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.	**Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss** Case No. 6:13-cv-01426-RBD-GJK

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

Defendant moves to dismiss Plaintiffs' Alien Tort Statute ("ATS") and Torture Victims Protection Act ("TVPA") claims based on statute of limitations grounds under both statutes and an alleged lack of subject matter jurisdiction for the ATS claims. Doc. 82. Plaintiffs have provided more than sufficient bases for tolling the statute of limitations for all claims, an issue on which this court has already decided. Doc. 71. Further, Plaintiffs acknowledge this court's prior ruling on the issue (Doc. 71), but reserving their rights for appeal, Plaintiffs continue to maintain that this Court has jurisdiction over Plaintiffs' ATS claims because they "touch and concern" the United States and, therefore, overcome the *Kiobel* presumption against extraterritoriality. Accordingly, Defendant's motion should be denied entirely.

FACTS AND PROCEDURAL HISTORY

On September 4, 2013, Plaintiffs filed this action against Pedro Pablo Barrientos Nuñez (hereinafter "Defendant" or "Barrientos"), a former Lieutenant in the Chilean Army under General Augusto Pinochet, for the 1973 torture and extrajudicial killing of their husband and father, popular Chilean folk singer and democratic activist Víctor Jara. Doc. 1. The operative Second Amended Complaint ("SAC") alleges that Barrientos, now a US citizen, not only led, along with other Chilean army officers, the arbitrary detention and brutal torture of Víctor Jara, but also personally participated in the execution of Víctor Jara on or about September 15, 1973 and then ordered his subordinates to desecrate his body by shooting it repeatedly after the fatal shot. Doc. 63.

The SAC recounts decades of efforts by Plaintiffs Joan Jara and her daughters to find justice, despite the extraordinary obstacles they encountered, including the lack of meaningful investigation during the pendency of the Pinochet regime, the Amnesty Law protecting persons

who committed offenses during that time which has not been repealed, and the continued silence of military witnesses to the events. Doc. 63 at ¶¶ 44, 46. Although Plaintiffs knew that Víctor Jara was captured immediately after the *coup* and detained and executed by the Chilean military, and although Plaintiffs were able to identify and bury his body in 1973, Plaintiffs have spent the last 40 years trying to identify the individuals responsible for Víctor Jara's death. Nonetheless, until recently, their assiduous efforts were met with only limited success. *Id*. at ¶¶ 39-51. Their repeated requests for investigation by Chilean authorities resulted in no identification of the direct perpetrators of Víctor Jara's torture and death until 2009. *Id*; Doc. No. 77 at 10-11. From 1973 to 1990, the judiciary deliberately refused to investigate cases related to deaths at the hands of Chilean authorities. Doc. 63 at ¶¶ 42-43.

Despite the end of the Pinochet regime in 1990, the military maintained significant control and influence and continued to suppress evidence of Víctor Jara's detention, torture, and death, and refused to identify those responsible, in spite of Plaintiffs' judicial and non-judicial efforts. *Id*. at ¶¶ 42-50. In this environment, those with knowledge about the events were unwilling to come forward. This situation persisted until 2009, when José Adolfo Paredes Márquez, a conscript in the Chilean military, first identified Barrientos as a participant responsible for these crimes. *Id.* at ¶ 47; *see also* Doc. 50 at 15-19. It was only at this point that Plaintiffs began to learn of the full circumstances surrounding Víctor Jara's death; specifically,

the torture and use of Russian roulette in the assassination and the subsequent shootings of his corpse. *Id*. at ¶¶ 38, 47.[1]

In 2012, Defendant Barrientos was discovered to be living in Deltona Florida, as a U.S. citizen, and he is not amenable to suit in any other forum. *Id.* at ¶ 8. Defendant has resided in the U.S. since 1989. *Id*; Doc. 77 at 1-2; *see also* Doc. 82 at 2. Indeed, he has declared bankruptcy in Florida and owned a home in Florida. McMillan Decl., ¶ 5; Doc. 77 at 7; Doc. 63 at ¶ 8. Plaintiffs are also prepared to present evidence that the Defendant has operated several businesses in Florida. Doc. 63 at ¶ 8; Doc. 77 at 2, 7.

Barrientos has admitted that he is aware he is the subject of criminal charges in Chile and will remain in the United States, obviously 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. In a televised interview, Barrientos stated he received a rogatory letter informing him that he was accused of the murder of Víctor Jara before Chilean Criminal courts. Exhibit 1, Chilevision Transcript of the Report on the Death of Víctor Jara (May 16, 2012), at 10. When asked by a reporter if he would return to Chile to face criminal charges, Barrientos replied that although he

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[1] While not part of his legal argument, Barrientos provides commentary regarding the reliability of statements made by Mr. Marquez and suggests that he is Plaintiffs' only liability witness. Doc. 82 at 2. While Defendant is welcome to challenge the credibility of this or any other witness, his inference that witnesses named in the SAC are the only witnesses known to Plaintiffs simply has no basis in law or fact. Plaintiffs have carried their burden to plead sufficient facts to state a plausible basis for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Mr. Paredes's identification of Defendant in 2009 as the perpetrator responsible provides a more than sufficient basis for tolling the statute of limitations.

had returned to his home country multiple times since becoming a United States citizen, now he was "simply not going to go" back to Chile. *Id*.

ARGUMENT AND MEMORANDUM OF LAW

I. Standard Of Review

In considering a motion under Rule 12(b)(6), "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). 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." *Tello v. Dean Witter Reynolds, Inc.*, 410 F.3d 1275, 1288 n.13 (11th Cir. 2005) (internal quotations omitted) (emphasis added), *cited with approval in Lindley v. City of Birmingham, Ala*., 515 F. App'x 813, 815 (11th Cir. 2013); *see also Sec'y of Labor v. Labbe*, 319 F. App'x 761, 764 (11th Cir. 2008) (same). 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).

Similarly, in considering a motion under Rule 12(b)(1), where the defendant attacks the court's jurisdiction based solely on allegations in the complaint, the court must take the allegations as true and construe them in plaintiff's favor. *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty*., 501 F.3d 1244, 1251 (11th Cir. 2007).

II. Extraordinary Circumstances and Plaintiffs' Diligence Warrant Equitable Tolling of the Statute of Limitations to At Least 2009.

Defendant's Rule 12(b)(6) Motion to Dismiss Plaintiffs' TVPA and ATS claims based on statute of limitations should be denied. It is clear from the facts pled in the SAC that Plaintiffs' efforts to uncover the circumstances surrounding Víctor Jara's death were frustrated by government and military suppression of evidence, and refusal of soldiers to identify individuals involved in the attack against Víctor Jara. It was only in 2009, when the perpetrator was identified, and 2012 when his whereabouts were located, that the statute of limitations began to run. Doc. 63 at ¶¶ 40-47; Doc. 50 at 15-19. Defendants arguments to the contrary are unavailing. Therefore, the statute of limitations must be tolled at least until 2009.

A. The Statute Of Limitations Must Be Tolled Until At Least 2009 Because Despite Plaintiffs' Diligence, Discovery Of The Identity Of The Perpetrators And Circumstances Leading To Víctor Jara's Death Was Impossible Until That Time.

Claims under the ATS and TVPA are subject to a ten-year statute of limitations, with permissible equitable tolling. 28 U.S.C. § 1350, note sec. 2(c); *Arce v. Garcia*, 434 F.3d 1254, 1261-62 (11th Cir. 2006) (applying TVPA's ten-year limitations and tolling provisions to the ATS). 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, 652 (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 ATS and 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 v. Fernández-Larios*, 402 F.3d 1148, 1155 (11th Cir. 2005) (tolling appropriate "when the plaintiff has no reasonable way of discovering the wrong perpetrated against her"); *Arce,* 434 F.3d at 1261-62 (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.").

All of the aforementioned circumstances, at different moments in time, are discussed chronologically in the SAC. Doc. 63 at ¶¶ 39-51. The only people with knowledge of those responsible for the crimes, namely members and former members of the Chilean military, maintained a conspiracy of silence that did not break until 2009. *Id.* at ¶ 42-47. Such impediments prevented Plaintiffs from discovering the identity and information on the circumstances leading up to Víctor Jara's death until that time.

The Eleventh Circuit case, *Cabello v. Fernandez Larios,* is particularly instructive. 402 F.3d 1148 (11th Cir. 2005). Family members of Winston Cabello, a Chilean intellectual who had been killed by Chilean military officers following the same *coup* at issue in this case, had not been able to identify the officers and the specific details of his torture and killing necessary to pursue a remedy until long after his death. *Id.* at 1155. The plaintiffs were aware that he had been arrested immediately after the September 11, 1973 *coup* and taken to the *Copiapó* military garrison. *Id*. at 1152. They were notified in October 1973 that the military executed Cabello and which military unit was responsible (*Id*. at 1155), but did not learn of the defendant's involvement in the murder until he made a public admission in 1987. *Id*. at 1153. Despite years of misinformation provided to the Cabello plaintiffs by the government and military, it was not until 1990 that the military finally revealed the location of Cabello's grave and the family was able to exhume his body and gather evidence of the full circumstances of his torture prior to death. *Id*. at 1152. Thus, even though they were aware of his death in 1973 and the responsible military unit and individual in 1987, the Eleventh Circuit nevertheless held that tolling was appropriate until 1990 because that is when evidence on the full circumstances was revealed (*Id*. at 1155-56). The fact that the discovery was made on this date was critical to the court's determination of the tolling period, not that this was the time of the end of the regime, as Defendant wrongly asserts. Doc. 62 at 9.

As in *Cabello*, Plaintiffs' efforts to uncover information were prevented by the dictatorship's amnesty for those involved in the *coup*, suppression of evidence, and ineffective investigation. Doc. 63 at ¶¶ 40-43. Furthermore, Plaintiffs have been diligent in their efforts to identify those responsible for killing Víctor Jara, during which time they exhausted every domestic legal process available as well as engaged in extrajudicial advocacy for accountability

through the Víctor Jara Foundation and Justice for Víctor campaign in an effort to discover the identity of the perpetrators and the circumstances leading up to his death. Doc. 63 at ¶¶ 39-51. Plaintiffs' initiatives were also rendered futile by the continuing code of silence among by current and former members of the Chilean military. Doc. 63 at ¶ 46.

In sum, Plaintiffs have pled facts establishing that, in spite of Plaintiffs' extraordinary diligence, government and military suppression of evidence made it impossible to discover the identity of the perpetrator and the circumstances surrounding Víctor Jara's death until 2009. Because there is no appearance "beyond a doubt" that Plaintiffs can prove no facts that toll the statute, Plaintiffs claims are timely and should not be dismissed under Rule 12(b)(6).

B. Defendant's Arguments Are Unavailing Because Extraordinary Circumstances Prevented Plaintiffs From Discovering Defendant's Involvement In Víctor Jara's Torture And Death Prior To 2009.

Unable to overcome *Cabello*, Defendant offers three implausible arguments: (1) that tolling the statute of limitations requires active government misconduct or concealment of evidence, such as falsifying the names of military personnel; (2) that the statute should not be tolled because the government adequately investigated the events in 1973 and Plaintiffs mere dissatisfaction with the results is insufficient for tolling (Doc. 82 at 8); and (3) that the statute of limitations may not be tolled past 1990 when the government transitioned (Doc. 82 at 10), or alternatively, the statute may not be tolled past 1998 when the Amnesty Law began to be applied less stringently (Doc. 82 at 10).

These claims lack merit, not least because Defendant's first and third arguments fly in the face of established precedent and would require a completely unmerited extension of the law. They fail, moreover, because (1) there are many bases for tolling the statute of limitations, not limited to active government concealment; (2) the dictatorship did not conduct a legitimate investigation into the atrocities it had itself committed during the *coup*, including its refusal to

provide information on the culpable individuals and unit involved in the atrocities committed against Víctor Jara (Doc. 63 ¶¶ 40-43); (3) from 1978 until 1998, the Amnesty Law prohibited investigation into those that committed crimes under the Pinochet regime, including with respect to Víctor Jara (*Id*. at ¶¶ 46-50), and although the Amnesty Law began to be applied less strictly after 1998, individuals were nonetheless inhibited from coming forward with evidence concerning the death of Víctor Jara until 2009 (*Id.* at ¶¶ 41-44). In short, Defendant's claims are unavailing because they in no way undermine, as they cannot, the fact that it was impossible for Plaintiffs to discover Defendant's involvement in Víctor Jara's torture and death prior to 2009.

1. Extraordinary Circumstances For The Purposes of Equitable Tolling Are Not Limited To Government Misconduct Or Concealment.

As an initial matter, Defendant erroneously argues that extraordinary circumstances are limited to claims of government misconduct or concealment of evidence, such as falsifying the names of military personnel. Doc. 82 at 9. Defendant's reading goes against the law of this Circuit and Congress's explicit guidance regarding equitable tolling of the TVPA, which calls for the application of all tolling principles to preserve a plaintiff's claims:

> The legislation provides for a 10–year statute of limitations, but explicitly calls for consideration of *all* equitable tolling principles in calculating this [statute of limitations] period with a view towards giving justice to plaintiffs rights. Illustrative, *but not exhaustive*, of the types of tolling principles which may be applicable include the following….*where the defendant has concealed his or her whereabouts or the plaintiff has been unable to discover the identity of the offender*.

S. Rep. No. 102–249, at 10–11. (emphasis added). The legislative history of the TVPA explicitly states that courts, in calculating the limitations period, do so "with a view toward giving justice to plaintiff's rights." *Id.*

Moreover, Defendant's citation to *Arce* misstates the established rule. Doc. 82 at 7. Plaintiffs agree that mere ambient conflict is not sufficient to toll a statute, however, as *Arce*

illustrates, there are many principles of equitable tolling that may apply, including the existence of a repressive, authoritarian regime. *Arce*, 434 F.3d at 1265 ("The remedial scheme conceived by the TVPA and the [ATS] would fail if courts allowed the clock to run on potentially meritorious claims while the regime responsible for the heinous acts for which these statutes provide redress remains in power, frightening those who may wish to come forward from ever telling their stories."). Thus, taking a limited view of tolling principles, as Defendant suggests, would undermine both the law of this Circuit and the Congressional intent to provide a forum for victims who are unable to seek justice in the country where their harms occurred.

2. The Repressive Military Regime Did Not Conduct A Legitimate Investigation Into The Atrocity It Had Itself Committed, And Did Not Identify Individual Perpetrators Or Military Units Responsible For The Civilian Attacks That Killed Víctor Jara.

Courts toll the statute of limitations for the ATS and TVPA where a plaintiff cannot file suit for human rights abuses without risking violent retaliation to themselves or their families by the repressive regime in their home country. *See Arce*, 434 F.3d at 1265; *Jean*, 431 F.3d at 780. During the period following the *coup* in Chile in 1973, the Chilean military initiated a systematic crackdown on all opposition and dissent, resulting in the torture, death, and detention of thousands of civilians. Doc. 63 at ¶¶ 18–21, 42. In this environment, Plaintiffs bravely filed an application to open a criminal investigation into the death of Víctor Jara by the Chilean Criminal Court in 1978, at great risk of their own safety. Doc. 63 at ¶ 39; 45.

Defendant argues that because Plaintiffs were informed of Víctor Jara's death shortly after it occurred and since the regime concluded that "a criminal offense" had occurred, the regime did not conceal evidence and so the statute of limitations should not be tolled. Doc. 82 at 7-8. However, the investigation was thwarted by government suppression of crimes committed during the *coup* and was closed without any identification of perpetrators responsible for the

death. Doc. 63 at ¶¶ 39-40. Thereafter, as Defendant acknowledges (Doc. 82 at 10), the junta essentially extended amnesty to all persons who committed criminal offences during the *coup* so that they could not be prosecuted for the atrocities they committed, further suppressing any meaningful investigation into the circumstances of the death. Doc. 63 at ¶ 41. By prohibiting the prosecution of the perpetrators, the Amnesty Law prevented investigations of crimes committed. *Id.* In subsequent years, as the military maintained its control, this effectively stymied any further attempt to investigate. *Id*. at ¶ 43.

Notwithstanding Defendant's arguments to the contrary, it is simply not germane that Plaintiffs knew of Víctor Jara's death shortly after it occurred. Doc. 82 at p. 8. It is patent that awareness of a death does not bring with it knowledge of the wrong or the perpetrator. Although Plaintiffs were able to identify and bury Víctor Jara's body in 1973, they did not know until 2009 *who* was responsible for his death nor the surrounding circumstances. Doc. 63 at ¶ 47. It was, therefore, impossible for them to commence an action against Defendant without knowing his identity. Further contrary to Defendant's claims (Doc. 82 at 11), no public records exist identifying the individual military officers stationed at Chile Stadium and at the underground prisons where Víctor Jara was killed. Such information, if it exists, has not been disclosed to Plaintiffs despite two investigations led by prosecutors and investigating judges in Chile, which did not determine the individual military officers stationed at the Stadium until 2009. Doc. 63 ¶¶ 40, 46-47, 50. As in the Eleventh Circuit's finding in *Cabello*, these facts amply support equitable tolling the limitations period until 2009. Plaintiffs knew even ***less*** than the *Cabello* plaintiffs, who at least learned of the military unit (in 1973) and the perpetrator (in 1987) involved in Cabello's murder. The Eleventh Circuit nevertheless tolled the statute of limitations in *Cabello* beyond these dates because the full circumstances of his death did not come to light

until 1990. *Cabello*, 402 F.3d at 1154-55. For the same reasons, the full circumstances of the death of Víctor Jara only came to light in 2009.

Defendant finds no help in *McGinley*, which held that a statute of limitations should not be tolled simply because the plaintiffs were unsatisfied with the result of an investigation. No. 8:11-CV-322-T-EAK, 2013 WL 6768352 * 1 (M.D. Fla. Dec. 19, 2013). There, the plaintiffs learned within approximately one year of their son's death that he was struck by a UPS truck, were provided with the identity of the driver, and received a detailed 300-page investigatory report of the circumstances surrounding their son's death, including the names of eye witnesses. *Id.* at *3. The court found that the circumstances were not so extraordinary as to justify tolling the statute of limitations because the plaintiffs possessed all the relevant information and were actively involved in the investigation. *Id.* at *7.

The facts in *McGinley* are dramatically different than those here where the government, military, and former military actors prevented the disclosure of information regarding the circumstances surrounding Víctor Jara's death. Whereas in *McGinley* the plaintiffs were provided with a detailed report that contained the names of eye witnesses and the perpetrator himself, here, such relevant information was not provided to the family despite their numerous efforts to obtain such information. It is clear from the SAC that the statute of limitations should be equitably tolled until at least 2009 when the identity of the perpetrator and circumstances surrounding the torture and killing of Víctor Jara was made known.

3. Equitable Tolling Is Appropriate, Even After The Abusive Regime Was Removed From Power.

Tolling is proper even after the abusive regime transitions out of power. *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112, 1147-48 (E.D. Cal. 2004) (tolling the statute of limitations under the TVPA until 2003, nine years after the El Salvadorian military regime was removed from

power). Defendant's argument that, at most, the statute of limitations should be tolled up to 1990 when the military dictatorship in Chile ended, or 1998 when the Amnesty Law began to be applied less strictly, is flatly incorrect. Doc. 82 at p. 10. The impediments to uncovering the circumstances surrounding Víctor Jara's death and the identity of the perpetrators persisted long after the transition in government and after the Amnesty Law was applied less stringently. Even after that point, members and former members of the Chilean Military refused to identify the individuals responsible, in spite of Plaintiffs' judicial and non-judicial efforts. Doc. 63 at ¶¶ 46, 50. The implied assertion that after the end of the regime the facts surrounding the crimes of the past suddenly came to light and that the perpetrators and witnesses readily came forward to implicate themselves and others is ludicrous and flies in the face of history and common sense.

Defendant cites to *Cabello* and *Arce* for the suggestion that equitable tolling should not apply after 1990 when the transition to democracy commenced. Doc No. 82 at 7-10. But in *Arce*, the decision to toll the statute of limitations until the change of government was because the obstruction to justice had been lifted by the change of government. 434 F.3d at 1263-64. That was not the case here. Equally, in *Cabello*, the statute of limitations was tolled until the Cabello's body was located and exhumed, before which the plaintiffs "could not possibly have pursued their claims" because prior to that date, the plaintiffs had insufficient information about the manner of Cabello's death and the harm he suffered. 402 F.3d at 1154-55. The decision was not based on the date on which the transition commenced. As the *Arce* court noted, Congress has explicitly stated that the TVPA should be equitably tolled when, as here, "*the plaintiff[s]*

[have] been unable to discover the identity of the offender." *Arce*, 434 F.3d at 1262 (quoting S. Rep. No. 102–249, at 10–11).[2]

Accordingly, Plaintiffs have pled sufficient facts to support a showing of extraordinary circumstances, in spite of extreme diligence, to warrant tolling of the statute of limitations from the date of Víctor Jara's killing, September 15, 1973, to at least until 2009, the date that Barrientos was identified as a culpable party. Doc. 63 at ¶¶ 47, 58. Thus, Plaintiffs' filing of the Complaint was timely filed within the ten-year statute of limitations.

III. Plaintiffs' Claims Displace The *Kiobel* Presumption Because Defendant Is A U.S. Citizen, U.S. Resident, And Is Unreachable In Any Other Forum.

In granting Plaintiffs' motion for default judgment, this court dismissed Plaintiffs' ATS claims based on its assessment of *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013). Docs. 62 and 71. Although Plaintiffs recognize that the Eleventh Circuit's subsequent decisions interpreting *Kiobel* are binding on this court, Plaintiffs hereby make the following submission to preserve argument for appeal, with the hope that the Eleventh Circuit reverses

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[2] Equally, Defendant's immigration to the United States in 1989 does not trigger the statute of limitations period, since Plaintiffs had no means of obtaining information necessary to determine Defendant's involvement until 2009. In *Arce v. Garcia,* the Eleventh Circuit held "[j]ustice may also require tolling where both the plaintiff and the defendant reside in the United States but where the situation in the home state nonetheless remains such that the fair administration of justice would be impossible, even in United States courts." *Arce*, 434 F.3d at 1262; *see also Cada,* 920 F.2d at 451. Instead, the government's failure to properly investigate Joan Jara's allegations is sufficient to toll the statute of limitations at least until the day the Plaintiffs learned the identity and whereabouts of Víctor Jara's killer. Barrientos' involvement was revealed in 2009, Doc. 63 ¶ 47, and his residence was revealed to the public on May 17, 2012. *Id*. at 48.

itself and properly applies the *Kiobel* presumption or that the Supreme Court clarifies the "touch and concern" test favorably to Plaintiffs' ATS claims.[3]

Defendant is a U.S. citizen and Florida resident not currently amenable to suit in any other forum. For these and other reasons, Plaintiffs' ATS claims displace the *Kiobel* presumption and Defendant's Motion to Dismiss should be denied. The ATS is a purely jurisdictional statute providing federal courts with "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). The Supreme Court has held that the ATS gives courts the power to recognize certain violations of international law as federal common law. *Kiobel*, 133 S. Ct. at 1663 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004)). Where such causes of action arise within the territory of a foreign sovereign, federal courts determine whether such claims "touch and concern," the United States with sufficient force to overcome a presumption against extra-territoriality. *Id.* at 1669. As discussed below, the Eleventh Circuit has improperly interpreted *Kiobel*, based on the concurrence of two justices and disregarding the language of the majority opinion.

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[3] To the extent Plaintiffs' ATS claims might be barred by *Baloco* and *Chiquita*'s incorrect application of *Kiobel*, Plaintiffs assert a non-frivolous argument for extending, modifying, or reversing *Baloco* and *Chiquita* by the Supreme Court. *See Baloco v. Drummond Company Inc*., 767 F.3d 1229 (11th Cir. 2014); *Cardona v. Chiquita Brands*, 760 F.3d 1185 (11th Cir. 2014) (petition for *ceratori* pending). Plaintiffs incorporate by reference their Additional Briefing in Support of Motion for Default Judgment Following Statute Conference. Doc. 50. Likewise, the question of safe harbor for individual perpetrators was not at issue in *Kiobel,* and, therefore, it was not an issue addressed or dismissed by the majority. As Kennedy made plain in his concurrence, "*The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute.*" *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

Nothing in the majority opinion suggests that the Court intended to overturn the line of cases against individual human rights abusers found in the United States that stretches back more than 30 years. *See id.* at 1664-68. Moreover, since the holding is limited to claims under the ATS, Plaintiffs' claims under the TVPA remain unaffected by this decision. *Id.* at 1669.

A. Application Of The *Kiobel* Presumption Requires Fact-Specific Analysis.

In *Kiobel*, the Supreme Court found that a presumption against extraterritoriality applies to ATS claims arising from purely extraterritorial conduct. 133 S.Ct. at 1669. But this presumption is displaced where, as here, the claims "touch and concern" the United States with sufficient force. *Id*. In *Kiobel*, the Court crafted a new presumption against extraterritoriality that applies to claims under the ATS, a presumption distinct from the canon of statutory construction known by the same name. *Id.* at 1664. Noting that the ATS is "strictly jurisdictional," the Court held that "the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS." *Id*. In the context of the ATS, "the question is not what Congress has done but instead what courts may do." *Id.* Thus, although the Court found that nothing within the text or history of the ATS rebuts the presumption against extraterritoriality, this is not the end of the analysis. *Id.* at 1669. The presumption against extraterritoriality is displaced when the claims "touch and concern" the United States with sufficient force. *Id*. at 1669.

Accordingly, *Kiobel* requires a two-part analysis: first, courts should determine whether extraterritorial conduct is alleged, and if so, the presumption against extraterritoriality applies; and second, if the presumption against extraterritoriality does apply, courts should engage in a fact-specific inquiry as to whether these claims "touch and concern" the United States with sufficient force to displace the *Kiobel* presumption.

Applying this test to the claims in *Kiobel*, the Court first determined that the conduct took place extraterritorially and that the foreign corporate defendants were amenable to suit in other countries, with only a bare corporate presence in the United States.[4] *Id.* Thus, "it would reach too far to say that mere corporate presence suffices" to displace the presumption. *Id.* Although the Court did not delineate all possible factors relevant to displacing the *Kiobel* presumption, because its analysis took into account the nationality and residency of the defendants and availability of alternative fora for suit, these are relevant factors. *See id.*; *accord* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co*., No. 10-1491, 2012 WL 2161290, at *4-5 (June 11, 2012) (arguing that the exclusive presence of a foreign perpetrator in the U.S. warrants an ATS claim).

B. The Eleventh Circuit's Decision In *Baloco* Is Inconsistent With The Supreme Court's Holding In *Kiobel* And, Therefore, Should Not Be Applied.

Defendant asserts that the Eleventh Circuit's recent decision in *Baloco v. Drummond Company Inc*. should control this court's decision. 767 F.3d 1229 (11th Cir. 2014). *Baloco*'s strict approach to the presumption against extraterritoriality is inconsistent with *Kiobel*. Under the ruling in *Baloco*, a plaintiff must plead facts demonstrating that the defendant's conduct was "focused" in the United States to overcome the presumption. *Id.* at 1239. However, in *Kiobel*, the Court explicitly rejected such a strict geographical analysis. *Baloco* mistakenly applies

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[4] The sole connection between the defendants in *Kiobel* and the United States was the presence of their parent company in one New York office – an office that was owned by yet another separate company and used solely to meet with investors. *Id.* at 1677-78 (Breyer, J., concurring).

Justice Alito's concurrence which the majority (seven out of nine justices) explicitly rejected. *Compare Baloco*, 767 F.3d at 1239, *with Kiobel*, 133 S.Ct. at 1670 (Alito, J., concurring).[5]

Indeed, had the Supreme Court adopted the position taken in *Baloco*, most ATS claims based on extraterritorial conduct might be foreclosed. However, other courts have found extraterritorial conduct can sufficiently displace the presumption. *See, e.g., Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 522, 531 (4th Cir. 2014); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 322 (D. Mass. 2013); *Ahmed v. Magan*, No. 2:10-CV-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013). This court should decline to follow this strict territorial approach and instead apply the Supreme Court's precedent in *Kiobel*.

C. Applying A Fact-Specific Inquiry, The Kiobel Presumption Is Displaced Here.

Plaintiffs' ATS claims "touch and concern" the United States with sufficient force to displace the *Kiobel* presumption because: (1) the Defendant is a U.S. citizen, permanently residing in Florida (Doc. 63 at ¶ 8); (2) Defendant is not amenable to suit in any other forum (Doc. 68 at ¶ 30); and (3) U.S. policy interests accord with allowing the claims to go forward since the United States has a strong interest in not providing a safe haven for human rights

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[5] Justice Alito, joined by Justice Thomas, concurred in the majority opinion, and acknowledged the majority's "narrow" approach, noting that the "touch and concern" test "obviously leaves much unanswered." *See id.* at 1669 (Alito, J., concurring). Nevertheless, Justice Alito recognized that he ***would have preferred*** a "broader standard," in which only conduct within the territory of the United States that amounts to a violation of international law would be actionable under the ATS, but this is not the position the majority adopted. *Id.* at 1670.

abusers, such as Defendant (Doc. 68 at ¶ 30), and the government of Chile has supported the pursuit of this case before United States courts (Doc. 48; Ugas Decl., ¶¶ 18-19).[6]

Defendant Barrientos's U.S. residency and citizenship have become his primary means to evade justice. *See* Statement of Facts; *see also* Exhibit 1. It can be no coincidence that Barrientos has now appeared in this action at the eleventh hour after learning that this case may assist in the efforts to extradite him back to Chile, to face justice for the crimes Plaintiffs allege. Doc. 77 at 4-5. Applying the *Kiobel* presumption as Defendant has asked this Court to do would in effect provide Defendant Barrientos with refuge in the United States from accountability for crimes against humanity he committed in Chile, all while reaping the benefits of U.S. citizenship and residency – in clear contradiction with U.S. foreign policy. Because Plaintiffs' claims are in accord with U.S. foreign policy interests, they displace the *Kiobel* presumption.

CONCLUSION

Plaintiffs' Second Amended Complaint provides a strong basis for tolling the statute of limitations and establishes that this court has subject matter jurisdiction to hear Plaintiffs' claims under both the ATS and the TVPA. Therefore, Defendant's motion to dismiss should be denied.

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[6] Moreover, the U.S. was significantly affected on its own soil by the acts committed by the Pinochet regime. As the Eleventh Circuit Court determined in *Cabello*, the U.S. government provided protection in the U.S. to Chilean military generals that were ousted by the junta. *See Cabello*, 402 F.3d at 1153.

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Certificate of Service

I certify that on March 20, 2015, I electronically filed a copy of the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of the electronic filing to the following:

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