CASE NO. 04-15666-D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

MARIE JEANNE JEAN, in her individual capacity,
and as parent and legal guardian for minors
VLADIMY PIERRE and MICHELDA PIERRE, and
LEXIUSTE CAJUSTE,

Appellants,

v.

CARL DORÉLIEN, and LUMP SUM CAPITAL, LLC,
a Maryland limited liability company,

Appellees.

On Appeal From
The United States District Court
for the Southern District of Florida
Miami Division

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The Honorable James Lawrence King, District Court Judge

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument. This appeal involves two matters of first impression for this Circuit: (1) whether equitable tolling is applicable to claims brought pursuant to the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note), and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; and (2) whether the adequate and available remedies requirement from Section 2(B) of the TVPA applies to Appellants' claims brought pursuant to the ATCA.

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PRELIMINARY STATEMENT

The following references are used in this Brief:

Jean	Plaintiff-Appellant Marie Jeanne Jean, in her individual capacity, and as parent and legal guardian for minors Vladimy Pierre and Michelda Pierre.
Cajuste	Plaintiff-Appellant Lexiuste Cajuste
Plaintiffs	Plaintiff-Appellant Marie Jeanne Jean, in her individual capacity, and as parent and legal guardian for minor Vladimy Pierre and Michelda Pierre, and Plaintiff-Appellant Lexiuste Cajuste, collectively
Dorélien	Defendant-Appellee Carl Dorélien
LSC	Defendant-Appellee Lump Sum Capital, LLC
[Dkt. (doc. #):(page #)]	Record on Appeal

STATEMENT OF JURISDICTION

Plaintiffs timely appeal the final judgment dismissing their federal claims against Dorélien, which were brought pursuant to the law of nations, the Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350, note), and the Alien Tort Claims Act, 28 U.S.C. § 1350. The district court had jurisdiction over these claims pursuant to 28 U.S.C. §§ 1350 and 1331.

Plaintiffs further timely appeal the final judgment dismissing their state law claims against Appellees for violations of Florida's Uniform Fraudulent Transfer Act, § 726.101 et seq., Florida Statutes, brought pursuant to the district court's supplemental jurisdiction, 28 U.S.C. § 1367.

This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting Dorélien's Motion for Judgment on the Pleadings, Statute of Limitations.
2. Whether the district court erred in granting Dorélien's Motion to Dismiss, Improper Venue.
3. Whether the district court erred in dismissing Plaintiffs' Florida's Uniform Fraudulent Transfer Act claims against Dorélien.
4. Whether the district court erred by dismissing Plaintiffs' Florida's Uniform Fraudulent Transfer Act claims against LSC.

STATEMENT OF THE CASE

This is an appeal from the district court's dismissal of Plaintiffs' civil action for compensatory and punitive damages against Dorélien alleging violations of the Torture Victim Protection Act ("TVPA"), Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73 (codified at 28 U.S.C. § 1350, note) and the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. Plaintiffs further appeal from the district court's dismissal of their state law claims seeking relief to prevent and undo the fraudulent transfers of Dorélien's assets to LSC in violation of Florida's Uniform Fraudulent Transfer Act ("FUFTA"), § 726.101 et seq., Florida Statutes.

I. COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW

Jean filed her Initial Complaint in the district court on January 24, 2003 [Dkt. 1] alleging that Dorélien's actions and the actions of his subordinates, while Dorélien was a Colonel in the Haitian Armed Forces, caused the extrajudicial killing of Michel Pierre ("Pierre"), Jean's husband and the father of her minor children, Vladimy and Michelda Pierre. Jean alleged that Pierre's killing and the events incident to that killing violated the prohibitions against extrajudicial killing and crimes against humanity of the TVPA, customary international law, and the ATCA. [Dkt. 1:6-9; Dkt. 69:2]

On October 23, 2003, Plaintiffs filed their First Amended Complaint [Dkt. 21] adding Cajuste as a party and adding his claims against Dorélien alleging

torture, arbitrary detention, and cruel, inhuman and degrading treatment, all in violation of the TVPA, customary international law, and the ATCA. [Dkt. 21:10-14] Cajuste also joined in Jean's claim against Dorélien alleging crimes against humanity. [Dkt. 21:14-15]

Plaintiffs filed a Second Amended Complaint on March 11, 2004,[1] which added LSC as a party and alleged an additional state law claim against Dorélien and LSC for violation of the FUFTA. [Dkt. 37:3, 18-24] Specifically, Plaintiffs' alleged in their state law claim that Dorélien had fraudulently entered into a Lottery Prize Assignment Agreement ("Assignment Agreement") with LSC in order to avoid payment of debts to his creditors, including Plaintiffs. In addition to a request for damages, Plaintiffs sought an injunction to prevent LSC from disbursing the proceeds of the assignment to Dorélien pending the litigation of Plaintiffs' human rights claims. [Dkt. 37:18-24; Dkt. 28] On March 10, 2004, the district court entered a ten-day temporary injunction, subject to Plaintiffs' right to request an additional ten-day extension. [Dkt. 32] The court also ordered the parties to file any evidence in support of their respective positions within the

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1. The district court entered into the docket an unsigned version of Plaintiffs' Second Amended Complaint [Dkt. 33] when it granted their motion for leave to amend. [Dkt. 32] Plaintiffs subsequently entered a second, signed version of the Second Amended Complaint which contains some slight non-material alterations from the previous unsigned version. [Dkt. 37] Plaintiffs refer only to the signed version of the Second Amended Complaint [Dkt. 37] in this brief.

first ten-day period and any memoranda of law within the second ten-day period. [Dkt. 32] Pursuant to the district court's instructions, Plaintiffs filed the transcript of the March 4, 2004 hearing [Dkt. 44], the deposition transcripts of Dorélien's son Karl-Steven Dorélien [Dkt. 46] and his attorney Christian Scholin [Dkt. 48], and the affidavit of Mario Joseph [Dkt. 42].[2]

On March 15, 2004, Dorélien filed a Motion for Judgment on the Pleadings, Statute of Limitation in which he argued that Cajuste's claims should be dismissed on the grounds that they were barred by the ten-year statute of limitations applicable to the TVPA and the ATCA. [Dkt. 39] Cajuste responded arguing that the doctrine of equitable tolling should be applied to toll the statute of limitations for his claims thereby making them timely. [Dkt. 54] The district court refused to apply equitable tolling and issued an order granting Dorélien's motion. [Dkt. 61] Despite the fact that Dorélien had not moved to dismiss any of Jean's claims or Cajuste's state law claims, [Dkt. 54] the district court entered a final judgment in favor of Dorélien and against <u>both</u> Plaintiffs and dismissing Plaintiffs' Second Amended Complaint <u>in its entirety</u>. [Dkt. 61:2-3]

2. The district court never ruled on Plaintiffs' emergency motion. However, its dismissal of that motion is implicit in the district court's dismissal of Cajuste's and Jean's claims in their entirety [Dkt. 61; Dkt. 62; Dkt. 67; Dkt. 76], and its tacit refusal to retain supplemental jurisdiction over Plaintiffs' state law claims when it issued its final order. [Dkt. 97]

Plaintiffs subsequently filed a motion for correction and relief pursuant to Federal Rule of Civil Procedure 60, arguing that the district court had incorrectly dismissed Jean's claims along with Cajuste's in that Dorélien had never moved to dismiss her claims on statute of limitations grounds and could not have because they had been timely filed without application of equitable tolling. [Dkt. 65] Plaintiffs further argued that Dorélien had not requested that the court dismiss Plaintiffs' state law fraudulent transfer claims against Dorélien and that in any event their state law claims were timely asserted. [Dkt. 65:2, 5] Based upon Jean's Rule 60 motion, the district court struck the portion of its previous order that dismissed Jean's claims. [Dkt. 67] Without discussion or rationale, however, the district court did not reinstate Cajuste's fraudulent transfer claims against Dorélien or LSC, thereby dismissing Cajuste as a party. [Dkt. 67:2]

After the district court rendered its final order dismissing Cajuste's claims [Dkt. 67], Cajuste moved the court pursuant to Federal Rule of Civil Procedure 59(e) for a dismissal without prejudice so that Cajuste could amend his complaint to include additional materials supporting his argument that equitable tolling should apply to toll the statute of limitations for his TVPA and ATCA claims. [Dkt. 75:3-4] The district court denied Plaintiff's motion without discussion. [Dkt. 84]

On March 26, 2004, Dorélien moved for dismissal for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), arguing that the TVPA requires Plaintiffs to exhaust all adequate and available remedies in Haiti, to which Jean filed a response in opposition.[3] [Dkt. 53; Dkt. 69] The district court granted Dorélien's motion finding that in an affidavit filed by Plaintiffs in support of their claim [Dkt. 42] the affiant stated that Plaintiffs had an enforceable judgment against Dorélien in Haiti. The district court further found that because Jean had not attempted to enforce her judgment in Haiti, she failed to satisfy the exhaustion requirement of the TVPA. [Dkt. 76:3-4] Consequently, the district court dismissed the Second Amended Complaint in its entirety, once again failing to provide any discussion or rationale for why it was dismissing Jean's state law fraudulent transfer claims against Dorélien and LSC. [Dkt. 76]

Plaintiffs appealed to this Court the district court's orders dismissing their claims in their entirety. [Dkt. 79] This Court issued an order sua sponte dismissing the appeal for lack of jurisdiction, finding that the district court's orders were not final or otherwise appealable. The Court explained that "[t]he district court has neither resolved the appellants' claims as to defendant Lump

3. By the time Jean responded [Dkt. 76] to Dorélien's motion to dismiss for improper venue, Cajuste had been dismissed as a party on statute of limitations grounds. [Dkt. 61; Dkt. 67]

Sum Capital, LLC or Dorélien's counterclaim against the appellants for tortious interference with business and marital relations." [Dkt. 85:2]

In light of the Eleventh Circuit's dismissal, Plaintiffs filed a motion in the district court requesting that the court enter a final judgment. [Dkt. 86] The district court set the motion for a hearing. [Dkt. 87] On two separate occasions the Defendants moved for a continuance. [Dkt. 88; Dkt. 89] The district court, apparently frustrated with the delays cause by these motions for continuance, [Dkt. 99:2] ordered the Parties on July 26, 2004 to brief the remaining issues that needed to be resolved by the court. [Dkt. 90] As part of that order, the district court set the time limits for compliance with its order as follows:

> Plaintiffs [must] submit with[in] thirty (30) days of this Order briefs outlining their positions on both their Motion for a Final Judgment and the issues raised in light of the decision by the [Eleventh Circuit]. Defendants must submit responses within twenty (20) days of Plaintiff's [sic] brief. Plaintiffs have ten (10) days to reply.

[Dkt. 90:2 (emphasis added)]

In response to that order, Plaintiffs filed their supplemental memorandum of law on August 24, 2004. [Dkt. 91] Plaintiffs argued that their state law fraudulent transfer claims against Dorélien and LSC were still before the court. Plaintiffs further asked the court to retain jurisdiction over those claims pursuant

to the court's supplemental jurisdiction and to certify their TVPA and ATCA claims for immediate appeal. [Dkt. 91:9]

Dorélien filed his memorandum on September 1, 2004. [Dkt. 92] Dorélien also moved for voluntary dismissal of his counterclaim against Plaintiffs without prejudice. [Dkt. 93]

LSC filed its memorandum on September 15, 2004, two days out of time. [Dkt. 94] LSC contended that because the Circuit Court of the Second Judicial Circuit, Leon County, Florida had approved the assignment of Dorélien's lottery proceeds to LSC and because LSC had been ordered by that court to deposit the payment in exchange for that assignment in an escrow account designated by the state court, that it was an innocent stakeholder with no further interest in the federal litigation. LSC asked the district court to dismiss it as a party on this basis. [Dkt. 94:1-2 ¶¶ 1-3]

Plaintiffs replied to LSC's memorandum on September 28, 2004. [Dkt. 96] Plaintiffs argued that the state court action did not moot their fraudulent transfer claim against LSC and that LSC was not an innocent stakeholder. [Dkt. 96]

The district court issued its final order, granting Dorélien's motion for voluntary dismissal of his counterclaim on the ground that Plaintiffs did not oppose the dismissal. [Dkt. 97:3] The district court, despite the fact that

Plaintiffs had submitted a response to LSC's memorandum, [Dkt. 96] stated that Plaintiffs had not objected to LSC's argument that it was an innocent stakeholder and granted LSC's request to be dismissed as a party. [Dkt. 97:3] The district court never addressed Plaintiffs' contention that their fraudulent transfer claims against Dorélien were still before the court. [Dkt. 97]

On October 27, 2004, Plaintiffs appealed the district court's orders dismissing Plaintiffs' claims. [Dkt. 98] Subsequent to the filing of this notice of appeal, the district court entered an "Order Denying Motion to Reopen Case," on October 29, 2004. [Dkt. 99] The district court found that Plaintiffs had not complied with its order requiring Plaintiffs to discuss the issues remaining before it and had not timely replied to LSC's brief requesting dismissal from the case. [Dkt. 99:2] Contrary to the district court's findings, however, Plaintiffs had responded to LSC's argument on September 28, 2004, asserting that LSC was not an innocent stakeholder and that no action taken by the Florida Court had mooted their fraudulent transfer claim against LSC. [Dkt. 96] Consequently, Plaintiffs amended the notice of appeal to include the district court's October 29, 2004 order so that they could appeal the district court's findings in that order. [Dkt. 100]

II. STATEMENT OF THE FACTS

A. Dorélien and the Military Regime's Overthrow of the Haitian Government.

In 1990, Haiti held a democratic election and elected Jean Bertrand Aristide, who took office in February 1991. [Dkt. 37:5 ¶ 13] In September 1991, a military junta overthrew President Aristide's government in a violent coup d'état. [Dkt. 37:5 ¶ 13] The resulting unconstitutional military regime ruled Haiti through terror and violence from October 1991 until September 1994. [Dkt. 37:5 ¶¶ 13-14] At all times relevant to Plaintiffs' claims, the Haitian military, police and paramilitary forces acted under the management, command, control and supervisory authority of the Haitian Armed Forces. [Dkt. 37:10 ¶ 29]

Dorélien was a Colonel in the Haitian Armed Forces and a member of the military regime's high command. [Dkt. 37:3 ¶ 7] In the early stages of the regime (approximately 1992), Dorélien was appointed Chief of Personnel or Assistant Chief of Staff making him responsible, inter alia, for the appointment, transfer, and removal of armed forces personnel and military discipline, including the administration of military justice. [Dkt. 37:3 ¶ 7] Dorélien in his position in the high command planned, ordered, authorized, encouraged, or permitted subordinates in the Haitian Armed Forces and paramilitary forces to commit acts of extrajudicial killing; torture; arbitrary detention; cruel, inhuman or degrading treatment; and crimes against humanity. [Dkt. 37:3, 9-10 ¶¶ 7, 9, 28-29]

Dorélien further conspired with and aided such forces in covering up those abuses. [Dkt. 37:9-10 ¶ 28] Further, Dorélien's acts and omissions and those of his subordinates specifically resulted in the torture and illegal detention of Cajuste and in the extrajudicial killing of Michel Pierre, [Dkt. 37:9-10, 12 ¶¶ 26-29, 33, 42] Jean's husband and the father of Jean's minor children. [Dkt. 37:1 ¶¶1-2, 3-5; Dkt. 69:2]

The abuses committed by Armed Forces and paramilitary forces against Haitian civilians were widely reported in the national and international media, and foreign diplomatic officials, human rights organizations, and others voiced their concerns about these abuses to the military regime and the high command. [Dkt. 37:9 ¶ 26] Thus, Dorélien knew or reasonably should have known that the Haitian Armed Forces and paramilitary forces under his control were committing severe human rights abuses against civilians. [Dkt. 37:9 ¶ 26]

Further, at all relevant times, the Haitian military, police and paramilitary forces acted under the management, command, control and supervisory authority of the Haitian Armed Forces, including Dorélien. [Dkt. 37:10 ¶ 29] Dorélien maintained legal authority and effective control over his subordinates in the Haitian military. [Dkt. 37:9 ¶ 27] At all relevant times, the chain of command within the Haitian Armed Forces was fully functional. [Dkt. 37:9 ¶ 27] Local officers were not permitted to conduct operations without authorization from

superior officers, and operational information and intelligence regularly flowed up the chain of the command. [Dkt. 37:9 ¶ 27]

Despite Dorélien's knowledge and control, he failed or refused to take all necessary measures to properly investigate and prevent abuses against Haitian civilians committed by or attributed to his subordinates. [Dkt. 37:9 ¶ 27] He further failed to punish personnel under his control for committing such abuses. [Dkt. 37:9 ¶ 27]

Dorélien's actions, stated above, were outside the scope of his lawful authority and were not authorized by international or Haitian law. [Dkt. 37:10 ¶ 28]

B. Cajuste is Tortured and Illegally Detained by the Military Regime.

From 1988 to 1990, Cajuste was president of the Union of Public Transportation Workers of Haiti. [Dkt. 37:6 ¶ 18] In 1990, he helped form a new trade union called the Centrale Generale des Travailleurs ("CGT") of which he later became General Secretary. [Dkt. 37:6 ¶ 18] CGT members supported the democratic election of President Aristide in December 1990. [Dkt. 37:6 ¶ 18] In the capital, Port au Prince, Cajuste was outspoken in the local media about his support of the democratically elected President Aristide and his efforts to organize a general strike in protest of the military regime. [Dkt. 37:8-9 ¶ 25] As

a result of these and other activities, Cajuste was well known throughout Haiti for his unionist activities. [Dkt. 37:8 ¶ 25]

After the coup d'état in September 1991, the military regime began targeting trade unions and their leaders to prevent popular resistance to military rule. [Dkt. 37:6 ¶ 18; Dkt. 37:8 ¶ 25] Cajuste was one of several union leaders who were targeted for their attempts to instigate a general workers' strike in protest of the military regime's actions. [Dkt. 37:9 ¶ 25] As a result of the actions and omissions of Dorélien and his subordinates in carrying out the military regime's program of suppressing union leaders, Cajuste was tortured, arbitrarily detained, and treated in a cruel, inhuman and degrading manner. [Dkt. 37:12, 14, 15 ¶¶ 42, 52, 61]

The events leading to Cajuste's torture and detention by the military regime began on April 23, 1993, when Cajuste arrived with three colleagues at Radio Caraïbes, a radio station in Port au Prince, Haiti, to give a scheduled radio interview concerning a workers' strike. [Dkt. 37:6 ¶ 19] Military policemen, who were present at the station when Cajuste arrived, ordered Cajuste and two of his colleagues to follow them to the police station for questioning. [Dkt. 37:6-7 ¶ 19] At the station, the three men were led into a room and forced to face a wall. [Dkt. 37:7 ¶ 20] Approximately ten military soldiers subjected Cajuste to verbal abuse, including threats related to his pro-Aristide activity and union work. [Dkt.

37:7 ¶ 20] They handed Cajuste a gun in an attempt to force him into a shoot-out. [Dkt. 37:7 ¶ 20]

After two hours of verbal abuse, approximately fifty additional attachés (some in civilian clothing, some in uniform) hit Cajuste repeatedly with brass knuckles and fists. They also dragged and continuously beat Cajuste on his back, abdomen, arms, and face. [Dkt. 37:7 ¶ 21]

Cajuste was then separated from his two companions and taken into a smaller room that contained a metal bed and a pile of wooden batons. [Dkt. 37:7 ¶ 22] He was shoved into a fetal-like position. [Dkt. 37:7 ¶ 22] His legs and head were under the bed frame with his back and buttocks exposed. [Dkt. 37:7 ¶ 22] The attachés, one after another, jumped from the bed onto Cajuste's back. [Dkt. 37:7 ¶ 22] They then took turns beating him with the wooden batons until he lost consciousness. [Dkt. 37:7 ¶ 22]

Cajuste awoke approximately two days later in a small prison cell. [Dkt. 37:7 ¶ 23] He had severe lacerations on his buttocks. [Dkt. 37:7 ¶ 23] Cajuste remained in the prison cell for three days with no toilet, no room to move, and only seawater to drink. [Dkt. 37:7 ¶ 23] He was eventually moved to a police infirmary. [Dkt. 37:7 ¶ 23] After a United Nations official demanded that Cajuste be transferred to a hospital, the military moved Cajuste, but they placed him in a military rather than a civilian hospital. [Dkt. 37:7-8 ¶ 23] Cajuste

remained in custody for one month at that military hospital. [Dkt. 37:8 ¶ 23] He was released from the military hospital sometime between the end of May and the beginning of June 1993. [Dkt. 37:6-8 at ¶¶ 19-23; Dkt. 54:1-2] Once released, Cajuste's civilian doctors faced difficulty in administering treatment, as the military did not keep records of procedures performed on Cajuste while he was in their custody. [Dkt. 37:8 ¶ 23] Cajuste suffered from kidney failure requiring temporary dialysis. [Dkt. 37:8 ¶ 23] He also required several plastic surgeries to remove dead tissue from his buttocks. [Dkt. 37:8 ¶ 23]

C. The Murder of Michel Pierre by the Military Regime.

Michel Pierre, Jean's husband and the father of Jean's minor children, [Dkt. 37:1 ¶¶1-2, 3-5; Dkt. 69:2] was killed during an attack by Haitian military and paramilitary forces against civilians in the impoverished seaside neighborhood of Raboteau, in Gonaïves, Haiti. [Dkt. 37:5 ¶ 15]

The attack against the civilians in Raboteau, known as the "Raboteau Massacre," was part of the Haitian military regime's repressive campaign against popular resistance to military rule. [Dkt. 37:8 ¶ 8] The campaign aimed to force the Haitian population, particularly the Haitian poor who overwhelmingly supported President Aristide, to abandon the struggle for a return to constitutional order. [Dkt. 37:8 ¶ 8] The Raboteau Massacre was one of a number of similar attacks conducted by the armed forces against civilians in neighborhoods

considered strongholds of support for President Aristide and his "Lavalas" party, including the neighborhoods of Chantal, Carrefour-Feuilles, Carrefour-Marin, Thomassin, Borgne and Cité Soleil. [Dkt. 37:8 ¶ 8] Soldiers and paramilitary forces shot, killed, tortured, raped, detained, and physically abused civilians in these areas, and often looted and burned or destroyed homes, in an effort to break the resistance of the citizens of poorer neighborhoods to military rule. [Dkt. 37:8 ¶ 8]

On April 18, 1994, and again on April 22, 1994, units of the Haitian Armed Forces, together with members of a paramilitary group, attacked the civilian population of Raboteau. At least 26 unarmed civilians were shot and killed and more than fifty homes were destroyed. [Dkt. 37:5 ¶ 15]

Pierre, Jean, and their two children, lived in Raboteau at the time of the massacre. On or about April 22, 1994, Michel Pierre became aware that soldiers were invading Raboteau. Michel Pierre fled in a boat to the sea, as fearful residents often had done when the Armed Forces came to harass, beat, or detain Raboteau residents in the past. [Dkt. 37:6 ¶ 16; Dkt. 69:2]

The Armed Forces and paramilitary forces, anticipating the residents' flight to the sea, laid in wait in boats and on the shore. As Pierre and others tried to flee by boat, the soldiers opened fire killing Pierre. The soldiers buried

Pierre's body in a shallow grave by the sea. Jean discovered Pierre's body several days later. [Dkt. 37:6 ¶ 17]

D. Dorélien's Flight from Haiti and his Subsequent Deportation from the United States.

Sometime after September 1994, Dorélien fled Haiti under the threat of force of the United States military, which had mobilized to depose the unconstitutional military regime of which Dorélien was a member. [Dkt. 37:18 ¶ 75] Dorélien arrived in the United States in 1995 and sought asylum, but was refused. [Dkt. 28 Exh. C at p. 3]

On November 16, 2000, while residing in Florida, a Haitian court, the Court of the First Instance of Gonaives, convicted Dorélien in absentia for murder, illegal arrest, conspiracy, and torture along with General Raoul Cedras (the leader of the military regime) and other named defendants for their responsibility for the atrocities committed during the Raboteau Massacre. [Dkt. 37:10, 19 ¶¶ 30, 77; Dkt. 28 at Exh. A] In addition, the Haitian court issued a civil judgment (the "Haitian Judgment") finding Dorélien and other perpetrators of the Raboteau Massacre jointly and severally liable to the victims of the massacre for the sum of 1 billion Haitian gourdes (approximately $24 million in United States dollars). [Dkt. 37:19 ¶ 77; Dkt. 28 at Exh. A]

On June 21, 2002, United States immigration authorities arrested Dorélien as he attempted to escape from his home in Port St. Lucie, Florida. [Dkt. 37:19 ¶

78; Dkt. 28 at Exh. B] While Dorélien was incarcerated at the Krome Detention Center in Miami, Florida, he was served with Jean's summons and the Initial Complaint in this case. [Dkt. 52:2 ¶ 3]

On or about January 27, 2003, Dorélien was deported to Haiti. [Dkt. 37:19 ¶ 79] In Haiti, Dorélien was incarcerated by Haitian authorities. [Dkt. 37:19 ¶ 79] However, as a result of a recent violent rebellion that began in January 2004, in the city of Gonaives where the Raboteau Massacre occurred, [Dkt. 69:9-10; Dkt. 69 at Exh. A p. 2 ¶ 3, Exh. G] Dorélien and other members of the military regime of which he was a part were freed from prison without legal process. Dorélien and the military regime once again hold great power in Haiti. [Dkt. 69:9-11; Dkt. 69 at Exh. A at p. 2 ¶¶ 4-5, Exh. G at pp. 2-3, 12]

In Haiti there is a real threat that anyone attempting to enforce their judgment against Dorélien based upon the Raboteau case would be at grave risk. [Dkt. 69:10; Dkt. 69 at Exh. A at 3 ¶ 6-7] Recently, the Haitian judge who presided over the Raboteau Massacre trial was attacked and beaten. The judge's attackers were reportedly motivated by the judge's role in that particular trial. [Dkt. 69:11; Dkt. 69 at Exh. A at p. 3 ¶ 6, Exh. D at p.1 ¶ 8, Exh. F at p.1]

E. Prior to his Deportation, Dorélien wins the Florida Lottery.

In June 1997, while a Florida resident, Dorélien won the Florida Lottery. [Dkt. 37:18 ¶ 76] As a lottery winner, Dorélien was entitled to annual installment

payments of $159,000 for 20 years, totaling approximately $3.2 million. [Dkt. 37:18 ¶ 76] At the time that Dorélien won, the lottery prize was available only in installments, not as a lump sum. [Dkt. 37:18 ¶ 76]

On or about November 25, 2003, Dorélien's son, Karl-Steven Dorélien ("Karl-Steven"), acting pursuant to a power of attorney and Dorélien's instructions, entered into a Lottery Prize Assignment Agreement with LSC. [Dkt. 37:19 ¶ 81; Dkt. 37 at Exh. A p.1 ¶ B] Under the Assignment Agreement, LSC agreed to pay Dorélien $1.3 million (the "Lump Sum Payment") in exchange for Dorélien's remaining thirteen annual lottery payments of $159,000, which totals $2,067,000. [Dkt. 37:19-20 ¶ 81; Dkt. 37 at Exh. A p.1 ¶ B] As required by Florida law, LSC applied for approval of the assignment by order of the Circuit Court of the Second Judicial Circuit, Leon County, Florida ("Leon County Circuit Court"). [Dkt. 96 at Exh. B at p. 7, ¶ 2(2)]

Plaintiffs intervened in the petition for approval of the assignment, and on September 10, 2004, the Leon County Circuit Court entered an order restraining the payment of the assignment proceeds to Dorélien pending the resolution of their claims against him. [Dkt. 96:3] However, on September 21, 2004, the Leon County Circuit Court issued an amended order directing that the proceeds from the assignment were to be paid into an escrow account on which LSC shall

remain the sole signatory until further order of the Leon County Circuit Court. [Dkt. 96:3]

On June 21, 2004, Jean filed a separate action in the Leon County Circuit Court to domesticate the Haitian Judgment against Dorélien in Florida. Dorélien did not oppose the application and on September 2, 2004, the Leon County Circuit Court issued a certificate of non-objection in the consolidated case. Accordingly, the Haitian Judgment is now a valid and enforceable Florida judgment against Dorélien. [Dkt. 96:2] The two state court actions were consolidated by order of the Leon County Court on August 4, 2004. [Dkt. 96:2 n.1]

III. STANDARD OF REVIEW

An order granting a motion for judgment on the pleadings is reviewed de novo. Hawthorne v. Mac Adjustment, Inc., 140 F.3d 1367, 1370 (11th Cir. 1998).

> We review a judgment on the pleadings de novo. Judgment on the pleadings is appropriate when there are no material facts in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts. When we review a judgment on the pleadings, therefore, we accept the facts in the complaint as true and we view them in the light most favorable to the nonmoving party. The complaint may not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Id. (internal citation and quotation omitted).

A district court's determination that the doctrine of equitable tolling is inconsistent with the language of a particular statute and therefore cannot be applied under any circumstances is reviewed de novo. Wade v. Battle, 379 F.3d 1254, 1265 (11th Cir. 2004) (citing Drew v. Dep't of Corr., 297 F.3d 1278, 1283 (11th Cir. 2002)). A district court's determination that equitable tolling should not be applied based upon the circumstances of a particular claim is reviewed for clear error. Stewart v. Booker T. Washington Ins., 232 F.3d 844, 852 (11th Cir. 2000) ("The trial court's determination on equitable tolling is reviewed for clear error.") (citing Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 660 (11th Cir. 1993)); see also Carter v. West Publ'g Co., 225 F.3d 1258, 1266 (11th Cir. 2000); First Ala. Bank, N.A. v. United States, 981 F.2d 1226, 1229 (11th Cir. 1993).

A ruling on a motion to dismiss is reviewed de novo, taking all the material allegations of the complaint as true while liberally construing the complaint in favor of the plaintiff. Roberts v. Florida Power & Light Co., 146 F.3d 1305, 1307 (11th Cir. 1998). A court may dismiss a complaint at the pleadings stage "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984).

SUMMARY OF THE ARGUMENT

Jean and Cajuste were victims of grave injustices meted out in Haiti at the hands of Dorélien and his subordinates. Michel Pierre, Jean's husband and the father of her minor children, was murdered, and Cajuste was illegally detained and tortured. Jean and Cajuste filed this lawsuit, in part, for claims arising under the Torture Victim Protection Act ("TVPA") and Alien Tort Claims Act ("ATCA") against Dorélien for his responsibility in these crimes.

Cajuste's claims were erroneously dismissed by the district court on grounds that the statute of limitations had run. Although the legislative history of the TVPA expressly provides that the doctrine of equitable tolling should apply to toll the statute of limitations, the district court refused to apply the doctrine in this case. Unfortunately, the district court's order is unclear whether it refused to apply the equitable tolling doctrine because the doctrine could not be applied as a matter of law or because the doctrine should not be applied on these facts. Under either ground, the district court should be reversed.

Because the doctrine of equitable tolling is not inconsistent with the text of the TVPA and is supported by its legislative history, the doctrine applies to the TVPA as a matter of law. The doctrine also applies based on the facts of this case. The legislative history expressly provides that equitable tolling should apply to toll the statute of limitations of TVPA claims prior to the time a

defendant enters the United States. Federal courts have applied the doctrine for TVPA claims during the time a regime responsible for torture remains in power. Both of these circumstances are applicable here.

The doctrine of equitable tolling applies equally to the ATCA. Like the text of the TVPA, nothing in the text of the ATCA is inconsistent with the doctrine of equitable tolling. Federal courts, including the United States Supreme Court, have looked to the legislative history of the TVPA to cast light on the scope of the ATCA. Thus, the legislative history of the TVPA should also be applied to the ATCA. Further, federal courts have applied the doctrine of equitable tolling to the ATCA by analogy to the TVPA.

The district court erred in granting Dorélien's motion to dismiss against Jean when, contrary to the federal rules, it considered matters outside the four-corners of the complaint without first converting the motion to one for summary judgment. The district court also erred in its finding that because Jean had a Haitian judgment currently enforceable by a Haitian court, she failed to exhaust her adequate and available remedies. To make this determination, the district court must have improperly considered some materials outside the pleadings, while selectively ignoring other materials that refute its finding. Significantly, the materials the district court ignored showed that the current political climate in Haiti precludes Jean from coming forward to seek enforcement of the Haitian

judgment without great risk to her and her attorneys. Moreover, the district court erroneously extended the exhaustion-of-remedies requirement of the TVPA to Jean's claims brought pursuant to the ATCA.

After leaving Haiti and before being deported from the United States, Dorélien won the Florida lottery. After the commencement of this lawsuit, Dorélien tried to transfer his lottery winnings to his son, causing Jean and Cajuste to amend their complaint to include claims under Florida's Uniform Fraudulent Transfer Act ("FUFTA") against Dorélien and LSC, the company with whom Dorélien entered into a lottery prize assignment agreement. The district court dismissed the FUFTA claim against LSC after erroneously finding that Plaintiffs did not object to the dismissal and after seemingly adopting LSC's flawed argument that it was an innocent stakeholder and had no further interest in the litigation.

The district court failed to explain why it dismissed Plaintiffs' FUFTA claim against Dorélien. Thus, it is unclear if it dismissed the claim on the merits or refused to exercise supplemental jurisdiction over the claim. Either basis constitutes reversible error.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED IN GRANTING DORÉLIEN'S MOTION FOR JUDGMENT ON THE PLEADINGS, STATUTE OF LIMITATIONS.

The Torture Victim Protection Act ("TVPA"), Pub. L. 102-256, Mar. 12, 1992, 106 Stat. 73 (codified at 28 U.S.C. § 1350, note), provides a ten year statute of limitations to claims brought pursuant to the Act. 28 U.S.C. § 1350 (note) (quoting Section 2(c) of the TVPA: "Statute of limitations.--No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."). Although the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350, does not expressly provide a statute of limitations, Plaintiffs concede that the ten year statute of limitations for TVPA claims also applies to their ATCA claims. See Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1363 (S.D. Fla. 2001) (citations omitted) (recognizing that federal courts have used the TVPA's ten-year statute of limitations period for ATCA claims because it is the closest analogous federal statute).

On October 23, 2003, the complaint was amended to add Cajuste as a party and to assert his claims against Dorélien for violations of the TVPA and ATCA. [Dkt. 21] The events giving rise to these claims occurred between April 23, 1993 and the end of May or beginning of June 1993. [Dkt. 21:5-6 at ¶¶ 16-20; Dkt. 37:6-8 at ¶¶ 19-23; Dkt. 54:1-2] In the district court, Dorélien moved for

judgment on the pleadings, claiming Cajuste's TVPA and ATCA claims were barred by the statute of limitations. [Dkt. 39] Cajuste countered that based on the doctrine of equitable tolling his TVPA and ATCA claims were timely filed. [Dkt. 54] The district court granted Dorélien's motion, summarily concluding that the doctrine of equitable tolling should not be applied in this case. [Dkt. 61:1-2]

"'Equitable tolling' is the doctrine under which plaintiffs may sue after the statutory time period has expired if they have been prevented from doing so due to inequitable circumstances." Ellis v. Gen. Motors Acceptance Corp., 160 F.3d 703, 706 (11th Cir. 1998) (citation omitted). An appellate court's review of the district court's conclusions about applying the doctrine depends on the basis for the district court's determination. A district court's determination that equitable tolling is inconsistent with the language of a particular statute and therefore cannot be applied under any circumstances is reviewed de novo. Wade v. Battle, 379 F.3d 1254, 1265 (11th Cir. 2004) (citing Drew v. Dep't of Corr., 297 F.3d 1278, 1283 (11th Cir. 2002)). A district court's determination that equitable tolling should not be applied based on the facts is reviewed only for clear error. Stewart v. Booker T. Washington Ins., 232 F.3d 844, 852 (11th Cir. 2000) (citing Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 660 (11th Cir. 1993)); see also

Carter v. West Publ'g Co., 225 F.3d 1258, 1266 (11th Cir. 2000); First Ala. Bank, N.A. v. United States, 981 F.2d 1226, 1229 (11th Cir. 1993).

Thus, when a court is faced with the question of equitable tolling, two questions must be asked. First, whether equitable tolling may be applied as a matter of law to toll a particular statute of limitations. Second, "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." Ellis, 160 F.3d at 707 (internal quotation omitted).

The only discussion the district court provided in relation to its finding that Cajuste's TVPA and ATCA claims should not be equitably tolled was to state that "equitable tolling should not be applied to this case." [Dkt. 61:2] Thus, it is unclear whether the district court based its conclusion on a determination that as a matter of law the doctrine of equitable tolling cannot be applied to TVPA and ATCA claims or that under the facts the doctrine should not be applied. As explained below, the doctrine of equitable tolling should be applied no matter which determination underlies the district court's decision.

A. As a Matter of Law, Equitable Tolling Applies To Claims Brought Pursuant to the TVPA and ATCA.

Although an issue of first impression for this Court, equitable tolling should be applied to claims brought pursuant to the TVPA. See Hilao v. Estate of Marcos, 103 F.3d 767, 773 (9th Cir. 1996) (applying equitable tolling to toll

statute of limitations on TVPA claim); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1368 (S.D. Fla. 2001) (same).

"[L]imitations periods are customarily subject to 'equitable tolling' unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." Young v. United States, 535 U.S. 43, 49, 122 S. Ct. 1036, 1040 (2002) (internal citations and quotation omitted). Nothing in the TVPA suggests that an inconsistency exists between the text and the doctrine of equitable tolling.

In addition to considering whether the doctrine of equitable tolling is inconsistent with the text of a statute, a court may consider committee reports related to the enactment of a statute. See Hilao, 103 F.3d at 773 (citing the Senate Committee Report on the TVPA as authority that equitable tolling should apply in that case). Such reports represent "the authoritative source" for determining legislative intent. Garcia v. United States, 469 U.S. 70, 76, 105 S. Ct. 479, 483 (1984). Both the United States House of Representatives and the United States Senate committee reports concerning the enactment of the TVPA state that equitable tolling should apply to TVPA claims. S. Rep. No. 102-249, at 10-11 (1991) (stating that equitable tolling principles should apply to TVPA claims); H. Rep. No. 102-367, at 4-5 (1991) (equitable tolling "may apply to

preserve a claimant's rights."). Consequently, the equitable tolling doctrine should be applied to TVPA claims as a matter of law.

The ATCA consists of one sentence of text: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Thus, nothing in the text of the ATCA suggests that the doctrine of equitable tolling is inconsistent with the Act.

"[T]here is no record even of debate on the [ATCA]" pursuant to its enactment by the First Congress as part of the Judiciary Act of 1789. Sosa v. Alvarez-Machain, __ U.S. __, 124 S. Ct. 2739, 2755, 57-58 (2004). However, federal courts, including the Supreme Court, have looked to the legislative history of the TVPA to cast light on the scope of the ATCA. See Sosa, 124 S. Ct. at 2763 (citing legislative history of the TVPA in its discussion of the scope of the ATCA); Xuncax v. Gramajo, 886 F. Supp. 162, 172 n.2 (D. Mass. 1995). Federal courts have also read the TVPA's ten-year statute of limitations into the ATCA by reason of their similarity and the inclusion of the TVPA as a codified note to the ATCA. See Papa v. United States, 281 F.3d 1004, 1012 (9th Cir. 2002); Estate of Cabello, 157 F. Supp. 2d at 1363.

Therefore, given that the statute of limitations from the TVPA has been applied by analogy to the ATCA and that the doctrine of equitable tolling does

not conflict with the text of the ATCA, the statute of limitations for ATCA claims should also be subject to equitable tolling. See Hilao, 103 F.3d at 773 (equitably tolling the statute of limitations of an ATCA claim). Insofar as the district court determined that as a matter of law the doctrine of equitable tolling cannot be applied to Cajuste's TVPA and ATCA claims, the district court's judgment should be reversed.

B. Application of Equitable Tolling Under the Circumstances of Cajuste's Claims Effectuates the Congressional Purpose of the TVPA and the ATCA.

If the district court's dismissal of Cajuste's TVPA and ATCA claims was based on a finding that under these facts equitable tolling does not effectuate congressional purpose, it clearly erred.

1. Tolling the statute of limitations to the date Dorélien first entered the United States effectuates the Congressional purpose of the TVPA and the ATCA.

In its Report on the TVPA, the Senate observed that "all equitable tolling principles" should apply under this law, and it provided a list of "[i]llustrative, but not exhaustive," situations in which tolling was to be available. S. Rep. No. 102-249, at 10-11 (1991).[4]

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4. Based on similar statutory language, courts applying the Foreign Sovereign Immunities Act have required that "victims of terrorism be given benefit of 'all principles of equitable tolling, including the period during which the foreign state was immune from suit . . . .'" Cicippio v. Islamic Republic of

> The statute of limitation should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available. . . .

Id. at 11 (emphasis added, citations omitted).

This list clearly covers the circumstances in this case. Subsequent to the events giving rise to Cajuste's claims under the TVPA and ATCA, Dorélien did not enter the United States until January 1995. [Dkt. 28 Exh. C at p. 3; Dkt. 54:2, 4] See also Dorélien v. U.S. Att'y Gen., 317 F.3d 1314, 1315 (11th Cir. 2003) (Hull, Circuit Judge, specially concurring in the denial of rehearing en banc) (discussing the facts incident to the Board of Immigration Appeals denial of Carl Dorélien's motion for a stay of asylum and noting that "As the IJ found, Dorélien lived in Haiti from birth in 1949 until 1995. He was a military leader from 1991 until 1994 during the Cedras military regime.") Thus, the statute of limitations should have been tolled until that date. Because Cajuste's claims were filed on October 23, 2003, those claims were timely.

The same result should be reached for Cajuste's ATCA claims. Federal courts have identified a "close relationship" between the TVPA and ATCA for limitations purposes. See Papa, 281 F.3d at 1012. In Hilao v. Estate of Marcos,

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Iran, 18 F. Supp. 2d 62, 69 (D.D.C. 1998) (quoting 28 U.S.C. § 1605(f)) (emphasis added).

the Ninth Circuit held that the limitations period for consolidated ATCA claims against former Philippine dictator Ferdinand Marcos were tolled under the extraordinary circumstances present in that country — including Marcos' immunity from suit while in office, intimidation of human rights claimants, fear of reprisals on the part of potential plaintiffs, and lack of impartial forums. 103 F.3d at 772-73. The Hilao court cited the Senate Report on the TVPA as authority that equitable tolling under the statute included "periods in which the defendant was absent from the jurisdiction." Id. at 773; see also Estate of Cabello, 157 F. Supp. 2d at 1368.[5]

The district court's failure to apply equitable tolling to Cajuste's TVPA claim while Dorélien remained outside the United States would particularly frustrate Congress' purpose in enacting the TVPA, which was enacted to prevent foreign torturers from treating the United States as a safe haven. Specifically, if the statute of limitations is allowed to run on TVPA claims while persons liable under the TVPA for torture claims remain outside the United States, such persons

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5. The expression of this principle in federal law is not limited to the TVPA and ATCA. For example, the statute governing contract actions brought by the United States or an officer or agency thereof provides that the period during which "the defendant or the res is outside the United States" shall be excluded from computation of the limitations period. 28 U.S.C. § 2416(a). The same rule applies in criminal actions relating to tax offenses. See 26 U.S.C. § 6531; see also United States v. Myerson, 368 F.2d 393, 395 (2d Cir. 1966) ("There is nothing unreasonable or arbitrary about the tolling of the statute of limitations during an offender's absence from the country").

would merely have to wait until the statute of limitations expired before entering the United States in order to be immune from suit. Such a result should be rejected as inconsistent with Congress' intent in enacting the TVPA.

Page after page of the TVPA's legislative history reveals Congress' intent in preventing the United States from becoming such a safe haven for foreign torturers.[6] For example:

- "[The TVPA] puts torturers on notice that they will find no safe haven in the United States." 137 Cong. Rec. H34785, at 34785 (daily ed. Nov. 25, 1991) (statement of Rep. Mazzoli).
- "[The TVPA] sends a distinct and forceful message that the U.S. will not host torturers within its borders." Id. (statement of Rep. Yatron).
- "[A]pproval [of the TVPA] will serve as a strong message and deterrent to those who engage in torture. The TVPA alerts the world that the United States is not a safe haven for torturers." 135 Cong. Rec. H22713, at 22715 (daily ed. Oct. 2, 1989) (statement of Rep. Bereuter).
- "Mr. Speaker, the continued perpetration of torture is nauseating and an affront to civilized society. It would be equally revolting, however, if a torturer was physically present in the United States but could not be sued by the victim because of inadequacies or ambiguity in our present law." Id. at 22716 (statement of Rep. Leach).
- "[The TVPA] is an important clarification of the legal status of torture victims in United States courts. No longer can torturers find safe haven from their crimes in

6. Where, as here, statements of individual legislators are consistent with statutory language and other legislative history, "they provide evidence of Congress' intent." Brock v. Pierce County, 476 U.S. 253, 263, 106 S. Ct. 1834, 1840-41 (1986).

> the United States." 134 Cong. Rec. H28611, at 28614 (daily ed. Oct. 5, 1988) (statement of Rep. Fascell).

"'[T]he torturer has become -- like the pirate and slave trader before him -- hostis humani generis, an enemy of all mankind.'"[7] And torturers should "no longer have safe haven in the United States." S. Rep. No. 102-249, at 3 (1991). In the words of Senator Arlen Specter, a prominent TVPA supporter:

> [O]ne reason for enacting [the TVPA] is to discourage torturers from ever entering this country. There is no question that torture is one of the most heinous acts imaginable, and its practitioners should be punished and deterred from entering the United States.

138 Cong. Rec. S4176, at 4176 (daily ed. Mar. 3, 1992).

Because equitable tolling under these circumstances is necessary to effectuate Congress' aim that the United States not become a "haven" for torturers, the district court clearly erred inasmuch as it determined that the facts do not warrant application of the doctrine.

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7. Sosa v. Alvarez-Machain, __ U.S. __, 124 S. Ct. 2739, 2765-66 (2004) (Parenthetically quoting with approval Filártiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980), for the proposition that the scope of ATCA jurisdiction should be limited to claims with no "less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted").

2. Tolling the statute of limitations until the date the military regime of which Dorélien was a part left power in Haiti effectuates the Congressional purpose of the TVPA and the ATCA.

Federal courts adjudicating lawsuits against foreign despots and renegade commanders have held that the doctrine of equitable tolling applies where "'extraordinary circumstances outside the plaintiff's control made it impossible to timely assert the claim.'" Estate of Cabello, 157 F. Supp. 2d at 1368 (citation omitted). This "extraordinary circumstances" doctrine is marked by dictatorial government, civil war, torture, and emigration and tolls the statute of limitations on human rights claims under the TVPA and ATCA. See Estate of Cabello, 157 F. Supp. 2d at 1368 (tolling applies during rule of Chilean military authorities); Hilao, 103 F.3d at 773 (same during rule of Philippines' Ferdinand Marcos); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987) (same during Argentine military rule), reconsideration granted in part on other grounds, 694 F. Supp. 707 (N.D. Cal. 1988).

This case is a prime example of when the doctrine of equitable tolling should apply. The brutal military regime in Haiti did not begin to lose its grip on the people of Haiti until September 1994. The democratically elected government did not even take power until October 15 of that year. If Cajuste had filed claims against Dorélien before this change in regime, it would have been

extremely dangerous for Cajuste's family – his mother, daughter, two brothers, and a sister – who were still living in Haiti. [Dkt. 54:6; Dkt. 75:4] Thus, the statute of limitations should have been tolled until the date the military regime left power in Haiti and democracy was restored.

II. THE DISTRICT COURT ERRED IN GRANTING DORÉLIEN'S MOTION TO DISMISS, IMPROPER VENUE.

A. Dorélien's Motion Should Have Been Converted To A Motion For Summary Judgment.

At the outset, Jean notes that Dorélien's motion should have been converted to a motion for summary judgment and the parties should have been given an opportunity to submit pertinent documentation. A motion brought after the pleadings are closed should be brought as a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). However, "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Dorélien brought his Motion to Dismiss, Improper Venue, after the pleadings had closed. In the motion Dorélien relied upon an affidavit, previously filed by Plaintiffs in support of their motion for a temporary restraining order, to

show that Jean had failed to exhaust her remedies in Haiti. [Dkt. 53:2 (citing Affidavit of Mario Joseph ("Joseph Affidavit") Dkt. 42)] The district court clearly went beyond the allegations in the pleadings when it relied upon the Joseph Affidavit for its ruling that Jean failed to exhaust her remedies in Haiti. [Dkt. 76:3-4] In so doing, the district court erred by not converting the motion to one for summary judgment. Furthermore, the district court erred when the only evidence it considered was the Joseph Affidavit. Jean submitted documentation explaining the context of the statements in the Joseph Affidavit and showing that any remedies remaining were neither adequate nor available. [See Part II.B, below, discussing Dkt. 69 and its attached exhibits A-G.] Thus, the court erred as a matter of law by considering matters outside the pleadings without converting the motion one for summary judgment. Fed. R. Civ. P. 12(c). The district court further erred when, after looking to materials beyond the pleadings, it selectively considered only some materials but not others. See Hairston v. Gainesville Sun Publ. Co., 9 F.3d 913, 919 (11th Cir. 1993) ("It is not part of the court's function, when deciding a motion for summary judgment, to decide issues of material fact, but rather determine whether such issues exist to be tried.").

B. Jean Has No Adequate and Available Remedies To Exhaust.

Dorélien moved for dismissal for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3), contending that venue was improper in the district

court because: (1) Dorélien and Plaintiffs are in Haiti; (2) the TVPA requires that Plaintiffs exhaust all adequate and available remedies in Haiti; and (3) the Affidavit of Mario Joseph, [Dkt. 42] filed by Plaintiffs, shows that there are adequate and available remedies in Haiti.[8] [Dkt. 53]

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8. Although styled as a motion to dismiss for improper venue, Dorélien's motion concerned only an exhaustion of remedies argument. Inasmuch as Dorélien's motion is treated as one for improper venue, Plaintiffs offer the following: Jean alleged in the complaint that Dorélien was an alien and a resident of the United States and that venue was proper in the United States District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1391(b) and (d). Sections 1391(b) and (d) state as follows:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in . . . (3) <u>a judicial district in which any defendant may be found,</u> if there is no district in which the action may otherwise be brought.
>
> (d) <u>An alien may be sued in any district.</u>

28 U.S.C. § 1391(b)(3) and (d) (emphasis added).

There can be no dispute that Dorélien was an alien. Dorélien conceded in his Motion to Dismiss, Improper Venue, that he is a citizen of Haiti and did not contest Jean's assertion that he is an alien. [Dkt. 53 ¶ 1] As for whether he was "found" in the Southern District of Florida, Dorélien admitted he was incarcerated at the Krome Detention Center, which is located in Miami, Florida, on the day he was served the Plaintiffs' summons and complaint. [Dkt. 52:2 ¶ 3] Thus, Dorélien was "found" in the Southern District of Florida at the time the Complaint was served on him. "A defendant 'may be found' in a district in which he could be served with process; that is, in a district which may assert personal jurisdiction over the defendant." <u>Palmer v. Braun</u>, 376 F.3d 1254, 1259 (11th Cir. 2004) (interpreting 28 U.S.C. § 1400(a), a venue provision with language very similar to the one at issue here). Thus venue was proper in the district court based upon either § 1391(b)(3) or § 1391 (d).

In granting Dorélien's motion, the district court relied solely on the Joseph Affidavit, seemingly ignoring or rejecting the additional materials offered by Jean. The district court remarked that the Joseph Affidavit supports that "'both the criminal and civil judgments [against Defendant] remain legally binding,'" and Jean "'may presently enforce [her] civil judgment against Dorélien.'" [Dkt. 76:3-4 (quoting Dkt. 42:3)] The district court concluded that "Plaintiff's own evidence demonstrates that the Haitian civil judgment is still legally binding" and enforceable in Haiti and because "Plaintiffs have made no attempt to enforce their judgment in Haiti since it was obtained four years ago[,] the Court finds that adequate and available remedies exist in Haiti, which Plaintiffs must attempt to exhaust before alleging claims against Defendant in [this Court] pursuant to 28 U.S.C. § 1350." [Dkt. 76:4]

Section 2(b) of the TVPA provides: "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, quoting Section 2(b) of the TVPA). Dorélien bears the initial burden of demonstrating that Jean has not exhausted adequate available remedies in Haiti. See Estate of Rodriguez v. Drummond Co., Inc., 256 F. Supp.

2d 1250, 1267 (N.D. Ala. 2003); Sinaltrainal v. The Coca-Cola Co., 256 F. Supp. 2d 1345, 1358 (S.D. Fla. 2003)[9]; and Hilao, 103 F.3d at 778 n.5.

Jean concedes that the Haitian judgment remains a legally valid judgment against Dorélien. [Dkt. 42:2-3 & Exh. A; Dkt. 69:9] What Jean does not concede is that an available and adequate remedy exists in Haiti.

Exhaustion of remedies pursuant to the TVPA's exhaustion requirement is not required "'when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile.'" Xuncax, 886 F. Supp. at 178 (quoting S. Rep. No. 102-249 (1991)). As shown below, Jean's documentation supports – documentation the district court rejected or failed to consider – her contention that any attempt to enforce her civil judgment against Dorélien in Haiti in the present political climate there would be futile and potentially deadly and therefore is not adequate or available under section 2(b) of the TVPA.

For example, Jean offered the Declaration of Brian Concannon, Jr., Plaintiffs' expert witness ("Concannon"), [Dkt. 69 Exh. A] in support of her argument that the Haitian judgment against Dorélien is currently not enforceable in Haiti. [Dkt. 69:10] Concannon has current knowledge of the political situation

9. Although the Sinaltrainal court interpreted the exhaustion of available remedies issue as a challenge to the court's subject matter jurisdiction, other district courts have found that exhaustion of foreign remedies is not jurisdictional. See Cabello Barrueto v. Fernandez Larios, 291 F. Supp. 2d 1360, 1364-1365 (S.D. Fla. 2003) (§2(b) of the TVPA is not jurisdictional – citing cases).

in Haiti. [Dkt. 69 Exh. A at pp. 1-2 ¶¶ 1-2] As he stated, a "recent violent rebellion that began in January [2004] was launched in the city of Gonaives" where the Raboteau Massacre occurred. [Dkt. 69 Exh. A at p. 2 ¶ 3] As a result of that rebellion, Dorélien and other members of the military regime of which Dorélien was a part have been "freed from jail without legal process" and "now hold great power in Haiti." [Dkt. 69 Exh. A at 2 ¶¶ 4-5]

With Dorélien and his cohorts once again holding great power, Jean has no adequate or available remedy against Dorélien in Haiti today. There is a real, "not merely theoretical" threat that anyone attempting to enforce their judgment against Dorélien based upon the Raboteau case would be at grave risk. [Dkt. 69 Exh. A at 3 ¶ 6-7] Events which have occurred in Haiti since the members of the military regime were freed from prison demonstrate that threat. In January 2004, "forces opposed to the [Aristide government] set fire to the house of the chief prosecutor in the Raboteau case." [Dkt. 69 Exh. A at 3, ¶ 6, Exh. E] In April 2004, armed men attacked the Haitian judge who presided over the Raboteau Massacre trial; the attack was reportedly motivated by the judge's role in that trial. [Dkt. 69 Exh. A at 3 ¶ 6, Exh. D, Exh. F] Amnesty International recently issued a report summarizing how former members of the military regime, including Dorélien, threaten rule of law in Haiti. [Dkt. 69 Exh. G]

"It is completely unsafe and impossible, due to the current ineptitude of the Haitian judicial system, for the victims [of the Raboteau Massacre] to collect the money that the defendants were ordered to pay them. . . . [T]he victims would be in too much danger to bring claims or testify against [Dorélien]." [Dkt. 69 Exh. A at 3, ¶7] Thus, Jean would place herself at great risk if she were to attempt to enforce the Haitian Judgment in a Haitian court, as would any attorney attempting to do so on her behalf. In the current political climate, Jean does not have an adequate or available remedy in Haiti.

If the district court had properly treated Dorélien's motion as one for summary judgment, the motion would have probably been denied. As the above documents demonstrate, there is at the very least a disputed issue of material fact as to whether Plaintiff's judgment against Dorélien, although legally enforceable, is not actually enforceable. See Xuncax, 886 F. Supp. at 178. Thus, the district court's order granting Dorélien's motion to dismiss should be reversed as error.

C. The Exhaustion of Remedies Requirement From Section 2(B) of the TVPA Does Not Apply to Plaintiffs' Claims Brought Pursuant to the ATCA.

A plaintiff asserting a claim under the ATCA is not required to exhaust his remedies in the place where the alleged violations of customary international law occurred. In Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), the Second Circuit held that the state-action requirement of the TVPA should not be applied to the

ATCA because Congress intended the TVPA only to expand upon, not reduce the ATCA's scope. See Id. at 241 ("The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act."). Similarly, other courts have held that the exhaustion of adequate and available remedies requirement of the TVPA should not be applied to ATCA claims. See Abiola v. Abubakar, 267 F. Supp. 2d 907, 910 (N.D. Ill. 2003); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1132-1135 (C.D. Cal. 2002) (citing Kadic and stating that "[t]he court is not persuaded that Congress' decision to include an exhaustion of remedies provision in the TVPA indicates that a parallel requirement must be read into the ATCA."); see also Jama v. I.N.S., 22 F. Supp. 2d 353, 364 (D.N.J. 1998) ("There is nothing in the ATCA which limits its application to situations where there is no relief available under domestic law.").

Because Congress did not intend the scope of the ATCA to be diminished though enactment of the TVPA, as recognized by the courts cited above, the exhaustion of remedies requirement should not be held to apply to claims brought under the ATCA and customary international law, even if a plaintiff seeks recovery under both the ATCA and the TVPA. Therefore, Jean need not show that she exhausted her remedies in Haiti as to her claims for extra-judicial killing (Count One) [Dkt. 37:10-12] and crimes against humanity (Count Five) [Dkt.

37:17-18] to the extent that those claims are based upon the ATCA and customary international law.

III. THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFFS' FUFTA CLAIMS AGAINST DORÉLIEN AND LSC.

Before discussing the merits of this issue, a close consideration of the procedural aspects of the district court's dismissal of the FUFTA claims may be helpful.

When the district court granted Dorélien's Motion for Judgment on the Pleadings, Statute of Limitations [Dkt. 61], it erroneously dismissed Plaintiffs' complaint in its entirety. [Dkt. 61] Plaintiffs subsequently filed a motion for correction and relief pursuant to Federal Rule of Civil Procedure 60, arguing that the court had incorrectly dismissed Jean's claims along with Cajuste's in that Dorélien had never moved to dismiss her claims on statute of limitations grounds and could not have because they had been timely filed without application of equitable tolling. [Dkt. 65] Plaintiffs further contended that Dorélien had not requested that the court dismiss either Plaintiffs' state law fraudulent transfer claims against Dorélien and that in any event their state law claims were timely asserted. [Dkt. 65:2, 5] Based upon Jean's Rule 60 motion, the district court struck that portion of its order dismissing Jean's claims. [Dkt. 67] Without discussion or rationale, however, the district court did not reinstate Cajuste's fraudulent transfer claims against Dorélien or LSC. [Dkt. 67]

Similarly, when the district court granted Dorélien's Motion to Dismiss, Improper Venue, it dismissed, without discussion, all of Jean's claims against Dorélien, including Jean's FUFTA claims against Dorélien and LSC. [Dkt. 76]

Plaintiffs appealed the above-described orders [Dkt. 79], purportedly dismissing Plaintiffs' complaint in its entirety. This Court, however, sua sponte dismissed that appeal for lack of jurisdiction, finding that the orders on appeal were not final or immediately appealable because Plaintiffs' claims against LSC for fraudulent transfer and the counterclaim brought by Dorélien remained pending. [Dkt. 85:2]

After this Court dismissed the above appeal, the district court ordered the Parties to brief what issues remain for the court's consideration. [Dkt. 90] In their response, Plaintiffs stated:

> The Court has the discretion to retain jurisdiction over Plaintiffs' state law claim against Defendants Dorélien and LSC for fraudulent transfer, even after the dismissal of Plaintiffs federal statutory claims. See 28 U.S.C. § 1367(c). Plaintiff Jean continues to have standing to assert her claim for relief from fraudulent transfers because she is one of the judgment creditors in the Haitian court judgment against Dorélien in the amount of one billion Haitian gourdes.

[Dkt. 91:5 n.4] Plaintiffs also specifically requested that the district court retain jurisdiction of Plaintiffs fraudulent transfer claim against Dorélien and LSC and to certify their TVPA and ATCA claims for immediate appeal. [Dkt. 91:9]

In its final order, the district court dismissed Plaintiffs' FUFTA claims against LSC[10] and dismissed – again without discussion – Plaintiffs' FUFTA claims against Dorélien. [Dkt. 97:3-4]

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10. It is now clear that the district court did not consider Plaintiffs' Reply to LSC's request for dismissal of the FUFTA claim against it. In its Final Order of Dismissal, the district court states:

> Defendant Lump Sum moves for dismissal of the fraudulent transfer claims because it is an innocent stakeholder that merely wants to consummate its Lottery assignment transaction in a manner consistent with this and other court's orders. . . . Plaintiff has not objected to dismissal of Defendant Lump Sum as an innocent stakeholder whose further involvement is unnecessary to the prosecution of her case.

[Dkt. 97:3 (emphasis added] At first Plaintiffs were puzzled by the district court's finding that they did not object to the dismissal of LSC. Plaintiffs clearly objected to such a dismissal in their reply to LSC's memorandum. [Dkt. 96]

When the district court entered its "Order Denying Motion to Reopen Case," on October 29, 2004. [Dkt. 99], the district court's reasoning became clear. In that order, the district court stated, "Plaintiffs did not comply with this Court's Order to state the issues remaining for this Court's consideration after the Eleventh Circuit Opinion or address the issue, clearly raised by the Court, as to whether Lump Sum should be released. Nor did Plaintiffs file a timely Reply to Lump Sum's brief requesting dismissal from the case." [Dkt. 99:2] Subsequent to its final order, the district court must have discovered that Plaintiffs' filed a reply to LSC's memorandum; however, it considered the reply to be untimely and treated it as a motion to reopen.

The district court's finding that the reply was untimely is clearly erroneous. In its order instructing the parties to brief the court on issues remaining for resolution, the district court set forth specific time limits for filing the response and any replies. Plaintiffs were given ten days, not the usual five days, to file a reply. [Dkt. 90:2] LSC filed its memorandum on September 15, 2004. [Dkt. 94] Plaintiffs filed their reply to LSC's memorandum on September 28, 2004 [Dkt.

A. The District Court Erred in Dismissing Plaintiffs' FUFTA Claims Against Dorélien.

In the absence of any explanation by the district court, the legal basis for the district court's orders and final judgments dismissing Plaintiffs' FUFTA claims against Dorélien is unclear. If the district court was exercising its discretion pursuant to 28 U.S.C. § 1367(c) to not retain supplemental jurisdiction over the Plaintiffs' FUFTA claims against after dismissing their TVPA and ATCA claims, the district court erred by failing to state its reasons for exercising this discretion.[11] See Palmer v. Hospital Auth. of Randolph County, 22 F.3d 1559, 1569 (11th Cir. 1994) ("Because the district court failed to engage in any analysis of the discretionary factors available to it in this case, we must remand for consideration of section 1367(c).").

If the district court dismissed Plaintiffs' FUFTA claims against Dorélien on the merits, it erred as well. The district court must treat all material

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96], well before the ten-day period for service ran. See Fed. R. Civ. P. 6(a), (e). Thus, Plaintiffs' reply was timely filed and the district court erred by failing to consider Plaintiffs' argument that LSC should not be dismissed as a party.

11. Therefore, if this Court affirms the dismissal of Plaintiffs' federal law claims, Plaintiffs ask that the Court remand to the district court with instructions to state why it chose not to exercise its discretion to retain supplemental jurisdiction over Plaintiffs' fraudulent transfer claims against Dorélien. Of course there would be no need to remand for consideration under section 1367(c) if this Court reverses the dismissal of Plaintiffs' federal claims. In that scenario, the Court could simply instruct the district court to reinstate the state law claim against Dorélien.

allegations of the complaint as true while liberally construing the complaint in favor of the plaintiff. Roberts v. Florida Power & Light Co., 146 F.3d 1305, 1307 (11th Cir. 1998). A court may dismiss a complaint at the pleadings stage "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spaulding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984). The allegations in the Second Amended Complaint state a claim against Dorélien pursuant to FUFTA. [Dkt. 37:18-24]

B. The District Court Erred in Dismissing Plaintiffs' FUFTA Claims Against LSC.

The parties to this action are also parties to a consolidated case pending before the Circuit Court of the Second Judicial Circuit, Leon County, Florida ("Leon County Case"). The Leon County Case is a consolidated case comprising two actions: (1) In re Assignment of Certain Lottery Payments of Carl Dorélien, Leon County Circuit Court Case No. 04-CA-000559, which is a petition by LSC and Dorélien for the approval of Dorélien's assignment of his Florida Lottery prize to LSC in exchange for a lump sum payment of approximately $1.3 million; and (2) Marie J. Jean v. Carl Dorélien, Leon County Circuit Court Case No. 04-CA-001525, which is an action for the domestication of a civil judgment (the "Haitian Judgment") entered by a Haitian Court against Carl Dorélien for one

billion Haitian gourdes (equivalent to more than $20 million at the time that the Haitian Judgment was entered).[12]

Plaintiffs have domesticated the Haitian Judgment through the Leon County Circuit Court. On June 21, 2004, Jean filed an application pursuant to the Florida Uniform Out-of-Country Foreign Money Judgment Recognition Act, Sections 55.601-55.607, Florida Statutes, for the recognition of the Haitian Judgment. Dorélien did not oppose the application and, on September 2, 2004, the Leon County Circuit Court issued a certificate of non-objection in the consolidated case. [Dkt. 96 at Exh. A] Accordingly, the Haitian Judgment is now a valid and enforceable Florida judgment against Dorélien. See § 55.604(5), Fla. Stat. ("Upon entry of an order recognizing the foreign judgment, or upon recording of the clerk's certificate set forth above, the foreign judgment shall be enforced in the same manner as the judgment of a court in this state.")

Plaintiffs intervened in the petition for approval of the assignment, and on September 10, 2004, the Leon County Circuit Court entered an order (the "September 10 Order") restraining the payment of the assignment proceeds to Dorélien pending the resolution of their claims against him. On September 21, 2004, the Leon County Circuit Court entered an order (the "Amended Order") amending certain provisions of the September 10 Order, none of which are

12. The cases were consolidated by order of the Leon County Circuit Court entered on August 4, 2004.

relevant to the dismissal of the fraudulent transfer claims against LSC.

Pursuant to the Amended Order, the proceeds from Dorélien's assignment of his Florida Lottery prize to LSC are to be paid into a money market checking account with Northern Trust Bank pending the outcome of Plaintiffs' claims. Further, LSC "shall be the sole signator to this account" and "shall hold the monies in this account in escrow until further order" of the court. [Dkt. 96 at Exh. B at pp. 9-10, ¶¶ 2(11) and (14)] Significantly, because Dorélien may seek to overturn the domestication of the Haitian Judgment and/or the Amended Order, subparagraph 2(15) of the Amended Order expressly recognizes the continuing jurisdiction of the district court and this Court to enjoin LSC from paying the funds to Dorélien. Subparagraph 2(15) provides: "This Order shall not affect the jurisdiction of the United States District Court for the Southern District of Florida, or other Federal Courts over the claims brought by Intervenors [Plaintiffs] in those Courts." [Dkt. 96 at Exh. B at p. 11, ¶ 2(15)]

LSC used the above state court proceedings as its basis for obtaining a dismissal of the fraudulent transfer claim brought against it. Specifically, LSC characterized itself as an innocent stakeholder that had no further interest in the federal litigation. [Dkt. 94:1-2 ¶¶ 1-3] The district court apparently agreed with LSC and dismissed the fraudulent transfer claim against it.

> Defendant Lump Sum moves for dismissal of the fraudulent transfer claims because it is an innocent stakeholder that merely

> wants to consummate its Lottery assignment transaction in a manner consistent with this and other court's orders. . . .

[Dkt. 97:3]

Contrary to LSC's arguments to the district court and the district court's conclusion, nothing in the state court's orders resolve Plaintiffs' claims against LSC for fraudulent transfer. The state court expressly reserved ruling on whether LSC had knowledge of Dorélien's fraudulent intent when LSC requested approval of its assignment agreement with Dorélien. [Dkt. 96 exh. B at pp. 5-6 ¶ 9] Additionally, the state court recognized the federal courts' jurisdiction to enjoin LSC from paying the funds to Dorélien based on the fraudulent transfer claim in the federal lawsuit. [Dkt. 96 at Exh. B at p. 11, ¶ 2(15); Dkt. 96 at Exh. B at p. 7, ¶ 2(1) (reserving ruling on Emergency Motion to Prevent Fraudulent Transfer and continuing said motion sine die)]

The state court's orders also do not indirectly decide the issue of whether LSC had satisfied the requirements of § 726.109, Fla. Stat., which provides a defense for transferees "who took in good faith and for a reasonably equivalent value . . . ." § 726.109(1), Fla. Stat. Rather, the state court approved the assignment agreement for Dorélien's lottery proceeds based solely on whether the agreement met the test in § 24.1153(1)(b), Florida Statutes, which governs approval of assignments. [Dkt. 96 at Exh. B at p.7, ¶ 2(2)] The state court found that the test from § 24.1153 was met in the following regard: "The purchase price

being paid by Assignee in consideration for the assignment of the Lottery Payments represents a present value of the payments discounted at an annual rate that does not exceed Florida's usury limit for loans." [Dkt. 96 exh. B at p. 2 ¶ 3] That finding does not answer the question relevant to Plaintiffs' fraudulent transfer claim – i.e., whether LSC has satisfied the test of showing that LSC provided "reasonably equivalent value" in exchange for the assignment pursuant to § 726.109(1), Fla. Stat.

Further, LSC's placement of Dorélien's proceeds from the assignment in an escrow account based upon the state court's order requiring it to do so, does not moot Plaintiffs' claims against LSC. Plaintiffs continue to assert that they will be able to prove their claims against LSC alleging fraudulent transfer [Dkt. 37:18-24] and that the assignment should be avoided based upon §§ 726.105, .106, Fla. Stat. [Dkt. 37:23-24 ¶ 95(4)] Neither of those issues were decided by the state court.

Finally, should Dorélien ultimately prevail against the Plaintiffs in the state court litigation involving the domestication of the Haitian judgment against him, the state court would no longer have reason to hold the proceeds of that assignment in escrow, the proceeds of which would revert to LSC which would be obligated to provide the proceeds to Dorélien or his representative based upon the terms of the assignment agreement. Without jurisdiction over LSC, the

federal court could not act on a motion by Plaintiffs requesting that the district court enjoin such a transfer.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the district court's orders dismissing Plaintiffs claims against Dorélien and LSC, and remand this case for further proceedings consistent with this Court's ruling.

Dated December _____, 2004

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,918 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 and Times New Roman 14.

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Dated: __________________

CERTIFICATE OF SERVICE

This is to certify that on this ____ day of December, 2004, a copy of the foregoing was been served by U.S. Mail on:

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