment were down on the street after "something happened" and "somebody had been killed." DE 453 (Trial Tr. 3/9/18, Testimony of Beatriz Apaza Morales) at 87:8-23, 89:6-8 (Beatriz "saw a young man fall on the avenue in an alley"). When Beatriz looked out the window, the soldiers warned her to "get inside, get inside." *Id*. at 88:8-16. Beatriz testified that the soldiers "would aim at us when we wanted to look [out] the window," but the soldiers never shot at her when she looked out the window. *Id*. At some point after that, Beatriz saw Teodosia fall on the floor—"all we saw was smoke." *Id*. at 92:21-25.

The investigation by the three Bolivian prosecutors specifically encompassed the death of Teodosia. Trial Ex. 1002 at 1002.14. The Bolivian prosecutors found that the Armed Forces and National Police "had to respond to acts of aggression from the demonstrators, which in some cases endangered the lives of their forces." *Id.* at 1002.27. The prosecutors found that "the security forces were the target of attacks with rocks, dynamite, and firearms." *Id*. at 1002.32. Based on their comprehensive investigation, and a thorough "[i]nternational scholarly legal opinion" analyzing "[t]he use of force and limits on the legitimate defense of the Democratic State" the prosecutors "reject[ed] . . . the accusations and criminal complaints presented . . . against the members of the Military High Command . . . [and] the Police High Command for the deaths of

civilians, policemen, and servicemen in the tragic events of September and October of the year 2003." *Id.* at 1002.34.

Plaintiffs did not produce any evidence to show that Teodosia's death was unlawful under international law and thus extrajudicial.[10] Accordingly, the Court should grant the Rule 50 Motion with respect to Plaintiff Teófilo Baltazar Cerro.

3. Roxana Apaza Cutipa

Roxana Apaza Cutipa was struck in the head by a bullet as she stood outside on the roof of her four-story home. DE 453 (Trial Tr. 3/9/18, Testimony of Guzman Apaza Cutipa) at 72:1-5, 74-75. Nobody saw who fired the shot that struck Roxana, or even where it came from. Her brother, Guzman Apaza, testified that he heard explosions for a half-hour before his sister was shot. *Id.* at 78:6-79:4; 75:19-22. He could see people running in the street and military tanks and trucks. *Id.* at 74:13-20. "We heard noise and sounds and screams." *Id.* at 73:5-11. Roxana's other brother, Hernan Apaza, testified that, "starting at 6:30," he heard "[n]oises, people screaming, firecracker noises. It also seemed like shots . . . ." *Id.* at 101:12-16.

Roxana's death occurred on October 12 in the midst of violent clashes between security forces and insurgents in the city of El Alto near her home, only blocks away from the Rio Seco area. "In the city of El Alto, the Federation of Neighborhood Associations ordered a general blockade of all roads, instituting night watches, burning tires, and destroying public thoroughfares in order to prevent vehicles from passing, which led to several clashes between security forces and the social groups involved in the violence seen in the city of El Alto during that time." Trial Ex.

[10] As this Court has previously found, the undisputed facts of Teodosia's death are inconsistent with a finding of extrajudicial killing and, instead, evidence the paradigm of "an accidental or negligent killing (*e.g.*, *a stray bullet that penetrated the wall*)." *Mamani v. Berzaín*, 2009 WL 10664387, at *17 (S.D. Fla. Nov. 25, 2009) (emphasis added).

1002 at 1002.5. Protestors carrying sticks of dynamite were "threatening to take physical control of the international airport in El Alto," just blocks away. DE 474-7 (Harb Testimony) at 119:19-120:5; *see also* 128:10-20; Trial Ex. 1147 (video of destroyed overpass in El Alto, attached at DE 476 and played at DE 474-1 at 102:5-9 and DE 474-4 at 50:7-17).

Here, too, the evidence showed that "insurgents on rooftops" fired down on the police and military from their "elevated positions" in El Alto that day. DE 462 (Katz Testimony) at 130:21-131:4, 150:8-15. As with Teodosia, the bullet that struck Roxanna came from a top-down trajectory, causing a wound that went "from top to bottom and backwards." DE 461 (Dr. Fowler Testimony) at 59:23-60:5. Defendants presented unrebutted forensic evidence that it was not possible to determine the distance of the shooter from Roxana. *Id.* at 60:9-11. There is no evidence any soldiers were firing shots from elevated positions, or that soldiers were even present on rooftops or higher positions. Defendants also presented unrebutted evidence that it would have been impossible for anyone to aim at and shoot Roxana "in low-light conditions on the top of a roof" from seven blocks (400 meters) away on Avenue Juan Pablo, the only place where soldiers were located based on the evidence presented by Plaintiffs. DE 462 (Katz Testimony) at 49:5-11, 72:9-74:4. There was no line of sight for any shooter from Avenue Juan Pablo to Roxana's building. *Id.* at 71:5-72:8, 72:16-19. It is possible, however, that the shot came from a nearby rooftop, from which only protestors were shooting. *Id.* at 74:6-9.

The investigation by the three Bolivian prosecutors specifically included the death of Roxana. Trial Ex. 1002 at 1002.15. The Bolivian prosecutors found that the Armed Forces and National Police "had to respond to acts of aggression from the demonstrators, which in some cases endangered the lives of their forces." *Id.* at 1002.27. The prosecutors found that "the security forces were the target of attacks with rocks, dynamite, and firearms." *Id.* at 1002.32. Based on

their comprehensive investigation, the prosecutors "reject[ed] . . . the accusations and criminal complaints presented . . . against the members of the Military High Command . . . [and] the Police High Command for the deaths of civilians, policemen, and servicemen in the tragic events of September and October of the year 2003." *Id.* at 1002.34.

Plaintiffs did not produce any evidence to show that Roxana's death was unlawful under international law and thus extrajudicial. Accordingly, the Court should grant the Rule 50 Motion with respect to Plaintiff Hernán Apaza Cutipa.

4. Marcelino Carvajal Lucero

Marcelino Carvajal Lucero died after being struck by a bullet as he stood near a bedroom window on the second floor of his home. DE 452 (Trial Tr. 3/8/18, Testimony of Juana Valencia Carvajal) at 74:12-25. Marcelino was by himself in the room when he was shot. *Id.* at 80:10-19. Nobody saw who fired the shot, or where it came from. His wife, Juana Valencia Carvajal, testified, "I can't lie, I didn't see them shooting." *Id.* at 74:17.

Marcelino's death occurred on October 12 in the midst of violent clashes between security forces and insurgents in the Rio Seco area of El Alto near his home and family store. Trial Ex. 1002 at 1002.5, 1002.14. As noted above, protestors caused the explosion of a gas station, *id.* at 1002.5, and threatened to attack the nearby airport with dynamite, DE 474 (Harb Testimony) at 119:19-120:5; *see also id.* at 128:10-20, 134:21-23 ("Q. Had there been an explosion at a gas station in El Alto around this time? A. Yes."). The Carvajal family's store downstairs was closed because the protestors would not allow them to sell anything. DE 452 (Trial Tr. 3/8/18, Testimony of Juana Valencia Carvajal) at 79:8-18, 72:11-16. According to Juana, "[t]he war with the military was very dire. They were throwing firecrackers." *Id.* at 72:20-23. "There was a lot of noise out

there. [The avenue] was blocked with stones and glass and tires on fire and metal pieces." *Id.* at 73:13-16. She saw soldiers carrying weapons "[b]ecause there was opposition." *Id*. at 74:1-6.

The bullet that struck Marcelino came through a window on the second floor of his home. *Id.* at 74:12-25. As with Teodosia and Roxanna, the bullet came from a top-down angle, causing a wound trajectory from the front of Marcelino "towards his back and from above downwards." DE 461 (Dr. Fowler Testimony) at 62:6-11. It was not possible to determine the distance of the shooter from Marcelino. *Id.* at 62:16-22. Defendants presented unrebutted evidence that based on the up-to-down trajectory of the bullet, the shot could not have come from the street level where Juana saw the soldiers. DE 462 (Katz Testimony) at 49:19-50:4; *id.* at 50:1-4 ("The wound to Mr. Lucero's body came in through his scapula and down through his body at a 35-degree angle from up to down. That suggests a shot coming from an elevated position, and there's no other way to explain it, given the context."). There is no evidence that any soldiers were firing shots from elevated positions, or that soldiers were even present on rooftops or higher positions. On the other hand, Plaintiffs elicited unrebutted evidence that "insurgents on rooftops" fired down on the police and military from their "elevated positions" in El Alto that day. *Id.* at 130:21-131:4, 150:8-15.

The investigation by the three Bolivian prosecutors specifically encompassed the death of Marcelino in the Rio Seco area. Trial Ex. 1002 at 1002.14; DE 452 (Trial Tr. 3/8/18, Testimony of Juana Valencia Carvajal) at 80:23-25. The Bolivian prosecutors found that the Armed Forces and National Police "had to respond to acts of aggression from the demonstrators, which in some cases endangered the lives of their forces." Trial Ex. 1002 at 1002.27. The prosecutors found that "the security forces were the target of attacks with rocks, dynamite, and firearms." *Id.* at 1002.32. Based on their comprehensive investigation, the prosecutors "reject[ed] . . . the accusations and criminal complaints presented . . . against the members of the Military High Command . . . [and]

the Police High Command for the deaths of civilians, policemen, and servicemen in the tragic events of September and October of the year 2003." *Id.* at 1002.34.

Plaintiffs did not produce any evidence to show that Marcelino's death was unlawful under international law and thus extrajudicial. Accordingly, the Court should grant the Rule 50 Motion with respect to Plaintiff Juana Valencia de Carvajal.

5. Lucio Santos Gandarrillas Ayala

Lucio Santos Gandarrillas Ayala died after being struck by a bullet when he leaned out from behind a kiosk in the Senkata area of El Alto. DE 474-4 (Testimony of Luis Castaño, played 3/7/18 ("Castaño Testimony")) at 64:25-65:7. There was more than one person with Lucio behind the kiosk. *Id.* at 65:13-15. The only "eyewitness" to Lucio's shooting admits that he "couldn't tell whether it had been any of the military that gave the shot because all I did was hear the shot." *Id.* at 40:5-10. The witness himself was shot too and had difficulty getting to the hospital—even in an ambulance—because so many protestors were blocking the roads. *Id.* at 73:8-75:22.

Lucio's death occurred on October 12 in the midst of violent clashes between security forces and insurgents in the Senkata area of El Alto, near a gas plant from which the military escorted fuel trucks to relieve shortages in La Paz caused by the protestors' blockades. Trial Ex. 1002 at 1002.5. That day in Senkata, insurgents launched "attacks on the tanker trucks transporting gasoline to the city of La Paz" as "the mobilized civilian population was armed with Mauser rifles and dynamite." *Id*. at 1002.27. The "attacks" targeted "the members of the joint forces," and "the attacks on the tanker trucks endangered the lives of the hundreds of civilians who did not take part in the clashes." *Id*. Vice Minister Harb testified that he received a report on October 12 that "the gas convoy had been shot at" and "a soldier who was with the convoy actually was hit in the head

by a bullet." DE 474-7 (Harb Testimony) at 140:3-23; *see also id.* ("There were deaths from the National Police and from the army. That is documented as part of history.").

Although armed soldiers were positioned to shoot more than a city block away, the only alleged eyewitness conceded that he just "heard a shot" and saw a man fall. DE 474-4 (Castaño Testimony) at 34:11-15, 35:2-6, 35:16-37:20, 64:25-65:7. According to the unrebutted forensic evidence, it was not possible to determine the distance of the shooter from Lucio. DE 461 (Dr. Fowler Testimony) at 63:21-23. There was no ballistics evidence at all. DE 462 (Katz Testimony) at 50:5-14. But Defendants presented unrebutted evidence that, based on the eyewitness's testimony, the soldiers 180 meters away would not have had a line of sight to see Lucio at the kiosk, much less to shoot at him. *Id.* at 76:21-77:14.

The investigation by the three Bolivian prosecutors specifically included the death of Lucio in the Senkata area of El Alto. Trial Ex. 1002 at 1002.15. The Bolivian prosecutors found that the Armed Forces and National Police "had to respond to acts of aggression from the demonstrators, which in some cases endangered the lives of their forces." *Id.* at 1002.27. The prosecutors found that "the security forces were the target of attacks with rocks, dynamite, and firearms." *Id.* at 1002.32. Based on their comprehensive investigation, the prosecutors "reject[ed] . . . the accusations and criminal complaints presented . . . against the members of the Military High Command . . . [and] the Police High Command for the deaths of civilians, policemen, and servicemen in the tragic events of September and October of the year 2003." *Id*. at 1002.34.

Plaintiffs did not produce any evidence to show that Lucio's death was unlawful under international law and thus extrajudicial. Accordingly, the Court should grant the Rule 50 Motion with respect to Plaintiff Sonia Espejo Villalobos.

6. Arturo Mamani Mamani and Jacinto Bernabé Roque

Arturo Mamani Mamani and Jacinto Bernabé Roque each died after being struck by a bullet on different mountaintops overlooking the Animas Valley in the Southern Zone of La Paz. DE 454 (Trial Tr. 3/12/2018, Testimony of Gonzalo Mamani Aguilar) at 40:4-41:13, 42:22-23 ("the hills are kind of like little mountains"); Trial Ex. 1166A (photograph of locations on mountaintops); Trial Exs. 1178-1180 (drone footage taken by Plaintiffs, attached at DE 476).

Their deaths occurred on October 13, in the midst of violent clashes between security forces and insurgents in the province of Uni, in the same locality where a twenty-year old soldier, Edgar Lecona Amaru, was shot in the head and killed by insurgents who fired from the hills. Trial Ex. 1133 (Lecona autopsy report); Trial Ex. 1002 at 1002.13-.14, .20 ("death of one military conscript was caused by peasants facing off with military forces"). Insurgents blocked the main road, attacked the military while it was stopped at the blockade on the road below them, shot soldier Lecona in the head, and burned a military truck. DE 474-2 (General Antezana Testimony) at 139:5-143:13; DE 455 (Trial Tr. 3/12/18, Testimony of Jose Limber Flores Limachi) at 130:12-21; Trial Ex. 1133; Trial Exs. 1145/1145A (video of truck burning, attached at DE 476).

The bullet that struck Arturo hit him in the leg as he lay down on top of a mountain hundreds of feet above the road below. DE 461 (Dr. Carter Testimony) at 28:2-3; Trial Ex. 1166A (red marking). At the time the bullet struck him, he was lying on his back, "covered with straw." DE 454 (Trial Tr. 3/12/2018, Testimony of Gonzalo Mamani Aguilar) at 62:6-15. It is not possible to say the distance from which Arturo was shot. DE 461 (Dr. Carter Testimony) at 29:8-10. Jacinto also was struck by a bullet in the leg as he lay on top of an adjacent mountain, also hundreds of feet above the road below. *Id.* at 30:4-6; Trial Ex. 1166A (yellow marking). It is not possible to say the distance from which Jacinto was shot. DE 461 (Dr. Carter Testimony) at 30:24-31:1.

Defendants presented unrebutted evidence that neither Arturo nor Jacinto would have been visible to anyone on the road from their positions. DE 462 (Katz Testimony) at 50:15-22, 82:1-89:20. Likewise, it was not possible for anyone to aim at and shoot Arturo or Jacinto from the road below. *Id.*

The only "eyewitness" to the shootings, Gonzalo Mamani Aguilar, was lying in tall grass behind Jacinto on a mountaintop hundreds of meters away from where his father Arturo was lying down on a different mountaintop. DE 454 at 63:22-65:22; *see also* Trial Ex. 1168A (photograph of Gonzalo's position); Trial Ex. 1169 (same). Gonzalo testified that he only heard his father cry out. DE 454 at 38:21-39:5; 41:8-11. He did not see the military shoot his father. *Id.* Nor did he see the military shoot Jacinto. *Id.* at 41:12-42:10. When he first saw the military arrive at a blockade on the road below him earlier that morning—before the soldier Edgar Lecona was shot through the head from the hills—"[t]hey were not shooting." *Id.* at 59:1-15.

The testimony of plaintiffs' own witnesses rebuts any allegations that soldiers used disproportionate force. Augustin Sirpa, who was in the same area of the Animas Valley on the day Arturo and Jacinto were shot, attested to the military's use of proportionate force in the face of armed attacks by protestors. DE 456 (Trial Tr. 3/14/2018) at 68:10-72:6.

The following testimony is undisputed: On October 13, Sirpa became part of a blockade of over 200 people in the Southern Zone. *Id.* at 54:3-5. The purpose of the blockade was to stop all vehicles from passing through. *Id.* at 68:10-12. The police first came to the blockade around 9:00 a.m. and asked the crowd to leave. *Id.* at 69:16-25. The military came next and again asked the crowd to leave, gave the blockaders time to collect their things, and left the scene. *Id.* at 70:11-22. The blockaders did not move, however, and the military returned. *Id.* The military then used tear gas to disperse the crowd but they still would not leave. *Id.* at 71:3-18. Consistent with the

testimony of Gonzalo, during the interactions with the police and the military at this point, Sirpa heard no shots. *Id.* at 71:1-18. The blockaders went up the hills in response to the teargas and threw projectiles at the military. *Id.* Still, at that point, there was no shooting. *Id.*

Sometime around 11:00 a.m., the soldier Lecona was shot and killed near the blockade on the Animas Valley Road. Trial Ex. 1133 at 1133.1 (stating 3:10 p.m. investigation was conducted approximately 4 hours post mortem); Trial Ex. 1131 (death certificate reporting that soldier Lecona was killed by "open head trauma caused by gunshot"); Trial Ex. 1137 (Lecona autopsy, reporting "open traumatic brain injury due to bullet"); DE 474-2 (General Antezana Testimony) at 139:05-141:16. As General Antezana testified, the military left Uni at 9:00 a.m. heading west on the Animas Valley road and was ambushed shortly thereafter:

> Q. Did Captain Belmonte report back to you that there had been an ambush?
> A. Yes. He called me because he had felt an ambush and he had a dead soldier. . . .
> Q. So someone under his command who belonged to the military school had been shot?
> A. Yes. Soldier Leco[n]a instantly died with a shot in his eye.
> Q. Did he report to you the manner in which he had been shot?
> A. Yes. When they reached the obstacle, the ditch on the road, the truck suddenly stopped and the order was to disembark and adopt a security measure. While they were analyzing a way to go through this obstacle some shots were made and he was able to see that the soldier was killed.

Id. at 139:05-141:16. General Antezana responded to Captain Belmonte that he should try to exit the ambush zone, following the rules of engagement. *Id.* at 142:09-143:13. It was only after Lecona was shot that any orders were given to change from non-lethal to lethal ammunition. DE 454 (Trial Tr. 3/12/2018, Testimony of Jose Limber Flores Limachi) at 151:2-6. Only then, around 11:00 a.m.—after tear gas was used to disperse the crowd and a soldier was shot in the head—did Sirpa began to see bullets coming from the direction of the military. DE 456 at 53:9-54:5.

The military then saw Sirpa while he was carrying an injured person, Fausto Ramos, up a hill. *Id.* at 55:25-56:6, 71:19-72:1. The military ordered Sirpa to put his "hands in the air" and he

and Fausto were detained. *Id.* The military carried Fausto 30 meters to the military trucks, and then took him to the hospital. *Id.* at 56:15-22, 64:7-10. As soon as Sirpa was detained, the military asked him "who killed the soldier?" *Id.* at 56:22-24. Sirpa was questioned and then released to go home. *Id.*at 63:24-64:2.

The investigation by the three Bolivian prosecutors specifically encompassed the deaths of Arturo, Jacinto, and the soldier Lecona in the Southern Zone of La Paz and is consistent with Plaintiffs' witnesses' testimony. Trial Ex. 1002 at 1002.8. The prosecutors found that "the security forces were the target of attacks with rocks, dynamite, and firearms." *Id.* at 1002.32, 1002.5 ("the Neighborhood Associations of El Alto announced that they were going to come down into the Zona Sur [southern suburbs] of La Paz to ransack the city."). Based on their comprehensive investigation, the prosecutors "reject[ed] . . . the accusations and criminal complaints presented . . . against the members of the Military High Command . . . [and] the Police High Command for the deaths of civilians, policemen, and servicemen in the tragic events of September and October of the year 2003." *Id*. at 1002.34.

Plaintiffs did not produce any evidence to show that Arturo's or Jacinto's deaths were unlawful under international law and thus extrajudicial. Accordingly, the Court should grant the Rule 50 Motion with respect to Plaintiffs Gonzalo Mamani Aguilar and Hermógenes Bernabé Callizaya (son of decedent Jacinto Bernabé Roque).

7. Raul Ramón Huanca Márquez

Raul Ramón Huanca Márquez died on October 13 after being struck by a bullet in the town of Ovejuyo in the Southern Zone of La Paz, "very close" to the spot on the Animas Valley road where, as noted above, insurgents ambushed the military from the hills and shot the soldier Lecona. Trial Ex. 1133; Trial Ex. 1002 at 1002.13-.14, .20; DE 474-2 (General Antezana Testimony) at

139:5-139:25 ("Q. And to get from Uni to Chasquipampa there's one road and you have to go through the Animas Valley in the Ovejuyo area; is that right? A. That is right—that is correct. Q. Did Captain Belmonte report back to you that there had been an ambush? A. Yes."); DE 474-9 (Testimony of Juan Carlos Pari ("Pari Testimony"), played on 3/12/18) at 46:12-24. Insurgents also surrounded the military, took their weapons, and burned a military truck in the nearby town of Chasquipampa that same day. Trial Exs. 1145/1145A (video of truck burning, attached at DE 476); DE 474-2 (General Antezana Testimony) at 135:11-19 ("[T]here were about 4,000 to 5,000 people in place. They surrounded the truck and soldiers asking them to surrender, to leave their weapons on the floor, especially the truck as they needed that as a trophy.").

Raul's death occurred in the midst of these violent uprisings. Trial Ex. 1002 at 1002.14. Plaintiff's witness Juan Carlos Pari—who was looking out his window on the town of Ovejuyo—testified that there were people positioned in the hills above the military at the time. DE 474-9 (Pari Testimony) at 33:19-34:15. Prior to any shots fired by the military in Ovejuyo that day, something happened in the hills that Pari could not see. *Id.* at 60:20-62:17. He heard shots fired but could not see who was shooting. *Id.* He "only saw the[military] positioned to shoot" on a bridge above the town. *Id.* He could not "see what happened at that spot" in the hills. *Id.*

Mr. Pari then saw three young men come out from behind a store with Raul behind them. *Id.* at 76:16-77:13. Because the store had been closed for days and no one else was moving in the town, Mr. Pari did not know why they were there. *Id.* at 26:12-23; *see also id.* at 76:18-77:20. The young men then jumped across a riverbed, while Raul was behind them. *Id.* at 26:12-23; *see also id.* at 76:18-77:09. At that moment, "everything started," and there was "chaos" and "confusion" originating from the hills that Pari could not see, and the youths coming out from behind the store:

> A. At the moment, I only saw them, but here it started [indicating the hills]. So from here, it's where everything started, and there were more people here, but I couldn't see. I didn't see what was going there. I was right here, the man that fell behind the post and the other thing.
> Q. When you said when everything started, there was confusion, right?
> A. Yes.
> Q. There was chaos?
> A. Well, with the persons who were coming out.

Id. at 78:4-19.

Pari then saw the military on the bridge shooting, but he did not see Raul get shot. *Id.* at 73:8-20. There "was shooting going on," he "heard the shot, and then [he] looked and saw [Raul] fall." *Id.* The bullet that struck Raul hit him in the abdomen. DE 461 (Dr. Carter Testimony) at 32:10-18. It is not possible to say the distance from which Raul was shot. *Id*. at 33:9-11.

Defendants presented unrebutted forensic evidence that Raul could not have been shot by soldiers from the bridge, as Plaintiffs contend, because there was no direct line of sight from the bridge to the spot where Raul was hit. DE 462 (Katz Testimony) at 51:4-12, 93:3-94:19. The images of the shooting location in Ovejuyo from Google Earth in October 2003 definitively show that there were several large structures between the bridge and the location where Raul was shot that would have prevented soldiers on that bridge from seeing, much less targeting and shooting, Raul. *Id.* at 51:4-12, 93:3-94:19 ("Does this picture taken just two months before October 2003 indicate that there is a structure in between those two locations? . . . THE WITNESS: There are several structures in the way. . . . Q. Sir, would an individual on the bridge have a line of sight between at least those three obstacles to where the individual Mr. Pari said he saw get shot, get shot? A. No, ma'am."); *see also* Trial Ex. 87 (Google Earth satellite photo reflecting structures between bridge (blue dot) and the location of Raul (red dot)). This evidence is undisputed—as Pari did not, and cannot, attest to the vantage point from the bridge—and precludes an inference that the military shot Raul from the bridge as Plaintiffs contend. *See* Rule 50 Order, DE 488 at 13

(rejecting "unreasonable inferences, or those at war with the undisputed facts." (internal quotation marks omitted)).

The investigation by the three Bolivian prosecutors specifically encompassed the death of Raul and the soldier Lecona in the Southern Zone around the town of Ovejuyo. Trial Ex. 1002 at 1002.8, 1002.14. The prosecutors found that "the security forces were the target of attacks with rocks, dynamite, and firearms." *Id.* at 1002.32, 1002.5 ("the Neighborhood Associations of El Alto announced that they were going to come down into the Zona Sur [southern suburbs] of La Paz to ransack the city."). As discussed above, on October 13, the soldier Lecona was shot from the hills "very close" to where Raul was shot, DE 474-9 (Pari Testimony) at 46:12-24, before any shots were fired by the military that day, *see* Trial Ex. 1002 at 1002.20 ("death of one military conscript was caused by peasants facing off with military forces"). Based on their comprehensive investigation, the prosecutors "reject[ed] . . . the accusations and criminal complaints presented . . . against the members of the Military High Command . . . [and] the Police High Command for the deaths of civilians, policemen, and servicemen in the tragic events of September and October of the year 2003." *Id.* at 1002.34.

Plaintiffs did not produce any evidence to show that Raul's death was unlawful under international law and thus extrajudicial. Accordingly, the Court should grant the Rule 50 Motion with respect to Plaintiff Felicidad Rosa Huanca Quispe.

* * * *

Plaintiffs called twenty-three live witnesses and six witnesses by video deposition. They presented eighty-seven trial exhibits. They established that certain casualties occurred but failed to show that any of the decedent's deaths resulted from an extrajudicial killing. For each decedent, the unrebutted forensic evidence shows that none of the deaths could have occurred in the manner

that Plaintiffs contend. Moreover, Plaintiffs produced no evidence that it was unlawful to use military force, or that the military was sent to kill civilians. Instead, the undisputed evidence showed that the military lawfully was deployed to address a specific crisis at each location where decedents died. Trial Ex. 1002 at 1002.28 ("Their actions were taken in response to the social movements, whose violence was endangering social peace."); *see* Rule 50 Order, DE 488 at 18-19 (there were "specific crises at each of the locations where decedents were shot"). The independent Bolivian prosecutors who investigated the deaths thus found that none of the decedent's deaths was unlawful under Bolivian law. Trial Ex. 1002 at 1002.34. Plaintiffs presented no evidence to rebut those findings.

For these reasons, the Court should grant the Rule 50 Motion because Plaintiffs failed to produce "sufficient evidence to demonstrate that each death was not lawful under international law and thus extrajudicial." *Mamani III*, 968 F.3d at 1240.

IV. At a Minimum, the Court Should Grant Defendants' Motion for a New Trial Under Rule 59.

Plaintiffs failed to produce sufficient evidence to support their TVPA claims on the issues remanded to this Court. As a result, the Court should grant judgment as a matter of law in Defendants' favor on the TVPA claims. Alternatively, the Court should order a new trial under Rule 59. In considering the facts set forth in this Motion, the Court "is free to weigh the evidence," including "not only that evidence favoring the jury verdict but evidence in favor of the moving party as well." *Williams*, 689 F.2d at 973. Viewing the evidence under this standard requires, at a minimum, a new trial with respect to any decedent for which the Court finds there was sufficient evidence to withstand the Rule 50 Motion.

CONCLUSION

Rule 50(a) "aims to facilitate the exercise by the court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the Due Process Clause of the Fifth Amendment." Fed. R. Civ. P. 50 (1991 Advisory Comm. Notes).

Plaintiffs failed to adduce any evidence that the decedents "were killed by soldiers acting under orders to indiscriminately shoot at civilians and that Defendants were either personally involved in those orders or otherwise failed to prevent or punish such conduct within their chain of command." *Mamani III*, 968 F.3d at 1239–40. As was made clear at trial, Plaintiffs have never put forth *any* evidence of the involvement of Defendants in *any* order to use lethal force, indiscriminate or otherwise, nor could they as the Bolivian military structure does not contemplate such an order.

There simply is no evidence that links Defendants with any extrajudicial killings in this case. The Eleventh Circuit "do[es] 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." *Mamani I*, 654 F.3d at 1154. Accordingly, for these reasons and for the reasons stated in Dkt. Nos. 421, 421-1, 475 & 487, and at oral argument, all of Plaintiffs' claims fail as a matter of law and judgment should be entered in favor of Defendants on all TVPA claims. Alternatively, the Court should grant Defendants' motion for a new trial under Rule 59.

Dated: November 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 20, 2020, I electronically filed the foregoing documents with the Clerk of the Court using CM/ECF. I also certify that the foregoing documents are being served this day on all counsel of record or parties of record on the Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ James E. Gillenwater
James E. Gillenwater

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