

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

JOAN JARA, in her individual capacity,  
and in her capacity as the personal  
representative of the ESTATE OF VICTOR  
JARA,

Case No.: 6:13-cv-01426-RBD-GJK

AMANDA JARA TURNER, in her  
individual capacity,

and MANUELA BUNSTER, in her  
individual capacity,

Plaintiffs.

v.

PEDRO PABLO BARRIENTOS NUNEZ.

Defendant.

**DEFENDANT PEDRO BARRIENTOS' MOTION TO SET ASIDE DEFAULT  
JUDGMENT**

COMES NOW the Defendant, by and through undersigned counsel, pursuant to Federal Rule of Civil Procedure 60, and moves this Honorable Court to set aside its November 20, 2014 order granting, in part, Plaintiffs' Application for Default Judgment on the Second Amended Complaint. In the alternative, pursuant to the authorities cited below, the Defendant moves this Court to dismiss the Plaintiffs' Second Amended Complaint in its entirety. In support, Defendant states:

**FACTS**

As this Court is aware, this dispute arises from the events surrounding the September 11, 1973 *coup d'etat* which deposed Chilean President Salvador Allende. Allende's communist-oriented reforms devastated Chile's economy and led to his express repudiation by the Chilean

legislative and judicial branches. This prompted the military to seize power and install a military *junta* led by General Augusto Pinochet.

During the course of his ill-fated presidency, Allende has been receiving clandestine arms shipments from Cuba. The newly-installed military *junta* feared the outbreak of armed conflict, and acted swiftly to detain Allende's supporters and other communist and leftist activists. Victor Jara was rounded up as a part of these actions, and interned at Chile Stadium in Santiago. The military's efforts ultimately went too far, resulting in the false detention, torture, and execution of scores of individuals at Chile Stadium and other locations. Victor Jara was among those killed at Chile Stadium.

Pedro Barrientos, the Defendant in this case, was a Lieutenant assigned to the *Tejas Verdes* regiment during this time period. While some portions of the *Tejas Verdes* regiment, along with other regiments, were stationed at Chile Stadium, others were assigned to different tasks and locations throughout Santiago, including the "War Arsenal" and the Padre Hurtado commune. Mr. Barrientos was among those never stationed at Chile Stadium. As an explosives expert, Mr. Barrientos was primarily stationed at the War Arsenal during this period. Mr. Barrientos never met Victor Jara, and had no involvement in his death. *See* Affidavit of Pedro Barrientos, attached hereto as **EXHIBIT A**.

A key eyewitness<sup>1</sup> against Mr. Barrientos is Jose Adolfo Paredes Marquez ("Jose Paredes" or "Paredes"), who also served with the *Tejas Verdes* regiment during this time. Sometime in 2009, Paredes claimed to have been stationed in Chile Stadium, and witnessed the killing of Victor Jara. Paredes initially alleged that Mr. Barrientos shot Victor Jara. Apparently, Paredes is the only individual to specifically claim witnessing Mr. Barrientos kill Victor Jara.

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<sup>1</sup> *See also* Second Amended Complaint (Doc. 63) at para.47 (describing Paredes' testimony as "a critical piece of evidence.")

<sup>2</sup> The Spanish version is a photocopy from Chilean court records. The Court should note that underlining and circling appearing in the text was added by Mr. Barrientos during his review of the documents. The writing on the

However, on May 26, 2009, Paredes gave a different sworn statement to the Court of Appeals of Santiago. In that statement, Paredes completely recanted his previous testimony, admitting that it was based on his imagination and psychological pressure exerted upon him by his interrogators. A certified English translation of this document, along with the Spanish version,<sup>2</sup> has been appended hereto as **EXHIBIT B** for the Court's consideration.

Sometime in 2012, Paredes resurfaced on Chilean Television, and appeared to once again make claims which a Chilevision investigative report interpreted as identifying Mr. Barrientos as the main perpetrator of Victor Jara's death. It is this news media report which apparently led Plaintiffs to pursue Mr. Barrientos, even though Mr. Barrientos never made any attempts to conceal his whereabouts, identity, or service in the Chilean military.

Plaintiffs filed suit against Mr. Barrientos on September 4, 2013. Mr. Barrientos was personally served with a summons on September 4, 2013. This case was initially filed in the Middle District's Jacksonville Division. On September 16, 2013, Judge Morales Howard entered an order transferring this case to the Orlando Division. Mr. Barrientos misinterpreted this order to mean that this case has been closed.

Mr. Barrientos does not speak English. He is not familiar with the U.S. legal system. While he continued receiving documents in the mail during the pendency of this case in Orlando throughout the year 2014, he did not understand them. Mr. Barrientos did attempt to consult with two attorneys, but to no avail: both attorneys informed him that they could not help. Neither attorney gave Mr. Barrientos any legal advice, much less informed him that he was obliged to respond to the lawsuit. See Exhibit A at para. 9.

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<sup>2</sup> The Spanish version is a photocopy from Chilean court records. The Court should note that underlining and circling appearing in the text was added by Mr. Barrientos during his review of the documents. The writing on the margins and in the upper right corners apparently are from Chilean judicial authorities. Paredes apparently signed in two places: on the right margin of page 1, and towards the bottom of page 2.

Mr. Barrientos has been in contact with a gentleman called Eladio Jose Armesto. Mr. Armesto is a Florida notary public, but not a lawyer. He previously helped Mr. Barrientos establish a family trust for his house. Mr. Armesto mistakenly informed Mr. Barrientos that in order for the case to be re-opened, Mr. Barrientos would have to be once again personally served. *Id.* at para. 10.

Around January 15, 2015, Mr. Barrientos saw a report on CNN Chile stating that a default judgment has been entered against him. Upon learning this, Mr. Barrientos promptly retained undersigned counsel to represent him in this matter. This motion follows.

#### **INTRODUCTION AND SUMMARY OF ARGUMENTS**

The Plaintiffs' Second Amended Complaint contains five claims for relief. The Plaintiffs' claims are based on the Alien Torts Statute, 28 U.S.C. § 1350 ("ATS") and the Torture Victim Protection Act, 28 U.S.C. § 1350 note ("TVPA"). This Court dismissed the Plaintiffs' ATS claims based on *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). However, this Court granted Plaintiffs' Application for Default Judgment as to the TVPA claims in Counts I and II. Therefore, because the Default Judgment was only entered as to Plaintiffs' TVPA claims, Mr. Barrientos will not address the dismissed ATS claims in this motion.

Mr. Barrientos contends that this Court should set aside its Default Judgment because, in light of the strong presumption in favor of adjudicating disputes on their merits: 1) Mr. Barrientos has a meritorious defense, 2) Plaintiffs will not be prejudiced, and 3) the neglect on Mr. Barrientos' part is excusable. Mr. Barrientos also contends that even if this Court finds that his neglect is not excusable, this Court has authority to set aside the Default Judgment, because Paredes' recantation constitutes evidence of fraud and misrepresentation or, in the alternative, newly discovered evidence. Finally, should this Court determine that neither of the above

grounds applies, Mr. Barrientos asks this Court to set aside its Default Judgment under the “catch-all” provision of Rule 60(b)(6), given the unusual and unique circumstances of this case.

In the alternative, because Mr. Barrientos will demonstrate that Plaintiffs’ TVPA claims are time-barred as a part of his meritorious defense argument, Mr. Barrientos asks this Court to dismiss Plaintiffs’ Second Amended Complaint in its entirety.

## ARGUMENT AND MEMORANDUM OF LAW

### **I. STANDARD**

Federal Rule of Civil Procedure 60(b) authorizes this Court to grant relief from a final judgment or order for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; [and]
- ...
- (6) any other reason that justifies relief.

*Id.*

In the Eleventh Circuit, “defaults are seen with disfavor because of the strong policy of determining cases on their merits.” *Florida Physician’s Ins. Co. v. Ehlers*, 8 F.3d 780, 783 (11th Cir.1993). When consider a motion to set aside a default judgment based on mistake, inadvertence, surprise, or excusable neglect, “the defaulting party must show that: (1) it had a meritorious defense that might have affected the outcome; (2) granting the motion would not result in prejudice to the non-defaulting party; and (3) a good reason existed for failing to reply to the complaint.” *Id.*

### **II. THE DEFAULT JUDGMENT SHOULD BE SET ASIDE**

Mr. Barrientos asks this Court to set aside its default judgment because 1) he has strong meritorious defenses, both on the merits and due to the statute of limitation; 2) the Plaintiffs' case is based on the fraudulent testimony and misrepresentations of key "eyewitness" Jose Paredes, who admitted to falsifying his account of Victor Jara's death in 2009; and 3) Mr. Barrientos' neglect in failing to respond to this lawsuit is excusable given the circumstances.

**A. Mr. Barrientos Can Successfully Defend Himself on the Merits**

Mr. Barrientos did not kill Victor Jara. The evidence against Mr. Barrientos is based on fabricated accounts and yellow journalism. Plaintiffs' Second Amended Complaint notes that "[i]n 2009, a critical piece of evidence came from the testimony of Jose Adolfo Paredes Marquez, a conscript in the Chilean military, who was present at the torture of Victor Jara and testified that he witnessed Defendant shoot Victor Jara." *Id.* at para. 47. Mr. Barrientos has several documents from the Santiago Court of Appeals in his possession. One such document, dated May 26, 2009, contains a sworn statement from Paredes in which Paredes recants his previous claims of having witnessed Victor Jara's death, and admits that his prior statement was based on his imagination and the rich body of literature concerning Victor Jara. *See* Exhibit B.

In his sworn statement, Paredes testified: "I was never at Chile Stadium, but everything I indicated in my first statement is the result of my imagination and from reading books, diaries and comments about Victor Jara." Exhibit B at 1. Paredes also testified that "I ratify everything I have indicated with regard to not having any involvement in the death of Victor Jara, it was all made up due to the fear instilled in me by the police officers that interrogated me, who pressured me psychologically." *Id.* at 2.

Plaintiffs also reference a May 2012 Chilevision investigative report. Second Amended Complaint (Doc. 63) at para. 48. That report, while in Spanish, is available in its entirety on Youtube in three parts under the following links:

- <https://www.youtube.com/watch?v=yp0397DArIU> (“Part One”).
- <https://www.youtube.com/watch?v=DFVILgLPqEQ> (“Part Two”).
- <https://www.youtube.com/watch?v=lQGW8XZxC0w> (“Part Three”).

Paredes is prominently featured and interviewed in this report. In Part Two, reporters travel to Florida and confront Mr. Barrientos at his Deltona home. *See* Part Two at 16:12. Despite being apparently taken by surprise by the reporter, Mr. Barrientos adamantly denied being at Chile Stadium or having any involvement in Victor Jara’s death. In his Affidavit, Mr. Barrientos again reiterates that he was not personally stationed at Chile Stadium, and had no involvement in Victor Jara’s death. Exhibit A at para. 13-15.

#### **1. Fraud or Newly Discovered Evidence**

The issue of fraud centers around Paredes’ recantation contained in Exhibit B, and is inextricably entwined with Mr. Barrientos’ meritorious defense to this lawsuit.

One who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other misconduct has the burden of proving the assertion by clear and convincing evidence. ... The conduct complained of must be such as prevented the losing party from fully and fairly presenting his case or defense. ... Although Rule 60(b)(3) applies to misconduct in withholding information called for by discovery, [...] it does not require that the information withheld be of such nature as to alter the result in the case. ... This subsection of the Rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect.

*Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978) (internal citations omitted).

In this case, Mr. Barrientos does not mean to suggest that Plaintiffs or Plaintiffs’ Counsel knowingly committed a fraud on this Court. It seems that Plaintiffs were unaware of Paredes’

recantation and false testimony. Clearly, the fraud and misrepresentation occurred on the part of Paredes, as well as the Chilean media, to the extent it was aware of Paredes' recantation but chose to ignore it for the sake of sensationalist reporting.

This Court should also consider that Victor Jara is an international public figure and martyr of the political left. Thus, his life and death has become the topic of an extensive body of literature,<sup>3</sup> to such an extent that it has entered the domain of myth and legend. For this reason, Paredes admitted that his initial account of Victor Jara's death was "the result of my imagination and from reading books, diaries and comments about Victor Jara." Exhibit B at 1. This fact makes it particularly difficult to separate truth from fiction in a lawsuit such as this.

Applying the standard outlined in *Rozier*, Mr. Barrientos submits that by providing the Court with Paredes' sworn declaration recanting his earlier testimony, he has met the burden of proving the alleged fraud and misrepresentation. Plaintiffs' Second Amended Complaint reads as though Mr. Barrientos' involvement in Victor Jara's death is an established historical fact, when, in fact, it is based on highly spurious evidence. To the extent the Court was not made aware of this evidentiary problem in Plaintiffs' case, Mr. Barrientos submits that the judgment was unfairly obtained.

The *Rozier* Court also indicated that

Factually incorrect judgments are the subject of Rule 60(b)(2), which provides for relief from a judgment on grounds of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." We have held that under Rule 60(b)(2), the newly discovered evidence must be "such that a new trial would probably product a new result."

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<sup>3</sup> For instance, Plaintiff Joan Jara penned an entire book about her husband. See Joan Jara, *Victor: An Unfinished Song* (1983). A cursory search of Google will reveal hundreds of other articles and pieces of literature concerning Victor Jara.



573 F.2d at 1339 n.4. To the extent this Court does not find that Paredes' recantation rises to the level of fraud, Mr. Barrientos invites the Court to consider this document newly discovered evidence, and thus to set aside the judgment pursuant to Rule 60(b)(2).

Because Mr. Barrientos has a meritorious defense to Plaintiffs' allegations, and it is unlikely that Plaintiffs will be able to establish their allegations in a trial governed by U.S. evidentiary and legal standards, this Court should set aside its previously entered judgment. Aside from Mr. Barrientos' defense on the merits, this Court should additionally consider Mr. Barrientos' ability to successfully raise a statute of limitations defense in this matter.

#### **B. Plaintiffs' Claims Are Time-Barred**

The TVPA contains an express 10-year statute of limitations, which states: "No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose." 28 U.S.C. § 1350 note section 2(c) (1991). *See also Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005). Because the crime giving rise to this case occurred in 1973, but Plaintiffs did not bring suit until 2013—40 years after the fact—Plaintiffs' claims are clearly time-barred under the plain language of the TVPA. However, because the Eleventh Circuit has applied the doctrine of equitable tolling to the TVPA, this does not settle the matter. *Cabello* at 1154-55.

In a brief filed with this Court on February 18, 2014 (Doc. 50), Plaintiffs argue that this Court should apply the equitable tolling doctrine to their claims. Doc. 50 at 15-19. The thrust of Plaintiffs' equitable tolling argument is that the Chilean government failed to properly investigate Victor Jara's death, and this is somehow sufficient "to toll the statute of limitations at least until the day the Plaintiffs learned the identity and whereabouts of Victor Jara's killer." Doc. 50 at 19. *See also* Second Amended Complaint (Doc. 63) at para. 39-51. However, the

facts alleged in Plaintiffs' Second Amended Complaint do not support equitable tolling in this case, because they do not rise to the level of "extraordinary circumstances" outlined by the Eleventh Circuit.

### **1. No Equitable Tolling Because No Extraordinary Circumstances**

Plaintiffs' proposition that an inadequate government investigation and difficulties in locating witnesses justify equitable tolling is clearly at odds with the Eleventh Circuit's precedent. The Eleventh Circuit held that "equitable tolling is appropriate in situations where the defendant misleads the plaintiff, allowing the statutory period to lapse; or when the plaintiff has no reasonable way of discovering the wrong perpetrated against [Plaintiff] ... Additionally, in order to apply equitable tolling, courts usually require some affirmative misconduct, such as deliberate concealment." *Cabello*, 402 F. 3d at 1155 (internal quotations and citations omitted). The Plaintiff bears the burden of establishing that equitable tolling applies. *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006).

*Cabello* also considered the Pinochet years in Chile. In *Cabello*, the Plaintiffs brought suit, including their TVPA claims, in 1999 – 9 years after the Pinochet Government's fall in 1990, but 26 years after the 1973 killings giving rise to the complaint. *Id.* at 1154. In *Cabello*,

[Plaintiffs] knew that Cabello was killed in October 1973 and that unknown military officers were involved. However, it was not until 1990 that they obtained knowledge of Cabello's manner of death and information about the harm suffered by him before his death. Until Cabello's unmarked grave was located, his family did not know that he and the other prisoners had been tortured before being massacred.

*Id.* at 1155.

The *Cabello* Court ultimately considered equitable tolling to be appropriate because "the events surrounding Cabello's death made it nearly impossible for the Cabello survivors to discover the wrongs perpetrated against Cabello." *Id.* at 1155 (emphasis added). The Court also

held that equitable tolling was only applicable until 1990, thus making Plaintiffs' 1999 complaint timely. *Id.* at 1156.

Similarly, in *Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005), the Eleventh Circuit applied equitable tolling to a Haitian Plaintiff's TVPA claims until 1) the defendant was removed from his position of power following the toppling of Haiti's military regime in 1994; and 2) the defendant entered the United States, enabling personal jurisdiction to be exercised over him, in 1994. 431 F.3d at 779-80.

The *Arce* case is also instructive. The *Arce* Court found that under the circumstances of the civil war in El Salvador, equitable tolling was appropriate until the war's end in 1992, because of legitimate fears of reprisal and "state-sponsored acts of violence and oppression," which continued until 1992. *Id.* at 1265. *Cabello, Jean*, and *Arce* all suggest that, at most, equitable tolling should be applied when 1) the Court cannot exercise personal jurisdiction over a defendant, and/or 2) the offending regime remains in power. These cases teach that affirmative misconduct rising to the level of active, deliberate concealment—not merely inadequacies investigations or difficulties in identifying witnesses—is required before equitable tolling becomes appropriate.

Furthermore, in *Arce*, the Eleventh Circuit articulated the policy considerations applicable to equitable tolling:

Mere ambient conflict in another country does not, by itself, justify tolling for suits filed in the United States. From the standpoint of the United States, many countries oppress their citizens today, and many countries have oppressed their citizens in decades and centuries past. A lenient approach to equitable tolling would revive claims dating back decades, if not centuries, when most or all of the eye witnesses would no longer be alive to provide their accounts of the events in question.

434 F. 3d at 1265 (emphasis added).

This case embodies the policy problem outlined in *Arce*. Plaintiffs' position would have this Court apply "a lenient approach" to equitable tolling, thereby reviving an untimely claim dating back four decades, under circumstances where "most or all of the eye witnesses would no longer be alive to provide their accounts of the events in question." *Id.* at 1265.

Joan Jara learned of the circumstances surrounding her husband's death on September 18, 1973. Second Amended Complaint (Doc. 63) at para 38. She knew that he had been tortured and killed. *Id.* She knew that he had been detained at the State Technical University then transferred to the Chile Stadium, where he was ultimately killed at the hands of the Chilean military. *See id.* at para. 22-26. Mrs. Jara had knowledge of this information due to her contact with other detainees from Chile Stadium, as well as other witnesses who informed her about her husband's death, enabling her to retrieve his body and make funeral arrangements. *Id.* at para. 32; 38.

In addition, plaintiffs knew which units of the Chilean military were involved in these events—the *Tejas Verde*, *Blindados No. 2*, *Esmeralda*, and *Maipo* regiments. *Id.* at para. 26. These were not clandestine paramilitary units, whose members wore masks and took other measures to conceal their identities. These were regular Chilean military formations, whose order of battle, command structure, and membership were officially recorded.

It is also noteworthy that an official investigation into Victor Jara's death was actually opened in 1978, and remained pending until 1982—during Pinochet's rule. *Id.* at para. 39-40. While Plaintiffs complain about the "adequacy" of this and subsequent investigations, Plaintiffs do not allege any affirmative misconduct, much less deliberate concealment, such as would justify equitable tolling. *Cabello*, 402 F. 3d at 1155. This was not the situation in *Cabello*, where the plaintiffs did not have information concerning how Cabello died, or even where he

was buried, until 1990. *Cabello* at 1155. In fact, unlike in this case, the Chilean government in *Cabello* engaged in affirmative misconduct by deliberately concealing the manner of Cabello's death and his place of burial. "The Chilean government also created great confusion by sending three conflicting death certificates to the Cabello family." *Id.* at 1155.

Problems with identifying witnesses are endemic to all cases, and do not rise to the level of extraordinary circumstances necessary to justify equitable tolling. In fact, in domestic U.S. jurisprudence, an entire practice and doctrine regarding pleading fictitious "Doe" defendants has evolved to address this very problem. *See generally* Rebecca S. Engrav, *Relation Back of Amendments Naming Previously Unnamed Defendants under Federal Rule of Civil Procedure 15(c)*, 89 CAL. L. REV. 1549, 1550 (2001). Available at: <http://scholarship.law.berkeley.edu/californialawreview/vol89/iss5/5> (noting that "plaintiffs often rely on naming a fictitious 'John Doe' as a defendant to preserve their claims until such time as the correct names can be determined.").

Absent active concealment or other misconduct, these issues are not extraordinary circumstances, and do not justify equitable tolling. Here, Mr. Barrientos moved to the United States in 1989, thus becoming subject to this Court's personal jurisdiction. Mr. Barrientos made no attempts to conceal his identity, whereabouts, or otherwise deny his membership in the *Tejas Verde* regiment of the Chilean military during the time period involved. Therefore, equitable tolling should only be applied to the year 1989, or, at best, 1990. In either case, Plaintiff's suit is barred by the TVPA's 10-year statute of limitations.

### **C. Plaintiffs Will Not Be Prejudiced By Setting Aside the Judgment**

To the extent setting aside this Court's default judgment is premised on Rule 60(b)(1) (mistake, inadvertence, surprise, or excusable neglect), Mr. Barrientos must also show that

“granting the motion would not result in prejudice to the non-defaulting party[.]” *Florida Physician's Ins. Co.*, 8 F.3d at 783. This is easily demonstrated for the following reasons. First, given the 40-year timeline of this dispute, swiftness of judgment does not appear to be at issue. Rather, Plaintiffs appear to be motivated by a desire to obtain closure and justice in this matter. Second, this is not a situation where this Court’s judgment transferred funds, property, or conferred some other benefit on the Plaintiffs that would be withdrawn if the judgment is set aside. Third, this is not a case where financial considerations play a role: Victor Jara’s popularity has conferred tremendous wealth upon his estate. Mr. Barrientos, by contrast, lives on a modest fixed income.

Finally, to the extent Plaintiffs are motivated by a desire for closure and justice, it would actually appear that setting aside this judgment is in the Plaintiffs’ best interest. This is because it stands to reason that Plaintiffs have an interest in the apprehension and adjudication of Victor Jara’s actual killer, not an individual who has been demonstrably falsely accused. Setting aside the default judgment will therefore not prejudice the Plaintiffs in this case.

#### **D. Mr. Barrientos’ Neglect is Excusable**

The third factor Mr. Barrientos must establish in order to justify relief under Rule 60(b)(1) is that “a good reason existed for failing to reply to the complaint.” *Florida Physician’s Ins. Co.* at 783. This Court has recently had occasion to address a request for relief under Rule 60(b)(1) in *Maurer Riders USA, Inc. v. Beijing Shibaolai Amusement Equipment Co., Ltd.*, No. 6:10-cv-1718-Orl-37KRS, 2014 WL 3687098 (M.D. Fla. July 24, 2014). Mr. Barrientos bears the burden of establishing excusable neglect. *Id.* at \*2. In *Maurer*, this Court noted that “where a defendant knows that a case has been filed against it but fails to act diligently to protect its

interests, the ‘defendant does not have a ‘good reason’ for failing to respond to a complaint.’”  
*Id.* at \*6 (quoting *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir.2007)).

Here, Mr. Barrientos submitted an affidavit explaining why he failed to respond. *See* Exhibit A. Mr. Barrientos’ failure to respond is attributable to his misunderstanding of the effect of this matter being transferred, and the mistaken belief he would have to be personally served for the case to be re-opened, based on the erroneous advice of a non-lawyer. *Id.* at para. 10. Mr. Barrientos speaks no English, has no knowledge of the U.S. legal system, and, until recently, has not retained counsel. When he did attempt to speak with lawyers in 2014, both lawyers said they could not help him, and did not offer any legal advice, including whether Mr. Barrientos was obligated to respond. *Id.* at para. 9. The only person who did offer any kind of advice, however incorrect it turned out to be, was Mr. Armesto, who is not a lawyer.

Mr. Barrientos’ source of information concerning this lawsuit has been the Chilean media, through which he learned that this Court recently entered a default judgment against him. Within a few days of learning this, Mr. Barrientos acted diligently in retaining counsel in order to respond. *See Maurer* at \*6 (relevant considerations include “the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.”).

*Maurer*, by contrast, involved two foreign amusement park ride manufacturers. *Id.* at \*1. The defaulting party was a Chinese manufacturer who regularly attended trade shows in Orlando, where it was personally served with Plaintiff’s complaint. *Id.* After service, the defendants returned to China and consulted with a California attorney regarding how to proceed. *Id.* This attorney “advised Defendants that service had not been properly effectuated pursuant to the Hague Convention and therefore no response was necessary.” *Id.* On these facts, this Court held

that “regardless of whether Defendants’ default is attributable in part to their attorney’s initial mistake of fact, Defendants’ demonstrated lack of diligence over the subsequent year renders any neglect in this case inexcusable.” *Id.* at \*6.

The Defendants in *Maurer*, however, were clearly a sophisticated international corporate party. They did business in the United States. When learning that a lawsuit has been filed against them, they chose to consult a California, but not a Florida, attorney. That lawyer gave them specific advice, which they chose to follow. Given their sophisticated status and international business dealings, the *Maurer* defendants clearly should have known better.

Here, by contrast, Mr. Barrientos is an unsophisticated party. He does not speak English. He has received no education on the U.S. legal system, and was not previously represented by an attorney. Neither lawyer he attempted to consult with gave him any actual legal advice. The one piece of advice he did receive informed him that this lawsuit could not be re-initiated without subsequent personal service of process, which created a misconception that Mr. Barrientos was not obligated to respond. Moreover, when Mr. Barrientos did learn that a default judgment had been entered against him, he immediately took action, retaining counsel within a matter of days. Given these circumstances and his unsophisticated status, Mr. Barrientos’ neglect is therefore excusable.

Mr. Barrientos has demonstrated that he has a meritorious defense to Plaintiffs’ suit, that Plaintiffs will not be prejudiced by the setting aside of default judgment, and that the neglect on his part is excusable. In ruling on this motion, this Court should give particular weight to the strong preference of adjudicating disputes on their merits. *See Olsen v. Quinn Const., Inc.*, No. 8:10-cv-753-T-33EAJ, 2011 WL 687501 \*1 (M.D. Fla. Feb. 16, 2011) (finding that defendants failure to respond “amount to mistake or excusable neglect[,]” and further that “[i]t appears that



Defendant has a meritorious defense that might affect the outcome of this case if reached on the merits, and the Court prefers to reach the merits of the case as opposed to decide it on a technicality.”); *Monticello Ins. Co. v. Dynabilt Mfg. Co., Inc.*, No. 605CV548ORL19DAB, 2005 WL 3019241 \*5 (M.D. Fla. Nov. 10, 2005) (vacating default judgment and observing that “in this Circuit, there is a distinct preference for a trial on the merits as opposed to a judgment by default.”).

### CONCLUSION

In light of the strong preference to adjudicate dispute on their merits, this Court should set aside its default judgment under the circumstances of this case. Mr. Barrientos has presented this Court with several alternate grounds for relief. First, under Rule 60(b)(1), Mr. Barrientos established that he has a meritorious defense, Plaintiffs will not be prejudiced, and the neglect on Mr. Barrientos’ part is excusable given his unfamiliarity with the U.S. legal system. Second, under Rule 60(b)(2) and (3), Mr. Barrientos established that the accusations against him are based on misrepresentations and fraud, since the key eyewitness against him has recanted. If the Court does not consider this to rise to the level of fraud, Mr. Barrientos asks the Court to consider Paredes’ recantation as newly discovered evidence. Finally, given the circumstances of this matter, this Court also enjoys broad equitable powers to set aside its judgment under the “catch-all” provision of Rule 60(b)(6), which authorizes relief from a final judgment “for any other reason that justifies relief.”

In the alternative, because Plaintiffs’ claims are completely time-barred, Mr. Barrientos requests that this Court consider dismissing the entirety of Plaintiffs’ Second Amended Complaint.

WHEREFORE, the Defendant, PEDRO PABLO BARRIENTOS NUNEZ, requests that this Court vacate and/or set aside its November 20, 2014 order granting, in part, Plaintiffs' Application for Default Judgment on the Second Amended Complaint. In the alternative, Mr. Barrientos requests that this Court dismiss Plaintiff's Second Amended Complaint as time-barred.

Dated: January 30, 2015

Respectfully submitted,

*/s/ Jan Kubicz, ESQ.*

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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01(g)**

I certify that, pursuant to Local Rule 3.01(g), undersigned counsel for Defendant/movant Pedro Barrientos conferred telephonically with Mark Beckett, Christina Hioureas, and Kathleen Roberts, opposing counsel representing Plaintiffs. Counsel could not agree on a resolution of the present motion, and opposing counsel is objecting to the present motion.

/s/ P. Jan Kubicz, Esq.

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was electronically filed with the Clerk of this Court by using the CM/ECF system, which will send a notice of the electronic filing to counsel for Plaintiffs: Christian Urrutia, Esq., Christina Hioureas, Esq., James Arthur Bolling, Esq., Marc Suskin, Esq., Mark D. Beckett, Esq., Nushin Sarkarati, Esq., Serine Consolino, Esq., Stephen D. Buscy, Esq., L. Kathleen Roberts, Esq.

/s/ P. Jan Kubicz, Esq.

DATED this 30<sup>th</sup> day of January, 2015.

/s/ Jan Kubicz, ESQ.

JAN KUBICZ, ESQUIRE

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**EXHIBIT A**

**Affidavit of Pedro Barrientos**

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

JOAN JARA, in her individual capacity,  
and in her capacity as the personal  
representative of the ESTATE OF VICTOR  
JARA,

Case No.: 6:13-cv-01426-RBD-GJK

AMANDA JARA TURNER, in her  
individual capacity,

and MANUELA BUNSTER, in her  
individual capacity,

Plaintiffs.

v.

PEDRO PABLO BARRIENTOS NUNEZ.

Defendant.

AFFIDAVIT OF PEDRO BARRIENTOS

BEFORE ME, the undersigned authority, this day appeared PEDRO PABLO BARRIENTOS  
NUNEZ, who being duly sworn states:

1. I am the Defendant in this case.
2. On September 4, 2013, I was served with the Plaintiff's original complaint in this case.
3. Approximately two weeks since being served, this case was transferred from the Jacksonville Division to the Orlando Division of the U.S. Middle District Court. I mistakenly thought at that time that this meant the case against me has been dismissed.
4. I also mistakenly believed that in order for this lawsuit to be re-initiated against me, I had to once again be personally served, much like on September 4, 2013.
5. I do not speak or understand the English language.

6. I am not familiar with the U.S. legal system. I have not received any training as to U.S. law.
7. I continued to receive court documents by mail throughout 2014. I did not understand those documents.
8. Prior to January 19, 2015, I have not retained an attorney to represent me in this matter.
9. Around April of 2014, I made two attempts to consult with U.S. lawyers. I spoke with a lawyer from Miami and another from Tampa. Both lawyers stated that they could not help me, and did not provide me with any legal advice. Neither lawyer informed me that I had a duty to respond to this lawsuit at that time.
10. I have previously spoken to Mr. Eladio Jose Armesto. Mr. Armesto, who is a Florida notary public but not a lawyer, has helped me set up a family trust for my house in the past. Mr. Armesto told me that in order for this case to be re-opened against me, I would again have to be personally served.
11. I regularly follow Spanish-speaking Chilean media. I first learned that a default judgment has been entered against me from a CNN Chile Report publishing around January 15, 2015.
12. After learning that a default judgment has been entered against me, I retained The Baez Law Firm to represent me in this matter on January 19, 2015.
13. I dispute the allegations that the Plaintiffs make against me.
14. I did not kill or torture Victor Jara. I did not participate in or witness his death.
15. I was not personally present at Chile Stadium during the time periods alleged in the Plaintiffs' complaint.
16. I have never attempted to hide or conceal my identity.



17. I am not aware of any efforts by the Chilean authorities to hide, conceal, or falsify my identity or any records pertaining to me during the time periods alleged in the Plaintiffs' complaint.
18. While this Affidavit is written in the English language, my attorneys, who are bilingual in Spanish and English, have translated its contents for me.

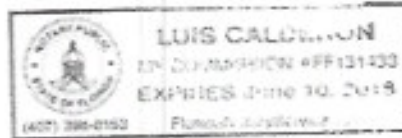
Under penalty of perjury, I swear that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: January 23, 2015.

*Pedro Pablo Barrientos*

PEDRO PABLO BARRIENTOS NUNEZ

Defendant



The foregoing instrument was acknowledged before me this 23 day of January, 2015, by PEDRO PABLO BARRIENTOS NUNEZ, personally known to me.

*[Handwritten Signature]*

Signature of Notary Public-State of Florida



**EXHIBIT B**

Sworn Statement of Jose Paredes (May 26, 2009):  
Certified English Translation and Spanish Version

## Court of Appeals Santiago

Santiago, May twenty six two thousand nine

Appears: JOSE ADOLFO PAREDES MARQUEZ, previously identified on the record, who after having been sworn to tell the truth states:

When all of us members of the Second Combat Battalion and part of the Third Combat Battalion from the School of Engineers travelled from Tejas Verdes, we arrived at the War Arsenals at dawn at about 06:30 or 07:00 hours, from there we were sent to La Moneda where we performed duty and from there we, the Soldiers of first division were sent to Padre Hurtado the following day. The Officers that came with us to Santiago were Captain Soto, Lieutenants Barrientos and Smith. In charge of my Battalion were Captain Montero and someone else with a higher rank, but I don't remember his last name. Also Non-commissioned Officers Montiel and Mella came. In Padre Hurtado Class Lorenz was with us. We were in Padre Hurtado for approximately four months, we took command of that location. I think Lieutenant Smith was from the Third Combat Battalion, I never met with him in Santiago, or in the War Arsenals or in Padre Hurtado, the last memory I have of him is in Tejas Verdes.

I was never at Chile Stadium, but everything I indicated in my first statement is the result of my imagination and from reading books, diaries and comments about Victor Jara. I was in Padre Hurtado along with all the members of my division under the command of Captain Montero. On some occasions, Lieutenant Barrientos would go to Padre Hurtado. Our division was made up of about thirty or thirty-three Soldiers. Those who were at Stadium Chile were the members of the second division and part of the third construction division.

With regards to what I stated about the ambulances to take out the dead bodies, I made this up since they had to have a way of transporting people.



I reiterate that I was at Chile Stadium when I went to fight for the Army's National Boxing Champion, which took place between June and July 1973 and on that occasion I became familiar with the dressing rooms, this being the reason I moved around so easily the day we established ourselves in said place.

In regards to your question, I must indicate that my weapon's number is 108668, if I remember correctly. Just as I don't remember either having made a covenant to secrecy.

I ratify everything I have indicated with regard to not having any involvement in the death of Victor Jara, it was all made up due to the fear instilled in me by the police officers that interrogated me, who pressured me psychologically.

This is all I can say to your honor.

After having read, it is ratified and signed along with your honor and authorizing clerk.

SIGNATURE: Jose Paredes

CERTIFICATE OF ACCURACY


I, Laura Cruz, do state the following under penalty of perjury:

I am competent in reading and writing both English and Spanish languages.

I am a Court Certified Spanish Interpreter in the state of Florida.

I have made the translation into English of annexed document written in Spanish.

The translation is accurate to the best of my ability.

  
\_\_\_\_\_  
Laura Cruz  
Certification number 12-00193

On this 22<sup>nd</sup> day of the month of January, 2015



dos mil setecientos  
setenta y cuatro  
Poder Judicial  
2774  
2775  
los mil  
setecientos  
setenta y  
cuatro

CORTE DE APELACIONES  
SANTIAGO

Santiago, veintiséis de mayo de dos mil nueve.

Comparece: JOSÉ ADOLFO PAREDES MÁRQUEZ, ya individualizado en autos, quien exhortado a decir verdad expone:

Cuando viajamos de Tejas Verdes todos los miembros de la Segunda Compañía de Combate y parte de la Tercera Compañía de Combate de la Escuela de Ingenieros llegamos a los arsenales de guerra de madrugada como a las 06:30 o 07:00 horas, de ahí nos mandaron hacia La Moneda donde hicimos guardia y de ahí a los soldados de la primera sección nos mandaron a Padre Hurtado al día siguiente. Los oficiales que vinieron con nosotros a Santiago fueron el capitán Soto, los tenientes Barrientos y Smith. A cargo de mi compañía venía el capitán Montero y otro de más rango, pero no recuerdo su apellido. También vinieron los suboficiales Montiel y Mella. En Padre Hurtado estuvo con nosotros el clase Llorenz. En Padre Hurtado estuvimos alrededor de cuatro meses, tomamos el mando de ese lugar. Me parece que el teniente Smith era de la Tercera Compañía de Combate, nunca me encontré con él en Santiago, ni en los arsenales de guerra ni en Padre Hurtado, el último recuerdo que tengo de él es en Tejas Verdes.

*Jose Paredes*

Yo nunca estuve en el Estadio Chile, pero todo lo que señalé en mi primera declaración es producto de mi imaginación y de la lectura de libros, diarios y comentarios sobre Víctor Jara. Yo estuve en Padre Hurtado junto con todos los miembros de mi sección bajo el mando del capitán Montero, el teniente Barrientos en algunas ocasiones concurría a Padre Hurtado. La sección la conformábamos unos treinta o treinta y tres soldados. Los que estuvieron en el Estadio Chile fueron los miembros de la segunda sección y parte de la tercera sección de construcciones.

Don Miguel...  
Diputado y... 2775  
Poder Judicial  
2776  
M...  
M...  
M...

Con respecto a lo que declaré de las ambulancias para sacar a los muertos, esto lo inventé ya que de alguna forma tenían que trasladar a la gente.

Reitero que yo estuve en el Estadio Chile cuando fui a pelear el campeonato nacional de Box del Ejército, el que se realizó entre junio y julio de 1973 y en esa oportunidad conocí los camarines, siendo este el motivo por el cual me desplazé con tanta facilidad el día que nos constituimos en dicho lugar.

A su pregunta, debo señalar que el número de mi arma es 108668 si mal no recuerdo. Así como tampoco recuerdo haber realizado un pacto de honor de guardar silencio.

Ratifico todo lo que he señalado en orden a que no tengo ninguna participación en la muerte de Victor Jara, todo fue un invento a causa del miedo que me produjeron los policias que me interrogaron, los que me presionaron psicológicamente.

Es todo cuanto puedo señalar a S.S. Ilma.

Leída se ratifica y firma junto a S.S. Ilma. y Secretario que autoriza.

*José Pareja*