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.	)	

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 ("Hungary"), by and through their attorneys, hereby respectfully move to dismiss the above-captioned action. A Memorandum of Points and Authorities in support of this Motion is submitted herewith for the Court's consideration.

ORAL HEARING REQUESTED

Pursuant to Local Rule 7(f) Hungary hereby respectfully requests an oral hearing on this Motion.

Dated: May 14, 2014

Respectfully submitted,

/s/ Emily C. Harlan

D. Grayson Yeargin (Bar No. 476324)
Emily C. Harlan

NIXON PEABODY LLP
401 Ninth Street, N.W., Suite 900
Washington, D.C. 20004-2128
Telephone: (202) 585-8000
Facsimile: (202) 585-8080
gyeargin@nixonpeabody.com

Thaddeus J. Stauber
Sarah Erickson André
Michael O. Azat

NIXON PEABODY LLP
Gas Company Tower
555 West Fifth Street
Los Angeles, CA 90013

Counsel for 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

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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 Memorandum of Points and Authorities in support of their Motion to Dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction.

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I. Introduction

This Court's sole basis for asserting subject matter jurisdiction over Hungary is under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330 *et seq*. The FSIA provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604; *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The appellate court found that Plaintiffs' allegations were sufficient to overcome a Rule 12(b)(6) challenge under the FSIA's commercial activity exception. *See de Csepel v. Hungary*, 714 F.3d 591, 598-99 (D.C. Cir. 2013).

As recognized by the appellate court, to satisfy the FSIA's commercial activity exception and strip a foreign sovereign of its presumptive immunity, "1) the lawsuit must be based upon an act that took place outside the territory of the United States; 2) the act must have been taken in connection with a commercial activity[;] and 3) the act must have caused a direct effect in the United States." *Id.* at 598 (D.C. Cir. 2013) (quoting *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 888-89 (D.C. Cir. 2006)). Grouping all Plaintiffs, their claims, and the artworks together, the panel reasoned that while neither a bailment nor the requisite "direct effect" in the United States was expressly alleged, they could be inferred so as to allow Plaintiffs to overcome Hungary's initial motion to dismiss. *See id.* at 601.

As demonstrated below, while such an inference was reasonable at the Rule 12(b)(6) stage, where, as here, a party challenges the facts on which subject matter jurisdiction hinges under Rule 12(b)(1), a court should satisfy itself that it has jurisdiction to hear the case. *See James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1092 (D.C. Circuit 1996). In analyzing Hungary's Rule 12(b)(1) challenge, the Court can no longer "infer" subject matter jurisdiction, and "must go beyond the pleadings and resolve any disputed issues of fact the resolution of

which is necessary to a ruling upon the motion to dismiss." *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004) (citation omitted). It is the Plaintiffs' burden to demonstrate by a preponderance of the evidence that this Court has subject matter jurisdiction to hear the case – if Plaintiffs cannot meet this burden, the case should be dismissed. *See Bolden-Bey v. U.S. Parole Comm'n*, 731 F. Supp. 2d 11, 13 (D.D.C. 2010); *See McManus v. District of Columbia*, 530 F. Supp. 2d 46, 62 (D.D.C. 2007). Without the benefit of inferences, Plaintiffs cannot demonstrate the required elements of jurisdiction.

Through the exchange of discovery, Plaintiffs confirmed that each artwork was inherited separately as sole and separate property of one of the three Herzog siblings, only one of whom later became a United States citizen. Plaintiffs confirmed that thirty-two of the forty-four claimed artworks were individually and separately inherited by non-U.S. citizens with no connection to the United States.[1] As a result, the Court cannot assume that bailments or direct effects relating to the three heirs' property would be common or identical. Rather, the Court should review and analyze the Herzog siblings' alleged property, alleged bailments, and possible "direct effects" separately.

Plaintiffs cannot establish the existence of valid bailments and the Court cannot infer that such contracts existed. In fact, there is affirmative evidence contradicting Plaintiffs' bailment claims, demonstrating that Plaintiffs' predecessors themselves knew and acknowledged that the artworks were seized, forfeited, confiscated, taken, or otherwise became State property during the Communist era.

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[1] Plaintiffs' Objections and Responses to Defendants' First Set of Interrogatories ("Plfs' Resp. First Interrogs.") are attached as Exhibit A to the Declaration of Michael O. Azat. A chart identifying the Herzog siblings' individual ownership to each artwork identified in the Complaint, as acknowledged in Plaintiffs' Objections and Responses to Defendants' First Set of Interrogatories No. 7 at 10, is attached as Exhibit B to Mr. Azat's Declaration.

Finally, Plaintiffs cannot demonstrate a "direct effect" in the United States and the Court can no longer infer that such an effect occurred. There is no evidence that Hungary's purported bailments (or their repudiation) with the non-U.S. citizen plaintiffs or their predecessors has had a "direct effect" in the United States as neither the non-U.S. Citizen plaintiffs nor their predecessors have (or had) any connection to the United States. In addition, the only purported "direct effect" that can be connected to the sole U.S. citizen plaintiff is purely financial in nature, and this circuit – like other circuits – recognizes that financial impact is not sufficient to constitute a direct effect. Courts look to the place where legally significant acts giving rise to the claim occurred in order to determine the location of a direct effect. As those acts took place in Hungary, there is no "direct effect" in the United States sufficient to warrant this Court taking jurisdiction over Hungary.

As Plaintiffs have failed to meet (and cannot meet) their burden of proving, by a preponderance of the evidence that a valid bailment exists or that a bailment caused a "direct effect" in the United States, Hungary respectfully requests that this Court grant this motion.

II. Background

A. Factual Background

This action involves the disputed ownership of forty-four individual and separate artworks once attributable to the collection of Baron Mór Lipót Herzog; these artworks have been in Defendants' possession for approximately fifty to seventy years. Following the death of Baron Herzog (in 1934) and his wife (in 1940), the Herzog collection was divided among the couple's three children: Erzsébet (Herzog) Weiss de Csepel, István Herzog, and András Herzog. In 1943, the Herzog family attempted to save their artworks from damage and confiscation by hiding the bulk of the collection in the cellar of one of the family's factories. Compl. ¶ 58. On March 19, 1944, Germany invaded Hungary and occupied it until the Soviet Red army forced the

Germans out of Hungary in the spring of 1945. Sometime prior to May 23, 1944, the artworks were discovered. Compl. ¶ 59. It appears that some of the artworks were transferred to Germany, while the remainder was stored in Hungary. Compl. ¶¶ 59-61.

In May 1944, many members of the Herzog and Weiss de Csepel families left Hungary. Compl. ¶ 63. Ms. Weiss de Csepel and her children reached Portugal in June 1944, and eventually arrived in the United States in 1946. Compl. ¶ 63. Plaintiffs Angela and Julia Herzog left Hungary following their father's deportation and death, with both obtaining Italian citizenship. Comp. ¶ 41, Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 3 at 8. It appears that István Herzog, a Hungarian citizen, remained in Hungary, where he died in 1966. Compl. ¶ 42, Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 3 at 8.

Following Germany's defeat in 1945, it is believed that some works from the Herzog Collection were seized by the Red Army and shipped to Russia; other works were recovered by the Western Allied forces in Germany and returned to Hungary. Compl. ¶¶ 66, 67. In 1947, Hungary signed a peace treaty with the allies. Compl. ¶ 69. After the war, some pieces from the Herzog collection were returned to members of the Herzog family. Compl. ¶ 72; Dkt. No. 15-3, complaint filed in Hungary in 1999 by Martha Nierenberg ("The procedure of return of the objects in regard to the Herzog Collection also went smoothly."). According to Plaintiffs, such returns were "largely on paper or short-lived." Compl. ¶ 70. Other artworks remained with Defendants. Compl. ¶¶ 76, 70-73.

When Ms. Weiss de Csepel wrote to Defendants in 1966 regarding the Opie painting, she received the response that Hungary was "not able to acknowledge Erzsébet Herzog's [Weiss de Csepel's] property claim to the painting of John Opie, representing a 'Girl in red [d]ress', because the named object is forming the property of the Hungarian Government." Azat Decl.,

Exh. C (HERZOG00000319-HERZOG00000324) at 00000323. In 1989, Erzsébet Weiss de Csepel asked Defendants to return to her those artworks that were inherited by her and held by Defendants as deposits. Shortly thereafter, Defendants returned three artworks once attributable to the Herzog Collection to Ms. Weiss de Csepel's representative. Azat Decl., Exh. D (HUNG003054-HUNG003059) at HUNG003055 and HUNG003058. The works were returned with the admonition that under Hungarian law, the works could not be removed from Hungary. Azat Decl., Exh. D (HUNG003054-HUNG003059) at HUNG003055.

In 1999, Martha Nierenberg (daughter of Erzsébet Weiss de Csepel, aunt to Plaintiff David de Csepel, and cousin to Plaintiffs Julia and Angela Herzog) filed a lawsuit in Hungary seeking restitution of certain artworks once inherited by her mother. Ms. Nierenberg represented to the courts that the artworks were held as sole, separate, and distinct property of the three Herzog siblings and their heirs.[2] Dkt. No. 15-3, complaint filed in Hungary in 1999 by Martha Nierenberg. To ensure that the interests of all three Herzog siblings were represented, the heirs of András and István Herzog – including Stephan and Peter Herzog (sons of István Herzog) and Plaintiffs Julia and Angela Herzog (daughters of András Herzog) – retained counsel and were

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[2] At the May 24, 2004, hearing before the Metropolitan Court, Dr. Tamás Varga, attorney for Martha Nierenberg, stated:

> On the basis of Section 6 of [Baron Mór Lipót Herzog and wife's joint] will, it can be established that the testators provided that their heirs divide the works of art belonging to the estate into three equal parts, and also stipulated that if no agreement is reached between the heirs in this respect then an arbitration court proceeding should follow in accordance with Act 1911 on Arbitration Court Proceedings, as in force at the time, and they also specified the name of the arbitrators.
>
> To my knowledge, and as far as Plaintiff is aware, no such arbitration court proceeding took place, which implies that the heirs divided the estate regularly, and, as per such division, no co-ownership of each item of the estate was established but each item came to be owned by the heirs separately.

Azat Decl., Exh. E (HUNG005004-HUNG005014) at HUNG005011; *see also* Dkt. No. 15-3, complaint filed in Hungary in 1999 by Martha Nierenberg.

brought into the lawsuit as co-defendants.[3] In 2000, shortly after the lawsuit was filed, Defendants returned to Ms. Nierenberg one of the artworks sought in her complaint with the admonition that a preservation order was being placed on the work to ensure that it would not be removed from Hungary. Azat Decl., Exh. F (HUNG002404-HUNG002406) at HUNG002405.

After more than eight years of litigation and numerous appeals by both sides, the Hungarian courts concluded that Hungary was the rightful owner of the artworks based on several legal theories, including the application 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, and adverse possession. Ms. Nierenberg did not seek review of the decision by the Hungarian Supreme Court.

B. Procedural History

On July 27, 2010, David de Csepel (grandson of Erzsébet Weiss de Csepel and nephew of Martha Nierenberg,) and Julia and Angela Herzog (the Italian-citizen daughters of András Herzog), filed their Complaint in this action. On February 15, 2011, Hungary moved to dismiss Plaintiffs' Complaint. On September 1, 2011, the district court issued a Memorandum Opinion and an Order granting, in part, Hungary's motion to dismiss. *See de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011). The district court recognized Hungary's international comity defense, dismissing eleven of forty-four claims, *see id.* at 144-45, and denied the remainder of Hungary's motion, *see id.* at 126-44. Both parties appealed.

[3] Despite their representation and the fact that artworks attributed to their predecessors were identified in the complaint, the heirs of András and István Herzog did not litigate their claims and therefore failed to exhaust their claims, an action recognized as necessary by the U.S. Court of Appeals for the Seventh Circuit. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 678-85 (7th Cir. 2012).

On April 19, 2013, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit, affirmed this Court's denial of the remainder of Hungary's motion to dismiss and reversed this Court's international comity finding, asserting that this Court's finding was premature. On June 4, 2013, the U.S. Court of Appeals for the D.C. Circuit denied Hungary's petition for rehearing *en banc*. On July 29, 2013, the appellate court's mandate issued and the action returned to this Court. Following an initial scheduling conference and a Joint Rule 16.3 Report, on December 9, 2013, this Court issued an order setting a schedule permitting Hungary to file a motion to dismiss, under Rule 12(b)(1).

At Plaintiffs' request, the Court ordered full discovery to proceed. On April 30, 2014, the parties exchanged responses to the first round of discovery. Included, was the following interrogatory and response regarding the "direct effect" in the United States that must exist for this Court to take jurisdiction over Hungary:

> DEFENDANTS' INTERROGATORY NO. 14: State all facts to support YOUR claim that "Defendants' continued possession of the Herzog Collection and failure to restitute the Herzog Collection following demand by the U.S. Herzog Heirs caused a direct effect in the United States."
>
> RESPONSE TO DEFENDANTS' INTERROGATORY NO. 14: See General Objections. In addition to their General Objections, Plaintiffs object to Interrogatory No. 14 on the grounds that it seeks information that is protected from disclosure by the attorney client privilege and the work product doctrine. Plaintiffs further object to Interrogatory No. 14 on the grounds that (i) the term "YOUR" is overly broad and unduly burdensome to the extent that it refers to persons other than the Plaintiffs themselves; (ii) it is overly broad and unduly burdensome to the extent it calls for "all" facts; and (iii) it may require a legal conclusion concerning what constitutes a "demand" and a "direct effect."
>
> DEFENDANTS' INTERROGATORY NO. 30: IDENTIFY the alleged direct effect in the United States and when it occurred as a result of the DEFENDANTS' continued possession and failure to restitute the HERZOG COLLECTION ARTWORKS inherited from András Herzog by his daughters Angela Maria Herzog and Julia Alice Herzog from the HERZOG COLLECTION to Angela Maria Herzog and/or Julia Alice Herzog.
>
> RESPONSE TO DEFENDANTS' INTERROGATORY NO. 30: See General Objections. In addition to their General Objections, Plaintiffs object to Interrogatory No.

> 30 on the grounds that it calls for information that is protected from disclosure by the attorney-client privilege or work product doctrine. Plaintiffs further object to Interrogatory No. 30 on the grounds that (i) it is vague and ambiguous, (ii) it is duplicative of Interrogatory No. 14; and (iii) it may require a legal conclusion concerning what constitutes a "direct effect."
>
> DEFENDANTS' INTERROGATORY NO. 31: IDENTIFY the alleged direct effect in the United States and when it occurred as a result of the DEFENDANTS' continued possession and failure to restitute the HERZOG COLLECTION ARTWORKS inherited by István Herzog from the HERZOG COLLECTION to István Herzog or his heirs.
>
> RESPONSE TO DEFENDANTS' INTERROGATORY NO. 31: See General Objections. In addition to their General Objections, Plaintiffs object to Interrogatory No. 31 on the grounds that it calls for information that is protected from disclosure by the attorney-client privilege or work product doctrine. Plaintiffs further object to Interrogatory No. 31 on the grounds that (i) it is vague and ambiguous, (ii) it is duplicative of Interrogatory No. 14; and (iii) it may require a legal conclusion concerning what constitutes a "direct effect."

Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) at 18, 31-32; *see also* Plaintiffs' Objections and Responses to Defendants' First Set of Requests for Production of Documents Nos. 27, 32, and 33, at 19, 22-23. Plaintiffs offered no substantive answers and no relevant documents. Instead of providing support for their claims of bailment and "direct effect," Plaintiffs offered only objections.

III. Standard of Review Under Federal Rule of Civil Procedure 12(b)(1)

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)); *see also General Motors Corp. v. Envtl. Prot. Agency*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court with limited jurisdiction, we begin, and end, with examination of our jurisdiction."). Because "subject-matter jurisdiction is an 'Art. III as well as a statutory requirement, [. . .] no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003) (quoting *Insurance Corp. of Ireland, Ltd. v. Compagnie des*

Bauxites de Guinee, 456 U.S. 694, 702 (1982)). In fact, Federal Courts are "forbidden . . . from acting beyond [their] authority," *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008), and, therefore, have "an affirmative obligation to consider whether the constitutional and statutory authority exists [for the court] to hear the dispute," *James Madison Ltd. by Hecht*, 82 F.3d at 1092 (internal quotation omitted).

Challenges to this Court's subject matter jurisdiction may be raised at any time. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction, *see* Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."); *United States ex rel. Schweizer v. Oce, N.V.*, 577 F. Supp. 2d 169, 173 n.2 (D.D.C. 2008).

Plaintiffs must establish the court's jurisdiction over the subject matter by a preponderance of the evidence. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008); *Finca Santa Elena, Inc. v. U.S. Army Corps of Eng'rs*, 873 F. Supp. 2d 363, 368 (D.D.C. 2012); *Bolden-Bey v. U.S. Parole Comm'n*, 731 F. Supp. 2d 11, 13 (D.D.C. 2010) ("On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing by a preponderance of the evidence that the court has subject matter jurisdiction."); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 63 (D.D.C. 2002).

Where a defendant's motion to dismiss for lack of subject matter jurisdiction challenges only the legal sufficiency of the plaintiffs' jurisdictional allegations, the court can take the plaintiffs' factual allegations as true and determine whether such allegations bring the action within any of the immunity exceptions raised by the plaintiff. *See Saudi Arabia v. Nelson*, 507

U.S. 349, 351 (1993); *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000). Where, however, the motion challenges the factual basis of the court's subject matter jurisdiction, "the court may not deny the motion to dismiss merely by assuming the truth of the facts alleged by the plaintiff and disputed by the defendant." *Phoenix Consulting, Inc.*, 216 F.3d at 40; *see also Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002); *Wilderness Soc. v. Griles*, 824 F.2d 4, 16 (D.C. Cir. 1987) (recognizing that in analyzing a Rule 12(b)(1) motion, "a district court can assure that appropriate extra-pleading materials are consulted in determining the threshold jurisdictional issue"); *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005); *Scolaro v. District of Columbia Bd. of Elections & Ethics*, 104 F. Supp. 2d 18, 22 (D.D.C. 2000) (citing *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992)).

This Circuit has recognized that "[w]hen a foreign sovereign disputes the fact(s) upon which the district court's subject matter jurisdiction depend(s), the court 'must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss.'" *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004) (quoting *Phoenix Consulting, Inc.*, 216 F.3d at 40). As another judge of this Court noted recently,

> When the movant's purpose is to challenge the substance of the jurisdictional allegations, he may use affidavits and other additional matter to support the motion . . . . [There are] a wide array of cases from the four corners of the federal judicial system involving the district court's broad discretion to consider relevant and competent evidence on a motion to dismiss for lack of subject matter jurisdiction to resolve factual issues . . . . [O]nce a factual attack is made on the federal court's subject matter jurisdiction, the district judge is not obliged to accept the plaintiff's allegations as true and may examine the evidence to the contrary and reach his or her own conclusion on the matter.

Finca Santa Elena, Inc., 873 F. Supp. 2d at 368 (Wilkins, J.) (quoting 5B Charles Alan Wright and Arthur Miller, Federal Practice and Procedure: Civil § 1350, 159-98 (3d ed. 2004) (citations and footnotes omitted)). When Defendants challenge the factual basis of the Court's subject

matter jurisdiction, the Court has "considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction." *Prakash v. Am. Univ.*, 727 F.2d 1174, 1179 (D.C. Cir. 1984). Absent subject matter jurisdiction over a case, the court must dismiss it. *See McManus*, 530 F. Supp. 2d at 62.

IV. The FSIA's Commercial Activity Exception Does Not Provide the Court with Subject Matter Jurisdiction over Hungary

The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts." *Amerada Hess Shipping Corp.*, 488 U.S. at 434. The basic premise of the FSIA is that foreign sovereigns are immune from suit in the United States *unless* the action falls under one of the specific exceptions enumerated in the statute. *See* 28 U.S.C. § 1604. Under the FSIA, the foreign sovereign has "immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits." *Phoenix Consulting, Inc.*, 216 F.3d at 39 (quoting *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)).

The special circumstances of a foreign sovereign require the court to engage in more than the usual pretrial factual and legal determinations. *See Foremost-McKesson*, 905 F.2d at 449. The U.S. Court of Appeals for the D.C. Circuit has noted that it is particularly important that the court "satisfy itself of its authority to hear the case" before trial. *Id.* (quoting *Prakash*, 727 F.2d at 1179). Once a foreign-sovereign defendant asserts immunity, the plaintiff bears the burden of producing evidence to show that there is no immunity and that the court has jurisdiction over the plaintiff's claims. *See Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 42 (D.D.C. 2000) (citations omitted).

Plaintiffs assert that the FSIA's commercial activity exception applies to strip Defendants of their presumptive sovereign immunity, thereby providing the court with subject matter jurisdiction to consider Plaintiffs' claims. Plaintiffs' Complaint invokes the provision of the

commercial activity exception that abrogates sovereign immunity in any case where "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." 28 U.S.C. § 1605(a)(2). To satisfy this exception, "1) the lawsuit must be based upon an act that took place outside the territory of the United States; 2) the act must have been taken in connection with a commercial activity[;] and 3) the act must have caused a direct effect in the United States." *Rong*, 452 F.3d at 888-89. As Judge Tatel noted, "[b]ecause Hungary's actions obviously occurred outside the United States," the exception's applicability turns on whether Plaintiffs can satisfy the second and third prongs of Section 1605(a)(2). *de Csepel*, 714 F.3d at 598-99.

A. The Court Should Not "Infer" a Bailment and Plaintiffs' Fail to Provide Evidence of a Bailment Sufficient to Trigger the Commercial Activity Exception

The appellate court suggested that the bailments Plaintiffs purportedly allege could satisfy the second prong of the commercial activity exception. Under the second prong, the court must assess "[t]he commercial character of an activity . . . by reference to the nature of the . . . particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). The question is "not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives," but "whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (internal quotation marks omitted).

Concluding that the alleged bailments were not premised solely on the 1947 Peace Treaty and acknowledging that "Herzog Collection was initially expropriated by the Hungarian government," *de Csepel*, 714 F.3d at 600, the appellate court reasoned that a breach of a bailment

(or bailments) could theoretically satisfy *Weltover*, as a bailment is a form of contract, and a foreign state's participation in a contract is the type of activity in which a "private player within the market" engages, *id.* at 599 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (internal quotation marks omitted)).

In reaching this conclusion, however, the appellate court drew an inference – the hypothetical existence of one or more unidentified and undefined bailments agreement between Plaintiffs or their predecessors and a foreign sovereign. Such an assumption may have been appropriate under Rule 12(b)(6) review, but the court cannot make assumptions or draw inferences in Plaintiffs' favor in analyzing Hungary's Rule 12(b)(1) motion. *See Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998) ("[W]hen the question to be considered is one involving the jurisdiction of a federal court, jurisdiction must be shown affirmatively, and that showing is *not made by drawing from the pleadings inferences favorable to the party asserting it.*") (emphasis added) (citing *Norton v. Larney*, 266 U.S. 511, 515 (1925) ("It is quite true that the jurisdiction of a federal court must affirmatively and distinctly appear and *cannot be helped by presumptions or by argumentative inferences drawn from the pleadings.*") (emphasis added)). Accordingly, the Court cannot draw an inference of a bailment to create subject matter jurisdiction to strip Defendants of their presumptive sovereign immunity, based solely on unsupported allegations in the Complaint.

Thus, to satisfy this requirement, Plaintiffs must provide some evidence to support a valid bailment claim between Plaintiffs and Defendants. They have failed to do so. Plaintiffs failed to identify with any level of particularity a valid bailment (or bailments) in their Complaint, and even after exchange of discovery, Plaintiffs have provided no meaningful evidence of a valid bailment. Plaintiffs assert that Defendants marked a small number of the artworks as "deposits"

at certain times, but Plaintiffs provide no evidence of "delivery by the bailor and acceptance by the bailee of the subject matter of the bailment," *Dumlao v. Atl. Garage, Inc.,* 259 A.2d 360, 362 (D.C. 1969), as they must.

In fact, documents provided by Plaintiffs in their discovery production make clear that neither Plaintiffs' predecessors nor Hungary's Communist government considered themselves to be participants in a "bailment" with Defendants regarding the artworks. *See, e.g.*, Azat Decl., Exh. G (HERZOG00000001-HERZOG00000012) at HERZOG00000008 (Claim by Erzsébet Weiss de Csepel seeking compensation for "[c]onfiscation of houses and other types of real property and of works of art by the Communist Hungarian government in 1954"); Azat Decl., Exh. G (HERZOG00000001-HERZOG00000012) at HERZOG00000011 (identifying artworks listed in Plaintiffs' Complaint, and noting "[t]hese paintings were confiscated by the Communist Hungarian Government in 1954, and to claimant's knowledge, many of them . . . are on exhibit in the Museum of Fine Arts at Budapest"); Azat Decl., Exh. C (HERZOG00000319-HERZOG00000324) at HERZOG00000320 (additional claims and correspondence regarding the John Opie and Lucas Cranach artworks which, according to a letter dated January 12, 1976, was "the property of the State of Hungary" (Opie) or "acquired by the Hungarian state . . .by policemen seizing it and turning it over to the Government" (Cranach) in the early 1960s and attaching, as proof of taking by Hungarian state, a letter from the Ministry of Culture, dated March 31, 1966, rejecting Ms. Weiss de Csepel's claim to the Opie painting, "because the named object is forming the property of the Hungarian Government");[4] *see also* Azat Decl., Exh. H

[4] Such seizures and confiscations are not commercial activities, but sovereign actions. *See, e.g., Garb v. Republic of Poland*, 440 F.3d 579, 588 (2d Cir. 2006); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1398 (5th Cir. 1985); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 254 (7th Cir. 1983); *Haven v. Rzeczpospolita Polska (Republic of Poland)*, 68 F. Supp. 2d 947,

(HUNG008082-HUN008088) at HUNG008085-HUN008087 (indictment against Ilona Kiss, former wife and guardian of István Herzog) relating to unauthorized removal from Hungary of artworks attributable to István Herzog, many of which are named in the Complaint); Azat Decl., Exh. I (HUNG007906-HUNG007912) at HUN007909-HUNG007911 (sentence imposed against Ms. Kiss following prosecution for smuggling); Azat Decl., Exh. J (HUNG008013-HUNG008015) at HUNG008014 (memorandum regarding execution of criminal forfeiture of artworks, many of which are named in the Complaint). Therefore, Plaintiffs fail to demonstrate by a preponderance of the evidence, *see Bolden-Bey*, 731 F. Supp. 3d at 13, that a valid bailment (or bailments) exists to constitute a commercial activity.

B. Plaintiffs Provide No Evidence of a "Direct Effect" in the United States, as Required by the Commercial Activity Exception

Even if Plaintiffs offered evidence of a valid bailment, however, the FSIA's commercial activity exception cannot be employed as Plaintiffs cannot satisfy the Section 1605(a)(2)'s third prong. As demonstrated below, Plaintiffs cannot prove a "direct effect" in the United States because: (1) the non-U.S. citizen Plaintiffs and their purported bailments have no connection to the United States, and (2) the connection of the U.S. citizen Plaintiff's alleged bailment with the United States is tied solely to citizenship, not a legally significant action or event. As the only conceivable impact the U.S. citizen Plaintiff's bailment could have in the United States would be purely financial in nature, this theoretical impact does not rise to the level of "direct effect" sufficient to strip Hungary of its immunity.

In responding to this third prong, the court must examine whether Plaintiffs' carry their burden of proving that Hungary promised or expected to perform specific obligations in the

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954 (N.D. Ill. 1999) ("It is obvious that governmental expropriation of private property under governmental authority . . . is the classic type of [sovereign, rather than commercial,] activity . . . .").

United States when the parties entered into the alleged bailment(s). *Weltover*, 504 U.S. at 619; *see also Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 90 (D.C. Cir. 2005); *Westfield v. Fed. Republic of Germany*, 633 F.3d 409, 415 (6th Cir. 2011) (finding no "direct effect" in the United States where plaintiffs had "not alleged that Germany ever promised to deliver [the] art collection to the United States"). Courts recognize that "an effect is direct if it follows as an *immediate consequence* of the defendant's activity." *Weltover*, 504 U.S. at 618 (internal citation and punctuation omitted; emphasis added). Immediacy implies no "unexpressed requirement of 'substantiality' or 'foreseeability,' " but rather "ensures that jurisdiction may not be predicated on purely trivial effects in the United States." *Id.*

"Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States." *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994); *see also id.* at 1239 ("Appellant would have us interpret § 1605(a)(2) in a manner that would give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen claims to have suffered a loss from the acts of a foreign state. We think that the language of § 1605(a)(2) limiting jurisdiction to cases where there is a " direct effect" in the United States makes it unlikely that this was Congress' intent."); *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 236-37 (2d Cir. 2002); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 894-95 n.10 (5th Cir. 1998) ("[T]he third clause does not permit jurisdiction over foreign states whose acts cause only speculative, generalized, immeasurable, and ultimately unverifiable effects in the United States."). Moreover, the direct effect must be "substantial and foreseeable." *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988). A direct effect "requires that 'something legally significant actually happened in the

United States.'" *Bell Helicopter Textron Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219, 226 (D.D.C. 2012) (quoting *Zedan*, 849 F.2d at 1515).

1. The Claims of the three Herzog Heirs should be Analyzed Separately

At the Rule 12(b)(6) stage, the appellate court found that the "direct effect" factor was satisfied because Plaintiffs "allege[] that Hungary promised to return the artwork to members of the Herzog family it knew to be residing in the United States and then breached that obligation by refusing to do so." *de Csepel*, 714 F.3d at 601 (quoting Compl. ¶¶ 36, 101)). The appellate court conceded that "[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." *Id.* (emphasis added). In reaching its inference, the appellate court appears to have assumed that the artworks were jointly owned.

As noted above, a court cannot draw an inference supporting subject matter jurisdiction when the factual bases of such jurisdiction is challenged under Rule 12(b)(1). *See Norton*, 266 U.S. at 515; *Shipping Fin. Servs. Corp.*, 140 F.3d at 131. Thus, an inference of joint ownership that would anticipate specific performance in the United States cannot be drawn in Plaintiffs' favor at this stage. *See id.* Moreover, even if such an inference was permitted, it is does not hold up to the closer scrutiny of the Rule 12(b)(1) stage. Plaintiffs' themselves have previously professed in court the very opposite premise – that Erzsébet Weiss de Csepel, István Herzog, and András Herzog inherited artworks from their parents as sole and separate property. Plaintiff de Csepel's predecessor in interest, Martha Nierenberg, argued plainly to the Hungarian courts that the artworks were divided among the three sibling heirs as sole and separate property. Azat Decl., Exh. E (HUNG005004-HUNG005014) at HUNG005011. Ms. Nierenberg maintained that

Hungary could return specific property to her, without risk that the separate and distinct ownership rights of the heirs of András or István would be affected. Azat Decl., Exh. E (HUNG005004-HUNG005014) at HUNG005011. Further, in their discovery responses, Plaintiffs affirmatively identify the specific artworks inherited by each heir. Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 7; Azat Decl., Exh. B (chart).

As Plaintiffs and their predecessors state that each one of the forty-four artworks is individually attributable to either Erzsébet Weiss de Csepel, István Herzog, or András Herzog as sole and separate property, and historical evidence confirming this is in the record, the Court should analyze separately whether each of the alleged bailment(s) between Defendants and any one of the three Herzog siblings or their heirs created a "direct effect" in the United States sufficient to trigger the FSIA's commercial activity exception.

2. Plaintiffs Cannot Demonstrate that the Purported Bailment between András Herzog (or His Heirs) and Defendants Created a "Direct Effect" in the United States as required by the Commercial Activity Exception

By Plaintiffs' admission, Angela and Julia Herzog are Italian residents and citizens of Italy and Hungary; neither holds U.S. citizenship. Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 3 at 8. The Complaint fails to identify a single connection between these individuals or their claimed artworks and the United States, and Plaintiffs, following exchange of discovery, failed to identify any facts or meaningful connections, suggestions, or evidence of an impact in the United States. As Plaintiffs failed to provide any support to meet their burden of showing, by a preponderance of the evidence a "direct effect" in the United States, this Court lacks jurisdiction over Hungary as to the Italian Plaintiffs and their claims. *See Lujan*, 504 U.S. at 561; *Phoenix Consulting Inc.*, 216 F.3d at 40; *Bolden-Bey*, 731 F. Supp. 3d at 13.

Aside from the fact that Plaintiffs fail to identify or provide evidence of a "direct effect," to the extent that the alleged bailment between the Italian Plaintiffs and Defendants anticipated return of the property associated with András Herzog to his heirs, there is no evidence to suggest that such an action would cause a "direct effect" in the *United States*. Rather, the only impact the alleged bailment could have on a country outside of Hungary would be to Italy.

As the Court is not permitted to draw inferences supporting subject matter jurisdiction in Plaintiffs' favor, *see Norton*, 266 U.S. at 515, and there is no plausible support or evidence to demonstrate (or even suggest) a "direct effect" in the United States from Defendants' alleged bailment with András Herzog or his heirs, Hungary respectfully asserts that this Court lacks subject matter jurisdiction over Hungary with regards to claims for artworks that are identified by Plaintiffs as the sole and separate property of András Herzog, *see* Compl. ¶ 16(iii), (vii)-(ix), (xii), (xiv)-(xvi), (xxiv)-(xxxiii), (xxxv)-(xxxvi), ¶17(i), (v), ¶18(i)-(ii), ¶19(i); *see also* Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 7 at 11; Azat Decl., Exh. B (chart). *See Weltover*, 504 U.S. at 619; *Peterson*, 416 F.3d at 90 (D.C. Cir. 2005).

3. Plaintiffs Cannot Demonstrate that the Purported Bailment between István Herzog (or His Heirs) and Defendants Created a "Direct Effect" in the United States as required by the Commercial Activity Exception

The heirs of István Herzog inherited any remaining ownership rights to the portion of the Herzog Collection designated as Istvan's sole and separate property. As with the claims associated with the heirs of András Herzog, Plaintiffs provide no information or evidence of a "direct effect" in the United States caused by (or relating to) the alleged bailment between István Herzog (or his heirs) and Hungary. Thus, Plaintiffs again fail to provide any support to meet their burden of showing, by a preponderance of the evidence, a "direct effect" in the United States sufficient to permit this Court to take jurisdiction over Hungary as to István Herzog's heirs

and their claims. *See Lujan*, 504 U.S. at 561; *Phoenix Consulting Inc.*, 216 F.3d at 40; *Bolden-Bey*, 731 F. Supp. 3d at 13. Notwithstanding Plaintiffs' failure to respond to Hungary's inquiries regarding "direct effect," Hungary asserts that any conceivable impact in the United States from an alleged bailment between Hungary and István Herzog or his heirs cannot rise to the level sufficient to invoke the commercial activity exception.

The Complaint does not identify the heirs of István Herzog; nor does it identify the country (or countries) of residence or citizenship of Istvan's heirs. Documents submitted to the Hungarian courts by Martha Nierenberg, however, as well as information contained in Plaintiffs' discovery responses, state that when István, a Hungarian citizen, died in Hungary in 1966, he left his estate to non-U.S. citizen, non-party heirs: his sons Stephan (Hungarian and Swiss citizenship; Swiss residence) and Peter (Hungarian citizenship and residence) and his second wife Mária Bertalanffy (Hungarian citizenship and residence).[5] Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 2 at 6. Plaintiffs offer no evidence (and no suggestion) that these individuals have (or had) any connection to the United States.

Plaintiffs assert that before her death, Ms. Bertalanffy executed a will leaving her 1/3 interest in Istvan's estate to Erzsébet Weiss de Csepel's sons, Gabriel and John de Csepel, both of whom are identified by Plaintiffs as citizens of Hungary and the United States. Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 2 at 6, No. 3 at 8. Per Plaintiffs' discovery responses, Gabriel died in 1997, predeceasing Ms. Bertalanffy (who has since died), leaving his interest to his brother John and sister Martha Nierenberg. Azat Decl., Exh. A (Plfs' Resp. First Interrogs.)

[5] Plaintiffs' identify Maria Bertalanffy as having received a 1/3 interest in Istvan's estate. Plaintiffs do not, as requested, provide the citizenship or place of residence of Ms. Bertalanffy prior to her death. According to information produced in the Nierenberg litigation, Ms. Bertalanffy lived in Gödöllő, Hungary, prior to her death in March 8, 1999. Azat Decl., Exh. K (HUNG004487-HUNG004490) (Grant of Probate, dated September 11, 2000).

No. 2 at 7. According to Plaintiffs, Peter and Stephen (both non-U.S. citizens and residents of Hungary and Switzerland, respectively) together have a 2/3 interest in Istvan's estate; John de Csepel and Ms. Nierenberg (both Hungarian and United States' citizens) have a 1/3 interest in the estate. Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 2 at 7. Thus, Plaintiffs attempt to draw a modern-day link between Istvan's estate and two non-party U.S. citizens.

The Court must look beyond a facial connection to the United States, however, to determine whether the theoretical impact cause by Hungary's purported bailment caused a "substantial and foreseeable," effect in the United States, *Zedan*, 849 F.2d at 1514, or whether the impact in the United States was minor and more akin to "ripples caused by an overseas transaction [that] manage eventually to reach the shores of the United States," *United World Trade, Inc.*, 33 F.3d at 1238. Until 1999 – after the deaths of both Gabriel Herzog and Ms. Bertalanffy – all interest in Istvan's estate was held by non-U.S. citizens and non-U.S. residents. Thus, unless the alleged bailment was created after 1999, there is no rational or legal basis to suggest that the alleged bailment involving István Herzog's artworks could have any effect – direct or otherwise – in the United States.[6]

That two non-party U.S. citizens may now have some connection to Istvan's estate is the result of Ms. Bertalanffy's will, not Istvan's will or the terms of an alleged bailment. Consequently, any impact this alleged bailment could have on the United States is neither "substantial" or "foreseeable," *Zedan*, 849 F.2d at 1514, but is instead merely a "ripple[] caused by an overseas transaction [that] manage[d] eventually to reach the shores of the United States," *United World Trade, Inc.*, 33 F.3d at 1238, by virtue of Ms. Bertalanffy's will.

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[6] In fact, to the extent that a "direct effect" was generated in connection with István Herzog's artworks, it took place in Hungary, when artworks attributable to him were seized and forfeited following criminal proceedings in the 1950s. Azat Decl., Exh. H (HUNG008082-HUN008088); Exh. I (HUNG007906-HUNG007912); Exh. J (HUNG008013-HUNG008015).

As the Court is not permitted to draw an inference of subject matter jurisdiction in Plaintiffs' favor, *see Norton*, 266 U.S. at 515, and there is no evidence that the alleged bailment involving artworks attributed to István Herzog could cause a "direct effect" in the United States sufficient to satisfy the commercial activity exception, Hungary respectfully asserts that this Court lacks subject matter jurisdiction over Hungary with regards to claims for artworks that are identified by Plaintiffs as the sole and separate property of István Herzog, *see* Compl. ¶ 16(v), (xvii)-(xviii), and 16(xx)-(xxiii); *see also* Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 7 at 11; Azat Decl., Exh. B (chart). *See Weltover*, 504 U.S. at 619; *Peterson*, 416 F.3d at 90 (D.C. Cir. 2005).

4. Plaintiffs Cannot Demonstrate that the Purported Bailment between Erzsébet Weiss de Csepel (or Her Heirs) and Defendants Created a "Direct Effect" in the United States as Required by the Commercial Activity Exception

As with the heirs of István and András, Plaintiffs fail to provide any evidence (or a suggestion) of a "direct effect" in the United States stemming from an alleged bailment between Defendants and Erzsébet Weiss de Csepel, the only Herzog heir with a connection to the United States. As Plaintiffs failed to meet their burden of demonstrating a "direct effect" by a preponderance of the evidence, *see Bolden-Bey*, 731 F. Supp. 3d at 13, in order to establish this Court's subject matter jurisdiction, *Khadr*, 529 F.3d at 1115, the Court must reject their unsupported assertion of jurisdiction over Hungary. But even if the Court were to look past Plaintiffs' silence, case law demonstrates that despite his connection to the United States as a citizen, Plaintiff David de Csepel cannot identify a legally significant fact, action, or event that constitutes a "direct effect" in the United States sufficient to confer jurisdiction.

This Court cannot draw in Plaintiffs' favor an inference of a "direct effect" emanating from the alleged bailment between Erzsébet Weiss de Csepel and Defendants. *Phoenix*

Consulting Inc., 216 F.3d at 40. Moreover, the information before the Court demonstrates that the artworks claimed by Plaintiffs would not (and cannot) leave Hungary without Hungary's express permission, pursuant to export regulations that pre-date World War II, even if they were to leave Hungary's possession. Hungary, like many European countries, has laws created to maintain and protect its cultural patrimony. This Court took judicial notice of Hungarian laws that "prevent the export of artwork of historical and cultural significance, like the artwork in question, unless permission is first sought and granted." *See* Dkt. No. 14, Defendants' Motion for Judicial Notice (referencing Hungarian Act No. XI of 1929, Hungarian Act No. LXIV of 2001, Hungarian Act IV of 1978 on the Criminal Code § 77, and Hungarian Act IV of 1978 on the Criminal Code § 216/B); Dkt. No. 34, Order, dated September 1, 2011, granting, in part, Defendants' Motion for Judicial Notice. The laws protect the artwork itself and are not dependent in any way on the identity or citizenship of the owner. The laws permit an owner to sell the protected artwork, provided that the artwork does not leave Hungary. Thus, there is no evidence (or support for an inference) that Hungary would anticipate, in any bailment, specific performance in the United States.

Plaintiffs are well-acquainted with these laws. In 1948, Hungary brought smuggling charges against István Herzog's first wife, Ilona Kiss, when it discovered that Ms. Kiss had smuggled artworks attributable to István Herzog out of Hungary in violation of Hungarian law, resulting in the seizure and forfeiture of numerous artworks that are part of this lawsuit. Azat Decl., Exh. H (HUNG008082-HUN008088); Exh. I (HUNG007906-HUNG007912); Exh. J (HUNG008013-HUNG008015). In 1989, when Hungary returned three artworks to Erzsébet Weiss de Csepel, having recognized her ownership claim to these works, the transfer documents noted that the artworks could not leave Hungary. Azat Decl., Exh. D (HUNG003054-

HUNG003059) at HUNG003055. In 2000, when Hungary returned an artwork to Martha Nierenberg, the transfer documents noted that the artwork could not leave Hungary. Azat Decl., Exh. F (HUNG002404-HUNG002406) at HUNG002405.

This Court took judicial notice of the Hungarian appellate court's decision in 2008 in the Nierenberg litigation, a decision that refers explicitly to this export limitation on artworks of historical and cultural significance, citing Hungarian Act LXIV of 2001 on the Protection of Cultural Heritage, which discussed "protected art objects," and explaining that the law poses a barrier to a replevin claim. Dkt. No. 34, Order, dated September 1, 2011, granting, in part, Defendants' Motion for Judicial Notice. Thus, while there is evidence to the contrary, there is no evidence to show that the artworks associated with Erzsébet Weiss de Csepel, András Herzog, or István Herzog would ever be sent to the United States, thereby creating a "direct effect."

Even where there may be a link between a commercial activity and the United States, courts continue to recognize that the FSIA's "direct effect" requirement is not satisfied where a "plaintiff's U.S. citizenship furnished the only connection between the commercial activity and the United States." *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1185 (D.C. Cir. 2013) (quoting *Cruise Connections Charter Mgmt. 1, LP v. Attorney General of Canada*, 600 F.3d 661, 665 (D.C. Cir. 2010)). Nor it is satisfied when the loss to the U.S. citizen plaintiff is purely financial. *See Zedan*, 849 F.2d at 1511 (finding no direct effect where contract was made in Saudi Arabia and defendant's breach led to financial loss to U.S. citizen plaintiff and the contract did not require that money be forwarded to a specific address in the United States); *BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 81 (D.D.C. 2003) ("A financial loss in the United States, when all the acts giving rise to the claim occur outside this country, is insufficient to show the 'direct effect; in the United States that the FSIA requires.");

see also Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 78 (2d Cir. 2010); *Virtual Countries, Inc.*, 300 F.3d at 240; *United World Trade, Inc.*, 33 F.3d at 1237.

If financial loss alone to a U.S. citizen could trigger the exception, "the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states . . . [and could] . . . result in litigation concerning events with no connection with the United States other than the citizenship or place of incorporation of the plaintiff." *Antares Aircraft, L.P v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993). As Plaintiffs cannot assert that any impact from the alleged bailment agreement rises to the level of "direct effect" in the United States, this Court lacks subject matter jurisdiction, despite David de Csepel's identify as a U.S. citizen.[7]

Plaintiffs fail to provide any evidence of a "direct effect" in the United States, and the available evidence demonstrates that any theoretical impact in the United States by the alleged bailment falls short of the "direct effect" bar. *See, e.g., Bell Helicopter Textron, Inc.*, 734 F.3d at 1185. Hungary respectfully asserts that this Court lacks subject matter jurisdiction over Hungary with regards to claims for artworks that are identified by Plaintiffs as the sole and separate property of Erzsébet Weiss de Csepel, *see* Compl. ¶ 16(i)-(ii), (iv), (vi), (x)-(xi), (xiii), (xix), (xxxiv), ¶17(ii)-(iv); *see also* Azat Decl., Exh. A (Plfs' Resp. First Interrogs.) No. 7 at 11; Azat Decl., Exh. B (chart). *See Weltover*, 504 U.S. at 619; *Peterson*, 416 F.3d at 90 (D.C. Cir. 2005).

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[7] Plaintiffs assert that the non-U.S. citizen and non-party heirs assigned their rights to U.S. citizen Plaintiff David de Csepel. These assignments, made in June and August of 2008, occurred *after* the Nierenberg litigation was concluded in January 2008 and long after any alleged bailment was created. Azat Decl., Exh. L (HERZOG00002156-HERZOG00002167). Accordingly, such assignments cannot create a means by which the non-U.S. citizen heirs can manufacture a jurisdiction-conferring connection to the United States.

5. The location of any "Direct Effect" is Hungary, not the United States

In *Weltover, Inc. v. Argentina*, 941 F.2d 145 (2d Cir. 1991), a decision unanimously affirmed by the Supreme Court, *see Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), the U.S. Court of Appeals for the Second Circuit recognized that courts "often look to the place where legally significant acts giving rise to the claim occurred" to determine the location of a "direct effect." *Weltover, Inc.*, 941 F.2d at 152; *Rong*, 452 F.3d at 892 (Henderson, J., concurring); *Corzo v. Banco Central de Reserva del Peru*, 243 F.3d 519, 525-26 (9th Cir. 2001) (if cause of action arises entirely in foreign country, "[t]he fact that United States computer companies might have been affected by . . . breaches [resulting from Peruvian bank's act] is jurisdictionally irrelevant"); *United World Trade*, 33 F.3d at 1239; *Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997).

Here there is no allegation, assertion, or evidence from Plaintiffs that any activity relating to the purported bailment took place outside of Hungary. Judge Tatel noted that with respect to the purported bailment, "Hungary's actions obviously occurred outside the United States." *de Csepel*, 714 F.3d at 598-99. Thus, to the extent that the alleged bailment could have a "direct effect" anywhere, as demonstrated here, it would be in Hungary.

V. Conclusion

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

Dated: May 14, 2014 Respectfully submitted

/s/ Emily C. Harlan
Emily C. Harlan

D. Grayson Yeargin (Bar No. 476324)

NIXON PEABODY LLP
401 Ninth Street, N.W., Suite 900
Washington, D.C. 20004-2128
Telephone: (202) 585-8000
Facsimile: (202) 585-8080
gyeargin@nixonpeabody.com

Thaddeus J. Stauber
Sarah Erickson André
Michael O. Azat
Gas Company Tower
NIXON PEABODY LLP
555 West Fifth Street
Los Angeles, CA 90013

Counsel for 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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of May, 2014, I caused the foregoing Motion to Dismiss to be served, via the Court's ECF electronic filing system, upon the following counsel of record in this matter:

Michael D. Hays
Alyssa T. Saunders
COOLEY LLP
1299 Pennsylvania Avenue, N.W., Suite 700
Washington, D.C. 20004
mhays@cooley.com
asaunders@cooley.com

Michael Shuster
Dorit U. Black
HOLWELL SHUSTER & GOLDBERG LLP
125 Brand Street
New York, NY 10017
mshuster@hsgllp.com
dblack@hsgllp.com

Sheron Korpus
Alycia Regan Benenati
Megan K. Zwiebel
KASOWITZ BENSON TORRES &
FRIEDMAN LLP
1633 Broadway
New York, NY 10019
skorpus@kasowitz.com
abenenati@kasowitz.com
mzwiebel@kasowitz.com

/s/ Emily C. Harlan
Emily C. Harlan