

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

Claudia Balcerro Giraldo, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 2:09-cv-1041-RDP
)	
Drummond Company, Inc. et al.,)	
)	
Defendants.)	

**AUGUSTO JIMÉNEZ'S
MOTION FOR SUMMARY JUDGMENT**

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Dated: September 24, 2012

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Augusto Jiménez hereby moves for summary judgment on all claims by all plaintiffs pursuant to Federal Rule of Civil Procedure 56(a). The allegations of the complaint on which the Court relied to deny Mr. Jiménez's motion to dismiss have been proven untrue during discovery. There is no evidence showing that Mr. Jiménez was involved in the killings alleged in this case, and Plaintiffs' claims against him should now be dismissed.

INTRODUCTION

The 596 plaintiffs in this case bring claims against Augusto Jiménez, President of Drummond Ltd.'s ("DLTD") Colombian branch. They claim that he personally collaborated with an illegal right-wing paramilitary group called the Autodefensas Unidas de Colombia ("AUC") to kill innocent civilians who lived along DLTD's rail line. Plaintiffs assert that Mr. Jiménez is liable for the deaths of 144 people as a result of this alleged collaboration under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS") and the Torture Victims Protection Act, 28 U.S.C. § 1350 Note ("TVPA").

When deciding the motion to dismiss, the Court accepted Plaintiffs' allegations against Mr. Jiménez as true, including the allegations that he "was a direct participant in Drummond's plan to make significant payments to the AUC's Juan Andres Alvarez Front" and that DLTD employee Alfredo Araujo "used his position in the company to get Defendant Jiménez and others to agree to the plan to

make substantial payments to the AUC.” Second Am. Compl. ¶¶ 133, 134 (Dkt. 55); Mem. Op. at 28-29 (Mar. 11, 2011) (Dkt. 141).¹ The Court observed that Plaintiffs alleged that he “knew of the AUC’s record of engaging in the Colombian civil conflict and agreed to pay that organization on behalf of Drummond.” Mem. Op. at 29 (Mar. 11, 2011). As a result, the Court concluded that “a reasonable inference can be made that Jiménez’s motives for approving payments to the AUC were for the purpose of participating in the murders as alleged.” *Id.*

Plaintiffs deposed five former paramilitaries,² a paramilitary collaborator (Jaime Blanco), a Colonel of the Colombian army (Colonel Mejía), two former Drummond employees,³ and ten present Drummond employees and consultants,⁴ and also obtained voluminous documents and e-mails covering the entire period of 1996-2006 that include, inter alia, all documents making any reference to paramilitaries. El Tigre testified that Alfredo Araujo arranged payments by DLTD to the AUC, but failed to allege any involvement by Jiménez. Ex. J, Esquivel Dep. 30-37, Mar. 22, 2012.⁵ Araujo flatly denied El Tigre’s account. Ex. T, Araujo

¹ The Court’s order denying Mr. Jiménez’s motion to dismiss addressed the Second Amended Complaint. The factual allegations of the Second Amended Complaint and the now-operative Third Amended Complaint are very similar, except for the one critical distinction: Plaintiffs removed the allegation that Mr. Jiménez “agreed” to the plan to make payments to the AUC.

² El Tigre, Samario, Gelvez, Duarte and Charris.

³ Mike Zervos and Julian Villate.

⁴ Garry Drummond, Mike Tracy, Augusto Jiménez, Alfredo Araujo, Fabio Echeverri, Bruce Webster, Jose Miguel Linares, Debra Peel, Ken Dortch, and John Fallis.

⁵ Mr. Jiménez cites to the exhibits to DLTD’s Motion for Summary Judgment, where possible, as “Ex. A,” “Ex. B,” etc. Exhibits to this motion will be cited as “Jiménez Ex. A,” “Jiménez Ex.

Dep. 46:6-15, May 24, 2012. And not a single witness, or a single document, provided any non-hearsay support to the allegations that Jiménez was a participant in any plan to pay the AUC.

Mr. Jiménez himself flatly denied any collaboration with or payments to the AUC, saying, “we set that policy. We will not make payments . . . no matter what, we were not going to make payments.” Ex. E, Jiménez Dep. 58:9-16, June 29, 2012. Supporting Mr. Jiménez’s denial is the conclusive result of an investigation by the Colombian Attorney General’s National Unit Against Terrorism. The Colombian prosecutor, William Pacheco, initiated an investigation of Mr. Jiménez and Mr. Araujo for possible ties to the AUC (based on an anonymous letter that later turned out to be fake). Jiménez Ex. A, Office of the Att’y Gen. of the Nat. Decision (June 29, 2010) at DRUM0000311. He issued a 55-page decision in which he cited testimony by numerous witnesses and relevant documents gathered as part of the investigation. *Id.* He ultimately concluded that there was no evidence to support charges against Mr. Jiménez or Mr. Araujo. *Id.* at DRUM0000350; Jiménez Ex. B, Pacheco Dep. 16:21-17:19, July 12, 2012. In fact, Mr. Pacheco testified in this case that Mr. Jiménez’s lawyer contacted him, insisting that Mr. Jiménez was available to answer questions in the investigation,

B,” etc.

but Pacheco declined to even interview Mr. Jiménez because of the lack of evidence against him. Jiménez Ex. B, Pacheco Dep. 98:20-99:10.

The remainder of the evidence is likewise devoid of support for the allegation that Mr. Jiménez agreed to make payments to the AUC or otherwise approved such payments. Mr. Jiménez was barely mentioned in the testimony that Plaintiffs elicited from paramilitary witnesses, and there are certainly no documents to support such a claim. The two statements made by Plaintiffs' witnesses about Mr. Jiménez relate to killings that are not at issue here and, in any event, are inadmissible hearsay. They may not be properly considered by the Court on this motion.

In addition to the arguments here, Mr. Jiménez joins the arguments in DLTD's motion for summary judgment, and adopts them in their entirety insofar as they are applicable to him. In particular, the ATS claims against Mr. Jiménez must be dismissed because the ATS cannot be applied extraterritorially. The Supreme Court will hear additional argument on October 1 in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111(2d Cir. 2010), *cert. granted* 132 S. Ct. 472 (Oct. 17, 2011), regarding "whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States," 132 S. Ct. 1738 (Mar. 5, 2012), suggesting that it will resolve that question. All of Mr.

Jiménez's conduct took place in Colombia. Even if the ATS can be applied extraterritorially, both the ATS claim and the remaining TVPA claim against Mr. Jiménez require proof of state action.⁶ *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005). As this Court and the Eleventh Circuit have stated, there must be evidence "of a symbiotic relationship that involves the torture or killing alleged in the complaint to satisfy the requirement of state action." *Sinaltrainal v. Coca-Cola, Co.*, 587 F.3d 1252, 1266 (11th Cir. 2009) (internal quotation omitted); Mem. Op. at 11 (Apr. 30, 2010). There is simply no evidence of such a symbiotic relationship between the Colombian government and the AUC in the killing of Plaintiffs' 144 decedents, and the TVPA claim must also be dismissed.

For all of these reasons, there is no genuine issue of material fact with regard to Mr. Jiménez's liability in this case, and the claims against him should be dismissed.

STATEMENT OF UNDISPUTED FACTS

1. DLTD is a limited partnership organized under the laws of Alabama, and headquartered in Birmingham, Alabama. Ex. B, Agreement of Ltd. P'ship of DLTD.

⁶ The ATS does have a war crimes exception to the state action requirement, *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995), but the meager evidence against Mr. Jiménez cannot satisfy the intent and knowledge requirements of this exception. See DLTD Mot. Summ. J. 22-29 (Sept. 17, 2012) (Dkt. 396).

2. Since approximately 1995, DLTD has owned and operated a coal mine and related facilities near the town of La Loma, in the Department of Cesar, Colombia, and a port for the loading and shipping of coal in La Cienaga, Department of Magdalena. Ex. C, Tracy Dep. 35:11-17, June 28, 2012; Ex. D, G. Drummond Dep. 73:20-21, June 27, 2012; Ex. E, Jiménez Dep. 24:19-25:1.

3. Augusto Jiménez is a Colombian citizen who has been the President of Drummond Ltd.'s Colombian branch since 1990. Ex. E, Jiménez Dep. 23:15-20.

4. The main offices for Drummond Ltd.'s Colombian branch, including Mr. Jiménez's office, are located in Bogotá, Colombia. Ex. Q, Zervos Dep. 33:8-34:4, June 20, 2012; Ex. E, Jiménez Dep. 159:20-160:4.

5. Jim Adkins was not hired by Mr. Jiménez, nor did he report to Mr. Jiménez. Mr. Adkins reported to officials in Birmingham. Ex. E, Jiménez Dep. 92:9-15, 122:4-9; Ex. S, Linares Dep. 130:22-131:5, June 7, 2012; Ex. C, Tracy Dep. 105:9-106:2; Ex. K, Adkins Dep. 56:9-57:13.

6. Jim Adkins worked at DLTD's port and mine but never in the Bogotá office. Ex. K, Adkins Dep. 132:17-133:10.

7. There is no evidence that Mr. Jiménez knew of any payments by DLTD to the AUC. Ex. E, Jiménez Dep. 47:16-50:14; 58:9-59:5.

8. There is no evidence that Mr. Jiménez intended that the AUC use DLTD funds to kill innocent civilians near DLTD's rail line. Ex. E, Jiménez Dep. 47:16-50:14; 58:9-59:5.

ARGUMENT

I. Summary Judgment Must Be Granted Where There Are No Genuine Issues Of Material Fact

Summary judgment under Rule 56 is appropriate only when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, determines that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986).

Once a party has properly filed evidence supporting the summary judgment motion, the nonmoving party may not rest upon mere allegations in the pleadings, but must set forth specific facts illustrating genuine issues for trial. *See* Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322-24. Conclusory statements, speculation and hunches, however, are insufficient to avoid summary judgment. *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1198 (11th Cir. 1997). Summary judgment is appropriate where “the evidence of a genuine issue of material fact is ‘merely colorable’ or of insignificant probative value.” *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1400 (11th Cir. 1998). The existence

of a scintilla of evidence in support of the nonmoving party's position is insufficient. Rather, the evidence must be such that the fact-finder reasonably could find for the nonmoving party. *Anderson*, 477 U.S. at 252. In addition, to avoid summary judgment, Plaintiffs must proffer evidence that would be admissible at trial. *Macuba v. Deboer*, 193 F.3d 1316, 1324-25 (11th Cir. 1999); *Rowell v. Bellsouth Corp.*, 433 F.3d 794, 800 (11th Cir. 2005).

II. There is No Evidence That Augusto Jiménez Collaborated With The AUC In Extrajudicial Killings

Plaintiffs do not allege that Augusto Jiménez directly participated in the killings at issue here. Instead, Plaintiffs rely on three secondary liability theories—aiding and abetting, conspiracy and agency—to allege that Mr. Jiménez aided and abetted, conspired with, or directed the AUC to kill people who lived in towns along DLTD's rail line, and should therefore be held liable for their deaths. Third Am. Compl. ¶¶ 196-281. To establish Mr. Jiménez's liability for extrajudicial killings under either an aiding and abetting or a conspiracy theory, Plaintiffs must show both that he personally participated in a scheme to provide support to the AUC, and that he shared the AUC's intent to kill civilians near Drummond's rail line.⁷ The evidence does not create a genuine issue of fact as to either allegation, and only relates, if at all, to the union leader murders which are not at issue here.

⁷ The Court has already dismissed the general agency theory, finding that the complaint was "wholly missing" any allegations "that the AUC acted 'under the control of' Drummond." Mem. Op. at 31 (Apr. 30, 2010). The Court allowed Plaintiffs to proceed solely on a theory of

To prove aiding and abetting, Plaintiffs must show that: “(1) the principal violated international law; (2) the defendant knew of the specific violation; (3) the defendant acted with the intent to assist that violation – that is, the defendant specifically directed his acts to assist in the specific violation; (4) the defendant’s acts had a substantial effect upon the success of the criminal venture; and (5) the defendant was aware that his acts assisted the specific violation.” Mem. Op. at 20-21 (Apr. 30, 2010). Proof of conspiracy requires a showing that: “(1) two or more persons agreed to commit a wrongful act; (2) defendants joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it; and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy.” *Id.* at 29. Proof of intent under conspiracy “requires the same proof of *mens rea* as aiding and abetting claims—a showing of intent, not merely knowledge.” *Id.* at 30 (citing *Presbyterian Church*, 582 F.3d at 260).

Plaintiffs have obtained testimony through the letters rogatory process from five paramilitaries and one paramilitary collaborator, all of whom are in prison in Colombia. Only two of these witnesses testified in some way about Mr. Jiménez’s role in or knowledge of collaboration between DLTD and the AUC. That testimony, however, was about the union leader murders, not about the murders of

ratification, which is entirely without legal merit or any basis in the evidence, as discussed in DLTD’s motion to dismiss. *See* DLTD’s Mot. Summ. J. at 38-46 (Dkt. 396).

civilians along the rail line. It is therefore irrelevant to this motion. Furthermore, this evidence is inadmissible, and plainly insufficient to create a genuine issue of material fact in this case.

The remaining evidence taken through discovery—the testimony of Colonel Mejía of the Colombian Army and Colombian prosecutor William Pacheco, the depositions of Jim Adkins and senior executives of Drummond (both present and former), and thousands of pages of documents, emails and financial records—directly contradicts Plaintiffs’ allegations.⁸

A. Jaime Blanco Maya’s Testimony Regarding the Murder of the Union Leaders

One of Plaintiffs’ witnesses is Jaime Blanco Maya. Blanco was DLTD’s independent food contractor from 1996 to mid-2001. Ex. N, Blanco Dep. 42:5-6, Apr. 19 and May 25, 2012. He was arrested in September 2010 for conspiring

⁸ See, e.g., Ex. A, Mejía Dep. 20:2-5 (“Q. . . . at any point did you become aware anywhere in Cesar of companies helping fund the AUC? A. No.”); Ex. K, Adkins Dep. 144:18 - 145:6 (“Q. And when Augusto Jimenez told you the policy [against payments to illegal groups], what did he say? A. Well, he -- he discussed it more deeply. You know, he discussed the implications of -- of -- of dealing with organizations like this and what it could do to the company . . . these are the rules and we have to live by them and -- and if we don’t we’re going to be out of business.”); Ex. Q, Zervos Dep. 99:16-100:2 (“Q. Okay. While you were working for Drummond, did you have an understanding of whether it was at that time illegal for Drummond to pay the AUC for any reason? A. Yes. Q. Okay. And how did you gain that understanding? A. Augusto Jiménez told me. . . . Number one, was our company policy that was not to be done and that it was against the law in Colombia.”); Ex. R, Memo. from A. Jiménez to G. Honeycutt, “Security Problems” (Feb. 27, 2004) (“You should know as everybody in this company must know very clear, the strong and very consistent policies of the company expressed by Mr. G.N. Drummond, that under no circumstances or threats Drummond will pay directly or indirectly to illegal groups.”).

with the AUC to kill two DLTD union leaders, Valmore Locarno and Victor Orcasita, in March 2001. *Id.* at 122:5-10; 125:4-7.

When asked about a conversation he had with Mr. Jiménez after the union leaders were killed, Blanco said:

I told Mr. Augusto [sic] Jimenez that the person that had determined or influenced or for the killing of the union leaders was Jim. . . . Q. Do you recall anything that Augusto [sic] Jimenez said back to you when you gave him this information? A. He scratched his head. He didn't say anything.

Id. at 51:5-16. Shortly thereafter, when asked again about statements by Mr. Jiménez, Blanco commented:

[Mr. Jiménez] knew about the relationships and the relationships that I handled between Mr. Jim [Adkins] and the AUC. He had knowledge of those relationships, and he took it as a fact, and he actually expressed it to me on several occasions that I had some responsibility in the killing of the union members together with Mr. Jim.

Id. at 54:18-55:3. Later, when pressed further about statements by Mr. Jiménez relating to the AUC, Blanco opined that Mr. Jiménez “knew the work that Jim Adkins was doing for Drummond with the AUC.” *Id.* at 109:8-9.

First and foremost, these statements are irrelevant here. They relate to an alleged agreement between Jim Adkins, Jaime Blanco and El Tigre regarding the murders of union leaders Valmore Locarno and Victor Orcasita, not to any alleged agreement with the AUC regarding people living near the rail line. The entire line of questioning regarding Mr. Jiménez had nothing to do with the murders at issue

in this case. *See id.* at 50:4-5 (“Did Augusto [sic] Jimenez ever discuss with you the murder of the Drummond union leaders?”); *id.* at 51:1-4 (“Back to Augusto [sic] Jimenez though. Do you remember any details of the conversation you had with him about the union murders and anything that he said?”); *id.* at 54:14-16 (“[W]hat is your recall now of the statement that Augusto [sic] Jimenez made to you after the union leaders were killed?”).

Second, these statements do nothing to prove that Mr. Jiménez agreed to any sort of collaboration with the AUC. Blanco’s only specific testimony about a conversation with Mr. Jiménez reveals that Mr. Jiménez did not respond when confronted with Blanco’s allegations that Jim Adkins was involved in the union leader murders - he just “scratched his head.” *Id.* at 51:15. The remainder of his statements do not relate specific facts or incidents, and there is no evidence that Blanco had personal knowledge of this information. These statements are no more than Blanco’s unsubstantiated opinion that Mr. Jiménez had knowledge about Adkins’ alleged involvement in the murders.

Third, even accepting Blanco’s testimony as more than mere speculation, Blanco only describes Mr. Jiménez’s knowledge of *Adkins*’ alleged dealings with the AUC. Nowhere does Blanco say that Mr. Jiménez approved of Adkins’ alleged agreement to make payments to the AUC, much less that Mr. Jiménez intended that any such payments be used to assist the AUC in intentionally killing civilians

near the rail line. This testimony simply does nothing to prove Plaintiffs' allegations that Mr. "Jiménez knew of the AUC's record of engaging in the Colombian civil conflict and *agreed* to pay that organization on behalf of Drummond." Mem. Op. at 19 (Mar. 11, 2011) (emphasis added).

Finally, Blanco's statements are not admissible and should not be considered on this motion for summary judgment because he refused to testify regarding the murders of the union leaders on cross examination. When asked about whether he attended a meeting with an AUC leader to plan the murders of the union leaders, he refused to answer, and further stated that he would "abstain from answering questions related to the homicide of the union members since I am awaiting sentencing and the law protects me in the aspect of self-incrimination." Ex. N, Blanco Dep. 173:15-19. The right to cross-examine an adverse witness is a fundamental element of due process, *In re Oliver*, 333 U.S. 257, 273 (1948), and courts may strike or exclude testimony where a party had a limited ability to cross examine a witness. *See United States v. Smith*, 157 F. App'x 215, 217 (11th Cir. 2005). Mr. Jiménez joins the arguments more fully set out in DLTD's motion on this point. *See DLTD's Mot. Summ. J.* at 34-36 (Dkt. 396). The Court should strike from the record Blanco's testimony regarding the murders of the union leaders because he flatly refused to testify on the subject on cross examination.

Consideration of this testimony on summary judgment would be a violation of Mr. Jiménez's due process rights.

B. Jairo de Jesus Charris's Testimony Regarding the Murder of the Union Leaders

The only other witness to offer testimony implicating Mr. Jiménez is Jairo Charris. Charris is currently serving a 30-year prison term for the March 2001 murders of the DLTD union leaders. Jiménez Ex. C, Charris Dep. 190:17-20, May 16 and 17, 2012. Charris worked at the DLTD mine as a security guard through one of DLTD's outside security contractors. *Id.* at 14:13-17. He then worked for Blanco's food service company. *Id.* at 48:21-49:7. He later became part of the Juan Andres Alvarez Front of the AUC. *Id.* at 102:14-17.

Just as with Jaime Blanco's testimony, Charris's testimony regarding Mr. Jiménez relates *only* to the murders of the union leaders, *not* to the murders alleged in this case. When Charris was asked who knew of the plan to kill the union leaders in March 2001, he testified, "I asked Jim Adkins that in addition to Mr. Garry Drummond and Mike Tracey who else knew about the plan for the killings and he told me Alfredo Araujo, General Peña, Augusto Jiménez, Luis Carlos Rodriguez, Colonel Garzon, that they all were in agreement about the death of the union leaders." *Id.* at 92:6-11. A few lines later, Charris expanded his list to also include Colonel Jorge Garzón, Pedro Maya and Ricardo Urbina, describing the

people who agreed to kill the union leaders as “[a]ll the people that were of the utmost trust of Drummond.” *Id.* at 93:20-26.

Charris’ testimony about this supposed statement of Adkins is not relevant here. As the Court has made clear numerous times, there must be evidence that “the defendant specifically directed his acts to assist in the *specific* violation.” Mem. Op. at 12 (Apr. 30, 2010). Charris, however, purports to relate a statement by Jim Adkins about the murders of Locarno and Orcasita in March 2001. Those murders were the subject of a previous case in which Mr. Jiménez was fully exonerated.⁹ Those murders are not at issue here. Even if this supposed statement by Adkins were true, it is not evidence that Mr. Jiménez and others at DLTD “all were in agreement” that the AUC should kill people living near DLTD’s rail line.

Not only is this testimony about Adkins’ statement irrelevant, it is also inadmissible hearsay. There is no hearsay exclusion that would apply to permit the admission of Adkins’ alleged statement at trial.

First, Adkins’ statement is not admissible as a coconspirator statement. Under Rule 801(d)(2)(E), “[f]or a statement to constitute non-hearsay by a coconspirator, the [Plaintiff] must show by a preponderance of the evidence that: (1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made

⁹ The murders are also the subject of *Baloco v. Drummond*, Case No. 7:09-cv-557-RDP (N.D. Ala.), which was dismissed on September 12, 2012.

during the course and in furtherance of the conspiracy.” *United States v. Flores*, 572 F.3d 1254, 1264 (11th Cir. 2009) (citing *United States v. Hasner*, 340 F.3d 1261, 1274 (11th Cir. 2003). Furthermore, the statement “does not by itself establish . . . the existence of the conspiracy or participation in it” Fed. R. Evid. 801(d)(2). In other words, there must be *independent* evidence that Mr. Jiménez was involved in conspiracy with Jim Adkins to kill the union leaders in order to admit Adkins’ statement as evidence against Mr. Jiménez. See *United States v. Underwood*, 446 F.3d 1340, 1346 (11th Cir. 2006) (admitting statement where there was “ample evidence” that the defendant was involved in the conspiracy); *United States v. Dynalectric Co.*, 859 F.2d 1559, 1582 (11th Cir. 1998) (admitting statement where there was “independent evidence” of the non-offering party’s participation in the conspiracy). No independent evidence of a conspiracy between Mr. Adkins and Mr. Jiménez exists here, nor is there a single document to support such a conspiracy theory. On the contrary, the evidence in this case exhibits Mr. Jiménez’s steadfast adherence to the policy against payments to illegal groups.

Second, the statement is not admissible as an agent admission. A statement is not hearsay if it is offered against the opposing party and it “was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.” Fed. R. Evid. 802(d)(2)(D). To offer Adkins’ hearsay statement

as a statement by an agent, Plaintiffs must lay a foundation that Adkins was acting as *Mr. Jiménez's* agent and not as, for example, an agent of DLTD. *See United States v. Docampo*, 573 F.3d 1091, 1097 (11th Cir. 2009) *cert. denied*, 130 S.Ct. 2342 (2010); *United States v. Roe*, 670 F.2d 956, 965 (11th Cir. 1982) (upholding admission of statements where the government “laid an ample foundation” that the declarant “was a servant of the defendants”). “When such a statement is offered against another corporate employee, instead of the corporation, proper admission under Rule 801(d)(2)(D) will necessarily depend on the nature of the relationship between the declarant and the defendant.” Wright & Miller: Fed. Prac. & Proc. § 7023, n.5 (2012) (citations omitted).

No agency relationship can be presumed from the fact that Mr. Jiménez was the President of DLTD’s Colombian branch and Jim Adkins worked for DLTD. “[A]n agency relationship is established only where the party-opponent personally ‘directed [the declarant’s] work on a continuing basis.’” *Lippay v. Christos*, 996 F.2d 1490, 1498 (3d Cir. 1993) (citing *Boren v. Sable*, 887 F.2d 1032, 1041 (10th Cir. 1989)); *see also United States v. Agne*, 214 F.3d 47, 54-55 (1st Cir. 2000) (upholding admission of statements by declarant where “the record support[ed] an interference that the [declarant] was directly responsible to the defendant”); *United States v. Paxson*, 861 F.2d 730, 734 (D.C. Cir. 1988) (upholding admission of statements where the declarant “reported directly” to the defendant); *United States*

v. Draiman, 784 F.2d 248, 256–57 (7th Cir. 1986) (upholding admission of statements where the declarant “was hired by [the defendant]” and defendant “had a large degree of control over [the declarant]”); *United States v. Young*, 736 F.2d 565, 567-68 (10th Cir. 1984) (upholding admission of statements by declarant where evidence was introduced to show that the declarant reported directly to party-opponent).

As established by the evidence, Jim Adkins was not hired by Mr. Jiménez, did not report to Mr. Jiménez, and did not work in the same office as Mr. Jiménez.¹⁰ Mr. Adkins was hired to assist the expatriate employees of DLTD, and therefore had much more contact with the Birmingham office than with the Bogotá office. Ex. K, Adkins Dep. 23-25, 56:9-19. Although Mr. Jiménez was the President of DLTD in Colombia and Adkins served as security advisor to DLTD, “mere occupation of a subordinate position in a corporate chain of command” is not sufficient “to establish an ‘agency relationship’ for the purpose of admission under Rule 801(d)(2)(D).” *Boren*, 887 F.2d at 1040.

There is no evidence that there was an agency relationship between Mr. Jiménez and Jim Adkins, and certainly no evidence that the scope of any such relationship included the killing of Drummond’s union leaders. Without proof of

¹⁰ Mr. Jiménez testified that “[Adkins] never reported to [him].” Ex. E, Jiménez Dep. 91:12-19; 122:4-9. Adkins testified that he reported directly only to Mike Tracy, Mike Zervos, and Bill Phillips. Ex. K, Adkins Dep. 56:9-19.

such an agency relationship, the alleged statement by Jim Adkins about Mr. Jiménez's agreement to the plan to kill the union leaders is inadmissible against Mr. Jiménez and cannot be considered for purposes of this motion for summary judgment.

CONCLUSION

The evidence that has now been established in this case is a far cry from the allegations of the Third Amended Complaint. The Court, in denying Mr. Jiménez's motion to dismiss, drew a number of "reasonable inferences" in favor of Plaintiffs. But reasonable inferences are no longer enough. Plaintiffs now need evidence. There is no evidence whatsoever that Mr. Jiménez had any involvement in the killings that are at issue in this case. For the foregoing reasons, Plaintiffs' claims against Mr. Jiménez should be dismissed.

Dated: September 24, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on **September 24, 2012**, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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