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 VÍCTOR JARA, AMANDA JARA TURNER, in her individual capacity, and MANUELA BUNSTER, in her individual capacity,	)	Case No. 6:13-cv-01426-RBD-GJK
Plaintiffs,	)	
v.	)	
PEDRO PABLO BARRIENTOS NÚÑEZ,	)	
Defendant.	)	

PLAINTIFFS' STATEMENT OF NON-OPPOSITION
TO DEFENDANT'S MOTION TO VACATE JUDGMENT

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INTRODUCTION

Joan Jara, in her individual capacity, and in her capacity as the personal representative of the Estate of Víctor Jara, Amanda Jara Turner, in her individual capacity, and Manuela Bunster, in her individual capacity (collectively the "Plaintiffs"), hereby provide notice to the Court that they do not oppose the Defendant's Motion to Vacate the Default Judgment. On September 4, 2013, Plaintiffs filed this action against Pedro Pablo Barrientos Nuñez ("Defendant" or "Defendant Barrientos"), a former Lieutenant in the Chilean Army under General Augusto Pinochet, for the 1973 torture and extrajudicial killing of their husband and father, popular Chilean folk singer and democratic activist Víctor Jara. (Doc. No. 1). After extensive briefing and argument, on November 20, 2014, this Court entered judgment against Defendant Barrientos. (Doc. No. 71).

Now, seventeen months after first being served, Defendant belatedly comes before this Court asking that the default be lifted. Defendant offers no credible explanation or legal justification for his failure to defend this action. Yet, Plaintiffs believe that everyone is entitled to have their fundamental rights protected, including the right to a fair trial. Even though Defendant has forfeited this right, Plaintiffs welcome the opportunity to fully litigate their claims against Defendant, and to give him an opportunity to be heard.

Plaintiffs' lack of opposition to Defendant's motion is in no way an endorsement of Defendant's position. In fact, because Defendant's motion is so deficient and based on factual misstatements, Plaintiffs provide the Court with a short summary of relevant facts and law to clarify the mistakes in Defendant's motion.

FACTS AND PROCEDURAL HISTORY

It is undisputed that Plaintiffs served Defendant personally with the Complaint and Summons at his home, 1584 Brady Drive, Deltona, Florida 32725, on September 4, 2013. *See*

Return of Service, September 6, 2013 (Doc. No. 3). On September 12, 2013, Plaintiffs filed Consent to Inter-Division Transfer, resulting in transfer of this case to the Orlando division. (Doc. No. 24). Immediately thereafter, on September 16, 2013, the Defendant registered a deed that transferred his home at 1584 Brady Drive, Deltona, Florida to the "Barrientos Family Trust," in an apparent attempt to insulate his assets from attachment. *See* Second Am. Compl. ¶ 8 (Doc. No. 63; *see also* Quit Claim Deed signed by Barrientos, Declaration of Kathryn McMillan (hereinafter "McMillan Decl."), Exh. 1). At the same time, Defendant chose not to defend this lawsuit. (Doc. No. 35). In fact, despite extensive motion practice and the filing of two amended complaints, prior to the present motion, Defendant at no point responded to Plaintiffs' case.

Plaintiffs filed a motion for default judgment on November 18, 2013 and requested a judgment as to liability for the claims alleged and for a hearing on damages. (Doc. Nos. 40, 41). On January 16, 2014, Plaintiffs presented argument on the motion for default with regard to, *inter alia*, the statute of limitations and exhaustion of domestic remedies. *See* Hearing Tr. (Doc. No. 60). This Court requested additional briefing on several issues including equitable tolling of the statute of limitations. (Doc. No. 47). To address these concerns and to plead additional facts relating to the statute of limitations and exhaustion defenses, Plaintiffs filed the First Amended Complaint in this action on February 19, 2014. (Doc. No. 52).

In connection with equitable tolling, Plaintiffs asserted the following proposition in the First (and Second) Amended Complaint: "In 2009, a critical piece of evidence came from the testimony of José Adolfo Paredes Márquez, a conscript in the Chilean military, who was present at the torture of Víctor Jara and testified that he witnessed Defendant shoot Víctor Jara." (Doc. No. 52 ¶ 47). This single sentence, and another statement by Mr. Paredes, form the basis for

Defendant's application. Plaintiffs submit that none of the various arguments stemming from this statement are sufficient to vacate this Court's judgment granting default.

Plaintiffs nonetheless make two observations regarding this sentence. First, they acknowledge that this sentence was imperfectly drafted. While Plaintiffs correctly identified the 2009 testimony of Mr. Paredes as the first moment Defendant Barrientos became known to Plaintiffs as someone involved in the torture and killing of Víctor Jara—the date relevant for tolling—and while Mr. Paredes also identified Defendant Barrientos as the soldier who fired the fatal shot, it was not until 2012 that this second detail emerged, in a subsequent statement by Mr. Paredes. Second, although Mr. Paredes has made multiple statements, and some of his past statements are not consistent, these are credibility issues that Defendant could have tested at trial, if he timely appeared and defended, rather than deliberately evading the Court's jurisdiction. Regardless, Plaintiffs believe that Defendant should now have the opportunity he previously disdained.

On May 8, 2014, Plaintiffs filed an Application for Default Judgment on the First Amended Complaint. (Doc. No. 55). On June 30, 2014, this Court dismissed Plaintiffs' First Amended Complaint without prejudice, indicating that Plaintiffs had adequately pleaded TVPA claims and ordering Plaintiffs to file an amended complaint alleging that Víctor Jara's daughters had standing to sue for wrongful death under Chilean law to demonstrate their standing as claimants for extrajudicial killing claim under the TVPA. (Doc. No. 62). On July 30, 2014, Plaintiffs filed an Application for Default Judgment on the Second Amended Complaint in compliance with the Court's order. (Doc. No. 63). Plaintiffs filed a motion for entry of default judgment on September 22, 2014. (Doc. No. 68). On November 20, 2014, this Court granted

Plaintiffs' motion for default judgment on all TVPA claims and set a damages hearing for February 23, 2015. (Doc. No. 71).

At the behest of this Court, Plaintiffs have repeatedly attempted to locate the Defendant. *See* Status Conference Tr. 36:11-25 (Doc. No. 60). However, they have been unable to do so due to Defendant's apparent efforts to conceal himself. *See* McMillan Decl. ¶¶ 4-10. Although Defendant never once appeared during the proceedings, he was not passive during this time, as his affidavit suggests. *See* Barrientos Aff. ¶¶5-8 (Doc. No. 73, Exh. A). Defendant submits that he mistakenly believed that for the case to proceed, he had "to once again be personally served" by the Plaintiffs. *Id.* ¶¶ 4, 10. From the time he was served with the original Complaint, Barrientos appears to have taken affirmative steps to conceal himself from Plaintiffs and make it harder, if not impossible, for them to serve him in person. *See* McMillan Decl. ¶¶ 4-10.

After being personally served with the initial Complaint at his place of residence, Defendant Barrientos appears to have deliberately gone into hiding. Plaintiffs diligently attempted to search for him, but could no longer locate him at his address on Brady Drive. *See Id*. In November 2013, a private investigator uncovered evidence that Barrientos only came by his house infrequently. *See id.* ¶ 4. Plaintiffs continued to search for Defendant Barrientos at this location, as well as at his ex-wife's home, but could not locate him. *Id.* ¶ 7. Plaintiffs later learned *that less than three weeks after being served with the complaint*, Defendant Barrientos filled out a permanent forwarding address change on September 23, 2013, from 1584 Brady Drive to P.O. Box 5462. *Id.* ¶ 9. By February 2014, Defendant's home on 1584 Brady Drive appeared abandoned: it was unkempt, weeds were growing, the blinds were closed, and no vehicles were in the driveway. *Id.* ¶ 10.

While the Defendant had been receiving and ignoring the service of dozens of court documents, moving assets and evading service, Joan Jara, an 87 year old widow, and her daughters, had been preparing mentally and emotionally for trial.[1]

On January 15, 2014, CNN Chile ran a report in which Francisco Ugás, from the Chilean Office of the Prosecutor, and Almudena Bernabeu, an international attorney with the Center for Justice and Accountability, discussed the charges against Barrientos and commented that the damages hearing could contribute to Chile's effort to get Defendant extradited to face justice in Chile for the crimes he committed. Defendant saw this report. *See* Barrientos Aff. ¶ 11 (Doc. No. 73, Exh. A). It can be no coincidence that days after this report aired, Defendant finally appeared before this Court, asking for relief from the judgment. *See id.* ¶¶ 10-12.

I. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) provides in part, "On motion and upon such terms as are just, the court may relieve a party from a final judgment, order or proceeding 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 . . . misrepresentation, or misconduct by an opposing party; (6) any other reason that justifies relief." Defendant Barrientos does not remotely meet the standard of any of these provisions as the courts have interpreted the Rule. *See Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 386 (1993).

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[1] Perversely, the Defendant would like the Court to believe that Ms. Jara and her daughters have been living a life of luxury where the death and torture of their husband and father "has conferred tremendous wealth upon his estate." (Doc. No. 73 at 14). Not only is this irrelevant to the legal standard Defendant must meet for this motion, but factually untrue.

II. ARGUMENT

A. Defendant Barrientos Does Not Qualify For Relief Under 60(b)(1) Because There Was No Valid Mistake, Inadvertence, Surprise, Or Excusable Neglect.

Under Rule 60(b), "excusable neglect" encompasses situations in which failure to comply with a filing deadline is attributable to negligence. *Pioneer Inv. Servs. Co.*, 507 U.S. at 386. Whether a party's neglect of a deadline may be excused is an equitable decision turning on "all relevant circumstances surrounding the party's omission," including "the danger of prejudice to the [opposing party], 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." *Pioneer Inv. Servs. Co.*, 507 U.S. at 396; *see also Cheney v. Anchor Glass Container Corp*., 71 F.3d 848, 850 (11th Cir. 1996) (applying the *Pioneer* standard); *Skinner v. Legal Advoc. Ctr. of Cent. Florida, Inc.*, No. 6:11-CV-1760-ORL-37, 2012 WL 2814348, at *4 (M.D. Fla. July 10, 2012) (Dalton, J.) (same). The burden of establishing "excusable neglect" is on the defaulting party. *Maurer Rides USA, Inc. v. Beijing Shibaolai Amusement Equip. Co., Ltd.*, No. 6:10-CV-1718-ORL-37, 2014 WL 3687098, at *2 (M.D. Fla. July 24, 2014) (Dalton, J.).

To establish mistake, inadvertence, or excusable neglect under Rule 60(b)(1), a 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." *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1295 (11th Cir. 2003) (citations omitted). In addition, vacatur will be denied if the moving party has acted in bad faith. *United States v. Ferguson*, No. 3:07-CV-631-J-34, 2015 WL 164204, at *12 (M.D. Fla. Jan. 13, 2015) (finding that Defendants' misrepresentations to the court amount to bad faith and accordingly denied vacatur under Rule 60(b)(1)).

1. **Defendant Barrientos' conduct demonstrates bad faith.**

Where a movant acts in bad faith, courts in the Eleventh Circuit have found that vacatur under Rule 60(b)(1) is improper. Parties act in bad faith when they misrepresent facts to the court in their declarations and pleadings in support of a Rule 60(b)(1) motion. *See Ferguson*, 2015 WL 164204, at *12. Defendant Barrientos acted in bad faith by making misrepresentations to the court, and therefore his failure to respond to this lawsuit is inexcusable neglect. For example, Defendant declares that he is "not familiar with the U.S. legal system." Barrientos Aff. ¶ 6 (Doc. No. 73, Exh. A). However, on September 16, 2013 – twelve days after Plaintiffs served Defendant with this lawsuit and just a few days after Plaintiffs consented to inter division transfer – Defendant registered a deed transferring ownership of his house from himself to the Barrientos family trust. (*See* McMillen Decl., Exh. 1). Barrientos' familiarity with the U.S. legal system is clear in his steps to create and transfer home ownership to a family trust in an apparent attempt to avoid attachment of his property, in case a court rendered an adverse judgment.

Defendant's familiarity with the U.S. legal system is further demonstrated by the fact that he has used the U.S. legal system to benefit himself in the past: In 2004, the Defendant engaged an attorney, Modesto Lopez, in a Chapter 7 bankruptcy proceeding before the U.S. Bankruptcy Court Middle District of Florida (Orlando). *See In re Barrientos & Figueroa*, No. 6:04-bk-06299-ABB (Bankr. M.D. Fla. May 28, 2004) (Doc. No. 1). Thus, Defendant's claim that he is "not familiar with U.S. legal system" is a misrepresentation. Barrientos Aff. ¶ 6 (Doc. No. 73, Exh. A). Having secured the benefits of bankruptcy and of transferring assets into a family trust, Defendant's claim that he did not understand the dozens of court documents alleging his personal responsibility for torture and murder could implicate his legal rights is not credible.

As detailed in Section I above, following his receipt of the Complaint, Barrientos went into hiding in an attempt to dodge service of each pleading filed by Plaintiffs. Despite receiving

numerous submissions and orders in this case, Defendant claims he was unaware that the case was proceeding or that default judgment had been entered against him until he watched a program on CNN Chile. *See* Barrientos Aff. ¶ 11 (Doc. No. 73, Exh. A). Moreover, the civil suit against Barrientos was highly publicized in Chile.[2] Defendant by his own admission says that he regularly follows Spanish-speaking Chilean media and was, therefore, on notice of the pending litigation against him. *Id.* ¶ 11 (Doc. No. 73, Exh. A).

Defendant's misrepresentations to the court constitute bad faith. Accordingly, the Defendant's failure to respond cannot constitute excusable neglect, nor form a basis for vacatur of the judgment against him under Rule 60(b)(1). *Ferguson*, 2015 WL 164204, at *12.

2. **Even without his bad faith, Defendant Barrientos' purported reasons still would not constitute "excusable neglect."**

Defendant's alleged reasons for delay – among them a purported lack of English ability, and bad legal advice – do not constitute "excusable neglect." It is well established in the Eleventh Circuit that mistakes of law do not constitute "excusable neglect" under Rule 60(b)(1). *See Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 997 (11th Cir. 1997) ("We hold that, as a matter of law, the lawyer's failure to understand clear law cannot constitute excusable

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[2] *See* Ricardo Pérez V., *Víctor Jara juicio para retirar ciudadanía estadounidense a implicado será en febrero*, 98 AÑOS LA NACION (Jan. 16, 2015), available at http://www.lanacion.cl/noticias/mundo/eeuu/victor-jara-juicio-para-retirar-ciudadania-estadounidense-a-implicado-sera-en-febrero/2015-01-16/103647.html; *see also* Nacion.cl, *Víctor Jara: familia demandó en EEUU a supuesto asesino, 98 AÑOS LA NACION* (Sept. 5, 2013), available at http://www.lanacion.cl/noticias/pais/nacional/victor-jara-familia-demando-en-eeuu-a-supuesto-asesino/2013-09-05/130321.html; *see also* Pascale Bonnefoy, *Chilean's Family Files Suit in U.S. Over His Torture and Death in '73*, N.Y. Times (Sept. 5, 2013), http://mobile.nytimes.com/2013/09/06/world/americas/family-of-slain-chilean-folk-singer-files-suit-in-florida.html?_r=1; Mimi Whitefield, *Anniversary of Chilean Coup Brings Renewed Calls for Justice*, Miami Herald (Sept. 9, 2013), http://www.miamiherald.com/news/nation-world/world/americas/article1954811.html.

neglect."); *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys.*, 803 F.2d 1130, 1132-33 (11th Cir. 1986); *United States v. Real Prop. & Residence*, 920 F.2d 788, 792 (11th Cir. 1991). Further, "[a] defendant's lack of fluency in the English language does not form the basis of excusable neglect within the ambit of Rule 60(b)." *Solomon v. 318 Fashion, Inc.*, No. 93 CIV. 7699 (CSH), 1994 WL 702008, at *1 (S.D.N.Y. Dec. 14, 1994); *see also United States v. Montano*, 398 F.3d 1276, 1280 (11th Cir. 2005).

Defendant's attempt to establish excusable neglect through his lack of legal sophistication is also unavailing. Courts in this Circuit have not hesitated to deny vacatur motions by allegedly "unsophisticated" individuals. *See, e.g.*, *In re Welzel*, No. 98-42613, 2001 WL 36401283, at *6 (Bankr. S.D. Ga. Feb. 28, 2001) ("[Defendant's] utter failure for nearly three months to identify its interest in the case, hire counsel, file an answer, or seek an extension is inexcusable. ***Even the most unsophisticated person served with a summons is expected, indeed required, to respond to a complaint or risk default judgment."*** (emphasis added))**.**

3. **Even if Defendant could show excusable neglect, he still could not demonstrate a meritorious defense that would change the outcome of this case.**

Defendant wrongly claims that he could have successfully defended himself on the merits and on statute of limitations grounds. To obtain relief under Rule 60(b) "a party must demonstrate a defense that probably would have been successful, in addition to showing excusable neglect." *Solaroll Shade*, 803 F.2d at 1133. Defendant claims that he could have successfully defended himself against Plaintiffs' allegations; however, the jurisprudence of the Eleventh Circuit is clear that "a moving party cannot satisfy the burden of showing a meritorious defense simply by 'asserting a general denial.'" *In re Worldwide Web Sys., Inc.*, 328 F.3d at 1296 (citing *Solaroll Shade*, 803 F.2d at 1133). Defendant's statements here amount to little more than a general denial and therefore cannot serve as the basis for vacatur.

Nor is Defendant's reliance on the TVPA's ten-year statute of limitations sufficient. Equitable tolling is appropriate when extraordinary circumstances are present that are both beyond the plaintiff's control and unavoidable even with diligence. *Jean v. Dorelien*, 431 F.3d 776, 779 (11th Cir. 2005). As Plaintiffs argued in the motion for default judgment, their efforts to uncover the circumstances surrounding Víctor Jara's death were frustrated by government and military suppression of evidence. (Doc. No. 50 at 15-19). It was not until 2009 that Barrientos was identified as a culpable party and 2012 when his whereabouts were uncovered; for those and other reasons, Plaintiffs' claims should be equitably tolled until at least 2009. Plaintiffs' Second Amended Complaint and additional briefing in support of the motion for default judgment detail the nearly forty years of Plaintiffs' diligence in investigating the circumstances surrounding Víctor Jara's death. *See* Second Am. Compl. ¶¶ 39-51 (Doc. No. 63); *see also* Ugas Aff. (Doc. No. 48), after which this Court found Plaintiffs sufficiently established Defendant's liability for TVPA claims to merit default judgment. Order Granting Mot. for Default at 4-5 (Doc. No. 71).

Government concealment of evidence can establish extraordinary circumstances to warrant tolling. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. 1995) (noting that equitable tolling is appropriate "when the plaintiff has no reasonable way of discovering the wrong perpetrated against her"); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) (equitably tolling statute of limitations under both the TVPA and ATS where regime suppressed relevant evidence); *Jean v. Dorelien*, 431 F.3d 776, 780-81 (11th Cir. 2005) (tolling for the period the repressive regime remained in power in Haiti, preventing plaintiff from investigating). Defendant erroneously states that only two extraordinary circumstances are available for tolling the TVPA and that Plaintiffs cannot meet the standard. *See* Def.'s Mot. to Set Aside Default J. at 11 (Doc. No. 73) (arguing that only absence from jurisdiction and the period in which the

offending regime remains in power are bases for tolling). Defendant's reading conflicts with Congress's explicit guidance regarding equitable tolling under the TVPA.

> The legislation provides for a 10-year statute of limitations, but explicitly calls for consideration of *all* equitable tolling principles in calculating this [statute of limitations] period with a view towards giving justice to plaintiff's rights. Illustrative, *but not exhaustive*, of the types of tolling principles which may be applicable include the following . . . where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.

S. Rep. No. 102–249, at 10-11 (1991) (emphasis added). Thus, the legislative history and jurisprudence of this Circuit hold that equitable tolling should be provided to give plaintiffs the benefit of the full statute of limitations *once their claims can reasonably be known to them*. From 1978 to present day, Plaintiffs have been diligent in their efforts to identify the individuals responsible for killing Víctor Jara. *See* Second Am. Compl. ¶¶ 39-51 (Doc. No. 63).

The Eleventh Circuit's decision in *Cabello v. Fernandez-Larios* is particularly relevant here. In *Cabello*, plaintiffs were aware that their family member, Winston Cabello, was arrested soon after the 1973 *coup d'etat* in Chile and taken to Copiapó military garrison where he was executed. 402 F.3d 1148, 1152 (11th Cir. 2005). Although plaintiffs were aware that Winston Cabello had been executed by the Chilean military in 1973, and learned of the defendant's involvement through a public admission in 1987, it was not until the Chilean military identified the location of Cabello's grave in 1990 that the family was able to gather evidence on the full circumstances of Winston Cabello's death and ill treatment. *Id*. Accordingly, the court tolled the statute of limitations until 1990. *Id.* at 1158.

Here, Plaintiffs have alleged that their efforts to uncover the circumstances surrounding Víctor Jara's death were frustrated by the persistent suppression of evidence by Chilean authorities. *See* Second Am. Compl. ¶¶ 39-51 (Doc. No. 63). Plaintiffs have alleged that the Chilean Military continued to suppress evidence of his detention and death, and did not identify

the individuals responsible, in spite of Plaintiffs' judicial and non-judicial advocacy efforts. *Id.* ¶¶ 46, 50. Plaintiffs have alleged that it was not until 2009 that they first learned of Defendant's involvement in the torture and extrajudicial killing of Víctor Jara and that he was subjected to Russian roulette resulting in his death. *Id.* ¶ 47. Accordingly, it was not until this time that Plaintiffs could learn the full circumstances surrounding Víctor Jara's death. *Id.* ¶¶ 38, 47. The active concealment by Chilean authorities made it impossible for Plaintiffs to discover the wrongs perpetrated against him and the identity and location of the perpetrators. Ugas Decl. ¶¶ 6-8. Plaintiffs have, therefore, pled sufficient facts to support a showing of extraordinary circumstances, despite extreme diligence, to warrant tolling of the statute of limitations.

Nor does Defendant's immigration to the United States in 1989 defeat this basis for tolling, since Plaintiffs had no means of obtaining information necessary to determine Defendant's involvement until 2009. In *Arce v. Garcia*, the Eleventh Circuit held "[j]ustice may also require tolling where both the plaintiff and the defendant reside in the United States but where the situation in the home state nonetheless remains such that the fair administration of justice would be impossible, even in United States courts." 434 F.3d 1254, 1262 (11th Cir. 2006). Defendant presents no credible argument of fact or law as to how he could overcome this basis for tolling. Accordingly, Defendant is unable to mount an affirmative defense necessary to meet the meritorious defense prong to obtain relief under Rule 60(b)(1).

B. Defendant Barrientos Does Not Qualify For Relief Under 60(b)(2) Because Any Allegedly Newly Discovered Evidence Had No Effect On Barrientos' Refusal To Participate In These Proceedings.

Although Defendant "invites the Court to consider [the Paredes witness's alleged recantation] newly discovered evidence, and thus to set aside the judgment pursuant to Rule 60(b)(2)," the impugned statement does not meet the standard for "newly discovered evidence" and thus lacks merit. To demonstrate entitlement to relief under Rule 60(b)(2): "(1) the evidence

must be newly discovered since the trial [or final judgment or order]; (2) due diligence on the part of the movant to discover the new evidence must be shown; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be such that a new trial [or reconsideration of the final judgment or order] would probably produce a new result." *Townsend v. Veterans Affairs Med. Ctr*., 522 F. App'x 494, 496 (11th Cir. 2013). The Eleventh Circuit has found that since a motion for a new trial under Rule 60(b)(2) is an "extraordinary motion," the "requirements of the rule must be strictly met." *Harduvel v. Gen. Dynamics Corp.*, 801 F. Supp. 597, 604 (M.D. Fla. 1992). If any of the five elements is not satisfied, the motion fails. *Id.*

The first prong of the test requires that the evidence be "newly discovered since the trial [or final judgment or order]." *Townsend*, 522 F. App'x at 496. The evidence which the Defendant cites, the Paredes statement, is hardly newly discovered. The statement is part of the public record, since Defendant obtained it from the Chilean court records. (Doc. No. 73 at 3 n.2). Since the statement pre-dated default judgment in this case, it "cannot be considered newly discovered evidence." *Scutieri v. Paige*, 808 F.2d 785, 794 (11th Cir. 1987) (citing *Music Research, Inc. v. Vanguard Recording Soc'y, Inc.*, 547 F.2d 192, 196 (2d Cir. 1976)) (finding that record publicly released three months prior to trial could not constitute newly discovered evidence). Further, the Defendant has not argued that the statement was not in his possession at the time of default judgment; he does not provide *any* information as to how he came into possession of this document. As the Eleventh Circuit held in *Gundotra v. U.S. Dept. of I.R.S.*, "evidence cannot be 'newly discovered' under Rule 60 if it is in the possession of the moving party or that party's attorney prior to the entry of judgment." 160 F. App'x 834, 836 (11th Cir. 2005) (citing *Taylor v. Texas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987)). Since Defendant does

not provide any information as to when he acquired the Paredes statement or how he acquired it, Defendant fails the standard for Rule 60(b)(2) relief on this prong alone.

Defendant also fails to show that he discovered the "new evidence" through "due diligence" or that the document in question provides anything other than impeachment material for a single witness. *See Townsend*, 522 F. App'x at 496; *see, e.g.*, *Kuenzel v. Allen*, 880 F. Supp. 2d 1205, 1211 (N.D. Ala. 2011) (finding documents submitted after trial that put into question accuracy of a witness's testimony were merely impeachment). Moreover, the absence of this evidence appearing before the court in an earlier stage of the litigation is apparently due to the Defendant's scheme to avoid the litigation.

Fourth, Defendant fails to show the materiality of this alleged new evidence to his failure to participate in these proceedings. Defendant's scheme to avoid participation in the case was enacted from the onset of this litigation. *See supra* Section II.A. The original complaint made no mention of Paredes as a witness and/or his testimony. *See generally* Doc. No. 1. The first reference to Paredes only came about in Plaintiff's First Amended Complaint on February 19, 2014, following a hearing before this Court, in which Barrientos did not participate. (Doc. No. 47). Therefore, Barrientos' refusal to participate had nothing to do with whether Paredes equivocated in his statements. Assuming *arguendo* that that it did, reference to a witness pinpointing Defendant as the killer would not provide a reasonable basis for failure to respond. To the contrary, Defendant could have denied any such allegations irrespective of which witnesses were mentioned or not mentioned in the Complaint.

Finally, Defendant fails to show (or even argue) that "the evidence [is] such that a new trial [or reconsideration of the final judgment or order] would probably produce a new result." *Townsend*, 522 F. App'x at 496.

C. Defendant Barrientos Does Not Qualify for Relief Under 60(b)(3) Because Neither Plaintiffs Nor Their Attorneys Have Committed Fraud Or Misconduct.

For relief under Rule 60(b)(3), Defendant must present: "clear and convincing evidence that [his] *opponent* committed fraud[3] or engaged in some other form of misconduct" and "that the alleged misconduct prevented [him] from making a 'full and fair' presentation of [his] case." *Harduvel*, 801 F. Supp. at 607 (emphasis added); *see also Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007). Such relief may only be granted in situations involving "the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated." *In re Braga*, 272 F.R.D. 621, 626 (S.D. Fla. 2011) (citing *Johnson v. Law Offices of Marshall C. Watson, P.A.*, 348 Fed. Appx. 447, 448 (11th Cir. 2009)). The defendant must show "an unconscionable plan designed to improperly influence the court in its decision" (*id.*) and that the new evidence would have allowed him to re-shape his case through a new theory or emphasis *and* that the fraud was unknown or undiscoverable with the exercise of reasonable diligence before the entry of judgment. *See Harduvel*, 801 F. Supp. at 607-08, 610; *Cox Nuclear Pharmacy, Inc.*, 478 F.3d at 1314; *First Nat'l Life Ins. Co.*, 876 F.2d at 882. Defendant has not presented a single shred of evidence suggesting he can meet this requirement for vacatur, because he cannot.

[3] Fraud is the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment. *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 456 (6th Cir. 2008) (finding that for the purposes of Rule 60(b)(3), fraud should be defined under the general common law understanding); Black's Law Dictionary 685 (8th ed. 2004).

1. **Defendant is not entitled to have the judgment set aside under Rule 60(b)(3) where the alleged fraud was committed by a third-party witness.**

Defendant bases his allegation of fraud on the claim that a witness referenced in the First Amended Complaint allegedly lied in claiming that Defendant shot and killed Víctor Jara. *See* Def.'s Mot. to Set Aside Default J. at 8 (Doc. No. 73). Thus, as an initial matter, Defendant has not alleged that Plaintiffs or their counsel have committed fraud, never mind proving it by clear and convincing evidence. *See id.* at 7-8; *see also Harre v. A.H. Robins Co.*, 750 F.2d 1501, 1505 (11th Cir. 1985), *vacated in part on other grounds by* 866 F.2d 1303 (11th Cir. 1989) (pursuant to Fed. R. Civ. P. 60(b)(3), the moving party must show that the fraud alleged is attributable to the opposing party or, at least, to opposing party's counsel).

Even if Defendant had demonstrated "an unconscionable plan designed to improperly influence the court in its decision," he nonetheless fails to show that Mr. Paredes's alleged fraud prevented him from making a "full and fair" presentation of his case. Plaintiffs allege Defendant personally shot and killed Víctor Jara. If, as Defendant claims, he did not murder Víctor Jara, he could not have been duped by Mr. Paredes into believing he had.

2. **Defendant is not entitled to have the judgment set aside under Rule 60(b)(3) because Plaintiffs have not committed fraud and none of Plaintiffs' actions prevented Defendant from presenting his case.**

Defendant's motion implies that if Plaintiffs knew of Mr. Paredes's alleged recantation, they too would be guilty of fraud. But "[c]onclusory averments of . . . fraud . . . unaccompanied by a statement of clear and convincing probative facts . . . do not serve to raise the issue of the existence of fraud." *Booker v. Dugger*, 825 F.2d 281, 283-84 (11th Cir. 1987).

Although Plaintiffs' reference to Mr. Paredes's statement contains an inadvertent ambiguity, Plaintiffs' mistake does not amount to "an unconscionable plan designed to

improperly influence the court in its decision." *In re Braga*, 272 F.R.D. at 626. Plaintiffs referenced the statement identifying the Defendant in the complaint solely in response to this Court's order to demonstrate that the statute of limitations should be tolled. (Doc. No. 47). Far from "the most egregious misconduct," the reference to Mr. Paredes's 2009 statement was a good faith attempt "to comply with a court order." *In re Braga*, 272 F.R.D. at 626. As noted in the facts and procedural history, Plaintiffs identified 2009 as the year Mr. Paredes first identified Barrientos as a perpetrator in Víctor Jara's death. While this witness has also identified Defendant as the shooter, Plaintiffs believe he did not testify to this detail until 2012. Such a mistake does not approach fraud. *See First Nat'l Life Ins. Co.*, 876 F.2d 877, 883 (11th Cir. 1989) (holding that the failure to correct a factual error in an affidavit prior to judgment does not amount to fraud under Rule 60(b)(3)).

Although Defendant may challenge the credibility of any witness, witness credibility is an issue for discovery and trial. *See Armstrong v. The Cadle Co.*, 239 F.R.D. 688, 695 (S.D. Fla. 2007) (finding the movant failed to demonstrate how inconsistencies in testimony were actually attempts by the Plaintiff to engage in fraud). Furthermore, Defendant has not argued, as he cannot, that reference to Mr. Paredes's 2009 statement prevented him from putting forward a "full and fair" presentation of his case. Defendant admits in his motion that his supposed confusion about the litigation was due to poor English skills and faulty legal advice. Def.'s Mot. to Set Aside Default J. at 3-4 (Doc. No. 73). Defendant had the opportunity to present the court with evidence to rebut Mr. Paredes's statement and failed to do so. *See First Nat'l Life Ins. Co.*, 876 F.2d at 883 (finding the movant had opportunity to fully and fairly present his case where he could have but did not present counter-affidavits to an allegedly fraudulent affidavit).

Moreover, as noted in Section II.B. *supra*, the evidence of fraud that Defendant points to was either already in Defendant's possession or was readily ascertainable before trial. *See Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007); *Coniglio v. Bank of Am., N.A.*, No. 8:14-CV-01628-EAK, 2014 WL 6882294, at *4 (M.D. Fla. Dec. 4, 2014) (upholding default judgment and finding alleged factual mistake in plaintiffs' complaint was not evidence of fraud and had no effect on responsibility of defendant to respond to the complaint). Thus, Defendant failed to exercise reasonable diligence and the pursuit of truth at trial was not hampered by anything other than movant's "own reluctance to undertake an assiduous investigation," at the appropriate stage of the proceedings. *See Armstrong*, 239 F.R.D. at 695.

D. Defendant Barrientos Does Not Qualify For Relief Under 60(b)(6) Because He Has Failed To Show Exceptional Circumstances Justifying This Extraordinary Remedy.

Rule 60(b)(6) provides that "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . any other reason that justifies relief." Relief under Rule 60(b)(6) "is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances." *Crapp v. City of Miami Beach*, 242 F.3d 1017, 1020 (11th Cir. 2001). The burden is on the party seeking relief to show that "absent such relief, an 'extreme' and 'unexpected' hardship will result." *Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 680 (11th Cir. 1984). To prevail under Rule 60(b)(6), the movant "must do more than show that a grant of its motion might have been warranted." *Rice v. Ford Motor Co.*, 88 F.3d 914, 919 (11th Cir. 1996). He must "demonstrate a justification for relief so compelling that the district court [is] *required* to grant [the] motion," *Id.* (emphasis in original), but even then "whether to grant the requested relief is . . . a matter for the district court's sound discretion." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1317 (11th Cir. 2000) (internal citation omitted).

Defendant baldly states that "given the circumstances of this matter," the Court may set aside its judgment under the "catch-all" provision of Rule 60(b)(6). Def.'s Mot. to Set Aside Default J. at 17 (Doc. No. 73). On the most charitable reading, Defendant appears to ask the court to apply the exception to all of the arguments he alleged under 60(b)(1)-(3). But where a moving party's proposed reasons for relief can be classified under any one of the first five clauses, the court *cannot consider* relief under the residual exception, regardless of its failure to grant relief under the other clauses. *See Solaroll Shade*, 803 F.2d at 1133; *In re Braga*, 272 F.R.D. 627; *Harduvel*, 801 F.Supp. at 613. Defendant's alleged difficulty understanding English and obtaining counsel can be classified, and were argued, under Rules 60(b)(1) and (2). *See Lender v. Unum Life Ins. Co. of Am. Inc.*, 519 F. Supp. 2d 1217, 1224 (M.D. Fla. 2007) (denying movant relief under 60(b)(6) where incompetence of attorney could have been addressed in other provisions of 60(b) and finding that the provisions of Rule 60(b) are mutually exclusive). Although Defendant does not merit relief under either provision, he is precluded from re-asserting these arguments under the residual exception. *See Solaroll Shade*, 803 F.2d at 1133.

Defendant vaguely states that the circumstances are "unusual and unique," but nowhere does he explain what they are or in what way they are extraordinary. The "unique" circumstance that Defendant finds himself in is due to his willful failure to appear in the case until this time. *See Lender*, 519 F. Supp. 2d at 1224 (noting that extraordinary circumstances may exist if "the party is faultless in the delay."). However, "[t]he Rule 60(b)(6) emergency valve does not offer its extraordinary relief to a party that ties itself in knots in order to plead confinement." *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1357-58 (11th Cir. 2014) (finding the plaintiffs were not entitled to Rule 60(b)(6) extraordinary relief where they failed to raise an argument at trial and could offer no credible justification for why they did not); *Ackermann v.*

United States, 340 U.S. 193, 198 (1950) (finding no extraordinary circumstances where movant was denaturalized in default proceeding and chose not to appeal).

III. CONCLUSION

Although the foregoing demonstrates that Defendant does not have a credible basis for his Motion to Vacate the Default Judgment, Plaintiffs welcome an opportunity to fully litigate the claims brought against Defendant Barrientos and, therefore, do not oppose the motion. Plaintiffs reserve the right to seek costs incurred from the date of commencement of these proceedings until the date of Defendant's Motion to Vacate the Default Judgment.

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Certificate of Service

I certify that on February 17, 2015, I electronically filed a copy of the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of the electronic filing to the following:

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