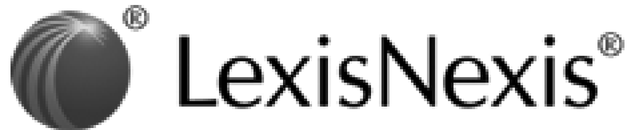
APPENDIX



BLACKROCK, INC., Plaintiff, - against - SCHRODERS PLC, Defendant.

07 Civ. 3183 (PKL)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2007 U.S. Dist. LEXIS 39279

May 30, 2007, Decided
May 30, 2007, Filed

COUNSEL: [*1] SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Jay Samuel Berke, Esq., New York, NY, Attorney for Plaintiff.

PILLSBURY WINTHROP SHAW PITTMAN, LLP, Frederick Arthur Brodie, Esq., New York, NY, Christine N. Kearns, Esq., Attorneys for Defendant.

JUDGES: Peter K. Leisure, U.S.D.J.

OPINION BY: Peter K. Leisure

OPINION

OPINION AND ORDER

LEISURE, District Judge:

Plaintiff BlackRock, Inc. ("BlackRock") brought this action seeking to enjoin defendant Schroders plc ("Schroders") and its subsidiary companies from employing former employees of BlackRock and from inducing those employees to violate their contractual obligations and fiduciary duties to BlackRock. Schroders now moves to dismiss the complaint on the grounds that this Court lacks personal jurisdiction over Schroders and pursuant to the doctrine of *forum non conveniens.* For the reasons set forth below, Schroders' motion is GRANTED on the grounds of *forum non conveniens.*

BACKGROUND

BlackRock is an asset management firm incorporated in Delaware and headquartered in New York. (Connolly Aff. P 2.) BlackRock (Deutschland) GmbH ("BlackRock Germany") is a German subsidiary of BlackRock, and it has offices in Frankfurt, [*2] Germany. (Id. at 4.) Schroders, a United Kingdom public limited company with offices only in London, England, is a holding company for a portfolio of asset management companies. (Trust Decl. PP 2, 4.) One of these companies is Schroders Investment Management GmbH ("Schroders Germany"), an indirect subsidiary of Schroders. (Id. P 2.)

This action arises out of the March 5, 2007 resignation of Achim Kussner from BlackRock and BlackRock Germany, where he had been a Managing Director of both. (Connolly Aff. P 4.) On March 12, 2007, Schroders Germany announced that Mr. Kussner would become its new Country Head. (Id.) Between March 8 and March 12, 2007, five other employees of BlackRock Germany, including three directors, also resigned. (Id.) BlackRock claims that Mr. Kussner solicited these employees to leave BlackRock Germany for Schroders Germany (id. P 7) and that Schroders induced him to do so (Comp. P 2). BlackRock contends that Mr. Kussner's actions were in violation of the Confidentiality and Employment Policy that is part of Mr. Kussner's employment contract (the "Employment Contract") with BlackRock Germany [1] (see id. Ex. A)

and that Mr Kussner breached [*3] the fiduciary duties he owes his employer. (Id. P 3.) According to the Employment Contract's choice of law provision, the Employment Contract, and thus the Confidentiality and Employment Policy, is subject to German law. (Kearns Decl. Ex. A P 13.1); see *Sterling Drug, Inc. v. Bayer AG, 14 F.3d 733, 739 n.2 (2d Cir. 1994)* (choice of law provision in agreement applies also to subsequent, modifying agreement with no choice of law provision).

1 Mr. Kussner was initially employed by Merrill Lynch Investment Managers (Deutschland) GmbH ("MLIM Germany"), the original counterparty to the Employment Contract. (See Kearns Decl. Ex. A; Connolly Aff. P 8.) In the second half of 2006, Merrill Lynch Investment Managers merged with BlackRock, and MLIM Germany changed its name to BlackRock (Deutschland) GmbH (referred to herein as BlackRock Germany). (See Connolly Aff. P 8.) As a result of the merger, Mr. Kussner became an employee of BlackRock Germany. (See id.) On September 29, 2006, in anticipation of the merger, MLIM Germany and Mr. Kussner expressly amended the Employment Contract to include BlackRock's Confidentiality and Employment Policy. (Id. P 9; Kearns Decl. Ex. B.)

[*4] Mr. Kussner is not a party to this action. BlackRock maintains that this is because it might not be able to assert jurisdiction over him in this forum promptly enough for the purposes of a preliminary injunction. (See Hr'g Tr. 6:11-16, May 9, 2007.) Schroders notes that Mr. Kussner's employment contract with BlackRock Germany provides for jurisdiction in Frankfurt, Germany, not this forum. (See Kearns Decl. Ex. A § 13.1.)

DISCUSSION

Schroders has moved to dismiss BlackRock's complaint on the grounds of lack of personal jurisdiction and pursuant to the doctrine of *forum non conveniens.* The issue of personal jurisdiction in this matter is closely intertwined with the merits of the case, and the inquiry into the issue promises to be fact-intensive. Accordingly, the Court first assesses the convenience of this forum. Because the result of this inquiry is dispositive, the Court does not reach the question of whether it has personal jurisdiction over Schroders. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 127 S. Ct. 1184, 1194, 167 L. Ed. 2d 15 (2007)* ("[W]here subject-matter or personal jurisdiction is difficult to determine, and *forum non conveniens* [*5] considerations weigh heavily in favor of dismissal, the court properly takes the less burdensome course.").

I. *Forum Non Conveniens* Dismissal Standards

The doctrine of *forum non conveniens* is based on the principle that "'a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.'" *Norex Petroleum Ltd. v. Access Indus., Inc., 416 F.3d 146, 153 (2d Cir. 2005)* (quoting *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)*); *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842, 845 (S.D.N.Y. 1986)* (Keenan, J.) ("The doctrine of *forum non conveniens* allows a court to decline jurisdiction, even when jurisdiction is authorized by a general venue statute."), aff'd, *809 F.2d 195 (2d Cir. 1987)*. Notwithstanding the propriety of the action under the venue statute, "dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. [*6] " *Piper Aircraft Co. v. Reyno, 454 U.S. 233, 249, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)*. The Supreme Court has declined to fashion the exact circumstances that would "'justify or require either grant or denial of remedy.'" Id. (quoting *Gilbert, 330 U.S. at 508*). Consequently, a district court's inquiry is highly fact-specific. Id. ("'Each case turns on its facts.'" (quoting *Williams v. Green Bay & W.R. Co., 326 U.S. 549, 557, 66 S. Ct. 284, 90 L. Ed. 311 (1946)*)); *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivanos, 712 F. Supp. 383, 392-93 (S.D.N.Y. 1989)* (Leisure, J.) ("The Supreme Court has emphasized the flexibility with which the District Court must approach a *forum non conveniens* determination, and consequently there are no specific circumstances which would require either a grant or denial of the remedy.").

In furtherance of these general principles of law, the Second Circuit has crafted a three-step inquiry for its district courts to follow:

> At step one, a court determines the degree of deference properly accorded the plaintiff's choice of forum. At step two, it considers whether the alternative forum

> proposed by the defendants is adequate [*7] to adjudicate the parties' dispute. Finally, at step three, a court balances the private and public interests implicated in the choice of forum.

Norex, 416 F.3d at 153 (citing *Iragorri v. United Techs. Corp., 274 F.3d 65, 73-74 (2d Cir. 2001)* (en banc)). A defendant moving for dismissal on *forum non conveniens* grounds bears the burden of proof. *Aguinda v. Texaco, Inc., 303 F.3d 470, 476 (2d Cir. 2002)*; see also *VictoriaTea.com, Inc. v. Cott Beverages Canada, 239 F. Supp. 2d 377, 381 (S.D.N.Y. 2003)*. Finally, the Second Circuit's review of a district court's dismissal on the basis of *forum non conveniens* is "severely cabined." *Alfadda v. Fenn, 159 F.3d 41, 45 (2d Cir. 1998)*. Analysis of each of these three steps follows.

II. The Degree of Deference Due the Plaintiff

Under Supreme Court and Second Circuit precedent, a court should defer to a plaintiff's choice of forum. *Iragorri, 274 F.3d at 70*; see also *Piper, 454 U.S. at 255* ("[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum."); *Gilbert, 330 U.S. at 508* [*8] ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."). However, such deference is "not dispositive, and it may be overcome." *Iragorri, 274 F.3d at 71*. It is important to note that "the reason we give deference to a plaintiff's choice of her home forum is because it is presumed to be convenient." Id. (citing *Piper, 454 U.S. at 255-56*). Therefore, where it becomes apparent that plaintiff's choice of forum was not made with regard to convenience, and instead was made for "forum-shopping reasons," it is acceptable to afford plaintiff's choice less deference. *Iragorri, 274 F.3d at 71*.

Under this general approach, a district court's determination of "the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations." *Iragorri, 274 F.3d at 71*. Specifically, "the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United [*9] States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*." *Id. at 71-72* (footnotes omitted). The factors favoring denial of a motion for dismissal include

> the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense.

Id. at 72. Conversely, where it appears that a plaintiff has chosen a U.S. forum because of forum-shopping reasons less deference will be afforded plaintiff's choice and, consequently, the greater the likelihood of dismissal. Id. Such forum-shopping reasons include

> attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum.

Id.; see, e. [*10] g., *Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 71 (2d Cir. 2003)* ("In such circumstances, it is more likely that forum-shopping for a higher damage award or for some other litigation advantage was the motivation for plaintiff's selection.").

Schroders brings this motion for dismissal claiming that "BlackRock's choice of forum deserves no deference." (Def.'s Mot. at 18.) It believes no deference is warranted because it claims the core of the dispute is based in Germany. (Def.'s Mot. at 16.) Schroders further argues that BlackRock's decision not to name BlackRock Germany as plaintiff - the party Schroders believes is the correct plaintiff - is evidence that BlackRock was motivated by forum-shopping reasons, primarily that the discovery procedures in Germany would not be as favorable to BlackRock as the procedures in New York. (Def.'s Mot. at 17-18.)

BlackRock responds, contending that, because it is headquartered in Manhattan and it has chosen to file the instant action in this District, the Court should accord full deference to that decision. BlackRock claims that deference to its choice must be given unless Schroders shows "such oppressiveness and vexation [*11] as to be

out of all proportion to plaintiff's convenience." (Pl.'s Opp. at 20 (citing *Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103 (2d Cir. 2000)*).) [2] BlackRock further contests Schroders's claim of forum-shopping by claiming it has named the correct party in interest as Schroders, rather than Schroders Germany. [3] (Pl.'s Opp. at 2-4, 20-22.) BlackRock also suggests that by claiming Germany as the correct alternate forum rather than the United Kingdom, Schroders is forum shopping. (Pl.'s Opp. at 22.)

2 The Court believes BlackRock mischaracterizes Wiwa, and misses its core holding: Second Circuit case law on this issue shows that there is not a "rigid rule of decision protecting U.S. citizen or resident plaintiffs from dismissal for *forum non conveniens*." *Wiwa, 226 F.3d at 102*. Instead, the Wiwa Court held that the key to the case law in this Circuit is "a consistent, pragmatic application' of the Gilbert factors to actions in which a plaintiff has particular ties to the forum state." Id. (citations omitted).

3 Interestingly, BlackRock discusses at length the appropriateness of its choice of defendant rather than focusing on the relevant considerations of the lawsuit's ties to this District and questions of convenience. BlackRock explains this by claiming that Schroders's allegations of forum-shopping are based on BlackRock's choice of defendant (Pl.'s Opp. at 21), however, Schroders's primary argument is that BlackRock brought its claim in this District to "obtain[] U.S.-style discovery." (Def.'s Mot. at 18.)

[*12] It is undisputed that BlackRock itself has "bona fide connection" to this District, *Iragorri, 274 F.3d at 71-72*, as it is headquartered in Manhattan. It is less clear that BlackRock is, in fact, the real plaintiff in interest in this matter, or simply a "prox[y] chosen for an improper purpose," as Schroders claims. (Def.'s Reply at 4.) The Court will not defer to a plaintiff's choice of forum where that plaintiff "falls back on its United States citizenship as the sole and only possible basis for suing these defendants in a court of the United States." *Ionescu v. E.F. Hutton & Co. (France) S.A., 465 F. Supp 139, 146 (S.D.N.Y. 1976)* (Pollack, J.) (quoting *Mizokami Bros. of Arizona, Inc. v. Baychem Corp., 556 F.2d 975, 977 (9th Cir. 1977)* (per curiam)). Nor will the Court give a plaintiff's choice of forum strong deference where it is not "one of the principal parties in interest." *VictoriaTea.com, 239 F. Supp. 2d at 381*; see also *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 612 (2d Cir. 1998)* ("Because the real parties in interest are foreign corporations, there is not [*13] a strong presumption in favor of the plaintiffs' choice of forum."). It is also unclear that the lawsuit as a whole has sufficient connections to this District to warrant deference to BlackRock's choice of forum. *Iragorri, 274 F.3d at 71-72*; see also *Ionescu, 465 F. Supp at 146* (dismissing on grounds of *forum non conveniens* where "no act whatsoever of the defendant in connection with this claim took place in this country").

To determine if BlackRock is the real party in interest here, the Court looks to whether it was a key member of the "relationships and transactions that engendered the action." *VictoriaTea.com, 239 F. Supp. 2d at 381*. Mr. Kussner went from being an employee of MLIM Germany to "an employee and Managing Director of BlackRock Germany." (Complaint P 16.) The employees Mr. Kussner allegedly enticed away from BlackRock were employed by BlackRock Germany. (Complaint P 22.) Moreover, the agreement at issue was signed in Germany as a condition to work at BlackRock Germany, expressly references German law, is subject to German law and is written in German. (Connolly Aff. P 8; Complaint Ex. A; Kearns Decl. Ex. A P 13.1, [*14] Ex. B.)

BlackRock, however, claims that it has been and will be harmed directly, in addition to the harm done to its BlackRock Germany subsidiary. (Pl.'s Opp. at 2; Complaint P 65.) [4] Certainly as an employee of BlackRock and BlackRock Germany, Mr. Kussner had fiduciary duties to both BlackRock and BlackRock Germany. As in *Ionescu,* however, none of the acts by Schroders upon which this claim is based took place in the United States, let alone this District. Instead, all of the key events upon which this dispute is based took place either in Germany or in the United Kingdom.

4 BlackRock also claims that Mr. Kussner had contact with New York in his position as Managing Director of BlackRock Germany (Complaint P 16) and that it will be harmed directly because "BlackRock, Inc. . . . measures and reports its income and financial performance . . . based on the performance of all its subsidiaries and affiliates, including BlackRock Germany" (Complaint P 65; Def.'s Mot. at 16-17). However,

the Court finds these claims insufficient to overcome the dearth of connections between the underlying lawsuit and this forum.

[*15] Thus, the Court's concerns about whether BlackRock is the key party in interest coupled with the lack of ties to this District in the core underlying facts of the dispute convince this Court that the lawsuit itself does not have a sufficient connection to this forum to warrant strong deference. See *Kirch v. Liberty Media Corp., No. 4 Civ. 667 (NRB), 2006 U.S. Dist. LEXIS 82175, at *4, 2006 WL 3247363 (S.D.N.Y Nov. 8, 2006)* ("[P]laintiff's choice of this forum is not to be afforded great deference, in light of the inherently Germany nature of this dispute."); *VictoriaTea.com, 239 F. Supp. 2d at 381* (dismissing for *forum non conveniens* where "the principal parties in interest to the underlying relationships and transactions that engendered the action" were not citizens of the United States or of the chosen forum); *Diatronics, Inc. v. Elbit Computers, LTD, 649 F. Supp. 122, 128 (S.D.N.Y. 1986)* (dismissing for *forum non conveniens* where "[a]lmost every significant event concerning the pertinent transaction took place In Israel").

Having evaluated the connection of BlackRock and the underlying lawsuit to this [*16] forum, the Court also must weigh the question of convenience to determine if it may save BlackRock's request for strong deference to its choice of forum. See *Iragorri, 274 F.3d at 71-72*. Thus, the Court now turns to a consideration of

> the convenience of the plaintiff's residence in relation to the chosen forum, the availability of witnesses or evidence to the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense.

Id. at 72.

As has been discussed in detail above, BlackRock's residence is in its chosen forum. However, after consideration of the other factors at issue, it seems this forum is not the most convenient for this litigation. The majority of witnesses BlackRock claims are necessary to depose - eight of the eleven mentioned in BlackRock's papers - are in Germany or the U.K. [5] (See Connolly Aff., Kushel Aff., Oliner Aff.); see also *Kirch, 2006 U.S. Dist. LEXIS 82175, at *4*. Further, Schroders has already indicated that it would be amenable to suit in the forum district. (Trust Dec. P [*17] 15; Def.'s Mot. at 18; Def.'s Reply at 5.) And finally, as the early communications between the parties prior to the filing of the Order to Show Cause in this Court show, legal assistance would be readily available to both parties in Germany. (See Trust Dec. at Exs. 1-2.) Thus, factors of convenience do not convince this Court that BlackRock's choice of forum deserves strong deference.

5 As is discussed in detail below, factors relating to BlackRock's ability to obtain witnesses' attendance weigh heavily in favor of dismissal.

Instead, it seems that BlackRock was motivated to bring suit in this forum based on considerations related to procedure available here. See *Iragorri, 274 F.3d at 72* (finding evidence of forum-shopping where reasons for bringing case in chosen forum include "attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case"). Specifically, BlackRock has indicated that a preliminary injunction is the goal of its action here. (See [*18] Hr'g Tr. 22:14-16). According to BlackRock, however, it believes it will not be able to obtain a preliminary injunction without expedited discovery, which it seems to claim would not be available to it in Germany. (See Pl.'s Opp. at 23.) Moreover, Mr. Kussner, who is seemingly a key party at interest to this case, is not even named by BlackRock because BlackRock believes it is unlikely to be able to assert jurisdiction over him in this District within the time frame it would like. (See Hr'g Tr. 6:11-16.) Schroders also points out that BlackRock relies on e-mail communications it "discovered" and has attached to its complaint, many of which may not be admissible under German constitutional and statutory law. (See Def.'s Mot. at 18 n.14.) The Court addresses many of these issues in greater detail below, but for purposes of the analysis at hand here, they do provide some indication that forum-shopping informed BlackRock's choice of forum.

Thus, given all of the *Iragorri* factors this Court has considered -- that the connection of the underlying litigation to this forum is attenuated, and that there is some inference of forum-shopping -- the Court concludes that BlackRock's [*19] choice of forum will not be given the strong deference ordinarily afforded a plaintiff in a *forum non conveniens* analysis. Instead, BlackRock's

choice of venue will be given limited deference.

III. Adequacy of an Alternative Forum

The second step in this analysis involves considerations related to selection of an alternate forum. A complaint is not properly dismissed under the doctrine of *forum non conveniens* unless a suitable alternate forum for the dispute exists. *Iragorri, 274 F.3d at 73*; see *Piper, 454 U.S. at 254 n.22*. The movant bears the burden of demonstrating that an adequate alternative forum exists. *Bank of Credit and Commerce Int'l (OVERSEAS) Ltd. v. State Bank of Pak., 273 F.3d 241 248 (2d Cir. 2001)*. "'An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute.'" *Norex, 416 F.3d at 157* (quoting *Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 75 (2d Cir. 2003)*).

Schroders contends that the courts of Germany present an adequate alternative forum and that this case [*20] should be tried there. BlackRock disputes the adequacy of the forum that German courts provide, apparently on the basis that German procedure does not permit for expedited discovery. BlackRock maintains that it requires expedited discovery for its application for a preliminary injunction. BlackRock's argument is unpersuasive.

"'An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute.'" *Norex, 416 F.3d at 157* (quoting *Pollux, 329 F.3d at 75*). Implicit in a finding that an alternative forum permits litigation of the subject matter of the dispute is "a finding that the foreign jurisdiction is as presently capable of hearing the merits of the plaintiff's claim . . . as the United States court where the case is pending," *Norex, 416 F.3d at 159*, and that the alternative forum offers a remedy that is not "clearly unsatisfactory," *Piper, 454 U.S. at 254 n.22*. The possibility of a difference in substantive law between the forums "should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* [*21] inquiry." *Piper, 454 U.S. at 247*.

Schroders has represented to this Court that it will consent to the personal jurisdiction of the courts in Germany. (Trust Decl. P 15.) Thus Schroders is amenable to service of process in Germany, and BlackRock does not dispute this.

It is also not disputed that German courts will permit the litigation of BlackRock's claims. Rather, BlackRock argues that German courts cannot provide a satisfactory remedy to BlackRock because a timely preliminary injunction -- the remedy it seeks foremost -- is not available to it in a German court. (See Hr'g Tr. 22:14-16 ("[T]he needs that BlackRock has turned to this Court for . . . is ultimately a preliminary injunction.").) BlackRock argues that a preliminary injunction will not be available to it without expedited discovery. (See Pl.'s Opp. at 23.) In essence, BlackRock argues that without the sort of expedited discovery sometimes permitted by United States courts, it will not be able to prevail in an application to a German court for a preliminary injunction. (Id.)

Initially, the Court notes that German courts are empowered to issue preliminary injunctions in civil matters. ([*22] See Driver-Polke Decl. P 7.5 (citing Zivilprozessordnung § 916 et seq.).) Further, it is not in dispute that BlackRock's underlying claims can be litigated in German courts. In fact, as discussed below, most of the claims arise out of German law.

What is more, it is clear that "the unavailability of beneficial litigation procedures similar to those available in the federal district courts does not render an alternative forum inadequate." *Blanco v. Banco Indus. de Venezuela, S.A., 997 F.2d 974, 982 (2d Cir. 1993)* (citing *Borden, Inc. v. Meiji Milk Products Co., Ltd., 919 F.2d 822, 829 (2d Cir. 1990)*); see also *Panama Processes, S.A. v. Cities Service Co., 650 F.2d 408, 415, 416 (2d Cir. 1981)* (Kearse, J.) (affirming dismissal over dissent's objection that no discovery would be available to plaintiff in the alternative forum); *Potomac Capital Inv. Corp. v. KONINKLIJKE LUCHTVAAPT MAATSCHAPPLJ N.V., 97 Civ. 8141, 1998 U.S. Dist. LEXIS 2343, 1998 WL 92416, at *5 (S.D.N.Y. Mar. 4, 1998)* ("[W]ere a forum considered inadequate merely because it did not provide for federal style discovery, few foreign forums could be considered 'adequate'--and that is [*23] not the law."). For this reason, courts in this District have repeatedly found Germany to be an adequate alternative forum despite the differences in discovery procedures. See, e.g., *Kirch, 2006 U.S. Dist. LEXIS 82175, at **19-21*; *Fagan v. Deutsche Bundesbank, 438 F. Supp. 2d 376, 382 (S.D.N.Y. 2006)*; *NCA Holding Corp. v. Norddeutsche Landesbank Girozentrale, 96 Civ. 9321 (LMM), 1999 U.S. Dist. LEXIS 817, 1999 WL 39539, at *2 (S.D.N.Y. Jan. 28, 1999)* ("That the German legal system is

different than that of the United States does not render Germany an inadequate forum."); *Opert v. Schmid, 535 F. Supp. 591 (S.D.N.Y. 1982)*.

Furthermore, the sort of expedited discovery that BlackRock argues is unavailable in German courts is not necessarily available in this forum. Rather, it is available only at the district court's sound discretion. See *Ayyash v. Bank Al-Madina, 233 F.R.D. 325, 326 (S.D.N.Y. 2005)*. Courts in this district apply one of two tests to determine whether the expedited discovery is appropriate. Depending on the test the court applies, the party requesting expedited discovery must either satisfy [*24] a four-part test similar to the standard for a preliminary injunction, see *Notaro v. Koch, 95 F.R.D. 403, 405 n.4 (S.D.N.Y. 1982)*, or demonstrate that it has "good cause" for its request and that the request is reasonable in light of the circumstances, see *Ayyash, 233 F.R.D. at 327*. This Court has not granted BlackRock's application for an order granting expedited discovery. Thus, the inadequacy BlackRock perceives in German courts does not necessarily distinguish the alternative forum from the present forum.

For these reasons, this Court agrees with the many other courts in this district that have found the courts of Germany to provide an adequate forum.

IV. Private and Public Interest Factors

Once a court has determined the degree of deference due a plaintiff's choice of forum and satisfied itself that an alternate forum exists, it must weigh two sets of factors to determine whether adjudication is more appropriate in the present forum or the alternative forum. See *Pollux, 329 F.3d at 75*. The first set of factors concerns the private interests of the litigants. See *Iragorri, 274 F.3d at 73*. In considering [*25] these factors, the district court weighs the hardships the defendant will face if jurisdiction is retained in the present forum against the hardships plaintiff will face if the motion to dismiss is granted. *Pollux, 329 F.3d at 75*. The court must also weigh the public interest factors of justice and court efficiency. *Alcoa Steamship Co. v. M/V Nordic Regent, 654 F.2d 147, 151 (2d Cir. 1978)* (en banc). In short, "[t]he action should be dismissed only if the chosen forum is shown to be genuinely inconvenient and the selected forum significantly preferable." *Iragorri, 274 F.3d at 74-75*.

A. Private Interest Factors

The private interest factors address the convenience to the litigants. These factors include

> "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive."

Iragorri, 274 F.3d at 73-74 (quoting *Gilbert, 330 U.S. at 508*). [*26] While analyzing these factors, a district court weighs the difficulties a defendant would suffer if the dispute were adjudicated in the present forum against the difficulties a plaintiff would face if the case were dismissed and the plaintiff were thus forced to bring suit in an alternate forum. See *id. at 74*.

Two private interest factors strongly favor dismissal of this case in favor of litigation in the courts of Germany. These factors are the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses. The other private interest factors are not significant in this case. The bulk of the non-testimonial sources of proof in this case is documentary, and largely electronic, and thus is readily transportable. Further, it appears that the documents are not concentrated in any one geographic area. Likewise, it appears that some documents are in English and others in German and that translation will be necessary regardless of forum.

Compulsory process is unavailable in this forum for attendance of most, if not all, of the unwilling witnesses in this matter. It is undisputed that the eight identified witnesses for [*27] which BlackRock sought an order for expedited depositions cannot be compelled to appear at trial if it were to take place in New York. (See Order to Show Cause, Att. A, Apr. 20, 2007.) Likewise, compulsory process is not available for Mr. Kussner, who is perhaps the single most important witness in this matter. [6] Compulsory process is available in Germany for the witnesses who are residents of Germany, however. See *NCA Holding Corp., 1999 U.S. Dist. LEXIS 817, at *6*.

6 BlackRock assumes that Mr. Kussner and the other former employees of BlackRock Germany

will appear willingly as witnesses on Schroders' behalf. This might well be the case. However, the Court is unwilling to base its decision on a party's speculations about its adversary's litigation strategy and about non-party witnesses' intentions.

This matter could be tried without the live trial testimony of the unwilling witnesses. However, so proceeding would be contrary to the policy of this Circuit. Unwilling witnesses can be [*28] deposed pursuant to the Hague Evidence Convention, to which the United States, Germany, and the United Kingdom are all signatories. See Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555. Likewise, there are alternatives to live, in-person testimony at trial. However, there is a preference in this Circuit for live trial testimony. See *DiRienzo v. Philip Servs. Corp., 294 F.3d 21, 30 (2d Cir. 2002)*. This preference is even stronger in cases such as this one where the jury's ability to assess the credibility of the witnesses will be particularly important. See id. Further, it would be undesirable to proceed in this matter without the presence of Mr. Kussner given that, at its core, this action concerns Mr. Kussner's alleged breach of contractual obligations and violation of fiduciary duties. See *Allstate Life Ins. Co. v. Linter Group, Ltd., 994 F.2d 996, 1001 (2d Cir. 1993)* (unavailability of key witnesses is a factor favoring dismissal on the grounds of *forum non conveniens.*) Thus, this factor favors dismissal of the complaint in favor of litigation in the courts of Germany.

[*29] The cost of obtaining attendance of willing witnesses also favors dismissal in favor of litigation in Germany. Most of the witnesses involved in this matter are in Germany or the United Kingdom. Indeed, the only witnesses in New York are two of BlackRock's lawyers and a member of BlackRock's management committee, and it appears from the affirmations of these New York witnesses that they have no information pertaining to Schroders' alleged torts. (See Connolly Aff., Kushel Aff., Oliner Aff.) Any of the European witnesses willing to appear would need to be transported to New York. With a trial in Germany, transport of English witnesses would be considerably less costly, in terms of time and money, and the transport of German witnesses would, of course, not be an issue to consider.

In sum, the private interest factors that are of significance in this case decidedly favor dismissal in favor of adjudication in Germany.

B. Public Interest Factors

The Court now turns to those considerations of the *forum non conveniens* inquiry that protect the public's interest. These factors include (1) the consideration that jurors should not be obligated to decide disputes with no relation [*30] to their community; (2) the fact that where a case affects many people, a forum that allows those affected to view the suit, rather than learn of it by report from a foreign forum, is preferable; (3) the forum's local interest in having its own controversies decided at home; and (4) the potential pitfalls that stem from a diversity case being heard in a foreign forum that must resolve conflicts of law and substantive law problems, rather than a forum familiar with the state law to be applied to the case. [7] *Gilbert, 330 U.S. at 508-09*; *Iragorri, 274 F.3d at 74*.

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Gilbert also specifies administrative difficulties resulting from court congestion as a public factor consideration. *Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)*. This consideration is not presently applicable in this District, however. Cf. *Guidi v. Inter-Continental Hotels Corp., 224 F.3d 142, 147 (2d Cir. 2000)* ("the recent filling of all judicial vacancies and the resulting full complement of judges for the District makes this concern of little or no present significance").

[*31] As previously noted, this case is at heart a German one. The application of Gilbert's public interest factors reflects this and weighs further in favor of dismissal. New York jurors have no connection to this German dispute and should not be burdened with the duty of finding the facts of this case. Likewise, to the extent this case touches on the affairs of other people, those people are in Germany, not New York, further supporting trial in Germany rather than in the Southern District of New York.

Of greater significance is Germany's interest in having this case decided in Germany. This case implicates issues such as German competition law (see Driver-Polke Decl. P 3.1), German employment law (see id. at P 6.3), and German privacy law (see id. at P 7.1), which are clearly of interest to Germany. See *Allstate, 994 F.2d at 1002* (government has a strong interest in enforcing its own laws); *Kirch, 2006 U.S. Dist. LEXIS*

*82175, at *30* (forums have an interest in applying their own laws). Further, to the extent these concerns appear in procedural or evidentiary contexts, they may be completely ignored by a court in this district, even if the [*32] district court applies German law. For example, BlackRock's review and use of Mr. Kussner's e-mails may violate German criminal statutes and the German Constitution. (Id. at P 7.1.) Accordingly, a German court might exclude such evidence. (Id. at P 7.1-7.2.) However, a district court sitting in diversity jurisdiction could well find that such an exclusionary rule is evidentiary and, accordingly, not applicable. See, e.g., *L-3 Communications Corp. v. OSI Systems, Inc., 02 Civ. 9144 (PAC), 2006 U.S. Dist. LEXIS 19686, at **54-55, 2006 WL 988143, *17 (S.D.N.Y. Apr. 11, 2006)* (Federal courts apply the Federal Rules of Evidence without regard for the Erie doctrine).

Finally, as indicated, trial in this forum would likely require the application of German law. The likelihood that the present forum would have to apply a foreign jurisdiction's law "lends weight to the conclusion that the suit should be prosecuted in that jurisdiction." *Calavo Growers of Cal. v. Generali Belg., 632 F.2d 963, 967 (2d Cir. 1980)*. Inherent in the application of foreign law is the risk of the misunderstanding or misapplication of the foreign law. In the [*33] words of Judge Friendly,

> try as we may to apply the foreign law as it comes to us through the lips of the experts, there is an inevitable hazard that, in those areas, perhaps interstitial but far from inconsequential, where we have no clear guides, our labors, moulded by our own habits of mind as they necessarily must be, may produce a result whose conformity with that of the foreign court may be greater in theory than it is in fact.

Conte v. Flota Mercante Del Estado, 277 F.2d 664, 667 (2d Cir. 1960).

A court in this forum would likely apply German law to this case. Further, although a definitive determination that German substantive law applies to this case would be premature, the mere need to "untangle problems in conflict of laws" is part of the Court's consideration in evaluating the public interest factors. *Peregrine Myanmar v. Segal, 89 F.3d 41, 47 (2d Cir. 1996)*. As a general matter, a district court sitting in diversity jurisdiction applies the choice of law rules of the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*; *Lee v. Bankers Trust Co., 166 F.3d 540, 545 (2d Cir. 1999)*. [*34] In this respect, it is worth noting that, when faced with a conflict of tort laws, New York courts apply an "interest analysis" to determine which jurisdiction's law will apply. *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders in Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber, 407 F.3d 34, 50 (2d Cir. 2005)* (quoting *Padula v. Lilarn Properties Corp., 84 N.Y.2d 519, 521, 644 N.E.2d 1001, 620 N.Y.S.2d 310 (1994)*). Where, as is the case here, the laws in question regulate conduct, courts in New York will usually apply the law of the place of the tort. *Lee, 166 F.3d at 545*. As previously discussed, the actions giving rise to BlackRock's complaint occurred largely in Germany. However, in New York, the first step in a choice of law analysis is to determine whether an actual conflict of laws exists. *Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998)*; *In re Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 613 N.E.2d 936, 937, 597 N.Y.S.2d 904 (N.Y. 1993)* (Kaye, C.J.). The Court is not now in the position to determine if an actual conflict exists and, accordingly, notes that it appears that German law will likely apply rather than holding so. However, "the likelihood [*35] that [foreign] law would govern in turn lends weight to the conclusion that the suit should be prosecuted in that jurisdiction." *Calavo Growers, 632 F.2d at 967*.

In sum, the private factors strongly favor dismissal of this case in favor of trial in Germany, and public factors overwhelmingly favor dismissal in favor of trial in Germany. The Court would have found this even if granting the plaintiff's selection of forum maximum deference. Dismissal is warranted, a fortiori, in light of the reduced deference the plaintiff's selection of forum is entitled to in this case.

CONCLUSION

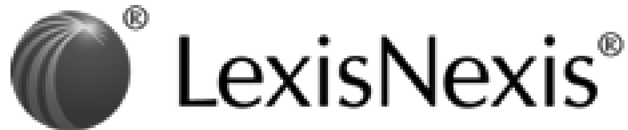
For the reasons set for herein, Schroders' motion to dismiss BlackRock's action is hereby GRANTED on the grounds of *forum non conveniens.*

SO ORDERED.

New York, New York

May 30, 2007

Peter K. Leisure U.S.D.J.



DAVID L. de CSEPEL, et al., Plaintiffs, v. REPUBLIC OF HUNGARY, et al., Defendants.

Civil Action No. 10-1261 (ESH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

2011 U.S. Dist. LEXIS 98573

September 1, 2011, Decided
September 1, 2011, Filed

COUNSEL: [*1] For DAVID L. DE CSEPEL, ANGELA MARIA HERZOG, JULIA ALICE HERZOG, Plaintiffs: Daniel Donohoe Prichard, Michael Dewayne Hays, LEAD ATTORNEYS, DOW LOHNES PLLC, Washington, DC; Alycia Regan Benenati, PRO HAC VICE, Dorit Ungar, PRO HAC VICE, Megan Kathleen Zwiebel, PRO HAC VICE, Michael S. Shuster, PRO HAC VICE. Sheron Korpus, PRO HAC VICE, KASOWITZ, BENSON, TORRES & FRIEDMAN LLP, New York, NY.

For REPUBLIC OF HUNGARY, a foreign state, HUNGARIAN NATIONAL GALLERY, MUSEUM OF FINE ARTS, MUSEUM OF APPLIED ARTS, BUDAPEST UNIVERSITY OF TECHNOLOGY AND ECONOMICS, Defendants: David D. West, Donald Grayson Yeargin, NIXON PEABODY LLP, Washington, DC; Sarah Erickson Andre, PRO HAC VICE, Thaddeus J. Stauber, PRO HAC VICE, NIXON PEABODY LLP, Los Angeles, CA.

JUDGES: ELLEN SEGAL HUVELLE, United States District Judge.

OPINION BY: ELLEN SEGAL HUVELLE

OPINION

MEMORANDUM OPINION

Plaintiffs David L. de Csepel, Angela Maria Herzog, and Julia Alice Herzog are descendants of Baron Mór Lipót Herzog, a Jewish Hungarian collector of art who amassed a collection of more than two thousand paintings, sculptures, and other artwork prior to his death in 1934. Plaintiffs allege that artwork comprising the Herzog Collection was seized by Hungary and Nazi [*2] Germany as part of a campaign of genocide against Hungarian Jews during World War II, and that at least forty works of art from the Herzog Collection are currently in the wrongful possession of Museum of Fine Arts (Szémpm[#x171]vészeti Múzeum) in Budapest, the Hungarian National Gallery, and the Museum of Applied Arts in Budapest (together, the "Museums"), as well as the Budapest University of Technology and Economics (the "University"), each of which is an agency or instrumentality of the Republic of Hungary (collectively, "defendants").

Plaintiffs have brought this action alleging that defendants breached certain bailment agreements entered into after World War II when they refused to return pieces of the Herzog Collection upon demand in 2008. Plaintiffs seek the return of these portions of the Herzog Collection, an accounting of all works of the Herzog Collection currently in defendants' possession, declaratory relief, and restitution based on unjust enrichment. Defendants have moved to dismiss pursuant

to *Rule 12(b)(1)* for lack of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), *28 U.S.C. §§ 1602 et seq.*, under the doctrine of forum non conveniens, and based on the 1973 [*3] Agreement between Hungary and the United States ("1973 Agreement"). In addition, defendants have moved to dismiss pursuant to *Rule 12(b)(6)* on the grounds that plaintiffs' claims are barred by the applicable statute of limitations, the act of state doctrine, the political question doctrine, and the doctrine of international comity. For the following reasons, defendants' motion is granted in part and denied in part.

BACKGROUND

The following facts are drawn from the allegations in the Complaint, which the Court accepts as true for purposes of evaluating a motion to dismiss, as well as the affidavits and other evidence presented by the parties on the issue of jurisdiction. *Phillips v. Fulwood, 616 F.3d 577, 581, 392 U.S. App. D.C. 396 (D.C. Cir. 2010)* (citing *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007))*; *Settles v. U.S. Parole Comm'n, 429 F.3d 1098, 1107, 368 U.S. App. D.C. 297 (D.C. Cir. 2005)* (court may consider facts beyond the complaint when ruling on a *Rule 12(b)(1)* motion). [1]

1 The Court will grant in part defendants' Motion for Judicial Notice of Documents and Facts (Dkt. No. 14), and take judicial notice of the existence of the Nierenberg litigation (including the 1999 Complaint and the 2008 decision by the Metropolitan Appellate [*4] Court) and the various Hungarian laws referred to in this opinion.

I. THE HERZOG COLLECTION

Baron Mór Lipót Herzog, a well-known Jewish Hungarian art collector, amassed a collection of more than two thousand paintings, sculptures and other artworks (the "Herzog Collection"). (Compl. ¶¶ 1, 38.) After Baron Herzog's death in 1934, and the death of his wife in 1940, the Herzog Collection was divided among their three children--Erzsebét (Elizabeth) Weiss de Csepel, István (Stephen) Herzog and András (Andrew) Herzog. (Compl. ¶ 39.)

The artworks comprising the Herzog Collection were among the valuable art and other objects looted and seized by Hungary, an ally of Nazi Germany during World War II. (Compl. ¶ 1.) Defendants are currently in possession of at least forty works of art from the Herzog Collection. (Compl. ¶ 2; Opp. at 45.)

II. THE PARTIES

Plaintiff David L. de Csepel is a United States citizen who resides in Los Angeles, California. (Compl. ¶ 6.) He is the grandson of the late Elizabeth Weiss de Csepel, who became a U.S. citizen in 1952 and died in the United States in 1992. (Compl. ¶¶ 6, 63, 78.) Plaintiff de Csepel represents all of the heirs of Elizabeth Weiss de Csepel in this action, [*5] as well as the heirs of her brother, István Herzog, who died in Hungary in 1966. (Compl. ¶¶ 40, 42.)

Plaintiffs Angela Maria Herzog and Julia Alice Herzog are Italian citizens who reside in Rome, Italy, and are the daughters of the late András Herzog. (Compl. ¶¶ 7-8.) Plaintiffs Angela Herzog and Julia Herzog represent the heirs of András Herzog in this action and, together with Plaintiff de Csepel, they also represent the heirs of their uncle, István Herzog.

Defendant Republic of Hungary is a foreign state as defined in *28 U.S.C. § 1603(a)*. (Compl. ¶ 9.) Defendants Museum of Fine Arts, Hungarian National Gallery, Museum of Applied Arts and Budapest University of Technology and Economics are all agencies or instrumentalities of Hungary, as defined in *28 U.S.C. § 1603(b)*. (Compl. ¶¶ 11-14.)

III. HUNGARY ALLIES WITH NAZI GERMANY AND BEGINS A CAMPAIGN OF GENOCIDE AGAINST HUNGARIAN JEWS

On November 20, 1940, Hungary agreed to the Tripartite Pact signed by Germany, Italy, and Japan on September 27, 1940, and thereby joined the Axis Powers. (Compl. ¶ 46.)

During World War II, Hungary enacted various laws, modeled on Germany's Nuremberg laws, eliminating or severely restricting the public, economic [*6] and social rights of Jews. Among other things, these new laws defined "Jew" in racial terms, prohibited sexual relations or marriage between Jews and non-Jews, and excluded Jews from full participation in various professions. (Compl. ¶¶ 44-45, 47; Opp. Lattmann Decl.) ¶¶ 6-16.)

During 1941 and 1942, thousands of Jews were deported by the Hungarian government to territories under German control, where they were brutally

mistreated and massacred. (Compl. ¶ 49.) The Hungarian military and gendarme units also murdered hundreds of Jews and forced Jewish men into forced labor without providing them with adequate shelter, food, or medical care. (Compl. ¶¶ 49-50.) By March 1944, at least 27,000 Hungarian Jewish forced laborers--including András Herzog, the father of Plaintiffs Julia Herzog and Angela Herzog--had perished under these brutal conditions. (Compl. ¶ 50.)

In March 1944, Adolf Hitler sent German troops into Hungary to ensure Hungary's loyalty and to assist the Hungarian government in resisting the advancing Russian army. (Compl. ¶ 51.) Between May and July 1944, Hungarian authorities, working in collaboration with SS commander Adolf Eichmann, deported over 430,000 Jews--more than fifty [*7] percent of the entire pre-war Hungarian Jewish population. (Compl. ¶ 52.) By the time the Russians had overrun Hungary in early 1945, more than 500,000 of Hungary's pre-War population of 825,000 Jews were dead. (*Id.*)

IV. THE LOOTING OF THE HERZOG COLLECTION

During the Holocaust, Hungarian Jews--including the Herzogs--were required to register their art treasures. (Compl. ¶¶ 56-57.) While the Herzog family attempted to protect their art by hiding the bulk of it in the cellar of one of the family's factories at Budafok, the Hungarian government and their Nazi collaborators discovered the hiding place, and the chests containing the art were opened in the presence of Denes Csanky, the director of the Museum of Fine Arts. (Compl. ¶¶ 58-59.) The art was taken to Adolf Eichmann's headquarters at the Majestic Hotel in Budapest for his inspection. (Compl. ¶ 60.) Eichmann selected many of the best pieces to display as trophies and then shipped them off to greater Germany. (*Id.*) The remainder of the collection was taken over by the Museum of Fine Arts. (*Id.*) Other pieces from the Herzog Collection were seized by the Hungarian government from homes, safe deposit vaults, and other Herzog properties. [*8] (Compl. ¶ 61.)

V. THE HERZOG FAMILY ESCAPES FROM HUNGARY

In May 1944, Elizabeth and her children, together with other members of the Herzog and Weiss de Csepel families, fled to Portugal. Elizabeth immigrated to the United States in 1946, and became a U.S. citizen on June 23, 1952. (Compl. ¶ 63.) Plaintiffs Angela and Julia Herzog--the daughters of András Herzog--escaped to Argentina and eventually settled in Italy. (Compl. ¶ 64.) István Herzog and some members of his family remained in Hungary, while others escaped and settled in Switzerland. (Compl. ¶ 64.)

VI. THE 1947 PEACE TREATY

After World War II, Hungary and the Allies entered into a Peace Treaty in 1947. (*See* Opp. Benenati Decl. Ex. A.) Article 27 of the Peace Treaty provided:

> Hungary undertakes that in all cases where the property, legal rights or interests in Hungary of persons under Hungarian jurisdiction have, since September 1, 1939, been the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is impossible, that fair compensation shall be made [*9] therefor[e].

(*Id.* art. 27(1).)

VII. THE POST-WAR FATE OF THE HERZOG COLLECTION

Plaintiffs assert that while the Hungarian government purported to "return" a handful of items from the Herzog Collection to the Herzog Heirs in the years immediately following the war, those "returns" were largely on paper or short-lived, and the vast majority of the Herzog Collection remained in the possession of Hungary, the Museums and the University. (Compl. ¶¶ 70-71.)

Even as to those pieces of the Herzog Collection that were physically returned to the Herzog Heirs, Hungarian government officials allegedly harassed and threatened the Heirs to whom they were returned, including the lodging of false smuggling allegations, until they agreed to re-deposit the works with the museums according to new bailment agreements so that they could be displayed and exhibited by defendants. (Compl. ¶¶ 72-73.) In 1948, the Museum of Fine Arts exhibited certain pieces of the Herzog Collection with labels expressly acknowledging that they were "on deposit." (Compl. ¶ 73.)

VIII. THE UNITED STATES FOREIGN CLAIMS SETTLEMENT PROCESS--THE FIRST HUNGARIAN CLAIMS PROGRAM

In 1947, a leftist bloc gained control of the Hungarian government, [*10] eventually leading to the creation of the Hungarian People's Republic in 1949. (Country Profile: Hungary, U.S. Dep't of State (May 19, 2011), http://www.state.gov/r/pa/ei/bgn/26566.h tm.) All private industrial firms with more than ten employees were nationalized. (*Id.*) During the Communist era, Hungary did not recognize individual property rights. (Compl. ¶ 93.)

Consequently, relations between the United States and Hungary soon deteriorated. In 1951, the United States ordered the closure of all Hungarian consulates in the United States. (*See* Opp. Benenati Decl. Ex. R.) Pursuant to the Trading with the Enemy Act, the United States already held certain Hungarian assets blocked by Executive Order 8389, 3 C.F.R. 645 (1938-1943). (*Id.*) In 1955, the United States decided to use those blocked assets to compensate United States claimants and amended the International Claims Settlement Act of 1949 to authorize the Foreign Claims Settlement Commission (the "Commission") to consider claims by United States nationals against Bulgaria, Hungary, Italy, Romania and the former Soviet Union (the "First Hungarian Claims Program"). *See* Act of August 9, 1955, Pub. L. No. 84-285, 1955 U.S.C.C.A.N. (69 Stat. 570) [*11] 2745, 2748 (the "1955 Claims Amendment"). (*See also* Opp. Benenati Decl. Ex. R at 537.)

The 1955 Claims Amendment authorized the Commission to adjudicate claims of United States nationals against Hungary for Hungary's failure:

> (1) to restore or pay compensation for property of United States nationals as required by Articles 26 and 27 of the Treaty of Peace;
>
> (2) to pay effective compensation for the nationalization, compulsory liquidation or other taking, prior to August 9, 1955, of property of United States nationals; and
>
> (3) to meet obligations expressed in currency of the United States arising out of contractual or other rights acquired by United States nationals prior to September 1, 1939, and which became payable prior to September 15, 1947.

(Opp. Benenati Decl. Ex. R at 537.)

As of the effective date of the 1955 Claims Amendment, Elizabeth Weiss de Csepel--who had become a United States citizen on June 23, 1952--was the only United States citizen with an ownership interest in any portion of the Herzog Collection. (Compl. ¶ 63.)

After fleeing Hungary, the Herzog Heirs assert they were unable to get accurate information as to what had become of their property. (Compl. ¶ 75.) Elizabeth Weiss [*12] de Csepel believed at the time that certain artworks from the Herzog Collection that belonged to her had likely been nationalized by Hungary in 1954 as a result of Hungarian Museum Decree No. 13 of 1954 (the "1954 Museum Decree") (Bánki Decl., Ex. C).

Section 9(1) of the 1954 Museum Decree provided, in relevant part, that:

> At the entering into force of the Legislative Decree hereunder, those museum pieces in the safekeeping of the museum whose owner is unknown, or has left the country without permission, shall be placed into State ownership, pursuant to the Legislative Decree hereunder.

(Mot. Bánki Decl. Ex. C, p. 2 § 9(1); Opp. Lattmann Decl. ¶¶ 31-32.)

Because she and her family had fled Hungary during the Holocaust, Elizabeth Weiss de Csepel believed that Hungary would treat her as someone who "has left the country without permission" and apply the 1954 Museum Decree to her art, and she submitted an affidavit to the Commission to that effect. (Opp. at 12.) She filed a claim with the Commission for compensation for twelve pieces of the Herzog Collection which she knew to be in the possession of Defendant Museum of Fine Arts, seven of which she claimed to own outright and five of which [*13] she claimed to own jointly with her brothers, who were not United States citizens. (*Id.*) Her claim also included real property, which she correctly believed had been nationalized pursuant to other decrees not relevant here. (*Id.*) Hungary was not involved in any way in the Commission process and had no input in the decisions

made or the awards rendered by the Commission. (*Id.*)

On April 13, 1959, the Commission awarded $210,000 to Elizabeth Weiss de Csepel for both the real estate and the artworks. The Commission's Proposed, Final, and Amended Final decisions expressly reserved Elizabeth's rights against the Hungarian government to recover the balance of her claim. (*See* Mot. Ramirez Decl., Exs. A, C, & D.)

IX. THE 1973 AGREEMENT

In 1965, the United States began negotiations with Hungary in order to obtain compensation for the balance of the claims that had resulted in partial awards through the First Hungarian Claims Program. (*See* Opp. Benenati Decl. Ex. R at 539.) At the meeting between United States and Hungarian officials on June 17, 1966, George Spangler, the United States chief negotiator, raised the issue of certain "nationalized" art collections belonging to former Hungarian citizens [*14] who had become naturalized citizens of the United States after the seizure of the artworks. Karolyi Reti, Hungary's chief negotiator, responded that "[a]rt collections had never been nationalized in Hungary." (*See* Opp. Benenati Decl. Ex. E at 237.) Reti also stated that the United States had no standing to press claims on behalf of claimants who were not United States nationals at the time their paintings came into the custody of the Museum of Fine Arts, and the United States negotiators agreed. (*Id.* at 238.)

On March 6, 1973, the United States and Hungary entered into an executive agreement. *See* Agreement Between the Government of the United States of America and the Government of the Hungarian People's Republic Regarding the Settlement of Claims, March 6, 1973, 24 U.S.T. 522 (the "1973 Agreement"). The 1973 Agreement provided that, in exchange for the lump sum payment of $18,900,000 by Hungary, there would be a "full and final settlement and . . . discharge of all claims of the Government and nationals of the United States against the Government and nationals of the Hungarian People's Republic which are described in this Agreement." *Id.*, art. 1, § 1. The 1973 Agreement addressed four [*15] categories of claims:

> (1) property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation or other taking on or before the date of this Agreement, excepting real property owned by the Government of the United States;
>
> (2) obligations expressed in currency of the United States arising out of contractual or other rights acquired by nationals of the United States prior to September 1, 1939, and which became payable prior to September 15, 1947;
>
> (3) obligations of the Hungarian People's Republic under Articles 26 and 27 of the Treaty of Peace between the United States and Hungary dated February 10, 1947, and
>
> (4) losses referred to in the note of December 10, 1952 of the Government of the United States to the Government of the Hungarian People's Republic.

Id., art. 2.

X. THE FALL OF COMMUNISM

With the opening of Hungary to the West in 1989, the Herzog Heirs learned that many pieces of the Herzog Collection were being openly exhibited at the Museums. (Compl. ¶ 77.) Tags under the paintings identified them as "From the Herzog Collection." (*Id.*)

Elizabeth Weiss de Csepel, then 89 years old, attempted negotiations with the Hungarian government to [*16] recover the art that belonged to her. (Compl. ¶ 78.) She obtained only six paintings and a wood sculpture before her death in 1992--all of them works attributed to little known artists. (*Id.*) The identifiable masterworks remained in the Museum of Fine Arts and the Hungarian National Gallery. (*Id.*)

In the early 1990s, the Hungarian Parliament enacted two compensation laws. (Mot. at 15-16; Mot. Bánki Decl. Ex. F ("1991 Compensation Act"); Mot. Bánki Decl. Ex. G ("1992 Compensation Act").) None of the Herzog Heirs filed claims for art under the 1991 or 1992 Compensation Acts. (Pasztory Decl. ¶ 6.)

XI. NEGOTIATIONS WITH HUNGARY AND THE NIERENBERG LITIGATION

Following Elizabeth Weiss de Csepel's death in 1992, her daughter, Martha Nierenberg, inherited her share of the Herzog Collection and continued her

mother's efforts to recover the art. (Compl. ¶ 79.) In 1996, the Hungarian Minister of Culture and Education appointed a Committee of Experts to determine who legally owned the Herzog Collection. (Pasztory Decl. ¶ 8.) The government appointed the Director of the Museum of Fine Arts and a legal representative of the Ministry of Foreign Affairs to the Committee. (*Id.*) The Committee met on several [*17] occasions in 1996 and 1997 and reviewed the ownership status of certain art objects that Martha Nierenberg asserted were the property of the heirs of Elizabeth and István Herzog. (*Id.* ¶¶ 9-10.)

XII. NIERENBERG LITIGATION

In October 1999, after what plaintiffs describe as "months of silence" from the Hungarian government, plaintiffs concluded that Hungary had no genuine intention of returning the art, and Martha Nierenberg filed a lawsuit in Hungary to recover ten paintings that belonged to her mother, Elizabeth Weiss de Csepel. (Compl. ¶ 79.) She later amended her complaint to include two additional paintings. The Museum of Fine Arts, without explanation, returned one painting to her shortly after the litigation commenced. However, the litigation proceeded with respect to the remainder of the paintings. Plaintiffs Angela Herzog and Julia Herzog (as well as the sons of István Herzog--Stephen Gabriel Herzog and Peter Herzog) later intervened as defendants in the lawsuit, as there was initially a dispute (which was ultimately resolved) between them and Martha Nierenberg as to who owned certain of the artworks. (Opp. Varga Decl. ¶¶ 7-8; Mot. Bánki Decl. Ex. M.)

On October 20, 2000, the Budapest [*18] Metropolitan Court ordered that all except one of the paintings be returned to Martha Nierenberg. (*See* Opp. Varga Decl. Ex. A.) Among other things, the court rejected the defendants' argument that they had acquired ownership of the paintings by virtue of the 1954 Museum Decree, and agreed with Mrs. Nierenberg that the government had the paintings at issue in its possession only as "bailee." (*See id.* at 34-38, 52.)

Defendants appealed the decision. On November 29, 2002, the Supreme Court of Hungary vacated the judgment of the Metropolitan Court on the ground that the court erred in concluding that the paintings belonged to Elizabeth Weiss de Csepel, rather than other Herzog Heirs, in the absence of participation in the lawsuit by all of the Herzog Heirs. (*See* Opp. Varga Decl. Ex. B at 12-13.) Therefore, the court remanded the case to the trial court for further proceedings. (*Id.*) The Supreme Court agreed with the lower court that the defendants had not established that the paintings had become state property as a result of Section 9 of the 1954 Museum Decree. (*See id.* at 14-16.) The Supreme Court also agreed with the lower court that no "nationalization ... or other taking" of the paintings [*19] had occurred as provided in the 1973 Agreement. (*Id.* at 16) However, the Supreme Court asked the lower court to consider whether, in light of the compensation received by Elizabeth Weiss de Csepel from the United States Foreign Claims Settlement Commission, defendants had a claim for adverse possession based on their belief (even if erroneous) that they possessed the art as a result of the 1973 Agreement. (*See id.* at 17-18.)

On remand, the Metropolitan Court ordered the return of one painting to Martha Nierenberg on November 16, 2005, but otherwise dismissed the claim on the grounds of adverse possession. (*See* Opp. Varga Decl., Ex. C.) However, the court agreed with the findings of the prior two courts that Elizabeth Weiss de Csepel had left Hungary with the permission of the Hungarian state in 1944, and that the defendants always knew who owned the art. (*See id.* at 22-23.) Therefore, the court agreed that the 1954 Museum Decree had not given the state ownership of the art at issue. (*Id.*)

On January 10, 2008, nine years after Martha Nierenberg commenced her lawsuit, the Metropolitan Appellate Court dismissed Martha Nierenberg's claim in its entirety, holding that the 1973 Agreement barred [*20] Elizabeth Weiss de Csepel because the United States had awarded her compensation through the Foreign Claims Settlement Commission process. (*See* Mot. Bánki Decl. Ex. M.) The court also agreed with the lower court that the state had obtained ownership via adverse possession. (*See* Mot. Bánki Decl., Ex. M at 14-15.)

ANALYSIS

I. STANDARD OF REVIEW

When reviewing a facial challenge to the Court's subject matter jurisdiction pursuant to *Rule 12(b)(1)*, the Court must assume the truth of all factual allegations in the complaint, construing them in the light most favorable to the plaintiff, even if some are subject to dispute by the opposing party. *See Republic of Austria v.*

Altmann, 541 U.S. 677, 681, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004); *Phoenix Consulting, Inc. v. Republic of Angola, 216 F.3d 36, 40, 342 U.S. App. D.C. 145 (D.C. Cir. 2000)*. Nonetheless, plaintiffs bear the burden of establishing subject matter jurisdiction. *Pitney Bowes, Inc. v. U.S. Postal Serv., 27 F. Supp. 2d 15, 19 (D.D.C. 1998)*. In addition, "[w]hen a court rules on a *Rule 12(b)(1)* motion, it may 'undertake an independent investigation to assure itself of its own subject matter jurisdiction,'" and it may consider "facts developed in the record beyond the complaint." *Settles v. U.S. Parole Comm'n, 429 F.3d 1098, 1107, 368 U.S. App. D.C. 297 (D.C. Cir. 2005)* [*21] (quoting *Haase v. Sessions, 835 F.2d 902, 908, 266 U.S. App. D.C. 325 (D.C. Cir. 1987))*.

To survive a motion to dismiss for failure to state a claim under *Rule 12(b)(6)*, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" such that a court may "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly, 550 U.S. at 555* (citations omitted). In ruling on a 12(b)(6) motion, a court may consider facts alleged in the complaint, documents attached to or incorporated in the complaint, matters of which courts may take judicial notice, and documents appended to a motion to dismiss whose authenticity is not disputed, if they are referred to in the complaint and integral to a claim. *U.S. ex rel. Folliard v. CDW Tech. Servs., Inc., 722 F. Supp. 2d 20, 24-25 (D.D.C. 2010)*.

II. [*22] JURISDICTION UNDER THE FSIA

A. Standard of Review

The Foreign Sovereign Immunities Act, *28 U.S.C. §§ 1602 et seq.*, provides the exclusive basis for asserting jurisdiction over a foreign state in a United States court. *See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-35, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989)* (citing *28 U.S.C. § 1604*; *28 U.S.C. § 1330(a)*); *accord Peterson v. Royal Kingdom of Saudi Arabia, 416 F.3d 83, 85, 367 U.S. App. D.C. 421 (D.C. Cir. 2005)*; *Agudas Chasidei Chabad v. Russian Fed'n, 466 F. Supp. 2d 6, 14 (D.D.C. 2006)*, *rev'd in part on other grounds*, *528 F.3d 934, 381 U.S. App. D.C. 316 (D.C. Cir. 2008)*. In enacting the FSIA, Congress codified the "restrictive principle" of sovereign immunity, limiting the jurisdiction of American courts to hear claims against foreign states. *Republic of Austria v. Altmann, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004)*. Therefore, unless one of the statutory exceptions enumerated in *28 U.S.C. § 1605* is satisfied, a foreign state is immune from suit in United States courts. *See 28 U.S.C. § 1604*; *Amerada Hess, 488 U.S. at 434-35* & n.3. Sovereign immunity is a threshold issue, as it goes to the Court's subject matter jurisdiction. *Altmann, 541 U.S. at 691*; *Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1026 (9th Cir. 2010)* [*23] (en banc).

The defendant-state has the ultimate burden of establishing immunity under the FSIA. *Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1171, 307 U.S. App. D.C. 102 (D.C. Cir. 1994)*. Once the defendant makes a prima facie showing that it is a foreign state, the plaintiff bears the burden of asserting at least some facts showing that one of the FSIA exceptions applies. *Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 940, 381 U.S. App. D.C. 316 (D.C. Cir. 2008)*; *Crist v. Republic of Turkey, 995 F. Supp. 5, 10 (D.D.C. 2000)*. The burden then shifts back to the defendant to prove, by a preponderance of the evidence, that the alleged exception does not apply. *Chabad, 528 F.3d at 940*.

To the extent that jurisdiction depends on particular factual propositions independent of the merits, the plaintiff must, on a challenge by the defendant, present adequate supporting evidence. *Id.* "For purely factual matters under the FSIA, however, this is only a burden of production; the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Id.* Where, however, jurisdiction depends on the plaintiffs having asserted a particular *type* [*24] of claim, "there typically is jurisdiction unless the claim is immaterial and made solely for the purpose of obtaining jurisdiction or . . . wholly insubstantial and frivolous, *i.e.*, the general test for federal-question jurisdiction under *Bell v. Hood, 327 U.S. 678, 682-83, 66 S. Ct. 773, 90 L. Ed. 939 (1946)*, and *Arbaugh v. Y & H Corp., 546 U.S. 500, 513, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 & n.10 (2006)*." *Chabad, 528 F.3d at 940* (internal quotation marks omitted)

(alteration in original). "The *Bell v. Hood* standard to be applied is obviously far less demanding than what would be required for the plaintiff's case to survive a summary judgment motion under *Fed. R. Civ. P. 56*." *Id.*

B. Expropriation Exception

Plaintiffs rely primarily on the FSIA's expropriation exception, *28 U.S.C. § 1605(a)(3)*, to challenge defendants' assertion of sovereign immunity. *Section 1605(a)(3)* states in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United [*25] States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

This exception consists of two distinct clauses, and plaintiffs argue that the Court has jurisdiction under the second clause. (Compl. ¶ 21.) Therefore, in order to have jurisdiction, this Court must find that: (1) "rights in property" are at issue; (2) the property was "taken in violation of international law"; and (3) "the property at issue (or any property exchanged for it) [is] . . . 'owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality' engages in commercial activity in the United States." *Peterson, 416 F.3d at 86-87* (quoting *28 U.S.C. § 1605(a)(3)*). As defendants do not dispute that "rights in property" (*i.e.*, the ownership rights to the Herzog Collection) are "in issue," the Court will proceed to the second element.

1. Taking in Violation of International Law

A taking violates international law if: (1) it was not for a public purpose; (2) it was discriminatory; or (3) no just [*26] compensation was provided for the property taken. *See Crist, 995 F. Supp. at 10-11* (citing *Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 711 (9th Cir. 1992))*; *Cassirer, 616 F.3d at 1027*; *Restatement (Third) of Foreign Relations Law of the United States § 712* (1987). *See also* H.R. Rep. No. 94-1487, at 19-20 (describing phrase "taken in violation of international law" as including expropriations that are "arbitrary or discriminatory in nature"). At the jurisdictional stage, the Court need not decide whether the taking actually violated international law; as long as plaintiffs' claims are "substantial and non-frivolous," they provide a sufficient basis for the exercise of jurisdiction. *Chabad, 528 F.3d at 941-42*.

The Complaint clearly alleges substantial and non-frivolous claims that the Herzog Collection was taken without just compensation and for discriminatory purposes. Specifically, it alleges that despite efforts by the Herzog family to prevent the confiscation of their artwork by hiding the bulk of it in the cellar of one of the family's factories in Budafok, the Hungarian government, in collaboration with the Nazis, discovered the hiding place and confiscated its contents [*27] as part of a larger campaign of asset seizure and genocide against Hungarian Jews. (Compl. ¶¶ 54-59.) The artwork was then taken directly to Adolf Eichmann's headquarters, where Eichmann selected certain pieces to display as "trophies" before shipping them off to Germany. (Compl. ¶ 60.) Other pieces of the Herzog Collection were seized by the Hungarian government from homes, safe deposit vaults, and other properties of the Herzog family. (Compl. ¶ 61.) Some of these works were sent abroad to Germany or elsewhere, while others remained in Hungary. (*Id.*)

Defendants argue that these seizures cannot be considered violations of international law, because both Ms. Nierenberg and Ms. Weiss de Csepel were Hungarian citizens, and therefore the seizure of their property by the Hungarian government did not violate international law. (Mot. at 34-35.) Indeed, is well-settled that a state's taking of the property of its own citizens, no matter how egregious, does not constitute an international law violation. *Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir. 1976)* (finding no international law violation where "aggrieved parties are nationals of the acting state," despite fact that taking was pursuant [*28] to Nazi racial decrees); *see also Altmann, 541 U.S. at 728* (Breyer, J., concurring) (noting "consensus view" of lower courts that the FSIA expropriation exception's "reference to 'violation of international law' does not cover

expropriations of property belonging to a country's own nationals"); *Altmann v. Republic of Aus., 317 F.3d 954, 968 (9th Cir. 2002)* (plaintiff cannot be a citizen of the defendant country at the time of the expropriation, because "expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.") (citing *Siderman de Blake, 965 F.2d at 711*); *Yang Rong v. Liaoning Provincial Gov't, 362 F. Supp. 2d 83, 102 (D.D.C. 2005)* ("[C]onfiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided, do not constitute violations of international law.").

Plaintiffs, however, argue that Hungary did not consider Ms. Nierenberg and Ms. Weiss de Csepel to be Hungarian citizens at the time of the seizures, as evidenced by the anti-Semitic laws passed by Hungary during World War II. (Opp. at 30.) Specifically, plaintiffs argue that as of 1944, [*29] Hungarian Jews could not acquire citizenship by means of naturalization, marriage, or legalization (Opp. Lattmann Decl. ¶ 6); vote or be elected to public office (*id.* ¶ 7); be employed as civil servants, state employees, or schoolteachers (*id.*); enter into enforceable contracts (*id.*); participate in various industries and professions (*id.* ¶ 8); participate in paramilitary youth training or serve in the armed forces (*id.* ¶ 9); own property (*id.* ¶ 10); or acquire title to land or other immovable property (*id.* ¶ 11). Moreover, all Hungarian Jews over the age of six were required to wear distinctive signs identifying themselves as Jewish, and were ultimately subject to complete forfeiture of all assets, forced labor inside and outside Hungary, and ultimately genocide. (*Id.* ¶¶ 14-17.)

Defendants argue in response that "plaintiffs['] own statements and submissions" undercut the assertion that their predecessors were not Hungarian citizens at the time of the taking in 1944. (Reply at 9 n.7.) Specifically, defendants point to a formal submission by Ms. Nierenberg's attorney to the Hungarian courts in 1999 that Ms. Nierenberg "did not surrender her Hungarian citizenship; she was not deprived [*30] of it; she was not dismissed from the ties of Hungarian citizenship." (Reply Bánki Decl. Ex. F.)

Notwithstanding the fact that Ms. Nierenberg still considered herself to be a Hungarian citizen in 1944, it is clear that under these extraordinary facts, the government of Hungary thought otherwise and had *de facto* stripped her, Ms. Weiss de Csepel, and all Hungarian Jews of their citizenship rights. Consequently, the alleged Hungarian "citizenship" of plaintiffs' predecessors does not preclude the application of the expropriation exception in this case. *See Cassirer v Kingdom of Spain, 461 F. Supp. 2d 1157, 1165-66* (applying expropriation exception to Nazi Germany's seizure of German national's property where plaintiff argued that Nazi citizenship laws precluded citizenship for Jews), *aff'd in part*, *616 F.3d 1019 (9th Cir. 2010)* ("By [1939], German Jews had been deprived of their civil rights, including their German citizenship."). *Cf. Roboz v. Kennedy, 219 F. Supp. 892, 894 (D.D.C. 1963)* (finding that plaintiffs were not "domiciled in, or a subject, citizen or resident of" Hungary under the International Claims Settlement Act, because they had a firm intent to leave Hungary, had lost [*31] their home, had no rights in law, and could not vote); *Kaku Nagano v. McGrath, 187 F.2d 759, 768 (7th Cir. 1951)* (noting that under the Trading with the Enemy Act, "our concept of a citizen is one who has the right to exercise all the political and civil privileges extended by his government" and that "[c]itizenship conveys the idea of membership in a nation").

Moreover, even if defendants are correct that the seizure of the Herzog Collection by Hungary alone would not constitute a violation of international law, the Complaint also states a substantial and non-frivolous taking in violation of international law based on the active involvement of German Nazi officials in the taking of at least a portion of the Herzog Collection. (Compl. ¶¶ 59-61.) Specifically, the Complaint avers that the German Nazis assisted the Hungarian government in the discovery of the bulk of the Herzog Collection in Budafok, and that this artwork was taken directly to Adolf Eichmann's headquarters following its seizure. (*Id.* ¶¶ 59-60.) [2] The "plain language of the [FSIA] does not require that the foreign state against whom the claim is made be the entity that took the property in violation of international law." [*32] *Cassirer, 616 F.3d at 1028*, *cert. denied*, *2011 U.S. LEXIS 4928*, No. 10-786 (June 27, 2011); *see Altmann, 317 F.3d at 968* (allowing suit to proceed against Austria under expropriation exception where Nazis allegedly stole six paintings in Austria with the assistance of the Austrian government).

2 As to the remainder of the collection, while the Complaint states that it was seized "by the Hungarian government" (Compl. ¶ 61), the statement of facts accompanying plaintiffs'

Opposition claims the involvement of the German Nazis in these subsequent seizures as well. (Opp. at 7.) To the extent a portion of the Herzog Collection was seized solely by the Hungarian Government without the involvement of Nazi Germany, such seizures plainly cannot be said to violate international law solely based on the involvement of Germany.

In addition, defendants argue that Hungary has cured any previous violations of international law arising out of the taking of the Herzog Collection by way of the 1973 Agreement with the United States, pursuant to which Hungary paid the United States $18.9 million to resolve and extinguish claims by U.S. nationals relating to "measures of nationalization, compulsory liquidation, [*33] expropriation, or other taking" by Hungary. (Opp. at 35-37.) Moreover, Hungary argues that the Hungarian 1991 and 1992 Compensation Acts provided compensation to current and former Hungarian nationals whose property was taken in connection with wartime laws "restricting the public and economic expansion of Jews" or otherwise taken during the Communist era. (*Id.*)

As explained below, the 1973 Agreement did not compensate plaintiffs for the 1944 takings of the Herzog Collection because it did not settle the claims of individuals--such as plaintiffs' predecessors--who were not United States citizens at the time of the takings. (*See infra* Part III.) As for the post-Communist era compensation legislation, the 1991 Act applied only to Communist-era nationalization, and plaintiffs did not apply for or receive compensation under this Act. (Opp. Lattmann Decl. ¶ 25.) While the 1992 Compensation Act did allow for compensation for World War II-era claims, plaintiffs did not apply for or receive compensation for the Herzog Collection under this Act, and it appears that the Act itself does not purport to settle all such claims or preclude a legal action seeking the return of stolen goods in lieu of [*34] compensation. (Opp. Pasztory Decl. ¶ 6; Opp. Lattman Decl. ¶ 30; Opp. Varga Decl. ¶ 17.)

In sum, the Court finds that plaintiffs' claim that the Herzog Collection was taken in violation of international law is substantial and non-frivolous, and therefore, it adequately satisfies the second requirement of the FSIA's expropriation exception. [3]

3 Defendants argue in a footnote that plaintiffs have failed to exhaust their remedies in Hungary as to the thirty-two paintings described in this case that were not the subject of the 1999 Hungarian lawsuit. (Mot. at 17 n.15.) To the extent defendants argue that the Complaint should be dismissed on this basis, the Court will deny this motion. The text of the *§ 1605(a)(3)* contains no such requirement, and the D.C. Circuit has recently declined the invitation to impose one. *Chabad, 528 F.3d at 948-49* (holding that it is "likely correct" that a plaintiff invoking the expropriation exception is not required to exhaust local remedies before litigating in the United States.)

2. Commercial Activity Nexus

The third requirement of the FSIA's expropriation exception requires a commercial activity nexus between the foreign state (or its agency or instrumentality) [*35] that owns or operates the property at issue and the United States. *28 U.S.C. § 1605(a)(3)* Plaintiffs here rely on the second clause of this requirement, which requires that the entity that owns or operates the property at issue be "engaged in a commercial activity in the United States." *Id.* The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act," *id. § 1603(d)*, and courts have "broad discretion to 'determin[e] what is a commercial transaction for purposes of' the FSIA." *Chabad, 466 F. Supp. 2d at 24* (quoting H.R. Rep. No. 94-1487, at 16 (1976)) (internal quotation marks omitted) (alternations in original). The term "commercial" distinguishes governmental acts from those that can be engaged in by private persons or entities. *Id.* (citing *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992))* ("[W]hen a foreign government acts . . . in a manner of a private player within [a market], the foreign sovereign's acts are 'commercial' within the meaning of the FSIA." (alterations in original))

Defendants argue that a separate definition of "commercial activity" set forth at *28 U.S.C. § 1603(e)* should also [*36] apply here, and therefore, the necessary commercial activity under the expropriation exception must involve "substantial contact" with the United States. (Opp. at 37-39; *see 28 U.S.C. § 1603(e)*.) But the D.C. and Ninth Circuits have recently rejected this very argument. *Section 1603(e)* sets forth the definition of "commercial activity *carried on* in the United States by a foreign state" (emphasis added), and

applies it only to cases brought under the first clause of *§ 1605(a)(3)* (cases in which the property is alleged to be "present in the United States in connection with commercial activity carried on in the United States by the foreign state"). It does *not* apply to cases such as this one that are brought under the second clause of *§ 1605(a)(3)*. As the D.C. Circuit recently explained when confronted with a similar challenge by Russia:

> Congress took the trouble to use different verbs in the separate prongs, and to define the phrase in the first prong. Russia wants us to turn that upside down and obliterate the distinction Congress drew. Moreover, we see no anomaly in applying the "commercial activity definition set forth in *§ 1603(d)*. . . . The substantiality requirement of *§ 1603(e)* [*37] is thus inapplicable.

Chabad, 528 F.3d at 947; *accord Cassirer, 616 F.3d at 1033 n.19* ("The second clause . . . is subject to the broader definition of 'commercial activity' in *§ 1603(d)*, which does not mention 'substantial contact.'").

Plaintiffs have pled--and defendants admit--that the Museums and the University (both agencies or instrumentalities of Hungary) are in possession of the pieces of the Herzog Collection identified in the Complaint. (Compl. ¶¶ 2, 15-20; Opp. at 45.) Moreover, "possession is sufficient to satisfy the 'owned or operated' requirement of *28 U.S.C. § 1605(a)(3)*." *Chabad, 729 F. Supp. 2d at 147*. Moreover, plaintiffs have established for jurisdictional purposes that the Museums and the University are engaged in "either a regular course of commercial conduct or a particular commercial transaction or act" in the United States as of the commencement of this action. *28 U.S.C. § 1603(d)*. Specifically, the Complaint alleges that the Museums and University have loaned art to museums located in the United States and received reciprocal benefits in exchange; encouraged United States tourism and allowed United States visitors to purchase admission tickets over the internet; [*38] published guidebooks in English featuring paintings from the Herzog Collection which are sold to visitors from the United States at the museum gift shop, which accepts U.S. credit cards; authored and promoted books and other publications about the paintings, and sold these books online through Amazon; accepted orders for printed reproductions of the paintings directly from U.S. residents and shipped those prints directly to the U.S.; engaged in tourist advertising in the U.S. (including promotional brochures that promote works comprising a portion of the Herzog collection); and with respect to the University, participated in student exchange programs and the United States Fulbright Program. (Compl. ¶¶ 32-33.) These examples are more than sufficient to amount to "commercial activity" for jurisdictional purposes under the FSIA. *See Chabad, 528 F.3d 934 at 948, 381 U.S. App. D.C. 316* (finding that contracts for the publishing and sale of documents and papers with U.S. publishing firms "easily satisf[ied]" the commercial activity requirement under *§ 1603(d)*); *Cassirer, 461 F. Supp. 2d at 1173-76* (state-owned Foundation alleged to have, *inter alia*, sold posters, books, and licensed reproductions of images in the [*39] U.S., shipped gift-shop items to U.S. purchasers, and placed advertisements in magazines distributed in the U.S.).

Given this showing that one of the FSIA exceptions applies, the Court concludes that it has subject matter jurisdiction over plaintiffs' claims. [4]

> 4 Plaintiffs also assert that this Court has jurisdiction under the FSIA's commercial activity exception, *28 U.S.C. § 1605(a)(2)*. (Compl. ¶ 35; Opp. at 38-42.) Because the Court finds that the expropriation exception applies, it need not address this argument.

III. 1973 AGREEMENT & CLAIMS SETTLEMENT COMMISSION

Defendant argues that plaintiffs' claims are governed by the 1973 Agreement, which they argue settled and precluded all claims for the "nationalization, compulsory liquidation, expropriation or other taking" of property between 1939 and 1973. (Mot. at 16.) As the FSIA was adopted "[s]ubject to existing international agreements to which the United States is a party at the time of the enactment of this Act [enacted Oct. 21, 1976]," *28 U.S.C § 1604*, defendants conclude that plaintiffs claims are barred and that this Court lacks jurisdiction. (Opp. at 21-28.)

In response, plaintiffs correctly point out that the 1973 Agreement was [*40] based on the concept of espousal, which is the process by which a state acts on behalf of its citizens to settle claims against another state on their behalf, and as a result, the United States may

only espouse claims by persons who were United States citizens at the time of their injury. *Dayton v. Czechoslovak Socialist Republic, 834 F.2d 203, 206, 266 U.S. App. D.C. 177 (D.C. Cir. 1987).*

Defendants counter that the 1973 Agreement lacks an explicit provision that only claims of U.S. nationals who were citizens at the time of the alleged taking are covered and extinguished by the Agreement, citing contract cases for the "well-settled principle of contract law, that the plain and unambiguous meaning of an instrument is controlling." (Reply at 7.) The 1973 Agreement, however, is an international treaty--not a private contract--and must be interpreted as such. While "[t]he interpretation of a treaty, like the interpretation of a statute, *begins* with its text," *Medellin v. Texas, 552 U.S. 491, 506, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008)* (emphasis added), a treaty is "'an agreement among sovereign powers,'" and as such courts may consider "the negotiation and drafting history of the treaty as well as 'the postratification understanding of signatory [*41] nations.'" *Id. at 507* (quoting *Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226, 116 S. Ct. 629, 133 L. Ed. 2d 596 (1996))*.

Both Hungary and the United States expressly recognized the inherent limitations on espousal authority during negotiations of the 1973 Agreement. (Opp. Benenati Decl. Ex. E at 238 (minutes of negotiations of 1973 Agreement in which Hungary's chief negotiator acknowledges (and the United States negotiator confirms) that the United States did not have standing to espouse claims on behalf of persons who were not U.S. citizens at the time their property was taken).) Moreover, the State Department clearly and consistently recognized this interpretation of the 1973 Agreement immediately after its execution. (Opp. Benenati Decl. Ex. H (1973 letter from State Department personnel explaining to a member of Congress that it is a "universally accepted principle of international law that a state does not have the right to ask another state to pay compensation to it for losses sustained by persons who were not its citizens at the time of loss"); *id.* Ex. G (1973 letter from State Department personnel to potential claimant explaining that "[u]nder customary international law, a state has standing to present [*42] a claim against another state only if the claim belongs to one of its nationals and it has been owned by the national from the date of its accrual to the date of settlement").) Indeed, in a 2002 letter, the State Department Office of the Legal Advisor stated:

> The [1973] Agreement settled and discharged certain claims against the Government of Hungary of U.S. nationals who were U.S. nationals at the time their claims arose. It did not settle or discharge claims of U.S. nationals who became U.S. nationals after their claims arose. This position has been conveyed consistently by the executive branch of the United States Government to Members of Congress and U.S. claimants. . . . Additionally, we communicated this view long ago to the Government of Hungary; subsequently, we were informed by the head of Hungary's domestic compensation program that it shared this interpretation and had administered its program in a manner consistent with this view.

(*Id.* Ex. F.) *See also Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184-85, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982)* ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled [*43] to great weight.") (citation omitted). Accordingly, even if the United States were able to settle and bar the claims of non-citizens, it is clear that this was not the interpretation ascribed to the Agreement by the United States or Hungary at any time before, during, or after its negotiation (at least until Hungary took such a position in connection with this case). Therefore, the 1973 Agreement can only settle and bar those of plaintiffs' claims that arose out of takings by Hungary between 1952 (the year Elizabeth Weiss de Csepel became a U.S. citizen) [5] and 1973.

> 5 Istaván Herzog, András Herzog, and their heirs were not American citizens at any point prior to 1973. (Opp. at 7, 45; Compl. ¶¶ 42, 63, 64.)

Plaintiffs assert that the 1973 Agreement cannot bar any of their claims because there was no such "taking" between 1952 and 1973. (Opp. at 45.) Any relevant "takings," they claim, occurred during the Holocaust and in 2008 when Hungary repudiated the demand of Martha Nierenberg for the return of the art, thereby breaching the bailment created after World War II. (Opp. at 45; Compl. ¶¶ 79, 94, 104, 107.) The only potential United States citizen who could have been covered by the 1973 [*44]

Agreement is Elizabeth Weiss de Csepel, and only then if there was a taking of her property between 1952 and 1973.

To the extent defendants argue that plaintiffs' art was taken pursuant to the 1954 Museum Decree, the Complaint alleges a substantial and nonfrivolous claim to the contrary. The 1954 Museum Decree applied to art that was in the custody of a Hungarian museum and whose owner was either unknown or had left the country without permission. (Opp. Lattman Decl. ¶ 32; Bánki Decl. Ex. C § 9(1).) Plaintiffs assert that neither of these conditions applies to Ms. Weiss de Csepel's art, as defendants "always knew who owned the items from the Herzog Collection that were in their possession, and Elizabeth Weiss de Csepel cannot be considered to have left the country without permission." (Opp. at 47; Opp Pasztory Decl. ¶¶ 11-12; Opp. Varga Decl. ¶¶ 12-15.)

Defendants argue that the claim filed by Elizabeth Weiss de Csepel with the Foreign Claims Settlement Commission under the First Hungarian Claims Program extinguished at least a portion of plaintiffs' claims here, given that the Commission ultimately awarded partial compensation to Ms. Weiss de Csepel for twelve works of art, "which were [*45] taken without compensation by the Government of Hungary" pursuant to the 1954 Museum Decree. (Mot. Ramirez Decl. Ex. C at 2.) Because the 1955 Claims Amendment (codified at *22 U.S.C. § 1641m*) provides that "[t]he action of the Commission in allowing or denying any claim under this title [*22 U.S.C. §§ 1641 et seq.*] shall be final and conclusive on all questions of law and fact and not subject to review . . . by any court," defendants conclude that this Court lacks jurisdiction to review plaintiffs' claims as to these twelve paintings.

Ms. Weiss de Csepel, however, was only partially compensated by the Commission, receiving a payment of just $169,827 for both the artwork and the confiscated real property. (Opp. Benenati Decl. Ex. D.) Therefore, the award from the Commission under the First Hungarian Claims Program did not prevent Ms. Weiss de Csepel from seeking additional recovery from Hungary, including restitution of the property itself. Section 313 of the 1955 Claims Amendment provided:

> Payment of any award made pursuant to section 303 or 305 shall not, unless such payment is for the full amount of the claim, as determined by the Commission to be valid, with respect to which the award [*46] is made, extinguish such claim, or be construed to have divested any claimant, or the United States on his behalf, of any rights against the appropriate foreign government or national for the unpaid balance of his claim *or for restitution of his property.*

Act of August 9, 1955, Pub. L. No. 84-285, 1955 U.S.C.C.A.N. (69 Stat. 570) 2745, 2748 (codified at *22 U.S.C. § 1641l*) (emphasis added). Plaintiffs are therefore not seeking to review or overturn "the action of the Commission in allowing or denying any claim," *22 U.S.C. §§ 1623(h)*, *1641m*, and accordingly, the 1955 Claims Amendment does not strip this Court of jurisdiction.

IV. FAILURE TO STATE A CLAIM

Defendants raise several challenges to plaintiffs' bailment claims pursuant to *Rule 12(b)(6)*. First, defendants assert that the 1947 Peace Treaty signed by Hungary cannot create private rights or provide for a private cause of action, such as an action for bailment, in the absence of express language providing for such an action in the treaty. (Reply at 12-13.) As the Peace Treaty does not contain such express language, defendants argue that "Plaintiffs' theory that the Peace Treaty purports to provide them with a private cause of action [*47] (bailment) against Hungary fails." (*Id.* at 13.) Plaintiffs' claims, however, do not depend on the existence of a bailment created by the Peace Treaty itself. Rather, the Complaint alleges breach of express and/or implied bailment agreements between defendants and the Herzog family. Specifically, the Complaint alleges:

> Hungary, the Museums and the University knew at all relevant times that the Herzog Heirs owned the Herzog Collection and that certain of the Herzog Heirs resided in the United States. Hungary, the Museums and the University arranged with representatives of the Herzog Heirs to retain possession of most of the Herzog Collection, including the art belonging to the U.S. Herzog Heirs, so that the works could continue to be displayed in Hungary. The post-war

> relationship between Hungary, the Museums, the University and the Herzog Heirs with respect to the Herzog Collection was in essence a bailment, whereby Defendants retained possession of the art and displayed it for financial fain in the Museums and the University.

(Compl. ¶ 36; *see also id.* ¶ 99 ("the Herzog Heirs and the representatives had no choice but to re-deliver possession, or to consent to Defendants' retention of [*48] possession of those portions of the Herzog Collection"); *id.* ¶¶ 70-73 (noting that defendants "recogniz[ed] the ownership rights of the Herzog Heirs to the Herzog Collection" and displayed the works "with labels acknowledging that they were 'on deposit,'" defendants "harassed and threatened" representatives of the Herzog family until they agreed to "return" the Herzog Collection to defendants and to allow the artwork to remain in the defendants' physical possession).

Therefore, while plaintiffs' bailment claim is *consistent* with Hungary's representations in the 1947 Peace Treaty (*see* Compl. ¶ 69 ("The 1947 Peace Treaty . . . confirmed that Hungary was to act solely as a custodian or trustee of looted or heirless property")), plaintiffs do not assert that the bailment was created by virtue of the Peace Treaty. [6]

> 6 Plaintiffs have been less than clear in maintaining this distinction. (*See* Opp. at 9 (referring to the "bailment relationship that Hungary agreed to in the 1947 Peace Treaty").) As plaintiffs have now clarified that they do not "rely upon or challenge the terms, conditions, or validity of the Peace Treaty," or "seek to claim directly under the Peace Treaty" (Surreply at 5), defendants' [*49] arguments (*see* Reply at 2-4) challenging their ability to do so are moot.

Defendants further suggest that plaintiffs' bailment theory fails as a matter of law. In the District of Columbia, a bailment requires delivery by the bailor, acceptance by the bailee, and a change of possession and control from one to the other. *Bernstein v. Noble, 487 A.2d 231, 234 (D.C. 1985).* Defendants suggest that because they *already possessed* the artwork at the time the bailments were allegedly created, no "change in possession and control" could have occurred at that time, thereby defeating the creation of a bailment. (Reply at 14.) Defendants' argument, however, lacks legal support. The cases cited by defendants stand for the unremarkable proposition that a change in possession and control is a necessary condition for the creation of a bailment. *See Black Beret Lounge & Restaurant v. Meisnere, 336 A.2d 532, 532 (D.C. 1975)* (no bailment where restaurant never had possession or control of coat left in an unattended cloakroom); *Dumlao v. Atlantic Garage, Inc., 259 A.2d 360, 362 (D.C. 1969)* (no bailment of property in automobile trunk where hotel had no knowledge of the trunk's contents). In other words, [*50] no bailment can be created where the bailee never possesses the property at all or does not know that he has accepted the property. These cases do not stand for the altogether different proposition that no bailment is created where the transfer of possession and control has *already occurred. See 8A Am. Jur. 2d Bailments § 40* (2011) (acknowledging existence of bailments arising "where the bailee is already in possession of the property"); *Hoffmann v. United States, 17 F. App'x 980, 989 (Fed. Cir. 2001)* (finding genuine issue of material fact as to the existence of an implied-in-fact bailment where property seized in 1945 and authorized Government officials subsequently made representations that it would be returned). Here, since defendants admit to possession of the artwork in question (Opp. at 45), it is undisputed that the requisite transfer of possession and control from the Herzog family to defendants has occurred.

Defendants also argue that plaintiff cannot show that Hungary consented to the creation of a bailment, a deficiency they claim is dispositive because a bailment is a form of contract requiring mutual consent of the parties. The assent of the parties to a bailment, however, [*51] may be implied from the conduct of the parties. *Hoffman v. United States, 266 F. Supp. 2d 27, 39 (D.D.C. 2003)* ("An implied-in-fact bailment contract with the Government is created if property is seized and there is 'a promise, representation or statement by an authorized [G]overnment official' that the seized property will be returned." (quoting *Ysasi v. Rivkind, 856 F.2d 1520, 1525 (Fed. Cir. 1988))* (internal quotation marks and citation omitted); *8A Am. Jur. 2d Bailments § 37* ("A contract of bailment may be implied from the circumstances of a transaction or from the words and acts of the parties evincing a purpose to enter into that relation toward the property."). In addition, the law recognizes a so-called "constructive bailment" or "quasi-bailment" under circumstances "where the person having possession of a chattel holds it under such circumstances that the law

imposes on him or her the obligation of delivering it to another," even without an explicit agreement between the bailor and the bailee. *Id.* § 12; *id.* § 2 ("A constructive bailee is a person who acquires possession of another's property by mistake or accident, or by force of circumstances under which the law imposes upon [*52] him or her the duties of a bailee."); *see also First American Bank, N.A. v. District of Columbia, 583 A.2d 993, 996-97 (D.C. 1990)* (finding quasi-bailment where District impounded illegally parked vehicle).

Here, plaintiffs have pled that defendants, while recognizing the ownership rights of the Herzog Heirs, exercised possession and control over the Herzog Collection in such a manner as to imply a bailment relationship. (*See* Compl. ¶¶ 36, 70-73, 99). In addition, plaintiffs charge that Hungary made public representations concerning Holocaust-looted property in the 1947 Peace Treaty that are consistent with plaintiffs bailment theory. (Compl. ¶ 69 ("The 1947 Peace Treaty among Hungary and the Allies confirmed that Hungary was to act solely as a custodian or trustee of looted or heirless property [and that] under no circumstances could Hungary itself possess any right, title or interest in the property.").) [7] Accordingly, plaintiffs' allegations are sufficient at this stage to state a claim for bailment. *See Rosner v. United States, 231 F. Supp. 2d 1202, 1214-15 (S.D. Fla. 2002)* (denying motion to dismiss claim for breach of implied-in-fact contract of bailment where government accepted [*53] possession of plaintiffs' property with the express knowledge that the property belonged to plaintiffs; never claimed to be the owner of the property; took possession of the property with the express intent of undertaking to return the property to its rightful owners; stored and guarded the property so that it could be returned to its rightful owners; and indicated, expressly and through applicable laws, that the property would be returned). [8]

7 As noted above (*see supra* note 4), the Court is not suggesting that the Peace Treaty itself created the alleged bailment. Rather, it serves as evidence of the relationship between the parties at that time.

8 Defendant has also moved to dismiss plaintiffs' additional claims for conversion, constructive trust, accounting, declaratory relief, and restitution based on unjust enrichment on the grounds that they are not independent causes of action, but rather are predicated on plaintiffs' bailment claim. (Reply at 16-18.) As the Court finds that the Complaint does state a claim for bailment, defendants' challenge to these additional claims must also be rejected.

V. FORUM NON CONVENIENS

Defendants argue that the Court should dismiss the action under the [*54] doctrine of forum non conveniens. In deciding forum non conveniens claims, the Court must first determine whether an adequate alternative forum for the dispute is available, and if so, whether a balancing of the private and public interest factors strongly favors dismissal. *See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255, 102 S. Ct. 252, 70 L. Ed. 2d 419 & n.22 (1981)*. 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, 67 S. Ct. 839, 91 L. Ed. 1055 (1947)* ("[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."); *TMR Energy Ltd. v. State Property Fund of Ukraine, 411 F.3d 296, 303, 366 U.S. App. D.C. 320 (D.C. Cir. 2005)*, and a determination under the doctrine is a discretionary one, *see Am. Dredging Co. v. Miller, 510 U.S. 443, 453, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994)*.

The burden is on the defendants to satisfy the threshold requirement of demonstrating the existence of an adequate alternate forum with jurisdiction over the case. *El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 677, 316 U.S. App. D.C. 86 (D.C. Cir. 1996)*. Defendants argue that Hungary is an adequate alternate forum, and at least two district courts in the past ten years have reached a similar conclusion. *See Moscovits v. Magyar Cukor Rt., 00-cv-0031, 2001 U.S. Dist. LEXIS 9252, at *14 (S.D.N.Y. June 29, 2001)* [*55] (granting motion to dismiss on forum non conveniens grounds because Hungary was an adequate alternative forum); *Dorfman v. Marriott Int'l Hotels, Inc., 99-cv-10396, 2001 U.S. Dist. LEXIS 642, at *23 (S.D.N.Y. Jan 26, 2001)* (noting that Hungary is an adequate forum). Hungarian courts demonstrably have jurisdiction to hear plaintiffs' claims, as evidenced by the Nierenberg litigation that occurred there between 1999 and 2008. Plaintiffs assert that the Hungarian courts cannot provide them with appropriate redress because, in their view, "Hungarian courts consider any claims to the Herzog Collection to be barred by the passage of time." (Opp. at 52.) As the opinion from the Nierenberg litigation makes clear, however, the Hungarian courts have not taken a uniform position with

regard to all Holocaust-era artwork, or even as to the entire Herzog Collection. Rather, the Metropolitan Appellate Court (as well as the lower Hungarian courts) analyzed plaintiffs' claim to each piece of art separately, taking account of the particular factual circumstances and history surrounding each painting before arriving [*56] at its decision. (*See* Mot. Bánki Decl. Ex. M.) Having already lost their case in Hungary as to the eleven pieces of art at issue there, plaintiffs may well be justified in their belief that they would lose a similar case regarding the rest of the Herzog Collection. But a foreign forum "is not inadequate merely because it has less favorable substantive law." *El-Fadl, 75 F.3d at 678*.

Assuming, therefore, that Hungary is an adequate alternative forum, the Court nevertheless concludes that defendants have failed to show that the balance of private and public factors favors dismissal in this case. The relevant private interest factors are: (1) "relative ease of access to sources of proof"; (2) "availability of compulsory process for attendance of unwilling" witnesses; (3) cost of attendance of witnesses; (4) enforceability of a judgment, if obtained; and (5) "other practical problems that make trial of a case easy, expeditious and inexpensive." *Am Dredging, 510 U.S. at 448* (citing *Gulf Oil, 330 U.S. at 508*). Relevant public interest factors include: (1) the preference for deciding local controversies at home, and conversely (2) the preference for resolving significant issues in a more central [*57] forum; (3) in diversity cases, the familiarity of the forum with applicable state law; and (4) the burden of jury duty on citizens of a forum unrelated to the case. *Id. at 448-49* (citing *Gulf Oil, 330 U.S. at 508-09*).

As to the private interest factors, Hungary maintains that as the events at issue in this action took place in Hungary, any relevant witnesses that are still alive are most likely located in Hungary and speak Hungarian or Magyar as their first language. (Mot. at 42.) In addition, Hungary notes that it is "a democratic nation, recognized member of the European Union, and is the [former] president of the European Union," and thus "it cannot be reasonably asserted that Plaintiffs (or their predecessors) could not receive a fair trial in that country." (*Id.*) Plaintiffs counter that many relevant witnesses?namely, plaintiffs themselves as well as Martha Nierenberg--all live outside Hungary. Language concerns, therefore, do not shift the balance in favor of Hungary, as relevant depositions and documents would require translation regardless of where this matter is heard. *See Chabad, 466 F. Supp. 2d at 29* (rejecting cost of translating documents as a significant factor where documents [*58] would require translation regardless of forum). In addition, plaintiffs note that the Court has the power to attach Hungary's property in the United States in aid of executing any judgment rendered under the FSIA. *See 28 U.S.C. § 1610(a)(3)*, *(b)(2)*. Thus, as to the private factors, it cannot be concluded that they favor dismissal.

As for the public factors, Hungary argues that Hungarian courts have an interest in having local controversies decided at home and are better able to interpret and apply both current and historical Hungarian laws as they apply to plaintiffs' claims. (Mot. at 42; Reply at 38.) This showing by Hungary does little more than state the public interest factors, and falls far short of demonstrating that the "strong presumption" in favor of plaintiffs' choice of forum should be disturbed. *Piper Aircraft, 454 U.S. at 255*. This Court is a designated forum for all actions brought under the FSIA, *see 28 U.S.C. § 1391(f)(4)*, and is familiar with the issues of law presented by such a case. *See, e.g., Chabad, 466 F. Supp. 2d 6*. Moreover, "there is a public interest in resolving issues of significant impact in a more central forum, such as this one." *Id. at 29-30* (citing *Gulf Oil, 330 U.S. at 509*). [*59] As this is not a diversity case, but one implicating matters of international law, either Hungary or the United States may have to deal with foreign legal concepts. *See Gulf Oil, 330 U.S. at 509*. Finally, the Court notes that there is no burden on potential jurors, as jury trials are not available in suits brought under the FSIA. *Chabad, 466 F. Supp. 2d at 30*.

For all of these reasons, the Court denies defendants' motion to dismiss on forum non conveniens grounds.

VI. STATUTE OF LIMITATIONS

Defendants argue that plaintiffs' claims are barred by the applicable statute of limitations. Motions to dismiss "based on a limitations defense are disfavored because resolution generally requires the development of a record and the adjudication of factual issues." *Malewicz v. City of Amsterdam, 517 F. Supp. 2d 322, 335 (D.D.C. 2007)* (citing *Richards v. Mileski, 662 F.2d 65, 73 n.13, 213 U.S. App. D.C. 220 (D.C. Cir. 1981)*. "Dismissal on statute of limitations grounds is only appropriate when the complaint establishes the defense on its face." *Id.*

The statute of limitations at issue here is the District of Columbia's three-year statute for claims relating to

"the [*60] recovery of personal property or damages for its unlawful detention." *D.C. Code § 12-301(2)*; *Gilson v. Republic of Ireland, 682 F.2d 1022, 1025 n.7, 221 U.S. App. D.C. 73 (D.C. Cir. 1982)* ("The applicable statute of limitations [in a FSIA case] is determined by the local law of the forum."). The District of Columbia followed the "discovery rule," which provides that a cause of action accrues "when the plaintiff knows or through the exercise of due diligence should have known of the injury." *District of Columbia v. Dunmore, 662 A.2d 1356, 1359 (D.C. 1995)*. Here, plaintiffs' claims are based on the repudiation of bailments created at the end of World War II. Accordingly, "a claim for conversion accrues when the plaintiff demands the return of the property and the defendant refuses, or when the defendant takes some action that a reasonable person would understand to be either an act of conversion or inconsistent with a bailment." *Malewicz, 517 F. Supp 2d. at 335* (citing *In re McCagg, 450 A.2d 414, 416 (D.C. 1982))*.

Defendants claim that numerous events have transpired since the end of World War II that have triggered the three-year statute of limitations, including Elizabeth Weiss de Csepel's claim before the [*61] Foreign Claims Settlement Commission in 1959, plaintiffs' learning that "many pieces of the Herzog collection were being openly exhibited" in Hungary (Compl. ¶ 77), Ms. Weiss de Csepel's death in 1992 (Compl. ¶¶ 78, 79), and the filing of the Nierenberg litigation in Hungary in 1999. Thus, at the very least, Hungary argues, the statute of limitations expired in October 2002, three years after Ms. Nierenberg filed suit in Hungary following the collapse of negotiations between plaintiffs and the Hungarian government.

In response, plaintiffs assert that Ms. Weiss de Csepel was mistaken in her belief in the late 1950s that Hungary had nationalized a portion of the Herzog Collection pursuant to the 1954 Museum Decree because plaintiffs were unable to obtain accurate information as to what had become of the Collection during the Communist era. (Compl. ¶¶ 75, 93.) Moreover, defendants have failed to point to actions of the *defendants* (as opposed to Ms. Weiss de Csepel) in the late 1950s with respect to the Herzog Collection "that a reasonable person would understand to be either an act of conversion or inconsistent with a bailment." *See Malewicz, 517 F. Supp 2d. at 335*.

In any event, plaintiffs [*62] assert that their claims should be equitably tolled during the Communist era. A statute of limitations may be equitably tolled "when the plaintiff 'despite all due diligence . . . is unable to obtain vital information bearing on the existence of his claim.'" *Chung v. U.S. Dept. of Justice, 333 F.3d 273, 278-79, 357 U.S. App. D.C. 152 (D.C. Cir. 2003)* (quoting *Currier v. Radio Free Europe, 159 F.3d 1363, 1367, 333 U.S. App. D.C. 50 (D.C. Cir. 1998)* (alteration in original). The Complaint alleges precisely this--that plaintiffs were unable to obtain information about the fate of the Herzog Collection during the Communist era and would not have been able to obtain relief even had they obtained such information, given that Hungary did not have an independent judiciary (or even recognize most individual property rights) during this period. (Compl. ¶¶ 75, 76, 93.)

Although plaintiffs may have learned additional information concerning the whereabouts of the Herzog Collection between 1989 and 1999, plaintiffs argue that their bailment action had not yet accrued at this time. "Where a demand and refusal are relied on to show a conversion, the refusal must be absolute and unconditional . . . . A refusal which is not absolute, but is qualified [*63] by certain conditions which are reasonable and justifiable . . . is not a sufficient basis for a conversion action." *Malewicz, 517 F. Supp 2d. at 335* (citing 90 C.J.S Trover & Conversion § 45 (2006)); *see also Restatement (Second) of Torts § 240* ("[O]ne in possession of a chattel who is in reasonable doubt as to the right of a claimant to its immediate possession does not become a converter by making a qualified refusal to surrender the chattel to the claimant for the purpose of affording a reasonable opportunity to inquire into such right.").

The Complaint alleges that the Herzog Heirs "promptly commenced negotiations with the Hungarian government following the collapse of Communism in 1989" (Compl. ¶ 94), and that these negotiations continued until Ms. Nierenberg filed suit in Hungary in 1999. (Compl. ¶¶ 77-79.) Moreover, the Complaint further states that "for years, Hungary actively misled the Herzog Heirs into believing that it accepted their ownership rights to the Herzog Collection, was giving their claims serious consideration, and repeatedly advised them that it would reach a favorable decision, at which time they could decide if any further action would be required." (Compl. [*64] ¶ 94.) Assuming plaintiffs can establish these facts, plaintiffs' bailment action could not

have arisen during the period in which they were engaged in good-faith negotiations with the Hungarian government, as defendants had not yet "absolutely and unconditionally" refused plaintiffs' demand for return of the Collection.

Finally, plaintiffs suggest that their claims should be tolled during the pendency of the Nierenberg litigation. While the District of Columbia has no provision automatically tolling the applicable statutes of limitation during the pendency of actions in foreign courts, plaintiffs argue that the claims should be equitably tolled during this period. (Opp. at 60-61.) As the Court has noted previously in the administrative context, in certain circumstances it may be "appropriate to equitably toll statutes of limitations under D.C. law where claimants first sought to exhaust their available administrative remedies." *Owens v. District of Columbia, 631 F. Supp. 2d 48, 57 (D.D.C. 2009)*; *accord Pettaway v. Teachers Ins. & Annuity Ass'n of Am., 547 F. Supp. 2d 1, 5-6 (D.D.C. 2008)* (finding "good cause to equitably toll the District of Columbia's three-year statute of limitations" [*65] for plaintiff's ERISA claim because she pursued her rights diligently through mandatory channels for exhausting administrative remedies); *Waldau v. Coughlin*, No. 95-1151, 1996 WL 312197, at *9 (D.D.C. June 3, 1996) (concluding that plaintiff's efforts to administratively exhaust claims through Merits Systems Protective Board tolled statute of limitations for *Bivens* claims under D.C. law); *cf. Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 844, 224 U.S. App. D.C. 272 & n.8 (D.C. Cir. 1982)* (rejecting laches defense where delay in filing suit resulted from exhausting administrative remedies because, *inter alia*, "it would be an injustice to unsuccessful bidders [on government procurement contracts] if we now penalized them merely for exhausting those administrative remedies" and because plaintiff's "many attempts to receive administrative relief served to put the government on notice that [plaintiff] was not sleeping on its rights").

Defendants cite several cases which stand for the proposition that the District of Columbia does not automatically toll statutes of limitations where a plaintiff mistakes her remedy by filing in the wrong venue or otherwise commits procedural error. *See Carter v. Wash. Metro. Area Transit Auth., 764 F.2d 854, 857, 246 U.S. App. D.C. 221 (D.C. Cir. 1985)*. [*66] But even defendants do not claim the plaintiff erred by litigating this matter in Hungary before filing here. Rather, defendants allege that plaintiffs were *required* to exhaust their remedies in Hungary prior to filing suit here (Mot. at 17 n.15 & 18), a fact that, if anything, supports plaintiffs' plea for equitable tolling. In addition, to the extent that Hungary made representations during the Nierenberg litigation "that it would reach a favorable decision, at which time they could decide if any further action would be required" (Compl. ¶ 94), this could serve as additional evidence to support equitable tolling. *See Young v. United States, 535 U.S. 43, 50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002)* (equitable tolling permitted in situations "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass").

The Court therefore concludes that the Complaint states fact which, if true, could support a finding that this action is timely. Accordingly, the Court declines to resolve this issue on a motion to dismiss.

VII. ACT OF STATE DOCTRINE

Hungary invokes the act of state doctrine, which "'precludes the courts of this country from inquiring into the validity of public [*67] acts of a recognized foreign sovereign power committed within its own territory.'" *World Wide Minerals v. Republic of Kazakhstan, 296 F.3d 1154, 1164, 353 U.S. App. D.C. 147 (D.C. Cir. 2002)* (quoting *Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964))*. The doctrine rests on the view that such judgments might hinder the conduct of foreign relations by the branches of government empowered to make and execute foreign policy, *Sabbatino, 376 U.S. at 423-25*, and applies whenever either "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 405, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990)*. The act of state doctrine "'is not a jurisdictional limit on courts,'" *Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 707 (9th Cir. 1992)* (quoting *Liu v. Republic of China, 892 F.2d 1419, 1431 (9th Cir. 1989))*, and a motion to dismiss based on the act of state doctrine is therefore properly considered under *Rule 12(b)(6)*, not *Rule 12(b)(1)*. In order to dismiss a complaint under *Rule 12(b)(6)* based on the act of state doctrine, the Court "must be satisfied that there is no set of [*68] facts favorable to the plaintiffs and suggested by the complaint which could fail to establish the occurrence

of an act of state." *Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1534, 240 U.S. App. D.C. 363 (D.C. Cir. 1984)*, *rev'd on other grounds*, *471 U.S. 1113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985)*.

The "key question" in determining whether the act of state doctrine applies, is "whether the act in question is truly a *sovereign* act--that is, an act '*jure imperii*,' an act that is taken 'by right of sovereignty.'" *Malewicz, 517 F. Supp. 2d at 338* (quoting *Black's Law Dictionary* 854 (7th ed. 1999)). By contrast, "purely commercial" acts do not require deference under the act of state doctrine. *Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976)*

As an initial matter, plaintiffs' primary claim for bailment does not implicate the act of state doctrine. Plaintiffs allege that they entered into a series of bailment agreements with defendants after World War II, and that defendants have breached these bailments by refusing to return the property. The actions challenged by plaintiffs, therefore, are not "sovereign acts," but rather *commercial* acts that could be committed by any private university or museum. Such "purely [*69] commercial" acts do not require deference under the act of state doctrine. *Id.* (repudiation of debts a "purely commercial act"); *see Malewicz, 362 F. Supp. 2d at 314* ("There is nothing 'sovereign' about the act of lending art pieces, even though the pieces themselves might belong to a sovereign.")

The question of jurisdiction under the FSIA (*see supra* Part II), requires this Court to determine whether the Herzog Collection was taken in violation of international law, a question that may implicate the act of state doctrine. *See Sabbatino, 376 U.S. at 428* ("[T]he [Judicial Branch] will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit . . . even if the complaint alleges that the taking violates customary international law.")

To the extent the Court is being asked to pass judgment on the acts of a foreign sovereign, however, the sovereigns involved are Nazi Germany and their allies in the World War II-era Hungarian government. Confronted by similar facts, courts have consistently held that the act of state doctrine does not apply to the Nazi taking of Jewish property during [*70] the Holocaust. *See Chabad, 466 F. Supp 2d at 26* (declaring such takings "manifestly illegal"); *Bodner v. 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 Act of State doctrine wholly inapplicable to this case."). There is no reason to apply a different standard to the actions taken by Hungary toward its Jewish population during World War II. (*See* Compl. ¶¶ 54-57; Opp. Lattmann Decl. ¶¶ 4-18.) Moreover, the balance of factors weighs against applying the act of state doctrine where "the government which perpetuated the challenged act of state is no longer in existence." *Sabbatino, 376 U.S. at 428*. Thus, it will not be invoked here.

VIII. POLITICAL QUESTION DOCTRINE

With the exception of a single footnote that cited no supporting authority (Opp. at 25 n.19), defendants failed to raise their argument for dismissing this case on political question grounds until their reply brief, where they devote more than nine pages to the issue. This is plainly insufficient under this Circuit's precedents. *See Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 93 n.3, 351 U.S. App. D.C. 214 (D.C. Cir. 2002)* ("a footnote [*71] at the end of their opening brief does not suffice" to raise a claim on appeal); *Hutchins v. District of Columbia, 188 F.3d 531, 539 n.3, 338 U.S. App. D.C. 11 (D.C. Cir. 1999)* ("We need not consider cursory arguments made only in a footnote."); *Bean Dredging, LLC v. United States, 773 F. Supp. 2d 63, 2011 U.S. Dist. LEXIS 32966, at *14 n.5 (D.D.C. Mar. 29, 2011)* (same).

But even if the Court were to consider this argument, it would reject it. 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, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)*.

Defendants argument that plaintiffs' claims have been committed to the Executive branch are based entirely on the notion that plaintiffs' claims are addressed and settled by the 1947 Peace Treaty and the 1973 Agreement between Hungary and the United States. (Reply at 20-24.) Plaintiffs' claims, according to defendants, disrupt the Executive branch's determination that Hungarian claims should be settled through the Foreign Claims Settlement Commission and call into question the "sufficiency of the[se] compensation [*72] schemes." This argument is meritless. 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. See supra* Part III. Nor do plaintiffs' claims require the Court to, as defendants would have it, "evaluate the U.S. foreign policy as well as the sufficiency of the compensation schemes put in place by the United States, other United Nations, and Hungary." (Reply at 24.) Rather, they charge that Hungary has breached certain agreements regarding specific artwork in a manner that does not implicate existing international compensatory frameworks at all. As such, plaintiffs' claims do not implicate separation-of-powers concerns that would justify invocation of the political question doctrine.

IX. INTERNATIONAL COMITY

Finally, defendants assert that plaintiffs' claims are barred by the doctrine of international comity, and ask that this Court respect the prior judgment of the Hungarian courts in the Nierenberg litigation by dismissing this case. (Mot. at 52-56.)

Unlike domestic judgments, foreign judgments are not automatically entitled to preclusive effect in United States courts. *Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895).* [*73] Instead, "the theory often used to account for the *res judicata* effects of foreign judgments is that of comity." *In re Arbitration Between Int'l Bechtel Co. & Dep't of Civ. Aviation of the Gov't of Dubai, 300 F. Supp. 2d 112, 117 (D.D.C. 2004)*; *see also Hilton, 159 U.S. at 164*. Under the doctrine of international comity, "the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or on appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact" if

> there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect . . . .

Id. at 202.

The judgment in the [*74] Nierenberg litigation involved the claims of only a single plaintiff, Martha Nierenberg, and applied only to eleven paintings claimed to be solely owned by her and known to be in the custody of defendants. The instant matter involves two additional plaintiffs (in addition to Ms. Nierenberg's son), two additional defendants (the Museum of Applied Arts and the University), and over 40 pieces of art, most of which were not at issue in the Nierenberg litigation. Consequently, the Nierenberg litigation cannot have preclusive effect as to the pieces of artwork not at issue in that litigation. *Drake v. FAA, 291 F.3d 59, 66, 351 U.S. App. D.C. 409 (D.C. Cir. 2002)* ("a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies *based on the same cause of action*") (emphasis added).

As for plaintiffs' claim for the return of the eleven artworks at issue in the Nierenberg litigation, the Court will grant defendants' motion to dismiss on comity grounds. "[T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts" unless the foreign judgment is somehow "contrary to . . . crucial public policies." *Laker Airways Ltd. V. Sabena, Belgian World Airlines, 731 F.2d 909, 931, 937, 235 U.S. App. D.C. 207 (D.C. Cir. 1984).* [*75] Ms. Nierenberg litigated her claim to twelve pieces of the Herzog Collection in Hungary for over eight years, asserting causes of action similar to those set forth here. The Nierenberg litigation resulted in the return of one piece of artwork and a lower court judgment for the return of ten others. (Opp. Varga Decl. ¶¶ 7-8, Ex. A.) This decision was ultimately overturned by the Metropolitan Court of Appeals in a sixteen-page decision that examined the factual circumstances surrounding each of the eleven paintings still at issue. (Mot. Bánki Decl., Ex. M.) The Metropolitan Court of Appeals ultimately determined that Ms. Nierenberg's claim had been extinguished by the 1973 Agreement, and that additional defendants had acquired title through adverse possession. (*Id.*)

Plaintiffs charge that the Hungarian courts "improperly held that the 1973 Agreement covered

takings" that were plainly outside its scope, thereby violating the "strong public interest" of the United States "in ensuring that its executive agreements . . . are interpreted correctly. (Opp. at 70.) Plaintiffs further allege that Hungary "has a long history of avoiding accepting responsibility for its acts of genocide during World [*76] War II and has consistently avoided any meaningful attempt to restitute property--and especially art--belonging to Hungarian Jews." This is precisely the type of "mere assertion" by a party that a foreign judgment "was erroneous in law or in fact" that the Supreme Court has held *may not* be grounds for declining to respect the results of foreign judgments. *Hilton, 159 U.S. at 202*. Plaintiffs do not assert, as they must, that there has not been an "opportunity for a full and fair trial" in Hungary "before a court of competent jurisdiction, conducting the trial upon regular proceedings." *Id.* Defendants appeared in the prior case, and plaintiffs have not charged that Hungary's judiciary is unable "to secure an impartial administration of justice" in actions against the Hungarian government or its agencies or instrumentalities. *Id.* Moreover, the record is devoid of evidence of "either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect." *Id.*

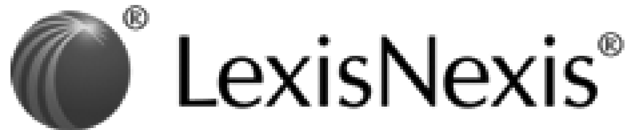
CONCLUSION

For the foregoing reasons, defendants' Motion to Dismiss is granted as to plaintiffs' claims [*77] to the eleven pieces of artwork at issue in the Nierenberg litigation but denied in all other respects.

/s/ ELLEN SEGAL HUVELLE

United States District Judge

Date: September 1, 2011



THE DETROIT INSTITUTE OF ARTS on behalf of itself and the CITY OF DETROIT, MICHIGAN, Plaintiff and Counter-Defendant, v. CLAUDE GEORGE ULLIN, et al., Defendants and Counter-Plaintiffs.

CASE NO. 06-10333

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2007 U.S. Dist. LEXIS 28364

March 31, 2007, Decided

COUNSEL: [*1] For Detroit Institute of Arts, Detroit, City of, Plaintiffs: Alan S. Schwartz, LEAD ATTORNEY, Joshua F. Opperer, LEAD ATTORNEY, Mark A. Stern, LEAD ATTORNEY, Honigman, Miller, (Detroit), Detroit, MI; Thaddeus J. Stauber, LEAD ATTORNEY, Nixon Peabody (Los Angeles), Los Angeles, CA.

For Claude George Ullin, Albert Henry Ullin, Peggy Dreyfus-Kaufman, Christopher Georges Dreyfus, Dominic Georges Dreyfus, Coralie Cowper, formerly known as Caorlie Eve Dreyfus, Brigitte Bernard-Salin, Elizabeth Cronk Salin, Francois Birman, Isabelle Williams, Stephane Birmant, Brigitte Amzalac, Defendants: Steven G. Silverman, LEAD ATTORNEY, Gross, Nemeth, (Detroit), Detroit, MI.

For Claude George Ullin, Albert Henry Ullin, Peggy Dreyfus-Kaufman, Maria Gantner-Dreyfus, Christopher Georges Dreyfus, Dominic Georges Dreyfus, Coralie Cowper, Brigitte Bernard-Salin, Elizabeth Cronk Salin, Janine Birmant, Francois Birman, Isabelle Williams, Stephane Birmant, Daniele Diamant-Berger, Brigitte Amzalac, Counter Claimants: Steven G. Silverman, LEAD ATTORNEY, Gross, Nemeth, (Detroit), Detroit, MI.

JUDGES: DENISE PAGE HOOD, United States District Judge.

OPINION BY: DENISE PAGE HOOD

OPINION

MEMORANDUM OPINION AND ORDER

[*2] **I. INTRODUCTION**

This matter is before the Court on Plaintiff/Counter-Defendant The Detroit Institute of Arts' Motion to Dismiss Counterclaims, filed on June 19, 2006. On August 8, 2006, Defendants/Counter-Plaintiffs filed a Brief in Opposition to Plaintiff/Counter-Defendant's Motion to Dismiss. Oral argument was heard on September 13, 2006.

Plaintiff/Counter-Defendant, The Detroit Institute of Arts, a private non-profit corporation operating as a museum open to the public, brought the present quiet title action pursuant to *28 U.S.C. § 1332* and *§ 1655*, requesting declaratory and injunctive relief, against Defendants/Counter-Plaintiffs, who are the heirs of Martha Nathan, a prior owner of the Painting. [1] On April 27, 2006, Defendants/Counter-Plaintiffs filed Counterclaims against Plaintiff/Counter-Defendant DIA for declaratory judgment, restitution, and conversion.

1 Defendants/Counter-Plaintiffs include: Claude George Ullin, Albert Henry Ullin, Peggy

Dreyfus-Kaufman, Christopher Georges Dreyfus, Dominic Georges Dreyfus, Coralie Cowper F/K/A Coralie Eve Dreyfus, Brigitte Bernard-Salin, Elizabeth Cronk Salin, Francois Birman, Isabelle Williams, Stephanie Birmant, and Brigitte Amzalac (Defendants/Counter-Plaintiffs).

[*3] DIA has moved to dismiss Defendants/Counter-Plaintiffs' Counterclaims because the Michigan statute of limitations bars Defendants/Counter-Plaintiffs' claim to the Painting since they did not raise their claim until 2004, sixty-six years after its original sale in 1938. Also, Defendants/Counter-Plaintiffs are barred from asserting their claims under the doctrine of laches because Defendants/Counter-Plaintiffs unreasonably delayed asserting a claim to the Painting.

II. STATEMENT OF FACTS

The instant matter arises out of a dispute as to the ownership of a painting by Vincent Van Gogh, entitled *Les Becheurs* (The Diggers)(1889) (the "Painting"). Plaintiff/Counter-Defendant has had continuous ownership of the Painting since 1969, when DIA received it as a bequest from art collector, Robert H. Tannahill. Defendants/Counter-Plaintiffs are the heirs of Martha Nathan, the prior owner of the Painting who was a Jewish woman born in Frankfurt am Main, Germany. Mrs. Nathan was married to a prominent art collector, Hugo Nathan. Upon Mr. Nathan's death in 1922, Mrs. Nathan inherited numerous artworks, including the Painting. Mr. Nathan expressly indicated in a codicil to his will [*4] that he was bequeathing his artworks to Mrs. Nathan in anticipation that she would sell some of the artworks to meet her financial needs. In 1938, Mrs. Nathan sold the painting to a group of European Art dealers, who in turn, sold the Painting to Mr. Tannahill.

In February 1937, Mrs. Nathan left Germany in order to escape Nazi persecution, moved to Paris, France and obtained French citizenship. In May 1938, Mrs. Nathan returned to Germany to sell her home. The Nazi government made her turn over six paintings in her home to the Staedel Art Institute, none of which included the Painting. In August 1938, she moved her household goods from Germany to France, placing them in storage. [2] Prior to December 1938, she moved some of her artworks, including the Painting, to Basel, Switzerland. On December 14, 1938, a year and a half after living in France and before the German occupation of France, Mrs. Nathan sold some of her artwork, including the Painting, then located in Basel, Switzerland, to three prominent European art dealers. [3] Two of the art dealers, Justin Thannhauser and Alexander Ball, knew of, and had been familiar with Mrs. Nathan for many years as they were German Jews, whose [*5] families owned art galleries in Germany and who also left Germany to escape Nazi persecution. The other art dealer, George Wildenstein, was also Jewish, but not German. Mrs. Nathan sold the painting to the three men for 40,920 Swiss Francs (approximately U.S. $ 9,360).

2 These goods were eventually confiscated by the Nazi regime in June 1942.

3 Defendants/Counter-Plaintiffs deny that a sale occurred.

Following World War II, and the fall of the Nazi regime, Mrs. Nathan pursued and succeeded in obtaining restitution and damages for wartime losses that were a result of Nazi persecution. She successfully obtained compensation for an exit tax the Nazi government required her to pay when she originally left Germany, the sale of her home which was deemed to be for less than fair market value, the six paintings she was required to turn over to the Staedel Art Institute, and the household items that were confiscated by the Nazi regime. At no time did Mrs. Nathan pursue restitution or damages for the Painting.

[*6] Upon her death in 1958, Mrs. Nathan's brother, Willy Dreyfus, co-executor of her estate protected her estate's interests up until his death in 1977. Willy Dreyfus also sought compensation for his family's wartime losses, filing an action in U.S. Federal court in 1973.

In 1999, the American Association of Museums adopted the Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era. Pursuant to these guidelines, DIA posted on its website artwork having a Nazi-era provenance, including the Painting. Defendants/Counter-Plaintiffs contacted DIA in May 2004, asserting a claim of ownership. After investigating the provenance of the artwork, Plaintiff/Counter-Defendant contacted Defendants/Counter-Plaintiffs informing them that it had rejected their claim of ownership.

III. APPLICABLE LAW & ANALYSIS

A. Standard of Review

Federal Rules of Civil Procedure 12(b)(6) provides for a motion to dismiss for failure to state a claim upon which relief can be granted. This type of motion tests the legal sufficiency of the plaintiffs Complaint. *Davey v. Tomlinson, 627 F. Supp. 1458, 1463 (E.D. Mich. 1986).* [*7] A court takes the factual allegations in the Complaint as true when evaluating the propriety of dismissal under *Fed. R. Civ. P. 12(b)(6)*. *Ziegler v. IBP Hog Market, Inc., 249 F.3d 509, 512 (6th Cir. 2001)*; *Hoeberling v. Nolan, 49 F. Supp.2d 575, 577 (E.D. Mich. 1999)*. Further, the court construes the complaint in the light most favorable to the plaintiff, and determines whether it is beyond a doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Varljen v. Cleveland Gear Co., Inc., 250 F.3d 426, 429 (6th Cir. 2001).*

B. Plaintiff/Counter-Defendants' Motion to Dismiss Counterclaims

This Court must apply the choice of law rules of the forum state in which it sits. *Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. "Under Michigan's common law choice of law rule, statutes of limitation are considered procedural and are governed by the law of the forum." *Johnson v. Ventra Group, Inc., 191 F. 3d 732, 746 (6th Cir. 1999).* As such, Defendants/Counter-Plaintiffs' claims for restitution [*8] and conversion are governed by *MICH. COMP. LAWS § 600.5805*. Under this statute, Defendants/Counter-Plaintiffs were required to bring their cause of action for injuries to property within three years of the date on which the claim first accrued. *See MICH. COMP. LAWS § 600.5805(10).*

"A conversion is committed when dominion is wrongfully asserted over another's property. Therefore, the statute on a claim for conversion would not start to run until the date when dominion is asserted." *Miller v. Green, 37 Mich. App. 132, 138, 194 N.W.2d 491*; *37 Mich. App. 132, 194 N.W.2d 491 (1971)*. Claims for the recovery of personal property accrue "at the time the wrong upon which the claim is based was done regardless of the time when damage results." *MICH. COMP. LAWS § 600.5827*. "If the discovery rule is applied, . . . the period of limitations does not begin to run until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, that he had a possible cause of action." *Brennan v. Edward D. Jones & Co., 245 Mich. App. 156, 159, 626 N.W.2d 917*; *245 Mich. App. 156, 626 N.W.2d 917 (2001).* [*9] Plaintiff/Counter-Defendant DIA argues that Michigan does not apply the discovery rule to toll the statute of limitations for conversion claims. Plaintiff/Counter-Defendant cites *John Hancock Financial Services, Inc. v. Old Kent Bank, 185 F. Supp. 2d 771, 779-80 (E.D. Mich. 2002)* in support of this proposition. However, *John Hancock* states that the discovery rule does not apply to toll the statute of limitations for conversion claims involving negotiable instruments. Id. (Emphasis added). Notwithstanding this fact, Plaintiff/Counter-Defendant is correct that the discovery rule is inapplicable to the facts in this matter. In *Brennan,* the Michigan Court of Appeals stated that,

> [t]he strong public policies favoring finality in commercial transactions, protecting a defendant from stale claims, and requiring a plaintiff to diligently pursue his claim outweigh the prejudice to plaintiffs and militate against applying a discovery rule in the context of commercial conversion cases.

Brennan, 245 Mich. App. at 160. As such, Defendants/Counter-Plaintiffs' Counterclaims accrued on the date that Mrs. Nathan sold the Painting to the [*10] three European art dealers in 1938. In other words, their claim accrued in 1938, the date of the alleged wrong giving rise to Defendants/Counter-Plaintiffs Counterclaims.

Even if this Court were to apply the discovery rule to Defendants/Counter Plaintiffs' Counterclaims, this would not save the Counterclaims from being barred by the statute of limitations. In 1973, the executor of Mrs. Nathan's estate made claims in addition to those previously asserted by Mrs. Nathan, for his families wartime losses. At this point, Mrs. Nathan's heirs, "through the exercise of reasonable diligence should have discovered" that they had a possible cause of action to recover the Painting.

In regard to Defendants/Counter-Plaintiffs' Counterclaim for declaratory judgment, the Sixth Circuit has stated that "[b]ecause a declaratory judgment action is a procedural device used to vindicate substantive rights, it is time-barred only if relief on a direct claim would be barred." *International Ass'n of Machinists and Aerospace Workers v. Tennessee Valley Authority, 108 F.*

3d 658, 668 (6th Cir. 1997). As such, Defendants/Counter-Plaintiffs' Counterclaim that seeks declaratory relief is likewise [*11] barred because the underlying substantive claims of conversion and restitution are barred by Michigan's three-year statute of limitations.

Defendants/Counter-Plaintiffs assert that Plaintiff/Counter-Defendant voluntarily waived its statute of limitations defense by adopting the American Association of Museum Guidelines and posting the Painting on its website. Defendants/Counter-Plaintiffs argue that by posting the Painting on its website, Plaintiff/Counter-Defendant made a general invitation to the public to come forward and make a claim of ownership. Defendants/Counter-Plaintiffs further assert that their Counterclaims accrued when Plaintiff/Counter-Defendant rejected their claim to ownership of the Painting in 2005. As such, their Counterclaims were filed within the applicable three year statute of limitations. This argument is without merit.

Under Michigan law, a waiver is an "intentional abandonment of a known right." *Roberts v. Mecosta Co. Hospital, 466 Mich. 57, 64, 642 N.W.2d 663*; *466 Mich. 57, 642 N.W. 2d 663 (2002).* It is clear that by adopting the Guidelines, Plaintiff/Counter-Defendant was not intentionally waiving its right to assert any defenses it may be entitled to. [*12] The Guidelines specifically state that they "are intended to assist museums in addressing issues relating to objects that may have been unlawfully appropriated during the Nazi era . . . ." (Pl.'s Mot. to Dismiss, Ex. B) The Guidelines further state that "in order to achieve an equitable and appropriate resolution of claims, museums *may elect* to waive certain available defenses." (*Id.*) Plaintiff/Counter-Defendant has sought to achieve resolution of this claim by initiating the instant quiet title action. This act alone is inapposite to waiving its right to assert defenses it may have available to it. The Court finds that Plaintiff/Counter-Defendant has not waived its right to assert a statute of limitations defense, and that Defendants/Counter-Plaintiffs' Counterclaims are barred by Michigan's statute of limitations, and must be dismissed. *See Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 2006 U.S. Dist. LEXIS 93627, 2006 WL 3827512 (N.D. Ohio).*

IV. CONCLUSION

Accordingly,

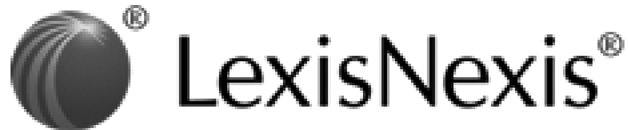
IT IS ORDERED that Plaintiff/Counter-Defendant The Detroit Institute of Arts' Motion to Dismiss Counterclaims [**Docket No. 27, filed on June 19, 2006**] is GRANTED.

IT IS FURTHER ORDERED that Defendants/Counter-Plaintiffs' [*13] Counterclaims are DISMISSED WITH PREJUDICE.

Dated: March 31, 2007

/s/ Denise Page Hood

United States District Judge



LAURA DORFMAN, Plaintiff, -against- MARRIOTT INTERNATIONAL HOTELS, INC., DUNA SZALLUDA Rt., OTIS ELEVATOR COMPANY and OTIS FELVANO kft., Defendants.

99 Civ. 10496 (CSH)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 642

January 26, 2001, Decided
January 29, 2001, Filed

DISPOSITION: [*1] Motions of defendants Marriott International Hotels, Inc., Duna Szalluda Rt. and Otis Felvano Kft. to dismiss complaint on ground of forum non conveniens denied.

COUNSEL: For LAURA DORFMAN, plaintiff: Lawrence Goldhirsch, Weitz & Luxenberg, P.C., New York, NY.

For MARRIOTT INTERNATIONAL, INC., DUNA SZALLODA RT., defendants: Benjamin A. Fleischner, White, Fleischner & Fino, New York, NY.

For MARRIOTT INTERNATIONAL, INC., DUNA SZALLODA RT., cross-claimants: Benjamin A. Fleischner, White, Fleischner & Fino, New York, NY.

JUDGES: CHARLES S. HAIGHT, JR., SENIOR UNITED STATES DISTRICT JUDGE.

OPINION BY: CHARLES S. HAIGHT, JR.

OPINION

MEMORANDUM AND ORDER

HAIGHT, Senior District Judge:

Plaintiff brings this negligence action against the captioned defendants. According to her complaint, in June of 1998 the plaintiff was a guest at the Budapest Marriott Hotel ("Hotel") located in Budapest, Hungary. On or about June 25 she suffered personal injuries upon exiting an unleveled elevator located in the Hotel. These injuries required immediate medical attention by medical personnel in Budapest, and eventual surgery in the United States. A self-described youthful octogenarian, Dorfman [*2] alleges that her injuries were caused by a defective, dangerous, and/or hazardous condition in, on or about said elevator. See Declaration in Opposition to Motion to Dismiss Complaint at 2. Such condition, in turn, was allegedly due to the carelessness, recklessness and negligence of defendants, or their agents, in variously owning, managing, maintaining, operating, supervising, inspecting and repairing the Hotel property and its elevator.

Dorfman claims damages in the amount of $ 5,000,000, and asserts that this Court has jurisdiction pursuant to diversity of citizenship between the parties.

Specifically, plaintiff alleges that she is a citizen and resident of the state of New York; that defendant Marriott International Hotels, Inc. ("Marriott") is a Delaware

corporation doing business in New York; that defendant Duna Szalloda Rt. ("Duna") is a corporate Hungarian citizen with a principal place of business in Budapest, and the name under which Marriott does business in Hungary; that defendant Otis Elevator Company ("OE") is a New Jersey corporation with its principal place of business in New Jersey and doing business in New York; and that defendant Otis Felvono kft. ("OF") is a [*3] branch of OE doing business in Hungary.

The complaint has given rise to a spate of defensive motions. OE moves pursuant to *Rule 12(b)(6), Fed.R.Civ.P.*, to dismiss the complaint for failure to state a claim against OE upon which relief can be granted. OE also moves on the same ground to dismiss the cross-claims alleged against it by Marriott and Duna. Marriott and Duna cross-move to dismiss the complaint on the grounds of *forum non conveniens*, lack of personal jurisdiction over Duna, and failure to join all necessary parties. OF cross-moves to dismiss the complaint pursuant to *28 U.S.C. § 1391(a)* and *Rules 12(b)(2)*, *(3)*, *(4)* and *(5)* on the grounds of lack of personal jurisdiction over OF, insufficient service of process, and *forum non conveniens*.

I

OTIS ELEVATOR'S MOTION TO DISMISS COMPLAINT AND CROSS-CLAIM PURSUANT TO *RULE 12(b)(6)*

As with any motion pursuant to *Rule 12(b)(6)*, all factual allegations contained in the complaint must be treated as true by the Court. *Cohen v. Koenig, 25 F.3d 1168 (2d Cir. 1994)*. The court must not dismiss the [*4] action "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Frasier v. G.E. Co., 930 F.2d 1004, 1007 (2d Cir. 1991)*. In addition, all reasonable inferences must be made in the plaintiff's favor. *Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995)*.

In evaluating a *Rule 12(b)(6)* motion, the Court may look only to the complaint and any exhibits attached to it or other documents incorporated by reference. *Leonard v. Israel Discount Bank of New York, 199 F.3d 99, 107 (2d Cir. 1999)*; *Trugman-Nash v. New Zealand Dairy Board, 1996 U.S. Dist. LEXIS 1957, No. 93 Civ. 8321, 1996 WL 77933 at *3 (S.D.N.Y. Feb. 23, 1996)*.

According to the complaint, defendant OE is incorporated in the State of New Jersey, which is also its principal place of business. OE additionally conducts business in New York. Defendant OF, the plaintiff alleges, [*5] is "the name under which Otis Elevator, Co. does business in Hungary, is merely a branch of defendant [OE] and is not a true subsidiary, due to common ownership, financial dependency, identity of personnel, failure to observe corporate formalities and other circumstances." Complaint at 2. Under this theory of the corporate relationship, OF "does business" in New York through OE, and is therefore continuously and systematically present in New York so as to purposefully avail itself of the protection and benefits of New York law.

OE contends that OF is a separate corporation, that the veil of corporate ownership should not be pierced, and that OE owed no duty of care to the plaintiff, and thus could not have acted negligently toward her. OE attaches to its motion to dismiss an affidavit of Douglas Pew, associate counsel for OE. Pew challenges the characterization of OF as alleged in plaintiff's complaint. Pew asserts that OF is a separately incorporated and managed company under the laws of Hungary.

In its Declaration in Opposition to the Motion to Dismiss, the plaintiff attached pages allegedly from OE's website, www.otis.com, which it claims belie OE's statements to the effect [*6] that OF and OE are distinct corporate entities for our purposes. Specifically, plaintiff says, OE proclaims on its website that OE's "mechanics and agent representatives maintain in excess of 700,000 elevators and escalators in virtually every country of the world" (quite possibly including Hungary), and "over 80% of its employees are of nationalities other than American" (quite possibly including Hungarian). *See* document downloaded from the OE website, plaintiff's Declaration in Opposition to the Motion to Dismiss, Exhibit B.

Predictably, OE's Reply Affidavit on its Motion to Dismiss disputes the conclusions the plaintiff draws concerning the contents of the defendant's website.

Within the context of a *Rule 12(b)(6)* motion, a district court may not consider matters outside the pleading unless it converts the motion into one for summary judgment under *Rule 56*. Thus, the last sentence of *Rule 12(b)* provides that in such event, "the motion shall be treated as one for summary judgment and

disposed of as provided in *Rule 56*, and all parties shall be given reasonable opportunity to present [*7] all material made pertinent to such a motion by *Rule 56*."

This is an appropriate case in which to convert OE's *Rule 12(b)(6)* motion into one for summary judgment under *Rule 56*. The OE website constitutes a matter outside the pleadings, so that conversion is necessary for the Court to consider it; and consideration of the website's unabashed claims is appropriate, since at face value they tend to support the plaintiff's jurisdictional theories.

The parties will need to conduct discovery before being in a position to submit all the additional material pertinent to a summary judgment motion. The scope of that discovery is considered under Point IV, infra.

II

DEFENDANT OTIS FELVANO'S MOTION TO DISMISS PURSUANT TO *28 U.S.C. § 1391 (a)*, *RULES 12(b)(2)-(5)* AND FORUM NON CONVENIENS

Defendant OF moves to dismiss the complaint for lack of personal jurisdiction under *Rule 12(b)(2)*, insufficiency of process and service of process pursuant to *Rules 12(b)(4)* and *(5)*, and for improper venue, pursuant to both *Rule 12(b)(3)* and the doctrine of *forum non conveniens*. The crux of OF's argument parallels that of OE, namely, that OF is organized under the laws of Hungary [*8] and is not a "mere department" of OE.

The Court will first consider the threshold question of whether this Court has personal jurisdiction over OF.

A plaintiff bears the ultimate burden of establishing jurisdiction over a defendant by a preponderance of the evidence. *Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985)*. However, when a *Rule 12(b)(2)* motion to dismiss is brought by a defendant at this stage of the litigation - before discovery and without an evidentiary hearing - the plaintiff need only make a prima facie showing that personal jurisdiction exists. *Ball v. Metallurgie Hoboken-Overpelt, S.A., 902 F.2d 194, 197 (2d Cir.)*, cert. denied *498 U.S. 854, 112 L. Ed. 2d 116, 111 S. Ct. 150 (1990)*. Though eventually the court must determine whether the defendant in fact subjected itself to its jurisdiction, at this stage the plaintiff may rely on mere allegations of fact, which will be taken as true. *Credit Lyonnais Securities (USA), Inc. v. Alcantara, 183 F.3d 151, 153 (2d Cir. 1999)*; *Cornell v. Assicurazioni Generali S.P.A., Consolidated, 2000 U.S. Dist. LEXIS 11004,* [*9] *No. 97 Civ. 2262, 2000 WL 1099844, at *1 (S.D.N.Y. August 7, 2000)*. Courts are given "considerable procedural leeway" in deciding motions under *Rule 12(b)(2)*, *Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)*, and are entitled to consider matters outside the pleadings without converting the motion to dismiss into one for summary judgment. *Gianino v. Panacya, 2000 U.S. Dist. LEXIS 12338, No. 00 Civ 1584, 2000 WL 1224810 at *4 (S.D.N.Y. August 29, 2000)*; *Huangyan Import & Export Corp. v. Nature's Farm Products, 2000 U.S. Dist. LEXIS 12335, No. 99 Civ. 9404, 2000 WL 1224814, at *4 (S.D.N.Y. August 29, 2000)*; *Baron Philippe de Rothschild, S.A. v. Paramount Distillers, Inc., 923 F. Supp. 433, 436 (S.D.N.Y. 1996)* [1].

1 This principle is not inconsistent with the conclusion reached under Point I, that OE's *Rule 12(b)(6)* motion must be converted into one for summary judgment. OE, a domestic corporation, does not and cannot contend that it is not subject to the Court's jurisdiction. Rather, OE contends it is not liable for OF's conduct. For the reasons stated in Part I, the contention raises issues which are a fair ground for discovery.

[*10]

It is well settled that in a diversity case a federal court exercises personal jurisdiction over a party in accordance with the law of the forum state. *Marine, 664 F.2d at 901*. The plaintiff here contends that OF is subject to the Court's jurisdiction pursuant to *New York CPLR § 301*. Under *§ 301* a foreign corporation is subject to suit if "engaged in such a continuous and systematic course of 'doing business' here as to warrant a finding of its presence in this jurisdiction." *Koehler v. Bank of Bermuda, 101 F.3d 863, 865 (2d Cir. 1996)*, citing *Frummer v. Hilton Hotels Int'l Inc., 19 N.Y.2d 533, 536, 281 N.Y.S.2d 41, 227 N.E.2d 851*, cert. denied, *389 U.S. 923, 19 L. Ed. 2d 266, 88 S. Ct. 241 (1967)*. The plaintiff does not allege that defendant OF directly conducted business in New York within the meaning of *§ 301*. However, under New York law, jurisdiction may be obtained over a foreign company if it is a "mere department" of an entity [*11] that is present in New York, as the plaintiff alleges here, or, if the relationship between the foreign corporation and the local one gives rise to the valid inference of an agency relationship.

Palmieri v. Estefan, 793 F. Supp. 1182, 1187 (S.D.N.Y. 1992).

In *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft, 751 F.2d 117, 119-22 (2d Cir. 1984)*, the Court announced the factors to consider in determining whether to assert jurisdiction over a related foreign corporation. The "essential factor," which by itself is not determinative, is common ownership. *Volkswagenwerk, 751 F.2d at 120*. Here, it is uncontested that OF is wholly owned by OE. See Memorandum of Law in Support of Defendant OF's Motion to Dismiss, at 6. Three other factors to consider are the financial dependency of the subsidiary on the parent, the degree to which the parent interferes in personnel and fails to observe corporate formalities, and the degree of control over marketing and operations by the parent over the subsidiary. *Volkswagenwerk, 751 F.2d at 120-22*.

[*12] The plaintiff here concedes that at this stage of litigation it has not obtained information regarding financing or control by OE with regard to OF. Plaintiff's Memorandum of Law in Opposition to Motions to Dismiss, at 6. As discussed above, in response to defendants' motions to dismiss, the plaintiff has submitted pages from www.otis.com, OE's corporate website, which advertise that OE has employees in 1700 worldwide locations, that 80% of its employees are non-Americans and that 80% of its revenues are generated abroad.

OF argues that plaintiff's factual allegations are, in fact, bare legal conclusions not worthy of consideration. OF argues further that OE's website in fact contains no information related to OF, nor any other dealings in Hungary by OE. Otis Felvano Kft.'s Memorandum of Law in Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, at 5. Furthermore, reiterates the defendant, OF is a separately incorporated and managed entity, with its own officers and Board of Managers (none of whom are in common with OE), maintaining its own corporate records and paying employees and expenses with its own accounts.

[*13] The defendant is correct that legal conclusions masquerading as factual allegations cannot substitute for actual facts, and will fail to preserve a complaint even under the liberal standard appropriate to this pre-discovery stage of litigation. Cornell, 2000 WL 1099844, at *1, citing *Papasan v. Allain, 478 U.S. 265, 286, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986)*. However, unlike in Cornell, the plaintiff has not altogether "failed to cure the deficiencies of its...complaint," and factual allegations do exist. 2000 WL 1099844, at *2. Specifically, the facts recited on OE's corporate website raise a legitimate question as to the level of control exercised by OE with respect to OF, and the fact of 100% ownership by OE of OF.

The questions raised by the Beech factors are appropriately addressed after discovery has occurred, at which point the plaintiff will be required to establish the presence of the factors by a preponderance of the evidence.

To that end, the Court hereby allows the plaintiff limited discovery to ascertain the jurisdictional facts necessary to establish this Court's jurisdiction. James Wm. Moore et al., *Moore's* [*14] *Federal Practice, § 12.31[7]* (2000 Edition); *Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982)*(sanction may be imposed for failure to comply with a limited discovery order for purposes of establishing jurisdictional facts). Where a plaintiff must, as here, establish jurisdiction by a preponderance of the evidence, the court is wise to allow this discovery. *Filus v. Lot Polish Airlines, 907 F.2d 1328, 1332 (2d Cir. 1990)*("generally a plaintiff may be allowed limited discovery with respect to the jurisdictional issue"); *Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 713 (9th Cir.)*, *cert. denied*, *507 U.S. 1017 (1993)*("where pertinent facts bearing on the question of jurisdiction are in dispute, discovery should be allowed"; quoting *America West Airlines, Inc. v. GPA Group, Ltd., 877 F.2d 793, 801 (9th Cir. 1989))*.

The discovery contemplated within the context of OF's motion will also be pertinent to the resolution of OE's motion. Its scope is considered under Point IV, infra.

III.

CROSS-MOTIONS TO DISMISS MADE [*15] BY DEFENDANTS MARRIOTT INTERNATIONAL HOTELS, INC. AND DUNA SZALLUDA Rt.

Defendants Marriott and Duna are jointly represented by counsel. Their cross-motion papers, far from a model of clarity, complicate judicial analysis.

For example, the Notice of Motion states that

Marriott and Duna are moving to dismiss the complaint "pursuant to *Rule 12(b)*," without specifying which of the seven separate grounds specified in the Rule the defendants have in mind. The Notice then states three bases for dismissal: forum non conveniens, which does not implicate *Rule 12(b)* at all; "this Court lacks jurisdiction over defendant Duna," which would appear to invoke *Rule 12(b)(2)* ("lack of jurisdiction over the person"), although Duna may also have in mind *Rule 12(b)(4)* ("insufficiency of process") and *Rule 12(b)(5)* ("insufficiency of service of process"); and a failure to join all necessary parties, which would implicate *Rule 12(b)(7)* ("failure to join a party under Rule 19"). To the limited extent that these defendants' briefs clarify their arguments, it would seem that this indispensable party ground for dismissal is based upon the contention that "plaintiff has failed properly to serve process [*16] upon two parties which are indispensable to this action," namely, Duna and OF. Main Brief for Marriott and Duna at 20.

OF also moves to dismiss the complaint on the ground of *forum non conveniens*. All motions to dismiss the complaint on that ground are denied for the reasons stated in Point V, *infra*.

With respect to the Court's jurisdiction over the person of Duna, and the sufficiency of service of process upon Duna, the questions would appear to mirror those presented by OF's cross-motion concerning the relationship between OE and OF, discussed in Parts I and II, supra.

Thus plaintiff's complaint alleges that Marriott is a Delaware corporation, P 2, and that Duna "is the name under which defendant [Marriott] is doing business in Hungary and is merely a branch of defendant [Marriott]." P 4. If those allegations are correct, so that in effect Marriott managed the Budapest hotel bearing its corporate name and Duna was only Marriott's instrument for that purpose, then service upon Marriott may be regarded as service upon Duna; or, in the alternative, Duna may not be a party upon which service need be made at all. The latter proposition seems to be illustrated by *Guidi v. Inter-Continental Hotels Corp., 1997 U.S. Dist. LEXIS 10444, 1997 WL 411469* [*17] *(S.D.N.Y.)*, reversed on other grounds, *224 F.3d 142 (2d Cir. 2000)*. In Guidi, the allegedly tortious conduct occurred at the Semiramis Hotel in Cairo, Eqypt. Plaintiffs sued Inter-Continental Hotels Corp., a Delaware corporation, and five other corporate defendants. The district court observed that "of the six defendants named in the Complaint, only defendant Inter-Continental Hotels Corp., a Delaware corporation that manages the Semiramis Hotel, has been served." *1997 U.S. Dist. LEXIS 10444, *2, 1997 WL 411469 at *1* (emphasis added). The district court granted Inter-Continental's motion to dismiss the complaint on the ground of *forum non conveniens*. The Second Circuit reversed and remanded the case to the district court for full litigation on the merits of wrongful death claims arising out of the killing of guests by an Egyptian terrorist. I will discuss the court of appeals' *forum non conveniens* ruling in Guidi under Point IV, infra. The present point is that if an American hotel corporation (such as Inter-Continental or Marriott) "manages" a hotel in a foreign country (such as the Semiramis in Egypt or the Marriott Budapest [*18] in Hungary) where American guests are killed or injured, service upon the American corporation alone may be sufficient to support a plenary trial on the merits in a Federal district court.

All these considerations turn, of course, upon the exact nature of the relationship, if any, between Marriott and Duna. That is equally true of the relationship, if any, between OE and OF. The several defendants' motions raise those issues; and it is crystal clear that limited discovery must be pursued before the parties are in a position to brief them fully and the Court can decide them. The nature of the discovery to be taken is considered under Point IV.

IV.

THE NATURE AND BOUNDARIES OF THE DISCOVERY NECESSITATED BY THESE MOTIONS

The discovery to be had pursuant to this Opinion must be limited to the issues which the Opinion discusses. That is to say: the relationships between the American and Hungarian corporations involved (both elevator and hotel); the degree of control and management direction exercised by one over the other; and any other factors which bear upon the questions of (1) whether service upon the American corporation constitutes service over the Hungarian corporation; and [*19] (2) even if it does not, whether the American corporation is liable for the conduct of the Hungarian corporation.

It necessarily follows that discovery will not be

permitted into the underlying merits. That is to say: the cause of the accident; the particulars of the conduct of the plaintiff and any other individuals; and any other factors which bear upon the questions of negligence, causation, and the plaintiff's damages.

Those limitations are necessary because (1) if it is ultimately determined that a particular defendant is not properly before this Court, that defendant should not have to subject itself to discovery into its conduct; and (2) such defendant would not have the right to inquire into the plaintiff's conduct or the extent of her damages.

Given the age of the plaintiff and the attendant circumstances, I direct that this discovery be conducted on an expedited basis. I am making an order of reference to a Magistrate Judge to supervise discovery and to set a schedule for the submission of further motion papers on the jurisdictional and procedural questions raised by the present papers. This Court will decide those motions when they are fully ripe.

V.

THE MOTIONS OF [*20] DEFENDANTS MARRIOTT INTERNATIONAL HOTELS, INC., DUNA SZALLUDA Rt., AND OTIS FELVANO Kft. TO DISMISS THE COMPLAINT ON THE GROUND OF FORUM NON CONVENIENS

As noted, Mariott, Duna, and OF move to dismiss the complaint on the ground of *forum non conveniens.*

A federal court's inherent power to decline to entertain a case over which it has jurisdiction is embodied in the doctrine of *forum non conveniens*, a doctrine serving the ends of justice and efficiency. *DiRienzo v. Philip Services Corp., 232 F.3d 49, 56 (2d Cir. 2000).* The modern doctrine was established by the Supreme Court in *Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947)*, and its companion *Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518, 91 L. Ed. 1067, 67 S. Ct. 828 (1947).* Gilbert involved removal from one federal court in favor of another federal court. Congressional enactment thereafter of *28 U.S.C. § 1404(a)*, which authorizes transfers between federal courts, relegated common law *forum non conveniens* [*21] to cases where the transfer is proposed to a foreign venue. *DiRienzo, 232 F.3d at 56*. Where a proposal to transfer a case to a foreign jurisdiction is made, the courts continue to apply Gilbert and its progeny in this circuit.

In order for a defendant to prevail on a motion to dismiss for *forum non conveniens* the defendant must demonstrate two things. First, as a threshold matter, the defendant must show that an adequate alternative forum exists. *Peregrine Myanmar, Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996).* Second, the defendant must demonstrate "that the ordinarily strong presumption favoring the plaintiff's chosen forum is countered by the private and public interest factors set out in Gilbert, which weigh so heavily in favor of the foreign forum that they overcome the presumption for plaintiff's choice of forum." *DiRienzo, 232 F.3d at 57.* As Gilbert made clear, unless the balance strongly favors the defendant, the plaintiff's chosen forum will rarely be disturbed. *330 U.S. at 508.*

[*22] Initially the Court must determine the adequacy of the proposed forum, namely, Hungary, the situs of the alleged accident. The standard imposed on the defendant to establish such adequacy is not heavy. The alternative forum will normally be adequate so long as the defendant is amenable to process there, *DiRienzo, 232 F.3d at 57*, and the forum permits litigation of the subject matter of the dispute, adequate procedural safeguards, and an adequate remedy. *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981).*

The defendants here submit an affidavit by Dr. Emese Koranyi, a Hungarian attorney, familiar with its laws. See Notice of Cross-Motion by Marriott International Hotels, Inc. and Duna Szalluda Rt., Exhibit J. The affidavit states that Hungarian law recognizes the right of a plaintiff to recover for injuries sustained as a result of the "negligence" of another. Under Section 339 of the Hungarian Civil Code, says Koranyi, "a person who causes damage to another person in violation of the law shall be liable for such damage," unless they can show that they acted in [*23] a manner "generally to be expected." The Statute of Limitations for such actions is said to be five years.

The plaintiff, in response, does not contest the claims made in Koranyi's affidavit. Since the standard for establishing adequacy is minimal, and defendants concede, importantly, that the "Courts of Hungary would have jurisdiction over the defendants," I conclude that the defendants have established the adequacy of an alternative forum.

Having established an adequate forum elsewhere, the Court must now apply the Gilbert test to the choice between Hungary and the Southern District of New York.

This analysis requires applying a "strong presumption in favor of the plaintiff's chosen forum when weighing the public and private interest factors favoring each location." *DiRienzo, 232 F.3d at 60*. Further, a plaintiff's U.S. citizenship and residence is entitled to consideration favoring retaining jurisdiction. *Guidi, 224 F.3d 142*; *Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 102 (2d Cir. 2000)*. [2]

2 The defendants challenge the currency of Guidi, and argue that its reasoning be confined to the extreme situation found in its fact pattern. See Reply Memorandum of Law in Support of Marriott International Hotels, Inc. and Duna Szalluda Rt. Cross-Motion to Dismiss, at 2 ("Guidi should be limited to its facts"). The Second Circuit recently, in DiRienzo, however, explicitly stated that "Guidi and Wiwa are not limited to their facts, as the dissent argues." *232 F.3d at 63*.

[*24]

I turn first to the four public interest factors Gilbert announced for courts to examine in its *forum non conveniens* inquiry: (1) administrative difficulties associated with court congestion; (2) the fairness of imposing jury duty on the local community; (3) the local interest; (4) avoiding difficult conflicts of law and application of foreign law. *330 U.S. at 508-09*.

The first factor, considerations of court congestion, favors neither party. Our courts are regularly congested, but not inordinately so at this time. Further, there is no evidence to show that Hungarian courts are any less congested than this Court is. As the Court in Guidi stated, "the recent filling of all judicial vacancies and the resulting full complement of judges for the District makes this concern of little or no present significance." *224 F.3d at 147*.

The second and third factors operate in tandem, and focus on whether local interest in the controversy justifies maintaining jurisdiction here. Though the Court recognizes the factual distinctions between the two cases, we find [*25] Guidi instructive on this question. In that case, the plaintiffs' sued an international hotel on wrongful death claims. The plaintiffs' decedents were assaulted, and four killed, by a gunmen who entered a hotel restaurant in Egypt and began shooting. The lawsuit was filed in the Southern District of New York. There, as here, the claim was a relatively uncomplicated tort matter. There, as here, the defendant corporation was incorporated in the United States, doing business abroad. The "local interest" in having the controversy adjudicated locally is similar, namely, that Americans injured abroad through the alleged fault of American corporations acting overseas is a local concern, worth the relatively minimal costs of local adjudication. As the Court in Guidi stated, "[defendant] is a corporate defendant with its principal place of business [in the U.S.] and is being sued for a relatively simple tort violation," while the plaintiff, "[is an] ordinary American citizen for whom litigating in Egypt presents an obvious and significant inconvenience, especially considering their adverse experience with that country to date." *224 F.3d at 147*. While our plaintiff [*26] here suffered no terrorist attack, she alleges a series of emotionally traumatic experiences in Hungary which, coupled with her advanced age, make travel to the area for purposes of litigation a serious burden. As the Supreme Court held in Koster, "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *330 U.S. at 524*. The Court finds that factors two and three weigh toward the plaintiff.

Factor four asks courts to avoid difficult problems in conflict of laws and the application of foreign law. The Court assumes without deciding that Hungarian law might, at least in part, be applied to this case. Neither party discusses to any meaningful degree the extent of any potential conflict of laws or foreign application. It would be premature to decide the conflict of law questions at this stage of litigation, without briefing by the parties. Needless to say, this factor weighs in neither direction.

I now examine the private interest factors. [*27] Private interest factors recommended by Gilbert include: (1) relative ease of access to evidence; (2) availability for compulsory process; (3) cost of obtaining attendance of the willing witnesses; (4) possibility of view of the premises; (5) and all other practical considerations bearing on speed and economy. *330 U.S. at 508*.

In failing to address this prong of the analysis at all, the plaintiff appears to concede to the defendants that most of these private interest factors weigh in their favor. The Court need not belabor the obvious point that most the evidence and witnesses are located in Hungary. As

the defendants note, "most of the witnesses, including the employees of the Hotel and Otis Felvano, Kft., as well as the medical personnel who initially treated the plaintiff, will find Hungary a more convenient forum." Memorandum of Law in Support of Defendants Marriott International Hotels, Inc. and Duna Szalluda Lt. Motion to Dismiss, at 18. In addition to the fact that the jury would be unable to witness for itself the situs of the injury, the defendants emphasize the prejudice they would suffer by the unavailability [*28] of compulsory process to compel material witnesses to testify for the defense, and the cost of transporting those who would travel to New York.

Accepting those dilemmas as real, the Court must note that litigation of this nature is hardly unprecedented. Though these private interest concerns weigh in favor of the defendants, letters rogatory, videotaped depositions, and other procedural tools exist to mitigate somewhat these concerns. *DiRienzo, 232 F.3d at 66*. Regardless, based upon the evidence presented by the defendants, "the private interest factors fall far short of clearly showing that trial in the Southern District is oppressive or vexatious to defendants," and "as a consequence, the public and private interest factors have not overcome the strong presumption that must be accorded plaintiffs' choice of forum." *DiRienzo, 232 F.3d at 66*. Unless the balance "strongly favors" the defendants, the plaintiffs selection is to be "rarely disturbed." *Gilbert, 330 U.S. at 508*.

For these reasons, defendants motion to dismiss on grounds of *forum non conveniens* is denied.

CONCLUSION

For the foregoing reasons, the motions of defendants [*29] Marriott International Hotels, Inc., Duna Szalluda Rt., and Otis Felvano Kft. to dismiss the complaint on the ground of *forum non conveniens* are denied.

Decision on all the other motions described in this Opinion is reserved, pending completion of discovery of a nature and scope consistent with this Opinion.

By separate Order entered concurrently herewith, the case will be referred to a Magistrate Judge for supervision of such discovery and the scheduling of the submission of further motion papers.

It is SO ORDERED.

Dated: New York, New York

January 26, 2001

CHARLES S. HAIGHT, JR.

SENIOR UNITED STATES DISTRICT JUDGE

Not Reported in F.Supp.2d, 2009 WL 948764 (S.D.Ohio)
(Cite as: 2009 WL 948764 (S.D.Ohio))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Eastern Division.
DRFP, L.L.C., d/b/a Skye Ventures, Plaintiff,
v.
THE REPUBLICA BOLIVARIANA DE VENEZUELA, et al., Defendants.

No. 2:04-cv-793.
April 1, 2009.

Rex H. Elliott, Charles Horne Cooper, Jr., John C. Camillus, Sheila P. Vitale, Cooper & Elliott, John Patrick Kennedy, Steven Beryl Ayers, Crabbe Brown & James LLP, Luis Manuel Alcalde, Pica Corporation, Columbus, OH, Andrew G. Douglas, OCSEA, Westerville, OH, for Plaintiff.

Pierce Edward Cunningham, Cunningham, Taliaferro & Eynon, LLC, David William Burleigh, Peter Anthony Schmid, Deters Benzinger & Lavelle PSC, Cincinnati, OH, for Intervenor Plaintiff. Daniel William Costello, Porter Wright Morris & Arthur, David S. Bloomfield, Jr., James Dodds Curphey, Porter Wright Morris & Arthur, Columbus, OH, Bonard Molina-Garcia, Daniel Salinas-Serrano, Dmitri Evseev, Gaela K. Gehring Flores, Jay Kelly Wright, Paolo Di Rosa, Robert A. Schwartz, Susan G. Lee, Arnold & Porter LLP, Washington, DC, for Defendants.

MEMORANDUM OPINION AND ORDER

JOHN D. HOLSCHUH, District Judge.

***1** Plaintiff DRFP, L.L.C., d/b/a Skye Ventures ("Plaintiff") sued Defendant The Republica Bolivariana de Venezuela and the Venezuelan Ministry of Finance (collectively, "Defendants") for default on two promissory notes allegedly guaranteed by Defendants. Defendants moved to dismiss the case on the grounds of foreign sovereign immunity and *forum non conveniens,* but on February 13, 2009 this Court denied Defendants' motion and found that 1) assuming the promissory notes in question are valid, the Court has subject matter jurisdiction pursuant to the commercial activity exception to foreign sovereign immunity contained in 28 U.S.C. § 1605(a)(2); and 2) the case could not be dismissed pursuant to the doctrine of *forum non conveniens* because Venezuela is not a currently available alternative forum. (Mem. Op. & Order p. 24, doc. # 144.)

This matter is before the Court on Defendants' Motion for Certification. (Doc. # 145.) Defendants can appeal this Court's denial of foreign sovereign immunity as of right under the collateral order doctrine pursuant to 28 U.S.C. § 1291, *see O'Bryan v. Holy See,* 556 F.3d 361, 372 (6th Cir.2009), and Defendants represent that they intend to exercise this right (Mot. Certification p. 3, doc. # 145). Defendants' Motion asks the Court to certify for an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), this Court's refusal to dismiss the case for *forum non conveniens.* Defendants also ask the Court to certify an issue this Court alluded to, but did not actually rule on, in its February 13, 2009 Memorandum Opinion and Order: the issue of whether this Court should recognize and enforce a decision of the Venezuelan Supreme Court in the interests of international comity. (*See* Mem. Op. and Order p. 23 n. 5, doc. # 144.)

I. Applicable Legal Standard

Ordinarily, an appeal may only be taken following a final judgment. *See* 28 U.S.C. § 1291. However, limited exceptions exist. One of these exceptions provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination

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of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). "Exceptional circumstances must exist ... before leave is granted for an interlocutory appeal," *W. Tenn. Chapter of Associated Builders and Contractors, Inc. v. City of Memphis,* 138 F.Supp.2d 1015, 1018 (W.D.Tenn.2000), and the decision lies within the discretion of the Court. To certify an issue or order for an interlocutory appeal under § 1292(b), the Court must be satisfied that "(1) the order involves a controlling question of law, (2) a substantial ground for difference of opinion exists regarding the correctness of the decision, and (3) an immediate appeal may materially advance the ultimate termination of the litigation." *In re City of Memphis,* 293 F.3d 345, 350 (6th Cir.2002).

***2** If this Court certifies an issue for an interlocutory appeal, the Sixth Circuit also has discretion over whether to hear the appeal, *see* 28 U.S.C. § 1292(b), and Defendants would bear "the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

II. Analysis

A. Certification of the *Forum Non Conveniens* Issue

Defendants ask the Court to certify this issue for an interlocutory appeal because, in Defendants' view, *forum non conveniens* is an important threshold issue that is well-suited for an interlocutory appeal because a *forum non conveniens* dismissal has the potential to avoid an unnecessary trial. Defendants also point out that there will already be an appeal in this case on the foreign sovereign immunity issue, and that certifying the *forum non conveniens* issue will promote judicial economy by giving the Sixth Circuit the opportunity to review this Court's disposition of this issue along with the disposition of the foreign sovereign immunity issue. Plaintiff, however, opposes certification and argues that allowing an interlocutory appeal will not materially advance the ultimate termination of the litigation because, even if the Sixth Circuit disagreed with the Court's analysis of the *forum non conveniens* issue, the case would be remanded for further consideration of that issue.

The Court agrees with Defendants, and finds that the requirements for certifying this issue for an interlocutory appeal have been satisfied. This Court found that a *forum non conveniens* dismissal would be inappropriate because a recent decision by the Venezuelan Supreme Court "conclusively decided an issue central to Plaintiff's case adversely to Plaintiff's stated position [,]" rendering Venezuela unavailable as an alternative forum. (Mem. Op. and Order p. 22, doc. # 144.) This Court's interpretation of that decision and of Venezuelan law is a pure question of law that is reviewed de novo on appeal, *see Johnson v. Ventra Group, Inc.,* 191 F.3d 732, 738 (6th Cir.1999), and thus the issue involves a question of law.

This question of law, moreover, is controlling because its resolution "could materially affect the outcome of the case." *See In re City of Memphis,* 293 F.3d at 351. Plaintiff is correct that, if the Sixth Circuit disagrees with this Court's finding that Venezuela is not an available forum, the Sixth Circuit would remand the case for a consideration of the *Gulf Oil* public and private factors, *see Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-9, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), rather than immediately dismiss the case. However, such a remand could still impact the outcome and resolution of the case by presenting the possibility of avoiding protracted and expensive litigation. *See Kraus v. Bd. of County Comm'ns. for Kent County,* 364 F.2d 910, 922 (6th Cir.1966). Absent review or a contrary decision from the Sixth Circuit, the parties would proceed to litigating the remainder of Defendants' motion to dismiss and to merits discovery related to the valid-

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ity of the promissory notes at issue. Given the already extensive history of this case, such litigation would certainly qualify as "protracted and expensive." However, if the Sixth Circuit disagreed with this Court on the availability issue, balancing the *Gulf Oil* factors could be quickly accomplished because the parties have already briefed this issue. If the Court concluded that the balance of those factors favored dismissal, the case would be quickly terminated and its outcome affected by the *forum non conveniens* issue.

***3** The Court also finds that there are substantial grounds for a difference of opinion as to the correct interpretation of the Venezuelan Supreme Court's opinion, as Defendants articulate in their motion (see Mot. Certify pp. 11-15). Interpreting a foreign country's law presents issues about which reasonable jurists may certainly disagree, and this case is no exception. Moreover, for many of the reasons articulated above, an immediate appeal may materially advance the ultimate termination of this litigation. Considerable time and expense may be saved by allowing the Sixth Circuit to review this issue along with Defendants' appeal as of right of the foreign sovereign immunity issue.

The Court thus concludes that an interlocutory appeal on the issue of *forum non conveniens* is appropriate, and hereby certifies that issue pursuant to 28 U.S.C. § 1292(b). Defendants now bear the burden of convincing the Sixth Circuit to agree to hear this issue.

B. Certification of the Issue of Whether or Not to Recognize and Enforce the Venezuelan Supreme Court Opinion

The Court, however, cannot reach the same conclusion with respect to Defendants' second requested issue for certification. Defendants ask the Court to certify the issue of whether or not this Court must follow the holding of the Venezuelan' Supreme Court's recent opinion. But as Plaintiff correctly points out (Resp. p. 17, doc. # 152) and Defendant also acknowledges (Mot. Certify p. 16, doc. # 145), this Court has not yet ruled on this issue and certifying it for "review" by the Sixth Circuit would be nonsensical.

In a footnote to the Court's holding that the Venezuelan Supreme Court's opinion rendered Venezuela an unavailable forum, the Court stated that "[t]his ruling should not be construed to conclusively resolve the issue of what binding effect the Venezuelan Supreme Court opinion may have on *this* Court," and noted that federal courts may recognize and enforce foreign judgments out of comity and respect, but that federal courts are by no means required to do so. (Mem. Op. & Order p. 23 n. 5, doc. # 144.) The Court expressed no opinion as to whether it would actually enforce or decline to enforce the Venezuelan Supreme Court opinion, and clearly left that decision for another day. Defendant now asks the Court to certify for review "the issue flagged by footnote 5" (Mot. Certify p. 16, doc. # 145), but there is simply nothing for the Sixth Circuit to review with respect to this issue. The Court made no ruling on it, so there can be no substantial ground for a difference of opinion on a nonexistent ruling. To the extent that Defendants are questioning the actual *ability* of this Court to, at some point in the future, decide this issue against them, there can be no ground for debate. The law is clear that "a foreign country's judgments are not subject to the Full Faith and Credit Clause [,]" *Taveras v. Taveraz,* 477 F.3d 767, 783 (6th Cir.2007) (quoting *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 322, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981)), and that recognition in the interests of comity is not an absolute command, *id.*

***4** Defendants, in effect, are asking the Sixth Circuit to decide this issue in the first instance, but that is not how the federal judicial system works. Issues must be first litigated and passed on in the district courts before they are ready for review on appeal; in this case neither party has briefed the question of whether or not to recognize and enforce the holding of the Venezuelan Supreme Court, and the issue is not ripe for a decision by this Court or review by the Sixth Circuit.

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III. Conclusion

For the reasons stated above, Defendants' Motion to Certify is **GRANTED IN PART** and **DENIED IN PART.** The Court certifies its denial of Defendants's request for dismissal due to *forum non conveniens* for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), but declines to certify the question of whether or not to recognize and enforce the recent Venezuelan Supreme Court decision.

IT IS SO ORDERED.

S.D.Ohio,2009.
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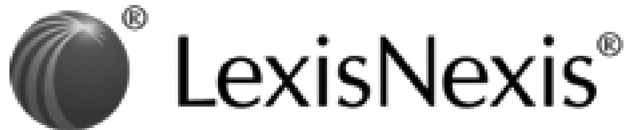


ALEXANDER MOSCOVITS, as assignee of Interbarter-Lombard, Kft., Plaintiff, -against- MAGYAR CUKOR Rt. and AGRANA Int'l AG, Defendants.

00 Civ. 0031 (VM)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 9252

June 29, 2001, Decided
July 9, 2001, Filed

DISPOSITION: [*1] Defendants' motion to dismiss on ground of forum non conveniens GRANTED.

COUNSEL: ALEXANDER MOSCOVITS, plaintiff, Pro se, Miami Beach, FL.

For MAYGAR CUKOR RT., AGRANA INTERNATIONAL AG, defendants: John J. Kenney, Simpson Thacher & Bartlett, New York, NY.

JUDGES: VICTOR MARRERO, United States District Judge.

OPINION BY: VICTOR MARRERO

OPINION

DECISION AND ORDER

VICTOR MARRERO, United States District Judge.

Plaintiff Alexander Moscovits ("Moscovits"), *pro se*, a United States Citizen and Florida resident, brought this action as assignee of the now defunct Interbarter-Lombard, Kft. ("Interbarter"), a Hungarian corporation, against defendants Magyar Cukor Rt. ("Magyar"), a Hungarian corporation, and Agrana International AG ("Agrana"), Magyar's Austrian parent corporation. Moscovits asserted common law claims of breach of contract, conversion, fraud, and defamation. Magyar and Agrana jointly moved for dismissal of all claims on the ground of forum non conveniens, among other things, arguing that Hungary is the more convenient place for this litigation. In response to the motion, Moscovits invoked this Court's subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), [*2] *28 U.S.C. §§ 1330(a)*, *1605(a)(2)*. For reasons stated below, the motion is granted based on forum non conveniens and the complaint is dismissed.

BACKGROUND

In 1992 and 1993, Interbarter entered into a series of contracts with Sarkadi Cukorgyar Rt. ("Sarkadi") and Mezohegyesi Cukorgyar Rt. ("Mezo"), both Hungarian state owned sugar mills. Compl. Count I P 7, Count II P 7; Affidavit of Zoltan Moscovits ("Z. Moscovits Aff.") P 3; Affidavit of Miklos Fekete In Support of Defendants' Motion to Dismiss the Complaint, Dated November 24, 2000 (4 pp.) ("Fekete One Aff.") PP 4-5. Sarkadi, Mezo, and three other companies merged in 1995 to form Magyar, which was then privatized. Compl., Count I, P 5; Fekete One Aff. P 4.

Under the terms of the contracts, Interbarter promised to finance equipment, materials, and other

assets necessary for the production of sugar, and to obtain lines of credit for Sarkadi and Mezo. Compl. Count I P 7, Count II P 7. Sarkadi and Mezo, in turn, were obligated to order the needed materials through Interbarter, which would purchase them in its own name and ship them to Sarkadi and Mezo. Compl., Ex. B (Framework contract between Interbarter [*3] and Sarkadi, dated March 17, 1992), Ex. H. (Framework contract between Interbarter and Mezo, dated September 12, 1992); Plaintiff's Verified Sur-Reply ("Sur-Reply") at 2. Moscovits avers that farm equipment was to be purchased from American companies in the United States. Z. Moscovits Aff. P 4. In exchange for Interbarter's services, Sarkadi and Mezo promised to pay Interbarter a fee equal to a percentage of the obtained credit, and a penalty if they failed to use any of the obtained credit. Compl. Count I P 10, 14, Count II P 10, 14. The contracts called for these payments to be in United States Dollars, but did not specify a destination for such payments. Compl., Ex. H. Moscovits claims, however, that Interbarter could designate the destination of payment and that it chose a New York bank. Z. Moscovits Aff. PP 3-5.

As collateral for the financing, Sarkadi and Mezo promised to place a specified amount of sugar in a public warehouse. Compl. Count I P 8, Count II P 8. The warehouse documents were to be endorsed to Interbarter, who would hold them until Sarkadi and Mezo were able to repay the credit to Interbarter or to the bank from which Interbarter procured the credit. Compl. Count [*4] I P 9, Count II P 9. Sarkadi and Mezo also promised to insure the collateral. Id. The contracts were executed in Hungary and did not specify under what law they would be enforceable. Compl., Ex. B-I (framework contracts, specific contracts, and contract modifications between Interbarter and Sarkadi and Mezo).

Interbarter secured the financing for Sarkadi and Mezo from a Hungarian bank. Z. Moscovits Aff. P 6; Affidavit of Miklos Fekete in Support of Defendants' Motion to Dismiss the Complaint, Dated March 28, 2001 (28 pp.) ("Fekete Two Aff.") P 21. Sarkadi and Mezo secured insurance for the collateral from Hungarian insurance companies. Fekete Two Aff. P 22. Moscovits claims that both Sarkadi and Mezo failed, however, to use the full lines of obtained credit and that they did not pay upon demand the transaction fee or the penalty fee for the unused credit. Compl. Count I P 20, Count II P 16. The payments that were made by Sarkadi and Mezo, he claims, were supposed to be wired to a New York bank account, but were instead paid to Interbarter in Hungary. Sur-Reply at 1-2. Sarkadi and Mezo also never ordered the equipment that was supposed to be purchased and imported from the United [*5] States, and it was thus never bought. Moscovits further claims that the collateral and insurance were not produced by Sarkadi and Mezo in a timely fashion. Id.

In 1993, Sarkadi sued Interbarter in Hungary for breach of contract, claiming that Interbarter endorsed and used the warehouse documents in violation of the contracts. Compl., Count I, P 22; Fekete Two Aff. PP 40-45. Simultaneously, Sarkadi filed a criminal complaint against Interbarter charging improprieties pertaining to the warehouse documents. Compl., Count I, P 20. After Sarkadi and Mezo merged, Magyar continued the legal actions. Compl. I, P 20; Fekete Two Aff. PP 41, 44. Interbarter and Moscovits, who intervened in the Hungarian proceedings as assignee of Interbarter, counter-sued Magyar for breach of contract arising from the Sarkadi and Mezo dealings, as well as for defamation for false criminal charges. Affidavit of Dr. Zoltan Jeszenszky, dated January 29, 2001 ("Jeszenszky Aff.") P 2. In December 2000, the Hungarian court ruled in favor of Magyar. Response at 10.

In January 2000, Moscovits filed the instant complaint against Magyar and Agrana based on the same events which were the subject of the Hungarian litigation. [*6] He seeks compensatory and punitive damages for breach of contract, fraud, conversion and defamation. Magyar and Agrana moved to dismiss on the ground of forum non conveniens, arguing that Hungary is the more convenient jurisdiction for the litigation of these claims.

DISCUSSION

Courts analyze an invocation of the forum non conveniens doctrine in two parts. Initially, the court determines whether there exists an adequate alternative forum. See *Gulf Oil Corp. v. Gilbert. 330 U.S. 501, 506-07, 91 L. Ed. 1055, 67 S. Ct. 839 (1947)*. If so, the court chooses between the two forums by balancing the private interests of the litigants and the public interest concerns of the court. See *id. at 508-09*.

Forum non conveniens analysis is independent of the basis for this Court's subject matter jurisdiction. Consequently, whether Moscovits invokes diversity jurisdiction or federal question jurisdiction under FSIA, this Court's analysis is the same. See *Blanco v. Banco*

Indus. de Venezuela, S.A., 997 F.2d 974, 977 (2d Cir. 1993); see also *Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 491, n. 15, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983)*. [*7] In addition, that this dispute has been substantially adjudicated in another country is a factor to be considered in the forum non conveniens inquiry, but it is not a dispositive one. The analysis does not ask whether foreign decisions should be controlling, but rather whether in the interest of justice and all other relevant concerns the action would best be brought in another forum.

A. ADEQUATE ALTERNATIVE FORUM

The requirement of an adequate alternative forum is ordinarily satisfied if the defendants are amenable to service of process in the alternative forum and the forum permits litigation of the subject matter of the dispute. See *Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981)*; *DiRienzo v. Philip Servs. Corp., 232 F.3d 49, 57 (2d Cir. 2000)*.

Defendant Magyar is clearly amenable to service of process in Hungary, not only because it is a Hungarian corporation and thus subject to lawsuits in that country, Fekete One Aff. P 2, but also because Moscovits did in fact sue Magyar there based on the same conduct at issue here, Jeszenszky Aff. P 2; Affidavit of Dr. Istvan Rubanyi in Support of Defendant's Motion [*8] to Dismiss the Complaint ("Rubanyi Aff.") P 15. It is unclear whether Agrana is also amenable to service in Hungary, but since Agrana argues that Hungary is an adequate alternative forum, it is estopped from asserting that Hungary lacks jurisdiction over these claims and dismissal of this action as to Agrana may be conditioned upon it agreeing not to challenge personal jurisdiction of the Hungarian court. See *Ilusorio v. Ilusorio-Bildner, 103 F. Supp. 2d 672, 680*, (S.D.N.Y.), aff'd, *F.3d , 2001 U.S. App. LEXIS 17157 (2d Cir. 2001)*.

Moscovits has already litigated the subject matter of his claims in Hungary, suing for breach of contract and defamation. He now brings suit in this Court for those causes of action as well as for conversion and fraud. While Moscovits contends that Hungary does not provide specific causes of action for conversion and fraud, Jeszenszky Aff. P 2, the adequacy of an alternate forum does not depend upon the availability of causes of action identical to those in the United States. See *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC, 155 F.3d 603, 610 (2d Cir. 1998)*. In any event, Hungary does recognize a general cause of [*9] action for damages, which Moscovits does not deny, Response at 6-7, and under which he likely could have brought suit asserting a right to recover damages for the type of injury he alleges. [1]

1 The Hungarian legal system separates contractual from non-contractual damages. There is only one cause of action and theory of damages for extra-contractual harm: where one unlawfully causes damage to another, the injured party must be compensated, but damages are never punitive. See Martindale-Hubbell Int'l Law Digest at HGRY-8 (2000); see also Rubanyi Aff. PP 6, 9 (citing Hung. Civ. Code of 1959, Title II, ch. XXIX, § 339, ch. XXI, § 355).

Moscovits claims, however, that the Hungarian legal system is not adequate because it does not comport with due process. He contends, for instance, that Hungary lacks formal evidence rules, and complains that in his case the trial judge in Hungary held *ex parte* hearings and excluded the public from the courtroom, and moreover, that such occurrences are commonplace. [*10] Moscovits's personal experiences in the Hungarian proceedings, however, are not relevant to whether the Hungarian judicial system is generally an adequate alternative forum. An alternative forum is not deemed inadequate unless it is characterized by a "complete absence of due process". *Broadcasting Rights Intern. Corp. v. Societe du Tour de France, S.A.R.C., 708 F. Supp. 83, 85 (S.D.N.Y. 1989)* (quoting *Panama Processes, S.A. v. Cities Serv. Co., 500 F. Supp. 787, 800 (S.D.N.Y.1980)*, aff'd, *650 F.2d 408 (2d Cir. 1981)*); see also *Gschwind v. Cessna Aircraft Co., 161 F.3d 602 (10th Cir. 1998)*. That Hungary's courts may not offer the full range of procedural protections available to litigants in United States federal courts is insufficient reason to conclude that the Hungarian forum is inadequate. See *Blanco, 997 F.2d at 982*; *Younis v. American University in Cairo, 30 F. Supp. 2d 390, 394 (S.D.N.Y. 1998)*.

Finally, Moscovits argues that delays litigants encounter in Hungary are so long that prosecuting his case there is tantamount to a denial of due process. He points to the Third Circuit's [*11] decision in *Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1228 (3d Cir. 1995)*, which held that a twenty-five year delay in India rendered the forum inadequate. But without specific evidence of pervasive delays, Moscovits's assertion is

speculative at best. Moreover, Moscovits is not faced with any delay because his case has already been adjudicated. Moscovits also asserts that an appeal is likely to take two years. But forum non conveniens analysis looks only at whether there is an adequate alternative forum, not whether an adequate alternative appeals process exists.

To the foregoing analysis of applicable case law principles, the Court has added consideration of another policy note which, other things being equal, may weigh against exercising jurisdiction in some forum non conveniens situations, including the case at bar. Many litigants, as Moscovits here suggests, advocate upon us the notion that courts in this country should sit in judgment of the adequacy of justice and of the legal systems of other nations; that we should hold them to our standards and by so doing encourage the perception that only in American courts may litigants be assured full, expeditious [*12] and fair adjudication of their disputes. It is not only the arrogance inherent in this attitude that this Court finds troubling.

Rendering value judgments about the sufficiency of foreign justice systems, assuming that universally acceptable methods and measures to do that may be devised, itself is laden with legal difficulties and political perils. From the standpoint of efficiency, our legal system could and should not be expected to assume the costs and burdens entailed in serving as court to the world, no more so than in foreign affairs it would be generally tolerable to encourage the impression that our military should perform at all times and all places as policeman to the world. See *Blanco, 997 F.2d at 982* ("It is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation").

Finally, for this Court generally to pronounce judgment on the adequacy of justice of a particular foreign state would undermine any efforts those legal systems may be undergoing to reform and to foster domestic and international confidence in the country's laws. See *PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998)* [*13] (comity precludes a court from judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards). This consideration is especially pertinent as regards nations, such as Hungary, emerging from dramatic transition to a political system that strives to model its means of adjudication and concept of due process on principles prevailing here. See In *Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842, 867* (noting that inflicting foreign standards and values on a developing nation would "deprive the Indian judiciary of this opportunity to stand tall before the world"), aff'd as modified, *809 F.2d 195 (2d Cir. 1987).* A determination by this Court that the other country's justice system affords an inadequate forum for resolution of disputes is tantamount to a denunciation that may tend to become a self-fulfilling prophecy. Such a course would only work to ingrain the perception of deficiency in that legal system. To this extent, it could retard endeavors to improve any flaws in due process which litigants like Moscovits rely upon in urging that the forum should be deemed insufficient to warrant transferring [*14] to it matters that otherwise would be more conveniently litigated there.

Accordingly, because Magyar and Agrana are amenable to service of process in Hungary, and because Moscovits could, and in fact did, litigate the subject matter of this dispute there, this Court concludes that Hungary offers an adequate alternative forum for further litigation of this action.

B. GILBERT FACTORS

Generally, there is a strong presumption in favor of the plaintiff's choice of forum. See *Reyno, 454 U.S. at 255-6*. As such, defendants usually have the burden of overcoming this presumption by establishing that the Gilbert factors "tilt strongly in favor" of the alternative forum. See id.; accord *R. Maganlal & Co. v. M.G. Chem. Co., 942 F.2d 164 (2d Cir. 1991)*. But where the complainant is the assignee of a foreign corporation, the "courts have generally refused to give special deference" to plaintiff's choice of forum. *Pain v. United Technologies Corp., 205 U.S. App. D.C. 229, 637 F.2d 775, 797 (D.C. Cir. 1980)* (citing *United States Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika OG Australie Line, 65 F.2d 392 (2d Cir. 1933)* [*15] and *Fitzgerald v. Westland Marine Corp., 369 F.2d 499 (2d Cir. 1966))* (finding that the domestic forum choice of a 'nominally American plaintiff', defined as subrogees, assignees, or representatives of foreign companies, is not generally given special deference). Because Moscovits is the assignee of Interbarter, a Hungarian corporation, and is suing in that capacity, his choice of forum is not entitled to the standard deference.

1. Private Interest Factors

When weighing the private interests of the litigants, the court must consider: (a) the ease of access to sources of proof; (b) the availability of compulsory process for attendance of unwilling witnesses; (c) the cost for cooperative witnesses to attend trial; (d) the enforceability of a judgment; and (e) all other practical matters that might expedite a trial or make one less expensive. See *Gilbert, 330 U.S. at 508*. Here, these private interest factors weigh heavily in favor of dismissal of this action.

Almost all of the evidence relevant to the dispute at hand is located in Hungary. Because all events underlying Moscovits's claims occurred in Hungary, documents, materials and witnesses concerning [*16] the controversy are most likely to be found there. As noted above, the contract parties were Hungarian, their agreements were negotiated and signed in Hungary, the sugar was processed in Hungary, the financing was obtained from a Hungarian bank, the insurance on the collateral was obtained from Hungarian insurance companies, and the collateral sugar was stored in a Hungarian warehouse. Moscovits claims that dollars were to be paid to a New York bank account, but also admits that the money was never received there. Similarly, he claims that equipment was to be bought from American companies, but admits that these purchases never occurred.

Magyar and Agrana argue that all relevant documents are in Hungary and that some documents are in the control of non-party witnesses, such as the public warehouse. Fekete Two Aff. PP 27-37. Moscovits counters that he took all relevant documents back to the United States and that he has already presented these documents to the court, translated from Hungarian into English. Kiss Aff. P 17. It seems unlikely, however, that Moscovits possess every document relevant to Magyar and Agrana's defenses. Thus, consideration of this factor balances, at best, [*17] evenly.

Magyar and Agrana contend that the vast majority of witnesses are in Hungary, and that many do not speak English, Fekete Two Aff. PP 16-26, while Moscovits finds this to be "purely speculative", Response at 25. All the individuals who were involved in the contracts and subsequent events, however, are Hungarians located in Hungary, save Zoltan Moscovits, who is Moscovits's father and a resident of Florida. Z. Moscovits Aff. P 1. Although Zoltan Moscovits is of advanced years, his testimony may be preserved by deposition. Magyar and Agrana name five Hungarian witnesses who are located in Hungary and list many more by their positions of employment, such as the operators of the Hungarian warehouse where the sugar was stored as collateral and the Hungarian police who investigated the criminal report. Fekete Two Aff. PP 18-26. Additionally, four of Magyar and Agrana's affiants and two of Moscovits' affiants are Hungarians located in Hungary.

Because many of these witnesses are Hungarians and non-parties, they are therefore not subject to compulsory process. See *Fed. R. Civ. P. 45(b)(2)*. The inability to bring witnesses to the United States for live cross-examination weighs [*18] heavily in favor of finding litigation in an United States court inappropriate. See *Alfadda v. Fenn, 159 F.3d 41, 47 (2d Cir. 1998)*.

Moscovits asserts that the testimony of Hungarian witnesses may be obtained via letters rogatory. But this Court has held that such a method, especially when used for the vast majority of witnesses, is inefficient and expensive. See *Ilusorio, 103 F. Supp. 2d at 677*.

As to execution of any judgment Moscovits may obtain in a United States court, such a judgment is probably not enforceable in Hungary because there is no bilateral treaty between the two countries so permitting, Rubanyi Aff. P 17, and may not be enforceable within the United States because the only connection that Moscovits claims Magyar and Agrana have to this country is that they maintain bank accounts here, which the defendants vehemently dispute, compare Compl., Count I, P 21, with Grausam Aff. P 15 and Fekete 1 Aff. P 15. Regardless, a Hungarian judgment against Magyar and Agrana would certainly be enforceable in Hungary. Thus, even if a judgment of this Court could be enforced against the defendants in this country, the United States would [*19] still not be any more of a convenient forum than Hungary with respect to the enforceability of judgment. As such, this factor is neutral at best.

Lastly, judicial economy is best served by dismissal in favor of Hungary. Moscovits brought suit against defendant Magyar in Hungary based upon the same facts as are at issue here. Judicial resources are not well served by trying nearly identical cases on either side of the Atlantic Ocean. Accordingly, the Court finds that the private interests involved in this case weigh strongly toward dismissal.

2. Public Interest Factors

The public interest factors to be weighed by the court include (a) administrative difficulties that arise when litigation is brought in a congested forum instead of at its origin; (b) imposing jury duty on citizens of a community that has no relation to the litigation; (c) the local interest in having disputes settled at home; and (d) avoiding unnecessary problems associated with the application of foreign law. See *Gilbert, 330 U.S. at 508-9*. These factors also weigh heavily in favor of dismissal of this case.

Moscovits asserts that delays in Hungarian courts are unacceptable. But, as noted above, [*20] his allegations in this regard are unsubstantiated. Nor is the protraction of litigation unique to any one forum. Indeed, it is endemic. Even in our own court it is not unheard-of for actions, especially those entailing complexities such as characterize this case, to require several years to reach final disposition. It is clear that the Southern District of New York is heavily congested, see *PT United Can Co. v. Crown Cork & Seal Co., 1997 U.S. Dist. LEXIS 692*, No. 96 CV. 3669, 1997 WL 31194 at *9 (S.D.N.Y. Jan. 28, 1997) (reconfirming Gilbert's specific reference to this District as one that is heavily congested), aff'd, *138 F.3d 65 (2d Cir. 1998)*, and that "there is a legitimate interest in ensuring that disputes with little connection to the district be litigated elsewhere", *CCS Int'l, Ltd. v. ECI Telesystems, Ltd., 1998 U.S. Dist. LEXIS 12755*, No. 97 CIV. 4646, 1998 WL 512951 at *10 (S.D.N.Y. Aug. 18, 1998).

This action has minimal ties to the United States or New York. Moscovits alleges that dollars were to be deposited in a New York bank, and that equipment was to be purchased and imported from companies in the United States, but neither of these events occurred. Because Moscovits [*21] asserts jurisdiction under FSIA, which does not allow for a jury trial, see *Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan, 46 F. Supp. 2d 231, 239 (S.D.N.Y. 1999)*; *28 U.S.C. §§ 1330*, *1441(d)*, the public interest in not imposing jury duty on citizens to whom litigation has no relation may not be relevant. Any potential burden on a jury is thus excluded from the balance of considerations.

Regardless, the analysis weighs heavily in favor of dismissal because while the case has, at best, trace connections to the United States, its ties to Hungary are strong. The dispute arises out of an era in which Hungarian corporations were embracing capitalism and eschewing communism. The parties are Hungarian and the conduct giving rise to the causes of action never left Hungary's borders. Thus, Hungary has a weighty interest in trying this case, and indeed already has. New York, on the other hand, has little or no interest in the resolution of this case.

The Court also recognizes the interest in avoiding unnecessary complexities associated with the application of foreign law. Although hesitance to apply foreign law is not dispositive [*22] to the issue of dismissal, it is a legitimate factor favoring dismissal. See *Boosey & Hawkes Music Publishers Ltd. v. Walt Disney Co., 145 F.3d 481, 491 (2d Cir. 1998)*. It is highly likely that Hungarian law would apply here, regardless of whether federal or New York State choice of law rules apply. Both doctrines usually apply the law of the jurisdiction with the most significant interest in or relation to the action being adjudicated. Compare *In re Gaston & Snow, 243 F.3d 599, 605 (2d Cir. 2001)*(federal choice of law rules apply the law of the jurisdiction with the most significant relationship to the action) with *Brink's Ltd. V South African Airways, 93 F.3d 1022, 1030 (2d Cir. 1996)*, cert. denied, *519 U.S. 1116, 136 L. Ed. 2d 845, 117 S. Ct. 959* (New York State choice of law rules usually "apply the law of the jurisdiction with the most significant interest in, or relationship to, the dispute"). With respect to all causes of action here, both contract and tort, Hungary has the most significant interest in and relationship to the dispute for the reasons mentioned above.

Finally, a forum non conveniens dismissal [*23] may be conditioned on the occurrence of an event in order to protect the party opposing dismissal. See *Blanco, 997 F.2d at 984*. Thus, implicit in the rule of forum non conveniens is that a defendant cannot assert that another forum is more convenient and just, and while at the same time, refuse to accept the jurisdiction of that forum. See *Ilusorio, 103 F. Supp. 2d at 680*. Magyar and Agrana filed a joint motion to dismiss in this case on the ground of forum non conveniens. Accordingly, the Court conditions dismissal on Agrana's consent to personal jurisdiction of the Hungarian courts.

ORDER

For the reasons stated above, it is hereby

ORDERED that defendants' motion to dismiss on the ground of forum non conveniens is GRANTED; and it is

further

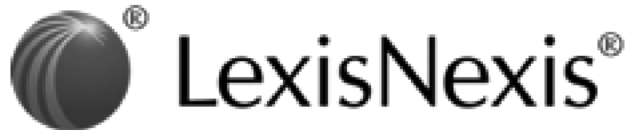
ORDERED that the time to appeal from the final judgment entered in this action on June 1, 2001 is hereby extended to thirty (30) days from the date of entry of this Decision and Order.

Dated: 29 June 2001

New York, New York

SO ORDERED

Victor Marrero, U.S.D.J.



WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH, Plaintiff, v. UNITED STATES GYPSUM COMPANY, et al., Defendants

Civil Action No. 85-1606

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1986 U.S. Dist. LEXIS 22246

July 25, 1986, Decided and Filed

OPINION BY: [*1] GREEN

OPINION

ORDER

JOYCE HENS GREEN, UNITED STATES DISTRICT JUDGE

This matter comes before the Court on the defendants' joint motion to dismiss. For the reasons set forth below the defendants' motion is granted in part and denied in part.

I.

Plaintiff Wesley Theological Seminary of The United Methodist Church ("Wesley") is a non-profit organization located in the District of Columbia. In May, 1985 Wesley filed this action against the United States Gypsum Company, the National Gypsum Company, and the W.R. Grace Company to recover "sums of money expended and to be expended on account of the presence of defendants' hazardous asbestos-containing acoustical plaster products in its buildings." Memorandum of Points and Authorities in Opposition to Defendants' Joint Motion to Dismiss at 1. Wesley claimed that it had already removed some of the asbestos material and would "eventually face the expensive prospect of removing all of defendants' asbestos products from its property." *Id.* The plaintiff's complaint requested compensatory and punitive damages based on numerous tort and contract causes of action. The legal theories proffered included strict liability, negligence, breach [*2] of express and implied warranties, fraud and misrepresentation, nuisance, and restitution. Additionally, the plaintiff alleged that the defendants acted "intentionally, in concert and conspiratorily." *Id.* at 2.

Defendants United States Gypsum, National Gypsum, and W.R. Grace manufacture and sell asbestos products. The defendants apparently do not contest at this point in the proceedings the plaintiff's claim that its asbestos products were installed in the plaintiff's buildings. Rather, the defendants' motion to dismiss focuses on the legal sufficiency of the plaintiff's claims. The defendants argue that the plaintiff seeks recovery for economic loss, and that tort law does not permit recovery for economic loss. The defendants further contend that in the absence of a valid tort claim the "concert of action" and "civil conspiracy" counts must be dismissed. The defendants challenge the sufficiency of the breach of warranty claim by arguing that the plaintiff failed to give notice as required under District of Columbia law. Finally, the defendants contend that the plaintiff's allegations cannot, as a matter of law, satisfy the required elements of a proper restitution or nuisance [*3] claim.

II.

When reviewing a motion to dismiss a court may not dismiss the complaint "unless it appears that the plaintiff can prove no set of facts in support of . . . [the] claim which would entitle [the] plaintiff to relief." *Conley v. Gibson, 355 U.S. 41 (1957)*. The plaintiff defending against a motion to dismiss need not prove the factual basis for the claim; to the contrary, the court must accept the factual allegations as true.

A. *The Tort Claims*

The defendants contend that the plaintiff's claim for damages is not recoverable under a tort theory because the plaintiff has not alleged specific harm to persons or property:

Plaintiff's complaint is premised solely upon the anticipated effects of the alleged deterioration of asbestos-containing products, and, as such, is a plain example of a contract or warranty cause of action. But plaintiff is not seeking recovery for damage to its property that has already occurred. Instead, plaintiff wishes to be compensated for potential harm that may occur due to the perceived failure of the products over time to live up to its expectations. A tort action simply cannot be used as a vehicle for recovery of such damages.

Defendants' [*4] Reply Memorandum at 8. District of Columbia law, the defendants insist, "requires an accident causing actual property damage or personal injury as a prerequisite to a valid cause of action in tort." *Id.* at 8-9. Here, it is argued, the plaintiff had merely "chosen to act on its perception" that a "speculative, inchoate injury" has occurred. Defendants' Memorandum in Support of Joint Motion to Dismiss at 16.

The defendants' pleadings distort the plaintiff's allegations and misstate applicable District of Columbia law. Both sides concede that the District of Columbia has adopted the doctrine of strict liability in tort, as set forth in *section 402A, Restatement of Torts (Second). See Cottom v. McGuire Funeral Service, Inc., 262 A.2d 807 (D.C. App. 1970)*; *Berman v. Watergate West, Inc., 391 A.2d 1351, 1356-57 (D.C. App. 1978)*. Second 402A states in pertinent part that:

(1) One who sells any product in a defective condition *unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, *or to his property,* if

(a) the seller is engaged in the business of selling such a [*5] product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(Emphasis added.) In this instance the plaintiff has alleged that the defendants' product is "unreasonably dangerous" and has caused damage to its property. The complaint states that the defendants "have caused a serious health hazard to be created within and upon the property and building[s] of the plaintiff" and that the health hazard created by the defendants "has interfered with the safe and uninhibited use and enjoyment of plaintiff's property and buildings by the plaintiff and the individuals who use the plaintiff's buildings." This "dangerous condition," the plaintiff asserts, has created an "urgent situation [requiring] . . . immediate action for the health and welfare of persons using those buildings." Complaint, paras. 24, 26. The complaint, read together with the [*6] plaintiff's opposition memorandum, reflects that the plaintiff has closed parts of its buildings allegedly to protect inhabitants from the risk of asbestos contamination. Plaintiff's Memorandum in Opposition to Motion to Dismiss at 4. In short, the plaintiff has alleged property damage to the extent that its buildings have been made uninhabitable by an "unreasonably dangerous" product.

Precisely the same type of alleged injury was found to constitute property damage under *section 402A* by the District of Columbia Court of Appeals in *Berman v. Watergate West, Inc., 391 A.2d 1351*. In *Berman* the plaintiff contended that her apartment was defective. The "most serious defect . . . was the malfunctioning of an air conditioning unit. According to appellant's testimony, the air conditioner created such serious humidity in her bedroom that she had to keep the door to that room closed and sleep in her living room for two years, until the unit was repaired." *Berman, 391 A.2d at 1353*. The court concluded that the claim was actionable in tort, and

that the jury was entitled to measure damages based on the injury suffered from being left with an uninhabitable bedroom for a period of [*7] two years:

. . . the record clearly demonstrates that appellant was unable to use her bedroom for some two years. The lease for appellant's apartment was in evidence. On this basis, the jury could have arrived at a perfectly proper measure of consequential damages. *See* 2 L. Frumer and M. Friedman, *Products Liability* § 16-01[2] and cases cited therein at n.6. *See also Dravillas v. Vega, D.C.App., 294 A.2d 363 (1972)*; *McCrossin v. Hicks Chevrolet, Inc., D.C.App., 248 A.2d 917, 921 (1969)*.

Id. at 1360.

Of course, whether Wesley was justified in closing parts of its buildings--that is, whether the defendants' acoustical ceiling materials *actually are* unreasonably dangerous and pose a threat to the health of building inhabitants--is a matter for the fact finder to decide. At this stage in the proceedings, the court *must* accept the plaintiff's allegations as true. To the extent, therefore, that the plaintiff has alleged that an unreasonably dangerous product has contaminated its buildings, created a health risk, and necessitated closure and repairs, it cannot be concluded from a liberal construction of the complaint that the allegations of injury [*8] are only speculative. The plaintiff has effectively alleged that parts of its premises are temporarily uninhabitable. If true, there is little question but that under *Berman* the defendants' product has caused property damage. [1]

1 Other jurisdictions have reached the same result under similar circumstances. The Third Circuit, for example, has held that the question of whether radioactive emissions from a nuclear accident can be said to cause property damage for purposes of a tort claim is a matter about which "plaintiffs should be permitted to develop . . . facts." *Commonwealth of Pennsylvania v. General Public Utilities Corp., 710 F.2d 117, 122-23 (3d Cir. 1983). See also Philadelphia National Bank v. Dow Chemical Co., 605 F. Supp. 60 (E.D. Pa. 1985)* (plaintiffs permitted to introduce evidence to jury to support tort claim that defendant's product caused property damage by "increasing risk" that *person* might be hurt by weakened infrastructure (*e.g.* fallen mortar or brick)). Likewise, a New York court has recently held that asbestos installation can support a tort claim for property damage:

"The complaint can be properly construed as alleging that plaintiffs' buildings have been contaminated by asbestos; that the contamination has physically altered plaintiffs' buildings so as to have made them harmful to health; that the extent and imminence of the threat is not known, but it was certain to become progressively worse had plaintiffs not incurred the repair and replacement costs they seek to recover herein; that to remove the threat plaintiffs have had to tear down and replace portions of their buildings; and that this cost of retrofitting their buildings so as to make them safe is the measure of plaintiffs' property damages."

City of New York v. Keene Corp., No. 44559/84 (slip op. at 7) (Sup. Ct. N.Y. Nov. 19, 1985).

As discussed in *Keene,* an important distinguishing factor between tort and contract causes of action is the extent to which "safety interests" or "expectation interests" are involved. Here, as in *Keene,* the plaintiff does *not* contend that the asbestos ceiling did not perform its function as contracted for, but rather that it posed a safety risk from the time of installation. As the Superior Court in *Keene* phrased it:

"Given the nature of the risk, must plaintiffs have waited until the asbestos had flaked and deteriorated to the point that it could no longer function as insulation before being entitled to relief, and then only in contract? . . . the focus here is clearly on the danger posed, and not the failure of the product to function as expected. That the danger has not yet manifested itself in personal injury is a are fortuity that ought not to deprive plaintiffs of relief in tort."

[*9] Having concluded that the plaintiff has properly alleged injury to its property and not mere "economic loss," none of the tort claims--whether based on a theory of strict liability, negligence, or intentional tort [2] --is subject to dismissal as a matter of law at this point in the proceedings.

2 As noted above, *section 402A* provides for

recovery of damages for injury to *property* caused by a defective product under a theory of strict liability. Neither party contests the fact, however, that property damages could *also* be recoverable at common law under either a negligence or intentional tort theory.

B. *Breach of Warranty and Restitution* [3]

3 In its memorandum in opposition to the motion to dismiss, the plaintiff indicates that it no longer intends to proceed with the nuisance claim. Similarly, the Court's holding in part IIA above moots the defendants' challenge to the plaintiff's conspiracy allegations. Thus the only two remaining issues concern the breach of warranty and restitution claims

The defendants contend that the plaintiff's breach of warranty claims must be dismissed for failure to give notice under *District of Columbia Code § 28:2-607(3)(a)*. [*10] They argue that the plaintiff cannot properly claim that it was not required to give notice, because this argument necessitates conceding the underlying warranty claim. *See* Defendants' Reply Memorandum at 19-20. Similarly, the defendants insist that the plaintiff ought not be permitted to rely on a theory of "constructive notice" to the defendants, *see id.* at 20-22, because the plaintiff is not a "lay consumer" but rather a "commercial purchaser." *See id. quoting Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984).*

Whether the defendants received sufficient "constructive notice" sufficient to relieve the plaintiff of its obligations under *D.C. Code § 28:2-607(3)(a)* is an issue that cannot be resolved at this point in the proceedings in the absence of discovery. When reviewing a motion to dismiss the court must accept the plaintiff's allegations as true. The plaintiff here has alleged that the defendants had constructive notice of the alleged defect before the breach occurred.

The plaintiff's "restitution claim" presents different problems. The defendants correctly assert that as a general matter restitution does not give rise to an independent cause of action. Restitution [*11] is merely a *type* of remedy that an injured plaintiff may request under certain circumstances. Under District of Columbia law, a plaintiff is required to choose between a damage remedy or restitution. A plaintiff may not seek full restitution (accompanied by rescission of the contract) *and* damages. *See Mariner Water Renaturalizer of Washington v. Aqua Purification Systems, 665 F.2d 1066, 1069 (D.C. Cir. 1981).* Read in its entirety, the majority of the claims listed in the complaint appear to seek relief in the form of damages. Accordingly, the claim for relief through restitution shall be dismissed without prejudice to reinstatement should the plaintiff indicate in writing within 20 days of this Order that it wishes to elect a remedy other than damages.

III.

For the reasons set forth above, the defendants' joint motion to dismiss is denied with respect to the plaintiff's tort, conspiracy, and breach of warranty claims and granted as unopposed with respect to the nuisance claim. The claim for restitution is dismissed without prejudice subject to the conditions set forth above in part IIB.

SO ORDERED this 25th day of July, 1986.