

**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

PLAINTIFFS DAVID BONIFACE, NISSANDÈRE MARTYR AND JUDERS YSEMÉ'S
REPLY IN SUPPORT OF THEIR MOTION
FOR PARTIAL SUMMARY JUDGMENT

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Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 56.1 of the Local Rules of the United States District Court for the District of Massachusetts, Plaintiffs David Boniface, Nissandère Martyr, and Juders Ysemé (collectively “Plaintiffs”) hereby submit this Reply in support of their Motion for Partial Summary Judgment.¹ For the reasons detailed below, as well as in Plaintiffs’ Motion for Partial Summary Judgment² and Plaintiffs’ Opposition to Defendant’s Motion for Summary Judgment and in the Alternative to Sever Claims,³ Plaintiffs respectfully request that this Court grant partial summary judgment in their favor on Defendants’ affirmative defense of failure to exhaust local remedies.

I. THIS COURT SHOULD GRANT PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. Defendant’s Opposition Repeats Arguments Already Rejected by This Court and Fails to Establish Any Disputed Material Facts Regarding Exhaustion.

Defendant contends that “[t]his is not a case in which . . . the Defendant should bear the burden of establishing the existence of local remedies,”⁴ notwithstanding established precedent to the contrary, including this Court’s decision denying Defendant’s Motion to Dismiss. *Cf. Boniface v. Viliena*, 338 F. Supp. 3d 50, 64-65 (D. Mass. 2018) (quoting *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005)) (explaining that the substantial burden to show “that there are remedies abroad which have not been exhausted . . . lies with the defendant”). Defendant argues that the Declaration of Mario Joseph, Plaintiffs’ Haitian attorney, and the existence of related Haitian

¹ Plaintiffs have concurrently filed a Motion to Strike a Portion of the Affidavit of Jean Morose Viliena in Opposition to Plaintiffs’ Motion for Partial Summary Judgment.

² Dkt 144-148.

³ Dkt 153-154.

⁴ Dkt 150 at 4.

proceedings are somehow sufficient for him to overcome the presumption and shift the burden to Plaintiffs for his exhaustion affirmative defense. Defendant's argument fails on multiple grounds.

First, Defendant offers no material evidence to overcome the presumption or the uncontroverted evidence that Plaintiffs exhausted local remedies. Defendant's Opposition does not identify *any* additional local remedies that he believes Plaintiffs should have exhausted prior to filing their TVPA suit.⁵ Indeed, Plaintiffs have made numerous filings with Haitian authorities, as well as regional and international bodies, 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. Plaintiffs have testified in the legal proceedings despite obstacles and threats directed at them and other witnesses, including coordinated road blockages by Defendant's associates to keep Plaintiffs from reaching the courthouse.⁶ In addition, the undisputed evidence shows that Defendant has avoided accountability in Haiti. Defendant fled to the United States and was declared a "fugitive" by Haitian courts. Defendant's self-serving assertion that he "fully and freely participated in all judicial proceedings brought against him in Haiti"⁷ flies in the face of this judicial determination, as well as the uncontroverted evidence documenting his use of the United States as a safe harbor from prosecution. Only *after* Plaintiffs filed the U.S. Complaint in March 2017 did Defendant belatedly choose to engage with the Haitian legal proceedings and, even then, he did so under highly questionable circumstances.⁸

Second, Defendant's proffered evidence is insufficient to negate the presumption that

⁵ Dkt 150 at 3-4.

⁶ Dkt 145 Section III.

⁷ Dkt 150 at 2.

⁸ Dkt 145 at 10-12.

Plaintiffs exhausted local remedies. As this Court has recognized, the Declaration of Mario Joseph, Plaintiffs' Haitian attorney, simply establishes that, as a matter of Haitian law, Plaintiffs have *standing* to seek damages from Defendant, which they pursued as part of the stalled criminal case against Defendant and his co-conspirators in Haiti. *See Boniface*, 338 F. Supp. 3d at 65. The Declaration details some of the numerous steps taken by Plaintiffs to hold Defendant accountable in Haiti and supports, rather than detracts from, the uncontroverted evidence that Plaintiffs exhausted local remedies.⁹ Similarly, the fact that proceedings progressed against five lower-level defendants who remained in Haiti, is insufficient to establish that Plaintiffs failed to exhaust local remedies as to Defendant, particularly given his flight from justice. Further, those Haitian proceedings did not offer Plaintiffs an adequate remedy as they were marred by ongoing threats and retaliation against Plaintiffs and witnesses.¹⁰ Nor have Plaintiffs recovered any of the damages awarded to them,¹¹ in keeping with the broader dysfunction of the Haitian judiciary in political violence cases.¹²

Finally, even if the Court were to find that there is a disputed issue as to Plaintiffs' efforts to pursue local remedies, which there is not, the uncontroverted evidence establishes that remedies

⁹ Joseph Decl. ¶ 4, Dkt 20-1 (noting Plaintiff David Boniface's *partie civile* status in the criminal and civil proceedings before the Les Cayes court of first instance for the death of Eclesiaste Boniface, and Plaintiffs Juders Ysemé's and Nissage Martyr's *partie civile* statuses in the criminal and civil proceedings for injuries suffered during the radio station attack); *id.* ¶ 8 (noting that the Les Cayes court of first instance declared Defendant a "fugitive" and ordered *in absentia* proceedings against him).

¹⁰ Dkt 145 at 15-16.

¹¹ Dkt 145 at 17.

¹² Dkt 145 at 17 citing Declaration of Brian Concannon, Jr. ("Concannon Decl.") ¶ 98 ("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.'").

in Haiti are ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile, such that exhaustion under the TVPA is not required.¹³ Notably, this Court previously acknowledged Plaintiffs’ detailed allegations concerning the dysfunction of the Haitian justice system—allegations which have now been substantiated through undisputed evidence—and noted that the Declaration of Mario Joseph “would likely not be sufficient” to satisfy Defendant’s substantial

¹³ Defendant relies on *Corrie v. Caterpillar, Inc.*, 403 F.Supp 2d 1019 (W.D. Wash. 2005) to support his exhaustion argument. *Corrie*, which has never been cited in the First Circuit on exhaustion, is distinguishable on multiple fronts. In *Corrie*, family members of individuals who were killed or injured when Israeli Defense Forces (IDF) used bulldozers to demolish homes in Palestinian Territories brought suit against Caterpillar, a Delaware-incorporated corporation that manufactured and sold the bulldozers to the IDF pursuant to a U.S. congressionally-enacted program that was financed by the executive branch. As a threshold matter, the court in *Corrie* principally dismissed plaintiffs’ TVPA claims for failure to state a claim given the absence of any allegations that defendant had “participated in or directed any of the IDF’s challenged conduct.” *Corrie*, 403 F.Supp 2d at 1024. Here, in contrast, Plaintiffs alleged in detail and produced evidence and testimony substantiating Defendant’s direct participation and involvement in the TVPA claims at issue. As to exhaustion of local remedies, there was no indication in *Corrie* that plaintiffs had ever sought to file claims against Caterpillar in Israel prior to their filing of the TVPA suit. *See id.* at 1026 (taking judicial notice of court docket, which indicated that plaintiffs had filed claims against the IDF in Israel, but not against defendant Caterpillar). Here, undisputed evidence confirms Plaintiffs’ diligent efforts to exhaust local remedies against Defendant in Haiti despite intractable obstacles. Dkt 145 Section III. Further, the *Corrie* court highlighted the adequacy of the local forum in Israel, noting that “Israel’s courts are generally considered to provide an adequate alternative forum for civil matters.” *Corrie*, 403 F. Supp. 2d at 1026. In contrast, Plaintiffs have offered uncontroverted evidence regarding the systemic weakness of the Haitian justice system, including its politicization and corruption, and the threats of retributive violence against Plaintiffs and potential witnesses in cases of political violence. Dkt 145 Section IV. Notably, the U.S. State Department has explicitly acknowledged the systemic shortcomings of the Haitian judiciary. Dkt. 20-1 Ex. E [Haiti 2016 State Department Human Rights Report] at 9-12 (“[S]enior officials in the executive and legislative branches exerted significant influence on the judicial branch. . . . Judges assigned to politically sensitive cases complained about interference from the executive branch. . . . [A]uthorities often failed to question witnesses, complete investigations, compile complete case files, or conduct autopsies. . . . Courts could award damages for human rights abuse claims brought in civil forums, but seeking such remedies was difficult and rarely successful.”).

burden. *Boniface*, 338 F. Supp. 3d at 66. Defendant’s Opposition offers no evidence to meet his burden or to rebut Plaintiffs’ uncontroverted evidence regarding the futility of local remedies. *Id.* at 65 (The ultimate burden of proof “lies with the defendant.”).

B. The Concannon Expert Report and Sworn Declaration Is Properly Before this Court at Summary Judgment.

Plaintiffs’ expert, Mr. Brian Concannon Jr., signed a declaration pursuant to 28 U.S.C. § 1746 in support of Plaintiffs’ Motion for Partial Summary Judgment, attaching his expert report as Exhibit A and attesting to its truth.¹⁴ Defendant contends, without a shred of legal support, that this Court may not rely on Mr. Concannon’s expert report (“Concannon Report”), despite the fact that it was timely and properly disclosed to Defendant pursuant to Federal Rule of Civil Procedure 26(a)(2). That expert report (adopted in Mr. Concannon’s declaration) provides expert testimony on the availability of local remedies in Haiti for Plaintiffs’ claims of extrajudicial killing, torture and mass arson against Defendant. 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 and at trial numerous times before U.S. courts.¹⁵

Defendant did not disclose any expert witnesses pursuant to Federal Rule of Civil Procedure 26(a)(2).¹⁶ Nor did Defendant’s counsel elect to take Mr. Concannon’s deposition.¹⁷

¹⁴ Dkt 147.

¹⁵ Dkt 147-1 Section I. *See also* Dkt 147-1 Ex. A (listing Mr. Concannon’s expert qualifications); Ex. B (listing cases in which Mr. Concannon has testified as an expert in last four years); Ex. C (listing documents and things reviewed and/or relied upon for the expert report).

¹⁶ Declaration of Bonnie Lau (“Lau Decl.”) ¶ 3.

¹⁷ Lau Decl. ¶ 4.

Expert discovery closed on January 31, 2022.¹⁸ Defendant did not file a *Daubert* motion seeking to strike or exclude any portion of Mr. Concannon’s Report together with his dispositive motion.

Having missed his opportunity to offer his own expert witness on the issue of exhaustion, (an issue Defendant affirmatively briefed at both the pleadings and summary judgment stages), and having declined to cross-examine Mr. Concannon or seek to exclude any of his testimony, Defendant now unjustifiably seeks to bar the Court from considering the Concannon Report at summary judgment. This Court should deny Defendant’s request.

Expert reports are routinely cited by parties and relied upon by courts at summary judgment,¹⁹ including in TVPA cases.²⁰ Expert testimony is particularly warranted where, as here, the relevant issues are likely to extend beyond the personal knowledge of any single individual. This Court has found that “threats of violent retaliation and allegations that a country’s judicial system is corrupt or ineffective” are factors that are “routinely” used by courts to show that a plaintiff lacks effective domestic legal remedies.” *Boniface*, 338 F. Supp. 3d at 66 (collecting cases). Invariably, expert testimony is required to establish these types of systemic

¹⁸ Lau Decl. ¶ 5; Dkt 133-134.

¹⁹ See e.g., *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 29 n.20 (1st Cir. 2005) (finding that district court abused its discretion by failing to consider expert report at summary judgment because “[t]he report was sworn to with an affidavit”); *Sec. Inv. Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 528 F. Supp. 3d 219, 231 (S.D.N.Y. 2021) (“Courts frequently consider expert reports in ruling on summary judgment motions.”).

²⁰ See e.g., *Jane W. et al. v. Thomas*, No. CV 2:18-cv-00569, 2021 WL 4206665 (E.D. Pa. Sept. 15, 2021) (granting plaintiffs’ summary judgment motion and relying, in part, on plaintiffs’ expert report to conclude that defendant did not meet his burden of demonstrating that plaintiffs failed to exhaust local remedies in Liberia, including given the inadequacy of local remedies); *Jaramillo et al v. Naranjo*, No. 10-21951, 1:10-Civ-TORRES, 2021 WL 4427455, at *9 (S.D. Fla. Sept. 27, 2021) (granting plaintiffs’ summary judgment motion and relying, in part, on plaintiffs’ expert reports to conclude that the TVPA’s foreign state actor requirement was met).

factors. The Concannon Report (which is adopted as sworn testimony in his declaration) documents the weaknesses of the Haitian judicial system, including its politicization and corruption,²¹ as well as the broader pattern and practice of threats and retaliation against individuals, like Plaintiffs, who seek justice for politically-motivated attacks in Haiti.²²

Defendant cites no case law or legal authority whatsoever that would bar the Court from considering the Concannon Report at summary judgment. Moreover, Plaintiffs rely on numerous additional uncontroverted sources of evidence to demonstrate the futility of local remedies in Haiti, including the testimony of Plaintiffs,²³ third-party witnesses²⁴ and Defendant,²⁵ as well as

²¹ Dkt 147-1 Section II.A.

²² Dkt 147-1 Section II.B.

²³ Dkt 146 Lau Decl. Ex. 1 [Boniface Dep.] at 43:8-23, 71:21-73:4, 96:11-100:6, 102:3-103:12 (detailing the ongoing threats and retaliation because of attempts to pursue justice in Haiti); Dkt 146 Lau Decl. Ex. 2 [Juders Ysemé Dep.] at 98:18-105:2 (same).

²⁴ Dkt 146 Lau Decl. Ex. 14 [LaGuerre Dep.] at 15:2-27:15 (detailing threats); Dkt 146 Lau Decl. Ex. 15 [Larrieux Dep.] at 34:2-36:10, 37:12-41:10 (same); Dkt 146 Lau Decl. Ex. 17 [Frankel Ysemé Dep.] at 17:16-19:18 (same).

²⁵ Dkt 146 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”); *see also id.* at 112:12-16 (“[I]t 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).

In an apparent attempt to walk back his sworn testimony regarding the politicization of the Haitian judiciary, Defendant filed an affidavit in support of his Opposition, in which he states, “[b]ased on my personal experience and public life in Haiti, I believe that the country of Haiti has a functioning and fair judicial system that has provided the Plaintiffs in this case, with a means to recover damages for any claims that can be proved against others.” Dkt 152 ¶ 6. Defendant’s conclusory statement, which contradicts his prior sworn testimony and cites no facts, should be disregarded by this Court as a transparent attempt to manufacture a disputed issue solely for the purposes of opposing summary judgment. *See Mahan v. Bos Water & Sewer Comm’n*, 179 F.R.D. 49, 53 (D. Mass. 1998) (“If a party simply could offer a contradictory, post-deposition affidavit to defeat summary judgment without providing a satisfactory explanation for the contradiction, the purpose of summary judgment would be defeated.”) (internal citations omitted). Plaintiffs have filed a separate motion to strike this portion of Defendant’s affidavit.

documentary evidence.²⁶

C. The Recovery of Civil Damages is Nonexistent in Haiti, Including for Plaintiffs, Underscoring the Ineffectiveness of Local Remedies.

As Plaintiffs have previously explained, 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. Indeed, Plaintiffs have never been able to recover any portion of the damages awarded to them against the lower-level defendants who were convicted in Haiti.²⁷

Defendant's Opposition argument, which again cites no facts or law, confuses the issue, including by arguing that Plaintiffs should show "that there exist in the United States any assets that could be used to satisfy those judgments,"²⁸ to support their exhaustion argument. As detailed *supra*, it is settled that the burden as to the affirmative defense of exhaustion rests with Defendant. Further, Plaintiffs' inability to collect damages from *other defendants* is simply illustrative of the systemic weaknesses of the Haitian judiciary, which this Court has acknowledged is a relevant factor in considering whether Haitian remedies are unavailable. *Boniface*, 338 F. Supp. 3d at 66 (ineffectiveness of a country's judicial system "sufficient to show that a plaintiff lacks effective domestic remedies.").

See Plaintiffs' Motion to Strike Portion of Affidavit of Jean Morose Viliena in Opposition to Plaintiffs' Motion for Partial Summary Judgment.

²⁶ *See e.g.*, Dkt. 20-1 Ex. E [Haiti 2016 State Department Human Rights Report] at 9-12.

²⁷ Dkt 145 Section IV.C.

²⁸ Dkt 150 at 6.

II. CONCLUSION

Plaintiffs respectfully request that the Court grant their motion for partial summary judgment as to Defendant's exhaustion affirmative defense.

Dated: May 2, 2022

Respectfully submitted,

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By their attorneys,

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