ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

Nos. 11-7096; 12-7025; 12-7026

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID L. de CSEPEL, et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

REPUBLIC OF HUNGARY, et al.,

Defendants-Appellants/Cross-Appellees.

On Appeal From The United States District Court
For The District of Columbia

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SUMMARY OF ARGUMENT

The District Court's dismissal of Plaintiffs' claims to eleven artworks on grounds of international comity should be reviewed *de novo* and reversed. Because it is inappropriate for a United States court to defer to a foreign judgment that clearly misinterprets or contravenes a United States treaty or executive agreement, the District Court should not have deferred to what the District Court itself found to be a clearly erroneous construction of the 1973 Agreement. It was also inappropriate for a United States court to defer to a foreign judgment that in itself constitutes a violation of international law (in that it constitutes a final "taking" of property in violation of international law). At the Rule 12 stage, the District Court should have accepted Plaintiffs' allegations and arguments that the Nierenberg Litigation was not conducted in accordance with internationally recognized standards of due process and allowed that issue, as well as the claims themselves, to proceed to discovery. The District Court's decision effectively penalizes Plaintiffs for attempting to exhaust their remedies in Hungary in accordance with then prevailing (but subsequently clarified) law in this Circuit requiring exhaustion. Upholding the District Court's decision on this point will inevitably discourage future claimants from attempting to exhaust their remedies. For all of these reasons, the decision of the District Court dismissing certain of Plaintiffs' claims on grounds of international comity should be reversed.

ARGUMENT[1]

THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' CLAIMS TO ELEVEN ARTWORKS ON GROUNDS OF INTERNATIONAL COMITY

A. Standard of Review

Defendants wrongly suggest that the District Court's dismissal of Plaintiffs' claims to eleven artworks on grounds of international comity should be reviewed only under an abuse of discretion standard. (Response and Reply Brief of Defendants-Appellants/Cross-Appellees ("Defs.' Reply Br.") at 50-51 (citing an unreported decision of the Fifth Circuit and decisions by the Ninth and Eleventh Circuits).) However, this Court has not specifically articulated what standard of review should apply where, as here, a district court has given a foreign judgment *res judicata* effect. Other Circuits have held that the appropriate standard of review is *de novo*. *See, e.g., Otos Tech Co. v. OGK Am., Inc.*, 653 F.3d 310, 312 (3d Cir. 2011) ("We exercise de novo review over a district court's decision to grant full faith and credit to a foreign judgment"); *Diorinou v. Mezitis*, 237 F.3d 133, 140 (2d Cir. 2001) (holding that the appropriate standard of review is *de novo*

[1] Capitalized terms not defined herein shall have the meanings ascribed to them in the Glossary in the Response/Principal Brief of Plaintiffs-Appellees/Cross-Appellants ("Pls.' Resp. Br.").

"just as it would be on review of a judgment of a domestic court based on *res judicata* or collateral estoppel"); *id.* at 139 (citing *Hilton* for *de novo* standard).[2]

Applying *de novo* review here is consistent with the well-settled principle that this Court reviews questions of law *de novo,* including the closely analogous question of whether a domestic judgment should be given *res judicata* effect. (*See* Pls.' Resp. Br. at 28 (citing *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127 (D.C. Cir. 2004) (questions of law are reviewed *de novo*); *RSM Prod. Corp. v. Freshfields Bruckhaus Deringer US LLP*, 682 F.3d 1043, 1047 (D.C. Cir. 2012) (dismissal on grounds of *res judicata* is reviewed *de novo*); *Ibrahim v. District of Columbia*, 463 F.3d 3, 7 (D.C. Cir. 2006) (same)).) Accordingly, *de novo* review is appropriate in this case.[3]

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[2] The cases relied on by Defendants (Defs.' Reply Br. at 50-51) are inapposite because none involved the *res judicata* effect of a foreign judgment. Indeed, the Second Circuit in *Diorinou* expressly distinguished *Jota v. Texaco, Inc.,*157 F.3d 153, 160 (2d Cir. 1998) (cited at Defs.' Reply Br. at 52) on that basis, explaining that cases – like *Jota* – that considered comity only in the context of the "pendency or availability of litigation in a foreign forum" – a doctrine "akin to *forum non conveniens*" – were properly reviewed under an abuse of discretion standard but that cases considering the *res judicata* effect of a foreign judgment, as here, should be reviewed *de novo*.

[3] Even if this Court applies an abuse of discretion standard (which it should not), the District Court's dismissal of Plaintiffs' claims on grounds of international comity should be reversed.

B. The District Court Should Not Have Deferred To The Erroneous Decision Of The Hungarian Court

A United States court's extension of comity to a foreign judicial decree is a matter of choice – not absolute obligation. *See Hilton v. Guyot*, 159 U.S. 113, 163 (1895). While *Hilton* cautions against revisiting the merits of a foreign judgment "upon the mere assertion of the party that the judgment was erroneous in law or fact," 159 U.S. at 202-03, courts may properly withhold comity if there is a showing, *inter alia*, of "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 [the foreign judgment] full effect." *Id.* (emphasis added); *see also Laker Airways Ltd. v. Sabena*, 731 F.2d 909, 937 (D.C. Cir. 1984) ("[T]he obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act."); Restatement (Third) Foreign Relations Law § 482(2) (comity need not be granted where the judgment is repugnant to United States public policy) & comment b ("A particular case may disclose such defects as to make the particular judgment not entitled to recognition."). (*See also* Defs.' Reply Br. at 52-53.) Here, the District Court failed to recognize that the evidence established much more than a "mere assertion" that the decision of the Hungarian court was legally erroneous. *See Opinion* at 145. The evidence established that the decision was contrary to the plain language of an executive agreement between the United States and Hungary and that the decision facilitated

a taking of Plaintiffs' property in violation of international law – each matters as to which the United States has strong public policy interests. The District Court therefore erred as a matter of law in deferring to the Hungarian court's ruling.

1. The Hungarian Court's Decision Was Based On An Indefensible Interpretation Of An United States Executive Agreement

The judgment of the Hungarian court was not entitled to deference because it was based on the court's bad faith interpretation of the 1973 Agreement as barring Martha Nierenberg's claims. (2008 Final Judgment at 15 (JA-__); Pls.' Resp. Br. at 74.)[4] The District Court correctly recognized that, contrary to the findings of the Hungarian court, the 1973 Agreement does not apply to, much less bar, Plaintiffs' claims. *See Opinion* at 135. Likewise, the Seventh Circuit recently held that the 1973 Agreement did not settle claims by persons who were Hungarian nationals during the Holocaust. *See Abelesz v. Magyar Nemzeti Bank*, Nos. 11-

[4] Defendants' suggestion that the 2008 Final Judgment of the Hungarian court was based in part on "lawful confiscation pursuant to pre-war non-discriminatory laws regarding cultural objects" (Defs.' Reply Br. at 53-54) is wrong. The 2008 Final Judgment relies entirely on post-war actions by the Hungarian state. (2008 Final Judgment at 11-15 (JA__).) Presumably, Defendants are referring to their argument in the District Court that they possessed certain pieces of the Herzog Collection in connection with a 1929 law that gave the Hungarian government discretion to block the ordinary export of certain pieces of art that had been imported to Hungary more than twenty-five years earlier. (*See* Defendants' Memorandum of Law in Support of Motion to Dismiss (JA-__).) However, none of the Hungarian courts ever held that the 1929 law barred Martha Nierenberg's claims. (Varga Decl. ¶¶ 9-11 (JA__).)

2387, 11-2791, 2012 U.S. App. LEXIS 17732, at *95 (7th Cir. Aug. 22, 2012).[5] Neither the court below, nor the Seventh Circuit, found the question to be a close one, each flatly rejecting the arguments to the contrary based on the plain language of the 1973 Agreement and the historical interpretation of the 1973 Agreement by the executive branch. *See Opinion* at 133-35; *Abelesz*, 2012 U.S. App. LEXIS 17732, at *94-95.

[5] *Abelesz* involved claims by putative classes of Holocaust victims and their heirs against the Hungarian national bank and national railroad for the expropriation of property during World War II. The Seventh Circuit flatly rejected defendants' argument that the 1973 Agreement barred plaintiffs' claims or conflicted with the FSIA. *See Abelesz*, 2012 U.S. App. LEXIS 17732, at *94-95. The court also rejected several other arguments Defendants advanced here. For example, the Seventh Circuit held that the 1947 Peace Treaty does not conflict with the FSIA or otherwise bar claims based on World War II-era takings. *Id.* at *94. Defendants' assertion that the Seventh Circuit's holding has "no bearing" on this case because Plaintiffs' claims are "based on the Peace Treaty" (Defs.' Reply Br. at 14 n.3) is unavailing. Plaintiffs' claims are not based upon the Peace Treaty, as the District Court correctly recognized. *Opinion* at 135-36. (Pls.' Resp. Br. at 30-34.) The Seventh Circuit also rejected defendants' argument that the takings at issue were "domestic takings" that could not violate international law for purposes of Section 1605(a)(3) of the FSIA because plaintiffs were Hungarian nationals at the time of the takings and held that the takings violated international law because they were an integral part of an overall genocidal plan. *Abelesz*, 2012 U.S. App. LEXIS 17732, at *35. Defendants' argument that this holding should not apply here because the Complaint does not "present the integral relationship between expropriation and genocide comparable to the relationship alleged by the *Abelesz* plaintiffs" (Defs.' Reply Br. at 31) is wrong. Such a fact-based argument is also premature at this stage. The Complaint plainly alleges that the seizure of Plaintiffs' art was part and parcel of an organized campaign of genocide designed to exterminate Hungary's Jewish population and to enrich Hungary and its Nazi allies. (Compl. ¶¶ 1, 3, 5, 28-29 (JA-__).)

Defendants do not dispute that the United States has a strong public policy interest in ensuring that its executive agreements are interpreted correctly in accordance with American law and applicable standards of international law. (Pls.' Resp. Br. at 75.) Because the decision of the Hungarian court involved a clearly erroneous interpretation of a United States executive agreement, the District Court erred in affording comity to its judgment. As the Ninth Circuit explained in *Asvesta v. Petroutsas*, 580 F.3d 1000, 1013-14 (9th Cir. 2009):

> Generally, the issue of comity arises when a foreign court has entered a judgment after applying its own substantive and procedural laws …; in these cases, *Hilton's* admonition to avoid a reexamination of the merits of a foreign court's judgment seems most relevant. Here, however, we consider whether the district court properly extended comity to a foreign court that applied the Hague Convention – a legal framework agreed upon and implemented by all contracting nations. In this context, we are in a better position to examine the merits of a foreign court's Hague decision in deciding whether that decision warrants deference…. [We] … conclude that we may properly decline to extend comity to the Greek court's determination if it clearly misinterprets the Hague Convention, contravenes the Convention's fundamental premises or objectives, or fails to meet a minimum standard of reasonableness.

(Emphasis added). *See also Carrascosa v. McGuire*, 520 F.3d 249, 263 (3d Cir. 2008) (declining to extend comity to Spanish court's Hague Convention analysis where such analysis "departed from the fundamental premise of the Hague Convention"). The same considerations control here, and indeed more forcefully given the obvious misreading by the Hungarian court of an executive agreement made by the United States. The District Court was well-positioned to evaluate the

merits of the Hungarian Court's decision because it involved a United States executive agreement, and in fact held, correctly, that the interpretation of the 1973 Agreement put forward by the Hungarian court was wrong. *See Opinion* at 133-35. The District Court should have declined to extend comity to a Hungarian court decision whose reasoning it rejected on the merits, particularly in light of the United States' undisputedly strong public interest in resolving claims concerning the looting of cultural property (especially Jewish property) during World War II and Hungary's own professed policy of not erecting technical barriers to such claims.[6] *See, e.g., Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 466 F. Supp. 2d 6, 30 (D.D.C. 2006), *aff'd*, 528 F.3d 924 (D.C. Cir. 2008); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 133 (E.D.N.Y. 2000). (Defs.' Reply Br. at 21 n.6.)

2. The Hungarian Court's Decision Contravened International Law

The Hungarian Court's rejection of Martha Nierenberg's claim in itself violated international law because it constituted the final rejection, by an arm of the Hungarian state itself, of her claim to the eleven artworks at issue and was predicated on a bad faith and self-serving interpretation of an international executive agreement. (*See* Pls.' Resp. Br. at 74 (citing the Vienna Convention on

[6] Hungary has signed the Washington Principles and other multilateral statements of principle in which it has agreed to foster recovery of Holocaust looted art. (*See* Compl. ¶ 83 (JA-__); 1998 Delegation Statement, ECF-22-13 (JA-__).) Yet in the Nierenberg Litigation, Hungary made highly technical arguments and invoked, and prevailed upon, an obvious misreading of the 1973 Agreement, as the District Court itself found. *See Opinion* at 133-35.

the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 340, Arts. 26 & 31 (PADD000036-37).) *See also Abelesz*, 2012 U.S. App. LEXIS 17732, at *50-51 (holding that a "taking" in violation of international law becomes actionable only when a foreign state finally declines to compensate or otherwise remedy a taking of property). Therefore, the District Court erred in deferring to that decision on grounds of comity.

3. Plaintiffs Adequately Pleaded Bias And Lack Of Due Process In The Hungarian Court

The Complaint alleges that the Nierenberg litigation was not conducted in accordance with internationally recognized standards of due process. (Compl. ¶ 79 (JA-__).) Defendants acknowledge this allegation, but contend that Plaintiffs were required to show more at the Rule 12 stage to avoid dismissal on grounds of comity. (Defs.' Reply Br. at 55.) As discussed *infra,* nothing in this Court's prior jurisprudence or Federal Rule of Civil Procedure 8 required Plaintiffs to plead each and every detail and deficiency of the Nierenberg Litigation with particularity. *See infra* at 13. To do so would have effectively required setting forth a legal brief in Plaintiffs' Complaint.

Tellingly, Defendants simply ignore the evidence that Plaintiffs submitted to the court below showing numerous substantive and procedural infirmities in the Hungarian litigation. For example, Plaintiffs submitted an affidavit explaining that Martha Nierenberg was unable to obtain relevant evidence during that litigation

from Defendants, who had control of all relevant documents. (Varga Decl. ¶ 5 (JA-__).) Plaintiffs also submitted evidence that other claimants have faced similar hurdles in Hungary as Hungary has consistently evaded other Holocaust restitution claims. (*Id.* ¶¶ 20-23 (JA-__).) This undisputed evidence, submitted prior to any opportunity for discovery, should have been sufficient to allow Plaintiffs' claims to proceed past the Rule 12 stage particularly where, as here, the Hungarian court's ruling derived from a proceeding where the foreign state itself was the Defendant. *See* Restatement (Third) Foreign Relations § 482, comment b ("Evidence that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable … to secure documents … would support a conclusion that the legal system was one whose judgments are not entitled to recognition. A judicial system may fail to meet the criteria of fairness in general, or in its treatment of particular classes of litigation, such as those involving Jews in Germany under Hitler.") (emphasis added).[7]

[7] In response, Defendants merely suggest that the Nierenberg Litigation should be deemed fair because it dragged on for eight years before the Hungarian courts ultimately held against the plaintiff. (Defs.' Reply Br. at 53.) Of course, there is no rule that judgments must be recognized on comity grounds simply because proceedings are prolonged, and Defendants cite no authority to that effect.

4. Granting Deference To The Hungarian Court's Decision Is Inconsistent With, And Would Discourage, The Exhaustion Of Foreign Remedies

At the time Martha Nierenberg commenced her action in Hungary domestic law suggested that exhaustion of foreign remedies was required before a United States court would hear her claim. (Pls.' Resp. Br. at 73.) This Court and the Ninth Circuit have since held otherwise. *See Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 948-49 (D.C. Cir. 2008) (holding that plaintiff was not required to exhaust remedies in Russia before proceeding with claims in the United States); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1034-37 (9th Cir. 2010) (FSIA contains no exhaustion requirement), *cert. denied* , 131 S. Ct. 3057 (2011).

The Seventh Circuit recently held (erroneously, in our respectful view) that exhaustion is required in order to establish a "taking" without just compensation in violation of international law, notwithstanding the court's agreement with this Court and the Ninth Circuit that Section 1605(a)(3) of the FSIA contains no express exhaustion requirement.[8] *See Abelesz*, 2012 U.S. App. LEXIS 17732, at

[8] To the extent that Defendants now argue that (contrary to the law of this Circuit) Plaintiffs' claims should be dismissed for failure to exhaust remedies in Hungary (Defs.' Reply Br. at 31 n.11), that argument is not properly before this Court on appeal. Defendants relegated any mention of exhaustion to a single passing reference in a footnote in their opening brief. (Brief of Defendants-Appellants/Cross-Appellees at 55 n.14). *See Sugar Cane Growers Coop. of Fl. v. Veneman*, 289 F.3d 89, 93 n.3 (D.C. Cir. 2002) (argument waived when relegated

*46-51. Regardless of whether exhaustion of foreign remedies may be expressly required under certain circumstances, implicit in the concept of exhaustion of remedies is the assumption that a plaintiff who does not obtain adequate relief as a result of those efforts will have the opportunity to ask a U.S. court to take a second look at the claim.[9] For example, in *Abelesz*, the court directed defendants to identify specific remedies available to plaintiffs in Hungary. *See Abelesz*, 2012 U.S. App. LEXIS 17732, at *53. If defendants met that burden, the court offered plaintiffs the choice, *inter alia*, of voluntarily dismissing their claims without prejudice and "refil[ing] their case in a U.S. court if and when they exhaust their remedies in Hungary" or asking the district court to stay their cases "while they pursue the Hungarian remedies identified by defendants." *Id*. at *60.[10] Nothing in

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to footnote in opening brief). Likewise, Defendants raised the argument only in a footnote before the District Court. *See Opinion* at 131 n.3 ("To the extent defendants argue that the Complaint should be dismissed on this basis [of alleged failure to exhaust remedies in Hungary], the Court will deny the motion.").

[9] To hold otherwise would effectively render Section 1605(a)(3) of the FSIA meaningless because a U.S. plaintiff would never be able to obtain jurisdiction under that section if exhaustion were a prerequisite to establishing a taking in violation of international law, but comity required deference to any adverse decision by a foreign court.

[10] Defendants have made no showing as to any specific remedies that would presently be available to Plaintiffs in a Hungarian court. Even if Defendants could now identify such remedies, Plaintiffs have offered a "legally compelling" explanation for why attempting to exhaust such remedies further would be futile. (*See* Varga Decl. ¶¶ 18-23 (JA-__).) *See Abelesz*, 2012 U.S. App. LEXIS 17732, at *59-60 (remanding case to District Court for defendants to identify specific

Abelesz suggests that plaintiffs could be barred from proceeding in the United States on grounds of international comity in the event that the Hungarian courts reject their claims. To the contrary, the *Abelesz* decision expressly leaves open the possibility of review in a United States forum. By contrast, the District Court's decision turns the concept of exhaustion of remedies on its head by affording automatic *res judicata* effect to a foreign adjudication, even where the Court expressly recognized such adjudication to be based on a flawed interpretation of a United States executive agreement. The District Court's holding discourages any future putative claimants from attempting to exhaust foreign remedies before pursuing claims in a United States forum.[11]

Defendants' suggestion that Plaintiffs' exhaustion argument is a mere "afterthought" to avoid the statute of limitations because it is not expressly pleaded in the Complaint (Defs.' Reply Br. at 53) is wrong. Under this Court's decision in *Chabad* and Federal Rule of Civil Procedure 8, Plaintiffs were not required to plead exhaustion of Hungarian remedies with specificity in the Complaint to assert

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remedies available to plaintiffs and for plaintiffs to have the opportunity to show why attempting to exhaust such remedies would be futile).

[11] Hungary's continued efforts to promote the image of an independent domestic judiciary are also unpersuasive. *See* Letter from Sarah Andre to Clerk of Court dated Sept. 26, 2012 (Doc. No. 139654). The recent decision by the Hungarian Constitutional Court submitted by Defendants is limited to a narrow issue – the retirement age of Hungarian judges – and does not address the numerous other concerns about the independence of the Hungarian judiciary outlined by the Venice Commission. (Pls.' Resp. Br. at 58 n.23.)

claims against Defendants under Sections 1605(a)(2) and (a)(3) of the FSIA. Plaintiffs properly raised the issue of exhaustion in response to arguments made in Defendants' motion to dismiss. Should this Court find otherwise, Plaintiffs should be granted leave to amend the Complaint at the Rule 12 stage.

CONCLUSION

WHEREFORE, for the reasons set forth above and previously, Plaintiffs respectfully request that this Court reverse the decision of the District Court to the extent that it granted Defendants' motion to dismiss Plaintiffs' claims to eleven artworks that were previously the subject of litigation in Hungary.

Dated: October 11, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 28.1(e)(2)(B) because this brief contains 3,632 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(1).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2012, I caused to be filed with the Court through the CM/ECF system the foregoing REPLY BRIEF OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system. I also hereby certify that five copies of the brief will be hand-delivered to the Clerk's Office within two business days of its electronic filing.

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