

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

JESUS CABRERA JARAMILLO, in his individual)	
Capacity, and in his capacity as the personal)	
Representative of the estate of Alma Rosa)	
Jaramillo,)	
)	
JANE DOE, in her individual capacity, and in)	
her capacity as the personal representative of)	CASE NO: 1:10-CV-21951
the estate of Eduardo Estrada, and)	UNGARO/TORRES
)	
JOHN DOE, in his individual capacity,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CARLOS JIMENEZ NARANJO,)	
)	
Defendant.)	
_____)	

REPLY TO PLAINTIFFS’ OPPOSITION TO MOTION TO DISMISS

Defendant, Carlos Jimenez Naranjo (“Jimenez”) replies to Plaintiffs, Jesus Cabrera Jaramillo (“Jaramillo”), Jane Doe, and John Doe’s opposition to Jimenez’s motion to dismiss, as follows:

I. JIMENEZ’S MOTION TO DISMISS HAS NOT BEEN UNTIMELY FILED.

Plaintiffs first argue that Jimenez’s motion is untimely filed because he filed and served the motion after the time period permitted under Fed. R. Civ. P. 12(a)(1)(A). Plaintiffs’ Opposition to Defendant’s Motion to Dismiss (“Opposition”), D.E. No. 62 at 3. Plaintiffs cite to cases that provide little to no discussion about the application of time limits imposed on a responsive motion under Rule 12.

In *Luv N’ Care, Ltd. v. Babelito*, 306 F. Supp. 2d 468 (S.D.N.Y. 2004), the court rejected the plaintiff’s assertion that the defendant only had 20 days to bring a motion to

dismiss. *Luv N' Care*, 306 F. Supp. 2d at 471. The court recognized that the issue is “surprisingly confusing” for courts which results in considerable disagreement. *Luv N' Care*, 306 F. Supp. 2d at 472. While Rule 12(a) requires a party to serve an answer within 20 days after being served with a summons and complaint, there is no provision under Rule 12 explicitly mentioning a time limit for a motion to dismiss. *Luv N' Care*, 306 F. Supp. 2d at 472. Relying on a leading treatise, the court rejected the “overly strict interpretation” of Rule 12 that Plaintiffs would like this court to adopt and found that a defendant must bring a motion to dismiss “in a reasonably timely fashion.” *Luv N' Care*, 306 F. Supp. 2d at 472-73 (emphasis added). The court considered the circumstances related to the defendant’s delay in filing the motion and concluded that the motion had been timely filed even though the defendant filed the motion beyond the 20-day time period. *Luv N' Care*, 306 F. Supp. 2d at 473.

Such circumstances also exist in this case. First, the defendant is on the government’s OFAC list which precludes his receiving any services by counsel or anyone else without a license from the government. This unique issue was not resolved until days prior to counsel filing Jimenez’ motion to dismiss. This issue was addressed by Judge Ungaro at hearing and with out objection by the plaintiff’s on July 19, 2011, the court granted Jimenez’s unopposed motion to vacate the default judgment. D.E. No. 56.

On September 2, 2011, counsel for Jimenez filed a notice of appearance with the court. Only 9 days later, counsel for Jimenez filed this motion to dismiss. D.E. No. 60. The complaint filed in this case involves complex legal issues, and facts and witnesses all of which are in Colombia. Counsel for Jimenez worked diligently to discuss the

issues related to the motion with Jimenez, who continues to be detained at the federal detention center in Miami and is available to counsel for only limited periods of time. Immediately after these initial discussions with Jimenez and others, counsel filed this motion. Given the complexity of the case and these extenuating circumstances, Jimenez filed this motion in a reasonably timely fashion, as described in *Luv N' Care*.

II. DESPITE THEIR ARGUMENTS IN THE OPPOSITION, PLAINTIFFS' COMPLAINT IS STILL BASED ENTIRELY ON CONCLUSIONS AND GENERALIZATIONS THAT FAIL TO MEET THE STANDARDS OUTLINED IN *IQBAL*.

Responding to Jimenez's argument that the complaint fails to allege facts with any specificity, Plaintiffs rely on sweeping generalizations that Jimenez "exercised command and control" over BCB soldiers who were responsible for violence directed toward civilians in the region, including "setting the BCB's policy and managing its day-to-day affairs, such as the appointment, discipline and termination of BCB paramilitaries." Plaintiffs' Opposition to Defendant's Motion to Dismiss ("Opposition"), D.E. No. 62, at 5-6. Plaintiffs still fail to explain how Jimenez's command over 7,000 men, see Plaintiffs' Complaint ("Complaint"), D.E. No. 1 at 4, ¶ 10, provides enough facts to suggest that Jimenez is somehow liable for the two killings at issue in this case. Plaintiffs supply these generalizations couched with legal conclusions, i.e. "command and control," to try to fill this huge hole in the complaint.

The only allegation in the complaint that even comes close to the *Iqbal* standard is that Julian Bolivar and Ernesto Paez, both former BCB leaders, "have testified acknowledging [Jimenez]'s knowledge of and responsibility as the BCB leader for these murders." Complaint, D.E. No. 1 at 10, ¶ 45. In their response, plaintiffs fail to provide any evidence in support of these assertions. However, mere allegations that Jimenez

knew or should have known of the wrongful acts is not enough to meet that standard. *Mamani v. Berzain*, 2011 WL 3795468, Case No. 09-16246 (11th Cir. Aug. 29, 2011) (“*Mamani*”) at *4 (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009)).

The *Iqbal* standard requires that the complaint contain sufficient factual allegations which, if accepted as true, state a claim of relief that is plausible on its face. *Iqbal*, 129 S. Ct. at 1949. To meet the facial plausibility requirement, the plaintiff must plead sufficient facts that allow the court to “draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. The allegations must not be “merely consistent with’ a defendant’s liability,” but must be more than a “sheer possibility that the defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949. Plaintiffs do not provide any substantive details of the testimony of Bolivar and Paez beyond Jimenez’s mere knowledge and acceptance of the killing.

It is equally possible to draw from this allegation that Jimenez both learned of the killings and acknowledged his leadership of the AUC after the fact. This would not be the first time for an armed group to adopt such a stance. Elisa Mala and J. David Goodman, *At Least 80 Dead in Norway Shooting*, N.Y. TIMES, July 22, 2011, available at <http://www.nytimes.com/2011/07/23/world/europe/23oslo.html?> (noting that Islamic militants initially claimed responsibility for the terrorist attacks in Norway but it was later discovered that a Norwegian national was responsible). Such a statement of responsibility is totally unreliable and fails to provide Jimenez and the court with any real idea as to how Plaintiffs connect him to these killings.

Plaintiffs’ complaint lacks any clear and concrete allegation that Jimenez contributed to the planning of the two specific killings, specifically directed either

individual who actually committed the killings, or was in any way involved with the killings. While Jimenez's knowledge and acceptance of the killings may be merely consistent with Jimenez's liability, both do not provide any reasonable inference that Jimenez is liable for them.

III. PLAINTIFFS' COMPLAINT FAILS TO ALLEGE A "SYMBIOTIC RELATIONSHIP" BETWEEN JIMENEZ AND THE COLOMBIAN GOVERNMENT.

Plaintiffs next argue that the complaint sufficiently alleges a "symbiotic relationship" between Jimenez and the Colombian government to establish that the relevant acts in this case were committed under color of law. Opposition at 7-10. Plaintiffs rely heavily on *In re Chiquita Brands Int'l* ("Chiquita"), 2011 WL 2163973, Case No. 10-80652 (S.D. Fla. June 3, 2011) to conclude that the allegations in the complaint allege a sufficient link between the Colombian government and the paramilitary group purportedly associated with Jimenez.

In *Chiquita*, the plaintiffs' complaint alleged specific factual allegations that showed a "direct, symbiotic relationship between the Colombian government and the [paramilitary group] that involves the [group's] torture and killing of civilians" in the relevant regions. *Chiquita* at *19 (emphasis added). The complaint named specific senior officers in the Colombian military who collaborated with the paramilitaries in the commission of various attacks. *Chiquita* at *20. The complaint also cited specific meetings between military officials and leaders of the paramilitary group, and specific instances where the Colombian government had carried out assassinations with members of the paramilitary group. *Chiquita* at *22. The court concluded that these allegations did more than "assert generalized allegations of collusion between

Colombian authorities and the [paramilitary group],“ and provided “detailed facts of the government’s role in creating, financing, promoting, and collaborating with the [paramilitary group] . . .” *Chiquita* at *23 (emphasis added).

Plaintiffs’ complaint woefully falls short of this level of specificity. In its opposition, Plaintiffs again rely on general allegations to show this “symbiotic relationship.” The complaint generally alleges that the Colombian government “introduced and used paramilitary groups” to fight an internal armed conflict with guerrilla groups. Opposition at 8. However, it fails to specifically identify the government officials who ordered the introduction of the paramilitary group purportedly associated with Jimenez and the individuals in the group who received that order. The complaint also generally alleges that the paramilitary group purportedly associated with Jimenez generally infiltrated local governments and officials. Opposition at 8. However, it fails to specifically name any officials under the influence of the paramilitary group or explain how this infiltration was directly connected to any human rights abuses. The complaint further alleges that the Colombian government generally authorized the invasion of the area controlled by the group purportedly associated with Jimenez. Opposition at 9. Again, Plaintiffs fail to provide any details as to the government officials who authorized the invasion and which individuals in the paramilitary group received that authorization.

Unlike in *Chiquita*, Plaintiffs fail to cite to any specific instances when the paramilitary group associated with Jimenez worked directly with the Colombian government to commit human rights abuses identical, or even similar, to the acts on which the complaint is based. As Plaintiffs point out, the "symbiotic relationship" need

not be related to the specific acts on which the complaint is based. However, the allegations must still specifically show a relationship has something to do with the conduct at issue, i.e. the killing of individuals who are members of the non-governmental organization, Program for Peace Development ("PDP"). *Romero v. Drummond Co.*, 552 F.3d 1303, 1317 (11th Cir. 2008). Plaintiffs fail to allege the details of any specific instance where this occurred.

In contrast, in *Chiquita*, the plaintiffs alleged specific instances where Colombian soldiers and paramilitaries conducted joint operations to commit human rights abuses against individuals identical to the plaintiffs located in the same region. *Chiquita* at *22 ("On February 19, 2000, the AUC selectively assassinated five banana workers in the "peace community" of San Jose de Apartado, in Uraba; reports indicated that members of the 17th Brigade were direct participants in the attack."). Plaintiffs do not allege as much. Plaintiffs' complaint is based on mere conjecture and speculation that somehow because the local police and government soldiers did not provide Estrada any assistance, and a government official told the paramilitary group that Jaramillo was a guerrilla collaborator, the government worked hand-in-hand with the paramilitary group to commit human rights abuses against members of the PDP.

Without providing any allegations of specific instances of joint operations for these types of killing, Plaintiffs' complaint fails to meet the requirement showing a "symbiotic relationship," as outlined in *Romero v. Drummond Co.*, 552 F.3d 1303, 1317 (11th Cir. 2008). Again, Plaintiffs rely on generalizations and expect Jimenez and the court to connect the dots and draw conclusions from those generalizations. Where *Romero* requires much more, the complaint must be dismissed.

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IV. THE COURT DOES NOT HAVE PERSONAL JURISDICTION OVER JIMENEZ

A. THE COURT DOES NOT HAVE TRANSIENT JURISDICTION OVER JIMENEZ.

Lastly, the Plaintiffs argue that the court has personal jurisdiction over Jimenez, despite the fact that the United States and Colombian governments extradited him against his will to Florida. Opposition at 10-15. Plaintiffs believe that a nonresident's presence in the forum need not be voluntary and boldly support this statement by claiming that "the plurality [in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990)] authored by Justice Scalia never uses the word 'voluntary.'" Opposition at 11-12.

Interestingly, Plaintiffs missed the last few paragraphs of the plurality where Justice Scalia responds to Justice Brennan's opinion (and generously uses the word "voluntarily" twice!). More importantly, Justice Scalia recognized that the one and only factor discussed by Justice Brennan that relates to transient jurisdiction and is "fully" persuasive is: "the fact that a defendant voluntarily present in a particular State has a 'reasonable expectatio[n]' that he is subject to suit there." *Burnham*, 495 U.S. at 624-25. Justice Scalia goes on to explain:

By formulating it as a "reasonable expectation" Justice BRENNAN makes that seem like a "fairness" factor; but in reality, of course, it is just tradition masquerading as "fairness." The only reason for charging Mr. Burnham with the reasonable expectation of being subject to suit is that the States of the Union assert adjudicatory jurisdiction over the person, and have always asserted adjudicatory jurisdiction over the person, by serving him with process during his temporary physical presence in their territory. That continuing tradition, which anyone entering California should have known about, renders it "fair" for Mr. Burnham, who voluntarily entered California, to be sued there for divorce-at least "fair" in the limited sense that he has no one but himself to blame.

Burnham, 495 U.S. at 624-25. Clearly even Justice Scalia conceded that the rule for transient jurisdiction traditionally applies only where the defendant voluntary injects himself into the forum. Here, Jimenez cannot "blame" himself for being present in Florida or the United States. The United States and Colombia brought him into this forum against his will and without his permission. Plaintiffs fail to explain how that fact is consistent with the "reasonable expectation" that Justice Scalia recognizes as "fully persuasive" under the rule.

In fact, Florida courts have also adopted a similar interpretation of *Burnham* and do not neglect to emphasize the "voluntary" aspect of the defendant's presence in the forum. See *Garrett v. Garrett*, 668 So. 2d 991, 994 (Fla. 1996) (concurring, Wells, J.) ("Florida courts have personal jurisdiction over a nonresident defendant when that nonresident defendant is properly served with service of process while that nonresident defendant is voluntarily present in Florida.") (citations omitted) (emphasis added); *Keveloh v. Carter*, 699 So. 2d 285, 288 (Fla. 5th DCA 1997); *Pota v. Hotz*, 852 So. 2d 379, 381 (Fla. 3d DCA 2003).

Plaintiffs proceed to rely on several cases which allegedly support their claim that Jimenez's presence in Florida need not be voluntary to subject him to transient jurisdiction. First, Plaintiffs rely on *S.E.C. v. Eurobond Exch., Ltd.*, 13 F.3d 1334 (9th Cir. 1994) as an example where a district court exercised personal jurisdiction over an extradited defendant. Plaintiffs neglect to point out that the court found personal jurisdiction over the defendant mainly because the defendant effectively waived any attack on jurisdiction by failing to claim the defense on or before filing an answer.

Eurobond Exch., 13 F.3d at 1337. Jimenez has properly filed this motion under Rule 12 and has not waived the opportunity to challenge this court's jurisdiction.

Next, Plaintiffs also rely on *S.E.C. v. Marimuthu*, 552 F. Supp. 2d 969 (D. Neb. 2008). However, the court in *Marimuthu* did not find personal jurisdiction on the basis of transient jurisdiction under *Burnham*. Rather, citing to *S.E.C. v. Unifund, SAL*, 910 F.2d 1028 (2d Cir. 1990), the court conducted a general jurisdiction analysis to conclude that the defendant's manipulation of stocks and opening of stock accounts in the United States created a reasonable expectation that United States investors would be affected by the defendant's actions. *Marimuthu*, 552 F. Supp. 2d at 973; see also *Unifund, SAL*, 910 F.2d at 1033. The defendant's extradition to the United States did not form any part of the court's analysis of personal jurisdiction.

Lastly, Plaintiffs rely on *C.S.B. Commodities, Inc. v. Urban Trend (HK), Ltd.*, 626 F. Supp. 2d 837, 846 (N.D. Ill. 2009), which did find personal jurisdiction over the defendant based on transient jurisdiction outlined in *Burnham*. *C.S.B. Commodities*, 626 F. Supp. 2d at 845-47. However, as the court in *C.S.B. Commodities* noted, *Burnham* lacked a majority, so the court proceeded to find personal jurisdiction over the defendant in the case under the test outlined in Justice Brennan's concurrence. *C.S.B. Commodities*, 626 F. Supp. 2d at 846. The court pointed out: "Defendants have made no argument that their presence in the forum was either involuntary or unknowing. Therefore, even under Justice Brennan's test, service of process would satisfy due process." *C.S.B. Commodities*, 626 F. Supp. 2d at 846. This is simply not the case here with Jimenez. Furthermore, the court in *C.S.B. Commodities* grounded its opinion in the fact that the defendant was served while present in the forum "solely for the

activities leading to the complaint.” *C.S.B. Commodities*, 626 F. Supp. at 847. Again, Jimenez is in Florida against his will and for reasons completely disconnected with the events that form the basis of the Plaintiffs’ complaint.

Not surprisingly, Plaintiffs fail to cite to a single case where courts have found transient jurisdiction over a defendant who has been extradited to the United States. Where Jimenez was brought, and continues to remain, in Florida involuntarily, transient jurisdiction cannot provide the basis for personal jurisdiction over him for this case.

B. THE COURT DOES NOT HAVE GENERAL JURISDICTION OVER JIMENEZ.

In the alternative, Plaintiffs also argue that Jimenez has sufficient minimum contacts to find general jurisdiction. Again, relying on *Marimuthu*¹, Plaintiffs argue that Jimenez was responsible for manufacturing and exporting drugs which were imported and sold into the United States. Opposition at 14. Plaintiffs also point out that Jimenez laundered the proceeds of the sales of those drugs through banks in Florida. Opposition at 14.

For the purpose of general jurisdiction, though, courts must look to the minimum contacts that the defendant currently has with the forum, and not the contacts that he may have had in the distant past. See *In re Terrorist Attacks on September 11, 2011*, 718 F. Supp. 2d 456, 471 (S.D.N.Y. 2010). It is true that contacts may be assessed over a period of years prior to the filing of the plaintiffs' complaint. See *Carib-USA Ship Lines Bahamas v. Dorsett*, 935 So. 2d 1272, 1276 (Fla. 4th DCA 2006). However, by

¹ The court in *Marimuthu* cited *S.E.C. v. Unifund, SAL*, 910 F.2d 1028 (2d Cir. 1990) in support of its finding of personal jurisdiction. *Unifund* based its finding of general jurisdiction on a "caused consequences" standard that nowhere to be found in the relevant Florida statute authorizing general jurisdiction. See Fla. Stat. 48.193.

Plaintiffs' own admission, the paramilitary group connected to Jimenez was disbanded in 2005, D.E. No. 1, at 4, ¶1-10, and the group's ancillary involvement in the drug trade presumably ended then and there. Plaintiffs' argument is ludicrous that Jimenez's alleged contacts with the United States nearly 7 years ago provide minimum contacts for personal jurisdiction today.

The only contacts that Jimenez currently has with Florida are through the direct command of the United States and Colombian governments. As Jimenez has already explained in his motion, this unilateral governmental activity is not sufficient to satisfy the requirements of general jurisdiction. *American Overseas Marine Corp. v. Patterson*, 632 So. 2d 1124, 1127 (Fla. 1st DCA 1994).

IV. CONCLUSION

In the end, Plaintiff's complaint fails to specifically allege that Jimenez committed much of anything. While the complaint does allege that Jimenez was the leader of 7,000 men as part of an organization with loose ties to the Colombian government, and two of those men killed people who were connected with the Plaintiffs, the standards in *Iqbal* and *Mamani* require more specific allegations to impute liability to Jimenez. Rather than provide details of how Jimenez was connected to these events, the factual allegations in the complaint leave it up to the reader to connect the dots and come to conclusions through inference. Since these allegations are not enough, the motion must be dismissed.

Plaintiffs are also unable to cite to a single case that provides transient jurisdiction over an individual who has been brought against his will to the United States. Jimenez's current contacts with the United States are tenuous and have been

entirely orchestrated at the direction of the United States and Colombian governments. Jimenez did not voluntarily enter this country and will leave the moment that he is given the opportunity to freely do so. Courts never anticipated exercising personal jurisdiction over an individual who was not voluntarily present in the forum. Therefore, the court does not have jurisdiction over Jimenez and the motion must be dismissed.

I HEREBY CERTIFY that this pleading will be provided to all interested parties through the Court's CM/ECF system.

Respectfully submitted,

_____/s/_____

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