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

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| **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 TO DISMISS**

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Plaintiffs David L. de Csepel, Angela Maria Herzog and Julia Alice Herzog (together, "Plaintiffs") respectfully submit this memorandum of law in opposition to the Motion to Dismiss by the Republic of Hungary, the Hungarian National Gallery, the Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics (together, "Defendants") dated May 14, 2014 (ECF No. 86) (the "Motion").

## PRELIMINARY STATEMENT

The Motion is Defendants' second attempt to dismiss the Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).[1] Defendants' first attempt was rejected, first by this Court and later by the Court of Appeals for the District of Columbia Circuit. After losing a motion for rehearing *en banc* and a motion to stay the mandate of the Court of Appeals pending the filing of a petition for a writ of certiorari, Defendants elected not to petition the Supreme Court for certiorari. Instead, they ask this Court to examine subject matter jurisdiction for the second time based on the same facts and arguments that the Court of Appeals already considered and rejected. Defendants' Motion contravenes the mandate rule and the law of the case doctrine and should be denied.

The Motion also fails for the same reasons that the Court of Appeals denied Defendants' prior Rule 12(b)(1) motion to dismiss. The Court of Appeals sustained jurisdiction under the commercial activity exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §

[1] Defendants repeatedly, and misleadingly, mischaracterize their prior motion to dismiss as solely a Rule 12(b)(6) motion. *See* Mem. of Points and Authorities in Support of Motion to Dismiss ("Def. Mem.") at 1, 13, 17. However, there is no doubt that Defendants' prior motion to dismiss was principally a Rule 12(b)(1) challenge to subject matter jurisdiction under the Foreign Sovereign Immunities Act. *See de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 120 (D.D.C. 2011) ("Defendants have moved to dismiss pursuant to Rule 12(b)(1) for lack of jurisdiction…"); *de Csepel v. Republic of Hungary*, 714 F.3d 591, 596 (D.C. Cir. 2013) ("Hungary moved to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)….").

1605(a)(2), because it correctly recognized that Plaintiffs' claims are based on Defendants' repudiation of bailment agreements entered into by Defendants and Plaintiffs' predecessors in the years following World War II. *De Csepel*, 714 F.3d at 600. Defendants maintain that no such agreements existed and complain that the Court of Appeals improperly "inferred" the existence of such "hypothetical" agreements from the allegations of the Complaint. However, the Court of Appeals drew no such inference. The Court of Appeals correctly relied on the facts pleaded in the Complaint to determine that jurisdiction existed. *See id.* at 599-601.

Discovery is still at an early stage, but has already shown that the Court of Appeals was right. The documents produced by Defendants to date confirm that the bailment agreements pleaded in the Complaint were far from "hypothetical," as Defendants have long argued to this Court. Further discovery, including depositions, is necessary to clarify the terms of some of those agreements as some agreements were not in writing, or are no longer available. However, the discovery taken to date shows that Defendants recognized the validity of some of the bailment agreements as recently as 1989 and 2000 when they returned other artworks from the Herzog Collection to members of the Herzog family.

Defendants' argument that the Court of Appeals erred in finding the "direct effect" prong of the commercial activity exception satisfied is likewise barred by the mandate rule and law of the case, but also fails as a matter of law. Contrary to Defendants' assertions, there is no requirement that an effect be "substantial" or "foreseeable" in order for it to be "direct," nor is there a requirement that a defendant agree that the effect would have occurred. There is also no requirement that a plaintiff be a U.S. citizen or that an agreement expressly state that performance is to occur in the United States in order for the breach to have a "direct effect" in the United States. Further discovery is required to confirm which artworks were covered by

what agreements, as well as the terms of those agreements to the extent they are not available. However, Plaintiffs and their predecessors always had the ability to demand specific performance in the United States by requesting export of the artworks to the United States, irrespective of where they resided. Therefore, the Court of Appeals correctly concluded that Defendants' breach of the bailment agreements caused the requisite direct effect in the United States.

Finally, although the Court of Appeals did not reach the issue in light of its conclusion that jurisdiction exists under the commercial activity exception, this Court also has subject matter jurisdiction under the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3). This Court already sustained jurisdiction under Section 1605(a)(3) on Defendants' prior Rule 12(b)(1) motion and this Court's grounds for doing so remain valid. While Plaintiffs' claims are, as the Court of Appeals found, "based upon" Defendants' breach of post-war bailment agreements, those post-war bailment agreements would never have existed had it not been for Defendants' looting and seizure of the art, homes and other property of the Herzog family during World War II. Therefore, "rights in property taken in violation of international law" are clearly "in issue" in this action. Moreover, Defendants' repudiation of the bailment agreements constituted one or more "taking(s)" in violation of international law that are also sufficient to satisfy Section 1605(a)(3).

For all of these reasons, Defendants' motion to dismiss should be denied. Alternatively, this Court should postpone ruling on the Motion until additional discovery is completed, and provide the parties with an opportunity to supplement the record with further briefing and affidavits. The Court of Appeals already sustained jurisdiction at the pleadings stage and this Court ordered full discovery to proceed based on that decision. Defendants chose to file the

Motion just two weeks after the parties exchanged initial discovery responses and documents and now seek to make a record based on facts in their possession that are disputed. As the discovery taken to date confirms, Plaintiffs' claims are based on the breach of multiple bailment agreements, many of which were either not written, or the written agreements are apparently no longer available. Therefore, additional discovery, including fact and expert depositions, is necessary to establish the terms of those agreements, their scope and effect, and the relevant dates and circumstances of breach. Additional fact and expert discovery is also needed to clarify the circumstances under which various Communist-era documents were created, to resolve inconsistencies among those documents, and to establish what Hungarian law was at the relevant time and how it was interpreted and applied (which is not purely a legal issue).

## STATEMENT OF FACTS

The relevant facts are set forth in detail in the Complaint, this Court's prior decision, *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 120-26 (D.D.C. 2011) and the decision of the Court of Appeals, *de Csepel v. Republic of Hungary*, 714 F.3d 591, 594-97 (D.C. Cir. 2013). Because this is a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, this Court may consider not only the facts pleaded in the Complaint, but also extrinsic materials submitted by way of affidavit, in determining whether it has subject matter jurisdiction. *See World Wide Minerals Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1157 (D.C. Cir. 2002).[2] Therefore, Plaintiffs summarize below not only the relevant allegations of the Complaint, but also certain documents produced by Defendants in discovery that supplement and confirm the

[2] Consideration of such materials does not convert the motion to a motion for summary judgment. *See BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 80 (D.D.C. 2003) ("The submission of matters outside the pleadings does not convert a Rule 12(b)(1) motion to one for summary judgment but, rather, permits the court to conduct an independent review of the evidence to resolve factual disputes concerning whether subject matter jurisdiction exists.").

allegations of the Complaint (*see* Declaration of Alycia Regan Benenati ("Benenati Decl.") dated July 25, 2014, Exs. A-U).

The Parties

Plaintiffs are the descendants of Baron Mor Lipot Herzog, a well-known Jewish Hungarian art collector who amassed a magnificent collection of more than two thousand paintings, sculptures and other artworks (the "Herzog Collection") prior to his death in 1934. (Compl. ¶¶ 1, 38.) After Baron Herzog's death, and the death of his wife in 1940, the Herzog Collection was divided among their three children, Erzsebét (Elizabeth) Weiss de Csepel, István (Stephen) Herzog and András (Andrew) Herzog. (Compl. ¶ 39.) The Herzog siblings divided the artworks among themselves, and Plaintiffs are not aware of any document that officially memorializes that division. (*See* Declaration of Michael O. Azat, dated May 14, 2014 ("Azat Decl.") Ex. A (Plaintiffs' Response to Defendants' Interrogatory No. 2).) However, based on the information presently available to Plaintiffs, Plaintiffs have identified which artworks they believe were owned by each of the Herzog siblings. (*See id.* (Plaintiffs' Response to Defendants' Interrogatory No. 7).)[3]

Plaintiff David L. de Csepel, a United States citizen, is the grandson of the late Elizabeth Weiss de Csepel. Elizabeth Weiss de Csepel became a United States citizen on June 26, 1952 and lived in the United States from 1946 until her death 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 remained in Hungary after the war and died in 1966. (Compl.

[3] Plaintiffs specifically reserved the right to supplement their response to Interrogatory No. 7 as additional information is obtained in discovery. *See id.*

¶¶ 40, 42.) Since at least 1999, two of those heirs have been United States citizens. (Azat Decl., Ex. A (Plaintiffs' Response to Defendants' Interrogatory No. 2).)

Plaintiffs Angela Maria Herzog and Julia Alice Herzog are the daughters and sole heirs of the late András Herzog, who died in 1943 after Hungary and its Nazi collaborators sent him into forced labor at the Russian front. (Compl. ¶¶ 7-8, 41.) Angela and Julia Herzog escaped to Italy with their mother in 1944 and returned only briefly to Hungary after the war before settling permanently in Italy. Angela Herzog and Julia Herzog became Italian citizens in 1959 and 1960, respectively. Both currently reside in Italy.

Defendant Republic of Hungary is a foreign state as defined in 28 U.S.C. § 1603(a). 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.)

The Looting of the Herzog Collection During World War II

During World War II, Hungary allied with Nazi Germany and began a brutal campaign of genocide that ultimately resulted in the deaths of more than a half a million Hungarian Jews. (Compl. ¶¶ 49-52.) As part of that campaign, Hungary enacted various laws, modeled on Germany's Nuremberg laws, that eliminated or severely restricted the public, economic and social rights of Jews. (Compl. ¶¶ 44-48; ECF No. 22-24 (Decl. of Tamas Lattmann dated April 29, 2011 ("Lattmann Decl.") ¶¶ 6-16).) Those laws, and various coercive activities engaged in by the Hungarian state, effectively nullified Hungarian citizenship for all Jews. (Lattmann Decl. ¶¶ 17-18.) *See de Csepel*, 808 F. Supp. 2d at 130. Those members of the Herzog family who could manage to do so were forced to flee Hungary in or around May 1944. (Compl. ¶ 63.)

Hungary and its Nazi collaborators seized pieces of the Herzog Collection from their hiding places in the cellar of one of the family's factories and also from the homes, safe deposit vaults, and other properties of the Herzog family. (Compl. ¶¶ 53-61.) Some of the artworks were placed in the Museum of Fine Arts while others were sent to Germany. (Compl. ¶¶ 60-62.) Other artworks were deposited in the museums by representatives of the Herzog family for safekeeping after bombs damaged the family's homes. (*See, e.g.*, Benenati Decl., Ex. A (HUNG010287-010299) (documents from July and August 1944 discussing Andras Herzog's housekeeper, Mrs. Plosz, arranging for 177 antique gold jewelry items (Compl. ¶ 16(xxxii)), 4 antique silver medals (Compl. ¶ 16(xxxv)), and 78 antique silver cameos, intaglios and other semi-precious stones (Compl. ¶ 16(xxxvi)), to be moved to the safe at the Museum of Applied Arts for safeguarding).)[4]

Post-War Bailment Agreements

In 1947, Hungary and the Allies entered into a Peace Treaty. *See* Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065, TIAS No. 16512. Pursuant to Allied restitution policy, certain artworks from the Herzog Collection that had been removed to the territories of the Third Reich were sent back to Hungary where Defendants were responsible for overseeing the process of restitution.

While Defendants "returned" some items from the Herzog Collection to members of the Herzog family in the years following the war, those "returns" were largely on paper or short-

[4] On January 26, 1949, the acting director of the Museum of Applied Arts provided a list to the Council of the Hungarian National Museum of "items of historical value kept in the Museum of Applied Arts as temporary deposits or on any other bases, and which do not constitute the property of the museum." The list included the "András Herzog antique jewelry collection, partly out on loan to the Museum of Fine Arts for exhibition." (Benenati Decl., Ex. B (HUNG009689-9702, at HUNG09697-98).)

lived, and the vast majority of the Herzog Collection remained in the possession of Defendants. (Compl. ¶¶ 70-71.) One reason for this was that Defendants sought to profit from the looting undertaken by Defendants and their Nazi collaborators by imposing an onerous "repatriation duty" in connection with the return of artworks that had been seized and taken abroad to Germany. A December 9, 1947 Report on the One-Year Operation of the Ministerial Commissioner for Affairs of Artworks Seized from Public and Private Collections discusses the return of privately owned artworks from Germany on the so-called "Art Treasure Train" and "Silver Train." The memorandum notes:

> At acceptance, the owners are obliged to pay a duty fee of 11 per cent of the value of the privately owned artworks returned from Germany. It is understandable that the owners of larger collections and artworks of higher value do not hurry to take out their artworks, knowing that such items are in a good place. Thus, I still have 192 artworks in my custody from the consignments of the Art Treasure Train and the Silver Train.

(Benenati Decl., Ex. C (HUNG011008-11023, at HUNG011021-22).) A November 10, 1947 memorandum from a ministerial commissioner to Dr. Gyula Ortutay, Minister of Religion and Public Education, states that various artworks that are the subject of the Complaint were returned to Hungary from Germany and were "the property of the minor heirs of the late Andras Herzog," including:

- Florentine sculptor: 15th century Madonna relief (Compl. ¶ 16(xxvix));
- German master: Saint Catherine wooden sculpture (Compl. ¶ 16(xxv));
- Schwarzwald Master: Saint Agnes wooden sculpture (Compl. ¶ 16(xxiv));
- South German sculptor: Prophet, wooden sculpture (Compl. ¶ 16(xxviii));
- Greco: Christ on the Mount of Olives (Compl. ¶ 16(ix));
- Greco: Saint Andrew (Compl. ¶ 16(vii)); and

- Corot: Lady with a Marguerite (Compl. ¶ 16(iii)).

(*See* Benenati Decl., Ex. D (HUNG010995-010997, at HUNG010996).) In addition, the art returned on the trains from Germany included "property of Istvan Herzog," including:

- Jacopo della Quercia: Female Head, stucco sculpture (Compl. ¶ 16(xxii));
- Giovanni Santi: Christ (Compl. ¶ 16(xviii));
- Greco: The Flagellation of Christ (Compl. ¶ 16(viii));
- Zurburan: Saint Andrew (Compl. ¶ 16(xxi)); and
- a painting by Conninck that is not presently part of the Complaint.

(*Id.*) The Memorandum explains:

> these artworks, following the appropriate certification of ownership, have been released into possession by a committee of representatives from the finance ministry, the justice ministry and the economic supreme council on the basis of my proposal, but despite this the owners, to whom the artworks could only be released in return for the repatriation duty, only redeemed and took away the Zurbaran and Conninck pictures. <u>The rest remain in the care of the office of the ministerial commissioner to this day</u>.

(*Id.* (emphasis added).)

Other documents confirm that Defendants retained possession of many artworks from the Herzog Collection, including for the purpose of exhibiting them, while continuing to recognize the ownership rights of the Herzog family to those artworks. (Compl. ¶ 73.) For example, in August 1948, Herzog family attorney Emil Oppler wrote to the Director of the Museum of Fine Arts expressing surprise to read in the papers that the Museum had "acquired" two El Grecos and was displaying them without requesting his consent and informing him in writing of the holding of the exhibition. (Benenati Decl., Ex. E (HUNG015290-96), at HUNG015294.) The Director responded promptly that the paintings had been borrowed from Ministerial Commissioner Sandor Jeszensky only for temporary exhibition and clarified that:

> It is plain that we consider these paintings to be borrowed pieces, and we would like you to approve our exhibition.

(*Id.* at HUNG015295 (emphasis added).) These paintings were exhibited with signs indicating they were "on deposit." (Compl. ¶ 73.)

Consistent with these documents, a November 20, 1948 memorandum by Commissioner Jeszensky explained that "the Ministerial Commissioner's Office found a solution under which it is able to place works from the Herzog collection at the disposal of the Museum of Fine Arts, as a temporary deposit, for the purpose of exhibiting them." (Benenati Decl., Ex. F (HUNG011369-HUNG0011383), at HUNG011376-77 (emphasis added).) The artworks subject to that arrangement included at least the following artworks that are the subject of the Complaint:[5]

- El Greco: Saint Andrew (¶ 16(vii));
- El Greco: Christ on the Mount of Olives (¶ 16(ix));
- Pordenone: Portrait of a Woman (¶ 16(xvi));
- Eugenio Lucas Padilla: The Revolution (¶ 16(xiv));
- Corot: Lady with a Marguerite (Daisy) (¶ 16(iii));
- El Greco: The Espolio (¶ 16(viii));
- Zurburan: Saint Andrew (¶ 16(xxi));
- Santi: Christ with a Fly (¶ 16(xviii));
- 15th century Florentine Madonna relief (¶ 16(xxvix));

[5] Plaintiffs state "at least" when referring to the documents produced by Defendants because in some cases, the descriptions of artworks listed in the documents are less than clear. Depositions, including expert testimony, will be required to confirm precisely which artworks are described in the documents.

- 15th century Gothic Saint Catherine (¶ 16(xxv)); and
- Schwarzwald Sculptor: Figure of Saint Agnes (¶ 16(xxiv)).[6]

A 1949 list confirms that various artworks "of the late Andras Herzog," including the artworks described in Jeszensky's November 20, 1948 letter and at least the following additional artworks described in the Complaint are "[d]eposited in the custody of the Office of the Ministerial Commissioner:"

- Polidoro da Lanciano: Christ and the Woman Taken in Adultery (¶ 16(xii));
- Figure of Saint Barbara (¶ (xxvi)); and
- South German sculptor: Prophet (¶ 16(xxviii)).

(*See* Benenati Decl., Ex. G (HUNG012000-12002), at HUNG012001 (emphasis added).)

Other artworks were returned to members of the Herzog family after the war, but were later re-deposited according to new bailment agreements with Defendants. (Compl. ¶¶ 72-73.) For example, on May 3, 1950, Herzog family attorney Dr. Emil Oppler offered to deposit various paintings with the Museum of Fine Arts on behalf of Elizabeth Weiss de Csepel "while maintaining the ownership title to the deposit." (Benenati Decl., Ex. H (HUNG012654-12668), at 12663 (emphasis added).) Among the paintings included in the deposit agreement were at least the following artworks that are the subject of the Complaint:

- Mazo (school of Velasquez): Portrait of Don Balthasar Carlos (¶ 16(ii));
- Gianpetro: Christ (¶ 16(xv));
- Bruyn: Portrait of a Man (¶ 16(i));
- Munkacsy: Atelier (In the Studio) (¶ 17(iv));

[6] The Memorandum further notes that the finance ministry had earned income of 81,743.70 frt. to that point from the repatriation duties charged for release of privately owned artworks.

- El Greco: Holy Family (¶ 16(xi));
- Borsos: Architect Zitterbarth (¶17(i)); and
- Van Dyck: Portrait of a Woman (¶ 16(xix)).

(*Id*.) Oppler noted, "I have previously deposited the following painting in the Museum of Fine Art: Courbet: Snowy Landscape." (Compl. ¶ 16(iv)) (*Id.*) On or around May 26, 1950, Defendants acknowledged receipt of some of the paintings listed by Oppler, including Bruyn: Portrait (¶ 16(i)), Mazo: Balthasar (¶ 16(ii)), Gianpietro: Christ (¶ 16(xv)) and Munkacsy: Atelier (¶ 17(iv)) and agreed that "[t]he National Center for Museums and Monuments is handling these works of art as deposits, with acknowledgment of the owner's title." (*See id.* at HUNG012664-12667 (emphasis added).) The artworks were then handed over to the Museum of Fine Arts for "safeguarding." (*See* Benenati Decl., Ex. I (HUNG002241-43), at HUNG002242.)

The same May 1950 deposit agreement also included certain artworks that were returned by Defendants to Elizabeth Weiss de Csepel in 1989: Dutch painter, 17th century: Female Portrait; School of Tiepolo: The Nativity; School of Tiepolo: Adoration of the Magi, as well as Munkacsy's "Bust of Christ" which was returned to Martha Nierenberg in 2000. (*See* Benenati Decl., Ex. J (Defendants' Response to Interrogatory No. 2).) Indeed, when Defendants returned "Bust of Christ" to Martha Nierenberg in 2000, the Director of the Hungarian National Gallery sent a letter to the Directorate for Cultural Heritage explaining:

> The painting, which was in the possession of the Herzog family, was offered to the National Agency for Museums and Monuments by attorney Dr. Emil Oppler on behalf of Erzsebet Herzog on May 3, 1950 as a deposit. The offer was accepted, the painting was placed in deposit in the Museum of Fine Arts on May 26, 1950, from where it was taken over by the Hungarian National Gallery in 1957. This painting is one of the pictures constituting the subject matter of the lawsuit brought by Marta Nierenberg, the heir of Erzsebet Herzog. Since her

> ownership right has never been disputed, we have followed the recommendation of the legal team representing our institution in the case and will release the painting from deposit to attorney Dr. Tamas Varga . . . , the legal counsel of Marta Nierenberg, for domestic placement (with the agreement of the Ministry of National Cultural Heritage and the Treasury Assets Agency).

(Benenati Decl., Ex. K (HUNG017545-017548), at HUNG017546 (emphasis added).) *See also* Benenati Decl., Ex. J (Defendants' Response to Interrogatory No. 20) (acknowledging that Defendants returned "Bust of Christ" because they "reach[ed] the conclusion that the artwork had been held under a valid deposit agreement.").

Based on the foregoing, it is evident that Defendants possessed most, if not all, of the artworks listed in the Complaint based on post-war deposit (bailment) agreements. Further discovery, including depositions, is required to clarify the terms of those agreements to the extent that written agreements never existed or are no longer available and to clarify which artworks were covered by what agreements.

Plaintiffs always had the ability to request export of their artworks to the United States (*i.e.*, specific performance under the relevant bailment agreements). Documents produced by Defendants in discovery show that Defendants permitted the export of art, including to the United States. (*See, e.g.*, Benenati Decl., Ex. L (HUNG009476-9492), at HUNG009484-89 (permits issued to Geza Danos and Peter Danos to export artworks to New York)). While Defendants argue that certain export laws applied throughout the relevant period (Def. Mem. at 23-24 (citing ECF No. 14 (Defendants' Motion for Judicial Notice of Documents and Facts dated February 15, 2011)), Plaintiffs explained in the Declaration of Tamas Varga dated May 2, 2011 ("Varga Decl.") (ECF No. 22-26) that it is far from established to what extent those laws applied to each of the artworks pleaded in the Complaint. Regardless, Defendants do not dispute that export was possible under those laws with Defendants' consent. (Def. Mem. at 23-24.)

## PROCEDURAL HISTORY

Plaintiffs commenced this action on July 27, 2010 asserting claims for breach of contract, conversion, constructive trust, an accounting, declaratory judgment, and restitution based on unjust enrichment arising out of Defendants' breach of various express or implied bailment agreements that allowed Defendants to retain possession of the Herzog Collection in the years following World War II. (ECF No. 1.)

On February 15, 2011, Defendants filed their first motion to dismiss the Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (ECF No. 15) and also filed a Motion for Judicial Notice of certain facts and documents (ECF No. 14). Defendants' motion to dismiss asserted various theories, including foreign sovereign immunity under the FSIA, treaty and/or executive agreement, forum non conveniens, the act of state doctrine, the statute of limitations, the political question doctrine, comity/res judicata, and failure to state a claim for bailment. Because the motion was a Rule 12(b)(1) motion, and the Court was entitled to consider materials outside of the pleadings, both sides submitted affidavits and exhibits for this Court's consideration.[7] In their motion, Defendants argued, *inter alia*, that the commercial activity exception to the FSIA (28 U.S.C. § 1605(a)(2)) was not satisfied because "the basis of Plaintiffs' claims is Hungary's decision to nationalize certain property during the Communist regime …. [a] sovereign act, not a commercial act." (ECF No. 15 at 31.) Defendants also argued that any relevant "acts" could not have had a "direct effect" in the United States, particularly as to the Italian plaintiffs, because all legally significant acts took place in

[7] (*See* ECF. Nos. 15-2 (Declaration of Orsolya Banki with exhibits in support of motion to dismiss), 15-5 (Declaration of Eric Ramirez with exhibits in support of motion to dismiss), 22-24 (Lattmann Decl.), 22-26 (Varga Decl.), 22-2 (Declaration of Alycia Benenati with exhibits in opposition to motion to dismiss), 22-22 (Declaration of Balazs Pasztory), and 22-23 (Declaration of Andrea Pizzi.)

Hungary and therefore had a mere tangential relation to this country. (ECF No. 15 at 32-33.) Defendants also argued that the expropriation exception to the FSIA (28 U.S.C. § 1605(a)(3)) was not satisfied.

On September 1, 2011, this Court denied the motion to dismiss in all respects, except as to eleven paintings that had previously been the subject of litigation in Hungary brought by Martha Nierenberg, Plaintiff de Csepel's aunt. *See de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 135 (D.D.C. 2011). This Court sustained jurisdiction under the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3) and did not reach Plaintiffs' argument that the commercial activity exception, 28 U.S.C. § 1605(a)(2), also conferred jurisdiction. *See id.* at 133 n.4.

On September 12, 2011, Defendants filed a notice of appeal of the denial of their motion to dismiss on grounds of sovereign immunity pursuant to 28 U.S.C. § 1291. Defendants subsequently moved for certification of five additional issues for appeal pursuant to 28 U.S.C. § 1292(b), Plaintiffs cross-moved for certification of the comity ruling, and the District Court granted both motions on November 30, 2011. In their opening brief, Defendants specifically invited the Court of Appeals to consider the commercial activity exception to the FSIA, and argued that the exception was not satisfied because, *inter alia*, all "legally significant act(s)" occurred in Hungary, Hungary's acts were sovereign, not commercial, and there could be no "direct effect" in the United States where only one of three plaintiffs was a U.S. citizen and Istvan Herzog died in Hungary in 1966. (*See* Appellant Final Brief filed November 8, 2012 at 40-43.)

On April 19, 2013 the D.C. Circuit affirmed in part and reversed in part this Court's denial of the Defendants' motion to dismiss. The Court of Appeals found that the Defendants

are not immune from suit under the commercial activity exception to the FSIA, 28 U.S.C. § 1605(a)(2), because 1) Plaintiffs' bailment claim is a form of breach of contract claim, 2) a foreign state's repudiation of a contract is precisely the type of activity in which a private player within the market engages, and 3) said repudiation could have direct effects in the United States. *De Csepel*, 714 F.3d at 598-601. The Court of Appeals also held that Plaintiffs' claims are not barred by treaty or executive agreement and affirmed this Court's rejection of Defendants' remaining defenses. The only ground on which the Court of Appeals reversed this Court was with respect to this Court's conclusion that Plaintiffs' claims for the eleven paintings were barred by comity. The Court of Appeals held that because comity is an affirmative defense for which the party seeking recognition of the foreign judgment bears the burden of proof, such issues are properly addressed at summary judgment or at trial. *See id.* at 607-08.

On May 20, 2013, Defendants filed a petition for rehearing and rehearing *en banc* in the Court of Appeals. In their petition, Defendants argued that "[t]he panel inferred that the alleged bailment contract envisioned a direct effect in the United States because the contemplated return of property 'was to be directed to members of the Herzog family Hungary knew to be residing in the United States.' … This inference is directly contradicted by the complaint and by the documents before the court, which demonstrate that it is unreasonable to assume that the parties to the alleged bailment would anticipate that artworks owned by non-U.S. citizens (with no connection to the United States) would be returned to the United States." (*See* Petition for Rehearing or Rehearing En Banc at 12.) Defendants also argued that Hungary's export laws would prevent the export of the artworks pleaded in the Complaint. (*Id.* at 15.) The Court of Appeals denied the petition on June 4, 2013.

Defendants then moved to stay the Court of Appeals' mandate, claiming that they intended to file a petition for a writ of certiorari with the United States Supreme Court. (*See* Motion to Stay Mandate, dated June 10, 2013.) Defendants reiterated their argument that the Court of Appeals had "ignored materials properly before it that not only made the inference of performance in the United States unreasonable, but made such an inference utterly implausible." (*Id.* at 10.) Plaintiffs opposed the motion. On July 10, 2013, the Court of Appeals stayed the mandate for the limited purpose of allowing Defendants to seek a stay directly from the Supreme Court and ordered Defendants to report within 10 days whether such a motion had been filed. By letter dated July 19, 2013, Defendants advised the Court of Appeals that they did not intend to pursue a stay. The mandate of the Court of Appeals issued on July 23, 2013. Defendants never filed a petition for a writ of certiorari.

Pursuant to the Scheduling Order entered by this Court on December 9, 2013 (ECF No. 82), as amended on March 12, 2014, the parties exchanged their responses to their first sets of document requests and interrogatories on April 30, 2014. Just two weeks later, Defendants filed the Motion. Document discovery is presently scheduled to be completed by August 15, 2014. Fact witness depositions are scheduled to be completed by December 19, 2014 with expert discovery to follow between February and April, 2015. All discovery is scheduled to be completed by May 19, 2015.

## ARGUMENT

### I. STANDARD OF REVIEW

When a defendant challenges only the legal sufficiency of a plaintiff's jurisdictional allegations, 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); *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993). When a defendant contests a jurisdictional fact alleged by the plaintiff, or raises a mixed question of law and fact, the court must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling on the motion to dismiss. *See Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). The court "retains 'considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,' but it must give the plaintiff 'ample opportunity to secure and present evidence relevant to the existence of jurisdiction.'" *Phoenix Consulting*, 216 F.3d at 40; *see also Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537-38 (1995) ("Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements … and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection).").

Defendants disingenuously cite various non-FSIA cases in support of their assertion that Plaintiffs bear the burden of establishing jurisdiction by a preponderance of the evidence. (Def. Mem. at 1-2, 9). However, contrary to Defendants' assertion, the D.C. Circuit has made clear that in the context of foreign sovereign immunity, while a plaintiff may bear an initial burden of producing evidence to show that immunity should not be granted, the ultimate burden of proof of sovereign immunity rests on the sovereign <u>defendant</u>, not the plaintiff. *See Phoenix*, 216 F.3d at 40 (the sovereign "defendant bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity."); *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835, 842 (D.C. Cir. 2006) ("While [plaintiff] bears the burden of

producing evidence to show that immunity should not be granted, [defendant] bears the ultimate burden of persuasion (*i.e.*, to show that the commercial-activity exception does not apply"); *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008) ("For purely factual matters under the FSIA … [plaintiff's burden] is only a burden of production; the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence."). As discussed *infra*, Defendants have failed to meet their burden here.

## II. THIS COURT IS BOUND BY THE COURT OF APPEALS' DETERMINATION THAT SUBJECT MATTER JURISDICTION EXISTS UNDER FSIA SECTION 1605(A)(2)

Under the law of the case doctrine, "the *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*" and "an even more powerful version of the doctrine – sometimes called the 'mandate rule' – requires a lower court to honor the decisions of a superior court in the same judicial system." *LaShawn v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc); *Ins. Group Comm. v. Denver & R.G.W.R. Co.*, 329 U.S. 607, 612 (1947) (The "mandate rule" requires that "[w]hen matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court."). Here, the Court of Appeals already ruled, on Defendants' prior Rule 12(b)(1) motion, that this Court has subject matter jurisdiction over Plaintiffs' claims under the "commercial activity" exception to the FSIA, 28 U.S.C. § 1605(a)(2). Accordingly, the mandate rule precludes this Court from revisiting the D.C. Circuit's conclusion that subject matter jurisdiction exists.

The Supreme Court has instructed the lower courts to be "loathe" to reconsider issues already decided "in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson v. Colt Indus.*

*Operating Corp.*, 486 U.S. 800, 817 (1988). Whether law-of-the-case applies turns "on whether a court previously decide[d] upon a rule of law … not whether, or how well, it explained the decision." *Id.* at 817; *see also Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995) (holding that the law-of-the-case doctrine applies to questions decided "explicitly or by necessary implication"). "The mandate rule 'forecloses relitigation of issues expressly or impliedly decided by the appellate court.'" *Larsen v. U.S. Navy*, 887 F. Supp. 2d 247, 251 (D.D.C. 2012) (quoting *United States v. Susi*, 674 F.3d 278, 283 (4th Cir. 2012)).

Both the Supreme Court and D.C. Circuit have rejected any "jurisdictional question" exception to the law-of-the-case doctrine. *See Christianson*, 486 U.S. at 816 (observing that "[p]erpetual litigation of any issue – jurisdictional or nonjurisdictional – delays, and therefore threatens to deny, justice"); *LaShawn*, 87 F.3d at 1394 ("[T]his court and other courts of appeals routinely apply law-of-the-case preclusion to questions of jurisdiction … and do so even when the first decision regarding jurisdiction is less than explicit.") and 1936 (emphasizing that "no such [jurisdictional] exception exists").[8]

In *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), the D.C. Circuit, as here, was faced with a second motion to dismiss for lack of subject matter jurisdiction based on the FSIA. The Court observed that "[i]n order for us to rule for the second time on Iran's contentions regarding the direct effects portion of § 1605(a)(2), we would have to find some reason for not adhering to the law of the case doctrine." *Id.* at 350 (emphasis added). In

[8] *See also Sierra Club v. Khanjee Holding (US) Inc.*, 655 F.3d 699, 704 (7th Cir. 2011) (law of the case doctrine applies to questions of subject matter jurisdiction); *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir.1996) ("Surely a court that has decided that it has jurisdiction is not duty-bound to entertain thereafter a series of repetitive motions to dismiss for lack of jurisdiction."); *Free v. Abbott Labs., Inc.*, 164 F.3d 270 (5th Cir. 1999) (issue of subject matter jurisdiction would not be reconsidered on second appeal in the absence of a change in the controlling law or facts).

that case, Iran pointed to the Supreme Court's intervening decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) as having changed the law. *Id.* The Court of Appeals agreed, observing that "[t]here is no doubt that, as far as this circuit is concerned, *Weltover* changed the law" but found its prior opinion was unaffected by *Weltover*, and therefore remained the law of the case and was not subject to reconsideration on a second interlocutory appeal.

Here, there is no reason for this Court not to adhere to the mandate rule and the law of the case doctrine. As discussed *infra*, Defendants present no new facts that were not before this Court or the Court of Appeals on their prior motion, nor otherwise unavailable to Defendants at the time of the prior motion. Nor has there been any intervening change in the law. Therefore, this Court should deny Defendants' motion in accordance with the mandate rule and the law of the case doctrine.

## III. THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS UNDER 28 U.S.C. § 1605(a)(2)

As the Court of Appeals has previously held, this Court 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). *See de Csepel*, 714 F.3d at 598. None of the discovery taken to date in this case alters that conclusion. To the contrary, discovery has confirmed the existence of the bailment agreements Defendants have long dismissed as

"hypothetical" and confirmed that the Court of Appeals was entirely correct in sustaining jurisdiction under Section 1605(a)(2).

### A. Plaintiffs' Claims Are "Based Upon" Defendants' Repudiation of Post-War Bailment Agreements

The Court of Appeals held that Plaintiffs' claims are "based upon … act[s] in connection with a commercial activity" because "the particular conduct upon which the family's suit is 'based' for purposes of the commercial activity exception is not the initial expropriation of the Collection during the Holocaust but instead Hungary's creation and repudiation of subsequently formed bailment agreements." *De Csepel*, 714 F.3d at 600.[9] The Court of Appeals held that "[a] bailment is a form of contract, and a foreign state's repudiation of a contract is precisely the type of activity in which a 'private player within the market' engages." *De Csepel*, 714 F.3d at 599 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993)).[10] *See also Malewicz v. Amsterdam*, 362 F. Supp. 2d 298, 313-14 (D.D.C. 2005) (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

[9] "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 v. Nelson*, 507 U.S. at 356.

[10] 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 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 v. Nelson*, 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.'").

sovereign about the act of lending art pieces, even though the pieces themselves might belong to a sovereign").

Defendants maintain – as they did on their prior motion – that no such agreements ever existed. (Def. Mem. at 2, 12-15.) Instead, Defendants accuse the Court of Appeals of improperly drawing "an inference – the hypothetical existence of one or more unidentified and undefined bailments [sic] agreement [sic] between Plaintiffs or their predecessors and a foreign sovereign." Def. Mem. at 13. However, the Court of Appeals drew no such inference. The Complaint clearly pleads the existence of such bailment agreements (Compl. ¶¶ 36, 87-88, 96-105), and the Court of Appeals expressly referenced those allegations in its decision and found them adequate to support jurisdiction. *See de Csepel*, 714 F.3d at 605.[11] Therefore, Defendants' assertion that "Plaintiffs failed to identify with any level of particularity a valid bailment (or

[11] Contrary to Defendants' misstatement of the law, even if the Court had drawn an inference from the allegations of the Complaint, that inference would have been perfectly permissible under the law of this Circuit. *See, e.g., Am. Nat'l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (On review of a motion to dismiss for lack of subject matter jurisdiction, "[w]e assume the truth of all material factual allegations in the complaint and 'construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged,'and upon such facts determine jurisdictional questions." (emphasis added; internal citations omitted). The Supreme Court's decision in *Norton v. Larney*, 266 U.S. 511 (1925) (cited at Def. Mem. at 13, 17, 19, 22) does not hold otherwise. In *Norton*, jurisdiction was raised for the first time on appeal to the Court of Appeals when it emerged that there was no diversity among the parties and the court was required to determine whether the suit arose under a law of the United States. The Supreme Court found that the allegations of the complaint were insufficient to establish jurisdiction, but recognized that "it sufficiently appears elsewhere in the record that the suit arose under an act of Congress and its solution depended on the construction and effect of that act." *Id.* at 513. The Court therefore affirmed the Court of Appeals' finding of jurisdiction because it recognized that "it would be mere ceremony to reverse the decree and remit the purely formal making of the amendment to the lower court."

bailments) in their Complaint" (Def. Mem. at 13) has already been rejected by the Court of Appeals and should not be reexamined by this Court.[12]

Defendants' argument that "even after exchange of discovery, Plaintiffs have provided no meaningful evidence of a valid bailment" (Def. Mem. at 13) is both misleading and meritless. Defendants filed this Motion just two weeks after the parties exchanged initial discovery responses and when the vast majority of relevant documents were entirely in Defendants' possession. The documents subsequently produced by Defendants in discovery confirm that the Court of Appeals was entirely correct in holding that Plaintiffs' claims are based upon various express or implied post-war bailment agreements with Defendants. *See supra* at 7-13 (discussing Benenati Decl., Exs. A-L.)[13]

Defendants' disingenuous argument that documents produced by Plaintiffs in discovery "make clear that neither Plaintiffs' predecessors nor Hungary's Communist government considered themselves to be participants in a 'bailment' with Defendants regarding the artworks" (Def. Mem. at 14) is also flatly wrong. Defendants identify documents relating to three events that they claim show the absence of a bailment relationship:

- Elizabeth Weiss de Csepel's claim for compensation from the United States Foreign Claims Settlement Commission in 1955 for the alleged confiscation of real property and certain works of art (Azat Decl., Ex. G);

[12] Even if the Court of Appeals had not already decided the matter, Defendants' suggestion that Plaintiffs were required to identify the relevant bailment agreements with "particularity" in the Complaint is wrong. *See* Fed. R. Civ. P. 8. *See also de Csepel*, 808 F. Supp. 2d at 136-37 (finding that Complaint stated a claim for bailment); *de Csepel*, 714 F.3d at 605 (same).

[13] Defendants renew their argument that Plaintiffs must provide evidence of "delivery by the bailor and acceptance by the bailee of the subject matter of the bailment" in order to sustain their claims. (Def. Mem. at 13-14.) Both this Court and the Court of Appeals have already held that Plaintiffs have satisfied that requirement at the pleading stage. *See de Csepel*, 714 F.3d at 605; *de Csepel*, 808 F. Supp. 2d at 136-37. The documents cited by Plaintiffs (Benenati Decl. Exs. A-L) further confirm that those elements, to the extent applicable, are satisfied.

- Elizabeth Weiss de Csepel's 1976 claim for compensation for two additional artworks pursuant to the 1973 Agreement and 1966 correspondence with Defendants concerning one of those paintings (Opie: Portrait of a Lady (Compl. ¶ 16(xiii)) (Azat Decl., Ex. C); and

- Defendants' 1949 indictment and 1950 conviction of Ilona (Kiss) Herzog, the ex-wife of Istvan Herzog, for alleged smuggling of art out of Hungary (Azat Decl., Exs. H-J).

(Def. Mem. at 15.) Documents pertaining to the criminal proceedings against Mrs. Istvan Herzog come from Defendants' production, not Plaintiffs'. Regardless, none of these documents or events establishes the absence of a bailment relationship with respect to each of the artworks alleged in the Complaint.

*First*, Elizabeth Weiss de Csepel's 1955 claim to the United States Foreign Claims Settlement Commission was discussed extensively by both sides in the briefing of Defendants' prior Rule 12(b)(1) motion to dismiss, along with the 1954 Museum Decree that she (erroneously) believed gave rise to her claim, and the 1973 executive agreement between the United States and Hungary that gave rise to her separate 1976 claim for compensation.[14] (*See, e.g.*, ECF. No. 15 (Defendants' Memorandum of Law) at 8-14, 21-28.) In its decision, this Court expressly rejected Defendants' argument that the 1954 Museum Decree, the 1973 Agreement, or Elizabeth's 1955 claim to the Commission bar Plaintiffs' bailment claims in this action. *See de Csepel*, 808 F. Supp. 2d at 123-126, 134-35. Likewise, the Court of Appeals specifically

[14] *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). Defendants submitted various documents pertaining to Elizabeth Weiss de Csepel's 1955 claim in connection with their prior Rule 12(b)(1) motion, including the decisions of the Foreign Claims Settlement Commission (*see* ECF No. 15-5 (Ramirez Decl.), Exs. C - E). Therefore, the copy of Elizabeth Weiss de Csepel's 1955 claim to the FCSC produced by Plaintiffs in discovery (a document that is also available in the U.S. National Archives along with the FCSC decisions previously produced by Defendants) is hardly new evidence that warrants reexamining the conclusions of this Court and the Court of Appeals on Defendants' prior motion.

rejected Defendants' argument – renewed here – that these events show that Plaintiffs' claims are based on sovereign acts of expropriation rather than breach of bailment agreements. *See de Csepel*, 714 F.3d at 599-600 (distinguishing *Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006) (cited at Def. Mem. at 14)). Thus, Defendants' attempt to reargue this point is barred by the mandate rule and law of the case. Defendants offer no evidence on this Motion that any of the artworks described in the Complaint were in fact nationalized pursuant to the 1954 Museum Decree. As discussed *infra*, to the extent Defendants specify the date of any "taking" they point to the 1950 criminal attachment of the assets of Mrs. Istvan Herzog, not the 1954 Museum Decree.

*Second*, nor is the March 31, 1966 letter from the Hungarian Ministry of Culture that Elizabeth Weiss de Csepel submitted to the Foreign Claims Settlement Commission in 1976 new evidence showing the absence of a bailment relationship with respect to each of the 44 artworks claimed in the Complaint.[15] (Azat Decl., Ex. C.) The letter asserts, without explanation, that a single painting (Opie: Portrait of a Lady (Compl. ¶ 16(xiii)) was allegedly owned by the Hungarian State as of that date. The letter says nothing about the remainder of the artworks listed in the Complaint. Other documents produced by Defendants show that Defendants sent that letter despite knowing its assertions to be false. (Benenati Decl., Ex. N (HUNG002569-71), at HUNG002570) (July 16, 1965 memorandum stating that the museum could not have become the owner of the Opie because the museum knew that Elizabeth, not the donor, was the owner of the painting at the time they accepted it).

[15] Defendants cite the copy of this document produced by Plaintiffs, but also included a version of this letter in their own document production. (Benenati Decl., Ex. M (HUNG002291-94), at HUNG002292).

*Third*, Defendants' 1950 conviction (in absentia) of the former Mrs. Istvan Herzog for alleged smuggling also fails to show the absence of a bailment relationship with respect to all the artworks pleaded in the Complaint.[16] The documents make clear that only the property of the former Mrs. Istvan Herzog – not the property of the three Herzog siblings – was subject to forfeiture.[17] (Azat Decl., Exs. H-J.) While the November 28, 1950 memorandum Defendants cite discusses the alleged criminal forfeiture of various artworks, including some artworks described in the Complaint, *see* Azat Decl., Ex. J., other documents produced by Defendants show that Defendants were fully aware that not all of the listed artworks were the property of Istvan Herzog – much less his wife – and that art belonging to the Herzog siblings had improperly been swept up into the criminal proceedings. (*See, e.g.*, Benenati Decl, Ex. O (HUNG011803-11811), at HUNG011807) (April 7, 1949 memorandum from Commissioner Jezsensky to Police Lieutenant-Colonel noting that "[detectives] impounded and left in my safekeeping 20 paintings some of which were the property of Istvan Herzog, while others were the property of Andras Herzog. The Record, which had already been pre-written, mentions the artworks as artworks originating from Mrs. Istvan Herzog's collection.") (emphasis added);

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[16] Documents concerning the former Mrs. Istvan Herzog's conviction are also not new facts that warrant reexamining jurisdiction. The Complaint asserts that Hungary brought "false smuggling allegations" against Plaintiffs' predecessors in an effort to retain the artworks (Compl. ¶ 72). Defendants argued to the Court of Appeals on their prior motion, as they do here, that "these are not commercial acts but the acts of a sovereign" (*see* Final Response and Reply Brief of Defendants-Appellants at 33) and the Court of Appeals rejected that argument. *See de Csepel*, 714 F.3d at 599, 604. Moreover, the criminal proceedings against Mrs. Istvan Herzog were discussed extensively in the decisions from the Nierenberg litigation that were before this Court and the Court of Appeals on the prior motion. (*See, e.g.*, ECF. No. 15-2 (Banki Decl.), Ex. M at 10-11.)

[17] Defendants' sole basis for assigning ownership of any of the artworks from the Herzog Collection to Mrs. Istvan Herzog was a contract that she and Istvan had executed in 1944 in an effort to shield his property from the Jewish confiscation laws because she was not Jewish. (Azat Decl., Ex. H at HUNG008085.).

Benenati Decl., Ex. P (HUNG015589-95), at HUNG015593) (March 20, 1951 memorandum from the Director of the Museum of Fine Arts to the National Agency of Museums and Monuments noting that Dr. Henrik Lorant, an attorney representing Elizabeth Weiss de Csepel, had advised him that certain paintings were mistakenly included in the criminal attachment during the criminal proceedings started against Mrs. Istvan Herzog and were in fact the property of his client, Elizabeth Weiss de Csepel. The Director therefore "request[ed] commencement of the procedure for terminating the criminal attachment." (*Id.*))

Later documents show that Defendants continued to treat at least some of the artworks listed in the November 1950 memorandum as deposits. (*See, e.g.*, Benenati Decl., Ex. Q (HUNG015616-15680), at HUNG015651) (July 2, 1951 inventory of exhibited items listing certain artworks as "deposits," including Schwarzwald Sculptor: Saint Agnes (Compl. ¶ 16(xxiv)) and Greco: Christ on the Mount of Olives (Compl. ¶ 16(ix)).); Benenati Decl., Ex. R (HUNG017184-17224), at HUNG017204, HUNG017214 & HUNG017216 (December 17, 1958 "Inventory Book of artworks held in custody (so-called deposit) by the Hungarian National Museum – Museum of Fine Arts" listing various artworks as deposits, including the Quercia: Bust (Compl. ¶ 16(xxii)); German Master: St. Catherine (Compl. ¶ 16(xxv)); and Frankish Master: Prophet (Compl. ¶ 16(xxviii))).[18]

Forty years later – in February 1997 – the Director of the Museum of Fine Arts represented at a meeting of the Experts' Committee convened by Defendants to evaluate Martha Nierenberg's claim that the Museum of Fine Arts continued to treat certain artworks originating from the Herzog Collection as deposits, but that the deposit contracts could not be located.

[18] This same 1958 inventory of deposits includes three paintings returned to Elizabeth Weiss de Csepel in 1989. *See id.* at HUNG017208, HUNG017210.

(Benenati Decl., Ex. S (HUNG017759-017767, at HUNG017764.) The artworks allegedly subject to such treatment included:

- Munkacsy: The Studio (Compl. ¶ 17(iv));
- Munkacsy: Christ in a White Robe (returned to Martha Nierenberg in 2000);
- Munkacsy: Afternoon Visit ("La Visite") (Compl. ¶ 17(iii));
- Iacopo Della Quercia or pupil: "Prudentia," woman's head, stucco (Compl. ¶ 16(xxii));
- Schwarzwald Sculptor: St. Agnes (Compl. ¶ 16(xxiv)); and
- German Sculptor, "St. Barbara," 16th century wooden sculpture (Compl. ¶ 16(xxvi).)

At least two of the artworks mentioned – the Della Quercia sculpture and the St. Agnes sculpture – are among those listed in the November 28, 1950 memorandum as allegedly subject to criminal forfeiture. (Azat Decl., Ex. J.) Accordingly, it is far from established that the criminal conviction of the former Mrs. Istvan Herzog resulted in a "taking" of Plaintiffs' art and further discovery is required to clarify the facts.

Regardless, even if certain artworks listed in the Complaint were wrongfully "taken" pursuant to such criminal proceedings, that fact would go to whether and when a bailment agreement was breached, not its existence. *See infra* at 38-39. *See also Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1132-33 (D.C. Cir. 2004) (holding that defendants failed to satisfy their burden of proving that the plaintiff's allegations did not bring the case within a statutory exception to immunity where defendants' factual challenge to jurisdiction did not include affirmative evidence showing that their conduct fell outside the

terrorism exception to immunity under the FSIA, but instead only pointed to "contradictions" between the plaintiff's claims and some passages in CIA and State Department documents).

For all of these reasons, the Court of Appeals correctly concluded that Plaintiffs' claims are "based upon … act(s) in connection with commercial activity" as required to sustain jurisdiction under Section 1605(a)(2).

### B. Defendants' Breach Of The Relevant Bailment Agreements Caused A Direct Effect In The United States

The Court of Appeals held that the "direct effect" requirement of Section 1605(a)(2) was satisfied because "[a]lthough the complaint never expressly alleges that the return of the artwork was to occur in the United States, we think this is fairly inferred from the complaint's allegations that the bailment contract required specific performance – i.e., return of the property itself – and that this return was to be directed to members of the Herzog family Hungary knew to be residing in the United States." *De Csepel*, 714 F.3d at 601 (citing Compl. ¶¶ 36, 101 (alleging that Hungary "knew at all relevant times that the Herzog Heirs owned the Herzog Collection and that certain of the Herzog Heirs resided in the United States;" "owed the Herzog Heirs a duty of care to protect the property and return it to them" under the bailment contract; and breached that obligation by "fail[ing] to restitute the Herzog Collection following demand by the U.S. Herzog Heirs").[19] In reaching this conclusion, the Court expressly distinguished *Westfield v. Fed. Republic of Germany*, 633 F.3d 409, 415 (6th Cir. 2011) (cited at Def. Mem. at 16.) Defendants argue that this conclusion was error because (1) "the non-U.S. citizen Plaintiffs and their purported bailments have no connection to the United States:" and (2) "the connection of the

[19] As discussed *supra* at n. 11, such an inference was perfectly acceptable on a Rule 12(b)(1) motion to dismiss.

U.S. citizen Plaintiff's alleged bailment with the United States is tied solely to citizenship, not a legally significant action or event. (Def. Mem. at 15.) Each of these arguments was raised (and rejected) on the prior appeal, and is therefore barred by the mandate rule and law of the case, and in any event fails for multiple reasons.

*First*, as an initial matter, Defendants again misstate the relevant legal standards. Defendants inexplicably rely on outdated case law to argue that an effect must be "substantial" and "foreseeable" in order to be "direct" under Section 1605(a)(2). *See* Def. Mem. at 16 (quoting *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988)) and 21 (same). However, the Supreme Court in *Republic of Argentina v. Weltover* expressly rejected the idea that Section 1605(a)(2) contains a "substantiality" or "foreseeability" requirement and held simply that an effect is "direct" if "it follows 'as an immediate consequence of the defendant's … activity.'" *Weltover*, 504 U.S. 607, 618 (1992). In *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir. 1995), the Court of Appeals noted that "[b]efore *Weltover*, several courts, including this one, subscribed to the view that under § 1605(a)(2), direct effects must also be 'substantial' and 'foreseeable,'" but found that "[t]here is no doubt that, as far as this circuit is concerned, *Weltover* changed the law." More recently, the Court of Appeals has confirmed that "[t]he FSIA … requires only that effect be 'direct,' not that the foreign sovereign agree that the effect would occur" and expressly rejected a defendant's argument that there was no jurisdiction because the defendant had never agreed that there was any "single aspect of the underlying transaction that … [would] take place in the United States." *See Cruise Connections Charter Management 1 L.P. v. AG of Canada*, 600 F.3d 661, 665 (D.C. Cir. 2010). Accordingly, Defendants' assertion that Plaintiffs must "prov[e] that Hungary promised or expected to

perform specific obligations in the United States when the parties entered into the alleged bailment(s)" (Def. Mem. at 15-16) is wrong.

*Second*, Defendants' reliance on language from *Zedan* for the proposition that a direct effect "requires that 'something legally significant actually happened in the United States'" is also misplaced. (Def. Mem. at 17.) The third clause of Section 1605(a)(2) expressly contemplates that the relevant "act" giving rise to jurisdiction occurs outside of the United States. The "legally significant act" test originated from the Second Circuit's decision in *Weltover* and was neither expressly adopted nor rejected by the Supreme Court. *See Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991); *Weltover*, 504 U.S. 607. In *Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, 2006 WL 3060017, at *8 (D.D.C. Oct. 26, 2006) (Huvelle, J.), this Court questioned the applicability of the test in this Circuit, noting that "[i]n post-*Weltover* cases, the D.C. Circuit, unlike other circuits, has not imposed a *per se* rule requiring plaintiffs to allege an express agreement to make payments in the United States." This Court observed that while "[c]ourts in other jurisdictions apply a 'legally significant act' test that requires a plaintiff to allege the existence of a contract provision expressly requiring payment in the United States (or, at a minimum, a contract provision authorizing the designation of a specific place of payment at some later time)…. the cases in this circuit have left open the possibility that a court could find a 'direct effect' based upon a non-express agreement to pay in the United States." *Id.* at *8-9. *See also Cruise Connections*, 600 F.3d at 666 (stating "we have no need to consider … whether a foreign sovereign had to have agreed to the use of a U.S. bank account"); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146 (D.C. Cir. 1994) (Wald, J., concurring) ("[F]or an act to have a 'direct effect' in the United

States, there is no prerequisite that the United States be contractually designated as the place of performance.").

Here, not all of the bailments were governed by express written agreements, or those agreements are unavailable; therefore, their terms remain to be developed through further discovery, including fact and expert depositions. *See supra* at 8-13. However, the record shows that most relevant bailments were created after 1946, when Elizabeth Weiss de Csepel was already residing in the United States with her husband – Alfons Weiss de Csepel – who had a valid power of attorney concerning the affairs of his deceased brother-in-law, Andras Herzog. (Benenati Dec., Ex. T (HUNG011038-050), at HUNG011046-48 (Power of Attorney)). Therefore, Defendants knew they were entering into bailment agreements with persons residing in the United States. (Compl. ¶ 36, 87-88.)

While Defendants now argue that the claims for the artworks inherited by Elizabeth Weiss de Csepel, Andras Herzog, and Istvan Herzog must be analyzed separately (Def. Mem. at 17-18), Defendants previously admitted that they never knew the exact distribution of the Herzog Collection among the different heirs and therefore always treated the collection as one unit. (*See* Benenati Decl., Ex. U (HUNG002371-2387), at HUNG002382 (Minutes of the Fourth Expert Committee meeting held on May 12, 1997).)

In any event, there is no requirement that a U.S. citizen be party to an agreement in order for the breach of that agreement to have a "direct effect" in the United States (Def. Mem. at 15-16.) In *Weltover*, the Supreme Court expressly rejected "Argentina's suggestion that the 'direct effect' requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States" and observed that "[w]e expressly stated in *Verlinden* that the FSIA permits 'a foreign plaintiff to sue a foreign sovereign in the courts of the United

States, provided the substantive requirements of the Act are satisfied.'" *See Weltover*, 504 U.S. 607, 619 (1992) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983)).[20] Therefore, Defendants' speculation that the Court of Appeals "appears to have assumed that the artworks were jointly owned" is unfounded, and irrelevant.[21]

Courts in this Circuit and elsewhere have held that the "direct effect" requirement may be satisfied if a plaintiff had the option of requesting that performance be made in the United States, irrespective of where that plaintiff resided. *See Cruise Connections Charter Management 1 L.P. v. AG of Canada*, 609 F.3d 450, 450-51 (D.C. Cir. 2010) (Silberman, J., concurring) (an alternative ground for affirming the district court's finding of direct effect would have been that defendant could have requested and received payment in the United States); *DRFP LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010) (where bonds placed no restrictions on where holder could demand payment and holder demanded payment in Ohio, the failure to pay caused a direct effect in the United States); *Hanil Bank v. PT Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998) (finding direct effect in the United States where letter of credit gave the plaintiff the discretion to choose the place for payment); *Voest-Alpine*

[20] In *Cruise Connections*, the Court of Appeals took the analysis a step further and clarified that "[n]othing in the FSIA requires that the 'direct effect in the United States' harm the plaintiff." *Cruise Connections*, 600 F.3d at 666 (finding direct effect where revenues that would otherwise have been generated in the U.S. under third party contracts were not forthcoming as a result of defendant's breaches).

[21] The Complaint alleges that the Herzog Collection was divided among the three siblings upon their parents' deaths, implying separate ownership of the relevant artworks. (Compl. ¶ 39.) Regardless, because Plaintiffs' citizenship has no bearing on the "direct effect" analysis, the fact that Plaintiffs "confirmed" in their interrogatory responses that the artworks were inherited separately (Def. Mem. at 2, 17) does not constitute new evidence that merits this Court reexamining the Court of Appeals' conclusion that subject matter jurisdiction exists. As Plaintiffs indicated in their interrogatory responses, the precise division of the collection among the three siblings remains subject to clarification as discovery progresses. (Azat Decl., Ex. 2 (Response to Interrogatory Nos. 2 & 7.)

*Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998) (where letter of credit did not specify place for payment, direct effect occurred when China failed to send payment to U.S. location designated by presenting party); *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) (finding direct effect in the United States where agreement gave plaintiff broad discretion to name any non-Nigerian bank, including one in the U.S., as the place where money was to be deposited). Regardless, by 2008 – when the Complaint asserts that the relevant breaches occurred – the artworks originating from Elizabeth Weiss de Csepel and Istvan Herzog were owned, in full or in part, by United States citizens. (*See* Azat Decl., Ex. 2 (Response to Interrogatory No. 2.)

While further discovery is required to establish the terms of the bailment agreements that were not in writing or are no longer available, Plaintiffs maintain that they always had the ability to request specific performance in the United States by applying to export the artworks. (*See, e.g.*, Benenati Decl., Ex. L (examples of export permits)). None of the export laws cited by Defendants (Def. Mem. at 22-23) provide otherwise.[22] Certainly by 2008 – when Plaintiffs assert the relevant breaches occurred – Plaintiffs could have requested export of the artworks to the United States regardless of where Plaintiffs themselves resided. While Defendants point to the fact that the artworks returned to Elizabeth Weiss de Csepel in 1989 and to Martha Nierenberg in 2000 remained in Hungary (Azat Decl., Exs. D, F), those artworks were returned in Hungary pursuant to consensual arrangements between the parties, and therefore do not prove the absence of a "direct effect" resulting from Defendants' failure to honor Plaintiffs' demand in this case.

[22] These laws were originally submitted by Defendants in connection with Defendants' Motion for Judicial Notice, filed concurrently with Defendants' prior Rule 12(b)(1) motion to dismiss. As such, the laws were part of the record before this Court on that motion.

## IV. THIS COURT ALSO HAS JURISDICTION UNDER 28 U.S.C. § 1605(a)(3)

Although Defendants do not address the argument, this Court also has subject matter jurisdiction under the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3), which provides, in relevant part, that a foreign state is not immune from suit in any case "[i] in which rights in property taken in violation of international law are in issue and [ii] that property or any property exchanged for such property is … owned or operated by an agency or instrumentality of the foreign state and [iii] that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3).

This Court previously held that each of the elements of Section 1605(a)(3) was satisfied because "defendants do not dispute that 'rights in property' (*i.e.*, the ownership rights to the Herzog Collection) are 'in issue;'" the Complaint "clearly alleges substantial and non-frivolous claims that the Herzog Collection was taken without just compensation and for discriminatory purposes" and "in violation of international law"; 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; and "plaintiffs have established for jurisdictional purposes that the Museums and the University are engaged in 'either a regular course of commercial conduct or a particular commercial transaction or act' in the United States as of the commencement of this action." *De Csepel*, 808 F. Supp. 2d at 128-32. On appeal, the only finding Defendants disputed was this Court's conclusion that there was a taking "in violation of international law." (Final Appeal Brief of Defendants-Appellants at 38.)

The Court of Appeals chose not to "rul[e] on the availability of the expropriation exception, holding instead that "the family's claims fall comfortably within the FSIA's commercial activity exception." *De Csepel*, 714 F.3d at 598. The Court of Appeals observed

that the Complaint "seeks to recover not for the original expropriation of the Collection, but rather for the subsequent breaches of bailment agreements [the Herzog family members] say they entered into with Hungary." *De Csepel*, 714 F.3d at 598. While Plaintiffs' claims are, as the Court of Appeals correctly observed, firmly rooted in bailment, that fact does not remove the claims from the scope of the expropriation exception to the FSIA.

Under the FSIA, a "taking violates international law" if it is done "without payment of the prompt adequate and effective compensation required by international law" or is "arbitrary or discriminatory in nature." H.R. Rep. 94-1487, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618. As this Court correctly recognized, at the motion to dismiss stage, this Court need not find that a taking actually violated international law; all that is required are substantial, non-frivolous allegations of an international law violation. *See Chabad*, 528 F.3d at 941; *de Csepel*, 808 F. Supp. 2d at 128. The Complaint pleads such violations here, and Defendants have offered no evidence showing otherwise.

*First*, Section 1605(a)(3) – unlike Section 1605(a)(2) – contains no requirement that a plaintiff's claim be "based upon" a taking in violation of international law. Rather, "rights in property taken in violation of international law" must simply be "in issue." *See* 28 U.S.C. § 1605(a)(2) & (a)(3). Such rights are plainly "in issue" here, because the bailment agreements between Plaintiffs and Defendants would never have existed had it not been for the looting and seizure of the Herzog family's homes and property that occurred during the Holocaust and the Herzog family's flight from Hungary to escape genocide. This Court previously agreed that Hungarian Jews were essentially stripped of all the rights and privileges of Hungarian citizenship as a result of the actions of Hungary during the war. *De Csepel*, 808 F. Supp. at 130. Defendants' unlawful taking of the Herzog Collection during the Holocaust gave them control

over the art – particularly the art removed to Germany during the war and later returned to Hungary – and Hungary used that control to pressure Plaintiffs' predecessors into agreeing to leave their art in the Museums, including by charging exorbitant fees for the "repatriation" of art that Defendants and their Nazi collaborators had removed from Hungary. *See supra* at 8.

*Second*, the breach of a bailment agreement constitutes a conversion (*i.e.*, a "taking" of property). *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."). Therefore, Defendants' breach of the relevant bailment agreements also constituted a taking in violation of international law. *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 v. Republic of Austria*, 142 F. Supp. 2d 1187, 1202-03 (C.D. Cal. 2001) *aff'd*, 317 F.3d at 965, 968 n.4 (Nazis' seizure of art collection and Austria's post-war refusal to return it or to pay compensation stated a substantial and non-frivolous claim against Austria under 28 U.S.C. § 1605(a)(3)).

The Complaint alleges that the relevant "taking" occurred in 2008 when Defendants repudiated Martha Nierenberg's demand. (Compl. ¶¶ 36, 87, 96-105.) This 2008 "taking" violated international law because Martha Nierenberg, the Italian Plaintiffs, and other heirs of Istvan Herzog were foreign citizens and the art was taken without just compensation. While Defendants clearly believe that any "taking" occurred much earlier than 2008 (Def. Mem. at 2, 14), Defendants have to date declined to specify precisely when and under what circumstances

each artwork described in the Complaint allegedly came into Defendants' ownership, instead pointing to more than twenty possible reasons as to why each artwork remained in Defendants' possession, custody and control. (*See* Benenati Decl., Ex. J (Response to Interrogatory Nos. 3, 9, 11).[23] Further discovery is necessary to clarify precisely when, and under what circumstances, any "taking" occurred. Plaintiffs submit that irrespective of when any "taking" occurred, the taking was done "without payment of the prompt adequate and effective compensation required by international law" and/or was "arbitrary or discriminatory in nature" and therefore violated international law.[24]

For all of these reasons, this Court should again conclude that it has jurisdiction under 28 U.S.C. 1605(a)(3).

[23] While Defendants suggest that certain artworks were "taken" in 1950 pursuant to the criminal proceedings against Mrs. Istvan Herzog (Def. Mem. at 21 n.6), the impact of those proceedings on the artworks pleaded in the Complaint is less than clear. *See supra* at 27-29. While further discovery is required to clarify the impact, if any, of those proceedings, it is undisputed that the criminal proceedings did not apply to all of the artworks pleaded in the Complaint. (Azat Decl., Exs. H-J.)

[24] This Court has already rejected Defendants' footnote argument – renewed here – that Plaintiffs improperly failed to exhaust remedies in Hungary. *See de Csepel*, 808 F. Supp. 2d at 131 n.3 ("Defendants argue in a footnote that plaintiffs have failed to exhaust their remedies in Hungary as to the thirty-two paintings described in this case that were not the subject of the 1999 Hungarian lawsuit…. To the extent defendants argue that the Complaint should be dismissed on this basis, the Court will deny this motion. The text of § 1605(a)(3) contains no such requirement, and the D.C. Circuit has recently declined the invitation to impose one.") (citing *Chabad*, 528 F.3d at 948-49). The Seventh Circuit's decision in *Abelesz*, 692 F.3d at 678 (which is not binding in this Circuit) does not hold otherwise. The Seventh Circuit remanded that case to the District Court for plaintiffs either to exhaust their remedies in Hungary or show a compelling reason for their failure to do so. *See id.* at 697. Here, Plaintiffs attempted to exhaust their remedies in Hungary for nearly a decade and were completely unsuccessful. Any further efforts to exhaust remedies would have been entirely futile. *See* (ECF No. 22-26 (Varga Decl.) at 16-18).

## V. IT WOULD BE PREMATURE FOR THIS COURT TO GRANT THE MOTION

While it would be proper for this Court to deny the Motion on the grounds of the mandate rule and law of the case, or for the same reasons that the Court of Appeals and this Court rejected Defendants' prior motion, it would be premature for this Court to grant the Motion while discovery is ongoing.

The Court of Appeals has already ruled, at the pleadings stage, that Plaintiffs have adequately pleaded jurisdiction under 28 U.S.C. § 1605(a)(2). This Court has similarly ruled that Plaintiffs have adequately pleaded jurisdiction under 28 U.S.C. § 1605(a)(3). Therefore, Defendants have already had a full and fair opportunity to show that they should be "immun[e] from trial and the attendant burdens of litigation" (Def. Mem. at 11 (quoting *Phoenix Consulting, Inc.*, 216 F.3d at 39) and have failed to do so. The document discovery taken to date confirms that the factual issues in this case are complex, to say the least. While it can no longer be seriously disputed that Plaintiffs' allegations of bailment are supported (*see supra* at 7-13), further discovery – including fact and expert depositions – is necessary to establish the terms of the relevant bailment agreements to the extent they have not been produced or were not written, the scope and effect of those agreements, and the relevant dates and circumstances of breach. *See Phoenix*, 216 F.3d at 40 (holding that the court "must give the plaintiff 'ample opportunity to secure and present evidence relevant to the existence of jurisdiction'"). Many of these documents were created during the Communist era. Therefore, additional fact and expert discovery is particularly critical to clarify the circumstances under which the documents were created and to resolve inconsistencies among the documents. Fact and expert discovery is also necessary concerning applicable Hungarian law and how it was interpreted and applied (which is not purely a legal issue). Therefore, unless this Court is prepared to deny the motion on the

present record, it should defer ruling on the Motion until after discovery is completed and permit the parties to supplement the record as appropriate with further briefing and affidavits.

## CONCLUSION

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss in its entirety. In the alternative, Plaintiffs request that the Court defer ruling on the Motion until after discovery is completed. Should this Court grant the motion for any reason, Plaintiffs respectfully request leave to re-plead.

Dated: July 25, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss was served this 25th day of July, 2014, via the Court's electronic filing system on the following individuals:

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