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' MOTION TO DISMISS COMPLAINT

Defendants, Yasiel Puig Valdes a/k/a Yasiel Puig ("Puig") and Maritza Valdes Gonzalez ("Valdes"), pursuant to Fed R. Civ. P. 12(b)(6), hereby move to dismiss plaintiffs' complaint [DE #1] for failure to state a claim upon which relief may be granted. The grounds for this motion are set forth in the following memorandum of law.

MEMORANDUM OF LAW

Introduction

Taking plaintiff at his pleadings, this is an action brought by a Cuban citizen who was arrested in Cuba, was tried and convicted in Cuba, and is currently serving a prison sentence in Cuba, all as a result of allegedly false testimony given by defendants in Cuba. Plaintiff alleges that he would not have been arrested and convicted but for defendants' allegedly false testimony during the Cuban government's investigation and trial of plaintiff, and that, therefore, defendants (who are also Cuban citizens) are liable

under the Torture Victim Protection Act ("TVPA"), for aiding and abetting and conspiring with the Cuban government in its harsh treatment of plaintiff while he was in the Cuban government's custody.[1]

The complaint must be dismissed for at least three reasons. 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 complaint's allegations regarding plaintiff's treatment in the Cuban prison system do not satisfy the TVPA's definition of torture. Third, the complaint fails to 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 torture.

I. Legal Standard.

A complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). To meet this "plausibility standard," plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

The complaint here falls woefully short of this standard. Indeed, when stripped of its conclusory allegations of conspiracy and aiding and abetting, the complaint says nothing about defendants other than that they allegedly falsely testified during a criminal

[1] The TVPA provides, in part: "An individual who, under actual or apparent authority, or color of law, of any foreign nation – (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual." Torture Victim Protection Act § 2(a), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Historical and Statutory Notes)).

investigation and trial in Cuba. These allegations, even if true (and, to be clear, they are not true), do not state a claim for relief under the TVPA.

II. The Complaint's Allegations Do Not Warrant the Extraterritorial Application of the TVPA.

The complaint's allegations involve conduct that occurred exclusively in Cuba and has no connection with the United States. Specifically, the complaint alleges that a Cuban citizen was wrongfully arrested, tired and convicted in Cuba based on purportedly false testimony given by two Cuban citizens during a criminal investigation and trial in Cuba. (Compl. ¶¶ 33, 36, 67-70, 72-73, 86-87, 89-90, 92-96, 200-215.) In light of this, the court's first task is to determine whether the TVPA even applies here.

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). In *Kiobel*, a group of Nigerian nationals filed suit against several multinational oil companies under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, alleging that the corporations aided and abetted the Nigerian government in committing violations of "the law of nations" in Nigeria. *Id.* at 1662.

The Supreme Court affirmed the Second Circuit's dismissal of plaintiffs' claims, holding that, "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." *Id.* at 1664 (internal citations and quotes omitted). The TVPA does not provide any indication – much less a "clear indication" – that it is to be applied extraterritorially. *See* TVPA, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified

at 28 U.S.C. § 1350 (Historical and Statutory Notes)). 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. *See Kiobel,* 133 S. Ct. at 1664.

Although *Kiobel* was decided a scant four months ago, already one district court has expressly relied on it to dismiss a TVPA claim on the ground that the statute does not apply extraterritorially. *Murillo v. Bain,* 2013 WL 1718915 (S.D. Tex. April 19, 2013). In *Murillo*, a Honduran couple sued the president of Honduras under the TVPA for the killing of their son at a political rally in Honduras. The district court, citing *Kiobel*, dismissed plaintiff's case on extraterritoriality grounds, noting 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). Because this case, too, has nothing to do with the United States, the TVPA does not apply and the complaint must be dismissed.

III. The Complaint's Allegations Do Not Satisfy the TVPA's Statutory Definition of Torture.

Even if the court were inclined to apply the TVPA extraterritorially to plaintiff's claim, the complaint must still be dismissed because its factual allegations fail to satisfy the TVPA's statutory definition of torture.

The TVPA defines "torture," in part, as:

> **[A]ny 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[.]**

TVPA § 3(b), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (Historical and Statutory Notes)) (emphasis added).

Courts interpreting this language have consistently noted that the TVPA's "definition of torture includes a severity requirement that is crucial to ensuring that the conduct proscribed by. . . the TVPA is sufficiently extreme and outrageous to warrant the universal condemnation that the term 'torture' both connotes and invokes." *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 326 F.3d 230, 234 (D.C. Cir. 2003) (internal citations and quotes omitted) (dismissing claim for torture as that term is used in the TVPA); *Weisskopf v. United Jewish Appeal-Federation of Jewish Philanthropies of New York, Inc.,* 889 F. Supp. 2d 912, 925 (S.D. Tex. 2012) (dismissing TVPA claim on the ground that the conduct described in the complaint did not meet the statute's definition of torture).

As the court in *Simpson* explained, not even acts that "reflect a bent toward cruelty on the part of the perpetrators" necessarily satisfy the TVPA's definition of torture:

> [T]orture does not automatically result whenever individuals in official custody are subjected even to direct physical assault. Rather, **torture is a label that is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain**.

Simpson, 326 F.3d at 234 (emphasis added), citing, *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 92–93 (D.C. Cir. 2002).

The court in *Price* noted that:

> The critical issue 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." *See* S. Exec. Rep. No. 101-30, at 15 ("[I]n order to constitute torture, an act must be a … of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.")... **[T]orture does not automatically result whenever individuals in official custody are subjected even to direct physical assault.** Not *all* police brutality, not *every* instance of excessive force used against prisoners is torture[.]

Price, 294 F.3d at 93 (bold added, italics in original) (holding that "plaintiffs must allege more than that they were abused" in order to survive a motion to dismiss). Absent from the complaint here are any allegations describing acts of an "extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain and suffering," as required by the TVPA. *See Price, supra.*

Instead, plaintiff vaguely alleges that he suffered "random beatings," (Compl. ¶ 80.a), but provides no particulars as to these alleged beatings, as he must in order to defeat a motion to dismiss. *Price*, 294 F.3d at 93-94 ("[P]laintiffs' complaint offers no useful details about the nature of the kicking, clubbing, and beatings that plaintiffs allegedly suffered. As a result, there is no way to determine from the present complaint the severity of plaintiffs' alleged beatings – including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out – in order to ensure that they satisfy the TVPA's rigorous definition of torture. In short, there

is no way to discern whether plaintiffs' complaint merely alleges police brutality that falls short of torture. Thus, the facts pleaded do not reasonably support a finding that the physical abuse allegedly inflicted by Libya evinced the degree of cruelty necessary to reach a level of torture."); *Aldana v. Del Monte Fresh Produce, N.A.,* 416 F.3d 1242, 1253 (11th Cir. 2005) (affirming district court's dismissal of TVPA claims based on intentionally inflicted physical pain and suffering where the allegations regarding such physical pain and suffering – e.g., plaintiff was "tortured with physical violence" – were conclusory).

Other than the impermissibly vague claim that plaintiff was subject to "random beatings," the complaint alleges what can, at most, be described as harsh prison conditions – namely, that plaintiff was: placed in solitary confinement in a windowless cell, fed spoiled food, deprived of "sun and open air," regularly confined to an overcrowded and unsanitary cell, denied medical care, allowed visitors only one hour a month, subjected to the confiscation of food and treats brought to him by his family, and arbitrarily transferred to a prison away from his family. (Compl. ¶ 80.b – j.) Prison conditions in Cuba are no doubt harsh. Claiming to have endured harsh prison conditions, however, does not suffice to state a claim under the TVPA. Rather, plaintiff must allege facts demonstrating that a state official's conduct "rose to such a level of depravity and caused … such intense pain and suffering as to be properly classified as torture." *Id.* at 94. Plaintiff has not done so.

Plaintiff has also failed to allege that the so-called torture was intentionally inflicted on him for a specific purpose, as required by the TVPA. TVPA § 3(b)(1) (torture

must be "intentionally inflicted … 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").

Plaintiff not only fails to allege that his "torture" was for a specific purpose, he actually appears to allege the opposite – namely, that his treatment at the hands of the Cuban government was not intended for any particular purpose, but is simply the way all Cuban prisoners are treated as a matter of course. (*See, e.g.,* Compl. ¶ 186 ("All prisoners are subject to malnourishment, scarcity of food, inadequate medical care, overcrowded … cells"), ¶ 187 ("dissidents," like plaintiff, are punished by "being kept imprisoned in their cells for 23 out of 24 hours a day, by beatings, by arbitrary prison transfers …, by being served food that is spoiled … by being deprived of sunlight … and by being placed in solitary confinement)".)

Because the acts described in the complaint do not meet the TVPA's stringent definition of torture and because plaintiff does not allege that he was subjected to those acts for a special purpose (as opposed to being treated the way all Cuban dissident prisoners are treated), the complaint fails to state a claim under the TVPA and must be dismissed.

IV. The Complaint's Allegations Fail to State a Claim for Secondary Liability under the TVPA.

Hardly a model of clarity (or brevity), the complaint's sole count attempts to state a claim against defendants for "aiding and abetting" and "conspiring with" the Cuban government to torture plaintiff in violation of the TVPA. (*See* Compl. at ¶¶191-227 and 228-235.) Even if the court were inclined to apply the TVPA extraterritorially and overlook plaintiff's abject failure to allege conduct that satisfies the TVPA's definition of torture, the complaint still must be dismissed because plaintiff has failed to state a claim under the TVPA based on secondary liability.

In order to state a claim against defendants for secondary liability for violation of the TVPA, plaintiff must allege that defendants assisted or conspired with the Cuban government with the purpose or intent to facilitate the commission of the specific offenses alleged. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute and Shareholder Derivative Litig.,* 792 F. Supp. 2d 1301, 1343 (S.D. Fla. 2011) Importantly, vague and conclusory allegations of secondary liability do not suffice, rather the complaint must provide factual allegations that raise the right to relief above the speculative level. *Sinaltrainal v. Coca-Cola Co.,* 578 F.3d 1252, 1270 (11th Cir. 2009) (directing the district court to dismiss TVPA claims for failure to state a claim upon which relief may be granted), *abrogated on other grounds by Mohamad v. Palestinian Auth.,* 132 S. Ct. 1702 (2012).

The complaint here fails to provide the requisite factual allegations regarding defendants' alleged "purpose or intent to facilitate the commission of the specific offenses alleged." Instead, the complaint alleges in conclusory fashion that defendants

"acted with the intent to assist the government," (Compl. ¶ 231), but offers nothing by way of factual allegations. Plaintiff attempts to fill this void with speculation by claiming that defendants must have known that plaintiff would be tortured because, well, everybody knows that Cuba's legal system does not afford due process and its prison conditions are abysmal. (*See, e.g.,* Compl. ¶¶ 219 - 223.) Such speculation is insufficient. *Sinaltrainal,* 578 F.3d at 1270 (directing dismissal of secondary liability claim under the TVPA where "plaintiffs' vague and conclusory allegations … fail to detail any factual allegations to raise a right to relief above the speculative level.")

The crux of plaintiff's claim here is that defendants "entered into a conspiracy and a joint plan with the Cuban government[.]" (Compl. ¶ 191.) Significantly, nowhere does plaintiff actually allege that defendants entered into any agreement with the Cuban government.[2] Instead, the complaint alleges an agreement between defendant Puig and his mother, defendant Valdes, "to become informants for the Cuban government[.]" (Compl. ¶ 194.) Plaintiff must allege more. He must allege facts showing an agreement between defendants and the party that perpetrated the alleged torture (i.e., the Cuban government). Absent that, plaintiff cannot state a claim for secondary liability under the TVPA. *See In re Chiquita Brands,* 792 F. Supp. 2d at 1351 (complaint must provide

[2] The complaint contains conclusory allegations that defendants conspired with, and aided and abetted, "unnamed agents of the INDER, the repressive DCSE and the Cuban government." (Compl. ¶¶ 11 – 14.) As noted above, such allegations do not suffice. The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

"facts regarding dates, attendees, and discussions of meetings between Chiquita and the AUC, as well as facts regarding the terms of the agreements reached").[3]

Conclusion

Plaintiff's claim against defendants must be dismissed because: (1) the TVPA is not to be applied 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 complaint fails to properly allege that defendants had any purpose or intent to facilitate the Cuban government's torture of plaintiff.

Respectfully submitted,

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[3] The complaint's failure to allege such an agreement distinguishes this case from the other case filed by plaintiff's counsel against a Major League Baseball player, *Curbelo Garcia, et al. v. Chapman,* 13-cv-22210-CMA. (S*ee* Compl. ¶¶ 17, 179.) In that case, Judge Altonaga denied defendants' motion to dismiss plaintiffs' secondary liability claim under the TVPA on the ground that the complaint clearly alleged that defendant, after being caught attempting to flee Cuba, met with Cuban president Raul Castro and entered into an agreement to become a snitch for the government. *Case no. 13-cv-22210-CMA* (DE 84 at 17 and 22.) Plaintiff here does not, and cannot, make such an allegation. Not only is Judge Altonaga's decision in *Chapman* factually distinguishable, it is now of questionable validity given the Supreme Court's subsequent decision in *Kiobel* prohibiting the application of federal statutes that do not clearly evince a Congressional intent to be applied extraterritorially to cases that, like this case, have nothing to do with the United States.

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 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.

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