IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANTS' RENEWED 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 Renewed 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 18, 2015 (ECF 106) (the "Motion").

PRELIMINARY STATEMENT

Defendants have inundated the Court with over 1000 pages of declarations, documents, and deposition testimony as if this were a motion for summary judgment instead of their **third** Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Despite the voluminous record, Defendants have once again failed to meet their burden to show that Defendants are immune from suit under the Foreign Sovereign Immunities Act ("FSIA"). Instead, the fact discovery completed by the parties confirms that this Court has jurisdiction under both Sections 1605(a)(2) and 1605(a)(3) of the FSIA. This Court should therefore deny Defendants' Motion and allow this case finally to proceed on its merits.

Discovery has confirmed that the Court of Appeals was correct in sustaining jurisdiction under the third clause of the commercial activity exception of the FSIA, 28 U.S.C. § 1605(a)(2). As the Court of Appeals correctly recognized, Plaintiffs' claims are "based upon" Defendants' breach of various post-war bailment agreements. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 598 (D.C. Cir. 2013). Indeed, after deriding Plaintiffs' bailment claims as "hypothetical" for five years, and after discovery brought to light actual written bailment agreements, Defendants are finally forced to admit for the first time in their renewed Motion that they still hold at least ten of the forty-four artworks listed in the Complaint as deposits and that these deposit inventory records "could provide indicia that [the ten artworks] may have been considered bailments by one or both parties at some time." (Def. Br. at 2-3 (emphasis added).)

Incredibly, Defendants still refuse to return even those deposited artworks to Plaintiffs. The documentary evidence also supports Plaintiffs' bailment claims as to the remaining artworks. In fact, Defendants recognized the validity of some of those very same 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 that the Complaint adequately pleads a "direct effect" in the United States also fails as a matter of law. While Defendants go to great lengths to attempt to draw distinctions between the different artworks and heirs in their Motion, discovery has confirmed that in the past, Defendants largely disregarded these distinctions and treated the Herzog Collection as it if were owned collectively by the Herzog family, including its United States members, when it benefited them. As a result, Defendants' relevant "acts" had "direct effects" in the United States because they affected the Herzog heirs collectively, even if those acts may have also had simultaneous effects elsewhere. Moreover, there is no requirement that a plaintiff be a United States 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. 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. For all of these reasons, the Court of Appeals correctly concluded that Defendants' breach of the bailment agreements caused the requisite direct effect in the United States.

Although not addressed in the prior briefing, this Court also has jurisdiction under the first and second clauses of Section 1605(a)(2) because Plaintiffs' claims are also "based upon" Defendants' commercial activity in the United States. This Court has already held that the

Museums and the University are engaged in commercial activity in the United States, *see de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 132 (D.D.C. 2011), and Defendants have never disputed that finding. The Complaint pleads that Defendants have used artworks from the Herzog Collection for promotional purposes, including soliciting visitors from the United States, as well as selling books and merchandise, have exhibited at least one of the artworks in the United States, and that Defendants have reaped profits from these activities that rightfully belong to Plaintiffs.

Discovery has also confirmed that this Court was correct in holding in 2011 that it has jurisdiction under the expropriation exception to the FSIA, 28 U.S.C. § 1605(a)(3). While Plaintiffs' claims are, as the Court of Appeals later found, "based upon" Defendants' breach of post-war bailment agreements (*de Csepel*, 714 F.3d at 598), "rights in property taken in violation of international law" are "in issue" for purposes of Section 1605(a)(3) because Defendants took advantage of their wartime looting and seizure of the Herzog Collection to retain or repossess artworks in the years following the war pursuant to these bailment arrangements. Defendants' repudiation of the bailment arrangements also constituted one or more "taking(s)" in violation of international law for purposes of Section 1605(a)(3). Neither the Peace Treaty nor the 1973 Agreement precludes this Court from exercising jurisdiction under Section 1605(a)(3) because neither expressly conflicts with the provisions of the FSIA and neither resolved Plaintiffs' claims for each of the artworks alleged in the Complaint. Defendants' claim that Plaintiffs were required to further exhaust remedies in Hungary has already been rejected by this Court and is meritless in any event. Defendants have had every opportunity to remedy the takings alleged in the Complaint and have stonewalled the family at every juncture. Indeed, the 2008 decision in

the Nierenberg Litigation was itself a violation of international law because it was based on the Court's bad faith interpretation of the 1973 Agreement.

For all of these reasons, Defendants' renewed Motion should be denied.

STATEMENT OF FACTS[1]

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, their three children – Erzsebét (Elizabeth) Weiss de Csepel, István (Stephen) Herzog and András (Andrew) Herzog – divided the Herzog Collection among themselves. (Compl. ¶ 39; Tatevosyan Decl. Ex. 5 at 6.) Plaintiffs are not aware of any document that officially memorializes that division and there are discrepancies among the documents. However, based on the documents and other information presently available to Plaintiffs, Plaintiffs have identified which artworks they

[1] 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). 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 the 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."). Therefore, Plaintiffs summarize below not only the relevant allegations of the Complaint, but also various documents and deposition testimony submitted by Defendants as well as other documents and testimony that supplement and confirm the allegations of the Complaint (*see* Decl. of Alycia Regan Benenati ("Benenati Decl.") dated June 24, 2015, Exs. 1-31; *see also* ECF 106-1 (Decl. of Irene Tatevosyan dated May 18, 2015) Exs. 1-77; ECF 106-10 (Decl. of Thaddeus J. Stauber dated May 18, 2015) Exs. 1-12.)

believe were owned by each of the Herzog siblings for purposes of this litigation. (*See id*. at 11; *see also* Benenati Decl. Ex. 1 (Pls.' Amended Response to Defs.' Interrogatory No. 7).) Accordingly, Plaintiffs' Interrogatory Responses reflect the heirs' present-day agreement as to which family members own which artworks.

The three named Plaintiffs represent all of the living heirs to the Herzog Collection. Plaintiff David L. de Csepel, a United States citizen, is the grandson of the late Elizabeth Weiss de Csepel, who 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. ¶¶ 40, 42; Tatevosyan Decl. Ex. 61; Benenati Decl. Ex. 2.) Since at least 1999, two of István Herzog's heirs have been United States citizens. (Tatevosyan Decl. Ex. 5 at 6.)

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. (*Id*.) 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; Benenati Decl. Ex. 3 ¶¶ 6-16.) Those laws, and various coercive activities engaged in by the Hungarian state, effectively nullified Hungarian citizenship for all Jews. (Benenati Decl. Ex. 3 ¶¶ 17-18.) *See de Csepel*, 808 F. Supp. 2d at 130.

Hungary's campaign of genocide against its Jews was not limited to murder, deportation, and denial of basic human and citizenship rights. The looting of Jewish property, including cultural property, was an integral feature of the Hungarian Jewish genocide. (Compl. ¶ 53.) Jews – including the Herzogs – were required to register their art treasures with the government. (*Id.* ¶ 56.) The Hungarian government 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.)

Some 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. 4 (documents from July and August 1944 discussing András 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.)[2]

The 1947 Peace Treaty

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. Article 27(1) of the Peace Treaty provided:

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

(*Id*.) Thus, Hungary represented in the Peace Treaty that it would not claim ownership of property that had been looted from Hungarian Jews during the Holocaust, but would instead seek to restore that property *in rem* to its rightful owners. (Compl. ¶ 69.).

Post-War Bailment Agreements

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 in the years following World War II, and Defendants were responsible for overseeing the process of restitution. (Compl. ¶ 67.) Defendants "returned" some items from the Herzog Collection to members of the Herzog family in the years following the war. (Compl. ¶ 70.) However, those

[2] 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 on loan to the Museum of Fine Arts for exhibition." (Benenati Decl., Ex. 5 at HUNG09697-98.)

"returns" were largely on paper or short-lived, and the vast majority of the Herzog Collection either remained in, or was ultimately returned to, Defendants' possession. (Compl. ¶¶ 70-73.)

Defendants do not dispute at least 25 of the 44 artworks listed in the Complaint were never returned to the Herzog family. (Def. Br. at 7; Tatevosyan Decl. Ex. 76). Defendants retained some artworks and profited from the looting undertaken by them 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. 6 at HUNG011021-22).) A November 10, 1947 memorandum from a ministerial commissioner to Dr. Gyula Ortutay, Minister of Religion and Public Education, identified various artworks that were returned to Hungary from Germany and were "the property of the minor heirs of the late András Herzog" or the "property of István Herzog." (*See* Tatevosyan Decl. Ex. 57 at HUNG010996).)[3] The Memorandum explained:

[3] The memorandum identified the following artworks listed in the Complaint: 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)); 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.

> 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. The rest remain in the care of the office of the ministerial commissioner to this day.

(*Id*. (emphasis added).)[4]

Other documents confirm that Defendants retained possession of many artworks from the Herzog Collection, including for the purpose of exhibiting them, all while recognizing 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. 7 at HUNG015294.) The Director responded promptly that the paintings had been borrowed from Ministerial Commissioner Sandor Jeszenszky 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 Jeszenszky 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,

[4]This November 1947 memorandum contradicts Defendants' claim that the painting Giovanni Santi: Christ (Compl. ¶ 16(xviii)) was "legally and physically" returned in June 1947. (Tatevosyan Decl. Ex. 76 at 2 (citing Tatevosyan Decl. Ex. 8 at HUNG0010930.).) Another document submitted by Defendants confirms that the Santi painting was still in the custody of the Office of Ministerial Commissioner in July 1948. (*See* Tatevosyan Ex. 18).

as a temporary deposit, for the purpose of exhibiting them." (Tatevosyan Decl., Ex. 64 at HUNG011376-77 (emphasis added).)[5] Likewise, a 1949 list confirms that various artworks "of the late András Herzog," including the artworks described in Jeszenszky's November 20, 1948 letter and at least three additional artworks described in the Complaint are "[d]eposited in the custody of the Office of the Ministerial Commissioner." [6]

In late 1948, Defendants falsely accused István Herzog's former wife, Ilona (Kiss) Herzog, of smuggling art out of Hungary and brought criminal proceedings against her while she was living in Switzerland. (Compl. ¶¶ 72-73; Tatevosyan Ex. 19 at HUNG008086; Benenati Decl. Ex. 9.) Her alleged ownership of the art was predicated solely on an agreement that István Herzog had signed with his non-Jewish wife in 1944 in an effort to avoid persecution and seizure under the confiscation laws implemented by Hungary and its Nazi allies. (*See* Tatevosyan Decl. Ex. 19 at HUNG008085 ("In 1944, during the time of the deprivation laws, István Herczog, resident of Budapest, transferred the ownership of his collection of paintings by a donation contract to his wife who was not subject to the said laws and was also his guardian."). The

[5] The artworks subject to that arrangement included at least the following eleven artworks that are the subject of the Complaint, some of which belonged to Andras Herzog and some of which belonged to Istvan Herzog: 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)); 15th century Gothic Saint Catherine (¶ 16(xxv)); and Schwarzwald Sculptor: Figure of Saint Agnes (¶ 16(xxiv)). Two of these artworks (Zurburan: Saint Andrew (¶ 16(xxi)), Santi: Christ with a Fly (¶ 16(xviii)) are artworks that Defendants claim were "returned" in 1947. (*See* Def. Br. at 7; Tatevosyan Decl. Ex. 76.)

[6] Those three artworks were Polidoro da Lanciano: Christ and the Woman Taken in Adultery (¶ 16(xii)); Figure of Saint Barbara (¶ 16 (xxvi)); South German sculptor: Prophet (¶ 16(xxviii)). (*See* Benenati Decl., Ex. 8 at HUNG012001 (emphasis added).)

indictment listed ten paintings as the property of Mrs. István Herzog (five of which are listed in the Complaint in this action).[7]

On February 10, 1949, the head of the Office of the Ministerial Commissioner for Artworks Seized from Public and Private Collections – Sandor Jeszenszky – advised the judicial bailiff overseeing the criminal proceedings by internal memorandum that "Mrs. István Herczog, nee Ilona Kiss, has no painting or any other property that could be seized in either the Nat. Museum of Fine Arts or at the Ministerial Commission. It is her husband, István Herczog, who has such property, but he is under guardianship, and in my opinion a person under guardianship is not financially responsible for any other person." (Benenati Decl. Ex. 10 at HUNG0011784.) The memorandum went on to note that "paintings belonging to István H. were seized as reprisal for smuggling by Mrs. István." Two weeks later, Commissioner Jeszenszky received a letter from Laszlo Moravetz, Police Lieutenant-Colonel, advising him that

> the artworks and paintings of the András Herzog collection, deposited in the Museum of Fine Arts, are the property of the Hungarian Republic, and as such should be treated as national asset. The above-mentioned valuables shall not be released to anyone, no matter who comes to take them upon whose authorization, be it a private person or public officer, not even on grounds of seizure for the collection of debt.

(Tatevosyan Ex. 24 at HUNG0011997-999.) In the Nierenberg Litigation, Defendants pointed to this letter as evidence of the "spirit of the age" where the police authority attempted to instruct Mr. Jeszenszky how to manage András Herzog's estate in 1949 even though no relevant court resolution was entered until 1952. (Benenati Decl. Ex. 11 at HUNG002480.) In any event, there

[7] Shortly after the criminal proceedings began, the Museum of Fine Arts acknowledged that it had received four of those paintings as a "deposit" from the Financial Police: Vivarini: Holy Family (Compl. ¶ 16(xx)); Courbet: Spring (Compl. ¶ 16(v); Ribot: Still Life (Compl. ¶ 16(xvii)) and Zurburan: Saint Andrew (Compl. ¶ 16 (xxi).)

is no evidence that Hungary relied on the 1949 directive to take any action concerning the artworks of András Herzog.

In April 1949, Commissioner Jeszenszky again attempted to clarify that some of the artworks that had been impounded as a result of the criminal proceedings against Mrs. István Herzog in fact belonged to other family members. Further illustrating the "spirit of the times," his memorandum noted that "[t]he Record, which had already been pre-written, mentions the artworks as artworks originating from Mrs. István Herzog's collection." (Benenati Decl. Ex. 12 at HUNG011807) (emphasis added).)

On May 3, 1950, while the criminal proceedings against Mrs. István Herzog were pending, 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." (Tatevosyan Decl. Ex. 23 at 12663 (emphasis added).)[8] On or around May 26, 1950, Defendants acknowledged receipt of some of the paintings listed by Oppler and agreed that "[t]he National Center for Museums and Monuments is handling these works of art as deposits, with acknowledgment of the owners' 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. 13 at HUNG002242.) The same May 1950 deposit agreement also included three 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

[8] Among the paintings included in the deposit agreement were at least the following seven artworks which Defendants claim were "returned": Van Dyck: Portrait of a Woman (¶ 16(xix)); Bruyn: Portrait of a Man (¶ 16(i)); Mazo (school of Velasquez): Portrait of Don Balthasar Carlos (¶ 16(ii)); El Greco: Holy Family (¶ 16(xi)); Gianpetro: Christ (¶ 16(xv)); Borsos: Architect Zitterbarth (¶17(i)); Munkacsy: Atelier (In the Studio) (¶ 17(iv)). (*Id*.) Oppler noted, "I have previously deposited the following painting in the Museum of Fine Arts: Courbet: Snowy Landscape," (Compl. ¶ 16(iv)).)

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. 14 (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. 15 at HUNG017546 (emphasis added).) *See also* Benenati Decl., Ex. 14 (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."). Dr. Balazs Samuel, the head of the Secretariat of the General Directorate of the Museum of Fine Arts, and Defendants' designated 30(b)(6) witness, confirmed that if an artwork is held as a deposit, it is not owned by the state. (*See* Benenati Decl. Ex. 16 at 33:17-19.)

While some officials may have understood that particular artworks from the Herzog Collection belonged to particular members of the family, Defendants ignored any such knowledge when it suited them. For example, On October 6, 1950, financial investigators of the Executive Committee of the Budapest Metropolitan Council presented a judgment stating that "Mrs. István Herzog's artworks being kept for safekeeping in the Museum of Fine Arts" pass into

state ownership. (Benenati Decl. Ex. 17 at HUNG013202.) However, the judgment wrongly listed fourteen artworks – including artworks that other government and museum officials had previously acknowledged as belonging to Elizabeth Weiss de Csepel. Indeed, someone wrote "A.W. No!" in the margins next to the paintings, suggesting that the officials responsible for executing the judgment recognized that the judgment improperly included artworks belonging to Mrs. Alfons Weiss (*i.e.*, Elizabeth Weiss de Csepel). On this Motion, Defendants point to a November 28, 1950 Memorandum of Execution of Criminal Forfeiture as evidence that the criminal forfeiture directed to Mrs. István Herzog actually extended to twenty artworks (fifteen of which are in this lawsuit) including paintings that Defendants had previously expressly acknowledged as owned by András and Elizabeth when they received those artworks as deposits. (Def. Br. at 8 (citing Tatevosyan Exs. 19-21 & 77).)

The ultimate effect of the criminal forfeiture proceedings is unclear. Defendants point to the fact that some of the artworks listed in the criminal judgment were entered into the Museum of Fine Arts' core inventory as evidence that Defendants considered the artworks state property. (Def. Br. at 2, 38; Tatevosyan Decl. Ex. 1.) However, Dr. Balazs Samuel, the head of the Secretariat of the General Directorate of the Museum of Fine Arts, and Defendants' designated 30(b)(6) witness concerning the ownership of the Herzog Collection, confirmed that the fact that an artwork is listed in the Museum's core inventory does not necessarily mean it is owned by Hungary (*See* Benenati Decl. Ex. 16 at 35:3-12.) Moreover, according to Dr. Samuel, the placement of an artwork on the core inventory does not constitute a "confiscation" of property. (*See id*. at 54:21-55:1 ("I might be reprimanded by my attorney, but in the protection of the integrity of the museum and the museum system in Hungary in general, museums have not ever

confiscated any artwork. They keep and safe keep pieces of art. That's it.").[9] Indeed, six of the allegedly "forfeited" artworks are still held by Defendants as deposits to this day, along with four other artworks listed in the Complaint.[10] (*See* Tatevosyan Decl. Ex. 1).

In March 1951, Dr. Henrik Lorant, another representative of Elizabeth Weiss de Csepel, appeared at the Museum of Fine Arts and declared that nine artworks constituting the property of Mrs. Alfonz Weiss had been mistakenly included in the criminal attachment against Mrs. István Herzog. He executed a draft deposit agreement offering to deposit those artworks with the museum. (*See* Tatevosyan Decl. Ex. 63 at HUNG015592-94.) The Director of the Museum of Fine Arts then wrote a letter requesting "commencement of the procedure for terminating the criminal attachment" as to those artworks. (*Id*. at HUNG015594.) Defendants were unable to locate a copy of the deposit agreement signed by Dr. Lorant, nor is it clear what steps were taken following its receipt.

The First Hungarian Claims Program

In 1955, the United States authorized the United States Foreign Claims Settlement Commission to adjudicate claims of United States nationals against Hungary for Hungary's failure, *inter alia*, "to restore or pay compensation for property of United States nationals as required by Articles 26 and 27 of the Treaty of Peace" and "to pay effective compensation for the nationalization, compulsory liquidation or other taking, prior to August 9, 1955, of property of

[9] The Deputy Director of the Museum of Fine Arts, Maria Mihaly, similarly testified that some artworks on the core inventory may not actually be the property of the state. (*See* Benenati Decl. Ex. 18 at 29:8-21.)

[10] According to Ms. Mihaly, the current deposit inventory on which these ten artworks appear was created in 1958. (Benenati Decl. Ex. 18 at 19:18-21.) Prior to that the Museum had deposit lists compiled at various times in different years. (*Id*. at 19:24-20:8.) An "L" in the inventory number signifies that an artwork is a deposit. (*Id*. at 23:2-7.) Ms. Mihaly further confirmed that the museum does not have deposit agreements for all of the artworks in the deposit inventory and that the museum has artworks on the deposit inventory where the circumstances of their entry into the museum is unknown. (*Id*. at 26:25-27:8.)

United States nationals." *See* Act of August 9, 1955, Pub. L. No. 84-285, 69 Stat. 570, 1955 U.S.C.C.A.N. 626, 638 (the "1955 Claims Amendment"), *codified at* 22 U.S.C. § 1631. Elizabeth Weiss de Csepel filed a claim for certain artworks that she believed (erroneously) had been nationalized in connection with Hungary's 1954 Museum Decree and received partial compensation. (Tatevosyan Decl. Exs. 27 & 28.) This Court previously held that Elizabeth's FCSC claim does not bar her claims in this action. *See de Csepel*, 808 F. Supp. 2d at 135. Defendants have never shown – including in the Nierenberg Litigation – that Elizabeth's art was nationalized pursuant to the 1954 Museum Decree.

Defendants Take Possession Of Two Additional Artworks

Defendants argue that two artworks by Cranach (Compl. ¶ 16(vi)) and Opie (Compl. ¶ 16(xiii) did not come into Defendants' possession until well after World War II. Documents produced by Defendants suggest that in late 1952 and early 1953, Hungarian police officials detained Ferenc Kelemen, an asset manager for the Weiss de Csepel family, and accused him of espionage as a result of his communications with persons living abroad. (Tatevosyan Decl., Ex. 29 at HUNG008647-53.) During his interrogation, Kelemen admitted that he had hidden a painting by Cranach (Compl. 16(vi)) belonging to Elizabeth Weiss de Csepel in his apartment until 1950, when he delivered it to Dr. Henrik Lorant, a Weiss family attorney, concealed behind another less valuable painting. (*Id*. at HUNG008652, HUNG008667.) Kelemen denied ever informing the family that the painting had been found because "he was afraid that if the Weiss family had learned that the painting was found, they would have urged him to send it to them abroad." (*Id*. at HUNG008649.) In November 1952, the State Security Office apparently searched the residence of Dr. Lorant and found the hidden Cranach painting and took it away. (*Id*. at HUNG008654.) The Ministry of Internal Affairs then handed the painting to the

Hungarian National Gallery in 1962 who then transferred it to the Museum of Fine Arts. (Benenati Decl. Ex. 19 at HUNG017280.) Defendants have produced no act or other order giving them ownership, as opposed to a custodial interest, in the Cranach.

In 1963, a man named Endre Gyarmathy apparently informed the Hungarian National Gallery that he had a painting in his possession that was allegedly the property of the Weiss family and had been safeguarded by his mother. He asked the museum to take it over as he did not wish to be responsible for its safekeeping. (Tatevosyan Decl. Ex. 32 at HUNG016025.) The Museum accepted the painting as a "donation." (*Id*. at HUNG016031-34.) However, a July 1965 internal memorandum stated 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 the museum accepted it. (Benenati Decl., Ex. 20 at HUNG002570.)

In August 1965, Elizabeth Weiss de Csepel received information that the Cranach and Opie paintings were in the Museum of Fine Arts and wrote to the Ministry of Culture asking the Ministry to certify that the paintings were in the Museum based on the 1954 Museum Decree. (Benenati Decl., Ex. 21 at HUNG013107). Despite the fact that neither painting had arrived in the Museum before 1962, the Ministry misled Elizabeth and responded that both the Cranach and the Opie were owned by the Hungarian State. (Tatevosyan Decl. Ex. 33 at HERZOG00000323.) Elizabeth submitted that response to support her 1977 claim to the United States Foreign Claims Settlement Commission. (*See* Tatevosyan Decl. Ex. 34.)

The 1973 Agreement

In 1965, the United States began negotiations with Hungary to obtain compensation for the balance of the claims that had resulted in partial awards through the First Hungarian Claims Program in 1955. On March 6, 1973, the United States and Hungary entered into an executive

agreement. *See Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims*, Mar. 6, 1973, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167 (the "1973 Agreement"). The 1973 Agreement provided that, in exchange for the lump sum payment of $18,900,000 by Hungary, there would be a "full and final settlement and … discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People's Republic which are described in this Agreement." *Id*., art. 1(1).

As this Court previously held, the 1973 Agreement applied only to claims of persons who were United States nationals (generally defined as United States citizens)[11] both in 1973 and at the time their loss was suffered. *See de Csepel*, 808 F. Supp. 2d at 131. Therefore, the 1973 Agreement did not settle claims by persons who were not United States citizens at the time their loss was suffered. Dr. Kiss, Hungary's Rule 30(b)(6) designee on the 1973 Agreement agreed, testifying that "[t]he prime principle applied in this agreement was that the person whose claim was submitted should be or should have been an American citizen at the time of suffering the damages and be American – should be American citizens at the time when the agreement is signed." (Benenati Decl. Ex. 22 at 32:14-19 (emphasis added).) Accordingly, the only "taking" that could conceivably have fallen within the scope of the 1973 Agreement would have been a taking of property belonging to Elizabeth Weiss de Csepel between 1952 (when she became a U.S. citizen) and the date of the Agreement. None of the other heirs were United States citizens during this period.

In addition, the 1973 Agreement only covered claims by United States nationals for property affected by Hungarian measures of nationalization, compulsory liquidation,

[11] 1973 Agreement, arts. 1(1) and 3.

expropriation or other taking on or before the date" of the Agreement. *See* 1973 Agreement, 24 U.S.T. 522; *accord* Benenati Decl. Ex. 22 at 99:4-6 (Dr. Kiss agreeing that "all these deeds has [sic] to take place before the date of the signature of the agreement. That's what it stipulates.").

Despite this clear textual limitation, Defendants wrongly applied the Agreement as giving Hungary ownership of the artworks originating from the Herzog Collection even if Hungary had not previously acquired ownership. For example, a March 14, 1973 internal memorandum from the Financial Institutions Authority to the Ministry of Culture stated that "[t]he works of art in question – should they have not yet passed into Hungarian state ownership – have become property of the Hungarian State by virtue of the claims settlement agreement." The memorandum asked the Ministry to "take the necessary measures to register and secure the Hungarian state ownership on the works of art in question." (*See* Tatevosyan Decl. Ex. 41.) Defendants also wrongly applied the Agreement to artworks belonging to András and István Herzog. The March 1973 memorandum indicated that the 1973 Agreement applied not only to twelve artworks that formerly belonged "to the Weiss de Csepel family," but also included artworks belonging to András and István Herzog that had been included in the October 1950 criminal proceedings against Mrs. István Herzog. (*See* Tatevosyan Decl. Ex. 41; *see also* Tatevosyan Decl. Ex. 40.) In March 1974, the Museum of Fine Arts confirmed to the Ministry that "the paintings from the collections of the family Weiss of Csepel, Geza Danos and the Herczog Collection have been inventoried with the permission of the Department." (Benenati Decl. Ex. 23 at HUNG013264 (emphasis added).) Defendants even transferred one painting belonging to Elizabeth Weiss de Csepel from the deposit inventory to the core inventory in 1975 – two years after the 1973 Agreement took effect. (*See* Benenati Decl. Ex. 18 at 68:8-23.)

The Fall of Communism

In 1989, the Herzog Heirs learned that many pieces of the Herzog Collection were being openly exhibited by the Defendants. (Compl. ¶ 77.) Tags under the paintings identified them as "From the Herzog Collection." (*Id*.) Elizabeth Weiss de Csepel, then 89 years old, obtained only a handful of artworks before her death in 1992. (*Id*. at ¶ 78.) However, the artworks she obtained were all artworks that had been deposited back in 1950 by Dr. Oppler. (*See* Tatevosyan Decl. Exs. 23, 44, 45.)

Negotiations With Hungary And The Nierenberg Litigation

Following Elizabeth's death in 1992, Martha Nierenberg continued her mother's efforts to recover the art. (Compl. ¶ 79.) In 1996, the Hungarian Minister of Culture and Education appointed a Committee of Experts to determine who legally owned the artworks comprising the Herzog Collection. During those meetings, Dr. Mojzer, the Director of the Museum of Fine Arts from 1989-2004, admitted that Hungary did not own certain of the artworks Martha claimed – including artworks identified in Plaintiffs' present Complaint. (Benenati Decl. Ex. 24 at HUNG017764.) Dr. Mojzer also admitted that "[t]he Museum of Fine Arts never knew the exact distribution of the Herzog collection among the different heirs. They have always treated the collection as one." (Benenati Decl., Ex. 25 at HUNG002382).[12]

After negotiations proved unsuccessful, Martha Nierenberg filed a lawsuit in 1989 in Hungary to recover ten paintings that belonged to her mother. (Compl. ¶79.) She later amended her complaint to include two additional paintings. The Museum of Fine Arts returned one

[12] Dr. Mojzer had also worked at the Museum from 1957-1974 and at the Hungarian National Gallery from 1974-1989 prior to assuming the position of Director of the Museum of Fine Arts in 1989. *See* online obituary at http://jekely.blogspot.com/2014/08/in-memoriam-miklos-mojzer.html. Therefore, he would have been very familiar with the Museum's procedures during the relevant period. Dr. Mojzer died in 2014 and therefore could not be deposed in this action.

painting – Munkacsy's "Bust of Christ" – to her shortly after the litigation commenced. (*See supra* at 13; Tatevosyan Decl. Exs. 49-63.) Angela and Julia Herzog later intervened in the lawsuit as defendants as there was a dispute between them and Martha as to who owned certain of the artworks.

On October 20, 2000 the Budapest Metropolitan Court ordered that all paintings except one be returned to Martha. (ECF-22-27). Defendants appealed the decision. On November 29, 2002, the Supreme Court of Hungary vacated the judgment of the Metropolitan Court on the ground that the court erred in concluding that the paintings belonged to Elizabeth, as opposed to other members of the Herzog family, in the absence of participation in the lawsuit by all of the Herzog Heirs. (ECF-22-29, at 12-13.) The court remanded the case to the trial court for further proceedings. (*Id*.) On remand, the Metropolitan Court on November 16, 2005 ordered the return of one painting to Martha but otherwise dismissed the claim on the grounds of adverse possession. (ECF-22-31.)

On January 10, 2008, nine years after Martha commenced her lawsuit, the Metropolitan Appellate Court dismissed her claim in its entirety, holding that Hungary had essentially "purchased" ownership of the paintings through the 1973 Agreement. (ECF-15-4.) The court also agreed with the lower court that the state had obtained ownership via adverse possession, running from the date of the 1973 Agreement. (*Id*. at 14-15.) Defendants argue that "Ms. Nierenberg did not seek review of the decision by the Hungarian Supreme Court." (Def. Br. at 14.) However, no appeal was possible from that decision. (*Id*. at 2 (stating that the decision was non-appealable); Benenati Decl. Ex. 26 ¶ 6.)

Recent Hungarian Legislation

In 2013 – three years after this lawsuit was started – Hungary enacted new legislation that purports to establish a claims process to facilitate the return of artworks held in public collections that were "entrusted to the Hungarian state for the purpose of safekeeping and not with the intention that they would be confiscated." (Stauber Decl. Ex. 5.) Thus, Hungary has acknowledged that it holds artworks that do not belong to it. In March 2013, the Museum was asked to provide a list of deposited artworks to the Prime Minister (Benenati Decl. Ex. 18 at 29:22-30:7) as well as documents pertaining to those pieces of art that are in state ownership, but which have been claimed by a third party. (*Id*. at 30:16-21.) Defendants have refused to publicize or otherwise provide that list to Plaintiffs or answer questions concerning the substance of the list (*Id*. at 29-34), arguing that the communications between the Museum and the Prime Minister's office on this subject are cloaked by government privilege. (*Id*.) Accordingly, Plaintiffs have no way to verify whether other artworks from the Herzog Collection may be included on the secret list.

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 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 15) and also filed a Motion for Judicial Notice of certain facts and documents. (ECF 14.) 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), and Plaintiffs cross-moved for certification of the comity ruling. The District Court granted both motions on November 30, 2011.

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-United States 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. On May 14, 2014, also in accordance with the Scheduling Order, Defendants filed their second Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, and the parties briefed the motion. In their responsive brief, Plaintiffs requested that this Court defer ruling on the motion until discovery was completed. In October 2014, this Court ordered supplemental briefing on Plaintiffs' request for additional discovery, as well as whether Section 1605(a)(3) of the FSIA would confer jurisdiction over all three plaintiffs' claims. On December 12, 2014, this Court denied Defendants' motion without prejudice pending the close of fact discovery. (ECF 100.) The parties proceeded to conduct the depositions of Defendants' witnesses and Plaintiff Angela Herzog in February and April 2015. (*See* Def. Br. at 17.) Defendants filed the current Motion on May 18, 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 of Appeals recently emphasized that "[i]n deciding a motion to dismiss for lack of jurisdiction, we are mindful of the distinction between jurisdiction – a court's constitutional or statutory power to decide a case – and ultimate

success on the merits …. What plaintiffs must allege to survive a jurisdictional challenge, then, 'is obviously far less demanding than what would be required for the plaintiff's case to survive a summary judgment motion' or a trial on the merits." *Helmerich & Payne Int'l Drilling Co. v. Republic of Venezuela*, 784 F.3d 804, 804 (D.C. Cir. 2015) (quoting *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008)).

A plaintiff bears an initial burden of producing evidence to show that immunity should not be granted; however, the ultimate burden of persuasion of sovereign immunity rests on the sovereign defendant, 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."); *see also 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"); *Chabad*, 528 F.3d at 940 ("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*, Plaintiffs have produced evidence sufficient to show that Defendants are not immune from suit under both Section 1605(a)(2) and (a)(3) of the FSIA. Defendants have failed to meet their burden to establish otherwise. Moreover, the law of the case doctrine bars Defendants' attempts to reargue numerous legal issues that this court and the Court of Appeals have already determined adversely to Defendants.

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

As the Court of Appeals 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. Contrary to Defendants' assertions (Def. Br. at 20-40), none of the discovery taken to date in this case alters that conclusion. Instead, discovery has only confirmed that Plaintiffs' claims are "based upon" Defendants' repudiation of various post-war bailment agreements and that those repudiations had a "direct effect" in the United States.

Although not addressed in the prior motion practice, this Court also has jurisdiction over Defendants under the first and second clauses of Section 1605(a)(2) because Plaintiffs' claims for conversion, constructive trust, unjust enrichment and an accounting are "based" at least in part upon Defendants' commercial activity in the United States, including Defendants' use of artworks from the Herzog Collection for promotional purposes to attract visitors from and to sell merchandise in the United States. *See infra* at 43-44.

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 598, 600.[13] 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)).[14] *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 sovereign about the act of lending art pieces, even though the pieces themselves might belong to a sovereign.").

While Defendants up until this Motion dismissed the very concept of bailments in this case as "hypothetical" (ECF 86 at 13), Defendants now admit, following depositions, that nearly one quarter of the artworks listed in the Complaint – 10 out of 44 – are still held by the Museums in their deposit inventories to this day which "could provide indicia that ten of the forty-four artworks may have been considered bailments by one or both parties at some time." (Def. Br. at

[13] "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.

[14] 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.'").

2-3.)[15] Other documents produced by Defendants in discovery confirm that most – if not all – of the remaining 34 artworks listed in the Complaint were also treated as deposits (*i.e.*, bailments) by Defendants at some point in the years following World War II. *See supra* at 7-15. Some of those bailments were created pursuant to express written agreements. (*See, e.g.*, Tatevosyan Decl. Ex. 23.) Others were documented less formally. (*See, e.g.*, Benenati Decl. Ex. 3; Tatevosyan Decl. Ex. 64.)[16] In its December 12, 2014 Opinion, this Court agreed that "the documentary evidence produced thus far provides some support for the complaint's assertion that there existed an understanding between the parties that defendants were mere custodians of the Herzog Collection." (ECF 100 at 10.)

Defendants' argument that the documents produced by both sides in discovery "make clear that neither Plaintiffs' predecessors nor Hungary's Communist government considered themselves to be participants in a 'bailment' regarding any of the artworks" (*Id.* at 38) is simply wrong. Defendants identify the following documents and events that they claim show the absence of a bailment relationship:

- Defendants' 1949 indictment and 1950 conviction of Ilona (Kiss) Herzog, the ex-wife of István Herzog, for alleged smuggling of art out of Hungary (Tatevosyan Decl., Exs. 19, 21, 22, 23, 62, 77)
- An internal 1949 communication from the State Security Office of the Ministry of the Interior to the head of the Office of the Ministerial Commissioner for Artworks Seized from Public and Private Collections concerning the artworks of András Herzog (Tatevosyan Decl. Ex. 24)

[15] Those ten artworks include two artworks Plaintiffs have identified as the property of the heirs of Elizabeth Weiss de Csepel, seven artworks Plaintiffs have identified as the property of the heirs of Andras Herzog, and one artwork Plaintiffs have identified as the property of the heirs of Istvan Herzog. (Tatevosyan Decl. Ex. 1.)

[16] This is not surprising, given the circumstances of the time. Defendants did not maintain a formal deposit inventory until 1958 and admit that they do not have written agreements for all artworks held as deposits. Nor do they have complete information as to how artworks came to be on the deposit inventory. (Benenat Decl. Ex. 18 at 19:18-20:13; 26:25-27:9.)

- Defendants' alleged seizure of two artworks by Opie and Cranach in the 1950s and 1960s (Tatevosyan Decl., Exs. 29, 32, 33) and related 1960s correspondence (Tatevosyan Decl. Ex. 34)

- Internal correspondence concerning Defendants' response to an inquiry from art dealer Hugo Perls purportedly acting on behalf of Maria Parravicini – the mother of Angela and Julia Herzog – in 1954 (Tatevosyan Decl., Exs. 25, 26)

- Statements made by Elizabeth Weiss de Csepel to the United States Foreign Claims Settlement Commission in 1955 (Tatevosyan Decl. Ex. 71)

- Statements made by Defendants during the Nierenberg Litigation concerning two artworks by Brocky and Borsos (Tatevosyan Decl. Exs. 65-70)

- A 1998 power of attorney from Angela Maria Herzog to her sister Julia Herzog authorizing her to "request on my behalf the return of property confiscated in Hungary during the last war" (Tatevosyan Decl. Ex. 71.)

(Def. Mem. at 38-40.) Contrary to Defendants' assertions, none of these documents or events shows the absence of a bailment relationship as to all of the artworks pleaded in the Complaint.

First, the documents concerning the 1950 criminal proceedings against Mrs. István Herzog make clear that only the property of the former Mrs. István Herzog – not the property of the three Herzog siblings – was subject to forfeiture. *See supra* at 10-15. (Tatevosyan Decl., Exs. 19-21.)[17] While some artworks listed in the Complaint may have been erroneously included in the criminal proceedings against Mrs. István Herzog (*see supra* at 11-15), later documents show that the impact of those proceedings was unclear because Defendants continued to treat at least some of the artworks listed in the November 1950 memorandum as deposits, *i.e.*, artworks

[17] Documents concerning the former Mrs. Istvan Herzog's conviction are not new facts that warrant reexamining jurisdiction on this Motion. 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.)

"not owned by the state," and continue to do so today. *See supra* at 15; *See also* Benenati Decl., Ex. 27 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. 24 at HUNG017764) (admitting that certain artworks were still held as deposits in 1997 including 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)); Tatevosyan Decl., Ex. 2 at 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)); Frankish Master: Prophet (Compl. ¶ 16(xxviii))).[18] That 1958 deposit inventory remains the current deposit inventory of the Museum of Fine Arts. (Benenati Decl. Ex. 18 at 19:18-21.) 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.

Second, the internal 1949 communication concerning the artworks of András Herzog (Tatevosyan Decl. Ex. 24) is also not evidence of the absence of a bailment relationship between Plaintiffs' predecessors and Defendants. Indeed, the letter actually supports Plaintiffs' bailment allegations because it confirms that artworks and paintings from András Herzog were, as of

[18] This same 1958 inventory of deposits includes three paintings returned to Elizabeth Weiss de Csepel in 1989. *See id*. at HUNG017208, HUNG017210. *See supra* at 20-21.

February 1949, "deposited" in the Museum of Fine Arts. (*Id*. at HUNG011998.) Defendants admitted during the Nierenberg Litigation that the letter was sent several years before any court judgment was entered with respect to any of András Herzog's art (Benenati Decl. Ex. 11 at HUNG002480), and there is no evidence that the letter was shared with members of the Herzog family. The record shows that Defendants continued to treat artworks belonging to András Herzog as deposits long after the 1949 letter was sent; in fact, some artworks belonging to András Herzog are still treated as deposits today. (*See* Tatevosyan Decl. Ex. 1.)

Third, Defendants' alleged seizure of two artworks by Opie and Cranach in the 1960s (Tatevosyan Decl., Exs. 29, 32, 33) does not defeat Plaintiffs' bailment claims for each of the 44 artworks pleaded in the Complaint. Defendants knew that both paintings belonged to Elizabeth Weiss de Csepel, a United States citizen, when they took them into possession, and Defendants have produced no official measure transferring title of either artwork. Therefore, Defendants arguably possessed both paintings as a custodian – not as an owner. The Museum did not even inventory the Cranach for ten years after its seizure. Therefore, it is unclear at what point Defendants asserted "ownership" over the artworks. While Defendants advised Elizabeth Weiss de Csepel that both paintings were state property in the mid-1960s in response to her query as to whether they had been nationalized pursuant to the 1954 Museum Decree, the record shows that Defendants knew those assertions to be false when they were made, including because neither artwork had been in the museum in 1954.

Fourth, Defendants' internal correspondence concerning an inquiry from art dealer Hugo Perls purportedly acting on behalf of Maria (Parravicini) Bethlen – the mother of Angela and Julia Herzog – also does not defeat Plaintiffs' bailment claims. (Tatevosyan Decl., Exs. 25, 26) While Perls' letter asked the Museum to "sell" the seven El Grecos to Mrs. Bethlen, Mrs.

Bethlen's own correspondence with Mr. Perls reveals that she considered her children to be the "owners" of those seven El Grecos and that she was simply seeking his assistance in getting their property returned:

> You know that my two children of my first husband, Baron Herzog, are the owners of seven pictures by El Greco. In the books about Greco these pictures are reproduced under the name of Baron Herzog. I think these paintings are still in the Museum in Budapest. Not necessary to say that I would like my children to get them back. Would you please treat in my name with the Hungarian Embassy either in Washington or in Bern. The best solution would be to have these paintings sent to Bern and to deposit them in the Credit Suisse in Zurich, of course on my name.

(*See* Tatevosyan Decl. Ex. 26 at HUNG013043-44 (emphasis added).) There is no evidence that Defendants' "classified" response (which stated only that the "majority" of the artworks were the property of the Museum of Fine Arts – not that all were) was shared with Mr. Perls or any member of the Herzog family.

Fifth, Defendants' communications during the Nierenberg Litigation concerning two paintings by Borsos and Brocky (Tatevosyan Decl. Exs. 65-70) are also not sufficient to show the absence of a bailment relationship as to each of the artworks pleaded in the Complaint. At most, those communications relate to the date of termination of a bailment as to those two artworks. Indeed, Defendants confirmed in discovery that the Borsos painting was held by Defendants as a deposit until 1975 – two years after the 1973 Agreement was signed. (Benenati Decl. Ex. 18 at 68:1-23.)

Sixth, 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' first 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 1977 claim for compensation. (*See, e.g.*, ECF. 15 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 bars Plaintiffs' bailment claims in this action. *See de Csepel,* 808 F. Supp. 2d at 123-126, 134-35. Likewise, the Court of Appeals specifically 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). Accordingly, this Court should not revisit this issue on this Motion.

Lastly, the 1998 Power of Attorney from Angela Herzog to Julia Herzog authorizing her to "request on my behalf the return of property confiscated in Hungary during the last war" (Tatevosyan Ex. 72) is not inconsistent with Plaintiffs' bailment claims. Plaintiffs have never disputed that artworks at issue were taken during the war. *See infra* at 45-49.

For all of these reasons, the Court of Appeals correctly concluded that Plaintiffs' claims are "based upon" bailments, which were "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 Supreme Court held in *Republic of Argentina v. Weltover* that an effect is "direct" if "it follows 'as an immediate consequence of the defendant's … activity'" and expressly rejected any requirement that an effect be "substantial" or "foreseeable." *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."[19] 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 Mgmt. 1 L.P. v. AG of Canada*, 600 F.3d 661, 665 (D.C. Cir. 2010). While Defendants argue that a direct effect "requires that 'something legally significant actually happened in the United States'" (Def. Br. at 33), the Court of Appeals, unlike other circuits, has not imposed a *per se* rule requiring plaintiffs to allege an express agreement to make payments in the United States. *See Cruise Connections*, 600 F.3d at 666 ("[W]e 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, 1147 (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.").

Nor is there a requirement that a United States citizen be party to an agreement in order for the breach of that agreement to have a "direct effect" in the United States. 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)

[19] Defendants acknowledge this holding in a footnote (Def. Br. at 25 n.9) but inexplicably continue to suggest elsewhere that an effect must be "substantial" and "foreseeable" in order to be "direct" under Section 1605(a)(2). *See* Def. Mem. at 30 (quoting *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988)) and 31 (same).

(quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983)).[20] Therefore, it is irrelevant whether artworks from the Herzog Collection were or are owned entirely by foreign citizens. Also irrelevant under *Weltover* is the extent to which the Italian plaintiffs communicated or corresponded with their United States relatives, and the extent to which the non-United States citizen Herzog Heirs had connections to the United States. (Def. Br. at 26-31.)[21]

The Court of Appeals held that the "direct effect" requirement of Section 1605(a)(2) was satisfied in this case 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 contracts; and breached that

[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 United States under third party contracts were not forthcoming as a result of defendant's breaches).

[21] Defendants' statements concerning the parties' agreement not to depose Julia Herzog are not entirely accurate. (Def. Br. at 27.) Plaintiffs agreed to submit written answers in lieu of the oral deposition of Julia Herzog because Julia Herzog was scheduled to have surgery in the days immediately following her scheduled deposition and was not sure when the procedure would occur or whether she was capable of being deposed. Plaintiffs noted in their responsive email that counsel had only asked Julia Herzog the specifically listed questions and could not confirm that she would not contradict any other aspect of her sister's testimony until Plaintiffs received the transcript of that deposition and had an opportunity to review it with her. (Stauber Decl. Ex. 12.) Plaintiffs have not yet had that opportunity as Julia Herzog was only very recently released from the hospital following surgery.

obligation by "fail[ing] to restitute the Herzog Collection following demand by the U.S. Herzog Heirs"). Defendants accuse the Court of Appeals of improperly drawing an inference "that the forty-four individual artworks – collected by Baron Herzog during his lifetime and later divided among his three children as their sole and separate property – are a single entity," a "single bailment," and argue that no such inference can be drawn following discovery. Def. Br. at 21. However, the Court of Appeals drew no such inference. The Complaint clearly pleads the existence of multiple post-war 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 (holding that the Complaint adequately pleaded various express or implied post-war bailment agreements with Defendants).[22]

1. Discovery Has Confirmed That Defendants Treated The Herzog Collection As An Indivisible Group

In its December 12, 2014 Opinion, this Court agreed that "plaintiffs' jurisdictional argument would be bolstered by evidence that defendants treated the Herzog Collection as an

[22] Contrary to Defendants' assertions (Def. Br. at 21, 28), 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) does not require 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."

indivisible group." (ECF 100 at 10.) Discovery has confirmed that Defendants did precisely that when it benefited them to do so.

As this Court correctly recognized, some of the documentary evidence produced suggests that certain Hungarian officials may have had knowledge concerning the individual ownership of artwork by the Herzog heirs as a result of, for example, the labels that the family put on their packing crates when they attempted to hide the artworks from Defendants and their Nazi collaborators. (ECF 100 at 10; Def Br. at 23-24.) However, other documents show that Defendants disregarded these distinctions when it benefited them and took actions that impacted the artworks as if they were owned jointly. These relevant "acts" had direct effects in the United States. Indeed, Defendants repeatedly asserted in the Nierenberg Litigation that the division of the artworks among the heirs was unknown – and that they had not attributed full evidentiary value to the so-called lists they now put forward in this case – and used those facts to argue that the artworks had been nationalized as "abandoned" property. (*See, e.g.*, Benenati Decl. Ex. 28 at HUNG002958.)

For example, Defendants wrongly included artworks belonging to Elizabeth Weiss de Csepel, András Herzog, and István Herzog in the criminal proceedings brought against the former Mrs. István Herzog. *See supra* at 11-15. As Balint Magyar, the Hungarian Minister of Culture, stated in 1997: "The official measure – a measure taken in the course of criminal procedures – did not distinguish the individual items by the individual family members who owned them but treated them as a whole, regardless of the ownership status of the individual family members." (Benenati Decl. Ex. 29 at HUNG002401.) That "act" simultaneously impacted Elizabeth Weiss de Csepel (in the United States), the Italian Plaintiffs (in Italy), and István Herzog (in Hungary) simultaneously. Defendants also treated the 1973 Agreement

between the United States and Hungary as a "purchase" not only of the artworks of Elizabeth Weiss de Csepel (living in the United States), but also of artworks belonging to the heirs of András and István Herzog (living in Italy and Hungary). Defendants' 2008 repudiation of Martha Nierenberg's claims simultaneously affected Martha (in the United States), as the heir of both Elizabeth and István, as well as the Italian Plaintiffs (in Italy), who understood that any further efforts to reclaim their art in Hungary would be futile. These "acts" therefore had "direct effects" in the United States even if they also had simultaneous effects elsewhere.

These "acts" are consistent with the statement of Dr. Miklos Mojzer that "The Museum of Fine Arts never knew the exact distribution of the Herzog collection among the different heirs. They have always treated the collection as one." (Benenati Decl., Ex. 30 at HUNG002382.) Contrary to Defendants' assertions (Def. Br. at 22 n.6), the testimony of Dr. Balazs Samuel – who has been with the Museum only since 2008 – does not contradict Dr. Mojzer's 1997 statement. The initial exchange with Dr. Samuel confirms this:

> Q: Prior to the commencement of this litigation, did the museum know which particular member of the Herzog family had owned each of the artworks listed in the complaint?
>
> A: I really cannot answer this question. I cannot tell you if they knew which particular member of the Herzog family was the owner of the item.

(Benenati Decl. Ex. 16 at 72:23-73:4.) Dr. Samuel was then shown Dr. Mojzer's 1997 statement and was asked whether it was consistent with his understanding of how the Museum of Fine Arts has treated the collection. Dr. Samuel testified that he had "not attended these meetings, so I cannot tell you why Dr. Mojzer is making such claims. Unfortunately, he has been deceased so we can not ask him about it." (*Id*. at 74:12-75:24.) Dr. Samuel noted that each artwork receives a separate inventory number but reiterated that he did not "understand what [Dr. Mojzer's] statement means, that a collection was treated as one. In what sense? By what criteria? What

does this mean?" (*Id*. at 75:13-76:5.) It was only after the parties took a short recess, and Dr. Samuel conferred with Defendants' counsel, that he came back and asked to "clarify" his testimony to hypothesize that Dr. Mojzer's statement referred to the treatment of the collection by historians as opposed to in a legal sense. (Def. Br. at 22 n.6 (quoting Benenati Decl. Ex. 76:20-25.). Dr. Samuel's "clarification" is unpersuasive.

2. Herzog Family Members Always Had The Ability To Request That Their Art Be Sent To The United States

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 Mgmt. 1 L.P.*, 600 F.3d at 450-51 (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 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 United States 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 United States, as the place where money was to be deposited).[23]

Contrary to Defendants' assertions (Def. Br. at 34-35), Plaintiffs always had the ability to request export of their artworks to the United States, including at the time the relevant deposit agreements were concluded. While the application of Hungary's export laws is a subject for expert discovery, Defendants' own documents show that Hungary permitted the export of art, including to the United States. (*See, e.g.*, Benenati Decl., Ex. 31 at HUNG009484-89 (permits issued to Geza Danos and Peter Danos in April and May 1948 to export artworks to New York).) While Defendants argue that the default option under Hungarian law was for performance to occur at the place of business of the obligor (*i.e.*, the Museums) and that certain export laws applied throughout the relevant period that prohibited export (Def. Mem. at 34-35), Plaintiffs explained in 2011 that it is far from established to what extent those export laws applied to each of the artworks pleaded in the Complaint. (Benenati Decl. Ex. 25). Regardless, export was possible even under those laws with Defendants' consent. (Def. Br. at 34.) The opinion of Dr. Samuel – who was not at the Museum during the relevant period – that Defendants would never have agreed to such export (ECF 106-11 at ¶¶ 7-8) is entirely speculative.

Indeed, in an internal 1948 memorandum (Tatevosyan Decl. Ex. 18), Defendants expressed concern over releasing certain artworks belonging to the heirs of András Herzog because they believed that other artworks from the Herzog Collection might have been removed from the country illegally. (Def. Br. at 7; Tatevosyan Decl. Ex. 18 at HUNG011325.) The memorandum notes:

[23] 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* Tatevosyan Decl., Ex. 2 (Response to Interrogatory No. 2.)

> The already apparent great interest in these paintings among both art dealers and agents makes it likely that at least a part of them will be sold, and there is a danger that they will be taken out of the country, either legally or illegally…. According to legislation in force, in the case of export the state has an option on them. However, should it fail to exercise its option within 8 days, the export permit may be issued. According to latest practice, export permits are issued by the National Bank, based on the estimate of the Museum of Fine Arts, in which case 40% of the estimated value is payable for the export permit.

Id. at HUNG011325. The memorandum goes on to note that:

> Director General István Genthon also has a confidential suggestion whereby the export of the Herzog art works that are to be returned might be permitted if the painting entitled Christ on the Mount of Olives by Greco was donated to the Museum of Fine Arts.

Id. This statement confirms that export of the art was possible at various times.

Certainly by 2008 – when Plaintiffs assert that the relevant breaches occurred – Plaintiffs could have requested export of the artworks to the United States regardless of where Plaintiffs themselves resided, given Hungary's status as a member of the European Union. 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 (Tatevosyan Decl., Exs. 44, 75; Def. Br. at 35 n.13), those artworks were returned pursuant to consensual arrangements between the parties, and therefore do not prove the absence of a "direct effect" in the United States resulting from Defendants' failure to honor Plaintiffs' demand in this case.

Likewise, the fact that some Herzog family members or their representatives may have requested to export or place certain artworks in other locations (Def. Br. at 27-28) does not prove the absence of a "direct effect" in the United States resulting from Defendants' failure to honor Plaintiffs' demand in this case. To the contrary, Mrs. Bethlen's request to export certain artworks to Switzerland confirms that Plaintiffs' predecessors fully understood that they had the ability to request specific performance outside of Hungary, including in the United States. (*See* Benenati

Decl. Ex. 26 at HUNG013043-44.) The fact that Hungary may have denied that request at that time is not evidence that Plaintiffs could not have obtained permission to export their art in 2008.

C. This Court Also Has Jurisdiction Under the First and Second Clauses of Section 1605(a)(2)

Alternatively, this Court also has jurisdiction under the first and second clauses of Section 1605(a)(2), which provide that a foreign state is not immune from jurisdiction where "the action is based upon a commercial activity carried on in the United States by the foreign state" or the action is based upon "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." This Court previously held that Defendants are engaged in commercial activity in the United States, and Defendants have never disputed that finding. *See de Csepel*, 808 F. Supp. 2d at 131.

In *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (1992), the Ninth Circuit held that the Sidermans' allegations that Argentina solicited guests in the United States for the Argentinean hotel they had expropriated from the plaintiffs and accepted payments for those reservations in this country showed that Argentina was receiving profits and benefits derived from United States sources that rightfully belonged to the Sidermans. *See id*. at 709. Accordingly, the court held that "[t]he Sidermans' causes of action for conversion, constructive fraud, intentional interference with business relationships and breach of fiduciary duty directly relate, therefore, to Argentina's acts in this country" for purposes of the first and second clauses of Section 1605(a)(2).

Here, the Complaint makes very similar allegations. In addition to Plaintiffs' bailment claims, the Complaint also asserts claims for conversion, constructive trust, accounting and unjust enrichment based on part on the fact that Defendants continue to profit from their unlawful possession of the Herzog Collection, including by soliciting tourists in the United

States, exhibiting at least one of the artworks claimed, selling admission tickets in the United States over the internet, promoting images from the Herzog Collection in and by authoring, promoting and distributing books and other publications exploiting the paintings. (Compl. ¶ 5, 32-34, 37.) Defendants have also exhibited at least one artwork from the Herzog Collection in the United States. (Compl. ¶ 32(d).) These activities have caused Defendants to "receive[] substantial financial benefits from their possession of the Herzog Collection that far exceed any costs they have expended in storing the Herzog Collection." (*Id.* ¶ 102.) Accordingly, Plaintiffs' claims are also "based upon" this commercial conduct in the United States.

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

Section 1605(a)(3) of the FSIA provides that a foreign state is not immune from the jurisdiction of United States courts 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) (emphasis added).

This Court has already held that each of these elements is satisfied based on Defendants' and their Nazi allies' looting and seizure of the Herzog Collection during World War II. *See de Csepel*, 808 F. Supp. 2d at 128-131. 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.) Likewise, that is the only element of the takings exception challenged by Defendants on this Motion. (*See* Def. Br. at 40-58.)

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. In its December 2014 Opinion authorizing this Motion, this Court specifically asked the parties to address jurisdiction under Section 1605(a)(3). (*See* ECF 100 at 12.) 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, and this Court's conclusion that the elements of that exception are met remains valid.

A. Artworks From The Herzog Collection Were "Taken In Violation of International Law" During The Holocaust

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 de Csepel*, 808 F. Supp. 2d at 128. The Court of Appeals recently reaffirmed this standard, emphasizing that "[i]n an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' … *only* if the claims are 'wholly insubstantial or frivolous.' A claim fails to meet this exceptionally low bar, if prior judicial decisions 'inescapably render the claim [] frivolous' and 'completely devoid of merit.'" *Helmerich & Payne Int'l Drilling Co.*, 784 F.3d at 812 (quoting *Hagans v. Lagine*, 415 U.S. 528, 538 (1974). "'[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial' for jurisdictional purposes." *Id*. Here, Plaintiffs' claims are far from "wholly insubstantial or

frivolous" and therefore easily meet the "exceptionally low bar" for jurisdiction articulated by the Court of Appeals.

As this Court has already held, the vast majority of the artworks listed in the Complaint were "taken" from Plaintiffs' predecessors during the Holocaust as part of a campaign of genocide that indisputably violated international law. *See de Csepel*, 808 F. Supp. 2d at 128 (holding that "[t]he Complaint clearly alleges substantial and non-frivolous claims that the Herzog Collection was taken without just compensation and for discriminatory purposes."). The Complaint alleges the incontrovertible fact that Defendants collaborated with the Nazis – including the infamous Adolf Eichmann – and seized the Herzog Collection as part of an organized campaign of genocide against Hungarian Jews.[24] (Compl. ¶¶29, 59.) *See Agudas Chasidei Chabad v. Russian Fed'n*, 729 F. Supp. 2d 141, 145 (D.D.C. 2010) ("An expropriation is a violation of international law if the taking is not for a public purpose, is discriminatory, or does not provide for just compensation."). *Accord Altmann v. Republic of Austria*, 317 F.3d 954, 967-68 (9th Cir. 2002), *amended by*, 327 F.3d 1246 (9th Cir. 2003), *aff'd on other grounds*, 541 U.S. 677 (2004).

This Court has already rejected Defendants' footnote argument that the "domestic takings" rule bars Plaintiffs' claims because Plaintiffs were Hungarian citizens during the

[24] These takings constituted war crimes and crimes against humanity. *See* Convention on the Prevention and Punishment of the Crime of Genocide (1948) ("genocide, whether committed in time of peace or in time of war, is a crime under international law."); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1203 (C.D. Cal. 2001) ("[T]he Nazi's aryanization of art collections was part of a larger scheme of the genocide of Europe's Jewish population."), *aff'd*, 317 F.3d 954 (9th Cir. 2002). Under international law, genocide includes the taking of property from a persecuted group. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, pt. II, art. 6(b), 59 Stat. 1544, 1547 (the "Nuremberg Charter") (defining "war crimes" as including plunder of public or private property and "crimes against humanity" as including "persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal.").

Holocaust (Def. Br. at 45 n.16).[25] *See de* Csepel, 808 F. Supp. 2d at 130 (holding that Hungary had *de facto* stripped "all Hungarian Jews of their citizenship rights" during the Holocaust). Moreover, this Court also held that

> even if defendants are correct that the seizure of the Herzog Collection by Hungary alone would not constitute a violation of international law, the Complaint also states a substantial and non-frivolous taking in violation of international law based on the active involvement of German Nazi officials in the taking of at least a portion of the Herzog Collection.

Id. at 130 (citing Compl. ¶¶ 59-61)).[26] Those conclusions remain valid. The Seventh Circuit reached the same result in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 676 (7th Cir. 2012), based on slightly different reasoning, holding that "[w]here international law universally condemns the ends, we do not believe the domestic takings rule can be used to require courts to turn a blind eye to the means used to carry out those ends – in this case, widespread expropriation of victims' property to fund and accomplish the genocide itself."). *Abelesz*, 692 F.3d at 682 n.6. The reasoning of *Abelesz* also supports rejection of the domestic takings rule here.[27] Finally, the actions of nations under Nazi control or occupation cannot be considered

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[25] None of the cases relied on by Defendants (Def. Br. 45 n.16) involved the taking of property as part of a governmental campaign of genocide as is alleged here. In *Yang Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 101 (D.D.C. 2005), a Chinese political subdivision unilaterally declared assets of a nongovernmental organization to be state assets. *United States v. Belmont*, 301 U.S. 324, 332 (1937), involved the dissolution and nationalization of a Russian corporation. *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976), involved looting by private citizens

[26] It is undisputed that Hungary was under Nazi German occupation when the Herzog Collection was seized. Hungary's own Constitution, which took effect on January 1, 2012, asserts that Hungary lost its "self-determination" while under German occupation. (Benenati Decl. Ex. 3 ¶ 39.)

[27] Other courts have held that the taking of Jewish property by the Nazis during World War II violated international law. *See Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1165-66 (C.D. Cal. 2006) (expropriation exception applied to Nazi Germany's seizure of German national's property where plaintiff argued that Nazi citizenship laws precluded citizenship for Jews), *aff'd in part*, 616 F.3d 1019, 1023 (9th Cir. 2010) ("In [1939] … German Jews had been

valid sovereign acts. Indeed, the State Department has expressly freed courts to "pass upon the validity of the acts of Nazi officials" in the context of the application of the act of state doctrine.[28]

Defendants do not dispute that at least 42 of the 44 artworks listed in the Complaint were "taken" during World War II.[29] (Def. Br. at 2.) Instead, Defendants argue in a footnote that any World War II era "taking in violation of international law" was remedied because 19 artworks were allegedly "legally and physically returned" to the family after World War II (Def. Br. at 45

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deprived of their civil rights, including their German citizenship."); *see also Altmann*, 142 F. Supp. 2d at 1203 (Nazi takings of Klimt paintings from a Jewish collector were "undeniably a taking in violation of international law.") *Cf. Roboz v. Kennedy*, 219 F. Supp. 892, 894 (D.D.C. 1963) (plaintiffs were not "domiciled in, or a subject, citizen or resident of Hungary" under the International Claims Settlement Act, because they had a firm intent to leave Hungary, had lost their home, and no rights in law, and could not vote); *Kaku Nagano v. McGrath*, 187 F.2d 759, 768 (7th Cir. 1951), *aff'd sub nom. McGrath v. Nagano*, 342 U.S. 916 (1952) ("[O]ur concept of a citizen is one who has the right to exercise all the political and civil privileges extended by his government .... Citizenship conveys the idea of a membership in a nation.").

[28] *See Bernstein v. N.V. Nederlandsche-Amerikaansch Stoomvaart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam). *See also Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000) ("[T]he confiscation of private property during the Holocaust was a violation of customary international law" with respect to claims involving property taken during World War II in Vichy France); *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 307 (D. R.I. 2007) (Nazi party's forced liquidation of Jewish art dealer's gallery inventory was properly classified as looting or stealing), *aff'd*, 548 F.3d 50 (1st Cir. 2008); *Menzel v. List*, 267 N.Y.S.2d 804, 811 (N.Y. Sup. Ct. 1966) (Nazi party could not convey good title to art taken during World War II because seizure of art during wartime constituted "[p]illage, or plunder … [which is the] taking of private property not necessary for the immediate prosecution of [the] war effort, and is unlawful"); *Weiss v. Lustig*, 58 N.Y.S.2d 547, 549 (N.Y. Sup. Ct. 1945) ("[W]e are not dealing with the laws of a sovereign State, but with a country overrun by bandits, who were issuing their own decrees. To recognize these decrees as the laws of a sovereign State, would do violence to every fundamental principle of human justice.").

[29] Defendants argue that two paintings – the Cranach described in paragraph 16(vi) of the Complaint and the Opie described in paragraph 16(xiii) of the Complaint – were not "taken" until the 1950s or 1960s. Even if that were true (which is not entirely clear from the documents), the Complaint still pleads substantial and non-frivolous World War II era takings claims against Defendants as to the remaining 42 artworks which are sufficient to sustain jurisdiction over all Defendants. This Court should decline to resolve disputed factual issues concerning particular artworks at this motion to dismiss stage when those issues do not affect jurisdiction overall and can be more effectively addressed on summary judgment.

n.16.) Even if some artworks were in fact "returned," (and it is far from clear that all 19 were), the documentary evidence supports Plaintiffs' allegations that any "returns" were largely on paper or short-lived and that Defendants quickly repossessed any artworks that were returned. *See supra* at 7-15; Compl. ¶ 70-73. Regardless, it is undisputed that the remaining 25 artworks described in the Complaint were never returned to the family. *See* Tatevosyan Decl. Ex. 76.

B. Rights In Property Taken In Violation Of International Law Are "In Issue"

Section 1605(a)(3) – unlike Section 1605(a)(2) – does not require that a plaintiff's claims 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." *Compare* 28 U.S.C. § 1605(a)(3) *with* 28 U.S.C. § 1605(a)(2); *see* Pl. Opp. Mem at 37. Accordingly, as this Court previously recognized, courts have sustained jurisdiction under Section 1605(a)(3) even where the sovereign that performed the original "taking" is not the defendant in the litigation. *See de Csepel*, 808 F. Supp. 2d at 130.

Such rights are plainly "in issue" here, because the bailment agreements between Plaintiffs and Defendants resulted directly from Defendants' acts during the Holocaust when the Herzog Collection was "taken in violation of international law" by Defendants and their Nazi collaborators. Defendants' unlawful taking of the Herzog Collection during the Holocaust gave them possession and control over the artworks – particularly the artworks removed to Germany during the war and later returned to Hungary. Hungary used that possession and control to pressure Plaintiffs' predecessors – most of whom had fled Hungary after losing their homes and livelihoods – 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.

Other artworks were "returned" but Defendants quickly regained possession after Defendants brought false smuggling claims against Herzog family members who had fled abroad as a result of the war. (*See* Compl. ¶¶ 36, 66-68, 70-73; *supra* at 10-15.) Simply put, had the looting and seizure by Defendants and their Nazi allies during World War II not occurred, Plaintiffs would have retained possession of their art, their homes and their livelihoods – in Hungary. If not for Defendants' campaign of genocide, there would have been no need for bailment agreements involving the Herzog Collection in the first place.

C. Defendants' Repudiation Of A Bailment Agreement Also Constitutes A "Taking In Violation of International Law"

The breach of a bailment agreement constitutes a conversion (*i.e.*, a "taking" of property). *See Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 332, 335 (D.D.C. 2007). Therefore, even if Defendants remedied the original World War II "takings" by returning certain artworks (and they did not), any breach by Defendants 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 breach occurred in 2008 when the Hungarian court issued its final decision in the Nierenberg Litigation. (Compl. ¶¶ 36, 87, 94-105.) Any 2008 "taking" violated international law because Martha Nierenberg, the Italian Plaintiffs, and other heirs of István Herzog all held foreign citizenship by 2008 and the art was taken without

just compensation.[30] The 2008 decision final judgment in the Nierenberg Litigation was also an independent violation of international law because it was based on the court's bad faith interpretation of the 1973 Agreement as barring Martha Nierenberg's claims. *See* Vienna Convention on the Law of Treaties, art. 31 May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith"); *see also id*. art. 26 (every treaty must be performed in good faith).

Defendants argue that any "taking" occurred much earlier than 2008, during the Communist era. (Def. Br. at 41, 45 n.16.) 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. 14 (Defs.' Responses to Interrogatory Nos. 3, 9, 11). Resolving the specific history of each individual artwork raises substantial issues of fact that this Court should decline to address on a motion to dismiss.

Defendants suggest that fifteen artworks were "seized" as a result of criminal proceedings brought against the former Mrs. István Herzog for alleged smuggling in the early 1950s (Def. Mem. at 2, 7-8). The documentary evidence is inconsistent and the impact of those proceedings on the artworks is less than clear. *See supra* at 14-15. Indeed, some of the artworks allegedly subject to seizure are still held by Defendants as deposits to this day. *Id*. Moreover, to the extent that artworks were in fact "taken" as a result of those criminal proceedings, the taking violated

[30] While the court judgment applied on its face only to the paintings at in the lawsuit, Plaintiffs understood from the decision that any further demand for restitution of any portion of the Herzog Collection would be futile. (Compl. ¶ 94.) Indeed, the record shows that Defendants ignored the Italian Plaintiffs' June 2000 request for the return of their artworks pending resolution of the Nierenberg Litigation. (Tatevosyan Decl. Ex. 56.)

international law.[31] Regardless, it is undisputed that the criminal proceedings did not affect all of the artworks pleaded in the Complaint and this Court should decline to dismiss Plaintiffs' claims to individual artworks at the motion to dismiss stage when such dismissals would not impact jurisdiction overall.

To the extent that Defendants acquired ownership of artworks from the Herzog Collection after the 1973 Agreement was executed, those takings also violated international law because the 1973 Agreement was intended to cover expropriations, nationalizations and takings prior to the date of the Agreement. It was not intended to give Defendants license to nationalize property *after* the date of the Agreement. *See supra* at 19.

D. The Peace Treaty Does Not Preclude This Court From Exercising Jurisdiction Under Section 1605(a)(3)

Defendants attempt to re-argue that any claim for World War II-era "takings" is not actionable because the Peace Treaty "expressly conflicts" with the FSIA and precludes this Court from exercising jurisdiction under Section 1605(a)(3) (Def. Br. at 42-45). *See* 28 U.S.C. § 1604 (FSIA applies "[s]ubject to existing international agreements to which the United States is a party at the time of enactment…"); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989) (the "subject to" clause in Section 1604 applies only "when international agreements '*expressly conflic[t]*' with the immunity provisions of the FSIA."). As the Court of Appeals correctly recognized, however, the Peace Treaty does not apply, much less divest this

[31] Defendants predicated those proceedings on a Holocaust-era agreement between Istvan Herzog and his wife that Defendants knew to be invalid. (Tatevosyan Decl. Ex. 19.) Defendants brought criminal charges against Mrs. Istvan Herzog in absentia after she fled Hungary and relinquished her passport at the border. (*Id*. *See also* Benenati Decl. Ex. 8.) Defendants targeted the Herzog family members because they had fled abroad during the Holocaust. *Id*.; *see supra* at 10-15. Accordingly, any taking was done "without payment of the prompt adequate and effective compensation required by international law" and was "arbitrary or discriminatory in nature."

Court of subject matter jurisdiction over Plaintiffs' claims, irrespective of whether jurisdiction is evaluated under Section 1605(a)(2) or (a)(3) of the FSIA. *See de Csepel*, 714 F.3d at 600.[32] *See also Abelesz*, 692 F.3d at 695-96 (holding that the Peace Treaty does not "expressly conflict" with the immunity provisions of the FSIA for disputes concerning restitution of property expropriated during World War II).[33]

Article 27 of the Peace Treaty – in which Hungary committed to restore or pay fair compensation for property in Hungary of "persons under Hungarian jurisdiction" – did not settle or otherwise resolve Plaintiffs' claims. Neither Article 27 – nor any other provision of the Peace Treaty – settled or otherwise resolved claims against Hungary of "persons under Hungarian jurisdiction."[34] Article 27 instead simply stated Hungary's obligation to compensate such claimants prospectively. *See Abelesz*, 692 F.3d at 695 ("Article 27 spoke exclusively to Hungary's obligations. It said nothing about the rights and responsibilities of the people from whom Hungary expropriated property."). By contrast, Hungary expressly waived all claims against the Allies on behalf of itself or its nationals arising out of the war (Peace Treaty, art. 32).

[32] By contrast, in *Moore v. United Kingdom*, 384 F.3d 1079 (9th Cir. 2004) (cited at Def. Br. at 42), the treaty at issue applied to plaintiff's claims.

[33] Another District Judge in this Court found the reasoning of *Abelesz* unpersuasive and concluded that where "the gravamen of the plaintiffs' [complaint] is that the Hungary Defendants' efforts to comply with the 1947 Treaty were 'paltry and wholly inadequate'" there was an express conflict between the Peace Treaty and the FSIA that precluded the Court from exercising jurisdiction over plaintiffs' claims in that case. *See Simon v. Republic of Hungary*, 37 F. Supp. 3d 381 (D.D.C. 2014). The *Simon* court expressly distinguished the bailment claims at issue in this case from the *Simon* plaintiffs' claims for compensation for property that had been liquidated after the war in accordance with the Peace Treaty.

[34] Any such settlement would have been entirely inconsistent with the principle of espousal, pursuant to which a state acts on behalf of its own citizens only and advances their claims against another state. The United States can only espouse or settle claims by persons who were United States citizens at the time of their injury. *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203, 206 (D.C. Cir. 1987). The fact that Jewish organizations and interest groups may have lobbied for broad language at the time the Peace Treaty was drafted (Def. Br. at 43-44) is not evidence that the United States agreed to abandon this long-standing principle.

This one-sided waiver is not surprising given Hungary's status at the time as a defeated enemy nation.

Nor does the dispute resolution procedure described in Article 40 of the Peace Treaty apply to Plaintiffs' private bailment claims. Article 40 created an arbitration procedure that covered diplomatic disputes among the signatory nations concerning the Treaty (a procedure that Hungary ultimately avoided participating in by refusing to appoint its representative to the Commission that was supposed to adjudicate disputes). *See* Advisory Opinion of the I.C.J., 1950 I.C.J. 221, at 9 (July 18, 1950); *accord* Advisory Opinion of the I.C.J., 1950 I.C.J. 65, at 75 (cited at Def. Br. at 43). Article 40 does not, on its face, apply to private bailment claims that arose after the Peace Treaty was signed, such as are asserted here. *See de Csepel*, 714 F.3d at 602 (holding that Plaintiffs' bailment claims "fall outside the Treaty's scope").

Because the relevant provisions of the Peace Treaty do not apply to – much less bar – Plaintiffs' claims, there is no "express[] conflic[t]" between the Peace Treaty and the relevant provisions of the FSIA that would divest this Court of subject matter jurisdiction.

E. The 1973 Agreement Does Not Bar Plaintiffs' Claims

Defendants' argument that the 1973 Agreement applies and divests this Court of subject matter jurisdiction (Def. Br. 46-48) is equally meritless and has already been rejected by this Court.[35] *See de Csepel*, 808 F. Supp. 2d at 132-33. Thus, the law of the case doctrine bars Defendants' attempt to re-argue this point.

[35] Defendants should be estopped from asserting the 1973 Agreement as a defense to Plaintiffs' claims for the Cranach and Opie paintings that were the subject of Elizabeth's 1977 claim to the United States Foreign Claims Settlement Commission because Defendants knowingly provided false information to Elizabeth Weiss de Csepel concerning Defendants' ownership of the artworks and therefore misled her into asserting the claims. (*See supra* at 17.)

The 1973 Agreement – like the Peace Treaty – was "based on the concept of espousal." *De Csepel*, 808 F. Supp. 2d at 133. Both Hungary and the United States expressly recognized this limitation on their authority during the negotiations of the 1973 Agreement.[36] *See id*. at 133. Moreover, after the 1973 Agreement was signed, both the Department of State and Congress recognized that the 1973 Agreement covered only claims of persons who were United States citizens both in 1973 and at the time of their injury. *De Csepel*, 808 F. Supp. 2d at 133-34.

Contrary to Defendants' assertions (Def. Br. at 46-47), the testimony of Dr. Kiss – Defendants' Rule 30(b)(6) witness who participated in the negotiations of the 1973 Agreement on behalf of Hungary – supports Plaintiffs' interpretation of the 1973 Agreement, not Defendants'. While Dr. Kiss testified that the Agreement covered United States claims dating from World War II to the date of the 1973 Agreement (Def. Br. at 47), he was very clear that "[t]he prime principle applied in this agreement was that the person whose claim was submitted should be or should have been an American citizen at the time of suffering the damages and be American – should be American citizens at the time when the agreement is signed." (Benenati Decl. Ex. 22 at 32:14-19.) Therefore, Dr. Kiss's testimony is entirely consistent with the United States' understanding that the only war-time claims covered by the Agreement were those belonging to persons who were United States citizens when they were injured and at the time the Agreement was signed. Here, none of the Herzog family members were United States citizens during the war. Therefore, the only "taking" that could conceivably be covered by the 1973 Agreement would be a taking of the property of Elizabeth Weiss de Csepel between 1952 – the

[36] The 1973 Agreement cannot bar the claims of the non-United States citizen plaintiffs, Angela and Julia Herzog, under any circumstances because neither they nor their father were ever United States citizens. (Compl. 41.) Nor can it bar the claims of Istvan's heirs as none of his heirs was a United States citizen prior to 1973.

date she became a United States citizen – and the effective date of the Agreement in 1973. No such taking has been shown here.

F. Plaintiffs Are Not Required To Further Exhaust Remedies In Hungary

Defendants' argument that the heirs of András and István Herzog are barred from pursuing their claims because they have failed to exhaust available remedies in Hungary (Def. Br. at 52-58) has already been rejected by this Court and is wrong in any event.

In their first motion to dismiss in 2011, Defendants argued – as they do here – that Plaintiffs' claims should be barred because they failed to exhaust their remedies in Hungary as to the thirty-two paintings described in the Complaint that were not the subject of Martha Nierenberg's 1999 Hungarian lawsuit. (ECF 15 at 17 n. 15.) This Court rejected that argument, holding that "[t]o 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." *De Csepel*, 808 F. Supp. 2d at 131 n.3 (citing *Chabad*, 528 F.3d at 948-49 (holding that it is "likely correct" that a plaintiff invoking the expropriation exception is not required to exhaust local remedies before litigating in the United States.)[37] On appeal, Defendants did not raise the alleged failure to exhaust remedies as a substantive ground for dismissal, mentioning it only in passing in a footnote in the context of Defendants' forum non conveniens argument (which was rejected by the Court of Appeals). (Def. App. Br. at 55 n.14.) Accordingly, this Court's prior holding that

[37] The *Chabad* court also held, in the alternative, that any remedies in Russia were inadequate. *See id.*, 528 F.3d at 948.

Plaintiffs' claims are not barred based on the alleged failure to exhaust remedies is the law of the case and should not be revisited.[38]

The Seventh Circuit's decisions in *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 678-82 (7th Cir. 2012), and *Fischer v. Magyar Allamvasutak Zrt*, 777 F.3d 847, 855 (7th Cir. 2015), *cert. denied*, 2015 U.S. LEXIS 3783 (2015), do not set forth new legal principles that warrant re-examining the issue of exhaustion of remedies in this case (and are not binding on this Court in any event).[39] *See* Def. Br. at 52-53 (citing cases showing that some courts had required exhaustion well before *Abelesz* and *Fischer* were decided). However, the Courts of Appeal in *Chabad* (which is binding on this Court) and *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1034-37 (9th Cir. 2010), declined to impose such a requirement in the absence of a textual mandate in Section 1605(a)(3).

In *Fischer* and *Abelesz*, the Seventh Circuit agreed that Section 1605(a)(3) does not itself require exhaustion before a claim can be brought in the United States. *See Fischer*, 777 F.3d at 847; *Abelesz*, 692 F.3d at 679. The court in *Fischer* further clarified that *Abelesz* should not be

[38] 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).

[39] The Seventh Circuit in *Abelesz* remanded the case to the District Court "with instructions that both sets of plaintiffs either exhaust any available Hungarian remedies identified by the national bank and national railway or present to the district court a legally compelling reason for their failure to do so." The court made clear that it was Defendants' burden to be specific about the remedies available to plaintiffs in Hungary and offered plaintiffs the choice of voluntarily dismissing their claims, with a possibility of re-filing once remedies in Hungary were exhausted; staying the case while they pursued any Hungarian remedies identified by defendants; or asking the district court for an opportunity to develop the record further on the adequacy and availability of remedies in Hungary. *Id.* at 682-84. The Plaintiffs chose to develop the record further. However, on remand, the District Court found that the plaintiffs failed to show a legally compelling reason for their failure to exhaust available Hungarian remedies and dismissed the cases. The appeal in *Fischer* followed.

read as requiring exhaustion in order to state a violation of international law. *Fischer*, 777 F.3d at 857 (clarifying that "We did not hold [in *Abelesz*] that plaintiffs failed to allege violations of international law in the first instance"). Instead, the Seventh Circuit found that "the comity at the heart of international law required plaintiffs either to exhaust domestic remedies … or to show a powerful reason to excuse the requirement." *Id*. at 858. In other words, the Seventh Circuit found that the foreign state should be given the first opportunity to remedy the international law violation.[40]

Comity does not require further exhaustion of remedies here. Unlike the plaintiffs in *Abelesz* and *Fischer*, Martha Nierenberg clearly exhausted her remedies in Hungary with respect to the artworks at issue in the Nierenberg Litigation. Unlike *Abelesz* and *Fischer,* Plaintiffs have previously shown that other members of the Herzog family reasonably believed that any further efforts to pursue judicial claims in Hungary in 2008 would have been futile. (Compl. ¶ 94, 104; Benenati Decl. Ex. 26 at ¶¶ 6, 18-23.). *See Abelesz*, 692 F.3d at 681 (requiring plaintiffs "either to pursue and exhaust domestic remedies in Hungary or to show convincingly that such remedies are clearly a sham or inadequate or that their application is unreasonably prolonged."); *Fischer*, 777 F.3d at 858 ("There is of course no need to exhaust futile or imaginary domestic remedies."). While Defendants claim that they have recently created new processes that make it easier for claimants to request the return of their art, (Def. Br. at 57; Decl. of Zoltan Novak Exs. 7 & 8), Defendants point to no authority that requires Plaintiffs to abandon a pre-existing lawsuit in order to pursue newly minted procedures created three years after the lawsuit was commenced.

[40] Instead of remedying an international law violation, the 2008 decision in the Nierenberg Litigation was itself an international law violation. *See supra* at 51-52.

Finally, Defendants' suggestion that they have not yet "breached" any bailments applicable to the artworks of András and István Herzog (Def. Br. at 57) is absurd. Defendants ignored the Italian Plaintiffs' requests for the return of their art during the Nierenberg Litigation and ruled against Martha Nierenberg (who had told Defendants she was also an heir of István Herzog), leading the family to conclude that any further demand for the return of their art in Hungary would be futile. (*See* Compl. ¶ 94, 104; Benenati Decl. Ex. 26 at ¶¶ 6, 18-23.) Since this litigation began, Defendants have consistently said that they consider the artworks in this lawsuit to be their property. (*See* Benenati Decl. Ex. 16 at 22:6-8 (discussing letter sent to plaintiffs at inception of litigation); *id*. at 65:18-66:6.) Indeed, during the recent depositions in Hungary, Defendants' counsel emphasized that "I think for the record it's very clear that we have denied all the claims and asserted the Hungarian State's ownership to each and every one of the 44 artworks claimed." (*See id*. at 66:7-10.)

For all of these reasons, this Court should once again sustain jurisdiction under Section 1605(a)(3).

CONCLUSION

WHEREFORE, for the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss in its entirety. Should this Court grant the motion for any reason, Plaintiffs respectfully request leave to re-plead.

Dated: June 24, 2015

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 24th day of June, 2015, via the Court's electronic filing system on the following individuals:

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