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N.D. OF ALABAMA

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

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

AUGUSTO JIMÉNEZ'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Dated: November 29, 2012

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INTRODUCTION

Plaintiffs include in their Statement of Disputed Material Facts ("PSDMF"), and repeat in their argument, literally dozens of statements that either are not supported by the evidence in this case, or are based on inadmissible hearsay by paramilitary prisoners. Most of the representations of fact are immaterial to Mr. Jiménez's motion, and we accordingly do not address them here. We do, however, address each of the factual contentions Plaintiffs claim create a genuine issue of fact regarding Mr. Jiménez's personal participation in the alleged agreement with the AUC to murder innocent civilians near Drummond Ltd.'s ("DLTD") rail line.

Response to Plaintiffs' Statement of Undisputed Material Facts

1. Disputed. The head of the security department reported to Mr. Jiménez, and he would see drafts of security reports and provide comments. Ex. E, Jiménez Dep. 26:15-27:15; 90:9-17.[1]

2. Disputed that Mr. Jiménez "helped secure protection for Drummond from the Colombian armed forces." Mr. Jiménez did request support from the Army and police in meetings with President Pastrana. *Id.* at 38:11-39:17.

3. Disputed. Mr. Jiménez managed contractor hiring at the highest level, but was not personally responsible for monitoring contractors. Ex. D, Drummond Dep. 191:7-15; Ex. E, Jiménez Dep. 35:4-17; 132:12-134:23.

4. Disputed. Mr. Jiménez did not directly supervise investigations of

[1] Mr. Jiménez cites to the exhibits to DLTD's Motion for Summary Judgment as "Ex. A," "Ex. B," etc.

employees, but was responsible for the policy that Drummond would not pay any illegal group. Ex. D, Drummond Dep. 85:12-18; Ex. E, Jiménez Dep. 47:16-48:21.

5. Disputed, states a legal conclusion. Araujo did report to Mr. Jiménez. Ex. T, Araujo Dep. 99:13-100:2.

6. Disputed, states a legal conclusion. General Peña did report to Mr. Jiménez. Ex. E, Jiménez Dep. 25:22-27:12.

7. Disputed, states a legal conclusion. Blanco met with Augusto Jiménez regarding the termination of his contract. Ex. N, Blanco Dep. 108:10-15.

8. Disputed, mischaracterizes the evidence. Mr. Jiménez received copies of some reports from Jim Adkins that included information about the AUC's operations and movements, but General Peña was directly in charge of the security department. Ex. E, Jiménez Dep. 26:15-27:16.

9. Disputed, mischaracterizes the evidence. Mr. Jiménez was copied on an email reporting hearsay statements that implied a connection between Viginorte and the AUC, but those were never confirmed. DLTD Pls' Ex. 25; Ex. K, Adkins Dep. 266:8-267:10; 295:6-296:8.

10. Disputed, mischaracterizes the evidence and states a legal conclusion. Meeting notes reflect General Peña's report that the Army refused to have any contact with Israeli groups who had trained paramilitaries. Pls' Ex. 7.

11. Disputed, mischaracterizes the evidence. Mr. Jiménez initiated an

investigation into Blanco's payment allegations which were first made in 2011, and any evidence of illegal activity would have been provided to the proper authorities for investigation. Ex. E, Jiménez Dep. 59:6-62:6.

12. Disputed, mischaracterizes the evidence. Mr. Jiménez "scratched his head" when Blanco stated that Adkins was involved with the union leader murders, and did not discuss Blanco's alleged involvement with the AUC with representatives of the U.S. embassy. Ex. N, Blanco Dep. 51:2-16; Pls' Ex. 8.

13. Disputed, mischaracterizes evidence. Employees reporting to Mr. Jiménez had a duty to investigate and report only if there was *evidence* that employees or contractors paid the AUC. Ex. E, Jiménez Dep. 55:6-16; 59:6-61:14.

14. Disputed, mischaracterizes the evidence. Mr. Jiménez initiated investigations and reported evidence to authorities regarding the AUC, and would terminate a contractor given evidence of illegal conduct. *Id.* at 55:6-16; 59:6-62:6.

ARGUMENT

I. There Is No Evidence of Mr. Jiménez's Knowing Collaboration With the AUC in These Killings

Plaintiffs rely on several secondary theories of liability with respect to Mr. Jiménez—aiding and abetting, conspiracy and ratification—that all depend on Plaintiffs' success in proving that Mr. Jiménez *knowingly* assisted in the AUC's killings of individuals who lived along DLTD's rail line. None of the evidence cited by Plaintiffs establishes Mr. Jiménez's knowing collaboration.

Plaintiffs identify the "key evidence against" Mr. Jiménez as the following:

> (a) Two DLTD employees who "played key roles in Drummond's AUC funding," Alfredo Araujo and General Rafael Peña, reported directly to Mr. Jiménez;
>
> (b) Mr. Jiménez knew that Jim Adkins, a member of DLTD's security department, agreed to provide funds to DLTD food services contractor Jaime Blanco to pass on to the AUC; and
>
> (c) Mr. Jiménez was "personally involved in the arrangement for security contractor Secolda to make payments to the AUC."

Opp. at 1, Dkt. 417. We take each of these three contentions in order.

Conduct By Araujo and Peña: That Mr. Araujo and General Peña reported directly to Mr. Jiménez is meaningless absent admissible evidence that Mr. Jiménez knew of and assisted in any wrongful conduct by them. Plaintiffs offer no evidence that Mr. Jiménez knew of Araujo or Peña's alleged assistance to the AUC. They merely cite allegations against Araujo and Peña and state that each reported to Mr. Jiménez. *See* Opp. at 10-11, PSDMF ¶¶ 2, 3, 4. As explained below, Plaintiffs cannot lessen their burden by resorting to the command responsibility doctrine with its "knew or should have known" standard because it is inapplicable to an executive of a private company who has no authority over the actual perpetrators. *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002); *see infra* § IV.

Adkins' Arrangement With Jaime Blanco: According to Jaime Blanco, he made an arrangement with Jim Adkins in 1996 that (1) Adkins would periodically bring $10,000 in cash from the United States for Blanco to give to the

AUC, and (2) the meal prices in the food service contract between DLTD and Blanco's company, ISA, would be artificially inflated to allow Blanco to pay the AUC 25 million pesos (about $12,000) a month. Ex. N, Blanco Dep. 70:5-76:16. There is no evidence other than Blanco's testimony to support either claim. Jim Adkins denies each and every part of Blanco's testimony. Ex. K, Adkins Dep. 296:9-297:12. The AUC commander with whom Blanco claims to have made the arrangement—El Tigre—testified that he met Blanco for the first time in May of 2000, four years ***after*** Blanco claims the arrangement was made. Ex. J, Esquivel (El Tigre) Dep. 41:19-43:5. And El Tigre did not testify that he received money from DLTD or Drummond Company, Inc. through Blanco at any time. Even though DLTD produced to Plaintiffs all of ISA's invoices (and even though Plaintiffs apparently had access to Blanco's computer files), there is no documentary evidence to support Blanco's claims of deliberate overcharging and payments to the AUC.

More important on this motion, the evidence fails to establish actual knowledge by Mr. Jiménez of the arrangements Blanco claims to have made with El Tigre. Plaintiffs represent that Blanco testified that, in 2001, Jiménez "voiced his concern about who would manage Drummond's relationship with the AUC if [Blanco] left." Opp. at 12, 27. That quote, however, is taken not from Blanco's testimony, but from a written declaration he supplied the Plaintiffs. This

declaration is inadmissible hearsay. *See* DLTD Reply at 13, Dkt. 424. During Blanco's testimony, Plaintiffs' counsel tried but failed to elicit testimony of any such statement by Mr. Jiménez. Ex. N, Blanco Dep. 109:4-111:2. Blanco testified only that Mr. Jiménez referred to "piratulo" (silly mistakes) that Mr. Adkins had made with respect to the AUC, and when asked whether Mr. Jiménez gave any specifics about these mistakes, Blanco said, "No, no, he did not." *Id*. at 110:13-16.

Plaintiffs also rely on Blanco's testimony that Mr. Jiménez "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 54:14-55:5. This testimony, of course, does not provide support for Plaintiffs' claim that Mr. Jiménez knew of an arrangement between Mr. Adkins and the AUC to provide money through Blanco. Further, this Court has already ruled that the murder of the union leaders is not part of this case. Mem. Op. (Nov. 9, 2009) at 11 n.8 ("The murders at issue here are not alleged to involve union leaders or members."). And finally, Blanco's statements regarding the union leader murders should not be considered on this motion because he refused to testify on the subject on cross examination. *See* Jiménez Mot. Summ. J. at 13-14, Dkt. 405.

Payments by Secolda to the AUC: Plaintiffs rely heavily on their claim that "Jiménez was personally involved in payments made by Drummond security contractor Secolda to the AUC." Opp. at 12; *see also id.* at 25, 26, 27, 29-30. But

there is no admissible evidence that Secolda made any payments to the AUC, that DLTD "used" that company to make payments, or that Mr. Jiménez participated in any such scheme. Plaintiffs rely on two instances of inadmissible hearsay. *First*, they cite the testimony of former paramilitary Charris that Secolda made payments to the AUC. Opp. at 10 (PSDMF ¶ 1, citing Tracy Opp. PSDMF ¶ 1, citing DLTD Pls' Ex. 2, Charris Dep. 31:5-13). Yet they fail to mention that when asked on cross examination, Charris clarified that he based his statement about Secolda entirely on something he was told by someone who was later killed by the AUC. DLTD Pls' Ex. 2, Charris Dep. at 197:2-7.[2] *Second*, Plaintiffs cite testimony of Jaime Blanco, in which Blanco related an alleged statement by Jorge 40.[3]

The only other evidence cited by Plaintiffs of payments by Secolda to the AUC is a July 13, 2001 memorandum by Jim Adkins saying "we suspect" Secolda of paying the paramilitaries. Opp. at 10 (PSDMF ¶ 1, citing Tracy Opp. PSDMF ¶ 1, citing Tracy Opp. PSUMF ¶ 19, citing Tracy Pls' Ex. 23). Adkins testified that this was nothing more than a suspicion, and that DLTD had no knowledge of any such payments. Ex. K, Adkins Dep. 294:2-17. Plaintiffs cannot substitute Mr. Adkins' "suspicion" for evidence of Mr. Jimenez's actual knowledge.[4]

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[2] Charris was asked "Who told you that?" and answered "Mr. Jose Alfredo Daza Ortiz was killed by the AUC." Charris Dep. at 197:2-7.

[3] Blanco stated: "Jorge [40] told me that Agusto Jimenez was handling that himself directly." Ex. N, Blanco Dep. 103:18-104:14, 113:6-14.

[4] *In re Refco Inc. Secs. Litig.*, 07 MDL 1902(JSR), 2012 WL 3126834 (S.D.N.Y. July 30, 2012) (dismissing securities fraud case "because the plaintiffs here failed to allege facts that plausibly

II. Hearsay Evidence About the Union Leader Killings Is Inadmissible

In addition to these three "key facts," Plaintiffs also rely on hearsay testimony by Charris that Mr. Adkins told him Mr. Jiménez (among many other Drummond executives) was in agreement with a plan to murder union leaders. Opp. at 10, 11. Plaintiffs contend that this evidence is relevant as a prior bad act under Rule 404(b) and that it is admissible under the co-conspirator hearsay exception. Even if this evidence is admissible under Rule 404(b) (which it is not),[5] it is inadmissible hearsay. To fall within the co-conspirator exception, Plaintiffs must establish by a preponderance of *independent* evidence that Mr. Jiménez was party to a conspiracy with Adkins. *See* Fed. R. Evid. 801(d)(2); Jiménez Mot. Summ. J. at 15-16. The evidence is squarely to the contrary. There are no documents to support such a conspiracy and there is not a single witness who claims personal knowledge of any meeting or discussion, much less agreement, between Mr. Adkins and Mr. Jiménez. Plaintiffs cite four paragraphs of their statements of material facts, Opp. at 27 (citing PSUMF ¶ 8 and PSDMF ¶¶ 6-8),

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suggest that the defendants here had knowledge of the fraud they are accused of aiding and abetting. . . . Vague suspicions are far removed from reckless disregard, let alone actual knowledge.").

[5] To introduce evidence under Rule 404(b), "there must be sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the act(s) in question." *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007). A federal jury has already found that Mr. Jiménez did not have any involvement in the union leader killings. Furthermore, every witness with personal knowledge—Adkins, Jiménez, and Blanco (who was present when the statement was made, according to Charris)—have flatly denied Charris's testimony. It is clear Plaintiffs wish to use this as improper evidence that Mr. Jimenez collaborated with the AUC.

yet not one of those paragraphs cites any evidence of an agreement between Mr. Adkins and Mr. Jiménez to commit any wrongdoing.

III. Plaintiffs' Evidence Does Not Satisfy Any of the Theories of Liability Against Mr. Jiménez

A. There Is No Evidence Of "Personal Participation" by Mr. Jiménez

The only evidence Plaintiffs cite for Mr. Jiménez's "personal participation" in these killings is a hearsay statement by former paramilitary Jorge 40 that Mr. Jiménez "was handling . . . directly" payments to the AUC through DLTD's security contractor Secolda. Opp. at 26. Blanco's statement of what Jorge 40 supposedly said is hearsay and must be disregarded.

B. The Evidence Cannot Support a Finding of Knowledge and Intent for Aiding and Abetting or Conspiracy

As explained in detail in the DLTD briefs,[6] Plaintiffs must prove that Mr. Jiménez (1) knew that his supposed assistance to the AUC would assist in the killings of innocent civilians near DLTD's rail line, and (2) "acted with the intent to assist [those killings]—that is, [Mr. Jiménez] specifically directed [his] acts to assist in the [killings]." Mem. Op. (Apr. 30, 2010) at 20. As explained above, none of Plaintiffs' evidence is sufficient to satisfy the knowledge requirement of aiding and abetting.

Moreover, Plaintiffs cite no evidence at all that Mr. Jiménez intended that any alleged DLTD support to the AUC would be used to kill civilians near

[6] *See* DLTD Mot. Summ. J. at 22-37; DLTD Reply in Supp. of Mot. Summ. J. at 5-17.

DLTD's rail line. Instead, they argue that his intent "is established by the same facts" as the knowledge element because the "'natural and probable consequences' of Jiménez's conduct include the AUC's murders of the decedents." Opp. at 27 (citing *United States v. Myers*, 972 F.2d 1566, 1573 (11th Cir. 1992)). *Myers*, however, is inapposite. First, *Myers* is a criminal case. Second, the opinion does not address the intent requirement for aiding and abetting, but rather the intent requirement for a substantive criminal offense. *Id*. Plaintiffs are essentially arguing that intent for aiding and abetting means nothing more than Mr. Jiménez "should have known" what the AUC would do. No case law supports this untenable proposition of law, and it should be rejected.

With respect to conspiracy, there is no testimony by any witness that Augusto Jiménez personally agreed with any AUC member to do anything. Further, this Court has held that conspiracy requires the same level of intent as aiding and abetting. Mem. Op. (Apr. 30, 2010) at 30. Because Plaintiffs cannot meet this standard, summary judgment should be granted in Mr. Jiménez's favor.

C. Plaintiffs' Ratification Theories Are Unsupported By The Law

Plaintiffs rely on two theories of ratification and both should be rejected.

Corporate-law theory. Plaintiffs' first ratification theory is not based on agency law but rather domestic corporate law. Plaintiffs argue that Mr. Jiménez can be held liable because he "approved and ratified DLTD's torts." Opp. at 24.

They cite no evidence of affirmative approval of the killings along DLTD's rail line, only that Mr. Jimenez "failed to do anything when confronted with evidence that Drummond employees and contractors were supporting the AUC." *Id.* at 25.

In support of this theory, Plaintiffs cite an Alabama state case and a corporate law treatise. They also quote part of the treatise for their argument that "'a corporate officer [who] participates in the wrongful conduct, or knowingly approves' of the corporation's conduct, is liable." Opp. at 24 (citing § 1135 of Fletcher Cyclopedia of the Law of Corporations ("Fletcher")). But Plaintiffs leave out the key first clause of this sentence from the treatise, which reads in full: "Under the responsible corporate officer doctrine, if a corporate officer participates in the wrongful conduct, or knowingly approves the conduct, the officer, as well as the corporation, is liable for the penalties." Fletcher § 1135. The responsible officer doctrine is a product of state law, and Alabama law holds that "[u]nder the responsible corporate officer doctrine, officers and directors or agents of a corporation are held personally liable for their ***active participation*** in an intentional tort." *In re Lowery*, Nos. 10-81684, 10-80071, 2010 WL 4259947, at *2 (N.D. Ala. Bankr. Oct. 21, 2010) (emphasis added);[7] *see also* Fletcher § 1137 ("[a]n

[7] *Lowery* relies on *Galactic Employer Servs., Inc. v. McDorman*, 880 So. 2d 434 (Ala. Civ. App. 2003), which held that only a corporate agent who "personally participates" in a tort may be held "personally liable" for it. Plaintiffs also cite *Crigler v. Salac*, 438 So. 2d 1375, 1380 (Ala. 1984), as "articulating [the] same rule" as Fletcher Cyclopedia. Opp. at 24. But Plaintiffs again fail to tell the Court that *Crigler* likewise required personal participation by the corporate director in the tort: "In order to hold an officer of a corporation liable for the negligent or

officer, director or other agent of a corporation is not personally liable for torts of the corporation or of its other officers and agents merely by virtue of holding corporate office, but can only incur personal liability by participating in the wrongful activity."). In other words, even under the corporate law relied on by Plaintiffs, they must show Mr. Jimenez's active participation in these killings, not his "failure to do anything."[8]

Moreover, as this Court concluded with respect to aiding and abetting and conspiracy, the threshold question when deciding whether to use a secondary theory of liability is whether there is a consensus for this theory in international law. Mem. Op. (Apr. 30, 2010) at 20 n.21. Plaintiffs cite no international law suggesting that there is a consensus in international law supporting this theory of approval without any active participation or approval by silence. Moreover,

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wrongful acts of the corporation, 'there must have been upon his part such a breach of duty as contributed to, or helped bring about, the injury; that is to say, he must be a participant in the wrongful act.'" *Id*. at 1380 (citing Fletcher § 1137).

[8] Plaintiffs cite a district court case from Ohio for the proposition that the Court can "infer approval" by Mr. Jiménez based on certain facts. Opp. at 25 (citing *Onyx Envtl. Servs., LLC v. Maison*, 407 F. Supp. 2d 874 (N.D. Ohio 2005)). The court in *Onyx* relied solely on Ohio state law to conclude that "tacit knowledge" could be used to find that an officer approved of an employee's tort. Even if Alabama law supplies the standard here rather than international law (which it does not), Plaintiffs cite no Alabama law to the same effect.

Plaintiffs also cite *Pescia v. Auburn Ford-Lincoln Mercury, Inc.*, 68 F. Supp. 2d 1269, 1283 (M.D. Ala. 1999), for the proposition that inaction amounts to ratification because "one element of ratification involves the 'failure to take adequate steps to remedy the situation.'" Opp. at 26. However, *Pescia* concerns ratification in the *agency-law* context. Plaintiffs improperly rely on it to support their ratification in the *corporate-law* context. *Pescia* has nothing to do with whether a corporate officer may be held liable for the torts of his company. Its discussion of the agency-law element of "failure to take adequate steps" is not applicable in the corporate-law ratification context.

Plaintiffs cite no ATS cases applying this theory.

Agency law theory. Plaintiffs' second ratification theory is based on agency law. They argue that Mr. Jiménez "ratified the AUC's murders" based on the standard for ratification they articulated in their opposition to DLTD's motion for summary judgment. DLTD Opp. at 36-40. For the reasons explained in DLTD's reply, there is no international law consensus that ratification is a viable theory of secondary liability. DLTD Reply at 18-19. Even if Alabama law applies, Plaintiffs cannot satisfy the threshold requirement that the AUC was Mr. Jiménez's agent. They offer no facts to support the proposition that Mr. Jiménez had any control over the AUC whatsoever.[9] Ratification also requires actual knowledge of the wrongdoing. *Mardis v. Robbins Tire & Rubber Co.*, 669 So. 2d 885, 889 (Ala. 1995). Plaintiffs' evidence does not create a genuine issue as to Mr. Jiménez's actual knowledge here. *See supra* § I.

IV. Command Responsibility Does Not Apply To Private Corporate Officers

The command responsibility doctrine has never been applied in the ATS or TVPA context to a corporate officer such as Mr. Jiménez.[10] For all of the reasons

[9] To the extent Plaintiffs claim that Mr. Araujo, Mr. Adkins or General Peña were agents of Mr. Jiménez, Plaintiffs also fail to show that he exercised control over them sufficient to meet this standard, instead of relying solely on his position at the company.

[10] The Eleventh Circuit makes clear that a plaintiff "cannot amend her complaint through argument in a brief opposing summary judgment" by asserting new claims or theories of liability. *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). Plaintiffs

stated in Mr. Tracy's reply brief, the international criminal cases that Plaintiffs cite are inapposite and the doctrine should not be adopted in this case. Tracy Reply in Supp. of M. for Summ. J. (Nov. 28, 2012) at 7-13. Mr. Jiménez is not a military or government official with the ability "to prevent or punish criminal conduct" of the alleged war criminals. *See Ford v. Garcia*, 289 F.3d at 1290. Nor is there any allegation of a direct relationship between Mr. Jiménez and the "perpetrator of the crime," as required by the doctrine. *Id.* at 1288.

CONCLUSION

Plaintiffs claim to have "far more evidence incriminating Jimenez than was presented in Drummond I" to prove their case. Opp. at 1. They have nothing of the sort. In fact, Plaintiffs' evidence against Mr. Jiménez consists almost entirely of inadmissible hearsay in the form of written declarations and deposition testimony by paramilitaries. The rest of their evidence concerns the union leader killings that were the already the subject of *Drummond I* and cannot be retried here. When Plaintiffs' inadmissible and irrelevant evidence is disregarded, there is no genuine dispute of material fact with respect to Mr. Jiménez's personal liability, and his motion for summary judgment should be granted.

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did not plead command responsibility as a theory of liability in the Third Amended Complaint, and cannot defeat Mr. Jiménez's motion for summary judgment by advancing such a theory now.

Dated: November 29, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on **November 29, 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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