UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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** **John Doe, in his individual capacity, and in his capacity as the personal representative of the estate of Eduardo Estrada,** **Plaintiffs,** **v.** **CARLOS MARIO JIMÉNEZ NARANJO, also known as "Macaco," "El Agricultor," "Lorenzo González Quinchía," and "Javier Montañez,"** **Defendant.**	**Case No.: 1:10-cv-21951-EGT** **OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT**

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

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INTRODUCTION

Defendant Carlos Mario Jiménez Naranjo ("Defendant" or "Macaco") is a convicted narco-terrorist who admitted guilt in this Court and is serving a criminal sentence in this state. His criminal conduct involved importing cocaine into this country (and this state) and laundering the proceeds of his trafficking in this country's (and state's) banks. Macaco is the Defendant in this civil case for his role in the abduction and brutal slayings of Eduardo Estrada Gutierrez and Alma Rosa Jaramillo Lafourie ("Decedents"). The Decedents are the relatives of Plaintiffs Jesús Cabrera Jaramillo, Jane Doe, and John Doe (collectively "Plaintiffs"). Their slayings were part and parcel of Defendant's criminal conduct aimed at the United States, for which he was extradited to the United States, for which he was convicted in the United States, and for which he is now serving a prison term in the United States. It strains credulity to contend, as Defendant does, that this Court – the same court that sentenced him – lacks jurisdiction over him or that his conduct does not touch and concern the United States.

In their Amended Complaint (Dkt. 91), Plaintiffs bring claims for extrajudicial killing; torture; cruel, inhuman or degrading treatment; war crimes; and crimes against humanity. Defendant now attempts to stop their claims using Rule 12(b), contending, without support, that: (1) the Court lacks personal jurisdiction over Defendant even though he was served with this lawsuit in this jurisdiction, and the court has exercised jurisdiction over him in accepting his guilty plea and imposing a criminal judgment on him; (2) Plaintiffs' claims under the ATS fail under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013), even though the claims here are against an individual, not a corporation, and they touch and concern the United States with sufficient force to displace any presumption against extraterritoriality; and (3) the Amended Complaint's extensive factual allegations fail to satisfy *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), despite the fact that the allegations far exceed that standard. Def. Mem. 1. Each of Defendant's arguments fails for a host of reasons. As set forth below, this Court's exercise of personal jurisdiction is proper, any presumption is displaced, and the claims are well-pleaded.[1]

[1] Notably, Defendant does not even attempt to argue that Plaintiffs' claims under the TVPA can be dismissed. Indeed, *Kiobel* did not address the TVPA so no presumption against those claims could exist.

BACKGROUND

Defendant resides in Florida. ¶ 10.[2] He is currently serving a 33-year prison sentence at the Miami Federal Detention Center after voluntarily submitting to personal jurisdiction in this district and pleading guilty to trafficking cocaine into, and laundering money in, this country and state. ¶¶ 10, 11, 24, 56, 60; *see also* Second Superseding Indictment, *United States v. Jimenez-Naranjo*, No. 1:07-cr-20794-JAL-1 (S.D. Fla. Aug. 19, 2010), ECF No. 371. The crimes to which Defendant pleaded guilty and for which he is currently serving a prison sentence were part of a narco-terrorism scheme that encompassed the killings of Alma Rosa Jaramillo and Eduardo Estrada. ¶ 54.

Between 1998 and 2005, Defendant was the high commander of an organization known as Bloque Central Bolivar ("BCB"), and commanded up to seven-thousand armed combatants. ¶ 11. The BCB is a subdivision of the United Self-Defense Forces of Colombia ("AUC"), a paramilitary group introduced and used by the Colombian government in coca-rich areas of the country where the Colombian government had limited or no state presence. ¶¶ 19-20. As part of its campaign and its effort to control all exportation of coca in the area, the BCB, under Defendant's direction, executed systematic attacks on civilians, including torture, forced disappearances, extrajudicial killings, and massacres. ¶¶ 21, 27-28. As the leader of the BCB, Defendant commanded subordinates responsible for protecting coca-cultivation and narcotic-trafficking businesses and directed widespread and systematic attacks on civilian populations. ¶ 11.

Defendant directed his paramilitaries to target leaders of the Program for Peace and Development ("PDP"), an organization that provided peasants alternatives to growing coca, BCB's main source of wealth and its political and economic base. ¶¶ 11, 30-31. Two of those PDP leaders were Decedents. ¶¶ 13, 15. Eduardo Estrada, a potential candidate to run against a BCB candidate for mayor, was killed on July 16, 2001 by one of Defendant's subordinates. ¶¶ 33-34. Alma Rosa Jaramillo worked on the campaign of a mayoral candidate who ran in opposition of the BCB candidate. ¶ 39. On or about June 28, 2001, she was forcibly abducted by Defendant's subordinates. ¶ 41. Her mutilated body was later found in a river on or about July 1, 2001. ¶ 42.

[2] All references to paragraph (¶) refer to the Amended Complaint.

The former head of the BCB's military wing, Julian Bolivar, and the former head of its political wing, Ernesto Paez, have testified acknowledging Defendant's knowledge of and responsibility for Decedents' murders. ¶ 46. Defendant's abuses were committed as part of Defendant's strategy to gain and maintain control over Middle Magdalena and hence establish control of the lucrative drug trade involving the cultivation of drugs destined for the United States. ¶¶ 46, 2.

ARGUMENT

I. Defendant has Waived any Defense Based on Personal Jurisdiction by Failing to Raise it in a Timely Manner

A party waives defenses listed in Rules 12(b)(2)-(5) by failing to make a timely motion under Rule 12 or failing to include a defense in a responsive pleading. Fed. R. Civ. P. 12(h)(1). Accordingly, a defense of personal jurisdiction is waived if not raised within the 21-day period permitted for a responsive pleading under Rule 12(a)(1)(A). *Suntrust Bank v. O'Brien*, No. 3:09CV85/RV/EMT, 2009 WL 1393439, at *2 (N.D. Fla. May 18, 2009); *United States v. FloridaUCC Inc.*, No. 4:09CV46/RH/WCS, 2009 WL 1971428, at *8 (N.D. Fla. July 3, 2009). Defendant did not raise the defense of lack of personal jurisdiction until well beyond the deadline for a responsive pleading: more than a year after being served with the summons and Complaint; 80 days after the deadline to Answer on June 24, 2011; and 55 days after the July 19, 2011 status conference at which he was relieved of his default. Accordingly, Defendant has not made a timely motion, he has not preserved that defense, and he cannot raise it now.

II. This Court has Personal Jurisdiction over Defendant

Defendant was properly served while physically present in the state of Florida. This Court, therefore, has personal jurisdiction over the Defendant. *Burnham v. Superior Court*, 495 U.S. 604, 611-12 (1990). Personal jurisdiction based on physical presence of a non-resident defendant in a forum state is proper and meets traditional notions of fair play and substantial justice. *Id.* No state or federal court since *Burnham* (or before the short-lived line of cases it overturned), has ever denied personal jurisdiction when the party was personally served in the forum state. *See C.S.B. Commodities, Inc. v. Urban Trend (HK) Ltd.*, 626 F. Supp. 2d 837, 846-47 (N.D. Ill. 2009) ("Since *Burnham* was decided, there does not appear to be a single published opinion in which a court has found jurisdiction lacking where an individual was served in the forum."); *Burnham*, 495 U.S. at 613-14 ("Particularly striking is the fact that, as far as we have

been able to determine, *not one* American case from the period (or, for that matter, not one American case until 1978) held, or even suggested, that in-state personal service on an individual was insufficient to confer personal jurisdiction.") (emphasis added).

That the Defendant was in Florida following his extradition simply has no bearing on the matter. *United States v. Alvarez-Machain*, 504 U.S. 655, 659-62 (1992) (defendant's forcible seizure from another country does not affect jurisdiction of a federal court). In his Motion to Dismiss, Defendant relies on non-binding dictum in Justice Brennan's concurrence in *Burnham* to suggest that *Burnham* creates a "voluntary presence" requirement. Defendant is wrong: *Burnham* specifically said that physical presence in a state was itself sufficient for personal jurisdiction, and no court since has applied a "voluntary presence" requirement – including those involving extradited defendants. *Id.* at 662 (when a treaty has not been invoked, a court may properly exercise jurisdiction even though the defendant's presence is procured by means of a forcible abduction); *United States v. Matta*, 937 F.2d 567 (11th Cir. 1991) (illegality of extradition to the United States does not foreclose personal jurisdiction in criminal case); *see also St. Paul Surplus Lines Ins. Co. v. Davis*, 983 F.2d 1057 (4th Cir. 1993) (finding personal jurisdiction in civil suit over individuals extradited from Israel to face charges under criminal indictment); *S.E.C. v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1337 (9th Cir. 1994) (personal jurisdiction in civil case against extradited defendant was proper, even without waiver, because "the purpose of the extradition process is to obtain a court's personal jurisdiction over a defendant" and extradition treaty did not prohibit civil suits). Indeed, Defendant fails to cite a single case in which a court has declined to exercise personal jurisdiction on the basis that the defendant was extradited to the forum.

Moreover, even if *Burnham* created a voluntary presence requirement (it did not), Defendant is now voluntarily present. Defendant voluntarily pleaded guilty to violating United States laws and is serving his sentence in Miami federal prison. *See, e.g.*, Plea Agreement at ¶ 17, *United States v. Naranjo*, No. 1:07-cr-20794-JAL-1 (S.D. Fla. Aug. 20, 2010), ECF No. 367 ("Plea Agreement") (Defendant Naranjo "confirms that he is guilty of the offenses to which he is pleading guilty; that his decision to plead guilty is the decision that he has made; and that nobody has forced, threatened, or coerced him into pleading guilty."). Thus, this Court has personal jurisdiction over the Defendant who was personally served here in Florida, who is still

(voluntarily) present, and over whom this Court has already exercised jurisdiction by accepting his guilty plea and imposing judgment.

A. Defendant's Minimum Contacts with the State of Florida Support the Court's Exercise of Personal Jurisdiction

Even if this Court ignored the Defendant's physical presence in this state (it should not), Defendant's sufficient contacts with the state support this Court's exercise of personal jurisdiction. *See Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008) (A federal court may exercise personal jurisdiction over a defendant "so long as the exercise is consistent with federal due process requirements.").

The exercise of personal jurisdiction comports with due process when: "'(1) the nonresident defendant has purposefully established minimum contacts with the forum . . . and (2) the exercise of jurisdiction will not offend traditional notions of fair play and substantial justice.'" *S.E.C. v. Carrillo*, 115 F.3d 1540, 1542 (11th Cir. 1997) (citations omitted); *see also Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

Defendant has admitted that he trafficked cocaine into the United States and laundered money through Florida banks. ¶¶ 10, 24; *see also* Plea Agreement. Indeed, Defendant was extradited from Colombia to this Court to face federal criminal charges for those crimes. ¶ 10. Defendant's involvement in this illegal enterprise, which directly targeted and occurred within this state, establishes sufficient contacts to support personal jurisdiction and accords with notions of fair play and substantial justice. *S.E.C. v. Marimuthu*, 552 F. Supp. 2d 969, 973 (D. Neb. 2008); *see also Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947-48 (11th Cir. 1997) ("The burden is on the defendant to demonstrate that the assertion of jurisdiction in the forum will make litigation 'so gravely difficult and inconvenient' that [he] unfairly is at 'a severe disadvantage' in comparison to his opponent.") (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985)).

Defendant has not even argued– much less succeeded to demonstrate– that the exercise of personal jurisdiction would be "so gravely difficult and inconvenient" as to defeat due process. In fact, Florida is the *most* convenient forum for Defendant to defend himself in as he is currently incarcerated and "actually living" at the Federal Detention Center in Miami. *See Shurman v. Atlantic Mortg. Inv. Corp.*, 795 So.2d 952, 956 (Fla. 2001).

In sum, there is no basis to the Defendant's jurisdictional challenge: this Court has

personal jurisdiction over the Defendant and this case should proceed to discovery.

III. *Kiobel* Does Not Bar Plaintiffs' ATS Claims Because They Touch and Concern the United States

A. The *Kiobel* Presumption is Displaced Where ATS Claims Touch and Concern the United States with Sufficient Force

Defendant is wrong when he asserts that under *Kiobel*, the "ATS does not provide a cause of action to aliens for violations of law of nations that occur outside the United States." Def. Mem. at 5 (citing *Kiobel*, 133 S.Ct. at 1669). In *Kiobel*, the Supreme Court found that a presumption against extraterritoriality applies to ATS claims that deal with purely extraterritorial conduct. 133 S.Ct. at 1669. However, the Court also explicitly held that the presumption will be displaced where – as here – the claims "touch and concern" the United States with sufficient force to displace that presumption. *Id.*[3] Whether the *Kiobel* presumption is displaced requires a case-specific factual inquiry. *Id.* (evaluating the presumption "[o]n these facts").[4] Even *if* we assume that the presumption against extraterritoriality applies to Plaintiffs' ATS claims, the facts here clearly demonstrate that those claims touch and concern the United States with sufficient force to displace that presumption.

B. The *Kiobel* Presumption is Displaced because Defendant Resides in the United States

In *Kiobel*, Nigerian plaintiffs sued U.K. and Dutch parent companies in New York for abetting Nigerian military abuses in Nigeria. *Id.* at 1662-63. The sole connection between those

[3] Moreover, contrary to Defendant's argument, the *Kiobel* presumption presents a merits question, not a question of subject-matter jurisdiction. *Kiobel* cites *Morrison*, in which the Supreme Court held: "to ask what conduct [a statute] reaches is to ask what conduct [the statute] prohibits, which is a merits question. Subject-matter jurisdiction, by contrast, 'refers to a tribunal's 'power to hear a case.' . . . It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 2877 (2010); *see also Kiobel*, 133 S.Ct. at 1664 (citing *Morrison*); *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013) (*Kiobel* presumption held a "merits argument").

[4] All of the concurring justices in *Kiobel* recognized the decision's narrow reach. *See, e.g.*, 133 S.Ct. at 1669 (Alito, S., concurring) (*Kiobel* "obviously leaves much unanswered"); *id.* at 1673 (Breyer, S., concurring) (*Kiobel* "leaves for another day the determination of just when the presumption against extraterritoriality might be 'overcome.'" (citations omitted)). Justice Kennedy remarked that "further elaboration and explanation" would be required in cases involving "allegations of serious violations of international law principles protecting persons." *Id.* at 1669 (Kennedy, A., concurring).

defendants and United States territory was their corporate presence in one New York office – an office that was owned by a separate company and that played no role in the abuses that were the heart of the plaintiff's allegations. *Id.* at 1677-78 (Breyer, S., concurring). In *Kiobel*, "mere corporate presence" of a foreign multinational corporation in the United States did not sufficiently "touch and concern" the United States because "[c]orporations are often present in many countries." *Id.* at 1669. Defendant's presence in this Country, however, is not akin to the "mere corporate presence" of the multinational defendants in *Kiobel*. *Id.* This narco-terrorist Defendant, who directed widespread and systematic attacks on civilian populations, including these Plaintiffs' relatives, cannot be found in multiple jurisdictions. The perpetrator of the abuses committed against the Plaintiffs is only a resident of one state. That is the state of Florida. Leaving aside the issue of whether the *Kiobel* presumption even applies when the defendant is a human being capable of being in only one place at a time, following the majority's reasoning, the *Kiobel* presumption may be displaced where an individual defendant physically resides in the United States. *See Ahmed*, 2013 WL 4479077, at *2 (presumption displaced because the defendant was "a permanent resident of the United States"); *see also Sexual Minorities Uganda v. Lively*, - F. Supp. 2d -, No. 12-CV-30051-MAP, 2013 WL 4130756, at *14 (D. Mass. Aug. 14, 2013).

Moreover, the *Kiobel* majority adopted the "touch and concern" analysis, in part, to help guide the judiciary in interpreting U.S. law in harmony with the political branches. 133 S.Ct. at 1664. While the *Kiobel* majority declines to specify what conduct would satisfy the "touch and concern" test, Justices Breyer, Ginsberg, Sotomayor, and Kagan suggested that they would displace the presumption where "the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind." *Id.* at 1671 (Breyer, S., concurring); *see also Mwani v. Laden*, - F. Supp. 2d -, No. CIV.A. 99-125 JMF, 2013 WL 2325166, at *4 (D.D.C. May 29, 2013) (considering opinions of concurring justices in determining that a defendant's claims touched and concerned the United States "with sufficient force" to displace the *Kiobel* presumption). Indeed, denying a cause of action under the ATS against perpetrators of grave human rights crimes found on United States soil, in United States custody, and unavailable for remedy in any other forum, as here, would undermine United States foreign policy interests. It could "give rise to the prospect that this

country would be perceived as harboring the perpetrator." Supplemental Brief for the United States as *Amicus Curiae in Partial Support of Affirmance*, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 2161290, at *4 (June 11, 2012) ("*Kiobel* Supp. Brief").

To that end, all three branches of the United States government are unified in their support for a policy of permitting ATS claims against individual perpetrators of severe human rights abuses who have sought safe harbor in the United States. *See, e.g.*, Statement of Interest of United States of America at ¶ 9, *Ahmed v. Magan*, No. 2:10-cv-00342-GCS-MRA (S.D. Ohio Mar. 15, 2011), ECF No. 45 ("U.S. residents like Magan who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts."); Statement of Interest by the United States of America at ¶ 9, *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Feb. 14, 2011), ECF No. 147 (same); S. REP. NO. 102-249, at 3 (1991) (Conf. Rep.) (TVPA was enacted to deny torturers "safe haven in the United States"); H.R. REP. NO. 102-367, at 3 (1991) (Conf. Rep.) (TVPA reflects United States "obligation . . . to provide means of civil redress to victims of torture"). *See also Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (Congress "not only expressed no disagreement with our view of the proper exercise of the judicial power [in the *Filártiga* line of cases, *i.e.*, ATS cases against individual defendants found in the United States] but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail") (referencing the TVPA); *id.* at 732 (*Sosa* is "generally consistent" with *Filártiga*); Oral Argument at 13:21-23, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, 2012 WL 628670 (Feb. 28, 2012) (Justice Kennedy describing *Filártiga* as "binding and important precedent"); *Kiobel*, 133 S.Ct. at 1661 (reaffirming *Sosa*). Plaintiffs' ATS claims advance the United States' interest in denying safe haven to Defendant, an individual who stands accused of grave human rights abuses. *See Kiobel* Supp. Brief, 2012 WL 2161290, at *13.

In sum, Plaintiff's claims touch and concern the United States because the United States is housing a well-known narco terrorist whom it brought here to the United States after he directed the brutal murder of the Decedents. It touches and concerns the United States because this common enemy of mankind is here in our federal prison system.

C. The *Kiobel* Presumption is Displaced Because Claims Based on Defendant's Brutal Killing of Decedents Forcefully Touch and Concern the United States

Not only is Defendant here in the Southern District of Florida, he is here in the custody of the United States Government as a result of substantial U.S. investment in pursuing his arrest and removing him from the local jurisdiction in which Plaintiffs had previously pressed their claims. ¶¶ 3, 57-58. He remains here having pleaded guilty to crimes of narco-terrorism that involved using force and violence, including against Plaintiffs' relatives, to aid his drug trafficking from Colombia to the United States.[5] Defendant had the Decedents tortured and killed because they supported anti-coca cultivation efforts that threatened the interests of the AUC. *E.g.*, ¶¶ 2, 13, 15, 30-33, 38-42, 46-51, 54, 56, 60. Because Plaintiffs' ATS claims are based on Defendant's conduct in support of the AUC's control of coca-rich regions and its drug trafficking to the United States, the ATS claims touch and concern the United States with "sufficient force" to displace the *Kiobel* presumption.

Indeed, the U.S. Government's interest in investigating, prosecuting, and incarcerating Defendant, an admitted Colombian narco-terrorist, is in complete accord with Plaintiffs' interest in bringing ATS claims that arise from the same criminal enterprise. The drug trafficking activities for which Defendant was extradited, and to which he has now pled guilty, were committed as part of an unlawful scheme that also included the wrongful acts forming the basis of Plaintiffs' claims under the ATS – specifically, the extrajudicial killings of Alma Rosa Jaramillo and Eduardo Estrada and the torture of Jane Doe. *E.g.*, ¶¶ 54, 60.

In fact, *Kiobel* analysis in this case is straightforward because providing a forum for suit against the Defendant is completely consistent with U.S. policy. In designating the AUC as a

[5] The United States Government explicitly recognized that the Defendant's organization engaged in violence as part of his drug-trafficking efforts. *See* Press Release, the Federal Bureau of Investigation, Colombian Paramilitary Leader Sentenced to 33 years in Prison for Drug Trafficking and Narco-Terrorism (Nov. 9, 2011), *available at* http://www.fbi.gov/miami/press-releases/2011/colombian-paramilitary-leader-sentenced-to-33-years-in-prison-for-drug-trafficking-and-narco-terrorism ("'Investigations such as this clearly define the connection between drugs and terrorism . . . International narco-terrorist organizations oppress communities in their home countries through force and corruption, and fund these activities by supplying illegal drugs in our communities. Every time DEA and our federal and international law enforcement partners dismantle a drug trafficking organization that funds or supports terrorism, we remove a serious threat and stop a funding source for terrorist acts.'") (quoting Special Agent in Charge Mark R. Trouville of the Drug Enforcement Administration's (DEA) Miami Field Office with regard to Defendant's sentencing)).

"terrorist organization" and "Specifically Designated Global Terrorist Organization" in 2001, and a "Significant Foreign Narcotics Trafficker" and a "Foreign Narcotics Kingpin" in 2003, the U.S. Government made the policy determination that support for the AUC implicates vital U.S. interests. ¶¶ 24, 55. In particular, these designations reflect a determination by the Executive Branch that the AUC's activities, including such conduct as provides the basis for Plaintiffs' ATS claims, "threatens the . . . national security of the United States." 8 U.S.C. § 1189(a)(1)(c); *see also Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2713 (2010) (The Secretary of State "may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in 'terrorist activity' or 'terrorism,' and thereby 'threatens the security of United States nationals or the national security of the United States.'" (quoting 8 U.S.C. §§ 1189(a)(1) and (d)(4)). More specifically, the United States Government has concluded already that Defendant's membership and participation in the AUC directly implicates vital U.S. interests. By seeking Defendant's extradition and prosecuting him under U.S. laws, the United States has unambiguously demonstrated its interest in the wrongful acts Defendant committed in Colombia. This fundamental difference distinguishes this case from *Chen Gang v. Zhao Zhizhen*, No. 3:04CV1146-RNC, 2013 WL 5313411 (D. Conn. Sept. 20, 2013) (and the cases cited therein), where no such demonstration of interest by the United States was made. *See id.* at *3 (citing cases).

Thus, the Defendant's conduct touched and concerned the United States enough to support his extradition, prosecution, conviction, and now the service of his sentence. It now must also touch and concern the United States enough to provide a forum for Plaintiffs' claims – especially when they arise out of the same horrible conduct.

D. Dismissing Plaintiffs' ATS Claims Would Not Address *Kiobel* Concerns

Defendant does not argue, as he cannot, that *Kiobel* has any effect as to Plaintiffs' parallel claims under the Torture Victim Protection Act. Jurisdiction for those claims is not based on the ATS; jurisdiction for the TVPA claims is based on federal question jurisdiction under 28 U.S.C. § 1331 because the claims "arise under" a federal statute – the TVPA. *See, e.g.*, *Kiobel*, 133 S.Ct. at 1669 (Kennedy, A., concurring) (*Kiobel* has no application as to claims under the TVPA). When TVPA claims are viable and will be litigated, dismissing accompanying ATS claims does nothing to address the *Kiobel* Court's caution to avoid interpretations of U.S. law that carry "foreign policy consequences not clearly intended by the

political branches." *See id.* at 1664. Where parties litigate claims for torture and extrajudicial killing under the TVPA based on extraterritorial conduct, no purpose is served by preventing the same conduct from providing the basis of ATS claims for additional violations of international law.

Because other claims based on the same common nucleus of facts will proceed irrespective of the fate of Plaintiffs' ATS claims, the *Kiobel* presumption is displaced.

IV. Plaintiffs' Amended Complaint Exceeds the Requirements of *Iqbal and Twombly*

Defendant is incorrect in contending that the Amended Complaint fails to provide "any clear and concrete factual nexus" between Defendant and the killings of Eduardo Estrada and Alma Rosa Jaramillo and relies on "conclusory statements rather than factual allegations." Def. Mem. 3-4. Plaintiffs have far exceeded any plausibility pleading standard under *Iqbal* and *Twombly*.

A. The Plausibility Standard

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain "'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555 (citations omitted). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678. Facial plausibility exists where plaintiffs have pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A "formulaic" or "threadbare" recitation of the elements is insufficient. *Id.*

Twombly "does not 'impose a probability requirement at the pleading stage.'" *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008) (citations omitted); *see also F.T.C. v. 1st Guar. Mortg. Corp.*, No. 09-6180-CIV. SEITZ, 2011 WL 1226213, at *2 (S.D. Fla. Mar. 30, 2011) ("Dismissal is only appropriate where the plaintiff's factual allegations do not 'raise a right to relief above a speculative level.'"), *aff'd sub nom. F.T.C. v. Lalonde*, - F. App'x -, No. 11-13569, 2013 WL 5734888 (11th Cir. 2013). Instead, the "standard 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence' of the required element." *Rivell*, 520 F.3d at 1309-10 (citations omitted). "It is sufficient if the complaint succeeds in 'identifying facts that are suggestive enough to render [the element] plausible.'" *Id.* at 1310 (citations omitted). When considering a motion to dismiss for failure to state a claim, the

"allegations in the complaint are taken as true and construed in the light most favorable to the plaintiffs." *Id*. at 1309.

B. Plaintiffs Have Pleaded Sufficient Facts to Plausibly Establish Defendant's Liability

Plaintiffs have more than met their burden under Rule 8(a)(2). To bring an ATS claim, Plaintiffs must allege that an alien Defendant committed a tort in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350; *see also Kiobel*, 133 S.Ct. at 1663. Plaintiffs have done so. They allege in the Amended Complaint that Defendant, a citizen of Colombia, violated the law of nations when he committed torts against Decedents and Jane Doe. *See* ¶¶ 4, 6-10. Defendant makes the broad unsupported assertion that Plaintiffs "fail to provide any clear and concrete factual nexus linking [Defendant]" to the tortious acts alleged in the Amended Complaint. Def. Mem at 3. To the contrary, Plaintiffs have gone far beyond the *Iqbal/Twombly* standard by pleading specific facts regarding Defendant's involvement in the AUC and BCB's torture and killing of civilians in the Middle Magdalena region, including Decedents. Plaintiffs allege that: (1) Defendant exercised command and control over BCB soldiers who were responsible for the torture and murder of civilians in Middle Magdalena; and (2) Defendant had knowledge of and accepted responsibility for the torture and murder of Decedents by his subordinates. ¶¶ 28-29, 31, 45-46. Plaintiffs specifically allege that BCB paramilitary soldiers and political operatives under Defendant's command were involved in the "widespread and systematic torture, kidnapping, and extrajudicial killing of vulnerable civilians" in the Middle Magdalena region. ¶ 28. Plaintiffs also allege that Defendant "had dominion over Middle Magdalena's resources, including its people, and over the BCB" and that during Defendant's reign "[t]he BCB tortured and murdered more than 10,000 civilians in Middle Magdalena." ¶ 29. Furthermore, Plaintiffs allege that Defendant "exercised all aspects of command and control over the AUC, over the BCB and all of the BCB's members, including setting the BCB's policy and managing its day-to-day affairs, such as the appointment, discipline and termination of BCB paramilitaries." ¶ 45.

The Amended Complaint proceeds to draw a direct connection between Defendant and the torture and killing of Decedents. It alleges that Decedents' organization, the PDP, became a target of Defendant-controlled BCB by providing "alternatives for the peasants obliged by the paramilitaries and other groups to work the coca fields, threatening the BCB's main source of

wealth and its political and economic base." ¶ 31. The Amended Complaint states that Decedent's torture and killings "were committed as part of [Defendant's] overall strategy to gain and maintain control over Middle Magdalena." ¶ 46. Indeed, it specifically states that "[t]he former head of the BCB's military wing, Julian Bolivar, and the former head of its political wing, Ernesto Paez, have testified acknowledging Macaco's knowledge of and responsibility as the BCB leader for these murders." *Id.*

These factual allegations amply satisfy Plaintiffs' burden under *Twombly* and *Iqbal*. It is well settled that claims under the ATS and the TVPA may be based on principles of secondary liability, including aiding and abetting, conspiracy, and command responsibility. *See e.g.*, *Mohamad v. Palestinian Authority*, 132 S.Ct. 1702, 1709 (2012) (noting that "the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing") (citing with approval *Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (applying command responsibility to former Vice Minister of Defense and Public Security of El Savador for abuses carried out by his subordinates in the Salvadoran military)); *see also Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (defendant may be liable under the ATS and TVPA "on two different theories: (1) aiding and abetting or (2) conspiracy"); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002) ("legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA]"); *Mamani v. Berzain*, 654 F.3d 1148, 1157 n.8 (11th Cir. 2011) ("We do not, in principle, rule out aiding and abetting liability or conspiratorial liability and so on under the ATS"). By providing detailed factual allegations regarding Defendant's connection to the BCB and mental state, Plaintiffs have sufficiently pleaded Defendant's secondary liability under the standards set forth by *Iqbal* and *Twombly*.

Defendant cites *Mamani* to support his position that the Amended Complaint's allegations are "conclusory," but his reliance on that case is misplaced. Plaintiffs have pled not only facts sufficient to establish Defendant's liability for the violations of the ATS and TVPA under secondary liability standards recognized by the Supreme Court and this Circuit, but have additionally pled that Defendant specifically directed the violence against Decedents, overcoming the putative shortcomings in *Mamani*. *See* ¶¶ 31, 46. The Amended Complaint goes so far as to identify specific witnesses under Defendant's command who have testified that Defendant was both aware of and responsible for the Decedents' torture and murder. *See* ¶ 46.

These facts create a plausible claim of relief and are more than mere "formulaic recitations of the elements of a claim." In addition, *Mamani* was a case against two leaders of a nation at a limited time of unrest where the circumstances of the killings were ambiguous and the line of command was long. In contrast, here, we have a narco-terrorist whom the U.S. Government has indicted, extradited, and convicted. There is no reason he should not now be held civilly accountable to his victims in the same Court where he was convicted. Accordingly, the Amended Complaint's allegations meet the plausibility standard.

CONCLUSION

For the foregoing reasons and based on the entire record in this case, Defendant's motion to dismiss should be denied.

Respectfully Submitted,

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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 Amended Complaint was served by CM/ECF on November 12, 2013, on counsel or parties of record on the service list.

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