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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

MELVIN J. HOWARD

Plaintiff,

vs.

MAXIMUS, INC., d/b/a
MAXIUMS, CANADA INC., d/b/a
Themis Program Management & Consulting Ltd.,
STEVE KITCHER, in his individual capacity; **JOANNE PLATT,** in her individual capacity;

Defendants.

Case No.: 3:13-CV-01111-ST

OBJECTIONS TO FINDINGS AND RECOMMENDATION

Plaintiff respectfully submit that Magistrate Stewart's Recommendation applied the wrong legal standard, erroneously accepted Defendants' explanations rather than the allegations of the Complaint, and effectively created a pleading standard that requires plaintiff to prove their case before bringing it. Plaintiff respectfully objects to the Findings and Recommendation (F&R) (Doc. No. 27) filed in the instant action on November 20, 2013. The F&R included a scheduling order that requires objections to be filed by December 09, 2013 and this objection is filed within that time.

A. PRELIMINARY STATEMENT

Defendant, Maximus, Inc. et al. seeks dismissal of Plaintiffs' claims on an implausibly simplistic reading of the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __, 2013 U.S. LEXIS 3159 (Apr. 17, 2013) and the decades of jurisprudence underlying it. According to Magistrate Stewart, *Kiobel* imposes a "bright line" rule that prohibits the Court from recognizing any otherwise cognizable claims if the alleged violation "occurred outside the United States." Def. Br. 7. Such a categorical bar, however, does not represent the opinion of the Court; it reflects only the concurring opinion of Justice Alito which garnered only one additional vote. *See Kiobel*, 2013 U.S. LEXIS 3159, at *28-30 (Alito, J. concurring). The opinion of the Court, by contrast, held that at most there should be a *presumption* against the extraterritorial application of the ATS to certain claims. In fact, the Court held that ATS claims raised in a particular case can rebut the presumption if the claims "touch and concern the territory of the United States . . . with sufficient force." *Id.* at *26 (citing *Morrison v. National Australia Bank Ltd.*, 561 U.S. __, 130 S. Ct. 2869 (2010)). Plaintiffs Civil and Human Rights claims are in no way foreclosed by *Kiobel* in effect it is the opposite.

Kiobel's factual background corresponded to a typical Fcubed action, like *Morrison*'s. As mentioned previously, the latter involved a lawsuit brought by Australian investors, mostly against Australian defendants, relating to investment transactions entered into in Australia. *Morrison*, as Justice Ginsburg noted during the argument, "has 'Australia' written all over it." The same was true of *Kiobel*. The lawsuit concerned human rights violations committed by the Nigerian military against the Ogoni population in Nigeria. The defendants' presence in the United States was limited to an office in New York City, owned by a subsidiary affiliated

company. The case had, therefore, no connection with the United States other than the plaintiffs residing in the country on a refugee status. As a result of the *Kiobel* decision, the exclusion of an extraterritorial application of the ATS affects F-cubed actions only. Second, *Kiobel* does not impact pending or future F-squared actions, i.e., those where one of the three elements considered—the citizenship of the plaintiff, the citizenship of the defendant, or the situs of the occurrences which ground the claim—is substantially connected with U.S. soil, thus removing one of its "F," or foreign, attributes. As a consequence, when the defendant is (1) a U.S. citizen, (2) a company incorporated in the United States, or (3) an alien who finds him or herself in the United States, or if the conduct underlying the action occurred within the United States, the decision in *Kiobel* does not limit the ATS's applicability.

Second, even if the presumption against extraterritoriality is applied to claims arising out the U.S. controlled and owned entity in Canada, the claims nevertheless "touch and concern" United States territory and interests "with sufficient force" so as to displace the presumption. *See Kiobel*, 2013U.S. LEXIS 3159, at *26. Unlike in *Kiobel*, Plaintiffs' claims challenge conduct undertaken by U.S. and Canadian employees of a U.S. corporation (domiciled in Virginia) in conspiracy with Canadian personnel in carrying out (unlawful) conduct. Two courts have offered different takes on the implications of *Morrison* in the RICO context. The U.S. District Court for the Southern District of New York has embraced the theory that the line between domestic and extraterritorial application of RICO should be drawn based on whether the enterprise involved is foreign or domestic. The Second Circuit has appeared to advocate a contacts-based, quasi-jurisdictional test to determine whether a particular case involves sufficient contacts with the United States to invoke RICO.

Notably, a Ninth Circuit judge recently dissented from an order sending an ATS case to mediation after concluding that *Morrison* leaves courts without any authority to become involved in extraterritorial ATS matters. *Sarei v Rio Tinto*, 625 F.3d 561 (9th Cir. 2010) (Kleinfeld, J, dissenting). The Court reviews the Findings and Recommendations de novo. The Court may "accept, reject or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

B. STANDARD FOR MOTION TO DISMISS

Although Defendants' explanations for [disputed conduct], if unrebutted, are properly considered on a motion for summary dismissal. . , review under Rule 12(b)(6) is confined to the factual allegations of the complaint, which must be accepted as true." *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 1002 (9th Cir. 1999), *superseded by statute on other grounds*. Courts may also consider any relevant portions of documents referred to in the complaint. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In addition to accepting a plaintiff's factual allegations as true, courts "construe those facts and draw all reasonable inferences therefrom 'in the light most favorable to the nonmoving party.'" *In re MRV Commc'ns, Inc.*, No. CV 08-3800 GAF. In cases where an official's conduct is alleged to have violated international human rights norms – and indeed, where jurisdiction is premised on sufficient allegations of violations of such norms, as under the ATCA a court necessarily must look to international law, as well as the law of the official's country ("domestic" law), to determine whether the official's conduct was ultra vires.

C. TOUCH AND CONCERN THE TERRITORY OF THE UNITED STATES WITH SUFFICENT FORCE

On November 8, 2012, the Securities and Exchange Commission (SEC) instituted public administrative proceedings to determine whether to revoke or suspend for a period not exceeding twelve months the registration of each class of the securities of Centurion Health Corp the Plaintiff's company for failure to make required periodic filings with the Commission. In this Order, the Division of Enforcement (Division) alleges that the Company is delinquent in required periodic filings with the Commission. In this proceeding, instituted pursuant to Exchange Act Section 12(j), a hearing will be scheduled before an Administrative Law Judge. At the hearing, the Administrative Law Judge will hear evidence from the Division and the Company to determine whether the allegations of the Division contained in the Order, which the Division alleges constitute failures to comply with Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 there under, are true. The Administrative Law Judge in the proceeding will then determine whether the registration pursuant to Exchange Act Section 12 of each class of the securities of the Company should be revoked or suspended for a period not exceeding twelve months. The Commission ordered that the Administrative Law Judge in this proceeding issue an initial decision not later than 120 days from the date of service of the order instituting proceedings. On December 5, 2012 the registrations of the registered securities of Centurion Health Corp were revoked. The Plaintiffs continued arbitrary detention in Canada in addition to the misconduct that ran rampant contributed to this act. It was intentional and with malice that the Defendants interfered with the Plaintiff's business affairs. The Plaintiff would have been able to remedy this situation if he had been able to attend to the hearing in the United States prior to the

securities being revoked. The Plaintiff was warned by some in the legal community in Canada to expect this type of treatment they write: "Your case will likely create a great deal of attention and debate in Canada as some will perceive your case as a broad attack against Canada's health system. We understand you are simply seeking redress in the form of damages for discriminatory treatment that you have suffered due to Canadian government actions, nevertheless you should anticipate that the Government of Canada will take a hard line on this case and will attempt to leverage all significant tools and resources. As we pointed out, the concerns and reactions your case may create fails to take into account the already significant private sector Canadian health care provider's involvement in Canada's health sector." In reference to the U.S. Department Of State web site http://www.state.gov/s/l/c29884.htmMelvin Howard, on behalf of The Centurion Health Corporation and the Howard Family Trust, has served Canada with a "Notice of Intent" on July 16th, 2008. Melvin Howard alleges that a proposed project, the Regent Hills Health Care Centre was treated in a manner that contravened Canada's NAFTA Chapter 11 obligations Melvin Howard is a U.S. citizen. In *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 US 247, __, 130 S Ct 2869, 2883 (2010) (holding that § 10-b of the Securities and Exchange Act of 1934 does not apply to extraterritorial conduct when the security is bought or sold on a foreign market) upon which Magistrate Stewart principally relies, it only eliminated from future ATS litigation those ATS actions discussed in *Morrison*: so-called F-cubed ATS actions in which foreign defendants are sued for conduct that took place entirely within foreign territory. All other actions remain within the reach of U.S. courts. Second, the Court's focus on the issue of the statute's extraterritoriality, instead of corporate liability, limited the ruling's scope. As it stands now, U.S.-based corporations can be lawfully sued before federal courts, while foreign companies can be subject to the ATS only under certain conditions.

D. THE DETENTION OF PLAINTIFF HOWARD WERE WITHOUT JUSTIFICATION AND THEREFORE ARBITRARY

The plaintiffs' allegations of cruel, inhuman or degrading treatment or punishment, and arbitrary detention should not be examined under a heightened pleading. Rather, when faced with a motion to dismiss for failure to state a claim, courts should analyze allegations of cruel, inhuman or degrading treatment or punishment; and arbitrary detention pursuant to the well-established international and domestic definitions of these international law torts.
Under international and U.S. law, a plaintiff has fully pled all of the elements of torture if he or she alleges that (1) s/he was subjected to severe pain or suffering, whether physical or mental, (2) at the instigation, or with the consent or acquiescence, of a public official or other person acting in an official capacity, and (3) the pain or suffering was intentionally inflicted for the purpose of punishment, intimidation, coercion, or obtaining information. International, regional and domestic tribunals and the international instruments defining torture all recognize that torture may be solely mental, and does not have to be accompanied by the infliction of physical pain or suffering or permanent damage to be actionable.

Furthermore, international and U.S. law recognize the interrelationship between a plaintiff's allegations of torture and cruel, inhuman and degrading treatment or punishment. Courts have recognized that a plaintiff's evidence of a claim of torture may establish an alternative claim of cruel, inhuman or degrading treatment or punishment. The distinction between torture and cruel, inhuman or degrading treatment or punishment derives principally from the difference in the intensity of suffering inflicted, as well as the intent of the perpetrator.

Thus, when faced with allegations of physical mistreatment or mental abuse, triers of fact must undertake a factual analysis to determine whether the challenged conduct constitutes torture or cruel, inhuman or degrading treatment of punishment. The Plaintiff here allege that their detentions were unjust and incompatible with human dignity because they were without justification and based solely on their activities in support of building the largest private surgical facility that would be U.S. owned. Failing to recognize authority cited by Plaintiff, ignoring the unjust and arbitrary basis of Plaintiffs' detentions without warrant, cause, notice of charges, access to legal support or family, and subject to physical abuse, were unjust and incompatible with "justice or with the dignity of the human person.

E. UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

A court may exercise personal jurisdiction over a foreign defendant for claims arising under federal law only if the defendant has sufficient contacts with the U.S. as a whole to justify the exercise of personal jurisdiction. The Due Process Clause prohibits a court from exercising personal jurisdiction under circumstances that would offend "traditional notions of fair play and substantial justice. Personal jurisdiction may be general or specific, and a defendant may be subject to general jurisdiction only if its contacts with the forum are "continuous and systematic. Specific jurisdiction requires a finding that (i) the foreign defendant purposefully directed activity towards the United States and (ii) the cause of action arises out of or relates to such activity. The contacts required for specific jurisdiction are those in existence at the time the underlying claim arose. Thus, nothing in international or U.S. law exempts a corporation from liability for human rights abuses.

CONCLUSION

The Supreme Court has stated that the Constitution requires that the judicial power of the United States be vested in courts having judges with life tenure and undimnishable compensation in order to protect judicial acts from executive or legislative coercion. O'Donoghue v. United States, 289 U.S. 516, 531, 53 S.Ct. 740, 743, 77 L.Ed. 1356 (1933). A decision without consent by a magistrate, a non-Article III judge, would undermine this objective of the Constitution and might violate the rights of the parties. Willie James Glover, Plaintiff-Appellee Cross-Appellant, v. Alabama Board of Corrections, Et Al., Defendants, James Towns, Defendant-Appellant Cross-Appellee., 660 F.2d 120 (5th Cir. 1981) Wherefore, the Plaintiff prays that the District Court review the "RECOMMENDATIONS" of the Magistrate and Defendant's filings in this case de novo, and find all of the judicial notices and objections with merit sufficient to overturn the Magistrate's "RECOMMENDATIONS".

Dated: December 5, 2013

Respectfully submitted,

Melvin J. Howard