UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-21891-CIV-ALTONAGA/Simonton

DANILO CURBELO GARCIA,
et al.,

Plaintiffs,
vs.

AROLDIS CHAPMAN,

Defendant.
_____/

OMNIBUS ORDER

THIS CAUSE came before the Court on three motions submitted by Defendant, Aroldis Chapman ("Chapman"): (1) a Motion for Summary Judgment . . . ("Motion for Summary Judgment" or "MSJ") [ECF No. 138], filed on September 9, 2013, together with a Statement of Facts . . . ("Defendant's SF") [ECF No. 143],[1] filed on September 10, 2013; (2) a Consolidated Motion to Strike . . . ("Motion to Strike" or "MTS") [ECF No. 144],[2] filed on September 12, 2013; and (3) a Motion in Limine ("Motion *in Limine*") [ECF No. 166],[3] filed on October 28, 2013. Plaintiffs, Danilo Curbelo Garcia ("Curbelo Garcia"), Maylen Turruellas ("Turruellas"), Yunis Curbelo ("Curbelo"), and Carlos Rafael Mena Perdomo ("Mena Perdomo") (collectively,

[1] Plaintiffs filed a Response to Chapman's Motion for Summary Judgment . . . ("MSJ Response") [ECF No. 154] on October 14, 2013, which contained a Response to Defendant's Statement of Material Facts ("Plaintiffs' SF"). (*See* MSJ Response 2–5). On October 25, 2013, Chapman filed a Reply Memorandum . . . ("MSJ Reply") [ECF No. 163].

[2] Plaintiffs filed a Response in Opposition to Defendant's Motion to Strike ("Strike Response") [ECF No. 150] on September 26, 2013, to which Chapman replied ("Strike Reply") [ECF No. 153] on October 7, 2013.

[3] Plaintiffs filed a Response in Opposition to Defendant's Motion in Limine ("*Limine* Response") [ECF No. 174] on November 11, 2013, to which Chapman replied ("*Limine* Reply") [ECF No. 178] on November 20, 2013.

"Plaintiffs"), requested a hearing and oral argument, and on November 26, 2013, the Court heard oral arguments on the three motions. (*See generally* November 26 hearing [ECF No. 179]). The Court has carefully considered the parties' written submissions and oral arguments, the record, and applicable law.

I. BACKGROUND

This case arises out of Plaintiffs' claims that Cuban government officials arbitrarily detained and tortured Curbelo Garcia and Mena Perdomo after Chapman and his father, Juan Alberto Chapman Bennett ("Chapman Bennett"), falsely accused Curbelo Garcia and Mena Perdomo of offering to assist Chapman defect from Cuba; Chapman and Chapman Bennett subsequently testified against Curbelo Garcia and Mena Perdomo at these men's respective trials in Cuba. (*See* Compl. [ECF No. 1]). Plaintiffs' First Amended Complaint ("Amended Complaint") [ECF No. 46][4] alleges Chapman, a Cuban national and Major League Baseball ("MLB") player for the Cincinnati Reds, violated the Torture Victim Protection Act of 1991 ("TVPA"), PUB. L. NO. 102-256, 106 STAT. 73, (1992) (codified at 28 U.S.C. section 1350 (Historical and Statutory Notes)). (*See* Am. Compl. 67–74).

Specifically, the Amended Complaint contains the following remaining claims: torture in violation of the TVPA (Count II); loss of consortium under state law (Count III); loss of parental consortium under state law (Count IV); and torture in violation of the TVPA against all Defendants (Count VI).[5] (*See id.*). Plaintiffs seek general and punitive damages, along with

[4] Plaintiffs moved to amend their Amended Complaint on May 17, 2013 to address recent changes in the law pursuant to *Kiobel v. Royal Petroleum, Co.*, 133 S. Ct. 1659 (2013), and to add two defendants. (*See* Second Mot. Leave Amend Compl. [ECF No. 98]). The Court granted in part and denied in part the motion to amend. The parties and the Court rely on the Amended Complaint as the operative complaint.

[5] By Order dated June 5, 2013 ("June 5 Order") [ECF No. 103], the Court dismissed Counts I and V in the Amended Complaint and denied Plaintiffs' request to add additional parties. (*See* Order 1, 5). Chapman remains the only Defendant in the instant case. (*See id.*)

interest and costs. (*See id.* 74). The Court reviews the facts in the record.[6]

A. Chapman's Baseball Career in Cuba

Chapman, a Cuban citizen, is domiciled in the United States, where he is a professional baseball pitcher for the Cincinnati Reds. (*See* Chapman Dep. 5:4–9 [ECF No. 154-4]). Chapman previously played baseball for the Cuban national team in Holguin. (*See id.* 12:1–10). Around 2008, Chapman attempted to defect from Cuba, but his attempt failed when he was intercepted by the Cuban authorities. (*See id.* 19:7–20:9). After he was caught, Chapman believed he would not be permitted to play baseball in Cuba and thought his career was over. (*See id.* 79:25–81:13). According to Chapman, baseball players caught trying to leave Cuba were sanctioned or separated from the team for a time (*see id.* 81:15–23), and "everybody calls you a traitor when that happens" (*id.* 80:19–20). As a result of his attempted defection, Chapman was not permitted to play in the 2008 Olympic games. (*See id.* 22:14–23:18). Chapman, however, stressed he was not sanctioned by the Cuban government or banned from playing baseball on the Cuban national team as he had initially feared. (*See id.* 22:6–24:24, 79:25–81:13, 81:21–82:5). Chapman continued to play for the baseball team in Holguin as well. (*See id.* 23:22–24:6).

B. Curbelo Garcia's Interactions with Chapman

Curbelo Garcia, an expatriated Cuban citizen and permanent resident of the United States, traveled to Cuba on July 18, 2008 to visit his extended family. (*See* Curbelo Garcia Aff. ¶ 6 [ECF No. 154-11]; Turruellas Aff. ¶¶ 6–7, 9, 11 [ECF No. 154-3]). On July 29, 2008, Curbelo Garcia and Alejandro Manuel Medina Aguilera, also known as "Habana" ("Habana"), located Chapman on his bicycle and met Chapman near a police station in Frank Pais in Cuba. (*See* Def.'s SF ¶ 8; Pls.' SF ¶ 8). Curbelo Garcia asked Chapman when he would leave Cuba, and

[6] The parties did not include many undisputed material facts in their statements of fact. (*See generally* Def.'s SF; Pls.' SF). As a result, the Court's factual summary draws heavily upon the parties' depositions and affidavits.

Chapman replied he did not intend to leave Cuba as he had learned his lesson from his prior failed attempt to defect. (*See* Def.'s SF ¶¶ 9–10; Pls.' SF ¶¶ 9–10). Curbelo Garcia explained to Chapman that in the United States Major League Baseball ("MLB") players with less talent than Chapman earned millions of dollars. (*See* Def.'s SF ¶ 11; Pls.' SF ¶ 11). Habana continued the conversation about MLB players with Chapman. (*See* Def.'s SF ¶ 12; Pls.' SF ¶ 12). After their conversation with Chapman, Curbelo Garcia and Habana were stopped by Cuban police while leaving Frank Pais. (*See* Def.'s SF ¶ 13; Pls.' SF ¶ 13).

Later, Chapman and his father filed reports dated July 31, 2008 with the Cuban authorities regarding events that took place on July 27 and 28, 2008, and stated a man known as Habana, along with several other individuals, offered to assist Chapman leave Cuba. (*See generally* Chapman Victim Statement [ECF No. 46-1]; Chapman Bennett Model Compl. Report [ECF No. 46-2]).[7] In the Victim Statement, Chapman explained he received a telephone call from Habana at his home address on July 27, 2008 at about 9:00 p.m. (*See* Chapman Victim Statement 1). During the call, Habana asked Chapman to meet him in Holguin the next day. (*See id.*). On July 28, 2008, Chapman went to Holguin but did not see Habana. (*See id.*). That evening, Chapman received a telephone call from Habana updating him that Habana would visit him the next day. (*See id.*).

The same evening, Habana and another man arrived at Chapman's home and asked to speak with him. (*See id.*). Chapman and Habana spoke inside for approximately half an hour and discussed Chapman playing baseball. (*See* Am. Compl. ¶ 35; Am. Answer ¶ 35; Chapman Bennett Model Compl. Report 1). Chapman and Habana then went outside and conversed in the street with the other man. (*See* Chapman Bennett Model Compl. Report 1). Chapman recalled

[7] The parties refer to Chapman's "Victim Statement" ("Declaración de Víctima") and Chapman Bennett's "Model Complaint Report" ("Mo[d]elo de Denuncia") as denunciations or police reports.

the man with Habana was travelling with a third unidentified man in a red Moskvitch vehicle. (*See* Chapman Victim Statement 1). According to Chapman Bennett, the man who spoke with Chapman inside (Habana) was "short, stocky and of black skin," and the other man who stayed outside in the street was "dark-skinned [and] a little taller and thinner." (Chapman Bennett Model Compl. Report 1). After Chapman reentered his home, he told Chapman Bennett about the conversation he had with the men outside, noting the men propositioned Chapman with a plan for defection. (*See id.*).

The following evening on July 29, 2008, Habana again called Chapman and asked him to come to Frank Pais. (*See* Chapman Victim Statement 1). Around 10:00 p.m., Chapman rode his bicycle to Frank Pais, where he met with Habana and another Caucasian male. (*See id.* at 1–2). Chapman recalls Habana and the Caucasian male were driving a blue Audi vehicle. (*See id.* at 2; Am. Compl. ¶ 37; Am. Answer ¶ 37). The Caucasian male told Chapman his plan to help him leave Cuba, emphasizing Chapman could earn a high salary in MLB. (*See* Chapman Victim Statement 2). Although Chapman replied he was not interested, the man told Chapman he would call him around 6:00 a.m. the next morning. (*See id.*). Chapman's phone rang the morning of July 30, 2008, but the caller hung-up. (*See id.*).

Chapman received citations from the police to answer questions about Curbelo Garcia, and in his discussions with police, Chapman accused Curbelo Garcia of offering to take him out of Cuba illegally. (*See* Chapman Dep. 44:13–48:6, 100:20–101:7, 105:18–106:5). Chapman did not claim he was forced by Cuban police to accuse Curbelo Garcia. (*See id.*). After Chapman and Chapman Bennett filed reports with Cuban state security (*see generally* Chapman Victim Statement; Chapman Bennett Model Compl. Report), Curbelo Garcia was arrested on July 30, 2008. (*See* Def.'s SF ¶ 15; Pls.' SF ¶ 15). Curbelo Garcia and Habana were charged with human

trafficking violations of the Cuban Penal Code. (*See* Def.'s SF ¶¶ 16–17; Pls.' SF ¶¶ 16–17).

Curbelo Garcia was detained for approximately six months while awaiting trial, during which time he lost sixty pounds. (*See* Curbelo Garcia Aff. ¶¶ 17–19, 25). Curbelo Garcia attributes his substantial weight loss to the spoiled, infested food he received while in prison and the lack of potable water. (*See id.* ¶¶ 25, 27). Curbelo Garcia was confined to his cell without access to sunlight or fresh air for extended periods of time, resulting in skin irritations, including liver spots and bruising.[8] (*See id.* ¶ 23).

On January 21, 2009 at Curbelo Garcia's trial in Cuba (*see id.* ¶ 17), Chapman and Chapman Bennett both testified for the government against Curbelo Garcia (*see id.* ¶¶ 8, 11, 19). Chapman testified that he and his father reported Curbelo Garcia to the Cuban authorities for offering Chapman money to play baseball in the United States. (*See id*. ¶¶ 8, 11). Chapman testified that Curbelo Garcia had a plan to use a speedboat to relocate baseball players from Cuba to the United States. (*See id.* ¶¶ 8–11). At trial, Curbelo Garcia testified he had no such plans, did not have the means to carry out the elaborate plan described by Chapman, and no evidence was ever found by Cuban authorities indicating Chapman's allegations were true. (*See id.* ¶¶ 7–10). Curbelo Garcia acknowledges he testified at his trial that he previously spoke with Chapman about leaving Cuba and about the salaries of MLB players in the United States. (*See* Def.'s SF ¶¶ 19–20; Pls.' SF ¶¶ 19–20).

During Curbelo Garcia's trial, Chapman falsely testified about his intent to leave Cuba. (*See* Chapman Dep. 31:4–6, 34:24–35:1, 120:4–123:19). Chapman testified at trial as having

[8] After Curbelo Garcia was imprisoned for a year and a half, his wife, Turruellas, visited him in prison. (*See* Turruellas Aff. ¶ 14). Turruellas observed Curbelo Garcia's health had declined greatly since she had last seen him: his skin had turned ashen and was mottled and stained with liver spots, his hair had turned grey, and his lips were dry and cracked; Curbelo Garcia also suffered from chills and a fever. (*See id.*).

"no intention of leaving Cuba" (*id.* 120:13–21), but later admitted he "never gave up trying to leave" Cuba after his first attempt to defect failed (*id.* 120:4–12). Chapman admitted during his deposition that he falsely testified about his intention to leave Cuba because he did not want to be imprisoned.[9] (*See id.* 120:22–123:19).

Shortly after his trial, Curbelo Garcia was convicted and sentenced to ten years imprisonment; he is serving the remainder of his sentence at his parents' residence in Cuba. (*See* Curbelo Garcia Aff. ¶¶ 5, 21, 33). After his conviction, Curbelo Garcia twice appealed his sentence based on Chapman's and Chapman Bennett's false testimony, but his appeals were unsuccessful. (*See id.* ¶ 21). Turruellas assisted her husband, Curbelo Garcia, with both of his appeals. (*See* Turruellas Aff. ¶ 12). She helped pay for Curbelo Garcia's attorney's fees and spoke with his attorney over the telephone and in person after her husband's conviction. (*See id.*). The appeals cost $1,000 each, plus $4,500 in attorney's fees. (*See id.*).

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[9]
Q. You lied, though, right?
* * *
A. I'm not going to jail.
Q. But you lied?
* * *
A. That's what I said.
* * *
Q. You went to trial against Curbelo Garcia --
A. Yes.
Q. -- accusing him of offering to take you out of Cuba, which you intended to do anyway --
A. Yes.
Q. -- for which he went to jail for many years?
A. It wasn't my fault.
Q. And you lied and said that you had no intention of leaving; isn't that correct?
* * *
A. I said it because I wasn't going to jail.
Q. But you were okay with sending somebody else to jail?
* * *
A. I wasn't going to send him.

(Chapman Dep. 121:1–123:19).

C. Mena Perdomo's Interactions with Chapman

Mena Perdomo resides in the Dominican Republic. (*See* Mena Perdomo Dep. 8:5–9, 108:1–8 [ECF No. 154-2]). He travelled frequently to Cuba for business to buy and sell goods. (*See id.* 100:1–102:10). While visiting Cuba, Mena Perdomo would stay occasionally at his former in-laws' home in the province of Holguin. (*See id.* 103:12–24). Mena Perdomo's former brother-in-law is Raul Magana ("Magana"), also known as El Niño Magana. (*See id.* 106:11–25). On July 14, 2008, Mena Perdomo was staying at his former mother-in-law's home in Holguin. (*See id*. 8:9–23). On July 15, 2008, Magana met Chapman at a carnival in Frank Pais. (*See* Am. Compl. ¶¶ 109–10; Am. Answer ¶¶ 109–10). Magana had a conversation with Chapman where he "offered to smuggle Chapman out of Cuba so that he could play baseball." (Am. Answer ¶¶ 110). Chapman submitted a written statement to the Cuban police regarding his conversation with Magana. (*See id.* ¶ 109).

On July 16, 2008, Mena Perdomo was detained by Cuban state security while at a gas station in Frank Pais and charged with human trafficking. (*See* Mena Perdomo Dep. 12:24–13:21; Mena Perdomo Aff. ¶¶ 8, 18 [ECF No. 154-1]). While imprisoned and awaiting trial, Mena Perdomo did not receive adequate medical attention to treat his diabetes, and his health declined severely. (*See* Mena Perdomo Aff. ¶¶ 8–18, 25–31).

Mena Perdomo's trial in Cuba occurred on June 3, 2009. (*See* Mena Perdomo Dep. 35:22–24, 37:17–38:12). Chapman testified against Mena Perdomo, saying Mena Perdomo had offered him millions of dollars to play baseball in the Dominican Republic, although Chapman could not recall if it was one, three, or even ten million dollars. (*See* Mena Perdomo Aff. ¶ 20; Mena Perdomo Dep. 39:2–41:22, 43:17–23). Still, Chapman admits he had never met Mena Perdomo (*see* Chapman Dep. 43:17–19), did not know him personally, and only knew of him

(*see* Mena Perdomo Aff. ¶ 20; Mena Perdomo Dep. 38:13–40:11).

Magana was a co-defendant at Mena Perdomo's trial, and Chapman also testified against Magana. (*See* Mena Perdomo Dep. 34:8–15, 34:12–21, 106:11–16; Chapman Dep. 34:11–20). Although Chapman said he had never met Magana and only knew of him (*see* Chapman Dep. 43:20–24), Chapman contends Magana told him a man from the Dominican Republic wanted to take Chapman out of Cuba (*see id*. 43:20–44:12).

Mena Perdomo was convicted after his trial, sentenced to nine years in prison, and was detained until April 1, 2013, when he was released for humanitarian reasons. (*See* Mena Perdomo Aff. ¶¶ 8, 24). Mena Perdomo appealed his conviction three months after his trial; he filed a second appeal six months later. (*See* Mena Perdomo Dep. 55:17–56:7).

According to Mena Perdomo, Chapman testified "he was going to accuse all the other persons that approached him [about defecting, and] . . . he was going to expose them to the state security, because he was a good revolutionary." (*Id*. 45:8–17). Chapman Bennett also testified he would not allow his son to abandon Cuba, and his family was "too revolutionary to violate the ethical and moral principles which the revolution had taught them." (*Id*. 50:14–21). In addition to testifying against Curbelo Garcia and Mena Perdomo, Chapman testified against other individuals who allegedly offered to help Chapman defect from Cuba, including Habana and Magana. (*See* Chapman Dep. 31:25–32:12, 34:11–20). According to Mena Perdomo, Chapman testified against individuals in three other trials and reported those who had approached him about defecting. (*See* Mena Perdomo Aff. ¶ 20). Whether Chapman also testified against another individual named "Lisandro" is disputed by the parties. (*See* Chapman Dep. 36:12–38:14; MSJ Resp. 13). Juan Carlos Herrera Acosta, Curbelo Garcia's cellmate for six months, stated Chapman had the reputation in prison of being a government informant. (*See* Herrera

Acosta Aff. ¶ 9).

Later in 2009, Chapman successfully defected while traveling with the Cuban national baseball team in Rotterdam in the Netherlands. (*See* Chapman Dep. 17:6–18:13). Chapman's friend, Carlos Thompson, assisted Chapman defect. (*See id.*).

The Court now turns to address Chapman's Motion for Summary Judgment, Motion to Strike, and Motion *in Limine*, respectively. Chapman moves for summary judgment on multiple grounds, including Plaintiffs' failure to show evidence Curbelo Garcia and Mena Perdomo were subjected to torture, and that Chapman intended or is secondarily liable for the torture. Chapman's Motion to Strike seeks to exclude Plaintiffs' three proposed expert witnesses based on the witnesses' lack of qualifications and unreliable testimony. Chapman's Motion *in Limine* seeks to preclude Plaintiffs from making certain references and utilizing inadmissible evidence at trial, including unauthenticated documents and uncertified translations.

II. MOTION FOR SUMMARY JUDGMENT

Chapman contends the Motion for Summary Judgment must be granted given the Plaintiffs' lack of admissible evidence in support of their claims. (*See generally* Mot. Summ. J.).

A. Legal Standard

Summary judgment shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(a), (c). "[T]he court must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc) (quoting *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995)). "An issue of fact is material if it is a legal element of the claim under the applicable substantive law which might

affect the outcome of the case." *Burgos v. Chertoff*, 274 F. App'x 839, 841 (11th Cir. 2008) (quoting *Allen v. Tyson Foods Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (internal quotation marks omitted)). "A factual dispute is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Channa Imps., Inc. v. Hybur, Ltd.*, No. 07-21516-CIV, 2008 WL 2914977, at *2 (S.D. Fla. Jul. 25, 2008) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *See Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969) (citations omitted). If reasonable minds might differ on the inferences arising from undisputed facts, the Court should deny summary judgment. *See Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982) (citations omitted).

The movant's initial burden on a motion for summary judgment "consists of a responsibility to inform the court of the basis for its motion and to identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (internal quotation marks and alterations in original omitted) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

B. Legal Analysis

Chapman argues summary judgment should be entered in his favor for six reasons: (i) Plaintiffs cannot establish Curbelo Garcia and Mena Perdomo were tortured in a Cuban prison; (ii) Plaintiffs cannot establish a conspiracy between Chapman and the Cuban government; (iii) Plaintiffs fail to present any evidence that Chapman intended for the Cuban government to torture Curbelo Garcia and Mena Perdomo; (iv) the TVPA does not reach extraterritorial acts; (v)

Plaintiffs have not exhausted their remedies in Cuba; and (vi) Plaintiffs' state law claims fail. (*See* Mot. Summ. J. 6–20). The Court first addresses Chapman's extraterritorial TVPA argument, followed by Chapman's argument regarding exhaustion of remedies. The Court then collectively considers Chapman's contentions regarding torture and secondary liability under the TVPA. Finally, the Court briefly addresses the state law claims.

1. Extraterritorial TVPA Claims

Chapman moves for summary judgment on the basis that the TVPA is presumed not to apply outside the United States and Plaintiffs' claims under the TVPA are extraterritorial. (*See* Mot. Summ. J. 17–18). Plaintiffs contest Chapman's interpretation that a presumption against extraterritoriality applies to claims under the TVPA based on *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013). The Supreme Court in *Kiobel* held "the presumption against extraterritoriality applies to claims under the ATS [Alien Tort Statute]," reasoning Congress did not intend "federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign."[10] 133 S. Ct. at 1668–69.

In the wake of *Kiobel*, Chapman urges the Court to apply to the TVPA the same presumption the Supreme Court did for the ATS, and deny Plaintiffs' claims under the TVPA on the basis of their extraterritoriality. (*See* Mot. Summ. J. 17–18). Chapman relies on a recent decision from a district court in the Southern District of Texas which applied *Kiobel* to deny the plaintiffs' claims under the TVPA as extraterritorial. (*See* Mot. Summ. J. 17–18 (citing *Murillo v. Bain*, Civil Action No. H-11-2373, 2013 WL 1718915, at *3 (S.D. Tex. Apr. 19, 2013) ("American laws like the Alien Tort Statute and Torture Victim Protection Act are presumed not

[10] The Amended Complaint included counts under both the Alien Tort Statute, 28 U.S.C. § 1350, and the TVPA. Plaintiffs sought to withdraw their claims under the ATS in light of *Kiobel* and were granted leave to do so. (*See* June 5 Order 1).

[to] apply beyond the borders of the United States.") (footnote call number omitted))).

Before discussing *Kiobel* and *Murillo*, the Court briefly reviews the longstanding case law regarding Congress's ability to regulate extraterritorial conduct and examines the TVPA's legislative history. The Eleventh Circuit has repeatedly acknowledged Congress's "power to regulate the extraterritorial acts of U.S. citizens." *United States v. Belfast*, 611 F.3d 783, 810 (11th Cir. 2010) (citing *United States v. Plummer*, 221 F.3d 1298, 1304 (11th Cir. 2000) and *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980)). The Eleventh Circuit has explained, however, "[w]hether Congress has chosen to exercise that authority . . . is an issue of statutory construction. It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Id.* at 810 (quoting *Nieman v. Dryclean U.S.A. Franchise Co., Inc.*, 178 F.3d 1126, 1129 (11th Cir. 1999)). This statutory presumption against extraterritoriality survives unless it is overcome, either expressly or by inference.

> "The presumption against extraterritoriality can be overcome only by clear expression of Congress' intention to extend the reach of the relevant Act beyond those places where the United States has sovereignty or has some measure of legislative control." *Id.* at 1129. *See also Morrison v. Nat'l Austl. Bank Ltd.*, ––– U.S. ––––, 130 S.Ct. 2869, ––––, 177 L.Ed.2d 535, 2010 WL 2518523, at *5 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."). Such an intention of course may appear on the face of the statute, but it may also be "inferred from . . . the nature of the harm the statute is designed to prevent," from the self-evident "international focus of the statute," and from the fact that "limit[ing] [the statute's] prohibitions to acts occurring within the United States would undermine the statute's effectiveness." *Plummer*, 221 F.3d at 1310.

Belfast, 611 F.3d at 811 (alterations in original).

The TVPA's express statutory intent overcomes the presumption against extraterritoriality. Although the statute on its face may be unclear, the language in the Senate Report to the TVPA unambiguously states Congress's intent to apply the statute

extraterritorially. The Report explains:

> The purpose of [the TVPA] is to provide a Federal cause of action against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing. This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990. The convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. *This legislation will do precisely that–by making sure that torturers and death squads will no longer have a safe haven in the United States.*
>
> Judicial protection against flagrant human rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. *Consequently, the Torture Victim Protection Act (TVPA) is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad*.

S. Rep. No. 102-249, at 3–4 (1991) (emphasis added). In following the TVPA's statutory intent, courts have historically allowed extraterritorial claims to proceed under the TVPA. *See, e.g.*, *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338, 1338 (11th Cir. 2011); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303 (11th Cir. 2008); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005).

In light of this statutory analysis, Chapman's reasoning comparing the TVPA to the ATS wholly fails to persuade. While the Supreme Court found the ATS did not apply extraterritorially, the ATS and the TVPA are two distinct statutes and need not be treated the same. *See Baloco ex rel. Tapia*, 640 F.3d at 1345 ("The TVPA differs from the ATS in certain crucial ways. Whereas the ATS is a jurisdiction conferring statute, the [TVPA] provides a cause of action for torture and extrajudicial killing.") (internal quotation marks and citation omitted)). Indeed, to recover under the TVPA, the torture or wrongful death must have been "committed by an individual acting 'under actual or apparent authority, or color of law, of any foreign nation.'"

Id. at 1346. Concluding the TVPA does not apply to extraterritorial claims based on Chapman's citation to one case (*see* MSJ Resp. 20) is too far a leap when the majority opinion in *Kiobel* specifically did not address the TVPA[11] and the TVPA is a distinct statute. *See Kiobel*, 133 S. Ct. at 1668–69; *Baloco ex rel. Tapia*, 640 F.3d at 1345. The Court declines to follow *Murillo*'s extension of *Kiobel*, as Chapman urges. Summary judgment in favor of Chapman on the basis of extraterritoriality is denied.

2. Exhaustion of Remedies

Chapman next argues Plaintiffs have not exhausted their remedies in Cuba pursuant to the TVPA and accordingly urges the Court to grant summary judgment. (*See* Mot. Summ. J. 19–20). Chapman emphasizes Plaintiffs have failed to provide documentation, such as public records from Cuba, evidencing Plaintiffs' appeals. (*See id.* at 19). Plaintiffs contend they exhausted available remedies in Cuba (*see* MSJ Resp. 20–21), and Curbelo Garcia and Mena

[11] In his concurring opinion in *Kiobel*, Justice Kennedy states:

> the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition. Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U.S.C. § 1350, and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, . . . and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

133 S. Ct. at 1669 (J. Kennedy, concurring). Kennedy also later alludes to the TVPA's extraterritorial application, stating "Congress has enacted other statutes, and not only criminal statutes, that allow the United States to prosecute (or allow victims to obtain damages from) foreign persons who injure foreign victims by committing abroad torture, genocide, and other heinous acts." *Id.* at 1677 (citations omitted). Kennedy specifically cites to the TVPA in his list of other statutes, noting the purpose of the TVPA is to ensure "'torturers and deaths quads will no longer have a safe haven in the United States . . . by providing a civil cause of action in U.S. courts for torture committed abroad.'" *Id.* (quoting S. Rep. No. 102-249 at 1671-1672).

Perdomo attest they filed criminal appeals in Cuba (*see id.* at 20–21).

Under the TVPA "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 106 STAT. 73, note § 2(b). "[T]he exhaustion requirement pursuant to the TVPA is an affirmative defense, requiring the defendant to bear the burden of proof . . . . This burden of proof is substantial." *Jean v. Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005) (citations and footnote call number omitted). In this regard the Eleventh Circuit gives the Senate Report to the TVPA considerable weight:

> *[T]he committee recognizes that in most instances the initiation of litigation under this legislation will be virtually prima facie evidence that the claimant has exhausted his or her remedies in the jurisdiction in which the torture occurred. The committee believes that courts should approach cases brought under the proposed legislation with this assumption . . . .*
>
> More specifically, . . . [the exhaustion requirement] should be informed by general principles of international law. 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. The ultimate burden of proof and persuasion on the issue of exhaustion of remedies, however, lies with the defendant.

Id. at 781-82 (quoting S. Rep. No. 102-249, at 9–10 (alterations and emphasis in original; citations omitted)); *see also Enahoro v. Abubakar*, 408 F.3d 877, 892 (7th Cir. 2005) ("[T]o the extent that there is any doubt[,] . . . both Congress and international tribunals have mandated that such doubts [concerning the exhaustion of remedies under the TVPA] be resolved in favor of the plaintiffs."); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *17–18 (S.D.N.Y. Feb. 28, 2002) (raising exhaustion of remedies under the TVPA as an affirmative defense did not satisfy the initial burden of demonstrating plaintiffs had not

exhausted "alternative and adequate" remedies in Nigeria).

Chapman has the burden of demonstrating Plaintiffs failed to exhaust "available and adequate remedies" in Cuba. *Jean*, 431 F.3d at 781. Chapman, however, has not shown Plaintiffs failed to utilize available remedies in Cuba. *See id.* Plaintiffs have personal knowledge of their efforts to appeal (*see* Mena Perdomo Dep. 55:17–56:7; Curbelo Garcia Aff. ¶ 21), and the Court views the evidence in the light most favorable to the party opposing summary judgment, *see Chapman*, 229 F.3d at 1023. Curbelo Garcia states he twice appealed his sentence based on Chapman's and Chapman Bennett's false testimony, but his appeals were unsuccessful. (Curbelo Garcia Aff. ¶ 21). Plaintiffs also rely on testimony from Turruellas to support their argument that they exhausted available remedies. Turruellas states she assisted her husband with both of his appeals. (*See* Turruellas Aff. ¶ 12). Turruellas helped pay for Curbelo Garcia's legal costs, including attorney's fees, and spoke with his attorney over the telephone and in person after her husband's conviction. (*See id.*). Mena Perdomo first appealed three months after his trial and filed a second appeal six months later. (*See* Mena Perdomo Dep. 55:17–56:7). Plaintiffs' testimony is sufficient to support a finding that Plaintiffs adequately exhausted available remedies in Cuba. (*See id*. 55:17–56:7; Curbelo Garcia Aff. ¶ 21).

To the extent Chapman disputes whether Plaintiffs even filed appeals in Cuba, genuine issues of material fact remain and summary judgment must be denied. Furthermore, Chapman does not discuss whether a Cuban court would be receptive to appeals or suits accusing the government of torture filed by political prisoners, such as Curbelo Garcia and Mena Perdomo.[12] (*See generally* Am. Compl., Exs. I, K, L [ECF Nos. 47-1, 47-3, 47-4]). Accordingly, the Court

[12] Juan Carlos Herrera Acosta ("Herrera Acosta"), a former cellmate of Curbelo Garcia, stated in his affidavit that he and Curbelo Garcia — both political prisoners — received harsher treatment from the Cuban prison guards than did other prisoners. (*See* Herrera Acosta Aff. ¶¶ 4, 7, 10–16).

does not grant summary judgment on the basis of Plaintiffs' failure to exhaust available remedies.

3. Secondary Liability for Claims of Torture under the TVPA

Curbelo Garcia and Mena Perdomo allege acts of torture by Cuban government officials in violation of the TVPA in Counts II and VI, respectively, of the Amended Complaint. (*See* Am. Compl. 68–69, 73–74). In his Motion for Summary Judgment, Chapman argues Plaintiffs cannot establish they were tortured, and any mistreatment of Plaintiffs while imprisoned does not satisfy the TVPA's "severity" and "purpose" requirements. (*See* Mot. Summ. J. 6–8; MSJ Reply 6–9). Chapman further asserts Plaintiffs cannot prove Chapman is secondarily liable under the TVPA pursuant to theories of conspiracy or aiding and abetting. (*See* Mot. Summ. J. 11–17; MSJ Reply 9–11). Plaintiffs insist the record contains sufficient evidence to establish Curbelo Garcia and Mena Perdomo were tortured, and Chapman is secondarily liable for torture under either a conspiracy or aiding and abetting theory of liability. (*See generally* MSJ Resp.).

The TVPA provides, "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation– (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual . . . ." 106 STAT. 73, note § 2(a). The TVPA defines "torture" as:

> any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind . . . .

Id. note § 3(b)(1). To state a claim under the TVPA, Plaintiffs must establish: (1) a state actor under actual or apparent authority; (2) subjected Plaintiffs to torture; and (3) the torture was intentionally inflicted. *See id.* As Plaintiffs do not allege Chapman committed the torture,

Plaintiffs must show Chapman is secondarily liable for torture to be successful on their claims. Plaintiffs must demonstrate secondary liability according to customary international law theories of civil conspiracy or aiding and abetting. *See generally In re Chiquita Brands Int'l, Inc. Alien Tort Statute and S'holder Derivative Litig.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011) (order granting in part second motion to dismiss); *In re Chiquita Brands Int'l, Inc. Alien Tort Stat. & S'holder Derivative Litig.*, 690 F. Supp. 2d 1296 (S.D. Fla. 2010) (order granting in part motion to dismiss).

Regarding the first element, the TVPA requires the torture be carried out "under actual or apparent authority, or color of law." 106 STAT. 73, note § 3(b)(1). Chapman does not refute Cuban prison officials mistreated Plaintiffs while they were in prison. The Court considers Cuban local police, state security, and prison officials to be state actors, and Chapman has not presented any evidence to the contrary.[13] The TVPA's state action requirement is satisfied as the prison officials, serving as representatives of the Cuban government and acting in their official capacities, committed the "torture."

The Court briefly turns to the second element concerning whether torture, as defined by the TVPA, was committed. *See* 106 STAT. 73, note § 2(a). Chapman asserts the prison officials' mistreatment of Plaintiffs does not rise to the level of torture (*see generally* Mot. Summ. J.), while Plaintiffs insist their mistreatment while imprisoned amounts to torture[14] (*see generally*

[13] Chapman only asserts in his affirmative defenses that Plaintiffs "have not sufficiently alleged the requisite state action." (Am. Answer 40, ¶ 10).

[14] During his prolonged imprisonment, Curbelo Garcia was confined to a four-foot by six-foot cell shared by up to six prisoners and was deprived of access to fresh air and sunlight. (*See* Curbelo Garcia Aff. ¶ 23; Herrera Acosta Aff. ¶ 10). He received spoiled and maggot-infested food, was denied an adequate supply of potable water, and was deprived of adequate toilet facilities. (*See id.* ¶ 25). Similarly, Mena Perdomo was served spoiled food and was denied proper medical treatment, including insulin and vitamin injections needed to treat his diabetes. (*See* Mena Perdomo Aff. ¶¶ 24–30).

Curbelo Garcia Aff.; Mena Perdomo Aff.). The Court does not determine whether Curbelo Garcia's and Mena Perdomo's treatment in prison constitutes torture as defined by the TVPA and customary international law, as disputed factual issues remain regarding Plaintiffs' exact treatment in prison and whether such treatment by prison officials was intentional (*see* Def.'s SF ¶¶ 23–25; Pls.' SF ¶¶ 23–25).

Assuming Plaintiffs were subjected to torture, the third element of the TVPA requires the torture be "intentionally inflicted" for the purpose of obtaining a confession, punishing, intimidating, or coercing an individual, or for any reason based on discrimination. 106 STAT. 73, note § 3(b)(1). The parties dispute the underlying facts, which Plaintiffs rely on as circumstantial evidence of intent. (*See* MSJ Resp. 11 (discussing whether Plaintiffs' mistreatment was purposeful)). For example, Plaintiffs contend the mistreatment by Cuban prison officials was intentionally discriminatory, noting Mena Perdomo was fed spoiled food while his cellmates were not. (*See* Pls.' SF ¶ 24). Chapman argues such treatment was not purposeful, but was due to the fact the prison's "freezers probably weren't working," as Mena Perdomo testified. (Def.'s SF ¶ 24; Pls.' SF ¶ 24). Whether the torture was intentionally inflicted on Plaintiffs remains an issue to be decided by the trier of fact because the parties dispute the underlying facts from which the prison officials' intent can be inferred. *See McCormick v. United States*, 500 U.S. 257, 270 (1991) ("It goes without saying that matters of intent are for the jury to consider.") (citation omitted).

Assuming Cuban prison officials intentionally subjected Plaintiffs to torture, Plaintiffs must still demonstrate an issue of triable fact regarding Chapman's liability, specifically his secondary liability, in order to survive Chapman's Motion for Summary Judgment. Courts recognize secondary liability under the TVPA. *See Cabello*, 402 F.3d at 1157 ("An examination

of legislative history indicates that the TVPA was intended to reach beyond the person who actually committed the acts, to those ordering, abetting, or assisting in the violation.") (citation omitted); *see also Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1709 (2012) (citation omitted); *Romero,* 552 F.3d at 1315–16; *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247–48 (11th Cir. 2005) (citation omitted). To be successful on their TVPA claim, Plaintiffs must show Chapman is secondarily liable under the TVPA through either a theory of civil conspiracy or aiding and abetting. (*See* Mot. Summ. J. 11–12). The Court addresses aiding and abetting liability.

Aiding and Abetting Liability

To prove aiding and abetting liability, Plaintiffs must show: (1) the Cuban government committed an international law violation — in this case, torture; (2) Chapman acted with the purpose or intent to assist in that violation; and (3) Chapman's assistance substantially contributed to the Cuban government's commission of the violation. *See In re Chiquita,* 792 F. Supp. 2d at 1343–44 (citations omitted). Chapman attacks the sufficiency of Plaintiffs' evidence supporting a claim of aiding and abetting liability. (*See* Mot. Summ. J. 12). Plaintiffs contend there is sufficient circumstantial evidence to establish both Chapman's intent and substantial assistance in the commission of torture against Plaintiffs. (*See* MSJ Resp. 16–19).

Regarding the first element of aiding and abetting, as discussed, Plaintiffs have sufficiently shown the Cuban government committed the mistreatment of Plaintiffs.

Regarding the second element of *mens rea*, the parties dispute the appropriate intent standard. Chapman stresses Plaintiffs have not shown "Chapman acted with the 'specific purpose that the [Cuban government] commit the [torture] . . . .'" (Mot. Summ. J. 12) (citations omitted). But while Plaintiffs assert they can satisfy Chapman's "specific purpose" intent

standard, they submit the appropriate standard for secondary liability under the TVPA is derived from customary international law and does not require so specific a showing of Chapman's *mens rea*.[15] (*See* MSJ Resp. 16–19). Under Plaintiffs' knowledge-based standard, to be secondarily liable, Chapman need only know at least one of the principal's unlawful goals and intend to help accomplish it. (*See id.*). Whether referred to by Plaintiffs or Chapman as a knowledge, purpose, or intent standard, *In re Chiquita* sets out the *mens rea* element for secondary liability.[16]

The Eleventh Circuit requires "more than mere knowledge of the principal's unlawful goals." *In re Chiquita*, 792 F. Supp. 2d at 1343; *see generally Cabello*, 402 F.3d 1148. Under *In re Chiquita*, "the mere fact that Chiquita had knowledge that [members of the Colombian paramilitary organization, the AUC,] would commit such offenses" was not enough, *id.* at 1344; the defendant must "act with the *intention* of accomplishing the offense[,]" *id.* at 1343 (emphasis in original) (citing *Cabello*, 402 F.3d at 1159). Consequently, plaintiffs had to show "Chiquita paid the AUC with the specific purpose that the AUC commit the international-law offenses alleged in the complaints . . . [meaning] Chiquita intended for the AUC to torture and kill civilians in Colombia's banana-growing regions . . . ." *Id.* at 1344.

As the Court stated in the November 28, 2012 Order [ECF No. 84] denying Chapman's Motion to Dismiss, Plaintiffs must show "Chapman acted with the specific purpose that the Cuban government commit the international-law offenses alleged . . . . In other words, Plaintiffs

[15] Plaintiffs' MSJ Response discusses the *mens rea* standard for secondary liability, but only briefly touches on secondary liability through an aiding and abetting theory. While the parties briefly discussed an aiding and abetting theory of liability during the November 26 hearing, Plaintiffs principally focus on a conspiracy theory of liability. (*See generally* MSJ Resp.).

[16] The same *mens rea* standard governs civil conspiracy and aiding and abetting theories of secondary liability. *See In re Chiquita*, 792 F. Supp. 2d 1351–52 (citations omitted). The court in *In re Chiquita* did not include a separate knowledge element in the aiding and abetting standard, but noted "acting with purpose to assist in the specific violation encompasses knowledge of that violation." *Id.* at 1344 n.65. Consequently, if the defendant intended to assist in the specific violation, the defendant would possess knowledge of that violation. *See id.*

must allege Chapman specifically intended for the Cuban government to subject Curbelo Garcia and Mena Perdomo to prolonged arbitrary detentions and/or torture." *Garcia v. Chapman*, 911 F. Supp. 2d 1222, 1237 (S.D. Fla. 2012) (alterations in original, citations, and internal quotation marks omitted). The Court further clarifies this *mens rea* standard as its analysis originally pertained to the ATS. As only claims for torture under the TVPA remain, it is only logical Plaintiffs must show Chapman intended for the Cuban government to subject Curbelo Garcia and Mena Perdomo to *torture*.

Plaintiffs have presented evidence that Chapman had the requisite intent to assist in the torture of Plaintiffs. Chapman voluntarily filed a Victim Statement[17] against Curbelo Garcia and spoke with Cuban authorities after he received a citation from the police requesting he answer questions about Curbelo Garcia. (*See* Chapman Dep. 44:13–48:6, 100:20–101:7, 105:18–106:5).

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[17] Chapman argues the Victim Statement and Model Complaint Report Chapman and Chapman Bennett submitted to the Cuban police have not been authenticated and thus are inadmissible as evidence. (*See* MSJ Reply 4). Chapman cites to *Saunders v. Emory Healthcare, Inc.*, 360 F. App'x 110, 113 (11th Cir. 2010), to support his position these documents are inadmissible.

The Eleventh Circuit in *Saunders* explained: "To be admissible in support of or in opposition to a motion for summary judgment, a document must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." *Id.* (citation omitted). In *Saunders*, the district court had stricken a *pro se* plaintiff's unauthenticated exhibits in granting the defendant-employer summary judgment. *See id.* The Eleventh Circuit found no abuse of discretion, as the exhibits were in fact not properly authenticated and moreover, many of the exhibits were authenticated by the defendant or others in the case, thereby not causing a substantial prejudicial effect in the trial court's consideration of the summary judgment motion. *See id.*

Here, not considering these police reports on summary judgment would substantially prejudice Plaintiffs. Moreover, Plaintiffs contend the documents are part of the public records in Cuba, and Plaintiffs made preliminary efforts to authenticate Chapman's Victim Statement during his deposition, where Chapman conceded the handwriting and signature at the bottom of the document appeared to be his. (*See* Chapman Dep. 48:19–53:1). The record reflects Chapman reported the incident relating to Curbelo Garcia to Cuban authorities. (*See id.* 44:13–48:6, 100:20–101:7, 105:18–106:5; Curbelo Garcia Aff. ¶¶ 8, 11). Consequently, the Court will consider the documents for purposes of deciding Chapman's Motion for Summary Judgment. Moreover, Chapman raises this authentication issue in his Motion *in Limine*, and further still, given the ongoing discovery (*see* Am. Scheduling Order [ECF No. 176]), authentication of this evidence, or any other evidence, may be accomplished before trial.

Chapman then testified against Curbelo Garcia and Mena Perdomo at their trials in Cuba. (*See id*. 30:2–14, Mena Perdomo Aff. ¶ 20). During Curbelo Garcia's trial, Chapman gave false testimony regarding his intent to defect in order to remain in good standing with the Cuban government and avoid potential penal consequences, such as imprisonment. (*See* Chapman Dep. 122:24–123:19). Although Chapman protests Curbelo Garcia's imprisonment was not his fault (*see id.*), it was a foreseeable consequence of his testimony against Curbelo Garcia.

Further, Chapman met Curbelo Garcia on several occasions prior to the trial and was able to briefly describe his appearance in the Victim Statement filed with Cuban state security. (*See* Chapman Victim Statement 2). At Curbelo Garcia's trial, Chapman would have had the opportunity to look upon Curbelo Garcia during the proceedings and notice his weakened physical condition. As described, Curbelo Garcia's physical transformation — substantial weight loss and discolored, mottled skin resulting from six months of imprisonment — would have been immediately apparent to Chapman. A trier of fact may find Chapman was thus made aware of the mistreatment Curbelo Garcia suffered while imprisoned and awaiting trial.[18]

[18] Chapman had not previously met or seen Mena Perdomo, unlike Curbelo Garcia, prior to testifying at his trial. (*See* Mena Perdomo Dep. 38:13–39:12; Chapman Dep. 43:17–24). Accordingly, similar inferences cannot be applied to show Chapman specifically knew of Mena Perdomo's weakened physical condition and onset of partial blindness during his approximately ten months of imprisonment awaiting trial. (*See* Mena Perdomo Aff. ¶ 18, 26–30).

Such knowledge of specific individuals, however, may not be necessary. *In re Chiquita* required only that Chiquita intended the AUC to torture and kill civilians, not that Chiquita intended the AUC to torture and kill specific individuals, i.e., specifically the plaintiffs' relatives identified in the complaint. *In re Chiquita*, 792 F. Supp. 2d at 1344–45.

As a result, it may be enough that Chapman intended Curbelo Garcia to be subjected to torture. There is circumstantial evidence in the record supporting Plaintiffs' position that Chapman intended the prolonged arbitrary detention and torture of individuals who offered to help him defect. Moreover, having established Chapman's *mens rea* at Curbelo Garcia's trial, which preceded Mena Perdomo's trial by nearly six months, it is foreseeable Mena Perdomo would be similarly detained and tortured if convicted. (*See* Curbelo Garcia Aff. ¶ 19–21; Mena Perdomo Aff. ¶ 18). Plaintiffs also cite to evidence indicating Chapman testified against multiple individuals who allegedly offered to help Chapman defect from Cuba (*see* Chapman Dep. 30:2–4, 31:25–32:12, 34:6–14), and Chapman had a reputation among

Chapman's decision to continue to testify against Curbelo Garcia, knowing his debilitated state, establishes a triable issue of fact with respect to Chapman's intent.

Regarding the third element, Plaintiffs must establish Chapman substantially assisted in Plaintiffs' torture. *See generally Cabello*, 402 F.3d at 1158–59; *In re Chiquita*, 690 F. Supp. 2d at 1310–11, 1313–14. "[L]iability for aiding-abetting often turns on how much encouragement or assistance is substantial enough. The *Restatement* suggests five factors in making this determination: 'the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind.'"[19] *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983) (alteration in original; citation omitted).

Triable issues of fact exist regarding whether Chapman substantially assisted in subjecting Plaintiffs to torture. As discussed, Chapman testified against Curbelo Garcia and Mena Perdomo at their trials. (*See* Chapman Dep. 30:2–14; Mena Perdomo Aff. ¶ 20). Chapman's false testimony at trial can be said to have substantially contributed to (or even proximately caused) Curbelo Garcia's conviction of human trafficking, and as a consequence, his continued imprisonment and torture. *See In re Chiquita*, 690 F. Supp. 2d at 1313–14 (relating substantial assistance for aiding and abetting to proximate cause) (citation omitted). In considering if Chapman's assistance was "substantial," the record shows only two government witnesses testified against Curbelo Garcia — Chapman and Chapman Bennett (*see* Curbelo

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inmates for being a government informant (*see* Herrera Acosta Aff. ¶ 9). These facts tend to show Chapman had the requisite *mens rea* under the TVPA.

[19] In determining if Chiquita provided substantial assistance to the AUC, the district court conducted a proximate cause analysis and noted proof of but for causation was not required for aiding and abetting liability. *See In re Chiquita*, 690 F. Supp. 2d at 1313–14 (explaining the provision of funds to a terrorist organization was a substantial factor in its members carrying out terrorist activities, and as a result, was the proximate cause of those terrorist activities).

Garcia Aff. ¶¶ 8, 11, 19), and only three government witnesses testified against Mena Perdomo — Chapman, Chapman Bennett, and his wife, Maria Caridad De La Cruz (*see* Mena Perdomo Aff. ¶¶ 21–23).

Based on the circumstantial evidence in the record, there are triable issues of fact whether Chapman had the requisite intent to assist in the torture of Plaintiffs and whether his assistance substantially contributed to the torture. Summary judgment under the aiding and abetting theory is not appropriate as genuine issues of material fact, in particular questions of intent, remain and cannot be appropriately resolved.[20] Given this conclusion, the Court does not separately address arguments regarding conspiracy liability under the TVPA.

4. State Law Claims of Loss of Consortium

Chapman also seeks summary judgment on the loss of consortium claims brought by Turruellas and her daughter, Yunis Curbelo. (*See* Mot. Summ. J. 20). A loss of consortium claim by a husband is "derivative, and therefore necessarily based on there being a sufficient tort alleged for [the wife] in her own right." *Habelow v. Travelers Ins. Co.*, 389 So. 2d 218, 220 (Fla. 5th DCA 1980) (illustrating an underlying cause of action for one spouse is needed to support a loss of consortium claim by the other spouse) (citations and internal quotation marks omitted); *see also Faulkner v. Allstate Ins. Co.*, 367 So. 2d 214, 217 (Fla. 1979). Here, Turruellas and Curbelo's state law claims remain dependent on the underlying cause of action — Curbelo Garcia's claim of torture under the TVPA. As summary judgment is denied on the grounds discussed, it is likewise appropriate for the Court to deny summary judgment on the derivative loss of consortium claims brought by Turruellas and Curbelo.

[20] The fact that certain discovery is still outstanding is further reason to deny the Motion for Summary Judgment. The Court permitted the parties additional discovery with the limited purpose of deposing Curbelo Garcia in Amended Scheduling Order.

III. MOTION TO STRIKE

Chapman moves to strike each of Plaintiffs' proposed expert witnesses. (*See generally* Mot. Strike).

A. Legal Standard

Federal Rule of Evidence 702 explains a witness, who has the requisite "knowledge, skill, experience, training, or education" may qualify as an expert and provide expert testimony if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Id. The Supreme Court has set forth the criteria for the admissibility of expert testimony under Rule 702 by instructing trial judges to "determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue[,]" which includes "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993) (footnote call numbers omitted). This standard is applicable to all expert testimony: "*Daubert*['s] general holding—setting forth the trial judge's general 'gatekeeping' obligation—applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999) (citing FED. R. EVID. 702).

The Eleventh Circuit has established a three-part conjunctive test to determine whether expert testimony should be admitted under *Daubert*:

> "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is

> sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue."

Rink v. Cheminova, Inc., 400 F.3d 1286, 1291–92 (11th Cir. 2005) (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). The party seeking to introduce expert testimony bears the burden of satisfying these criteria by a preponderance of the evidence. *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999) (citation omitted).

With respect to the qualification of an expert, courts recognize that "[w]hile scientific training or education may provide possible means to qualify, experience in a field may offer another path to expert status." *United States v. Frazier*, 387 F.3d 1244, 1260-61 (11th Cir. 2004). A witness who possesses general knowledge of a subject may qualify as an expert despite lacking specialized training or experience, so long as his testimony would likely assist a trier of fact. *See, e.g., Maiz v. Virani*, 253 F.3d 641, 665 (11th Cir. 2001) (finding that a witness with "a Ph.D. in economics from Yale, extensive experience as a professional economist, and a substantial background in estimating damages" was qualified as an expert in assessing the loss suffered by the plaintiff in a civil RICO claim involving fraudulent real estate transactions, even though the witness had no real estate development experience).

Even if a witness is qualified as an expert regarding a particular issue, the process used by the witness in forming his opinions must be sufficiently reliable under *Daubert* and its progeny. *See Quiet Tech. DC–8, Inc. v. Hurel–Dubois UK Ltd.*, 326 F.3d 1333, 1342 (11th Cir. 2003) (*Daubert*'s gatekeeping obligation includes preventing speculative, unreliable expert testimony from reaching the jury as "one may be considered an expert but still offer unreliable testimony." (citations omitted)). To be qualified as an expert witness based "solely or primarily on experience, [] the witness must explain *how* that experience leads to the conclusion reached,

why that experience is a sufficient basis for the expert opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply 'taking the expert's word for it.'" *Frazier*, 387 F.3d at 1261 (emphasis in original; alteration added) (quoting FED. R. EVID. 702 advisory committee's note (2000 amends.)); *see also Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). Thus, it remains a basic foundation for admissibility that "[p]roposed [expert] testimony must be supported by appropriate validation—*i.e.*, 'good grounds,' based on what is known." *Id.* (quoting *Daubert*, 509 U.S. at 590) (alterations in original).

The final requirement for admissibility of expert testimony is that it "assist the trier of fact." *Frazier*, 387 F.3d at 1262. In other words, "expert testimony is admissible if it concerns matters that are beyond the understanding of the average lay person." *Id.* (citing *United States v. Rouco*, 765 F.2d 983, 995 (11th Cir. 1985)). "Expert testimony is properly excluded when it is not needed to clarify facts and issues of common understanding which jurors are able to comprehend for themselves." *Hibiscus Assocs. Ltd. v. Bd. of Trs. of Policemen & Firemen Ret. Sys. of Detroit*, 50 F.3d 908, 917 (11th Cir. 1995) (citations omitted).

B. Legal Analysis

Chapman moves to exclude Plaintiffs' experts Gregorio Miguel Calleiro ("Calleiro"), Roberto Hernandez del Llano ("Hernandez del Llano"), and Elida Morin ("Morin"). Plaintiffs intend to proffer Calleiro and Hernandez del Llano as experts on the policies and practices of Cuban state security regarding professional athletes and on the Cuban government's network of informants. (*See* Strike Resp. 10–11; Mot. Strike Ex. A, at 1 ("Calleiro Report") [ECF No. 144-

1]; Mot. Strike Ex. E, at 1 ("Hernandez del Llano Report") [ECF No. 144-5]). Plaintiffs intend to offer Morin as an expert on Cuba's criminal justice system. (*See* Strike Reply 11; Mot. Strike Ex. C, at 1 ("Morin Report") [ECF No. 144-3]). After careful review, the Court finds all three witnesses' testimony should be excluded.

1. Gregorio Miguel Calleiro

Plaintiffs opine Calleiro is an expert on Cuban state security policies and practices regarding athletes as government informants. (*See* Calleiro Report 1). Calleiro explains the structure of the network of government informants in Cuba and notes that athletes who are informants are permitted to travel abroad with the national sports teams. (*See id.* 2). Calleiro theorizes Chapman is a government informant based on his less than one-year suspension after his failed defection (an act normally resulting in at least a two-year suspension), his need to clear his name to resume playing baseball on the national team, and the criminal denunciations Chapman and Chapman Bennett filed against Curbelo Garcia and Mena Perdomo with the Cuban police. (*See id.* 4).

Chapman moves to exclude Calleiro's testimony on the grounds that he is not qualified as an expert, his methodology is not reliable, and his testimony would not assist the trier of fact. (*See* Mot. Strike 1–2, 9–11, 18–19; Strike Reply 5–6). As to his qualifications, according to Plaintiffs Calleiro was one of only eight national directors working at Cuba's National Institute of Sport, Physical Education and Recreation ("INDER") and is the highest-ranking official to defect from Cuba. (*See* MTS Resp. 10). Calleiro has twenty-four years of experience, half of which were spent at the national level, directing athletic programs and teaching athletes in Cuba. (*See id.*). As the Director of INDER, Calleiro managed Cuba's professional athletes for non-Olympic sports (*see* Calleiro Dep. 12:1–9, 13:3–14:10 [ECF No. 144-2]), although baseball was

an Olympic sport (*see* Strike Reply 3, n.1). Plaintiffs contend Calleiro maintains his knowledge current through informal communication with colleagues at INDER. (*See* MTS Resp. 10).

While a witness's "experience in a field" (as opposed to specialized, scientific training) may qualify the witness as having expert knowledge, that experience must be reliable and relevant to assist the trier of fact. *Frazier*, 387 F.3d at 1261–62; *see also Maiz*, 253 F.3d at 665. The Court is not convinced Calleiro is qualified to testify as an expert on Cuban state security practices regarding professional baseball athletes based on knowledge acquired while working at INDER from 1968 to 1992. (*See* Calleiro Dep. 10:23–12:24). Since Calleiro defected in 1992, he has not been employed by INDER these more than twenty years. (*See id.* 23:23–25:21). In addition, Calleiro has not published any scholarly articles or presented his theory about Cuban athletes as government informants at academic seminars or educational programs.[21] (*See id.* 38:12–22, 41:12–16).

Even assuming Calleiro had sufficient field experience to qualify him as an expert, his testimony must be reliable and relevant. The purpose of *Daubert*'s gatekeeping "requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152. An expert's qualifications or personal experience, without more, cannot provide an adequate foundation to render reliable the expert's stated opinion. *See Frazier*, 387 F.3d at 1261 (quoting *Quiet Tech.*, 326 F.3d at 1341 ("[W]hile an expert's overwhelming qualifications may bear on the reliability of his proffered testimony, they are by no means a guarantor of reliability."); *see also* FED. R. EVID. 702 advisory committee's

[21] Radio Marti, a Spanish radio program, is hardly an academic forum where Calleiro could subject his theory to any meaningful form of peer review, as suggested by Plaintiffs.

note (2000 amends.) (explaining "proffered expert testimony must . . . [be] properly grounded, well-reasoned, and not speculative before it can be admitted")). In assessing the reliability of an expert opinion, the Eleventh Circuit considers: (1) whether the expert's theory or methodology can be and has been tested; (2) whether the theory has been subject to peer review and publication; (3) the known or potential rate of error of the scientific methodology or technique employed; and (4) whether the methodology or technique is generally accepted in the scientific community. *See Quiet Tech.*, 326 F.3d at 1341 (citations omitted); *see also Frazier*, 387 F.3d at 1262 (noting courts utilize the same reliability criteria to assess scientific opinion and "non-scientific, experience-based testimony" (citations omitted)).

Plaintiffs hardly attempt to explain how Calleiro's opinion that Chapman became a government informant to "clear [his] name and resuscitate his [baseball] career" (Calleiro Report 5) is reliable and would assist the trier of fact (*see generally* MTS Resp.). Calleiro's Report does not discuss any methodology or principles used to assess the evidence he relied on to arrive at his opinion that Chapman became an informant and accused Plaintiffs of helping him defect "in order to clear his own name." (Calleiro Report 4). Furthermore, Calleiro relied on only the Plaintiffs' Complaint, the denunciations from Chapman and his parents against Curbelo Garcia and Mena Perdomo, the Cuban judgment against Curbelo Garcia, and an ESPN article in formulating his opinion that Chapman was a government informant. (*See* Calleiro Report 2–5; Calleiro Dep. 25:22–27:1). Calleiro did not rely on any academic literature, including treatises, publications, or scholarly articles, nor did he apply any reliable principles or methodology in assessing the facts or limited evidence he reviewed to reach his opinion. (*See* Calleiro Dep. 42:8–16). The remaining reliability factors identified by the Eleventh Circuit address the expert's applied methodology. Calleiro used none, so there is no methodology for the Court to

assess. Consequently, the Court finds that neither Calleiro's Report, nor his deposition testimony, demonstrates any replicable or reliable methodology in support of his opinion.

In addition, Plaintiffs have not shown that Calleiro's testimony, which is based on experience in Cuba from over twenty years ago, would assist the trier of fact. Plaintiffs have not provided any expert testimony or other evidence, apart from general, unsupported statements by their proposed experts, that Cuba's political environment and state security operations have not changed during the past twenty years. (*See* Calleiro Dep. 29:6–10, 41:2–11, 46:8–24; Hernandez del Llano Dep. 30:22–31:2 [ECF No. 144-6]; Morin Dep. 33:11–24, 67:7–68:6 [ECF No. 144-4]). Calleiro states he maintains his knowledge of Cuban sports and political information through limited communications with Cuban delegations and Cuban nationals who have recently defected. (*See* Calleiro Dep. 39:6–15, 40:2–18). Calleiro, however, fails to provide sufficient details regarding the source and content of the information for the Court to assess its reliability. Furthermore, Calleiro has failed to elaborate on the nature, substance, scope, or frequency of these communications and how they contributed to his opinion of Chapman as an informant.

Not only has Calleiro failed to sufficiently demonstrate his limited knowledge of Cuba's state security operations relating to athletes as informants is current, Plaintiffs have not shown Calleiro's testimony is reliable and would assist the trier of fact. Calleiro's expert testimony is thus inadmissible.

2. Roberto Hernandez del Llano

Plaintiffs offer Hernandez del Llano as an expert on Cuba's state security practices, including the utilization of athletes as government informants, the function and membership of the Cuban Communist Party, and prisoner treatment and conditions at Villa Marista prison. (*See* Hernandez del Llano Report 1). In his proffered testimony, Hernandez del Llano explains the

Cuban government relies on snitches and informants, often recruiting athletes or performers who travel abroad; and the government utilizes a network of informants to conduct its surveillance and counterintelligence efforts. (*See id.* 2). Hernandez del Llano states most Cuban baseball players on the national team are government informants; otherwise, they are not permitted to travel internationally with the team. (*See id.*). Hernandez del Llano concludes Chapman is a government informant because he was only suspended for a short time after attempting to defect, he accused at least five others of attempting to help him defect, he is an active member of the Cuban Communist Party, and he and Chapman Bennett filed criminal denunciations against Curbelo Garcia and Mena Perdomo with the Cuban police. (*See id.* 2–3).

Chapman moves to exclude Hernandez del Llano's testimony on the same grounds as Calleiro, asserting he is not qualified to testify as an expert and his testimony is neither reliable nor helpful to the trier of fact. (*See* Mot. Strike 4–5, 15–16, 22–24; Strike Reply 4–6). Plaintiffs respond that Hernandez del Llano's experience as a KGB-trained, state security intelligence officer at the Interior Ministry ("DCSE") for twelve years qualifies him as an expert on surveillance and espionage in Cuba. (*See* Strike Resp. 11). Plaintiffs contend Hernandez del Llano has experience in Cuba as recently as 2007 and continues to maintain his knowledge through espionage contacts. (*See id.*).

Although Hernandez del Llano has relevant field experience from serving as a DCSE intelligence officer until 1992 (*see* Hernandez del Llano Report 1), thereafter he worked as a commercial manager and owned a tourism travel agency from 1992 until 2002 (*see* Hernandez del Llano Dep. 9:3–11). During that ten-year period, he consulted only occasionally for the Cuban government on security operations. (*See id.* 14:2–7). Until he left Cuba in 2007, Hernandez del Llano was a private entrepreneur in the intelligence field, but the Cuban

government did not permit him to work in Cuba after 2003 due to his alleged ties to Cuba's opposition party. (*See id*. 9:12–17).

Hernandez del Llano has not previously testified as an expert witness[22] (*see id*. 18:11–19:18), he has not published any scholarly articles or presented his theories at academic seminars (*see id*.), and he has consulted on intelligence matters only on occasion (*see id.* 13:24–14:7). The sufficiency of Hernandez del Llano's field experience for purposes of qualifying him as an expert on Cuban state security practices is scant.

In addition to testifying about the utilization of athletes as government informants, Plaintiffs request that Hernandez del Llano be permitted to give expert opinions on the Cuban Communist Party and testify about his personal experience as a prisoner at Villa Marista Prison. (*See* Hernandez del Llano Report 1). Hernandez del Llano states he was a "loyal and respected member of the Cuban Communist Party" when he worked at DCSE. (*Id.*). After becoming disillusioned with the DCSE, he quit in 1992; when asked to return in 2002 to complete a specific job, he refused. (*See id.*). Hernandez del Llano's refusal and opposition efforts against the Cuban government later led to his arrest. (*See id.*). In 2004, Hernandez del Llano was imprisoned for forty-five days at the Villa Marista Prison, where he states he was tortured and treated inhumanely by prison guards. (*See* Hernandez del Llano Report 1; Hernandez del Llano Dep. 19:19–20:14).

Although neither party fully addresses this aspect of Hernandez del Llano's proffered testimony, the Court is not convinced Hernandez del Llano has demonstrated he is qualified as an expert on the Cuban Communist Party or the conditions at the Villa Marista prison. Hernandez del Llano has not shown specialized knowledge about the Party, only that he is (or

[22] Hernandez del Llano states he once testified as a defense witness, describing the torture he personally experienced while imprisoned at Villa Marista prison. (*See* Hernandez del Llano Report 1).

was) a member of the Cuban Communist Party. (*See* Hernandez del Llano Report 1). Hernandez del Llano's time spent in prison does not make him an expert on Cuban prison conditions. Any testimony by Hernandez del Llano regarding the conditions he personally experienced at the Villa Marista prison (*see* Hernandez del Llano Dep. 19:19–20:14), assuming the testimony's relevance, may be given as a fact witness, rather than as an expert. Despite the Court's concerns about Hernandez del Llano's qualifications as an expert, the Court nonetheless examines the reliability of his testimony.

Hernandez del Llano's Report and deposition testimony contain many of the same deficiencies regarding reliability and relevance to the trier of fact as Calleiro's proposed testimony. Hernandez del Llano does not explain a reliable methodology for how he arrived at his opinion that Chapman was an informant for the Cuban government. (*See* Hernandez del Llano Report 2–3). Hernandez del Llano relied on only the Plaintiffs' Amended Complaint, the denunciations from Chapman and his parents against Curbelo Garcia and Mena Perdomo, the judgment against Curbelo Garcia, an ESPN article, and other unspecified online media in forming his opinion. (*See* Hernandez del Llano Dep. 6:6–7:8; Hernandez del Llano Report 2; Mot. Strike 15). He did not rely on any academic literature, including treatises, publications, or scholarly articles to develop his opinion that Chapman was a government informant. (*See* Hernandez del Llano Report 2). Moreover, as Chapman points out, Hernandez del Llano offers conclusory statements[23] about contested factual issues (*see* Mot. Strike 22–23) and fails to

[23] For example, Hernandez del Llano speculates and summarily concludes in his Report that Chapman snitched so as to be allowed to play baseball again in Cuba:

> Firstly, I rely on my intimate knowledge of the inner workings of the intelligence and counter-intelligence machinery in Cuba. As stated above, athletes are frequently used as snitches and are not allowed to travel unless their loyalty is proved. Secondly, . . . Chapman had been previously caught attempting to escape from Cuba [in 2008]. That escape attempt should have ended his career, or at the very least, should have barred him

explain how he applied any principles or methodology to the evidence he reviewed in reaching his opinions. *See Frazier*, 387 F.3d at 1261 (explaining a court cannot "simply 'tak[e] the expert's word'") (citation omitted); *Quiet Tech.*, 326 F.3d at 1342 (noting an expert's testimony may be unreliable) (citations omitted). Hernandez del Llano, like Calleiro, failed to utilize any reliable methodology in support of his opinion that Chapman became an informant to regain the Cuban government's confidence and continue playing baseball on the national team.

Hernandez del Llano must also show his prior field experience remains relevant, considering his limited involvement with Cuba's state security after 1992. Hernandez del Llano's knowledge of Cuba's state security as an intelligence officer dates back to 1992, at which time he consulted occasionally for the Cuban government until 2002. (*See* Hernandez del Llano Dep. 13:24–14:7). Hernandez del Llano claims he maintained his "expertise" after 2002, as he had a "personal interest in finding out about the Cuban Intelligence Service" (*id.* 15:2–5) and informally communicated with people working in Cuban intelligence (*see id.* 33:13–34:2). Hernandez del Llano's Report and deposition testimony, however, fail to provide any details about how he acquired this information, including its quality and frequency. Hernandez del Llano's testimony is inadmissible under *Daubert*.

3. Elida Morin

Plaintiffs proffer Morin as an expert on the Cuban judicial system, including how criminal cases in Cuba are commenced and investigated and the independence of judges and

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> from baseball for a prolonged period of time, and it definitely should have kept him from traveling less than a year after his escape attempt. Chapman was suspended for only a matter of months, and he was traveling abroad again in January 2009. . . . That signifies to me that Chapman engaged in a lot of snitching in order to regain any trust he lost in his escape attempt.

(Hernandez del Llano Report 2–3).

attorneys in Cuba. (*See* Morin Report 1). Morin's proffered expert testimony explains that Cuban criminal cases commence with a criminal denunciation (police report), which prompts an investigation into the alleged crime. (*See id.* 2). Once the suspect is arrested, he is detained awaiting trial. (*See id.*). Regarding the judicial process, Morin states judges and attorneys must promote the interests of the Communist State and notes defendants may not receive a fair defense at trial. (*See id.* 3). Morin also offers her opinion that it is noteworthy Chapman was not arrested after his failed attempt to defect in 2008 and explains how Chapman and his parents likely initiated the criminal proceedings against Curbelo Garcia and Mena Perdomo upon filing denunciations against them. (*See id.* 3–4).

Chapman moves to exclude Morin as an expert witness, arguing she is not qualified to testify on Cuba's criminal justice system, her testimony is not reliable, and it would not be helpful to the trier of fact. (*See* Mot. Strike 3–4, 12–14, 20–22; Strike Reply 3–6). Plaintiffs insist Morin has substantial experience as a criminal defense attorney in Cuba to qualify her as an expert on Cuba's criminal justice system. (*See* Strike Resp. 11). Plaintiffs suggest the fact that Morin's experience was from 1994 and earlier should not matter because Cuba's laws, procedures, and institutions remain stagnant. (*See id*. 11–12). Moreover, Plaintiffs argue Morin maintains her knowledge of Cuban law through her work as a consultant for other attorneys in the United States. (*See id.* 11). The Court is not persuaded by Plaintiffs' arguments.

Morin graduated from a Cuban law school in 1989 and practiced criminal law and litigation in Cuba for six years (*see* Morin Report 1; Morin Dep. 19:17–20:2, 22:18–25:7), but she has not practiced law in Cuba since 1994 (*see* Morin Dep. 25:8–10). In 1994, Morin left Cuba to pursue a legal education in Mexico. (*See id.* 7:9–20). In 1997, she immigrated to the United States where she attended law school and started a civil and family law practice in 2002.

(*See id.* 7:21–10:17; 13:19–24). Notwithstanding Morin's Cuban legal training, she has not practiced criminal law in Cuba since 1994 (*see id.* 25:8–10), she has never testified as an expert, and to the Court's knowledge, she has not published any scholarly materials on this subject (*see id.* 35:22–36:22).

In formulating her opinions about the initiation of criminal proceedings against Plaintiffs, Morin reviewed the Amended Complaint, news articles surrounding Chapman's defection, Chapman's Answers to Interrogatories, the denunciations by Chapman and his parents against Curbelo Garcia and Mena Perdomo, and the judgment against Curbelo Garcia. (*See* Morin Report 1–2). Although Morin recently reviewed Cuba's penal code and rules of criminal procedure, it is unclear that she has any specialized knowledge in the field of Cuban criminal law that would qualify her as an expert. (*See* Morin Dep. 37:1–23). Morin's testimony explaining Cuba's rules of criminal procedure seems of little benefit to the trier of fact, and in any event, it is not clear Morin's knowledge is current.

For Morin's legal analysis to be helpful to a jury, her testimony on Cuban law should be reliable and accurately reflect Cuba's penal code and rules of criminal procedure during the Complaint's relevant time period. Plaintiffs fail to show that Morin's educational and work experience from nearly twenty years ago remains current and relevant to the facts of this case. Moreover, the consultations on Cuban law Morin offers U.S. attorneys do not signify she is an expert on Cuban law, or that her knowledge of Cuban law is up-to-date. The Court gives little weight to these consultations, as Morin's testimony lacks specificity regarding the kind of legal consultations offered, the areas of Cuban law she has advised on, the materials she has reviewed as a basis for her opinions, or the frequency of the consultations. Morin's testimony, like Calleiro's and Hernandez del Llano's, is inadmissible as it does not satisfy *Daubert*.

Accordingly, the Court grants Chapman's Motion to Strike, striking all three of Plaintiffs' proposed experts.

IV. MOTION IN LIMINE

Chapman's Motion *in Limine* is denied without prejudice for the reasons stated in open court during the November 26 hearing. The parties may refile motions *in limine* at the appropriate time by the deadline for filing pre-trial motions (May 19, 2014).

V. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED as follows:

1. Chapman's Motion for Summary Judgment **[ECF No. 138]** is **DENIED**.
2. Chapman's Motion to Strike **[ECF No. 144]** is **GRANTED**.
3. Chapman's Motion *in Limine* **[ECF No. 166]** is **DENIED without prejudice**.

DONE AND ORDERED in Chambers, at Miami, Florida, this 29th day of January, 2014.

CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record