IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)

Teőfila Ochoa Lizarbe, *et al*.,

Plaintiffs

v.

Juan Manuel Rivera Rondon,

Defendant

Civil Action No. 8:07-CV-01809
Honorable Peter J. Messitte

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR CERTIFICATION OF THE COURT'S FEBRUARY 26, 2009 ORDER DENYING DEFENDANT'S MOTION TO DISMISS

28 U.S.C. § 1292(b) gives the Court discretion to certify an order as appropriate for an interlocutory appeal. Defendant has moved the Court to do so with respect to its February 26, 2009 Order denying Defendant's Motion to Dismiss. Defendant's Motion is adopted and incorporated herein by reference.

In opposing Defendant's motion for certification, Plaintiffs attempt to reargue their opposition to Defendant's motion to dismiss. The question before the Court, however, is not whether it properly denied Defendant's motion. The only questions before the Court on this motion are whether "(1) the order to be appealed involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation." *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 741 (D. Md. 2003).

Each issue raised in Defendant's motion for certification satisfies the above test. The Court should therefore amend its February 26, 2009 Order to state that the Order "involves controlling

questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

I. The Court's Order involves controlling questions of law and there are substantial grounds for difference of opinion.

A. 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 ("No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose."). The Complaint relies entirely on incidents alleged to have occurred in August of 1985. *See* Complaint, ¶ 48, 54, 60, 66. The Complaint was filed on July 11, 2007. Thus, this lawsuit was filed almost ***22 years*** after the alleged events in question.

In rejecting Defendant's statute-of-limitations argument, the 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." Op. at 12. The Court therefore apparently found that equitable tolling applies because "the plaintiff[s] in some extraordinary way ha[ve] been prevented from asserting [their] rights." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (C.A.3 Pa. 1994) (internal quotation marks omitted).

There are several substantial grounds for a difference of opinion on this issue. First, the Fourth Circuit Court of Appeals has cautioned that equitable tolling should apply only sparingly and in the most extreme circumstances. *See Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000). Second, the Plaintiffs' arguments in favor of equitable tolling have been rejected by other Courts.[1] *See Van Tu v. Koster*, 364 F.3d 1196 (10th Cir. 2004). Third, the Plaintiffs' own allegations in the Complaint belie their argument that they were somehow prevented from

[1] Plaintiffs' reference to the "numerous cases" cited in their opposition to Defendant's motion to dismiss further highlights the fact that there is substantial ground for differences of opinion on this issue.

investigating their claims. Indeed, the Plaintiffs 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. *See* Compl. at ¶¶ 91, 93, 94.

In opposing Defendant's motion for certification, Plaintiffs contend that this issue is fact-intensive and therefore does not involve a "controlling question of law." Def. Opp. at 7. Plaintiffs' misunderstand this prong of the certification analysis. It is well-settled that, "if resolution of the question being challenged on appeal will terminate the action in the district court, it is clearly controlling." 19-203 George C. Pratt, *Moore's Federal Practice - Civil* § 203.31. Patently, if the Court of Appeals holds in favor of Defendant on this issue, it will have found that Plaintiffs' claims are barred by the statute of limitations, which will terminate the action in the District Court. Accordingly, this issue involves a "controlling question of law."

Moreover, this issue does not require any fact-finding. It is Defendant's position that, if the allegations in the Complaint are taken to be true, Plaintiffs' claims are barred by the statute of limitations. On the other hand, Plaintiffs argued, and the Court found, that the allegations in the Complaint are sufficient for the Court to apply the doctrine of equitable tolling. Based on the record, the Court of Appeals can resolve this issue and, if it rules in Defendant's favor, its ruling will terminate the case. Thus, there is substantial ground for difference of opinion and the Court should certify this issue for immediate appeal.

B. The Defendant is immune from suit under the Foreign Sovereign Immunities Act of 1976.

Defendant has a right to appeal the Court's denial of his Motion to Dismiss under the Foreign Sovereign Immunities Act ("FSIA") based on the collateral order doctrine. *See 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); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006). Defendant has noted a direct appeal.

Even assuming, *arguendo*, that the collateral order doctrine did not apply to Defendant's FSIA argument, there is substantial ground for difference of opinion as to this issue, and it would therefore be appropriate for certification under 28 U.S.C. § 1292(b). Plaintiffs contend that, in light of *Yousuf v. Samantar*, 552 F.2d 371 (4th Cir. 2009), "there is no substantial ground for a difference of opinion in this Circuit." Pl. Opp. at 4. However, even the *Yousuf* Court recognized that its decision places it in the minority. *Id*. at 375-76. In light of the circuit split on this issue, and the fact that *Yousuf* represents a minority position, there is unquestionably substantial ground for difference of opinion. *See RSM Production Corp. v. Fridman*, 2009 U.S. Dist. LEXIS 12898, *19 n.8 (S.D.N.Y., Feb. 19, 2009) (noting the circuit split and the fact that *Yousuf* is in the minority). Defendant should be permitted to exhaust his appellate remedies on this dispositive issue before this case is fully litigated.

C. The Plaintiffs failed to exhaust their remedies in Peru.

The TVPA 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, as the Plaintiffs conceded, 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."

The Plaintiffs' own allegations in the Complaint demonstrate that they failed to exhaust available remedies in Peru. *See* Compl. at 100, 101, 104. In opposing this motion, Plaintiffs assert that this is a "fact-intensive" issue that is not appropriate for immediate appeal. They neglect to

address the applicable test, however, which requires only that this be an issue that can terminate the case in the District Court. 19-203 George C. Pratt, *Moore's Federal Practice - Civil* § 203.31. Without question, if the appellate court rules in favor of Defendant, that ruling will terminate the case. Therefore, this is a "controlling question of law" under 28 U.S.C. § 1292(b).

In light of the arguments raised in Defendant's motion, there is substantial ground for difference of opinion on this issue, and the Court should certify it for immediate appeal.

D. The Plaintiffs' case should be dismissed under the political question doctrine.

Courts have long held that the judicial branch must take special care not to become entangled in political questions best left to the executive under our tripartite separation of powers. In oft-cited language, the Supreme Court, in *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), set forth six independent tests for the existence of a political question:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217, 82 S.Ct. 691. If any *one* of these factors is present, the Court should ordinarily dismiss the claim. *See id*.

As Defendant pointed out in his Motion to Dismiss and Reply, all of the above factors weigh in favor of dismissal in this case. As more fully explicated in Defendant's motion, they are also all factors about which there is inherently substantial ground for disagreement. Plaintiffs' sweeping assertion to the contrary is insufficient to provide a basis for denial of this motion. Furthermore, *Eckert Int'l, Inc. v. Gov't of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79 (4th Cir.

1994), does not support Plaintiffs' contention, as the Court shed no light on the District Court's rationale for denying certification.

E. Plaintiffs' claims are barred by the Act of State doctrine.

The Act of State doctrine applies to bar judicial intervention where "the outcome of the case turns upon [] the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l*, 493 U.S. 400, 406 (1990); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964)). The policies underlying the doctrine include "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *W.S. Kirkpatrick & Co.*, 493 at 408.

As the Court noted in its Opinion, the Supreme Court has articulated a three-factor test for applying the Act of State doctrine: (a) "the degree of codification or consensus concerning a particular area of international law," (b) the extent to which the issue "touch[es] ... sharply on national nerves," with greater justification for "exclusivity in the political branches" the more "important the implications of an issue are for our foreign relations," and (c) whether "the government which perpetrated the challenged act of state is no longer in existence." *Sabbatino*, 376 U.S. at 428.

The Court held that this case fails to satisfy any of the three factors. However, there is substantial ground for disagreement on this question. As a threshold matter, Plaintiffs' Complaint undoubtedly raises allegations regarding acts of state. *See* Compl. at ¶¶ 6, 12, 15, 35, 39-40, 42-43, 48-49, 54. The facts set forth in Plaintiffs' complaint amply demonstrate that the *Sabbatino* factors are present in this case, and provide more than sufficient grounds for disagreement on this issue. Again, *Eckert* provides no support for Plaintiffs' contentions, as it contains no analysis of this issue. Defendant need only show that there is substantial ground for disagreement on this controlling legal issue, and the record is more than sufficient for him to make that showing.

F. The Complaint fails to state a claim upon which relief can be granted.

In their Opposition to Defendant's Motion to Dismiss, the Plaintiffs took the position that their claims against Defendant are grounded on three theories of indirect liability: conspiracy, aiding and abetting, and joint criminal enterprise. Defendant moved to dismiss because Plaintiffs' Complaint fails to state a claim under any of those theories. The Court nevertheless found that the Complaint alleges direct conduct by Defendant, and further found that the Complaint alleges valid causes of action based on indirect liability. Op. at 29.

There is substantial ground for disagreement on these issues for all the reasons cited in Defendant's Motion to Dismiss and Reply. As shown in the cases cited in Defendant's motion, it is legally impossible to conspire with oneself or to aid and abet oneself. Likewise, a corporation cannot conspire with or aid and abet its officers or agents. Plaintiffs' argument that a military officer can be liable for conspiracy or aiding and abetting, and the Court's agreement with that argument, further demonstrates that there is substantial ground for disagreement on this issue. The Court should certify the issue for immediate appeal.

G. The Plaintiffs are not alleged to be "aliens" under the Alien Tort Claims Act.

The Alien Tort Claims Act grants district courts "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 (emphasis supplied). It is Defendant's position that only those who are citizens of other countries, *but residing in the United States*, constitute "aliens" under the ATCA. The Complaint alleges that "Plaintiff Teofila Ochoa…is a citizen and *resident of Peru*;" and "Plaintiff Cirila Pulido Baldeon…is a citizen and *resident of Peru*." *See* Complaint, ¶ 8, 10. Therefore, neither individual is an "alien" and their ATCA claims should be dismissed.

In denying Defendant's Motion to Dismiss on this issue, the Court relied solely on *Rasul v. Bush*, 542 U.S. 466 (2004), and Plaintiffs rely on that case in arguing that certification should be

denied. As explained in Defendant's motion, he respectfully submits that *Rasul* is distinguishable from the present case and, consequently, this is an issue upon which there is substantial ground for disagreement, and which should therefore be certified for immediate appeal.

H. Venue is not proper in this Court.

Actions against "foreign states" as defined by the FSIA must be brought in the United States District Court for the District of Columbia, unless the events at issue occurred in the United States. 28 U.S.C. § 1391 (f)(4). As discussed above, the claim against the Defendant is a claim against Peru because the defendant was acting in his official capacity as an officer in the Peruvian military carrying out orders which amounted to official policy.

In denying Defendant's Motion to Dismiss, the Court found that "Rivera Rondon has been sued in his individual, not his official capacity." Op. at 34. As noted above, however, in their Complaint, the plaintiffs unequivocally alleged that the actions taken by the defendant 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. There is, therefore, substantial ground for disagreement as to whether this is an action against a foreign state brought in an improper venue.

II. The Appellate Court's decision whether to exercise pendent jurisdiction is irrelevant to this Court's determination as to certification.

Defendant has a right to an interlocutory appeal of the Court's Order on certain grounds, including that that he is immune from suit under the Foreign Sovereign Immunities Act of 1976 ("FSIA"). The Court's denial of Defendant's Motion on that and other grounds is immediately appealable under the collateral order doctrine. *See 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); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006). Defendant has noted an interlocutory appeal.

Furthermore, all of the issues raised in Defendant's Motion to Dismiss are reviewable by the Court of Appeals in the exercise of its pendent appellate jurisdiction. Under that exception to the final judgment rule, the appellate 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 v. Republic of Sudan*, 461 F.3d 461, 475 (4th Cir. 2006).

Plaintiffs speculate that the Court of Appeals is unlikely to exercise pendent jurisdiction over the various issues in this motion. However, Plaintiffs' contention is completely irrelevant to the Court's consideration of this motion. In deciding this motion, the Court must determine whether to certify its Order for interlocutory appeal under 28 U.S.C. 1292(b), irrespective of Plaintiffs' views on the likelihood of the appellate court's eventually hearing the issues. As explained above, "(1) the order to be appealed involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question of law; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation." *In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 741 (D. Md. 2003). Therefore, the Court should amend its February 26, 2009 Order to state that the Order "involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served pursuant to the electronic filing protocol of this Court this 27th day of April, 2009, to Wade B. Wilson, Esquire, Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue, N.W., Washington, D.C. 20004.

/s/
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