No. 09-1376

In The
United States Court of Appeals
For The Fourth Circuit

JUAN MANUEL RIVERA RONDON,

Appellant,

v.

TEŐFILA OCHOA LIZARBE
AND CIRILA PULIDO BALDEON,

Appellees.

On Appeal from the United States District Court
For the District of Maryland, No. 8:07-CV-01809
Peter J. Messitte, United States District Judge

BRIEF OF APPELLANT JUAN MANUEL RIVERA RONDON

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, the Appellant states as follows:

Appellant is not a publicly held corporation or other corporate entity. No publicly held corporation or other publicly held entity has a direct financial interest in the outcome of this litigation. No party is a trade association. This case does not arise out of a bankruptcy proceeding.

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STATEMENT OF JURISDICTION

A. District Court Jurisdiction.

In bringing this action against Juan Manuel Rivera Rondon ("Rivera Rondon"), Teőfila Ochoa Lizarbe ("Lizarbe") and Cirila Pulido Baldeon ("Baldeon") contend that he is liable for alleged extrajudicial killing and torture as defined in the Torture Victim Protection Act, codified at 28 U.S.C. § 1350 note ("TVPA"). (Apx 11.) They therefore asserted that the District Court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1350. (Apx 11.)

Rivera Rondon moved to dismiss the case on the basis that he is immune from liability pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 28 U.S.C. §§ 1602-1611("FSIA"). Rivera Rondon also moved to dismiss because Lizarbe and Baldeon failed to exhaust their remedies abroad, as required by the TVPA, and because this action was brought well beyond the TVPA's ten-year statute of limitations. Thus, it is Rivera Rondon's position that the District Court did not have subject matter jurisdiction.

The District Court denied Rivera Rondon's motion to dismiss. (Apx. 256.)

B. Appellate Court Jurisdiction.

Rivera Rondon noted this interlocutory appeal of the Court's denial of his motion to dismiss based on the FSIA. The Court "ha[s] jurisdiction to review this issue because [o]rders denying sovereign immunity are immediately appealable

collateral orders." *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006). The Court has discretionary pendent appellate jurisdiction to consider the other issues raised in this brief and, as explained in greater detail below, it should do so because they "are so interconnected with immediately appealable issues that they warrant concurrent review." *Id*. at 475.

STATEMENT OF THE ISSUES

(1) Whether the District Court erred in denying Appellant's motion to dismiss based on the Foreign Sovereign Immunities Act of 1976 where, at all times relevant to this action, Appellant was acting within the scope of his official duties as an agent of a foreign government.

(2) Whether the District Court erred in applying the doctrine of equitable tolling to permit the Appellees to bring this action nearly 22 years after the alleged acts in violation of the ten-year statute of limitations under the Torture Victims Protection Act.

(3) Whether the District Court erred in denying Appellant's motion to dismiss for the Appellees' failure to exhaust their remedies abroad as required by the Torture Victims Protection Act.

STATEMENT OF THE CASE

On July 11, 2007, Lizarbe and Baldeon filed this action in the United States District Court for the District of Maryland against Rivera Rondon based upon

events alleged to have occurred 22 years earlier, in August 1985, when he was a low-ranking officer in the Peruvian military acting in his official capacity. (*See* Apx 12, 20-21.) Strikingly, in the complaint's 157 paragraphs, there are virtually no allegations about Rivera Rondon, and certainly none sufficient to maintain any cause of action against him.

Although organized as seven counts, the complaint pleads claims cognizable under only two statutes and no common law theories. Specifically, Lizarbe and Baldeon have filed a statutory cause of action under the Torture Victim Protection Act, and they have raised matters of international law under the jurisdiction purportedly granted by the Alien Tort Claim Act.

On August 30, 2007, Lizarbe and Baldeon moved for a default judgment, and the Clerk of the Court entered a default on September 27, 2007. (Apx 3-4.) On November 27, 2007, in response to a request from Rivera Rondon for Court-appointed counsel, the District Court appointed Timothy Maloney and Cary J. Hansel, of the law firm of Joseph, Greenwald & Laake, P.A., to represent Rivera Rondon in this matter. (Apx 43.) Rivera Rondon thereafter opposed the motion for default judgment and the Court denied the motion. (Apx 4.)

On November 21, 2007, Rivera Rondon moved to dismiss the complaint on nine grounds: (1) the claims asserted are barred by the statute of limitations; (2) Rivera Rondon is immune from suit under the Foreign Sovereign Immunities Act

of 1976; (3) Lizarbe and Baldeon failed to exhaust their remedies in Peru; (4) the case should be dismissed under the political question doctrine; (5) Lizarbe's and Baldeon's claims are barred by the Act of State doctrine; (6) the Complaint fails to state a claim upon which relief can be granted; (7) the Alien Tort Claims Act does not provide the Court with jurisdiction; (8) improper venue; and (9) the decedents failed to allege that they appeared before the Court through duly-appointed personal representatives on behalf of the open estates. (Apx 4.) Lizarbe and Baldeon opposed the motion. (Apx 5.)

The Court held a hearing April 14, 2008. (Apx 46-129.) The Court denied Rivera Rondon's motion on February 26, 2009. (Apx 256.) It issued a memorandum opinion the same day. (Apx 222-55.) Rivera Rondon timely noted this interlocutory appeal on March 27, 2009. (Apx 257.)

STATEMENT OF FACTS

In the more than 150 paragraphs of the Complaint, Lizarbe and Baldeon allege gross violations of the most basic human rights, which are now historically acknowledged to have occurred at the hands of both the Peruvian military and Shining Path guerillas.

However, not a single violation is alleged to have been carried out, directly or indirectly, by Rivera Rondon. Rivera Rondon is not alleged to have fired a shot or to have ordered that a shot be fired. He is not alleged to have killed anyone or

to have ordered that anyone be killed. He is not alleged to have touched a single alleged victim. Rivera Rondon is not alleged to have even seen any alleged victims. No plaintiff or witness, living or deceased, has ever identified the Rivera Rondon, in the Complaint or elsewhere, as having personally committed or ordered even a single atrocity.

Other than attending a meeting as a soldier "called" to do so by his superior officer, prior to the alleged events in Accomarca and being officially stationed by the military with his squad *outside of the town*, the Complaint makes no allegations whatsoever that Rivera Rondon did anything to harm anyone or was involved in any other way in the events with which Lizarbe and Baldeon take issue. (*See* Apx 20, 22.)

There are very few other facts relevant to the disposition of this matter, but they are all alleged or admitted in the Complaint. First, the alleged events occurred in August of 1985. (*See* Apx 19-23.)

Second, at all relevant times, Rivera Rondon was acting in his "official capacity" as a low-ranking officer in the Peruvian military following the orders of his superiors. (*See* Apx 12, 20-21, 29-30.) The allegations in the complaint make this unmistakably clear. Lizarbe and Baldeon took great pains to charge that the alleged actions of Rivera Rondon were in direct response to policy set by the

elected president and passed down to Rivera Rondon through the chain of command as part of the Peruvian government's war against terrorism.

The Complaint alleges that during the relevant period of time, "Peru was in a state of civil war," and that the Peruvian Army was "fighting the Maoist rebel group" Shining Path, which "committed widespread abuses, including massacres, bombings and targeted assassinations." (Apx 16.) In point of fact, Shining Path is on the U.S. Department of State's "Designated Foreign Terrorist Organizations" list, and the European Union and Canada likewise regard them as a terrorist organization and prohibit providing funding or other financial support for them. *See* US Department of State, October 11, 2005. *Foreign Terrorist Organizations (FTOs)*, Accessed through web archive on 2007-11-17.; *Council Common Position 2005/936/CFSP, March 14, 2005*, available online, accessed 2007-11-17; Government of Canada, *Listed Entities*, accessed 2007-11-17.

Lizarbe and Baldeon note that "national elections" were held in 1980, and that the newly-elected government "declared a state of emergency" in an area to include where the alleged events occurred in an effort to fight the Maoist terrorists in that region. (Apx 17.) They further allege that it was "the government" which "deployed the Peruvian Army" to the alleged location where the events at issue occurred. (Apx 18.) Thereafter, the soldiers, such as Rivera Rondon, were alleged to be carrying out, "military operations" in the region. (Apx 18.) Finally, it is

alleged that it was the "Peruvian Army" that "targeted the Accomarca District" where the events in question allegedly took place. (Apx 19-20.)

Lizarbe and Baldeon allege that a Peruvian General who was "Chief of the Political-Military Command" for the area involved, "ordered the General Staff of the Peruvian Army's Second Infantry Division to devise an operational plan to 'capture and/or destroy terrorist elements.'" (Apx 14, 19-20.) The Complaint alleges that the military "operation" was "placed under the control of" a Lieutenant Colonel who was the "Chief of Operations of the General Staff." (Apx 19-20.) Lizarbe and Baldeon assert that Rivera Rondon attended a meeting called by his superior officer, the Lieutenant Colonel, to "plan" a military operation in Accomarca. (Apx 20.) Further, it is alleged that Rivera Rondon was merely a Lieutenant at the time and allegedly involved in the resulting operation as such and while wearing his military uniform and using military equipment. (Apx 20-21.)

The foregoing allegations, taken as a whole, unquestionably demonstrate that the alleged conduct of Rivera Rondon was taken entirely in his official capacity as an officer in the Peruvian military pursuant to orders given to him through the chain of command and consistent with a policy designed to fight terrorism and ultimately emanating from the elected president of Peru himself.

Third, the allegations underlying the Complaint were the subject of extensive investigation and review by Peruvian Courts, where Rivera Rondon was

initially cleared of all wrongdoing. (*See* Apx 29-30.) In any event, there is now a process available in Peru for the redress of any alleged wrongs. As demonstrated below, these allegations or admissions mandate dismissal. The District Court erred in denying Rivera Rondon's motion to dismiss, and this Court should reverse that ruling.

SUMMARY OF ARGUMENT

The District Court erred in denying Rivera Rondon's motion to dismiss. Rivera Rondon is entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"). The District Court held to the contrary, finding (1) that the FSIA does not apply to individual foreign government officials, (2) that FSIA does not apply to former foreign government officials and, (3) that Rivera Rondon had acted outside the scope of his official duties. Each of those findings was erroneous.

First, there are conflicting decisions in this Court as to whether the FSIA applies to individual foreign government officials. The Court must apply the earliest of those decisions, which holds that it does. In the alternative, the more recent decision to the contrary should be overruled.

Second, the District Court relied on *dicta* in ruling that the FSIA does not apply to former government officials. This Court should ignore that *dicta* and hold, based on the language and statutory history of the FSIA, that it shields former government officials from liability.

Third, the District Court erroneously relied on a letter purportedly from the Embassy of Peru in finding that Rivera Rondon acted outside the scope of his official duties. The letter is contradicted by the detailed factual allegations in the complaint, which plainly show that Rivera Rondon acted within the scope of his official duties. For all the foregoing reasons, the Court should reverse the District Court's denial of Rivera Rondon's motion to dismiss.

The Court should also exercise its pendent appellate jurisdiction to review two other, closely-related issues. The District Court found that Rivera Rondon had not adequately proven his defense that Lizarbe and Baldeon failed to exhaust their remedies abroad, as required by the TVPA. In so doing, the Court improperly placed the burden on Rivera Rondon, which should have been the plaintiff's burden of proof.

Furthermore, the District Court incorrectly applied the doctrine of equitable tolling and erroneously found that Lizarbe's and Baldeon's action was not precluded by the ten-year statute of limitations. That finding also warrants reversal under the circumstances of this case.

ARGUMENT

I. Rivera Rondon is immune from suit under the Foreign Sovereign Immunities Act of 1976.

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 ("FSIA") provides that, with some exceptions not relevant here, a defendant acting

in an official capacity on behalf of a foreign government is immune from suit for actions taken in his official capacity. Section 1604 of Title 28 provides in relevant part: "Subject to existing international agreements to which the United States [was] a party at the time of enactment of [the] Act[,] a foreign state shall be immune from the jurisdiction of the courts of the United States . . . ."

"Foreign state" is defined to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a). "Agency or instrumentality of a foreign state" is further defined as:

> [A]ny entity--
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 USCS § 1332(c) and (e)] nor created under the laws of any third country.

28 U.S.C. § 1603(b).

The District Court held that Rivera Rondon does not enjoy FSIA immunity for three reasons. First, relying solely on the Court's recent decision in *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009), the Court held that the FSIA does not apply to individual foreign government agents, and therefore Rivera Rondon does not have immunity. (Apx. 234-35.) Second, the Court found that Rivera Rondon was acting outside the scope of his official duties and, therefore, the FSIA would not apply in any event. (Apx 235-36.) In reaching that conclusion, the Court

relied solely on a letter from the Ambassador of Peru asserting that Rivera Rondon had acted outside the scope of his official duties. Third, the Court held, again relying on *Yousuf*, that the FSIA does not apply to *former* government officials. (Apx 235.)

In reviewing a District Court's application of the FSIA, this Court "review[s] the district court's factual findings with respect to jurisdiction for clear error and the legal conclusion that flows therefrom *de novo*." *Globe Nuclear Servs. & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 285 (4th Cir. 2004) (internal quotation marks omitted). In this case, the Court erred as a matter of law in concluding that the FSIA does not apply to individuals or former government officials. Furthermore, the Court clearly erred in finding that Rivera Rondon acted outside the scope of his official duties.

A. Rivera Rondon is "an agency or instrumentality of a foreign state."

1. The "agency-or-instrumentality" standard generally.

Most federal courts of appeals that have considered the question have concluded that the immunity provided by the FSIA protects not only foreign states, but also those acting in an official capacity on behalf of foreign states. *See In Re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008) (holding that "an individual official of a foreign state acting in his official capacity is the 'agency or instrumentality' of the state, and is thereby protected by the FSIA"); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th

Cir. 1999) (stating that, "[n]ormally, the FSIA extends to protect individuals acting within their official capacity as officers of corporations considered foreign sovereigns"); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-03 (9th Cir. 1990) (concluding that "section 1603(b) can fairly be read to include individuals sued in their official capacity"); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996) (stating that "[a]n individual can qualify as an 'agency or instrumentality of a foreign state'").[1]

Chuidian is the seminal case on this issue. In it, the Court of Appeals for the Ninth Circuit thoroughly analyzed whether the FSIA applies to individual government agents. The Court first summarized pre-1976 common law regarding foreign sovereign immunity. Under the common law, "immunity would attach only to inherently governmental or 'public' acts of a state. Non-governmental or 'private' activities, such as a state's commercial enterprises, would be subject to suit in foreign courts." *Chuidian*, 912 F.2d at 1099. Foreign governments sued in the United States began seeking declarations of immunity from the State Department, which the State Department would then file in the courts. *Id*. Courts

[1]There is a circuit split on this issue, with the Seventh Circuit Court of Appeals and this Court concluding that the FSIA does not apply to individual government agents. *See Enahoro v. Abubakar*, 408 F.3d 877, 882 (7th Cir. 2005); *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) (discussed in detail below).

began enforcing the State Department's "suggestions" as a matter of course. *Id*. at 1100.

Against this backdrop, Congress enacted the FSIA in 1976:

> [I]n 1976 Congress enacted the Act, largely codifying the existing common law of sovereign immunity. The principal change envisioned by the statute was to remove the role of the State Department in determining immunity. Sovereign immunity could be obtained only by the provisions of the Act, and only by the courts interpreting its provisions; "suggestions" from the State Department would no longer constitute binding determinations of immunity.

Chuidian, 912 F.2d at 1100.

In light of the history and plain language of the FSIA, the *Chuidian* Court concluded that there is no principled basis for excluding individuals from the statute's umbrella of immunity:

> While section 1603(b) may not explicitly include individuals within its definition of foreign instrumentalities, neither does it expressly exclude them. The terms "agency," "instrumentality," "organ," "entity," and "legal person," while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals. Nowhere in the text or legislative history does Congress state that individuals are not encompassed within the section 1603(b) definition; indeed, aside from some language which is more commonly associated with the collective, the legislative history does not even hint of an intent to exclude individual officials from the scope of the Act. Such an omission is particularly significant in light of numerous statements that Congress intended the Act to codify the existing common law principles of sovereign immunity. As pointed out above, pre-1976 common law expressly extended immunity to individual officials acting in their official capacity. If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law.

Chuidian, 912 F.2d at 1101.

The Court further explained that permitting actions against government officials would create a loophole in the FSIA, undermining the policy behind the statute:

> It is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly. Thus, . . . we cannot infer that Congress, in passing the Act, intended to allow unrestricted suits against individual foreign officials acting in their official capacities. Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly. It would be illogical to conclude that Congress would have enacted such a sweeping alteration of existing law implicitly and without comment. Moreover, such an interpretation would defeat the purposes of the Act: the statute was intended as a comprehensive codification of immunity and its exceptions. The rule that foreign states can be sued only pursuant to the specific provisions of sections 1605-07 would be vitiated if litigants could avoid immunity simply by recasting the form of their pleadings.

Chuidian, 912 F.2d at 1102 (citations omitted).

Finally, the Court reasoned that neither the plain language nor the legislative history of the FSIA permit an interpretation of the statute as shielding governmental entities while leaving the immunity of individual government officials to be determined under the common law. *Id*. at 1102-03. For all of the above reasons, the *Chuidian* Court held that the FSIA applies with equal force to foreign states and individual foreign government officials.

Other Courts of Appeals that have considered this issue (including, as explained below, this Court) have relied principally on *Chuidian*. The Court of Appeals for the Second Circuit adopted *Chuidian*'s reasoning in holding that "the FSIA treats individual agents of the foreign state, when they undertake their official duties, as the 'foreign state' for the purposes of 28 U.S.C. § 1603." *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 85 (2d Cir. 2008). The Sixth Circuit Court of Appeals cited *Chuidian* when it recognized that, "[n]ormally, the FSIA extends to protect individuals acting within their official capacity as officers of corporations considered foreign sovereigns." *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999). The District of Columbia Court of Appeals did likewise when it succinctly concluded: "An individual can qualify as an 'agency or instrumentality of a foreign state.'" *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996).

As the Second Circuit recognized, "[t]he Seventh Circuit is an outlier. It has construed the FSIA's grant of immunity narrowly, to exclude individual government officials, reasoning that '[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.'" *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 81 (quoting *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)). Hence, there is a circuit split on this question.

This Court has addressed the issue twice: first in *Velasco v. Gov't of Indonesia*, 370 F.3d 392 (4th Cir. 2004), and again five years later in *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009).

a. *Velasco v. Gov't of Indonesia.*

In *Velasco*, the plaintiff sued the Government of Indonesia, National Defense Security Council of the Republic of Indonesia, and a number of government officials to enforce a promissory note. *Velasco*, 370 F.3d at 395. The District Court dismissed the suit against all defendants, finding that they enjoyed immunity under the FSIA. *Id*. This Court affirmed.

At the outset of its analysis, the Court of Appeals explained the FSIA and its applicability to the case. Relying on *Chudian*, the Court expressly recognized that the FSIA shields individual government agents from liability:

> Under the FSIA, the term "foreign state" is defined to include "a political subdivision of a foreign state or an agency of instrumentality of a foreign state." 28 U.S.C. § 1603(a). An "agency or instrumentality of a foreign state" is in turn defined as any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States …nor created under the laws of any third country. 28 U.S.C. § 1603(b). The Government of Indonesia and the NDSC are "foreign states" within the meaning of the FSIA.
>
> Although the statute is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state. *See, e. g., Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-03 (9th Cir. 1990) (interpreting section 1603(b) to include individuals sued

> [*399] in their official capacity) . . . . Claims against the individual in his official capacity are the practical equivalent of claims against the foreign state. *Chuidian*, 912 F.2d at 1101. The FSIA, however, does not immunize an official who acts beyond the scope of his authority. *Id*. at 1106.

Velasco, 370 F.3d at 399 (other citations omitted).

The FSIA contains an exception for commercial activity, which is not relevant in the present case, but which was before the Court in *Velasco*. 28 U.S.C. § 1605(a)(2) provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .

In *Velasco*, the Court considered whether the commercial-activity exception required that individuals possess actual authority to bind the sovereign, or whether apparent authority was sufficient. The Court concluded that the commercial-activity exception under the FSIA demands actual authority. *Velasco*, 370 F.3d at 400. The Court further affirmed the District Court's finding that the individual defendants lacked actual authority to issue the promissory note. *Id*. at 400-02.

Accordingly, the Court held that the FSIA shielded the defendants from liability: "Because the Defendants are immune from suit under the FSIA and the

commercial activity exception does not apply, the District Court properly dismissed the claims against the Defendants for lack of subject matter jurisdiction." *Id*. at 402.

b. *Yousuf v. Samantar*.

Five years later, in *Yousuf*, the Court held that the FSIA does not apply to individual foreign government agents. In *Yousuf*, the plaintiffs sued a former high-ranking Somalian official for alleged torture and human rights violations committed by government agents under the defendant's command. *Yousuf*, 552 F.3d at 373. The District Court ruled that the defendant enjoyed immunity under the FSIA, but this Court reversed.

The Court of Appeals dismissed *Velasco* as an actual-authority and apparent-authority case, and said that it "did not settle the question of whether Congress intended to confer sovereign immunity under the FSIA on an individual acting within the scope of his authority." *Yousuf*, 552 F.3d at 379.

The Court reviewed the language and statutory history of the FSIA. The Court homed in on the statute's definition of "agency or instrumentality of a foreign state" as an "entity" that "is a separate legal person, corporate or otherwise." 28 U.S.C. § 1603(b)(1). The Court decided that "the FSIA's use of the phrase 'separate legal person' suggests that corporations or other business

entities, but not natural persons, may qualify as agencies or instrumentalities." *Yousuf*, 552 F.3d at 380.

The Court divined further support for its holding from the statutory definition of "entity," which, under the statute, "is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of [Title 28] nor created under the laws of any third country." 28 U.S.C. § 1603(b)(3). The Court reasoned:

> 28 U.S.C. § 1332(c) and (e), which govern the citizenship of corporations and legal representatives of estates, are inapplicable to individuals, and it is nonsensical to speak of an individual, rather than a corporate entity, being 'created' under the laws of a country.

Yousuf, 552 F.3d at 380.

The Court further decided that "the overall statutory scheme of the FSIA" pointed to its being inapplicable to individuals. *Id*. at 380. In particular, the Court pointed out that the provision of the FSIA regarding service of process seemed to contemplate service only on a foreign entity, rather than on an individual. *Id*. at 380-81.

Finally, the Court found confirmation for its understanding of the FSIA in a House Committee Report that says "separate legal person" was "intended to include" corporate entities. *Id*. at 381. In light of the foregoing analysis, the Court concluded that "the FSIA does not apply to individual foreign government agents like Samantar." *Id*. at 1381.

2. There is an irreconcilable conflict between *Velasco* and *Yousuf*, and the Court must follow *Velasco*, the earliest of the conflicting opinions.

The *Yousuf* Court's dismissal of *Velasco* as *dicta* was simply incorrect. The Court's declaration in *Velasco* that the FSIA applies to individual government agents was part of its holding and, indeed, was essential to its affirmance of the District Court's decision. Consequently, there is a split among panels within this Circuit as to whether the FSIA applies to individuals. It is well settled that, "when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed, unless and until it is overruled by this court sitting *en banc* or by the Supreme Court." *McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (*en banc*). Here, *Velasco* was the first case to decide this issue and, therefore, must be followed.

As noted above, *Yousuf* distinguished *Velasco* on the ground that *Velasco* was "focused on the wholly separate question of whether, and under what circumstances, the acts of an individual operate to *bind* a foreign sovereign claiming immunity under the FSIA." *Yousuf*, 552 F.3d at 379. That reading of *Velasco* ignores the central role the individual-immunity issue played in the Court's analysis.

In *Velasco*, the plaintiff had sued both government entities and individual government officials in an effort to enforce a promissory note. The District Court dismissed the action, ruling that all defendants enjoyed immunity under the FSIA.

On appeal, the plaintiff argued that the commercial-activity exception applied. The Court rejected that argument, holding that actual authority is necessary to implicate the commercial-activity exception. The Court concluded that the individual defendants did not have actual authority to bind the sovereign. Thus, the commercial-activity exception did not apply and the defendants, including the individuals, were immune from liability under the FSIA.

The *Velasco* Court's holding was broad: "Because the Defendants are immune from suit under the FSIA and the commercial activity exception does not apply, the District Court properly dismissed the claims against the Defendants for lack of subject matter jurisdiction." *Velasco*, 370 F.3d at 402. Thus, in holding that the FSIA shielded all defendants from liability, it was absolutely necessary for the Court to decide that "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state." *Id*. at 399. Otherwise, the Court could not have affirmed the District Court's dismissal of the case against the individual defendants.

Furthermore, the Court's statement that "[t]he FSIA . . . does not immunize an official who acts beyond the scope of his authority," necessarily entails the converse—the FSIA does immunize an individual official who acts within the scope of his authority. *Id*. at 399. Otherwise, the limitation on immunity recognized by the Court in *Velasco* would be meaningless. Why recognize an

exception to immunity for acts committed outside the scope of authority if individual government officials are not immune from liability in the first instance?

Indeed, the Court's premise that "[t]he FSIA . . . does not immunize an official who acts beyond the scope of his authority" was necessary to the Court's more-extensive analysis of whether an agent with apparent authority can implicate the commercial-activity exception. *Id*. at 399. In other words, if the FSIA does not apply to individuals, the *Velasco* Court's entire analysis of whether an agent with apparent authority can bind the sovereign and thereby trigger the commercial-activity exception is entirely moot with respect to the individual defendants in that case. And the Court gave no indication whatsoever that it was excluding the individual defendants from its analysis. To the contrary, it affirmed the District Court's dismissal of the case against all defendants. *Id*. at 402. Even accepting, *arguendo*, the *Yousuf* Court's perception that the *Velasco* Court was "ultimately focused" on the authority issue, the Court's determination that the FSIA applies to individuals was an indispensable building block in the Court's authority analysis.

Moreover, other federal courts have interpreted *Velasco* as holding that the FSIA applies to individuals. *See In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 81 (2d Cir. 2008) (citing *Velasco* among "our sister circuits . . . holding that an individual official of a foreign state acting in his official capacity is the "agency or instrumentality" of the state, and is thereby protected by the

FSIA"); *Guevara v. Republic of Peru*, 468 F.3d 1289, 1305 (11th Cir. 2006) (citing *Velasco* among the "several circuits [that] have found that [FSIA] immunity extends to [individual] state officials acting in their official capacity"); *Oster v. Republic of S. Afr.*, 530 F. Supp. 2d 92, 100 (D.D.C. 2007) (citing *Velasco* for the principle that "[f]oreign sovereigns can be held liable for the actions of an individual if that individual acts in an official capacity and if that behavior fits within one of the FSIA's exceptions to immunity").

Thus, the issue of whether the FSIA applies to individuals was part of the Court's holding in *Velasco*. It is a binding precedent of this Court. Patently, there is an irreconcilable conflict between *Velasco* and *Yousuf*. The FSIA cannot both apply to individuals, as the *Velasco* Court held, and not apply to individuals, as the *Yousuf* Court held. Under these circumstances, *Velasco*, "the first case to decide the issue[,] is the one that must be followed." *McMellon*, 387 F.3d at 334.

3. Alternatively, the Court should overrule *Yousuf*.

In *McMellon*, this Court (sitting *en banc*) recognized that "a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel." *McMellon*, 387 F.3d at 334.[2] As explained above, *Velasco* and

[2] On a number of occasions, the Court has said that "[a] panel cannot overrule the decision of a prior panel." *See, e.g.*, *Desmond v. PNGI Charles Town Gaming, L.L.C.*, 564 F.3d 688 (4th Cir. 2009). In *McMellon*, the *en banc* panel recognized that this phrase appears in the case law. *McMellon*, 387 F.3d at 332. The Court patently rejected it as a hard and fast rule, however, concluding: "While we

Yousuf irreconcilably conflict and, thus, the Court must follow *Velasco*. In the alternative, however, the Court should exercise its statutory and constitutional power to overrule *Yousuf*.

The Court must begin any statutory interpretation with the plain language of the statute and, if the words of the statute are unambiguous, that is where the interpretation ends. *Stephens v. Astrue*, 565 F.3d 131 (4th Cir. 2009). Indeed, "[i]t is well established that when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms." *Id*. (internal quotation marks omitted). The Court has expressly recognized: "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." *West Virginia Div. of Izaak Walton League v. Butz*, 522 F.2d 945, 955 (4th Cir. 1975) (internal quotation marks omitted).

In *Yousuf*, the Court ultimately added to the plain language of the FSIA. As the Ninth Circuit recognized in *Chuidian*, "[n]owhere in the text or legislative

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recognize that a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel, we believe that, as a matter of prudence, a three-judge panel of this court should not exercise that power." *Id*. at 334. In this case, Rivera Rondon respectfully requests that the Court exercise its power to overrule *Yousuf*.

history does Congress state that individuals are not encompassed within the section 1603(b) definition." *Chuidian*, 912 F.2d at 1101. Even the *Velasco* Court noted that "the statute is silent on the subject." *Velasco*, 370 F.3d at 399. The *Yousuf* Court's interpretation of the FSIA necessarily required it to add to the statutory language. It found a limitation on immunity that is not apparent from the plain language of the statutory text.

If statutory language is ambiguous, the Court may consider the legislative history of the statute to aid in interpretation. *Etape v. Chertoff*, 497 F.3d 379, 391 (4th Cir. 2007). Even assuming, *arguendo*, that the plain language of the FSIA is ambiguous, the *Yousuf* Court's discussion of the legislative history is unpersuasive.

The *Yousuf* Court's consideration of the legislative history of the FSIA was far more abbreviated than the Ninth Circuit's expansive review in *Chuidian*. In *Yousuf*, the Court looked only to a single House Committee Report, which ambiguously said that "'separate legal person' was 'intended to *include* a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.'" *Yousuf*, 552 F.3d at 381 (quoting H.R. Rep. No. 94-1487, at 15 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614) (emphasis added). Patently, the above-quoted House Report does not

in any way limit the definition of "separate legal person" to corporate entities. Rather, it merely recites that the phrase was intended to *include* corporate entities.

There is nothing in the legislative history of the FSIA that affirmatively demonstrates a legislative intent to exclude individuals from immunity. As the Ninth Circuit pointed out in *Chuidian*, "aside from some language which is more commonly associated with the collective, the legislative history does not even hint of an intent to exclude individual officials from the scope of the Act." *Chuidian*, 912 F.2d at 1101.

A statutory interpretation that adds to the plain language of a statute should not be based on such scant evidence of legislative intent, particularly when it places this Circuit out of step with the majority of circuits that have considered the question. If the Court is not inclined to follows *Velasco* as binding precedent, it should overrule *Yousuf* and adopt the Ninth Circuit's reasoning in *Chuidian*.

4. Rivera Rondon was acting as an agent of a foreign government and within the scope of his official duties.

Properly interpreted, the FSIA immunizes any individual who was (1) acting as the agent of a foreign government and (2) within the scope of his official duties. Here, those two issues are intertwined. Lizarbe and Baldeon unequivocally alleged in their complaint that the actions taken by Rivera Rondon were done in his official capacity as an officer in the Peruvian military based on policy set at the highest levels of the Peruvian government. The complaint alleged that:

1. "Peru was in a state of civil war," and that the Peruvian Army was "fighting the Maoist rebel group" Shining Path, which "committed widespread abuses, including massacres, bombings and targeted assassinations" (Apx 16);

2. "national elections" were held in 1980, and that the newly-elected government "declared a state of emergency" in an area to include where the alleged events occurred in an effort to fight the Maoist terrorists in that region (Apx 17);

3. it was "the government" which "deployed the Peruvian Army" to the alleged location where the events at issue occurred so that "military operations" could be carried out in the region (Apx 18);

4. it was the "Peruvian Army" that "targeted the Accomarca District" where the events in question allegedly took place (Apx 18-19);

5. a Peruvian General who was "Chief of the Political-Military Command" for the area involved, "ordered the General Staff of the Peruvian Army's Second Infantry Division to devise an operational plan to 'capture and/or destroy terrorist elements'" (Apx 14, 19);

6. the military "operation" was "placed under the control of" a Lieutenant Colonel who was the "Chief of Operations of the General Staff" (Apx 19);

7. at all relevant times, Rivera Rondon was a low-ranking officer in the Peruvian military, referred to as a "military actor" in the Complaint (Apx 12, 14);

8. Rivera Rondon was allegedly "called" to attend a meeting by his superior officer, the Lieutenant Colonel, to "plan" a military operation in Accomarca; there is no allegation that atrocities or wrongdoing of any type was planned or discussed at this meeting (Apx 20); and

9. Rivera Rondon was merely a Lieutenant at the time and allegedly involved in the resulting operation as such and while

> wearing his military uniform and using military equipment (Apx 20-21).

In denying Rivera Rondon's motion to dismiss, the District Court did not find that he was not acting as an agent of a foreign government. Instead, the Court found that he was acting outside the scope of his official duties. (Apx 235.) The Court relied solely on a letter purportedly from the Ambassador of Peru to that effect. (*See* Apx 44-45; 235.) The Court took the letter as conclusive evidence that Rivera Rondon acted outside the scope of his official duties, finding that it "preclude[d] dismissal . . . as a matter of law." (Apx 235.)

In considering a motion to dismiss under the FSIA, "the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial." *Velasco*, 370 F.3d at 398 (internal quotation marks omitted). Thus, the Court may engage in limited jurisdictional discovery. Here, the only factual evidence before the Court was the factual allegations in the complaint and the unsworn letter purportedly from the Ambassador of Peru.

In weighing this evidence, the Court clearly erred in relying solely on the letter and ignoring the contradictory factual averments by Lizarbe and Baldeon themselves. The letter is unreliable for two reasons. First, it was unsworn and does not even purport to represent the official position of the Peruvian government. (*See* Apx 45.) Thus, it was not even authenticated as a valid letter from the Ambassador or established as the state's official position on the matter.

Second, the letter is contradicted by the allegations in Lizarbe's and Baldeon's complaint, which clearly show that Rivera Rondon acted in an official capacity. To begin with, the letter suggests that Rivera Rondon will "declare" that he "participated in the massacre of civilians in the town of Accomarca . . . in August of 1985." (Apx. 45.) Nothing could be further from the truth. Based on the accusations in the complaint, it is clear that Rivera Rondon did not participate in any massacre, and there was no valid reason for the Court to expect him to "declare" that he did.

Despite the information apparently provided to the author of the letter, Rivera Rondon is not even alleged to have participated in the events in the town of Accomarca. He is alleged *only* to have: (1) been a low-ranking officer in the Peruvian military; (2) attended a meeting he was ordered to attend where he was told his unit would block a road during a military operation against a terrorist group recognized as such by the United States; (3) followed orders by reporting to duty at the designated road; and (4) accurately filed a report to the effect that neither he nor his unit came into contact with any civilians. (*See* Apx 16-24.) Importantly, there is no allegation that the atrocities at Accomarca were planned in advance or that Rivera Rondon knew of any such plan. Nor is there an allegation that Rivera Rondon *knowingly* covered up any atrocities. In short, on the day of the events at Accomarca, Rivera Rondon is alleged to have waited by a road

outside of town without having so much as seen a civilian, much less interacted with or harmed one.

Furthermore, the letter states:

> [O]n the date of this unfortunate event, President Alan Garcia Perez was just starting his first democratically elected term in office. He commenced his administration by reaffirming his unrestricted respect for civil liberties and the human rights of Peruvian citizens and the strengthening of democratic institutions in the country. Therefore, it is an untruthful statement that the actions of Mr. Rivera Rondon were the result of directives or regulations coming from the Government.

(Apx 45.)

Lizarbe and Baldeon suggested exactly the opposite in their complaint:

> From about 1985 to 1990, including at the time of the Accomarca [events], Alan Garcia [sic] served as president of Peru. Throughout his presidency, Peruvian government forces, and in particular the Peruvian Army, continued to commit widespread and systematic human rights abuses against the civilian population of Peru. Government forces abducted, tortured and disappeared suspected "subversives" and murdered civilians in military operations. . . .

(Apx 27.)

Finally, the conclusion of the letter as a whole—that Rivera Rondon acted outside the scope of his official duties—is contradicted by the numerous factual allegations in the complaint, as outlined above. The Court clearly erred in crediting this unsworn, unreliable letter over the factual allegations in the complaint that clearly demonstrate that Rivera Rondon acted within the scope of his official duties. (*See* Apx 12-21.)

It is hard to imagine a plainer example of a military officer acting in his official capacity than that alleged by Lizarbe and Baldeon themselves in their own complaint. The government declared a state of emergency and deployed the army to a particular region to conduct military operations. Once in that region, the Army targeted a particular district. A General in the Army ordered his staff to develop an operational plan. A plan was developed by the General's staff, including a Lieutenant Colonel, who was placed in charge of the operation. That Lieutenant Colonel then ordered Rivera Rondon, a mere Lieutenant, to attend a meeting and carry out a minor portion of the operation (which is not alleged to have included any contact with the Shining Path, the Appellees, or the decedents). At all times, Rivera Rondon was obviously acting pursuant to the policy traced in the Complaint from the highest levels of government, through the chain of command and directly to Rivera Rondon who, *in his uniform and acting in his capacity as an officer*, followed the orders he was given.

Obviously, the actions Rivera Rondon is alleged to have taken (attending a meeting as a military officer called to do so by his superior, being stationed outside of a particular town as a member of the military while on duty, and drafting an official military report pursuant to military protocols) were lawfully within the scope of his official duties as a Lieutenant in the Peruvian Army.

Under similar facts, Courts have held that the FSIA applies. In *Belhas v. Ya'Alon*, 466 F.Supp.2d 127 (D.D.C. 2006), the Court dismissed a claim under the doctrine of foreign sovereign immunity rooted in the FSIA. *Belhas* was a suit brought by citizens of Lebanon against former Israeli General Moshe Ya'Alon pursuant to the ATCA and the TVPA, alleging that a bombing in Lebanon, by the Israeli military, constituted war crimes, extrajudicial killing, crimes against humanity, and cruel, inhuman, or degrading punishment. The defendant general was alleged to have been involved in the bombing attack. The defendant moved to dismiss on, among other grounds, that the suit was barred by the FSIA.

The *Belhas* plaintiffs alleged that the defendant "had command responsibility for the attack," "participated in the decision," and was "acting under color of Israeli law," *id*. at 130-31. As in the present matter, the plaintiffs in *Belhas* did not allege that the defendant was acting in his personal capacity or that his activities were private in any way. As a result, the court concluded that it "is undisputed that General Ya'alon was acting in his official capacity with respect to the events underlying this lawsuit." The Court dismissed the suit based upon FSIA official capacity immunity. *Id*. at 131.

Belhas is virtually identical to the present case. A military officer, acting pursuant to orders and the policies of his government, was sued under the TVPA and the ATCA for actions undertaken in his official capacity. As a result, he was

entitled to FSIA sovereign immunity, and the case was dismissed. The same result should be reached here and for the same reasons.

Another instructive case is *Matar v. Dichter*, 2007 WL 1276960 (S.D.N.Y. May 2, 2007). There, plaintiffs sued Avraham Dichter, the former director of the Israeli General Security Service under the ATCA and the TVPA. Specifically, plaintiffs alleged that the General Security Service officer authorized, planned and directed military personnel in the bombing of a residential neighborhood in Gaza City and developed, implemented, and escalated Israel's alleged targeted killing policy. 2007 WL 1276960 at *1.

The court dismissed the Complaint under the FSIA after concluding that "[p]laintiffs unquestionably sue Dichter in his official capacity [because] [n]othing in the Complaint permits an inference that Dichter's alleged conduct was 'personal and private in nature.'" *Id*. (*citing Leutwyler v. Al-Abdullah*, 184 F.Supp.2d 277, 287 (S.D.N.Y. 2001); *Belhas*, 466 F.Supp.2d at 130-131). The exact same is true here. Nothing in the complaint permits the inference that Rivera Rondon acted in anything other than his official capacity. As a result, the Complaint should be dismissed under the FSIA.

In *Tannenbaum v. Rabin*, No. CV-95-4357, 1996 WL 75283 (E.D.N,Y. Feb. 13, 1996), the plaintiff sued Israel's Minister of Police and former Prime Minister Yitzhak Rabin for allegedly directing the beating of the plaintiff by police. The

plaintiff attempted to sue the defendants individually, but the Court found them immune from liability:

> Although the complaint names the defendants in their individual as well as their official capacities, Tannenbaum alleges no acts committed directly by the late Prime Minister Rabin, nor any by Shachal, nor any by "John Doe" other than those committed "at the direction of' the other two defendants. Tannenbaum alleges only that defendant police officer "John Doe" was "acting at the direction of Defendants Rabin and Shachal," when he committed the acts of which plaintiff complains ....[] In short, Tannenbaum's claim is against the defendants in their official roles only and therefore, as agencies or instrumentalities of a foreign state under 28 U.S.C. §§ 1603(a) - (b).

Id. at *3.

Similarly, in *El-Fadl v. Central Bank of Jordan*, the plaintiff claimed that Jordanian officials had him detained and tortured by military police. 75 F.3d 668, 670 (D.C. Cir. 1996). The plaintiff was careful to allege that these actions were undertaken "in an individual capacity." *Id*. at 671. The D.C. Circuit nevertheless held that the officials had acted on behalf of the sovereign and were entitled to immunity. *Id*. at 671. *Accord Askir v. Boutros-Ghali*, 933 F. Supp. 368, 370 n.3 (S.D.N.Y. 1996) (rejecting claims against U.N. official individually as "none of [his] alleged actions are outside of the scope of his official duties").

Here, the allegations in the complaint established that Rivera Rondon was acting within the scope of his official duties. The letter purportedly from the Ambassador, which was lacking in fundamental indicia of reliability and, factually, was contradicted by the complaint itself, does not outweigh the factual allegations

pleaded by Lizarbe and Baldeon. The Court therefore clearly erred in finding that Rivera Rondon acted outside the scope of his authority.

B. The FSIA protects former foreign government officials from suit.

The District Court also ruled that Rivera Rondon does not enjoy immunity under the FSIA because he was not serving as a foreign government official at the time suit was filed. (Apx 235.) In so ruling, the Court relied exclusively on *Yousuf*.

After holding that the FSIA does not apply to individual government agents, the Court in *Yousuf* further stated that the FSIA does not apply to *former* government officials. In other words, according to the *Yousuf* Court, "even if an individual foreign official could be an 'agency or instrumentality under the FSIA,' sovereign immunity would be available only if the individual were still an 'agency or instrumentality' at the time of suit." *Yousuf*, 552 F.3d at 383.

In reaching that conclusion, the Court relied on *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S. Ct. 1655, 155 L. Ed. 2d 643 (2003). In *Dole Food*, a ground of farm workers sued Dole Food Company in state court, alleging that they were injured by exposure to an agriculture pesticide. *Id*. at 471. Dole Food impleaded the Dead Sea Companies. *Id*. The Dead Sea Companies removed the action to federal court, claiming that they were instrumentalities of the State of Israel under the FSIA. *Id*. at 472.

The United States Supreme Court held that the Dead Sea Companies did not enjoy a right to removal under the FSIA because they were not instrumentalities of a foreign state at the time suit was filed. The Court reasoned that, "[t]o be entitled to removal under § 1441(d), the Dead Sea Companies must show that they are entities 'a majority of whose shares or other ownership interest is owned by a foreign state.'" *Id*. at 478 (quoting 28 U.S.C. § 1603(b)(2)). The Court concluded: "We think the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." *Dole Food Co.*, 538 U.S. at 478.

Relying on that holding by the Supreme Court, this Court in *Yousuf* said: "[E]ven if an individual foreign official could be an 'agency or instrumentality under the FSIA,' sovereign immunity would be available only if the individual were still an 'agency or instrumentality' at the time of suit." *Yousuf*, 552 F.3d at 383. As explained below, that statement by the *Yousuf* Court was mere *dicta*, which was not binding on the District Court and is not binding on this Court. Furthermore, if this Court is of the opinion that the statement was not *dicta*, it should nevertheless overrule *Yousuf*.

1. The discussion of this issue in *Yousuf* is *dicta*.

A comment by the Court that is not "essential to the holding[]" constitutes *dicta*. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 342 n.9 (4th Cir. 1996)

(noting that a "comment was dicta because it was not essential to the holdings"); *Karsten v. Kaiser Found. Health Plan*, 36 F.3d 8, 11 (4th Cir. 1994) (stating that if it considered a particular issue raised in the case, its opinion on that issue "would be nothing more than pure *dicta*, unnecessary for the determination of this case").

Moreover, this Court has declared that, where a Court issues a holding and an alternative holding, the alternative holding is *dicta*. *Karsten*, 36 F.3d at 11 (4th Cir. 1994) (*per curiam*). The Court in *Karsten* cautioned against alternative holdings, and explained: "If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest *dicta*." *Id*.

In *Yousuf*, the Court clearly held: "[T]he FSIA does not apply to individual foreign government agents like Samantar. Accordingly, the district court erred by concluding that Samantar is shielded from suit by the FSIA." *Yousuf*, 552 F.3d at 381. The Court then proceeded to say that, "even if an individual foreign official could be an 'agency or instrumentality under the FSIA,' sovereign immunity would be available only if the individual were still an 'agency or instrumentality' at the time of suit." *Id*. at 383. Thus, in light of the Court's holding as to first issue, its discussion of the second issue was unnecessary for determination of the case. If, as the Court held, the FSIA does not apply to individual foreign government officials, there is no reason to even consider whether it applies to

former foreign government officials. Judge Duncan said as much in a concurring opinion: "With respect, I join in all but Part III of Judge Traxler's incisive opinion. . . . Our conclusion that the FSIA does not apply to individuals is sufficient to resolve the case before us." *Id*. at 384 (Duncan, J., concurring).

As mere *dicta*, the *Yousuf* Court's analysis of whether the FSIA applies to former foreign government officials was not binding on the District Court in this case, and it is not binding on this Court in reviewing the denial of Rivera Rondon's motion to dismiss. For the reasons explained below, the Court should reverse the District Court's holding on this issue.

2. If *Yousuf* is not *dicta*, it should be overruled.

As explained above, this Court recognized that "a three-judge panel has the statutory and constitutional power to overrule the decision of another three-judge panel." *McMellon*, 387 F.3d at 334. If the Court is inclined to interpret Part III of *Yousuf* as binding precedent, it should nevertheless overrule it for the reasons explained below.

3. FSIA immunity should be determined as of the time of the conduct at issue.

Dole Food Co. involved two questions: (1) "whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the share of a corporate parent one or more tiers above the subsidiary;" and (2) "whether a corporation's instrumentality status

is defined as of the time an alleged tort or other actionable wrong occurred or, on the other hand, at the time suit is filed." *Dole Food Co.*, 538 U.S. at 470.

In resolving the latter of the two questions, the *Dole Food* Court based its ruling on the plain language of 28 U.S.C. § 1603(b)(2), which defines "agency or instrumentality of a foreign state" as "any entity . . . which is an organ of a foreign state or political subdivision thereof, *or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof*." (Emphasis added.) The Court held that that, because the italicized language above is "expressed in the present tense," it "requires that instrumentality status be determined at the time suit is filed." *Dole Food Co.*, 538 U.S. at 478.

The Supreme Court's resolution of the two issues before it in *Dole Food Co.* is inapplicable to the question before the Court in this case. As the United States District Court for the Southern District of New York said:

> The Supreme Court [in *Dole Food Co.*] held that a foreign state's ownership of an entity must be direct for the entity to be considered an instrumentality. The Supreme Court also ruled that ownership must be determined as of the date on which the complaint was filed. Neither of these points of law speaks, however, to the circumstances under which an individual is covered by the FSIA.

Burnett v. Al Baraka Inv. & Dev. Corp. (In re Terrorist Attacks), 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005) (citations omitted).

Other appellate courts have said that *Dole Food Co*. is inapplicable to cases involving individual defendants, and an individual defendant's status should be

determined as of the time of the conduct at issue. *See USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 203-04 (3d Cir. 2003); *Belhas v. Moshe Ya'Alon*, 515 F.3d 1279, 1285-86 (D.C. Cir. 2008) (*dicta*).

The *Belhas* Court explained, albeit in *dicta*, that expanding *Dole Food* to individual government officials would undermine the fundamental policies behind the FSIA:

> Appellants ask us to hold that a public official protected by the sovereign immunity of his country at the time he performs acts on behalf of the government loses that protection on the day he resigns or reaches the expiration of his term. Aside from the fact that such a holding makes no practical sense, it would be a dramatic departure from the common law of foreign sovereign immunity, as codified in the FSIA. The Supreme Court recently reiterated that one "well-recognized" purpose of the FSIA was the "codification of international law at the time of the FSIA's enactment." *Permanent Mission of India*, 548 U.S. at , 127 S. Ct. at 2356. In 1976, it was well settled that sovereign immunity existed for "any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 66(f) (1965). The common law of foreign sovereign immunity made no distinction between the time of the commission of official acts and the time of suit. When Congress codified the common law in the FSIA, it retained this same protection for foreign officials. *See Chuidian*, 912 F.2d at 1099-1100. In light of the above "well-recognized" purpose of the FSIA, it is unreasonable to assume that in enacting the FSIA, Congress intended to make such sweeping and counterintuitive changes to foreign sovereign immunity with the simple use of the word "is."

Belhas, 515 F.3d at 1285.

The *Belhas* Court further noted that *Dole Food* did not even address this issue, but that it nevertheless appears to support the opposite rule with respect to individual government officials:

> *Dole Food* does not appear to support the proposition advanced by appellants. It resolved only two questions, neither of which is relevant to this case . . . . Although the Court held that a corporation's instrumentality status is defined at the time of suit, *id*. at 478 at 478, relying in part on the statute's use of the present tense of "is owned," 28 U.S.C. § 1603(b)(2), the case never dealt with the acts of a government official. The status of a corporation at one time owned by a foreign state and an individual who was at one time an official of such a state are hardly the same. The corporation and the state have at all times been entities wholly separate and distinguishable from each other and able to act without the presence or even existence of the other. This does not define the relationship between the state and its officials. While it is true, indeed obvious, that the official has an existence independent of the state, the state does not act independently of its agents. Every act committed by a sovereign government is carried out by its officials and agents. While the state may own corporations that conduct some of these acts, it need not do so. Regardless of whether it creates or owns corporations, individual officials or agents must act as instrumentalities for anything actually to be done. To suppose that the sovereign's immunity protecting the individual official in the performance of his sovereign's business vanishes the moment he resigns, retires, or loses an election is to establish that he had no immunity at all. Even though the state's immunity survives his departure, it is difficult to say how it could act within its immunity without being able to extend that immunity to the individual officials who acted on its behalf.
>
> While *Dole Food* was not dealing with appellants' novel theory, the court did offer language in that case relevant to this argument. The *Dole Food* Court opined that a purpose of foreign sovereign immunity is "to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns." 538 U.S. at 479. To allow the resignation of an official involved in the

> adoption of policies underlying a decision or in the implementation of such decision to repeal his immunity would destroy, not enhance that comity. . . .

Belhas, 515 F.3d at 1285-86.

The reasoning of *Belhas*, *Burnett*, and others is far more persuasive than the *dicta* in *Yousuf*. The Court in *Yousuf* simply expanded *Dole Food*'s holding to apply to individual foreign government officials. The Court in *Dole Food* did not itself render that holding, and so the result in *Yousuf* is not dictated by *Dole Food*.

Moreover, there are good reasons for not extending *Dole Food*'s holding to individual defendants. There is a great difference between a former government official and a corporate entity that was formerly owned by a sovereign government. This Court has recognized that "[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state." *Velasco*, 370 F.3d at 399. It follows that individuals who act as agents of a foreign state enjoy the same immunity as the state. The state's immunity does not cease when the official leaves his or her official capacity, and the official's immunity should continue as well. As the District of Columbia Circuit reasoned:

> To suppose that the sovereign's immunity protecting the individual official in the performance of his sovereign's business vanishes the moment he resigns, retires, or loses an election is to establish that he had no immunity at all. Even though the state's immunity survives his departure, it is difficult to say how it could act within its immunity without being able to extend that immunity to the individual officials who acted on its behalf.

Belhas, 515 F.3d at 1285-86.

Furthermore, as the *Belhas* Court pointed out, and as explained in greater detail by the Ninth Circuit Court of Appeals in *Chuidian*, the FSIA codified the common law of foreign sovereign immunity that existed in 1976. At that time, "[t]he common law of foreign sovereign immunity made no distinction between the time of the commission of official acts and the time of suit." *Belhas*, 515 F.3d at 1285. As the *Chuidian* Court said with respect to a different issue, if the FSIA immunizes only foreign government officials who are serving in that capacity at the time suit is filed, "the Act contains a substantial unannounced departure from prior common law." *Chuidian*, 912 F.2d at 1101. It is unreasonable to assume that was Congress's intent in enacting the FSIA, particularly with no supporting evidence in the legislative history.

For those reasons, the Court should discount the *dicta* in *Yousuf* that the FSIA does not apply to former foreign government agents. Alternatively, if the Court determines that the *Yousuf* Court's discussion of this issue is not *dicta*, it should nevertheless overrule it. Properly interpreted, the FSIA shields former foreign government agents from liability for alleged acts committed in their official capacities. As explained above, in this case, Lizarbe and Baldeon have sued Rivera Rondon for acts he allegedly committed while acting in his official capacity as an agent of the Government of Peru. He is immune from liability under the

FSIA. The District Court therefore erred in denying his motion to dismiss, and this Court should reverse that ruling.

II. The Court should consider other issues raised in Rivera Rondon's motion to dismiss under its pendent appellate jurisdiction.

As noted above, Rivera Rondon has a right to an interlocutory appeal of the District Court's decision that he is not immune from suit under the FSIA. The Court's denial of Rivera Rondon's motion to dismiss on that ground is immediately appealable under the collateral order doctrine. *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006). *Accord Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 277 (5th Cir. 2007); *Gupta v. Thai Airways Int'l, LTD*, 487 F.3d 759, 764 (9th Cir. 2007).

Furthermore, the other issues raised in Rivera Rondon's motion to dismiss addressed below are reviewable by the Court in the exercise of its pendent appellate jurisdiction. Under that exception to the final judgment rule, this Court "retain[s] the discretion to review issues that are not otherwise subject to immediate appeal when such issues are so interconnected with immediately appealable issues that they warrant concurrent review." *Rux*, 461 F.3d at 475. This Court will exercise pendent appellate jurisdiction under two circumstances: "(1) when an issue is 'inextricably intertwined' with a question that is the proper subject of an immediate appeal; or (2) when review of a jurisdictionally insufficient issue is 'necessary to ensure meaningful review' of an immediately

appealable issue." *Rux*, 461 F.3d at 475 (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995)).

Here, the issue of whether Lizarbe and Baldeon failed to exhaust their remedies in Peru, as required by the TVPA, and the question of whether this action is untimely under the applicable statute of limitations are both inextricably intertwined with the FSIA issue. These issues therefore warrant concurrent review.

As set forth in his motion to dismiss, for numerous reasons, Rivera Rondon should not be subjected to this civil action in the District Court. Most notably, he is entitled to immunity under the FSIA, as explained above. Furthermore, however, even if, *arguendo*, the District Court's analysis of the FSIA issue were correct, this action should not go forward because Lizarbe and Baldeon failed to exhaust their remedies abroad, as required by the TVPA. Similarly, even if neither of the above issues entitled Rivera Rondon to dismissal, this action was brought nearly 22 years after the events in question, well beyond the applicable statute of limitations under the TVPA. Thus, all three issues lead to the same result, this action should have been dismissed by the District Court.

The Court should consider the exhaustion and limitations issues because they present clear, alternative grounds for dismissal. Accordingly, the three issues are inextricably intertwined and should be reviewed concurrently.

III. The Appellants failed to exhaust their remedies in Peru.

The Torture Victims Protection Act provides that, a "court shall decline to hear a claim 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(2)(b). Thus, TVPA claims carry a requirement to exhaust remedies in the local jurisdiction prior to filing suit here and remedies in Peru must be effectively non-existent. A difficult or time-consuming process is insufficient. Instead, the Peruvian process must be followed unless it is "unobtainable, ineffective, inadequate, or obviously futile."

Lizarbe and Baldeon admitted in the complaint and their papers that remedies exist in Peru and that they are being pursued there by the very same parties who filed this case:

> 1. "In or about 2005, Peruvian prosecutors filed murder charges in civilian court against Defendant Rivera Rondon. . . ." (Apx 30.)
>
> 2. "In or about June 2005, the Third Supraprovincial Criminal Court…opened an investigation against…Defendant Rivera Rondon." (Apx 31.)
>
> 3. "Under Peruvian law, victims of human rights abuses, including Plaintiffs, are not entitled to civil compensation until a criminal case in a civilian court results in a conviction…." (Apx 31.)

Furthermore, in their opposition to Rivera Rondon's motion to dismiss, Lizarbe and Baldeon conceded: "Soon thereafter, Plaintiffs each exercised their right to become a parte civil [civilian party]…By doing so, Plaintiffs have done the

equivalent to 'suing' under United States law…." Pl. Opp. to Mot. to Dismiss at 38. Thus, in opposing Rivera Rondon's Motion to Dismiss, Lizarbe and Baldeon admitted for the first time that they have sued Rivera Rondon in Peru.[3] Having so admitted, they cannot contend that there is no process in Peru to address their grievances. Not only is there a process, but they are participating in it (a fact they did not admit in the dozens of pages of their Complaint).

In denying Rivera Rondon's Motion to Dismiss, the District Court reasoned that "[u]nder the TVPA, the defendant bears the burden of proving that available and adequate local remedies exist in Peru." (Apx 237.) The Court concluded that "Rivera Rondon has not met his burden in this regard." (Apx 238.) In particular, the Court noted that there was no evidence regarding the expediency of the civil case in Peru or the level of damages available. (Apx 239.)

The District Court was legally incorrect in weighing any lack of evidence against Rivera Rondon. In *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005), a

[3] Lizarbe and Baldeon did not allege in the Complaint that they had actually become parties civil to the prosecution in Peru. As noted in the Motion to Dismiss, without such allegations, this case could not proceed. *See Ruiz v. Martinez*, 2007 WL 1857185, 6 (W.D.Tex. May 17, 2007) ("Most importantly, Ruiz fails to allege that he submitted a grievance regarding the alleged torture to Mexican authorities….Until Ruiz exhausts the "adequate and available remedies" of Mexico, the ATS bars his torture claim in the United States, and the Court has no jurisdiction over this issue.").

case relied upon by the District Court here, the Court of Appeals for the Eleventh Circuit quoted from the Senate Report to the TVPA:

> "The procedural practice of international human rights tribunals generally holds that the respondent has the burden of raising the nonexhaustion of remedies as an affirmative defense and must show that domestic remedies exist that the claimant did not use. *Once the defendant makes a showing of remedies abroad which have not been exhausted, the burden shifts to the plaintiff to rebut by showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile*."

(Quoting S. Rep. No. 102-249, at 9-10) (emphasis added). Indeed, the District Court cited this very Senate Report in denying Rivera Rondon's motion to dismiss. (Apx. 238.)

Rivera Rondon undoubtedly showed that there are remedies abroad, which have not been exhausted, simply by pointing to Lizarbe's and Baldeon's complaint and other papers. If, as the District Court found, "[t]he record is barren of any evidence that the criminal case against [Rivera Rondon] is proceeding apace or that there is any reasonably foreseeable date for its conclusion," or "establish[ing] the level of damages available" in Peru, that dearth of evidence weighs against the plaintiffs. Upon Rivera Rondon's showing of the availability of remedies in Peru, the burden should have shifted to Lizarbe and Baldeon and, in the absence of any evidence by them that their remedies abroad are inadequate, the Court should have dismissed this case. For those reasons, the Court should reverse the District Court's denial of Rivera Rondon's motion to dismiss on this ground.

IV. The claims asserted are barred by the statute of limitations.

The Torture Victims Protection Act (TVPA) contains a ten-year statute of limitations. *See* 28 U.S.C.A. § 1350, note (stating that "[n]o action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose").[4] The complaint relies entirely on incidents alleged to have occurred in August of 1985. *See* Complaint, ¶ 48, 54, 60, 66. (Apx 19-23.) The Complaint was filed on July 11, 2007. (Apx 3.) Thus, this lawsuit was filed almost ***22 years*** after the alleged events in question.

In rejecting Rivera Rondon's statute-of-limitations argument, the District Court relied on the doctrine of "equitable tolling." The Court found that equitable tolling should apply because "Plaintiffs have pled that until at least the year 2000, the political climate in Peru was unremittingly hostile to any effort on their part to pursue remedies against Rivera Rondon in Peru." (Apx 233.) The Court apparently found that equitable tolling applies because "the plaintiff[s] in some extraordinary way ha[ve] been prevented from asserting [their] rights." *Oshiver v.*

[4] In certain cases, the TVPA's ten-year statute of limitations can be applied to a cause of action arising under the Alien Tort Claims Act, 28 U.S.C.A. § 1350 (ATCA). *See, e.g., Doe v. Islamic Salvation Front,* 257 F.Supp.2d 115, 119 (D.D.C. 2003). Rivera Rondon assumes, *without conceding the point*, that the ATCA counts asserted here qualify for the TVPA's ten-year statute of limitations. In any event, ten years is certainly the longest limitations period even arguably applicable to the two types of statutory claims brought here. Thus, the present lawsuit was filed approximately 12 years after the end of the longest possible limitations period.

Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994) (internal quotation marks omitted). In so doing, the Court erred.

This Court has cautioned that equitable tolling should apply only sparingly and in the most extreme circumstances:

> [A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where-due to circumstances external to the party's own conduct-it would be unconscionable to enforce the limitation period against the party and gross injustice would result.

Harris v. Hutchinson, 209 F.3d 325, 328-30 (4th Cir. 2000) (emphasis added).

Thus, in defending their extraordinary delay in bringing suit, Lizarbe and Baldeon bore the heavy burden of demonstrating that, "due to circumstances external to [their] own conduct," "it would be *unconscionable* to enforce the limitation period against [them] and *gross injustice* would result." *Id*.

In denying Rivera Rondon's motion to dismiss, the Court relied on allegations in the complaint that "Plaintiffs could not have brought a lawsuit in the United States against Defendant Rivera Rondon . . . prior to the removal of Alberto Fujimori . . . as president of Peru in or about November 2000" given the allegedly repressive nature of the Fujimori presidency. (*See* Apx 27-28.) The Court of

Appeals for the Tenth Circuit rejected a similar contention in *Van Tu v. Koster*, 364 F.3d 1196, 1199-1200 (10th Cir. 2004).

Van was an Alien Tort Claims Act case like the current matter. The plaintiffs were residents of the Village of Son My in the Republic of Vietnam. They brought suit on their behalf and as representatives of deceased victims and survivors of the My Lai Massacre, which occurred thirty-two years prior to the filing of the suit. The defendants were alleged to have committed atrocities, including murder, against civilian residents of the village of Son My (My Lai). Similar to this case, the plaintiffs in *Van* argued for equitable tolling "on the basis of plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel." *Van Tu v. Koster*, 364 F.3d 1196, 1199 -1200 (2004).

In *Van*, the district court dismissed the entire action, with prejudice, on statute-of-limitations grounds. The Tenth Circuit Court of Appeals affirmed, explaining:

> The district court properly determined that plaintiffs were required to bring their action within the ten-year statute of limitations, and that they failed to do so….Plaintiffs argue that the aforementioned statutes of limitations should be tolled because of exceptional circumstances. We agree with the district court that even if some degree of equitable tolling were appropriate on the basis of plaintiffs' poverty, their status as subjects of a Communist government, the Vietnam War, and their inability to travel, plaintiffs have made no showing sufficient to justify tolling the *Bivens* claim for twenty-eight years, and their *Alien*

> *Tort Statute claim for twenty-two*. We therefore reject their equitable tolling argument.

Van Tu, 364 F.3d at 1199-1200 (emphasis added).

Moreover, the admissions in the Complaint demonstrate the total fallacy of the Lizarbe's and Baldeon's position. There was no bar to investigating or filing the present claim as a result of the Fujimori presidency because, *according to the Complaint*, the claims asserted here were in fact being investigated and filed in multiple forums while Mr. Fujimori was president. Specifically, the Complaint alleges that during the Fujimori presidency: (1) "In or about October 1985, the Peruvian Senate commission published its report concluding that 69 people were killed in the Accomarca [events]," (*see* Apx 29); (2) "Around the same time [*i.e.*, October 1985], both government prosecutors and military authorities opened their own investigations," (Apx 29); (3) "[T]he Peruvian Supreme Court eventually ruled that the case was solely within the jurisdiction of the military justice system," (Apx 29); (4) "In or about 1987, two years after the Accomarca [events], a military court absolved Defendant Rivera Rondon and others," (Apx 29-30); and (5) "The court's 1987 ruling was thrown out by the Supreme Council for Military Justice. In or about 1989 the lower military court again dismissed the charges against all the defendants [including Rondon] except Hurtado [who is not a party here]," (Apx 30).

Lizarbe and Baldeon admit in their Complaint that, within the statute of limitations, the Peruvian Senate, government prosecutors, military authorities, military courts, and the Peruvian Supreme Court were all investigating and adjudicating issues related to the events at Accomarca. Having so admitted, Lizarbe and Baldeon strain credulity by asking the Court to accept that no one could investigate or file these claims within the statute of limitations.[5]

Lizarbe and Baldeon claim to have been unable to investigate their potential suit prior to 2000, but in the same Complaint they allege that a Peruvian Senate Commission Report, *including Rivera Rondon's name and details of his alleged*

[5] Likewise, as noted in the Motion to Dismiss and the Reply, the events at Accomarca were contemporaneously known virtually worldwide. *See* Motion to Dismiss, Exhibit 1 (October 24, 1985 *New York Times* article reporting that, "Andean peasants asserted today that soldiers in Ayacucho Province shot or stabbed to death 59 people in a massacre in two villages late in August"… "A [Peruvian] military investigation confirmed that at least 49 people were slain by soldiers on Aug. 14 in the hamlet of Accomarca, also in Ayacucho Province."); *see* Motion to Dismiss, Exhibit 2 (September 19, 1985 *Houston Chronicle* article reporting that the Peruvian "government revealed that soldiers massacred about 40 peasants in an Andean village last month….The disclosure Wednesday by President Alan Garcia's new administration was the first time in the five-year war against the Shining Path, a Maoist guerrilla movement, that Peru's government or armed forces acknowledged that soldiers killed civilians….Garcia has put the Joint Armed Forces Command under orders to end human rights abuses….Garcia directed the military last week to make an 'exhaustive investigation'…."). The fact that "Andean peasants," *one of whom was named in the article*, were free to speak out about the events in question to the extent of being quoted in the *New York Times* mere months afterwards in 1985 flies in the face of the plaintiffs' position that the regime publicly investigating these events was so repressive that this case could not be brought until 22 years later.

involvement, was made public in 1985. (Apx. 29.) The existence of the numerous contemporaneous investigations and the public findings related thereto *preclude* any reliance on the doctrine of equitable tolling:

> Where regulatory or other proceedings involving the defendant's wrongdoing are recorded, the plaintiff may be held to a standard of inquiry notice and may not successfully invoke the equitable tolling doctrine.

Council v. Better Homes Depot, Inc., 2006 WL 2376381, *10 (E.D.N.Y 2006). *See also*, *Armstrong v. McAlpin*, 699 F.2d 79, 90 (2d Cir. 1983) (appellant plaintiffs' failure to timely file was inexcusable, because they should have discovered the fraud with reasonable diligence due to well publicized Securities Exchange Commission action).

The District Court thus erred in applying the doctrine of equitable tolling. This action, which was brought over 22 years after Rivera Rondon's alleged torts, should have been dismissed as grossly untimely.

CONCLUSION

For the foregoing reasons, Appellant Juan Manuel Rivera Rondon respectfully requests that the Court reverse the District Court's denial of Appellant's motion to dismiss, and remand this case to the District Court with instructions to dismiss the complaint with prejudice.

REQUEST FOR ORAL ARGUMENT

Appellant Juan Manuel Rivera Rondon respectfully requests oral argument because he believes that oral argument will assist this Court in deciding important questions regarding the issues addressed in the briefs.

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing brief for Appellant Juan Manuel Rivera Rondon with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to the following CM/ECF participants:

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