UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIGUEL ANGEL CORBACHO DAUDINOT.

Plaintiff, CASE NO. 1:13-cv-22589-KMV

v.

YASIEL PUIG VALDES a/k/a YASIEL PUIG
and MARITZA VALDES GONZALEZ.

Defendants.
_____/

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS COMPLAINT FOR FAILURE TO STATE A CLAIM

Plaintiff, MIGUEL ANGEL CORBACHO DAUDINOT, through counsel, files this Response to Defendant's Motion to Dismiss his Complaint and in support thereof state:

I. INTRODUCTION

In January 2010, Defendants, acting as informants for the Cuban government, falsely accused plaintiff of attempting to smuggle Yasiel Puig ("Puig"), a famous Cuban baseball player, out of Cuba so that he could play baseball abroad. Based on those accusations, Plaintiff was arrested and arbitrarily detained with convicted criminals in Cuban prisons for many months without formal charges being filed against him and without the benefit of going before any judge or tribunal. After almost 10 months of uninformed incarceration, Plaintiff was summarily convicted in a trial that lasted less than a day, and in which the court's only evidence was the testimony of Defendants. In prison, the Plaintiff was subjected to torture, resulting in severe and permanent severe physical and mental pain and anguish. Puig, who had been suspended from the Cuban national baseball team and the Cuban National Series team of Cienfuegos in late 2009, accused and testified against Plaintiff in a successful attempt to regain the Cuban government's trust so that he would be allowed back on the national team in order to travel. After several accusations, where he accused several individuals of attempting to smuggle him out of the country, Puig was reinstated into the Cuban national baseball team almost immediately after his accusation, and he attempted to defect from Cuba while traveling abroad with the national

baseball team only seven (7) months after his testimony against Plaintiff in court. Eventually, Puig managed to defect from Cuba, and he and Valdes currently live in the United States.

The case at bar is brought under The Torture Victim Protection Act of 1991 ("TVPA"), 28 U.S.C. §1350 note 2, which is separate and distinct from the Alien Tort Statute ("ATS"), 28 U.S.C. §1350.

Plaintiff has successfully stated a claim under the TVPA. Plaintiff addresses the issues raised in Defendants' Motion as they raised them. First, the presumption against extraterritorial application does not apply to the TVPA. Second, Plaintiff satisfies the definition of torture as set by the TVPA—including both the "severity standard" and "purpose standard" as set out by the statute and the case law. Lastly, Plaintiffs have stated a *plausible* claim for relief under theories of secondary liability that is filled with more than merely unadorned statements, but with facts, including names, dates, details, documents, documents containing the Defendants' own signatures, actions, and events. [1]

II. ARGUMENT

The TVPA was intended to apply to acts committed on foreign soil

Defendants cite a case out of the Southern District of Texas, *Murillo v. Bain*, CIV.A. H-11-2373, 2013 WL 1718915 (S.D. Tex. 2013), which misapplies *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 185 L.Ed.2d 671 (2013), to make the argument that the court here ought to dismiss the instant case due to the presumption against extraterritorial application, as explained in *Kiobel*, which only ever addresses the ATS. In *Murillo*, the Texas court found that the TVPA claims could be dismissed due to the insufficiency of the facts alleged, the lack of personal jurisdiction, and the lack of service on the defendant. After already finding all of the above-stated grounds to dismiss the complaint, the court summarily stated without any analysis, that the TVPA does not apply extraterritorially.

However, the ATS and the TVPA are two separate and distinct laws, which Chief Justice Roberts distinguished in the court's own opinion in *Kiobel*. In his concurring opinion Justice Kennedy also distinguished the ATS and the TVPA and intimated its extraterritorial application,

[1] If the court should find that Plaintiffs have not plead with sufficient details the hardships they have suffered to plead torture under the TVPA, they respectfully request this court allow them to Amend the instant complaint in order to meet the requirement.

stating "any serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350, and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted."*Id*. at 1669.

The Texas court's interpretation in *Murillo* is contrary to existing interpretations of the TVPA in the 11th Circuit. In *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F. 3d 1338 (2011), the court distinguished the ATS and the TVPA. The court, like the Court in *Kiobel*, reasons that the ATS is a jurisdictional statute which does not grant a separate cause of action. *Id.* at 1345. However, unlike the ATS, the TVPA provides both United States citizens and aliens with "a cause of action for torture" when the acts alleged are done under the color or authority of a foreign nation. *Id.* at 1345-1346. As illustrated by Justice Kennedy's concurring opinion in *Kiobel*, the TVPA differs greatly from the ATS and it is necessary to make an independent determination of the Act's extraterritoriality.

Irrespective of the Southern District of Texas' application of *Kiobel* to TVPA, the plain language of the statute itself states that liability is extended to "an individual, who, under actual or apparent authority or color of law ***of any foreign nation***" tortures another. By its plain meaning a person is only liable under this statute if he subjects another to torture with the authority or color of law of a ***foreign nation*** and he or she would only have that authority if he or she is acting extraterritorially since that foreign authority would not be valid in the United States.

This becomes even more obvious when reading the language regarding the exhaustion of remedies. The TVPA requires a party to first exhaust all "remedies in the place in which the conduct giving rise to the claim occurred."[2] The application of the statute would therefore be irrational if it did not apply to conduct abroad. As such, the only cognizable plaintiffs under the interpretation advanced by Defendants would be those persons who are tortured *in the United States* by persons acting with the authority of a *foreign* government and who exhaust all their U.S. court remedies before resorting to a U.S. court. Such a result could not possibly be the purpose of the legislation. Rather, disallowing persons who commit torture from using the United States as a shelter and allowing recourse through the U.S. court system after the victims

[2] In the case at bar, Plaintiff has exhausted all remedies in Cuba, filing an appeal that was denied and finding that there are not further appeals or legal recourses Plaintiff can make inside of Cuba (DE 10, ¶¶ 79-80).

have sought the aid of the country in which the wrong was committed seems like the most logical and natural application of the statute.

More importantly, it was Congress' unadorned intent that the law apply extraterritorially. The Act was made into a public law on March 12, 1992, and was introduced "to carry out obligations of the United States under the United Nations Charter and other international agreements." *Public Law, Pub.L. 102–256.* Stat. *106 Stat. 73.*

The Congressional Record is rife with accolades for the Act and statements that make clear the statute permits a cause of action for acts of torture committed abroad and would put "torturers on notice that they will find no safe haven in the United States…. Torturers may be sued under the bill if they seek the protection of our shores or otherwise subject themselves to the personal jurisdiction of a U.S. court," said Romano L. Mazzoli, Representative of Kentucky's 3rd district and Chairman of the House of Representatives' Immigration, International Law and Refugees Subcommittee. Representative William S. Broomfield, of Michigan's 18th district, a Foreign Affairs Committee member and supporter of the bill stated, "this bill would clearly open the courts of the United States to victims of torture overseas. It would permit torture victims or their survivors to bring civil actions against the persons responsible, provided they can be found within this country." *TORTURE VICTIM PROTECTION ACT OF 1991* (House of Representatives – November 25, 1991) Congressional Record, 102nd Congress, (1991-1992), p. H11245.

Plaintiffs have successfully plead torture under the TVPA

The Torture Victims Protection Act, 28 U.S.C. §1350(2)(a) establishes liability for damages inflicted on the suing party in a civil action for "an individual, who, under actual or apparent authority or color of law of any foreign nation subjects an individual to torture." The statute goes on to define torture under the act as:

> 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."

28 U.S.C. §1350(b)(1) (emphasis added).

In their Motion to Dismiss (DE 11), Defendants claim that Plaintiff must meet a "severity requirement" and "purpose requirement" that was established by the United States Court of Appeals for the District of Columbia in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92 (D.C. Cir. 2002) and reaffirmed in *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003). Those cases held that in order to properly plead torture under the TVPA the acts alleged must be "sufficiently extreme and outrageous to warrant the universal condemnation that the term `torture' both connotes and invokes." 294 F.3d at 92. "[T]orture does not automatically result whenever individuals in official custody are subjected even to direct physical assault." Id. at 93. Rather, torture is a label that is "usually reserved for extreme, deliberate and unusually cruel practices." Id. at 92-93. The issue—Defendants contend—"is the degree of pain and suffering that the alleged torturer intended to, and actually did inflict upon the victim. The more intense, lasting, or heinous the agony, the more likely it is to be torture." *Id*. at 93.

Plaintiff does not concede that the 11th Circuit must adopt the District of Columbia's standard of torture under the TVPA. Indeed, the 11th Circuit in *Aldana v. Del Monte Fresh Produce, N.A.*, Inc., 416 F.3d 1242 (11th Cir. 2005) recalled in its opinion that "neither Congress nor the Supreme Court has urged us to read the TVPA as narrowly as we have been directed to read the Alien Tort Act." *Id*. at 1252. The *Aldana* court found that Plaintiffs successfully pled torture under the TVPA for repeated *threats* of imminent death when Plaintiffs were in the custody or physical control of the security force and suffered severe, prolonged mental and physical pain or suffering by being *threatened* with imminent death because of the Plaintiffs for their labor activities. *Id*. The *Aldana* court found that plaintiffs plead torture under the TVPA for *threats* of imminent death during a detention that lasted for just more than eight (8) hours. Plaintiff's torture lasted for 3 and a half (3½) years, and the consequences of his torture is still being felt.

But even if Plaintiff accepts Defendants' severity/purpose requirement as the one to meet, which Plaintiff does not accept, Plaintiff has met that requirement. The cases on which Defendants rely to state that Plaintiff has not properly pled a claim for torture are *Weisskopf v. United Jewish Appel-Fed'n of Jewish Philanthropies of New York, Inc.,* 889 F. Supp. 2d 912,

925 (S.D. Tex. 2012), *Simpson*, and *Price*. In *Weisskopf* the Plaintiff's only claim to torture appears to have been that "that his visitation rights with his children were limited to supervised visits and that he and his children "were falsely imprisoned for 1 to 3 hours per week in prison-like conditions as their only contact allowed by Defendants' agent, Ruth Eisenmann, for over 1 year." *Id.* at 4. The Plaintiff in *Simpson* pled that Libyan authorities forcibly removed her and her husband from a cruise ship, held them captive, threatening to kill them if they tried to escape, held them together for a period of three months before separating them shortly before letting her go while holding on to him for a further four months without informing her of his condition or his whereabouts and keeping him incommunicado. She did not provide the court with any further details of mistreatment endured by her or her husband in prison. In *Price*, the Plaintiffs, two Americans who had been living in Libya, alleged that they were arrested for taking pictures, which they admitted to having taken. Following their arrest, they were denied bail and kept in what they claim was a "political prison" for 105 days pending the outcome of their trial. In their complaint, Plaintiffs assert that they endured deplorable conditions while incarcerated, including urine-soaked mattresses, a cramped cell with substandard plumbing that they were forced to share with seven other inmates, a lack of medical care, and inadequate food. The complaint also asserts in an unspecified manner that the plaintiffs were "kicked, clubbed and beaten" by prison guards, and "interrogated and subjected to physical, mental and verbal abuse".

While the allegations in *Price* are a step closer to the facts alleged in the instant case, than the allegations contained in either *Simpson or Weisskopf*, they are still a pale shadow of the detailed allegations contained in the instant case. By contrast to the cases presented by Defendants, Plaintiff's allegations of torture, have been very specific, more horrific, more severe, more detailed, of longer duration, and their consequences have been permanent.

Throughout his three and a half (3½) years' incarceration, the government attempted to break Corbacho Daudinot, beginning with his thirty (30) days' interrogation that took place without affording Plaintiff with the assistance of a lawyer. During those thirty days the guards engaged in a deliberate campaign to terrorize and disorient the Plaintiff, putting him in an interior windowless cell, whose lights, which buzzed and flickered continually, were never turned off, and it was impossible to determine the passage of time due to the fact that the corridor in front of his cell had no access to windows, he was not permitted to fall asleep, he was provided food and water at irregular intervals, was subjected to a battery of frequent and sporadic

interrogation sessions that lasted hours, where the interrogators deliberately attempted to frighten and further disorient Plaintiff. The interrogation room was very dim and had faulting lighting, which, when added to his sleep deprivation, made it difficult for Corbacho Daudinot to concentrate or to see the documents that were presented to him by the officials. His interrogators would alternately behave violently, mockingly, or sedately. His interrogators would slam their hands down on the table and lunge out of their seats, they would waive allegedly incriminating documents wildly and fling them in front of Corbacho Daudinot, they would yell at him, they would scream directly in his ears, they would sit back and laugh at him, they threatened to "make him disappear", they told him that his family would "never know what happened to [him]", they would threatened to beat him, they would threatened to bring Yasiel Puig to come to beat him, they would threaten to confiscate all of his property and leave his family destitute, and they would threaten to imprison him for thirty (30) years because, as they informed him, Yasiel Puig had told them that Corbacho Daudinot had offered to take him out of the country. After about two weeks or more, of undergoing these kinds of interrogation and disorientation practices, his interrogators would sometimes force Corbacho Daudinot to sign documents whose contents he was not aware and had no bearing of truth. The interrogators gave him documents to sign that he could not read because (a) the guards did not permit him to read it; (b) of the lighting conditions in the room made it impossible to read, and (c) he was too exhausted and disoriented from his ordeal to understand what was going on around him. *See*, (DE 10, ¶¶59-61, 85).

Because Corbacho Daudinot was convicted of Human Trafficking of an athlete, which is a political crime in Cuba, the Cuban government treated Corbacho Daudinot as an "enemy of the state" or dissident. (DE 10, ¶81). Corbacho Daudinot suffered psychological tortures as much as physical tortures. On a psychological level he suffered: continuous credible and frightening threats that occurred on a daily basis, sometimes several times a day, which terrorized the Plaintiff. These threats consisted of threatened beatings, threats of framing Corbacho Daudinot of a new crime that he did not commit while he was in their custody[3], of threats against his life[4],

[3] Corbacho Daudinot had witnessed the guards carry out this particular threat on other prisoners and knew that they could and would do it to him as well. The guards would threaten to plant evidence against Corbacho Daudinot—such as a knife or drugs—in his personal belongings during a routine search and accuse him of a new crime in prison for which his sentence would be extended and for which they could exact further punishment. This threat kept Ccorbacho Daudinot in continual fear, cowering in his cell, and afraid to sleep, lest the guards take that moment to plant evidence on him. These threats were a constant presence, sometimes overtly stated by the guards with a smile or a shout or a sneer, sometimes only hinted at by a guard using a snide comment and a wink, while giving

and of threats of taking away his monthly visit with his wife or other privileges (DE 10, ¶¶82-85a). These threats were credible because Plaintiff had seen the guards carry out these threats before.

Some tortures inflicted upon Plaintiff were both physical and psychological: He was punished in solitary confinement in dank, windowless cells that he shared with rats and roaches and which have no mattresses or blanket, at one point for up to 10 days (DE 10, ¶¶85b, 85t, 85u.[5] He was placed in solitary confinement for ten (10) days to sit in complete darkness, without a mattress or a blanket, and infested with rats and cockroaches because he refused to accuse of wrong-doing a man, who Corbacho Daudinot did not know and did not witnessed doing anything wrong. (DE 10, ¶85u) He was fed food that is spoiled, rotting and covered in maggots. On a daily basis he was fed rotten fish and spoiled pig's belly and pig's feet stew that he could barely keep down, despite the fact that he saw other prisoners, who had not be convicted of political crimes, receive unspoiled food. (DE 85, ¶85c). When he complained about the spoiled food, he was informed by the guard, known as Tony Cara Mala, said that ""this is the kind of food that you get when you try to take the third batter from Cienfuegos [referring to PUIG]" (DE 10, ¶85c). Even as other prisoners, who were not convicted of political crimes, were permitted to leave their cells to enjoy open air and sunlight, Plaintiff was confined to his windowless cell four 24 hours a day during the length of his incarceration, to the point where his skin became mottled and blotchy (DE 10, ¶85e). While some prisoners enjoyed better sanitary conditions and uncrowded cells, Plaintiff was subject to unsanitary conditions, where twenty-two (22) to thirty (30) men shared the same cramped hot cell, were fed rotting food, and had to relieve their bowels and bladders in a hole on the ground of the cell. No toilet paper, sanitary napkins or even scraps of cloth were provided (DE10, ¶85f). Even as other nonpolitical prisoners had mattresses, Corbacho Daudinot was forced to sleep on the floor when the cell was overcrowded and on a

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Corbacho Daudinot a glimpse of the evidence that the guard intended to plant. These threats were particularly effective on Corbacho Daudinot, who maintained that he had been falsely accused by Puig, and was convicted only because of that accusation. He lived in fear that he would be falsely accused and convicted again for a crime he had not committed.

[4] These threats took a variety of forms, but some of the most common threats were stated as follows: (1) "Accidents happen to people like you in prison"; (2) "Prison is a dangerous place for an anti-revolutionary like you. Anything can happen to you here."; and, (3) Be careful. There are a lot of dangerous people here who don't like traitors to their country."

[5] Plaintiff was placed in solitary confinement the same day that his wife came to visit.

slab without mattress when the cell was not overcrowded (DE10, ¶85f).[6] Despite having kidney problems, he was provided with less than a gallon of murky contaminated water a day for him to use for a multitude of purposes: for drinking, to clean up after himself after using the toilet (since no toilet paper was provided), or for washing himself. During the stifling summer months, when the sweat made the clothes cling to his body, he was not provided with additional water. Even though other nonpolitical prisoners were provided with water upon request, Plaintiff was repeatedly told that as an "enemy of the state", he was not entitled to such things (DE 10, ¶85h).

While other prisoners received medical care upon request (DE 10, ¶85k), Corbacho Daudinot did not simply "lack medical care", he was *denied* any medical attention despite being a sick man, who had been receiving regular care for his kidney condition prior to being imprisoned (DE 10, ¶85j, 85k). The lack of water and the contaminated condition of the water caused Plaintiff to become dehydrated and exacerbated his condition, causing him crippling pain. When he begged the guards for more water for his kidney condition, they laughted at him or threatened him into silence (DE 10, ¶85h). Plaintiff informed the prison that he was undergoing treatment for his kidneys prior to his detainment and told them that he needed to see a doctor, a request that was ignored (DE 10, ¶85j). As a result of the failure to receive medical treatment and of drinking the limited amounts of the contaminated water the guards provided him, began experiencing debilitating bouts of kidney pains that would incapacitate him for several hours, and in which he would repeatedly beg for medical treatment. At those times, the guards would laugh at him and accuse him of lying in order to leave the prison (DE 10, ¶85j). Receiving no medical treatment, the bouts of renal pain became more frequent, sometimes lasting for days, where he was unable to rise from his slab or place on the floor, calling incessantly for the guards to please send him a doctor (DE 10, ¶85j). The guards continued to insist that he was fabricating his ailments, and he depended on his family to bring him paid medication in order to manage the pain, even though he could get no treatment for the underlying problem (DE 10, ¶85j) To cover up for their deliberate abuse of the Plaintiff, the prison informed Daudinot's wife, who was worried about her husband, that they had treated his medical condition and that he only had a renal colic, when in reality he received no medical treatment or attention and was suffering, he later learned, from two (2) cysts in his right kidney (DE 10, ¶85l).

[6] If sleeping on the floor was not difficult enough, Plaintiff and other political prisoners were routinely awakened by what the guards would term "the counting of the prisoners", which consisted of banging on the cell's iron gate between 11pm to 5am. (DE 10, ¶85o)

Throughout his Complaint, the Plaintiff denotes the marked difference in the treatment of himself as compared to the treatment received by other prisoners not accused of political crimes. Other prisoners were allowed to receive more frequent visits in prison and for longer periods of time, while he was limited to a one-hour visit once a month, and was denied that arbitrarily (DE 10, ¶85p, 85q, 85t). He was placed in a prison far away from his family for the entirety of his incarceration and contrary to the rights afforded to prisoners under Cuban law (DE 10, ¶85s). He was constantly targeted due to his alleged involvement with Puig, who was from the same community where the prison was located (DE 10, ¶85v), and was repeatedly told that as an "enemy of the state" Corbacho Daudinot "had no rights" and that as far as Corbacho Daudinot was concerned "the laws could only serve to wipe his feet" (DE 10, ¶85p). The guards confiscated the food or treats brought to him by his family, even as the prison denied him basic care—such as unspoiled food and toothpaste—provided to other prisoners (DE 10, ¶85r)

The effects of the torture on Corbacho Daudinot are apparent. Due to his treatment in prison CORBACHO DAUDINOT is now an extremely sick man, who is constantly afraid, nervous, and hardly able to function. He is paranoid, he cannot sleep and he does not enjoy life. He lives with the constant awareness that he has no rights, that anything he does can be construed as evidence of a crime, and that his very life can be taken from him at any time (DE 10, ¶86). Upon his release he suffered and continues to suffer in a non-relenting fashion from psychological problems for which he seeks continuous professional help from a psychologist, an inability to fall asleep, causing him to only attain a few hours per week of sleep, which he can only attain by taking medication, vivid nightmares from his time in prison, constant fear of being re-imprisoned arbitrarily and without warning, extreme claustrophobia, an inability to eat, an inability to converse normally with family and friends, an inability to partake with family as his claustrophobia makes him incapable of sharing in activities inside the home or other enclosed spaces, an inability to properly nurture his child due to the amount of effort he has to put into caring for himself or in maintaining a conversation with others, and a constant fear that one of his family members, including his son, will suffer the same arbitrary imprisonment. Corbacho Daudinot is now forced to work as a street sweeper, because it is the best way for Cuba to keep track of "enemies of the state", the non-performance of which would subject him to further imprisonment for "dangerousness", an ambiguous criminal charge Cuba uses arbitrarily against persons it considers enemies (DE 10, ¶87).

Corbacho Daudinot didn't simply endure "substandard plumbing", "inadequate food", and "lack of medical care" for 105 days, as did the Plaintiffs in *Price*. And, unlike the Plaintiffs in *Price*, Corbacho Daudinot was a sick man, who was purposefully denied *any* medical attention and was fed rotting, maggot-infested food and a very limited amount of contaminated water. And after eating food designed to make a person sick, he (along with the other 22 to 30 unfortunates who shared his hot cell) had to relieve his bowels in a hole in the ground of the cell without running water, toilet paper, sanitary napkins or even scraps of cloth. At least the Plaintiffs in *Price* had urine-soaked mattresses. Corbacho Daudinot never had any—he slept on the floor or on a slab—and when he was placed in solitary confinement as additional punishment in a dank, windowless cell, he was forced to sleep on the concrete floor or against the wall and was not even provided a blanket (DE 10, ¶85). And while he could not see anything when the lights were turned off, he could hear the roaches and the rats that kept him company. Corbacho Daudinot's torture was psychological as much as it was physical. His torturers drove the point home that he had no rights and that his life had no value. He was denied rights supposedly guaranteed to him by the Cuban constitution and regularly granted to other prisoners.

Corbacho Daudinot's torture was undeniably severe, especially given that he was an innocent man. The psychological torture made him a shell of man who became afraid of being suddenly locked away in a small windowless room and being forced to eat rotten food, of being taken away from his son, who was only 5 at the time of his imprisonment, and never seeing him again. On occasion, Corbacho Daudinot is literally even afraid of his own shadow (DE 10, ¶ 210). This psychological scarring has caused Corbacho Daudinot to undergo continual treatment with a Psychologist in Cuba. (DE 10, ¶ 210).

Unlike the cases presented by the Defendants the consequences of the torture alleged in the case at bar are plain and drastic and have long-lasting effects that will haunt the Plaintiff for the rest of his life. Unarguably, the effects of the treatment received by Plaintiff in prison fit the definition of agony that is "intense, lasting, or heinous" as defined by *Price*, and the treatment visited upon him was designed to punish him with particularity for being "an enemy of the state".

Treatment of prisoners in Cuba is not uniform. The politics of the crime dictate everything: the notoriety of the trial, the facility where the prisoner is held, when and if he

should be found guilty, the length of his sentence, the rights, privileges and luxuries he will be afforded and his overall treatment once in custody. Certain crimes—such as Human Trafficking—are political due to the government's public attention on the matter. Aside from being a political crime, Human Trafficking is also considered a National Security crime, because it is seen as weakening the country by "stealing" talent that is cultivated by the revolution.

The purpose for the torture that was visited upon the Plaintiff was provided throughout the Complaint: Human Trafficking. Human Trafficking is a political crime, constituting what that country considers to be a crime against its national security (DE 10, ¶¶ 17, 81, 85, 133, 204, 205, 208).

In Cuba, punishment for these kinds of crimes is meted through various types of systematic torments that are similar to those described by the Plaintiff. A certain class of prisoner is treated to a certain class of treatment. In Cuba, rapists and killers are afforded better treatment in prison than are political prisoners. Just as Cuba routinely tortures prisoners accused of similar political crimes, the Cuban prison in this case targeted Plaintiff for torture and did in fact torture Plaintiff deliberately and individually to punish him because they believed that he had offered to take Yasiel Puig out of the country. That many prisoners also suffer deliberate torture and deprivation in prison does not negate that it was in fact torture directed against them as punishment for what is considered to be a political and national security crime.

While Defendants can probably provide the court *ad infinitum* with cases listing horrific and blood curdling acts of cruelty that trigger a reader's visceral reaction, their listing of acts that other courts have found to meet the standard for TVPA does not undermine Plaintiff's contention that they too endured torture as defined by the TVPA, and is essentially an argument that "since the acts of torture described in these cases are worse than the ones alleged by Plaintiff, then the the acts alleged in the instant case do not meet the severity standard for the TVPA". That argument is akin to claiming that the person who breaks her arm in a car accident was not injured nor was she in an accident because another person broke his back in a separate car accident that was more severe.

Plaintiffs have adequately pled Secondary Liability TVPA

Defendants assert that Plaintiff fails to state a claim for secondary liability under the TVPA because Plaintiff must plead, essentially, that Defendants entered into the conspiracy with

the Cuban government with the ***specific intent*** and purpose that the Cuban government *torture* Plaintiff under the definition set by the TVPA.

Plaintiff disagrees that secondary liability requires Plaintiff to so specifically plead Defendants' *mens rea* in the conspiracy.

Aiding and abetting and conspiracy liability are derived from federal common law standards, not statutory language like the TVPA. The appropriate standard for secondary liability under the TVPA is derived from international law. *Re: Chiquita Brands International, Inc,* 2011 WL 2169873, 34 (S.D. Fla. 2011)(citing *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir.2009)).

Receiving some guidance from *Halberstam v. Welch,* 705 F.2d 472 (C.A.D.C. 1983), the Eleventh Circuit held that to find Defendants liable for conspiracy, Plaintiffs needed to prove by a preponderance of the evidence that (1) two or more persons agreed to commit a wrongful act, (2) [Defendant] joined the conspiracy knowing of at least ***one of the goals*** of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy. Cabello v. Fernandez-Larios, 402 F.3d 1148, 1159 (11th Cir. 2005). See *Chiquita* 211 WL 2169873.

To plead aiding and abetting liability, Plaintiff must allege that (1) Cuba committed an international-law violation (in this case prolonged arbitrary detention and/or torture), (2) that Defendants acted with the purpose or intent to *assist* in that violation, and (3) that Defendants' assistance substantially contributed to Cuba's commission of the violation. *See Cabello* 402 F.3d and *Chiquita* 211 WL 2169873. The eleventh circuit necessitates a less calculated intent requirement for aiding and abetting than conspiracy, stating that "the Torture Victim Protection Act reaches those who ordered, abetted, or *assisted* in the wrongful act." *Aldana v. Del Monte Fresh Produce,* N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005)(quoting *Cabello*).

As stated above, the standard for secondary liability is not set by the TVPA, but by federal common law and by international law as it is understood and interpreted by federal courts. Therefore, the ***purpose*** or ***intent*** that Plaintiff must plead that Defendants possessed in entering the conspiracy with Cuba or in aiding and abetting the Cuban government is not—as Defendants contend—that the government *specifically* torture Plaintiff according to the strictures of the TVPA.

Under *Cabello*, to be held liable for torture based on conspiracy a Defendant need not have ***specifically intended*** that the Plaintiff undergo torture under *any* definition, but rather, that Defendant joined the conspiracy knowing at least ***one of the goals of the conspiracy*** and ***intending to help accomplish it***. Throughout the complaint, Plaintiff has voiced at least two unlawful goals of the conspiracy: (1) the arbitrary prolonged detention[7] of the Plaintiff and (2) the torture of the Plaintiff once he was in Prison.[8] (DE 10, ¶¶ 11-14, 23-30, 33, 246-254) And in *Eastman Kodak Company v. Carballo v. Kavlin*, 978 F.Supp. 1078 (S.D.Fla. 1997), the court held that an individual, who filed a false accusation against a Plaintiff that resulted in that Plaintiff's arbitrary and prolonged detention and torture, could be held liable "assuming that she knew about the prison's conditions and conspired to cause Plaintiff to undergo that dreadful experience, under ordinary principles of tort law she would be liable for the foreseeable effects of her actions."

This knowledge standard for secondary liability is also the correct standard in customary international law. The standard for aiding and abetting should be derived from generally accepted norms of international law. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 33 (D.C. Cir. 2011). In the past, the 2nd circuit has correctly held that international law is derived from a large variety of decisions and sources that are both international and domestic. *Flores v. So. Peru Copper Corp.*, 414 F.3d 233, 247-48 (2d Cir. 2003). However, In *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir.2009), the 2nd circuit mistakenly concluded that "purpose" was the appropriate standard for aiding and abetting under customary international law. In particular, it strays from its previous deferential determinations of international law by not relying on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR) – both of which are international tribunals created by the United Nations Security Council (and

[7] Although the Supreme Court's holding in *Kiobel* makes arbitrary prolonged detention that takes place extraterritorially no longer actionable in federal courts under the ATS, Plaintiffs use it here only as an argument in support of their argument for secondary liability, which is derived by applying International law. Arbitrary prolonged detention has long been recognized as unlawful under customary international law. Plaintiff is not seeking redress for their arbitrary prolonged detention since it is not actionable under the TVPA, but it was still *one of the goals of the conspiracy* in this case.

[8] The other goals of the conspiracy were improving Puig's baseball career after he lost the trust and confidence of the government and the Communist Party and returning him and his family back into the good graces of the government. The Cuban government has its own reasons for entering into these conspiracies; it keeps an iron grip on the population, while making public examples of those who try to "steal" their talent, and demonstrates to snitches how they are rewarded for doing the right thing.

therefore, in part, the United States). Instead, the court relies on The Rome Statute, the treaty creating the International Criminal Court and to which the U.S. is not a party.

Nonetheless, the correct knowledge standard for secondary liability has been a part of international jurisprudence since the Nuremberg Military Tribunals. As way of example, in *The Zyklon B Case*, the Brittish Military Court found three persons guilty for supplying poisonous gas to the German S.S. (a Nazi paramilitary group largely responsible for many of the war crimes committed during World War II) while *knowing* such gas would be used against allied nationals held in concentration camps. 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS at 93. Similarly, in the *Flick Case*, Flick was found guilty by supplying financial support to the S.S. while *knowing* of the atrocities the organization was committing.

The Nuremberg court upheld the knowledge standard in *The Ministries Case*, where the court found that the *actus reas* of merely approving a loan was not enough to support a conviction of a banker who made a loan to the S.S. despite the knowledge that such loans would be used to commit atrocities. 14 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 at 620. When discussing the *mens rea* required under secondary liability the *Chiquita* court misinterpreted and misapplied the Nuremberg court's finding in *The Ministries Case*, which was the only case the *Chiquita* court mentioned and relied upon in discussing the standard of intent. However, the Nuremberg Court never changed the standard *mens rea* from that of "knowledge".

This knowledge standard carries on to more recent cases decided by the ICTY and ICTR. In the case of *Prosecutor v. Furundzija*, the ICTY Trial Chamber addressed whether "mere knowledge that his actions assist the perpetrator in the commission of the crime is sufficient to constitute mens rea in aiding and abetting the crime." Case No. IT-95-17/1-T, Judgement, ¶ 236 (Int'l Crim. Trib. for the Former Yugoslovia Dec. 10, 1998). After, looking at the present day case law, the Nuremberg trials, work by the International Law Comission, and the Rome Statute, the tribunal decided that in the vast majority of cases, knowledge that a person's actions would assist the perpetrator in the commission of the crime would be enough. *Id.* Similar holdings have arisen in the vast majority of other cases. *See Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, ¶ 102 (Int'l Crim. Trib. for the Former Yugoslovia Feb. 24, 2004); *The Prosecutor v.*

Emmanuel Rukundo, Case No. ICTR-2001-70-T at ¶ 53 and ¶ 578 (2009); *Tadic*, Case No. IT-94-1-A at ¶ 459, 474, 626, and 657.

It is the knowledge standard that the Eleventh Circuit applied in *Cabello* when it held that Plaintiffs must plead that Defendant joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it. The intent articulated by *Cabello* is that of *helping* accomplishing at least *one* of the goals in the conspiracy.

But even if Plaintiff accepts the Defendants' intent standard of secondary liability as true, Plaintiff has met that high standard.

In the case at bar the Plaintiff repeatedly alleges that Valdes entered into a conspiracy with her son, PUIG, and with the Cuban government, to accuse Plaintiffs of Human Trafficking and to testify against the Plaintiff at trial in order to secure against the Plaintiff's arbitrary prolonged detention and torture in Cuban prison. [DE 10, ¶¶ 12-17, 18-21, 23-37, 213-249.] The Defendants personal motivations of financial gain and advancing her Puig's career by helping him get back into the national Cuban baseball team does not negate their intent and purpose to help the Cuban government commit arbitrary prolonged detention and torture. The Complaint alleges several facts in support of the conspiracy, such as Valdes' purposeful targeting of a tourist car and solicitation to go see her son at the baseball field, Puig's demand for 100 convertible pesos, the Defendants' deliberately seeking out INDER officials to accuse Plaintiff, Puig's purposeful act of keeping the mobile phone that OROZCO had given him fully charged and on him, while taking the calls from OROZCO and his cohort from abroad, Puig's deliberately noncommittal answers to OROZCO and his cohort, designed to entice further communication with Puig, the Defendants' deliberate false testimony during the Cuban proceedings, and the government's commendation of the behavior. [DE 10, ¶¶ 213-249]. Similarly, PUIG's ideological membership in the INDER and in the Communist Youth afforded him the clout and connections to help secure a better position on the baseball team through his accusations.

Defendants knew the suffering that would be inflicted upon the Plaintiff in prison for a political national security crime like Human Trafficking and they still accused him, intending for the Plaintiff to suffer that torture [DE 10, ¶ 67, 70-78, 88-102, 204-212, 213-245]. Defendants personally saw the effects that the many months of torture in prison had already inflicted on

Plaintiff during trial and they purposefully testified against them in court to continue the torture [DE 10, ¶¶ 67, 70- 78, 88-102]. As their actions were pursuant to a conspiracy and agreement between themselves, PUIG's meeting with the INDER's deputy director and coach of the National Series Team was a significant and relevant fact here [DE 10, ¶¶ 70- 78, 88-102, 213-249]. The fact is that the Defendants are two out of a larger number of other informants in the large network of informants maintained and propped up by the government. *See* the affidavit of Gregorio Miguel Calleiro, that was provided as Exhibit U in Plaintiff's First Amended Complaint [DE 10, ¶197].

In the case at bar Defendants joined the conspiracy to become informants for the Cuban government to accuse individuals of attempting to smuggle Puig out of the country in order to rehabilitate Puig in the eyes of the government security so that he could rejoin the Cuban National Team (DE 10, ¶¶ 8, 10, 35, 88-102, 103-114, 213-249). In furtherance of that conspiracy Defendants made false accusations to the Cuban government against Plaintiff, knowing and intending that Plaintiff would be incarcerated of a serious political crime and detained in torturous conditions (DE 10, ¶67). In continued active participation of the conspiracy, Defendants reiterated their accusations and participated in the investigation of Plaintiff, culminating their assistance to the government with sworn testimony given at Plaintiff's trials in order to secure the Plaintiff's continued detention and torture [DE 10, ¶ 70-78, 88-102, 212, 213-249].

In the case at bar, Plaintiff gave specific information to assert Defendants' participation in the conspiracy and in aiding and abetting the wrongful state actors, admitting dates, times, locations, names, public records court documents, including, and most tellingly, the accusations signed by Defendants. In those documents, the Defendants accuse Plaintiff of the crime of Human Trafficking. *See* Exhibits A and B, as attached to Plaintiff's First Amended Complaint (DE 10, ¶ 6).

The allegations presented by Plaintiff in his Complaint do more than assert generalized allegations of collusion between Cuban authorities and the Defendants. The Plaintiff provides the date when the conspiracy began (shortly after he was sanctioned by the government in 2009), the dates on which the Valdes and Puig accused the Plaintiff of offering to smuggle Puig out of Cuba, the names of Puig and Valdes' co-conspirators on the INDER, the dates that Plaintiff was

arrested and the name of the First Lieutenant, who arrested Plaintiff, the name of one of the guards who tormented Plaintiff, the dates that Defendants appeared in court and the testimonies that they provided on those dates, the specific actions that Valdes and Puig took in furtherance of the conspiracy and/or to aid and abet the Cuban government in its wrongful acts, the Defendants' own words and signed accusations, along with the names of several state actors from the DCSE, with whom Defendant's spoke to further their conspiracy. In addition, Plaintiff has provided the names of at least four (4) other people that Puig accused of Human Trafficking, including Alexander Orozco Noa (DE 10, ¶¶ 88-102), Odalys Diaz Gonzalez, Armando Muniz, and Carlos Ivan Hernandez Concepcion (DE10, ¶ 127), and "at least two other men (DE 10, ¶114). Finally, Plaintiff has provided a harrowing, comprehensive and disturbing account of the acts committed against him in the Cuban prison by the authorities and its lasting effects on them.

In a similar case against Cuban pitching sensation, Aroldis Chapman, which relies on a similar set of facts as the case at bar, the Defendant presented the court in the Southern Judicial District of Florida with a Motion to Dismiss that utilized a similar argument: that Plaintiffs had not adequately plead secondary liability under aiding and abetting and conspiracy because Plaintiffs had not pled that Defendants specifically intended that the Cuban government subject the Plaintiff to prolonged arbitrary detention and/or torture.

In that case, Southern District of Florida court held that "Contrary to Chapman's characterization of the Amended Complaint, Plaintiffs specifically allege Chapman "entered into the conspiracy with the intent or purpose of facilitating the Cuban government to commit arbitrary arrest, prolonged detention, and torture in contravention to the laws of nations." (Am. Compl. ¶¶ 322–23). Plaintiffs additionally allege sufficient "factual content"—including specific instances of assistance (making false accusations) tied to a specific purpose to assist the Cuban government's violations of international law (prolonged arbitrary detentions and torture)—"that allows the court to draw the reasonable inference" Chapman assisted the Cuban government with the purpose or intent that the Cuban government would subject Curbelo Garcia and Perdomo to prolonged arbitrary detentions *1239 and torture." Garcia v. Chapman, 911 F.Supp.2d 1222, 1238 (S.D. Fla. 2012). Defendants' in this case met with high-ranking Cuban officials from the INDER, significantly the Deputy Director for INDER and the Cienfuegos' team's baseball coach, who were part of the same ongoing conspiracy. In addition, there was also a quick succession of nearly identical false accusations, and after making those accusations, Puig was

allowed back on the national team. Lastly, the Plaintiff presents the court with a notable and disturbing pattern that baseball players in Cuba have adopted in order to secure their positions with the government [DE 10, ¶¶ 194-203], and of Puig and Valdes' pattern of accusing people of offering Puig money to play baseball abroad after being sanctioned or caught attempting to leave Cuba [DE 10, ¶¶ 114, 127].

The Complaint competently alleges conspiracy by stating that Defendants entered into a conspiracy with the INDER, the DCSE and Cuban officials to inform and accuse individuals of Human Trafficking in order to have those individuals arbitrarily arrested and subjecting to prolonged detention and torture, that Defendants joined the agreement with the intent and knowledge that their participation would facilitate the commission of that violation, and that the Cuban government did, in fact, commit that violation.

The Complaint also alleges aiding and abetting liability by pleading that the Cuban government officials violated international law by arbitrarily arresting and subjecting the Plaintiffs to prolonged detention and torture, that Defendants acted with the intent and knowledge of assisting in that violation and that Defendants' assistance substantially contributed to the government officials' commission of the violation.

WHEREFORE, Plaintiff respectfully requests that this court enter an order denying Defendants' Motion to Dismiss.

Respectfully Submitted,

s/Kenia Bravo
Kenia Bravo, Esq., FBN 68296

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was filed in federal court using CM/ECF on October 14, 2013.

s/Kenia Bravo
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