

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

CASE NO: 1:10-cv-21951 Torres

**Jesús 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 the
estate of Eduardo Estrada, and**

John Doe, in his individual capacity,

Plaintiffs,

v.

**CARLOS MARIO JIMÉNEZ NARANJO, also
known as “Macaco,” “El Agricultor,” “Lorenzo
González Quinchía,” and “Javier Montañez,”**

Defendant.

**PLAINTIFFS’ OPPOSITION TO DEFENDANT’S MOTION TO DISMISS FOR LACK
OF PROSECUTION**

Defendant Carlos Mario Jimenez Naranjo’s (the “Defendant”) recent Motion to Dismiss for Lack of Prosecution is entirely without basis and should be denied. Plaintiffs have vigilantly and diligently prosecuted this case from the outset. Accordingly, Plaintiffs request that this Court deny Defendant’s motion and set a date for a discovery conference so that this case can proceed expeditiously.

A dismissal for failure to prosecute under Fed. R. Civ. P. 41(b) is a “sanction of last resort, applicable only in extreme circumstances.” *Navarro v. Cohan*, 109 F.R.D. 86, 88 (S.D. Fla. 1985) (quoting *State Exch. Bank v. Hartline*, 693 F.2d 1350, 1352 (11th Cir. 1982)). Before granting a Rule 41(b) motion, the Court must find that there has been a “clear record of delay or willful contempt” by the Plaintiff. *Id.* (quoting *Hildebrand v. Honeywell, Inc.*, 622 F.2d 179,

181 (5th Cir. 1980)). Courts have recognized that the delay or misconduct must be severe to warrant dismissal under Rule 41(b) and that the “[m]ere lapse of time does not warrant dismissal when the plaintiff has been diligent throughout; speed simply for the sake of speed is not the purpose to be served.” *Cherry v. Brown-Frazier-Whitney*, 548 F.2d 965, 969 (D.C. Cir. 1976).

Here, Plaintiffs have gone above and beyond diligence throughout the proceedings: Plaintiffs have never failed to comply with a court order, have always filed their responses on time, have fully briefed Defendant’s prior motions to dismiss this case, and have successfully moved this Court for their right to appear anonymously. In fact, Plaintiffs have continuously worked to ensure this case maintains its momentum, without delay. For example, when this Court stayed all claims pending resolution of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), Plaintiffs successfully moved this Court to allow at least some of the claims to move forward. D.E. 75. When this Court on June 26, 2012, lifted its stay on claims arising under the Torture Victim Prevention Act (“TVPA”), 28 U.S.C. § 1350, note § 2(a), Plaintiffs began working diligently toward propounding discovery related to those claims, including researching and preparing foreign discovery and identifying relevant witnesses. *See* Declaration of Leo P. Cunningham at 1, filed concurrently herewith. Plaintiffs have prepared their initial disclosures, and, when this Court issues a scheduling order, Plaintiffs will be ready, and eager, to proceed with discovery.

The cases Defendant cites in his Motion to Dismiss further undermine Defendant’s argument; the cases lay out the severe misconduct required to support dismissal under Rule 41(b), none of which is present in this case. In *Munoz v. Ramirez*, No. 07-22296-CIV-MORENO, 2009 WL 151548, at *2 (S.D. Fla. Jan. 22, 2009), the plaintiff failed to respond to a motion to dismiss, file a pretrial statement, and failed to comply with court orders. In *Salmon v. City of Stuart*, 194 F.2d 1004 (5th Cir. 1952), the plaintiff took no action whatsoever for more than a year following the initial filing of the suit. In *Lopez v. Smurfit-Stone Container Enter.*, 289 F.R.D. 103, 105 (W.D.N.Y. 2013), no one could locate the Plaintiff, who failed to respond to a court order directing him to advise whether he intended to move forward with the case. Finally, in *Hickman v. Fox Television Station*, 231 F.R.D. 248, 253 (S.D. Tex. 2005), the plaintiff consistently failed to comply with court orders and was continuously unavailable. The circumstances here simply fail to compare. *See Cherry*, 548 F.2d at 969.

Defendant is unable to support any allegation of delay or willful contempt. Plaintiffs have been diligently prosecuting this case and are prepared to proceed with discovery immediately. Therefore, Plaintiffs respectfully request that this Court deny Defendant's motion and issue a scheduling order or, alternatively, hold a Rule 16 conference so that we may proceed with discovery.

Dated: July 18, 2013

By: /s/ Julie C. Ferguson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiffs' Opposition to Defendant's Motion to Dismiss for Lack of Prosecution was served by CM/ECF on July 18, 2013, on counsel or parties of record on the service list.

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/s/ Julie C. Ferguson
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