

There is no disagreement among any of the parties who have appeared before the Panel⁴ that the core cases in this MDL proceeding—the two Railroad Cases concerning the actions of the Hungarian national railroad during the Holocaust—should be centralized. The District of Columbia Plaintiffs, Hungary, and MÁV all agree that these two cases should be centralized in the District of Columbia before the Honorable John D. Bates, while only the plaintiffs in the Chicago action advocate the Northern District of Illinois as the transferee district. In addition, although MÁV is not a party to either of them, MÁV proposes to add to the centralization two putative tag-along cases that do *not* involve the actions of the Hungarian railroad. All plaintiffs agree that the tag-along cases should not be included in the centralization, because they do not involve any significant factual questions in common with the Railroad Cases.

I. PROCEDURAL UPDATE

A number of significant events have occurred since the District of Columbia Plaintiffs filed the initial Motion in this docket. *First*, the court in the Chicago action has stayed all proceedings in that case until after the Panel decides the Motion.⁵ *Second*, the translated summons and complaint in the District of Columbia action have been delivered to the Central Authority in Hungary for service under the Hague Convention. *Third*, the court in the District of Columbia action has granted the plaintiffs' motion and appointed their counsel as interim class counsel pur-

⁴ To date, the following parties have not appeared in this Panel proceeding: (1) MÁV Cargo, a defendant in the District of Columbia action, (2) the plaintiffs and the various Hungarian bank defendants in *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank, et al.*, No. 1:10-cv-01884 (N.D. Ill.) (“Banks Case”), although counsel for the plaintiffs in that case are also counsel for the plaintiffs in the Chicago action; and (3) the various museum defendants in *de Csepel v. Republic of Hungary*, No. 1:10-cv-01261 (D.D.C.) (“Art Case”). The plaintiffs in the Art Case object to its designation as a tag-along case.

⁵ Chicago action, Minute Order, ECF No. 39, Nov. 16, 2010.

suant to Fed.R.Civ.P. 23(g)(3).⁶ *Fourth*, MÁV has filed a notice in this docket designating the Banks Case and the Art Case as putative tag-along cases.⁷

These developments provide further support for the granting of the Motion. Because the Chicago action has been stayed (deferring briefing and consideration of the defendant's threshold motion to dismiss), by the time the Panel holds its hearing in this matter, tentatively scheduled for late January 2011, both Railroad Cases will likely be at the same procedural stage, with the plaintiffs' pleadings outstanding and no responsive pleadings or dispositive motions having been filed.⁸

There is no significant factual overlap between the Railroad Cases and the two putative tag-along cases, except that they all arise from the Holocaust era in Hungary. The Railroad Cases both concern the involuntary dislocation and transportation, ultimately to the deaths of most of them, of approximately one-half million people by a railroad, MÁV, that in the process dehumanized them by packing them into cattle and other freight cars and stole the belongings of most of the victims. In sharp contrast, the Art Case concerns the expropriation of one family's art collection and the efforts of that family to recover the specific individual pieces in that collection from various Hungarian museums, while the Banks Case concerns the failure of various Hungarian Banks to release the proceeds of bank accounts to the account holders or their heirs.

⁶ District of Columbia action, Order, ECF No. 9, Nov. 15, 2010.

⁷ JPML Docket 2207, Notice, ECF No. 8, Nov. 10, 2010.

⁸ This contradicts what the Chicago plaintiffs reported. *See* Chicago Plaintiffs' Opposition Mem. at 7 (the MÁV motion to dismiss "will be nearly fully briefed by the time this Panel hears oral argument in late January").

II. REPLY ARGUMENT

A. NO PARTY OBJECTS TO CENTRALIZATION OF THE RAILROAD CASES.

As stated above, no party in this proceeding objects to centralization of the Railroad Cases. This is because the two cases assert substantially similar facts and legal claims. Clearly, the purposes of § 1407 to streamline pretrial discovery and related proceedings will be achieved by consolidating these two cases in a single MDL court. As discussed below, the same efficiencies and streamlining would not be achieved were the putative tag-along cases included in the MDL case.

B. THE DISTRICT OF COLUMBIA IS THE APPROPRIATE TRANSFEREE COURT.

Hungary and MÁV have explained in their memorandum why the District of Columbia is the appropriate transferee court and Judge Bates is the appropriate transferee judge. The experience of that court and judge with cases under the Foreign Sovereign Immunities Act will aid in the fair adjudication of various complex pretrial rulings to be made in the Railroad Cases. The case before Judge Bates is already moving forward—the process for obtaining service under the Hague Convention has advanced, and Judge Bates has already designated counsel for the District of Columbia Plaintiffs as interim class counsel to protect the class’s interests. District of Columbia action, ECF 9, Nov. 15, 2010. Moreover, as Hungary has observed, it may have a legal right to have this litigation proceed against it *only* in the District of Columbia, and apart from any legal entitlement, the Hungarian embassy to the United States is located there. On this latter point, the Chicago action plaintiffs inappropriately read convenience of the “parties” out of § 1407(a) in arguing that the presence of the Hungarian embassy in the District of Columbia is “a red herring if there ever was one.” Chicago Plaintiffs’ Opposition Mem. at 9-10.

By contrast, Chicago offers no advantage.⁹ The proceedings there are in fact not materially more advanced than in the District of Columbia action. MÁV has not yet responded to the amended complaint filed in the Chicago action in September 2010, and because of the stay recently entered by the Northern District of Illinois, will not do so until the issue of consolidation presently before this Panel is resolved. Equally significant, the overwhelming majority of current plaintiffs in the Chicago action—17 out of 21—were first named in that action only in the amended complaint,¹⁰ which was filed just seven weeks before the District of Columbia plaintiffs filed their action.

The Chicago action plaintiffs, however, advocate Chicago as the transferee forum to avoid splitting the Railroad Cases from the Banks Case. In wholly unfounded hyperbole, they assert that “[s]plitting the Hungarian Banks and Hungarian Railroads cases between two different judges in two different circuits will frustrate every single purpose behind MDL transfer as it will risk massive inconsistencies in *legal rulings* among the cases.” Chicago Plaintiffs’ Opposition Mem. at 2 (emphasis added). Their admitted focus is upon the “myriad complex issues of law”

⁹ One distinct disadvantage to Chicago is the greater frequency of flight delays into and out of its principal international airport, O’Hare International Airport, compared to Dulles International Airport, that serves Washington, D.C. For the first nine months of 2010, Dulles is ranked 15th among major U.S. airports in on-time arrivals and 12th in on-time departures, while O’Hare is ranked 23rd for both. *See* U.S. Department of Transportation, Bureau of Transportation Statistics www.bts.gov/programs/airline_information/airline_ontime_tables/2010_09/html/table_04.html and www.bts.gov/programs/airline_information/airline_ontime_tables/2010_09/html/table_06.html (viewed November 18, 2010). This is relevant because § 1407(a) directs consideration of the relative convenience for the parties and witnesses of the proposed transferee districts, and in this case it is likely that parties and witnesses will be traveling to the transferee district from abroad.

¹⁰ The Chicago action plaintiffs misstate that their action was filed “on February 9, 2010 on behalf of twenty one [sic] named plaintiffs and all others similarly situated.” Chicago Plaintiffs’ Opposition Mem. at 5. Actually, the complaint filed on that date listed, in an appendix, 95 individuals who purported to be plaintiffs. The Amended Complaint filed in September names only 21 plaintiffs, of whom only *four* appear to have been named in the original pleading. Thus, 17 plaintiffs are new as of September 2010. There is no explanation in the record for the disappearance of 91 of the original 95 plaintiffs from the new pleading.

presented by the various cases. *Id.*¹¹ The defect in this exaggeration is that § 1407(a) is, by its express terms,¹² directed solely to common *factual* questions and not to common legal issues, no matter how complex they may be. *See In re Pharm. Benefit Plan Adm’rs Pricing Litig.*, 206 F. Supp. 2d 1362, 1363 (J.P.M.L. 2002) (centralization denied because, “while these five actions clearly share common legal questions and, perhaps, a few factual questions, unique questions of fact predominate over any common questions of fact.”); *In re Natural Gas Liquids Regulation Litig.*, 434 F. Supp. 665 (J.P.M.L. 1977) (“since these actions raise a common question of law and share few, if any, common questions of fact, transfer under section 1407 is unwarranted”). As noted above, other than the common historical context, there are no real factual issues in common between the Banks Case pending in Chicago, which involves bank deposits that were not returned to account holders and their heirs, and the Railroad Cases, which involve Jews forcibly deported to concentration camps by the railroads and deprived of their personal property in the process.

Given the actual purpose behind MDL transfer—to avoid inefficiencies and inconsistencies in factual discovery and related pretrial rulings—the pendency of the Banks Case in Chicago is no reason to prefer the Northern District of Illinois in the face of the manifest reasons for centralization of the Railroad Cases in the District of Columbia. Moreover, even if the pendency of the Banks Case in Chicago were deemed a relevant factor merely because of the common histor-

¹¹ Lest there be any doubt that the claimed commonalty between the Banks Case and the Railroad Cases is legal, not factual, the Chicago action plaintiffs identify “two central *legal* considerations: whether the Treaty of Paris of 1947 bars or does not bar claims of Plaintiffs in the two cases; the extent to which Hungarian government entities enjoy immunity under FSIA.” Chicago Plaintiffs’ Opposition Mem. at 9 (emphasis added).

¹² In pertinent part, the statute provides: “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings....”

ical context—and it should not be—it would be counterbalanced by the pendency of the Art Case, which shares the same historical context, in the District of Columbia.

C. THE BANKS CASE AND THE ART CASE SHOULD NOT BE CENTRALIZED WITH THE RAILROAD CASES.

While the Railroad Cases satisfy the first requirement of § 1407(a)—that the actions to be centralized involve common questions of fact—the Banks Case and the Art Case do not share that commonality. Instead, the Banks Case and the Art Case involve very different factual claims and almost entirely different defendants than the Railroad Cases.¹³ In such circumstances, the Panel generally does not consolidate the differing cases with the centralized cases. *See, e.g., In re Protegen Sling & Vesica Sys. Prods. Liab. Litig.*, M.D.L. No. 1387, 2001 U.S. Dist. Lexis 1438 (J.P.M.L. Feb. 7, 2001) (while products liability cases related to one product were consolidated, additional case involving the same defendant but a different product was not consolidated); *Valentine v. Coca-Cola Co. (In re Glaceau Vitaminwater Mktg. & Sales Prac. Litig.)*, 641 F. Supp. 2d 1381 (J.P.M.L. 2009) (“the proponents of centralization have failed to persuade us that any common questions of fact are sufficiently complex and/or numerous to justify Section 1407 transfer in this docket”); *In re Monumental Life Ins. Co. Indus. Life Ins. Litig.*, MDL No. 1371, 2002 U.S. Dist. Lexis 19510 (J.P.M.L. Oct. 11, 2002) (transfer and consolidation of putative tag-along case denied where sole defendant in that case was not involved in existing MDL proceeding); *In re Fout & Wuerdeman Litig.*, 657 F. Supp. 2d 1371 (J.P.M.L. 2009) (common factual questions not “sufficiently complex and/or numerous to justify Section 1407 transfer at this time. Alternatives to transfer exist that may minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings.”).

¹³ Hungary is the sole defendant named both in one of the Railroad Cases and in one of the putative tag-along cases, the Art Case.

In *In re Worldcom, Inc., Sec. & ERISA Litig.*, 226 F. Supp. 2d 1352 (J.P.M.L. 2002), the Panel denied centralization of three cases with the many securities fraud and ERISA cases ordered to be centralized. The first of the three was brought solely against WorldCom for a breach of contract arising from a four day interruption of telephone service. The Panel denied inclusion of that case in the centralization because it “bears no relation to actions focusing on alleged accounting and other financial irregularities at WorldCom.” 226 F. Supp. 2d at 1355. The other two cases excluded from the centralization were brought against a stock analyst and his employer, but not against WorldCom or its directors. The Panel explained that, since WorldCom was not in the case, the issues involving the stock analyst were sufficiently distinct. Moreover, the Panel noted that, with the litigation against the analyst pending before a different judge in the transferee district, “to the extent any coordination between the ‘analyst’ actions and the MDL-1487 actions becomes desirable, the involved judges within the transferee district may address that matter in an appropriate fashion on their own.” *Id.* In like fashion, to the extent any coordination of the Railroad Cases with the Art Case is deemed appropriate, the two different judges in the District of Columbia can accomplish that on their own.

Here, as in *Valentine* and *WorldCom*, alternatives to consolidation of the Banks and Art Cases exist that will permit whatever minimal coordination of those cases might be needed among them and the Railroad Cases. For example, since the Art Case is also pending in the District of Columbia, consultation between the two judges of the same court may eliminate possible duplication of efforts. And since the plaintiffs’ counsel in the Banks Case are also plaintiffs’ counsel in the Chicago railroad case, they can meaningfully coordinate their litigation with the MDL proceedings if the need to do so should ever arise. *See Valentine*, 641 F. Supp. 2d at 1381;

WorldCom 226 F. Supp. 2d at 1355. *See also, Fout & Wuerdeman Litig., supra; In re Eli Lilly and Co. (Cephalexin Monohydrate) Patent Litig.*, 446 F.Supp. 242, 244 (J.P.M.L. 1978).

As the Panel’s previous decisions teach, if the putative tag-along cases with disparate factual issues were centralized together with Railroad Cases, the result would likely achieve no greater efficiencies. The documents to be produced by the defendant banks and museums in the Banks and Art Cases, and the testimony of witnesses concerning those defendants’ conduct will have no bearing on the factual issues concerning MÁV’s central role in shipping a half-million innocent victims to the Nazi concentration and death camps. And *vice versa*.

Despite the manifest factual differences between the Railroad Cases and both the Banks Case and the Art Case, Hungary and MÁV argue that there are seven “common questions of fact” among all four cases. Hungary and MÁV Mem. at 3-4. Actually, three of the seven are questions of law, not fact.¹⁴ The remaining four cited questions of fact¹⁵ are not actually common across case boundaries. Thus, for example, the bank defendants’ “connections with property

¹⁴ “Whether Defendants are immune from the jurisdiction of the U.S. courts under the FSIA, ...Whether the 1947 Peace Treaty to which Hungary and the United States are parties affects the justiciability of this action[, and] Whether these cases should proceed here or in Hungary under Hungarian law.” Hungary and MÁV Mem. at 4. These are obviously issues of law. *See, e.g., , McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1105 (D.C. Cir. 2001) (“A foreign nation’s entitlement to sovereign immunity raises questions of law....”), *cert. denied*, 537 U.S. 941 (2002), *modified in another respect*, 320 F.3d 280 (D.C. Cir. 2003); *United States v. Jimenez-Nava*, 243 F.3d 192, 195 (5th Cir. 2001) (treaty interpretation); *Iceland S.S. Co., Ltd.-Eimskip v. U.S. Dept. of Army*, 201 F.3d 451, 458 (D.C. Cir. 2000) (treaty interpretation); *Carton v. General Motors Acceptance Corp.*, 611 F.3d 451, 454-55 (8th Cir. 2010) (choice of law); *Hartford Underwriters Ins. Co. v. Foundation Health Services, Inc.*, 524 F.3d 588, 592 (5th Cir. 2008) (choice of law); *In re Nazi Era Cases Against German Defendants Litig.*, 196 Fed. Appx. 93, 96 (3d Cir. 2006) (justiciability under treaty).

¹⁵ Hungary and MÁV state the putative common questions thus:

1. Each Defendant’s involvement in the Holocaust in Hungary during World War II.
2. Each Defendants’s connections with property looting aimed at Hungarian Jews during the Holocaust.
3. The extent to which Defendant s acted in concert as to given plaintiffs.
4. The extent to which given Plaintiffs were affected by a given Defendants’ [sic] actions.

Hungary and MÁV Mem. at 3 (footnote omitted).

looting aimed at Hungarian Jews during the Holocaust” may be important to the Banks Case, but they are of no moment to the Railroad Cases or to the Art Case, which are concerned only with the conduct of the railroads and museums, respectively. *Id.* at 3. Similarly, the extent to which the museum defendants in the Art Case “acted in concert as to” the Herzog family is irrelevant to the Railroad Cases and the Banks Case. *Id.* The same analysis applies to each of the four purported common issues overlapping the four cases.

Thus, with distinctly different factual claims and different defendants, the Banks Case and the Art Case should *not* be centralized with the Railroad Cases.

III. CONCLUSION

For all of the foregoing reasons, the centralization of the Railroad Cases before Judge Bates in the District of Columbia will further “the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407(a). Accordingly, the District of Columbia Plaintiffs respectfully request that the Panel centralize the Railroad Cases before Judge Bates in the United States District Court for the District of Columbia for consolidated and coordinated pretrial proceedings.

Respectfully submitted,

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