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' UNOPPOSED MOTION FOR
LEAVE TO FILE SUR-REPLY MEMORANDUM

Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Local Civil Rule 7, Plaintiffs David L. de Csepel, Angela Maria Herzog and Julia Alice Herzog (together, "Plaintiffs"), by and through counsel, respectfully move for leave to file a sur-reply memorandum in response to a new argument made by Defendants Republic of Hungary, Hungarian National Gallery, Museum of Fine Arts, Museum of Applied Arts, and Budapest University of Technology and Economics (together, "Defendants") for the first time in their Reply Brief In Support of Renewed Motion to Dismiss ("Reply"), filed on July 9, 2015 [ECF. No. 112]. A copy of Plaintiffs' proposed Sur-Reply Memorandum is attached hereto as Exhibit 1. In support of this motion, Plaintiffs state as follows:

1. In their Reply, Defendants argue for the first time that this Court cannot take jurisdiction over Hungary under the expropriation exception to the FSIA – 28 U.S.C. § 1605(a)(3) – because the clause requiring that the property at issue is "owned or operated by an agency or instrumentality of the foreign state" is not satisfied and, even if it were satisfied, does

not confer jurisdiction over Hungary. (Reply at 21-24.) Defendants never challenged this aspect of the expropriation exception in their moving brief, or in any of their prior briefing on Section 1605(a)(3) of the FSIA over the past five years. Because Plaintiffs did not have an opportunity to address Defendants' new argument in their opposition brief, a sur-reply is warranted.

2. Courts in this Circuit have recognized that it is improper for a movant to raise in a reply brief new matters not previously addressed in the moving brief because the non-moving party may be "sandbagged" by not having the opportunity to respond. *See Bd. Of Regents of the Univ. of Wash. v. Envtl. Prot. Agency*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (to prevent "sandbagging," issues not raised until the reply brief are waived); *Flynn v. Veazey Constr. Corp.*, 310 F. Supp. 2d 186, 189 (D.D.C. 2004) ("If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply."). Therefore, to the extent that the Court elects to consider the newly raised arguments, the district court "routinely" grants motions for leave to file a sur-reply if, as here, a party is "'unable to contest matters presented to the court for the first time' in the last scheduled pleading." *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003) (quoting *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001)); *see also Lopez v. Council on Am.-Islamic Relations Action Network Inc.*, 657 F. Supp. 2d 104, 109 (D.D.C. 2009) (allowing sur-reply in further opposition to motion to dismiss where "plaintiffs' sur-reply is 'helpful to the adjudication' of the motion to dismiss and … is not 'unduly prejudicial to the defendants'"), *aff'd* 383 Fed. Appx. 1, 2010 U.S. App. LEXIS 11914 (D.C. Cir. 2010); *Flynn*, 310 F. Supp. 2d at 190 (granting motion for leave to file sur-reply where defendants raised new arguments for the first time in their reply in support of its motion to dismiss). In 2011, this Court granted

Plaintiffs' motion for leave to file a sur-reply when Defendants introduced new matter for the first time on reply in support of their first motion to dismiss. *See* Order dated September 1, 2011 (ECF No. 34). Once again, Defendants have waited until their reply to introduce new arguments here.

3. Plaintiffs regret the need to burden the Court with additional briefing, particularly in view of the extended page limits already granted by this Court to both sides. However, given that this is Defendants' third attempt to dismiss the Complaint for lack of subject matter jurisdiction, and the complexity of the issues presented by the motion, Plaintiffs respectfully submit that Plaintiffs' proposed Sur-Reply Memorandum will be helpful to the Court in adjudicating the motion to dismiss, will help frame the issues for oral argument in the event the Court elects to have one, and will not prejudice Defendants. Allowing Plaintiffs to file their proposed Sur-Reply Memorandum will not affect any case deadlines, as there is presently no schedule in place.

4. Pursuant to Local Civil Rule 7(m), Plaintiffs' counsel has conferred with Defendants' counsel. Defendants have advised Plaintiffs that they will not oppose the relief sought in this motion but reserve the right to request leave to file a response to the proposed Sur-Reply.

WHEREFORE, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for leave to file the attached Sur-Reply Memorandum.

Respectfully submitted,

/s/ Michael D. Hays

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Dated: July 17, 2015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' Motion For Leave to File Sur-Reply Memorandum, together with the annexed Proposed Sur-Reply Memorandum of Points and Authorities In Opposition to Defendants' Renewed Motion to Dismiss the Complaint and Proposed Order, was served this 17th day of July, 2015, via the Court's electronic filing system on the following individuals:

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

PLAINTIFFS' [PROPOSED] SUR-REPLY 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 sur-reply memorandum of law in further 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 No. 106) (the "Motion").

PRELIMINARY STATEMENT

In their Reply brief (ECF No. 112), Defendants argue for the first time that this Court cannot exercise jurisdiction over Hungary under Section 1605(a)(3) of the FSIA even if this Court finds that "rights in property taken in violation of international law are in issue" because the additional statutory requirement that the Artworks be "owned or operated by an agency or instrumentality of the foreign state" is not satisfied and, even if satisfied, cannot confer jurisdiction over Hungary itself. (Reply at 21-24.) Defendants' arguments are not only untimely, but are also inconsistent with Defendants' prior binding judicial admissions in this action, this Court's decision denying Defendants' first motion to dismiss, and relevant D.C. Circuit precedent. For all of these reasons, Defendants' new arguments should be treated as waived or, to the extent this Court elects to consider them, rejected.

ARGUMENT

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 "in which rights in property taken in violation of international law are in issue and"

> [i] that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or
>
> [ii] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3) (emphasis added). Up until now, Defendants' Section 1605(a)(3) arguments have focused on whether the Artworks were taken "in violation of international law." (*See* Motion at 40-58.) Despite having had multiple opportunities to brief Section 1605(a)(3) jurisdiction in this Court and the Court of Appeals over the past five years, Defendants never raised the "owned or operated" requirement as an additional ground for dismissal until the Reply.[1] Defendants' new arguments are untimely and have been waived. *See Bd. Of Regents of the Univ. of Wash. v. Envtl. Prot. Agency*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (to prevent "sandbagging," issues not raised until the reply brief are waived); *Flynn v. Veazey Constr. Corp.*, 310 F. Supp. 2d 186, 189 (D.D.C. 2004) ("If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply."). To the extent that this Court elects to consider Defendants' newly-raised arguments (which it should not), those arguments should be rejected based on Defendants' prior admissions, law of the case, and relevant D.C. Circuit precedent.

I. The Artworks Are "Owned or Operated" By Agencies or Instrumentalities of Hungary That Are Engaged In Commercial Activity In The United States

Contrary to Defendants' assertions (Reply at 21-24), each of the elements of the "owned or operated" clause of Section 1605(a)(3) is satisfied here.

A. The Museums and University Are Agencies Or Instrumentalities of Hungary

Defendants suggest for the first time on Reply that the Museums and University are not "agencies or instrumentalities" of Hungary for purposes of the FSIA but rather part of "the foreign state itself" under the "core functions" analysis set forth in *Transaero, Inc. v. La Fuerza*

[1] Defendants have filed seven briefs in support of their three motions to dismiss the Complaint in this Court alone.

Aerea Boliviana, 30 F.3d 148, 151 (D.C. Cir. 1994). (Reply at 23-24.) This argument fails for several reasons.

First, Defendants have admitted that the Museums and the University are agencies or instrumentalities of Hungary as defined in the FSIA. (*See* Answer (ECF No. 76) ¶ 2 ("Defendants admit that the institutional defendants are each an agency or instrumentality of Hungary"); ¶ 14 ("Defendants admit that the Museums and the University are agencies or instrumentalities of the Republic of Hungary, as defined in 28 U.S.C. § 1603(b), owned and operated by the Republic of Hungary (or, during the Communist era, the People's Republic of Hungary)"; ¶ 15 ("Defendants admit that artworks once attributable to the Herzog Collection are currently in the possession of the Museums and the University, each an agency or instrumentality of the Republic of Hungary").)[2] Defendants are bound by those judicial admissions. *See Amgen, Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1197 n.6 (2013) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them") (quoting *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)); *Railway Co. v. Ramsey*, 89 U.S. 322, 327 (1874) ("Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission."); *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 491 (2d Cir. 2014) (Defendant's admission in its answer that it was a "creditor" within the meaning of the Truth in Lending Act constituted a binding judicial admission); *Ferguson v. Neighborhood Hous. Services of Cleveland, Inc.*, 780 F.2d 549, 551 (6th Cir. 1986) (Defendants' admission in its answer that it

[2] Defendants similarly represented that the Museums and the University are "agencies or instrumentalities" of Hungary in their Corporate Disclosure Statements filed with their briefs in the Court of Appeals.

was an "employer" within the meaning of the Fair Labor Standards Act was an admission of fact, the establishment of which created federal subject matter jurisdiction).

Second, Defendants have offered no evidence to contradict their prior judicial admissions that the Museums and the University are agencies or instrumentalities of Hungary. Section 1603(b) of the FSIA defines an "agency or instrumentality of a foreign state" to mean any entity

> (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States … nor created under the laws of any third country.

28 U.S.C. § 1603(b) (emphasis added). In *Transaero*, the D.C. Circuit held that the Bolivian Air Force was a "foreign state" rather than an "agency or instrumentality" for purposes of service of process under Section 1608 of the FSIA because the "core functions" of the armed forces were governmental, rather than commercial in nature. *See Transaero*, 30 F.3d at 153. In *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006), the Second Circuit similarly concluded that the "core functions" of the Ministry of the Treasury of Poland were governmental, rather than commercial, in nature. *Id.* at 597-98. Here, the core functions of the Museums and the University are clearly commercial, rather than governmental, in nature. *See de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 131 (D.D.C. 2011) ("The term 'commercial' distinguishes governmental acts from those that can be engaged in by private persons or entities") (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)); *de Csepel v. Republic of Hungary*, 714 F.3d 591, 599 (D.C. Cir. 2013) (holding that Defendants' alleged breach of bailment agreements was commercial in nature because "the alleged contract addresses and establishes commercial relations with respect to artwork").

Defendants offer no evidence suggesting otherwise. To the contrary, Defendants have previously admitted that the Museums and the University engage in commercial activity , both in

Hungary and the United States. (*See* Answer ¶ 32 ("Defendants admit that they have loaned artworks in the past to museums located in the United States. Defendants admit that they are visited by tourists, that they have sold items from museum gift shops to tourists, and they have accepted fees from these visitors, including visitors from the United States. Defendants admit that they have authored, promoted, and/or distributed books or other publications that reference artworks once attributable to the Herzog Collection, including those works cited in Paragraph 32 of the Complaint. Defendants admit that they receive the benefit of tourist advertising in the United States, conducted by the Hungarian National Tourist Office, which promotes the museums to visitors from around the world."); ¶ 33 ("Defendants admit that the University participates in exchange programs with universities located in the United States and that the University participates in the Fulbright Program sponsored by the U.S. Department of State's Bureaus of Educational and Cultural Affairs."). Defendants' argument that the Museums and the University "record, house and display the artworks" owned by Hungary (Reply at 23) does not transform their "core function" from commercial to governmental. All museums in the world, whether public or private, "record, house and display" artworks. *See Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 313-14 (D.D.C. 2005) (noting that "[i]f an act is something that a private person or entity *can* do, it is not 'sovereign' and concluding that "[t]here is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign. Loans between and among museums (both public and private) occur around the world regularly.") Therefore, this case is more analogous to *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 729 F. Supp. 2d 141, 147 (D.D.C. 2010), where the court held that the Russian State Library and the Russian State Military Archive were both agencies or instrumentalities of

Russia because of their commercial functions despite Russia's belated attempt to amend its answer to assert otherwise.

B. The Museums and the University Possess the Artworks And Therefore "Own or Operate" Them For Purposes of Section 1605(a)(3)

Defendants argue that there is no jurisdiction under Section 1605(a)(3) because Hungary owns the Artworks and Hungary is a "foreign state" not an "agency or instrumentality" of a foreign state. (Reply at 23.) Even if that were true, it is of no avail.[3] The clause requires that the property be "owned or operated" by an agency or instrumentality. 28 U.S.C. 1605(a)(3) (emphasis added). The D.C. Circuit has held that the phrase "owned or operated" means "'possessed or exerted control or influence' over the property at issue." *Nemariam v. Fed. Democratic Republic of Eth.*, 491 F.3d 470, 481 (D.C. Cir. 2007); *accord Agudas Chasidei Chabad*, 729 F. Supp. 2d at 147 ("[P]ossession is sufficient to satisfy the 'owned or operated' requirement of 28 U.S.C. § 1605(a)(3)."). Here, Defendants have admitted, and it remains undisputed, that the Museums and the University have possession, custody or control over the vast majority of the Artworks listed in the Complaint.[4] (*See* Answer ¶¶ 15-19.) This Court has already held that such possession is sufficient to satisfy the "owned or operated" requirement of Section 1605(a)(3). *See de Csepel*, 808 F. Supp. 2d at 132 (finding the "owned or operated" requirement met where "Plaintiffs have pled – and defendants admit – that the Museums and the University (both agencies or instrumentalities of Hungary) are in possession of the pieces of the

[3] Defendants state "it is not disputed that the artworks are owned by Hungary, not by the Hungarian entities" based on certain statements made by Defendants' witnesses at their depositions. (Reply at 23.) However, in their Answer, Defendants admitted that the Artworks "are Defendants' lawful property" (¶ 15) and that "Defendants acquired lawful ownership of the artworks once attributable to the Herzog Collection by nationalization, adverse possession, statute of limitations, and or agreement." (¶ 123) (emphasis added).

[4] Defendants have alleged that the four Artworks identified in paragraphs 16(xxiii), 16(xxxiii), 16(xxxv), 17(v) and of the Complaint are not in the possession of Hungary, the Museums, or the University. (Decl. of Jessica Walker (ECF No. 112-2) Ex. 1.)

Herzog Collection identified in the Complaint.") (citing *Chabad*, 729 F. Supp. 2d at 147). That holding is law of the case. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) ("[T]he *same* issue presented a second time in the *same case* in the *same court* should lead to the *same result*") (emphasis in original).

C. It is Undisputed That the Museums and the University Are Engaged in Commercial Activity In the United States

The final requirement for jurisdiction under Section 1605(a)(3) is that the agency or instrumentality that "own[s] or operate[s]" the property be "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). This Court previously held that "plaintiffs have established for jurisdictional purposes that the Museums and the University are engaged in 'either a regular course of commercial conduct or a particular commercial transaction or act' in the United States as of the commencement of this action" and that such acts "are more than sufficient to amount to 'commercial activity' for jurisdictional purposes under the FSIA." *De Csepel*, 808 F. Supp. 2d at 132. Defendants did not dispute that finding on appeal (nor have they done so on this Motion). Moreover, Defendants admitted in their Answer that the Museums and the University are engaged in commercial activity in the United States. (*See* Answer ¶¶ 32-33.)

II. Satisfaction of the "Owned or Operated" Clause of Section 1605(a)(3) Confers Jurisdiction Over All Defendants, Including Hungary

Defendants argue that, even if the "owned or operated" clause of Section 1605(a)(3) is satisfied, that is not sufficient to confer jurisdiction over Hungary itself because Hungary is a "foreign state" and jurisdiction over Hungary can be predicated only on the clause of Section 1605(a)(3) that requires that the property be "present in the United States in connection with a commercial activity carried on in the United States by the foreign state." (Reply at 24.) Defendants are wrong.

First, the plain text of Section 1605(a)(3) does not support Defendants' construction. Section 1605 states broadly that a "foreign state" is not immune from the jurisdiction of United States courts if any exception to immunity is satisfied, including the requirement in Section 1605(a)(3) that property be "owned or operated by an agency or instrumentality of the foreign state … that .. is engaged in a commercial activity in the United States." *See* 28 U.S.C. § 1605.

Second, numerous courts have sustained jurisdiction over foreign states and their agencies or instrumentalities based on the "owned or operated" clause. *See, e.g.*, *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1037 (9th Cir. 2010) (sustaining jurisdiction over both Kingdom of Spain and Foundation); *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008) (sustaining jurisdiction over Russia and its agencies or instrumentalities); *Chabad*, 729 F. Supp. 2d at 146-47 (same); *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002) (sustaining jurisdiction over Austria and state-owned Austrian Gallery).

The cases cited by Defendants do not hold otherwise. In *Garb*, the Second Circuit suggested that the "owned or operated" clause of Section 1605(a)(3) applies only to jurisdiction over an agency or instrumentality, not the foreign state itself. *See Garb*, 440 F.3d at 589. As the District Court correctly observed in *Freund v. Republic of France*, 592 F. Supp. 2d 540, 561 n.10 (S.D.N.Y. 2008), however, "[t]his language was *dicta*, … because the *Garb* court concluded that the Ministry of the Treasury of Poland was not an 'agency or instrumentality' of Poland" and "the lack of an 'agency or instrumentality' of a foreign sovereign in the case was dispositive of the Second Circuit's inquiry." The court in *Freund* declined to reach the issue, holding that because neither of the agencies or instrumentalities named as defendants in that case met the requirements of the "owned or operated" clause, jurisdiction did not exist over those entities or France itself. *See id.* at 562 ("[E]ven if a foreign sovereign may lose its immunity as a 'foreign

state' through the application of [the 'owned or operated' clause], no Defendant in this case satisfies that element of the 'takings' exception.").[5]

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: July 17, 2015

Respectfully submitted,

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[5] To the extent that the United States may have adopted the *dicta* of *Garb* in its Amicus Brief in support of *certiorari* in *Cassirer* (Def. Br. at 23-24), that view contravened the Ninth Circuit's decision, was not supported by citation to any case law or authority other than *Garb*, and was not ruled on by the Supreme Court because it denied certiorari. When the action was reinstated, the Cassirer plaintiffs elected to dismiss Spain voluntarily and to proceed against the Foundation alone.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiffs' [Proposed] Sur-Reply Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss was served this 17th day of July, 2015, via the Court's electronic filing system on the following individuals:

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ORDER GRANTING PLAINTIFFS' UNOPPOSED MOTION
FOR LEAVE TO FILE SUR-REPLY MEMORANDUM

Upon consideration of the Unopposed Motion For Leave to File Sur-Reply Memorandum ("Motion") by Plaintiffs David L. de Csepel, *et al.*, together with the proposed Sur-Reply Memorandum of Points and Authorities in Opposition to Defendants' Renewed Motion to Dismiss the Complaint (the "Sur-Reply Memorandum") attached thereto, it is this ____ day of _____, 2015, hereby:

ORDERED, that the Motion be, and it hereby is GRANTED. Plaintiffs are granted leave to file the proposed Sur-Reply Memorandum in response to the Reply Brief in Support of Renewed Motion to Dismiss filed by Defendants; and

IT IS FURTHER ORDERED that Plaintiffs' Sur-Reply Memorandum, attached as Exhibit 1 to the Motion, shall be deemed filed on the docket of this case as of the date of entry of this Order.

_____
Hon. Ellen S. Huvelle
United States District Judge

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