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.	)	
	)	

REPLY BRIEF IN SUPPORT OF 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

Defendants Republic of Hungary, The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics (collectively "Hungary" or "Defendants"), by and through their attorneys, hereby respectfully submit this Reply Brief in support of their renewed Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

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I. Introduction

Discovery confirmed that artworks once attributable to Baron Mór Lipót Herzog became the sole, separate, and distinct property of one of three heirs (András Herzog, István Herzog, and Erzsébet Weiss de Csepel) following his death in 1934 and his wife's death in 1940. Since 1940, each of the 44 artworks identified in the Complaint has had a distinct and unique provenance. Following the war, and in keeping with Hungary's obligations under the Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2065 T.I.A.S 1651 ("Peace Treaty"), Hungary began the process of returning specific artworks to the heir (or representative) to whom that artwork was attributed. In 1948, those returns were halted and returned artworks were reclaimed after Mrs. István Herzog was indicted and (following trial) convicted of violating pre-war cultural patrimony laws that prohibit removal from Hungary of artworks of cultural significance. Other artworks were taken or acquired by the Hungarian State during the Communist Era. But all artworks have two things in common: (1) the historical events involving the artworks occurred in Hungary, and (2) none have express or implied bailment agreements specifying performance or any obligations in the United States.

In 1999, Martha Nierenberg filed suit in Hungary, asserting ownership of twelve artworks attributed to her mother, Erzsébet Weiss de Csepel. Between 1989 and 2000, Hungary returned to Ms. Weiss de Csepel and Ms. Nierenberg artworks that it determined were not property of Hungary, with the requirement that the artworks could not leave Hungary. In 2008, after nearly a decade of litigation and appeals, the independent Hungarian courts ruled that Hungary was the owner of the remaining claimed artworks under several distinct, legitimate legal theories. Ownership of the artworks claimed by the Italian Plaintiffs (twenty-four artworks) or attributed

to István Herzog (eight artworks) was not adjudicated in the lawsuit, as those heirs affirmatively chose not to assert claims. *See* Declaration of Jessica Walker ("Walker Decl."), Exh. 1.

Sixty-five years after the end of World War II and more than twenty years after the fall of communism, Plaintiffs filed a complaint in the United States asserting that this Court should take the extraordinary steps of stripping Hungary of its presumptive immunity and questioning the legitimacy of Hungary's ownership of artworks. To do this, Plaintiffs attempt to redefine Hungary's actions as both commercial *and* sovereign, subjecting Hungary to the Court's jurisdiction under both the commercial activity exception and the expropriation exception.

These creative legal theories attempt to re-cast Hungary's post-war possession and ownership as bailments and violations of international law. The theories are not, however, supported by the facts confirmed following complete discovery, which make clear that the parties did not contemplate performance of any "bailment agreements" in the United States to trigger the commercial activity exception. Performance in the United States, absent clear agreement of the parties, would violate Hungarian law. Indeed, the Italian Plaintiffs confirmed in direct testimony that they never contemplated such an action. Further, Hungary is not a proper party to this action under Section 1605(a)(3) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330 *et seq*. Hungary's current ownership of the artworks is the result of post-war actions and the 2008 legal decision confirming Hungary's ownership of eleven artworks is not a taking in violation of international law. As neither exception applies, Hungary cannot be forced to defend its laws, its courts, its history, or its actions in this Court.

As an European Union member and U.S. ally, with its own independent courts and post-Communist compensation programs, Hungary asks no more than any other European Union member state or the U.S. itself would ask: that modern-day property and restitution claims

arising from historical events in Hungary during the World War II and Communist eras be heard by Hungarian courts in a manner that respects all parties' due process rights under Hungarian law.

II. The FSIA's Commercial Activity Exception Does Not Apply to Provide This Court with Subject Matter Jurisdiction Over Hungary

A. The First and Second Clauses of Section 1605(a)(2) Do Not Apply to Provide This Court with Jurisdiction over Hungary

Section 1605(a)(2) of the FSIA provides that a foreign state shall not be immune from the jurisdiction of courts of the United States in a case

> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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). In their Complaint, Plaintiffs invoked the Court's jurisdiction under the third clause of this provision:

> Under 28 U.S.C. §§ 1603(a) and 1605(a)(2), a foreign state (including an agency or instrumentality thereof) shall not be immune from suit in any case "in which the action is based 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."

Compl. ¶ 35 (quoting the third clause of Section 1605(a)(2)). In its April 19, 2013, decision, the D.C. Circuit addressed only the second and third requirements of the above clause "[b]ecause Hungary's actions *obviously occurred outside the United States . . . .*" *de Csepel v. Republic of Hungary*, 714 F.3d 591, 598 (D.C. Cir. 2013) (emphasis added).

Plaintiffs now invoke the first and second clauses of Section 1605(a)(2) – clauses that are not referenced in Plaintiffs' Complaint. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (1992), cited by Plaintiffs, notes that in examining Section 1605(a)(2), "the critical inquiry is

whether there is 'a nexus between the defendant's commercial activity in the United States and the plaintiff's grievance.'" *Id*. at 709 (citation omitted). Plaintiffs' claims are not based on Hungary soliciting U.S. tourists, selling tickets in the U.S. over the internet, or other limited activities in the United States, but on post-war bailments and actions that took place in Hungary.[1]

Siderman, moreover, was decided before the Supreme Court issued its decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). In *Nelson*, the Court examined the phrase "based upon," which is relevant to all three of Section 1605(a)(2)'s clauses. 507 U.S. at 356-58. The Court explained that "a claim is '*based upon*' commercial activity if the activity establishes one of the 'elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.'" *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014) (quoting *Nelson*, 507 U.S. at 357). "In other words, the alleged commercial activity must establish 'a fact without which the plaintiff will lose.'" *Id*. (citation omitted).

Plaintiffs' claims for bailment and conversion are not "based upon" Hungary's promotion in the United States of books or Hungarian tourism, Compl. ¶¶ 4, 32, 37; nor are these claims "based upon" Hungary's promotion in the United States of educational exchange programs or Hungarian culture, Compl. ¶¶ 4, 33-34, 37. Plaintiffs themselves assert that their claims are based not on the "initial expropriation of the Collection during the Holocaust[,] but instead [on] Hungary's creation and repudiation of subsequently formed bailment agreements." Opp. at 27-28 (quoting *de Csepel*, 714 F.3d at 598, 600); *see also* Opp. at 27 (asserting that "discovery has

[1] Plaintiffs assert that "in addition to Plaintiffs' bailment claims, the Complaint also asserts claims for conversion, constructive trust, accounting and unjust enrichment." Opp. at 43. But "constructive trust," "accounting," and "restitution based on unjust enrichment" – the actual claim identified in Plaintiffs' complaint – are not causes of action, but remedies. *See, e.g., Sabre Int'l Sec. v. Torres Advanced Enter. Solutions, Inc.*, 820 F. Supp. 2d 62, 71 (D.D.C. 2011); *Haynes v. Navy Fed. Credit Union*, 52 F. Supp. 3d 1, 10 (D.D.C. 2014) (quoting *Armenian Assembly of America, Inc. v. Cafesjian*, 692 F. Supp. 2d 20, 48 (D.D.C. 2010)); *Chase Manhattan Bank v. Burden*, 489 A.2d 494, 497 (D.C. 1985).

only confirmed that Plaintiffs' claims are 'based upon' Defendants' repudiation of various post-war bailment agreements"). As Plaintiffs claims are "based upon" on "an act *outside the territory of the United States* in connection with a commercial activity of the foreign state elsewhere," 28 U.S.C. § 1605(a)(2) (emphasis added), the first two clauses are not applicable.

B. Plaintiffs Provide No Evidence of A "Direct Effect" in the United States

1. Discovery Confirmed that Each Artwork Has Separate and Distinct Ownership

Discovery has confirmed that each artwork is separate and unique property attributable to only one of three Herzog siblings. Prior to this lawsuit, Plaintiffs and their predecessors maintained that the artworks are separate property. *See* Dkt. No. 15-3; Declaration of Irene Tatevosyan (Dkt. Nos. 106-1-6) ("Tatevosyan Decl."), Exhs. 25-26, 47-48, 56. This is not a new position for Plaintiffs and their predecessors, and predates "the heirs' present-day agreement." Opp. at 5. In fact, the Herzog siblings attributed artworks separately amongst themselves as early as 1946 and 1947, consistent with the current attribution. Walker Decl., Exhs. 5-7.

Even now, Plaintiffs and their family members continue to recognize that the artworks are attributable to only one sibling – the Italian Plaintiffs maintain that they are the exclusive owners of artworks attributable to András Herzog (*see* Declaration of Thaddeus Stauber, (Dkt. Nos. 106-9-10) ("Stauber Decl.")), Exh. 11 at 18:6-9, 28:21-29:18; *id*., Exh. 12, and the "assignment" made by the heirs of István Herzog to David de Csepel specifically identifies artworks that are the subject of the 2008 assignment. Plaintiffs contend that the Complaint "clearly pleads the existence of multiple post-war bailments," conceding that the artworks cannot be treated as a whole. Opp. at 37. Plaintiffs now assert that one artwork they previously attributed to András should, in fact, be attributed to István, *see* Declaration of Alycia Regan

Benenati (Dkt. 110-1-9) ("Benenati Decl."), Exh. 1, but they do not assert a shared or group ownership of the works, beyond a 2008 assignment. *See* Walker Decl., Exh. 1.

Plaintiffs' predecessors' ownership of separate artworks has been recognized repeatedly by Hungary.[2] Plaintiffs assert collective legal treatment based on statements made by Dr. Mojzer, the former director of the MFA, in meetings in 1997. As explained by Dr. Balázs Sámuel, Leader of the Secretariat of the General Directorate of the Museum of Fine Arts, while reference to items once owned by a single person (Baron Herzog) as the "Herzog Collection" may make sense from an art historian's perspective, it does not signify the legal status of individually registered artworks. Stauber Decl., Exh. 4 at 76:20-25; *see also id*., Exh. 10 at 58:13-22. And contrary to Plaintiffs' statements, Dr. Sámuel explained this position (and his disagreement with Dr. Mojzer's statements) both before *and* after a break in his deposition. Benenati Decl., Exh. 16 at 75:4-76:5, 76:20-77:6.

2. Plaintiffs Do Not Identify A Direct Effect In the United States

The parties agree that an effect is "direct" if "it follows 'as an immediate consequence of the defendant's . . . activity." Opp. at 34 (quoting *Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (1992)). Plaintiffs fail, however, to identify any evidence of a "direct effect" in the United States to support stripping Hungary of its presumptive immunity.

a. The Appellate Court's Pre-Discovery Inferences Are Not Supported By the Evidence

In 2013, the Appellate Court, looking only at Plaintiffs' Complaint, found that

[2] When seizing artworks belonging to all three Herzog siblings in connection with the smuggling investigation, Hungary was not treating the Herzog artworks as an indivisible, single collection. Instead, it was responding to concerns that representatives of András Herzog and Erzsébet Weiss de Csepel would smuggle their artworks out of the country just as Mrs. István Herzog had smuggled works belonging to her husband. Contemporaneous documents list artworks owned by each sibling and call for the seizure of the artworks to keep them in the country. *See* Tatevosyan Decl., Exh. 18; Walker Decl., Exh. 8 at HUNG011609-10. These documents indicate concern about losing significant artworks motivated the investigation, not persecution of the owners.

> Although 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 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. But this statement was made prior to discovery.

At the time that the appellate court issued its decision, neither this Court nor the appellate court were in possession of evidence affirming that there is *no* connection (now or in the past) between Hungary, the Italian Plaintiffs, the artworks attributed to András Herzog, and the United States. Nor were the courts aware of evidence confirming that there has never been an agreement between the Italian Plaintiffs and any other family members to share possession or any interest in the artworks attributable to András Herzog. Neither court knew that the Italian Plaintiffs had written to Hungary in 1998 noting that, if works were returned to them, they would place them in an apartment in Hungary. Neither court knew that, when deposed in 2015, Plaintiff Angela Herzog would testify that she had never contemplated sending any of the artwork attributable to their father to the United States.[3] Nor did either court have evidence confirming that there was no connection between Hungary, the heirs of István Herzog, the artworks attributable to István Herzog and the United States before 1999, when István Herzog's second wife (and heir) left a partial interest in István's estate to American citizen relatives.

[3] In the April 22, 2015, email from Plaintiffs' counsel, Plaintiffs' counsel stated: "Julia does not contradict any of the questions we specifically asked her about yesterday and today except that she thinks that they may have stopped coming back to Hungary with her mother closer to the 1948-49 time frame than to 1955 (and Angela said she could not recall the end date). . . . Without a copy of the transcript, we were not able to repeat every question asked in the deposition and every answer given by Angela. We do not expect that she will otherwise contradict anything Angela said. We will of course let you know if that changes after we get the transcript back and can review it with her." Stauber Decl., Exh. 12. After the transcript was circulated in May, Julia Herzog failed to contradict any statement made by her sister, and Plaintiffs' counsel did not communicate their inability to review the transcript with Ms. Herzog. Nor have Plaintiffs submitted declarations or documents from Herzog heirs or witnesses supporting a direct effect.

Plaintiffs contend that the artworks seized by Hungary following the criminal smuggling proceedings against Mrs. István Herzog were "official measures" that "*simultaneously* impacted Elizabeth Weiss de Csepel (in the United States), the Italian Plaintiffs (in Italy), and István Herzog (in Hungary) *simultaneously*." Opp. 38 (emphasis added). "Official measures" taken by Hungary in October and November 1950 were not commercial acts, they were the acts of a sovereign. But even if these acts could somehow be regarded as violations of post-war bailments, the violating acts would necessarily be just as "multiple" as the underlying "bailment agreements" had been. The fact that the violating acts were "simultaneous" would not mean that the same violation caused direct effect both in the U.S. and in Italy or Hungary. The violation of a particular bailment could cause an effect only in Hungary or the country where the beneficiary of the alleged bailment resided.

Similarly, the Hungarian Court's 2008 decision was a sovereign act – not a commercial activity. But even if a judicial decision could constitute a breach in 2008 – the date "Plaintiffs assert that the relevant breaches occurred," Opp. at 42 – these "breaches" relate *only* to those claims previously advanced by Martha Nierenberg. As neither the Italian Plaintiffs nor the heirs of István Herzog pursued claims in Hungary, their bailment claims could not have been breached or repudiated with the Hungarian court's 2008 decision.[4]

b. No Direct Effect "Flows In A Straight Line Without Deviation Or Interruption"

Plaintiffs contend that they "always had the ability to request that their art be sent to the United States." Opp. at 43. If the hypothetical ability to request that property be sent to the U.S. is sufficient to strip a foreign sovereign of its presumed immunity, then Section 1605(a)(3)'s

[4] Ms. Nierenberg's claim to a twelfth artwork (Compl. ¶ 16(xxxiv)) – included in the pending lawsuit, but not referenced in Ms. Nierenberg's complaint – was denied by Hungary in 2002. *See* Tatevosyan Decl., Exhs. 65-70.

"direct effect" requirement would be rendered meaningless. Here, until the current lawsuit, performance in the U.S. was never demanded. Indeed, when deposed on April 21, 2015, Plaintiff Angela Herzog *still* did not demand return of artworks to the United States, noting that she had never considered this question. Stauber Decl., Exh. 11.

Hungarian law precludes items of cultural patrimony from leaving the country. Such laws pre-date World War II and are comparable to laws throughout Europe that are designed to protect a country's cultural heritage. These laws are well known to Plaintiffs and their predecessors. When the Munkácsy's Christ in White Robe was returned to Ms. Nierenberg in 2000, after Hungary determined that she was the lawful owner, Ms. Nierenberg's representative took legal ownership of the artwork with full knowledge that the artwork could not leave Hungary. Ms. Nierenberg entered into a "consensual agreement" with the Museum of Fine Arts such that the museum would continue to physically hold the work for a short period of time, but the cultural protection placed on the work to prevent it from leaving the country was imposed by law, not with Ms. Nierenberg's "consent." Artworks returned to her mother, Erzsébet Weiss de Csepel, in 1989, when Hungary determined that she was the lawful owner, also remained in Hungary as required by Hungary's cultural patrimony law.[5]

Plaintiffs note that in 1948, another Hungarian family sought, and received, permission to export artworks from Hungary. Yet, the Commission for the Export of Paintings opposed the proposed export of "the Her[z]og collection safeguarded in the . . . Museum of Fine Arts" due to "the fact that these are art treasures of extremely high value." Walker Decl., Exh. 9. And Dr.

[5] With no support, Plaintiffs contend that by 2008, they 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." Opp. at 42. But countries throughout the European Union have similar laws, Renewed Motion to Dismiss (Dkt. No. 106) at 35, and Plaintiffs do not identify a European Union law or directive that would require Hungary – or any other EU country – to limit or disregard long-standing cultural patrimony laws.

Sámuel confirmed that no export permits were granted after 1949. Thus, there is no basis for Plaintiffs to assume that, after 1949, they would be granted a permit to export artworks, and Dr. Sámuel's statement that Hungary would never permit export of artworks is not "speculative," Opp. at 41, but supported by the facts. *See* Dkt. 106-11 at ¶¶ 7-8; Walker Decl., Exh. 10.

Each artwork is registered as separate and unique property, even if recorded in the same document. Each "act" of registration could affect only the specific owner of each separate and unique property, not non-owner family members. The only document Plaintiffs identify as an "express written agreement" creating a bailment, Opp. at 29, does not identify a place of performance. Tatevosyan Decl., Exh. 23. Tatevosyan Declaration Exhibit 64, the document Plaintiffs cite for the proposition that bailments were "documented less formally," Opp. at 29, likewise does not mention a place of performance. Tatevosyan Decl., Exh. 64. (The other cite for this proposition, Benenati Declaration Exh. 3, Opp. at 29, is the declaration of Dr. Tamás Lattmann and does not support any creation of bailments, formally or informally. Exhibit 4 to the Benenati Declaration, which discusses the arrangement for András Herzog's jewelry collection to be moved to the Museum of Applied Arts for safekeeping in 1944, does not mention a place of performance or return either.) The document discussing a "draft deposit contract" to be signed by Dr. Lóránt in 1951 (which was not located in discovery) lists seven artworks, all of which appear in Tatevosyan Exh. 23, and does not mention a place of performance either. Tatevosyan Decl., Exh. 63, Opp. at 15. Plaintiffs do not dispute that under Hungarian law, Hungary – the location of the obligor – is the default place of performance. *See* Declaration of Zoltán Novak (Dkt. Nos. 106-7-8) ("Decl. Novak"), Exhs. 4, 6.

But even if export was "possible . . . with Defendants' consent," Opp. at 41, such export could only follow specific performance (completion) of the bailment in Hungary. In other

words, the "bailment" transaction (with performance in Hungary) and the "export" transaction (with performance outside of Hungary) are two separate and distinct transactions. Thus, post-bailment performance export of those artworks could not be regarded as a direct effect from a bailment, but as an independent act.

The D.C. Circuit's recent analysis of "direct effect" confirms that no direct effect exists here. In *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804 (D.C. Cir. 2015), the Oklahoma-based plaintiff asserted that Venezuela's breach of drilling contracts caused a direct effect in the United States. Because the case involved a contract executed and performed outside the United States, the court analyzed the third clause of the FSIA's commercial activity exception. *Id.* at 817. Prior to the breach, a defendant Venezuelan subsidiary made payments to the plaintiffs' bank in Oklahoma. *Id.* at 818. The plaintiffs argued a direct effect in the United States because defendants failed to make additional payments to the plaintiffs' Oklahoma bank following defendants' breach.

The plaintiffs relied on *Weltover*, where, as a result of Argentina's failure to pay bondholders in New York, a payment was not made to accounts in the United States. *See id.* (citing 504 U.S. at 609-10). But the D.C. Circuit quickly distinguished *Weltover*. The appellate court found critical the fact that under the Venezuelan contracts, the defendants could choose to deposit payments in the United States *or* in Venezuelan banks – i.e., the place of performance was subject to the "exclusive discretion" of the defendants. *Id.* In *Weltover*, in contrast, defendant Argentina was contractually required to make payment to a bank in the United States. 504 U.S. at 618-19. In finding no "direct effect" caused by the defendants' breach of contract, Judge Tatel, writing for the majority, concluded, "where, as here, the alleged effect depends solely on a foreign government's discretion, we cannot say that it 'flows in a straight line without

deviation or interruption.'" 784 F.3d at 818 (quoting *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994)); *see also Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146 (D.C. Cir. 1994) (recognizing that where sovereign defendant had discretion in place of performance of payment, plaintiffs could not establish direct effect under *Weltover*).

As with *Helmerich & Payne*, *Princz*, and *Goodman Holdings*, Hungary was under no contractual obligation to send any artworks attributable to the Herzog siblings to the United States. Plaintiffs assert that Hungary *could* grant export permits to allow the artworks to leave Hungary, but that action is solely within Hungary's discretion. Because the "alleged effect depends solely on [Hungary's] discretion," the alleged effect does not "flow [ ] in a straight line without deviation or interruption," to permit application of the third clause of the commercial activity exception. 784 F.3d at 818 (quoting *Princz*, 26 F.3d at 1172).

Rather than identify a legally relevant "direct effect" in the United States, Plaintiffs assert that certain actions "do not prove the absence of a 'direct effect' in the United States." Opp. at 42. But it is not Hungary's obligation to prove a negative. Plaintiffs' burden may not be great at the Rule 12(b)(1) phase, but where, as here, Defendants challenge the factual basis for the court's subject matter jurisdiction and the parties have completed fact discovery, "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Before the burden of persuasion shifts to Hungary, Plaintiffs must producing evidence to show that there is no immunity and that the court has jurisdiction over their claims. *See Bell Helicopter Textron, Inc. v. Islamic Republic of Iran,* 734 F.3d 1175, 1183 (D.C. Cir. 2013); *Daliberti v. Republic of Iraq,* 97 F. Supp. 2d 38, 42 (D.D.C. 2000). They have not met this burden.

As Plaintiffs have not shown any evidence of a direct effect at this stage, after complete discovery – not just limited or jurisdictional discovery – Plaintiffs have failed to satisfy Section 1605(a)(2). This Court should reject Plaintiffs' demand that the Court employ the FSIA's commercial activity exception to strip Hungary of its presumptive immunity, particularly as to the Italian Plaintiffs who have little to no connection to the United States and, by their own acknowledgment, never contemplated that the artworks attributable to their father would be sent to the United States.

3. Plaintiffs Do Not Identify an Enforceable Bailment

Plaintiffs point to deposit lists and museum registrations as "proof" of enforceable bailments. But the "deposit" lists were drawn up by governmental bodies charged with the task of identifying, collecting, registering, and safekeeping artworks that had been lost or abandoned during World War II. These governmental entities did not engage in "commercial acts," and the registrations cannot be considered commercial activities (bailment agreements).

Moreover, the registration processes, prescribed by museum rules and regulation are not commercial acts. As with deposit lists, artworks are registered pursuant to state-approved museum regulations that museum employees are required to follow. They are not commercial acts. In fact, for each of the ten artworks listed in the deposit inventory, the "mode of acquisition" column (which contains the name of a depositor in the case of commercial deposits) indicates "Governmental Commission" – not a Herzog family member. In contrast, "deposit" entries for other works formerly part of the Herzog Collection clearly refer to individual Herzog family members in the "mode of acquisition" column. Such artworks include the Dutch Portrait of a Lady, which was returned to Erzsébet in 1989 (mode of acquisition: "Mrs. Weiss – Herzog") and a sculpture on The Conversion of Paul the Apostle, which had been placed in the museum

long before the war (mode of acquisition: "Mór Lipót Herzog in 1921"). *See* Tatevosyan Decl., Exh. 2; Walker Decl., Exh. 11. This demonstrates that the latter two entries were based on "commercial" deposit agreements concluded with individuals, while the ten works with "deposit" entries in this action were not held as deposits for individuals, but held by the museum per government mandate. *See* Walker Decl., Exh. 12 at 17:14-18:9 (noting that "customs authorities or police, also place its items into the deposit with us" where those items "are confiscated or seized because they were being smuggled out or in the country"). The deposit information about The Conversion of Paul the Apostle (deposited in 1921) also illustrates that formal commercial deposit agreements had been entered into prior to the creation of the current deposit inventory system in 1958, and thus contradicts Plaintiffs' assertion that bailments "were documented less formally" before 1958 (Opp. at 29). *See* Tatevosyan Decl., Exh. 2; Walker Decl., Exh. 11; *see also* Benenati Decl., Exh. 18 at 19:18-20:13.

Discovery revealed limited evidence that a bailment agreement may have existed at one time for one artwork, the Giampietrino (Compl. ¶ 16(xv)), attributed solely to András Herzog and thus solely an Italian heir claim. This work was placed in the museum under a written agreement, along with the three artworks returned to Erzsébet in 1989, the Munkácsy that was returned to Ms. Nierenberg in 2000, and eight other artworks that are claimed in this lawsuit. *See* Tatevosyan Decl., Exh. 23 at HUNG000012663. This document is the *only* document Plaintiffs point to as an "express written agreement" creating bailments. Opp. at 29. While this document contains language that the "National Center for Museums and Monuments is handling these works of art as deposits, with acknowledgment of the owner's title," the document contains no agreement or instructions as to specific performance of the bailment, the circumstances under which the artworks may be returned, or the location to which the artworks could be returned, let

alone any statement that indicates performance in the United States was contemplated by either side. Tatevosyan Decl., Exh. 23.

This "bailment" was, however, repudiated in 1961, when in response to an inquiry from Plaintiffs' representative, the Museum informed a government branch that the painting became property of the state through purchase, forfeiture, or failure to pay taxes. For all other artworks on this "bailment" document, either Plaintiffs' predecessor's ownership was recognized (and the works were given back to Martha Nierenberg or her mother) or a bailment agreement could not have been created as the financial police could not consent to the creation of a bailment prior to the prosecutor's determination of the works' legal status and further, the documents demonstrate that the artworks were seized by the police, forfeited in criminal proceedings, left in the museum because of "exorbitant repatriation duties" or were otherwise taken by and forfeited to the State such that there could be no deposit. Police seizures, criminal procedures, and taxation are not the kind of activities in which a private person can engage and, therefore, cannot be part of a "commercial activity."

Hungary asserts that this bailment agreement is neither valid nor enforceable, but even if it was valid – even if there had not been criminal proceedings that resulted in the seizure of specific artworks or forty-five years of Communist governments or treaties or claims processes – even if a bailment agreement could conceivably exist for *any* of the claimed artworks, this Court lacks jurisdiction under the FSIA's commercial activity exception because Plaintiffs cannot demonstrate a "direct effect" in the United States.

III. The FSIA's Expropriation Exception Does Not Apply to Provide This Court with Subject Matter Jurisdiction Over Hungary

Plaintiffs' Opposition asserts that most of the artworks claimed in this lawsuit were "taken" from Plaintiffs' predecessors during the Holocaust in violation of international law.

Opp. at 46. But the Opposition does not dispute that certain artworks did not come into Hungary's possession until years after the war, through state seizure during the Communist Era (Cranach, Compl ¶ 16(vi)) or donation (the Opie, Compl. ¶ 16(xiii)).[6]

Further, nineteen of the remaining forty-two claimed artworks were legally and physically returned to Plaintiffs' predecessors or their representatives shortly after the war, thereby remedying the "taking" – and completing performance of any purported expropriation-related bailment. Any subsequent post-return taking was not a taking in violation of international law to trigger the expropriation exception.[7]

A. Claims for World War II Takings are Addressed by the Peace Treaty, Which Conflicts Expressly with the FSIA

In its 2013 decision, the appellate panel summarized Hungary's argument that Peace Treaty Articles 27 and 40, taken together, "establish an exclusive treaty-based mechanism for

[6] As noted in the Renewed Motion to Dismiss, Dkt. 106 at 9, the Ferenczy painting, (Compl. at 19(i)), attributed by Plaintiffs to András Herzog, was *purchased* by the Museum of Fine Arts, Budapest at an auction in 1961. *See* Tatevosyan Decl., Exhs. 30, 31.

[7] To dispute the original returns, Plaintiffs point to documents showing some of the nineteen artworks returned following the war came back into the museums' possession. Opp. at 10 n.5, 12 n.8. A close look at the documents reveals, however, the returns did happen, with later events bringing the artworks back into the museums' ownership. The Zurbarán Saint Andrew (Compl. ¶ 16(xxi)) was physically returned to Mrs. István Herzog on July 17, 1947, and later seized in October 1948, in connection with the smuggling action. Walker Decl., Exh. 2 at Compl. ¶ 16(xxi)). The Giovanni Santi (Compl. ¶ 16(xviii)) was legally released in 1947, seized by the tax authorities to secure public debts in 1949, and returned to Mrs. István Herzog's representative by November 1950. Walker Decl., Exh. 2 at Compl. ¶ 16(xviii). The painting returned to Hungary in 1951. *Id*.

Plaintiffs cite to Tatevosyan Decl., Exh. 23 at HUNG012663, as including "at least the following seven artworks which Defendants claim were 'returned'." Opp. at 12, n.8. The returns of these artworks in 1946 and in 1947 to Plaintiffs' representatives are documented. *See* Tatevosyan Decl., Exhs. 76, 6-15. Exhibit 23, dated May 1950, is Dr. Emil Oppler's offer to place the artworks into the museums' possession from outside locations, thus proving that these artworks had been returned to Plaintiffs' representatives following the war, as they otherwise would not have had the artworks to hand back to the museums. *See* Tatevosyan Decl., Exh. 23 at HUNG012663; Walker Decl., Exh. 2.

resolving all claims seeking restitution of property discriminatorily expropriated during World War II from individuals subject to Hungarian jurisdiction." *de Csepel*, 714 F.3d at 602.

The panel then rejected Hungary's proposed application of the treaty exception argument

> [F]or the simple reason that [Plaintiffs'] claims fall outside the Treaty's scope. Article 27 concerns property discriminatorily expropriated during World War II. As we have explained, however, the family's claims rest not on war-time expropriation but rather on breaches of bailment agreements formed and repudiated after the war's end.

de Csepel, 714 F.3d at 602. The panel found that it was Plaintiffs' claim of commercial bailment – not a taking in violation of international law – that provided the basis, at the pre-discovery phase, for a court to take jurisdiction over Hungary. *Id*. ("These allegations [of bailment] distinguish this case from one 'in essence based on disputed takings of property' and thus outside the purview of the commercial activity exception" (quoting *Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006)).[8]

[8] The panel's reference to *Garb* is instructive. In that case the plaintiffs sought redress for property taken in post-War Poland. *Garb*, 440 F.3d at 582. Like the Plaintiffs here, the *Garb* plaintiffs asserted that the court could take jurisdiction over defendants under both the commercial activity exception and the expropriation exception. The court found that while the plaintiffs brought claims for property taken in violation of international law, the expropriation exception did not apply because the plaintiffs failed to satisfy the remaining elements of Section 1605(a)(3). Turning to the commercial activity exception, the court noted that "regardless of the subsequent commercial treatment of the expropriated property, plaintiffs' claims are 'based upon' the acts of expropriation." *Id*. at 586. The appellate court then rejected the plaintiffs' assertion that the commercial activity exception applied to their claims "because this assertion simply recharacterizes plaintiffs' 'takings' argument." *Id*. at 588.

As the panel noted, "[f]ederal courts have repeatedly rejected litigants' attempts to establish subject matter jurisdiction pursuant to other FSIA exceptions when their claims are in essence based on disputed takings of property." *Id*. (citing *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1398 (5th Cir. 1985)); *see also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *see also id*. at 587 (noting that "subsequent commercial transactions involving expropriated property do not give rise to subject matter jurisdiction over claims arising from the original expropriation"). Thus, if this action is based on a taking in violation of international law, then the Court should consider whether Plaintiffs' claims are subject to the expropriation exception – not the commercial activity exception. But if, instead, Plaintiffs claims are based on a commercial activity, then the Court should consider whether

The panel's reasoning was employed by Judge Howell in *Simon v. Hungary*, 37 F. Supp. 3d 381 (D.D.C. 2014), in which she found that the *de Csepel* panel's interpretation of the FSIA's treaty exception in this action necessitated a finding that the Peace Treaty barred the war-time takings claims of other Hungarian plaintiffs. *See id.* at 420-21. The *Simon* court, noting the *de Csepel* panel's careful distinction between war-time taking claims and post-war allegations, recognized that the plaintiffs' claims against the Hungarian defendants pertained to "property or rights expropriated during World War II," and that the "exclusive mechanism for resolution of disputes regarding 'the interpretation or execution' of the 1947 [Peace] Treaty was provided in Article 40." *Id.* at 424. Therefore, the court found, "the 1947 [Peace] Treaty constitutes an 'existing agreement' to which the United States was a party prior to the enactment of the FSIA that 'expressly conflicts' with the FSIA, meaning the 1947 [Peace] Treaty controls." *Id.* at 424 (citation omitted). As a result, the court recognized that the Hungarian defendants "are entitled to sovereign immunity except as modified by the 1947 [Peace] Treaty and, consequently, the plaintiffs' claims must be dismissed for lack of subject matter jurisdiction." *Id.*

Moreover, offensive use of a pre-existing agreement to assert claims in U.S. courts against a sovereign state may run counter to the "long recognized . . . presumption against finding treaty-based causes of action, because the decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1080 (D.C. Cir. 2012) (citations omitted); *see also* Walker Decl., Exh. 17 (Andrew Martin, *Private Property, Rights, and Interests in the Paris Peace Treaties*, 24 Brit. Y.B. Int'l L. 273, 289 (1947) (recognizing that Articles 26 and 27 of the Peace Treaty provide the exclusive remedy for taken property claims in Hungary)).

Plaintiffs' claims are subject to the commercial activity exception – not the expropriation exception. It is one or the other, not both.

B. Certain Claims Advanced by Plaintiff de Csepel Are Covered by the 1973 Agreement

Even if one accepts Plaintiffs' interpretation of the scope of the Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, March 6, 1973, 24 U.S.T. 522, T.I.A.S. 7569, 938 U.N.T.S. 167 ("1973 Agreement") it clearly applies to those claims advanced by Plaintiff de Csepel that are premised on a taking that occurred after his grandmother became a citizen in 1952. Two artworks – the Opie and the Cranach – came to Hungary's possession for the first time in 1952 (Cranach) and 1963 (Opie). *See* Decl. I. Tatevosyan, Exhs. 29, 32. Because these works were taken by Hungary after Ms. Weiss de Csepel became a U.S. citizen and before the 1973 Agreement was signed, they are covered by this agreement. In both instances, Hungary's possession of the artworks was not the result of a World War II seizure, but a Communist taking, as claimed by Erzsébet Weiss in her Foreign Claims Settlement Commission ("FCSC") claims and recognized by the FCSC in their awards. Contrary to Plaintiffs' assertion that Hungary misled Ms. Weiss de Csepel about the state ownership of the two works by incorrectly stating they came under state ownership through the 1954 Museum Act, Opp. at 17, Hungary never mentioned the 1954 Museum Act and stated, in accordance with its internal registries, that the two artworks became museum property in the 1960s. Benenati Decl., Exh. 21 at HUNG013096; Tatevosyan Decl., Exh. 33 at HERZOG00000323-24.

C. Plaintiffs Have Not Alleged a Violation of International Law that Permits the Court to Take Jurisdiction over Hungary Under the Expropriation Exception

Plaintiffs' Complaint focuses on a "wartime looting and seizure of the Herzog Collection" upon which Plaintiffs' post-war bailment claims are premised. Opp. at 3; *see also* Compl. ¶¶ 1, 3, 29, 36, 53-62. Plaintiffs now contend that a "breach" of bailments that occurred when the Hungarian court issued its final decision in 2008, regarding only works claimed by

Martha Nierenberg – alleged by Plaintiffs to be a commercial act, Opp. at 39, 42 – is also a "taking in violation of international law" triggering the expropriation exception. Opp. at 50. But a written judicial decision from a court of a European Union member state following submission of briefs and evidence, after many public hearings and appeals, and where both Martha Nierenberg and Hungary were represented by counsel of their choice, cannot be deemed either a "breach" of bailments by Hungary or a "taking in violation of international law."

Plaintiffs attempt to analogize this case to *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008) where following a Russian court's decision that found the plaintiff was the lawful owner of property in Russia, the Russian executive branch refused to abide by the Russian court decision. The D.C. Circuit found that Russia's refusal to recognize and follow its own court decision constituted a taking distinct from the taking which led to the plaintiff's original loss. *Id.* at 944-45. But, this case is not *Chabad*. Hungary's judiciary and executive branches operate independently, and Plaintiffs have not provided any evidence that the Hungarian judiciary was acting under the control of the executive branch or that it misapplied Hungarian law in a discriminatory manner in 2008. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 679 (7th Cir. 2012).

Plaintiffs also contend that the seizure and forfeiture of artworks in connection with the criminal smuggling proceedings against Mrs. István Herzog was a taking in violation of international law.[9] Opp. at 52 n.31. But the seizure was not a taking in violation of law – international or otherwise. The forfeiture followed several years of criminal proceedings after

[9] Plaintiffs contend that the "impact" of the 1950s criminal proceedings against Mrs. István Herzog and subsequent forfeiture "is less than clear," Opp. at 51, and that because the forfeiture did not involve *all* of the artworks listed in the Complaint, the court should "decline to dismiss Plaintiffs claims to individual artworks at the motion to dismiss stage when such dismissals would not impact jurisdiction overall," Opp. at 52. But the impact of the 1950s criminal proceedings and forfeiture *is* clear – all forfeited artworks were taken over as state property.

the war, during which Mrs. Herzog was represented by a lawyer. Moreover, Mrs. Herzog (herself not Jewish) was a Hungarian citizen, prosecuted for violating pre-war laws, not in connection with the Holocaust. Thus, even if Plaintiffs could show that the criminal action was somehow unlawful, it was not a violation of *international* law.[10]

D. This Court Cannot Take Jurisdiction Over Hungary Under the Expropriation Exception

Garb, relied on by the appellate panel as support for why Plaintiffs' claims should be analyzed under the commercial activity exception, highlights the foreign policy reasons for why Hungary cannot be a defendant in this action under the expropriation exception. In *Garb*, Jewish claimants, who had owned real property in Poland between 1939 and 1945, sued the Republic of Poland and the Ministry of the Treasury of Poland for the expropriation of that property following the war. The *Garb* court noted that to trigger this exception, a plaintiff must demonstrate each of the following four elements:

(1) that rights in property are at issue;

(2) that the property was "taken";

(3) that the taking was in violation of international law; *and either*

(4)(a) "that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state," *or*

[10] Plaintiffs assert that the Defendants "predicated those [criminal] proceedings on a Holocaust-era agreement between István Herzog and his wife that Defendants knew to be invalid." Opp. at 52 n.31. Post World War II Hungarian law allowed Hungarians to challenge war-time agreements like the gift deed between István Herzog and his wife. *See* Reply Declaration of Zoltán Novak ("Reply Decl. Novak"), Exh. A (Prime Minister Decree No. 200/1945 of the Provisional National Government on the Nullification of the Jewish laws and decrees). The gift deed between István and his wife was not, however, challenged within the statutory deadline and therefore remained in effect. Walker Decl., Exh. 13. Thus, the Hungarian court's order to confiscate artworks given to Mrs. Herzog in the gift deed was supported by non-discriminatory post-war law and involved the Hungarian State taking action against a Hungarian citizen regarding property in Hungary.

> (4)(b) "that 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[.]"

440 F.3d at 588 (quoting 28 U.S.C. § 1605(a)(3)). The *Garb* panel assumed, for purposes of analysis, that the first two elements were satisfied. *See id*. at 588-589. The court noted that it was not yet a settled question whether a taking by Poland from Polish citizens would be considered a violation of international law and focused its decision, instead, on the fourth element. *See id*. at 589. Because the property claimed – Polish land – was not "present in the United States," the court found that the first clause of the fourth element could not apply. *Id*.

Turning to the second clause, the panel noted:

> In order to satisfy the fourth element of the "takings" exception where, as here, the property at issue is located outside the United States, plaintiffs must show that the property they seek to recover is "owned or operated by an agency or instrumentality of a foreign state.

Id. at 590 (citation omitted). The panel affirmed the lower court's finding that the court could not take jurisdiction over Poland because Poland "is not an 'agency of instrumentality' of a foreign state," but "the foreign state itself." *Id*. at 589.

The court went on to analyze whether the Polish Ministry should be considered an "agency or instrumentality" – a separate legal person from Poland – or part of Poland and, thus, not within this second clause. *Id*. at 590-91. In doing so, the court employed the "core functions" analysis set for in the D.C. Circuit's decision in *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994). After examining the background and legislative history of the FSIA, the *Transaero* court concluded that a foreign entity's status as a "separate legal person" from a foreign state depends on "whether the core functions" of the foreign entity are "predominantly governmental or commercial." 440 F.3d at 591 (quoting *Transaero*, 30 F.3d at 151); *see also Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003). Thus,

the question of whether the court is permitted to exercise jurisdiction over the remaining Hungarian defendants depends on "whether the core functions" of the three museums and university "are predominantly governmental or commercial." *Transaero*, 30 F.3d at 151.

In *Garb*, the defendants asserted that the Polish Ministry was not an agency or instrumentality, but part of the foreign state itself, because the ministry "exists to act on behalf" of Poland, noting that it "manages property, including land, on behalf of the Polish State" and that it "does not hold property separately from the Polish State." *Id*. at 595. Based on the full record, the court found that the Polish Ministry was "an integral part of Poland's political structure" and that its "'core function . . . is indisputably governmental' rather than commercial." *Id*. Here, it is not disputed that the artworks are owned by Hungary, not by the Hungarian entities. *See* Walker Decl., Exh. 14 at 16:10-14 ("Well, the owner is the Hungarian state."), 17:15-20, 33:3-7, 33:19-24; *id*., Exh. 15 at 15:5-16:8, 29:2-30:6, 34:2-35:2; 65:11-17. These entities record, house, and display the artworks, as required by Hungarian laws, regulations and procedures. Thus, like the Polish Ministry, they could be considered part of Hungary, not independent "agenc[ies] or instrumentalit[ies]." *Garb*, 440 F.3d at 598.

As the U.S. Solicitor General has counseled in another modern day art restitution claim arising from World War II:

> Where a plaintiff alleges that the property at issue "*is present in the United States* in connection with a commercial activity carried on in the United States by the foreign state," 28 U.S.C. 1605(a)(3), then there is jurisdiction over the foreign state itself based on its own commercial activities within this country. But where a plaintiff alleges that the property is "owned or operated by an agency or instrumentality of the foreign state * * * engaged in a commercial activity in the United States," then there is jurisdiction over only the foreign agency or instrumentality that has availed itself of American markets, *not the foreign state*.

Brief for the United States as *Amicus Curiae* in *Kingdom of Spain, et al., v. Estate of Claude Cassirer* (10-786) at 15 (emphasis added); *see also id*. at 16 (noting that "other foreign states

should not be subject to the jurisdiction of United States courts based on the possession of expropriated property by their agencies and instrumentalities");[11] Walker Decl., Exh. 16.

Thus, even if the Court found it premature to gauge whether the public Hungarian entities are integral to the Hungarian State or are separate legal entities with commercial core functions, neither clause of Section 1605(a)(3)'s fourth element can apply to permit this court to take jurisdiction over *Hungary* under the expropriation exception (regardless of whether based on World War II or post-war events) where the property claimed is not present in the United States and Hungary is not an "agency or instrumentality," but a foreign state.[12] *See, e.g., Freund v. Republic of France*, 592 F. Supp. 2d 540, 562 (S.D.N.Y. 2008)).

E. This Court Should Decline to Take Jurisdiction Over the Unexhausted Claims Associated with András and István Herzog

Hungary does not assert in this motion that Plaintiffs' claims are *barred* by statutory exhaustion or a court-imposed exhaustion requirement. Hungary asserts, instead, that principles of international comity are best served if the Court *declines* to exercise discretion, so that the claimant can pursue a remedy in the court of the country alleged to have committed the wrong.[13]

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[11] Available at: http://www.justice.gov/sites/default/files/osg/briefs/2010/01/01/2010-0786.pet.ami.inv.pdf.

[12] The *Garb* dissent argued that because of the "seriousness of the events alleged" in the plaintiffs' complaint, the panel should expand the "restrictive theory" of sovereign immunity under the FSIA and look past the majority's finding that the Polish Ministry is "part and parcel" of Poland to take jurisdiction over the ministry. 440 F.3d at 597 n.24, 598 (dissent). The majority rejected this suggestion, noting that regardless of the nature of the plaintiffs' claims,

> we are bound to apply the doctrine of state sovereign immunity, which itself protects important principles, not the least of which is that, except when a small number of special circumstances prevail, sovereign states are granted immunity from suit in the courts of other sovereign states-a reciprocal norm that significantly insulates the United States from suits in foreign countries.

Id. at 597 n.24.

[13] The U.S. Court of Appeals for the D.C. Circuit has previously recognized the need for exhaustion, even though it may not be statutorily mandated. *See Agudas Chasidei Chabad of*

Because Hungary is not asking the Court to consider an argument made previously, the prudential law-of-the-case doctrine does not preclude this Court's consideration of Hungary's direct effect argument. *See, e.g., LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739-40 (D.C. Cir. 1995).

Plaintiffs contend that they should be excused from having to exhaust claims attributable to the Italian Plaintiffs or István Herzog, asserting 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." Opp. 58. After the completion of discovery, there is no evidence from the heirs to support this now unsubstantiated lawyers' claim. All Plaintiffs rely on is the same attorney declaration submitted in the first motion to dismiss briefing in which this Court recognized the 2008 decision under international comity. Further, none of the cited "evidence" suggests that judicial remedies in Hungary are "futile or imaginary," *Fischer*, 777 F.3d at 858. The Italian Plaintiffs and the heirs of István Herzog *chose* not to participate in the Hungarian litigation, electing to withhold evidence in their possession. *See* Tatevosyan Decl., Exh. 54. But as they have not shown that the Hungarian judicial systems are a "sham," "inadequate," or "unreasonably prolonged," they "should pursue and exhaust their domestic remedies in Hungary." *Abelesz*, 692 F.3d at 681.

IV. Conclusion

For the reasons set forth above, Defendants respectfully request that the Court grant the Renewed Motion to Dismiss and dismiss Plaintiffs' Complaint on the ground that this Court lacks subject matter jurisdiction over Hungary.

U.S., 528 F.3d at 949. The court ultimately excused the claimant's failure to exhaust remedies, but only after confirming that the "only remedy Russia has identified is on its face inadequate," and, therefore, the taking could not be remedied by Russia. *Id; see also Abelesz*, 692 F.3d at 682; *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 855 (7th Cir. 2015).

Dated: July 9, 2015

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of July, 2015, I caused the foregoing Renewed Motion to Dismiss and Memorandum of Points and Authorities in Support Thereof to be served, via the Court's ECF electronic filing system, upon the following counsel of record in this matter:

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