RECORD NO. 10-1908

In The
United States Court of Appeals
For The Fourth Circuit

MOHAMMED AZIZ, MERAN SALIH ABDULLAH; MOSSA ABDULLAH MOSSA; SUTHI A. MOSSA; ZAKIA SADULLA; KURDISH NATIONAL CONGRESS OF NORTH AMERICA, "KNC," on behalf of themselves and all other similarly situated,

Plaintiffs – Appellants,

v.

ALCOLAC, INCORPORATED,

Defendant – Appellee.

REPUBLIC OF IRAQ, a sovereign nation; VWR INTERNATIONAL, LLC, a/k/a VWR International LTD, f/k/a BDH, LTD; THERMO FISHER SCIENTIFIC, INCORPORATED, f/k/a Oxoid, LTD, a/k/a Oxoid Incorporated; JOHN DOES #1-100,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 10-1908 Caption: Mohammed Aziz, et al. v. Alcolac, Incorporated

Pursuant to FRAP 26.1 and Local Rule 26.1,

Alcolac, Incorporated (name of party/amicus) who is Appellee (appellant/appellee/amicus), makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
   Rhodia, Inc., Rhodia Holding Inc., Rhodia Iberia SL, and Rhodia S.A.
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
   If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑ YES ☐ NO
   If yes, identify entity and nature of interest:
   Rhodia S.A.
5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on December 8, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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Dec. 8, 2010
(date)

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JURISDICTIONAL STATEMENT

The district court's jurisdiction was invoked under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1350 (the Alien Tort Statute). J.A. 358-59 (¶¶ 18-19). This Court's jurisdiction is invoked under 28 U.S.C. § 1291 (appellate jurisdiction from final decisions of district courts).

The district court entered a final judgment under Federal Rule of Civil Procedure 54(b) on July 20, 2010. J.A. 416. Appellants filed a notice of appeal on August 9, 2010. *Id*. at 417.

STATEMENT OF THE ISSUES

1. Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note, imposes liability not only on "individual[s]" (*id*. § 2(a)), but also on corporations.

2. Whether any binding norm of customary international law made applicable by the Alien Tort Statute, 28 U.S.C. § 1350, imposes liability on corporations that allegedly aided and abetted purported international crimes without the purpose to facilitate such crimes.

STATUTORY PROVISIONS INVOLVED

The Torture Victim Protection Act provides in full as follows (28 U.S.C. § 1350 note (Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73)):

Torture Victim Protection

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991."
SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of Remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of Limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) Extrajudicial Killing.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture.—For the purposes of this Act—

> (1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and
>
> (2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—
>
> > (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
> >
> > (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
> >
> > (C) the threat of imminent death; or
> >
> > (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The Alien Tort Statute provides in full as follows (28 U.S.C. § 1350):

> **Alien's action for tort**
>
> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

On April 7, 2009, five former residents of Kurdish areas of northern Iraq and the Kurdish National Congress of North America (the "Kurdish Representatives") filed a putative world-wide class action on behalf of approximately 100,000 Kurdish people against the Republic of Iraq, Alcolac, Inc. ("Alcolac"), two other corporate defendants, and 100 John Doe defendants for damages caused by Iraq's use of chemical weapons against the Kurds in 1988. The class-action complaint asserted ten claims and sought compensatory and punitive damages and the costs of medical monitoring. J.A. 12-37.

On August 10, 2009, Alcolac filed a motion to dismiss the class-action complaint. J.A. 38-39. Alcolac supported its motion with a 60-page memorandum of law and additional exhibits of which Alcolac asked the district court to take judicial notice. *Id*. at 40-344.

On November 9, 2009, the Kurdish Representatives attempted to withdraw their original class-action complaint and substitute an amended class-action complaint. J.A. 345-86 (the "Amended Complaint"). The district court ultimately permitted the substitution. *Id*. at 402.

The Amended Complaint asserts two claims against Iraq, Alcolac, and 100 John Doe defendants: (1) violation of the Torture Victim Protection Act, 28 U.S.C. § 1350 note (the "TVPA") and (2) violation of the Alien Tort Statute, 28 U.S.C.

§ 1350 (the "ATS"). J.A. 370-72 (¶¶ 51-62). Like the original complaint, the Amended Complaint seeks certification of a world-wide class of "approximately 100,000" Kurds who were attacked by Iraq with chemical weapons in 1988. *Id*. at 366-67 (¶¶ 40, 43). The Amended Complaint also seeks compensatory and punitive damages and medical monitoring costs. *Id*. at 373.

After further briefing and oral argument, on June 9, 2010, the district court granted Alcolac's motion to dismiss the Amended Complaint with prejudice. J.A. 414-15. Although the original complaint alleged claims against Iraq and those claims continued in the Amended Complaint, the Kurdish Representatives had not and still have never, served Iraq. Expressly finding that "there is no just reason for delay," the district court on July 20, 2010, entered a final judgment in favor of Alcolac under Federal Rule of Civil Procedure 54(b). J.A. at 416.

This appeal followed. J.A. 417.

STATEMENT OF THE FACTS

The facts for purposes of Alcolac's motion to dismiss and this appeal are drawn from the Amended Complaint, the four exhibits attached to the Amended Complaint, and documents referenced in the Amended Complaint or that were

appended to the memoranda in support of or opposition to the motion to dismiss and that are subject to judicial notice.[1]

A. Alleged Facts Directed to the Kurdish Representatives' Claims

"During the 1980s, Saddam Hussein's regime in Iraq used mustard gas and other chemical weapons on a large and widespread scale during its war against Iran." J.A. 359 (¶ 21). In "1988," Iraq also used "mustard gas" against the "residents of Kurdish villages, town[s,] and cities . . . [of] northern Iraq." *Id*. at 351 (¶ 2).

To obtain the ingredients to make mustard gas, Iraq solicited chemical companies in several countries outside Iraq. Many companies solicited by Iraq refused to sell chemicals that could be used to make chemical weapons. J.A. 359-60 (¶¶ 23-24).

"In April 1984, in response to the findings of a special investigatory mission sent by the U.N. Secretary General to Iran, which showed that mustard gas and other chemical weapons had been used in the Iran-Iraq war, [the Australia Group] placed licensing restrictions on the export of chemicals used in the manufacture of chemical weapons." J.A. 360 (¶ 25). The members of the Australia Group were

[1] Alcolac does not agree with the "facts" as alleged in the Kurdish Representatives' Amended Complaint and recounts them here, as it must, solely to address the sufficiency of the pleadings.

"Australia, France, Germany, Italy, Japan, Korea, [the] Netherlands, New Zealand, Norway, Romania, the United Kingdom[,] and Switzerland." *Id*. at 360 (¶ 25).

Alcolac is a "corporation" (J.A. 357 (¶ 16)) and a "chemical manufacturer" (*Id*. *at* 351 (¶ 1)). "During the early 1980s, Alcolac began to sell thiodiglycol ('TDG')." *Id*. at 361 (¶ 26). TDG is a "solvent used for a variety of lawful commercial purposes that can also be used as an ingredient in mustard gas." *Id*. at 404.

"[I]n late 1987 and early 1988" (J.A. 363 (¶ 32)), an Alcolac subsidiary sold "more than one million pounds of thiodiglycol (a precursor material used to make mustard gas) to NuKraft Mercantile Corporation, a newly formed 'paper' company located in Brooklyn, New York, which [TGD] was then shipped to Iraq via Jordan." *Id*. at 357-58 (¶ 16).

Iraq's mustard-gas attacks on Kurds in 1988 killed "at least 5,000" people and "injured many thousands more, . . . physically and psychologically." J.A. 351 (¶ 2). In addition to the immediate deaths and injuries, the attacks caused long-term health risks, "pain and suffering," and "staggering" "economic losses." *Id*. at 352 (¶¶ 4-6).

Kurdish victims of the Iraqi mustard-gas attacks who are U.S. citizens are members of the putative "A Class" who allege violations of the TVPA. J.A. 366 (¶ 39), 370 (Count I). Kurdish victims of the Iraqi mustard-gas attacks who are

foreign nationals (or U.S. citizens suing as representatives of foreign nationals) are members of the putative "B Class" who allege violations of the ATS. J.A. at 366 (¶ 39), 370-72 (Count II).

B. Alleged Facts Directed at Alcolac's Purported Knowledge and Purpose

The Amended Complaint alleges no facts that Alcolac sold TDG (1) with the intent that it reach Iraq, (2) that it be used to make mustard gas, or (3) for the purpose of attacking the Kurds. Moreover, none of the four exhibits to the Amended Complaint or any document referenced in the Amended Complaint supports such a purpose. J.A. 375-86 (exhibits to Amended Complaint).

The only allegation about Alcolac's purpose appears in paragraph 53 of the Amended Complaint, which alleges in conclusory fashion that Alcolac sold TDG "into the stream of international commerce with the *purpose* of facilitating the use of said chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq." J.A. 370 (¶ 53) (emphasis added).

Although the Amended Complaint alleges no facts demonstrating that Alcolac sold TDG for the purpose of attacking the Iraqi Kurds with mustard gas, the Amended Complaint asserts that Alcolac had constructive knowledge (*i.e.*, Alcolac must or should have known that it was selling TDG indirectly to Iraq), because it sold a large quantity of TDG to a new customer:

> Alcolac had never done business with NuKraft Mercantile before. On November 19, 1987, Alcolac officers and managers met at Alcolac's offices in Baltimore, Maryland, with representative[s] of NuKraft. One of these representatives was a Dutchman named Franz Von Anraft, who was later convicted in Holland for criminal offenses relating to the purchase of TDG from Alcolac destined for Iraq. At this meeting, Alcolac was informed that NuKraft was a shell corporation with no assets, and that the company had been set up solely to facilitate these purchases of Kromfax (TDG) for shipment to Europe, for transshipment elsewhere. These representatives further informed Alcolac that they needed 3 to 6 million pounds of TDG per year, which, ***in effect***, gave Alcolac notice that the TDG was destined for Iraq, the only major purchaser of TDG whose needs for TDG were still unmet after Iran's "requirements" for the chemical had been met through the prior sale to Colimex. The NuKraft representatives further advised Alcolac that the TDG being purchased would be transshipped via a Swiss company, vaguely identified as "Companies Inc."

J.A. 363-64 (¶ 33) (emphasis added).

The exhibits to the Amended Complaint reveal that the Kurdish Representatives have had access to extensive discovery in related civil litigation and official reports to develop their claims. Specifically, Exhibits A-C attached to the Amended Complaint are deposition exhibits from Alcolac's files obtained by the Kurdish Representatives' counsel in Texas litigation concerning the same TDG shipments. J.A. 375-82 (Exhibits A-C bearing deposition exhibit labels); *see id*. at 358 (¶ 16) (describing "Texas civil suit"); 362 (¶ 29) (describing fruits of "discovery process" in that case); *see also id*. at 388-89 (Kurdish Representatives' counsel states that this case "has benefited" from Texas case because "there is a wealth of information that has been obtained in [Texas] that can be helpful" here.).

In addition, Exhibit D is an excerpt from the "Full Final and Complete Disclosure of Iraq to the United Nations Special Commission Regarding Chemical Weapons" (1998). *Id*. at 383-86. The Exhibits do not support the allegations in the Amended Complaint and instead contradict the inferences that the Complaint seeks to draw.

- Exhibit A purports to be a letter from Alcolac's Safety Director to Exxon Chemical America responding to Exxon's concern that its use of TDG in a chemical "process" with hydrochloric acid may inadvertently generate mustard gas. J.A. 377. Alcolac's safety director states that, "to my knowledge, no one at Alcolac has done any work on how fast or under what conditions this reaction occurs," but nonetheless offers a formula and helpful safety precautions from the "[c]hemical literature." *Id*. at 376. The letter is not, as the Amended Complaint characterizes it, Alcolac's "chemical formula for the use of Kromfax [Alcolac's brand of TDG] in the manufacture of mustard gas." *Id*. at 361 (¶ 26). Exxon is not alleged to have wanted to make mustard gas or otherwise to start a chemical weapons program.

- Exhibit B purports to be a memorandum stating that the company must have "some knowledge of the planned use of the chemical" (TDG) and that the buyer must complete a form and obtain an export license. J.A. 380. Far from proving that "any unusually large orders" for TDG from new customers "would be used for chemical weapons" (*id*. at 362 (¶ 29), the memorandum reflects an intention to comply with applicable law.

- Exhibit C purports to be an invoice for TDG from Alcolac to Nu Kraft Mercantile Corp. J.A. 382. The invoice describes the TDG as a "Textile Additive" consigned to a Swiss company. *Id*. at 382. The invoice even bears the legend "DIVERSION CONTRARY TO U.S. LAW PROHIBITED." *Id*. at 382. The invoice on its face documents that the TDG is being used for lawful commercial purposes rather than the manufacture of mustard gas and is being shipped to Switzerland rather than

Iraq. Although the Amended Complaint asserts that Alcolac "intentionally fail[ed] to identify the ultimate destination" and "falsely describ[ed]" the TDG as a "Textile Additive" (*id*. at 364 (¶ 34)), no facts are alleged in support of those accusations.

- Exhibit D is an excerpt of two pages of what purports to be the Full Final and Complete Disclosure of Iraq in 1998. The top two-thirds of the page lists direct suppliers of chemicals and munitions to Iraq from Egyptian and Chinese enterprises. J.A. 385. The bottom third of the page lists "procurement through third countries or companies in third countries." *Id*. at 385 (capitalization omitted).

  Exhibit D does not disclose that Alcolac was aware that the TDG sold to NuKraft would be shipped to Iraq. Instead, it states that an "Oriac Co." supplied 650 tons of TDG which was "purchased from the manufacture [sic] company Alcolac in 1987-1988 in Paltimor [presumably Baltimore]. [¶] After the 3rd shipment Alcolac company asked for a [sic] end user certificate. [¶] Oriac supply the Alcolac company with a certificate from Liberia in Africa. [¶] This certificate not excepted [presumably, accepted] by Alcolac company so the 4th shipment stopped and not supplied." J.A. 385-86.

C. The District Court's Decision

The district court dismissed both the TVPA and ATS claims with prejudice.

1. The TVPA imposes liability on individuals, not corporations such as Alcolac

The district court dismissed the TVPA claim asserted by the putative Class A plaintiffs and accepted the argument that "Alcolac is a corporation, not a human being" and therefore "cannot be held liable under the TVPA." J.A. 407.

After noting the conflict between a separate opinion in the Second Circuit and the Eleventh Circuit over corporate liability under the TVPA (J.A. 407-08),

and "in the absence of binding precedent" from this Circuit (*id*. at 408), the district court followed "the more persuasive view" of the Second Circuit separate opinion (*id*. at 408). The district court reasoned that:

> "[U]nder the TVPA, the term 'individual' describes both those who can violate its proscriptions against torture, as well as those who can be victims of torture." [*Khulamani v. Barclay Nat. Bank Ltd*.,] 504 F.3d [254,] 323 [(2d Cir. 2007) (Korman, J., concurring in part and dissenting in part)]. Also, as noted by the Supreme Court, while the term "person" often has broader meaning under the law, and may include both human beings and corporations, the term "individual" in ordinary usage refers to a "human being." *Clinton v. City of New York*, 524 U.S. 417, 428 n.13 (1998). The Court finds it most sensible to apply the same meaning to the term "individual" in the statute whether the term is used to identify the perpetrator or the victim of actionable torture. *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) ("Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue.")[.]

J.A. 408-09 (internal parallel citations omitted).

2. Norms of customary international law made applicable by the ATS impose no liability on corporations that lack a purpose to violate international law

The district court dismissed the ATS claim asserted by the putative Class B plaintiffs because the Amended Complaint alleges no facts that would establish that Alcolac acted "with the purpose of facilitating genocide against Kurdish people." J.A. 412-13. The district court assumed, for purposes of the motion to dismiss, that the Amended Complaint stated "viable ATS claims against Iraq." J.A. at 412. But to state viable ATS claims against Alcolac, the district court

determined that the Amended Complaint must allege facts "show[ing] that [Alcolac] provided substantial assistance [to Iraq] with the *purpose* of facilitating the alleged offenses." J.A. at 412 (quoting *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.2d 244, 247 (2d Cir. 2009) (emphasis added)).

Because the Amended Complaint alleged no facts that Alcolac acted with such a purpose, the district court concluded that the Kurdish Representatives have

> not presented allegations sufficient to establish that Alcolac provided TDG to Iraq with the purpose of facilitating genocide against Kurdish people. Thus, following *Talisman*, [the Kurdish Representatives] have failed to state a claim against Alcolac for aiding and abetting Iraq under the ATS. *Cf. Talisman*, 582 F.3d at 248-49 ("We affirm the district court's grant of summary judgment in favor of Talisman because plaintiffs presented no evidence that the company acted with the purpose of harming civilians living in the Southern Sudan.")

J.A. 412-13.

SUMMARY OF THE ARGUMENT

The judgment below is correct and the district court should be affirmed.

A. The district court properly dismissed the TVPA claim with prejudice. According to the Dictionary Act (1 U.S.C. § 1) and common parlance, the ordinary meaning of "an individual" on whom the TVPA imposes liability is a human being, not a corporation such as Alcolac. What is more, the consistency principle – the principle that the same words in the same statute bear the same meaning – compels the conclusion that the kind of "individual" on whom the TVPA imposes liability is a human being, because the same kind of "individual" is authorized by

the TVPA to claim damages for suffering "physical pain" and being administered "mind altering substances." Although the TVPA's text admits of no ambiguity, the legislative history confirms that "individual" excludes corporations: legislators wanted to exclude foreign governments and corporations from liability under the TVPA and substituted "individual" for the broader "person" to achieve that result. The Ninth Circuit and a separate opinion in the Second Circuit agree that the TVPA imposes liability only on human beings and not corporations. Only the Eleventh Circuit has reached a contrary result, and that result is based purely on deference to a prior panel's decision upholding a TVPA claim against a corporate defendant, even though the prior panel did not identify or decide the corporate-liability issue.

B. The district court properly dismissed the ATS claim with prejudice. According to the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the ATS is a jurisdictional grant of federal common lawmaking authority to recognize claims for violations of binding norms of customary international law. The claim that Alcolac aided and abetted Iraq's manufacture of chemical weapons to attack the Kurds fails to state a claim under the ATS because no binding norm of customary international law that should be recognized as a matter of federal common law imposes liability on (1) corporations (2) for aiding and abetting under the ATS (3) without the purpose to facilitate a violation of

customary international law. Even if federal common law permitted the imposition of liability on corporations for aiding and abetting international law violations of which they merely knew, the Amended Complaint (4) fails to allege facts that, if proved, would establish that Alcolac knew that its sale of a large quantity to TDG to a new customer would be transshipped to Iraq and used to make mustard gas to attack the Kurds rather than consumed elsewhere as a textile additive to make commercial dyes.

ARGUMENT

The district court correctly held that the TVPA and ATS claims against Alcolac should be dismissed with prejudice.

Standard of Review

This Court reviews the district court's dismissal of the TVPA and ATS claims *de novo*. *See Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006). A complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007) ("factual allegations" must "raise a right to relief above the speculative level" and "nudge[] their claims across the line from conceivable to plausible"). Alleged facts and fair inferences from those facts are assumed to be true. *Robinson v. Amer. Honda Motor Co.*, 551 F.3d 218, 222 (4th

Cir. 2009). But legal conclusions that paraphrase statutory elements and speculative inferences of what the defendant might have known or intended are not assumed to be true and fail to state claims upon which relief can be granted. *See id*. ("the court is not bound by the complaint's legal conclusions") (citation omitted); *see also Sanders v. Norfolk S. Ry. Co.*, No. 10-1189, 2010 WL 4386881, at *1 (4th Cir. Nov. 5, 2010) (per curiam) ("A court, however, is not required 'to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences' or 'allegations that contradict matters properly subject to judicial notice or by exhibit.'") (citation omitted); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) ("We also decline to consider 'unwarranted inferences, unreasonable conclusions, or arguments.'") (citation omitted).

A. The District Court Correctly Held that the TVPA Imposes No Liability on Corporations such as Alcolac

The Dictionary Act (1 U.S.C. § 1) and the consistency principle compel the construction that the "individual[s]" subject to liability under the TVPA are natural and not artificial persons. The legislative history is consistent with that construction. And an emerging majority of circuit courts hold that corporations are not liable under the TVPA. Since Alcolac is a corporation, it is not liable under the TVPA, and the judgment dismissing that claim with prejudice should be affirmed.

1. The TVPA imposes liability only on "individual[s]" and the ordinary meaning of individual (absent other textual indication) is a natural person, not a corporation

The Dictionary Act, 1 U.S.C. § 1, provides that, "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations . . . as well as individuals." Congress amended the Dictionary Act in 1871 to define "person" to include corporations and municipalities as well as individuals. *See, e.g.*, *Lippoldt v. Cole*, 468 F.3d 1204, 1214-15 (10th Cir. 2006). The expansion of "person" to include artificial in addition to natural persons plainly implies that corporations and individuals are distinct and that both are subsets of the superset "persons." It follows that the word "individual" in an Act of Congress should ordinarily be construed to mean a human being or natural person, and not a corporation or artificial person, unless the context indicates otherwise. *See Clinton v. City of New York*, 524 U.S. 417, 428 n.13 (1998) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1152 (1986) and the Dictionary Act for the proposition that an "individual" "in ordinary usage" means a "single human being," but that a "person" "often has a broader meaning"; but concluding that the context made "individual" and "person" synonymous for purposes of the Line Item Veto Act).

The TVPA is an Act of Congress. *See* 106 Stat 73 (1992) ("An Act to carry out obligations of the United States under the United Nations Charter and other

international agreements . . . ."). As an Act of Congress, the TVPA is subject to the default rules of construction provided by the Dictionary Act. *See* 1 U.S.C. § 1. Section 2(a) of the TVPA imposes "[l]iability" only on "an individual." 28 U.S.C. § 1350 note, § 2(a); *supra* p. 2. Because the ordinary usage of "an individual" is a human being, the TVPA imposes no liability on corporations. Since the Amended Complaint alleges that Alcolac is a "Georgia corporation" (J.A. 357 (¶ 16)), the TVPA imposes no liability on Alcolac.

Nor does the context in which "individual" appears in the TVPA require a deviation from the Dictionary Act's default rule of construction.

2. Consistent use of "individual" in the TVPA precludes its application to a corporation

The context in which "individual" appears in the TVPA confirms that the Act imposes liability only on human beings and not corporations. Courts construe the same term to have the same meaning in the same statute. *See, e.g.*, *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute 'presents a classic case for application of the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."' *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)).") (parallel citations omitted); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568-570 (1995) ("In seeking to interpret the term 'prospectus,' we adopt the

premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions. See *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). . . . Act[s] sof Congress[] should not be read as a series of unrelated and isolated provisions. . . . '[I]dentical words used in different parts of the same act are intended to have the same meaning.' *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 342 (1994) (internal quotation marks and citations omitted); see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230 (1993); *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).") (parallel citations omitted); *see also Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (U.S. 2007) ("standard principle of statutory construction provid[ing] that identical words and phrases within the same statute should normally be given the same meaning" is "doubly appropriate" when those words or phrases are added to the statute "at the same time"). Courts have applied the consistent-construction principle on countless occasions.[2]

[2] *Dep't of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 342 (1994) ("Given the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning, *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932))), that phrase must carry the same meaning in subsection (a)(4), where it qualifies the definition of commercial and industrial

Consistently construed, the statutory term "individual" in the TVPA can mean only a human being because only human beings can be victims of "torture" and "extrajudicial killings." 28 U.S.C. § 1350 note, § 2(a)(1), (2). Because the kind of "individual" who can *suffer* "torture" and "extrajudicial killing" must be a human being, so too must the "individual" who *inflicts* the torture be a human being (*see id*. (imposing "liability" only on "an individual" torturer)) – at least if "individual" bears the same meaning in the same sentence of the TVPA.

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property.") (internal quotation marks and parallel citations omitted); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. See *Estate of Cowart v. Nicklos Drilling Co*., 505 U.S. 469, 479 (1992)."); *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am*., 508 U.S. 439, 460 (1993) ("Presumptively, '"identical words used in different parts of the same act are intended to have the same meaning,'" *Comm'r v. Keystone Consol. Indus*., 508 U.S. 152, 159 (1993) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). . . .") (parallel citation omitted); *Mertens v. Hewitt Assocs*., 508 U.S. 248, 260 (1993) ("We certainly agree with petitioners that language used in one portion of a statute (§ 502(a)(3)) should be deemed to have the same meaning as the same language used elsewhere in the statute (§ 502(a)(5))."); *Comm'r v. Keystone Consol. Indus*., 508 U.S. 152, 159 (1993) ("It is a 'normal rule of statutory construction,' *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986), that 'identical words used in different parts of the same act are intended to have the same meaning.' *Atlantic Cleaners & Dyers, Inc*, 286 U.S. 427, 433."") (internal parallel citations omitted); *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993) ("The word 'conduct' is used twice, and it seems reasonable to give each use a similar construction. See *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986)."") (internal parallel citations omitted).

Even if one might entertain the possibility of "tortur[ing]" or "killing" a corporation with civil sanctions and criminal penalties,[3] the definitions of "torture" in section 3(b) of the TVPA make clear that the tortured individual must be a human being. Only a human being can suffer "severe *physical* pain" or be administered "mind altering substances" that are "calculated to disrupt profoundly the senses or the personality." 28 U.S.C. § 1350 note, § 3(b)(2)(A), (B) (emphasis added). Whatever else may be said of corporations, they do not suffer physically and do not have minds, senses, or personalities that can be altered with drugs.

The principle that the same word has the same meaning compels "an individual" in the TVPA to mean a human being and exclude a corporation. By contrast, the Kurdish Representatives' construction would require that term to include corporations (for the torturing individual) and exclude corporations (for the tortured individual) in the *same sentence*. 28 U.S.C. § 1350 note, § 2(a); *see Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[T]here is a presumption that a given term is used to mean the same thing throughout a statute, *Atlantic Cleaners & Dyers, Inc.*, 286 U.S. 427, 433, a presumption surely at its most vigorous when a term is repeated within a given sentence . . . .") (parallel citations omitted).

[3] The extrajudicial "killing" of a corporation may not be possible. Since a corporation is a juridical entity, it can be "killed" only by operation of law – that is, judicially.

3. The TVPA's legislative history cannot be used to contradict its text and in any event demonstrates that the TVPA does not impose liability on corporations

The Kurdish Representatives do not offer a single decision in which courts have used legislative history to contradict the plain meaning of statutory text. The premise of the Kurdish Representatives' argument is that the TVPA is "ambiguous" and that this Court may therefore "resort" to legislative history. Opening Brief of Appellant ("Kurdish Br.") 12. But as demonstrated in the previous two sections (*supra* pp. 16-21), the Dictionary Act and the consistency principle compel the conclusion that "individual" includes human beings and excludes corporations. Because the text is clear, legislative history cannot contradict it. *See, e.g.*, *Hallstrom v. Tillamook County*, 493 U.S. 20, 28, 310 (1989) ("This reliance on legislative history is misplaced. We have held that '[a]bsent a clearly expressed legislative intention to the contrary,' the words of the statute are conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. at 108.") (parallel citations omitted).

In any event, the TVPA's legislative history supports rather than contradicts the statutory text. Although some legislators sought to use the word "individual"

to exclude "foreign states and their entities" from liability (Kurdish Br. 13),[4] other legislators sought to change "person" to "individual" in the TVPA in order to "appl[y] it [the TVPA] to individuals *and not to corporations*." (emphasis added).[5] Whether an individual legislator wanted to exclude foreign states or corporations from liability under the TVPA, Congress changed "person" to "individual" and was well aware that the amended text would impose liability only on human beings

[4] *See* S. Rep. No. 102-249, *The Torture Victim Protection Act of 1991*, S. Comm. on the Judiciary 7 (Nov. 26, 1991) ("The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued."); H.R. Rep. No. 102-367 Pt. 1, *Torture Victim Protection Act of 1991*, H.R. Comm. on the Judiciary 4 (Nov. 25, 1991) ("Only 'individuals,' not foreign states, can be sued under the bill."); *Torture Victim Protection Act of 1989*, Hearing before the Senate Subcomm. on Immigration and Refugee Affairs of the Comm. on the Judiciary, 101st Cong., 2d Sess. 30 (June 22, 1990) (testimony of David P. Stewart, Asst. Legal Adviser, Dept. of State) ("The Torture Victim Protection Act does not get to the government. . . . The statute itself only goes to individuals."); *id*. at 48 (testimony of Michael H. Posner, Exec. Dir., Lawyers Comm. for Human Rights) ("The defendants would be the individual violators themselves and not the foreign governments.").

[5] *The Torture Victim Protection Act*, Hearing before the House Subcomm. on Human Rights and International Organizations of the Comm. on Foreign Affairs, 101st Cong., 2d Sess. 87-88 (June 7, 1988) (committee markup) (colloquy between Members Leach and Bellis) (Mr. LEACH. "But before bringing it to a vote, I would ask unanimous consent that an amendment be considered at a later point with staff that relates to a precise definition of person to make it clear we are applying it to individuals and not to corporations in how this bill and its ramifications unfold."; Mr. BELLIS. As I understand it, the intention is to limit the application of this civil action so that only individuals who engaged in torture could be the defendants. [¶] Mr. LEACH. Yes, that is correct. [¶] Mr. BELLIS. That would be a fairly simple amendment of changing the word, 'person' to 'individuals' in several places in the bill. [¶] Mr. LEACH. That is correct and I will have to draft language to that effect.").

and not on any artificial persons such as foreign governments or corporations. By revealing Congress's careful attention to the text of the TVPA, the legislative history confirms that "individual" should be used in its ordinary, exclusive sense to include only human beings and exclude all artificial persons such as foreign governments and corporations.

The Kurdish Representatives construe "individual" to include corporations only by misusing the legislative history. *First*, the Kurdish Representatives equate "individual" (the term that appears in the TVPA as enacted) with "person" (the term used in a Senate bill) and then assume without argument that "person" must include corporations. Kurdish Br. 12-13. As demonstrated in the previous section, however, the consistency principle demands that the same term bear the same meaning. *See supra* pp. 17-21. Even if the TVPA had used "person" rather than "individual," the same "person" is both torturer and victim in section 2(a) of the Act. *See* 28 U.S.C. § 1350 note, § 2(a)(1)-(2). Because only a natural person can suffer "physical pain" and be administered "mind altering substances," it follows that only a natural person can inflict torture – at least if "person" is to have the same meaning (*i.e.*, exclusive of corporations) in the same sentence of the TVPA. *See supra* p. 20. More fundamentally, the Kurdish Representatives' equation of "individual" and "person" ignores the fact that Congress substituted "individual" for "person" in order to limit those liable under the TVPA. Thus, even if "person"

included corporations (a construction that the consistency principle rejects), Congress rejected that term in favor of "individual." The legislative history thus flatly rejects the Kurdish Representatives attempt to use "person" and "individual" synonymously and requires the Court to construe the narrower term. As demonstrated above, *see supra* pp. 16-21, the Dictionary Act and consistency principle reveal that the narrower term "individual" means "human being" and excludes artificial persons from liability under the TVPA.

Second, the Kurdish Representatives invoke the remedial "purpose" of the TVPA to suggest that any construction that expands liability "best fulfills the purpose of the TVPA." Kurdish Br. 15. The demonstrated difficulty with such purposive modes of construction is that they ignore the compromises inherent in the legislative process – in this case, the desire by some legislators to exclude foreign governments, others to exclude corporations, and the majority substituting "individual" for "person" to include only human beings and exclude all artificial persons. *See W. Va. Univ. Hospitals v. Casey*, 499 U.S. 83, 98 (1991) ("[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President.") (parallel citation omitted), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-

166, 105 Stat. 1071 (1991). The broad remedial purpose of the TVPA would arguably be "best fulfill[ed]" by imposing liability on foreign governments as well as human beings. But even the Kurdish Representatives admit that the TVPA does not reach that far. Kurdish Br. 13. Their remedial argument proves far too much.

4. The only circuit court to have addressed the issue has held that the TVPA imposes no liability on corporations; the sole circuit in conflict imposed TVPA liability on a corporate defendant without identifying or deciding the corporate-liability issue

The question whether the TVPA imposes liability on corporations is one of first impression in this Circuit. Four sister circuits have discussed that question. The Ninth Circuit has held, and a separate opinion in the Second Circuit has stated, that the TVPA does not impose liability on corporations. The Eleventh Circuit has held that the TVPA does impose liability on corporations. And the Fifth Circuit has reserved the question. Because the Eleventh Circuit neither acknowledged nor analyzed the corporate-liability question, and because the subsequent decisions of the Ninth and Second Circuits carefully construed the TVPA, the emerging majority of circuit courts rejecting corporate liability is persuasive authority that should be followed by this Circuit.

The Ninth Circuit and a separate opinion in the Second Circuit have held that the TVPA does not impose liability on corporations. In the most recent decision, *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010), the Ninth Circuit held that "the Torture Victim Protection Act does not apply to

corporations." *Id*. at 1126 (bold face and capitalization omitted). In support of its holding, the Ninth Circuit relied on the Dictionary Act and the consistency principle and observed that "the legislative history demonstrates that Congress rejected the notion of corporate liability." *Id*. at 1127. "Had Congress intended for the court to interpret the term 'individual' so broadly as to include corporations, it would have included some evidence of this intent in the legislative history." *Id*. at 1127-28. In declining to follow the Eleventh Circuit, the Ninth Circuit observed that "[i]t does not appear the defendants in that case [*Aldana v. Del Monte Fresh Produce, N.A., Inc*., 416 F.3d 1242 (11th Cir. 2005) (per curiam)] ever challenged the notion of corporate liability, however, and the Eleventh Circuit did not explain its reasoning on the issue." 621 F.3d at 1126 (citation omitted).

In *Khulumani v. Barclay Nat'l Bank Ltd*., 504 F.3d 254, 323-24 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part), a separate and scholarly opinion of the Second Circuit likewise concluded that the TVPA does not impose liability on corporations. Relying on the consistency principle, and quoting Judge Weinstein's decision in *In re Agent Orange Product Liab. Litig*., 373 F. Supp. 2d 7, 56 (E.D.N.Y. 2005), Judge Korman reasoned that "the definition of 'individual' within the statute appears to refer to a human being, suggesting that only natural persons can violate the Act." 502 F.3d at 324 (Korman, J., concurring in part and dissenting in part). With the exception of *dicta* from decisions of

district courts in Maryland and the Southern District of New York, every district court outside the Eleventh Circuit agrees that the TVPA imposes no liability on corporations.[6]

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[6] *See Flomo v. Firestone Natural Rubber Co.*, No. 1:06-CV-00627, 2010 WL 3938312, at *6 (S.D. Ind. Oct. 5, 2010) (finding the *Kiobel* majority's argument that corporate liability does not exist under the TVPA or ATS "especially compelling"); *Doe v. Nestle, S.A.*, No. CV 05-5133, 2010 WL 3969615, at *50 (C.D. Cal. Sept. 8, 2010) ("But in light of the plain statutory language of the Act, the Court concludes that the majority of courts are correct that the Act does not extend liability to corporations. Congress simply has not provided for corporate liability."); *Ali Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 28 (D.D.C. 2010) ("Defendants correctly assert that Ali may not plead a cause of action against non-natural persons under the TVPA."); *Mohamad v. Rajoub*, No. 08-1800, 2009 WL 3127206, at *2 (D.D.C. Sept. 30, 2009) ("Simply stated, Congress's plain intent as reflected in the text (which specifies only individuals) and the legislative history (which could not be clearer) 'was to confine liability for acts of torture and extrajudicial killing to private individuals.' *Dammarell v. Islamic Republic of Iran*, No. 01-2224, 2005 WL 756090 at *31 (D.D.C. Mar. 29, 2005). Therefore, this Court finds plaintiffs cannot bring a TVPA claim against the Palestinian Authority or the Palestine Liberation Organization, and the Court dismisses these claims."); *Bowoto v. Chevron Corp.*, No. C 99-02506-SI, 2006 WL 2604591, at *2 (N.D. Cal. Aug. 22, 2006) ("All this leads the Court to conclude that it is better to adhere to what Congress specifically intended, rather than imposing liability based upon an extrapolation from Congress's general goal. . . . The Court concludes that Congress intended only that the TVPA reach natural persons, not corporations"), *aff'd*, 621 F.3d 1116, 1126-28 (9th Cir. 2010); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005) ("since the statute speaks in terms of individuals" the meaning of the term individual "must mean the same thing with respect to both victim and perpetrators" and thus, "the statutory language of the TVPA precludes a corporation from being a victim or a perpetrator"); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005) ("On balance, the plain reading of the statute strongly suggests that it only covers human beings, and not corporations."); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1176 (C.D. Cal. 2005) ("The Court holds that corporations are not "individuals" under the TVPA based on its reading of the plain language of the statute."); *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d at 56 ("Because the TVPA uses

The Eleventh Circuit has held that the TVPA does impose liability on corporations. In *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d at 1253, the Eleventh Circuit held that allegations in a complaint "could constitute torture" under the TVPA and ATS (*id.* at 1253) and vacated the dismissal of those claims against a corporate defendant (*id.* at 1245). None of the five briefs filed in *Aldana* (three ordinary briefs and two supplemental briefs to address the implications of the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)) discussed whether the TVPA imposed liability on corporations. The Eleventh Circuit panel thus did not discuss the issue. *See* 416 F.3d at 1253. Although the corporate-liability issue would appear to have been open for a subsequent Eleventh Circuit panel to decide, the subsequent panel in *Romero v.*

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the same term "individual" to identify offenders, the definition of "individual" within the statute appears to refer to a human being, suggesting that only natural persons can violate the Act"); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 828 (S.D.N.Y. 2005) ("Only individuals may be sued under the TVPA. Accordingly, to the extent Plaintiffs have not already withdrawn these claims, the TVPA claims are dismissed against" several corporate defendants.") (internal citations omitted); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004) ("UBS AG is not an individual, but a corporation, and as such cannot be sued under the TVPA."); *Friedman v. Bayer Corp.*, No. 99-CV-3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999) ("Plaintiffs also attempt to state claims under the Torture Victims Protection Act . . . This statute has been held to apply to individual defendants but not to corporations."); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 382 (E.D. La. 1997) ("The court concludes that because Freeport as a corporation is not an 'individual' for purposes of the TVPA, Freeport cannot be held liable under the TVPA. Plaintiff has no cause of action because he cannot fully satisfy the first element required to state a claim under the Act."), *aff'd on other grounds*, 197 F.3d 161, 169 (5th Cir. 1999).

Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008), refused to decide it. Instead, the *Romero* panel held that the TVPA imposed liability on corporations on the authority of *Aldana*. The *Romero* panel's entire *ratio decidendi* consists of the following three sentences:

> Even if we agreed with Drummond that its argument about corporate liability under the Torture Act was jurisdictional, we would be bound to reject that argument. Under the law of this Circuit, the Torture Act allows suits against corporate defendants. We held that a complaint, under the Act, stated a claim against a corporate defendant in *Aldana v. Del Monte Fresh Produce, N.A., Inc*., 416 F.3d 1242 (11th Cir. 2005), and we are bound by that precedent.

552 F.3d at 1315.

Although the *Drummond* panel should not have felt itself bound by *Aldana*, the significance of those Eleventh Circuit decisions for this appeal is that neither is binding authority in this Circuit and the absence of any reasoning whatever deprives them of the persuasive authority that would ordinarily be due a considered decision of a sister Circuit. The only reasoned authority on the TVPA corporate-liability issue is the decision of the Ninth Circuit and the separate opinion in the Second Circuit, and they agree that corporations such as Alcolac are not liable. With the exception of *dicta* from the Maryland and Manhattan district courts, the

only district courts that have held that the TVPA imposes liability on corporations are districts within the Eleventh Circuit that are bound by that law of that Circuit.[7]

In an early decision, the Fifth Circuit reserved the question whether the TVPA imposes liability on corporations. *See Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 169 (5th Cir. 1999) ("Thus, we affirm the district court's dismissal of Beanal's claims under the TVPA on the ground that his allegations fail to provide the requisite factual specificity and definiteness to survive a Rule 12(b)(6) motion to dismiss. Therefore, we need not reach the question of whether a cause

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[7] *See In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 GBD, 2010 WL 3783702, at *11 (S.D.N.Y. Sept. 13, 2010) ("Although the TVPA limits primary liability to individuals only, a corporation or other entity may be held secondarily liable, under the TVPA, for aiding and abetting the primary individual actor.") (citation omitted); *Al-Quraishi v. Nakhla*, No. PJM-08-1696, 2010 WL 3001986, *40 (D. Md. July 29, 2010) ("Since this case involves the ATS and not the TVPA, the Court need not reach any definitive conclusions as to the meaning of the TVPA, though it bears noting that the word 'individual' does not necessarily comprehend only natural persons; it may also comprehend an 'individual' corporate entity."); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003) ("This court follows the reasoning set forth in *SINTRAINAL* and finds that the plaintiff union can assert a TVPA [claim] against the corporate defendants. The court concludes that because corporations can be sued under the ATCA and Congress did not explicitly exclude corporations from liability under the TVPA, private corporations are subject to liability under the TVPA. Thus, because Drummond Co., Inc. and Drummond Ltd. are 'individuals' under the TVPA, the union can assert TVPA claims against these entities."); *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003) ("Given that the legislative history does not reveal an intent to exempt private corporations from liability, that private corporations can be sued under the ATCA, and that the term 'individual' i[s] consistently viewed in the law as including corporations, this court concludes that the TVPA claim against Bebidas [corporation] should not be dismissed for lack of subject matter jurisdiction.").

of action for individual human rights violations is actionable against a corporation under the TVPA.").

This Court should join the emerging majority of its sister Circuits and hold that the TVPA imposes liability only on human beings and not corporations.

B. The District Court Correctly Held that Norms of Customary International Law Made Applicable by the ATS Impose No Aiding-and-Abetting Liability on Corporations Without the Purpose to Facilitate Alleged Violations

In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the U.S. Supreme Court held that the ATS was "strictly jurisdictional [in] nature" (*id*. at 713) and authorized civil actions only for violating "binding . . . norm[s]" of "customary international law" (*id*. at 736-37). The Kurdish Representatives fail to identify a norm that would permit the imposition of liability on Alcolac, for four reasons. *First*, no binding norm of customary international law imposes liability on corporations. *Second*, absent express direction from Congress, federal common law does not permit imposition of liability for aiding and abetting under the ATS. *Third*, no binding norm of customary international law imposes aiding-and-abetting liability without the purpose to violate the international law. And *fourth*, even if a binding norm of customary international law permitted the imposition of liability for mere knowledge, the Amended Complaint alleges no facts that establish such knowledge, only impermissibly speculative inferences. Considered separately, any of these four reasons is an adequate and independent ground on

which to affirm the judgment below. Taken together, they provide compelling grounds on which to affirm the district court.

1. No binding norm of customary international law imposes liability on corporations

In the district court, Alcolac contended that the ATS claims failed to state violations of binding norms of customary international law. *See*, *e.g.*, Defendant Alcolac, Inc.'s Reply in Support of Its Motion to Dismiss 27-39; *id*. at 27 (ATS claims are "fatally deficient"); *id*. at 28 ("the allegation that 'Defendants'' conduct violates the ATS fails as a matter of law"); *id*. at 32-35 ("aiding-and-abetting claim fails"). Although Alcolac did not contend in the district court that customary international law imposes no liability on corporations, the corporate-liability contention is fairly included within the issue that Alcolac raised – namely, whether binding norms of customary international law permit imposition of liability under the ATS on Alcolac. *Cf*. *Sosa*, 542 U.S. at 733 n.20 ("A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."). Because the corporate-liability contention is fairly encompassed within the issue that Alcolac raised below and would not alter or amend the judgment, Alcolac may offer it on appeal as an additional argument in support of the district court's judgment. *See Yee v. City of Escondido*, *Cal*., 503 U.S. 519, 534 (U.S. 1992) (collecting cases) ("Once a federal claim is properly

presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (U.S. 1995) (permitting review of a "new argument to support what has been [petitioner's] consistent claim").

A corporation such as Alcolac may be sued under the ATS only if the Kurdish Representatives can establish a binding norm of customary international law imposing liability on corporations that is binding, universal, and as specific as the three established prohibitions against "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 715 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68 (1769)). In *Sosa*, the Court explained that the ATS conferred jurisdiction only for violations of customary international law norms that are binding, universal, and specific. *See* 542 U.S. at 725, 729, 732-38. The Court reasoned that, at the time of its enactment in 1789, actionable claims under the ATS were likely restricted to a "narrow set of common law violations derived from the law of nations" (*id*. at 721), then limited to "violation of safe conducts, infringement of the rights of ambassadors, and piracy" (*id*. at 715). Although customary international law is not restricted to those three original alien torts, any new actionable claim under the ATS must "rest on a norm of international character accepted by the civilized world and defined with a

specificity comparable to the features of the 18th-century paradigms we have recognized." 542 U.S. at 725.

A corporation such as Alcolac cannot be sued under the ATS because there is no "binding customary rule," "accepted by the civilized world," that corporations can be held liable under customary international law. *Sosa*, 542 U.S. at 725, 738. Evidence of the status of a binding norm under customary international law is primarily determined by reference to treaties, controlling executive or legislative acts, and judicial decisions. *See Sosa*, 542 U.S. at 734 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)). When those sources do not provide the rule of decision, "resort must be had to the customs and usages of civilized nations," an inquiry which may in turn look to "the works of jurists and commentators . . . for trustworthy evidence of what [international] law really is." *Sosa*, 542 U.S. at 734.

With reference to primary authority, treaties provide no support for the imposition of liability on corporations for violations of customary international law. The majority of international treaties, including the "major conventions protecting basic human rights," address only the liability of states and human beings. *Doe v. Nestle*, No. CV 05-5133, 2010 WL 3969615, at *68 (C.D. Cal. Sept. 8, 2010) (citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 317 (S.D.N.Y. 2003)). Specifically, neither the Geneva

Convention of 1925 nor Security Council Resolutions 582, 588, 596, and 612 (Kurdish Br. 18, 19, 24, 27, 29) create private rights of action, much less do they impose liability on corporations. The few treaties that depart from the norm and contain provisions plausibly addressing corporate liability are restricted to two groups: (1) treaties seeking to address or prevent the effects of narrow harms such as transnational environmental torts (*Doe*, 2010 WL 3969615, at *69); and (2) treaties lacking universal support, as demonstrated by a limited number of ratifying parties (*see*, *e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 137-38 (2d Cir. 2010)). Neither treaties of limited applicability nor treaties of limited acceptance establish a binding norm accepted by all civilized nations.

International judicial decisions and incorporating statutes of international tribunals also indicate that corporations cannot be held liable for violations of the law of nations. The International Military Tribunal at Nuremberg, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court "have continually declined to hold corporations liable for violations of customary international law." *Kiobel*, 621 F.3d at 136 (observing that the Nuremberg Tribunal had jurisdiction "over natural persons only," that the jurisdiction of the International Criminal Tribunals was "expressly confined" to "natural persons," and that the jurisdiction of the International Criminal Court is limited to "natural persons.") (internal citations

omitted). Tellingly, when a proposal was made to grant the International Criminal Court – the most recently established of the international tribunals – jurisdiction over corporations, that proposal was rejected precisely because the "criminal liability of corporations is still rejected in many national legal orders." *Kiobel*, 621 F.3d at 137 (citing, *inter alia*, ALBIN ESER, INDIVIDUAL CRIMINAL RESPONSIBILITY, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 767, 779 (Antonio Cassesse *et al*. eds., 2002)). International tribunals, from the seminal formulation at Nuremberg through to the present, "make it abundantly clear that, since Nuremberg, the concept of corporate liability for violations of customary international law has not even begun to 'ripen[]' into a universally accepted norm of international law." *Kiobel*, 621 F.3d at 137 (citing *The Paquete Habana*, 175 U.S. at 686)).

Contrary to the Kurdish Representatives' contention, the Second Circuit's rejection of corporate liability in *Kiobel* does not "go[] against the great weight of authority holding otherwise." Kurdish Br. 21 n.3. *First*, *Kiobel* is the only Circuit Court decision to apply the *Sosa* specificity standard to the issue of corporate liability under the ATS.[8] The only other Circuit Court to have directly spoken on

[8] Several Circuit Courts have upheld lower court decisions involving ATS claims on unrelated grounds or have assumed – without deciding – that a corporation can be held liable under the law of nations. *See, e.g.*, *Hereros v. Deutsche Afrika-Linien Gmblt & Co.*, 232 Fed. App'x. 90 (3d Cir. 2007) (affirming district court's finding that plaintiffs failed to allege a violation of a specific, obligatory, and

the issue, the Eleventh Circuit in *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009), did so only in passing and without applying *Sosa*.[9] The Kurdish Representatives' contention also ignores the great weight of international law authority which demonstrates no binding norm of corporate liability under

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universal norm of the law of nations, but not addressing the issue of corporate liability); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) (affirming the district court's holding that the ATS does not contain an exhaustion requirement, but not addressing the issue of corporate liability); *Carmichael v. United Techs. Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988) (dismissing plaintiffs' claims after assuming, without deciding, that the ATS conferred jurisdiction over corporate defendants). Because they offer no reasoned decision on the issue of corporate liability under the ATS after *Sosa*, the foregoing decisions are not persuasive authority.

[9] *See* 578 F.3d at 1263 ("In addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.") (citing *Romero*, 552 F.3d at 1315). The divergence between the Eleventh Circuit's ruling in *Sinaltrainal* and the Supreme Court's specificity requirement in *Sosa* is even more evident in light of the precedent on which *Sinaltrainal* rests. The *Sinaltrainal* court relied on *Romero* for its holding on the scope of liability under the law of nations. In *Romero*, the Eleventh Circuit held that corporate liability existed under the ATS because (1) "the text of the Alien Tort Statute provides no express exception for corporations," and (2) it is "the law of this Circuit." 552 F.3d at 1315. *Sosa*, in contrast, makes clear that the burden is properly placed on the plaintiff affirmatively to "marshal support for his proposed rule" and demonstrate the existence of a specific binding norm. 542 U.S. at 747; *id.* at 736 ("Alvarez cites little authority that a rule so broad has the status of a binding customary norm today."); *id.* at 738 ("Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require."). Lastly, the Circuit precedent on which *Romero* relied – *Aldana*, 416 F.3d at 1242 – simply concluded without explanation that TVPA and ATS claims against a corporate defendant could go forward and never acknowledged or analyzed the corporate-liability issue under either statute. *See supra* pp. 26-27.

customary international law. With respect to ATS claims of the sort alleged in the Amended Complaint, "[n]o corporation has ever been subject to any form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights." *Kiobel*, 621 F.3d at 148. Absent a binding norm of customary international law imposing liability on corporations such as Alcolac, the district court's judgment dismissing the ATS claims should be affirmed.

2. Absent express direction from Congress, federal common law does not permit imposition of liability for aiding and abetting under the ATS

In the district court, Alcolac contended that "the Fourth Circuit has not recognized claims of aiding and abetting under the ATS." Memorandum in Support of Defendant Alcolac, Inc.'s Motion to Dismiss 36; *see id*. at 36-38 (developing no aiding-and-abetting liability argument); Defendant Alcolac, Inc.'s Reply in Support of Its Motion to Dismiss 32-33 (reasserting no aiding-and-abetting liability argument against Amended Complaint). This Court may affirm on the ground that the ATS provides no jurisdiction over aiding-and-abetting claims absent express direction from Congress because that ground was pressed in (even though not passed on by) the district court and that ground would not alter or amend the judgment below. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) (a prevailing party may "defend its judgment on any ground

properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.").

Even if a binding, universal, and specific norm of customary international law imposed liability under the ATS on corporations as primary actors (*but see supra* pp. 31-38), such primary liability does not necessarily support imposition of liability on corporations or any other parties as secondary actors. As authoritatively construed by the Supreme Court in *Sosa*, the ATS is a "jurisdictional grant" (542 U.S. at 714) of federal common lawmaking power to "recognize private causes of actions in violation of the law of nations" (*id*. at 694). As a grant of power to prescribe judge-made law, the ATS incorporates the principles applicable to all exercises of federal common lawmaking authority, including "the general practice . . . to look for legislative guidance before exercising innovative authority over substantive law" (*id*. at 694-95), the "restrained conception [that] the discretion [of] a federal court should exercise in considering a new cause of action" (*id*. at 725-26), and whether "to permit enforcement without the check imposed by prosecutorial discretion" (*id*. at 727). Recognizing new federal common law claims based on international law "should be undertaken, if at all, with great caution." *Id*. at 728.

Federal common law should not recognize secondary liability for violations of international law – even if customary international law norms imposing aiding-

and-abetting liability are binding, universal, and specific – because the federal courts should not undertake such a "vast expansion of federal law" in the absence of "congressional direction to do so." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182-83 (1994)). The automatic acceptance of aiding-and-abetting liability by some circuit courts represents an abdication of their authority and obligation to determine the content of federal common law. As the Solicitor General explained:

> Nor, contrary to Judge Katzmann's view, does the fact that the ATS refers to substantive norms of international law render *Central Bank* "inapposite." Pet. App. 57a-58a. As this Court made clear in *Sosa*, causes of action recognized under the ATS are "federal common law" causes of action, 542 U.S. at 732, and the fashioning of such law must be guided by *Central Bank*. Indeed, *Sosa* not only acknowledged the Court's "general practice" to look for legislative guidance before fashioning federal common law; it observed that "[i]t would be remarkable to take a more aggressive role in exercising a jurisdiction [under the ATS] that remained largely in shadow for much of the prior two centuries." *Id*. at 726.
>
> The fact that courts have previously considered decisions of international criminal tribunals as evidence of the "law of nations" for purposes of the ATS, see Pet. App. at 33a n.5 (Katzmann, J., concurring), does not diminish the force of *Central Bank*. Whatever relevance principles of criminal liability have in informing the substantive content of international law for purposes of the ATS, the question of the relevance of criminal-law principles of secondary liability for civil actions is settled by *Central Bank*. *Central Bank* makes clear that the existence of criminal aiding and abetting liability does not support civil liability, 511 U.S. at 181-183, because civil aiding and abetting liability "has been at best uncertain in application," *id*. at 181, would represent a "vast expansion of federal law," *id*. at 183, and would eliminate the check of prosecutorial discretion, *ibid*.; *Stoneridge*, *supra*. Thus, *Central Bank* speaks

> directly to the relevance of criminal aiding and abetting liability under international law to the existence of civil liability under the ATS. Moreover, the absence of a prosecutorial check has special salience as a reason to reject civil aiding and abetting liability in the ATS context. See *Sosa*, 542 U.S. at 727 (judicial caution required because a cause of action under the ATS entails "permit[ting] enforcement without the check imposed by prosecutorial discretion").

Brief for the United States as *Amicus Curiae* in Support of Petitioners in *American Isuzu Motors, Inc. v. Lungisile Ntsebeza*, No. 07-919, at 10-11 (Feb. 2008), *on writ of certiorari from Khulamani*, 504 F.3d 254, *aff'd because of the absence of a quorum under 28 U.S.C. §§ 1, 2109*, 118 S. Ct. 2424 (2008).

Exercising the judgment conferred by the authority to fashion federal common law, this Court should follow the Supreme Court's guidance in *Sosa* and *Central Bank* and decline to recognize a claim for aiding and abetting primary violations of customary international law.

3. No binding norm of customary international law imposes aiding-and-abetting liability without the purpose to violate international law and the allegations in the Amended Complaint fail to allege facts to prove the required purpose

If federal common law permitted liability to be imposed under the ATS for aiding and abetting violations of international law, such liability would require the defendant to have "provided substantial assistance with the *purpose* of facilitating the alleged offenses." *Talisman*, 582 F.3d at 247 (emphasis added). Because the Amended Complaint alleges no facts establishing that Alcolac sold TDG with such

a purpose, the district court properly dismissed the ATS claim with prejudice and the judgment below should be affirmed.

Only the purpose standard satisfies the Supreme Court's demand in *Sosa* that customary international law norms actionable under the ATS be binding, universal, and specific. *See Sosa*, 542 U.S. at 732. Only the purpose standard of liability is common to *all* treaties and tribunals under international law. *Talisman*, 582 F.3d at 259; *Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring). Thus, only the purpose standard satisfies *Sosa's* requirement that an international law norm demonstrate "acceptance among civilized nations" to support jurisdiction under the ATS. 542 U.S. at 732.

The Kurdish Representatives' contention (Kurdish Br. 9, 19) that aiding-and-abetting liability may be imposed for mere knowledge that an act would assist a violation of international law is based on a flawed analogy to domestic aiding-and-abetting liability and therefore fails *Sosa*'s requirement that a norm be derived from binding, universal, and specific *international law*. Under *Sosa*, a necessary (but not sufficient) condition for ATS jurisdiction is a binding norm of customary *international law*. *See Sosa*, 542 U.S. at 732 n.20 (liability of non-state actors such as corporations or individuals turns on whether "*international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued") (emphasis added); *id*. at 725 ("[A]ny claim based on the present-day law of nations

[should] rest on a norm of *international character*.") (emphasis added); *see also Talisman*, 582 F.3d at 258. Although the purpose standard is common to all treaties and tribunals under international law (*Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring); *Talisman*, 582 F.3d at 259), the knowledge standard is accepted by some international bodies but rejected by others. *Id*. The Kurdish Representatives' analogy to domestic aiding-and-abetting liability thus fails to support recognition of a mere knowledge standard as a matter of customary international law.

Moreover, the Kurdish Representatives' contention that international law supports recognition of a knowledge standard fails because they cannot satisfy *Sosa*'s requirement that the knowledge standard is universally observed. *See Sosa*, 542 U.S. at 732. To be sure, some international treaties and tribunals impose liability based on a knowledge standard. But the Kurdish Representatives' selective excerpts (Kurdish Br. 19-20) from Judge Katzmann's concurring opinion in *Khulumani* and the Second Circuit's decision in *Talisman* neglect to mention that those excerpts were part of a broader discussion on the lack of consensus surrounding the knowledge standard and omit the conclusion of both opinions that no consensus exists in international law in support of a knowledge standard. *Khulumani*, 504 F.3d at 270 (Katzmann, J., concurring in part and dissenting in part); *Talisman*, 582 F.3d at 259. Indeed, the Kurdish Representatives' excerpts

are so selective that they omit the prefatory language to the Rome Statute of the International Criminal Court which requires action "[f]or the purpose of facilitating the commission of such a crime" (The Rome Statute of the International Criminal Court art. 25(3)(c) (emphasis added), *opened for signature* July 17, 1998, 37 I.L.M. 1002) and thus flatly contradicts their contention that the Rome Statute supports a lesser knowledge standard (Kurdish Br. 23).

The Kurdish Representatives strain to impose liability for mere knowledge that an act facilitates violation of international law because the facts alleged in the Amended Complaint at most support constructive knowledge by Alcolac that its large TDG sales to a new customer might be used to make mustard gas (J.A. 363-54 (¶ 33)) and plainly fail to establish any purpose by Alcolac to sell TDG (1) with the intent that it reach Iraq, (2) that it be used to make mustard gas, or (3) for the purpose of attacking the Kurds. *See id*. at 412-13 (analysis of the district court); *infra* pp. 43-49.

The only allegation about Alcolac's purpose appears in paragraph 53 of the Amended Complaint, but that allegation is a bare recitation of the purpose standard and rests on no supporting facts. Paragraph 53 alleges in conclusory fashion that Alcolac sold TDG "into the stream of international commerce with the *purpose* of facilitating the use of said chemicals in the manufacture of chemical weapons to be used, among other things, against the Kurdish population in northern Iraq." J.A.

370 (¶ 53) (emphasis added). As this Circuit has repeatedly held, especially after the Supreme Court's decisions in *Twombly* and *Iqbal*, "the court is not bound by the complaint's legal conclusions." *Robinson*, 551 F.3d at 222 (citation omitted); *see Sanders*, 2010 WL 4386881, at *1 ("A court, however, is not required 'to accept as true allegations that are merely conclusory . . . .'") (citation omitted).

Because the Amended Complaint fails to allege facts which, if proved, would establish that Alcolac sold TDG for the purpose of assisting Iraq to manufacture chemical weapons and commit genocide against the Kurds, the ATS claim should be affirmed on the ground relied on by the district court and the judgment below should be affirmed.

4. Even if a binding norm of customary international law permitted the imposition of liability for mere knowledge, the Amended Complaint alleges no facts that establish such knowledge, only impermissibly speculative inferences

Even if the ATS provided jurisdiction to impose liability on corporations for aiding and abetting a violation of customary international law on mere knowledge that such assistance would facilitate the violation – which it does not – the Amended Complaint alleges little more than that Alcolac sold a large quantity of a chemical with both commercial and military purposes to a new customer. Those facts, even if proved, would not be sufficient to establish that Alcolac must or should have known that the TDG it sold to Nu Kraft Mercantile Corp. would be transshipped to Iraq, made into mustard gas, and used to attack the Kurds. The

speculative inferences that the Amended Complaint alleges and asks the court to draw are not themselves supported by alleged facts and therefore are not sufficient to "nudge[] [the Kurdish Representatives'] claims across the line from conceivable to plausible . . . ." *Twombly*, 550 U.S. at 570. *Twombly* and *Iqbal*'s fact-pleading requirement cannot be evaded by alleging speculative inferences to paint in a sinister light facts that admit of a wholly innocent explanation, especially when those speculative inferences are contradicted by the very exhibits attached to the complaint. *See Sanders*, 2010 WL 4386881, at *1 ("A court, however, is not required 'to accept as true . . . unwarranted deductions of fact, or unreasonable inferences' or 'allegations that contradict matters properly subject to judicial notice or by exhibit.'") (citation omitted); *Nemet*, 591 F.3d at 255 ("We also decline to consider 'unwarranted inferences, unreasonable conclusions, or arguments.'").

The only facts properly alleged in the Amended Complaint are that Alcolac sold a large quantity of a chemical that could be used to make mustard gas (as well as dyes and inks) to a new customer. The accusations that Alcolac knew that the TDG would be transshipped to Iraq, made into mustard gas, and used to attack the Kurds, all rest on speculative inferences that are not themselves supported by facts and are instead contradicted by the very exhibits on which the Amended Complaint relies. Specifically, Alcolac's purported knowledge that the TDG would be transhipped to Iraq rests on not actual but constructive knowledge based on the size

of the new customer's purchase, which according to the Amended Complaint "***in effect***[] gave Alcolac notice that the TDG was destined for Iraq" because no other country had such large unmet needs. J.A. 363-54 (¶ 33) (emphasis added). Similarly, Alcolac's purported knowledge that the TDG – which is a "solvent used for a variety of lawful commercial purposes" as well as "an ingredient in mustard gas" (*id*. at 404) – would be used to make mustard gas rests (again) on the allegation that the new customer's order for TDG was "unusually large." *Id*. at 362 (¶ 29). From the size of the new customer's order, the Amended Complaint makes the causal leap that Alcolac "knew" that its TDG exports "were destined for use in chemical weapons" (*id*. at 362 (¶ 28)), "would be used for chemical weapons purposes" (*id*. at 362 (¶ 29)), and were "market[ed]" for use "in the manufacture of chemical weapons" (*id*. at 362-63 (¶ 30)). Lastly, proof that the mustard gas would be used to attack the Kurds rests on the allegation that Saddam Hussein's Iraq disliked the Kurds for collaborating with Iran and attempting to create an independent Kurdistan. *Id*. at 359 (¶ 22). Because Saddam Hussein disliked the Kurds, the Amended Complaint asks the trier of fact to infer that it was "inevitable" that he would attack them with mustard gas:

> There were, therefore, well-founded concerns that it was highly probable and, indeed, inevitable, that the chemical weapons that were being used by Iraq's military along the Iran-Iraq border would also be used on Kurdish communities on the Iraqi side of the border.

Id. at 359 (¶ 22). The Amended Complaint does not even have the temerity to allege that Alcolac should have known of the supposed "inevitab[ility]" that Saddam Hussein would use mustard gas on the Kurds.

The speculative inferences that the Amended Complaint asks the trier of fact to draw are not themselves supported by facts and are therefore not sufficient to survive a motion to dismiss under *Twombly* and *Iqbal*. The Supreme Court in those cases demanded aspiring plaintiffs to plead "*factual content*" that, if proved, would establish that the defendant "is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (emphasis added). It is the "*factual allegations*" that must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 570. The Amended Complaint alleges no facts that would, if proved, establish that Alcolac's large sale to a new customer was anything more than an attempt to sell a textile additive to a new purchaser for use in chemical dyes. To "nudge[] their claims across the line from conceivable to plausible" (*id*.), the Kurdish Representatives need facts. On the three inferences that the Amended Complaint asks the trier of fact to draw – that Alcolac knew the chemical was going to Iraq, that Alcolac knew that it would to be used to make mustard gas, and that Alcolac knew that the mustard gas would be used on the Kurds – the Amended Complaint is devoid of factual content and rests entirely on speculative inferences.

What is more, the speculative inferences that the Amended Complaint seeks to draw are flatly contradicted by the very exhibits on which it relies. The Amended Complaint uses Exhibit A to suggest that Alcolac was handing out the formula for mustard gas along with shipments of TDG, much like North Korea might deliver plans to make a nuclear bomb along with sales of fissile material. J.A. 361 (¶ 26). To the contrary, Exhibit A is a memorandum from Alcolac's safety director to Exxon that reveals Alcolac's limited knowledge of the concentrations of hydrochloric acid that would be necessary to generate mustard gas from TDG and was in the context of avoiding inadvertent creation of mustard gas in Exxon's chemical processes. *Id*. at 376; *see supra* p. 9. The Amended Complaint uses Exhibit B to prove that "any unusually large orders" for TDG from new customers "would be used for chemical weapons." J.A. at 362 (¶ 29). Contrary to that allegation, the memorandum reflects an intention to comply with applicable law. *Id*. at 380. The Amended Complaint alleges in connection with Exhibit C that Alcolac "intentionally fail[ed] to identify the ultimate destination" and "falsely describ[ed]" the TDG as a "Textile Additive." *Id*. at 364 (¶ 34). The invoice that is Exhibit C, however, on its face documents that the sale of TDG by Alcolac to Nu Kraft Mercantile Corp. is for lawful commercial purposes (use as a "Textile Additive," not mustard gas) and is consigned to a Swiss company (not destined for Iraq). *Id*. at 382. The Amended Complaint baldly asserts that the

documented use and destination are false, but *no facts* are alleged in support of those accusations. The Amended Complaint uses the fourth and last exhibit, Exhibit D, to imply that Alcolac knew that it sold TDG to Iraq through intermediaries. *Id*. at 364-65 (¶ 35). In fact, Exhibit D contrasts direct purchases of chemicals and munitions by Iraq from Egyptian and Chinese enterprises with indirect "procurement through third countries or companies in third countries" through multiple layers of transactions which concealed from Alcolac the ultimate destination and purchaser of the TDG sold to NuKraft. *Id*. at 385. *Far* from incriminating Alcolac, Exhibit D exculpates Alcolac by showing that it stopped shipments to its new customer immediately after NuKraft was unable to supply an end user certificate in a form acceptable to Alcolac. *Id*. at 385-86. "A court . . . is not required 'to accept as true allegations that . . . contradict matters properly subject to judicial notice or by exhibit.'" *Sanders*, 2010 WL 4386881, at *1 (citation omitted).

The Kurdish Representatives have had ample opportunities to marshal facts to prove Alcolac's knowledge that TDG would be transshipped to Iraq and used to make mustard gas to attack the Kurds. They have had discovery from Alcolac through Texas civil litigation that was commenced in 1994 and has been pending for more than 16 years. They have had access to reports on Iraq's WMD (weapons of mass destruction) program since the fall of Saddam Hussein's regime. And they

have been allowed to replead all of their claims after receiving Alcolac's 60-page motion to dismiss in the district court. After all that effort, the Amended Complaint remains unable to allege any *facts* to prove that Alcolac knew that TDG would be transshipped to Iraq and used to make mustard gas to attack the Kurds. Under *Twombly* and *Iqbal* and the law of this Circuit, speculative inferences, especially when contradicted by the very exhibits on which the operative complaint relies, cannot substitute for facts. Otherwise, the fact-pleading requirement of *Twombly* and *Iqbal* accomplished no more than substituting notice pleading for a creative writing exercise in which imaginative plaintiff's counsel relying on innocuous facts draw fictionalized conclusions of legal violations. *Twombly* and *Iqbal* require not just that the plaintiff's story be "conceivable." *Twombly*, 550 U.S. at 570. They demand facts to show that a legal violation is "plausible." *Id.* The Kurdish Representatives have had ample opportunities to develop those facts. The facts required to support their ATS claim simply do not exist.

Grave accusations such as complicity in genocide through chemical weapons demand pleading of meaningful evidence. *Cf. Burnett v. Al Baraka Inv. & Dev't Corp.*, 274 F. Supp. 2d 86, 103-04 (D.D.C. 2003) ("No heightened standard of pleading will be applied in this case, but, given the extreme nature of the charge of terrorism, fairness requires extra-careful scrutiny of plaintiffs' allegations as to any particular defendant . . . ."). In the absence of anything more than Alcolac's large

sale of a dual-use chemical to a new customer, after access to more than a decade of discovery, official Iraq WMD reports, and an opportunity to replead the complaint, the ATS claim should be dismissed with prejudice – even under a knowledge standard.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Dated: December 8, 2010

RESPECTFULLY SUBMITTED,

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Dated: December 8, 2010

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 8th day of December, 2010, I caused this Brief of Appellee to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 8th day of December, 2010, I caused the required number of bound copies of the foregoing Brief of Appellee to be hand-filed with the Clerk of this Court and one copy to be served, via UPS Ground, upon counsel at the above addresses.

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