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.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS' RULE 37 MOTION FOR SANCTIONS

Plaintiff, MIGUEL ANGEL CORBACHO DAUDINOT, through counsel, files this Response to Defendants' Rule 37 Motion for Sanctions and in support thereof state:

I. HISTORY

In the instant case, Plaintiff filed the Complaint [DE 1] pursuant to the Torture Victim Protection Act ("TVPA") against Defendants on July 18, 2013. Plaintiff filed a First Amended Complaint on September 12, 2013 [DE 10] in response to Defendants' August 22, 2013 Motion to Dismiss [DE 7], and filed a Second Amended Complaint [DE 24] on January 13, 2014 following the Court's Order [DE 23] instructing Plaintiff to amend the pleadings.

During the hearing addressing Defendants' Motion to Dismiss the Second Amended Complaint that took place on June 24, 2014, Plaintiff's counsel, Defendants' counsel and the court all acknowledged what was already well-established in the Second Amended Complaint—that Plaintiff CORBACHO DAUDINOT was in Cuba, serving out what was left of the seven-year prison sentence that Defendants' actions subjected him to when they falsely accused him of attempting to smuggle him out of Cuba. Defendants' counsel even recognized that Plaintiff would be unable to appear for deposition in the United States because of his situation in Cuba. The court entered an order [DE 40] denying Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint. The court additionally entered a scheduling order [DE 42], which—among

other things—referred all non-dispositive pre-trial motions and discovery disputes to Magistrate Judge Andrea M . Simonton.

On Jun 25, 2014, on the day the court denied Defendants' Motion to Dismiss and only one day after Defendants complained in open court that Corbacho Daudinot could not come to the United States to be deposed, Defendants' counsel, Sean Santini ("Attorney Santini") emailed a Notice of Taking Deposition on August 7, 2014 for Corbacho Daudinot. Attorney Santini established that date unilaterally and received no confirmation from Plaintiff. Based on his comments in open court, and on the text of the email that contained the notice, Attorney Santini clearly knew that taking the deposition on that date would be impossible, and had sent that email in bad faith in order to place Plaintiff, who Attorney Santini knew could not be here, in an untenable position. *See* "**Exhibit A**", Attorney Santini's June 25, 2014 email and attached Notice of Taking Deposition. Aside from that communication, Attorney Santini did not communicate further with Plaintiff about the deposition.

During the same period of time that Attorney Santini was allegedly seeking to take Plaintiff's August 7 deposition, he asked for two (2) extensions of time to respond to Plaintiff's Second Amended Complaint. Attorney Santini requested the first extension of time in order to accommodate his other existing commitments (*see* as "**Exhibit B**", the email requesting the extension of time, and as "**Exhibit C**", the Motion for Extension of Time), and he requested the second extension of time until August 8, the day after the supposed deposition was to take place, in order to be able to confer with his client, whose Major League Baseball schedule did not permit him to confer with his attorney on a response to a Complaint. *See* as "**Exhibit D**", the email requesting the second extension of time, and as "**Exhibit E**", the second Motion for Extension of Time. These extensions of time for answering a complaint that had been filed almost eight (8) months prior, and in order to confer with Yasiel Puig, solidified Plaintiff's belief that the Notice of Deposition set for August 7, 2014 was not filed in good faith, since Attorney Santini was bogged down with work, since he could not even confer with Yasiel Puig about responding to the Complaint (much less conducting the deposition), and since Yasiel Puig would not be able to attend Plaintiff's deposition.

On August 12, 2014, Attorney Santini sent another Notice of Taking Deposition of Plaintiff unilaterally scheduled for September 12, 2014. *See* "**Exhibit F**", Attorney Santini's

August 12, 2014 email and attached Notice of Taking Deposition. Once again, this unilaterally set deposition deadline was impossible for Plaintiff to meet since his condition in Cuba had not changed—he was still serving out the remainder of his prison sentence. Attorney Santini did not send Plaintiff any further communication about the unilaterally-set September 12, 2014 deposition, which also elapsed.

On September 15, 2014, Attorney Santini emailed Plaintiff asking for a date that the parties could mutually schedule for October 2014, and warned that if Plaintiff did not respond by September 25, 2014, Defendants would move for a Rule 37 motion ("**Exhibit G**"). The undersigned counsel responded to that email, informing Attorney Santini that Plaintiff was unavoidably and involuntarily prevented from attending the depositions Defendants had unilaterally scheduled, and that it was Plaintiff's belief that Defendants had not set those dates in good faith, and asked Defendants to postpone setting Plaintiff's deposition until December ("**Exhibit H**"). Attorney Santini remained firm and insisted that the deposition go forward in November ("**Exhibit I**"). After the undersigned informed him that Plaintiff's counsel was unavailable during the month of November ("**Exhibit J**"), Attorney Santini accepted to conduct the deposition in December ("**Exhibit K**").

Despite being unable to attend a deposition in the United States at this time, Plaintiff, a legal permanent resident of the Dominican Republic, had been working diligently long before the court's order denying Defendants' Motion to Dismiss [DE 40] to secure Plaintiff's presence in the United States in order to be deposed and in order to testify at trial, and—to that end—had on January, 2014 applied to the Department of Homeland Security for an I130 visa. The Plaintiff's I130 visa application was approved and sent out on October 6, 2014. *See* "**Exhibit L**", Plaintiff's visa application approval.

After the parties exchanged the above-mentioned emails that tentatively agreed to conduct Corbacho Daudinot's deposition in December, Plaintiff's counsel attempted to get in contact with Corbacho Daudinot to discuss possible dates to conduct Corbacho Daudinot's deposition in December—either in Miami or in Cuba. Despite calling him almost daily at various times of the day or night, counsel were unable to reach Corbacho Daudinot. On the morning of October 9, 2014, right before engaging in an all-day mediation, the undersigned learned that Plaintiff had been detained by the Cuban police in September and that he was being held in

prison without charges. Corbacho Daudinot, who had been on provisional release and carrying out the remainder of his prison sentence at home, is still currently detained in prison.

On the same day that undersigned learned that Plaintiff had been imprisoned in Cuba, Attorney Santini—without warning—filed a Rule 37 motion for sanctions, despite the fact that the parties had tentatively reached an agreement to conduct Corbacho Daudinot's deposition in December, and despite the obvious impossibility of the Plaintiff attending the previous depositions that Defendants had unilaterally set in bad faith.

II. ARGUMENT

Defendants did not comply with the Local Rule 7.1 Requirement

As a motion for discovery sanctions under Rule 37, Defendants' motion is subject to the Local Rule 7.1(a)(3) conferral requirement. United States v. Twenty-Nine Pre-Columbian, 2014 WL 4655737 (S.D.Fla.). Local Rule 7.1(a)(3) compels, except in a few enumerated circumstances, that, prior to filing any motion, movant's counsel must "make reasonable effort to confer (orally or in writing), with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve by agreement the issues raised in the motion." The rule specifically requires that each motion includes a conferral statement showing, what efforts were made to resolve the subject of the ***motion***, and it provides that failure to comply with the rule may be cause to deny the motion.

While Attorney Santini did provide a certification stating that he attempted to avoid court action on the matter by making a "good faith attempt to schedule a reasonable and mutually convenient deposition date with plaintiff's counsel" as required under Fed.R.Civ.P. 37(d)(1)(B), Attorney Santini did not include a Local Rule 7.1(a)(3) statement of having conferred with opposing counsel about the motion because he, in fact, failed to confer with opposing counsel before filing the motion. Had Attorney Santini conferred with the undersigned, he would have learned of Plaintiff's arrest in Cuba, which makes the setting of the deposition impossible.

Although Attorney Santini's email of September 15, 2014 reads "If I do not hear from you by the 25th [of September], I'll have no choice but to file a Rule 37 motion", he immediately did hear from Plaintiff's counsel, and further entered into a tentative agreement to conduct Plaintiff's deposition in December. Attorney Santini did not again mention a Rule 37 motion for

sanctions, nor did he discuss the current motion at bar with the undersigned before having filed it. Defendants' failure to confer, alone, is grounds to deny their motion.

Defendants has not demonstrated good faith

Rule 37(d) requires that the moving party in a motion for sanctions "must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain [the discovery sought]". In fact, the entire Rule emphasizes the necessity for good faith in conducting discovery and in compelling discovery.

Defendants, in the instant action have not conducted discovery in good faith. Defendants and their counsel are all well aware that Corbacho Daudinot is serving out the remainder of a seven-year prison sentence to which Defendants' actions exposed him. During the June 24, 2014 hearing before judge Williams, Attorney Santini railed against the hardship of obtaining Corbacho Daudinot's deposition because of his legal realities in Cuba. Then, one day after having expressed to the court that he believes it will be impossible to depose the Plaintiff in the United States, Attorney Santini, disingenuously sent Plaintiff's counsel a Notice of Deposition to be held the following month in Miami, Florida.

Defendants' notices for deposition were not sent in good faith with the expectation of producing any such discovery. If those notices had been conducted in good faith, Attorney Santini's office would have verified Plaintiff's availability, it would have verified his participation, it would have verified his need for an interpreter, it would have—at the very least—contacted Plaintiff's counsel the day before the scheduled depositions to confirm Plaintiff's attendance, especially in light of Plaintiff's physical location and his legal complications. Instead, Defendants simply allowed the deposition dates to lapse, and did not contact Plaintiff's counsel until several dates had elapsed from the unrealistic deposition dates.

To further demonstrate Defendants' lack of good faith, they did not seek redress of their discovery dispute with the Magistrate Judge, as instructed by the court's scheduling order, but rather, immediately filed for Rule 37 Sanctions, despite Plaintiff's well-known inability to come to the United States.

Defendants wrongfully have used the discovery process as a procedural maneuver in order to do what they are doing now, which is to seek sanctions against the Plaintiff for failing to

attend an arbitrarily set deposition to which he has no ability to attend. Defendant's motion for sanctions should be dismissed for Defendant's failure to act in good faith.

Plaintiff has acted in good faith and has not demonstrated bad faith

As detailed above, Plaintiff has been making a diligent good faith effort to come to the United States in order to participate in both the deposition and in the trial. Plaintiff's efforts have been hampered by his legal status in Cuba, which has deprived him of his personal documents, including his Permanent Residency documents from the Dominican Republic. Despite that, he has applied and been approved for a visa in the United States (Refer to Exhibit L).

Plaintiff did not willfully or wantonly disregard Defendant's depositions, but instead Plaintiff has missed Defendants' unilaterally set depositions due to an involuntary inability to attend same, despite his best efforts to make it to the United States.

Sanctions are not warranted against Plaintiff

"All federal courts have the power, by statute, by rule and by common law, to impose sanctions against recalcitrant … parties' litigant." Carluci v. Piper Aircraft Corp., 775 F.2d 1440, 1446 (11th Cir. 1985)(directly cited in *Samadi v. Bank of America, N.A.*, 476 Fed.Appx. 819, 2012 WL 1128697 (11th Cir. 2012). In a motion for Rule 37 sanctions, the movant must make a *prima facie* showing of a party's failure to comply with discovery obligations. Once the movant makes his *prima facie* showing, "the burden shifts to the party alleged to [have] failed in its discovery duties to show that its actions were substantially justified or otherwise harmless." Kendall Lakes Towers Condominium Association, Inc. v. Pacific Insurance Company, Limited, 2011 WL 6190160, *5 (S.D.Fla. 2011)(referencing *Parrish v. Freightliner, LLC*, 471 F.Supp.2d 1262, 1268(M.D.Fla. 2006).

In *Samadi*, where the district court had ordered Samadi to "pay reasonable expenses, including attorney's fees" incurred by the opposing party as a result of Samadi's absence in his scheduled deposition, the Plaintiff "refused to make himself available for deposition within the time for discovery and, after receiving notice of the date scheduled, he refused to appear unless he received material that he had requested…." Likewise, in *Taylor v. Taylor B.C.*, 133 Fed.Appx. 707, 709 (11th Cir. 2005), the Eleventh Circut upheld a district court's fees and costs sanction of plaintiff under Rule 37(d), where the plaintiff was given notice by the court that he would be

deposed, but at the time of the attempted deposition he continued to object to the deposition, he refused to be sworn, and he refused to testify about anything outside of the allegations, which amounted to a refusal to participate in the deposition.

In the case at bar, Plaintiff did not refuse to attend the deposition in Miami, nor does he refuse to be deposed by the Defendants. He was literally physically unable to attend the depositions due to his detainment in Cuba, which has been involuntary imposed on him as a result of the Defendants' actions. Defendants knew that Plaintiff is carrying out a prison sentence in Cuba and could not attend those depositions. Secondly, in this case there were no additional attorneys fees or costs incurred by the Defendants, who did not expect a deposition to take place on those days and did not plan for them.

While Plaintiff believes that his actions have not merited any sanctions due to Plaintiff's involuntary inability to comply with Defendants' unilaterally set depositions, "a district court may only impose a severe sanction, such as dismissal of an action, when it has been established that the offending party's failure to comply with its discovery obligations is due to the party's willfulness, bad faith, or fault". Kendall Lakes, at *4 (citing *National Hockey League v. Metropolitan Hocky Club*, 427 U.S. 639, 640, 96 S.Ct. 2778, 49 L.Ed.2d 747 91976 and *Societe Internationale v. Rogers*, 357 U.S. 197, 212, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)). Further, the Eleventh Circut in *Kelly v. Old Dominion Freight Line, Inc.*, 376 Fed. Appx. 909, 913 (11th Cir. 2010)(citing *Hashemi v. Campaigner Publ'ns, Inc.*, 737 F.2d 1538, 1538-39 (11th Cir. 1984)), found that "the sanction of dismissal is a most extreme remedy and one not to be imposed if lesser sanctions will do" and that dismissal is an appropriate sanction, where "failure to comply with discovery has involved either repeated refusals or an indication of full understanding of discovery obligations coupled with a bad faith refusal to comply". *Id*. (citing *Griffin v. Aluminum Co. of Am.*, 564 F.2d 1171, 1172 (5th Cir.1977).

In *Carluci*, where the district court imposed a monetary sanction, the record of misconduct by Defendant's attorney, Anania, was "legion": he wrongfully terminated several of opposing party's discovery production sessions by claiming good faith disputes even though the court had already settled the alleged disputes in Carluci's favor, an order which "Anania did not make even a 'best effort' attempt to comply"; he instructed "a witness not to respond to questions regarding the availability of originals" the court had ruled the opposing party was

entitled to same, and despite the fact that "the document custodian had already admitted the production of the original would 'only take a few minutes'"; he ignored several court orders to produce originals for discovery, and instead chose to "impose his own time constraints on the proceedings" by flying "off to meet 'prior commitments' in Miami" without seeking leave from the court; and, finally, Anania made conflicting and misleading representations to the court. *Id*. at 1447-48.

In *Kelly*, the Eleventh Circut upheld the district court's dismissal of the case based on the fact that "Kelly committed numerous discovery violations": he filed a motion to compel before the opposing party's deadline for producing discovery (he violated a court order and several rules of procedure by failing to confer with the opposing party before filing the motion as well); he filed a second motion to compel that was also deficient and meritless since the opposing party had already supplied the discovery that had been requested; he failed to file timely responses to opposition parties request for production; he failed to respond to opposing party's motion to dismiss (which was denied by the court); he failed to respond to opposing party's requests to schedule his deposition after having been warned by the court that he was required to comply with the Federal Rules of Civil Procedure; he failed to appear for his scheduled deposition; he never attempted to confer with opposing party before filing his motion in opposition to the deposition, he refused to cooperate with opposing party to resolve discovery disputes and made no good faith attempt to learn the rules, comply with the rules, or correct his errors. *Id*. at 914-15.

The Plaintiff has not engaged in multiple discovery violations, nor in fact, has he engaged in any discovery violations. He has conducted himself in good faith, but has been unable to come to Miami for his depositions, and is currently incarcerated in Cuba without charges. The Plaintiff has not engaged in any willful behavior resulting in discovery violations meriting sanctions.

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that this court enter an order denying Defendants' Motion for sanctions.

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 15, 2014.

s/Kenia Bravo
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