IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID L. de CSEPEL, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**No. 1:10-cv-01261(ESH)**
	)	
REPUBLIC OF HUNGARY, *et al.*,	)	
	)	
Defendants.	)	
	)	

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS BY THE REPUBLIC OF HUNGARY, THE HUNGARIAN NATIONAL GALLERY, THE MUSEUM OF FINE ARTS, THE MUSEUM OF APPLIED ARTS, AND THE BUDAPEST UNIVERSITY OF TECHNOLOGY AND ECONOMICS

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

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I. Introduction

Despite the issue of jurisdiction being ripe and squarely before this Court, Plaintiffs have not identified evidence supporting their jurisdictional claim. This Court's sole basis for asserting subject matter jurisdiction over Hungary is under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330 *et seq*. Plaintiffs contend that the FSIA's commercial activity exception, 28 U.S.C. §1605(a)(2), applies to strip Hungary of its presumptive immunity. To trigger application of the commercial activity exception, "1) the lawsuit must be based upon an act that took place outside the territory of the United States; 2) the act must have been taken in connection with a commercial activity[;] and 3) the act must have caused a *direct effect in the United States*." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 598 (D.C. Cir. 2013) (quoting *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 888-89 (D.C. Cir. 2006) (emphasis added)). "[D]rawing all reasonable inferences from the Complaint in the family's favor," the D.C. Circuit found that a "direct effect" could be "inferred" from the face of Plaintiffs' Complaint, and the case returned to this Court for further proceedings. *Id.* at 602.

After more than eight years of litigation in Hungary, eleven months of discovery in this proceeding that has included 26,263 pages of documents and hundreds of pages of interrogatory responses exchanged, and the opportunity to submit supporting declarations, Plaintiffs have not produced or identified any evidence of a direct effect in the United States. Rather than identify evidence of a direct effect, Plaintiffs advance a theory that the alleged bailments of their predecessors (Erzsébet, András, and István Herzog) with Hungary cause a direct effect in the United States because Plaintiffs and other Herzog family members – most of whom are non-parties and/or non-citizens with no identified connection to the United States – "had the ability to request" that Hungary export works from the Herzog Collection to the United States. Plaintiffs'

Opposition ("Opp.") at 35. An unsupported theory, however, does not satisfy Plaintiffs' burden at this stage. As discussed below and in Hungary's Motion, the evidence produced by both parties affirmatively demonstrates that the alleged bailments do not cause a direct effect in the United States, and no exception to the FSIA applies to permit this Court to take jurisdiction over Hungary.

II. Standard of Review

In reviewing a motion to dismiss filed under Rule 12(b)(1), a "[c]ourt may consider not only the facts pleaded in the Complaint, but also extrinsic materials submitted by way of affidavit, in determining whether it has subject matter jurisdiction." Opp. at 4 (citing *World Wide Minerals Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1157 (D.C. Cir. 2002)); *see also* Opp. at 18. To assure itself that it has jurisdiction, the court "must go beyond the pleadings and resolve any disputed issues of fact the resolution of which is necessary to a ruling upon the motion to dismiss." *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 197 (D.C. Cir. 2004) (quotation omitted). This Court "retains 'considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction.'" *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000) (quotation omitted).

"To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the plaintiff must establish the court's jurisdiction over the subject matter by a preponderance of the evidence." *Simon v. Republic of Hungary*, No. 10-1770 (BAH), --- F. Supp. 2d ---, 2014 WL 1873411, *9 (D.D.C. May 9, 2014) (adjudicating Rule 12(b)(1) challenge that FSIA exceptions did not apply to permit court to take jurisdiction over Hungary) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)); *see also Bolden-Bey v. U.S. Parole Comm'n*, 731 F. Supp. 2d 11, 13 (D.D.C. 2010).

Plaintiffs contend that they are subject to a more lenient standard. *See* Opp. at 18. Under that standard, Plaintiffs bear the initial burden of producing evidence to show that immunity should not be granted. *See Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1183 (D.C. Cir. 2013) (recognizing that "the FSIA begins with a presumption of immunity, [under] which the plaintiff bears the initial burden to overcome by producing evidence that an exception applies"); *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008); *FG Hemisphere Assocs. v. Democratic Republic of Congo*, 447 F.3d 835, 842 (D.C. Cir. 2006). Not until the Plaintiffs satisfy that burden of production does Hungary bear the burden of persuasion to show that an exception to the FSIA does not apply. *See Bell Helicopter Textron, Inc.*, 734 F.3d at 1183; *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 940; *FG Hemisphere Assocs.*, 447 F.3d at 842.

But even a reduced standard does not save Plaintiffs' claims. Plaintiffs fail under either standard as they have not produced evidence that an exception to the FSIA applies. Specifically, Plaintiffs fail to support their claimed exception because they identify *no* evidence of a "direct effect" in the United States caused by alleged bailments between Hungary and any of the Herzog siblings. As Plaintiffs do not identify any evidence of a "direct effect" to trigger the commercial activity exception, this Court lacks jurisdiction over Hungary.

III. The Prudential Law-of-the-Case Doctrine Does Not Preclude this Court from Adjudicating Hungary's Motion

Plaintiffs contend the appellate court found conclusively that it had jurisdiction over Hungary under the commercial activity exception and that this Court cannot revisit the question of subject matter jurisdiction. Opp. at 19. This Court, however, is not limited by the panel's preliminary findings because with this motion, Hungary challenges whether Plaintiffs identify

evidence of a direct effect from extensive discovery – not whether a direct effect can be "inferred" from the face of Plaintiffs' Complaint.[1]

The law-of-the-case doctrine represents "the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as the law of the case) by that court or a higher one in earlier phases." *Crocker v. Piedmont Aviation*, 49 F.3d 735, 739 (D.C. Cir. 1995). The "law-of-the-case" doctrine instructs that "the *same issue* presented a second time in the *same case* in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (emphasis in original). "Law of the case is a prudential rule rather than a jurisdictional one; in the words of Justice Holmes, the doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'" *Crocker*, 49 F.3d at 739-40 (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988); *Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion[;] it does not limit the tribunal's power."); *Women's Equity Action League v. Cavazos*, 906 F.2d 742, 751 n.14 (D.C. Cir. 1990).

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[1] While Plaintiffs note correctly that Hungary's prior motion to dismiss invoked both Rule 12(b)(1) and 12(b)(6), the panel evaluated Hungary's direct effect challenge through the lens of Rule 12(b)(6), *not* Rule 12(b)(1). In fact, this Court noted at the September 25, 2013, hearing that the identification of a "direct effect" in the United States was an important issue to be considered on remand.

> THE COURT: Well, what about the direct effect business? That's what he's hanging on.
>
> MR. SHUSTER: Well, there's a direct effect issue in the United States, but there's also – there's also -- the other exception we invoked is property -- rights and property taken in violation of international law. I think that was the basis upon which this Court –
>
> THE COURT: Yeah. But that's not the basis for the Court of Appeals' decision. They say bailment. They say this is a bailment case.

Dkt. No. 74, (Transcript of September 25, 2013, initial scheduling conference) at 7-8.

The appellate court analyzed Hungary's "direct effect" argument using the Rule 12(b)(6) standard, under which the panel examined basic pleading sufficiency and assumed the factual allegations in Plaintiffs' Complaint to be true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Reviewing the Complaint alone and assuming the truth of Plaintiffs' unsupported allegations, the panel found that Plaintiffs pled viable factual allegations of a direct effect that should not be dismissed pre-discovery.

> Although the complaint never expressly alleges that the return of the artworks was to occur in the United States, we think this is fairly *inferred from the complaint's* allegations that the bailment contract required specific performance – i.e., return of the property itself – and that this return was to be directed to members of the Herzog family Hungary knew to be residing in the United States. . . . Accordingly, *drawing all reasonable inferences from the complaint in the family's favor*, as we must at this stage of the proceedings . . . we find that the family has alleged facts that, if true, would satisfy the commercial activity exception's requirement of a "direct effect" in the United States.

de Csepel, 714 F.3d at 601 (emphasis added). Thus, if Hungary sought to challenge now whether a direct effect could be demonstrated or inferred from the Complaint itself, that challenge would be barred by the law of the case. But Hungary is not advancing that argument. Hungary asserts that after eleven months of discovery, the exchange of fifty interrogatories and responses, and the production and exchange of 26,263 documents, Plaintiffs can provide no evidence of a direct effect.

Courts recognize that when the parties have expanded the record and a subsequent motion is evaluated under a different standard – a higher standard – the law of the case does not apply. *See, e.g., Murphy v. PricewaterhouseCoopers, LLP*, 580 F. Supp. 2d 4, 9 n.7 (D.D.C. 2008) (holding that plaintiff's law-of-the-case argument fails because the arguments presented in defendant's motion for summary judgment were based, at least in part, on an expanded record); *Mazloum v. District of Columbia Metro. Police Dep't*, 522 F. Supp. 2d 24, 47 (D.D.C. 2007);

Nurriddin v. Bolden, No. 04-2052 (JDB), --- F. Supp. 2d ---, 2014 WL 1648517, at *7 (D.D.C. April 25, 2014); *Safir v. Dole*, 718 F.2d 475, 481 n.3 (D.C. Cir. 1983) (recognizing that the law of the case doctrine does not preclude reexamination of "issues affected by newly discovered facts").

Because the court is reviewing Hungary's direct effect argument under a different standard (going beyond the pleadings to consider relevant evidence) from that used by the panel, and it can now consider materials outside of the Complaint obtained during discovery, the prudential law-of-the-case doctrine does not preclude this Court's consideration of Hungary's direct effect argument.

IV. Despite Extensive Discovery, Plaintiffs Have Failed to Identify Evidence of a Valid Bailment Relationship

Plaintiffs contend that this Court can take jurisdiction over Hungary because the appellate court found that it could infer from the Complaint that Plaintiffs could articulate a plausible bailment (or bailments) with Hungary for some (or all) of the artworks once attributable to the Herzog Collection.[2] Numerous documents, now in the record, demonstrate that neither Plaintiffs' predecessors nor Hungary's Communist government considered themselves to be participants in a "bailment" regarding the artworks. These documents, now in record, demonstrate:

[2] According to Plaintiffs, "Defendants maintain – as they did on their prior motion – that no such [bailment] agreements ever existed." Opp. at 23 (citing Hungary's Motion to Dismiss ("MTD") at 2, 12-15). This is a misstatement. Hungary asserts – as it did in the cited pages – that no *valid* bailment exists. To the extent that a *valid* bailment existed in the past, Hungary returned artwork to Plaintiffs or their predecessors, *see* Dkt. Nos. 86-5, 86-7 Azat Decl. in Support of MTD, Exhs. D, F; or the valid bailment agreements were extinguished when Hungary, acting as a foreign sovereign, confiscated the works, *see* Dkt. 86-8, Azat Decl. in Support of Motion to Dismiss ("MTD"), Exh. G; or seized them in forfeiture proceedings connected with Ms. Herzog's criminal proceedings, *see* Dkt. Nos. 86-9, 86-10, 86-11, Azat Decl., Exhs. H, I, J.

- Plaintiffs (or their predecessors) sought, on multiple occasions, compensation from the U.S. government for artworks "confiscated" by Hungary. *See* Dkt. No. 13-5 and 13-6, Ramirez Decl., Exhs. A-E; Dkt. Nos. 86-4, 86-8, Azat Decl., Exhs. C, G.

- Plaintiffs (or their predecessors) sought to purchase artwork from Hungary. Azat Decl. in Support of Reply, Exh. 1.

- Plaintiffs (or their predecessors) represented to the U.S. government that Hungary would not return the artwork. Azat Decl. in Support of Reply, Exh. 2.

- Hungary considered works from the Herzog Collection to be State property, not a bailment. Azat Decl. in Support of Reply, Exh. 3.

- Hungary acknowledged that certain artworks were held on deposits, and chose to return those artworks to Plaintiffs (or their predecessors). Dkt. No. 86-5, 86-7, Azat Decl., Exhs. D, F.

- Documents accompanying returned artworks note that, under Hungarian law, the artwork will not leave Hungary. Dkt. Nos. 86-5, 86-7, Azat Decl., Exhs. D, F.

- Many of the artworks identified in the Complaint were seized by Hungary in connection with the forfeiture action and multi-year criminal proceedings involving Ilona Kis, the former wife of István Herzog. Dkt. Nos. 86-9, 86-10, 86-11, Azat Decl., Exhs. H, I, J.

- The Hungarian government rejected Plaintiffs' requests or demands for the artworks. Dkt. No. 86-4, Azat Decl., Exh. C.

Plaintiffs respond to this documented evidence by stating that "none of these documents or events establishes *the absence* of a bailment relationship with respect to each of the artworks alleged in the Complaint." Opp. at 25 (emphasis added). Importantly, however, Plaintiffs fail to provide any affirmative evidence to demonstrate a *valid* bailment relationship or to undermine the inescapable conclusion that, based on the evidence, neither Plaintiffs, their predecessors, nor Hungary considered themselves to be in a valid bailment relationship.[3]

[3] Plaintiffs argue that such a conclusion is not appropriate as: (1) Plaintiffs assert that Erzsébet was mistaken when she believed that the 1973 Agreement gave rise to her separate 1976 claim for compensation for her taken artworks, Opp. at 25; (2) a March 31, 1966, letter from the Hungarian Ministry of Culture to Erzsébet (which accompanied her Foreign Claims Settlement Commission compensation claim based on the Opie painting's confiscation) which rejected her

V. Plaintiffs Identify No Evidence of a Direct Effect Sufficient to Trigger the FSIA's Commercial Activity Exception

Plaintiffs fail to identify evidence of a valid bailment agreement; nor do they provide the mere suggestion, via affidavit from any plaintiff or family member, to define the Complaint's unsupported allegation of a bailment. The bigger issue, however – the issue that is the core point of Hungary's current motion – is whether Plaintiffs carry their burden of identifying evidence that Plaintiffs' alleged bailments create a "direct effect" in the United States. Even if Plaintiffs were to discover valid bailments with Hungary, this Court lacks jurisdiction under Section 1605(a)(2) unless Plaintiffs affirmatively demonstrate with evidence – not mere assertions – that the alleged bailments create a "direct effect" in the United States. Unless Plaintiffs produce evidence of a direct effect, the burden of persuasion does not shift to Hungary.

"Interference with a property right does not necessarily demonstrate a 'direct effect' under the FSIA." *Bell Helicopter Textron, Inc.*, 734 F.3d at 1184. A direct effect "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Id.* (quoting *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994)); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992); *Bao Ge v. Li Peng*, 201 F.

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claim to the Opie painting, does not show an *absence* of a bailment agreement, Opp. at 26; and (3) Plaintiffs assert that the forfeiture order issued regarding Mrs. István Herzog's property, was over-inclusive, encompassing artworks that were not her property, but the property of the Herzog siblings, Opp. at 27.

While none of these points "establishes *the absence* of a bailment relationship," to borrow Plaintiffs' phrase, they do not undermine the documentary evidence referenced above, which demonstrates that Hungary seized certain works from Herzog family members in connection with criminal proceedings and that Plaintiffs did not expect Hungary would return artworks from the Herzog Collection to them. Nor do Plaintiffs' assertions provide the requisite *affirmative* evidence of a bailment relationship – evidence that Plaintiffs must identify to meet their initial burden. *See Bell Helicopter Textron, Inc.*, 734 F.3d at 1183; *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 940; *FG Hemisphere Assocs.*, 447 F.3d at 842. Finally, to the extent that Plaintiffs' assertions have any relevance to a purported direct effect, that relevance is to the alleged bailments associated with Erzsébet – these assertions have no relevance to alleged bailments associated with András or István.

Supp. 2d 14, 24 (D.D.C. 2000).[4] Thus, an effect is not direct if "[m]any events and actors necessarily intervened" between the act perpetrated overseas and the impact felt here. *Bell Helicopter Textron, Inc.*, 734 F.3d at 1184 (citing *Princz*, 26 F.3d at 1172). Nor does the FSIA permit jurisdiction over foreign sovereigns when the complained of effects are attenuated, remote, or speculative. *See Weltover, Inc*., 504 U.S. at 618.

In determining where the effect is directly felt, courts in this Circuit "look to the place where legally significant acts giving rise to the claim occurred rather than to where merely incidental or eventual effects are felt." *Youming Jin v. Ministry of State Sec*., 475 F. Supp. 2d 54, 63 (D.D.C. 2007) (citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988)).[5] For there to be a direct effect here, Plaintiffs must demonstrate that "something legally

[4] The Supreme Court acknowledged that the commercial activity exception did not explicitly "contain[ ] any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover, Inc*., 504 at 618. But the Court was careful to note that when permitting a court to take jurisdiction over a foreign sovereign because of a commercial act, the "direct effect" in the United States can be neither nominal nor negligible. *See id.* ("Of course the generally applicable principle *de minimis non curat lex* ensures that jurisdiction may not be predicated on purely trivial effects in the United States" and recognizing that the "direct effect" cannot be "too speculative," "remote," or attenuated"). Rather, "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity." MTD at 16 (quoting *Weltover, Inc*., 504 U.S. at 618).

[5] Plaintiffs challenge Hungary's reference to *Zedan*, which states that a direct effect "requires that 'something legally significant actually happened in the United States.'" Opp. at 32 (quoting *Zedan*, 849 F.2d at 1515). Plaintiffs note that the "legally significant" test was not expressly adopted by the Supreme Court in *Weltover*, Opp. at 32, presumably to suggest that this Court should ignore the reasoning. The test, however, is good law as it has not been rejected by the Supreme Court and has, in fact, been cited repeatedly in the District of Columbia. *See Kettey v. Saudi Ministry of Educ.*, No. 13-745 (CKK), --- F. Supp. 2d ---, 2014 WL 2919152, at *6 (D.D.C. June 27, 2014)*; Bell Helicopter Textron Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219 (D.D.C. 2012); *Youming Jin*, 475 F. Supp. 2d at 63.

Plaintiffs cite to *Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P*., No. 06-00570 (ESH), 2006 WL 3060017 (D.D.C. Oct. 26, 2006) (Huvelle, J.), an unpublished decision from this Court that predates the decisions listed above, asserting that "this Court questioned the applicability of the [legally significant] test in this Circuit . . . ." Opp. at 32. That decision notes, in a footnote, that other circuits use the "legally significant" test – it does not comment on the test itself, which has since been applied several times in the District of Columbia. Plaintiffs quote the decision, noting that following *Weltover*, the D.C. Circuit did not

significant actually happened in the United States." *Bell Helicopter Textron Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219, 226 (D.D.C. 2012) (quoting *Zedan*, 849 F.2d at 1515). "A financial loss in the United States, when all the acts giving rise to the claim occur outside this country, is insufficient to show the 'direct effect' in the United States that FSIA requires." *Id.* at 227 (quoting *BPA Int'l, Inc. v. Kingdom of Sweden*, 281 F. Supp. 2d 73, 81 (D.D.C. 2003)); *Agrocomplect, AD v. Republic of Iraq*, 524 F. Supp. 2d 16, 30-31 (D.D.C. 2007); *see also Bell Helicopter Textron, Inc.*, 892 F. Supp. at 226 n.8 ("Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States." (quotation omitted). The "direct effect" requirement is not satisfied where a "plaintiff's U.S. citizenship furnished the only connection between the commercial activity and the United States." *Bell Helicopter Textron Inc.*, 734 F.3d at 1185 (quoting *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 665 (D.C. Cir. 2010)).

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impose a "*per se* rule requiring plaintiffs to allege an express agreement to makes payments in the United States." Opp. at 32 (quoting *Idas Resources N.V.*, 2006 WL 3060017, at *8. But the opinion continues,

> "As a factual matter, however, in almost every case, in this circuit and others, involving the direct effect exception, the existence or absence of an expressly designated place of payment has been decisive." [*Global Index., Inc. v. MKAPA*, 290 F. Supp. 2d 108, 114 (D.D.C. 2003).] Therefore, absent an expressly designated place of payment, the only possible way of establishing a direct effect by nonpayment "that courts of this circuit have even considered" is a "*consistent* history of payment in the [United States]." *Id.* at 114 n.8 (emphasis added).

Idas Resources N.V., 2006 WL 3060017, at *9 (additional citations omitted). As Plaintiffs can point to no evidence that the United States was "expressly designated" as the place of performance or that there is a "consistent history" of specific performance in the United States to suggest that performance was "supposed" to occur in the United States – with respect to bailments associated with *any* of the Herzog siblings – this decision undermines, rather than supports, a finding of direct effect.

While the Complaint attempts to paint Plaintiffs and the non-party heirs as joint owners of the artworks attributed to the Herzog Collection, documents produced by Hungary and other evidence provided by Plaintiffs in discovery makes clear that the Erzsébet, András, and István Herzog inherited artworks from their parents as sole and separate property. Dkt. No. 86-2, Azat Decl., Exh. A (Plfs' Resp. to Defs' First Interrogs., No. 7); Dkt. No. 86-3, Exh. B (chart); Dkt. No. 86-6, Exh. E at HUNG005011. Hungary does not assert that there is a "requirement that a U.S. citizen be party to an agreement in order for the breach of that agreement to have a 'direct effect' in the United States." Opp. at 33. Courts continue to recognize that U.S. citizenship is not necessary "provided the substantive requirements of the [FSIA] are satisfied." *Weltover*, 504 U.S. at 619 (quotation omitted).

This Court, however, need no longer accept as true Plaintiffs' assertion that specific performance of bailments associated with the Herzog heirs would have an impact, much less a "direct effect" in the United States, because materials produced in discovery contradict this statement.[6] *See Price*, 389 F.3d at 197. As the property rights are now clearly distinct, there is no longer a basis to presume that bailments involving artworks attributable to a non-U.S. citizen, with little or no connection to the United States, would cause a direct effect here.

[6] Citing the Complaint and "drawing all reasonable inferences from the complaint in the family's favor," the appellate court "inferred from the complaint's allegations that the bailment contract required specific performance – i.e., return of the property itself – and that this return was to be directed to members of the Herzog family Hungary knew to be residing in the United States." *de Csepel*, 714 F.3d at 601. Affirmative documentation of separate ownership produced during discovery demonstrates that it is no longer reasonable to infer that, for example, the sole and separate property of Italian plaintiffs would be sent to the United States, particularly as the documents purporting to give Plaintiff de Csepel authority to represent all heirs, was created in 2008, after the litigation in Hungary ended and long after any alleged bailment was created.

A. Plaintiffs Identify No Evidence that the Purported Bailment between András Herzog (or His Heirs) and Hungary Created a "Direct Effect" in the United States

Despite tens of thousands of pages of discovery, Plaintiffs cannot point to evidence of a legally significant act in the United States to satisfy their burden of production. Plaintiffs provided no documentary evidence of a direct effect in the United States caused by the alleged bailment between Hungary and András Herzog (or his heirs). In its interrogatories, Hungary asked Plaintiffs to "[i]dentify the alleged direct effect in the United States and when it occurred as a result of the Defendants' continued possession and failure to restitute the Herzog collection artworks inherited from András Herzog by his daughters Angela Maria Herzog and Julia Alice Herzog from the Herzog collection to Angela Maria Herzog and/or Julia Alice Herzog." Dkt. No. 86-2, Azat Decl., Exh. A (Plfs' Resp. to Defs' Interrog.) at 31. Plaintiffs responded with objections alone, asserting that the question: (1) called for information protected by the attorney client privilege or work product doctrine, (2) was vague, (3) was duplicative of Interrogatory No. 14, which sought information regarding the direct effect associated with the U.S. Plaintiffs' bailment, and (4) may require a legal conclusion regarding what constitutes a direct effect. Dkt. No. 86-2, Azat Decl., Exh. A at 31.

Plaintiffs identify twenty-five (25) artworks as the property of András. Compl. ¶ 16(iii), (vii)-(ix), (xii), (xiv)-(xvi), (xxiv)-(xxxiii), (xxxv)-(xxxvi), ¶17(i), (v), ¶18(i)-(ii), ¶19(i); Dkt. No. 86-2, Azat Decl. Exh. A at 10-11; Dkt No. 86-3, Exh. B (chart). Plaintiffs' Opposition is silent regarding a direct effect in the United States in connection with András and his heirs, Italian citizen Plaintiffs Julia and Angela Herzog, aside from a general statement that "Plaintiffs could have requested export of the artworks to the United States regardless of where Plaintiffs themselves resided." Opp. at 35. This statement is not supported by *any* documentation or other evidence and falls far short of satisfying Plaintiffs' "burden of producing evidence to show that

immunity should not be granted." *FG Hemisphere Assocs.*, 447 F.3d at 842. Plaintiffs identify no requests to export artworks to the United States. Decades-old requests to receive or *purchase* artworks attributable to András Herzog were written by the Italian Plaintiffs' agents on behalf of the Italian Plaintiffs who lived in Italy. Azat Decl. in Support of Reply, Exh. 1.

In fact, the Italian Plaintiffs' modern-day request for artworks attributable to András note that the Italian Plaintiffs would place returned artworks in their apartment in *Hungary* – not Italy or the United States. Azat Decl. in Support of Reply, Exh. 4 (HERZOG00003125, and English translation of HERZOG00003125) ("I own a furnished home in Budapest, at via Madàch no. 11, where I would like to place some of [the artworks]."). Thus, there is *no* evidence that the Italian Plaintiffs expected that Hungary would send property attributable to András Herzog to the United States. To the extent that a "direct effect" could be identified, it would be, per Plaintiffs' own words, in Hungary.

Further, to the extent that Hungary would or could elect to give the artworks associated with András to Hungarian representatives of the Italian Plaintiffs so that works could be sold – contrary to the Italian Plaintiffs' own statement that the works would be installed in a Hungarian apartment – there is no evidence to suggest that the proceeds would go to the United States, as the Italian Plaintiffs live in Italy. But even if there was evidence that the Italian Plaintiffs expected to sell artworks within Hungary and deposit those proceeds in the United States, mere "financial injury," particularly to non-U.S. residents, does not demonstrate a "direct effect." *Allen v. Russian Fed'n*, 522 F. Supp. 2d 167, 189 (D.D.C. 2007) (recognizing that "financial injury cannot be characterized as a 'direct effect' under the commercial activities exception because a 'mere financial loss' to United States residents, without more, is not a 'direct effect' in the United States").

As Plaintiffs have failed to identify any documentary evidence or affidavits to demonstrate that the alleged bailments between Hungary and András (or his heirs) could have a legally significant direct effect in the United States – much less any effect at all – Plaintiffs have failed to meet their burden.[7] *See Bell Helicopter Textron, Inc.*, 734 F.3d at 1183; *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 940; *FG Hemisphere Assocs.*, 447 F.3d at 842.

B. Plaintiffs Identify No Evidence that the Purported Bailment between István Herzog (or His Heirs) and Hungary Created a "Direct Effect" in the United States

Despite tens of thousands of pages of discovery, Plaintiffs cannot point to evidence of a legally significant act in the United States to satisfy their burden of production. Plaintiffs point to no evidence of a direct effect in the United States caused by the alleged bailment between Hungary and István Herzog (or his heirs). In its interrogatories, Hungary asked Plaintiffs to "[i]dentify the alleged direct effect in the United States and when it occurred as a result of the Defendants' continued possession and failure to restitute the Herzog collection artworks inherited by István Herzog from the Herzog collection to István Herzog or his heirs." Dkt. No. 86-2, Azat Decl., Exh. A (Plfs' Resp. to Defs' Interrog.) at 31. Plaintiffs replied with the same non-responsive objections they made to requests concerning András, asserting that the question: (1) called for information protected by the attorney client privilege or work product doctrine, (2)

[7] Plaintiffs state that Mr. Alfons Weiss de Csepel, husband to Erzsébet, possessed "power of attorney concerning the affairs of his deceased brother-in-law, András Herzog," and that, therefore, "Defendants knew they were entering into bailment agreements with persons residing in the United States." Opp. at 33. The document was signed in 1942, when Alfons, Erzsébet, and András were all residents of Hungary. Moreover, because the Italian Plaintiffs inherited András's estate in 1943, a power of attorney granting Mr. Weiss de Csepel authority to act as András's proxy does not create a "legally significant" act in the United States. Dkt. No. 86-2, Azat Decl., (Plfs' Resp. to Defs' Interrog.) Exh. A at 6. ("András Herzog died intestate in 1943 and his daughters inherited equal squares of his interest in the Herzog collection."). In fact, Plaintiffs' agent represented to the Hungarian police that the Italian Plaintiffs' mother, Countess Parravicini, not an American resident, was the guardian and legal representative of the Italian Plaintiffs. Azat Decl. in Support of Reply, Exh. 5 (HUNG009734-40).

was vague, (3) was duplicative of Interrogatory No. 14, which sought information regarding the direct effect associated with the U.S. Plaintiffs' bailment, and (4) may require a legal conclusion regarding what constitutes a direct effect. Dkt. No. 86-2, Azat Decl., Exh A (Plfs' Resp. to Defs' Interrog.) at 32.

Plaintiffs identify seven (7) artworks as the property of István. Compl. ¶ 16(v), (xvii)-(xviii), and 16(xx)-(xxiii); Dkt. No. 86-2, Azat Decl., Exh. A (Plfs' Resp. to Defs' Interrog.) at 10-11; Dkt. No. 86-3, Exh. B (chart). Of these works, four were confiscated by Hungary following criminal proceedings against Istvan's former wife. Dkt. No. 86-3, Azat Decl., Exh. B (chart). István died in Hungary in 1966, leaving his estate to non-citizen, non-party heirs. According to Plaintiffs, István left his estate to his sons Stephan (Hungarian and Swiss citizen, Swiss resident) and Peter (Hungarian citizen and resident) and his second wife, Maria Bertalanffy (Hungarian citizen and resident). Dkt. No. 86-2, Azat Decl., Exh. A (Plfs' Resp. to Defs' Interrog.) at 6-7. Ms. Bertalanffy died in 2000, with the result that her one third fractional share of Istvan's estate was left to John de Csepel and Martha Nierenberg, both dual citizens of Hungary and the United States. Dkt. No. 86-2, Azat Decl., Exh. A (Plfs' Resp. to Defs' Interrog.) at 6-7; Dkt. No. 86-12, Exh. K.

That two U.S. citizens – neither of whom is a party to this action – received, in 2000, fractional ownership to artworks from the Herzog Collection associated with István, is insufficient to establish a direct effect in the United States. Prior to 2000, there was no connection between István or his heirs and United States to suggest a "legally significant" – or even legally insignificant – act in the United States.[8] Moreover, an effect is not direct if "[m]any

[8] In fact, to the extent that a "legally significant act" can be tied to bailments associated with István, that act occurred in 1950 – in Hungary – when the Criminal Court of Budapest found that Mrs. István Herzog had unlawfully smuggled artworks out of Hungary, with the result that

events and actors necessarily intervened" between the act perpetrated overseas and the impact felt here. *Bell Helicopter Textron, Inc.*, 734 F.3d at 1184 (quoting *Princz*, 26 F.3d at 1172). But for the deaths of non-U.S. citizens (István in 1966 and Ms. Bertalanffy in 2000) and the designation of U.S. citizen heirs in 2000 by a non-U.S. citizen, there would be no connection between the artworks attributable to István and the United States.

Plaintiffs point to no evidence that the non-U.S. citizens heirs of István have, or had, any expectation that they expected Hungary to return works to them or that such returns would take place in the United States. As noted above, though Istvan's heirs could theoretically articulate that they suffered injury as they could have sold any works returned in Hungary and placed the proceeds in a U.S. bank account, such theoretical financial harm does not rise to the level of a "direct effect" to trigger the commercial activity exception. *Allen*, 522 F. Supp. 2d at 189. As Plaintiffs cannot identify any evidence of a legally significant act in the United States, the connection to the United States did not "flow[] in a straight line without deviation or interruption," *id.* (quotation omitted), and U.S. citizenship alone is not sufficient to demonstrate a "direct effect," *Cruise Connections Charter Mgmt. 1, LP*, 600 F.3d at 665, Plaintiffs have not met their burden to produce evidence of a direct effect. *See Bell Helicopter Textron, Inc.*, 734 F.3d at 1183; *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 940; *FG Hemisphere Assocs.*, 447 F.3d at 842.

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artworks attributable to István Herzog (as well as some artworks attributable András and Erzsébet) were forfeited to Hungary. Dkt. No. 86-10, Azat Decl., Exh. I. This event occurred *outside* the United States and long before the U.S. citizen/non-party heirs had any cognizable interest in Istvan's property.

C. Plaintiffs Identify No Evidence that the Purported Bailment between Erzsébet Weiss de Csepel (or Her Heirs) and Hungary Created a "Direct Effect" in the United States

Erzsébet, Plaintiff de Csepel's predecessor, may have been a U.S. citizen at the time of one or more purported bailments, *see* Opp. at 33 ("most relevant bailments were created after 1946, when Elizabeth Weiss de Csepel was already residing in the United States with her husband"), but Plaintiffs draw little connection between the bailment and the requisite "direct effect" in the United States, beyond Erzsébet's U.S. citizenship. Plaintiffs contend that Erzsébet *could* have asked for specific performance of the alleged bailment, requiring Hungary to return artworks attributable to her in the United States. In contrast to the alleged bailments of András and István, this allegation raises, for the first time, the possibility that the alleged bailment with Erzsébet *could* cause an impact of some degree in the United States. The evidence, however, does not support this assertion that the impact could rise to the level of a "direct effect."

Plaintiffs identify twelve (12) artworks as the property of Erzsébet. Compl. ¶ 16(i)-(ii), (iv), (vi), (x)-(xi), (xiii), (xix), (xxxiv), ¶ 17(ii)-(iv); Dkt. No. 86-2, Azat Decl. Exh. A (Plfs' Resp. First Interrogs.) at 10-11; Dkt. No. 86-3, Exh. B (chart). The evidence demonstrates that Erzsébet never expected to obtain possession of the artworks in the United States. Following inquiries (from Erzsébet) and litigation (brought by her daughter Martha Nierenberg), Hungary returned artwork that it determined had been held as a valid deposit. Dkt. Nos. 86-5, 86-7, Azat Decl., Exhs. D, F. The artworks were not returned to Erzsébet or her daughter in the United States, but to their representative in Hungary, with notice that the artworks could not leave Hungary.[9] Dkt. Nos. 86-5, 86-7, Azat Decl., Exhs. D, F.

[9] Plaintiffs reference export permits granted to Geza and Peter Danos as evidence that Hungary has permitted export of artwork to the United States. Opp. at 13 (citing HUNG009484-89). These permits were granted in early 1948, before the Communist government seized private collections. Regardless, Plaintiffs do not assert that they were aware of the returns, prior to

Assuming Hungary recognized Plaintiff de Csepel's alleged bailments and assuming that Hungary elected to return artworks attributable to Erzsébet in Hungary, as Hungary did after concluding that certain works attributable to Erzsébet were being held under valid deposit agreements, Plaintiff de Csepel could keep those items (somewhere in Hungary) or sell them (in Hungary). If he kept the artworks somewhere in Hungary, there could be no direct effect in the United States. If he were to sell the artworks and deposit the proceeds in a U.S. bank account, there would be an "effect" in the United States connected with the alleged bailment. But Hungary's refusal to recognize Plaintiff de Csepel's ownership claim, and the corresponding loss to his bank account, does not create a "direct effect." Case law is clear that "[a] financial loss in the United States, when all the acts giving rise to the claim occurred outside this country, is insufficient to show the 'direct effect' in the United States that [the] FSIA requires." *Agrocomplect, AD*, 524 F. Supp. 2d at 30-31 (quoting *BPA Int'l, Inc.*, 281 F. Supp. 2d at 81).

While Plaintiffs can draw a connection between Hungary, the alleged bailment involving artworks attributable to Erzsébet, and the United States, the U.S. connection is limited. The evidence demonstrates that "all acts giving rise to the [bailment] claim[s] occurred outside this country," *id.*, and does not identify that "something legally significant actually happened in the United States," *Bell Helicopter Textron Inc.*, 892 F. Supp. 2d at 226. Because Plaintiffs can point to no evidence to demonstrate a "direct effect" in the United States caused by the alleged bailment(s) with Erzsébet or her heirs, Plaintiffs have not met their burden. *Bell Helicopter Textron, Inc.*, 734 F.3d at 1183; *Agudas Chasidei Chabad of U.S.*, 528 F.3d at 940; *FG Hemisphere Assocs.*, 447 F.3d at 842.

Hungary's document production this year. All of the evidence suggests otherwise, and to the best of Hungary's knowledge, neither Plaintiffs nor any other members of the Herzog family ever made requests that artworks from the Herzog Collection be exported to the United States, nor requested permits to export artworks from the Herzog Collection to the United States.

In sum, Plaintiffs offer no evidence of a "direct effect" in the United States caused by the alleged bailment with András (or his Italian heirs). Plaintiffs' minimal evidence regarding the remaining bailments' impact on the United States is both "too remote and attenuated to satisfy the 'direct effect' requirement of the FSIA" and "too speculative to be considered an effect at all," *Weltover*, 504 U.S. at 618, because it is premised solely on citizenship or a theoretical financial loss.[10] As Plaintiffs have not met their burden of providing evidence of direct effect to satisfy their initial burden under the FSIA, Hungary respectfully asserts that this Court lacks subject matter jurisdiction over the bailment claims associated with András, István, or Erzsébet.

VI. The Expropriation Exception Does Not Apply to Strip Hungary of Its Presumptive Sovereign Immunity

On April 19, 2013, the D.C. Circuit issued a decision affirming this Court's denial of Hungary's motion to dismiss on the ground that, taking into account that inferences must be drawn in the Plaintiffs' favor at that early stage, Plaintiffs' Complaint pleads a plausible bailment claim. In briefly addressing the expropriation exception, also invoked by Plaintiffs as a basis for jurisdiction, the appellate court noted:

> In their complaint, however, the Herzog family seeks to recover not for the original expropriation of the Collection, but rather for the subsequent breaches of bailment agreements they say they entered into with Hungary. Specifically, the complaint alleges that Hungary's "possession or re-possession of any portion of the Herzog Collection following [World War II] constituted an express or implied-in-fact bailment contract," under which Hungary assumed "a duty of care to protect the property and to return it to [the Herzog family]," and which Hungary breached by refusing to return the Collection in 2008. *Id.* ¶¶ 100-01, 104. The family's claims, they reiterate, are nothing "more than straightforward

[10] In fact, with respect to alleged bailments connected to István or Erzsébet, Plaintiffs' entire argument of "direct effect" is premised on an expansive theory that if a foreign government enters into a bailment with a foreign individual, and that individual (or that individual's heirs) move, at some point, to the United States, a U.S. court can take jurisdiction over the foreign country on the ground that a the individual could (theoretically) ask for specific performance in the United States. Hungary contends that the FSIA's commercial activity exception was not intended to force a foreign sovereign to submit to the jurisdiction of U.S. courts where the direct effect is purely speculative. *See Weltover*, 504 U.S. at 618.

> bailment claims that are cognizable in a United States court." Appellees' Br. 26. Indeed, every one of their other substantive claims – conversion, constructive trust, accounting, restitution based on unjust enrichment – appears to stem from the alleged repudiation of the bailment agreements. . . . Given that plaintiffs are "masters of the complaint" with the power to bring those claims they see fit, *see Caterpillar, Inc. v. Williams*, 482 U.S. 386, 395, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987), it is incumbent upon us to address Hungary's jurisdictional challenge in light of the bailment claims the family actually brings.

de Csepel, 714 F.3d at 598. At the September 25, 2013, status hearing, this Court noted repeatedly that the D.C. Circuit had defined Plaintiffs' claim as a bailment that could go forward under the FSIA's commercial activity exception, and advised Plaintiffs not to stray from the direction given by the appellate court.

> THE COURT: Now you're doing what I can't do; bifurcating away. When they talked about *forum non-conveniens* in the Court of Appeals they didn't discuss anything to do with that law would apply, did they? I read it yesterday so -- I have to -- one thing about the plaintiff. I would be loath[] to go too far afield of the Court of Appeals. They bought a theory as pled. They didn't buy some of these other things. Or if they did, they certainly didn't tell me. I worked hard to -- I worked on other things, but they didn't endorse that. And I would be very loath[] to go far afield from what they've –
>
> MR. SHUSTER: I hope not to have to attempt to do so.
>
> THE COURT: Yeah. You got a bailment, you got to prove it. That's where, frankly, if you were going to bifurcate, for pity's sakes, you'd want to know whether they could prove bailment. That's the real case. If they can't, there's nothing here.

Dkt. No. 74, (Transcript) at 16-17.

> MR. STAUBER: Well, it depends on -- when you're looking at subject matter jurisdiction -- when there was direct effect, when there was a breach, under Italian law we understand you can't simply assign your claims. So that's why we say that these are issues. I think the Court's right. If there's not a bailment, then perhaps there is no place, no case. I want to make clear, we're happy to move forward with discovery full flight.
>
> THE COURT: I'd focus on that, because that's what I'm focusing on; bailment. I understand some of these other issues may be necessary incidentals. But if you don't have a bailment, that makes it pretty easy. Because the Court of Appeals told me that's the basis for their claim.

Dkt. No. 74, (Transcript) at 21.

> THE COURT: Okay. Once again, the Court of Appeals has finessed all that and sort of taken that in historical sense and made it interesting but not critical to the allegations. The allegations are, basically, post-war you told me either explicitly or implicitly that these are being held as you're the bailee. I think that that's – I think that's the way we have to litigate the case. That's the way that they've –
>
> MR. STAUBER: We agree.
>
> THE COURT: -- in some sense brilliantly pled it, and now they're stuck with it. Anyways, the more you want to go digging back into the World War I[I] I don't know how much it will do for us. Anyway, that's fine.

Dkt. No. 74, (Transcript) at 23-24.

Despite this Court's direction, Plaintiffs assert that their Complaint properly invokes the expropriation exception because of the "looting and seizure of the Herzog family's homes and property that occurred during the Holocaust and the Herzog family's flight from Hungary to escape genocide." Opp. at 37. Plaintiffs cannot have it both ways – either the basis of their claim is a commercial activity (wherein Hungary entered into a commercial contract and behaved like a commercial actor, not a sovereign) or it is an expropriation in violation of international law (wherein Hungary, acting as a sovereign, has the power to confiscate property; a power that a private or commercial party lacks). The appellate court has already interpreted what Plaintiffs have pled – a bailment – and found that the commercial activity exception could be inferred by the Complaint's allegations.

In *Simon*, the plaintiffs sought compensation for property taken from them during the Holocaust. *See* 2014 WL 1873411, at *1. The plaintiffs invoked the FSIA's expropriation exception. *See id.* at *11 n.15. Much as it had done before this Court, Hungary challenged that the 1947 Peace Treaty governed the plaintiffs' war-time takings claims. *See id.* at *16. Because that treaty pre-dated and conflicted with the FSIA, Hungary asserted, no exception to the FSIA

applied to strip Hungary of its sovereign immunity. *See id.* The court agreed with Hungary, granting the motion to dismiss. *See id.* at **16-29. The court was careful to distinguish *Simon* from this case on the ground that *Simon* involved wartime taking while this action involved post-war bailments.

> At issue in *de Csepel* were the efforts of the heirs of a major Hungarian Jewish art collector to reacquire art objects that were "loaned" to the Hungarian state immediately after World War II. 714 F.3d at 595-96. The heirs alleged that the arrangement constituted a bailment "whereby Hungary assumed 'a duty of care to protect the property and to return it to" the plaintiff's family. *Id*. at 596. The lawsuit centered on the heirs' claims that Hungary breached the bailment agreement by refusing to return the artwork in 2008. *Id.* The D.C. Circuit rejected Hungary's argument that the 1947 Treaty and the 1973 Executive Agreement between the United States and Hungary prevented the District Court from exercising subject matter jurisdiction. *See id*. at 602-03. In doing so, the Court accepted Hungary's description that Articles 27 and 40 of the 1947 Treaty "[t]aken together . . . establish an exclusive treaty-based mechanism for resolving all claims seeking restitution of property discriminatorily expropriated during World War II from individuals subject to Hungarian jurisdiction." *Id.* at 602. Nonetheless, the Court found that the "Peace Treaty presents no conflict with Hungary's amenability to suit under the FSIA[ ]" in that case "for the simple reason that the [heirs'] claims fall outside the Treaty's scope." *Id.* Specifically, the Court explained that the "family's claims rest not on war-time expropriation but rather on breaches of bailment agreements formed and repudiated after the war's end." *Id.* at 602 (citation omitted). Thus, the D.C. Circuit had no reason to address whether the 1947 Treaty's exclusive mechanism for addressing claims based on expropriated property were in conflict with the FSIA. *See id.*

Simon, 2014 WL 1873411, at *27 (footnote omitted); *see also id*. at *28 ("In contrast to the claims at issue in *de Csepel*, the plaintiffs in the instant matter are pressing claims entirely related to expropriation of property during the war.").

If Plaintiffs re-characterize their bailment claims as violations of international law invoking the expropriation exception, rather than the "more than straightforward bailment claims

that are cognizable in a United States court," *de Csepel*, 714 F.3d at 598 (quoting Plaintiffs' appellate brief), the reasoning in *Simon* should be applied to bar Plaintiffs' claims.[11]

VII. This Motion is Ripe for Consideration

On September 25, 2013, the parties appeared before this Court for a scheduling conference. Hungary sought permission to file a subsequent Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction to challenge the factual underpinnings of the inferred bailment claim. This Court gave Hungary permission to file such a motion. The Court asked the parties to submit a briefing schedule, noting that the Court would prefer to consider the motion sooner, rather than later. Dkt. No. 74, (Transcript) at 22 ("I'm well aware you can bring [a motion challenging subject matter] up till the very end, but every day that passes is less desirable, obviously.").

After receiving the parties' joint status report and proposed briefing schedule, the Court issued an order adopting many of the requested deadlines, including the discovery deadlines and

[11] Hungary disputes vigorously that a final decision from a Hungarian court, after eight years of litigation and appeals, where the parties were presented by their chosen counsel, where the parties put documents into evidence, and where Plaintiffs have offered no evidence of a due process violation, could constitute a "taking," much less a taking in violation of international law as Plaintiffs assert. Opp. at 38-39. Plaintiffs have not identified any evidence to bolster this unsupported assertion that a judicial proceeding in a European Union member-country could constitute a violation of international law.

Hungary does not dispute that *Agudas Chasidei Chabad of United States* involved a modern taking, as the executive ignored the judiciary's finding that property in Russia should be returned to the claimant. *See* 528 F.3d at 944-947. But this case is not *Chabad* – Hungary's judiciary and executive operate independently, and Plaintiffs have not provided any evidence that the Hungarian judiciary was biased or influenced by the executive to misapply Hungarian law.

Moreover, even if the Court were to accept Plaintiffs' unfounded allegation that a decision by a European court constitutes a "taking" in violation of international law, that "taking" is limited to the eleven of the twelve artworks claimed by Martha Nierenberg – the 2008 decision did not adjudicate the ownership of the remaining thirty-three (33) artworks. Accordingly, if there was a taking in 2008, that relates only to artworks attributable to Erzsébet, not to the remainder of the artworks, which are, with one exception, attributable to András or István.

Rule 12(b)(1) motion briefing schedule. On March 12, 2014, this Court granted the parties' joint motion to extend the discovery by six-and-a-half weeks and the briefing deadlines by thirty days. Under the new deadlines, document requests and initial interrogatory responses were due on April 30, 2014, two weeks before Hungary's motion was due on May 14, 2014. Approving the dates agreed to by the parties, Plaintiffs' Opposition was due more than six weeks later, on June 30, 2014, with Defendant's reply due three weeks later, on July 21, 2014.

On June 19, 2014, more than four weeks after Hungary filed its motion and less two weeks before their Opposition was due, Plaintiffs informed Hungary of their intention to seek an extension of time to file their Opposition until September 15, 2014, a date more than four months after Hungary filed its motion.[12] Hungary opposed the request. Both parties briefed the issue and participated in a conference call with Magistrate Judge Kay on June 27, 2014. Dkt. Nos. 87 and 88. With Magistrate Judge Kay's participation and guidance, the parties reached an agreement on future briefing deadlines, and Magistrate Judge Kay issued an order extending Plaintiffs' deadline to July 25, 2014. Hungary's reply deadline was reset to August 25, 2014. Magistrate Judge Kay noted during the call that Hungary's motion was "ripe" for review. Azat Decl. in Support of Reply at ¶ 2.

Plaintiffs now contend, almost eleven months after Hungary received permission from this Court at the September 25, 2013, hearing to file its motion, after Hungary has provided Plaintiffs with 20,869 pages of documents (including English translations), and after Plaintiffs

[12] Plaintiffs state that "Defendants chose to file the Motion just two weeks after the parties exchanged initial discovery responses and documents and now seek to make a record based on facts in their possession that are disputed." Opp. at 3-4. The motion briefing schedule was conceived jointly and approved by this Court. The parties jointly requested a continuation of the discovery dates, as documentary discovery was extensive, with the result that Hungary had a mere two weeks with Plaintiffs' discovery responses before filing the motion. Plaintiffs, in contrast, had more than ten weeks with the documents, having received an extension from Magistrate Judge Kay.

had more than ten weeks to draft their Opposition, that the motion is not ripe – specifically that the Court should shelve the motion to permit additional, unspecified discovery.

This motion is ripe for review. Plaintiffs have not asserted that they have not had sufficient time to review all of the documents Hungary produced. Nor have they identified what discovery they need to conduct that they have not been able to conduct during the past eleven months. Plaintiffs received 20,869 pages of documents in organized categories and 185 pages of interrogatory responses from Hungary. Plaintiffs did not provide declarations or affidavits from any plaintiff, Herzog family member, or other witness to address or identify either a bailment or a "direct effect" in the United States, nor have they explained why additional time or discovery would enable them to produce such evidence. Plaintiffs have not explained how an expert is required to inform the Court and interpret evidence of a "direct effect." Plaintiffs do not identify what additional evidence they seek to gather, nor explain why they have not been able to collect this evidence over the more than four years that this case has been proceeding in the United States. In sum, Plaintiffs offer little reason to ignore Magistrate Judge Kay's recognition of ripeness or to disregard the deadlines proposed by the parties (including Plaintiffs) and approved by this Court.

VIII. Conclusion

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

Dated: August 25, 2014

Respectfully submitted

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