**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Abukar Hassan Ahmed,

Plaintiff,

v.

Abdi Aden Magan,

Defendant.

**Case No. 2:10-cv-342
Judge Smith
Magistrate Judge Abel**

OPINION AND ORDER

This matter is before the Court on Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (Doc. 18). Plaintiff filed a response to Defendant's motion, and this matter is ripe for review. For the reasons that follow, the Court **DENIES** Defendant's motion.

I. Background

In April 2010, Plaintiff Abukar Hassan Ahmed, initiated this action under the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, Pub. L. No. 102-256 (1992), and the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, against Defendant, Abdi Aden Magan. Plaintiff alleges that Defendant is responsible for the torture, arbitrary detention, and cruel, inhuman or degrading treatment or punishment of Plaintiff in Somalia, during the reign of the Barre government, and during which time Defendant held the rank of Colonel and served as Chief of the National Security Service of Somalia Department of Investigations. Defendant moves for dismissal of this action, arguing that the common law doctrine of official act immunity bars this

Court from exercising jurisdiction over Plaintiff's claims, that Plaintiff failed to exhaust judicial remedies as required by the TVPA and ATS, and that Plaintiff's claims are time-barred under the applicable statute of limitations.

After initially reviewing Defendant's Motion to Dismiss, the Court notified the United States Department of State of this action, and requested it to provide its views on the issue of whether Defendant is entitled to sovereign immunity. (*See* Doc. 29, citing *Samantar v. Yousuf*, 130 S.Ct. 2278 (2010)). The Court invited the Department of State to submit a statement of interest by January 31, 2011, or notify the Court that it intended to file such a statement at a later date. *Id.* The United States timely notified the Court that it was actively considering whether to participate in this litigation, and requested that the Court defer any decision that addresses the immunity of a foreign official until the United States had completed its deliberations (Doc. 37). On February 10, 2011, the Court granted the request to defer ruling on the motion to dismiss and administratively stayed the action pending further order of the Court.

On March 15, 2011, the United States submitted a Statement of Interest conveying the Department of State's determination that Defendant is not immune from this suit (Doc. 45). The statement provides in part: "Upon consideration of the facts and circumstances in this case, as well as the applicable principles of customary international law, the Department of State has determined that Defendant enjoys no claim of official immunity from this civil suit." *Id.* at 7. In reaching this determination, the Department of State found it to be "particularly significant" that Defendant "is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity," and the executive branch's "assessment that it is

appropriate in the circumstances here to give effect to the proposition that U.S. residents like [Defendant] who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts." *Id.* Defendant filed a response to the Statement of Interest (Doc. 47), arguing that this Court should not defer to the determination of the executive branch. Plaintiff subsequently filed a response to Defendant's response, asserting that this Court should follow the executive branch's reasonable conclusion that Defendant is not entitled to common law immunity (Doc. 51).

Based on United States Supreme Court precedent concerning individual official immunity, this Court gives due deference to the well-reasoned express determination of the Department of State, and accordingly concludes that Defendant is not immune from suit and is subject to the jurisdiction of this Court in this action. *See Samantar*, 130 S.Ct. at 2291 (finding "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."); *see also Yousuf v. Samantar*, No. 1:04-cv-1360 (E.D. Va. Feb. 15, 2011) (after remand from the United States Supreme Court, District Court deferred to executive branch's determination that the defendant did not have foreign official immunity, and proceeded to consider the remaining issues in the defendant's motion to dismiss); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2nd Cir. 1971) (deferring to State Department's immunity issue determination, stating "once the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

On March 30, 2011, Plaintiff filed a Motion to Stay Proceedings (Doc. 46). Plaintiff sought a four-month stay in these proceedings "in light of the possible change of Plaintiff's lead and local counsel in this case," because Defendant's Motion to Dismiss remained pending,

because this case had been administratively stayed, and because a stay would allow the parties more time to resolve discovery disputes (Doc. 46). On April 22, 2011, the Magistrate Judge granted Plaintiff's motion, noting that the Court had already stayed this case until further notice (Doc. 50). The Magistrate Judge also directed the parties to call his chambers within seven days of an order ruling on the pending Motion to Dismiss to facilitate the establishment of a new case schedule.

Because all issues relating to Defendant's Motion to Dismiss have been fully briefed, the Court hereby **ADMINISTRATIVELY REOPENS** this case and will now address this motion.

II. Motion to Dismiss

Defendant argues that dismissal is appropriate because Plaintiff failed to exhaust domestic remedies and because the action is barred by the applicable statute of limitations. Although Defendant seeks dismissal pursuant to Rule 12(b)(6), he attached affidavits in support of his motion to dismiss for failure to state a claim.

Generally, a court may not consider any facts outside the complaint and any attached exhibits on a motion to dismiss for failure to state a claim. *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001). If material outside the pleadings has been offered to accompany a motion to dismiss, the court essentially has two options. First, the court may exclude the additional material and decide the motion based upon the complaint alone. *Kopec v. Coughlin*, 922 F.2d 152, 154 (2nd Cir. 1991). Second, the court may treat the motion to dismiss as a motion for summary judgment and dispose of the motion as provided in Rule 56. *Carter v. Stanton*, 405 U.S. 669, 671 (1972); *Rose v. Bartle*, 871 F.2d 331, 340 (3rd Cir. 1989). Thus, if matters outside the complaint are considered by the court in ruling on a motion to dismiss, then

the motion must be considered as a motion for summary judgment. *Sims v. Mercy Hospital of Monroe*, 451 F.2d 171 (6th Cir. 1971).

Here, the remaining issues set forth in Defendant's pending Motion to Dismiss depend on matters outside the pleadings. Therefore, Defendant's Motion to Dismiss must be, and is, converted to a Motion for Summary Judgment.

Generally, a court must provide notice that a motion to dismiss will be treated as a motion for summary judgment in order to give the parties an opportunity to present material to the Court. *Rose*, 871 F.2d 331; *see* Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion."). In the Sixth Circuit, before a district court *sua sponte* grants summary judgment on a converted motion, the "district court must afford the party against whom *sua sponte* summary judgment is to be entered ten-days notice and an adequate opportunity to respond." *Yashon v. Gregory*, 737 F.2d 547, 552 (6th Cir. 1984). Despite this "clearly established rule," an appeals court will reverse for failure to notify only if the losing party can "demonstrate prejudice." *Id.* Thus, whether notice of conversion is required depends on the facts and circumstances of each case. *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975).

In response to Defendant's motion, Plaintiff submitted his own declaration regarding the facts of this case, and declarations of others regarding such matters as the political and judicial situation in Somalia, Somaliland, and Kenya in recent decades. Because Defendant's pending motion can be decided at this time without additional filings and without prejudicing either party,

the Court will resolve it at this time pursuant to the standard governing summary judgment.

III. Summary Judgment Standard

The standard governing summary judgment is set forth in Rule 56 of the Federal Rules of Civil Procedure, which provides that "[t]he court shall grant summary judgment 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."

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *See Muncie Power Prods., Inc. v. United Techs. Auto., Inc.*, 328 F.3d 870, 873 (6th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must view all the facts, evidence and any inferences that may permissibly be drawn from the facts, in favor of the nonmoving party. *Matsushita*, 475 U.S. at 587. The Court will ultimately determine whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-53. Moreover, the purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. *Lashlee v. Sumner*, 570 F.2d 107, 111 (6th Cir. 1978). The Court's duty is to determine only whether sufficient evidence has been presented to make the issue of fact

a proper question for the jury; it does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Liberty Lobby*, 477 U.S. at 249; *Weaver v. Shadoan*, 340 F.3d 398, 405 (6th Cir. 2003).

In responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Liberty Lobby*, 477 U.S. at 257). The existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing party. *Liberty Lobby*, 477 U.S. at 252. The nonmoving party must present "significant probative evidence" to demonstrate that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Companies, Inc.*, 8 F.3d 335, 340 (6th Cir. 1993). The Court may, however, enter summary judgment if it concludes that a fair-minded jury could not return a verdict in favor of the nonmoving party based on the presented evidence. *Liberty Lobby*, 477 U.S. at 251-52; *see also Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street*, 886 F.2d at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001).

IV. Discussion

As noted above, Defendant argues that Plaintiff's claims should be dismissed for failure to

and of legal documentation in Somaliland, which caused problems in the administration of justice. Untrained police and other persons reportedly served as judges." *Id.* Furthermore, Plaintiff's expert, Martin R. Ganzglass, an American lawyer with extensive experience in Somalia, states that Somaliland's judicial system is independent of Somalia's judicial system, and from 1991 until the present time, the Somaliland courts have no jurisdiction to hear cases arising from conduct in Somalia. (Ganzglass Decl., ¶¶ 13-14). Plaintiff's conduct allegedly occurred in Mogadishu, the capital of Somalia. Thus, evidence demonstrates that Plaintiff has no adequate and available remedy in Somaliland for the harm he alleges.

Alternatively, Defendant asserts that Plaintiff had an adequate and available remedy in Somalia after the fall of the Barre administration in 1991.[1] In support, Defendant cites to an undated declaration of Alessandro Campo, which Plaintiff has challenged as irrelevant.[2] Mr. Campo, who has served as a legal expert for the United Nations and the Italian Embassy to Somalia, declares:

---

[1] It is undisputed that no remedy was adequate and available to Plaintiff in Somalia prior to the fall of the Barre administration in 1991, as Plaintiff alleges that he was tortured and arbitrarily detained by members of the Barre regime.

[2] In July 2010, Plaintiff moved to strike the affidavits of Alessandro Campo, Mahmoud Haji Nur, and Mohamed Abdirizak that Defendant submitted in support of his Motion to Dismiss (Doc. 26). Plaintiff argued that these affidavits are irrelevant to the present case and that two of the three affiants provide opinion testimony even though they do not qualify as experts within the definition of Federal Rule of Evidence 702. The Court denied the motion without prejudice, noting that the Court had not yet converted the Motion to Dismiss to a Motion for Summary Judgment and that it was therefore unnecessary to determine the admissibility of the challenged affidavits at that time. (*See* Doc. 42). The Court has now converted the Motion to Dismiss to a Motion for Summary Judgment. Because the challenged affidavits convey the affiants' personal knowledge regarding conditions in Somalia and Somaliland during pertinent periods of time, the Court declines to strike these affidavits. Accordingly, to the extent Plaintiff's motion to strike remains pending, it is **DENIED**.

exhaust available legal remedies and because Plaintiff's claims are time-barred pursuant to the applicable statute of limitations. These arguments will be discussed in turn.

A. Exhaustion of Remedies

As to the "exhaustion of 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). "[T]he exhaustion requirement pursuant to the TVPA is an affirmative defense, requiring the defendant to bear the burden of proof. . . [and] [t]his burden of proof is substantial." *Jean v. Dorelian*, 431 F.3d 776, 781 (11th Cir. 2005). The exhaustion requirement, however, does not apply to the ATS. *Id.*

Defendant argues that Plaintiff was required to exhaust his legal remedies in Somalia or Somaliland prior to filing suit in the United States. Defendant asserts that Somaliland has a functioning government with a court system, and that Plaintiff could have brought his claims there. Defendant cites the U.S. Department of State's Country Report on Human Rights Practices in Somalia for 2003 (the "Report"), published February 25, 2004, regarding the judicial circumstance in Somaliland. The Report states in part that "Somaliland's Government included . . . a functioning civil court system." *Id.* In view of this statement, Defendant argues that "[g]iven the availability of an adequate remedy in Somaliland prior to the time Plaintiff filed this action, Plaintiff's claims must be dismissed." (Doc. 18, p. 11).

Although there may have been a "functioning civil court system" in Somaliland, the Report details its problems: The Somaliland "Constitution provides for an independent judiciary; however, the judiciary was not independent in practice. There is a serious lack of trained judges

> After the fall of the Barre administration in 1991, a Somali bringing a claim for victimization against a former official of the Barre administration would have had little or no fear of reprisal for himself or family members still residing in Somaliland, the rest of Somalia, or outside of the area. The remnants of the Barre Administration do not exist in Somalia, or outside of the area. The remnants of the Barre Administration do not exist in an organized fashion and would be incapable of taking retaliatory action against Plaintiffs or their families.

(First Campo Decl, ¶ 11). Defendant reasons that, pursuant to this statement, when the Barre administration fell, Plaintiff would not have reasonably feared reprisal from the controlling group for initiating an action against a former government official such as Defendant, and therefore a remedy for the alleged harm was adequate and available in Somalia.

Mr. Campo's declaration is disputed by evidence submitted by Plaintiff. Plaintiff's expert, Mr. Ganzglass declares that, even after the fall of the Barre administration, there has been no functioning government or independent judiciary in Somalia, and thus it was impossible to litigate a human rights claim alleging torture and arbitrary detention in Somalia. (Ganzglass Decl., ¶ 17). Since 1991, there have been many unsuccessful attempts to form a central government in Somalia, but Somalia continues to be "beset by clan warfare and clan-based violence." *Id.* at ¶ 15. The Report supports Mr. Ganzglass's assertions. The Report states in part: "Political violence and banditry have been endemic since the 1991 revolt against Siad Barre. Since that time, tens of thousands of persons, mostly noncombatants, have died in inter-factional and inter-clan fighting." Report at § 1(a). Because there is conflicting evidence regarding whether Plaintiff had an adequate and available legal remedy in Somalia, Defendant cannot demonstrate that, as a matter of law, Plaintiff failed to exhaust his remedies in Somalia prior to filing the instant action.

B. Statute of Limitations

Under the TVPA and the ATS, plaintiffs have ten years from the date the cause of action arose to bring suit for torture, extrajudicial killing and other torts committed in violation of the law of nations or a treaty of the United States. 28 U.S.C. § 1350 note, § 2(c) ("No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."); *see Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. 2009) (concluding that the ten-year limitations period applicable to the claims under the TVPA applies to claims made under the ATS); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154-55 (11th Cir. 2005) (same).

However, even when a plaintiff does not bring an action under the TVPA and ATS within ten years after the cause of action arises, it may not be precluded, due to the application of the equitable tolling doctrine. *See Chavez*, 559 F.3d at 492 ("the justifications for the application of the doctrine of equitable tolling under the TVPA apply equally to claims brought under the ATS"). The Sixth Circuit has identified five factors a district court should consider when determining whether to equitably toll the statute of limitations: (1) lack of notice of the filing requirement, (2) lack of constructive knowledge of the filing requirement, (3) diligence in pursuing one's rights, (4) absence of prejudice to the defendant, and (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement. *Chavez*, 559 F.3d at 492 (citing *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000)). However, "the propriety of equitable tolling must necessarily be determined on a case-by-case basis." *Id.* When the pertinent facts are not in dispute, the application of the equitable tolling doctrine is a question of law. *See id.* at 493 (citing *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007)). When the facts are in dispute, however, resolution of the facts rests with the sound discretion of the district court. *See id.*

In *Chavez*, a case involving TVPA and ATS claims against a Salvadoran armed forces officer arising from conduct in the early 1980s, the Sixth Circuit noted that "Congress provided explicit guidance regarding the application of equitable tolling under the TVPA." *Id.* at 492. Namely, the TVPA "calls for consideration of all equitable tolling principles in calculating this [statute of limitations] period with a view towards giving justice to plaintiff's rights." S. Rep. No. 102-249, at 10 (1991). The *Chavez* Court also cited the following additional "explicit guidance" of Congress, by means of the Senate Report, regarding when to apply the equitable tolling doctrine in TVPA cases:

> Illustrative, but not exhaustive, of the types of tolling principles which may be applicable include the following. The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. 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.

Id. at 492-93 (quoting S. Rep. No. 102-249, at 10-11 (1991)).

As noted by the *Chavez* Court, other federal courts have applied the equitable tolling doctrine in TVPA and ATS cases when extraordinary circumstances justify its application. *Id.* (citing *Arce v. Garcia*, 434 F.3d 1254, 1262-63 (11th Cir. 2006) (tolling the statute of limitations under the TVPA and ATS until the signing of the Peace Accord in 1992 because the fear of reprisals against plaintiffs' relatives orchestrated by people aligned with the defendants excused the plaintiffs' delay)); *Cabello*, 402 F.3d at 1155 (tolling the statute of limitations under the TVPA and ATS "[u]ntil the first post- junta civilian president was elected in 1990" for claims

brought against a Chilean military officer); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (tolling the statute of limitations for TVPA and ATS claims against former Philippine dictator Ferdinand Marcos until the Marcos regime was overthrown); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549 (N.D. Cal. 1987) (holding that the plaintiff raised an issue of fact as to whether the ATS statute of limitations should be tolled for claims against an Argentine military officer until a democratically-elected government was in place)).

In *Chavez*, the Sixth Circuit observed that "[w]hen the situation in a given country precludes the administration of justice, fairness may require equitable tolling. In such limited circumstances, where plaintiffs legitimately fear reprisals against themselves or family members from the regime in power, justice may require tolling." 559 F.3d at 493. These extraordinary circumstances "make it impossible for plaintiffs to assert their TVPA and ATS claims in a timely manner." *Id.* Based on the facts before it, the *Chavez* court determined that the district court did not abuse its discretion in tolling the TVPA and ATS statute of limitations until March 1994, in view of evidence that it was not sufficiently safe for the plaintiffs to seek redress in court until national elections were held in El Salvador that month. *Id.* at 494-95. Because the plaintiffs in the *Chavez* case filed suit in December 2003, less than ten years after March 1994, they initiated their action before the expiration of the ten-year statute of limitation period. *See id.*; *see also United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (holding that the "[p]rinciples of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped.").

Plaintiff has presented evidence that would support a finding that extraordinary

circumstances exist in this case that would justify the application of the equitable tolling doctrine. More particularly, Plaintiff has presented evidence that it was not possible for him to bring an action against Defendant until Defendant arrived in the United States in May 2000. As discussed above, evidence submitted by Plaintiff indicates that he did not have an adequate and available remedy in Somalia, in view of the absence of an independent judiciary and the continued presence of inter-clan violence.

Similarly, evidence submitted by Plaintiff demonstrates that he did not have an adequate and available remedy when Defendant fled to Kenya in 1991. Defendant asserts that Plaintiff could have brought an action against him when Defendant lived in Kenya from 1991 until 2000. But Plaintiff has presented evidence that Kenyan law did not provide an adequate and available remedy for Plaintiff's alleged harm. Specifically, Plaintiff's expert in Kenyan law, Dr. Makau W. Mutua, has opined that "from 1991 up until the end of the year 2000, Kenyan law did not provide a remedy for victims of crimes or torts in violation of international law committed outside of Kenya." (Mutua Decl., ¶ 7). Dr. Mutua further opined: "during 1991 to 2000, Kenyan courts did not have jurisdiction to hear allegations of torture, cruel, inhuman or degrading treatment or punishment, or arbitrary detention committed outside of Kenya." *Id.* at ¶ 8. Thus, while Defendant asserts that Plaintiff could have brought his claims against him in Kenya, Plaintiff has presented evidence that such an action was not available during Defendant's residence there.

Plaintiff does not explain why he waited until April 2010 to file this action when Defendant has apparently been in the United States since May 2000. However, insofar as this could be viewed as dilatory conduct, the statutory scheme provides for a generous statute of limitations, and application of the equitable doctrine would delay when the statute of limitations

would begin to run. Consequently, the Court resolves that Plaintiff has presented evidence that would support a finding that the statute of limitations should be tolled until Defendant arrived in the United States in May 2000. Application of the equitable tolling doctrine in this case would "stop" the running of the applicable statute of limitations, or, in effect, prevent it from starting to run until Defendant arrived in the United States. Therefore, Plaintiff has presented evidence that would support a determination that the ten-year statute of limitations began to run when an adequate and available remedy became available to Plaintiff in May 2000. *See Chavez* (finding that equitable tolling principles stopped the TVPA and ATS statute of limitations from running until adequate remedy became available, and that filing of lawsuit nine years and nine months after statute of limitations began to run was timely); *see also Cabello* (noting that "tolling means just what it says-the clock is stopped while tolling is in effect"). Plaintiff filed his action in this Court on April 21, 2010, which, according to Plaintiff's evidence, was less than ten years after Defendant became subject to the jurisdiction of United States courts. In view of the evidence presented by Plaintiff, Defendant cannot show that, as a matter of law, the applicable statute of limitations bars Plaintiff's action.

For these reasons, the Court concludes that Defendant is not entitled to summary judgment on the issues presented by his motion.

V. Conclusion

Based on the foregoing, Defendant's Motion to Dismiss (Doc. 18), which has been converted to a Motion for Summary Judgment, is **DENIED**. Even though the Court denies this motion, Defendant is not precluded from filing a timely case-dispositive motion following the conclusion of discovery. Defendant is, however, precluded from attempting to relitigate the

particular issues resolved by this Opinion and Order.

The Clerk shall remove Document 18 from the Court's pending motions list.

IT IS SO ORDERED.

s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT