UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOAN JARA; AMANDA JARA TURNER;
and MANUELA BUNSTER,

Plaintiffs,

v. Case No. 6:13-cv-1426-Orl-37GJK

PEDRO PABLO BARRIENTOS NUNEZ,

Defendant.

ORDER

This cause is before the Court on the following:

1. Defendant's Motion to Dismiss (Doc. 82), filed March 3, 2015; and
2. Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss (Doc. 84), filed March 20, 2015.

Upon consideration, the Court finds that the Motion is due to be granted in part and denied in part.

BACKGROUND

This action arises out of the torture and murder of Victor Jara, a folk singer and activist supporter of Chilean President Salvador Allende, who was killed during the military coup that installed General Augusto Pinochet in power in 1973. (Doc. 52, ¶ 1.)[1]

I. General Pinochet's Regime and Human Rights Abuses

On September 11, 1973, the Chilean Army, led by General Pinochet, staged a

[1] The facts are obtained from Plaintiffs' Second Amended Complaint (Doc. 63) and are taken as true solely for the Court's consideration of Defendant's Motion to Dismiss (Doc. 82).

coup d'état against the democratically elected government of President Allende and appointed General Pinochet as Commander-in-Chief. (Doc. 63 ¶¶ 18–19.) The Chilean Army arrested individuals perceived to be supporters of or sympathizers with the Allende government, and it "initiated a systematic crackdown on all opposition and dissent throughout the country." (*Id.* ¶¶ 20–21.)

On the first day of the coup, troops from the Chilean Army attacked a university and detained hundreds of professors, students, and administrators—among them, Victor Jara[2]—in a stadium ("Stadium"), which "served as one of the first mass detention centers of General Pinochet's military regime." (*Id.* ¶¶ 22–24.) On September 12, 1973, Lieutenant Pedro Pablo Barrientos Nunez ("Defendant") and his soldiers were deployed to the mass detention site at the Stadium where they would "continue to arbitrarily detain civilians, including Victor Jara." (*Id.* ¶¶ 26–27.) The Chilean Army detained approximately 5,000 civilians at the Stadium, and the soldiers kept a record of each detainee's name. (*Id.* ¶ 24.)

During the detention, members of the Chilean Army "made threats and taunts" to the detainees. (*Id.* ¶ 25.) Additionally, "[m]any of the civilians were tortured and subjected to cruel, inhuman, or degrading treatment based merely on the suspicion of left-leaning political activism and therefore of being subversive to General Pinochet's regime." (*Id.*)

II. Victor Jara's Detention and Death

[2] Victor Jara was first detained at the university. (*Id.* ¶ 30.) While transporting Jara to the Stadium, Captain Fernando Polanco Gallardo—a commanding officer in military intelligence—recognized him "as the well-known folk singer whose popular songs addressed social inequality and who had supported President Allende's government," so he separated Jara from the group and "beat [him] severely" before transferring him to the stadium. (*Id.* ¶ 31.)

During the first three days of his detention, Victor Jara wrote a poem (which was later delivered to his wife, Plaintiff Joan Jara, that said: "How hard it is to sing when I must sing of horror. Horror which I am living, horror which I am dying." (*Id.* ¶ 32.) On September 15, 1973, he was taken to an underground locker room that the Chilean Army used to "violently interrogate and torture civilians." (*Id.* ¶ 33.) "Throughout his detention in the locker room . . . Victor Jara was in the physical custody of [Defendant], soldiers under [Defendant's] command, or other members of the Chilean Army . . . ." (*Id.* ¶ 34.) He was also "blindfolded, handcuffed, interrogated, brutally beat, and otherwise tortured" by soldiers under Defendant's command. (*Id.* ¶ 35.)

Eventually, Defendant shot Victor Jara with a pistol in the back of the head at point-blank range during a game of "Russian roulette." (*Id.* ¶ 36.) Defendant's subordinates then shot Victor Jara's corpse "at least forty times" (*id.*) and "ignobly and unceremoniously discarded [Jara's body] outside the stadium, along with the bodies of other civilian prisoners who had been killed by the Chilean Army" (*id.* ¶ 37).

When a Civil Registry employee, Hector Herrera, recognized Victor Jara's body being brought into the morgue on September 18, 1973, he notified Plaintiff Joan Jara, who later "identified the tortured body of her husband and observed the gunshot wounds he had sustained." (*Id.* ¶ 38.) Joan Jara and her daughters, Plaintiffs Amanda Jara Turner and Manuela Bunster, buried Victor Jara in secret and then fled for their safety to the United Kingdom. (*Id.*)

III. The Investigations

Five years later, upon Joan Jara's application to open a criminal investigation into Victor Jara's murder on September 8, 1978, the Chilean Criminal Court of First Instance

initiated a criminal investigation ("1978 Investigation"). (*Id.* ¶ 39.) After finding insufficient proof to charge any individual as a principal or accessory to any crime, the court closed the investigation on August 31, 1982. (*Id.* ¶ 40.) Plaintiffs allege that the investigation was frustrated in two ways. First, General Pinochet's regime remained in power and "had every incentive to ensure that the scope of the investigation was limited and, whenever possible, would not result in prosecutions." (*Id.*) Second, General Pinochet's regime passed an Amnesty Law, which granted amnesty "to all persons who, as principals or accessories, ha[d] committed criminal offences [sic] during the state of siege between September 11, 1973 and March 10, 1978, unless they [were] currently on trial or ha[d] already been convicted." (*Id.* ¶ 41.)

In 1990, the people of Chile voted out General Pinochet's regime (*id.* ¶ 42), but the Chilean civilian and military courts "strictly and consistently applied the Amnesty Law" until General Pinochet was arrested for human rights violations in October of 1998 (*id.* ¶¶ 42–43). Following his arrest, the Chilean Supreme Court "started limiting the application of the Amnesty Law and some of the investigations and prosecutions for human rights violations were allowed to go forward." (*Id.* ¶ 44.)

On August 16, 1999, Plaintiffs filed a complaint in the Chile Court of Appeals against General Pinochet for the aggravated homicide of Victor Jara and the Santiago Appeals Court initiated a new investigation ("1999 Investigation"). (*Id.* ¶ 45.) Just over two years later, the court consolidated the 1978 and 1999 investigations ("Consolidated Investigation of 2001"). (*Id.* ¶ 46.) After a temporary closure, the Santiago Court of Appeals reopened the Consolidated Investigation of 2001 upon request by Plaintiffs.

Finally, in 2009, Jose Adolfo Paredes Marquez, a soldier in the Chilean Military,

testified that he witnessed Defendant shoot Victor Jara. (*Id.* ¶ 47.) At the time, Defendant's whereabouts were unknown. (*Id.*) However, in May 2012, Chilevision, a major Chilean television station, revealed that Defendant was residing in Florida. (*Id.* ¶ 48.)

IV. The Instant Action

Upon learning of Defendant's whereabouts, Plaintiffs "promptly initiated the present action."[3] (*Id.*) They assert claims under the Alien Tort Statute ("ATS") and Torture Victim Protection Act ("TVPA"). (*Id*.) Plaintiffs allege, *inter alia*, that: (1) Defendant was one of the officers who participated in the establishment of a system of imprisonment, torture, and execution of suspected leftists and a scheme of human rights abuses of civilians at the stadium (*id*. ¶¶ 28, 59); (2) "Defendant was in command of the mass detention of detainees at the stadium [and] took command and exercised direct control over" some of the soldiers (*id.* ¶¶ 29, 54); (3) Defendant was "under a duty to investigate, prevent, and punish violations of international and Chilean law committed by soldiers under his command," which he failed to do (*id.* ¶ 56); and (4) Defendant ordered his subordinates to torture Victor Jara and then "*personally subjected* [him] to the 'game' of Russian roulette, putting [him] in fear for his life" and ultimately killing him (*id.* ¶ 57–58). (*See also id.* ¶¶ 52–67.) Plaintiffs further allege that: (1) Defendant violated international human rights laws; (2) Defendant's acts and omissions were "deliberate, intentional, wanton, malicious, oppressive, and done with a willful and conscious disregard for

[3] Plaintiffs have no other domestic remedy in Chile at this time. Although the Santiago Court of Appeals also charged Defendant as a direct perpetrator in the killing of Victor Jara on December 26, 2012, Chilean law prohibits the assessment of civil claim for damages until the criminal proceeding is complete; moreover, no criminal actions can proceed because Chilean law does not permit criminal prosecutions *in absentia*. (Doc. 53 ¶ 49.)

Plaintiffs' rights and those of their husband and father," entitling Plaintiffs to punitive damages; (3) as a direct and proximate result of Defendant's wrongful killing of Victor Jara, Plaintiffs "have and will continue to suffer" from their loss; (4) Victor Jara would have been able to collect damages from Defendant for battery and other torts; and (5) Plaintiffs suffer mental anguish and emotional distress as a result of Defendant's unlawful and outrageous conduct and intentional or reckless infliction of emotional distress. (*Id.* ¶¶ 62– 67.) Lastly, Plaintiffs allege that they were diligent and persistent in their efforts to identify those responsible for the death of Victor Jara and that the conditions in Chile over the past forty years "constitute extraordinary circumstances that justifiably prevented Plaintiffs from bringing this action and accordingly toll any applicable statute of limitations." (*Id.* ¶¶ 50–51.)

Defendant now moves to dismiss the Second Amended Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), arguing that the Court does not have subject matter jurisdiction over the ATS claims and that the TVPA claims are barred by the statute of limitations. (Doc. 82.) Plaintiffs oppose. (Doc. 84.) The Court held a hearing on the matter on April 10, 2015, and it is now ripe for the Court's adjudication.

STANDARDS

I. Rule 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a defendant may assert a facial or factual challenge to the Court's subject matter jurisdiction. *McElmurray v. Consol. Gov. of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). If the challenge is facial based on the allegations in the complaint, "'the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is

raised.' Accordingly, 'the court must consider the allegations in the plaintiff's complaint as true.'" *Id.* (quoting *Williamson v. Tucket*, 645 F.2d 404, 412 (5th Cir. 1981)).

II. Rule 12(b)(6)

If a complaint does not comply with minimum pleading requirements or otherwise fails to "state a claim to relief that is plausible on its face," the defendant may seek dismissal of the complaint under Federal Rule of Civil Procedure 12(b)(6). *See Ashcroft v. Iqbal*, 556 U.S. 662, 672, 678–79 (2009). When resolving a Rule 12(b)(6) motion, courts must limit their consideration to the complaint, its attachments, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007); *e.g.*, *GSW, Inc. v. Long Cnty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). Courts also must accept all well-pled factual allegations—but not legal conclusions—in the complaint as true. *Tellabs*, 551 U.S. at 322. After disregarding allegations that "are not entitled to the assumption of truth," the court must determine whether the complaint includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Iqbal*, 556 U.S. at 663, 679 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

DISCUSSION

Defendant argues the Court lacks subject matter jurisdiction to hear Plaintiffs' ATS claims because all of the alleged conduct occurred in Chile and the Defendant's current U.S. citizenship is not sufficient to satisfy the "touch and concern" requirement to displace the ATS's presumption against extraterritorial application. (Doc. 82, pp. 3–5.) Plaintiffs counter that the Defendant's U.S. citizenship and Florida residency "touch and concern"

the United States with "sufficient force" to displace the presumption against extraterritoriality. (Doc. 84, pp. 14–19.) Additionally, Defendant argues that Plaintiffs' TVPA claims are time-barred because they were brought forty years after Victor Jara's death, which is well-over the statute's express ten-year statute of limitations. (Doc. 82, pp. 6–13.) Plaintiffs argue their TVPA claims are not time-barred because extraordinary circumstances warrant equitable tolling of the statute of limitations until 2009. (Doc. 84, pp. 5–14.) The Court will address each argument in turn.

I. ATS Claims

The U.S. Supreme Court has held that the ATS, 28 U.S.C. § 1350, does not generally have extraterritorial application—that is, it does not reach tortious conduct taking place entirely outside of the United States. *Kiobel v. Royal Duth Petroleum Co.*, 133 S.Ct. 1659, 1669 (2013). A narrow exception exists for extraterritorial torts that nevertheless "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.*

Kiobel forecloses all of Plaintiffs' ATS claims because the tortious conduct took place entirely outside the United States. *See id.* Though *Kiobel* provides for some possible extraterritorial application of the ATS, the wholly foreign conduct here—torture of a Chilean citizen in Chile for protesting the overthrow of the Chilean government—simply does not "touch and concern" the United States with such force as to overcome the presumption against extraterritoriality. *Cf. Mwani v. Laden*, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (distinguishing *Kiobel* and allowing an ATS claim to proceed where the conduct occurred outside the United States but touched and concerned it deeply—an attack on and around a U.S. Embassy that was partially planned in the United States);

Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 310 (D. Mass. 2013) (holding that *Kiobel*'s presumption against extraterritorial application did not apply where the defendant's conduct "occurred, in substantial part, within" the United States, including committing torts in Springfield, Massachusetts).

Plaintiffs' argument that Defendant's U.S. citizenship and Florida residency sufficiently "touch and concern" the United States because they make him unamenable to suit in any other forum, allowing him to "evade justice" and curtailing the United States' "strong interest in not providing a safe haven for human rights abusers," is unpersuasive for two reasons. First, related to displacing the presumption against extraterritoriality, the Eleventh Circuit recently held that "although the U.S. citizenship of [a defendant] is relevant to [its] inquiry, this factor is insufficient to permit jurisdiction on its own." *Doe v. Drummond Co., Inc.*, No. 13-15503, 2015 WL 1323122, at *14 (11th Cir. March 25, 2015) (citing *Balaco v. Drummond Co., Inc.*, 767 F.3d 1229, 1236–37 (11th Cir. 2014) (concluding that a defendant's U.S. citizenship is not sufficient to displace the presumption because this factor alone does not carry the "significant weight" necessary to "warrant the extraterritorial application of the ATS to situations in which the alleged relevant conduct occurred abroad")). Second, Defendant is not evading justice and the United States is not providing a safe haven to human rights abusers because foreclosing Plaintiffs' ATS claims does not leave them without remedy; torture and extrajudicial killing are cognizable under the TVPA, which was enacted in part to provide a remedy where the ATS cannot. *See Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) (noting that the TVPA reaches "human rights abuses committed abroad" where the ATS cannot). Plaintiffs' ATS claims are due to be dismissed.

II. TVPA Claims

Claims brought under the TVPA are subject to a ten-year statute of limitations, which can be equitably tolled if a plaintiff can prove "extraordinary circumstances" sufficient for equitable tolling. *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153–1154 (11th Cir. 2005); *see also Jean v. Dorelien*, 431 F.3d 776, 779 (11th Cir. 2005) ("'Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.'" (quoting *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999))). Whether the facts of the case demonstrate "extraordinary circumstances" is a fact-specific determination. *Id.* at 1154.

Defendant concedes and the Court agrees that, viewing the allegations of the Second Amended Complaint in the light most favorable to Plaintiffs, the statute of limitations was tolled until 1990 when General Pinochet's regime toppled. (Doc. 82, p. 10); *see also Arce v. Garcia*, 434 F.3d 1254, 1264 (11th Cir. 2006) ("The remedial scheme conceived by the TVPA . . . 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."); *see also Jean*, 431 F.2d at 78 (equitably tolling the statute of limitations until the responsible military regime and commander was removed from power).

Defendant argues that equitable tolling is not justified beyond 1990 because, after that time, the government did not engage in "affirmative misconduct rising to the level of active, deliberate concealment" required before equitable tolling becomes appropriate.

(Doc. 82, pp. 10–13.) In support, he argues that: (1) Plaintiffs knew which units of the Chilean military were involved in the events surrounding Victor Jara's death, and Plaintiffs do not allege that this information was deliberately concealed or falsified; (2) Plaintiffs knew as early as 1973 that they had a cause of action related to the ill treatment and killing of Victor Jara when Joan Jara identified his tortured body and observed the gunshot wounds he sustained; (3) the "unwillingness on the part of those with knowledge to come forward" (*see* Doc. 63 ¶ 46) as a result of the Amnesty Law is does not constitute the required affirmative misconduct; and (4) "a lenient approach to equitable tolling would revive claims dating back decades, if not centuries, when most or all of the eye witnesses would no longer be alive to provide their accounts of the events in question," *see Arce*, 434 F.3d at 1265. (Doc. 82, pp. 10–13.) He argues, therefore, that Plaintiffs' allegations do not constitute extraordinary circumstances required to justify equitable tolling. (Doc. 82, p. 13.) The Court is not persuaded.

First, although the *Arce* court rejected a "lenient approach to equitable tolling," it did so only in the context of "mere ambient conflict in another country" by itself. *See* 434 F.3d at 1265 (holding, in fact, that equitable tolling was warranted given the circumstances—the responsible regime remaining in power, even though the defendants resided in the United States).

Second, the Court is unpersuaded by Defendant's argument that the statute of limitations should be tolled *only if* the government engaged in affirmative misconduct such as deliberate concealment of Victor Jara's death. Indeed, affirmative misconduct in the form of deliberate concealment is only *one of* the circumstances that constitute extraordinary circumstances and warrant equitable tolling of the statute of limitations. *See*

Cabello, 402 F.3d at 1154 (stating that the inquiry is a "*fact-specific determination* because a finding of 'extraordinary circumstances' necessary for equitable tolling is reserved for extraordinary facts") (citation omitted) (emphasis added). The TVPA's legislative history sheds light on the inquiry. It provides:

> The legislation provides for a 10-year statute of limitations, but explicitly calls for consideration of all equitable tolling principles in calculating this period *with a view toward giving justice to plaintiff's rights*. Illustrative, but not exhaustive, of the types of tolling principles which may be applicable include the following. The statute of limitation should be tolled during the time the defendant was absent from the United States . . . . Excluded also from calculation of the statute of limitations would be the period when a defendant has immunity from suit. The statute of limitations should also be tolled for the period of time in which the plaintiff is imprisoned or otherwise incapacitated. It 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*.

S. Rep. No. 102-246, at 10–11 (1991) (emphasis added). This history suggests a disjunctive view of the tolling scenarios between affirmative concealment and an inability to discover the identity of the offender. Plaintiffs allege they were "diligent and persistent in their efforts to identify the individual(s) responsible for killing Victor Jara" (*see* Doc. 63 ¶ 50) in the following specific, plausible particulars: (1) they filed an initial application to open a criminal investigation in 1978 while the responsible regime was still in power (*id.* ¶ 39); (2) they 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 (*id.* ¶¶ 41, 44–46); and (3) as soon as the court closed the Consolidated Investigation of 2001 in 2008, they requested for it to be reopened (*id.* ¶ 46–47). 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. (*Id.* ¶¶ 47–48.)

Whether further discovery will develop the factual background bearing on the issue of the Plaintiffs diligence in commencing this action is an open question. At this stage, the allegations of reasonable diligence are sufficient to withstand an assault from the 12(b)(6) front. The action is will proceed on Plaintiffs TVPA claims.

CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED**:

1. Defendant's Motion to Dismiss (Doc. 82) is **GRANTED IN PART** and **DENIED IN PART**:
   a. The ATS Claims in Counts I and II, and Counts III, IV, and V in their entirety, are **DISMISSED WITH PREJUDICE**.
   b. The Motion is **DENIED** in all other respects. Defendants shall answer the surviving counts of the Second Amended Complaint on or before April 28, 2015.

DONE AND ORDERED in Chambers in Orlando, Florida, on April 14, 2015.

ROY B. DALTON JR.
United States District Judge

Copies:

Counsel of Record