UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIGUEL ANGEL CORBACHO DAUDINOT

Plaintiff, CASE NO. 13-cv-22589-KMW

v.

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

Defendants.
_____/

PLAINTIFF'S MOTION TO STRIKE PORTIONS OF DEFENDANTS' REPLY [DE 15] FOR DEFENDANTS' FAILURE TO COMPLY WITH LOCAL RULE 7.1(c)

Plaintiff, by and through his attorneys, file this Motion to Strike Portions of Defendants' Reply [DE 15] for Defendants' failure to comply with the strictures of Local Rule 7.1(c), and in support thereof state:

1. Defendants filed a Motion to Dismiss for Failure to State a Claim, stating, among other things, that Plaintiff claims against Defendants must be dismissed because:

   a. The TVPA was barred under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 185 L.Ed.2d 671 (2013). They cited an unpublished district court case opinion out of the state Texas, *Murillo v. Bain*, CIV.A. H-11-2373, 2013 WL 1718915 (S.D. Tex. 2013) to support their contention that the TVPA was barred by *Kiobel*. Defendants exhaustively defined what "extraterritoriality" meant in their Motion (DE 11, pp. 3-5) as:

      i. "The Supreme Court recently addressed the issue of the extraterritorial application of a federal statute – that is, "whether a claim may reach conduct occurring in the territory of a foreign sovereign" – in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (April 17, 2013)" (DE 11, p. 4, ¶ 1).

      ii. "When a statute gives no clear indication of an extraterritorial application, it has none … and reflects the presumption that United States law governs

domestically but does not rule the world." (DE 11, p. 4, ¶2) (quoting *Kiobel*).

iii. The TVPA does not provide any indication – much less a "clear indication" – that it is to be applied extraterritorially. Accordingly, the TVPA does not apply to conduct "occurring in the territory of a foreign sovereign," such as the conduct alleged here, and plaintiff's claim must be dismissed. (DE 11, p. 4, ¶2).

iv. "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" (DE 11, p. 5, ¶1) (quoting *Murrillo*)

b. The Plaintiff does not meet the TVPA's "**severity/purpose standard**" that was set by *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). Defendants cited only one additional case, again out of the district court of Texas, *Weisskopf v. United Jewish Appel-Fed'n of Jewish Philanthropies of New York, Inc.*, 889 F. Supp. 2d 912, 925 (S.D. Tex. 2012), to define the standard. (DE 11, pp.5-8).

c. Plaintiff fails to plead secondary liability [DE 11, pp. 8]. Plaintiff—in order to hold Defendants liable through secondary liability under the TVPA for the injuries suffered by them in Cuban prison—had to plead that Defendants "***specifically intended*** that Plaintiffs be tortured" in Cuba (DE 12, p.8), although Defendants do admit that Plaintiff's Amended Complaint stated that the conspiracy entered into by Defendants had several purposes, one of which was the torture of Plaintiff (DE 15, p. 9). Defendants state, *inter alia,* that:

i. The complaint must provide factual allegations that raise the right to relief above the speculative level (DE 11, p 8).

ii. The amended complaint here fails to provide the requisite factual allegations regarding defendants' alleged "purpose or intent to facilitate the commission of the specific offenses alleged (DE 11, p. 9).

iii. The amended complaint alleges in conclusory fashion that defendants "acted with the intent to assist the government," but offers nothing by way of factual allegations (DE 11, p. 9).

iv. Plaintiff offer speculation and Speculation is insufficient. (DE 11, p. 9).

v. Plaintiff does not actually plead conspiracy with the Cuban government, but only with his mother, which does not suffice (DE 11, pp.9-10).

vi. Plaintiff must allege a conspiracy with the Cuban government, which they do not do (De 11, p. 10).

2. On October 31, 2013, Defendants filed a Reply in Support of Motion to Dismiss for Failure to State a Claim [DE 15], which, barring some exceptions that will be addressed within this motion, does not comply with Local Rule 7.1(c). Defendants' Reply states that Plaintiff's claims against Defendants must be dismissed because:

a. The TVPA was barred under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 185 L.Ed.2d 671 (2013). While some of Defendants' arguments are clearly in answer to Plaintiff's Response, the court should strike the portions of the Reply contained in DE 15, p.4,¶2 – p.5,¶1, in which the Defendant provides a new interpretation for "extraterritoriality". By providing a novel (and contradictory) interpretation to extraterritoriality, despite having provided a different definition of that concept in their motion to dismiss, Defendants' do not address a matter raised by Plaintiff in his Response, while simultaneously depriving the Plaintiff of its right to address this interpretation, which should have been raised in their motion. Plaintiff rightly responded to Defendants' Motion to Dismiss using the definition of extraterritoriality as provided by Defendants in that Motion, accepting their definition on its face, without raising any new issues of interpretation. Defendants now seek to essentially move the goal post by altering their original interpretation, leaving Plaintiff without a means by which he may address this new interpretation.

b. Plaintiff fails to meet the TVPA's "severity/purpose standard". Defendants filed a proper Reply to this issue. (DE 15, pp. 4-5)

c. Plaintiff fails to plead secondary liability (DE 15, pp. 6). With the exception of the portion of the Reply where Defendant distinguishes the instant case from that of *Garcia v. Chapman*, *Garcia v. Chapman,* 911 F. Supp. 2d 1222 (S.D. Fla. 2012) (DE 15, p.7, ¶3 – p.8, ¶1), Defendants simply reargue the same position they set out in their motion to Dismiss: that Plaintiff fails to plead with factual specificity that Defendants and the Cuban government had an agreement (DE 15, p.6, ¶2 – p.7, ¶2).

II. ARGUMENT

Local Rule 7.1(c) states, *inter alia*, that a "reply memorandum shall be strictly limited to rebuttal of matters raised in the memorandum in opposition without reargument of matters covered in the movant's initial memorandum of law."

As noted above, some of Defendants reply arguments are valid replies to Plaintiff's Response, while other arguments are either simply reargruments of issues already addressed in their Motion to Dismiss or are new arguments that are not rebuttals of matters raised in the Plaintiff's memorandum in opposition to the Motion.

Specifically, Defendants' new interpretation of "extraterritoriality" (DE 15, p.4,¶2 – p.5,¶1), which arguably contradicts the definition Defendant provided in their Motion to Dismiss, is not a rebuttal of matters ***raised*** in Plaintiff's opposition memorandum because Plaintiff's opposition memorandum incorporated the definition of "extraterritoriality" provided to them by Defendants Motion and, using that definition, stated the presumption against extraterritoriality it did not apply to claims raised under the TVPA. Defendants' refocusing on the "extraterritoriality" interpretation to, in essence, create a new standard than the one plainly set out in their Motion to Dismiss, essentially moves the goal posts for the Plaintiff's response and deprives him of the ability to defend his position. Had Defendants raised this novel definition of "extraterritoriality" in the original motion—which was the proper place to raise it—then Plaintiff could had addressed it in his Response.

Next, Defendants reargue the same position they set out in their Motion to Dismiss when it comes to the issue of secondary liability under the TVPA. As they did with their Motion to Dismiss, Defendants again claim that Plaintiff did not plead secondary liability with detailed factual specificity that Defendants had an agreement with the Cuban government. Here the

Defendants merely point out Plaintiff's Response argument, and then simply rehash the arguments they made in their Motion to Dismiss (DE 15, p.6, ¶2 – p.7, ¶2).

Replies are not intended to serve as "gotcha" devices that surprise the opposing party with novel interpretations of fact or law that could have been raised in the original motion, nor are they intended to serve as exclamation points to the moving party's initial motion. Replies are supposed to provide the court only with rebuttals to matters *raised* in the non-moving party's Response so long as those rebuttals are not merely reargruments of what was stated in the original motion.

WHEREFORE, Since the specified portions of the Defendants' motion neither rebuts matters raised in the opposition memorandum without reargument of matters covered in the their initial memorandum of law, the court should strike the following partions of Defendants' Reply: DE 15, p.4,¶2 – p.5,¶1, and p.6, ¶2 – p.7, ¶2, as well as any other portion of Defendants' Reply the court deems does not comply with the letter or the spirit of the Rules.

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 November 4, 2013.

s/Kenia Bravo
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