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 IN OPPOSITION TO DEFENDANTS' RULE 37 MOTION FOR SANCTIONS AND MEMORANDUM OF LAW

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

I. PROCEDURAL 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. After several motions and responses and a hearing, the Plaintiff ultimately 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 each and every communication with Defendants' counsel—as well as during counsel's appearances in court—the undersigned has acknowledged what was already well-established in the Second Amended Complaint and elsewhere—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..

On Jun 25, 2014, Defendants' counsel, Sean Santini ("Attorney Santini") emailed a Notice of Taking Deposition on August 7, 2014 (a date he decided unilaterally) for Corbacho Daudinot. Attorney Santini clearly knew that taking the deposition on that date would be

impossible, and had sent that notice in bad faith in order to place Plaintiff in an untenable position.

On August 12, 2014, Attorney Santini sent another Notice of Taking Deposition of Plaintiff unilaterally scheduled for September 12, 2014. 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.

Defendant's counsel next insisted on deposing the Plaintiff in December, 2014 despite the undersigned's repeated insistence that Plaintiff could not attend at that time due to his unchanging prison condition.

On October 9, 2014 the Defendants' filed a Rule 37 Motion, which the court denied on November 11, 2014, for Sanctions for failure to attend the aforementioned depositions on August 7 and September 12.

On January 7, 2015 Plaintiff filed a Motion to Stay the Proceedings for a period of three (3) months to permit the Plaintiff to obtain a travel visa to the United States. The court denied that motion.

On January 14, 2015, the parties attended mediation conference in the offices of Murai, Wald, Biondo, and Moreno, which was mediated by Rene Murai, Esq. Although no agreement was reached on that date, the parties consciously agreed to keep negotiations open and maintaining Mr. Murai as the mediator of said negotiations, and the parties had made several attempts at continued negotiations since that time. Attached as "**Exhibit A**", are emails from Sean Santini, Defendants' attorney, reflecting the on-going negotiations between the parties.

In their motion for sanctions [DE 74], Defendants mischaracterize certain facts regarding the history of the case, stating that "Plaintif has not produced any evidence to support his… acusation that Yasiel Puig… and his mother conspired with the Cuban government to torture plaintiff…." However, that is plainly not the case as Plaintiff provided documentary proof of his allegations along with the complaint—including official Cuban court documents—and then provided further evidence as part of Plaintiff's Rule 26 Disclosures.

On March 3, 2015, the Defendants sent Plaintiff a Request for Production. However, Plaintiff already provided Defendants with all of the documentary evidence that he had in his

possession in the Complaint and in Plaintiff's Rule 26 Disclosures. Due to Cuba's secretive and reclusive nature, this case shall revolve, mainly, on testimony, rather than documentation. In fact, aside from one (1) Cuban court document from a separate case that did not involve the Plaintiff and came to our attention after the Request for Production's due date, Plaintiff cannot produce a single document that is responsive to Defendant's Request that he had not already produced in the Complaint or in his Rule 26 Disclosures.

In the beginning of March, 2015 many things regarding the Plaintiffs' travel restrictions from Cuba had changed. Plaintiff received his Cuban passport, and obtained authorization to travel to the United States and abroad from Cuba. On or about March 6, when Plaintiff agreed to appear for deposition on April 21, Plaintiff expected to travel to the United States in early April. However, although Corbacho Daudinot had received authorization to travel, the Cuban tribunal failed to send his authorization to the National Directorate of Identification, *Direction National de Identification* ("DNI"), which kept his name on a no-fly list that is kept at the airport. In mid March, Corbacho Daudinot went to the airport in Havana, but was stopped from flying because Cuba's inefficient bureaucratic apparatuses, which failed to remove him from the DNI no-fly list.

On March 30, Avelino Gonzalez, mindful of the April 15 deadline for expert discovery and of the upcoming April 21st deposition date, contacted Rene Murai and informed him that Corbacho Daudinot was still stranded in Cuba, and asked him to extend a counter-offer to Sean Santini, Defendants' attorney. Through the coming days and weeks, Mr. Gonzalez communicated with the mediator, who assured him that he was actively communicating with Defendants' counsel, and that Defendants were still interested in negotiating in good faith.

On April 10, 2015, Mr. Murai suggested that Plaintiff draft an agreed motion for extension of time to exchange expert discovery, and that the mediator would secure Attorney Santini's agreement. The undersigned memorialized that conversation with an email that also informed Mr. Murai that Plaintiff wanted to obtain an informal stay of discovery for the Request for Production that Defendants had sent the Plaintiff while they negotiated a final agreement on the case so as to maintain litigation costs low. There was no purpose to increasing litigation costs, Plaintiff reasoned, if a settlement was imminent. The mediator informed Avelino J. Gonzalez that he had forwarded that email to Sean Santini. Find attached as "**Exhibit B**", the email dated April 10 to Rene Murai.

On April 10, based on the mediator's suggestion, Plaintiff drafted an Agreed Motion for Englargment of Time to Exchange Expert Discovery and sent the mediator a copy so that he would send it on to Attorney Santini. Find attached as "**Exhibit C**", Plaintiff's email sending the Agreed Motion to the mediator.

On April 13, after having received no feedback on the agreed motion, the undersigned sent Attorney Murai an email inquiring as to the status of the Agreed Motion. Find attached as "**Exhibit D**", the email from the undersigned to Mr. Murai, inquiring as to the status of the Agreement.

After receiving the undersigned's email regarding the Agreed Motion, the mediator forwarded the draft of the Agreed Motion to Defendants' counsel, Averil Andrews, who responded on the following day, indicating that Defendants did not object to the Motion. Find attached as "**Exhibit E**", Attorney Andrew's response to the mediator's email to her containing the Agreed Motion, indicating that Defendants did not object to the agreed motion.

By the time that Attorney Andrew's sent her assent to the Agreed Motion, the Plaintiff, who was wary of missing the deadline, had already paid an expert witness, Nancy Perez Sixto, who drafted an expert report the Plaintiff sent to Defendants and to the mediator (to facilitate negotiations) within the deadline established by the court.

On April 14, 2015, the Plaintiff once again reached out to Rene Murai, who had been acting as an intermediary between the parties in furtherance of obtaining a settlement, to reschedule the deposition of the Plaintiff, which was scheduled on April 21, 2014. The undersigned explained to the mediator in the email that the Plaintiff, who had authorization to travel from Cuba, but had not been removed from the no-fly list at the airport. See attached as "**Exhibit F**" that email to Rene Murai.

On April 20, the undersigned called Attorney Andrews to verify that the deposition for the next day had been cancelled and to see if the attorneys could meet to discuss possible settlement instead. See attached as "**Exhibit G**", an email memorializing that conversation.

Plaintiff has been laboring in the good faith belief that Defendants were seeking to negotiate in order to reach a settlement agreement. Plaintiff's belief was supported by the fact that Defendants entered into an Agreed Motion for Enlargement of Time to Exchange Expert

Discovery, which stated that the parties "are in the process of negotiating a settlement" and that "they may be able to reach an understanding given just a little more time."

Plaintiff relied on this agreement of continued negotiation when he failed to serve a Response to Request for Production (which at the due date was a simple matter of informing the Defendant that they had no documents to produce that had not already been produced in Plaintiff's Rule 26 Disclosures), and when he failed to seek relief from the court regarding Plaintiff's deposition on April 21, 2014. It was Plaintiff's good-faith belief and expectation that the parties were negotiating toward a settlement that prevented him from seeking such relief and from further litigating the case.

Plaintiff supplied Defendants with his Response to Request for Production on May 8, 2015, which contained only three (3) documents that had not previously been provided to Defendant. However, on April 21, 2015, Plaintiff's counsel, Avelino J. Gonzalez, personally showed Defendants' counsel, Sean Santini, copies of the three (3) documents that had not previously been provided.

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.

Attorney Santini never asked about Defendants' Response to Request for Production, and while he did speak with Attorney Gonzalez, he did not make 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), and Attorney Santini did not include a Local Rule 7.1(a)(3) statement of having conferred with opposing counsel about the 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 have not been acting in good faith.

Prior to filing the Motion for Sanctions, Defendants had not sought a Response to Request for Production, despite Plaintiff's specific request to informally stay the discovery process to specifically address the Request for Production. Defendants did not explicitly agree to stay the discovery process, but instead entered into an Agreed Motion for Enlargement of Time to Exchange Expert Discovery, while remaining silent as to Plaintiff's appeal regarding the Requests for Production. After filing the instant Motion for Sanctions, the Plaintiff almost immediately sent the Defendants a Response to Request for Production, demonstrating that he was not concealing discovery from the Plaintiff, but was merely attempting to reduce costly litigation. Had Defendants merely stated that they would not stay the discovery and asked for the Response to Request for Production, they would have received it immediately.

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. Nevertheless, Plaintiff was able to obtain permission to travel from Cuba, but was waiting for the Cuban tribunal to inform DNI to remove his name from the no-fly list that is contained in the Cuban airport. A week prior to the scheduled deposition, on April 14, 2015, Plaintiff informed Defendants through their mediator, Rene Murai, that Plaintiff would be unable to attend the deposition, and requested to please reschedule same. Defendants failed to acknowledge such request, despite the fact that the parties were allegedly involved in active negotiations. Plaintiff additionally called Defendants' counsel the day before to verify that the deposition had been canceled, only to run into a brick wall. Defendants have purposely incurred additional unnecessary expenses by failing to cancel a deposition to which they were informed the Plaintiff could not attend.

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 a deposition to which he has no current 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's diligent good faith effort to come to the United States have been fruitful. Plaintiff has managed to obtain his passport and authorization to travel from Cuba. It is only Cuba's inefficient bureaucratic apparatuses that have prevented Plaintiff from traveling to Miami.

Plaintiff did not willfully or wantonly disregard Defendant's deposition, but instead Plaintiff advised the Defendants that he could not attend the deposition due to an involuntary inability to attend same despite his best efforts to travel to the United States. Plaintiff informed the Defendants of his inability to attend the deposition with sufficient time for the Defendants to cancel or reschedule it.

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 deposition because of bureaucratic inefficiencies that have kept him on a no-fly list in the Cuban airport, a situation that has been involuntary imposed on him as a result of the Defendants' actions. Defendants knew that Plaintiff could not attend the deposition. Secondly, in this case there were no additional attorneys fees or costs incurred by the Defendants, who were informed that Plaintiff would not be able to attend the deposition.

While Plaintiff believes that his actions have not merited any sanctions due to Plaintiff's involuntary inability to comply with Defendants' deposition, "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, but instead sought to stay the discovery, and relying on Defendants' agreement to continue negotiations, did not file a Response to Request for Production as a matter of form, while still providing an expert's report. He has conducted himself in good faith, but has been unable to come to Miami for his deposition because of the actions of Defendants, who

placed him in his current predicament. 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 May 8, 2015.

s/Kenia Bravo
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