

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

DAVID BONIFACE,
NISSANDÈRE MARTYR, and
JUDERS YSEMÉ,

Plaintiffs,

v.

JEAN MOROSE VILIENA
(a.k.a. JEAN MOROSE VILLIENA),

Defendant.

Case No. 1:17-cv-10477-ADB

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT OF PLAINTIFES
DAVID BONIFACE, NISSANDERE MARTYR AND JUDERS YSEME**

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INTRODUCTION

Plaintiffs David Boniface, Nissandère Martyr,¹ and Juders Ysemé (collectively “Plaintiffs”) bring suit against defendant Jean Morose Viliena (“Defendant”) under the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, for Defendant’s role in the extrajudicial killing of David Boniface’s brother, Ecclesiaste Boniface, and in the torture and attempted extrajudicial killing of Juders Ysemé and Nissage Martyr.² Defendant asserts, as an affirmative defense, that Plaintiffs failed to exhaust local Haitian remedies prior to filing suit in the United States under the TVPA.³ For the following reasons, Plaintiffs respectfully request that the Court grant their motion for partial summary judgment on the exhaustion defense.

First, Defendant bears a substantial burden to prove his affirmative defense but has failed to adduce any evidence that Plaintiffs failed to exhaust local remedies in Haiti.

Second, the uncontroverted evidence demonstrates that Plaintiffs diligently pursued local remedies in Haiti despite intractable obstacles, including Defendant’s flight from justice. Defendant has not, and cannot, overcome the presumption and the undisputed evidence that Plaintiffs exhausted their local remedies in Haiti.

Finally, even if there were a disputed issue of material fact as to whether Plaintiffs

¹ On March 24, 2017, one day after Defendant was served with the Summons and Complaint in this matter, original plaintiff Nissage Martyr died suddenly under unusual circumstances. On August 31, 2018, the Court granted Plaintiffs’ motion to substitute Nissandère Martyr, the son of Nissage Martyr, as Plaintiff pursuant to Federal Rule of Civil Procedure 25. *Boniface v. Viliena*, 338 F. Supp. 3d 50, 70-73 (D. Mass. 2018).

² Plaintiffs also assert a claim of arson under the laws of the Republic of Haiti pursuant to 28 U.S.C. § 1367. Compl. ¶¶ 118-24, Dkt. 1.

³ See First Am. Answer, First Affirmative Defense, Dkt. 131 (“The Complaint fails to state a claim upon which relief may be granted.”); Mot. Dismiss 10-12, Dkt. 46 (arguing Plaintiffs failed to state a claim because of their failure to exhaust local remedies in Haiti).

sufficiently exhausted local remedies, the evidence is undisputed that remedies in Haiti are ineffective, unobtainable, unduly prolonged, inadequate, and obviously futile.

RELEVANT BACKGROUND

Les Irois is a town in the Grand-Anse department of Haiti. In December 2006, defendant Jean Morose Viliena (“Defendant”) was elected mayor of Les Irois as a candidate for the Haitian Democratic and Reform Movement (MODEREH) political party.⁴ Defendant’s main opposition in the mayoral election was a candidate from the Struggling People’s Party (OPL).⁵ Following his election in December 2006, Defendant served as mayor of Les Irois through February 2010.⁶

In August 2012, Defendant was appointed by former Haitian President Michel Martelly to serve as the Interim Executive Agent for Les Irois.⁷ As Interim Executive Agent, Defendant exercised the functions of mayor until his term expired in or around October 2015.⁸

In July 2007, Plaintiff David Boniface was a resident of Les Irois, where he worked as a grade school teacher.⁹ He was also a trained and certified human rights observer.¹⁰ He supported

⁴ Declaration of Bonnie Lau (“Lau Decl.”) Ex. 3 [Viliena Nov. 1, 2021 Dep.] at 28:8-29:9 (“I was the candidate for a political party called MODEREH”); Lau Decl. Ex. 1 [Boniface Jan. 27, 2022 Dep.] at 48:14-49:2; Lau Decl. Ex. 2 [Juders Ysemé Jan. 28, 2022 Dep.] at 39:17-41:2; *see also* First Am. Answer ¶¶ 11, 28, Dkt. 131 (“Defendant . . . admit[s] that he was elected as Mayor of Les Irois”).

⁵ Lau Decl. Ex. 3 [Viliena Dep.] at 33:4-34:13; Lau Decl. Ex. 1 [Boniface Dep.] at 48:14-23.

⁶ First Am. Answer ¶ 11, Dkt. 131.

⁷ Lau Decl. Ex. 3 [Viliena Dep.] at 35:18-20; First Am. Answer ¶ 14, Dkt. 131 (“Defendant . . . admit[s] that he served as the Interim Executive Agent of Les Irois for the period August 2012 through 2015”).

⁸ Lau Decl. Ex. 3 [Viliena Dep.] at 23:23-24:12 (describing role as “interim mayor” of Les Irois from 2013 until 2015); *see also* First Am. Answer ¶ 14, Dkt. 131.

⁹ Lau Decl. Ex. 1 [Boniface Dep.] at 63:23-64:7.

¹⁰ Lau Decl. Ex. 1 [Boniface Dep.] at 11:1-14:7, 18:13-19:3, 64:8-14.

the opposition Struggling People's Party.¹¹ On July 27, 2007, David Boniface's brother, Ecclesiaste Boniface, was murdered outside the Boniface family home.¹²

In April 2008, Plaintiff Nissage Martyr (now deceased) was a resident of Les Irois; he rented out a room in his home for the operation of a new radio station, Vision Nouvelle.¹³ The Vision Nouvelle radio station was founded by individuals affiliated with the Struggling People's Party.¹⁴ In April 2008, Plaintiff Juders Ysemé was a resident of Les Irois and was frequently present at the Vision Nouvelle radio station.¹⁵ On April 8, 2008, the Vision Nouvelle radio station was attacked and destroyed.¹⁶ Juders Ysemé and Nissage Martyr both suffered serious injuries during the attack, leaving Juders Ysemé blind in one eye and requiring Nissage Martyr to have one of his legs amputated.¹⁷

¹¹ Lau Decl. Ex. 1 [Boniface Dep.] at 47:21-49:2.

¹² Lau Decl. Ex. 3 [Viliena Dep.] at 64:10-65:11, 77:22-78:5 (acknowledging that Ecclesiaste Boniface was murdered in Les Irois in July 2007 while he was mayor); Lau Decl. Ex. 1 [Boniface Dep.] at 15:19-23, 38:24-39:19, 40:18-41:16, 73:20-74:6.

¹³ Lau Decl. Ex. 3 [Viliena Dep.] at 81:5-82:1; Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 11:21-12:5; Lau Decl. Ex. 13 [Mers Ysemé Oct. 29, 2020 Dep.] at 42:19-52:18.

¹⁴ Lau Decl. Ex. 3 [Viliena Dep.] at 81:8-14, 87:7-12.

¹⁵ Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 11:16-12:2, 43:12-44:18.

¹⁶ Lau Decl. Ex. 3 [Viliena Dep.] at 81:5-11, 105:25-106:10, 107:23-108:21, 109:8-112:16 (acknowledging attack on Vision Nouvelle radio station in Les Irois in April 2008 while he was mayor).

¹⁷ Lau Decl. Ex. 3 [Viliena Dep.] at 107:23-108:3, 109:17-110:15, 110:23-111:11 (acknowledging injuries to Juders Ysemé and Nissage Martyr); Lau Decl. Ex. 7 [Viliena Jan. 11, 2022 Dep.] at 221:1-8, 234:25-235:14 (same); Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 8:15-11:9, 15:24-23:11, 44:19-62:13, 107:18-109:16 (describing attack and injuries to himself and Nissage Martyr).

On October 29, 2009, thirty-six homes were burned down in Les Irois in a mass arson.¹⁸

These included the homes of David Boniface, Juders Ysemé, and Nissage Martyr.¹⁹

PROCEDURAL HISTORY

On March 22, 2017, Plaintiffs David Boniface, Juders Ysemé, and Nissage Martyr filed the complaint initiating this lawsuit (the “Complaint”).²⁰

The day after Defendant was served with the Summons and Complaint, Plaintiff Nissage Martyr, who had appeared to be in good health, died under mysterious circumstances in Haiti.²¹ Nissage fell gravely ill rapidly and unexpectedly, and died on his way to the hospital.²² This Court substituted his son Nissandère Martyr as a plaintiff in place of Nissage Martyr.²³

On March 23, 2018, Defendant moved to dismiss the Complaint, arguing *inter alia* that Plaintiffs had failed to state a claim under the TVPA given their alleged failure to exhaust local remedies in Haiti.²⁴ On August 31, 2018, the Court rejected Defendant’s exhaustion arguments

¹⁸ Lau Decl. 7 [Viliena Dep.] at 130:13-131:16, 136:18-21 (acknowledging that the mass arson destroyed thirty-six homes in Les Irois in October 2009 when he was mayor); Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 72:3-73:1; Lau Decl. Ex. 1 [Boniface Dep.] at 76:13-77:5; Lau Decl. Ex. 14 [LaGuerre Oct. 28, 2020 Dep.] at 37:10-38:2, 43:4-24; Lau Decl. Ex. 15 [Larrieux Oct. 26, 2020 Dep.] at 59:19-61:11; Lau Decl. Ex. 16 [Lebon June 4, 2021 Dep.] at 39:14-17, 50:24-51:25; Lau Decl. Ex. 17 [Frankel Ysemé Oct. 27, 2020 Dep.] at 43:9-45:18; Lau Decl. Ex. 13 [Mers Ysemé Dep.] at 63:2-13, 66:11-67:13.

¹⁹ Lau Decl. Ex. 1 [Boniface Dep.] at 77:123; Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 24:25-30:23, 66:19-24, 72:5-73:19.

²⁰ Compl., Dkt. 1.

²¹ Ysemé Decl. ¶ 3, Dkt. 78-1; Ysemé Decl. ¶ 4, Dkt. 105; Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 94:1-98:17; Nissage Martyr Death Notice 1, Dkt. 18; *see also* Lau Decl. Ex. 7 [Viliena Dep.] at 196:15-197:15, (acknowledging death of Nissage Martyr after service of Complaint); First Am. Answer ¶ 16, Dkt. 131 (“Nissage Martyr is deceased . . .”).

²² Ysemé Decl. ¶ 3, Dkt. 78-1; Ysemé Decl. ¶ 4, Dkt. 105; Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 94:1-98:17; Nissage Martyr Death Notice 1, Dkt. 18.

²³ Mots. Dismiss & Sub. Parties Mem. & Order 27-31, Dkt. 56.

²⁴ Mot. Dismiss 10-12, Dkt. 46.

and allowed Plaintiffs' TVPA claims to proceed. *Boniface v. Viliena*, 338 F. Supp. 3d 50, 64, 66-67 (D. Mass. 2018). The Court acknowledged that Plaintiffs' Complaint contained detailed allegations regarding the purported dysfunction of the Haitian justice system, the pattern of retribution against individuals who attempted to pursue legal accountability in Haiti, and Defendant's own actions to thwart domestic proceedings against him, including fleeing to Massachusetts to escape prosecution—all valid bases to demonstrate that Plaintiffs lacked effective domestic legal remedies under the TVPA. *Id.* at 64, 66-67.

On August 8, 2019 and March 30, 2020, the Court entered protective orders against Defendant, finding on both occasions that Plaintiffs had demonstrated that Defendant posed a past and ongoing threat to Plaintiffs and to witnesses.²⁵

EXPERT TESTIMONY ON EXHAUSTION OF LOCAL REMEDIES

Plaintiffs served Defendant with two expert witness disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2).²⁶ The expert report of Brian Concannon, Jr. ("Concannon Report") provides expert testimony on the availability of local remedies in Haiti for Plaintiffs' claims of extrajudicial killing, torture and mass arson against Defendant.²⁷ Mr. Concannon is a lawyer who has worked full-time on issues related to human rights and democratic development in Haiti for over twenty-four years, and has been qualified and testified as an expert on Haiti at deposition

²⁵ Protective Order, Aug. 8, 2019, Dkt. 80; Elec. Order Granting Protective Order, Mar. 30, 2020, Dkt. 106.

²⁶ Plaintiffs also disclosed the expert report of Robert Maguire, a retired Professor of the Practice of International Affairs at the Elliott School of International Affairs, George Washington University, and former Senior Advisor on Haiti at the U.S. Department of State. Professor Maguire may be asked to offer testimony on the role and activities of community-based political violence groups in Haiti, including those of KOREGA in the Grand-Anse department region in Haiti in and around the 2007-2009 period.

²⁷ Declaration of Brian Concannon, Jr. ("Concannon Decl.") ¶ 4 and Ex. A [Expert Report of Brian Concannon, Jr. ("Concannon Report")] Section I.

and at trial numerous times before U.S. courts.²⁸

The Concannon Report details four principal conclusions regarding the availability of local remedies in Haiti. First, Plaintiffs have no meaningful access to remedies for their claims in the Haitian justice system, due to the inherent weaknesses of the system, including its politicization and corruption, as well as the prevailing political context.²⁹ Second, Plaintiffs, like others in Haiti who seek justice for politically-motivated attacks, are subject to an ongoing risk of retaliation for attempting to access local remedies.³⁰ Third, even assuming a Haitian court was able and willing to render a judgment against a politically-connected individual, which is unlikely, the enforcement of a civil damages award in these types of cases is nonexistent in Haiti.³¹ Fourth, despite these intractable obstacles, Plaintiffs have nevertheless pursued local remedies with the utmost diligence, utilizing both legal and advocacy mechanisms, with a predictable lack of results.³²

Defendant has not disclosed any expert witnesses pursuant to Federal Rule of Civil Procedure 26(a)(2) and expert discovery closed on January 31, 2022.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” This Court has repeatedly held that partial summary judgment may properly be granted as to affirmative defenses. *See, e.g., United States ex rel. Martino-Fleming v.*

²⁸ Concannon Report Section I.

²⁹ Concannon Report Section II.A.

³⁰ Concannon Report Section II.B.

³¹ Concannon Report Section II.C.

³² Concannon Report Section II.D.

S. Bay Mental Health Ctrs., 540 F. Supp. 3d 103, 133 (D. Mass. 2021); *First Choice Armor & Equip., Inc. v. Toyobo Am., Inc.*, 839 F. Supp. 2d 407, 415 (D. Mass. 2012); *Mass. Inst. of Tech. v. Lockheed Martin Global Telecomms., Inc.*, 251 F. Supp. 2d 1006, 1007 n.1 (D. Mass. 2003); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (“One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported . . . defenses.”).

Where, as here, the moving party does not bear the burden of proof on an issue at trial, that party may show “that there is an absence of evidence to support the nonmoving party’s case”; a negation of the non-moving party’s claim or defense is not required. *See OneBeacon Am. Ins. Co. v. Com. Union Assur. Co.*, 684 F.3d 237, 241 (1st Cir. 2012) (quoting *Celotex*, 477 U.S. at 325); *see also F.D.I.C. v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) (holding that where a plaintiff uses a summary judgment motion “to challenge the legal sufficiency of an affirmative defense — on that which the defendant bears the burden of proof at trial — a plaintiff may satisfy its Rule 56 burden by showing that there is an absence of evidence to support an essential element of the non-moving party’s case”). If the moving party shows that there is an absence of evidence, the non-moving party who bears the burden of proof at trial must contradict this showing by presenting “definite, competent evidence”; the judge may not “allow conjecture to substitute for the evidence necessary to survive summary judgment.” *Town of Westport v. Monsanto Co.*, 877 F.3d 58, 66 (1st Cir 2017) (quoting *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991); and *Pina v. Children’s Place*, 740 F.3d 785, 802 (1st Cir. 2014)).

ARGUMENT

I. Defendant Has Failed to Satisfy the Substantial Burden to Prove the Affirmative Defense of Exhaustion of Local Remedies.

The TVPA’s exhaustion defense “was not intended to create a prohibitively stringent condition precedent to recovery under the statute.” *Xuncax v. Gramajo*, 886 F. Supp. 162, 178

(D. Mass. 1995). The exhaustion defense “‘is an affirmative defense, requiring the defendant to bear the burden of proof,’ a burden which is ‘substantial.’” *Boniface*, 338 F. Supp. 3d at 64 (quoting *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005)). The legislative history of the TVPA indicates that in most instances the initiation of litigation “will be virtually prima facie evidence that the claimant has exhausted his or her remedies.” *Boniface*, 338 F. Supp. 3d at 65 (quoting *Dorelien*, 431 F.3d at 781-82 (quoting S. Rep. No. 102-249, at 9-10 (1991))); *see also Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1357 (S.D. Fla. 2003) (“Plaintiffs [in TVPA cases] are entitled to a presumption that local remedies have been exhausted, which Defendants must overcome before Plaintiffs are required to prove exhaustion or, presumably, the futility of exhausting local remedies.”).

Only when the defendant “makes a showing of remedies abroad which have not been exhausted” does the burden shift to the plaintiff “to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile.” *Boniface*, 338 F. Supp. 3d at 65 (quoting *Dorelien*, 431 F.3d at 782). The ultimate burden of proof, however, “lies with the defendant.” *Boniface*, 338 F. Supp. 3d at 65 (quoting *Dorelien*, 431 F.3d at 782). To the extent there is any doubt on the issue of exhaustion, “both Congress and international tribunals have mandated that such doubts be resolved in favor of the plaintiffs.” *Boniface*, 338 F. Supp. 3d at 65 (quoting *Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005)).

Plaintiffs are thus entitled to a presumption that local remedies have been exhausted.

II. Defendant Has Adduced No Evidence to Support the Exhaustion Defense.

Defendant has failed to produce any evidence whatsoever to support his argument that Plaintiffs somehow failed to exhaust local remedies. Plaintiffs’ motion can be granted on this basis alone. *See, e.g., Giammettei*, 34 F.3d at 54 (affirming summary judgment of affirmative

defenses because defendants failed to offer evidence to support the underlying elements of the defenses); *Jaramillo v. Naranjo*, No. 10-21951-Civ-TORRES, 2021 WL 4427455, at *9 (S.D. Fla. Sept. 27, 2021) (granting summary judgment on exhaustion defense because defendant produced no evidence that plaintiffs failed to exhaust local remedies).

Nor can Defendant plausibly contend that there are adequate and available remedies in Haiti for Plaintiffs to exhaust in light of his own statements on the matter. Indeed, during his deposition, Defendant stated that politics thwart the availability of justice in Haiti: “In Haiti, everything that happens has to stay with politics. And any time that politics is involved in something, it’s very difficult for the people to find justice”³³

III. The Undisputed Evidence Shows that Plaintiffs Exhausted Local Remedies in Haiti.

Since 2007, prior to filing this Complaint, Plaintiffs have pursued a broad range of legal options to seek justice against Defendant and his co-conspirators in Haiti—all to no avail. The undisputed evidence plainly establishes Plaintiffs’ diligence in pursuing all available Haitian remedies. Defendant offers no evidence to overcome either the presumption or the uncontroverted evidence that Plaintiffs exhausted local remedies.

It is undisputed that Plaintiffs have exercised the utmost diligence in trying to initiate and support legal proceedings related to the death of Ecclesiaste Boniface, the injuries inflicted on Juders Ysemé and Nissage Martyr during the radio station attack, and the mass arson. On July 28, 2007, the day after his brother Ecclesiaste Boniface was killed, David Boniface filed a

³³ Lau Decl. Ex. 3 [Viliena Dep.] at 112:21-24; *see also id.* at 112:12-16 (“[...] because it takes senators and deputy with the power to have the police to come to a place like Les Irois.”); *id.* at 113:11-17 (describing the “weakness” and “irresponsibility” of the Haitian state).

complaint with the Haitian authorities.³⁴ Since then, Plaintiffs have made numerous additional filings with Haitian authorities related to all three incidents.³⁵ Plaintiffs have testified in the legal proceedings despite threats and obstacles directed at them and other witnesses,³⁶ including coordinated road blockages by Defendant's associates to keep them from reaching the courthouse.³⁷

It is also undisputed that Plaintiffs made related filings with regional and international bodies, including the Inter-American Commission on Human Rights and MINUSTAH (the UN peacekeeping mission in Haiti), as well as engaged in extrajudicial advocacy for accountability.³⁸ As Mr. Concannon opines, “[w]ith the possible exception of the victims of the Raboteau Massacre, I am not aware of any victims of human rights violations in Haiti who have worked with more persistence than Plaintiffs to obtain justice.”³⁹

Nevertheless, the undisputed evidence shows that Defendant has avoided accountability in Haiti. Defendant was initially arrested in September 2008, but was released three months later

³⁴ Lau Decl. Ex. 1 [Boniface Dep.] at 72:13-73:4.

³⁵ Concannon Report ¶ 114; Lau Decl. Ex. 1 [Boniface Dep.] at 78:25-83:19 (detailing the numerous filings made with Haitian authorities, including the prosecutors for Grand-Anse and the Jérémie court of first instance, investigating judge for the civil court of Jérémie, and Les Irois police precinct and Jérémie office of the Haitian National Police); Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 23:6-9, 75:11-23, 79:23-80:8, 89:1-14 (detailing numerous filings made with Haitian authorities, including the civil court of Jérémie and peace court of Les Irois).

³⁶ *See infra* Section IV.B.

³⁷ Lau Decl. Ex. 1 [Boniface Dep.] at 97:12-99:16; *see also* Lau Decl. Ex. 15 [Larrioux Dep.] at 37:16-38:21 (describing Defendant's associates stopping him from attending hearing in Jérémie).

³⁸ Concannon Report ¶ 115; Lau Decl. Ex. 1 [Boniface Dep.] at 42:14-43:7, 79:14-82:15; Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 14:7-15:16, 89:1-25, 90:22-93:15.

³⁹ Concannon Report ¶ 114.

following political pressure.⁴⁰ Defendant then fled to the United States and was declared a “fugitive” by Haitian courts.⁴¹ Defendant largely remained in the United States until his appointment by presidential decree as Interim Executive Agent in August 2012.⁴² Following his appointment—and the government support it conveyed—Defendant began to return frequently to Haiti, travelling freely despite the Haitian criminal charges which remained pending against him.⁴³ The criminal proceedings against Defendant languished without any progress,⁴⁴ as did Plaintiffs’ civil party claims, which under Haitian law were conjoined with the criminal proceedings.⁴⁵ *See Gramajo*, 886 F. Supp. at 178 (finding that plaintiff had exhausted local remedies where, despite plaintiff’s diligent efforts, the domestic criminal case stalled and the attendant civil claims did not proceed).

Only *after* Plaintiffs filed the U.S. Complaint in March 2017 did Defendant belatedly

⁴⁰ Concannon Report ¶¶ 70-71.

⁴¹ Concannon Report ¶ 120.

⁴² Concannon Report ¶ 72; *see also* Lau Decl. Ex. 4 (Viliena Passport Pages [Viliena Fourth Supp Production 000001-15]) (showing exit stamp from Port-au-Prince and entry stamp from Miami dated November 27, 2009, and entry stamp from Port-au-Prince dated August 20, 2012, with no other entry or exit stamps between); Lau Decl. Ex. 7 [Viliena Dep.] at 188:23-189:2, 189:13-14 (“I visited Haiti more often from 2013 I went to the United States in December 2009 and only came back in 2012 or 2013”); Lau Decl. Ex. 8, Open Letter from Viliena (Mar. 15, 2011) [Viliena Second Supp Production 000042-47], at Viliena Second Supp Production 000042 (stating Viliena has resided in the United States for over twelve months as of March 15, 2011).

⁴³ Concannon Report ¶ 72 (“Naming him mayor despite serious outstanding charges of lethal misuse of his official powers was a strong signal—to the courts, the police, the people of Les Irois, Plaintiffs, and Defendant himself—that the government would stand by him, regardless of any pending charges.”).

⁴⁴ Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 84:14-85:9 (explaining that Defendant was never convicted after being released).

⁴⁵ Concannon Report ¶¶ 99, 111 (describing the civil party procedure and Plaintiffs’ languishing civil party claims); *see also* Declaration of Mario Joseph, Attorney, Dkt. 20-1, ¶¶ 5, 8, 13 (describing *partie civile* procedure under Haitian law).

choose to engage with the Haitian legal proceedings.⁴⁶ Even then, he did so under highly questionable circumstances. During his “acquittal” at an April 30, 2018 hearing, no witnesses were summoned or testified, and no questions were asked regarding the killing of Ecclesiaste Boniface or the radio station attack—the purported subject matter of the charges against him.⁴⁷ Nor did Plaintiffs receive timely notice, as they were only notified of the hearing the day before it was scheduled to take place.⁴⁸ The acquittal at the hearing “was the result of either a corrupt decision or willful disregard for judicial standards.”⁴⁹ Moreover, despite Plaintiffs’ persistent efforts, no proceedings have been initiated in Haiti against Defendant for the mass arsons.⁵⁰

The record is clear that Plaintiffs diligently sought legal remedies in Haiti and elsewhere. Defendant has adduced no evidence to show otherwise. There is no genuine dispute as to any material fact that Plaintiffs have exhausted local remedies in Haiti under the TVPA. The Court should grant partial summary judgment in favor of Plaintiffs on the exhaustion defense.

IV. It Is Undisputed that Remedies in Haiti Are Ineffective, Unobtainable, Unduly Prolonged, Inadequate, or Obviously Futile.

Even if the Court were to find there is a disputed issue as to Plaintiffs’ efforts to pursue local remedies, the undisputed evidence also establishes that remedies in Haiti are ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile, such that exhaustion under the TVPA is not required. In rejecting Defendant’s exhaustion argument at the motion to dismiss

⁴⁶ Concannon Report ¶¶ 111, 121.

⁴⁷ Concannon Report ¶¶ 121-22

⁴⁸ Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 82:22-83:1; 110:4-11.

⁴⁹ Concannon Report ¶ 121-22.

⁵⁰ Concannon Report ¶ 113; *see also* Lau Decl. Ex. 1 [Boniface Dep.] at 95:13-96:9 (confirming that proceedings for the mass arson were never initiated against Defendant); Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 77:8-10, 80:17-21 (same).

stage, the Court emphasized that “[c]ourts have routinely found that threats of violent retaliation and allegations that a country’s judicial system is corrupt or ineffective are sufficient to show that a plaintiff lacks effective domestic legal remedies.” *Boniface*, 338 F. Supp. 3d at 66 (collecting cases); *see also Gramajo*, 886 F. Supp. at 178 (holding that “when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile,” exhaustion under the TVPA is not required (quoting S. Rep. No. 102-249 (1991))).

Here, Plaintiffs have pursued and produced discovery to support each of the allegations relied upon by this Court to deny Defendant’s motion to dismiss, namely that the systemic weakness of the Haitian judiciary and threats of retaliation rendered it futile for Plaintiffs to pursue local remedies. *See Boniface*, 338 F. Supp. 3d at 66. Further, the record establishes that the recovery of civil damage awards is nonexistent in Haiti, and Plaintiffs, in fact, have never recovered any portion of their damage award. The undisputed evidence thus shows that Plaintiffs lack effective domestic legal remedies in Haiti.

A. The Haitian Justice System Is Politicized and Corrupt.

“Plaintiffs have no meaningful access to remedies for their claims in the Haitian justice system” because of the inherent weaknesses of the system, including its politicization and corruption. Concannon Report ¶ 129; *accord Dorelien*, 431 F.3d at 782-83 (finding Haitian remedies futile because, *inter alia*, the political situation in Haiti hindered access to justice); *Ahmed v. Magan*, No. 2:10-cv-342, 2011 WL 13160129, at *4-5 (S.D. Ohio Nov. 7, 2011) (finding local remedies futile where judiciary had insufficient training and there were other “problems in the administration of justice”). The Concannon Report details the systemic shortcomings of the Haitian legal system, which foreclose the availability of local remedies for

cases such as Plaintiffs’ that involve political violence.⁵¹ Defendant apparently concurs, as evidenced by his own deposition testimony.⁵²

Given the political context in Haiti over the past decade, any remedies were particularly futile for the extrajudicial killing of Ecclesiaste Boniface and the torture and attempted extrajudicial killing of Plaintiffs Juders Ysemé and Nissage Martyr. Defendant was initially arrested for his role in the murder of Ecclesiaste Boniface and in the attack on the Vision Nouvelle radio station against Juders Ysemé and Nissage Martyr in September 2008.⁵³ Approximately three months later, however, Defendant was released from detention under political pressure and fled to the United States.⁵⁴ In August 2012, President Martelly appointed Defendant as Interim Executive Agent of Les Irois via presidential decree, despite his pending criminal charges and fugitive status.⁵⁵ The appointment “was a strong signal—to the courts, the police, the people of Les Irois, Plaintiffs, and Defendant himself—that the government would stand by him, regardless of any pending charges.”⁵⁶ Following his appointment, Defendant returned frequently to Haiti with impunity, and without encountering any consequences from his pending criminal charges.⁵⁷ Indeed, both the administrations of President Martelly (2011-2016) and President Moïse (2016-2021) have a record of supporting Defendant and opposing efforts to

⁵¹ Concannon Report ¶¶ 34-46.

⁵² Lau Decl. Ex. 3 [Viliena Dep.] at 112:21-24 (“In Haiti, everything that happens has to stay with politics. And any time that politics is involved in something, it’s very difficult for the people to find justice”)

⁵³ Concannon Report ¶ 70.

⁵⁴ Concannon Report ¶¶ 70-71.

⁵⁵ Lau Decl. Ex. 3 [Viliena Dep.] at 35:18-20; First Am. Answer ¶ 14, Dkt. 131; Concannon Report ¶ 72.

⁵⁶ Concannon Report ¶ 72.

⁵⁷ Concannon Report ¶ 72.

seek justice by victims of political violence.⁵⁸

B. Plaintiffs and Witnesses Face Threats of Retributive Violence.

Plaintiffs and potential witnesses are subject to an ongoing risk of retaliation for attempting to access remedies in Haiti, rendering any such remedies “unavailable” under the TVPA. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003) (“[T]he Court is aware of no case . . . in which plaintiffs were required to exhaust local remedies . . . where doing so would be futile and would put plaintiffs in great danger.”), *disagreed with on other grounds, Kiobel v. Royal Dutch Petro. Co.*, 621 F.3d 111 (2d Cir. 2010); *Dorelien*, 431 F.3d at 782-83 (determining that defendant failed to dispute that the ongoing risk of retaliation against plaintiffs would prevent successful litigation of human rights claims in Haiti).

Intimidation and violence are routinely used to thwart judicial proceedings in Haiti.⁵⁹ In particular, perceived political dissidents, especially those advocating for increased accountability against individuals, such as Defendant, who are affiliated with the Martelly and Moïse administrations, face additional risks to their safety.⁶⁰ “Plaintiffs and witnesses in these cases are frequently targets of intimidation, harassment, and violence either to deter them from participating in cases and pursuing accountability, or as retribution because they have attempted to do so.”⁶¹

Plaintiffs and multiple witnesses have testified to the ongoing threats and retaliation they

⁵⁸ Concannon Report ¶¶ 59-63.

⁵⁹ Concannon Report ¶¶ 73-82.

⁶⁰ Concannon Report ¶¶ 83-95.

⁶¹ Concannon Report ¶ 96.

have suffered—and continue to suffer—for their attempts to pursue justice in Haiti against Defendant.⁶² In July 2015, the Inter-American Commission on Human Rights issued precautionary measures ordering the Government of Haiti to immediately provide protection to Plaintiffs, along with their families, in light of the serious threats of violence by Defendant and his associates.⁶³ No such steps were ever taken.

In March 2017, Nissage Martyr, one of the original plaintiffs in this lawsuit, died under unusual circumstances in Haiti the day after Defendant was served with the Summons and Complaint.⁶⁴ Following continued threats, Plaintiffs David Boniface and Juders Ysemé were forced to flee Les Irois and go into hiding, where they have remained for the past five years, disconnected from their families, friends, and economic and social networks.⁶⁵

This Court has twice entered protective orders against Defendant, finding that Plaintiffs have demonstrated good cause to conclude that Defendant poses a past and ongoing threat to Plaintiffs and other witnesses.⁶⁶

⁶² Lau Decl. Ex. 1 [Boniface Dep.] at 43:8-23, 71:21-73:4, 96:11-100:6, 102:3-103:12; Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 98:18-105:2; Lau Decl. Ex. 14 [LaGuerre Dep.] at 15:2-27:15; Lau Decl. Ex. 15 [Larrieux Dep.] at 34:2-36:10, 37:12-41:10; Lau Decl. Ex. 17 [Frankel Ysemé Dep.] at 17:16-19:18.

⁶³ Ysemé Decl., Dkt. 78-1, Ex. B1 (Resolution 26/2015 of the IACHR); Ysemé Decl., Dkt. 105, Ex. B1 (same).

⁶⁴ Nissage Martyr Death Notice 1, Dkt. 18.

⁶⁵ Lau Decl. Ex. 1 [Boniface Dep.] at 101:24-102:2, 103:13-105:15; Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 105:23-107:4; Ysemé Decl. ¶ 4, Dkt. 78-1; Ysemé Decl. ¶ 5, Dkt. 105.

⁶⁶ Protective Order, Aug. 8, 2019, Dkt. 80 (“Defendant Jean Morose Viliena [] was present in Haiti on or around August 4, 2019 and had contact with former associates during which he discussed harming Plaintiffs. Plaintiffs Boniface and Ysemé reasonably fear for their safety and are concerned about retaliation by Defendant. Their fears are based on past dealings with Defendant as well as a recent interaction with men they believe to be Defendant’s associates.”); Elec. Order Granting Protective Order, Mar. 30, 2020, Dkt. 106 (“This protective order . . . is necessary to protect Plaintiffs’ witnesses due to reasonable fear for their safety.”).

C. Recovery of Civil Damages Is Nonexistent in Haiti, Including for Plaintiffs Here.

Local remedies in Haiti remain unobtainable and inadequate given that, even in the rare instances where legal proceedings for political violence progress to judgment, enforcement of civil damages awards is nonexistent. *See Lizarbe v. Rondon*, 642 F. Supp. 2d 473, 485 (D. Md. 2009) (finding that defendant failed to meet his burden as to exhaustion where the court “has no basis for determining what items of damages are compensable under Peruvian law or whether a civil award against [defendant] in Peru could begin to approach the level of the Florida District Court award, were he to be found liable”), *aff’d in part*, 402 F. App’x 834 (4th Cir. 2010).

According to Mr. Concannon, there does not appear to be “a single case over the past twenty-seven years in which a plaintiff obtained civil damages for political violence in a Haitian court.”⁶⁷ Here, although Plaintiffs’ claims progressed against five lower-level defendants who remained in Haiti and resulted in a damages award for the extrajudicial killing of Ecclesiaste Boniface and the attack on the radio station in the Les Cayes trial court in July 2015, Plaintiffs have never been able to recover any portion of this award.⁶⁸ Nor have Plaintiffs recovered any of the damages awarded to them by the Jérémie civil court in 2013 from the individuals convicted of the mass arson that burned down their homes.⁶⁹

In sum, the undisputed evidence demonstrates that Plaintiffs’ remedies in Haiti are ineffective, unobtainable, unduly prolonged, inadequate, and obviously futile, thus overcoming any exhaustion defense under the TVPA.

⁶⁷ Concannon Report ¶ 98.

⁶⁸ Concannon Report ¶ 112; Lau Decl. Ex. 1 [Boniface Dep.] at 54:12-56:20; Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 23:17-24:6, 79:10-79:22.

⁶⁹ Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 81:12-82:6, 86:1-88:23.

CONCLUSION

Defendant has adduced no evidence showing that Plaintiffs failed to exhaust local remedies in Haiti, and fails to meet his substantial burden to prove this affirmative defense. Instead, the undisputed evidence demonstrates that Plaintiffs exhausted local remedies and diligently pursued justice in Haiti despite Defendant's flight from justice. The undisputed evidence also establishes that Plaintiffs have no effective remedies in Haiti given the systemic weakness of the Haitian judicial system, threats of retributive violence, and inability to collect civil judgment awards in political violence cases. As Defendant himself acknowledged during his deposition, it is futile to pursue justice in Haiti given the politicization of its justice system. Accordingly, Plaintiffs respectfully request that the Court grant their motion for partial summary judgment as to Defendant's exhaustion affirmative defense.

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Respectfully submitted,

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