UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:20-CV-24294-LFL

RAQUEL CAMPS, in her capacity as the personal representative of the ESTATE OF ALBERTO CAMPS,

EDUARDO CAPPELLO, in his individual capacity, and in his capacity as the personal representative of the ESTATE OF EDUARDO CAPPELLO,

ALICIA KRUEGER, in her individual capacity, and in her capacity as the personal representative of the ESTATE OF RUBÉN BONET,

and, MARCELA SANTUCHO, in her individual capacity, and in her capacity as the personal representative of the ESTATE OF ANA MARÍA VILLARREAL DE SANTUCHO,

Plaintiffs,

v.

ROBERTO GUILLERMO BRAVO,

Defendant.

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR A DIRECTED VERDICT

I. INTRODUCTION

Over the course of this trial, the jury has heard Plaintiffs Raquel Camps, Eduardo Cappello, Alicia Krueger, and Marcela Santucho and witnesses detail the dangers and persecution they experienced in their efforts to hold the perpetrators of the Trelew Massacre accountable first in Argentina, and finally now as a last resort in the United States. A case like this is exactly the type contemplated by Congress in enacting the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, and by courts in developing the TVPA's equitable tolling jurisprudence. Defendant's motion displays a fundamental misunderstanding of the TVPA, its history, and its purpose.

Tolling under the TVPA is premised on extraordinary circumstances and reasonable diligence. Whether extraordinary circumstances existed is a fact-intensive inquiry. For example, courts have held that fear of reprisal, significant obstacles to bringing claims, and relying on domestic accountability processes all were extraordinary circumstances that toll the statute of limitations. Here, the record has established the challenges Plaintiffs and their family members faced in seeking accountability for military abuses in Argentina, including, a pervasive environment of repression and persecution, as well as Plaintiffs' inability to access information regarding the Massacre, locate Bravo, and their reliance on domestic accountability processes.

As shown below, Plaintiffs have established a legally sufficient evidentiary basis on which the jury can determine whether the statute of limitations has been tolled such that Plaintiffs' complaint was timely filed on October 20, 2020.

II. LEGAL STANDARD

In deciding a judgment for a matter of law under FRCP 50, courts "view the record in the light most favorable to the nonmoving party and draw all reasonable inferences in [their] favor." *Johnston v. Borders*, No. 18-14808, -- F.4th --, 2022 WL 2073561, at *11 (11th Cir. June 9, 2022). The court must "determine whether the facts and inferences point so overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict." *Webb-Edwards v. Orange Cnty. Sheriff's Off.*, 525 F.3d 1013, 1029 (11th Cir. 2008) (internal citations omitted).

Moreover, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe," *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 151, 120 S. Ct. 2097, 2110, 147 L. Ed. 2d 105 (2000) (citations omitted). If there is a legal basis upon which the jury could find for the non-moving party, judgment as a matter of law is inappropriate. *See id*. (citing *Bruno v. Monroe County*, 07-10117-CIV, 2009 WL 2762641, at *1 (S.D. Fla. Aug. 31, 2009), *aff'd*, 383 Fed. App'x 845 (11th Cir. 2010).

III. THIS ISSUE IS APPROPRIATE FOR JURY DECISION

As discussed in the sections that follow, Bravo cannot seriously contend that a material dispute of fact does not exist as to whether Plaintiffs faced "extraordinary circumstances" and exercised reasonable diligence. Due to those disputes, this case must advance to the jury.

Courts have repeatedly held that, where a material dispute of fact exists as to whether "extraordinary circumstances" were present to justify equitable tolling, equitable tolling is a question for the jury. *See Ramos v. Hoyle*, No. 08-21809-CIV, 2010 WL 11505866, at *5 (S.D. Fla. Feb. 23, 2010) (upholding jury's finding that extraordinary circumstances warranted tolling of the statute of limitations); *In re Mushroom Transp. Co*., 382 F.3d 325, 339 (3d Cir. 2004) ("In assessing the finding that [the plaintiff] failed as a matter of law to exercise reasonable diligence for purposes of . . . equitable tolling, we are guided by the general rule that such determinations are typically within the jury's province unless the facts are so clear that reasonable minds cannot differ . . . ."); *Ellicott v. Am. Cap. Energy, Inc*., 906 F.3d 164, 171 (1st Cir. 2018) (upholding jury's finding that equitable tolling was warranted); *Weissman v. Williams*, No. 1:15-CV-40(WLS), 2017 WL 11404587, at *18 (M.D. Ga. Sept. 29, 2017) ("Because the relevant material facts with regard to equitable tolling are in . . . whether this claim is tolled due to fraud is also

ultimately a question for the jury").[1]

Moreover, in cases like this one, where the "the predominant issues in a suit"—e.g., whether Defendant Bravo acted in self-defense in shooting the 19 prisoners—is a triable issue of fact, "federal law looks with disfavor upon fragmenting a portion of the case for trial to the court." *Ott v. Midland-Ross Corp.*, 600 F.2d 24, 31 (6th Cir. 1979) (citing *Dice v. Akron, Canton & Youngstown R. R. Co*., 342 U.S. 359 (1952)).

Defendant's cases on this point are inapposite. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005), does not address the question of whether equitable tolling should go to the court or the jury; it merely states the applicable standard of review for equitable tolling on appeal. *See, e.g.*, *St. Charles Foods, Inc. v. Am.'s Favorite Chicken Co*., 198 F.3d 815, 823 (11th Cir. 1999) (although an issue is ultimately a "legal conclusion" reviewed *de novo* on appeal, underlying issues of fact must still be determined by jury).

Arce v. Garcia, 434 F.3d 1254, 1263 fn.21 (11th Cir. 2006), decided equitable tolling issue simply because no dispute of fact existed, as explained by the *Arce* district court: ***"[i]f it is a jury issue, it needs to be presented to the jury***, but my inclination is there is no disputed fact here, and that looking at the facts that are not disputed, I believe as a matter of law, that The Court can rule that the statute has been equitably tolled at least until '92." Transcript of Record Volume 11 at 2051:2-8, *Arce v. Garcia*, No. 99-8364-CIV, 2002 WL 34453282 (S.D. Fla. July 10, 2002).

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[1] *See also See Morton's Market Inc. v. Gustafson's Dairy Inc.*, 198 F.3d 823, 832-33 (11th Cir. 1999) (holding summary judgment should have been denied because "there is a jury question regarding tolling the statute of limitations"); *Kleiman v. Wright*, No. 18-CV-80176, 2020 WL 5632654, at *24 (S.D. Fla. Sept. 21, 2020) ("[W]hether the statute of limitations is tolled based on a defendant's alleged fraudulent concealment is a question of fact for a jury to decide."); *In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284, 1322 (S.D. Fla. 2018) (denying motion for summary judgment because disputed evidence was "sufficient to create a jury question as to whether extraordinary circumstances beyond plaintiffs control existed sufficient to trigger equitable tolling").

The caselaw Defendant improperly cites in his verdict form is similarly unavailing. In *Pauling v. Sec. of Dep't of the Interior*, 71 F. Supp. 2d 231, the court decided tolling in advance of trial because there was "no danger of the Court reaching any issues that will be squarely before the jury if the case proceeds to trial." *Pauling*, 71 F. Supp. 2d at 233. Unlike in *Pauling*, there are several facts in this case that go both to liability and tolling—*e.g.*, the conspiracy to coverup the massacre, the intimidation of witnesses, and the massacre's gruesome nature.

In *Montin v. Estate of Johnson*, the court decided a "narrowly defined issue" regarding "equitable tolling ***due to alleged mental incapacity***." 636 F.3d 409, 414 (emphasis added). The court decided tolling because the mental incapacity inquiry "at issue is more akin to the type of issues courts resolve at competency hearings than the type of issues ultimately resolved by juries." *Id.* Unlike in *Montin*, there is no specialized inquiry in this case that requires tolling to be decided by the Court.

Finally, *Clarke v. Hanley*, No. 3:18-cv-1765, 2022 WL 124298 (D. Conn. Jan. 13, 2022), was decided on a motion to dismiss and says nothing about whether, had the case reached trial, the judge or the jury should decide tolling.

IV. TOLLING THE STATUTE OF LIMITATIONS IS APPROPRIATE

Defendant does not dispute that the statute of limitations begins to run only after the TVPA's enactment in 1992. Defendant Motion for a Directed Verdict ("Def.'s Mot.") at 1, ECF No. 139. The TVPA's legislative history makes clear that, in considering a defendant's statute of limitations defense, "***all*** equitable tolling principles" must be considered "in calculating this period ***with a view toward giving justice to plaintiff's rights***." *Arce v. Garcia*, 434 F.3d 1254, 1262-63 (11th Cir. 2006) ((emphasis added) citing S. Rep. No. 102-249 at 10–11 (1991)). "[W]hen a movant untimely files because of extraordinary circumstances that are both beyond their control and unavoidable even with diligence," the statute of limitations should be tolled until such time as

the circumstances have changed. *Arce v. Garcia*, 434 F.3d 1254, 1261–62, 1264 (11th Cir. 2006). Such extraordinary circumstances, beyond Plaintiffs' control, exist in this case, and they toll the statute of limitations for each of their claims since 1983 until at least the date on which Argentina's first extradition request for Bravo was denied on November 1, 2010.[2]

Defendant's argument that there are only a limited set of circumstances that toll the statute of limitations under the TVPA (Def.'s Mot. at 6-7) is plainly incorrect. The Eleventh Circuit has looked to the TVPA's legislative history to guide its analysis of tolling under the TVPA, considered its explicitly "[i]llustrative, *but not exhaustive*, [list] of the types of tolling principles which may be applicable" in TVPA cases, and recognized additional situations under which "justice may also require tolling." *Arce v. Garcia*, 434 F.3d 1254, 1262 (11th Cir. 2006) (citing S. Rep. No. 102-249 at 10–11 (1991)) (emphasis in the original). The TVPA contemplates a multiplicity of circumstances in which human rights violations take place and, as a result, the case law recognizes that multiple overlapping extraordinary circumstances can toll the statute of limitations. Defendant's attempt to narrow the factual inquiry in this case must fail.

A. A well-founded fear of reprisal reprisals and inability to investigate continued well past 2005.

Plaintiffs have presented evidence of fear of reprisals and inability to investigate their claims against Defendant, factors well recognized to support tolling the statute of limitations under the TVPA, even after criminal investigations were finally allowed to proceed in Argentina in 2005.

Plaintiffs presented clear evidence that they were afraid of violent reprisal based on their connection to victims of the Trelew Massacre and for their efforts in seeking accountability, and

[2] Defendant does not dispute that tolling applies until 1983 because a repressive regime existed in Argentina. *See* Def.'s Mot. at 9.

that their fear continued well beyond the end of the military regime and the advent of nominal democracy in 1983. That the threat or fear of reprisals does not necessarily subside just because the repressive regime is no longer in power has been recognized in many of the TVPA cases cited by Defendant in his motion. *See Warfaa v. Ali*, 1 F.4th 289, 295-96 (4th Cir. 2021) (upholding the district court's ruling on tolling because of "the risk of retaliation to Warfaa and his family, given the specific problems with bringing a claim involving human-rights abuses perpetrated by former officials of the dictatorship, even though Barre [the military dictator] was no longer in power"); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1146–48 (E.D. Cal. 2004) (tolling limitations period during and after El Salvadoran civil war due to fear of retaliation from military, government, and death squads if plaintiffs brought litigation in United States); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 897 (C.D. Cal. 1997) (tolling limitations period due to "threat of reprisal" in Burma if plaintiffs attempted to access courts in the United States). The reasoning applied in these cases is consistent the Eleventh Circuit cases cited by Defendant. *Jean v. Dorelien*, 431 F.3d 776, 780 (11th Cir. 2005) (noting that with the TVPA Congress "acknowledged that plaintiffs face unique impediments such as reprisals from death squads and immunity of high-ranking government officials in bringing human rights litigation"); *Arce v. Garcia*, 434 F.3d 1254, 1265 (11th Cir. 2006) (upholding tolling where "plaintiffs legitimately feared reprisals from the Salvadoran military").

In Argentina, the military threat remained present even after the formal end of the military dictatorship. Indeed, Plaintiffs have presented undisputed evidence that Argentina's democracy was fragile and still subject to strong influence by its military.[3] The Argentine military actively

[3] June 27, 2022, Trial Tr. ("Day 1 Trial Tr.") at 55:20-56:1 (testimony of Professor James Brennan); Day 2 Trial Tr. at 50:17 (testimony of Eduardo Cappello).

resisted accountability efforts, including stonewalling investigations and engaging in armed uprisings that threatened the democratic government.[4] This ultimately resulted in the government of Argentina creating legal bars to investigation and accountability for crimes committed by the military against the Argentine people.[5] This kept the general population, especially those who had directly experienced persecution, in fear.[6]

Plaintiffs have presented evidence that fear of violent reprisal persisted among those directly affected by the disappearances of the earlier years. Raquel Camps testified that her father and mother's history and manner of death were kept from her for her own safety during her childhood—when she once ventured to ask her grandfather what had occurred, she was told, "Don't ever ask me again about that."[7] Eduardo Cappello was advised not to reveal that he had family members that had disappeared for fear of what dangers he might face.[8] Witness Marileo testified that as a result of the military's threats in 1972 he stayed silent about what he saw in Trelew for thirty years—well after the end of the period of serial dictatorships in Argentina.[9] Plaintiffs presented unrebutted evidence that witnesses in trials of military officers reported intimidation during trials taking place as recently as 2012-2016 both in Argentina and abroad.[10] To believe the end of the repressive regime is all it would take to overcome this fear of reprisal is to ignore the terror visited upon Plaintiffs by the military state, and the continued power of the

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[4] Day 1 Trial Tr. at 77:4-6, 9-15, 17-21 (testimony of Professor James Brennan).

[5] Day 1 Trial Tr. at 78:1-11 (testimony of Professor James Brennan); Day 2 Trial Tr. at 51:25-52:2 (testimony of Eduardo Cappello).

[6] Day 2 Trial Tr. at 50:17; 51:25-52:10; 53:3-4, 7-8 (testimony of Eduardo Cappello); Day 1 Trial Tr. 77:4-6, 9-21 (testimony of Professor James Brennan).

[7] Day 4 Trial Tr. at 156:2-4.

[8] Day 2 Trial Tr. at 42:16-21; 47:3-6; 53:3-12; 61:13-16.

[9] June 15, 2021, Deposition of Miguel Marileo ("Marileo Dep.") at 48:1-4.

[10] Day 1 Trial Tr. at 79:13-16; 79:24-80:12; 83:5-11 (testimony of Professor James Brennan).

military even after it allowed democracy to return.

Plaintiffs have presented sufficient evidence that there was a cover-up of the events surrounding Trelew. Defendant's argument to the contrary is simply wrong. *See* Def.'s Mot. at 14-15. Defendant and the other officers involved in the shooting immediately advanced a story of an escape attempt, a story that the dictator Lanusse and his government quickly adopted and made the only story that could be legally disseminated.[11] In August 1972, the government made publishing anything other than the military's version of events unlawful.[12] The military's version of events was published in newspapers and conscripts in the Almirante Zar Naval Base were instructed to stick to that story.[13] Percipient witnesses to the events were threatened to keep quiet. As witness Marileo explained: "It was a threat. It was a threat that I needed to be silenced and silent forever. In fact, I was silent for 30 years."[14] Not only did the military seek to impose its own version of events on the Argentinean population, it sent officers responsible for the Massacre overseas,[15] while misrepresenting to at least one of the Plaintiffs in this case where they had sent the officers.[16]

Defendant's assertion that Plaintiffs knew "the manner of [their relatives'] death, circumstances surrounding the events" in the 1970s, is baseless. *See* Def.'s Mot. at 14. Defendant states that the bodies of the Trelew Massacre victims "were released to the families for proper funeral arrangements shortly after they died," Def.'s Mot. at 14, but fails to mention that several of

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[11] Day 1 Trial Tr. at 61:7-10 (testimony of Professor James Brennan).

[12] *Id.*

[13] February 14, 2022, Deposition of Carlos Humberto Celi, Volume II ("Celi Dep. Vol. II") at 7:7-14.

[14] Marileo Dep. at 48:1-4.

[15] *See* Day 2 Trial Tr. at 186:1-10; 187:19-22; 188:8-11; 189:3-6 (testimony of Roberto Bravo.

[16] March 28, 2022, Deposition of Alicia Krueger ("Krueger Dep") at 56:8-21.

those funerals were attacked by the military and the bodies seized,[17] or that seeking to obtain forensic evidence presented extraordinary risks.[18] Defendant in his motion misrepresents the nature of the Lanusse regime's investigation of the Trelew Massacre and that the investigation was public, Def's Mot. at 3—contradicting his own trial testimony that this was a "top secret" document that he could not access until it was disclosed to him as part of the extradition proceedings against him.[19] The Argentine military, including Defendant Bravo, engaged in a concerted effort to prevent the families or the public from gaining access to information.

Plaintiffs have presented extensive evidence showing their efforts to find out what happened in Trelew and the extraordinary challenges they faced in obtaining any information. Plaintiff Krueger and the Cappello and Santucho families brought suits against the Argentine Navy in the aftermath of the Massacre but were forced to abandon their claims because of violent persecution against them.[20] Plaintiffs Krueger and Santucho were forced into hiding and then into exile, leaving behind all their possessions and cut off from their connections, for fear of being murdered, tortured, or disappeared.[21] The families of the victims and survivors, as well as their lawyers, were killed, disappeared, or persecuted to keep them quiet.[22] Despite the manifest risks, Plaintiff Alicia Krueger sent letters to the Argentine government demanding a full investigation so

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[17] April 5, 2022, Deposition of Marcela Santucho ("Santucho Dep.") at 17:2-5; May 14, 2021, Deposition of Julio Cesar Ulla ("Ulla Dep.") at 60:1-4, 18-20; 63:11-19.

[18] Ulla Dep. at 46:5-47:10.

[19] June 29, 2022 Trial Tr. ("Day 3 Trial Tr.") at 70:5-12 (testimony of Roberto Bravo).

[20] Krueger Dep. at 25:15-17; 25:23-26:24; 37:16-19; Day 2 Trial Tr. at 43:16-46:7 (testimony of Eduardo Cappello); Santucho Dep. at 20:19-20; 31:19-21; 32:20-23.

[21] Krueger Dep. at 32:10-33:11; Santucho Dep. at 26:14-15.

[22] *See, e.g.*, Day 1 Trial Tr. at 63:9-21; 70:18-20; 71:14-16; 71:23 (testimony of Professor James Brennan); Day 2 Trial Tr. at 47:8-10; 48:9-13; 49:25-50:3 (testimony of Eduardo Cappello); Day 4 Trial Tr. at 154:9-17; 156:14-18 (testimony of Raquel Camps); Krueger Dep. at 30:9-10; 31:12-14; 31:23-32:5; Santucho Dep. at 20:18-20; 20:23-21:2, 21:9-15.

that the families of the victims of Trelew could learn the truth of what had happened at the Almirante Zar Naval Base.[23] She also coordinated with other family members of the Trelew Massacre victims to send a joint letter explicitly seeking the names and locations of those responsible for the Trelew Massacre.[24] The Cappello and Santucho families likewise sought information.[25]

However, little came from these efforts. Key facts did not come to light until prosecutors, with the weight of the Argentine state, began to investigate the Trelew Massacre in 2005. It was not until the criminal proceedings were underway that the full identities of the perpetrators were finally known, documents that shed light on internal investigations were made available, and witnesses who disproved the military's version of events came forward.[26] And as Dr. Pregliasco testified today, he got access to the cell-block area in order to conduct a physical reconstruction of the events in question because he received a court order that gave him access.[27]

Moreover, Plaintiffs' fear of retribution and persecution for participating in a criminal case against military was only diminished when the Argentine prosecutors began seriously investigating the Trelew Massacre and set up witness protection programs for the families of the Massacre's victims in 2005.[28] This witness protection program was only offered *in connection with* the criminal case in Argentina.[29] No evidence suggests that it was a generalized protection

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[23] Krueger Dep. at 50:3-14.

[24] Krueger Dep. 53:6-7; 53:12; 53:15-23; 54:25-55:1; 55:3-5.

[25] *See, e.g.*, Santucho Dep. at 28:25-29:4; Krueger Dep. at 53:15-18.

[26] Day 2 Trial Tr. at 59:5-20, 81:25-82:1, 83:1-4 (testimony of Eduardo Cappello); Krueger Dep. at 53:6-7; 53:12; 53:15-23; 54:25-55:1, 55:3-5; 56:8-21; Santucho Dep. at 30:2-5; 35:10-12; *see generally* PX0068.

[27] Day 4 Trial Tr. at 48:2-4 (testimony of Dr. Rodolfo Guillermo Pregliasco).

[28] *See* Day 2 Trial Tr. at 89:17-23 (testimony of Eduardo Cappello); Day 4 Trial Tr. at 166:7-11 (testimony of Raquel Camps).

[29] Day 4 Trial Tr. at 166:7-11 (testimony of Raquel Camps).

that might provide safety for individuals prosecuting civil cases against military officers abroad. On the other hand, Plaintiffs offered unrebutted evidence that witnesses were threatened even in cases against Argentine military officers outside of Argentina.[30] In the face of such facts, Defendant's argument that the nominal removal of the military regime from power marked an end to the extraordinary circumstances that Plaintiffs faced is unpersuasive.

B. Plaintiffs were unable to locate Defendant until 2008, despite reasonable diligence.

Plaintiffs' inability to locate Bravo until 2008 also tolls the statute of limitations. For years, Plaintiffs were diligently demanding that the government identify the perpetrators.[31] It was not until prosecutors located Defendant during the criminal case in Argentina that Plaintiffs learned he was in the United States.[32]

Plaintiffs' inability to locate Bravo as one of the perpetrators of the Trelew Massacre is sufficient to toll the statute of limitations. The court's decisions in the *Jara* case are instructive. There the court recognized that tolling because of "affirmative concealment" and "an inability to discover the identity of the offender" are two distinctive tolling factors. *Jara v. Barrientos Nunez*, Case No. 6:13-cv-1426-Orl-37JK, 2015 WL 12852354, at *5 (M.D. Fla. Apr. 14, 2015). The court found that Plaintiffs' diligent efforts to identify those responsible for Victor's torture and death would be sufficient to toll the statute, even though there was no "affirmative misconduct rising to the level of active, deliberate concealment." *See Jara*, 2015 WL 12852354, at *5. Likewise, although the defendant in *Jara* had been living openly in the United States for many years, the plaintiffs did not learn of his whereabouts until 2012 when a Chilean television station revealed

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[30] Day 1 Trial Tr. at 80:9-12 (testimony of Professor James Brennan).

[31] Krueger Dep. at 50:3-14.

[32] Day 2 Trial Tr. at 40:13-17, 71:11-12 (testimony of Eduardo Cappello); Day.4 Trial Tr. at 174:9-11 (testimony of Raquel Camps); Krueger Tr. at 56:8-21; Santucho Dep. 34:13-15.

that he had been living in Florida. *Jara*, 2015 WL 12852354, at *2. This too tolled the statute of limitations. *Jara*, 2015 WL 12852354, at *5; *see also Yousuf v. Samantar*, No. 1:04-cv-1360, 2012 WL 3730617, at *4–6 (E.D. Va. Aug. 28, 2012) (tolling the limitations period because, *inter alia*, "plaintiffs' lack of knowledge about his whereabouts in the years following his departure from Somalia—prevented the commencement of" plaintiffs' TVPA claims). This makes sense—it is impossible to sue someone if you don't know where they are. Defendant's protestation that he lived openly in the United States is both misleading and unconvincing. He lived openly in another country, far from Argentina, and no one, not even the Argentine prosecutors investigating the Trelew Massacre, knew what country he was in until 2008.[33] Even Defendant Bravo has acknowledged that part of the reason that he was sent to the United States was to make him harder to find.[34]

Reasonable diligence did not require that the Plaintiffs conduct a worldwide search to find Defendant Bravo after they learned of his whereabouts in 2008. *See Holland v. Florida*, 560 U.S. 631, 653 (2010) ("The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." (internal citations omitted)).

C. Since 2005 and until now, Plaintiffs have reasonably relied on in-country accountability processes.

Tolling is likewise appropriate during a period where Plaintiffs were involved in and reasonably relying on the progression of accountability efforts in the country where the atrocity occurred. *Jane W. v. Thomas*, 560 F. Supp. 3d 855, 874 (E.D. Pa. Sept. 15, 2021) (tolling limitations period while a truth and reconciliation commission investigated the acts underlying

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[33] Day 2 Trial Tr. at 40:13-17 (testimony of Eduardo Cappello); Santucho Dep. at 34:13-15; Krueger Dep. at 56:8-21; Day 4 Trial Tr. at 74:9-11 (testimony of Raquel Camps).

[34] Day 2 Trial Tr. at 189:3-6 (testimony of Roberto Bravo).

plaintiffs' complaint because it "lull[ed] plaintiffs into believing they would have had no need to conduct an independent investigation into defendant's conduct."); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 291 (S.D.N.Y. 2009) (tolling limitation period during truth and reconciliation proceedings because (1) it is unreasonable to expect plaintiffs "to participate in that lengthy and difficult process and simultaneously" bring a TVPA lawsuit and (2) plaintiffs could have reasonably assumed that defendants would participate in the accountability processes in their home country process, "in which case plaintiffs would have had no need to conduct an independent investigation or commence [TVPA] lawsuits").

In *Thomas*, the Truth and Reconciliation Commission ("TRC") was a process established to investigate human rights violations during Liberia's civil wars and provide recommendations for further investigation and criminal prosecution, as well as recommendations for reparation and rehabilitation.[35] Plaintiffs, like many survivors of the Lutheran Church Massacre, took no direct part in the TRC process.[36] Rather, they relied on the TRC's existence and the promise of implementation of its recommendations as delivering the accountability they sought.[37] And indeed, the TRC did recommend the creation of a war crimes tribunal and identified 123 individuals for investigation and prosecution by this war crimes court.[38] But the Liberian Supreme Court gutted the TRC's recommendations. *Thomas*, 560 F. Supp. 3d at 874. The effect of that,

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[35] Report of Country Conditions Expert at 23-24, *Jane W v. Thomas*, No. 2:18-cv-00569-PBT, (E.D. Pa. Mar. 19, 2021), ECF 61-13

[36] Decl. of Jane W ¶ 28, *Jane W v. Thomas*, No. 2:18-cv-00569-PBT (E.D. Pa. Mar. 19, 2021), ECF No. 60-5; Decl. of John X ¶ 44, *Jane W v. Thomas*, No. 2:18-cv-00569-PBT (E.D. Pa. Mar. 19, 2021), ECF No. 60-6; Decl. of John Y ¶ 34, *Jane W v. Thomas*, No. 2:18-cv-00569-PBT (E.D. Pa. Mar. 19, 2021), ECF No. 60-7; Decl. of John Z ¶ 28, *Jane W v. Thomas*, No. 2:18-cv-00569-PBT (E.D. Pa. Mar. 19, 2021), ECF No. 60-8.

[37] Decl. of John Z ¶ 29, *Jane W v. Thomas*, No. 2:18-cv-00569-PBT (E.D. Pa. Mar. 19, 2021), ECF No. 60-8.

[38] Report of Country Conditions Expert at 26, *Jane W v. Thomas*, No. 2:18-cv-00569-PBT, (E.D. Pa. Mar. 19, 2021), ECF 61-13

inter alia, was to eliminate the possibility for criminal accountability, *i.e.*, "meaningful justice to war crimes victims." It was after this possibility for criminal accountability was "eviscerated" in 2011 that it became no longer reasonable to toll the statute of limitations. *Thomas*, 560 F. Supp. 3d at 874; *see also In re S. Afr. Apartheid*, 617 F. Supp. 2d at 291 (stating that a "diligent and reasonable plaintiff would have had time to participate in [the TRC's] lengthy and difficult process and simultaneously to prepare a lawsuit").

Defendant's attempt to distinguish *Thomas* and *In re South African Apartheid* on the basis that these cases related to TRC proceedings and not criminal prosecutions misrepresents the characteristics of a TRC process and misunderstands the degree of effort, resources and involvement that Plaintiffs had in the criminal proceedings in Argentina. The point of *Thomas* and *In re Apartheid* was not that the TRCs at issue provided analogous remedies to the TVPA, but that the TRC was a proceeding that might provide some remedy to the plaintiffs at all. Neither case states that the TRCs at issue provided reparations and, indeed, most TRCs do not provided reparations. Hum. Rts. Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence*, Pablo de Greiff ¶ 44, UN Doc. A/HRC/24/42 (Aug. 28, 2013) ("The overwhelming majority of truth commissions have not been called to implement reparations").

In any event, TRCs have traditionally "been presented as an alternative to ***judicial prosecution for atrocities***."[39] Moreover, criminal prosecutions in Argentina for the crimes of the military—like the one that took place for the Trelew Massacre (PX18)—have been recognized for providing similar remedies and for being an essential tool for transitional justice. Margarita K.

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[39] *The Mandate of the Truth and Reconciliation Commission,* SIERRA LEONE: TRUTH AND RECONCILIATION COMMISSION, *available at* https://www.sierraleonetrc.org/index.php/view-report-text-vol-1/item/vol-one-chapter-one?category_id=19.

O'Donnell, *New Dirty War Judgments in Argentina: National Courts and Domestic Prosecutions of International Human Rights Violations*, 84 N.Y.U. L. REV. 333, 340–44 (2009). Both of those understandings are consistent with the testimony provided by Plaintiffs legal expert Maximo Langer, who testified that the Trelew criminal proceedings in Argentina "the equivalent of the truth commission" for the Trelew victims because Argentina's TRC in the 1980s (CONADEP) had not investigated the massacre.[40] Here, like the plaintiffs in *Thomas*, Plaintiffs relied on the accountability processes available to them in their home country to seek "meaningful justice" for the Trelew Massacre. But unlike the plaintiffs in *Thomas*, each of the Plaintiffs participated in "lengthy and difficult" Argentine criminal proceedings since they were initiated and relied on those proceedings to obtain justice. *Cf. In re South African Apartheid*, 617 F. Supp. 2d at 291. All four Plaintiffs heavily participated in the proceedings. Alicia Krueger and Marcela Santucho testified and presented evidence throughout the proceedings.[41] Raquel Camps and Eduardo Cappello traveled to Trelew, "thousands of miles" from their homes, to attend the hearings.[42] The time and level of involvement required of families of the Trelew victims as civil parties in the criminal trial was significant.[43] As a result of Plaintiffs' and others' efforts, Bravo's co-perpetrators were convicted in 2012. Plaintiffs then continued to advocate for Bravo's extradition.[44] In 2014, by Defendant's own admission, Argentina renewed its extradition request, which remains pending.[45]

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[40] Day 4 Trial Trans. at 140:6-8.

[41] *See* Krueger Dep. at 48:17-23; Santucho Dep. at 28:8-9.

[42] Day 4 Trial Tr. at 172:13; 172:18-173:2; 173:5-8 (testimony of Raquel Camps); *see also* Day 2 Trial Tr. at 54:24; 55:4 (testimony of Eduardo Camps).

[43] *See, e.g.*, Day 4 Trial Tr. at 172:22-173:4 (testimony of Raquel Camps).

[44] Day 2 Trial Tr. 60:8-11 (testimony of Eduardo Cappello); *see also id.* at 80:20-22; 81:12-14.

[45] Day 2 Trial Tr. at 197:1-8 (testimony of Roberto Bravo).

The facts cited above support, at a minimum, a finding that the statute of limitations should until November 1, 2010,[46] when the first request for Bravo's extradition was denied, in light of "the tremendous time and energy required for plaintiffs" to participate in the Argentine criminal proceedings and because they reasonably believed this would be the most effective way to secure accountability for the Trelew Massacre. *See In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 291; *Thomas*, 560 F. Supp. 3d at 874.

D. Plaintiffs Exercised Reasonable Diligence both before and after finding out where Bravo was

Tolling requires reasonable diligence—not maximum feasible diligence. *See Holland v. Florida*, 560 U.S. 631, 653 (2010). Defendant's assertion that "the evidence suggests that Plaintiffs gave scant, if any, thought to seeking a legal remedy," Def's Mot. at 11, ignores the evidence presented at trial. Plaintiffs, to the best of their ability and in light of the extraordinary circumstances described above, attempted to pursue justice with reasonable diligence. Despite this persecution, Plaintiff Krueger, even after being forced into exile, wrote numerous letters to the Argentine government seeking information and advocating for accountability without success until 2005, when a credible criminal investigation and later prosecution of the perpetrators of the Trelew Massacre finally began.[47] Each of the Plaintiffs are complainants in the criminal case and have been participating actively in the proceedings.[48]

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[46] A reasonable juror could find that the renewed extradition request continued to toll the statute of limitations.

[47] Krueger Dep. 50:3-14; 53:6-7; 53:12; 53:15-23; 54:25-55:1; 55:3-5.

[48] *See* Krueger Dep. at 48:19-20; 56:12-16; Day 4 Trial Tr. at 161:15-163:24; 164:15-165:5 (testimony of Raquel Camps); Day 4 Trial Tr. at 169:16-19 (testimony of Raquel Camps); Santucho Dep. at 28:9; Day 2 Trial Tr. at 80:10-11, 20-22; 81:12-14 (testimony of Eduardo Cappello). Under the Argentinean federal criminal procedure, crime victims or their family members may become complainants. A complainant who is admitted to the criminal proceedings is "allowed to propose evidence gathering measures, file charges against the defendant, appeal adverse rulings, and participate in the trial." Agustín Cavana, *The Amia Special Investigation Unit: An Overview of Its History and A Proposal for the Future*, 26 Sw. J. Int'l L. 39, 46 (2020).

Plaintiffs did not have an obligation to put themselves in danger or conduct a worldwide search for Defendant Bravo. With no information about what country he was in, and little information about him save for his last name and the fact that he was an officer,[49] it is unreasonable to expect that Plaintiffs should have been able to find him even before the Argentine government did, with all the resources at its disposal.

Finally, Plaintiffs have presented evidence showing they exercised diligence in pursuing accountability after learning that Bravo lived in the United States. Even before Bravo was finally located, Plaintiffs were already actively participating in the criminal investigation, as described above. Upon learning of his whereabouts, they immediately filed a request for his extradition, which the Argentine government then sought. They fully expected the extradition to be successful until its November 1, 2010 denial. Plaintiffs pursued and relied on domestic remedies until their ineffectiveness became clear.

CONCLUSION

For the foregoing reasons, Defendant's motion for directed verdict must be denied, and the issue of tolling should be decided by the jury.

Dated: July 1, 2022 By: */s/ A. Margot Moss*

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[49] Day 4 Trial Tr. at 174:16-18 (testimony of Raquel Camps); Day 2 Trial Tr. at 58:25-59:2; 59:5-6, 12 (testimony of Eduardo Cappello).

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing instrument was electronically served on the attorneys of record for all parties to the above cause in accordance with the Federal Rules of Civil Procedure on July 1, 2022.

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