

**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 VICTOR
JARA,

AMANDA JARA TURNER, in her
individual capacity,

and MANUELA BUNSTER, in her
individual capacity,

Plaintiffs.

v.

PEDRO PABLO BARRIENTOS NUNEZ.

Defendant.

Case No.: 6:13-cv-01426-RBD-GJK

DEFENDANT’S MOTION TO DISMISS THIRD AMENDED COMPLAINT

COMES NOW the Defendant, by and through undersigned counsel, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), and moves this Honorable Court to dismiss Plaintiffs’ Third Amended Complaint (Doc. 111). In support, Defendant states:

FACTS AND PROCEDURAL HISTORY

This dispute arises from the 1973 killing of Chilean musician and political activist Victor Jara, which occurred in the context of a military coup which deposed Salvador Allende and installed a *junta* led by General Augusto Pinochet in power.

The Plaintiffs filed their original complaint against Mr. Barrientos on September 4, 2013, which is 40 years after Victor Jara’s death, and 24 years after Mr. Barrientos first became subject to the personal jurisdiction of U.S. courts by physically moving to the United States. The Plaintiffs filed an Amended Complaint (Doc. 52) on February 19, 2014, and a Second Amended

Complaint (Doc. 63) on July 30, 2014. The parties litigated Mr. Barrientos' Motion to Dismiss the Second Amended Complaint (Doc. 82), which the Court ultimately denied in part and granted in part. In its Order (Doc. 93), the Court dismissed Plaintiffs' ATS counts with Prejudice. Doc. 93 at 13. The Court permitted the Plaintiffs' TVPA claims to survive dismissal, rejecting Mr. Barrientos' argument that the Second Amended Complaint was time barred.

Up to the filing of the Third Amended Complaint, the Plaintiffs proceeded under the theory that Mr. Barrientos "not only led, with other Chilean army officers, but also personally participated in the execution of Victor Jara ..." Doc. 63 at ¶ 1. Based on the recanted statement of former conscript Jose Adolfo Paredes Marquez ("Mr. Paredes") and a Chilean media broadcast, the Plaintiffs presented a theory alleging that Mr. Barrientos:

... put a pistol to the back of Victor Jara's head and proceeded to "play" rounds of "Russian roulette." Lieutenant Barrientos loaded one bullet in the chamber of his pistol, spun the chamber and pulled the trigger, knowing that each shot could be lethal. During the course of this "game," Lieutenant Barrientos shot Víctor Jara in the back of the head at point blank range. He then ordered the five military conscripts under his command to repeatedly shoot Víctor Jara's corpse ...

Second Amended Complaint (Doc. 63) at ¶ 36.

The Third Amended Complaint discards this detailed (however outlandish) narrative. Instead, Plaintiffs now present a vague, conclusory and threadbare assertion that Mr. Barrientos "killed, caused others to kill, and/or conspired to kill Victor Jara." Third Amended Complaint (Doc. 111) at ¶ 35.

In response, Mr. Barrientos moves the Court to dismiss the Plaintiffs' Third Amended Complaint pursuant to Rule 12(b)(1) and 12(b)(6). First, Mr. Barrientos re-asserts that the Third Amended Complaint is time-barred under the TVPA's 10-year statute of limitations. Since Plaintiffs have apparently discarded Mr. Paredes' narrative, they should no longer be permitted to rely on the argument that equitable tolling principles tolled their cause of action until 2009,

when Mr. Pardes first implicated Mr. Barrientos. Second, Mr. Barrientos submits that Plaintiffs' action is subject to dismissal for failing to exhaust available local remedies. Third, Mr. Barrientos submits that in light of Plaintiffs' vague and conclusory assertions, the Third Amended Complaint must be dismissed as inadequately pleaded.

ARGUMENT AND MEMORANDUM OF LAW

I. Applicable Standard

In general:

A motion to dismiss, pursuant to Rule 12(b)(6) [...] is a motion attacking the legal sufficiency of a complaint. In ruling on a Rule 12(b)(6) motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true. [...] In addition, all reasonable inferences should be drawn in favor of the plaintiff.

Haddad v. Dudek, 784 F.Supp.2d 1308, 1313-14 (M.D. Fla. 2011) (internal citations omitted).

A party is permitted to use a Rule 12(b)(6) motion to dismiss as a vehicle to challenge a complaint on statute of limitations grounds. *Lesti v. Wells Fargo Bank, N.A.*, 960 F.Supp.2d 1311, 1316-17 (M.D. Fla. 2013). "A Rule 12(b)(6) motion to dismiss on statute of limitations grounds may be granted ... if it is apparent from the face of the complaint that the claim is time-barred." *Id.* See also *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004).

Courts have entertained motions to dismiss premised on a failure to exhaust adequate and available local remedies "as a jurisdictional challenge." *Mamani v. Berzaín*, 21 F. Supp. 3d 1353, 1364 (S.D. Fla. 2014). See also *Escarria-Montano v. United States*, 797 F. Supp. 2d 21, 25 (D. D.C. 2011) (granting Rule 12(b)(1) motion to dismiss, because "Plaintiff has not shown that he has exhausted his administrative remedies, and the exhaustion requirement is

jurisdictional.”)¹ However, “[t]he burden of proving an exhaustion-of-local-remedies defense is on the defendant, and it is a ‘substantial’ one.” *Mamani*, 21 F. Supp. 3d. at 1369; *Jean v. Dorelien*, 431 F.3d 776, 781-82 (11th Cir. 2005).

With respect to the pleading standard in general: “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations [...], a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Compnay v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). The pleading standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. [...] A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ [...] Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted).

In addition, *Twombly* and *Iqbal* have articulated a “plausibility standard,” whereby “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. *See also Geller v. Von Hagens*, No. 8:10-CIV-1688-EAK-AEP, 2010 U.S. Dist. LEXIS 129561 at 6-7 (M.D. Fla. Nov. 23, 2010) (discussing the post-*Iqbal* pleading standard, and noting that “[b]ecause of the necessity to show plausibility, the past practice of construing the complaint in the light most favorable to the pleader and drawing all inferences in his favor has been replaced by construing a pleading against the pleader ...).

¹ Similarly, in *Ali v. Rumsfeld*, 649 F.3d 762, 775 (D.C. Cir. 2011), the Court, after restyling the Plaintiffs’ ATS claims as FTCA claims against the United States, viewed the “failure to exhaust administrative remedies as jurisdictional.” 649 F.3d at 775. The Court went on to hold that the district court “properly dismissed the ATS claims under FRCP 12(b)(1) for lack of subject matter jurisdiction.” *Id.*

II. The Plaintiffs' Claims are Barred by the Statute of Limitations

Mr. Barrientos has previously argued, and now once again argues, that the Plaintiffs' claims are expressly time-barred by the TVPA's 10-year statute of limitations. While the doctrine of equitable estoppel applies to TVPA claims, Plaintiffs failed to demonstrate the requisite extraordinary circumstances to justify equitable tolling in this case. Equitable tolling is only appropriate given extraordinary circumstances "that are both beyond [a plaintiff's] control and unavoidable even with diligence." *Arrington v. United Parcel Service*, 384 Fed.Appx. 851, 852 (11th Cir. 2010). Equitable tolling is an extreme remedy, and the Eleventh Circuit emphasized that Courts should apply a strict approach to the determination of whether to apply equitable tolling. *Arce v. Garcia*, 434 F.3d 1254, 1265 (11th Cir. 2006).

In this case, Mr. Barrientos has previously argued to the Court that affirmative misconduct such as fraud, deliberate concealment, or the continued jurisdiction of a repressive regime should be required before equitable tolling can be applied. To be clear, Mr. Barrientos renews and once again maintains this position now, although Mr. Barrientos acknowledges that this Court was not previously persuaded by this argument. Doc. 93 at 11-12. Setting this issue aside, however, the Plaintiffs' action is still barred even assuming that being unable to discover the offender's identity is sufficient to justify equitable tolling given due diligence.

Dismissal is therefore appropriate at this stage for two reasons. First, the Third Amended Complaint abandoned Mr. Paredes' narrative that Mr. Barrientos personally shot Victor Jara while playing Russian roulette. *Compare* Third Amended Complaint (Doc. 111) at ¶ 35 *with* Second Amended Complaint (Doc. 63) at ¶ 36. Yet Plaintiffs continue to maintain that Mr. Paredes' testimony was a "critical piece of evidence" which led to the identification of Mr. Barrientos, and thus presumably justifies equitable tolling. Third Amended Complaint (Doc.

111) at ¶ 46. Given the inconsistency of these positions, Plaintiffs should not be permitted to clutch at straws and bootstrap their previous reliance on Mr. Paredes' recanted claims to justify equitable tolling through 2009.

Second, case investigation and research conducted since arguments on Mr. Barrientos' motion to dismiss the Second Amended Complaint revealed that Plaintiffs have not exercised due diligence. This is because under Chilean law, Plaintiffs actually enjoyed two legal alternatives to pursue and recover financial compensation for the death of Victor Jara. In support of this position, the translated sworn statement of Chilean attorney Rodrigo Antonio Morales Zagal ("Mr. Morales") has been attached hereto as **EXHIBIT A**. Mr. Morales' translated CV/Resume has also been attached as **EXHIBIT B**. While this position directly supports the argument that Plaintiffs have not exhausted available local remedies, developed more fully below, it is also relevant to demonstrate the Plaintiffs' lack of due diligence in this case.

As Mr. Morales points out, Chilean law allows Plaintiffs to "[request] compensation in conjunction with a criminal action." Exhibit A at ¶ 3. This option, however, is "very limited," because it "not only involves proving the criminal act, but also the involvement of one or several individuals as perpetrators, accomplices or accessories." *Id.* at ¶ 4. Offenders must be identified, and trials *in absentia* are not permitted. *Id.* This was the avenue pursued by Plaintiffs and discussed in the Affidavit of Francisco Ugas (Doc. 48).

However, under Chilean law, Plaintiffs enjoyed a second "equally appropriate" and available alternative, which, in the opinion of Mr. Morales, would have been "more efficient." Exhibit A at ¶ 6. This alternative, available after 1991, was "to request such compensation, not before the criminal court judge, as a supplementary petition, but rather a civil court judge, as a main petition." *Id.* Under this avenue, it is sufficient to establish an activity by a government

agency, *id.* at ¶ 8(a), and the identification of the actual individual perpetrators is not required. *Id.* at ¶ 13. Moreover, unlike in a criminal trial, the actual government agents involved need not appear in court. *Id.* The Plaintiffs did not pursue this available remedy in the Chilean courts. *Id.* at ¶ 21.

While this issue creates an obvious problem for the Plaintiffs with respect to the TVPA's exhaustion of available local remedies requirement, it also indicates a lack of due diligence relevant for equitable tolling purposes. The concept of "due diligence" is inextricably entwined with the pursuit of one's rights. *See, e.g., Doe v. United States*, 469 Fed. App'x. 798, 799 (11th Cir. 2012). Equitable tolling might therefore be appropriate where one pursued one's rights, but was prevented from the timely exercise of those rights by some extraordinary circumstance. *Id.* *See also Holland v. Florida*, 560 U.S. 631, 649 (2010). Viewed in light of the fact that equitable tolling is considered an extraordinary remedy to be exercised sparingly, equitable tolling should not be applied where the Plaintiffs have slept on their rights by failing to pursue an available legal avenue for seeking redress in this case.

The Third Amended Complaint should therefore be dismissed as time-barred. Equitable tolling does not apply, because Plaintiffs failed to demonstrate extraordinary circumstances in light of the Third Amended Complaint's abandoned reliance on Mr. Paredes' testimony and the Plaintiffs' failure to exercise due diligence with respect to pursuing legal rights available to them in Chile.

III. The Third Amended Complaint Should be Dismissed for Failure to Exhaust Local Remedies

The TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 Note, §2(b). Case investigation undertaken

since arguments on Mr. Barrientos' motion to dismiss the Second Amended Complaint revealed that the Plaintiffs have not exhausted adequate and available local remedies. Since failure to exhaust local remedies has been treated as a jurisdictional issue, *Mamani*, 21 F. Supp. 3d at 1364, and subject matter jurisdiction cannot be waived or forfeited by the parties, *see, e.g., Nat'l Parks Conservation Ass'n v. United States DOI*, 46 F. Supp. 3d 1254, 1266 (M.D. Fla. 2014), Mr. Barrientos is not otherwise barred from raising this issue in the present motion.²

Here, Exhibit A demonstrates that an adequate remedy was available to Plaintiffs in Chile. As discussed above, Plaintiffs enjoyed the opportunity to initiate an action before a Chilean civil court judge as a main petition. The Chilean government has specifically acknowledged that the death of Victor Jara occurred at Chile Stadium on September 15, 1973 at the hands of government agents. Exhibit A at ¶¶ 16-18. Thus, as early as 1990, Plaintiffs possessed “[e]ssential facts to claim tort liability from the Government.” *Id.* at ¶ 19. Since 1991, “there were no limitations to request and eventually obtain a civil compensation[.]” *Id.* at ¶ 21.

The Court should also consider that since 1990, Chile enjoyed a return to stable democracy. *See, e.g.,* Third Amended Complaint (Doc. 111) at ¶ 41. Since 1998, Chilean courts ceased their strict interpretation of the Amnesty Law. *Id.* at ¶¶ 42-44. Therefore, with the Pinochet regime removed from power, the Plaintiffs enjoyed free and unfettered access to Chilean courts. *Cf. Jean*, 431 F.3d at 782-83 (noting that Haitian “judgment [was] ineffective and currently unenforceable” due to violence and ongoing upheavals in Haiti).

Given the detailed analysis of Chilean law contained in Exhibit A, Mr. Barrientos respectfully submits that he has met the substantial burden of demonstrating that Plaintiffs

² Since a defendant bears the substantial burden of convincing the Court that a complaint should be dismissed for failure to exhaust local remedies, and the defense's research and investigation into Chilean law, culminating in the information presented in Exhibit A, was not available at the time of the motion to dismiss the Second Amended Complaint, the present motion is the first available vehicle in which the defendant can deploy this argument while presenting sufficient supporting evidence to meet the required burden.

enjoyed, but failed to exhaust, adequate and available remedies in Chile. The Third Amended Complaint should therefore be dismissed, because Plaintiffs failed to exhaust adequate and available local remedies in Chile, and this Court is therefore without subject matter jurisdiction. *See Escarria-Montano*, 797 F. Supp. 2d at 25 (D.DC 2011).

IV. The Third Amended Complaint Must be Dismissed as Inadequately Pleaded

The Third Amended Complaint resorts to labels, conclusions, and a formulaic recitation of the elements needed to sustain claims of indirect liability³ under the TVPA. The Plaintiffs' allegations are vague and ambiguous, and fail to place Mr. Barrientos or his defense on notice regarding the basis for Mr. Barrientos' liability. For instance, Plaintiffs now simply allege that Mr. Barrientos "killed, caused others to kill, and/or conspired to kill Victor Jara." Third Amended Complaint (Doc. 111) at ¶ 35.

As Mr. Barrientos previously noted in his memorandum in opposition to the Plaintiffs Motion for Leave to Amend (Doc. 108), it is now far from clear whether the Plaintiffs believe that Mr. Barrientos: 1) was personally present at Chile Stadium and personally participated in the alleged killing of Victor Jara; 2) was personally present at Chile Stadium, did not personally kill Victor Jara, but actually ordered his subordinates to do so; 3) was personally present at Chile Stadium, did not personally kill Victor Jara, did not order his subordinates to do so, but conspired with fellow officers to either kill Victor Jara or order their subordinates to do so; 4) was not personally present at Chile Stadium (at least at the time of Victor Jara's death), but ordered his subordinates to kill Victor Jara from outside Chile Stadium, or 5) any permutation of these possibilities.

³ *See Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) ("the TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the violation.").

The “and/or” language inserted into the proposed Third Amended Complaint renders the Plaintiffs’ allegations particularly unclear and inexact. The Third Amended Complaint does not meet the plausibility standard required in light of *Iqbal* and *Twombly*, and, with respect to the basis for Mr. Barrientos’ liability, reads awfully like the type of “an unadorned, the-defendant-unlawfully-harmed-me accusation” disapproved of by *Iqbal*. 556 U.S. at 678.

In addition, in order to state a cognizable conspiracy or aiding and abetting claim under the TVPA, the Plaintiffs must make “a showing of intent, and not merely knowledge.” *Doe v. Drummond*, No.: 2:09-CV-01041-RDP2010 U.S. Dist. LEXIS 145386 at *53 (N.D. Ala. April 30, 2010). Thus, to prove aiding and abetting, Plaintiffs must demonstrate “active participation” by Mr. Barrientos. *Cabello*, 402 F.3d at 1158. To establish conspiracy, Plaintiffs must demonstrate, among other elements, that Mr. Barrientos “joined the conspiracy knowing of at least one of the goals of the conspiracy and intending to help accomplish it[.]” *Id.* at 1159.

This “requires more than mere knowledge of the principal’s unlawful goals.” *In re Chiquita Brands Int’l, Inc.*, 792 F. Supp. 2d 1301, 1343 (S.D. Fla. 2011). Instead, Plaintiffs must show that Mr. Barrientos acted “with the purpose or intent to facilitate the commission of the specific offenses alleged.” *Id.* (emphasis added). Rather than making such a showing, the Third Amended Complaint offers generic labels and conclusions. For instance, in ¶ 58, the Third Amended Complaint alleges that Mr. Barrientos:

conspired with his subordinates and officers in the Chilean Army who planned or carried out human rights abuses against civilians at the Stadium. Lieutenant Barrientos conspired and acted in concert with one or more members of the Chilean Army pursuant to a common plan, design, and scheme to carry out the attacks against civilians at the Stadium, as a result of which Víctor Jara was subjected to the violations described herein.

These generic allegations fall far short of describing how Mr. Barrientos acted with purpose or intent to bring about torture and extrajudicial killing. Instead, Plaintiffs offer conclusory

allegations that “Lieutenant Barrientos had knowledge of and was an active participant in this system of violent repression against the civilian population at the Stadium. It was the intent of Lieutenant Barrientos to further this system of repression.” Third Amended Complaint (Doc. 111) at ¶ 59.

However, alleging knowledge and intent to participate in a generic “system of repression” against the civilian population at large is not synonymous with establishing actions done with the purpose or intent of inflicting torture and extrajudicial killing, the specific offenses which the Plaintiffs have alleged in this case.

The Third Amended Complaint thus falls far short of the pleading standard required by *Twombly* and *Iqbal*, and therefore does not state a claim upon which relief can be granted. It should be dismissed accordingly.

CONCLUSION

The Third Amended Complaint should be dismissed because it is expressly time-barred under the TVPA’s 10 year statute of limitations. Because the Plaintiffs abandoned their former reliance on Mr. Paredes’ narrative, and because the Plaintiffs have not exercised due diligence in pursuing their rights in Chile, there are no extraordinary circumstances to support the application of equitable tolling to this case. The Third Amended Complaint should also be dismissed because the Plaintiffs have failed to exhaust adequate and available local remedies in Chile. Finally, the Third Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted, because it does not comport with the pleading standard required by *Twombly* and *Iqbal*.

WHEREFORE, Defendant Pedro Barrientos respectfully requests that this Court dismiss the Plaintiffs' Third Amended Complaint.

Dated: September 25, 2015

Respectfully submitted,

By: /s/ Jan Kubicz

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01(G)

I certify that, pursuant to Local Rule 3.01(g), undersigned counsel for Defendant/movant Pedro Barrientos conferred telephonically with Mark Beckett and Christina Hioureas, opposing counsel representing Plaintiffs. Plaintiffs' counsel will contest all aspects of the present motion, and intend to file a memorandum in opposition stating their position.

/s/ P. Jan Kubicz, Esq.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was electronically filed with the Clerk of this Court by using the CM/ECF system, which will send a notice of the electronic filing to counsel for Plaintiffs: I certify that a copy of the foregoing was electronically filed with the Clerk of this Court by using the CM/ECF system, which will send a notice of the electronic filing to counsel for Plaintiffs: Christian Urrutia, Esq., Christina Hioureas, Esq., Richard Dellinger, Esq., Marc

Suskin, Esq., Mark D. Beckett, Esq., Nushin Sarkarati, Esq., Serine Consolino, Esq., Stephen D.

Busey, Esq., L. Kathleen Roberts, Esq.

/s/ P. Jan Kubicz, Esq.