

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION**

ELOY ROJAS MAMANI, *et al.*, )  
)  
Plaintiffs, )  
)  
v. )  
)  
GONZALO DANIEL SÁNCHEZ DE )  
LOZADA SÁNCHEZ BUSTAMANTE, )  
)  
Defendant. )

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**Case No. 08-21063-CV-COHN**

ELOY ROJAS MAMANI, *et al.*, )  
)  
Plaintiffs, )  
)  
v. )  
)  
JOSÉ CARLOS SÁNCHEZ BERZAÍN, )  
)  
Defendant. )

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**Case No. 07-22459-CV-COHN**

**PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

In response to this Court's January 17, 2018 Order, Plaintiffs file this Sur-Reply to answer the two questions posed by the Court:

1. Whether the Court may properly consider the 2017 Declaration of Victor Hugo Canelas Zannier in ruling on Defendants' Motion for Summary Judgment.
2. Whether Mr. Canelas will be available to testify at trial and the impact, if any, of Mr. Canelas's availability on the Court's consideration of his 2017 Declaration in ruling on Defendants' Motion for Summary Judgment.

As explained below, Mr. Canelas will be available to testify at trial, and the Court should consider his 2017 Declaration in ruling on Defendants' Motion for Summary Judgment.

### **I. Mr. Canelas Will Be Available to Testify at Trial**

As attested in a new declaration submitted as an exhibit to this Sur-Reply, Mr. Canelas is willing and able to testify at the trial in this case. *See* Ex. JJJJ (Declaration of Victor Hugo Canelas Zannier) (Jan. 19, 2018).<sup>1</sup> He has applied at the U.S. Embassy in Bolivia for a visa to travel to the United States and is awaiting a reply. If he is denied a visa, he is willing to testify by video. *See* Fed. R. Civ. P. 43(a) (permitting trial testimony "by contemporaneous transmission from a different location" under "compelling circumstances"); *see also, e.g., Lopez v. NTI, LLC*, 748 F. Supp. 2d 471, 479-80 (D. Md.

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<sup>1</sup> Exhibits cited herein, which were not cited by Defendants, are attached to the Declaration of Joseph L. Sorkin in Support of Plaintiffs' Sur-Reply to Defendants' Reply in Support of Their Motion for Summary Judgment, or the Declaration of Joseph L. Sorkin in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. Each Defense Exhibit cited herein ("Def. Ex.") is attached to the Declaration of Ana C. Reyes in Support of Defendants' Motion for Summary Judgment, or the Declaration of Ana C. Reyes in Support of Defendants' Reply in Support of Their Motion for Summary Judgment.

2010) (holding burden of international travel justified allowing indigent Honduran plaintiffs to testify via videoconference). Mr. Canelas would also be willing to testify at a trial deposition, as the parties agreed in the Joint Rule 26(f) Report, which states: “The Parties will work on an agreement regarding trial depositions in Bolivia for witnesses who will be unable to attend trial in Florida.” Dkt. 229 (Case No. 08-21063).

**II. The Court May Consider the 2017 Declaration of Victor Hugo Canelas Zannier in Ruling on Defendants’ Motion for Summary Judgment**

Plaintiffs submitted Mr. Canelas’s 2017 Declaration in support of their opposition to Defendants’ Motion for Summary Judgment. Mr. Canelas signed the declaration under penalty of perjury on February 1, 2017. *See* Ex. H (Declaration of Victor Hugo Canelas Zannier) (Feb. 1, 2017); *see also* 28 U.S.C. § 1746 (2012) (authorizing reliance on declarations signed under penalty of perjury).

This Court should consider Mr. Canelas’s 2017 Declaration in ruling on the Motion for Summary Judgment because the 2017 Declaration satisfies the three requirements set out by Federal Rule of Civil Procedure 56(c)(4), which requires that a declaration “be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” First, the 2017 Declaration is “made on personal knowledge,” in that it recounts conversations that Mr. Canelas personally heard. Second, the declaration “sets out facts that would be admissible in evidence,” in that the statements Mr. Canelas recounts are not hearsay because they are offered against an opposing party and are either statements of a party opponent, *see* Fed. R. Evid. 801(d)(2)(A), or made by the party’s agent or coconspirator during and in furtherance of the conspiracy, *see* Fed. R. Evid. 801(d)(2)(D), (E). Third, the 2017 Declaration demonstrates that the declarant is competent to testify on the matters stated in that it makes clear that Mr. Canelas was present at the events that

he describes and was able to hear and understand the statements that he recounts. *See, e.g.*, Ex. H ¶¶ 4-5 (stating that while present at home of and in the presence of Sánchez de Lozada, he personally heard statements made by Sanchez Berzaín).

Defendants argue that the 2017 Declaration should not be considered because Mr. Canelas did not state that he is willing to testify at trial.<sup>2</sup> Plaintiffs do not accept Defendants' unsupported claim that declarations submitted in opposition to summary judgment may not be considered if the declarant does not explicitly state a willingness to testify at trial. Case law suggests the opposite. Even a verified complaint "may be treated as an affidavit on summary judgment if it satisfies the standards of [Rule 56(c)(4)]." *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1444 & n.35 (11th Cir. 1991) (en banc). Rule 56(c)(4) does not impose an obligation that the declaration must state the declarant's willingness to testify at trial in order to be considered on summary judgment, and Defendants are unable to point to a single case that has held otherwise.<sup>3</sup> The issue is moot, however, given that Mr. Canelas has now submitted a second declaration making clear that he is willing to testify at trial and that he is in the process of applying for a visa at the U.S. Embassy in Bolivia to do just that.

Defendants also suggest that some or all of the declarations submitted by Plaintiffs should be disregarded because Plaintiffs declined to respond to Defendants' demand, made in

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<sup>2</sup> To the extent Defendants also urge this Court to strike the 2017 Declaration because it allegedly contains conclusory allegations, *see* Def. Reply Mem. at n.8, their request should be rejected. "The Court may discount [any] conclusory statements in considering a summary judgment motion and need not strike the declarations in their entirety." *Karpenski v. Am. Gen. Life Cos.*, 999 F. Supp. 2d 1218, 1226 (W.D. Wash. 2014) (rejecting motions to strike declarations in entirety on summary judgment).

<sup>3</sup> Defendants suggest without foundation that other declarants relied upon by Plaintiffs in opposition to Defendants' Motion for Summary Judgment will not appear at trial. *See* Def. Reply Mem. at 16-17. If the Court determines that Plaintiffs have an obligation to document the willingness of their witnesses to testify at trial, Plaintiffs respectfully request an opportunity to submit declarations in which, like Mr. Canelas, each of the declarants affirms a willingness to testify at trial.

April and May 2017, that Plaintiffs identify which of their witnesses they planned to rely on for summary judgment and which were likely to appear at trial in Florida. In response, Plaintiffs explained that they had not yet determined which witnesses they would present at trial—and had no obligation to do so in the midst of discovery<sup>4</sup>—but supplied a list of sixteen witnesses whom they expected to rely on for summary judgment. *See* Ex. KKKK (Letter from S. Schulman to A. Reyes) (Apr. 11, 2017); Def. Ex. 113 (Letter from S. Schulman to A. Reyes) (May 22, 2017). Mr. Canelas was listed as one of the witnesses willing to be deposed voluntarily. Defendants did not depose a single one of those witnesses. The names of all of the declarants, along with their contact information, were properly disclosed to Defendants through Initial Disclosures that were regularly updated. *See* Def. Ex. 67 (Pls.’ Sixth Am. Initial Disclosures). Mr. Canelas’s name and contact information were included in those disclosures.

Further, this is not a case where Defendants were surprised by Mr. Canelas’s statements—Plaintiffs produced his 2017 Declaration to Defendants during discovery.<sup>5</sup> Defendants in fact used Mr. Canelas’s 2017 Declaration as a basis for questions during third-party depositions. *See* Def. Ex. 92 at 118:15-122:10 (asking deponent to comment on Mr. Canelas’s “character and reputation,” and whether “Mr. Canelas is telling the truth” about the contents of his sworn statement). Defendants knew of Mr. Canelas, and moreover had possession of his 2017 Declaration well in advance, but nevertheless chose not to depose him. Their arguments to exclude his 2017 Declaration fall flat. *See HB Dev., LLC v. W. Pac. Mut.*

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<sup>4</sup> As part of the pretrial stipulation, the parties are required to file with the Court their list of trial witnesses no later than seven days prior to the pretrial conference, or if no pretrial conference is held, seven days prior to the call of the calendar. *See* S.D. Fla. L.R. 16.1(e). There is no obligation for the parties to identify trial witnesses during the discovery process.

<sup>5</sup> Plaintiffs first produced the 2017 Declaration to Defendants on March 6, 2017 in connection with their first production of documents responsive to Defendants’ document requests.

*Ins.*, 86 F. Supp. 3d 1164, 1172-74 (E.D. Wash. 2015) (rejecting motion to strike summary judgment declaration where defendants knew of declarant, demonstrated knowledge of declarant's role through deposition questions, and failed to pursue other avenues of discovery).

### CONCLUSION

For all of the above reasons, this Court should properly consider Mr. Canelas's 2017 Declaration because it complies with all of the requirements of Federal Rule of Civil Procedure 56(c)(4) and because Plaintiffs have fully complied with all of their pretrial disclosure obligations.

Dated: January 24, 2018  
Miami, Florida

Respectfully submitted,

By:     /s/ Ilana Tabacinic      
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**CERTIFICATE OF SERVICE**

I hereby certify that on January 24, 2018, I electronically filed the foregoing documents with the Clerk of the Court using CM/ECF. I also certify that the foregoing documents are being served this day on counsel of record in the attached Service List either via transmission of Notice of Electronic Filing generated by CM/ECF or via e-mail.

*/s/ Ilana Tabacinic*

Ilana Tabacinic

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

ELOY ROJAS MAMANI, <i>et al.</i> ,	)	Case No. 08-21063-CV-COHN
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Plaintiffs,	)	
	)	
v.	)	
	)	
GONZALO DANIEL SÁNCHEZ DE	)	
LOZADA SÁNCHEZ BUSTAMANTE,	)	
	)	
Defendant.	)	
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Plaintiffs,	)	
	)	
v.	)	
	)	
JOSÉ CARLOS SÁNCHEZ BERZAÍN,	)	
	)	
Defendant.	)	
_____	)	

**DECLARATION OF JOSEPH L. SORKIN IN SUPPORT OF PLAINTIFFS’ SUR-REPLY IN OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

I, Joseph L. Sorkin, declare and state as follows:

1. I have personal knowledge of the facts stated in this declaration, and, if asked to do so, could and would testify to these facts under oath.

2. I am a partner with the law firm of Akin Gump Strauss Hauer & Feld LLP. I am one of the counsel of record for the plaintiffs Eloy Rojas Mamani, Etelvina Ramos Mamani, Sonia Espejo Villalobos, Hernán Apaza Cutipa, Juan Patricio Quispe Mamani, Teófilo Baltazar Cerro, Juana Valencia de Carvajal, Hermógenes Bernabe Callizaya, Gonzalo Mamani Aguilar,

and Felicidad Rosa Huanca Quispe in this action. I am admitted to practice law in the State of New York. I am admitted *pro hac vice* before this Court.

3. Attached hereto as **Exhibit JJJJ** is a true and correct copy of the Declaration of Victor Hugo Canelas Zannier, dated January 19, 2018, along with a certified translation.

4. Attached hereto as **Exhibit KKKK** is a true and correct copy of a Letter from Steven Schulman to Ana Reyes dated April 11, 2017.

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

Dated: January 24, 2018

/s/ Joseph L. Sorkin

Joseph L. Sorkin

**EXHIBIT LLL**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION**

ELOY ROJAS MAMANI, <i>et al.</i> ,	)	<b>Case No. 08-21063-CV-COHN</b>
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
GONZALO DANIEL SÁNCHEZ DE	)	
LOZADA SÁNCHEZ BUSTAMANTE,	)	
	)	
Defendant.	)	

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ELOY ROJAS MAMANI, <i>et al.</i> ,	)	<b>Case No. 07-22459-CV-COHN</b>
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Plaintiffs,	)	
	)	
v.	)	
	)	
JOSÉ CARLOS SÁNCHEZ BERZAÍN,	)	
	)	
Defendant.	)	

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**DECLARATION OF VICTOR HUGO CANELAS ZANNIER**

1. I am a Bolivian citizen, living in La Paz, Bolivia. I have a valid Bolivian passport.

2. In February 2017, at the request of lawyers for the Plaintiffs in this case, I signed a declaration for submission in this case. At that time, I told Plaintiffs’ lawyers that I was willing to be deposed in Bolivia by the Defendants. To my knowledge, Defendants never asked to take my deposition.

3. I am willing and able to testify at a trial of this case in Florida in March of this year or whenever it is scheduled.



4. I am in the process of applying for a visa to the United States at the U.S. Embassy in La Paz.
5. I previously visited the United States in 1997 and 1998.
6. If I am not granted a visa to travel to the United States, I am willing to testify via video or sit for a trial deposition in Bolivia.

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

Dated: [handwritten] 01/19/2018

[signature]  
Victor Hugo Canelas Zannier



onsuelo cardozo  
traductora

## CERTIFICATE OF TRANSLATION

I, Consuelo Cardozo, hereby certify that I am competent to translate from Spanish into English (or vice versa); that I have read the *Declaración de Víctor Hugo Canelas Zannier* in Spanish; that I have translated into English, to the best of my ability, the aforementioned document; and that I have used the best of my knowledge, while respecting the original content faithfully as an authorized translator.

Therefore, I certify that the attached translation into English of the *Declaración de Víctor Hugo Canelas Zannier* is a true and accurate translation of the aforementioned declaration in Spanish.

Cochabamba, Bolivia, January 22, 2018

Consuelo Cardozo

Certificate of Translation 1987  
School of Continuing Education  
New York University

**CORTE DE DISTRITO DE LOS ESTADOS UNIDOS  
DISTRITO DEL SUR DE FLORIDA  
DIVISIÓN DE FORT LAUDERDALE**

ELOY ROJAS MAMANI, <i>et al.</i> ,	)	<b>Caso No. 08-21063-CV-COHN</b>
	)	
Demandantes,	)	
	)	
v.	)	
	)	
GONZALO DANIEL SÁNCHEZ DE LOZADA SÁNCHEZ BUSTAMANTE,	)	
	)	
Demandado.	)	
_____	)	
	)	<b>Caso No. 07-22459-CV-COHN</b>
ELOY ROJAS MAMANI, <i>et al.</i> ,	)	
	)	
Demandantes,	)	
	)	
v.	)	
	)	
JOSÉ CARLOS SÁNCHEZ BERZAÍN,	)	
	)	
Demandado.	)	
_____	)	

**DECLARACIÓN DE VICTOR HUGO CANELAS ZANNIER**

1. Soy ciudadano boliviano. Actualmente soy residente de La Paz, Bolivia. Tengo un pasaporte boliviano vigente.
2. A petición de los abogados de los demandantes en el presente caso, en febrero de 2017 firmé una declaración que fue presentada en el mismo. En ese entonces les informé a los abogados de los demandantes que estaba dispuesto a declarar ante los demandados en Bolivia. Según mi conocimiento, los demandados nunca solicitaron mi declaración.
3. Estoy dispuesto a declarar en el juicio del presente caso y estoy disponible para hacerlo en la Florida en marzo de 2018 o para cualquier fecha que se fije.

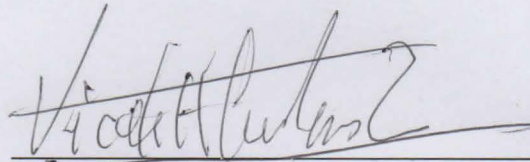
4. He iniciado el proceso de solicitud de una visa para viajar a los Estados Unidos en la embajada estadounidense en La Paz.

5. He viajado a los EEUU en ocasiones anteriores en 1997 y 1998.

6. Si se me deniega la visa para viajar a los EEUU, estoy dispuesto a declarar mediante video o presentarme en Bolivia para una declaración para el juicio.

Declaro bajo pena de perjurio bajo las leyes de los Estados Unidos que lo anteriormente expuesto en los anteriores párrafos es verdadero y correcto.

Fecha: 01/19/2018



Victor Hugo Canelas Zannier

**EXHIBIT MMMM**

# Akin Gump

STRAUSS HAUER & FELD LLP

**STEVEN SCHULMAN**  
+ 202.887.4000  
sschulman@akingump.com

April 11, 2017

VIA E-MAIL (areyes@wc.com)

Ana C. Reyes  
Williams & Connolly LLP  
725 Twelfth Street, N.W.  
Washington, DC 20005

Re: *Mamani v. Sánchez de Lozada*, Case No. 08-21063. and *Mamani v. Sanchez Berzaín*, Case No. 07-22459, United States District Court for the Southern District of Florida

Dear Ana:

This is in response to your letter dated April 7, 2017, concerning witnesses and other discovery issues.

First, we have indeed provided all contact information we have in our possession for those witnesses we identified as available for deposition in Bolivia in our letter dated March 27, 2017 (for some we had only a phone number; for others only an address). Accordingly, I do not know to which three witnesses you are referring, but in any event I am confident we have met our obligations.

Second, the provision you cite in the Joint Rule 26(f) concerning witnesses relates, as you quote, to “witnesses reasonably likely to appear for trial in Florida.” We are under no current obligation to narrow our Initial Disclosures with respect to individuals whose testimony might be used at summary judgment, particularly since we cannot at this time know on what grounds Defendants will base any such motion. As you also might imagine, we have not yet decided which witnesses, other than those whom we have agreed to present for deposition, are likely to testify at trial.

Third, we reiterate our request that Defendants disclose contact information in their possession for any witnesses included in Defendants’ initial disclosures. Defendants made a strategic choice to incorporate into their Initial Disclosures all witnesses listed in Plaintiffs’ Initial Disclosures, and by doing so accepted the burdens that come with Rule 26. Nowhere do we claim that Plaintiffs’ burden under Rule 26 shifts to Defendants. We are simply asking that Defendants disclose any contact information in their possession beyond what Plaintiffs have disclosed for those witnesses.

Ana C. Reyes  
Williams & Connolly LLP  
April 11, 2017  
Page 2

Fourth, you are confusing the Rule 26(a)(1)(A)(i) obligation to identify persons “likely to have discoverable information ... that the disclosing party may use to support its claims or defenses” with Defendants’ request that Plaintiffs identify “each witness to Decedent’s death.” *See, e.g.*, Defendants’ First Set of Interrogatories to Plaintiff Eloy Rojas Mamani, dated Dec. 20, 2016. Our Initial Disclosures with respect to individuals who Plaintiffs may use to support their claims fulfill Plaintiffs’ obligations under Rule 26. Likewise, Plaintiffs also complied with their obligations to respond to Defendants’ interrogatories with the information available to Plaintiffs.

Sincerely,

A handwritten signature in black ink, appearing to read "S.H. Schulman", is centered on a light gray rectangular background.

Steven H. Schulman