

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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**DAVID L. de CSEPEL, *et al.***

**Plaintiffs,**

**vs.**

**REPUBLIC OF HUNGARY, *et al.*,**

**Defendants.**

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) **No. 1:10-cv-01261(ESH)**  
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**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT**

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Plaintiffs David L. de Csepel, Angela Maria Herzog and Julia Alice Herzog respectfully submit this memorandum of law in opposition to Defendants' Motion to Dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

### **PRELIMINARY STATEMENT**

The horrors of the Holocaust in Hungary, and Hungary's deliberate acts of genocide against Hungarian Jews, are well documented. For the Herzog family, the Holocaust meant the loss of family members, the loss of home and livelihoods, and the loss of property – including the valuable artworks comprising the Herzog Collection that are the subject of this action. Defendants' continued wrongful possession of the Herzog Collection – and their insistence on continuing to profit from it – is the final indignity to the Herzog family.

While other nations, like Germany, have faced their Holocaust-era history and made genuine efforts to restore Holocaust looted art to its rightful owners, Hungary has paid only lip-service to the principles of restitution that have been embraced by the United States and other nations around the world. Hungary has stonewalled every effort by Herzog family members to recover their art, and now tries to hide behind irrelevant Communist-era laws and events in an effort to excuse Defendants' continued possession of the Herzog Collection. Defendants' motion glosses over Hungary's role in the Holocaust and the events surrounding Hungary's Holocaust-era acquisition of the Herzog Collection, attempting instead to defend this action based entirely on subsequent Communist-era nationalizations. However, none of the Communist-era laws or events Defendants cite immunizes them from liability here, because those laws and events never gave Defendants title to the items in the Herzog Collection described in the Complaint. Under straightforward common law principles, Defendants have always possessed the Herzog Collection as nothing more than bailees. As such, Defendants' refusal to return the Herzog

Collection cannot be justified. This Court should reject Defendants' attempts to portray this case as something other than what it is – a straightforward attempt to recover property from someone who wrongfully possesses and refuses to return it. At a minimum, the Court should deny the motion as raising issues of fact that cannot be fully adjudicated on a motion to dismiss.

Contrary to Defendants' assertions, this Court has subject matter jurisdiction over this action because at least two exceptions to immunity under the Foreign Sovereign Immunities Act ("FSIA") are satisfied. First, jurisdiction is proper under 28 U.S.C. § 1605(a)(3) because each of the relevant elements of that provision are satisfied. The seizure of Jewish property by Hungary and its Nazi collaborators during the Holocaust – and specifically the seizure of the Herzog Collection – unquestionably violated international law. Moreover, it is undisputed that Hungary and its state-owned Museums and University continue to possess the pieces of the Herzog Collection identified in the Complaint. It is also undisputed that the Museums and the University are engaged in commercial activity in the United States (including the very same types of commercial acts that other courts have held sufficient to confer jurisdiction over claims against foreign states and their agencies and instrumentalities under 28 U.S.C. § 1605(a)(3)).

Second, jurisdiction is proper under 28 U.S.C. § 1605(a)(2). Plaintiffs' claims are based upon various bailments that enabled the Museums and the University to exhibit pieces of the Herzog Collection in the years following World War II and to profit from those exhibits. The creation (and repudiation) of a bailment agreement is a commercial, rather than sovereign, act in which any private museum or university could engage. Defendants' creation (and breach) of those bailments caused direct effects in the United States because Hungary at all relevant times owed duties to the Herzog heirs residing there.

Defendants' argument that a 1973 executive agreement between Hungary and the United States bars Plaintiffs' claims is wrong because the agreement does not apply. The 1973 Agreement settled claims only of persons who were United States citizens both in 1973 and at the time their property was taken. None of the owners of the Herzog Collection was a United States citizen during the Holocaust when Defendants took possession of the Herzog Collection. The only United States citizen with an ownership interest in the Herzog Collection at the time of the 1973 Agreement was Erzsebét (Elizabeth) Weiss de Csepel – the late grandmother of Plaintiff David de Csepel – who became a United States citizen in 1952. Because there was no relevant “taking” of her interest in the Herzog Collection between 1952 and 1973, the 1973 Agreement does not apply.

The remaining grounds for dismissal asserted by Defendants are also meritless. Defendants have failed to meet their burden to show that this action should be dismissed on grounds of *forum non conveniens* or that the act of state doctrine properly applies to, much less bars, this action. Defendants' argument that Plaintiffs' claims are time-barred also fails and would require this Court to resolve issues of fact, which is simply inappropriate at the motion to dismiss stage. Nor have Defendants shown that any – much less all – of Plaintiffs' claims are barred by the doctrines of comity, *res judicata*, or collateral estoppel, or by the political question doctrine.

For all of these reasons, Defendants' motion to dismiss should be denied in its entirety.

## **STATEMENT OF FACTS<sup>1</sup>**

### **The Herzog Collection**

Before his death in 1934, Baron Mor Lipot Herzog, a well-known Jewish Hungarian art collector, amassed a magnificent collection of more than two thousand paintings, sculptures and other artworks (the “Herzog Collection”). (Compl. ¶¶ 1, 38.)<sup>2</sup> After Baron Herzog’s death in 1934, the Herzog Collection remained with his wife until her death in 1940 and was then divided among their three children, Erzsebet (Elizabeth) Weiss de Csepel, István (Stephen) Herzog and András (Andrew) Herzog. (Compl. ¶ 39.)

The artworks comprising the Herzog Collection were among the valuable art and other objects deliberately looted and seized by Hungary, a war-time ally of Nazi Germany, as part of a brutal campaign of genocide directed at Hungarian Jews during World War II (“WWII”). (Compl. ¶ 1.) Today, at least forty works of art from the Herzog Collection are known to be in the wrongful possession of Defendants. (Compl. ¶ 2.)

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<sup>1</sup> While the pertinent facts are set forth in detail in the Complaint, Defendants’ motion to dismiss purports to “contain[] significant background information to provide the Court with the historical context for Plaintiffs’ claims.” (Def. Br., introduction, at 2.) Although Plaintiffs disagree with the accuracy and relevance of the additional “background information” submitted by Defendants (which they themselves argue is not relevant to their legal analysis, and which they claim requires “little or no factual interpretation”) and to its consideration at the motion to dismiss stage, Plaintiffs’ Statement of Facts includes additional facts not pleaded in the Complaint in order to respond to Defendants’ factual allegations. Should the Court determine that its jurisdiction or Plaintiffs’ substantive claims are deficient absent these additional allegations, Plaintiffs request leave to amend their Complaint to include them.

<sup>2</sup> This action seeks the recovery of forty pieces of art from the Herzog Collection that are known to be in Defendants’ possession. (Compl. ¶¶ 2, 15-20.) Because the whereabouts of most of the pieces of the Herzog Collection remain unknown, this action also seeks an accounting from Defendants of any other pieces from the Herzog Collection that are in their possession, custody or control beyond those specifically identified in the Complaint. (Compl. ¶¶ 5, 114-119.)

### **The Parties**

Plaintiff David L. de Csepel is a United States citizen who resides in Los Angeles, California. (Compl. ¶ 6.) He is the grandson of the late Elizabeth Weiss de Csepel, who died in the United States as a citizen in 1992. (Compl. ¶¶ 6, 78.) Plaintiff de Csepel represents all of the heirs of Elizabeth Weiss de Csepel in this action, as well as the heirs of her brother, István Herzog, who died in Hungary in 1966. (Compl. ¶¶ 40, 42.)

Plaintiffs Angela Maria Herzog and Julia Alice Herzog are Italian citizens who reside in Rome, Italy and are the daughters of the late András Herzog. (Compl. ¶¶ 7-8.) András Herzog died in 1943 while being subjected to forced labor on the Russian front, leaving his share of the Herzog Collection to his two daughters. (Compl. ¶ 41.) Plaintiffs Angela Herzog and Julia Herzog represent the heirs of András Herzog in this action and, together with Plaintiff de Csepel, also represent the heirs of their uncle, István Herzog.

Defendant Republic of Hungary is a foreign state as defined in 28 U.S.C. § 1603(a). (Compl. ¶ 9.) Defendants Museum of Fine Arts, Hungarian National Gallery, Museum of Applied Arts and Budapest University of Technology and Economics are all agencies or instrumentalities of Hungary, as defined in 28 U.S.C. § 1603(b). (Compl. ¶¶ 11-14.)

### **Hungary Allies With Nazi Germany And Begins A Campaign Of Genocide Against Hungarian Jews**

On November 20, 1940, Hungary became the first additional country to adhere to the Tripartite Pact signed by Germany, Italy and Japan on September 27, 1940, and thereby joined the Axis Powers. (Compl. ¶ 46.) When Nazi Germany invaded the Soviet Union in June 1941, Hungary declared war on the Soviet Union as an Axis ally and sent an army to fight alongside the Germans. (Compl. ¶ 48.)

At home, Hungary enacted various laws, modeled on Germany's Nuremberg laws, eliminating or severely restricting the public, economic and social rights of Jews. Among other things, these new laws defined "Jew" in racial terms, prohibited sexual relations or marriage between Jews and non-Jews, and excluded Jews from full participation in various professions. (Compl. ¶¶ 44-45, 47; Decl. of Prof. Dr. Tamas Lattmann dated April 29, 2011 ("Lattmann Decl.") ¶¶ 6-16.) These laws, and various coercive activities engaged in by the Hungarian state, effectively nullified Hungarian citizenship for all Jews. (Lattmann Decl. ¶¶ 17-18.)

During 1941 and 1942, thousands of Jews were deported by the Hungarian government to territories under German control, where they were brutally mistreated and massacred. (Compl. ¶ 49.) The Hungarian military and gendarme units also, without provocation, murdered hundreds of Jews. (*Id.*) Hungary also forced Jewish men into forced labor under the command of Hungarian military officers, without providing them with even minimally adequate shelter, food, or medical care. (Compl. ¶ 50.) By March 1944, at least 27,000 Hungarian Jewish forced laborers – including András Herzog, the father of Plaintiffs Julia Herzog and Angela Herzog – had perished under these brutal conditions. (Compl. ¶ 50.)

In March 1944, Adolf Hitler sent German troops into Hungary to ensure Hungary's loyalty and to assist the Hungarian government in resisting the advancing Russian army. (Compl. ¶ 51.) Between May and July 1944, a period of about three months, Hungarian authorities, working in collaboration with the infamous SS commander Adolf Eichmann, deported over 430,000 Jews – more than fifty percent of the entire pre-war Hungarian Jewish population. (Compl. ¶ 52.) By the time the Russians had overrun Hungary in early 1945, more than 500,000 of Hungary's pre-War population of 825,000 Jews were dead. (*Id.*)

### **Hungary And Its Nazi Allies Loot the Herzog Collection**

The looting of Jewish property, including cultural property, was an integral part of the campaign of genocide directed at Hungarian Jews during the Holocaust. (Compl. ¶¶ 53-57.) Jews – including the Herzogs – were required to register their art treasures. (Compl. ¶¶ 56-57.) While the Herzog family attempted to protect their art by hiding the bulk of it in the cellar of one of the family’s factories at Budafok, the Hungarian government and their Nazi collaborators discovered the hiding place and the chests containing the art were opened in the presence of Denes Csanky, the director of the Museum of Fine Arts. (Compl. ¶¶ 58-59.) The art was taken to Adolf Eichmann’s headquarters at the Majestic Hotel in Budapest for his inspection. (Compl. ¶ 60.) Eichmann selected many of the best pieces to display as trophies and then shipped them off to greater Germany. (*Id.*) The remainder of the collection was taken over by the Museum of Fine Arts for “safekeeping.” (Compl. ¶ 60.) Other pieces from the Herzog Collection were seized by the Hungarian government and their Nazi collaborators from the homes, safe deposit vaults, and other properties of the Herzog family. (Compl. ¶ 61.)

### **The Herzog Family Escapes From Hungary**

Stripped of their property and livelihoods and fearing for their lives, members of the Herzog family who could manage to do so were forced to flee Hungary. (Compl. ¶ 63.) In May 1944, Elizabeth and her children, together with other members of the Herzog and Weiss de Csepel families, fled to Portugal. Elizabeth immigrated to the United States in 1946, where, on June 23, 1952, she became a U.S. citizen. (Compl. ¶ 63.) Plaintiffs Angela and Julia Herzog – the daughters of András Herzog – escaped to Argentina and eventually settled in Italy. (Compl. ¶ 64.) They later married Italians and became Italian citizens in 1959 and 1960, respectively. István Herzog and some members of his family remained in Hungary, while others escaped and settled in Switzerland. (Compl. ¶ 64.)

### **The 1947 Peace Treaty**

In 1947, Hungary and the Allies entered into a Peace Treaty. (See Decl. of Alycia Regan Benenati, dated May 2, 2011 (“Benenati Decl.”), Ex. A (Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, TIAS No. 1651 (the “Peace Treaty”).) Of relevance here, Article 27 of the Peace Treaty provided:

Hungary undertakes that in all cases where the property, legal rights or interests in Hungary of persons under Hungarian jurisdiction have, since 1 September 1939, been the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is impossible that fair compensation shall be made therefore.

(Benenati Decl., Ex. A (Peace Treaty), art. 27(1).) Thus, Hungary agreed in the Peace Treaty that it would not claim ownership of property that had been looted from Hungarian Jews during the Holocaust, but would instead act solely as a bailee of that property until it could be restituted to its rightful owners. (Compl. ¶ 69.)<sup>3</sup>

### **The Post-War Fate of the Herzog Collection**

While Defendants purported to “return” a handful of items from the Herzog Collection to the Herzog Heirs in the years immediately following the war, those “returns” were largely on paper or short-lived, and the vast majority of the Herzog Collection remained in the possession of Hungary, the Museums and the University. (Compl. ¶¶ 70-71.)<sup>4</sup> Defendants continued to

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<sup>3</sup> Because none of the Herzog Heirs qualified as a “United Nations national” as of February 10, 1947, Art. 26 of the Peace Treaty (Def. Br. at 2-3) is inapplicable.

<sup>4</sup> Defendants dispute these allegations by referring to a statement in Martha Nierenberg’s 1999 Hungarian complaint that the “procedure of return of the objects in regard to the Herzog Collection also went smoothly.” (Def. Br. at 3, 18 (citing Declaration of Orsolya Bánki, dated February 15, 2011 (“Bánki Decl.”), Ex. L (1999 Complaint, filed by Ms. Martha Nierenberg, Metropolitan Court, Budapest, Hungary) at 5.) However, Plaintiffs’ allegations in the Complaint are based on facts that were not known to Martha Nierenberg in 1999 – including documents first obtained during the course of the Nierenberg litigation in Hungary. Moreover, only a very limited number of the Herzog artworks, at most, were “returned.”

recognize the ownership rights of the Herzog Heirs to those pieces that remained in Defendants' custody (including by exhibiting the works as "on deposit"). (Compl. ¶ 73.) Thus, the bailment relationship that Hungary agreed to in the 1947 Peace Treaty continued with respect to that art.

Even as to those pieces of the Herzog Collection that were physically returned to the Herzog Heirs, Hungarian government officials repeatedly harassed and threatened the Heirs to whom they were returned, including by bringing false smuggling allegations, until they agreed to re-deposit the works with the museums according to new bailment agreements so that they could be displayed and exhibited by the Defendants. (Compl. ¶¶ 72-73.) In 1948, the Museum of Fine Arts exhibited certain pieces of the Herzog Collection with labels expressly acknowledging that they were "on deposit." (Compl. ¶ 73.)

#### **The United States Foreign Claims Settlement Process – First Hungarian Claims Program**

After 1947, relations between the United States and Hungary deteriorated. In 1951, the United States ordered the closure of all Hungarian consulates in the United States. (See Benenati Decl., Ex. R (Richard B. Lillich, THE UNITED STATES-HUNGARIAN CLAIMS AGREEMENT OF 1973, 69 Am. J. Int'l L. 534, 535-36 & n.17 (1975) ("Lillich").) Pursuant to the Trading with the Enemy Act, the United States already held certain Hungarian assets blocked by an Executive Order. *Id.* In 1955, the United States decided to use those blocked assets to compensate United States claimants and amended the International Claims Settlement Act of 1949 (the "1949 Act") to authorize the Foreign Claims Settlement Commission (the "Commission") to consider claims by United States nationals against Bulgaria, Hungary, Italy, Romania and the former Soviet Union. See Act of August 9, 1955, Pub. L. No. 84-285, 69 Stat. 570, 1955 U.S.C.C.A.N. 626, 638 (the "1955 Claims Amendment"); see also Benenati Decl., Ex. R (Lillich) at 537.

The 1955 Claims Amendment authorized the Commission to adjudicate claims of United States nationals against Hungary for Hungary's failure:

- (1) to restore or pay compensation for property of United States nationals as required by Articles 26 and 27 of the Treaty of Peace;
- (2) to pay effective compensation for the nationalization, compulsory liquidation or other taking, prior to August 9, 1955, of property of United States nationals; and
- (3) to meet obligations expressed in currency of the United States arising out of contractual or other rights acquired by United States nationals prior to September 1, 1939, and which became payable prior to September 15, 1947.

1955 Claims Amendment, *codified at* 22 U.S.C. § 1631 (the “First Hungarian Claims Program.”)

The 1955 Claims Amendment defined “national of the United States” to mean, with respect to natural persons, “United States citizens, together with the inhabitants of certain of our island dependencies who are not citizens but who owe allegiance to the United States.” *See* 1955 Claims Amendment § 301, *codified at* 22 U.S.C. 1641(2) (emphasis added).

In order to be eligible for compensation under the First Hungarian Claims Program, the claimant had to have been a United States citizen both in 1955 and at the time of injury. (*See* Benenati Decl. Ex. B (Foreign Claims Settlement Commission: Working Draft Report of the House Committee on Foreign Affairs on H.R. 6382, 84<sup>th</sup> Cong., 1<sup>st</sup> Sess. (May 21, 1955) at 4 (claimants “[m]ust now be a United States citizen and have been a citizen at the time of taking of property”)); Ex. C (Transcript of Hearing Before the Subcommittee on Europe of the Committee on Foreign Affairs of the United States House of Representatives on H.R. 13261, 93<sup>rd</sup> Cong., 2d. Sess. at 9 (April 4, 1974) (confirming that under the First Hungarian Claims Program, the Commission “only considered those who were United States citizens on the date that the taking occurred.”)).)

An award by the Commission in the First Hungarian Claims Program did not prevent the claimant from seeking additional recovery from Hungary – including restitution – if the

Commission's decision did not fully compensate the claimant. Section 313 of the 1955 Claims Amendment provided that:

[p]ayment of any award made pursuant to section 303 or 305 shall not, unless such payment is for the full amount of the claim, as determined by the Commission to be valid, with respect to which the award is made, extinguish such claim, or be construed to have divested any claimant, or the United States on his behalf, of any rights against the appropriate foreign government or national for the unpaid balance of his claim or for restitution of his property. All awards or payments made pursuant to this title shall be without prejudice to the claims of the United States against any foreign government.

See Act of August 9, 1955, Pub. L. No. 84-285, 1955 U.S.C.C.A.N. (69 Stat. 570) 626, 641.

Section 313 of the 1955 Claims Amendment was later codified at 22 U.S.C. § 1641l.

As of the effective date of the 1955 Claims Amendment, Elizabeth Weiss de Csepel – who had become a United States citizen on June 23, 1952 – was the only United States citizen with an ownership interest in any portion of the Herzog Collection. (Compl. ¶ 63.) Elizabeth was only eligible for compensation for any taking of her property by Hungary between June 23, 1952 and August 9, 1955, as the Commission expressly acknowledged in its award to her. (See Declaration of Eric Ramirez dated February 15, 2011 (“Ramirez Decl.”) [Dkt. No. 13-5], Ex. D (Decision No. HUNG-2079 of the Foreign Claims Settlement Commission of the United States (excluding any claim by Elizabeth Weiss de Csepel for real property or artwork not “compulsorily liquidated or otherwise taken between June 23, 1952, the date claimant became a national of the United States, and August 9, 1955, the date set forth in the statute before which a taking must have occurred in order to give rise to a compensable claim under section 303(2).”).)

After fleeing Hungary to avoid extermination, the Herzog Heirs were unable to get accurate information as to what had become of their property. (Compl. ¶ 75.) Based on the limited information available to her, Elizabeth Weiss de Csepel believed at the time (and, as the family discovered later, erroneously) that certain artworks from the Herzog Collection that

belonged to her had likely been nationalized by Hungary in 1954 as a result of Hungarian Museum Decree No. 13 of 1954 (the “1954 Museum Decree”) (Bánki Decl., Ex. C).

Section 9(1) of the 1954 Museum Decree provided, in relevant part, that:

At the entering into force of the Legislative Decree hereunder, those museum pieces in the safekeeping of the museum whose owner is unknown, or has left the country without permission, shall be placed into State ownership, pursuant to the Legislative Decree hereunder.

(Bánki Decl., Ex. C, p. 2 § 9(1) (emphasis added); Lattmann Decl. ¶¶ 31-32.)

Because she and her family had fled Hungary during the Holocaust, Elizabeth Weiss de Csepel believed (erroneously) that Hungary would treat her as someone who “has left the country without permission” and apply the 1954 Museum Decree to her art and she submitted an affidavit to the Commission to that effect. She filed a claim with the Commission for compensation for twelve pieces of the Herzog Collection which she knew to be in the possession of Defendant Museum of Fine Arts, seven of which she claimed to own outright and five of which she claimed to own jointly with her brothers (who were not United States citizens). Her claim also included real property, which she believed (correctly) had been nationalized pursuant to other decrees not relevant here.<sup>5</sup> Hungary was not involved in any way in the Commission process and had no input in the decisions made or the awards rendered by the Commission.

On April 13, 1959, the Commission awarded Elizabeth Weiss de Csepel \$210,000 for both the real estate and the artworks combined. Consistent with the text of Section 313 of the 1955 Claims Amendment (codified at 22 U.S.C. § 1641l), the Commission’s Proposed, Final, and Amended Final decisions expressly reserved Elizabeth’s rights against the Hungarian

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<sup>5</sup> As Defendants point out, Elizabeth’s daughter, Martha Nierenberg, also filed a claim with the Commission for certain real property in Hungary. (Def. Br. at 7-8). However, because Martha Nierenberg did not have any ownership interest in the Herzog Collection until her mother’s death in 1992 (Compl. ¶ 78), her claim to the Commission is of no relevance to this action.

government to recover the balance of her claim. (*See* Ramirez Decl., Ex. A at 2 (“Payment of any part of this award shall not be construed to have divested the Claimant herein, or the Government of the United States on her behalf of any rights against the Government of Hungary for the unpaid balance of the claim, if any.”); *see also* Ramirez Decl., Exs. C and D (same).)

The First Hungarian Claims Program was completed on August 9, 1959. The Commission received and determined the validity and amount of 2,725 claims against Hungary and rendered awards amounting to \$80,296,047 in principal and interest. (*See* Benenati Decl., Ex. R (Lillich) at 538.) With only \$2,237,737.96 available in the Hungarian Claims Fund, however, claimants holding awards over \$1,000 actually received only approximately 1.5% of their awards. (*Id.*)

In a January 8, 2008 letter to the Hungarian Minister of Foreign Affairs urging the return of various pieces of the Herzog Collection to Martha Nierenberg, the daughter of Elizabeth Weiss de Csepel, three members of Congress – including then-Senator Hillary Rodham Clinton – agreed that the paintings sought by Martha Nierenberg “were not covered at all by the 1959 decision of the Foreign Claims Settlement Commission because Elizabeth Weiss de Csepel was not a U.S. citizen at the time those paintings were stolen, and because the paintings were not considered ‘nationalized, compulsorily liquidated or taken’ as those terms are used in the statute governing the work of the Foreign Claims Settlement Commission.” (*See* Benenati Decl., Ex. D (Letter dated Jan. 8, 2008 from Hillary Rodham Clinton, Alcee L. Hastings and Benjamin L. Cardin to H.E. Dr. Kinga Goncz, Hungarian Minister of Foreign Affairs).)

### **The 1960’s Negotiations and the 1973 Agreement**

In 1965, the United States began negotiations with Hungary in order to obtain compensation for the balance of the claims that had resulted in partial awards through the First Hungarian Claims Program. (*See* Benenati Decl., Ex. R (Lillich) at 539.) At the meeting

between United States and Hungarian officials on June 17, 1966, George Spangler, the United States chief negotiator, raised the issue of certain “nationalized” art collections belonging to former Hungarian citizens who had become naturalized citizens of the United States after the seizure of the artworks. Karolyi Reti, Hungary’s chief negotiator responded that “art collections had never been nationalized in Hungary.” (See Benenati Decl., Ex. E (Transcript of Proceedings: United States-Hungarian Negotiations, Twenty-Second Meeting, June 17, 1966) at 237.) Reti also stated that the United States had no standing to press claims on behalf of claimants who were not United States nationals at the time their paintings came into the custody of the Museum of Fine Arts, and the United States negotiators agreed. (*Id.* at 238)

On March 6, 1973, the United States and Hungary entered into an executive agreement. *See Agreement Between the Government of the United States of America and the Government of the Hungarian People’s Republic Regarding the Settlement of Claims*, signed at Washington on March 6, 1973, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167 (the “1973 Agreement”). The 1973 Agreement provided that, in exchange for the lump sum payment of \$18,900,000 by Hungary, there would be a “full and final settlement and ... discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People’s Republic which are described in this Agreement.” *Id.*, art. 1, § 1. The 1973 Agreement addressed four categories of claims for:

- (1) property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation or other taking on or before the date of this Agreement, excepting real property owned by the Government of the United States;
- (2) obligations expressed in currency of the United States arising out of contractual or other rights acquired by nationals of the United States prior to September 1, 1939, and which became payable prior to September 15, 1947;

(3) obligations of the Hungarian People's Republic under Articles 26 and 27 of the Treaty of Peace between the United States and Hungary dated February 10, 1947, and

(4) losses referred to in the note of December 10, 1952 of the Government of the United States to the Government of the Hungarian People's Republic.

*Id.*, art. 2.

Like the 1955 Claims Amendment, the 1973 Agreement applied only to claims of persons who were United States nationals (generally defined as U.S. citizens)<sup>6</sup> both in 1973 and at the time their loss was suffered. (See Benenati Decl., Ex. F (Letter dated September 20, 2002 from Ronald J. Bettauer, Deputy Legal Adviser, United States Department of State to Andrew L. Jagoda) (explaining that “[t]he [1973] Agreement settled and discharged certain claims against the Government of Hungary of U.S. nationals who were U.S. nationals at the time their claims arose. It did not settle or discharge claims of U.S. nationals who became U.S. nationals after their claims arose.”) (emphasis added); Ex. G (Letter dated March 27, 1973 from Fabian A. Kwiatek, Assistant Legal Adviser, United States Department of State to Alex Lowinger) (explaining that under the 1973 Agreement, “[i]n general, if at the time of the taking by the Hungarian authorities the property was owned by persons who were Hungarian nationals and not United States nationals, the Department is unable to render any assistance in the matter. Under customary international law, a state has standing to present a claim against another state only if the claim belongs to one of its nationals and it has been owned by the national from the date of its accrual to the date of settlement.”); Ex. H (Letter of July 24, 1973 from Marshall Wright, Assistant Secretary for Congressional Relations, United States Department of State to United States Senator Alan Cranston) (explaining that “[c]laims of persons who were not nationals of the United States on the date their claims arose were excluded by the Congress under the

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<sup>6</sup> 1973 Agreement, arts. 1(1) and 3.

provisions of Title III of the agreement. Such claims were also excluded under the agreement.”.) Therefore, the 1973 Agreement did not settle claims by persons who were not United States citizens at the time their loss was suffered.

### **The 1973 Hungary-Italy Agreement**

On April 26, 1973, Hungary entered into an agreement with Italy that was similar to the 1973 Agreement with the United States in order to settle various claims arising out of Hungary’s nationalization of property belonging to Italian citizens. (See Bánki Decl., Ex. J (Agreement Between the Hungarian People’s Republic and the Italian People’s Republic Concerning The Settlement of Pending Financial and Patrimonial Questions dated April 26, 1973 (the “Hungary-Italy Agreement”).) The Hungary-Italy Agreement applied, in relevant part to:

Italian claims concerning Italian property, rights, and interests affected by Hungarian measures of nationalization, expropriation, compulsory liquidation, or by other similar measures restricting or limiting such property, rights and interests; Italian claims against the Hungarian People’s Republic or Hungarian physical or juridical persons, arising out of commercial and financial transactions concluded before the Payments Agreement dated December 16, 1948; Italian claims against Hungarian insurance companies in compulsory liquidation arising from reinsurance contracts concluded before the Payments Agreement dated December 16, 1948.

(Bánki Decl., Ex. J (Hungary-Italy Agreement), art. I; Declaration of Andrea Pizzi dated April 29, 2011 (“Pizzi Decl.”) ¶ 8.) Italy agreed that “[f]rom the date of the entry into force of this Agreement the Italian Republic shall no longer assert nor sustain any claim as specified in Article I/a of this Agreement.” (Bánki Decl., Ex. J (Hungary-Italy Agreement), art. IV; Pizzi Decl. ¶ 12.)

The Hungary-Italy Agreement defined “Italian property, rights and interests” as:

such property, rights and interests which – at the time of the entry into force of the Hungarian measures mentioned in Article I/a of this Agreement, belonged, directly or indirectly, totally or partially to the Italian State, to physical persons who were Italian citizens, or to juridical persons, which had residence in Italy,

provided that they still meet the same requirements at the time of the signature of this Agreement.

(Bánki Decl., Ex. J. (Hungary-Italy Agreement), Art. II; Pizzi Decl. ¶ 9.) Thus Italy – like the United States in the 1973 Agreement – only espoused and settled claims of persons who were its own citizens both at the time of the relevant taking and at the time of the agreement. (Pizzi Decl. ¶ 10.) Plaintiffs Angela Herzog and Julia Herzog – the only Italian citizens with an interest in the Herzog Collection in 1973 or now – did not become Italian citizens until 1959 and 1960, respectively. Because there was no relevant “taking” of their property between 1959 and 1973, the Herzogs never applied for, nor received compensation under, the Hungary-Italy Agreement.

### **The Fall of Communism**

With the opening of Hungary to the West in 1989, the Herzog Heirs learned that many pieces of the Herzog Collection were being openly exhibited, hanging on the walls of the Museums. (Compl. ¶ 77.) Tags under the paintings identified them as “From the Herzog Collection.” (*Id.*)

Elizabeth Weiss de Csepel, then 89 years old, attempted negotiations with the Hungarian government to recover the art that belonged to her. (Compl. ¶ 78.) She was almost entirely unsuccessful, obtaining only six paintings and a wood sculpture before her death in 1992 – all of them works attributed to little known artists. (*Id.*) The identifiable masterworks remained in the Museum of Fine Arts and the Hungarian National Gallery. (*Id.*)

In the early 1990s, the Hungarian Parliament enacted two compensation laws. (Def. Br. at 15-16; Bánki Decl., Ex. F (Act XXV of 1991 “*On the Partial Compensation for Damages Unjustly Caused by the State to Private Property Owners in Order to Settle Ownership Relations*” (“1991 Compensation Act”)); Bánki Decl., Ex. G (Act XXIV of 1992 “*On Providing, in Order to Settle Ownership Relations, Partial Compensation for Damages Unjustly Caused by*

*the State in the Properties of Citizens through the Enforcement of Legal Rules Framed from 1 May 1939 to 8 June 1949*” (“1992 Compensation Act”).) However, neither of those laws applies to Plaintiffs’ claims to the Herzog Collection. (See Lattmann Decl. ¶¶ 25-30; Declaration of Tamás Varga dated May 2, 2011 (“Varga Decl.”) ¶¶ 16-17 & Ex. A at 32; Declaration of Balazs Pasztory dated April 29, 2011 (“Pasztory Decl.”) ¶¶ 4-6.)

Although the 1991 Compensation Act referenced the right of Holocaust-era claimants to receive compensation, it only provided actual compensation for Communist-era, as opposed to Holocaust-era, claims. (See Lattman Decl. ¶ 25; Bánki Decl., Ex. F (1991 Compensation Act) at § 1(3) (explaining that “[c]ompensation of damages caused by the application of regulations enacted between May 1, 1939 and June 8, 1949, and listed in Appendix No. 1, will be effected by virtue of the provisions of a separate act to be framed by November 30, 1991 according to the principles laid down in this Act.”).)

The 1992 Compensation Act – which was the “separate act” referred to in Section 1(3) of the 1991 Compensation Act – allowed for limited monetary compensation to claimants based on the application of certain Holocaust-era regulations. (See Lattman Decl. ¶ 26.) However, the 1992 Compensation Act made no provision for actual restitution of identifiable property, nor was it specifically intended to compensate claimants for art. (See *id.*, ¶ 29) The court in the Nierenberg Litigation held the 1992 Compensation Act did not bar a claim for restitution. (See Lattman Decl. ¶ 30; Varga Decl. ¶ 17.) None of the Herzog Heirs filed claims for art under the 1991 or 1992 Compensation Acts. (Pasztory Decl. ¶ 6.)

### **Negotiations With Hungary And The Nierenberg Litigation**

Following Elizabeth Weiss de Csepel’s death in 1992, her daughter, Martha Nierenberg, inherited her share of the Herzog Collection and continued her mother’s efforts to recover the art. (Compl. ¶ 79.) In 1996, the Hungarian Minister of Culture and Education appointed a

Committee of Experts to determine who legally owned the Herzog Collection. (Pasztory Decl. ¶ 8.) The government appointed the Director of the Museum of Fine Arts and a legal representative of the Ministry of Foreign Affairs to the Committee. (*Id.*) The Committee met on several occasions in 1996 and 1997 and reviewed the ownership status of certain art objects which Martha Nierenberg asserted were the property of the heirs of Elizabeth and István Herzog. (*Id.* at ¶¶ 9-10.) The Experts' Committee at no point suggested that the state had acquired ownership of the art at issue by virtue of the 1954 Museum Decree and the Director of the Museum of Fine Arts admitted that certain of the artworks claimed by Martha Nierenberg – including artworks identified in the present Complaint – were not owned by Hungary. (Pasztory Decl. ¶¶ 8-12.)

In October 1999, after months of silence from the government and it being apparent that Hungary had no genuine intention of returning the art, Martha Nierenberg filed a lawsuit in Hungary to recover ten paintings that belonged to her mother, Elizabeth Weiss de Csepel. (Compl. ¶ 79.) She later amended her complaint to include two additional paintings. The Museum of Fine Arts returned one painting to her shortly after the litigation commenced, without explanation. However, the litigation proceeded with respect to the rest of the paintings. Plaintiffs Angela Herzog and Julia Herzog later intervened in the lawsuit as there was initially a dispute between them and Martha Nierenberg as to who owned certain of the artworks (which was later resolved). (Varga Decl., ¶¶ 7-8.)

On October 20, 2000 the Budapest Metropolitan Court ordered that all except one of the paintings be returned to Martha Nierenberg. (*See* Varga Decl., Ex. A (Oct. 20, 2000 Decision).) Among other things, the court rejected the defendants' argument that they had acquired ownership of the paintings by virtue of the 1954 Museum Decree, because the owner of the

paintings was “unknown” in 1954. (*See id.* at 34-38.) The court found that defendants – which included Hungary, the Museum of Fine Arts and the Hungarian National Gallery – always knew who the owners of the paintings were. (*See id.*) The court also noted that defendants had never argued that Elizabeth Herzog had left Hungary illegally. (*See id.* at 35.) The court agreed with Mrs. Nierenberg that the government had the paintings at issue in its possession only as “bailee.” (*See id.* at 52)

Instead of honoring the Metropolitan Court’s decision and returning the art to Mrs. Nierenberg, Defendants appealed the decision. On November 29, 2002, the Supreme Court of Hungary vacated the judgment of the Metropolitan Court on the ground that the court erred in concluding that the paintings belonged to Elizabeth Weiss de Csepel, rather than other Herzog Heirs, in the absence of participation in the lawsuit by all of the Herzog Heirs. (*See Varga Decl., Ex. B (Nov. 29, 2002 Decision) at 12-13.*) Therefore, the court remanded the case to the trial court for further proceedings. (*Id.*) Significantly, the Supreme Court agreed with the lower court that the defendants had not established that the paintings had become state property as a result of Section 9 of the 1954 Museum Decree. (*See id.* at 14-16.) The Supreme Court also agreed with the lower court that no “nationalization ... or other taking” of the paintings had occurred as provided in the 1973 Agreement. (*Id.* at 16) However, the Supreme Court asked the lower court to consider whether, in light of the compensation received by Elizabeth Weiss de Csepel from the United States Foreign Claims Settlement Commission, defendants had a claim for adverse possession based on their belief (even if erroneous) that they possessed the art as a result of the 1973 Agreement. (*See id.* at 17-18.)

On remand, the Metropolitan Court on November 16, 2005 ordered the return of one painting to Martha Nierenberg, but otherwise dismissed the claim on the grounds of adverse

possession. (*See* Varga Decl., Ex. C.) However, the court agreed with the findings of the prior two courts that Elizabeth Weiss de Csepel had left Hungary with the permission of the Hungarian state in 1944, and that the defendants always knew who owned the art. (*See id.* at 22-23.) Therefore, the court agreed that the 1954 Museum Decree had not given the state ownership of the art at issue. (*Id.*)

Following that decision, various members of Congress, including then-Senator Hillary Rodham Clinton, wrote letters to Hungary supporting Martha Nierenberg's claim and urging Hungary to return the art to her. (*See* Benenati Decl., Exs. D, I, J.) Those letters firmly rejected Hungary's argument that Martha Nierenberg could or should have pursued a claim in Hungary prior to the collapse of Communism. (*See* Benenati Decl., Ex. J at 2 ("We are most troubled by reports that it has been argued in court by representatives of those currently holding the paintings that Ms. Nierenberg's claim is barred by a statute of limitations that expired *in 1986*, i.e., that Ms. Nierenberg's family should have expected a good-faith resolution of this matter *from the totalitarian communist regime* and it is her fault for not filing a claim sooner."); Ex. D at 2 (stating "in precisely what year could one have expected legal justice from the People's Republic of Hungary?").) The letters also rejected Hungary's argument that the 1959 decision of the Foreign Claims Settlement Commission barred Martha Nierenberg's claim. (*See* Benenati Decl., Ex. D (January 8, 2008 letter) at 1.)

On January 10, 2008, nine years after Martha Nierenberg commenced her lawsuit, the Metropolitan Appellate Court dismissed Martha Nierenberg's claim in its entirety, holding that Hungary had essentially "purchased" ownership of the paintings through the 1973 Agreement because the United States had awarded Elizabeth Weiss de Csepel compensation through the Foreign Claims Settlement Commission process. (*See* Bánki Decl., Ex. M.) This was error

because Hungary (and its courts) knew that Elizabeth Weiss de Csepel's art was never "taken" during the relevant period covered by the 1973 Agreement and her claims were therefore not settled by that agreement and the awards made by the Foreign Claims Settlement Commission during the First Hungarian Claims Program (in which Hungary played no role) were never intended to bar later claims for restitution. (*See supra* at 11-13.) The court also agreed with the lower court that the state had obtained ownership via adverse possession. (*See Bánki Decl., Ex. M* at 14-15.) Contrary to Defendants' assertions (Def. Br. at 18), no appeal was possible from that decision. (*See Varga Decl.* ¶ 6; *see also Bánki Decl., Ex. M* (2008 Final Judgment) at 2 (stating that the decision was non-appealable).)

### **Hungary Agrees To The Washington Principles**

In 1998 at the Washington Conference on Holocaust-Era Assets, the Hungarian delegation admitted Hungary's role in the looting of Jewish property during the Holocaust (Compl. ¶ 83), acknowledged that Hungary "took part in World War II as an ally of Germany" and that from March 1944 to April 1945 "[p]ersecution of Jews proliferated and the confiscation of Jewish property took place." (*See Benenati Decl., Ex. K* (Washington Conf. on Holocaust-Era Assets (November 30-December 3, 1998) Proceedings 271 (Delegation Statement of Hungary) (J.D. Bindenagel ed., U.S. Gov't 1999).) The Hungarian delegation stated Hungary's commitment "to the restitution or compensation of Holocaust victims concerning cultural assets." (*Id.*) Hungary promised to designate a state commissioner to manage the task, but has never done so.

Despite paying lip-service to these and other international standards for restitution of Nazi-era looted art, Hungary has steadfastly avoided actually restoring the Holocaust-era art in its possession. (*See Varga Decl.*, ¶¶ 18-23.)

## ARGUMENT

### I. STANDARDS OF REVIEW

Defendants have moved to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Where, as here, a defendant challenges only the legal sufficiency of the plaintiff's jurisdictional allegations under Rule 12(b)(1),<sup>7</sup> it is well settled that the court must assume the truth of the factual allegations pleaded in the complaint and construe them in the light most favorable to the plaintiff. *See Republic of Austria v. Altmann*, 541 U.S. 677, 681 (2004); *Phoenix Consulting v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). If there is a factual dispute concerning the jurisdictional facts alleged by the plaintiff, the court may rely on materials outside the pleadings in order to determine whether it has jurisdiction. *See Phoenix Consulting*, 216 F.3d at 40.

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face,’” such that a court may “‘draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (explaining that the complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level”). The court may consider “only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [courts] may take judicial notice” and must construe the facts in the light most favorable to the Plaintiffs. *E.E.O.C. v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

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<sup>7</sup> Defendants themselves argue that the “the legal analysis of Hungary’s various grounds for dismissal of Plaintiffs’ Complaint requires little or no factual interpretation.” (Def. Br., introduction, at 2.)

**A. THIS COURT HAS JURISDICTION UNDER THE FSIA**

This Court has subject matter jurisdiction over Plaintiffs' claims because two exceptions to immunity are satisfied under the FSIA. See 28 U.S.C. §§ 1605(a)(2) and 1605(a)(3).<sup>8</sup>

**1. Takings Exception (28 U.S.C. § 1605(a)(3))**

This Court has jurisdiction over all Defendants<sup>9</sup> under the second clause of 28 U.S.C. § 1605(a)(3), which provides in relevant part that a "foreign state" is not immune from the jurisdiction of the United States courts in any case:

in which rights in property taken in violation of international law are in issue and [i] that property or any property exchanged for such property is present in the United States in connection a commercial activity carried on in the United States by the foreign state; or [ii] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3) (emphasis added). Each of those elements is satisfied here and this Court therefore has jurisdiction over Hungary, the Museums and the University.<sup>10</sup>

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<sup>8</sup> Defendants wrongly argue that this Court need not reach the question of whether an exception to immunity applies under the FSIA because the 1973 Agreement divests the Court of subject matter jurisdiction. (See Def. Br. at 21 n.16 (citing 28 U.S.C. § 1604).) This argument is addressed *infra* at 42-49.

<sup>9</sup> Defendants' suggestion that Plaintiffs have asserted the "takings" exception only against the Museums (Def. Br. at 33) is wrong. Plaintiffs have pleaded that all Defendants are subject to jurisdiction under Section 1605(a)(3). (Compl. ¶ 21.)

<sup>10</sup> See *Agudas Chasidei Chabad of the United States v. Russian Fed'n*, 729 F. Supp. 2d 141, 148 (D.D.C. 2010) (holding that court had jurisdiction over Russia and three of its agencies and instrumentalities based on the second clause of Section 1605(a)(3)); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, at 1172 n.7 (C.D. Cal. 2006) ("[I]f the Foundation – an alleged agency and instrumentality of Spain – has sufficient commercial contacts to satisfy 'a commercial activity' as set forth at the end of 28 U.S.C. § 1605(a)(3), then those contacts are also sufficient to hold Spain to answer under this exception"), *aff'd*, 616 F.3d 1019 (9th Cir. 2010) (en banc); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1205-06 (C.D. Cal. 2001) (holding that the second clause of 1605(a)(3) conferred jurisdiction over both Austria and its agency or instrumentality where the property at issue was owned or operated by an agency or instrumentality of Austria that was engaged in commercial activity in the United States), *aff'd*, 317 F.3d 954 (9th Cir. 2002).

**a. Rights In Property Taken In Violation of International Law Are “In Issue”**

Defendants do not dispute that “rights in property” (*i.e.*, the rights to the Herzog Collection) are “in issue” in this action. Instead, Defendants argue that the Herzog Collection was not “taken in violation of international law” because (i) any taking by Hungary of property that belonged to Hungarian citizens (including “takings” during World War II) purportedly did not violate international law (Def. Br. at 34-35), (ii) Hungary allegedly paid compensation via the 1973 Agreement for any taking of property belonging to Elizabeth Weiss de Csepel after she became a United States citizen (Def. Br. at 36), and (iii) Hungary enacted laws in the 1990s and paid compensation in Hungary to Hungarian citizens for certain takings of property after 1939. (Def. Br. at 36.) As discussed below, each of those arguments fails.

**(1) The Taking Of The Herzog Collection During World War II Violated International Law**

At the motion to dismiss stage, this Court need not find that a taking actually violated international law. Instead, all that is required are substantial, non-frivolous allegations of an international law violation. *See Agudas Chasidei Chabad of United States v. Russian Fed’n*, 528 F.3d 934, 941 (D.C. Cir. 2008) (“[F]or jurisdiction, non-frivolous contentions suffice.”); *Altmann*, 142 F. Supp. 2d at 1202 (“At the jurisdictional stage, a court need not determine if property was taken in violation of international law; so long as the plaintiff’s claims are substantial and non-frivolous, there is a sufficient basis for the exercise of the court’s jurisdiction”); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992) (same).

The Complaint alleges the incontrovertible fact that Defendants collaborated with the Nazis – including the infamous Adolf Eichmann – and that they seized the Herzog Collection as part of an organized campaign of genocide against Hungarian Jews during World War II.

(Compl. ¶¶ 29, 59.) Defendants largely ignore these allegations and instead put forward their own selective version of the facts, asserting that Hungary possessed the Herzog Collection solely as a result of a 1929 Act (which placed certain restrictions on the export of items of artistic, academic, historical or museological significance from Hungary) and the 1954 Museum Decree. (See Def. Br. at 1, n.1 and 35 (citing Bánki Decl., Ex. B (Hungarian Act No. XI of 1929), Ch. I, § 2 and Ex. C (1954 Museum Decree).) This factual argument – and it is just that – is simply a further attempt by Defendants to make this case about anything other than the fact that Defendants took possession of the art during the Holocaust, after having stripped the art’s owners of their rights and their dignity, all as part of an organized campaign to assist Nazi Germany in exterminating the Jews and their culture. Defendants’ alternative version of history should not be credited. As discussed *infra* at 46-48, Defendants’ conclusory assertions do not support – let alone conclusively establish – their argument that the 1954 Museum Decree applies to any (much less all) of the pieces of the Herzog Collection at issue in this action. Nor can Defendants rely on the 1929 Act – which gave the government discretion to block the ordinary export of certain pieces of art (and only art that had been imported to Hungary more than twenty-five years earlier) (Varga Decl. ¶¶ 9-11) – to explain the later seizure of property pursuant to anti-Semitic laws as part of a calculated plan to exterminate Hungarian Jews and their culture. (Compl. ¶ 29.)

Defendants wrongly suggest that any “taking” of Plaintiffs’ property prior to 1951<sup>11</sup> could not have violated international law because “expropriation by a sovereign state of the

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<sup>11</sup> Defendants choose the 1951 date because that is the date that Martha Nierenberg acquired United States citizenship. (Def. Br. at 7.) However, as discussed *supra* at 12 n.5, the date of Martha Nierenberg’s naturalization is not relevant to this action because she did not have any interest in the Herzog Collection as of that date or until her mother’s death in 1992. The

property of its own nationals does not implicate settled principles of international law.” (Def. Br. at 35.) In other words, it is not illegal under international law to systematically seize an ethnic group’s property while killing it off. This is arrant nonsense.<sup>12</sup>

It is well-settled that a taking violates international law if it is “arbitrary or discriminatory in nature,” or done “without payment of the prompt adequate and effective compensation required by international law” *See Chabad*, 729 F. Supp. 2d at 145 (“An expropriation is a violation of international law if the taking is not for a public purpose, is discriminatory, or does not provide for just compensation.”); *see also* H.R. Rep. No. 94-1487, at 19-20; Restatement (Third) of Foreign Relations Law of the United States § 712 (1987). *Accord Altmann v. Republic of Austria*, 317 F.3d 954, 967-68 (9th Cir. 2002)), *amended by*, 327 F.3d 126 (9th Cir. 2003), *aff’d on other grounds* 541 U.S. 677 (2004).

Here, the “takings” at issue were not only discriminatory and without adequate compensation, but they also constituted war crimes and crimes against humanity because they were part of an organized campaign of genocide against Hungarian Jews. *See* Convention on the Prevention and Punishment of the Crime of Genocide (1948) (confirming that “genocide, whether committed in time of peace or in time of war, is a crime under international law.”); *Altmann*, 142 F. Supp. 2d at 1203 (“[T]he Nazi’s aryanization of art collections was part of a larger scheme of the genocide of Europe’s Jewish population.”). Under international law, genocide includes the taking of property from a persecuted group. For example, the Charter of

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pertinent date is Elizabeth Weiss de Csepel’s date of naturalization, which was June 23, 1952. Regardless, Defendants’ argument is groundless.

<sup>12</sup> Defendants’ suggestion that Plaintiffs have somehow conceded that their claims do not involve a taking “in violation of international law” because of statements made distinguishing various class actions that were the subject of MDL motions (Def. Br. at 34 (citing Ramirez Decl., Ex. F)) is likewise meritless. Nothing in Plaintiffs’ submissions (which annexed a copy of the current Complaint) suggests that Plaintiffs’ causes of action do not derive from an unlawful taking of Plaintiffs’ property in violation of international law.

the International Military Tribunal at Nuremberg, formed to try war criminals after World War II, defined “war crimes” as including plunder of public or private property. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, pt. II, art. 6(b), 59 Stat. 1544, 1547 (the “Nuremberg Charter”). Likewise, the Nuremberg Charter defined “crimes against humanity” as including “persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal...” *Id.*, art. 6(c).<sup>13</sup> *See also* Judgment of the International Military Tribunal, *reprinted at* 6 F.R.D. 69, 122, 130-31, 155 (1946); Inter-Allied Declaration of January 5, 1943, *reprinted in* 8 Dep’t St. Bull. 21, 21-22 (1943) (“looting” included not only outright seizure but also any form of forced sale), *quoted in Altmann v. Republic of Austria*, 327 F.3d 1246, 1246-47 (9th Cir. 2003), *aff’d on other grounds*, 541 U.S. 677 (2004).

Consistent with these principles, other courts have held that the taking of Jewish property by the Nazis during World War II violated international law. For example, in *Altmann v. Republic of Austria*, the court held that Nazi takings of Gustav Klimt paintings from a Jewish collector were “undeniably a taking in violation of international law” where “[t]he taking was not for public purpose; instead, some of the art was distributed to the collections of Hitler, Göring, and Dr. Furher. Other art was sold for the benefit of the Nazi party” and no just compensation was paid for the taking. *Altmann*, 142 F. Supp. 2d at 1203. Likewise here, some of Plaintiffs’

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<sup>13</sup> The Nuremberg Charter was ratified by the original United Nations (essentially the Allies who had defeated Nazi Germany and its Axis allies such as Hungary) and the Nuremberg Charter and the Tribunal rulings were then codified by the General Assembly as part of the body of international law that binds all nations. *See* U.N. G.A. Res. 177(II), *available at* <http://www.un.org/documents/ga/res/2/ares2.htm>. The same principles are also reflected in the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, which Hungary has ratified.

art made its way into the hands of Nazi officials and was taken to Germany. (Compl. ¶¶ 60-62.)

The *Altmann* court also held that “Nazi Germany is not recognized as a valid foreign sovereign,” *Id.* at 1203; *see also Agudas Chasidei Chabad of United States v. Russian Federation*, 466 F. Supp. 2d 6, 19 (D.D.C. 2006) (holding that “Nazi Germany’s seizure of the Archive clearly violated international law as it was discriminatory, not for a public purpose, and did not result in payment of just compensation.”), *aff’d*, 528 F. 3d 934, 955 (D.C. Cir. 2008); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023-24 (9th Cir. 2010) (sustaining jurisdiction over Spain where complaint alleged that Germany had confiscated a painting from a German Jew and that Spain currently held the painting). Other courts have similarly classified the actions of the Nazis as unlawful theft. *See Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 307 (D. R.I. 2007) (Nazi party’s forced liquidation of Jewish art dealer’s gallery inventory was properly classified as looting or stealing), *aff’d*, 548 F.3d 50 (1st Cir. 2008); *Menzel v. List*, 267 N.Y.S.2d 804, 811 (N.Y. Sup. Ct. 1966) (Nazi party could not convey good title to art taken during World War II because the seizure of art during wartime constituted “[p]illage, or plunder ... [which is the] taking of private property not necessary for the immediate prosecution of [the] war effort, and is unlawful”); *Weiss v. Lustig*, 58 N.Y.S.2d 547, 549 (N.Y. Sup. Ct. 1945) (“This court ... may take judicial notice of the fact that we are not dealing with the laws of a sovereign State, but with a country overrun by bandits, who were issuing their own decrees. To recognize these decrees as the laws of a sovereign State, would do violence to every fundamental principle of human justice.”).<sup>14</sup> The actions of Hungary during World War II were no different. Hungary was a

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<sup>14</sup> The cases relied on by Defendants (Def. Br. at 35) do not compel a different conclusion. Only one involved the looting of Jewish property during the Holocaust – in that case, by private citizens. *See Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976). Later courts have not hesitated to pass on the validity of Nazi takings of Jewish property. *See, e.g., Cassirer*, 616 F.3d at 1023-24; *Chabad*, 466 F. Supp. 2d at 19; *Altmann*, 142 F. Supp. 2d at 1203. The other cases

wartime ally of Nazi Germany, enacted similar anti-Semitic laws, and engaged in the same acts of genocide. *See Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000) (recognizing that “the confiscation of private property during the Holocaust was a violation of customary international law” with respect to claims involving property taken during World War II in Vichy France). The restrictions placed on Hungarian Jews as a result of the anti-Semitic laws passed by Hungary during World War II – many of which mirrored Germany’s anti-Semitic laws – constituted a *de facto* removal of the citizenship rights of Hungarian Jews. (See Lattmann Decl. ¶¶ 16-18.)

In any event, the Complaint also pleads the active involvement of German Nazi officials in the seizure of the Herzog Collection. (Compl. ¶¶ 59-62.) Therefore, even if Defendants were correct that the looting of the Herzog Collection by Hungary alone would not constitute a colorable violation of international law because the Herzog Collection was owned by Hungarian citizens in 1944 (which they are not), the Complaint nevertheless states a “substantial and non-frivolous” taking in violation of international law based on the involvement of the German Nazis in the taking of Plaintiffs’ property. (*Id.*)<sup>15</sup> Defendants’ argument that Plaintiffs could only

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relied on by Defendants are inapposite. *See Yang Rong v. Liaoning Provincial Gov’t*, 362 F. Supp. 2d 83, 101 (D.D.C. 2005) (China nationalized foundation belonging to Chinese citizens), *aff’d* 452 F.3d 883 (D.C. Cir. 2006); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990) (Philippine government official ordered bank not to pay on letter of credit owed to Philippine citizen); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966) (Castro government took over five Cuban cigar manufacturers), *aff’d*, 375 F.2d 1011 (2d Cir. 1967); *United States v. Belmont*, 301 U.S. 324, 332 (1937) (Soviet government dissolved and nationalized property of Russian corporation).

<sup>15</sup> The Complaint also alleges a separate, substantial and non-frivolous “taking” of certain of Plaintiffs’ property in 2008 when Defendants repudiated Martha Nierenberg’s demand for a dissolution of the bailments that had come into effect after World War II as a result of the Peace Treaty and otherwise. (Compl. ¶¶ 36, 87, 96-105.) *See Chabad*, 528 F.3d at 945-46 (holding that the unfulfilled promises by the newly constituted Soviet government to return the Library to the plaintiff constituted a separate “taking” in violation of international law); *Altmann*, 142 F. Supp. 2d at 1202-03 (Nazis’ seizure of art collection and Austria’s post-war refusal to return it or

claim against Germany for such takings (Def. Br. at 48-49) is baseless. This Court may properly exercise jurisdiction over Hungary even if Hungary did not itself perform the unlawful “taking” but instead acquired property that was previously seized by another sovereign (*i.e.*, Germany) in violation of international law. *See* 28 U.S.C. § 1605(a)(3) (use of passive voice emphasizes act of taking rather than the actor); *Chabad*, 466 F. Supp. 2d at 19 (“For the purposes of the FSIA, the defendant-state need not be the state that took the property in violation of international law.”); *Cassirer*, 616 F.3d at 1022 (same); *see also Altmann*, 317 F.3d at 968 (allowing suit to proceed against Austria and the Austrian Gallery where it was alleged that the paintings at issue had been confiscated in part by German Nazis).

**(2) Neither The 1973 Agreement Nor The Hungarian Laws Enacted During The 1990s Compensated Plaintiffs For The Unlawful Wartime Taking Of Their Property**

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Contrary to Defendants’ assertions (Def. Br. at 35-37), Plaintiffs were never compensated for the unlawful taking of their property during World War II.<sup>16</sup> Neither the 1973 Agreement nor the Hungary-Italy Agreement compensated Plaintiffs for the World War II-era takings of the Herzog Collection because Plaintiffs were not United States citizens or Italian citizens at the time of those takings and the Agreements therefore did not apply. *See infra* at 42-48.

Nor did the 1991 and 1992 Compensation Acts compensate Plaintiffs for the taking of the Herzog Collection. The 1991 Act applied only to Communist-era nationalization. (Lattmann

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to pay compensation stated a substantial and non-frivolous claim against Austria under 28 U.S.C. § 1605(a)(3)), *aff’d*, 317 F.3d at 965, 968 n.4. That “taking” also violated international law because the property at issue belonged to a United States citizen in 2008, and Defendants’ refusal to return the art directly contravened their obligations under the 1947 Peace Treaty.

<sup>16</sup> Defendants cite *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 887-93 (2d Cir. 1981) for the proposition only that “appropriate” compensation should be paid when a foreign state expropriates property in violation of international law. (Def. Br. at 36.) However, the Second Circuit in *Banco Nacional de Cuba* was careful to note that “appropriate compensation” would include “full compensation in certain circumstances.” *See id.* at 893.

Decl. ¶ 25.) Plaintiffs never applied for, and did not receive, compensation for the Herzog Collection under the 1991 Act because the Herzog Collection was never nationalized by the Communists. Nor did Plaintiffs apply for, or receive, compensation pursuant to the 1992 Compensation Act for the Herzog Collection, and the existence of the 1992 Compensation Act does not bar a claim for restitution in kind as is asserted here. (Pasztory Decl. ¶ 6; Lattmann Decl. ¶ 30; Varga Decl. ¶ 17.)

**b. The Artworks At Issue Are Owned Or Operated By  
The Museums and the University, Which Are Each  
Engaged in Commercial Activity In The United States**

Defendants do not dispute that the Museums and the University – each agencies or instrumentalities of Hungary – are in possession of the pieces of the Herzog Collection identified in the Complaint. (Compl. ¶¶ 2, 15-20; Def. Br. at 45.) That “[p]ossession is sufficient to satisfy the ‘owned or operated’ requirement of 28 U.S.C. § 1605(a)(3).” *Chabad*, 729 F. Supp. 2d at 147; *see also Nemarian v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 480 (D.C. Cir. 2007) (“owned or operated” means “possessed or exerted control or influence over” the property at issue).

Nor do Defendants dispute that the Museums and the University are engaged in the “commercial activity” alleged in the Complaint, which includes:

- loaning art to museums located in the United States, including in the District of Columbia, and receiving reciprocal benefits thereby;
- encouraging United States tourism and allowing United States visitors to purchase admission tickets over the internet;
- publishing guidebooks in English featuring paintings from the Herzog Collection which are sold to visitors from the United States;
- accepting United States credit cards;
- authoring, promoting and distributing books and other publications exploiting the paintings, including at least one book published through a United States publisher

that is available for sale via Amazon.com and other retailers, who accept United States credit cards as payment;

- accepting orders for printed reproductions of paintings directly from residents of the United States and shipping those prints directly to the United States;
- advertising through the Hungarian National Tourist Office in New York, which maintains a website in English concerning exhibits at the Museums and downloadable brochures; and
- with respect to the University, participating in student exchange programs and the United States Fulbright Program, including by accepting students from the District of Columbia.

(Compl. ¶¶ 32-33.)<sup>17</sup> Instead, Defendants wrongly argue that this commercial activity is insufficient to confer jurisdiction over Defendants because there is no “substantial contact” between the Museums and the United States or between the “commercial activity” described in the Complaint and Plaintiffs’ claims. (Def. Br. at 37-38.) Defendants misstate the relevant standard by referring to an inapplicable section of the FSIA, and are wrong in any event.

**(1) No “Substantial Contact” Requirement Applies Here**

The “substantial contact” standard upon which Defendants erroneously rely is derived from the definition of “commercial activity carried on in the United States by a foreign state” set forth in 28 U.S.C. § 1603(e),<sup>18</sup> and applies only to cases brought under the first clause of Section 1605(a)(3) (*i.e.*, cases in which the property is alleged to be “present in the United States in connection with a commercial activity carried on in the United States by the foreign state”). It does not apply to cases – such as this one – that are brought under the second clause of Section

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<sup>17</sup> Defendants’ suggestion that certain of these activities, such as visits from United States tourists or the ability to purchase books online, “are not the actions of the museums themselves” (Def. Br. at 39) is unavailing because Defendants actively solicit such tourism and publish books in English with the intention of reaching a United States audience, including through a United States publisher. (Compl. ¶¶ 32-33.)

<sup>18</sup> Section 1603(e) defines “commercial activity carried on in the United States by a foreign state” to mean “commercial activity carried on by such state and having substantial contact with the United States.” 28 U.S.C. § 1603(e) (emphasis added).

1605(a)(3) (*i.e.*, where the property is alleged to be “owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in a commercial activity in the United States”). *See* 28 U.S.C. § 1605(a)(3). As the Ninth Circuit explained in *Cassirer*:

The second clause of § 1605(a)(3) also differs from the first. The first clause, which pertains to commercial activities of the foreign state itself, requires that those activities be “carried on” in the United States. Section 1603(e) defines “commercial activity carried on in the United States by a foreign state” as “commercial activity carried on by such state and having substantial contact with the United States.” The second clause, applicable here, relates to a “commercial activity” in which an instrumentality of a foreign state engages, and is subject to the broader definition of “commercial activity” in § 1603(d), which does not mention “substantial contact.”

*Cassirer*, 616 F.3d at 1033 n.19. By contrast, the definition of “commercial activity” in Section 1603(d) – which is applicable here – is simply “a regular course of commercial conduct or a particular commercial transaction or act.” *See* 28 U.S.C. § 1603(d) (emphasis added).

The District of Columbia Court of Appeals in *Chabad* similarly held that the “substantial contact” requirement does not apply to cases – like this one – that are brought under the second clause of § 1605(a)(3):

Congress took the trouble to use different verbs in the separate prongs, and to define the phrase in the first prong. Russia wants us to turn that upside down and obliterate the distinction Congress drew. Moreover, we see no anomaly in applying the “commercial activity” definition set forth in § 1603(d) [to cases brought under the second clause of § 1605(a)(3)]. While the first clause of § 1605(a)(3) and the definition in § 1603(e) are quite demanding in some respects, the clause applies to activities “carried on *by the foreign state*,” whereas the second clause involves the commercial activities of the foreign state’s agencies and instrumentalities. Congress might well have thought such entities’ greater detachment from the state itself justified application of § 1603(d)’s broad definition.... The substantiality requirement of § 1603(e) is thus inapplicable.

*Chabad*, 528 F.3d at 947 (emphasis added). *See also Chabad*, 729 F. Supp. 2d at 147 (using definition of “commercial activity” found in § 1603(d) to determine that second clause of § 1605(a)(3) was satisfied). Defendants ignore the Court of Appeals’ holding in *Chabad* entirely,

though they cite the *Chabad* decision elsewhere in their brief. (Def. Br. at 23.) Their argument should be rejected on this basis alone.

Defendants' reliance on *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 328 (D.D.C. 2007) (Def. Br. at 37-38) is misplaced, because in that case – unlike here – only the first clause of § 1605(a)(3) was at issue because the paintings were present in the United States. Likewise, the other cases relied on by Defendants (Def. Br. at 38-39) are inapposite because in each, the plaintiffs invoked jurisdiction under the first clause of § 1605(a)(3) and the courts analyzed the “substantial contact” standard solely in that context. *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988); *Lempert v. Republic of Kazakhstan*, 223 F. Supp. 2d 200, 203 (D.D.C. 2002), *aff'd*, 62 Fed. Appx. 355 (D.C. Cir. 2003).

Nor are Plaintiffs required to show that Defendants' commercial activity in the United States is directly related to the artworks at issue in order to sustain jurisdiction under the second clause of § 1605(a)(3). As the Ninth Circuit explained in *Cassirer*:

the second clause of 1605(a)(3) contains no requirement that a lawsuit arise out of specific activity having to do with the property in the United States, that is, there is no express analogue to the traditional doctrine of specific jurisdiction, nor does it explicitly require any particular level of activity or conduct commensurate to that normally contemplated for general jurisdiction.

*Cassirer*, 616 F.3d at 1033 (distinguishing the “commercial activity” exception – § 1605(a)(2) – which uses the phrase “based upon” and therefore does require a particular nexus with the United States). The District of Columbia Court of Appeals has similarly held that the Due Process Clause (and its related “minimum contacts” requirement) does not apply to cases brought against foreign states under the FSIA. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002).

**(2) Other Courts Have Sustained Jurisdiction Based On  
The Same Types Of Commercial Activity Alleged Here**

Other courts have sustained jurisdiction over foreign states and their agencies and instrumentalities based on precisely the same types of allegations of commercial activity asserted in the Complaint.<sup>19</sup> For example, in *Altmann v. Austria*, the Ninth Circuit found that it had jurisdiction over both Austria and the Austrian Gallery for claims involving the taking of certain Klimt paintings during World War II where plaintiff alleged that the Austrian Gallery authored, edited and published through Yale University in the United States a book about the women in Klimt paintings and a guidebook with photographs of the stolen paintings, and also advertised Gallery exhibitions in the United States. *See Altmann*, 317 F.3d at 969. In fact, the court held that such allegations “far exceed[]” the commercial activity necessary to satisfy § 1605(a)(3). *Id.*

In *Cassirer v. Kingdom of Spain*, the Ninth Circuit similarly sustained jurisdiction over both Spain and its wholly-owned Foundation for claims involving art that was looted during World War II where the Foundation was alleged to have, among other things, sold posters and books and licensed reproductions of images in the United States, shipped gift shop items to purchasers in the United States, filmed a program to be shown on flights between Spain and the United States, placed advertisements in magazines distributed in the United States, sent press

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<sup>19</sup> In addition to the commercial activity alleged in the Complaint (Compl. ¶¶ 32-33), the Museum of Fine Arts now has a Facebook page (*see* <http://www.facebook.com/pages/Sz%C3%A9pm%C5%B1v%C3%A9szeti-M%C3%BAzeum/127253613961476?ref=sgm#!/pages/Sz%C3%A9pm%C5%B1v%C3%A9szeti-M%C3%BAzeum/127253613961476?sk=wall>) and provides a link to that page on the Museum’s official website. (*See* <http://www.szepmuveszeti.hu/web/guest/aktualitasok>) The Museum’s website also includes YouTube videos (<http://www.szepmuveszeti.hu/web/guest/szepmuhely>) and the Museum’s Facebook page provides a link to other YouTube videos. The Museum’s website also invites visitors to visit the MySpace page of the Museum Shop (<http://www.szepmuveszeti.hu/web/guest/shop>). Although the link does not appear to be active, the Museum Shop’s MySpace page appears to be found at <http://www.myspace.com/449298374>. (Benenati Decl., Exs. L-P.)

releases, brochures, and general information to Spain's tourism offices in the United States, distributed a museum bulletin to individuals in the United States, borrowed and loaned artworks in the United States, and maintained a website through which United States citizens could sign up for newsletters, view the collection, and purchase advance admission tickets. *See Cassirer*, 461 F. Supp. 2d at 1173-76. In *Chabad v. Russian Federation*, the District of Columbia Court of Appeals sustained jurisdiction over both Russia and two of its state-owned agencies and instrumentalities for claims involving the seizure of a library and an archive where the plaintiffs alleged that the defendant agencies or instrumentalities had each entered into commercial contracts with American corporations. *See Chabad*, 528 F.3d at 948; *see also Chabad*, 729 F. Supp. 2d at 147-48.

Other courts have similarly held that advertising in the United States and accepting American credit cards is sufficient to constitute "commercial activity" in the United States. *See Sideman de Blake*, 965 F.2d at 712 (finding that "the complaint and declarations allege sufficient facts to bring [plaintiffs'] expropriation claims within both the commercial activity and international takings exceptions to the FSIA's grant of foreign sovereign immunity where a United States citizen alleged expropriation of a hotel corporation in Argentina and alleged that Defendants solicited guests for the hotel in the United States and accepted United States credit cards and travelers' checks as payment); *Magness v. Russian Fed'n*, 54 F. Supp. 2d 700 (S.D. Tex. 1999) (sustaining jurisdiction over Russia and its agencies or instrumentalities for claims based on the expropriation of a piano factory where plaintiffs alleged that the relevant agencies or instrumentalities advertised similar products in the United States and sold admission tickets to

museum exhibits and offered numerous items for sale on a website where United States credit cards and funds were accepted).<sup>20</sup>

## 2. **Commercial Activity Exception**

This Court also has jurisdiction over Defendants under the third clause of 28 U.S.C. § 1605(a)(2), which provides that a “foreign state” is not immune from jurisdiction in any case:

in which the action is based upon [i] a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (emphasis added).

### a. **Plaintiffs’ Claims Are “Based Upon” Bailment Agreements Created In Connection With Defendants’ Commercial Activity In Hungary**

The FSIA defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act,” the “commercial character of [which] shall be determined by reference to” its “nature,” rather than its “purpose.” 28 U.S.C. § 1603(d). In interpreting this provision, the Supreme Court has observed that “a state engages in commercial activity under the restrictive theory where it exercises ‘only those powers that can

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<sup>20</sup> While Plaintiffs submit that they have pleaded more than sufficient commercial activity on the part of the Museums and the University in the United States to satisfy the second clause of § 1605(a)(3), Plaintiffs respectfully request the opportunity to take jurisdictional discovery to confirm and supplement those allegations should this Court find Plaintiffs’ pleading to be in any way deficient. See *Intelsat Global Sales & Mktg. v. Cmty. of Yugoslav Posts Tels. & Tels.*, 534 F. Supp. 2d 32, 34 (D.D.C. 2008) (“a court should allow for limited jurisdictional discovery if a plaintiff shows a non-conclusory basis for asserting jurisdiction and a likelihood that additional supplemental facts will make jurisdiction proper”); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 316 (D.D.C. 2005) (allowing the parties to conduct jurisdictional discovery to develop the record on the defendants’ commercial activity in the United States); *Cassirer*, 461 F. Supp. 2d at 1165 (court granted jurisdictional discovery to resolve issues concerning whether FSIA immunity applied).

also be exercised by private citizens,’ as distinct from those ‘powers peculiar to sovereigns.’ Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts in the manner of a private player within the market.” *Saudi Arabia*, 507 U.S. at 360; *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987) (holding that “the ‘rule of thumb’ used to determine whether activity is of a commercial ... nature is ‘if the activity is one in which a private person could engage, it is not entitled to immunity.’”).

The Supreme Court has held that “based upon,” for purposes of 28 U.S.C. § 1605(a)(2), means “those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.” *Saudi Arabia*, 507 U.S. at 356. Defendants mischaracterize the relevant question as “whether Plaintiffs’ claims ... involve ‘commercial activity’ outside the United States that ... ‘cause[d] a direct effect in the United States.’” (Def. Br. at 29.) However, under the third clause of Section 1605(a)(2) at issue here, the relevant question is whether Plaintiffs’ claims are “based upon an act ... in connection with [Defendants’] commercial activity” in Hungary and whether that act caused a direct effect in the United States. *See* 28 U.S.C. § 1605(a)(2). This distinction is significant because

neither *Nelson*, nor other case law, nor the legislative history of § 1605(a)(2) suggest that a foreign state’s conduct “in connection with a commercial activity” must itself be a commercial activity to fall within the third exception to foreign sovereign immunity. In other words, there is no support for the proposition that the foreign state’s conduct “in connection with a commercial activity” must be an “exercise[] [of] only those powers that can also be exercised by private citizens” to fall within the third exception in § 1605(a)(2)... Rather, as the Supreme Court observed in *Nelson*, “Congress manifestly understood there to be a difference between a suit ‘based upon’ commercial activity and one ‘based upon’ acts performed ‘in connection with’ such activity.”

*Doe v. Unocal Corp.*, 395 F.3d 932, 957 (9th Cir. 2002) (citing *Saudi Arabia*, 507 U.S. at 357-58), *vacated on other grounds*, 395 F.3d 978 (9th Cir. 2003); *see also Transamerican S.S. Corp.*

*v. Somali Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) (“The [Somali government] Agency does not seriously dispute the finding that its detention of the ship and demand for payment were ‘commercial activit[ies] of the foreign state elsewhere.’”).

Here, the relevant “act” or “acts” for purposes of § 1605(a)(2) is the creation of a bailment with respect to each of the artworks pleaded in the Complaint, including through the 1947 Peace Treaty (which governed the relationship between Plaintiffs and Defendants with respect to any artworks not physically returned after World War II) or pursuant to separate agreements between the Defendants and the Plaintiffs’ representatives as to those few artworks that were physically returned (Compl. ¶¶ 69, 96-105.) The relevant “act” is not “Hungary’s decision to nationalize certain property during the Communist regime,” as Defendants wrongly claim in attempting to replead the Complaint (Def. Br. at 31), because no such nationalization occurred.<sup>21</sup> *See infra* at 46-48.

The creation of a bailment with respect to works of art is an act in which any private museum or university could engage, and is therefore not entitled to immunity. *See Malewicz*, 362 F. Supp. 2d at 313-14 (explaining that “[i]f the activity is one in which a private person could engage, it is not entitled to immunity” and holding that there was “nothing sovereign about the act of lending art pieces, even though the pieces themselves might belong to a sovereign.”); *accord Sideman*, 965 F.2d at 708. Those “acts” were “in connection with” Defendants’

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<sup>21</sup> While Plaintiffs’ property was “taken” during World War II such that “rights in property taken in violation of international law are in issue,” *see supra* at 25-31, those takings became bailments after World War II when Hungary agreed to the 1947 Peace Treaty and Plaintiffs’ claims are therefore not “based upon” acts of expropriation for purposes of section 1605(a)(2). The bailment relationships created after the war with respect to the Herzog Collection distinguish this case from the cases relied on by Defendants (Def. Br. at 30-31) which only involved acts of expropriation.

commercial activity in Hungary because they allowed Defendants to exhibit the Herzog Collection and to attract visitors to the museums. (Compl. ¶¶ 32-33.)

**b. Defendants' Creation And Breach Of Those Bailment Agreements Caused A Direct Effect In The United States**

As discussed above, the relevant question is whether the act at issue (here, Defendants' creation (and subsequent breach) of a bailment) – as opposed to Defendants' commercial activity in general – caused a direct effect in the United States. *See* 28 U.S.C. § 1605(a)(2).

An effect is “direct” if “it follows ‘as an immediate consequence of the defendant’s ... activity.’” *Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (1992) (rejecting the idea that Section 1605(a)(2) “contains any unexpressed requirement of ... ‘foreseeability.’”); *see also Cruise Connections Charter Mgmt. 1 L.P. v. Attorney Gen. of Canada*, 600 F.3d 661, 665 (D.C. Cir. 2010) (“The FSIA ... requires only that effect be ‘direct,’ not that the foreign sovereign agree that the effect would occur.”).

Here, the creation of the bailments caused a “direct effect” in the United States because Elizabeth Weiss de Csepel was already residing in the United States as of 1946 and Defendants knew that to be the case. Because she was already residing in the United States at the time that the relevant bailments with Defendants were created, Defendants thereby took on the obligation to hold and return property to a United States resident under the 1947 Peace Treaty, as well as under any separate bailments that were created with respect to her art during that period. When Defendants breached those bailments in 2008 when they refused to return Elizabeth Weiss de Csepel’s art to her daughter, Martha Nierenberg, they breached a duty owed to a United States citizen living in the United States. Accordingly, Defendants’ creation (and repudiation) of the bailments clearly had a “direct effect” in the United States. *See Siderman*, 965 F.2d at 711-712 (citing “the general rule that ‘a direct effect occurs at the locus of the injury directly resulting

from the sovereign defendant's wrongful acts'" and finding that the alleged seizure and continued operation of the plaintiffs' property by the defendants had direct effects in the United States); *Cruise Connections Charter Management*, 600 F.3d at 665 (Canada's termination of a contract with a United States corporation had a direct effect in the United States where it caused the corporation to lose revenues under third-party agreements).<sup>22</sup>

**B. THE 1973 AGREEMENT DOES NOT BAR PLAINTIFFS' CLAIMS**

Contrary to Defendants' assertions (Def. Br. at 21 n.16 (citing 28 U.S.C. § 1604)), the 1973 Agreement does not divest this Court of subject matter jurisdiction or otherwise bar Plaintiffs' claims.

**1. The 1973 Agreement Applied Only To Claims Of Persons Who Were United States Citizens In 1973 And At The Time Of The "Taking"**

In arguing that the 1973 Agreement "precludes all claims for the 'nationalization, compulsory liquidation, expropriation or other taking' of property where the alleged taking occurred between 1939 and 1973," Defendants omit a crucial limitation. (Def. Br. at 21.) The 1973 Agreement settled only claims of (i) "nationals of the United States" (i.e., United States citizens) against Hungary (ii) for property that was subject to measures of "nationalization, compulsory liquidation, expropriation, or other taking" by Hungary between 1939 and 1973. *See* 1973 Agreement, arts. 1-3 (emphasis added). Moreover, it settled only claims of persons who

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<sup>22</sup> By contrast, in the cases relied on by Defendants (Def. Br. at 32-33), the "effects" of defendants' alleged commercial conduct were significantly more attenuated. *See Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994) (holding that Nazi enslavement of American plaintiff residing in Slovakia during World War II did not cause "direct effects" in the United States where "[m]any events and actors" intervened between the work that plaintiff performed and the United States and plaintiff did not return to the United States immediately following his liberation); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) (holding that bank transfers in the United States were "simply too attenuated" from the defendants' actions to be considered a direct effect).

were United States citizens both in 1973 and when their property was taken. Such claims are not asserted here.

The 1973 Agreement was based on the concept of espousal, pursuant to which a state acts on behalf of its citizens and advances their claims against another state:

[E]spousal is one of the key concepts in the legal framework of international claims. Under international law and practice, claims between a national of one country and a foreign state are deemed to be claims between the two countries which those sovereigns may settle ... for example, by the negotiation of government-to-government settlement agreements that settle a block of claims in exchange for a lump-sum payment from the other government to the United States.

(See Benenati Decl., Ex. Q (*Property Restitution, Compensation, and Preservation: Hearing before the Commission on Security and Cooperation in Europe*, 104<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (July 18, 1996), at 3 (Statement by Chairman of the U.S. Foreign Claims Settlement Commission) (explaining that “[t]he claims that the Commission adjudicates are espousable claims.”).)

The United States can only espouse or settle by treaty or executive agreement claims by persons who were United States citizens at the time of their injury. See *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203, 206 (D.C. Cir. 1987). The United States expressly recognized this limitation on its authority during the negotiations of the 1973 Agreement. (See Benenati Decl., Ex. E (Transcript of Negotiations) at 238.)

After the 1973 Agreement was signed, both the United States Department of State and the United States Congress clearly recognized that the 1973 Agreement covered only claims of persons who were United States citizens both in 1973 and at the time of their injury. (See Benenati Decl., Ex. F (2002 Bettauer letter) (confirming that the 1973 Agreement “did not settle or discharge claims of U.S nationals who became U.S. nationals after their claim arose”); Ex. G (1973 letter from Kwiatek to Lowinger) (explaining that the State Department could not assist persons who were Hungarian nationals at the time of the taking); Ex. H (1973 Letter from

Wright to Sen. Cranston) (explaining that claims of persons who were not nationals of the United States on the date their claims arose were excluded under the Agreement).) *See also* 1974 Act, § 3, 22 U.S.C. § 1641b (providing compensation only for claims for the taking of “property of nationals of the United States” in Hungary).

Likewise, the Foreign Claims Settlement Commission clearly understood both the First and Second Hungarian Claims Programs to be available only to persons who were United States citizens both at the time the Programs were implemented and when their claims arose. (*See* Benenati Decl., Ex. B (House Report) at 4, Ex. C (Hearing Transcript) at 9 and Ramirez Decl., Ex. D (Award to Erzsebet Weiss de Csepel) (stating that the award excluded any claim for art not “compulsorily liquidated or otherwise taken between June 23, 1952, the date claimant became a national of the United States, and August 9, 1955”).) The Commission applied the same standard to its other claims programs. *See De Vegvar v. Gilliland*, 228 F.2d 640, 641 (D.C. Cir. 1955) (recognizing that the Foreign Claims Settlement Commission refused to provide compensation to a plaintiff who was not a United States citizen at the time that her property was taken by Yugoslavia).

Contrary to Defendants’ assertions (Def. Br. at 32, n. 22; 36-37), the 1973 Agreement does not bar any of the Plaintiffs’ claims because none of the claims are based on the taking of property of a United States citizen during the relevant period. *See Haven v. Rzeczpospolita Polska*, No. 99 C 1727, 1999 U.S. Dist. LEXIS 16228, at \*11-12 (N.D. Ill. Oct. 1, 1999) (rejecting defendants’ argument that a 1960 executive agreement settling certain claims of United States nationals against Poland barred plaintiffs’ claims for expropriation of real property in Poland during and after World War II where the plaintiffs were not United States nationals at

the time their property was taken).<sup>23</sup> Plaintiff de Csepel's claims are derived both from the interest in the Herzog Collection of his grandmother, Elizabeth Weiss de Csepel, and from that of his great-uncle, István Herzog, who was never an American citizen. Elizabeth Weiss de Csepel – the only United States citizen with an interest in the Herzog Collection at the time of the 1973 Agreement – did not become a United States citizen until 1952. Therefore, the 1973 Agreement could only conceivably apply to a “taking” of her property by Hungary between 1952 and 1973, and there was no such taking. Instead, the relevant “takings” occurred during the Holocaust – long before Elizabeth Weiss de Csepel acquired United States citizenship – and in 2008 when Hungary repudiated the demand of her daughter, Martha Nierenberg, for the art, and therefore breached the bailments that were created after the war. (Compl. ¶¶ 79, 94, 104, 107.) István Herzog died as a Hungarian citizen in 1966 and his heirs were not United States citizens at any point prior to 1973, and the 1973 Agreement therefore cannot bar any claim derived from István Herzog's interest in the Herzog Collection. (Compl. ¶ 42.)

Defendants admit that the 1973 Agreement does not bar the claims of Plaintiffs Angela and Julia Herzog, who inherited their interest in the Herzog Collection upon their father's death

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<sup>23</sup> The cases relied on by Defendants (Def. Br. at 24) do not hold otherwise. In *Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7, 9-10 (D.D.C. 1986), *aff'd on other grounds*, 834 F.2d 203 (D.C. Cir. 1987), the court declined to decide whether a 1981 executive agreement between the United States and Czechoslovakia extinguished plaintiffs' claims where plaintiffs were not United States citizens when their property was taken and were therefore excluded by the terms of the agreement. Congress's decision to provide *ex gratia* compensation to the plaintiffs also counseled in favor of the court abstaining from exercising jurisdiction. See *Dayton*, 672 F. Supp. at 12. In *Schmidt v. Polish People's Republic*, 579 F. Supp. 23, 26-27 (S.D.N.Y. 1984), *aff'd*, 742 F.2d 67 (2d Cir. 1984), the court concluded that it had jurisdiction under the FSIA over plaintiffs' claims against Poland, but found that plaintiffs' claims were time-barred because the relevant breaches had occurred more than six years prior to the commencement of the action.

in Hungary in 1943, and who were never United States citizens.<sup>24</sup> (Compl. ¶ 41; Def. Br. at 32 n.22 (arguing that the “1973 Agreement bars the U.S. citizen claims, leaving only the claims of Italian citizens”).)<sup>25</sup>

**2. There Was No Relevant “Taking” Of Elizabeth Weiss de Csepel’s Portion Of The Herzog Collection Between 1952 and 1973**

Because Elizabeth Weiss de Csepel was the only United States citizen who could conceivably have been covered by the 1973 Agreement, the 1973 Agreement can only apply if there was a “taking” of her property between 1952 and 1973. Defendants identify only one possible ground for a relevant “taking” of any portion of Elizabeth Weiss de Csepel’s interest in the Herzog Collection between 1952 and 1973, namely, the 1954 Museum Decree, and point to the 1959 decision of the United States Foreign Claims Settlement Commission awarding compensation to Elizabeth Weiss de Csepel as evidence that the Commission considered the 1954 Museum Decree to apply to the twelve works of art at issue in that claim. (Def. Br. at 5, 9.)

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<sup>24</sup> Nor does the 1973 Hungary-Italy Agreement (Bánki Decl., Ex. J) bar their claims because Angela and Julia Herzog did not become Italian citizens until 1959 and 1960, respectively. Therefore, neither sister was an Italian citizen at the time their property was taken and Italy could not have espoused or settled their claims. (Pizzi Decl., ¶¶ 7-12.) Moreover, even if the Herzogs’ claims were covered by the Hungary-Italy Agreement (which they are not), the Hungary-Italy Agreement provides only that *Italy* “shall no longer assert nor sustain any claim” against Hungary covered by the Agreement (See Bánki Decl., Ex. J (1973 Hungary-Italy Agreement), Art. IV); the Agreement says nothing concerning the rights of private claimants to assert claims against Hungary or its agencies or instrumentalities in the United States. (Pizzi Decl., ¶ 12.)

<sup>25</sup> Defendants’ unsupported statement that “[w]ithout a U.S. citizen plaintiff in this case, there is no viable basis for jurisdiction” (Def. Br. at 28, 56) is wrong. As this Court recognized in *Idas Res. N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, No. 06-00570 (ESH), 2006 U.S. Dist. LEXIS 77928, at \* 7-8 (D.D.C. Oct. 26, 2006) (Huvelle, J.), *aff’d*, No. 06-7202, 2007 U.S. App. LEXIS 25500 (D.C. Cir. Oct. 29, 2007), the “FSIA permits suits in U.S. courts against foreign states (or their political subdivisions, agencies or instrumentalities) even when all plaintiffs are themselves foreign citizens.” See also *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983) (explaining that as long as an exception to immunity under the FSIA is met, an action “may be brought in federal court regardless of the citizenship of the plaintiff”).

Defendants offer no authority for their conclusory assertion that the 1954 Museum Decree applies to all forty of the artworks identified in the Complaint; instead, Defendants simply annex a copy of the Decree to the affidavit of their Hungarian counsel and assert (without support) in their brief that it applies. (Def. Br. at 45.)

The 1954 Museum Decree applied only to art that was in the custody of a Hungarian museum and (i) whose owner was unknown or (ii) whose owner had left the country without permission. (See Lattmann Decl. ¶ 32; Bánki Decl., Ex. C (1954 Museum Decree) p. 2, § 9(1).) Neither of those conditions applied to Elizabeth Weiss de Csepel's art because Defendants always knew who owned the items from the Herzog Collection in their possession, and Elizabeth Weiss de Csepel cannot be considered to have left the country without permission. (See Pasztory Decl. ¶¶ 11-12; Varga Decl. ¶¶ 12-15.) Nor could it apply by its terms to any art that was in the custody of the University in 1954.

After reviewing the relevant documentary evidence, Hungary's self-appointed Committee of Experts (which included the Director of the Museum of Fine Arts) never found the 1954 Museum Decree applicable to any of the pieces of the Herzog Collection it evaluated (including pieces at issue in this litigation), and the Hungarian courts – including the Hungarian Supreme Court – expressly rejected application of the 1954 Museum Decree to the pieces of the Herzog Collection at issue in the Nierenberg litigation (which also includes pieces at issue in this litigation). (Pasztory Decl. ¶¶ 11-12; Varga Decl. ¶¶ 12-15.)

The fact that the United States Foreign Claims Settlement Commission may have reached a different conclusion in 1959 – based on what we know now to be a flatly erroneous factual submission from Elizabeth Weiss de Csepel (*see supra* at 11-12) should not control, particularly in light of the contrary findings of the Hungarian courts with respect to the same pieces of art

after reviewing the relevant documentary evidence from the government and the museums. Nor can the Commission's findings with respect to those twelve pieces of art be extrapolated to all forty pieces of art claimed in the Complaint.<sup>26</sup>

At most, the relevance of the 1954 Museum Decree, if any, to the ownership of each of the forty artworks claimed in the Complaint is an issue of fact that cannot be resolved on a motion to dismiss.

**3. Even If The 1973 Agreement Applied To Some Of The Art, It Does Not Divest This Court Of Subject Matter Jurisdiction**

The FSIA, which was enacted on October 21, 1976, added Section 1604 to Title 28 of the U.S. Code, which provides that “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”<sup>27</sup> Defendants argue that the 1973 Agreement is an “existing international agreement,” as provided in Section 1604, and that this Court therefore lacks subject matter jurisdiction irrespective of whether any exception to immunity under the FSIA is satisfied. (Def. Br. at 21 n. 16.) Even if this Court finds that the 1973 Agreement applies to some or all of the twelve pieces of art for which Elizabeth Weiss de Csepel received some compensation from the Commission (which it should not), the 1973 Agreement does not divest this Court of subject matter jurisdiction.

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<sup>26</sup> Because Plaintiffs are not seeking to review the “action of the Commission in allowing or denying any claim,” 22 U.S.C. § 1623(h), the cases relied on by Defendants (Def. Br. at 25-27) are inapposite.

<sup>27</sup> The FSIA also added 28 U.S.C. § 1330(a), which provides that “[t]he district courts shall have original jurisdiction without regard to amount in controversy over any nonjury civil action against a foreign state ... as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title or under any applicable international agreement.” 28 U.S.C. § 1330(a) (emphasis added).

In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) the Supreme Court held that the “subject to” clause in Section 1604 applies only “when international agreements ‘expressly conflic[t]’ with the immunity provisions of the FSIA.” 488 U.S. at 442 (emphasis added). Here, as in *Amerada Hess*, there is no express conflict between the provisions of the 1973 Agreement and the FSIA. The 1973 Agreement provides, in relevant part, that

neither Government will present to the other on its behalf or on behalf of any person included in the definition of the United States or Hungarian nationals any claims which have been referred to in this Agreement and neither Government will support such claims. In the event that such claims are presented directly by nationals of one country to the Government of the other, such Government will refer them to the Government of the national concerned.

1973 Agreement, art. 6(3). Accordingly, while the United States agreed not to espouse certain claims of its citizens that were resolved by the 1973 Agreement, the Agreement is entirely silent on the question of sovereign immunity and states simply that the United States will refer covered claims of its citizens to Hungary. In the absence of an express conflict between the 1973 Agreement and the FSIA, this Court should evaluate subject matter jurisdiction over Defendants according to the exceptions to immunity outlined in the FSIA.

## **II. THE DOCTRINE OF *FORUM NON CONVENIENS* DOES NOT SUPPORT DISMISSAL**

This Court should also reject Defendants’ attempt to avoid adjudication in this forum pursuant to the doctrine of *forum non conveniens*. (Def. Br. at 40-43.) Defendants cannot meet their heavy burden of showing that this case should be dismissed under this discretionary doctrine. Dismissal on *forum non conveniens* grounds should only be granted “when trial in the chosen forum would ‘establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff’s convenience’ or when the ‘chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.’” *Piper Aircraft Co.*

*v. Reyno*, 454 U.S. 235, 241 (1981) (quoting *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). Defendants come nowhere close to making either of these showings.

**A. Plaintiffs' Choice Of Forum Is Entitled To Substantial Deference**

There is a substantial presumption in favor of the plaintiff's choice of forum. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."), *superseded by statute on other grounds as stated in American Dredging Co. v. Miller*, 510 U.S. 443, 448 n.2 (1994); *Laker Airways Ltd. v. Pan Am. World Airways*, 568 F. Supp. 811, 813 (D.D.C. 1983). That is particularly true where, as here, at least one of the plaintiffs is a United States citizen. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000) (Supreme Court precedent "has clearly and unambiguously established that courts should offer greater deference to the selection of a U.S. forum by U.S. resident plaintiffs when evaluating a motion to dismiss for *forum non conveniens*"); *Bodner*, 114 F. Supp. 2d at 131 (a United States citizen's choice of forum "is entitled to significant deference.").<sup>28</sup>

**B. Hungary Is Not An Adequate Alternative Forum**

As Defendants admit, it is their burden to establish that Hungary is an adequate alternative forum for the resolution of Plaintiffs' claims. (Def. Br. at 40.) *See El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996); *Chabad*, 466 F. Supp. 2d at 27. To make that showing, Defendants must show that "(1) defendants are amenable to process in the

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<sup>28</sup> Contrary to Defendants' assertions (Def. Br. at 40), the fact that Plaintiffs do not reside in the District of Columbia is immaterial – it is the choice of a United States forum rather than the particular district that matters. *See Wiwa*, 226 F.3d at 103 ("[t]he benefit for a U.S. resident plaintiff of suing in a U.S. forum is not limited to suits in the very district where the plaintiff resides, especially considering that the defendant may not be amenable to suit in the plaintiff's district of residence"); *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000) (plaintiffs' "'home forum' as American citizens is a United States court").

alternative forum and (2) the subject matter of the lawsuit is cognizable in the alternative forum so as to provide plaintiffs appropriate redress.” *Bodner*, 114 F. Supp. 2d at 132. Defendants have failed to make that showing here.

The fact that one other court may have found Hungary to be an adequate alternative forum for the resolution of different claims (Def. Br. at 41) does not mean that Hungary is automatically an adequate alternative forum for the resolution of Plaintiffs’ claims. See *Moscovits v. Magyar Cukor Rt.*, 00 Civ. 0031(VM), 2001 U.S. Dist. LEXIS 9252, at \*14 (S.D.N.Y. June 29, 2001) (holding that Hungary was an adequate alternative forum for claims brought by the assignee of a private Hungarian company against another private Hungarian company), *aff’d*, 34 Fed. Appx. 24 (2d Cir. 2002); *McLellan v. Am. Eurocopter, Inc.*, 26 F. Supp. 2d 947, 950 (S.D. Tex. 1998) (even where other courts have found Canada to be an adequate alternative forum, that determination was not controlling because each case is fact specific).<sup>29</sup>

The fact that Martha Nierenberg pursued certain claims in Hungary in 1999 does not establish that Hungary was then, much less that it is now, an adequate alternative forum for the resolution of Plaintiffs’ claims. See *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 159 (2d Cir. 2005) (A “*forum non conveniens* analysis does not concern itself with the reason why an alternative foreign forum is no longer available; its singular concern is the fact of present availability.”). Defendants do not explain how Plaintiffs’ claims could presently be brought in a Hungarian court. See *Chabad*, 466 F. Supp. 2d at 27 (holding that “defendants’ ... conclusory statements as to whether this case can be brought in a Russian court” were insufficient to show

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<sup>29</sup> Defendants’ reliance on *Dorfman v. Marriott Int’l Hotels, Inc.*, No. 99 Civ. 10496 (CSH), 2001 U.S. Dist. LEXIS 642, at \*23 (S.D.N.Y. Jan. 26, 2001) (cited at Def. Br. at 41) is entirely misplaced because the plaintiffs in that case conceded that Hungary was a viable alternative forum and the district court nevertheless refused to dismiss the claim on *forum non conveniens* grounds. See *id.* at \*29.

that Russia was an adequate alternative forum). Indeed, the final decision of the Budapest Metropolitan Appellate Court in the Nierenberg litigation makes clear that the Hungarian courts consider any claims to the Herzog Collection to be barred by the passage of time because, in their view, Plaintiffs should have pursued their claims during the Communist regime and Plaintiffs' failure to do so allowed Hungary to obtain title to the Herzog Collection via adverse possession. (Bánki Decl., Ex. M.) Nor have the Hungarian courts shown any willingness to order restitution in other cases. (Varga Decl. ¶¶ 18-23.)

“[A]n alternative forum in which the plaintiff can recover nothing for a valid claim is not adequate.” *See Malewicz v. City of Amsterdam*, 362 F. Supp. 2d at 308 (quoting *Mustambara v. Lufthansa German Airlines*, 2003 U.S. Dist. LEXIS 5755 at \*4 (D.D.C. Mar. 24, 2003)); *see also Malewicz*, 517 F. Supp. 2d at 334-35 (because plaintiffs' claims in The Netherlands would be barred by liberative or acquisitive prescription, any remedy in The Netherlands would be non-existent and inadequate); *Bodner*, 114 F. Supp. 2d at 132 (“As defendants have not demonstrated that this Court's abdication of jurisdiction would not strip plaintiffs of class-based relief or of a cause of action, the Court finds that defendants have not established there is an adequate alternative forum available to plaintiffs in this case.”).

**C. Neither The Public Nor Private Interest Factors Favor Dismissal Of This Action**

Even if Defendants could show that Hungary is an adequate alternative forum (which they cannot), the court must balance the relevant private and public interest factors. *See Chabad*, 466 F. Supp. 2d at 28. Here, this is not “one of those rare cases where the doctrine [of *forum non conveniens*] should be applied because neither the public nor private interest factors favor dismissal.” *Gulf Oil Corp.*, 330 U.S. at 509.

The relevant private interest factors that this Court must consider include “(1) relative

ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses, (3) cost of attendance of witnesses, (4) enforceability of a judgment if obtained, and (5) other practical problems that make trial of a case easy, expeditious and inexpensive.” *Chabad*, 466 F. Supp. 2d at 28 (internal citations and quotations omitted). None of these factors favors a Hungarian forum.

While certain documents relevant to the claims may be located in Hungary, other documents are located in the United States and Italy where Plaintiffs reside. Moreover, courts have held that advances in modern technology make the physical location of original documents far less significant than it used to be. *See Chabad*, 466 F. Supp. 2d at 28-29 (holding that the “the location of documents is not a significant factor”); *Bodner*, 114 F. Supp. 2d at 133 (“The costs involved to defendants in defending this action in New York are significantly mitigated by the time- and money-saving tools including e-mail, fax, scanners, digital photography, and global access to the internet.”). Nor does the cost of translating documents weigh in favor of dismissal. *See Chabad*, 466 F. Supp. 2d at 29.

Defendants’ assumption that most relevant witnesses are located in Hungary (Def. Br. at 42) is wrong. None of the Plaintiffs currently resides in Hungary and other witnesses, like Martha Nierenberg – who is elderly – are located here in the United States.

The District Court has the power to attach Hungary’s property in the United States in aid of execution of any judgment rendered under the FSIA. *See* 28 U.S.C. §§ 1610(a)(3), (b)(2); *Chabad*, 528 F.3d at 951 (rejecting Russia’s claim that enforcement of a judgment in the United States would be futile because the court has the power to attach property belonging to Russia in the United States). For all of these reasons, Defendants have failed to meet their burden to show that the private interest factors favor dismissal.

Nor do the relevant public interest factors favor dismissal. The relevant public interest factors include “(1) the preference for deciding local controversies at home, and conversely (2) the preference for resolving significant issues in a more central forum; (3) in diversity cases, the familiarity of the forum with applicable state law; and (4) the burden of jury duty on citizens of a forum unrelated to the case.” *Chabad*, 466 F. Supp. 2d at 28.

This Court is the designated United States forum for all actions brought under the FSIA. See 28 U.S.C. § 1391(f)(4). This Court is well familiar with most of the issues of law that are implicated in this action. See, e.g., *Chabad*, 466 F. Supp. 2d at 14-31 (evaluating jurisdiction under the FSIA, the act of state doctrine, and forum non conveniens); *Malewicz*, 517 F. Supp. 2d at 333-340 (evaluating jurisdiction under the FSIA, exhaustion, statute of limitations, act of state doctrine, and forum non conveniens). Even to the extent Hungarian law is implicated by any of Plaintiffs’ claims, United States courts are experienced in applying foreign law and should not be reluctant to do so. See *Transamerica Leasing Inc. v. La Republica de Venezuela*, 21 F. Supp. 2d 47, 54 (D.D.C. 1998), *rev’d on other grounds*, 200 F.3d 843 (D.C. Cir. 2000); *Manu Int’l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981) (the need to apply foreign law is not a reason to grant *forum non conveniens* dismissal). Because this action is brought under the FSIA, which does not allow for jury trials, there is no burden on potential jurors. See *Chabad*, 466 F. Supp. 2d at 30.

One of the Plaintiffs is a United States citizen and United States courts unquestionably have an interest in protecting the rights of citizens. See *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.* 228 F. Supp. 2d 348, 368 (S.D.N.Y. 2002). Moreover, the United States has a strong public interest in adjudicating claims arising out of Holocaust-era takings of property, as evidenced by the strong support given by members of Congress to the family’s quest

to recover the Herzog Collection (Benenati Decl., Exs. D, I, J) and the numerous other actions in which United States courts have retained jurisdiction over Holocaust-era property claims. See *Chabad*, 466 F. Supp. 2d at 30 (finding that “[t]he general public interest in this case is evidenced by the demonstrated interest and involvement of the United States government in pushing for a resolution of the dispute surrounding the Collection”); *Altmann*, 317 F.3d at 973-74 (refusing to dismiss claim based on *forum non conveniens*); *Malewicz*, 517 F. Supp.2d at 339-340 (same). This Court should also have a strong interest in ensuring that a United States executive agreement and the proceedings of the United States Foreign Claims Settlement Commission are interpreted correctly and are not improperly used by foreign courts to bar meritorious claims, as occurred in the Nierenberg litigation.

### **III. PLAINTIFFS’ CLAIMS ARE NOT BARRED BY ANY STATUTE OF LIMITATION**

Defendants’ argument that this action is barred by the District of Columbia’s three-year statute of limitation for personal property claims (Def. Br. at 44) cannot be appropriately resolved at the motion to dismiss stage and is meritless in any event.

#### **A. This Court Should Refrain On A Motion To Dismiss From Deciding Complex Statute of Limitations Questions Such As Those At Issue Here**

Resolving a statute of limitations defense at the motion to dismiss stage is particularly disfavored in this Circuit because courts have recognized that “resolution [of this defense] generally requires the development of a record and the adjudication of factual issues.” *Malewicz*, 517 F. Supp. 2d at 335. See also *Richards v. Mileski*, 662 F.2d 65, 73 n.13 (D.C. Cir. 1981) (citing to “an overwhelming line of authority” rejecting resolution of a statute of limitations defense at the motion to dismiss stage). At the motion to dismiss stage, the Court must draw all reasonable inferences in favor of the plaintiff. See *supra* at 23. Thus, “[d]ismissal on statute of limitations grounds is only appropriate when the complaint establishes the defense on its face.”

*Malewicz*, 517 F. Supp. 2d at 335; *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (“because statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred”). In *Malewicz*, the court declined to resolve at the motion to dismiss stage the question of whether plaintiff’s claims for restitution of art looted during the Holocaust were barred by a statute of limitation, finding that the question “requires the Court to consider a large amount of evidence outside the pleadings. Not only would the Court have to decide between competing interpretations of the documents in question, it would have to decide whether the statute of limitations should be equitably tolled, which also involves the consideration of facts.” 517 F. Supp. 2d at 336.

Defendants’ argument that the statute of limitations has expired depends on their self-serving (and factually disputed) characterization of Plaintiffs’ claims as involving a “taking” of Plaintiffs’ property pursuant to the 1954 Museum Decree. (Def. Br. at 45.) As discussed *supra* at 48, this Court simply cannot decide without development of a full factual record whether the 1954 Museum Decree applied to any, much less all, of the pieces of the Herzog Collection described in the Complaint (and Plaintiffs submit it applied to none of them). Nor can this Court conclude from the Complaint that Plaintiffs “knew” that Defendants had nationalized or otherwise taken ownership of Plaintiffs’ art (which they had not). (Def. Br. at 46.)<sup>30</sup> Hungary’s own Committee of Experts found otherwise in the mid-1990s, as did the Hungarian courts in the Nierenberg litigation. *See supra* at 19-20.

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<sup>30</sup> Defendants’ argument that statements allegedly made by Martha Nierenberg in a 1999 newspaper interview show that Plaintiffs knew that Hungary had “taken” her property is meritless. (Def. Br. at 46 n.30.) Even if the article were properly the subject of judicial notice (which it is not), the article does not say that Martha Nierenberg or her mother knew that Hungary was asserting ownership over the Herzog Collection in 1999 or earlier.

**B. No Statute of Limitation Bars Plaintiffs' Claims**

Though Defendants do not acknowledge the theory anywhere in their motion, the Complaint makes clear that Plaintiffs' claims are predicated on the creation of bailments at the end of World War II, both pursuant to the 1947 Peace Treaty – in which Hungary agreed to keep custody of Holocaust looted property, including the Herzog Collection, until the property was returned to its rightful owners (Compl. ¶ 69) – and pursuant to other separate agreements between the Defendants and the Herzog heirs. (Compl. ¶¶ 70-73.) *See Rosner v. United States*, 231 F. Supp. 2d 1202, 1214-15 (S.D. Fla. 2002) (sustaining claim for breach of implied-in-fact contract of bailment where government accepted plaintiffs' property knowing that it belonged to plaintiffs, never claimed ownership, took possession with the express intent of returning the property to its rightful owners, stored and guarded the property and indicated expressly and through applicable laws that the property would be returned).<sup>31</sup> Because Hungary held the Herzog Collection only as bailee, Plaintiffs had no cause of action for conversion until a demand for its return was refused unless a reasonable person would have concluded that Defendants had taken action inconsistent with the bailment. *See In re Estate of McCagg*, 450 A.2d 414, 416 (D.C. 1982) (the loan of paintings, without any limit on the time for demanding their return, constituted a bailment for an indefinite term and a cause of action does not arise until a demand has been made and refused).<sup>32</sup> None of those circumstances applied here before 2008, and Plaintiffs' action is therefore timely.

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<sup>31</sup> Defendants do not argue that the Complaint fails to state a claim for bailment.

<sup>32</sup> By contrast, in *Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. at 13, the plaintiffs' claims were based on the nationalization of their property in the 1940s and the three-year statute of limitations for conversion began to run from that date. In *Schmidt v. Polish People's Republic*, 579 F. Supp. at 30 (cited at Def. Br. at 24, 47), plaintiffs' cause of action arose when defendants repudiated their promise to repay the plaintiff bondholders more than six years prior to the commencement of the action.

“Where a demand and refusal are relied on to show a conversion, the refusal must be absolute and unconditional.... A refusal which is not absolute, but is qualified by certain conditions which are reasonable and justifiable ... is not a sufficient basis for a conversion action.” See 90 C.J.S. Trover & Conversion § 45 (2006); Restatement (Second) Torts § 240 (1965) (“[O]ne in possession of a chattel who is in reasonable doubt as to the right of a claimant to its immediate possession does not become a converter by making a qualified refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such right.”). Here, the Complaint alleges that the family spent years diligently negotiating with Defendants for the return of the Herzog Collection after the collapse of Communism and that Defendants did not absolutely and unconditionally refuse to return any portion of the Herzog Collection until 2008. (Compl. ¶ 94.) Accordingly, this action is timely under the District of Columbia’s three-year statute of limitation. See *Malewicz*, 517 F. Supp. 2d at 335 (“If a defendant lawfully acquires the property in the first instance (*e.g.*, through a bailment), a claim for conversion accrues when the plaintiff demands the return of the property and the defendant refuses, or when the defendant takes some action that a reasonable person would understand to be either an act of conversion or inconsistent with a bailment.”) To the extent that Defendants may argue that there were other actions that were somehow inconsistent with the bailment created after World War II, and that a reasonable person would have understood them to be inconsistent with the bailment, those arguments would raise issues of fact that are not appropriately resolved on a motion to dismiss. See *Malewicz*, 517 F. Supp. 2d at 336.<sup>33</sup>

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<sup>33</sup> Defendants’ argument that the discovery rule bars Plaintiffs’ claims (Def. Br. at 44-45) also raises issues of fact that are not appropriately resolved on a motion to dismiss and, in any event,

Even if this action did not involve a bailment, Defendants' argument that any claim for the taking of property during the Holocaust would be time-barred (Def. Br. at 44, n.27) is also wrong. The looting of the Herzog Collection during the Holocaust by Hungary and its Nazi collaborators constituted acts of genocide, war crimes, and crimes against humanity for which no statute of limitation should apply. *See Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 63 (E.D.N.Y. 2005) (no statute of limitation should apply to acts of genocide, war crimes, or crimes against humanity), *aff'd sub nom. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008).<sup>34</sup> Hungary itself has recognized that no statute of limitations exists for war crimes and crimes against humanity. *See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 754 U.N.T.S. 73 (Nov. 26, 1968). (*See also* Compl. ¶ 86.)

**C. Any Applicable Statute of Limitation Should Be Tolled**

Plaintiffs' claims are also timely because any applicable statute of limitation should be equitably tolled. The Supreme Court has held that limitations periods are customarily subject to equitable tolling, "unless tolling would be 'inconsistent with the text of the relevant statute.'" *Young v. United States*, 535 U.S. 43, 49 (2002). "The essence of the doctrine of equitable tolling of a statute of limitations is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action." *Bodner*, 114 F. Supp. 2d at 135. *See Chung v. DOJ*, 333 F.3d 273, 278 (D.C. Cir. 2003) (holding that the statute of limitations may be equitably tolled "when

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is wrong. As discussed *infra* at 60-61, Plaintiffs could not obtain the necessary information to bring their claims sooner.

<sup>34</sup> The fact that this action is brought against Hungary itself – who is alleged to have perpetrated the crimes at issue – distinguishes this case from the cases against private museums relied on by Defendants. (Def. Br. at 27.)

the plaintiff despite all due diligence ... is unable to obtain vital information bearing on the existence of his claim.”); *Rosner*, 231 F. Supp. 2d at 1209 (tolling Federal Tort Claims Act’s statute of limitations so that Hungarian Jews could seek the return of property seized by the federal government during World War II).

Here, the Complaint alleges that Plaintiffs were unable to obtain accurate information as to what had become of their property during the Communist era (Compl. ¶¶ 75, 93) and could not have pursued a claim in Hungary during that period. (Compl. ¶¶ 76, 93.) Members of Congress have agreed with Plaintiffs’ argument that no relief was possible until after the fall of Communism. (See Benenati Decl., Exs. D, I, J (letters).)

Plaintiffs’ claims should also be equitably tolled even after the fall of Communism and during the pendency of the Nierenberg litigation because Plaintiffs continued to be unable to obtain vital information concerning their claims – including records showing the history of the individual artworks – until well after the collapse of Communism. (Varga Decl. ¶ 5.) During this period, Defendants led Martha Nierenberg to believe that they were giving her demand serious and meaningful consideration and that an amicable resolution could be achieved. (See Pasztory Decl. ¶¶ 7-10.) See *Rosner*, 231 F. Supp. 2d at 1209 (permitting equitable tolling where complaint alleged that “plaintiffs and other members of the class have been kept in ignorance of vital information essential to pursue their claims, without any fault or lack of diligence on their part”). Nor should Plaintiffs be penalized for Martha Nierenberg’s attempts to exhaust remedies in Hungary particularly where, as here, Defendants allege that such exhaustion was required. (Def. Br. at 17 n.15 & 18.) See *infra* at 66 n.39; *Young*, 535 U.S. at 50 (equitable tolling is permitted “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period or where the complainant has been induced or tricked by his

adversary's misconduct into allowing the filing deadline to pass."); *Cf. Owens v. Dist. of Columbia*, 631 F. Supp. 2d 48, 57 (D.D.C. 2009) (Huvelle, J.) (holding that equitable tolling is appropriate where plaintiffs first sought to exhaust their administrative remedies).<sup>35</sup>

#### **IV. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE ACT OF STATE DOCTRINE**

Defendants' argument that Plaintiffs' claims are barred by the act of state doctrine (Def. Br. at 49-52) is also meritless. In general, the act of state doctrine prohibits a United States court from "examin[ing] the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Chabad*, 528 F.3d at 951. Congress has barred application of the act of state doctrine to claims for uncompensated takings of property occurring after January 1, 1959. See 22 U.S.C. § 2370(e)(2) (the "Second Hickenlooper Amendment").

The act of state doctrine "is not jurisdictional, but prudential," and "[t]he burden of proving that the court should apply the act of state doctrine and abstain from hearing the case is on the party asserting the applicability of the doctrine." *Virtual Def. & Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 7-8 (D.D.C. 1999) (denying motion to dismiss on act of state grounds). Because the act of state doctrine is not jurisdictional, courts may not consider its application prior to establishing that subject matter jurisdiction exists. See *In re Papandreou*,

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<sup>35</sup> The cases relied on by Defendants (Def. Br. at 46) are entirely inapposite and, notably, did not leave the plaintiff without a remedy. See *Carter v. Wash. Metro. Area Transit Auth.*, 764 F.2d 854, 857 (D.C. Cir. 1985) (declining to retain jurisdiction where state appellate court had reinstituted plaintiff's state court action); *Sigler v. Youngblood Truck Lines, Inc.*, 149 F. Supp. 61, 67 (D. Tenn. 1957) (holding that Tennessee's non-suit statute did not apply to an action instituted in North Carolina and noting that plaintiff's claim was not time-barred in North Carolina).

139 F.3d 247, 256 (D.C. Cir. 1998). In evaluating whether to apply the doctrine, courts “should be mindful that the decision to deny judicial relief to a party should not be made lightly.”

*Malewicz*, 517 F. Supp. 2d at 337. It is Defendants’ burden to show that Plaintiffs’ claims are barred by the act of state doctrine. *See Chabad*, 528 F.3d at 951. Defendants have failed to make that showing here.

**A. The Act Of State Doctrine Does Not Bar Plaintiffs’ Bailment Claims**

The Complaint alleges that Defendants retained or recovered possession of the pieces of the Herzog Collection that had been looted during World War II pursuant to a series of bailments. (Compl. ¶¶ 69-70, 97-101.) Any repudiation by Defendants of those bailments occurred long after 1959 – the effective date of the Second Hickenlooper Amendment – and the act of state doctrine therefore does not apply. *See Chabad*, 528 F.3d at 953 (holding that the act of state doctrine posed no barrier to plaintiff’s claim that events occurring in 1991 and 1992 effected an unlawful taking of plaintiff’s property); 22 U.S.C. § 2370(e)(2).

**B. The Seizure Of The Herzog Collection During The Holocaust Was Not A Legally Protected Act Of State**

None of the factors outlined by the Supreme Court in *Sabbatino* support application of the act of state doctrine here. First, the taking of the Herzog Collection as part of an organized campaign of genocide against Hungarian Jews was not done for any *bona fide* economic, academic, or other recognized government purpose. (*See supra* at 25-31; Compl. ¶¶ 25-28.) Accordingly, the act of state doctrine should not apply. *See Sabbatino*, 376 U.S. at 428 (counseling against application of the act of state doctrine where the acts at issue have been uniformly condemned by the international community); *Chabad*, 466 F. Supp. 2d at 26 (rejecting application of the act of state doctrine where “[t]he Nazi taking of Jewish property during the Holocaust was manifestly illegal”); *Bodner*, 114 F. Supp. 2d at 130 (“[t]he wholesale rejection of

the Vichy government at the close of World War II render[s] the Act of State doctrine wholly inapplicable to this case”).

Second, Defendants have not made any credible showing that this case will have negative “implications ... for our foreign relations.” *Sabbatino*, 376 U.S. at 428. Members of Congress have for years supported the family’s quest to recover the Herzog Collection. (See Benenati Decl., Exs. D, I, J.) Moreover, United States courts have adjudicated other Holocaust-era claims involving foreign sovereigns. See *Altmann*, 541 U.S. at 680; *Cassirer*, 616 F.3d at 1022; *Malewicz*, 517 F. Supp. 2d at 325. The United States Department of State has also expressly barred the application of the act of state doctrine to the acts of the Nazis, stating that

[t]he policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

See State Department Press Release No. 296, April 27, 1949, *quoted in Bernstein v. N.V.*

*Nederlandsche-Amerikaansch*, 210 F.2d 375, 375-76 (2d Cir. 1954). There is no rational basis for applying a different standard here to the actions of Hungary, a Nazi ally, that were based on similarly repugnant laws and policies.<sup>36</sup> (Lattman Decl. ¶¶ 4-18.)

Third, the balance of factors weighs against applying the act of state doctrine where, as here, “the government which perpetrated the challenged act of state is no longer in existence.” *Sabbatino*, 376 U.S. at 428 (citing the Nazi government at issue in the *Bernstein* case as an example of a government that was no longer “extant”). The District of Columbia Court of Appeals has agreed that this language in *Sabbatino* suggests that “whatever flexibility *Sabbatino*

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<sup>36</sup> In addition, as an ally of Nazi Germany and a belligerent nation during World War II, Hungary should not be able to claim the protection of the act of state doctrine for its wartime acts. See *Bodner*, 114 F. Supp. 2d at n.11 (citing Hague Convention No. IV of October 18, 1907, 36 Stat. 2277).

preserves is at its apex where the taking government has been succeeded by a radically different regime.” *Chabad*, 528 F.3d at 954; *see also Bodner*, 114 F. Supp. 2d at 130 (act of state doctrine did not apply because “the sovereign involved is the Vichy Government, the official acts of which were rejected and revoked by the French government at the end of World War II”); *Menzel v. List*, 267 N.Y.S.2d 804, 816 (rejecting application of the act of state doctrine to the acts of German Nazi officials because “[t]he Third Reich collapsed with the surrender in 1945,” and thus “[t]he Third Reich was neither extant nor recognized by the Government of the United States at the time of trial.”). That is precisely the case here where the Hungarian government that allied with the Nazis and looted the Herzog Collection has been defunct for more than sixty years. Indeed, Hungary itself has suggested in its own new Constitution that Hungary was not acting as a sovereign state during the relevant period of World War II. (Lattman Decl. ¶ 39.)

Finally, the 1947 Peace Treaty – in which Hungary agreed to restitute property looted from Hungarian Jews during the Holocaust – should be considered “a treaty ... regarding controlling legal principles” such that the act of state doctrine should not apply. *See Sabbatino*, 376 U.S. at 428; *Ramirez de Arrellano v. Weinberger*, 745 F.2d 1500, 1540 (D.C. Cir. 1984) (en banc) (“When ... the political branches have specified the controlling legal principles in a treaty with the foreign sovereign or when there are generally accepted tenets of international law concerning the foreign act, the danger of improper judicial interference with the Executive’s responsibilities for foreign affairs is greatly reduced.”), *vacated on other grounds*, 471 U.S. 1113 (1985); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Socialist Ethiopia*, 729 F.2d 422, 426 (6th Cir. 1984) (holding that treaty between United States and Ethiopia providing for “prompt, just and effective compensation” for takings constituted “controlling legal standard”

for purposes of rejecting application of the act of state doctrine); *Am. Int'l Group v. Islamic Republic of Iran*, 493 F. Supp. 522, 525 (D.D.C. 1980) (act of state doctrine did not apply where treaty between United States and Iran provided controlling legal principles).

**V. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS**

This Court should also reject Defendants' footnote argument that "this action involves the application and interpretation of U.S. foreign policy" and therefore that the political question doctrine bars Plaintiffs' claims. (Def. Br. At 25 n.19.) Defendants are wrong. The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962) and the precise confines of the doctrine remain "murky and unsettled." *Harbury v. Hayden*, 522 F.3d 413, 418 (D.C. Cir. 2008). Defendants have not shown that any of the factors relevant to a political question analysis apply here. *See Baker*, 369 U.S. at 217. To the contrary, members of Congress have consistently supported the family's claims. (See Benenati Decl., Exs. D, I, J.) Moreover, other courts have held that "claims for conversion, unjust enrichment, restitution and an accounting with respect to lost and looted property are not committed to the political branches." *Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir. 2005); *see also id.* at 551 (noting that the fact that the Supreme Court "allowed the [Altmann] case to proceed underscores that courts have a place in deciding Holocaust-era claims concerning looted assets."); *Rosner*, 231 F. Supp. 2d at 1204 (holding that plaintiffs' claims for an accounting and restitution of their property based on an implied-in-fact bailment created after World War II did not require deference to the political branches). The Supreme Court made clear in *Baker* that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Defendants have shown no

valid ground for applying the political question doctrine here,<sup>37</sup> and the Court accordingly should reject their political question argument.<sup>38</sup>

**VI. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE DOCTRINES OF INTERNATIONAL COMITY, RES JUDICATA, OR COLLATERAL ESTOPPEL**

Defendants on the one hand argue that Plaintiffs' claims should be barred because they have failed to exhaust their remedies in Hungary<sup>39</sup> (Def. Br. at 17 n.15, 18) but on the other ask this Court to refrain from considering Plaintiffs' claims under the doctrines of international comity, *res judicata* and collateral estoppel because in Defendants' view, the judgment of the

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<sup>37</sup> The cases relied on by Defendants (Def. Br. at 25 n.19) are inapposite and actually support Plaintiffs' arguments. In *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986), the Supreme Court rejected application of the political question doctrine. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) involved application of the federal doctrine of preemption, not the political question doctrine. *Verlinden B.V. v. Cent. Bank of Nigeria* also did not involve the political question doctrine. Indeed, the Supreme Court noted that Congress had enacted the FSIA in order to "free the Government from the case-by-case diplomatic pressures" that had resulted from the courts' traditional deference to the Executive on issues of sovereign immunity prior to the enactment of the FSIA. See *Verlinden*, 461 U.S. at 498 (holding that the Court had jurisdiction under the FSIA to resolve plaintiffs' claims for breach of a letter of credit).

<sup>38</sup> Defendants also assert the doctrine applies because "the Italian Agreement, which governs the claims of the Italian plaintiffs, would require this Court to weigh-in on historical political policies and relations between Italy and Hungary...." (Def. Br. at 25 n.19.) This argument also fails because as discussed *supra*, the Italy-Hungary agreement does not apply to any of Plaintiffs' claims.

<sup>39</sup> This argument is wrong. Contrary to Defendants' assertions (Def. Br. at 18), Martha Nierenberg did exhaust her remedies in Hungary because no further appeal of the 2008 decision of the Metropolitan Appellate Court was possible. (See Varga Decl., ¶ 6.) Nor were the other Herzog heirs required to exhaust their remedies in Hungary because, as the District of Columbia Circuit recently observed, "nothing in 1605(a)(3) suggests that plaintiff must exhaust foreign remedies before bringing suit in the United States." *Chabad*, 528 F.3d at 948 (declining to impose exhaustion requirement on plaintiff asserting claims for recovery of property located in Russia); see also *Cassirer*, 616 F.3d at 1037 (rejecting argument that exhaustion is a statutory prerequisite to jurisdiction under the FSIA). The *Malewicz* case upon which Defendants rely (Def. Br. at 17 n.15) was decided prior to the Court of Appeals' decision in *Chabad*. Moreover, the court held that exhaustion is not required if, as here, the remedies available in the foreign sovereign's courts are inadequate and any attempt to exhaust remedies would be futile. See *Malewicz*, 517 F. Supp. 2d at 333-34; see *supra* at 51. (Varga Decl. ¶¶ 6, 18-23.)

Budapest Metropolitan Appellate Court in the Nierenberg litigation bars Plaintiffs' claims. (Def. Br. at 52-56.) Defendants' arguments are both inconsistent and wrong.

Unlike domestic judgments, foreign judgments are not automatically entitled to *res judicata* effect in United States courts.<sup>40</sup> *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Instead, "the theory often used to account for the *res judicata* effects of foreign judgments is that of comity." *In re Arbitration Between Int'l Bechtel Co. & Dep't of Civ. Aviation of the Gov't of Dubai*, 300 F. Supp. 2d 112, 117 (D.D.C. 2004); *Hilton*, 159 U.S. at 164 ("Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."); *Laker Airways Ltd.*, 731 F.2d at 937 ("'Comity' summarizes in a brief word a complex and elusive concept – the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum."). "Whether a case raises a concern with comity is inherently fact dependent." *SEC v. Banner Fund Int'l*, 211 F.3d 602, 612 (D.C. Cir. 2000).

"The doctrine of international comity neither impels nor obliges the United States district court to decline jurisdiction in a particular case." *Bodner*, 114 F. Supp. 2d at 129. Rather, "the doctrine is premised upon a respect for the acts of another nation balanced by a recognition of international duty and convenience, and consideration for the rights of a nation's own citizens and others under the protection of its laws." *Id*; see also *In re Arbitration of Certain Controversies Between Chromalloy Aeroservices & the Arab Republic of Egypt*, 939 F. Supp.

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<sup>40</sup> Most of the cases relied on by Defendants (Def. Br. at 53-56) are inapposite because they involve the *res judicata* or other preclusive effect of domestic judgments.

907, 913 (D.D.C. 1996) (“Comity *never* obligates a national forum to ignore the rights of its own citizens or of other persons who are under the protection of its laws.”).

Factors that a United States court must consider in evaluating whether to grant comity to a foreign judgment include: (i) “[if] there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction,” (ii) under “a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries” and (iii) whether “there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect.” *Hilton*, 159 U.S. at 202. Those factors do not support application of comity here.

Defendants cannot show that all of the Plaintiffs had a full and fair opportunity in Hungary to litigate their claims concerning all of the art at issue here. The judgment in the Nierenberg litigation involved only a single plaintiff – Martha Nierenberg – and applied only to eleven paintings that had belonged to her mother, Elizabeth Weiss de Csepel that were known at the time to be in the custody of Defendants Hungary, the Museum of Fine Arts, and the Hungarian National Gallery. This action involves different parties and different claims. This action seeks the return of more than forty pieces of art, including art that belonged solely to András and István Herzog and their heirs. Martha Nierenberg was not in privity with the heirs of András or István Herzog in the Nierenberg litigation, as evidenced by the fact that Plaintiffs Julia Herzog and Angela Herzog at one point hired separate counsel and intervened as defendants in that litigation because they disagreed that Martha Nierenberg owned certain of the artworks she

had claimed.<sup>41</sup> (Varga Decl., ¶¶ 7-8.) Defendants Museum of Applied Arts and the University were also not parties to the Nierenberg litigation. Because not all of the Plaintiffs in this action were in privity with Martha Nierenberg, neither comity nor the related domestic doctrine of *res judicata* bars Plaintiffs' claims. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."); *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002) (claim preclusion applies only where a prior suit involved the same parties or their privies and was based on the same cause of action).

Even as to the artworks that were specifically at issue in the Nierenberg litigation, the doctrines of comity, *res judicata* and collateral estoppel should not apply. "[T]he obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act." *Laker Airways*, 731 F.2d at 937; see also *Chromalloy*, 939 F. Supp. at 913 (declining to grant comity to foreign decision vacating arbitration award in part because "[t]he U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable"). Here, allowing the judgment of the Budapest Metropolitan Appellate Court to bar any of Plaintiffs' claims would violate the strong public policy of the United States and of this forum.

American courts have expressed a clear view that the United States has a strong public interest in resolving claims concerning the looting of cultural property, and particularly with respect to the looting of Jewish property during World War II. See, e.g., *Chabad*, 466 F. Supp. 2d at 30 (acknowledging a "strong public interest in the United States in the outcome" of litigation concerning the return of cultural artifacts to American citizens); *Bodner*, 114 F. Supp.

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<sup>41</sup> While the Herzogs later withdrew their objections as to the pieces of art at issue in the Nierenberg litigation, that does not make Martha Nierenberg (or Elizabeth Weiss de Csepel) their "privies" or "predecessors" as Defendants conclusorily assert. (Def. Br. at 56.)

2d at 133 (“Public policy favors providing a forum in which United States citizens may seek to redress an alleged wrong”); *Altmann*, 317 F.3d at 974 (finding that litigation concerning art work looted by the Nazis was properly brought in the United States). *See also* Remarks by J. Christian Kennedy, Special Envoy for Holocaust Issues at Potsdam, Germany, April 23, 2007, *available at* [http://germany.usembassy.gov/kennedy\\_speech.html](http://germany.usembassy.gov/kennedy_speech.html) (noting that the United States is “very much committed to the principle of returning property to its rightful owners in the field of art restitution”). The United States also has a strong public interest in ensuring that its executive agreements – such as the 1973 Agreement – are interpreted correctly in accordance with American law and applicable standards of international law. *See Laker Airways*, 731 F.2d at 939 (refusing to extend international comity to British injunction the sole purpose of which was to interfere with American court’s interest in interpreting and enforcing American antitrust laws). The Hungarian court failed to do that in the Nierenberg litigation when it improperly held that the 1973 Agreement covered takings that were outside the scope of the 1973 Agreement and when it held that the 1973 Agreement could provide grounds for Hungary to assert adverse possession even as to art not covered by the Agreement. Comity does not require United States courts to afford deference to self-interested judgments of foreign courts that are clearly wrong.

Nor can Defendants show that there is “nothing to show either prejudice in the [Hungarian] court, or in the system of laws under which it was sitting” *see Hilton* at 202. Hungary has a long history of avoiding accepting responsibility for its acts of genocide during World War II and has consistently avoided any meaningful attempt to restitute property – and especially art – belonging to Hungarian Jews. (Varga Decl. ¶¶ 18-23.) Nor do Hungarian courts accept that Holocaust survivors could not have achieved restitution during the Communist regime.

**CONCLUSION**

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss in its entirety. Should this Court decide to grant any portion of Defendants' motion, Plaintiffs respectfully request leave to amend their Complaint.

**ORAL HEARING REQUEST**

Pursuant to Local Civil Rule 7(f), Plaintiffs hereby respectfully request an oral hearing on this Motion.

Respectfully submitted,

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Dated: May 2, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Plaintiffs' Memorandum Of Points And Authorities In Opposition To Defendants' Motion to Dismiss the Complaint and the accompanying declarations, exhibits, and proposed order were served this 2nd day of May, 2011, via the Court's electronic filing system on the following individuals:

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