IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JANE DOE I, JANE DOE II, AND JANE DOE III, Plaintiffs, v. **EMMANUEL CONSTANT, a.k.a. TOTO CONSTANT,** Defendant.	**Case No.: 04-CV-10108 (SHS)** **MEMORANDUM IN OPPOSITION TO DEFENDANT'S SECOND MOTION PURSUANT TO RULE 60(b)(4) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR RELIEF OF A VOID JUDGMENT**

Plaintiffs Jane Doe I, Jane Doe II, and Jane Doe III ("Plaintiffs") respectfully submit this Memorandum in Opposition to the Defendant's Second Motion Pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure for Relief of a Void Judgment. Defendant Emmanuel Constant ("Defendant Constant" or "Defendant") first filed a Motion for Relief Under Rule 60(b)(4) on October 11, 2007; Plaintiffs filed a response on October 25, 2007. Almost four months later, on February 7, 2008, the Defendant filed a second Rule 60(b)(4) motion and attached an Amended Memorandum of Law (hereinafter "Def.'s Am. Mem."). The amended Rule 60(b)(4) memorandum raises new arguments in addition to those previously submitted. The second motion and memorandum were not originally served on the Plaintiffs, and Plaintiffs were unaware of the second set of documents until the Court's March 19, 2008 Order to respond. The Plaintiffs received copies of the documents on March 25, 2008.

Plaintiffs submit this Memorandum of Law in response to the February 7, 2008 motion and pursuant to this Court's order issued on March 19, 2008. Plaintiffs

respectfully request the Court deny Defendant's motion as being untimely, without merit, and prejudicial to Plaintiffs.

INTRODUCTION

Plaintiffs Jane Doe I, II, and III brought this action against Defendant Constant, the principle leader and founder of a paramilitary organization known FRAPH.[1] During 1993 to 1994, members of FRAPH perpetrated a campaign of terror against the civilian population of Haiti, including attacks against Plaintiffs.

Defendant Constant's motion to void the judgment under Rule 60(b)(4) should be denied because it is untimely, brought nearly fourteen months after entry of judgment. Plaintiffs properly served Defendant Constant with the Summons and Complaint, as well as all subsequent pleadings in this matter, and he had ample opportunity to contest this Court's jurisdiction before default judgment was entered on August 18, 2006. Defendant Constant's default was willful as he provides no valid reason for failing to prevent the default despite repeated attempts to secure his involvement.

Furthermore, Defendant Constant's motion should be denied because his claims are wholly without merit. His challenge to the subject matter jurisdiction of this Court fails for the following reasons: 1) Plaintiffs filed this case within the applicable statute of limitations; 2) Plaintiffs exhausted adequate and available remedies in Haiti; and 3)

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[1] FRAPH is alternatively known as the *Front Révolutionnaire pour l'Avancement et le Progrés d'Haiti,* (Revolutionary Front for the Advancement and Progress of Haiti), Haitian People's Armed Revolutionary Front, and The Front for the Advancement of Progress in Haiti. In his motion, Defendant Constant uses the name "The Front for the Advancement and Progress of Haiti." (Def.'s Am. Memo. at 5.) As expert-witness Dr. Robert McGuire explained at the August 29, 2006 damages hearing, FRAPH is an acronym that was developed first and given meaning later. (Tr. of 8/29/06 Hearing, at 19-20.) The acronym forms the Creole word for "severe blow." (*Id.*) Professor McGuire explained that, in 1994, Defendant Constant changed the meaning of the acronym to the Haitian People's Armed Revolutionary Front. (*Id.* at 20.) Regardless of the underlying meaning, the acronym stayed the same. *Id.* Plaintiffs pled in the Complaint that more than one version of the full name of the group was used during the relevant time, but that, more importantly, the group was always known as FRAPH. (Compl. ¶12.)

Plaintiffs properly pled that Defendant Constant was operating under the color of law at all relevant times and the record supports such a finding.

Finally, the Court should deny Defendant's motion because Plaintiffs deserve finality in their judgment.

PROCEDURAL HISTORY

On December 22, 2004, Plaintiffs filed with this Court a Summons and Complaint against Defendant Constant for claims brought under the Alien Tort Statute (the "ATS"), 28 U.S.C. § 1350; and the Torture Victim Protection Act (the "TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).[2] (Findings of Fact and Conclusions of Law (hereinafter "Findings of Fact"), Docket Number 71 at 1-2.) A process server, Ricardo R. Burnham, personally served Defendant Constant with the Summons and Complaint on January 14, 2005, in front of 26 Federal Plaza, Duane Street Entrance, New York. (*Id.* at 2.) The Summons was returned to the Court with proof of service on January 26, 2005.[3] (*Id.*)

The Clerk of the Court entered a Certificate of Default on December 1, 2005, certifying that Defendant Constant had failed to answer or otherwise appear in this matter. (Findings of Fact at 2.) The Certificate of Default was properly served on

[2] On several occasions in his memorandum, Defendant Constant refers to the 1994 lawsuit *Belance v. FRAPH*, Case No. 94-CV-02619 (E.D.N.Y.). (Def.'s Am. Mem. at 6.) This previous case, brought solely against the organization FRAPH was dismissed in 1999 after the plaintiff requested that the judgment be held in abeyance because of fear of threats to her daughter in Haiti. *Belance v. FRAPH*, Case No. 94-CV-02619, Docket Number 36. Defendant Constant's only involvement in that case was that he gave a deposition during which he made several admissions that were entered into evidence in this matter at the August 29, 2006 hearing on damages. An additional excerpt from his deposition is attached here as Exhibit A to the Declaration of Jennifer Green to show Defendant's date of entry into the United States, relevant to his arguments that Plaintiffs filed this case outside the statute of limitations.

[3] Plaintiffs filed with the Court on January 4, 2006, an additional Affidavit of Service from Mr. Burnham which established how and why he knew that the recipient of the personal service of process was Defendant Constant. (Docket Number 39.) Also on January 4, 2006, Plaintiffs filed an Affidavit of Service from Plaintiffs' Counsel Moira Feeney providing how and why Plaintiffs knew that all pleadings in this matter were being served at Defendant Constant's true and accurate place of residence. (Docket Number 40.)

Defendant Constant, and the Plaintiffs moved for a default judgment on December 7, 2005. (*Id.*)

On January 31, 2006, pursuant to the Court's December 22, 2006 order, (Docket Number 38), Plaintiffs filed a Memorandum of Law Regarding Subject Matter Jurisdiction in which Plaintiffs set forth their arguments for subject matter jurisdiction under the ATS and the TVPA (Docket Number 43). The memorandum was also properly served upon Defendant Constant. (*Id.*)

This Court issued an Order Granting Plaintiff's Motion for a Default Judgment on August 16, 2006, and setting the date for a hearing to determine damages. (Findings of Fact at 2.) Plaintiffs served Defendant Constant with the Court's order. (*Id.*)

Expert reports containing documentation such as documents by the United States government on the activities of Emmanuel Constant were submitted to the Court. Defendant was served with all expert reports. (Docket Numbers 47-49.)

The Court held a public evidentiary hearing on August 29, 2006, to address damages; however, neither Defendant Constant nor a representative appeared at the hearing. (Tr. of 8/29/06 Hr'g at 53, Docket Number 70.) At the hearing, the Court was presented with testimony from Plaintiff Jane Doe I and Plaintiff Jane Doe II; Dr. Robert McGuire, a social studies expert who focuses on Haiti; and Dr. Mary Fabri, a psychologist who examined Jane Does I and II. The court also heard a pre-recorded video deposition of Dr. Benjamin Lerman, a physician who examined Jane Does I and II. Jane Doe III did not testify, but submitted a written declaration concerning her claims as well as a report from Dr. Kathleen Allden, her examining psychiatrist. (Findings of Fact at 2.)

The Court issued Findings of Fact and Conclusions of Law on October 24, 2006, which found Defendant Constant liable for torture, attempted extrajudicial killing, and crimes against humanity. (Findings of Fact at 9.) The Court awarded Plaintiffs compensatory and punitive damages totaling $19,000,000. (Findings of Fact at 13.) During each stage of this litigation, as the Court noted, "Constant . . . failed to participate in this action despite repeated attempts to secure his involvement." (*Id*. at 2.)

Defendant filed a Motion for Relief under Rule 60(b)(4) on October 11, 2007. (Docket Number 74.) Plaintiffs filed a response on October 25, 2007. (Docket Number 75.) Defendant submitted a reply brief on January 7, 2008. (Docket Number 77.) On February 7, 2008, the Defendant filed a Motion to Hold the Decision on Defendant's 60(b)(4) Motion for Relief of a Void Judgment in Abeyance Pending Submission of Defendant's Amended and Corrected Memorandum of Law. Defendant simultaneously filed the Amended 60(b)(4) Memorandum but did not serve Plaintiffs with these documents. Plaintiffs became aware of these documents upon receiving electronic notification of the Court's March 19, 2008 Order requiring Plaintiffs to respond to the Defendant's motion. The clerk of the Court sent copies of the motion and amended memorandum to Plaintiffs, which were received March 25, 2008.

STATEMENT OF FACTS

In September 1991, the Haitian Armed Forces overthrew the elected president, Jean Bertrand Aristide, in a violent *coup d'état*. (Compl. ¶10; Findings of Fact at 3.) During the years of military rule in Haiti from 1991 to 1994, the Haitian Armed Forces used paramilitaries to carry out a campaign of terror and intimidation against the people of Haiti. (Compl. ¶12; Findings of Fact at 3.) In 1993, Defendant Constant founded the

paramilitary group known as FRAPH. (*Id.*)

Defendant Constant modeled the paramilitary group FRAPH after the "Tonton Macoutes" that were active throughout the years of the Duvalier dictatorship, during which Defendant's father served as an army commander. (Compl. ¶ 13; Tr. of 8/29/06 Hr'g at 26.) The Tonton Macoutes operated parallel to and in conjunction with the army while reporting directly to Duvalier. (Compl. ¶ 13.) In 1993 and 1994, FRAPH became the second generation of Tonton Macoutes, nationally organized to monitor the population for opposition to the military government while inflicting terror on the people of Haiti. (Tr. of 8/29/06 Hr'g at 26.)

FRAPH also operated in concert with, and as an extension of, the Haitian Armed Forces. (Compl. ¶¶ 13, 36.) In his role as the leader of FRAPH, Defendant Constant communicated regularly with the high command of the Haitian Armed Forces. (Finding of Facts at 3.) FRAPH received arms, training, and funding from the Haitian Armed Forces and FRAPH was used by the military to maintain control over the population. (Compl. ¶¶ 13, 36; Tr. of 8/29/06 Hr'g at 31-33; Finding of Facts at 3.) Defendant Constant took orders and command from the military. (Tr. of 8/29/06 Hr'g at 27-28.) FRAPH members operated without uniforms, thus providing the military with plausible deniability for controversial acts. (*Id.* at 31.) The military and police in Haiti allowed members of FRAPH to operate with impunity, committing acts that terrorized the population without fear of arrest from governmental authorities. (*Id.* at 36-37.)

Defendant Constant served on the Central Committee of FRAPH and acted as the de facto leader throughout its existence. (Compl. ¶34; Tr. of 8/29/06 Hr'g at 33-34; Findings of Fact at 3.) The Central Committee coordinated with the armed forces, issued

membership cards and directed FRAPH's activities at the regional levels. (Compl. ¶35; Tr. of 8/29/06 Hr'g at 34; Findings of Fact at 3.) FRAPH maintained regional offices in every department of Haiti, as well as hundreds of local offices, strategically located in the poor neighborhoods where the political support for the deposed elected president was the strongest. (Compl. ¶35; Tr. of 8/29/06 Hr'g at 35; Findings of Fact at 3.) By May 1994, Defendant Constant was Secretary General of FRAPH and the only active member on the Central Committee. (Compl. ¶35; Tr. of 8/29/06 Hr'g at 40; Findings of Fact at 3.)

With the financial and logistical support of the Haitian Armed Forces, FRAPH terrorized the poor population of Haiti, including Jane Does I, II, and III, using rape and other forms of torture to punish and intimidate opponents of the military regime. (Compl. ¶¶13-14, 33; Tr. of 8/29/06 Hr'g at 47-49; Findings of Fact at 3-4.) Defendant Constant, commander and spokesperson of FRAPH, knew about FRAPH's use of rape and other abuses and could have stopped it, but did not. (Compl. ¶¶38-40; Tr. of 8/29/06 Hr'g at 52; Findings of Fact at 4.)

On December 24, 1994, after fleeing Haiti, Defendant Constant entered the United States where he remains. (Compl. ¶15; *see also* Declaration of Jennifer Green ("Green Decl."), Exhibit A at 197:1-2.)

Haiti enjoyed a brief period of constitutional rule after elections in 1995, but in 2004, former members of FRAPH and the Haitian Armed Forces led an armed uprising that resulted in yet another overthrow of the constitutional government. (Compl. ¶¶ 16-17; Tr. of 8/29/06 Hr'g at 53.) An interim government was installed from 2004 to 2006, and Haiti remained marred by continued political violence and the lack of a functioning judiciary. (Compl. ¶¶ 43-45; Tr. of 8/29/06 Hr'g at 52-54.) Despite elections in 2006,

the Haitian judiciary continues to lack the capacity and will to prosecute those accused of human rights abuses from the 1991 to 1994 period. *See* November 20, 2007 Declaration of Mario Joseph ("November 2007 Joseph Declaration") ¶4, attached to Green Decl. as Exhibit C.[4] Judges are known to be corrupt, and the judiciary system has no infrastructure as many courthouses built or refurbished after 1995 were destroyed during the violence of 2003 to 2004. (Tr. of 8/29/06 Hr'g at 53.) Other members of FRAPH and other human rights abusers have not been prosecuted and roam Haiti freely. November 2007 Joseph Declaration, ¶4, Green Decl. at Ex. C. Even if it were possible to bring a legal case or provide testimony against Defendant Constant or his cohorts from FRAPH in Haiti, it remains too dangerous for Plaintiffs to do so. (Compl. ¶ 47; Tr. of 8/29/06 Hearing, at 52-54.)

State Mortgage Fraud Case

While living in the United States, Defendant Constant became involved in real estate and subsequently became the subject of a criminal mortgage fraud investigation conducted by the Attorney General of the State of New York. (Def.'s Am. Mem. at 3, 10.) *See Infamous Haitian Accused of Fraud*, N.Y. TIMES, July 7, 2007, *available at* http://www.nytimes.com/2006/07/07/nyregion/07haiti.html (last visited Apr., 20, 2008). He is currently serving a one to three year sentence after pleading guilty to crimes involving mortgage fraud in Suffolk County, New York. *Haiti Thug Could Face 25 Years*, DAILY NEWS, Jan. 10, 2008, *available at* http://www.nydailynews.com/news/

[4]Plaintiffs submitted an earlier declaration from Mario Joseph, a Haitian human rights attorney, dated August 25, 2006 ("August 2006 Joseph Declaration") to this Court on the issue of Haitian law on damages. (Docket Number 63.) Defendant Constant attached the August 2006 Joseph Declaration to his motion at issue here. (Def.'s Am. Mem. at Exhibit A.) On November 20, 2007 Mario Joseph submitted a declaration to Judge Abraham Gerges in *The People of the State of New York v. Emmanuel Constant*, Ind #8206/2007, for the purposes of providing the judge with an update on the conditions of the judiciary in Haiti.

ny_crime/2008/01/10/2008-01-10_haiti_thug_could_face_25_years.html (last visited Apr. 21, 2008). He faces similar charges in Kings County, New York. *Id*. On May 22, 2007, Judge Abraham Gerges of the Supreme Court of Kings County rejected a negotiated plea agreement between Defendant Constant and the state prosecutor that would have sentenced him for time served only. *See The People of the State of New York v. Emmanuel Constant*, Memorandum, Ind #8206/2007, attached to Green Decl. as Exhibit B. The plea was rejected, in part, because allegations brought to the court's attention concerning Defendant's role in FRAPH, a paramilitary group accused of rape, murder and the intimidation of the Haitian people. (*Id*. at 2.) Subsequently, instead of a one to three year sentence, a three to nine year sentence was proposed. In early January 2008, Defendant Constant rejected the new plea and now faces trial. *Haiti Thug Could Face 25 Years*, *supra*.

ARGUMENT

I. DEFENDANT CONSTANT'S MOTION IS UNTIMELY.

Defendant Constant files his second motion under Rule 60(b)(4) of the Federal Rules of Civil Procedure. A motion for relief from a judgment pursued under Rule 60(b)(4) must be filed "within a reasonable time." Fed. R. Civ. Pro. 60(c). *Graham v. Sullivan*, No. 86 Civ. 163, 2002 U.S. LEXIS 18240, at *4 (S.D.N.Y. Sept. 23, 2002); *United States v. Dailide,* 316 F.3d 611, 617-18 (6th Cir. 2003); *Gordon v. Monoson,* 2006 U.S. Dist. LEXIS 34183 *7 (D.V.I. 2006); *but see United States v. One Toshiba Color Television,* 213 F.3d 147 (3d Cir. 2000). Defendant Constant filed his original motion on October 11, 2007, approximately 14 months after the Court's August 16, 2006 grant of a default judgment in this matter, and 23 months after the Clerk's entry of default. Motions

brought 14 months after judgment are not brought "within a reasonable time." *Graham*, No. 86 Civ. 163, 2002 U.S. LEXIS 18240, at *4 (S.D.N.Y. Sept. 23, 2002) (citing *Young v. Coughlin,* 2001 U.S. Dist. LEXIS 15323 *2 (S.D.N.Y. Sept. 24, 2001) (*pro se* plaintiff's 14 month delay in bringing a Rule 60(b) motion was unreasonable)).

Moreover, "[i]n considering Rule 60(b) motions, courts have been unyielding in requiring that a party show good reason for . . . failure to take appropriate action sooner." *United States v. Martin*, 395 F. Supp. 954, 961 (S.D.N.Y. 1975). Courts must "balance the interest in finality with the reasons for the delay." *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d Cir. 1983); *Freedom N.Y., Inc. v. United States*, 438 F. Supp. 2d 457 (S.D.N.Y. 2006). Rule 60(b) motions should be denied where a defendant fails to "provide any justification for their own failure to take action after receiving notice that the clerk had entered a default against them." *New York v. Green*, 420 F.3d 99, 109 (2d Cir. 2006).

Defendant Constant is a sophisticated individual as is demonstrated from the record and the pleadings he has made in this case. He attended university, has held numerous professional positions "in both the Haitian and American public and private sectors." (Def.'s Am. Mem. at 3.) In addition to being the leader of FRAPH, he served in the diplomatic corps in Haiti and as the Chief of Staff for the Secretary of Commerce. (*Id.*) Yet, Defendant Constant does not provide a good reason for failure to take appropriate action sooner.

Defendant does not contest that he was properly served with the Summons and Complaint and all subsequent pleadings in this matter, including the notice that the clerk had entered a default against him. (Def.'s Am. Mem. at 10.) In fact, Defendant Constant

attaches as an exhibit to his present motion the August 25, 2006 Declaration of Mario Joseph (*Id*. at Exhibit A.) This declaration, (Docket Number 63), was provided to the Defendant on August 25, 2006, as an attachment to Plaintiffs' Memorandum of Points and Authorities on Damages. (Docket Number 59.) The inclusion of this exhibit serves only to supports Plaintiffs' argument that Defendant Constant was consistently and regularly served with Plaintiffs' pleadings, a fact which he does not deny.

Defendant Constant states that he retained an attorney named John E. Tiffany to appear on his behalf in this case. (Def.'s Am. Mem. at 10.) There has been no appearance made in this case by Tiffany or any other attorney on behalf of Defendant Constant. Nor did Defendant Constant provide evidence that he had reason to believe that Tiffany had answered the Complaint on his behalf or responded to the Court at any time from January 14, 2005, until present. Defendant Constant, who continued to receive service of subsequent pleadings in this case, has presented no evidence that he made an effort to find another attorney, or to hold Tiffany accountable for the $10,000 payment that he claims to have paid Tiffany. Without an attorney, Defendant Constant did not file a responsive pleading *pro se* until now.

Defendant Constant also points to his arrest on July 5, 2006 as reason for his failure to participate in this proceeding. (Def.'s Am. Mem. at 10.) His arrest came 18 months after he was served with the Summons and Complaint. He offers no explanation for his silence during these 18 months, a period when he was properly served with multiple pleadings in this matter, including but not limited to the Notice of Request for Entry of Default filed with the Court on May 31, 2005, (Docket Number 20), the Motion for Default Judgment filed on December 7, 2005, (Docket Number 30), the Notice of

Entry of Clerk's Certificate of Default also filed December 7, 2005, (Docket Number 33), and the Memorandum of Law in Support of Amended Motion for Default Judgment filed January 31, 2006, (Docket Number 43).

The cases relied upon by Defendant in support of his motion are inapposite. For example, in *One Toshiba Color Television,* 213 F.3d 147 (3d Cir. 2000), (Def.'s Am. Mem. at 9), the default judgment was voided because the defendant did not receive constitutionally sufficient notice of the actions against him. 213 F.3d at 156. The other cases cited by Constant also involve problems with service or lack of personal jurisdiction. *Shenouda v. Mehanna*, 203 F.R.D. 166, 171 (D.N.J. 2001) (judgment void because plaintiffs failed to properly serve defendants); *Rohm & Hass Co. v. Aries*, 103 F.R.D. 541 (S.D.N.Y. 1984) (judgment void due to lack of personal jurisdiction under Connecticut's long-arm statute); *Austin v. Smith*, 312 F.2d 337, 341 (D.C. Cir. 1962) (default judgment void because defendant not properly served with interrogatories). By contrast, here Defendant does not allege problems with service. Nor does he challenge that he was personally served with the Summons and Complaint within the jurisdiction of the Southern District of New York, thus establishing personal jurisdiction in this case. *Burnham v. Superior Court of California*, 495 U.S. 604 (1990).

Defendant Constant brings this motion beyond a reasonable time as required by Rule 60(b). But even if timely, his motion fails on the merits.

II. DEFENDANT CONSTANT'S MOTION IS WITHOUT MERIT.

The Second Circuit uses three principal factors to guide the decision on whether to vacate a default judgment pursuant to the provisions of Rule 60(b): "(1) whether the default was willful, (2) whether the defendant demonstrates the existence of a meritorious

defense, and (3) whether, and to what extent, vacating the default will cause the nondefaulting party prejudice.'" *Green*, 420 F.3d at 108. Here, each of these factors unequivocally demonstrates that Defendants' motion to vacate lacks merit.

A. Defendant Constant's Default was Willful.

Where a defendant is properly served, default is willful where "the conduct of counsel or litigant was egregious and was not adequately explained." *SEC v. McNulty*, 137 F.3d 732, 738 (2d Cir. 1998). Conduct is not adequately explained where "neither the memorandum nor . . . affidavit gave any indication that [d]efendant had done anything whatsoever to prevent the default's occurrence." *Id.* at 740; *see also Todtman, Nachamie, Spizz & Johns, P.C. v. Ashraf,* No. 05 Civ. 10098, 2007 U.S. Dist. LEXIS 16486, at 10 (S.D.N.Y. 2007) (dismissal proper where defendant "ignored the summons and complaint for over seven months without satisfactory explanation"). Defendant Constant does not contest that he was personally served the Summons and Complaint or subsequent pleadings. Nevertheless, he ". . . failed to participate in this action despite repeated attempts to secure his involvement." (Findings of Fact at 2.)

Defendant Constant argues that his failure to answer the Complaint was not willful because he had a "good faith belief" that the Court lacked jurisdiction or that he had already been sued for the same cause of action. (Def.'s Am. Mem. at 10.) The Federal Rules of Civil Procedure (and common sense) dictate that such defenses or objections to a lawsuit shall be presented to the Court in the form of a responsive pleading, either a written answer or motion for relief – not by silence. Fed. R. Civ. Pro. 12. Defendant Constant provides no explanation as to why he also ignored the orders from this Court, such as the Entry of Default and the Findings of Fact and Conclusions of

Law. However, he has indicated that he is in prison. (Def.'s Am. Mem. at 3). He is serving a one to three year sentence for crimes to which he pled guilty in Suffolk County, New York. *Haiti Thug Could Face 25 Years*, *supra*. In May 2007, a plea agreement in relation similar charges in Kings County, New York, was thrown out after the Judge became aware of the allegations of his role in FRAPH, and he now awaits trial.[5] *The People of the State of New York v. Emmanuel Constant*, Memorandum, Ind #8206/2007, Green Decl. at Ex. B.

B. Defendant Has Failed to Present Facts that Would Constitute a Meritorious Defense.

Defendant's motion seeks to void the judgment based on an alleged lack of subject-matter jurisdiction. However, this Court has already determined that it has subject matter jurisdiction over Plaintiffs' claims of torture, attempted extrajudicial killing and crimes against humanity pursuant to the ATS. (Findings of Fact at 7), citing *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (ATS confers jurisdiction for a modest number of international law violations). This Court also held it has jurisdiction over Plaintiffs' claims of torture and attempted extrajudicial killing pursuant to the TVPA. (Findings of Fact at 8), citing *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 245 (2d Cir. 2003).

Defendant Constant's belated challenges to the subject matter jurisdiction in this case are based on 1) the timing of Plaintiffs' filing of the case; 2) whether Plaintiffs have exhausted remedies in Haiti, and 3) whether Defendant was operating under "color of law." As demonstrated below, Defendant Constant's allegations lack merit and thus his

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[5] It should be noted that the crimes to which he has pled guilty to in Suffolk County, New York, involve a mortgage fraud scheme. *Haiti Thug Could Face 25 Years*, *supra*; *The People of the State of New York v. Emmanuel Constant*, Memorandum, Ind #8206/2007, Green Decl. at Ex. B. The fact that these crimes

motion fails.

1. The Law of Equitable Tolling Dictates the Plaintiffs' Claims Are Not Barred by the Statute of Limitations.

Defendant Constant correctly states in his motion that the acts giving rise to Plaintiffs' claims are based upon conduct that occurred no later than July 1994. (Def.'s Am. Mem. at 13.) However, under the law of equitable tolling, the clock does not start ticking for statute of limitations purposes until Defendant Constant entered the United States on December 24, 1994. Plaintiffs filed this matter on December 22, 2004, within the ten-year statute of limitation.

The TVPA provides a ten-year statute of limitations for claims brought pursuant to the Act, stating that "[n]o action shall be maintained under this section unless it commenced within 10 years after the cause of action arose." TVPA § 2(c). The ATS does not expressly provide a statute of limitations, but it is well-established that the ten-year statute of limitations for TVPA claims also applies to ATS claims. *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 386 (E.D.N.Y. 2002).[6]

Limitations periods are "customarily subject to equitable tolling, unless tolling would be inconsistent with the text of a relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal citations and quotation marks omitted). In passing the TVPA, Congress clearly intended for courts to toll the statute of limitations while a defendant remains outside the jurisdiction of the United States. (S. Rep. No. 249, 102d

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involve fraud is relevant to veracity.

[6] *See also Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005) (internal citations omitted) (applying the TVPA's ten year statute of limitations to both TVPA and ATS claims); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1154-55 (11th Cir. 2005); *Papa v. United States*, 281 F.3d 1004, 1012-13 (9th Cir. 2002); *Wiwa*, 2002 U.S. Dist. LEXIS 3293; *Doe v. Islamic Salvation Front*, 257 F. Supp. 2d 115, 119 (D.D.C. 2003); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1363 (S.D. Fla. 2001); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1194-96 (S.D.N.Y 1996).

Cong., 1st Sess., at 11 (1991)) ("[t]he statute of limitation should be tolled *during the time the defendant was absent from the United States*"). Although the Second Circuit has not had to directly address equitable tolling in the TVPA context, no court has held that equitable tolling does not apply to the TVPA. In *Arce v. Garcia,* the Eleventh Circuit states that the ten-year limitation is equitably tolled "so long as the defendant remain[s] outside the reach of the United States courts or the courts of other, similarly fair legal systems." 434 F.3d 1254, 1262 (11th Cir. 2006); *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. 1996) (citing S. Rep. No. 102-249 at 10-11). These equitable tolling principles also extend to the ATS. *See e.g., Jean v. Dorelien*, 431 F.3d 776, 778-79 (11th Cir. 2005); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005).[7]

Thus, there is no doubt the statute is tolled during the period of Defendant Constant's absence from the United States. According to Defendant Constant in a deposition taken June 7, 1995, he remained in Haiti until December 19, 1994, traveled to the Dominican Republic, and then entered the United States on December 24, 1994. Deposition of Constant, at 197:1-2, Green Decl. at Exhibit A. He states, "I said I went into the United States on December 24th, [1994]." *Id.* Plaintiffs filed this case within ten years from Defendant's date of entry into the United States.[8]

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[7] Similarly, in other TVPA/ATS cases where the defendant was unreachable, courts have also applied equitable tolling to preserve a plaintiff's claims. In *Cabello v. Fernandez-Larios*, the court held that the defendant's participation in the witness protection program tolled the statute of limitations since "the Defendant was ostensibly absent from this jurisdiction, in that he could not be served." *Cabello*, 157 F. Supp. 2d at 1368. Indeed, in a criminal prosecution for income tax evasion, the Second Circuit stated that "[t]here is nothing unreasonable or arbitrary about the tolling of the statute of limitations during an offender's absence from the country." *United States v. Myerson*, 368 F.2d 393, 395 (2d Cir. 1966); *see also Wiwa*, 2002 U.S. Dist. LEXIS 3293 *61 n.23 (noting that New York state tolling provision, N.Y.C.P.L.R. § 207, "allows tolling 'if, when a cause of action accrues against a person, he is without the state, the time within which the action must be commenced shall be computed from the time he comes into or returns to the state.'").

[8] Defendant Constant erroneously asserts that this action did not commence when Plaintiffs filed the complaint, but rather when he was served on January 14, 2005. (Def.'s Am. Mem. at 13.) However, Rule 3 of the Federal Rules of Civil Procedure explicitly provides that the filing of the complaint marks the

Defendant Constant argues that Plaintiffs could have effected service of process on him by other means prior to his entry into the United States. (Def.'s Am. Mem. at 15.) However, personal jurisdiction over Defendant Constant exists in this case only because Plaintiffs personally served him within the jurisdiction of this Court. Obtaining personal jurisdiction over Defendant Constant would have been impossible before the date of his entry into the United States because he had no minimum contacts within the jurisdiction prior to this date. Thus service of process by the other means suggested by Defendant Constant in a foreign country like Haiti would not have sufficed.[9]

Accordingly, Plaintiffs Complaint, filed on December 22, 2004, was within the ten-year statute of limitations.

2. Defendant Does Not Demonstrate that Plaintiffs Have Failed to Exhaust Remedies in Haiti.

Defendant alleges Plaintiffs have failed to exhaust all adequate and available remedies in Haiti. (Def.'s Am. Mem. at 16-19.) The TVPA states 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). However, there is no exhaustion of remedies requirement for claims brought under the ATS in this matter. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y Mar. 19, 2003); *Jean*, 431 F.3d at 781. In order

commencement of the action. Moreover, where the action was filed in time, service of process after the expiration of the limitations period does not bar the claim so long as service is made within 120 days thereafter. *See Frasca v. United States*, 921 F.2d 450, 452 (2d Cir. 1990). In this case, the complaint was filed on December 22, 2004, within the ten-year statute of limitations. Despite difficulty encountered in contacting or locating Constant for service, he was nonetheless personally served on January 14, 2005, well within the 120-day period. (Summons Returned Executed, Docket Number 13, and Affidavit of Service, Docket Number 40.)

[9] Defendant also asserts that plaintiffs could have served Defendant's agent in New York, Lionel Sterling. However, Constant gives no information as to how plaintiffs would have had a reason to know that Mr.

to vacate the judgment in this case, Defendant Constant must make a sufficient showing of facts that if proved at trial, would constitute a complete defense. *Badian v. Elliott*, 165 Fed. Appx. 886 (2d Cir. 2006) (citing *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 167 (2d Cir. 2004)).

The TVPA's exhaustion requirement is to be construed liberally and waived whenever foreign remedies are obviously futile. *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197 n. 6 (S.D.N.Y. 1996) (noting that the legislative history of the TVPA indicates that the exhaustion requirement "was not intended to create a prohibitively stringent condition precedent to recovery under the statute"); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass 1995) (holding that "when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile," exhaustion pursuant to the TVPA is not required) (quoting S. Rep. No. 102-249 (1991)).

Not only have Plaintiffs properly alleged that Haiti lacks adequate remedies and pursuit of those remedies would be futile, (Comp. ¶¶ 43-48), but Plaintiffs have also provided this Court with the expert testimony of Dr. Robert Maguire who testified that political violence and the lack of a functioning judiciary system mean that adequate and available remedies for Plaintiffs do not exist in Haiti (Tr. of 8/29/06 Hr'g at 52-54; Findings of Fact at 12). In 2004, in the months leading up to the filing of the Complaint in this matter, Haiti underwent yet another overthrow of the democratically-elected government. (*Id.*) Former members of the military and FRAPH terrorized regions of the country and as a result the use of rape as a tool of repression and intimidation re-emerged in Haiti. (Comp. ¶ 44.)

Sterling was Constant's agent, "authorized by appointment or by law to receive service of process" as required by Rule 4. Fed. R. Civ. P. 4 (e)(c).

In addition, the Haitian judiciary has proven unable and unwilling to objectively adjudicate cases involving notorious human rights abusers. In a declaration submitted to the Kings County court presiding over Defendant Constant's criminal matter, Haitian human rights attorney Mario Joseph explains that the situation in Haiti has not improved, that the courts remain in capable and unwilling to prosecute for human rights abuses, and that other members of FRAPH continue to successfully evade justice in Haiti. November 2007 Joseph Declaration, Green Decl. at Exhibit C, ¶4. Any progress made during the period of democratic government rule toward accountability for human rights abuses during the military regime was undone during the period of interim government. (Comp. ¶¶ 44-45; Tr. of 8/29/06 Hr'g at 52-54; Green Decl. at Exhibit C, ¶4.) To date, no FRAPH members have been held accountable by the Haitian courts. (Tr. of 8/29/06 Hr'g at 52-54; Findings of Fact at 12.) Finally, Plaintiffs have properly alleged that they would be in grave danger if they had to return to Haiti to file a case or provide testimony. (Comp. ¶ 46.) Their need to remain anonymous based on the threat that exists in Haiti remains on-going. Any attempt to exhaust remedies in Haiti would be futile.

Moreover, under the TVPA, "defendants, not plaintiffs, bear the burden of demonstrating that plaintiffs have not exhausted 'alternative and adequate' remedies." *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *55-56 (S.D.N.Y. Feb. 28, 2002). The exhaustion requirement is an affirmative defense that requires the defendant to bear the burdens of production and proof. *Jean*, 431 F.3d at 781; *See also Hilao*, 103 F.3d at 778, n.5; *Estate of Rodriquez v. Drummond Co*., 256 F. Supp. 2d 1250, 1267 (N.D. Ala. 2003).

At a minimum, Defendant must "demonstrate that a [Haitian] court would be

amenable to a suit for violations of international law." *Wiwa*, 2002 WL 319887, at *57. Defendant Constant alleges only that the declaration of Haitian attorney Mario Joseph submitted by Plaintiffs in August 2006 serves to establish that available and adequate remedies exist in Haiti. (Def.'s Am. Mem. at 17.) However, the declaration speaks to the applicable Haitian laws regarding punitive damages, and does not speak to whether, as a practical matter, Plaintiffs would actually have access to available and adequate remedies in Haiti. (August 2006 Joseph Declaration, Def.'s Am. Mem. at Ex. A.) The existence of the Haitian Constitution or other laws in Haiti does not, unfortunately, make up for a corrupt and lethargic judiciary in Haiti. The fact that Mr. Joseph strives to litigate on behalf of victims of human rights abuses does not overcome the reality that the Haitian courts are still unable to provide redress to such victims and Defendant Constant offers no evidence to the contrary. On the other hand, the lack of a functioning judiciary and on-going impunity enjoyed by human rights abusers documented in the November 2007 Joseph Declaration, (Green Decl. at Exhibit C), makes it clear that an adequate and available remedy for Plaintiffs remains nonexistent in Haiti.

3. Defendant Constant Acted Under "Color of Law."

Defendant Constant erroneously alleges that he was not a state actor nor was he operating under the "color of law" when he served as the leader of FRAPH.[10] (Def.'s Am. Mem. at 25.) The TVPA assesses legal liability upon any "individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture or extrajudicial killing. 28 U.S.C. § 1350 note. Courts have found that the

[10] In his argument that he was not a state actor, Defendant Constant makes a number of unsubstantiated claims regarding the underlying facts of the case. (Def.'s Am. Mem. at 20-26.) He provides no evidence to support these claims. His mere assertion of facts in his argument cannot substitute for evidence, and by his default in this case, he makes it impossible for Plaintiffs to rebut his naked factual assertions.

TVPA and the ATS have the same "state action" requirement for acts of torture or extrajudicial killing. *See Saravia*, 348 F. Supp. 2d at 1149. The Second Circuit has indicated that to determine whether a non-state actor was acting under color of law, courts should look to jurisprudence developed under the Fourteenth Amendment and 42 U.S.C. Section 1983. *Kadic*, 70 F.3d at 245.

A defendant acts under color of law when he "acts together with state officials" or "with significant state aid." *Id. See also Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1247 (11th Cir. 2005). The *Kadic* court found that it was Congress' intent to "'make [] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim,' and that the statute "does not attempt to deal with torture or killing by purely private groups.'" *Id.* at 245 (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991)). Economic, military or political support by the government to the private individual, along with the government's acquiescence in human rights abuses committed by that individual meets this state action test. *Id*. This is so even when there is no evidence that the individual himself had engaged in the actual human rights violations but, as with the defendant here, was the commander of forces that were the perpetrators. *Id.* On the other hand, an attenuated and indirect connection between the actions of the government and the private actor (*e.g.,* purchasing property which was expropriated by the government in a discriminatory manner), is not enough to satisfy the state action requirement. *See Bigio v. The Coca-Cola Co.*, 239 F.3d 440, 448 (2nd Cir. 2001).[11]

[11] The appellants in *Bigio* sought damages from Coca-Cola for the "unlawful manner" in which their property had been seized by the Egyptian government and sold to the Coca-Cola Company. 239 F.3d at 443-444. The court found that the allegations were unsupported, and that "[a] private party does not 'act under color of law' simply by purchasing property from the government." *Id*. Consequently, the appellate

The present case against Defendant Constant alleges, and the evidence has shown, actions in concert with state officials and significant state aid consistent with the standard endorsed in *Kadic*. Here, FRAPH operated in concert with, and as an extension of, the Haitian Armed Forces. (Compl. ¶¶ 13, 36; Tr. of 8/29/06 Hr'g at 27-28.) The record reflects that FRAPH committed human rights abuses, including acts of torture, using the material aid and support of the Haitian Armed Forces. (Compl. ¶¶ 13, 36; Tr. of 8/29/06 Hr'g at 31-33; Finding of Facts at 3.) In his role as the leader of FRAPH, Defendant Constant communicated regularly with the high command of the Haitian Armed Forces. (Finding of Facts at 3.) Defendant Constant took orders and command from the military. (Tr. of 8/29/06 Hr'g at 27-28.) Defendant's actions, as the commander of FRAPH, meet the "color of law" requirement in *Kadic.*

Another version of the state action test is whether the defendant is a "willful participant in joint action with the state or its agents" in human rights violations. *Wiwa,* 2002 U.S. Dist. Lexis 3293 at *13 (finding state action based on allegations of meetings to plot with the government, payments to the Nigerian military and police, purchase of weapons for the Nigerian police, coordinated intelligence, and furnishing the Nigerian military with boats and helicopters). Plaintiffs need not show that the defendant acted in concert with the state with respect to each human rights violation. A showing of conspiracy between the government and the private person is sufficient for state action. *Id.* at *14; s*ee also Talisman,* 244 F. Supp.2d at 328 (allegations of paying Sudan for protection, knowing that protection included unlawful acts; purchasing dual-use military

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court concluded that the district court did not have subject matter jurisdiction over the Bigios' claims. *Id.* at 449. Plaintiffs' allegations, as describe herein, go well beyond the activities of the Coca-Cola Company alleged in *Bigio.* The close relationship between FRAPH and the Haitian government is not the attenuated and indirect connection that the court in *Bigio* wanted to avoid.

equipment and permitting Sudanese military to use certain facilities to launch attacks on civilians; and helping to plan a strategy for "ethnic cleansing" are enough to find state action). The facts in the present case, at a minimum, show such "joint action" between FRAPH and the Haitian Armed Forces.

In *Sinaltrainal v. Coca-Cola Co.*, a case also involving paramilitary activity, the court held that a "symbiotic relationship" existed between the paramilitary and the government of Colombia because the two parties confer benefits on each other through an interdependency essential to each other's success. 256 F. Supp. 2d 1345, 1353 (S.D. Fla. 2003). The plaintiffs in that case alleged that "the paramilitary are permitted to exist, openly under the laws of Colombia, and are assisted by government military officials." *Id*. Here, Plaintiffs have alleged and shown the same relationship existed between FRAPH and the Haitian Armed Forces. FPAPH did the dirty work of the military, and the military allowed them to operate with impunity.

In the present case, the allegations and evidence presented satisfy the "under the color of law" test laid out in *Kadic* and the record supports such a finding.

4. There is no "color of law" requirement for Plaintiffs' crimes against humanity claims.

Plaintiffs properly pled that Defendant Constant was operating under the color of law at all relevant times and the record supports such a finding. However, even if the Court found this not to be the case, Plaintiffs have brought claims against him for crimes against humanity, a cause of action that does not require state action. *Kadic v. Karadzic*, 70 F.3d 232, 239-42 (2nd Cir. 1995); *see also Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 104 (2d Cir. 2000). In addition, the *Kadic* court held that no additional showing

of state action was required to find liability under the ATS for torture or other abuses requiring state action, if the acts were committed in furtherance of crimes against humanity. *Id.*; *see also In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 52-54 (S.D.N.Y. 2005); *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 100 n.6 (D.D.C. 2003).

Defendant's motion to vacate the judgment on these grounds fails because it would not constitute a complete defense. *Badian*, 165 Fed. Appx. 886.

C. Vacating the Default Would Prejudice Plaintiffs.

Plaintiffs have invested time and effort, at great emotional and personal risk, into the timely litigation of their claims against Defendant Constant. Plaintiffs deserve finality after diligently pursuing their claims.

First, at the damages hearing on August 29, 2006, the Court heard the emotional testimony of Jane Doe I and II. (Tr. of 8/29/06 Hr'g at 59-102.) Testimony was also provided by Dr. Mary Fabri, an expert on the psychological impact of rape and torture. (*Id*. at 107.) Dr. Fabri testified to the severity of Post Traumatic Stress Disorder symptoms suffered by both women as a result of the underlying atrocities they endured at the hands of FRAPH. (*Id*. at 107-132.) Bringing a case against Defendant Constant and testifying in court took tremendous courage on their part. Testifying as to the details of such intimate and horrifying events such as rape is re-traumatizing under the best of circumstances. Requiring Plaintiffs to re-live, again, the events that occurred in Haiti could have lasting detrimental effects on their mental health. Denying finality in this case would thus severely prejudice these diligent plaintiffs.

Second, enormous effort, including many attorney hours and expense on the part

of the Plaintiffs, went into the litigation of this case. Vacating this judgment would mean all this effort would have to be duplicated.

Third, Plaintiffs have put themselves and their families at great personal risk in order to pursue this judgment against Defendant Constant. The Court went to lengths to help protect their identities in light of the on-going violence in Haiti, perpetrated by former members of FRAPH and close colleagues of Defendant Constant. Unfortunately the situation in Haiti has not improved enough for Plaintiffs to be public with their identities. Also, Defendant Constant may likely be deported back to Haiti in the near future, increasing the risk to Plaintiffs' family members. *See* November 2007 Joseph Declaration, Green Decl. at Exhibit C.

For these reasons, granting Defendant Constant's motion to vacate the judgment in this case will prove highly prejudicial to Plaintiffs.

CONCLUSION

Defendant Constant has filed an untimely motion that is without merit. He willfully ignored the Complaint against him and willfully waited more than 14 months after judgment was entered to make this motion. His claims are erroneous and do not provide a meritorious defense in this matter. Re-opening this case at this late date would deny finality and severely prejudice the Plaintiffs. For each of these reasons, Plaintiffs respectfully request the Court to deny Defendant Constant's motion.

/s/
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To:

Emmanuel Constant

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CERTIFICATE OF SERVICE

I, Moira Feeney, hereby certify that on April 21, 2008, I caused a true copy of the Memorandum in Opposition to Defendant's Second Motion Pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure for Relief of a Void Judgment and accompanying Declaration of Jennifer Green in Support of the foregoing to be served, by Fed Ex, upon:

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Dated: San Francisco, CA
April 21, 2008

/s/
Moira Feeney