UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOAN JARA, in her individual capacity, and in her capacity as the Personal Representative of the ESTATE OF VÍCTOR JARA, AMANDA JARA TURNER, in her individual capacity, and MANUELA BUNSTER, in her individual capacity, Plaintiffs, v. PEDRO PABLO BARRIENTOS NÚÑEZ, Defendant.	)	Case No. 6:13-cv-01426-RBD-GJK

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

This Court should deny Defendant Pedro Pablo Barrientos Nuñez's ("Defendant" or "Barrientos") motion to dismiss Plaintiffs' Third Amended Complaint ("TAC"), in its entirety, for the following reasons. First, the TAC properly pleads, as required by the Torture Victim Protection Act ("TVPA"), that Defendant is liable for the torture and execution of Víctor Jara. Defendant's arguments would subvert well established pleading practice by asking this Court to hold that pleading alternative theories of liability runs afoul of *Iqbal* and *Twombley*. Second, Plaintiffs have pleaded more than sufficient bases for tolling the statute of limitations for their TVPA claims, an issue on which the Court has already ruled. Doc. 93. Defendant's motion presents no novel arguments to merit reconsideration of this issue. Finally, Defendant is barred

from raising the affirmative defense of failure to exhaust local remedies because he failed to raise it in his first motion to dismiss. *See* Doc. 82. Regardless, even if Defendant were not barred from raising this defense, dismissal is inappropriate because the Defendant falls far short of meeting the substantial threshold required by this defense.

FACTS AND PROCEDURAL HISTORY

On September 4, 2013, Plaintiffs filed this action for Defendant's role in the torture and death of their husband and father, Chilean folk singer and democratic activist Víctor Jara. Doc. 1 ¶ 1. Consistent with all prior complaints filed in this action, the TAC alleges that Defendant and members of the Chilean Army, with whom Defendant conspired and/or who were under his command and control, arbitrarily detained, tortured and killed Víctor Jara on or about September 15, 1973. Doc. 111 ¶¶ 51-65. On March 3, 2015, Defendant filed his first motion to dismiss. Doc. 82. Defendant now brings his second motion to dismiss, introducing an argument that he failed to raise previously, namely that Plaintiffs have failed to exhaust local remedies. Doc. 112.

In September 1973, Defendant served in the Chilean Army as a Lieutenant and Section Commander in the Tejas Verdes Regiment. Doc. 111 ¶ 9. From September 12 through 16, 1973, Defendant and soldiers under his command were present at Chile Stadium, in Santiago, Chile. *Id*. ¶¶ 9, 26. Defendant exercised direct and actual control over soldiers at the stadium, commanding the mass detention of civilians, including the arbitrary detention of Víctor Jara,. *Id*. ¶¶ 28-29. Between September 12 and September 15, 1973, Defendant conspired to arbitrarily detained and tortured Víctor Jara and ordered soldiers under his control to arbitrarily detain and torture Víctor Jara. *Id.* ¶ 56.

On or about September 15, 1973, Víctor Jara was separated from other detainees and taken to an underground facility at Chile Stadium. Doc. 111 ¶ 32. There, Víctor Jara was

interrogated, beaten, and tortured by Defendant, soldiers under Defendant's control, and/or his co-conspirators. *Id*. ¶¶ 32, 34. Defendant, individuals under his control, and/or his co-conspirators then shot Víctor Jara in the head with a 9mm pistol, killing him. *Id*. ¶ 76. Afterwards, soldiers under Defendant's control and/or his co-conspirators riddled Víctor Jara's body with over 40 bullets. *Id*. ¶¶ 35, 76. Defendant's subordinates and/or co-conspirators then dumped Víctor Jara's body outside of Chile Stadium. *Id*. ¶ 36.

The TAC recounts decades of efforts by Plaintiffs to obtain justice, in the face of extraordinary obstacles including the absence of any meaningful investigation during the Pinochet regime, the promulgation of the Amnesty Law bestowing blanket protection on individuals who committed offenses in connection with the 1973 *coup d'état*, and the continuing conspiracy of silence among witnesses of atrocities such as the detention, torture, and killing of civilians at Chile Stadium. *Id*. ¶¶ 43, 45.

Plaintiffs discovered that Víctor Jara was captured, detained, and executed by the Chilean military in 1973 and, fortunately, were able to find, identify and bury his body not long after his death. But, as important at it is, giving a loved one a proper burial is not justice. For the past 40 years, Plaintiffs had no available avenue by which to determine who detained, tortured, and killed their husband and father.

From 1973 to 1990, the judiciary refused to investigate cases related to allegations that the Chilean Armed Forces – instrumental in installing the dictatorship in 1973 – tortured and killed civilians. *Id*. ¶¶ 41-42. The refusal to bring the responsible to account continued after the Pinochet regime came to a close in 1990. The military, and General Pinochet himself, maintained significant control and influence in Chile after Pinochet was deposed. Accordingly,

the suppression of evidence continued as to Víctor Jara's detention, torture, and death, as did a refusal to identify those responsible, in spite of Plaintiffs' sustained efforts. Doc. 111 ¶¶ 41-49.

Literally for decades Plaintiffs' repeated attempts to stimulate an investigation by Chilean authorities into those responsible for Víctor Jara's torture and death were met with only limited success. *Id*. ¶¶ 38-50. Finally in 2009, Defendant was identified as one of the perpetrators of the torture and death of Víctor Jara. *Id*. ¶¶ 38-50; Doc. No. 77 at 11-12. It was not until José Adolfo Paredes Márquez, a conscript in the Chilean military, first identified Barrientos as a person responsible for the detention, torture, and killing of Víctor Jara that Plaintiffs had any reason to suspect Defendant's involvement in Victor Jara's torture and death. Doc. 111 ¶ 46; *see also* Doc. 50 at ¶¶ 15-19. Only then did Plaintiffs begin to learn of the full circumstances surrounding Víctor Jara's death. In 2012, Barrientos was discovered to be living in Deltona, Florida, as a U.S. citizen. Doc. 111 ¶ 7. Plaintiffs promptly filed suit against Barrientos in 2013. Doc. 1.

ARGUMENT AND MEMORANDUM OF LAW

I. Standard Of Review.

When considering a Rule 12(b)(6) motion, "the court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff." *Speaker v. U.S. Dep't of Health & Human Servs. Ctr. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). *Twombly* and *Iqbal* require only that plaintiffs plead facts that are sufficient, when, taken as true, to "nudge[] their claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). "Plausible" does not mean "probable." A complaint withstands Rule 12(b)(6) "even if it strikes a savvy judge that actual proof of these facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556 (citation omitted).

In addition, the Eleventh Circuit applies the "no set of facts" standard whereby, "[a]t the motion-to-dismiss stage, a complaint may be dismissed on the basis of a statute-of-limitations defense only if it appears *beyond a doubt* that Plaintiffs can prove *no set of facts* that toll the statute." *Lindley v. City of Birmingham, Ala*., 515 F. App'x 813, 815 (11th Cir. 2013) (emphasis added); *see also Sec'y of Labor v. Labbe*, 319 F. App'x 761, 764 (11th Cir. 2008). As a result, "a motion to dismiss on statute of limitations grounds should not be granted where resolution depends either on facts not yet in evidence or on construing factual ambiguities in the complaint in defendants' favor." *Lesti v. Wells Fargo Bank N.A.*, 960 F. Supp. 2d 1311 (M.D. Fla. 2013). Therefore, where a complaint's allegations leave open the possibility that the plaintiff's claims could be tolled, it should not be dismissed under Rule 12(b)(6).

II. Defendant's Motion Should Be Denied Because The TAC More Than Plausibly Alleges That Defendant Is Liable Under The TVPA For Torturing And Killing Víctor Jara.

The TAC contains ample factual allegations that more than plausibly assert that Defendant is liable, under the TVPA, for the torture and extrajudicial killing of Víctor Jara. Defendant does not deny this, but argues that pleading alternative forms of liability is inappropriate. In what can charitably be called a novel interpretation, Defendant insists that *Twombly* and *Iqbal* stand for the proposition that the well-established practice of pleading in the alternative is deficient as a matter of law. Doc. 112 at 9-11. These cases hold no such thing and Defendant's motion should accordingly be denied.

A. Defendant Concedes That The TAC Properly Pleads The Elements of Torture And Extrajudicial Killing Under The TVPA.

The TAC puts Defendant on notice as to why he is liable for the torture and killing Víctor Jara. Defendant does not contest this, effectively conceding that the elements of torture and extrajudicial killing are properly pleaded.

The TVPA provides that "an individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual." 28 U.S.C. § 1350 note § 2(a)(1). Torture is defined as:

> [A]ny act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

Id. § 3(b)(1).

The TAC alleges that Defendant is liable for the torture of Víctor Jara. Specifically, the TAC alleges that Víctor Jara was subjected to severe pain and suffering when Defendant, Defendant's subordinates and/or co-conspirators beat and shot him. Doc. 111 ¶¶ 34-35. This treatment was intentional, as it was part of conspiracy by Defendant and his co-conspirators to detain, torture, and kill individuals ideologically opposed to the regime, such as Víctor Jara. Doc. 111 ¶¶ 19-22, 27-28, 33-36.

The TAC further alleges that Víctor Jara was subjected to this treatment by Defendant, his subordinates, and/or co-conspirators, as a form of punishment and intimidation since Víctor Jara supported the leftist government of President Allende. *Id*. ¶¶ 21, 22, 26, 29-30, 33-36. While committing these acts, Defendant, soldiers under his command, and/or his co-conspirators acted under actual or apparent authority, or color of law of the nation of Chile. *Id*. ¶¶ 9, 19, 20, 25-28, 33. At all relevant times, Víctor Jara was in the physical custody of Defendant, soldiers under his command, and/or co-conspirators in the Chilean Army who acted in furtherance of the Chilean Army's common plan, design, and scheme to detain, torture, and kill political dissidents. Doc. 111 ¶¶ 22, 23, 28 33-36.

Similarly, Defendant does not contest that the elements of extrajudicial killing are also properly pleaded in the TAC. Extrajudicial killing is defined as "a deliberate 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 at § 3(a). The TAC alleges that Defendant, those under his command, and/or those he conspired with, transported Víctor Jara to a facility in Chile Stadium on September 15, 1973. *Id*. ¶¶ 32, 33, 35. There, Defendant killed, caused others to kill, and/or conspired to kill Víctor Jara by shooting him in the head with a 9mm pistol, and subsequently riddling his corpse with at least forty more bullets. *Id*. ¶¶ 33-36, 65, 76. Víctor Jara was never charged with, convicted of, or sentenced for any crime. *Id*. ¶ 78. His death was 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. *Id*. ¶ 66. Accordingly, both torture and extrajudicial killing, under the TVPA, are properly plead in the TAC.

B. The TAC Properly Pleads Alternative Forms Of Liability, Each Of Which, At A Minimum, Plausibly Establishes Defendant's Responsibility For The Torture and Extrajudicial Killing Of Víctor Jara Under The TVPA.

Defendant in large part bases his motion to dismiss on the theory that pleading alternative forms of liability is inappropriate. Doc. 112 at p. 9. Defendant seeks to overturn this well-established practice by asking this Court to hold that pleading alternative theories of liability runs afoul of *Iqbal* and *Twombley*. However, pleading in the alternative is entirely proper.

It is uncontroversial that plaintiffs are entitled to plead, on information and belief, alternative forms of liability under which a defendant can be held responsible without running afoul of the requirements of *Twombly* and *Iqbal*. *See Adinolfe v. United Technologies Corp.*, 768 F.3d 1161, 1175-76 (11th Cir. 2014) ("It is a well-settled rule of federal procedure that plaintiffs

may assert alternative and contradictory theories of liability . . . Listing several possible causal factors does not amount to conclusory catch all allegations.") (internal quotations omitted); *see also* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.").

Both direct and secondary liability are appropriate under the TVPA. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012) (noting that the TVPA contemplates direct liability as well as "liability against officers who do not personally execute the torture or extrajudicial killing"); *see also Doe v. Drummond Co.*, 782 F.3d 576, 607 (11th Cir. 2015) ("secondary or indirect theories of liability recognized by U.S. law are available for claims brought under the TVPA."). Defendant's arguments fly in the face of this well-held doctrine.

In the TAC, Plaintiffs properly plead five forms of liability: (1) direct perpetration; (2) command responsibility; (3) aiding and abetting; (4) conspiracy; and (5) joint criminal enterprise. Doc. 111 ¶¶ 51-66. Courts have consistently recognized each of these forms of liability as appropriate under the TVPA.[1] Indeed, this point is not in dispute among the Parties.

1. Direct Perpetration Is Properly Pled In The TAC.

The TAC contains more than sufficient allegations to establish that Defendant is directly liable for torturing and killing Víctor Jara. Plaintiffs allege that Defendant killed Víctor Jara, in and around September 15, 1973, by shooting him in the head with a 9mm pistol. Doc. 111 ¶¶ 33-35, 57, 76. This allegation certainly puts Defendant on "notice" that Plaintiffs allege Defendant is directly liable for torturing and killing Víctor Jara. *See Twombly*, 550 U.S. at 544.

[1] *See Drummond Co.*, 782 F.3d at 605, 609 (recognizing direct and secondary theories of liability under the TVPA, including command responsibility and aiding and abetting); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157-59 (11th Cir. 2005) (recognizing conspiracy); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 491 (D. Md. 2009), *aff'd on other grounds*, 402 F. App'x. 834 (4th Cir. 2010) (recognizing joint criminal enterprise).

2. Command Responsibility Is Properly Pled In The TAC.

In the alternative, the TAC contains more than sufficient allegations to establish that Defendant is liable for the torture and killing of Víctor Jara under command responsibility. The Eleventh Circuit has explicitly recognized command responsibility under the TVPA. In *Drummond Co.*, 782 F.3d at 609, the elements of command under the TVPA are:

> (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.

The TAC contains sufficient factual allegations to establish the reasonable inference that Defendant had command responsibility over those who tortured and killed Víctor Jara. The TAC alleges that from September 12 through 16, 1973, Defendant had both *de facto* and/or *de jure* authority over his subordinates and others stationed at Chile Stadium as a Lieutenant and Section Commander in the Tejas Verdes Regiment, including those who participated in the torture and extrajudicial killing of Víctor Jara. Doc. 111 ¶¶ 9, 26, 28, 53. It further alleges that since Defendant was one of the individuals in command of the mass detention of civilians at Chile Stadium, he knew or should have known that his subordinates were planning to and/or did torture and kill Víctor Jara. *Id*. ¶¶ 53, 56. Defendant also knew of the crimes given that he ordered and/or directly participated in the torture and killing of Víctor Jara. *Id*. ¶¶ 33-35, 56. The TAC also alleges that Defendant failed to take steps to prevent the commission of the crimes against Víctor Jara or to punish those under his authority who carried them out. *Id*. ¶¶ 55, 56, 57.

3. Aiding and Abetting Is Properly Pled In The TAC.

The Eleventh Circuit has explicitly recognized aiding and abetting liability under the TVPA. *Drummond Co.*, 782 F.3d at 605. Aiding and abetting liability requires that "the

wrongful act at the center of the claim was, in fact, committed, and the defendant gave knowing substantial assistance to the person or persons who committed the wrongful act." *Id*. at 608 (citing *Cabello*, 402 F.3d at 1158-59 and *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983)). Defendant erroneously argues that Plaintiffs must make a showing of intent, and not merely knowledge, to state a cognizable aiding and abetting claim under the TVPA. Doc. 112. The Eleventh Circuit has explicitly rejected this heightened requirement, stating that "the *mens rea* standard for an aiding and abetting theory of liability in this circuit is knowledge." *Drummond Co.*, 782 F.3d at 604. Accordingly, Defendant's argument is baseless.

The TAC contains more than sufficient factual allegations to establish the reasonable inference that Defendant gave "knowing substantial assistance" to those who tortured and killed Víctor Jara. Defendant was a commander of the mass detention of civilians, involved in establishing a system of imprisonment, torture, and execution of suspected leftists at Chile Stadium. Doc. 111 ¶¶ 9, 26, 27, 28. The establishment of such a system facilitated and/or led to the torture and killing of Víctor Jara by individuals who operated under Defendant's control. *Id*. ¶¶ 27, 32, 33, 34, 35. Moreover, Defendant was himself an active participant in the torture and killing of Víctor Jara, and, therefore, is alleged to have aided and abetted. *Id*. ¶¶ 26-28, 33-35.

4. Conspiracy Is Properly Pled In The TAC.

The Eleventh Circuit has explicitly recognized conspiracy liability under the TVPA. *Cabello*, 402 F.3d at 1159. The elements of conspiracy under the TVPA are met when: (1) two or more persons agreed to commit a wrongful act, (2) a defendant joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it, and (3) one or more of the violations was committed by someone who was a member of the conspiracy and acted in furtherance of the conspiracy. *Id*. (citing *Halberstam*, 705 F.2d at 481, 487).

The TAC contains more than sufficient factual allegations to establish the reasonable inference that Defendant conspired to commit wrongful acts that resulted in the torture and extrajudicial killing of Víctor Jara. Defendant knowingly collaborated with other Chilean Army officers to establish a system of imprisonment, torture, and execution of suspected leftists.[2] Doc. 111 ¶ 27. Defendant was a commander of Chile Stadium and acted with the intent to further the system of arbitrary detention, torture, and execution of civilians. *Id*. ¶¶ 27-28. Moreover, Defendant operationalized the system by giving orders to those under his *de jure* and/or *de facto* control and/or directly participating in the system of imprisonment, torture, and execution of suspected leftists. *Id*. ¶¶ 27, 28, 32-35. Víctor Jara was tortured and killed as a result of the conduct of those with whom Defendant conspired. *Id*. ¶¶ 27, 32-35.

5. Joint Criminal Enterprise Is Properly Pled In The TAC.

Federal courts have recognized joint criminal enterprise as a distinct and proper form of liability under the TVPA. *See Lizarbe*, 642 F. Supp. 2d at 490. This theory of liability provides for joint liability where there is a common design to pursue a course of conduct where: "(i) the crime charged was a natural and foreseeable consequence of the execution of [the] enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of [the] enterprise, and, with that awareness, participated in [the] enterprise." *Id*. (citing *Prosecutor v. Brdjanin*, Case No. IT–99–36–T, Judgment, ¶ 265 (Sept. 1, 2004)).

[2] Specifically, the TAC alleges that Defendant conspired with officers, including Lieutenant Jorge Smith Gumucio, Section Commander in the Third Combat Company, Tejas Verdes; Captain Luis Germán Montero Valenzuela, Commander of the Second Combat Company, Tejas Verdes; Captain Víctor Federico Lizarraga Arias, Commander of the Third Combat Company, Tejas Verdes; Major Alfredo Alejandro Rodríguez Faine, Battalion Commander, Tejas Verdes; Lieutenants Raúl Anibal Jofré Gonzalez and Edwin Armando Dimter Bianchi of Regimiento Blindados N°2; LieuErnesto Luis Bethke Wulf, of Regimiento "Maipo"; and Lieutenant Nelson Edgardo Haase Mazzei, Tejas Verdes. Doc. 111 ¶ 27.

The TAC contains more than sufficient allegations to establish the reasonable inference that Defendant entered into a joint criminal enterprise, the natural foreseeable consequence of which was the torture and killing of Víctor Jara. *Id*. ¶¶ 24, 27, 28, 30, 33-35, 59. Defendant engaged in a common design with other members of the Chilean Army, the purpose of which was the arbitrary detention, torture, and execution of suspected leftists at Chile Stadium. Doc. 111 ¶¶ 24, 27, 28, 59. Defendant willingly participated in the criminal enterprise knowing that acts of torture and killing would be carried out in its furtherance. *Id*. ¶¶ 27, 28, 33-35.

In sum, the Eleventh Circuit has held "that plaintiffs may assert alternative and contradictory theories of liability;" the TAC contains ample factual allegations that support each form of liability which more than plausibly suggest that Defendant is directly and secondarily liable for the torture and extrajudicial killing of Víctor Jara. *See Adinolfe*, 768 F.3d at 1175. The Court should, therefore, deny Defendant's motion to dismiss for failure to sufficiently plead.

III. The Court's Prior Ruling That Extraordinary Circumstances Warrant Equitable Tolling Of The Statute Of Limitations Should Stand.

The Court previously denied Defendant's motion to dismiss Plaintiffs' TVPA claims as time-barred by the statute of limitations. Doc. 93. Defendant's renewed motion is equally unpersuasive as Plaintiffs have not altered any allegations in the TAC relevant to tolling.

Claims under the TVPA are subject to a ten-year statute of limitations, with permissible equitable tolling. 28 U.S.C. § 1350, note § 2(c). Plaintiffs must show that they have been "pursuing [their] rights diligently" and "that some extraordinary circumstances stood in [their] way." *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419 (2012); *Jean v. Dorelien*, 431 F.3d 776, 779 (11th Cir. 2005). "The diligence required for equitable tolling purposes is 'reasonable diligence,'. . . *not* 'maximum feasible diligence.'" *Holland v. Florida*, 560 U.S. 631, 653 (2010) (internal citations omitted; emphasis added) (reversing Eleventh

Circuit on tolling grounds). Equitable tolling requires a fact-sensitive inquiry. *See, e.g.*, *Holland*, 560 U.S. at 650 (requiring a "case-by-case" analysis).

Courts in the Eleventh Circuit routinely toll the statute of limitations for TVPA claims where timely filing was prevented by the continued existence of the responsible regime, danger to witnesses, and government and military concealment of evidence preventing parties from discovering the wrongs perpetrated against them. *See Cabello*, 402 F.3d at 1155 (tolling appropriate "when the plaintiff has no reasonable way of discovering the wrong perpetrated against her"); *Arce v. Garcia*, 434 F.3d 1254, 1261-62 (11th Cir. 2006) (where regime suppressed evidence); *Jean*, 431 F.3d at 779-81 (where repressive regime prevented plaintiff from investigating). It bears emphasizing that the legislative history of the TVPA explicitly contemplates extraordinary circumstances where a "plaintiff has been unable to discover the identity of the offender" as a basis for equitable tolling. S. Rep. No. 102-249, at 10-11 (1991); *see also Cabello*, 402 F.3d at 1155. This includes cases where the plaintiff "cannot obtain information necessary to decide whether the injury is due to wrongdoing and, *if so, wrongdoing by the defendant."* *Pac. Harbor Capital, Inc. v. Barnett Bank, N.A.*, No. 2:97-CV-416-FTM-24D, 2000 WL 33992234, at *3 (M.D. Fla. Mar. 31, 2000), *aff'd*, 252 F.3d 1246 (11th Cir. 2001), *as amended* (July 3, 2001) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (emphasis added); *see also* S. Rep. 102-249, 10-11 (the statute of limitations "should also be tolled where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender.").

Plaintiffs have consistently detailed their diligent and persistent efforts to discover the identity of the individuals that killed Víctor Jara. *See* Doc. 111 ¶¶ 38-50; Doc. 53 ¶¶ 39-51. Notably, the Court previously relied on the "specific, plausible particulars" alleged in the Second

Amended Complaint ("SAC") to toll the statute of limitations. Doc. 93 at 12-13. Each of the allegations referred to by the Court to sustain its ruling continues to be included in the TAC. Thus, the TAC, like the SAC, continues to allege:

> (1) [Plaintiffs] filed an initial application to open a criminal investigation in 1978 while the responsible regime was still in power [SAC ¶ 39; TAC ¶ 38]; (2) [Plaintiffs] filed a complaint before the Chile Court of Appeals against General Pinochet and others in August of 1999 as soon as the Chilean Supreme Court "started limiting the application of the Amnesty Law" despite the frustrations that still remained intact from the Amnesty Law [SAC ¶¶ 41, 44-46; TAC ¶¶ 40, 43-45]; and (3) as soon as the court closed the Consolidated Investigation of 2001 in 2008, they requested for it to be reopened [SAC ¶ 46-47; TAC ¶¶ 45-46.] Despite their best efforts, they were unable to obtain the identity of an offender – Defendant – until 2009, and they "promptly initiated" this action as soon as they learned of Defendant's whereabouts. [SAC ¶¶ 47-48; TAC ¶¶ 46-47.]

Defendant now relies on the absence in the TAC of the allegation in the SAC that Defendant shot Víctor Jara while playing Russian roulette to argue that Plaintiffs should not be able to toll the statute of limitations. Once again, as in previous motions, Defendant argues that Plaintiffs should not be permitted to rely on Mr. Paredes's testimony because of purported credibility issues. Doc. 112 p. 5-7. Defendant's arguments fail to focus on the relevance of Mr. Paredes's testimony.

Plaintiffs are free to shape the scope of their allegations and to select which facts they wish to plead to state a plausible basis for relief. As set out in the TAC, it was Mr. Parades' testimony in 2009 that first identified Defendant to Plaintiffs as someone involved in the death of Victor Jara. Doc. 111 ¶ 46. As they alleged previously in the SAC, Plaintiffs allege in the TAC it was not until 2009 that Plaintiffs learned of Defendant's role and more about the circumstances surrounding Victor Jara's detention, torture, and killing. Doc. 111 ¶¶ 37, 46. The question of whether or not Victor Jara was forced to play Russian roulette is irrelevant to the question of when Plaintiffs learned of Defendant's identity and involvement. Nor are assertions about the

credibility of an individual whose testimony led Plaintiffs to develop independent proof of Defendant's wrongful acts relevant to the tolling issue.

Equally unavailing is Defendant's argument that Plaintiffs' failure to pursue a civil suit against an entirely different defendant, namely the government of Chile, demonstrates a lack of diligence. For the past 40 years, Plaintiffs have shown the utmost diligence in their efforts to identify the individual(s) responsible, often in the face of intractable obstacles. *Id*. ¶¶ 38-49. Despite their efforts, Plaintiffs did not discover Defendant's identity and connection with Víctor Jara's death until 2009 or his location in the U.S. until 2012, at which point they promptly filed this action. As this Court previously recognized, Plaintiffs' diligence and extraordinary circumstances merit the tolling of their TVPA claims against Defendant until at least 2009.

IV. Defendant's Motion To Dismiss For Failure To Exhaust Local Remedies Is Procedurally Barred Since Defendant Failed To Raise This Defense in His First Motion to Dismiss.

Defendant incorrectly styles his motion to dismiss for failure to exhaust local remedies as a "jurisdictional challenge" under Fed. R. Civ. P. 12(b)(1), rather than as an affirmative defense, thereby cloaking his failure to raise this defense in his first motion to dismiss. *See* Doc. 82. But the TAC does not give Defendant a second bite at the apple and, in any event, the Eleventh Circuit has consistently held that an exhaustion defense is not jurisdictional.

The filing of an amended complaint does not revive the right to present by motion defenses that were available but were not asserted in a timely fashion prior to the amendment of the pleading. *See* Fed. R. Civ. P. 12(g); *Maryland Cas. Co. v. Shreejee Ni Pedhi's, Inc.*, No. 3:12-CV-121-J-34MCR, 2013 WL 460311, at *3 (M.D. Fla. Jan. 8, 2013) (denying motion to dismiss because "[t]he mere addition of new factual allegations to the counterclaim does not change the fact that Plaintiff could have and should have raised these defenses in the first motion to dismiss"); *Vinson v. Koch Foods of Alabama, LLC*, No 2:12-CV-1088-MEF, 2014 WL

2589697, at *4 (M.D. Ala. June 10, 2014) (refusing to consider arguments raised in a motion to dismiss that were available to defendant in first motion). Plaintiffs have alleged no relevant new facts in the TAC. *See* Doc. No. 111. Since Defendant could have raised this argument in response to the earlier version of the complaints, he is barred from raising it now.

Moreover, a failure to exhaust argument is an affirmative defense and not jurisdictional. In drafting the TVPA, Congress unambiguously described the exhaustion requirement as "an affirmative defense, requiring the defendant to bear the burden of proof." 28 U.S.C. § 1350 note. Consistent with this, the Eleventh Circuit has repeatedly characterized the exhaustion requirement as an affirmative defense and not as a jurisdictional element. *Jean,* 431 F.3d at 781 (exhaustion requirement is an "affirmative defense"); *see also Cabello Barrueto v. Fernandez Larios*, 291 F. Supp. 2d 1360, 1367 (S.D. Fla. 2003) (finding that, as an affirmative defense, the exhaustion requirement of the TVPA is not jurisdictional and therefore denying defendant's motion to dismiss as untimely); *Doe v. Constant*, 354 F. App'x 543, 545 (2d Cir. 2009) (affirming that the exhaustion requirement is an affirmative defense and not jurisdictional) (citing *Jean,* 431 F.3d at 781); *United States v. Walsh,* 700 F.2d 846, 855–56 (2d Cir.1983) (holding timeliness under a statute of limitations is not jurisdictional, but is an affirmative defense that may be forfeited or waived); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1319 (N.D. Cal. 2004) (finding the exhaustion requirement is not jurisdictional).

While Defendant cites *Mamani* to assert that exhaustion of local remedies is a jurisdictional defense, *Mamani* was decided in error and is not binding on this court. *Mamani*, 21 F. Supp. 3d at 1364. Rather, the binding precedent in this Court is, as Court of Appeals for the Eleventh Circuit clearly stated in *Jean*, that "the exhaustion requirement pursuant to the TVPA is an affirmative defense, requiring the defendant to bear the burden of proof." *Jean,* 431

F.3d at 781. Defendant offers no reason why this Court should deviate from the well-established rule in this Circuit. Accordingly, the Court should find that Defendant is barred from belatedly raising the exhaustion of local remedies argument at this time.

V. Even If The Court Were To Consider Defendant's Affirmative Defense Of Failure To Exhaust Local Remedies, The Court Should Deny The Motion Because Defendant Failed To Meet His Substantial Burden Of Showing That Plaintiffs Indeed Failed To Exhaust Local Remedies.

Even were the Court to address the merits of Defendant's motion to dismiss based on this affirmative defense, it should nevertheless deny the motion because Defendant has not met his burden of proving that Plaintiffs failed to exhaust adequate and available domestic remedies.

It is undisputed amongst the Parties, that "[t]his burden of proof [of failure to exhaust local remedies] is substantial." *Jean*, 431 F.3d at 781; Doc. 112 p. 4. The presumption in favor of Plaintiffs is so high, that "in most instances the initiation of litigation under [the TVPA] will be virtually prima facie case evidence that the claimant has exhausted his or her remedies." Senate Report to the TVPA, S. REP. NO. 102-249, at 8. Accordingly, Plaintiffs are "entitled to a presumption that local remedies have been exhausted, which Defendants must overcome before Plaintiffs are required to prove exhaustion or, presumably, the futility of exhausting local remedies." *Sinaltrainal v. Coca-Cola Co*., 256 F. Supp. 2d 1345, 1357-58 (S.D. Fla. 2003). Thus, where a movant, like Defendant, has not overcome the presumption that domestic remedies have been exhausted, the Court should deny the motion to dismiss.

A. Defendant Does Not Contest That Plaintiffs Have Exhausted All Local Remedies *Against Him*.

Defendant does not contest that Plaintiffs have exhausted all local remedies against him in Chile, nor can he. Where, as here, a plaintiff is demonstrably involved in a domestic criminal case that makes little progress over the course of years, domestic remedies are considered inadequate or unavailable. *Lizarbe*, 642 F. Supp. 2d at 485 (denying motion to dismiss where

plaintiffs' civil claims against defendant were pendant in a criminal investigation for which there was no reasonably foreseeable date of conclusion). For instance, in *Xuncax,* the court noted that even though the plaintiff had returned to Guatemala and provided over twelve hours of in-court testimony during which she recounted her ordeal, the criminal case had nevertheless made no progress for several years. *Xuncax v. Gramajo,* 886 F. Supp. 162, 178 (D. Mass. 1995). Having made these factual findings and noting that Guatemalan civil cases cannot commence until criminal cases conclude, the court held that the plaintiff had exhausted local remedies. *Id.*

Over the course of more than forty years, Plaintiffs filed three separate criminal reports with Chilean courts to investigate the torture and murder of Víctor Jara. The government investigations made little progress until 2012, when Defendant was indicted in Chile. Doc. 111 ¶¶ 11, 48. However, as a U.S. citizen and resident, Defendant is not within Chile's jurisdiction. Since criminal trials *in absentia* are prohibited in Chile, the prosecution of Defendant cannot move forward until he is extradited to Chile or returns of his own volition. *Id*. ¶¶ 10, 48; *see also* Sworn Statement of Antonio Morales Zagal, Doc. 112-1 ¶¶3(d), 4. Defendant has admitted that he is aware he is the subject of criminal charges in Chile and will remain in the U.S., apparently to avoid the possibility that he might be brought before a Chilean court to face criminal accountability for his conduct in the death of Víctor Jara. Doc. 84 p. 3. Further, as a matter of domestic law in Chile, Plaintiffs' civil claims for damages cannot be assessed until the criminal proceedings are complete. Doc. 111 ¶ 17.

In sum, Plaintiffs' civil claims against Defendant in Chile cannot proceed until the conclusion of the long-standing and continuing criminal proceedings that have no reasonably foreseeable date of conclusion. It is Defendant's deliberate absence from the country of his birth and the place of his wrongful conduct that has significantly contributed to this delay. Plaintiffs

have no available, adequate domestic remedies to exhaust against Defendant. *See Lizarbe,* 642 F. Supp. 2d at 485; *Xuncax,* 886 F. Supp. at 178.

B. Defendant Fails To Show That An Action for Compensatory Damages Against The Government of Chile Would Have Been Available When Plaintiffs Filed The Present Suit.

Unable to contest that Plaintiffs have exhausted all local remedies against him, let alone meet his substantial burden on this point, Defendant instead posits that the filing of a separate compensatory damages action – not against him but against an entirely different defendant (namely the government of Chile) should be construed as an adequate and available remedy that must also be exhausted. This contention fails for a host of reasons.

First, Defendant fails to show that an action against Chile would have been available when Plaintiffs filed the present case. According to Defendant's own expert, any civil action against the government of Chile would be subject to the applicable statute of limitations. Doc. 112-1 ¶ 7 (acknowledging that this action would only be valid "to the extent that the statute of limitations does not apply."). Further, Defendant's expert suggests that for civil actions, the statute of limitations for crimes committed as part of the *coup* likely began to run as of 1991. *Id.* ¶ 20. Defendant's expert does not specify the length of the applicable statute of limitations. *See id.* Thus, Defendant fails to establish, as is his burden, whether an action against the government of Chile would have been adequate or available when Plaintiffs filed the present suit. *See Xuncax v. Gramajo,* 886 F.Supp. 162, 178 (D.Mass.1995) (holding that "when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile," exhaustion pursuant to TVPA is not required) (quoting S. Rep. No. 102–249 (1991)).

Second, the action could be stayed. Defendant's expert also notes that when a separate civil suit is filed, the action may still be stayed pending the resolution of a related criminal proceeding. *Id.* ¶ 10 n. 4 (citing Article 167 of the Civil Code of Procedures). Thus, even if a

civil action against the government of Chile were possible, the action might remain pending until the end of the related ongoing criminal action, which as detailed in Section IV (A) *supra*, has no reasonably foreseeable date of conclusion. Therefore, the availability of Defendant's proffered remedy is speculative at best. *See Xuncax*, 886 F. Supp. at 178.

C. An Action For Compensatory Damages Against Chile Is Not An Adequate Remedy Because It Does Not Comport With The TVPA's Legislative Purpose Of Establishing Individual Liability.

Section 2(a) of the TVPA explicitly creates *individual* liability for damages. The congressional intent behind the TVPA was to ensure that the United States does not offer a "safe haven" to perpetrators of human rights abuses and that they "are held legally accountable for their acts." S. Rep. 102-249, at 3 (1991); *see also* TVPA Preamble (stating that the TVPA establishes "a civil action for recovery of damages *from an individual* who engages in torture or extrajudicial killing) (emphasis added); *Mohamad*, 132 S. Ct. at 1708 (holding that the text of the TVPA authorizes liability "solely against natural persons"). Moreover, the legislative history of the TVPA anticipates grounds for tolling the statute of limitation for periods of time in which the *individual* defendant is unavailable from suit. S. Rep. No. 102-249, at 11 (1991). Accordingly, the statute anticipates the availability of suit against an *individual*, not the state.

Here, Defendant suggests an entirely separate action, not against Defendant or even another individual, but against the government of Chile. Defendant acknowledges that, in the suit he proposes, "the identification of the actual individual perpetrators is not required . . . and the actual government agents involved need not appear in court." Doc 112 at 2 (citing Exhibit A ¶ 13). Thus, even if such a suit were available, which Defendant has not established, it still would not constitute an adequate remedy sufficient to displace the presumption of exhaustion of remedies in accordance with the stated purpose of the TVPA.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant's motion to dismiss Plaintiffs' TAC.

Respectfully submitted, Dated: October 13, 2015

/s/

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Certificate of Service

I certify that on October 13, 2015, I electronically filed a copy of the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants: None.

/s/ Richard S. Dellinger
Richard S. Dellinger