

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
<b>DAVID L. de CSEPEL, <i>et al.</i></b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>vs.</b>	)	<b>No. 1:10-cv-01261(ESH)</b>
<b>REPUBLIC OF HUNGARY, <i>et al.</i>,</b>	)	
	)	
<b>Defendants.</b>	)	
	)	
_____	)	

**MOTION OF 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 FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292(b) TO APPEAL ISSUES ARISING FROM THIS COURT’S SEPTEMBER 1, 2011, MEMORANDUM OPINION AND ORDER**

Defendants Republic of Hungary, The Hungarian National Gallery, The Museum of Fine Arts, The Museum of Applied Arts, and The Budapest University of Technology and Economics (“Hungary”), by and through their attorneys, hereby respectfully move for 28 U.S.C. § 1292(b) certification to appeal five issues arising from this Court’s September 1, 2011, Memorandum Opinion and Order denying, in part, Hungary’s motion to dismiss the Complaint. The Court should certify five issues pursuant to 28 U.S.C. § 1292(b) because the Court decided “controlling question[s] of law as to which there is substantial ground for difference of opinion” and an interlocutory appeal would “materially advance the ultimate termination of litigation.” 28 U.S.C. § 1292(b). The basis for Hungary’s motion for 28 U.S.C. § 1292(b) certification is set forth in greater detail in the accompanying Memorandum of Points and Authorities.

Wherefore, Hungary respectfully requests that the Court grant the motion and certify for interlocutory appeal certain issues arising from this Court's September 1, 2011, Memorandum Opinion and Order.

Dated: September 26, 2011

Respectfully submitted,

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### **PRELIMINARY STATEMENT**

Hungary has the right, under 28 U.S.C. § 1291, to an immediate appeal of that portion of the Order that denied Hungary's motion seeking dismissal on the grounds of Hungary's foreign sovereign immunity. Hungary brings its motion requesting certification for interlocutory appeal of five other issues arising from this Court's Order. Those issues arise from controlling questions of law, the resolution of which will materially advance resolution of this case. *See* 28 U.S.C. § 1292(b).

Certification will not delay this action as the filing of the Notice of Appeal relating to foreign sovereign immunity divests this Court of jurisdiction over Hungary during the pendency of the appeal and the Court has stayed all proceedings and discovery. Review of multiple issues by the appellate court is particularly appropriate here because this case involves a friendly foreign sovereign and resolution of the issues presented below will determine whether Hungary is forced to submit to the jurisdiction of this Court, as well as expend the time and expense associated with foreign litigation. Accordingly, it would be prudent and efficient for the U.S. Court of Appeals for the District of Columbia Circuit to address at this time other narrow issues that, if granted, completely dispose of all claims in this matter.

### **ISSUES TO BE CERTIFIED**

1. Whether the doctrine of *forum non conveniens* warrants dismissal;
2. Whether the District of Columbia's statute of limitations bars claims relating to the remaining artworks;
3. Whether this case presents non-justiciable political questions;
4. Whether Plaintiffs' bailment claim states a viable cause of action; and
5. Whether the Court should apply the act of state doctrine to bar Plaintiffs' claims.

**PROCEDURAL BACKGROUND**

Subject matter jurisdiction for all of Plaintiffs' claims in this matter is premised on purported exceptions to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330, *et seq.* Hungary denies and disputes that the District Court has subject matter jurisdiction, and denies and disputes that any exception to its foreign sovereign immunity exists. Rather, Hungary contends that it is immune from suit in the United States under the FSIA.

On February 15, 2011, Hungary moved to dismiss Plaintiffs' complaint on a number of grounds, including that:

- a. the District Court lacks subject matter jurisdiction under the FSIA, Plaintiffs' claims are subject to "existing international agreement[s]" that preclude application of the FSIA, and no exception to the FSIA's presumptive immunity exists;
- b. under the doctrine of *forum non conveniens*, the complaint should be dismissed because an adequate forum (Hungary) exists and both the private and public factors favor dismissal;
- c. the District of Columbia's statute of limitations bars Plaintiffs' claims;
- d. Plaintiffs' claims present non-justiciable political questions;
- e. Plaintiffs' Complaint does not state a viable cause of action;
- f. Plaintiffs' Complaint is barred by the act of state doctrine.

On September 1, 2011, this Court issued its Order granting, in part, Hungary's motion to dismiss. The Court denied, *inter alia*, the portion of Hungary's motion that sought dismissal based on Hungary's immunity from suit under the FSIA. The District Court did, however, recognize that eleven of the artworks sought in the Complaint had been the subject of eight years

of litigation in Hungary that resulted in a valid judgment. As a result, the Court held that claims to these eleven artworks were barred by principles of international comity.

On September 12, 2011, Hungary filed its Notice of Appeal to challenge this Court's finding that an exception to the FSIA applied to strip Hungary of its presumptive sovereign immunity. It is well-settled that a court's denial of sovereign immunity is immediately appealable by Hungary as a collateral order. *See Owens v. Republic of the Sudan*, 531 F.3d 884, 887 (D.C. Cir. 2008) (noting that when the denial of a motion to dismiss "subjects a foreign sovereign to jurisdiction, the order is 'subject to interlocutory appeal under the collateral order doctrine.'" (quoting *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31 (D.C. Cir. 2000))); *Simpson ex rel. Estate of Mostafa Fahmy Karim v. Socialist People's Libyan Arab Jamahiriya*, 470 F.3d 356, 359 (D.C. Cir. 2006); *Kirkham v. Societe Air France*, 429 F.3d 288, 291 (D.C. Cir. 2005). On the same day, Hungary filed a motion to continue this Court's September 20, 2010, Scheduling Conference and stay all proceedings and discovery in this matter. The Court granted Hungary's motion on September 15, 2011.

By this motion, Hungary seeks permission to appeal immediately the five issues set forth above arising from the Court's Order. Hungary's request to appeal issues certified under 28 U.S.C. § 1292(b) while it pursues automatic appeal of FSIA issues is not unique. Indeed, district courts routinely certify – and appellate courts routinely entertain – appeals authorized under 28 U.S.C. § 1292(b) in tandem with appeals of interlocutory decisions including denials of immunity defenses brought as of right under 28 U.S.C. § 1291. *See, e.g., APCC Services, Inc. v. Sprint Commc'n Co.*, 297 F. Supp. 2d 90, 95 (D.D.C. 2003); *APCC Services, Inc. v. AT&T Corp.*, 297 F. Supp. 2d 101, 104 (D.D.C. 2003); *DRFP, L.L.C. v. The Republica Bolivariana de Venezuela*, No. 2:04-cv-793, 2009 WL 948764, at \*\*2-3 (S.D. Ohio Apr. 1, 2009) (certifying

*forum non conveniens* defense where defendant appealed denial of FSIA immunity); *Chao v. Virginia Dept. of Transp.*, 291 F.3d 276, 279 (4th Cir. 2002) (reviewing denial of state sovereign immunity defense as well as district court’s ruling on equitable tolling issue); *Heathcoat v. Potts*, 790 F.2d 1540, 1542 (11th Cir. 1986) (considering defendants’ appeal of state sovereign immunity defense as well as appeal of defenses based on waiver and statutory bar to suit); *City of Virginia Beach, Va. v. Roanoke River Basin Ass’n.*, 776 F.2d 484, 486, n.2 (4th Cir. 1985) (evaluating denial of state sovereign immunity defense as well as personal jurisdiction and service of process issues).

Certifying the five issues raised by Hungary here comports with the standards set forth in 28 U.S.C. § 1292(b) as they are controlling questions of law and their resolution will materially advance the ultimate termination of this action.

### **ANALYSIS**

#### **I. STANDARD FOR 28 U.S.C. § 1292(b) CERTIFICATION**

District courts have “first line discretion to allow interlocutory appeals.” *Swint v. Chambers County Comm’n*, 514 U.S. 35, 47 (1995). The Court may exercise its discretion and certify a non-final order for interlocutory appeal when “(1) the order involves a controlling question of law; (2) a substantial ground for difference of opinion concerning the ruling exists; and (3) an immediate appeal would materially advance the litigation.” *APCC Services, Inc.*, 297 F. Supp. 2d at 95 (citing 28 U.S.C. § 1292(b) and *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1002 n.2 (D.C. Cir. 1986)). Because the Order satisfies all three requirements, the Court should certify the Order for interlocutory appeal.

#### **II. CONTROLLING QUESTION OF LAW**

This Court has described a controlling question of law as “one that would require reversal if decided incorrect or that could materially affect the course of litigation with resulting

savings of the court's or the parties' resources." *APCC Services, Inc.*, 297 F. Supp. 2d at 95-96 (quoting *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 19 (D.D.C. 2002)). Controlling questions of law include those that would "terminate an action if the district court's order were reversed," as well as those that otherwise "may involve a procedural determination that may significantly impact the action." *APCC Services, Inc.*, 297 F. Supp. 2d at 96 (citations omitted).

There is no question that the Order's rulings regarding the five defenses above involve controlling questions of law under these standards. This action will be terminated in its entirety if the Court's rulings are reversed on any of the following grounds: (1) the action should be dismissed because the United States is not the proper forum; (2) the applicable statute of limitation bars claims as to the remaining artworks at issue in the case; (3) Plaintiffs' claims present non-justiciable political questions; (4) Plaintiffs' ill-defined bailment claim – the claim on which Plaintiffs' other causes of action are predicated – fails to state a claim; or (5) Plaintiffs' claims are barred by the act of state doctrine. *See, e.g., Irwin v. WWF, Inc.*, 448 F. Supp. 2d 29, 35-36 (D.D.C. 2006); *Vila v. Inter-American Investment, Corp.*, 596 F. Supp. 2d 28, 30 (D.D.C. 2009) ("There is no dispute that a statute of limitations challenge raises a controlling question of law in the sense that a ruling on the challenge 'would terminate an action if the district court's order were reversed.'" (quoting *APCC Services, Inc.*, 297 F. Supp. 2d at 96)); *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991) (reviewing certified issue of whether claims were non-justiciable political questions). Because the five issues presented in this motion involve controlling questions of law, the first *APCC Services, Inc.* factor warrants certification.

### **III. SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION**

“A substantial ground for difference of opinion is often established by a dearth of precedent within the controlling jurisdiction and conflicting decisions in other circuits.” *APCC Services, Inc.*, 297 F. Supp. 2d at 97 (citing *City Stores Co. v. Lerner Shops*, 410 F.2d 1010, 1011 (D.C. Cir. 1969)). As set forth below, substantial grounds for difference of opinion exist with respect to all five issues for which Hungary seeks certification.

#### **a. Whether the Doctrine of Forum Non Conveniens Warrants Dismissal**

After finding that Hungary was an adequate alternative forum and recognizing the Hungarian courts’ holding that Hungary is the lawful owner of eleven of the artworks at issue in the lawsuit, the Court denied Hungary’s motion to dismiss on *forum non conveniens* grounds. The Court found that the United States is the proper forum to resolve this dispute, despite the fact that: (1) only one of three plaintiffs is a U.S. citizen; (2) none of the events involving the alleged taking of the artworks at issue in the case took place in the United States; (3) most of the relevant documents are likely to be found in Hungary and in the Hungarian language; (4) witnesses (if they are alive) are likely to be in Hungary; (5) Hungarian courts are likely in a better position to interpret and apply current and historical Hungarian laws; (6) Hungarian (rather than United States’) courts have a greater interest in resolving this local case; (7) Plaintiffs’ claims would not be subject to a statute of limitations in Hungary; and (8) Hungarian courts are familiar with many of the issues in this case as ownership of eleven of the artworks listed in the Complaint were litigated for almost a decade in Hungary.

Hungary asserts that there is significant relevant authority to the contrary suggesting that the above facts warrant dismissal on *forum non conveniens* grounds.<sup>1</sup> See, e.g., *Irwin, Inc.*, 448 F. Supp. 2d at 35-36 (granting motion to dismiss on *forum non conveniens* grounds because the administrative difficulties of trying the case “in a forum thousands of miles away from the majority of witnesses and the evidence are obvious” (quoting *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 879 (5th Cir. 1987)); *BPA Int’l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 86 (D.D.C. 2003) (“Because [plaintiff’s] claims arose out of actions occurring in Sweden, access to sources of proof would be much easier if the case were heard in Sweden rather than Washington, D.C. Many, if not most, of the potential witnesses and much of the evidence will likely be located in Sweden and therefore will likely be beyond the reach of the Court’s compulsory process.”); *Croesus EMTR Master Fund L.P. v. Federative Republic of Brazil*, 212 F. Supp. 2d 30, 39 (D.D.C. 2002) (“Litigating a case on these grounds will require a heavy emphasis on [foreign] sources of proof (and law), and thus seems likely to be expensive, cumbersome and time-consuming if conducted here.”); see also *Carey v. Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234, 238-39 (2d Cir. 2004) (stating that district court’s decision to dismiss in favor of Germany was proper due to difficulty otherwise to be incurred by German defendant in securing presence of its witnesses in the United States and due to reasonableness of requiring plaintiff to litigate business transaction dispute in the country where it occurred); *Strategic Value Master Fund v. Cargill Fin. Services Corp.*, 421 F. Supp. 2d 741, 766 (S.D.N.Y.

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<sup>1</sup> The Court references *Agudas Chasidei Chabad v. Russian Fed’n*, 466 F. Supp. 2d 6 (D.D.C. 2006) in its discussion of the *forum non conveniens* doctrine. Hungary asserts that *Chabad* is inapposite as that case involves a Communist country clearly unwilling to provide an adequate alternative forum, the taking did not take place in Russia, and Russia refused to participate in the litigation after receiving an unfavorable decision in response to its claim to sovereign immunity under the FSIA. See *id.* at 27-28.

2006) (“Where alleged misconduct is centered in the foreign forum and the majority of evidence resides there, dismissal is favored.”); *Telephone Sys. Int’l, Inc. v. Network Telecom PLC*, 303 F. Supp. 2d 377, 384-85 (S.D.N.Y. 2003) (dismissing in favor of United Kingdom despite presumption in favor of American corporation’s choice of United States forum because “[t]hat presumption in favor of a plaintiff’s convenience is not absolute and may be outweighed”); *First Union Nat’l Bank v. Paribas*, 135 F. Supp. 2d 443, 447 (S.D.N.Y. 2001) (“[T]he weaker the connection between a plaintiff’s U.S. activities, even those of a U.S. plaintiff, and the events at issue in the lawsuit, the more likely it is that defendants attacking the plaintiff’s choice of a U.S. forum will be able to marshal a successful challenge to that choice.”).<sup>2</sup>

Hungary asserts, however, that its ground for appeal of the *forum non conveniens* decision goes beyond the above factors as this Court’s dismissal of claims relating to artworks claimed directly by Plaintiff de Csepel significantly altered the landscape of this litigation. As the Court noted in its decision, there is a substantial presumption in favor of a plaintiff’s choice of forum. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). Any connection of David de Csepel – the only United States citizen plaintiff – to the action is extremely tenuous at best as the eleven artworks to which he had a direct claim (through Elizabeth Weiss de Csepel and later Martha Nierenberg) have been dismissed from this case. Acknowledging that principles of international comity warranted recognition of Martha Nierenberg’s extensive litigation in the Hungarian Courts, the Court granted Hungary’s motion to dismiss with respect to Martha

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<sup>2</sup> The Court asserts that the District of Columbia provides a proper forum because this Court “is a designated forum for all actions brought under the FSIA.” (Order at 35.) Hungary asserts that while 28 U.S.C. § 1391(f)(4) provides that actions against foreign parties *may* be brought in the District of Columbia, this provision relates only to venue within the United States, not whether the case should be in the United States rather than in the foreign sovereign’s own courts.

Nierenberg's eleven artworks. As the remaining claims have little or no connection to the United States, Plaintiffs should pursue their lawsuit in Hungary.<sup>3</sup>

Because (1) significant case law recognizes the propriety of dismissal on *forum non conveniens* grounds in similar situations, *see, e.g., BPA Int'l, Inc.*, 281 F. Supp. 2d at 86; *Croesus EMTR Master Fund L.P.*, 212 F. Supp. 2d at 39, (2) it is questionable whether the U.S. citizen-plaintiff has any viable claims in light of this Court's Order, and (3) Hungary is recognized as an adequate alternative forum, *see Moscovits v. Magyar Cukor Rt.*, 00 Civ. 0031 (VM), 2001 U.S. Dist. LEXIS 9252, \*14 (S.D.N.Y. June 29, 2001); *Dorfman v. Marriott Int'l Hotels, Inc.*, 99 Civ. 10496 (CSH), 2001 U.S. Dist. LEXIS 642, \*23 (S.D.N.Y. Jan. 26, 2001), Hungary respectfully asserts that there is a substantial ground for difference of opinion as to the propriety of the Court's denial of Hungary's motion to dismiss on *forum non conveniens* grounds.

**b. Whether the Statute of Limitations Bars the Remaining Claims**

The Court denied Hungary's motion to dismiss on statute of limitations grounds, finding, *inter alia*, that Plaintiffs' claims should be equitably tolled during the pendency of the Nierenberg litigation in Hungary from 1999 to 2008. Hungary asserts that there is a dearth of controlling or even relevant judicial authority for tolling these claims, due to the fact that, as the Court stated, "the District of Columbia has no provision automatically tolling the applicable

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<sup>3</sup> The Complaint states that Mr. de Csepel, together with the Italian Plaintiffs, "has authority to represent all of the Herzog heirs in this action." (Complaint ¶ 6.) That non-U.S. citizens may have assigned their claims to Mr. de Csepel does not counsel in favor of finding that the United States is a proper forum. *See, e.g., Iragorri v. United Techs Corp.*, 274 F.3d 65, 73-74 (2d Cir. 2001) (en banc); *Online Payment Solutions Inc. v. Svenska Han-Delsbanken AB*, 638 F. Supp. 2d 375, 381 (S.D.N.Y. 2009) (recognizing that "a plaintiff's choice of forum should receive greater deference where it appears that there is a bona fide connection between the plaintiff or the lawsuit and the forum"); *BlackRock, Inc. v. Schroders PLC*, No. 07 Civ. 3183, 2007 U.S. Dist. LEXIS 39279, at \*12-13, \*15 (S.D.N.Y. May 30, 2007) (finding that strong deference to plaintiff's choice of forum was not warranted, despite the named plaintiff's connection to New York, where it was unclear whether the named plaintiff was the real party in interest or whether the lawsuit itself was sufficiently connected to this forum).

statutes of limitation during the pendency of actions in foreign courts.” (Order at 38.) Even if, however, equitable tolling was to apply in this context (taking into account an attempt to exhaust alternative remedies), Hungary asserts that such tolling should apply *only* to claims for artworks to which Martha Nierenberg had an ownership interest.

Ms. Nierenberg’s 1999 Complaint sought custody of many artworks that had been part of the Herzog collection. At some point in the litigation, the Hungarian Courts brought in Angela Maria Herzog and Julia Alice Herzog (the Italian Plaintiffs) as defendants in the action to ensure that their property interests were protected.<sup>4</sup> The Italian Plaintiffs, however, never filed a claim for return of the artworks to which they had a purported property interest in the United States or elsewhere. As discussed above, it does not appear that claims for the artworks to which David de Csepel has a purported ownership interest (claims this Court found should be tolled pending Ms. Nierenberg’s attempt to exhaust claims in Hungary) remain part of the case.<sup>5</sup> Neither the Italian Plaintiffs nor any unidentified heir of István (Steven) Herzog (who remained in Hungary) ever made any claims to the artworks that remain in this case.<sup>6</sup> Neither the Complaint nor any other materials provided by Plaintiffs offer any justification for equitably tolling the claims of the

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<sup>4</sup> By the end of the litigation, only twelve artworks were the subject of the litigation. One artwork was returned to Ms. Nierenberg, the remaining eleven artworks were found to be the property of Hungary. Claims to these eleven artworks, which the court found to be equitably tolled during the pendency of the Nierenberg litigation, were dismissed by this Court.

<sup>5</sup> To the extent that Plaintiff de Csepel advances claims to artworks inherited by Erzsébet (Elizabeth) Weiss de Csepel that were not part of Martha Nierenberg’s lawsuit, Plaintiffs’ Complaint provides no justification for tolling such claims.

<sup>6</sup> Baron Herzog’s three children, Elizabeth Weiss de Csepel, István (Steven) Herzog, and András (Andrew) Herzog each inherited a one-third portion of the Herzog Collection shortly after the Baroness’s death in 1940. (Complaint ¶¶ 6, 39.) Plaintiff de Csepel inherited any claims from his grandmother, Elizabeth Weiss de Csepel. (Complaint ¶ 6.) The Italian Plaintiff inherited any claims from Andrew Herzog. (Complaint ¶¶ 7, 8.) The Complaint states that the Plaintiffs have “authority to represent all the Herzog heirs in this action,” but provides no support for this statement or any evidence regarding claims that belong to heirs of Steven Herzog who inherited one third of the Baron’s estate.

Italian Plaintiffs (or other unidentified heirs); Plaintiffs offer no explanation for the Italian Plaintiffs' (or other unidentified heirs') election to wait until 2010 to pursue these artworks.<sup>7</sup>

Because the Italian Plaintiffs (and the unidentified heirs) never made claims to the artworks that remain in this case, they can provide no reasonable justification for equitably tolling their claims, especially with the lack of authority to support application of the tolling theory to the facts here.

Thus, Hungary contends that there is a substantial ground for difference of opinion as to whether any claims brought by Plaintiffs should be equitably tolled to avoid the applicable statute of limitations.

**c. Whether Plaintiffs' Claims Present Non-justiciable Political Questions<sup>8</sup>**

The political question doctrine is firmly rooted in separation-of-powers principles and instructs that courts should decline to adjudicate matters which have "in any measure been committed by the Constitution to another branch of government." *Baker v. Carr*, 369 U.S. 186, 211 (1962). It is well-settled that the responsibility for foreign affairs falls to the Executive Branch – not the Judicial branch. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420-21 (2003); *Weiss v. Assicurazioni Generali, S.p.A. (In re Assicurazioni Generali, S.p.A.)*, 592 F.3d 113, 118 (2d Cir. 2010). Because the Executive branch, in its foreign affairs capacity, entered into the Treaty of Peace with Hungary, Feb. 10, 1947, 61 Stat. 2109 ("1947 Treaty") and the *Agreement Between the Government of the United States of America and the Government of*

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<sup>7</sup> As a basis for equitably tolling the statute of limitations, the Court stated that Martha Nierenberg's lawsuit in Hungary could be considered an attempt to exhaust remedies. The Italian Plaintiffs (and the other unidentified heirs) did not make any effort to exhaust their remedies.

<sup>8</sup> The Court held that Hungary's opening brief did not raise (adequately) the political question argument. The Court did, however, grant Plaintiffs' motion for leave to file a Surreply, thus ensuring Plaintiffs the opportunity to respond to Hungary's political question argument, and addressed the argument in the Order.

*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”) to “settle questions still outstanding” between Hungary and the United States (1947 Treaty) and “settle[] and discharge[]” all claims by U.S. Nationals against Hungary and its nationals (1973 Agreement), Hungary contends that Plaintiffs’ claims are non-justiciable political questions.

The Court rejected Hungary’s political question argument on the ground that “Plaintiffs do not challenge the ‘sufficiency’ of the 1973 Agreement or the awards by the Commission, they claim that such measures *do not apply to them at all.*” (Order at 42-43.) The parameters of Plaintiffs’ assertions, however, are beside the point. By permitting Plaintiffs’ claims to go forward, the Court is wading into territory that is the exclusive provenance of the Executive branch. The Supreme Court has recognized that resolution of Holocaust-era compensation claims are a matter

*well within the Executive’s responsibility for foreign affairs.* Since claims remaining in the aftermath of hostilities may be “sources of friction” acting as an “impediment to resumption of friendly relations” between the countries involved, there is a “longstanding practice” of the national Executive to settle them in discharging its responsibility to maintain the Nation's relationships with other countries. The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, securing private interests is an express object of diplomacy today . . . .

*Garamendi*, 539 U.S. at 420-21 (emphasis added).<sup>9</sup> Because the resolution of Holocaust-era claims is solely within the purview of the Executive branch and here, was in fact, specifically addressed in the 1947 Treaty and 1973 Agreement, Hungary respectfully asserts that there is a

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<sup>9</sup> Regardless of how Plaintiffs characterize their claims, it is evident from the Complaint that Plaintiffs’ claims arise out of World War II and Holocaust-era events in Europe and Hungary. If the claims do not, then international law is not implicated and there is no violation of international law for purposes of the FSIA.

substantial ground for difference of opinion as to whether Plaintiffs' claims present non-justiciable political questions.

**d. Whether Plaintiffs' Ill-Defined Bailment Claim States A Viable Cause of Action**

The Plaintiffs' claims now appear to center on the argument that Hungary's possession of the remaining artworks is some sort of bailment. Hungary maintains that Plaintiffs failed to adequately allege a bailment claim. As recognized by the Court, the contours of Plaintiffs' bailment claim are poorly defined. (Order at 29, n.6.) Initially, Plaintiffs argued that their claim relates to "a bailment relationship that Hungary agreed to in the 1947 Peace Treaty," (Opp. at 9), but they later assert that they do not "seek to claim under the Peace Treaty, (Surreply at 5.) Although Plaintiffs point to the 1947 Treaty, they fail to adequately define the bailment or (bailments) asserting, variously, that there are "new bailment agreements," (Opp. at 9), as well as bailments created at the end of World War II, (Opp. at 57.) Such vague, conclusory assertions fall short. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Plaintiffs' claim is not based on any express contract between the parties; nor can it be reasonably argued that such a claim was affirmatively created by the 1947 Treaty. Rather, Plaintiffs argued, and the Court found, the bailment as define here is "implied" or "constructive" and is "consistent" with the 1947 Treaty. The Court based its finding, in part, on the fact that that the 1947 Treaty provided that Hungary should restore "property, legal rights, and interests ...or, if restoration is impossible, that fair compensation shall be made therefor" to the Hungarians. Peace Treaty, art. 27. If, however, Hungary failed to return property (or provide compensation) in accordance with Article 27, then Hungary is in breach of its obligations under the 1947 Treaty – nothing in the 1947 Treaty itself can be read to convert a failure to adequately comply with Article 27 into a bailment with a private cause of action for an individual. Plaintiffs

provide no relevant authority to support the proposition that claims arising from actions allegedly committed in Hungary during World War II or the Communist era constitute a bailment under the laws of the District of Columbia or Hungary.<sup>10</sup> Because “[n]o bailment can be implied where it appears it was the intention of the parties . . . that the property was to be held by the party in possession in some capacity other than as bailee,” *Mac’Avoy v. Smithsonian Inst.*, 757 F. Supp. 60, 65 (D.D.C. 1991), Hungary respectfully asserts that there is a substantial ground for difference of opinion as to the propriety of the Court’s finding that Plaintiffs’ Complaint alleged a viable claim for bailment.

**e. Whether the Court Should Apply the Act of State Doctrine to Bar Plaintiffs’ Claims**

This Court rejected Hungary’s assertion that the act of state doctrine bars Plaintiffs’ claims. It did so on the grounds that (1) the alleged bailment is a commercial, rather than sovereign act, and (2) the foreign governments who acted unlawfully – Nazi Germany and the World War II-era Hungarian government – are no longer in power and thus not entitled to application of the act of state doctrine. Hungary respectfully asserts that the Court misread Hungary’s arguments. Hungary asserts that it is the alleged taking, not the bailment, that is the sovereign act at issue here – this is the act for which an FSIA exception would strip Hungary of its presumptive sovereign immunity. It is not disputed that such an act is sovereign in nature – such a taking could not have been accomplished by a private actor. The Court found, however, that because the taking is attributed in the Complaint to Nazi Germany and/or the World War II-era Hungarian government – governments that are no longer in power – the act of state doctrine should not be applied.

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<sup>10</sup> Hungary notes that if the alleged bailment claims do not arise out of the 1947 Agreement, then there has been no violation of international law sufficient to trigger the FSIA.

The cases cited in the Order do not counsel that a country, like Hungary, that has maintained its sovereignty (both before and after World War II) is not entitled to invoke the act of state doctrine where the act was committed within that country's confines. Hungary, unlike Nazi Germany or Vichy France, retained its sovereignty after the war, as evidenced by the fact that it, as a foreign sovereign, has signed numerous international agreements and treaties since the end of World War II, including the 1947 Treaty and the 1973 Agreement. *See Bodner Banque Paribas*, 114 F. Supp. 2d 117, 130 (E.D.N.Y. 2000) ("The wholesale rejection of the Vichy government at the close of World war II render[s] the [a]ct of [s]tate doctrine wholly inapplicable to this case.") Moreover, the taking alleged here occurred on Hungarian soil. *See Agudas Chasidei Chabad*, 466 F. Supp. 2d at 26 (noting that "irrespective" of "whether the Soviet Army's taking of the Archive as spoils of war at the conclusion of World War II was an official government act," the taking "occurred in Poland and not in Soviet territory"). Because "[t]he act of state doctrine 'precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory,'" *World Wide Minerals v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)), Hungary respectfully asserts that there is a substantial ground for difference of opinion as to the propriety of the Court's refusal to apply the act of state doctrine.

#### **IV. MATERIAL ADVANCEMENT OF THE DISPOSITION OF THE LITIGATION**

An immediate appeal of the five issues presented for certification would clearly advance the litigation because reversal on any one of these grounds would result in dismissal of the entire case. *See APCC Services, Inc.*, 297 F. Supp. 2d at 95, *see also United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1193 (D.C. Cir. 2005).

Further, an immediate appeal of the issues presented here would further the interests of efficiency – both for the court and for the parties. *See APCC Services*, 297 F. Supp. 2d at 100 (granting motion for certification because immediate appeal would “conserve judicial resources and spare the parties from possibly needless expense if it should turn out that this Court’s rulings are reversed”) (citing *Lemery v. Ford Motor Co.*, 244 F. Supp. 2d 720, 728 (S.D. Tex. 2002)); *Rendall-Speranza v. Nassim*, 107 F.3d 913, 916 (D.C. Cir. 1997) (granting pendant jurisdiction because, “if the appellants have a valid defense in the statute of limitations, then the court can both economize on judicial resources and avoid resolving their claims of immunity”); *Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 169-70 (D.D.C. 2006) (certifying an order for appeal “[i]n the interest of conserving judicial resources”); *Maciariello v. Sumner*, 973 F.2d 295, 296-97 (4th Cir. 1992) (reviewing protected speech issue certified for interlocutory appeal together with related issue of qualified immunity); *see also Judicial Watch, Inc.*, 233 F. Supp. 2d at 20 (noting high § 1292(b) standard necessary to overcome “strong congressional policy against piece-meal review” (quoting *United States v. Nixon*, 418 U.S. 683, 690 (1974))).

Moreover, “[w]here ‘proceedings that threaten to endure for several years depend on an initial question of jurisdiction . . . or the like,’ certification may be justified even if there is a relatively low level of uncertainty.” *APCC Services, Inc.*, 297 F. Supp. 2d at 98 (quoting 16 Wright & Miller, *Federal Practice & Procedure*, § 3930 at 422 (1996)); *see also Atlantic City Elec. Co. v. Gen. Elec. Co.*, 207 F. Supp. 613, 620 (S.D.N.Y. 1962) (recognizing that when there are reasons to conclusively and expeditiously determine an issue, a narrow approach is unjustified in determining whether there is a substantial ground for difference of opinion). As evidenced by the eight years of Hungarian litigation, this action will take considerable time and

resources.<sup>11</sup> That litigation involved only twelve artworks. This lawsuit now involves more than thirty artworks and, as in the Hungarian litigation, each artwork will require individual analysis. Further, this lawsuit involves multiple (and unidentified) plaintiffs and their authority to represent all heirs is unclear.

Further, there is no benefit to denying certification, as this Court granted Hungary's motions to stay all proceedings in this case pending appeal of the Order with respect to Hungary's immunity under the FSIA. *See, e.g., Vila*, 596 F. Supp. 2d at 31 (noting that granting motion for certification while proceedings are stayed poses "no danger of 'obstructing or impeding this judicial proceeding'" (internal citations omitted)).

Because Hungary is exercising its appeal as of right on the FSIA immunity issue, if the Order is not certified, the parties run the risk of having to return to the D.C. Circuit to appeal these issues – issues which could have been certified at this time. Because review of the five issues presented in this motion may materially advance the ultimate termination of this litigation (and conserve judicial and party resources) the third *APCC Services, Inc.* factor weighs in favor of granting Hungary's motion for certification.

### **CONCLUSION**

For the foregoing reasons, Hungary respectfully requests that the Court certify for interlocutory appeal the Order denying, in part, Hungary's motion to dismiss, on the following issues: (1) whether the doctrine of *forum non conveniens* warrants dismissal in this matter; (2)

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<sup>11</sup> *Cassirer v. Kingdom of Spain, et al*, CV 05-3459 GAF (CTx) (C.D. Cal.), filed in May 2005, involves an adverse ownership claim to a single artwork possessed by an instrumentality of Spain. The Spanish parties appealed the district court's finding that an exception to the FSIA applied to give the court jurisdiction. After one three-judge panel decision, an en banc court decision, a petition for a writ of certiorari, and meetings with the Office of the Solicitor General, the case, more than six years later, is back before the district court on a motion to dismiss on statute of limitations grounds.

whether the District of Columbia's statute of limitations bars claims relating to the remaining artworks; (3) whether this case presents non-justiciable political questions; (4) whether Plaintiffs' bailment claim states a viable cause of action; and (5) whether the Court should apply the act of state doctrine to bar Plaintiffs' claims.

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Respectfully submitted,

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