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.	)	

SUPPLEMENTAL BRIEF IN SUPPORT OF 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

Pursuant to this Court's October 20, 2014, Order, Defendants 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 ("Hungary"), offer the following supplemental brief in response to this Court's question:

> Assuming that 28 U.S.C. § 1605(a)(2) does not apply to the claims of some or all plaintiffs, would the expropriation exception, 28 U.S.C. § 1605(a)(3), nevertheless provide subject matter jurisdiction over all three plaintiffs' claims alleging breach of the bailment agreements in 2008?

Dkt. No. 91 (Order for Supplemental Briefing) at 2.

Section 1605(a)(3) does not provide subject matter jurisdiction over any of Plaintiffs' claims alleging breach of alleged bailment agreements in 2008. When this Court last considered whether it could take jurisdiction over Hungary under the Foreign Sovereign Immunity Act's ("FSIA") expropriation exception, the parties were at the initial pleading stage. Since appearing before this Court on September 25, 2013, the parties have engaged in extensive discovery, whereby Hungary provided Plaintiffs with thousands of pages of historical evidence and the complete Nierenberg litigation court record in English, and the parties exchanged interrogatories. There is nothing to suggest that the 2008 judgment of the Hungarian court in the Martha Nierenberg litigation constitutes an expropriation.

The 2008 judgment is not a breach of any bailment agreements or anything resembling a taking. The published, reasoned Hungarian opinions were the product of litigation before the competent courts of a NATO and European Union member nation that applied recognized legal principles to a well-developed court record. The judgment was purely a domestic concern – not a violation of international law – as Martha Nierenberg, Angela and Julia Herzog, and the heirs of István Herzog were Hungarian citizens throughout the Hungarian litigation. Finally, as the Nierenberg litigation adjudicated the ownership of only those eleven artworks associated with Erzsébet Weiss de Csepel, there can be no conceivable breach or "taking" with respect to those remaining thirty-three (33) artworks that were not adjudicated in the Nierenberg litigation.

Plaintiffs have not met their burden of overcoming Hungary's presumptive immunity by producing evidence that an exception to the FSIA applies.

I. The 2008 Hungarian Court Judgment Is Neither a Breach of Alleged Bailment Agreements Nor a Violation of International Law

Plaintiffs have not met their burden of establishing jurisdiction by showing that Hungary's immunity should be stripped based on any expropriation. *See, e.g., Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013) (recognizing that "the FSIA begins with a presumption of immunity, [under] which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies"). While Hungary may carry the ultimate burden of persuasion, Plaintiffs must affirmatively produce evidence that Section 1605(a)(3) applies. *See id.; FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835, 842 (D.C. Cir. 2006). Plaintiffs can point to nothing beyond their assertions in the pleadings that supports jurisdiction based on expropriation. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004) (citation omitted) (noting that in resolving disputes regarding subject matter jurisdiction over sovereigns, "the court 'must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss.'").

A taking violates international law if: (1) it was not for a public purpose; (2) it was discriminatory; or (3) no just compensation was provided for the property taken. *See Crist v. Republic of Turkey*, 995 F. Supp. 5, 10 (D.D.C. 1998). Hungary is not aware of any case in which a judicial decision by a foreign sovereign's court has been deemed a "taking" to allow a U.S. court to take jurisdiction over the sovereign pursuant to 28 U.S.C. § 1605(a)(3). Plaintiffs rely on *Agudas Chasidei Chabad of the United States v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008), for the proposition that the 2008 Hungarian court judgment constitutes a taking in violation of international law. Plaintiffs' Opposition to Motion to Dismiss at 38. Hungary does

not dispute the D.C. Circuit's finding that *Chabad* involved a modern day taking, but there the court found that the taking was the result of actions by the Russian executive branch, which ignored the Russian judiciary's finding that the property in dispute should be returned to the claimant. *See* 528 F.3d at 944-947.

This case is not *Chabad.* Plaintiffs' bailment agreement theory is premised not on discriminatory, wartime takings, but on Hungary's post-war possession of the artworks and its alleged refusal to return artworks to Plaintiffs or their predecessors upon demand. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 603 (D.C. Cir. 2013) ("To repeat, the Herzog family seeks to recover for breaches of bailment agreements formed and repudiated after World War II, not for the initial expropriation of their property during the war.").

And unlike the Court's finding in *Chabad* regarding Russia, Hungary's judiciary and executive branches operate independently. Plaintiffs have not provided any evidence that the Hungarian judiciary was acting under the control of the executive branch or that it misapplied Hungarian law in a discriminatory manner in 2008. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679 (7th Cir. 2012) (recognizing that "Hungary is a well-established European state, with a well[-]functioning legal system that operates under established and cognizable rules of law"). Further, Ms. Nierenberg never contended during the eight years of Hungarian court proceedings (1999 to 2008) that she was not given the same due process and procedural safeguards provided to other Hungarian citizens. *See Crist*, 995 F. Supp. at 10-11.

In their appellate briefs, Plaintiffs suggested that changes made to the Hungarian Constitution in 2012 have led certain entities to "question the independence of Hungary's judiciary." Final Response/Principal Brief of Plaintiffs-Appellees/Cross-Appellants, dated November 8, 2012, at 58-59, n.23. Hungary disputes Plaintiffs' characterization, but, in any

event, these supposed challenges to the Hungarian judiciary's independence did not arise until more than three years *after* Martha Nierenberg's lawsuit was concluded in 2008. Ms. Nierenberg's own counsel stated in a brief in 2004 that, since 1990, "it has become possible for the citizens and other entities to enforce those basic rights, including their right to property, at the independent and unbiased Hungarian Courts."[1]

During the Nierenberg litigation, Ms. Nierenberg was represented by the counsel of her choice. The hearings in the matter were noticed, recorded, and open to the public and the media. Ms. Nierenberg sought and received historical documentation from Hungary at the court's order. She had many opportunities to present her arguments, which she did by filing numerous briefs (including appellate briefs). The parties submitted more than two hundred exhibits, of which approximately eighty were submitted by Ms. Nierenberg. The parties appealed various decisions to three-judge appellate panels, and received reasoned, published decisions based on the evidentiary record and applicable Hungarian laws.

After analyzing the claims to the eleven artworks individually, not as a group, the Hungarian court recognized Hungary's ownership of the artworks claimed by Martha Nierenberg under legal theories recognized by U.S. courts. For example, the Hungarian court held that Hungary owned certain works under a theory of adverse possession. This theory is not only

[1] During discovery, Hungary asked Plaintiffs to "[s]tate all facts to support YOUR claim that the final judgment in the NIERENBERG LITIGATION was rendered 'as a result of proceedings that were not conducted in accordance with internationally recognized standards of due process or in accordance with international law,'" Plfs' Resp. First Interrogs. No. 24 at 26, and to produce "[a]ll DOCUMENTS that RELATE to YOUR alleged due process violations in the NIERENBERG LAWSUIT," Plfs' Resp. First Req. Doc. Prod., No. 57 at 44. In response, Plaintiffs offered no substantive answers and no relevant documents. Instead, Plaintiffs offered only objections. *See* Plfs' Resp. First Interrogs. No. 24 at 26-27; Plfs' Resp. First Req. Doc. Prod., No. 57 at 44. In keeping with the Court's ten-page limitation for this brief, Hungary does not attach any documents exchanged by the parties in discovery, but can provide them to the Court should the Court wish to review them.

recognized in American courts as a lawful doctrine of property ownership and defense, it is also recognized in actions involving artworks alleged to have been taken during the Holocaust. *See Dunbar v. Seger-Thomschitz*, 638 F. Supp. 2d 659, 663 (E.D. La. 2009), *aff'd*, 615 F.3d 574 (5th Cir. 2010); *see also Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 9 (1st Cir. 2010) (finding Holocaust-era taken artwork claim barred by state statute of limitations); *Orkin v. Taylor*, 487 F.3d 734, 741-42 (9th Cir. 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 806-08 (N.D. Ohio 2006). The Hungarian courts also recognized that claims to certain works could be resolved by international agreements. This theory – that foreign sovereigns can resolve the property claims of their citizens through international agreements – is a well-established legal principle. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981); *Simon v. Republic of Hungary*, No. 10-1770 (BAH), 2014 WL 1873411, at *17-29 (D.D.C. May 9, 2014).

Despite the fact that the Parties have engaged in discovery for more than a year, Plaintiffs point to no evidence that the 2008 judgment was obtained by fraud, that the Hungarian courts lacked jurisdiction over the claims or parties, or that the judges were acting pursuant to the Hungarian State's direction.[2] Plaintiffs have not met their burden of producing evidence to support the Complaint's assertion that the 2008 judgment could constitute a "repudiation" of an undated, unidentified bailment agreement, much less a taking that would rise to a violation of international law. *See Bell Helicopter Textron, Inc.*, 734 F.3d at 1183.

[2] Although Hungary provided Plaintiffs with the complete Nierenberg court record in English in this litigation, all Nierenberg litigation documents have been readily available to Plaintiffs for many years, as they themselves (the heirs of András and István Herzog) or their predecessors (Plaintiff de Csepel's aunt, Martha Nierenberg) filed or received them as parties to the Hungarian proceedings.

II. The Purported Taking Was Not a Violation of International Law

The 2008 judgment was not a violation of international law; it was a court decision applying domestic law to one of its citizens. It is well-established that the "expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law." *Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 101 (D.D.C. 2005) (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)). "[C]onfiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law." *Id.* at 102 (quoting *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966)); *see also United States v. Belmont*, 301 U.S. 324, 332 (1937); *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976).

Through hearings and submission of documentation at the start of her lawsuit in Hungary, Ms. Nierenberg moved for recognition of and successfully established her Hungarian citizenship. *See Murarka v. Bachrack Bros., Inc.*, 215 F.2d 547, 553 (2d Cir. 1954) ("It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations."); *see also Von Dunser v. Aronoff*, 915 F.2d 1071, 1073 (6th Cir. 1990); *Sadat v. Mertes*, 615 F.2d 1176, 1183 (7th Cir. 1980). In addition, Plaintiffs acknowledged in discovery responses in this litigation that Martha Nierenberg, Angela and Julia Herzog, and the heirs of István Herzog, *all* have Hungarian citizenship. Plfs' Resp. First Interrogs. No. 3 at 8. The 2008 judgment was a decision rendered

by a competent Hungarian court, involving Hungarian property claims to property located in Hungary brought by a Hungarian citizen against Hungary and Hungarian State museums.[3]

The September 1, 2011, Memorandum Opinion by this Court found that the *wartime* takings from Ms. Nierenberg, as alleged in the Complaint, could constitute a violation of international law, rather than a domestic taking, because: (1) Ms. Nierenberg, along with other Jews, was *de facto* stripped of her citizenship because of the hardships that Jews were forced to endure at the end of World War II, and (2) Plaintiffs alleged that German Nazi officials were active "in the taking of at least a portion of the Herzog Collection." Dkt. No. 33 at 17-19. As for the *modern-day* taking Plaintiffs allege, it is not disputed that Ms. Nierenberg, Julia and Angela Herzog, or the heirs of István Herzog held and retained their Hungarian citizenship throughout the 1999-2008 litigation. And no sovereign beyond Hungary was involved in the purported 2008 judgment. Accordingly, Plaintiffs have not demonstrated that the alleged 2008 taking should be converted from a domestic taking to a taking in violation of international law.

Because Ms. Nierenberg, Julia and Angela Herzog, and the heirs of István Herzog are – by their own account – Hungarian citizens now and throughout the Hungarian litigation, a theoretical taking by Hungary of a Hungarian citizens' alleged property in Hungary in 2008 cannot constitute a violation of international law.

[3] Mindful of the Court's ten-page limitation for this brief, Hungary refrains from inundating this Court with any of the thousands of pages from the Nierenberg litigation. Hungary offers, instead, this brief summary of the activities, noting the absence of due process violations or other judicial infractions to suggest that the 2008 judgment is not a violation of international law, but is in fact, as this Court recognized years ago, a judicial decision entitled to recognition under principles of international comity. *See, e.g.*, *LG Display Co. Ltd. v. Obayashi Seikou Co. Ltd.*, 919 F. Supp. 2d 17, 28-29 (D.D.C. 2013). Hungary would be happy to provide any documents from the record that this Court should wish to review to verify these facts.

III. The Purported 2008 Taking Cannot Include Artworks Attributable to István or András Herzog, as the Hungarian Court Did Not Adjudicate Claims to Those Artworks

The 2008 judgment did not adjudicate the claims of ownership to thirty-three of the forty-four artworks in the present case.[4] The Hungarian courts brought the heirs of András and István Herzog into the lawsuit to ensure that their interests were represented. Although they had the opportunity to be heard, they affirmatively chose not to pursue any claims. Accordingly, even if the 2008 judgment that recognized Hungary's ownership of eleven artworks were to constitute a repudiation amounting to a "taking," that can only relate to the eleven artworks attributable to Erzsébet that were the subject of the claim advanced by Martha Nierenberg and now by Plaintiff de Csepel. Because the heirs of András and István Herzog elected not to raise them, claims to the thirty-two pieces of artwork attributable to András and István were not considered, analyzed, or otherwise adjudicated by the Hungarian court in the 2008 judgment. As a result, even if the Court found that the 2008 judgment somehow satisfied the expropriation exception, it would not establish jurisdiction over the claims involving thirty three of the forty-four artworks.[5] Section 1605(a)(3) cannot apply to claims for the thirty-two artworks attributable to András or István

[4] Plaintiffs identify the following artworks as property attributable to András Herzog: Complaint ¶ 16(iii), (vii)-(ix), (xii), (xiv)-(xvi), (xxiv)-(xxxiii), (xxxv)-(xxxvi), ¶ 17(i), (v), ¶ 18(i)-(ii), ¶ 19(i). *See* Plfs' Resp. First Interrogs. No. 7 at 11. Plaintiffs identify the following artworks as property attributable to István Herzog: Complaint ¶ 16(v), (xvii)-(xviii), and (xx)-(xxiii). *See* Plfs' Resp. First Interrogs. No. 7 at 11.

[5] As noted in the Reply in Support of Motion to Dismiss, filed August 25, 2014, at 23 n.11, Dkt. No. 90, one of the works Plaintiffs attribute to Erzsébet Weiss de Csepel (Compl. ¶ 16(xxxiv)) was not claimed by Martha Nierenberg in the Hungarian lawsuit. *See* Plfs' Resp. First Interrogs. No. 7 at 10-11. Like the artworks attributable to András and István Herzog, that work cannot be deemed to have been "taken" by Hungary, as a claim to this work was not raised to or considered by the Hungarian courts.

Herzog or the one artwork now claimed by Plaintiff de Csepel, but not claimed by Martha Nierenberg – these works were not part of the alleged 2008 judgment "taking."

IV. Conclusion

For the reasons set forth above, Hungary respectfully requests that the Court grant its motion and dismiss Plaintiffs' Complaint on the ground that this Court lacks subject matter jurisdiction over Hungary.

Dated: October 28, 2014

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October, 2014, I caused the foregoing Supplemental Brief in Support of Hungary's Motion to Dismiss to be served, via the Court's ECF electronic filing system, upon the following counsel of record in this matter:

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