IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 1:13-cv-22589-KMW

MIGUEL ANGEL CORBACHO DAUDINOT

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants, Yasiel Puig Valdes a/k/a Yasiel Puig and Maritza Valdes Gonzalez, submit the following reply memorandum in support of their motion to dismiss plaintiff's first amended complaint [DE 11].

Introduction

Defendants' motion to dismiss raises three grounds for why plaintiff's claim for secondary liability under the Torture Victims Protection Act ("TVPA") must fail. First, the TVPA does not apply to a claim that is wholly unconnected to the United States, as is plaintiff's claim here. Second, the amended complaint's allegations regarding plaintiff's treatment in the Cuban prison system do not satisfy the TVPA's definition of torture. Third, the amended complaint fails to properly allege, as it must in order to state a claim for secondary liability under the TVPA, that defendants' actions were intended to result

in plaintiff's prolonged detention and torture or that defendants had an agreement with the Cuban government.

As explained below, the arguments raised in Plaintiffs' (sic) Response to Defendant's (sic) Motion to Dismiss Complaint for Failure to State a Claim ("Pl.'s Mem.") [DE 12] are without merit. Plaintiff does not have a claim against defendants for secondary liability under the TVPA and his action should be dismissed, with prejudice.

I. The TVPA does not apply to the facts alleged by plaintiff.

Plaintiff argues that "the TVPA was intended to apply to acts committed on foreign soil." (Pl.'s Mem. at 2.) That, of course, is not the issue. The issue is whether it applies to conduct having nothing to do with the United States. Or, put differently, whether the amended complaint's allegations suffice to rebut the presumption against the extraterritorial application of a federal statute – a presumption that can only be displaced when the claims "touch and concern the territory of the United States" with "sufficient force." *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659, 1669 (2013). Because the conduct alleged here does not even arguably "touch and concern the territory of the United States," plaintiff's claim is barred by the presumption against the extraterritorial application of US laws. *Id.*

To support its argument that the TVPA ought to be applied extraterritorially to the facts of this case, Plaintiff cites Justice Kennedy's one-paragraph concurrence in *Kiobel* which notes that the majority's decision does not address the TVPA. (Pl.'s Mem. at 3.) Whereas it is no doubt true that *Kiobel* involves the Alien Tort Statute ("ATS"), there is nothing in the majority's opinion restricting to the ATS the Court's holding that U.S. laws

ought to be applied extraterritorially only in those cases where the claims "touch and concern the territory of the United States" with "sufficient force."

Plaintiff seeks to distinguish the district court's decision in *Murillo v. Bain*, 2013 WL 1718915 (S.D. Tex. 2013) -- dismissing a TVPA claim on extraterritoriality grounds -- by arguing that the court there "summarily stated without analysis, that the TVPA does not apply extraterritorially." [DE 12 at 2.] That is simply not true. Indeed, to the contrary, the court in *Murillo* expressly relied on *Kiobel* when it held that:

> **This case has nothing to do with the United States**. The parents of a deceased Honduran are suing a Honduran politician, complaining about the Honduran army's behavior at a Honduran airport. **American laws like** the Alien Tort Statute and **the Torture Victim Protection Act are presumed not to apply beyond the borders of the United States**.

Id. at *3 (emphasis added).

Plaintiff next argues that *Murillo* is "contrary to existing interpretations of the TVPA in the 11th Circuit." (Pl.s' Mem. at 3.) In support of this argument, plaintiff cites *Baloco ex rel. Tapia v. Drummond Co, Inc.* 640 F. 3d 1338 (2011). Two things are worth noting about plaintiff's reliance on *Baloco* in support of its argument that the TVPA should apply extraterritorially to plaintiff's claim here. First, *Baloco* has nothing to do with whether the TVPA ought to be applied extraterritorially (the issue before the court there was one of standing – who may bring a claim under the TVPA for an "extrajudicial killing"). Second, even if *Baloco* contained an extraterritoriality analysis, the analysis would be of little relevance today given the subsequent decision by the Supreme Court in *Kiobel* delineating if and when a U.S. statute should be applied extraterritorially.

Plaintiff last argues that the TVPA's plain language compels a finding that the TVPA should be applied extraterritorially. (Pl.'s Mem. at 3 - 4.) Again, plaintiff is wrong. Plaintiff points to the fact that the TVPA applies to those who act "under actual or apparent authority or color of any **foreign nation**." (Pl.'s Mem. at 3.) This, says plaintiff, means that the TVPA was intended to apply extraterritorially because, in order to act under the authority of a foreign nation, defendant must have been located in that foreign nation. (*Id.*) That argument is a *non sequitur.* A defendant can well have been engaged in torturing a defendant in a country other than the country that authorized the torture. For instance, an Iranian national working for his country's government who tortures an American national in Jordan would be liable under the TVPA should the Iranian national subject himself to personal jurisdiction in the United States.

In the same vein, Plaintiff argues that the TVPA's exhaustion of remedies provision – requiring a party to first exhaust all remedies in the place in which the conduct giving rise to the claim occurred – implies that the statute must be applied to conduct occurring abroad. (Pl.'s Mem. at 3 - 4.) Again, plaintiff's argument mixes the issue of where the offending conduct occurred with the issue of whether that conduct sufficiently "touch[es] and concern[s] the territory of the United States" to warrant the extraterritorial application of U.S. law. In the example given above, the torture of a U.S. national is certainly something that "touches and concerns" the United States and justifies the application of its laws extraterritorially.

Those, however, are not the facts alleged here. The case before this court involves a Cuban citizen who was arrested in Cuba, tried and convicted in Cuba, and tortured while serving his prison sentence in Cuba, all as a result of allegedly false

testimony given in Cuba by Cuban citizens. In the words of the *Murillo* court, "this case has nothing to do with the United States." As such, U.S. laws like the TVPA do not apply and plaintiff's claim must be dismissed.

II. Plaintiff's allegations fail to meet the TVPA's definition of torture.

Plaintiff argues that the amended complaint's allegations of prison conditions in Cuba suffice to satisfy the TVPA's definition of torture, suggesting that the Eleventh Circuit has adopted a loser definition than other courts. (Pl.'s Mem. at 5 – 6.) Plaintiff is simply wrong about this and his reliance on *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Circuit 2005), to support his argument is truly mystifying.

In *Aldana,* the Eleventh Circuit specifically held (agreeing with defendants' position here) that, in order for intentionally inflicted physical pain to meet the TVPA's definition of torture, it must be "severe." *Id.* at 1353 (holding that allegations of pushing, shoving and hair pulling do not suffice). Moreover, *Aldana* is contrary to plaintiff's claim that the amended complaint's allegations regarding "threats" by prison guards meet the TVPA's torture definition. In *Aldana*, the Eleventh Circuit held that specific and "imminent death threats" could qualify as torture. *Id.* at 1252 ("The complaint alleges that Plaintiffs … all were told they would be killed that night.") No such allegations are made here. Instead, the best plaintiff can muster is that he received "[v]eiled threats on his life from the guards," such as "[a]ccidents can happen to people like you in prison." (Am. Compl. ¶ 85.a.iii.)

At bottom, plaintiff's strategy regarding the sufficiency of his torture allegations is to rehash at length (and occasionally embellish) the allegations regarding his treatment in Cuban prisons. (Pl.'s Mem. at 6 – 12.) No matter how often plaintiff repeats these

allegations, however (*see* Am. Compl. ¶ 83 and ¶ 85 a – v), they simply do not, as a matter of law, meet the TVPA's definition of torture. *See, e.g., Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (dismissing claim for torture as that term is used in the TVPA).

III. Plaintiff's allegations fail to plead secondary liability under the TVPA.

Plaintiff argues that he need not "specifically plead Defendants' *mens rea* in the conspiracy." (Pl.s' Mem. at 13.) Instead, plaintiff argues that all he must do to state a claim for secondary liability under the TVPA is allege that defendants joined the conspiracy knowing of at least one of its goals and intending to help accomplish that goal. (*Id* at 13 – 14.). The problem with the amended complaint's effort to plead secondary liability under the TVPA is that it fails to allege with factual specificity that the defendants and the Cuban government had any agreement.

Plaintiff touts the fact that some of the amended complaint's allegations are set forth with specificity – e.g., when Puig was sanctioned by the Cuban government, when Puig accused plaintiff of attempting to smuggle him out of Cuba, when plaintiff was arrested, what defendants testified to and what happened to plaintiff while in prison. (Pl.s' Mem. at 16 – 18.) Nowhere, however, does the amended complaint allege any facts showing an actual agreement between defendants and the Cuban government. Absent that, plaintiff cannot state a claim for secondary liability under the TVPA. *See In re Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.,* 792 F. Supp. 2d 1301, 1351 and 1354 (S.D. Fla. 2011) (complaint must provide "facts regarding dates, attendees, and discussions of meetings between Chiquita and the AUC, as well as facts regarding the terms of the agreements reached").

The absence of these necessary factual allegations is not an oversight. Indeed, it highlights the internal inconsistency in plaintiff's theory and provides yet another reason why this case should be dismissed. According to the amended complaint, the goal of defendants' scheme to falsely accuse plaintiff of attempting to smuggle Puig out of Cuba was to ingratiate Puig with the Cuban authorities so that he'd again be allowed to play on the Cuban national team where he'd have another opportunity to defect from Cuba. (*See, e.g., Am. Compl.* ¶ 215.) The Cuban government, of course, never agreed to this goal. The Cuban government's alleged goal was to "reinforce[e] its control over its populace and reduc[e] its attrition[.]" (*See Am. Compl.* ¶ 218.) Taking plaintiff at his pleadings, defendants' alleged goal was the exact opposite of the Cuban government's alleged goal. Thus, not only was there no agreement to help accomplish a common goal here, the parties' actually had, according to plaintiff, conflicting goals.

Plaintiff attempts to argue his way around this fundamental flaw in his case by claiming that the parties' alleged method for accomplishing their respective goals – i.e., detaining plaintiff for a prolonged time and torturing him – was the actual goal of their supposed conspiracy. (Pl.s' Mem. at 14.) This strategy, however, poses a problem for plaintiff: It requires him to allege (with the particularity required under *In re Chiquita Brands*) that defendants and the Cuban government specifically agreed that their goal was to detain plaintiff for a prolonged time and torture him. As noted in defendants' motion to dismiss, plaintiff has not and cannot do so.

One final note on plaintiff's continued reliance on *Garcia v. Chapman,* 911 F. Supp. 2d 1222 (S.D. Fla. 2012), a case of dubious precedential value at this point given the Supreme Court's intervening decision in *Kiobel* prohibiting the application of federal

statutes to cases that, like this case, have nothing to do with the United States. Even if the court were inclined to apply the TVPA extraterritorially to the facts of this case, plaintiff's reliance on *Garcia* would still be misplaced. There, Judge Altonaga, in holding that the allegations of the complaint sufficed to state a claim under the TVPA, specifically noted that plaintiff had specifically alleged that defendant "entered into an agreement with [Cuban President Raul] Castro to prove his loyalty to the government by becoming an agent of the government." *Id.* at 1237 and 1240. No such allegation was made here (nor can such an allegation be made, at least not consistent with counsel's Rule 11 obligations).

In sum, because the amended complaint does not properly allege that defendants acted with the purpose or intent to facilitate the Cuban government's prolonged detention and alleged torture of plaintiff (nor, for that matter, does plaintiff allege the particulars of any agreement between defendants and the Cuban government), the amended complaint's effort to state a claim for secondary liability under the TVPA fails.

Conclusion

As set forth above and in defendants' motion to dismiss [DE 11], plaintiff's claim for secondary liability must be dismissed because: (1) the TVPA does not apply extraterritorially to cases, such as this one, that have nothing to do with the United States; (2) the acts allegedly inflicted on plaintiff while in the custody of the Cuban government fail to satisfy the TVPA's stringent definition of torture; and (3) the amended complaint fails to properly allege that defendants had any purpose or intent to facilitate

the Cuban government's prolonged detention and alleged torture of plaintiff or, for that matter, that defendants had any agreement with the Cuban government.

Respectfully submitted,

SANTINI LAW
1200 Brickell Avenue, Suite 950
Miami, Florida 33131
Tel: (305) 372-7307
Fax: (305) 372-7308
ssantini@santinilawfirm.com

By: /s/ Sean R. Santini
Sean R. Santini
Florida Bar No. 832898

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Sean R. Santini
Sean R. Santini

SERVICE LIST

Kenia Bravo
avelinogonzalez2@bellsouth.net
Avelino J. Gonzalez, P.A.
6780 Coral Way
Miami, FL 33155

Avelino Jose Gonzalez
avelinogonzalez@bellsouth.net
Avelino J. Gonzalez, P.A.
6780 Coral Way
Miami, FL 33155