IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. de CSEPEL, *et al.*	
Plaintiffs,	
vs.	**No. 1:10-cv-01261(ESH)**
REPUBLIC OF HUNGARY, *et al.*,	
Defendants.	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDICIAL NOTICE OF DOCUMENTS AND FACTS

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Dated: May 2, 2011

Plaintiffs David L. de Csepel, Angela Maria Herzog and Julia Alice Herzog respectfully submit this memorandum of law in opposition to Defendants' Motion For Judicial Notice of Documents and Facts [Dkt. No. 14].

PRELIMINARY STATEMENT

Defendants ask this Court to take judicial notice of fourteen documents pursuant to Federal Rule of Evidence 201(b)(2). Those documents fall into three categories:

(1) court documents from the litigation brought by Plaintiff de Csepel's aunt, Martha Nierenberg, in Hungary in 1999 (Defendant's Motion For Judicial Notice Of Documents and Facts ("Judicial Notice Motion"), Items 1 and 2);

(2) Hungarian treaties and other Hungarian statutes (Judicial Notice Motion, Items 3-13), and

(3) a newspaper article published in The Journal News (Westchester County, NY) on October 6, 1999 (Judicial Notice Motion, Item 14).

Federal Rule of Evidence 201 allows a court to take judicial notice of "adjudicative facts," which are only those facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Because none of the documents that are the subject of Defendants' motion can properly be considered "adjudicative facts" within the meaning of Rule 201(b)(2), Defendants' motion for judicial notice should be denied.[1]

[1] Plaintiffs expressly reserve their right to object to the admissibility of any of the documents and/or facts that are the subject of this motion.

ARGUMENT

I. Matters of Foreign Law (Categories 1 and 2) Are Not Properly The Subject Of Judicial Notice Under Federal Rule of Evidence 201

Defendants ask this Court to take judicial notice of the "existence" of Martha Nierenberg's 1999 Complaint in Hungary, the "existence" of the 2008 decision of the Budapest Metropolitan Court in the Nierenberg Litigation, and the fact that the court in that 2008 decision denied her claims. (*See* Defendants' Memorandum of Points and Authorities in Support of Motion for Judicial Notice of Documents and Facts, dated February 15, 2011 ("Def. Br.") [Dkt. No. 14] at 6-7.) Defendants also ask the Court to take judicial notice of the "existence" of various Hungarian treaties and statutes. (Def. Br. at 7.)

None of these documents are properly the subject of judicial notice under Federal Rule of Evidence 201 because they are not "adjudicative facts" within the meaning of that Rule.[2] "Adjudicative facts," for purposes of Rule 201, "are simply the facts of the particular case" and are distinct from "legislative facts" which "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *See* Rule 201, Note to Subdivision (a). Thus, laws, statutes and treaties are not generally considered to be properly the subject of judicial notice pursuant to Rule 201. *See Von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016, 1021 (9th Cir. 2009) ("Judicial notice of legislative facts … is unnecessary."); *United States v. Knauer*, 707 F. Supp. 2d 379, 397 (E.D.N.Y. 2010) ("Rule 201 was not intended to apply to questions which are characterized as matters of law rather than matters of fact….").

[2] Judicial notice is also only appropriate when the fact to be noticed is relevant. *See Ass'n of Nat'l Advertisers, Inc. v. Fed. Trade Comm'n*, 627 F.2d 1151, 1168 n.24 (D.C. Cir. 1979). As discussed in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, the treaties and statutes relied on by Defendants are simply not relevant to Plaintiffs' claims.

Moreover, Rule 201 does not apply to matters of foreign law; instead, the court's consideration of such matters is governed by Federal Rule of Civil Procedure 44.1. *See* Rule 201, Note to Subdivision (a); *see also Figueiredo Ferraz Consultoria E Engenharia de Projeto Ltda v. Republic of Peru*, 655 F. Supp. 2d 361, 367 (S.D.N.Y. 2009) (differentiating between facts that are the subject of judicial notice and matters of foreign law which are governed by Rule 44.1); *see also Estate of Botvin v. Islamic Republic of Iran*, No. 05-0220, 2011 U.S. Dist. LEXIS 31213, at *22-23 (D.D.C. Mar. 25, 2011) (citing Rule 44.1 as the legal standard for establishing the law of a foreign jurisdiction). Under Rule 44.1, "the court's determination of an issue of foreign law is to be treated as a ruling on a question of 'law,' not 'fact'…." *See* Fed. R. Civ. P. 44.1.

Indeed, Rule 44.1 expressly avoids use of the concept of "judicial notice." As the Advisory Committee explained:

> [Rule 44.1] refrains from imposing an obligation on the court to take 'judicial notice' of foreign law because this would put an extreme burden on the court in many cases; and it avoids use of the concept of 'judicial notice' in any form because of the uncertain meaning of that concept as applied to foreign law…. Rather the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties.

See Advisory Committee Notes on 1966 Amendments to Rule 44.1.

The cases relied on by Defendants do not hold otherwise, as each involved judicial notice only of *domestic* litigation and pleadings. *See Klamath Water Users Ass'n. v. Fed. Energy Reg. Comm.*, No. 06-122, 2007 U.S. App. LEXIS 13483, at *2 (D.C. Cir. June 7, 2007) (taking judicial notice of pleadings filed with the Federal Energy Regulatory Commission); *Dupree v. Jefferson*, 666 F.2d 606, n.1 (D.C. Cir. 1981) (taking judicial notice of related proceedings in D.C. District Court); *Wise v. Glickman*, 257 F. Supp. 2d 123, n.5 (D.D.C. 2003) (taking judicial notice of arbitrator rulings in related case filed in same district); *Hinton v. Shaw Pittman Potts &*

Trowbridge, 257 F. Supp. 2d 96, n.5 (D.D.C. 2003) (taking judicial notice of records from related domestic criminal proceeding).

Moreover, while Defendants ask the Court to take judicial notice only of the "existence" of the Complaint and the 2008 decision from the Nierenberg Litigation, it is evident from Defendants' motion to dismiss that Defendants seek to have the Court do far more than that. Defendants have argued that Plaintiffs' claims should be barred by the doctrine of *res judicata* based on those documents. *See* Defendants' Mem. Of Points and Authorities in Support of Their Motion to Dismiss [Dkt. No. 15] ("Def. MTD Br.") at 52-56. This is improper even if Rule 201(b)(2) applies (which it does not). *See Klamath Water Users Ass'n*, 2007 U.S. App. LEXIS 13483, at *2 ("The court takes judicial notice of the existence of the pleading, not the accuracy of any legal or factual arguments made therein.").

For all of these reasons, Plaintiffs submit that this Court should deny Defendants' request for judicial notice and instead analyze the decisions from the Nierenberg Litigation and the treaties and statutes submitted by Defendants, to the extent they are relevant, only under Federal Rule of Civil Procedure 44.1 as a matter of law, not fact.

II. The 1999 Newspaper Article Is Not Properly the Subject of Judicial Notice

This Court also should deny Defendants' Motion to the extent it requests that the Court take judicial notice of the 1999 newspaper article relied on by Defendants. This article is also not properly the subject of judicial notice. Although Defendants claim that they are only asking the Court to take judicial notice of the "existence" of the article, it is evident from Defendants' Memorandum in support of their Motion to Dismiss that Defendants improperly seek to rely on the statements attributed to Martha Nierenberg in that article to dispute Plaintiffs' factual assertions in the Complaint. *See* Def. MTD Br. at 46.

Courts may properly take judicial notice of newspaper articles *only* for the limited purpose of noting what was generally available in the public realm at the time the article was written and may not properly consider whether the contents of those articles were in fact true. *See Von Saher*, 578 F.3d at 1022 (taking judicial notice of newspaper publications concerning paintings looted by the Nazis "solely as an indication of what information was in the public realm at the time."); *see also United States v. Philip Morris Inc.*, 116 F. Supp. 2d 131, 154 (D.D.C. 2000) (explaining that it is not appropriate for a party to rely on facts contained in newspaper articles because "[a]lthough courts may take the 'public record' into account when deciding motions to dismiss, that record includes only certain official documents, not mere newspaper articles."); *Deglace v. DEA*, No. 07-5073, 2007 U.S. App. LEXIS 27972, at *1 (D.C. Cir. Nov. 30, 2007) (denying motion for judicial notice where "the substance of the newspaper article submitted by appellant is subject to 'reasonable dispute.'"); *United States v. Friday*, 525 F.3d 938, 959 (10th Cir. 2008) (finding that facts contained in newspaper articles "do not satisfy Fed. R. Evid. 201(b)."). Accordingly, Defendants cannot properly rely on any statements attributed to Martha Nierenberg in the 1999 article (which are not inconsistent with the Complaint in any event) to rebut Plaintiffs' factual allegations.

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that the Defendants' Motion For Judicial Notice of Documents and Facts be denied.

Dated: May 2, 2011

Respectfully submitted,

/s/ Michael D. Hays

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' Memorandum Of Points And Authorities In Opposition To Defendants' Motion For Judicial Notice Of Documents And Facts and the accompanying 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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