

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

DAVID MURILLO and SILVIA MENCIAS  
on behalf of themselves and as Personal  
Representatives of their deceased son, ISIS  
OBED MURILLO, and his next of kin,  
including his SIBLINGS

v.

ROBERTO MICHELETTI BAIN

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CASE NO. 4:11-cv-02373

**ROBERTO MICHELETTI BAIN'S MOTION TO DISMISS  
PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE  
12(b)(2), 12(b)(5) and 12(b)(6)**

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	§	CASE NO. 4:11-cv-02373
v.	§	
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ROBERTO MICHELETTI BAIN	§	

**ROBERTO MICHELETTI BAIN’S MOTION TO DISMISS  
PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE  
12(b)(2), 12(b)(5) and 12(b)(6)**

Defendant Roberto Micheletti Bain (“Micheletti”) files this Motion to Dismiss for Lack of Service of Process, Lack of Personal Jurisdiction and Failure to State a Claim Upon Which Relief Can Be Granted pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(5) and 12(b)(6) (“Motion to Dismiss”) and would show the Court as follows:

**INTRODUCTION**

1. Micheletti files this Motion to Dismiss on three separate grounds: (1) Plaintiffs’ failure to properly serve Micheletti; (2) lack of personal jurisdiction over Micheletti; and (3) Plaintiffs’ failure to state a claim upon which relief can be granted.

2. First, Plaintiffs have failed to serve Micheletti pursuant to Federal Rule of Civil Procedure 4(f). Despite nine separate attempts by Plaintiffs to serve Micheletti, not a single attempt comported with the Federal Rule. Accordingly, Plaintiffs’ Original Complaint [Doc. 1] should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(5).

3. Next, even if Plaintiffs are able to demonstrate service (which Micheletti disputes), this Court does not have personal jurisdiction over Micheletti. Plaintiffs, who are

Honduran citizens and residents, have sued Defendant Micheletti, also a Honduran citizen and resident, in the United States District Court for the Southern District of Texas, Houston Division in an action involving the death of Plaintiffs' son, who was also a citizen and resident of Honduras. All of the facts alleged by Plaintiffs concern events that purportedly occurred in Honduras during June 2009. Plaintiffs claim, without any concrete underlying facts, that Micheletti is subject to *in personam* jurisdiction because he "owns a residence in the state of Texas...owns other properties, possesses business interests and has an agent for service in the state of Texas." See [Doc. 1] at ¶ 18. Plaintiffs' conclusory statements regarding jurisdiction lack factual support. Micheletti has only three ties to Texas, which are not sufficient minimum contacts for personal jurisdiction purposes: (1) an ownership interest in a single piece of property in Magnolia, Texas which Micheletti has only visited for two hours total; (2) checking and savings accounts with Wells Fargo Bank, N.A, that were opened in December 2007 and closed in December 2008 and February 2011 respectively, which were not consistently used by Micheletti; and (3) sporadic trips to Texas for either vacation or layovers when flying to other destinations. Micheletti has *no other ties* whatsoever to Texas. Moreover, Micheletti is unable to gain entrance to the United States pursuant to an order of the United States Department of State, making it impossible for him to defend this lawsuit in Texas. For the foregoing reasons, it would violate notions of fair play and substantial justice to exercise jurisdiction over Micheletti. As such, Plaintiffs' lawsuit should be dismissed on the basis that this Court lacks personal jurisdiction over Micheletti pursuant to Federal Rule of Civil Procedure 12(b)(2).

4. Finally, even if Plaintiffs can demonstrate service and jurisdiction (which Micheletti disputes), Plaintiffs have failed to state a claim upon which relief can be granted. Put simply, Plaintiffs have failed to plead their nine claims with *any* specificity. Instead, Plaintiffs

rely on conclusory allegations that do not address Micheletti specifically, in an attempt to hold Micheletti responsible for alleged acts that even Plaintiffs' pleadings make clear have no causal connection to Micheletti. Further, Plaintiffs' pleadings ask this Court to find that the court system in Honduras is an inadequate forum for events that took place in Honduras and that involve Honduran citizens and residents without *any* basis or specifics. Put simply, Plaintiffs' pleadings do not come close to meeting the standards required by *Iqbal* and *Twombly*. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, ---U.S.---, 129 S.Ct. 1937 (2009). Accordingly, Plaintiffs' Original Complaint should be dismissed for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

#### **FACTUAL BACKGROUND**

5. Roberto Micheletti Bain is a citizen and resident of Honduras. See the Affidavit of Roberto Micheletti Bain, attached hereto as **Exhibit A**. Micheletti does not reside in Texas and has never done so. *Id.* His home, family and businesses are all in Honduras. *Id.* Micheletti has never owned an interest in any business in Texas, nor has he ever worked for a business in Texas. *Id.* The Honduran businesses in which he holds an ownership interest have no offices in Texas (or the United States for that matter), nor do they sell products or services in Texas or advertise in any way to Texas residents. *Id.* Micheletti does not have a Texas driver's license. *Id.* He did at one time have a green card to live in the United States during the 1970s. *Id.* From 1974 to 1979 he resided in Louisiana. *Id.* After returning to Honduras in 1979, Micheletti voluntarily surrendered his green card. *Id.*

6. Micheletti has sporadically been to Texas for personal vacations. *Id.* He has flown through Houston to travel to other destinations on several occasions. *Id.* Micheletti has never traveled to Texas in a business capacity, nor have his trips to Texas for vacation ever lasted

more than a week or two. *Id.* Micheletti does have an ownership interest in one piece of real property in Magnolia, Texas (the “Property”), however, he has only visited the Property twice, both times for only an hour. *Id.* The Property was purchased in 2008. *Id.* Micheletti has never resided there, nor has he ever stayed at the Property overnight. *Id.* The dwelling on the Property was rented for \$1000 a month for the last several years until the dwelling was burned to the ground in September 2011 by a wildfire. *Id.* A savings account and a checking account were set up in Micheletti’s name, as well as his family’s, in Houston, Texas in 2007 for the purchase of the property. *Id.* The bank accounts were closed in December 2008 and February 2011. *Id.* All rents and bills for the Property from February 2011 to September 2011 were handled by Jenny Vivas, an insurance agent, and deposited and withdrawn from Ms. Vivas’ personal bank account. **Exhibit B**, the affidavit of Jenny Vivas.

7. Further, Micheletti has not entered the United States since March 2009. Exhibit A. His visa to travel to the United States was revoked in September 2009, and his visa has not been restored. **Exhibit C**, Revocation of Micheletti’s Visa; Exhibit A.

8. On June 23, 2011, Micheletti was sued by Plaintiffs in this Court in the Southern District of Texas based upon alleged events that occurred in Honduras. [Doc. 1]. Specifically, the Original Complaint alleges nine causes of action, which can be grouped as follows:

- (i) **Claim 1**: Extrajudicial Killing pursuant to the Torture Victim Protection Act (the “**TVPA Claim**”);
- (ii) **Claims 2, 3, 4, 5 & 6**: Crimes Against Humanity pursuant to the Alien Tort Statute (“**ATS**”) of Murder (Claim 2), Persecution: Killing of Isis Murillo (Claim 3), Persecution: Plaintiffs and Decedent’s Family (Claim 4), Inhumane Acts (Claim 5), and Violations of the Right to Life, Liberty and Security of Person and Freedom of Assembly and Association (Claim 6) (collectively, the “**ATS Claims**”); and
- (iii) **Claims 7, 8 and 9**: Texas state law claims of Wrongful Death (Claim 7), Intentional Infliction of Emotional Distress (Claim 8) and Negligence (Claim 9) (collectively, the “**State Law Claims**”).

[Doc. 1] at ¶¶ 92-156.

9. On June 28, 2011, a process server served Jenny Vivas both “as power of attorney for Roberto Micheletti Bain” and individually at 32125 Joseph Road in Hockley, Texas. [Docs. 8 & 9]. Ms. Vivas does not have power of attorney from Micheletti currently or in the past, nor has she ever been his agent for service of process. Exhibit B.

10. That same day, a process server served Suyapa Vivas at 11626 Walnut Springs Lane in Magnolia, Texas. [Doc. 10]. A process server also served Joe Olvera, the current resident at 29814 Amarillo Street in Magnolia, Texas. [Doc. 11]. Mr. Olvera stated that he did not personally know Micheletti. *Id.* A process server also served the current resident at 27220 Remington Estates East in Magnolia, Texas. [Doc. 12]. The resident also stated that he did not personally know Micheletti. *Id.*

11. On July 7, 2011, a process server mailed copies of the Original Complaint to addresses in El Progreso and Comayaguela, Honduras via US Mail. [Docs. 7, 15 & 16]. On August 12, 2011, a process server mailed copies of the Original Complaint to addresses in El Progreso and Comayaguela, Honduras via FedEx. [Docs. 13, 14, 17 & 18].

12. Micheletti now files this Motion to Dismiss for insufficient service of process, lack of personal jurisdiction and failure to state a claim upon which relief can be granted.

### **INSUFFICIENT SERVICE OF PROCESS**

#### **I. Legal Standard**

13. Federal Rule of Civil Procedure 12(b)(5) permits a challenge of the method of service. FED. R. CIV. P. 12(b)(5); *Naranjo v. Universal Surety of Am.*, 679 F.Supp.2d 787, 795 (S.D. Tex. 2010). Federal Rule of Civil Procedure 4(f) governs the service of process on an individual in a foreign country. Rule 4(f) provides:

(f) **Serving an individual in a Foreign Country.**

Unless federal law provides otherwise, an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served at a place not within a judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country’s law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country’s law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

FED. R. CIV. P. 4(f). “When service of process is challenged, the party on whose behalf it is made must bear the burden of establishing its validity.” *Naranjo*, 679 F.Supp.2d at 795-96 (citing *Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir. 1981)).

**II. Arguments and Authority**

14. Plaintiffs have failed to properly serve Micheletti pursuant to Federal Rule of Civil Procedure 4(f). Honduras and the United States do not have a treaty relationship concerning the service of documents, making Rule 4(f)(1) inapplicable. *See* Judicial Assistance on Honduras, published by the United States Department of State, *available at* [http://travel.state.gov/law/judicial/judicial\\_673.html](http://travel.state.gov/law/judicial/judicial_673.html) (last viewed Sept. 21, 2011); *see also*



Bilateral Treaties in Force as of January 1, 2011, *available at* <http://www.state.gov/documents/organization/169274.pdf> (last viewed Sept. 21, 2011). Service must, therefore, be made in Honduras without the guidance of a treaty.

15. Plaintiffs have likewise failed to serve Micheletti by any means provided by Rule 4(f)(2). First, none of Plaintiffs' attempts at service in the United States accomplished actual service on Micheletti. Service on Ms. Vivas "as power of attorney for Roberto Micheletti Bain" was unsuccessful because Ms. Vivas does not have power of attorney for Micheletti and she is not his designated agent for service. *See* Exhibit B. Further, Plaintiffs' attempts to serve Ms. Vivas personally, along with four other individuals, none of whom were Micheletti, likewise did not accomplish service. Additionally, Plaintiffs' attempts to serve Micheletti via Federal Express and the United States Postal Service did not accomplish service in accordance with Honduran law. Honduran law provides that an individual must be served with process by a person authorized by the Clerk of the Courts. **Exhibit D**, the affidavit of Jose Alfredo Saavedra Paz, at ¶¶ 3-5. Put simply, service of process by Federal Express or regular mail does not comport with Honduran law, making Rules 4(f)(2)(A) & (C) inapplicable. Exhibit D at ¶ 3. Further, Plaintiffs are barred from arguing that 4(f)(2)(C)(ii) applies because the Federal Express and regular mail packages were dispatched by Plaintiffs, not the Court, as required by the Rule. *See* Fed. R. Civ. P. 4(f)(2)(C)(ii); *G & H Partners, Ltd. v. Boer Goats Int'l Ltd.*, 896 F.Supp. 660, 663 (W.D. Tex. 1995). Accordingly, Plaintiffs have failed to serve Micheletti pursuant to Federal Rule of Civil Procedure 4(f).

#### **LACK OF PERSONAL JURISDICTION**

16. Even if service on Micheletti was proper, which it was not, Plaintiffs' Original Complaint should be dismissed because this Court does not have personal jurisdiction over

Micheletti. Accordingly, Plaintiffs' Original Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

### **I. Legal Standard**

17. When a nonresident defendant moves to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2), the plaintiffs bear the burden of establishing the Court's jurisdiction over the nonresident. *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 592 (5th Cir. 1999); *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir. 1994). If the Court chooses to decide the matter without an evidentiary hearing, the plaintiffs may meet their burden by presenting a *prima facie* case for personal jurisdiction. *Id.* However, the *prima facie* case requirement does not require the Court to credit conclusory allegations, even if uncontroverted. *Panda Brandywine Corp. v. Potomac Electric Power Co.*, 253 F.3d 865, 869 (5th Cir. 2001). The Court will take the allegations of the complaint as true, except where they are controverted by opposing affidavits, and all conflicts will be resolved in favor of the plaintiffs. *Gardemal*, 186 F.3d at 592; *Wilson*, 20 F.3d at 648.

18. A federal district court may exercise personal jurisdiction over a nonresident defendant if: (1) the long-arm statute of the forum state permits the exercise of personal jurisdiction over the defendant; and (2) the exercise of such jurisdiction by the forum state is consistent with due process under the United States Constitution. *Revell v. Lidov*, 317 F.3d 467, 469 (5th Cir. 2002). A defendant is amenable to the personal jurisdiction of a federal court sitting in a federal question case to the same extent that it would be amenable to the jurisdiction of a state court in the same forum. *Burstein v. State Bar of Cal.*, 693 F.2d 511, 514 (5th Cir. 1982); *Skidmore Energy, Inc. v. KPMG*, No. Civ. A. 3:03-cv-2138-B; 2004 WL 2008514, at \*2 (N.D. Tex. Sept. 3, 2004).

19. The Texas long-arm statute confers jurisdiction to the limits of the federal constitution, therefore, the inquiry in this case is whether exercising jurisdiction over Micheletti would satisfy due process requirements. *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 716 (5th Cir. 1999); *Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir. 1999). In order to satisfy due process, two elements must be shown: (1) the nonresident must have some minimum contact with the forum that results from an affirmative act on his part such that the nonresident defendant can anticipate being haled into the courts of the forum state; and (2) it must be fair or reasonable to require the nonresident to defend the suit in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-77 (1985).

## **II. Arguments and Analysis**

### **A. Plaintiffs Cannot Establish Minimum Contacts With Texas.**

20. In order to establish minimum contacts, Plaintiffs must show that Micheletti purposefully availed himself of the privilege of conducting activities in Texas, thus invoking the benefits and protections of the laws of the state of Texas. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *Electrosorce, Inc. v. Horizon Battery Techs., Ltd.*, 176 F.3d 867, 871 (5th Cir. 1999). Minimum contacts can only be established if the Plaintiffs can demonstrate specific or general jurisdiction. *Panda Brandywine*, 253 F.3d at 867-68 (citing *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 215 (5th Cir. 2000)). Under the analysis for either specific or general jurisdiction, “the constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the forum [s]tate.” *Burger King*, 471 U.S. at 474 (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 316 (1945)). The “purposeful availment” requirement “ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts.” *Burger King*, 471 U.S. at 475. Plaintiffs must establish a substantial connection between the nonresident Defendant and the forum state. *Jones v. Petty-Ray*

*Geophysical Geosource, Inc.*, 954 F.2d 1061, 1068 n.9 (5th Cir. 1992). “[W]hether the minimum contacts are sufficient to justify subsection of the non-resident to suit in a forum is determined not on a mechanical and quantitative test, but rather under the particular facts upon the quality and nature of the activity with relation to the forum state.” *Miss. Interstate Express, Inc. v. Transpo, Inc.*, 681 F.2d 1003, 1006 (5th Cir. 1982).

**i. The Court Does Not Have Specific Jurisdiction over Micheletti.**

21. Specific jurisdiction over a nonresident is appropriate when the person has purposefully directed his activities at the forum state and “the litigation results from the alleged injuries that ‘arise out of or relate to’ those activities.” *Alpine View*, 205 F.3d 208 at 215 (citing *Burger King*, 471 U.S. at 472; *Hall v. Helicopteros Nacionales de Colombia, S.A.*, 638 S.W.2d 870, 872 (Tex. 1982), *rev’d on other grounds*, 466 U.S. 408 (1984)). To determine whether specific jurisdiction exists, the Court must “examine the relationship among the defendant, the forum, and the litigation to determine whether maintaining the suit offends the traditional notions of fair play and substantial justice.” *Grundle Lining Const. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 205 (5th Cir. 1996); *Seitz v. Envirotech Sys. Worldwide Inc.*, 513 F.Supp.2d 855, 860 (S.D. Tex. 2007).

22. Plaintiffs fail to cite a single fact to support a finding of specific jurisdiction. Instead, Plaintiffs boldly allege that, “this Court has personal jurisdiction over Defendant” without any facts to support their claim. *See* Plaintiffs’ Original Complaint [Doc. 1] at ¶ 15. Such conclusory allegations do not make a *prima facie* showing of personal jurisdiction. *See Panda Brandywine*, 253 F.3d at 868-69; *Seitz*, 513 F.Supp.2d at 861-62. Further, Plaintiffs’ allegations wholly relate to events that took place in Honduras, not Texas. [Doc. 1]. The decedent was a Honduran citizen and resident. *Id.* at ¶ 37. Plaintiffs themselves are Honduran

citizens and residents. *Id.* at ¶¶ 16-17. The alleged events that form the basis of Plaintiffs' claims all occurred at the Toncontin International Airport in Tegucigalpa, Honduras. *Id.* at ¶¶ 38-42. Plaintiffs do not allege any facts that "arise out of or relate to" any contacts with Texas. *Id.* Accordingly, this Court does not have specific jurisdiction over Micheletti.

**ii. The Court Does Not Have General Jurisdiction Over Micheletti.**

23. This Court cannot exercise general jurisdiction over a nonresident defendant unless the contacts with the forum state are "substantial, continuous, and systematic." *Johnston v. Multidata Systems Int'l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415-16 (1984)). The "continuous and systematic contacts test is a difficult one to meet, requiring *extensive* contacts between a defendant and a forum." *Johnston*, 523 F.3d at 609 (citing *Submersible Sys., Inc. v. Perforadora Cent., S.A.*, 249 F.3d 413, 419 (5th Cir. 2001)) (emphasis added). "[E]ven repeated contacts with forum residents by a foreign defendant may not constitute the requisite substantial, continuous and systematic contacts required for a finding of general jurisdiction." *Id.* at 610 (citing *Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002) (citations omitted)). "Random, fortuitous, or attenuated contacts are not sufficient to establish jurisdiction." *Id.* (citing *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 312 (5th Cir. 2007)). The Fifth Circuit "has consistently imposed the high standard set by the Supreme Court when ruling on general jurisdiction issues." *Id.* at 611. Plaintiffs must demonstrate contacts that are more extensive in quality and nature between Micheletti and Texas than those needed to support specific jurisdiction. *Dalton v. R & W Marine*, 897 F.2d 1359, 1362 (5th Cir. 1990); *Seitz*, 513 F.Supp.2d at 860.

**(a) Plaintiffs Fail to Plead a Prima Facie Case.**

24. Plaintiffs allege *upon information and belief* that Micheletti owns multiple properties in Texas, possesses businesses interests in Texas and has an agent for service in Texas. [Doc. 1] at ¶ 18. Plaintiffs' allegations are conclusory and fail to make a *prima facie* showing of general jurisdiction. *See Gardemal*, 186 F.3d at 592 (plaintiff bears the burden of establishing the Court's jurisdiction over a nonresident and must make a *prima facie* showing of general jurisdiction); *Panda Brandywine*, 253 F.3d at 869 (the Court is not required to credit conclusory allegations, even if uncontroverted).

25. In *Davis v. Nordstrom FSB*, the plaintiff pled general jurisdiction as follows: "General jurisdiction is acquired because Defendant has cardholders in and does business with people in the State of Texas." *Davis v. Nordstrom FSB*, Cause No. H-06-0418; 2006 WL 2479002, at \*3 (S.D. Tex. Aug. 25, 2006). Judge Atlas held that Plaintiff's conclusory allegations were insufficient to establish a *prima facie* case for general jurisdiction. *Id.* ("The allegations that Defendant has an unspecified number of customers in Texas and conducts unspecified business in Texas does not amount to a *prima facie* showing of general jurisdiction."). Specifically, Judge Atlas pointed out that the plaintiff did not "specify the Defenan't's [sic] Texas customers, how frequently Defendant did or does business in Texas, what type of business activities Defendant conducts in Texas, whether Defendant regularly solicits business in Texas, or whether Defendant's contacts with Texas are sporadic or long term." *Id.* As a result, Judge Atlas found that the plaintiff had not established general jurisdiction over the defendant. *Id.* at \*3-4.

26. Like the plaintiff in *Davis*, Plaintiffs improperly rely on broad conclusory statements to establish a *prima facie* showing of personal jurisdiction. Plaintiffs fail to allege

*any* specific factual allegations concerning jurisdiction, instead relying on statements like “multiple properties” and “business interests.” Accordingly, Plaintiffs’ Complaint should be dismissed because Plaintiffs have failed to establish a *prima facie* case for general jurisdiction over Micheletti.

**(b) Micheletti’s Contacts With Texas Are Not Substantial, Continuous or Systematic.**

27. Even if this Court finds that Plaintiffs have pled a *prima facie* case of general jurisdiction, Micheletti simply does not have contacts with Texas that rise to the level of being substantial, continuous and systematic. Contrary to Plaintiffs’ allegations, Micheletti does not possess any business interests in Texas, nor does he have an agent for service in Texas (his insurance agent is not an agent for service of process). Exhibits A & B. He has never been employed by a United States company. Exhibit A. Micheletti has never owned an interest in a business in Texas, nor has he ever worked for a business in Texas. *Id.* The Honduran businesses in which he holds an ownership interest have no offices in Texas (or the United States for that matter), nor do they sell products or services in Texas or advertise in any way to Texas residents. *Id.* Micheletti does not have a Texas driver’s license. *Id.* He did at one time have a green card to live in the United States during the 1970s. *Id.* From 1974 to 1979 he resided in Louisiana. *Id.* After returning to Honduras in 1979, Micheletti voluntarily surrendered his green card. *Id.* Micheletti never resided in Texas. *Id.*

28. In fact, Micheletti only has three discreet contacts with Texas: (1) an ownership interest in a piece of property in Magnolia Texas; (2) checking and savings accounts with Wells Fargo that were opened in December 2007 and closed in December 2008 and February 2011, respectively; and (3) sporadic trips to Texas for either vacation or layovers when flying to other destinations. Exhibit A. None of these contacts rise to the level of being substantial, continuous

and systematic, even when viewed as a whole. *Johnston*, 523 at 609. Accordingly, Plaintiffs' Complaint should be dismissed.

**(1) Ownership of A Single Piece of Property Does Not Confer General Jurisdiction.**

29. Micheletti does have an ownership interest in one piece of property located in Magnolia, Texas (previously defined as the "Property"). Exhibit A. However, ownership of real property alone does not provide contacts sufficient to establish general jurisdiction over a nonresident. *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 779 (5th Cir. 1986) (owning a condominium in Texas without more, is insufficient to convey general jurisdiction); *Bryant v. Roblee*, 153 S.W.3d 626, 630 (Tex. App.—Amarillo 2004, no pet.) (ownership of loans secured by liens on real property insufficient to establish general jurisdiction). Rather, Plaintiffs must demonstrate more in the way of substantial, continuous and systematic contacts with Texas in order for the Court to exercise general jurisdiction over Micheletti. *See General Electric Capital Corp. v. Posey*, Cause No. 4:02-cv-319-Y; 2006 WL 708163, at \*3 (N.D. Tex. Mar. 20, 2006) (interest in partnership that owned real property in Texas was insufficient to warrant exercise of general jurisdiction); *Bryant*, 153 S.W.3d at 631 (ownership of loans secured by liens on Texas property did not demonstrate continuous and systematic contacts necessary for general jurisdiction); *The Johns Hopkins University v. Nath*, 238 S.W.3d 492, 502-03 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (owning an oil and gas interest and having an agent for service of process in Texas was insufficient to establish general jurisdiction).

30. In this case, Micheletti does not reside on the Property, nor has he ever stayed on the Property overnight. Exhibit A. Micheletti lives in Honduras. *Id.* He does not own any other real property in Texas. *Id.* Micheletti has only visited the Property twice, both times for only an hour. *Id.* The Property was purchased in 2008. *Id.* The dwelling on the property was rented for



\$1000 a month for the last several years until the dwelling was burned to the ground in September 2011 by a wildfire. *Id.* Initially, the rent was deposited into a bank account in the name of Micheletti and his wife (discussed below). As of February 2011, the income from the rental property has been deposited into a U.S. bank account managed by Jenny Vivas, an insurance broker. *See* Exhibit B. All taxes, insurance and expenses for the property are paid from that U.S. bank account at Ms. Vivas' direction. *Id.* No money has ever been transferred out of that account to Micheletti because the expenses associated with the Property have exceeded the amount of the rent. *Id.* Because the dwelling on the Property burned to the ground in September 2011, no rent will be deposited into any account in the near future. *Id.*

31. Micheletti's ownership interest in one piece of property in Texas is simply inadequate to establish the type of substantial, continuous and systematic contacts that would confer personal jurisdiction over Micheletti. *Holt*, 801 F.2d at 779. Micheletti's contact with the property has been minimal (only two visits), and he does not personally handle or maintain the rent or expenses associated with the Property. Exhibit A.

## **(2) The Checking and Savings Accounts**

32. Likewise, Micheletti's brief ownership in one checking and one savings account in Texas is inadequate to demonstrate substantial, systematic and continuous contacts with Texas. The presence of a bank account in Texas is insufficient to convey general jurisdiction. *Kudu Co., Ltd. v. Latimer*, Cause No. 4:10CV680; 2011 WL 3739313, at \*8 (E.D. Tex. Aug. 1, 2011) (personal bank account in Texas alone was insufficient to confer general jurisdiction). In determining whether possession of a bank account will subject a person to general jurisdiction, the focus is on "the quality and nature of the defendant's contacts with Texas, and, therefore, use of the bank account 'must be continuous and systematic in order to support the exercise of

general jurisdiction.” *Waterman Steamship Corp. v. Ruiz*, --S.W.3d.-- Cause No. 01-10-00516; 2011 WL 1505446, at \*23 (Tex. App.—Houston [1st Dist.] Apr. 14, 2011, no pet.) (citing *El Puerto de Liverpool, S.A. de C.V. v. Servi Mundo Llantero S.A. de C.V.*, 82 S.W.3d 622, 631 (Tex. App.—Corpus Christi 2002, no pet.)). “The purpose of the account, the number of account transactions, and the duration of the account are factors to be considered, but are not by themselves determinative of the issue of general jurisdiction.” *Elizondo v. Elizondo*, Cause No. 04-08-00384; 2009 WL 1617761, at \*4 (Tex. App.—San Antonio June 10, 2009, no pet.) (sporadic use of bank accounts were not enough to establish general jurisdiction); *Waterman*, 2011 WL 1505446, at \*23 (deposit of \$227 million into account of parent company in Dallas was insufficient to confer general jurisdiction); *see also Primera Vista S.P.R. de R.L. v. Banco Serfin, S.A. Institucion de Banca Multiple Grupo Financiero Serfin*, 974 S.W.2d 918, 926 (Tex. App.—El Paso 1998, no pet.) (pass-through bank account in Texas to facilitate Mexican clients’ transactions did not confer general jurisdiction).

33. In this case, Micheletti’s checking and savings accounts were opened with Wells Fargo Bank in Houston in December 2007. Exhibit A. Micheletti deposited the initial funds into the checking account for the purchase the property. *Id.* After that, Micheletti did not personally deposit or withdraw any funds from the checking account. *Id.* The money from the savings account was deposited into the checking account (\$5,400.72) in December 2008, and the savings account was closed. *Id.* The checking account was closed in February 2011. *Id.* Micheletti never personally handled or maintained the rent or expenses associated with the Property. *Id.* The rental income that was deposited in the checking account was simply insufficient to confer general jurisdiction. *Smirch v. Allied Shipyard*, 164 F.Supp.2d 903, 910 (S.D. Tex. 2001) (“In short, a nonresident defendant might yield significant revenue from Texas

clients, but fall short of the court's jurisdiction by not actually conducting business within the state.")

**(3) Travel to Texas**

34. Micheletti has traveled to Texas in the past, either stopping in Texas airports on the way to other destinations as a member of the Honduran Congress or for vacation with his family. Exhibit A. Micheletti has not entered the United States since March 29, 2009. *Id.* His visa was suspended in September 2009 by the US Government (discussed in more detail below). *Id.* Trips to Texas for personal and recreational purposes alone do not confer general jurisdiction. *Helicopteros*, 466 U.S. at 418; *Johnston*, 523 F.3d at 614 (“[M]ere travel, even at regular intervals into a state, does not create general jurisdiction.”).

**(c) When Viewed As a Whole, Micheletti's Contacts With Texas Are Not Substantial, Continuous and Systematic.**

35. When viewed as a whole, Micheletti's contacts with Texas are simply insufficient to establish general jurisdiction. *Holt*, 801 F.2d at 779 (party's contacts must be viewed *in toto*); *Smirch v. Allied Shipyard, Inc.*, 164 F.Supp.2d 903, 910 (S.D. Tex. 2001); *Paolino v. Argyll Equities, L.L.C.*, 401 F.Supp.2d 712, 727 (W.D. Tex. 2005). His contacts with Texas have not been substantial, continuous and systematic.

36. The Fifth Circuit laid out the standard necessary to prove substantial, continuous and systematic contacts in order to confer general jurisdiction in *Holt Oil & Gas Corp. v. Harvey*. 801 F.2d 773 (5th Cir 1986). In that case, the defendant's contacts with Texas included the following: (1) defendant attended college and was formerly employed in Texas; (2) defendant owned a condominium in Texas; (3) defendant traveled to Texas on numerous occasions to visit his children; (4) defendant frequently visited Texas for recreation; (5) defendant transacted a great deal of business in Texas, which included business investments in

multiple Texas companies, including being the sole shareholder of one of the companies. *Id.* at 779. The Fifth Circuit found that the defendant “had maintained constant and extensive personal and business connections with Texas throughout his adult life.” *Id.* The court also found it significant that “the instant controversy [arose] out of one of [the defendant’s] business contacts in Texas” which was not sufficient to prove specific jurisdiction, but was “nonetheless relevant to [the court’s] determination.” *Id.* Ultimately, the court concluded that there was general jurisdiction over the defendant, but not before warning that “the issue is close.” *Id.* at 778.

37. Other courts have interpreted the Fifth Circuit’s holding in *Holt* to indicate that the standard necessary to find general jurisdiction must be more than the contacts present in *Holt*. In *Paolino v. Argyll Equities, L.L.C.*, the defendant (1) maintained a personal stock brokerage account in Texas; (2) traveled to Texas “regularly” for personal visits with his family; (3) maintained a Texas driver’s license; (4) lived and working in Texas from 1996 to 1998; (5) traveled to Texas to attend a gun show the previous summer; and (6) formed and actively participated in two Texas corporations. 401 F.Supp.2d at 726. The Western District of Texas distinguished *Holt*, stating that the present case “present[ed] a weaker case for exercising general personal jurisdiction than the facts in *Holt*, which the Fifth Circuit had characterized as ‘close.’” *Id.* at 731. Accordingly, the court found the defendant’s contacts insufficient to exercise general jurisdiction. *Id.*; see also *Deining v. Deining*, 677 F.Supp. 486, 494 (N.D. Tex. 1988) (“In the instant case, the contacts of [d]efendants...pale in comparison to those required in *Holt Oil & Gas* to support the exercise of general in personal jurisdiction.”).

38. Like the defendant in *Paolino*, Micheletti’s contacts with Texas do not rise to the level of the defendant’s contacts in *Holt*. Micheletti has never attended school in Texas, nor has he been employed there. Exhibit A; see also *Holt*, 801 F.2d at 779. He has not traveled to Texas

on “numerous occasions.” *Id.* He has never transacted business in Texas, nor has he had ownership in any business in Texas. *Id.* Accordingly, when Micheletti’s contacts with Texas are viewed *in toto*, they simply do not rise to the level of being substantial, systematic and continuous. Plaintiffs’ Complaint, therefore, should be dismissed.

**B. Finding Jurisdiction Over Micheletti Would Offend the Notions of Fair Play and Substantial Justice.**

39. Even if the Court finds that Micheletti has sufficient contacts to Texas, the Court cannot exercise jurisdiction over a nonresident if doing so will offend “traditional notions of fair play and substantial justice.” *Int’l Shoe*, 326 U.S. at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Five factors are used to determine whether the exercise of jurisdiction is fair and reasonable: “(1) the burden on the nonresident defendant, (2) the forum state’s interest, (3) the plaintiff’s interest in securing relief, (4) the interest of the interstate judicial system in the efficient administration of justice, and (5) the shared interest of the several states in furthering social policies.” *McFadin v. Gerber*, 587 F.3d 753, 760 (5th Cir. 2009). “The relationship between the defendant and the forum must be such that it is reasonable to require the defendant to defend the particular suit that is brought there.” *Johnston*, 523 F.3d at 615. When foreign defendants are involved, the court must also “consider the procedural and substantive policies of other nations whose interest are affected by the assertion of jurisdiction by the [forum state].” *Id.* (citing *Asahi Metal Indus. Co. v. Superior Court of Ca.*, 480 U.S. 102, 155 (1987)).

**i. The Burden on Micheletti Is Very High.**

40. In this case, the burden on the nonresident defendant is extremely high. Micheletti resides in Honduras, approximately 1200 miles from Houston, Texas where this case would be tried. Exhibit A. More importantly, Micheletti’s visa was revoked by the United States Government in 2009, making it impossible for him to enter the country. *Id.*; *see also*

Exhibit C. In fact, the United States Department of State recently denied Micheletti's request for a visa to allow him to fly to the United States to testify before the House Committee on Foreign Affairs. Exhibit A; *see also* Comments of Chairman Ros-Lehtinen on the State Department's Attempts to Block Congressional Appearance of Former Honduran President Micheletti, *available at* [http://foreignaffairs.house.gov/press\\_display.asp?id=1866](http://foreignaffairs.house.gov/press_display.asp?id=1866) (last visited Sept. 6, 2011). Instead, Micheletti was forced to testify via videoconference. Exhibit A. Put simply, Micheletti is unable to defend himself in Houston regardless of the circumstances because he cannot appear at trial. As a result, the burden placed on Micheletti to defend a lawsuit in Texas is very high.

41. Further, even if he could enter the country, Micheletti would be burdened by being forced to defend himself in a foreign legal system. *Asahi*, 480 U.S. at 114-16 (burden of Japanese corporation defending itself in California was too great and offended the notions of substantial justice); *Johnston*, 523 F.3d at 617 (burden on Canadian defendant was "severe" because the defendant would be forced to defend itself in a foreign legal system and would not have compulsory access to many of the witnesses and evidence necessary to defend itself). Plaintiffs have failed to bring any action in the Honduran courts, despite having access to causes of action that address the alleged conduct raised in the Original Complaint. Exhibit D at ¶¶6-18. This failure by Plaintiffs to make use of the most convenient forum for this lawsuit further highlights the burden on Micheletti to travel to Texas to defend himself.

42. Also, conducting the trial in Texas would require translation of numerous documents and testimony. Micheletti speaks Spanish. Exhibit A. Most residents of Honduras likewise speak and write in Spanish, requiring costly translations of documents and witness

testimony. *Id.*; *Punyee v. Bredimus*, Cause No. 3:04CV0893-G; 2004 WL 2511144, at \*7 (N.D. Tex. Nov. 5, 2004).

43. All of the witnesses and documents necessary for Micheletti to defend himself are in Honduras, making the burden even greater on Micheletti. *Id.* All of the witnesses in this case are presumed to be in Honduras. *See* [Doc. 1]. Federal courts have no compulsory process for trial over Honduran citizens, including any witnesses that will be necessary for trial. FED. R. CIV. P. 45; *see, e.g., Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 673 (5th Cir. 2003) (federal courts do not have compulsory power over foreign citizens). Likewise all of the documents related to the case are likely to be in Honduras, and all of the depositions will have to take place in Honduras. “[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition is to create a condition not satisfactory to litigants.” *Dtex, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 799 (5th Cir. 2007) (citing *Perez & Compania (Cataluna), S.A. v. M/V Mexico I*, 826 F.2d 1449, 1453 (5th Cir. 1987)). Additionally, the expense for Texas counsel to travel to and from Honduras to investigate this case, review documents and take depositions will be costly and burdensome. Accordingly, the overall burden on Micheletti is extremely high.

**ii. Texas Does Not Have An Interest in the Outcome of This Lawsuit.**

44. Texas has a minimal or no interest in the outcome of this lawsuit. Plaintiffs and Defendant are all citizens and residents of Honduras. [Doc. 1]. The decedent in the case was a citizen and resident of Honduras. *Id.* The facts alleged by Plaintiffs are all claimed to have taken place in Honduras. *Id.* As a result, Texas has no interest in this outcome of this lawsuit. *See Johnston*, 523 F.3d at 617-18 (Texas has minimal interest in a suit where none of the parties were residents of Texas and the tortious acts did not take place in Texas).

**iii. The Procedural and Substantive Policies of Honduras Will Be Affected By a Finding of Jurisdiction.**

45. All parties involved in this case are citizens of Honduras. Exhibit A. The acts alleged by Plaintiffs involve the Honduran government and Honduran laws. [Doc. 1]. Currently, an investigation is underway by the Honduran government regarding the decedent's death. Exhibit D at ¶ 21. A finding of jurisdiction would usurp the power of the Honduran legal system, raising a host of political issues. As a result, this factor weighs heavily against a finding of jurisdiction. *See Asahi*, 480 U.S. at 115; *Johnston*, 523 F.3d at 617. Accordingly, given the burden on Micheletti, Texas' lack of interest in the outcome and the effect on the laws and procedures of Honduras, finding jurisdiction over Micheletti would offend the notions of fair play and substantial justice.

**FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

46. Subject to his motions to dismiss for lack of proper service and lack of personal jurisdiction, Micheletti moves to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). As discussed above in paragraph 8, Plaintiffs' claims can be divided into three groups: (1) the ATS Claims; (2) the TVPA Claim and (3) the State Law Claims. For the reasons discussed below, all three groups of claims fail to meet the necessary pleading requirements.

**I. Legal Standard**

47. Federal Rule of Civil Procedure 12(b)(6) allows dismissal if Plaintiffs fail "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6); *Abecassis v. Wyatt*, 704 F.Supp.2d 623, 649 (S.D. Tex. 2010). In *Twombly* and *Iqbal*, the Supreme Court established the necessary pleading requirements a complaint must meet to state a claim for relief and survive a Rule 12(b)(6) dismissal. *See Twombly*, 550 U.S. 544 (2007); *Iqbal*, ---U.S.---, 129 S.Ct. 1937



(2009). In *Twombly*, “the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Abecassis*, 704 F.Supp.2d at 649 (ATS case applying *Iqbal* and *Twombly*). *Twombly* stands for the proposition that a complaint must contain “enough facts to state a claim to relief that is plausible on its face.” *Id.* (citing *Twombly*, 550 U.S. at 570). *Twombly* also held that although a court must accept all of the allegations in a complaint as true for 12(b)(6) purposes, that tenet does not apply to legal conclusions. *Twombly*, 550 U.S. at 555. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S.Ct. 1949 (citing *Twombly*, 550 U.S. at 555).

48. *Iqbal* further elaborated on the standards set forth in *Twombly* and stated, “the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Abecassis*, 704 F.Supp.2d at 649 (citing *Iqbal*, 129 S.Ct. at 1949). The complaint must contain “factual content” allowing a court to make a reasonable inference “that the defendant is liable for the misconduct alleged,” not just the possibility that he “acted unlawfully.” *Id.* (citing *Iqbal*, 129 S.Ct. at 1949). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (citing *Iqbal*, 129 S.Ct. at 1949).

## **II. Arguments and Analysis**

### **A. The ATS Claims**

49. The Alien Tort Statute is a jurisdictional statute that creates no new causes of action. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). A claim under the ATS must be supported by a common law cause of action which violates international law or a United States

treaty. 28 U.S.C. § 1350. Allegations regarding the ATS require more than mere conclusory allegations. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 165 (5th Cir. 1999) (dismissing ATS claims on the grounds that they were “devoid of names, dates, locations, times or any facts that would put [defendant] on notice as to what conduct supports the nature of his claims.”); *Abecassis*, 704 F.Supp.2d at 655 (dismissing ATS claims for failure to plead nonconclusory facts). General propositions are not well-pleaded facts, and an ATS complaint must allege sufficient non-conclusory factual allegations to support a clearly established violation of international law. *See Mamani v. Berzain*, ---F.3d---, 2011 WL 3795468, \*3 (11th Cir. Aug. 29, 2011) (dismissing ATS claims because “no tort has been stated” in a complaint that “had all of the flaws” *Iqbal* warned against).

**i. Plaintiffs’ Allegations**

50. Plaintiffs plead five causes of action under the ATS as violations of “customary international law”: Claim 2: the crime against humanity of murder - [Doc. 1] at ¶¶ 101-107; Claim 3: the crime against humanity of persecution as to Isis Murillo – *Id.* at ¶¶ 108-116; Claim 4: the crime against humanity of persecution as to decedent’s family – *Id.* at ¶¶ 117-125; Claim 5: the crime against humanity of inhumane acts – *Id.* at ¶¶ 126-133] and Claim 6: the violation of the right to life, liberty and security of person – *Id.* at ¶¶ 134-141. All five causes of action are pled nearly identically using the following conclusory allegations:

- The person or persons who killed Isis Murillo targeted him (and his family) on political grounds, by reason of his affiliation with a group or collectively, namely pro-Zelaya supporters and opponents of the *coup*. (Claim 3, 4)
- The killing of decedent was committed as part of a widespread or systematic attack against a civilian population and was committed with knowledge of the attack. (Claims 2, 3, 4, 5)
- Defendant’s acts or omissions caused Plaintiff and Decedent’s next of kin to suffer damages, including severe physical and mental pain and suffering, in the amounts to be determined at trial. (Claims 2, 3, 4, 5, 6)

- Defendant's acts and omissions were deliberate, willful, intentional, wanton, malicious, and/or oppressive, and should be punished by an award of punitive damages in an amount to be determined at trial. (Claims 2, 3, 4, 5, 6)
- Defendant is liable for said conduct in that he requested, confirmed, ratified, incited and/or conspired with the Honduran Armed Forces and National Police or persons or groups acting in coordination with the Armed Forces or under their control to bring about these violations. (Claims 2, 3, 4, 5, 6)
- In addition, or in the alternative, Defendant is liable for the conduct committed by subordinates, caused the violations alleged and caused Plaintiffs and decedent's family to experience severe mental pain and suffering. (Claims 2, 3, 4, 5, 6)

[Doc. 1].

**ii. The Conclusory "Allegations of Fact"**

51. A careful review of the Original Complaint reveals that the underlying "facts" alleged by Plaintiffs to support their ATS claims are likewise no more than conclusory statements that are not entitled to the assumption of truth. *Iqbal*, 129 S.Ct. at 1950. Specifically, Plaintiffs rely on the following conclusions, which are pled as facts to support causation for all five of their ATS claims (as well as their TVPA and State Law Claims):

- The period of the *de facto* regime's rule in Honduras was characterized by widespread and/or systematic attacks against the civilian population of Honduras, in particular politicians, public officials, media outlets, human rights defenders and citizens who opposed the coup and the coup government. [Doc. 1] at ¶ 57.
- The attacks included the severe deprivation of fundamental rights, including, inter alia, the rights to life, liberty, expression, and assembly. *Id.* at ¶ 58.
- Micheletti authorized, ordered, planned, condoned, induced and/or instigated the military to carry out executive decrees and decisions that he promulgated, particularly with respect to targeted repression of the media and confiscation of equipment, and to threaten and intimidate political opponents. *Id.* at ¶ 88.
- A superior subordinate relationship existed between Micheletti and the person or persons who committed the offenses alleged herein. *Id.* at ¶ 89.
- Micheletti knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit the offenses alleged herein. *Id.* at ¶ 90.

- Micheletti failed to take all necessary and reasonable measures to prevent these abuses or failed to punish the subordinates after the commission of the acts alleged herein. *Id.* at ¶ 91.

52. All of these conclusory statements are improper and are entitled to no weight of truth for 12(b)(6) purposes. *Iqbal*, 129 S.Ct. at 1950. Recently, in *Mamani v. Berzain*, the Eleventh Circuit examined similar facts and reversed the district court's ruling denying a motion to dismiss for failure to state a claim. 2011 WL 2795468. In that case, plaintiffs were the relatives of people killed during a time of civil unrest and political upheaval in Bolivia in 2003. *Id.* at \*1. Plaintiffs sued the former president of Bolivia and the former defense minister of Bolivia pursuant to the ATS and the Torture Victims Protection Act ("TVPA"), claiming that defendants violated international law by committing extrajudicial killings; by perpetrating crimes against humanity; and by violating rights to life, liberty, security of person, freedom of assembly and freedom of association when people were killed and injured during the course of police and military operations to restore order in the country. *Id.* The Eleventh Circuit noted:

We do not look at these ATS cases from a moral perspective, but from a legal one. We do not decide what constitutes desirable government practices. We know and worry about the foreign policy implications of civil actions in federal courts against the leaders (even the former ones) of nations. And we accept that we must exercise particular caution when considering a claim that a former head of state acted unlawfully in governing his country's own citizens. "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits."

*Id.* at \*2 (citations omitted).

53. Following the Supreme Court's approach in *Iqbal*, the Eleventh Circuit began by identifying the conclusory allegations in the complaint, including legal conclusions without factual support, which "are entitled to no assumption of truth." *Id.* (citing *Iqbal*, 129 S.Ct. at

1950). The court found the following allegations regarding the defendants to be statements of legal conclusions, rather than factual allegations:

- “exercised command responsibility over, conspired with, ratified, and/or aided and abetted subordinates in the Armed Forces...to commit acts of extrajudicial killing, crimes against humanity, and other wrongful acts alleged herein”;
- “met with military leaders, other ministers, other ministers in the Lozada government to plan the widespread attacks involving the use of high-caliber weapons against protesters”;
- “knew or should have known of the pattern and practice of widespread, systematic attacks against the civilian population by subordinates under their command”; and
- “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”

*Id.* at \*4. Further, the court pointed out that allegations that government leaders knew or should have known of wrongful violence are “[e]asy to say about leaders of nations, but without factual support of more specific acts by these defendants, the “bare assertions” are “not entitled to be assumed true.” *Id.* (citing *Iqbal*, 129 S.Ct. at 1951). Like the allegations in *Mamani*, Plaintiffs’ factual allegations are nothing more than bare assertions. This Court should disregard Plaintiffs’ conclusory factual allegations and give them no weight of truth. *Iqbal*, 129 S.Ct. at 1951.

### **iii. The Lack of Any Specificity**

54. With the conclusory allegations removed from consideration, Plaintiffs simply have not pled any entitlement to relief under the ATS. Specifically, Plaintiffs’ ATS Claims for crimes against humanity fail to establish any causal connection between the death of Isis Murillo and Micheletti. Further, Plaintiffs have failed to establish that their crimes against humanity allegations qualify as violations of international law.

**a. Claims 2, 3 & 4: Crimes Against Humanity of Murder and Persecution**

55. Plaintiffs allege the following “facts” to support their claim for the crime against humanity of murder:

- Upon information and belief, the Honduran Army stationed sharpshooters on nearby buildings. [Doc. 1] at ¶ 40.
- At or around the time that Zelaya’s plane was attempting to land and being blocked from doing so, the Honduran Army shot Isis Murillo in the head and killed him. *Id.* at ¶ 41.
- Subsequent to the coup, a letter surfaced which was dated June 26, 2009, from Defendant Micheletti to General Romeo Vasquez Velasquez (hereinafter “Vasquez Velasquez”), head of the Honduran armed forces, in which Micheletti wrote to “remind” the general “of the mission to be performed on 28 June” and that “those people who say they are Hondurans who want to change our constitution do not deserve to be in this country.” Two days later, it was Gen. Vasquez Velasquez who ordered President Zelaya’s kidnapping and forced exile. Micheletti’s letter of June 26, 2009, to Gen. Vasquez is evidence that he was asserting authority over the military even before the *coup* was complete. *Id.* at ¶¶ 83-85.

56. Plaintiffs allege the following “facts” to support their claims for the crime against humanity of persecution as to Isis Murillo and his family:

- Isis Obed Murillo, along with members of his family, joined thousands of other opponents of the coup at the airport on July 5, 2009 for a non-violent, peaceful gathering to welcome Zelaya back and support the restoration of the democratically-elected government. [Doc. 1] at ¶ 38.
- Upon information and belief, the Honduran Army stationed sharpshooters on nearby buildings. [Doc. 1] at ¶ 40.
- At or around the time that Zelaya’s plane was attempting to land and being blocked from doing so, the Honduran Army shot Isis Murillo in the head and killed him. *Id.* at ¶ 41.
- Plaintiff David Murillo was also present at the gathering at Toncontin airport where his son Isis was shot and killed, which caused him severe mental pain and suffering and emotional and physical distress. Subsequent to Isis’ killing, Plaintiffs and their family began receiving threatening and/or harassing calls and texts. Subsequent to Isis’ killing, Plaintiffs and their family were subjected to surveillance and harassment by police and other actors. *Id.* at ¶¶ 47-49.

- Shortly after Isis' death, police helicopters flew low over Plaintiffs' home approximately four times. The helicopter would circle over the house so low that Plaintiff could see police looking at him with binoculars and could see their weapons drawn. On at least one occasion, fliers were dropped from the helicopter which stated that what happened to Plaintiff David Murillo's son would also happen to them. Plaintiff received other messages via text and phone which contained similar threats. *Id.* at ¶¶ 50-52.
- Plaintiffs were forced to relocate to another community in an effort to escape the constant threats, surveillance and harassment and have had difficulty finding work and feeling secure in their persons, home and communities. Plaintiffs' daughter was followed to and surveilled at work several times by persons who took her photograph. She was ultimately fired from her job as the result of the controversy surrounding her brother's death and the harassment she received at work. *Id.* at ¶¶ 53-54.

57. Plaintiffs' factual allegations simply fail to make a causal link of *any* kind between Micheletti and the death of Isis Murillo. Further, the allegations do not link Micheletti and the alleged political persecution of Murillo and his family. In fact, Plaintiffs make no nonconclusory allegations that demonstrate (1) an intent to murder Isis Murillo for any reason (political or otherwise) on the part of the Honduran Army; (2) that the Honduran Army was acting on the orders of Micheletti; (3) that Micheletti had any harmful or malicious intent toward Isis Murillo or his family; and (4) that Micheletti is responsible for the death of Isis Murillo or the alleged political persecution claimed by Murillo's family.

58. In *Shan v. China Construction Bank Corp.*, the Second Circuit examined a similar ATS case where the plaintiff failed to plead any causal link between the tort alleged and the defendant. 421 F. App'x 89, 2011 WL 1681995 (2d Cir. May 5, 2011) (affirming 12(b)(6) dismissal for failure to establish an ATS torture claim under either direct liability, aiding and abetting, or conspiracy theories). In *Shan*, the plaintiff, a resident alien, alleged torture at the hands of the Chinese police for an audit that uncovered wrongdoing by his former employer, the Bank. *Id.* at \*2. He sued the Bank, claiming that the Bank and the Chinese police "both operated as arms of the Government of China," and therefore, the Bank should be held directly liable for

“police violations of customary international law.” *Id.* at \*3. Even though plaintiff conceded that proof of direct liability required that the Bank “participated physically or otherwise directly, in the material elements of a crime whether [individually] or jointly with others or planned, instigated, ordered, solicited, or induced the alleged violations,” plaintiff argued that he adequately pled direct liability by alleging the Bank called police to come arrest him and created false evidence to justify his arrest because of the audit. *Id.* at \*2. Even with the inference that the Bank “directed the Chinese police to abuse him,” Plaintiff’s allegations did not support a claim that the Bank was directly liable for the alleged ATS violation. *Id.*

59. In dismissing the claim, the *Shan* court differentiated between well pled facts establishing an ATS violation and “allegations [that are] insufficient to support a reasonable inference of direct liability by the Bank for conduct . . . the complaint repeatedly asserts was committed by” the police. *Id.* Likewise, the court affirmed the dismissal of the aiding and abetting claim because actionable assistance must be “practical” and have a “substantial effect on the perpetration of the crime;” however, Plaintiff’s allegations that the Bank contacted and provided false information to the police did not “constitute substantial assistance” in perpetrating the alleged tort. *Id.* at \*5 (internal citations omitted). Likewise, in *Mamani*, the Eleventh Circuit held that it did not “accept that, even if some soldiers or policemen committed wrongful acts, present international law embraces strict liability akin to respondeat superior for national leaders at the top of the long chain of command in a case like this one.” *Id.* at \*5.

60. In the present case, there are no allegations that Micheletti “participated physically or otherwise directly, in the material elements of [the] crime.” *See Shan*, 2011 WL 1681995, at \*2. Likewise, there are no facts to suggest that Micheletti’s actions constituted a “substantial effect on the perpetration of the crime” against Isis Murillo. *See id.* at \*5. Assuming



*arguendo* that some low level soldiers or policemen did commit a wrongful act, which Micheletti does not concede, current international law simply does not embrace a concept of “strict liability akin to respondeat superior for national leaders at the top of the long chain of command.” *Mamani*, 2011 WL 3795468, at \*5. Accordingly, Plaintiffs’ claims should be dismissed pursuant to Rule 12(b)(6).

**b. Claims 5 & 6: Crimes Against Humanity of Inhumane Acts and Violation of the Right to Life, Liberty and Security of Person and Freedom of Assembly and Association**

61. The two remaining ATS claims for inhumane acts and the violation of the right to life, liberty and security of person and freedom of assembly of association are so vague, it is impossible to determine what is being alleged against Micheletti. The lack of clarity in the allegations alone demonstrates that these causes of action have not been adequately pled. In fact, the ambiguity of these purported causes of action does not enable this court to exercise subject matter jurisdiction over the claims.<sup>1</sup>

62. In order for a district court to exercise subject matter jurisdiction pursuant to the Alien Tort Statute (also known as the Alien Tort Claims Act) (collectively, “ATS”), a plaintiff must meet three requirements: (1) the plaintiff must be an alien; (2) the cause of action must lie in tort; and (3) the tort must violate international law or a United States treaty. 28 U.S.C. § 1350; *Beanal*, 197 F.3d at 164-65; *Ruiz v. Federal Gov’t of the Mexican Republic*, Cause No. EP-07-CV-079-PRM; 2007 WL 2978332, at \*2 (W.D. Tex. Sept. 28, 2007). When a plaintiff invokes international law as the basis for jurisdiction under the ATS, the court must look to the law of nations as recognized by common law. *Sosa*, 542 U.S. at 735. The Supreme Court examined the criteria necessary for determining when a court has jurisdiction over a claim pursuant to the ATS

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<sup>1</sup> Accordingly, Micheletti moves to dismiss these claims under both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The court held that a tort committed in violation of the law of nations is actionable under the ATS only if the claim is based “on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18<sup>th</sup> century paradigm we have recognized.” *Id.* at 725. “Actionable violations of international law” may be based upon contemporary norms, so long as it is “a norm that is specific, universal and obligatory.” *Ruiz*, 2007 WL 2978332, at \*4 (citing *Sosa*, 542 U.S. at 732). The Supreme Court warned that federal courts should exercise “great caution” in adapting the law of nations to private rights. *Sosa*, 542 U.S. at 727-28.

63. “[T]he question of defining ‘the law of nations’ is a confusing one which is hotly debated, chiefly among academics.” *Beanal*, 197 F.3d at 165. “The requirement that a rule achieve general assent before it becomes binding on all nations as international law is ‘stringent’; [w]ere this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.” *Flores v. Southern Peru Copper Corp.*, 253 F.Supp.2d 510, 513-14 (2d Cir. 2002) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)). Courts have narrowly construed the causes of action available under the law of nations. *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F.Supp. 343, 348 (S.D. Tex. 1989). “The mere fact that many or even all nations consider an act a violation of their domestic law does not suffice to create a principle of international law.” *Id.* (citing *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 423 (2d Cir. 1987), *rev’d on other grounds*, 488 U.S. 428 (1989)). General propositions such as “crimes against humanity” and “extrajudicial killings” “do not take us far in particular ATS cases.” *Mamani*, 2011 WL 3795468 at \*3.

64. In *Flores v. Southern Peru Copper Corp.*, the Second Circuit held that principles such as the “right to life” or the “right to health” are “vague and amorphous.” 414 F.3d 233, 254 (2d Cir. 2003). The court further held:

These principles are boundless and indeterminate. They express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them. But in the words of a sister circuit, they “state abstract rights and liberties devoid of articulable or discernable standards and regulations.”

*Id.* at 255 (citing *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999)). As a result, the Second Circuit held that plaintiffs had failed to establish the existence of a customary international law of “right to life” or “right to health.” *Id.* Likewise, the Southern District of Texas in *Jones* held that an alleged violation of a decedent’s human rights and fundamental freedoms did not constitute a violation of international law. *Jones*, 722 F.Supp. at 348-49 (“To interpret international human rights law to create a private right of action overstates the level of agreements among nations on remedies for human rights violations.”) (citing *Hanoch Tel-oren v. Libyan Arab Republic*, 517 F.Supp.542, 549 (D.D.C. 1981).

65. Additionally, Plaintiffs’ reliance on the findings of the Inter-American Commission on Human Rights (the “IACHR”), an organ of the Organization of American States (the “OAS”), and the United Nations Office of the High Commissioner for Human rights (the “OHCHR”), also fails to support a claim under the ATS. See *Frazer v. Chicago Bridge & Iron*, Cause No. H-05-3109; 2006 WL 801208, at \*6 (S.D. Tex. Mar. 27, 2006) (holding that the OAS Charter did not create a cause of action under the ATS). Put simply, Plaintiffs’ claims for inhumane acts and the violation of the right to life, liberty and security of person and freedom of assembly of association fall short of the strict requirements to qualify as violations of international law.

66. Further, “[t]o the extent that crimes against humanity are recognized as violations of international law, they occur as the result of ‘widespread or systematic attack’ against civilian populations.” *Mamani*, 2001 WL 3795468, at \*6 (citing *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005)). The *Mamani* court found that in light of the lack of order at the time in Bolivia, which was undergoing a major political transition like the one at issue in this case, the injury toll arising from the events was not large enough to rise to the level widespread or systematic wrongs that qualify as crimes against humanity. *Id.* In that case, approximately 70 people were killed and 400 injured. *Id.* The court noted that, “[a]llowing plaintiffs’ claims to go forward would substantially broaden, in fact, the kinds of circumstances from which claims may properly be brought under the ATS.” *Id.*

67. In the present case, Plaintiffs’ causes of action for inhumane acts and the violation of the right to life, liberty and security of person and freedom of assembly of association are the types of actions that do not qualify as international norms. Further, even if they do, these causes of action fail to meet the pleading standards set out in *Iqbal* and *Twombly*. See *Mamani*, 2011 WL 3795468, at \*6. Like the plaintiffs in *Mamani*, Plaintiffs have not pled nonconclusory facts that establish the type of “widespread and systematic wrongs” that qualify as crimes against humanity. Accordingly, Plaintiffs’ ATS claims should be dismissed for failure to state a claim upon which relief can be granted.

**B. Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted Under the Torture Victim Protection Act.**

68. Plaintiffs have failed to adequately plead their claim under the TVPA. The TVPA requires that plaintiffs seek compensation abroad before suing in the United States. 28 U.S.C.A. § 1350 note § 2(b) (“A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to

the claim occurred.”). This requirement was enacted by Congress to “ensure that U.S. Courts will not intrude unto cases more appropriately handled by courts where the alleged torture or killing occurred, under the theory that this requirement will also avoid exposing U.S. courts to unnecessary burdens and to encourage the development of meaningful remedies in other countries.” *Ruiz v. Martinez*, Cause No. EP-07-CV-078; 2007 WL 1857185, \*6 (W.D. Tex. May 17, 2007) (citing *Harbury v. Hayden*, 444 F.Supp.2d 19, 41 (D.D.C. 2006) (citations omitted). Foreign remedies are usually deemed adequate unless there “is no remedy at all.” *Ruiz*, 2007 WL 1857185, at \*6 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)); *Corrie v. Caterpillar, Inc.*, 403 F.Supp.2d 1019, 1025-26 (W.D. Wash. 2005) (Israeli tort law provided adequate remedies).

69. In this case, Plaintiffs have failed to pursue *any* action against Micheletti in Honduras. Exhibit D at ¶ 22. Honduran law provides a cause of action against government officials for human rights violations. *Id.* at ¶¶ 6-17. Further, Honduran law provides both administrative and judicial remedies for such claims. *Id.* Accordingly, Plaintiffs have failed to fulfill requirement 2(b) of the TVPA.

70. Further, any argument by Plaintiffs that the Honduran legal system will provide “no remedy at all” should be rejected on its face. Plaintiffs plead “[c]onditions in Honduras render any attempt at redress impossible.” [Doc. 1] at ¶ 44. They further attempt to bolster this claim by pleading, “To date, no one has been charged or prosecuted for the killing of Isis Murillo.” *Id.* at ¶ 43. Such allegations lack any legal or factual basis and do not in any way demonstrate a lack of remedies available in Honduras. Moreover, allegations similar to those of Plaintiffs regarding Honduran courts do “not enjoy a particularly impressive track record.” *Stalinski v. Bakoczy*, 41 F.Supp.2d 755, 760 (S.D. Oh. 1998) (Honduras found to be an adequate

forum for *forum non conveniens* purposes); *see also Gonzales v. P.T. Pelangi Niagara Mitra Int'l, P.T.*, 196 F.Supp.2d 482, 487-91 (S.D. Tex. 2002) (case dismissed on *forum non conveniens* grounds despite plaintiffs' argument that Indonesian courts are corrupt).

71. Several federal courts have found Honduras to be an adequate forum for tort claims. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1361 (S.D. Tex. 1995); *Rodriguez v. Shell Oil Co.*, 950 F.Supp. 187, 188-89 (S.D. Tex. 1996); *Stalinski*, 41 F.Supp.2d at 762. Further, multiple federal courts have found foreign forums to be adequate in human rights cases. For instance, in *Flores v. Southern Peru Copper Corp.*, the plaintiffs argued that "Peru is not an adequate alternative forum because justice is for sale in Peru." 253 F.Supp.2d 510, 534 (2d Cir. 2002). The Second Circuit rejected that argument. *Id.* at 538-39. The court noted that the parties agreed that the corruption had improved in recent years in the Peruvian courts, while seeing room for improvement. *Id.* at 538. The court noted that "the Second Circuit has in a number of *forum non conveniens* decisions cautioned district courts against blanket condemnation of another nation's courts." *Id.* at 539. The court ultimately held that the Peruvian courts were an adequate alternative forum for plaintiffs' ATS claims. *Id.*; *see also Aguinda v. Texaco, Inc.*, 303 F.3d 470, 478 (2d Cir. 2002) (finding Ecuador to be an adequate alternative forum, despite plaintiffs' arguments of corruption).

72. The Southern District of New York likewise has found both Turkey and Nigeria to be adequate alternative forums for ATS and TVPA claims. *Turedi v. Coca Cola Co.*, 460 F.Supp.2d 507, 623-26 (S.D.N.Y. 2006); *United Bank for Africa PLC v. Coker*, Cause No. 94 Civ. 0655 (TGP); 2003 WL 22741575, at \*6 (S.D.N.Y. Nov. 18, 2003). The Eleventh Circuit found Guatemala to be an adequate alternative forum for ATS and TVPA claims. *Aldana v. Del*

*Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1290-92 (11th Cir. 2009). Accordingly, Honduras provides an adequate forum and remedies for Plaintiffs' claims.

73. Further, an investigation into the death of Isis Murillo is underway in Honduras by the Republic of Honduras Prosecutor's Office, contrary to Plaintiffs' allegations. Exhibit A. That investigation was initiated when Micheletti served as President, indicating that the Prosecutor's office has taken the death of Murillo very seriously. *Id.* However, the fact that Micheletti has not been charged based upon the Prosecutor's investigation in no way indicates that Plaintiffs' cannot adequately seek redress by the civil courts of Honduras. Exhibit D at ¶¶ 6-18. Instead, it indicates that Micheletti does not have any criminal liability for the acts alleged by Plaintiffs.<sup>2</sup> Because Plaintiffs have failed to pursue their causes of action in Honduras, they have failed to state a claim upon which relief can be granted under the TVPA.

74. Additionally, Plaintiffs' have failed to allege any facts that establish a claim for extrajudicial killing pursuant to the TVPA. The TVPA defines extrajudicial killing as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." 28 U.S.C. § 1350. Plaintiffs have failed to plead any nonconclusory facts that demonstrate a link between Micheletti and the killing of Isis Murillo, much less a "deliberate" will on the part of Micheletti toward Isis Murillo. *See* ¶¶ 57-60, *supra*.

75. In *Mamani v. Berzain*, plaintiffs did not allege any facts that demonstrated that decedents' deaths were "deliberate" in the sense of being "undertaken with studied consideration and purpose" as required by the TVPA. 2011 WL 2795468, at \*5-\*6. As a result, the court found that plaintiffs' TVPA claim for extrajudicial killing failed to meet the pleading

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<sup>2</sup> In July 2011, Micheletti made an inquiry to the Republic of Honduras Prosecutor's Office about the investigation into the death of Isis Murillo. **Exhibit E**, Inquiry to Prosecutor's Office. The Prosecutor's Office responded that Micheletti has not been found responsible for the death of Isis Murillo. **Exhibit F**, the Prosecutor's Response.

requirements set forth in *Twombly* and *Iqbal*. *Id.* Even construing the allegations in the complaint in plaintiffs' favor, the court found that "decedents' deaths [during military operations to restore order] could plausibly have been the result of precipitate shootings during an ongoing civil uprising." *Id.* Further, the court found no facts sufficient to establish that *these* particular defendants, in their capacity as high-level government officials, committed extrajudicial killings. *Id.* at \*6. Because Plaintiffs have failed to plead any allegations that establish a link between Micheletti and the killing of Isis Murillo, much less a "deliberate" will on the part of Micheletti toward Isis Murillo, Plaintiffs have failed to state a claim upon which relief can be granted under the TVPA.

**C. The State Law Claims Must Also Be Dismissed.**

76. First, if Plaintiffs' ATS and TVPA Claims are dismissed, this Court should decline to exercise jurisdiction over Plaintiffs' Texas state law claims. *See Bell v. Harris County*, Cause No. H-10-2421, 2011 WL 2494103, at \*15-\*16 (S.D. Tex. June 22, 2011) (declining to exercise supplemental jurisdiction after federal claims were dismissed). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988). The general rule in the Fifth Circuit "is to dismiss state law claims when the federal claims they supplement are dismissed." *Bell*, 2011 WL 2494103, at \*15; *see also Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 585 (5th Cir. 1992) ("our general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed."). In this case, the Complaint has only been on file for three months. [Doc. 1]. No discovery has taken place. Trial has not



been scheduled. The Court has not spent significant time examining the issues in the case. *See Bell*, 2011 WL 2494103, at \*16 (court declined jurisdiction over state court claims when the case was less than one year old, no trial was scheduled, the court had not familiarized itself with any of the state law issues and neither party would suffer prejudice).

77. Further, Plaintiffs fail to allege adequate facts to support their wrongful death, intentional infliction of emotional distress and negligence claims. Instead, Plaintiffs reassert the same conclusory allegations with no factual support. Accordingly, Plaintiffs' State Law Claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

78. In order to state a claim for wrongful death under the Texas Wrongful Death Statute, Plaintiffs must prove "damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's wrongful act, neglect, carelessness, unskillfulness, or default." TEX. CIV. PRAC. & REM. CODE § 71.002(b). Plaintiffs have failed to plead any nonconclusory facts that demonstrate that Micheletti committed any wrongful act. *See* ¶¶ 57-60, *supra*. Likewise, Plaintiffs have failed to plead any nonconclusory facts that any person was acting as Micheletti's agent. Accordingly, Plaintiffs' claim for wrongful death should be dismissed for failure to state a claim upon which relief can be granted.

79. In order to state a claim for intentional infliction of emotional distress, Plaintiffs must prove: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the defendant caused the plaintiff[s] emotional distress; and (4) the resulting emotional distress was severe. *Bradley v. Phillips Petroleum Co.*, 527 F.Supp.2d 661, 696 (S.D. Tex. 2007) (citing *Hoffmann-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004)). Plaintiffs have failed to adequately plead the required elements for intentional infliction of emotional distress. First, Plaintiffs have failed to plead any nonconclusory facts that

Micheletti acted intentionally or recklessly toward Isis Murillo and/or his family. *See* ¶¶ 57-60, *supra*. Further, Plaintiffs have failed to plead that the actions of Micheletti actually caused the emotional distress claimed by Plaintiffs. *Id.* Finally, Plaintiffs have failed to plead nonconclusory facts that the emotional distress was severe. *See* [Doc. 1] at ¶ 152. Accordingly, Plaintiffs' claim for intentional infliction of emotional distress should be dismissed for failure to state a claim upon which relief can be granted.

80. In order to state a claim for negligence under Texas law, Plaintiffs must show: (1) the existence of a legal duty; (2) a breach of that duty; and (3) damages proximately caused by that breach. *Boudreaux v. Swift Transportation Co., Inc.*, 402 F.3d 536, 540-41 (5th Cir. 2005) (citing *HIS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004)). "Whether a legal duty exists is a threshold question of law for the court to decide from the facts surrounding the occurrence in question." *Netvet Group v. Fagin*, Cause No. 3:10-CV-1934-BH, 2011 WL 2601526, at \*3 (N.D. Tex. July 1, 2011) (citing *Thapar v. Zezulka*, 994 S.W.2d 635, 637 (Tex. 1999)). Under Texas law, the primary consideration in determining whether a duty exists is foreseeability of risk. *Boudreaux*, 402 F.3d at 541. To establish a breach of duty, Plaintiffs must show "that a defendant either did something an ordinarily prudent person exercising ordinary care would not have done under the circumstances, or that the defendant failed to do that which an ordinarily prudent person would have done in the exercise or ordinary care." *Id.* In order to constitute the proximate cause of a plaintiff's injuries, the negligence must be the actual cause of the injuries, and the injuries must have been the foreseeable result of the negligence. *Id.* In the present case, Plaintiffs once again allege only conclusory allegations designed to meet the elements of a common law negligence claim. [Doc. 1] at ¶¶ 155-156. Plaintiffs do not plead a single fact to support its sweeping conclusory

statements. Accordingly, Plaintiffs' claim for negligence should be dismissed for failure to state a claim upon which relief can be granted.

**PRAYER**

Defendant Roberto Micheletti Bain respectfully asks that this Court grant his Motion to Dismiss and for such other or further relief, general or special, at law or in equity, to which he may be justly entitled.

Dated: September 28, 2011

Respectfully submitted,

**PORTER HEDGES, LLP**

By: /s/ John A. Irvine

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Facsimile: (305) 541-6532

**ATTORNEYS FOR ROBERTO  
MICHELETTI BAIN**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing pleading was sent to the following via ECF on this the 28th day of September, 2011:

Pamela C. Spees  
Anjana Samant  
Center for Constitutional Rights  
666 Broadway, 7<sup>th</sup> Floor  
New York, NY 10012

/s/ John A. Irvine

John A. Irvine

# **EXHIBIT A**

**EN EL TRIBUNAL DE DISTRITO DE LOS ESTADOS UNIDOS  
DISTRITO DEL SUR DE TEXAS  
DIVISIÓN DE HOUSTON**

DAVID MURILLO y SILVIA MENCIAS, §  
en su propio nombre y en calidad de §  
Representantes personales de su hijo §  
fallecido, ISIS OBED MURILLO, así como §  
en el de sus familiares cercanos, incluidos §  
sus HERMANOS Barrio La Plazuela §

contra

ROBERTO MICHELETTI BAIN §

CASO N.º 4:11-cv-02373

**DECLARACIÓN DE ROBERTO MICHELETTI BAIN**  
**BAJO PENA DE PERJURIO**

“Mi nombre es Roberto Micheletti Bain. Tengo más de 18 años de edad, estoy en pleno uso de mis facultades mentales y capacitado para formular esta declaración. Los hechos que se expresan en esta declaración recaen dentro de mi conocimiento personal, son veraces y correctos.

Soy ciudadano y residente de Honduras. Me convertí en miembro del Congreso Nacional de Honduras en 1980. Fui Presidente del Congreso Nacional de Honduras desde enero de 2006 hasta junio de 2009. En junio de 2009, me convertí en el Presidente de Honduras. Me desempeñé como Presidente de Honduras hasta enero de 2010.

No resido en Texas y jamás lo he hecho. Mi hogar, mi familia y mis negocios están, todos, en Honduras. Jamás he poseído ningún interés en alguna compañía en Texas, ni jamás he trabajado para una compañía en Texas. No tengo un agente de notificación en Texas, aunque sí tengo un agente de seguros en Texas. Las compañías hondureñas en las que tengo un interés de propiedad no tienen oficinas en Texas (o en los Estados Unidos para tal asunto), y dichas compañías tampoco venden productos o servicios en Texas ni realizan ningún tipo de publicidad a los residentes de Texas. Jamás he tenido una licencia de conducir de Texas. Jamás he asistido a una escuela en Texas. En un momento tuve una tarjeta verde para vivir en los Estados Unidos durante la década de los años 70. Desde 1974 hasta 1979 viví en Louisiana. Después de regresar a Honduras en 1979, entregué voluntariamente mi tarjeta verde.

Esporádicamente he estado en Texas por vacaciones personales. He volado hasta Houston para viajar a otros destinos en varias oportunidades como miembro del Congreso de Honduras o para vacaciones personales. Jamás he viajado a Texas en carácter comercial y mis viajes a Texas por vacaciones jamás tuvieron una duración de más de una o dos semanas.

Tengo un interés de propiedad en un bien inmueble en Magnolia, Texas (la “Propiedad”). Sin embargo, solamente he visitado la Propiedad en dos oportunidades y en ambas ocasiones solamente por una hora. La Propiedad fue adquirida en 2008. Jamás he vivido allí ni tampoco he permanecido en la Propiedad más de un día. La vivienda que se encuentra en la Propiedad fue arrendada por 1000 dólares estadounidenses al mes durante los últimos años, hasta que la

vivienda se incendió por completo en septiembre de 2011 como resultado de un incendio forestal.

Se abrió una cuenta corriente a mi nombre, así como en nombre de mi esposa e hijos en Houston, Texas, en 2007 para la compra de la propiedad. Yo deposité los fondos iniciales en la cuenta para la compra de la Propiedad. Después de eso, en lo personal no deposité ni retiré fondos de la cuenta. La cuenta corriente se cerró en febrero de 2011. Nunca he manejado o mantenido personalmente la renta o los gastos relacionados con la Propiedad. Se abrió una cuenta de ahorros en mi nombre, así como en el de mi esposa, en diciembre de 2007, cuando se abrió la cuenta corriente. El dinero de la cuenta de ahorros fue depositado en la cuenta corriente (5.400,72 dólares estadounidenses) en diciembre de 2008, y luego dicha cuenta de ahorros fue cerrada.

No he ingresado a los Estados Unidos desde el 29 de marzo de 2009. Mi visa para viajar a los Estados Unidos fue revocada en septiembre de 2009 y no ha sido restituida. Se adjunta una copia fiel y exacta de la carta en la que se revoca mi visa a la Moción de desestimación como Prueba C. El Departamento de Estado de los Estados Unidos recientemente rechazó mi solicitud de una visa que me autorizara a viajar a los Estados Unidos para testificar ante el Comité de Asuntos Exteriores de la Cámara de Representantes. Me vi obligado a testificar por videoconferencia.

Sería una carga para mí defenderme en una acción en Houston, Texas. Según mi leal saber y entender, todos los documentos y testigos que necesito para defenderme en esta acción se encuentran en Honduras. Hablo español como lengua materna, al igual que la mayoría de los residentes de Honduras. La mayoría de los documentos que necesito para defenderme posiblemente estén redactados en español.

Durante mi presidencia, la Oficina del Fiscal de la República de Honduras inició una investigación sobre la muerte de Isis Murillo. En julio de 2011, consulté a la Oficina del Fiscal de la República de Honduras con respecto a si se había presentado una denuncia sobre la muerte de Isis Murillo. Se adjunta una copia fiel y exacta de dicha carta de consulta a la Moción de desestimación como Prueba E. La Oficina del Fiscal contestó que no me habían encontrado responsable de la muerte de Isis Murillo. Se adjunta una copia fiel y exacta de la respuesta de la Oficina del Fiscal de la República de Honduras a la Moción de desestimación como Prueba F.

Declaro bajo pena de perjurio, en virtud de lo que establecen las leyes de los Estados Unidos de América, que lo que antecede es veraz y correcto".

Firmado el día 22 de septiembre de 2011.



Roberto Micheletti Bain

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

DAVID MURILLO and SILVIA MENCIAS	§	
on behalf of themselves and as Personal	§	
Representatives of their deceased son, ISIS	§	
OBED MURILLO, and his next of kin,	§	
including his SIBLINGS Barrio La Plazuela	§	
	§	
	§	CASE NO. 4:11-cv-02373
v.	§	
	§	
ROBERTO MICHELETTI BAIN	§	

**DECLARATION OF ROBERTO MICHELETTI BAIN**  
**UNDER PENALTY OF PERJURY**

“My name is Roberto Micheletti Bain. I am over 18 years of age, of sound mind and capable of making this declaration. The facts stated in this declaration are within my personal knowledge and are true and correct.

I am a citizen and resident of Honduras. I became a member of the Honduran National Congress in 1980. I was the President of the Honduran National Congress from January 2006 to June 2009. In June 2009, I became the President of Honduras. I served as the President of Honduras until January 2010.

I do not reside in Texas and have never done so. My home, family and businesses are all in Honduras. I have never owned an interest in any business in Texas, nor have I ever worked for a business in Texas. I do not have an agent for service in Texas, although I do have an insurance agent in Texas. The Honduran businesses in which I hold an ownership interest have no offices in Texas (or the United States for that matter), nor do the businesses sell products or services in Texas or advertise in any way to Texas residents. I have never had a Texas driver’s license. I have never attended school in Texas. I did at one time have a green card to live in the United States during the 1970s. From 1974 to 1979 I resided in Louisiana. After returning to Honduras in 1979, I voluntarily surrendered my green card.

I have sporadically been to Texas for personal vacations. I have flown through Houston to travel to other destinations on several occasions as a member of the Honduran Congress or for personal vacation. I have never traveled to Texas in a business capacity, nor have my trips to Texas for vacation ever lasted more than a week or two.

I do have an ownership interest in one piece of real property in Magnolia, Texas (the “Property”), however, I have only visited the Property twice, both times for only an hour. The Property was purchased in 2008. I have never resided there, nor have I ever stayed at the Property overnight. The dwelling on the Property was rented for \$1000 a month for the last several years until the dwelling was burned to the ground in September 2011 by a wildfire.



A checking account was set up in my name, as well as my wife and children's names, in Houston, Texas in 2007 for the purchase of the property. I deposited the initial funds into the account for the purchase of the Property. After that, I did not personally deposit or withdraw funds from the account. The checking account was closed in February 2011. I have never personally handled or maintained the rent or expenses associated with the Property. A savings account was set up in my name, as well as my wife's, in December 2007 when the checking account was opened. The money from the savings account was deposited into the checking account (\$5,400.72) in December 2008, and the savings account was closed.

I have not entered the United States since March 29, 2009. My visa to travel to the United States was revoked in September 2009, and my visa has not been restored. A true and correct copy of the letter revoking my visa is attached to the Motion to Dismiss as Exhibit C. The United States Department of State recently denied my request for a visa to allow me to fly to the United States to testify before the House Committee on Foreign Affairs. I was forced to testify via videoconference.

It would be a burden on me to defend a lawsuit in Houston, Texas. To my knowledge, all of the documents and witnesses necessary for me to defend myself in this lawsuit are located in Honduras. I speak Spanish as my first language, as do most of the residents of Honduras. Most of the documents necessary for me to defend myself will likely be in Spanish.

During my presidency, the Republic of Honduras Prosecutor's Office initiated an investigation into the death of Isis Murillo. In July 2011, I made an inquiry to the Republic of Honduras Prosecutor's Office about whether a complaint was made regarding the death of Isis Murillo. A true and correct copy of that letter of inquiry is attached to the Motion to Dismiss as Exhibit E. The Prosecutor's Office responded that I had not been found responsible for the death of Isis Murillo. A true and correct copy of the response from the Republic of Honduras Prosecutor's Office is attached to the Motion to Dismiss as Exhibit F.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

Executed on September 22, 2011.

---

Roberto Micheletti Bain



**TRANSPERFECT**

- AMSTERDAM
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- BOSTON
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- CHARLOTTE
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- COLUMBUS
- DALLAS
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- DUBAI
- DUBLIN
- DÜSSELDORF
- FRANKFURT
- GENEVA
- HONG KONG
- HOUSTON
- LONDON
- LOS ANGELES
- LYON
- MEXICO CITY
- MIAMI
- MILAN
- MINNEAPOLIS
- MONTREAL
- MUNICH
- NEW YORK
- PARIS
- PHILADELPHIA
- PHOENIX
- PORTLAND
- PRAGUE
- RESEARCH TRIANGLE PARK
- SAN DIEGO
- SAN FRANCISCO
- SAN JOSE
- SEATTLE
- SEOUL
- SINGAPORE
- STOCKHOLM
- STUTTGART
- SYDNEY
- TEL AVIV
- TOKYO
- TORONTO
- VANCOUVER
- WASHINGTON, DC
- ZURICH

City of New York, State of New York, County of New York

I, Cayleigh Powell, hereby certify that the file "Declaration of Roberto Micheletti Bain" is, to the best of my knowledge and belief, a true and accurate translation from English into Spanish.

Cayleigh Powell

Sworn to before me this  
September 23, 2011

Signature, Notary Public

**KRISTIN MILORO**  
 Notary Public - State of New York  
 No. 01M16212799  
 Qualified in New York County  
 Commission Expires Oct 19, 2013

Stamp, Notary Public

# **EXHIBIT B**

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

DAVID MURILLO and SILVIA MENCIAS §  
on behalf of themselves and as Personal §  
Representatives of their deceased son, ISIS §  
OBED MURILLO, and his next of kin, §  
including his SIBLINGS Barrio La Plazuela §

CASE NO. 4:11-cv-02373

v. §

ROBERTO MICIELETTI BAIN §

DECLARATION OF JENNY VIVAS  
UNDER PENALTY OF PERJURY

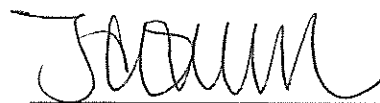
“My name is Jenny Vivas. I am over 18 years of age, of sound mind and capable of making this declaration. The facts stated in this declaration are within my personal knowledge and are true and correct.

I am an insurance agent for Farmer’s Insurance Group. I work and reside in Houston, Texas. I am not, nor have I ever been, Roberto Micheletti Bain’s registered agent or agent for service in the United States. Roberto Micheletti Bain has never given me power of attorney.

I am familiar with the property purchased by Roberto Micheletti Bain and his wife in December 2008 in Magnolia, Texas (the “Property”). For the past several years, the Property was a rental property. Beginning in February 2011, the income from the Property was deposited into my personal United States bank account, which is managed by me. All taxes, insurance and expenses for the property are paid from that U.S. bank account at my direction. No money has ever been transferred out of that account to Mr. Micheletti because the expenses associated with the Property have exceeded the amount of rent. The dwelling on the Property burned to the ground in September 2011 due to the Texas wildfires. Because the dwelling on the Property is gone, no rent will be deposited into the account in the near future.

I declare under penalty of perjury that the foregoing is true and correct.”

Executed on September 21, 2011.



Jenny Vivas

# **EXHIBIT C**

EMBASSY OF THE  
UNITED STATES OF AMERICA

11 de septiembre 2009

Roberto Micheletti Bain  
Presidente del Congreso Nacional

Honorable Presidente del Congreso:

Por este medio le informamos que todas y cada una de las visas de los Estados Unidos que actualmente posee le han sido revocadas por el Departamento de Estado de los Estados Unidos.

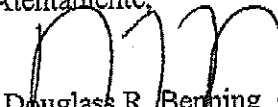
Desde que tomó lugar el golpe de estado el 28 de junio del 2009 en contra del gobierno de Honduras electo democráticamente, los Estados Unidos y la comunidad internacional han trabajado diligentemente para asegurar que el orden constitucional y democrático retorne, incluyendo el regreso del Presidente Zelaya negociado bajo los auspicios del Presidente Arias de Costa Rica. Sin embargo, como se mencionó en el comunicado del día 03 de septiembre, el Departamento de Estado reconoce la necesidad de medidas fuertes a raíz de la continua resistencia del gobierno de facto de aceptar el Acuerdo de San José y del fracaso continuo para restaurar el gobierno democrático y constitucional en Honduras.

Si el régimen de facto es capaz, mediante negociaciones rápidas y de buena fe, siguiendo el proceso precedido por el Presidente Arias, de lograr un acuerdo para devolver el orden constitucional y democrático a Honduras, los Estados Unidos tiene la esperanza de facilitar la normalización de relaciones entre Honduras y la comunidad internacional, incluyendo la reconsideración de muchas medidas que han resultado por el golpe de estado del 28 de junio.

Le agradecería presente o envíe sus pasaportes con visas vigentes para la cancelación de las mismas. Sin embargo, le recuerdo que aunque sus visas no sean físicamente canceladas, ya han sido canceladas a partir del día de hoy y no son válidas para viajar a los Estados Unidos.

Si desea conversar acerca del estatus de su visa, el Embajador Hugo Llorens, el Ministro Consejero Simon Henshaw o mi persona, estamos disponibles para atenderle a usted personalmente en cualquier momento,

Atentamente,



Douglas R. Benning  
Consul General

EMBASSY OF THE  
UNITED STATES OF AMERICA  
September 11, 2009

Roberto Micheletti Bain  
President of the National Congress

Honorable President of the Congress:

We are hereby informing you that all and every one of the United States visas currently in your possession have been revoked by the Department of State of the United States.

Since the coup d'état of June 28, 2009 against the democratically elected government of Honduras, the United States and the international community have diligently worked to ensure the return of the constitutional and democratic order, including the return of President Zelaya negotiated under the auspices of President Arias of Costa Rica. However, as mentioned in the communiqué of September 3, the Department of State recognizes the need for strong measures, given the continued resistance of the de facto government to accept the San José Agreement and the continuous failure to restore the democratic and constitutional government in Honduras.

If the de facto regime is capable, by quick negotiations in good faith, following the process previously conducted by President Arias, to achieve an agreement to return the constitutional and democratic order in Honduras, the United States hopes to facilitate the normalization of the relations between Honduras and the international community, including the reconsideration of many measures that resulted from the coup d'état of June 28.

I would appreciate it if you submitted or sent your passports with current visas for their cancellation. However, I remind you that even if your visas are not physically cancelled, they have already been cancelled as of today and are not valid for travel to the United States.

If you wish to discuss the status of your visa, Ambassador Hugo Llorens, Deputy Chief of Mission Simon Henshaw or myself are willing to talk to you personally at any time.

Sincerely,

[signature]  
Douglass R. Benning  
Consul General



**TRANSPERFECT**

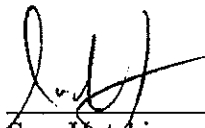
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- PORTLAND
- PRAGUE
- RESEARCH TRIANGLE PARK
- SAN DIEGO
- SAN FRANCISCO
- SAN JOSE
- SEATTLE
- SEOUL
- SINGAPORE
- STOCKHOLM
- STUTTGART
- SYDNEY
- TEL AVIV
- TOKYO
- TORONTO
- VANCOUVER
- WASHINGTON, DC
- ZURICH

City of New York, State of New York, County of New York


I, Sara Hutchison, hereby certify that the documents:

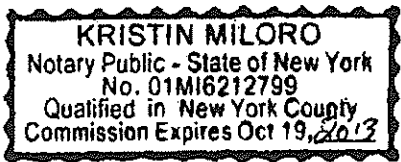
- Embassy of the United States of America 11 de Septiembre 2009
- Republica de Honduras Constancia
- Senior Fiscal General DeLa Republic Roberto Micheletti Ibain
- Secretaria De Relaciones Exteriores De La Republica De Honduras

are, to the best of my knowledge and belief, a true and accurate translation from Spanish to English.

  
 \_\_\_\_\_  
 Sara Hutchison

Sworn to before me this  
September 26, 2011

  
 \_\_\_\_\_  
 Signature, Notary Public



Stamp, Notary Public



# **EXHIBIT D**

**IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

DAVID MURILLO and SILVIA	§	
MENCIAS on behalf of themselves and as	§	
Personal Representatives of their deceased	§	
son, ISIS OBED MURILLO, and his next	§	
of kin, including his SIBLINGS Barrio La	§	
Plazuela	§	
	§	CASE NO. 4:11-cv-02373
v.	§	
	§	
ROBERTO MICHELETTI BAIN	§	

**DECLARATION OF JOSE ALFREDO SAAVEDRA PAZ**  
**UNDER PENALTY OF PERJURY**

1. Mi nombre es José Alfredo Saavedra Paz. Soy mayor de 18 años de edad, de mente sana y capaz de hacer esta declaración. Los hechos en esta declaración se encuentran dentro del ámbito de mi conocimiento y son verídicos y correctos.

2. Egrese de la facultad de derecho en Honduras, el año 1989, en el año 1991, obtuve mi título universitario como Licenciado en Ciencias Jurídicas y Sociales, Luego obtuve mi Título de Abogado en el año 2002, extendidos ambos por la Universidad Nacional Autónoma de Honduras, Luego obtuve mi exequátur para ejercer el notariado en el año 2008 autorizado por la Honorable Corte Suprema de Justicia, a partir del año 1998, ejerzo la docencia en la facultad de derecho, en el Departamento de Derecho Procesal, ejerzo la profesión como Procurador en los diferentes Tribunales de la República y soy asesor de distintas empresas del País,

3. En Honduras no es posible citar, notificar o emplazar una demanda vía correo electrónico, fax, mensajero privado, correo ordinario o certificado, incluso por telegrama con acuse de recibo o por cualquier otro medio de comunicación cuando se trate de comunicaciones de las que dependa el personamiento o la realización o intervención personal de alguien en las actuaciones como el caso que nos ocupa. Lo anterior se fundamenta en el artículo 143 numeral 1 relacionado con el numeral 4 del Código Procesal Civil vigente a partir del primero de noviembre del 2010.

4. En Honduras cuando se trate de citaciones y emplazamientos las mismas deberán ser realizadas por el secretario o receptor del tribunal quien hará entrega de la documentación misma que será firmado por el secretario que las efectué y por las personas a quien se hagan cuando el destinatario de la comunicación sea hallado en el domicilio y se niegue a recibir las copias de la resolución o cedula, o no quiera firmar la diligencia, acreditativa de la entrega el secretario le advertirá sobre la obligación que le impone la ley, y si insistiera en su negativa le hará saber que queda a su disposición en la Secretaria del Tribunal.

5. Si el domicilio donde se pretenda realizar la comunicación fuere el lugar en donde el destinatario tenga su domicilio según registro oficiales o fuera la vivienda o local arrendado al demandado y no se encontrare ahí, puede efectuar la entrega a cualquier empleado o familiar mayor de catorce años que se encuentre en el lugar. Lo anterior se fundamenta en el artículo 144 numeral 1, 2, 3,4.

6. De conformidad a nuestra legislación civil la competencia territorial corresponde al juzgado del domicilio del demandado, y si no lo tuviere en el territorio nacional será el juez competente el de su residencia en Honduras.

7. Los herederos o representantes legales del Señor ISIS OBED MURILLO, conforme nuestra Legislación Nacional, pueden si así lo desean y deciden promover acciones legales indemnizatorias ante los Tribunales del País, contra el Señor ROBERTO MICHELETTI BAIN, y estos es decir los Tribunales están en la obligación de darle trámite a las acciones que se promuevan conforme a derecho.

8. El conocimiento de un litigio fundado en derecho privado se atribuirá al juzgado o tribunal que posea jurisdicción, competencia civil genérica; competencia objetiva, funcional y territorial y en su caso, sea designado conforme a las normas de reparto de casos. Lo anterior se fundamenta en el artículo 23 y 34 numeral 1 del código procesal civil vigente en Honduras.

9. En el año 1986 y 1987 el Congreso Nacional de la República de Honduras emitió las leyes que regulan los procedimientos para que los particulares puedan presentar reclamos contra el Estado. Las leyes son tres: la Ley General de la Administración Pública, la Ley de Procedimiento Administrativo y la Ley de la Jurisdicción de lo Contencioso Administrativo.

10. La primera establece la organización de la Administración Pública, clasificándola en Administración Pública Central y descentralizada, para separar lo que es el gobierno central constituido por las diferentes secretarías de estado, de las instituciones con autonomía propia que son las instituciones descentralizadas y las municipalidades. La ley de Procedimiento Administrativo establece la forma en que se deben dictar los actos administrativos por la Administración Pública y el procedimiento que se deberá seguir en todos los actos de la administración pública cuando declaren, reconozcan o limiten derechos de los particulares. Finalmente la Ley de la Jurisdicción de lo Contencioso Administrativo establece una jurisdicción especial constituida por tribunales del Poder Judicial cuya finalidad es revisar la legalidad de los actos de la Administración Pública, el artículo 1 de esta ley define su ámbito de aplicación estableciendo: **“Por la Presente Ley se regula la Jurisdicción de lo Contencioso Administrativo encargada de conocer las pretensiones que se deduzcan en relación con los actos de carácter particular o general, de la Administración Pública sujetos al derecho administrativo.”**

11. Esta ley crea los tribunales de lo contencioso administrativo que empezaron a funcionar en el año 1989 y 1990.

12. De acuerdo al artículo 42 de La Ley de la Jurisdicción de lo Contencioso Administrativo, para admitir una demanda Contencioso Administrativa, es necesario haber agotado previamente la vía administrativa, esto es haber presentado un reclamo directamente ante la Administración Pública a través del órgano que se trate, recogiendo también lo señalado en la Ley de Procedimiento Administrativo cuyo artículo 146 establece: “No se podrá demandar judicialmente, en materia de Derecho privado, al Estado, a las instituciones autónomas y a las municipalidades sin previo reclamo administrativo presentado ante el titular del órgano o entidad respectiva.”

13. Así, quien pretenda que el Estado de Honduras le indemnice por haber sido objeto de infracción de algún derecho reconocido por la ley, deberá presentar directamente ante el órgano del Estado que se trate un reclamo y agotar el procedimiento administrativo hasta obtener una resolución administrativa y haber agotado los recursos que la Ley de Procedimiento Administrativo establece. Si esta resolución administrativa es en sentido contrario a sus pretensiones, podrá recurrir a los tribunales de la Jurisdicción de lo Contencioso Administrativo.

14. Ante los tribunales de lo Contencioso Administrativo los particulares pueden recurrir demandando la nulidad del acto administrativo que no reconoció sus pretensiones, para lo cual basta ser titular de un interés legítimo y directo en ello, conforme lo señala el artículo 13 de la Ley de la Jurisdicción de lo Contencioso Administrativo. Si además de la nulidad del acto administrativo el interesado pretende el reconocimiento de una situación jurídica individualizada y su restablecimiento, únicamente estará legitimado el titular de un derecho subjetivo derivado del ordenamiento, de conformidad con el artículo 14 de la mencionada ley.

15. La nulidad del acto administrativo puede deberse a cualquier infracción al ordenamiento jurídico, incluso el exceso y la desviación de poder, el exceso de poder incluye la alteración de los hechos, la falta de conexión lógica entre la motivación y la parte dispositiva del acto, la contradicción no justificada del acto con otro anteriormente dictado y cualquier otro vicio inherente al objeto o contenido del acto. La desviación de poder lo constituye el ejercicio de potestades administrativas para fines distintos a los establecidos por la ley.

16. El reconocimiento de una situación jurídica individualizada es el reconocimiento de que el Estado a través de su resolución administrativa no reconoció, limitó o tergiversó de cualquier forma el derecho subjetivo del interesado. El titular del derecho subjetivo puede solicitar el reconocimiento de una situación jurídica individualizada y que se tomen las medidas necesarias para su pleno restablecimiento, entre ellas la indemnización de daños y perjuicios.

17. Es necesario establecer que conforme al artículo 49 del Código procesal Penal de la República de Honduras, la acción para deducir la responsabilidad civil proveniente de un hecho punible sólo podrá se ejercitada por el perjudicado y sus herederos.

18. En conclusión las leyes de la República de Honduras sí establecen procedimientos e incluso una jurisdicción especial para que los interesados puedan demandar al Estado de Honduras para obtener incluso indemnización de daños y perjuicios, proveniente de un delito cometido supuestamente por un funcionario de la administración.

19. Bajo mi mejor conocimiento y entendimiento, como abogado y notario, inscrito en el colegio de Abogados de Honduras, el sistema legal en Honduras funciona de manera eficiente y efectiva, permitiendo así la resolución de reclamos y la indemnización por daños y perjuicios amparados por las leyes de la República.


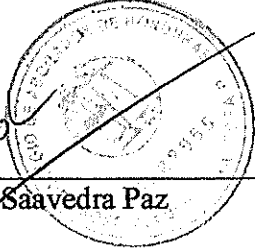
20. Conforme la Convención Americana sobre derechos Humanos específicamente en el artículo 46 para que una petición o comunicación presentada conforme los artículos 44 y 45 sea admitida por la comisión se requerirá: Que se haya interpuesto y agotado los recursos de jurisdicción interna conforme a los principios del derecho internacional generalmente reconocidos y que se haya presentado dentro del plazo de seis meses, a partir de la fecha en que el presunto lesionado en sus derechos haya sido notificado de la decisión definitiva. Esta disposición es respetada y aplicada en nuestro País.

21. Bajo mi conocimiento y entendimiento a la fecha existe un expediente de investigación iniciado por el ministerio público de nuestro país, a través de una de sus fiscalías, específicamente la fiscalía de derechos humanos, para averiguar sobre las circunstancias del fallecimiento del señor ISIS OBED MURILLO misma que a la fecha no ha individualizado ningún tipo de responsabilidad en relación al señor ROBERTO MICHELETTI BAIN.

22. Bajo mi mejor conocimiento y entendimiento a la fecha no existe proceso civil, penal promovido ni reclamos administrativos individualizado en contra del señor ROBERTO MICHELETTI BAIN, que tal conocimiento y entendimiento se obtuvo de la revisión de controles diarios que al efecto llevan los tribunales de la República.

23. Declaro, bajo pena de perjurio bajo las leyes de los Estado Unidos de América, que lo anteriormente escrito es verídico y correcto.

Firmado este 27 de Septiembre de 2011.

  
  
José Alfredo Saavedra Paz

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

DAVID MURILLO and SILVIA	§	
MENCIAS on behalf of themselves and as	§	
Personal Representatives of their deceased	§	
son, ISIS OBED MURILLO, and his next	§	
of kin, including his SIBLINGS Barrio La	§	
Plazuela	§	
	§	CASE NO. 4:11-cv-02373
v.	§	
	§	
ROBERTO MICHELETTI BAIN	§	

**DECLARATION OF ROBERTO JOSE ALFREDO SAAVEDRA PAZ**  
**UNDER PENALTY OF PERJURY**

1. My name is José Alfredo Saavedra Paz. I am older than age 18, of sound mind, and capable of making this statement. The facts in this statement are known to me and are true and correct.

2. I am a graduate of the law school in Honduras, from 1989; I obtained my Bachelor’s Degree in Law and Social Sciences in 1991, and subsequently, in 2002 I obtained my title of Attorney-at-Law, both issued by the National Autonomous University of Honduras. After that, in 2008, I obtained a writ of exequatur to serve as a notary, authorized by the Honorable Supreme Court of Justice as of 1998; I serve on the faculty of the Law School, in the Department of Legal Procedure; I serve as a Solicitor in various Courts of the Republic, and I am an advisor to various companies in the country.

3. In Honduras it is not possible to serve a subpoena, notification, or summons by e-mail, fax, private messenger, ordinary or certified mail, or even by means of a telegram with acknowledgment of receipt, or using any other communication methods, if the notice in question requires the personal appearance or personal involvement or presence of a party to an action, as it does in the case that concerns us here. The above is based on Article 143, Numeral 1, associated with Numeral 4 of the Civil Procedure Code applicable as of November 1, 2010.

4. In Honduras, summons and subpoenas must be served by the Court Clerk or Receiver, who will deliver the documents; these must be signed by the Clerk serving them and by the persons to whom they are served. If the addressee of the communication is indeed found at that domicile but refuses to accept a copy of the resolution or warrant, or will not sign the diligence certifying delivery, the Clerk will advise him of his obligations under law. Upon a persistent refusal, the addressee will be told that it is at his disposal at the Office of the Court Clerk.

5. If the address where service is attempted is the legal address of the addressee, in accordance with official recourse, or if it is the home or rented premises of the summoned party, but if he is not there, service may be performed with any employee or relative older than age fourteen who is found in that place. The above is based on Article 144, Numeral 1, 2, 3, 4.

6. In accordance with our civil legislation, territorial competence appertains to the court of the summoned party's domicile; and if this is not within the national territory, the competent judge shall be the one for his residence in Honduras.

7. Pursuant to our National Legislation, the heirs or legal representatives of Mr. ISIS OBED MURILLO may, if they so desire and decide, file legal actions for indemnification before the Courts of the Country, against Mr. ROBERTO MICHELETTI BAIN, and they, i.e., the Courts, have the obligation to admit said actions when filed in accordance with the law.

8. Cognizance of a complaint based on private law shall be attributed to the court or tribunal with jurisdiction, generic civil competence; objective, functional, and territorial competence, as the case may be, shall be assigned in accordance with the norms for assigning cases. The above is based on Article 23 and 24, Numeral 1, of the current civil procedure code of Honduras.

9. In 1986 and 1987 the National Congress of the Republic of Honduras issued the laws to regulate the procedures for private individuals to file claims against the State. There are three laws: the General Law of Public Administration, the Law of Administrative Procedure, and the Law for Jurisdiction over Administrative Disputes.

10. The first establishes the organization of the Public Administration, classifying it into the Decentralized and the Central Public Administrations, in order to distinguish the central government, which is constituted by the various state secretariats from autonomous institutions (which are the decentralized institutions) and the municipalities. The Law of Administrative Procedure determines how administrative acts of the Public Administration are to be issued, and the procedure to be followed for all public administration acts, whenever they state, acknowledge, or restrict the rights of private individuals. Finally the Law for Jurisdiction over Administrative Disputes establishes a special jurisdiction, comprised by the tribunals of the Judicial Branch, whose purpose is to review the legality of the acts of the Public Administration. Article 1 of this law establishes its scope: **"This Law hereby regulates Jurisdiction over Administrative Disputes, in order to ascertain the intent to be attributed to acts of the Public Administration, of a particular or general nature, and which are bound by Administrative Law."**

11. This law created the administrative dispute tribunals, which began operating in 1989 and 1990.

12. In accordance with Article 42 of the Law for Jurisdiction over Administrative Disputes, in order to admit an Administrative Dispute suit, it is a requirement for the administrative procedure to have first been exhausted; that is to say, a claim must be filed directly with the Public Administration through the agency in question, in accordance with what is set forth in the Law of Administrative Procedure, whose Article 146 establishes that: "The State, autonomous institutions, and municipalities may not be sued in court, with regard to private Law, unless an administrative claim was previously submitted to the head of the respective agency or entity."

13. Accordingly, whoever seeks to be indemnified by the Honduran State on account of having been subjected to a violation of some right recognized by the law, must submit a claim directly to the State agency in question and exhaust the administrative procedure, until obtaining an administrative resolution, and must have exhausted the recourse established by the Law of Administrative Procedure. If said administrative resolution proves contrary to his intent, he may resort to the tribunals in the Jurisdiction over Administrative Disputes.

14. Private individuals may resort to the Administrative Dispute tribunals in order to sue for the nullification of the administrative act that ran counter to his intent, for which purposes it shall suffice to be the party entitled to a direct and legitimate issue in the matter, as set forth in Article 13 of the Law for Jurisdiction over Administrative Disputes. If, aside from the nullification of the administrative act, the interested party seeks the recognition of a unique legal situation and restitution, only the party entitled to a subjective right arising from the law shall have standing, in accordance with Article 14 of the aforementioned law.

15. The nullification of an administrative act may proceed due to any violation of the law, including abuse and misuse of power; abuse of power can include tampering with the facts, lack of a logical connection between the motivation and the relevant parts or orders of the act, an unjustifiable contradiction between that act and another previously handed down, or any other inherent flaw in the purpose or substance of the act. Misuse of power means the use of administrative authorities for purposes other than those established by law.

16. Recognition of a unique legal situation means an acknowledgment that the State, through its administrative resolution, failed to recognize, or restricted, or distorted the subjective right of the interested party in some way. The party entitled to the subjective right may request that the existence of a unique legal situation be recognized, and for the necessary measures to be taken for full restitution, including indemnification for damages and prejudices.

17. It is necessary to establish that, in accordance with Article 49 of the Criminal Procedure Code of the Republic of Honduras, the motion to determine civil liability arising from a punishable act may be pressed only by the prejudiced party and his heirs.



18. To conclude, the laws of the Republic of Honduras do indeed establish procedures and in fact even a special jurisdiction for interested parties to sue the Honduran State, to include indemnification for damages and prejudices, arising from a crime allegedly committed by an administrative official.

19. To the best of my knowledge and understanding, as an attorney-at-law and as a notary, and a member of the Bar of Attorneys-at-Law of Honduras, the legal system of Honduras works in an efficient and effective manner, and allows for the resolution of claims and indemnification for damages and prejudices as provided for by the laws of the Republic.

20. In accordance with the Inter-American Convention on Human Rights, and specifically Article 46, in order for a petition or communication submitted in accordance with Articles 44 and 45 to be admitted by the commission, the following shall be required: That the internal jurisdiction recourse has in fact been recurred to and exhausted in accordance with generally accepted principles of international law, and it must have been submitted no later than six months after the party whose rights were allegedly harmed was notified of the definitive decision. This provision is respected and applied in our country.

21. Based on my knowledge and belief, there is currently an investigative docket opened by the Attorney General of our country, through one of his prosecutorial offices, specifically that of the human rights prosecutor, in order to inquire into the circumstances of the death of Mr. ISIS OBED MURILLO, which as of this date has not specified any type of liability or responsibility with regard to Mr. ROBERTO MICHELETTI BAIN.

22. To the best of my knowledge and belief as of this date no civil or criminal procedure has been filed, nor any individualized administrative claim been filed against Mr. ROBERTO MICHELETTI BAIN, and said knowledge and belief is based on a review of the daily controls maintained for such purposes by the courts of the Republic.

23. I declare, under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Signed this 27th day of September of 2011.

---

José Alfredo Saavedra Paz



**TRANSPERFECT**

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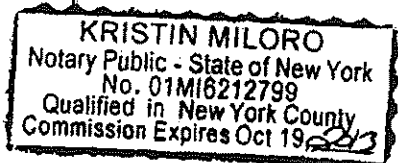
City of New York, State of New York, County of New York

I, Sara Hutchison, hereby certify that the document "Declaration of Jose Alfredo Saavedra Paz" is, to the best of my knowledge and belief, a true and accurate translation from Spanish to English.

Sara Hutchison

Sworn to before me this  
September 28, 2011

Signature, Notary Public



Stamp, Notary Public

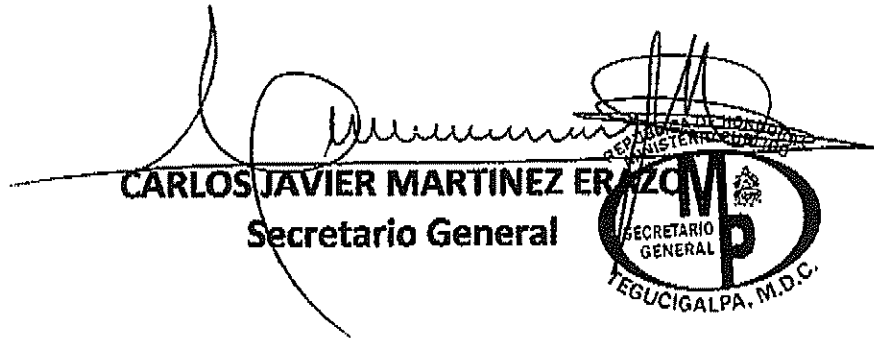
# **EXHIBIT E**



### CONSTANCIA

El Infrascrito Secretario General del Ministerio Público CERTIFICA: Que según Informe rendido por la Fiscalía Especial de Derechos Humanos, el señor ROBERTO MICHELETTI BAIN, hasta la fecha no ha sido individualizado como responsable de los hechos que motivaron la investigación contenida en la denuncia número 0801-2009-27544, referente a la muerte del ciudadano ISIS OBED MURILLO MENCIA.

Para los fines pertinentes se le extiende la presente a los trece días del mes de julio de dos mil once.

  
**CARLOS JAVIER MARTINEZ ERAZO**  
**Secretario General**



**Edificio Lomas Plaza II, Lomas del Guljarro, Avenida República Dominicana, Tegucigalpa, Honduras CA.  
Apartado Postal 3730 PBX 221-3089 FAX 221-5667**

[logo:] **REPUBLIC OF HONDURAS**  
**MP**  
**PROSECUTOR'S OFFICE**

**CERTIFICATE**

The undersigned Secretary General of the Prosecutor's Office CERTIFIES: That, according to the Report issued by the Special Prosecutor's Office for Human Rights, Mr. ROBERTO MICHELETTI BAIN has not been identified to date as being responsible for the facts that motivated the investigation contained in complaint number 0801-2009-27544 referring to the death of citizen ISIS OBED MURILLO MENCIA.

We issue this document for the appropriate purposes on the thirteenth day of the month of July, two thousand eleven.

[signature]

**CARLOS JAVIER MARTINEZ ERAZO**  
**Secretary General**

[signature]

[stamp:] **REPUBLIC OF HONDURAS**  
**PROSECUTOR'S OFFICE**  
**MP**  
**SECRETARY GENERAL**  
**TEGUCIGALPA, M.D.C.**



**TRANSPERFECT**

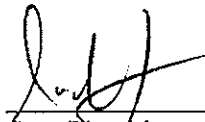
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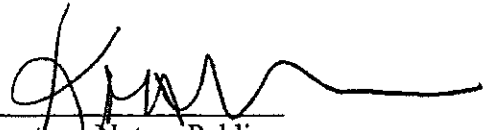
I, Sara Hutchison, hereby certify that the documents:

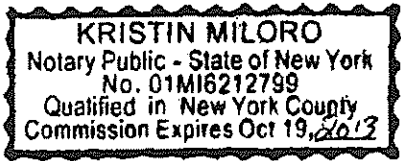
- Embassy of the United States of America 11 de Septiembre 2009
- Republica de Honduras Constancia
- Senior Fiscal General DeLa Republic Roberto Micheletti Ibain
- Secretaria De Relaciones Exteriores De La Republica De Honduras

are, to the best of my knowledge and belief, a true and accurate translation from Spanish to English.

  
 \_\_\_\_\_  
 Sara Hutchison

Sworn to before me this  
September 26, 2011

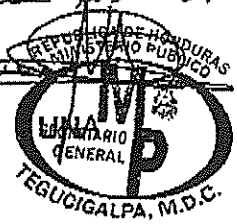
  
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 Signature Notary Public



Stamp, Notary Public

# **EXHIBIT F**

Recibido en el Fiscalia 12 de julio del 2011 pasado las 3:57 PM



SE SOLICITA CERTIFICACIÓN DE ESTADO PERSONAL EN INVESTIGACIÓN.

SEÑOR FISCAL GENERAL DE LA REPÚBLICA.

Yo, **ROBERTO MICHELETTI IBAIN**, con tarjeta de identidad número 1804-1984-00791, mayor de edad, casado, hondureño, ejecutivo de negocios, con domicilio y residencia en la Ciudad de Progreso, Departamento de Yoro y en tránsito por esta Ciudad, actuando en mi condición personal y con el respeto acostumbrado comparezco ante usted a exponer y solicitar lo siguiente:

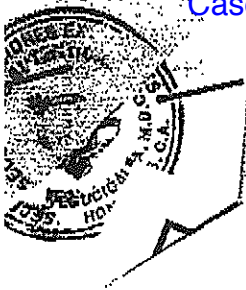
Existe información pública que ante esa dependencia que usted dignamente dirige se presento denuncia para investigar la muerte del señor Isis Obed Murillo y por ello solicito se Certifique cual es mi condición en tal investigación, es decir es necesario que se certifique mi situación personal en la investigación referida.

Fundo la presente solicitud en los Artículos 80 de la Constitución de la República y 101 del Código Procesal Penal.

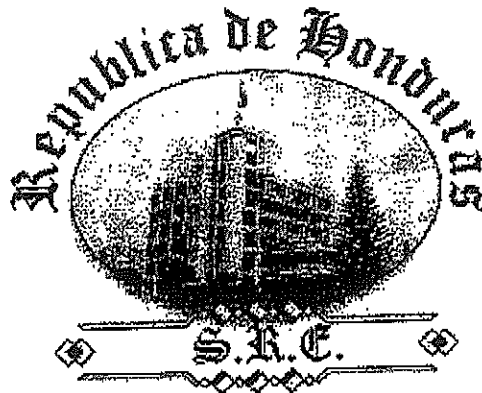
Al señor Fiscal General en reitero de mi respeto Pido: Admitir el presente escrito emitiendo la certificación solicitada en cuanto a mi estado en la investigación referida y resolver de conformidad a derecho.

Tegucigalpa, M. D. C. 12 de julio de 2011.





9830 2011



SECRETARIA DE RELACIONES EXTERIORES  
DE LA REPUBLICA DE HONDURAS

**Apostille**

(Convention de la Hays du 5 Octobre 1961)

Derechos: 150.00

No Recibo: 7121868

En Honduras el presente documento público ha sido firmado :

MIRNA LIZETTE ALVARADO

Quien actua en calidad de:

SECRETARIA POR LEY

y esta revestido del sello correspondiente a:

SECRETARIA DE LA CORTE SUPREMA DE JUSTICIA

**" ESTA OFICINA NO SE HACE RESPONSABLE POR EL CONTENIDO DEL DOCUMENTO QUE LEGALIZA LA FIRMA "**

Certificado en: Tegucigalpa M.D.C. por:

ARMANDO ROMERO CLAUDINO

JEFE DE AUTENTICAS

Honduras C.A. el: 12 de: JULIO de: 2011



*[Handwritten signature]*  
Firma

[handwritten:] [illegible] July 12, 2011 [illegible] 3:57 p.m.  
[signature]

[stamp:] REPUBLIC OF HONDURAS  
PROSECUTOR'S OFFICE  
**MP**  
SECRETARY GENERAL  
TEGUCIGALPA, M.D.C.

REQUEST FOR CERTIFICATION OF PERSONAL STATUS IN AN INVESTIGATION.

TO THE ATTORNEY GENERAL OF THE REPUBLIC.

I, **ROBERTO MICHELETTI IBAIN** [*sic*], identity card number 1804-1984-00791, of legal age, married, a Honduran, business executive, domiciled and residing in the City of Progreso, Department of Yoro, in transit in this City, acting personally and with the customary respect, appear before you to state and request the following:

There is public information that the office under your management received a complaint to investigate the death of Mr. Isis Obed Murillo and, for this reason, I request a Certification of my status in this investigation, in other words, it is necessary to certify my personal situation in said investigation.

I base this request on Articles 80 of the Constitution of the Republic and 101 of the Code of Criminal Procedure.

I respectfully ask the District Attorney: To admit this document, issuing the certification requested concerning my status in said investigation and resolve according to the law.

Tegucigalpa, M. D. C., July 12, 2011.

[signature]

[seal:] [illegible]

9630	2011
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*Republic of Honduras*  
**S. R. E.**  
*MINISTRY OF FOREIGN AFFAIRS*  
*OF THE REPUBLIC OF HONDURAS*  
**Apostille**  
**(Convention de La Haye du 5 Octobre 1961)**  
 [Hague Convention of October 5, 1961]

**Fees: 150.00**  
**Receipt No.: 7121866**

**In Honduras, this public document has been signed by:**

MIRNA LIZETTE ALVARADO

**Acting in the capacity of:**

SECRETARY BY LAW

**and bears the stamp of:**

THE CLERK'S OFFICE OF THE SUPREME COURT OF JUSTICE

<p><b>“THIS OFFICE DOES NOT ASSUME RESPONSIBILITY CONCERNING THE CONTENT OF THE DOCUMENT WHOSE SIGNATURE IT CERTIFIES.”</b></p>
---

**Certified in: Tegucigalpa M.D.C. by:**

ARMANDO ROMERO CLAUDINO  
**HEAD OF AUTHENTICATIONS**

**Honduras C.A. on: JULY 12, 2011**

[seal:]  
[illegible]

[seal:] MINISTRY OF FOREIGN AFFAIRS  
 DEPARTMENT OF AUTHENTICATIONS  
 TEGUCIGALPA, M.D.C.  
 HONDURAS, C.A.

[signature]  
Signature



**TRANSPERFECT**

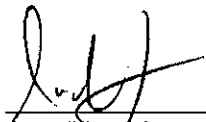
- AMSTERDAM
- ATLANTA
- AUSTIN
- BARCELONA
- BERLIN
- BOGOTÁ
- BOSTON
- BRUSSELS
- CHARLOTTE
- CHICAGO
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- PARIS
- PHILADELPHIA
- PHOENIX
- PORTLAND
- PRAGUE
- RESEARCH TRIANGLE PARK
- SAN DIEGO
- SAN FRANCISCO
- SAN JOSE
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City of New York, State of New York, County of New York

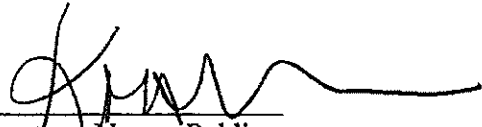
I, Sara Hutchison, hereby certify that the documents:

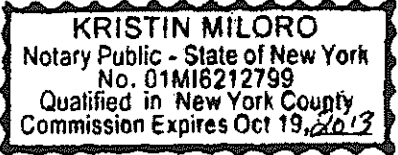
- Embassy of the United States of America 11 de Septiembre 2009
- Republica de Honduras Constancia
- Senior Fiscal General DeLa Republic Roberto Micheletti Ibain
- Secretaria De Relaciones Exteriores De La Republica De Honduras

are, to the best of my knowledge and belief, a true and accurate translation from Spanish to English.

  
 \_\_\_\_\_  
 Sara Hutchison

Sworn to before me this  
September 26, 2011

  
 \_\_\_\_\_  
 Signature Notary Public



Stamp, Notary Public

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

DAVID MIRILLO and SILVIA MENCIAS  
on behalf of themselves and as Personal  
Representatives of their deceased son, ISIS  
OBED MURILLO, and his next of kin,  
including his SIBLINGS Barrio La Plazuela

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§  
§

CASE NO. 4:11-cv-02373

v.

ROBERTO MICHELETTI BAIN

**ORDER GRANTING ROBERTO MICHELETTI BAIN’S MOTION TO DISMISS  
PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE  
12(b)(2), 12(b)(5) and 12(b)(6)**

Having considered Defendant Roberto Micheletti Bain’s Motion to Dismiss for Lack of Service, Lack of Personal Jurisdiction and Failure to State a Claim Upon Which Relief Can Be Granted pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(5) and 12(b)(6) (“Motion”), the Court finds the Motion meritorious. Accordingly, the Motion is GRANTED and the case is DISMISSED WITH PREJUDICE.

Signed \_\_\_\_\_, 2011.

\_\_\_\_\_  
The Honorable Lynn N. Hughes  
United States District Judge