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

CASE NO: 1:10-cv-21951 Ungaro/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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Rules

INTRODUCTION

Plaintiffs Jesús Cabrera Jaramillo, Jane Doe, and John Doe (collectively "Plaintiffs") filed this lawsuit against Defendant Carlos Mario Jiménez Naranjo ("Defendant") because he is responsible for the abduction and brutal slayings of Eduardo Estrada Gutierrez and Alma Rosa Jaramillo Lafourie (the "Decedents"), family members of the Plaintiffs. Their suit is brought in federal court pursuant to the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") and Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 ("TVPA"). Their suit is brought in Florida because Defendant is in Florida. He is here because he was indicted and convicted for selling cocaine into and laundering money in this country and in this State. Defendant's belated attempt to avoid responsibility for the terrorism he committed against Plaintiffs by seeking dismissal of this Complaint is meritless. The claims against him are well pled and personal jurisdiction is proper in Florida.

BACKGROUND

Defendant is one of Colombia's most notorious paramilitary leaders and drug traffickers. ¶ 12 (paragraph (¶) references refer to the Complaint). Between 1998 and 2005, the Defendant was the high commander of an organization known as Bloque Central Bolivar ("BCB"), and commanded up to seven-thousand armed combatants. ¶ 10. The BCB is a subdivision of the United Self-Defense Forces of Colombia ("AUC"), a paramilitary group introduced and used by the Colombian government as part of its campaign against guerilla fighters located in areas of the country where the Colombian government had limited or no state presence. ¶¶ 18-20. As part of this campaign, the BCB, under Defendant's direction, executed systematic attacks on civilians, including torture, forced disappearances, extrajudicial killings, and massacres. *Id*. 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 population. ¶ 10.

In 1998, the Defendant led an invasion of Middle Magdalena, a resource-rich area of Colombia known for its large production of coca. ¶¶ 25-26. Through the use of violence, Defendant proceeded to consolidate power in Middle Magdalena and became the *de facto* governor and high commander of all of Middle Magdalena. ¶¶ 26-28. The BCB, at Defendant's direction, funded this violent political expansion through the production, sale, and trafficking of narcotics, including the export of cocaine to the United States. ¶ 21.

As part of his consolidation of power in Middle Magdalena, Defendant directed the BCB to target leaders of the Program for Peace and Development ("PDP"), an organization which provided peasants alternatives to growing coca, BCB's main source of wealth and its political and economic base. ¶¶ 29-30. Two of those PDP leaders were Decedents. ¶¶ 31, 37. 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. ¶¶ 32-33. Despite being shot approximately 300 meters from a local police station, the local police did not assist him and government soliders passed by and offered no help. ¶ 35. Alma Rosa Jaramillo worked on the campaign of a mayoral candidate who ran in opposition of the BCB candidate. ¶ 38. In months after the election, a BCB sympathizer city councilman told Defendant's subordinates that she was a guerilla collaborator. ¶ 35. On or about June 28, 2001, she was forcibly abducted by Defendant's subordinates. ¶ 40. Her mutilated body was later found in a river on or about July 1, 2001. ¶ 35.

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 as the BCB leader for Decedents' murders. ¶ 45. The abuses were committed as part of the Defendant's overall strategy to gain and maintain control over Middle Magdalena. *Id*.

Defendant used the proceeds of narcotics-trafficking to fund the BCB's violence in Middle Magdalena. ¶ 21. As part of this business, Defendant imported cocaine into the United States and used banks in Miami, Florida to launder the proceeds of those unlawful activities. *See* Second Superseding Indictment, *United States v. Jimenez-Naranjo*, No. 1:07-cr-20794-JAL-1 (S.D. Fla. Aug. 19, 2010); Superseding Indictment, *United States v. Jimenez-Naranjo*, No. 1:05-cr-00235-RMC (D.D.C. Sept. 25, 2007). As a result of these actions, Defendant was extradited to the State of Florida on May 13, 2008 to face criminal charges before this Court. *See* U.S. Department of Justice, *14 Members of Colombian Paramilitary Group Extradited to the United States to Face U.S. Drug Charges* (May 13, 2008), Exhibit ("Ex.") 1 to the Declaration of Nema Milaninia in Support of Plaintiffs' Opposition to Motion to Dismiss, filed concurrently herewith. In May 2011, Defendant pled guilty to these charges and was

sentenced.[1] Defendant is now currently an inmate at the Federal Detention Center in Miami, FL. *See* Federal Bureau of Prisons, *Inmate Finder* (Sept. 29, 2011) (Ex. 2).

ARGUMENT

I. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE IT IS UNTIMELY

Defendant's motion is untimely and should be denied on that independent basis. Even where no responsive pleading has been filed, this Court and other trial courts in the Eleventh Circuit have held that a motion to dismiss is untimely if filed and served after the 21-day period permitted for a responsive pleading under Fed. R. Civ. P. 12(a)(1)(A). *See Nowak v. Lexington Ins. Co.*, 464 F. Supp. 2d 1248, 1249 (S.D. Fla. 2006) (holding "that the Motion to Dismiss was untimely filed more than twenty days after the Complaint was served on Defendant . . ."); *Suntrust Bank v. O'Brien*, No. 3:09CV85/RV/EMT, 2009 WL 1393439, at *2 (N.D. Fla. May 18, 2009) (dismissing defendant's Rule 12(b) motion as untimely because it was filed twenty-eight days "after the time for filing an answer had expired."); *United States v. FloridaUCC Inc.*, No. 4:09-cv-46, 2009 WL 1971428, at *8 (N.D. Fla. July 3, 2009) (denying defendant's Rule 12(b) motion because "motion was filed well beyond the 20 day time period."). Here, Defendant's motion to dismiss is untimely because it was filed 54 days after the July 19, 2011 status conference at which he was relieved of his default, 80 days after the deadline to Answer on June 24, 2011, and over a year after being served with the summons and Complaint.

II. PLAINTIFFS' COMPLAINT EXCEEDS THE STANDARDS UNDER *IQBAL* AND *TWOMBLY*

Defendant's motion to dismiss makes two arguments why Plaintiffs' Complaint purportedly fails to state a claim for relief under Fed. R. Civ. P. 12(b)(6): (1) Defendant contends that the Complaint "fails to offer any nexus between [Defendant] and his subordinates who allegedly committed the unlawful acts;" and (2) Defendant contends that the Complaint fails to "allege specifically that the Colombian government officials were involved in the killings of Jaramillo and Estrada." Defendant's Motion to Dismiss ("Def. Mem.") at 1, 12. Even were this Court to determine that Defendant's motion to dismiss is timely, which it is not,

[1] Based on information identified on the Defendant's docket in *United States v. Naranjo*, Case No. 1:07-cr-20794-JAL-1 (S.D. Fla.) when it was available to Plaintiffs and other members of the public. The contents of the docket are now sealed.

Plaintiffs' allegations easily satisfy any plausibility standard of pleading under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

A. The Applicable 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). In *Twombly*, the Supreme Court explained that "[t]o 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*, 129 S. Ct. at 1949 (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*.

The Eleventh Circuit, in addressing the pleading standard under *Twombly*, has stated that "[t]his rule 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. 09-61840-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.'"). Instead, the "standard 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the required element." *Id*. 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; *see also In re Chiquita Brands Int'l, Inc., Alien Tort Statute & S'holder Deriv. Litig*, -- F. Supp. 2d --, No. 10-80652-CIV-MARRA, 2011 WL 2163973, at *6 (S.D. Fla. June 3, 2011) (holding that when construed in the light most favorable to the plaintiffs, plaintiffs had sufficiently stated claim under ATS and TVPA).

B. Plaintiffs Have Pled Sufficient Plausible Facts to Establish Defendant's Liability

Plaintiffs have pled sufficient plausible facts to establish Defendant's liability for the violations of the ATS and TVPA alleged in the Complaint. The Eleventh Circuit has consistently recognized that liability for claims under the ATS and the TVPA may be based on principles of secondary liability, including aiding and abetting, conspiracy, and command responsibility as was alleged in the Complaint. *See Mamani v. Berzain*, No. 10-13071, 2011 WL 3795468, at *5 n.8 (11th Cir. Aug. 29, 2011) ("We do not, in principle, rule out aiding and abetting liability or conspiratorial liability and so on under the ATS . . ."); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (holding that defendant could be liable for claims 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) (holding that "legislative history makes clear that Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA]").

Defendant cannot and does not explicitly contend that theories of secondary liability were inadequately pled. Rather, Defendant makes the broad assertion that "[t]he complaint is completely devoid of any concrete connection between [Defendant] and the alleged acts." Def. Mem. at 9. That mischaracterizes the Complaint and, implicitly, the standard required at the motion-to-dismiss stage. To survive a motion to dismiss, a Complaint must only "contain sufficient factual matter" which, when accepted as true and taken in the light most favorable to Plaintiffs, states a "plausible claim for relief." *Iqbal*, 129 S. Ct. at 1949-50. There is no "concrete connection" requirement, but this Complaint explicitly establishes Defendant's liability for the atrocities he caused.

Plaintiffs have gone beyond the *Iqbal* 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. The Complaint alleges both 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 these specific Decedents by his subordinates. ¶¶ 27-28, 30, 44-45. The Complaint specifically alleges 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. ¶ 27. The Complaint notes 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." ¶ 28. The Complaint makes clear 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." ¶ 44.

The Complaint proceeds to draw a direct connection between the Defendant and the torture and killing of Decedents. The Complaint alleges that Decedents' organization, the PDP, became a target of the 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." ¶ 30. The 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." ¶ 45. Indeed, the Complaint 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.*

The detailed description of the connection between Defendant and the torture and murder of Decedents distinguishes this case from *Mamani* on which Defendant relies in his motion to dismiss. Def. Mem. at 7-8. In *Mamani*, the Eleventh Circuit found to be too conclusory the allegations that: (1) the President and Defense Minister of Bolivia "exercised command responsibility over, conspired with, ratified, and/or aided and abetted subordinates in the [Bolivian] armed forces;" (2) the defendants "knew or reasonably should have known of the pattern and practice of widespread, systematic attacks against the civilian population by subordinates under their command;" and (3) that defendants "failed or refused to take all necessary measures to investigate and prevent these abuses, or to punish personnel under their command for committing such abuses." 2011 WL 3795468, at *4. The Eleventh Circuit found that the plaintiffs in *Mamani* did not plead sufficiently specific facts that could plausibly suggest that the defendants knew or should have known about the killing of the decedents in that case. *Id.*[2]

[2] While this requirement of specific knowledge of victims marks a sharp departure from Supreme Court and Eleventh Circuit precedent, (*see In re Yamashita*, 327 U.S. 1, 14-16 (1946) (holding that a high ranking commander can be liable for acts of his subordinates even if he did

In this case, Plaintiffs have pled not only facts sufficient to establish Defendant's liability for the violations of the ATS and TVPA under secondary liability standards previously recognized in this Circuit and in other federal courts, plaintiffs have additionally pled that Defendant specifically directed the violence against Decedents, overcoming the putative shortcomings in the *Mamani* case. *See* ¶¶ 30, 45. Indeed, the 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* ¶ 45. 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. In contrast, here, we have a narco-terrorist whom the U.S. government has indicted in two different districts, 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.

C. Plaintiffs Have Pled Sufficient Plausible Facts To Establish That The Violations Were Committed Under Color of Law

Defendant is wrong to argue that Plaintiffs failed to plead sufficient facts to establish a connection between the acts in the Complaint and the government of Colombia (also known as acting under "color of law"). Def. Mem. at 11-13. Plaintiffs have pled sufficient plausible facts to establish that the violations of were committed under "color of law."

This Court and the Eleventh Circuit have held that to plead "color of law" under either the ATS or the TVPA it is sufficient to allege plausible facts of a "symbiotic relationship" between the defendant and the government. *See Chiquita Brands*, 2011 WL 2163973, at *6; *Sinaltrainal v. Coca-Cola Co*., 578 F.3d 1252, 1266 (11th Cir. 2009) (adopting the "symbiotic relationship" standard). Defendant claims that the Complaint "must allege specifically that the Colombian government officials were involved in the killings of Jaramillo and Estrada." Def. Mem. at 12. In *Chiquita Brands*, this Court rejected that precise argument, holding that a "symbiotic relationship" does not require showing "specific government involvement with each individual act of torture and killing of Plaintiff's relatives." 2011 WL 2163973, at *19. This

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not order or direct the specific wrongful conduct); *see generally Ford*, 289 F.3d 1283 (holding that a high ranking commander can be liable for acts of his subordinates even if he did not order or direct the specific wrongful conduct)), the instant complaint meets this higher standard.

Court reasoned that "[w]hile the symbiotic relationship must involve 'the torture or killing alleged in the complaint . . . the Eleventh Circuit has approved a district court exercising this standard by inquiring whether 'the symbiotic relationship between the paramilitaries and the Colombian military had anything to do with the conduct at issue." *Id.* (citing *Doe v. Drummond Co.*, Case No. 2:09-cv-01041, slip op. at 11 (N.D. Ala. April 30, 2010)).

In fact, this Court has concluded that at a motion-to-dismiss stage it is sufficient where, as here, Plaintiffs have "allege[d] a symbiotic relationship between the Colombian government and the AUC with respect to the AUC's campaign of torture and killing of civilians." *Id.* In *Chiquita Brands*, this Court found that the plaintiffs did "more than assert generalized allegations" by providing facts regarding "the government's role in creating financing, promoting, and collaborating with the AUC" and the link between this relationship and the "campaign of torture and killing" in the Urbana and Magdalena regions of Colombia. *Id.* at *23; *see also Drummond*, slip op. at 11 ("The Colombian government, according to the allegations, not only tolerates the paramilitaries, but also encourages, supports, and relies on their existence. This is more than a 'formulaic recitation' that the paramilitary forces were in a symbiotic relationship with the Colombian government.").

As in *Chiquita Brands*, Plaintiffs' Complaint describes a direct, symbiotic relationship between the Colombian government and the AUC that involves the AUC's torture and killing of civilians in the Middle Magdalena region. For example, the Complaint alleges:

- "To fight this internal armed conflict against the guerrilla groups located in areas of the country where the Colombian government had only limited or no state presence, the Colombian government **introduced** and used paramilitary groups." ¶ 18 (emphasis added).

- "The AUC's influence reached beyond the Colombian government and military and extended to local government officials. Specifically, the AUC **controlled** individuals involved in the selection of mayors, judges, directors of public hospitals, and other municipal officials in all areas they occupied. The AUC **infiltrated** local governments because the AUC's role was to infiltrate and fight guerrillas in areas of the country where the Colombian government had only limited or no state presence." ¶ 21 (emphasis added).

- "The Colombian government **knew** of, and at times directly **participated in**, well-publicized and documented human rights abuses, and continued to organize, regulate, arm, conspire and collaborate with the AUC. The Colombian government provided transportation, munitions, and communications to the AUC. Powerful political officials, including top officials in Colombian President Álvaro Uribe

Vélez's government, are associated with the AUC. Other politicians had strong links with and received funding from the AUC." ¶ 22 (emphasis added).

- "The Colombian government not only did nothing to prevent but **authorized** Middle Magdalena's invasion." ¶ 26 (emphasis added).

- "Eduardo Estrada was believed to be a potential candidate to run against the BCB candidate for mayor who eventually won the election on or about October 28, 2000." ¶ 32.

- "Eduardo Estrada was shot approximately 300 meters from the local police station, yet the local police **did not assist** him. Government soldiers also **passed and offered no help**." ¶ 35 (emphasis added).

- "In 2000, Alma Rosa Jaramillo was working on the campaign of a mayoral candidate who ran in opposition to a BCB candidate who eventually won the election on or about October 28, 2000. In the months after the election, Alma Rosa Jaramillo discovered that a BCB sympathizer city councilman in Middle Magdalena named Manuel Payares had told Macaco's subordinates that she was a guerrilla collaborator. Alma Rosa Jaramillo confronted Macaco's subordinates to explain that the accusations were false and, in early 2001, she even filed a slander suit against Payares." ¶ 38.

These detailed facts which specifically describe a direct and symbiotic relationship between the torture and murder of Decedents and the Colombian government distinguish the allegations in this case from those found insufficient in the *Sinaltrainal* case which Defendant relies upon in his motion to dismiss. In *Sinaltainal*, and unlike here, the plaintiffs conclusory alleged that the paramilitaries were "permitted to exist," were "'assisted' by the Colombian government," that the government "tolerate[d] the paramilitaries, allow[ed] them to operate, and often cooperate[d], protect[ed] and/or work[ed] in concert with them." 578 F.3d at 1266. Here, Plaintiffs do not merely allege that the Colombian government "tolerated and permitted" the AUC's activity. The Complaint alleges the Colombian government's active participation in the AUC's activity and in the killings of the Decedents. *See* ¶¶ 32, 35, 38. Thus, unlike *Sinaltrainal*, where there was "no suggestion the Colombian government was involved in, much less aware of, the murder and torture alleged in the complaints," (578 F.3d at 1266) Plaintiffs provide detailed allegations of the government's close cooperation with the AUC regarding the torture and killing alleged in the Complaint. *See* ¶¶ 18, 21-22, 26 32, 35, 38.

The facts pled here also go well beyond those found to be sufficient in *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005). In *Aldana* the Eleventh Circuit

found that the plaintiff's allegations that public officials "failed to take action in order to permit the violence to occur," "were part of the security force," "assisted' the security force" and that the Mayor allegedly participated in the offense were sufficient to establish that the violations occurred under "color of law." *Id.* at 1248-49. As in *Aldana*, this Complaint also alleges the active participation of government soldiers and local officials in the killings of Decedents, including that government soldiers passed by a murdered Eduardo without offering to assist and city councilman in Magdalena falsely informed Defendant's subordinates that Alma Rosa was a guerrilla collaborator. *See* ¶¶ 32, 35, 38. But it also goes further by alleging that the Colombian government used the AUC in areas whether it had limited or no state presence, provided the AUC transportation, munitions and communications, and authorized the AUC's invasion of Middle Magdalena. *See* ¶¶ 18, 22, 26. Accordingly, the Complaint's allegations meet the plausibility standard.[3]

III. THIS COURT HAS JURISDICTION OVER THE DEFENDANT

The Eleventh Circuit has held that during the motion to dismiss phase, a plaintiff must only "establish a *prima facie* case of personal jurisdiction over a nonresident defendant." *S.E.C. v. Carrillo*, 115 F.3d 1540, 1542 (11th Cir. 1997) (quoting *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). When determining whether a *prima facie* case has been

[3] Proof of state action or that the violations were committed under "color of law" is also met because Defendant and his subordinates were the "*de facto* government of Middle Magdalena." ¶ 46. The Complaint alleges that "by the year 2000 [the BCB] became the occupying force and *de-facto* government of all of Middle Magdalena, with the Defendant sitting as its high commander." ¶ 26. The Complaint notes that the BCB "controlled the selection of mayors, judges and directors of public hospitals, as well as other municipal officials" and "also developed a political wing with members occupying positions in local government." ¶ 27. Federal courts have recognized that non-State entities, although not a part of the legitimate government, may have *de facto* control over a defined territory and satisfy the state action requirement. *See Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 9 (D.D.C. 1998) ("However, the state action requirement of the TVPA does not require that a particular government be officially recognized. Certain private groups may constitute a de facto state, in which case they will be held liable under the TVPA."); *Kadic v. Karadzic*, 70 F.3d 232, 244 (2d Cir. 1995) ("Any government, however violent and wrongful in its origin, must be considered a 'de facto government' if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation.") (citation omitted). Accordingly, along with there being a "symbiotic relationship" between Defendant and the Colombian government, sufficient plausible facts have been asserted that Defendant and his subordinates were the *de facto* government of Middle Magdalena. In fact, it was this *de facto* government that caused the harms suffered by Decedents.

established, "[t]he district court must accept the facts alleged in the complaint as true . . . [and] the district court must construe all reasonable inferences in favor of the plaintiff." *Id*.

A federal court may exercise personal jurisdiction over a defendant "so long as the exercise is consistent with federal due process requirements." *Licciardello v. Lovelady*, 544 F.3d 1280, 1283 (11th Cir. 2008). Defendant's motion is not timely and the defense of personal jurisdiction has, therefore, been waived (or forfeited). However, if the Court were to reach the merits of the issue, the requirements of due process are satisfied in this case because: (1) Defendant was served while present in the State of Florida; (2) Defendant has sufficient contacts with the State; and (3) the exercise of personal jurisdiction in this case does not offend "traditional notions of fair play and substantial justice."

A. Defendant has Waived Any Defense Based on Personal Jurisdiction

Fed. R. Civ. P. 12(h)(1) states that a party waives any defenses listed in Rule 12(b)(2)-(5) by failing to make a motion under Rule 12 or failing to include a defense in a responsive pleading. FED. R. CIV. P. 12(h)(1)(B). In the instant case, Defendant has yet to file an answer to the Complaint and his motion to dismiss was filed after the time for filing an answer had expired. Therefore, Defendant has waived the defense of lack of personal jurisdiction. *See O'Brien*, 2009 WL 1393439, at *2 (holding that Defendant waived the defense for improper venue by failing to file an answer on time and by filing his motion to dismiss 28 days after the summons and Complaint were served); *FloridaUCC*, 2009 WL 1971428, at *8 (holding that defendant had waived the defense of lack of personal jurisdiction "[b]ecause Plaintiff's [motion to dismiss] was filed well beyond the 20 day time period" permitted to file an answer). This motion was not filed until 54 days after the status conference at which he was relieved of his default.

B. This Court has Personal Jurisdiction Because Defendant Was Served While in Florida

A defendant served while present in the State is subject to personal jurisdiction there "without regard to whether the defendant was only briefly in the State or whether the cause of action was related to his activities there." *Burnham v. Superior Court*, 495 U.S. 604, 611-12 (1990). In *Burnham*, the Supreme Court unanimously upheld the constitutionality of personal jurisdiction based on personal service on a non-resident while that person was physically in the State. *Id*. at 628. The Court held that "jurisdiction based on physical presence alone

constitutes due process because it is one of the continuing traditions of our legal system." *Id*. at 619. The Court reasoned that:

> Among the most firmly established principles of personal jurisdiction in American tradition is that the courts of a State have jurisdiction over non-residents who are physically present in the State. The view developed early that each State had the power to hale before its courts any individual who could be found within its borders, and that once having acquired jurisdiction over such a person by properly serving him with process, the State could retain jurisdiction to enter judgment against him, no matter how fleeting his visit.

Id. at 610-11.

Defendant erroneously relies upon the concurring opinion of Justice Brennan in *Burnham* to argue that a non-resident's presence in the forum must be "voluntary." Def. Mem. at 20. The Supreme Court has not ruled that "voluntary" presence is constitutionally required for personal jurisdiction based on a non-resident's presence. *Burnham*, 495 U.S. at 628 (holding unanimously that "[b]ecause the Due Process Clause does not prohibit the California courts from exercising jurisdiction over petitioner based on the fact of *in-state service of process*, the judgment is affirmed") (emphasis added). Indeed, the plurality authored by Justice Scalia never uses the word "voluntary" and Justice Brennan's concurrence implies that personal jurisdiction may be appropriate even where the defendant's presence in the forum is involuntary. *Id.* at 636 n.11 (noting that there "*may be* cases in which a defendant's involuntary or unknowing presence" does not confer personal jurisdiction) (emphasis added); s*ee also C.S.B. Commodities, Inc. v. Urban Trend (HK) Ltd.*, 626 F. Supp. 2d 837, 846 (N.D. Ill. 2009) ("Despite Justice Brennan's less bright-line approach, his opinion hints that rare (if ever) would be the situation when transient jurisdiction would not satisfy due process.").

Since *Burnham* every civil case involving an extradited defendant has been permitted to proceed. In fact, no court in a civil case has denied personal jurisdiction over an extradited defendant. *See, e.g., S.E.C. v. Eurobond Exch., Ltd.*, 13 F.3d 1334, 1337 (9th Cir. 1994) (upholding the district court's exercise of personal jurisdiction over an extradited defendant); *S.E.C. v. Marimuthu*, 552 F. Supp. 2d 969 (D. Neb. 2008) (same); *see also C.S.B. Commodities*, 626 F. Supp. 2d at 846-47 ("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. This court sees no reason to break from that apparently unbroken line of precedent.").

Here, Defendant was personally served on July 13, 2010 while at the Florida Detention Center in Miami. *See* Docket Entry No. 19. Because Defendant was properly served while physically present in the state of Florida, this Court should uphold the exercise of personal jurisdiction.

C. The Exercise of Personal Jurisdiction in this Case Comports with Due Process

Exercising personal jurisdiction over Defendant here satisfies the requirements of due process. The *Burnham* plurality noted that due process is satisfied where a court adheres to "jurisdictional rules that are generally applied and have always been applied in the United States." *Burnham*, 495 U.S. at 622-23. In *Burnham*, the plurality authored by Justice Scalia found that personal service satisfied the requirements of due process because service while physically present in the forum has long been an accepted basis of personal jurisdiction. *Id.* Here, where defendant was personally served while physically present in the forum, due process is satisfied.

Personal jurisdiction is also proper because it comports with "contemporary notions of due process." *Id.* at 630. Even Defendant concedes that personal jurisdiction over a defendant served with process in the State will almost always comport with due process. Def. Mem. at 20 ("The transient rule is consistent with reasonable expectations and is 'entitled to a strong presumption that it comports with due process.'") (citation omitted).

A jurisdictional rule traditionally satisfies 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." *Carrillo*, 115 F.3d at 1542 (quoting *Francosteel Corp. v. M/V Charm, Tiki, Mortensen & Lange*, 19 F.3d 624, 627 (11th Cir. 1994)). In this case, personal jurisdiction over Defendant also comports with due process because: (1) Defendant has minimum contacts with this State; (2) Defendant is not burdened by litigating in the State where he is currently residing; and (3) this Court and Plaintiffs have a strong interest in adjudicating this suit in this forum.

1. Defendant has minimum contacts with the State of Florida

An extradited individual has minimum contacts with a State where his criminal activities had an effect in the State or where the defendant interacted with institutions in the State. This case is similar to *Marimuthu*. There the defendant, a resident of Malaysia, was

extradited to the United States to face criminal charges for securities fraud. 552 F.Supp.2d at 973. While detained in a federal detention center, the defendant was served with a summons and Complaint relating to a separate civil suit. *Id.* The district court rejected defendant's argument that it lacked personal jurisdiction, reasoning that the defendant had minimum contacts with the State because he had had manipulated U.S. stocks using investment accounts he voluntarily opened with U.S. brokers. *Id.*

Defendant's argument that "[h]is contacts in this forum have been both tenuous and involuntary" should also be rejected. Here, like in *Maritmuthu*, Defendant has sufficient contacts with the State of Florida. Defendant was responsible for manufacturing and exporting drugs which were imported into the United States. *See* Second Superseding Indictment, *United States v. Jimenez-Naranjo*, Case No. 1:07-cr-20794-JAL-1 (S.D. Fla. Aug. 19, 2010). In addition, Defendant used the proceeds from his drug trafficking and laundered them through banks in Florida. *Id*. It was because of these contacts with Florida that Defendant was extradited from Colombia to face federal criminal charges in this Court. *See* Ex. 1. And it was because of these facts that Defendant agreed to plead guilty. Accordingly, Defendant has clear minimum contacts with this State.

2. The exercise of personal jurisdiction in this case will not offend traditional notions of fair play and substantial justice

When determining whether personal jurisdiction satisfies notions of fair play and substantial justice, the Eleventh Circuit looks to three factors: (1) the burden on the defendant; (2) the interests of the forum; and (3) the plaintiff's interest in obtaining relief. *See Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 947-48 (11th Cir. 1997).

The Eleventh Circuit has noted that the burden on a litigant is only significant if it is "'gravely difficult and inconvenient' that he unfairly is at 'a severe disadvantage' in comparison to his opponent." *Id.* at 948 (holding that the Southern District of Florida had jurisdiction over RICO claims against alien corporation and defendants where defendants presented no evidence that their defense would be significantly compromised if required to litigate in Miami) (citation omitted). Inconvenience alone is not enough to deny a court personal jurisdiction over the defendant. *Id.* (noting that only in "rare cases" will inconvenience become constitutionally unreasonable) (citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 116 (1987).

The Eleventh Circuit has also noted that a defendant's burden is "counterweighed" by evidence of plaintiff's strong interest to litigate in the State and if the plaintiff have no other means of obtaining relief. *See Carrillo*, 115 F.3d at 1548 (holding that Florida had an "'obvious interest in stamping out the type of nefarious economic chicanery alleged.' Additionally, the plaintiff SEC has a strong interest in litigating this case in this forum because it has no other means of obtaining relief.") (citing *Sculptchair, Inc. v. Century Arts*, 94 F.3d 623, 632 (11th Cir. 1996); *Sculptchair*, 94 F.3d at 631-32 (finding any burden on a foreign defendant currently residing in Florida to be "counterweighted" by Florida's interest in adjudicating the claims alleged in the complaint and "Sculptchair's natural interest in obtaining relief for these alleged injustices.").

Here, Defendant has not demonstrated that the exercise of personal jurisdiction would be "so gravely difficult and inconvenient" as to defeat due process. Not only is the burden "slight," Florida is arguably 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) (defendant was considered to be "actually living" in prison at the time of service, and was properly served there.).

In addition, both this Court and Plaintiffs have a significant interest in adjudicating these claims here. Plaintiffs bring their claim pursuant to two federal statutes. This Court should therefore presume that personal jurisdiction is necessary to serve "congressional objectives" as embodied in the ATS and TVPA. *BCCI Holdings*, 119 F.3d at 948 (noting that where a claim is brought under a federal statute "courts should presume that nationwide personal jurisdiction is necessary to further congressional objectives."). Furthermore, plaintiffs have a strong "natural interest" in litigating in the forum. Like the plaintiff in *Carillo*, Plaintiffs here have no other means of obtaining relief, as Defendant is not subject to personal jurisdiction in any other State in the United States and has effectively been removed from Colombian jurisdiction due to his extradition here. For these reasons, the interests of this forum and of Plaintiffs outweigh any possible inconvenience this litigation may impose on Defendant. Indeed, it would offend notions of fair play and substantial justice if the Defendant, a convicted narco-terrorist, were immune from lawsuits by the very individuals who were victims of his crimes.

For these reasons, the exercise of personal jurisdiction over Defendant comports with the Due Process clause of the Fifth Amendment.[4]

CONCLUSION

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

Dated: September 29, 2011

By: /s/ Julie C. Ferguson

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[4] Defendant is mistaken in suggesting that the only way to establish personal jurisdiction is through Florida's long-arm statute. Def. Mem. at 14. Personal service on a defendant who is physically present in the forum is, and has always been, a basis for personal jurisdiction. *Burnham*, 495 U.S. at 610-11. Indeed, before the development of long-arm jurisdiction, service of a complaint on a defendant within the jurisdiction was the only way to obtain personal jurisdiction. *See Pennoyer v. Neff*, 95 U.S. 714 (1877).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Declaration of Nema Milaninia in Support of Plaintiffs' Opposition to Defendant's Motion to Dismiss was served through the Court's CM/ECF System on counsel or parties of record on the service list.

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